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LAW AND LITERATURE: A MISUNDERSTOOD RELATION¹? THE CRITICISM OF RICHARD POSNER AND ROBERT WEISBERG TO THE LAW IN LITERATURE MOVEMENT

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ABSTRACT: The *law and literature movement*, started in 1973 in the United States with the release of *The Legal Imagination*, by James Boyd White, had as its main objective to reach the humanization of jurists. Although it caught the attention of several authors and spread to different countries, the initial stage of the movement, also known as law in literature, was not immune to criticism. Thus, this article, via bibliographic research, aims at presenting the criticism by Richard Posner, who mainly questions the premise that literature can humanize the jurist. Also, this paper analyzes the production by Robert Weisberg, who sees in the area an overly-romanticized view of literature. Knowing such criticism is crucial to think about the past, present and future of the movement, searching for the right answers it demands.

KEYWORDS: Law and literature; Law in literature; Criticism; Richard Posner; Robert Weisberg.

1 INTRODUCTION

In 1977³, J. Allen Smith (1979), professor of law at the *Rutgers School of Law* and creator of the *Law and Humanities Institute*⁴, made a

¹ This is a reference to the subheading to the first edition of Richard Posner's book (*Law and Literature: A Misunderstood Relation*) from 1988, which was omitted in the second edition (1998). This article is based on the author's Ph.D. dissertation, presented at Universidade Federal de Santa Catarina (UFSC), titled "*Law and Literature*" e "*Direito e Literatura*": estudo comparativo entre a produção acadêmica do movimento nos Estados Unidos e no Brasil ("*Law and Literature*" and "*Direito e Literatura*": a comparative study between the movement's production in Brazil and in the United States) (Oliveira, 2019).

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significant prediction: law and literature were about to reapproach and soon would be related, as in times gone by⁵. Indeed, some years before that, in 1973, James Boyd White had published *The Legal Imagination*, which is considered a starting point for the standardization⁶ of the studies in the area.

Written as a textbook, with exercises and activities, the objective of the book was to help the law student to read and write more proficiently, offering analytical questions to foster critical thinking by future jurists (White, 2018). By doing so, *The Legal Imagination* was, in general, well received by North-American jurists⁷. There is, for example, the aforementioned article by Smith (1979), which emphasizes the condition of law schools in the United States, defending the idea that the students were eager for change in their complicated situation, especially regarding the ever-growing distance between the law and the real world. Professor Robin West (1988) was also influenced by White's ideas, and created two opposing categories, the *economic man* and the *literary woman*, in order to work not only the dichotomy of gender, but also of empathy and world perception in the moment the movement was rising⁸.

³ The article was originally presented in 1977, at the *Maryland Law Forum*, but it was published only in 1979, in the *Journal of Legal Education*.

⁴ Na institute created in 1978, concerned with interdisciplinary research in Law and Humanities.

⁵ It is possible to infer by reading the works of Robert Ferguson (1984), *Law & Letters in American Culture*, that these times gone by refer to the first years of the North-American Republic, since its revolution for independence, in 1776, to the fourth decade of the 19th century. The main argument defended by Ferguson (1984) is that the United States of the late 18th century, a young nation with no tradition or identity, needed to overcome aesthetical and intellectual obstacles in order to have a founding myth.

⁶ Other North-American authors, such as Irving Browne (1883), John Wigmore (1922-1923), Benjamin Cardozo (1925), Helen Silving (1950), as well as Brazilian authors, such as José Gabriel Lemos Britto (1946), and Aloysio de Carvalho Filho (1958), had written about Law and Literature long before White. His production is considered a starting point, however, for the standardization of research in the area: the creation of subjects, research groups, colloquiums and diverse events, among others.

⁷ So much so, the book by White had, so far, three released editions: the original one, of 1973, by Little Brown; the abridged one, by Chicago Press; and an anniversary edition, in 2018, for the 45 years of its release, by Wolters Kluwer.

⁸ It so happens that in the 1970s the legal academia in the United States was under the influence of the *Law and Economics Movement*, which, shortly, is concerned with the economic impact of the laws and legal decisions, and defends “the application of economics to understand all forms of human behavior and consequently all legal regulations of such behavior” (Heinen, 2016, p. 48). So, the key word for the *Law and Economics Movement* is rationality; Jurists tend to defend their own interest from rational choices, which maximizes the profit. However for West (1988), the economic man is filled with certainty, but devoid of empathy. For that matter, West (1988) suggests economic standarts are not the best ones to rule over the legal area, especially in difficult

This first moment of the law and literature movement, therefore, is marked by a humanistic bias, dedicated to viewing the law in literature in order to humanize the legal practitioners. So, it is important to highlight that it has become very common⁹ to state that the law and literature movement has, at least, three branches: law *of* literature, related to copyright matters; law *in* literature, whose objective is to identify the representation of the legal universe in fictional works; and law *as* literature, which has the intention of understanding the legal text as a literary text, and, hence, using literary interpretation techniques to understand the law¹⁰.

