

## BOOK REVIEW

**Law and Literature: A Misunderstood Relation**, RICHARD A. POSNER, Harvard University Press, Cambridge, Massachusetts, and London, England, 1988, pp. 371.

Today, as we seem to be moving from an age of specialization into an age of ever increasing subspecialization, many thinking people are oppressed by a sense that the center cannot hold. Adventurous scholars have been seeking to ameliorate this disintegration by means of interdisciplinary work. One person who takes his stand firmly in the endangered cultural "center" is Richard A. Posner, judge of the United States Court of Appeals for the Seventh Circuit and lecturer at the University of Chicago Law School. His book *Law and Literature: A Misunderstood Relation* is based on very broad reading in both literature and literary criticism, and on original thinking in the field of legal philosophy. It is well written, always lively and entertaining, and in short, one of the most interesting contributions to interdisciplinary studies in recent years.

Judge Posner's book is written in three parts of unequal length and deals with three distinct elements of the law and literature field. In the first part, he analyzes a number of works of literature with legal themes.<sup>1</sup> Wisely, he almost exclusively confines himself to literature that is well known: the works of such authors as Homer, Marlowe, Shakespeare, Kleist, Melville, Dostoevsky, Kafka, and Camus.<sup>2</sup> He does not skimp in his exploration of the critical corpus dealing with his texts, and in fact one of the chief merits of his book is the copious annotation that invites readers to delve more deeply into each problem he discusses.<sup>3</sup> In the second part of the book, Judge Posner discusses some contemporary theories of literary criticism and examines their applicability to the interpretation of literary texts and of constitutional and statutory texts.<sup>4</sup> He also provides a very lucid discussion of

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<sup>1</sup> R. POSNER, *LAW AND LITERATURE* 25-205 (1988).

<sup>2</sup> An obvious omission is Balzac, whose plots often turn on the laws governing inheritance, bankruptcy, and other property issues in early nineteenth century France.

<sup>3</sup> Indeed, Judge Posner suggests that "[l]awyers ought to think about the great issues that law intersects. . . . The great works of literature that take law as their theme (though often just an ostensible theme) provide a convenient, though not the only, point of entry to broader thinking about the law." R. POSNER, *supra* note 1, at 175.

<sup>4</sup> *Id.* at 209-316.

the rhetoric of judicial opinions, notably by Justices Marshall, Holmes, Brandeis, and Cardozo. Finally, in the third and smallest segment of the book, he examines the regulation of literature by law—specifically, the problems of defamation, obscenity, and copyright.<sup>5</sup> Judge Posner opposes the censorship of allegedly obscene literature, including literature held to be obscene by feminists on the ground that it promotes degrading images of women. He is also commendably sensitive to the fact that copyright restrictions can inhibit authors' work as easily as they can protect their interests.<sup>6</sup>

Literary criticism, which provides the thesis of Judge Posner's book, is certainly an area where a hundred schools of thought contend. The disagreements among critics do not concern detail so much as they concern the fundamental question of how and why we read a text. It was not without good reason that a specialist in critical theory recently felt compelled to ask "in an intellectual environment where different versions of feminism, Marxism, psychoanalysis, and semiotics intersect and compete for our commitment, does the unitary term *theory* have any meaning?"<sup>7</sup>

The core of Judge Posner's book lies in the second part, where he discusses critical theories. He provides a cautious introduction to one of the newest, deconstructionism, and he rather incautiously dismisses one of the oldest, the view that the purpose of literature is the moral improvement of readers.<sup>8</sup> His central concern, however, is the distinction between the intentionalist critics, who seek the meaning of the text primarily in the author's intentions as discovered by examining it in the light of

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<sup>5</sup> *Id.* at 319-52.

<sup>6</sup> *Id.* at 344-49.

<sup>7</sup> C. Nelson, *Against English: Theory and the Limits of the Discipline*, in *PROFESSION* 87, at 46 (1987).

