

to the significance of external ones.<sup>43</sup> Whilst an analysis of *Rylands v. Fletcher* does, in my view, reveal the factor of interplay between the two sets of forces I have described, it also carries lessons for those most concerned with the internal pressures upon the common law process.<sup>44</sup> I have attempted to draw attention to the fact that case law rule statements in reality draw upon large quantities of linguistic material. Perhaps we lawyers are now paying the price for our predecessors' presentations, for laudable enough reason, of *stare decisis* as a quasi-scientific method, and talk of "reading a case."

43. See for example the genre of *The Politics of Law*.

44. It might be added that the building up of a common law rule structure is never a consistent step-by-step pattern. In any "line" of cases, some will be out of kilter, subsequently to be played down. An example is *Owens v. Liverpool Corporation* [1939] 1 KB 394 disapproved in *Bourhill v. Young* [1943] AC 92 both by Lord Thankerton, p. 100 and Lord Porter, p. 116. Moreover dissenting judgments may be lurking, witness the fortunes of the opinion of Evatt J in *Chester v. Waverley Municipal Council* [1939] 62 CLR 1, approved by Hidden J in *Alcock v. Chief Constable of S. Yorkshire* [1991] 2 WLR 814, p. 829.

## POSNER'S RORTYITE (PRAGMATIC) JURISPRUDENCE

TIBOR R. MACHAN

### I. THE RECURRING SKEPTICAL OPTION

In jurisprudence we have witnessed an age old debate about whether law is an institution that requires a moral foundation or is, instead, a system of rules or code of conduct requiring merely its imposition by the will of those in power. Roughly this is the question dividing natural law and positivist approaches to jurisprudence—one that has been recurring for those who concern themselves with the nature of law. The debate continues in various nuanced forms in our time.

Contrary to some impressions left by those labeling contemporary skeptical arguments "post-modernist," there is nothing new about the current crop of attempts to undermine our confidence in the human capacity to know what is right and wrong or, more basically, to know objective reality. The main difference may amount to some added nuances, as is to be expected from any renewed effort to convince us of some position, and the gall with which the novelty of all this is announced.

The human being is by nature unsettled, unequipped with the sort of biological hard wiring that secures for us guidelines to action.<sup>1</sup> Each new generation, indeed, every new individual, needs to come to (some measure of) grips with his or her role as a chooser from among various options concerning how to attend to and conduct oneself in the world. This does not at all imply skepticism, only the requirement of all of us to seek and find answers for ourselves, even if, at least in some areas, the best answers should be the same for us all.

In our time the skeptical gambit is advanced most insistently by deconstructionists, anti-foundationalists, and neo-pragmatists. And these are not mutually exclusive groups. One who fits into at least two of these is Richard Rorty, Professor of Humanities at the

1. This in part explains why the debate between those claiming there is a fixed human nature and those who deny it is misconceived. Human nature does not need to involve fixed traits or attributes—it may involve only fixed or permanent or stable capacities.

University of Virginia. His influence has ranged wide and far. In particular, he has begun to make an impression on the thinking of certain legal theorists, among them Richard Posner of the Seventh District Circuit Court and the School of Law of the University of Chicago.

## II. POSNER'S GAMBIT

In an American Enterprise Institute presentation of July 1, 1991, entitled "Pragmatism versus the Rule of Law,"<sup>2</sup> Posner advances a jurisprudential position that departs from his earlier positivism-utilitarianism. What he says here is interesting on its own, apart from his widely discussed jurisprudential ideas, conveyed, for example, in his book *The Problems of Jurisprudence*.<sup>3</sup> In his talk Posner moves toward the sort of pragmatism now associated mostly with the views of the philosopher Richard Rorty. He makes this clear when he tells us that he embraces pragmatism "in approximately the sense in which [it] is expounded and defended by the philosopher Richard Rorty." He may not, of course, fully and explicitly embrace *all* of what Rorty thinks relevant to jurisprudence. Still, in the following pages I treat his views in the light of the above comment, which suggests, rather strongly, that Posner's philosophical (or, as he might prefer to call it, anti-philosophical) stance is drawn from Rorty.<sup>4</sup>

It is not clear whether Posner is fully cognizant of just how drastic is Richard Rorty's skepticism. I say this because in portions of his discussion he seems to continue to embrace a form of positivism, according to which although we cannot affirm moral or political claims to be true, we are able to do this with empirical claims. But Rorty's pragmatism makes all claims equally theory-dependent. Only from within a community with a given theory or frame of reference can one affirm or deny some claim, there being no independent objective reality against which such claims, whether empirical or normative, may be checked.