However, Julie Peters, in an article titled *Law, Literature, and the Real Vanishing: On the Future of an Interdisciplinary Illusion* (2005)¹¹, moves away from this traditional classification to see the movement based on projects¹²: the *humanist* project, initiated by White in 1973; the

cases, since they directly affect the lives of individuals. To explain that, she creates the idea of the literary woman who, as opposed to the economic man, is filled with doubt and uncertainty, admittedly ignorant of her own subjectivity. Literature, thus, is seen as a self-discovery tool; It is through Literature and stranger narratives that little by little she discovers herself, accomplishing, this way, the exercise of empathy.

⁹ It was not possible during the research to identify who first proposed the division in branches. The classification seems granted, consensual, thus, it is common sense.

¹⁰ In particular, I believe that this division into strands gives little information about the proposed interdisciplinary connections. What does it mean to identify the representations of Law in literary works? Is the purpose to search the literary work for teaching tools, documentary sources for the history of Law, insights for the legal philosophy? And as for the Law seen as Literature – is it necessary to apply onto legal documents the techniques of the theory of literature, of hermeneutics, of discourse analysis? All these questions allow positive answers, which demonstrates the infinite possibilities of approximation between the two areas.

¹¹ It should be noted that Peters (2005) is skeptical of the law and literature movement, and in 2005 announced its death. However, her classification can encompass the complexity and comprehensiveness of the subject, as it identifies the intentions of the proposing jurists (in the humanist project, humanizing the law through literature; in the hermeneutic project, using literary theories to interpret legal texts). One criticism that her classification deserves is to treat the North-American law and literature movement as a linear narrative, as if the projects were temporally successive and homogeneous among themselves. In this sense, I agree with the analysis of Thomas (2017), for whom the projects occurred simultaneously, in Law schools and Literature schools.

¹² The nomenclature *project* seems more adequate than the vague term *branch* and the idea of *phase* (as if the Law and Literature research history followed some sort of specific chronological order, which is not true).

hermeneutic project, begun by Dworkin in 1982¹³; and the *narrativist* project¹⁴, started by Richard Delgado in 1989.

According to Peters, the humanist perspective had as its main trait “its commitment to the human as an ethical corrective to the scientific and technocratic visions of law that had dominated most of the twentieth century” (2005, p. 444). Driven by the belief that literature could somehow bring reality into law, authors such as James Boyd White and Richard Weisberg themselves envisioned that interdisciplinarity could push technicality away from the field, while bringing literature to the forefront of political practice, denouncing truths about power.

However, it is a mistake to believe that this humanist project emerged in a peaceful way, free of criticism and controversy. Thus, the main objective of this article, via bibliographic review, is to present two of the main critics of the humanist project (or of law in literature): Richard Posner, famous for his writings on economic analysis of law, and Robert Weisberg, who, even though writing about law and literature, critically evaluates some aspects of the movement.

While Posner (2009) questions mainly the premise that literature can humanize the legal practitioner, Robert Weisberg (1989) identifies in the works of the area a romanticized view of literature, seen as the great savior of the law. Thus, agreeing or not with these criticisms, it is essential to know them to reflect on the directions that the movement has taken and to be able to give them the appropriate answers.

¹³ Especially with his chain novel theory, which would be sharply criticized by Stanley Fish (1982).

¹⁴ According to Peters (2005), the American narrative project has a strong influence on feminist theory and critical race theory. Considering that feminist studies were once again giving voice to women and their conditions in society and that, in the legal area, there are hegemonic narratives that ignore such conditions, the narrative project sought to present reports of the subjects themselves excluded from this speech scenario to, thus, revolutionize the Law. However, this perspective should not be mistaken by José Calvo González's *Narrative Law Theory*. While in Calvo González (1996) there is a discussion stemming from the hermeneutic project itself, concerning language and interpretation, the North American narrativist project is influenced by feminist theory and the critical theory of race that come to integrate the theoretical body of literary theory. On Calvo González's narrative theory applied to Brazilian law, check Ferrareze Filho (2017).

2 LAW, LITERATURE, AND A MISUNDERSTOOD RELATION: THE CRITICISM BY RICHARD POSNER

One of the most acknowledged critics of the *law and literature movement* is the judge and professor Richard Posner, known for the *law and economics* movement, in which, in 1986 wrote his first article¹⁵ on the topic, titled *Law and Literature: a relation reargued*. In this article, Posner (1986, p. 1352) explains he did not know of the existence of the *law and literature movement*, until he read an article that was publicly criticized by professor Robin West, which was based on Kafka:

It was only in the course of preparing a response to an attack on the economic model of human behavior surprisingly pivoted on the fiction of Kafka that I became acquainted with the law and literature movement and began to realize that it had potential applications, not to economic analysis, but to the interpretation of statutes and constitutions and the writing of judicial opinions, which are now professional concerns of mine.

