

University of Chicago Law School

Chicago Unbound

Journal Articles

Faculty Scholarship

1989

Gregor Samsa Replies

Richard A. Posner

Follow this and additional works at: https://chicagounbound.uchicago.edu/journal_articles



Part of the [Law Commons](#)

Recommended Citation

Richard A. Posner, "Gregor Samsa Replies," 83 Northwestern University Law Review 1022 (1989).

This Article is brought to you for free and open access by the Faculty Scholarship at Chicago Unbound. It has been accepted for inclusion in Journal Articles by an authorized administrator of Chicago Unbound. For more information, please contact unbound@law.uchicago.edu.

GREGOR SAMSA REPLIES

Professor Anthony D'Amato has conducted a remarkable biographical investigation. Although there had long been whispered suspicions that "Richard Posner" was a pen name, it was not until the publication of D'Amato's article¹ that the suspicions were confirmed and "Richard Posner" was unmasked. He is, of course, Gregor Samsa, the verminous protagonist of Kafka's novella *The Metamorphosis*.

It would calumniate previous scholars, however, to suppose D'Amato wholly unaided in his quest for the historical Posner. D'Amato himself would be the first to acknowledge the influence on his own thinking of Professor Peter Junger's contention, greeted with ridicule when made, that "Posner" was actually "the Great Hedgehog."² Indeed, I think it fair to suggest, without intending any denigration of Professor D'Amato, that speedy discovery of Posner's identity was inevitable with the publication of *Law and Literature: A Misunderstood Relation*, in 1988. The extraordinary *inwardness* (this is no time for false modesty) with which "Posner" discusses Kafka's fiction in Chapter 4 of *Law and Literature*, when combined with the undoubted historical fact that Kafka died without issue, would suggest to an intelligence far less penetrating than Professor D'Amato's that the author of *Law and Literature* must be one of Kafka's fictional characters.

But which one? Although Professor Robin West would undoubtedly nominate the torturer-protagonist of *In the Penal Colony*, D'Amato's argument for Samsa is compelling. The parallelism between "Posner's" career and Samsa's post-Kafkan career, as recounted by D'Amato, is unmistakable. And only the naive would think D'Amato's hypothesis refuted by the death of Samsa at the end of *The Metamorphosis*. Fictional characters are immortal, and Kafka himself thought the

¹ D'Amato, *As Gregor Samsa Awoke One Morning from Uneasy Dreams He Found Himself Transformed Into an Economic Analyst of Law*, 83 NW. U.L. REV. 1012 (1989).

² Junger, *A Fox Interprets the Hedgehog*, 39 In Brief 5 (Jan. 1987) (Law Alumni News Bulletin of Case Western Reserve University). The article contains a line drawing of a hedgehog that resembles—a beetle. Some credit should also go to Professor Peter Teachout, who first noted "Posner's" fictionality: "What Posner was like, he [Teachout] was certain, was the character of Wilhelm's father, Doctor Adler, in Saul Bellow's *Seize the Day*." Teachout, *Chicago Exposition: The New American Jurisprudential Writing as a Cultural Literature*, 39 MERCER L. REV. 767, 801 (1988). As Junger erroneously thought Posner a real animal, Teachout erroneously thought him a fictional human. But would a human being advocate "baby selling"? Never mind that "Posner" claims not to advocate baby selling. See Posner, *The Regulation of the Market in Adoptions*, 67 B.U.L. REV. 59 (1987). He's thought to, by Robin West among others, and where there's smoke, there's fire. Only a monster would advocate baby selling; Gregor Samsa is a monster; therefore, "Posner" is Samsa.

novella's ending a failure.³

A distinguished student of jurisprudence as well as of biographical detection, D'Amato has not been content merely to reveal his stunning discovery. In a manner at once unobtrusive and magisterial he raises profound questions about the economic analysis of law with which Samsa-Posner is identified.⁴ He asks whether there is not something ridiculous about the legal economist's pretension to be able to analyze every form of human behavior in economic, which is to say scientific, terms. Is this not rampant reductionism? Does it not disable its practitioners, notably Samsa himself, from participating in sane, rewarding personal relationships? Is not Samsa's career a testament to the adage that economists know the price of everything and the value of nothing? Is not, indeed, even Samsa's fabled productivity a token not of the fruitfulness of the economic approach but of the very opposite, its bankruptcy? Surely it is only by ignoring the richly textured particularity—the swarming, pulsating, buzzing confusion—of human experience that the legal economist is able to apply a single model to the whole range of social interactions.

