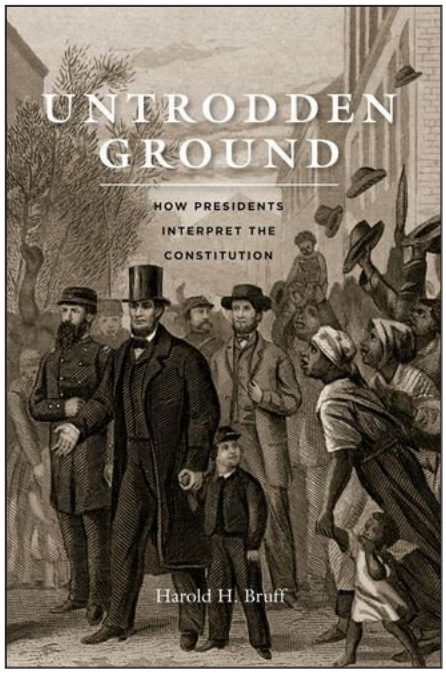


## Untrodden Ground: How Presidents Interpret the Constitution

**By Harold H. Bruff**

*University of Chicago Press, Chicago, IL, 2015. 557 pages, $55.*

***Reviewed by Louis Fisher***

This study offers a perceptive, deeply researched, and thoughtful analysis of how Presidents interpret the Constitution. Harold Bruff builds on his prior service with the Justice Department, decades of teaching law school, and years of impressive scholarship. His writing is crisp, clear, coherent, and develops each topic systematically. As a general point, he expresses concern that even "in ordinary times, our system has recently become similar enough to a permanent constitutional dictatorship to give deep pause." Lyndon Johnson's "record of unilateralism and duplicity" in conducting the war in Vietnam "forfeited the support of both Congress and the people." Richard Nixon "brought on ... his own demise." George W. Bush forgot the lessons of Vietnam "by fomenting an unnecessary war against Iraq through deception."

Bruff asks whether a legal background improves a President's capacity to interpret the Constitution. His answer: "Not particularly." Some Presidents "escaped the practice of law for politics at the earliest opportunity (Wilson, Franklin Roosevelt, Clinton)." To that list we could add Barack Obama. Some, Bruff adds, "have shown scant regard for the rule of law (Jefferson and Franklin Roosevelt at times, Nixon always)." To Bruff, the "great counterexample is Lincoln, whose long experience as a trial lawyer grounded him in a devotion to actual facts and cogent legal argument."

Bruff writes that George Washington "remarked that he stood on untrodden ground and that everything he did would become a precedent," so "he stepped forward carefully, leaving tracks in which others would follow." Some of his initiatives backfired. He asked Secretary of State Thomas Jefferson to pose a series of questions to the Supreme Court about treaty interpretation. Chief Justice John Jay declined to provide answers or give guidance. As Bruff remarks, it was "a mistake for Washington to have asked for the Court's advice." On April 22, 1793, Washington issued the Neutrality Proclamation, warning Americans to avoid any involvement in the war between England and France and instructing law officers to prosecute all persons who violated the proclamation. Bruff states that Congress passed the Neutrality Act the next year, making neutrality violations federal crimes, but he does not mention Washington's embarrassment in trying to prosecute individuals based solely on the proclamation. Jurors understood the Constitution better than Washington and his advisers did. Perhaps kings abroad could issue proclamations and punish those who failed to abide by royal commands, but Presidents could not. Jurors, insisting that only Congress could make criminal law, made it clear they would acquit anyone charged with violating the Neutrality Proclamation. Washington got the message, requesting legislative action on what became the Neutrality Act.

When Washington submitted the Jay Treaty to the Senate in 1796, members of the House of Representatives asked for documents. As Bruff points out, Washington denied that the House had any power to demand the papers and that it would be unconstitutional to give the House a role in the treaty process. That was highly simplistic and misleading. House members knew they had no role in treaty making. The Constitution is explicit about that. But the House frequently has an essential role in treaty *implementation* by providing necessary authorizations and appropriations. Bruff does not mention it, but several years earlier Washington followed Jefferson's advice to treat the House equally with the Senate in handling the Algerine Treaty. It provided funds to pay bribes ("tributes") to the Barbary pirates. Whatever documents the Senate received, the House received as well. With the Jay Treaty, if the House had sufficient votes it could have instructed Washington: "We will not pass legislation to implement the Jay Treaty unless we are adequately informed, and for that purpose we will await the documents we requested." In that situation, Washington (and future Presidents) could decide to surrender documents to the House or let a treaty fail.

