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## BOOK REVIEW

KILL ALL THE LAWYERS?: SHAKESPEARE'S LEGAL APPEAL, Daniel J. Kornstein, New Jersey: Princeton University Press (1994). 274 pp.

*Melvyn R. Leventhal\**

Judge Posner tells us that the law and literature movement "seeks to use legal insights to enhance understanding of literature."<sup>1</sup> He believes, however, that the movement is to a considerable extent hubris, and he warns that:

The biggest danger in any interdisciplinary field is amateurism. The lawyer who writes about literature may dazzle other lawyers, and the literary critic who writes about law may dazzle other literary critics, and in neither case may the dazzled be able to evaluate the quality of the contribution. The danger is particularly acute in the case of the lawyer who writes about literature.<sup>2</sup>

Kornstein's book of essays on "legal themes" in Shakespeare's plays, *Kill All the Lawyers?: Shakespeare's Legal Appeal*, illustrates Posner's point. Kornstein fails to prove his thesis, and that of the "law and literature movement," that a "lawyer's [special] knowledge and legal insights can enhance and enrich understanding" of Shakespeare's works.<sup>3</sup> Moreover, Kornstein's claims that certain "legal themes" or principles are raised or illustrated by a play are sometimes far-fetched and wholly unsupported by the text of the play. Finally, he errs on

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<sup>1</sup> RICHARD A. POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATION* 1 (1988).

<sup>2</sup> *Id.* at 363.

<sup>3</sup> DANIEL J. KORNSTEIN, *KILL ALL THE LAWYERS?: SHAKESPEARE'S LEGAL APPEAL* 8 (1994).

important details.

I review below Kornstein's essays on *The Merchant of Venice* and *Measure for Measure* because, as Kornstein observes, these plays commonly are perceived as Shakespeare's two "legal" plays "with law cemented . . . into their very foundations."<sup>4</sup> If Kornstein fails to persuade us that a lawyer is uniquely qualified to expound on the legal themes in these two plays, he most assuredly will fail in his proof when he discusses Shakespeare's other plays. I also review Kornstein's essay on *Hamlet* because my criticisms of that essay are representative of my views on the book as a whole.<sup>5</sup>

### *Merchant of Venice*<sup>6</sup>

Kornstein states that *The Merchant of Venice* is dominated "from start to finish" by momentous legal themes, with the "main action" turning on a civil lawsuit.<sup>7</sup> He finds the play, and especially the trial scene in Act Four, to be "a dramatic crystal of many legal issues, a rich text for a law school seminar."<sup>8</sup> While he acknowledges that the critic Harold Bloom has described the play as an "anti-Semitic masterpiece,"<sup>9</sup> Kornstein nevertheless believes that "[a]ll in all, we might reasonably conclude that the play is generally evenhanded" in its treatment of Jews and Christians.<sup>10</sup>

Kornstein's description of the play is inaccurate. *The Merchant of Venice* is a romantic comedy about the adventures, loves and courtships of three frolicking bachelors. Its primary theme is "let's chase women, party, get married and party some more." Its only legal theme is that the law is an ass. And it is profoundly anti-Semitic.

That the play is not a heavy drama with solemn legal

<sup>4</sup> *Id.* at 35.

<sup>5</sup> In addition to *The Merchant of Venice*, *Measure for Measure* and *Hamlet*, Kornstein finds "legal themes" in *Henry VI*, *Julius Caesar*, *A Midsummer Night's Dream*, *Henry IV*, *Othello*, *Much Ado About Nothing*, *The Winter's Tale*, *Richard II*, and *King Lear*.

<sup>6</sup> WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE* (Jay L. Halio ed., The Oxford Shakespeare 1993) (1597).

<sup>7</sup> KORNSTEIN, *supra* note 3, at 67.

<sup>8</sup> KORNSTEIN, *supra* note 3, at 88.

<sup>9</sup> KORNSTEIN, *supra* note 3, at 85.

<sup>10</sup> KORNSTEIN, *supra* note 3, at 86.

themes is well illustrated by the cast of characters and the main action of the play. Bassanio, a young bachelor of Venice, profligate and broke, courts and marries Portia, a quick-witted heiress. Gratiano, Bassanio's bosom buddy, woos and marries Portia's lady-in-waiting, Nerissa. Finally, Bassanio's other good friend, Lorenzo, courts and marries Shylock's daughter, Jessica. All three of the women playfully disguise themselves as men for comic effect.

