The Pragmatic Polemic: Judge Richard Posner

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I. Biography

Richard A. Posner was born in 1939 and raised in New York City. He attended Yale for his undergraduate degree in English, graduating summa cum laude in 1959. Posner graduated first in his class from Harvard Law School in 1962, magna cum laude, and was President of the Harvard Law Review.[1] After graduating from law school Posner clerked for Supreme Court Justice Brennan. Maintaining his affiliation with the elite universities, Posner accepted a position as associate professor at Stanford Law School in 1968. He moved to the University of Chicago's School of Law in 1969 where he taught until he was appointed to the United States Court of Appeals for the Seventh Circuit in 1981. Posner was the Chief Judge from 1993 to 2000. As a judge, Posner has authored over 2317 legal opinions, well above the average for an appellate judge.[2] He has published over thirty books and hundreds of scholarly articles.[3] Posner continues to lecture at the University of Chicago Law School, and he also writes a weekly blog on political and economic issues.[4]

Judge Posner is widely respected in the legal community. Stephen Barnett of the Berkeley Law School and John Langbein of the Yale Law School, "begin their descriptions of

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[1] Posner, "Biography"; available from http://home.uchicago.edu/~rposner/biography; Internet; accessed 22 April 2008.

[2] Compiled List of Posner's Decisions; available from www.projectposner.com; Internet; accessed 22 April 2008.

[3] Posner, "Publications, Presentations and Works in Progress," http://www.law.uchicago.edu/faculty/posner-r/ppw.html. Accessed April 22, 2008.

[4] Becker Posner Blog; available from: http://www.becker-posner-blog.com; Internet; accessed 22 April 2008.

Posner with, 'he's a genius, you know.'"[5] Supreme Court Justice Scalia "thinks Posner is a genius and adds that he cannot do what Posner does."[6] The book *Great American Judges: An Encyclopedia*,[7] which is a list of one hundred of America's greatest judges, has a chapter devoted to Posner. Ronald Kahn notes that Posner is the "most notable proponent of the law and economics approach to legal theory and practice," [8] which makes Posner the "primary opponent of normative, philosophical approaches to the law."[9] Indeed, Geoffrey Stone, Dean of the University of Chicago Law School[,] says that Posner "'is the most important and original legal thinker since Oliver Wendell Holmes.'"[10] John Mikhail of Georgetown Law School asserts that "few individuals have played as pivotal a role in the development of American law during the past three decades"[11] as Posner. He is the jurist most often cited in scholarly articles—"cited almost as much as the next two, Ronald Dworkin and Oliver Wendell Holmes, added together."[12] As Milton Friedman, the legendary Chicago economist puts it, "he's a very brilliant fella and he's written on everything under God's green sun. What else do you want?"[13] With praise by

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[5] William Domnarski, *In the Opinion of the Court* (Chicago: University of Illinois Press, 1996), 146.

[6] Ibid.

[7] Ronald Kahn, *Great American Judges: An Encyclopedia* ed. John Vile (Santa Barbara, California: ABL-CIO Inc., 2003), 615-628.

[8] Kahn, 615.

[9] Ibid.

[10] Domnarski, 146.

[11] John Mikhail, "Law, Science, and Morality: A Review of Richard Posner's The Problematics of Moral and Legal Theory," 54 Stan. L. Rev. 1057 (May 2002): 1058-1059.

[12] Larissa MacFarquhar, "The Bench Burner," *The New Yorker*, Vol. 77, Iss. 39 (10 December 2001): 78.

[13] Ibid.

contemporaries like these, it is not surprising that Ronald Dworkin calls Posner "the wonder of the legal world."[14]

II. Exposition: Posner's Philosophy of Law

Posner is a self-proclaimed pragmatist, which he acknowledges is "a devil to define."[15] More precisely, he is a "pragmatic moral skeptic,"[16] a sort of "moral relativist"[17] who rejects "moral realism, at least in its strong sense as the doctrine that there are universal moral laws ontologically akin to scientific laws."[18] Since he is a judge much of his analysis regarding philosophy's interplay with law stems from an adjudicative position. He argues that pragmatism "is the best description of the American judicial ethos and the best guide to the improvement of judicial performance—and thus the best normative as well as positive theory of the judicial role."[19] The ultimate criterion of pragmatic adjudication, says Posner, is reasonableness.[20] Although legal pragmatism is deeply concerned with consequences, Posner says it is not consequentialism.[21] This point shall be addressed more fully later in the critique.