Understanding that political reality, Presidents have often included both senators and representatives in treaty negotiation, building support for the treaty in both houses. Those precedents were wholly ignored by Justice George Sutherland in the 1936 *Curtiss-Wright* case. He insisted in dicta that, although the President makes treaties with the advice and consent of the Senate, "he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress is powerless to invade it." However, from his 12 years in the U.S. Senate, Sutherland knew that senators were regularly involved in treaty negotiation. Despite that obvious and unambiguous history, the Supreme Court, on June 8, 2015, in *Zivotofsky v. Kerry*, claimed that the President "has the sole power to negotiate treaties," citing for support the erroneous dicta in *Curtiss-Wright*.

As Bruff explains, another misreading of the Constitution developed during the administration of John Adams. In 1800, the

British requested that the United States turn over "Jonathan Robbins," who was charged with murder. The person's name was actually Thomas Nash, a British subject. During House debate, lawmakers heard John Marshall, at that point a U.S. representative, refer to the President as "the sole organ of the nation in its external relations." In isolation that might appear to recognize an exclusive presidential role in foreign affairs, but Bruff correctly notes that, when read in context, the speech merely affirmed that Adams was implementing an extradition provision in the Jay Treaty. He was not making foreign policy unilaterally. He was implementing national policy decided by treaty.

Bruff returns to the "sole organ" doctrine later in the book when he discusses the *Curtiss-Wright* case. Justice Sutherland interpreted Marshall's speech to recognize "the very delicate, plenary, and exclusive power of the President as the sole organ of the Federal Government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress. ..." But Adams was relying on authority granted him by treaty. He was not claiming some kind of independent authority. Bruff notes that Woodrow Wilson, both as professor and President, "would certainly have agreed" with Sutherland's formulation. Probably so, but Wilson would have been wrong. The claim that the President possesses "plenary and exclusive" power in international relations can be dismissed simply by reading the text of Articles I and II of the Constitution. In the 2015 *Zivotofsky* case, the Supreme Court finally jettisoned the sole organ dicta but retained other errors committed by Sutherland and his colleagues in *Curtiss-Wright*.

In various places Bruff explores what is called the Lockean prerogative, permitting the executive in time of emergency to act in the absence of law and sometimes against it. A prime example is said to be President Jefferson's action with the Louisiana Purchase, going beyond the terms that Congress originally provided. Bruff explains that Jefferson, unsure of his authority, "went to work on a draft of a constitutional amendment to address the problem" but eventually put that aside, telling Madison "the less we say about the constitutional difficulties respecting Louisiana the better." In the end, Jefferson did not act solely on independent executive authority. He secured Senate support for the treaty and obtained extra appropriations from Congress to pay for the larger territory. Bruff says that Jefferson's "argument for submitting the constitutionality of the Louisiana Purchase to the approval of the people conspicuously omitted another and more conventional mode of determining legality—submittal to the judgment of the courts." Public support is important, but authority had to come from *Congress*. The agreement was submitted to lawmakers and received their support. There was no need to refer the matter to the judiciary.

Jefferson's judgment about constitutional authority fell short with his decision to sponsor and enforce the Embargo Act of December 1807, barring American ships and goods from international trade. Bruff points out that the embargo "savaged the American economy, sparking fierce resistance among American merchants, especially in New England." Jefferson's embargo "intruded far more into the lives and liberties of Americans than had the Sedition Act of 1798, which he had so eloquently deplored." Congress finally yielded to public objections "and humiliated the president by repealing the most draconian provisions, effective on his last day in office."

Bruff extensively analyzes Franklin D. Roosevelt's presidency. After suffering a number of defeats from the Supreme Court, which struck down as unconstitutional various New Deal measures, Roosevelt and a few advisers put together the Court packing plan, which would have allowed Roosevelt to add as many as six justices to the Court. As Bruff correctly states, Roosevelt's rationale for the bill—that it would promote judicial efficiency—was "transparently dishonest." The "greatest blot" on Roosevelt's presidency, Bruff says, is the mass internment of Japanese Americans in World War II "without the slightest justification." His "unconstitutional internment stands as one of the gravest breaches of the duty of faithful execution in the nation's history."

Truman was the first President to take the country to war without first coming to Congress for either a declaration or authorization. Instead, he went to the U.N. Security Council to receive two resolutions to support military action against North Korea. To Bruff, Truman "did not need to forgo prior congressional authorization. This was not an emergency like the outset of the Civil War, when Lincoln had to fight without Congress for a time. Congress could have supplied a speedy and unconfining authorization. ..." The war went badly for Truman, injuring his presidency and allowing the Republicans to take the White House in the 1952 elections.

