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No Lever and No Place to Stand (A Response to Christopher Shannon)

John Henry Schlegel

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Book Reviews

The Dance of History

John Henry Schlegel, *American Legal Realism and Empirical Social Science*. Chapel Hill: University of North Carolina Press, 1995. Pp. xii, 418. \$55.00

Christopher Shannon*

John Henry Schlegel has written a book that attempts to explain why law has not followed the path of other academic disciplines in adopting a natural-science model of empirical inquiry. He convincingly argues that by the time legal academics confronted empirical science in the guise of Legal Realism during the 1920's, American legal education had already undergone a kind of scientific revolution: the adoption in the late nineteenth century of the Langdellian case-law method, a deductive approach that saw the law library as a sufficient "field" for legal research. This intellectual practice, and the

* Christopher Shannon has taught American intellectual history at the University of Iowa and Yale University. He is the author of *Conspicuous Criticism: Tradition, the Individual and Culture in American Social Thought from Veblen to Mills* (Baltimore: Johns Hopkins University Press 1996). He is currently working on a study of the Cold War origins of multiculturalism.

professional identity that grew up around it, has made empirical research a “square wheel” in American legal education.¹

Schlegel offers this contextual explanation for the marginality of Realism as “an invitation to open a discussion about what intellectual history . . . is and has become as this century closes” (260). Following Realism’s own move from legal texts to social contexts, Schlegel insists that “rather than a history of ideas, intellectual history needs to be the history of intellectuals, people who do things with ideas” (5). In the spirit of this invitation, my Review focuses more on Schlegel’s approach to Realism than on his account of it. Schlegel dismisses the history of ideas as “an essentially empty exercise,” and calls on historians to give up “the dance of reason” in order to embrace “the whole dance of life” (4, 261). Schlegel’s book, however, reveals this move from text to context to be nothing more than the dance of history, an essentially empty exercise in causal explanation. In this Essay, I examine Schlegel’s book not only as an account of American Legal Realism, but also as a symptom of a fundamental structural incoherence in the conception of intellectual history as an academic discipline.

American Legal Realism is the legacy of a much broader intellectual movement that Morton White long ago dubbed “the revolt against formalism.” In his classic *Social Thought in America: The Revolt Against Formalism*, White characterized Gilded Age and Progressive Era intellectual life in terms of a general reorientation from a deductive rationalism to an inductive empiricism.² In philosophy, timeless verities gave way to a notion of historically relative truths; in social theory, contractarian individualism gave way to cultural organicism; and in economics, laissez-faire capitalism gave way to a greater acceptance of government regulation.

Schlegel’s account of Realism employs all the tropes of White’s revolt against formalism. Schlegel presents “classical” legal formalism as “a way of organizing and thus understanding the world of common and constitutional law in terms of hierarchically ordered, binary categories” (31). Much of classical legal thought directed itself toward the maintenance of one particular binary opposition, individual freedom versus government control; moreover, legal scholars argued this public/private distinction in terms of the “essential character” of an activity rather than mere expediency (31-32). Against this concern

1. John Henry Schlegel, *American Legal Realism and Empirical Social Science* (Chapel Hill: University of North Carolina Press, 1995), 252. Subsequent page number citations are enclosed in parentheses.

2. Morton Gabriel White, *Social Thought in America: The Revolt Against Formalism* (New York: Viking Press, 1949).

for the “teleological fitness” of legal decisions, Realism sought to recast legal thought in terms of instrumental reason (49). Realists saw law as “less a matter of the invariable application of norms . . . and more a matter of equitable, and thus variable, discretion on the part of officials of the state” (44). Legal reasoning was to yield not sacred “doctrines” but instrumental “rules,” which were to be “organized not with reference to principles but rather with respect to considerations of policy, of social advantage” (226). Like the Progressive law reformers who predated Realism proper, Realists wanted “to see the law in action so as to reform the law in the books,” and this instrumental reformism “provided the reason for engaging in empirical legal research” (229).

Schlegel’s account of the general intellectual orientation of Realism confirms the work of previous scholars, but adds little. Schlegel attacks previous studies as too “rooted in the history-of-ideas tradition,” but then presents the received wisdom, the official “story” of Realism that he claims to be revising, in social-historical terms (7). The story “as the story is usually told” seems very much a story of people and institutions (15).

The conventional account, as set forth by Schlegel, goes something like this. Legal Realism began in the years following World War I as a revolt against traditional legal education as practiced in American universities. Nicholas Murray Butler, the president of Columbia University, criticized legal education in America for being “too narrow and technical,” too divorced from ethics and intellectual developments in the new social sciences (15). Prompted by these criticisms, Harlan Fiske Stone, dean of the Columbia Law School, appointed a committee to investigate the possibility of reforming legal education. A key member of this committee, Herman Oliphant, advocated a “functional” approach to the study of law, an approach that stressed the importance of the social context of legal problems. Oliphant hoped to incorporate the social sciences into the study of law by dividing law into three categories—business relations, family relations, and governmental relations—that would correspond to economics, sociology, and political science. Despite a fairly positive initial response, Oliphant’s proposals had no effect on the curriculum at Columbia.

At the same time, Robert Maynard Hutchins sought to incorporate empirical social science into the curriculum at Yale. Like Oliphant, Hutchins met with some initial interest followed by a reassertion of the case-law method. As the established law schools lost interest in the social sciences, Realists established their own school, the Institute of Law, at Johns Hopkins. Headed by Walter Wheeler Cook, a refugee from the Yale Law School, the Institute enjoyed a brief

period of funding, yet Hopkins, too, soon lost interest. The Depression Era brought not only a scarcity of funds, but also a cultural reaction against empirical social science as a naturalist philosophy hostile to moral values. Given this economically and culturally hostile environment, many Realists decided to take advantage of the new employment opportunities available in various New Deal agencies, and Realism simply died out (15-21).

Schlegel cautions that "some things may not have happened this way" (15). He insists that the story as it is usually told bears "only a modest resemblance to what it was like to be a Realist in the 1920's and 1930's" (15). In the spirit of Realism itself, Schlegel sets out to revise this story through his own empirical study of Realism. Schlegel bases his story primarily on three case studies of Realism and Realists at work: Charles E. Clark and William O. Douglas at Yale, Underhill Moore at Yale, and Walter Wheeler Cook at Johns Hopkins. Each study offers a detailed account of the specific institutional context of a specific brand of Realism, but the contexts rendered fail to alter, in any fundamental way, the conventional understanding of Realism. Schlegel concedes a "sameness" to "these three stories of empirical legal research . . . a recurrence of cases of modest success followed by . . . well . . . nothing" (211). He concludes that Realists "preached, and occasionally delivered evidence of, the importance of an empirical understanding of the workings of the legal system and yet somehow Realism always returned to case-law analysis" (25). At this level, Schlegel seems merely to confirm the story as it is usually told.

At another level, Schlegel takes issue not so much with the story of Realism as with the causes of that story. He rejects the common explanation that Realism failed because it had nothing to say, and argues that the movement "gave out when, faced with the implications of their own constructions, the protagonists lost their nerve" (2). He traces this failure of nerve to the pressure of the professional identity of the legal academic that developed before the advent of Realism in the 1920's. The process of professionalizing the study of law at the turn of the century entailed "the development of the norms of a scholarly vocation" and the "identification and delineation of a field of knowledge that would be peculiar to, and the exclusive preserve of, the nascent legal academics" (36). Conceived by James Barr Ames of Harvard and propagated by the newly formed Association of American Law Schools, this new professional ideology demanded a commitment to the production of "detailed, systematic, sustained, and comprehensive works of scholarship on the German grand scale" (27). In developing professional standards for acceptable research, this first generation of legal academics drew on a case-law method of library research fundamentally at odds with the empirical approach

that would come to dominate the social science professions in the 1920's. Law and the social sciences followed a similar process of professionalization, yet developed professional standards so distinct as to allow for little dialogue across professional boundaries.

Schlegel argues that by the 1920's the Realists had undergone a process of "internalization of professional norms and practices" that ultimately hindered their commitment to Realism (70). He presents this psychological process as a product of a specific social experience, a period of "colonial service" in Midwestern state universities, where many of the Realists developed a commitment to the legal profession that would eventually lead them back to the more prestigious Eastern law schools (27). These "colonial officers" developed a "mutual support network" at once intellectual and social: a "Chicago summer session" seminar served as the "main site for . . . intellectual interchange," while "treks around and about Madison's two beautiful lakes and time in Chicago's beer gardens" provided the "social" setting for the development of the Realists' professional vocation (36, 40).

Schlegel's contextual approach balances social history with biography, what he calls "the 'accident' of person" (213). Schlegel explains the failure of Realism not only as a consequence of professionalization, but also in terms of the personal idiosyncracies of the Realists themselves. The Realists were a "restless" and "cantankerous" lot (253). They were attracted to the study of law, but they were "unhappy with the world of the common law professor" (224). Lapsing into armchair psychology, Schlegel declares that "while malcontents often drift away from the activity that makes them unhappy, they can also attempt to improve their situation by remaking that activity." Moving from psychology to psychopathology, Schlegel suggests that Realists were attracted to empirical social science precisely because of its opposition to "law's traditional wisdom," and pursued Realism in order to feed their malcontentedness (224).

A proper social historian, Schlegel allows for individual differences within this general psychological orientation and links particular psychologies to particular career paths. Walter Wheeler Cook, the most restless and least secure of the Realists, found in Realism "the home, the stability he had made for himself in his restlessness" (80). Reflective by nature, Cook "spent a long time and much effort growing into a scholarly vocation in his chosen field" (79). Legal analytics "afforded an outlet for the basic combativeness of Cook's personality," a combativeness that ironically ensured both his commitment to Realism and his failure to sustain the professional friendships necessary for building an institutional base for Realism (79, 220). Underhill Moore, in contrast, was "more secure than Cook,

less reflective" (80). Moore had "a nonacademic identity" developed in his private practice and had little interest in developing a scholarly vocation. He sought in Realism simply a "social understanding of law" that could be used for practical, progressive reform. Moore had no patience for legal analytics, and when faced with resistance from the legal academy, he simply abandoned empirical research.

Schlegel provides a balanced and convincing explanation of the institutional trajectory of Legal Realism and Legal Realists. He accomplishes what he set out to do: Embracing both biography and social history, he provides a model of intellectual history as the history of intellectuals. Ironically, the strengths of the book reveal the weaknesses of intellectual history as a scholarly endeavor.

Schlegel rightly identifies empirical research as a square wheel in the legal academy, yet he fails to consider his social history of intellectuals as a round wheel that fits all too well into the practice of academic history. I realize that Schlegel writes as a legal academic rather than as a historian, but, as an intellectual historian, I find his assessment of the current state of intellectual history to be something of a straw man. Legal history is itself still a kind of square wheel that has yet to find a secure place in the legal academy, and much of the work on the history of Realism may be of an older history-of-ideas style, but that style is far from the mainstream of the current practice of intellectual history.

Schlegel throws down the same gauntlet that social historians threw down in the 1970's, and picks it up in much the same way as intellectual historians of that era. Works like Thomas Haskell's *The Emergence of Professional Social Science* and Mary O. Furner's *Advocacy and Objectivity*, both written some twenty years ago, answered the objections of social historians by proposing the very professionalization thesis that Schlegel relies on so heavily in his book.³ Schlegel convincingly argues that as an interdisciplinary movement, Legal Realism fell between the cracks of professions concerned primarily with maintaining their distinct institutional identities within the university; however, since the late 1970's, "professionalization" has been used to explain just about everything that intellectuals have said and done in the twentieth century. Schlegel does cite Haskell and Furner in a footnote, but his opening polemic suggests that he is in some way the first person to examine professionalization as a serious factor in intellectual history (273).

3. See Thomas L. Haskell, *The Emergence of Professional Social Science* (Urbana: University of Illinois Press, 1977); Mary O. Furner, *Advocacy and Objectivity* (Lexington: University of Kentucky Press, 1975).

I do not mean simply to criticize Schlegel for a lack of originality. In an academic profession driven by novelty, this may be an issue for some, but I feel that Schlegel's polemic raises issues deeper than the proper acknowledgment of scholarly debt. Schlegel's method and subject matter are intimately linked. His social history of intellectuals stands as a Realist history of American Legal Realism. Ironically, Schlegel's own account of Realism as an intellectual orientation constantly calls into question the validity of the Realist project, and by implication the validity of his own. Schlegel's insistence on an institutional explanation for the failure of Realism works against his own evidence of the intellectual failure of Realism in its own terms.

Schlegel's empirical study of the Realists suggests the Realists' empirical study of the law was, itself, an essentially empty exercise. In case after case, Schlegel judges the empirical data collected by the Realists to be either predictable or inconclusive. Schlegel cites three major studies at Yale: Charles E. Clark and William O. Douglas's joint study of court congestion, Douglas's study of the administration of bankruptcy law, and Clark's study of auto accident compensation. Schlegel concludes: "If what was wanted was the facts on which to base the argument for reform, quantitative empirical research either produced too many, as in the courts studies, or worse, a very few at an enormous cost, as in the business failures or auto accidents projects" (230). Underhill Moore fares no better in Schlegel's assessment: "Moore's view of science brought with it few ideas with real explanatory power," and while it "allowed one to study anything, it was remarkably thin in the help that it offered with the task of coming to understand the meaning of what one learned" (233).

The contrast between Schlegel's sympathy for the Realists and skepticism toward Realism appears nowhere more glaring than in his account of the greatest of the Realists, Walter Wheeler Cook. According to Schlegel, it was Cook "alone among the Realists who had a well worked out understanding of what it was to apply scientific method to law" (224). Not a particularly original thinker, Cook nonetheless brought the Deweyan, pragmatic revolt against formalism to bear on the study of law. He insisted that "human laws are devices, tools, which society uses to regulate and promote human relations" (154). Judges and lawyers should evaluate "a given rule of law . . . by finding how it works" rather than by how well it conforms to established legal principles (154). With these notions, "Cook literally dragged the modern idea of science into law" (225). Schlegel insists that "this was a significant achievement"; he concludes, however, that the program of Cook's major Realist undertaking, the Institute of Law at Johns Hopkins, simply did not "hang together" (225, 223). Even as Schlegel concludes "there was no program" at the

Institute, he insists that “all this aside there were real achievements” (243).

This tension cannot be excused as interpretive balance. It borders on textual schizophrenia. Schlegel declares that Cook’s ideas “offered absolutely no innate direction for research” (158). He presents the Institute of Law at Hopkins as “nothing more than a mishmash of what each individual . . . wanted to do” (205). There “was no theoretical or even less grandiose idea that might have grounded the Institute’s research . . . no agreement on what a scientific approach to law meant” (205). In one instance, the Institute undertook a study of the courts of Ohio, Maryland, and New York to investigate the excessive cost, duration, and uncertainty of litigation. Schlegel concludes that “although there were interesting facts presented along the way and occasionally quite penetrating insights into modern litigation, it was usually the case that it was unclear what the study might *prove*” (179). Indeed, the survey of the courts provided “an interesting, massive, but wholly un-thought-out agglomeration of data, hypotheses, projects, and opinions” that evoked a “sense of simple technique overrunning understanding” (181, 204). Having said all this, Schlegel nonetheless insists that such problems “ought not to be allowed to overwhelm the positive achievement of these studies” (204). Well, for this reader, they should.

