

Liberty and Shakespeare

Mises Daily: Friday, November 04, 2011 by Allen Mendenhall



[The Journal of Liberty and Society (2011)]

In an October 2002 article in the *New York Times*, "Next on the Syllabus, Romeo v. Juliet," Adam Liptak investigates the curious if questionable move to install literary texts in law-school curricula. Liptak's opening lines betray his skepticism:

The fact [that Kafka was a lawyer] got the discussion started on a recent afternoon in a sunny seminar room at the New York University School of Law, where 17 law students and 2 professors gather every week for a sort of book club, for credit, in a class called Law and Literature."^[1]

Liptak's likening of the class to a book club, quickly followed by his strategic comma usage setting off the phrase "for credit," implies that, in effect, the course is more about enthusiasm than scholarship. How could the activities of book clubbers, Liptak seems to suggest, merit course credit in professional school? Liptak implicitly raises an even greater question: Does literature matter to the so-called "real" world?

In arguing for the inclusion of humanities courses in law school curricula, law-and-literature professors have had to answer that question. They have convinced professional school deans and administrators that literature is important and relevant to actual problems. The turn to political criticism among English faculty is also a move to show that literature has some practical bearing beyond entertainment or leisure. As humanities programs lose funding and students while law-

and-literature faculty, courses, conferences, and journals proliferate, it bears asking whether law-and-literature adherents have done a better job persuading university officials that literature is socially significant.

Nearly every Anglo-American law school offers a course called Law & Literature. Nearly all of these courses assign one or more readings from Shakespeare's *oeuvre*. Why study Shakespeare in law school? That is the question at the heart of these courses. Some law professors answer the question in terms of cultivating moral sensitivity, fine-tuning close-reading skills, or practicing interpretive strategies on literary rather than legal texts. Most of these professors insist on an illuminating nexus between two supposedly autonomous disciplines. The history of how Shakespeare became part of the legal canon is more complicated than these often defensive, syllabus-justifying declarations allow.

This essay examines the history of Shakespeare studies vis-à-vis legal education. It begins with early law-and-literature scholarship, which focused on Shakespeare's history or biography – speculating as it did about whether Shakespeare received legal training or became a lawyer – and concludes with recent law-and-literature scholarship treating Shakespeare as a source of insight for law students and lawyers. Early law-and-literature scholarship on Shakespeare anticipated new-historicist theory. More recent law-and-literature work, with its turn to presentism, seems in lockstep with current Shakespeare studies. In law-and-literature classrooms, Shakespeare is more fashionable (like a hobby) than scholarly (like a profession). But law-and-literature scholarship on Shakespeare represents high-caliber work based on interdisciplinary research and sustained engagement with legal and literary texts.

This essay concludes with a note about the direction of the university in general and of the law-and-literature movement in particular. My closing argument is, I admit, tendentious. It raises issues usually raised by confrontational academics and suggests remedies for what William M. Chace has called "the decline of the English Department"^[2] or what Harold Bloom has called "Groupthink" in "our obsolete academic institutions, whose long suicide since 1967 continues."^[3] If Chace and Bloom are right about a decline in academic standards – evidence shows that they are at least right about a decline in the number of English majors – then the fate of literary studies seems grim. Nevertheless, Chace and Bloom overlook the migration of literature professors into American law schools, a phenomenon that has not received enough attention.

One aspect of this phenomenon is the migration of students from the humanities to professional schools. I have known students who hoped to attend graduate school in the humanities but quite

understandably viewed that route as impractical and went to law school instead. A positive result of this trend is that many law students are open to the idea of law and literature and find luminaries like George Anastaplo or Stanley Fish more interesting than other law professors. The final comments of this essay will address the strange exodus of literary scholars into professional schools, which pay more money and arguably provide vaster audiences and readership, more generous funding opportunities, and reduced teaching loads.

Perhaps more than other literary disciplines, save for cultural studies, Shakespeare studies has moved into the realm of interdisciplinarity, albeit without large contributions from scholars outside of literature departments. The law-and-literature field would have perished without the expertise of literature professors; likewise, Shakespeare studies, if it continues down the path of politics and cultural criticism, will perish without the expertise of economists, political scientists, and law professors, whose mostly non-Marxist ideas, when pooled with the ideas of the literature scholars, might fill out a space for interesting scholarship and redeem the interdisciplinary label. Information sharing is especially crucial for literature scholars who, in order to examine the history of Shakespeare in American culture, have turned to practices and methods traditionally reserved for other disciplines. In this respect, the direction of Shakespeare studies is representative of the direction of the humanities in general.

It may be possible to overcome disciplinary boundaries while recognizing the importance of disciplinary expertise. For understandable reasons, conservative literary critics decry political trends in current literary theory. What these critics ought to decry, though, is the nature of the political trends rather than political trends themselves. What if, instead of Marxist or quasi-Marxist paradigms, literary critics adopted the theories of free-market economics?

Adherents of law and literature unwittingly have carved out an approach to literary studies that jettisons Marxism and quasi Marxism but that retains civic goals. Law and literature cuts across labels like "conservative" and "liberal." It demonstrates how professional or vocational studies are incomplete without teachings in liberal arts. At a time when antitraditional, quasi-Marxist ideologies have taken over graduate programs in literature, and when humanities funding and enrollment are wanting, the burgeoning law-and-literature courses offer an avenue for restoration of literary study with a civic focus.

