

The Good, the Bad, and the Ironic: Two Views on Law and Literature

Daniel J. Kornstein, *Kill All the Lawyers? Shakespeare's Legal Appeal*. Princeton: Princeton University Press, 1994. Pp. xvii, 274. \$24.95.

Ian Ward, *Law and Literature: Possibilities and Perspectives*. Cambridge and New York: Cambridge University Press, 1995. Pp. xi, 264. \$49.95.

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The law and literature project¹ continues to expand in two directions. First, some scholars pursue the detailed study of specific texts and authors for the light they shed on the nature of law and its impact on our lives. Second, some engage in the systematic introspection required for the application of critical theory—to both fiction about legal issues and to the interpretation of legal texts as a form of literature—in an attempt to make a place for the law and literature movement within, or as a continuation of, modern and postmodern intellectual history.² Daniel Kornstein's *Kill All the Lawyers?* reflects

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1. Law and literature is a project that is most easily defined as a process of reading and comparing literary and legal texts for the insights each provides into the other, and whose combined force illuminates our understanding of ourselves and our society. See Bruce L. Rockwood, *Introduction: On Doing Law and Literature*, in *LAW AND LITERATURE PERSPECTIVES* 19 (Bruce L. Rockwood ed., 1996). As James Boyd White has noted, "[l]iterature and law are both about reason and emotion, politics and aesthetics. . . ." JAMES BOYD WHITE, *Law and Literature: "No Manifesto,"* 39 *MERCER L. REV.* 739, 751 (1988).

2. For a nice discussion of the relationship of text and theory, see David Bevington, *Reconstructing Shakespeare*, *U. CHI. MAG.*, Spring 1990, at 21.

the first trend, and Ian Ward's collection of essays, *Law and Literature*, combines both approaches, seeking to frame its textual analysis within an overview of several schools of critical theory. Each approach has its strengths and weaknesses, and while each of these excellent new books contributes to the development of the field, each also shows the limitations of an analysis that puts too much emphasis on a single approach. The "good" in the title of this Review reflects their focus on classical and modern texts that demonstrate to lawyers and lay readers alike how well literature and literary theory can illuminate the place of law in society. What is arguably "bad" is Kornstein's inability to focus on a few major themes, leaving the reader overwhelmed by detail, and Ward's recurrent reliance on tightly summarized theoretical arguments of others, overburdening the reader anxious to get to the heart of the literary text and its implications for our understanding of law. The "ironic" can be seen in many of the characterizations of lawyers and the law in both books—starting with Kornstein's title and including Ward's detailed discussion of Johnathan Swift's view of the law—and in the narrative methods deployed in the texts they examine.³ Irony is also apparent in Ward's clearly expressed doubts about the point of all the theory he has so thoroughly explicated.⁴

Daniel Kornstein, a practicing attorney and president of the Law and Humanities Institute, has written widely over the past decade on Shakespeare's treatment of law, and his lessons for contemporary attorneys, in articles published in the *New York Law Journal* and numerous law reviews. His book reflects many years of reflection on his chosen subject, incorporated now into a treatment of "those [plays] that seemed most useful and fertile for the theme of Shakespeare and the law."⁵ While "only an amateur" when it comes to Shakespeare, he makes a convincing case that "[c]ulture has been delegated too much to the experts": Those who love Shakespeare, particularly attorneys who combine their legal training and experience with close reading of Shakespeare, independent study of scholarship in the field, and their own experience of his plays, can "draw new connections, and open new perspectives, not only on the plays, but also on notions of law."⁶ By implication—and by example—Kornstein does just that, and in a way that encourages a similar response in his audience. He addresses a reading public interested in

3. IAN WARD, *LAW AND LITERATURE: POSSIBILITIES AND PERSPECTIVES* 112-16 (1995). See, e.g., *infra* text accompanying notes 105-11 (discussing Ward's treatment of Atwood).

4. See, e.g., WARD, *supra* note 3, at 56. After all is said and done, perhaps Ward felt he had to discuss the theory so that no one else need do it again!

5. DANIEL J. KORNSTEIN, *KILL ALL THE LAWYERS? SHAKESPEARE'S LEGAL APPEAL* at xvii (1994).

6. *Id.* at xiv.

the law and—he hopes—inclined to accept that his approach will aid its understanding of both the law and Shakespeare's plays and their implications for our times.

In contrast, Ian Ward, senior lecturer in the Centre for Legal Studies at the University of Sussex in England, is an established scholar with long experience in teaching and writing for an academic audience. He shares Kornstein's enthusiasm for his subject—"I want this book to be enjoyable. It certainly has been to write"⁷—and emphasizes the study of texts:

I have introduced some of the dominant themes in contemporary literary theory, [but] I have tried to do so to the minimum extent, and only insofar as necessity dictates. What I have wanted to avoid is to write yet another book on the alleged merits and demerits of the various 'isms' which have entered the literary legal vocabulary. This is a book about literature and about text, not about theory. My discussions of the roles of the author and the reader and the text . . . exist simply to strengthen the case for returning to the text. . . . They are all important to varying degrees, but I have no idea what the extent of this variance is, and neither, I suspect, does anyone else.⁸

Nevertheless, Ward's approach is initially highly theoretical. His first three chapters summarize the emergence of the law and literature movement through a comprehensive synopsis of the ideas of many contributors to the field, and his subsequent essays on specific literary texts contain substantial chunks of theoretical exegesis as well. In short, Ward says he wishes to focus on texts and the educational value of the law and literature movement, but envelops text in theory to a great extent.

Since Kornstein's approach to Shakespeare is almost entirely atheoretical, while paying close attention to the texts he examines in much the same way as Ward, I will examine *Kill All the Lawyers?* first, explore how Ward covers some of the same ground in his treatment of Shakespeare, and then consider Ward's exegesis of other texts. Both books invite a wider readership into the law and literature community, while both show that steps still need to be taken to accomplish that expansion, a concern I will address in my conclusion.

7. WARD, *supra* note 3, at ix.

8. *Id.* at x.

I

Kornstein indicates from the outset that his purpose is not to provide a systematic or comprehensive treatment of all legal aspects of Shakespeare's plays, but simply

to identify some major legal themes in Shakespeare, some not previously discussed, and their modern relevance and implications in an attempt to engage current moral and social issues. My objective is to find . . . those theatrical moments that most affect our legal thoughts today, that establish that Shakespeare still speaks *to us* about some of the legal questions that matter most to us today—which on examination always prove variants of age-old human problems. . . . My approach is free of ideology and school of thought.⁹

Kornstein begins his book with a striking synopsis of the plot of *The Merchant of Venice*, written as a law student might write the factual summary in a brief of a commercial law case. It is a compelling synopsis, at once so unexpected and so familiar, and shows how deep the roots of Shakespeare are in our imagination and our cultural heritage.¹⁰ He then proceeds to give a brief overview of the law and literature movement, focusing on the debate between Judge Richard Posner and Richard H. Weisberg over the value of the interdisciplinary study of law and literature.¹¹ Knowing that both scholars are members of the Law and Humanities Institute, it appears that Kornstein is here trying to provide a broader context for his book, while persuading Judge Posner to continue to play the game, and perhaps even come around to seeing law and literature as something more than an intramural form of light relief from his more serious work in law and economics.¹² Kornstein also briefly acknowledges the contributions of James Boyd White and Robert Ferguson to the field, and cites examples of numerous writer-lawyers on both sides of the Atlantic who have forged links between law and literature in their

9. KORNSTEIN, *supra* note 5, at xvi.

10. *Id.* at 3-4. Only later does Kornstein address and ultimately reject the claims that the play is anti-Semitic and therefore ought not to be produced or seen. *Id.* at 85-86. See generally JOHN GROSS, *SHYLOCK: A LEGEND AND ITS LEGACY* (1992); Bruce L. Rockwood, *Shylock the Stranger, in THE EYES OF JUSTICE* 251 (R. Kevelson ed., 1994).

