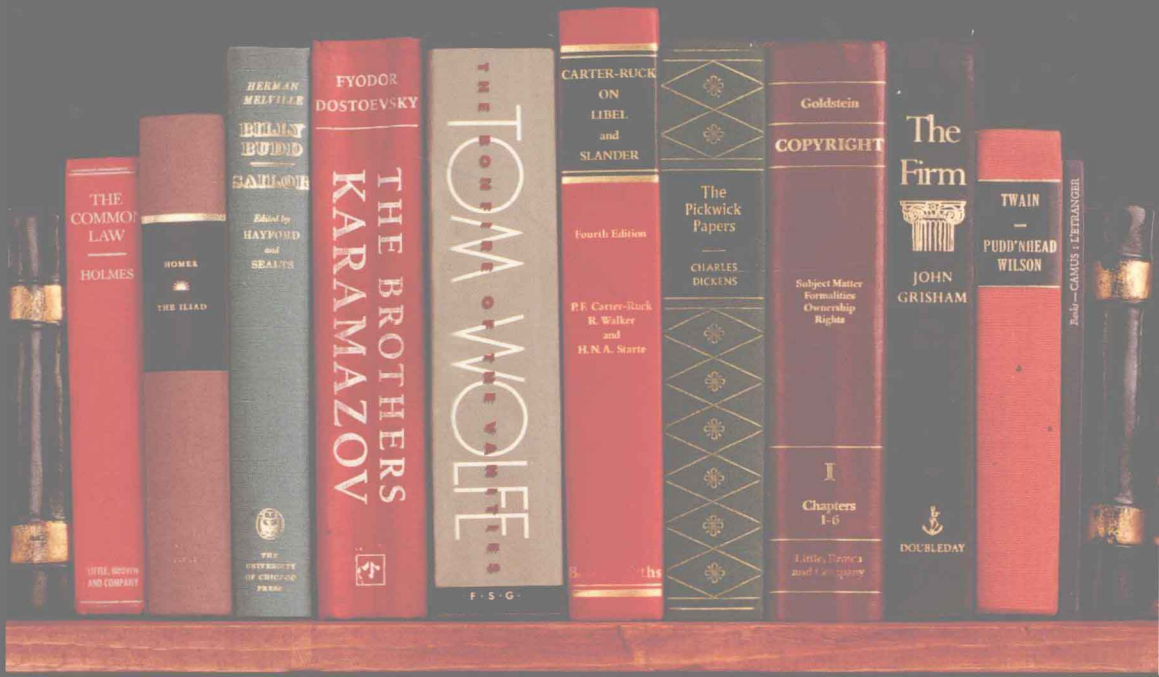
RICHARD A. POSNER



LAW AND LITERATURE

REVISED AND ENLARGED EDITION

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RICHARD A. POSNER

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For Emeline and Nathaniel

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Law and Literature

Preface

THE FIRST EDITION of this book was published a decade ago. I have continued to teach, reflect about, read about, and write about the interdisciplinary field of "law and literature." I welcome this opportunity to crystallize my current thinking in the form of a substantially revised and enlarged edition.

The field has grown in the past decade. The number of courses, in law schools alone, has doubled. Elizabeth Villers Gemmette, "Law and Literature: Joining the Class Action," *29 Valparaiso Law Review* 665, 666–667 (1995). (Gemmette reports that the first edition of this book is the most frequently assigned or recommended nonfiction work in such courses. Id. at 671 n. 46.) A number of notable monographs have appeared, including Thomas Grey's *The Wallace Stevens Case: Law and the Practice of Poetry* (1991), and Martha Nussbaum's *Poetic Justice: The Literary Imagination and Public Life* (1995). That scholars of such distinction as Grey and Nussbaum have enlisted in the law and literature movement attests to its vitality. The continued spate of symposia, anthologies, and general works on law and literature is illustrated by *Adversaria* (special issue of *Mosaic,* Dec. 1994); *The Happy Couple: Law and Literature* (J. Neville Turner and Pamela Williams eds. 1994); Ian Ward, *Law and Literature: Possibilities and Perspectives* (1995); and *Law and Literature Perspectives* (Bruce L. Rockwood ed. 1996). (See also *Interpreting Law and Literature* [Sanford Levinson and Steven Mailloux eds. 1988], published the same year as the first edition of this book.) A first-class law and literature scholarship by practicing lawyers has emerged. See Daniel J. Kornstein, *Kill All the Lawyers? Shakespeare's Legal Appeal* (1994); William Domnarski, *In the Opinion of the Court* (1996). And two new journals have been started, *Cardozo Studies in Law and Literature* and the *Yale Journal of Law and Humanities,* the first wholly, the second partly, devoted to law and literature. Nourished by the law's continuing fascination for American writers, the field of law and literature is