The Early Works

If early law-and-literature work on Shakespeare is any indication, the methods of new historicism are actually quite old. This early work attempted to explain Shakespeare's sophisticated engagement with the law by examining significant cultural documents (most notably legal documents) that might have influenced Shakespeare. As Cushman Kellogg Davis, the seventh governor of Minnesota and a longstanding senator from that state, opined in 1883,

We seem to have here something more than a sciolist's temerity of indulgence in the terms of an unfamiliar art. No legal solecisms will be found. The abstrusest elements of the common law are impressed into a disciplined service with every evidence of the right and knowledge of commanding. Over and over again, where such knowledge is unexampled in writers unlearned in the law, Shakespeare appears in perfect possession of it. In the law of real property, its rules of tenure and descents, its entails, its fines and recoveries, and their vouchers and double vouchers; in the procedure of the courts, the methods of bringing suits and of arrests, the nature of actions, the rules of pleading, the law of escapes, and of contempt of court; in the principles of evidence, both technical and philosophical; in the distinction between the temporal and the spiritual tribunals; in the law of attainder and forfeiture; in the requisites of a valid marriage; in the presumption of legitimacy; in the learning of the law of prerogative; in the inalienable character of the crown, — this mastership appears with surprising authority.[4]

This statement smacks of hopefulness and Bardolotry at once. It seeks to enlist Shakespeare in the ranks of lawyers everywhere while celebrating Shakespeare's apparent ability not just to undertake but master multiple fields (literature and law). Simply put, it seeks to appropriate the ever-"appropriable" Shakespeare. Materialist critics are quick to point out that privileged groups have succeeded in appropriating Shakespeare. In so doing, these critics ignore the irony that their approach is itself an appropriation. The best starting point for criticism on Shakespeare is an acknowledgement that Shakespeare's works are highly complex and irreducible to cookie-cutter appropriations that seek to enlist the Bard in the ranks of contemporary political causes.

Davis was not alone in his belief that Shakespeare was a lawyer or else a person with legal training. Consider the following lines from a September 1858 letter from Lord Chief Justice John Campbell to an attorney named J. Payne Collier:

Were an issue tried before me as Chief Justice at the Warwick assizes, "whether William Shakespeare, late of Stratford-upon-Avon, gentleman, ever was clerk in an attorney's office in

Stratford-upon-Avon aforesaid," I should hold that there is evidence to go to the jury in support of the affirmative.[5]

Echoing these sentiments, Richard Grant White, a Shakespearean scholar who studied law at New York University, adopts a more sober tone. White argues that Shakespeare displays no more legal knowledge than other Elizabethan literati. White's grand and hyperbolic claim is that *all* the Elizabethan literati therefore must have been lawyers:

There are ... considerable grounds for the opinion that Shakespeare had more than a layman's acquaintance with the technical language of the law. For it must be admitted ... that he exhibits a remarkable acquaintance with it. That other playwrights and poets of his day manifest a like familiarity ... precludes us ... from regarding the mere occurrence of law-terms in his works as indications of early training proper to him alone.[6]

White takes Bardolotry to a whole new level, shamelessly glorifying the entire legal community. What these various quotations show us is that early law-and-literature work on Shakespeare was made up of both informed and wishful speculations about Shakespeare's legal background. One might venture to argue that this work anticipated the move to philology that ultimately secured Shakespeare's place in literary education. Although it tended towards overstatement and exaggeration, this work nevertheless considered various texts, primary and secondary, and couched its inquiries in terms of measurable evidence. Little archival research appears to have taken place, however, and the hypotheses of early law-and-literature Shakespeareans seem to pivot on secondary sources collected and classified by nonlegal scholars.

Not all legal scholars believed that Shakespeare was a lawyer; some swiftly dismissed the idea, but instead of dismissing all fancy, these naysayers attributed Shakespeare's legal knowledge to his extraordinary genius:

Some of the admirers of our great dramatist may assert that the universality of his genius, the strength, vigour, and magnitude of his intellectual faculties and powers of investigation, enabled him to acquire a more profound knowledge of a greater variety of subjects than ever yet seems to have been possessed by the same individual, and that the legal knowledge he has displayed in the correct use of law terms is not more remarkable than his intimate acquaintance with human nature, and accurate observation of the habits and customs of mankind, or than the knowledge of seamanship, and the correct use of nautical terms he has displayed in the *Tempest*.[7]

This quote by William Lowes Rushton, a Shakespearean and a barrister of Gray's Inn, does not treat Shakespeare's familiarity with law as anything less than the workings of a brilliant mind. By Rushton's account, Shakespeare's legal knowledge is really a reference point for demonstrating Shakespeare's worldly knowledge (i.e., his knowledge about *everything*).

Despite its unchecked enthusiasm, the work of scholars like Davis, Hartridge, White, and Rushton is far from formulaic. Anticipating objections to his project, Davis is quick to point out that isolating Shakespeare's legal lexica into individualized compartments – as if one legal reference had no bearing on another despite the overall prevalence of legal terminology in any given play – is to overlook the aggregate importance of law to Shakespeare's individual plays if not his complete *oeuvre*. "Some of the quotations, taken alone," he submits, "are doubtless of trifling probative force. They are given because, in cumulative testimony, each independent fact is a multiplier."^[8]

As Davis penned his conjectures, English departments began popping up across America, solidifying literature as a discipline in itself. It was not unusual, then, for a man of letters like Davis to undertake prolonged literary research projects while maintaining a separate career in politics. It would be anachronistic to suggest that these early law-and-literature scholars thought of themselves as professional academics of either law *or* literature, since neither law *nor* literature had congealed into an institutional disciplinary body in America. Nevertheless, these scholars employed techniques that were in many respects ahead of their time and that anticipated later theoretical movements not as novel, perhaps, as we suppose.

Unlike the work of contemporary cultural materialists, whom these early scholars anticipate, the work of early law-and-literature adherents did not seek to recover the lost histories of lower-class peoples or to shed light on lowbrow activities, but instead to demonstrate how statutes, trials, common law precedents and the like might have informed Shakespeare's law-saturated texts. The early Shakespeare law-and-literature proponents were like new historicists without openly political agendas – which of course does not foreclose the possibility that they had concealed political agendas.

