

THE VALUE OF MORAL PHILOSOPHY

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INTRODUCTION

Economics is the science of means. It describes the strategies people adopt to attain their goals at minimum cost and the obstacles that sometimes prevent these strategies from succeeding. It tells us how to achieve our ends in the least wasteful — the most economic — fashion, with the limited resources at our command. And sometimes it surprises us by showing that a person's actions, which appear at first to be wasteful or counterproductive, actually make good economic sense once we understand the person's true aims. Economics belongs to the domain of what Jürgen Habermas, following Max Weber, calls "instrumental rationality," and there it reigns supreme.¹

But economics cannot tell us what our purposes or goals should be. It cannot tell us how to spend our time and talents and money. It cannot tell us whether we should learn to play the piano or to snowboard, to build a fortune or give our wealth away, to develop a taste for burgundy or Proust, to blaspheme or pray. Beyond the simple injunction not to be wasteful, economics has no advice to give me regarding my own personal choice of ends, and no instruction to offer regarding the ends of human living generally. The exploration of these questions belongs to the province of philosophy, and of moral philosophy in particular, which claims for itself a higher prestige than economics, on the ground that ends are prior to means and intrinsically, not just instrumentally, important.

In a pair of articles that appeared in 1979 and 1980, Richard Posner argued that economics is not limited to giving instrumental advice.² He attempted to show that economics also offers helpful guidance in the choice of ends, both personal and social. He claimed, in fact, that the rigor and precision of economics equip it to provide better guidance in the choice of ends than do other disciplines, including moral philosophy.³ With this argument, Posner sought to widen the authority of economics, to extend its dominance from the realm of

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¹ JÜRGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION* 170 (Thomas McCarthy trans., Beacon Press 1984) (1981).

² See Richard A. Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487 (1980) [hereinafter Posner, *Efficiency Norm*]; Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103 (1979).

³ See Posner, *Efficiency Norm*, *supra* note 2, at 497–99.

means to that of ends, and thereby to displace moral philosophy from its own position of authority in the latter field. He attempted to capture for economics the higher prestige of philosophy.

The argument that Posner advanced in these articles was sharply attacked by philosophers.⁴ I shall not review their criticisms or his responses, because Posner now concedes that his efforts to elevate economics to a science of ends all failed.⁵ But it is useful to keep this earlier episode in mind when reading Posner's 1997 Holmes Lectures, for the central claim of these Lectures is that moral philosophy is also impotent to direct our choice of ends. Economics may be powerless to do this too, but at least, Posner suggests, it provides sound if humble help in the choice of means — something moral philosophy cannot do. Instead of elevating economics as he sought to do before, Posner seeks here to depose philosophy, but the intended result is the same: the reversal of the order of prestige, entailed by the priority of ends over means, which makes the discipline of economics, with its exactness and rigor, subordinate to the less exact but more expansive enterprise of moral philosophy. If the argument of these Lectures is sound, it is economics that should enjoy the greater prestige, not because it is capable of guiding our choice of ends, but because philosophy is equally powerless to do so — the only choices that can be influenced by rational argument being those among means, which economics authoritatively decides.

Posner's argument rests upon a certain picture of the role — or perhaps I should say the nonrole — of reason in moral life. It is a depressing picture that amounts, at bottom, to a denial of the efficacy of reason — of critical, reflective thought — in the most important task we face, the choice and evaluation of ultimate ends. This is discouraging enough. But to his denial of reason's effectiveness in moral life generally, Posner adds a second, equally discouraging claim about the character of moral philosophy as it is practiced today. Whatever it once was, Posner says, moral philosophy has become a profession, no different from others like accounting,⁶ and with no more competence or authority to speak about the values that give human life its direction and meaning. He describes today's professional moral philosophers with contemptuous sarcasm and depicts their situation as one of frustrated impotence producing grandiose but laughable illusions of self-importance. Together, these two claims — that reason is powerless to direct moral life and that today's professional moralists are without standing to do so — give Posner's Lectures a deeply pessimistic cast.

⁴ See Jules L. Coleman, *Efficiency, Utility, and Wealth Maximization*, 8 HOFSTRA L. REV. 509 (1980); Ronald M. Dworkin, *Is Wealth a Value?*, 9 J. LEGAL STUD. 191 (1980).

⁵ See Richard A. Posner, *The Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1637, 1669–70 (1998).

⁶ See *id.* at 1687–88.

This is a feature they share, he suggests, with many of Holmes's pronouncements.⁷ But the comparison is inexact, for Holmes's own dark vision of human life was brightened from time to time by a heroic romanticism⁸ that is utterly remote from the spirit of these Lectures, which are witty and learned and dryly irreverent, but despairing from start to finish.

