

**Reply To Judge Richard A. Posner**

**on**

**The Inseparability**

**of**

**Law and Morality**

**by**

**Ellis Washington<sup>1</sup>**

---

1. Ellis Washington, DePauw University; B.M. 1983, University of Michigan; M.M., 1986, John Marshall Law School; J.D. 1994. He was an editor on the University of Michigan Law Review in 1989, and a law clerk for the Rutherford Institute in 1992. Currently, Ellis Washington is a lecturer specializing in legal theory, jurisprudence, Constitutional law, critical race theory, legal feminist theory and political philosophy. He has published three books, *THE DEVIL IS IN THE DETAILS: ESSAYS ON LAW, RACE, POLITICS, AND RELIGION* (1999), *BEYOND THE VEIL: ESSAYS IN THE DIALECTICAL STYLE OF SOCRATES* (2000), *THE INSEPARABILITY OF LAW AND MORALITY, THE CONSTITUTION, NATURAL LAW AND THE RULE OF LAW* (2002).

- I. Introduction
  - A. Positive law vs. Natural law: Is/Ought Revisited
  - B. Origins of Legal Positivism
  - C. Natural law and Modern Times
  - D. Posner's Presuppositions
  - E. A Constitution In Search of a Philosophy: Natural law, the Framers, and Original Intent
- II. The Limits of Moral Theorizing
  - A. The Thesis of Part II Summarized
  - B. My Moral Stance
    - 1. Moral Relativism
    - 2. Moral Subjectivism
    - 3. Moral Skepticism
    - 4. Emotivism
    - 5. Moral Particularism
  - C. What I Think of "Theory"
  - D. The Relativity of Morals
  - E. Reconceiving Morality Functionally
  - F. The Moral Sentiments
    - 1. Rationalization and Rule Skepticism
  - G. The Problems of Motivation and the Methods of the Moral Entrepreneur
  - H. The Scholarship of Morality
    - 1. Functional Analysis
    - 2. High Moral Theory
    - 3. Posner's Intellectual Hierarchy Restated
    - 4. Reflective Equilibrium
    - 5. Moral Casuistry
  - I. The Perils of Uniformity
  - J. Professionalism's Cold Grip and the Impotence of Education
  - K. Moral Change and the Persistence of Moral Debate and of Academic Moralism
- III. The Limits of Moral Reasoning in Law
  - A. Law and Morality: The Relation Reargued
  - B. Some Cases
    - 1. The Euthanasia Cases
    - 2. The Abortion Cases
    - 3. The Segregation Cases and a Note on Affirmative Action
    - 4. The Case of the Murdering Heir
  - C. Conclusion to Part III

\* Posner's original outline basically comprises Parts II and III of this article

*This article is a formal Reply to Judge Richard A. Posner's article published in the Harvard Law Review.<sup>2</sup> Posner's article was actually an amalgamation of lectures he gave as the speaker of the annual Oliver Wendell Holmes Lecture series celebrating the 100<sup>th</sup> anniversary of Holmes's famous essay, "The Path of Law." In these lectures, Posner addresses his aversion to what he calls "academic moralism," moral philosophy, legal theory, moral theory and "moral entrepreneurs," because moral theory lacks the "intellectual cogency or the emotional power to change people's beliefs or behavior."<sup>3</sup> By academic moralism, Posner means the propensity by certain legal philosophers and legal theorists in using moral or political arguments to defend an intellectual or legal end. Posner holds to the idea of a strong separation of legality and morality and has a "visceral dislike" towards academic moralism.*

Jesus Christ was a moralist, but he did not make academic-style arguments in support of his preaching. I am interested in the type of moralizing that is, or at least pretends to be, free from controversial metaphysical commitments such as those of a believing Christian, and so might conceivably appeal to the judges of our secular courts.<sup>4</sup>

Judge Richard A. Posner,  
*The Problematics of Moral and Legal Theory* (1998)

And they took him, and brought him unto Areopagus [the Athenian Supreme Court], saying, May we know what this new doctrine, whereof thou speakest, is? (For all the Athenians and strangers which were there spent their time in nothing else, but either to tell, or to hear some new thing.) Then Paul stood in the midst of Mars' hill, and said, Ye men of Athens, I perceive that in all things ye are too superstitious. For as I passed by, and beheld your devotions, I found an altar with this inscription, TO THE

---

<sup>2</sup> Richard A. Posner, *The Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1637 (1998) [hereinafter, *Problematics*]; From May-June, 1996, I actually worked as a deputy clerk for Posner's Court of Appeals for the Seventh Circuit. Having studied many of Posner's cases in law school, I was eager to meet this legendary figure. Unfortunately, when I went to his office to set up an appointment to discuss some of my ideas with him, I observed that the Judge was very busy, perhaps writing an opinion. As he lifted his head in obvious irritation that someone had disturbed his concentration, I lost courage and slipped back into the shadows, never to try to meet with him again—at least personally. After five weeks, I quit that job as a deputy clerk because the position wasn't intellectually challenging enough for me.

<sup>3</sup> *Id.* at 1638.

<sup>4</sup> *Id.* at 1648.

UNKNOWN GOD. Whom therefore ye ignorantly worship, him declare I unto you.<sup>5</sup>

Saint Luke (A.D. 61)

## 1. INTRODUCTION

### A. Positive Law vs. Natural Law: Is/Ought Revisited

[1] Judge Posner's extended critique against academic moralism titled "The Problematics of Moral and Legal Theory," is actually a case study not on the problematics of moral theory as he postulates; rather, it addresses the decline of constitutional jurisprudence in America, and the need for legal and moral theorists with a theistic-based philosophy to rise up and offer a prudent and rational apologetic against the sophism of separating law and morality.<sup>6</sup> Before I get into the formal analysis of Posner's work, a short historical background of the

---

<sup>5</sup> *Acts 17:19, 21-23* (King James), available at <http://bible.gospelcom.net/bible>.

<sup>6</sup> The pivotal question then is how did America change from a nation founded "under God" whose national motto is, "In God We Trust," to a nation that has lost sight of the foundational structure that under-girds its laws? And how did the Supreme Court move from a judicial body that was suppose to *interpret* the Constitution to one that *creates* a Constitution by legislating from the bench? The demise of America's legal foundations occur when society rejects laws that are based on solid, irrevocable, moral, universal, absolute values, to a society that bases it's laws on an arbitrary system of relativism, situation ethics, materialism, individualism, hedonism, paganism, or in any secularist ideology. This secularization of law has influenced all branches of knowledge -- law, philosophy, business, religion, medicine, education, science, the arts, and mass media. Harold Berman, a law professor at Harvard, has remarked: "[There is a] massive loss of confidence in law – not only on the part of law consumers, but also on the part of law-makers and law-distributors." HAROLD BERMAN, *THE INTERACTION OF LAW AND RELIGION* 21 (1974). "There is an enormous chasm between what incoming students think the law is—an organized set of facts—and what it really is--uncertainties." Sandy Goldsmith & Barbara Kate Repa, *Are You Using Study Aids As A Crutch?* 16 *STUDENT LAWYER*, Sept. 1987, at 32. See generally DAVID BARTON, *THE MYTH OF SEPARATION: WHAT IS THE CORRECT RELATIONSHIP BETWEEN CHURCH AND STATE*, (1992); DAVID BARTON, *ORIGINAL INTENT: THE COURTS, CONSTITUTION AND RELIGION* (1997).

philosophical roots of American law, the Constitution, and jurisprudence would be instructive.

[2] The age-old debate among philosophers, legal theorists, constitutional law scholars, politicians, judges, and academics, between what law *is* (Positive law) and what law *ought* to be (Natural law) can be summarized in the following two statements. The first is by Supreme Court Justice Benjamin Cardozo, who wrote that, “if there is any law which is back of the sovereignty of the state, and superior thereto, it is not law in such a sense as to concern the judge or lawyer, however much it concerns the statesman or moralist.”<sup>7</sup> Justice Cardozo’s statement is a classic Positive law position—raw, statist power over the people. However, as I shall detail later in this article, there are many theoretical problems and internal contradictions with Positive law legal theory. The other statement is by Lawrence P. McDonald, who elucidates a contrasting legal philosophy called Natural law stating that, “if a judge can interpret the Constitution or laws to mean something obviously not intended by the original makers . . . then the nation’s Constitution and laws are meaningless.”<sup>8</sup> Which one was right about the nature of law? -- Cardozo or McDonald? – Positive law or Natural law? Is law a devise, tool or creation of man *qua* man or is law a set of tablets written by the “finger of God” to serve as a foundation of all laws of men? What presuppositions are at the foundations of our laws? Our statutes? Our Constitution?

[3] Most legislators, who write the laws, judges, who interpret the laws, police, FBI, and other law institutions that enforce the laws, and lawyers, who argue the law before courts and seek judicial redress to change the laws, have given little substantive thought to these

---

<sup>7</sup> *Problematics, supra* note 2, at 1638.

<sup>8</sup> LAWRENCE P. McDONALD, WE HOLD THESE TRUTHS 32 (1976).

seemingly pivotal questions upon which civilization turns. However, if you understand law to be totally of human creation and human enforcement, you will have a very different approach to the law than someone whose understanding is that all legitimate law is from a divine source (God) handed down to man to dispense equitably and justly according to a set of preordained, immutable principles, codified in a written book (the Bible).<sup>9</sup>

[4] In this article I would like to discuss one of the primary philosophical and intellectual suppositions that is the foundation of our contemporary conceptions of *what law is* – *Positive law* or *legal positivism*, as opposed to *what law ought to be* – *Natural law* or “*the law of nature*” as philosophers, Montesquieu, Hobbes, Blackstone, Locke, and Thomas Jefferson understood it. This is/ought dichotomy has been much discussed by legal scholars

---

<sup>9</sup> David Melton, was the former director of the The Rutherford Institute in Michigan. During my first year of law school at Thomas Cooley Law School, I served as his law clerk. In a speech delivered at Thomas Cooley Law School in 1992, Melton stated that, "law is like a liquid, it must be contained or it will be of no use to anyone." The word "law", therefore must be understood in a much broader context than it is usually understood in civil and criminal matters, and viewed like Christian theism, as the catalysis which is the foundational morality of society. Law, by definition, contains and controls, it prevents excess and fosters due process under the law to all. The sophistic jurisprudence presently practiced in American law is due to a fundamental shift of what our laws are based on. To the Framers, the law of the Constitution was firmly rooted in irrevocable, Judeo/Christian precepts of liberty, through obedience to God's laws. To the contemporary liberal jurist, the Constitution is a document to be manipulated rather than interpreted according to the doctrine of *stare decisis*. In the words of Supreme Court Chief Justice Charles Evans Hughes: "the Constitution is what the judges say it is." See THE AUTOBIOGRAPHICAL NOTES OF CHARLES EVANS HUGHES 143 (David J. Danelski & Joseph S. Tulchin eds., 1973). This aleatoric, arbitrary manner of interpreting the Constitution has ominous similarities to the Third Reich Commissar of Justice decree in 1936: "A decision of the Führer in the express form of a law or decree may not be scrutinized by a judge. In addition, the judge is bound by any other decisions of the Führer, provided that they are clearly intended to declare law." Ernst Von Hippel, *The Role of Natural law in Legal Decisions of the Federal German Republic*, 4 NAT. L. F. 106, 110 (1959).

as an argument both for and against Positive law in judicial decisionmaking.<sup>10</sup> However, the critics seem unanimous in their assertion that the irreconcilable conflicts caused by Positive law in constitutional jurisprudence greatly outweigh the problems Positive law has purported to solve.

[5] To best understand Positive law and its antecedents – *positivism* and *logical positivism* - you must understand their component meanings. *Positive law* simply means a law established or recognized by governmental authority. *Positivism* is a theory that theology and metaphysics are earlier imperfect modes of knowledge, and that Positive knowledge is based on natural phenomena and their properties and relations as verified by the empirical sciences. *Logical positivism* was a philosophical movement that held characteristically that all meaningful statements are either analytic or conclusively verifiable, or at least confirmable by observation and experimentation. Therefore, metaphysical theories (i.e., the Bible) are strictly meaningless in regard to the law and its interpretation.

[6] If one holds to the expressed presumption that all valid laws, ordinances, and statutes have separate and distinct legal and moral components and you believe this is morally wrong, then the laws that the legislators and judges generate from these Positive laws will likewise be morally wrong, corrupt, and ultimately destructive to society. For example, most people would agree that in our present system of government we have more laws, statutes, and ordinances on the books than at any other time in history, and that tomorrow there will be more laws enacted than today.

---

<sup>10</sup>Edward S. Corwin, *The Higher Law Background of American Constitutional Law*, 42 HARV. L. REV. 149 (1928); Arnold Brecht, *The Myth of Is and Ought*, 54 HARV. L. REV. 811 (1941); H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 77 HARV. L. REV. 593 (1958); Lon Fuller, *Positivism and Fidelity to Law*, 71 HARV. L. REV. 630 (1958); ; LON FULLER, ANATOMY OF THE LAW 175-86 (1968).

[7] The great English political philosopher, Thomas Hobbes (1588-1679), saw the self-perpetuating and destructive nature of Positive law evident in the burgeoning city-states of Europe in the seventeenth century when Hobbes first formulated his ideas on social contract theory, which he elucidated in his celebrated treatise on this subject titled *Leviathan*.<sup>11</sup> Leviathan was a pseudonym representing an all-consuming, self-perpetuating government, which Hobbes likened to the terrible and dreadful sea monster. Like much of his treatise, Hobbes borrowed the title from the Bible. Note particularly the selected passages from *Job* 41:

Canst thou draw out leviathan with an hook? or his tongue with a cord which thou lettest down? will he make many supplications unto thee? will he speak soft words unto thee? . . . Canst thou fill his skin with barbed irons? or his head with fish spears? . . . His heart is as firm as a stone; yea, as hard as a piece of the nether millstone. When he raiseth up himself, the mighty are afraid: by reason of breakings they purify themselves. The sword of him that layeth at him cannot hold: the spear, the dart, nor the habergeon . . .<sup>12</sup>

This is the counterproductive effect of Positive law—it seeks to fashion a law for the endless multiplicity of circumstances and situations rather than fashioning a general set of laws based on immutable principles that serve as the foundation for all other laws. The irony here is that with all the laws, ordinances, and statutes we have on the books, escalating crime rates and increasing contempt for the Rule of law is higher now than at virtually anytime in the history of mankind. Why is this so?

---

<sup>11</sup> THOMAS HOBBS, *LEVIATHAN; OR THE MATTER, FORM, AND POWER OF A COMMONWEALTH ECCLESIASTICAL AND CIVIL* (1651).

<sup>12</sup> *Job* 41:1, 3, 7, 24-26 (King James).

[8] Since the second half of the nineteenth century, legality and morality have been systematically separated by scientists, intellectuals, philosophers, judges, legal theorists, and even theologians. This view was eventually adopted and enacted in legislative mandates, and codified in judicial opinions and state and federal law. Today, Positive law and its progeny: positivism, legal positivism, and legal realism, are the major philosophies of contemporary American constitutional jurisprudence. Positive law is actually an outgrowth of the eighteenth century moral philosophy of *utilitarianism*, from which Enlightenment and Romantic period legal theorists derived their Positive law ideas. Utilitarianism was but one of several dozen or so modern secularist philosophies which all had their origins in relativism. What is relativism? R. H. Popkin, in his article “*Relativism*” in *The Encyclopedia of Religion*, defines the core precepts of this philosophy:

[V]iews are to be evaluated relative to the societies or cultures in which they appear and are not to be judged true or false, or good or bad, based on some overall criterion but are to be assessed within the context in which they occur. Thus, what is right or good or true to one person or group, may not be considered so by others . . . there [are] no absolute standards. . . . “Man is the measure of all things”, and . . . each man could be his own measure. . . Cannibalism, incest, and other practices considered taboo are just variant kinds of behavior, to be appreciated as acceptable in some cultures and not in others. . . . [Relativism] urges suspension of judgment about right or wrong . . . .<sup>13</sup>

[9] John Dewey, the father of modern public education in America, mandated the philosophy of relativism as the basis for teaching in the public schools. In his book *The Public and its Problems*,<sup>14</sup> Dewey stated that, “[t]he belief in political fixity, of the sanctity of

---

<sup>13</sup> Richard H. Popkin, *Relativism*, in 12 *The Encyclopedia of Religion* 274 (1987).

<sup>14</sup> See, JOHN DEWEY, *THE PUBLIC AND ITS PROBLEMS* (1927).

some form of state consecrated by the efforts of our fathers and hallowed by tradition, is one of the stumbling-blocks in the way of orderly and directed change.”<sup>15</sup> Historians Dornan and Vedlik, in their book, *Judicial Supremacy*, noted that Justices ascribing to relativism in their jurisprudence, rejected the Natural law doctrine the Framers used in writing the Constitution. Instead, Positive law held that Government would become the sole source of rights. They further noted,

The Natural law and natural rights principles which [earlier Justices] had also been reading into the Constitution . . . were not applicable to a society that was in a constant state of flux and change. . . . But in the process, the idea of transcendent rights would be discarded, and there would be no appeal from the edicts of the true law-giver—the Court.”<sup>16</sup>

[10] Characterizing the law as being in a constant state of change or “flux” is of course a common theme in the writings of Holmes, Carl Llewellyn, Posner, Laurence Tribe, and others, comporting well with their evolutionary worldview that all matter is material, and as for the metaphysical realm, it is important only in regards to personal religious devotion. To them, religion, moral theory, or legal philosophy is absolutely irrelevant to determining what the law actually is. However, this naturalistic philosophy has many inconsistencies, contradictions, and theoretical problems that will be chronicled throughout this article.

## **B. Origins of Legal Positivism**

[11] Although usage of the word “Positive” can be traced in the English language as far back as the fourteenth century, this term did not develop into an independent, coherent legal

---

<sup>15</sup> *Id.* at 34. Judges ascribing to relativism in their jurisprudence, of necessity rejected the Natural law doctrine the Framers used in writing the Constitution.

<sup>16</sup> ROBERT K. DORNAN & CSABA VEDLIK, JR., *JUDICIAL SUPREMACY: THE SUPREME COURT ON TRIAL* 26 (1986).

theory until the late eighteenth and early nineteenth centuries. Historically, this also corresponded to the height of the secular revival movement called, “The Enlightenment Period.” During this time men of learning consciously sought to discover knowledge solely through the use and development of their own natural faculties, apart from acknowledging any divine source. The two major theorists of Positive law were the British philosophers, John Austin (1790-1859)<sup>17</sup> and Jeremy Bentham (1748-1832).<sup>18</sup> The common theme throughout their writings insisted that “law as it is” is not necessarily the same as “law as it should be.” In other words, law and morals were viewed as distinct and separated entities.

[12] As I have stated earlier, Positive law is actually an outgrowth of *utilitarianism* or the view that regards the consequences of an act as demonstrative of what is good or morally right. This idea was not as innovative as one may think. Three centuries before positivism began to be applied to law, the great Italian political philosopher, Niccolo Machiavelli (1469-1527) coined the infamous phrase of political expediency: “the end justifies the means” in his famous treatise on political statescraft, *The Prince* (1513). Throughout the writings of Austin and Bentham are presuppositions towards a utilitarian moral outlook.<sup>19</sup> Bentham and Austin believed that a law, ordinance, statute, or even a constitution, could be perfectly valid law apart from any pre-existing moral precepts. For example, Bentham believed that a law is

---

<sup>17</sup> JOHN AUSTIN, *THE PROVIDENCE OF JURISPRUDENCE DETERMINED: AND THE USES OF THE STUDY OF JURISPRUDENCE* 185-86 (Isaiah Berlin et al eds., 1954) (1832).

<sup>18</sup> Jeremy Bentham, *Fragment on Government*, in I WORKS 221 (1859); Jeremy Bentham, *Principles of Penal Law*, in I WORKS 865 (1859); Jeremy Bentham, *Of Promulgation of The Laws*, in I WORKS 297 (1859); Jeremy Bentham, *Principles of Morals and Legislation*, in I WORKS 84, c. XIII (1859).Hart, *supra* note 10, at 594-95.

<sup>19</sup> *Id.* at 602.

right or good if it brings the most happiness [or least unhappiness] to most people. Bentham called this the “*Principle of Utility*,” and he frequently used it to evaluate laws from a moral point of view. This insistence on an expressed segregation between morality and legality was further developed by successors of Austin and Bentham and became known as the *separability thesis*. Thus, throughout their writings, express descriptions and examples of what law is – “expository” or “analytical” jurisprudence, and what law ought to be – “censorial” or “normative” jurisprudence, was consistently demonstrable.

### **C. Natural law in Modern Times**

[13] During the summer of 1991, questions concerning the origins of the controlling, legitimate philosophy of American constitutional law, jurisprudence, and the nature of law, were discussed and debated before a riveted public on national television. It was not that the public was enamored with weighty precepts of constitutionalism; their attention was directed towards a seedy set of circumstances underlying an unsubstantiated sexual harassment charge that brought these issues to the forefront. I am speaking of Senate hearings on the nomination of Clarence Thomas to become only the second African-American Supreme Court Justice in the history of the Court. The political stakes were high, often at a feverish pitch, for the liberal establishment knew very well that most of their political victories over the past sixty years had their roots in judicial legislation from the bench. It was Franklin Delano Roosevelt's unprecedented four-term reign as President of the United States that gave him the opportunity to "pack" the Supreme Court with liberal, activist Justices in order to give constitutional sanction to his New Deal, leviathan-government legislation. Clarence Thomas's appointment to the Supreme Court could jeopardize six decades of virtual unbridled socialism and liberalism's hegemony because Thomas, though a Black man, is a conservative. Therefore, his appointment could tip the delicate balance of power on the Supreme Court from radically liberal to at least marginally moderate-to-conservative on many pivotal cases, including several highly controversial cases before the Court regarding moral and social issues.

[14] As the Senate reviewed Mr. Thomas's corpus of writings, a curious legal philosophy he wrote about was discovered called "Natural law." Although Natural law was the original

philosophy of the Constitution and appeared in the overwhelming majority of the speeches and writings of the Founding Fathers as indispensable to the success of the American Republic, this important Constitutional doctrine had fallen out of favor in the legal community long before Clarence Thomas's Supreme Court nomination.

[15] Natural law's decline began shortly after World War II in the case of *Everson v. Board of Education* (1947),<sup>20</sup> the case in which Justice Frankfurter "found" a new judicial doctrine called "separation of church and state." However, it became especially vilified during the last forty years with the Court's official legalization of secular humanism as a legitimate constitutionally protected religion with government sanction to be taught in the public schools.<sup>21</sup> Thus, the legal philosophy of Natural law immediately became a lightning rod issue by the mainstream media and the left-wing politicians as a major threat to their majority in the Senate and Congress. In order to prevent Natural law from having a prominent role in future constitutional decisionmaking, the liberal media and left-wing special interest groups, instituted a massive smear campaign against Judge Thomas's nomination in a concerted effort to defeat it by any means necessary. Unfortunately, this performance was successful a few years before in Judge Robert Bork's Senate confirmation hearings to the Supreme Court, where the legal philosophy of Natural law also played an equally prominent role.

[16] As I have stated earlier, Natural law was pivotal to the Framers in the origins of the Constitutions of the thirteen colonies as well as other founding documents including the Declaration of Independence, the Constitution, and the Bill of Rights. Of course the Framers

---

<sup>20</sup> *Everson v. Board of Education*, 330 U.S. 1 (1947).

<sup>21</sup> *Torcaso v. Watkins*, 367 U.S. 488 (1961).

did not invent the underlying principles of Natural law but utilized its suppositions as a pertinent mechanism in fashioning a viable foundation for their own new Republic in 1776. Actually, the origins of Natural law date back to ancient Greek philosophy, and was further developed by the Roman ideals of the natural dignity of mankind, which were vested by God with certain inalienable rights—rights so basic and universal that they belonged to every human by virtue of their very humanity. Jefferson used the words “Life, Liberty, and the pursuit of happiness.”<sup>22</sup> Later, the English in the fifteenth century coined the term *Common law* as their restatement and codification of law concepts.<sup>23</sup> But if one wishes to comprehensively trace both Natural law and Common law to their ultimate origins, one must look to a much older judicial doctrine called, the *Higher law*. With its roots in the

---

<sup>21.</sup> THE DECLARATION OF INDEPENDENCE (U.S. 1776).

<sup>22.</sup> The Common law is rooted in Christian theism and transcends politics, trends, or the state of the economy. The law, rooted in the doctrine of higher law (i.e., Natural law) will be fair to all who will submit themselves under its yoke. Several prominent constitutional scholars have rightly delineated the common law’s inestimable contribution to American law. “Whatever you may say of its defects, which are incidental to all human institutions, there can be no denying that the Common Law has one advantage over the legal system of any country: it was Christian from the very beginning of its history. . . No doubt there are many causes for this superiority; but in my humble opinion, the most important is that, while Roman law was a deathbed convert to Christianity, the Common Law was a cradle Christian.” JOHN C.H. WU, FOUNTAIN OF JUSTICE 64-65 (1955); The Common Law “was the product of a union between universal Christian laws and local customs.” EUGENE ROSENSTOCK-HUESSEY, OUT OF REVOLUTION 27 (Argo Books 1969) (1938). “There never has been a period of history, in which the Common Law did not recognize Christianity as lying at its foundation.” PERRY MILLER, THE LIFE OF THE MIND IN AMERICA, 123-24 (1966). “What nobler triumph has England achieved, or can she achieve, than the proud fact that her Common Law exerts a universal sway over this country, by free suffrage of all its citizens? That every lawyer feels that Westminster Hall is in some sort his own.” *Id.* at 125. Posner’s contention that moral theory lacks “innovation” could not be true, for it’s antecedent, the Common Law, was not only very innovative, but flexible as well. One writer commented, “the Common law had a great deal of flexibility, whereas statute law is very rigid; statute law is governed by the letter of the law rather than by the principle of justice, and legal appeal becomes more an exercise in legal phariseism than justice.” JOHN ROUSAS RUSHDOONY, LAW AND LIBERTY 87 (1971).

Judeo/Christian tradition, the Higher law was the structure upon which all the laws of Western civilization were founded. The doctrine states that all life was created by God and for his glory; therefore all laws of man must be based on God's immutable laws as codified in his word, which is the Bible. Any law that man makes that contradicts or in anyway disparages God's Higher law is null and void. Therefore, the Declaration of Independence, the Constitution, and the Bill of Rights, as well as most case law at the local, state, and federal levels even as late as the 1960s, were thoroughly grounded in the moral principles and philosophical precepts of Natural law.<sup>24</sup>

[17] The Framers, when drafting the Constitution, were prudent enough to foresee the chaos and anarchy of a revolution of any government of man that lacked a foundation grounded in Christianity. The Framers purposely forsook certain pagan elements of the Greco/Roman conceptions of Natural law as well as the secular humanistic ideals of the Enlightenment. Tragically, during this same period, French philosophers, intellectuals, and revolutionaries enthusiastically embraced these same secular humanistic ideas the Framers understood would lead to anarchy and tyranny. The outcome was predictable in France. A bloody Revolution in 1789, less than two decades after the founding of America as an independent Republic on July 4, 1776, and the same year that the Constitution and the Bill of Rights were ratified by a majority of the states. The principle ideas of the Enlightenment Period held that: (1) Man is the center of all things; (2) Mankind is intrinsically good and, if placed in a nurturing environment with the proper cultivation, would aspire to sublime heights of charity, virtue, and good works benefiting all of humanity. A contemporary archetype of those revolutionary times was Napoleon Bonaparte. His self-decree as Emperor

---

<sup>23</sup> See DORNAN, *supra* note 16.

of France in 1804 (though as a revolutionary, he promised the French people he would not do so), quickly dispelled the inane notion of mankind's intrinsic goodness.<sup>25</sup>

[18] The Framers avoided the anarchy of the French Revolution when drafting America's Constitution and the Bill of Rights by wisely being cognizant of the innate folly and genocidal excesses of mankind. For this purpose, the Framers instituted the doctrine of checks and balances in all of America's founding documents. Other reasons included: (1) to devolve power from the top down, away from the state power held by a few and towards the people (note the incessant refrain in the Bill of Rights: Congress shall not. . . Congress shall not . . . Congress shall not...Congress shall not. . .). The Framers, from their colonial experience under George III, knew the main enemy of liberty, morality, and freedom was not *the people*, but *the government*; (2) to sustain the moral precepts of the American Republic based explicitly on the Christian religion and the Bible; and (3) to protect present and future minority groups from the "tyranny of the majority," which is the historical and natural outcome of any pure democracy. Illustrative of this fact was the famous statement made by Benjamin Franklin at the conclusion of the First Constitutional Convention in Philadelphia, when he was asked by a woman "what have you done for us today?" Franklin's sardonic reply was "madam, we have given you a *Republic*, if you can keep it!" The reply illustrates that Republics, unlike Democracies, do not flourish as an ungainly weed, but require careful

---

<sup>24</sup> The great classical music composer, Ludwig van Beethoven (1770-1827) following the Zeitgeist of the Enlightenment Period, dedicated his great Symphony #3 in E-Flat to Napoleon Bonaparte in 1803. When he heard that Napoleon had decreed himself Emperor of France in 1804, Beethoven, in his customary fit of rage, so violently scratched out the dedication to Napoleon, that in the original manuscript, one can see that Beethoven actually tore a hole in the paper! Beethoven later re-dedicated his third symphony—"Eroica" (Heroic) "In memory of a great man."

cultivation, an intelligent and moral citizenry, and constant vigilance. This fact the Framers well understood.

