A Tax Teacher Tries Law and (Dramatic) Literature

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[We hope to teach mythology not as a study, but as a relaxation from study; to give our work the charm of a story-book, yet by means of it to impart a knowledge of an important branch of education.]

Thomas Bulfinch, Preface to The Age of Fable (1855).¹

I. WHY LAW AND LITERATURE? WHY THIS ARTICLE?

Thomas Bulfinch was right. Relaxation from study can be, under the right circumstances, a form of study. But how can one provide the right circumstances in a law school curriculum? Law and Literature comes immediately to mind.²

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² The connection between law and literature is hardly a recent discovery. As long ago as 1908, John Henry Wigmore compiled and published a list of what he called "legal novels." John Henry Wigmore, A List of Legal Novels, 2 ILL. L. REV. 574 (1908), later revised and corrected as A List of One Hundred Legal Novels, 17 ILL. L. REV. 26 (1922). To qualify for inclusion in his list, a novel had to fall into at least one of these four categories:

(A) Novels in which some trial scene is described—perhaps including a skillful cross-examination;
(B) Novels in which the typical traits of a lawyer or judge, or the ways of professional life are portrayed;
(C) Novels in which the methods of legal investigation, pursuit[,] and punishment of crime are delineated; and
(D) Novels in which some point of law, affecting the rights or the conduct of the personages, enters into the plot.

Wigmore, A List of Legal Novels, supra, at 574. Dean Wigmore allowed himself some surprising omissions: Billy Budd and Crime and Punishment, for example. Later writers expanded on Dean Wigmore's list or assembled lists of their own. See Roy M. Mersky, Law, Popular Culture, and Cultural Studies, 23 LEGAL
Ideas are inherently fascinating things, yet law students often resist their fascination. In so-called “practical” courses, like the ones I usually teach, a discussion of ideas is generally greeted as an unwelcome distraction from the perceived substance of the course. And even in avowedly “theoretical” courses like Jurisprudence, ideas often lose their savor if they are presented merely as abstract propositions or experienced merely as exercises in taxonomy (“deontological”) or name-dropping (“Kantian”). Moreover, in either kind of law school course, any discussion of ideas is hampered by the students’ suspicion that some ideas are necessarily sounder than others and that the professor, despite her protestations to the contrary, knows perfectly well which are which. An untrammeled discussion of ideas is more likely to bloom in an atmosphere where the participants presume that one person’s ideas are as good as anyone else’s: an atmosphere where each student can approach each idea with the freedom of an amateur—an atmosphere, indeed, where the professor is something of an amateur, too.

And so I resolved to teach a course in Law and Literature. But would it be Law in Literature or Law as Literature? The latter movement’s hermeneutic strategy—deploying the techniques of literary analysis in the interpretation of legal texts—is not so far-fetched as it might at first seem. We like to think of the Law as something independent of and antecedent to man: something to be discovered and comprehended through the conscientious application of neutral intellectual principles, in much the same way as Alexander Pope imagined the laws of physics were deduced:

Nature and Nature’s laws lay hid in night:
God said, Let Newton be! and all was light.3

In fact, however, law is very much man’s creation. Like literature, it is the product of his imagination: not “imagination” in the sense of caprice or fantasy, but “imagination” in the sense of contrivance. To the extent that legal texts and literary texts reflect this same human faculty, they ought to be susceptible of interpretation by means of the same tools.

What keeps me from a whole-hearted embrace of the Law as Literature

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3. John Bartlett, Familiar Quotations 412b (1968). This couplet was intended for use as the epitaph on Newton’s monument in Westminster Abbey. Contemporary students of science would probably prefer British scientist J.B.S. Haldane’s less confident assessment: “My own suspicion is that the Universe is not only queerer than we suppose, but queerer than we can suppose.” J.B.S. Haldane, Possible Worlds (1927), quoted in Columbia World of Quotations.
approach is its seeming failure to take account of interpretive context. Both the "postmodern" view that a text's meaning is independently constructed by each reader, and the more traditional view that a text's meaning is implanted by its author and retrieved by its readers (a view that I find personally more congenial but pedagogically less convenient) converge on the same dichotomy: legal interpretation is undertaken to resolve a dispute or regulate a relation; literary interpretation is largely self-delighting. Consequently, ambiguity plays a vastly different role in the two domains. Good legal writing—whether it be a statute, a trust instrument, or a court decision—is intended by its author to be unambiguous. Even if that intention is not in fact realized or realizable, the author's project was nonetheless the selection of words calculated to convey the same meaning to future readers as the words had for her. The literary author, on the other hand, prizes ambiguity.6 Almost invariably, when a literary critic uses the word "ambiguity," he uses it as a term of praise. If a text is susceptible of only one interpretation, it is not art.

How many times have simpletons gleefully flung in lawyers' faces this line from Shakespeare's King Henry the Sixth, Part Two, "[t]he first thing we do, let's kill all the lawyers." That line, they assure us, represents Shakespeare's opinion of lawyers. They could not be more wrong. The line represents Shakespeare's best guess about Dick the Butcher's opinion of lawyers, but not Shakespeare's opinion. For that, we need more evidence.8 When Justice

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4. "[Literary discourse is] not bound by the rule of noncontradiction but eager to embrace competing or opposing strains of thought.... Texts of this sort are not coercive of their reader, but invitational: they offer an experience, not a message...." James Boyd White, What Can a Lawyer Learn from Literature?, 102 Harv. L. Rev. 2014, 2017 (1989) (reviewing Richard A. Posner, Law and Literature: A MISUNDERSTOOD RELATION (1988)).

5. See generally William Empson, Seven Types of Ambiguity (1930).

6. Fowler's Modern English Usage states: [T]he reason why [legalese] is difficult to grasp is not that it wanders verbosely round the point but that it goes straight there with a baffling economy of words. It has the compactness of a mathematical formula. Legalese cannot be judged by literary standards. In it everything must be subordinated to one paramount purpose: that of ensuring that if words have to be interpreted by a Court[,] they will be given the meaning the draftsman intended. Elegance cannot be expected from anyone so circumscribed.

FOWLER'S MODERN ENGLISH USAGE 411-12 (2d ed. 1965).


8. Let us look more closely at the scene in which the line is spoken. The fictional character Dick the Butcher is one of the followers of Jack Cade, a historical character who led a commoners' revolt during the reign of King Henry VI. Unlike the historical Jack Cade, however, Shakespeare's Cade is a braggart who, with bogus claims of Plantagenet blood, seeks the British crown for himself. In the lines immediately preceding Dick's remark about lawyers, Shakespeare has Cade declare that once he is enthroned, he will abolish money and fancy clothing so that the English people will "worship [him] their lord." Id. at 75. "The first thing we do, let's kill all the lawyers," responds Dick, as if to suggest that lawyers will be an impediment to Cade's confiscatory plans. And barely one minute of stage-time later, Cade orders a harmless clerk hanged because the clerk knows how to read and write. Id. at 102-10. And five short scenes later, Cade openly declares his dictatorial intentions: "[a]way, burn all the records of the realm: my mouth shall be the parliament of England." King Henry the Sixth, pt. II, act 4, sc. 7, 13-15. Thus, Shakespeare tells us that these men who want to kill all the lawyers also want to kill all intellectuals and abolish all democracy. If one is to draw from all this
Bradley, concurring in the notorious Bradwell v. Illinois, writes, "[t]he natural and proper timidity and delicacy which belongs to the female sex evidently unfit it for many of the occupations of civil life," it is reasonable to conclude that Justice Bradley really did believe that the female sex is unfit for many of the occupations of civil life. But when Shakespeare writes the words "[f]rainty, th' name is woman," we have to be careful about "conclusions." The words tell us nothing about Shakespeare's opinion of women; they reflect only Shakespeare's opinion of Hamlet's opinion of women.

With these thoughts in mind, I concluded that I would find the Law in Literature approach more agreeable than the Law as Literature approach. Accordingly, I resolved that my course would use works of the literary imagination as texts to be mined for the insights they might provide into the nature of law and justice and as stimuli to more wide-ranging discussions. Of course, this approach is not without pitfalls of its own: it can foster a didactic view of literature as a mere repository of moral lessons. To guard against this tendency and to move my students away from purely literary analysis, I urged my students to dispense with the author altogether in their thinking:

[T]ry not to speculate about the author's "intention" or about the [work's] "meaning." Instead, study each work as if it were an account of real events and real people recorded by a motiveless, self-operated robot camera. Real events have no meaning, if by "meaning" we have in mind a unitary interpretation that exactly captures, reduces to words, and exhausts the event's significance. Real events (and real people) do not mean, they simply are. To put it more concretely, if you can find something in the [work] and support your findings with specific references to the text, then that something is in the [work]. But do not disregard historical context entirely. Although I recommend that you treat Shylock and Portia as actual persons saying and doing actual things, remember that they are saying and doing these things during the sixteenth century.

I decided, for several reasons, that the reading list would comprise nothing but dramas, rather than novels or short stories. First, many of the nondramatic works in the Law and Literature canon—for example, Billy Budd, Bleak House, To Kill a Mockingbird—are already familiar, perhaps overly familiar, to law students who took English courses in college. I wanted my students to approach each work with as much freshness and with as few preconceived notions as possible. Second, dramas are much shorter than novels; reading one novel per week might be an onerous burden for a law student simultaneously wrestling with corporate tax or antitrust, but reading one play per week is quite manageable. We can study a greater number of authors when the reading list is exclusively plays. And third, dramas have a concentration and immediacy that

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any conclusions at all about Shakespeare's view of lawyers, that view would hardly be antipathetic.

