Loyola University Chicago Law Journal

Volume 23
Issue 2 *Winter 1992*

Article 3

1992

Critiques

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not necessarily less talented, often their first book is their best book. Their first book has expressed what they had inside themselves to express and they don't improve because their inspiration flags and it isn't replaced by a growing craft skill because they are not systematic craftsmen improving over time. I think there are exceptions; maybe Philip Roth is an interesting exception, I would argue. But, as I say, the movement from expression in the classical sense of imitation leading to incremental improvement to the modern romantic sense of inspiration and individuality may well involve a loss in quality, although it is a judgment that no one really is able to make responsibly.

CRITIQUE***

WILLIAM T. BRAITHWAITE****

Judge Posner has given considerable energy to exploring the connections between law and economics and between law and literature. He has sought to find out what contributions these two subjects, or disciplines, can make to the law, and he has approached this question at the levels of both theory and practice. He has considered economics and literature as they bear upon jurisprudence, or philosophy of law, and also as they bear upon the actual working of rules of law in the world of affairs.

In respect of what economics and literature can offer to the theory and practice of law, Judge Posner has weighed both subjects in the balance, and he finds literature wanting. He believes economics to be far superior to literature in both an instrumental and a substantive capacity. He concludes that economics is superior to literature as a tool of analysis, and in what it can teach about the effect of legal rules in practice. He concludes that economics is also superior, in what it can teach about jurisprudence, in respect of the theory of human action it embodies or assumes.

I cannot claim to know about economics what Judge Posner knows. I have, however, read his book on law and literature, and since I have been teaching in that field for ten years, I have also given some thought to most of the issues he raises about whether and how the study of literature can contribute to the study of law.

*** The Great Books Society of Loyola University Chicago School of Law invited Professors William T. Braithwaite and George Anastaplo to participate in a roundtable discussion of law and literature. Presented here are critiques of RICHARD A. POSNER, LAW AND LITERATURE: A MISUNDERSTOOD RELATION (1988).

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I am grateful for the opportunity to raise with him directly some of the questions brought to mind by my reading of his book.

i.

One of the works of literature Judge Posner has lectured on, debated, and written about is Herman Melville's short novel, *Billy Budd*. A young and handsome but unsophisticated sailor impressed into service on an 18th century English warship is falsely accused of conspiring to incite mutiny. Unable to defend himself with words, he strikes his accuser a blow that proves fatal. The ship's captain, a witness to the killing, knows Billy's moral innocence, but believes that military law obliges a court-martial. Although troubled at condemning a man guilty in his act but blameless in his intent, the court's members bend to the captain's arguments for conviction, and Billy Budd is hanged.

In chapter 11 of *Billy Budd*, the author, speaking in his own name, raises the question of the relation between "knowledge of the world," that is, practical wisdom or prudence, and "knowledge of human nature," which I take to be part of philosophic wisdom, or simply wisdom. He narrates a conversation with an unnamed "senior scholar" who made the following observation:

> In a matter of some importance I have seen a girl wind an old lawyer about her little finger. Nor was it the dotage of senile love. Nothing of the sort. But he knew law better than he knew the girl's heart. Coke and Blackstone hardly shed so much light into obscure spiritual places as the Hebrew prophets. And who were they? Mostly recluses.[6]

The unnamed senior scholar seems to me to be saying something like this. One can get from the books of the law (which are essentially historical and political in content), a "knowledge of the world" sufficient to serve the ordinary purposes of life. This kind of practical wisdom does not, however, shed much light upon the darker corners of the human heart. For that, a deeper wisdom is needed, the kind available only from study of the writings and thoughts of men who are enough removed from worldly affairs to have the leisure needed for thinking about the deepest questions. Lawyers and judges are too much in the world of practical affairs to have this leisure, even if they should have the mind and temper for such thought. Hence we must turn to the reclusive Hebrew prophets of the Old Testament, and, perhaps, Melville may also be

6. HERMAN MELVILLE, BILLY BUDD 75 (Harrison Hayford & Merton M. Sealts, Jr., eds., Univ. of Chi. Press ed. 1962).

suggesting other men like them, such as the philosophers and the great poets.

We can put Melville's point this way. A lawyer must certainly know some psychology and, for the occasional exceptional case, the psychology the lawyer needs to know can be learned from studying the Bible.