#### 4. Posner's Presuppositions

[19] Posner's entire thesis on moral theory and legal theory is built on several false premises: (1) that law and morality should and must be separated; (2) that *law as it is* (Positive law<sup>26</sup> = reality, expository, analytical) should be the only concern of judges in actual judicial decisionmaking; (3) that *law as it ought to be* (Natural law<sup>27</sup> = morals, originalism, normative, censorial) is the realm of philosophy and religion and is impotent to aid judges in judicial decisionmaking; and (4) that moral philosophy cannot be evaluated using moral terms because it allows no room for cross-cultural (i.e., "universal") truths. Posner's hierarchy of academic intellectualism is as follows:

- 1 Science (Darwinian Evolution)<sup>28</sup>

---

<sup>25</sup> Positivism – 1. A way of thinking that regards nothing as ascertained or ascertainable beyond the facts of physical science or of sense. 2. A system of philosophy elaborated by Auguste Comte (1798-1857), holding that man can have no knowledge of anything but actual phenomena and facts and their interrelations, reflecting all speculation concerning ultimate origins or causes. READER'S DIGEST ENCYCLOPEDIA DICTIONARY, 1035 (1968).

<sup>26</sup> Natural law - Historically a number of senses have been attributed to this term; today the preponderant sense, especially in legal contexts, is "a law that determines what is right and wrong and that has power or is valid by nature, inherently, hence everywhere and always." Leo Strauss, "*Natural Law*," in 11 INTERNATIONAL ENCYCLOPEDIA OF SOCIAL SCIENCES 80 (David L. Sills ed., 1968). "Twentieth century legal scholars have mostly rejected the notion of Natural law on positivist grounds, because genuine scientific knowledge cannot validate value judgments, and Natural law is composed entirely of value judgments. The modern user of this term should be aware of the debate surrounding the concept it denotes, and of the generally low regard in which the concept is now held." *Id.* at 370. See Laurence Tribe, *Natural Law and the Nominee*, N.Y. TIMES, July 15, 1991, at A15.

<sup>27</sup> Sir Julian Huxley, Charles Darwin's successor and *de facto* Minister of Propaganda, has commented that, "until today we are enabled to see evolution as a universal and all

---

pervading process. . . Our present knowledge indeed forces us to the view that the whole of reality *is* evolution - a single process of self-transformation." Julian Huxley, *Evolution and Genetics*, in *WHAT IS SCIENCE?* 272, 278 (James R. Newman ed., 1955). Huxley also noted that "there proceeded during the 19th Century, under the influence of the evolutionary concept, a thoroughgoing transformation of older studies like History, Law and Political Economy; and the creation of new ones like Anthropology, Social psychology, Comparative Religion, Criminology, Social Geography." *ENCYCLOPEDIA BRITANNICA*, McGraw-Hill, Vol. 20.

<sup>28</sup> On the American legal realism school, David Adams stated that legal realists "wrote with the explicit aim of understanding the law in its daily operation by focusing on what judges and lawyers (and others) actually *do*, rather than what they, or theorists like Aquinas [Natural law] or Austin [Positive law], *say* they do. The concern of the legal realists lay with the 'law in action,'" not with the 'law in books.'" DAVID M. ADAMS, *PHILOSOPHICAL PROBLEMS IN THE LAW* 85 (1982). [hereinafter *Philosophical Problems*].

<sup>29</sup> In the 1870s, Christopher Columbus Langdell, the first Dean of the Harvard Law School, applied the evolutionary principles of Darwinism to the law with his development of the "case method" of teaching and studying the law. Herbert Titus has remarked that this method "revolutionized the study of law in the United States." Herbert Titus, *God, Evolution, Legal Education, and Law*, *JOURNAL OF CHRISTIAN JURISPRUDENCE* 11-12 (1980); Langdell's successor as Dean of Harvard Law School, Roscoe Pound, has stated: "It must be borne in mind that nature did not mean to antiquity what it means to us who are under the influence of evolution." ROSCOE POUND, *AN INTRODUCTION TO THE PHILOSOPHY OF LAW* 10 (rev. ed. 1954). Pound also taught "that no current hypothesis is reliable, as ideas and legal philosophies change radically and frequently from time to time." RENE WORMSER, *THE STORY OF THE LAW* 485 (Simon and Schuster 1962) (1949). "I am skeptical as to the possibility of an absolute judgment." *Id.* at 483. Pound developed what theorists called sociological law. Sociological jurisprudence "has radically affected, sometimes directly and sometimes indirectly, the thinking of American jurists, judges, and lawyers. It has also made itself felt throughout the entire international field of Western jurisprudence." *Id.* at 484-85.

<sup>31</sup> Oliver Wendell Holmes, was a Supreme Court Justice from 1902 to 1932. In his book, *The Common Law*, said, "The life of law has not been logic; it has been experience." OLIVER WENDELL HOLMES, *THE COMMON LAW* 1 (Harvard University Press 1963) (1881). Professor G. Edward White has interpreted Justice Holmes' use of the word "logic" to mean

the formalistic, religion-based logic that reasoned downward syllogistically from assumed truths about the universe; the proposed counter-system was "experience," the changing "felt necessities" that reflected current social values and were altered by time and circumstances. . . [This was] merely a fatalistic acceptance that law was not so much the embodiment

---

of reason as a manifestation of dominant beliefs at a given time.

G. EDWARD WHITE, *THE AMERICAN JUDICIAL TRADITION* 157 (1976). To Holmes, law "was simply an embodiment of the ends and purposes of a society at a given point in its history." *Id.* Holmes reduced law to its lowest common denominator to mean "beliefs that have triumphed." *See* *THE HOLMES-POLLOCK LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR FREDERICK POLLOCK, 1874-1932*, at 2:36 (M. Howe, ed., 1953) Holmes further remarked that "truth [is] the majority vote of that nation that could lick all others." Oliver Wendell Holmes, *Natural Law*, 32 *HARV. L. REV.* 40 (1918). He also stressed that "when it comes to the development of a *corpus juris* the ultimate question is what do the dominant forces of the community want and do they want it hard enough to disregard whatever inhibitions may stand in the way." Letter from Oliver Wendell Holmes, Jr., to John C. H. Wu (Aug. 26, 1926) in *JUSTICE OLIVER WENDELL HOLMES: HIS BOOK NOTICES AND UNCOLLECTED LETTERS AND PAPERS* 187 (Harry C. Shriver ed., 1936). Holmes remarked that

I see no reason for attributing to man a significance different in kind from that which belongs to a baboon or to a grain of sand. I believe that our personality is a cosmic ganglion; just as when certain rays meet and cross there is white light at the meeting point, but the rays go on after the meeting as they did before, so, when certain other streams of energy cross at the meeting point, the cosmic ganglion can frame a syllogism or wag its tail.

RICHARD HERTZ, *CHANCE AND SYMBOL* 107 (1948).

<sup>31</sup> Regarding the legal philosophy of Justice Benjamin Cardozo, who served on the Supreme Court from 1932-1938, Constitutional scholar, David Barton, remarked, "Justice Cardozo, as a strong relativist, also rejected fixed standards and rights and wrongs... According to Justice Cardozo, the judge is not to 'concern' himself with Natural law. . . he also advocated usurping the traditional separation of powers under which legislators had always been the lawmakers: I take judge-made law as one of the existing realities of life." (footnote omitted). DAVID BARTON, *THE MYTH OF SEPARATION* (1989) (quoting BENJAMIN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 10 (1921)).

<sup>33</sup> Posner basically has a relativist utilitarian legal philosophy and can be summed up in the following quote: "law is only what most of the people think at that moment of history, and there is no higher law. It follows, of course, that the law can be changed at any moment to reflect what the majority currently thinks. More accurately, the law becomes what a few people in some branch of the government think will promote the present sociological and economic good. In reality the will and moral judgment of the majority are now influenced by or even overruled by the opinions of a small group of men and women. This means that vast changes can be made in the whole concept of what should and what should not be done. Values can be altered overnight and at almost unbelievable speed." C. EVERETT KOOP AND

- 3 Legal Positivism (Bentham, Austin, Hart)
- 4 Classical Philosophy (Plato, Montesquieu, Kant, Rawls)
- 5 [Secular] Academic Moralism (Dworkin, Nagel)
- 6 Religion [general]: Hinduism, Buddhism, Islam, Mormonism)
- 7 Judeo/Christianity [Theism] (Natural law, Originalism)<sup>34</sup>

[20] To Posner, science is the preeminent intellectual pursuit. To believe its pronouncements is common sense; to deny the infallibility of science is ignorant because science is based on precise observation, rigorous experimentation, hypothesis, rationalism, objective truth, naturalism, and theory. To question science is anti-intellectual and “silly.” Religion (Posner generally lumps all religions together) is generally relegated to the opposite end of the intellectual paradigm and is viewed by Posner as subjective, “local,” “provincial” and anti-intellectual. Throughout his article, Posner gives Christian theism the most severe criticism, which explains why it ranks at the bottom of his intellectual paradigm. This is because the good judge believes that Christian theism lacks the intellectual cogency to change the mind of any thinking person. I believe Posner’s ideas in this area to be profoundly wrong.

**E. A Constitution In Search of A Philosophy:  
Natural Law, the Framers, and Original Intent**

[21] What writings did the Framers rely on most when they wrote the Declaration of Independence, the Bill of Rights, and the Constitution? To answer this question, a mammoth

---

FRANCIS SCHAEFFER, *WHATEVER HAPPENED TO THE HUMAN RACE?* 6-7 (Crossway Books 1983) (1979).

<sup>34</sup>*See supra* note 26.

study was undertaken by two political science professors at the University of Houston: Donald S. Lutz and Charles S. Hyneman. In their research, which took over ten years to amass, the professors and their research team reviewed over 15,000 items, including 2,200 books, newspaper articles, pamphlets, and monographs of political materials written between 1760 and 1805. From this material, Lutz and Hyneman found that the three philosophers quoted most frequently by the Framers were Montesquieu (1689-1755), Blackstone (1723-1780), and Locke (1632-1704). Notably, these three men were all staunch Natural law philosophers. More astounding than this, however, was a source quoted by the Framers *four* times more frequently than either Montesquieu or Blackstone and *twelve* times more frequently than Locke—the Bible.<sup>35</sup> **The Lutz/Hyneman study concluded that 96% of all of the Constitutional Framers quotes reviewed in their comprehensive study originated directly from the Bible.**

[22] As a legal theorist whose philosophy is rooted in Christian intellectualism, I am convinced that if one is to have a proper understanding of the nature of law, the Rule of law, and the Constitution, you must have a proper understanding of what the Framers of the Constitution intended when they wrote America's founding documents including: the Mayflower Compact, the constitutions of the original thirteen colonies, the Northwest Ordinance (1787), the Declaration of Independence, the Constitution, the Bill of Rights, and the subsequent constitutions of the various states that were admitted into the Union after the Constitution was ratified in 1776. Scholars call this legal philosophy, Natural law or originalism. As mentioned earlier, during the late 1980s and early 1990s, Natural law was

---

<sup>35</sup>DONALD S. LUTZ, THE ORIGINS OF AMERICAN CONSTITUTIONALISM 141 (1988); STEPHEN K. MCDOWELL AND MARK A. BELIES, AMERICA'S PROVIDENTIAL HISTORY 186 (1989).

given international exposure in the Senate confirmation hearings of the Supreme Court nominations of Robert Bork<sup>36</sup> and Clarence Thomas.<sup>37</sup>

[23] To get at these source materials of the Constitution and the philosophies that these writings are based upon, it is axiomatic for one to have a proper understanding of America's most important founding documents, and why and how the Framers chose Natural law as the controlling philosophy of the Constitution and how and why it was the Framers original intent to have these ideas and ideals incorporated into all state constitutions, local laws, ordinances, and court decisions *in perpetuity*.

[24] Like the Old Testament prophets of ancient Israel, who repeatedly warned the people against idolatry, the Framers understood the need to forsake the folly of separating law from morals, morality from Christianity, church from state, as well as a litany of sophistic philosophies of men. They knew from their study of history and governments of men, and by

---

<sup>36</sup>Judge Robert Bork, poignantly chronicles the process of his ultimately failed nomination to the Supreme Court in 1987 in his book. ROBERT BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 271-322 (1990). It was Bork, and later, Judge Clarence Thomas's courage during their Supreme Court Senate Hearings in 1987 and 1991 respectively, that gave me the idea to go to law school and the fortitude not to drop out of law school when it seemed by all external indicators that my legal career was stillborn. *See also* Ellis Washington, *Confessions to Nine Strangers and a Preacher*, in *BEYOND THE VEIL: ESSAYS IN THE DIALECTICAL STYLE OF SOCRATES*, 15-20 (2000).

<sup>37</sup>"An enthusiasm for something called 'Natural law.'" Michael Kinsley, *Judges, Democracy and Natural Law*, *TIME*, August 12, 1991 at 68; This justifiably alarms some people, who are worried that "Natural law" could become an excuse for a conservative judge to *impose* his political agenda just as conservatives have accused liberal judges of using "privacy" to do the same thing." *Id.* some enthusiasts see the Ninth Amendment which provides that the list of rights in the Constitution "shall not be construed to deny or disparage others retained by the people" as a direct incorporation of Natural law. *Id.*; "The committee made public its analysis of Judge Thomas's opinions on civil rights and "Natural law," the controversial view held by Judge Thomas and others that ambiguous legal doctrines not spelled out in the Constitution may be interpreted according to a higher moral law." Steven Holmes, *Another Rights Group Is Opposing Judge Thomas*, *N.Y. TIMES*, 14 Aug. A9, col. 4, 1991.

their own experiences as a colony, that if they faltered on this point then their so-called American Republic would quickly devolve—first into a Democracy (i.e., mob rule), then into a statist, socialist bureaucracy (welfare state), and ultimately into anarchy and nihilism.

Tragically, America is well past being considered a socialist bureaucracy and is now well on its way toward societal anarchy. Had not the Framers given us these sublime founding documents over two hundred years ago, it would have been difficult for anyone to believe or predict just how far the Rule of law, statutory law, the Constitution, federal/state judicial decisionmaking, and Supreme Court case law would depart from the Framers original intent .

## **II. The Limits of Moral Theorizing**

### **A. The Thesis of Part II Summarized**

[25] Posner, in his Harvard Law Review article on legal theory, expressly “[c]halleng[es] the type of legal theory that resembles or draws on moral theory.”<sup>38</sup> To Posner, “moral theory does not provide a solid basis for moral judgments, let alone for legal ones.”<sup>39</sup>

Although not explicitly stated in his article, Judge Posner’s apologetic stance toward academic moralism is actually an assault against Christian theism as a tenable corpus of intellectual thought in what Holmes referred to as “the marketplace of ideas.” Posner compartmentalizes and segregates academic moralism to a shantytown community, just outside of the ivy-covered walls of the academy, where the gods of empiricism, secularism, intellectualism, and scientific rationalism are worshiped. By choosing to denigrate moral theory in an acrimonious manner,<sup>40</sup> Posner follows a well-traveled but ultimately dead-end

---

<sup>38</sup>Posner, *supra* note 2, at 1638.

<sup>39</sup>*Id.*, at 1639.

<sup>40</sup>The term “academic moralism” is a pejorative term that I find both insulting, unnecessary

road of Positive law, legal realism, empiricism, moral skepticism, secular humanism, and naturalism, which holds all metaphysical phenomena as anti-intellectual and all sensory phenomena (i.e., ideas that can be understood by using our five senses) as the only body of knowledge that is worth serious academic pursuit.<sup>41</sup>

[26] To bolster his thesis, Posner uses the following stereotypes regarding people who hold a moral or theistic-based philosophy: (1) cast all people of faith as emotional, subjective, anti-intellectual and/or irrational; (2) lump all religions into one group, which he characterizes as superstitious—akin to magic and inferior to purely scientific intellectual bodies of knowledge, and whose *modus operandi* is closer to the Taliban rather than prudent, reasonable thinkers; ( and (3) characterize moral theorists insistence on linking law and morality as “prissy, hermetic, censorious, naive, sanctimonious, self-congratulatory, too far Left or too far Right, . . . [and] rather insipid.”<sup>42</sup> Posner justifies the first and second theses as necessary to maintain any type of rational, “academic” discourse.<sup>43</sup>

[27] Ironically, Posner seems to forget that Western civilization in general and the academy specifically owe their very existence to Christianity. For example, Christian individuals, organizations, or denominations instituted and founded 123 of the first 126 universities and colleges established in America. All of the so-called “Ivy League” schools—

---

and ultimately misleading in Posner’s legal analysis. It is repeatedly used by Posner in his article, *Problematics*, to define moral philosophers and legal theorists who use *any* type of moral ideas or ethical philosophy to analyze legal issues.

<sup>41</sup>As I will demonstrate later in this article, Posner’s empiricism has many theoretical problems which among other things is generally counter-intuitive, self-contradictory, and overtly biased against moral philosophy, especially of a Christian variety.

<sup>42</sup>Posner, *supra* note 2, at 1640.

<sup>43</sup>*Id.*

Harvard, Yale, Brown, University of Pennsylvania, Princeton, Cornell, Columbia, William and Mary, and Washington and Lee—were originally divinity schools founded by Christian churches for the express purpose of training ministers to preach the Gospel of Jesus Christ to the pagan nations both here and abroad. For example, John Harvard, a Protestant minister from England, established Harvard University, America’s first university, in 1636. The theistic ideology was so strong at Harvard that only Christian ministers were allowed to be professors for the school’s first 100 years.<sup>44</sup> Prior to the influx of secularism invading the academy in the nineteenth century, there were no utilitarians, radical liberals, atheists, agnostics, anarchists, secular humanists, or pagans teaching in America’s great intellectual Christian colleges and universities. The Christian origins of these institutions notwithstanding, no critic would doubt the intellectual mantle of the “Ivy League” schools and their progeny—great bastions of intellectual thought like Bucknell, Colgate, Lehigh, Smith, Wellesley, Brandeis, Radcliffe, Stanford, Georgetown, Berkeley, University of Chicago, University of Michigan, Ohio Wesleyan, De-Paul, Notre Dame, and many other educational institutions of higher learning which were founded expressly on uniting education, morality, and intellectualism with religion. Nor had the American academy in those early days accepted the sophistry of separating law and morals although it was repeatedly tried.<sup>45</sup> Therefore, we are confronted with a pivotal question: how did the academy in general and judges, lawyers, and the courts specifically, become so secularized and hostile to moral theory and the Framers original Constitutional philosophy of Natural

---

<sup>44</sup>BARTON, *supra* note 1, at 80-85.

<sup>45</sup>*Id.* at 49-74, citing Supreme Court opinions that refused to separate law from morals.

law, which expressly presupposes a theistic worldview?

[28] Between 1450-1950, Western civilization witnessed five great separations. In brief they are: (1) from 1450-1700, the Renaissance Period saw the separation of secular from sacred<sup>46</sup>; (2) from 1700-1850, the Enlightenment Period saw the separation of intellectualism from Christianity<sup>47</sup>; (3) Positive law, a secularist, utilitarian philosophy originating in England in the eighteenth century, introduced a separation of law from morals;<sup>48</sup> (4) Charles Darwin's

---

<sup>46</sup>Francis Schaeffer comments: "In the [S]outh, much of the High Renaissance was based on a humanistic ideal of man's being the center of all things, of man being autonomous; second in the [N]orth of Europe, the Reformation was giving an opposite answer." FRANCIS SCHAEFFER, *HOW SHOULD WE THEN LIVE?*, 80 (1976).

<sup>47</sup>Holmes remarked,

To an imagination of any scope the most far-reaching form of power is not money, it is the command of ideas. . . [A] hundred years after his death the abstract speculations of Descartes had become a practical force controlling the conduct of men. . . [T]he world is governed to-day by Kant [more] than by Bonaparte.

Oliver Wendell Holmes, *The Path of Law*, 110 HARV. L. REV. 1008-09 (1897), *quoted in* Adams, *supra* note 28, at 101.

<sup>48</sup>*See*, WASHINGTON, *The Nuremberg Trials: Birth of the Death of the Common Law*, in *THE DEVIL IS IN THE DETAILS*, *supra* note 1, at 5. In contemporary American politics, President Clinton, although mired in an adulterous scandal with a young intern, Monica Lewinsky, has thus far failed to sway the courts to legally separate his public and private behavior, but has won in the court of public opinion where 60-70% of the American public polled believes that one can be a moral degenerate and still be a good leader. Most astonishing however is the fact that these same people view this idea as a logical opinion. An article in the venerable ABA Journal stated :

Our Court certainly has no machinery of this age to take a Gallup Poll. And the scientific miracles of this age have not yet produced a gadget which the Court can use to determine what traditions are rooted in the 'conscience of our people.' Moreover, one would have to look far beyond the language of the Ninth Amendment to find that the Framers vested in this Court any such awesome veto powers over law making, either by the States or by the Constitution.

*The Origin of the Species* (1859) provoked the separation of science from Christianity by providing a scientific explanation to the origins of life (evolution), thus replacing the biblical account as mentioned in *Genesis* chapters 1-11 (creation);<sup>49</sup> (5) the Supreme Court in *Everson v. Board of Education* (1947),<sup>50</sup> enacted in American constitutional law the political, judge-created doctrine of the separation of church and state. These five sophistic separations have wreaked (and continue to wreak ) untold havoc upon American society, public/private morality, and the Rule of law, and therefore the totality of the circumstances cannot be succinctly stated.

[29] Posner has a “visceral dislike” of academic moralism”<sup>51</sup> because legal theorists who use moral philosophy to solve legal issues mix law with morality. Academic moralism is untenable to him because academic moralism does not have the cogency to convince anyone to change their behavior. Posner characterizes his worldview as “pragmatic moral skepticism.”<sup>52</sup> However, as much as Posner rails against academic moralism, a repeated theme throughout his article is his tendency to denigrate moral theory as merely “hyper-

---

*Courts Test Mettle of Public Opinion Surveys*, 66 A.B.A.1511 (1980).

<sup>49</sup>Creation scientists Drs. Morris and Clark wrote: “Evolution is thus not only anti-Biblical and anti-Christian, but it is utterly impossible as well. Evolution has served effectively as the pseudo-scientific basis of atheism, agnosticism, socialism, fascism, and numerous other false and dangerous philosophies over the past centuries.” See WASHINGTON, *Liberal Law and the Scientific Mythology of Evolution*, in THE DEVIL IS IN THE DETAILS, *supra* note 1, Chapter 4. In the sixth edition of his book, *The Origin of Species*, Charles Darwin abandoned natural selection as the force behind evolution due to the continuing lack of evidence and theoretical problems. CHARLES DARWIN, THE ORIGIN OF SPECIES, 66 (6th ed. 1872).

<sup>50</sup>*Everson v. Bd. of Educ.*, 330 U.S. 1, 13 (1947).

<sup>51</sup>Posner, *supra* note 2, at 1640.

<sup>52</sup>*Id.* at 1645.

local,”<sup>53</sup> a minority opinion, purely personal and significant only to the adherent. Posner, in his lectures on Holmes’s essay, *The Path of Law*, is clear that theistic-based academic moralism is the lowest on the intellectual continuum and has little place in serious academic discourse, and, most importantly, should have *no* influence in judicial decisionmaking.

[30] Why is Posner so adverse to *moral* theory and *normative* theory, while often juxtaposing morals and law throughout his article on academic moralism? Why is he opposed to using moral theory in legal arguments? Why is he so dismissive of religion (particularly Christianity), but spends so much time using it to bolster his arguments? Posner attacks Christianity at every turn and defies evolution despite mounting evidence of the implausibility of evolutionary theory and the increasing realization by the scientific community (especially archeology, geology, and biology) of *any* actual physical proof of evolution.<sup>54</sup> On the other hand, the academic community, long given over to a naturalistic worldview, is grudgingly recognizing the plausibility that every factual claim made in the Bible has been (or is being) confirmed by scientific evidence. Below I have isolated some passages from Posner’s article that serve as the foundation for his belief against mixing

---

<sup>53</sup> *Id.* at 1643.

<sup>54</sup> Several of evolution’s famous “missing links” were all eventually proved to be shameless frauds: *Heidelberg Man*- Built from a jaw bone that was conceded by many scientists to be quite human; *Nebraska Man*- Scientifically built up from one tooth, later found to be the tooth of an extinct pig; *Pitldown Man*- The jawbone turned out to belong to a modern age; *Peking Man*- Supposedly 500,000 years old, but all evidence has disappeared; *Neanderthal Man*- At the Intl. Congress of Zoology (1958) Dr. A.J.E. Cave said his examination showed that this famous skeleton found in France over 50 years ago is that of an old man who suffered from arthritis; *New Guinea Man*- Dates all the way back to the 1970s. This species has been found in the region just north of Australia; *Cro-Magnon Man*- One of the earliest and best established fossils is at least equal in physique and brain capacity to modern man . . . So what’s the difference?; *Modern Man*- This genius thinks we came from a monkey. *Romans 1:22 (Professing themselves wise they became fools)*. See C. CHICK, *BIG DADDY*, (1992).

morality and law, followed by my general expository critique, analysis, and conclusions.

[31] Posner begins his thesis by expounding upon what he refers to as his “strong form” of moral theory stating that, “*moral theory does not provide a solid basis for moral judgments.*”<sup>55</sup> This statement strikes me as counterintuitive. First, how can *moral theory* not provide a strong foundation for *moral judgments*? Secondly, what other logical choice do we have to base moral judgments on if we cannot base them on moral, philosophic, religious, or ethical principles that are explicitly rooted in morality? Perhaps Posner is referring to the non-moral philosophy of Nietzsche or Heidegger—amoral relativism and legal realism? I shall explore this and other options later in this article.

[32] Posner’s “weak form” of moral theory states

even if moral theory can provide a solid basis for some *moral* judgments, it should not be used as a basis for *legal* judgments. Moral theory is not something that judges are, or can be, made comfortable with or good at, it is socially divisive, and it does not mesh with the actual issues in cases.<sup>56</sup>

Here, Posner lapses into what I call his existential domain. By this I mean that Posner overstates his case (quite unconvincingly) by conceding that moral theory *can* be a solid foundation for some *moral* judgments just not *legal* ones. Is not law based on morality? Of course it is, and though Posner and his intellectual godfather, Justice Oliver Wendell Holmes, refer to this relationship as a “coincidence,” I will prove in this article that there are no coincidences between legality and morality, especially in the history of American Constitutional law. Posner also does not convincingly address how any civilized society can

---

<sup>55</sup> Posner, *supra* note 2, at 1639 (emphasis added).

<sup>56</sup> Posner, *supra* note 2, at 1639 (emphasis added).

voluntarily obey laws that are not rooted in immutable, universal, and transcendental principles other than by force or brutality. Posner further conflates and confuses his argument by seeking to separate a “political” issue from a “moral” one when he states, “[a]s for the frequent use of the word ‘moral’ as an impressive synonym for ‘political,’ my only criticism is that labeling political arguments ‘moral’ invites confusion.”<sup>57</sup> On the contrary, the “confusion” Posner seeks to avoid by his separation of law from morals is equally as confused when separating morals from politics. (This was a major point of contention in the impeachment hearings of America’s former embattled President Clinton).<sup>58</sup> If you take morals out of politics, you are left with amoral politics. If you take morality out of law, you are left with lawlessness. In either case, confusion and anarchy will ultimately prevail under such a system of law.

[33] To Posner’s credit, he informs the reader of his real feelings on the issue of law and morals when he states, “I confess to a visceral dislike . . . of academic moralism. A lot of it strikes me as prissy, hermetic, censorious, naive, sanctimonious, self-congratulatory, too far Left or too far Right, and despite its political extremism, rather insipid.”<sup>59</sup> Here, I can appreciate his candor and passion; however, commenting on this string of adjectives (some might say invectives) would be an entire article in itself. But just a few points on what I think are some of the primary ideas Posner seeks to develop in his article. First, Posner, as a self-

---

<sup>57</sup>*Id.*

<sup>58</sup>President Clinton and his defenders unsuccessfully tried to separate his political life (“public life”) from his moral life (“private life”) in regards to the sexual affair he apparently had with a former White House intern, Monica Lewinsky. This affair became a public scandal in January 1998. Later that year, President Clinton became the first and only president of the twentieth century to be impeached by Congress.

