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ESSAYS

THE BARD AND THE BENCH: AN OPINION AND BRIEF WRITER'S GUIDE TO SHAKESPEARE

Robert W. Peterson*

Someone once wrote, "What's past is prologue." Someone also wrote, "The Devil can cite scripture for his purpose." In fact, Shakespeare wrote both,¹ and both are true of Shakespeare. Shakespeare's comments on the human drama are as fresh as tomorrow's news and as personal as one's reflection. They are both prologue and epilogue to our passage on this earthly "O."²

Like flint on steel, Shakespeare's pen and paper kindled words, phrases, poetry, plots, and plays that still dazzle, puzzle, provoke, and enlighten. No other author matches his cognitive and aesthetic eminence. No other author can claim a library dedicated to his or her work and time comparable to the Folger Shakespeare Library in Washington, D.C. No other author can claim the library immediately behind the U.S. Su-

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1. WILLIAM SHAKESPEARE, *THE TEMPEST* act 2, sc. 1, l. 424 ("prologue"); WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE*, act 1, sc. 3, l. 137 ("scripture").

2. WILLIAM SHAKESPEARE, *KING HENRY THE FIFTH* act 1, sc. 1, l. 128.

Or may we cram

Within this wooden O the very casques,

That did affright the air at Agincourt?

Id. Some believe the "O" is a reference to Shakespeare's own theater, the Globe. The Globe was a multi-sided polygon and appeared round.

preme Court building.³

Small wonder that, whether inspired by devil or angel, we can and do cite the Bard to our purpose. Whatever passages the Devil may lift from these great works, the bench and bar, presumptive forces of good, happily go *bon mot-to-bon mot* with the forces of darkness and injustice.

This work is a legal brief writer's and opinion drafter's guide to Shakespeare. It collects and catalogues by topic citations to plays, poems, or passages that are actually found in judicial opinions.⁴ This essay also suggests a few uncited orphans deserving a home in brief or opinion. The catalogue is web based; the reader may search it in its electronic format or download it for old-fashioned browsing.⁵

Some may argue that the world is ill served by yet another work on Shakespeare, the law, or both. Perhaps they are right. A visit to one of the major on-line book shops reveals over 600 books on Shakespeare in print, including Harold Bloom's current best seller "*Shakespeare, the Invention of the Human*."⁶ But in the past decade, what script writer, including any less than 400 years old, has had eight feature length films produced (*Romeo and Juliet*, *Much Ado About Nothing*, *Twelfth Night*, *Henry V*, *Hamlet* (twice—with Mel Gibson and Kenneth Branagh in the title role), *Richard III*, *Othello*), with three more forthcoming (*Titus Andronicus*, *A Midsummer Night's Dream*, and yet another *Hamlet*), plus a movie about producing one of his plays (*Searching for Richard*) and another, nominated for thirteen academy awards and winning seven—including best picture—speculating on the screen-writer's love-life (*Shakespeare in Love*)? What 400-year-old writer's play has run as the most popular "B" rated soap opera ever—the O.J. Simpson trial, starring you-know-who as Othello and Desdemonna, and featuring Mr. Goldman as the hapless Roderigo and Lt. Fuhrman as Iago (with Othello's handkerchief recycled as Simpson's glove).

Not even James Bond can claim this success, even

3. Folger Shakespeare Library, 201 East Capitol Street, SE, Washington, DC 20003-1094, (visited Mar. 8, 1999) <<http://www.folger.edu>>.

4. Although not catalogued, many are gathered and discussed in William Domnarski, *Shakespeare in the Law*, 67 CONN. B. J. 317 (1993).

5. *Santa Clara Law Review* (visited March 8, 1999) <<http://www.scu.edu/lawreview>>.

6. HAROLD BLOOM, *SHAKESPEARE, THE INVENTION OF THE HUMAN* (1998).

though Hollywood has produced Bond films for longer than Shakespeare wrote. If Hollywood and the popularity of one of the many “trials of the century” are any measure, Shakespeare still resonates with our time. Rumors of the death of this Dead-White-Male are greatly exaggerated.

First, some score cards. The miracle of electronic research confirms well over 800 citations attributed to Shakespeare in state and federal opinions.⁷ So deeply embedded is Shakespeare in our language and culture that there are hundreds of additional easily recognized but unattributed references. For example, while considering whether a class action fell within Federal Rule of Civil Procedure 23(b)(2) or 23(b)(3), the court pondered, “Whether (b)(2) or not (b)(2) is indeed the question.”⁸ The discovery of such gems falls to serendipity rather than the wonders of on-line research. Indeed, it is almost impossible to speak English without also speaking Shakespeare.

