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Cover Page Footnote

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BOOK REVIEW

IN DEFENCE OF POESIE*

MICHAEL L. RICHMOND**

Law and Literature: A Misunderstood Relation. Richard A. Posner. Cambridge: Harvard University Press, 1988. Pp. xi, 371.

There then appeared a new distinctive mark on the youthful corpus of Law and Literature studies—"theory." . . . By 1982, the fledgling had reached adolescence, carrying with it some of the pretensions but also some of the more clearly marked potential of the mature adult. . . . Legal academics now had to grapple with a real contender, albeit not yet fully grown, and also with their long-standing aversion to foreign words and phrases.¹

INTRODUCTION

Judge Richard Posner's hardbound sally into the world of law and literature leaves readers both impressed and befuddled. Although he has given the legal profession a work of insight and perception, he has also given it a work of unfortunate underreaching and misplaced criticism of a movement with great potential. *Law and Literature: A Misunderstood Relation*² begins with remarkable promise but ends with a whimper.

Posner's book enhances the coordinate study of law and literature, despite his repeated suggestions that literature has little of substance to offer the lawyer.³ The book's strength derives from Posner's direct analysis of literary works, exemplified by his penetrating analysis of revenge in literature.⁴ Unfortunately, although he is keenly perceptive at times, too often he fails to develop his analyses fully.⁵ Moreover, because Posner misreads several of the commentaries he discusses, he downplays the importance of literature for the lawyer.⁶ Nevertheless, Judge Posner

* P. Sidney, *Defence of Poesie* (c. 1582), excerpted in 1 F. Kermode & J. Hollander, *The Oxford Anthology of English Literature* 636 (1973).

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1. Weisberg, *Coming of Age Some More: "Law and Literature" Beyond the Cradle*, 13 *Nova L. Rev.* 107, 119 (1988) (footnotes omitted).

2. R. Posner, *Law and Literature: A Misunderstood Relation* (1988).

3. See, e.g., *infra* notes 49-50 and accompanying text.

4. See *infra* notes 8-49 and accompanying text.

5. See, e.g., *infra* notes 49, 71 and accompanying text.

6. See, e.g., *infra* notes 67-68, 84-85, 113 and accompanying text.

has made a valuable contribution to the emerging scholarship of law and literature.⁷

I. POSNER ON REVENGE

Posner is most successful in his analysis of revenge in literary works.⁸ He begins with a discussion quite natural to a leading figure in the law and economics movement, analyzing the approach of "rational man" to revenge. Posner suggests an economic risk-benefit analysis of revenge in a society that has not adopted means to provide for "redress through public machinery, whether the machinery of public law (illustrated by criminal prosecution) or of private law (illustrated by tort law)."⁹ Posner's "rational man" acknowledges that revenge will not recoup any losses incurred from the act for which he seeks retribution. He also apprehends that his failure to seek revenge makes him a more likely target for future aggressors who will not worry about defending themselves against his retaliation. In other words, economic reasoning precludes one from seeking revenge except to "convince potential aggressors that you will retaliate even if the expected benefits of retaliation, calculated *after* the aggression has occurred, are smaller than the expected costs at that time."¹⁰ What we gain from our initial aggression, Posner suggests, we lose in defending ourselves against subsequent retaliation.

Even though "rational man" may engage in acts of revenge and retaliation, "[v]engeance . . . is an extremely clumsy method of maintaining order."¹¹ Posner demonstrates that societies which permit citizens to redress grievances through individual acts of vengeance elect a costlier method of maintaining order than those which employ a system of fines combined with incarceration or other corporal punishment.¹² Ultimately, then, societies adopt a controlled system of laws to replace revenge-motivated behavior by individuals. Posner notes, however, that "law channels rather than eliminates revenge—replaces it as system but not as feeling."¹³ Not simply "rational man," but all people succumb to emotions when society fails to provide an effective alternative to the release of those emotions.¹⁴ Citizens will, therefore, continue to seek re-

7. For a succinct history of the law and literature movement, see generally Weisberg, *supra* note 1.

8. See R. Posner, *supra* note 2, at 25-70.

9. *Id.* at 27.

10. *Id.* at 28.

11. *Id.* at 29.

12. See *id.* at 30-31.

13. *Id.* at 33.

14. Revenge springs from a gut level emotion, defying rationality and economic sense with equal abandon. For example, for many years, Texas statutorily justified the revenge murder of an unfaithful spouse or adulterer caught *in flagrante*. See Tex. Penal Code art. 1220 (repealed 1974). One Texas case traces the roots of the statute back to Roman civil law. See *Price v. State*, 18 Tex. Crim. 474, 481 (1885) (citing 4 W. Blackstone, Commentaries 191 (Chitty ed.)); see also *Williams v. State*, 162 Tex. Crim. 242, 243, 284 S.W.2d 151, 151 (1955) (defendant need not prove justification beyond a reasonable doubt). De-

venge when external forces block enforcement of legal substitutes, or when those substitutes fail to operate effectively.¹⁵

Posner then analyzes instances in literature in which characters seek revenge because their societies either have no transference mechanisms, or because the mechanisms in place have proven ineffective.¹⁶ Posner chooses texts ranging from Greek tragedy to Elizabethan tragedy, from the German Heinrich von Kleist to the Southerner William Faulkner. He has perceptively selected and read his texts.

Posner begins at an eminently appropriate point, the mythology of the ancient Greeks, who treated revenge almost as an art form.¹⁷ Posner could hardly have started his study of revenge at a better place in history.¹⁸ The fall of the House of Atreus begins with a gruesome banquet at which Thyestes unwittingly eats the flesh of his sons, murdered by his brother Atreus in revenge for a panoply of sibling wrongs including the seduction by Thyestes of Atreus's wife. The story proceeds with other instances of revenge which took place during and after the Trojan War and concludes with the acquittal of Atreus's grandson, Orestes, for the revenge murder of his mother.¹⁹ For Posner, Orestes' acquittal by the court of Athena, the goddess of wisdom, represents the transition from the revenge of a loosely structured society to the criminal courts of an organized society.²⁰

Similarly, revenge in Sophocles' Theban plays has given way to the

spite the permissive nature of the statute, however, Texas courts were quick to note that revenge did not occur in the normal course of events. *See, e.g.,* Great Am. Reserve Ins. Co. v. Sumner, 464 S.W.2d 212, 216 (Tex. Ct. App. 1971) ("Ordinarily most husbands do not undertake to vindicate such wrongs by homicide but rather lay their problem in the lap of the divorce courts.").

In a somewhat bewildered tone, Posner comments that in *The Merchant of Venice*, Shylock "actually prefers taking lethal revenge on Antonio to receiving extravagant interest on his loan." R. Posner, *supra* note 2, at 95. Posner does suggest that Shylock's motivation at least in part was economic, for Shylock felt that his business would prosper in Antonio's absence. *See id.* at 95 n.36. But ultimately, neither economic motivation nor "rational man" can explain the feral need to obtain retaliation at what can prove to be any cost.

15. *See* R. Posner, *supra* note 2, at 55-56.

16. *See id.* at 44-64.

17. Posner ignores one of the most gruesome and well-documented instances of revenge in Greek mythology. Medea, subject of numerous dramas, *see, e.g.,* P. Corneille, *Medee* (1639); Euripides, *Medea*; R. Jeffers, *Medea* (1946), sought revenge on the husband who rejected her for a younger woman. She sent Jason's new bride a unique wedding present—an exquisitely beautiful and deadly poisoned robe. Not content with making Jason suffer the death of his new bride, Medea further tormented him by tearing their two sons limb from limb.

18. Posner does discuss Euripides' *Hecuba*. Hecuba, like Medea, *see supra* note 17, gains revenge by killing the children of a man who has wronged her. A reviewer cannot refrain from repeating Posner's description of the play's concluding with "the transformation of Hecuba into a (literal) bitch." R. Posner, *supra* note 2, at 39.

19. *See* R. Posner, *supra* note 2, at 33-38.

20. Athena's Court of the Areopagus as depicted in *Eumenides* represented the "desire to end the cycle of vengeance—thus making transparent the relationship between vengeance and the absence of regular institutions of criminal justice." *Id.* at 34.

rule of law. As one critic notes, "[I]n [*Oedipus Rex* and *Oedipus at Colonus*] Oedipus is his own judge and jury, convicting himself in the first, acquitting himself in the second. On one level, the Oedipus plays seem to be about individual conscience—whether Oedipus feels himself guilty or innocent."²¹ The ills which befall Oedipus, although mandated by the gods, stem from his own sense of remorse and guilt rather than from any societal need for retribution for his acts.²²

From Greek tragedy Posner draws two conclusions of particular import to lawyers and judges. First, "revenge is associated with a particularly uncompromising form of strict liability for harms inflicted however justifiably. So one is not surprised to find that early legal systems, in which the roots of law in revenge still show, rely on strict liability more heavily than modern legal systems do."²³ In this regard, Orestes' absolution demonstrates the ségué from absolute liability to liability based on fault.²⁴ Clytemnestra's collusion in the murder of Agamemnon permits her no opportunity to explain her motives—she must die in turn. However, Athena excuses Orestes for murdering Clytemnestra as he killed without fault, the gods having compelled him to avenge the death of his father. As Posner implies, this societal transition does much to explain the transition in tort law from the system of *wergild*²⁵ through strict liability²⁶ to the ultimate imposition of liability only upon a showing of fault.²⁷

Second, Posner notes that "[w]e the audience start off with great sympathy for the revenger and wish him or her complete success, only to find

21. S. Spender, *Oedipus Trilogy* 13 (1985).

22. After blinding himself, Oedipus sings:

It was Apollo, friends, Apollo.
He decreed that I should suffer what I suffer;
But the hand that struck, alas! was my own,
And not another's.
For why should I have sight.
When sight of nothing could give me pleasure?

Sophocles, *Oedipus the King* lines 1276-81 (H. Kitto trans. Oxford U. Press ed. 1962).

23. R. Posner, *supra* note 2, at 35.

24. *See id.* at 36.

25. *Wergild* provided a system of compensating a lord or the King during the Middle Ages. Compensation was based on a rather complete schedule of fines and reimbursements depending on the loss incurred. *See generally* D. Walker, *The Oxford Companion to Law* 1296 (1980) (discussing *wergild*).

