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## Remarks on Law and Literature

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## Remarks on Law and Literature\*

Richard A. Posner\*\*

It is a great pleasure to be here and to talk to you about law and literature. A vast number of literary works touch on law. The oldest example I know is the *Egyptian Book of the Dead*, which has a trial scene complete with a scale of justice with the two pans. The *Iliad* (also, of course, a very ancient work) contains a brief trial scene more like arbitration than adjudication, but nevertheless a definite allusion to a justice system. The *Odyssey* is centrally about revenge, which is the system for the maintenance of law and order before there is an organized system of courts. Coming down a century or two, but still in ancient Greece, Aeschylus' trilogy *Oresteia* climaxes in a trial scene described as the first trial for bloodshed in a Greek world—the trial of Orestes for the murder of his mother, Clytemnestra. A number of other Greek plays deal with revenge, or with crimes that are punished by some form of law—sometimes natural law, sometimes human law. The Elizabethan renaissance was much interested in law. Contract is the central metaphor of *Dr. Faustus*, by Christopher Marlowe; and Shakespeare's plays are so pervaded by legal imagery and legal themes that it has been argued that Shakespeare must have studied law to have known so much about it and to have been so interested in it. Later we have Dickens' great legal novels, *Pickwick Papers* and *Bleak House*. Fyodor Dostoevsky, in *The Brothers Karamazov* and *Crime and Punishment* wrote about the legal system with great insight based in part on his own experiences as a criminal defendant. Herman Melville wrote a famous legal novella, *Billy Budd*, and also a wonderful story, "Barnaby the Scrivener," about a person we would today call a paralegal. Franz Kafka was a lawyer, and several of his stories, and his novel *The Trial*, are about law. Among his legal parables that have fascinated scholars is one in

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\* Judge Richard A. Posner, widely known for law and economics scholarship, explored law and literature scholarship in RICHARD A. POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATION* (1988). The Great Books Society of Loyola University Chicago School of Law invited Judge Posner to speak on this subject March 29, 1990. Judge Posner's remarks are set forth here, followed by critiques of *Law and Literature*, by Professors William T. Braithwaite and George Anastaplo.

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which Bucephalus, the horse of Alexander the Great, reappears in twentieth-century Prague and decides to study law. In other literature of our century we find works on legal themes by Faulkner, Shaw, Camus, and many others. There is, in short, a vast corpus of literary treatments of legal subjects.

Although there is relatively little in any of these works, even ones that are written by lawyers (like Kafka), that will help judges directly with the solution of technical legal questions, they can help us to achieve perspective on fundamental jurisprudential issues that pervade lawyers' work whether or not the lawyer is aware of them. I believe, therefore, that there is a place in law schools for courses in law and literature; concretely, they can serve as a balance to the highly technical legal studies in which students become immersed and which socialize them into the folkways of the profession. My observation at the University of Chicago Law School has been that after a few days the law students have become so captivated by the legal approach that they no longer can approach a legal problem from the standpoint of a lay person. The principal function of a course like law and literature is to force the student to step back from the technical study of law and look at the legal system once more from the outside, as lay people do; and thus to retain some perspective on their professional activities.

One of the things that judges feel, or should feel, and that the lay public is aware of also, is a series of tensions between various senses of law as form and rule and technique on the one hand, and on the other hand as the rendering of substantial justice. Tensions exist between rule and discretion, between law and justice, between rule and standard, between law and equity, between strict construction and flexible construction, between natural law and positive law, between formalism and realism, and so on. Judges lean toward one end of the spectrum or the other but my own view is that anyone who leans too far either way is a bad judge. Literature can make us—the judges and other members of the legal community—more sensitive to this point.