11. KORNSTEIN, *supra* note 5, at 5-11. Richard Posner, well known for his many writings in the field of law and economics, first entered the law and literature debate in response to criticisms of his economic analysis by Robin West, who drew parallels between Posner and the world portrayed by Franz Kafka. See generally ROBIN WEST, *NARRATIVE, AUTHORITY, AND LAW* (1993). Richard H. Weisberg invited Posner to think again, praising Posner for implicitly recognizing the importance of the law and literature canon in his use of "criticism that is text-centered" and "has a wealth of bibliographical data for all levels of its readership." RICHARD H. WEISBERG, *POETHICS AND OTHER STRATEGIES OF LAW AND LITERATURE* 188-90 (1992).

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

own lives and works.¹³ He then briefly reviews what is known of the biography of Shakespeare, and the place of law in his experience and in the life of Elizabethan England.¹⁴ He concludes this introduction with the observation that Shakespeare may have sought to influence the lawyers and judges of his day in the direction of law reform. He observes that “[i]nterpreting Shakespeare is in some ways like interpreting the Constitution”—whether by reference to author’s intent, or as a continuing conversation as each generation reinterprets Shakespeare for itself.¹⁵

Chapters Two through Thirteen of Kornstein’s book each address a particular play with the same basic methodology: an outline of the plot that is tied into one or more contemporary legal issues and referenced to recent trials and court decisions. To give a sense of the kinds of arguments Kornstein makes, the evidence he provides, and the persuasiveness with which he makes his case, I examine several of those chapters here.

In Chapter Two, Kornstein dissects the origins of the famous and often invoked phrase, “The first thing we do, let’s kill all the lawyers” from *Henry VI, Part 2*.¹⁶ He describes lawyer bashing from Dickens to Bierce in literature, and to Spielberg’s 1991 film, *Hook*, in the popular cinema.¹⁷ But Kornstein shows that Shakespeare, unlike Swift, was sympathetic to law and lawyers, and recognized the need for lawful authority in society. The character who says “kill all the lawyers” is Dick the Butcher, responding to Jack Cade, who has been manipulated into leading a rebellion and calling for a utopia where “[a]ll the realm shall be in common.”¹⁸ This class revolt naturally attacks lawyers as symbols of hated authority and oppression of the poor. Lawyers are high on the “enemies list” because of their importance to the preservation of the status quo.¹⁹ Taking us through several layers of meaning, Kornstein draws a parallel to

13. KORNSTEIN, *supra* note 5, at 9-11.

14. *Id.* at 11-21. His historical and biographical information is largely based on W. NICHOLAS KNIGHT, *SHAKESPEARE’S HIDDEN LIFE: SHAKESPEARE AT THE LAW, 1585-1595* (1973).

15. KORNSTEIN, *supra* note 5, at 20. He cites an exchange about Shakespeare between Justices Sandra Day O’Connor and Harry Blackmun in *Browning-Ferris Indus. v. Kelso Disposal*, 492 U.S. 257, 290 (1989), in order to show the continuing vitality of Shakespeare and his value in understanding the nature of interpretation.

16. WILLIAM SHAKESPEARE, *THE SECOND PART OF KING HENRY THE SIXTH* act 4, sc. 2, l. 78 (Stanley Wells & Gary Taylor eds., Oxford Shakespeare ed., Oxford University Press 1988) [hereinafter *HENRY VI, PART 2*].

17. KORNSTEIN, *supra* note 5, at 22-23; *cf. id.* at 33-34 (discussing attacks on lawyers by Marlin Fitzwater and George Bush). He misses the classic quotation from Swift noted by Ward, that lawyers are a “society of men among us, bred up from their youth in the art of proving by words multiplied for the purpose, that white is black, and black is white, according as they are paid.” WARD, *supra* note 3, at 115.

18. *HENRY VI, PART 2*, *supra* note 16, at act 4, sc. 2, ll. 70-74.

19. KORNSTEIN, *supra* note 5, at 25-26.

Shay's rebellion in the United States in 1786, in which debt-ridden farmers in western Massachusetts attacked lawyers as "being in league with eastern creditors."²⁰ On this level of meaning, one can read Shakespeare as intending Dick the Butcher's call to be taken literally and with approval by at least some in the audience. But on another level, Dick's cry can be seen as a "compliment to lawyers," as Justice John Paul Stevens argued when he said that Dick the Butcher was "a rebel, not a friend of liberty," adding that "Shakespeare insightfully realized that disposing of lawyers is a step in the direction of a totalitarian form of government."²¹ Of course, Kornstein points out, "we should not go overboard in praising lawyers for opposing revolutions," citing many lawyers who have supported revolutions: Robespierre, Danton, the signers of our Declaration of Independence, and even Fidel Castro.²²

On balance, Kornstein argues, Shakespeare is ambiguous about his attitude here as in so many things. He has "the plucking of the red and white roses in the fourth scene of the second act of *Henry VI, Part I* [occur in] the Garden of Middle Temple, one of the Inns of Court," suggesting a sympathetic view of lawyers. "Why choose a lawyer's haven," Kornstein queries, "if the Bard thought so little of lawyers?"²³ His references to the killing of judges and lawyers in *Henry VI, Part 2* may merely follow Holinshed's *Chronicles*, a compilation first published in 1587 and thus available to Shakespeare as a source.²⁴ The violence attributed to Cade, Kornstein argues, also reflects the violence of a legal system that hangs the poor because they cannot read.²⁵ Finally, looking at the perversion of the law that destroys Humphrey, Duke of Gloucester, lord protector during the minority of Henry VI, Kornstein suggests:

Perhaps the sequence of events culminating in Gloucester's death means the death of law and the triumph of chaos and disorder.

20. *Id.* at 27. He mentions Harold Laski's comment that lawyers are always liquidated first in revolutions, without giving a precise citation for the reference. This is a fairly common practice of Kornstein's, and reflects his apparent belief that some ideas are common knowledge of which the reader can take "judicial notice," which can be inconvenient for readers looking for further information.

21. *Id.* at 28 (quoting *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 371 n.24 (1985) (Stevens, J., dissenting)).

22. *Id.* at 29.

23. The notion that this reference shows sympathy to lawyers is unclear. The setting may simply reflect the fact that the scene involved a legal issue, that is, the issue of who had the best claim to be the legitimate heir to the throne. The scene symbolically marks the beginning of the Wars of the Roses, as Shakespeare's Richard Plantagenet proposes a silent test: He asks his supporters to pluck a White Rose, which became the symbol of the House of York, while Somerset plucks a Red Rose, which became the symbol of the House of Lancaster. Asimov suggests the garden was simply a private place to avoid being overheard when discussing what might be called treason. ISAAC ASIMOV, 2 ASIMOV'S GUIDE TO SHAKESPEARE 545, 548 (1993).

24. KORNSTEIN, *supra* note 5, at 29.

25. HENRY VI, PART 2, *supra* note 16, at act 4, sc. 7, ll. 38–42.

It is at this point, and not before, that the commons rise up in anger. By fairly administering the law, by acting as a tribune of the people, Gloucester had 'won the commons' hearts'. . . . Cade's mob emerges only at the moment of Gloucester's death. They did not criticize the law before then. The people are compelled, through lack of a lawgiver, through the total breakdown of the constitutional rule of order, to take the law into their own hands. They do not protest all law, but only perverted, false law As symbols of the evil legal system, lawyers become the object of hatred.²⁶

Both Shakespeare and Kornstein leave us guessing about the meaning of the famous lines from *Henry VI, Part 2*, although the symbolism of a revolt occurring after the murder of Gloucester suggests where their sympathies lie: with the position that where lawyers no longer serve a public ideal of the law, the public will no longer respect or value them.

In his subsequent analysis of *Measure for Measure*, Kornstein explores the utility and fairness of using positive law to enforce morality, particularly when private violations of law have gone unchecked for years. If such laws are not enforced, will not all respect for law wither away, and society decay as a result? But if such laws are strictly interpreted and harshly enforced, will this not also engender disrespect for lawful authority? Shakespeare explores these issues in the context of a law imposing the death sentence for fornication. Kornstein applies the principles debated in Shakespeare's Vienna to consider the implications of the Supreme Court's narrow decision to uphold the Georgia statute criminalizing homosexual sodomy in *Bowers v. Hardwick*.²⁷ Discussing the 1957 Wolfenden Report to Parliament,²⁸ which called for decriminalizing homosexual practices between consenting adults in England, and the attack on it in 1958 by Lord Devlin²⁹ on grounds that sound much like those raised by "family values" advocates today, Kornstein uses the events and dialogue in *Measure for Measure* to question the logic of Lord Devlin, and the *Bowers* Court. Kornstein doubts there is any "way to distinguish between an imminent actual threat [to the survival of society] and mere public disapproval," and questions whether (as Devlin claims) "a society is entitled to protect itself against a change in social institutions," particularly "at the cost of human freedom."³⁰

26. KORNSTEIN, *supra* note 5, at 32-33 (citation omitted).

27. 478 U.S. 186 (1986).