It would have been helpful for Bruff to explain how Congress decided to implement the U.N. Charter, which required each nation state to decide for itself its "constitutional processes" for participating in a U.N. military action. During Senate debate on the charter, Truman, from Potsdam, wired a note to Sen. Kenneth McKellar pledging that, when the Security Council reached agreements on military action, "it will be my purpose to ask the Congress for appropriate legislation to approve them." The note became public because it was placed in the *Congressional Record*.

After the Senate approved the charter, Congress had to pass legislation to determine the "constitutional processes" of the United States. It did that by passing the U.N. Participation Act, enacted in December 1945. Truman signed it without expressing any constitutional objections. Section 6 requires that U.N. agreements for military force "shall be subject to the approval of the Congress by appropriate Act or joint resolution." When Truman went to war against North Korea five years later, he violated the U.N. Participation Act. Similarly, President Clinton violated that statute when he bypassed Congress and received U.N. resolutions for military action against Haiti and Bosnia. President Obama violated that statute by seeking U.N.—not congressional—approval for military action against Libya in 2011.

Truman and Eisenhower initiated employee loyalty programs that left few procedural safeguards for federal employees, who could be dismissed for disloyalty on the basis of claims and charges that remained anonymous to them. Eisenhower's standards condemned "any behavior, activities or associations which tend to show that the individual is not reliable or trustworthy." As Bruff asks: "How many of us could survive strict application of that standard?"

President Kennedy inherited from the Eisenhower administration a CIA plan to overthrow Castro. As Bruff notes, the Bay of Pigs invasion by 1,400 Cuban exiles was "supported ineffectually by some old CIA airplanes with false markings." Bruff explains that, after that marked and abject failure, Kennedy approved Operation Mongoose, a plan to remove Castro "by fair means or foul, including various CIA assassination plots that often descended

into the absurd." The Cuban missile crisis of October 1962 is described by Bruff as "a constitutional dictatorship in the classic sense that the president and his advisors were acting in the absence of 'timely legal checks to their authority.'" Lyndon Johnson and the Democratic Party paid heavily for the escalation of the Vietnam war. As to Nixon, Bruff describes his approach to governance, especially in foreign policy, as "highly secretive and even personal." He excluded "Congress, the people, and most of the executive branch from his decision making." Bruff covers Ford in three pages, and says that his pardon of Nixon likely cost him the election in 1976.

Bruff notes that Carter "disdained dealing with the Washington establishment and the barons of Congress," with a "fine Wilsonian self-righteousness." In the summer of 1979, Carter "made an ill-conceived speech that seemed to blame the people for the nation's woes" and proceeded to fire a group of Cabinet members. Subsequent chapters in *Untrodden Ground*, covering from Reagan to Obama, underscore miscalculations and costly errors by Presidents and their advisers, highlighted by the Iran-Contra affair, Clinton's impeachment, and the war against Iraq in 2003. Although Clinton was "acquitted" in the Senate, many senators who voted not to remove him said in their floor statements that he was indeed guilty of perjury and obstruction of justice. Obama's recess appointments to the National Labor Relations Board were struck down by a unanimous Supreme Court. After telling the public for several years that he was not a king or monarch and could not address immigration problems unilaterally, he did so in November 2014. Thus far he has met defeat in district court and the Fifth Circuit. It is often claimed that Presidents, being elected by all the people, are devoted to the "national interest." Bruff's careful scholarship puts a large dent in that theory.

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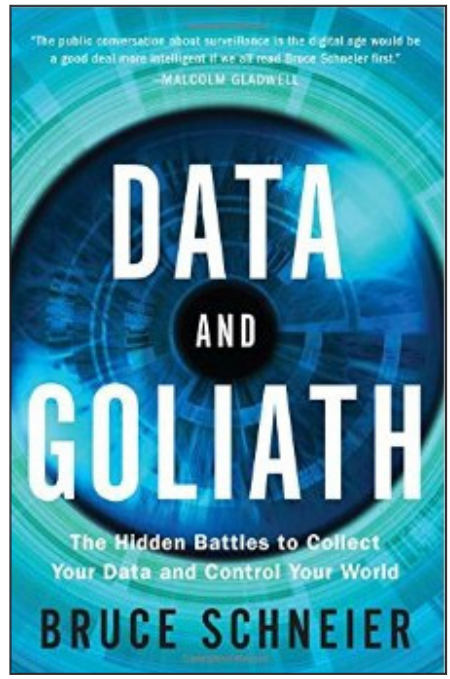


## Data and Goliath: The Hidden Battles to Collect Your Data and Control Your World

**By Bruce Schneier**

*W.W. Norton and Co., New York, NY, 2015.*

*383 pages, $27.95.*

***Reviewed by Elizabeth Kelley***

*Data and Goliath*—the very title invites you to read and have fun. But make no mistake—this is not a whimsical book. Rather, *Data and Goliath: The Hidden Battles to Collect Your Data and Control Your World*, by Bruce Schneier, is sobering and frightening. When Schneier, whom *Wired* magazine called "one of the world's foremost security experts," writes, "[w]e are living in the golden age of surveillance," he does not mean it approvingly.