How much *does* a lawyer need to know about the human heart? How can one best come by whatever such knowledge the lawyer needs? In particular, does one learn more about the human heart from studying the books of the greatest writers on economics—such as Adam Smith, Jeremy Bentham, and Karl Marx—or from Plato, Shakespeare, and the Bible? What would we have to assume about human nature in order to defend the opinion that economics can teach more about psychology than literature?

ii.

Judge Posner has also written on Shakespeare's *Merchant of Venice*, one of two plays Shakespeare set in that city, the other being *Othello*. The thirty-seven plays in the Shakespearean canon are set in a variety of political regimes and in a variety of locales, including London, rural England, Rome, Venice, Athens, and Vienna. I believe the plays provide an indication of what Shakespeare saw life to be like in the different regimes and locales in which he set them.

The two Venetian plays should be of special interest to Americans, for the commercial republic in the Venice of which Shakespeare wrote is in some ways like the commercial republic our own Founding Fathers may have had in mind. Thus, it may be instructive to look at *Othello* and *Merchant of Venice* as poetic images of the advantages and shortcomings of life in a regime devoted to promoting those exchanges for personal gain that constitute commerce.

Othello is a Moor, a pagan man of color living in a cosmopolitan city ruled by white Europeans. He is also a courageous general, and it is for his military prowess that the Venetian government has hired him to help defend the city against the Turks. One wonders why Venice could not have found a competent military commander from among its own citizens. Can we imagine Israel hiring mercenary soldiers?

What prompted, if news reports are to be believed, numerous desertions from the Soviet Army by Lithuanian soldiers upon that country's assertion of its independence? Are the most able men in

Venice too much occupied with commerce and the politics of encouraging commerce to study the art of war? Should we expect a city as much given to commerce as was Venice to produce a Lee or a Grant, an Eisenhower or a Marshall?

The Merchant of Venice reveals another defect in the city's institutions. The Jewish moneylender, Shylock, seeks to enforce his famous, or infamous, "pound of flesh" contract against the Christian merchant, Antonio. The contract is clearly unconscionable, perhaps even criminal, but the Duke of Venice, who is the city's chief judicial officer, feels unable to justify a judgment for Antonio. He believes this would compromise the enforceability of contracts, upon which Venice's power and reputation as a center of trade depend. So he is obliged to send for a judge from another city.

The Venice presented by Shakespeare is a city that fails to educate its own judges and generals and so must hire foreigners to lead its soldiers and preside in its courts. We wonder about the relation between commerce and patriotism. Would a sensible soldier want a Donald Trump or Michael Milken for his platoon leader? Are men of this character likely to volunteer to put their own very comfortable, not to say luxurious, lives in danger in order to defend the intangible freedoms of others?

We wonder, too, about the relation between commerce and justice. In particular, we wonder what kind of community, and what kind of education, are necessary to produce the best lawyers and judges?

iii.

One view of the education needed by one who would live his life in the law was set out by Thomas Jefferson in a letter written probably in the 1770s. An autographed copy of this letter is owned by the University of Pennsylvania Law School and was published in its law review in 1971.[7]

This letter, and others Jefferson wrote on the same subject, leave little doubt that he believed lawyers should have what we today call a general liberal education. To him, this included both the natural sciences and the humanities. He prescribed readings in mathematics, astronomy, chemistry, anatomy, zoology, and botany. He prescribed readings in ethics and religion, in politics and history, in rhetoric, oratory, and literature. And of course he prescribed readings also in law—Coke, Bacon, Blackstone, and others.

7. Commentary, *Thomas Jefferson Recommends a Course of Law Study*, 119 U. PA. L. REV. 823, 833-38 (1971).

One feature of Jefferson's curriculum that is striking to today's lawyer is the proportion between readings that are specifically legal and readings in other subjects. It seems safe to say he believed that mastering the craft, the methods, and the corpus of the law was only one part of a lawyer's education. Science and literature were just as important as Blackstone.

The question of what place literature has in the education of a lawyer is, as I believe Jefferson's letter suggests, larger than the question, sometimes heard today, of whether the law school curriculum should include literature. Focusing on the law school curriculum deflects attention from the question of what kinds of things should be studied in preparation for law school. Judge Posner has been among those challenging the supposition that the law is best studied as a self-sufficient discipline isolated from other subjects. In this, he seems to me to be on solid ground, supported as he is by Jefferson's view that the lawyer's education must go far beyond the covers of Blackstone.