Davis provides numerous examples of new-historicist techniques. He compares the legal proceedings of Mary Stuart with those of Shylock,^[9] the drama of the Inns of Court with the drama of the stage,^[10] and the diction of Shakespeare's plays with the nomenclature of the common law.^[11] Davis's goals are not to show that Shakespeare was an ideological product of his era, so

Davis cannot have written pure new historicism. Yet his methodology does resemble the new historicism of the late 20th century.

Davis was not alone in his critical methodology. As early as 1859, Campbell wrote about Shakespeare's "frequent use of law-phrases" and "the strict propriety with which he always applied them."^[12] Campbell appears to have sparked the debate over Shakespeare's legal training and qualifications. In 1883, Franklin Fiske Heard, a lawyer, jurist, and Shakespearean scholar, published a book titled *Shakespeare as a Lawyer*,^[13] which extends Campbell's analysis. In 1899, responding directly to Campbell, William C. Devecmon, a lawyer from Maryland, authored *In re Shakespeare's "Legal Acquirements"*,^[14] which argued that, contrary to popular opinion, Shakespeare often misapplied legal diction. To bolster his point, Devecmon cites 14 errors ranging from Shakespeare's use of "replication" in *Hamlet* to his use of "indenture" in *Pericles*. In 1911, Edward J. White, a practicing lawyer from Baltimore, compiled *Commentaries on the Law in Shakespeare*,^[15] a beast of a book that spells out explanations for each of Shakespeare's legal designations in all of the plays and eight of the sonnets. "It does not follow," White cautions, "the law of the plays can furnish any basis for the sensationalist to build up a claim of title to the plays in favor of a lawyer, instead of a poet, for the law is merely incidental in the plays, whereas, the poetry is that of the master poet of all time."^[16]

White rejects a certain kind of romanticism (Shakespeare as lawyer) while embracing another kind (Shakespeare's immortality). In a second edition,^[17] picking up where Davis left off, White adds a chapter on the "Bacon-Shakespeare" controversy. Shortly thereafter two books by British lawyer, politician, and Shakespearean scholar, Sir Granville George Greenwood, followed: *Shakespeare's Law and Latin* (1916)^[18] and *Shakespeare's Law* (1920).^[19] These works built on Campbell's book and attempted to rebut the works (too many to list) of refuters of the Shakespeare-as-lawyer hypothesis. Supportive of Greenwood's conjectures, Sir Dunbar Plunket Barton, an Anglo-Irish statesman who served for two years as Ireland's solicitor general, penned *Links Between Shakespeare and the Law*.^[20] Later, in 1936, George W. Keeton, a barrister of Gray's Inn and a law professor, published *Shakespeare and His Legal Problems*.^[21]

Like a new historicist, Keeton begins his chapters by situating readers in the everyday sites and scenes of Shakespeare's time and only afterwards making sense of the time-traveling experience. In 1967, Keeton expanded his project in *Shakespeare's Legal and Political Background*,^[22] the latest of what I call the "early works." I include this text as an early work because it predates James Boyd White's publication of *The Legal Imagination* in 1973,^[23] and because it appears late in Keeton's career but addresses topics that Keeton had considered earlier. It is fair to say, at any

rate, that these early law-and-literature scholars were steeped in Anglo-American legal traditions and that they therefore gleaned inferences and meaning from Shakespeare's works that scholars without legal training may have missed. That does not mean that they always arrived at sound conclusions or made reliable and consistent claims. It does, however, suggest that a person with legal training can tell us a great deal about Shakespeare's texts that a person without legal training might not.

These examples demonstrate the value of a law-and-literature approach to Shakespeare studies. A new-historicist analysis of Shakespeare's legal references is not possible without a more-than-passing knowledge of law, legal history, or the common-law tradition. Even though some of Shakespeare's legal language is inaccessible to American lawyers and law students – whose legal education does not include studies of Gray's Inn or of the differences between solicitors and barristers – many legal terms used by Shakespeare are quickly recognizable even to first-year American law students. These students, forced to read "old" English cases in contracts and property-law courses, will make out many terms or concepts in Shakespeare that a reader without legal training, or a lawyer who has been practicing in one field so long that he no longer is familiar with working paradigms of other fields, might overlook. The concepts of "fee tail" and "fee simple," for instance, may mean nothing to graduate literature students, but for lawyers or law students who work with these concepts every day, Shakespeare's references to them will seem strikingly relevant.

The term "fee tail" refers to an almost obsolete estate that limits inheritability to lineal heirs.^[24] This present possessory interest, abolished in most US jurisdictions, passes to a grantee's heirs until those heirs die without issue. By contrast, the term "fee simple" refers to a full and total interest in a particular piece of property. This interest has a potentially infinite duration, and a holder of a fee simple may sell or devise his interest as he pleases. There are various subcategories of fee tail and fee simple that are not worth mentioning here. The point is that although Shakespeare employs the term fee simple in *Merry Wives of Windsor*; *All's Well That Ends Well*; *Henry VI, Part II*; *Troilus and Cressida*; *Romeo & Juliet*; and *Lover's Complaint* (a poem usually attributed to Shakespeare) – all works published around the turn of the 16th and 17th centuries – the term itself is hardly archaic. A present-day lawyer cannot draft a will, let alone pass a bar examination, without understanding the word's meaning and application.^[25]

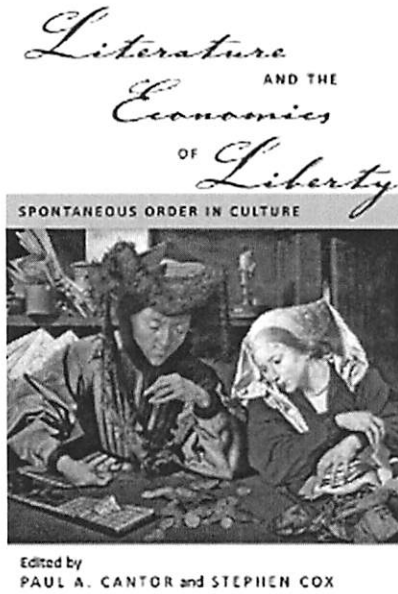
A new historicist could benefit from these early forays that extract legal topoi from Shakespeare and then examine them in light of connections to popular legal culture. So, for instance, a new historicist might borrow from Davis's notes about "party verdict," a term appearing in *Richard III*.

