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BOOK REVIEW

Law and Literature: A Misunderstood Relation, by Richard A. Posner.* Cambridge, Mass. and London, England: Harvard University Press, 1988. Pp. xi, 371. \$25.00 (cloth); \$12.95 (paper).

Reviewed by Paul Brickner**

Even William Shakespeare had to make a living. Although Judge Posner does not make so direct a pronouncement, he touches upon the economics of Shakespearean theater in his book entitled *Law and Literature: A Misunderstood Relation*. This book not only provides the insight of brilliant legal analysis as applied to literature, but also incorporates a significant amount of economic thinking and psychological perspective. The most striking features of the book are the brilliance of the author, demonstrated time and again, and the vast panorama of Western literature from which the author draws with ease and comfort. Posner turns to a dazzling number of literary works and studies for example and analysis.

It is not until the conclusion of the book, however, that Richard A. Posner, a member of the University of Chicago Law School

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faculty and a Judge of the United States Court of Appeals for the Fifth Circuit, tries to describe the study of law and literature in functional terms. Those who view literature as fiction, as imaginative stories created by the human mind from unconscious internal dynamics, may never accept the importance of the study of law and literature as an academic enterprise. Many will consider that the highest and best use for the field of law and literature is as an avocation. But Judge Posner, in his concluding chapter, attempts to identify some concrete uses for literature and law. He cautions against "a stunted race of legal specialists," trained in prelaw and law but lacking a sufficient understanding of the humanities.¹ He argues that "literary theory and literary criticism have little relevance to the interpretation of statutory and constitutional texts," because of differences in "character, origins, and . . . use or social function."²

Perhaps Posner best sums up the importance of literature to the legal profession by stating that "what literature speaks to are the eternal problems of the human condition, not the specific manifestations of those problems in the politics of our century."³ Posner considers "the eternal problems of the human condition" to be those matters that make great and lasting legal opinions. But what of the judicial authors who write the great and lasting legal opinions? Does the germinating field of study, law and literature, tell us anything about them? Judge Posner describes Marshall and Holmes as "probably the two greatest judges in our history."⁴ Few would disagree. Although he writes about their rhetoric and writing styles, Judge Posner fails to inquire into the possible impact that literature played in nurturing and developing greatness in these and other judicial giants. After all, if law and literature mean anything at all today, then surely the combination must have meant something to law students and judges of the past. We should be able to decipher from their legal writings the impact that literature had on them. A few comments about three of our greatest jurists—Marshall, Holmes, and Cardozo—may serve to explain the point.

Albert Beveridge tells of John Marshall's frontier education and his boyhood love for poetry. "[T]he reading of poetry became his solace and comfort throughout his long life; indeed, Marshall liked to make verses himself, and never outgrew the habit."⁵ Of course,

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1. R. POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATION* 360 (1988).
 2. *Id.* at 355.
 3. *Id.* at 357.
 4. *Id.* at 292.
 5. I A. BEVERIDGE, *THE LIFE OF JOHN MARSHALL* 41 (1916).

Marshall's lengthy biography of Washington demonstrates his comfort with literature and writing.⁶

As the son of the author of *The Autocrat of the Breakfast Table*,⁷ Oliver Wendell Holmes, Jr. was heir to a rich literary heritage. Professor Fred Rodell has noted that Holmes was "[a]quainted in his youth with his father's lively intellectual circle—Agassiz, Motley, Longfellow, Hawthorne and Melville" and became "friend . . . of a much broader range of leading intellectual figures of his day. William and Henry James, Charles Pierce, Henry Adams, and George Santayana were among them."⁸ Cardozo benefited from both the legal and literary skills of his father⁹ and the influence of his mother.¹⁰

Basic themes can be derived from the writings and opinions of Marshall and Holmes which reflect their active lives and varied experiences. In particular, we can see in Marshall's opinions the influence of his service during the Revolutionary War. As Chief Justice Burger has noted, "Young John Marshall was a lieutenant, a captain-lieutenant, and later deputy judge advocate under Washington. He spent that terrible winter at Valley Forge and saw his comrades die for want of a central authority. We can see a constant theme throughout [his] great building block cases"¹¹

Just as the want of a strong central authority to support the forces of the colonists during the American Revolution had impact on John Marshall, the magnitude of the battles of the Civil War similarly affected Oliver Wendell Holmes.¹² As his most recent biographer has explained, Holmes saw the Civil War in terms of the thinking and writings of Charles Darwin, whose impact on the intel-

6. J. MARSHALL, *THE LIFE OF GEORGE WASHINGTON* (1804-07).

7. Holmes, *The Autocrat of the Breakfast Table*, *ATLANTIC MONTHLY* (Nov. 1857 et. seq.).

8. A. COX, *THE COURT AND THE CONSTITUTION* 151 (1987).

9.