Schneier points out that this golden age of surveillance did not happen by accident. Indeed, we Americans have chosen convenience and safety over privacy. For the convenience of cell phones, the Internet, the Cloud, and other technologies, we have given corporations the right to know virtually everything about us at every moment of every day. And, for safety from all things dangerous, such as child abductors, drug dealers, and certainly terrorists, we have relinquished our privacy, along with our civil liberties.

A fellow at the Berkman Center for Internet and Society at Harvard Law School and a program fellow at the New America Foundation's Open Technology Institute, Schneier has written several books on security and cryptography. Given that background, you might expect *Data and Goliath* to be rather technical and dense. Again, the book surprises you. Sophisticated technology is explained in ordinary terms. For example:

> Last year, when my refrigerator broke, the serviceman replaced the computer that controls it. I realized that I had been thinking about the refrigerator backwards: it's not a refrigerator with a computer, it's a computer that keeps food cold. Just like that, everything is turning int a computer. Your phone is a computer that makes calls. Your car is a computer with wheels and an engine. Your oven is a computer that bakes lasagnas. Your camera is a computer that takes pictures. Even our pets and livestock are now regularly chipped; my cat is practically a computer that sleeps in the sun all day.

One of the organizing themes of *Data and Goliath* is that there are two major engines for data collection, government and corporations, and their relationship is symbiotic. Data collection is nothing new. Schneier quotes Cardinal Richelieu, who said, "Show me six lines written by the most honest man in the world, and I will find enough therein to hang him." Mass surveillance can be traced to Jeremy Bentham, who designed a prison called a "panopticon" that allowed a single watchman to continuously watch its inmates. The Founding Fathers sought to protect us with the Fourth Amendment, which Schneier points out contains the all-important but often-overlooked concept of the right of the people to be *secure* against unreasonable searches and seizures. Over the years, with the rise of threats to our national security and with advances in technology, we began to relinquish more and more of our autonomy to the government. September 11, 2001 marked a turning point. But, as Schneier shows, the need for targeted surveillance does not justify mass surveillance.

The mountains of data that have been collected may or may not have made us safer. Schneier quotes Congressman Jim Sensenbrenner, one of the authors of the Patriot Act, who described mass surveillance

as "scooping up the entire ocean to guarantee you catch a fish." The media's focus on the spectacular frightens us and lulls us into sacrificing whatever we are led to believe is necessary in order to remain safe. In the meantime, Schneier is mindful that, relative to other countries, such as China and Russia, we Americans enjoy tremendous freedoms.

Schneier warns that "we're growing accustomed to the panopticon," and he devotes approximately 70 pages to "overcom[ing] our fears, learn[ing] how to value our privacy, and put[ting] rules in place to reap the benefits of big data while securing ourselves from some of the risks." He believes "that in half a century people will look at the data practices of today the same way we now view archaic business practices like tenant farming, child labor, and company stores."

On the book jacket, the author Malcolm Gladwell writes: "The public conversation about surveillance in the digital age would be a good deal more intelligent if we all read Bruce Schneier first." Gladwell is the author of the bestselling *David and Goliath: Underdogs, Misfits, and the Art of Battling Giants*, whose title inspired Schneier's. In the battle between David and Goliath, David won. Our challenge is not to let Data win. As Schneier concludes, "Data is the pollution problem of the information age, and protecting privacy is the environmental challenge. Almost all computers produce personal information. It stays around, festering. ... [O]ur grandchildren will look back at us during these early decades of the information age and judge us on how we addressed the challenge of data collection and misuse." ⊙

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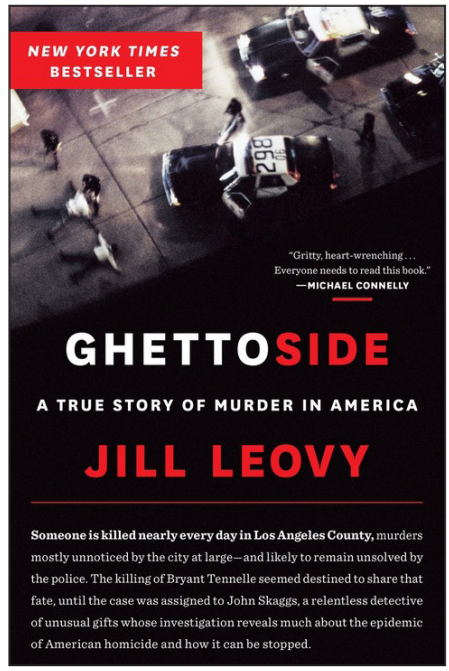


