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Kill All the Lawyers?: Shakespeare's Legal Appeal

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KILL ALL THE LAWYERS?: SHAKESPEARE'S LEGAL APPEAL. By Daniel J. Kornstein. Princeton: Princeton University Press. 1994. Pp. xvii, 274. \$24.95.

On October 12, 1991, near the end of a long day of televised hearings of the Senate Judiciary Committee, Senator Alan Simpson read the following lines from Shakespeare to Supreme Court nominee Clarence Thomas:

Good name in man and woman, dear my lord,
Is the immediate jewel of their souls,
Who steals my purse steals trash; 'tis something, nothing;
'Twas mine, 'tis his, and has been slave to thousands.
But he that filches from me my good name
Robs me of that which not enriches him
And makes me poor indeed.¹

These lines, evoking the pain of impugned reputation, seemed to express Senator Simpson's sympathy for Thomas at a moment when Professor Anita Hill's accusations had put Thomas's reputation under exacting scrutiny. But, as Daniel Kornstein² points out in his new book, *Kill All the Lawyers? Shakespeare's Legal Appeal*, these words from *Othello* are spoken by the scheming Iago, who slyly emphasizes the importance of reputation to Othello just before falsely suggesting that the flirtations of Othello's wife Desdemona have put Othello's own reputation in jeopardy (p. 157). Kornstein suggests that a listener aware of this dramatic context might see Senator Simpson as an Iago, "placing each word carefully in the ear of Judge Thomas [not to soothe him but] to inflame his anger against [his] accuser" (pp. 156-57).

Kornstein's book explains the dramatic context surrounding many Shakespearean lines often quoted by lawyers. In so doing, Kornstein organizes his book according to Shakespeare's "major legal themes" (p. xvi). Each chapter begins with a brief description of the characters and plot of a particular Shakespeare play; Kornstein then explains the themes in that play one by one. As he presents them, these themes are often independent and unrelated. For example, Chapter Three on *Measure for Measure* includes sections on subjects ranging from "Law and Morality" and "Privacy" to "Dead-Letter Statutes" and "Cruel and Unusual Punishment" (pp. 35-64). The autonomy of these sections lends the book an encyclopedic feel. Kornstein himself acknowledges in the Prologue

1. P. 157 (quoting WILLIAM SHAKESPEARE, *OTHELLO* act 3, sc. 3, ll. 160-66 (Stanley Wells & Gary Taylor eds., Clarendon Press 1988)).

2. President, Law and Humanities Institute; Founding partner, Kornstein Veisz & Wexler.

that his book seems like the beginning to an "encyclopedia on the subject of Shakespeare and the law" (p. xvii).

So what is this subject of Shakespeare and the law? Kornstein does not explicitly describe this broad and ambitious project. He admits that his book might be criticized for not elaborating "enough about Shakespeare's life, or the law, or each play, or the theories of how we can make the connections," and he preempts that criticism, saying, "To that charge I plead no contest" (p. xvii). After apologizing for not focusing on these issues in his book, he never quite explains what issues he *will* emphasize. Early on, he suggests a few possible foci, dwelling in turn on the law and literature movement, Shakespeare's life, and his own relationship to Shakespeare's work. None of these introductory discussions, however, accurately delineates the actual approach Kornstein takes in describing the major legal themes of Shakespeare's plays.

Kornstein first presents his book as a law and literature project. In Chapter One, he positions himself as a proponent of the law and literature movement, which promotes the use of law and literature to inform each other (pp. 3-11). He claims that law often serves up "the stuff of literature" and that literature clarifies our understanding of the law and "move[s] more hearts and minds" than the law (pp. 4, 8). In describing this reciprocal relationship, Kornstein does not explain how it relates to his project. He insists that the connection between law and literature is "a field itself worthy of study," but he does not define the limits of that field (p. 9). Kornstein apparently appeals to the law and literature movement to justify his topic and not to borrow any specific critical approach.