The Justice's father, however, was capable of soaring eloquence. You should read the will he drafted for his brother-in-law, Benjamin Nathan. Professor Underhill Moore of Yale once referred to him as the source of Benjamin Cardozo's "skill but not his character." . . . I believe that the source of his ability was his father, not just Horatio Alger's influence. Note that at least one sister was a poet with a published volume to her credit.

Letter from Michael H. Cardozo IV to Paul Brickner (June 22, 1984).

10. A. GOODHART, *FIVE JEWISH JUDGES OF THE COMMON LAW* (1949).

11. Burger, *We the People*, 37 *CASE W. RES. L. REV.* 385, 391 (1987).

12. *THE MIND AND FAITH OF JUSTICE HOLMES: HIS SPEECHES, ESSAYS, LETTERS AND JUDICIAL OPINIONS* 383 (M. Lerner ed. 1943), "John Marshall" 383. "To us who took part in the Civil War, the greatest battle of the Revolution seems little more than a reconnaissance in force, and Lexington and Concord were mere skirmishes that would not find mention in the newspapers." Reprinted from O. HOLMES, *SPEECHES* 87-88 (1913).

lects of Holmes's day was extraordinary.¹³ For Holmes, both the Civil War and the law were expressions of the Darwinian concept of the "survival of the fittest."¹⁴ For example, he looked upon antitrust laws as inconsonant with the Darwinian thesis, noting that "[t]he antitrust laws said you must fight, but you may not win."¹⁵

Although life's experiences, particularly military experiences, greatly influenced both the "great Chief Justice"¹⁶ Marshall and "Chief Justice" Holmes,¹⁷ literature also must have played an important role in the development of their thinking. But the impact of literature on judges is more ephemeral and, indeed, approaches the influence of education in general. Had Judge Posner, however, undertaken the effort of inquiring into the impact of literature on these three great jurists, for whom literature was an important source of wisdom and judgment, his book would be markedly better. It would have been interesting and enlightening to have read Judge Posner's opinions on the impact of literature on these two greats, had he chosen to make them "clinical examples" of his study. Even one short chapter might have added meaningful concrete examples.

The third judicial giant mentioned above, Benjamin N. Cardozo, was more the product of literature than either Holmes or Marshall because he led a cloistered existence. Books and reading provided Cardozo with the vicarious experiences that were otherwise denied to him because of his reclusive lifestyle. For example, a glance at the footnotes to his major work, *The Nature of the Judicial Process*, discloses the vast scope and breadth of his reading.¹⁸ Books for Cardozo were forms of life-long experiences and a supplement to his monastic existence.¹⁹ Indeed, this reviewer has commented that even a lowly literary figure, Horatio Alger, seems to have had significant impact on Cardozo through his employment as Cardozo's tutor prior to his enrollment at Columbia College.²⁰ Jus-

13. S. NOVICK, *HONORABLE JUSTICE: THE LIFE OF OLIVER WENDELL HOLMES*, 202, 258-59 (1989).

14. *Id.* at 141.

15. *Id.* at 305.

16. *See supra* note 11, at 391-92.

17. F. RODELL, *NINE MEN: A POLITICAL HISTORY OF THE SUPREME COURT FROM 1970 TO 1955*, 180 (1959).

18. Cardozo's footnotes demonstrate his vast learning: Greek and Roman literature, current psychology, and jurisprudence and so on.

19. G. HELLMAN, *BENJAMIN CARDOZO: AMERICAN JUDGE* 281-82 (1940). "Cardozo loved not only to read books, but also to be surrounded by them. In his apartment in Washington, as in his New York home, thousands of volumes were his sympathetic companions, speaking to him in many tongues."

20. Kaufman, *Benjamin Cardozo*, in L. FRIEDMAN & F. ISRAEL, *THE JUSTICES OF THE UNITED STATES SUPREME COURT 1978-1978: THEIR LIVES AND MAJOR OPINIONS*, 2287-88. G.

tice Frankfurter, referring to Alger's teaching responsibilities toward the young Cardozo as a "droll fact,"²¹ seems to have overlooked the real impact of the man on the future judge. If Alger meant that much, then certainly the great literature of the ages, to which they all were exposed, must have had a major impression on the great jurists.