prospering and its status as a school of interdisciplinary legal scholarship seems secure. See Gary Minda, *Postmodern Legal Movements: Law and Jurisprudence at Century's End,* ch. 8 (1995).

The field has developed pretty much along the lines described in the first edition of this book, with two major exceptions. First, interest in the application of literary methods to the interpretation of statutes and constitutions has diminished in the face of a growing sense that interpretation is relative to purpose and therefore unlikely to raise the same issues for different interpretanda (dreams, operas, labels, constitutions, sonnets), and is also one of those activities that is not much, if at all, improved by being pursued self-consciously. My own thinking about interpretation has changed, the changes being reflected in the revisions to the chapter on interpretation.

Second, there is increased interest in using imaginative literature and its techniques to address issues remote from the jurisprudential issues—such as, How does law grow out of revenge? What is natural law? What is objective interpretation of a text? How "literary" are or should be judicial opinions? What is the relation between rhetoric and justice?—that had been the focus of the movement. James Boyd White, in his review of the first edition ("What Can a Lawyer Learn from Literature?" 102 *Harvard Law Review* 2014 [1989]), took me to task for failing to understand that the important thing is that a lawyer have a *literary* education, not that he or she read works of literature that are *about* law. Id. at 1028. Imaginative literature unrelated, or at least seemingly unrelated, to law is used by White, Nussbaum, and others as the basis for a new model of legal scholarship, which I have made the subject of Part Three of this edition. The new model emphasizes narration and reminiscence rather than analysis, prefers judicial biography to the study of judicial opinions, promises fresh insights into the plight of people (blacks and women, for example) with whom American law has had troubled encounters, and in general seeks to promote compassion and empathy by enlarging the imagination of lawyers and judges.

The chapters in Part Three are the only entirely new ones, but a number of the others have been considerably augmented, one consequence being that Chapter 2 in the first edition is now three chapters—1, 3, and 4, with old 1 having become new 2. There are discussions of works by writers not discussed in the first edition, including works by Shelley, Manzoni, Stendhal, Forster, Duerrenmatt, Gaddis, and Richard Wright; discussions of additional works by writers that were discussed in the first edition; and discussions of several works of popular fiction. All the chapters have been revised or reorganized (or both) and bibliographical refer-

ences brought up to date. Some of the new material is borrowed from books and articles of mine published since the first edition: *Cardozo: A Study in Reputation* (1990); *The Problems of Jurisprudence* (1990); *Overcoming Law* (1995); "When Is Parody Fair Use?" 21 *Journal of Legal Studies* 67 (1992); "Judicial Biography," 70 *New York University Law Review* 502 (1995); "Judges' Writing Styles (And Do They Matter)," 62 *University of Chicago Law Review* 1421 (1995); "Legal Narratology," 64 *University of Chicago Law Review* 737 (1997).

I have tried conscientiously to rethink the interpretations and other opinions expressed in the first edition. This process of reconsideration, in which I have been aided by the extensive scholarship on pertinent issues that has been published since 1988, has led to a number of changes. In addition, errors have been corrected and extraneous materials deleted.