Second, Kornstein attempts to explain how Shakespeare knew so much about law (pp. 11-21). This biographical digression also fails to explain his focus. In fact, Kornstein expressly disavows the notion that his project is "to speculate on the biography of the Bard" (p. xvi). Nevertheless, relying on evidence from W. Nicholas Knight's book *Shakespeare's Hidden Life*,³ he argues that certain social and personal circumstances may have led Shakespeare to develop a particular interest in the law. For example, Kornstein first suggests that Shakespeare and the other playwrights of his time may have developed legal themes in order to appeal to the law students from the Inns of Court in London who made up much of their audience (p. 13). In support of this proposition, he points out that during Shakespeare's career, more than a third of the plays performed in London had at least one trial scene (p. 13). In addition, Kornstein argues that personal involvement with the courts may have sharpened Shakespeare's interest in law (pp. 15-21). He de-

3. Pp. 15-20 (relying on W. NICHOLAS KNIGHT, *SHAKESPEARE'S HIDDEN LIFE: SHAKESPEARE AT THE LAW, 1585-1595* (1973)).

scribes Shakespeare as “obsessed” with an ill-fated legal dispute over his inheritance, which, in conjunction with other cases, made him into a “walking litigation factory” (pp. 16, 19). At the end of the book, however, he casts doubt upon the theory that Shakespeare worked as a lawyer or law clerk during the ten years of his life about which we know nothing (pp. 228-38). In sum, the biographical discussions intimate few parallels between Shakespeare’s experiences and his plays,⁴ and Kornstein’s subsequent discussions of the plays rarely allude to Shakespeare’s life.

Kornstein’s own life presents another possible focus for his discussion. More than once Kornstein describes how he personally responded to a Shakespearean performance,⁵ and he explains that “each of us approaches Shakespeare idiosyncratically” (p. xvii). Kornstein’s idiosyncratic responses pervade his discussion. The plays stir his memory, and his recollections — legal and nonlegal — pepper the text. For him, the line “Let’s kill all the lawyers”⁶ conjures up a slew of lawyer-haters — Ambrose Bierce, debt-ridden farmers in Shay’s rebellion in 1786, and President Bush’s press secretary Marlin Fitzwater, for example (pp. 23-24, 27, 33). These legal, cultural, and historical references reveal Kornstein’s political leanings and legal activism. For example, he says that “Oliver North . . . should read *Richard II*” and that in *A Midsummer Night’s Dream*, “Shakespeare is encouraging a ‘living document’ approach to interpreting the Constitution” (pp. 198, 131). Kornstein uses such references only to illustrate and decorate his points and not to make them. Kornstein’s own life, like Shakespeare’s life and the theories of law and literature, remains peripheral to the focus of his discussion of Shakespeare and the law.

Kornstein’s commentary on the plays eventually reveals three basic critical approaches to his subject of Shakespeare and the law. First, Kornstein presents many political, interpretive, and ethical themes as essentially legal in nature. Second, he compares Shakespearean characters and situations to legal characters and situations. Third, he applies modern concepts of law to dramatic characters and situations. These approaches, employed independently, achieve varying levels of success.

First, Kornstein examines the plays to identify those themes, issues, and ideas that are legal in some way. After locating a legal element in a play, he discusses the parallel modern legal concept.

4. Kornstein suggests that Shakespeare’s lawsuit over his inheritance might explain his interest in inheritance in *King Lear*, and that Shakespeare’s appeal to equity in the lawsuit foreshadows the courtroom battle over the contract in *The Merchant of Venice* (p. 17).

5. See, e.g., pp. xi, 157.

6. P. 22 (quoting WILLIAM SHAKESPEARE, *THE SECOND PART OF KING HENRY THE SIXTH* act 4, sc. 2, l. 78 (Stanley Wells & Gary Taylor eds., Clarendon Press 1988)).