28. KORNSTEIN, *supra* note 5, at 38 (citing Report of the Committee on Homosexual Offenses and Prostitution).

29. LORD DEVLIN, *THE ENFORCEMENT OF MORALS* (1958).

30. KORNSTEIN, *supra* note 5, at 39.

Citing anti-abortion violence and the controversy over remarks made at the 1992 Republican National Convention, Kornstein suggests that the advocacy of using laws to enforce morality is increasing. The increasing role of the Christian Coalition and similar groups in pressuring political parties to regulate morals, recent calls for punitive welfare reform, and the enactment of the Communications Decency Act, all suggest that the movement for increased public regulation of private morality has not yet reached its peak. Contemporary society is faced with the potential for abuse of power reflected in the role of Angelo in *Measure for Measure*.

In his explication of *Measure for Measure*, Kornstein defends the reasoning of Justice Blackmun's dissent in *Bowers*, and after summarizing Robert Bork's argument that "we legislate little else" than morality, asks how we are to determine "which moral convictions should be transformed into law, that is, which of the various moral principles held by people in a pluralist society command (and should command) sufficient support to become enforceable through coercive power of the state."³¹ *Measure for Measure* takes a clear position in this debate, coming "down against laws seeking to enforce private morality."³² Kornstein uses the play to explore privacy doctrine, public respect for the law, and the relevance of the Roman law concept of *desuetude*—the notion that a law has been nullified through disuse—as means of justifying non-enforcement of obsolete laws that remain on the books, whether for reasons of laziness or political cowardice.³³ The threatened death sentence for Claudio, Kornstein argues, would raise Eighth Amendment questions concerning cruel and unusual punishment in our society, as would, Justice Lewis Powell suggested,³⁴ any prison sentence which Georgia might have imposed had the state actually sought to enforce its law against Michael Hardwick.³⁵ He concludes by arguing that the most significant lesson of the play is its modern approach to the problem of legal interpretation and judging:

By eschewing extremes, Shakespeare comes up with a theory of moderation that blends law and discretion, and all that those two concepts mean, into a workable system of legal interpretation. . . . [L]aw should be enforced, but in moderation. . . . Formal

31. *Id.* at 40-41.

32. *Id.* at 42.

33. *Id.* at 47.

34. *Bowers v. Hardwick*, 478 U.S. 186, 198 (Powell, J., concurring).

35. In addition to these issues, the ambiguity of advocating mercy while relying on the rule of law, the problem of the abuse of power, and the not-so-modern problem of sexual harassment, are also raised in the play and subjected to Kornstein's scrutiny. KORNSTEIN, *supra* note 5, at 43-58.

laws may have unjust results unless tempered by equity; rigid interpretation of formal rules is fraught with risk.³⁶

Kornstein also discusses *The Merchant of Venice* and *Richard II*, both plays that have been the subject of extensive analysis by other writers in law and literature. *The Merchant of Venice* has been explicated by Richard H. Weisberg to emphasize the play's portrayal of the failure of mediation and the importance of keeping promises:

The brilliance of the play's conclusion lies in the subtle ascendancy of ethics over comedy, of law over equity, of oaths over breaches, of commitment over mediation. . . . To put it epistemologically, Jewish commitment finally prevails over Christian mediation in *The Merchant of Venice*. . . . To put it legally, law conquers equity, and the covenant regains its ascendancy.³⁷

Kornstein compares *The Merchant of Venice* to *Measure for Measure*, exploring the tension in both between law and equity, finding major differences between the two plays, and giving a subtle variation on Weisberg's analysis.³⁸ Kornstein comments on the two plays:

Portia's resemblance [in *Merchant of Venice*] to Isabella [in *Measure for Measure*] . . . goes only so far. Although Portia delivers a great speech about mercy, she does not act mercifully. Isabella, in contrast, does match act to word; she is liberated from her passion for revenge to a feeling of sympathy. Likewise, Shylock's personality [in *Merchant of Venice*] remains what it has always been (avaricious and vengeful), while Angelo [in *Measure for Measure*] had to be introduced to evil. Finally, and perhaps most vital of all, *The Merchant of Venice* differs . . . in underscoring a basic legal counterprinciple: strict adherence to formal rules is often necessary to do justice, especially for an outsider.³⁹

This analysis, coming so closely on the heels of his comments on the importance of tempering rules with equity as shown in *Measure for Measure*, may initially raise some doubts: Is Kornstein simply listing whatever legal principles seem to appear in a scene or speech, without any concern for consistency, or is he articulating the apparent

36. *Id.* at 58-62.

37. WEISBERG, *supra* note 11, at xi, 101-03 (1992). In Peter J. Alscher, *Staging Directions for a Balanced Resolution to The Merchant of Venice*, 5 CARDOZO STUD. L. & LIT. 1 (1993), this interpretation is highlighted. There are staging directions to bring out this aspect of the play, and related discussions.

38. Weisberg puts great emphasis on the failures of "Christian mediation" and the value of personal responsibility for one's own oaths and promises, while Kornstein is focusing on the spirit with which rules of either law or equity are applied. Compare WEISBERG, *supra* note 11, at 93-104 with KORNSTEIN, *supra* note 5, at 63-65, 76-77.

39. KORNSTEIN, *supra* note 5, at 65, 72-77, 82-83.

inconsistencies in Shakespeare? On reflection, it is clear that the juxtaposition is telling, and the synthesis apparent. Law and equity are both tools in the hands of any jurist, and whether they are used for good or ill turns on something more than principle; it turns on the spirit with which they are exercised: with sympathy by Isabella, with rigidity by Angelo, and with self-interest by Portia.⁴⁰

Richard II, which Kornstein scrutinizes later in the book, has been the subject of extensive meditations by both Ian Ward and James Boyd White, one of the founders of the modern law and literature movement.⁴¹ White shows how the play provides a series of conflicting voices “answering each other in the shifting contexts that the conversation defines as it proceeds,” as Shakespeare explores the proper constitutional basis of authority in an England which is gradually moving from a Medieval to a Modern world view. White notes that “each of the speeches also performs its own method of thought and expression, for which it necessarily claims a kind of authority as well, as indeed Shakespeare does for the play itself.”⁴² Exploring the rhetorical images used in the play to characterize the “crown,” White argues that Shakespeare “works on the principle that the truth cannot be said in any single speech or language,” but must emerge in our observation of these competing voices and the impact of their interaction.⁴³ After a close textual exegesis of the major speeches in the play, White concludes by tying the play into his rhetorical view of the nature of law:

At the end of the play we are left in the modern world, in which it is most unclear what can count as a ground upon which one person can have power over another, and why. In this sense, *Richard II* can be read as having invented . . . the problem of authority to which our constitutional discourse has ever after been directed. . . . For after the deposition there is no king, but only a man in power. There is no language in which he (or we) can satisfactorily describe his situation, or explain or justify his power. . . . The most we can hope to do is what Shakespeare does, to develop one way of talking as far as we can, then poise it against another; that is where the truth lies, in the relation

40. Angelo and Portia both see the error of their ways in the final scenes of their respective plays. Portia's mediation in Act IV serves to protect her own financial interests, and leads her to enforce the law selectively and to refrain from exercising the mercy she later bestows on the errant Gratiano and Bassanio. As Weisberg grudgingly admits: “Of course, Portia and Nerissa are about to forgive their husbands . . .” WEISBERG, *supra* note 11, at 102.

41. WARD, *supra* note 3, at 59-89; JAMES BOYD WHITE, *ACTS OF HOPE: CREATING AUTHORITY IN LITERATURE, LAW, AND POLITICS* 47-81 (1994).

