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STILL WORTHY OF PRAISE

Martha C. Nussbaum*

As for the person who belittles the study of philosophy, I really do not understand what in the world he would consider worthy of praise. . . . And to say that there is no systematic art concerned with the most important things of life is the statement of a person who speaks without due reflection and makes a mistake in the most important matters. . . . For now, I mean only to explain why, deprived of the service of the republic, I have devoted myself to this particular pursuit.

Cicero, On Duties

Reading Richard Posner’s Holmes Lectures is something like reading Hume’s Treatise with the Hume removed: like, that is, encountering the implausibly mechanistic picture of human personality and the defiant debunking of reason’s pretensions without at the same time, and inseparrably, encountering the gentle, playful, and many-colored mind, thoroughly delighted by reason and human complexity, incomparably deft in argument, that again and again soars beyond and dives beneath the rigid structures it has erected for itself. Because I think there are many ingredients of the full Hume in Posner, I regard these lectures as an occasion for sadness, as well as for criticism. However that may be, to criticism I now turn.

I shall comment, first, on the methods Posner uses to criticize moral theory. Next, I shall attempt to pin down what his own view actually is and show how closely his critique of moral theory parallels well-known (and discredited) strategies used by ancient Greek skeptics and

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4 For a comparison of Hume and Posner, see my review of Posner’s Sex and Reason, Martha Nussbaum, “Only Grey Matter”? Richard Posner’s Cost-Benefit Analysis of Sex, 59 U. CHI. L. REV. 1689, 1705–07 (1992). Posner’s strategy is similar to Hume’s (in such sections of the Treatise as “Of the Reason of Animals” and “Of the Love and Hatred of Animals,” see HUME, supra note 3, at 176–79, 397–98) in the sense that he attempts to strip away prejudices and preconceptions by showing his reader that a naturalistic account of moral phenomena will explain them adequately, while doing better than non-naturalistic accounts in explaining relevant similarities between human and animal behavior. See Nussbaum, supra, at 1705–07.
contemporary postmodernists. I shall mention some more fruitful approaches to specifying the sources of normativity. I shall then suggest some answers to Posner’s question about how philosophy can expect to influence individual and public practice. Finally, I shall address two valuable points that Posner’s lectures offer: the need for philosophers to broaden their experience of life, and the need for philosophical argument to use the resources of the literary imagination.

I. POSNER’S METHODS

Posner claims that a part of moral philosophy, the part he calls “academic moralism,” is “incapable of contributing significantly to the resolution of moral or legal issues or to the improvement of personal behavior.”5 The philosopher needs, but does not have, “cogent arguments.”6 For this reason and others, “[a]cademic moralism . . . is not an agent of moral change.”7 At times, too, Posner attacks more broadly, denying that “a moral code” could be “changed by rational persuaders, intoning or refining the arguments of Aristotle, Aquinas, Kant, Hegel, or Mill.”8 We would then expect him to provide two things to support his claim: first, a sustained critique of the arguments of the “academic moralists” (and, given his broader attack, of the major historical figures whose views they advance); second, a scrutiny of major cases in which philosophical views are generally thought to have changed public or private morality, showing that the received view of philosophical influence is inaccurate.

But Posner lets us down. He simply does not argue his case in either of the two ways he needs to. No argument of any major historical moral philosopher is examined in these lectures. Nor is any argument of any contemporary “academic moralist” examined here, with one exception to which I shall shortly turn.9

5 Posner, supra note 2, at 1655.
6 Id. at 1666.
7 Id. at 1690.
8 Id. at 1666.
9 Some of the thinkers on Posner’s list of “academic moralists,” id. at 1639, get no critique at all; this is true of Sissela Bok, David Gauthier, Alan Gewirth, Frances Kamm, and Joseph Raz. Others, including Elizabeth Anderson, Onora O’Neill (who is not on Posner’s original list), and John Rawls, are criticized without any attempt to state or to evaluate their arguments: Posner criticizes O’Neill and Anderson for peripheral remarks they make about economic matters, remarks that are not in the least central to their arguments. See id. at 1691. And although Posner chastises philosophers for advancing weak arguments against economics, no serious philosophical critiques of economics — for example, those of Sen and the late Jean Hampton — are mentioned at all. See JEAN HAMPTON, POLITICAL PHILOSOPHY (1996); AMARTYA SEN, CHOICE, WELFARE, AND MEASUREMENT (1982); AMARTYA SEN, ON ETHICS AND ECONOMICS (1987). Hampton’s unfinished large book on political philosophy, The Authority of Reason, will be published this year by Cambridge University Press. (Hampton died in 1996 at the age of 41.) Posner also has a tendency to focus on weak pieces of work that are genuinely silly, as if they stood for the profession as a whole. Thus, Peter Unger’s very bad Living High and Letting Die (1996) gets more space than Sen and about as much as Nagel and Rawls. See Posner, supra note 2, at 1689;
And how does Posner treat the work of Rawls, the greatest of contemporary moral philosophers? He quotes a passage from political scientist Benjamin Barber that pokes fun at Rawls’s picture of human psychology in the Original Position. Without offering any reason to believe that Barber’s description is correct (it is not), Posner then says that if you do not like the psychology described, you will not be persuaded by anything Rawls has to offer. If this sound-bite style of criticism is exemplary of the respect with which economists treat their opponents, Posner’s readers have many reasons to prefer philosophers, who, from the first undergraduate course on, demand a careful reconstruction of an argument’s premises before launching a critique.

In only one case does Posner offer anything like an argument directed at a philosopher’s argument: his objection to Judith Jarvis Thomson’s famous article on abortion. Posner says that Thomson has ignored the important distinction between pulling the plug on a fetus and chopping up a fetus. Here he actually describes what Thomson says and makes a pertinent objection. How good an objection is it? We cannot tell, because Posner gets bored and moves on, rather than stopping to ponder the significance of his point. Does he think that


Obviously I have not discussed Posner’s treatment of Ronald Dworkin, a legal theorist who is also a moral theorist. There are two reasons for this omission. First, I have confined my discussion to Posner’s general attack on ethical theory and have not discussed his arguments about legal theory. Also, I admire Dworkin’s Response to Posner, see Ronald Dworkin, Darwin’s New Bulldog, 111 HARV. L. REV. 1718 (1998), with which I am substantially in agreement, and feel that it can speak for itself.


