

RICHARD A. POSNER

LAW AND LITERATURE 3rd edition (Harvard, 2009) i-xi + 592 pp.

Reviewed by Robert F. Barsky

This new edition of Richard Posner's book will no doubt enhance its already sterling reputation. In reviewing the second edition (of 1998) ten years ago, I wrote that since its first appearance in 1988, it had "established itself as one of the 'standard texts' for the field of literature and law" because "Posner has an encyclopaedic knowledge of literatures from a range of eras and cultures, and he draws liberally from them in his identification of law literature relations." (*Literary Research*, 1999). The latest edition amplifies the virtues of the previous ones. Wide-ranging, well-written, and erudite, it could not only serve as the basic text for courses on literature and law, but also stimulate anyone interested in the books and the ideas Posner treats, and there is a plethora of both. It should particularly interest specialists in nineteenth-century literature, which produced many of the fundamental works that are now standard in the literature and law canon, such as *Bleak House*, *Brothers Karamazov*, *Crime and Punishment*, and *Billy Budd*. Besides examining these and reminding us that many notable writers of this period—such as Balzac and Flaubert—were trained in law, Posner insightfully analyzes work by a wide range of nineteenth-century authors from England and America, including James Fenimore Cooper, Arthur Conan Doyle, Henry Rider Haggard, Henry James, Herman Melville, Percy Bysshe Shelley, and Mark Twain.

A short examination of Posner's central passages about *Bleak House* provide a sense

of where the strengths of law and literature analyses lie. In his discussion of Dickens, Posner usefully compares the treatment of the chancery proceedings in *Bleak House* to those of the court in Franz Kafka's *The Trial*: "the early nineteenth-century English chancery court, with its leisurely course, its emphasis on documentary evidence, and its inquisitorial procedure, resembled the Continental courts more than it did the common law courts of England and America" (187). Comparisons like these illuminate both texts, particularly when we learn that Kafka "admired Dickens' novels" (187), a point that could stimulate further study of their intertextual relations. But Posner could have done much more with the role and rule of law in the works of other nineteenth century authors. He barely mentions Zola, who apparently wrote his first great work, *Thérèse Raquin*, in reaction to Raskolnikov's dialogical confession in Dostoevsky's *Crime and Punishment*, a point that helps explain crucial details of Zola's plot. Since these two novels are crucial to the study of the relation between literature and law, it is strange that Posner wholly neglects the first and says surprisingly little about the second. While there is only so much one can cover in a single book (even one of this length), and while Posner is an American legal scholar (and judge) rather than a literary critic, his lacunae are conspicuous. Besides what I have just noted, he is much stronger on the Anglo-American tradition and a few classics than he is on French, German, and especially Latin American literature.

Overlapping the gaps in the literature he treats is a larger gap in the methodology of his analyses. As I first noted ten years ago, "he and those like him never even ponder a relationship between administrative law and literary criticism, and [he] therefore misses the point about the source and the power of particular discursive conventions, as well as the self-other/author-hero relationships in law and literature." In all three of his editions, Posner misses the importance of more fundamental links between literature and law, especially in

their construction of characters, “others”, who suit particular narrative situations. I have explored this problem in my own work on how--for the purposes of the UNHCR Geneva Convention--refugees must “construct” themselves as refugees in order to be admitted as such into a country of origin (Robert F. Barsky, *Constructing a Productive Other: Discourse Theory and the Convention Refugee Claimant* [1995.]). Whenever subjects in a legal proceeding are asked to invent, justify, or exonerate themselves through the power of creative narrative, they are in important ways re-enacting what an author does when he or she “constructs” characters in order to make them convincingly play a role in a fictional narrative. In both cases the process begins from scratch. Since most refugee claimants and most fictional characters have no recorded past, they must be represented from the ground up in order to play their respective roles. To understand this process, we need the help of other theorists who have explained the circulation of social discourse: Marc Angenot, Mikhail Bakhtin and articulations of his work on self-other relations by Michael Holquist (in *Dialogism* [2002]), and Pierre Bourdieu on the ways in which symbolic relations unfold in the discourse marketplace (in *Language and Symbolic Power*, ed. John B. Thompson (1991)). But these texts, and the areas to which they refer, are all conspicuous by their absence from this text. Posner does not even refer to John Austin’s “speech acts,” which are not only crucial to the functioning of legal proceedings but also directly relate to the naming process in literature and the power of the language used in both literature and law. And, given the importance of intercultural trials, both fictional and actual, there’s also a very surprising lacuna in the absence of any discussion of François Lyotard’s *Différend*. Though these may seem minor omissions, given the vast amount of territory Posner covers, they are in fact crucial ones, since they each involve specific

points of coincidence between the two fields. Posner himself claims that “only rarely can we learn much about the day-to-day operations of a legal system from works of imaginative literature” (21), but this is true only if we ignore the fundamental overlaps that Posner himself ignores.

