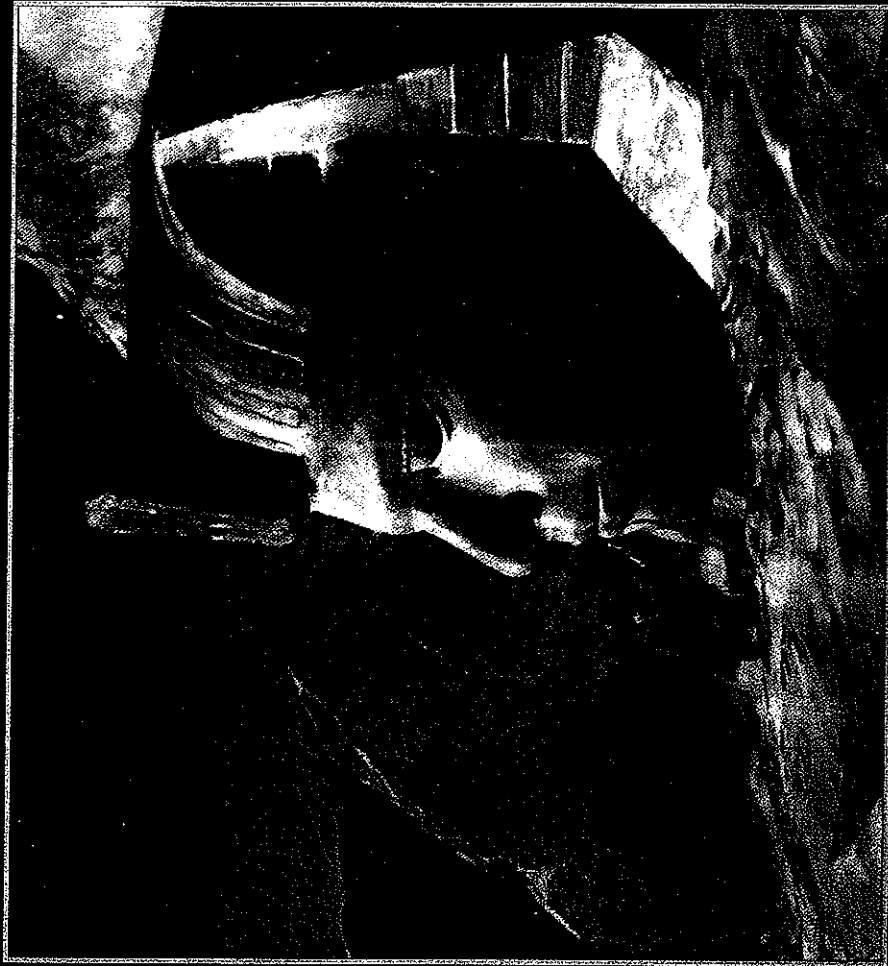


# FIELD WORK

SITES IN LITERARY AND CULTURAL STUDIES



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## Law's Literature

*David Kennedy*

Literature makes lawyers wise—while law makes literature uneasy, fact to its fiction, power to its pleasure. Disciplines separate and unequal. Or perhaps it's law that marks literary critics as wise, savvy about power, just as literature marks jurists weak, even effete.

But are these the only views? Law read as literature might well unravel—and literature might find in law a narrative of desire, returning to literature a consciousness of its power.

Let's just take Shakespeare in the Supreme Court, a convention, a cliché. Read aloud, the court's Shakespearian excursions can't help provoke a smile, even as the justices turn to Shakespeare for authority, for wisdom, for reassurance. Finding it "invidious to discriminate against [illegitimate children] when no action, conduct, or demeanor of theirs is possibly relevant," for example, the court affirms, "We can say with Shakespeare: 'Why bastard, wherefore base?' King Lear, Act 1 Scene 2."<sup>1</sup> We find Shakespeare figured as common-law judge, sketching a norm<sup>2</sup> or providing historical detail.<sup>3</sup> Of course, Shakespeare is not always an authority. As one witty justice put it:

As to the...dissent's reliance on the Bard, we can only observe: Though Shakespeare, of course, knew the Law of his time, He was foremost a poet, in search of a rhyme.<sup>4</sup>

He nevertheless often finds himself in a string cite. In *Caldwell v. Mississippi*, finding a prosecutor's response to defense counsel's plea for mercy inappropriate, the court writes,

This is true whether the plea for mercy discusses Christian, Judean or Buddhist philosophies, quotes Shakespeare or refers to the heartache suffered by the accused's mother.<sup>5</sup>

In *Boutillier v. the Immigration and Naturalization Service*, Shakespeare finds himself in surprising company:

To label [homosexuals] "excludable aliens" would be tantamount to saying that Sappho, Leonardo da Vinci, Michelangelo, Andre Gide, and perhaps even Shakespeare, were they to come to life again, would be deemed unfit to visit our shores.<sup>6</sup>

Occasionally old Bill brings a refreshing relativism,<sup>7</sup> even irony.<sup>8</sup> Still, sometimes it's a stretch. Take *Walters v. National Assoc. of Radiation Survivors*, 1985:

[The] statement ("The first thing we do, let's kill all the lawyers") was spoken by a rebel, not a friend of liberty. See *W. Shakespeare, King Henry VI, pt. II Act IV, scene 2, line 72*. As a careful reading of that text will reveal, Shakespeare insightfully realized that disposing of lawyers is a step in the direction of a totalitarian form of government.<sup>9</sup>

As this case suggests, there is a politics, as well as a history to the court's interest in Shakespeare, an interest that has peaked in recent years with concern about interpretation and reading. Over the last three decades, lawyers and courts have been occupied with precisely the questions studied at the Center for Literary and Cultural Studies in its first ten years—strategies of reading and narration, patterns of culture, limits and channels of power, the imponderables of interpretive conflict, the politics of reason.

We might read Shakespeare as a symptom, law leaning on literature in anxiety, and these are anxious times in law.

Some factoids, as they say on CNN: the Supremes have referred to Shakespeare a scant thirty times since 1790, the overwhelming majority in the last twenty years. And not, I feel sure, simply because opinions are

increasingly written by clerks eager to display their undergraduate erudition. (Which plays, you wonder? *Lear* 1, *Macbeth* 1, *Hamlet* some 9 times—rarely before 1950. [Iago alone 6]) Lawyers are much fonder of Shakespeare, mentioning him in their briefs more than 75 times just since 1979.

If we look at all the cases of all the courts, state and federal, now accessible by computer search, we find Shakespeare more than a thousand times since 1789. But we note a changing citation rate—from .27 times per year in the last century to 44.6 times per year today. Even corrected for an astoundingly larger caseload (177,765 cases in 1994 compared to 7,077 in 1900, and only 110,109 from 1754–1900), the citation rate has doubled in this century, from .01171 percent of all cases in 1913 to .0244 percent in 1992.

Period	# of References	# Per Year	Year	Total Cases	Average # Shakespeare Cases	Percentage
1754–1900	39	0.27	1992	182,804	44.6	.02440
1900–1925	42	1.62	1987	141,718	44.8	.03161
1925–1945	56	2.67	1982	105,784	29.0	.02741
1945–1949	27	5.40	1977	75,749	24.8	.03272
1950–1954	38	7.60	1972	51,383	15.8	.03074
1955–1959	28	5.60	1967	38,453	12.6	.03273
1960–1964	50	10.0	1962	35,687	10.0	.02801
1965–1969	63	12.6	1957	28,497	5.60	.01965
1970–1974	79	15.8	1952	26,632	7.60	.02857
1975–1979	124	24.8	1947	22,557	5.40	.02389
1980–1984	145	29.0	1935	19,049	2.67	.01405
1985–1989	224	44.8	1913	13,840	1.62	.01171
1990–1994	223	44.6				

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Well, so much for empiricism.

The interesting point is that Shakespeare appears ever more frequently in disputes about interpretation—although he seems to support the widest variety of reading strategies. Shakespeare comes not to bury meaning but to praise it.

