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Recommended Citation

Lewis H. LaRue, *Posner on Literature*, 85 Mich. L. Rev. 325 (1986).

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Citation: 85 Mich. L. Rev. 325 1986-1987



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CORRESPONDENCE

Posner on Literature

L.H. LaRue*

Judge Richard A. Posner has expanded the scope of his writing. We have previously known him as one of the leaders in law and economics. He is now moving into the field of law and literature. His offering is an article, *Law and Literature: A Relation Reargued*, which has been published in the *Virginia Law Review*.¹

As one might expect, he performs intelligently. Posner is well read in literature; he displays a genuine love for that which he has read; and he writes with wit and grace. In short, in law and literature, as in law and economics, Posner is a force to be reckoned with. The evidence for these assertions can be found in the article: his comments on W.B. Yeats' poems *Easter 1916* (pp. 1363-64, 1366) and *The Second Coming* (pp. 1378-79) demonstrate his skill as a reader of poetry; his literary analysis of Justice Holmes' dissent in the *Lochner* case (pp. 1379-85, 1389-90) shows that he can apply these literary skills to a reading of judicial opinions.

However, I must utter a "however." As I read Posner (and I would recommend others read him) he builds his analysis on the base of several dichotomies that seem to be drawn from ordinary common sense. One of the dichotomies is the distinction of pleasure versus instruction. Another is form (or style) versus content. Yet another is science versus rhetoric. These several dichotomies are linked into a logic that provides the structural underpinning for Posner's analysis; my caveat is that the logic of these dichotomies limits rather than strengthens his analysis. This is my conclusion, so let me now start at the beginning.

Posner starts unobjectionably enough by noting that literature is that which we treat as literature; the poet may offer something as a poem, but we must accept (p. 1355). This is a satisfactory starting point. The next step is to ask: why might we accept? Posner's answer here is conventional, but none the worse for being so; we accept a work as literature because it deals with great themes that have mean-

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1. 72 VA. L. REV. 1351 (1986).

ing across generations of humankind. One of the great themes is law, which is at the core of many works of literature (pp. 1354-56).

As a starting point, none of this is objectionable, although most of us who have labored in this particular vineyard would find it incomplete. The mystery of literature's survivability is complex, for it is not altogether clear what "survive" means in this context. To say that a poem or a novel survives by being read says nearly nothing, for the word "read" is a word of enormous ambiguity and equivocation. The problem here is that Posner rests with the common-sense meanings of "survive" and "read," whereas I think that there is some difficult conceptual and theoretical analysis that must be done. Posner would perhaps not disagree with this; I suspect that in his forthcoming work (we can surely expect more) Posner will address these questions. In his work in law and economics, he has proved himself to be adept at theory, and so we can expect him to address these theoretical questions at some future date. However, in this particular article, Posner does not wish to address the theoretics of reading; he has more immediate questions, to which I would now turn.

Let us take as granted the fact that the problems of law and justice are profound themes in some of the treasures of our literature. One can then ask two questions: Do lawyers have anything special to say about this literature? Does this literature have anything special to say to lawyers? Judge Posner's answer is skeptical on both counts, and since the skeptic can always be rewarded by having good grounds for his skepticism, it follows that much of what Posner says will be true. Even so, I differ; let me explain.

Take the first question: do lawyers have anything special to say about literature that deals with law? Posner is surely right in being skeptical about any affirmative answer to this question. Unless the well-trained lawyer is equally well educated in literature, his or her comments about *The Merchant of Venice* or *The Trial* are likely to be shallow or otiose. However, Posner does cite lawyer-critics such as Richard Weisberg and James Boyd White (p. 1358 n.29), and he cites them approvingly. I would go further and cite them enthusiastically; the combination of literary training and legal training combines fruitfully in them, so that I am tempted to cite the old maxim about the whole being greater than the sum of its parts: their literary criticism is enriched by their reflections on law. Although I am confident about this judgment, I do not wish to argue it; one can read White and Weisberg and decide for oneself; and at any rate, Posner's second question is the important one.