For all its gaps, this third edition adds new material. There is more on how literary models and techniques might be used to improve the performance of judges and lawyers, and on growing concerns about copyright law and literary plagiarism; there is also a sketch of the future of this field for which this book, in Posner’s opinion, represents “the closest that law and literature movement has come to producing” a treatise (xv). But if this is the best treatise on the topic produced so far, it is clear that we need a better one, if only because Posner seriously misrepresents the field of literary studies. In his view, literary criticism has “allowed itself to become submerged in cultural studies” (8), making English departments laughingstocks of the university. This is one of many generalizations that reflect prejudice rather than knowledge of literary studies, including such notions such as these: “except by radical critics, the greatness of Homer or Dante or Shakespeare is no longer questioned” (23); “it takes many years to separate the wheat [of literature that will survive] from the chaff [of what will not]” (23); “if there is a single property that enables a writing to pass the test of time and be received into the canon, it is adaptability to new and different cultural settings” (28). Each of these statements reveals ignorance or misunderstanding of work that has preceded his own and that has challenged--from feminist, historical or theoretical perspectives--some of the homogenous thinking about literature and the institutions employed to assess and diffuse it. Posner is likewise well behind the curve on the road of theory. Despite recent work areas such as sociocritique, or the sociology of literature, he has

just discovered that the question “what is literature” might be misleading (31), and despite the subtle complexity of such books as Robert Grudin’s *Book: A Novel* (Random House 1992) or even David Lodge’s *The British Museum is Falling Down* (Penguin 1998), he claims that in academic novels, “the focus... is on personal rivalries, comic predicaments, sexual misadventures, and other activities in which academics engage in common with other people, rather than on the things that set them apart” (34). But is the academic novel nothing but a story of ordinary life embroidered with literary chit-chat? In the spectrum that runs from the fiction of ordinary life (insofar as there is such a thing) to books on literary theory, there is much more grey than black or white, which is precisely the condition of the legal field as Posner defines it here. A work like Grudin’s not only describes the realm of theory but does so by linking its plot to the kinds of theoretical issues that are discussed in the scholarship. Likewise, Lodge’s work isn’t just intrigue and common foibles. It’s also a discussion of the stakes and constraints of literary research, from his earliest academic novel all the way up to, say, *Thinks* (2002).

Finally, Posner decries the “leftists”: those who without rigor or training or understanding occupy the silly domains of cultural studies or literary criticism (it’s unclear which he prefers, but he certainly derides the former as being the corrupting force). That he feels this way clouds his judgment and discernment, so that he ends up attacking critics who have challenged his own work, notably Robin West, whose careful feminist-inspired analysis challenges but also complements Posner’s approach by adding a whole new perspective on the questions he raises (see for example (*Caring for Justice*. [1997])). He also pigeon-holes Terry Eagleton as a “Marxist literary theorist” (160) even though Eagleton’s work spans a huge array of concerns, right up to his current considerations of atheism as the

new religion (*Reason, Faith, and Revolution: Reflections on the God Debate*, 2009). If we are to separate wheat from chaff in our assessment of literature, we might likewise sift strong versions of literary criticism or language theory from weak ones, rather than just lumping all of them together. Posner himself is weak on literary criticism while strong on law; in his own comfort zones, he offers succinct, interesting, and valuable insights on such fascinating topics as revenge, judicial opinions, and the workings of specific areas of the legal field. But despite his effort to link law and literature in mostly positive and apolitical ways, he reveals his politics in unmeasured comments, or in strange views that appear from time to time in this book, such as the observation that there has been a “dramatic improvement in the quality of life in New York” (44) beginning in the 1990s. (That, I cannot help noting, is when the homeless were dragged off the streets and expelled to New Jersey, when the sordid consumer capitalist corporation took even stronger hold of the city and when, frankly, it became a far less agreeable place because it began to cost so much money to just be there.) Posner also reveals overpowering biases in some of his literary judgments, such as the claim that *To Kill a Mockingbird* is “an inferior version of Faulkner’s novel on the same theme, *Intruder in the Dust*” (53). To prefer one novel over the other is a matter of judgment; to make one an inferior version of the other seems a little condescending. Likewise dismissive of film in general, he claims that “even the best of law films... are doubtful candidates for analysis as literary works”, because they “lack the density and complexity even of their novelistic counterparts, such as the law novels of John Grisham” (54). What about Polanski’s take on Ariel Dorfman’s play “Death and the Maiden”? Law films aren’t just whodunits or courtroom dramas, but his limited perspective on cultural representations of law leads him to think so, and thus to make such sweeping

generalizations.

This is a valuable, impressive and at times flawed book, essential for those interested in literature and law, but far from the basic text for the field. Consider the competition. In *Troubling Confessions: Speaking Guilt in Law and Literature* (2001) Peter Brooks brings manifest erudition and engaged scholarship to questions of confession, using psychoanalysis as a grounding model; Wai Chee Dimock's *Residues of Justice: Literature, Law, Philosophy* (1996) offers a powerful set of close readings linked to a range of fundamental political philosophy employed in Anglo-American jurisprudence; in *Doing What Comes Naturally: Change, Rhetoric and the Practice of Theory in Literary and Legal Studies* (1989), Stanley Fish puts his own close readings to work alongside his insights about interpretive communities; in *The Mirror of Justice: Literary Reflections of Legal Crises* (1997), Theodore Ziolkowski links literary texts that deal with law to the crises of the context within which they were written (and read); and finally, in *Law and Literature* (1996), Lenora Ledwon offers a series of foundational texts that allow students to explore the domain for themselves, making the kinds of links that seem pertinent given their interests and approaches. Posner offers an overview, with examples of how readings could be done, the kinds of traps we might fall into as either non-lawyers or non-literary scholars, and the kinds of conclusions he considers worth drawing. It's in the dialogue between his work and those of literary theorists that the field will grow, and not in a treatise shaped by the kinds of biases, however interesting, that Posner reveals.

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