Consider Sophocles' play *Antigone*, written in the fifth century B.C. in Athens. Two brothers (who happened to be the sons of Oedipus, but that is a detail) find themselves on the opposite sides of a civil war in the city state of Thebes, which is ruled by Creon. One of the brothers is named Polynices and he is the leader of the rebels in the civil war. The other brother, Eteocles, is the leader of the loyalists defending Creon's rule. The loyalists win the civil war but both brothers, the rebel and the defender of the established

order, die in the fight. Creon decrees that Polynices, the rebel, shall remain unburied—a terrible punishment in the theology of the ancient Greeks—and that anyone who violates this decree shall be put to death. A decree has essentially the same authority in the legal universe of the play as a law passed by Congress today would have. Antigone, the sister of Eteocles and Polynices, defies the law and buries her dishonored brother. Creon sentences her to death after a brief trial in which Antigone argues, to no avail, that the higher religious law which commands proper burial of the dead should be allowed to trump Creon's earthbound positive law. Disaster ensues for Creon, including the death both of his son and his wife, and we are led to understand that he has made a terrible mistake in condemning Antigone. Yet it is apparent that Creon has a real problem; and the dilemma of natural law versus positive law that proves insoluble by him remains a challenge to a modern legal system. Because both brothers have been killed in the war, an honorable burial for both would fail to distinguish the traitor Polynices from the heroic defender—the denial of an honorable burial for Polynices is the *only* method by which Creon can punish the traitor and distinguish between the two brothers. It is a savage punishment, but civil war is harsh and has to be deterred.

To this practical, utilitarian argument based on civic values Antigone opposes an argument based on family, religion, and emotion. The discourse of the two antagonists, Creon and Antigone, is incommensurable and defies compromise. Much of positive law today has the character of Creon's decree, being rooted in practical, essentially political considerations rather than in deep moral values. Such law is often open to criticism from the standpoint of transcendental ethical values. Few judges would like to think of themselves merely as Creons, but few would feel comfortable in the role of Antigone. Most judges want on the one hand to enforce and comply with laws and doctrines of a humble utilitarian cast at best, and on the other hand to render substantial justice unfettered by the petty political compromises and calculations that shape legislation.

The same dilemma can be found in Shakespeare's *Merchant of Venice*. As most of you will remember, Antonio gives Shylock a bond in guarantee of a loan by Shylock to Antonio's friend Bassanio to enable Bassanio to woo the wealthy Portia in style. The bond provides that in the event of a default Shylock shall be entitled to a pound of Antonio's flesh. Antonio does default and Shylock demands judgment for the pound of flesh, making clear that he wants it taken from the region of Antonio's heart so that

Antonio will die. The bond is clear on its face and Venice as a commercial society attaches great importance to enforcing contracts, an attachment that Shylock plays on skillfully by asserting that if his bond is not enforced it will mean there is no justice in Venice. In the law of the play (that is, the law that the audience is supposed to accept for purposes of watching and enjoying the drama, as opposed to the law of England in 1597, the approximate date of composition of the *Merchant of Venice*), there is no rule that penalty clauses in contracts are unenforceable. There is also no concept of the equity of redemption, by which if the debtor agrees to satisfy the debt, even though he is late, his security cannot be taken from him. So, because of the way the law is presented to us without these meliorative doctrines, it looks as if Antonio is a goner, even though Bassanio has in fact come up with the money to repay Shylock; he has been loaned the money by Portia, and indeed in the trial scene offers not only to repay Shylock the whole face amount of the loan to Antonio but also to pay interest at any rate that Shylock demands. At this point in the trial scene Portia, who has married Bassanio by now, appears disguised as a male doctor of laws. There is a conflict of interest in her appearing in this role, since her money is at stake; but we don't worry about that. She appeals to Shylock's sense of mercy in a famous speech ("the quality of mercy is not strained; it falleth as the gentle rain from heaven"<sup>1</sup>) but this appeal is to no avail and things are looking really grim for Antonio until Portia pulls a pair of legal rabbits out of her hat. First she points out that the bond nowhere authorizes Shylock to shed Antonio's blood. Second she reminds everyone that it is a capital offense to attempt to kill a Venetian—which Shylock has already attempted to do—and therefore he will be lucky to get off with his life. Everyone is astonished at Portia's sagacity. Shylock is utterly defeated and withdraws after surrendering most of his fortune and converting to Christianity in order to escape being prosecuted as a criminal.