Rorty's version of pragmatism is, then, first and foremost, an anti-foundational philosophy, more a series of denials than affirmations.

2. Only a transcript is available of this presentation.

3. *The Problems of Jurisprudence* (1990).

4. It is important to note that many thinkers might like to accept several positions at once, even though critics would argue that this is not possible. In this instance I would argue that one cannot have Rorty half-way, for example, by embracing his value but rejecting his fact relativism.

Rorty denies that words represent reality; he denies that knowledge is objective; he denies that individuals can know anything at all; he claims that our beliefs are all based on the framework of ideas developed in our communities and can only be validated with reference to that framework instead of by reference to some independent reality. This, Rorty holds, is not only true of moral and political convictions, but also of such fields as the natural and social sciences. Concerning norms, Rorty makes clear that we "cannot say that [e.g.] democratic institutions reflect a moral reality and that tyrannical regimes do not reflect one, that tyrannies get something wrong that democracies get right." As regards the latter, he makes the point in his paper "Solidarity versus Objectivity." This view is that no independent reality can help us to establish the truth of our beliefs in any area of concern. All we can attain is the support of our community—of judges, scientists, Baptists, liberals, Roman Catholics, or whatever.<sup>6</sup>

It has been an interesting intellectual development for both thinkers—Posner moving from hard headed empirical positivism to the ungrounded, culturally relativistic intuitionist pragmatism, and for Rorty from the common sense championing of ordinary language philosophy to the same end—his communitarian pragmatism. In a sense there is a nice logic to both.

Positivism is so committed to empiricism that the only things ultimately knowable in that viewpoint are sensory impressions, current bits and pieces of sensations in the mind. But once we realize that this current content of the mind lacks any grounding for continuing in its present state, we move from positivism to historicism—only the current bits and pieces are true; ~~nothing at all is true~~ beyond them, transhistorically, generally, or universally. In any period of history the bits and pieces are interpreted in line with prevailing traditions, beliefs held within one's community which influence the individual who has the bits and pieces of sensory impressions. Finally, the bits and pieces no longer offer any foundation and are themselves discarded, leaving only the beliefs of the prevailing tradition, which has no basis in any thing, not even the sensory impressions of which hardheaded positivists had been so proud and because of the absence

5. Richard Rorty, "The Seer of Prague," *The New Republic*, July 1, 1991, p. 37.

6. Richard Rorty, *Objectivity, Relativism, and Truth* (1991). But see, Tibor R. Machan, "Some Reflections on Richard Rorty's Philosophy," 24 *Metaphilosophy* (January/April 1993), pp. 123-35, for a consideration of the merits of Rorty's rejection of representationalism and objectivity.

of which they so cavalierly dismissed morality, politics, and esthetics as meaningless fields of human concern.<sup>7</sup>

The ordinary language philosophy Rorty appears to have embraced in the past—not always shared by other philosophers so labeled—had been grounded on something called linguistic phenomenology, the sampling of terms as used by the person on the street, as it were. But these terms change over time, as language develops and the need for greater and greater diversity arises, giving the impression, in the absence of any firm grounding (which ordinary language philosophers rejected), that the language represents nothing in reality.

Thus we have both views leading to the pragmatism that now Posner and Rorty embrace, denying that our beliefs are true, whether in science or in normative areas of concern.