42. WHITE, *supra* note 41, at 47-48.

43. *Id.* at 49-50.

between languages They fit together, not in a logical but in a poetic or rhetorical order, to tell a story.⁴⁴

In contrast, Ward employs *Richard II*, together with *Richard III* and *King John*, to make his case that exploring legal history through the method of law and literature is less politically controversial than some other ambitions of law and literature scholars, and will attract the widest possible audience to the educational possibilities of the movement.⁴⁵ Ward's case study, unlike White's, is not part of a series of interconnected essays working toward a common thematic conclusion, but more like the sequential study of texts found in Kornstein's book.⁴⁶ Ward explores the competing constitutional theories of "mixed" and "absolute" monarchy, and the parallel philosophies of government—"providentialism and humanism"—reflected in this discourse.⁴⁷ Shakespeare, Ward argues, shows a grudging support of an "orthodox providential theme" in *Richard III*:

By unambiguously describing God's vengeance upon an equally unambiguously evil and insufficient Richard, Shakespeare was able to negate the need for anyone else to remove him. There is no need for rebellion, at least not a self-determined rebellion. This perhaps is the central constitutional message of *Richard III*.⁴⁸

By the time he came to write the later *Richard II*, Shakespeare had "committed himself to a thoroughly anti-absolutist stance in constitutional thinking," rejecting the "medieval world of Gaunt." He was beginning to doubt early Tudor doctrines of "providence and divine right." The play reveals

Shakespeare's growing sympathy with a position more akin to that taken by the English humanists, and to the type of mixed monarchy to which Queen Elizabeth herself subscribed; absolute to a degree, but subject to the common law of the realm, and limited by the common law determination of kingship.⁴⁹

Ward thinks *Richard II* conveys uncertainty, yet is rooted in an orthodox mixed-monarchy tradition that does not leave England quite as rootless and dependent upon competing stories as in White's

44. *Id.* at 74-77.

45. WARD, *supra* note 3, at 59.

46. Ward gives a more thorough review of the history of the Tudor Constitution than either White or Kornstein. WARD, *supra* note 3, at 61-64. White addresses some of these issues in his essay on Richard Hooker. WHITE, *supra* note 41, at 82-123.

47. WARD, *supra* note 3, at 62.

48. *Id.* at 71.

49. *Id.* at 88.

telling, unless we impose upon it our knowledge of the revolutions shortly to come.

Kornstein takes a completely different tack to *Richard II*, using it to comment upon a variety of contemporary legal issues and themes from the perspective of an American trial attorney. The initial scene of trial by combat is viewed as a commentary on the origins of the right to confrontation in our adversarial system of justice. The problem of judicial bias is explored through an examination of Richard's own interest in the outcome of the dispute, which is compared to the bias of King Leontes serving as judge and prosecutor in *The Winter's Tale*.⁵⁰ In exploring the constitutional dilemma of leaders who violate the law, Kornstein draws parallels between the Iran-Contra crisis and the Duke of York's initial refusal to join Bolingbroke's rebellion: "I am loath to break our country's laws."⁵¹

Would that our elected or appointed officials, our Oliver Norths, followed York's example and similarly pause. Oliver North and the other Iran-Contra figures should read *Richard II*. They would profit by it. Richard's own conduct is a precedent. He finds pretexts for seizing and confiscating the estate of Bolingbroke's father. What kind of law does a lawful king or government represent that resorts to illegal financing for special projects? Or that resorts to means that are technically legal but morally wrong?⁵²

The constitutional crisis facing Richard II—is the king above the law?—is seen by Kornstein to parallel the crisis that faced another Richard, President Richard Nixon, after the 1974 Nixon Tapes Case.⁵³ Kornstein, in a similar vein to Ward, comments:

Somewhere between the divine right of kings, at one extreme, and the man on a white horse, at the other, lies a happier, more moderate form of government. Here is where Shakespeare's political philosophy squints toward constitutional democracy. . . . [H]e compares governing to gardening, with a gardener saying, "All must be even in our government."⁵⁴

Kornstein sees the pardon Bolingbroke gives to the traitor Aumerle⁵⁵ as a point of departure for a discourse on President Carter's pardon of draft resisters, and President Bush's more

50. KORNSTEIN, *supra* note 5, at 194-96.

51. WILLIAM SHAKESPEARE, *KING RICHARD II*, act 2, sc. 3, l. 168 (Stanley Wells & Gary Taylor eds., Oxford Shakespeare ed., Oxford University Press 1988) [hereinafter *RICHARD II*].

52. KORNSTEIN, *supra* note 5, at 198.

53. See *United States v. Nixon*, 418 U.S. 683, 708 (1974).

54. KORNSTEIN, *supra* note 5, at 198-199 (quoting *RICHARD II*, *supra* note 51, at act 3, sc. 4, l. 37).

55. *RICHARD II*, *supra* note ?, at act 5, sc. 3, ll. 111-16.

constitutionally doubtful pardon of six Iran-Contra defendants.⁵⁶ And where Ward and White see a struggle between medieval and modern visions of government, Kornstein examines the discourse on inheritance and the law “of wills” in the play, and sees “modern notions of meritocracy at war with a thin-blooded, weak, and undeserving heir.”⁵⁷

After analyzing thirteen plays in depth, and with references to many others, in Chapter Fourteen, Kornstein evaluates the claim that Shakespeare actually worked as an attorney or legal clerk, which he sees as unproved. His concluding epilogue argues that although Shakespeare “had no overall theory of law,”⁵⁸ he has had, and continues to have, a profound impact on the law. From his perspective as a trial lawyer he cites such often emulated examples of Shakespearean rhetoric as Antony’s funeral oration in *Julius Caesar*,⁵⁹ arguing: “The lawyer who understands why Antony’s funeral speech succeeds while Brutus’s fails understands the value and the core meaning of oral advocacy.”⁶⁰ Kornstein argues that Shakespeare’s plays demonstrate the “relationship of law to human nature,” including “the need to balance law and discretion” and the “relationship of law and morals.”⁶¹ Contemporary attitudes of hostility and distrust towards lawyers and judges are mirrored in the plays, along with examples of such “honorable lawyers as Humphrey in *Henry VI, Part 2*, and the lord chief justice in both parts of *Henry IV*.”⁶² Numerous commentators have written of possible direct impacts of Shakespeare’s plays on the law of his era, and he has been cited and quoted in hundreds of American state and federal judicial opinions, in part because he has written “on so many sides of so many topics” that he can be cited for almost any proposition in the law.⁶³ As Antonio noted in *The Merchant of Venice*, “The devil can site Scripture for his purpose”; Kornstein concludes this is true of

56. KORNSTEIN, *supra* note 5, at 200-02.

57. *Id.* at 207.

58. *Id.* at 239.

59. *Id.* at 107-24, 240. Kornstein devotes an entire chapter to *Julius Caesar*, and explicates Antony’s famous oration from its beginning, “I come to bury Caesar, not to praise him,” through its climax: “Mischief, thou art afoot. Take thou what course thou wilt.” *Id.* at 110-12 (quoting WILLIAM SHAKESPEARE, *JULIUS CAESAR* act 2, sc. 2, ll. 75, 253-54 (Stanley Wells & Gary Taylor eds., Oxford Shakespeare ed., Oxford University Press 1988)).

60. *Id.* at 240.

61. *Id.* Revenge, defamation, what it means to “think like a lawyer,” the nature of constitutional government, equity, equality, and due process are also addressed in Shakespeare.

62. *Id.* at 241.

63. Kornstein observes that former Solicitor General Charles Fried, recently confirmed to the Massachusetts Supreme Judicial Court, used Shakespeare’s Sonnet LXV arguing for reliance on written texts to support our ability to understand the intentions of the Framers when they wrote the U.S. Constitution. *Id.* at 243-44 (citing Charles Fried, *Sonnet LXV and the ‘Black Ink’ of the Framers’ Intentions*, 100 HARV. L. REV. 751 (1987)).