Schlegel’s evidence consistently belies his conclusions. The problem lies not in Schlegel’s scholarship, but in the sentiments he brings to his scholarship, sentiments he makes clear in his polemic on intellectual history. Schlegel writes as a Realist, as someone who believes that truth lies in empirical inquiry into the “social, economic, or legal conditions or practices” of ideas; consequently, his work suffers from the same deficiencies he finds in Realism (21). The Institute of Law’s court studies vacillated between truism (“the data were reasonably smooth along the classic American urban-rural axis”) and nihilism (“but within groups chaos reigned”) (204). Similarly, Schlegel’s account of Realism vacillates between clichés about professionalization and profiles of the “accident of person” that work against any generalizations about historical processes or the nature of American Legal Realism.

I do not disagree with Schlegel’s account of the institutional course of Realism. I do feel, however, that his account suffers from a problem similar to that of a study proposed by Underhill Moore: “A suggestion to go to Cincinnati to ‘observe the operations of bank tellers at close range’ was pointless when a call to a friendly banker coupled with a bit of imagination would provide the same information” (237). The failure of law to follow other humanistic disciplines in modelling itself on empirical social science may seem

strange when one considers the norms that shape most of twentieth-century American intellectual life; however, when one considers the hundreds of years of prescientific practice that the legal profession brought to its confrontation with empirical social science, it appears less strange. By the late nineteenth century, secular academics had successfully marginalized the central discipline of a classical humanities education, theology. Empirical social science did not transform the classical curriculum so much as it created an entirely new one—the academic division of labor that plagues us to this day. Law followed a different path. The secular rationalism of the Constitution may have transformed the understanding of common law in nineteenth-century America, but it could not completely eradicate the “insider” perspective of common-law interpretation.⁴ The nineteenth century disestablished religion, but it did not disestablish law. Legal discourse retains an air of sanctity largely lacking in the humanities due to its connection to “sacred,” pre-scientific interpretive traditions. Schlegel describes the translation of these traditions into “professional norms,” but he fails to explain their persistence in the face of the modern assault on the sacred. Beyond an armchair observation on the weight of institutional continuity, I do not see how this persistence could be explained.

To be fair, Schlegel explicitly rejects “the heavy hand of the contemporary historian/explainer” and insists that “the point of this book is the stories” (12, 13). This raises the question: What is the point of the stories? Like so many of the court studies undertaken by the Realists, Schlegel’s biographical portraits may be interesting, and they may provide insights into individual personalities, but it is not clear what they prove. Cook’s failure to get along with his coworkers may have contributed to the ultimate failure of the Institute of Law, but according to Schlegel, internalized professional norms had already stacked the historical deck against Realism regardless of the personalities of individual Realists. Lacking any strong explanatory power, these professional biographies merely “prove” what Schlegel calls “that humanistic ideal—people trying their best to get from Monday to Tuesday in as honorable a job as they have managed to find” (261). Far from being “deeply postmodern,” this bureaucratic existentialism represents one classic strain of nonrevolutionary modernism, perhaps best embodied in Freud’s affirmation of the rational analysis of everyday life in pursuit of ordinary everyday unhappiness. One does not need to “embrace . . . biography and

4. See generally Morton J. Horwitz, *The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy* (New York: Oxford University Press, 1992).

social history” in order to prove this ideal; one could just as easily read Freud. Of course, people never really “prove” this ideal, they simply affirm it. As advertisements for the nihilism of modern humanism, Schlegel’s stories reduce life to the everyday world of work and love.⁵

At times, Schlegel’s account of Realism calls his own humanistic values into question. Schlegel expresses some dissatisfaction with the influence of John Dewey on Realism, and on Walter Wheeler Cook in particular. The greatest humanistic philosopher in twentieth-century America, Dewey constructed his pragmatic philosophy around the “primary assertion . . . that people do not think axiomatically in syllogisms but, rather, with an end or problem in view” (68). Schlegel follows Dewey by accepting the primacy of instrumental reason to human life, but concedes that “Dewey’s insight said absolutely nothing about what to think about and, indeed, in its generality, it suggested that one might think pragmatically about anything at all” (68). The lack of direction in Cook’s Institute of Law would seem to be as much a problem of ideas as of personal idiosyncracies or professional norms. My frustration with Schlegel parallels his frustration with Dewey and Cook: To say that intellectual history should be the history of intellectuals who do things with ideas does not tell us which intellectuals we should study, and implies that we might study any intellectuals at all. The only criterion for fit subject matter would seem to be proximity to the humanist ideal of bureaucratic muddling through.

Schlegel justifies his book as a search for “intellectual heroes” (259). Ironically, the book finds as its hero not an intellectual, but an idea: the idea of history itself. Despite his admiration for the Realists, Schlegel criticizes them for ignoring history in favor of “narrowly quantitative studies” (235). Schlegel sees in the grand tradition of European historical sociology a road not taken, one capable of providing “alternative frameworks for understanding” the data collected by the Realists in their various empirical studies. He argues that this tradition “was closed off to the Realists . . . for reasons of language, discipline, approach, and source,” but concedes that the Realists refused to engage even “the good American historical scholarship of Henry Adams, Charles Beard, and James Harvey Robinson” (235).

Schlegel explains this refusal in terms of the prevailing understanding of history in the legal academy: “Unfortunately, but understand-

5. On the place of work and love in modern thought, see Charles Taylor, “The Affirmation of Ordinary Life,” pt. 3 of *Sources of the Self: The Making of Modern Identity* (Cambridge: Harvard University Press, 1989).

dably, the Realists conflated history with one of its types, doctrinal history, and so eschewed history altogether because for them it had the wrong resonance" (235). Realists saw in doctrinal history a formalism too tied up with the tradition of legal interpretation to be able to get outside of the law and examine it objectively. The European and American historical traditions offered models of thinking that combined methodological looseness with a "rigidly objective . . . treatment of sources" (235). Cut off from these traditions, Realists drew on the increasingly tighter methodology of American sociology. Schlegel concludes: "Theirs would be a red-blooded American's quantitative empiricism even if the collection of totals and analysis of percentages benumbed the brain" (236). Presumably, an engagement with history would have provided a qualitative antidote to this vulgar, quantitative empiricism.

Schlegel fails to make clear just what "quality" history could have brought to the social-scientific study of law. Schlegel's book, however, makes clear that historical studies of American Legal Realism tend to be occasions for reflecting on the tension between a qualitative and a quantitative social science, and affirming the need for both in the scientific study of man and society. Morton Horwitz's *The Transformation of American Law, 1870-1960*, presents a different portrait of Realism than Schlegel's book, but also sees the historical significance of Realism in terms of the tension between quantity and quality in humanistic inquiry. Horwitz argues that the "critical thrust of Realism has been virtually smothered by the exaggerated emphasis placed on the Realist turn to social science." Identification with "the most intellectually regressive forms of behavioral and value-free social science" has obscured "a central element of the Realist legacy—its interpretive or hermeneutic understanding of reality."⁶

Unlike Schlegel, Horwitz insists that the Realists were "passionate about values." Horwitz blames the tendency toward "ethical positivism" in American legal discourse on the neutral-principles school that rose up in reaction to Realism in the years following World War II. This school of interpretation rejected the Realists' insistence on the connection between law, politics, and morality in favor of a "morality of process" independent of results. The triumph of this separation of law from politics has enabled American legal discourse "to hide behind unhistorical and abstract universalisms in order to deny, even to itself, its own political and moral choices."⁷ Schlegel and Horwitz disagree on the Realists, but they agree on

6. Horwitz, *Transformation of American Law*, 181.

7. *Ibid.*, 182, 253, 268, 272.

history: Both link history to some kind of moral sensibility, and in grand humanist fashion insist that such a sensibility be brought to bear on the study of law.

Like most historians of social science, historians of Legal Realism tell a story of the conflict between positivism and humanism, between a value-free and a value-informed mode of inquiry.⁸ Historians who tell this story tend to write from a humanist perspective, and tend to conclude with some kind of affirmation of “values.” A representative work in this genre of historical writing, Schlegel’s book unintentionally reveals the opposition of positivism and humanism to be false, and the affirmation of “values” to be empty. Schlegel more-or-less successfully reconstructs the meaning of Realism through his reconstruction of the context of Realism, but his social-historical reconstruction provides no basis for an ethical evaluation of Realism itself.

Schlegel’s biographical approach may avoid the mind-numbing “collection of totals and analysis of percentages” commonly associated with positivism, but apart from any explicit normative context for inquiry, biographical sketches themselves appear as mind-numbing “facts”—interesting perhaps, but of questionable significance. Schlegel’s social history of intellectuals places text in context without addressing the problem of how one evaluates text or context once one has accepted the positivist assumptions of empirical social science. In this way, it embodies the very procedural norms so often decried by historians of Realism and American legal discourse in general. Like so much of academic history writing, Schlegel’s book embodies an “operational aesthetic” geared merely toward revealing the mechanics of history.⁹

For truth, Schlegel substitutes moralism. This moralism, moreover, reveals itself to be as much a procedural norm as the social history of intellectuals. Schlegel concludes his book with an affirmation of the Realists as “intellectual heroes” who “expressed care, concern, and patience in carrying . . . work to a conclusion,” had “idea[s] [they] passionately believed in,” and possessed “extraordinary flinty integrity and seriousness of purpose” (257). The Realists may have possessed these qualities, but none of these qualities are specific to Realists or Realism. Schlegel’s book suggests that passionate belief in an idea is

8. For a recent example, see Dorothy Ross, *The Origins of American Social Science* (Cambridge: Cambridge University Press, 1991).

9. I take this phrase from Neil Harris’s account of P. T. Barnum’s museum of freaks and curiosities. Perhaps not as entertaining as Barnum’s shows, academic history has become increasingly Barnumesque with every passing year, and continues to prove that, yes indeed, there is a sucker born every minute. See Neil Harris, *Humbug: The Art of P. T. Barnum* (Chicago: University of Chicago Press, 1973), chap. 3.

more important than any particular idea believed in, and that seriousness itself is more important than any purpose to which seriousness could be directed.

This procedural orientation unites the social history of intellectuals with the history of ideas. I agree with Schlegel that the history of ideas is "an essentially empty exercise," but not because it fails to connect ideas to a material context. Connecting ideas to a material context does not tell us something more than connecting ideas to other ideas, it simply tells us something different. Ideas and texts may serve as contexts for understanding related ideas and texts. As contexts change, so will meanings. This excess of meaning leads to calls for synthesis, and synthesis soon leads to calls for revision. The belief that "it is an important thing for any culture to know where the ideas in its past and present came from" drives this process in social history and the history of ideas (259). Just why it is important to trace the course of ideas over time is not clear to me from Schlegel's book. Schlegel does not argue for history, he simply assumes it, and affirms it. In this existential affirmation, process becomes substance. Still, the textual genealogies of the history of ideas and the contextual genealogies of social history both fail to provide any basis for evaluating the ideas and intellectuals studied.

Why is it important to know where ideas come from? To play the devil's advocate, I will explain one cliché in terms of another: We study the transformation of ideas over time because those who do not know the past are destined to repeat it. In this spirit, Schlegel draws a practical lesson from his study of Realism: "Until some genius comes up with some reason for seeing law as something else, and sells it in a culture where currently the only alternative understanding of law available is that of . . . law as who you know . . . there is no point in talking" (256-57). As practical advice, this amounts to asserting that we need to change the culture before we can bring about cultural change. Professional identity "explains" the failure of Realism about as well as dormative powers explain why opium causes sleep. Legal Realism and the professional history monograph of the type Schlegel has written both grew out of a Progressive intellectual ferment committed to the belief that the new social sciences could tame the irrationalities of the market by revealing the chain of causality that drives the development of society. Against this faith, the twentieth century has seen the irrationality of the market merely supplemented by the irrationality of the state. The social sciences have failed to deliver the control promised in the fields they successfully shaped in their own image; there is no reason to think that law has much to learn from them. Social-scientific causality is little more than

common sense and tautology. The study of the past cannot bring control.

Of course, one may study the past for other reasons. Schlegel's stated purpose of finding "intellectual heroes" or role models suggests that the study of the past may serve as a means for character building or personal edification. This merely begs the question of what kind of character one should build and why. Schlegel presents a convincing portrait of the Realists as iconoclastic-but-committed academic bureaucrats, but does not advance any convincing argument for the worth of this character type. Indeed, such substantive arguments lie outside the procedural norms of history writing. Even so "rarified" an intellectual historian as Arthur O. Lovejoy never argued *for* the ideas he studied; he merely argued *about* them. Lovejoy led the fight against Realism at Hopkins, but his brand of the history of ideas objectifies the past in a manner similar to the Realist social history practiced by Schlegel.¹⁰ Lovejoy clearly sympathizes with the ideas he studies in his masterpiece, *The Great Chain of Being*, and Schlegel clearly sympathizes with the Realists, but neither historian claims to be bound to their subject matter in any substantive way; indeed, both scholars accept objective detachment from their subject matter as a precondition for proper historical inquiry. Lovejoy and Schlegel submit not to the authority of the texts/contexts that they study, but to the procedural norms of evidence and argument that structure professional history writing. Their work may tell us in different ways how certain ideas develop over time, but it cannot tell us if these ideas are true. Failing the test of truth, the "rarified atmosphere" of the history of ideas and the solid ground of social history are both "so much hot air" (208).

The problem of the relation of the historian to history points to a central issue in Realism itself. According to Schlegel, the conflict between the formalism of nineteenth-century legal science and the antiformalism of twentieth-century Legal Realism may be understood in terms of the conflict between the perspectives of the insider and the outsider. From the insider perspective, "law was about norms" (227). "Legal scientists examined case reports and from the cases derived . . . doctrines that were fit into a system of principles that governed the action of judges because they formed the law" (226). Progressive reformers working within the tradition of legal science accepted the normative authority of legal rules, and sought simply to make existing rules better. Legal Realism drew instead on Oliver

10. See Arthur O. Lovejoy, "Introduction: The Study of the History of Ideas," in *The Great Chain of Being: A Study of the History of an Idea* (Cambridge: Harvard University Press, 1957), 3. Lovejoy compares the study of the history of ideas to "analytic chemistry."

Wendell Holmes' prediction theory of law, which "suggested that it was plausible for a party inside the system to act as if he were observing the system" from the outside (227). Thus, Walter Wheeler Cook insisted that legal research, whether in the library or in the field, should yield "rules . . . organized not with reference to principles but rather with respect to considerations of policy, of social advantage" (226). This outsider, instrumental view of the law "suggested that the legal science of the insiders produced not the objective truth that it had always purported but something else" (227).

Skeptical of the insider perspective, Cook could not dismiss it completely without cutting himself off from the legal profession that for the most part operated within it. In the grand pragmatic tradition, Cook simply never bothered to reconcile the two perspectives. As Schlegel sums up this evasion: "Anything could be done scientifically: one simply adapted the available tools to the materials and objectives at hand and set to work at whatever one wanted" (227). Outsiders and insiders could peacefully co-exist, making use of each other's work when it suited their goals, and otherwise ignoring it. Cook's compromise "literally dragged the modern idea of science into law," yet "enabled law to avoid the awful morass of statistical method in which social science still finds itself" (225, 228).