A. Destroying the Moral Foundation for Law

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[14] Ronald Dworkin, "Philosophy & Monica Lewinsky," *New York Review of Books*, Volume 47, Number 4 (March 9, 2000): 48.

[15] Posner, *Law, Pragmatism and Democracy* (Cambridge, Massachusetts: Harvard University Press, 2003), 24.

[16] Posner, *Problematics of Moral and Legal Theory* (Cambridge, Massachusetts: Harvard University Press, 1999), ix.

[17] Ibid.

[18] Ibid.

[19] Posner, *Law*, 1.

[20] Ibid., 59.

[21] Ibid., 60.

To establish the legitimacy of pragmatism as the best foundation for law, Posner attempts to destroy the moral theory of law, natural law, and any transcendent value scheme. His important work *The Problematics of Moral and Legal Theory* aims at achieving the "demystification of law and in particular the freeing of it from moral theory, a great mystifier"[22] and demonstrating that "legal issues should not be analyzed with the aid of moral philosophy, but should instead be approached pragmatically."[23] Indeed, the tough questions of our day (he calls them "contested moral questions"[24]) cannot be answered by reference to morality. Posner defines morality thusly: "Morality is the set of duties to others. . . [and God] that are supposed to check our merely self-interested, emotional, or sentimental reactions to serious questions of human conduct. It is concerned with what we owe. . . ."[25] Morality, therefore, is concerned with how humans should act. But Posner rejects the legitimacy of applying a universal moral code to all people. His language is harsh: "the generative idea itself [of a moral order accessible to human intelligence and neither time-bound nor local], and the literatures in philosophy and law that elaborate and apply it, are spurious. . . ."[26]

Because a transcendent moral norm is not valid (since it does not exist) he argues that "moral theory [is] useless in the resolution of concrete legal issues. This is true even when those issues concern such morally charged subjects as abortion, affirmative action, racial and sexual

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[22] Posner, *Problematics*, vii.

[23] Ibid., viii.

[24] Ibid., footnote 3, ix.

[25] Ibid., 4.

[26] Ibid., 3.

discrimination, and homosexual rights."[27] While he clearly rejects moral theorizing as a valid activity in general, he concedes that in some situations moral theorizing may seem helpful, but "even if moral theorizing can provide a usable basis for some moral judgments, it should not be used for making *legal* judgments."[28] This is where Posner can be confusing: he accepts morality as a system of social control, but he argues that it has "less of an effect than moralists believe."[29] Posner simultaneously rejects moral theorizing as a valid basis for law. Morality affects societies, but it does not need to. There is no rooted 'ought' to the question of morality's influence on a society. Indeed, as he states, he is a moral relativist. This is clearly shown when he says, "I believe that the criteria for pronouncing a moral claim valid are given by the culture in which the claim is advanced rather than by some transcultural ("universal") source of moral values, so that we cannot . . .call another culture immoral unless we add 'by our lights.'"[30]

Ultimately, on the question of morality, the reader is left with the position that since no universal source of moral values exist, one cannot call someone else immoral, or even more importantly, no one can *be* immoral except in reference to either her own cultural-moral situation or another's cultural-moral position. Hence Posner can confidently say that "the morality that condemns the traitor, the adulterer, etc., cannot itself be evaluated in moral terms. That would be possible only if there were precise, and hence operational, transcultural moral truths."[31] The law, therefore, has no legitimate business punishing acts of immorality or promoting acts of morality.

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[27] Ibid., x.

[28] Ibid., 3.

[29] Ibid.

[30] Ibid., 8.

[31] Ibid., 9.