9. 83 U.S. 130, 139 (1872) (upholding Illinois' refusal to license women to practice law).
10. Id. at 141 (Bradley, J., concurring).
novels and even short stories often lack.

Law's engine is set in motion and its impact experienced by individuals as individuals: A must pay damages to B; C must reinstate D; E must go to prison. Yet law is constructed around persons collectively and by category: negligent physician, discriminatory employer, burglar. Even court opinions, which emerge from very particularized conflicts, are usually studied only insofar as they can be reduced to generalizable propositions. Individuals as individuals become submerged in a sea of abstraction and generality. The study of Law and Literature can restore the primacy of the individual, since works of literature are manifestly stories about individuals presented in a form that stubbornly resists the reductionist impulse. And plays, more than novels, hurl the experience of their characters into the reader's consciousness. For a character in a novel, experience is often cumulative rather than immediate, and it is often diluted for the reader by the novelist's ornamental or ruminative prose. In "real life," individuals experience events in an unmediated form that is much closer to what happens on a stage than to what happens in a novel.

I resolved that I would not confine myself to plays in which lawyers are explicitly represented, but that I would confine myself to plays that raised legal or jurisprudential issues without my having to distort the plays' content. Margaret Edson's superb Wit, for example, though exquisitely written and deeply moving, is by no stretch of the imagination a play about right and wrong. The play deals with the experiences and reflections of a college English teacher dying of ovarian cancer. Had I assigned the play to discuss, say, the legal implications of "Do Not Resuscitate" directives, thereby downplaying the author's meditations on kindness and mortality, my students likely would have felt frustrated and perhaps even outraged by my seeming obtuseness. But Antigone and An Enemy of the People do very nicely in a Law and Literature course even though not a single lawyer appears on stage in either play.

A play needed also to be well-written to be included in the course—not necessarily good, but well-written. (I am not entirely certain that I would call Barry England's Conduct Unbecoming a good play, but the writing is consistently polished and razor-sharp.) I wanted my students to reacquaint themselves with the pleasures of language and to observe the results of writing skills successfully applied. For this reason, I decided not to assign Jonathan Tolins's Twilight of the Golds, despite its provocative subject matter. The play takes place in a not-too-distant future when it is possible to determine by prenatal testing whether a child in utero is predisposed to homosexuality.

Should the gay protagonist’s sister, who is pregnant with such a child and mindful of the difficulties faced by lesbians and gay men in America, abort the “gay” fetus? While “conservatives” tend to hold both anti-abortion and anti-gay views, and “liberals” tend to hold both pro-choice and pro-gay views, the play’s situation neatly unpacks these attitudes, making liberals queasy about abortion and conservatives reassured by it. But I found the play’s dialogue to be so inert and implausible that I could not bring myself to assign it.

Teachers of Law and Literature tend to overlook the wealth of suitable material lodged within the world of dramatic literature. A comprehensive survey of Law and Literature courses taught at American and Canadian law schools revealed that of the thirty-four most commonly-assigned works, only eight were plays. And of those eight, only one was written after the year 1620. My purpose in writing this article is not simply to provide an account of one teacher’s experience, but also, by means of that account, to encourage other teachers of Law and Literature to include more dramas—especially modern dramas—in their course materials. In addition, I hope to reassure “practical” teachers like me, who may fear that the Law and Literature movement has strayed too far from the law school’s core mission, that literature can stimulate students to think rigorously about the law.

18. See Elizabeth Villiers Gemmette, Law and Literature: Joining the Class Action, 29 VAL. U. L. REV. 665, 686-87 (1995). I chose thirty-four works on which to base my comparisons because, according to Ms. Gemmette, thirty-four was the number of works that at least five respondents assigned.

The eight plays among these most frequently assigned works were, in descending order of frequency: Measure for Measure by William Shakespeare, The Merchant of Venice by William Shakespeare, Antigone by Sophocles, The Oresteia by Aeschylus, The Crucible by Arthur Miller, King Lear by William Shakespeare, Hamlet by William Shakespeare, and Julius Caesar by William Shakespeare.

The respondents exhibited a slight preference for Measure for Measure over The Merchant of Venice. However, if a teacher wishes to assign one Shakespeare play, The Merchant of Venice is a better choice. It is true that issues of justice play a more prominent role in Measure for Measure than they do in The Merchant of Venice, but the latter is simply a better play, and its characters are more plausible. Furthermore, most of the plays in this octet are dominated by their male characters, and Measure for Measure is no exception. Isabella, the principal female character in Measure for Measure, manages to be difficult and complex without being especially interesting. But The Merchant of Venice’s Portia is one of Shakespeare’s supreme creations; indeed, she functions as the play’s hero.
II. HOW TO READ A PLAY

Whole books have been written on this subject, and I had neither the time nor the wit necessary to present all of that learning to the students in my course. Still, inasmuch as play-reading is so very different from novel-reading, I felt the need to offer them at least a few practical guidelines.

A play's script is somewhat like a musical score. It is not a fully realized work of art in and of itself but rather a blueprint to be used and fleshed out by performer and director in order to present a fully realized work of art to an audience. In Shakespeare's *The Merchant of Venice*, Shylock responds with an impassioned refusal to the pleas that he forgive Antonio's bond:

An oath, an oath, I have an oath in heaven!
Shall I lay perjury upon my soul?
No, not for Venice.  

Most actors, when they deliver this last line, raise the pitch and volume of their voice at the word "Venice," so that the meaning of the line becomes, "not even in exchange for all the wealth of Venice would I break my oath." But I have heard at least one actor drop his voice in contempt on the word "Venice," so that the meaning of the line became "I certainly won't break my oath for something so paltry as Venice." Neither reading of the line is correct in the way that $\pi^2$ is the correct formula for the area of a circle. But either reading can be correct if the actor can make the audience believe it.

I warn students that plays can be read deceptively quickly. A play can be spoken aloud in a couple of hours, and we certainly can read much faster than we can speak. Unless one attends carefully to the action and construction of the work, a play—consisting (seemingly) of nothing but long and short speeches—may take on the one-dimensional quality of a comic book, misleading the reader into thinking she has digested the play on the first reading. Therefore, I recommended that my students read each play at least twice: once, to familiarize themselves with the work so that they will not lose sight of the forest when they start attending to the trees; and twice, to attend to the trees. In *The Voysey Inheritance*, by Harley Granville Barker, we have, among the *dramatis personae*, an Ethel Voysey, an Emily Voysey, and an Edward Voysey. We have a Trenchard and a Tregoning. In performance, these spelling resemblances present little difficulty, since audiences can readily distinguish one actor's face from another. But the reader of the play must pay careful attention in order to remain unconfused.

In the prologue to Shakespeare's *King Henry the Fifth*, the apologetic Chorus tells us, the audience, that the actors, being mere "ciphers" compared...
with the great heroes they impersonate on the stage, will "on [our] imaginary forces work" to induce us to believe in the authenticity of the imitators.

Piece out our imperfections with your thoughts;
Into a thousand parts divide one man,
And make imaginary puissance;
Think when we talk of horses, that you see them
Printing their proud hoofs i' the receiving earth;
For 'tis your thoughts that now must deck our kings,
Carry them here and there; jumping o'er times,
Turning the accomplishment of many years
Into an hour-glass.  

The imaginary forces of a play-reader must be "worked" even harder than those of a play-goer, for plays are not written to be read; they are written to be heard and seen. Some plays do make good reading, but that is just a bonus as far as the dramatist is concerned. Many plays that make a powerful impression in performance yield only a fraction of their quality on the printed page: Samuel Beckett's Waiting for Godot is an obvious example. Consequently, it is vital that the play-reader visualize each scene as she reads it.

For example, Shakespeare's King Lear opens with a conversation between two characters, Kent and Gloucester. After some brief political discussion, the conversation turns to the subject of Gloucester's bastard son, Edmund, of whom Gloucester then speaks as if the son were a sexual trophy: "[Y]et was his mother fair; there was good sport at his making." What is clear to an audience viewing the play, but less immediately clear to a reader, is that Gloucester's lewd recollections of Edmund's begetting are uttered right in front of Edmund. The reader can certainly gather that Edmund overhears his father's remarks, but gathering is not quite the same as seeing; the reader needs to take an extra step—to engage her "imaginary forces"—if she is to apprehend the source of Edmund's resentment.

In Lillian Hellman's Watch on the Rhine, Kurt Muller carefully waits until

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21. That is, when you see ten actors dressed as soldiers on the stage, you must imagine that they are an army of ten thousand. (The word "puissance" must be pronounced as a tri-syllabic in order for the line to scan.)


23. Nowadays, we speak of "seeing" a play. In Shakespeare's day, one spoke of "hearing" a play.

Admit me Chorus to this history;
Who prologue-like your humble patience pray,
Gently to hear, kindly to judge, our play.
The Life of King Henry the Fifth, at 32-34. And in Hamlet, the prince asks Polonius, "Will the king hear this piece of work?" William Shakespeare, Hamlet, act 3, sc. 2, 46-47.

