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Recommended Citation

Link to publisher version (DOI)
https://doi.org/10.15779/Z389Q8D
REVIEW ESSAY

Lapse of Judgment


Reviewed by Peter Read Teachout ‡

It is art that makes life, makes interest, makes importance, for our consideration and application of these things, and I know of no substitute whatever for the force and beauty of its process.1

[Works of art] are capable of saying more things to man about himself than any other “works” whatever are capable of doing—and it’s only by saying as much to him as possible, by saying, as nearly as we can, all there is, and in as many ways and on as many sides . . . that we enable him to pick and choose and compare and know, enable him to arrive at any sort of synthesis that isn’t through all its superficialities and vacancies, a base and illusive humbug.2

Henry James

INTRODUCTION

In this ambitious new work, Judge Richard Posner undertakes to organize the field of law and literature. He takes on the disorderly and rebellious problems that have been gradually accumulating in this area and seeks to impose upon them the kind of disciplinary control that he earlier brought to bear in helping to organize and establish the field of law and economics.3 That this new area is difficult to organize—the connections here, he admits, are “less tidy” than those in law and economics (p. 1)—only serves to make the challenge more interesting. Posner moves swiftly to assume control: he dismisses “superficial” and “mis-

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2. Letter from Henry James to Bernard Shaw, quoted in id. at 197 [hereinafter James to Shaw].
leading” links between law and literature (pp. 1-5); identifies what he considers to be the “important connections” (pp. 5-14); points out why the efforts of other literary legal scholars have been misdirected and ineffectual (pp. 14-18); and outlines his own “interdisciplinary” approach (id.). He devotes the remainder of his essay to demonstrating the advantages of his proposed approach.

Interdisciplinary study is, of course, nothing new to Posner. It formed the core of his earlier work in the field of law and economics. What is surprising is to find Posner laboring in the literary vineyard. One does not have to read very far into this book, however, before coming to appreciate that Posner has read widely in the field of literature. With the publication of Law and Literature, Homo Economicus makes his formal debut as a Renaissance man.

A talented and capable scholar, an exciting new field of study, a proposed new interdisciplinary approach: this is a book that ought to work. Yet it does not. Posner pours enormous energy into the effort, but Law and Literature is not, ultimately, a satisfying critical experience. Despite occasional moments of illumination, the work does not lead to a deeper, richer understanding of the relationship between law and literature. Nor does it lead to the establishment of an integrated critical perspective. If anything, it leads in the other direction: toward superficiality of understanding and disintegration of critical perspective.

The interesting question is why.

I

THE BASIC STRUCTURE AND ARGUMENT OF THE WORK

Posner divides his book into three major sections. The first section focuses upon the role of legal themes in works of literature—upon law in literature. Posner uses this section to introduce his proposed interdisciplinary approach. In Chapter One, he sets out that approach and applies it to several works of “revenge literature.” He identifies Homer’s Iliad and Shakespeare’s Hamlet as classic examples of revenge literature and devotes a considerable part of his discussion to explaining what these two works teach us about revenge as a social practice. In Chapter Two he examines more generally the problem of finding significance in legal themes in works of literature. In Chapters Three and Four, he turns to a detailed critique of the works of two other literary legal scholars, Richard Weisberg and Robin West. In his view, these scholars exemplify a particular type of abuse: they attempt to make works of literature carry a burden of social argument that they should not be made to carry. “They borrow the prestige of great literature,” he contends, “for political, ideological, or ethical ends to which the literature is not germane” (p. 16).
In the second major section of his book, Posner inverts the focus and examines a set of problems that arise when law is considered as a form of literature; the focus here is upon law as literature. In Chapter Five, Posner argues that efforts to apply the techniques of literary criticism to the interpretation of statutes are misguided because literary interpretation and statutory interpretation are fundamentally different activities. In Chapter Six, Posner considers the application of the techniques of literary interpretation to the rhetoric of judicial opinions. Here, he believes, literary criticism can play a legitimate and useful role. He insists, however, that ethical considerations should not enter into the assessment of rhetorical excellence. The rhetorical achievement of a judicial opinion is one thing, he maintains, its ethical character and force quite another.

The third section of the book consists of a single chapter discussing three types of law that regulate literature: obscenity law, libel law, and copyright law. In this section, Posner employs conventional externalities analysis to argue that judicial efforts to regulate literature are unsound. His argument here is quite consistent with his general market ideology.

At its core Posner’s proposed interdisciplinary approach combines three basic disciplinary perspectives: literature, law, and economics. These three critical perspectives correspond to the three major sections of Posner’s essay. In each section all three perspectives are brought to bear on the problems addressed, but as the reader moves from section to section, the center of attention shifts. In the first section, the center of attention is literature; in the second, law; in the third, economics. To some readers, the third section, with its conventional externalities analysis, might seem artificially tacked on to the rest of the work. But once the reader recognizes the basic pattern of the book, he can see how this last section is consistent with the logic of the underlying composition.

A. A Critical Overview

In the course of his essay Posner offers much that is intelligent and sensible. His criticisms of the works of Weisberg and West are for the most part perceptive and helpful. He points out the problems with Weisberg’s controversial analysis of *Billy Budd* (pp. 134-36, 155-65), and at a more general level exposes the fallacies underlying Weisberg’s critical approach (pp. 132-75). Posner’s criticisms of West’s treatment of Kafka’s fiction are also generally illuminating and accurate (pp. 176-205). Moreover, his larger point here is valid: both of these scholars

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4. Although Posner sometimes invokes other disciplinary perspectives, e.g., pp. 53, 70, these three clearly dominate.

attempt to use great works of literature to advance their own immediate political agendas, and in doing so betray one of the most fundamental requirements of criticism—that one deal with a work of art on its own terms.

There are other areas where Posner is on the right track, although he sometimes carries his points further than necessary. His contention in Chapter Five that statutory interpretation and literary interpretation are different activities with different contexts and purposes is valid, and he is right to insist that those differences be kept in mind (pp. 237-55). But he goes too far when he insists that the only proper mode of statutory interpretation is intentionalist interpretation and the only proper mode of literary interpretation is “New Critical” (or non-intentionalist) interpretation. In interpreting legislation, Posner believes, our primary concern should be with carrying forward the intention of the legislature (pp. 226-27). Therefore, in this context, the central effort of interpretation should be attempting to discern what the legislature actually intended. Works of literature, in contrast, ought to stand on their own two feet; they should be capable of being enjoyed and appreciated without the need for extraneous explanatory material. Evidence about the author’s intention very rarely illuminates in any significant way the meaning of a work of literature, Posner believes, so in this context inquiry into the author’s actual intention ought to play very little if any role (pp. 226-240).

The problem with Posner’s analysis is that it is based upon a false choice; the activity of interpretation in both legal and literary contexts inescapably involves elements of both intentionalist and New Critical inquiry. We can often gain valuable insight into what a work of literature “means” by going behind the text to biographical or historical data that sheds light upon what the author was attempting. And statutory

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6. Posner uses these terms in a fairly unrefined way. Essentially, as he uses the terms, “intentionalist” interpretation means seeking to discover the meaning of a text by inquiring into what the author or legislative body intended (pp. 218-19), and the “New Critical” interpretation means attempting to discern the meaning of a text by paying close attention to the text itself without regard to extraneous evidence about the author’s intention (id.).

7. Posner admits that consideration of “extraneous” evidence reflecting on an author’s intentions may sometimes enhance our understanding of a work of literature, but he attempts to downplay the value of any enhancement of appreciation gained thereby (p. 233). In so doing, he underrates the potential value to the literary critic of such evidence. See, e.g., H. Gardner, In Defence of the Imagination 175-76 (1828). For example, we can better appreciate Dante’s Divine Comedy by understanding the particular political, religious, and literary problems with which he was dealing, see E. Auerbach, Dante: Poet of the Secular World (1961); Keat’s poem, Ode to a Nightingale, by understanding the context of its creation in terms of Keat’s own personal experience, see W. Bate, John Keats (1963); and Wordsworth’s Ode to Immortality by understanding that it was written not after Wordsworth had suffered a decline of poetic powers, but at a time when he was entering a new phase of poetic exploration, see L. Trilling, The Immortality Ode, in The Liberal Imagination: Essays on Literature and Society 125 (1950). In each case, evidence extraneous to the work itself significantly enhances our understanding and appreciation of the work in question. And in each case, the effort to understand what the author was
interpretation that focuses exclusively upon trying to discover the "intent" of some now defunct legislative body with respect to a question that in many cases it never squarely addressed is rife with problems, particularly when it takes the form of "reading through" the words actually employed in an effort to discover the legislative body's presumed collective intent.\(^8\) There are differences in function and emphasis in the two contexts, but drawing an artificial line between these two types of interpretation as Posner does distracts attention from the real differences.

Posner's discussion in Chapter Six of the use of the techniques of literary criticism to understand the rhetorical achievement of judicial opinions is also problematical. His claim that it is possible to distinguish between the rhetorical and ethical aspects of a judicial opinion has a certain validity, but his effort to keep these aspects of judicial performance radically separate gets him into needless difficulty.\(^9\)

Finally, Posner is right to be skeptical about some of the claims that have been made for the law and literature movement, especially the claim that applying the insights of literature to legal problems will bring about some sort of salvation (pp. 356-57). It is important to keep the enterprise in realistic perspective, and Posner performs a helpful service by cautioning against the temptation to claim too much for it.

To criticize Posner's work in such terms, however, is to consider only its surface achievements and difficulties and to ignore the deeper problems that plague Posner's work. The remainder of this essay represents an effort to get at these fundamental problems and to explain why, at a deeper level, Posner's work is so disappointing.

\(^8\) An example of the kind of difficulties into which "intentionalist" interpretation can lead when it takes this form is Justice Taney's ruling in the infamous Dred Scott case that the framers intended to exclude African-Americans from the meaning of the term "citizens" as it appears in the Constitution. Dred Scott v. Sanford, 60 U.S. (19 How.) 393, 406-26 (1857); see White, Constructing a Constitution: "Original Intention" in the Slave Cases, 47 Md. L. Rev. 239, 252-263 (1987). For a thoughtful discussion of the problems with the "intentionalist" approach, see White, id.

More generally, an approach to interpreting statutes under which the court is required to focus exclusively on actual legislative intent is less likely to lead to the development of a body of interpretive law that is just, reasonable, and harmonious than is an approach under which the court begins its inquiry by asking what purpose ought to be attributed to the legislation under consideration. The "attribution of purpose" approach is developed in H. Hart and A. Sacks, The Legal Process 1144-1417 (tent. ed. 1958) (the basic methodological approach is set forth in concise statement at 1411, and summarized in general terms at 1410-17).