The great literary works of Western civilization provided all three justices with significant insight into what were and are "the eternal problems of the human condition."²² That insight, an understanding of the eternal in human affairs, is what enables judicial giants such as Holmes, Cardozo, and Marshall to write opinions of lasting value. *Palsgraf*²³ in the hands of a less able judge is just another decision of an appellate court, of little concern to anyone but the particular parties and their counsel.²⁴ A lesser hand than Cardozo's would not have drafted "the most celebrated of all tort cases"²⁵ in American law. A lesser judge than Holmes, who chose to dissent in *Lochner*,²⁶ would not have created what Judge Posner calls "the greatest judicial opinion of the last hundred years."²⁷ A more pedestrian chief justice would not have had the vision or the skill to draft the likes of *Marbury v. Madison*,²⁸ the most famous opinion in American law. Indeed, Cardozo commented with admiration on the language of Marshall.

I place first in order [of the classification of the types or methods of judicial opinion writing], for it is first in dignity and power, the type magisterial or imperative. It eschews ornament. It is meager in illustration and analogy. If it argues, it does so with the downward rush and overwhelming conviction of the syllogism, seldom with tentative gropings towards the inductive apprehension of a truth imperfectly discerned. We hear the voice

HELLMAN, *supra* note 15, at 14, 15, 17 and 122.

21. Frankfurter, *Benjamin Nathan Cardozo*, 5 COLLIER'S ENCYCLOPEDIA 418, 419 (1983).

22. R. POSNER, *supra* note 1, at 357.

23. *Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339, 162 N.E. 99 (1928).

24. *Palsgraf v. Long Island R.R. Co.*, 222 A.D. 166, 168, 225 N.Y.S. 412, 414 (1927).

It is a false and cramping notion that cases are made great solely or chiefly by reason of something intrinsic in themselves. They are great by what we make of them. *McCulloch v. Maryland*—to choose almost at random—is one of the famous cases of our history. I wonder, would it not be forgotten, and even perhaps its doctrine overruled, if Marshall had not put upon it the imprint of his genius."

B. CARDOZO, *LAW AND LITERATURE AND OTHER ESSAYS AND ADDRESSES* 39 (1931).

25. W. PROSSER, *SELECTED TOPICS ON THE LAW OF TORTS* at 191 (reprint ed. 1987).

26. *Lochner v. New York*, 198 U.S. 45, 74 (1905) (Holmes, J., dissenting).

27. R. POSNER, *supra* note 1, at 285.

28. 1 Cranch 137 (1803).

of the law speaking by its consecrated ministers with the calmness and assurance that are born of a sense of mastery and power. Thus Marshall seemed to judge, and a hush falls upon us even now as we listen to his words. Those organ tones of his were meant to fill cathedrals or the most exalted of tribunals The thrill is irresistible. We feel the mystery and the awe of inspired revelation. His greatest judgments are framed upon this plane of exaltation and aloofness.²⁹

In a fascinating introduction to his study of law and literature, Posner inquires into the prevalence of legal themes and trials in major western literary works and incorporates insights from the law and the trial as dramatic devices in literature. Technicalities, he explains, are used for dramatic impact, rather than for their true representation of the law.³⁰ Judge Posner begins his study with an analysis of revenge as a theme in literature.

The popular adage, "don't get mad, get even," demonstrates that revenge is a common, indeed prevalent, human emotion. Yet revenge seems to be most frequently studied within the context of literature.³¹ The narrowness of legal training, Judge Posner tells us, is to blame for the relative neglect by legal and literary authorities of revenge as a topic of study. Yet revenge does seem to have an important, though limited place in law. Although an analysis of revenge literature, such as that provided by this volume, gives the reader a greater understanding of human nature, albeit its baser side, revenge seems to defy categorization or classification in traditional legal theory.

Revenge, however important to a mature understanding of human nature and human institutions, is relegated in law to the world of prosecutors and detectives. Motive is the law's container for revenge, yet motive is largely limited in the law to opening and closing statements in criminal prosecutions and to issues of the admissibility of evidence. Although the question of intent in criminal prosecutions is the subject of a vast area of legal literature and case law,³² revenge is but one weapon in the prosecution's array of arguments available to persuade judge or jury or an argument for the admission of evidence. While Judge Posner believes that greater interdisciplinary study in our law schools will reduce the neglect of revenge by

29. B. CARDOZO, *supra* note 24, at 10-11.

30. R. POSNER, *supra* note 1, at 38.

31. *Id.* at 26 n.3.