Many readers and viewers of the play have thought Portia's argument about not shedding blood absurdly legalistic and highly vulnerable to the counterargument—which Shylock however does not make—that the bond should be interpreted to grant Shylock the implicit right to shed Antonio's blood since otherwise the purpose of the bond would be thwarted. But I don't think it is an accident that Shylock does not make this argument—an argument based on purposive rather than literal construction of contracts. It

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1. WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE* act 4, sc. 1.

would open him to a devastating counterthrust, because, after all, the fundamental purpose of the bond is to ensure the repayment of Shylock's loan; and there is Bassanio offering to repay it in full—and with abundant interest even though the loan was interest-free. So it is Shylock who rejects purposive interpretation and stands four square on technicality and literalism and Portia who, personifying equity and mercy, uses Shylock's own commitment to technicalities to lever him out of court.

The use that Portia makes of the forms of law is significant not only in establishing the difference between her and Shylock but also in demonstrating the practical importance of those forms. It would not do for Portia and the other Venetians simply to say that the bond is ridiculous and Shylock a villain and therefore the bond should be annulled. Venice depended on trade with aliens such as Shylock (Jews could not be citizens in sixteenth century Venice), and no alien would trust the Venetian courts if they took such a free-wheeling equitable approach. A court that merely does justice in some nebulous lay sense can be expected to construe that Protean term in ways that give the local people a huge advantage over foreigners. An impersonal, objective, at times even inflexible, rule-bound jurisprudence is an essential protection precisely for the outsider, the pariah—a point that has been made by minority legal scholars in criticism of the radicalism of critical legal studies. So Shylock's positivism, like Creon's positivism, although presented as repulsive, is not entirely without social value.

In both examples I have given and in many others I could give, the spokesmen for rules and positivism and strict construction were men and the spokesmen for equity and natural law were women. An interesting question is whether more than coincidence is involved in this pattern. A number of feminist legal scholars, following Carol Gilligan's pathbreaking book *In a Different Voice*,<sup>2</sup> argue, yes there is a difference between the way in which men and women perceive law, and it is the difference captured by Sophocles and Shakespeare in their assignment of sex roles to their characters. Men, the argument goes, are drawn naturally to an ethics of rights and duties, both defined by rules, but women are drawn naturally to an ethics of care in which disputes are not so much resolved as dissolved in an overriding concern for settling disputes on mutually acceptable terms. The implication of this line of argument is that as women come to play a larger and larger role in law,

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2. CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* (1982).

the very nature of legal thought will change and we will see more reliance on standards, more flexibility, more equity, fewer dichotomous rules, fewer hard cases (in the original sense of harsh decisions), fewer well-defined rights and duties, less individualism and more altruism. Well, we shall just have to wait and see.

I want to switch gears now and speak very briefly about the interpretation of statutes and the constitution when examined from the standpoint of literary interpretation. If you look across the field of law and literature you will see that law and literature scholars are not only concerned with mining these great works of literature that I have mentioned for their jurisprudential implications; they are also concerned with the possibility that literary and legal interpretation might have significant parallels, so that experiences and skills developed in literary interpretation might be transferable to the legal setting.

The most conspicuous effort to bring literary techniques to bear on law is the effort of radical scholars of the critical legal studies movement to use the technique of deconstruction on legal texts. Deconstruction is the furthest extreme of an approach to interpreting literary and philosophical text that emphasizes the primacy of the reader over the author in the creation of meaning. Just as there are intentionalists with regard to statutory and constitutional interpretation, so there are intentionalists with regard to literary interpretation, and at the opposite pole in the literary domain there are those who believe that meaning is created by readers rather than authors. Some legal scholars argue that there ought to be a corresponding legal interpretive extreme to which they give the name deconstruction. Let me make a very brief effort to convey a sense of what I understand deconstruction to mean. Think for a moment more critically than we usually do of the process of communication. Suppose I see a tree outside of my house. A perception forms in my mind. If I want to recreate the same perception in your mind—if I want in other words to talk about the tree outside my house—I encode my perception in suitable words and vocalize them aloud. You hear them and you construct your own perception from your understanding of my words. So language is the communicative medium, transferring thoughts from my head to yours, no doubt with some loss of nuance but with meaning more or less intact.