From the viewpoint of educated lay people there is something rather appealing about all this because, after all, the world seems to be buried in the condition of unceasing diversity, lack of consensus, cultural chauvinism, tribalism, ethnicity, and so forth, all of which seem consistent with what the pragmatists claim, namely, to quote Posner, "Pragmatism . . . really isn't a philosophy at all. It is an anti-philosophy. It is destructive, but I think it is helpfully destructive." (*Ibid.*, p. 19) He adds, "I think the lessons of philosophy that I have gleaned and that are set forth in the problems of jurisprudence are entirely negative. The lessons are that systems, systematic thinking about morals, about justice, and about interpretation do not lead anywhere." (p. 39)

In practical terms this leads to exactly nothing, although Posner declares that what we should conclude from this is that judges should make decisions on the basis of their intuitions. "I am suggesting that we can, because we do, have confident beliefs without reasoning to them from unimpeachable truths . . . because I haven't suggested and don't mean to suggest that our strong moral intuitions are true. They are merely undislodgable at the time, an undislodgable part of our grounds for action, and that is good enough for me, because I don't think we can do better." (p. 8)

In other words, Posner thinks judges can have no basis for what they decide when what is called for is some moral judgment, say about justice or prudence or fairness, other than their intuitions or strong sentiments or feelings. Anything else is myth. Thus natural law is a myth. The attempt, to rest, for example, U. S. constitutional law on "a natural law jurisprudence . . . are not convincing, . . .

7. *Objectivity, Relativism, and Truth*, p. 5.

not rigorous, . . . not logical, . . . not coherent, . . . semantic, . . . arbitrary, and so forth." (p. 68) Thus what it would take to do better than rest decisions on intuitions is to produce a natural law jurisprudence that does not fail in these respects, namely, one that is *convincing, rigorous, logical, coherent, not semantic, not arbitrary*, and so forth.

My aim here is to poke some holes in Posner's justification for embracing pragmatism. I will begin with calling into question Posner's set of standards by which he seems to insist we evaluate jurisprudential philosophies. Next I will criticize Posner's claims about intuitions. In the course of discussing Posner's ideas, I will also explore some of the crucial features of Rorty's pragmatism. This will show that Rorty can offer nothing remotely close to satisfactory for purposes of making sense of jurisprudence or, indeed, anything else. I will argue that if we left it where Posner does, we would have no such thing as jurisprudence, but merely a bunch of robed individuals wielding their arbitrary power, something they would be no more entitled to do than would terrorists be to wielding the power they are often condemned for wielding by robed men and women.

### III. POSNER'S FALLACY

Posner claims that "efforts that have been made in recent years to construct a natural law jurisprudence of the United States have failed" because "they are not convincing, they are not rigorous, they are not logical, they are not coherent, they are semantic, they are arbitrary." (p. 68) Posner does not show any of this; he merely asserts it. But let us assume—contrary to fact but for the sake of argument—that Posner has discovered these matters about efforts to establish a natural law jurisprudence. What do these discoveries mean?

Not being convincing seems like a serious objection and it would be if we had some clue as to what criteria someone employs to judge some argument or theory as convincing. To convince someone requires that (a) the case be advanced logically, with true premises and sound definition of relevant terms; (b) the person one is attempting to convince consider such logical and factually well grounded arguments a means to arrive at a conviction; (c) the person pay heed to the effort being made. But Posner tells us up front that he is "making a standard pragmatist's gambit," namely, "attempting to dethrone logic from an important place in moral judgments." Well, if one whom we are attempting to convince rejects logic as having importance for moral judgments, no wonder that no natural law argument could

succeed for such a person. They refuse to apply logic to such argument. They are, as Posner puts it, "denying the priority of reason in human judgment." If reason for them does not matter, to become convinced of something is for them impossible—they will accept only what they intuit, just as Posner proclaims. Thus the fact that Posner is not convinced by natural law jurisprudence is more a matter of his own disposition not to consider such arguments than of the failure of those arguments.