24. A few well-known poetic works—Milton's Samson Agonistes and Shelley's Prometheus Unbound, for example—are written in dramatic form but intended by their authors as purely literary creations, not works for the stage. This rather specialized genre is known as "closet drama."

25. William Shakespeare, King Lear, act 1, sc. 1, 22-23.
his wife’s mother and brother have left the room before he beats an adversary unconscious. Yet he administers the beating while his wife is still in the room. That he allows her to remain manifests the extent of his trust in and reliance on her, and an audience would certainly see her on stage during the beating. But a reader of the play must take an extra step to detect her presence, since she does not speak any of the ten lines leading up to the beating.

Play-going is an aural, no less than a visual, experience, and the play-reader necessarily misses the urgency that actors’ voices bring to theatrical communication. Consider this exchange from Shakespeare’s King Henry the Fourth, Part One:

C. GLENDOVER. I can call spirits from the vasty deep.

E. HOTSPUR. Why, so can I, or so can any man,
But will they come when you do call for them?26

These lines are amusing enough on the printed page, but it requires the sound of the actors’ voices to convey Glendower’s bombastic self-importance and Hotspur’s nimble impudence.

Silence, too, can communicate. In the first scene of Barry England’s Conduct Unbecoming, we meet two young men, Drake and Millington, who are about to join a British regiment in nineteenth century India. Drake is from the middle class and wants desperately to fit in, while the upper-class Millington is contemptuous of the regiment and wants desperately to return to England. Fothergill, the Senior Subaltern, is called upon to explain to Drake and Millington some of the regimental customs:

Senior Subaltern. [L]et me remind you of one or two of the basic facts of life. You don’t speak to anyone, of course. Nor will anyone speak to you. Except me. It’s my job to speak to you. And you may speak to me. But never to a senior officer—even addressed first—in which case, you reply, “Yes, sir.” Unless it is the Colonel, in which case you reply, “Yes, Colonel.” We always call the Colonel, Colonel, in this regiment.

Drake. Quite.

Senior Subaltern. Quite.

Millington. That seems an eminently sound arrangement.27

It seems to me that Millington’s line acquires additional derisive punch if the actor pauses somewhat before delivering it, as if to suggest that Millington senses from the silence following Fothergill’s “Quite” that some sort of utterance is now required of him, and that his sarcastic comment is all he can bring himself to contribute. Again, the play-reader must keep her mental ear no less than her mental eye attuned to the nuances of a play.

26. Id. at 52-54.
27. Id. at 12.
The printed stage directions in a script can be immensely helpful to play-readers intent on better approximating through their reading the effect of a play in performance. I always urge my students, at least when they are reading a particular play for the first time, to read the stage directions as if they were an integral part of the text. Lillian Hellman is particularly conscientious in the matter of stage directions; her description of the Farrelly living room at the beginning of her Watch on the Rhine affords the reader not only a visual impression of the furniture, but also a sense of the Farrelly family's solidity and self-satisfaction:

SCENE: The living-room of the Farrelly house, about twenty miles from Washington, D.C., on a warm July morning. Center stage are large French doors leading to an elevated open terrace. On the terrace are chairs, tables, a large table for dining. Some of this furniture we can see: most of it is on the left side of the terrace, beyond our sight. L[eft] stage is an arched entrance, leading to the oval reception hall. R[ight] stage is a door leading to a library. The Farrelly house was built in the early 19th century. It has space, simplicity, and style. The living-room is large. Upstage L., a piano, downstage L., a couch, downstage R., a couch and chairs, upstage a few smaller chairs. Four or five generations have furnished this room[,] and they have all been people of taste. There are no styles, no periods, the room has never been refurnished. Each careless aristocrat has thrown into the room what he or she brought home when grown-up. Therefore the furniture is of many periods: the desk is English, the couch is Victorian, some of the pictures are modern, some of the ornaments French. The room has too many things in it: vases, clocks, miniatures, boxes, china animals. On the L. wall is a large portrait of a big kind-faced man in an evening suit of 1900. On another wall is a large, very ugly landscape. The room is crowded. But it is cool and clean[,] and its fabrics and woods are in soft colors.

Hellman's stage directions sharpen the action as well. In the first act of Watch on the Rhine, we meet Marthe and Teck, a married couple whose mutual indifference has deteriorated into mutual scorn. During one of their conversations, Teck abruptly changes the subject:

TECK. . . . Have you been sleeping with David?

MARTHE. (Stops, stares at him, then simply,) No. I have not been. (Turns away, crosses L. and puts out cigarette in ashtray on mail table.) And that hasn't been your business for a good many years now.

Marthe's movements subtly underscore her contempt for Teck: Even when their conversation is at its most personal, her cigarette is of more consequence than he is.

29. Id.
30. Id. at 30.
31. It is sometimes difficult to identify the addressee of a stage direction. In Watch on the Rhine, Lillian
Students tend to resist and even resent stage directions. They find some directions insultingly obvious or calculated to spoil their pleasure in discovery. And I must admit that I find some stage directions downright baffling. Later in *Watch on the Rhine*, Hellman tells the reader in a stage direction: “He leans down, kisses her, as if it were important.” How, pray tell, does a person kiss importantly? Hellman’s obscure direction reminds me of a remark supposedly made in rehearsal by the nineteenth century English actor/director Bebohm Tree to a group of actresses whose performances as royal ladies-in-waiting Tree found unsatisfactory: “Ladies, just a little more virginity, if you don’t mind.”  

But if students are initially encouraged to read all stage directions, they will soon discover how to distinguish consequential directions from mere distractions.

III. WHAT TO DO ABOUT “OFFENSIVE” LANGUAGE

When I was a college student during the 1960s, generational politics were at their height, and we all took it as gospel that we were far more open-minded and far freer with our language than our teachers were. It was inconceivable to us that a professor or an author over thirty had the ability to shock our sensibilities by his utterances. We considered no word to be strictly taboo, and we heartily endorsed Oscar Wilde’s opinion that “[t]here is no such thing as a moral or an immoral book. Books are well written or badly written. That is all.”

Times have changed. A 2001 column in the University of Virginia student newspaper deplored the presence of “half-naked models [and] interviews with porn stars” in the Abercrombie and Fitch clothing catalog. A 2002 book reviewer in the University of Nebraska student newspaper, though speaking favorably of a satirical course catalog that offered courses on such “subjects as prostitution, drug dealing, how to obtain true happiness[,] and Satan’s influence on the word of art,” did think it prudent to warn away those student readers who are “easily offended.” (I cannot imagine a ‘60s college book reviewer

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32. See *I haven’t spoken to my wife for over a month*, DAILY MAIL (London), Nov. 7, 2000, at 13.
33. OSCAR WILDE, THE PICTURE OF DORIAN GRAY, at xix (1890)
issuing such an advisory.) And, in 1998, the teacher of a college course in “interpersonal communications” was discharged as the result of one student’s objections to the teacher’s inclusion (and uttering) of a particular epithet in a list of words that the class was discussing and categorizing as taboo.\footnote{36}

Consequently, I felt I had reason to be concerned about the language in some of the plays I had chosen for my course. Students would encounter the most hateful racial, sexual, and religious epithets as well as explicit descriptions of sexual acts: both heterosexual and homosexual. There would be no way of including contemporary plays in my syllabus if I were compelled to limit the reading list to plays with “safe” language and “safe” subject matter, and I wanted very much to include contemporary plays. What to do? On the one hand, I knew I would be unsympathetic to student objections to a play’s language or content if, in my judgment, the play was a serious work of art, and I wanted to forestall any such objections lest class time be taken up dealing with them. On the other hand, my students might very well find the plays I selected unobjectionable without any hectoring from me, and I might look rather needlessly distrustful if I subjected them to a fiery speech of anticipatory denunciation at the beginning of the course. I decided that I was more concerned about averting language-based objections than about looking needlessly suspicious. It also occurred to me that preliminary warnings about language might send a useful and reassuring signal, to those students not worried about language, that the rules of engagement in this course would be a bit more indulgent than those in other courses. So I included the following advice in my syllabus (the tone now strikes me as a bit too imperious, but here it is):

Some of the plays on the reading list contain extremely strong language: not all of them; not even most of them; but some of them. By “strong language” I don’t mean just the occasional four-letter word. I mean really strong language: explicit language, vulgar language, hateful language. There is no way to avoid such language without restricting our reading to plays written before 1970, and I don’t want to do that. These plays are to be taken seriously and respectfully as works of art. If you think you will be unable to take a play seriously and respectfully if it contains vulgar or abhorrent language, please do not take this course. You will be unhappy in it. Or you will cause unhappiness in others. The late Dorothy Parker, a remarkably perceptive literary critic, concluded her glowing review of Andre Gide’s scandalous novel \textit{The Counterfeiters} with this pronouncement: “Doubtless you have heard that the book is not pleasant. Neither, for that matter, is the Atlantic Ocean.”\footnote{37}

And as a follow-up in class, rather than dwelling on the evils of censorship, I described to my students some of the aesthetic and moral gains we can derive


\footnote{37} \textbf{Dorothy Parker}, \textit{The Portable Dorothy Parker} 458 (1982).
from literature when the author is permitted to draw on the fullest resources of the language. An artist needs to have available to her "the extremes of the social spectrum of language" if she wishes to convey the full extent of our moral universe. As Norman Mailer, who was, in his day, much criticized for the vulgarity of his literary language, put it, "[w]hat was magnificent about the word shit is that it enabled you to use the word noble." If artists are forbidden to write candidly about low-mindedness, how can we believe an artist’s high-minded writings? Does she write high-mindedly because she feels high-minded or because she dares not write otherwise? If an artist is free to write candidly about vice, her writings about virtue ring truer.