\(^9\) See infra pp. 1288-95.
II
THE PROBLEM OF POSNER'S "SCIENTIFIC" SENSIBILITY

The place to begin is with the character of the sensibility Posner brings to bear upon the critical enterprise in which he is engaged in this work. In the sense that I describe below, it is a "scientific" sensibility. Whatever its basis and explanation, it clashes with the material of art with which Posner deals at every point along the way. By saying that Posner's performance reflects a scientific sensibility, I do not mean to suggest that Posner is a kind of Barzarov; he does not appear here as a rationalist monster without human dimension. To the contrary, the Posner we meet in these pages is a well-read, cultivated individual, and often a quite sensitive and perceptive reader. Underlying his approach nonetheless is a residuum of scientific conviction that touches and colors every aspect of his analysis.

What that means, at bottom, is that, unlike Henry James, Posner does not believe that "art makes life." To Posner life is already out there; the role of art is not to describe or clarify it, but primarily to provide embellishment. Life is properly understood only in scientific terms; art is the frosting on the cake.

One can see this view of art reflected in the opening pages where Posner is discussing the role of metaphor. That role, as he describes it, is primarily decorative. One can employ metaphor "to create arresting images" (p. 3), or to produce "an effect of vividness, novelty, and insight" (p. 3). Metaphor can also be used to influence the response of the reader. Thus the lawyer employs legal fictions in order "to soothe the reader" (p. 3); and the poet—Posner invokes T.S. Eliot as an example—uses metaphor "to jar the reader" (p. 3). In neither case, however, is the fiction or metaphor necessary to get at what is really there. Posner does not completely ignore the role of literature in "giv[ing] structure to our experience" (p. 4), but the tone of his discussion indicates that, to him, metaphor is a "fiction" as opposed to the "reality." Reality can only be grasped directly in other, non-metaphorical terms, presumably those of scientific description and analytic discourse.

Consistent with this view, Posner emphasizes that the use of metaphorical or figurative language often serves as a "source of obfuscation" (p. 3). In some cases "[m]etaphor elides the reasoning process that might indicate both the aptness and the limits of the analogy that the metaphor (a compressed analogy) conveys" (p. 3). This is not a major problem

10. The quotations are taken from a discussion where Posner compares a lawyer's reasoning by analogy to a poet's use of simile, but Posner equates simile with metaphor. The full quotation is "[t]he poet uses similes, like metaphors, to create arresting images. The essential requirement is that the things compared be dramatically unlike—shockingly so in Eliot's simile—so that an effect of vividness, novelty, and insight is produced" (p. 3).
when we read "imaginative literature" because we know it is fictional, and so we "discount figurative language" in it (pp. 3-4). But the same is not true of legal literature and other "discursive, analytical prose"; here we should be wary lest we mistake the fiction for the reality (p. 4).

What is true about metaphor is, at a more general level, true about art. The discussion throughout the book indicates that, to Posner, art represents a fictional (as opposed to an accurate) view of reality. It may serve to amuse, to soothe or to jar, to stir or heighten reaction, even to deceive and obscure, but it is not essential for understanding what is really there.

This, of course, is not the only possible way to view metaphor and art. An alternative view is reflected in Professor Clemen's essay on Hamlet's use of imagery. Clemen argues that metaphor and imagery can sometimes provide a kind of direct and immediate access to reality that scientific discourse cannot. To make his point, he asks his reader to consider the way Hamlet expresses "the short space of time which lies between his father's death and his mother's remarriage." Hamlet does so, he observes, by invoking "a series of pictures taken from real life."

A little month, or ere those shoes were old
With which she follow'd my poor father's body,
Like Niobe, all tears:

. . .

Ere yet the salt of most unrighteous tears
Had left the flushing in her galled eyes,

. . .

the funeral baked meats
Did coldly furnish forth the marriage tables.

Clemen goes on to observe:

These are no [mere] poetic similes, but keen observations of reality. Hamlet does not translate the general thought into an image paraphrasing it; . . . he uses the opposite method: he refers the generalization to the events and objects of the reality underlying the thought. This sense of reality finds expression in all the images Hamlet employs. Peculiar to them all is that closeness to reality which is often carried to the point of an unsparing poignancy. They are mostly very concrete and precise, simple and, as to their subject matter, easy to understand; common and ordinary things . . . . In contrast to Othello or Lear, for example, who awaken heaven and the elements in their imagery . . . Hamlet prefers to keep his language within the scope of reality, indeed, within the everyday world. It is not spacious scenery and nature which dominate in Hamlet's

12. Id. at 106-07.
13. Id. at 107.
14. Id. at 107.
imagery, but rather trades and callings, objects of daily use, popular games and technical terms; his images are not beautiful, poetic, magnificent, but they always hit their mark, the matter in question, with surprisingly unerring sureness. They do not waft the things of reality into a dream-world of the imagination; on the contrary, they make them truly real, they reveal their inmost, naked being. All this, the wealth of realistic observation, of real objects, of associations taken from everyday life, is enough to prove that Hamlet is no abstract thinker and dreamer. As his imagery betrays to us, he is rather a man gifted with greater powers of observation than the others. He is capable of scanning reality with a keener eye and of penetrating the veil of semblance even to the very core of things. "I know not seems."  

In our own conversations in daily life we use metaphor and imagery (though we may not be as good at it as Hamlet is) for much the same ends—not to embellish, not to decorate, not to fancify, but to express the reality of the world in which we live. To be convinced of that, one need only try to imagine what life would be like without recourse to these linguistic devices. Without metaphor and simile, without art, reality would be transformed into an abstraction, and life would lose its significance and meaning. That is not to say that Posner is wrong in warning that metaphor, if taken uncritically, can sometimes deceive, that it can keep us from asking the kinds of questions we ought to ask about a particular experience, or that it can keep us from seeing aspects of that experience that we ought to see. But the heart of the problem is not metaphor or art itself, but the insensitive employment of or uncritical reaction to metaphor and art.

That art is necessary to make sense out of experience, that "art makes life," is something that every great critic of art has recognized in one form or another. That is why the truly great literary critics—such as Henry James or, in quite another manifestation, Lionel Trilling—have been artists themselves. Their critical work has the kind of pertinence and force it does because it has been shaped by an artist's sensibility. The work of these critics demonstrates the truth of James' observation that synthesis made possible through art is the only synthesis that is not so full of "superficialities and vacancies" as to amount to a "base and illusive humbug."  

Posner, however, proceeds from other premises: He sees art, not as something that is necessary to give life meaning and significance, but as an expendable luxury and amusement. This affects both the character of the synthesis he attempts to achieve and the terms of criticism he employs. We see this reflected, among other places, in the design and

15. Id. at 107-08 (footnotes omitted).
16. James to Shaw, supra note 2, at 197.
application of his interdisciplinary approach. Posner approaches the problems of law and literature from the combined critical perspective of three scholarly disciplines: law, literature, and economics. How does this approach differ from the critical approach we find in the writings of artist-critics such as Trilling and James? The key difference is that the artist-critic applies to whatever he considers, not simply a particular set of disciplinary perspectives, but his entire education and experience. He responds to the works he criticizes as a whole person and on such terms seeks to engage his reader. To critics like Trilling and James, engaging the whole person was the very essence of critical activity. In contrast, Posner’s interdisciplinary approach is centered in academic understanding. Posner emphasizes three particular scholarly disciplines—law, literature, and economics—but it would not change things if he added a dozen others. His approach would still be essentially academic or disciplinary, and his understanding would be bounded by the limits of the disciplines he chose to apply.

If one reflection of Posner’s scientific sensibility is his embrace of an academic or disciplinary perspective, another is the curious impatience he exhibits toward great works of literature. In the course of his essay, Posner covers a vast literary territory, but he never slows down sufficiently to deal thoughtfully with the works he examines. He does not seem interested in them as works of art: as achievements of imagination, as creative compositions, as works that present mysteries and difficulties that cannot be easily understood. He does not view them as works that have complex and mysterious lives of their own. Instead, he proceeds through them as a behavioral scientist might, labeling, classifying, categorizing—this work is about revenge, this character is a standard revenge figure—leaving the impression as he goes that, once these works and characters have been located in such a way, there is nothing much more to be said about them. His entire performance seems driven by a pressure to touch down briefly and then move on. If this is literature, it is literature in the fast lane.

It is possible to see this impatience in another light: as a reflection of Posner’s refusal to let himself become fully engaged by the great works of literature he considers. It is as if he is always holding something back. Early in his essay, Posner makes a revealing comment in this regard. Ostensibly it is a comment about the character of literary and legal scholarship of the 1950s and 60s. Unlike the new theoretical scholarship, Posner argues, the scholarship produced during this earlier period was accessible to the amateur reader and hence required no great discipline to understand:

Legal scholarship around 1960 and literary scholarship of the same period have something else in common: they are for the most part readable by people who have no training in either field. Being neither heavily theoretical nor highly technical, they make few demands on the reader. Indeed, lacking the power of theory, they tend to cultivate the charm of rhetoric. . . . (p. 10)

This assertion has a certain validity. It is true that Trilling's and Brower's essays in literary criticism,18 and Fuller's and Bickel's essays in jurisprudence,19 are not "heavily theoretical" or "highly technical," and, as a consequence, are "for the most part readable by people who have no training in either field." But to claim that therefore these critical works "make few demands on the reader" is nonsense. The thought one encounters in these works is subtle and sophisticated, often much more so than that found in contemporary theoretical works. These works not only make great demands on the reader in and of themselves, but, by virtue of the critical expectations they establish, they also make great demands on the reader as a reader of the primary works to which they refer.