In Chapter 6 of *Law and Literature* Samsa had tried, with low cunning, to anticipate D'Amato's criticisms of the economic approach. He had argued that abstraction is the essence of scientific method; that since people are, after all, merely animals with large brains (to the discerning this was another clue to "Posner's" identity), their social interactions might well exhibit scientific law-like regularities; that there was a thriving literature, from which lawyers could borrow with profit, on the economics of nonmarket behavior; that there was much evidence that participants in the legal process often behaved rationally; that legal thought was not so powerful a tool of inquiry that it could afford to spurn the contributions of other disciplines; and that while the vocabulary of economics was indeed cold and forbidding, it was so merely as a byproduct of the economist's desire for precision, and was no more dehumanizing than the decennial census, or epidemiological studies of lung cancer, or the earned run average. Yet there was a fly in this ointment. For when all had been said, *where was love?*

Professor West's unmasking of the author of *Law and Literature* takes place on the plane of psychobiography rather than of history, yet neatly complements Professor D'Amato's revelation of "Posner's" identity.⁵ A seamless web of selective quotation, West's deconstructive *tour de force* leaves no doubt that the author of *Law and Literature* is a character out of Kafka. Dreading freedom (his protests merely further evidence of the "subtext" laid bare by West), dreading the natural (like

³ See R. GRAY, *FRANZ KAFKA* 91 (1973).

⁴ In this part of the essay one senses D'Amato's debt to Jonathan Swift's satire on science—the Laputa episode in Part III of *GULLIVER'S TRAVELS*, 153-75 (H. Davis ed. 1938).

⁵ See West, *Law, Literature, and the Celebration of Authority*, 83 NW. U.L. REV. 977 (1989).

Aschenbach in *Death in Venice*), celebrating passivity and domination, craving submission to authority—what else *could* he be?

The “Posner” who emerges from West’s canny reading is not, as some have thought him—indeed, as West herself once thought him⁶—a Panglossian celebrant of free markets, unless one understands that economic freedom is slavery. He is not a classical liberal, unless one understands that liberalism is a flight from freedom. He is not a pluralist, a cultural relativist, an individualist, or a libertarian, unless one understands that these are all masks of authoritarianism. The “Posner” who, like that more famous authoritarian George Orwell (another pen name), believes that judgments of literary value should be allowed to emerge in the fullness of time rather than be dictated by a cultural elite;⁷ who, like the authoritarian John Stuart Mill, believes in the marketplace of ideas;⁸ who, like the authoritarian lawyers of the American Civil Liberties Union, believes that art should not be censored;⁹ who criticizes the politicization of literature,¹⁰ describes Justice Holmes’ opinion upholding a compulsory sterilization law as “poorly reasoned, brutal, and even vicious,”¹¹ denies that the idea of justice is exhausted in the concept of legal justice,¹² questions legal formalism and other aspects of traditional legalism,¹³ rejects authorial authority in literary interpretation,¹⁴ urges a more empathetic jurisprudence,¹⁵ and counsels his readers *not* to “disregard the Romantic impulse—that sense of infinite human potential that is not only a permanent part of human nature but a source historically of much good as well as ill”¹⁶—this libertarian poseur has missed the entire point of freedom. Freedom brooks no compromises; “ordered liberty” is an oxymoron. Freedom is the spirit of 1968, the spirit of youth and the

⁶ See West, *Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 HARV. L. REV. 384, 387 (1985) (“Posner’s theoretical world is a satisfied and apparently happy one.”).