26. *See, e.g.*, *Lambert v. Bessey*, 83 Eng. Rep. 220, 221 (1681) ("In all civil acts, the law doth not so much regard the intent of the actor, as the loss and damage of the party suffering."); Anonymous, *Y.B. 5 Edw. 4, fo. 7, pl. 18* (1466) (statement of Brian, apparently as counsel) ("As in the case where I erect a building, and when the timber is being lifted a piece of it falls upon the house of my neighbor and bruises his house, he will have a good action, and that, although the erection of my house was lawful and the timber fell without my intent."), *reprinted in* W. Prosser, J. Wade & V. Schwartz, *Cases and Materials on Torts* 4-5 (8th ed. 1988).

27. *See* R. Posner, *supra* note 2, at 31, 36. As late as 1616, fault became relevant in English tort law only if the defendant could prove the plaintiff's injury occurred "utterly without his fault." *Weaver v. Ward*, 80 Eng. Rep. 284 (1616) (dictum).

that as the play (or story) proceeds we cool on revenge."²⁸ Thus, lawyers should conduct criminal trials bearing in mind that revenge should not ameliorate criminal conduct and that juries may not sympathize with the avenger.²⁹

Posner's observation may not have carried the same ring of truth in the Greece of Aeschylus as it arguably does today in practice. The society of the Greek tragedians did not always react negatively to a vengeance murder. Personal vengeance still had its place in a society whose laws offered only an incomplete substitute for revenge, if they offered any at all.³⁰

Greek tragedians often had their choruses voice approval of revenge-actuated murders.³¹ For example, in the story of the House of Atreus, Thyestes' surviving blood relative, Aegisthus, avenges his progenitor by seducing the wife of Atreus's son, Agamemnon, and then convincing her to murder her husband in the bargain. The Chorus seemingly reacts in a negative manner to the avenger: "Aegisthus, for this insolence of thine/ That vaunts itself in evil, take my scorn."³² Yet closer scrutiny reveals that the Chorus does not recoil at the vengeance itself. Rather, it objects to Aegisthus' cowardice not only at refusing personally to kill Agamemnon and uphold his father's honor, but at using a woman as his tool in the bargain.³³

28. R. Posner, *supra* note 2, at 39.

29. Cf. R. Posner, *supra* note 2, at 39-40 ("The audience's changing response . . . helps us understand why revenge is infeasible in many cases and repulsive in most of the rest.").

30. Accordingly, one should beware of over-generalizations that suggest juries will look askance at defendants who commit crimes with vengeance as their motive.

31. See *infra* notes 32-33 and accompanying text.

32. Aeschylus, *Agamemnon* 72 (E. Morshead trans. Harvard Classics ed. 1909). True, the voice of the chorus in Greek tragedy does not necessarily reflect the values of the society in which the tragedy occurs. Still, only with the rarest of exceptions does the chorus reflect any but the most neutral position available among the characters. Kenneth Rexroth states that in Sophocles' dramas, "[t]he chorus is us." K. Rexroth, *Classics Revisited* 37 (1986).

33. Thou womanish man, waiting till war did cease,
Home-watcher and defiler of the couch,
And arch-deviser of the chieftain's doom! . . .
Ay, thou art one to hold an Argive down—
Thou, skilled to plan the murder of the king,
But not with thine own hand to smite the blow! . . .
Thou losel soul, was then thy strength too slight
To deal in murder, while a woman's hand,
Staining and shaming Argos and its gods,
Availed to slay him?

Aeschylus, *supra* note 32, at 73.

In Sophocles' version of *Electra* the chorus also reacts approvingly to the vengeance death of Clytemnestra:

Chorus [sings]. The cry for vengeance is at work; the dead are
stirring.
Those who were killed of old now
Drink in return the blood of those who killed them.

Although Posner correctly concludes that people react negatively to revenge in particularly vicious cases,³⁴ his conclusion may be overbroad. The observer who seems to react negatively to revenge may instead react negatively to the avenger.³⁵ The viewer may even approve of the need for revenge.³⁶

By the time of Elizabethan playwrights, the sense of revenge drama had changed. Posner uses *Hamlet* to introduce a detailed analysis of Shakespearean revenge.³⁷ Although Shakespeare's Denmark apparently established a legal system to replace vengeance, the characters of the play maintain such a lofty place in society that they

are effectively above the law. There is little likelihood that Hamlet might be punished for killing Polonius and trying to conceal his body (Claudius raises the issue briefly, only to reject it on the ground that Hamlet is too popular), or even for killing the king. . . . The only way for Hamlet to obtain justice against Claudius, or for Laertes to obtain justice against Hamlet, is by revenge.³⁸

Thus we have the second stage of revenge as envisioned by Posner—a situation where a system of laws fails to function given such externalities as the immune status of the actors.³⁹ As Claudius's status has thwarted the law which should have replaced revenge, only personal revenge can fill the vacuum left behind. Posner demonstrates this most forcefully by comparing *Hamlet* to Shakespearean dramas set in earlier times: *Titus Andronicus*, *Macbeth* and *Julius Caesar*.⁴⁰ Posner notes that whereas these three plays do not depict revenge critically, *Hamlet* carries an ambivalent view of vengeance.⁴¹ Most significantly, two Shakespearean dra-

Chorus-Leader. See, they are coming, and the blood-stained arm
Drips sacrifice of death. It was deserved.

Sophocles, *Electra* lines 1397-1400 (H. Kitto trans. Oxford U. Press ed. 1962). Clytemnestra's death, in light of Agamemnon's sacrifice of their daughter, Iphigenia, may seem harsh to the modern mind. However, Electra and Orestes in their turn had the filial duty to exact the death of their mother for having murdered their father.

34. See *supra* notes 28-29 and accompanying text.

35. See *supra* notes 32-33 and accompanying text.

36. See *supra* note 33 and accompanying text. Arguably, the execution of Theodore Bundy would be a contemporary example. His crimes were so vicious and numerous that objection to the execution, even by the most vocal of groups, was muted or non-existent. Cf. *Bundy is Put to Death in Florida After Admitting Trail of Killings*, N.Y. Times, Jan. 25, 1989, at 1, col. 5 (cheering crowds at Bundy's execution).

37. See R. Posner, *supra* note 2, at 54-62. Posner also dwells on *Julius Caesar* as a revenge play. See *id.* at 41-44.

38. *Id.* at 55-56.

39. See *id.*

40. See *id.* at 62. Although *Hamlet* is based on primitive Norse legends dating well before 1100 A.D., see O. Campbell & E. Quinn, *The Reader's Encyclopedia of Shakespeare* 285 (1966), Shakespeare moved the story to a more modern Denmark—one in which trade with England flourished (the King sends Hamlet to England at act 4, sc. 3) and the youth of Denmark studied abroad (for example, at Wittenberg, as in act 1, sc. 2). This brings it temporally out of the dark ages and closer in time and custom to Elizabethan England.

41. See R. Posner, *supra* note 2, at 62. Hamlet's own ambivalence toward his duty to

mas set in Renaissance Italy—*The Merchant of Venice* and *Romeo and Juliet*—emphatically reject revenge.⁴² Indeed, Shylock's futile attempt, in *The Merchant of Venice*, to use the device of law to wreak vengeance⁴³ bolsters Posner's conclusion. A legal system, organized to preclude instances of private vengeance, may not itself become a tool of the very vengeance it purports to avoid.⁴⁴

Posner has discovered in Shakespeare what could be substantial support to further develop his thesis that a structured society replaces a non-productive anarchic system of revenge with a system of rules and laws designed to sublimate an elemental emotion by an appropriately civilized alternative.⁴⁵ The younger or less refined the society, the more revenge plays a role in its culture. Thus, the more primitive society of the Scottish Thanes approved of revenge,⁴⁶ the intermediate society of mercantile Denmark accepted it,⁴⁷ and the structured society of Renaissance Italy rejected it.⁴⁸ Yet Posner does nothing with this discovery. Instead, he uses the divergence of attitudes in Shakespeare's plays simply to point out that we should not assume that Shakespeare had a single "position" on revenge.⁴⁹ Posner has failed to fully use his meticulously developed argument to support his initial thesis.

Posner has masterfully demonstrated one way in which the lawyer can use literature to gain insights into the law, yet declines to draw the inevitable conclusion. We could dismiss Posner's failure to use his analysis of Shakespearean revenge simply as an oversight—a lapse in logic. Yet this apparent lapse bespeaks a greater flaw in Posner's book: his refusal to acknowledge that literature can provide the lawyer and legal theorist

avenge his father's death has been the topic of so much discussion that more than a mere mention of it would go beyond the scope of this review. The classic study is that in A. Bradley, *Shakespearean Tragedy* (1904).

42. See R. Posner, *supra* note 2, at 62. The law of Verona, as shown by the Prince's decree against any further public efforts to continue the Montague-Capulet vendetta, attempted to replace vengeance. However, the Prince's very ruling shows his inability through law to effectively curb revenge. Thus, the third setting for revenge noted by Posner has come about. See *id.* at 31-32.

43. Posner notes that Shylock represents both "vengefulness; and legal formalism in its lay sense of using the letter of the law to accomplish an unjust end." *Id.* at 94.

44. Posner does not seem to subscribe to this reading of *The Merchant of Venice*. He writes that "[w]e are made to see how law is a substitute for revenge and could in principle provide a basis for obtaining revenge in as gruesome a form as the avenger might desire." R. Posner, *supra* note 2, at 95. However, Posner's statement is only partially accurate. First, ultimately Shylock fails due to the niceties of the very law he attempts to use. Thus, the law itself has avoided the attempted subversion and operated to deny revenge. Second, it is not "law," but rather the totality of a legal system, that provides the substitute for revenge. Thus, the legal system of Venice, by encompassing the strict letter of law, replaces vengeance, and the court prevents Shylock from obtaining his pound of flesh only by a contortion of the very law itself.

45. See R. Posner, *supra* note 2, at 31-33.

46. See *Macbeth*, act 5, sc. 7, lines 23-27.

47. See *Hamlet*, act 5, sc. 2, lines 382-97.

48. See *The Merchant of Venice*, act 4, sc. 1, lines 186-205.

49. See R. Posner, *supra* note 2, at 62.

with an invaluable source of insight and argumentation. Ironically, Posner has taken a sequence of literature addressing the theme of revenge and, with care and insight, developed and proved a theory which helps clarify the development of many areas of the law as well. But Posner's unfulfilled treatment of Shakespeare should not surprise his readers. Throughout *Law and Literature* Posner rejects any but the most timid uses of literature for the lawyer. An examination of the uses of literature Posner accepts, and those he rejects, will explain his self-imposed limitations on the role of literature.