Shakespeare, as well.⁶⁴ This does not trivialize Shakespeare, in Kornstein's view, but merely reflects the close affinities between his law-saturated era and our own, particularly in the similarities between the instability of the Tudor dynasty and the Elizabethan religious settlement and our own era of Constitutional debate and social and political uncertainty. Kornstein concludes that "Shakespeare legislated for the future with his plays more than those who draft constitutions, enact statutes, and judge cases. . . . At long last we can acknowledge Shakespeare as one of our greatest lawgivers."⁶⁵ This may have been intended to be a major thesis of the book, and it is supported by much of the detail provided,⁶⁶ but the point should have been brought out with greater clarity initially, rather than presented with the appearance of an afterthought.

Kornstein's is the distinctive voice of an American lawyer; his reading is not as analytic as White's or Ward's, but his well-crafted plot summaries and the numerous connections he draws between Shakespeare's world and our own make this a valuable book. It will inspire attorneys and law professors alike to think more about the value of using Shakespeare at the bar and in the classroom. Written in a way that is accessible to teachers and students, it could inspire a further renaissance in appreciation of the Bard. The writing is disjointed in places, sometimes his comments appear inconsistent, and the book may not appeal to the theoretically minded, but, on its own terms, it is a great success.

II

Ian Ward's *Law and Literature: Possibilities and Perspectives*, makes a significant contribution in the two distinct ways suggested by its subtitle. First, his first chapter provides a useful and thorough overview of the theoretical work that has been done in law and literature. Ward conveys the gist of the central arguments, and enables a reader new to law and literature quickly to get to the heart of the major perspectives on the field. Throughout the rest of the book, Ward likewise summarizes and applies much contemporary theory that bears on law and literature, thus giving the reader a context for understanding the significance of the field. Second, by his

64. *Id.* at 241-42 (quoting WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE* act. 1, sc. 3, l. 97 (Stanley Wells and Gary Taylor eds., Oxford Shakespeare ed., Oxford University Press 1988)).

65. *Id.* at 245.

66. Kornstein argues, for example, that Shakespeare wrote *Measure for Measure* in 1604 to show the new King, James I, "how to govern in view of English jurisprudence, precedent, and case law." *Id.* at 62-63.

judicious selection and explication of texts, Ward gives the reader a true sense of the myriad possibilities of law and literature.

Ward lets you know which literary figures he thinks matter, and contributes to widening the perspectives brought to the field by his references to Native American, Islamic, and Jewish law, which, he points out, are all “constructed around a series of metaphors and parables.”⁶⁷ In reviewing the contribution of Robin West to the field, from her initial critique of Richard Posner’s law and economics analysis to her more recent arguments, Ward claims that “[a]lthough she concludes by suggesting that there is a place in critical legal scholarship for a literary supplement, West’s recent work is clearly less sympathetic to law and literature. Her ambitions are more political, less textual.”⁶⁸

I am not sure I agree that West’s ambitions are decreasingly textual, given the importance West continues to place on the educative value of literary texts,⁶⁹ one of Ward’s own main objectives for the field.⁷⁰ Is he suggesting that her political concerns must make her less sympathetic to law and literature? Or is it that the law and literature movement as he defines it does not include her methods? For reasons that are not clear, given his choice of texts to critique later in the volume, Ward appears to worry that the political edge of some law and literature scholarship is risky,⁷¹ yet at the same time he faults critical legal studies (CLS) scholars for not making more use of literary texts and narrative methods than they do:

67. WARD, *supra* note 3, at 5.

68. *Id.* at 11. *See also id.* at 22 (“For some, such as Robin West, literature is only of value insofar as it can help to reveal the politics of law . . .”).

69. *See* WEST, *supra* note 11, at 9-14. She sees literature as a crucial tool in moral and political discourse, and does not disparage it for the sake of her political analysis, as shown in her essay *Economic Man and Literary Woman*, in *id.* at 251-63. *Cf.* L.H. LaRue, *West on Story and Theory*, 92 MICH. L. REV. 1786 (1994).

70. Ward’s *Preface* reveals his belief that too often

learning ‘the’ law is like eating sawdust. The law grinds down its supplicants. . . . Literature, on the other hand, can be fun. It hopes to please. . . . One of the themes of this book is that an appreciation of law and literature can better educate lawyers and, indeed, non-lawyers, precisely because it is fresh and enjoyable, whilst at the same time it is capable of broadening the learning experience.

Ward, *supra* note 3, at ix. He later argues for concentrating on “the educative ambition of law and literature,” noting that “unlike many other theoretical approaches to the problems of law, law and literature wants to better educate.” *Id.* at 23. Ward applies this educative goal not only to law students and teachers, but to the public, including especially children and young people, for whom law and literature may be the only training in the questions of law and justice at the heart of legal study. *Id.* at 23-27, 116-18.

71. *See* WARD, *supra* note 3, at 22-23 (arguing that West and Richard Weisberg “are dancing around the edge of the volcano,” and that while law and literature “to have any point at all, must be prepared to flirt” with politics, the movement “should not, however, permit itself to be seduced”).

Yet in general, despite much debate by CLS adherents on the possibilities of alternative discourse, relatively little has been done. Any political or social ambitions which might be harboured in literary texts have been extracted and employed by law and literature scholars rather than by critical legal scholars.⁷²

Ward seems here to be engaging in a process of labeling certain scholars as primarily law and literature scholars, and others as critical legal scholars, without completely accepting the natural overlap between the fields that make such distinctions artificial and impermanent at best.⁷³ And he makes no mention of critical race theory as an offshoot of the CLS movement, even though this is a field of critical scholarship where narrative methods—the telling of stories, parables, and autobiographical narratives—are widely used.⁷⁴ In my view, the law and literature movement is a broad field which encompasses some of what those whom Ward writes about as practitioners of CLS do, but is not limited to that or any other theoretical school. Thus, Ward is correct in giving his priority to texts, since for law and literature to be effective as a legitimate and independent source of understanding, law and literature cannot say in advance whether any particular political outcome or theory will emerge from the analysis of the text: “[T]he political manifesto is supposed to emerge from the educational force of the literature,” as he puts it.⁷⁵ Ward concludes this overview with a reaffirmation of the “educative potential” of law and literature and an assertion that the two kinds of law and literature distinguished by Posner—“law as and law *is*’ literature”⁷⁶—are “indistinguishable in text use.”⁷⁷

In Chapter Two, Ward discusses the theoretical debate over the “death of the author” first suggested in 1968 by the French semiotician Roland Barthes.⁷⁸ Ward argues to the contrary that “in

72. *Id.* at 11.

73. He appears to accept the overlap implicitly in the diversity of his subsequent choices of authors and scholars to discuss in Chapters Two and Three, including critical theorists, law and literature scholars, and novelists, such as Roland Barthes, Ronald Dworkin, Terry Eagleton, Umberto Eco, Stanley Fish, Michel Foucault, E.D. Hirsch, Marcel Proust, Edward Said, Jean-Paul Sartre, and Mark Twain. The possibilities inherent in linking literature and theory are well displayed in TERRY EAGLETON, *SAINTS AND SCHOLARS* (1987), a fantasy that reinforces the view that irony plays a fundamental part in understanding law and literature.

74. He refers to Patricia Williams, but not Derrick Bell or Kimberle Williams Crenshaw. He has a brief bibliographical reference to Richard Delgado, but ignores Delgado’s fictional Rodrigo dialogues, see, e.g., RICHARD DELGADO, *THE RODRIGO CHRONICLES* (1995), and thus omits from his analysis the implications of a large body of work that fits within law and literature, CLS, and critical race theory. See generally GARY MINDA, *POSTMODERN LEGAL MOVEMENTS 167-85* (1995).

75. WARD, *supra* note 3, at 23.

76. *Id.* at 12-13.