I thank my editor at Harvard University Press, Michael Aronson, for encouraging me to undertake this new edition; Jennifer Canel, Kevin Cremin, Sorin Feiner, Simon Gilbert, Matthew Jackson, Christopher Keller, Geoffrey Manne, Neil Petty, David Sommers, and Andrew Trask for excellent research assistance; and Paul Abramson, Albert Alschuler, Michael Aronson, Jack Balkin, Wayne Booth, Richard Craswell, Joseph Epstein, Stephen Holmes, Lawrence Lessig, Catharine MacKinnon, Martha Nussbaum, Robert Pippin, Charlene Posner, Eric Posner, Richard Stern, Dan Subotnik, and participants in a Work in Progress Luncheon at the University of Chicago Law School and in the university's Rhetoric Workshop for many helpful criticisms and suggestions, and Anita Safran for expert copyediting. I take this opportunity also to acknowledge again the very helpful research assistance on the first edition of Darren Fortunato, Michael Keane, Laura Neebling, and Richard Zook, and the many helpful comments on the manuscript of that edition by Michael Aronson, David Bevington, Robert Ferguson, David Friedman, Michael Gagarin, Harrison Hayford, Stephen Holmes, Peter Jansen, Clayton Koelb, John Langbein, L. H. LaRue, Saul Levmore, Kenneth Northcott, Richard Porter, Charlene Posner, Eric Posner, James Redfield, Lawrence Rosen, Edward Rosenheim, Eva Saks, Cass Sunstein, Richard Weisberg, Robin West, and James Boyd White.

Contents

Introduction

E. M. Forster was not a lawyer, and his novel *Howards End* (1911) is not a "legal novel" even to the extent to which *A Passage to India*, which has a notable trial scene, could be said to be one. *Howards End* pivots on the contrast in style and values between a pair of German-born but Anglicized sisters, Margaret and Helen Schlegel—cultured, sensitive, high-minded heiresses of German Romanticism—and the Wilcoxes, a thoroughly English family whose men personify philistine commercial values. Margaret Schlegel marries Henry Wilcox after the death of his first wife. The unmarried Helen becomes pregnant by a pathetic young man of the working classes named Leonard Bast. Bast's wife, as it happens, had been Henry Wilcox's mistress at a time when he was married to his first wife but living in a different part of the world because of his work; and he had failed to make any provision for the mistress after leaving her.

Henry Wilcox regards the pregnancy of his unmarried sister-in-law as a deep scandal to which only two responses are possible. If the seducer is unmarried, he must be forced to marry her; if he is married, he "must pay heavily for his misconduct, and be thrashed within an inch of his life" (p. 305).[1] Wilcox questions his wife in an effort to discover the seducer's identity. Margaret doesn't want to reveal it, so she changes the subject. She asks whether Helen may stay at their house (Howards End), as Helen wants very much to do, this last night before she goes off to Munich to have the baby in seclusion. Henry is appalled, but responds mildly enough by questioning Helen's reasons for wanting to stay at Howards End. He gets nowhere—Margaret insists that the only important thing is that Helen wants to stay—and he quickly changes tack. "If she wants to sleep one

1. Page references are to the Vintage Books edition (1954).

night, she may want to sleep two. We shall never get her out of the house, perhaps" (p. 306). A lawyer's ears should prick up. This is a familiar lawyer's gambit—the "slippery slope." If you accept claim *a,* you must consider whether that commits you to accept *b, c . . . n* on the ground that there is no principled distinction among the claims, therefore no logical stopping point; and then you must consider the consequences of the entire set of claims. To suppose that this principle of argument obliterates the distinction between a visit of one night and a visit of indefinite length is absurd; and we may begin to wonder whether Henry Wilcox isn't an inflexible, rule-obsessed, in short *legalistic* reasoner, and whether his insistence that the only possible responses to Helen's pregnancy are a shotgun marriage or a criminal assault on the seducer isn't of a piece with his "slippery slope" argument in point of obtuse rigidity. Henry's legalistic bent shows up in another context. The first Mrs. Wilcox, who had been the legal owner of Howards End, had wanted to leave the house to Margaret but had expressed her intention in a note that did not comply with the formalities required for a will. Henry, standing on his legal rights, had torn up the note, perpetrating an injustice in the name of legal justice.