At the periphery is the comic villain, the Jew Shylock, whose character and personality are defined by his love of money and his hatred of Christians. He appears in but five of the play's twenty scenes. Throughout the play, Shylock is rarely called by his name. Rather he is simply the "Jew," the "villain," the "cruel devil," an "impenetrable cur," or an "inexorable dog." He is the devil incarnate: "here he [the devil] comes in the likeness of a Jew."<sup>11</sup> He is subhuman: "never did I know a creature that did bear the shape of man, so keen and greedy to confound a man."<sup>12</sup> In Elizabethan times, Shylock was most likely played "with a red wig and beard and a bottle nose."<sup>13</sup>

We learn from Shylock's first aside to the audience that he is driven by hatred and a thirst for revenge—he hates Antonio because he's a Christian and loans money interest-free. Shylock immediately whispers his devilish plot, in a further aside: "If I can catch him [Antonio] once upon the hip, I will feed fat the ancient [Jewish] grudge I bear him."<sup>14</sup>

Throughout the play Shylock is mocked, ridiculed and scorned. Even Jessica hates her Jewish father. Describing her house as "hell" and "tedious," she steals, without remorse or reservation, a great part of her father's life savings and elopes with Lorenzo.<sup>15</sup> She later says: "I shall be saved by my husband; he hath made me a Christian."<sup>16</sup>

Finally, there is the Merchant of Venice, "the good Antonio, the honest Antonio—O that I had a title good enough to

<sup>11</sup> THE MERCHANT OF VENICE, *supra* note 6, act 3, sc. 1, lines 19-20.

<sup>12</sup> THE MERCHANT OF VENICE, *supra* note 6, act 3, sc. 2, lines 272-74.

<sup>13</sup> Jay L. Halio, *Introduction to THE MERCHANT OF VENICE*, *supra* note 6, at 10.

<sup>14</sup> THE MERCHANT OF VENICE, *supra* note 6, act 1, sc. 3, lines 43-44.

<sup>15</sup> THE MERCHANT OF VENICE, *supra* note 6, act 2, sc. 3, lines 2-3.

<sup>16</sup> THE MERCHANT OF VENICE, *supra* note 6, act 3, sc. 5, lines 17-18.

keep his name company."<sup>17</sup> Antonio borrows 3000 ducats from Shylock and signs a note secured by a pound of his own flesh to bankroll Bassanio's wooing of Portia. When all of Antonio's ships are lost at sea and he defaults on the note, the Duke of Venice, Portia, Nerissa, Bassanio and Gratiano join forces to save Antonio from the clutches of the Jew.

Kornstein's description of Portia, the play's central character, as a solemn lawgiver is nowhere supported by the text. Rather she is always quick-witted and whimsical. She is forever engaged in banter with Nerissa. Poor-rich Portia inherits a large estate, but her father, reaching back from the grave, insists that Portia marry the suitor with the wisdom to select from among three metal caskets—gold, silver and lead—the metal that is truly precious. Portia muses: "O me, the word 'choose'! I may neither choose who I would nor refuse who I dislike; so is the will of a living daughter curbed by the will of a dead father. Is it not hard, Nerissa, that I cannot choose one, nor refuse none?"<sup>18</sup>

Portia humorously comments to Nerissa on each of her suitors. As for the Neapolitan prince: "Ay, that's a colt [awkward man] indeed, for he doth nothing but talk of his horse; and he makes it a great appropriation to his own good parts that he can shoe him himself. I am much afeard my lady his mother played false with a [black]smith."<sup>19</sup> She "pray[s] God grant them [all] a fair departure." And when she is told that still another awaits to woo her while four others wish to say goodbye, sharp-witted Portia responds: "If I could bid the fifth welcome with so good heart as I can bid the other four farewell, I should be glad of his approach."<sup>20</sup>

Act Four, according to Kornstein, is the "crucial trial scene" that "sears the legal and popular conscience like nothing else in Shakespeare."<sup>21</sup> It is here that Kornstein tells us we will find that "[i]t is impossible to understand [*The Merchant of Venice*] fully and in all its richness without grasping [its momentous] legal themes."<sup>22</sup> Here, we are told, we will

<sup>17</sup> THE MERCHANT OF VENICE, *supra* note 6, act 3, sc. 1, lines 12-14.

<sup>18</sup> THE MERCHANT OF VENICE, *supra* note 6, act 1, sc. 2, lines 22-26.

<sup>19</sup> THE MERCHANT OF VENICE, *supra* note 6, act 1, sc. 2, lines 39-43.

<sup>20</sup> THE MERCHANT OF VENICE, *supra* note 6, act 1, sc. 2, lines 124-26.

<sup>21</sup> KORNSTEIN, *supra* note 3, at 65.

<sup>22</sup> KORNSTEIN, *supra* note 3, at 67.

see graphically illustrated the tension between law and equity, liberty of contract versus the need to "avoid rigid interpretation of formal rules."<sup>23</sup> And here too we will find evidence that "strict adherence to formal rules is often necessary to do justice, especially for [Shylock] an outsider."<sup>24</sup>

In fact, as Portia makes perfectly clear, the trial scene is a part of the comedy. Just before Portia and Nerissa travel to Venice (to help their husbands save Antonio from Shylock), Nerissa asks, "shall [our husbands] see us [in Venice]?" The always gay and flippant Portia answers by providing this preview of her role in the upcoming trial scene:

They shall [see us], Nerissa; but in such a habit [costume]  
 That they shall think we are accomplished  
 With that we lack. I'll hold thee any wager,  
 When we are both accoutered like young men,  
 I'll prove the prettier fellow of the two,  
 And wear my dagger with the braver grace,  
 And speak between the change of man and boy  
 With a reed voice, and turn two mincing steps  
 Into a manly stride and speak of frays  
 Like a fine bragging youth . . . and tell quaint lies. . . .  
 And twenty of these puny lies I'll tell,  
 That men shall swear I have discontinu'd school [not]  
 Above a twelvemonth. I have within my mind  
 A thousand raw tricks of these bragging jacks [fellows],  
 Which I will practice.<sup>25</sup>

When the trial scene opens, Portia and Nerissa have not yet arrived. Rather, the scene is a packed courtroom with the Duke of Venice presiding at the trial of *The Eye-for-an-Eye Jew v. The Turn-the-Other-Cheek Christian*. Antonio has defaulted on his note. Both the Duke and Antonio give Shylock every indication that his lawsuit has merit and that he will prevail in his demonic plot to obtain a pound of Christian flesh. The law in Venice is so out-of-touch with reality, so irrational and hypertechanical, that no one doubts for a moment that the law supports Shylock's demand for capital punishment as a penalty for Antonio's being late with his payment of a note. It does not take a great legal mind to realize that the law's support for

<sup>23</sup> KORNSTEIN, *supra* note 3, at 65.

<sup>24</sup> KORNSTEIN, *supra* note 3, at 65.

<sup>25</sup> THE MERCHANT OF VENICE, *supra* note 6, act 3, sc. 4, lines 60-78.

Shylock's demand makes the law look like an ass. Shylock argues "The pound of flesh which I demand of him is dearly bought: 'tis mine, and I will have it. If you deny me, fie upon your law! There is no force in the decrees of Venice. I stand for judgment. Answer, shall I have it?"<sup>26</sup> Although this insistence on capital punishment is preposterous on its face, the Duke is dumbfounded and flustered by the argument: he will adjourn the court, he stammers, indeed abort the trial, unless Bellario, "a learned doctor" for whom he has sent, arrives.<sup>27</sup>

Nerissa and then Portia enter. Portia will now make good on her word to practice "a thousand raw tricks."<sup>28</sup> She begins by tricking the Duke into calling upon her to preside at the trial as Bellario's substitute. The audience knows that Portia and Nerissa are a flighty heiress and her side-kick in disguise, dressed in the haughty elegant garb of a "young doctor [of law] of Rome" and his law clerk. The audience is expected to laugh at their transformation, at Portia's affectation of pretentious judge-like and lawyer-like ways. And how is "Judge" Portia described—this young heiress, this prankster, who everyone knows hasn't the foggiest notion of, or training in, the law? She is "a young and learned doctor to our court" with learning "the greatness whereof I cannot enough commend."<sup>29</sup> Everyone in the audience laughs knowing that here is the clever, tricky Lady of Belmont—not a great legal scholar—called upon to decide a case that anyone but a lawyer and a Duke would know is based on the rantings of a madman. Thus, the trial scene is a lawyer-joke—an attack on lawyers, their legalisms and their pretensions. The butt of the joke is the law, lawyers, the Jew and Venetian society.

Shylock again demands, this time of Judge Portia, that the letter of his bond be followed strictly. He bargained for a pound of flesh; he argues that he has a right to a pound of flesh. Judge Portia ultimately answers—if you want strict adherence to the exact wording of your bond, then that's what you'll get. Take a pound of flesh—but not a drop of blood. And be certain that its exactly a pound—for if the scales "do turn but in the

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<sup>26</sup> THE MERCHANT OF VENICE, *supra* note 6, act 4, sc. 1, lines 98-102.

<sup>27</sup> THE MERCHANT OF VENICE, *supra* note 6, act 4, sc. 1, line 104.

<sup>28</sup> THE MERCHANT OF VENICE, *supra* note 6, act 3, sc. 4, line 77.

<sup>29</sup> THE MERCHANT OF VENICE, *supra* note 6, act 4, sc. 1, lines 156-57.

estimation of a hair, thou diest and all thy goods are confiscated."<sup>30</sup>

By insisting upon strict enforcement of the letter of his bond, Shylock's own argument is his downfall. Unable to satisfy the impossible conditions imposed by Portia, he leaves the stage crestfallen and defeated, denied even the principal amount of the note, largely deprived of his property and forced to convert to Christianity.<sup>31</sup> This sharp turn in the plot—the schemer turning from a sure winner to a complete loser—had Shakespeare elsewhere coining the phrase, “to be hoist[ed] with [one's] own petard [bomb].”<sup>32</sup> In *The Merchant of Venice*, Shylock was the “‘biter bit,’ a joke Elizabethans loved almost as much as jokes about cuckoldry.”<sup>33</sup> The Elizabethan audience is, therefore, in uproarious laughter and applause—Shylock the Jew is defeated, Antonio the Christian is saved.