The controversy between West and Posner started in 1985, when she wrote the article *Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*. It was the response to an article by Posner (1980) in which he understands social relations as market transactions; Hence, considering that such relationships are consensual, their moral foundation is the very idea of consent, because through it, individuals seek a maximization of wealth, promoting well-being and individual autonomy.

West (1985, p. 427) disagrees on that, for she believes social relations are not always based on consent, but also in other factors: we consent “because we recognize the virtue of the values the institution reflects, because we think of the institution as operating for the most part in our self-interest, or because consenting to authority confirms our feeling of guilt and meets our need for punishment”.

What interests us, however, is related to the justifications and examples used by Robin West (1985) in her arguments: she takes them from several works by Kafka, which was heavily criticized by Posner (1986, p. 7):

¹⁵ According to the Professor's curriculum, available at: <https://www.law.uchicago.edu/faculty/posner-r>. Accessed on: April 16, 2018.

I would be happier still if her paper and this reply had been submitted to a journal of philosophy or literature rather than to the Harvard Law Review; for though I would be the last person in the world to quarrel with the application to law of insights from other disciplines, there are no applications to law in Professor West's article.

[...]

One might have expected her to ground this position in the literature of the social sciences. But instead she draws her evidence entirely from fiction, her own and Kafka's.

[...]

Professor West's approach, however, seems particularly eccentric. She reads Kafka so literally that the incidents and metaphors from business and law in his fiction become its meaning. That is like reading Animal Farm as a tract on farm management.

[...]

If you do not read Kafka tendentiously, looking for support for one ethical or political position or another - if you abandon yourself to the fiction you will not, I think, be inclined to draw inferences about the proper organization of society.

[...]

Because Georg's friend, a brooding omnipresence in the story, is an unsuccessful businessman, Professor West conceives the story to be about capitalist alienation. How dull!

From this criticism, one may see that Posner's position is somewhat skeptical in relation to the use of literature to discuss legal and/or political matters. Such impression is confirmed in another article, in which the author criticizes the law and literature movement and highlights which would be, in his opinion, a safer relation between the two disciplines. *It should be noted, therefore, that Posner does not reject an interdisciplinary approach between law and literature;* He only proposes different paths for its realization, as will be shown.

The first objection of Posner (1986b, p. 1355-1359) is that legal abilities are not crucial to act as a literary critic; he even thinks the analyses made by professors like James White have quality content, but only because he has a degree in English language or literature, nor because he is a jurist. Besides, for Posner (1986b, p. 1356-1357), many literary Works allegedly have legal content, when, in fact, they do not. Except for cultures whose

only vestiges left are present considered literary (such as the epic Nordic tales, known as *Eddas*¹⁶), the practical law, which is of interest to lawyers and judges, is in statutes, judicial opinions, and other legal texts. In literature, even if there is a court, judge or lawyer, the topic never is the law itself (or the laws), but rather philosophical topics such as the concept of justice, revenge, love, among others. As an example, Posner (1986b, p. 1357) mentions *The Merchant of Venice*, by Shakespeare:

At one level the play is about the enforcement of a contract that contains a penalty clause, which the defendant avoids by a technicality. Even in Elizabethan England the contract would have been unenforceable and the trial regarded as farcical. The legal dispute is not the point of the play but a convenient metaphorical framework for contrasting two modes of social interaction: the arm length dealing of mutually suspicious strangers and the way of altruism and love. Shylock the Jew symbolizes the rejection of love, embodied in its specifically Christian form by Jesus Christ, in favor of commercial, self-interest. Antonio, the Merchant of the title, is a symbol of Christ, and Portia, I believe, a symbol of practicality and good sense.

The presence of these topics in literary works is explained by Posner (1986b, p.1356) based on the idea of what a *classic* is. A literary work is not born a classic, it becomes so, as long as it is able to call attention of different people in different times and spaces. To do so, it is common that the author seeks universal topics that structurally change little, such as love, ambition, the human nature, and, also, topics related to the law: “Specific doctrines and procedures may change, but the broad features of the law do not” (Posner, 1986b, p. 1356). For this reason, elements of the law may even be present, in a certain way, in literature, but not in function of the prevailing law, but of the author’s search to give the work a classic character.

It does not mean, however, that the author opposes himself to any relation between law and literature. Actually, Posner (1986b, p. 1375) believes literature has much to teach the jurist, but, in this first moment, he emphasizes *form*, especially regarding the writing of judicial opinions.

¹⁶ On the subject, it is interesting to see *Law and Literature in Medieval Iceland*, by Theodore Andersson and William Miller.