II. POSNER'S USES OF LITERATURE

Posner only half-heartedly embraces the study of literature by lawyers, limiting its role to "a valuable supplementary perspective, stimulating new insights and inquiries."⁵⁰ In this regard, Posner isolates four areas in which literature may play a role for the lawyer.

First, as his study of revenge demonstrates, "literature can supply insights into the nature and origins of law."⁵¹ Yet Posner's limited insights do not acknowledge the greater conclusion that could be drawn from his reading of Shakespeare and the Greek tragedians. Instead, literature merely adds a human gloss to the objective views of lawyers.

Second, literature about the law will lead "to fruitful reflections on the tension between formal legal concepts and broader ethical notions of justice."⁵² Posner, however, does not believe that literature in this sense is particularly relevant to lawyers in their professional lives "due to the narrowness of legal training and the resulting narrowness of the lawyer's idea of law."⁵³ Posner also rejects the possibility that literature can instill humanitarian ideals into the lives of practitioners.⁵⁴ But today's law-

50. *Id.* at 353.

51. *Id.* at 354. Posner earlier makes the cryptic and belittling observation that "[t]he reason why literature ostensibly about law often does not engage the lawyer's professional knowledge is that, by its very nature, literature—especially great literature—deals with the permanent and general aspects of human nature and institutions." *Id.* at 15. Of course literature attempts to say something about the broader human condition, but so does law. Our legal system structures our daily life, defines the boundaries of our aspirations, and confines our more destructive emotions and responses. The interaction of each member of humankind with each other depends implicitly on the laws of the society in which the individual exists.

And when the last law was down, and the Devil turned round on you—where would you hide, Roper, the laws all being flat? This country's planted thick with laws from coast to coast—man's laws, not God's—and if you cut them down—and you're just the man to do it—d'you really think you could stand upright in the winds that would blow then? Yes, I'd give the Devil benefit of law, for my own safety's sake.

R. Bolt, *A Man For All Seasons*, in *Laurel British Drama: The Twentieth Century* 395 (R. Corrigan ed. 1965) (Act I, Sir Thomas More speaking to his son-in-law, William Roper) (stage directions omitted).

52. R. Posner, *supra* note 2, at 355.

53. *Id.* at 355.

54. *See id.* at 356-57.

yers, despite specialization and a resulting narrow outlook on the law, have begun to see the practice of law in a broader social context⁵⁵ and should welcome the lessons found in great literature.

Third, according to Posner, a study of literary criticism and theory can assist an attorney in interpreting legal texts.⁵⁶ In particular, lawyers may gain a deeper understanding of the reasoning in judicial opinions by reading them with an eye to their linguistic structure.⁵⁷ At the same time, attorneys versed in literary theory have useful tools at their command when dealing with matters of copyright, obscenity and defamation.⁵⁸ Legal regulation of literary matters requires an understanding of both law and literature to function effectively.⁵⁹ Despite this seeming openness to the lessons of literature, Posner questions literature's ability to serve as a broader didactic tool for lawyers seeking to improve their writing and reasoning skills.⁶⁰

Last, "the field deserves a place in legal teaching and research."⁶¹ Studying jurisprudential and ethical issues as reflected in literature leads to a more stimulating and memorable class for student and teacher alike. Literature also serves as a vehicle for a course in legal writing, particularly in terms of rhetorical and advocacy skills.⁶² Fiction also imparts drama to trials, an element often missing from trial transcripts.⁶³

As noted elsewhere, contemporary law students have weaker backgrounds in literature than the students of twenty-five years earlier.⁶⁴ A stunning minority of law students, if asked to contrast the speeches of

55. See Kaye, *Women Lawyers in Big Firms: A Study in Progress Toward Gender Equality*, 57 *Fordham L. Rev.* 111, 113-16 (1988).

Attorneys have been forced to consider the role of law in relation to society's needs, and to ponder the equity of legal rules. Initiatives throughout the country relating to tort reform, for example, have generated substantial discussion on the social benefit of tort law. See *infra* notes 81-82 and accompanying text.

56. See R. Posner, *supra* note 2, at 209-68, 355.

57. See *id.* at 269-99, 356.

58. See *id.* at 352, 356.

59. See *id.* at 352, 359 (literary perspective useful in teaching courses about legal regulation of literature).

60. See *id.* at 297 ("not possible to learn to write greatly, but . . . possible to learn not to write poorly"). But see *id.* at 359 ("possibility of teaching advocacy from the great literary examples of eloquence and persuasion . . . has been overlooked").

61. *Id.* at 358.

62. See *id.* at 359.

63. Recall, however, that *Inherit the Wind* contains a courtroom scene based in large part on the actual trial transcript of the Scopes Monkey Case. On the other hand, in how many trials did Clarence Darrow confront William Jennings Bryan?

64. See Richmond, *The Cultural Milieu of Law*, 13 *Nova L. Rev.* 89, 91-93 (1988). See generally A. Bloom, *The Closing of the American Mind: How Higher Education Has Failed Democracy and Impoverished the Souls of Today's Students* (1987) (curricular offerings and pragmatic philosophy give inadequate grounding in fundamentals); E. Hirsch, *Cultural Literacy: What Every American Needs to Know* (1987) (curricula ignore basic cultural underpinnings); Huber, *President's Message: Values, Commitment and Our Students*, A. Am. L. Sch. Newsl., June 1988, at 1-2 (law schools must be aware of poor undergraduate preparation of their students).

Posner also, quite properly, notes what many law teachers believe but few are willing to

Brutus and Antony,⁶⁵ would know the inquisitor referred to Shakespeare's *Julius Caesar*. Fewer still would have read the play. Thus, "[o]ne function of a course on law and literature is to provide remedial education in literature—a remedial education not wasted even from the narrow perspective of purely professional goals."⁶⁶ Posner proves remarkably perceptive in this underrecognized role of the course in law and literature.⁶⁷

Posner's approach to the other three areas he singles out for lawyers interested in literature is regrettably narrow. In each, he cuts short his view of literature's utility with an abruptness perhaps born from his disagreements with those authors who have written in the field of law and literature. An examination of each area reveals the impropriety of Posner's limitations, as well as his misreading of the authors he criticizes.

A. *Legal Themes Reflected in Literature*

Posner's discussion of revenge illustrates the narrowness of his use of literature in teaching lessons about the law. For example, Posner maintains that tort law and criminal law exist as societal mechanisms for preventing the economically unsound system of private vengeance.⁶⁸ The less formalized a society's system of laws, the more people will seek personal revenge for harm done to them by others.⁶⁹ Similarly, if a society has a structure for recompense and retribution that fails to function efficiently, members of the society will return to private vengeance.⁷⁰ What Posner intimates through his discussion of Greek and Shakespearean tragedy—that the more structured a society, the more it tends to reject revenge as acceptable behavior—he fails to state plainly.⁷¹ Inasmuch as Posner does not draw even this modest conclusion, it is unlikely that he would attempt to apply his analysis to contemporary legal trends.

Posner's observations, however, can help explain the contemporary movement of tort reform as viewed in conjunction with developments in

acknowledge, that "[a] law teacher cannot assume that his students have any literary background at all." R. Posner, *supra* note 2, at 360-61.

65. See *Julius Caesar*, act 3, sc. 2, lines 12-44, 79-113. "Yet," as Posner notes, "what better way to impart a feeling for the essentials of advocacy than by careful study and comparison of Brutus's and Antony's speeches?" R. Posner, *supra* note 2, at 359; see also Kornstein, *Oral Advocacy in "Julius Caesar"*, N.Y.L.J., May 31, 1988, at 2, cols. 3-4 (comparing successful oral advocacy of Antony with failed oral advocacy of Brutus).

66. R. Posner, *supra* note 2, at 361.

67. Although Posner does not discuss the collateral benefits of studying popular culture, Professor Anthony Chase has noted the value of studying films and contemporary novels, recognizing potential benefits similar to those noted by Posner. See, e.g., Chase, *An Obscure Scandal of Consciousness*, 1 Yale J. L. & Humanities 105-06 (1989); Chase, *On Teaching Law and Popular Culture*, 3 Focus on Law Studies: Teaching About Law in the Liberal Arts 1, 1, 8 (Spring 1988).

68. See R. Posner, *supra* note 2, at 25-26, 32; *supra* notes 11-12, 45 and accompanying text.

69. See *supra* notes 12, 14 and accompanying text.

70. See *supra* notes 15-16, 38-39 and accompanying text.

71. See *supra* note 49 and accompanying text.

criminal procedure. Two trends in seemingly disparate areas of the law emerged concurrently in the 1960s: the Warren Court's expansion of criminal defendants' rights,⁷² and the increase in avenues,⁷³ and awards⁷⁴ for plaintiffs in tort actions. Posner teaches that systemically, a body of laws should operate to minimize the natural emotional desire of members of society to seek revenge, observing that "law channels rather than eliminates revenge—replaces it as system but not as feeling."⁷⁵ If one legal substitute for revenge is thwarted—for example, if criminal convictions become more difficult to obtain—another legal substitute must permit broader opportunity for redress or private persons will wreak their own vengeance. Thus, although Posner does not consider the matter, the natural trend of tort law would lead it to expand opportunities for recovery as criminal law produces fewer convictions.⁷⁶

The Warren Court established procedural safeguards in criminal prosecutions.⁷⁷ At the same time, state courts adopted a broad range of measures designed to expand the ability of plaintiffs to recover in tort cases.⁷⁸ More recently, the Burger Court made inroads on the advances of the Warren Court, producing fewer barriers to conviction.⁷⁹ A strong national movement has sprung up, seeking to guarantee that victims of crime have a voice at the trials of those who injured them.⁸⁰ The law has

72. See, e.g., *Miranda v. Arizona*, 384 U.S. 436, 467-76 (1966) (police must warn defendant of certain rights during custodial interrogation); *Aguilar v. Texas*, 378 U.S. 108, 110-15 (1964) (affidavit to obtain search warrant must provide sufficient basis for finding of probable cause); *Wong Sun v. United States*, 371 U.S. 471, 484 (1963) (exclusion of evidence obtained from unlawful arrest).