Posner's condescending view of this earlier period's legal and literary scholarship reflects his inability or unwillingness to recognize the intellectual challenge of nontheoretical works. His generalization that works which are not heavily theoretical or highly technical make few demands on the reader applies with equal force, it can be seen, to virtually all the great works of imaginative literature that make up our cultural tradition, and to virtually all the materials that form the core of our common law legal culture. Both these bodies of literature are relatively accessible to the non-expert and thus represent an "amateur" literature. But to say that a literature is amateur in this sense is not to say that it makes few demands on the reader, as anyone who has struggled to understand—really understand—even a short lyric or a simple anonymous ballad will attest.20

This misperception—that imaginative or critical literature of this sort is less intellectually "demanding" than theoretical literature—underlies Posner's understanding of the critical enterprise in which he is


20. For an example of the type of effort required, see Reuben Brower's reading of William Blake's "simple" eight-line poem "The Sick Rose" in the introductory chapter of R. BROWER, supra note 18, at 6-10.
engaged, and it ultimately limits the kind and quality of insights he is able to generate. If critical literature does not take the form of theory, Posner seems to believe, then there can be nothing in it that really challenges the mind, and therefore it can be dealt with at a level of partial involvement. This assumption encourages a laziness of critical attention that prevents full engagement with the classic works. It accounts in large part, I believe, for what otherwise might appear to be isolated lapses of judgment on Posner's part.21

"Great work," J. Middleton Murry once said, simply will not yield up its full significance, its essential beauty, at the first reading; not until you have patiently worked your way into the creative centre can you truly say that you apprehend it; and only when you have truly apprehended a work of literature are you in a position to make positive declarations about its style.22

That kind of critical attention is missing here. Posner is not an unintelligent reader, far from it, but he is an impatient one. Too often he attempts to force the works he is reading into the mold of contemporary thought, and in doing so misses entirely the special experience and education—the enrichment of insight, the enlargement of spirit—that the works themselves offer. Too often he is content to rest with a first reading of the works he discusses; he lacks the patience to work his way "into [their] creative centre," and as a consequence he never achieves true apprehension, never finally sees their full significance, never reaches their essential beauty.

Over the course of his book, Posner's failure of critical engagement takes a tremendous toll. To illustrate, I focus on two major problems with Posner's performance. The first is simply that the judgments produced by application of his proposed interdisciplinary approach are often not sound. I call this the "lapse of judgment" problem. Exactly how and why Posner's critical judgments are not sound I attempt to explain in Part III. The second problem is that application of Posner's approach leads to a disintegration of critical understanding. This problem, which I call the "disintegration" problem, I address in Part IV. Through this analysis I hope to show how application of Posner's interdisciplinary approach leads, not toward, but away from "true" apprehension.

III

THE LAPSE OF JUDGMENT PROBLEM

Posner's discussion of Homer's Iliad and Shakespeare's Hamlet in the first chapter of the book illustrates the lapse of judgment problem. One of Posner's central purposes in this chapter is to introduce and

21. See infra Section III.
demonstrate the advantages of his interdisciplinary approach. Yet it is here, interestingly, that his critical judgments are most consistently disappointing. This raises the question whether there is not some connection between the lapses of judgment and the application of his interdisciplinary approach.

Below I consider two representative judgments from this first chapter: (1) Posner's claim that "Achilles' tragic mistake" was his "compromise of sending Patroclus to fight in [his] place" (p. 51); and (2) Posner's judgment that "Hamlet's biggest mistake" was his failure to kill Claudius at his prayers (p. 59). Neither of these judgments withstands close scrutiny. Neither is ultimately sound. Since these judgments are central to Posner's reading of these works, and since they reflect the type and quality of insights that his proposed interdisciplinary approach generates, understanding why they are not sound should illuminate the deficiencies of Posner's approach.

But first I need to provide some background.

A. Posner's View of the Aim of Criticism: Generating "Novel" Insights

The central aim of criticism, Posner believes, is to generate novel insights about great works of literature—to discover "novel meanings" (p. 54). The legal scholar can do this, but only if he employs a broad interdisciplinary approach. This approach involves applying to works of literature insights not only from law, but from other disciplines as well, such as economics, biology, and anthropology (pp. 53, 70). Posner uses the first section of the book to introduce such an interdisciplinary approach and to demonstrate its potential for generating novel insights.

For this demonstration, Posner selects the theme of revenge. He believes that this theme has special interest for the lawyer because formal institutions of justice arose to replace revenge as a means of dispute resolution, and did so in large part because primitive revenge systems were not efficient (pp. 29-33). Thus works of literature centered upon the revenge theme should not only be especially interesting to lawyers, but also represent the type of works about which the mind trained in the law may have something to say.

Posner maintains that two great works of literature—Homer's *Iliad* and Shakespeare's *Hamlet*—are essentially and fundamentally "about" revenge (pp. 14, 67). He claims these works give us an understanding "of revenge as a radically imperfect but sometimes inescapable social practice" (p. 69). Nor is this just an incidental illumination. Both works are centrally about revenge, he insists; they are "the supreme examples" of revenge literature (p. 70). "If these two great works are not really (essentially, fundamentally) about revenge," he asks rhetorically at one point, "what are they really about?" (p. 67). Indeed, Posner becomes so con-
vinced that revenge is what these works are about in fact that he attributes the failure of other critics to see them in terms of revenge as the product of the “narrowness” of their education and training (pp. 14-15, 70).

Having satisfied himself that these works belong to the genre of revenge literature, Posner proceeds to apply to them his interdisciplinary approach. That approach, as defined by its application here, consists of three basic steps. First, Posner analyzes revenge itself, without regard to its specific appearances in literature, from the perspectives of “biology, anthropology, literary criticism, classical history, psychology, and economics” (p. 53). At least that is what he claims to be doing, but his pervasive use of economic terminology to describe the “practice of revenge” indicates that the dominant understanding in his analysis is economic (pp. 27-32).

Second, Posner turns to the works of revenge literature he has selected and reduces them to a paraphrased statement of the major action. I say “reduces” because Posner’s paraphrases are in fact reductionist in thrust and effect. They leave out those aspects of the works that would be most interesting to a literary scholar. Moreover, in subtle but important ways, they transform the underlying meaning of the works themselves. Third, working primarily from his paraphrased statement, Posner asks what the author in each case was trying to tell us about revenge. This inquiry yields two primary types of statements: statements about what the author wanted us to understand to be the protagonist’s “mistake,” and statements about what the author wanted us to understand about the appropriateness of revenge as a mode of dispute resolution. Posner’s critical approach reflects a self-conscious effort to give these statements specific disciplinary—here, economic or legal—“relevance.” The statements so generated presumably are not only significant in their own right but also represent the kind of insights that Posner’s proposed interdisciplinary approach is generally capable of generating.

The problem with the “novel” insights produced by this process is not that they are not novel, but that they are not insights. For the most part they do little to illuminate the text under consideration, and in some cases they actually confound our understanding of it. Nor do they help us to better appreciate the artist’s achievement. In spite of Posner’s efforts to make his insights seem interesting and relevant, they have about them a curiously platitudinous quality. The novel insights generated by application of Posner’s proposed interdisciplinary approach do not, in short, advance the ends of criticism.

23. Posner never explicitly defines his interdisciplinary approach. As a consequence, the reader is left to reconstruct that approach from his application of it in his essay.
B. "Achilles’ Tragic Mistake"

At a critical moment in his discussion of the *Iliad*, Posner makes an assertion upon which his whole theory of the poem seems to rest:

Although the poet is acutely conscious of the negative side of the heroic ethic, I think he is telling us that Achilles’ tragic mistake was not the refusal to yield to the entreaties of Agamemnon’s emissaries in Book IX, a refusal solidly grounded in the absolutism of heroic character, but the compromise of sending Patroclus to fight in Achilles’ place. The compromise has all the earmarks of modern instrumental reasoning. It is antithetical to the sacred code of honor that informs the vengeance ethic epitomized by Achilles, and it marks his doom. (pp. 51-52)

These assertions, and the view of the *Iliad* they reflect, are not supported by the text of the poem. Posner’s judgment here is not sound. Understanding why it is not should help illuminate generally the problems with Posner’s proposed interdisciplinary approach.

A threshold problem is figuring out what Posner is saying in this passage. Exactly what is the “tragic mistake” he wants to attribute to Achilles here? What “compromise” does Achilles supposedly make? What does Achilles do or say at this moment in the poem that can be fairly characterized as “instrumental reasoning”? The answers to these questions are not readily apparent from a reading of the text of the poem itself, nor does Posner’s discussion do much to clarify his meaning. Not insignificantly, he makes no effort to refer to specific passages in the text in order to show what he means. Consequently, he leaves the reader to speculate about his meaning.

What Posner *seems* to be saying is this: The heroic code requires that one embrace death heroically. To die young in battle is far better than to live to a ripe old age by avoiding the risk of death in battle. At other moments in the action Achilles faces death heroically, giving him a kind of dignity that even the gods do not have (p. 51). But at this particular moment Achilles wavers and sends Patroclus off “to fight in [his own] place.”24 This must be what Posner is referring to, then, when he speaks of Achilles’ “compromise.” Why Achilles makes this decision, or why Posner thinks he makes this decision, is not clear from the immediate discussion, but elsewhere Posner suggests that Achilles may have done so in the hope of prolonging his own life (p. 49). When Posner refers to Achilles’ “instrumental reasoning,” he is referring to the calculation behind this decision. Achilles’ “mistake” is not his decision to let

24. Achilles sends Patroclus off to fight in his *armor*, but whether he sends Patroclus off to fight in his *place*, as Posner asserts, is highly debatable. It is certainly not something that can be assumed by a parenthetical assertion, as Posner does here. This may seem a minor point, but it exemplifies Posner’s tendency to blur over important distinctions, and illustrates the kind of frustration that arises as a consequence.
Patroclus return into battle, but rather resting that decision upon a calculus of self-interest that is inconsistent with the requirements of the heroic code. What then is “tragic” about this “mistake”? The suggestion is that Achilles’ mistake causes Patroclus’ death, which in turn draws Achilles back into battle and ultimately brings about his own death. It “marks his doom.”

But the text of the poem itself does not support this account.25 Posner’s reading presupposes that Achilles is responsible for the decision to send Patroclus into battle wearing Achilles’ armor. But to what extent is Achilles to blame? The idea itself was not, after all, Achilles’ idea. It was “wise Nestor” who originally proposed the plan,26 and it was Patroclus who prevailed upon Achilles to let him carry through with it, not vice-versa.27 As Homer tells the story, Achilles consents only hesitantly to a plan of action promoted by others. Having been persuaded to go along, he then proceeds to do what he can to minimize the likelihood of failure. So if there is blame to be had for the decision, of the three major figures most directly involved in the decision, Achilles is the least responsible.28

Furthermore, there is nothing in what Achilles actually says or does at this moment in the poem to support Posner’s claim that Achilles acted out of a calculation of self-interest. Although Achilles displays a desire to preserve his honor, he indicates no concern for his own life and safety. The poet makes clear that Achilles’ main concern is for the life and safety of his friend.29 Neither the language in which Achilles addresses others nor that in which Homer describes Achilles at this part of the poem can fairly be characterized as the language of “instrumental reasoning.” The term itself is an anachronism, and Posner’s invocation of it here serves to obscure rather than illuminate the underlying psychology of the poem.