For example, Kornstein suggests that in *Measure for Measure*, Angelo's abrupt decision to arrest Claudio for violating a previously unenforced prohibition on fornication is unfair as a matter of law (pp. 36, 46). He then describes how modern law addresses this unfairness under the legal doctrine of desuetude (pp. 47-49).

Kornstein takes an expansive approach to the identification of "legal themes." In *Julius Caesar*, Kornstein sees legal issues in Brutus's Machiavellian determination that the violent means of assassinating Caesar are justified by the expedient end of advancing the classic republican political system (pp. 113-14). Legal themes also appear to him in *A Midsummer Night's Dream* in Theseus's comment to Hippolyta that plays are not silly "if imagination amend them";⁷ to Kornstein, this remark suggests activist theories of interpretation applicable to the Constitution (pp. 129-31). In *The Winter's Tale*, Paulina's outspoken criticism of Leontes, who has unjustly accused his wife Hermione of adultery, reveals Paulina to be "the citizen-critic of government" and thus adds a legal dimension to the play (p. 190). Kornstein sees any theme involving politics, interpretation, or ethical qualities as legal.

The more Kornstein perceives dramatic elements as "legal," the less insightful his discussion tends to be. In discussing *Richard II*, Kornstein describes the power vacuum created by Richard's weakness as involving "the very stuff of constitutional law" and "the nature of government itself" (p. 199). Having made this vague connection to law, he does not seem to know what to do next. He simply concludes that *Richard II* "provides some of the intellectual background of the American Revolution" (p. 200). That offhand observation leaves the reader with no clearer understanding of Shakespeare or of the law.

Second, Kornstein analyzes Shakespeare's characters and dramatic scenes as legal characters and dilemmas. This approach enables him to cast light on dramatic characters and situations by evaluating them from a legal perspective. In the discussion of *The Merchant of Venice*, for example, Kornstein illuminates the character Portia by evaluating her performance in her roles of judge and lawyer (pp. 68-76). He argues that Portia's reliance on a legal technicality to thwart the character Shylock impugns not only her substantive fairness as a judge but also her overall fairness as a person (pp. 76-77). The comparison of dramatic situations with modern legal situations makes those dramatic situations more immediate and imaginable for modern lawyers. By describing the peace negotiations in *Henry IV Part 2* as akin to a settlement conference, Kornstein prevents the reader from viewing the archbishop of

7. P. 129 (quoting WILLIAM SHAKESPEARE, *A MIDSUMMER NIGHT'S DREAM* act 5, sc. 1, l. 211 (Stanley Wells & Gary Taylor eds., Clarendon Press 1988)).

York's admonition, "A peace is in the nature of a conquest, / For then both parties nobly are subdued, / And neither party loser"⁸ as merely a military maxim from a remote era (pp. 140-41). In this way, his comparisons of dramatic contexts with more familiar legal situations imaginatively enlist his legal perspective.

All is not well with this legal perspective, however. Kornstein often fails to situate his legal perspective within a broader analysis. For example, he sometimes evaluates characters as if they were actually and only modern legal personae, without realizing that this approach is reductive. His comparisons of dramatic situations to modern legal conflicts often warp crucial aspects of the plays. For example, when he criticizes Portia in *The Merchant of Venice* for relying on a technicality instead of simply finding Shylock's contract void as against public policy, he not only assumes that the public policy safeguard obtained in medieval Venice, but he also assumes away the premise that Antonio cannot escape enforcement of the contract (p. 71). Such anachronistic relations of modern law to Shakespeare's dramatic situations distort Kornstein's critical understanding.