For Posner (1986b, p.1376), judicial opinions, a kind of vote cast by judges in collegiate courts, are a form of rhetoric, especially when referring to the so-called hard cases, which cannot be purely decided on the basis of legislation and deal with complex topics such as abortion and euthanasia. Literary critics are rhetorical specialists and can therefore assist in the development of this type of writing.

Most legal texts, such as norms and contracts, need not concern themselves with form, since they need not persuade anyone, as they emanate from the State authority itself or from the autonomy of the parties' will. However, the votes of judges are nothing more than rhetoric and need to persuade their recipients, based on various criteria such as plausibility, ethical appeal, among others. To prove his point, Posner (1986b, p. 1379-1385) analyzes a judicial opinion and explains the rhetorical tools found there: the judge stands as a simple citizen; He builds layers of arguments without revealing his opinion at once etc. For that reason, it would be helpful for judges to learn values from literary writing, such as complexity – not using a simple manicheist bias –, the correct use of words, the building of argumentative layers, so as to improve the procedural texts and, consequently (but not only), the way the hard cases are justified.

In 1987, Posner wrote his review for *The Failure of the Word: The Protagonist as Lawyer in Modern Fiction*, by professor Richard Weisberg. In the text, Posner (1987, p. 1176) once again emphasizes the confusion made between fiction and reality, by saying that “Professor Weisberg's book is about law and lawyers only in the sense in which a certain conception of law might be thought to signify resentment and hence injustice”. Furthermore, he demonstrates that an interpretation by Richard Weisberg of on the application of nineteenth-century British maritime law is historically wrong, according to the norms at the time. The empirical application of his skepticism is visible here: sometimes literature is just literature.

A year later, Posner releases the first edition of his book *Law and Literature: a Misunderstood Relation*, in which he continues to develop his

criticism of the law and literature movement. The book has a second edition in 1998, renamed *Law and Literature*, and a third one in 2009, retaining the last title.

The 2009 edition, the most recent one regarding the making of this paper, features a more tolerant Posner, although he keeps many of his former opinions. In the preface, the author (2009, p. xi) states that “a literary sensibility may enable judges to write better opinions and lawyers to present their cases more effectively”.

As for the humanist project, Posner (2009) defends now a slightly different opinion than that of the 1986 article: even if dogmatic law (the laws themselves) is not visible in literary works, there are books *about* the law. The main question is explaining what it means for a certain work to be *about the law*, since such characteristic can be seen in a very generalist way, encompassing the natural law and revenge, and may as well regard to specific normative systems, parallel to the positive law, which have some kind of influence over it (for instance, laws and customs of traditional communities). For that matter, it is possible to learn not about laws, but about the philosophy of law, from literature:

But this depends on the meaning of “about.” Literature may contain many details of vanished social customs without being “about” them, or without being just about them. The Homeric epics contain a wealth of information, though much of it garbled, about Mycenaean culture. But if they were merely a depiction of vanished customs they would be read today just as historical or sociological source documents, as the Icelandic sagas largely are (Posner, 2009, p. 31).

It does not mean, however, that the author has no objections as to the way law and literature studies had been conducted up to the publication of his book. For him (2009, p. 6), the quantitative growth of productions on the topic encouraged a profusion of publications in general in the North-American legal academia, but it does not mean a qualitative growth of studies on the topic. So much so, amongst the difficulties faced by current researchers, Posner (2009, p. 6-7) highlights amateurism:

the plague of interdisciplinarity: the lawyer writing about literature without literary sensitivity or acquaintance with the relevant literary scholarship, the literary scholar

writing about law without legal understanding. The scholar who crosses academic boundaries risks losing the benefits of specialization, but that is not the major danger, because specialization has costs as well as benefits; it has for sure not brought unalloyed gains to literary scholarship. The greater danger is the attractiveness of interdisciplinarity to weak scholars as a method of concealing weakness. The literary scholar who writes about law is apt to be judged indulgently by other literary scholars, impressed by his apparent mastery of another field, and the legal scholar who writes about literature is apt to be judged indulgently by other legal scholars similarly impressed.

Besides that, another aspect mentioned by the author (2009, p. 7) is about the absence of defined boundaries on how to study the topic, which generates, as a consequence, “lack of coherence, along with indiscriminateness, jargon, and a pervasive left-liberal political bias - all of which turn out to be related to each other and also to the misconceived humanizing Project”.

In summary, Posner (2009, p. 16) criticizes the understanding of how the study of literature, especially the classics, can help the study of the law, based on the supposed humanization of the jurist (the premise that literature can help humanize the law). For Posner (2009, p. 7), this view could not be more wrong. According to the author (2009), literary characters should not be good or bad, but interesting.