I have seen many performances of The Merchant of Venice, and, although I am Jewish, I have never been discomfited by any of the play’s anti-Semitic incidents—except once, when a director had pruned some of the characters’ anti-Semitic lines. I was furious. First of all, I felt patronized. I wanted to shout, "I can tell the difference between Art and hate speech, thank you very much." And second, I felt that the director, by excising anti-Semitic lines, had made the Christian characters less offensive and therefore made Shylock’s anger at them seem trumped-up and groundless. The Christians were made more attractive and the Jew less attractive, thus distorting the playwright’s conception and possibly persuading the Christians in the audience that anti-Semitism exists more in the minds of Jews than in the hearts of Christians. If an author wishes to write about ugliness, she must be permitted to make it ugly, or the audience (or reader) may fail to be persuaded that it is ugly. Would non-black readers of The Adventures of Huckleberry Finn have apprehended the inhumanity of racism quite so keenly if Mark Twain had had his white characters consistently refer to black people respectfully and without epithets?

The 1966 musical Cabaret takes place in Berlin during the Weimar period, when Nazism and anti-Semitism were on the rise in Germany. One of the show’s musical numbers, "If You Could See Her," is sung by a nightclub’s master of ceremonies to a person in a gorilla suit. The song’s premise is that the singer is in love with a gorilla, and the singer tells us that if we could only see the gorilla through the singer’s eyes, we wouldn’t wonder at his infatuation. The song’s last lines originally were:

But if you could see her through my eyes,

39. Id. at 252-53.
40. See generally MARK TWAIN, THE ADVENTURES OF HUCKLEBERRY FINN (1885). The characters in Mark Twain’s most famous novel utter the most inflammatory of racial epithets more than two hundred times, causing some readers of the novel to see hate speech where others see Art. For a discussion of the recent attempts to suppress the novel, see Kennedy, supra note 36, at 108-12. Professor Kennedy sees Art, not hate speech, and calls such hostility to the book "[an] achingly poignant example of mistaken protest," and one commentator’s objections a "frightening exhibition of how thought becomes stunted in the absence of any sense of irony" KENNEDY, supra note 36, at 108-09.
She wouldn’t look Jewish at all.

That’s a terrific line in the context of the show. It conveys to the modern audience the unblushing anti-Semitism that was fast becoming Germany’s everyday cultural currency. And it makes the modern audience laugh. And then catch itself laughing. It does not create an anti-Semitic moment on the stage.

Unfortunately, as word of this song lyric spread prior to Cabaret’s Broadway opening (the show had “tried out” in Boston), art was once again mistaken for hate speech, and a number of organizations that had reserved large blocks of tickets threatened to cancel their bookings unless the offending “anti-Semitic” line was removed. The show’s lyricist, Fred Ebb, tells the story:

It was the first show where we had a crack at success . . . and we were all more frightened than we might be today. But they were threatening to close us down before we opened, taking ads out accusing us of anti-Semitism. So, because of the pressure, I changed the punchline to what I thought was a very weak line. . . . [E]ven in the movie, when Bob Fosse [the film’s director] shot the song, if you notice, “She wouldn’t look Jewish at all” is said with absolutely no accompaniment; Joel [Grey, playing the master of ceremonies] just whispers the line. And that’s so, if Bobby [Fosse] had any trouble from people, he could substitute the line without getting the musicians back in.41

It’s a shame that Bob Fosse had Joel Grey whisper the last line. Whispering suggests that the master of ceremonies is fearful of making the remark. The song can portray Germany’s pre-war social environment more effectively if the line is sung boldly and blithely.

IV. Organization of the Course

I teach the course as a seminar. The “required” reading list consists of nine plays, all of which are discussed in the seminar. In addition, I provide students with a list of fifteen “supplementary” plays, which are not discussed in the seminar. Each student is required to choose one play from the required list and one play from the supplementary list and to write a research paper that discusses the two plays.

I limited the “required” list to nine, not because I thought only nine were worthy of the honor, but rather for the unromantic reason that the total purchase price of nine play scripts was about as much money as I could reasonably require a student to spend for one course, although the number nine has proved in practice to be an ideal number for full class attention. The first two plays we discussed in class were The Visit, by Friedrich Dürrenmatt, and A Man for All Seasons, by Robert Bolt. I recount the class discussion of these two plays later in this article. The remaining seven required plays were The Merchant of

41. See generally Mark Steyn, Broadway Babies Say Goodnight 86-87 (1999).
Venice by William Shakespeare; Conduct Unbecoming by Barry England (about a snobbish junior officer in a British regiment in nineteenth-century India who is accused of sexual assault and then tried very informally by his fellow officers); Saint Joan by George Bernard Shaw; Watch on the Rhine by Lillian Hellman (about a genteel Southern family shaken out of its complacency on the eve of World War II); Bent by Martin Sherman [no relation] (about a gay man interned in a Nazi concentration camp because of his sexual orientation); Justice by John Galsworthy (about a man who commits a

42. Today's readers are sometimes put off by Shakespeare's language, and I have found that a basic discussion of Shakespeare's meter can make his verse more appealing, especially to the mathematically minded. The meter in which Shakespeare wrote his dramatic verse is called iambic pentameter. An iamb is a pair of syllables, the first of which is short or unstressed, and the second of which is long or stressed: da-DUM. Iambic pentameter is a verse line consisting of five iambics: "Is this the face that launched a thousand ships?" [Marlowe] "Uneasy lies the head that wears a crown." [Shakespeare] "When I consider how my light is spent" [Milton]. "An aged man is but a paltry thing." [Yeats] The conventions of iambic pentameter permit the occasional line to begin with a single trochee (DUM-da) instead of an iamb ("Euclid alone has looked on beauty bare" [Millay]), and also allow an extra unstressed syllable at the end of a line ("A thing of beauty is a joy forever" [Keats]).

Ever since Chaucer established iambic pentameter in England ("He was a verray, parfit gentil knyght"), it has been the most common metrical form in English poetry, especially dramatic and narrative poetry. Spoken English is essentially iambic, and the popularity of iambic pentameter is due largely to its correspondence to the natural rhythms of English speech. For example, the inscription on English dramatist Aphra Behn's monument in the cloisters of Westminster Abbey appears on the stone to be prose—"Here lies a proof that wit can never be Defense enough against mortality"—but it is actually a pair of rhyming lines in iambic pentameter:

Here lies a proof that wit can never be
Defense enough against mortality.

By contrast, non-iambic meters in English verse tend to be monotonous or jingly: for example, trochaic:

By the shores of Gitchee Gumee,
By the shining Big-Sea-Water,
Stood the wigwam of Nokomis,
Daughter of the Moon, Nokomis.
Dark behind it rose the forest,
Rose the black and gloomy pine-trees,
Rose the firs with cones upon them;
Bright before it beat the water,
Beat the clear and sunny water,
Beat the shining Big-Sea-Water. [Longfellow]

or dactylic:

Touch her not scornfully;
Think of her mournfully,
Gently and humanly;
Not of the stains of her,
All that remains of her
Now is pure womanly. [Thomas Hood]

It is not the shortness of Longfellow's and Hood's lines that produces the monotonity; it is the meter. Even when iambic lines are as short as those in Longfellow's Song of Hiawatha, they still have a more natural quality. For example,

Whose woods these are, I think I know.  
His house is in the village, though.  
He will not see me stopping here.  
To watch his woods fill up with snow. [Frost]
“white collar” crime to obtain money to help a battered wife); and Cherry Docs by David Gow (about a Jewish lawyer asked to defend a neo-Nazi skinhead accused of a hate crime).

I resolved in advance that I would rely entirely on volunteers to keep the class discussion moving; I would not call on students, lest I shatter the congenial mood that I hoped would encourage the free sharing of ideas. Generally, volunteers came forward dependably. If, however, I posed a question that had “political correctness” implications, I found it helpful, instead of soliciting students’ actual opinions, to ask students simply to “state the argument” for one side or the other, so they could articulate an unpopular idea without concern that the idea would be imputed to them personally.

V. DISCUSSION NOTES ON THE COURSE’S FIRST TWO PLAYS

A. The Visit (Der Besuch der alten Dame) by Friedrich Dürrenmatt (1956). 43

The Visit is an exuberantly pessimistic social parable by the Swiss playwright Friedrich Dürrenmatt. As one of my students correctly surmised, Dürrenmatt wrote the play in revulsion at the role his country played during the Nazi era, but in keeping with my admonition about authors’ “intentions,” I ask my students to ignore the specific target of Dürrenmatt’s anger and to assume, as always, that the play’s characters are real people doing real things.