Davis relates this term to the 1631 impeachment of David Ramsay. Ramsay's trial occurred well after the publication (let alone production) of *Richard III*, a First Folio work. It does not follow, however, that the trial cannot shed light on the methods by which impeachment trials were conducted at the time of Shakespeare's writing.^[26]

A new historicist might also benefit from Davis's comparison of act 1, scene 2, of *Henry V* with Bacon's *Apophthegms*, number 184, in which Bacon describes French and German codifications of "law salique," a measure excluding females from the throne.^[27] Works like Davis's are useful and significant despite their zeal and lofty rhetoric. They tell us as much about Shakespeare's moment and milieu as they do about the scholars' moment and milieu. So many law-and-literature scholars currently work out of these early paradigms that an exhaustive list would be impossible to compile in this space. There is now a whole dictionary, edited by B.J. and Mary Sokol, devoted to Shakespeare's legal language.^[28] Suffice it to say that these early works are worthy of attention in their own right.

The Later Works (1973 to present)

It is well settled that James Boyd White's *The Legal Imagination* (1973)^[29] catalyzed the law-and-literature movement as we know it today. A professor in the Department of English, Department of Classics, and College of Law at the University of Michigan, White brings a unique interdisciplinary perspective to bear on this field that he more or less founded. He remains prolific even in his old age, having published a string of books on a wide variety of topics having to do with legal rhetoric and legal or literary hermeneutics. Since White's landmark *tour de force* in 1973, several legal scholars have followed in his footsteps, venturing into literature (broadly defined to include novels, plays, poems, short stories, essays, and so on) to make sense of legal culture and legal texts. Some of the resulting scholarship has been quite good – some, however, more than slightly wanting.



~~\$25.00~~ \$20.00

Shortly after White's "overture," the work of literary PhDs like Robert Weisberg (PhD, English, 1971, Harvard University; JD, 1979, Stanford University), Richard H. Weisberg (PhD, French and comparative literature, 1970, Cornell University; JD, 1974, Columbia University), and, among others, Stanley Fish (PhD, English, 1962, Yale University) lent credibility to a field seen as dubious by law-school deans and territorial literature professors.^[30] Today the movement seems to be picking up, not losing, momentum, in part due to the interdisciplinary nature of the project and in part due to the literati heavyweights who have used the movement as an opportunity to enlarge their celebrity status (to say nothing of their salaries).

The vast array of Shakespeare-focused works that flew under the banner of law and literature during the 1970s, '80s, and '90s actually undermined the entire field. Titles like Michael Richmond's "Can Shakespeare Make You a Partner?" (1989)^[31] signaled a practical but nonscholastic rationale for lawyers to turn to Shakespeare's texts. Works most commonly addressed during this period include *The Merchant of Venice*, *King Lear*, *Hamlet*, and *Measure for Measure*.^[32] In the rush to canonize Shakespeare in this budding genre that sought to include humanities texts in professional schools, even the conspiracy theories of a Supreme Court justice, John Paul Stevens, became authoritative readings.^[33] Stevens is not the only Supreme Court justice with an opinion on the Shakespeare authorship debate, as the following chart by the *Wall Street Journal*^[34] makes clear:

Shakespeare's Court

The Supreme Court on the likely author of Shakespeare's plays:	
Active Justices	
Roberts, Chief Justice	No comment.
Stevens	Oxford
Scalia	Oxford
Kennedy	Stratford
Souter	"No idea."
Thomas	No comment.
Ginsburg	"No informed views."*
Breyer	Stratford
Alito	No comment.
<i>*Justice Ginsburg suggests research into alternate candidate, Florio.</i>	
Retired Justices	
O'Connor	Not Stratford
Blackmun*	Oxford
Brennan*	Stratford
<i>*Deceased</i>	

That Supreme Court justices have weighed in on Shakespeare's authorship is more a study in itself and less a constructive contribution to Shakespeare scholarship. Not long after Stevens's law-review article, at any rate, some creative attempts to render the Shakespeare as lawyer or other conspiracy theories surfaced. Law professor James Boyle, for instance, penned a novel, *The Shakespeare Chronicles* (2006),^[35] dealing with the obsessive search for the "true" author of Shakespeare's works. I suspect that Boyle would admit that *The Shakespeare Chronicles*, being fiction, does not represent scholarship, even if its production required rigorous scholarly research.

In light of these false starts, it is no wonder that Richard Posner famously declares, "The biggest danger in any interdisciplinary field is amateurism.... The danger is particularly acute in the case

of the lawyer who writes about literature."^[36] One of the greatest and most embarrassing ironies of the whole law-and-literature movement is that Posner's well-known book *Law and Literature*^[37] has outsold any other law-and-literature work despite being highly critical if not downright dismissive of law and literature in particular and perhaps even imaginative literature in general. For Posner, a pragmatist, literature is hardly more than therapy or consolation and has more often than not led humanity down a precarious rather than a moral path (consider art's role in the rise of Nazi Germany). It bears noting in passing that law-and-literature work on Shakespeare tended, and tends, to be more sensationalist than law-and-literature work on other authors, so Posner's claim has particular resonance in the Shakespeare context.