This does not mean that literature is incapable of generating political or moral consequences, since “information and persuasion affect behavior, and literature, as we know, both informs and persuades” (Posner, 2009, p. 457). The point is that these consequences are generated at the time of publication of the work, that is, when it is not a classic yet, coming to stabilize and lose the controversial character over time. To strengthen his argument, Posner (2009, p. 458) presents three premises:

The first is that immersion in literature does not make us better or worse people. A few works of literature may, as just suggested, have such an effect because of the information they convey or the emotional wallop they deliver, but they are a skewed sample of the great literary works. Second, we should not be discountenanced when we encounter morally offensive views in literature even if the author appears to share them; a work of literature is not maimed by expressing unacceptable moral views and a mediocre work of literature is not redeemed by expressing moral views of which we approve. Third, the

author's personal moral qualities or opinions should not affect our evaluation of the work.

As he continues his explanation, Posner (2009, p. 458) states that viewing in literature a pedagogical and moralizing character contradicts a tradition in literary criticism, originated by Plato, who distrusts artistic works.:

Plato, Tolstoy, Bentham, and the Puritans, among others, were deeply suspicious of literature and the arts and unwilling to grant any value to literature that contained immoral ideas. Devotees of the “naked truth,” whether religious, philosophical, or scientific, these eminences despised surface and figuration and hence found no redeeming value in immoral literature. Plato thought the physical world a pale copy of the world of the immortal Forms, which he thought accessible only to philosophy—and literature was just a copy of the copy.

One can infer that Posner (2009) considers both views too extreme, of literature having political or moral value and being the salvation of the law, or of not having any value whatsoever and being ignored. Thus, he begins his criticism of the humanization of the law from literature by recalling that it was in Germany, the birthplace of important cultural, artistic and philosophical traditions, that Nazism flourished.

Moreover, it is not by deeply knowing the classics that literature professors have better lives: “Immersion in literature and art can breed rancorous feelings of personal superiority, alienation, and resentment” (Posner, 2009, p. 462). This is valid for the works of art themselves; The classics have ambiguous moral content, since, depending on their production context, some attitudes represented as natural may no longer be acceptable in present times:

Rape, pillage, murder, human and animal sacrifice, concubinage, and slavery in the Iliad; misogyny in the Oresteia and countless works since; blood-curdling vengeance; antisemitism in more works of literature than one can count, including works by Shakespeare and Dickens; racism likewise; homophobia (think only of Shakespeare's Troilus and Cressida, Mann's “Death in Venice,” and Sartre's chilling “The Childhood of a Leader”); monarchism, aristocracy, fascism, Stalinism, caste systems and other illegitimate (as they seem to us) forms of hierarchy; colonialism, imperialism, religious obscurantism, militarism, gratuitous violence, torture, mutilation, and criminality; alcoholism and drug

addiction; stereotyping; sadism; pornography; machismo; cruelty to animals; snobbism; praise of idleness; and contempt for the poor, the frail, the elderly, the deformed, and the unsophisticated, for people who work for a living, for the law-abiding, and for democratic processes. The world of literature is a moral anarchy; if immersion in it teaches anything in the moral line it is moral relativism (Posner, 2009, p. 462).

According to Posner (2009), authors of the humanist Project argue that egalitarianism is present in literature in order to reach the reader. But for Posner, a work need not necessarily defend egalitarianism; Therefore, it cannot be said that certain works are inherently progressive. To the author (2009, p. 463):

Most of the best-known English, French, Russian, German, and American novels can be sorted into one or more nonegalitarian classes: novels that are preoccupied with private themes (as they now strike us) often archaically conceived, such as adultery and manliness (for example, Lawrence, Hemingway, Ford Madox Ford, and Joyce); adventure novels (a class that overlaps the first); and novels that despite surface appearances are disengaged from any serious interest in the social or political arrangements of society (which, as we have seen, may largely be true even of Kafka and Camus), that disparage the modern project of liberty and equality (for example, Dumas, Scott, Dostoevsky, Waugh, at times Conrad and Faulkner), that presuppose an organization of society in which a leisured, titled, or educated upper crust lives off the sweat of the brow of a mass of toilers at whose existence the novelist barely hints (for example, Austen, James, Wharton, Proust, Waugh, Fitzgerald), that are preoccupied with issues more metaphysical than societal (Beckett, Hesse, Melville, Tolstoy, Mann, and, again, Kafka and Camus), that defend bourgeois values (Defoe, Galsworthy, Trollope), that deal with public themes yet whose take on them is equivocal or inscrutable (Melville, Twain, and Faulkner), or that deal with both social and private themes but the latter predominate (Stendhal, Flaubert, Bulgakov).