On the other hand, I wonder whether Jefferson's view of the education of a lawyer can be made congruent with Judge Posner's suggestion of the architectonic status of economics as an instrument for legal analysis. Of course, it may be that the Jeffersonian model of legal education is impractical, or has been superseded by history, or even was unsound when Jefferson conceived it. However this may be, his letter can provide the impulse for us to wonder whether there is as great a disproportion as Judge Posner has so ably argued between the contribution that economics can make to the law and the contribution that literature can make. One way we might focus our curiosity on this point is to ask whether Jefferson's 1770s view that a liberal education is the best legal education has any vitality in the American law schools of today.

CRITIQUE

GEORGE ANASTAPLO*****

I must confess that I was surprised when I settled down to read Judge Posner's *Law and Literature*[8] in preparation for this discussion. I had read two dozen reviews of the book and had attended a panel discussion about it—and had formed the impression that

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8. POSNER, *supra* note 3.

Judge Posner was decidedly hostile to having law and literature courses in the law school curriculum. Not only was this the gist of what I had gotten from the law and literature professors who had criticized the book in law journals, but it was also what was suggested by those reviewers who were friendly to the book.

I was startled, therefore, to discover how friendly Judge Posner is to law and literature courses. He does have reservations, of course, but this should not keep academicians interested in those courses from putting his repeated endorsements of them to good use, especially since he is known as a conservative. His generous support ought to be welcomed, even as particular readings by him of texts are challenged.

Judge Posner recognizes that students do not come to law school as well prepared as they should be and that they need to know much more about the humanities than they do these days, to which law and literature courses can contribute.[9] Students, in the process of thus becoming better educated, should also become better equipped to write. Consider, as well, the following endorsement by Judge Posner:

> Most of the issues that would be discussed in [a law and literature course] could, it is true, be covered in a course on jurisprudence or legal process stressing the rhetoric, ethical underpinnings and dilemmas, interpretive problems, and epistemology of law. But such a course is not likely to be so vivid, memorable and entertaining as a well-taught course in law and literature.[10]

His endorsements should be exploited by those who believe that law and literature courses begin to make up for deficiencies in both students and teachers. Such courses suggest that life may be much more meaningful and hence more interesting than it is widely believed to be. When one reads certain first-class authors, one realizes that most of what one thinks and feels, as well as most of what is thought and felt by many people around one, may be in need of serious examination.

i.

The failure of law and literature advocates to respond properly to Judge Posner's book reflects, I suspect, shortcomings in their ability to read with imagination and to use the rhetorical skills of which he makes so much. Those advocates should be able to take

9. *See, e.g., id.* at 360-61.
10. *Id.* at 358.

advantage of his interests and concessions and to notice what is favorable, not only what is unfavorable, to their cause in his book. No doubt, their reservations about the law and economics studies of which Judge Posner is a champion make him suspect to the more humanistically-inclined law professors.

Robert Maynard Hutchins, when he was President of the University of Chicago, used to justify the presence of the professional law school on a university campus by saying that often it was only there that the student was taught to read with care. (His own experience had included service as Dean of the Yale Law School.) If law and literature advocates were themselves more skilled in reading, they would be better equipped to make a proper critique of whatever may be troublesome in the Posner position. Instead, their own readings of texts are often more questionable than his.

Judge Posner has useful things to say about the texts he examines in his book. His limitations, such as they are, are largely those of his time or circumstances. He, as a distinguished legal scholar, very much relies on authorities, systematically inventorying sources and schools of thought in a fashion familiar to readers of law journals. The most serious difficulties in his interpretations of text are not generally noticed by his most vigorous law and literature critics because they share with him certain contemporary assumptions about what the most careful reading requires and looks like.

ii.

I will now attempt to illustrate what I have been saying by considering, however briefly, three well-known subjects about which Judge Posner has something to say. The range of his interests is reflected in examples taken from ancient and modern literary texts and from the law that are probably familiar to most of you. An examination of what he particularly has to say about a Greek play, a play by Shakespeare, and a United States Supreme Court Justice should provide a fair indication of how Judge Posner works and what serious criticism of him should notice.