With the publication of Ian Ward's *Shakespeare and the Legal Imagination* (1999)^[38] and Craig Bernthal's *The Trial of Man* (2003),^[39] sound scholarship (as opposed to enthusiastic appropriation) made its way into the Shakespeare law-and-literature canon. Ward took up concepts and theories far more complicated than those of his predecessors – specifically, methodologies rooted in rhetoric, phenomenology, hermeneutics, and historicism. Ward's book implies that an underlying purpose for cross-pollinating two disciplines is to reinvest community politics with epistemic rhetoric and democratic constitutionalism. Ward attempts to describe a Shakespearean politics by openly championing political ideology while acknowledging the limitations of that approach – namely, that any appropriation of Shakespeare reflects on the interpreter more than Shakespeare.

"We cannot," Ward declares, "make Shakespeare a Marxist, unless we are a Marxist; a patriot, unless we are a patriot; or a postmodern deconstructionist, a new historicist and so on, unless we already are persuaded by postmodernism or new historicism or whatever."^[40] Accordingly, the "Marxist Shakespeare or the postmodern Shakespeare describes the interpreter, not Shakespeare."^[41] Ward does not pretend disinterestedness or otherwise try to mask his tendentiousness, but rather delights in his politically charged call for a communitarian constitutionalism extracted from Shakespeare. He turns to presentism, in particular modern constitutional theory, to advocate for a "contemporary political morality" based on and enacted by Shakespearean paradigms.^[42] His presentist flair is in keeping with the presentist flair of contemporary Shakespeare studies, except that his presentism eschews references to contemporary popular culture and instead interrogates the philosophy or jurisprudence of figures like Karl Llewellyn, Michel Foucault, Ronald Dworkin, and Robin West. Ward's attention to several notables of the Shakespeare-studies movement – Stephan Greenblatt, Michael Bristol, Derek Cohen, and Jonathan Dollimore – props up his scholarship and demonstrates his versatility.

Bernthal is more interested in the concepts of judgment and justice, particularly as they concern Christian mores and traditions. For him, judgment is an archetype. Examining the theological foundations of law, Bernthal uncovers rituals and stories informing Shakespeare's trial scenes. Shakespeare's texts are, Bernthal claims, profound responses to the spiritual landscape of Elizabethan and Jacobean England in which religious beliefs poured over and into civil institutions. Shakespeare's allusions and analogies are often biblical, and Christianity frames Shakespeare's notions of sin, guilt, natural law, trials, and verdicts. Bernthal brings to light the theological bases for Shakespeare's legal themes and metaphors. He does so with grace and wit and without burdening readers by over-referencing popular legal culture.

Not all recent law-and-literature work on Shakespeare has come from career academics. Daniel J. Kornstein, a founding partner of the law firm Kornstein, Veisz, Wexler & Poland, LLP, in New York City, recently published *Kill All the Lawyers?*,^[43] a book that is enthusiastic but that refuses to succumb to mawkish celebration of Shakespeare's life or legacy, the possible exception being the opening paragraphs about Kornstein's relationship to the New York Shakespeare Festival. Kornstein acknowledges that he practices law "as a profession," but that "when it comes to Shakespeare," he is "only an amateur."^[44] He quickly follows, however, with the defensive-seeming statement "The Bard ... belongs most of all to the educated amateur, and we need more amateurs."^[45]

Kornstein appears all too conscious of his outsider status. Although not an academic in the popular sense of the term, Kornstein did manage to publish his book with a university press – not necessarily an indication of high-quality scholarship – and to attract back-cover blurbs by such renowned literary journals as *Virginia Quarterly Review*, *Times Literary Supplement*, and *Renaissance Quarterly*. His detailed analyses of figures, events, and places like Joseph Papp, John Shakespeare, the Inns of Court, the Alien Statute (*c.f. Merchant of Venice*), oral advocacy, classical republicanism, genre, slander, and civil procedure – all in light of Shakespeare's plays – suggest that his self-derogatory tag of amateurism is excessive humility, possibly even facetiousness. Kornstein appears to know more about Shakespeare than the average literature professor *not* specializing in Shakespeare. That does not make him an expert, but it does seem to suggest that his self-criticism is tongue-in-cheek if not downright deflective (right off the bat, he has an excuse for any shortcomings).

Like Ward, Kornstein is in lockstep with current Shakespeare studies in its turn to presentism. Rather than investigating contemporary philosophy, however, Kornstein analyzes milestone figures and events from popular legal culture. Although impressively researched, Kornstein's book is burdened with these forced attempts to relate Shakespeare's texts to present day, or near-

present-day, affairs — among them, Oliver Stone's film *JFK*, the Supreme Court decision in *Bowers v. Hardwick*,^[46] the Fourteenth Amendment, or the Senate Judiciary Committee. Kornstein does not buttress his attempts with many references to critical theorists or prominent figures of the cultural-studies movement. His analyses seem desperate to demonstrate that Shakespeare is relevant to contemporary audiences. His interrogation of *Bowers vis-à-vis* Shakespeare leads to a sweeping conclusion that the "problem of law and morality is complex and divisive," that law "reflects and advances the prevailing moral values of society," and that "laws have a moral dimension, and judges are necessarily influenced by the spirit of the age."^[47] Although these statements are probably true, they are also general to the point of counterproductivity. Generality notwithstanding, one might also criticize Kornstein for trying to make Shakespeare sexier to contemporary audiences by relating Shakespeare to only the most exciting legal phenomena. Shakespeare's contemporary relevance would be better shown by exploring the mundane aspects of law — like fee tail and fee simple — that Shakespeare's texts clearly implicate.