32. See P. ROCHE, *THE CRIMINAL MIND* 82-91 (1958); J. MARSHALL, *INTENTION—IN LAW AND SOCIETY* (1968).

lawyers,³³ he seems to overlook the secure place of revenge in criminal jurisprudence. Modus operandi and revenge as explanations for the commission of a crime, particularly a gruesome criminal act, are commonplace in the criminal justice system.

The interdisciplinary fields of law and psychology or law and psychiatry have been used in law and literature for more than fifty years.³⁴ Judge Posner uses a powerful and effective but now somewhat outdated word, "psychopath," in discussing Camus' *The Stranger*.³⁵ Meursault, the protagonist in the murder case, "is incapable of remorse for his action. Indeed, a case can be made that he is a psychopath, utterly self-absorbed and incapable of any feeling for his fellow human beings, whether his mother, his lover, or the Arab."³⁶ But, though less effective than the word "psychopath," current medical usage refers to antisocial personalities.³⁷ It can be argued that law and literature as a field of study provides an added dimension to our understanding of the criminal mind; however, it is questionable whether there is a need to supplement existing psychological studies and case histories with literary examples. After all, a high percentage of inmates who fill our prisons are psychopaths.³⁸ Real cases, true detective stories and actual criminal court trials should serve to educate our law students without resort to Camus. Nevertheless, great literature can provide special insights and interesting examples that will help students to understand a little better and remember a bit longer.

In contrast to the deranged, revengeful, or psychopathic personalities that fill our criminal courtrooms and the pages of literary works, Judge Posner points out that Shakespeare and Homer celebrate mature values and mature personalities.³⁹ There is much to be learned from level-headed and well-adjusted literary characters. The tale of criminal behavior, whether real or fictional, hardly provides us with an ideal exemplar. Society needs heroes, as well as villains.

Judge Posner discusses many of the great literary works of the ages, as well as important efforts of modern times. He provides intriguing analysis of Shakespeare's *Hamlet* and Melville's *Billy*

33. R. POSNER, *supra* note 1, at 70.

34. See E. ROBINSON, *LAW AND THE LAWYERS* (1935).

35. R. POSNER, *supra* note 1, at 89.

36. *Id.*

37. DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS § 301.70 (rev. ed. 1987).

38. *Id.* § 301.70. "The disorder is often extremely incapacitating, resulting . . . in many years of institutionalization, more commonly penal than medical."

39. R. POSNER, *supra* note 1, at 98.

Budd. His treatment of Shakespeare's *Julius Caesar* and *The Merchant of Venice* are superb. But he treats us also with insight into Dostoevsky's *The Brothers Karamazov*, Homer's *Iliad*, Twain's *Pudd'nhead Wilson*, and Kafka's *The Trial*. His analysis of Anthony's oration at Caesar's funeral, from Shakespeare's *Julius Caesar*, is masterful, exciting, and classic.

But more than that, he brings to bear throughout this imposing volume insight and analysis at every level of law and literature. John Marshall, Learned Hand, Oliver Wendell Holmes, Benjamin N. Cardozo and other great jurists are referred to throughout this work, always with special insight.

Judge Posner is not sparing in his criticism and, indeed, it is usually most effective. He differs markedly with Professor Richard Weisberg's treatment of the Holocaust and his view that "Western values, including the tradition of rational inquiry, somehow contributed to the ugliest events of this century . . ." ⁴⁰ But Posner notes that this view is widespread among literary critics and other intellectuals. Nevertheless, his differences are well stated and persuasive.

Judge Posner also takes issue with the writing of Professor Robin West, which he describes as falling within "the spirit of the critical legal studies movement." ⁴¹ He criticizes West in a convincing manner, with the assurance of a mature and experienced scholar, confident that this relative newcomer has missed the mark.

Politics and economics, however, have to be brought in from the outside, by the tendentious reader [of Kafka]. Or so it seems to me—for Robin West is not alone in interpreting Kafka's fiction as a criticism of capitalism. While some Marxists consign Kafka to the "cultural dung heap of reaction," others have claimed him as one of their own. But West's approach is extreme: she reads Kafka so literally that the incidents and metaphors from business and law in his fiction become its meaning. (The occupational hazard of lawyer-critics is to suppose that literature on legal themes represents law more literally than other literature represents its themes.) She might as well read *Animal Farm* as a tract on farm management, or *Moby Dick* as an expose of the whaling industry. Just as *Gulliver's Travels* is not really a disquisition on the problems of being a big person in a land of little people or a little person in a land of big people, or on talking horses, or on islands that float in the air, so Kafka's fiction is not really a series of disquisitions on people who starve themselves

40. *Id.* at 174.