A similar compromise has come to structure the humanities in general in the wake of the pragmatic revolt against formalism. Schlegel's own book embodies the very insider/outsider schizophrenia he analyzes in law. Strident assertions of value (the humanistic ideal) co-exist with strident assertions of value-free objectivity (the social history of intellectuals), both of which co-exist with strident qualifications of value and objectivity ("I have no illusions . . . that my narrative is more direct, more unmediated, less controlled than would be the case were I to adopt a more argumentative form of presentation") (13). The academic division of labor has ensured that these contradictory orientations rarely appear together in a single work, and this arrangement has proven comfortable enough for so long as there has been a basic agreement on the ends of humanistic inquiry. These ends found their clearest formulation in the "consensus" era following World War II: economic prosperity through some form of a mixed economy, and cultural cosmopolitanism through government support of the arts and education.

Since the early 1970's, the political mood of the country has shifted against these values. Universities and law schools in particular have come under attack as strongholds of a cultural cosmopolitanism perceived as hostile to tradition. The left-liberal consensus that still dominates the mainstream of the academy has responded with ever more strident assertions of an increasingly empty humanist ideal, and

ever more paranoid denunciations of the “authoritarian personality” of their opponents; both strategies suggest desperation. Against the ethically and intellectually bankrupt humanism of the academy, mainstream conservatives have attempted to revive the “traditional” nineteenth-century virtues of free markets and family values; this, too, suggests desperation. There is nothing “traditional” about these values. The free market of the nineteenth century defined itself against not only the decaying feudal order and the mercantilist state, but also against all traditions that might restrict the pursuit of economic self-interest. Middle-class ideologues of domesticity reinvented the family as a separate sphere of value apart from the amoral marketplace, but this arrangement has long since proved incapable of protecting the family from the totalizing logic of the market. By embracing the “value” of economic growth, conservatives ensure instability in the family and every other would-be “sacred” sphere of life.

The sterility of the humanist outsider perspective and the vacuity of the conservative pseudo-insider perspective reflect the persistent failure of American intellectuals to reconcile Enlightenment universalism with some substantive understanding of tradition. This failure has been particularly glaring in American law. During the nineteenth century, American judges and lawyers struggled to accommodate the outsider perspective of the Constitution with the insider perspective of common law. The Constitution soon became something like holy writ, man-made yet handed down, invested with all the sanctity of an ancient tradition; however, common law soon changed from a body of principles to be applied to specific cases to, in Morton Horwitz’s words, “a creative instrument for directing men’s energies toward social change.”¹¹ The principle of instrumentality has since provided a rather dubious basis for reconciling tradition and revolution in American law. Law remains an exegetical tradition bound by the authority of precedent, yet American law offers only a precedent of change hostile to all tradition.

Of course, debate over the “traditional” status of American law depends on some explicit understanding of the meaning of tradition. I take as my standard the social relations of knowledge embodied in what Roberto Unger, in his *Knowledge and Politics*, has identified as the “dogmatic disciplines” of grammar, theology, and legal doctrine. Within these traditional disciplines, there is no “clear distinction between the object accounted for and the account itself.” In the case of law, “the legal doctrine participates in the evolution of . . . the law,

11. Horwitz, *Transformation of American Law*, 1.

helping define its shape and determine its directions.” The “reasonings of lawyers and judges are drawn from the very tradition they expound and develop,” and “because of the intimate relationship between the account and its object, every claim . . . is an elaboration of some point of view already present in the community” of legal interpretation.¹²

American Legal Realism stands at the opposite pole from this understanding of law as a tradition. John Henry Schlegel’s account of Realism argues that American law operates somewhere between the extremes of a pure insider and pure outsider perspective. Like his historical subjects, Schlegel, too, operates between those extremes. Schlegel’s social history of intellectuals reduces the ideas of Realism to their historical context, only to affirm those ideas as transcendent values. If this be “the whole dance of life,” it would appear that the jig is up. The outsider perspective denies the truth status of the insider perspective, yet detaches itself from all the normative ordering principles necessary to make sense of the reality it objectively renders. Olympian denials of truth vacillate with existential affirmations of truth. This schizophrenia seemed to “work” during the glory days of academia in the 1950’s. I suppose as long as enough lawyers and legal historians have enough jobs, it will still seem to “work” despite its lack of intellectual coherence. For those content with this incoherence, *American Legal Realism and Empirical Social Science* provides a comfortable and comforting reading experience.

12. Roberto Mangabeira Unger, *Knowledge and Politics* (New York: The Free Press, 1975), 111, 112.

No Lever and No Place to Stand (A Response to Christopher Shannon)

John Henry Schlegel*

Rage, rage against the dying of the light.

Dylan Thomas¹

It is rather difficult for me to respond to a rage so fierce that at times it seems to lapse into incoherence, but I shall try. What I have done to bring forth such a rage seems to be two things. First is my celebration of the quotidian in the lives of intellectuals . . . most significantly for Mr. Shannon, though by no means my exclusive focus, their just getting on in a bureaucratic world. The second has to do with the lack of articulated grounds for my judgments of value, my apparent lack of commitment to truth. Both are said to play out in indefensible (or at least undefended) choices with respect to what stories to tell, what heroes to celebrate, what ideas to care about. And somehow all of this undermines what intellectual history should be about.

I make no bones about my reasons for doing as I do, so let me be clear about these matters. I cannot say what the life of an intellectual was like in 1850, 1750, or 1650, but I can say that for the past hundred or so years the major locus of intellectual activity has been in bureaucratic institutions—universities, magazines of opinion, think tanks. And yet we intellectuals on the whole think and write as if the standard of value in our business is the life of a Newton or a Rousseau or a Kant or some other independently wealthy gentleman, or retainer of such, someone for whom getting and spending is somehow unproblematic, and then flagellate ourselves in private (and occasionally in public) for not living up to that standard, for not

* John Henry Schlegel is a Professor of Law at the State University of New York at Buffalo. He regularly writes on the past and present of legal education and legal thought. Laura, Fred, and Jim checked my judgment on this one; for that kindness I absolve them of blame.

1. Dylan Thomas, *Do Not Go Gentle into That Good Night*, in *THE NORTON ANTHOLOGY OF POETRY* 1181, 1181 (Alexander W. Allison ed., 3d ed. 1983).

thinking transcendent thoughts all the time. We do ourselves ill by not recognizing the context in which we live and work and then measuring our lives by that context. To wish to measure ourselves by some context that we neither live in nor can recreate is that ultimate act of ahistoricity by an intellectual historian. I will not adopt such a measure and so sell hardworking humans short. And so I celebrate—with one or two cheers, never three—those who in the face of this quotidian existence seem to me to manage to do something that vaguely passes for noble, or fine, or admirable. Doing such in the bureaucratic institutions we all inhabit is, after all, a real achievement.

How then do I choose my heroes, my stories, my valuable ideas? Very simply. By myself in my own lights. The buck stops with me. As best as I can tell there is no truth, only an absence of lies. Though there are dozens of ways to recount the story that reaches this conclusion, I would begin with the observation that the Reformation killed the truth of revelation mediated by the Church Universal. The Enlightenment killed the Reformation's understanding of truth as revelation directly accessible to the believer. And the horrors associated with World War II killed the Enlightenment's notion of truth as revelation accessible through reason alone. There is no longer (nor ever was there) a transcendental, transpersonal, transhistorical basis for our value judgments. We make them all up.

This is not to say that man is the measure of all things. There is no measure of all things, only contested and contestable measures of some things. My stories, my heroes, my valuable ideas are my attempt to suggest, in the only way I as a historian know how, what stories are important, who ought to be taken to be a hero, which ideas are worth taking seriously. In aid of this activity I have nothing but verisimilitude, a range of experience hopefully shared with my readers, and the possibility that others share or can be persuaded to share my values.

Truth is by definition unattainable to fallen man and fallen man is the only one we have ever had. I thus make no claim to infallibility but deeply feel the limitations of my judgments. As an author I ask others to consider by their own lights—and none other—whether my stories are illuminating of a time past, whether my heroes were worthy in a time past, whether the ideas I value were useful for something at a time past. These are modest questions. Fallen man can ask only modest questions. But they are the questions I think are meaningful to ask about intellectuals and the product of their lives.

I also think they are sensible questions. After all, though one need not agree with Faulkner about man's triumph, and though the litany of outrages perpetrated by humans on each other is endless, still the

amazing thing is that without the aid of Truth (whatever we thought we had) we have built a remarkably rich and powerful body of thought in a deep and complex (though often meretricious) culture. Though hardly of transcendental significance—after all, the cockroaches will surely outlast our species—building this in the face of the second law of thermodynamics is no mean trick.

I would enjoy talking about the products of human culture in this way with Mr. Shannon, for they are obviously very important to him. But before we do so, I would ask him to consider the possibility that the appropriate response to my assertion that there is no lever and no place to stand when we make judgments in this fallen, bureaucratic world is not rage, but a willingness to engage in the hard work of telling meaningful stories, seeking meaningful heroes, identifying meaningful ideas . . . of building values as best as we humans can. Let us try together, Sir. You would be surprised how little one misses what one never had.

Empathy and Judgment

Martha C. Nussbaum, *Poetic Justice: The Literary Imagination and Public Life*. Boston: Beacon Press, 1996. Pp. xvii, 137. \$20.

Thomas Morawetz*

Reclaiming the place of philosophy as a metadiscipline,¹ philosophers have once more assumed the role of mediating boundary disputes among other disciplines. As the boundaries and shapes of various disciplines have grown vague and controversial, that role has become particularly significant and particularly quixotic as well.² Those who play this role have many audiences. Some speak primarily to, and about, scholars. Others concern themselves with pedagogy. Still others think about the impact of the disciplines on public officials and public affairs.

The relationship of law and literature is an especially fruitful interface for such scrutiny. Although courses on law and literature have proliferated in law schools, accompanied by a bull market in interdisciplinary articles, books, and journals,³ there is little agreement about the content and purpose of these activities. Indeed, there seem to be almost as many ways of giving content to law and literature as there are practitioners of it. This intersection of disciplines may variously become

* Thomas Morawetz is Tapping Reeve Professor of Law and Ethics at the University of Connecticut School of Law. He has published widely in jurisprudence, ethics, and criminal law.

1. "The notion that there is an autonomous discipline called 'philosophy,' distinct from and sitting in judgment upon both religion and science, is of quite recent origin. . . . [This is] the sense in which it has been understood as an academic subject in the nineteenth century." RICHARD RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* 131 (1979). The philosophical contributions of Ludwig Wittgenstein and Richard Rorty are widely understood as challenging this traditional way of conceiving of philosophy, and they have been influential in doing so. See also *THE RETURN OF GRAND THEORY IN THE HUMAN SCIENCES* (Quentin Skinner ed., 1985).

2. See *THE INSTITUTION OF PHILOSOPHY: A DISCIPLINE IN CRISIS* (Avner Cohen & Marcelo Dascal eds., 1989); *REDRAWING THE LINES: ANALYTICAL PHILOSOPHY, DECONSTRUCTION, AND LITERARY THEORY* (Reed W. Dasenbrook ed., 1989).

3. The proliferation of courses and research on law and literature is discussed in Elizabeth Villiers Gemmette, *Law and Literature: Joining the Class Action*, 29 *VAL. U. L. REV.* 665 (1995).

- (a) law *in* literature (the depiction of lawyers, judges, and legal practices in fiction), or
- (b) law *as* literature (the application of theories and techniques of understanding, borrowed from literary criticism, to legal texts and activities), or
- (c) the law *of* literature (consideration of the legal norms that shape and limit literary activity and attitudes), or
- (d) law *as influenced by* literature (examination of the role of literature in affecting legislation, judicial practice, political attitudes, and so on).

This list is only suggestive. Categories may be added to it, and these four categories themselves accommodate indefinitely many agendas and preoccupations.⁴

The purpose of all this activity is, if anything, more controversial than its content. To be sure, it provides employment for defrocked humanities scholars who have migrated to law schools in recent decades, and it affords law students a non-narcotic diversion from the rigors of legal doctrines and the apprehensions of study for the bar. At the same time, the vast majority of legal academicians persist in seeing law and literature courses and scholarship as fluff, peripheral to the enterprise of training lawyers, and therefore dispensable and unserious. No doubt many law students, lawyers, and judges agree. And there is also no doubt that equally many "pure" literary scholars continue to view their interdisciplinary cousins as adulterating the enterprise of theorizing about literature, as tainting the delicate dissection of transactions between readers and writers with distracting references to politics and legal doctrine.

Such skeptics about law and literature, as self-appointed guardians of traditional borders between the disciplines, may from one point of view be seen as fighting a war long lost. That, at least, is likely to be the position of scholars who have grown up without such borders, scholars who are more at home talking about texts in general than about legal texts or literary texts in isolation.⁵ The existence of this very Journal testifies to the viability and centrality of such scholarship.

4. I briefly discuss some of these possibilities in *Ethics and Style: The Lesson of Literature for Law*, 45 STAN. L. REV. 497 (1993).

5. Over the last thirty years, the work of such theorists as Roland Barthes and Jacques Derrida has effected a revolution in the study of language and in our understanding of all disciplines in which texts play an essential role. Hermeneutics, the study of the retrieval of meaning, has focussed the attention of legal and literary scholars on problems that their text-based enterprises have in common. Postmodern scholars are typically preoccupied with the implications of hermeneutical questions for understanding and communication in general. Among the most influential texts have been ROLAND BARTHES, *ELEMENTS OF SEMIOLOGY* (Annette Lavers & Colin Smith trans., 1968); JACQUES DERRIDA, *OF GRAMMATOLOGY* (Gayatri Chakravorty Spivak trans., 1976); HANS-GEORG GADAMER, *TRUTH AND METHOD* (Garrett Barden & John Cumming eds. & trans., 1975).

In this context, "interdisciplinary studies" threatens to become a misnomer when the disciplines themselves lose their identity and distinctiveness.

We can distinguish, therefore, three orientations toward such enterprises as law and literature. The first orientation—represented no doubt by the significant majority of legal academics, lawyers, and teachers of literature—presupposes that familiar, historically recognized borders among disciplines remain reliably and unshakeably in place. Interdisciplinary work is therefore secondary both in conception and in importance. The second orientation also presupposes that what we mean by law and by literature has changed little, that for the most part the study and practice of each discipline is bounded as it has been for most of the twentieth century. But this orientation is distinguished by a commitment to the importance of interdisciplinary work, in particular by the argument that lawyers and law teachers must accord literature a special place. The third orientation, as we have seen, is characteristic of those who question the assumed borders of disciplines and who deploy techniques, such as the deconstruction of texts and the exploration of hermeneutical insights, that transcend borders, arguably making them irrelevant. This third orientation belongs distinctively to postmodern commentators.