Posner continues his argument against a transcendent morality by saying that "morality is local. . . there are no *interesting* moral universals. There are tautological ones, such as 'murder is wrong,' where 'murder' means wrongful killing, or 'bribery is wrong,' where 'bribery' means wrongful paying."[32] The implication is that the pinnacle example of morality (i.e., everyone accepts that murder is wrong, and hence a natural morality against murder must exist) is merely a self-referential tautology that really just means 'bad is bad' and can have no legitimate value to the jurist. Posner takes his position to the next level, and argues that

> A person who murders an infant is acting immorally in our society; a person who sincerely claimed, with or without supporting arguments, that it is right to kill infants would be asserting a private moral position. I might consider him a lunatic, a monster, or a fool, as well as a violator of the locally prevailing moral code. But I would hesitate to call him immoral, just as I would hesitate to call Jesus Christ immoral for having violated settled norms of Judaism and Roman law or Pontius Pilate immoral for enforcing that law.[33]

For Posner, since morality is merely located within a specific cultural social group and indeed within specific individuals as sub-groups, an outsider to that morality cannot make a moral judgment of any strength. His position demands that morality be judged "nonmorally, in the way that a hammer may be judged well or poorly adapted to its goal of hammering nails into wood or plaster—by its contribution to the survival, or other ultimate goals, of a society or some group within it."[34] So we come full circle back to pragmatism and social science. Posner posits that "there are no *convincing* answers to *contested* moral questions unless the questions are reducible to ones of fact."[35] At the end of his attempted destruction of morality as a universal transcendent

[32] Ibid., 6.

[33] Ibid., 10.

[34] Ibid., 6.

[35] Ibid., 10.

basis for law, he is left with the belief that the "proper methods of inquiry are therefore…the methods of social science."[36]

B. Foundation for Law: Pragmatism

To Posner, pragmatism is best suited for the methods of social science because the ultimate goal of a judge and of the law in general is to improve law and "social institutions in general; for demonstrating the inadequacies of existing legal thought and for putting something better in its place."[37] Progress is of central importance for the pragmatist,[38] for social welfare and the betterment of society are always before the pragmatic judge. His decisions cannot be based solely on precedent: indeed, precedent must be used merely "as a policy rather than a duty"[39] insomuch as following precedent improves society pragmatically.

The last essential component of Posnerian theory is the application of economics to law. Posner argues that the field of economics offers valuable tools to judge law and judicial decision making. Since economics is aimed at improving and increasing the efficiency of given goals, and law is aimed at the same end, law would be benefited by the theories of economics. Basically, economics can be used to further pragmatism in the most efficient and effective way possible. Harris clarifies Posner's position: while the "layman might think that the law penalizes conduct such as murder, assault, rape and theft because such things have always been thought to be morally wrong"[40] it is actually "economic efficiency, not some other normative conception [that]

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[36] Ibid., viii.

[37] Posner, *Overcoming Law* (Cambridge, Massachusetts: Harvard University Press, 1995), viii.

[38] Ibid., 5.

[39] Ibid., 4.

[40] Harris, *Legal Philosophies* (Oxford, Oxford University Press, 2004), 48.

determines legal prohibition."[41] Harris also notes that Posner argues, based on economics, that there should be a market for adoptions.[42] Posner quickly admits that "nothing in economics prescribes an individual's goals. But whatever his goal or goals. . .he is assumed to pursue them in a forward-looking fashion by comparing opportunities open to him at the moment when he must choose."[43]

As Posner applies economics to law he is attempting to explain why certain facts are facts. For example, Posner posits "that a higher proportion of black women than white women are fat because the supply of eligible black men is limited; thus, black women find the likelihood of profit from an elegant figure too small to compensate for the costs of dieting."[44] Most people are content to just exercise and eat healthily without hypothesizing why black women tend to be larger than white women; but economics as an analytical tool provides a lot of fodder for interesting explanations of the world around us. Posner does deny that economic analysis of law is reductionistic: "Far from being reductionistic, as its detractors believe, economics is the instrumental science par excellence."[45] Posner takes this sort of thinking to legal topics. This paper now turns to the criticism of Posnerian jurisprudence.