I reject Posner's despair. I reject his picture of human living, with its bleak judgment that reason is impotent to guide us in the selection and assessment of ends. I do not go as far as Socrates, who sometimes argued that all vice is ignorance — that reason is not merely potent but irresistible when it comes to the choice of ends. But I do believe, as Socrates reminds his companion Thrasymachus in *The Republic*,⁹ that the greatest question for each of us is how we ought to live our lives as a whole — the question of what our ultimate values and loyalties and goals should be — and I believe that reason has a limited but real role to play in our struggle to find an answer. In the first Part of my Response, I shall try to explain why. The second Part is a brief statement of my own conviction that true moral philosophy can never be a profession and my hope that we will resist the forces that threaten to make it one, instead of belittling the effort with the cynicism Posner invites.

I. REASON AND MORAL LIFE

According to Posner, a person's habits of conduct and beliefs about what is right and wrong are fixed long before he or she acquires the intellectual maturity needed to engage in moral philosophy and the ability to reflect in a sustained and organized way on the ultimate ends of life.¹⁰ These beliefs and habits are not necessarily selfish. Many, in fact, are likely to be altruistic, because some measure of self-sacrifice appears to be a condition for the survival of every human community. Nor do the moral attitudes that one acquires early in life lack intellectual content. Most are a blend of feelings and ideas, soldered together in the process of primary moral instruction through which every social group inducts its young into the group's routines. But once this proc-

⁷ See *id.* at 1645.

⁸ See, for example, the famous concluding sentences of *The Path of the Law*:

And happiness, I am sure from having known many successful men, cannot be won simply by being counsel for great corporations and having an income of fifty thousand dollars. An intellect great enough to win the prize needs other food beside success. The remoter and more general aspects of the law are those which give it universal interest. It is through them that you not only become a great master in your calling, but connect your subject with the universe and catch an echo of the infinite, a glimpse of its unfathomable process, a hint of the universal law.

Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 478 (1897).

⁹ See PLATO, *THE REPUBLIC* 344e, at 86 (Desmond Lee trans., Penguin Books 2d ed. 1974).

¹⁰ See Posner, *supra* note 5, at 1666 & n.53.

ess is complete, Posner says, its results are beyond the power of philosophy to alter. Grown men and women can sometimes be persuaded to change even their most basic moral beliefs, but only, Posner insists, through the arational methods of great charismatic leaders, who teach by example and always demand from their followers a suspension of critical thought.¹¹ What Posner emphatically denies is that people ever change their moral convictions merely by reasoning about them in the way philosophers do. Reason by itself is impotent to achieve this result — that is the main message of these Lectures — and any philosopher who thinks he or she can alter a person's beliefs about what is right and wrong with arguments alone is, on Posner's view, badly mistaken.

Indeed, so far as moral philosophy is concerned, the situation is even worse. For philosophy is not only powerless to change our convictions about what is right and wrong, it actually tends, Posner claims, to further entrench our existing moral habits and beliefs by helping us to dress them up in intellectual garb, to rationalize what we are already disposed to do. It is possible and useful, Posner says, to inquire about the origin of our moral attitudes and to reflect on their utility. In these ways, theory (economic theory, mainly) can contribute to our understanding of moral life and may even cause us to adjust our practices when they are shown to be instrumentally unsound (that is, wasteful or self-defeating). These theoretical inquiries take moral life as their subject and explore its causes and consequences from an external point of view. But there is no comparable internal role for reason in moral life, Posner says, except to rationalize preexisting convictions in a blindly servile way.¹² That is Posner's central claim. It is the source of the pessimism that gives his Lectures their bleak and depressing tone, and the key to their real objective: the elevation of economics over philosophy, not through the expansion of the one but through the deflation of the other.

Posner presents this claim as if it were an empirical observation and suggests that the relevant facts weigh decisively in its favor. But the evidence is more mixed than Posner acknowledges, and is bound to remain so. One can multiply examples, as he does, of the ineffectiveness of reason in moral life, but there are examples (ranging from the commonplace to the heroic) on the other side too. There is the example of the Stoic philosophers, who reasoned their way into an extraordinary posture of detachment from ordinary human concerns.¹³ There is the testimony of psychoanalysis — tentative and ambiguous, to be sure — which suggests that even the most hardened habits sometimes

¹¹ See *id.* at 1667.

¹² See *id.* at 1684.