11 Barber depicts the Rawlsian agent as extremely risk-averse about everything in life, see Barber, supra note 10, at 299, whereas the people in the Original Position are risk-averse only about the task in hand, which is the choice of institutions that will govern the “basic structure of society,” JOHN RAWLS, A THEORY OF JUSTICE 7 (1971), meaning those institutions whose influence is both pervasive and present from the start. See id. at 152–53. There is no reason to suppose that someone who is risk-averse about political liberty or the liberty of conscience would be similarly risk-averse about buying a new car. Other errors in Barber’s description include the claim that the Rawlsian agent is averse to “freedom,” see Barber, supra note 10, at 299 (of course, the Rawlsian agent gives the strongest possible priority to liberty, see RAWLS, supra, at 60), and the claim that this agent cannot imagine “the best” outcome, Barber, supra note 10, at 299, a statement for which Rawls’s text gives no support at all.

Posner is also mistaken in a separate statement that he makes about Rawls: that a rational agent has consistent preferences over a lifetime. See Posner, supra note 2, at 1675. On the contrary, Rawls stresses the extent to which preferences are shaped by institutions and political arrangements. See RAWLS, supra, at 136–37.

12 See Posner, supra note 2, at 1674.

13 Again, Dworkin is an exception, but I do not discuss Posner’s treatment of Dworkin for the two reasons given in note 9 above.

14 See Posner, supra note 2, at 1675–76 (citing Judith Jarvis Thomson, A Defense of Abortion, 1 PHIL. & PUB. AFF. 47, 48–49 (1971)).
the significant moral distinction is between active killing and allowing to die? If so, he would need to consider the views on this distinction that Thomson and others have long elaborated — and it is by no means clear that the distinction survives rational scrutiny. Is he, instead, focusing on the familiar Catholic distinction between intending a harm and taking action for some legitimate purpose that will foreseeably have harm as its byproduct (the "doctrine of double effect")? Again, however, Thomson has had a good deal to say about this distinction, and it probably does not do the work that many would like it to do. Even if we grant the moral significance of Posner's distinction, does it really disable Thomson's argument in the case of pregnancies resulting from rape or incest? Could one not argue that even "chopping up" is a permissible response to a pregnancy resulting from such violent aggression? These are some of the comments a philosophy instructor might make, were she to receive Posner's paragraph in an undergraduate paper. She would probably begin by saying, "An interesting suggestion, but you need to think further: what can Thomson say in response to your objection?" Because Posner does not take this basic first step of asking what the criticized person's reply could be, we simply cannot tell whether he has a good point to make.

Posner's failure to engage philosophical arguments appears to stem from an underlying conviction that people are never changed by moral arguments. He would very likely reply to my criticism by insisting that academic moralists are all alike: all try to change conduct by a device — argument — that is unlikely to have any efficacy. We do not need to examine particular arguments, because we can see in advance that, being moral arguments, they will prove futile. But if that is to be Posner's reply, then, first of all, he should claim only that philosophical argument is inefficacious, not that it is not "cogent." To say that an argument is not "cogent" is usually to suggest that it lacks one or more of the salient characteristics of a good argument: true premises, logical validity, absence of equivocation. It is to say that people should not be persuaded by that argument, not only that they will not be persuaded. As we see, he has made both charges, the second of which does require engagement with particular arguments. Second, Posner needs to establish his claim that moral arguments are inefficacious, for it is widely thought that human beings are at least sometimes persuaded by moral arguments. It is all the more important, then, that he examine carefully the cases in which one might suppose that arguments have mattered in public life.

15 In Martha C. Nussbaum, Cultivating Humanity: A Classical Defense of Reform in Liberal Education 15-49 (1997), I argue that this aspect of undergraduate philosophy instruction makes a valuable contribution to citizenship: if we are to deliberate well as a democracy, we need to learn to put our opponents' position in its strongest light.
Here are a few of the examples that would usually be used to show that philosophers have had some influence on public life: Rousseau’s influence on the French Revolution; the influence of Cicero, Grotius, and Kant on the development of the international law of war and the modern human rights movement;\textsuperscript{16} the influence of Cicero on the thought of countless statesmen the world over;\textsuperscript{17} the influence of Locke and Montesquieu on the American founding; the influence of Marx on many modern governments; the influence of Burke on conservative politics; the influence of Mill on modern liberal and libertarian thought;\textsuperscript{18} the influence of John Dewey on American education.\textsuperscript{19} If


In one puzzling paragraph, Posner casts doubt on the claim that Kantian thought has had a good influence on Western moral thought by mentioning the brutality and evil inflicted by Stalinism and “communism more generally.” Posner, supra note 2, at 1654–55. Is he confusing Kantian thought with Marxist thought? Or is he (as the second half of the paragraph suggests) assuming that in order to show that Kant’s view has had a good influence one must show that all universalist views have had a good influence? But why should this be so? Kant’s view is good precisely on account of features that distinguish it from nonliberal forms of universalism.

\textsuperscript{17} For one poignant example, see Kwame Anthony Appiah’s account of his father Joe Appiah, one of the founders of the Republic of Ghana, who kept the \textit{De Officiis} on his bedside table along with the Bible and alluded to its idea of world citizenship in his dying letter to his children. See Kwame Anthony Appiah, \textit{Cosmopolitan Patriots, in For Love of Country: Debating the Limits of Patriotism} 21, 23 (Joshua Cohen ed., 1996).

\textsuperscript{18} See, e.g., RONALD DWORKIN, \textit{Liberty and Liberalism, in Taking Rights Seriously} 259 (1978) (defending Mill’s views against a critique by Gertrude Himmelfarb); RONALD DWORKIN, \textit{Liberty and Morality, in Taking Rights Seriously, supra}, at 240 (using a Mill-based view of liberty to criticize Lord Devlin’s view of the enforcement of morals); MARTHA NUSSBAUM, \textit{Sex and Social Justice} (forthcoming 1998) (manuscript at 16–17, on file with the Harvard Law School Library) (citing Mill’s view of liberty as a good basis for social regulation); \textit{id. at 17–20} (citing Mill’s \textit{The Subjection of Women} as a valuable liberal critique of the traditional liberal public-private distinction); RICHARD POSNER, \textit{Sex and Reason} 1-4 (1992) (describing his libertarian theory of sexual regulation with reference to Mill); \textit{id. at 202–04} (discussing, approvingly, Mill’s repudiation of “constructive injury” as a basis for regulation); \textit{id. at 233–37} (drawing on Mill to criticize moralistic theories of sexual regulation).