73. Plaintiffs can recover far more easily than before, due in part to the shift from negligence standards to strict products liability, see, e.g., *Greenman v. Yuba Power Prods., Inc.*, 59 Cal. 2d 57, 62, 377 P.2d 897, 900, 27 Cal. Rptr. 697, 700 (1963), due to the replacement of contributory negligence by comparative negligence, see, e.g., *Hoffman v. Jones*, 280 So. 2d 431, 438 (Fla. 1973), and the continuing erosion of immunities, see, e.g., *Freehe v. Freehe*, 81 Wash. 2d 183, 192, 500 P.2d 771, 777 (1972) (abrogating interspousal immunity).

74. For example, one government study "was particularly struck by the extraordinary growth over the last decade of the number of tort lawsuits and the average award per lawsuit." United States Attorney General's Office, Report of the Tort Policy Working Group on the Causes, Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordability 2 (1986) [hereinafter Tort Policy Working Group].

75. R. Posner, *supra* note 2, at 33.

76. Melvin Belli reports, with approval, a summation urging the jury to express its disapproval to the defendant through the use of punitive damages: "[T]hey are terribly important if you feel a message to a very miscreant manufacturer and corporation should be se[n]t [*sic*] to scrub their act, and it should." 5 M. Belli, *Modern Trials* § 65.9, at 85 (2d ed. 1982). *But cf.* *Juzwin v. Amtorg Trading Corp.*, 705 F. Supp. 1053, 1054-55, 1058-60 (D.N.J. 1989) (chronicling distinctions between punitive damage awards and criminal sanctions).

77. See *supra* note 72 and accompanying text.

78. See *supra* notes 73-74 and accompanying text.

79. See, e.g., *Massachusetts v. Sheppard*, 468 U.S. 981 (1984) (officer making search may rely on invalid warrant issued by magistrate); *United States v. Leon*, 468 U.S. 897 (1984) (inadequate search warrant issued in good faith); *Illinois v. Gates*, 462 U.S. 213 (1983) (search warrant issued on anonymous tip).

80. See generally McLeod, *An Examination of the Victim's Role at Sentencing: Re-*

reversed its trend, and criminal law has begun to provide an outlet for the frustration of those victimized. At the same time, a powerful movement to reform the tort system attacks both the availability of recovery⁸¹ and the amount of recovery.⁸² The criminal justice system has once again resumed an active role in satisfying the need of citizens to avenge wrongs.⁸³ Therefore, there is less of a need for tort law to provide an alternative to private revenge. As a result, the system has shifted emphasis from a desire to compensate the victim to an inquiry into the defendant's fault.

Unquestionably, this cursory analysis may seem little more than an example of reasoning by hindsight. No study exists even suggesting that victims of crime during the 1970s turned to the expedient of civil suits against aggressors that courts failed to convict. In light of the probable inability of criminals to compensate their victims, common sense tends to reject a close correlation between tort law and criminal conviction. Yet attacking the example does not undermine the underlying premise: an observation on the interaction of society and the emotional needs of its members, drawn from an analysis of literary works, may assist in explaining trends in the law. If a decreased need to sublimate revenge does in part provide the motivation for the changes in tort and criminal law, this awareness can help us respond with greater understanding to the unexpressed needs underlying the tort reform movement. Themes derived from literature, if applied to trends in the law, can help explain individual movements and integrate two seemingly unrelated ones.

If Posner's own analysis provides an example of a broader application of literature to the understanding of legal theory, the reader must question why Posner himself did not reach the same conclusion. The answer, it seems, lies partly in his misplaced criticism of the works of Richard

sults of a Survey of Probation Administrators, 71 *Judicature* 162 (1987) (legislatures must further address problem of limited victim involvement in sentencing); Young, *A Constitutional Amendment for Victims of Crime: The Victims' Perspective*, 34 *Wayne L. Rev.* 57 (1987) (constitutional amendment needed to address victims' concerns in criminal justice system).

81. See American Bar Association, Report of the Action Commission to Improve the Tort Liability System 18 (1987) ("The standard of proof in awarding punitive damages should be higher than in awarding compensatory damages. The standard should be proof by 'clear and convincing evidence.'"); see, e.g., *Bartlett v. New Mexico Welding Supply, Inc.*, 98 N.M. 152, 159, 646 P.2d 579, 586 (N.M. Ct. App.) (abrogating joint and several liability in a pure comparative negligence jurisdiction), *cert. denied*, 98 N.M. 336, 648 P.2d 794 (1982); *Laubach v. Morgan*, 588 P.2d 1071, 1075 (Okla. 1978) (joint and several liability applies only where proportion of negligence ascribable to each defendant is not determinable); cf. *Juzwin v. Amtorg Trading Corp.*, 705 F. Supp. 1053, 1057-64 (D.N.J. 1989) (constitutional concerns regarding punitive damages).

82. The Attorney General's Tort Policy Working Group has recommended capping non-economic damages and abrogating the collateral source rule. See Tort Policy Working Group, *supra* note 74, at 66-72.

83. See *supra* note 80 and accompanying text.

Weisberg. By misreading Weisberg's *The Failure of the Word*⁸⁴ as if it asserted that the Western legal system had philosophically permitted the ascendance of Nazi Germany, Posner reaches the incorrect conclusion that Weisberg has committed the sin of "putting literature to tendentious use."⁸⁵ This, we will see, gives rise to Posner's equally erroneous conclusion that literature can carry only a limited message for the lawyer.

Weisberg, through analysis of various pieces of literature, demonstrates that lawyers—or those acting as lawyers and jurists⁸⁶—use language to assist them in rationalizing immoral or amoral decisions. He suggests that novelists and playwrights have attempted over the years to convey this message, and that, thus far, lawyers have ignored it:

Time after time in these texts, narrative acts lead to passivity in the face of clear injustice or, worse still, to the creation of injustice itself. As questioning about the act of writing as these great novelists were, might they not have been suggesting that narrative institutions such as their own had run upon hard times? Language cannot replace ethics and values, they seem to have been saying, but it will fill the vacuum when all else dissipates.⁸⁷

Only coincidentally, in his introduction and conclusion, does Weisberg suggest that the written word, Cassandra-like, may have presaged the rationalization that led to the excesses and atrocities of World War II.⁸⁸ Posner has indulged in bookend criticism—seeking the message of a work by referring to its beginning and ending.

Posner's internal analysis of Weisberg's work also displays serious flaws, most likely because of his belief that Weisberg attempts to overreach. At no point are these flaws more clearly revealed than in their dispute over Herman Melville's novella, *Billy Budd, Sailor*,⁸⁹ which, along with several of Melville's other works, has become a focal point of discussion for the law and literature movement.⁹⁰ Again, Posner reads far more into Weisberg's interpretation than Weisberg suggests, charging that Weisberg sets out to make a villain of the captain who sentences

84. R. Weisberg, *The Failure of the Word: the Protagonist as Lawyer in Modern Fiction* (1984).

85. R. Posner, *supra* note 2, at 175.

86. In Herman Melville's *Billy Budd*, for example, Captain Vere serves in a judicial capacity although he is neither lawyer nor judge.

87. R. Weisberg, *supra* note 84, at 178.

88. Weisberg notes:

As within the culture itself, however, the gloss of articulate speech and formalistic elegance protects these resentful verbalizers from the careful scrutiny of others. In this way, they manage to gain influence and thus to expand their disguised rage outward until finally nothing of substance is permitted to survive.

Id. at xiii.

89. Of the many editions of Melville's work, the reader may wish to consult the University of Chicago Press edition of 1962, edited by H. Hayford and M. Sealts.

90. See Weisberg, *supra* note 1, at 113 & n.18; see also Saxe, *Law and Literature*, N.Y.L.J., Feb. 8, 1988, at 2, cols. 3-4 (discussing *Billy Budd, Sailor*, and advocating study of similar "great literary works" by lawyers and judges).

Billy to death.⁹¹

Billy Budd, a young sailor with a speech defect, is falsely accused by a ship's officer named Claggart of mutinous acts. Claggart has Billy brought to the captain of their British warship, sailing at the time well removed from any area of hostile action. When Captain Vere urges Billy to respond to the charges, Billy finds himself unable to speak.⁹² Ultimately, Billy responds to Claggart's accusations not verbally but by striking the mendacious officer with such strength that Claggart drops dead to the floor of Vere's cabin. Although Billy acts reflexively, he has unquestionably killed a superior officer. Vere, faced with several options, elects to hold a drumhead court martial (over which he exercises great control) and tries Billy, not for the murder, but for mutiny in time of war. When the court convicts Billy, Vere sentences him to death and the next day carries out the sentence.

Billy has committed a criminal act and Weisberg makes no attempt to suggest otherwise. However, the mitigating factors surrounding Billy's act cause the reader to question the severity of Vere's actions. Weisberg notes that Vere could have followed any number of alternative paths: he could have delayed the trial until returning to the fleet, he could have distanced himself from the workings of the court, he could have followed procedure more closely, and most significantly, he could have pronounced a more lenient sentence, or, at the very least, withheld execution pending review. Yet Vere chose at each step of the trial to follow the path most harmful to Billy.⁹³ Whatever Vere's motives, Weisberg

91. See R. Posner, *supra* note 2, at 158-59.

92. Vere's repeated requests

caused but a strange dumb gesturing and gurgling in Billy; amazement at such an accusation so suddenly sprung on inexperienced nonage; this, and, it may be, horror of the accuser's eyes, serving to bring out his lurking defect and in this instance for the time intensifying it into a convulsed tongue-tie; while the intent head and entire form straining forward in an agony of ineffectual eagerness to obey the injunction to speak and defend himself, gave an expression to the face like that of a condemned vestal priestess in the moment of being buried alive, and in the first struggle against suffocation.

H. Melville, *Billy Budd, Sailor* 98-99 (U. Chicago Press ed. 1962).

93. Vere's motivations for acting in such a rigid manner, although brought into issue by the novella itself, are secondary to Weisberg's primary thesis. Weisberg does suggest that Vere may have acted due to *ressentiment* of Admiral Nelson, embodied on the ship by Billy Budd. See R. Weisberg, *supra* note 84, at 160-70. Posner belittles the analogy. See R. Posner, *supra* note 2, at 159-60. The scope of this review will not permit extended commentary on this point. However, even assuming Posner is correct, his criticism of Weisberg's reading of Vere's actions is unsupported.