There is more. Even if one were to concede for purposes of argument that the plan of sending Patroclus off to battle was Achilles’ idea (which it clearly was not), and even if one were to concede that, in sending Patroclus off, Achilles acted on the basis of instrumental reasoning (for which there is absolutely no evidence), there would still be a problem with holding Achilles responsible for the tragic consequences that follow. Posner’s theory turns upon the notion that Achilles’ decision causes Patroclus’ death. But there is no support for this in the text of the poem either. Indeed, on this point, the poet goes out of his way to show the

25. The source of Posner's account is a mystery, but his reference seems to be his own paraphrased statement of the action.
26. HOMER, THE ILIAD bk. XI, lines 797-800.
27. Id. bk. XVI, lines 20-45.
28. Cf. J. REDFIELD, NATURE AND CULTURE IN THE ILIAD 107 (1975) (“The crucial errors in Achilles’ story . . . are the errors of others—of Agamemnon, of Nestor, of Patroclus.”).
29. HOMER, supra note 26 bk. XVI, lines 46-100, 220-24.
reader that Achilles is not responsible for Patroclus' death; if anyone is responsible, it is Patroclus himself.

The poet stresses that Achilles tries to prevent Patroclus from pursuing the retreating Trojans back to the walls of the city. Achilles warns Patroclus not to let himself get carried away by battle; he directs him not to pursue the retreating Trojans after he has helped to drive them from the ships; and he specifically warns him that if he does, he may be killed. But Patroclus ignores this warning; he disobeys Achilles by pursuing the Trojans back to the walls of Troy. What causes Patroclus' death, in short, is his disobedience of Achilles' instructions. This is not a subtle or ambiguous point in the poem.

But there is an even more fundamental problem with Posner's discussion. "Tragic mistake" analysis is simply not appropriate for the Homeric epic. In the epic poem, the character's fate is fixed by his character, not by some tragic mistake. The epic proceeds from a very different set of assumptions in this respect than does classical tragedy. As Professor Auerbach has observed, the epic poem

is based upon the insight that a man is an indivisible unity of body (appearance and physical strength) and spirit (reason and will), and that his individual fate follows from that unity, which like a magnet attracts the acts and sufferings appropriate to it. It was this insight that enabled Homer to perceive the structure of fate. He created a character—Achilles or Odysseus, Helen or Penelope—by inventing, by heaping up acts and sufferings that were all of a piece. In the poet's inventive mind an act revealing a man's nature, or, one might say, his nature as manifested in a first act, unfolded naturally and inevitably into the sum and sequence of that man's kindred acts, into a life that would take a certain direction and be caught up in the skein of events which add up to a man's character as well as his fate.

In other words, Achilles' fate was sealed from the very "first act" revealing "his nature."

Professor Auerbach explains the difference between the epic poem and classical tragedy:

Tragedy grew out of the epic myth; but in developing a form of its own, distinct from the epic, it concentrated more and more on the actual decision; a man and his destiny are laid bare in the moment when they become wholly and irrevocably one—the moment of doom. In Homeric epic a man moves toward his fate in a gradual process of clarification and the hero's end need not necessarily come into the story. Classical tragedy, on the other hand, discloses the end of his career when he has left all

30. Id. bk. XVI, lines 80-96.
31. Id. bk. XVI, lines 685-87.
32. E. AUERBACH, supra note 7, at 1.
diversity behind him and no escape is possible.\textsuperscript{33}

If the career of "epic" man is one in which his "individuality [is] enriched by each new turn of his fate,"\textsuperscript{34} the career of tragic man is just the reverse; it is a career in which, from the moment of tragic decision, individuality is gradually subsumed in the universal fate.\textsuperscript{35}

Posner's analysis of the \textit{Iliad} blurs over this elemental distinction between epic poem and classical tragedy. Although his "tragic mistake" analysis might have been appropriate in the context of classical tragedy, it clearly is not appropriate in the context of Homeric epic.\textsuperscript{36} The inquiry into "Achilles' tragic mistake" is misdirected from the outset.

This is not an isolated lapse of judgment, moreover. It is one of many instances in Posner's criticism of the \textit{Iliad} (and later of \textit{Hamlet}) where he makes claims that are either contradicted by the text under consideration or in some other respect are not adequately responsive to it. These claims cover the full range of literary judgments, from judgments about character to judgments about the larger meaning of the work under consideration.

For example, Posner reduces Achilles to a simple revenge figure, obscuring by doing so the critical role played by Achilles' ambivalence in the development of the larger drama of the poem. At one point, he describes Achilles as enjoying the "sweeter revenge" of "watching the Trojans make mincemeat of the Greeks in his absence" (p. 49). But any thoughtful reader of the poem will recognize the inadequacy of this description. Posner ignores the deep ambivalence that Achilles clearly feels toward the companions he has abandoned. As a consequence, Achilles becomes less interesting, and the poem itself loses much of its impact.

\textsuperscript{33} Id. at 3.
\textsuperscript{34} Id. at 4.
\textsuperscript{35} Id.
\textsuperscript{36} To the student of literature, Posner's application of "tragic mistake" analysis to this epic poem would appear as inexplicable and inappropriate as it would appear to a student of constitutional law if a federal court were to apply strict scrutiny analysis in reviewing an equal protection challenge to ordinary economic legislation, or, perhaps more analogously, if it were to apply such a mode of analysis in reviewing a commerce clause challenge to federal minimum wage legislation. The critical mode is simply the wrong one to apply in the particular context.

But I recognize that this is not something that can be fairly blamed on the interdisciplinary nature of Posner's proposed approach. There is nothing in the interdisciplinary approach itself that requires application of tragic mistake analysis in this or any other context. Exactly why Posner applies tragic mistake analysis here is a mystery; maybe it is simply because he thinks it is the sort of thing that literary critics do. Whatever the explanation, Posner's application of tragic mistake analysis to this epic poem reflects a fundamental ignorance of the basic forms of literature. This in turn undermines the credibility of his critical performance and calls into question the soundness of his proposed critical approach. Any approach, whether interdisciplinary or not, that rests upon such a weak understanding of the discipline of literary form is not likely to produce, one suspects, significant or satisfying insights.
This ambivalence is evident in Book IX when the Achean delegation approaches Achilles and pleads with him to return. The great drama of that moment—the drama that comes from the real force of the delegation's pleas on the one hand and from Achilles' stubborn but troubled resistance on the other—is lost entirely in Posner's account. The appeals made by the Achean delegation, appeals which reflect the central values and expectations of heroic culture, are reduced in Posner's account to the assertion that the delegation "promised Achilles the moon" (p. 49). And in a similar vein, Achilles' rejection of those appeals is reduced to a simple economic explanation. Achilles rejects the Achean offer, Posner claims, because he does not consider it "apt compensation" for giving up a long life (p. 49). Such considerations do play a role in Achilles' rejection of the appeals by the Achean delegation, but by portraying Achilles' rejection as if it was based simply upon a calculation of "apt compensation," Posner fails to recognize the deep ambivalence and confusion underlying Achilles' response. Without an awareness of that ambivalence and confusion, the drama of the moment is lost.

Later in the book, referring back to his earlier discussion of Homer's poem, Posner makes the following assertion: "[I]f you read the Iliad carefully you can have no doubt that you are meant to think it a fine thing that the Trojans are going to be slaughtered" (p. 304). But anyone who has "carefully" read the poem knows just the opposite. One of Homer's great achievements, in its own way deeply subversive of the heroic ethic, lies in the way the Iliad operates to develop in the reader (or the listener) a deep sympathy for the opposing side. If Homer meant us to think it "a fine thing" that the Trojans are going to be "slaughtered," he would not have labored as he did to develop the scene where Hector says farewell to his wife and small child. Nor would he have ended the poem with that poignant moment of reconciliation between Priam and Achilles, between the Trojan father who would never again see his own son and the Achean son who would never again see his own father. The whole movement of the poem, its whole thrust and purpose, is to complicate the sympathies; it is to prevent exactly the kind of crude response—thinking it "a fine thing" that the other side is to be "slaughtered"—that Posner offers as a final judgment.

37. Posner recognizes that Homer includes passages that portray sympathetically the other side, but he regards this as simply an effort on Homer's part to gain credibility by demonstrating that he is not entirely one-sided—just a matter of the poet foregoing "facile triumph" (p. 304). The lesson that Posner draws from this is that lawyers will be more successful as advocates if they learn to "empathize," not just with their own client, but with "the client's adversary" (pp. 304-05). Posner's discussion in no way qualifies his basic assertion that the reader of the Iliad is "meant to think it a fine thing that the Trojans are going to be slaughtered" or undermines the force of my criticism.
C. "Hamlet's Biggest Mistake?"

Similar problems plague Posner's analysis of Shakespeare's *Hamlet*, but with a slightly different significance. In his reading of *Hamlet*, Posner once again tries to pinpoint the protagonist's fatal mistake, and here again, to the extent that Elizabethan drama has a different form and focus from classical tragedy, "tragic mistake" analysis is inappropriate. But allowing Posner his misdirected inquiry, what does he claim was Hamlet's "fatal mistake"?

One "mistake" Hamlet made was failing to check the foils before fencing with Laertes. This failure, in Posner's view, was inexcusable negligence on Hamlet's part (p. 56). But "Hamlet's biggest mistake" was his failure to kill Claudius while the latter was praying (p. 59), a mistake that resulted in seven "unnecessary deaths." Posner surmises that Shakespeare included this scene to demonstrate that revenge is an inefficient and "expensive way of doing justice" (p. 56). In addition, Hamlet's failure to seize this occasion to kill Claudius was a mistake because it was based on an error in judgment: Hamlet should have known that Claudius was incapable of genuine repentance, so dispatching him while he was at his prayers would not contribute to his salvation. The passage in which Posner elaborates upon this idea is a central part of his analysis of *Hamlet*, and it reflects generally the character and quality of critical insight one encounters in this part of his discussion:

Hamlet's biggest mistake, the standard revenger's mistake, is to get carried away. The train of unnecessary deaths is set in motion when he forgoes the opportunity to kill Claudius at prayer because he wants to make sure that Claudius' punishment is eternal. The false step of sparing Claudius has a deeper significance, however. Claudius' prayer soliloquy reveals to the audience that Hamlet is mistaken in believing that if he kills Claudius at prayer Claudius will go to heaven. Maybe the audience is even supposed to think Hamlet's mistake a stupid one. (p. 59)

In other words, Hamlet's failure to kill Claudius at this opportune moment was not only inefficient, but "stupid."