\textsuperscript{19} The most influential work was \textit{John Dewey, Democracy and Education} (Free Press 1966) (1916). Dewey also implemented his own theories, most prominently at the University of Chicago’s Laboratory School. By now, his theories substantially influence elementary education throughout the United States.
we confine ourselves to influence by moral philosophers currently teaching in universities in the Anglo-American world — the narrower target of the term “academic moralism”\textsuperscript{20} — we would certainly want to consider the influence of Amartya Sen on international development economics and public policy;\textsuperscript{21} the influence of Peter Singer\textsuperscript{22} on the animal rights movement; the influence of philosophers in medical ethics on the development of the distinction between patients’ interests and patients’ rights;\textsuperscript{23} the influence of Mary Warnock and Jonathan Glover on British and European policies relating to reproductive technology and surrogate motherhood;\textsuperscript{24} the influence of Bernard Williams on British politics in the area of pornography.\textsuperscript{25}

To show that philosophers have influenced public views of morality and policy, we shall not need to show that there was nothing else in the surrounding society that conduced to the development of those views. Philosophy rarely asks people to depart altogether from all of

\textsuperscript{20} Note, however, that Cicero’s philosophical training was highly academic; he addresses the De Officiis to his son, who is away in Greece studying in the philosophical schools. See Cicero, supra note 1, at 1. Grotius was an academic until he was tried and exiled for heresy. Kant led a paradigmatically settled academic life. Dewey was a tenured academic. Others almost certainly would have been academics had restrictions on religious beliefs and marital status not prevented them. Fellows in Oxford and Cambridge colleges had to be unmarried until fairly recently, and an atheist such as Mill would have encountered still other obstacles.


\textsuperscript{22} See Peter Singer, Animal Liberation (1975).

\textsuperscript{23} This is a large and diverse topic, since philosophers have frequently been involved at the state level in helping to draft definitions of informed consent and other relevant legal instruments. For some examples of the theoretical positions in question, see Dan W. Brock, Life and Death (1993); Allen E. Buchanan & Dan W. Brock, Deciding for Others: The Ethics of Surrogate Decision Making (1989).


\textsuperscript{25} See Home Office, Report of the Committee on Obscenity and Film Censorship (1979). (Bernard Williams was the Committee’s Chairman.) This commission had little direct influence, but only because it was appointed by a Labor government, and the Conservatives took over just as its report was published. Although Posner cites Williams as a philosopher who is “skeptical of” normative moral theory, Posner, supra note 2, at 1640 n.2, it is important to note that Williams sharply distinguishes moral theory from both political and legal theory, and does not deny that the latter two do — and should — influence public life. See Martha Nussbaum, Why Practice Needs Ethical Theory: Particularism, Principle, and Bad Behavior, in The Path of the Law in the Twentieth Century (Steven J. Burton ed., forthcoming 1998) (manuscript at 7–10, on file with the Harvard Law School Library) (drawing in part on the author’s correspondence with Williams for this proposition).
their settled views. More commonly, it systematizes views that are disordered or brings to the surface a part of people's moral outlook that has been obscured, underdeveloped, or inconsistently applied. To show that philosophers have had no influence, Posner needs to show that this type of reflective systematizing does not make a difference.

Posner does not, however, investigate one of these examples, old or new. The American founding is mentioned once,26 but Posner never mentions Locke and Montesquieu, the philosophers who are most often understood to have influenced the Framers, or the Stoics and Cicero, who clearly had a formative influence on Thomas Paine's cosmopolitanism and on many American patriots' understanding of republican liberty.27 The vast area of international law, so clearly indebted to philosophical proposals, is omitted entirely.28 Although many, if not most, children in America, and many abroad, have been educated in ways that owe a considerable debt to the thought of John Dewey, this tremendous example is just left out. And although partnerships between philosophers and doctors have greatly influenced the practice of American medicine, especially by creating a vast expansion of patients' rights and a corresponding constriction of medical paternalism, none of this is addressed at all. In all these cases, then, it is commonly presumed that philosophers have had an influence on public life; to make his case, Posner would need to rebut this presumption. But he has not taken his own question seriously enough to address these obvious counterexamples.

More generally, the reader who knows something about academic philosophy will be surprised at every point by the sheer casualness and inaccuracy of Posner's treatment. Each reader will have her own examples. Among the most striking, however, is Posner's repeated suggestion that all liberal philosophers are secular and all religious philosophers conservative29 — although he mentions the views of at least two liberal philosophers who are known to him to be religious (Paul Weithman and me). Equally careless is his treatment of philosophy's

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26 See Posner, supra note 2, at 1696. Posner contents himself with observing that philosophers were not involved in drafting the founding documents — hardly surprising, since the relevant ones were dead — and adds a long list of philosophers (not including Locke and Cicero) of whose thought there is "no evidence" in these texts. See id. It is hardly clear what Posner requires for evidence, but surely he should not require an explicit citation. Only in this century has explicit footnoting become de rigueur; before that, so well known were certain texts that Adam Smith, for example, cites long stretches of Cicero verbatim without even mentioning his name. Consult ADAM SMITH, THE THEORY OF MORAL SENTIMENTS 138 (D.D. Raphael & A.L. Macfie eds., Oxford Univ. Press 1976) (orig. 6th ed. 1790), for a good example of Smith's method, an unacknowledged verbatim citation (in English) of Cicero's De Officis.