Now Posner might respond that all he is doing is what Hume and others have done throughout human history, namely, rejecting logic for decisions concerning values or considerations of right conduct, while retaining it for epistemological and scientific purposes. Actually, even Hume saw that this was not quite possible. Certainly subsequent to Hume it was recognized by many as an impossible gambit. Logic is itself a normative discipline. It tells *how we ought to reason*. If logic has been dethroned for normative purposes, then there is nothing to be said in its defense for the following proposition: "When one considers scientific and other so called value-free disciplines, one ought to think logically, but it is not the case that one ought to do this when it comes to ethics or jurisprudence." Since this is itself an ethical proposition—one might rank it within one field of applied ethics, namely, the ethics of scientific conduct—Posner cannot insist that we be logical here, but abandon (dethrone) logic elsewhere. (Here Rorty is actually willing to bite the bullet, whereas Posner wishes to have it both ways, with *and* without logic.)

Posner claims such efforts are not rigorous. Just what level of rigor is appropriate for an argument aimed at establishing a natural law jurisprudence? Clearly, there are different levels of rigor, depending on the subject matter at issue. When we advance arguments in mathematics, their rigor will be different from those advanced in, say, biology or psychology. Of course, in some fields an artificial rigor is introduced by rendering into mathematical formulas the verbal arguments that constitute the substance of the discipline. But in these, we need to consider the level of rigor of the premises. When an economist uses the term "preference" or "utility" or "satisfaction," the issue is not whether the symbolic-mathematical representation of such terms in an equation is rigorous, but whether the terms themselves represent reality rigorously or precisely. And such terms will succeed at being rigorous in different ways in different tasks; precision will be different in biology from what it comes to when used in, say, physics. Yet this is not all that can be said about Posner's complaint.

By embracing Rorty's pragmatism Posner is actually denying that any terms can represent anything in reality. Rorty states exactly that. As he says, "the notion that the reality referred to by [e.g.] 'quark' was 'determinate' before the word 'quark' came along" is wrong.<sup>8</sup> So if Posner accepts Rorty's pragmatism, he has no grounds for demanding rigor from any argument. Rigor assumes that some determinate reality is meant by a term and could be demarcated more or less correctly and precisely. All Rorty can say for rigor is that, for example, "the word 'quark' . . . is useful for coping with the environment." If Posner finds this view sound, he will have no basis for rejecting natural law jurisprudence or any other approach to the law—anything goes, as Paul Feyerabend (another radical relativist) argued in his book *Against Method*.<sup>9</sup> Not that Posner is fully aware of this result, of course: he may well wish to retain the prospect for some semblance of common sense realism as far as science and other factual judgments people make are concerned. But as with many radical pragmatists who join Rorty in this gambit, in fact no such prospect remains in terms of their drastic anti-representationalism. The community of scientists they might place confidence in to remain loyal to common sense is, as Feyerabend's works make plain, far from cohesive, lacks anything close to solidarity, and unless we are able, epistemologically, to tie this community's procedures to certain commonly recognizable independent, objective facts of reality, their authority as dependable witnesses to special truths will be unfounded and arbitrary.

Posner claims attempts at establishing natural law jurisprudence are "not logical." But there is logical and logical. Can one establish a moral judgment or principle deductively? David Hume showed, I think, that deductive arguments, based on simple empirical premises, do not support moral judgments, simply because the premises do not include the term "ought," whereas the conclusion does. Thus the argument must be invalid. But as Hume also demonstrated, from this line of reasoning, none of the sciences are logical. No series of premises containing "is" judgments can lead deductively to a conclusion including a "must" or "will be."<sup>10</sup> Thus efforts to establish

8. Paul Feyerabend, *Against Method* (1975).

9. Paul Feyerabend, *Science in a Free Society* (1978).

10. For a very illuminating discussion of the entire fact/value, description/evaluation dichotomy, and why it has been completely misconceived since Hume, see Julius Kovesi, *Moral Notions* (1968). It bears noting that what exactly Hume wanted to achieve with his distinction is not entirely clear—he may only have aimed at dissuading us from thinking that one can deduce "ought" statements from those

scientific principles are "not logical" either. Nor indeed are any efforts at establishing any judgment outside those that are part of a purely stipulative formal system.