⁷ See R. POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATION* 71-75 (1988); see also *id.* (index references under “test of time”).

⁸ See *id.* at 74 n.10.

⁹ See *id.* at 329-38.

¹⁰ See *id.* at 301-02.

¹¹ *Id.* at 289.

¹² See *id.* at 107-12.

¹³ See *id.* at 109, where “Posner” writes:

No society has ever embraced the legalistic conception in its full rigor, though many lawyers and judges have given it lip service and nineteenth-century American legal formalism made it the official legal ideology. Every society softens the rigors of strict legalism There is no inconsistency in this. It is false that law is not law unless it banishes every human, mitigating, discretionary, or “feminine” characteristic. . . . It is because the strict enforcement of rules is intolerable . . . that law is the *art* of governance by rules, not just an automated machinery of enforcement. (emphasis in original.)

¹⁴ See *id.* at 226-37.

¹⁵ See *id.* at 304-05.

¹⁶ *Id.* at 307.

healthy id.¹⁷ Freedom is the celebration of subjectivity in all its forms, and thus includes the freedom of the reader to disregard the meanings of the words in the text—a freedom that West exploits to the full in her reading of *Law and Literature*. Freedom is a commitment to the infinite plasticity of human nature, to the contingency of everything (*all* our words, *all* our concepts, *all* our law). Freedom is the faith that if only we could clear our minds of the fusty old men's ideas that have shaped political theory and economics and genetics and, yes, law itself—if only we could learn “to learn from our forgotten nature, to listen to our hearts, and to trust our deepest selves”¹⁸—if only we realized that the “rule of law,” and the market, and prisons and police, and convention,¹⁹ and differences among persons in aptitude and character, and the bourgeois values, and prudence, and asking students questions in class, and the monuments of Western civilization (including that reactionary sexist work, the *Nicomachean Ethics*), and maturity and professionalism and expertise and respect and tradition, and, in just two words, institutions and constraints, or, in a single word, “liberalism,” were all just so much authoritarian *bullshit*—then we could get on with the task (and it's a lot easier than you think) of building a warm, loving, caring, open, hopeful, hugging, unmediated, hierarchy-free, prelinguistic, empathic, affective (but not sentimental—liberals are sentimental), happy, herbivorous, weaponless, whole-grain, solar-powered, polymorphously perverse, classless, Utopian society for the Whole Human Family.

Moved and abashed, Samsa scuttles into a dark corner, to contemplate in sorrow the narrowness of his vision.

¹⁷ Everybody's young days are a dream, a delightful insanity, a sweet solipsism. Nothing in them has a fixed shape, nothing a fixed price; everything is a possibility, and we live happily on credit. There are no obligations to be observed; there are no accounts to be kept. Nothing is specified in advance; everything is what can be made of it. The world is a mirror in which we seek the reflection of our own desires. The allure of violent emotions is irresistible. When we are young we are not disposed to make concessions to the world; we never feel the balance of a thing in our hands—unless it be a cricket bat. We are not apt to distinguish between our liking and our esteem; urgency is our criterion of importance; and we do not easily understand that what is humdrum need not be despicable. We are impatient of restraint; and we readily believe, like Shelley, that to have contracted a habit is to have failed.

M. OAKESHOTT, *On Being Conservative*, in *RATIONALISM IN POLITICS AND OTHER ESSAYS* 168, 195 (1962).

¹⁸ West, *supra* note 5, at 1011.

¹⁹ Except for what she contends (never mind whether accurately) is the conventional interpretation of *Billy Budd* as a “tract against the abuses of legalism,” *id.* at 995; for she takes Posner-Samsa severely to task for questioning that conventional interpretation. *See id.* at 993-96. In an unexpected celebration of authorial authority West waxes indignant at what she believes to be Posner-Samsa's failure to recognize what Melville *really* wanted us to think about Captain Vere's character. *See id.* at 994, 995. And, in accusing Vere of blatant illegality, she seems momentarily to embrace a rule-of-law ideology. But it would be an error to tax West for inconsistency; why should she accept the authority of logic?