Additionally to that, Posner (2009, p. 464-465) points out that, even when readers are conscious of morally questionable worldviews in classic works, their popularity remains – readers learn to relativize the presence of obsolete ethics in literary works and thus the literary moral content is not relevant. Although current moral values are identifiable in older works, this does not mean that they survived as classics. As previously pointed out, for Posner (1986), a classic work is one that survives the test of time, remaining

popular because it deals with *universal* themes such as love, revenge, justice, among others. For Posner (2009, p. 466-467):

To devalue a work of literature because of its politics, morality, or religion is not only to cut off one's nose to spite one's face. It is philistine, illiberal, and, when it expresses itself in a sense of moral superiority to our predecessors, the form of ethnocentrism that has been dubbed "temporal parochialism." [...] To politicize literature also breaches the wall that separates culture from the state—what is properly private from what is properly public. To assign literature the task of promoting political and moral values is to associate it with public functions, such as the inculcation of civic virtue, as Plato proposed in the Republic. It makes literature an inviting candidate for public regulation and bolsters the radicals' claim that everything is politics.

At this point, caution is necessary since it is possible to understand the existence of limits to freedom of artistic expression. For instance, if a literary work is designed to express racist worldviews that offend the individual rights of a specific social group, it can and should be criticized for its ideological content. The limit, then, would be the very dignity of the human person, to be assessed in each specific case. So, I point out: in this article, I am only presenting the author's criticism, not endorsing it.

Subsequently, Posner (2009, p. 467) questions the humanization of law via literature from the following argument: each of us has an individual view of what is morally good and bad; Thus, the literature that defends the worldview conceived by the individual will be considered good and the literature that contradicts it will be seen as bad. Let us not forget that, for the author, it is possible to find different moral values in the same literary work, since the narratives tend to present such ambiguity due to the aforementioned temporal test that can make it a classic or not. Therefore, for Posner (2009, p. 472): "moral readings of works of literature tend to be reductive, and thus to commit the same sin of which the moralistic critics accuse the social scientists".

But if literature does not have an inherent pedagogical-moral trait, then, why read it? Posner (2009, p. 481-482) offers the following list of reasons:

Acquiring surrogate experience; obtaining templates for interpreting one's actual experiences (but not practical

lessons for living); sharpening one's writing and reading skills; expanding one's emotional horizons; obtaining self-knowledge; gaining pleasure; experiencing an echo-chamber effect; undergoing therapy; and enjoying art for art's sake. None of these benefits is likely to improve the reader's morals.

After exposing Richard Posner's criticism of the humanist project, we now present the criticism by Robert Weisberg (1989), whose main focus is to warn of the romanticized view that jurists have built on literature.

3 LAW, LITERATURE AND A ROMANTICIZED VIEW: THE CRITICISM BY ROBERT WEISBERG

Although Posner is the main critic of the law and literature movement, he is not alone in his skepticism. Robert Weisberg, a researcher who is also dedicated to the movement, wrote in 1989 (one year after the first release of Posner's book) an article titled *The Law-Literature Enterprise*, in which he makes clear his distrust in the so-far produced studies from the United States. According to Weisberg (1989, p. 3):

I will argue that much of the law-literature scholarship has produced skimpy intellectual results because it combines overly conventional readings of literature with a complacent understanding of law, sometimes masking itself in the self congratulatory tones of broad cultural understanding.

This way, the author starts to mention a series of intellectual gaps in studies on the topic. The first problem brought by Weisberg is the absence of real interdisciplinarity:

Wholes that merely equal the sums of their parts are not very useful, and some of the wholes here have even been smaller than the sums. The revelation of a connection between disparate forms of discourse is really illuminating only when discomfiting, or, better yet, subversive, because subversion of the apparent structure of a culture is precisely what this sort of "social text" approach can contribute. My general assumption, then, is that truly interdisciplinary study, or at least fertile interdisciplinary study, entails discomfiture. As Clifford Geertz has sharply discussed in his essay on the "blurred" generic lines between the social sciences and humanities, the application of the methods or premises of one discipline to another seems necessarily "discomposing" (Weisberg, 1989a, p. 3).

One of the greatest concerns presented by Weisberg (1989, p. 6-7) is the conceptual meaning of such interdisciplinary study. For him, the law and literature movement possesses a peculiarity that one cannot deny; By gathering support from Social Sciences (especially economics, with the economic analysis of law), the jurist attempts to explain how the law works, or should work, in order to achieve certain purposes. But when it comes to literature, this purpose cannot be achieved, because literature is not an explanatory discipline. In a broad sense, literature itself “is not a discipline’ at all, but one of the large productions or media of culture” (Weisberg, 1989, p. 5).

For that matter, Weisberg (1989, p. 5) states that the use of literature to explain the legal phenomenon has been done in an informal way, aiming at showing human life in a dramatic aspect – which is especially objectionable. For him, so, “this ‘use’ of literature in relation to law often takes a somewhat sentimental form”.