Posner seems unaware of how deeply the skepticism of both Hume and, especially, Rorty cuts. Thus he claims that "In certain human activities, there is a reality check that enforces a high degree of consensus. A scientist proposes a hypothesis that can be tested by a controlled experiment. An engineer designs an airplane that either will fly or will not fly. In both cases, we have an external check against these people's claims." (p. 17) Hume and Rorty would disagree. The one most critical of this position is Paul Feyerabend.<sup>8</sup> Rorty notes that, just as he himself, Feyerabend "is really against the correspondence theory of truth."<sup>11</sup> It is the crux of this theory that Posner affirms here in an un-Rortyite key, namely, that truth consists in a relation between what is said and what there is, or that our true claims correspond or represent, or in some other clear cut enough way attest to our awareness of something that can exist or be independent of our awareness. Posner might claim that even without such a quasi-realist account, we can attest to something like useful or workable or practical knowledge, falling in line, as he indicated early on, with some kind of pragmatist view. Yet if it is a Rortyite pragmatism, it is anti-realist and all talk of our being able to know reality, at least scientifically, empirically, must go.

Speaking along these pragmatist lines simply avoids the hard issues, namely, what exactly is knowledge, why is having it better than, say, just going by some hunches or opinions? That some belief is useful—for example, Newton's cosmological position—is going to have to be shown in part by reference to knowledge that is more than useful. Indeed, we cannot say that Newton was wrong at all, unless we have more than the usefulness of beliefs at our disposal, for then all we can say is that, perhaps, Newton wasn't as useful as Einstein seems to be now. Yet such temporal ways of speaking run aground quickly—it could be said that Newton was just as useful in his era as Einstein is in ours, whatever the truth of their respective theories. We need some better-than-pragmatist account of knowledge to clear up the evident confusion.

containing the "is" copula. But Hume also believed that no deduction of "must" or even "will" statements can be made from those containing only the "is" copula. The point may simply be that our reasoning does not consist of pure deductive inferences in any nonformal area of discourse.

11. *Objectivity, Relativism, and Truth*, p. 28n.

Posner's point that such efforts are "not coherent" is redundant since coherence is determined by means of logic. If these efforts are not logical, they could not be coherent either.

Yet "logical" can also mean that an effort to prove something is consistent with the requirements of Ockham's Razor and other principles of rationality more broadly conceived, as in the term "reasonable" which is used frequently in the law. Accordingly, one could reason that nothing explains human behavior better than the assumption that people have a capacity for rationality, to think and to do so more or less well, more or less carefully, more or less uncompromisingly.<sup>12</sup> This view about human beings arises from the line of reasoning philosophers call the argument from best explanation, a form used by detectives, astrophysicists, auto mechanics, and, yes, jurors. Black holes as well as the intentions of criminal defendants, not to mention the existence of minds and, as I have argued, free will are all established by means of reasoning logically, in the broader than deductive sense of that term. And if this is what Posner thinks attempts to establish natural law jurisprudence have failed at, he is probably wrong. For natural law itself means norms of conduct that may be established by means of the argument from best explanation, starting with the idea of human nature that makes the most comprehensive, most consistent, although not final and unchanging, sense of human affairs.

Is the effort merely semantic? Not if the concepts natural law theory employs have a realistic foundation. But it is just this foundation that Posner and Rorty deny when they accept antirepresentationalism, saying that all that words are is "useful for coping with the environment." But this characterization is hopelessly question-begging. How are we to mean "useful" or "coping" or "with" or "the environment" if terms never represent reality? What will establish whether some words do or do not help us cope with the environment if these terms represent nothing that can make sentences in which they are used true or false? And what does the charge of "arbitrary" come to on the lips of someone who embraces Rorty's viewpoint, according to which every judgment is without foundation but merely may or may not have the benefit of community support?