Why is this analysis so dissatisfying? Perhaps in large part because of its reductionist tendency: "Hamlet's biggest mistake, the standard revenger's mistake, is to get carried away." The problem with thinking and talking this way\(^\text{38}\) is that it reduces Hamlet to a "standard revenger." By doing so, Posner summarily eliminates from the range of relevant critical attention all that makes Hamlet interesting, all that makes him enduring as a great problematic character in literature. *Hamlet* is suddenly no different from any other "standard revenger" that one might encounter in popular literature.

\(^{38}\) See also p. 60 (Hamlet's "excessive bloodthirstiness is the occupational hazard of a revenger.").


What Posner fails to see is that what makes Hamlet interesting is the way he differs from your standard revenger. It is his special complication and intensity—his unique capacity to penetrate through surface appearances to the reality of things; his more-than-usual struggle to overcome his more-than-usual irresolution; his extraordinary powers of expression—it is all of those things that make Hamlet a unique, complex and problematic character. All this is lost when Hamlet is reduced, as he is in Posner's analysis, to a "standard revenger."

To say that Hamlet cannot be reduced to a type is not to say that his experiences, and his responses to them, have no universal significance. In fact, just the opposite is true. We are interested in Hamlet because he experiences, although perhaps in a more poetically intense way, what we all experience. We too live in a world where appearances often mask realities; Hamlet offers us a language that will allow us to penetrate the world of "seeming" to the world that really is. And we too often find ourselves temporarily paralyzed in the face of discovered corruption, incapable of acting decisively even though we know action is necessary. That recognition—that Hamlet is like us, and that his world is like our world—lies at the very heart of our experience in the play. But that potential for sympathetic appreciation is lost when Hamlet is reduced to a type—to a "standard revenger."

The central problem with Posner's analysis in this context is not so much raw error as it is a disappointing superficiality. Take for example Posner's judgment that Hamlet's failure to act at this particular moment is a result of his being "carried away" by emotional excess. How sound is this judgment? Is emotional excess the real reason Hamlet fails to act at this moment, or is there some other explanation?

Unlike his claim about "Achilles' tragic mistake," Posner's judgment in this instance does find some support in the text. The excuse Hamlet gives for not killing Claudius at this moment is, after all, frightening in the excess of hatred it seems to express. He wants his uncle to suffer eternal damnation; he wants to wait to catch Claudius in some activity that, unlike prayer, "has no relish of salvation in't." 39 The question is whether Hamlet's words at this moment should be taken at face value.

In his judgment that Hamlet's words reflect an "excess" of emotional hatred, Posner is joined by Samuel Johnson. Coleridge reports that Johnson pronounced the words Hamlet utters on this occasion "so atrocious and horrible as to be unfit to be put into the mouth of a human being." 40 So Posner's interpretation here not only has some basis in the

text of the play itself, but also finds a degree of support in the views of other critics.\footnote{41}

But is the judgment ultimately sound? Does the "excess of hatred" interpretation comport with the Hamlet that we know from the rest of the play? Does it deepen our understanding of Hamlet's character? How else might Hamlet's words on this occasion be taken? Interestingly, most critics who have thought about this scene and the problems it presents have concluded that Hamlet's words on this occasion should probably not be taken at face value as they are by Posner and Johnson.

Coleridge's discussion of this question is representative of the prevailing view. Coleridge rejects Dr. Johnson's interpretation, explaining "that Dr. Johnson did not understand the character of Hamlet":\footnote{42}

\textit{[T]he determination to allow the guilty King to escape at such a moment is only part of the indecision and irresoluteness of the hero. Hamlet seize\textit{s} hold of a pretext for not acting, when he might have acted so instantly and effectually: therefore, he again defers the revenge he was bound to seek, and declares his determination to accomplish it at some time,}

\begin{quote}
When he is drunk, asleep, or in his rage,
Or in th' incestuous pleasures of his bed.
This, allow me to impress upon you most emphatically, was \textit{merely the excuse} Hamlet made to himself for not taking advantage of this particular and favorable moment for doing justice upon his guilty uncle.\footnote{43}
\end{quote}

We should be careful, Coleridge insists, not to take everything Hamlet says at face value. Like the rest of us, Hamlet manufactures "excuses" for not acting that obscure his real motivations. That is part of his character, and the reader must be sensitive to it. The better understanding of Hamlet's words is that they are a "pretext" for not acting.

The attraction of the "pretext" understanding over the "excess of hatred" understanding is that, as Coleridge suggests, it is much more consistent with Hamlet's character. The reason Hamlet fails to act—the reason, that is to say, that is most consistent with his character—is not emotional excess; it is not, as Posner claims, that he is "carried away," but that he is \textit{not ready}. That, at any rate, is the judgment of most readers and critics. Posner's interpretation does not square with Hamlet's character as it is revealed in the rest of the play.

\footnote{41. Although both Dr. Johnson and Posner share the view that Hamlet's reaction at this moment reflects some sort of "excess," their views are not identical. What Johnson found disturbing was the element of cold calculation; it was "refinement of hatred" rather than emotional excess, \textit{id}.; whereas to Posner the essence of the problem is that Hamlet lets himself get "carried away" (p. 59). If Hamlet's words are to be taken at face value, then Johnson's reading would seem to be the better one. The tone and attitude of Hamlet's speech at this moment are much closer to calculation than to uncontrolled emotion.}

\footnote{42. S. COLERIDGE, supra note 40, at 193-94.}

\footnote{43. \textit{Id} at 194 (emphasis in original).}
Part of the disappointment with Posner’s analysis in this section stems from his summary dismissal of the pretext explanation. He simply asserts, without any effort at justification, that “[t]here is no basis in the text of *Hamlet* for assuming . . . that Hamlet could not be so bloodthirsty as to wish to damn Claudius for eternity, and therefore the reason he gives for sparing him must be a pretext” (p. 59-60). But what does he mean when he says there is “no basis in the text”? He makes this assertion without any serious inquiry into the question of Hamlet’s character. It is as if Hamlet as a complex and interesting character does not exist in Posner’s world. For Posner, the only possible explanations for Hamlet’s failure to kill Claudius are that he is bloodthirsty (“a marked characteristic of Hamlet in Act III,” p. 60) or a “bungler” (p. 60). Significantly, both explanations serve to reduce Hamlet to a stock figure. Posner is not interested in Hamlet as a *character* (a fully realized figure in literature), but only, or at least primarily, as a *type* (a reflection of some external behaviorist theory).

It is here that the disabling aspects of Posner’s critical method become most evident. Posner’s method encourages him to see Hamlet as a “standard revenger,” with the consequence that his inquiry never proceeds beyond the surface. Posner never asks in a serious way whether Hamlet’s words should be taken at face value or instead regarded as a pretext, because his critical method does not permit or encourage him to pursue questions of character. He takes Hamlet’s words at face value because at face value they fit the standard revenger’s pattern of emotional excess. In Posner’s analysis, in short, surface is everything. But if ever there was a play in which an analysis based on surface appearances is inappropriate, it is *Hamlet*. For if *Hamlet* is about anything (to answer the rhetorical inquiry Posner makes in Chapter One) (p. 67), it is about a world in which surface is *not* everything.

The narrowness of vision that limits Posner’s understanding of Hamlet’s character also limits the kinds of insights that he is able to generate about the play itself. What, in Posner’s view, does *Hamlet* ultimately offer the reader? What is the play finally about? The major lesson of the play, according to Posner, is that revenge is an “imperfect but sometimes inescapable social practice” (p. 69). But do we need *Hamlet* to tell us that? This analysis reduces the play to the level of platitude. It ignores everything about the play that makes it interesting.

This “novel” insight into the play’s significance and meaning is on a level with other legally “relevant” insights that Posner succeeds in

44. See infra pp. 1270-71.
45. Posner makes this statement in a section discussing what an understanding of revenge can teach us about *Hamlet*, but it is consistent with several observations he makes about what the play teaches us. (pp. 59, 62).
extracting from the play in the course of his discussion. We learn for example:

— that "Hamlet's sudden doubt about the ghost's bona fides ... illustrates the problem of proof that plagues a revenge system of justice ... because there is no machinery of investigation and adjudication" (p. 60);
— that Hamlet's "wast[ing] time building an unnecessary case against Claudius" and Laertes' "leap[ing] to the wrong conclusion" as to the proper object of his revenge both "underscor[e] the dangers in being a judge in one's own cause" (p. 57);
— that "[a]nother problem with revenge" is that it "places responsibilities on people who are not temperamentally well suited to bear them, in con-trast to a system of justice whose personnel ... are volunteers" (p. 56).

Posner offers these observations in part for their own illumination, and in part as examples of the sort of legally relevant insights that his proposed interdisciplinary approach is capable of generating. Presumably they represent the sort of special insight that the lawyer or legal scholar can bring away from the play. But they do not help illuminate the experience of the play itself. Nor do they help one better appreciate Shakespeare's achievement. And it would be difficult to claim that they have any substantial independent value as observations about life or law. The combination of these two things—the distractive tendency of these purportedly legally relevant observations and their platitudinous quality—contributes to the dissatisfaction one feels with the critical experience offered by Posner's book. Whatever Posner is describing in making statements like these, it is not Shakespeare's Hamlet. The world of Shakespeare's Hamlet is a world that complicates and troubles the understanding; it is a world where true comprehension is dearly acquired and always precarious. In these respects it is just the opposite of the world we encounter here.

D. The Problems with Posner's Proposed Critical Approach

One of the things that makes great works of literature "classics" is that they are open to many different interpretations. That is certainly true of Homer's Iliad and Shakespeare's Hamlet. In criticizing Posner for failing to get these works "right," I do not endorse the view that there is one, and only one, way to read these works. Anyone who has taught these works, or who has puzzled on his or her own about their meaning, knows how open they are to different understandings and interpretations. Who has not felt the excitement of coming across a fresh interpretation of a particular line or passage, an interpretation that suddenly sheds new illumination on the meaning of the entire work? But to say these works lend themselves to different interpretations is not to say that all interpretations are equally satisfying or valid. It is possible not only to say, but
to show, that some readings of a work of literature are less valid than others, indeed, that some are not valid at all.

The interesting thing about Posner's proposed interdisciplinary approach is the remarkable consistency with which it generates unsound or unhelpful judgments about the works under consideration. What is it about Posner's approach that tends to subvert the discovery of helpful insights? Four aspects of his approach appear to contribute to the mischief.