<sup>8</sup> Judge Posner rather elaborately disclaims any interest in the morality or the immorality of literary works:

The *Iliad* presents human and animal sacrifice, slavery, concubinage, treachery, and rape as usual, and usually ethical practices; anti-Semitism is similarly depicted in *The Merchant of Venice*. . . . But the reader, unless an anthropologist or a historian, will be no more interested in obsolete ethics in literature than in obsolete building materials, or obsolete military technology, in literature.

R. POSNER, *supra* note 1, at 301. The analogy fails. The reader may not need have an interest in obsolete military technology—not because it is obsolete, but because he or she is not also a military engineer. However, the reader who is also a moral agent will inevitably be interested in the ethical problems raised by even the most ancient text. In any case, military technology has evolved much more rapidly than ethics.

its historical and cultural context, including the author's biography, and the New Critics, who seek the meaning of the text primarily through a close reading of it as an independent artifact. It is Judge Posner's premise that different critical theories should be applied to literary texts and to legal ones: "I do not consider myself inconsistent in being an intentionalist when it comes to reading statutes and the Constitution but a New Critic when it comes to reading works of literature."<sup>9</sup> He posits that the two kinds of reading differ markedly in character:

The judge is trying to decode a communication from his superiors in the constitutional hierarchy and must use all available information, including whatever can be learned of the conscious intentions of those who wrote the provision that is being interpreted. The test of a literary interpretation, in contrast, can be purely pragmatic and utilitarian—does it make the work of literature richer, more instructive, more beautiful?<sup>10</sup>

Judge Posner develops his thesis through a comparison of readings of the eighth amendment to the United States Constitution and of Yeats' poem *Easter 1916*. His defense of an intentionalist reading of the law is very able, and it is subtle enough to take account of the problem regarding intention about intention: "the framers may have understood 'cruel and unusual punishments' to mean something fairly precise but may also have intended that the courts should be free to depart from that understanding."<sup>11</sup> Indeed, Judge Posner admits that "a legislator would have to be crazy to want to confine a general law—a constitutional provision, meant to last—to the things of which he had a picture in his mind."<sup>12</sup>

Judge Posner, on intentionalist grounds, rejects the notion that the prohibition of cruel and unusual punishments forbids the death penalty. He neglects, however, the possibility that under intentionalism as he defines it, if a consensus were to emerge in our society that the execution of criminals is cruel (no such consensus has in fact arisen), then the death penalty would arguably be forbidden by the eighth amendment—even though it had not been at the time of the adoption of the Bill of Rights. He argues that "what the Court would be doing in a case in which it interpreted the Eighth Amendment to find a prohibition against . . . denying prison inmates access to cable television would be as private and irresponsible as for a

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<sup>9</sup> *Id.* at 218.

<sup>10</sup> *Id.* at 245.

<sup>11</sup> *Id.* at 228.

<sup>12</sup> *Id.* at 230.

modern literary critic to read Virgil's *Fourth Eclogue*, written before the birth of Christ, as an allegory of his birth."<sup>13</sup> This example is a two-edged sword, since Judge Posner is well aware that for centuries such a reading of Virgil was neither private nor irresponsible.<sup>14</sup>

Judge Posner's defense of the application of what he calls an eclectic New Criticism to literary texts is less persuasive than his defense of the application of intentionalism to legal ones. He finds it "otiose" to consider "that the four people discussed in the second stanza of *Easter 1916* were real people and that three . . . were executed; that one . . . was the ex-husband of Yeats's inamorata, Maud Gonne; and that Yeats . . . believed in Irish independence."<sup>15</sup> But his negative method goes much further than that. In fact, he gives the appearance of having a low opinion of the intellectual capacities of both authors and readers. "Some literature," he remarks, "is written in something close to an unconscious blur."<sup>16</sup> On the other hand, he declares that "[t]o think one's way into the mind of ancient Greece or Renaissance England is a prodigious scholarly feat, requiring nothing less than a lifetime of disciplined study and probably unattainable even with all that effort and devotion."<sup>17</sup> This position is diametrically opposed to the traditional view, expressed for example, by T.S. Eliot: "The blood-stream of European literature is Latin and Greek . . . . What mutual intelligibility can we hope to preserve, except in our common heritage of thought and feeling in those two languages?"<sup>18</sup> For Judge Posner, traditional liberal education seems to be dead and buried.