28 For a discussion of this influence, see ARTHUR NUSSBAUM, A CONCISE HISTORY OF THE LAW OF NATIONS (1947).

29 See, e.g., Posner, supra note 2, at 1685–86.
influence on students. Posner treats the class of students that have been exposed to philosophy courses as distinct from "other members of the educated class, scientists for example or even lawyers and economists."30 Like too many at graduate-focused research universities, he has apparently forgotten about undergraduates! Not only do many undergraduate science and economics majors elect courses in philosophy, many are actually required to do so — in all the Catholic colleges and universities of this nation, and in many secular institutions as well, large and small, public and private.31 Obviously the fact (if it is one, for no evidence is offered32) that scientists are as moral as humanists shows nothing about the moral role played by philosophical education.33

Most remarkable of all, however, is Posner's contention that moral philosophers want to produce a society with a uniform morality and to remove "moral variety."34 It would appear that he has not noticed that an almost obsessive preoccupation of liberal moral and political philosophy in recent decades has been the defense of pluralism and of a type of liberalism that leaves maximum room for human variety. Some philosophers — Joseph Raz, for example — defend a comprehensive form of liberalism that makes autonomous self-development a central value; this approach leaves a great deal of room for human variety.35 Rawls's *A Theory of Justice* could also be read as suggesting such a comprehensive view, because he argues that a liberalism attaching a very strong priority to liberty gives individuals ample space to pursue their own conceptions of the good.36 Rawls now defends

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30 Id. at 1682.
31 For discussion and examples, see NUSSBAUM, cited above in note 15, at 15–49. Philosophy requirements in Catholic schools are distinct from, and supplement, theology requirements.
32 Nor could such evidence be offered consistently with Posner's subjectivism, because all views count for him as moral, so long as some person seriously advances them. See Posner, supra note 2, at 1640–41.
33 Nor do Posner's observations about the rescuers of the Jews, see Posner, supra note 2, at 1682–83, support his conclusion. The people studied by the Oliners, see SAMUEL P. OLINDER & PEARL M. OLINDER, THE ALTRUISTIC PERSONALITY: RESCUERS OF JEWS IN NAZI EUROPE (1988), were sent to school (in Germany and Poland) in a climate of anti-Semitism, at a time when dissenting teachers and professors had been sidelined, and many good people had gotten out of the country, or at least out of civil service jobs, voluntarily. So the failure of education to correlate significantly with being a rescuer tells us nothing about the good education that many of us would support. Furthermore, a more recent study of the rescuers, Kristen Monroe's *The Heart of Altruism*, shows that the most salient feature they share is a particular outlook on the relatedness of human beings, an outlook that holds that all human beings are interconnected, interdependent, and equal in worth. See KRISTEN RENWICK MONROE, THE HEART OF ALTRUISM: PERCEPTIONS OF A COMMON HUMANITY 91 (1996), reviewed in Martha C. Nussbaum, *Unlocal Hero*, NEW REPUBLIC, Oct. 28, 1996, at 36. This outlook could, of course, be imparted in many ways, and philosophy is only one way through which it came to the rescuers. But it is a universal moral-theoretical view.
34 Posner, supra note 2, at 1642.
36 See RAWLS, supra note 11, at 195–211, 541–44.
“political liberalism,” on the ground that the latter offers more scope for people to pursue different conceptions of the good. While not less concerned with individual liberty, political liberalism envisages the principles of justice (and the priority of liberty) as commanding a consensus for political purposes, rather than as parts of a comprehensive view of life. Other philosophers on Posner’s list, such as Dworkin, Sen, and Nagel, have expressed related views. And one might also mention Will Kymlicka, who has recently produced an excellent account of a liberal position on group and cultural rights.

The protection of liberal freedom does require some limits to the amount of immorality a society will tolerate. But Rawls makes that limit a very generous one, arguing that we should restrict the liberty of intolerant persons and groups only “when the tolerant sincerely and with reason believe that their own security and that of the institutions of liberty are in danger.” Would Posner defend a more ample latitude for the “immoral” and “amoral” whom he considers valuable to society? If not, he has no disagreement with the liberal philosophers.

II. RELATIVISM AND SUBJECTIVISM

But what is Posner’s own philosophical position? He embraces a form of moral relativism, which he defines as the view “that the criteria for pronouncing a moral claim valid are local, that is, . . . relative to the moral code of the particular culture in which the claim is advanced.” He exemplifies this view by saying, “Abortion is moral in cultures that have liberal attitudes toward sex or that have adopted a feminist ideology. It is immoral in ones that want to limit sexual freedom, promote population growth, or advance certain religious orthodoxies.” The first question that we must ask Posner is whether he is advancing this position as a description of our moral practice (and is thus saying that we actually do judge things immoral using purely local criteria), or as a normative recommendation for practice (and is thus saying that we ought to use local criteria, or are justified in

38 Thus, it would be consistent for a citizen to endorse the priority of individual liberty for political purposes while preferring a life that involves some personal resignation of liberty, for example in connection with an authoritarian religion. See id. at 221–22.
41 RAWLS, supra note 11, at 220. For related discussion, see DWORKIN, LIBERTY AND MORALISM, cited above in note 18; Amartya Sen, The Impossibility of a Pareitan Liberal, 78 J. POL. ECON. 152 (1970); Sen, cited above in note 39.
42 Posner, supra note 2, at 1642.
43 Id. at 1651. Both sides in the abortion debate are likely to feel that the grounds of their position have not been well characterized here.
judging things immoral only when we use local criteria). Posner's text gives at least some support for each reading. Posner suggests that his view is descriptive when he denies that he is making a "moral argument" for moral relativism and grants that such a relativism would be self-refuting.\(^{44}\) According to his account of "morality," any normative view that prescribes conduct in ways that "are designed to check" our instinctive reactions (including both the "self-interested" and the "sentimental") is a moral view.\(^{45}\) So it would appear that any view holding that we should not appeal to universal criteria in judging moral practice (as most of us are strongly inclined to do) must count, for Posner, as a "moral" view. Similarly, in a later passage dealing with economics, Posner repudiates all normative reasoning — including his own previous view that wealth-maximization should be a normative principle — with the exception of instrumental reasoning about the best means to prechosen ends.\(^{46}\) He thus gives us further warrant for reading his relativism descriptively, because otherwise he would be making normative recommendations about noninstrumental matters.