The impression of his obtuseness is reinforced when he fails to catch the meaning of Margaret's remark, "Will you forgive her—as you hope to be forgiven, and as you actually have been forgiven?" (p. 307). The reference is to Henry's relationship, which Margaret *had* forgiven, with the woman who is now Leonard Bast's wife. But the remark has a further significance, as an appeal to mercy over against strict legal justice. Henry rejects the appeal, saying, "I know how one thing leads to another." When he fails to react to her further remark, "May I mention Mrs. Bast?" Margaret becomes enraged. "Margaret rushed at him and seized both his hands. She was transfigured. 'Not any more of this!' she cried. 'You shall see the connection if it kills you, Henry! You have had a mistress—I forgave you. My sister has a lover—you drive her from the house . . . Only say to yourself: "What Helen has done, I've done."'" (p. 308). Even this sally has no effect. Committed to the fundamental precept of legal justice that like cases must be treated alike, Henry insists that "the two cases are different." But not being a clear thinker he is unable to identify the difference, so again he changes tack. He accuses Margaret of trying to blackmail him, thus placing her words in a legal category that he can offset against his own wrongful conduct. The charge of blackmail is false. Margaret has neither expressly nor by implication threatened Henry that unless he lets Helen stay the night at Howards End she will expose his old relationship with Mrs. Bast (and expose to whom? Who would care?). Henry is a very poor legal reasoner, but the interesting thing is that a novelistic setting remote from a

trial or any other identifiably legal scene resounds with the echo of legal rhetoric and reasoning.

The implication is that Forster associates the legal style of thinking with the failure to connect heart and mind. ("Only connect . . ." is the epigraph of *Howards End* and in effect Forster's motto.) The human tragedy, as Forster sees it, is that people become enmeshed in structures of thought that prevent them from leading emotionally satisfying lives and from being fair to one another. For example, Victorian sexual morality had, by its condemnation of homosexuality, contributed, Forster believed, to making his own life miserable. In *Howards End* this condemnation is displaced onto Henry's rejection of Helen for her lesser violation of the Victorian code. The code itself Forster would have associated with the legal mentality, for he wrote *Howards End* only a decade after the trial, conviction, and imprisonment of Oscar Wilde for homosexual acts. The implied opposition between Romantic values (those of the Schlegel sisters) and legal values is a recurrent one in literature, as we shall see; and while the excesses of Romanticism are also a theme of *Howards End*—Helen's irresponsible behavior with Leonard Bast is a factor in his destruction—Forster is more critical of legalism than of Romanticism. He imagines legal thinking to be committed to rigid dichotomies and inhuman abstractions that are insensitive to the complexities of emotion and as a result inflict needless suffering. A common literary reaction to law, it undervalues rule and abstraction as methods of bringing order out of the chaos of social interactions. But that is not the point I want to make. I want rather to suggest the ubiquity of law as a theme of literature.

Law's techniques and imagery have permeated Western culture from its earliest days. The law has engaged the attention of imaginative writers as an object of fascination in its own right, as we see in "legal" works of literature ranging from *Eumenides* and *Antigone* to *The Caine Mutiny, The Bonfire of the Vanities,* and *A Frolic of His Own;* as a dramatic and rhetorical mode, as in *Howards End;*[2] and also as a symbol of the orderly everyday world that is foil and backdrop to the disruptive situations that are the stock in trade of literature. (Most literature is about screwing up one's life in one way or another.) Law in the courtroom is agonistic, but the spirit of law is irenic and conciliatory. The first aspect of law, the forensic, provides an analogy to the troubled lives encountered in works of literature. We see

2. On the effect of legal devices, specifically the trial, on literary forms, specifically the novel, see the interesting discussion in Alexander Welsh, *Strong Representations: Narrative and Circumstantial Evidence in England* (1992); also the review of Welsh's book by Barbara Shapiro, "Circumstantial Evidence: Of Law, Literature, and Culture," 5 *Yale Journal of Law and the Humanities* 219 (1993).

this in the punning title of Kafka's novel *The Trial,* which in both English and German *(Der Prozess)* means both a legal proceeding and a personal crisis. The second aspect, law as the condition for social peace, provides contrast with those troubled lives. In recent years, a number of literary scholars have trained their sights on texts lying far outside the traditional literary canon. This enlargement of interest has brought statutes, contracts, and judicial opinions within the literary field of vision.