Thus, according to Weisberg (1989, p. 17),

The category of law in literature [...] encompasses the sentimental version of the law-literature connection which I mentioned earlier. We can read literature to better understand concrete human elements of law that conventional legal texts obscure, and thus can use literature to educate lawyers-to deabstract and "humanize" them.

This so-called sentimental version developed by Weisberg (1989) relates to the romanticized approach of literary works, according to which the jurist would thus become more emphatical and sensitive (more humane) from reading literature, as a salvation instrument. For Weisberg (1989), the jurist became discredited with the law, which is seen as too abstract and mechanical, so it should need to dialogue with the humanities, especially with literature, in order to overcome such limitations. The author, however, disagrees on this idea; For him, the area’s problem is the abstraction of the indoctrinators themselves, and there is no need for understanding the human element of the law as a great discovery. The simple analysis of concrete cases could help the humanization process: an example, according do Weisberg (1989), is the *State vs. Williams* case, in

which a couple of native Americans was sent to court for keeping their child away from medical care, which should have led the child to die. The couple was charged with unintentional murder, but many authors pointed to the need for viewing this case under a different perspective, due to the family's traditions.

Moreover, Weisberg (1989, p. 18) argues that, if the law needs to be more humane, it is necessary to reach other humanities, not only literature, which alludes to the education American citizens take before entering the law schools. Lastly, the author states:

To suggest that we must read the classics or even modern literature to see these points, at least at the level of generality at which these points are pitched, is to suggest that lawyers or law students are rather doltish. It suggests that students will miss the point when they read the case itself, so that the instructor must try the textual equivalent of a visual aid—a novel or play—to make the point. If this task is necessary, well, then it is necessary, but it tells us little about law and literature (Weisberg, 1989, p. 17).

Weisberg (1989), therefore, believes the papers on law in literature tend to be too generalist, not offering real contribution about law or culture, besides considering the literary work as a romantic, sentimental thing, and establishing little useful connections between the two areas.

Besides that, Weisberg (1989) identifies, yet, other meanings attained to the term *law and literature* that go beyond such sentimental use:

The general claim is essentially that law and literature are two parallel cultural phenomena; they are both attempts to shape reality through language, and are both concerned with matters of ambiguity, interpretation, abstraction, and humanistic judgment. They are also both performative activities which require us to engage in some combination of description of reality and ethical judgment (Weisberg, 1989, p. 6).

The problem, for Weisberg (1989), is that this approach ignores an essential fact: both law and literature are extremely different to each other. To explain his perspective, the author proposes as an example a world in which ethics/politics and aesthetics are united, as in the early years of the republic of the United States.

According to Weisberg (1989, p.9), jurists were simultaneously the cultural elite and the political leadership; Besides that, there was a demand to build the United States as a republican nation, and it would not have been possible without the support of culture. Therefore, literature exalted republican values, granted by the current law.

Following Weisberg's (1989, p.11) explanation, these two elements (law and culture / literature), by various factors, began to separate in the mid-nineteenth century. For this reason, even if the jurist wanted to act as part of the cultural elite, he was no longer responsible for its production, creation or control. The jurist now became an "elitist museum-keeper of cultural value, where what defines the elitist role is its superiority to the democratic mass rather than its ability to represent and define and inspire the values of the mass" (Weisberg, 1989, p. 12).

Due to that, for Weisberg (1989, p. 12), claiming the unity of ethics/politics and aesthetics is historically impossible and, even if doable, it is democratically risky – since the jurist (and the politician) could act in arbitrary ways, defining culture values over others to be preserved.

Furthermore, Weisberg (1989, p. 13) introduces another view on the union of ethics, politics and literature, called by him a totemic view. To exemplify, he analyzes the works by Thomas Stearns Eliot, British author and critic, born in the United States. According to Weisberg (1989, p. 13):

Oddly enough, the best sources are some of Eliot's fascist-organic Works like *After Strange Gods*, *Notes Toward a Definition of Culture*, and *The Idea of a Christian Society*, works in which the Reverend Eliot also becomes the legislator Eliot, the programmer of a proper moral culture. Eliot's cultural essays, relying heavily on anthropological writing about totemism, sketch out a sort of myth of the primal or ideal society unified in its social-moral-aesthetic fabric. Eliot longs for a world where human actions have moral valence which they now lack in a secular Society.

For Weisberg (1989, p. 14), Eliot distorts ancient societies, governed by myth and totem, and prescribes the return to a primary organic society, in which the individual lives unconsciously anchored in moral rules, led by a legislator – a political artist. Unlike in the early days of republic in the

United States (in which the ideological bias of the political artist is expressed), in Eliot's proposal, impersonal aesthetics is invoked to disguise political intentions. According to Weisberg (1989, p. 13-14): "The result is a very subtle ethical aesthetics, a writing of fascistic laws of order into primal sensuousness. It makes law preconscious. It is a dream of a brainwashed world, one for which orderly conduct is unconscious".