Against this the deconstructionist argues that language, especially written language, is an unruly medium of conveyance. Most words we use have multiple meanings and when they are strung

into sentences all sorts of ambiguities can be created as well as eliminated. Suppose we were not interested in communication but simply in the medium—in language—so that when you heard me describe the tree outside my house your mind would wander off to reflections on shoe trees, family trees, the tree of knowledge of good and evil, the Versailles Treaty, “The Threepenny Opera.” Deconstructionists insist that it is only a convention that insists that language be valued for its communicative role and that we can value it for anything we want and therefore, if we want, we can focus on its communication-retarding characteristics—its ambiguities, buried allusions, latent puns, and so forth. Deconstructionists note disapprovingly that we tend to think of writing on the model of speech—that is, as something that brings the reader into the presence of the writer, just as you are in my presence now. This meaning of “presence” is merely metaphoric. The writer is normally absent and often dead, and if we reversed the sequence and thought of speech on the model of writing we would cease thinking of either speech or writing as primarily communicative.

The relevant thing about deconstruction is that, unlike some other aspects of the effort to relate law and literature, there is nothing, I think, for the lawyer or judge. It is one thing to be skeptical about the possibility of decoding an old or ambiguous or broadly worded statutory or constitutional provision; it is another thing to decide to treat the provision as an exercise in retarding rather than in promoting communication. The main reason deconstruction has obtained currency in our academic discussions of law is simply that it sounds like “destruction,” has shock value, and is utterly alien to lawyers’ thinking. It is a dead end; but we should expect, in any new scholarly movement, such as law and literature, many of the paths on which its practitioners tread to prove to be dead ends.

There are—I don’t deny for a moment—wonderful interpretative puzzles of literature, some of which may have parallels of law, but here is one that I contend doesn’t have such a parallel of law, although others disagree. For centuries, people have been worrying about whether Macbeth and Lady Macbeth in Shakespeare’s play had children. Although Lady Macbeth at one point refers to having nursed a child, there is no indication that she and her demonic husband have any living children; yet when the weird sisters tell Macbeth that Banquo’s descendants will rule Scotland, Macbeth is deeply distressed. Since, however, he does not expect *his* descendants to rule in any event (if he is childless), why should he be upset about Banquo’s posterity? He has nothing against Ban-

quo, who is loyal to him, except the potential rivalry among descendants. So Macbeth must have, or be planning to have, children; otherwise his conduct with Banquo makes no sense. On the other hand, it is quite impossible to visualize the Macbeths either as parents or as a young couple planning a family; so they must not have children. Is there a solution to this dilemma? Much ink has been spilled on this subject, but I think there is not. Although there are certainly insoluble statutory and constitutional questions, they are insoluble in a different way. Often we don't have enough information to interpret a statutory or constitutional provision, whereas with the question of the Macbeth progeny we have too much information. We have equally compelling reasons to believe that the Macbeths have children and that they don't have children. What is more, though the result seems to be an intolerable contradiction, no normal reader or viewer of the play is troubled in the least. Only scholars parse works of literature for contradiction. A normal audience is swept up in the drama and sets aside its normal expectations of consistency. Readers of statutes or the constitution can't do that.

There is, however, at least one type of literary interpretive problem that does have a direct counterpart in law, and that is the deliberate gap. One of the earliest and most famous examples in literature is Homer's omission in *The Iliad* of any description of Helen of Troy's appearance. Her beauty is conveyed to us obliquely by the poet's description of the reactions of the old men of Troy who watch her walking about the city—they "ooh" and "ah" and so on but we are never told what she looks like. It would be absurd, therefore, to try and draw a picture of Helen from the text of the *Iliad*, just as it *was* absurd for Vladimir Nabokov, novelist and insect expert, to draw in an essay he wrote a picture of the bug that the protagonist of Kafka's story "The Metamorphosis," Gregor Samsa, turns into. Even though Kafka was careful not to describe the bug beyond noting that it had many legs and a fat awkward body, Vladimir Nabokov after a learned discussion of the different beetle species that it might be finally decides it is thus and so and draws a picture. This procedure is preposterous. In both the Homer case and the Kafka case, the author had reasons for leaving the character undescribed. Similarly, the draftsmen of legislative provisions frequently make a deliberate decision not to resolve an interpretive question raised by the draft. Maybe they can't agree and just don't want to take the time to redraft the bill for fear that in closing one gap they will open additional loopholes. If the gap is deliberate the court may be no better able to fill it by