¹³ See MARTHA C. NUSSBAUM, *THE THERAPY OF DESIRE* 359-401 (1994).

yield to reason.¹⁴ There is the familiar example of people who deliberately cultivate a taste (for music or literature or piety or philanthropy) because their rationally derived ideal of fulfillment — or perhaps even their rationally derived conception of duty — demands it. There is the example of Socrates, who will always be as powerful a reminder of the moral potency of reason as Jesus is of the potency of faith and charisma.¹⁵

To be convinced that reason has a positive, internal role to play in moral life, one need not believe that academic moral philosophers are better people than other men and women. It may well be (as Posner himself implies) that the true spirit of moral reasoning — which starts from the Socratic premise that it can change the way one lives — is missing from professional philosophy today. Nor must one believe that a highly reflective intelligence increases the chances its possessor will do the morally right thing in situations of extreme danger (a belief challenged by the case of the rescuers of Jews in Nazi Germany to which Posner attaches such importance).¹⁶ Even if the power of reason to affect moral behavior declines as one approaches the zone of mortal risk, that is no basis for concluding it is impotent in moral life generally. To avoid this conclusion, all one needs to believe is that under certain conditions and within certain limits reason can be an improving force in moral life. The evidence bearing on this claim has always been, and will always be, mixed and controversial. It is not a claim that can be settled empirically, and no survey of human behavior, however detailed and exhaustive, will ever decide it. Posner's portrait of moral life is not — as he wishes us to think — a strictly factual account based on sound social-scientific research. It is, in truth, a philosophical view of the very sort he attacks in these Lectures, and one that is both implausible and unattractive.

As an alternative to Posner's view, with its depressing message that reason is powerless to help us sort among, arrange, and choose our most important ends, I would propose another, broadly Aristotelian in inspiration,¹⁷ which is consistent with many of the facts Posner adduces but which affirms a positive, internal role for reason in the moral development of human beings.

My view, like Posner's, starts with the assumption that upbringing is critical to character and character to moral behavior. By the time a

¹⁴ An example is the case of "little Hans." See SIGMUND FREUD, *Analysis of a Phobia in a Five-Year-Old Boy*, in *THE SEXUAL ENLIGHTENMENT OF CHILDREN* 47 (Philip Rieff ed., Collier Books 1963) (1909); JONATHAN LEAR, *LOVE AND ITS PLACE IN NATURE* 98–119 (1990).

¹⁵ In this connection, one may usefully contrast Plato, see PLATO, *The Apology*, in *GREAT DIALOGUES OF PLATO* 423 (Eric H. Warmington & Philip G. Rouse eds., W.H.D. Rouse trans., Penguin Books 1956), with the story of Christ's ministry and crucifixion as told in the gospel of Mark.

¹⁶ See Posner, *supra* note 5, at 1682–83.

¹⁷ See SARAH BROADIE, *ETHICS WITH ARISTOTLE* 22–24 (1991).

person reaches the age of twenty or so and begins to reflect in an organized way on the large questions that moral philosophy poses, the habits that define his or her character have already been formed. If these habits are bad — if the young person's character is vicious — there is little that philosophy can do to repair the damage. In this sense, good character is a necessary condition of moral soundness, or moral integrity as that term is normally understood. But it does not follow that it is a sufficient condition, or that moral philosophy, which one takes up as an adult, has nothing to add to the character one acquired as a child. Good habits may in general be good enough. They may be reliable guides to most of the challenges of moral life. But even the best character is likely to prove deficient in certain predictable ways, and when it does, reason provides needed supplementation, correction, and support, adding a depth to moral life that no set of habits, however virtuous, can supply.

In the first place, the moral habits of even a well-brought-up man or woman often conflict and, more often still, fail to provide sure direction. Early in Book One of *The Republic*, Cephalus — an old man, plainly of good character — proposes the first of several accounts of justice that Socrates examines and finds wanting.¹⁸ Socrates puts Cephalus's genial account in the form of a definition: justice, according to Cephalus, is telling the truth and giving back to others what one owes them.¹⁹ Every man and woman of good character presumably believes these things and acts accordingly. But, Socrates asks, does Cephalus's definition mean you should give back to a friend who has gone mad the weapon he lent you when he was sane, if he should demand it? Should you tell him where the weapon is hidden, if he asks? One can think of Socrates' hypothetical as a case of conflicting obligations — the obligation to tell the truth and keep only what belongs to you, on the one hand, and the obligation to look after your friends, on the other. Or one can think of it as a case in which the injunction "Be honest and give others what you owe them" is insufficiently refined to provide an appropriate guide for action. Whichever view one takes of it, the problem Socrates poses cannot be solved with a habitual reflex, no matter how virtuous and solid one's habits. That is the main point of his response to Cephalus's otherwise admirable statement. What is needed to solve Socrates' dilemma is reflection: a train of thought that starts by inquiring about the purposes of the (good) habits of telling the truth and repaying one's debts and that seeks to extend, through a process of intellectual elaboration, the essential but incomplete guidance these habits supply. For many thoughtful men and women, the first recognition of reason's role in moral life — their first practical en-

¹⁸ See PLATO, *supra* note 9, at 330d–331d, at 64–66.

¹⁹ See *id.* at 331c, at 65–66.

counter with moral philosophy — comes with some dilemma of this kind, and it would not be a great exaggeration to say that the entire history of Western moral philosophy, which seeks to understand such encounters and to provide a framework for them, begins with Socrates' challenge to Cephalus at the start of *The Republic*.