But as a description of our moral practice, moral relativism is either trivially true or false. It is trivially true if read as the statement, "People guide their actions only by ideas that they actually have, ideas that have somehow impinged on their experience." Nor does this statement help us understand conduct in the modern world, in which every culture has access to the ideas of every other, via television, the Internet, and so forth. But if moral relativism means, "People guide their actions only by ideas that have their roots in their local culture," it is plainly false. As Aristotle long ago observed, "In general, all people seek not the way of their ancestors, but the good."\(^{47}\) People are ingenious borrowers of ideas. The ideas of Christianity, which arose in a dissident sect of Judaism in the Near East, have by now influenced conduct in every major region of the world. The ideas of Marxism, which originated in the British Library, have guided conduct in Cambodia, China, and Cuba. Cicero’s ideas about the just war, which had their origins in Athens and Rome, influence conduct in today’s international war crimes tribunals. Democracy is not a firmly rooted idea in China, but it is an extremely vigorous one, for which people go to their deaths.

Posner might respond by claiming that people guide their actions by foreign ideas only once they have already integrated them into their local cultures. The examples given above, however, would not support that claim. Christians have often followed Christian norms in their

\(^{44}\) *Id.* at 1655 (emphasis omitted).

\(^{45}\) *Id.* at 1639.

\(^{46}\) See *id.* at 1668–70 & n. 62.

own personal conduct without waiting to change the surrounding society. Marxists did not attempt to bring about wide-reaching cultural changes before engaging in revolutionary political conduct. International norms of proper conduct during war are rarely organic elements of local cultures; the Nuremberg trials, for example, reflected a judgment that Nazi conduct could appropriately be judged by norms that Nazi culture had rejected. Similarly, Chinese proponents of democracy attempt to influence politics directly, rather than through a prolonged period of cultural reform.

One might attempt to refurbish descriptive relativism by characterizing it as the view that moral norms differ across societies in significant and interesting ways. This position seems plausible, although its proponents frequently exaggerate the extent of difference by describing the entirety of a culture in a way that equates the culture with its oldest or most traditional strands, ignoring significant dissenting or minority voices. But that modest descriptive position would not help Posner establish his conclusion that the moral arguments of "academic moralists" are irrelevant to groups who have different histories. To get to that conclusion, he needs to show much more than modest differences, since modest differences frequently are bridged by argument. Thus, for relativism to support his larger argument, he needs to endorse it in a far stronger and, inevitably, less plausible form.

Relativism is consequently untenable as a descriptive view, except in a form so modest that it fails to support Posner's argument. We should therefore ask whether Posner intends to endorse relativism as a normative view. There is some support for such a reading in his text. For example, Posner does not make the descriptive statement that abortion is regarded as immoral in certain societies; rather, he makes the normative statement that abortion "is immoral" in certain types of societies. He repeatedly makes the normative claim that people have no right to criticize societies that do things differently. As a normative view, relativism does not have much bite in today's world if it simply means that one should guide one's conduct (or criticize the conduct of others) by criteria internal to the society in question; after all, every society in today's world contains the ideas of democracy, of feminism, of liberalism. Moreover, why should we accept such a claim? Why

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48 For a discussion of some examples of this error, see Martha C. Nussbaum, Cultivating Humanity 123–26, 139–44 (1997); Martha C. Nussbaum, Human Capabilities, Female Human Beings, in Women, Culture, and Development 61, 64–67 (Martha C. Nussbaum & Jonathan Glover eds., 1995). This issue is a major focus of Lecture 1 and Lecture 3 in my Feminist Internationalism, The Seeley Lectures in Political Theory, Cambridge University, March 1998 (manuscript on file with the Harvard Law School Library).

49 Posner, supra note 2, at 1651.

50 If the relativist should respond by saying that these ideas do not have the same power in all societies, then it would appear that the normative proposal has been altered: it would then be the proposal that we should guide our conduct by the most powerful views in our society. But why
shouldn’t we guide our conduct by the best standards we can find, whether they are internal to our culture or not? If the claim is only that it is unfair to blame people severely for not following a standard they could not have known about, fair enough, but that would not be very interesting; it tells us only that we should forgive some people who held slaves, not that slavery was acceptable.\textsuperscript{51}

Finally, as Posner himself grants, the normative version of relativism is self-refuting: relativism is far from being the prevailing local view of morality in most cultures of the world. Therefore, in telling us that we ought to defer to local normative views, relativism asks us to reject relativism.

But is Posner really a relativist at all? After claiming that he is a relativist and denying that he is a moral subjectivist,\textsuperscript{52} he goes on, after all, to endorse a form of moral subjectivism, according to which “an individual acts immorally only when he acts contrary to whatever morality he has adopted for himself.”\textsuperscript{53} This view is obviously false as a description of our moral practices. If we did hold this view, then praise, blame, moral education, and moral argument would not exist. According to Posner’s subjectivism, if \( A \) says that killing this person right now\textsuperscript{54} is right and \( B \) says that killing this person right now is wrong, \( A \) and \( B \) are not really disagreeing. One version of subjectivism will hold that their statements do not contradict one another at all, since we are to understand them as shorthand versions of the statements, “Killing this person right now is right in the eyes of \( A \)” and “Killing this person right now is wrong in the eyes of \( B \).” Another version, already familiar to Aristotle, will hold that the two statements do contradict one another, but are both true. This version requires us to suspend the principle of noncontradiction.\textsuperscript{55} Both versions, we see, require us to revise our understanding of our moral practices radically, the former by reinterpreting a contradiction as a noncontradiction and

\textsuperscript{51} And, in actual fact, arguments about the wrongness of slavery and dramatic descriptions of its brutality have been around at least since the fifth century B.C. Many American slaveholders were brought up on Euripides’ \textit{The Trojan Women} — they just did not connect one thing with another.

\textsuperscript{52} See Posner, \textit{supra} note 2, at 1642.

\textsuperscript{53} \textit{Id.} at 1643.

\textsuperscript{54} I add the qualification “right now” in order to make it clear that \( A \) and \( B \) really are disagreeing about the same thing, not simply making overly general statements that a more precise formulation might render consistent (as would be the case, for example, if \( A \) were to say, “Killing is wrong,” thinking about killing innocent human beings, and \( B \) were to say, “No, killing is right,” thinking about killing an aggressor in self-defense).