Kornstein unfortunately allows this modern legal perspective to guide his critical project. His goal is to uncover Shakespeare's legal messages for modern lawyers. Thus, he repeatedly seeks to reduce the plays' complex themes to simple lessons for lawyers. This message-driven focus is apparent in his discussion of Dick the Butcher's line: "The first thing we do, / Let's kill all the lawyers" in *Henry VI Part 2*.⁹ Kornstein envisions his purpose in this second type of analysis as divining Shakespeare's message; for instance, he concludes that the "original intent behind Dick's line" remains unclear because "[i]n such equivocal circumstances, and without more definitive biographical facts, it is impossible to say for sure what Shakespeare himself thought about lawyers or what he personally intended by Dick the Butcher's line" (p. 33). Kornstein imputes to Shakespeare a legal wisdom and moral authority that causes him to perceive Shakespeare's plays as a fertile source of legal and moral lessons for the lawyer. For example, *Henry IV Part 2* becomes "a

8. Pp. 140-41 (quoting WILLIAM SHAKESPEARE, *THE SECOND PART OF KING HENRY THE SIXTH* act 4, sc. 1, ll. 315-17 (Stanley Wells & Gary Taylor eds., Clarendon Press 1988)).

9. P. 22 (quoting SHAKESPEARE, *supra* note 6, at act 4, sc. 2, l. 78). Kornstein argues that the line has three "layers of meaning," with each layer representing a particular view of lawyers. P. 25. First, the line, yelled by Dick the Butcher amid a crowd of commoner rebels about to invade London in a popular revolt, might be understood as a criticism of lawyers as defenders of the status quo. Pp. 26-28. Second, because the disruptive role of the rebels appears in stark contrast to the stabilizing role of lawyers, the line might act as a backhanded compliment to the legal profession. Pp. 28-32. Finally, in what Kornstein declares to be "the most penetrating, and yet previously unexplored layer of meaning," the rebels' protest of the legal maneuvers by which the good Duke of Gloucester was tricked might amount to a criticism not of "all law, but perverted, false law." Pp. 32, 33.

morality play about youth faced with a choice between law and vanity" (p. 139).

The lessons Kornstein elicits often seem banal. For example, he explains "[t]he lesson of *Hamlet*" with an allusion to Justice Holmes, because "Holmes saw that such passion needs to be channeled" (p. 96). This approach oversimplifies the plays and ignores their complexity. When Kornstein claims that "[t]he whole theme of *Othello* can be summed up in terms of reputation," he dramatically underrepresents Shakespeare's appeal (p. 162).

Kornstein's penchant for reducing each play to a lesson mirrors the manner in which lawyers reduce complex legal issues to single questions for courts to decide. Although he concedes that "[w]hen it comes to Shakespeare I am only an amateur," his critical approach seems not amateurish but lawyerly (pp. xiii-xiv). Some of his lawyerly talents prove handy: he clearly parses out the facts of each play and ably notices legal issues. Like an advocate, at many points throughout the book he takes and argues one side of an issue. This trial-lawyer approach to the plays again makes too little of their dramatic complexity. For example, in his analysis of *The Merchant of Venice*, Kornstein defines his project as deciding whether Shylock is a "monster" or a tragic victim — which he dubs respectively the "majority" and "minority" views — and in doing so neglects the possibility that Shylock is *both* (p. 66). This intolerance of nuance and paradox appears again when, frustrated by his inability to reduce Portia to a caricature, he exclaims, "Some feminist! Portia almost seems like two different persons: one the clever, forceful judge, the other a passive princess" (p. 82).

As an advocate, Kornstein needs characters to champion. Accordingly, after observing that Shylock's daughter Jessica, who ran away from her father and married out of her faith, "talks less but rebels more" than Portia, he hurriedly concludes that she "may claim equal or better title as feminist heroine of the play" (p. 82). Kornstein's partisanship also leads him to hyperbolic description. Portia's condemnation of Shylock makes her "not just a minor-league bigot, but a world-class, equal opportunity hate monger" (p. 76). Contrast Kornstein's description of Bottom the Weaver in *A Midsummer Night's Dream* — who by Puck's magic temporarily turns into an ass and then later imagines it all a dream — as not only more self-aware, but in fact "the Jeffersonian ideal, the great liberal hope" (p. 133). Such extreme characterizations suggest Kornstein's effectiveness as an advocate but call into question his credibility as a literary critic. Kornstein's legal approach ends up distorting Shakespeare.