41. *Id.* at 177.

for a living, sons who commit suicide at their father's direction, traveling salesmen who are fired because they have turned into giant insects, denials of due process, judicial delay, a torturer who kills himself with his torture machine (which goes crazy in the process), singing mice, a talking ape, an introspective dog, or a horse (whom we shall meet later in this chapter) that practices law.⁴²

While Judge Posner clearly seems to make convincing arguments, his exchanges with Professor West continue.⁴³ The quotation above provides prospective readers with an appreciation of the excitement that Posner's book provides. Judge Posner states his arguments and conclusions in this powerful message:

If Richard Weisberg wants to use *Billy Budd* as the jumping-off place for his attack on law, that is fine, but he should make clear that it is *his* attack, not anything to do with Melville. If Kafka reminds Robin West of how much she dislikes capitalism, and thereby stimulates her to critical reflections about it, that is fine too, but she is not entitled to wrap her criticisms in the mantle of Kafka's immense prestige.⁴⁴

Posner is somewhat critical of great judges of the past, or at least of their style. It should surprise no one that he writes of Brandeis that his "is the style of the sledgehammer,"⁴⁵ citing Brandeis's famous dissent in *Olmstead*⁴⁶ as an example. As for the style of Marshall and Holmes, he says that their styles display a "lack of judicial craftsmanship."⁴⁷ Posner quickly questions, however, whether it is a fault of theirs or a deficiency in our concept of judicial craftsmanship.

In turning to Cardozo, Judge Posner notes that a "weakness of his style is an ornateness that at times lends an unserious quality to his prose and to his thought."⁴⁸ Cardozo, in *Palko v. Connecticut*,⁴⁹ wrote: "A reciprocal privilege [to appeal from a criminal conviction], subject at all times to the discretion of the presiding judge [citations omitted], has now been granted to the state. There is here no seismic

42. *Id.* at 179-80.

43. West, *Law, Literature, and the Celebration of Authority*, 83 NW. U.L. REV. 977 (1988-89). "The book contributes little to an understanding of either the works of literature or the legal and literary theories which it discusses." *Id.* at 978.

44. R. POSNER, *supra* note 1, at 186.

45. *Id.* at 292.

46. *Olmstead v. United States*, 277 U.S. 438, 478-79 (1928).

47. R. POSNER, *supra* note 1, at 292.

48. *Id.* at 293.

49. 302 U.S. 319 (1937).

innovation. The edifice of justice stands, its symmetry, to many, greater than before."⁵⁰ Posner suggests that this metaphor, bordering "on cuteness, strikes a sour note in a death case."⁵¹

But a full reading of the entire opinion suggests that Cardozo was not insensitive to the fact that *Palko* was a death penalty case following a state requested retrial of a life imprisonment finding. Cardozo made direct reference to "the punishment of death,"⁵² and indirect references in discussing the fourteenth amendment's due process protection against unjust deprivation or denial of life.⁵³ Cardozo also indirectly referred to death through his discussion of the fifth amendment's prohibition against double jeopardy.⁵⁴ Indeed, his use of the words "condemnation" and "condemned" conjures up images of the death penalty.⁵⁵ Had Cardozo used the word "balance" instead of "symmetry" perhaps Judge Posner would have been less troubled by the metaphor. Justice Cardozo, however, was not unmindful of the asymmetrical nature of the criminal justice system and of the heavy burden of proof placed on the prosecution. His concern with symmetry was focused on the right of appeal. Cardozo merely stated, in a vivid manner, that the state should be afforded no less a right to appeal from an unfair trial than the defendant.

While it is possible to quibble with details of the book and some of its fine points, Judge Posner has written a superb introduction to an educational area that deserves close attention and study. His book is not the complete answer to the issue of law and literature, but it is a major beginning. *Law and Literature: A Misunderstood Relation* is the type of book that will be studied and discussed for years to come. It is an important and thought-provoking study that could lead to significant changes in the way in which law students are taught in the twentieth century. Moreover, Judge Posner's book is almost always fascinating and is generally fun to read. What he tells us should be meaningful to every member of the bar.

50. *Id.* at 328.

51. R. POSNER, *supra* note 1, at 294.

52. *Palko*, 302 U.S. at 321-22.

53. *Id.* at 322.

54. *Id.* at 323.

55. *Id.* at 327.