This is how reason enters moral life: as a supplement to character, filling the gaps and resolving the conflicts among our moral habits. The rational reform of habit follows. Consider the story of Leontion, which Socrates relates in Book Four of *The Republic*.²⁰ Leontion, Socrates tells us, was walking up from the harbor at Piraeus one day, when he came upon a pile of corpses left behind by the public executioner. He was drawn to the spectacle and wanted to look closer. But at the same time, he was disgusted by his own desire and wished to turn away. Eventually, Leontion gave in to his morbid curiosity, but reproached himself and felt ashamed of his actions. Socrates tells this story because it exposes a conflict in Leontion's soul; one might generalize by saying that feelings of shame, embarrassment, and the like (and the phenomenon of repression as well) always reveal a conflict in the person who experiences them. These feelings express a kind of self-criticism, a judgment of blameworthiness that certain of one's habits or desires render upon other habits or desires. Well-brought-up people are not immune to such feelings; indeed, one might say that a sound upbringing and a good moral character (such as Leontion presumably possessed) make one peculiarly liable to feelings of shame. Only those with a bad moral character are shameless. Moreover, the schism in one's character that shame reveals constitutes a lack of integrity, which those with a good character are likely to find especially disturbing and be particularly anxious to repair. But this can be done only by articulating the criticism implicit in the feeling of shame, and that is a task for rational reflection (as Socrates' story about Leontion is also meant to make clear). Only reason can expose and diagnose the self-criticism that shame implies. Unless one is willing to live with shame (as many of course are, but with an anguish proportional to the goodness of their characters), there is no alternative to reflecting in a self-conscious way on the nature and sources of the internal divisions that shame brings to light.

It does not follow, of course, that reason is sufficient to overcome these divisions on its own. Understanding the source of one's shame does not by itself guarantee its disappearance. That requires the actual reform of one's habits — either the "bad" habits that make one ashamed, or the "good" habits whose censorious judgments the feeling of shame expresses — and for this work of reform reason must employ other feelings as its allies (a third point that Socrates uses the tale of

²⁰ See *id.* at 439e–440a, at 215–16.

Leontion to illustrate). But these allies must be under the command of reason. Left to themselves, they are blind. Reason must decide in which direction the reform of habit should proceed, and while there is always the danger that a person will seek wholeness of soul through a rationalization of the bad sort, to think that this will be the result in every case (as Posner does) underestimates the durability of shame in the souls of those with good habits and the importance to them of wholeness or integrity.

Reason serves a third function in a morality of character and habit. A good upbringing is not an isolated event. It is a complex cultural process, which assumes much by way of background and depends upon many conditions. A good upbringing is embedded in, and dependent upon, a way of life that many people share and must collaborate to preserve. But being well-brought-up within a way of life and learning the habits of right conduct that define its moral ideal do not by themselves ensure an understanding of the background conditions on which that upbringing depends. In fact, a person is likely to grasp these only if, at some point, his or her early moral education takes a philosophical turn and makes its own nature and conditions a subject of reflective study. Moral philosophy is not — to repeat — a substitute for proper habits. But it is often the only way a person can clearly comprehend the material and social circumstances required for a successful moral education in his or her community, and therefore often the only way of preserving for those who come after the possibility of receiving such an education themselves. Reason widens the horizon of the well-brought-up and enables them to see the background their own education presupposes; it helps them understand that perpetuation of the one demands preservation of the other; and it promotes the flexibility of attitude and approach that every effort of cultural preservation requires. Those who have been well-brought-up but lack a reasoned understanding of the culture on which their own good habits depend are less likely to see the importance of maintaining that culture, and more likely to approach the task of doing so mechanically and without reflection. In either case, they are likely to do a poorer job of preserving the form of life they have inherited than are those who possess reflective understanding as well as good habits. In Book Eight of *The Republic*, Socrates describes a descending series of political regimes and character types.²¹ The transition from each to the next — from timocracy to oligarchy, from oligarchy to democracy, and from democracy to tyranny — is a change for the worse. In each case, the change comes about through a kind of educational blindness, a failure on the part of one generation to understand the background of its own way of life and hence to see how the next generation might

²¹ See *id.* at 544c–576b, at 358–98.

successfully be educated into the (timocratic or oligarchic or democratic) values of its parents. The best moral habits in the world are no cure for this blindness. Only reason's special insight has the required remedial power.