The play takes place in the once-prosperous town of Gülle, now languishing in poverty and neglect. A former Gülle resident, Claire Zachanassian, returns after a long absence. In the many years since she was ejected from the town as a teenager, she has grown immeasurably wealthy through a succession of mercenary marriages, and she offers the desperate town and its people the sum of one billion marks if they will kill Anton Schill, the man who had got her pregnant thirty years earlier. 45 At the time of her pregnancy, Claire had brought a paternity action against Schill, but he bribed two townsmen into testifying that they, too, had slept with her. The perjured testimony destroyed Claire’s case, and she was expelled from the town in disgrace and turned to prostitution. Now wealthy and powerful, she is bent on retribution. At first, the town loftily spurs her offer: “We may be poor but we

43. The play’s original German title means “The Old Lady’s Visit,” but for some reason all the English translations that I know of use simply “The Visit.” Personally, I prefer Dürrenmatt’s original title; it sharpens the irony, and it’s a useful reminder to the reader that the two main characters are no longer young.

44. “Gülle” is the German word for “liquid manure,” so I suppose “Gülle” would be the plural of Gülle.

45. I ask my students to use Maurice Valency’s “adaptation” of the play (published by Samuel French), rather than one of the several “translations” available. Although called an adaptation, it is, in fact, a very faithful one: close to the original yet thoroughly idiomatic for the American stage. It was the version used in the 1958 Broadway premiere, starring Alfred Lunt and Lynn Fontanne. For reasons of euphony, Valency gives Anton the surname “Schill” instead of Dürrenmatt’s “Ill.” Friedrich Dürrenmatt, The Visit, 8 (Maurice Valency, trans., Samuel French 1956).
are not heathens. . . . In the name of humanity. We shall never accept. “
But each citizen, convinced that someone else will manage to dispose of Schill,
runs up huge debts that can be paid off only if Claire pays the town its billion
marks. In the end, after a failed attempt to persuade Schill to kill himself, the
town kills Schill and collects the money.

1. Since The Visit is the first play we study in the course, I begin with a
very straightforward, even prosaic, question that requires only the most literal
recounting of the play’s events. “Exactly what crimes were committed by
Schill back when Claire was young?” Certainly Schill was guilty of suborning
perjury, and he knowingly refused to support his child.

2. “If Claire is entitled to a tort remedy of damages, what is the nature of
the injury that Schill caused?” After all, it wasn’t Schill who expelled her from
the town; it was the townspeople generally. After leaving town, Claire turned to
prostitution. Should Claire’s damages from Schill be based in part on her
having had to turn to prostitution? And if we blame Schill for Claire’s
becoming a prostitute, should we give Schill “credit” for Claire’s having found
a rich husband in the brothel? These questions invite students to wade into
the murky waters of “causation” in tort law. Claire’s encounter with
prostitution was, I suppose, a result of Schill’s actions, but was it a foreseeable
result? And was her advantageous marriage to a billionaire who met her in
the brothel foreseeable? In calculating “net” damages, should we require a
stronger chain of causation with respect to a beneficial repercussion than with
respect to a harmful repercussion? In any event, Claire’s favorable marriage
did not undo the reputational harm she suffered as a result of the perjury Schill
procured.

3. Claire seems to blame Schill and the town for her life as a prostitute. Or
at least she believes prostitution to have been a foreseeable consequence of the
events in Güllen:

BOBBY [a subsidiary character]. And what happened to you [after you left
Güllen upon losing the paternity case]?

CLAIRE. I became a whore.

BOBBY. Why?

CLAIRE. The judgment of the court left me no alternative. No one would trust
me—no one would give me work.  

In a play that we discuss later in the course, Justice by John Galsworthy,

46. Id. at 38.
47. Id. at 69.
48. “I married old Zachanassian and his oil wells. He found me in a whorehouse in Hamburg. It was my
hair that entangled him . . .” Id. at 28.
50. Dürrenmatt, supra note 45, at 37.
another woman turns to prostitution in desperation, in this case after fleeing an abusive husband. When we discuss Galsworthy’s play, I remind students of Claire’s predicament and ask them, “If Ruth [the character in Justice] and Claire are representative in that they turned in desperation to prostitution, are laws against prostitution helpful to women or harmful to women?”

4. “Anton’s treachery took place at least thirty years before Claire seeks redress. Should such a delay bar her claim?” This question leads to a discussion of why we have statutes of limitations and, inevitably, to a discussion of whether there are any crimes for which liability should never be barred by any statute of limitations: Murder? Lying about one’s Nazi past on an application for US citizenship? Child sexual abuse? Failure to file a federal income tax return?

5. “Whom would you criminally charge with Schill’s death?” Schill’s death is presented in the play as follows:

BURGOMASTER. Anton Schill, stand up! (SCHILL hesitates.)

POLICEMAN. Stand up, you swine!

BURGOMASTER. Schulz, please.

POLICEMAN. I’m sorry. I was carried away.

(SCHILL walks slowly to Center and turns his back on the audience, then gives cigarette to the POLICEMAN, who steps on it.)

BURGOMASTER. Enter the lane.

(SCHILL hesitates a moment. He goes slowly into the lane of silent MEN [the townswomen were previously sent from the room]. The ATHLETE stares at him from the opposite end. SCHILL looks in turn at the hard faces of those who surround him, and sinks slowly to his knees. The lane contracts silently into a knot as the MEN close in and crouch over. They drag SCHILL Downstage. Complete silence. The knot of MEN pulls back slowly. Then it opens. Only the DOCTOR is left, kneeling by the corpse. The DOCTOR rises and takes off his stethoscope.)

PASTOR. Is it all over?

DOCTOR. Heart failure.

BURGOMASTER. Died of Joy.


52. The limitations period with respect to criminal prosecutions for failure to file a federal income tax return is six years. I.R.C. § 6531(4) (1986). With respect to a civil proceeding brought for the collection of federal income taxes assessed and owed, no statute of limitations exists with respect to a tax year for which the taxpayer filed no income tax return; the Internal Revenue Service may bring the proceeding at any time. Id. at § 6501(c)(3).
ALL. Died of Joy.\textsuperscript{53}

Earlier in the play, Claire asked the Athlete whether he had ever strangled anyone, so I suppose there is an implication that the Athlete strangled Schill while the mob was crowding around. Is the Athlete criminally liable for Schill’s death? If so, why is an executioner \textit{not} liable for a condemned person’s death? Can an individual member of a mob be charged criminally for the acts of other individual members of the mob? Clearly, the method of killing Schill was not improvised; the command “Enter the lane” suggests a good deal of premeditation. Is any individual besides the Athlete criminally liable for Schill’s death?

6. “Presumably, Claire’s bribery of the town constituted a crime. Would it have been criminal if she had simply demanded justice (for money) but left it up to the town to decide on Schill’s punishment?” Should we allow the victim to have a hand in sentencing? So-called “victim impact” statements, which are becoming more and more common, allow the surviving members of a murder-victim’s family to describe for the court, before sentence is pronounced, the consequences they suffered as a result of the convicted defendant’s conduct. Does the allowance and consideration of such statements imply that the killing of a person with many children merits harsher punishment than the killing of a person with no children? \textit{Does} the killing of a person with many children merit harsher punishment than the killing of a person with no children? Does the killing of a rich philanthropist merit harsher punishment than the killing of a rich miser? (As to this last question, students should assume in each case that the victim dies intestate and that her estate passes to several remote, unremarkable relatives. I don’t want students supposing that the philanthropist’s death results in any charitable bequests.)

7. After Claire offers the town the billion marks of blood money, Schill, not surprisingly, feels that his life is in danger even though no actual threat has yet been made by any individual townsperson. When Schill goes to the police and demands action, the policeman tells him, “Look Schill, you show us where anyone threatens your life in any way—say, for instance, a man points a gun at you—and we’ll be there in a flash.”\textsuperscript{54} No doubt this line is intended to be funny, in a mordant sort of way. If the police do not apply their crime-fighting resources until a would-be killer is actually pointing a gun at his intended victim, there is no way they can “be there” quickly enough to stop the crime.\textsuperscript{55} But is this a fair criticism of police conduct? Should we allow the police to

\textsuperscript{53} Dürrenmatt, \textit{supra} note 45, at 86-87.
\textsuperscript{54} \textit{Id.} at 49.
\textsuperscript{55} This line reminds me of a Cole Porter song lyric in a duet called “Friendship,” where two good-natured adversaries exchange dubious pledges of future assistance:

\begin{quote}
If they ever put a bullet through your brain,
I’ll complain.
\end{quote}

See \textit{Robert Kimball, COLE} 162 (1971).
take preemptive action? What sorts of preemptive conduct on the part of the police are or should be permitted? These questions can also lead to questions concerning the law of criminal attempt: Why is a failed attempt at murder nonetheless a crime? At what point in the concocting of a criminal enterprise does the process of concoction become criminal?56

8. “Claire asserts several times in the play that justice can be bought.57 Is she correct?” Can justice (or, more accurately, favorable legal outcomes) be bought in America today? Students might talk about the O.J. Simpson trial. They might talk about the effect of corporate lobbying on legislation. They might talk about the ability of rich taxpayers to hire better tax lawyers than middle-income taxpayers. I bring up the case of Ralph Engelstad, a wealthy alumnus of the University of North Dakota, who gave the university $100 million on the condition that the University retain its controversial nickname, the “Fighting Sioux.” The University accepted the gift: “Thumbing his nose at American Indian organizations long opposed to the nickname, Engelstad had over 4,000 reproductions of the mascot installed in the arena that [now] bears his name.”58 On the other hand, is it wrong if justice is for sale? After all, the rich eat better than the poor; the rich enjoy better housing than the poor; the rich enjoy better health care than the poor. Why is justice a different “good” from food, housing, or health care?