The position that Martha Nussbaum takes in her eloquent and passionate new book, *Poetic Justice: The Literary Imagination and Public Life*,⁶ and the task she sets for herself, clearly reflect the second orientation. She accepts and adheres to familiar distinctions between law and literature and illuminates the lessons of the latter for the former. As her argument progresses, it seems most immediately addressed to judges. She seeks to show that judicial decisions informed by "the literary imagination" are likely to be sounder and wiser than judgments reached by other means. Secondarily, she argues that legal education and the perspectives of lawyers should similarly be tempered by literary study.

If the focus of postmodern writers is on understanding and meaning, the preoccupation of more traditional writers such as Nussbaum is with morality. In her view, the lessons of literature for law are unequivocally moral lessons, lessons that are both indispensable for those who claim to do justice and unlikely to be learned in other ways,⁷ such as through social interaction.⁸ This impulse and

6. MARTHA C. NUSSBAUM, *POETIC JUSTICE: THE LITERARY IMAGINATION AND PUBLIC LIFE* (1996) [hereinafter *POETIC JUSTICE*].

7. See *infra* text accompanying note 14.

8. Nussbaum's concerns echo the notorious debates about relationships between "the two cultures" (science and the humanities) in the early 1960's. C. P. Snow and F. R. Leavis, as pointmen in the debates, disagreed about whether science and the humanities define two

conviction lead Nussbaum to accord training in literature an essential role in the cultivation of empathy and to accord empathy an essential role in judging. In the following discussion, I shall fill out the details of Nussbaum's argument (Part I), examine the implications and limits of her literary examples and her underlying conception of literature (Part II), and examine the implications and limits of her conception of the constraints of law and the role of judges (Part III).

I. LITERATURE AND MORAL IMAGINATION

Poetic Justice is derived from a series of lectures first given in 1991 at Northwestern University Law School and subsequently refined before other academic audiences. Nussbaum cites her experience teaching a law and literature course at the University of Chicago Law School in 1994 as shaping her arguments. Long associated with Brown University, most recently as University Professor, she is now professor of ethics at the University of Chicago. Her influential and well-received earlier books include works on Aristotelian theories of moral development⁹ and on the intersection of literature and moral philosophy.¹⁰

Two long-standing intellectual commitments are reflected in her agenda for law and literature. The first is a commitment to understanding the indispensable role of emotions in judgment, in particular the role of compassion and mercy in public judgment. The second is a commitment to the intelligibility of the concept of "quality of life," and to the defense of transcultural, nonrelativistic standards for measuring and assessing it.¹¹ What emerges from these ingredients are "the investigation and principled defense of a humanistic and multivalued conception of public rationality that is powerfully exemplified in the common law tradition."¹²

Poetic Justice is more hortatory than analytical. It defends unabashedly optimistic conceptions of the emotional potential of human beings, the power of literature to educe strong, beneficent emotions, and the capacity for wise, emotionally informed judgment among persons in general, among lawyers in particular, and even more particularly among judges. Nussbaum clearly rejects the more extreme claims of multiculturalists. For her, the relevant moral

separate cultures and whether the humanities naturally have hegemony over the transmission and refinement of morality. In claiming that role for literature, Nussbaum to some extent follows Leavis. See F. R. LEAVIS, *TWO CULTURES? THE SIGNIFICANCE OF C. P. SNOW* (1962); C. P. SNOW, *THE TWO CULTURES AND THE SCIENTIFIC REVOLUTION* (1964).

9. MARTHA C. NUSSBAUM, *THE FRAGILITY OF GOODNESS* (1986).

10. MARTHA C. NUSSBAUM, *LOVE'S KNOWLEDGE* (1990).

11. See *THE QUALITY OF LIFE* (Martha C. Nussbaum & Amartya Sen eds., 1993).

12. *POETIC JUSTICE*, *supra* note 6, at xv.

community is Western culture as it has evolved over recent millenia rather than the Balkanized subcultures of contemporary cultural discourse. It is important to look more closely at these features of her account, and to appreciate the ways in which they challenge the intellectual fashion, at least as that fashion is represented in the work of Jacques Derrida, Catherine MacKinnon, and Stanley Fish, rather than, for example, William Bennett.¹³

The essential first step of Nussbaum's argument is that persons in general are morally educable largely because they are emotionally educable. She is not concerned with self-regarding emotions such as anger, anxiety, or pride but rather with the emotions that underlie our perceptions of and transactions with others. Among the latter, certain emotions, such as envy and fear, inhibit such transactions while others, such as compassion, facilitate them. In Nussbaum's Aristotelian picture of human nature, compassion can be cultivated. Indeed it *must* be cultivated if persons are to exercise sensitive and refined moral judgment. Morality, in turn, is not a Kantian matter of determining universal rules and their instantiations but rather a matter of carrying out particularized acts characterized by appropriate feelings and other-regarding intentions. Compassion in this sense testifies against the privacy of emotions; it is possible only to the extent that one person enters into the emotions of another. This kind of linkage in turn makes possible moral responsiveness.

Nussbaum gives first place to literature in the triggering and cultivation of compassion (or empathy). At first, this seems odd. One might assume that compassion is directly evoked by social life rather than by reading, that our capacity for compassion is tested and aroused through the implicit demands of others, through observing and joining their pleasures and pains. Nussbaum thinks otherwise, apparently for two reasons. First, authors heighten and direct the opportunities for feeling empathy. Their creative intelligence concentrates the experience. We are single-minded in our attention to literature even if we are inattentive in our personal encounters. Thus, for Nussbaum, the important works of literature are those we are "held to . . . by love and fear" and not merely by "intellectual exhilaration and rational self-interest."¹⁴ Her second reason for

13. I have in mind Nussbaum's implicit rejection of skepticism about the coherent moral evolution of Western culture, the kind of skepticism that is exemplified by MacKinnon's self-styled Marxist analysis of the effects of power and bias on moral consciousness, see CATHERINE MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* (1989), and by Fish's suggestion that moral assumptions depend on the adventitious evolution of interpretive communities, see STANLEY FISH, *DOING WHAT COMES NATURALLY* (1989). The popular writings of William Bennett are free of such qualms about power and the relativity of value. See *THE BOOK OF VIRTUES* (1994); *THE MORAL COMPASS* (1995).

14. *POETIC JUSTICE*, *supra* note 6, at 30.

favoring literature over social life as a goad for empathy is that empathy includes metaphorical thinking, and literature is the main context in which such thinking flowers. In this sense, reading literature takes precedence over reading history: “[H]istory simply shows us ‘what happened,’ whereas works of literary art show us ‘things such as might happen’ in a human life.”¹⁵

Nussbaum has great confidence in the ability of persons in general and legal decision-makers in particular to engage in metaphorical thinking, guided by empathy, in their public roles. “[T]his imagination—including its playfulness, including its eroticism—is the necessary basis for good government of a country of equal and free citizens. With it, reason is beneficent, steered by a generous view of its objects; without its charity, reason is cold and cruel.”¹⁶ The implied dichotomy here is sharp. It seems to apply not only to individuals (those with playful imagination and those without) but also to particular judgments (those informed by playful imagination and those informed by cold reason).

This step in her argument merits analysis. On one hand, many will regard it as transparently (and heartwarmingly) true. Empathy, guided by playful imagination and guiding reason, is always a good thing; its absence is always regrettable. Thus, an empathetic decision is necessarily better than a nonempathetic one. On the other hand, the step involves easy, too easy, elisions. Does playful imagination always involve beneficence and generosity—or can the play of imagination equally well serve cruelty and selfishness? Is analytical reason always cold and defective, or do many problems of legal judgment require hard choices? Do such problems often require us to disregard our empathetic impulses, however regretfully? These questions implicate Nussbaum’s conception of law and the task of judging and will be considered in Part III.

The premises of Nussbaum’s argument represent a qualified (Aristotelian) form of individualism whereby full development of individual moral capacities follows a describable course. The individual who does not use his imagination to enter into the lives of others, to apprehend both their difference and their accessibility, is doubly doomed, doomed to a narrow and ungenerous range of emotions and doomed to moral inadequacy. In other words, imagination, or what Nussbaum calls “fancy,”¹⁷ is the vehicle through which emotions are cultivated. Moreover, the exercise of fancy develops not just any emotions but a hierarchy or ordering of

15. *Id.* at 5.

16. *Id.* at 43.

17. *Id.* at 13-52.

emotions that makes possible responsive, generous, and particularized actions. Individuals alone are bound to lack such ordered feelings and are therefore incapable of refined and sophisticated moral discrimination. Yet, as we have seen, social life itself is for Nussbaum neither the preferred nor the necessary medium for emotional/moral flourishing. Rather, literature is imaginative and “playful” participation in others’ lives, lives that are recreated through the prism of the author’s own imagination and thus transformed into seductive metaphors. To be sure, a reader who has lived in chaste isolation from others may not be the ideal beneficiary of literature’s lessons, but Nussbaum says little about how much living is a precondition for growth through reading. In any event, the community in her version of communitarianism is one in which persons “connect” through authors and books.¹⁸

Although Nussbaum never describes the emotions that inform morality or the parameters of moral judgment, the reason is neither coyness nor relativism. If they are emotions at all, empathy and compassion are second-order emotions; they are more accurately seen as modes of being in touch with the emotions, feelings, expectations, and vulnerabilities of others. What we expect from judges is not the experience of first-order emotions—such as fear, love, anger, distress—but the capacity to make morally significant decisions in the light of empathy with the first-order emotions of others. Moreover, empathy endows the judge with both closeness to and distance from others, the closeness of access and the distance required by fairness and justice. The latter is implicit in recognition by the judge of her power of decision and appreciation of her separate identity.¹⁹

Thus, Nussbaum is not being coy when she declines to specify the relevant emotions and parameters of judgment. Her position is that, for the judge who is not compassionate, no amount of argument and analysis can illuminate what she lacks, and for the compassionate judge, any attempt to set down and analyze the principles and rules of judgment will be otiose. Similarly, her argument is not relativistic. She assumes that compassionate judges, like Tolstoy’s happy families,²⁰ will be more alike than they are unlike. She urges judges and all moral decision-makers to be “confident in the process that some reasons are indeed stronger than others, that some ways of

18. Her preoccupation with empathy invites comparison with E. M. Forster’s concerns in presenting his bookish characters and admonishing them (and us) to “only connect.” E. M. FORSTER, *HOWARDS END*, epigraph (Vintage ed., 1970).

19. *POETIC JUSTICE*, *supra* note 6, at 75.

20. “All happy families are alike but an unhappy family is unhappy after its own fashion.” LEO TOLSTOY, *ANNA KARENINA* 13 (Rosemary Edwards ed. & trans., Penguin Books 1954).

treating human beings are indeed better than others, and can be justified as better by the giving of such reasons."²¹

Such an objectivist commitment can be seen as weak or strong. At its weakest and most formal, it concedes only that *any* moral judge deploys reasons that *she* regards as stronger than others and that for any person who claims to make moral judgments it cannot be the case that all "ways of treating human beings" are morally equivalent. But Nussbaum's commitment is neither weak nor formal. "[A]s concerned readers we search for a human good that we are trying to bring about in and for the human community. . . . Our search is guided, as well, by the judgments and responses of our fellow readers, who themselves are seeking such a comprehensive fit."²² In other words, Nussbaum presupposes a broad and universal humanism to which the imaginative and responsive reading of literature holds a key. Communication among moral agents, facilitated by literature, will yield such harmonious and harmonizing insights.²³

II. ON LITERATURE AND MORALITY

Compelling as it is, Nussbaum's defense of the role of literature begs questions about the nature of literature and the nature of law. I will address questions about literature in this Part and questions about law in the next Part.

Nussbaum examines three works of literature to illustrate her thesis: Dickens' *Hard Times*, Whitman's *Song of Myself*, and Wright's *Native Son*. Dickens receives the lion's share of attention because the message of *Hard Times* so clearly inspires and tracks Nussbaum's own message. In that novel, Dickens satirizes a mode of education, as well as a mode of thinking, that can variously be described as utilitarian, behaviorist, or crudely empirical. According to this view, only what is directly observable and quantifiable counts as an ingredient of knowledge. Usable knowledge, the only knowledge worth having, uses hard, not soft, data. The methods of science and not the methods of what we have come to call the humanities yield true knowledge and offer a basis for social progress. Thus, the most fruitful insights, the most exhilarating and effective clearing of intellectual cobwebs, arise from applying scientific methods to human affairs.

21. POETIC JUSTICE, *supra* note 6, at 83.

22. *Id.* at 84.

23. Confidence in the harmonizing power of dialogue is, of course, commonplace in contemporary political theory. The most resonant influence is the work of Jürgen Habermas. See 1,2 JÜRGEN HABERMAS, THE THEORY OF COMMUNICATIVE ACTION (1984, 1987).

Nussbaum demonstrates that Dickens' withering critique of this view works on two levels. The novel is not merely didactic and argumentative but is also written to evoke and exercise the empathetic capacities (the capacity for "fancy") of the reader. In other words, the novel is itself an *example* of the kind of education it commends. The same aims, or complementary ones, are achieved, according to Nussbaum, by Whitman and Wright. Whitman leads us to compare poets with judges as observers who abjure an "abstract pseudomathematical vision of human beings" for "a rich and concrete vision that does justice to human lives."²⁴ That vision embodies a "commitment to fairness and fitness [that] does not yield to bias and favor" but cultivates fairness as neutrality in full recognition of the "rich historical concreteness"²⁵ of persons.

If this commitment to seeing persons at once empathetically and neutrally (without bias) is essential for sound judging, and if literature is essential in showing readers how empathy and neutrality can be compatible, then "we should seek novels that depict the special circumstances of groups with whom we live and whom we want to understand."²⁶ Wright's *Native Son* is, for Nussbaum, a paradigm because it shows "how not only the external circumstances of action, but also anger, fear, and desire have been deformed by racial hatred and its institutional expression."²⁷

Thus, three disparate literary works support the argument that empathy in fueling imagination is an essential aspect of rational judgment in human affairs, and a fortiori in legal affairs. As a statement of humanistic optimism, the argument can hardly be faulted. Certainly some admirable works of literature can be used just as Nussbaum describes, and certainly some judges in varied situations perform their job wisely and benignly when they follow the methods she outlines.

A serious limitation of Nussbaum's argument, however, is that it takes a narrow, even a Procrustean, view of literature and its powers. In this sense, her own account is criticizable on some of the same grounds on which she disparages the utilitarian, pseudoscientific perspective of Mr. Gradgrind in *Hard Times*. Just as there is more to human nature than is accommodated in his philosophy²⁸ and more about the complexity and individuality of human experience to be gleaned from reading than he is prepared to concede, so too

24. POETIC JUSTICE, *supra* note 6, at 81.

25. *Id.*

26. *Id.* at 93.

27. *Id.* at 94.

28. "There are more things in heaven and earth, Horatio, than are dreamt of in your philosophy." WILLIAM SHAKESPEARE, *HAMLET* act 1, sc. 5.

Nussbaum offers an artificially constricted view of human nature and the benefits of reading. To be sure, she admits that she is selective, but she implies that works that do not conform to her thesis are lesser works, safely ignored: "We all know that many popular works entice the reader through crude sentiments and the evocation of fantasies that may involve the dehumanization of others."²⁹ Even if we shamefacedly put aside and censor from our awareness such works of apparent near-pornography, much of human nature and its apprehension through literature is left out of account.