## Ghettoside: A True Story of Murder in America

**By Jill Leovy**

*Spiegel & Grau, New York, NY, 2015.*

*366 pages, $28 (cloth), $18.89 (paper).*

***Reviewed by Joshua A. Kobrin***

The #BlackLivesMatter movement started well before Aug. 9, 2014, the day that police officer Darren Wilson shot Michael Brown in Ferguson, Missouri. But, in the wake of the shooting—and the death of other black males as a result of police actions—the slogan gained momentum. Now a rallying cry for a movement that calls for a response "to the virulent anti-Black racism that permeates our society," #BlackLivesMatter means so much more than the obvious statement contained in the 16 letter hashtag.

Jill Leovy's *Ghettoside: A True Story of Murder in America* shows why the #BlackLivesMatter movement speaks to so many Americans. Leovy wrote *Ghettoside*, which is about crime and police work in the Los Angeles Police Department's 77th Street Division, after spending more than a decade covering homicides for the *Los Angeles Times*. She could not have known, as the book moved to publication, that 2015 would be a year in which society's attitude toward black lives would become part of the national conversation. The new activist movement aims, as does one of the detectives in the book, to "mak[e] black lives expensive."

Leovy's book is an indictment of the criminal justice system in "ghettoside" Los Angeles, which she describes as "a place and a predicament [that] gave a name to that otherworldly seclusion that all violent black pockets of [Los Angeles] county had in common." Through her research and storytelling, Leovy shows how and why ghettoside residents believe that society does not think they matter. According to Leovy, "[T]he sense that the police—and the larger city—didn't care was not just a cliché. It was the lived experience of South L.A.'s black residents, quantified by data." Discussing violent crime in those neighborhoods, Leovy adopts a term supplied by an LAPD detective, summing up "the whole mess—not just the pileup of homicides among a small group of people, mostly black, and the unseen savagery of these crimes, but also the indifference with which the world seemed to view them"—as "the Monster."

Leovy captures the trauma of living with the Monster and having the sense that nobody cares. Even after the drop in crime at the end of the last century, from 1994 to 2006 the LAPD arrested suspects in only 38 percent of the 2,677 killings involving black male victims. *Ghettoside* argues that this lack of attention is not just a consequence of high crime—it is also a cause. Through the experience of her protagonists—the police detectives of the 77th Street Division—Leovy attacks the "broken windows" theory of policing, which focuses on *preventing* minor crimes in order to create an atmosphere of order and thereby reduce more serious crimes. She instead proposes prioritizing the thorough investigation, prosecution, and punishment of violent crimes, including those involving the murder of black men in crime ridden pockets of Los Angeles. Yet Leovy does not vilify the police to make this point. Instead, her protagonists are heroes; detectives struggling to solve murders against tremendous odds. These detectives include John Skaggs, whose almost superhuman work ethic inspired his colleagues to coin the term "John Skaggs Special," referring to "a certain kind of investigation: aggressive, relentless, field-focused"; Nathan Kouri, who, despite an introverted and bumbling nature, grows into his own style, vowing to work harder and eventually earning the title "Li'l Skaggs"; and Wally Tennelle, a detective who made the 77th a better place by living in it, only to have his youngest son, Bryant Tennelle, murdered

just a few blocks from home. That death, and the investigation that followed, forms the backbone of Leovy's story.

Skaggs investigates Tennelle's murder the same way he does every other murder—by relentlessly following leads, knocking on doors, and talking to anyone he can find. Leovy never argues that the victim's special status as a cop's son caused Skaggs to solve the case. Rather, Leovy argues that every detective needs to investigate every case the way Skaggs does. But Skaggs is no ordinary detective. Described as organized, tenacious, and having a great memory, he wakes up at 3:30 a.m., keeps his desk spotless, and works insane hours. These are tough standards for anyone to meet, let alone a detective on the front line. Nevertheless, the other detectives who populate *Ghettoside* are largely a dedicated group of people who care about the communities they serve. Frequent interactions with crime victims have provided these detectives with a special understanding of the life in the inner city and an ability to see the neighborhoods in a unique light. For Skaggs "ghettoside was the place to be," a place where work "mattered and should be done well." Reflecting on his prior work as a uniformed officer, Kouri "had come to sympathize with the same people against whom he had directed the harshest doubts when he wore a blue uniform. Hustlers, drug dealers, prostitutes, probation violators had become his witnesses, his suffering family members, all united with him against the Monster."