III. Criticism

A. Historical Criticism

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[41] Ibid., 49.

[42] Ibid., 50.

[43] Posner, *Overcoming*, 16.

[44] MacFarquhar, 78.

[45] Posner, *Overcoming*, 15.

This paper has already explained that Posner has had a tremendous influence on the legal world. It is worth reiterating that Posner is cited in scholarly articles almost as much as the *sum* of the second and third most cited authors, Dworkin and Holmes. As the pivotal figure in the law and economics movement he has influenced countless lawyers and judges as they argue and decide cases. Indeed, to bring the matter close to home, his influential book *Not a Suicide Pact: The Constitution in a Time of National Emergency* (Oxford, 2006) is used as a textbook in Patrick Henry College's *Intelligence, Law Enforcement, and Civil Liberties* course taught by Professor Jock Binnie, former FBI agent. In this book Posner advocates a malleable interpretation of the Constitution to allow the government the ability to use whatever means that are necessary to defend the country, even curtailing supposed rights of terrorists.[46] On a broad level, Posner has had a great impact, not the least of which is the way he, as a judge, has made decisions affecting not only the 5000 parties to his court cases, but the millions of people in the Seventh Circuit's jurisdiction.

B. Internal Criticism

i. Self-Contradictory

Posner's theories, especially 'pragmatism' as he means it suffers from fatal inconsistencies. He rejects morality in law and yet says that law 'ought' to do what is socially beneficial (i.e., pragmatic). But this statement is self-contradictory. The only way one can make a claim like 'ought' is in reference to something outside of itself that justifies the ought-claim. But at the point that he makes an ought-claim while rejecting a moral basis for that ought, how can there be an ought at all? What can possibly justify the ought-claim? Posner is a brilliant person and responds to this criticism often. One way he gets around this criticism is in his

[46] Posner, *Not a Suicide Pact: The Constitution in a Time of National Emergency* (Oxford: Oxford University Press, 2006).

footnote 3 to his *Problematics* where he says "[b]y moral "issues" I mean *contested* moral questions. When there is no contest, when everyone agrees on what's right, there is no issue and the need for theory does not arise."[47] But this leads to the second major criticism, that Posner begs the question of morality by continually pushing it away. The point that he is self-contradictory, however, remains: by rejecting morality and therefore a transcendent basis for his positions, there is no way he can make a claim that binds, such as his claim that pragmatism is the best because it achieves the best ends. Even the idea of 'best' assumes some sort of moral standard, a contradiction of his rhetoric.

ii. Begs the Question of Morality

The second major criticism, that Posner merely begs the question of morality, is shown by his footnote quoted above. Even if everyone agrees upon what is right, how does that mean it *is* right if there is no moral root to the rightness of the claim? Does that mean that consensus is rightness? If consensus is rightness (which I do not think Posner would accept) then that must mean that rightness is the transcendent standard (which is the definition of morality). Posner offers unusual explanations of what most people consider closed moral question in history, the mass murder of Jews by Nazi Germany and the Cambodian exterminations. Posner says that one "reason for the widespread condemnation of the Nazi and Cambodian exterminations. . . is that we can see in retrospect that they were not adaptive to any plausible or widely accepted need or goal of the societies in question."[48] But what if they were widely accepted, or if the goals in those societies were furthered by these mass exterminations? Would that be pragmatic, and thus acceptable? He *seems* to think so. He says that "Stalin's policies. . . including purges, [and]

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[47] Posner, *Problematics*, ix.

[48] Ibid., 21.

induced famine. . . were widely defended when it was thought that they had somehow helped the Soviet Union to prevail in the war against Nazi Germany. . . now that they are known to have been flops, we deride them."[49] But, on the other hand, "[i]f Hitler or Stalin had succeeded in their projects, and if their moral codes had played a role in that success (by promoting discipline or solidarity, perhaps), our moral beliefs would probably be different."[50] He does not bluntly say that if the murders had achieved some social good then they would be justified. But his argumentation and the examples he gives leads the reader (me at least) to believe that in order to be consistent, he would support those programs. Posner, if boxed like that, would probably say that he finds extermination to be morally reprehensible and would condemn the murders according to his own theories, but again, he would not say that the Germans or the Stalinists were immoral. The critique, however, is against how he pushes away the point where the foundational basis for pragmatism arises. Instead of being based on morality, he says his theory is based on social science and pragmatism. But upon what are those based on? Social progress, which itself must be justified by some other standard, and so the endless cycle continues.