If the law has fascinated writers and literary scholars, literature has fascinated judges and other lawyers, lately including law professors, as a possible model for their judicial, forensic, and scholarly efforts respectively, as a possible source of insight into the social problems that arise in legal cases, and as a rich source of quotations.[3] A number of distinguished authors of literary works have *been* lawyers (or law-trained), including Donne, Fielding, Sir Walter Scott, Balzac, James Fenimore Cooper, Flaubert, Tolstoy, Kafka, Galsworthy, Wallace Stevens, and possibly Chaucer. Even Henry James was for a time a student at the Harvard Law School. Some of today's most popular writers of fiction, such as John Grisham and Scott Turow, are lawyers.[4] And literature has been drawn directly into the orbit of the law as a subject of legal regulation under such rubrics as libel, copyright, and obscenity.

Although the overlap between law and literature is ancient, as a field of organized study "law and literature" hardly existed before the publication in 1973 of James Boyd White's textbook *The Legal Imagination.* The field remained tiny until well into the 1980s. For until very recently both legal scholarship and literary scholarship were autonomous fields defined by a specific, narrowly circumscribed, and nonoverlapping body of texts (the literary canon in the case of literary scholarship, and, in the case of legal scholarship, texts ranging from statutes, constitutional provisions, and opinions to articles and treatises—all written by lawyers) that were to be mastered by the application of a specific, narrowly conceived methodology. Literary texts lay outside the field of vision of the legal scholar, legal texts outside that of literary scholars. A recent blurring of the lines that separate different academic disciplines, and a growing professionalism and intellectual ambition in "soft" fields such as literature and law, got legal scholars interested in parallel fields,

3. See William Domnarski, "Shakespeare in the Law," 67 *Connecticut Bar Journal* 317 (1992).

4. No discussion of law in popular culture would be complete without examining the depiction of law in movies and television dramas; but to attempt this would extend this book unduly. Anyone interested in these topics will want to read Paul Bergman and Michael Asimov, *Reel Justice: The Courtroom Goes to the Movies* (1996), which synopsizes and analyzes 69 movies about law, and *Legal Reelism: Movies as Legal Texts* (John Denvir ed. 1996), a collection of critical essays.

including literature, while literary scholars, as I have mentioned, have become interested in nonliterary texts, including those of law.

Although a field that at its best can engage the interest of the serious student or practitioner of law and the serious student of literature, law and literature is also full of false starts, tendentious interpretations, shallow polemics, glib generalizations, and superficial insights. This does not distinguish it sharply from most other fields of scholarship outside the domain of the exact sciences. But the point is nonetheless worth emphasizing. The proper perspective on the law and literature movement is critical as well as sympathetic.

In Part One I shall be discussing works of literature that are in some sense "about" law, broadly defined to include natural law and revenge—normative systems that are parallel to positive law and influence it. This body of literature contains many of the monuments of Western culture, including works by Homer, the Greek tragedians, Shakespeare, Dostoevsky, Melville, Kafka, and Camus, as well as by innumerable writers of popular fiction. Yet I shall argue that we cannot learn a great deal about the day-to-day operations of a legal system from works of imaginative literature even when they depict trials or other activities of the formal legal system. The reason is bound up with the "test of time" as the touchstone of literary distinction, of which more shortly. But we can learn a great deal of *jurisprudence* from some works of literature; indeed, a well-chosen set of such works would be a close substitute for discursive works of jurisprudence. In addition, as we saw in considering *Howards End,* works of literature that do not deal overtly with the law or parallel normative systems can sometimes be better understood by being approached from a jurisprudential perspective.

The second part of the book examines two kinds of legal text—the legally operative document (whether a legislative enactment, statutory or constitutional, or a contract) and the judicial opinion—from the perspective of literature. Legislative enactments that become the subjects of celebrated or controversial judicial decisions are often deeply ambiguous texts, as are many works of imaginative literature. Such enactments raise the question of objectivity in interpretation, a question that has long preoccupied literary critics and scholars as well as judges and legal scholars. The specter of hopeless indeterminacy, of rampant subjectivity, hovers over the key texts of both fields.