<sup>59</sup>Posner, *supra* note 2, at 1640.

described “pragmatic moral skeptic[],”<sup>60</sup> has little use for morals and explaining law or vice versa. Secondly, Posner’s experience with the writings of legal philosophers, theorists, Constitutional scholars, and other academics writing on this issue, leaves him with adverse feelings towards those writers and their ideas. Thirdly, based on points one and two, Posner finds himself following a rather long and ignoble tradition of being a moral critic in the tradition of Kant, Voltaire, Hume, Huxley, Nietzsche, Heidegger, Sartre, Bertrand Russell, Brecht, Mead, Hellman, Fitzgerald, and others whom I shall mention throughout this article. One idea that this distinguished group of “intellectuals,” philosophers, writers, and scientists all had in common was a visceral dislike of morals (i.e., Christianity) because it exposed their naturalistic and empiricist worldview as a total fraud; therefore, they substituted their own philosophy as a counteroffensive against the prevailing moral code of their times. These people were so partisan and arrogant that they scarcely tried to hide their irrational prejudice against Christianity. Demonstrative of this point was Aldous Huxley’s famous confession of adhering to evolutionary theory even as Darwin himself later rejected natural selection because of a lack of evidence and increasing theoretical problems. Huxley slavishly clung to evolution because it provided him with a scientific and intellectual rationalization to commit fornication and adultery—no God, no judgment, no sin, no accountability, no responsibility for my actions.

[34] Posner’s contention that “*morality is local*” is plausible, but ultimately fallacious and sophistic because this idea seeks to denigrate and segregate morality to the closet of the local church, civic organization or other provincial institutions in an insipid effort to marginalize the universal moral appeal and influence of morality. An example of this view was shown

---

<sup>60</sup> *Id.* at 1645.

following what newspaper reporters of the day called a “defeat” to Christianity and the church; namely, the so-called “Scopes Monkey Trial.” In 1925, a court of appeals overturned a Tennessee statute that prohibited the teaching of evolution, along with creation science, in public school biology classes as a scientifically valid explanation for the origins of life. This public loss in this court of appeals, coupled with the growing influence of the theory of evolution and the societal decay precipitated by the “roaring twenties” was devastating to organized religion and in part caused the church to go into a fifty-five year self-inflicted retreat from politics, public influence and decline from its former domain as the moral barometer of society.

[35] During this dark age of American history, one could argue that morality was local. However, the advent of Reverend Jerry Falwell’s political action group, “The Moral Majority”, was the unexpected catalyst that significantly helped elect Ronald Reagan as President of the United States in his double landslide victories of 1980 and 1984. Furthermore, televangelist Pat Robertson, who owned his own Christian Broadcasting Network (CBN), ran a competitive campaign against former President George Bush in 1988. The presidency of George Bush witnessed a notable lapse in moral authority and leadership that was so overtly exemplified by Ronald Reagan. In 1989, this moral vacuum led to the founding of Pat Robertson’s Christian-based political action group “The Christian Coalition” with the erudite and savvy Ralph Reed as it’s first leader. The sleepy giant that was the American Christian church woke up and started to regain some of the political ground lost over the past six decades. These Christian-based political action groups and many other like-minded organizations helped to dispel the popular notion that morality is local, or as former

---

Speaker of the House of Representatives, Tip O’Neill, was fond of saying “all politics is local.” This is not true. What is true is that liberal politicians like O’Neill, Ted Kennedy, Tom Daschle, Dick Gephardt and others, as well as many modern-day secular judges like Holmes, Cardozo, Frankfurter, Brennan, Douglas and Posner, have a reflexive hatred for the idea of morals playing *any* in law and in the public marketplace of ideas. Admitting that the origins of law have a moral component erodes the humanist and radical egalitarian notions of statist primacy secular politicians and jurists hold so dear.

[36] Armed with his empiricist views, Posner can confidently contend that “many so-called moral phenomena can be explained without reference to moral categories” and not seem self-contradictory or irritatingly existential<sup>61</sup> because many of his readers either consciously or subconsciously hold these same anti-theistic biases. This bias extends down even to the law student level, where these youthful minions guard the publication portals of law reviews and law journals. Even a cursory review of law review articles and essays published last decade show distinct predilections toward empiricism. These so-called “open-minded,” independent students are overwhelmingly of a liberal, socialist, or secular ideology and favor an anti-theistic worldview regarding what articles get published and ultimately whose views are promulgated at a peer-review status level. Therefore, a Dworkin, Posner or a Catharine MacKinnon will get their works published in a law review more frequently than John

---

<sup>61</sup>Posner, *supra* note 2, at 1641. By turning this sentence around, one could deduce that many so-called *immoral* phenomena can be explained without reference to *moral* categories. This is true, but would using this logic add clarity to the phenomena one is trying to explain or further confuse the issue? I think the latter. And why would one, especially an academic seeking to bring intellectual rigor and truth to an issue, not want to use moral phenomena to explain a moral issue? To do otherwise seems to be sophistic. Too often legal scholars that engage in law as mere rhetoric belie their irrational adherence to a dubious political agenda—frequently of a radical liberal or a radical egalitarian persuasion.

Whitehead, Clarence Thomas, Robert Bork or even myself could ever hope. This is not due to the inferiority of their conservative ideas, but due to the lack of vision from our sophomoric guardians of the law review and law journal portals who are generally philosophically liberal, empiricist and anti-theistic.

[37] A recurrent theme in Posner's article is that he does not believe in a "universal morality." Historically, the founding and controlling philosophy in American constitutional jurisprudence has been Natural law, which, as demonstrated above, is simply a restatement of theistic Christianity in early state and federal law. Therefore, the following passage describing why Posner dislikes academic moralism is instructive:

[A]cademic moralism cannot succeed in its aim of improving human behavior for a number of reasons: (1) Knowing the moral thing to do does not furnish a motivation for doing it; the motivation has to come from outside morality; (2) The analytical tools employed in academic moralism—whether moral casuistry . . . are too feeble to override either narrow self-interest or moral intuitions...; (3) There is so much disagreement among academic moralists that . . .persuasive rationalization . . . [is] a preferred course of conduct; (4) The character of a modern academic career in philosophy is not conducive to moral innovation or insight; (5) Exposure to moral philosophy may actually lead people to behave less morally by making them more adept at rationalization.<sup>62</sup>

[37] These points can be reduced to Posner's preference for trivializing the significant contributions of moral theorists in the academy by unfairly characterizing them, and their ideas, as second-class intellectualism and his general predilection towards empiricism, rationalization, monism and skepticism. To a more radical degree, Posner's exposition above mirrors the same logic used by liberal politicians and educators who favor normalizing

---

<sup>62</sup>Posner, *supra* note 2, at 1641.

aberrant, promiscuous lifestyles and graphic depictions in sexual education classes as part of the general public school curriculum. (Note: I don't interpret Posner's philosophy as advocating this type of behavior in any way.) Their skeptical rationale is this: "kids are going to have sex anyway so we have to get them realistic information about sex so that they can do it the safe way." Posner, the pragmatic, moral skeptic, like his ideological counterparts in the educational system, has such a low moral impression of society in general and of our youth in particular, that he believes even if people *know* the right thing to do they are not going to *do* the right thing. Posner contends that trying to convince someone to change through moral argument is ineffective because moral theory is too "feeble" to overcome "self-interest or rationalization." While I understand and even find some plausibility in this point of view, history contradicts Posner's pessimistic analysis of human nature.

[38] For example, in the first century A.D., the Apostle Paul, before an erudite crowd of philosophers, intellectuals and affluent citizens, gave an eloquent discourse on Mars' Hill at the Areopagus (the Supreme Court) in Athens, the very birthplace of classical philosophy and the home of Solon, Zeno, Socrates, Plato, Aristotle, Cicero and Seneca. The apologetic he delivered on Christianity was quite successful in convincing the group to forsake sex-cult worship, paganism and idolatry for true godliness is found only in following the doctrine of Jesus Christ. The narrative stated: "And when they heard of the resurrection of the dead, some mocked: and others said, We will hear thee again of this matter . . . certain men clave unto him, and believed, among the which was Dionysius, the Areopagite, and a woman named Damaris, and others with them."<sup>63</sup>

[39] Was the Apostle Paul successful in attempting to use moral philosophy (here,

---

<sup>63</sup>Acts 17:32, 34.

Christianity) to make moral judgments to convince his audience to repent from paganism and adultery? The success of 2,000 years of Christianity as the foundation for virtually all of the great contributions of Western civilization and World civilization is self-evident. Posner further states that, “[i]t would be a disaster if moral theorists succeeded in their implied aim of imposing a uniform morality on society.”<sup>64</sup> To the moral skeptic judges and secular liberal politicians, moral theorists can only project their ideas by “imposing” them on someone or “cramming them down our throats.” This is a hackneyed cliché that I am surprised an esteemed judge such as Posner would use in serious academic writing. This statement has no basis in fact. Neither does he explain why it would be a “disaster” if moral theorists imposed a universal morality on society. In another passage he equates academic moralists to being the social equivalent of the Taliban—a radical Islamic fundamentalist sect in Afghanistan whose leaders impose a severe brand of Islam upon their women, forbidding them to show their face in public, work outside the home or even go to school. Violators of these religious decrees have been punished by amputation or even execution. For Posner to equate moral theorists with such an infamous group of religious zealots is beyond the pale and shows that Posner’s visceral dislike of moral theorists borders on the irrational.<sup>65</sup>

## **B. My Moral Stance**

---

<sup>64</sup>Posner, *supra* note 2, at 1642.

<sup>65</sup>My view of moral and legal theory is referred to as “originalism” by Robert Bork and Antonin Scalia, but it is essentially Natural law. Its primary components are: (1) It concerns law as ultimate revealed truth from God as given to man through the Bible; (2) Natural law is not based on any man’s opinion so its truth doesn’t die or become obsolete at the death of the original theorist (i.e., Aquinas, Montesquieu, Blackstone); (3) Natural law, as Christian intellectualism, does not denigrate into secularism, materialism, societal break down and anarchy like in the French Revolution, Colonialism, Marxism, naturalism, positivism, feminism, nor any number of secularist, political or governmental theories that humankind has turned to in the past.

### **Moral Relativism:**

*I am a moral relativist . . . [but] I do not embrace “vulgar relativism” . . . nor . . . “anything goes.”*<sup>66</sup>

[40] Although Posner tries to distance himself from the more radical philosophy of pure moral relativism, which applies radical egalitarianism to all bodies of knowledge, he is unconvincing. He fails to see the inexorable chain reaction to one who espouses *any* type of relativism, which is an eventual devolution into anarchy and nihilism.<sup>67</sup> This is so because mankind, contrary to secular academics, is not inherently good. Where man does evil it is not due to lack of education, as the intellectual class claim, but because of an intrinsic flaw in the very nature and character of man (i.e., the doctrine of original sin). Another moral philosophy, Natural law, holds quite the opposite view of human nature. It presupposes that humans were created in the image of God, therefore, making them, in part, spiritual beings. However, because the first man, Adam, allowed himself to become corrupted by sin, mankind has taken on a nature notoriously destructive, inherently evil, perverted, selfish and, most importantly, antithetical toward God and goodness. This is because mankind is in a fallen state of nature. Along with the Framers, classical philosophers prior to the 19<sup>th</sup> century understood this concept of mankind very well, which is why they fused these precepts into

---

<sup>66</sup>Posner, *supra* note 2, at 1642.

<sup>67</sup>*Nihilism*- an extreme form of skepticism that denies all existence. b. A doctrine holding that all values are baseless and that nothing can be known or communicated. 2. *Rejection of all distinctions in moral or religious value and a willingness to repudiate all previous theories of morality or religious belief.* 3. The belief that destruction of existing political or social institutions is necessary for future improvement. THE AMERICAN HERITAGE COLLEGE DICTIONARY, 923 (3d ed. 1997) (emphasis added). Nihilism plays a large part in Posner’s jurisprudence although he never admits it. I can only imagine that due to his exalted status as a Judge, law professor, lecturer and prolific author, modesty forbids him from admitting the similarity of his views with such an extreme philosophy.

the founding documents. These were two of the self-evident truths that Jefferson wrote about when he penned The Declaration of Independence (“ . . . The Law of Nature and of Nature’s God”). The archetype of divinity is manifested by our physical appearance as well as in the “inner man” and the glory of God is manifested in nature (i.e., creation). History repeatedly chronicles that natural man, left to his own devices, only creates totalitarianism, destruction and despair. Natural man is only concerned with gratifying his own base appetites on a social level, as the early colonists and some Founding Fathers did with slavery, sexism and when they killed the Indians for their land, as well as on a physical, intellectual or spiritual level.<sup>68</sup>

### 1. Moral Subjectivism

*I am sympathetic to this position. If a person decides to opt out of the morality of his society . . . as the conspirators against Hitler did, there is no way to show that he is morally wrong, provided that he is being consistent with himself. . . . [T]he morality that condemns the traitor or the adulterer cannot itself be evaluated in moral terms; that would be possible only if there were reasonably concrete transcultural moral truths.*

*My version of moral subjectivism is consistent with moral relativism in its sense of rejecting transcultural moral truths. There is no inconsistency in saying*

---

<sup>68</sup>Stanmeyer stated that,

The secularists deny this sacramental nature of reality. In denying the inner value of events, they deny their meaning, and thus render life meaningless. The secularists then seek value and worth and meaning in the surface of things: what pleases the eye, what soothes the ear, what beguiles the intellect. They substitute an *external* standard of beauty, truth, and goodness for the *inner* norm taught in the Gospel.

Stanmeyer, “*Materialist Worldview/Secularism*,” CLEAR AND PRESENT DANGER: CHURCH AND STATE IN POST-CHRISTIAN AMERICA, 10 (1983). “The denial of the Fall undergirds the secularist preference for collectivism. If man did not sin, his nature is not wounded. Lord Acton’s observation that “power corrupts, and absolute power corrupts absolutely” is not a rule of human nature but at most a description of past accidental excesses. *Id.* at 41.

*that all moral truths are local and then adding that one's own morality is hyperlocal, being limited to oneself.*<sup>69</sup>

[41] Although I understand and appreciate Posner's sentiments here, this passage has several theoretical problems. Posner contradicts himself when he argues that one cannot condemn Hitler's conspirators, the traitor or the adulterer because there are no "transcultural moral truths" and then states that his version of moral subjectivism and moral relativism *rejects* transcultural moral truths. The first thing we must establish is whether or not transcultural moral truths exist. If they do, the question is whether or not Posner believes that society can use these truths to judge and punish Hitler's conspirators, the traitor or the adulterer. The truths undergirding Natural law were "self-evident" to the colonists, as were the philosophical principles the Framers used as the foundation of the Constitution and America's other founding documents. Natural law was also the original philosophy early Justices on the Supreme Court, such as John Jay and John Marshall, used in jurisprudence. Why then does Posner, as an appellate judge, slavishly hold to an anti-universalist view of morals while the Constitution he is sworn to uphold is replete with explicit juxtapositions of law and morality? Perhaps he realizes that his theory of pragmatic moral skepticism and Holmesian legal realism is flawed. However, Posner also realizes that the stakes are too high to allow moral theorists to be correct. This dilemma reminds one of an interesting story of the classical music composer, Johannes Brahms. In the 1870s, Brahms was asked why he had not written a symphony yet. He responded "because every time I began a symphony, I hear the giant steps of Beethoven behind me." In other words, although truth may be intimidating, it is inevitable.

---

<sup>69</sup>Posner, *supra* note 2, at 1643.

[42] I contend that, like every human, Posner intrinsically knows that there are immutable laws that govern the *physical* universe, such as Newton's law of gravity, the First and Second law of Thermodynamics and Einstein's' theory of Space Time, so there must be immutable laws that govern our *spiritual* universe. To overcome this dilemma, Posner must use the tortured anti-logic of evolution, which is that all life is material and all material life is a result of a Big Bang billions of years ago. The intellectual alternative, to believe in the God of the Bible, insults Posner's voluminous intellect and would turn his skeptical worldview upside down. How can Posner reconcile the Bible's metaphysical claims with his materialist philosophy that all existence and life is matter? Many academic moralists, legal and moral philosophers, as well the Holmes and Posner school of secular legal realism, are inadequate to address, much less solve, the pathological social problems we have in modern times because their ideas purposely ignore or disparage the most fundamental components of human existence; namely spirituality and ultimate truth.<sup>70</sup>

## 2. Moral Skepticism

*"I am not a moral skeptic, that is, one who believes that moral truth is unknowable. . . [R]ealism need not (and in my view should not) have any metaphysical content whatever. . . [T]here are no convincing answers to the interesting moral questions. This claim marks me as a moral skeptic. . ."*<sup>71</sup>

[43] Like his mentor Holmes, who applied philosophic realism, or pragmatism, to invent a

---

<sup>70</sup>Specifically, I am referring to the three dimensions of human existence: (1) Conscience= Spirit; (2) Emotion/Will/Mind = intellect/soul; (3) Sight/taste/feeling/hearing/smell = flesh (body).

<sup>71</sup>Posner, *supra* note 2, at 1644 (quoting Thomas Nagel, *Universality and the Reflective Self*, in *THE SOURCES OF NORMATIVITY* 200, 205 (Onora O'Neill ed., 1996).

new legal philosophy and approach to jurisprudence known as realism, Posner takes great pains to remove any “metaphysical” (i.e., Christian theistic) content from his intellectual philosophy of “pragmatic moral skepticism.” He is quite explicit in his reasons for believing this way: “academic moralism cannot convince anyone to change their behavior.” This is an incredible and incredulous admission because it ignores the time-honored, theistic concept of proselytizing in the Judeo-Christian tradition that goes back six millennia and because Christ has and still convinces intelligent, rational people from all walks of life to change their worldview to that of theistic Christianity. Posner’s contention that academic moralism’s cannot convince rational and intellectual people is probably true when speaking about the empty staid speculations of legal philosophers, academicians and theorists like Dworkin, Ackerman, Koppelman, Feinberg, Rawls, Kennedy and other so-called mainstream legal philosophers. Holmes’ and Posner’s legal realism, as well as the philosophic speculations of secular theorists, are just another “ism” of man. Moreover, because these philosophies begin and end with man, they are ultimately superficial and sophistic ruminations of academicians who are trying to justify their existence and tenure with the ancient technique of rhetoric. (The ubiquitous publish or perish paradigm of the contemporary academy).

[44] Posner’s outright dismissal of moral philosophy in any viable context renders his brand of legal realism as false, disingenuous and dangerous. For example, if judges would apply the original Natural law philosophy of the Constitution in judicial decisionmaking, all of the so called “hard cases”, as Holmes called them, from slavery to segregation, from school prayer and Bible study in the public schools to abortion, euthanasia, physician assisted suicide, from women suffrage to federal income tax, would be quite simple matters to address in *legal* terms. The philosophical foundations of all laws are rooted in the original

philosophical principles of the constitutional Framers—Natural law, where justice and the Rule of law are preeminent. History has repeatedly shown that all other philosophical approaches to Constitutional jurisprudence devolve into some form of Positive law—he who is sovereign rules; might makes right; the end justifies the means; the gunman situation writ large; Utilitarianism, the most good for the most people; and relativism, there is no universal moral code that is better than any other moral or ethical set of principles.

[45] A legal system based on the subjective caprice of Positive law will of necessity develop into a leviathan, socialist bureaucracy where power is centralized and distributed from the top down. It would become a legal system where there are no “inalienable rights” and all rights enjoyed by the people originate from the statist power of government, not from a metaphysical deity. Under the economic structure of leviathan government, a host of wasteful, socialist welfare programs were created which led to higher taxes to pay for these expensive programs, leading to personal idleness and illiteracy on a grand scale, leading to government oppression of the people, the abolition of private property, societal breakdown, and eventual anarchy and nihilism.<sup>72</sup> To bolster his point, Posner’s pragmatic moral skepticism exposes his anarchical implications when he states that:

moral theory lacks the necessary resources for resolving moral controversies. . . . [Some may say that] a person who murders an infant is acting immorally in our society. . . . I might consider him a lunatic, a monster, or a fool, as well as a violator of the 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.

<sup>73</sup>

---

<sup>72</sup>See Milton & Rose Friedman, *FREE TO CHOOSE: A PERSONAL STATEMENT* (1990).

<sup>73</sup>Posner, *supra* note 2, at 1644.

[46] Infant killing is chronicled numerous times in secular history and in the Bible as a common part of ancient pagan fertility rites. In repeating this savage, indefensible act, modern man has an equally barbaric record denigrating the sanctity of life. The philosophical ideology of radical gender feminism, as well as its supporting political base (liberalism) in modern times, has chosen child sacrifice (abortion) as the mandatory tenet of the faith of the pseudo-religions of secular humanism and political correctness.

[47] Furthermore, as society has become increasingly immoral, it has concurrently become increasingly indifferent and hostile to moral judgments and the Rule of law so revered by former generations. Likewise, the Supreme Court, since the early 20<sup>th</sup> century, has devolved into a secular humanist oligarchy with an overtly leftist political agenda that is contrary, and in some cases, openly hostile to the original intent of the Framers of the Constitution. Over the past century, a majority of Supreme Court Justices have routinely shown little regard to the original intent of the Framers in Constitutional interpretation. For example, in *Roe v. Wade*,<sup>74</sup> the Court gave the sanction of law to infanticide that has resulted in the deaths, since *Roe v. Wade* in 1973, of over fifty million babies—an average of over 4,500 babies per day! On one level, one could argue quite persuasively that we owe Hitler and his Third Reich a big apology, for we have eclipsed him eight-fold in murdering the innocent based on the conservative estimate of 6.5 million which counts only the Jewish people Hitler committed systematic genocide against from 1932-1945. The total number is 18 million (Mao Tse Sung = 35 million; Stalin = 60 million).

[48] History and the Axis powers have rightly judged Hitler for the unspeakable acts of

---

<sup>74</sup>Roe v. Wade, 410 U.S. 113 (1973).

genocide and savageness he committed against his own people and humanity. Americans, however, are so far removed from national guilt or shame for our complicity in abortion that we arrogantly excuse or rationalize much more brutal behavior towards society's most vulnerable, the children, via our tacit support of the multi-billion dollar abortion industry. Meanwhile, a morally inept and leaderless Congress is impotent to stop abortions, failing even to pass a veto-proof "partial birth abortion" bill, while President Clinton, a well-known liar and repeat adulterer, enjoyed a 65% to 70% approval rating, especially from women's groups, because he supports *the* "issue" they care about most (i.e., abortion). Furthermore, there is no outrage when the President of the United States actively seeks to export abortion to Third World countries as a birth control device by cynically tying it to international aid.<sup>75</sup> This is what I mean when I say that America is well down the road to nihilism.

[49] Posner's hesitation at calling a person who murders babies immoral belies his intrinsically flawed moral skepticism that is rooted in naturalism. Incredible as Posner's contention of not considering a person to be "immoral" who murders an infant, the more outrageous statement is his analogy comparing that premise to Christ not being immoral for violating Jewish norms or to Pilate for not being immoral for contravening expressed tenants of Roman law in the trial against Jesus Christ, by letting mob rule pressure him to crucify an innocent man. This existential logic is simply beyond the pale.

[50] First of all, I must conclude from Posner's usage of biblical metaphors that he has no first hand experience in reading (or understanding) the Bible nor on the moral and biblical foundations of the Rule of law. Instead, he seems to rely on liberal theologians'

---

<sup>75</sup>"[C]hildren received little guidance from a culture steeped in relativistic values." JOHN WHITEHEAD, PARENT'S RIGHTS, 19 (1985).

commentaries *about* the Bible. To clarify Posner's misstatements about the Bible, let me state that unlike the murder of an infant, Jesus, in his life on earth, broke no Jewish "norm" or any Roman law. Jesus faithfully kept the Sabbath and feast days, worshiped and preached regularly in the synagogues, paid his taxes, paid his disciples taxes, and encouraged others to do so.

[51] Jesus, however, did "violate" any extra-biblical Jewish *traditions* like fasting three times a week, tithing even the smallest thing you owned (even herbs and spices), and working (healing) on the Sabbath day, as well as many other purely religious contrivances of the Pharisees, Sadducees, Scribes, lawyers, and the Herodians, the intellectuals of the first century. He did this because these "traditions of men" contradicted the Bible. So like the courage of Antigone against the ruler, Creon in Sophocles' play, *Antigone*, it can be a sublime gesture to break with the traditions of men, especially when paying allegiance to a greater principle or "Higher law", which supercedes all else.<sup>76</sup> However, the Jewish leaders

---

76

The Greek tragedy [Antigone] tells of the ruler Creon forbidding the burial of a traitor, and of Antigone's defiance of his order as she proclaims a higher law. . . .Antigone showed the issues of faith and allegiance . . . struggle between public law and religious tradition, between accommodation and absolutism.

Edward Rothstein, *At Bard College, Celebrating Mendelssohn in Large and Small Ways*, N.Y. TIMES, Aug. 27, 1991, at B3,. On higher law, Constitutional law scholar, John Whitehead, remarked:

First, through the higher law an explicit, non-question-begging standard of absolute justice is provided. Second, the biblically revealed higher law offers the only reliable guide to personal and national health. Third, the higher law imparts biblical principles to society and culture, which in turn should lead men to an understanding of the

that put Jesus on trial, as well as Pontius Pilate and Herod Antipas, by crucifying an innocent man, violated eighteen expressed *biblical* laws.<sup>77</sup> Posner further states that, “It was right to try the Nazi leaders rather than shoot them. . . . And it exhibited ‘Rule of law’ virtues to the German people that made it less likely that Germany would again embrace totalitarianism.” I must respectfully disagree with this idea as a-historical. Hitler’s Third Reich is another favorite metaphor that Posner likes to use, but like his frequent and errant use of biblical history, Posner is equally unpersuasive at using the case of Hitler to bolster his premises. I systematically dispel the popular revisionist view that the Nuremberg Trials gave the German people a dislike of totalitarianism or that those trials were a triumph of the Rule of law over despotism.<sup>78</sup> Throughout his article, Posner avoids the ultimate question—Is academic moralism true? Is legal realism true? Likewise, we will later see that the Court in the *Roe* and *Brown* opinions also dodged addressing these ultimate questions. This avoidance of

---

Bible. Fourth, if the biblical higher law undergirds a law system, it provides a tangible standard whereby justice can be obtained. . . . The early American judicial system is a good example of a system that worked because of the Christian absolutes that undergirded it.

JOHN WHITEHEAD, *THE SECOND AMERICAN REVOLUTION*, 190 (1982). *See also* Corwin, *supra*, note 10, at 149-51.

<sup>77</sup>CHARLES RYRIE, *STUDY BIBLE*, 1879 (1978).

<sup>78</sup>“I firmly disagree with the conventional historical view which holds that the Nuremberg trials were a vindication of the Rule of law and a triumph of Positive law over our original tradition of Natural law jurisprudence.” Washington, *supra* note 47, *see also* DANIEL JONAH GOLDHAGEN, *HITLER’S WILLING EXECUTIONERS: ORDINARY GERMANS AND THE HOLOCAUST* (1996). The author has probed the depth of man’s depravity to explain how Germany—a civilized, cultured, and the most educated country in Europe at that time, was unilaterally deceived, and its ordinary citizens accomplices and perpetrators of the most calculated and devastating genocide in human history. The book lays to rest many myths about the holocaust, that Germans were ignorant of the mass destruction of Jews, that the killers were all SS men, and that those who slaughtered the Jews did so reluctantly.

issues of “ultimate concern,” as theologian Paul Tillich called them, are critical to answer if the reader is to be left with anything substantive to believe in after one’s suppositions are put forth.

## 2. Emotivism

*Emotivism is the view that moral claims are simple statements of preference or aversion and therefore cannot be falsified or confirmed even in principle. . . I think it is false, but I agree that many moral claims are just the gift wrapping of theoretically ungrounded (and ungroundable) preferences or aversions.*<sup>79</sup>

[52] Posner is correct to hold the philosophy of emotivism false as pertaining to moral claims, but plausible as to other religious or ideological issues of men. For example, Mormonism has a substantial following in America (especially in the state of Utah), yet its preference toward polygamy and “aversions” against biracial marriage or to its aversion to ordaining black priests, could reasonably be viewed by an emotivist philosopher as a rationalization to protect a preference/aversion. Another example is radical liberalism’s expressed tolerance to most any idea, belief or practice in the public marketplace of ideas *but* Christianity. Posner, by his insistence on separating law from morals, is following a popular, but ultimately sophistic tradition, which as I will repeatedly state throughout this article, inevitably leads to degeneration of the Rule of law, societal breakdown, civilizational anarchy, and nihilism.

## 3. Moral Particularism

---

<sup>79</sup>Posner, *supra* note 2, at 1645.