In Act Four one cynical lawyer-joke follows another when Bassanio is urged by the Duke to pay-off the judge for his favorable verdict. At first Judge Portia demurs. But then Bassanio and Gratiano find themselves reluctantly giving up to Judge Portia and his-her “law clerk” Nerissa, the wedding rings they had received as solemn gifts from their wives, Portia and Nerissa—rings they swore they would wear forever as tokens of their love.

The play concludes in an idyllic scene. The three young men—Bassanio, Gratiano and Lorenzo—are united in Belmont with their wives, Portia, Nerissa and Jessica. Portia and Nerissa playfully insist that “some wom[e]n had the ring[s]”

<sup>30</sup> THE MERCHANT OF VENICE, *supra* note 6, act 4, sc. 1, lines 326-28.

<sup>31</sup> Shylock's forced conversion to Christianity is brought about by a complex series of events. Portia “rules” that because Shylock, an alien, has attempted to take the life of Antonio, a citizen of Venice, one-half of Shylock's assets must be transferred to Antonio and one-half to Venice. The Duke has the further remedy of ordering Shylock's execution, but instead pardons him. Antonio says that he will give up his one-half interest in Shylock's property in exchange, *inter alia*, for Shylock becoming a Christian. The Duke then announces that he will “recant” the pardon he has granted Shylock unless Shylock becomes a Christian.

<sup>32</sup> *Hamlet*, the Quarto text of 1604, act 3, sc. 4, line 209 (omitted from the Folio text of 1623). Hamlet reveals that he will plot to kill Guildenstern and Rosencranz, who were selected by Claudius to deliver Hamlet to his death. The very device intended to cause Hamlet's death results in the deaths of Guildenstern and Rosencranz who, therefore, were “hoist with [their] own petard.”

<sup>33</sup> Halio, *supra* note 13, at 11.



they had gifted to Bassanio and Gratiano.<sup>34</sup> Bassanio and Gratiano protest that they in fact gave the rings to the judge and his clerk. The last 150 lines of the play must be near the top of any list of the funniest and most playful banter between young lovers in all of Shakespeare. Despite this, Kornstein takes the position that this final scene demonstrates that, by the "play's end, law prevails over equity, oaths over breaches, and Shylock's ethical system over the Venetians' casual attitude toward obligations. Portia in effect adopts Shylock's values."<sup>35</sup> In fact, the play ends with Portia and Bassanio, Gratiano and Nerissa and Lorenzo and Jessica in the throes of love and living happily ever after. Period.

Kornstein's failure to recognize *The Merchant of Venice* as a romantic comedy leads him into professorial musings not supported by the text:

The vast majority of commentary—an eight-to-one ratio—agrees with Portia's ruling. [Has Kornstein actually taken a count?] For such observers, the ruling of the court was a victory of the liberating spirit over the deadly letter of the law, of mercy over legalism, of reasonable discretion over Shylock's demand for literal-minded justice, of love and mercy over cold justice.<sup>36</sup>

....

Portia's legalistic and hypertechnical "flesh-but-no-blood" construction is probably unnecessary. There are alternative rationales for denying Shylock's suit. Instead of resting her decision on interpreting the text of the bond, Portia could explicitly rely on public policy. Rather than ingeniously quibbling about the wording of the contract, Portia could have forthrightly addressed whether the bond was legal in the first place. It may be more accurate to understand Portia's ruling as in fact based on public policy, though explained by her in terms of construing contract provisions. We should perhaps focus on the result, not the rationale; and should watch what Portia does, not what she says.<sup>37</sup>

Legal principles had nothing to do with Portia's "decision." Portia, true to her personality, crafted a clever scheme. She disguised herself as a man, pretended to be a great lawyer, fooled the Duke into permitting her to preside at the trial and then hoisted Shylock with his own petard. All this made for

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<sup>34</sup> THE MERCHANT OF VENICE, *supra* note 6, act 5, sc. 1, line 208.

<sup>35</sup> KORNSTEIN, *supra* note 3, at 83.

<sup>36</sup> KORNSTEIN, *supra* note 3, at 66.

<sup>37</sup> KORNSTEIN, *supra* note 3, at 70.

good theater and good comedy and not, as Kornstein argues, "a rich text for a law school seminar."<sup>38</sup>

It also is disconcerting that Kornstein states that the play, "all in all" is evenhanded in its treatment of Jews and Christians.<sup>39</sup> Late nineteenth- and twentieth-century revisionists, embarrassed by the play's patently offensive anti-Semitism, have attempted to side-step the play's message and to reinterpret Shylock, going so far as to edit out the play's most offensive lines. Kornstein is misled and taken-in by these revisionists. He argues, for example, that Shylock initially may not have intended that the pound-of-flesh bond be taken seriously; that it was only after Shylock's daughter had stolen the family jewels and eloped with a Christian that Shylock insisted on a pound of Christian flesh.<sup>40</sup> Through this interpretation Shylock is portrayed more as a wounded father than as a mono-maniacal hater of Christians.