77. *Id.*

78. ROLAND BARTHES, *The Death of the Author*, reprinted in ROLAND BARTHES, *THE RUSTLE OF LANGUAGE* 54 (1986).

law and literature scholarship there is perhaps a case for reintroducing the author, if not in the interpretive enterprise at least in the pragmatics of text use."⁷⁹ His thorough and largely dispassionate review of the debate over the proper role of text, author, and reader makes the case for "reintroducing the author" to facilitate "the use of literature in legal study," illustrating the value of such a move in the context of three distinct discourses that are identifiable by their "author-function."⁸⁰ The first of these discourses are stories by legal theorists, written for a legal audience; he cites Maimonides, Francis Bacon, and Thomas More as examples. The second is literature "written to describe and comment upon law and society," such as works by Charles Dickens, Nathaniel Hawthorne, Jane Austin, Thomas Hardy, and, in this century, Mordechai Richler. Also in this category are texts addressing racism—such as works of Mark Twain and Alice Walker—and various examples of children's and feminist literature,⁸¹ which he examines in depth later in the book. The third discourse is "literature which uses law to describe something else." Here Ward cites Dostoevsky, Camus, and Kafka, who use "the legal situation" to portray "the alienation of the human condition."⁸² He concludes that what he characterizes as the "pragmatic political ambition" of law and literature requires it to return to the author since, Richard Rorty has argued, it is the author who creates the possibilities opened up by all three discourses.⁸³

In his third chapter, Ward examines the "cases" of hermeneutics and deconstruction, asking the question, "Is there a given meaning to any text? Or is there just a meaning generated by a particular reader?"⁸⁴ He summarizes the complete failure of understanding revealed in the famous "Gadamer–Derrida encounter":

By following Heidegger's lead, both Gadamer and Derrida deny the possibility of a transcendental language-free idea of human understanding. . . . [T]he difference between them is . . . one of degree. For Gadamer, hermeneutics preserves the possibility of unity of meaning. Although a text might give off a multitude of possible meanings, the intersubjective relationships of text and

79. WARD, *supra* note 3, at 28, 34.

80. *Id.* at 28.

81. *Id.* at 35-38.

82. *Id.* at 34-38.

83. *Id.* at 40-41 (commenting on RICHARD RORTY, *CONTINGENCY, IRONY, AND SOLIDARITY* (1989)). Ward remarks: "If we are to use literature to understand the situation of our fellow (wo)man, . . . we will need to understand the role of the author behind the texts. . . . Rorty expressly approves the assertion made by Hirsch that the use of a text requires knowledge of the author. . . . Rorty is keen to align himself with the pervasive belief that the text itself cannot reveal an authorial intent, merely, at most, its own." *Id.* at 41.

84. *Id.* at 43.

reader, and of reader and reader, create a bounded or 'constrained' meaning for every text. Thus a community of readers can share a meaning. . . . For the deconstructionist, however, like Derrida . . . texts are radically indeterminate, defying the possibility of ever being securely constrained by any circumstance.⁸⁵

Ward shows how this debate informs law and literature through the works of Stanley Fish, Owen Fiss, Ronald Dworkin, Mark Tushnet, Robin West, Allan Hutchinson, James Boyd White, Richard Weisberg, and others.⁸⁶ He has done the reader a great service in this summary, and at the same time established the foundation for his focus on texts in Parts Two and Three of his book. He ends the chapter with a reference to the work of Drucilla Cornell, and the ironic commentary:

By turning to Cornell we are returning to Derrida, and thus once again . . . to a certain extent coming full circle. There is ultimately no resolution to this debate. These are not 'cases' that can be won or lost. They are simply arguments and counter-arguments. Is there a meaning to this text, this chapter? Well, I hope so but, if not, how will I ever know, so why should I worry about it? It is you, not me, who really matters, and you, as reader, must reach your own conclusions.⁸⁷

In Part Two, Ward claims to have moved away from theory, to have "consciously sought to discuss literature"⁸⁸ itself—from Shakespeare to children's literature to several feminist novels, and the themes of responsibility in "modern literature" by Kafka and Camus.⁸⁹ In Part Three, he presents detailed case studies of two contemporary works, Ivan Klíma's *Judge on Trial*⁹⁰ and Umberto Eco's *The Name of the Rose*.⁹¹ These final studies and his examinations of Shakespeare and children's literature focus on the details of the text and their lessons for understanding the nature of law. However, his chapters on feminist literature and responsibility include a significant exegesis of contemporary critical theory, which may help or hinder the reader in grappling with the texts then addressed, depending on one's point of view. I will now turn to these "textual" chapters.

85. *Id.* at 43-44.

86. *Id.* at 43-56.

87. *Id.* at 56.

88. *Id.* at x.

89. *Id.* at 142.

90. IVAN KLÍMA, *JUDGE ON TRIAL* (Chatto & Windus 1991) (1986).

91. UMBERTO ECO, *THE NAME OF THE ROSE* (Harcourt Brace Jovanovich 1983) (1980).

Following his study of English legal history as revealed by three of Shakespeare's plays,⁹² Ward makes his most significant contribution to the law and literature field through a long-overdue and extended discourse on the value and use of children's literature to legal education, with detailed examinations of several well-known texts. This chapter alone is worth the price of the book, and should be brought to the attention of both professors in schools of education and teachers working in the field. He discusses the difficulty of determining how to label a work "children's literature," concluding that "the common position now is to determine children's literature by its audience, and by audience use."⁹³ He explores the relationship of the psychological theories of Nicholas Tucker and Jean Piaget to understanding the relationship of children and texts.⁹⁴ It is marvelous to find the insight that Beatrix Potter's *The Tale of Ginger and Pickles* is "truer to life" than Posner's *Economic Analysis of Law*.⁹⁵ His use of *The Flopsy Bunnies* as an example of Potter's simple and clear moral lessons is sound, but he has the facts wrong: The little bunnies do not get into trouble as a result of stealing from the garden. Rather, they eat overgrown lettuces thrown out among the grass clippings in the rubbish heap, fall asleep, and are found by Mr. McGregor.⁹⁶ The moral there, in my view, is the insight into the risks involved in having too many children without being able to feed or watch over them.

Other children's texts addressed include the works of Lewis Carroll and Mark Twain, Rudyard Kipling's *Jungle Books*, William Golding's *Lord of the Flies*, and Jonathan Swift's *Gulliver's Travels*.⁹⁷ Ward highlights the fact that very few people study law after secondary school, and that the lifetime impressions of law, equity, justice, and fairness of most citizens are formed by the jurisprudence of children's literature: "If legal language is, to use Foucault's phrase, a 'specialized

92. See *infra* text accompanying notes 45-49.

93. WARD, *supra* note 3, at 91.

94. *Id.* at 93-98.

95. *Id.* at 101.

96. BEATRIX POTTER, *THE TALE OF THE FLOPSY BUNNIES* 10-33 (1909). The story also teaches the virtues of good neighborliness and gratitude, as the bunnies are rescued by Mrs. Thomasina Tittlemouse, who is given at "next Christmas . . . a present of enough rabbit-wool to make herself a cloak and a hood, and a handsome muff and a pair of warm mittens." *Id.* at 37-38, 59.

97. *Id.* at 101-16. Other works that also deal with legal or political issues include JOHN REYNOLDS GARDINER, *STONE FOX* (1988) (oppressive taxation, welfare, Native American rights); ELEANOR HARDER, *DARIUS & THE DOZER BULL* (1971) (self-government, environmental law); DR. SEUSS, *THE LORAX* (1971) (environmental law); SALMAN RUSHDIE, *HAROUN AND THE SEA OF STORIES* (1990) (censorship and political corruption); DR. SEUSS, *YERTLE THE TURTLE AND OTHER STORIES* (1950) (totalitarianism). See also Bruce L. Rockwood, *Face to Face: Law and Other Stories*, in *FLUX, COMPLEXITY, AND ILLUSION* 351, 355-58 (Roberta Kevelson ed., 1993).

knowledge,' then literature and especially children's literature, can serve to de-specialize it, and for that it should be treasured."⁹⁸

Ward next discusses feminist theory as it applies to law and literature, explaining the distinction between the "Anglo-American position" (which emphasizes the "socio-political nature of literature") and the "French position" (which concentrates "on the construction of feminist texts as texts" and "perceive[s] the woman as a form of writing").⁹⁹ He presents the reader with a sound introduction to the diverse writing in this field, and then focuses on the "rape discourse" reflected in the work of Catherine MacKinnon and Susan Estrich, and its application in such novels as Margaret Atwood's *The Handmaid's Tale* and Andrea Dworkin's *Mercy*.¹⁰⁰ Ward writes of the total degradation of Atwood's protagonist, Offred:

The essential question that Atwood is posing is whether there is ever any choice for the woman, and if not whether every sexual event is rape or, of course, that no sexual event is ever rape. Language offers itself as a partial . . . escape for Offred: "One detaches oneself. One describes." This is a common theme in feminist descriptions of rape. Thus, in the same vein, by refusing to engage the event, these descriptions attempt to preserve some possession of the body.¹⁰¹

Ward's decision to focus on the rape discourse theme in Atwood's novel fails to acknowledge the book's proper placement in the broader literature of anti-utopias, science fiction, and satire. Atwood is not necessarily or merely writing about the oppression of women in general, but about the oppression of women in a near-future religious fundamentalist state which might arise if Congress were to enact the social agenda of the extreme Right and the "Christian coalition," while repealing all environmental laws. Rape plays a central role in the metaphor of the novel because of what Ward acknowledges as the "semiotics of rape," its definition "as a sexual act effected by power."¹⁰² But the broader theme of the novel is the isolation and loss of control that anyone must feel who has no power over his or her own life.¹⁰³ This theme is underscored by Offred's final words in the novel (which bear a striking similarity to the

98. WARD, *supra* note 3, at 118.

99. *Id.* at 119-28. "Thus, while the [French theorists] want feminist writing to unsettle, the [Anglo-American theorists] want women in the public arena and in the constitutional courts." *Id.* at 119.

100. *Id.* at 128-38 (discussing MARGARET ATWOOD, *THE HANDMAID'S TALE* (1986), and ANDREA DWORKIN, *MERCY* (1991)).

101. WARD, *supra* note 3, at 133.

102. *Id.* at 130.

103. In showing a world which might be, if we extrapolate from these contemporary political and social trends, Atwood is paralleling the exploration of censorship in RAY BRADBURY, *FARENHEIT 451* (1953).

sensibility reflected in the concluding paragraphs of George Orwell's *1984*¹⁰⁴):

The van waits in the driveway, its double doors stand open. The two of them, one on either side now, take me by my elbows to help me in. Whether this is my end or a new beginning I have no way of knowing: I have given myself over into the hands of strangers, because it can't be helped. And so I step up, into the darkness within; or else the light.¹⁰⁵

Atwood prefaces the novel with epigraphs from the Bible and Swift's "A Modest Proposal," and ends with an Appendix—a parody of an anthropological report, "Historical Notes on *The Handmaid's Tale*"¹⁰⁶—highlighting both the satirical impulse and the science fiction technique. Read in the context of other works of that genre,¹⁰⁷ the novel can still be seen to raise the questions Ward highlights, without risking the slide into the political volcano for which he earlier faults Robin West and Richard Weisberg¹⁰⁸, but now seems to court, as when he concludes this discussion by asking: "Is Gilead different from contemporary North America? Certainly the discourse of sexuality is no different, and neither, therefore, is the discourse of rape."¹⁰⁹

Ward's reading of Atwood seems to conflate her work with the more extreme views of Andrea Dworkin's *crie du coeur*, *Mercy*, the second novel he analyzes in this section. "[M]any of the themes of *Mercy* are those which can be found in *The Handmaid's Tale*. . . . In Dworkin's opinion, every sexual act is ultimately a rape and, moreover, male presence is a continual threat of rape."¹¹⁰ This raises an interesting question: Does he choose to present *Mercy* as a text because of its educational value, in spite of its approach to "rape from an overtly political position?"¹¹¹ Or does he call *Mercy* "political" as a cue that we are not to take it seriously, because of his earlier warnings against taking the law and literature movement in too political a direction? In either case, Dworkin's angry narrative and

104. Winston is being shot as he sits gazing up at the telescreen, yet "[h]e had won the victory over himself. He loved Big Brother." GEORGE ORWELL, 1984 245 (1949). While Atwood's ending appears more hopeful, Offred is likewise giving herself up to unknown forces, and has no control over her future. And Orwell ends his novel with an Appendix, "The Principles of Newspeak," to which Atwood's anthropological Appendix may be an implied homage.

105. ATWOOD, *supra* note 100, at 378.

106. *Id.* at 379-95.

107. *See, e.g.*, ALDOUS HUXLEY, *BRAVE NEW WORLD* (Harper and Row 1969) (1932); FREDERIK POHL, *THE YEARS OF THE CITY* (1984).

108. *See supra* note 71.

109. WARD, *supra* note 3, at 136.

110. *Id.* at 136-37.

111. *Id.* at 138.

“uncompromising demand for overt political action against men” is not likely to be widely read, and even less likely to be accepted by a broad audience. Rather than furthering the educational objectives of the law and literature movement, the events and arguments in *Mercy* will likely offend or discourage so many readers that even any underlying truths it has to say will not be taken seriously. For example, in his semiotic analysis of Andrea Dworkin’s hardly original message that “the true nature of rape [is] power not sexuality,”¹¹² Ward really shows that her novel hijacks a truth that has been better explored by others (including Atwood) in a manner that is more likely to reach a wide audience.¹¹³ Thus, in his examination of these two texts, Ward shows both the power of law and literature discourse, and the risks that it entails as it seeks to expand awareness of outsider stories without losing its audience.¹¹⁴

In Chapter Seven of *Law and Literature*, Ward applies himself with vigor, intermixing theory with text in a clear and dispassionate style. His exegesis of Kafka’s *The Trial* and Camus’s *The Stranger* is compelling.¹¹⁵ He draws a parallel between the concept of responsibility in modern literature as examined in these two literary works, and the “themes . . . [of] alienation and responsibility [which are] at the conceptual core of much . . . contemporary critical legal scholarship.”¹¹⁶ He discusses Richard Weisberg’s use of Camus “as representative of Nietzschean *ressentiment*,”¹¹⁷ and the influence of Kant, Kierkegaard, Heidegger, Habermas, Marcuse, and Foucault on the subsequent evolution of Critical Legal Studies, political philosophy, and “the narrative fictions of such writers as Kafka and

112. *Id.*

113. Andrea Dworkin has her defenders, who have created their own interesting and illuminating web site: <http://www.igc.apc.org/womensnet/dworkin/>—which takes as its epigraph a quotation from Gloria Steinem: “In every century, there are a handful of writers who help the human race to evolve. Andrea is one of them.” This cite includes a section called “The Lie Detector,” which lists statements often made about her writings and beliefs, and explanations as to whether they are true, false, or half-truths. “The Lie Detector” restates her opposition to rape, battery, prostitution, and pornography. See generally Edward de Grazia, *Sex de Jure*, THE NATION, Feb. 20, 1995, at 242; Martha Middleton, *Anti-Porn Legal Theorists Gather in Chicago*, NATIONAL L. J., Mar. 22, 1993, at 7; Carlin Romano, *Between the Motion and the Act*, THE NATION, Nov. 15, 1993, at 563; Jeffrey Toobin, *X-Rated*, THE NEW YORKER, Oct. 3, 1994, at 70; Cathy Young, *The Sexist Violence Against Women Act*, WALL ST. J., Mar. 23 1994, at A15.

114. The solution to the problem of reaching a wider audience to address the challenges of sexism and racism in society may lie in Ward’s earlier discourse on children’s literature. We shape (and possibly change) our world by how we educate our young, what we read to them, what television programs and commercials we show them. The gentle use of didactic children’s literature may have more power to prevent sexual misunderstanding than a dozen novels like *MERCY*. See, e.g., STAN & JAN BERENSTAIN, *THE BERENSTAIN BEARS: NO GIRLS ALLOWED* (1986) (Sister Bear teaches Brother Bear and his friends that his “boys only” club is unfair).

115. WARD, *supra* note 3, at 142-45, 154; see also *id.* at 204-05, in the book’s conclusion. Ward refers throughout to Camus’s novel *The Stranger* by its English title, *The Outsider*.

116. *Id.* at 151.

117. *Id.* at 142.