*Moral particularism is the view that although there are universal moral truths, they must be applied to particular moral issues with greater sensitivity to social context. . . . As I don't think that there are universal moral truths that have any bite, I reject moral particularism. . . . So, in sum, I embrace a version of moral relativism, reject moral particularism, and accept diluted versions of moral subjectivism, moral skepticism, and emotivism. . . . it might be called "pragmatic moral skepticism." But in the case of morality the audience for academic debate is likely to be either uninterested or, because of self-interest or moral intuition, already committed; and the committed cannot be swayed by, nor the uninterested persuaded to take an interest in, arguments about where one's moral duty lies. So there is a futility to academic moralism.<sup>80</sup>*

[52] Given that the above statement is true, then Posner's pragmatic moral skepticism, as exemplified in these lectures on Holmes, is likewise futile because he (and presumably his audience) are "already committed" to their own philosophy or worldview and cannot, according to Posner's analysis, be expected to convince *anyone* to change their views. So what's the point? Why don't we just take the Epicurean philosophy of life—"eat, drink and be merry, for tomorrow we die."<sup>81</sup> However, upon closer analysis, even this live-and-let-die philosophy is implicitly trying to convert those who are not conspicuously eating, drinking and being merry, to join their hedonist ranks. Indoctrination is an inevitable by-product of any ideology. Thus, Posner's legal philosophy of pragmatic moral skepticism is not only

---

<sup>80</sup>*Id.*

<sup>81</sup>On the Epicureans, Theologian, Charles Ryrie, stated

Philosopher-followers of Epicurus (341-270 B.C.) . . . believed that happiness was the chief end of life. Stoics. The Stoics, who regarded Zeno (340-265 B.C.) as their founder and whose name came from *Stoa Poikile* (Painted Porch) where he taught in Athens, emphasized the rational over the emotional. They were pantheistic. Their ethics were characterized by moral earnestness and a high sense of duty, advocating conduct according to nature.

untenable, but also violates a basic principle of Natural Law, what St. Thomas Aquinas called, “the principle of noncontradiction.” This important principle was a foundation of all Western philosophical thought, reason and science, from Socrates to Einstein. In short, this principle holds that certain laws of nature are immutable, like gravity, murder, and time. A violation of these principles invites an inescapable consequence, whether it be falling down, imprisonment, disease, or the death penalty.

[53] Certain fundamental principles of law and nature cannot, by definition, be contradicted. Otherwise they would cease to be fundamental principles. Inherent in Aquinas’s ideas on Natural law are the ideas of predictability, reliability and immutability. Note also that Posner retreats somewhat from his former thesis that there are *no* universal moral truths, to “no universal moral truths that have any bite.”<sup>82</sup> However, Posner, like many highly intelligent people from all walks of life, refuses to be intellectually honest about issues of “ultimate concern,” preferring rather to be a critic *of* morals and moral theory rather than an adherent *to* moral precepts in judicial decisionmaking. The result is civilizational decay, and the decline of American Constitutional law and legitimate jurisprudence.

### **C. What I Think of “Theory”**

[54] Posner’s views on theory are quite instructive for in them he shows us a glimpse of his own mortality. He intrinsically knows that he will one day share the same fate that befalls the great and small alike in death: “I must be careful about criticizing theory, [t]he first is my age. Not that I am ancient; but as people grow older, they often turn antitheoretical.”<sup>83</sup>

---

RYRIE, STUDY BIBLE, *supra* note 76, at 1572 (internal quotes omitted).

<sup>82</sup>Posner, *supra* note 2, at 1645.

<sup>83</sup>Posner, *supra* note 2, at 1646.

[55] Allow me to cite a short hypothetical narrative that I believe will be apropos as an exposition on this statement. Suppose that a radical euthanasia policy was recently enacted by the legislature and passed constitutional muster by the Supreme Court mandating the immediate “relocation” (to the after-life) of all “old people” over sixty five (because of population control issues). This draconian mandate could be waived if the individual could *prove* in a court of law a reason to live. As a state prosecutor in the case of *State v. Judge Richard A. Posner*, I would declare to the court that he is too feeble to execute in any significant way his duties as Chief Judge of the Seventh Circuit Court of Appeals or as a Senior Lecturer at the University of Chicago Law School. Why? Because by his own admission, people of his age group become “antitheoretical” the older they get. Turning to Posner, I would say, “You must admit, Mr. Posner, that you are not as theoretical as you were at forty, thirty, twenty, or even ten years ago. Correct?” “Yes.” This is an untenable position that, if allowed to continue, would amount to a needless burden upon society. Why? Because in this technological, intellectually sophisticated society of ours, where only the strong survive, for people like Mr. Posner to burden society any longer would violate a cardinal tenant of our great secular state, “survival of the fittest.” Therefore, I petition the court to hold that Mr. Posner should no longer be allowed to encumber the office he presently holds due to his declining ability to be theoretical. Let society be rid of you Judge Posner, and of all the other feeble, antitheoretical senior citizens in our midst, so that society’s triumphal march toward the third millennium will not be impeded! Mr. Posner, how do you plead? (Note, as a pragmatic moral skeptic all pleas to the conscience of the judge would be futile because, like you, the judge espouses to a Positive Law ethic—he who is sovereign, rules). So ordered. By your own words Mr. Posner, the court will judge you

guilty of being antitheoretical and therefore unfit to function any longer in the capacity as a judge and lecturer.

[56] This frightfully nihilistic scenario could become true in our society in just a few years.<sup>84</sup> It could become so because America in many ways is a post-modernist, secular

---

<sup>84</sup>"I teach you the Superman. Man is something that is to be surpassed." FREDERICK NIETZSCHE, *THUS SPAKE ZARATHUSTRA*, 67 (1937). "[T]he autonomous man knows but one law; and that law is his own law, the law of his own force, the law which is at once its own sanction and its own delimitation." G. BURMAN FOSTER, *FRIEDRICH NIETZSCHE*, 189 (1931). "[T]he loss of God leaves man at the naked mercy of his fellows, where might makes right." JOHN MONTGOMERY, *THE LAW ABOVE THE LAW*, 55 (1975). "Abolition has long been overdue. Autonomous man is a device used to explain what we cannot in any other way. He has been constructed from our ignorance, and as our understanding increases, the very stuff of which he is composed vanishes. . . . To man *qua* man we readily say good riddance." B. F. SKINNER, *BEYOND FREEDOM AND DIGNITY*, 200-01 (1971). "In those days, the author observes, God was retreating to the wings, and genius emerged as the focus of something approaching a secular religion." Matthew Scully, *Book Review of Carl Pletsch*, *NATIONAL REV.* Aug. 26, 1991 at 40 (reviewing CARL PLETSCH, *YOUNG NIETZSCHE: BECOMING A GENIUS*) (internal quotes omitted).

But if we define philosophy as a discipline in which the object is truth, then genius consists not in creativity but in discernment. The superior philosopher is not the one who fashions the most daring or intricate theoretical system. The superior philosopher is the wisest, the one whose ideas bear the closest relation to reality. As a philosopher and guide for mankind, therefore, Nietzsche rates praise for his 'genius' only if nihilism is correct and all is meaningless, what meaning is left to words like philosophy, wisdom, or genius?

*Id.* at 42; "Toward Socrates, Nietzsche bore a ferocious hatred, because the philosopher had taught of moral virtue and humility, foreshadowing the 'slave morality' of Christianity—a still greater calamity for mankind." *Id.*; "[T]he divisions in culture are not just horizontal divisions between mature adults; they are divisions between parents and children." Samuel Lippman, *Can We Save Culture?*, *NATIONAL REVIEW*, Aug. 26, 1991 at 53;

We must recognize that in a free society, private choices in culture must be subject to minimum restraint. But we must also be careful not to confuse rights with virtues: the exercise of the right to free cultural choice is not a good in itself, but rather must be subject to moral criticism and judged by the

Democracy, where the caprice of the majority at any given time is the law. The Framers called this, "mobocracy." Democracy is of course diametrically opposed to both the original philosophical precepts relied on by the Founder's of America and the Framers of the Constitution original ideal of a Republic; a sacred Republic where the Rule of law and the Constitution rooted in the immutable principles of Natural law and biblical theism, served as a bulwark to mob rule and to mankind's savage propensities toward excess, avarice and injustice to his fellow man. Democracy was much feared by the Framers<sup>85</sup> based on their numerous writings and speeches at the First and Second Constitutional Conventions because

---

content of the choice. The myriad things we do are either better or worse, higher or lower, more desirable or less desirable, more beautiful or less beautiful, more on the side of life or less on the side of life. This idea of cultural hierarchy stands in direct opposition to cultural relativism, the notion that everything is equally valid, nothing better than anything else and nothing worse. There will be those who call this idea elitist; I think it only describes the way one chooses a physician. Just as cultural relativism is unacceptable, so is moral relativism, the idea that what people do cannot be judged, only empathized with. Morality here means examining what people do in terms of a higher value; in our society this value can only be the carrying on of civilized life. Art, learning, liberty, and even the market are not suicide pacts. All these components of human action and thought are important, not just in themselves, but because they serve the purpose of life.

*Id.*, 53.

<sup>85</sup>The Framers borrowed the idea of separation of powers from the Bible, specifically, *Isaiah 33:22* (*For the Lord is our judge, the Lord is our lawgiver, the Lord is our king; he will save us*). See generally BARTON, *Original Intent*, *supra* note 1, at 335-338. "A complete separation of powers was not considered feasible by the Framers so they modified the doctrine by adding the notion of "checks and balances," whereby each of the three branches of government would be left alone by the others. This actually strengthened the power of the courts to review the actions of the executive." *The Government: How and Why It Works*, ENCYCLOPEDIA BRITANNICA, 49 (1978).

they well understood how fickle and unreliable mankind is and how quickly a Democracy can devolve from it's original principles of Natural law—a Judeo-Christian worldview that mandates equal justice for all. The liberal academic class, secular intellectuals, and moral skeptics like Posner, presently view these ideas as medieval and backward relics of a bygone era. Thus, the majority rules: whether it be that which defends an admitted adulterer as President or condones a Leftist oligarchy on the Supreme Court, who has at times throughout it's history, advocated and affirmed the constitutionality of slavery, upheld the slaughter of Native Americans and the stealing of their lands thus invalidating U.S. Treaties, legalized abortion on demand, refused to let women vote, and found a “constitutional right of privacy.” A constitution that legalized contraceptives, euthanasia, and income tax, can on any whim or any pretext, legislate your involuntary departure from this life on Earth, if it is in society's best interest to do so. Isn't this utilitarianism writ large? Isn't this a form of social nihilism?

[57] Posner says that “it would be loading the dice to define “theory” narrowly and then reject academic moralism as falling outside the definition. . . . Evolution, for example, cannot be observed, because most of it occurred before there were any observers who have left records.”<sup>86</sup> However, this is essentially what he does throughout his article. For example, Posner states that,

These Lectures present a theory *about* morality. A theory *of* morality, in contrast, is a theory of *how* we should behave. . . . I call theories *of* morality “moralism” to underscore their aim of changing human behavior and “academic moralism” to distinguish academic moral philosophy from moral preaching outside the academy. Jesus Christ was a moralist, but he did

---

<sup>86</sup>Posner, *supra* note 2, at 1646.

not make academic-style arguments in support of his preaching. I am interested in the type of moralizing that is, or at least pretends to be, free from controversial metaphysical commitments such as those of a believing Christian, and so might conceivably appeal to the judges of our secular courts.<sup>87</sup>

Here we find Posner at his most bombastic and incoherent tone. Apparently he doesn't realize that America's judges and their courts were not always "secular." Secular judges are a relatively recent phenomenon (aberration). For example, John Jay, the first Chief Justice of the Supreme Court, appointed by President George Washington himself, stated a quite different conception of the nature of law than Posner when he wrote: "Providence has given to our people the choice of their rulers, and it is the duty as well as the privilege and interest of our Christian nation to select and prefer Christians for their rulers."<sup>88</sup> How about that, a Chief Justice of the United States Supreme Court calling our society a "Christian Nation" and not one constitutional challenge until 1947 in *Everson v. Board of Education*, where Justice Frankfurter and his plurality gave us the infamous "separation of church and state" doctrine?

[58] Here, as well as throughout his Harvard Article, Posner is being both pretentious and disingenuous by expecting the reader to believe that his Lectures on Holmes were designed to talk *about* morality and not to present a theory *of* morality. I learned long ago that the best way to really understand what a person is saying (or meaning) is to listen to what he claims he is *not* saying or doing. Throughout Posner's Article, he systematically presents a

---

<sup>87</sup>Posner, *supra* note 2, at 1647-48 (emphasis added).

<sup>88</sup>JOHN JAY, THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY (Henry P. Johnson ed., 1890); *See also* B. F. MORRIS, THE CHRISTIAN LIFE AND CHARACTER OF THE CIVIL INSTITUTIONS OF THE UNITED STATES 153 (George W. Childs ed., 1864).

case *against* mixing morality and law by *doing* just that—mixing morals and law. I think it's safe to conclude that Posner would deduce that his Lectures were a colossal failure if at the end of his speech the entire audience reacted as the Parisian audience did at the debut of Igor Stravinsky's, *La Sacre du Printemps* (The Rite of Spring), which then caused a riot in the audience.<sup>89</sup> Posner's Lectures, just as any lecture, sermon, apologetic speech, or discourse, is designed (implicitly or explicitly) to convince the audience to take his words seriously enough to be persuaded to join his point of view. Otherwise, what's the point?

[59] While Posner contends to forgo narrowly defining “theory” so as to then reject academic moralism, he does precisely that throughout his article by insisting on a strong separation of law and morality, moral realism from religious-based moral theory, and philosophy from normative jurisprudence. For analysis' sake let me state that there are basically three philosophical worldviews: (1) God is God (theism); (2) Man is God (humanism); (3) Idol (“ism”) is God (paganism). Posner fits squarely in the second category, for his intellect is his God. Another hypothetical narrative on this point to emphasize the absurdity of this worldview would be to imagine that if tomorrow Posner was stricken with Alzheimer's disease, would Posner's intellect still be God? Could Posner's intellect remain his God in its now enfeebled condition or would his God now be the nurse that leads him to the bathroom? If Posner protested, would the nurse become his new god by default? By force? By involuntarily administered drug injections? After all, both Positive law and legal realism would hold that this nurse is exercising the Rule of law over his life for she is controlling where he goes, when he goes, and what he does. Posner's moral sentiments or

---

<sup>89</sup>So offensive was this music even to the notoriously liberal sensibilities of the French, that at the 1910 debut of Igor Stravinsky's, *The Rite of Spring*, the Parisian audience erupted into a violent riot which had to be quelled by the police.

protestations would be of little consequence to his secular caregivers and would probably be characterized by his doctors and nurses as the incoherent ranting of a feeble-minded old man.

## 1. The Relativity of Morals

*Even without any metaphysical grounding, there could be a universal moral law in the sense of a set of principles. . . but there doesn't appear to be a universal moral law that is neither a tautology (such as "Don't murder") nor an abstraction (such as "Don't lie all the time"). . .*<sup>90</sup>

[60] Posner is theoretically correct here that "there could be a universal moral law."

However, a universal moral law absent metaphysical precepts would be like the political philosophy of atheistic communism found in countries like Russia, China, North Korea, Cuba, or a socialist welfare state like Italy, France, Sweden and, to a lesser degree, America.

The reaction to universal moral law varies in these countries from outright hostility and savage persecution of a biblical scale, to superficial lip service of "family" and "traditional" values rhetoric. The Framers of the Constitution understood enough about world history to realize that a relativist philosophy of law, absent a specifically Judeo-Christian foundation, would ultimately lead to anarchy and despotism. For example, before Moses codified God's law into the Ten Commandments, God made His law known to man via His spoken word and the law of their hearts (conscience). Later, moral theorists like Cicero, Aquinas, Montesquieu, Blackstone<sup>91</sup> and Locke<sup>92</sup> would call this "The Law of Nature" (i.e., Natural

---

<sup>90</sup>Posner, *supra* note 2, at 1650.

<sup>91</sup>Blackstone described law as a rule of action given from a superior source to an inferior one to obey. Blackstone further emphasized that "the doctrines thus delivered we call the revealed or divine law, and they are to be found only in the holy scriptures. Upon these two foundations, the law of nature and the law of revelation, depend all human laws; that is to say, no human laws should be suffered to contradict these." WILLIAM BLACKSTONE,

law). In the biblical narrative of Cain and Abel, Cain killed his brother Abel in a jealous rage. Although Cain violated no written law (i.e., special revelation: “the Law of Nature’s God”) because this incident predated Moses’ Ten Commandments by about 1500 years. This murder did not dispel the fact that Cain purposely and with deliberation violated God’s eternal, objective moral order of the universe (Natural law) that was set in motion when he created the heavens and the earth (“In the beginning, God. . .”). Therefore, God was wholly justified in punishing Cain for his moral rebellion. Furthermore, like Natural law’s antecedent, the English Common Law, reliance on statutory law was replaced by judicial precedent, not because the English viewed the judges as demigods, as society presently seems to view judges or as they (the judges) act themselves today, but the Common Law was a natural development of both Anglo and American jurisprudence, whereby judges applied Natural law principles to actual cases over the generations until they created a quite sizable

---

COMMENTARIES ON THE LAWS OF ENGLAND 42 (1765-1770) [hereinafter, *Commentaries*]; Blackstone furthered: "Man, considered as a creature, must necessarily be subject to the laws of his Creator, for he is entirely a dependent being. . . And consequently, as man depends absolutely upon his Maker for everything, it is necessary that he should, in all points, conform to his Maker's will." BLACKSTONE, COMMENTARIES 39 ; "This will of his Maker is called the law of nature." *Id.*; "In the first century of American independence, the Commentaries were not merely an approach to the study of law; for most lawyers they constituted all there was of the law." DANIEL BOORSTIN, THE MYSTERIOUS SCIENCE OF THE LAW 3 (1958); Natural law "continues to have enormous influence upon the law and legal processes." RENE A. WORMSER, THE STORY OF THE LAW 80 (1962). The Commentaries were popular in Great Britain, but "by 1775, more copies of Blackstone's Commentaries had been sold in America than in all England." PERRY MILLER, THE LIFE OF THE MIND IN AMERICA 115 (1965).

<sup>92</sup>"John Locke . . . seculariz[ed] the Presbyterian tradition, nevertheless drew heavily from it." FRANCIS SCHAEFFER, HOW SHOULD WE THEN LIVE 109 (1983); Francis Schaeffer has noted that many "of the men who laid the foundation of the U.S. Constitution were not Christians in the [full] sense, and yet they built upon the basis of the Reformation either directly through the *Lex, Rex* tradition or indirectly through Locke." *Id.* at 10.

corpus of case law to guide future generations of judges in their decisionmaking. This maxim of legal theory was called *stare decisis* (i.e., precedent).

[61] On the slavery issue, Posner's tortured logic is contrary to both history and common sense when he states: "It is provincial to say that 'we are right about slavery. . . and the Greeks wrong...' Our modern beliefs concerning cruelty and inequality are *contingent*, rather than the *emanations* of a universal law."<sup>93</sup> The primary reason that America finally condemned slavery was that a small and courageous minority group of people including many of the Founders, like John Jay, George Mason, Benjamin Franklin, and John Quincy Adams,<sup>94</sup> abolitionists, like John Brown, William Lloyd Garrison, Harriett Tubman, and

---

<sup>93</sup>Posner, *supra* note 2, at 1650 (emphasis added) (quoting Ronald Dworkin, *Objective and Truth: You'd Better Believe It*, 25 PHIL. PUB. AFF. 87, 88-89 (1996)).

<sup>94</sup>

Further confirmation that even the Virginia Founders were not responsible for slavery, but actually tried to dismantle the institution, was provided by John Quincy Adams (known as the "hell-hound of slavery" for his extensive efforts against that evil). Adams explained:

The inconsistency of the institution of domestic slavery with the principles of the Declaration of Independence was seen and lamented by all the southern patriots of the Revolution; by no one with deeper and more unalterable conviction than by the author of the Declaration himself [Jefferson]. No charge of insincerity or hypocrisy can be fairly laid to their charge. The original draft of the Declaration of Independence had language outlawing slavery, but in order to ratify the Constitution, Jefferson and other like-minded Framers relented on this issue for the higher cause of legitimizing the Republic. Furthermore, never from their lips was heard one syllable of attempt to justify the institution of slavery. They universally considered it as a reproach fastened upon them by the unnatural step-mother country [Great Britain] and they saw that before the principles

Frederick Douglass, free and bond Black people, rose up and refused to allow slavery to exist in America any longer. Contrary to Posner's view, that slavery ended because it became economically too expensive to maintain, is ludicrous, cynical and terribly misguided. What is true is that America returned to its Christian roots and saw America's trafficking in Black slavery as failing to live up to its own creed, namely "that *all* men are created equal" and that they are endowed by their Creator with certain inalienable rights including life, *liberty. . .*" The Declaration of Independence declared this, the founding Fathers and their countrymen fought two bloody revolutions to acquire this, the Constitution codified this, the Bill of Rights amended and restated all of these self-evident truths conceived in liberty.

[62] America's founding documents as well as many other state and local laws were originally based upon Natural law philosophy. Therefore, even though chattel slavery as practiced in America was an inhumane and barbaric institution that never should have been tolerated in such a country, which claimed to be founded upon Christian precepts, the founding documents had in them the seeds of freedom sown within their very stanzas. It was only to the intransigence of the human heart of mankind, particularly in the pro-slavery South, that muffled the cries of sanity, justice, humanity, and reason; that muted the pleas

---

of the Declaration of Independence, slavery, in common with every other mode of oppression, was destined sooner or later to be banished from the earth. Such was the dauntless conviction of Jefferson to his dying day.

In the *Memoir of His Life*, written at the age of seventy-seven, [Jefferson] gave to his countrymen the solemn and emphatic warning that the day was not distant when they must hear and adopt the general emancipation of their slaves.

BARTON, ORIGINAL INTENT *supra* note 1, at 290 (internal citation omitted).

from their Black brothers and sisters to be treated equally as far back as the first arrival of Black Africans in 1619.<sup>95</sup> If the conscience of white people had not been significantly moved toward affirmative action, and if influential and powerful white people in key places in government, people like Presidents John Quincy Adams, Abraham Lincoln, the Abolitionists, and Frederick Douglass had not been moved towards the slave's plight, would slavery ever have ended. Thus, Posner's characterization of such a monumental historical event as slavery as merely a "contingent" event rather than an "emanation" of universal law is grossly ignorant of both history and of the true nature of law.

[63] One only has to look at other nations' experiments with government to see the pathetic trial of woe and ignominy caused by the folly of separating law from morals. Separating law from morals failed with the French Revolution. Separating law from morals failed with the European monarchy; before that, separating law from morals failed (or succeeded, depending on your point of view) in America's Civil War. Separating law from morals failed in World War II, caused great upheavals in the fascist, Vichy government of France and the socialist governments throughout Western Europe, communist Russia, North Korea, and China, Nazi Germany in the 1930s and 40s, and nihilist Cambodia in the 1970s. Unique among the history of the governments of men stands the great Constitutional Republic: America—the longest continuing Republic in the history of mankind.

[64] The painful irony here is that you very rarely even hear the word "Republic" used to describe either this country's governmental system, nor in reference to America's official

---

<sup>95</sup>Note that contrary to the historical revisionism of many liberal historians, America was not founded as a slave country, but the Pilgrims were actually missionaries of the Christian faith sent to America to proselytize the pagan Native American Indians, and to convert them to Christianity.

public policy of exporting Republican principles to other countries; that there is no public outcry toward this historical revisionism by our own elected officials, historians, political scientists, media venues, only belies a profound apathy and ignorance in American society whereby the general populace is willfully ignorant to the lessons we have not learned from history.

[65] Although Posner frequently calls mixing law and morals or politics and morals “confusing”, what is really confusing and incredulous is when he mixes some of his unique ideas on economic theory with actual political and historical events. For example, Posner states, “[s]ome moral principles, like unenforced laws, lag behind social change, and for the same reason: they don’t have much effect. . . One reason for the widespread condemnation of the Nazi and Cambodian genocides is that we can see in retrospect that they were not adaptive to any plausible or widely accepted need of the societies in question.”<sup>96</sup> My response to this egregious example of historical revisionism is that *if* they (the Nazi and Cambodian regimes) *were* “adaptive” or “plausible” to any “widely accepted need”, *then* would their acts of genocide be economically feasible to Posner? I certainly hope not! However, using this type of utilitarian philosophy in economic theory can be just as dangerous a tool in the hands of a dictator like a Lenin, Stalin, Hitler, or Pol Pot, as it can be in the hands of an unelected five member oligarchy like our modern Supreme Court. A Court that offers decisions from the bench with impunity, which would have caused a third revolution had the Framers been alive today. The sad reality is that in place of moral theory, Posner can only offer the reader his cold, insipid utilitarian speculations in the tradition of Bentham, Austin, and Holmes. There is no “innovation” or creativity in legal realism, a trait

---

<sup>96</sup> Posner, *supra* note 2, at 1652.

Posner repeatedly charges the moral theorists lack, therefore Posner is quite right by saying, “. . . we like to dress up our preferences and intuitions in universalistic language, giving a patina of objectivity to a subjective belief or emotion.”<sup>97</sup> This is exactly what Posner and many of the academic class have done by promoting the nihilist ideology—“separation of law and morality.” It is clearly evident by the perverse logic Posner uses to justify such a separation in the following passage: “. . . there is no [more] moral progress . . . to the residents of wealthy modern nations . . . than head-shrinkers and cannibals and mutilators of female genitalia. We are lucky in knowing more about the material world than our predecessors did and some of our contemporaries do.”<sup>98</sup> Although Posner would not characterize his philosophy as “vulgar relativism,” I would seriously disagree. How can one fail to see the vast social differences between Western civilization and the barbaric and savage practices of cannibalism or the mutilators of female genitalia currently practiced among several Third World nations? Posner’s relativism contends that the only difference between Western Civilization and Third World countries is our *technological* superiority. This reductive analysis has as its lowest common denominator, materialism. As I have stated many times in this article, Posner, by dispensing with a theistic worldview like Cardozo, Holmes and Llewellyn before him, necessarily devolves his philosophical base to the godless void of meaninglessness and materialism. [66] If you separate law from morality you are forced out of necessity into a materialist worldview; your *god* is merely your base five senses and whatever your selfish whims happen to be at the moment. Therefore, you will

---

<sup>97</sup>Posner, *supra* note 2, at 1653.

<sup>98</sup> *Id.*

pursue most vigorously that to which you give credence –what looks good, tastes good, smells good, sounds good or gives you the most pleasure. Empiricists like Posner are wholly one-dimensional persons philosophically, with little regard towards the conscience, the soul, or the spirit realms of consciousness; to them, the intellect is their controlling philosophy and provides the only meaningful basis of their worldview. The tangible, visible reality of realism is all that matters.

[67] Posner’s great dilemma is this: although he despises moral theory, he is forced to use it to criticize/defend his own brand of moral theory—pragmatic moral skepticism and Holmesian legal realism. Boiled down to the lowest common denominator, Holmes and Posner are utilitarian in their legal philosophy that the idea that carries the day is the idea that the *consensus* or a majority of people happen to hold at that time. This is what they mean by the law, nothing more, nothing less. Moral issues of life and abstractions like *truth*, *justice* and *law* to Posner are determined by opinion polls. As a result, they are highly subjective, transitory, indeterminate and as Holmes frequently remarked, “are in a constant state of flux.” Furthermore, Posner is forced to admit that:

[I]f moral theory does not convince because it lacks the cogency of scientific reasoning, how likely is it that these Lectures, . . . will convince?. . . But can’t it be argued that these Lectures are covertly moral, that I am in fact commending a kind of existential morality (antimorality as morality) in which people take responsibility for their actions without the comfort of supposing that they are acting in accordance with universal moral norms?<sup>99</sup>

[68] In other words: am I (or can I be) a moral or a good person without reliance on God

---

<sup>99</sup>*Id.* at 1655.

or some universal moral code?<sup>100</sup> I answer, No! Posner answers, Yes. Posner's supposition of morality without morals is another example of sophistic logic masquerading as intellectual rigor that can quite easily deceive the simple-minded. This myopic, egocentric view arrogantly ignores 6,000 years of recorded human civilization, where the perversion of law and morality contributed to unspeakable acts of cruelty and debauchery that continue to exist to this day. Posner's existential morality is just one of a host of false ideologies demigods, dictators, politicians, and charlatans throughout history, used for the acquisition of influence, money and power, or for the propagation of a naturalistic ideology, utilitarianism, Darwinism, communism, fascism, dialectical materialism, liberalism, and feminism.

[69] Posner, like Bentham and Holmes before him, essentially has a utilitarian worldview:

[C]onsensus makes "truth" rather than truth forcing consensus—moral theorist are up against the brute fact that there is no consensus on any moral principles from which answers to contested moral questions might actually be derived. If at some level moral theory is like scientific theory, as moral realists believe, it is like failed scientific theory.<sup>101</sup>

This adherence to utilitarianism, despite its numerous theoretical problems, is quite perplexing. For example, his fondness for "consensus" making truth rather than "forcing consensus," as he claims moral theorist do, harkens back to the old hackneyed cliché liberals level toward anyone with moral principles as trying to "force your morality down our throats." Moral theorists are not trying to force any ideas upon anyone, but to instruct, to teach, to demand, and to require morality in law as an irrevocable prerequisite against mob

---

<sup>100</sup>A well-known sentiment during the Colonial period that expressed this idea was this: "Let me hear no more of putting confidence in man, but shackle him to the chains of the Constitution." BARTON, *supra* note 1.