The fourth contribution that reason makes to moral life is less practical but of real value nonetheless. Imagine that a person possesses unfailingly sound moral habits. Suppose that she does the right thing out of habit in every situation, that her habits never conflict or fail to provide sure guidance, that she never does anything that causes her to feel shame, and that she is led by habit to do all she must to preserve the background conditions her own moral education requires and thus to give her children an upbringing of the very same kind she received. This is an extravagantly implausible supposition, but that is not the point. The point is that a life of perfect habitual virtue, however fulfilling it may be, becomes still more fulfilling if the person whose life it is also comprehends in thought the purpose and value of the habits she possesses. It is unreasonable to claim that an unexamined life is not worth living.²² That is another piece of Socratic extremism (along with the claim that vice is ignorance, and curable by understanding alone). But it is not at all unreasonable to maintain that reflective self-understanding gives the life of habit a depth and completeness it otherwise lacks. The depth that reason adds to moral habit need have no practical utility to be of value (though it does in fact have much utility besides). It is intrinsically valuable and hence desirable for its own sake. An unexamined life of habitual virtue is plainly worth living, but an examined life of virtue is superior to it. We might call the latter a life of "rationalized" virtue, using that term now in a positive sense. The only basis for denying the superiority of this second life is the belief that reason corrupts habit rather than perfecting it (something Posner suggests at one point in these Lectures).²³ But to believe this one must assume — as Posner generally does not — that the habits on which moral life is based are vulnerable to the influence of reason at their core and not merely at their edges (which is the same assumption Socrates uses to support his more optimistic conclusion that knowledge is virtue). Habit is the foundation of moral life, and just as a good habit cannot be created by reason, it cannot be undone by reason either. But reason can perfect habit and add depth to a life of habitual virtue. In this sense, Aristotle is right to suggest that reason is the perfection of character.²⁴

At this point one might object that Aristotle's account of the role of reason in moral life — which I have loosely followed here — was de-

²² See PLATO, *supra* note 15, at 443.

²³ See Posner, *supra* note 5, at 1684–85.

²⁴ See ARISTOTLE, THE NICOMACHEAN ETHICS I. vii. 13–16, at 33 (H. Rackham trans., William Heinemann rev. ed. 1934).

vised for Athenian gentlemen living in a political and social milieu that has utterly vanished, and question whether this account has any relevance for us, living, as we do, in a tolerant, democratic society marked by a degree of moral diversity that Aristotle would never have accepted and probably could not have understood. Posner stresses the moral diversity that characterizes America today.²⁵ He is right to do so, and right also to insist that America needs this diversity and would suffer — politically and economically — if our moral beliefs and practices were all the same.²⁶ But does our moral heterogeneity impeach the account that I have offered and suggest that reason has a smaller role to play in moral life than I have claimed it does? The opposite conclusion seems to me more plausible.

First, *within* the many different ethical communities that populate the contemporary moral world, right conduct is still founded upon habit, and reason is still needed as a supplement, critical guide, and preservative agent. To that extent, the account of moral life that Aristotle devised for a more homogeneous world has continuing validity. But in our world of moral variety — characterized by what Max Weber aptly described as a “polytheism” of ultimate values²⁷ — reason has an enlarged role to play in moral life, greater in one crucial respect than the role Aristotle envisioned for it.

In our world, all but a few cloistered individuals are routinely exposed to a number of different moral ideals and to the communities that espouse them. Most of these communities, moreover, have philosophical defenders who seek to articulate the bases of their practices and beliefs. The result is a clash of ideas, tumultuous and shrill, that few can avoid. Many devoted members of different moral communities are drawn to this debate not because they are searching for enlightenment, but, initially at least, because they wish to defend themselves and demonstrate that their own way of life is superior to that of others. (The felt need to defend oneself in this way is especially strong in our society — more so than in other morally heterogeneous societies of the past — in part because reason enjoys such a high prestige in our civilization, as a result of what Weber termed the “rationalization and intellectualization”²⁸ of life.)

Even if his original motives for entering the arena of public debate are strictly defensive, however, once the committed adherent of a particular moral tradition has joined issue with his opponents, his own commitments will be subjected to increasing stress. He will face endless new criticisms that he must either accept or refute (unless he sim-

²⁵ See Posner, *supra* note 5, at 1681–82.

²⁶ See *id.*

²⁷ See MAX WEBER, *Science as a Vocation*, in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 129, 147 (H.H. Gerth & C. Wright Mills eds. & trans., Oxford Univ. Press 1946) (1919).

²⁸ *Id.* at 155.

ply withdraws from the debate, as many of course do). For some, the majority perhaps, this encounter with critical ideas serves only to attach them more firmly to the beliefs with which they began. But for a not-insignificant minority, it weakens this attachment and leaves them more at liberty (in a moral sense) than Aristotle's account of ethical life imagines possible. For these unmoored souls, only reason remains as a means of reattachment. Of course, they retain many of their old habits; no amount of critical thinking can entirely free them of these. But their habits must now be reviewed with special care: they stand under a cloud of suspicion that only reason can remove. And only reason can reconnect the individual who no longer feels the force of an earlier, unthinking loyalty to a particular community either to that community or to any other. It is not that habit has become a less important factor in moral life. Good habits are still, as they have always been, a necessary condition of moral behavior. But reason has become a more important factor, precisely on account of the multiplication of moral possibilities and the enhanced prestige of rational argument that characterize the intellectualized and pluralistic world we inhabit. The detachment of the individual from the sustaining faiths of yesteryear — a central theme in much of our century's literature and philosophy — has thus had the effect not of diminishing the potency of reason in moral life, but of dramatically increasing it instead.