To praise the full meaning of statutes:

Suffice it to say that we focus on the [complete] language of 22 U.S.C. @1732, not any shorthand description of it. See *W. Shakespeare, Romeo and Juliet*, Act II, scene 2, line 43 ("What's in a name?").<sup>10</sup>

To praise the historical meaning of terms. In holding that the right to "confront" witnesses guarantees a "face to face" meeting, the court notes:

Shakespeare was thus describing the root meaning of confrontation when he had Richard the Second say: "Then call them to our presence—face to face, and frowning brow to brow, ourselves will hear the accuser and the accused freely speak" . . . Perception as well as the reality of fairness prevails.<sup>11</sup>

Or, on the other hand, to praise historically contingent readings:

To apply the rule blindly today, however, makes as much sense as attempting to interpret Hamlet's admonition to Ophelia, "Get thee to a nunnery, go" without understanding the meaning of Hamlet's words in the context of their age. (A footnote here helpfully explains that "Nunnery was Elizabethan slang for house of prostitution.")<sup>12</sup>

In 1990, Shakespeare weighs in against indeterminacy:

To say that Polonius, Claudius, and Gertrude express differing views about Hamlet's "antic disposition" is not to say that Hamlet has no meaning.<sup>13</sup>

In 1993, for plain meaning:

Of course it vastly understates the matter to say that the provision is "written in a fashion that contemplates actual delivery," as one might say Hamlet was written in a fashion that contemplates 16th-century dress. Causation of delivery is the very condition of this provision's operation—and the dissent says it does not matter whether delivery is caused.<sup>14</sup>

Shakespeare stands strong against obfuscation and ambivalence, for common sense. A frustrated dissent:

If, as the Court holds, these employees are engaged in production of agricultural crops for commerce, I do not see how it can hold that they are not engaged in agriculture. If the Court could say "To be or not to be: that is the question," it

might reasonably answer in support of either side. But here the Court tells us that the real solution of this dilemma is "to be" and "not to be" at the same time. While this is a unique contribution to the literature of statutory construction, I can only regret the great loss to the literature of the drama that this possibility was overlooked by the Bard of Avon.<sup>15</sup>

Well, enough.

Enough to taste the politics of this encounter, a politics often paralleled in the encounter between legal academics and cultural or literary studies. Lawyers have largely studied literature, borrowed from literature, in a project of rebuilding, supporting, stabilizing law. If we can read Shakespeare, we can certainly read the Constitution. Subliminal message: the Constitution is every bit as cultured, as literary.

Cultural study enriches the judge, softens judgment, leavens the law. It reminds us of the people, the purpose, the power of decision. And it is good for our moral health.

For many current legal scholars, literature provides an exit from the anxieties and self-doubts of the sixties and seventies, release from indeterminacy, response to nihilism. It was the interpretive community, in the parlor, with the presumption.

And I sense a parallel on the other side, although I don't know it as well—law, in the eyes of literary critics, seems strangely stable, where the rubber meets the road, a place for real politics. To study old law cases instead of old novels—here also an anxiety to quiet, an anxiety about the irrelevance, the discontinuity, the deconstruction of literature. Subliminal message: literary study is no backwater, it could be about power, could read the law, engage the issues of the day.

Nevertheless, most surprising in my encounters with cultural studies has been the literary mavens' image of law: reason, authority, clarity, force. . . narratives that move from fiction to action; an image of law legal scholars can frankly only sustain by reference to literature. . . or sociology, or economics, or anthropology. Literature the promise of culture, of ground; law the promise of power, of figure. A match made in heaven. . . or at least on the Supreme Court.

But I advocate a different encounter, a different politics—in interdisciplinary, less the end of anxiety than the beginning of critique. For lawyers, a look to literature not for reassurance, but for risks, for techniques of reading rather than revering.

I admit I am nostalgic for the last generation of literature students come to study law, armed with deconstruction and skepticism and the fire of critique, rather than the balm of reconstruction. And I revel in the energy, envy

the sophistication, the savvy, the zealous uncertainty of today's cultural studies—engaged with ethnicity and identity, with culture in its broadest, perhaps its anthropological sense, a sense increasingly dismayed even to be termed “culture.”