\textsuperscript{55} For a discussion of the relevant Aristotelian texts and their relevance to modern debates, see \textsc{Martha C. Nussbaum}, \textit{Sophistry About Conventions}, in \textsc{Love’s Knowledge} 220, 223–28 (1990).
a disagreement as two parallel reports of differing experiences, the latter by requiring us to suspend a basic law of logic to which we usually hold very firmly indeed.

Is there anything to be said in favor of subjectivism as a normative view? In other words, recognizing that it is not an accurate description of our moral practices, do we have any reason to adopt it? Posner surely gives us no good reasons: he relies on the standard claim that we cannot solve moral controversies any other way, because "[f]or every argument on one side of a moral issue there is an equally good one on the other side," and "[t]he arguments cancel."56 This claim was descriptively false when it was made (apparently) by Pyrrho in the fourth century B.C., and it is descriptively false when it is made by present-day scholars in postmodernism and critical legal studies. When real people hear two conflicting arguments, they usually do not regard both as equally good. Even when both arguments initially seem equally good, that is usually not the end of the matter: the listeners get to work figuring out more precisely how the arguments conflict, what premises they share, and which argument they really want to accept. So the real question for subjectivism is, what advantages might there be in looking at arguments in a way we usually do not?

The ancient Greek skeptics are instructive here.57 They tell us that if we relinquish our normal impulses and accept subjectivism — treating all moral claims as mere subjective reports and all arguments as utterances of opinion with equal weight on both sides — we get a surprising dividend: peace of mind. We do not have to worry about what is right and wrong; we do not have to vex ourselves deciding how to live. We just go with the flow, and if a tyrant tells us to do something shameful, we simply consult our instinctual fears and habits, and the action will come out however it comes out — never mind the exhausting business of trying to get it right. This is a successful outcome, if that is the life one wants. But of course it is not really a life free of normativity. It is simply a life that has preferred one norm, peace of mind, over other norms, such as justice and moral goodness. It is an attractive life to some people who want an untroubled sleep, in a world where tyrants do order unpleasant things.

Posner's theoretical statement of his position is, to say the least, underdeveloped. But if it is interpreted in the most plausible light, he is an ancient skeptic, who has solved the problem of conflicting moral

56 Posner, supra note 2, at 1666.
57 See, e.g., Martha C. Nussbaum, The Therapy of Desire: Theory and Practice in Hellenistic Ethics 280–315 (1994); Martha C. Nussbaum, Skepticism About Practical Reason in Literature and the Law, 107 Harv. L. Rev. 714 passim (1994) (comparing ancient Greek skepticism to contemporary writings in law and postmodernism). Notice that "skeptic" is not used here as it is in modern moral debate, to mean one who questions the justification for knowledge claims but grants the existence of moral beliefs. Ancient skeptics aimed at ridding people of belief and replacing it with a mere subjective impression of the way things are.
claims by adopting a stance of radical detachment from moral practices, a stance that sees human beings as machines motivated by moral causes, but lacking moral reasons. The skeptics frankly granted that such a person will be different from the rest of us: law and morality will motivate him only to the extent that they have become habitual parts of his animal mechanism before his turn to detachment. He will not see those motives as worthy of special respect or as giving humans a special standing in the world of nature. And if he does something immoral, nothing will disturb his peace of mind. Given the choice between a Kantian judge and a skeptic, I know which one I would choose.

III. The Sources of Normativity

But how do we justify our moral claims? Where does the normativity of ethical norms come from? Posner’s view on this question is unclear. He appears to believe that norms, or at least some of them, find their source in our emotions; but he also supports a cognitive account of the emotions, which holds that value judgments of the sort that societies teach and that argument might be thought to change are central constituents of our emotions. It is not at all clear, then, why he should think, as he appears to, that argument has no role to play in shaping our moral norms or showing which among them are justified. The question of justification is left unresolved.

But Posner’s treatment, flawed and peculiar though it is, raises these questions, which have been the obsessive focus of much of contemporary moral philosophy (the part called “metaethics”). Because the debate on these issues is so rich and detailed, I cannot hope even to describe it here, but I shall mention three prominent approaches to the question that can be found in the recent philosophical literature.

One family of views, which I shall call the “reflective-naturalist” view, is associated with Hume. According to this perspective, justification takes place wholly within a naturalistic understanding of the human being as an animal with complex ethical faculties. Ethical judgments are regarded as deliverances of our normative faculties, just as perceptual judgments are deliverances of our perceptual faculties.

58 See Posner, supra note 2, at 1662–64.

59 See id. at 1664. Posner’s position is unclear here too: he says only that “[e]motions, being triggered by beliefs, have a cognitive element,” id., but he cites two philosophers, Ronald de Sousa and me, see id. at 1664 n.46, who hold much stronger cognitive views that make the cognitive element a central part of emotions themselves. (Indeed, my view defines emotions in terms of cognitions alone.)

60 The best recent account of this question is CHRISTINE M. KORSGAARD WITH G.A. COHEN, RAYMOND GEUSS, THOMAS NAGEL & BERNARD WILLIAMS, THE SOURCES OF NORMATIVITY (Onora O’Neill ed., 1996).

61 See id. at 51–66. Korsgaard associates it with Aristotle as well, see id. at 50–51, but it is important to distinguish the two.
Their normativity springs from the fact that they are the expression of a particular aspect of our makeup — nothing more than that, but also nothing less. Simon Blackburn, one of the most eminent neo-Humeans in the current debate, has compared ethical properties to secondary qualities such as color, implying that our ethical judgments are about something in the world, but that they are decisively shaped by the nature of our faculties. Blackburn is at pains to emphasize that reconceiving ethics in this naturalistic way does not undermine any of our ethical practices or force us into any form of relativism. In fact, it leaves things where they were, because our ethical faculties are very complex, and we do engage in elaborate forms of argument and justification.