interpretation than a critic can describe Helen of Troy or Gregor Samsa. And then the question is whether the court shall throw up its hands or decide the case on grounds necessarily not interpretive in a helpful sense.

I have discussed the mining of literary works for jurisprudential implications and, very briefly, interpretive parallels between literary and legal texts. There are other interactions between law and literature, and as I don't have time to describe them I shall simply mention them. There is an interest in legal texts, particularly judicial opinions, as literary works having a rhetorical structure which has parallels in literature. Some of us believe, for example, that Justice Holmes was a master literary craftsman—indeed a better literary craftsman than a legal analyst—and that the memorability and impact of his opinions depends to a large extent on his mastery of rhetorical techniques that can be found in literature. The other side of this analysis of literary masterpieces of law is a critical appraisal of modern judicial prose, which for the most part is not only drab, unimaginative and unliterary, but also deceptive, bureaucratic and ghostwritten, and in other respects quite unlovely.

There is also some interest in approaching from a literary perspective the fields of law that are directly concerned with the regulation of literature, the arts, and other forms of imaginative expression. I have in mind for example defamation law. Defamation by fiction has become a major area of defamation law. Biographies of authors have revealed the extraordinary extent to which authors of works of fiction draw upon their personal experiences and thus bring into their books, often with minimum disguise, people whom they know personally, who may still be alive, who are treated very brutally—and who are beginning to bring defamation suits.

Turning to still another topic within the broad area of the regulation of literature by law, I note that a number of feminists have joined with the “moral majority” to put the heat on the dissemination of sexually explicit, and sometimes not so explicit, works of literature. From a literary perspective it is possible to argue—I think persuasively—that judgments of artistic value are impossible to make with anything approaching objectivity, so that we should not fool ourselves that if we permit censorship, but allow an escape hatch for works that the jury agrees has redeeming social value, we can be assured of sparing the masterpieces of the future.

And last, the literary perspective is useful in evaluating issues of copyright law; in particular it can teach lawyers and judges that

the emphasis copyright law places on creativity, and its insistence that there be no borrowing of details of plot or character or language without the permission of the author, rests on a debatable and perhaps transitory conception of literary creativity, and could inhibit that creativity. It is only a modern idea—an idea within the last two hundred years—that creativity consists of thinking up something brand new. The older conception of creativity was that it meant taking the best works extant and making them better. If you look at Shakespeare's plays, for example, you find that to an extraordinary extent he took details of plot and character and words and sentences and the like from his sources, like Holinshed and Thomas North's translation of Plutarch, and then he improved and rearranged and edited the prose into blank verse, producing an extraordinary transformation that under modern copyright law would be deemed plagiarism.

I will have to stop here, but this has been a brief survey and I hope it has awakened some interest in the field; depending on the ground rules, I would be happy to answer questions.

*Question:* Judge Posner, what exactly is the misunderstood relation between law and literature that is in the title of your book?<sup>3</sup>

*Judge Posner:* It is a reference to the fact that the book itself (not my talk) has a somewhat adversary cast, and spends a fair amount of time attacking the pioneering figures in the law and literature movement, people like James Boyd White, Richard Weisberg, and Robin West. I don't agree with their views and I spend a certain amount of time pointing out my disagreement. I also believe that like many new movements, the law and literature movement has been oversold; more has been promised for it by its participants than it can deliver. I don't think immersion in literature on legal themes or in techniques of literary criticism or literary history will transform people's view of law or justice or society. I don't think the movement has a revolutionary or transformative potential. I don't think for example that law and literature represents a last humanistic stand against the engulfment of law by social sciences and by massive law firms. There is some sense that with literature maybe we can change law back into the more genteel learned profession it was long ago. I don't think any of that is in the cards. I think that it is a useful perspective and deserves a place in law school and in legal scholarship, but that its potential is limited and that it is only one perspective among many.