Up to this point, I have been considering the contribution that reason makes to the moral lives of individuals without regard to their role or position in society. A few further words are in order concerning the special place of moral reflection in the work of judges, for this is the subject of the second Part of Posner's Lectures, which argues that moral reasoning has, and should have, little or no influence on judges' thinking. Much of what Posner says here seems to me entirely sensible — for example, his claim that courts should avoid deciding cases on the basis of highly controversial philosophical arguments (like those involved in the abortion and assisted-suicide cases).²⁹ This is prudent advice that reflects a sober assessment of the limited authority courts wield and of the practical need for judges to temper passions rather than inflame them, as well as a realistic appraisal of the insoluble nature of many philosophical disputes. Alexander Bickel gave similar advice nearly twenty-five years ago,³⁰ and it remains good advice today — better, I believe, than the recommendation that judges treat the law as a subfield of morality, press for philosophical clarity whenever they can, and assume that for each question of law or morality there is in principle a single right answer. But Posner badly understates the real, if limited, role that moral reflection can and must play in the de-

²⁹ See Posner, *supra* note 5, at 1698–1703.

³⁰ See ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 3–30 (1975).

cision of cases, and the conclusion he draws has things exactly backwards. Posner argues that whatever marginal effect such reflection has on the behavior of men and women generally, it has (and should have) even less influence on the behavior of judges acting within the constraints of their role.³¹ In reality, the role judges occupy is one in which the need for moral reflection is steadier and more insistent than in almost any other position. This is so for several reasons.

First, judges are continually faced with normative gaps and conflicts of the sort that the rest of us confront only occasionally. The disputes that come to them for decision are filtered through a process of selection that ensures this. To fill these gaps and settle these conflicts, judges must often ask themselves what goal or purpose — what end — the cases and statutes they are charged with interpreting aim to achieve. Economics can supply a great deal of helpful background here, but it cannot preempt this inquiry concerning ends, nor can it prevent the inquiry from taking a moral turn, because the end a judge assigns a law frequently requires a complex moral judgment informed by many basic values: the value of achieving a certain result, of promoting justice, of respecting the earlier decisions of other judges and of legislative bodies, of increasing the law's candor and clarity, and so on. The kind of moral quandary in which ordinary men and women find themselves from time to time, and which demands the exercise of reason, is for judges a routine predicament. It defines their professional position, and hence requires of them a greater than ordinary use of moral reason.

Second, judges have a special custodial responsibility that others share only to a lesser degree. Judges are required by their role to do all that they can to preserve the form of social life that the laws express, and this demands a broader, more reflective understanding than most citizens possess of the background conditions that give the laws their meaning, purpose, and aspirational force. A person with virtuous habits may fail to understand the conditions that made his or her own education possible and thereby fail to preserve the same education for others. That is a failure that moral reflection alone can prevent. But if a judge fails to preserve the laws because he does not understand the background that sustains them, this is a larger failing, given that the work of preservation is for him a special duty and a defining feature of his role. So a judge not only needs reason (as we all do) to meet his custodial responsibilities, he needs it with a special urgency, because these responsibilities are in his case particularly weighty.

Third, just as the life of an individual acquires depth when he or she adds reflective understanding to habit, comprehending the point or purpose of each habit and gathering them into a rationally organized

³¹ See Posner, *supra* note 5, at 1697–98.

scheme of values, so too the life of a people acquires depth as the basic commitments expressed in its laws become more articulate and their relationship to one another better understood. In this process, sometimes described as the law working itself pure,³² a people achieves the same kind of self-conscious maturity that an individual achieves by coming as an adult to understand the character that he or she acquired as a child, and the depth that reflective self-awareness adds to the life of a people has the same intrinsic value as the depth it adds to that of an individual. As individuals, we are each on our own as far as the achievement of such self-awareness is concerned. It is something we must win for ourselves. But the task of discovering and articulating our collective values as a people — though it is one in which we all participate, to varying degrees, from time to time — falls especially to certain individuals, to politicians and others, but perhaps most of all to judges. The task of judges is not merely to decide the cases that come before them one by one, but to bring the animating principles on which our legal order rests more and more into the open, and to arrange them in an articulate system of norms that self-consciously displays our character as a people and thus enhances the integrity of the laws, in Ronald Dworkin's sense.³³ Reason is the perfection of collective as well as individual character. Only through moral reflection can a people understand its values and hence itself. Judges bear a particularly heavy responsibility to encourage and guide this process, and thus for them moral reflection is an essential occupational technique.