Unfortunately, this explanation is not anywhere supported by the text. Shylock never blames Antonio for the loss of his daughter nor for the loss of his life's savings, and never explains his demand for a pound of flesh in such terms. If there is any doubt, it is resolved by Jessica herself, who states that her father's determination to kill Antonio long preceded her elopement and her thievery:

*When I was with him, I have heard him swear  
To Tubal and Chus, his countrymen,  
That he would rather have Antonio's flesh  
Than twenty times the value of the sum  
That he did owe him; and I know, my lord,  
If law, authority, and power deny not,  
It will go hard with poor Antonio.*<sup>41</sup>

Still, the play's anti-Semitic theme is a product of the climate in which it was written. "The Jews had all been exiled from England during the Middle Ages and the law that kept them out [of England] was in full force" during Shakespeare's lifetime.<sup>42</sup> Although Shakespeare's insights into the human

<sup>38</sup> KORNSTEIN, *supra* note 3, at 88.

<sup>39</sup> KORNSTEIN, *supra* note 3, at 86.

<sup>40</sup> KORNSTEIN, *supra* note 3, at 72.

<sup>41</sup> THE MERCHANT OF VENICE, *supra* note 6, act 3, sc. 2, lines 282-88 (emphasis added).

<sup>42</sup> MARCHETTE CHUTE, SHAKESPEARE OF LONDON 176 (1949).

condition made him a man "for all time,"<sup>43</sup> he was but a product of his age when it came to anti-Semitism. He was a playwright, actor and part-owner of a theater company that performed for London audiences of the late sixteenth and the early seventeenth centuries. However painful for Shakespeare's admirers to admit, the Bard was neither flawless nor divine.<sup>44</sup>

Finally, as *The Merchant of Venice* well illustrates, Shakespeare borrowed the plots for almost all of his plays from other writers. Most of the plot and action elements of *The Merchant of Venice*, upon which Kornstein builds his case for "legal themes," derive *entirely* from a story included in Ser Giovanni's *Il Pecorone*, written in 1478 and published in Milan in 1558—six years before Shakespeare was born.<sup>45</sup> If you read the story in *Il Pecorone* you will have difficulty identifying the *differences* between its plot and the plot of *The Merchant of Venice*. Kornstein therefore ought to sing the praises of Ser Giovanni, not Shakespeare.

### *Hamlet*<sup>46</sup>

Kornstein's discussion of *Hamlet* has similar weaknesses. There, Claudius murders young Hamlet's father and, within months of his foul crime, marries Hamlet's mother and becomes King of Denmark. Hamlet learns of the crime at the end

<sup>43</sup> "He was not of an age, but for all time," is from Ben Jonson's tribute to Shakespeare included as a preface to the First Folio of 1623, Mr. William Shakespeare's *Comedies, Histories and Tragedies*.

<sup>44</sup> We can, however, state in Shakespeare's defense that he was at least a half-step ahead of his contemporaries. In Christopher Marlowe's *The Jew of Malta*, written and performed in London in the early 1590s, Barrabas tries to poison a whole city of Christians and is finally plunged into a boiling cauldron; Shylock goes after but one Christian and he survives the ordeal of the trial scene.

<sup>45</sup> See *Il Pecorone* (1558), which, with other sources for *The Merchant of Venice*, is appended to *The Arden Shakespeare* edition of the play, at 146 (John R. Brown ed., 1955) (first reprinted in paperback in 1964). In addition, *The Ballad of Gernutus*, app. II (date uncertain), *id.* at 153, and *Declamation 95 of the Orator*, app. IV (1596), *id.* at 168, both refer to a Jew's demand for a pound of flesh for a bond and both probably antedate *The Merchant of Venice*.

The story of a bond for human flesh is also found in ancient religious tales from Persia and India. The first known English version dates from the end of the 13th century and has a Jew as the creditor. *Id.*, Introduction, at xxvii.

<sup>46</sup> WILLIAM SHAKESPEARE, *HAMLET* (G.R. Hibbard ed., The Oxford Shakespeare 1987) (1600).

of Act I, when his father appears to him as a ghost urging him to avenge the murder. Ophelia, daughter of an advisor to the King, is romantically involved with Hamlet to an extent and in ways that have been the subject of much conjecture among commentators. Of course, there is much more to the plot and action of this play, but this capsule of information will suffice.

Kornstein begins his chapter on *Hamlet* by repeating, without equivocation or discussion, a widely discredited interpretation. He quotes with approval Mr. Justice Marshall's observation that when Hamlet urges Ophelia "[g]et thee to a nunnery," Hamlet in fact means to a house of prostitution. "Nunnery," we are told, was slang for a brothel.<sup>47</sup> Thus, we are instructed, *Hamlet* "illustrate[s] the pitfalls of wooden legal interpretation."<sup>48</sup>

Both Kornstein and Marshall are wrong. It is far more likely that Shakespeare meant what he wrote—a nunnery. This is clear from the sentence that immediately follows the reference to a nunnery: *Hamlet*: "Get thee to a nunnery. Why, wouldst thou be a breeder of sinners?" Kornstein could have avoided this mistake had he consulted scholarly editions of the play. The Oxford University Press edition explains Hamlet's line as follows:

Hamlet means precisely what he says here. Only by entering a nunnery can Ophelia ensure that she will not become a *breeder of sinners*. The injunction makes it clear that nunnery is not being used here in the sense of "brothel" as it is in *Christ's Tears over Jerusalem*, for example, where a *nunnery* is synonymous with a *college of courtesans* . . . .<sup>49</sup>

The also excellent Arden Shakespeare contains this footnote:

A *nunnery* where [Ophelia] will preserve her chastity and be safe from love, marriage, and the breeding of sinners. *Nunnery* was sometimes used sarcastically for a house of *unchaste* women, and awareness of this may add a bitter undercurrent as the dialogue proceeds; but to insist on it as in J. Dover Wilson's *What Happens in Hamlet*, 1935, pp. 128-134, at the expense of the literal meaning, itself so poignant in the context, is perverse.<sup>50</sup>

<sup>47</sup> KORNSTEIN, *supra* note 3, at 91.

<sup>48</sup> KORNSTEIN, *supra* note 3, at 91.

<sup>49</sup> HAMLET, *supra* note 46, at 243 (commenting on act 3, sc. 1, lines 122-23).

<sup>50</sup> *Hamlet*, in THE ARDEN SHAKESPEARE 282 (Harold Jenkins ed., 1982). For

When Kornstein offers his own theory for Hamlet's indecision, he fares no better. According to Kornstein, "Hamlet's hesitancy [to kill his uncle] comes from his being on the cusp of discovering criminal law."<sup>51</sup>

Hamlet represents humanity's effort, faced with forces that would drag it backward, to ascend to a higher level. Hamlet symbolizes the battle between the primitive morality of personal vengeance and the modern rule of law, a turning point in the growth of the law from barbarism to civilization.<sup>52</sup>

Unfortunately, Kornstein's cite to the text of the play does not support his theory. He asserts that in the "to be or not to be" soliloquy the "question" posed is *not* whether life is worth living or whether Hamlet should commit suicide. Rather, the "question" is whether Hamlet should seek revenge and kill Claudius.<sup>53</sup> This, however, is too far-fetched to be taken seriously. Kornstein's claim that "law can benefit society by properly and usefully taming, channeling, and sublimating the hard-to-control passion for revenge,"<sup>54</sup> may be his personal opinion, his "meditation" on the interaction of law and revenge, but his assertion that Shakespeare's *Hamlet* illustrates this theme is not defensible.<sup>55</sup>

### *Measure for Measure*<sup>56</sup>

*Measure for Measure* is best appreciated and enjoyed, by lawyers and non-lawyers alike, as a drama about a conflict

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readers interested in comprehensive editions of Shakespeare's plays, I recommend the new Oxford University Shakespeare series. Twenty-two of the 38 plays are available by mail-order from Oxford University Press. While the series is uneven—some plays have introductions and footnotes that are much better than others—overall the Oxford series offers the best editions of Shakespeare's plays now in print. For those plays not yet available, I suggest the also excellent *Arden Shakespeare* published by Routledge.

Oxford University Press also publishes a number of Shakespeare's plays edited for high school and college students (Roma Gill, ed.). These editions also have excellent footnotes.

<sup>51</sup> KORNSTEIN, *supra* note 3, at 94.

<sup>52</sup> KORNSTEIN, *supra* note 3, at 92.

<sup>53</sup> KORNSTEIN, *supra* note 3, at 92.

<sup>54</sup> KORNSTEIN, *supra* note 3, at 90.

<sup>55</sup> KORNSTEIN, *supra* note 3, at 90.

<sup>56</sup> WILLIAM SHAKESPEARE, *MEASURE FOR MEASURE* (N.W. Bawcutt ed., 1991) (1604).

between Angelo, an abusive, powerful government official of Vienna, and Isabella, his easy-mark, a vulnerable powerless young woman preparing to take her vows as a nun. Isabella's brother, Claudio, has had sexual relations with his fiancée Julietta. Angelo has sentenced Claudio to death for fornication, a crime that had not been prosecuted for at least fourteen years. Angelo is in this position of authority because the Duke of Vienna has temporarily delegated to him the power to administer the law. Isabella courageously and boldly petitions Angelo to spare her brother's life. Angelo tells Isabella that if she sleeps with him, Claudio will be pardoned.

Shakespeare's greatness is his extraordinary facility with language, his gift for imagery and his ability to give us full-blown characters who play off and set off one another in counterpoint. The words spoken by a character are perfectly suited to the character and the emotional charge of the moment. Shakespeare's genius is well illustrated by the following dialogue. Isabella's pleading with Antonio for her brother's life, powerfully exposes the hypocrisy of powerful men. In the background is Lucio, Claudio's friend, providing syncopation, encouraging Isabella to lay it on.

