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BOOK REVIEW

Law and Literature: A Misunderstood Relation. Richard A. Posner. Cambridge, Mass., and London: Harvard University Press, 1988. 371 pp. \$25.00.

*William B. Jones, Jr.**

In this century the dominant trend in academic and professional communities has been toward ever-increasing specialization. The law has not been immune to the process. As if in reaction to the consequent narrowing of focus, various legal scholars in the past two decades have attempted to bring to bear upon the study of law the insights afforded by different disciplines. Perhaps the most widely-advertised of these crossover efforts is the politically conservative law and economics movement, headed by Richard A. Posner, a Judge of the United States Court of Appeals for the Seventh Circuit and a Senior Lecturer at the University of Chicago Law School.¹

Judge Posner has now added his name and a title to the rapidly-expanding bibliography of works published in the law and literature field. In *Law and Literature: A Misunderstood Relation*, he notes that, while the writings of Wigmore, Cardozo, and others have touched on the relationship between the literary and the legal, the academic enterprise known as law and literature did not assume a separate identity until 1973, with the publication of James Boyd White's groundbreaking textbook, *The Legal Imagination*.²

Since that time, law and literature has evolved beyond the aesthetic and ethical dimensions outlined by White. The leftist legal deconstructionists of the critical legal studies movement have politicized literary texts in their ideological attack on what they per-

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1. See R. POSNER, *ECONOMIC ANALYSIS OF LAW* (3d ed. 1986); R. POSNER, *THE ECONOMICS OF JUSTICE* (1981).

2. J. WHITE, *THE LEGAL IMAGINATION: STUDIES IN THE NATURE OF LEGAL THOUGHT AND EXPRESSION* (1973). See also J. WHITE, *THE LEGAL IMAGINATION, ABRIDGED EDITION* (1985).

ceive to be the repressive aspects of the Anglo-American legal system. One such critique, by law and literature pioneer Robin West, dissected Posner's law and economics theories regarding consensual wealth-maximizing transactions as models for judicial decisionmaking. West's analysis compared these models with the behavior of characters in *The Trial*, "The Judgment," "A Hunger Artist," and other short stories and parables by Franz Kafka.³ West's piece provoked a response from Posner,⁴ who disclaims having had any real interest in the "literary lawyer" movement beforehand. His article, which insists that West's political and economic reading of Kafka is superimposed on fictional works that offer no textual justification for her interpretations, has been incorporated as a chapter in *Law and Literature*.

The key to Posner's impressive study is found in its subtitle: *A Misunderstood Relation*. While the author acknowledges that law and literature may often intersect, he urges both literary and legal students to be alert to the important differences that distinguish the two realms. He contends that some of the claims made on behalf of the law and literature movement—that "the field will expose the roots of fascism, overthrow conventional understandings—if there are any—of such classics as *Hamlet* and *Billy Budd*, humanize law, reveal the deepest flaws of capitalism, socialism, or Christianity, solve the age-old problem of objectivity in law, or bring on (or forestall) the universal reign of text skepticism"⁵—have been at the very least overstated. A lawyer, simply because he or she is a lawyer, is not necessarily better equipped than a layperson to interpret literature on legal themes because, Posner argues, the "legal" content of such works is generally of secondary importance to the central meaning and is frequently employed metaphorically to express universal concerns about the nature of "justice," a somewhat broader abstraction than "law." Further, in the author's view, the narrowness of legal education (what he terms "the trade-school characteristics of much legal training")⁶ limits the lawyer's ability to respond to the expansiveness of great literature and to see the relevance of, say, Sophocles' *Antigone* to his or her professional life.

3. West, *Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 HARV. L. REV. 384 (1985-86).

4. Posner, *The Ethical Significance of Free Choice: A Reply to Professor West*, 99 HARV. L. REV. 1431 (1986). See also West, *Submission, Choice, and Ethics: A Rejoinder to Judge Posner*, 99 HARV. L. REV. 1449 (1986).

5. R. POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATION* 356 (1988).

6. *Id.* at 355.

Yet, Posner asserts, the "literary lawyer" can supply perspectives on the legal aspects of various plays, novels, and short stories that may serve to enhance the understanding and pleasure of the general reader. And, reciprocally, the study of literature affords the lawyer valuable insights into the nature of law and the "tension between formal legal concepts and broader ethical notions of justice."⁷

Law and Literature is divided into three unequal parts: "Literature on Legal Themes"; "Law as a Form of Literature"; and "The Regulation of Literature by Law." The first two sections are the most significant.