Literature and human nature.

Countless works of literature, from Sophocles through Shakespeare and Ibsen to Faulkner and Beckett, show how hard it is to attain the preconditions for empathy and the benign deployment of imagination and judgment. First of all, as Freud was adept at arguing, our emotions often operate in the service of denying rather than pursuing self-knowledge.³⁰ Self-knowledge, a precondition for empathy, is often painful to achieve and often achieved in a struggle with emotional predispositions. Even when it is achieved, self-knowledge can destroy.³¹ For other personalities, self-knowledge and empathy can be used for malign ends; Richard III is nothing if not in touch with the feelings of others, as is every master of manipulation.³² And, often in literature, altruistic motives may serve naiveté.³³ Beyond all this, literature often raises the pessimistic question of whether an imaginative and robust understanding of others in their complexity is compatible with mutual harmony and toleration or whether it is an awful and burdensome kind of knowledge that persons can hardly endure.

Dickens and Wright are special authors in this regard. Dickens has limited empathy for his characters insofar as few of them are three-dimensional (or round) and most are two-dimensional (or flat).³⁴ Rather than interacting with each other and demonstrating a capacity for change, the secondary (flat) players characteristically do star turns, demonstrating a single exaggerated trait. They are persons as epithets. The main (round) players are, in the eyes of many readers,

29. POETIC JUSTICE, *supra* note 6, at 10.

30. See generally SIGMUND FREUD, INTRODUCTORY LECTURES ON PSYCHOANALYSIS (James Strachey, ed. & trans., Norton 1976).

31. SOPHOCLES, OEDIPUS REX (D.W. Myatt trans., Thurmynd Press 1994); WILLIAM SHAKESPEARE, KING LEAR.

32. WILLIAM SHAKESPEARE, RICHARD THE THIRD.

33. HENRIK IBSEN, THE WILD DUCK (1884) *reprinted in* 6 IBSEN, at 127 (James Walter McFarlane ed. & trans., Oxford University Press 1960).

34. Generations of critics owe this distinction to E. M. FORSTER, ASPECTS OF THE NOVEL (1927).

insipid and limited, however much they may be empathetic and benign; they are easily overshadowed by the villains and the eccentrics.³⁵ Wright's characters as well, powerful as they are in stirring social conscience, are not notable for their complexity and variety.

Thus, Nussbaum's curriculum for law and literature threatens to paint an admirably optimistic view of human nature—of the relations among emotion, rationality, imagination, and judgment—but one that may be true neither to its inherent Protean complexity nor to the myriad representations of it in literature.

Literature and politics.

When writers of fiction grapple with law and politics, few find solace and cause for optimism. Many authors are persuaded that institutions are corrupt, that law and politics represent facades and rituals that barely hide, and indeed often facilitate, exploitation.³⁶ Moreover, many believe and argue that the more virtuous a public official is, the more readily she will be defeated and destroyed.³⁷ Victory for the forces of good is always the exception.

Nussbaum says little about, and has little use for, literature that shows the complex contexts in which empathetic and rational judgment must operate. The problem is, of course, more complicated than the Manichean opposition of the forces of altruism and the forces of corruption. Many authors see and fear that the processes of law and politics stultify even more than they corrupt, causing hope and ambition to wither. In countless ways, literature explores these contexts. Such literature should arguably be an important part of a curriculum in law and literature, especially one focussed on the capacities and opportunities of judges.

Literature and hermeneutics.

Much of Nussbaum's analysis seems to proceed on the assumption that literary works speak to us univocally. Certainly, Dickens and Wright hardly suffer from ambiguity, and Nussbaum analyzes Whitman with the assurance that she has ferreted out his singular meanings. Of course, she is correct in treating these particular works

35. Compare, for example, Uriah Heep with David Copperfield in CHARLES DICKENS, *DAVID COPPERFIELD* (Nina Burgis ed., Oxford University Press 1981) or Fagin with Oliver Twist in CHARLES DICKENS, *OLIVER TWIST* (Oxford University Press, 1966).

36. This Rousseauist view of human institutions is displayed in countless novels, plays, and films. See, e.g., ROBERT PENN WARREN, *ALL THE KING'S MEN* (1946); LOUIS MALLE, *LACOMBE, LUCIEN* (Nouvelles Éditions de Films, 1974).

37. See, e.g., HENRIK IBSEN, *AN ENEMY OF THE PEOPLE* (1882), reprinted in 6 IBSEN, *supra* note 33, at 19.

with little deference to variations in meaning and understanding that are reader-dependent. The satirical aspects of *Hard Times*, for example, are hardly more dependent on the particularities of a reader's expectations than are the hortatory aspects of a STOP sign.

Yet, the lessons of hermeneutics and theories of deconstruction are not irrelevant. Many desirable components of a curriculum in law and literature are works that invite endless debate and support multiple perspectives. Works by Kafka (*The Penal Colony*³⁸, for example), Melville (*Billy Budd, Bartleby the Scrivener*³⁹) and Camus (*The Fall*⁴⁰) only begin to fill a roster of writers for whom law is an arena of ambiguity and danger, and judgment is a task full of challenge and peril, both for the judge and the judged. These complexities hardly seem to be accommodated at all in Nussbaum's scheme.

The assumption that novels are primarily didactic and yield moral, or at least edifying, lessons⁴¹ is a premodern assumption, well suited to the context in which nineteenth-century novels (or novels written in a nineteenth-century mode) were published.⁴² Modernism, in the hands of such novelists as Joyce, Kafka, Musil, and Faulkner, teaches us to suspend the assumption that novels mirror moral and epistemological characteristics of the "real world" and to understand the manipulative powers of authors to suspend and surprise realist expectations.⁴³ Finally, postmodernism treats the reader's contribution to the transaction between author and reader as problematic. By focussing on didactic novels and by presuming to generalize readers' responses, Nussbaum takes a premodern, if intuitively seductive, posture toward literature.⁴⁴

III. ON LAW, INSIGHT, AND EMPATHY

If Nussbaum has a constrained view of literature and its relevance,

38. FRANZ KAFKA, *THE PENAL COLONY* (Willa and Edwin Muir trans., 1975).

39. HERMAN MELVILLE, *BILLY BUDD, SAILOR* (Penguin Books, 1986); HERMAN MELVILLE, *Bartleby the Scrivener* in *THE PORTABLE MELVILLE* 45 (Jay Leida ed., 1952).

40. ALBERT CAMUS, *THE FALL* (Justin O'Brien trans., Knopf 1957).

41. POETIC JUSTICE, *supra* note 6, at 12.

42. According to many critics, the nineteenth century (and the decades framing it) was the heyday of the novel, an era in which the novel represented the most familiar and commodious medium for cultural communication and in which questions of form and content were relatively unproblematic. The era that begins with Fielding and ends with Lawrence (the era of Dickens and Eliot, Balzac and Flaubert, Tolstoy and Dostoyevsky) was succeeded by a period of uncertainty and experimentation during which the terms of novelistic communication came to be reconceived by each author.

43. The breakdown of realism and a new self-consciousness about form and method are distinctive features of modernism in art and the theater, of course, as well as in fiction.

44. It seems plausible that this posture and these expectations are shared by most readers of fiction.

the same can be said for her view of law. It is, to be sure, churlish and wrong-headed to quarrel with the idea that empathetic imagination is more desirable than its absence, and that justice presupposes judges who understand the lives, needs, and feelings of those affected by their decisions. It is, however, easy to exaggerate this warm insight.

Consider Nussbaum's claim that empathetic "imagination—including its playfulness, including its eroticism—is the necessary basis for good government of a country of free and equal citizens. With it, reason is beneficent, steered by a generous view of its objects; without its charity, reason is cold and cruel."⁴⁵ Here, there seem to be two notions, that playful imagination *insures* beneficent judging (and law-making) and that generosity should never be absent from the workings of law. The first and less important notion posits an ideal that one *wishes* were true. But, as history, literature, and personal experience too often show, the links between imagination and beneficence (or generosity) cannot be assumed. Nussbaum, drawing inspiration from Aristotle, wants us to join the two dimensions of empathy, the cognitive and the motivational, to convince us that to understand others is to be disposed to treat them altruistically. The claim is attractive in positing an ideal, but the debate regrettably remains open.

The second notion, about links between generosity and law, leads Nussbaum to criticize such legal theorists as Herbert Wechsler and Stanley Fish. Against Wechsler, she emphasizes that neutral principles in law must always be tempered by "as rich and comprehensive an understanding as possible of the situation of the group involved in the case,"⁴⁶ that one must always see legal claimants "as individuals with their own stories to tell."⁴⁷ She attacks Fish for arguing that once you "take away extrahistorical justification . . . you do away with all rational justification. You are left with causes but not good reasons."⁴⁸ Nussbaum counters that the understanding that comes with empathy supplies its own good reasons, its own ethical justification.

Nussbaum criticizes Wechsler and Fish as too ethereal and seeks to bring them down to earth, but she performs her own acts of levitation. Although no one would question that it is highly desirable for judges to understand the background, circumstances, and feelings of parties to the case, these facts are not all always relevant, nor do they always

45. POETIC JUSTICE, *supra* note 11 at 43.

46. *Id.* at 89-90.

47. *Id.* at 96.

48. *Id.* at 84.

inspire generosity. First of all, one must raise the question, "Generous to whom?" It is not possible to be generous to both sides in a case, at least insofar as litigation is a zero-sum game.⁴⁹

Second, generosity and justice are strange bedfellows. To be just, on a common understanding of the term, is to give persons what they deserve; to be generous is to give them more than they deserve. Justice may require us to curtail or limit our generosity. Moreover, justice is often depicted as blind—blind, that is, to the individual characteristics that often appropriately inspire generosity.⁵⁰

Third, it is an over-familiar but uncomfortable fact that desert according to moral claims and desert as measured by legal claims are often different matters. In applying the law, insofar as it is clear and therefore perhaps inflexible, a judge may be prohibited from being beneficent.

Finally and most importantly, fully to inhabit the circumstances of a criminal defendant and listen to the "story" she would tell is almost certainly to exercise generosity in the direction of forgiveness. Responsibility according to the criminal law is typically imposed on those least able to comply because of wholly understandable personal histories and attitudes. Just as psychiatrists, in their pursuit of understanding, refrain from blaming and assigning guilt, so too all empathetic listeners characteristically move from blame to tolerance to (at least partial) forgiveness. But law exists to enforce responsibility even when it is barely reasonable to expect compliance.

None of this implies that imaginative understanding and generosity have no place in law, or that it is anything but desirable to have judges with such dispositions. But the predicament of such judges is often complex, harsh, and painful. Nussbaum offers too little discussion of these hard choices.

IV. CONCLUSION

The picture of human nature, of law and judging, and of the contribution of literature to law that Nussbaum evokes is immensely attractive. It posits an ideal of harmony and beneficence at many levels. Literature is a vehicle for cultivating beneficent habits of mind and heart by which we gain access and insight into the lives of others. Such habits of mind, through imagination, make possible just and generous institutions and social relationships of mutual understanding.

At the same time, literature, like other domains of experience, has endless effects. It may lead us to understand our limits as well as our

49. Perhaps the story of the judgment of Solomon is the exception that proves the rule.

50. I am indebted for this observation to Richard Kay.

strengths, our capacity for evil as well as for good, our capacity for insensitivity and confusion as well as for empathy and mutual transparency. It is possible, and often desirable, to focus on literary works that cast our common humanity in a positive light. As many writers know, however, what is common is not necessarily positive and what is positive is not necessarily common.

Literature teaches many kinds of lessons. Nussbaum's argument is compelling when she stresses the importance for judges of an informed and imaginative understanding of how lives are affected by their reasoned judgment. Her argument is less compelling, or at least less clear, when it presumes to tell us what lessons literature yields and how those lessons may inform justice. If the ideal of empathetic justice and the arguments articulating it are more tentative than Nussbaum admits, the ideal is still a venerated one worth reasserting on the cusp of the new millenium.

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.

Bruce L. Rockwood*

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

* Bruce L. Rockwood is Professor of Business Law at Bloomsburg University in Pennsylvania, where he teaches law and literature and other subjects. He is editor of the forthcoming *Law and Literature Perspectives* (Peter Lang), and is an active participant in the annual Roundtable on Law and Semiotics, which just celebrated its 10th anniversary. He has also written articles on international law and banking law. My thanks to M.A.R. Habib and Susan Marshall Rockwood for their comments and advice on earlier drafts. In addition, I thank Merle Loper for his comments and for the opportunity to examine some of the arguments in this Paper in his Seminar on Due Process and Equal Protection at the University of Maine School of Law during my sabbatical there in the fall of 1995.

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.

Copying, Culture, and Control: Chinese Intellectual Property Law in Historical Context

William P. Alford, *To Steal a Book is an Elegant Offense: Intellectual Property Law in Chinese Civilization*. Stanford: Stanford University Press, 1995. Pp. ix, 222. \$39.50.

Jonathan Ocko*

[O]nly if we have some understanding of why in Chinese civilization it has been an elegant offense to steal a book will China and its foreign friends know how in the future to discern and protect one another's legitimate interests.

William Alford¹

Few people are as well-suited as William Alford to provide this understanding. Now Henry L. Stimson Professor of Law and Director of East Asian Legal Studies at Harvard, Alford studied Chinese history at Yale Graduate School and law at Harvard, then practiced international law before returning to academia. Like his mentors, Jonathan Spence at Yale and Jerome Cohen at Harvard, Alford is adept at producing work that engages and stimulates both China scholars and non-specialists. The book at hand is no exception. Though relatively short in length, it is a rich, pioneering study that sets forth two distinct but closely related arguments. The first, which makes up the core of the book, explains by reference to China's

* Jonathan Ocko is Professor of History at North Carolina State University and Adjunct Professor of Legal History at Duke University School of Law, where he teaches courses on Chinese legal history and on law and society in contemporary China. His current research comprises projects on the concepts of justice in late imperial China, the concept of contract in Chinese culture, and mediation in Chinese culture. He would like to thank David Lange of Duke School of Law and William Jones of Washington University School of Law for being patient sounding boards.

1. WILLIAM P. ALFORD, *TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION* 123 (1995).

political culture why “intellectual property law, and in particular copyright, has never taken hold in China.”² The second, which builds on the first and constitutes the conclusion, seeks to convince American policy makers and diplomats that without “further political liberalization and a greater concomitant commitment [by the Chinese] to the institutions, personnel, interests and values needed to undergird a rights-based legality, detailed refinements in intellectual property doctrine itself will be of limited value.”³ Thus, Alford argues, as difficult as it is for one nation to influence “the enduring values and practices central to [another] nation’s identity,”⁴ the United States ought nonetheless to attempt to nurture a new, more rights-oriented political culture in China.

Alford’s persuasive plea for a values-driven China policy may strike some readers as ironic in light of Alford’s reminder at the outset of this study that, in studying legal developments in China, we should not assume that our own course of history is necessarily “normal” or inevitable.⁵ However, his teleological argument is devoid of the tendentiousness that might weaken its cogency. Alford’s work traces the story of how an enduring, paternalistic, authoritarian Chinese political culture, embodied successively by the commitments of imperial, republican, and socialist states to controlling both the flow and content of information for the purpose of sustaining state power, has impeded the development of intellectual property rights.