First, consider the Greek play, which is perhaps the greatest play ever written, Sophocles' *Oedipus Tyrannos*. Judge Posner has useful things to say here, but he does not go deeply enough. This is not, strictly speaking, his fault, since the same complaint can be made about most recognized classical scholars today. There is, for example, a general tendency to confuse what Oedipus did with what the gods ordained. It seems, however, to have been Oedipus'

character and misconceptions that led to the form of the consequences of his fulfillment of the prophecies that he dreaded with respect to parricide and incest. The fundamental presumptuousness of Oedipus may be seen not only in his reckless determination to steer clear of his home in Corinth upon hearing at Delphi the dreadful prophecies about himself, but also in his eventual self-blinding (as if he then knew all that he would ever need to learn) and in his tendency to attribute to the gods everything that happened to him. In short, it is a mistake to consider Oedipus' interpretation of events to be the same as Sophocles'.

Judge Posner considers the pollution visited upon Thebes to be a result of Oedipus' offenses, the offenses of parricide and incest.[11] But, so far as we are told in the play, the incest does not trouble Apollo, however much both Oedipus and his mother-wife are horrified by it. Both parricide and incest depend, at bottom, on a lack of self-knowledge. Self-knowledge in turn depends on a thoughtfulness for which Oedipus does not seem to be equipped. He is good at answering questions (that is, solving riddles); he is far less skilled at *asking* questions. One could well consider what the Socratic responses, and especially questions, would have been to the dreadful revelations offered Oedipus at Delphi.

I have noticed that Apollo, unlike Oedipus, is far more concerned by Oedipus' parricide than by his incest, at least so far as the Delphic explanation of the pollution at Thebes is a reflection of Apollo's concerns. But, we should also notice, it is not simply the parricide as parricide that troubles Apollo, but rather the parricide as regicide. (This is related, I mention in passing, to certain problems that Judge Posner has in his reading of Aeschylus' *Orestia*.) This is but one of many indications in the works of the greatest playwrights of the fundamental character of the *political*, not only in the ordering but also in the understanding of human thought and action. It should be evident that whatever merit this point has extends beyond Judge Posner's reading of these plays to the law and economics movement in which he first distinguished himself. Law, as traditionally understood, was much more rooted in, and in the service of, the political and hence the moral virtues (especially justice) than modern legal theorists seem to recognize.

iii.

I turn now to Shakespeare by considering what Judge Posner has to say about the funeral speeches by Brutus and Mark Antony

11. *Id.* at 30.

in *Julius Caesar*. Anyone interested in those speeches—and all of us as students of law should be—can profit from Judge Posner's discussion here. But there are problems with an approach, here and elsewhere, which makes as much of the amorality of rhetoric as his does.

Judge Posner does not seem to appreciate why Shakespeare gave Antony the more effective speech over Julius Caesar's body or, indeed, why he even had such a scene in the play, whatever his ultimate source for it. The key to the scene is not the character of rhetoric but rather the character of the audience. (Judge Posner does seem to be aware of this, at least up to a point.) We are meant to see what has happened to Rome, a city which can be said to have been corrupted by its conquests (or by an obsession with, to use law and economics language, maximization of wealth). The emphasis in Rome is now on self-interest and advantageous personal loyalties, not on the common good and republican virtue. Brutus' highmindedness would have been effective once, but at a time when it probably would not have been needed to counter the kind of threat Caesar now poses. Judge Posner suggests that it is not yet time in Rome for such an approach as Brutus'; rather, he should have said, the time has gone.

What, then, did Rome need? Was Julius Caesar, for all his faults, as good as Rome was going to get after years of civil war? On the other hand, if Brutus was to be able to follow seriously the reformation he intended, should he not have had recourse to more severity, not less, getting rid of the volatile Mark Antony along with Julius Caesar? Be that as it may, Aristotle would counsel us that it is not salutary to suggest that rhetorical masterpieces are to be expected in dubious causes, for to do so is to fail to recognize the pervasive influence of a hierarchy of ends. No doubt, rhetoric can sometimes seem amoral, but that tends to be in the short run. Is it not usually easier to speak finely and in a sustained way about the best things and the most noble ends? Underlying this question is a proper understanding about the relation of *nature* to *truth*, something that the modern intellectual is not usually equipped to address. (This inadequacy may be seen in the tendency to transform "legal reasoning" into sophistry.)