If Kornstein cannot help but view Shakespeare through the lens of an early-21st-century American lawyer, we should not indict him for it. After all, his views enable future examinations of oft-overlooked aspects of Shakespeare's plays: statutes, trials, rights, duties, taxes, and so on. Kornstein also reveals a compelling synergy between law and literature even as he disclaims any sort of expertise and even as he purports to jettison politicized schema of race, gender, and identity:

I hope I — as a lawyer — am not simply projecting or adopting a strained, partial, single-minded interpretation. To be sure, it is a common observation that whoever writes about Shakespeare no doubt writes about him or herself. Lawyers, Marxists, Freudians, feminists, and others often yield to the temptation to put the role of their special interest above all else, and end up sifting through Shakespeare's plays in search of echoes of their own preoccupation. In the process, such readers often ignore a great deal of contrary evidence supporting a different notion of Shakespeare. They make the mistake of seeing both in the plays and in Shakespeare's own attitudes only those elements that accord with their wishes.^[48]

If anything, this quote recalls a phenomenon to which I have already referred: Shakespeare's constant "appropriability." That Kornstein acknowledges this phenomenon suggests that he is aware of the culture wars so often marking Shakespeare studies. Kornstein's conclusions may seem general, but they are never unfounded. His presentist tactics demonstrate an awareness of

contemporary Shakespeare studies while his rejection of race and gender theory reveals his disenchantment with contemporary Shakespeare studies.

The Big Picture

Lawyers *do* have something significant to offer Shakespeare studies, and law professors, especially those with literary training or a sustained familiarity with Shakespeare, are invaluable resources for literary scholars and can even be literary scholars in their own right. If we heeded the call of the Cade's Rebellion conspirators (*c.f.*, *King Henry VI*) and killed all of the lawyers, we would, I suspect, miss out on some unique points of view. Worse, we might become careless in our scholarship, particularly when situating Shakespeare's plays in contemporary legal contexts.

As a case in point, consider Ayanna Thompson's essay "The Blackfaced Bard,"^[49] which attends to various sites of audience reception of *Othello* productions performed in blackface. What sets Thompson's essay apart from other, similar essays is its turn to legal texts to investigate the ways that judges codify, authorize, or manage codes of speech and performance by assessing audience interpolation. Thompson's abrupt transition to legal theory on blackface is both interesting and unusual. She seems to acknowledge that her move is problematic. She refers to "these seemingly disparate points of analysis"^[50] and later declares that while "it may seem as if I have taken us far from the debate about blackface performances of *Othello*, I am interested in these recent legal findings because they offer a fascinating discussion about the tension between intention, practice, and reception."^[51] Strangely, Thompson's recognition of a disjuncture seems to *alleviate* that disjuncture. On the other hand, the disjuncture is there, glaring and obtrusive. Thompson does a nice job — far better than most law students — briefing three cases: *Berger v. Battaglia*, *In re Ellender*, and *Locurto v. Giuliani*.^[52] Her point about these cases is that judges weigh communal receptions of blackface more heavily than they weigh performers' intent in donning blackface. More to the point, judges privilege negative media attention over any factoring of authorial intent.

Most practicing lawyers probably would prefer to see Thompson tease out the balancing test used to weigh certain First Amendment rights, but she glosses over that issue ("While debates about the balancing mechanism used to weigh the plaintiff's First Amendment rights against their ability to perform their public-service positions efficiently is a fascinating area of legal debate, I am more interested in the way this balancing mechanism privileges discussions of reception over intention").^[53] In fact, she glosses over several legal issues, jumping from various federal circuit decisions to a Supreme Court decision in just three pages,^[54] and from hate-speech issues ("group

libel" or "fighting words") about which entire books have been written, to related but still very different obscenity cases.^[55] She also provides no countercases – cases with opposite holdings – which almost always exist and which often split the circuits. At the very least, she could have differentiated between content regulations, which limit the communication of specific ideas, and conduct regulations, which limit such things as the time, place, and manner in which speech is conveyed.

Lawyers will no doubt appreciate Thompson's overarching theories, even if she does not adequately untangle the legal specificities on which they rely. She is at her best when arguing, "I do not believe that reception is static when it is 'collectivist,'" and that "intention, practice, and reception cannot be disentangled" because "they inform and challenge each other."^[56] Here she takes on some fairly prominent legal thinkers in a critical way, but her efforts, unfortunately, are abortive and therefore merely beg the question. Had Thompson collaborated with a professor of constitutional law or an expert on the First Amendment, her article would have been extraordinary. As it is, her article leaves much to be desired – it is a perfect example of why interdisciplinary collaboration is valuable to academics, especially academics in disciplines traditionally classified under the rubric of the humanities.

In the humanities, collaborative texts, or at least coauthored texts, are more the exception than the rule, unlike in scientific and economic disciplines – the so-called hard sciences – in which collaborative or coauthored texts are standard. I would venture to say that by resisting interdisciplinarity, conservative literary critics have allowed ideologues and fanatics to take over literary studies and to embarrass the literary profession by embracing Marxism and its triumphalist teleology. The demise of literary studies may have something to do with this takeover. For who in his right mind would major in a discipline that celebrates teachings that have caused such destruction and tyranny when applied to the workaday world? Rather than avoiding law or economics, perhaps literature professors should avoid *bad* law and *bad* economics.

In no other nonscientific field has interdisciplinarity been accomplished so smoothly as in law and literature. Shakespeare studies would benefit from a similar integration and diversification of information. Over time, so much has been written about Shakespeare that his works have become merely pretext for literary scholars to opine about more systemic problems and to negotiate any number of cultural challenges. This article itself uses Shakespeare as an entrance into other, broader issues. For various reasons, conservative literary critics decry this shift in focus because they view the resulting criticism as belonging to practitioners of separate fields of study. Too often, though, their response is to divorce literature from the cultures and communities that

shape it – to treat economics or law as beside the point. Economics and law are not beside the point. They inform literary studies and enable insightful readings of literary texts.