Fourth, our morally heterogeneous society survives only because the diverse communities of belief and practice it contains are framed by a national system of laws that ensures a large degree of toleration and mutual forbearance on the part of rival moral factions. Without a framework of this kind, the moral competition that exists in America today would be hard to contain. It would quickly cross the line that separates debate from conflict of another and more destructive kind. To preserve the peace in our morally fractious society, it is essential to maintain a regime of tolerance, and it is first and most importantly the responsibility of judges to do so. Judges have the main responsibility for ensuring that the conflict of moral commitments is moderated by an overriding (legal) norm of noninterference. They have a duty to police the conflict of ideas and make sure it remains within bounds. But in order to meet this duty, they must rise above the rival moral communities whose conflict it is their obligation to contain. They must conceive this conflict, and deal with it, from an independent and nonpartisan perspective — from a vantage point that may draw upon, but cannot owe its allegiance to, any of the communities involved, for

³² See RONALD DWORKIN, *LAW'S EMPIRE* 400 (1986).

³³ See *id.* at 94–96.

only in this way can they construct a credible scheme of toleration that all will respect.

The definition, and subsequent elaboration and defense, of a non-partisan perspective on moral conflict must make particularly heavy use of reason, because reason is the principal resource that remains for adjudicating such conflicts once the more specific loyalties of particular ethical communities have been left behind. Reason figures prominently in the moral lives of these communities, but above them, in the realm of independent moral judgment, there is little else on which to rely. That is why individuals who have been cut loose from their communities of ethical origin must depend to an increased extent on reason to provide moral guidance. And it is why judges, whose obligation to maintain our country's norm of toleration compels them to keep the claims of every such community at arm's length, must also rely on moral reason to an extraordinary degree — in their case, not on account of some personal fact about them, but because the special role they occupy demands it.

In these four ways, then, Posner has it backwards when he says that the role judges play leaves especially little room for moral reason. In fact, the work that judges do leaves more room for moral reason, and makes heavier use of it, than do most other social or political tasks. That is why moral philosophers are so interested in the phenomenon of judging, and why they are sometimes led to make extravagant claims of the kind that Dworkin makes about the relationship of law and morality.³⁴ But to reply to this extravagance, as Posner does, by insisting that moral reason should play only a marginal role (or none at all) in the activity of judging reflects a strikingly incomplete view of that activity itself, in the same way that his claim that reason lacks potency in moral life generally reflects an incomplete view of the activity of human living. I can only think that in each case he is not being serious, but is responding to one kind of extravagance with an opposing extravagance of his own.

II. PROFESSIONAL PHILOSOPHY

Posner is dubious about the value of moral philosophy in general, but he reserves his sharpest criticisms and most bitter sarcasm for today's professional moral philosophers, who make their living as university faculty members. Those of us who belong to this group cannot help but recognize certain of our features in the mirror of ridicule that Posner holds up, and no one will dispute his major premise — that the discipline of philosophy has become a profession with many of the same characteristics that other professions display: a systematic division of labor, institutionally maintained standards of qualification and

³⁴ See *id.*

advancement, the separation of the sphere of professional activity from that of private life, and so on.³⁵ But what conclusion should we draw from Posner's claim that "[m]oral philosophy has become as thoroughly professionalized as accounting"?³⁶ Should moral philosophers resign themselves to this condition, or should they fight against it, insisting — as I believe they must — that other disciplines (accounting, for example) may be professionalized, may even be strengthened by professionalization, but that moral philosophy cannot be without losing its most important and valuable traits? And how should we view this fight — as something ridiculous or heroic?

According to Posner, the situation of today's professional moral philosophers is anything but heroic. Their work is characterized by its freedom from risk, its conventional respectability, its confinement within the narrow sector of university life, and the steadiness of the income it affords. In all these respects, Posner says, philosophers today lead different lives than did those of earlier generations, who typically had no secure source of income, faced real risks of persecution for their views, were frequently quite unconventional and even disreputable, and often carried their ideas into the world as prophets and reformers (which of course increased the risk of persecution).³⁷

Posner contrasts the professional moral philosopher with another type, the "moral entrepreneur."³⁸ The moral entrepreneur takes risks by acting in the world, defies convention and insists that others take notice and change the way they live, struggles without the security of an institutional position or a steady income, and possesses a true personal charisma that generates real power and authority. Posner describes this type with respect and even admiration, and seems to regard many of the great moral philosophers of the past, beginning with Socrates, as examples of it.³⁹ But the professional philosophy of our age is utterly different. It is a routinized, pacified, riskless enterprise with no danger or charisma. Like most other occupations, Posner says, moral philosophy has been transformed by "what Weber memorably called the disenchantment of the world,"⁴⁰ and those engaged in it are no longer the great-souled intellectual adventurers of the past, but small cogs in a vast machine, powerless and uncharismatic, filled with frustration and resentment at their own impotence, living dreams

³⁵ See Posner, *supra* note 5, at 1687–88.