<sup>101</sup>Posner, *supra* note 2, at 1657.

rule and civilizational backwardness. He gives no evidence or historical examples to support this assertion, but seems to be one of many episodes of his *ad hominem* attacks against moral theorists. Perhaps this is because deep down he knows that moral theory *can* solve society's moral dilemmas more effectively than his brand of skepticism, which offers only cold, staid rhetoric. Remember that God destroyed all of creation in a catastrophic deluge on the consensus of one man named Noah. Truth doesn't require a majority vote. Truth, though held by one person, ultimately overrules all other competing ideas and ideologies because of its intrinsic verity. As I stated earlier, truth is inevitable

### **E. Reconceiving Morality Functionally**

[70] Perhaps more so than any other philosopher Posner is admittedly fond of evolution and it plays a critical part in shaping his worldview. For example, Posner contends that:

[M]oral discourse may to a considerable extent be a mystification rooted in a desire to feel good about ourselves — to feel that we are more than just monkeys with big brains, that we are special enough for God to take particular interest in us . . . all that the moral emotions actually imply, however, is that we are social animals with large brains<sup>102</sup>

[71] From a legal standpoint, this naturalistic view has its origins in Positive law. Although Posner, a legal realist, is critical of it, legal realism and other legal theories including formalism, feminism, Critical Legal Studies, Dworkin's "secular" Natural law, and many others ideologies come from the basic precepts of Positive law theory which is basically rooted in a philosophy of relativism. However, Natural law (i.e., Originalism) is quite different from all other legal theories. It turns the mirror of our perverse human natures back to our view so that we can see ourselves as God sees us in our sinful state—from the inside

---

<sup>102</sup> Posner, *supra* note 2, at 1657, 62.

out (intrinsic, objective), and not as man constructs his philosophy, from the outside in (extrinsic, subjective).<sup>103</sup> Posner, the pragmatic moral skepticist, like most scholars in the academic class, views evolution as the only rational, intellectually coherent and scientific explanation of the origins of life despite mounting theoretical problems and written documentation by Darwin himself that evolution, as a comprehensive, coherent, scientific explanation of the origins of man, is wholly untenable and quite impossible as well.

[72] I, like a growing number of scientists and academics, view evolution as scientific mythology.<sup>104</sup> Evolution is a strongly held academic fairytale for adults<sup>105</sup> tenuously grasped by the academic class to justify and rationalize their continual subjective preferences toward naturalism, empiricism, positivism and their reflexive aversions to the metaphysical, theism, and ultimate truth. Beneath the facade of evolution is sophistic, high-blown, intellectual-sounding propaganda.<sup>106</sup>

[73] Evolution is a religion. Its adherents of course deny this. The scientific mythology of evolution is worshiped by many in the academy as tenaciously as the Greeks and Romans held to their myths to explain history and to bring credence to the metaphysical world even though they must have known on an intrinsic, intellectual level that Zeus was not the God of

---

<sup>103</sup>. *But be ye doers of the word, and not hearers only, deceiving your own selves. 23. For if any be a hearer of the word, and not a doer, he is like unto a man beholding his natural face in a glass: 24. For he beholdeth himself, and goeth his way, and straightway forgetteth what manner of man he was. James 1:22-24.*

<sup>104</sup>See Washington, *Liberal Law and the Scientific Mythology of Evolution: McLean vs. Arkansas Board of Education*, in *THE DEVIL IS IN THE DETAILS*, *supra* note 1; PHILLIP JOHNSON, *DARWIN ON TRIAL*, (1993).

<sup>105</sup>See Washington, *supra* note 48, at 44.

<sup>106</sup>Mary Burgen, *Professing and Believing*, *ACADEME*, Jan./Feb.1998 at 3.

Abraham, Isaac and Jacob; that Prometheus was not Elijah; that Apollo was not David; that Psyche was not Deborah; that Hercules was not Samson. How else could you explain the monument erected in Athens, the seat of pagan intellectualism and philosophy: “TO THE UNKNOWN GOD.”<sup>107</sup>

[74] What a pathetic, feeble, impotent, and ignorant attempt to discern God. The most brilliant minds of first century antiquity were totally unaware that God, at a fundamental level, is self-evident and can be comprehended merely through observation of His creation.

The Apostle Paul stated his apologetic thusly:

For the invisible things of him from the creation of the world are clearly seen, being understood by the things that are made [creation] even his eternal power and Godhead [divinity] so that they are without excuse.<sup>108</sup>

[75] Posner clings ever so precariously to biological evolutionary theory despite a growing body of scientific evidence to the contrary, because, having wholly rejected moral theory, evolution provides the only intellectually plausible alternative to his rather moribund brand of pragmatic moral skepticism. In actuality, naturalism, empiricism, and evolution are gutless ideologies. It follows the doctrine of the herd mentality, of mob rule, of blind loyalty indicative of a cult and closes ranks around this ideology despite increasing theoretical problems that it’s adherents are or should be fully aware of.<sup>109</sup> With every spade of dirt

---

<sup>107</sup>*Id.*

<sup>108</sup> *Romans* 1:20.

<sup>109</sup> Bishop T. D. Jakes in one of his sermons used a naked metaphor analogy to make his point that you fear what people might think if they see your nakedness. It’s not so much that you are naked, but you aren’t sure what they actually think about you. *See* T.D. JAKES, *NAKED AND NOT ASHAMED* (T.D. Jakes Ministries, Dallas 1997). Mankind is basically a social being and we will do almost anything to be accepted. That applies from the playground to the academy, from the ghetto to the Supreme Court—consensus rules!

turned in the ancient lands of Israel, Syria, Iran, Iraq, Egypt, Ethiopia, etc. there is one more spade of dirt to bury the pernicious, sophistic, scientific mythology called evolution. Plato's moral authority was and is intrinsically of human origins, thus pagan and mortal. It begins and ends with Plato. The Apostle Paul's moral authority is transcendental, thus immutable, because his philosophy has a foundation rooted in God and biblical theism. The irony here is stark—Plato's writings speaks often about "god," however, the Bible says nothing about Plato, although it speaks of many philosophers both pre- and post-Plato. It seems as far as God is concerned, Plato's ideas are as dead (and inconsequential) as he is. Such is the judgment on all the vain philosophies of mere mortal man—"whose breath is in his nostrils."

#### **F. The Moral Sentiments**

[76] Posner's constant reductive analysis of moral theory as "altruism" is equally problematic and unfounded when he states that, "[a]ltruism. . . fits comfortably into the picture of man as 'economic man,' motivated by self-interest."<sup>110</sup> While I respect his point, I think Posner once again is being unduly skeptical. Let me give a brief historical analysis of Posner's philosophical antecedent for this view—namely Holmes' "Bad Man" thesis.<sup>111</sup> In the early 1930s, a third school of legal theory emerged that sought to understand the law in the most concrete fashion possible. *Realists*, as they were known, believed that the legal theories of Natural law and Positive law were too cerebral and abstract to be relevant in modern jurisprudence. Realists like Oliver Wendell Holmes, Benjamin Cardozo, Roscoe Pound, and Carl Llewellyn, began to look at explicitly what lawyers, judges and the courts actually *do* as really being the law and not what philosophers and theorists like Montesquieu, Blackstone,

---

<sup>110</sup> Posner, *supra* note 2, at 1662.

<sup>111</sup> ADAMS, *supra* note 28, at 85.

Locke, and Austin *say* they do. The rallying cry of realists was “law in action” as opposed to “law in the books.” Justice Oliver Wendell Holmes, in his celebrated essay and the subject of Posner’s Lectures, *The Path of Law*,<sup>112</sup> elucidated the core tenets of the legal realism school. To understand realism, you must see this theory as an outgrowth of the times it came from—the industrial revolution—where the late nineteenth century saw perhaps the greatest growth of technology and science than all the previous millennia of mankind combined. How could the law keep pace with these innovations? Holmes and others realists were actually reacting to an earlier legal movement called *formalism*, championed by Harvard law school’s first dean, C. C. Langdell, and Harvard law professors Williston, James Barr Ames, and others, who in the late 1870’s, sought to combine the rigors of scientific empiricism to legal precepts.<sup>113</sup> The result was the “casebook method” that applied the logic of deductive reasoning and evolutionary theory to the study of law by applying a pre-existing “Rule of Law” straightforwardly to the facts, thus determining the proper conclusion or holding of the Court. These “law as science” theorists became Holmes’ major targets in his essay, *The Path of Law*. Holmes stated that, “the life of the law has not been logic, it has been experience.”<sup>114</sup> Holmes argued against a formalist approach to the law through the eyes of an archetypal person he calls the bad man.<sup>115</sup> This bad man is supposed to be the average person whose only concerns are the end result, the bottom line, or how much he can get away with before the law punishes him. For example, Holmes’ bad man views a contract,

---

<sup>112</sup>Oliver Wendell Holmes, *The Path of the Law*, 10 HARVARD LAW REVIEW 457 (1897).

<sup>113</sup>W. Burlette Carter, *Reconstructing Langdell*, 32 GEORGIA LAW REVIEW 1 (1997).

<sup>114</sup>ADAMS, *supra* note 28, at 85.

<sup>115</sup>*Id.* at 91-92.

not as a moral obligation or in normative terms as “keeping ones word,” but simply as a choice between competing obligations—perform the contract or pay the penalty.

[77] Likewise in tort law, Holmes’ bad man would view the theory of paying damages for a negligent act he afflicted on someone as nothing more than a tax—the State punishing him for his negligent act. Therefore, Holmes concludes that a proper understanding of law is closer to the art of *predicting* rather than *deducing*. How much can one get away with before society punishes me versus using logical deduction to reach a specific conclusion. Holmes and the realist movement insisted that there is no logic in the law, as the formalists maintained, but held that in actual practice judges and the courts do not use logic to decide cases in the sense of using the “Rule of law” in deducing from general legal principles to specific conclusions.

[78] Holmes saw no logic in the law because he believed that the law developed very slowly based on the traditions and history of the people abiding under such laws. On this point, Holmes felt formalism failed to understand the actual nature of law. Holmes understood law not as a fixed canon of immutable commandments, but law as a constantly shifting, “evolving” set of rules that accommodate themselves to the constantly changing demands and interests of society (utilitarianism). Later, constitutional scholars like Duncan Kennedy and Laurence Tribe referred to this phenomenon as the “indeterminacy” of the law. Writers, Dornan and Vedlik, citing Holmes’ relativist approach to decisionmaking, described it as “the belief that truth cannot be immutable, that there are no abiding, timeless truths or absolute moral norms, because reality is judged to be in a constant state of flux. Truth . . . is whatever works in a given situation.”<sup>116</sup> This is classic Positive law jurisprudence

---

<sup>116</sup>DORNAN AND VEDLIK, *supra* note 16, at 70.

that unfortunately most modern jurists like Posner use it in their judicial decisionmaking.

Relativism is a primary reason why America's modern legal system is in such a state of chaos and for all intents and purposes, why the Rule of law doesn't solve modern problems in the law. The Rule of law is essentially dead.

[79] Constitutional scholar, John Eidsmoe, outlined several precepts of the philosophy of relativism as applied to law:

- (1) There are no objective, God-given standard of law, or if there are, they are irrelevant to the modern legal system.
- (2) Since God is not the author of law, the author of law must be man; it is law simply because the highest human authority, the state, has said it is law and is able to back it up.
- (3) Since man and society evolve, law must evolve as well.
- (4) Judges, through their decisions, guide the evolution of law.
- (5) To study law, get at the original sources of law—the decisions of judges; hence most law schools today use the “case law” method of teaching law.<sup>117</sup>

[80] Holmes, like Posner, favors a utilitarian philosophical approach to the law. In an article written early in his career in 1920, Holmes remarked that, “every one instinctively recognizes that in these days the justification of a law for us cannot be found in the fact that our fathers always have followed it. It must be found in some help that the law brings toward reaching a social end.”<sup>118</sup> Some forty three years later, Holmes, still holding to the

---

<sup>117</sup>JOHN EIDSMOE, CHRISTIANITY AND THE CONSTITUTION 394 (1987).

same anti-originalism dogma, stated in his seminal work, *The Common Law* that: “the felt necessities of the time, the prevalent moral and political theories, . . . even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.”<sup>119</sup> Justice Holmes, writing for the majority in, *Trop v. Dulles*, held that, “[the Constitution] must draw it’s meaning from the evolving standard of decency that mark the progress of a maturing society.”<sup>120</sup> Likewise, Cardozo, a no less equally revered jurist as Holmes, stated in his book, *The Nature of the Judicial Process*, that, “I take judge-made law as one of the existing realities of life.”<sup>121</sup> Dornan and Vedlik, in a similar vein said, [the Court has] “liberated itself from what the Declaration of Independence called “the Laws of Nature and of Nature’s God.”<sup>122</sup> Finally, it was Chief Justice Charles Evan Hughes who boldly exclaimed that–“The Constitution is what the judges say it is.”<sup>123</sup>

[81] Was Justice Holmes correct in his assessment of the nature of law? On judicial decisionmaking? On the nature of law? I do not seriously think that he was correct on any of these issues. Activist judges of all judicial philosophies, especially since the early 20<sup>th</sup> century, have sown the wind with a litany of outrageous opinions that in effect have contributed to the denigration of societal morality. Unfortunately, American society will reap the whirlwind for

---

<sup>118</sup>Oliver Wendell Holmes, *Law in Science and Science in Law in* COLLECTED LEGAL PAPERS 225 (1920).

<sup>119</sup>OLIVER WENDELL HOLMES, *THE COMMON LAW* 5 (1963).

<sup>120</sup>*Trop v. Dulles*, 356 U.S. 86, 101 (1958).

<sup>121</sup>BENJAMIN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 10 (1921).

<sup>122</sup>DORNAN & VEDLIK, *supra* note 16, at xi.

<sup>123</sup>EDWIN CORWIN, *THE CONSTITUTION AND WHAT IT MEANS TODAY* xxiv (1937).

not being vigilant in maintaining their Republic as the Framers warned, and for allowing the destruction of the Rule of law.

### 1. Rationalization and Rule-Skepticism

[82] Notwithstanding, Holmes and other realists contempt for logic, deductive reasoning is historically how judges and the courts come to decide cases and settle disputes—deducing conclusions from a preexisting “Rule of law.” The realist counters that the “Rule of law” is nothing but a subjective rationalization judges and the courts use it to justify their opinions. Legal realist and judge, Jerome Frank, has stated that the intrinsic quality of legal reasoning is an end/means paradigm. The judge, in deciding a case, looks to the *end* he wishes to achieve or his “gut feeling” and crafts the necessary *means* via application of a “Rule of law” to rationalize such a conclusion.<sup>124</sup> Another precept of realism follows a reasoning-as-rationalization approach to the law is rule-skepticism which holds that “the law . . . consists of decisions, not of rules.”<sup>125</sup> Thus, realists have concluded that since judges’ decisions are the law, the Common Law doctrine of *stare decisis* (i.e., precedent) is no longer relevant in modern judicial decisionmaking.<sup>126</sup> To the realist, the law was too much in a state of flux and

---

<sup>124</sup>JEROME FRANK, LAW AND THE MODERN MIND 59 (1963).

<sup>125</sup>*Id.*

<sup>126</sup>

The purpose of *stare decisis* is to ensure that evenhanded justice will be administered from one year to another, one decade to another, one century to another; that judges will not be permitted to create laws or to decide cases arbitrarily, or to favor particular persons in particular circumstances. They must abide by the accumulated experiences of legal custom, so that the law will be no respecter of persons, and so that people may be able to act in the certitude that the law does not alter

indeterminacy for *stare decisis* to apply. Also, realists questioned the rationale of binding a judge's opinion in one case to a decision in another case decided many years before, because the judge in the latter case could always find some "distinguishing" fact from the earlier to justify having a different result since no two cases are exactly alike.

[83] Like Positive law theorists, legal realists are primarily concerned with the *law as it is*, but they are also concerned with judicial decisionmaking, for it was ultimately in their hands what the law will or will not be. Holmes has remarked that "the prophecies of what the courts will do in fact, and nothing more pretentious are what I mean by the law."<sup>127</sup> Jerome Frank, has distilled the situation by stating that law "is either (a) actual law, i.e., a specific past decision, as to that situation, or (b) probably law, i.e., a guess as to a specific future decision."<sup>128</sup> To this end, realist's like Roscoe Pound, Dean of Harvard Law School during the 1930s, proposed the study of judicial behavior (the sociology of law) holding that to understand the law, you must analyze the patterns of decisions a judge makes so that you can more accurately "predict" how a judge will rule on a particular position in a future case.<sup>129</sup> Two recent examples highlighted the importance of a judge's jurisprudence of the past, present, and especially possible future opinions. First, the nomination to the Supreme Court of Judge Robert Bork by President Ronald Reagan in 1987, which tragically failed for purely

---

capriciously.

RUSSELL KIRK, *THE ROOTS OF THE AMERICAN ORDER* 185 (1974).

<sup>127</sup>Oliver Wendell Holmes, *The Path of the Law*, HARVARD LAW REVIEW, 457 (1897).

<sup>128</sup>JEROME FRANK, *LAW AND THE MODERN MIND* 48 (1963).

<sup>129</sup>*Id.* at 46-52.

partisan political reasons and second, Judge Clarence Thomas, whose nomination barely passed Senate confirmation in the Fall of 1991. The central questions liberals were fanatic about asking both nominees concerned their past decisions on such controversial topics as right of privacy, abortion, Natural law, civil rights, affirmative action, substantive and procedural due process, and judicial review. These past decisions were used as indications of how they would likely decide cases if selected to the Supreme Court. Posner may think that morals have no part in legal theory or in judicial decisionmaking, but look at the major ideological battles fought over Supreme Court nominees since the 1970s when Nixon had two of his moderate conservative candidates fall in defeat before the liberal jurist, Lewis F. Powell, was confirmed by the Senate. Ideology is a critical component of any judicial decisionmaking.

*Altruism—like love—typically is nonmoral: the example shows that the moral emotions are independent of morality, or at least of any consistent body of moral rules. Members of a criminal gang are indignant about informers. The quality of their emotion is the same as that of the good citizen who is indignant about traitors; the difference is that the circle of their altruistic feelings encloses the gang, rather than the country.*<sup>130</sup>

[84] Although I understand the analogy Posner is trying to make here, equating altruism with nonmoral feelings, I think the end result of this comparison is frighteningly nihilistic, even surreal. For a Chief Judge of one of our most respected and influential appeals courts to express such “vulgar relativism” as equating the quality of emotions that one gang member has for another gang member (incidentally, the very existence of the gangs is anathema to the Rule of law)<sup>131</sup> to a “good citizen” or, for instance a patriot like Patrick Henry, who said,

---

<sup>130</sup>Posner, *supra* note 2, at 1663.

<sup>131</sup>See Posner’s “El Rukin” cases: U.S. v. Henry Harris. Decided June 12, 1995, docket no. 94-2478; United States of America v. William Didomenico. Decided Mar. 1, 1996, docket

“give me liberty or give me death,” is a most perverse and disingenuous brand of legal reasoning bordering upon the absurd. Posner further holds that, “[l]aw, a substitute for moral sentiment, is unavailable to gang members. Even before there was a state with coercive powers, *there must have been* rules of conduct, explicit or implicit, but enforced to some degree; a human society could not survive without such rules.”<sup>132</sup>

[85] Here, Posner again lapses into what I refer to as his free-flowing, existentialism mode.<sup>133</sup> As Chief Justice on the Seventh Circuit Court of Appeals and Lecturer at the University of Chicago, Harvard and other prestigious universities, Posner acts like a person who is so far removed from the reality of everyday life as to be virtually incoherent when discussing a topic as germane to his Lecture as the origins of the Rule of law, American constitutional law, or the nature of law. The history of the Rule of law is extensively chronicled, yet Posner feels compelled to use the indeterminate language of “there must have been rules of conduct” as if he is trying to convince himself of the possibility that there was a moral foundation to the Rule of law, even though his materialist presupposition favors the opposite outcome. Like Tribe, Posner views law as “indeterminate,” therefore law based upon God or biblical theism doesn’t fit their philosophical assumptions, despite the fact that Natural law provided the Framers of the Constitution, with a thoroughly coherent

---

no. 93-1134; U. S. v. William Doyle. Decided Aug. 1, 1997, docket no. 95-3367. Thanks to Branch Librarian, Pat Piasecki for providing me with these cases with merely the “El Rukin” title and an approximate date.

<sup>132</sup> Posner, *supra* note 2, at 1663.

<sup>133</sup> Posner noted that: “I am in fact commending a kind of existential morality (antimorality as morality) in which people take responsibility for their actions without the comfort of supposing that they are acting in accordance with universal moral norms.” Posner, *supra* note 2, at 1665.

philosophy, and a theoretical foundation for America based upon an objective Rule of Law.<sup>134</sup> Posner and Tribe's subjectivist legal philosophy are at odds with American legal history and the history of Constitutional jurisprudence. Thus, this so-called indeterminacy in the law, like legal realism and pragmatic moral skepticism, is a self-contradictory philosophy of law and arguments based upon these views, are sophistic and ultimately inimical to society, law, and to traditional moral values should they ever become codified in law. Posner knows this. Tribe knows this. But you must understand that separating law from morality is the house of cards that a large majority in the legal academy is presently built upon. To admit that Natural law is the only legitimate form of constitutional jurisprudence and original philosophy of the Constitution, would be academic suicide to most professors teaching in America's elite, liberal law schools and universities—Careers would be forfeited, prestige among one's colleagues destroyed, and the academic class singular, coveted, and privileged position as a dispenser of knowledge, brought into disrepute.<sup>135</sup>

---

<sup>134</sup>Laurence Tribe, a professor of law at Harvard and a leading expert on Constitutional law, has written that, "the Constitution is an intentionally incomplete, *often deliberately indeterminate structure for the participatory evolution of political ideals and governmental practices*." LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW iii (1978) (emphasis added). Tribe continues that "the highest mission of the Supreme Court, in my view, is not to conserve judicial credibility, but in the Constitution's own phrase, 'to form a more perfect Union' between right and rights within that charter's necessarily evolutionary design." *Id.*, at iv. How could American Constitutional law be of "necessary evolutionary design" since it was created a century before Darwin's evolutionary theory became widely discriminated? This is clearly an example of a liberal academic contriving his preferences toward indeterminate law via evolutionary dogma. This type of legal philosophy, while well respected in the secular academy, is totally sophistic, lacking in any historical validity. It is true that the Constitution's open structure was the Framers' attempt to make the Constitution relevant to a future age, which they knew nothing about, by rooting the Constitution in vague, universalist philosophy but only in a small number of obscure passages. However, the philosophy of the Framers chiefly relied on Christian theism, religion, moral knowledge, morality, the Bible, and Natural law.

<sup>135</sup>Ironically, the American academy, though largely secularized and hostile to America's

[86] Another example of Posner's existential tendencies is found in the statement

the universality of the moral emotions no more proves the existence of a universal moral law than the universality of criminal punishment proves the existence of a universal criminal law. The moral emotions are enforcers, all right, but what they enforce depends on the needs, circumstances, and history of a particular culture.<sup>136</sup>

Posner has a revisionist and at times, even an anarchist/nihilist approach to history. Like his mentor Holmes, he takes an obvious truism: ("the general precepts of criminal law came out of a universal law called the Ten Commandments"), perverts it ("The universality of the moral emotions no more proves the existence of a universal moral law than the universality of criminal punishment proves the existence of a universal criminal law") and boldly contends that the original truism isn't true, but that his juxtaposition of that truism is. This is classic Hegelianism, where the academy's acceptance of Frederick Hegel's (1770-1831) thesis, antithesis, synthesis paradigm in the nineteenth century, perverted over twenty five hundred years of classical philosophy, logic, and reasoning techniques developed by Socrates, Plato, and Aristotle, where a syllogism was reasoned downward from a set of foundational principles (deductive reasoning). Here, Posner's legal reasoning is sophistic, but his

---

former biblical theistic worldview, has its own equally puritanical pseudo-religion-naturalism. In American politics it is manifested in the almost maniacal support Clinton enjoyed among the academic-class and within his own Democratic party, which in order to maintain political viability, has become increasingly radicalized embracing radical feminism, pedophilia, homosexuality, radical environmentalism, radical rights to privacy legislation, etc. Balancing these desperate views that are so foreign to traditional American values manifests itself in support for former President Bill Clinton, a congenital liar, a political Machiavellian, adulterer, traitor, who though weak in moral character and leadership, enjoyed solid support among most of his democratic colleagues who have long since turned a jaundiced eye towards his reprehensible behavior because the alternative would be having a conservative Republican like Newt Gingrich as president. Partisan democrats hold that this scenario must be prevented by any means necessary.

<sup>136</sup> Posner, *supra* note 2, at 1664.

voluminous intellect and supporting source materials convinces many of the verity of his opinions against moral theory. However, I think that Posner's "pragmatic moral skepticism" is merely a rationalization to protect his and Holmes's, preferences toward naturalism, evolution, liberal judicial activism,<sup>137</sup> and aversions to applying moral principles to legal issues, aversions which include a "visceral dislike" of originalism, Natural law, and moral philosophy. On this point, former Solicitor General and constitutional scholar, Judge Robert Bork, criticizes liberal judicial activists like Posner as not being true *legal* theorists at all, but *political* theorists, because they espouse a political philosophy that is both radically liberal and radically egalitarian in their approach to law, jurisprudence, and to Constitutional decisionmaking.<sup>138</sup>

#### **G. The Problem of Motivation and the Methods of the Moral Entrepreneur**

*The ambition of the academic moralist is to change people's moral beliefs and thus change their behavior. It is not a realistic ambition. To begin with, it is not clear that a change in moral beliefs will in fact lead to a change in behavior.*<sup>139</sup>

---

<sup>137</sup>On this point, Jefferson remarked

Nothing in the Constitution has given them [the Supreme Court] a right to decide for the Executive, more than the Executive to decide for them. The opinion which gives to the judges the right to decided what laws are Constitutional, and what are not, not only for themselves in their own sphere of action, but for the Legislative and Executive also, in their spheres, would make the judiciary a despotic branch.

THOMAS JEFFERSON, 8 THE WRITINGS OF THOMAS JEFFERSON (Paul Ford, ed., 1892-1899) 310 (1892-1899).

<sup>138</sup>See generally BORK, *supra* note 35; Bork's books are well-written, modern classic expositions on legal theory and the history of liberal radicalism, liberal egalitarianism and activist judicial decision making in American Constitutional law.

<sup>139</sup>Posner, *supra* note 2, at 1664.

[87] First, I resent Posner's characterization of moral philosophers as "moral entrepreneurs." This silly name-calling lacks any substantive insight and is used only to insult or belittle. Theistic-based moral philosophy is about change and reforming lives away from the cold, dead, fallacious beliefs systems that affirm ones subjective, political, hedonistic or intellectual presuppositions (i.e., liberalism, feminism, skepticism) because the ultimate goals of these ideologies is not truth, but political power. Therefore any presentation of a reasonable critique of their ideas usually devolve into petty *ad hominem* attacks by their apologists. A prudent, well-conceived defense of any substantive ideas based upon truth is beyond the realm of these moral and legal theorists. In the final analysis, adherents of these anti-moral philosophies are generally angry, cynical, with a rather narrow, pessimistic circle of colleagues ensconced behind the ivy-covered walls of academia who share their elitist views.

[88] The general public has little or no knowledge about some of the extreme radical ideas of the academy that are shamelessly put forth as enlightened intellectualism until they manifest themselves publicly in such pivotal judicial opinions as in *Dred Scott v. Sandford*, *Plessey v. Ferguson*, *Lochner v. New York*, *Brown v. Board of Education*, *Griswold v. Connecticut*, *Roe v. Wade*, or in public policy, as in President's Clinton's controversial gay military policy—"Don't ask; Don't tell."<sup>140</sup> The self-segregation of the academic class and the

---

<sup>140</sup>Other historical examples of appeasement leading to a impotent foreign policy or precipitating war include President Woodrow Wilson with Russia under Lenin and President Harry Truman with China under Mao Tse-Tung during the Korean War. English Prime Minister, Neville Chamberlain sought appeasement of Hitler and was rewarded with a blistering war that almost wiped England off the map. England would have been better served if prior to the outbreak of World War II, Chamberlain, as Winston Churchill urged, engaged Hitler under the ubiquitous precept Ronald Reagan used so effectively—"trust, but verify."

so-called “intellectuals” has both stymied true academic achievement and greatly limited the socialization aptitude needed by any man of letters who considers himself “educated.” Such a man (or woman) may have knowledge, but I dare say they do not have wisdom. Such a person may have many letters after their name, but I dare say that they are not educated. For example, I wager that Posner doesn’t have (or ever had) one black friend that he can enjoy spending time with, though as Chief Judge of the Seventh Circuit Court of Appeals, he frequently sits in judgment over Black people—most of them pro se or indigent defendants.<sup>141</sup>

Posner appears much more comfortable *judging* Blacks than the approach I prefer: intellectually engaging black intellectuals and their ideas as comparable to his own views or perhaps being educated by a Black person outside of the academy on some intellectual point that was previously beyond his intellectual radar. When I watch Posner in spirited debate on C-Span at the University of Chicago or some other citadel of the academy, he is always debating another White person; never anybody that looks or thinks like I do. What a missed opportunity; what an intellectual tragedy to himself and to society that Posner’s only connection to my people is to send to jail rather than engage us as intellectual equals.