What we need is an economic approach to literary criticism that will undo the damage of Marxism and its variants. Law and literature may be the most promising field for such an approach. Without unfixing the privilege of literature, law-and-literature scholars demonstrate literature's relevance and importance to society. The success of law and literature should inspire literary theorists to team up with experts from other fields – economics, law, political science – to produce criticism that incorporates knowledge and know-how from multiple perspectives. With the notable exception of Paul Cantor, a Shakespearean who has applied Austrian-economic theory to literary texts, and Stephen Cox, who recently coedited *Literature and the Economics of Liberty*^[57] with Cantor, only a few literary scholars work out of non-Marxian economic paradigms. Conversely, few economists view Marxian economics favorably. It would therefore seem that economists would dismiss a great deal of materialist criticism in Shakespeare studies, if only because its analyses pivot on Marxism or quasi Marxism and ignore the broad spectrum of alternate economic schools.

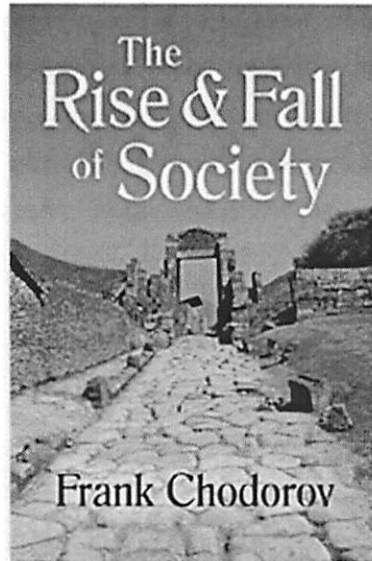
The fact that Marxism remains the dominant mode of economic literary theory suggests that literature professors have become completely out of touch with scholarship in fields like politics, economics, and law. The fact that Marxist critics celebrate ideology critique as if their approaches were above and beyond ideology suggests a tunnel vision and closed-mindedness that threaten the credibility of literary studies. Posner's argument that literature is irrelevant except as therapy will gain currency if literature professors do not reverse course and reconsider their treatment of economics, and possibly even their appropriations and adaptations of Freud.

If literature professors are going to treat political activism or economic theory as a starting point for criticism, they must become apprised of the political economy of thinkers beyond Marx, Althusser, Jameson, and the like, whose several ideas – which pervade materialist criticism – have not in practice helped the plight of the poor or disenfranchised the way that capitalism has. Few if any professors do "Smithian" or "Misesian" or even "Keynesian"^[58] analyses of literary texts, even though these perspectives recall sounder and more consensus-based economic theories. Literature professors must deal with the possibility that literature itself is totally incompatible with the Marxist school of historiography. Reading, producing, and studying literature requires time, money, leisure, and luxury. The genealogy of literature is fraught just as the study of literature is fraught. To realize a utopian Marxian vision might require abandoning literature altogether. Is that the ends towards which materialist criticism aspires?

I will conclude by sharing my enthusiasm about interdisciplinary scholarship such as that which appears in law-and-literature journals. This kind of scholarship often rejects the single-author model, perhaps because there are too many journals and books for one person to read them all and to retain more than a superficial understanding of multiple areas of research. The future of the humanities may involve more joint-authorship ventures. The mass proliferation of literacy, knowledge, and texts has made a working familiarity with multiple and differing fields nearly impossible.

For better or worse, the age of the Renaissance man is over. One individual cannot produce informed scholarship in several fields without the help of others. Coauthorship is not a panacea for information overload. It may create new problems. Good writers with distinct voices might have their voices diluted by coauthors. And how is scholar A, a nonexpert in field X, going to choose collaborators in field X without working in that field himself? How will scholar A judge the final efforts of his collaborators? These questions suggest that coauthorship is not the solution to various problems afflicting the humanities, although it is an option that could reverse leftist and Marxist trends.

If the aim of scholarship and the university is the pursuit of knowledge, then knowledge should not be stifled by monopolistic claims of ownership over ideas, historical figures, genres, or disciplines. Perhaps the time is ripe for a reevaluation of the university mission. As angst about the putative death of the humanities grows, humanities scholars might ask themselves whether they are writing themselves into extinction by undertaking projects on law, economics, science, and so on, without the cooperation of experts who work in those fields and who have devoted entire lifetimes to those critical paradigms. Likewise, professors of law, economics, science, and so on, should not grow defensive when humanities scholars point out the often fatal limitations of an experimental foray into texts to which humanities scholars have devoted entire lifetimes.



~~\$22.00~~ \$16.00

We can no longer hide behind the security of disciplinary barriers. We must step outside of our comfort zones. Disciplinary impediments serve to restrain intellectual production by blocking channels of communication and by shutting down access to much needed resources – most notably, experts in other fields. The future of law and literature and perhaps all of the humanities depends on the traversing of road blocks, the negotiation of conflicts, and, to once again mix metaphors, the substitution of certain players when other players become tired or winded. The humanities are probably not going to die any time soon. But they might find a new expression in professional schools where interdisciplinarity and coauthorship are more commonplace, and where Marxism is not the default and dominant paradigm.

Allen Mendenhall is a PhD student in English at Auburn University. He's a writer, attorney, and adjunct law professor. He holds a BA from Furman University, MA and JD from West Virginia University, and LLM from Temple University Beasley School of Law. Visit his website at AllenMendenhall.com. Send him mail. See Allen Mendenhall's article archives.

A version of this article appeared as "Shakespeare's Place in Law & Literature; or, a Non-Marxist Approach to Shakespeare Studies" in Volume Three of *The Journal of Liberty and Society* (2011).

You can subscribe to future articles by Allen Mendenhall via this [RSS feed](#).

Notes

[1] Adam Liptak, "Next on the Syllabus, Romeo and Juliet," the *New York Times*, October 30, 2002.