9. “Could you argue that Gülfen is, as a whole, better off as a result of the events of the play? After all, everyone but Schill is richer than before, Schill’s family is more than compensated for the loss of its dubious breadwinner, and Schill’s unhappy life is ended.” Would it have been more wrongful if the victim was chosen at random? Would it have been better if the victim was a volunteer? Or if the victim was chosen from among the terminally ill? These questions can lead to a discussion of whether a homicide victim’s consent should be a defense available to the killer. And they can lead to a discussion of whether it is proper to prohibit an act merely because of the act’s effect on the perpetrators rather than its effect on the victims. For example, is it right to prohibit cock-fighting merely on the ground that it debases and desensitizes the audience?59 Could we similarly condemn capital punishment merely on the ground that it debases and desensitizes the executioner?

56. A fascinating case in this regard is People v. Rizzo, 158 N.E. 888 (N.Y. 1927), where the New York State Court of Appeals, after congratulating the police on their “excellent work” in preventing an armed robbery, reversed the defendant’s attempted-robery conviction on the ground that the police had intervened so early in the defendant’s scheme that his pre-arrest preparations had not yet amounted to a criminal attempt. See Commonwealth v. Peaslee, 59 N.E. 55 (Mass. 1901).
57. Dürrenmatt, supra note 45, at 35, 38.
59. See IRVING KRISTOL, ON THE DEMOCRATIC IDEA IN AMERICA 33 (1972).
B. A Man for All Seasons by Robert Bolt (1960).

This famous history play chronicles the life and death (some would say "martyrdom") of Sir Thomas More, a Lord Chancellor of England and widely celebrated public figure during the most tumultuous years of the reign of King Henry VIII. Although written only four years after The Visit, A Man for All Seasons is a vastly different work: different in both style and content. Despite a few sardonic touches and theatrical devices involving a choric figure whom the playwright dubs the Common Man, Bolt's play is largely earnest, realistic, and laudatory, while Dürrenmatt's is ironic, expressionistic, and scornful. The world of The Visit is one of insignificant individuals—capable of neither heroic action nor heroic suffering—crushed by a mass society, while the world of A Man for All Seasons is populated by lofty, self-willed heroes and villains.

My standard admonition to my students—to ignore the author, and to assume that the play's characters are real people doing real things—takes on an added level of complexity here, inasmuch as the characters in this play really are real people doing real things. More particularly, the play's dialogue makes it plain that the characters are quite familiar with the facts of then-recent English history, and their actions often reflect that knowledge. Accordingly, I have found it helpful to preface the class discussion of the play with a brief account of the historical events leading up to the action, so that my students will know what the characters know (and be able to understand the many historical references made by the characters).60

King Henry VIII was the second English king in the Tudor dynasty. The dynasty was founded by his father and immediate predecessor, Henry VII. Henry VII's claim to the English crown by blood was quite tenuous (several people had a better claim), but he won it on the battlefield. The obvious question is: Why did the English ruling class permit the royal succession to be decided by combat rather than by descent? The likely answer is that they were simply tired of fighting, and Henry Tudor seemed as good a choice as any.

Starting in about 1455, two rival families, the House of Lancaster and the House of York, had contended ferociously for the English crown. These so-called Wars of the Roses, named for the two families' heraldic symbols (the red rose for Lancaster and the white rose for York), took an enormous toll on the country: both in lives and in wealth.61 When, some thirty(!!) years later, the


61. It is estimated that the casualties from a single battle—the Battle of Towton in 1461—may have been as high as 25,000: an enormous figure, even by present-day standards. See Anniversaries, Times (London), Mar. 29, 2002, at *1.

I point out to students that Cardinal Wolsey, in the play refers to these conflicts as the Yorkist Wars. Robert Bolt, A Man for All Seasons, 23 (1960). It would be quite like Wolsey, a loyal servant of Henry VIII, to characterize these wars as entirely the fault of disloyal Yorkists.
Lancastrian Henry Tudor defeated the Yorkist King Richard III in battle, both sides decided that enough was enough, especially since Henry had sworn a solemn oath to marry the Yorkist heiress so that any royal issue would be equally Yorkist and Lancastrian.

Henry VII and his wife had two sons, Arthur (the elder) and Henry (later Henry VIII). Henry VII selected a bride for the teenage Arthur, the Spanish princess Catherine, and no doubt the enormous dowry that accompanied her was a prime consideration (no pun intended, contracts teachers!). She and Arthur were married, but the groom died at sixteen, after less than a year of marriage. The King, who had a reputation for miserliness, was very loath to return Catherine’s dowry to Spain, so he kept Catherine at court and elicited from his surviving son a promise to marry her.

The old king died, the son was now King Henry VIII, and in accordance with his late father’s wishes, he determined to marry Catherine. There was, however, a serious impediment to the marriage that had to be overcome first, for the Bible appears to condemn as incestuous any marriage between a man and the widow of his brother: “You must not uncover the nakedness of your brother’s wife, for it is your brother’s nakedness.” This obstacle was overcome by means of a dispensation obtained from the Pope, and the marriage accordingly took place.

Since Henry is remembered today largely for his break with Rome, it may come as a surprise to many that England, in the early years of Henry’s reign, was one of the most loyally Catholic countries in Europe. Luther’s beliefs were widely condemned as heretical throughout Henry’s kingdom, and Henry even wrote an anti-Lutheran book—An Assertion of the Seven Sacraments—for the writing of which a grateful pope bestowed on him the honorific title Defender of the Faith. This loyalty to Rome was to fade, but although Henry ultimately discarded the Pope, he kept the title.

Henry wanted desperately to have a son. He wanted to provide for a smooth succession on his death, and he feared that a female’s succession would be anything but smooth. Henry was only too aware of the many rival claimants who had troubled the peace of his father’s reign, and he was convinced that only a legitimate male heir would have a chance of untroubled acceptance.

62. To help them remember the seven prismatic colors, British schoolchildren rely on the mnemonic Richard Of York Gave Battle In Vain (red, orange, yellow, green, blue, indigo, violet), which strikes me as infinitely superior to our home-grown mnemonic, “Roy G. Biv.”

63. Leviticus 18:16. Hamlet, referring to his mother’s hasty marriage to her dead husband’s brother, likewise considers such a marriage incestuous:

O, most wicked speed, to post
With such dexterity to incestuous sheets!
William Shakespeare, Hamlet, act 1, sc. 2, 156-57.

64. In point of fact, Henry had an illegitimate son, whom he publicly acknowledged, and on whom he bestowed the titles of Earl of Nottingham, Duke of Richmond, and Duke of Somerset, but he stopped short of trying to designate the illegitimate son as his heir. RIDLEY, supra note 60, at 152.
English law, unlike French law, did not prohibit a woman from inheriting the crown, but in fact no woman had ever reigned as an English monarch, and the one woman who had come close provided an unhappy example. (Her name was Matilda, the granddaughter of William the Conqueror, and her assertion of her right to the crown precipitated a dynastic war: which she lost.)

Unfortunately for Henry and Catherine, their only child who survived more than a few weeks was a daughter, Mary. A still-birth and an infant death had preceded Mary’s birth and even more still births succeeded it, until at last it was plain to all that Catherine was incapable of bearing any more children and that if Henry was to have a legitimate male heir, it would have to come from a different wife. As Henry brooded on his predicament, his thoughts turned to a second passage in Leviticus, which repeated the ban on marrying one’s brother’s widow but did so in language that seemed to apply with unnerving specificity to Henry’s situation: “The man who takes to wife the wife of his brother: that is impurity; he has uncovered his brother’s nakedness, and they shall die childless.”\textsuperscript{65} In these words, Henry found what he believed was the explanation for Catherine’s succession of still births and her failure to produce a son. Henry now believed that he had solid grounds for petitioning the Pope (not the same Pope who had granted the original dispensation) for a divorce.

Deuteronomy contained seemingly contradictory words that, rather than condemning such a marriage, appeared to command it.

If brothers live together and one of them dies childless, the dead man’s wife must not marry a stranger outside the family. Her husband’s brother must come to her and... make her his wife, and the first son she bears shall assume the dead brother’s name; and so his name will not be blotted out in Israel.\textsuperscript{66}

But Henry believed that Leviticus prevailed over Deuteronomy. Besides, he now had a second reason for wanting a divorce, beyond his desire for a son. Henry had fallen madly in love with Anne Boleyn, and, much to Henry’s vexation, she refused to be his mistress. She insisted on marriage. And so,

\textsuperscript{65} \textit{Leviticus} 20:21 (emphasis added).