This argument is at the heart of each of the four basic propositions the book advances. First, imperial China had no serious indigenous counterpart to Western conceptions of intellectual property because of the character of its political culture. Second, late imperial reforms in the area of intellectual property proved fruitless because the reformers failed to consider whether the Western models they invoked were relevant for China and assumed that foreign pressure would lead to adoption of and adherence to these norms. Third, the current attempts to establish intellectual property law in China, “especially the mainland,” have failed because they have overlooked the difficulty of reconciling Western “legal values, institutions, and

2. *Id.* at 1. Alford uses the term political culture in a general way, without offering his own specific working definition. *Id.* at 119. For a brief discussion of how the concept has been recently employed by others in Chinese studies, see Elizabeth J. Perry, *Introduction* to *POPULAR PROTEST & POLITICAL CULTURE IN MODERN CHINA* 1, 4-6, 10-11 (Jeffrey N. Wasserstrom & Elizabeth J. Perry eds., 2d ed. 1994).

3. ALFORD, *supra* note 1, at 120. Alford uses political culture here in the same way it is employed by Elizabeth Perry. According to Perry, a political culture approach sees change in a culture as “inevitably” drawing “heavily on established cultural repertoires.” Perry, *supra* note 2, at 5.

4. ALFORD, *supra* note 1, at 120.

5. *Id.* at 4.

forms” with the constraints of China’s past and present circumstances. Fourth, despite intellectual property being a central objective of American “diplomatic leverage,” the resulting bilateral agreements have not accomplished their intended goals because of American misunderstanding of legal developments in the mainland and Taiwan.⁶

These propositions are developed in the book’s five topical chapters, which I summarize in Part I of this Review. In Part II, I suggest questions that need attention in future research on intellectual property in China.

I

In Chapter Two, “Don’t Stop Thinking About . . . Yesterday: Why There was No Indigenous Counterpart to Intellectual Property in Imperial China,” Alford touches briefly on trademark, and barely at all on patent, before moving to a nuanced discussion of copyright. He finds that Douglass North’s theory of scientific and technological innovation leading to a heightened concern with property rights⁷ did not apply to China, except perhaps when the state sought to prevent certain technologies and trades from being transferred to peoples outside China who might threaten the empire. And, though the state would sometimes assist guilds and individuals in their efforts to protect trade names and marks, it was concerned less with demarcating and enforcing intellectual property rights than with preserving social order by preventing fraud. However, while Alford acknowledges that “economic and technological factors should not be ignored” in explaining “why the imperial Chinese state did not provide systematic protection for the fruits of innovation and creation,” he locates the principal cause in the political culture of imperial China, particularly “the constitutive role” of a “shared and still vital past.”⁸

As the source of truth, the past validated and legitimated. Poets, painters, and scholars took part in a process of “transformative engagement” with the past. Through the study and mastery of the contents of the Confucian Classics, the citation of which was the “very method of universal speech,”⁹ scholars prepared for the civil service examinations. And just as the state attempted to control publication

6. *Id.* at 2-3.

7. *Id.* at 133 n.2. North argues that new opportunities for profit lead to the creation of new legal institutions, which, in turn, determine the long-term success or failure of a society’s economy. See DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE (1990).

8. ALFORD, *supra* note 1, at 19.

9. The phrase is the late Joseph Levenson’s. See *id.* at 26 n.111.

of materials such as calendars, almanacs, and witchcraft manuals that could be used to challenge its monopoly on ordering the relationship between man and the heavens,¹⁰ so the state also proscribed the printing of unauthorized versions of the Classics and unapproved examination preparation materials. In the “interests of fairness and the maintenance of [social] harmony,”¹¹ the state might intervene to protect a monopoly over a mark or trade name, but Alford cogently asserts, “the need to interact with the past sharply curtailed the extent to which it was proper for anyone other than persons acting in a fiducial capacity to restrict access to its expressions.”¹² In sum, the intellectual property constituted by the common heritage of the past in general, and the enduring social truths of Confucianism in particular, belonged to the state.

Since the general reader may be unfamiliar with Confucianism, it is perhaps appropriate to digress here to offer an explanation. “Confucianism,” explains one of its contemporary practitioners and best scholars, “is a worldview, a social ethic, a political ideology, a scholarly tradition, and a way of life.”¹³ Although Alford does not provide an integrated explanation of Confucianism, he touches on nearly all of these elements while emphasizing the fit between the social ethic and political ideology. For Alford, as for many of us who study China, the Confucian cultural inheritance is characterized by overlapping, interlocking hierarchies of age, gender, and relationship that are encapsulated in the Three Bonds (between ruler and subject, father and son, husband and wife) and the Five Relationships, which add to the Three bonds the relationships between older and younger brother and between friends. When individuals performed the obligations appropriate to their status in these hierarchies, social order was created and maintained. Thus, the family was the matrix for society. As Alford notes, Confucius observed that one contributed to government by being filial to one’s parents and a friend to one’s brother.

Even if “immutable Confucian culture” was not, as Elizabeth Perry colorfully phrased it, “forever lurking like a sea monster beneath the surface of China’s political waters,”¹⁴ this linking of personal to

10. See PHILIP KUHN, *SOULSTEALERS: THE CHINESE SORCERY SCARE OF 1768*, at 85-91 (1990); RICHARD J. SMITH, *FORTUNE TELLERS AND PHILOSOPHERS: DIVINATION IN TRADITIONAL CHINESE SOCIETY* 39-40, 87-91 (1991).

11. ALFORD, *supra* note 1, at 25.

12. *Id.*

13. Tu Wei-ming, *The Confucian Tradition in Chinese History*, in *HERITAGE OF CHINA: CONTEMPORARY PERSPECTIVES ON CHINESE CIVILIZATION* 112, 112 (Paul Ropp ed., 1990).

14. Elizabeth J. Perry, *Casting a Chinese “Democracy” Movement: The Roles of Students, Workers, and Entrepreneurs*, in *POPULAR PROTEST & POLITICAL CULTURE IN MODERN CHINA*, *supra* note 2, at 74, 86. Perry’s quip was directed at the “unchanging China” arguments of

political values and of morality to politics has served the interests of China's leaders regardless of political regime. After the fall of imperial China in 1912, the Nationalist Party leaders, who established the Republic of China (R.O.C.), employed these linkages both on the mainland and, after 1949, in Taiwan. Finally, not only have these connections often been at the center of the political movements mounted by the Communists on the mainland since 1949, but elements of Confucianism itself are now seen by some in the People's Republic as the source of Taiwan's, South Korea's, Singapore's, and Hong Kong's economic success.¹⁵

However, in the late-nineteenth and early-twentieth centuries, a fragile Qing Dynasty (1644-1912) concentrated on the immediate problem of dealing with the West. In Chapter Three, Alford focuses on the foreign powers' turn-of-the century introduction into China of intellectual property ideas, a process he calls "learning the law at gunpoint,"¹⁶ though the implied threat of force figured more prominently than overt military pressure. Intellectual property was of negligible consequence until the 1880's, when Chinese merchants' appropriation of foreign brand names to avoid transit taxes and combat the popularity of imports led to demands for trademark protection. Bilateral treaties in 1902 and 1903 with Britain and the United States satisfied no one, and the Chinese rebuffed self-serving, foreign-directed efforts to draft more comprehensive regulations. Before new rules in 1923 afforded some protection, foreigners' accomplishments were limited to merely periodic successes at persuading local officials to use their discretionary power to prevent trademark and copyright piracy and agreement among themselves on a set of rules to protect against infringing each other's intellectual property in China. Less intimidating to local officials than foreigners, the Chinese fared even worse in defending their intellectual property against piracy.

Why did China make so little progress? Alford describes both internal and external reasons, but on balance lays greater weight on indigenous barriers. Chinese officials, Alford notes, comprehended that intellectual property fostered commerce, and anti-foreign boycott organizers used brand-name consciousness to mobilize and direct their

Lucian Pye. I want to thank Wendie Schneider for reminding me of this passage.

15. See generally *Confucianism: New Fashion for Old Wisdom*, *ECONOMIST*, Jan. 21, 1995, at 38 (citing Lee Kuan Yew, Senior Minister of Singapore, on Confucianism as a positive element in Chinese development and the rise of the Four Tigers); *Beijing Hosts Seminar on Confucianism, Market Economy*, *Xinhua* [New China News Agency], Aug. 3, 1995, available in LEXIS, Nexis News, *Xinhua* File; *Li Ruihuan: Confucianism Could Serve Practical Activities*, *Xinhua* [New China News Agency], Oct. 5, 1994, available in LEXIS, Nexis News, *Xinhua* File.

16. ALFORD, *supra* note 1, at 30.

supporters. Despite this awareness of intellectual property, Alford acknowledges, there was some merit in foreigners' complaints that the Chinese lacked a thorough understanding of intellectual property law. However, most crucial, Alford argues, was foreigners' own failure either to explain the utility of intellectual property or to train Chinese in how to enforce relevant laws. Still, even, after the R.O.C. had promulgated a Copyright Law and Measures to Encourage Industrial Arts in the early 1930's, little enforcement of any intellectual property rights occurred. Like its imperial predecessor, the R.O.C. focused primarily on controlling the content and flow of information. It had no tolerance "of the formalities of law when they interfered with its political agenda."¹⁷ Even if the R.O.C. had been more favorably disposed toward protecting intellectual property, its struggles against the Communists and the Japanese sapped its resources and attention, its administrative and judicial systems were inadequately funded, competent personnel, and professional integrity, and its citizens lacked an appropriate legal consciousness.

Chapter Four's title, "Squaring Circles," aptly conveys the dilemmas of intellectual property policy in the People's Republic of China (P.R.C.) since 1949. Finding in the Soviet Union's Marxist model an echo of the Confucian view that intellectual creation is "a product of the larger society from which it emerged,"¹⁸ the young P.R.C. replicated the Soviet disinclination to establish purely private ownership interests in intellectual property. In order to rebuild the economy after the Civil War, the P.R.C. came to an accommodation with individual patent holders. By the mid-1950's, however, the socialist transformation of the economy essentially eliminated private ownership and made such compromise unnecessary. Over the next decade, trademark legislation became a vehicle for supervising quality, not for granting exclusive rights. By the mid-1960's, increasingly radical policies led to attacks on property rights and material incentives in intellectual property as well as more generally to assaults on professionalism and the formal legal system itself. If a steel worker need not put his name on an ingot he had produced, "why," asked a popular Cultural Revolution saying, "should a member of the intelligentsia enjoy the privilege of putting his name on what he produces?"¹⁹

As China reformed its economic system and opened to the outside world in the wake of the Cultural Revolution, domestic and foreign pressures led, by the mid-1980's, to the promulgation of trademark,

17. *Id.* at 54.

18. *Id.* at 57.

19. *Id.* at 65.

patent, and copyright laws putatively intended to stimulate and protect creativity and innovation. Critics warned against an anti-socialist, initiative-squelching, rent-collecting “literary industrial complex”²⁰ and suggested that China freely—albeit illegally—import needed technology. Eventually Deng Xiaoping oversaw a compromise: a socialist legality with Chinese characteristics that granted rights circumscribed by responsibility to the state, and, more importantly, as Alford notes, rights all too often unenforceable for lack of adequate remedies. As Alford observes, the widespread stories in the press of infringement actions (brought by both foreign and domestic parties against domestic violators) might be better seen as evidence of the law’s ineffectiveness than as proof of its thorough enforcement. In all aspects of intellectual property, but especially in copyright, where, like previous Chinese states the socialist regime uses the law primarily to control the flow of ideas to the populace, the state’s conundrum has been how to generate laws that “create new forms of property without compromising basic state interests.”²¹

Chapter Five describes the process by which Taiwan has moved from pirating other nations’ intellectual property to being a substantial owner itself. Though the Guomindang regime exercised tight control of content, it condoned unrestrained reprinting of acceptable foreign titles. In the late 1950’s, pressure from American publishers led Taiwan, still financially dependent on the United States, to make some attempts to rein in piracy, but the situation had not improved appreciably by the 1970’s. Moreover, by the 1960’s and 1970’s, a global survey of five industries reported that 60 percent of all counterfeits originated in Taiwan. Highly publicized reforms in the mid-1980’s again had little effect. In 1989, concern over the role of piracy in its trade imbalance with Taiwan led the United States to place Taiwan on the Special 301 priority watch list.²² Taiwan and the United States reached an agreement requiring Taiwan to enforce, as well as to expand, existing intellectual property legislation. Still, infringement in computer and electronics continued unabated, and in an increasingly democratized Taiwan, voices of resentment against American infringements of sovereignty slowed implementation of the agreement. To a large extent, Alford argues, only after the 1992 designation of Taiwan as a center for piracy and counterfeiting, and the attendant threat of losing American markets and alienating

20. *Id.* at 67.

21. *Id.* at 76.

22. “Special 301 is a variant of Section 301 of the 1974 Trade Act that requires the USTR [United States Trade Representative] both to notify the Congress regularly of ‘priority foreign countries’ failing adequately to protect American intellectual property and to take all measures needed to address these deficiencies within statutorily mandated guidelines.” *Id.* at 102.

American political support, did Taiwan begin to make substantive legislative changes. Yet, indigenous forces also played a role. Courts broadened their mandate beyond "the maintenance of order,"²³ and all elements of the legal system improved in quality. Moreover, as Taiwanese manufacturers like Acer began to become technical innovators rather than contract manufacturers, Taiwan's leaders realized that without a commitment to intellectual property, Taiwan could not implement its "industrial upgrading."²⁴

In his concluding chapter on American policy, Alford vehemently argues that the United States has misplaced its priorities by making intellectual property the centerpiece of its relations with Taiwan and the P.R.C. He sardonically notes that, while reluctant to "interfere in China's internal affairs" by speaking out on Tiananmen, the Bush administration had no such qualms regarding intellectual property. Driven by concern that piracy was undermining the capacity of the entertainment and software industries to close the trade gap with Asia, the Clinton administration has maintained the pressure, eliciting various Memoranda of Understanding, but no tangible results. In sum, our threats extract short-term concessions but are "incapable of generating the type of domestic rationale and conditions needed to produce enduring change."²⁵ In clear, forceful strokes, Alford reiterates his picture of change impeded by China's political culture: "A system of state determination of which ideas may or may not be disseminated is fundamentally incompatible with one of strong intellectual property rights in which individuals have the authority to determine how expressions of their ideas may be used and ready access to private legal remedies to vindicate such rights."²⁶ Yet, as Alford acknowledges, we may be sorry if we get what we want. For if in the P.R.C., as in Taiwan, real protection of American intellectual property awaits "further development of Chinese-generated intellectual property of commercial importance," American companies will find the problem to be not pirates, but "technologically sophisticated" competitors.²⁷

II

To Steal A Book's power and elegance arise from its arguments' clarity. Alford lays out his propositions concisely and develops them relentlessly. By the end, the reader is persuaded that China's political

23. *Id.* at 110.

24. *Id.* at 107.

25. *Id.* at 118.