[89] A tremendous benefit of a theistic worldview does change ones ideas and convictions to those who are really open-minded for it teaches one to think as God thinks and to behave

---

<sup>141</sup>See *supra* note 130; The Seventh Circuit Court of Appeals like many appeals courts hear or are petitioned by a voluminous number of “pro se” criminal cases. These people are generally too poor to afford an attorney to handle their appeals case. During my short tenure as a deputy clerk at Posner’s Court of Appeals, I frequently reviewed briefs from black pro se prisoners who were too poor to hire an attorney to argue their appeal. Most of the briefs were written by hand. Statistics show that the overwhelming majority of defendants in criminal cases at all levels are African American males. Also during this period (May/June 1996) was the time Posner’s Court presided over the infamous “El Rukin” criminal appeals. The El Rukins were a notorious Black Chicago drug gang that engaged in a number of murders to protect their territory.

as if God is watching you all the time. It becomes imperative for the intellectual to live a life, “that is pleasing in God’s sight.”<sup>142</sup> You become a self-regulated person. Your worldview will decidedly change from subjective caprice to objective, un-blind justice. Repentance is the biblical doctrine that causes one to honestly, and in a deliberate, rational manner, understand that we are a sinners in dire need of salvation and that no amount of “good works” or education can redeem us. Therefore, Holmes, Nietzsche, Posner may have intellectual sounding ideas, but they are not true intellectuals. This is so because (1) their ideas are not based on immutable principles; (2) their ideas are not based on truth; (3) their ideas are not truly intellectually honest to themselves or to their readers in elucidating their core beliefs about the nature of law and of moral judgments; (4) they rely on sophistic doctrines as evolution, naturalism, a “living” Constitution, or the doctrine of the separation of law and morality; (5) Their arguments against moral theory (not moral theory itself) lack cogency, creativity and innovation. On this point I ask: was there ever a Langdell, Brandeis, Holmes, Cardozo, Frankfurter, Hand, Brennan, Posner, Dworkin, or Tribe, that ever founded a great Republic? No! But there was a Rutherford, Franklin, Samuel Adams, Washington, Madison, Hamilton, Mason, Jefferson, Jay, Marshall, and Witherspoon that did—if not directly, certainly by the potency of their ideas.

---

<sup>142</sup>I wonder if Posner is fully aware that the occupation he holds as a judge is steeped in biblical symbolism: (1) God is often pictured in biblical art as wearing a flowing robe similar to the one worn by most judges—here the black robes symbolizes judgment; (2) Our human judges stand in the place of God on earth and are commanded to dispense equitable justice to all regardless of social status; (3) Like a human judge, people come to court to get justice. The ultimate completion of this scenario are the two judgment days mentioned in the Bible: the first judgment day is by Christ for the saved called, “The Judgment Seat of Christ” *Romans* 14:10, where Christians are judged, not for entrance into heaven, but by their fidelity to the Lord while on Earth. The second judgment is for the unsaved called, “The Great White Throne Judgment”, where every person that ever lived will be judged guilty by God for rejecting His Son, Jesus Christ’ offer of salvation, *Revelation* 20:11-12; 15.

[90] Posner fails to understand the intrinsic nature of moral conduct and the internal self regulators (i.e., conscience) inherent in mankind when he states,

. . . being persuaded that a proposed course of action would be morally wrong might lead you to change course because you are the kind of person who obtains satisfaction from doing the right thing, but the satisfaction would have to come from *outside* the moral code.

[91] This statement is counterintuitive, for you cannot have a moral code totally *outside* of the inward moral code (conscience) that ratifies and affirms what you already know is right and wrong. The problem comes when you look at other people who seem to have no conscience or who have a much less sensitive conscience than yourself.

[92] Posner then makes the easy, but erroneous step that there isn't a conscience, or if there is one, it is outside of your moral code. Likewise, this is a self-contradictory view that makes no logical sense. Posner further states that, "[e]ven if more people get satisfaction out of doing the right thing than the wrong thing, the moral theorist could have an effect on behavior only if he could produce cogent arguments for the moral positions that he advocates."<sup>143</sup> Posner can adhere to this idea of the immutability of human nature because he (1) does not believe in the separation of law and morals; and (2) concedes that academic moralism's arguments are weak when using moral arguments to fix legal issues and, weaker still, when using Christianity in moral philosophy.

[93] It is like Jesus confronting the Pharisees; the more he spoke truth to them, the more they hated him and sought to destroy him. Why did the religious leaders and intellectuals of that day hate Jesus so much? Because their deeds, being evil, were affronted by the truth Jesus presented to them and since they could not refute Jesus either on political, religious, or

---

<sup>143</sup> Posner, *supra* note 2, at 1666.

intellectual grounds, they savagely crucified an innocent man. Incidentally, the raucous mob that coerced Pilate to crucify Jesus when he would have let him go, politically, was a pure democracy in action. “Mobocracy”, as the Framers derisively referred to democracy, carried the day and led to the crucifixion of Jesus Christ.

[94] Posner gives scorn and ridicule to the ideas of a canon of classical writers, who wrote works of such profoundness that they became the foundation of Western civilization, of our present day ideas, and ideals on morality and law:

For think: when was the last time a moral code was changed by rational persuaders, intoning or refining the arguments or Aristotle, Aquinas, Kant, Hegel, or Mill? And think of how we acquire *our* moral views. We acquire them mostly in childhood, when moral instruction that appeals to reason takes a back seat to parental example, experience, and religion.<sup>144</sup>

[95] On the contrary, the Framers were clearly influenced by the ideas of Aristotle and Thomas Aquinas as codified and developed to fit the requirements of the modern Republic, which are delineated in the writings of Montesquieu, Blackstone, and Locke, whose ideas the Framers quoted the most. As I stated earlier in this article, these men chose Natural law as the philosophy on which to base the Constitution of the United States Republic. Natural law is merely man’s restatement of God’s revealed law as codified in the Bible. The Framers and subsequent generations rejected the philosophies of Kant (1724-1804), Hegel (1770-1831) and John Stuart Mill (1806-1873) as inadequate to uphold the Rule of law because their ideas were not compatible with our constitutional Republic, which presupposes a belief in God.

[96] History has proven the Framers right, for Natural law rejects the reasoning of Kantian

---

<sup>144</sup>*Id. See* ROBERT COLES, THE MORAL INTELLIGENCE OF CHILDREN 179-82 (1997) (referring specifically to the ineffectuality of classroom instruction in moral philosophy in improving moral behavior).

empiricism, who argued that “reason is the means by which the phenomena of experience are translated into understanding.” The Framers rejected Hegel’s dialectical synthesis, “the monist, idealist philosophy which the dialectic of thesis, antithesis, and synthesis is used as an analytic tool to approach a higher unity or a new theses.” The Framers rejected John Stuart Mills’ theories on radical egalitarianism, empiricism, libertarianism, and utilitarianism. Mills held that everything should be lawful in a society unless it harms someone else.<sup>145</sup> Kant, Hegel, and Mills are revered in the liberal secular academy, but only because their ideas affirmed the subjective “preferences and aversions” the majority of modern liberal academics embraced—statist power, separation of law and morals, impotent Christianity, centralized power in a bureaucratic, socialist-style government, empiricism, utilitarianism, monism, naturalism, positivism, indeterminacy in the law and other such sophisms.

[97] When Posner states that “moral entrepreneurs typically try to change the boundaries of altruism, whether by broadening them, as in the case of Jesus Christ and Jeremy Bentham, or by narrowing them, as in the case of Hitler,”<sup>146</sup> he is setting up a strawman by narrowing the requisite choice to be confined to his own overblown concept of altruism. I totally reject this approach. Moral theorists don’t try to “change the boundaries of altruism.” This is a nonsensical statement and should not be the point of his argument. For example, Jesus *fulfilled* the law of Moses, thereby *obeying* the Mosaic law, and when Pharisees approached

---

<sup>145</sup> *Utilitarianism*- “the ethical theory that all action should be directed toward achieving the greatest happiness for the greatest number of people.” THE AMERICAN HERITAGE COLLEGE DICTIONARY, *supra* note 66, at 1331. *Empiricism*- the view that experience, especially of the senses, is the only source of knowledge. *Id.* at 449. *Monism*- 1.The view in metaphysics that reality is a whole and that all existing things can be ascribed to or described by a single concept of system. 2.The doctrine that mind and matter are formed from or reducible to the same substance or principle of being. *Id.* at 810.

<sup>146</sup> Posner, *supra* note 2, at 1667.

Jesus and asked him whether he would pay his taxes to the government [i.e., Caesar], he not only paid his taxes, but also the taxes of all twelve of his disciples. Jesus later stated his reasoning behind such actions, “Render unto Caesar the things which are Caesar’s and render to God the things that are God’s.”<sup>147</sup>

[98] On the other hand, Positive law legal theorists like Jeremy Bentham and John Austin, who first introduced the concepts of separating law from morals, have only denigrated the Rule of law. They have not tried to “change the boundaries of altruism.” On the contrary, they have all but destroyed the immutable precepts that Natural law, the Common law, and the Rule of law is all based upon, which is biblical theism. In its place, Positive law, propagates the subjective, capricious, and ultimately oppressive law of man divorced from morality. That is why the Nazi defendants during the Nuremberg trials felt confident in proposing Austin’s superior, sovereign defense, which posited that Germany, as a sovereign nation, cannot be subjected to the laws of any other nation and still be sovereign.<sup>148</sup> For example, many secular academics of the past, like Massachusetts Judge Charles Wyzanski, publicly argued for the release of the Nazi defendants on Positive law grounds. Many people that read his articles and arguments in the respected Atlantic Monthly magazine were convinced that he was right even though dozens of thousands of American soldiers gave their lives to prevent Germany’s national sovereignty from conquering Europe and winning World

---

<sup>147</sup>*Matthew 22:21* (King James), *see also Matthew 17:27* (King James) (“[Jesus said,] go thou to the sea, and cast an hook, and take up the fish that first cometh up; and when thou hast opened his mouth, thou shalt find a piece of money: that take, and give to them for me and thee.”),

<sup>148</sup>Posner, *supra* note 2, at 1673.

War II.<sup>149</sup>

[99] Nevertheless, many adherents to a Positive law philosophy like most of the noted jurists of this century: Holmes, Llewellyn, Cardozo, Frankfurter, Brennan, Thurgood Marshall, Posner, etc., and legal theorists: Lawrence Tribe, Bruce Ackerman, Akhil Amar, Walter Berns, Robert George, Andrew Koppleman, David Richards, Charles Fried, Leo Katz, and Judith Jarvis Thompson, among others hold this view because they see law as a subjective set of choices that are not based upon a “God” or a preexisting text. These secular academics seem oblivious to the fact that law stripped from its moral foundation of immutable precepts would eventually denigrate into an atheistic socialist state like the one so eloquently delineated in George Orwell’s books, *1984* and *Animal Farm*. That Posner sees fit to link Bentham to Jesus rather than to his proper antecedents such as Holmes, Pound, Cardozo, Llewellyn, Tribe, or Kennedy shows a profound lack of understanding of both legal positivism and history. Positive law theory was effectively used in the Nuremberg Trials to get reduced sentences and exoneration of many obviously guilty Nazi war criminals in addition to not bringing to justice many tens of thousands of murderous Nazi soldiers, commanding officers, businessmen and even the common German citizen whom as Goldhagen stated in his book, *Hitler’s Willing Executions*, gladly aided and abetted Hitler’s maniacal campaign of Aryan supremacy and world totalitarianism. This fact further proves my point that the Rule of law in America is essentially dead.<sup>150</sup>

---

<sup>149</sup>See Charles Wyzanski, Jr., *Nuremberg: A Fair Trial?*, THE ATLANTIC MONTHLY, Vol. 177, No. 4, April 1946, at 66-70.

<sup>150</sup>See PAUL JOHNSON, MODERN TIMES 422 (rev. ed. 1991); GOLDHAGEN, *supra* note 77.

## H. The Scholarship of Morality

### 1. Functional Analysis

[100] “What scholars can do— but this owes nothing to moral theory — is to criticize moral codes by showing that they lack functionality, instrumental efficiency, or rationality. . . [for example] society moves away from compassionate marriage.”<sup>151</sup> Here, Posner’s insistence on keeping law separate from morals is *a priori* because he does not want to give moral theorists any credit for having *any* good ideas in developing sound arguments in support of moral theory as a paradigm for changing behavior. To validate this point, Posner credits scholars as being “objective” regarding moral codes by not following such codes, but by “criticizing” them. By *criticizing* moral codes as opposed to *following* their tenets (i.e., don’t lie, don’t steal, don’t cheat), one is at great pains to determine *how* scholars contribute to society’s benefit by essentially encouraging rebellion against such basic time-tested, foundational, moral traditions as these.

[101] When Posner uses words like “functionality,” “instrumental efficiency,” and “rationality,” he is merely espousing an empiricist, naturalistic worldview where the five natural senses are deified in place of God, and foundational texts like the Bill of Rights and the Constitution are viewed as “indeterminate”—in a constant state of flux and irrelevant to legal philosophy and judicial decisionmaking. When applied to judicial decisionmaking, this type of jurisprudence leads to holdings and opinions that, only a generation or two earlier, most rational-minded jurists would have viewed as unconstitutional, extreme, absurd, and perverse expositions of the Rule of law. Furthermore, both the Framers of the Constitution and their precursors, the Founders of this American Republic, would have considered our

---

<sup>151</sup> Posner, *supra* note 2, at 1668.

current notions of constitutionalism, jurisprudence, and legal theory tyrannical. I only wish that more scholars would spend less time *criticizing* moral codes, especially moral codes that have stood or simply those moral codes that have worked, and more time *following* moral codes as well as encouraging their students and society to do likewise.

### 3. High Moral Theory

*People who specialize in moral philosophy as students and later as professors spend their working time reading and discussing and annotating and elucidating the great texts of the philosophical tradition, from Plato to Rawls, . . . The texts were written in widely different societies over a period of almost two and a half millennia. When viewed together as constituting a canon or tradition of insight and analysis, they all reference to the particulars of the society in which each was written. . . . The philosopher's self-indulgence is over-generalization.*<sup>152</sup>

[102] This passage is a good example of the Nietzschean side of Posner where, in order to bolster his argument regarding the separation of law and morals, he employs the offensive technique of deconstructing the texts upon which a particular moral code or philosophy are based. However, his arguments are specious and are similar to the ones made by a group of liberal German theologians during the late 1870s called the “Higher Criticism School.” These men, emboldened no doubt by the prolific scientific discoveries made in technology, social science, and natural science since the mid-nineteenth century, began to openly and explicitly question the metaphysical claims of the Bible by attacking the authenticity and reliability of the original biblical texts. This technique became increasingly popular by a growing number of universities and seminaries as academics sought to have their disciplines anointed with the imprimatur—“science.” Schools of theology and seminaries from Harvard to Stanford gradually fell prey to this pernicious, fallacious, and anti-text movement. Even

---

<sup>152</sup> *Id.* at 1670-71.

today a Chief Judge on one of our most esteemed court of appeals can write a vitriolic diatribe against theistic Christianity and moral theory in attacking their founding texts and not hear the slightest murmur from the academy other than via formalistic articles by academicians on technical points of his arguments.

[103] The diabolical effects of the Higher Criticism School began to fade somewhat shortly after World War II with the discovery of the Dead Sea Scrolls in 1947. These ancient texts provided biblical scholars with the oldest copies of the Bible ever found to date (200 B.C.) proving to many the infallibility of the biblical text. Inconspicuous for awhile, by the 1960s the Higher Critical scholars had liberalized practically every school of theology and seminary in America as well as throughout the Western World. In modern times, the Higher Criticism School of theology birthed a new generation of anti-metaphysical theologians called, “the Jesus Seminar.” The Jesus Seminar is a group of seventy self-appointed liberal theologians and biblical scholars who claim that parts of the Gospel narratives (especially the parts dealing with miracles) were not part of the original text and never occurred. Like evolution, liberalism, Positive law, critical legal studies, feminist legal studies, and legal realism, all cherished ideologies of the secular academy will continue to flourish as long as those with a radical political agenda are still in control of America’s legal, political, and academic institutions. Truth, to the academic class by in large, is considered relative, subjective, and irrelevant. Setting the agenda and controlling the marketplace of ideas is of preeminent concern.

### **3. Posner’s Intellectual Hierarchy Restated**

Science (Evolution)

Legal Realism (Holmes, Cardozo, Posner)

Moral Theory (Classical Philosophy)

Academic Moralism (Dworkin)

Moral preaching (Christian Theism)

[104] Posner, like Holmes, Cardozo, Frankfurter, Brennan, Thurgood Marshall, and many other jurists of the modern age, fiercely adheres to the duplicity of serving as wise judges whose judicial opinions should be respected, given the primacy of the Rule of law and obeyed, yet these same judges are not willing to be tied down to the beliefs of the Framers of the Constitution (anti-originalism). Moreover, there is a popular revisionist belief that in modern times “the great texts” were written in an earlier age during a less sophisticated time. Therefore the “great texts” have limited or no use in contemporary times. Once again, this is classic nihilism popularized by the German philosopher, Friedrich Nietzsche (1844-1900)—kill the text (i.e., societies prior adherence to biblical theism) and the people will die out of necessity or of their own free will because they will not have any foundation upon which to base their worldview other than that adopted by the academic class—the so-called “intellectuals.”<sup>153</sup> Posner supports this anti-text view by stating that, “. . . the idea that Plato, Aristotle, Kant, Hegel, or even Mill holds the key to solving any modern social problems is as implausible as thinking that the Bible does.”<sup>154</sup> Not only does Posner believe that the Bible

---

<sup>153</sup>Johnson is my favorite historian because unlike most academic historians of the revisionist school, he has a penchant to tell the truth despite contrary facts, despite ideology, or philosophy. This book gives the reader succinct and potent overviews of Europe’s and America’s most influential intellectuals. Johnson included chapters on: Jean-Jacques Rousseau, Shelley, Karl Marx, Henrik Ibsen, Tolstoy, Ernest Hemingway, Bertrand Russell, Jean-Paul Sartre, Edmund Wilson, Victor Gollancz, and Lillian Hellman. PAUL JOHNSON, *INTELLECTUALS* vii (1988).

<sup>154</sup> Posner, *supra* note 2, at 1671.

absolutely cannot solve any social problems, but that Darwinian evolution can solve, or at least can rationally analyze the “interesting” problems facing mankind.

[105] Contrary to Posner’s thesis, the history of Anglo-American jurisprudence owes its very existence directly to the Bible, not to Darwinian evolution. The Ten Commandments are etched in stone above the threshold to the Supreme Court, not the words of Plato, Holmes, Dworkin, or Rawls . There is a clear, unbroken continuum from the Ten Commandments, to the establishment of a theistic worldview in Western Civilization from with to the Greco/Roman Natural law tradition of Cicero, Aristotle, and Plutarch, to the Edict of Toleration in 312 A.D. by Emperor Constantine, to the Christian adoption of Natural law in the Middle Ages of St. Augustine and St. Thomas Aquinas, to the English Common law of Hobbes, Locke, Lord Coke, to the Enlightenment’s Natural law of Montesquieu, Blackstone, and Rutherford, and to the American Rule of law of Jefferson, Madison, Mason, and Witherspoon All of this makes Posner’s statement that, “moral theory no more has the ability to resolve moral dilemmas than mathematics has to square the circle,”<sup>155</sup> an illogical and a baseless statement. Beneath the surface of Posner’s arguments belie a radical secularist ideology that arrogantly ignores all logic, objectivity, evidence, history, and reason. The irony of Posner’s pragmatic moral skepticism is the lack of rationalism and intellectual rigor he claims plagues moral theory is precisely what his lectures on Holmes lack. Therefore, the entire thesis of his article can be reduced to a series of contradictions that he is trying to rationalize to fit into an inherently false presupposition via rhetoric and voluminous footnotes. He is not at all convincing. It is an incontrovertible fact

---

<sup>155</sup> Posner, *supra* note 2, at 1672-73.

that legal theory, law, government and good civilization of necessity is inseparable from morality.

#### 4. Reflective Equilibrium —

*The method of “reflective equilibrium” tries to weave our embedded principles and intuitions into some sort of coherent structure.* <sup>156</sup>

Regarding Rawls archetype, Posner makes the following observations:

Rawlsian man in the original position is finally a strikingly lugubrious creature: unwilling to enter a situation that promises success because it also promises failure, unwilling to risk winning because he feels doomed to losing, ready for the worst because he cannot imagine the best, content with security and the knowledge he will be no worse off than anyone else because he dares not risk freedom and the possibility that he will be better off . . . . <sup>157</sup>

[106] Rawlsian man, like Holmes’ “bad man”<sup>158</sup> or Posner’s pragmatic, moral skeptic man, and economic man, is a most pathetic and hopeless figure. Like the living dead, a prodigal son who never comes home, a Jezebel reveling in the blood of the martyred saints splattered on her robes, a Judas with thirty pieces of silver in one hand and the hangman’s noose around his neck—all of his choices being self-willed and rebellious of authority, lead only to alienation, despair, and death. This is the inevitable result of all philosophies of men: ineffective public policy, societal deconstruction, anarchy, nihilism, death.

[107] Using reflective equilibrium to make Rawlsian man, Holmes’ bad man or Posner’s skeptic man into a useful citizen is an exercise in futility because these archetypes were

---

<sup>156</sup> *Id.* at 1673.

<sup>157</sup> Benjamin R. Barber, *Justifying Justice: Problems of Psychology, Politics and Measurement in Rawls*, in *READING RAWLS: CRITICAL STUDIES ON RAWLS’ A THEORY OF JUSTICE* 292, 299 (Norman Daniels ed., 1989) (1975).

<sup>158</sup> ADAMS, *supra* note 28, at 91-92.

conceived in futility and in the profound skepticism that make mockery of the redemptive possibilities of human nature. Holmes' bad man never founded a great educational institution. Rawlsian man never built a church or a hospital. Posner's pragmatic skeptical man or economic man never built a university, erected a great edifice, or wrote any great works of science, literature, music, art or law. These archetypes' claims to fame are that they are the great complainers and whiners of society. Their voices, like the sounding brass or the tinkling cymbal, are heard often, but then fade quickly. These are the men whom Holmes, Posner, and Rawls based their ideologies upon? It is not hard to understand why nothing of consequence was ever or will ever be attributed to these wretched, cynical archetypes.

## 5. Moral Casuistry

Consider Judith Jarvis Thomson's comparison of a woman forced to carry her fetus to term with a person forced to spend nine months in bed connected by tubes to a stranger, a famous violinist, in order to prevent his dying from kidney disease . . . . It is difficult to take this reasoning seriously.<sup>159</sup>

[108] Judith Jarvis Thompson's excerpt above shows just how far removed from reality academia, in general, and feminist legal studies, in particular, have descended from the objective sphere of principle and truth to the subjective realm of will, power, and ideology. To his credit, Posner was correct to admit that, "it is difficult to take this reasoning seriously" for if this is "reasoning" at all in the classical sense that if:

$$A = B \text{ and } A + B = C \text{ then } A \neq C$$

Judith Jarvis's legal analysis, like most feminist theory I have read, is not only largely bereft of rationality, logic or truth, but is large on hyperbole, emotionalism and incoherent propaganda. Taken to the lowest common denominator, feminist theory appears to be the sophistic

---

<sup>159</sup> Posner, *supra* note 2, at 1675.

machinations of women academics (largely White liberals) who are trying to force their preferences for a radical feminist agenda and worldview in the marketplace of ideas by the sheer volume of their rhetoric rather than on the verity or persuasiveness of their ideas. The fact that these dim-witted ideas are published or given any serious attention at all is beyond credulity, but discussion of these ideas validates Jarvis as a serious legal theorist in many circles of the academy.

[109] Posner did not go far enough in his analysis of Jarvis's ideas. He cannot see that just as it is hard to take seriously Jarvis's theories in defense of abortion, others must concede the plethora of inadequacies in legal realism to which he and Holmes subscribe. Law as it is; law as majority vote; law as, "consensus;" law as law. Yet Posner's reasoning (pragmatic moral skepticism) and legal realism holds to the Positive law credo: "He who is sovereign rules" and "survival of the fittest." Concepts like truth, justice, judgment, good and evil, and morals, to Holmes and Posner, are all relative and are viewed as mere societal contrivances. Posner, the evolutionist, holds that mankind is no different than our relatives, the monkeys, except that we have "bigger brains." To Posner, God is not dead, as Nietzsche contended, he never existed (or, in his mind, needs to exist) because nobody has yet been able to prove that God exists using logical arguments "that have any bite."<sup>160</sup>

You couldn't argue the opponents of abortion out of their position even with a good analogy, because for most of them their position is founded on religious conviction, and one of the strongest norms of debate in our society is that you don't question another person's religious convictions.<sup>161</sup>

---

<sup>160</sup> *Id.* at 1645.

<sup>161</sup> *Id.* at 1676.

[110] This statement by Posner is simply false and once again shows Posner's profound, anti-Christian bias and ignorance of how people use their faith and reason to solve substantive moral dilemmas like slavery, segregation, abortion, world hunger, pandemic war, disease, euthanasia, pornography, obscenity and a host of other societal ills. People of religious persuasion are convinced to change their minds on a variety of issues all the time including the ubiquitous abortion question. For example, many people were convinced to become pro-life after the national debate and Senate hearings during the Summer of 1999, on the so-called "partial birth abortion" where a Republican senator gave a graphic depiction with charts and pictures of how this type of medical procedure is actually carried out by the doctor (much to the chagrin of his enlightened, "open-minded" colleagues in the Senate).<sup>162</sup> Even the plaintiff in the infamous case *Roe v. Wade*<sup>163</sup> (a.k.a. "Jane Roe") recently became a Christian, renounced abortion as murder, and is actively supporting pro-life causes including the pro-life organization, Operation Rescue. As a matter of fact, the founder and leader of Operation Rescue publicly baptized Jane Roe. The son of former atheist leader, pro-abortionist, and now recent victim of foul play, Madalyn Murray O'Hair, was the plaintiff in the famous Maryland case<sup>164</sup> that led to the Supreme Court ruling in *Engel v. Vitale*.<sup>165</sup> [111] Here, the Court ruled all voluntary prayer in the public schools unconstitutional. Ironically, one of Madeline

---

<sup>162</sup> First, the baby's body is brought out of the womb alive except for the head, then the doctor jabs a pair of scissors into the base of the skull and opens the baby's head. Then the baby's brains are sucked out with a vacuum and the remainder of the now dead baby is removed and disposed of.

<sup>163</sup> *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>164</sup> *McGowan v. Maryland*, 366 U.S. 420 (1960).

<sup>165</sup> 370 U.S. 421 (1962).

Murray O'Hare's sons later became a Christian and for the past two decades has been a noted Christian evangelist. The other son was killed with his mother apparently by a former Atheist American Society member in an extortion scheme gone bad. Therefore, Posner is wrong to say that people's views on abortion are so entrenched on the issue as to make change on this issue futile. This simply is not the truth.

[112] Posner equates moral philosophers as a narrow-minded, social club subset of the academy: "Philosophers are never so parochial as when they are placing beyond the pale of the "reasonable" the moral claims of people who do not belong to their social set."<sup>166</sup> This characterization has a number of theoretical problems. In general, the more education one has, the more hostile one becomes to traditional notions of morality like Christianity and the more one relies on his intellect as the final barometer of truth. That is why proselytizing in the university to get students, professors, and the university administration to follow a theistic worldview is much more difficult than getting them to adhere to a secular humanistic or naturalistic worldview. Why? Because the latter philosophy is more in line with the natural human tendencies toward humanism, naturalism, avarice, self-will, promiscuity, pride, and greed. Posner's pragmatic moral skepticism is a case study in parochialism because he spends a majority of his time in his article claiming that one major reason why he is against academic moralism is because it cannot change anybody's behavior without any empirical evidence. He appears to be against moral philosophy not because it is not *true*, but because he feels (for reasons he does not clearly articulate) it will not *change* anyone's behavior. This is quite an odd and unconvincing reason not to adhere to a potentially valid moral code that could potentially help one on a number of levels: morally, socially, intellectually, economically, and

---

<sup>166</sup> Posner, *supra* note 2, at 1678.

dare I say, eternally.

Most societies accept the authority of science precisely because it is such a successful practice, compared, say, to magic, from the standpoint of societal survival and flourishing. . . . there are no useful inventions embodying moral theory, which is another way of saying that there has been no moral counterpart to material progress. Yes, we've abolished slavery, but we no longer have an economy in which slavery would be productive.<sup>167</sup>

[113] By this passage once again we see Posner as the hapless materialist. In his worldview, slavery ended not because of the Civil War or any great moral awakening by society, but because of economic expediency. Here, Posner, the emotivist philosopher, is also evident (although he earlier rejects this philosophy). His moral claims that there are “no moral counterpart to material progress” is incredulous. Some general examples from history that contradict this statement are: (1) The Protestant Reformation; (2) The First and Second Great Awakenings in America; (3) The American Revolution; (4) The War of 1812; (5) The Civil War; (6) World Wars I and II; (7) The War on Terrorism. These were all moral revolutions that lead to great material progress and great spiritual and technological innovation, not only in America, but also throughout the world. This material progress is still being reaped to this day by the spread of Democracy (I prefer Republicanism), liberty, Judeo-Christianity, healthcare, education, etc. Furthermore, Posner’s contention about slavery ending in America due to a poor economic return on its investment is clearly an example of the “gift wrapping of theoretically ungrounded (and ungroundable) preferences . . .”<sup>168</sup>

---

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 1645.