Although this model seems to be the one of a dogma-based society, the proposal of Eliot (according to Weisberg's interpretation) is to make the law preconscious based on culture (including, here, literature). In the words of Weisberg (1989, p. 14):

It is, above all, a world of orthodoxy. Eliot's is a wonderfully perverse dream of a world in which law and literature are united, in which judgment of precedent haunts all present action. So Eliot's primal social structure is a perpetual moral contract, and in the ideal world literature embodies the contract. Eliot does not want belief or myth. He does not want a society where law and letters enjoy a rich and interesting relationship. Eliot hates the modern-romantic idea that poetry does not give the reader a chart of rules, but merely a measuring guide for significance. Rather he wants law, and a world where the letter is the law. Art is a vision of a legislated world.

According to Weisberg's criticism, understanding that ethics/politics and aesthetics are (or should be) united is either a fallacy (since law and literature have been separated since the nineteenth century), or should be viewed as a political, moral and psychological danger.

In the course of his criticism, Weisberg (1989, p. 15) admits that James Boyd White's proposal distances itself from the republican and totemic versions, since White believes that society is united by "cultural sinews", which participate in both legal and aesthetic aspects. For this reason, it is possible to conduct cultural criticism, highlighting the parallelism of seemingly disconnected disciplines and discourses. In short, for Weisberg (1989, p. 15), White refines the following Nietzschean idea: "when life begins to look intolerable, we can tolerate it if we treat it as an aesthetic phenomenon". However, Weisberg (1989, p. 15) nonetheless problematizes this approach. For him, if everything is treated as aesthetics,

the bases and identities of the disciplines (law, literature and others) are lost.

Having presented Robert Weisberg's (1989) criticism of law in literature, whose main objective is to demonstrate how a romanticized view of the area can generate research results without applicability, we thus move to the final considerations.

4 FINAL CONSIDERATIONS

The *law and literature movement* began in 1973 in the United States was based on the idea that literature could contribute to the humanization of law, an area that was dominated by technicism and the remoteness of reality. Although it drew the attention of many authors and spread to many countries, this early project of the movement, better known as law in literature, was not immune to criticism.

The present article sought to rescue the criticism by Richard Posner, directed mainly to question the idea that literature can humanize the law, and by Robert Weisberg, who looks at the limitations of a romantic view of literature as an art form and as an area of knowledge.

As far as Posner's criticism is concerned, agreeing with it or not, it is necessary to analyze it and, in some way, to answer it. To this end, we researchers in the field need to pay attention to the following questions: what do we mean when we affirm that literature *humanizes* the law? What does it mean to *humanize* and why is it desirable? What do we understand as *law* when we seek to identify the representation of law in literature: laws, legal institutes, customs, matters of the philosophy of law? As jurists, are we really capable of performing literary analysis without bothering to read and know the schools, traditions, authors and methods of literary theory, an autonomous academic field? And last but not least, what does the field of literature gain from this interdisciplinary proposal?

Regarding Weisberg's criticism, even though his remarks are sharp, they are equally necessary. If we start from the idea that literature can somehow make law better, not only do we transfer great responsibility to a distinct area (which has no commitment to the area of law, it should be

noted), but we also give openness to the following question: better for whom? Clinging to literature as our savior of the problems of law is based on the assumption that literature, both as an art form and as an academic field, has no flaws or major problems – which is false. In the case of Brazil, the situation is aggravated by the low rate of readers of literary works: how many of our active students or lawyers cultivate the habit of reading¹⁷? Moreover, as Weisberg well pointed out, why assume that a fiction book would generate more empathy for the student than reading a story from an actual case? Ultimately, the question must be faced: why, from all the academic areas of the humanities (history, anthropology, sociology, linguistics, among many others) and from all cultural-media products (cinema, television, visual arts, animation, just to name a few), should we turn to literature?

Far from endorsing such criticism or casting certainty, we share here the belief that it is necessary to understand what has already been problematized in other times and spaces. The purpose is the development of the area itself, so that future productions on the subject can be dedicated to answering the problematizations presented here, strengthening the epistemological bases of the area. In order for us to see the law and literature movement as an academic, theoretical area that can generate empirical results in legal teaching, research and extension, it is necessary to rethink its own foundations, addressing the criticism already formulated and facing the existing problems in our own national reality.

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¹⁷ For more information, see: [http://prolivro.org.br/home/images/2016/Pesquisa Retratos da Leitura no Brasil - 2015.pdf](http://prolivro.org.br/home/images/2016/Pesquisa_Retratos_da_Leitura_no_Brasil_-_2015.pdf). Accessed on: March 23, 2019.

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