26. *Id.* at 119.

27. *Id.* at 123.

culture largely explains the absence in China of intellectual property ideas as conceived in the West. To achieve this clarity, however, Alford inevitably has had to make choices about which aspects of his own broad knowledge of a complex culture to share with readers. Without, I hope, falling into the reviewer's trap of telling the author what book he should have written, my comments in this Part speak to these choices and suggest areas of research and avenues of thought that future scholars can pursue as they build upon the superb foundation laid by Alford.

The Question of Property

For nearly three hundred years, Western jurisprudence and scholarship about intellectual property have been inextricably linked to debates about the nature of real and personal property.²⁸ Similar connections are not as easily made in the Chinese context because the Chinese tradition lacks the essential starting point, a tradition of explicit analysis of property and property rights.

Certainly, the fourth-century B.C.E. writings of Mencius and Shang Yang emphasize that social order cannot exist without properly drawing and protecting land boundaries.²⁹ Surviving written materials reveal changing regimes of land ownership;³⁰ and court cases from the Qing period not only contain a rich lode of litigation over property, but also demonstrate that, as in the West, both law and custom recognized the principle that adding value by applying labor could establish an ownership claim. Yet, there is no discrete body of analytical writing on the subject until the twentieth century, when Chinese writers began to explore not only common and civil law traditions, but also Marxist theories. Thus, if we are to refine our understanding of property (and subsequently intellectual property) in Chinese culture, we must tease out of concrete historical experience what is unavailable to us in abstract tomes.

Over the last decade, social and legal historians have extended anthropologists' pioneering work on family division of land by examining other forms of property and ownership disputes. Alford

28. See generally PAUL GOLDSTEIN, COPYRIGHT'S HIGHWAY 37-53 (1994); Wendy J. Gordon, *An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory*, 41 STAN. L. REV. 1354, 1354-64 (1989); Grant Hammond, *The Legal Protection of Ideas*, 29 OSGOODE HALL L.J. 93, 99-106 (1991); Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 287-366 (1988).

29. Chang Wejen, *China's Legal Tradition*, at 235, 341 (Class materials for course on China's Legal Tradition, New York University Law School, Spring 1995, on file with author) (citing discussion by classical Chinese philosophers on the benefits of clarity in land ownership).

30. See ZHANG JINFAN, *ZHONGGUO GUDAI FAZHI ZHIDU* [CHINA'S ANCIENT LEGAL SYSTEM] *passim* (1992).

cites some of the most recent work from one project,³¹ but much remains to be done in the increasingly open legal archives that contain materials on both the late imperial and Republican periods. We need to ask whether there was a common core of attitudes or a bundle of discrete but related attitudes toward property rights. My surmise is that people's attitudes toward ownership, trespass, infringement, piracy, counterfeiting, and smuggling are contingent. It makes a difference who owns property and whether property is rural or urban, moveable or not. If a necessary commodity is available only through a government monopoly (e.g., salt in imperial China) or priced high as a consequence of government import controls (e.g., foreign software, cd's, and audio tapes in the P.R.C.) or in a situation of market domination by a single producer (e.g., Microsoft), there seems to be less respect for the commodity owner's rights. That both Americans and Chinese who would never shoplift a pack of gum cavalierly copy each other's software suggests that property-rights consciousness is extremely dependent on the situation. However, to move beyond surmise and the anecdotal will, as I have argued above, require extensive scholarly analysis of the exact nature of property rights thinking, as revealed in archival materials.

Moreover, as the socialist market economy develops in the P.R.C., it will be particularly challenging, but essential, to track through cases the interaction between evolving ownership forms and evolving attitudes toward intellectual property. A 1988 patent infringement case from Shenyang illustrates the nature of the problems that have been encountered. The case concerned collective factories that once "belonged" to supervisory "companies"—but which are now behaving as independent actors who seek competitive advantage, instead of as "siblings" who share everything.³² This dispute demonstrates that an intellectual creation is no longer regarded as the "product of the larger society from which it emerged,"³³ but the legitimate possession of its creator. As the report of the patent dispute editorialized in its

31. ALFORD, *supra* note 1, at 134 n.6. The papers from the first stage of this project have appeared in *CIVIL LAW IN QING AND REPUBLICAN CHINA* (Kathryn Bernhardt & Philip C.C. Huang eds., 1994) [hereinafter *CIVIL LAW*]. See Mark Allee, *Code, Culture, and Custom: Foundations of Civil Case Verdicts in a Nineteenth-Century Country Court*, in *CIVIL LAW, supra* at 122; Philip C.C. Huang, *Codified Law and Magisterial Adjudication in Qing*, in *CIVIL LAW, supra*, at 142; Melissa Macauley, *Civil and Uncivil Disputes in Southeast Coastal China, 1723-1820*, in *CIVIL LAW, supra*, at 85; Madeleine Zelin, *Merchant Dispute Mediation in Twentieth Century Zigong, Sichuan*, in *CIVIL LAW, supra*, at 249; see also Thomas Michael Buoye, *Violent Disputes Over Property Rights in Guangdong During the Qianlong Reign (1736-1795)* (1991) (unpublished Ph.D. dissertation, University of Michigan); David Ray Wakefield, *Household Division in Qing and Republican China: Inheritance, Family Property, and Economic Development* (1992) (unpublished Ph.D. dissertation, University of California (Los Angeles)).

32. See FAZHI RIBAO [LEGAL SYSTEM DAILY], May 31, 1988, at 3.

33. ALFORD, *supra* note 1, at 57.

conclusion: Methods of administrative interference have to be abandoned and rapidly replaced by new ones. "Otherwise, even if we start out with good intentions, things may go contrary to our wishes."³⁴

Authorship, Priority, and Specialized Knowledge

Justin Hughes has written that, in the West, there has developed a "set of central ideas [that] are never permitted to become private property and are held in a *permanent common*."³⁵ Some of the ideas are ordinary and others are extraordinary, but all are so important and society so dependent on them, both for their content and as signifiers, that they become "de-proprietyized."³⁶ This notion—that an idea becomes too important for it to remain solely the author's—resonates with Alford's argument that, in China, the importance of the past precluded restricting access to its expressions.

Certainly, the concept of the author existed in traditional China. Indeed, the Romantic notion of the author which, according to Peter Jaszi, strongly influenced Anglo-American copyright law,³⁷ had its counterpart in Chinese literati writing about painting. To the Romantics, a "work is an extension of the artist's personality."³⁸ For the Chinese, "to know [a painter's] art was to know the man himself,"³⁹ for "the character of the artist is seen as the core of painting."⁴⁰ Each Chinese painting, and each poem for that matter, was unique, a singular creation and distinctive manifestation of the moral character of the artist. Yet as Alford shows, because literati poets and painters focused on their interaction with the past, innovating "within the bounds of orthodoxy" and the context of past forms,⁴¹ the idea of copyright never blossomed in China. Painters and poets welcomed copying as a compliment, a recognition that their work manifested the power of their moral and artistic mastery. The imitation recognized their success at capturing the essence, or the *dao*, of a subject. Painting "in the manner of" tapped into this moral quality and generated for the subsequent painter his own sense of moral power. The presence of this power and the gentleman's

34. FAZHI RIBAO, *supra* note 32, at 3.

35. Hughes, *supra* note 28, at 319.

36. *Id.* at 320.

37. Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of "Authorship"* 1991 DUKE L.J. 455, 456.

38. *Id.* at 497.

39. SUSAN BUSH, *THE CHINESE LITERATI ON PAINTING: SU SHIH (1037-1101) TO TUNG CH'I-CHANG (1555-1636)* 11 (1971).

40. *Id.* at 182.

41. ALFORD, *supra* note 1, at 26, 29.

resistance to the seduction of money,⁴² separated literati art from that of the mere copyist or the academician who produced work for hire.

Like the artists, Confucian philosophers were in a constant interaction with the past through their predecessors' work and the Classics, "which contained paradigms for social order and had an absolute claim to trans-historical truth."⁴³ They felt bound "to the future by a social obligation to communicate their findings and discoveries"⁴⁴ and, as a public service to others, made available their own collections of rare books by publishing them in anthologies.⁴⁵ In all this, the philosophers' approach paralleled the painters', but the question of who first had an idea or insight appears to have been of more concern to philosophers. Indeed, in the mid-eighteenth century, "evidential scholars wanted to determine fairly and accurately who should be given priority in research."⁴⁶ Some of the scholars who made these breakthroughs developed a proprietary interest in their ideas, treating them as the "cultural property of a particular line within a lineage."⁴⁷ Through lineage schools, they tried to confine generational transmission of these ideas exclusively to their own descent group. Yet more often than not, because of the prestige to be gained by broad dissemination of such ideas, this knowledge passed into "the public domain."⁴⁸

To find stronger proprietary thinking, we must move beyond the world of the literati. Those who derived their social prestige from knowledge more arcane than Confucianism or who earned their livelihoods from technical knowledge must certainly have been less willing to have their "intellectual property" depropriated. Alford notes the efforts of guilds in imperial China to protect trade names and marks, as well as the support they could sometimes elicit from officials concerned with maintaining market stability and social order, but I suspect that there may have been greater popular consciousness of intellectual property rights than we think. Moreover, much of this intellectual property comprised knowledge sufficiently specialized to

42. *Id.* at 29.

43. BENJAMIN ELMAN, FROM PHILOSOPHY TO PHILOLOGY: INTELLECTUAL AND SOCIAL ASPECTS OF CHANGE IN LATE IMPERIAL CHINA 28 (1984).

44. *Id.* at 222.

45. *Id.* at 151. Before the invention of printing, literati made and circulated rubbings of steles on which the Classics had been inscribed. For a brief review of the publishing industry in late imperial China, see Evelyn S. Rawski, *Economic and Social Foundations of Late Imperial China, in POPULAR CULTURE IN LATE IMPERIAL CHINA* 21-28 (David Johnson et al. eds., 1985).

46. ELMAN, *supra* note 43, at 223.

47. See BENJAMIN ELMAN, CLASSICISM, POLITICS AND KINSHIP: THE CH'ANG-CHOU SCHOOL OF NEW TEXT CONFUCIANISM IN LATE IMPERIAL CHINA 6 (1990).

48. *Id.*

fall outside the “permanent common.” Those who owned and mastered sectarian religious texts “acquired considerable religious authority.”⁴⁹ And specialists in geomancy (*fengshui*), fortune-telling, and ritual maintained their position in society even as printed handbooks made much of their subject matter more generally available because they maintained a “large stock of handwritten materials” in which their trade secrets continued to reside.⁵⁰

Among these groups, unlike among the literati, there was nothing to be gained and much to be lost by freely disseminating rather than monopolizing their “cultural property.” The system of transmission from father to son or from master to acolyte might be seen as a self-enforcing intellectual property regime. An apt contemporary example is provided by a privately owned restaurant in Chengdu that sells a particular type of beancurd. Since the 1920’s, the family has carefully guarded its recipes, which the grandson of the creator variously refers to as the family’s trade secrets, intellectual property, and capital. In the 1950’s, the shop was subjected to “socialist transformation” and the family’s specialized knowledge “depropertized” by the state. But since then, the family has returned to its former practice of providing recipes to outsiders only after the “licensee” pays a fee and signs an agreement not to compete.⁵¹

Thus, I would argue, even if one cannot find it inscribed in codes or litigated in courts, an intellectual property rights consciousness, or sensibility, has probably existed in China for a long time. To uncover and understand this sensibility, we must move outside the sphere of literati painters and scholars. We need to attempt to examine under what circumstances various professional texts—coroner’s manuals, contract manuals, magistrate’s handbooks, novels, private editions of the Qing Code—were produced and sold. We need answers to a broad set of questions: Did the spread of newspapers and the development of new forms of literature for the “middling classes” produce new attitudes toward copyright?⁵² Was being first to market the only way publishers could protect themselves against piracy?⁵³

49. Susan Naquin, *The Transmission of White Lotus Sectarianism in Late Imperial China*, in *POPULAR CULTURE IN LATE IMPERIAL CHINA*, *supra* note 45, at 255, 259.

50. See James Hayes, *Specialists and Written Materials in the Village World*, in *POPULAR CULTURE IN LATE IMPERIAL CHINA*, *supra* note 45, at 75, 108. On geomancy, see SMITH, *supra* note 10, at 131-71.

51. Interviews with the owner (July 1993, July 1994) (interviews granted on condition of anonymity). Socialist transformation also meant that the state claimed the rights to use the family name in association with the word for beancurd. When the grandson opened his own shop using his surname as the business name, the city government threatened to bring suit. To avoid litigation, the man simply added a diminutive before the surname.

52. For an illustration of such a phenomenon, see ALFORD, *supra* note 1, at 44-45.

53. We know from Evelyn Rawski about the enormous scope and vitality of late imperial publishing. Rawski, *supra* note 45. We also need to know how, without copyright, publishers

Were the “courts” of the nascent late-nineteenth- and early-twentieth-century chambers of commerce a bridge between the private, guild-based and public, court-based enforcement of intellectual property?⁵⁴ Finally, how influential was the model presented by the enclaves under foreign control?

Confucianism, Political Culture, and the Flow of Ideas

Throughout the text, Alford uses Confucianism as short-hand for a complex body of ideas.⁵⁵ Though Alford surely did not intend it, readers may erroneously infer an enduring solidity to Confucianism. Certainly, there existed a dominant orthodoxy, an “imperial Confucianism” that the state demanded be reproduced in the civil service examination. There also existed among scholars a mainstream interpretation of the past. But we should remember not to take the imperial Confucianism that sought to control the flow of ideas as representative of Confucianism as a whole.⁵⁶ The imperial Confucian state was neither as aggressive nor as successful in controlling the flow of ideas as its twentieth-century successors.

Certainly, the late imperial state sought to maintain both an orthodoxy and an orthopraxy (respectively, correctness in thought and action).⁵⁷ The state could be highly effective in expunging dissidence if it committed substantial resources to a full-scale literary inquisition⁵⁸ or widespread investigation.⁵⁹ However, unless heterodoxy or heteropraxy posed an immediate and concrete threat to social and political order, or a group of scholars appeared to constitute a faction with a distinct political agenda, the state tended not to interfere. On the one hand, it could not regularly expend the

were able to remain profitable and viable.

54. Evidence that chambers of commerce played such a role is provided by a 1921 settlement by the Suzhou Chamber of Commerce of a trademark dispute. *In re Song Zhu Lu Hui*, Yi 2/1/882 (April 2, 1921) (available in Suzhou Chamber of Commerce Archives, Suzhou Municipal Archives). On chambers of commerce, see also sources cited *infra* note 72.

55. For a brief but comprehensive introduction to Confucianism, see Tu, *supra* note 13, at 112-37.

56. Tu Wei-ming, for example, argues that the “Confucianization of Chinese society reached its apex during the Ch’ing . . . which consciously and ingeniously transformed Confucian teaching into a political ideology, indeed a mechanism of symbolic control.” *Id.* at 135.