Leovy shows, however, that the detectives of the 77th were the exception, not the rule. As these detectives sought to clear cases, the rest of the nation "acquiesced in shootings and stabbings among 'inner city' black men ... suggest[ing] these men were expendable—or, worse, that perhaps the nation was better off without them." Even as violent crime plummeted nationwide, "the disparity between black male death rates and those of everybody else remained nearly as large as ever," prompting a "collective shrug" from the rest of the nation.

Thus, in Leovy's telling, police indifference, not police brutality, caused a rise in inner city violence. As a result, the Monster she describes rarely takes the form that catapulted the #BlackLivesMatter movement to national attention.

This is not to say that Leovy discounts police abuses and mass incarceration. Rather, she argues that "the perceived harshness of American criminal justice and its fundamental weakness are in reality two sides of a coin, the former a kind of poor compensation for the latter." This philosophy is best summed up by the 77th's homicide supervisor, Detective Sal La Barbera, who "believed that the state articulated its response to violence by apprehending those who committed it, and that failing to do so sent an unmistakable message the other way—that violence was tolerated, especially when the victims were poor black men."

The focus on "crime suppression" and "proactive enforcement" frustrates La Barbera and his detectives. When one murder leads to a cycle of gang retaliation, the LAPD's response is to saturate the neighborhood with cops. La Barbera calls this response "proactive harassment" and complains that it includes too many new uniformed officers and not enough detectives. The resulting arrests for petty offenses infuriate the community and yield few leads to help solve the murders. And eventually, detectives—who could better serve the community by putting their investigation skills to use—are forced to patrol in uniform, providing "a microcosm of how police had long functioned in the United States: preoccupied with control and prevention, obsessed with nuisance crime, and lax when it came to answering for black lives."

Leovy's analysis makes important points, not just about America's indifference to inner city violence, but also about the relationships between communities and the police. Toward the conclusion of the book it becomes clear that detectives not only have a unique attitude toward the community they serve, but also that the community respects their work. One victim's mother regards several of the detectives of the 77th as "family," hugs Kouri when he arrives at a crime scene, and proceeds to defend him—and the police generally—when her neighbors despair that the cops will never solve the crime. To her, Kouri is "one of the good ones."

In the wake of recent police killings, the Department of Justice "announced the first six cities to host pilot sites for the National Initiative for Building Community Trust and Justice." The initiative seeks to "assess the police-community relationship" at each site, "as well as develop a detailed site-specific plan that will enhance procedural justice, reduce bias and support reconciliation in communities where trust has been eroded." "Restoring trust where it has eroded is one of the defining public safety challenges of our day," explained Assistant Attorney General Karol V. Mason of the Office of Justice Programs. "Trust-building is the responsibility of the police and the community, and the National Initiative's goal is to build the bridge that will define a new era in public safety."[1]

*Ghettoside* shows that law enforcement can be carried out in a manner that increases trust and builds understanding relationships between the police and the communities they serve. Unfortunately, all too often community members interact with the uniformed officers sent to saturate a neighborhood. And those same community members do not come in contact with "one of the good ones," like Kouri, unless they are deeply involved—as a witness, victim, or suspect—in a violent crime. Teaching uniformed officers and policymakers to see the communities they serve through the eyes of policemen such as Skaggs, Kouri, and La Barbera—detectives who understand and appreciate the challenges and humanity of ghettoside neighborhoods—might go a long way towards enhancing justice, reducing bias, and rebuilding trust. ⊙

## Endnote

[1] "Attorney General Holder Announces the First Six Pilot Sites for the National Initiative for Building Community Trust and Justice," March 12, 2015, at http://www.justice.gov/opa/pr/attorney-general-holder-announces-first-six-pilot-sites-national-initiative-building-0.

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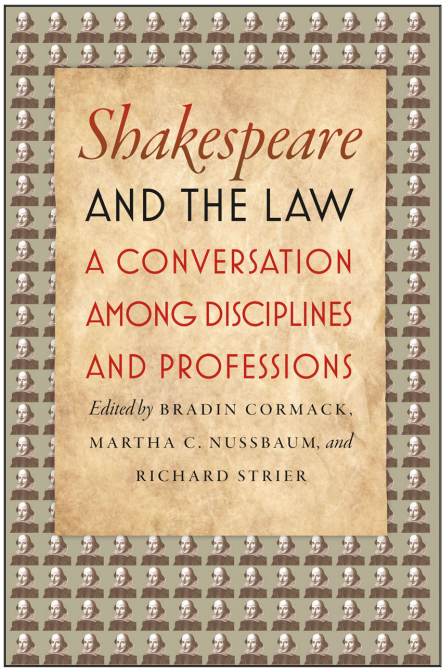


## Shakespeare and the Law: A Conversation Among Disciplines and Professions

**Edited by Bradin Cormack, Martha C. Nussbaum, and Richard Strier**

*The University of Chicago Press, Chicago, IL, 2013. 335 pages, $38 (cloth), $21 (paper).*

***Reviewed by Jon M. Sands***

The hard facts we know about William Shakespeare's life come, for the most part, from legal documents. Shakespeare's name on registrars, contracts, petitions, and wills testifies to his real, often litigious, presence. Aside from those records and the works themselves, the rest is silence.