- [2] William M. Chace, "The Decline of the English Department," *the American Scholar* (2009).
- [3] Harold Bloom, *Genius* (New York: Warner Books, 2002), p. ix.
- [4] Cushman K. Davis, *The Law in Shakespeare* (Washington, D.C.: Washington Law Book Co., 1883), p. 4-5. One might quibble that this passage represents "old historicism" rather than "new historicism" because the latter usually entails the practice of showing that works of literature are products of economic and cultural hegemonies and thus in need of deconstruction along the lines of ideological filiations. See, e.g., R.V. Young, *At War with the Word* (Wilmington, Delaware: ISI Books, 1999), p. 87.
- [5] N.B. Jedburgh Hartrigge, Preface, in *Shakespeare's Legal Acquirements* (John Lord Campbell, ed., New York: D. Appleton and Co., 1859), p. 9.
- [6] Richard Grant White, "William Shakespeare Attorney at Law and Solicitor in Chancery," *Atlantic Monthly*, volume 4 (1859), p. 99.
- [7] William Lowes Rushton, *Shakespeare as Lawyer* (London: Longman Brown Green Longmans and Roberts, 1858) p. 3.
- [8] Davis, *supra* note 4, p. 4.
- [9] *Idem*, p. 17.
- [10] *Idem*, p. 56.
- [11] *Idem*, pp. 117-285.
- [12] Lord Baron John Campbell, *Shakespeare's Legal Acquirements Considered* (London: John Murray, 1859), p. 5.
- [13] Franklin Fiske Heard, *Shakespeare as a Lawyer* (Boston: Little, Brown, and Company, 1883).
- [14] William C. Devecmon, *In re Shakespeare's "Legal Acquirements": Notes By an Unbeliever Therein* (London: Kegan Paul, Trench, Trubner & Co., Ltd., 1899).
- [15] Edward J. White, *Commentaries on the Law in Shakespeare* (St. Louis: The F.H. Thomas Law Book Co., 1911).
- [16] *Idem*, p. 1.
- [17] Edward J. White, *Commentaries on the Law in Shakespeare*, volume II. (St. Louis: The F.H. Thomas Law Book Co., 1913).
- [18] Sir Granville George Greenwood, *Shakespeare's Law and Latin* (Watts & Co., 1916).
- [19] Sir Granville George Greenwood. *Shakespeare's Law* (London: Cecil Palmer, 1920).
- [20] Sir Dunbar Plunket Barton, *Links Between Shakespeare and the Law* (Boston: Houghton Mifflin, 1929).
- [21] George W. Keeton, *Shakespeare and His Legal Problems* (London: A. & C. Black, Ltd., 1930).
- [22] George W. Keeton, *Shakespeare's Legal and Political Background* (London: Barnes & Noble, Inc., 1967).
- [23] James Boyd White, *The Legal Imagination* (University of Chicago Press, 1985 [Updated edition of the 1973 version]).
- [24] Fee tails serve as a staple plot device of Victorian novels such as Jane Austin's *Sense and Sensibility*.

[25] Interestingly enough, Shakespeare himself left the bulk of his will in fee tail to his daughter Susanna. See Samuel Schoenbaum, *William Shakespeare: A Compact Documentary Life* (Oxford: Clarendon Press, 1977), pp. 292-297.

[26] Davis, *supra* note 4, pp. 156-58.

[27] *Idem*, p. 184.

[28] B.J. and Mary Sokol, *Shakespeare's Legal Language* (London and New Brunswick, NJ: The Athlone Press, 2000).

[29] White, *supra* note 23.

[30] With apologies for the references to academic pedigree. I am of the mind that the works of a scholar either stand up or do not, pedigree notwithstanding. I mention the various academic degrees simply to show that these scholars have professional training in both law and literature.

[31] Michael L. Richmond, "Can Shakespeare Make You a Partner?" *St. Mary's Law Journal*, volume 20 (1989), pp. 885-896.

[32] I base this observation on the online working bibliography of Professor Daniel J. Solove.

[33] See, e.g., "John Paul Stevens, The Shakespeare Canon of Statutory Construction," *University of Pennsylvania Law Review* 140 (1992), pp. 1373-1387.

[34] Jess Bravin, "Justice Stevens Renders an Opinion on Who Wrote Shakespeare's Plays: It Wasn't the Bard of Avon, He Says; 'Evidence Is Beyond a Reasonable Doubt,'" *the Wall Street Journal*, April 18, 2009.

[35] James Boyle, *The Shakespeare Chronicles* (Lulu Press, 2006).

[36] Richard Posner, *Law and Literature: A Misunderstood Relation* (Cambridge, Mass.: Harvard University Press, 1988) p. 363.

[37] *Idem*.

[38] Ian Ward, *Shakespeare and the Legal Imagination* (London, Edinburgh, Dublin: Butterworths, 1999).

[39] Craig Bernthal, *Trial of Man: Christianity and Judgment in the World of Shakespeare* (Wilmington, Delaware: ISI Books, 2003).

[40] Ward, *supra* note 38, at 17.

[41] *Idem*.

[42] *Idem*, pp. 18-19.

[43] Daniel J. Kornstein, *Kill All the Lawyers?: Shakespeare's Legal Appeal* (Princeton University Press, 1994).

[44] *Idem*, pp. xiii-xiv.

[45] *Idem*, p. xiv.

[46] 478 US 186 (1986).

[47] Kornstein, *supra* note 43, at 41.

[48] *Idem*, p. xiii.

[49] Ayanna Thompson, "The Blackfaced Bard: Returning to Shakespeare or Leaving Him?," *Shakespeare Bulletin* 27 (2009), pp. 437-456.

[50] *Idem*, p. 440.

[51] *Idem*, p. 446.

[52] *Idem*, p. 445.

[53] *Idem*, p. 447.

[54] *Idem*, pp. 446-448.

[55] *Idem*, p. 448.

[56] *Idem*, p. 449.

[57] Paul A. Cantor and Stephen Cox, eds., *Literature and the Economics of Liberty: Spontaneous Order in Culture* (Ludwig Von Mises Institute, 2009).

[58] I must emphatically register that I do not endorse Keynesian economics, but I use this example because it is more mainstream than Marxism.