Isabella: Great men may jest with saints; tis wit in them,  
But in the less, foul profanation. . . .  
Lucio: (Aside to Isabella) Thou'rt i' the right, girl, more o' that.  
Isabella: That in the captain's but a choleric word,  
[Is] in the soldier . . . flat blasphemy. . . .  
Lucio: (Aside to Isabella) Art advised o' that? More on't.  
Angelo: Why do you put these sayings upon me?  
Isabella: Because authority, though it err like others,  
Hath yet a kind of medicine [for] itself  
That skins the vice o' the top.  
Go to your bosom,  
Knock there, and ask your heart what it doth know  
That's like my brother's fault; if it confess  
A natural guiltiness, such as is his,  
Let it [your heart] not sound a thought upon your tongue  
Against my brother's life.<sup>67</sup>

Later, when Angelo offers Isabella a pardon for her brother in exchange for sexual favors, Isabella is at first stunned. She urges Angelo to say that he is merely testing her. Shakes-

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<sup>67</sup> *Id.* act 2, sc. 2, lines 129-43.

peare perfectly captures one person tugging against another, the courage and tenacity that is Isabella and the hypocrisy that is Angelo:

Isabella: I have no tongue but one; gentle my lord,  
Let me entreat you speak the former language.

Angelo: Plainly conceive I love you.

Isabella: My brother did love Juliet,  
And you tell me that he shall die for it.

Angelo: He shall not, Isabel, if you give me love.

Isabella: I know your virtue hath a license in't,  
Which seems a little fouler than it is  
To pluck on [test] others.

Angelo: Believe me, on my honor,  
My words express my purpose.

Isabella: Ha! Little honor, to be much believed,  
And most pernicious purpose, Seeming, seeming!  
I will proclaim thee, Angelo, look for't.  
Sign me a present pardon for my brother,  
Or with an outstretched throat I'll tell the world aloud  
What man thou art.

Angelo: Who will believe thee, Isabel:  
My unsoiled name, the austereness of my life,  
My vouch against you, and my place i'the state,  
Will so your accusation outweigh  
That you shall stifle in your own report  
And smell of calumny. I have begun,  
And now I give my sensual race the rein.  
Fit thy consent to my sharp appetite;  
Lay by all nicety and prolixious blushes  
That banish what they sue for. Redeem thy brother  
By yielding up thy body to my will,  
Or else he must not only die the death,  
But thy unkindness shall his death draw out  
To lingering sufferance [torture]. And answer me tomorrow,  
Or, by the affection [inclination] that now guides the most,  
I'll prove a tyrant to him. As for you,  
Say what you can; my false o'erweighs your true.<sup>68</sup>

Kornstein argues that "the one all-encompassing legal theme" of *Measure for Measure* is "a theory of legal interpretation."<sup>69</sup> He argues that the play juxtaposes Angelo, who believes in strict enforcement of the law, against the Duke and Escalus (Angelo's deputy), who see the law as "administered by

<sup>68</sup> *Id.* act 2, sc. 4, lines 140-71.

<sup>69</sup> KORNSTEIN, *supra* note 3, at 58.

people and softened by realism, politics, equity, mercy, justice, discretion, and flexibility."<sup>60</sup> For Kornstein, the play portrays law-abused versus law-properly-administered, with the Duke (and therefore Shakespeare so Kornstein tells us) aligned with the latter.<sup>61</sup>

Even the average theater-goer—someone who takes in an occasional production of the Bard—understands, however, that the letter of the law must be tempered by principles of fairness for a legal system to achieve justice. One does not need "a lawyer's knowledge"<sup>62</sup> to see that *Measure for Measure* reflects that principle. A fortiori, a lawyer should understand that notion without reading this play. It is therefore difficult to understand Kornstein's emphasis of this point.

Furthermore, Kornstein fails to prove that *Measure for Measure* provides practicing lawyers or lawmakers with special insights into specific legal principles. Kornstein is of course correct in stating that *Measure for Measure* is about the enforcement of a dead-letter statute that imposes capital punishment for fornication. But *Measure for Measure* offers lawyers little insight into the arguments for and against such enforcement. For example, the Duke provides this explanation for why it would be unfair for him to personally enforce a dead-letter statute:

Sith 'twas my fault to give the people scope,  
'Twould be my tyranny to strike and gall them  
For what I bid them do; for we bid this be done,  
When evil deeds have their permissive pass  
And not the punishment.<sup>63</sup>

Thus, the Duke states that when government fails to enforce a law, it is in effect encouraging the conduct prohibited by the law. But there is no basis for claiming that Shakespeare makes any contribution to a lawmaker's understanding of legal principles through this utterance. One need not consult Shakespeare for this proposition. Numerous court cases and treatises

<sup>60</sup> KORNSTEIN, *supra* note 3, at 60.

<sup>61</sup> It is idle and wholly speculative to look for and find Shakespeare's personal views in any of his characters. As Hamlet observed, a great dramatist only holds "a mirror up to nature." He does not lecture us or moralize through his characters.

<sup>62</sup> KORNSTEIN, *supra* note 3, at 8.

<sup>63</sup> MEASURE FOR MEASURE, *supra* note 56, act 1, sc. 3, lines 35-39.



state the argument more cogently and precisely.