Shakespeare's plays resonate with legal themes. It is small wonder that the law and literature section of law libraries is overrepresented by studies devoted to Shakespeare. Most are unread and probably deservedly so. They tend toward facile or tedious arguments as to why Shakespeare's plays, which he wrote more than 400 years ago to provide a couple hours of popular entertainment, are relevant to today's legal problems. Critics can be harsh as to why plays seen on the Globe Theatre's stage should concern globetrotting lawyers or judges penning opinions in chambers.

To read or not to read—*Shakespeare and the Law*—that is the question. Thankfully, the book has much to commend it. The product of a symposium that included English professors, philosophers, lawyers, and judges, the volume offers insights into Shakespeare, culture, and law. The contributors are experts in their fields; they speak with authority when need be and with humor when called for. They include, for example, experts in 16th century culture discussing legal developments in Elizabethan England and how law as a practice, a body of rules, an idea, a profession, and a discipline was viewed then. In Elizabeth's England of four million people, about one million were involved in lawsuits each year. Law was becoming the dominant form of regulating social, economic, and political relations in an age of rapid change. If people were not attending plays, they seemed to be filing lawsuits, and this litigiousness is reflected in Shakespeare's plays.

Some of the essays in *Shakespeare and the Law* are written in the form of judicial opinions, and they are fun to read. Of course, you want the fun stuff first: "[T]he readiness is all," as Hamlet said. But we'll get to them later and will start with Daniel Brudney's essay, "Two Differences Between Law and Literature." Both plays and judicial opinions can have drama. Some may even argue that both can be forms of fiction. But a literary work is judged aesthetically, whereas judicial opinions argue through reason (although some judges—Oliver Wendell Holmes Jr., perhaps—persuade more by their rhetorical skills than by their reasoning). Great works of art contain deliberate ambiguities that reflect life's complexities. Judicial opinions try to reveal why one result is more compelling than another.

An interesting essay by Lorna Huston looks at rhetoric, a field of study in Elizabethan England, even for those with only a little Latin and even less Greek. Huston focuses on the rhetoric that Iago used to convince Othello of Desdemona's supposed infidelity. As the use of juries expanded during the 16th century, the original audiences at *Othello*, witnessing Iago's rhetorical techniques, might have used them in the real world to make their own forensic inquiries—to look behind lawyers' rhetorical curtains.

Another essay on *Othello*, by Richard McAdams, looks at the role of criminal complicity in early modern England. The play expresses the virtues of formal procedure and public deliberation over private revenge. Formal procedure surmounts prejudice and sophistry, clearing Othello of false charges leveled against him at the beginning of the play, yet Othello denies Desdemona such procedure when he murders her because of false accusations against her. The contrast reflected the transition in England to due process, however flawed. In the same play, the fact that, under Elizabethan law, accomplice liability was purely derivative of principal liability (Iago goes free if Othello is not convicted of murder) helps shed light on how Iago acts to provide himself with legal protection.

*The Merchant of Venice*, with its climactic trial scene and legal technicality, is the subject of a number of essays. It provides Judge Richard A. Posner and Harvard law professor and former solicitor general Charles Fried the opportunity to don Elizabethan appellate robes and opine. In the play, Shylock lends Antonio 3,000 ducats in exchange for a promise that, if Antonio does not repay the money, he will give Shylock a pound of his own flesh. Posner, representing himself as deciding an appeal from Shylock's conviction of attempted murder, takes his task seriously. After he addresses some fine points of law, he reverses Shylock's conviction on the ground that, if Shylock attempted to murder Antonio, he did so by using the legal system to enforce a contract. Shylock may have had malice in his heart, but the use of the courts cannot expose one to criminal prosecution. Posner does, however, find that Shylock forfeits his 3,000 ducats.