First, the effort to discover the protagonist's primary "mistake" is clearly misdirected. Posner never explains exactly why he thinks this particular inquiry is relevant. As I have argued above, it is neither meaningful nor helpful to read the *Iliad* as if Homer were centrally concerned with telling us the nature of "Achilles' tragic mistake." The same is true of *Hamlet*. And even in the context of classical tragedy, "tragic mistake" analysis needs to be handled with more subtlety than Posner seems prepared to do here. To talk about any work of literature as if the key to its meaning lay in discovering the protagonist's critical mistake is to turn the work under consideration into a sort of engineering problem. But literature is not a problem to be solved; it is an experience to be imaginatively lived. Recognizing that is a first step toward meaningful appreciation.

Second, Posner's search for an interpretation of these works with special disciplinary "relevance" to the lawyer is misplaced. The legally relevant statements that Posner manages to generate in his discussion of *Hamlet*—statements, for example, about "problems of proof" in a revenge system, or "being a judge in one's own cause"—do not rise much above the level of platitude. It is difficult to see how statements such as these illuminate in a serious way the experience of the play, or the activity of the law, or cultural experience generally. Such "insights" transform the play into an extension of the contemporary lawyers' world—they are the kinds of things that might be said at a lawyers' cocktail party—and in doing so destroy perhaps one of the most important things the play has to offer: an opportunity to get outside oneself. Rather than affording the reader an experience that complicates the understanding and expands the sympathies, the play becomes a cipher for the contemporary legal world.

This is not to say that bringing a lawyer's attention to bear upon works of literature can never open up aspects of those works that might have gone unnoticed, or generate insights that illuminate both the work under consideration and the conditions of contemporary legal exist-
ence. But whatever form that critical enterprise takes, it must be different from the one it takes here. It must ask different questions, employ a different critical perspective, and seek connections of some other type or at some other level.

Third, Posner’s critical approach suffers from a foolish preoccupation with novelty. The superficial quality of many of Posner’s critical judgments reflects this emphasis. Rather than seeking a deeper understanding of these complex works, Posner skims their surfaces for “novel meanings” (p. 54). This preoccupation contributes to the dissatisfying critical experience offered by this work.

Fourth, and perhaps most significantly, Posner’s critical method is not a “literary” method. What Posner means by an interdisciplinary approach, it turns out, is bringing to bear upon works of literature the techniques and insights of other disciplines. This explains why he tends to replace the texts of the works he considers with a paraphrased statement of the action. It also explains why his interest in Hamlet is as a type and not as a character. Posner is not interested in these works of literature as works of literature. He is not interested in illuminating the experiences offered by the texts he considers, or in exploring in a serious way the meaning of those experiences, or in helping us understand the characters in the texts as characters. Posner’s interest is in exploring revenge as a behavioral and cultural phenomenon. For his critical purposes, therefore, it makes little difference whether he is working from the texts of the works themselves or from a paraphrase—even a vulgar paraphrase. Under Posner’s critical approach, the text is simply something to be used when it supports the behavioral assertions he wants to make—and to be ignored (as in the case of “Achilles’ tragic mistake”) when it does not.

This is the fatal problem with Posner’s proposed approach: It directs attention away from rather than toward the text. The problem is not simply that such an approach may lead to “erroneous” interpretations,

46. That sort of thing has been done successfully by others. For a successful effort, see J. White, *When Words Lose Their Meaning* (1984).

47. Literary criticism, of course, can take many different forms, but there is one essential feature that ultimately makes it “literary”: that it carry the attention back to the text of the work under consideration. Criticism is “literary” when it illuminates the experience of the work itself and the achievement of the artist. Great works of imaginative literature have movement and structure, they have a life of their own; they are artistic compositions. They complicate the understanding, expand the sympathies, and enlarge and enrich our understanding of human experience. The purpose of literary criticism is to show how imaginative literature “works” in these several ways, and when criticism fails to do that, it is no longer “literary.”

48. Posner recognizes this at least indirectly in his concluding remark in Chapter One on the *Iliad* and *Hamlet*. “It is only as the study of law becomes more intellectual, more interdisciplinary (paradoxically, in directions other than the literary), that revenge literature can be brought within its reach” (p. 70) (emphasis supplied).
but that it deprives the reader of that which great literature offers—a mind-enlarging, sympathy-complicating experience that cannot be captured or duplicated by paraphrase.

It is helpful, in this respect, to compare Posner's approach to the approach taken by Professor James White in When Words Lose Their Meaning. The Iliad is a major focus of attention in both works. But whereas Posner directs the critical attention away from the text toward a paraphrased statement of the action, White constantly forces the attention back to the text itself. It is there, White insists, in the words the poet actually used, that one has to find the meaning of the work or not at all.

Compare the approaches taken by each in dealing with the dramatic confrontation in Book IX between Achilles and the Achean delegation. Posner reduces the arguments made by the Achean delegation to the simple assertion that the delegation "promis[ed Achilles] the moon" (p. 49). The very phrase he uses contemporizes the moment, transforming it into a reflection of our world. Whatever power this moment might have had to carry us out of our contemporary context, to provide an alternative way of seeing the world, is extinguished by this simple act of paraphrase.

In dealing with the same moment, White carries the reader in just the opposite direction, into the world of the text, opening up the moment that Homer has created for inquiry and reflection. What do the arguments made by the members of the Achean delegation tell us about the expectations and values that lay at the heart of heroic culture? What does Achilles' rejection of these appeals mean in terms of his own relationship to that culture? What is the significance of the confusion and ambivalence in Achilles' response? White's questions transport the reader outside his contemporary context. They invite the reader to try, at least, to see the world as Homer knew it. I have explained elsewhere why I think the substantive inquiry opened up by such questions is important and relevant, but that is not my present focus. My point here is much simpler. It is that White's critical approach constantly forces the reader's attention back to the text itself; it encourages "slow" and "active" reading, and in these respects it serves to open up and illuminate the experience offered by the work under consideration. White's approach is a "literary" critical approach—in all of the ways that Posner's is not. If it does not guarantee, at least it makes possible, true apprehension.

The ultimate problem with Posner's approach, ironically, is that it is

49. J. White, supra note 46.
50. For White's discussion of the Iliad, see id. at 24-58.
51. Id. at 44-51.
an “inter-disciplinary” approach: it encourages the critic to translate the great works of literature into the terms of contemporary disciplines, specifically, in this case, into the terms of contemporary law and contemporary economics. This very act of translation degrades these works and distorts their meaning. By such incursions, these great works, whose chief value lies in their capacity to complicate our sympathies and expand our understanding, are made prisoners of present preoccupations.

III

THE PROBLEM OF DISINTEGRATION OF CRITICAL PERSPECTIVE

I agree... that language shapes thought, that choice of words can therefore have political and social consequences, that an impoverished vocabulary can impoverish thought. (p. 311)

[Holmes' opinion in Buck v. Bell is] a poorly reasoned, brutal, and even vicious opinion... but it is a first-class piece of rhetoric. (p. 289)

I turn now to the other major problem with Posner's critical approach: the problem of disintegration of perspective. If nothing else, Posner's performance in this work makes clear that an interdisciplinary approach to criticism is not the same as an ethically integrated one. It demonstrates how the one approach can be antagonistic to the other. As long as Posner remains the technician, applying this or that combination of specific disciplinary perspectives, he appears to be on safe ground. But when the moral element is introduced, something very curious happens: the enterprise begins to unravel.

To illustrate this point I focus upon three additional judgments that Posner makes in the course of his essay: (1) his judgment that Camus' The Stranger is "an immoral work of fiction" (p. 155); (2) his judgment that Justice Holmes' dissenting opinion in Lochner v. New York is "the greatest judicial opinion of the last hundred years" (p. 285); and (3) his judgment that Holmes' opinion in Buck v. Bell ("three generations of imbeciles are enough") is "eloquent and moving" (p. 288). One could demonstrate with little effort, I think, that these critical judgments are no more sound than those discussed in the preceding section. My purpose here, however, is not to cover old ground, but to introduce a new dimension into the discussion: the dimension of ethical judgment.

One of Posner's major contentions in this work is that the ethical aspects of a literary work are unrelated to an assessment of its rhetorical excellence. He insists that the two aspects of performance—the ethical

53. Posner criticizes James White for the "narrowness" of his critical approach to the Iliad (p. 53). White's approach seems narrow to Posner because it is essentially a literary approach and not an economic or behaviorist one.
and rhetorical—be kept radically separate. That is so whether what is under consideration is a work of imaginative literature or a judicial opinion. Posner's point has a certain limited validity. It is often possible, and sometimes helpful, to distinguish between the rhetorical and ethical aspects of a literary work. But Posner's insistence upon radical separation of the two leads ultimately to a disintegration of critical perspective.

The three judgments identified above represent three steps in a process of progressive disintegration. As the work proceeds, Posner's insistence upon the separation of the ethical from the rhetorical aspects of understanding becomes increasingly radical, and, with that development, the critical insights he produces become increasingly superficial and incoherent, until finally his analysis no longer makes any sense.

A. Camus' The Stranger: "An Immoral Work of Fiction"

In discussing Camus' novel, The Stranger, Posner makes the odd claim that the work is "an immoral work of fiction" (p. 155). Posner seems to think the novel is "immoral" in part because Camus sympathizes with his criminal protagonist, Meursault. Camus not only fails to condemn Meursault for his crime, he condones his protagonist's actions, "inviting the reader to take Meursault's part despite his crime and lack of remorse, by depicting him as victim rather than killer and by depersonalizing the real victim" (p. 89).

While Posner may disapprove of Camus' sympathy for Meursault, his criticism of The Stranger appears to have a broader focus. Posner claims that Camus makes Meursault's trial "a sinister farce in which the defendant is condemned not for having murdered the Arab but for rejecting bourgeois values" (p. 87). Viewed in this light, the work is immoral because the rejection of bourgeois values takes a violent form, and the author does nothing to condemn it. Hence the novel reflects "a form of neoromanticism in which criminals are made heroes" (p. 90).

Why is this such an inadequate way of talking about the world we encounter in The Stranger? The primary reason is that it completely ignores the existentialist aspects of Camus' work. Clearly one of Camus' purposes in his novels, particularly in The Stranger and The Plague, is to raise the existentialist question: to ask whether life has any meaning apart from that supplied and reinforced by religion and culture. In each novel Camus structures the underlying experience so that religious and cultural beliefs are stripped away as a source of meaning, and the pro-

54. That is why Camus gives Meursault the "character" he does. Meursault has to be the kind of character who has not internalized the cultural conventions. Posner's description of Meursault ignores this aspect of his character. (pp. 86-87).
tagonist ultimately is left standing outside his culture. This permits him to explore whether there is any reason to go on living if one comes to believe that human existence is meaningless. Camus asks an important question in these works: What is left of the human spirit when it finds itself in an absurd and indifferent world?