The basic internal critique is thus: Posner cannot have his cake and eat it too. He denies that morality can be a foundation for law because there is no transcultural norm that imposes itself upon mankind (such as God). Simultaneously he says that laws (and judicial decisions) ought to be made and based on Posnerian pragmatism, which is focused on maximizing social benefit. But pragmatism needs a foundation that justifies why social benefit is a good goal. The only satisfactory foundation would have to be transcendent and transcultural, and thus he cannot

[49] Ibid.

[50] Ibid., 25.

consistently argue against morality and for social benefit. Ultimately Posner is upset that morality itself cannot solve the difficult questions of law. He gives the example of

> a person from a culture in which suicide is considered moral confronts a person from a culture in which suicide is considered immoral, and both agree on all the relevant facts (such as the motives for suicide and the emotional impact of a suicide on members of the suicide's family) but continues to disagree on the morality of the practice, to what can they appeal to resolve their dispute besides some concept fairly to be described as metaphysical because beyond the reach of science or of any other method of bringing about intercultural agreement?[51]

The answer to his question is that he is right. That is why Christians do appeal to the higher sustainer who is the ultimate judge, God. He sets the standard – we have to take His revealed will and apply it. Because of our imperfect ability to reason through the general revelation, we need this transcultural revelation that the Bible presents.[52]

C. External Criticism

A figure as polemical as Posner has certainly received his share of criticism from his peers in the academic and legal fields. Ryan Fortson takes Posner to task for denying morals but upholding social science as the answer. Fortson argues that even in the situations where the claims of efficiency that Posner trumpets are relevant to the case, "moral concerns must often also be brought in. Social science can offer guidance in achieving the goals that society sets, but it can offer no guidance in setting those goals in the first place."[53] The act of deciding which social science research to adopt rests upon a moral choice, and choosing to appeal to social

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[51] Posner, *Law,* 8.

[52] Posner makes the excellent point that "We cannot hope to know the universe as it really is, the metaphysical universe, because to do so would require us to be able to step outside ourselves and compare the universe as it really is with our descriptions of it" (*LPD,* 5). Mercifully, God has done just the inverse – he has stepped into our world and given us what we do need to compare the universe with our descriptions of it.

[53] Ryan Fortson, "PROBLEMS WITH RICHARD POSNER'S THE PROBLEMATICS OF MORAL AND LEGAL THEORY," 27 Wm. Mitchell L. Rev. 2345, (2001): 2348.

science research at all can at times be a moral decision.[54] Fortson makes the damning conclusion: "Posner is forced, at least implicitly, to draw upon moral argumentation in his theory of adjudication."[55] Another interesting criticism concerns that mystical footnote number three that moral issues merely means *contested* moral issues. Fortson says that Posner defines moral issues "in such a way that they only exist when they are unresolved. . . . This, though, is to put the cart before the horse."[56] This definition is particularly bad because it forecloses the possibility that the consensus could have been achieved through moral argumentation.[57] Posner, then, protects his argument by making it non-falsifiable.

Ronald Dworkin, always a target of Posner's cutting criticism, argues that Posner's reliance on pragmatism is a fallacy. Dworkin disagrees "that judges can avoid all philosophical issues" because the pragmatist judge will be able to "come up with the decision that will be best with regard to present and future needs."[58] Dworkin cogently argues that this claim is a "patent fallacy"[59] because "[l]awyers and judges must appeal to (or in any case make assumptions about) moral or political principles in order to decide whether the projected consequences of one decision are better than those of another."[60] How can a judge decide whether "the consequences of banning abortion—fewer abortions and more unwanted children—are better than the consequences of permitting it—fewer unwanted children and more aborted fetuses—without first

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[54] Ibid., 2371.