All this obliges the thoughtful statesman to consider what character is appropriate for a people equipped to make a republic work properly. What, we may well ask, is shaping the character of our people and what can be done about it? We need only recall, in order to be moved to take this question seriously, the shallowness,

if not even the demagoguery, of "effective" political discourse among us in recent years.

Judge Posner recognizes that "we live in one of the most licentious cultures in the history of the world."[12] But here he, as a conservative, joins most liberals both in insisting that "literature does not make us better (or worse) people"[13] and in not liking "the idea of letting politics shape [our] cultural life."[14] If our "culture" is indeed as licentious as Judge Posner believes, how did it get that way? Is it bad that it should be thus and, if so, can anything be legitimately done about it by the community?

I, as some of you know, have long argued for the abolition of broadcast television in the United States, that very television which is both an important cause and a pernicious effect of our corruption. Certainly, the market cannot be depended on to remedy our present condition. If anything, market demands have been contributing incessantly to the deterioration we are witnessing. Also contributing to all this are constitutional interpretations that, like much else in our lives, subvert the significance of politics. This subversion depends as well on a depreciation of that nature in the service of which the most thoughtful statesman is enlisted.

iv.

My third "case study" draws upon Judge Posner's assessment of Justice Oliver Wendell Holmes. Judge Posner regards him, along with Chief Justice John Marshall, as one of the "two greatest judges in our history."[15] I, on the other hand, regard Justice Holmes generally as a bad influence. His emphasis, as in his celebrated treatise on the common law,[16] upon the "experience" rather than upon the "logic" of law does not take sufficient account of what shapes and illuminates experience. His positivist anti-natural-right doctrines eventually led to the denaturing of the common law in *Erie Railroad v. Tompkins*,[17] a thoughtless surrender by Justice Holmes's disciples to the Secessionist principles against which the young Holmes had fought so gallantly in the Civil War. All this is grounded in Hobbesian materialism and a denial of justice as an enduring standard.

This is the sort of judgment that can be passed upon Justice

12. *Id.* at 333.
13. *Id.* at 358.
14. *Id.* at 301.
15. *Id.* at 292.
16. OLIVER WENDELL HOLMES, JR., THE COMMON LAW (Howe ed. 1963).
17. 304 U.S. 64 (1938) (overruling Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842)).

Holmes as a common-law scholar. His influence in constitutional law is mixed. We have suffered for some seventy years from his "clear and present danger" test. And when he tried to correct the damage he had done in *Schenck*[18] to the First Amendment, he came up with the-market-as-the-best-test-of-truth talk, something which Judge Posner has been induced to extend to assessments of literary works as well.[19] The emphasis is thus placed not on the intrinsic character of a work and on standards which endure for judging works, but rather on the workings of the market over time. Nor is it appreciated that to the extent that the market does work here, it is because of nature-based standards which somehow appeal even to the unreflecting.

Justice Holmes was, in some ways, the Mark Antony of American jurisprudence, but without the eroticism which eventually redeemed Antony somewhat. That is, Justice Holmes helped to corrupt further a people already in decline, even while he remained personally attractive. Like Mark Antony, Justice Holmes had an effective "style." His callous, and perhaps misinformed, opinion in *Buck v. Bell*[20] is extolled by Judge Posner as "a first-class piece of rhetoric."[21] We are again moved to wonder how rhetoric should be responsibly described.

Even more impressive, Judge Posner argues, is the Holmes dissenting opinion in *Lochner*,[22] "a rhetorical masterpiece."[23] "It is not," Posner says, "a good judicial opinion. It is merely the greatest judicial opinion of the last hundred years."[24] But, I presume to suggest, the *Lochner* case does not matter as much, nowhere near as much, as Judge Posner evidently believes: the United States could not have remained indefinitely the only major country in the Western World without power in its governments to control the economy, which is what the Court's reading of the Due Process Clauses and the Constitution in *Lochner* meant.[25] To make as much of the *Lochner* dissent as Judge Posner does is to make too much of rhetoric in the more limited sense of that ancient and noble discipline.