I think Camus' answer to this question in The Stranger is that something is left. His answer can be found in the way Meursault, a condemned man alone in his cell, thinks of his mother in the closing moments of the novel—not with guilt that he did not properly mourn her passing, nor with conscience-stricken grief that he did not treat her as he should have during her life, but with simple understanding and sympathy. He understands now why in her last years, in that home where she really had nothing in life to look forward to, his mother took up a "fiancé." Meursault appreciates how "[she] must have felt free then and ready to live it all again," and he too, though he has denied the existence of God and rejected the notion that life has any meaning in a traditional sense, feels "ready to live it all again too." There is in this simple thought a statement about the human spirit that is all the more profound because it is not overdone.

If you remove all cultural reinforcement, Camus seems to be saying, there is still a residual capacity for human understanding and sympathy. If you take away God, if you eliminate the promise of an afterlife, if you abandon the belief that existence has meaning, there is still something left. But even if Camus had not answered in this way, even if he had answered in more pessimistic terms, his mere asking of the question makes The Stranger a deeply moral work. Posner, in short, is mistaken in describing Camus' The Stranger as "an immoral work of fiction." In

56. At this moment, Meursault has rebuffed the embrace of the visiting chaplain, denied the existence of God, and rejected the very notion that life has meaning in any traditional sense. He has come face to face with the recognition that existence itself is "absurd." Yet, rather than giving over to despair, this is how Meursault responds:

With [the chaplain] gone, I was able to calm down again. I was exhausted and threw myself on my bunk. I must have fallen asleep, because I woke up with the stars in my face. Sounds of the countryside were drifting in. Smells of night, earth, and salt air were cooling my temples. The wondrous peace of that sleeping summer flowed through me like a tide. Then, in the dark hour before dawn, sirens blasted. They were announcing departures for a world that now and forever meant nothing to me. For the first time in a long time I thought about Maman. I felt as if I understood why at the end of her life she had taken a "fiancé," why she had played at beginning again. Even there, in that home where lives were fading out, evening was a kind of wistful respite. So close to death, Maman must have felt free then and ready to live it all again. Nobody, nobody had the right to cry over her. And I felt ready to live it all again too. As if that blind rage had washed me clean, rid me of hope; for the first time, in that night alive with signs and stars, I opened myself to the gentle indifference of the world.


57. Id.
doing so, he misses the meaning of the book and ignores its existentialist challenge.

One reason Posner reads Camus' novel the way he does is to support his general view that the artistic achievement of a work is unrelated to its ethical thrust. He wants to establish the proposition that an immoral work can still be great literature, and viewing Camus' novel as "an immoral work" gives him one way of doing so. In this instance, Posner's belief leads him to misread Camus' novel. But the underlying proposition is one that needs to be taken seriously.

Is it possible to separate the aesthetic and ethical aspects of response to a literary performance? What is gained and what is lost by such an effort? To answer these questions we turn to Chapter Six, which deals with the rhetoric of judicial opinions. In this chapter Posner argues for the radical separation of the ethical from the aesthetic aspects of critical response.

B. Holmes' Lochner Dissent: The "Greatest Judicial Opinion"?

Posner claims in Chapter Six that Justice Holmes' dissenting opinion in *Lochner v. New York* is "the greatest judicial opinion in the last hundred years" (p. 285). In the following passage, he explains what it is about Holmes' dissent that we ought particularly to value and respect:

The force of Holmes' opening sally ["This case is decided upon an economic theory which a large part of the country does not entertain"] 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? We know how an ordinary judge would express the same thought. Many have, and a fair composite would be: "I respectfully but earnestly dissent from the majority's unwarranted substitution of its own views of public policy for the more flexible mandate of the Constitution." And he will then devote pages of argument and citation to supporting the assertion. Holmes' method is more effective because in areas where our own knowledge is shaky we tend to take people at their own apparent self-evaluation and thus to give more credence to the confident than to the defensive.

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58. This is how Posner concludes a later discussion of Camus' novel:

I do not belong to the school that believes that literature must be morally uplifting to be great. Great writers have a remarkable ability to make the reader suspend ethical judgment while reading. Nor do I think that immoral literature causes immoral behavior. (I shall have more to say about these matters in Chapters 6 and 7). (pp. 154-55) (footnote omitted).

In short, Posner's reading of Camus' novel gives him an entering wedge for his argument in Chapter 6 that the ethical aspects of a judicial opinion have nothing to do with its excellence as a piece of rhetoric.

59. Id.

60. 198 U.S. 45, 75 (1905) (Holmes, J., dissenting from a holding that a law limiting working hours for bakers violated the liberty of contract under the 14th Amendment).
The next sentence in the dissent (beginning "If it were a question") is the ethical appeal. An ordinary judge would say something like, "My personal views on the truth of the majority's economic theory are irrelevant." That is the essential paraphrasable content of Holmes' sentence, but by putting it as he does he slips in the additional suggestion, which makes the sentence more credible, that he is slow to jump to conclusions. It is a masterful touch; it happens also . . . to be false. Holmes was not slow to jump to conclusions . . . . Many judges when voting to uphold statutes that they dislike will say so to make themselves sound impartial. That is a type of ethical appeal, but of a crass and self-congratulatory sort. Holmes' is subtle, disarming. It is a version of the "simple man" style that George Orwell used so effectively . . . . The plain style is often . . . an artifice of sophisticated intellectuals . . . . The implied author of the _Lochner_ dissent is not the real Oliver Wendell Holmes. (pp. 283-84, footnote omitted)

There are two primary things to notice here. First, notice how Posner focuses upon matters of surface style. He makes no attempt to show how Holmes' use of language in his _Lochner_ opinion reflects and shapes either Holmes' character or that of the larger constitutional culture.

Second, notice the terms of praise Posner employs. Holmes' performance is to be respected and emulated because of the way it (1) "puts the reader on the defensive," (2) "disarms" the reader, and (3) represents a kind of "artifice" that serves to hide the "real" Holmes from view (pp. 283-84). By praising Holmes' performance in the terms he does, Posner reduces rhetoric to a matter of stylistic technique, and the art of rhetoric to the clever employment of "tricks" to fool and manipulate the reader.

Posner goes on to discuss the character of Holmes' argument:

Would the dissent in _Lochner_ have received a high grade in a law school examination in 1905? I think not. It is not logically organized, does not join issue sharply with the majority, is not scrupulous in its treatment of the majority opinion or of precedent, is not thoroughly researched, does not exploit the factual record, and is highly unfair to poor old Herbert Spencer, of whom most people nowadays know no more than what Holmes told them in the _Lochner_ dissent. The dissent also misses an opportunity to take issue with the fundamental premise of the majority opinion . . . . The sweeping assertions at the beginning of the dissent are . . . discordant with its conclusion. Read as a whole, the opinion does not clearly challenge Lochnerism but just the abuses of Lochnerism. It is not, in short, a good judicial opinion. It is merely the greatest judicial opinion of the last hundred years. To judge it by "scientific" standards is to miss the point. It is a rhetorical masterpiece. (p. 285, footnote omitted)

Even though Holmes' opinion is not well organized, even though it does not lay out the issues clearly and helpfully, even though it does not deal
fairly with the competing points of view, even though, in the final analysis, it is not a very honest opinion, it is still, Posner insists, "the greatest judicial opinion of the last hundred years."

In seeking to understand Posner's position here, it is helpful to identify a position that he might have taken but does not. Posner might have argued that judicial opinions that defy the conventional rules sometimes "work" in ways that opinions that assiduously follow the rules do not. Judicial opinions, like any other imaginative writings, have a life and vitality of their own. In seeking to understand and appreciate rhetorical excellence in judicial opinions, therefore, the critic should not respond mechanically by applying "scientific" standards, but rather should respond to the impression given off by the opinion as a whole.

If that were Posner's point here, it would be valid. Opinions that violate the conventions of good judicial writing sometimes do work, and they work in part because they violate those conventions. Moreover, we can learn from trying to understand how they work. But that is not Posner's argument. Instead, he takes the more radical view that the deficiencies of Holmes' opinion from the standpoint of argumentative ethics are irrelevant to an assessment of its excellence as a rhetorical achievement. I think Posner is wrong. In the final analysis, it is impossible to talk meaningfully about the excellence of a rhetorical performance without taking into consideration the argumentative ethics of that performance.

The term "argumentative ethics," as I use it here, means more than mere logic and clarity of presentation; it refers to the full range of ethical expectations that attach to the thoughtful and responsible conduct of argument. I use the term in contradistinction to "substantive ethics." Argumentative ethics refers to the ethical aspects of the activity of argument itself, substantive ethics to the ethical aspects of some larger substantive vision toward whose realization the argument is employed.61

While it is possible to distinguish between the argumentative and substantive ethics of a rhetorical performance, and sometimes helpful to do so, the two cannot be regarded as completely separate because in fact they are interdependent. The underlying relationship is the same as that

61. Argumentative ethics deals with the following sorts of questions: Has the speaker or writer dealt with the issues fairly and responsibly? Has he dealt with them thoughtfully? Has he done justice to their underlying complexity? Has the speaker or writer addressed his audience in terms of mutual respect? Has the argument served to educate or to manipulate? Has it had a civilizing influence? Is the argumentative performance, viewed as a whole, one that commands our respect and emulation?

Substantive ethical questions include the following: Is the position contended for by the speaker or writer a substantively just one? Is it reasonable? Would adoption of that position be fair to those affected? Would it help carry civilization forward?
which exists between means and ends generally in the law.\footnote{62} It is, as Fuller would say, a relationship of "polarity": a relationship in which two terms that we sometimes find it convenient to consider as opposed are in fact mutually interdependent. To illustrate the interdependency that exists between the argumentative ethics and the substantive ethics of a rhetorical performance, consider the example of a speaker using manipulative forms of argument to persuade his audience that we ought to treat each other with mutual respect. The very act of doing so would involve the speaker in an internal contradiction.\footnote{63} Rhetoric inescapably reflects and shapes character.\footnote{64}

The problem with Posner's analysis is that he never makes clear why we should not take into consideration the argumentative ethics of a particular judicial performance in arriving at an estimate of its rhetorical achievement. Why is a judicial opinion not even "better" than Holmes' \textit{Lochner} dissent when it lays out the issues fairly, when its organization is helpful, when it establishes terms upon which disagreement can constructively proceed, and when the judgments which support it are thoughtful and principled ones? Why does such an opinion not represent an even greater rhetorical achievement than one in which these fundamental expectations of argumentative ethics are not met?