The same deficiencies are apparent in Kornstein's discussion of the issue of "Law and Morality." That chapter contains five pages on this "theme" and includes a lengthy discussion of the Supreme Court's five to four decision in *Bowers v. Hardwick*,<sup>64</sup> which upheld a Georgia law criminalizing private homosexual acts. Kornstein then states that *Measure for Measure's* "contribution to this old debate" is that "[i]t comes down [hard] against laws seeking to enforce private morality [and, a]s applied to Claudio's relationship with Julietta [they were bound under a marriage contract], the antifornication law seems even more ridiculous than it might in the abstract."<sup>65</sup> Even if these assertions are correct, this is hardly proof that lawyers have special insight into Shakespeare or that Shakespeare provides unique or even useful insights into legal principles. Moreover, when Kornstein appends one short paragraph on Shakespeare's play to five pages of his personal views on "Law and Morality" he suggests that his book is often more about Kornstein on contemporary legal issues than it is about "legal themes" in Shakespeare.

Finally, the text of the play does not even support Kornstein's modest claim for the play: on several occasions the Duke makes it clear that Angelo's offense is his hypocrisy, *not* his strict enforcement of the antifornication law. The play therefore does not come down hard against society's enforcement of private morality. For example, the Duke chastises himself for "giv[ing] the people scope" and hopes that Angelo will "strike home"<sup>66</sup> and strictly enforce Vienna's laws. The Duke is sorely distressed that:

We have strict statutes and most biting laws,  
The needful bits and curbs to headstrong weeds,  
Which for this fourteen years we have let slip,  
Even like an o'ergrown lion in a cave  
That goes not out to prey. Now, as fond fathers,  
Having bound up the threatening twigs of birch,  
Only to stick it in their children's sight  
For terror, not to use, in time the rod  
Becomes more mocked than feared; so our decrees,

<sup>64</sup> 478 U.S. 186 (1986).

<sup>65</sup> KORNSTEIN, *supra* note 3, at 42.

<sup>66</sup> MEASURE FOR MEASURE, *supra* note 56, act 1, sc. 3, line 41.

Dead to infliction, to themselves are dead,  
 And liberty plucks justice by the nose,  
 The baby beats the nurse, and quite athwart  
 Goes all decorum.<sup>67</sup>

Angelo therefore but echoes the Duke when he states that:

We must not make a scarecrow of the law,  
 Setting it up to fear the birds of prey,  
 And let it keep one shape till custom make it  
 Their perch and not their terror.<sup>68</sup>

## CONCLUSION

Kornstein correctly observes that it "is impossible to understand [*The Merchant of Venice*] fully and in all its richness without grasping [its] legal themes."<sup>69</sup> But then he misstates the themes. This play is not about highfalutin principles of law, inaccessible to the average theatergoer. Rather this play is an attack on lawyers who too often leave their common sense on the courthouse steps. The play's "legal theme" is that lawyers are too preoccupied with their legalisms and themselves to realize that capital punishment is not an appropriate remedy for a default on a note. *The Merchant of Venice* therefore illustrates a legal theme best understood by non-lawyers.

As illustrated by *Measure for Measure*, if Shakespeare has special relevance to practicing lawyers it is not because he provides insights into "legal themes"; rather Shakespeare's gift to lawyers is his extraordinary facility with certain figures of rhetorical speech—alliteration, assonance, onomatopoeia and antithesis—and his ability to animate his characters and drive home their thoughts, attributes and personalities through imagery. Lawyers and non-lawyers alike can improve their rhetorical skills, not learn legal doctrine, by immersing themselves in the text of Shakespeare's plays.

Kornstein states that the plan of his book took hold when he, as a "frazzled attorney trying to relax after a week of writing legal briefs and preparing cases for trial," escaped to a

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<sup>67</sup> MEASURE FOR MEASURE, *supra* note 56, act 1, sc. 3, lines 19-31.

<sup>68</sup> MEASURE FOR MEASURE, *supra* note 56, act 2, sc. 1, lines 1-4.

<sup>69</sup> KORNSTEIN, *supra* note 3, at 67.

performance of *Measure for Measure*.<sup>70</sup> Once there, however, he “felt [him]self tensing with excitement as the large number of legal issues” appeared before him on stage.<sup>71</sup> Isolating legal themes in Shakespeare’s plays, however, diverts attention away from the drama and the characters with both lawyers and non-lawyers gaining little in the process.

Lawyers looking for a break from work should escape into the exhilaration that comes from hearing Shakespeare’s poetry and the music of his language, that comes from seeing the vividness of his images and from reflecting on his profound insights into the recurring conflicts and issues that are at the center of human existence. My advice to lawyers is attend a favorably reviewed production of a play by Shakespeare. Thereafter *immerse* yourself in one of the better editions of the play, reading the text along with the illuminating footnotes. Out of that experience will come the exhilaration and wonder experienced by Shakespeare lovers, including lawyers, for 400 years.

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<sup>70</sup> KORNSTEIN, *supra* note 3, at xi.

<sup>71</sup> KORNSTEIN, *supra* note 3, at xi-xii.