The discussion of particular literary works in the first part of Judge Posner's book provides a sample of the results he obtains by applying his critical principles. His treatment of *Hamlet* and *Measure for Measure*, for example, should be read in the light of his statement that "we do not care much about what Shakespeare thought he was trying to accomplish—partly because we do not know, partly because we doubt that he fully knew."<sup>19</sup>

Why does the protagonist of *Hamlet* put off killing the king for so long? Judge Posner attributes the postponement to immaturity of character, suggesting that "Hamlet's expressed concern that the

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<sup>13</sup> *Id.* at 242.

<sup>14</sup> *See id.*

<sup>15</sup> *Id.* at 226.

<sup>16</sup> *Id.* at 231. Judge Posner cites, for example, Rilke's *Sonnets to Orpheus* as a "notable example or (largely) unconscious writing." *Id.* at 232 n.33.

<sup>17</sup> *Id.* at 236.

<sup>18</sup> T. S. ELIOT, *ON POETRY AND POETS* 70 (1957).

<sup>19</sup> R. POSNER, *supra* note 1, at 262-63.

ghost may be a devil, which leads him to delay his revenge so that he can stage the play within a play in order to test Claudius's guilt, seems marked as a pretext for further delay."<sup>20</sup> Judge Posner is referring to Hamlet's speech:

The spirit that I have seen  
May the devil, and the devil hath power  
T'assume a pleasing shape; yea, and perhaps,  
Out of my weakness and my melancholy—  
As he is very potent with such spirits—  
Abuses me to damn me.<sup>21</sup>

Is Hamlet's scruple nothing more than a mere pretext? Judge Posner states that "doubt about the ghost's bona fides, never before expressed by Hamlet, is a convenient rationalization for past delay and an excuse for more delay."<sup>22</sup> But Hamlet has indeed expressed such doubt before. At the time of the ghost's first apparition to him, he contemplates the possibility that it is an evil spirit:

Be thou a spirit of health or goblin damned,  
Bring with thee airs from heaven or blasts from hell,  
Be thy intents wicked or charitable,  
Thou com'st in such a questionable shape  
That I will speak to thee. I'll call thee Hamlet,  
King, father, royal Dane.<sup>23</sup>

Hamlet agrees only provisionally to call the apparition his father's ghost. He is genuinely unsure about its nature and, if the truth be told, the play never makes it perfectly clear whether the apparition is a ghost or a devil.<sup>24</sup>

Judge Posner suggests that treating the apparition as a devil "diminishes the play by making Hamlet the puppet of demonic forces."<sup>25</sup> Why? Hamlet is evidently not a puppet. Instead of running off to kill Claudius, he precisely takes pains to verify the ghost's accusation. Indeed, it is no more logical to assert that Hamlet is the puppet of demonic forces if the apparition is a demon than it would be to assert that he is the puppet of spectral forces if it is a real ghost. To dismiss Hamlet's scruple about the veracity of the ghost needlessly obfuscates the question of Hamlet's motivation.

<sup>20</sup> *Id.* at 60.

<sup>21</sup> W. SHAKESPEARE, *HAMLET*, II.2.599-604 (S. Wells & G. Taylor eds., *THE COMPLETE OXFORD SHAKESPEARE* 1139 (1987)).

<sup>22</sup> R. POSNER, *supra* note 1, at 60.

<sup>23</sup> W. SHAKESPEARE, *HAMLET* I.4.21-26 (S. Wells & G. Taylor eds., *THE COMPLETE OXFORD SHAKESPEARE* 1129 (1987)).

<sup>24</sup> See R.M. FRYE, *THE RENAISSANCE HAMLET* 14-29 (1984).

<sup>25</sup> R. POSNER, *supra* note 1, at 60.