Take, for purposes of comparison, Justice Harlan's dissenting opinion in \textit{United States v. White}.\footnote{65} Here is an opinion that has all of the persuasive force of Holmes' opinion in \textit{Lochner}, and is also a model from the standpoint of argumentative ethics. In the course of his \textit{White} opinion, Harlan identifies the competing considerations that bear upon the decision; he lays out both sides of the issue fairly; he helps establish terms upon which disagreement can constructively proceed; he deals creatively and thoughtfully with precedent; he employs metaphors in an imaginative way; he recognizes and respects the respective institutional roles of courts and legislative bodies in constitutional decision-making; he acknowledges that constitutional decisions often require discriminating judgment; and he attempts to show how that judgment should be exer-

\footnote{62. Fuller, \textit{Reason and Fiat in Case Law}, 89 \textit{Harv. L. Rev.} 376, 381 (1946); see Teachout, \textit{The Soul of the Figure: An Essay on Reading Fuller}, 70 \textit{Minn. L. Rev.} 1073, 1105-1126 (1986) (discussing the role of polarity in Fuller's jurisprudence).}

\footnote{63. As Fuller once observed, "If we do things the right way, we are likely to do the right thing." Fuller, \textit{What the Law Schools Can Contribute to the Making of Lawyers}, 1 \textit{J. Legal Educ.} 189, 204 (1948). Fuller was referring to the ethics of process rather than the ethics of argument, but his point has equal validity in the latter context.}

\footnote{64. The character-shaping conception of rhetoric is developed in J. \textit{White}, supra note 46. White does not envision a simple cause and effect relationship between character and the way we use words, but rather a complex relationship of reciprocity. \textit{See also} Teachout, \textit{supra} note 52.}

\footnote{65. 401 U.S. 745, 768 (1971) (Harlan, J., dissenting from a holding that a government narcotics agent could testify about the contents of a conversation overheard through warrantless electronic surveillance).}
cised in the immediate context. His whole opinion is a demonstration of the art of rhetoric in the deeper sense of rhetoric as a character-shaping activity.

Why should we not regard Harlan's performance in *White*, then, as an even greater rhetorical achievement than Holmes' in *Lochner*? More generally, why should we not take argumentative ethics into account in arriving at an estimate of the rhetorical achievement represented by a particular judicial opinion? Posner simply does not say.

Posner avoids dealing seriously with the question of argumentative ethics by defining our ethical expectations for judicial argument in narrow and mechanistic terms. In his discussion, those expectations are pretty much limited to "logic," "clarity," and "objectivity." But as consideration of Harlan's performance in *White* reveals, the ethics of argument encompass a much broader field. Terms like those invoked by Posner do not reflect the primary ethical expectations we bring to the argumentative aspects of judicial performance.

Another, not unrelated, problem with Posner's approach is that it transforms rhetoric into merely a matter of surface style. It fails to offer, as a consequence, a critical language capable of reaching or describing what it is that makes a particular judicial opinion "great." A comparison of this approach to that of Professor White might help point out the disabling impact of Posner's approach. The following passages represent efforts by both scholars to come to terms with the rhetorical achievement represented by Justice Brandeis' dissenting opinion in *Olmstead v. United States*.

In his discussion of Brandeis' opinion, Posner adopts a "surface style" conception of rhetoric:

> The staccato style of Brandeis' dissent (sentences of roughly equal length, starting the same way, and full of lists—"their beliefs, their thoughts, their emotions," and so on—and repetition, notably, of "they" and of "their") conveys a distracting sense of Brandeis' own excitement, making the reader wonder whether Brandeis may not have been projecting onto the long-dead framers his own vision of a just society. It is also a hectoring style; it grabs you by the lapel and shouts in your face, demanding your assent rather than engaging you in a discussion. This and its emotionality make it a discordant style in which to celebrate the classical liberal ideal of personal autonomy. It is also easily imitable and is the model for the windy jeremiads found in so many modern judicial dissents. (p. 293)

White adopts the broader "character shaping" conception of rhetoric:

> What is involved in this enterprise as Brandeis defines it? The answer is

66. 277 U.S. 438, 471 (1928) (Brandeis, J., dissenting from a holding that the fifth amendment does not apply to telephone wiretapping).
everything: the intellect, the capacity to read and express, the ability to penetrate surface forms to underlying truths, the sensitivity to shifts in social and intellectual forms, all in the service of the wise and just definition of the individual and his government. The reading of the Constitution is a stage in the making of the Constitution, and everything that is present in that activity is present in this one: the definition of a civilized polity operating under the rule of law and protecting the deepest values of the culture. Accordingly, to become a good judge requires the greatest education imaginable: education that will train us to see what the Framers saw; to hear their language and to penetrate it; to see by analogy what fits and what does not; to see through the surface to the underlying truth...

The contrast offered by these two passages should be sufficient to indicate the major differences. Posner's approach leaves the critic stalled on the surface, and leads to judgments that are of questionable validity. White's approach, by contrast, grounded in the notion that rhetoric shapes character, allows the critic to say what it is about Brandeis' rhetorical performance in Olmstead that makes it "great."

C. Holmes' Dissent in Buck v. Bell: A "Moving and Eloquent" Opinion?

In his discussion of Holmes' Lochner dissent, Posner seeks to isolate and dismiss as irrelevant any consideration of argumentative ethics in defining excellence in judicial rhetoric. When he turns to discuss the Holmes opinion in Buck v. Bell, he carries this process of "dis-integration" of critical judgment one step farther. In assessing the rhetorical excellence of a judicial opinion, he now insists, the critic must disregard both the argumentative ethics of the opinion and its substantive ethical thrust. This assertion represents the logical culmination of Posner's insistence upon radically separating the ethical and rhetorical aspects of

68. How accurate is it, for example, to describe Brandeis' use of repetition in his Olmstead dissent as a "staccato style," or to say that Brandeis' style reflects "a distracting sense of... excitement" or is a "hectoring style"? Brandeis does use repetition, his opinion does convey a sense of full engagement with the material, and it does radiate a sense of vision. But the critical terms Posner uses do not really get at the core of the experience it offers.
69. 274 U.S. 200 (1927) (rejecting a challenge under the 14th Amendment to a law providing for the sexual sterilization of institutionalized persons afflicted with imbecility or insanity).

Posner quotes the main passage from Holmes' opinion in Buck v. Bell:

We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. Three generations of imbeciles are enough. (p. 288, quoting 274 U.S. at 207)
judicial performance. He describes Holmes' rhetorical achievement in *Buck v. Bell* in the following terms:

This is beautiful prose—vivid, passionate, topped off by a brilliant aphorism—but it is dubious legal reasoning. . . . In *Buck v. Bell* Holmes drops the mask of judicial detachment and makes clear his personal approval of the Virginia statute—though on his view of the Fourteenth Amendment his opinion of the merits of the statute is irrelevant to the judicial function. *Buck v. Bell* would be a poorly reasoned, brutal, and even vicious opinion even if Carrie Buck really had been an imbecile; but it is a first-class piece of rhetoric—thus demonstrating . . . that there is no inherent moral or truth value in rhetoric. Scholarly analysis of the "rhetoric" of judicial decisions would be more fruitful, and certainly clearer, if scholars stopped trying to equate good rhetoric with goodness. (p. 288-89)

There are several things to note about Posner's analysis. Consider, first of all, Posner's opening observation: "This is beautiful prose—vivid, passionate, topped off by a brilliant aphorism." Here is an opinion that Posner himself has described as morally revolting (p. 288). Yet now, in his first response to it, he is describing it as beautiful. The radical separation of ethics from aesthetics here strikes one as almost schizophrenic.70 Posner is like the man who has just witnessed an execution by guillotine and been thoroughly revolted, yet whose first words are, "But what beautiful machinery." Posner has pushed the disintegration of response here to the point of incoherence.

The same kind of ethical incoherence is reflected in Posner's central assertion in this passage: that Holmes' opinion in *Buck v. Bell* is at once a "poorly reasoned, brutal, and even vicious opinion," but at the same time "a first-class piece of rhetoric" (p. 289). What meaning can "first-class piece of rhetoric" have after this? To say that a "poorly reasoned" and "vicious" opinion also represents "a first-class piece of rhetoric" impoverishes immeasurably our sense of what is meant by rhetoric and by excellence in rhetoric.

The puzzling thing is that Posner could have made the specific critical points he makes here, and done so in a way that would have been perfectly coherent, even helpful, if he had come at it just a little differently. He could have argued that in trying to understand and appreciate certain aspects of the rhetoric of a judicial opinion, it is sometimes desirable to suspend temporarily consideration of its moral or ethical dimensions. He then could have made the basic points that he makes here and achieved all the clarity he wanted. But these same observations would now illuminate the rhetorical deficiencies of Holmes' opinion.

70. One can also object to Posner's response on the ground that the terms of critical description—"vivid," "passionate," and "brilliant"—are not very accurate. Quite apart from the ethical objection, these particular terms do not fit.
Posner could have gone on to show that the deficiencies of Holmes' opinion from the standpoint of argumentative ethics are not unrelated to its deficiencies in terms of substantive ethical thrust; Holmes' willingness to use rhetoric to manipulate the reader's sympathies is not unrelated to his "revolt[ing]" enthusiasm for eugenic breeding. Posner could have carried the reader toward an integrated understanding. Instead he chooses to carry things in the opposite direction. He insists upon radically separating the ethical from the aesthetic dimensions of response, and ends up with a deeply impoverished view of rhetoric and with an ethical position that is fundamentally incoherent.

It becomes even more perplexing when later in his discussion in the same chapter Posner admits "that language shapes thought, that choice of words can therefore have political and social consequences, that an impoverished vocabulary can impoverish thought" (p. 311). If he believes that, how can he at the same time insist that an opinion that is "poorly reasoned" and "vicious" also represents "a first-class piece of rhetoric"? How can he hold up the ethically impoverished vocabulary of Holmes' opinion in *Buck v. Bell* as something for us to respect and emulate? Why does the ethically "impoverished vocabulary" of Holmes' opinion in this case, or of his opinion in *Lochner*, not do exactly what Posner says it does: "impoverish thought"? When we reach this point in Posner's discussion, the disintegration of critical perspective has become so advanced that things no longer make any sense. The lapse of judgment has become complete.