\textsuperscript{66} \textit{Deuteronomy} 25:5-6. Presumably, the Pope’s dispensation rested on this passage from Deuteronomy. Since, in the play, Henry and More dispute the relative significance of Leviticus and Deuteronomy, I ask my students, as an exercise, to reconcile the two biblical passages. The best resolution seems to be that Deuteronomy refers to a special case: Leviticus controls (that is, marriage to one’s brother’s widow is forbidden) unless the late brother died childless, in which case the marriage is required so the deceased brother’s line will not die out. Of course, this argument hardly helps Henry, inasmuch as his deceased brother was indeed childless. Another possible argument would contend that while Deuteronomy refers specifically to the situation where the brother is dead, Leviticus refers simply to a “brother’s wife,” possibly a living brother’s wife. Since the Pentateuch clearly contemplates polygamy (Jacob had four wives), perhaps Leviticus prohibits the marriage when the brother is living and Deuteronomy commands it when the brother is dead and childless. Again, though, this argument does not help Henry. In the play, Henry says that Deuteronomy is ambiguous, Bolt, supra note 61, at 47-48, but in fact Deuteronomy is no more ambiguous than Leviticus. Ambiguity arises in one passage only because of the existence of the other. Perhaps the best argument for Henry’s side is that Deuteronomy simply no longer applies in a society which, unlike biblical Israel, is not organized along tribal lines.
Henry commissioned his chief counselor, Cardinal Wolsey, to obtain from the pope the desired divorce.

The pope at this time was Clement VII. By today’s standards he was a very appealing figure: a broad-minded scholar and a great patron of the arts; for example, he commissioned Michelangelo’s *Last Judgment* for the wall of the Sistine Chapel. But Clement was conspicuously not a statesman, and that meant that by sixteenth century standards he was a disaster as a pope. The two great, contending powers in Europe at the time were France and Spain (England was just a provincial backwater), and Clement continually transferred his allegiance to whichever of the two countries seemed to be on top at the moment. This blatant opportunism so infuriated the Spanish emperor, Charles V, that the next time Spain was in the ascendant, Charles’s troops sacked Rome and took the pope prisoner. By the time Henry appealed to Clement for a divorce, Clement was under Charles’s thumb and dared not do anything to displease Charles. And it would have displeased Charles immensely for the pope to grant Henry’s divorce, for Charles was Catherine’s nephew. Clement would never grant Henry his divorce so long as Charles’s armies occupied central Italy.

Eventually, it became clear to Henry’s advisors that Henry would find no solution in Rome (the events of *A Man for All Seasons* begin shortly before that realization was made) and would have to make a bolder assertion in order to break with Catherine and marry Anne. He would have to argue that the pope was *without power* to grant the original dispensation from Leviticus’s clear command and that, consequently, Henry’s marriage to Catherine was void from its very inception. Cardinal Wolsey could not help the king in pressing *this* argument, for the argument was a fundamental assault on the authority of the pope and necessarily would lead to schism.

After summarizing these facts of English history for my students, I turn to a discussion of the play, with the following questions.

1. “Would you describe More as tolerant: as a respecter of other people’s consciences.” The historical More was anything *but* tolerant: before Henry’s break with Rome, More, in his official governmental capacities, was an enthusiastic persecutor and burner of Protestant “heretics.” As a prime example of his intolerance, More, in the play, refused to allow his daughter to marry William Roper until Roper renounced his Protestant views. For me, this raises an interesting question. More calls Roper (though not to his face) a “heretic” which does sound intolerant. Suppose, instead, More had said to Roper, “My family are all Roman Catholics. I want my daughter to marry a Roman Catholic because I think marriages have the greatest chance of success when the wife’s family and the husband’s family share the same religion.”

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Should such an opinion be regarded as “intolerance?” Is it intolerance if a Roman Catholic employer prefers to hire a Roman Catholic as a personal secretary? Does it make a difference whether the employer is a Roman Catholic university or a factory-owner?

As to the question of private conscience, More makes a curious remark to his friend Norfolk. Norfolk and most of the other English nobles have sworn to the Act of Succession; More has refused. When Norfolk asks him to swear to it for the sake of “fellowship” if for nothing else, More replies, “And when we stand before God, and you are sent to Paradise for doing according to your conscience, and I am damned for not doing according to mine, will you come with me, for fellowship.”

This remark suggests that conscience alone determines culpability: the same act that would be sinful if performed by an individual against his conscience would merit praise if performed by an individual motivated by conscience. What would happen to our law—especially our criminal law—if mens rea had this “conscience” component?

2. “Would it be fair to say that More believed in the separation of Church and State?” This is a somewhat illegitimate—or, at least, ahistorical—question, inasmuch as “separation of Church and State” is a post-sixteenth-century formulation. I use the question more as a prelude to question 4 than as a question to be answered for its own sake or with a view to addressing it to a point of conclusion. It serves as a tool to get students to articulate More’s political philosophy. Certainly, it is clear how More would resolve such present-day Church-and-State issues as school prayer (he’d be for it) and public aid to religious schools (he’d be for it). But in the context of the sixteenth century, “separation of Church and State” may be an impractical template to use: (1) On the one hand, More believed strongly that the State had a duty to stamp out religious heresy; (2) On the other, he opposed Henry’s attempt to make the Church a branch of the State. Although these two positions are inconsistent if we analyze them from the point of view of separation of Church and State, the two are quite consistent with More’s view of the role of religion in life.

3. “Could you state Henry’s position as an abstract principle of law, rather than just an act of will?” The tone of the play gives one the impression that Henry is acting without conscience or integrity: “I want her, and I will have her,” as it were. And, indeed, the historical Henry VIII was quite without conscience or integrity. But when we confine ourselves to the text of the play, the situation is less clear. I think it would be fair to formulate Henry’s fundamental position as follows: if a head of state wishes to divorce his wife, he should not need the pope’s permission to do so. I find it odd that some students allow the perceived baseness of Henry’s motives (a sexist preference

69. Id. at 105.
70. Id. at 126.
for male offspring or unrestrained lust for a woman who, history tells us, was not very nice) or his personal narcissism\(^\text{71}\) to discredit in their eyes his legal position on divorce; odd, because that position has won complete acceptance throughout the Western world. Perhaps students find Henry’s legal position tainted by the brutal lengths to which he was willing to go to ensure allegiance after his break with Rome.

4. “Given your discussion of the two previous questions, could you draft an oath that More could have signed and that would have satisfied King Henry?” This is a tough one; Henry’s counselors were far from unintelligent, and they couldn’t come up with anything. We know that More was quite willing to swear an oath that he would recognize Henry’s children by Anne Boleyn as Henry’s lawful heirs, in preference to Henry’s daughter by Catherine.

NORFOLK. Thomas, we must know plainly whether you recognize the offspring of Queen Anne as heirs to His Majesty.

MORE. The King in Parliament tells me that they are. Of course I recognize them.

NORFOLK. Will you swear that you do?

MORE. Yes.\(^\text{72}\)

But More’s words make plain that it was the Parliamentary imprimatur, not the offspring’s legitimacy, on which his allegiance to Anne’s offspring was founded. That is to say, no one could infer from More’s remarks that he recognized Henry’s marriage to Anne as valid. And Henry \textit{wanted} the marriage to be recognized as valid. He was afraid that an illegitimate child would not command widespread allegiance, and therefore an oath limited to recognizing Anne’s children merely as Henry’s \textit{de jure} heirs would not do.\(^\text{73}\) More would not recognize their legitimacy unless Henry’s marriage to Anne was lawful; and the marriage would not \textit{be} lawful unless Henry’s previous marriage was either annulled or terminated by divorce. The Pope would not grant the annulment or divorce, so Henry “created” a church that \textit{would}. This creation was accomplished by means of a parliamentary Act of Supremacy, which declared the king “Supreme Head of the Church in England.” More held that only the Pope had the authority to grant a divorce.\(^\text{74}\) An early version of the Act modified the “Supreme Head” title with the phrase “so far as the law of God allows.” More was willing to subscribe to the Act as long as it contained

\(^{71}\) Henry asks More’s daughter whether she can dance. “Not well, Your Grace.” Henry replies, “Well I dance superbly,” and, planting his leg before her face, he boasts, “That’s a dancer’s leg, Margaret.” Bolt, \textit{supra} note 61, at 44.

\(^{72}\) \textit{Id.} at 103.

\(^{73}\) \textit{Id.} at 94.

\(^{74}\) \textit{Id.} at 22.
that limitation, but Henry's advisors realized that the limitation had to go. In order for Henry's marriage to Anne to be lawful, Henry had to bypass or supersede the Pope, and More was unwilling to go along with that. "[T]he Act of Parliament ... is directly repugnant to the Law of God. The King in Parliament cannot bestow the Supremacy of the Church because it is a Spiritual Supremacy." A corollary question is "Whose position is more reasonable: Henry's or More's?" This gets students to think about what constitutes a reason. The grounds for Henry's position can be expressed in terms of political durability or personal, worldly interest; that is, pragmatic or functional grounds. The basis of More's position was religious belief. Is a belief a reason? Should the law treat religious beliefs differently from political beliefs? Should the law treat belief-based grounds differently from pragmatism-based grounds? It is at this point that we discuss Welsh v. United States, a statutory-interpretation case holding that a statutory draft-exemption for religion-based pacifism extended to ethics-based pacifism, and Wisconsin v. Yoder, the well-known case exempting the Amish from a compulsory schooling law. We also discuss whether religious employers should be exempt from fair employment laws prohibiting discrimination on the basis of sexual orientation.

5. "More's refusal to sign the oath brought about his death and thereby pauperized his family. Had he decided to sign the oath, despite his conscience, would we have been more willing to approve that decision if he had signed it to protect his family than if he had had no family and signed it only to protect himself?" There is a good deal of talk in the play suggesting that the acquisition of a spouse and children alters one's moral position. Early in the second act, More cautions his hot-headed son-in-law:

MORE. I'll keep my opinion to myself, Will.