After he removes his wig, Posner argues that Shakespeare as a legal dramatist was wanting, and that his characters' arguments appealed to emotion rather than to logic or to commercial realities. With a nod to law and economics, Posner stresses how the characters, reflecting the times, used the courts for commercial purposes. He adds that it would have behooved Venice to enact statutes that allowed parties to contract to achieve their goals, assuming their contracts comply with public policy, without resort to highly formalistic legal technicalities that frustrate these goals. Venice should have allowed the market to function freely, with the law as a tool to that end. Posner astutely concludes that both "Shylock and Portia understand that the law is something to be used—by Shylock to revenge himself against Antonio and by Portia to foil Shylock and save money—rather than supinely yielded to."

Charles Fried concurs in the judgment of "his brother Posner" reversing the conviction. He does so for the same reason as

Posner; Shylock used the court to achieve his goal, however maliciously. Fried, however, does not bemoan the Portia's hypertechnical formalistic argument. Shylock made the mistake of representing himself; he needed to "lawyer-up", and to counter the "pound of flesh" revelation with a severance of breach from remedies.

The essays in *Shakespeare and the Law* are varied, and most have the virtue of being short. As a result, the book covers many plays and themes, thankfully not including whether Shakespeare wrote the plays. (He did.) We have riffs on major plays, such as *King Lear* and *Hamlet*, and discussions of broad themes, such as political power and the search for legitimacy. David Brudney's essay on the differences between law and literature is illuminating on the subject of Macbeth's struggle to justify his acts (the sound of law with the fury of process). Other essays examine the justifications used for revolts in the history plays. Some topics in the books are more specialized: "A British People: Cymbeline and the Anglo-Scottish Union Issue," for example, places the play in the context of Shakespeare's contemporary James VI's efforts to unite the kingdoms and the legal concepts of citizenry. Its relevance may be more apparent now with the recent referendum for Scottish independence that was followed by the Labour Party's losing its seats (All's Well that Ends Well followed by Labour's love lost).

*Shakespeare and the Law* refers repeatedly to *Measure for Measure*. Numerous contributors discuss it, focusing on the tension between the harsh enforcement of the law's letter and the need for equity and mercy; David Bevington's essay on the subject is especially good. This dark comedy, Shakespeare's most legalistic, revolves around the purpose of laws, how strictly statutes should be enforced, who should enforce them, and whether the results of their enforcement are what their drafters intended. The play's characters tend even to have the appearance of legal arguments strutting on the stage, with the lenient Duke, the letter-of-the-law Judge Angelo, the holier-than-thou Isabella, and the condemned Claudio. Because *Measure for Measure* is so legalistic, and the issues tend to be unsatisfactorily resolved, it has fittingly become one of the most problematic plays in the canon. The book's discussions of it reflect the tensions in the work.

This theme of literal legal interpretation and strict enforcement is also taken up by Judge Diane P. Wood, who sits on the U.S. Court of Appeals for the Seventh Circuit. In an extended essay on Shakespeare's comedies, Wood is struck by how often an overly strict law has to be softened by mercy. She believes that, after a judge applies the text, there is frequently a need to appeal "to the kind of mercy or clemency that can be dispensed only by the executive authority." Such mercy, in our age, is sadly lacking. Wood also notes that, across the centuries, "the problems of legal interpretation have remained startlingly similar." The same questions of justice expressed in iambic pentameter are also raised, in less poetic prose, in judicial opinions. "Shakespeare," Wood writes, "reminds us that literalism offers at best false certainty, often at the price of dictating an unjust result." Judges must try, Wood stresses, to avoid unfair results while at the same time upholding the rule of law. It is not an easy task.

The symposium and the resulting book were intended to be a discussion among professions and disciplines, but the contributors are largely academics and judges. The book might have benefitted from reaching out to others, at least to actual practitioners. It was strange that no practicing lawyer was among the contributors. If you have an interest in Shakespeare, or in literature, many of the essays are worthwhile. You may even find yourself, between briefs, rummaging through boxes or scanning your bookshelves for your old college copy of Shakespeare.

This review, like the book, will not end on a somber note. The title of the last entry in the collection, "Shakespeare's Laws: A Justice, a Judge, a Philosopher, and an English Professor," sounds like a joke: they all walk into a bar, but, instead, it is a roundtable discussion of Shakespeare. It is a good read and a nice ending to the heavy topics. The star in the cast is Supreme Court Justice Stephen Breyer, who gives a soliloquy on his relationship to Shakespeare, his favorite plays, and other matters. The panelists in this entry seem to enjoy themselves as they air their personal likes and dislikes. Breyer and Posner go at it about whether the ghost in *Hamlet* was real, its implications, and whether Hamlet himself was duped. At the end, the question is posed whether reading Shakespeare will make better judges. Justice Breyer concludes that it just might. At the least, it could not hurt the quality of mercy. ☉

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