Posner's second question is: does literature have anything to teach

lawyers? Here too, it is reasonable to be skeptical; it is fair to put the burden of proof on the proponent. Consider Posner's remarks on statutes (pp. 1360-75). Posner separates the world of statutes and the world of poems by way of the dichotomy of instruction versus pleasure. Statutes are written to instruct us about what we ought to do, but poems do not have this sort of directive function. We read poems for pleasure. Consequently, one can argue that the art of interpreting poems is irrelevant to the task of interpreting statutes. On the surface of the matter, this seems to be simple common sense. However, common-sense dichotomies are always suspicious.

As an analogy, consider "play." Children play at games and at make-believe, singly and in groups, with great pleasure and true intensity. And the reason that they play is because of the pleasure. But to suggest that they are not thereby instructed in some of the most important things that they need to know is to suggest something that is surely false. Indeed, it appears that the inscrutable ways of divine providence have decreed that we are instructed in the most important things in the most indirect of ways. I think something like this must be true of literature. Narrative, myth, poetry, and song appear to be among the most ancient products of language. The systematic treatise comes late, and I think it would be foolhardy to suggest that instruction from science somehow has priority over fairy tales.

My own analysis of statutes would be to suggest that every statute does more than simply instruct; it also creates a "fictive world." Everyone who writes a statute makes a claim, albeit an implicit claim, that the statutory words are adequate to address a particular set of problems. This implicit claim is sure to be false and fictitious. Literature has much to teach about the way in which statutory language is fictitious, since poets themselves have spoken profoundly on the problem of speaking. To be sure, this literary knowledge may not help lawyers and judges decide cases, but it does reveal things which are of practical importance to them, such as: Why do most people think legal talk is alien? Why is the word "legalistic" a pejorative? The "fictive world" of statutory language is bizarre, and literature can teach lawyers why this is so.

With respect to judicial opinions, Posner grants that there is something that literature can teach. His point of concession rests on the proposition that a judicial opinion is drafted to persuade as well as to instruct, and further, to persuade in circumstances where we do not have scientific knowledge. Without science, we cannot persuade by fact and logic alone. The something more is found in rhetoric, in which one uses the devices of style to persuade. Lacking science, we

do not suspend judgment, for judgment is necessary. Lacking science, we are open to persuasion in many ways (pp. 1375-79). This analysis links two dichotomies; the science-versus-rhetoric dichotomy is linked to the form-and-content dichotomy. In science, the form (or style) is said by Posner to be irrelevant; the meaning of a scientific treatise depends solely upon its content. However, literature is more like rhetoric than it is like science; in literature and rhetoric, form is not irrelevant. Meaning is determined by a combination of form and content, and persuasion is generated by the extraordinary power that this combination of form and content can create.

By this view of the matter, literature has much to teach us. If we wish to learn about style, we need to turn to the place where style is most magnificently demonstrated, that is, to literature. And we can be aided in our study of style by the guidance of literary critics, who have made it their specialty (p. 1375). Having gained this knowledge, we can carry it back to the province of the judicial opinion. There, we can study what judges do, and with our increased sophistication in matters of style, we can see better how they go about doing it, that is, how they go about persuading us. Alternatively, we can improve our own style, and thus be more able performers (pp. 1388-91).

I do not wish to say that these things are false. What Posner says about judicial opinions is true enough at the level of common sense, but I would prefer to strike out in another direction. I would say here some things that are analogous to what I have said about statutes. Here too, the most important implicit claim in any judicial opinion is the claim that it makes sense to talk about the world in this way. The deepest criticisms are those which call into question the terms of description and of value that the judge is employing. Literature has much to teach here, especially about narrative. Most judicial opinions contain a "story"; it is called "the statement of facts." Unfortunately, it is usually a rather bad example of the narrative art. My point is not merely that the judicial "short story" lacks grace, but that it lacks imagination. Lawyers and judges need to ponder such questions as: Why are litigants frustrated even when they win? Is it necessary for opinions to leave out as much as they do? Do novelists tell stories that are truer than those that judges tell? How is it that a statement of facts, all of which are true facts, can still be false as a story?

I freely admit that my commentary on Posner is vulnerable; what I have said is an example of the genre — I am more interested in talking about what he didn't write than about what he actually wrote — and the genre is suspect. Perhaps I have uttered irrelevancies; perhaps I have raised questions for further inquiry; the reader must judge.