Moreover, Posner himself falls into the same erroneous trap of seeking motivations for an individual having acted or having failed to act. For example, in his section on revenge literature, Posner notes that "the revenge theme does not much interest [James Boyd] White or Weisberg. The reason may be the narrowness of legal training and the limited scope of legal reasoning." R. Posner, *supra* note 2, at 14-15. There is no shred of evidence as to why James Boyd White or Richard Weisberg has not dealt with revenge literature, so why bother setting up the straw man only to knock him down with empty conjecture? If Weisberg is wrong in doing this, then so is Posner—with far less textual

stresses that Vere uses language—words—to rationalize a harsh and morally questionable result.⁹⁴

Posner's critique of Weisberg follows from Posner's view of Vere, expressed as follows: "Vere is in sole command of a major warship in a major war. . . . Vere, a sensitive man and not a martinet, finds himself torn between private feeling and public responsibility. He chooses the latter."⁹⁵ This view, so typical of Posner's philo-authoritarian *weltanschauung*, has caused him to misinterpret Vere's character and Weisberg's commentary.

Engage in a bit of fancy for a moment, and imagine the very young Richard Posner sitting in a darkened movie theater, transfixed by the screen on which Errol Flynn and Basil Rathbone remain locked in the climactic duel to which the movie version of "Robin Hood" inevitably leads. Popcorn abandoned in his lap, young Posner cheers wildly with each thrust and parry of his hero. Barely able to breathe, wrist and forearm moving fluidly in precise time with the on-screen duel, young Posner readies himself for the *coup de grace* with which the villain would receive his richly-deserved reward. And yet, as Rathbone crashes lifeless to the ground, Flynn's sword having neatly dispatched him, a low moan escapes young Posner's lips. Young Posner, you see, cheered not for the outlaw and criminal Robin Hood, but for the symbol of authority and propriety, the Sheriff of Nottingham.

Posner takes the position that no matter how compelling their reasons, hero figures who engage in anti-authoritarian conduct should not command our sympathies. Posner sees these characters as expressing "*ubermenschlich* defiance of conventional morality."⁹⁶ But such an absolutist position not only vitiates the works of Thoreau, Ghandi and Martin Luther King, it totally forbids consideration of mitigating factors in deserving cases.

Consider, for example, Posner's reading of Heinrich von Kleist's novella, *Michael Kohlhaas*.⁹⁷ The title character, wronged by a lord presumably beyond the reach of the law, gathers a band of followers and wreaks terrible destruction on the lord's demesne and all who stand in the way of his reaching the lord. Ultimately, facing execution, Kohlhaas gains his final, triumphant vengeance on those who denied him justice by withholding vital information from one of his chief tormentors and, as Posner notes, "dies a happy man."⁹⁸ From this, Posner draws the con-

justification than Weisberg marshals for his thesis that Vere was motivated by envy of Nelson.

94. See R. Weisberg, *supra* note 84, at 159. Weisberg notes that "[w]ith piquant irony, Melville carefully suggests that one who calls loudest for a purely formal analysis of a phenomenon may be one who most subtly conceals some private animus." *Id.*

95. R. Posner, *supra* note 2, at 161.

96. *Id.* at 151.

97. H. von Kleist, *Michael Kohlhaas* (J. Kirkup trans. Blackie & Son Ltd. ed. 1967).

98. R. Posner, *supra* note 2, at 45. When earlier urged by an old woman to save his life by giving up the information, Kohlhaas rejects the suggestion:

clusion that “[w]e are meant, I believe, to understand that Kohlhaas allowed the passion for revenge to run away with him.”⁹⁹ If we view Kohlhaas’s death as his defeat as well, we must agree with Posner. But Posner himself notes that Kohlhaas died in triumph and contentment, his death having meant less to him than the vindication of his moral outrage. Thus, if Posner’s conclusion implies that Kleist means Kohlhaas’s death as an indictment of lawless behavior, it is at odds with Kohlhaas’s personal victory.

Michael Kohlhaas, guilty of murder and mayhem, dies in triumph and achievement—a flawed hero but a hero nonetheless. Posner brands as “Romantic” flawed or picaresque heroes, and continues that “[t]he Romantic outlook has a tendency to encourage radicalism, whether of the left or of the right.”¹⁰⁰ Thus, Billy Budd has as blood brothers Meursault of *The Stranger* and Raskolnikov of *Crime and Punishment*. Posner views the three merely as murderers, cold and threatening societal order.¹⁰¹ According to Posner, “Weisberg owes it to his readers to confront forthrightly the question of whether they should condone the killings depicted in the works he discusses.”¹⁰² Posner criticizes Weisberg for having written an “apologetic” for Meursault.¹⁰³ Yet the paragraph Posner singles out does not support his argument. The paragraph concludes that “Meursault might have received a relatively light sentence for manslaughter.”¹⁰⁴ Weisberg does not condone the killing. True, Weisberg argues that Meursault’s lack of premeditation constitutes a defense, but only to the extent of mitigating the penalty imposed. Mitigation of punishment does not necessarily imply approval of the criminal act.

What has Weisberg argued? Not, as Posner suggests, that Meursault acted in a blameless (if not laudable) manner. Rather, Weisberg argues that Meursault, although a felon, does not deserve capital punishment.

Kohlhaas, who was rejoicing at the power given him mortally to wound his enemy’s heel of Achilles at the very moment when that enemy was about to trample him into the dust replied: “Not for the whole world, granny, not for the world . . .” Kohlhaas said that [his] children, when they were grown up, would praise him for his conduct, and that for their sake and the sake of their grandchildren he could do nothing more worth while than to keep the paper [which held the information].

H. von Kleist, *supra* note 97, at 123.

99. *Id.*

100. *Id.* at 145-46.

101. Yet even the most hardened murderer does not necessarily merit a sentence of death. Courts must consider a number of factors in determining what sentence to pass, and some states—including those with mandatory sentencing guidelines—have even codified these factors. *See, e.g.*, Fla. Stat. § 921.141(5)&(6) (1987 & Supp. 1989). Although neither Raskolnikov nor Meursault would necessarily have avoided the death penalty under this approach, Posner’s absolutism would have denied them the right to have mitigating factors considered at all.

102. R. Posner, *supra* note 2, at 153.

103. *See id.* at 153-54. In Camus’ *The Stranger*, Meursault walks along a beach and, seemingly sunstruck, on the spur of the moment kills another man who happens to be there as well.

104. R. Posner, *supra* note 2, at 154 (citing R. Weisberg, *supra* note 84, at 121-22).

Weisberg views the protagonist as a criminal, but also criticizes the system which uses linguistic rationalization to condemn the protagonist to a much harsher penalty than morally required.

In fact, Posner's own analysis provides an example of the rationalization against which Weisberg cautions. Posner argues that readings that attempt to understand the hero who has undertaken criminal actions unjustly criticize the repressive side of law, noting that "[e]ven the repressive part of law serves human liberty, most of the time anyway. A society in which there is no security against the depredations of thieves, rapists, and murderers is a society with little freedom."¹⁰⁵ Posner has unconsciously described the world of Stalin and Hitler,¹⁰⁶ of Orwell's *1984* and Zamiatin's *We*. In this world, nameless citizens willingly submit to lobotomies in order to quell any criminal impulses which might arise in their brains: "For Reason must prevail."¹⁰⁷

Contrast the repressiveness of these societies with the true love of freedom in a democracy, whose members maintain "a natural taste for freedom . . . they will seek it, cherish it, and view any privation of it with regret."¹⁰⁸ Posner has fallen into the same fallacious rationalization that drives all tyrannies—repression by the state of certain elements serves the common good by making life more attractive for the majority of citizens. Therefore, repression by the state has a beneficial effect when it removes the minority criminal element.¹⁰⁹

The United States has never accepted this totalitarian philosophy. Indeed, state repression in the name of maintaining order proved one of the greatest fears of those debating the adoption of the United States Constitution.¹¹⁰

105. R. Posner, *supra* note 2, at 153.

106. During the formative years of the Third Reich, the police engaged in the practice of *Schutzhaft* or, as translated, protective custody.

[I]ts exercise was based on the Law of February 28, 1933, which . . . suspended the clauses of the constitution which guaranteed civil liberties. But protective custody did not protect a man from possible harm, as it did in more civilized countries. It punished him by putting him behind barbed wire.

W. Shirer, *The Rise and Fall of the Third Reich* 271 (1960). The Nazis used language to mask and justify a harsh practice designed to crush freedom. Protective custody, as noted by Shirer, turned from the benign protection of the individual from the ravages of the mob to the ravaging of the individual by the brutal repression of the state.

107. E. Zamiatin, *We* 218 (G. Zilboorg trans. Dutton pap. ed. 1952).

108. 2 A. de Tocqueville, *Democracy in America* 97 (P. Bradley ed. 1945) (emphasis added), cited in Dixon, *Equality, the Elusive Value*, 1979 Wash. U.L.Q. 5, 5.

109. J. Edgar Hoover is reported to have made a similar error when he claimed that "[j]ustice is merely incidental to law and order." J. Conlin, *The Morrow Book of Quotations in American History* 148 (1984) (attributed to Hoover without further source).

110. Patrick Henry stated:

I acknowledge that licentiousness is dangerous, and that it ought to be provided against: I acknowledge, also, the new form of government may effectually prevent it: yet there is another thing it will as effectually do—it will oppress and ruin the people. . . . I am not well versed in history, but I will submit to your recollection, whether liberty has been destroyed most often by the licentiousness

Their concerns carry through to the twentieth century, when state action has threatened the liberties of individuals:

Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.¹¹¹

Posner's language and rhetoric can easily justify a result unthinkable in a free society.¹¹² Posner himself has fallen—almost certainly unwillingly and unwittingly—into the very trap Weisberg described. Weisberg's conclusion that gentle language may mask deep repression applies equally to the definition of "Jewishness" written by a French lawyer for use by the Vichy regime,¹¹³ and to Posner's words.

Posner's fear of overusing literary texts leads him to misread other commentators and to ignore the great potential inherent in his own observations. At the same time, Posner demonstrates not only that literature can assist the lawyer in identifying sources and trends in the law but also, by unconscious example, that literature can teach us about the danger inherent in the misuse of words.

B. *Literary Concepts of Decency and Justice*

Posner does not believe that literature about the law carries much relevance for the practicing lawyer, although in this regard he sees potential

of the people, or by the tyranny of rulers. I imagine, sir, you will find the balance on the side of tyranny.

P. Henry, *The Debates in the Convention of the Commonwealth of Virginia on Adoption of the Federal Constitution* (June 5, 1788), *reprinted in* 3 J. Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 46-47 (1836).