ROPER. Yes? I'll tell you mine... 

MORE. Don't! If your opinion is what I think it is, it's High Treason, Roper. Will you remember you've a wife, now? And may have children. 

75. Bolt, supra note 61, at 67-68.
76. Id. at 126.
77. Many Americans persistently (and sanctimoniously) use the word "faith"—as in "faith-based organizations" and "people of faith"—as a synonym for "religion," as if to suggest that the only kind of belief that qualifies as "faith" is religious belief. See Sean Wilentz, From Justice Scalia, A Chilling Vision of Religious Authority in America, N.Y. TIMES, Jul. 8, 2002, at A19.
81. Bolt, supra note 61, at 68.
And he cautions his friend Norfolk along similar lines: “[Y]ou have a son.” Is it right to expect greater sacrifices from childless people than from people with children? This has become a hot workplace issue, as employers often expect employees without children to fill in for employees with children when the latter employees are away fulfilling parental duties.

Another workplace issue is suggested by another exchange from the play. When a reduction in More’s income obliges him to reduce his household expenses, he suggests that a servant’s childlessness ought to make the servant temper his salary demands:

MORE. What about you, Matthew? It’ll be a smaller household now, and for you I’m afraid, a smaller wage. Will you stay?

MATTHEW. Don’t see how I could, then, sir.

MORE. You’re a single man.

Is it consistent with the “equal pay for equal work” norm for an employer to pay for health insurance not only for each employee but also for all children that the employee might have? Do other norms override “equal pay for equal work”?

6. “Who was more culpable morally: Claire in The Visit, or Henry in A Man for All Seasons?” Both Claire and Henry bring about a man’s death. Should it matter to us, in answering this question, that More’s death was brought about by a person using political authority to get political subordinates to kill his victim under color of public law, while Schill’s death was brought about by a person using money to bribe private citizens to kill her victim in open defiance of public law? Does it matter to us that Henry’s victim was a great man whereas Claire’s victim was a mediocre one? Is it significant that Henry’s motive was (mostly) political while Claire’s was personal?

7. “Early in the play, Norfolk is portrayed as a philistine: smugly contemptuous of classical learning and fatuously captivated by falconry. Yet he proves to be one of More’s most loyal friends, and he defends him dexterously in a confrontation with More’s chief persecutor. King Henry, on the other hand, is quite cultivated: learned and musical. Yet he brings about More’s execution. Is Art then no defense against barbarism?” In The Visit, the Burgomaster reminds Schill that “Goethe slept here” and that “Brahms composed a quartet” here, as if their mere presence testifies to the town’s enlightenment. (The Burgomaster’s reassurance rings particularly hollow in this scene, since the audience knows perfectly well that the Burgomaster seeks Schill’s death.) Why do we assume that art is a defense against barbarism?

82. Id. at 96.
84. Bolt, supra note 61, at 77-78.
Why has that hope been shown historically to be a false one?  

8. “Thomas More is often spoken of as the patron saint of lawyers. Do you think he is a good model for the lawyers of today?” At this point in the class discussion, I feel compelled to admit to my students that although I am a great admirer of Bolt’s play, I am not an admirer of the historical Thomas More. He was a religious bigot, and his opinions about the role of religion put him on the wrong side of Western history. But does Bolt’s More, the character in the play, provide a good role model for today’s lawyers? Would it be fair to say that he’s inclined to elevate form over substance? Consider the importance he attached to the phrase “so far as the law of God allows” in the Act of Supremacy, and his unyielding reliance on silence as a defense when he should have known better. One of his most telling remarks is: “[I]n the thickets of the law, oh, there I’m a forester. I doubt if there’s a man alive who could follow me there, thank God. ... [W]hoever hunts for me will find me hiding in the thickets of the law.”

Does the protection that the law affords proceed from its complexity and impenetrability?

More says, “I know what’s legal[,] not what’s right. I’ll stick to what’s legal.”

Is a client well-served if his lawyer adopts that as her governing principle?

More seems to derive a certain satisfaction from his punishment. His lines, after his condemnation, suggest that he’s affecting the lofty resignation of the martyr.

When addressing his daughter in the last scene, he lapses into

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85. As George Bernard Shaw wrote, “People don’t have their virtues and vices in sets: they have them anyhow: all mixed.” George Bernard Shaw, Heartbreak House, in FOUR PLAYS BY GEORGE BERNARD SHAW 321, 387 (1953).

86. See William R. Burleigh, Homily at Red Mass: St. Mary’s Church, Evansville, Indiana, May 5, 1994, 36 CATH. LAW. 389, 400 (1996). It is true that More was canonized—in 1935—but he was never officially the patron saint of lawyers. That honor belongs to Ivo of Kermartin (St. Ives), a thirteenth-century French lawyer. 2 BUTLER’S LIVES OF THE SAINTS 351-52 (Herbert Thurston & Donald Attwater eds., 1962). On October 21, 2000, Pope John Paul II named More the patron saint of politicians. Val Castronovo et al., Dear Lord, Please Smite My Opponent. Amen, TIME, Nov. 6, 2000, at 41. This recent development provides a welcome pretext for asking my students whether More is a better role model for politicians than for lawyers.

87. See RIDLEY, supra note 60. “More’s Answer to Luther which was published in Latin in London in December 1523, was a publication which for abuse and obscenity has no parallel even in the field of sixteenth-century theological controversy.” Id. at 142.

88. Bolt, supra note 61, at 56-57.

89. Id. at 56.

90. I am quoting this line somewhat out of context. In the play, More speaks this line in response to pleas that he arrest a dangerous man who, as yet, has broken no laws. The line is quite unobjectionable—even admirable—in context, but when considered as a general proposition, it provokes much discussion.

91. Interestingly enough, More, in the very first scene of the play, seems to acknowledge the possibility that martyrdom might be a reward.

RICH. But every man has his price.

MORE. No, no!

RICH. But, yes! In money, too!

MORE. No, no, no.

RICH. Or pleasure. Titles, women, bricks and mortar, there’s always something.

MORE. Childish.
Biblical cadences—"Have patience, Margaret, and trouble not thyself. Death comes for us all..."—even though earlier in the play he always addressed her with the more common "you." When Norfolk offers him some wine on his way to the block, More rather grandly equates himself with Christ: "My Master [not even 'our Master'] had easel and gall, not wine, given Him to drink. Let me be going." And even on the scaffold, he describes himself as "blithe to go to [God]." Is a zest for martyrdom a desirable quality in a lawyer?

A patron saint functions as a symbol: in More's case, a symbol of personal integrity and heroic adherence to one's own standards of right and wrong. He has become, in our collective memory, the conscientious objector par excellence. When a culture has come to associate noble qualities with the memory of a historical figure and to draw inspiration from that memory, does it matter—should it matter—whether that figure in fact possessed those qualities? I remind students of this discussion when we get to Saint Joan later in the course. In the second scene in Shaw's play, Joan has come to the Dauphin's court at Chinon to ask for command of the French army. As a test of Joan's supposedly miraculous powers, the Dauphin proposes to exchange clothes with a courtier (Gilles de Rais, otherwise known as Bluebeard) to see whether Joan can penetrate their disguises and recognize "the blood royal." As the court withdraws and the two men exchange clothes offstage, the Archbishop of Rheims and the current commander of the army (La Trémouille) remain behind.

**LA TRÉMOUILLE.** I wonder will she pick him out!

**ARCHBISHOP.** Of course she will.

**LA TRÉMOUILLE.** Why? How is she to know?

**ARCHBISHOP.** She will know what everybody in Chinon knows: that the Dauphin is the meanest-looking and worst-dressed figure in the Court, and that the man with the blue beard is Gilles de Rais.

**LA TRÉMOUILLE.** I never thought of that.

**ARCHBISHOP.** You are not so accustomed to miracles as I am. It is part of my

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*RICH.* Well, in suffering, certainly.

MORE. (*Interested.*). Buy a man with suffering?

*RICH.* Impose suffering, and offer him—escape.

MORE. Oh. For a moment I thought you were being profound.


92. *id.* at 128 (emphasis added).


94. *id.* at 129. I, too, had to look up "easel." According to the Oxford English Dictionary, "easel" (or "easle") is an obsolete term meaning hot ashes or cinders.

profession.

LA TRÉMOUILLE [puzzled and a little scandalized]. But that would not be a miracle at all.

ARCHBISHOP [calmly]. Why not?

LA TRÉMOUILLE. Well, come! What is a miracle?

ARCHBISHOP. A miracle, my friend, is an event which creates faith. That is the purpose and nature of miracles. They may seem very wonderful to the people who witness them, and very simple to those who perform them. That does not matter: if they confirm or create faith they are true miracles.

LA TRÉMOUILLE. Even when they are frauds, do you mean?

ARCHBISHOP. Frauds deceive. An event which creates faith does not deceive: therefore it is not a fraud, but a miracle. 96

VI. CONCLUSION

Dramas, though briefer than novels, are no less rich in stimulating material. The combination of Law and Dramatic Literature led, as I had hoped, to some exhilarating class discussions, and I, for one, was sorry to see the course end.

96. George Bernard Shaw, Saint Joan, 70 (1924).