Most of the problems that arise in *Hamlet* are, from a practical point of view, beyond the reach of civilized law. For example, if the king is a murderer, there is no court to which one can have recourse against him. Judge Posner recognizes this. There is, however, only one legal proceeding mentioned in the play, the coroner's inquest into the death of Ophelia, and Judge Posner does not address it. The inquest takes place offstage, and its decision is reportedly that Ophelia may receive a Christian burial.<sup>26</sup> In other words, the inquest determines that Ophelia's drowning was not a culpable act of suicide but an act performed as a consequence of her insanity. Judge Posner touches on the death of Ophelia, to be sure, but he dismisses the issue altogether: "Suicide is suspected by most of the play's characters, but the description of Ophelia's drowning suggests that it was accidental."<sup>27</sup> Such breezy skepticism is scarcely justified—the less so since the Elizabethan and Jacobean playwrights certainly believed that it would "diminish" their work to allow a major character in a tragedy to die accidentally.<sup>28</sup> In any case, the issue of an insane person's lack of legal responsibility is very interesting in itself, and is the most important overtly legal theme in *Hamlet*.<sup>29</sup> Hamlet, indeed, excuses himself to Laertes for the killing of Polonius with the speech:

Was't Hamlet wrong'd Laertes? Never Hamlet.  
If Hamlet from himself be ta'en away,  
And when he's not himself does wrong Laertes,  
Then Hamlet does it not; Hamlet denies it.  
Who does it then? His madness.<sup>30</sup>

Judge Posner should have given this issue some attention. In fact, the killing of Polonius—or rather the way that Hamlet immediately

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<sup>26</sup> W. SHAKESPEARE, *HAMLET* V.1.1-5 (S. Wells & G. Taylor eds., *THE COMPLETE OXFORD SHAKESPEARE* 1154 (1987)).

<sup>27</sup> R. POSNER, *supra* note 1, at 55.

<sup>28</sup> The only exception is when the accidental death is the result of the intervention of providence. See, e.g., CYRIL TOURNEUR, *THE ATHEIST'S TRAGEDY* V.2 (1611). It is, in any case, not fanciful to find "a thematically significant contrast" between the death of Ophelia, who commits suicide, and that of Hamlet, who chooses not to do so. R. WYMER, *SUICIDE AND DESPAIR IN THE JACOBAN DRAMA* 35 (1986).

<sup>29</sup> For a summary of medieval canon law and early modern English legal practice with respect to the funerals of suicides, see R.M. FRYE, *supra* note 24, at 297-309. Additionally, for an illuminating discussion of the issues raised by Ophelia's funeral (including the apparent contradiction between the determination of the coroner and the opinion of the officiating clergyman), see J.D. WILSON, *WHAT HAPPENS IN HAMLET* 295-300 (1967).

<sup>30</sup> W. SHAKESPEARE, *HAMLET*, V.2.179-83 (S. Wells & G. Taylor eds., *THE COMPLETE OXFORD SHAKESPEARE* 1159 (1987)).

resumes his preaching to Gertrude after killing Polonius—is probably the most deranged thing he does in the entire play.

Another Shakespearean play that Judge Posner analyzes in detail is *Measure for Measure*. In one of the crucial scenes, the corrupt judge Angelo proposes that Isabella satisfy his sexual desires in return for her brother Claudio's life. Judge Posner observes that she thinks her "salvation might be jeopardized by sex with Angelo. Why it would be is not made clear."<sup>31</sup> Judge Posner thus demands that Shakespeare explain the assumptions of his time rather than use them dramatically. Judge Posner's suggestion that "[p]robably we are meant . . . to laugh at Isabella's indignant refusal to sacrifice her virginity for her brother's life,"<sup>32</sup> is clearly very far off the mark. Whether we personally accept it or not, the notion that sex outside of marriage may imperil one's salvation is surely not particularly exotic.

Judge Posner professes ignorance of anything not expressed in the text of literary works, thus foreclosing himself to a level of meaning which is not really an enrichment of a literary text but central to its understanding. It should be unnecessary to point out the universal revulsion against coerced sexual relations. Moreover, the circumstances in *Measure for Measure*—that Isabella has just entered the novitiate of a rigorous religious community and that she is faced with the astonishing hypocrisy of a man who will only agree to cancel the execution of Claudio for the crime of fornication if she will commit the same offense with himself—surely make Isabella's horrified response even more reasonable. If Judge Posner thinks this is supposed to make us laugh, to what does he expect us to react soberly?