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18. Schenck v. United States, 249 U.S. 47 (1919).
19. *See* POSNER, *supra* note 3, at 15, 73-74, 327, 330, 333, 334-35.
20. 274 U.S. 200 (1927).
21. POSNER, *supra* note 3, at 289.
22. Lochner v. New York, 198 U.S. 45 (1905).
23. POSNER, *supra* note 3, at 285.
24. *Id.*
25. *Id.* at 286.

v.

All this bears upon how the Constitution should be read. It is far from clear to me that most legal scholars today do read it properly. Among the consequences of intellectual developments to which Justice Holmes contributed is a shift away from politics and hence law as sovereign to a greater reliance upon the social sciences, whether history, psychology, social dynamics (Marxism), or economics. The majesty of justice is somehow lost sight of in this substitution, that justice to which traditional jurisprudence is dedicated and of which the greatest literature is very much aware.

I should not leave these assessments of Judge Posner's judgment as a legal scholar without putting myself at risk by indicating which judges or opinions I think more of than he does. Superior in learning to Justice Holmes is Justice Joseph Story, whose influence can be expected to be revived when we return to our senses. (It is the Story argument in *Swift v. Tyson*[26] that *Erie* presumes to replace.) As for twentieth century opinions, there are several candidates for preeminence: Chief Justice Earl Warren's opinion in *Brown v. Board of Education*,[27] however poorly-crafted in some respects, is certainly greater than the Holmes dissent in *Lochner*. More eloquent than anything Justice Holmes did in the opinions praised by Judge Posner is the opinion for the Court by Justice Robert H. Jackson in *West Virginia Board of Education v. Barnette*.[28] More important than the *Lochner* issue is the issue addressed by Justice Hugo L. Black in his opinion for the Court in the *Steel Seizure Case*,[29] especially since executive usurpation remains a serious problem for us down to this day. (I need not say anything about Justice Black and the First Amendment.) And for common-law analyses, Judge Benjamin Cardozo (New York Court of Appeals) is more to be reckoned with than Justice Holmes, whether in Massachusetts or in Washington, with opinions that are often more solid than Judge Posner gives him credit for, however sensitive Judge Posner's discussion of the Cardozo opinion in *Palko*[30] may be.[31]

26. 41 U.S. (16. Pet.) 1 (1842), *overruled by* Erie Railroad v. Tompkins, 304 U.S. 64 (1938).

27. 347 U.S. 483 (1954).

28. 319 U.S. 624 (1943).

29. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

30. Palko v. Connecticut, 302 U.S. 319 (1937), *overruled by* Benton v. Maryland, 395 U.S. 784, 793 (1969).

31. POSNER, *supra* note 3, at 294.

vi.

Much of what I have said on this occasion depends on the traditional recognition of politics as the supreme discipline. Moral judgment is needed in making sense both of literature and of law. (Law is immediately in the service of the political art.)

A proper reading of the greatest texts can elevate one's sights even as it cuts one's ego down to a healthy size. This is especially important for lawyers today whose specializations narrow their understanding and whose easy access to big money facilitates their corruption. The alternative is an impoverished way of life, especially for our most talented people: as their lives become more and more pampered and private, they are less and less open to the appeal of grand civic achievements.

If the best literature is to help us become what we are truly capable of, we must be alert to what to look for, including what minds greater than ours have considered the most serious questions. Professional scholars ultimately cannot be relied upon here, however useful they may be. There is something mechanical about the "research" that Judge Posner considers of overriding importance for professors at "leading law schools."[32] One can see here, too, the influence of the market and its promotion of novelty. Our principal concern as students of the law, however, should not be with devising something new but rather with discovering what others have long known.

It is in this conservative spirit, which is dedicated to recovering and preserving the best of what has gone before, that I commend to readers the instructive insights and useful things in Judge Posner's book, including his salutary insistence that "what literature speaks to are the eternal problems of the human condition."[33]

32. *Id.* at 361.

33. *Id.* at 357. For further discussion of topics mentioned here, see GEORGE ANASTAPLO, THE ARTIST AS THINKER: FROM SHAKESPEARE TO JOYCE (1983); and George Anastaplo, *Freedom of Speech and the First Amendment: Explorations*, 21 TEX. TECH. L. REV. 1941 (1990) (on classical texts and the First Amendment).