Kornstein's project — understanding Shakespeare's meaning — remains crucial for lawyers, as well as Senators, who seek to "use"

Shakespeare. Lawyers do use Shakespeare — his plays are quoted in judicial opinions far more often than are any other works of literature (p. 241). But why? Kornstein views Shakespeare as a legal and moral teacher; this, however, does not fully indicate why truths seem more true coming from Shakespeare. Rather, the authority behind such quotations lies not in the wisdom of the Bard but in the erudition of the quoter. Furthermore, when Kornstein argues that a remark of the chief justice to Falstaff in *Henry IV Part 2* “compresses in a verse a whole primer on advocacy,” he brings to light a more sensible use of quotation: as a source of “compressed” eloquence (p. 141). Lawyers can draw upon and learn from Shakespeare’s language, in all its eloquence and concision, in their professional pursuits.

Lawyers can use Shakespeare for more than quotation. Shakespeare’s situations and characters strike us as real. They vividly illuminate human experience and human nature.¹⁰ While Kornstein’s readings of the plays as lessons seem to confirm Judge Richard Posner’s warning that law in literature is no more than a metaphor,¹¹ literature’s role in law need not be confined to legal themes in order to be useful to lawyers. Whenever a lawyer needs to appeal to actual human experience and human nature, literature may assist him in that appeal. Kornstein’s difficulty in evading the dangers of a legal approach in his critical endeavor suggests only that an encyclopedia of legal themes is work for Shakespearean critics, not lawyers.

So what useful books can energetic lawyers fond of Shakespeare write? Kornstein’s third approach to connecting Shakespeare and the law provides a clue. Under this approach, he engages not in describing the legal meaning of the plays but in applying modern law to the characters and situations in those plays. His assumption that modern American legal doctrines obtain in the context of the plays proves both dangerous and valuable. While any attempt to use such doctrines to understand the dramatic characters and situations is anachronistic and misleading, the application of modern law to the Shakespearean situations can show how modern American law might resolve those situations today. For example, when Kornstein describes how an imaginary appeal of Shylock’s conviction might turn on doctrines such as due process and equal protection,

10. Kornstein laments, “Classic authors do not seem to matter to modern young people.” P. 12. But because Kornstein also observes that
in our teens or barely out of them, we are usually too young to understand fully or appreciate the plays. We have not lived enough, we are too inexperienced. We bring too little to the encounter. We can perhaps memorize a few lines and parrot the narrative, but not much beyond that, and certainly not with real understanding [p. xv]
it is hard to see why they should.

11. P. 6 (discussing RICHARD POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATION* (1988)).

he illustrates how differently our modern legal system affords recognition to issues of mercy, fairness, and equality (pp. 83-85).

Beyond this application of modern law to these dramatic situations, there is more that lawyers can do. Shakespeare's dramas provide paradigms of conflict, and Kornstein observes at the end of his book that "[w]e often measure, analyze, and consider legal issues against a Shakespearean pattern" (p. 245). Kornstein could perform such an analysis, but he often stops short. For example, in his discussion of *King Lear* he mentions that a recent book by Jane Smiley, *A Thousand Acres*,¹² reimagines *Lear*'s situation today as an inheritance dispute. Kornstein tells us that Smiley's characters Larry and Caroline (Lear and Cordelia) lose their case and face sanctions for suing in the first place (pp. 225-26). Kornstein concludes merely that this outcome "may symbolize the law's limits" (p. 225). He thus answers the question, "How would *Lear* be resolved today?" without proceeding to other questions that he has the legal expertise to answer: "Am I happy with that modern result? If not, does that suggest a problem in modern law?" These are questions we hope those like Kornstein — with the mind of a lawyer and a love of Shakespeare — will address.

— Kevin T. Traskos

12. P. 225 (discussing JANE SMILEY, *A THOUSAND ACRES* (1992)).