Judicial opinions, although sometimes opaque too, are not canonical texts and can therefore be clarified or modified in subsequent opinions without much fuss or bother. The literary issue raised by the judicial opinion is not that of meaning but that of style. Is style an integral, or merely

an ornamental, characteristic of the judicial opinion? Are there fruitful stylistic or rhetorical parallels between judicial opinions and works of imaginative literature? Is there such a thing as a "literary" judge, and is such a judge an improvement over the nonliterary judge? Have the "great" judges been more the former or the latter?

The relations between law and literature discussed in the first two parts of the book illuminate a number of topics in jurisprudence and legal theory; but, for an increasing number of legal scholars, inspired in part by philosophers and literary scholars, this is not enough. They want to reclaim law as a humanity from economists and economics-minded lawyers, who view law as a social science. They want to do this both by giving lawyers a literary education and by shifting the emphasis in legal scholarship—any legal scholarship, however remote the subject matter may seem from literature—from analysis to narrative and metaphor. Some want to bring works of imaginative literature into the legal classroom in order to present vivid pictures of the despised, the overlooked, and the downtrodden, and by fostering empathy for them to encourage legal reform along egalitarian or even revolutionary lines. This novel turning of the law and literature movement, one manifestation of which is an increased interest in biography and autobiography, is the subject of Part Three of this book. I am deeply skeptical about this branch of the law and literature movement. It has all the drawbacks of the didactic or moralistic school of literary criticism founded by Plato—of which, indeed, it is the continuation into legal studies—and more.

The single chapter of Part Four examines several topics in the regulation of literature by law. (An allied topic, the regulation of pornographic literature, is taken up in the chapter in Part Three on moralistic criticism, Chapter 9.) I discuss defamation by fiction and some implications of literary theory and scholarship for copyright protection, with particular emphasis on creative imitation (a term that only seems like an oxymoron) and on parodies. In the interest of literature itself, I caution against expanding the present scope of copyright protection of authors of imaginative literature.

It is in the areas discussed in Part Four, the areas in which the law regulates literature, that the law and literature movement can be expected to have its greatest impact on law. But there is just a chance that in the long run the movement will affect even more strongly ways of thinking about justice, interpretation, the judicial opinion, legal education, and legal scholarship, though this impact is bound to be more diffuse and only obliquely related to practice.

A curious thing about the works of literature that constitute the ever-

shifting canon of great literature[5] is their mysterious capacity to speak to people who live in different times, which often means in different cultures, from the time and culture in which the work was written. These works have a measure of *universality*—it is what enables them to pass the test of time, to survive into cultures remote from those of their creation. "The poet," as the critic Cleanth Brooks put it in words that are equally applicable to any writer of what comes to be considered great literature, "is constantly relating the human predicament of his time to the universal qualities of human nature through all the ages. His view of a situation, however sharp and immediate, is nevertheless always part of a long view."[6] If this is right, and I think it is, it has several cautionary implications for the law and literature movement. It implies that the movement will make a greater contribution to illuminating jurisprudential issues than to understanding or improving law at the operating level, that it will contribute little to statutory or constitutional interpretation, and that it will not guide legal scholars, judges, and other members of the legal profession to a resolution of any of the burning issues that confront American law today.

Readers should not infer from my emphasis on the limitations of the law and literature movement that my overall attitude toward it is negative. I support it and wish to see it flourish—not necessarily on my own terms, but with due consideration both for the drawbacks of some of the approaches that have been taken and for the advantages of the approach taken in this book. I want it to flourish but not to be overrated. Law and literature have significant commonalities and intersections, but the differences are as important. Law is a system of social control as well as a body of texts, and its operation is illuminated by the social sciences and judged by ethical criteria. Literature is an art, and the best methods for interpreting and evaluating it are aesthetic. There is no inconsistency between being a formalist in literature and an antiformalist, a pragmatist, in law—which happens to be my position. But that is a detail. My principal aim in this book is not polemical. It is to describe this still-new field of interdisciplinary scholarship and to mine it for fresh insights.

5. More precisely canons, since people from different cultures have different conceptions of the body of great literature. This is an issue examined in Chapter 1.

6. Quoted in Robert Penn Warren, "A Conversation with Cleanth Brooks," in *The Possibilities of Order: Cleanth Brooks and His Work* 1, 10 (Lewis P. Simpson ed. 1976).