In part one, Posner provides detailed analyses of a number of works on legal (and pre-legal) themes, including Aeschylus' *Orestia*, Marlowe's *Doctor Faustus*, Shakespeare's *Measure for Measure* and *The Merchant of Venice*, Kleist's *Michael Kohlhaas*, Dickens's *Pickwick Papers* and *Bleak House*, Dostoevsky's *The Brothers Karamazov*, and Camus' *The Stranger*. His readings are rather orthodox—even, at times, a bit literal-minded, as when he says that "Blake's aphorism in *The Marriage of Heaven and Hell*, 'Sooner murder an infant in its cradle than nurse unacted desires,' invites a dismissive attitude toward the murder taboo as toward the other supports of the social order."⁸

If one is seeking startling revaluations of the classics, he or she had best look elsewhere (possibly among the works of other law and literature practitioners). But the strength of Posner's work lies in its insistent levelheadedness. After two decades or so of structuralist and post-structuralist bibliobabble, it is refreshing to discover that it is possible, after all, for a critic to react to a work of literature with common sense and to record his reaction in our common language. In his prose *Dunciad*, Posner strives to expose the pedantic perversities of his peers.

For example, Posner takes issue with Richard H. Weisberg's idiosyncratic interpretation of Herman Melville's *Billy Budd*. Weisberg, who approaches all the works he discusses in *The Failure of the Word*⁹ from the perspective of the philosophy of Friedrich Nietzsche, inverts the symbolism of Melville's short novel, turning the Christ-like Billy into a Nietzschean "blond beast," the villain Claggart into a Nietzschean Christ (and therefore still a villain), and Captain Vere

7. *Id.*

8. *Id.* at 151.

9. R. WEISBERG, *THE FAILURE OF THE WORD: THE PROTAGONIST AS LAWYER IN MODERN FICTION* (1984).

into a "ressentiment"-consumed petty tyrant whose condemnation of the young sailor was a violation of the procedural rules of eighteenth-century British courts-martial.

With the greatest care, Posner turns *Billy Budd* right side up. He points to the textual evidence for Billy's symbolic association with Adam and Christ, Claggart's with the Edenic serpent and Satan, and Vere's with the sacrificing Father. Posner also notes that the legal irregularities that Weisberg has discovered in the book "reflect merely the difference between the fairly elaborate procedures required in a regular court-martial and the informality of a drumhead court-martial."¹⁰ Moreover, as most high-school readers of Melville's work would quickly and sensibly volunteer, the entire point of the story depends on Billy Budd's speedy trial and execution. "In literature," Posner observes, "art trumps due process."¹¹

Perhaps the author's greatest contribution to the law and literature movement is made in his perceptive discussion of revenge as both the forerunner of a coercive legal system and one of the oldest and most enduring of literary themes. Revenge figures in works of literature as ancient as the Homeric epics and as recent as E. L. Doctorow's *Ragtime*, yet, Posner laments, despite the arguments of Holmes and Pound, among others, that law evolved as a substitute for revenge,¹² the law and literature movement has evinced little interest in the topic. He attributes the reason for this neglect to that favorite bugbear of his, the narrow scope of legal education. Posner overreaches somewhat when he tries to pin the "narrowness" label on that most catholic of law and literature scholars, James Boyd White, whose *When Words Lose Their Meaning*¹³ is unfairly criticized for the author's failure to sufficiently address the issue of revenge in a chapter devoted to Homer's *Iliad*.

In his treatment of *The Iliad*, Posner attempts to show the inadequacy of the ancient heroic world's retaliatory code as a foundation for social order. The "wrath of Achilles"—his brooding anger and passive revenge against Agamemnon and his murderous rage and brutal revenge against Hector—is seen as consistent with a highly individualistic code of honor which is incompatible with the imperatives of a community shaped by the rule of law.

10. R. POSNER, *supra* note 5, at 156.

11. *Id.* at 157.

12. O.W. HOLMES, *THE COMMON LAW* 2-15 (1881); R. POUND, *THE SPIRIT OF THE COMMON LAW* 85, 87, 139 (1921).

13. J. WHITE, *WHEN WORDS LOSE THEIR MEANING: CONSTITUTIONS AND RECONSTITUTIONS OF LANGUAGE, CHARACTER, AND COMMUNITY* (1984).

Posner calls Shakespeare's *Hamlet* "a criticism, but not a rejection, of revenge."¹⁴ The greatest of the Elizabethan revenge plays is in part, according to the author, "a powerful argument for the rule of law,"¹⁵ presenting (with its heaped corpses) "the negative aspects of private revenge as a method of vindicating rights and maintaining public order."¹⁶ Nevertheless, within the universe of the play, Posner concludes, Hamlet has no real choice ultimately but to remember the ghost's injunction and seek vengeance for his father's murder. The author suggests that both *Hamlet* and *The Iliad* depict a primitive form of law of which lawyers should be aware and a still-vital feature of human behavior which they cannot ignore.