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3. RICHARD A. POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATION* (1988).

*Question*: How did your interest in the topic arise?

*Judge Posner*: My original interest in this field was stimulated by an article by Robin West in the *Harvard Law Review*.<sup>4</sup> It had both Franz Kafka and Richard Posner in the title—an immensely flattering juxtaposition, although I did not come out on a par with Kafka. West's argument was that literature contains a conception of human nature and society that is the answer or antidote to the economic view of man in society. She used as one of her examples Franz Kafka's last story, "The Hunger Artist." The protagonist is a hunger artist; that is his profession. (In fact there were hunger artists in continental Europe until the middle 1950s.) A hunger artist is someone who starves himself in public in a competition with other hunger artists. They sit in glass cages that are guarded so that no one can smuggle them food; and they try to hold out for twenty days or forty days or some other set period. There were also hunger artists who performed side shows: you would go to the circus and see an emaciated-looking person sitting in the glass cage and outside the cage would be the number of days since he had his last meal. In Kafka's story, the hunger artist is disturbed by the fact that the demand for hunger-artist entertainment is declining, and he decides therefore that he must take the ultimate step for a hunger artist, which is to starve himself to death. He is working at a circus and has a little cage off to the side; it is not one of the central attractions and he sits there day after day getting thinner and thinner. People come by and they are really not very interested in him. He is just terribly disappointed and finally he dies and the owner dumps him and his bed of straw into the garbage and places in his cage in his place a black panther and the people perk up—they really like the panther. For Robin West, this story typifies the cruelty of the market. The hunger artist's life depends on the vicissitudes of customer preference; and as a businessman you can starve to death if the market doesn't want your product. The change of taste destroys the hunger artist's market and kills him. Just as you might say Chrysler is being "killed" by Japanese competition, the hunger artist was killed by the competition from animal shows and other competitive spectacles.

So this for West is Kafka's comment on the market and a criticism of the economist's confidence in the ability of the market to allocate resources effectively and to induce hunger artists to go into activities that consumers are more interested in. This was the arti-

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4. Robin 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).

cle that got me thinking about law and literature, reading the scholarly literature of law and literature and literary works, and re-reading the literary works discussed in this literature. Having done that I did not feel that law and economics had been overthrown; in fact I sensed no inconsistency between the two domains. Economics is a way of organizing our thinking about law, a way of gaining detachment, and translating legal technicalities into somewhat more functional terms, and it is parallel to the literary perspective in that way; but the difference is that the economic perspective has proved to have an enormous number of intensely practical applications to law of a sort that law and literature has not yet produced.

*Question:* You mentioned Professor West and Professor White in the same sentence when you first discussed law and literature together and I wonder whether you can be criticized for that in the same manner since Professor White's works really suggest that law and literature is one type of thought?

*Judge Posner:* No, they shouldn't really be bracketed; White and West are very different. They do have certain points in common—they are both very hostile to the economic point of view and they see the literary perspective as somehow redemptive. They both have the sense that the rhetoric of economics is dehumanizing and that it conceals the human stakes in adjudication. So in that respect they are similar. They are very different in that West's perspective is radical and feminist and White is very much of a traditional Matthew Arnold type—Great Books are edifying and we can become better, more ethical lawyers by reading the works of better people. He is far less critical of the legal system than West and far more respectful of legal icons like John Marshall.

*Question:* Would you comment on the deconstructionist's approach to constitutional interpretation?

*Judge Posner:* The deconstructionists go so far overboard in denying the intelligibility of communication that they lose all credibility. For example, it is a fact that at 4:30 p.m. I appeared by prearrangement in front of the parking lot on Wabash and there were two students waiting for me by prearrangement and all this was pursuant to a letter and a phone call. This is proof that communication works. People who are skeptical about that, who really don't think language is a communicative medium, that in all language there is irremediable ambiguity, can't explain the simplest type of phenomenon—you buy a piece of furniture in a box and it comes with directions. You follow the directions and you have

assembled a piece of furniture. That is the sort of thing which is a deep mystery to the deconstructionists.