[55] Ibid., 2348.

[56] Ibid., 2350.

[57] Ibid.

[58] Dworkin, 48.

[59] Ibid.

[60] Ibid.

deciding whether abortion is murder?"[61] Dworkin concludes that "pragmatism is, after all, useless when values clash."[62] While his critique is sturdy, Dworkin's philosophy of human rights and morals is also unsatisfactory, for he lacks a foundational justification for his moral claims. He refuses to accept that morals are grounded in a higher law.[63]

A libertarian from the Cato Institute, Richard Epstein, takes Posner's 'reasonableness' standard to task, arguing that 'reasonableness' is just as malleable, confusing, shifting, and open to manipulation as the morality that Posner opposes. Indeed, after a lengthy evaluation of 'reasonableness' Epstein says that "anyone who is interested in pragmatism should be some form of consequentialist."[64] Understandably, Epstein is bewildered that Posner "actively distances himself from consequentialist reasoning."[65] Epstein says that all we can do is throw up our hands and wonder why anyone cares to fight so hard to "justify a theory that flunks the most elementary pragmatic demand: being contentless, Posner's theory does not tell us anything whatsoever, much less how it implements a system of liberty."[66]

Epstein also takes Posner to task for pragmatism itself. When the rubber meets the road, Epstein says, "Posner's pragmatism becomes but callous indifference to human suffering."[67] He analyzes Posner's treatment of the *Korematsu* decision that upheld the internment of Japanese

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[61] Ibid.

[62] Ibid.

[63] John Warwick Montgomery, *Human Rights and Human Dignity* (Alberta, Canada: Canadian Institute for Law, Theology, and Public Policy, Inc., 1995), 86.

[64] Richard A. Epstein, "The Perils of Posnerian Pragmatism," *The University of Chicago Law Review*, Vol. 71, Iss. 2 (Spring 2004): 649.

[65] Ibid., 650.

[66] Ibid.

[67] Ibid., 655.

people during World War II, and says that the "detention order cries out for a balance of interest between liberty and security that no one, pragmatist or otherwise, can simply sweep under the rug. Posner. . .bravely, if foolishly, defends. . .*Korematsu*, on the ground that the squeamish fail to understand how in wartime the grand test of reasonableness requires national security to trump claims of individual liberty."[68] To Epstein, the internment of Japanese citizens is not reasonable, and thus the standard cannot be sufficient. Epstein closes his criticism by saying that "Posner's peculiar brand of pragmatism fails the most pragmatic test. It doesn't work."[69]

Jeremy Waldron of Columbia University notes that since Posner adopts a view that says that the aim of law is to 'make things better,' he must be able to offer us "a way of arguing about what counts as an improvement (when there is a disagreement about this - as there is in our society)"[70] and "a way of arguing about questions of distribution and fairness for cases (almost all the cases that the law addresses) in which making things better for some people means making them worse for others."[71] But Posner fails to meet this standard, and even seems to think that "anyone who addresses these questions has crossed the line from the practical to the impractical, from pragmatism to moralism."[72] Like Epstein, Waldron notes that if Posner does not provide a grounded *why* we should be pragmatic, then he is "wrong on perhaps the most important challenge that pragmatism faces in a legal context."[73] After all, debates about what

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[68] Ibid.

[69] Ibid., 658.

[70] Jeremy Waldron, "*EGO-BLOATED HOVEL The Problematics of Moral and Legal Theory*," 94 Nw. U.L. Rev. 597 (2000): 601.

[71] Ibid.

[72] Ibid.