None of these charges against the natural law jurisprudential philosophy carry any weight in the terms Posner has explicitly accepted

12. Tibor R. Machan, "Applied Ethics and Free Will," 10 *J. of Applied Phil.* (1993) pp. 59-72.

when he embraced Rorty's pragmatism. The terms belong to a different frame of reference and that frame of reference is rejected by Posner, *a la* Rorty's pragmatism. Furthermore, there are candidates for such a frame of reference that are quite potent in making sense of our cognitive experience, from common sense understanding, through science, all the way to natural law jurisprudence.

#### IV. IMPOTENT INTUITIONS

Posner claims that since natural law jurisprudence is a failure, we must settle for an intuitionist jurisprudence. This means that we have some "undislodgeable . . . grounds for our action" which are, however, not true but simply beliefs in which we have confidence. Who exactly we are throughout these claims is a mystery to me, for clearly different people, especially from different communities and cultures, do not share these undislodgeable intuitions. Even the same person finds his or her intuitions dislodged and replaced from time to time—sometimes even as a result of having been convinced by another that what he or she believes is wrong. Prejudices are often dislodged, even when people have held them over some time as "grounds for . . . action." I once, when I was a child, had convictions about Jews that later I abandoned because I lived with some and because I found the arguments supporting them ridiculous. If one lives long enough, one witnesses such dislodgings often enough in oneself and in others.

Here, too, Posner might deploy his fact/value gambit by claiming that what I learned had to do with facts, not values. Yet if the norm, "one ought to respect facts rather than prejudices" were not a sound one, the factual issues would have no bearing on the matter. Only if it is true that one's prejudices, say as a member of a jury, scientific community, or the human race, ought not to be given priority when one judges the worth of other persons would it matter any that when claims about Jews being such and such which merit demeaning them turn out to be false, one ought to change one's view of them.

Posner thinks there are other ways than natural law jurisprudence and philosophy "in which one can discuss these highly charged, emotional questions," e.g., the wrongness of Nazi ideology. He thinks, for example, "that the Nazi ideology was founded on a number of empirical mistakes concerning race and other matters, which helped explain why Germany was defeated and which have helped discredit Nazi ideology. . . ." But he adds that he "would never try to [prove] that genocide is a moral wrong."

Never mind for now that as a Rorty-type pragmatist, Posner cannot even make sense of the idea of "empirical mistakes." Posner fails to appreciate just how deeply Rorty's pragmatism cuts against realism. Different communities of persons will find different empirical claims to be acceptable for them. It is not just moral intuitions that are not true for Rorty, but judgments with so called empirical content, given that the terms of such judgments cannot represent any sort of independent reality. The notion of an empirical mistake is, after all, too closely linked with realism, the view that our ideas refer to or represent something in reality. But this view is not pragmatic. So the Nazis cannot be faulted at all, either for their immorality, or for their factual mistakes, in Posner's own terms, contrary to what he says.

It seems clear, then, that Posner does not have any way to handle or discuss "these highly charged, emotional questions" about Nazism, communism, child molestation, or the widespread practice, in parts of India, of murdering wives for the sake of obtaining repeated dowries. But instead of saying, as he apparently should, that he just does not explore technical moral philosophy and metaethics thoroughly enough and will, thus, defer to others, just as he, wearing a judge's robe, would insist that others should defer to him about matters of positive law, he proceeds to embrace a totally empty skepticism. Inasmuch as one, who has no clue as to what standards to use to evaluate attempts to defend natural law jurisprudence, ought to admit to ignorance, Posner is here doing something wrong, no less so than would a someone who keeps giving medical advice without adequate study in the field of medicine.

Unfortunately this is not Posner's gambit—he would rather do some anti-philosophy and demean others' efforts to help out in our efforts to get clear on the moral basis of law.