There are interesting points about deconstruction, and some of the most bizarre aspects of deconstruction I would not call absurd—for example, the notion that people who think language is communicative also think that sexual intercourse is somehow better than masturbation. But their discourse is so remote from practical concerns that all it can do, transposed to law, is strengthen the originalist's position by providing a target. If you have read Robert Bork's book *The Tempting of America*,<sup>5</sup> you know that some of his most effective moments defending originalism come when he attacks radical legal scholars drunk on deconstruction. Obviously it is rhetorical rather than logical to say there is originalism or there is deconstruction, and now I will show you that deconstruction is absurd so you will have to adopt originalism. That is not logical unless these are exclusive alternatives, but it is rhetorically very effective. The critical legal studies movement is the sort of thing that you would expect to be subsidized by conservatives because it discredits radical perspectives.

*Question:* If you were the presiding judge in Antigone's trial, would you find her guilty or not guilty?

*Judge Posner:* When I teach law and literature I always take the role of the authority figures, Creon and Agamemnon and Captain Vere. I defend them because they need defenders—they are not popular figures. I think Creon had to do *something*, but clearly he had to compromise also. He went too far. It was legitimate for him to maintain that there had to be a distinction between the brother who was the traitor and the brother who was the defender of the city. They couldn't be treated with equal dignity. On the other hand, a permanent denial of burial to Polynices went too far. Perhaps having left Polynices unburied for some days, so that he had started to rot, was enough and he should have relented and allowed Antigone to bury him then. Those of you who are familiar with *Billy Budd* know that Captain Vere, while believing in Billy Budd's moral innocence, sentences him to be hanged. I would be prepared to make a stronger defense of Captain Vere because there isn't a clear intermediate solution.

*Question:* To go back to Antigone, do you think that Creon created that law specifically for Antigone because he thought that no one else would violate that edict and therefore she would?

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5. ROBERT BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990).

*Judge Posner:* I don't think so, although I don't at the moment have the text clearly enough in mind to be able to exclude what you say. There is no question that Creon finds Antigone intensely irritating and, as a living reminder that his predecessor as tyrant of Thebes was Oedipus, I'm sure he dislikes her. But my recollection is that he becomes irritated at her only after she takes a very uncompromising position in insisting on the right to bury her brother. His lack of a sense of compromise is matched by her rigidity, her defiance, and her refusal to see the dispute from his point of view. There is a fundamental tension here between the family and the city, and anyone who places his or her family above the state is disloyal. So Antigone is potentially traitorous because she attaches so much more weight to family obligations than to civic obligation. Creon is therefore a somewhat more *modern* type of person, with Antigone representing a pre-civic realm in which ties of blood and rituals of burial play a much more important role.

*Question:* It is worth pointing out in response to your question that Creon's first response is "What man did this?" That shows Antigone is, in a way, the last person that he expected?

*Judge Posner:* That is correct.

*Question:* I was wondering, with regard to this last point that you made about copyrights, which posture towards copyrights you thought was more conducive to creativity, the earlier thinking of taking the best of what exists and refining it or the more restrictive method of copyrighting we have now?

*Judge Posner:* I actually prefer the old style myself because efforts at originality so often fall completely flat. The older style of creativity has more of a craft quality and less of the romantic-inspiration quality. The notion was that you start off your career as a writer as an apprentice, not as a volcano of inspiration. There were forms—the sonnet, the ballad, etc.—and you worked within these forms, imitated the best that had been written, made your incremental improvements—and if you were a Shakespeare, your incremental improvements were fundamental. In the present system, writers are encouraged to express themselves rather than to work within existing forms. Most people have very little to express that is worth paying money to read about, and so you have people of modest abilities straining for originality and not learning a craft and improving throughout their career. If you read Shakespeare's plays you see over a period of about ten years quite a dramatic improvement in his work by dint of doing the same thing over and over again within a tradition, whereas for modern writers, who are

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.

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\*\*\* 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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