³⁶ *Id.* at 1688.

³⁷ See *id.* at 1687–88. Posner also claims that today's professional moral philosophers merely disguise in theoretical dress the accepted views of their social set, but this claim, even if true, has little to do with the specific conditions of modern professionalism and can be explained entirely by the age-old phenomenon of conformism, as Posner's own speculation about the views of their imaginary Roman counterparts suggests. See *id.* at 1678.

³⁸ *Id.* at 1667.

³⁹ See *id.*

⁴⁰ *Id.* at 1687.

of influence and authority as a kind of psychic compensation, but trapped in "a form of life against which the wings of moral theory beat feebly."⁴¹

Posner does not tell us how today's moral philosophers, caught within the "iron cage"⁴² of professional life, should view their situation or respond to it, but my guess is that he would give them the same advice that Weber gave the students who listened to his 1918 lecture on the meaning of an academic career.⁴³ In the age in which we now live, Weber said, anyone who is serious about an academic career must renounce all pretensions to prophecy, acknowledge that he can make only a modest and marginal contribution to a continuing collective endeavor, and accept that the achievements and relationships most likely to give his life meaning will not be found in his professional work, but in the realm of private experience.⁴⁴ I suspect that Posner would give today's moral philosophers similarly sober advice: be modest in your aspirations; go about meeting the workaday demands of your job with humility, in the knowledge that you may solve a small puzzle or two but cannot change or even comprehend the world of moral action as a whole; acknowledge that you lack all authority — as a professional philosopher — to prophesy or to set yourself up as a healer of souls; and accept that your job is just that: a disciplined enterprise, requiring skill and training, but no more capable of providing the key to life's meaning than other professional jobs, like accounting.

Whether this is good advice for other professionals, I shall not attempt to say. (I think it is bad advice for lawyers, and have explained why in another place.⁴⁵) But for moral philosophers, it is impossible advice and cannot be followed without abandoning the enterprise of moral philosophy itself. This is so for two reasons.

First, the subject of moral philosophy is the *whole* of life and how it should be lived. To take this subject seriously, a person must confront the questions of ultimate ends that give his or her entire life its direction and form. Moral philosophy therefore does not lend itself to the same division of labor as other disciplines, whose practitioners each study only one small portion of the field and rely on others for the rest. The subject of moral philosophy can be divided up in a similar way — today, in fact, it often is — but anyone who pursues the enterprise seriously, in accordance with its true spirit, must transcend this division and address the question of how one ought to live with

⁴¹ *Id.*

⁴² MAX WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* 181 (Talcott Parsons trans., Charles Scribner's Sons 1958) (1904).

⁴³ See WEBER, *supra* note 27, at 138–56.

⁴⁴ See *id.*

⁴⁵ See ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1993).

the wholeness it demands, looking to others for guidance and insight, perhaps, but recognizing that the search for an answer is a personal and not a collective endeavor.

Second, the work that moral philosophers do must be at the center of their search for meaning in life. For someone to say, "I teach moral philosophy for a living, but look for meaning elsewhere, outside the realm of work," is absurd (however many teachers of moral philosophy are guilty of this absurdity). A person who approaches the subject in this spirit shows that he or she has failed to understand it or has decided not to take it seriously. Moral philosophy differs in this respect from accounting. Accountants can view their work in just this way without demonstrating a lack of seriousness or understanding. By contrast, the work of moral philosophy must be directly meaningful for the person doing it, or it ceases to be moral philosophy. Whatever degree of potency one ascribes to reason in moral life, the professional moral philosopher whose work is just a job will always be a living oxymoron.

For a moral philosopher to accept Weber's counsel (which I am assuming would be Posner's counsel too) is therefore self-defeating. It entails the abandonment of moral philosophy itself. It has never been easy to be serious about moral philosophy. The Socratic dialogues of Plato show this. But the professionalization of moral philosophy in the twentieth century has made such seriousness even more difficult by creating a comfortable simulacrum of it. To this development, which Posner, like Weber, regards as an irreversible fate — "the inescapable condition of our historical situation"⁴⁶ — there are two attitudes one may adopt. The first is an attitude of humble resignation. For some disciplines, this may be an acceptable, even salutary, posture, but for moral philosophy it is death. The second is an attitude of resistance, which is the only path by which moral philosophy can survive its own professionalization. Those who take this path will always look somewhat ridiculous. They will always seem to be out of touch and behind the times. It will always be easy to make fun of them and their pretensions. But in their ridiculous ambition to stay with the question that Socrates put to Thrasymachus can we not also see a heroic resolve to remain faithful to the project of moral philosophy and to save it from the forces of disenchantment that would destroy it — a resolve at once laughable and stirring? The saddest thing about these depressing Lectures is Richard Posner's failure to be moved by this ambition, in which he finds only something to mock.

⁴⁶ WEBER, *supra* note 27, at 152.