[114] I will concede this point to Posner, that slavery kept the South mired in a backward, agrarian economy as the North gave birth the industrial revolution. However, is Posner unaware that slavery still exists and flourishes in countries like Sudan, Mauritania, Lybia, Ethiopia, and China? Slavery flourishes not only because it *is* economically feasible, but on a deeper level, because of mankind's perverse and intractable human nature to do evil and to indulge his insatiable lust for self-gratification at the expense of others.

### 1. The Perils of Uniformity

*[I]t is not a safe idea to have a morally uniform population.*<sup>169</sup>

[115] Posner's statement here belies a persistent prejudice against morality as well as an age-old anti-Christian myth. Namely, that moral theorists force their beliefs down the throats of others. Secondly, Posner seems to have an irrational fear that religious people (i.e., Christians) might once again gain "control" of our governmental and law making institutions. To Posner this is a dangerous ("not a safe") idea. Historically, however, Posner's warning of the dangers of a morally uniform population is more likely to occur when society allows a separation of law from morality than from a society that has sound, just moral principles behind its laws. For example, in Communist Russia under Lenin and Stalin, China under Mao, Cuba under Castro, Cambodia under Pol Pot, Chile under Pinochet, and other dictators, people of faith had to worship God in secret for fear of imprisonment in Russia's notorious gulags, China's death prisons, or the threat of simply being "disappeared," as in Chile. However, instead of a *morally* uniform worldview, we have an *immoral* uniform worldview(s)

---

<sup>169</sup> *Id.* at 1681.

where every man does what is right in his own eyes. This should frighten Posner much more than a society that follows a God-centered view of life and law. Unfortunately, Holmes' legal realist maxim: "the life of the law has not been logic, but experience," is the philosophy most law students are taught in law school and what most layman assume to be true. It is not true. A better summation of American constitutional jurisprudence would be *the life of the law has not been the law of man, but the law of God*.

[116] Posner continues his frontal assault on a society governed by moral absolutes as "[a] society of goody-goodies, the sort of society implicitly envisioned by academic moralists. Such a society, they reason, would not only be boring; it would lack resilience, adaptability, and innovation."<sup>170</sup> This is one of many examples of Posner's rather sophomoric tendencies of lapsing into superficial name-calling when his substantive ideas have been exhausted. He does this to bolster his weak arguments upholding a separation of law and morals. Calling a society based on moral absolutes or on the Rule of law, "goody-goodies" or "boring; . . . lack[ing] resilience, adaptability, and innovation" without one coherent example to sustain his argument; not one historical precedent or judicial opinion to bolster this point, appears to be another example of Posner "gift wrapping theoretically ungrounded (and ungroundable) . . . aversions."<sup>171</sup> As I have noted many times before in this article, many of the great inventions that most benefited mankind, whether it be history (Sir Winston Churchill, Paul Johnson),

---

<sup>170</sup> *Id.* at 1682. However, Blackstone's defense of the patent superiority of a Natural law jurisprudence seems persuasive to me (and to the Framers) and contradicts Posner's secularist view. Blackstone states the following: "Yet undoubtedly the revealed law [has] infinitely more authority than the moral system which is framed by ethical writers, and denominated the Natural law; because one is the law of nature, expressly declared so to be by God himself; the other is only what, by the assistance of human reason, we imagine to be that law." BLACKSTONE, *supra* note 90.

<sup>171</sup> Posner, *supra* note 2, at 1645.

science (Galileo, Newton), philosophy (Plato, Montesquieu), law (Blackstone, Jay, Marshall), religion (St. Augustine, St. Aquinas, Martin Luther), literature (Milton, Shakespeare, Goethe), music (Palestrina, Bach, Mozart), art (Michelangelo, DaVinci, Rembrandt), industry (Edison, Vanderbilt, Carnegie, Rockefeller), came from Western Civilization; from those people and those nations that lived by the “Protestant work ethic.” I do not think that these talented people who lived and created great works of art and literature, who lived by absolutes, were at all boring, but quite to the contrary, they make this difficult life more bearable to live.

## 2. Professionalism’s Cold Grip and the Impotence of Education

[117] In this section, Posner notes that, “Professors were notable by their absence from the cells of resistance to Hitler that developed during his rule.”<sup>172</sup> This is an obvious historical truism. However, does it surprise Posner that these same brilliant German professors and intellectuals from the academic class that gave the world Kant, Heidegger, Hegel, Marx, Brecht, Wittgenstein, Nietzsche, the “Higher Criticism School” of theology and their progeny, would be in complicity with the Third Reich? The liberal academic class (including most academic moralists) mouth ethical or rational-sounding *public* rhetoric, which often does not comport with its individual *private* practice. Today’s intellectual class, of which college/university professors figure proximately, comprise one of the best paid and most affluent group of people in American society and the colleges and universities enjoy great prestige as repositories of knowledge. However, absent a worldview that merges law and

---

<sup>172</sup> See ALICE GALLIN, *MIDWIVES TO NAZISM: UNIVERSITY PROFESSORS IN WEIMAR GERMANY 1925-1933* 4-5, 100-05 (1986) as quoted by Posner, *supra* note 2, at 1683.

morality, when a catastrophic calamity occurs like Adolph Hitler starting World War II and his maniacal holocaust against the Jews, or a financial collapse like the worldwide stock market crash of the late 1920s, if one does not have a moral view rooted in theistic precepts that supercedes all else, then one will, out of necessity, take a “survival of the fittest” attitude and make self-preservation your god rather than some abstract principle like justice, courage, altruism, good, law, or morality.

[118] When Hitler came to power in the early 1930s, most intellectuals and professors in Germany personally and actively supported Hitler,<sup>173</sup> or fell cowardly silent. The most courageous, including Albert Einstein and many other intellectuals, artists and writers all over Europe, meekly fled the country like frightened sheep. There was no German resistance to Hitler’s “occupation” of Germany like that in other occupied European countries with France, Belgium, and Holland being the most notable examples of resistance.<sup>174</sup>

---

<sup>173</sup> Positive law had been established in Germany since the late nineteenth century and accepted by most of Germany’s most famous jurists. So when Hitler’s brand of fascism was established in his election as Chancellor of Germany in 1933, the law of the land was Positive law’s maxim: “He who is sovereign rules”, or as H. L. A. Hart summarized it, “The gunman situation writ large.” This utilitarian ideology fit nicely with Hitler’s totalitarian notions of Aryan supremacy and the inferiority of all non-Aryan races. Therefore, in his maniacal zeal, Hitler and his armies of the Third Reich saw no contradiction with taking whatever they wanted by force—All non-Aryan races (especially the Jews), were viewed by Hitler as vermin to be eradicated. *See, supra* note 10 and accompanying text.

<sup>174</sup> Johnson writes

[T]he ardour to punish lasted longer but was eventually damped by the march of history. By the time the I.G. Farben executives were sentenced at Nuremberg (29 July 1948), the Berlin blockade had started . . . Karl Krauch, the man who Nazified the firm and personally selected Auschwitz for the *Buna* plant, got only six years. Eleven other executives got prison terms from eight years to eighteen months—‘light enough to please a chicken-thief’, as the prosecutor Josiah Dubois, angrily put it.

[119] Posner's criticisms of the Natural law theory of John Finnis demonstrate why we should *not* separate law from morals. Essentially, Posner's logic on this issue is profoundly misguided. Posner states that, "John Finnis's criticisms of homosexuality come packaged in such sentences as... The union of the reproductive organs of husband and wife really unites them biologically." I do not know what this means . . . . It may seem unfair of me to quote Finnis out of context, but the context is dominated by equally strange sentences, which read as if they had been translated from medieval Latin . . ."<sup>175</sup> As I mentioned before, nowhere does Posner show himself more unpersuasive than when he analogizes from a flawed understanding of Christianity to support his argument purposing a separation of law and morals. For example, even those with a rudimentary understanding of biblical theism can understand the passage by Finnis as a paraphrase of several biblical verses found in the book of Genesis, Exodus, Leviticus and Deuteronomy, but particularly Paul's Letter to the Church in Rome.<sup>176</sup> Furthermore, Finnis' criticism of homosexuality, though convoluted and rather weak (because he uses the wrong adverb, *spiritually* and *naturally* rather than *biologically*,

---

Johnson, *supra* note 149, at 422.

<sup>175</sup> Posner, *supra* note 2, at 1686, quoting John Finnis, *Is Natural law Theory Compatible with Limited Government?*, in *NATURAL LAW, LIBERALISM, AND MORALITY: CONTEMPORARY ESSAYS*, 1,15 (Robert P. George ed., 1996).

<sup>176</sup> In particular, *Romans* 1:20-23 "For the invisible things of him from the creation of the world are clearly seen, being understood by the things that are made, even his eternal power and Godhead; so that they are without excuse. Because that, when they knew God, they glorified him not as God, neither were thankful; but became vain in their imaginations, and their foolish heart was darkened. Professing themselves to be wise, they became fools. And changed the glory of the uncorruptible God into an image made like to corruptible man, and to birds, and four-footed beasts, and creeping things." Theologian, Charles Ryrie on vs. 20 remarks: "The things that are made (creation) reveal to all men the power and Godhead (= divinity) of the true God, so that the rejection of this truth makes a man without excuse before God." RYRIE STUDY BIBLE, *supra* note 76, at 1595.

which would have been better) nonetheless harkens back to two foundational precepts Jefferson used in The Declaration of Independence, which was influenced by Blackstone's *Commentaries on the Laws of England*. In this great treatise on law and legal theory, Sir William Blackstone states:

Man, considered as a creature, must necessarily be subject to the laws of his Creator, for he is entirely a dependent being. . . . And consequently, as man depends absolutely upon his Maker for everything, it is necessary that he should, in all points, conform to his Maker's will. This will of his Maker is called the law of nature.<sup>177</sup>

[120] The law of nature was no mere technical term of philosophy, but a well understood principle of law which the Framers of the Constitution were well aware of and sought to infuse into America's Constitution. Blackstone further delineates the duality of the law of nature by stating:

This law of nature, . . . dictated by God himself, is of course superior in obligation to any other. . . . [N]o human laws are of any validity, if contrary to this; . . . The revealed or divine law . . . found only in the holy scriptures . . . are found upon comparison to be really a part of the original law of nature.<sup>178</sup>

[121] Relying heavily on Blackstone's Natural law philosophy, the Founders picked up this two-pronged concept that God is revealed in the wonders of Creation (Nature, "the law of Nature") and is revealed in the word (revelation, the Bible "and of Nature's God") so that anyone, anywhere, from the most primitive savage in Africa or South America, to the most erudite intellectual at Harvard or Oxford, could clearly have a general level understanding of

---

<sup>177</sup> BLACKSTONE, COMMENTARIES, *supra* note 90, at 39.

<sup>178</sup> *Id.* at Vol.I, 41-42.

God through nature; not through the worship of nature, for this would be a bastardization of God's expressed intent which presupposes monotheism, but from a sober, deductive analysis of the wonders of creation that would make a person say surely all of nature had to have a had a Creator, whether it is the watch I am wearing now, the computer I am typing on presently, or a simple clay bowl That People eat from from—all this of this world has a design and the greatest of all designers is God.

[122] Furthermore, Posner, throughout this article has sophomoric inclinations of competition and weaves these tendencies in his criticisms of moral theory. "Modern moral philosophers are not moral innovators, and they are not moral heroes, either, or the makers of such heroes." My question here is this—who said that moral philosophers are "moral innovators" or "moral heroes?" This statement is ludicrous. Characterizing the tremendous contributions of moral philosophers to furthering intellectual thought and innovation especially in Western civilization is axiomatic to anyone with a rudimentary understanding of European and American philosophy and history. To hold otherwise, as in the writings of Posner and Holmes, belies a profound ignorance of the intellectual roots supporting the ideas of America's founding fathers and the Republic they created. Its not that Montesquieu, Hobbes, Burke, Blackstone, Locke, Witherspoon, Washington, Franklin, John and Samuel Adams, Paine, Jay, Madison, Mason, Jefferson, Hamilton, Marshall and others were "moral innovators" or "the makers of such heroes", but the God they served, and His Son, certainly were. They constantly acknowledged this fact in their numerous writings and speeches that it was the God of Abraham, Isaac and Jacob that gave them the great ideas and ideals they used to found this most great and unique Republic called America.

**K. Moral Change and the Persistence of Moral Debate — and of Academic Moralism**

*A society's moral code changes when it is shown to be nonadaptive, . . . when a charismatic moral leader uses nonrational methods of persuasion to alter moral feeling. Academic moralism, however, is not an agent of moral change.*<sup>179</sup>

[123] For Posner, a sitting Chief Justice on one of America's most prominent Court of Appeals (the Seventh Circuit in Chicago), to make such an inane, incoherent statement as this, demonstrates why Constitutional law in America has been in a constant state of crises—especially since the 1960s. Firstly, it is ultimately irrelevant whether society follows the moral codes of their forefathers but the fact of the underlying verity of such a code is of critical importance because truth stands on its own accord. Secondly, people generally are fickle and their opinions change as the weather. That's why the genius of the Framers is that they had enough forethought to ground the Constitution in principles that do not change (i.e., originalism, Natural law). Thirdly, the law is the law doctrine can be applied here if the law is legitimate. The law does not have to adapt to anything; people have to line up with the law, if they don't, there must be an enforceable and consistent penalty.

[124] Posner's elitism again comes to the fore in his cynical and arrogant characterization of the internal flux of a moral code, "moral code changes when it is shown to be nonadaptive, . . . when a charismatic moral leader uses nonrational method of persuasion to alter moral feeling. Academic moralism, however is not an agent of moral change."<sup>180</sup> This statement shows that Posner, though a judge, does not understand the moral precepts that undergird the Rule of law and America's founding documents including the Declaration of Independence, the Constitution, and the Bill of Rights—which are all indisputably Natural law documents,

---

<sup>179</sup> Posner, *supra* note 2, at 1689-90.

<sup>180</sup> *Id.*

thoroughly rooted in Moral law, and based on moral principles. Nor does he seem to appreciate the sacred compact that America's early European settlers, the Pilgrims, ratified in the "Mayflower Compact."<sup>181</sup> This sacred agreement between the Pilgrims and God was intentionally modeled on the biblical covenant God made with Israel, the only other nation in the history of mankind chronicled as founded by God and based on an expressed covenant between God and man. These historical facts of the moral foundations of our Republic do not interest Posner the least because it interferes with his preconceived and biased view that anything concerning religion, generally, and Christianity specifically, is irrational, "prissy, hermetic, censorious, naive, sanctimonious, self-congratulatory, too far Left or too far Right, and despite its frequent political extremism, rather insipid."<sup>182</sup>

[125] Adherents to moral theory and moral philosophy are as despised and hated as the converts to Christianity were in the Roman empire during the first three centuries A.D. Posner views moral theorists or those of a theistic worldview as mindless, irrational people who can be easily persuaded by a slick-talking moral leader using "nonrational methods of persuasion to alter moral feeling."<sup>183</sup> I must disagree. American people are much more sophisticated and intellectual than Posner gives them credit for. Posner's skeptical views on history, politics, law, religion, economics, and theory, belies the monastic life he must lead

---

<sup>181</sup> The Mayflower Compact (1607) was the covenant the Pilgrims, who viewed themselves as Christian missionaries, covenanted with themselves and God vowing to win the heathen to Christ: "Having undertaken for the Glory of God, and advancement of the Christian faith . . . a voyage to plant the first colony in the northern parts of Virginia . . ." Cited by BARTON, *supra* note 1, at 49.

<sup>182</sup> Posner, *supra* note 2, at 1640.

<sup>183</sup> *Id.* at 1690.

cloistered in the artificial environments of the court room, the law school lecture hall, and surrounded by like-minded secularist colleagues. Posner would not at all be comfortable around a person like me—a black man, born and raised in the ghettos of Detroit and who came of age during one of America’s most violent and deadly race riots.<sup>184</sup> Although my educational accomplishments pale in comparison to Posner’s, I do have common sense, a profound yearning and respect for ultimate truth and history and the Framers’ intention when they formed our great Republic. Posner, however, is either ignorant of the moral philosophical foundation of American history and jurisprudence or he is intentionally misleading his readership on these weighty topics. In either case, it is hard to believe that a man of such prolific accomplishments on subjects of law, legal theory, law and economics, Constitutional law, philosophy, politics, etc., could be so utterly bereft of a basic understanding of Constitutional jurisprudence, legal theory and moral philosophy.

[126] Posner seems to have historical dyslexia when he states that “I have been emphasizing academic moralism’s intellectual weakness . . . theism is a substitute for philosophical moralism.”<sup>185</sup> He has it backwards. It is axiomatic, even after a cursory survey of the major philosophies of Western civilization, that they are caricatures, distortions, or adaptations of some aspect of Judeo-Christianity. From Emperor Constantine’s Edict of Toleration in 312 A.D., which codified Christianity as the official religion of the Roman empire, to the 1960s, when the Supreme Court waged a frontal assault on the Constitution, ruling unconstitutional

---

<sup>184</sup> Foner writes "Altogether between 1965 and 1968 there were more than a hundred riots: eight thousand people were killed or injured, fifty thousand were arrested, and an estimated half a million blacks participated." ERIC FONER, A SHORT HISTORY OF RECONSTRUCTION, 1863-1877 (Harper & Row, New York, 1990).

<sup>185</sup> Posner, *supra* note 2, at 1690.

most public expressions of religion, faith in God has been a major pillar of Western civilization. Long before ancient Rome came belatedly to Christianity, before Aristotle, Plato, Socrates and Homer, the entire Old Testament text had already been written and translated from the original Hebrew and Aramaic texts into Greek, Syrian, Coptic, Latin, and other languages. How then can Posner contend that theism is a substitute for philosophical moralism? He has it backwards. Posner further states, “I noted earlier that Professor Finnis attacks homosexuality in a style of argument unlikely to be intelligible, let alone persuasive, to people who do not share *his* religious beliefs.”<sup>186</sup> Here, Posner’s existentialism comes to the fore. He writes as if Finnis’s philosophy is his own. It is not. Finnis and myself are following a highly rational, intellectually astute philosophical tradition. If Finnis’s views are unintelligible to Posner and other academics it only belies the naturalistic presuppositions and aversions to theism they have to overcome in order to even consider the claims of moral philosophy to be intellectually persuasive. If the judge’s sole objective is truth, and if he finds truth in the philosophical arguments of Finnis or other Natural law theorists; this is good, but to render them all as silly and non-cogent merely because Posner doesn’t “share” them, belies an irrational prejudice and a thorough ignorance of the true nature of law as well as the imperative of adherence to the original text in constitutional decisionmaking (strict construction) in order for any part of the Constitution to have any coherence at all. Posner goes on to write that, “Academic moralism is not really about making us better; it is about manning the ramparts and rallying the troops who defend the groups into which we are divided.”<sup>187</sup> Posner, characterizes academic moralism as merely one of many political camps

---

<sup>186</sup> Posner, *supra* note 2, at 1693.

<sup>187</sup> *Id.*

that adhere to blind partisan loyalty.<sup>188</sup>

[127] This partisanship to a secular moral philosophy or legal theory may be true in the works of Dworkin, Thomas Nagel, John Rawls, and Judith Jarvis Thomson, but the branch of moral philosophy of Supreme Court Justices, Scalia and Thomas, Robert Bork, John Finnis, John Whitehead, David Barton, and myself hold to—Natural law, is not moved by mere partisan consensus so dear to Posner’s legal realism philosophy, for we serve a Higher law (God); Therefore, all ideas, philosophies, theories, must be shifted through the screen of God’s revealed Word for *any* law to be legitimate. This isn’t anti-intellectual, or irrational anymore than Washington, Jefferson, Sir Isaac Newton, Montesquieu, Blackstone, Locke, Jefferson, Adams, Madison, or Mason were irrational, and these men attained a much greater status of accomplishment than any of the jurists from the school of legal realism or any other modern philosophy of law.<sup>189</sup>

### **III. The Limits of Moral Reasoning in Law**

#### **A. Law and Morality: The Relation Reargued**

*[P]ositive law in our system does not resolve most of the novel issues that judges must decide. . . . legal positivism is an inadequate descriptive or normative theory of*

---

<sup>188</sup> Like the partisan loyalty exhibited by liberal Democrats in supporting President Clinton in the face of irrefutable evidence that he lied under oath, obstructed justice, tampered with the jury members and witnesses as well as eight other felonies.

<sup>189</sup> Perhaps none of the Framers considered themselves philosophers in the sense of an Aristotle or Kant, but history has undoubtedly deemed their ideas firmly established in the tradition of classical philosophy. Certainly one can find numerous philosophical thought and reliance on the writings of the Framers so much so that I consider the writings and speeches of men like Rutherford, Washington, Jefferson, Madison, Paine, Witherspoon, Jay, Hamilton, Mason, Samuel Adams, John Quincy Adams, and Franklin, some of the greatest philosophic utterances of the American Revolutionary Period, and in many instances eclipsing other contemporary liberal Enlightenment philosophers in Europe like: Kant, Hume, Rousseau, Voltaire, and Descarte.

*American law, because so much of it is the product of judicial decisions that cannot be justified by reference to the standard sources.*<sup>190</sup>

[128] This statement is curious for its irony because Posner just spent an entire article denigrating moral philosophy and academic moralism for putting credence in “standard sources,” to resolve moral disputes. Following the anti-text tradition of The Higher Critical Scholars, Nietzsche, and Heidegger, Posner mounts a frontal attack against the great texts from which moral theorists deduce their ideas. However, Holmes’ legal realism and Posner’s pragmatic moral skepticism are nothing but an outgrowth of the legal positivism of Jeremy Bentham and John Austin, even though, historically, the legal realist school criticizes Positive law as being too abstract and removed to be relevant to what judges actually *do*. Although the rhetoric of both is different on a superficial level, the outcomes of Positive law and its progeny: formalism, legal realism, sociological law, moral skepticism, Critical Legal Studies, feminist theory, and liberalism, all of necessity *must* show a contempt for reliance on standard sources in judicial decisionmaking for these theories to continue to exist as credible legal theories. Posner further states that, “[a] potent source of confusion is the law’s *frequent borrowing* of moral terminology, of such terms as ‘fair’ and ‘unjust’ and ‘inequitable’ and ‘unconscionable,’” a borrowing that reflects in part the ecclesiastical origins of the equity jurisdiction that has misled Dworkin into believing that law is suffused with moral theory.<sup>191</sup>

---

<sup>190</sup> Posner, *supra* note 2, at 1693.

<sup>191</sup> Posner notes that “Holmes warned long ago of the pitfalls of misunderstanding law by taking its moral vocabulary too seriously; it is the major theme of his great essay *The Path of the Law*.” Posner, *supra* note 2, at 1694, quoting Oliver W. Holmes, *The Path of the Law* 10 HARV. L. REV. 457, 457-64 (1897). The problems of the law in modern society, however, seem to be predicated on the fact not that we take the law’s moral vocabulary too seriously, but that we don’t take it seriously enough. This has contributed to America’s present constitutional crises and has led to the destruction of the Rule of law in society.

This passage is reminiscent of H. L. A. Hart's "frequent coincidence" rationalization of why Positive law so often uses moral language in its analysis of law. Posner mentions "I admit. . . there is a considerable overlap between law and morality."<sup>192</sup> The frequent use of moral terminology in the legal analysis of both Positive law and realism is more than mere borrowing or coincidence. Moral vernacular belies the true origins of law to be inexorably rooted in moral and theistic philosophy.

[129] One of Posner's most inane and incredulous statements contends that, "no philosopher took a hand in drafting any of the founding documents or such successor texts as section I of the Fourteenth Amendment or Title VII of the Civil Rights Act of 1964." Once again, this is a blatant example of historical revisionism that shows such a profound lack of coherence or reality-base as to border on some ancillary philosophy<sup>193</sup> such as post-modernism,<sup>194</sup>

---

<sup>192</sup> In WASHINGTON, *Positive Law's "Frequent Coincidences" with Natural Law*, THE DEVIL IS IN THE DETAILS, *supra* note 1, at 71-73, I cite H. L. A. Hart's famous essay, *Positivism and the Separation of Law and Morality*. Hart uses moral principles to explain legal concepts. For example, Hart cites the law "No vehicles in the park" as a prima facie case for a union between law and morals. Positive Law's insistence on the separation of law and morals, even if the "law" is clearly immoral, allowed easy exploitation by Nazi and other totalitarian regimes because, once law is separated from its religious/moral foundations, anarchy and moral collapse will quickly fill the void. Thus, the Nazi's use of Positive law opened the floodgates to despotism and tyranny, filling the vacuum that the morally corrupt Weimar Republic failed to do. Hart makes another concession to Natural law in the example of the necessity of laws to protect people against physical violence. Hart acknowledges Natural law's superiority in this area, but quickly cautions us not to mistake the "necessity" for such laws for a "truth" about the nature of law. This reasoning is incongruous because it seeks credence from a legal theory, which, by definition, it is diametrical to, then stubbornly and illogically refuses to acknowledge the core principle of Natural law—God as the only foundation of all legitimate laws. *Id.*

<sup>193</sup> Aram Bakshian, Jr. wrote about a statement an old Austrian friend of his coined as his description of the "New World Order." "History. . . is mainly a matter of people rediscovering the obvious by tripping over it." If this sardonic quirk can be taken literally as a paradigm of the "American legal order," then we obviously have not learned very much. Aram Bakshian, Jr., *New Paradigm or old Paradox?*, NATIONAL REVIEW 36-37, June 24, 1991.

existentialism,<sup>195</sup> anarchism,<sup>196</sup> or nihilism.<sup>197</sup> The Framers of the Constitution expressly did a thorough comparative analysis of all of the political philosophies and governments known to them in search of an adequate philosophy to under gird the American Constitution, settling unanimously on the philosophy of Natural Law.<sup>198</sup> Over two hundred, America's primacy as the greatest nation in the history of mankind stands as an exemplary witness to the verity of the Framers' ideas of Natural law, natural rights, liberty, Republicanism and freedom for all—"one nation, under God, indivisible with liberty and justice for all." It hardly bears mentioning that philosophers, or those influenced by philosophy, had a hand in drafting all of America's founding documents, from the Mayflower Compact (1607), the Northwest Ordinance and the

---

<sup>194</sup> *Post modernism*- Language is a social construct, its meaning, indeterminate (George Will).

<sup>195</sup> "*Existential*- 1. Of or relating to existence. 2. Based on experience; empirical." THE AMERICAN HERITAGE COLLEGE DICTIONARY, *supra* note 66.

<sup>196</sup> "*Anarchism*- The theory or doctrine that all forms of government are unnecessary, oppressive and undesirable and should be abolished. *Anarchy*- 1. Absence of political authority. 2. Political disorder and confusion. 3. Absence of any cohesive principle, such as a common purpose." THE AMERICAN HERITAGE COLLEGE DICTIONARY, *supra* note 66.

<sup>197</sup> "*Nihilism*- 1. a. An extreme form of skepticism that denies all existence. b. A doctrine holding that all values are baseless and that nothing can be known or communicated. 2. Rejection of all distinctions in moral or religious value and a willingness to repudiate all previous theories of morality or religious belief. 3. The belief that destruction of existing or political or social institutions is necessary for future improvement." THE AMERICAN HERITAGE COLLEGE DICTIONARY, *supra* note 66.

<sup>198</sup> "[N]ot only to Locke, Montesquieu, but Aristotle and Cicero and Plutarch, Hobbes, Burlamaqui, Milton, Hooker, Bolinbroke, Blackstone, Burke, Shaftesbury and a score of collateral branches." JAMES BURNHAM, CONGRESS AND THE AMERICAN TRADITION 24 (1965). "The Fathers were the masters, not the victims, of these inherited ideas, and sometimes it is the rhetoric more than the ideas that is taken over." *Id.*

Note that John Witherspoon, a signatory on the Constitution, personally trained eighty- seven of the Founding Fathers as the first President of Princeton University, including one President and one Vice President. *See* BARTON, *supra* note 1, at 83.

Articles of Confederation, to the Declaration of Independence, the Constitution and the Bill of Rights, as well as most subsequent amendments and the more notable Acts of Congress.