One reason why Judge Posner thinks this scene is comic is his apparent inability to take the underlying situation seriously: "I have never heard of a legal system that made fornication a capital crime."<sup>33</sup> The Old Testament, however, makes such acts capital offenses, at least in certain circumstances.<sup>34</sup> In any case, the death penalty for fornication is part of the donnee of *Measure for Measure*.<sup>35</sup> Thus, Judge Posner attempts to play the game without first accepting its rules.

What *Measure for Measure* is "about," in reality, is the Christian

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<sup>31</sup> R. POSNER, *supra* note 1, at 102.

<sup>32</sup> *Id.* at 103.

<sup>33</sup> *Id.* at 103 n.48.

<sup>34</sup> See *Deuteronomy* 22:20-21.

<sup>35</sup> See generally W. SHAKESPEARE, *MEASURE FOR MEASURE* (S. Wells & G. Taylor eds., *THE COMPLETE OXFORD SHAKESPEARE* (1987)).

concept of sin and judgment—and grace. The title itself is taken directly from the Gospels.<sup>36</sup> A view of judgment thoroughly grounded in the Gospels is set forth very strongly in Isabella's speech:

Why, all the souls that were were forfeit once,  
And He that might the vantage best have took  
Found out the remedy. How would you be  
If He which is the top of judgment should  
But judge you as you are? O think on that,  
And mercy then will breathe within your lips,  
Like man new made.<sup>37</sup>

The key to understanding Angelo is not, as Judge Posner suggests, that he is "a natural underling,"<sup>38</sup> nor is it his "angelism."<sup>39</sup> Angelo holds the position of the unmerciful servant of the Gospels.<sup>40</sup> Thus, one commentator has explained, that from the Christian point of view taken in *Measure for Measure*, Angelo is a universal figure: "[T]he obvious hypocrite, like Angelo, is merely a parabolic instance of the hypocritical condition of all Adam's descendants. We are all Angelos, all born with a beam in our eye, with an infected will, with an immeasurable debt of sin from which we can be ransomed only through grace."<sup>41</sup> This is the reason why it is not preposterous for the Duke to pardon Angelo in the end. Thus, the issues raised by *Measure for Measure* are of enormous interest. The operation of a legal system by people who have been advised, by the highest possible authority, to "judge not" presents us with a fascinating paradox. Judge Posner's reading of the play, however, overlooks this important point.

Ultimately, Judge Posner's professedly New Critical reading of literature requires that he read or attempt to read the classics without reference to the civilization that produced them. As we have seen, he defends this approach by contending that we cannot understand cultures such as those of ancient Greece or Renaissance England. I would suggest that the same sense of history that Judge Posner demands of the reader of legal texts ought to be brought to bear on literary texts as well. His position seems to embody a central contradiction. Judge Posner suggests that we take liberties with

<sup>36</sup> *Matthew* 7:2.

<sup>37</sup> W. SHAKESPEARE, *MEASURE FOR MEASURE* II.2.75-81 (S. Wells & G. Taylor eds., *THE COMPLETE OXFORD SHAKESPEARE* 797 (1987)).

<sup>38</sup> See R. POSNER, *supra* note 1, at 109.

<sup>39</sup> *Id.* at 105.

<sup>40</sup> *Matthew* 18:21-35.

<sup>41</sup> A.C. Kirsch, *The Integrity of Measure for Measure*, in 28 *SHAKESPEARE SURVEY* 92 (K. Muir ed. 1975).



literary texts, forget their context, and substitute our own assumptions. Conversely, he posits that we are enjoined from doing the same to a legal text, since that will have political consequences.

If we in fact cannot understand the ideas and values of seventeenth century England, then how can we understand the ideas and values of eighteenth century America? If the intentions of the framers of the Constitution are discoverable, then why are those of Shakespeare not equally discoverable? Judge Posner provides no satisfactory answers to these questions. We read legal texts and literary ones for quite different reasons, to be sure, but Judge Posner's insistence on applying totally different views of reading to these two classes of texts ultimately prevents his very ambitious book from supplying a remedy for the confusion of tongues in contemporary academic and professional studies.

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