Henry, an advocate of a weak national government, clashed with James Madison. Yet their views on the need to protect society against tyrants were in accord. Madison stated:

Since the general civilization of mankind, I believe there are more instances of the abridgement of the freedom of the people by gradual and silent encroachments of those in power, than by violent and sudden usurpations; but, on a candid examination of history, we shall find that turbulence, violence, and abuse of power, by the majority trampling on the rights of the minority, have produced factions and commotions, which, in republics, have, more frequently than any other cause, produced despotism.

J. Madison, *The Debates in the Convention of the Commonwealth of Virginia on Adoption of the Federal Constitution* (June 6, 1788), *reprinted in* 3 J. Elliot, *supra*, at 87. (Elliot erroneously lists the date of Madison's address as June 16, 1788).

111. *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting) (footnote omitted).

112. Consider Hannah Arendt's commentary, noting the rhetorical justification of excesses committed in the name of the totalitarian state. She wrote that "[t]otalitarianism's central assumption that everything is possible thus leads through consistent elimination of all factual restraints to the absurd and terrible consequence that every crime the rulers can conceive of must be punished, regardless of whether or not it has been committed." H. Arendt, *Origins of Totalitarianism* 427 (1951).

113. See R. Weisberg, *supra* note 84, at 1-3, 7.

for improvement.¹¹⁴ Yet the study of literature carries with it the study of humanity and decency, and wise attorneys will find through literature a renewed ability to relate to their clients and afford them more effective counseling. In the centennial address at Cornell University Law School, Sol M. Linowitz commented:

Lawyers are making more and achieving less, and I'm afraid that in the process we have lost a great deal of what we were meant to be.

As a young lawyer, I dealt with human problems on a human scale. . . . I was fulfilled when men and women who had entered my office in panic or distress left it feeling more at peace. I came to understand that no lawyer worth his salt can practice his calling impersonally.¹¹⁵

Linowitz continued that lawyers had a greater ability to meet their clients' needs in part because they had studied literature and "you could often learn more about people from great novels than from law books."¹¹⁶ Posner disagrees, arguing that the experiences of life teach us about human nature far better than the mouthings of literature.¹¹⁷ We do not require guidance from dead poets. Experience alone, however, seldom proves a complete teacher and more often does little service.¹¹⁸

Yet assuming Posner stands in the corner of reason, he has not effectively countered the argument that literature can teach us about the people we serve as lawyers. At the very least, the study of literature can broaden our knowledge beyond the boundaries of our own experience.

114. The lawyer may pierce through the strata of pragmatism which accompany the practice of law to appreciate more fully the law's underlying theory and ideals. Posner writes that "I hope the trade-school characteristics of much legal training will not dash this hope." R. Posner, *supra* note 2, at 355.

115. Linowitz, *Point of View*, *Chronicle of Higher Ed.*, Sept. 14, 1988, at A52.

116. *Id.*

117. Posner writes:

The remaining possibility . . . is that literature provides a surer source of knowledge about human nature, social interactions, and other background information important to judges than other sources of such knowledge, including reading in other fields, professional experiences, and contact with people. I doubt that. People to whom literature is important may prefer to obtain their knowledge of human nature from books rather than from living people, but whether books are superior to life as a source of such knowledge is an undemonstrated and not especially plausible proposition.

R. Posner, *supra* note 2, at 303.

118. See Nord, *Revising Our Cultural Agenda*, 77 *Carolina Alumni Rev.* 8, 10 (Winter 1989). Nord notes:

Our lives are short, and our memories shorter. We cannot personally experience times before we lived. . . . No matter how rich our imaginations, there is much of human experience that we cannot imagine on our own, and no matter how thoughtful we are, there will be ideas we will never think without help.

The surest remedy for these limitations is to be found in our ability to experience the world vicariously, to absorb through various kinds of literature the ideas and insights of people who are more insightful than we are. . . . One mark of a wise person is the ability to take heart, and act on, the experiences and insights of others.

Not even Richard Posner has seen or experienced all the vicissitudes of human existence of which authors have written. Literature examines not only the behavior of the characters within the pages of books, but delves into their emotions and reasoning as well.

Many attorneys have never encountered young wives whose husbands have suddenly died. How can the attorney—man or woman—confronted by such a client possibly know how to react? Having read the following poem would help.

LAMENT

Edna St. Vincent Millay

Listen, children:
 Your father is dead.
 From his old coats
 I'll make you little jackets;
 I'll make you little trousers
 From his old pants.
 There'll be in his pockets
 Things he used to put there,
 Keys and pennies
 Covered with tobacco;
 Dan shall have the pennies
 To save in his bank;
 Anne shall have the keys
 To make a pretty noise with.
 Life must go on,
 And the dead be forgotten;
 Life must go on,
 Though good men die;
 Anne, eat your breakfast;
 Dan, take your medicine;
 Life must go on;
 I forget just why.¹¹⁹

Without an understanding of a client's emotions, a lawyer likely will retreat into a shell of professional indifference—a callous brusqueness designed to tie up all the material needs of the client, but to give no heed to those emotional demands on the client that might interfere with the client's following the good advice.

In Dickens' *Great Expectations*, Pip, a young man from a small town comes to London to seek his fortune. One of the finest solicitors in the city is to serve as his guardian's agent—the redoubtable Mr. Jaggers. Pip goes directly to Jaggers' chambers, where he must wait excited and bewildered, eager and terrified. Dickens painstakingly describes what steps Jaggers has taken to ensure Pip's economic welfare. Not until the very end of the meeting, however, does Dickens report any actual words Jag-

119. E. Millay, "Lament."

gers says to Pip. And then, the first words of the lawyer to the frightened young man are: "You will find your credit good, Mr. Pip, . . . but I shall by this means be able to check your bills, and to pull you up if I find you outrunning the constable. Of course you'll go wrong somehow, but that's no fault of mine."¹²⁰

Jaggers represents professional detachment at its height. His only concern is with the financial stability of the client. The only relevant words from attorney to client—the only human conversation—do little more than enforce the detachment. Cold and impersonal, Jaggers' last speech shows Pip he can count on Jaggers for little in the way of personal counseling and advice.

Literature, therefore, can caution us against maintaining our professional masks, as well as enlighten us about the emotional state in which our clients come to us. In other words, knowledge of literature can help us improve our relations with clients and achieve a greater orientation to the human side of practice. Robin West, an eloquent and caring voice writing about law and literature, believes that in this way literature offers its greatest service to the lawyer.

Perhaps the most important use of literature, for lawyers, is the most obvious one, but the least mentioned in modern discussion of the law and literature movement. Literature helps us understand others. Literature helps us sympathize with their pain, it helps us share their sorrow, and it helps us celebrate their joy. It makes us more moral. It makes us better people. The literary person, like economic man, is surely only one of the many persons we might become. But, unlike economic man, she is also someone we can unabashedly claim that we should become. She represents not just our cultural heritage, but more importantly (and relatedly) she represents our potential for moral growth. She is the possibility within all of us for understanding, for empathy, for sympathy, and most simply, for love.¹²¹

A few years ago, West and Posner engaged in a heated dialogue in the *Harvard Law Review* regarding possible inter-relationships between Kafka's fiction and Posner's economic perspective.¹²² West's articles in the dialogue argued that the dehumanized world of Kafka can lead to a criticism of a world based primarily on economic values. Posner replied by attacking her reading of Kafka's texts and her using Kafka to promote a political view. The echoes of this dispute have carried over into Posner's book, where he again takes West to task for her reading of Kafka,

120. C. Dickens, *Great Expectations* 160 (Oxford U. Press ed. 1987).

121. West, *Economic Man and Literary Woman: One Contrast*, 39 *Mercer L. Rev.* 867, 877-78 (1988) (footnote omitted).

122. See West, *Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 *Harv. L. Rev.* 384 (1985); Posner, *The Ethical Significance of Free Choice: A Reply to Professor West*, 99 *Harv. L. Rev.* 1431 (1986); West, *Submission, Choice, and Ethics: A Rejoinder to Judge Posner*, 99 *Harv. L. Rev.* 1449 (1986) [hereinafter *Submission*].

having incorporated in large part his earlier article into the book itself.¹²³

Regardless of whether Posner is correct in asserting that West overreached in her earlier interpretation of Kafka's writings,¹²⁴ he breached a duty to his readers by failing to contrast West's recent writings with her earlier pieces.¹²⁵ Had Posner taken this approach, he would have found a far richer body of work—articles which urge the humanistic potential of literature, which powerfully argue that literature can teach us how to achieve a more fulfilling professional life through deeper understanding of the needs of those around us.¹²⁶ In many ways, the human element that West tells us we can learn from literature parallels the concepts of equity and justice that Posner acknowledges the lawyer can successfully study through literature.¹²⁷

Posner might have incorporated much of West's commentary in his discussion of *The Merchant of Venice*. In Shakespeare's play, Portia seeks to interject a human element into a world of rigid legal doctrine, yet does so in Italy, a civil law country.¹²⁸ However, civil law countries, unlike common law countries, did not develop courts of equity to temper the harshness of law.¹²⁹ As a result, Portia's majestic "quality of mercy"

123. See R. Posner, *supra* note 2, at 176-205.

124. Posner accuses West of tendentious reading—the same charge he levels at Weisberg. In rebuttal, West accurately notes that Posner also has read Kafka tendentiously: "Thus, Posner's passionate commitment to his view of our nature prejudices his reading of Kafka. . . . This is reading by political fiat. Posner reads Kafka as a chronicler of our inner turmoil but refuses to read him as a chronicler of the choices and of the social institutions in which that turmoil is so strikingly reflected." West, *Submission*, *supra* note 122, at 1452.

125. Posner knew from West's rejoinder in their *Harvard Law Review* dialogue that her interpretation did not focus on Kafka as destructive of the authority of the state, but rather as emphasizing the value of the individual within the state.

Posner's world strikes me as flat and radically counter-experiential; it misdescribes our external social life and our internal motivational nature. My world, I suppose, strikes Posner as too bizarre to reckon with. There must be a way to cure our mutual ignorance—there must be a way to talk across the descriptive and normative divide. I thought literature might provide the bridge. That hope may have been naive: literature, like politics, may be endlessly contested. The use of literature may have merely shifted the battleground.