## **B. Some Cases**

### **1. The Euthanasia Cases**

. . . [A] group of distinguished moral philosophers, including Thomas Nagel, John Rawls, and Judith Thomson, to join with Ronald Dworkin in submitting a brief *amicus curiae* urging the Court to recognize a Constitutional right to physician assisted suicide.<sup>199</sup>

[130] My brand of Natural Law, stemming from the Montesquieu, Blackstone, Locke tradition, is in many ways antithetical to the garden-variety moral theory which runs the gamut of ideology from Left to Right. This is why I took great pains to separate the secular-based moral philosophy of the Dworkin camp and the theistic-based Natural Law philosophy to which Bork, Scalia, Thomas, Whitehead, Barton, Finnis and myself hold as the only constitutionally legitimate jurisprudence. Secular academic moralists who use religious-sounding, ethical rhetoric in support of their legal theorizing, apparently find no contradiction in supporting a clearly anti-biblical view as euthanasia, even to the point of writing an *amicus curiae* brief supporting a constitutional right to physician assisted suicide. Remember my constant refrain throughout this article, which is affirmed by history, common sense, and the example of Dworkin's *amicus curiae* brief: Any moral or legal philosophy of men not rooted in clearly articulated theistic precepts like Natural Law or Originalism, quickly devolves into godless materialism, ineffective public policy social instability, degeneration of the Rule of law, anarchy, nihilism, and death.

---

<sup>199</sup> The *amicus curiae* brief is reprinted in Ronald Dworkin et al, "Assisted Suicide: The Philosopher's Brief, N. Y. TIMES REVIEW OF BOOKS, Mar. 27, 1997, 41.

[131] Perhaps in Posner's cloistered monastic life as the Chief Justice of the Seventh Circuit Court of Appeals and lecturer at the University of Chicago Law School, Harvard Law School, and no doubt many other highly elitist institutions of "higher learning", he finds that people are not convinced to change their morality. However, in the real world, doubters are convinced (for good or evil) all the time to reform, repent, or regress. But even this contention is belied by clear evidence over the past forty years. Radical liberals, socialists, anarchists, agnostics, atheists, secular humanists, and an intellectual class generally hostile to absolute values like Natural Law, biblical theism, moral theory, and moral philosophy have largely populated the academy. A growing number of sociological studies have shown a marked drop in honesty, morality, belief in God, and test scores<sup>200</sup> to such a degree that most students, by the end of their freshman year in college, succumb to these secular humanist philosophies that many of the academic class hold sacrosanct and embrace the gods of moral skepticism, while viewing their previous religious beliefs adopted from their parents as provincial, irrational, anti-intellectual and repressive. This is not intellectual progression, but intellectual regression on a tragic scale.

[132] Again, Posner's pathological skepticism views the presentation of moral arguments

---

<sup>200</sup> David Barton cites statistics gathered by the Department of Health and Human Services, Statistical Abstracts of the United States, Department of Commerce, and several other federal agencies, on a number of areas regarding teenagers and moral issues. Barton's contention is that since 1963, the year in which the Court outlawed Christianity in the public schools in *Abington v. Schempp*, 374 U.S. 203, 213 (1963), after years of minor variations, statistics in the following moral issues exploded upwards: (1) Birth Rates for Unwed Girls 15-19 Years of Age; (2) Violent Crime: Number of Offenses; (3) Sexually Transmitted Diseases: Gonorrhea: Age Group 15-19; (4) SAT Total Scores (exploded downward); (5) Pregnancies To Unwed Girls Under 15 Years of Age; (6) Divorce Rates; (7) Cases of Sexually Transmitted Diseases Including AIDS; (8) Multi-Factor Productivity: Non-Farm Business (down). See BARTON, *supra* note 1, at 209-216.

“on complex moral issues” as entrenching on already made up minds. This is a woefully cynical view of mankind as being like a pre-programed robot. Once the information is entered therein, no matter how fallacious or diabolical the worldview, no counter information will be computed. History has shown that mankind’s worldview can be changed on both an individual and a collective level. Moral theory and moral persuasion has served, and continues to serve as, a viable catalyst for substantive changes in the worldview of people. For example, Paul’s discourse in Athens on Mars Hill, at the very epicenter of ancient Greek philosophy in the second half of the first century A.D., eloquently mixed morals and law and convinced a great number of prominent, wealthy, rational, affluent, and intellectual Athenians to forsake paganism and sexual immorality for Christianity.<sup>201</sup> It happened at the Areopagus (the Supreme Court at Athens). It happened to Emperor Constantine with his Edict of Toleration in 312 A.D. which made Christianity the only legitimate religion throughout the entire ancient Roman Empire. It happened to Martin Luther, the Pilgrims, the Puritans, and the colonists of the American Revolution. It happened to the founding fathers and to the Framers of the Constitution. In recent times, it happened in revival-style, Christian-based political movements: Reverend Jerry Falwell’s Moral Majority of the early 1980s and Pat Robertson’s Christian Coalition of the late 1980s and 1990s, which sparked the Reagan conservative revolution in American politics and established the phrase, “family values” as a household term. Therefore, one of Posner’s major theses, that moral philosophy cannot convince anyone to change their views, is categorically refuted. In academia (especially at the entry levels) and in the real world, moral philosophies based on absolute values are changing and reforming

---

<sup>201</sup> See BARTON, *supra* note 1.

lives everyday. However, Posner, in his stale, staid, insular environment of the courtroom and academia, cannot relate to the dirty truth of reality just outside the ivy-covered gates of his institutions, even though ironically, legal realism, the philosophy Posner and his mentor Holmes subscribe to, proposes to be concerned with *law as it is*.

[133] Judges, by separating law from morality, leave society only with immoral laws that eventually lead to societal oppression, anarchy, nihilism and death. As a judge, when you separate law from morality, your judicial opinions, which would normally carry the gravitas of moral authority and respect, no longer do. (Even the most rabid atheist or agnostic usually would not hesitate to swear on a Bible to tell the truth in a court of law). However, presently, the decisions of most judges lack the moral authority or eternal wisdom inherent in the position so revered by previous generations. Many judicial opinions lack legitimacy and have become impotent; nothing more than a string of dry, empty platitudes that most people care nothing about. If contravened, a person will hire an attorney to find a “loophole” in the law so that he will not suffer any consequences stemming from its violation. Remember, as I stated at the beginning of this article, the Rule of law in America is essentially dead. To this extent, Holmes’ *bad man* is alive and well. The irony, however, is stark and irrevocable. History has repeatedly demonstrated that once one separates law from morality, societal morality and all public and private institutions quickly degenerate, usually within a generation. This slippery slope of necessity leads to a dramatic rise in crime, corruption, and pessimism, as well as a perversion of justice, the Rule of law, the Constitution, and its three branches of government—the legislature, the executive, and the judiciary.<sup>202</sup> At a macro level, look at all of

---

<sup>202</sup> *Zorach v. Clauson*, 343 U.S. 306, 313 (1952). (“We are a religious people whose institutions presuppose a Supreme Being”).

the great world powers throughout history: from Nimrod to Ramsees II; from Nebuchadnezzar to Nero; from Domitian to Lenin; from Napoleon to Pol Pot; from Hitler to Saddam Hussein, to the manical Taliban of Afghanistan. The refrain is the same—law separated from morality equals totalitarianism, anarchy, nihilism, and death. For a “secular” judge like Posner, who took an oath swearing under God to uphold (faithfully execute) the Constitution, to contend that judicial decisionmaking isn’t a moral act, and for other jurists and legal scholars, whose views and writings on law are held as reputable and truthful due to their status as academics, to stubbornly hold to the sophism of law as separate and distinct from morality is grossly irresponsible and destructive, but affirms history’s repetitive refrain: positivism, utilitarianism, Darwinism, relativism, Positive law, realism, liberalism, feminism, is simply “gift wrapping theoretically ungrounded (or ungroundable) preferences or aversions.”

203

## 2. The Abortion Cases

[134] In *Roe v. Wade*, Posner correctly states that, “[t]he Court . . . ducked the moral issue . . . I do not want to defend the Court’s implicit assumption that there [are] no moral issues about abortion; a moral issue is not resolved by being ignored.”<sup>204</sup> However, Posner then tries to rationalize the Court’s moral cowardice by contending “that the Court was trying to neutralize rather than resolve the issue.”<sup>205</sup> This legal reasoning is quite incredulous indeed, for throughout his article, Posner, using similar techniques, ducked the moral issue by insisting on separating legality from morality throughout his Lectures on Holmes. Therefore, an

---

<sup>203</sup> Posner, *supra* note 2, at 1645.

<sup>204</sup> *Id.* at 1702.

<sup>205</sup> *Id.*

obvious moral issue like abortion is characterized by the Court as *not* being about morality. Thus Posner was correct in citing the Courts overt avoidance of the moral issues. In *Roe v. Wade*, the Court had no other choice but to skirt the moral issue.

[135] Since history is objective and discoverable by anyone with the right information, the Justices realized that they had no constitutionally legitimate foundation upon which to base their opinion. Incredibly, the Court relied upon evolution, social science, and ancient pagan historical examples of the Greek and the Roman practice of abortion, in order to validate their slim majority. Natural law was never mentioned in their judicial opinions. For if it had been mentioned, a pro-abortion majority would have been impossible to justify using Court precedent. The logic in *Roe v. Wade* was this: Ancient pagan societies all over the world practiced abortion, including the Greeks and the Romans. Many pre-Christian societies had abortion as a regular practice. Therefore, the syllogism continues, abortion must be all right if we in America join the world in butchering our most defenseless and innocent members of society in the name of expediency. Abortion on its own merits is indefensible enough,<sup>206</sup> but to sanction abortion in the name of a Constitution based on the integration of legality and morality, or to imply that this is in line with the original intent of the Framers, is grossly misleading and absurd. Finally, Posner's contention that the Court "neutralized", rather than "resolved", the moral issue regarding the abortion question, is equally disingenuous. The Court, having no constitutional basis for its ruling, simply made up a sophistic legal argument

---

<sup>206</sup> BORK, *supra* note 35, at 112, 114-115; See also, *Necessity As A Defense To A Charge of Criminal Trespass In An Abortion Clinic*, 49 U. CIN. L. REV. (1979); *Akron v. Akron Ctr. for Reprod. Health*, 462 U. S. 416, 428 (1983); Edward B. Arnolds & Norman F. Garland, *The Defense of Necessity in Criminal Law: The Right to Choose the Lesser Evil*, 65 J. CRIM. L. & CRIMINOLOGY 289 (1974); *Synder v. State*, 577 P.2d 160, 161 (Wash. App. 1978).

out of whole cloth. This is vulgar jurisprudence of the lowest order and, unfortunately, is still standard practice by the majority of Supreme Court Justices, as well as by most appellate and lower court judges.

### 3. The Segregation Cases and a Note on Affirmative Action

*Another famous case in which the Court ducked a conspicuous moral issue was *Brown v. Board of Education*. The Court did not say that integration was a moral imperative or that public school segregation denies blacks the dignity and respect accorded whites. It said that education is terribly important to people in the modern world and that psychologists had found that segregation impaired the self-esteem and educational success of blacks.<sup>207</sup>*

[136] The *Brown v. Board of Education* case is arguably one of the most famous cases handed down by the Supreme Court in the 20<sup>th</sup> century, but in actuality this case was a terrible example of constitutional jurisprudence, because like *Roe v. Wade*, the unanimous opinion did not rely on a single judicial precedent, but instead based their opinion on a spurious form of social psychology. Allow me to use sarcasm to make a point regarding *Brown v. Board of Education* : I'm sure that's why millions of black people suffered the ignominy of slavery for almost three centuries, and overt second class citizenship for over one hundred years, so that future generations of black people would not have their self-esteem and their educational success impaired by segregation-certainly not. Likewise, wasn't it self-esteem and educational success for blacks that sparked the Great Awakenings? The national Christian revivalist movements of the eighteenth and nineteenth centuries which led directly to the abolitionist movement included: the underground railroad pioneered by Harriette Tubman , Frederick Douglass, John Brown and the Civil War. Improving the self-esteem of black people so that

---

<sup>207</sup> Posner, *supra* note 2, at 1703-04.

they wouldn't "feel" bad about slavery had nothing to do with these seminal events. Is Posner postulating that the inhumane treatment of black people over such an extended period of time was rescinded in such a profound way as to improve black self-esteem and to improve the educational success of black people in America? (I am trying to be satirically rhetorical).

[137] This illegitimate brand of constitutional jurisprudence harkens back to the pre-World War II United States Supreme Court opinions that found a Constitutional right to regulate big industry and the origins of the spurious legal doctrine of substantive due process. This doctrine was concocted by a then conservative activist Court beginning with the *Lochner v. New York* decision.<sup>208</sup> Since then, subsequent Courts have come up with the most absurd judicial opinions and unconstitutional reasoning to support such holdings. In addition, legal scholars have written voluminous books and law review articles in defense of these forms of legal opinions. How could substantive due process occur in a constitutional Republic formerly based on Natural law and the Rule of law? Is it because judges who are fed on one hundred and fifty years of Austrianian utilitarianism, Langdellian formalism, Holmesian legal

---

<sup>208</sup> See *Lochner v. New York*, 198 U.S. 45 (1905) (the Court struck down laws regulating the maximum number hours a baker could work per week in New York). This case was the beginning of the rise of what scholars later called "substantive due process." This type of jurisprudence spawned an entire generation of case law where judges used their own subjective views to reach judicial decisions apart from reliance on an explicit text in the Constitution. At the beginning of this century, it was a conservative Supreme Court that frequently looked askance at any federal or state economic regulation— frequently striking it down, not for constitutional reasons, but for political expediency. *Lochner* and its progeny became the death knell to the long respected judicial doctrines of Natural law, originalism and *stare decisis*. See also *Muller v. Oregon*, 208 U.S. 412 (1908) (upholding maximum working hours provisions for women); *Bunting v. Oregon*, 243 U.S. 426 (1917) (the Court struck down maximum hours regulations); *Coppage v. Kansas*, 236 U.S. 1 (1915); *Adair v. U.S.* 208 U.S. 161 (1908) (overruled federal laws against "yellow dog" contracts on interstate railroads); *Adkins v. Children's Hospital*, 261 U.S. 525 (1923) (minimum wages). These constitutionally illegitimate decisions lead to a generation of judicial policy-making in the areas of the right of privacy, sex, abortion, and church/state issues. See also *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Roe v. Wade*, 410 U.S. 113 (1973).

realism, Positive law, critical legal studies, feminist theory, post-modernism, and secular academic moralism are ignorant of their own constitutional history? Or is it that most judges cannot coherently elucidate a legitimate judicial opinion based upon the original philosophical precepts the Framers used when drafting the Constitution, because they neither know nor care that Natural law was the original philosophy of America's Constitution? Sadly, this appears to be the case. Currently, Natural law in the legal scholarship community is the stone that the builders rejected.<sup>209</sup> One day it must retake its rightful place as the foundational philosophy of the American Constitutional law, or like George Washington warned in his Farewell Address, delivered September 17, 1796, our Republic will cease to exist.

Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports. In vain would that man claim the tribute of patriotism who should labor to subvert these great pillars of human happiness . . . . The mere politician . . . ought to respect and to cherish them. A volume could not trace all their connection with private and public felicity. Let it simply be asked, Where is the security for prosperity, for reputation, for life, if the sense of religious obligation desert . . . ? And let us with caution indulge the supposition that morality can be maintained without religion. Whatever may be conceded to the influence of refined education on minds . . . reason and experience both forbid us to expect that national morality can prevail, in exclusion of religious principle.<sup>210</sup>

#### **4. The Case of the Murdering Heir**

*Riggs v. Palmer, the "murdering heir" case . . . There was no moral issue. . . To interpret the statute as entitling murderers to inherit from their victims would have deserved the intentions of testators, the principal interest that the statute protects; it*

---

<sup>209</sup> See *supra*, note 26 and accompanying text.

<sup>210</sup> GEORGE WASHINGTON, 1 COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897, 220 (James D. Richardson, ed., 1896).

would have been a goofy interpretation. (“The dissenting judges were concerned that taking away the murderer’s legacy added to the punishment for his crime without legislative warrant”).<sup>211</sup>

[138] I agree with both the majority in the *Riggs v. Palmer*<sup>212</sup> case and Posner that, according a strict reading of the New York wills statute, the grandson-murderer should not benefit from his crime by being allowed to inherit under his grandfather’s will. This is a common sense verdict based upon the English Common law tradition. However, I will take it one step further. I am astounded that this case was even brought before the court and not thrown out on summary judgment, because the entire legal premise of *Riggs* is preposterous. Despite a controlling statute and statutory intent that the *Riggs* dissenting opinion and Posner’s analysis makes much ado about, why would any judge *ever* consider allowing an obviously guilty defendant to essentially profit from his crimes by collecting an inheritance from a testator that he himself had killed? You can only achieve this nonrational result when you rely on the relativistic philosophy of Positive law, law always supercedes morality, common sense, and the Rule of law. The dissent alluded to this idea by stating “the court is asked to make another will for the testator. The laws do not warrant this judicial action, . . . to concede the appellants’ views would involve the imposition of an additional punishment or penalty upon the respondent.”<sup>213</sup>

[139] This *law is law* jurisprudence deems rules sacrosanct and its emanations and outgrowths from the law (i.e., statutes, ordinances) as bedrock principle. This blind reliance

---

<sup>211</sup> Posner, *supra* note 2, at 1707.

<sup>212</sup> 22 N.E. 188 (N.Y. 1889).

<sup>213</sup> *Id.* at 139 (J. Gray dissenting).

to secular statutory law by Positive law judges, leads to absurd and irrational holdings as mentioned in the *Riggs* dissent. By denying the defendant his inheritance, absent a narrow and naive reading of the statute, the only hope of a correct ruling would be to rely on what Judge Earl calls “fundamental maxims” or “universal law.”<sup>214</sup> Although agreeing with the majority, Posner cannot abide by the way it reached its conclusion because Natural law is anathema to him. Therefore Posner retreats to familiar ground, the philosophy of separation of law and morality, when he states, “the issue was whether his immorality was a *legal* defense to his claim under the wills statutes, which made no mention of a murdering heir.”<sup>215</sup> This sentiment is one of the great dilemmas of Positive law and legal realism. It seeks to fashion a law, rule, or statute for an infinite amount of circumstances rather than rely on a core base of precepts and universal maxims like don’t kill, don’t steal, don’t lie, and those universal moral laws to base all subsequent rules, ordinances, and statutes upon. Utilizing Natural law jurisprudence, the judge will be able to effectively and efficiently handle any type of moral/legal issue brought before him. He, like the *Riggs* majority, will rely on laws based on immutable, theistic precepts rather than the staid, inflexible and often contradictory rules of man.<sup>216</sup> This is why America has the oldest continuing Republic. The Constitution and other founding documents of America are based on the immutable precepts of Natural law, which would consider the legal presumptions in *Riggs v. Palmer* constitutionally outrageous.

### C. Conclusion to Part III

---

<sup>214</sup> *Id.* at 136.

<sup>215</sup> Posner, *supra* note 2, at 1707.

<sup>216</sup> RUSHDOONY, *supra* note 22, at 87.

[140] The Classical man understood that all legitimate law was ultimately derived from God. The presumption was that God's word was to be obeyed. Natural law was based expressly on moral texts codified in our founding documents, derived directly from the Bible (i.e., laws against theft, perjury, adultery, etc.). Remember the Lutz and Hyneman study cited at the beginning of this article?<sup>217</sup> Fully 96% of all of the constitutional Framers writings, speeches, and quotes reviewed in this comprehensive study originated directly from the Bible.” The dichotomy between the Renaissance and the Reformation is the ubiquitous struggle that has always existed between good and evil, right and wrong, man and God, nature and nature's God. During the Renaissance (1400-1700), humanity was viewed as the centrality of the universe. During this period, mankind sought to free himself from the ravages of life that kept him ever-seeking to *survive* rather than to *succeed* in life. Modern science was founded. Many cures to diseases were discovered. The arts flourished as never before the Common law or Natural law became the law of Western civilization. Mankind had believed that all things were possible for him to achieve if he was able to learn it. Knowledge became an end in itself, as if it was a god.

[141] The Renaissance Man was synonymous to a person that had mastered, to one degree or another, all aspects of known bodies of knowledge—the humanities, literature, science, mathematics, medicine, law, politics. These great pillars of thought and the myriad of derivative forms marked a person of the Renaissance as secular, intellectual, cultivated, and independent from any metaphysical phenomena. However, beginning with eighteenth century, Positive law was formulated by the English legal philosopher's Jeremy Bentham and John

---

<sup>217</sup> *Supra*, note 34 and accompanying text.

Austin and continued to flourish during the late nineteenth and early twentieth centuries. Positive law, as developed by certain legal theorists, lawyers, judges, philosophers, scientists, and other intellectuals, held that these laws no longer have any connection to the metaphysical realm. In place of laws based on Judeo-Christianity concepts came laws of the utilitarian—law that provided the greatest good for the most people or did the least harm to the smallest number of people.

[142] Law, now stripped of any theistic foundation, became purely consequential and was used primarily to maintain social order and achieve secular humanistic ends. However, Positive law soon encountered many theoretical problems and internal contradictions. For example, how can a system of laws that seek to maintain social order ignore moral concerns? Certainly social order is not achievable if people do not value moral order and the inalienable rights of all people. Remember Jefferson’s summation of the Rule of law’s purpose was to protect “life, liberty, and the pursuit of happiness” The sophistry of *law as law* doctrine, as history has repeatedly shown, can only lead to despotism and anarchy. However, Natural law, is the only legal philosophy that does not put trust in man. Natural law realizes that since the first man, Adam, mankind has been in a fallen state of nature and to have any hope of a successful human government, his foible propensities must be subjugated to the immutable precepts of God. History has shown us repeatedly that to do otherwise, tyranny will prevail. That is why the Framers of the Constitution incorporated the doctrine of separation of powers.<sup>218</sup> The colonists were well aware from their experiences with England that a concentration of too much power in one branch of government was the enemy of liberty and

---

<sup>218</sup> The separation of powers doctrine used by the Framers came directly from Isaiah 33:22 “For the Lord is our judge, the Lord is our lawgiver, the Lord is our king; it is he who will save us.”

of the people. It is clear from the majority of source materials during the colonial period that viewed Natural law as the only legitimate philosophy on which the American Constitution was based. All of the most important books, articles, letters, speeches, pamphlets, and court decisions at that time conclusively prove this. Positive law, legal realism, critical legal studies, and their parallel philosophies in the literary field, utilitarianism, evolution, scientism, empiricism, radical liberalism, secular humanism, naturalism, and cultural relativism have proven themselves wholly inept legal philosophies for maintaining the moral authority explicit in the Rule of law. Posner further explains that,

if public opinion is divided on a moral issue, judges should refuse to intervene, should leave resolution to the political process. The other way is to say, with Holmes, that while this is ordinarily the right way to go, every once in a while an issue on which public opinion is divided will so excite the judge's moral emotions that he simply will not be able to stomach the political resolution that has been challenged on Constitutional grounds, and would feel immoral in rejecting the challenge. . . . I prefer the second route. It leaves a place for conscience. . . . a judges' civil disobedience— his refusal to enforce a law “as written” because it violates his deepest moral feelings —a significant datum.<sup>219</sup>

[143] This statement contradicts Posner's entire argument of why legal theorists, moral philosophers, and judges must separate law and morals. Now he appears to be advocating an exception, the case that renders a political result the judge finds immoral. This is a clear example of using moral philosophy to affect a legal outcome writ large. It contradicts a major portion of his argument, which Posner spent an entire lecture series and extended law review article trying to refute namely, that law and morality must be scrupulously separated.

[144] Finally, Posner's view of moral philosophers is that they are intelligent people and

---

<sup>219</sup> Posner, *supra* note 2, at 1708.

careful analysts, but lack the tools for resolving moral controversies. Furthermore, modern moral philosophers are inept at helping the judge to resolve moral dilemmas as witnessed by the Dworkin *amicus curiae* brief in support of euthanasia. In the final analysis, judges will have to look elsewhere (Posner again avoids the seminal question of where) for decisions to hard moral questions or perhaps need to rein in their attempt to make society in their own image. The political, moral, and legal philosophy of Kant, Mills, Nietzsche, Holmes, Llewellyn, Cardozo, Posner, and Rawls offer only a cold, staid, impotent, secular reason, pragmatic moral skepticism, or legal realism (i.e., the judge only decrees what the law is). Legal realist's contention that, "the life of the law has not been logic, but experience", is fine if the sovereign is a benign and morally upstanding ruler (say like King Solomon, Richard the Lionhearted, George Washington, James I, John Quincy Adams, Abraham Lincoln, Theodore Roosevelt, Ronald Reagan, Margaret Thatcher). However, history has repeatedly shown that the rapacious men who lust for power, seek it at every turn and covet it above all else, seldom make good lawmakers, judges or leaders of any type.

[145] So instead of a Rutherford, we get a Machiavelli. Instead of a Mason we get Mills. Instead of Blackstone, we get Bentham and Austin. Instead of Saint Paul, society chooses Nero. Instead of Moses, we get Ramsees II. Instead of Enoch, we get Nimrod. Instead of Jesus, the mob always chooses the murder, Barrabas. Instead of C. K. Chesterton, we favor Holmes. Finally, we favor Cardozo instead of C. S. Lewis, Posner instead of Bork, and Dworkin instead of Ellis Washington. These types, anti-types, and archetypes have little use for objective moral codes, theory, *stare decisis*, or even what the original intent of the Framers was when they founded this American Republic. To Holmes and Posner, judicial

---

decisionmaking follows Darwin's evolutionary maxim: "survival of the fittest." The only problem with this anti-theistic, anti-intellectual worldview is that it is self-contradictory. One day Holmes and Posner won't be the "fittest" and their ideas, ideals and their most cherished judicial opinions and writings will be destroyed by the rhetoric of their own philosophical suppositions.<sup>220</sup>

---

220

The Constitution is flexible. . . . Your point of view depends on whether you are winning. The Constitution isn't the real issue in this; it is how you want to *run the country*, and achieve national goals. The language of the Constitution is not at issue. It is what you can interpret it to mean in light of modern needs. In talking about a 'Constitutional crisis' we are not grappling with the needs of running the country but are using the issues for the self-serving purpose of striking a new balance of power. . . Today, the whole Constitution is up for grabs.

Gilbert Rogin, *The Talk of the Town*, THE NEW YORKER, April 28, 1973, at 34 (quoting Danald E. Santarelli, Associate Deputy Attorney General);

[t]he ideas of natural justice are regulated by no fixed standard; the ablest and the purest men have differed on the subject; and all that the Court could properly say, in such an event, would be that the Legislature (possessed of an equal right of opinion) had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice [emphasis added].

Calder v. Bull, 3 U. S. 305, 315 (1798); "judges . . . must look to the `traditions and conscience of our people' to determine whether a principle is `so rooted [there]. . . as to be ranked fundamental.'" Griswold v. Connecticut, 381 U. S. 479, 493 (1965);

the candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, . . . the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal.

GEORGE WASHINGTON, *supra* note 210, at 9-10.

[146] As tragic as some of Christianity's excesses have been throughout history, the catastrophic events of September 11, 2001 at the World Trade Center and the Pentagon by fanatical Muslim extremists, has with clarion vision shown everyone that a world without the restraining force of Judeo-Christianity would be a much more ominous place to live than a world with the universal morality of Judeo-Christianity as a constraining influence of societal behavior. That date, which will live in infamy, should forever settle the issue, yea furthermore place it beyond the realm of rational argument, anyone who would lightly consider the damnable consequences of a worldview, a philosophy, a system of laws, a people, a society, a nation, that seeks to separate the inseparable—law from morality, church from state, God from the public marketplace of ideas, lest they follow the well-beaten path of all the governments of men—ineffective public policy, societal instability, socialism (Democracy), totalitarianism, anarchy, nihilism and death. On this point Paul Johnson writes:

Certainly, mankind without Christianity conjures up a dismal prospect. The record of mankind with Christianity is daunting enough. . . . The dynamism it has unleashed has brought massacre and torture, intolerance and destructive pride on a huge scale, for there is a cruel and pitiless nature in man which is sometimes impervious to Christian restraints and encouragements. But without these restraints, bereft of these encouragements, how much more horrific the history of these last 2,000 years must have been! . . . In the past generation, with public Christianity in headlong retreat, we have caught our first, distant view of a de-Christianized world, and it is not encouraging."<sup>221</sup>

---

<sup>221</sup> PAUL JOHNSON, A HISTORY OF CHRISTIANITY 517 (1976).

Judge Posner has written a number of books, including *Economic Analysis of Law* (9th ed., 2014); *The Economics of Justice* (1981); *Law and Literature* (3rd ed. 2009); *The Problems of Jurisprudence* (1990); *Cardozo: A Study in Reputation* (1990); *The Essential Holmes* (1992); *Sex and Reason* (1992); *Overcoming Law* (1995); *The Federal Courts: Challenge and Reform* (1996); *Law and Legal Theory in England and America* (1996); *The Problematics of Moral and Legal Theory* (1999-2001); *Law, Pragmatism, and Democracy* (2003); *Catastrophe: Risk and Response* (2004); *Preventing Surprise Attacks: Intelligence Reform in the Wake of 9/11* (2005); *How Judges Think* (2008); *A Failure of Capitalism: The Crisis of '08 and the Descent into Depression*