#### V. POSNER'S ARBITRARY MORALISM

We may assess Posner's effort at securing some measure of respectability for pragmatic jurisprudence by recalling a point raised by Thomas J. Bieter:

The "value neutrality" of Judge Posner reminds me of the jurists and lawyers in the Nazi era. Having rejected the natural law tradition's connection between fundamental morality and law, and opting for law as the will of the state in legal positivism, they were intellectually disarmed and thus neutral when the Nazis began their assault upon the Jews. And this public "value neutrality [or, *a la* Posner and Rorty, radical intuitionism or relativism] of the intellectual, whether in or out of the university, influences the

many at the margin of society and again makes a David Duke a possibility.<sup>13</sup>

There is some dispute as to whether in fact their positivist, value-neutral stance did disarm the judges in Nazi Germany, as Bieter and others claim. It is difficult to judge this with precision. If reason is irrelevant in making normative judgments, then nothing follows, as to what we should or should not say or do, from the claim that one has no basis for normative judgments *vis-à-vis* Nazis or other tyrants. As we saw with Rorty, however, for some people such a belief has practical consequences, at least for purposes of assessing the merits of tyrannies versus democratic societies. But this also lacks any basis, by the terms of Rortyite pragmatism. The one thing that may follow, but no pragmatist seems to practice, namely, to refuse to say anything, do anything about anything, to remain still. (Cratylus, the ancient skeptic, tried but could not carry through with the project, so he elected to wag his finger instead of talking, thereby going back on his own skepticism.)

What is more crucial for my purposes is whether there is a logic to the value-neutral stance such that from that stance one has no grounds for condemning Nazi practices. It seems that this is undeniable—indeed, that is the view's central practical point. A person who is neutral about values will not judge some action morally good or bad, right or wrong, no matter how abhorrent it may be. All he or she will observe is that the conduct does not please or powerfully offends some people.

But what about Posner's intuitions? Well, we may hope that these are sound and commit him, at least, to following the law of the land in terms that are consistent with or extend reasonably the meaning they held for the American framers. But with Posner there is no reason to think that this will be a principled stance, merely one to which he was undislodgably committed back on July 1991. Given that he completely rejects objective universal moral truths—for example, the principles of natural law that are supposedly based on the reasonably firm facts of human nature and conditions of community life—it is not difficult to envision Posner changing his views, if only because, for example, he experiences some family trauma or health problems or, less plausibly perhaps but not *per impossible*, he will just decide to on a dare. This, incidentally, pretty much characterizes the conduct of amoral gang members or sociopaths.

13. Thomas J. Bieter, "Letter to *TIKKUN*," 12 *Vera Lex* (1992), p. 43.

Since he has the anti-philosophy he borrowed from Rorty, he is likely to remain dogmatically skeptical about any efforts, past or present, to ground moral judgments, including the judgment that a judge should be loyal to his oath of office and follow the Constitution.

Accordingly, we have no reason to count on Richard Posner to be any kind of friend of the rule of law, quite the contrary. Law, in fact, cannot be more to him than a set of arbitrary edicts laid down without rhyme or reason, without logic or philosophical or moral grounding, just, as it were, for the hell of it, quite arbitrarily. Not even the will of the people need matter to Posner, not by his own account. Indeed, by his own account, there is no reason to trust him when he tells us anything, if we are to take his anti-philosophical declarations at face value. He may be pulling our leg, for all we can determine with any confidence.

But even more alarmingly, Posner's account of the nature of law makes law itself no more obligatory, whatever its content, than would be the pronouncements of a terrorist or a raving lunatic. Within their own communities, these persons can have consensus as to the intuitive force of their guides to action.

In the last analysis, then, by Posner's own account the difference between a judge of the Seventh Circuit Court of Appeals and a wild eyed terrorist is no more than their garb, and even that difference can be looked at any way one wishes—the terrorist could see his as a point of rebellion and Posner's as the arrogance of power, nothing else. I think we can do better by far than to settle for such an account of the nature of law. As Anthony Kenny put it very poignantly, "Just because the criterion for correct belief given by the classical foundationalist fails, we should not conclude prematurely that no criterion can be given which will help to distinguish between rational and irrational beliefs, between sense and folly, between sanity and madness."<sup>14</sup>

I have not tried here to develop, only to intimate, a case for natural law jurisprudence.<sup>15</sup> I have suggested, however, that Posner's