Justification, in this approach, requires reflectively sorting out the various deliverances of our faculties until we find the view that satisfies us. Neo-Humean views standardly follow Hume (or one strand in Hume) by regarding reason as “the slave of the passions,” a source of instrumental judgments rather than a justifier of ultimate ends. They regard ultimate ends as dictated by our desires, which they see as relatively inflexible and lacking in cognitive content. Posner seems closest to this group of thinkers, though he (rightly) rejects their view of the passions; Blackburn develops some aspects of Posner’s position with much more sophistication and plausibility.

A close relative of the neo-Humean view finds its roots in Aristotle. Because this neo-Aristotelian view holds that deliberation and justification can and should shape one’s life plan (or, as the Greeks would say, one’s view of eudaimonia), I shall refer to it as the “reflective-eudaimonist” view. This view, too, regards the human being as a creature in the world of nature, but it stresses that human beings’ rational faculties permeate and transform all aspects of human functioning, prominently including the nature of desire and emotion. According to this view, ethical deliberation shapes desire and emotion themselves, and it therefore shapes ends in addition to devising means to ends. It is a complicated matter to describe the search for normativity in this

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62 Philippa Foot is another prominent neo-Humean ethical theorist. See, e.g., PHILIPPA FOOT, VIRTUES AND VICES AND OTHER ESSAYS IN MORAL PHILOSOPHY (1978).


64 HUME, supra note 3, at 415.

65 See Posner, supra note 2, at 1664.

66 The best contemporary account of this type of deliberation is in HENRY RICHARDSON, PRACTICAL REASONING ABOUT FINAL ENDS 209–27 (1994). Richardson convincingly argues that ethical deliberation conforms to the general criteria of rationality that neo-Aristotelians and neo-Humeans share. Other proponents of such views are John McDowell, David Wiggins, and myself. John Rawls’s view of justification is basically neo-Aristotelian, despite the Kantian affiliations of the rest of his view. See RAWLS, supra note 11, at 17–21, 577–86.
view. One prominent part of it involves searching for the best specification of a general end, which one usually does by seeking coherence and fit within the scheme of one’s ends taken as a whole. Reasoning plays a larger role in the eudaimonist search for normativity than it does in the neo-Humean view, since the Humean regards many of our desires as fixed, given in our biological apparatus. But the reflective-eudaimonist view still understands normativity as something that derives from a part of our natural makeup, and proponents of the view believe that it is both unnecessary and futile to search for any other source.

Neo-Kantians are dissatisfied with both of these forms of naturalism. Although most contemporary Kantians do not speak the language of the “noumenal” and the “phenomenal,” they do retain the basic Kantian idea that we are essentially split beings. On the one side are all our natural impulses, such as desires, emotions, and inclinations, which Kantians, like neo-Humeans, regard as relatively intransigent and fixed. On the other side is practical reason, the source of our dignity, which is capable of leading itself rather than simply being pushed around by the impulses. Practical reason is the source of its own laws and its own ends. It may choose to pursue an end that some desire also pursues, but it does so freely only when it legislates on its own, undetermined by the pressure of desire and inclination. Justifying a course of conduct as ethical requires showing that it is the choice of such a free, self-legislating practical faculty. Typically, such a justification involves demonstrating that the maxim of the action can pass a test based on Kant’s categorical imperative.

All three of these views, and others, are live options for answers to Posner’s normativity question; none involves his implausible rejection of all justification.

IV. THEORY AND PRACTICE

Posner holds that ethical theory never really influences practice. Ethical theorizing might have great value even if this were true, because it is intrinsically valuable to gain knowledge about our moral lives. But Posner’s claim is clearly false. I have given some plausible counterexamples; in order to make my case fully, I would have to examine them closely one by one — something that I am unable to do here. My aim has been only to show that Posner does nothing to rebut the common presumption that these theories have an influence.

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67 Prominent neo-Kantians include Christine Korsgaard, Barbara Herman, Onora O’Neill, and the late Jean Hampton.
68 See supra pp. 1780–82.
Now, however, I must explain how I believe theories can have such an influence. The answer is, I think, that there are many different routes to influence. Sometimes ethical theorists are also influential politicians: Cicero, Seneca, and Marcus Aurelius could promulgate their ethical norms through their own political practice and prestige. Sometimes, theorists are practical entrepreneurs of some other type. Thus, John Dewey put his own theories of education into practice by opening the Laboratory School. Amartya Sen has prevailed on the United Nations Development Programme to measure welfare using indices based on his theoretical capabilities approach. Philosophers in medical ethics go on ethics rounds in hospitals, advise state commissions, and in various other direct ways influence the development of medical law and medical practice.

But these are not the most common situations. Ethical theorists, as Posner notes, are usually inexperienced in politics; in general the profession does not prepare one well for the negotiation and compromise involved in political action. The most common route to influence therefore involves a complex division of labor: theorists teach undergraduates who, after graduation, influence public life in many different ways.

Theorists also have readers of many sorts, some of whom may disseminate their ideas in a practically useful way. This is how the work of Grotius and Kant has influenced international law, a profession with which the original theorists had no contact. This is how Locke’s ideas influenced the American founding. One of the important things to remember here is that theory’s influence does not require pervasive ethical change: it can lead to changes in laws and institutions that have a practical effect even when people on the whole remain recalcitrant. Thus, Kant did not expect to move the world toward lasting peace by teaching all people to govern their conduct by the categorical imperative. He hoped, certainly, to raise the average quality of ethical practice in his part of the world. But he also, and more significantly, hoped for what he in fact achieved: an influence on legislators and leaders who were in a position to shape the development of international law. These lawyers needed a theory to give their work direction by providing an account of the ethical core of their enterprise, but, of

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70 See supra note 19.

71 See supra note 21.

72 See supra note 23–24.

73 See Posner, supra note 2, at 1670.
course, Kant also needed these entrepreneurs in order for his ideas to have a practical impact.

Finally, theorists hope to shape the education of the young, which always takes place in accordance with some code of conduct. All the major ethical theorists make recommendations for the moral education of young children. Some theorists — for example, Plato, Aristotle, Seneca, Rousseau, and Dewey — construct detailed accounts of good education. Others, such as Kant and Rawls, focus in a more abstract way on the development of moral motives, leaving the details to be worked out by each society. Such accounts have had enormous influence on the education of children in our society.