West, *Submission*, *supra* note 122, at 1456. Posner may not have had the opportunity to read West's *Economic Man and Literary Women* prior to going to press. He did, however, read and even cite (without commentary) another recent piece by West. See R. Posner, *supra* note 2, at 82 n.23 (citing West, *Adjudication Is Not Interpretation: Some Reservations About the Law-as-Literature Movement*, 54 *Tenn. L. Rev.* 203 (1987)).

126. See West, *Adjudication Is Not Interpretation: Some Reservations About the Law-as-Literature Movement*, 54 *Tenn. L. Rev.* 203 (1987); West, *supra* note 121. West also has done fine work in the feminist legal studies movement. See West, *The Feminist-Conservative Anti-Pornography Alliance and the 1986 Attorney General's Commission on Pornography Report*, 1987 *A.B.F. Res. J.* 681; West, *Jurisprudence and Gender*, 55 *U. Chi. L. Rev.* 1 (1988).

127. See R. Posner, *supra* note 2, at 107-09.

128. See C. Calisse, *A History of Italian Law* §§ 93-96 (1928).

129. See H. deVries, *Civil Law and the Anglo-American Lawyer: A Case-Illustrated Introduction to Civil Law Institutions and Method* 176-77 (1976) ("France did not develop separate courts of equity or a system of equity in the sense of a distinct body of

speech is irrelevant to the proceedings to foreclose on Antonio's bond. She delivers it personally, to Shylock himself, as an attempt to gain settlement of the case.¹³⁰ Although Antonio loses the case, he ultimately succeeds because of Shylock's inability to fulfill the literal terms of the bond—to take strictly one pound of flesh without any collateral blood.¹³¹

Portia's judgment demonstrates that only through sophistry can a pure legal system reach the proper result. Common law countries, which permit the principles of equity to mitigate the harshness of legal remedies, can achieve the just result without straining the fabric of the system itself. Law without "the quality of mercy" can reach the just result only by endless convolutions of semantic distortion.

In his discussion of *The Merchant of Venice*, Posner emphasizes that Shylock represents statutory law, strict construction of the law, and the letter of the law.¹³² Opposed to Shylock is Portia, who represents common and constitutional law, flexible construction, and the spirit of the law.¹³³ Posner seeks to develop the tension between the two as embodying the tension between conflicting conceptions of law.¹³⁴ Had Shakespeare set his play in a country which had accepted a flexible approach to

law.") (footnote omitted). England, however, went the other route, and established courts of equity. See C. Bowen, *The Lion and the Throne* 359 (1957). Bowen writes:

Coke himself indicated that equity is a just correction of law in some cases. The common law could punish but it could not prevent. If John Doe's neighbor began to build a spite wall that cut off view and sunlight, King's Bench could not stop him but Chancery might.

Id.

130. *Por.* Do you confess the bond?

Ant. I do.

Por. Then must the Jew be merciful.

Shy. On what compulsion must I? tell me that.

Por. The quality of mercy is not strain'd;

It droppeth as the gentle rain from heaven

Upon the place beneath . . .

The Merchant of Venice, act 4, sc. 1, lines 182-86.

131. Then take thy bond, take thou thy pound of flesh;

But, in the cutting it, if thou dost shed

One drop of Christian blood, thy lands and goods

Are, by the laws of Venice, confiscate

Unto the state of Venice. . . .

Shed thou no blood; nor cut thou less, nor more,

But just a pound of flesh: if thou tak'st more,

Or less, than a just pound, be it but so much

As makes light or heavy in the substance,

Or the division of the twentieth part

Of one poor scruple, nay, if the scale do turn

But in the estimation of a hair,

Thou diest and all thy goods are confiscate.

The Merchant of Venice, act 4, sc. 1, lines 308-12; 326-33.

132. See R. Posner, *supra* note 2, at 108.

133. See *id.*

134. Posner writes that "[t]he law does not consist just of unbendable rules that must be enforced to the hilt regardless of consequences; meliorative doctrines are a part of law too." *Id.* at 106.

the interpretation and growth of its law, Posner would have properly identified the tensions. However, *The Merchant of Venice* is set not in England, but in Renaissance Italy.¹³⁵ Civil law, not common law, controlled Italian jurisprudence, and the law grew only by dint of legislative action.¹³⁶ Thus, if, as Posner writes, Shylock represents statutory law, he necessarily represents the prevailing system in Renaissance Italy.¹³⁷

The contextual flaw of reading *The Merchant of Venice* as though it were set in a common law jurisdiction does not undermine Posner's insight; he has simply gone outside the proper frame of reference in discussing these plays. His argument remains valid despite a minor flaw.¹³⁸ Portia's message reaches us whether she represents equity's superiority to law, or common law's superiority to civil law.

Literature helps to illuminate the need for law to serve the principles of justice. It teaches lawyers how to incorporate humanity and decency into their practice as well.¹³⁹ In this, lawyers can find a most pragmatic application for literature. Most lawyers, however, will find their improved writing the most evident practical result of studying literature.

C. Literature and Writing

With considerably less fanfare than accompanied Harvard's release of Posner's book, the University of Chicago Press recently released an abridged version of James Boyd White's classic, *The Legal Imagination*.¹⁴⁰ White exhorts his readers to study literature to assist them in using language effectively in a legal context.¹⁴¹ In contrast, Posner sees

135. As is *Measure for Measure*, also discussed by Posner at this stage of the book. See R. Posner, *supra* note 2, at 101-07.

136. See C. Calisse, *supra* note 128, §§ 93-96; see also H. deVries, *supra* note 129, at 177 n.1 (discussion of development of law and equity in various legal systems).

137. Whether Shakespeare had any knowledge of Italian jurisprudence is unknown, but scholars agree that he knew a great deal about Italy and Italian life. See Praz, *Italy in the Plays*, in O. Campbell & E. Quinn, *supra* note 40, at 391, 393.

138. Posner unfairly rakes Weisberg over the coals for the same error—and in the same language: "Yet if there are legal errors in *Billy Budd* . . . it is far from certain that Melville would have been aware of them. . . . Weisberg has gone outside the proper frame of reference." R. Posner, *supra* note 2, at 135. The context of the Italian plays does not technically permit Posner to speculate on the interplay of law and equity any more than does the context of *Billy Budd* technically permit Weisberg to discuss the validity at law of Vere's actions. The spirit of each, however, not only permits the discussion but rather makes it inevitable.

139. See *supra* notes 119-21 and accompanying text.

140. J. White, *The Legal Imagination* (U. Chicago Press ed. 1988). All references hereinafter are to the abridged edition.

141. White writes:

For fairly obvious reasons the lawyer cannot often establish such relationships [those between speaker and language which authors can establish] with legal language: one would think that the lawyer had to say, not suggest, what he meant; that he had to say it directly, not ironically; and that ambiguity was no merit for him. But to analyze how others have controlled their language may help the lawyer when he struggles with his own.

little validity in the use of language to produce anything but rhetoric—convincing arguments, even in the absence of logic.¹⁴² Certainly, lawyers need rhetoric, but they must have writing skills at hand for so many other reasons.

For Posner, the greatest judicial author—indeed, “the only one who belongs in the very first rank of prose writers”—is Oliver Wendell Holmes.¹⁴³ In particular, Posner regards Holmes’ dissent in *Lochner v. New York*¹⁴⁴ as an example of brilliant prose. He builds a strong case for the rhetoric of Holmes’ argument; he revels in the manner in which the argument proceeds. Posner demonstrates how, lacking logic and without any particularly brilliant usage of language, Holmes convinces the reader of the “rightness” of his argument.¹⁴⁵ Posner’s analysis here provides a model for reading judicial opinions, as his earlier commentary on revenge showed a distinct flair for literary criticism.¹⁴⁶

This analysis, however, is innately flawed: lawyers can only improve their writing through the study of forms of persuasion because persuasion is their sole concern.¹⁴⁷ Persuasion, although undeniably central to the work of many lawyers, by no means exhausts the panoply of reasons for which lawyers communicate. We argue, certainly, but we also describe, we narrate, we expound. Lawyers must study the use of words to

142. See R. Posner, *supra* note 2, at 309-16.

143. *Id.* at 296.

144. 198 U.S. 45, 74 (1905) (Holmes, J., dissenting).

145. See R. Posner, *supra* note 2, at 281-87.

146. Posner also practices what he has learned. Initially, he notes that “[t]he force of Holmes’s opening sally lies in the assurance with which it is made. It puts the reader on the defensive; dare he question a statement made with a conviction so confident and serene?” R. Posner, *supra* note 2, at 283. Consider Posner’s use of the same technique of persuasion, found on virtually every page of his book. For example, Posner writes that “[n]othing in either the theory or the vocabulary of economics should blind an economist or economically minded lawyer to issues of life and death, which in fact bulk large in the economic analysis of law.” *Id.* at 311. A nice thought, and easily said. However, the first example Posner cites of economics’ concern for death involves damages in wrongful death cases. See *id.* & n.71. People do not reduce the impact of death by measuring the resulting collateral economic advantages lost to their families. Rather, the law forces economic considerations to intrude upon the thoughts of the family of a deceased relative. Posner’s statement, though made with conviction, when analyzed has the same spurious logic behind it of Holmes’ *Lochner* dissent. Yet because Posner speaks with confidence and conviction, we want to believe him.

Posner also acutely draws analogies between the devices used in *Lochner* and the emotionally charged use of language devoid of logic by Antony in his funeral oration for Caesar. See R. Posner, *supra* note 2, at 278-81.

147. Posner writes:

I may seem to be saying that there are only two forms of persuasion: on the one hand logic—which cannot be used to decide the difficult and important cases—and on the other hand the tricks of rhetoric, as illustrated by my examples. To forestall such cynicism, however, it is necessary only to recall that between the extremes of logical, or scientific, persuasion and emotive persuasion lie a variety of methods for inducing justified true belief that are rational though not rigorous or exact.

Id. at 287 (footnote omitted).

perform most effectively all of these communicative tasks.¹⁴⁸

In the limited world of persuasion, the greatest judicial wordsmith, Cardozo,¹⁴⁹ plays a secondary role for Posner.¹⁵⁰ Posner writes that "Cardozo has Brutus's problem: his rhetoric draws attention to itself."¹⁵¹ He selects only one segment from Cardozo's opinions to discuss—a metaphor Cardozo uses in *Palko v. Connecticut*.¹⁵² For Posner, this metaphor represents ineffective rhetoric, and thus dooms Cardozo to second-class status.¹⁵³ But how unfair a treatment has Posner accorded to Cardozo—discussing merely one fragment from one opinion. Moreover, he has selected a passage written while Cardozo sat, not in his glory on the New York Court of Appeals carving out the future of tort law, but while he sat debilitated in health on the United States Supreme Court playing a supporting role in consideration of constitutional issues.