57. On the interaction of these two concepts, see DEATH RITUAL IN LATE IMPERIAL AND MODERN CHINA 3-34 (James Watson & Evelyn Rawski eds., 1990). On orthodoxy, see, as well, the work of K.C. Liu, who argues that “the state could effectively mold the culture—defined as the pattern of meaning—but perhaps only along the lines on which that culture was already evolving.” *Socioethics as Orthodoxy*, in ORTHODOXY IN LATE IMPERIAL CHINA 53, 54 (Kwang-Ching Liu ed., 1990).

58. See L. CARRINGTON GOODRICH, THE LITERARY INQUISITION OF CH’IEN-LUNG (1966); R. KENT GUY, THE EMPEROR’S FOUR TREASURES: SCHOLARS AND THE STATE IN THE LATE CH’IEN-LUNG ERA (1987); ZHONGGUO JINSHU DAGUAN [A COMPLETE INTRODUCTION TO CHINESE BANNED BOOKS] (An Pingqiu & Zhang Peiheng eds., 1990).

59. See generally KUHN, *supra* note 10.

required money and bureaucratic energy. On the other hand, except in times of extraordinary crisis, the late imperial state, as Alford demonstrates, was highly confident of the hegemonic power of its orthodox Confucian ideology.

Thus, until the Qing dynasty partially blamed the fall of the preceding Ming dynasty (1368-1644) on Wang Yangming's intuitionist attack on conventional Confucianism, other scholars—but not the state—combated Wang's philosophical heresies. The political implications of the views espoused by the late Ming academies, not their unorthodox Confucianism, prompted the government's hostility. In the early Qing, independent writers who prepared study aids published by private bookshops influenced civil service examinations. The government never fully succeeded in having only authorized official selections printed.⁶⁰ By the mid-eighteenth century the *kaozheng* school of evidential scholarship challenged (correctly) the authenticity of the versions of the Classics that undergirded the dominant Confucian ideology, thereby laying the foundation for late-nineteenth- and early-twentieth-century scholars' "rejection of the entire Confucian legacy."⁶¹ Yet until these ideas constituted a manifest threat, the government did not attempt to silence their advocates. In sum, the paternalist political culture of late imperial China accommodated the flow of a broad—albeit not unlimited—spectrum of information.

The political cultures in the party-states of the R.O.C. and the P.R.C. have condoned a much narrower range of views. The R.O.C. benchmark of truth was the thought of Sun Yatsen, its first president and the founder of the Nationalist Party. However, the R.O.C. lacked the capacity to fully control the flow and content of information until after the government fled to Taiwan. There, as Alford shows, it created a system of copyright registration that not only generated funding for censorship administration but also served as a sieve filtering out unwanted ideas. The P.R.C. uses a similar system that withholds copyright protection "from works the publication or distribution of which is prohibited by law"⁶² and permits publication of materials only after the authorities have reviewed the content and issued a "registration number."⁶³

60. Kai-wing Chow, *Discourse, Examination, and Local Elite: The Invention of the Tung-ch'eng School in Ch'ing China*, in *EDUCATION AND SOCIETY IN LATE IMPERIAL CHINA, 1600-1900*, at 185, 192 (Benjamin Elman & Alexander Woodside eds., 1994).

61. ELMAN, *supra* note 43, at 113, 32.

62. PRACTICAL HANDBOOK OF LAWS OF THE PEOPLE'S REPUBLIC OF CHINA GOVERNING INTELLECTUAL PROPERTY 199 (1994) (quoting Copyright Law of the P.R.C., art. 4).

63. A literal translation of the Chinese term is book number. ALFORD, *supra* note 1, at 79. On evasion of this system of control, see ORVILLE SCHELL, *THE MANDATE OF HEAVEN* 293-310 (1994).

Certainly, the primary goal of the P.R.C.'s regulations is to censor,⁶⁴ and, Alford argues, "a system of state determination of which ideas may or may not be disseminated is fundamentally incompatible with one of strong intellectual property rights in which individuals have the authority to determine how expressions of their ideas may be used and ready access to private legal remedies to vindicate such rights."⁶⁵ Yet this process of pre-publication registration suggests how, as the P.R.C. develops a socialist market economy, it intends to create a system of strong intellectual property rights for approved ideas. The key is registration. Just as paying taxes on a land transaction in imperial China made a claim litigable, pre-publication registration is the mark of the socialist state's cognizance of ownership and the right to seek protection of it in the courts. Dissident works, to the extent that they get published at all, are left unprotected; and the Chinese can claim to have created intellectual property rights with "Chinese characteristics."

Precisely because copyright can cut two ways, either opening or closing the flow of information, some scholars are inclined to the view that less, rather than more, copyright is conducive to open society. Peter Jaszi observes that a basic contradiction inheres in copyright: It aims to encourage production and dissemination of works, yet confers on their creators "the power to restrict or deny distribution."⁶⁶ In a talk on the metaphor of the frontier in the information age, James Boyle also touched on this point.⁶⁷ To settle the frontier is to demarcate, enclose, and curtail the very openness, freedom and opportunity that attracted settlers in the first place. Self-policing, decentralized, democratic structures are soon replaced by rule-making, corporate institutions discomfited by the alleged chaos and disorder of the frontier. Boyle was not opposed to rules *per se*, but called for ones that permitted maximum use of society's store of intellectual property—a large "permanent common." Similarly, Rosemary Coombe argues that intellectual property, especially trademark and copyright, by depriving us "of the optimal *cultural* conditions for dialogic practice," impedes debate, thereby producing a less open

64. For example, the Liaoning Provincial Government fined the publisher of an unauthorized translation of a Danielle Steel novel, not for violating the original's copyright, but for bypassing registration in order to sell a text with "inappropriate content." Interview with Chen Dayang, freelance translator, in Raleigh, N.C. (Sept. 1988).

65. ALFORD, *supra* note 1, at 119.

66. Jaszi, *supra* note 37, at 463.

67. James Boyle, *The Frontier as Metaphor in the Information Age*, Address at the Duke University Frontiers of Legal Thought Symposium on Law in the Information Age: The First Amendment, Privacy and Electronic Networks (Jan. 27, 1995).

society.⁶⁸ Strong property rights may be a bulwark for protecting individual liberties against the state. But, if property rights are too strong, powerful individuals or groups may use them to suppress the marginal or powerless.

This notion of wielding intellectual property as a club against the disadvantaged may partially explain the blithe disregard in the P.R.C. and the R.O.C. for American trademarks and copyrights. On both sides of the Taiwan Straits, Alford makes clear, resentment against American bullying runs high. On the mainland, there is strong sentiment that “the world [that is, the West] owes China something” for past humiliations. Scholars see clashes such as the one over intellectual property not as cultural but as economic conflicts.⁶⁹ Thus, intellectual property pirates know full well that their conduct is illegal, but some Chinese may think appropriating American intellectual property is a justifiable act of self-defense against economic imperialism. Or, to put it more colorfully: “To screw foreigners is patriotic.”⁷⁰ A more benign explanation might be that Chinese counterfeiters are simply using the iconographic power of a foreign trademark to lend cachet to their product.⁷¹ But in any case, as Alford emphatically demonstrates, rights consciousness of any sort cannot develop in a political culture that suppresses rather than nurtures negotiation and struggle over meaning.

The Role of Courts

Over the last several years, as case materials from late-imperial and Republican China have become available, American and Chinese researchers have begun to produce a body of archival-based scholarship that demonstrates greater use of courts and quasi-judicial institutions (e.g., the “courts” of chambers of commerce) than previously assumed.⁷² Alford cites this literature, but may underes-

68. Rosemary J. Coombe, *Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue*, 69 TEX. L. REV. 1860, 1866 (1991).

69. Geremie Barmé, *To Screw Foreigners is Patriotic: China's Avant-Garde Nationalists*, 34 CHINA J. 213, 216 (1995).

70. *Id.* at 209. The original use of the phrase denoted the physical act of screwing. Barmé and I use it more generally in the figurative sense.

71. It is important to distinguish among the different kinds of pirating and counterfeiting. For example, several years ago one would see in China t-shirts for teams such as the Houston Bulls with pictures of baseball players. The intent here was to use English names to increase the attractiveness of the shirt, much as putting the Hooters NASCAR logo on baseball caps does today. From conversations with purchasers of these items, it is clear consumers are utterly unaware of any significance or lack thereof in these trademarks. However, purchasers of products with the Motorola, Disney, Casio, or IBM logos or the brand names of high quality Chinese liquors anticipate that the trademark represents value. It is the intent of counterfeiters to use those implications to deceive the customer.

72. See generally Ma Min, *Judicial Authority and the Chamber of Commerce: Merchant Dispute Mediation and Adjudication in Suzhou City in the Late Qing*, Address at Luce

time the extent of this phenomena, especially for the Republican-period.⁷³ The Number Two Historical Archives in Nanjing possesses an enormous documentary record of proceedings from Republican period judicial and quasi-judicial institutions at both the national and provincial levels. My survey of the catalogues and perusal of some cases suggests that these materials can help us understand how the Chinese thought about property and intellectual property issues, how foreign ideas and pressures affected China's legal culture, and how much access there was outside major metropolitan areas to viable courts, competent judges, and Western-trained lawyers. The view of British expatriates in China that courts "reached decisions irrespective of the existence of duly registered trademarks,"⁷⁴ needs to be reviewed in light of the arguments and decisions in these records.

Whatever new findings researchers may make, they are unlikely to challenge Alford's analysis that the Guomindang had little appreciation of a strong, independent legal system. Nevertheless, if courts exist and offer an iota of procedural and substantive justice, the Chinese, just as other people, will turn to them as a last resort to manage conflict. They will turn to them even in chaotic times on the cusp of political change that will render the courts' decisions moot,⁷⁵ and even if the courts cannot fully protect citizens' civil and political rights because property rights take precedence. Either for want of will or capacity, the courts may not be able to enforce these decisions, but use of courts may create habits and expectations that can, in turn, lead to greater civil and political rights.⁷⁶

Conference Symposium at UCLA on "Code and Practice in Imperial Chinese Law" (Aug. 8-10, 1993). Professor Ma also has a forthcoming monograph on the Suzhou Chamber of Commerce. The Suzhou Municipal Archives has compiled an unpublished three-volume set of materials on the Suzhou Chamber. Kwang Man Bun discusses the conflict processing work of the Tianjin Chamber of Commerce in *The Merchant World of Tianjin: Society and Economy of a Chinese City* (1990) (unpublished Ph.D. dissertation, Stanford University). On chambers of commerce in general, see YU HEPING, *ZAOQI SHANGHUI YU ZHONGGUO XIANDAI HUA* [EARLY CHAMBERS OF COMMERCE AND CHINA'S MODERNIZATION] (1993). The Liaoning Provincial Archives contains substantial holdings from the Fengtian Chamber of Commerce. *LIAONING SHENG DANG'AN GUAN ZHINAN* [A GUIDE TO THE LIAONING PROVINCIAL ARCHIVES] 67 (1993).

73. ALFORD, *supra* note 1, at 148 n.154.

74. ALFORD, *supra* note 1, at 53. The public catalogue for the Number Two Archives is a mere hint of the richness of the actual holdings. See *ZHONGGUO DI'ER LISHI DANG'AN GUAN JIANMING ZHINAN* [A BRIEF GUIDE TO THE SECOND HISTORICAL ARCHIVES OF CHINA] 103-07 (1987). Mary Buck is drawing on these materials for a dissertation at Harvard on judicial reasoning.

75. For example, a case of administration litigation over water usage was still being fought out in October 1949. See, e.g., Case 29.147, Administrative Courts, Number Two Historical Archives, Nanjing. Such behavior is of course not peculiar to China. Paul Haagen, my colleague at Duke, has recently come across cases from Atlanta on the eve of its fall to Sherman in which ownership disputes over slaves were still being litigated.

76. Cf. ALFORD, *supra* note 1, at 120. I make this point more fully in Jonathan Ocko, *Introduction to Special Issue on Emerging Framework of Chinese Civil Law*, 52 *LAW &*

This is why it will be important for us to track carefully the decisions on intellectual property that issue from courts in Taiwan and the P.R.C. By looking at those that are solely domestic as well as those that involve American parties, we can begin to construct an understanding of the legal sensibility and reasoning being applied: Is it rights-based; is it being shaped by indigenous or international values; are local courts insulated from domestic administrative pressures and foreign policy concerns; do courts understand what intellectual property is? The evidence to date, ably presented by Alford, is that, in the P.R.C. administrative intervention and unfamiliarity with intellectual property concepts remain major problems. Moreover, on both sides of the Taiwan straits, foreign and domestic parties are victimized by courts' protection of local interests.⁷⁷

The case of Kellogg's Corn Flakes is illustrative on several points.⁷⁸ Soon after successfully establishing the product in southern China, Kellogg's discovered a Chinese company selling a cereal in packaging that was nearly identical to its own. The Chinese brand name, a transliteration of Kellogg's, was written in Kellogg's distinctive script. Every statement on the box, including the copyrighted slogans was precisely replicated. The only visible difference was the picture of the Chinese product, which looked more like Frito's than corn flakes. At the court of first instance, Kellogg's lost its case for trademark infringement. Relying on a tendentious line of reasoning and reading of the evidence, the local court not only found for the defendant, but also ordered Kellogg's to pay court costs and damages. Kellogg's appealed to the provincial high court, which, soon after the U.S. and China signed an intellectual property Memorandum of Understanding in February 1995, overturned the initial decision.⁷⁹ Though it provided sound legal reasons, one also wonders whether the high court acted without instruction from political authorities. At least in this instance, the absence of complete judicial independence may have proved salutary for U.S. businesses.

III

For the China specialist, *To Steal a Book* is a stimulating, challenging work whose findings touch on a number of central questions.

CONTEMP. PROBS. 1, 17-22 (1989). See also Stanley Lubman, *Introduction: The Future of Chinese Law*, 141 CHINA Q. 1, 20 (1995).

77. ALFORD, *supra* note 1, at 91-92. Interview with Supreme Court judge from Taiwan, in Durham, N.C. (Feb. 1, 1996) (interview granted on condition of anonymity).

78. Interview with Li Jingbing, partner in the Beijing Beidou Firm, which represented Kellogg's, in Beijing, China (Mar. 10, 1995).

79. On the MOU, see the testimony to Congress of Deputy U.S. Trade Representative Charlene Barshefsky, NEXIS, News/Cumews, (Mar. 2, 1995).

Although I have minor disagreements with some conclusions and feel that at times Alford's emphasis on an enduring Chinese political culture leads him to forget briefly his own warning—"at no time is any society's culture monolithic"⁸⁰—I still offer it an academic's highest praise: I commend *To Steal a Book* to the non-specialist as an engaging, reliable guide to complex issues such as Chinese and comparative intellectual property, Sino-foreign legal interaction, and current American trade policy toward China. Alford's work reminds the non-specialist that, despite the current focus on bilateral tensions and American losses, the course of intellectual property law in China has been and will be shaped by *China's* political culture and by the rights and interests of *Chinese* authors, inventors, and companies.

One hopes that when Professor Alford completes his current research on the impact of American legal education on a generation of Chinese lawyers and jurists, he will return to the subject of intellectual property. In the meantime, one expects that many readers, like the Chinese literati Alford discusses, will be paying his book the ultimate compliment, and making "fair use" of it in their own work.

80. ALFORD, *supra* note 1, at 6.