Indeed it seems only here, between law and literature, that cultural studies seems now to host an asymmetric encounter: from literature comes reconstruction, from law, critique. And I wonder if there isn't another side here as well. Might not law, its doubts, gaps, and ambiguities, its narratives, its realism about power—about the fragmentation, the readerliness, the dispersion, the porosity of power—reveal literature's own unconscious clout?

For the match made in heaven to work, for each discipline to reinforce the other, each must project the other as difference. The most important work of cultural studies might rather be encouragement to see two disciplines as one, law as culture, literature as the law.

It is here that we might have hope, the disruptive edge of each vibrating excitedly with the other.

## NOTES

1. *Levy v. Louisiana ex rel. Charity Hospital*, 391 U.S. 68, 72 n.6 (1968). Or take *Milkovich v. Lorain Journal*, 1990; Finding a “cause of action for damage to a person's reputation by the publication of false and defamatory statements,” the court notes: “In Shakespeare's *Othello*, Iago says to Othello: ‘Good name in man and woman, dear my lord, is the immediate jewel of their souls. Who steals my purse steals trash....’” *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 11 (1990).
2. *U.S. v. Apfelbaum* (1980):

Shakespeare's lines here express sound legal doctrine: “His acts did not o'ertake his bad intent; and must be buried but as an intent that perish'd by the way: thoughts are no subjects, intents but merely thoughts.”

3. *U.S. v. Apfelbaum*, 445 U.S. 115, 131 N.13 (1980) (citing *Measure for Measure*).
- In 1948, Goesaert v. Liquor Control, commentary on discrimination against female tavern owners, the court opined: “We meet the alewife, sprightly and ribald, in Shakespeare.” *Goesaert v. Cleary*, 335 U.S. 464, 465 (1948).
4. *Browning-Ferris Industries Inc. v. Kelco Disposal Inc.*/ 492 U.S. 257, 265 (1989).
5. *Caldwell v. Mississippi*, 472 U.S. 320, 337 (1985) (quoting *Caldwell v. Mississippi*, 443 So. 2d 806, 817 (1984)); *in Tison v. Arizona*, (1987):

An intuition that sons and daughters must sometimes be punished for the sins of the father may be deeply rooted in our consciousness.... See, e.g., Horace, *Odes* III, 6:1 (C. Bennett trans. 1939) *W. Shakespeare, The Merchant of Venice*, Act III, scene 5; H. Ibsen, *Ghosts* (1881).

*Tison v. Arizona*, 481 U.S. 137, 184 & n. 20 (1987).

6. *Boutilier v. I.N.S.* 387 U.S. 118, 130 (1967).

7. See for example: “The dissent finds Dean Wigmore more persuasive than President Eisenhower or even William Shakespeare. Surely that must depend upon the proposition that they are cited for.” *Coy v. Iowa*, 487 U.S. 1012, 1018 n.2 (1988) (citation omitted).

8. In an affirmative action case, the dissent:

The majority emphasizes, as though it is meaningful, that “No persons are automatically excluded from consideration; all are able to have their qualifications weighed against those of other applicants.” One is reminded of the exchange from Shakespeare's *King Henry the Fourth, Part I*: “GLENDOWER: I can call Spirits from the vasty Deep. HOTSPUR: Why, so can I, or so can any man. But will they come when you do call for them?”

*Johnson v. Transp. Agency*, 480 U.S. 616, 674 (1987).

9. *Walters v. Nat'l Assoc. of Radiation Survivors*, 473 U.S. 305, 317 n.24 (1985).

10. *Dames & Moore v. Regan*, 543 U.S. 654, 675 n.7 (1981).

11. *Coy*, 487 U.S. at 1016 (1988).

12. *U.S. v. Watson*, 423 U.S. 411, 438 & n.3 (1976).

13. *Bd. of Educ. v. Mergens*, 496 U.S. 226, 282 (1990).

14. *Fex v. Michigan*, 113 S.Ct. 1085, 1088 n.2 (1993).

15. *Farmers Reservoir & Irrigation Co. v. McComb*, 337 U.S. 755, 772 (1949).