None of this would have happened if, as Posner sometimes suggests, rational argument never persuades people. But his claim is implausible. Probably argument rarely persuades people to depart altogether from their most settled views. What it more commonly does, however, is to bring to the surface a part of one’s moral view that has been obscured or inconsistently applied. Frequently the systematic power of ethical theory is a great help in this sort of argument, ordering what is until then disordered, rendering explicit what is nameless and thus easily denied or effaced.74

V. EXPERIENCE AND IMAGINATION

Posner notes that today’s moral philosophers are comfortable middle-class academics, many with tenure.75 He suggests that this makes us narrow and insular, cut off from the experiences and opinions of people who do not think as we do. He admires thinkers who had uneven careers: those who were persecuted and exiled (Rousseau), were denied employment (MacKinnon76), left comfortable jobs (Nietzsche77 and Wittgenstein), were even thrown into jail (Russell78). He suggests not only that hardship helps make the thinker a successful “entrepreneur,” but also that it helps thought itself. I think he is in one way deeply wrong, but in another way partly right. Posner is surely wrong to think that hunger, ill health, political persecution, imprisonment, or even the lesser woes of lacking secure employment and health insurance are generally improving conditions for the human spirit.

75 See Posner, supra note 2, at 1687–88.
76 It seems implausible to attribute MacKinnon’s influence to the unfair adversity she faced. Many feminist thinkers have encountered adversity, and few have had her lasting influence. The power of her ideas is what matters.
77 Posner suggests that Nietzsche left his professorship in Basel in order to lead a more risky nonacademic life. In fact, he left because his poor eyesight and other health problems necessitated a change of climate and employment.
78 Russell was fired from City University on account of his writings on marriage, and was jailed twice for his anti-war activities, the second time at the age of 86.
Nietzsche made this error, writing that liberal institutions such as the liberties of speech and press make people "small, cowardly, and hedonistic." Calling John Stuart Mill a "flathead," he pronounced: "The highest type of free men should be sought where the highest resistance is constantly overcome: five steps from tyranny, close to the threshold of the danger of servitude." This is childish, and Posner's romantic view of tyranny is similarly childish. Philosophers and legal thinkers in America today are not entirely free from political adversity. Scholars and administrators frequently resent new approaches, especially those that challenge political orthodoxy. But despite the problems that still exist, American academics are better protected from political persecution than almost any group of intellectuals at any time in history. How sad that, instead of commending the academic freedom we have achieved, a distinguished judge — and a libertarian at that — should suggest that philosophers are improved by persecution.

But — and here we arrive at the first valuable point made in Posner's Lectures — security brings with it a risk of narrowness. Many philosophers are indeed lacking in experience of working-class life and of the world outside America. This is not good for moral philosophy. The imagination is a powerful instrument. Kant could write well on colonial domination without leaving Königsberg. Nonetheless, we can and should do more to broaden our experience, whether by working at some other job for a time or by involvement in domestic or international public service projects.

This brings me to Posner's second valuable point. Too often, our insularity is evident in the way we write. Persuasive moral argument, if it is going to reach outside the academy to a larger world, needs to employ the resources of the imagination, drawing people into philosophical argument in the way that Plato does, or Cicero, or Hume, or

80 See FRIEDRICH NIETZSCHE, The Will to Power 21 (Walter Kaufmann & R.J. Hollingdale trans., Vintage Press 1967) (1901); see also FRIEDRICH NIETZSCHE, Beyond Good and Evil 182–83 (Walter Kaufmann trans., Vintage Press 1966) (1885) (calling Mill one of the "mediocre Englishmen" responsible for "a general depression of European intelligence").
81 NIETZSCHE, supra note 79, at 542.
82 Things are different in other countries. Xiaorong Li, staff philosopher at the Center for Philosophy and Public Policy at the University of Maryland and human rights activist, a former colleague of mine in the project on women and quality of life at the World Institute for Development Economics Research, was recently expelled from China when on a visit to her parents. See Visiting Rights Advocate is Expelled by China, N.Y. TIMES, Apr. 8, 1998, at A7. Li has written eloquently, as a philosopher, about the disabilities suffered by women under the current Chinese regime, and has attacked the practice of defending these human rights abuses by appeal to cultural relativism. See Xiaorong Li, Gender Inequality in China and Cultural Relativism, in Women, Culture, and Development, supra note 48, at 407. A native of China, Li is now a U.S. citizen.
83 One cause of this narrowness is the fact that, with few exceptions, the present generation of moral philosophers has not had to perform military service.
Rousseau, or William James. The insularity of which Posner speaks is evident whenever moral philosophers, attempting to address the public at large, use the lifeless terms of art that they use in the academy. It is extremely difficult to nudge philosophers out of this way of writing, and indeed the journals in which one must publish to get tenure discourage a more flexible use of style. Anyone who teaches philosophy to undergraduates knows the excitement that Plato’s writings still generate and knows that there are very few present-day writers who are capable of generating a similar sense of the depth and urgency of philosophy’s problems.

There are many different ways to write philosophy well, and philosophers’ choices will to some extent depend on their culture and the breadth of the audience within it that they are trying to attract. Thus, Spinoza wrote very well for a well-educated, seriously reflective audience, although modern American undergraduates find his work far more difficult to approach than the works of Plato or Nietzsche. One thing that is sure, however, is that the jargon-laden nonwriting of the philosophical journals is a good style for persuading no human being, not even the one whom Epictetus called “a pupil of the schools, that animal at whom everyone laughs.”

Moral philosophers, then, are by no means above criticism. But Posner’s arguments do not show good philosophy to be valueless. Indeed, his grim picture of the human being as a mechanism controlled by hidden innate impulses reminds us of what it is about us that leads us into philosophy: our complex humanity, our sense that we are beings whose dignity derives from the pervasive role of critical reasoning in our social lives. As Cicero suggests, if we disdain philosophy, we disdain a big part of ourselves, and then it is not very clear what remains for us to admire. As long as human beings care about getting things right and producing arguments for what they do, moral philosophy will have a role to play in that process. When we do it well, it is still worthy of praise.

85 Posner holds that our moral intuitions are basically private and unshared, and therefore persuasion cannot change them. See Posner, supra note 2, at 1679–80.