[73] Ibid.

makes things better and debates about the fair distribution of improvements are unavoidable.[74] "It is simply question-begging to think that such debates can be superseded by a good-natured commitment to pragmatic amelioration."[75]

D. Ideological Criticism

It has already been articulated that Posner's pragmatism is insufficient to protect society.[76] He does not take his conclusions to their logical end rhetorically. For example, he does not go so far as to affirm the goodness of genocide when it does further social goals, but his arguments would (seem to) affirm this position. His pragmatism leads him to even say that if he were "a British colonial official (but with my present values) in nineteenth-century India, I would have outlawed suttee…. But I would have suppressed the practice because I found it disgusting, not because I found it immoral."[77] But what happens when he does not find it disgusting, as he says the men if India did not? It would not be suppressed and the live-burnings of widows would continue. In contrast, a legal system guided by a moral framework rooted in the Biblical revelation of the afterlife and of the importance of life would halt suttee. This is not to say that a legal system should be theocratic, even a Christian theocracy. As Montgomery aptly notes, the "blending of church and state is of course a spiritual problem in itself."[78] This is

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[74] Ibid.

[75] Ibid.

[76] By 'protect society' I mean to ensure a consistent and sufficient level of human rights protections, as this paper argues later in the comparison of Posnerian legal theory to Christianity.

[77] Posner, *Problematics,* 10-11.

[78] Montgomery, *Law Above the Law* (Minneapolis, Minnesota: Bethany House Publishers, 1975), 80.

primarily true because man is sinful and "tries to subdue hell"[79] and falls into Satan's trap. But a legal system, as the critics of Posner have shown, must have some moral system as the root of its laws. But unlike Dworkin's position, this moral system itself must be rooted by the transcendent God who has spoken into humanity through his divine revelation.[80]

Another example of the inadequacy of Posner's pragmatism is his own discussion of laws banning incest. He presents the hypothetical of someone challenging, as an unconstitutional deprivation of liberty, a law that barred incest without any exception (say, for those who are sterile). He says that since overturning such a law would result in a very small benefit to the few people who would engage in incest, and the ruling "would cause a degree of public upset disproportionate to the benefits of invalidation to the very occasional would-be participants in such a relationship,"[81] the pragmatic judge should not overturn the law. The danger for the Christian is to agree that the judge made the right decision while not criticizing the basis for the decision. Christianity teaches that incest is wrong. God has divinely stated so in Leviticus 18:9, 12; 20:17, 19; Deuteronomy 27:22. Judges should not ban it because the majority dislikes it (which would again be a form of majority tyranny) but because it offends the revealed will of God, the ultimate judge.

Finally, Posner's pragmatism justifies the Nuremberg trials and the prosecution of the Nazis on the grounds that it is *politically* right. In a similar vein, Posner has said that "no one can say that it is good or bad to have as many abortions as we do."[82] When human lives are at stake, Posner's pragmatism does not provide a rooted answer to tough questions. While Justice Jackson

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[79] Ibid.

[80] Ibid., 44-45.

[81] Posner, *Law*, 65-66.

[82] Posner, *Frontiers of Legal Theory* (Cambridge, Massachusetts: Harvard University Press, 2001), 26.

appealed to a higher law (albeit weakly) to justify the Nuremberg trials, Posner merely appeals to politics. But politics can swing a different direction and Posner's position provides no rooted reason why the mass murder of millions of people (because they were not of the desired race or intelligence) should not occur. Similarly, because he rejects a transcendent God that has spoken through the darkness and given man revelation, he cannot say that abortion is bad (or good). But Christianity would provide far more answers because at the very least it accepts that God has the right answers. As the Christian seeks to pursue God's will, he has a greater chance of actually achieving it than if he rejects God as Posner does.

Christianity also takes much of the oppressive weight off of judges' shoulders. While judges must pursue justice, it is true that, as Montgomery states, "Holy Scripture promises a Last Assize. . .and the ambiguities and failures of human justice through history will be rectified."[83] The judge ought to take comfort in the fact that justice will be manifested on the Day of Judgment.[84] Posner would be better off reconciling his need for a transcendental foundation for pragmatism by accepting the truth of Christianity's divine revelation. This would also help him to take comfort in Montgomery's exhortation that since God is the ultimate judge, Posner can rest easier knowing that his judicial decisions can be guided by the Most High.

[83] Montgomery, *Law Above*, 53.

[84] Ibid.

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