14. Anthony Kenny, *What is Faith?* (1992), p. 14.

15. For my own efforts to produce a convincing, logical, coherent, not merely semantic and certainly not an arbitrary case for natural law, allow me to point to one of my books on the foundation of political institutions, as well as my various papers arguing for the reasonableness of the natural law position. See, Tibor R. Machan, *Individuals and Their Rights* (1989); "Law, Justice and Natural Rights," 14 *W. Ont. L. Rev.* (1975), pp. 119-30; "Human Dignity and the Law," 26 *DePaul L. Rev.* (1977), pp. 119-26; "Metaphysics, Epistemology and Natural Law Theory," 31 *Am. J. Juris.* (1986), pp. 65-77; "The Unavoidability of Natural Law and

~ How could Posner reverse this?  
- BT likely Posner does it before/1977  
self-  
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objections to such a jurisprudence are weak and inconsistent and that the details of such weakness and failing are so deep-seated that they render Posner's Rortyite pragmatic jurisprudence nearly meaningless. We might note, simply in passing, that if Posner wishes to retain his confidence in empirical studies, scientific findings, and other so called factual investigations related to the very cases that come before him, he will have to grant the possibility of sound moral notions as well, if only because moral notions are part of the world every bit as much as are those others. And the principle of non-contradiction does not discriminate as to which part of reality it governs, so it needs to be grasped by us consistently, logically, sensibly, and when it does not, so it might be dealt with illogically, intuitively, undislodgably *for the moment*.

So however difficult it might be for a judge to find moral grounds for a decision—or, more appropriately, for the basic laws of the land on which decisions may (but not always deductively) be rested—the attempt must continue because, to paraphrase Posner, “I don't think we ought to do less.” Posner's pragmatic jurisprudence is really no jurisprudence at all.

This presentation, too, then has been a destructive analysis, but, to recall Posner's own arguably dubious characterization of what he set out to do in his discussion, “helpfully destructive.” It has been helpful, I believe, by showing that those who tilt against natural law philosophy tend, in the main, to cut the ground from under anything further they might wish to claim regarding how we ought to act, whether as judges or legal theorists, as well as scientists or ordinary people. Rorty and Posner, as so many in the very long tradition of radical or total skeptics, must be seen as unable to really make out

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Rights,” *Modern Age* (Winter 1987), pp. 38-44, and “Is Natural Law Ethics Obsolete?” 9 *Vera Lex* (1989). Furthermore, I present a discussion of what I call minimalist foundationalism in Tibor R. Machan, “Evidence of Necessary Existence,” 1 *Objectivity* (Fall, 1992), pp. 31-62. I argue that we do have axiomatic (which does not mean infallible, timeless or unchanging) knowledge of some facts that function, in part—if we but choose to keep them in focus—to secure for us objectivity and realism in all our fields of inquiry, provided we also attend to the details we can become aware of concerning those fields. Indeed, this accounts for why even the most skeptical of skeptics, such as Feyerabend, resorts to faulting people for their lack of consistency, why reasoning well is a normative requirement in any discourse, since the laws of logic identify the most general, universal and basic facts of being, the denial of which would most likely immediately steer one astray. They also govern our concept formation, supplemented with such rules as Occam's Razor, parsimony, etc.

I wish to thank J. Roger Lee and Richard Posner for their criticism of an earlier version of this paper.

their claims even to doubt what they doubt, since they torpedoed their minds even for that purpose. let alone for any constructive work.

Let me note, finally, that even though Posner may not, nor indeed may Rorty, intend to be so radically anti-representational and anti-rational as the logic of what they say implies, in the course of thinking in terms of their ideas it is just such radical conclusions one may reach and be unable to resist. This is what Bieter points out in the above quoted passage.

Especially for those accustomed to legal reasoning, the setting of precedents regarding how we ought to view the relationship between law and morality, as well as between morality and the rest of reality, may not be treated as some lighthearted, cavalier business. For the matters with which judges and other legal authorities deal are really serious nearly all of the time, and just as Western positive law, based on certain natural law conceptions of justice, requires due process in adjudication, they require due care in even the broadest theoretical reflections.

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