In the second section of *Law and Literature*, Judge Posner does battle with the "literary lawyers" who apply the methods of literary criticism to the interpretation of statutes and the United States Constitution. Because literary and legal texts differ fundamentally in the circumstances of their origins and in their social and cultural functions, the author finds little relevance in efforts to analogize literary and legislative interpretation.

Posner examines the attempts of the critical legal studies movement to import the principles of literary deconstructionism in order to undermine "the law's determinacy"¹⁷ by denying the possibility of achieving any definitive interpretation of any legal text. He argues effectively that the extreme skepticism of this approach "deprives the radical critic of firm ground for advocating social change; his own proposals can be derided as culture-bound, historically contingent, subjective, unverifiable."¹⁸

At greater length, Posner contrasts the New Critical and intentionalist schools of literary criticism and legal text analysis, proclaiming himself to be a New Critic with respect to literature and an intentionalist with regard to the law. New Criticism, which enjoyed its heyday in university English departments from the 1940s to the 1960s, emphasized the close reading of texts (poems were especially well-suited for the purpose) independent of biographical and historical background. The New Critics elevated the status of the individual work above that of the author. Literary intentionalism, on the other hand, is an older critical method that views a particular poem, story,

14. R. POSNER, *supra* note 5, at 62.

15. *Id.* at 59.

16. *Id.*

17. *Id.* at 216.

18. *Id.* at 217.

or novel as secondary to the creative agent and largely an extension of the author's personality and historical environment.

Posner contends that a New Critical reading of a literary work (such as W. B. Yeats' "Easter 1916," which he analyzes) yields a richer aesthetic experience than the essentially reductive intentionalist approach. A constitutional provision, however, such as the Eighth Amendment prohibition against "cruel and unusual punishments," is designed to serve a societal rather than a cultural purpose. The New Critical emphasis on textual autonomy would lead, Posner says, to "an uncanalized delegation to courts of the power to regulate criminal punishments."¹⁹ One judge's reading of the Eighth Amendment would be as valid as another's, and competing interpretations would abound. Posner states the case for adopting a "sophisticated legal intentionalism" which "recognizes that the framers . . . might intend that, within prescribed limits, the intentions of others (for example, of judges applying the legislators' handiwork in the distant future) should govern, rather than the legislators' mental pictures of the future."²⁰ But once an intentionalist such as Posner concedes so much to future discretion, where does he set his "prescribed limits"? The author barely pauses to consider the contradictions of his position.

Another chapter in part two is concerned with judicial opinions as literature. Posner believes that literary analysis, although next to useless in statutory and constitutional interpretation, can prove beneficial when applied to written judicial decisions. He catalogues the rhetorical devices Justice Holmes deployed in his famous dissent in *Lochner v. New York*,²¹ demonstrating step by step how the ethical and emotional appeals neutralize the masterpiece's logical flaws. In canvassing the judicial styles of Justices Marshall, Brandeis, and Cardozo, Posner ably highlights the strengths and weaknesses of each. His strictures on the baroque excesses of Cardozo, whose ill-conceived metaphorical flights stimulate laughter as often as thought, should be read by all law school professors who continue to recommend the justice as a model stylist.

A brief third section, that seems almost an afterthought, deals with the impact of defamation, obscenity, and copyright laws on literature. Posner's most interesting argument here concerns the limitations imposed on literary creativity by copyright laws. In a tentative manner he proposes the narrowing of copyright protection for the

19. *Id.* at 227.

20. *Id.* at 229.

21. 198 U.S. 45, 75 (1905).

sake of increased creative liberty. Part three, however, is too sketchy as it stands. Perhaps in some future revision of this book Judge Posner will fill in the blanks in the final section.

Law and Literature is the best available overview of a relatively new and challenging interdisciplinary field. The text is extensively footnoted, and the curious reader is directed to nearly every imaginable book and article on the subject. (Unfortunately, a bibliography was not appended.) Occasionally Posner grinds his law and economics ax, but on the whole *Law and Literature* is a well-balanced survey. If it lacks the rhetorical unity of White's *When Words Lose Their Meaning* or the combative audacity of Weisberg's *The Failure of the Word*, Posner's book surpasses the other two in range and reasonableness. As Alexander Pope wrote: "And if the *Means* be just, the *Conduct* true,/Applause, in spite of trivial Faults, is due."²²

22. *An Essay on Criticism*, pt. 1, lines 257-58, in POETRY AND PROSE OF ALEXANDER POPE 44 (A. Williams ed. 1969).