Cardozo wove magic with words. The employer of a servant planning to go off on a junket nevertheless incurs vicarious liability for acts undertaken prior to the servant's detour from the prescribed route. As Cardozo wrote, "[d]eviation there never was. The unfulfilled intention of passing the repair shop and returning did not transform the trip in its entirety, and vitiate that part of the service which was legitimate and useful."¹⁵⁴ By moving the word "deviation" to the beginning of the sentence, Cardozo concretely established the focal point of his logic—relief from vicarious liability lay only when employees deviated from their paths. A third party to a contract to weigh beans could recover for the weigher's misrepresentation because the weigher transmitted the erroneous weight to him "with the very end and aim of shaping the conduct of another."¹⁵⁵ The liability imposed could not possibly extend beyond cases where the defendant specifically meant to cause reliance in the very third party who now faced him across a courtroom.

Yes, Cardozo wrote in a "mannered" fashion, but for the lawyer his prose contains a wealth of information on the proper use of language.

148. For example, the lawyer writing a will does not persuade—in fact, the very thought of a will having to persuade the reader of its validity sends chills along the spine of the most hard-bitten estate lawyer. See C. Paquin, Paquin's Master Guide to a Successful Will Practice 28 (1979).

149. Cf. Chaffee, *Mr. Justice Cardozo*, Harper's Magazine, June 1932, at 41 ("Interspersed sometimes between the incisive epigrams of Holmes are cryptic passages, as if his mind had the vast sweep of a comet which arrives only at intervals within the range of human vision. [But t]he reader is never in doubt as to what Cardozo means.") (cited in Weissman, *Cardozo: "All-Time Greatest" American Judge*, 19 Cumberland L. Rev. 1, 8 (1988)).

150. Posner does acknowledge Cardozo as "the most mannered of the great judicial stylists." R. Posner, *supra* note 2, at 293.

151. *Id.* at 294.

152. 302 U.S. 319 (1937). "There is here no seismic innovation. The edifice of justice stands, its symmetry, to many, greater than before." *Id.* at 328.

153. See R. Posner, *supra* note 2, at 294.

154. *Clawson v. Pierce-Arrow Motor Car Co.*, 231 N.Y. 273, 275, 131 N.E. 914, 914 (1921).

155. *Glanzer v. Shepard*, 233 N.Y. 236, 242, 135 N.E. 275, 277 (1922).

Cardozo had many strengths, and Posner wrongly isolated only one—his factual descriptions—for praise.¹⁵⁶ What Posner criticizes as ornate, rather represents grace in achieving precision of phrase. Indeed, Cardozo did not need to resort to the tricks of rhetoric so admired by Posner—his logic and dignity needed no assistance.

Rhetoric, although a significant reason for the study of literature, need not stand alone. Lawyers may learn many invaluable professional lessons from books other than casebooks and hornbooks. They may learn that the use of simile, as in Burns' "O My Luve's Like a Red, Red Rose," produces a clearer and more convincing image than the use of metaphor, as in Blake's "The Sick Rose." They may learn that the ambiguity which makes poetry beautiful and meaningful, can at the same time cause a statute or a legal argument to fail.¹⁵⁷ They may learn to use adjective, noun, and sound to describe things and people, and convey moods, as did Hemingway¹⁵⁸ and Poe.¹⁵⁹ They may learn how descriptions can evoke strong emotions.¹⁶⁰ They may learn how to save the most telling point until it will evoke the greatest possible effect, as did O. Henry.¹⁶¹ In short, they may learn how to use language for any number of purposes, and rhetoric must ultimately depend on the effective use of language just as any other communicative purpose of the lawyer.

No doubt Posner knows this as well. He certainly points out that the ethic of literature, which he denominates its "craft values," will convey critical messages to the lawyer.

156. See R. Posner, *supra* note 2, at 293.

157. See, e.g., *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972) (vagrancy ordinance stricken for vagueness); *Winters v. New York*, 333 U.S. 507, 520 (1948) (Frankfurter, J., dissenting) (striking as vague statute prohibiting distribution of certain magazines). See generally L. Tribe, *American Constitutional Law* § 12-31 (2d ed. 1988) (discussing void for vagueness doctrine).

158. "*Que va*," said the woman of Pablo. "The melon of Castile is for self abuse.

The melon of Valencia for eating. When I think of those melons long as one's arm, green like the sea and crisp and juicy to cut and sweeter than the early morning in summer."

E. Hemingway, *For Whom the Bell Tolls* 85 (1940).

159. Hear the loud alarum bells —

Brazen bells!

What a tale of terror, now, their turbulency tells!

In the startled ear of night

How they scream out their affright!

Too much horrified to speak,

They can only shriek, shriek.

E. Poe, "The Bells" (1849).

160. Farmers in southern Illinois said the brown thrush no longer sang.

They were to say that in the year to come the brown thrush never once sang.

One Illinois boy going to town, holding his father's hand, having heard the church and town-hall bells all day, having seen only dark sorrow on all faces, looked up at the sky and found it strange the night stars were all out.

Lincoln was dead—and yet as always the stars moved alive over the night dome.

4 C. Sandburg, *Abraham Lincoln: The War Years* 355 (1939).

161. O. Henry (William Sidney Porter) developed the art of the ironic twist to the short story.

The benefits of literature . . . must be sought . . . in the craft values displayed in works of literature, notably *impartiality* (detachment, empathy, balance, perspective, a complex awareness of the possibility of other perspectives than the writer's own), *scrupulousness*, and *concreteness*. These values, which can be summarized in the term "aesthetic integrity," affect the moral as well as the aesthetic valuation of a work of literature.¹⁶²

Posner should have gone farther. Today's children may learn grammar and punctuation, but even if the schools convey these lessons to them,¹⁶³ without literature they cannot learn how to breathe spirit and grace into their words. As mentioned earlier, Posner recognizes only too well the lack of grounding children and young adults receive in great literature.¹⁶⁴ If young lawyers have not learned to write well and convincingly by the time they pass their bar exams, they must make up for lost time by studying the tools of the writer's trade.

CONCLUSION

Posner's spirited (albeit not totally convincing) hymn to economic rhetoric should not be seized upon as a clue that he views the study of law and literature as a threat to law and economics.¹⁶⁵ However, Posner does criticize James Boyd White, evidently for rejecting the guidance economic theory may give judges.¹⁶⁶ But White does not suggest that judges should not use economic theory, any more than Posner should suggest that literature has no business in the courtroom or the judicial opinion. Posner would cut off Robin West's "literary woman" entirely, yet none of the authors he so bluntly criticizes proposes a total rejection of economic theory.

Leave Posner's reasons for his narrow perspective for Posner to explain in another work. This book has much to commend it. The technical aspects of the book lack little. For those seeking to do further research, Posner has collected an impressive array of footnoted sources to permit additional study on most points he covers.¹⁶⁷ He draws from a wide range of sources. He writes with passion and considerable rhetorical strength. His commentary on revenge literature opens up a new field of interest and will undoubtedly provoke further study.

But the book suffers from frequently erroneous and misleading discussions of other commentators—discussions that seem to have caused Posner to miss the mark in his own conclusions.¹⁶⁸ Posner's insistence on a

162. R. Posner, *supra* note 2, at 303 (footnote omitted).

163. Cf. R. Flesch, *Why Johnny Can't Read—and What You Can Do About It* (1955) (schools not teaching basics of reading and writing).

164. See *supra* notes 64-67 and accompanying text.

165. See R. Posner, *supra* note 2, at 309-16.

166. See *id.* at 315.

167. See, e.g., R. Posner, *supra* note 2, at 26 n.3, 147 n.25, 241 n.51.

168. See *supra* notes 84-113 and accompanying text.

correct interpretation of a literary work¹⁶⁹ ignores the fact that no view of literature can carry with it "rightness" or "wrongness." All critics, including Posner himself, slip into the trap of tendentiously using the works they read.¹⁷⁰ All readers of literature by necessity find themselves forced into the role of critics. Yet Posner does not seem to acknowledge that a work of literature must stand on its own, for each new reader to discover and interpret. We can study the mechanisms by which the poet conveys thoughts, but only with the greatest of hubris can we purport to know what the poet means.¹⁷¹ "A poem should not mean/ But be."¹⁷²

Further, Posner's self-imposed constraints left me with an empty feeling. We participate in the classic vaudeville routine of the protagonist sitting in the empty living room, ear pointed toward the ceiling, waiting for the other shoe to drop to the bedroom floor above. Posner's discussion is but a beginning—the first shoe. He should not have left others to take his comments further. When interpreting literary works, Posner has great insight to share. He understands the pitfalls of a profession un-schooled in the literature of its surrounding society, and takes at least the initial step toward correcting the problem.

Ultimately, Posner himself provides an outstanding example for taking the study of law and literature beyond the narrow confines of which he admits. Recall that Posner begins his exceptional study of revenge in literature with the economic model for analyzing vengeance. Yet as Posner quickly notes, even though economic reasons demand that a state do away with revenge—even though logic demands that people reject revenge in a societal setting—vengeance lurks just barely beneath the surface in all members of society. Thus, economic theory cannot supply all the answers. The society considering only economics and not emotions dooms itself to failure. In studying literature, as Posner did, we study emotion. Of necessity, the complete jurist and the complete attorney must study both economics and literature. Posner's failure to fully grasp this need has led him to produce a book with both great promise and great problems.

169. See, e.g., Posner, *supra* note 2, at 71-205.

170. This review has also lapsed into playing the interpretation game. See *supra* notes 95-113 and accompanying text.

171.

If you are one of those taught to approach the presence of the poem in quest of vital lesson, of profound comment on man and the universe, the answer is, *Don't*. . . . You may, after all, rest comfortable in the assurance that if philosophy and morals are present in any vital way, they will make themselves felt without your conscious searching for them, insistent on their share in your awareness of the complete poem.

E. Daniels, *An Interpretation of Robert Frost's "Stopping by Woods . . ."*, in *The Creative Reader: An Anthology of Fiction, Drama, Poetry* 932 (R. Stallman & R. Watters eds. 1962).

172. A. MacLeish, "Ars Poetica" (1924).