Camus.”¹¹⁸ Ward’s reliance on Heidegger’s political thought as somehow central to modern critical theory is surely overdrawn—Heidegger was one of many, such as Schopenhauer, Bergson, and Nietzsche, who contributed to the continental strand of philosophical inquiry that sought to understand humanity’s place in the universe in an era marked by scientific advancement, religious doubt, and revolutionary uncertainty.¹¹⁹ Ward states:

Heidegger’s own insistence that “philosophy” was “dead,” and that the future of thought lay in exploring the intersection between disciplines such as politics, psychology and most especially language, has also become something of a keystone in twentieth-century critical theory. It is of course the belief that guides such interdisciplinary work as law and literature. Heidegger and Heideggerians such as Derrida, Arendt or Marcuse have advocated precisely the “cross-disciplinary” study, or “Ciceronian unity,” which law and literature scholars such as James Boyd White have advocated.¹²⁰

Arguing that Heidegger is responsible for interdisciplinary studies, law and literature, and the ideas of James Boyd White is rather like taking the position that the Communist Party’s advocacy of civil rights in the 1930’s was responsible for the civil rights movement, the work of the NAACP, and Martin Luther King, Jr.—a claim of *post hoc, ergo propter hoc* that cannot be taken seriously.¹²¹ Far too much of this chapter is spent on theory that has little or nothing to do with law and literature, and it only serves to detract attention from Ward’s concise discourse on Camus and Kafka, and his earlier claims to be dedicated to the text and the author. Perhaps Ward felt it was necessary to put his textual exegesis into this elaborate theoretical context, following the model of Weisberg,¹²² but the net effect is to create the impression that Ward is attempting to piggy-back a major role for Heidegger onto the new and vibrant law and literature

118. *Id.* at 154; *see also id.* at 169 (discussing connection between Kant and the objective of reestablishing a “philosophy of ethics at the heart of a new legal order in central Europe”).

119. Ward’s characterization of the Nazi period in Heidegger’s life as a mere “political flirtation” comes across as weak apologetics, regardless of Heidegger’s presumed “vast” influence. *Id.* at 146. He gives a curiously uncritical treatment of Heidegger’s questionable desire to become the “spiritual Führer of National Socialism.” *Id.* at 146-48 (discussing 1933 address by Heidegger at Freiburg University).

120. *Id.* at 149. Ward may be following Richard Weisberg’s emphasis on Heidegger. *See* Richard Weisberg, *Text into Theory: A Literary Approach to the Constitution*, 20 GA. L. REV. 939 (1986).

121. Advocates of Marxism, Christian Neo-Catholicism (Jacques Maritain), Hegelianism, Conservative Humanism (Matthew Arnold, Irving Babbitt), and Romanticism have all at various times advocated interdisciplinary studies and are equally available as sources for the interdisciplinary impulses of law and literature. My thanks to M.A.R. Habib for this insight.

122. RICHARD WEISBERG, *THE FAILURE OF THE WORD* (1984).

movement, which is better off without Heidegger's theoretical complexities and the taint of Heidegger's refusal to abandon "the political ideal of National Socialism."¹²³

Ward concludes his book with extended discourses on two wonderful contemporary novels, Ivan Klíma's *Judge on Trial* and Umberto Eco's *The Name of the Rose*. Each essay contains a detailed synopsis and analysis of the text under consideration and a clear connection to the theme of the previous chapter that "[t]he history of the human condition, as critical legal theorists repeatedly emphasize, is a history of the failure to take responsibility."¹²⁴ Each novel receives a thorough exegesis that shows how the introduction of exciting new texts can contribute to the success of law and literature as a method that educates and inspires. In exploring *Judge on Trial*, for example, Ward shows how the protagonist of the novel, Adam, a judge who survived the Nazi occupation and then grew disillusioned with the Communist regime he served, returns to Czechoslovakia as "a final act of self-assertion," spurred by the recognition that he needs to take responsibility and to develop "a different philosophy of law and life."¹²⁵ Ward notes: "When Adam returns to the Prague of 1969, he finds the freedom which can regenerate both the community and himself."¹²⁶

Implicit in Ward's choice of two new Continental novels as the focal point for the conclusion of his book is the clear message that the possibilities of law and literature are truly international and multicultural, not restricted to the classical literary canon as taught in Anglo-American universities. Law and literature as a movement continues searching for new stories and retelling old ones, and these two novels are only some of the many possibilities Ward wishes us to consider. One objective of this search for new stories is to provide the basis for building a new global community of tolerance and mutual respect in the coming century. Ward frames this objective as one of helping us make the existential decision to choose "as Camus's heroes . . . , Kafka's Joseph K. and Dostoevsky's Raskolnikov" learned to choose, "not between truth and falsehood, but between happiness and unhappiness."¹²⁷ Stories told, taught, and studied in the law and literature enterprise may do that, as Ward suggests, and they may do

123. Ward, *supra* note 3, at 148.

124. *Id.* at 166.

125. *Id.* at 168.

126. *Id.* at 170. Ward argues that Klíma's novel is a clear example of what Richard H. Weisberg "suggests is the ultimate ambition of law and literature scholarship; the use of literary texts to discover an ethical basis which can transcend the alienated condition." *Id.* at 168 (citing WEISBERG, *supra* note 11, at 46).

127. WARD, *supra* note 3, at 204 (discussing the lessons Brother William learns in Eco's *The Name of the Rose*).

more, as they help the reading community come to a higher level of understanding of the human condition, and a closer approximation of what truth, as well as happiness, might be.

III

Daniel J. Kornstein's *Kill All The Lawyers?* speaks to our era in the polished cadences of an experienced advocate, who is as much at home in the courtroom as in the world of Shakespeare. He shows the continued value of classic literary texts in illuminating contemporary legal problems and issues. He also shows that Shakespeare's plays are fun to read,¹²⁸ and may inspire more young people (as well as lawyers and professors) to read them. He lacks a coherent theory, yet Shakespeare himself in all his diversity may be the cause of that: The Bard cannot be pinned down.¹²⁹ In contrast, Ian Ward's *Law and Literature: Possibilities and Perspectives* serves by its method as a model for the use of texts as a primary vehicle for doing law and literature, while using a variety of theoretical approaches as a source of ideas that may help the reader read, but can never supplant the fundamental personal encounter with the text in the search for understanding. Ward's dedication of three entire chapters to primarily theoretical considerations, and the similar theoretical baggage attendant on his text-focused essays, suggests one drawback of the scholarly interest in law and literature, the danger of submerging some fairly simple and basic insights in a sea of academic glosses that only serve to obscure novel, play, story, or poem from its audience.¹³⁰

Both books will be of value to law school and college professors, graduate students, and students of legal studies and literature who wish to learn about the law and literature movement. Ward's chapters on theory may discourage some readers, while Kornstein's lack of an overall theory may make his book seem chaotic as he leaps from topic to topic and insight to insight. Future teachers of high school English would benefit from exposure to both books, particularly if they were inspired to adopt new approaches to teaching texts that forced students to go beyond *Cliffs Notes* and think about the relation of law and literature to the violent, uncivil, and intolerant society that

128. This is one of the main selling points in the movement to incorporate literary studies into the political science curriculum. Catherine H. Zuckert, *Why Political Scientists Study Fiction*, *CHRONICLE OF HIGHER EDUC.*, Mar. 8, 1996, at A48.

129. Consider Posner's analysis of the range of attitudes towards revenge portrayed in Shakespeare's plays. POSNER, *supra* note 12, at 62-63.

130. It was easy getting my ten-year-old son to read *Tom Sawyer* this summer by giving him a paperback copy about the same size as a Bruce Coville or *Goosebumps* story and letting him take it down to the water to read, without treating it as a classic or attaching any literary glosses.

faces them every day in and out of school. Overall, the lesson of these two books is that law and literature is a catholic discipline, a "big tent" that encompasses many tendencies, but is still undergoing some growing pains. To help law and literature find its voice, reach a wider public, and achieve its communitarian potential,¹³¹ law and literature scholars need to find a synthesis between Kornstein's text-driven enthusiasm and Ward's theoretically meticulous approach. Law and literature scholars need to reach out beyond the boundaries of academia and inspire a new generation of readers in the virtues of our constant and constantly changing civic culture. In this way they can translate what is good and useful in their ideas and approaches into a language that can reach and move the widest possible audience. Law and literature must combine a commitment to teaching with a renaissance in the spirit of the public intellectual if it is to achieve its full potential.

131. See generally WHITE, *supra* note 41.