If you cannot understand my argument, and declare “It’s Greek to me,” you are quoting Shakespeare; if you claim to be more sinned against than sinning, you are quoting Shakespeare; if you recall your salad days, you are quoting Shakespeare; if you act more in sorrow than in anger, if your wish is father to the thought, if your lost property has vanished into thin air, you are quoting Shakespeare; if you have even refused to budge an inch or suffered from green-eyed jealousy, if you have played fast and loose, if you have been tongue-tied, a tower of strength, hoodwinked or in a pickle, if you have knitted your brows, made a virtue of necessity, insisted on fair play, slept not one wink, stood on ceremony, danced attendance (on your lord and master), laughed yourself into stitches, had short shrift, cold comfort or too much of a good thing, if you have seen bet-

7. For those pursuing their own research using an on-line legal database, here are some simple suggestions. If you know a passage is cited in *Jones v. Smith*, but you want to find the case, enter the search request: name(Jones and Smith) and Shakespeare. To find cases quoting a passage, e.g., “quality of mercy,” enter the search request: “quality of mercy”. To search the text of Shakespeare to find a passage, there are several web sites with useful search engines and links to other Shakespeare-related sites. They are: Matty Farrow, *The Works of the Bard* (visited Mar. 8, 1999) <<http://www.gh.cs.su.oz.au/~matty/Shakespeare/Shakespeare.htmls>>, and *The Complete Works of William Shakespeare* (visited Mar. 8, 1999) <<http://the-tech.mit.edu/Shakespeare/search.html>>.

8. See *Wetzel v. Liberty Mutual Ins. Co.*, 508 F.2d 239, 248 (3d Cir. 1975) *cert. denied*, 421 U.S. 1011 (1976). See also *Sisk v. Williamson County*, 632 N.E.2d 672, 678 (Ill. App. Ct. 1994) (“to mow or not to mow”).

ter days or lived in a fool's paradise—why, be that as it may, the more fool you, for it is a foregone conclusion that you are (as good luck would have it) quoting Shakespeare; if you think it is early days and clear out bag and baggage, if you think it is high time and that is the long and short of it, if you believe that the game is up and that truth will out even if it involves your own flesh and blood, if you lie low till the crack of doom because you suspect foul play, if you have your teeth set on edge (at one fell swoop) without rhyme or reason, then—to give the devil his due—if the truth were known (for surely you have a tongue in your head) you are quoting Shakespeare; even if you bid me good riddance and send me packing, if you wish I was dead as a door-nail, if you think I am an eyesore, a laughing stock, the devil incarnate, a stony-hearted villain, bloody minded or a blinking idiot, then—by Jove! O Lord! Tut, tut! for goodness' sake! what the dickens! but me no buts—it is all one to me, for you are quoting Shakespeare.⁹

Shakespeare has given us book and film titles, such as Aldous Huxley's *Brave New World*¹⁰ and the recent film, *What Dreams May Come*.¹¹ With exceptional prescience, he anticipated the nature/nurture debate long before the psychiatric community began wondering how much our personalities owe to genetic pre-programming (nature) and how much they owe to upbringing and training (nurture).¹² Indeed, like Siamese twins joined at the heart, it is impossible to separate Shakespeare's language and thought from our own. *The Oxford Dictionary of Quotations* devotes eighty-nine pages to Shakespeare¹³—it devotes only thirty-nine pages to the Bible!¹⁴ Shakespeare has so inoculated our language that, of the 289 cases that use the phrase “pound of flesh,” only [thirty-five]

9. ALBERT MCCRUM, ET AL., *THE STORY OF ENGLISH* 99-100 (1986) (quoting English journalist Berward Levin).

10. WILLIAM SHAKESPEARE, *THE TEMPEST* act 5, sc. 1, l. 207 (“Miranda: ‘O brave new world / That has such people in’t.’”).

11. WILLIAM SHAKESPEARE, *HAMLET, PRINCE OF DENMARK* act 3, sc. 1, l. 73 (“Hamlet: ‘In that sleep of death, what dreams may come . . .’”).

12. WILLIAM SHAKESPEARE, *THE TEMPEST* act 4, sc. 1, l. 208. Prospero: [Speaking of the monster Caliban]

A devil, a born devil, on whose nature
Nurture can never stick; on whom my pains,
Humanely taken, all, all lost, quite lost . . .” *Id.*

13. *THE OXFORD DICTIONARY OF QUOTATIONS* 564-653 (Angela Partington, ed., rev. 4th ed., Oxford Univ. Press 1996).

14. *Id.* at 69-108.

judges bother to attribute it to Shakespeare (or the “Bard” or “The Bard of Avon”). Likewise, of the 282 references to “Much Ado About Nothing,” only twenty-four mention the source as Shakespeare.

Of the over 800 legal references attributed to Shakespeare (not counting the additional 537 unattributed references to the above two phrases alone), the most frequently cited play is *Hamlet*. The most frequently cited passage, however, is not from the most frequently cited play; it is from *Romeo and Juliet*—“What’s in a name? That which we call a rose / By any other name would smell as sweet.”¹⁵ Often used when attorneys attempt to force awkward law or facts into beneficial categories, this passage is so useful that there are over eighty-two attributed citations to it (and an additional forty-six unattributed references, although many are to law review titles which seem to favor this phrase).

Courts have cited all thirty-seven plays and many of the sonnets and poems. Among the plays, *Pericles, Prince of Tyre* is the wallflower, having been cited only once.¹⁶ This treatment is consistent with the play’s history—it was also excluded from the First Folio of 1623. This judicial neglect is unfortunate, because *Pericles* contains a poignant and timeless passage reflecting the inverse relationship between justice and poverty. While struggling to extract an object tangled in his net, the character, a poor fisherman, remarks, “[H]ere’s a fish hangs in the net, like a poor man’s right in the law; ‘twill hardly come out.”¹⁷

The beauty, flare, and uniqueness of language accounts for much of Shakespeare’s popularity in briefs and opinions. Shakespeare often puts the drafter’s thoughts in language more lofty and engaging than the author’s. Shakespeare just says it better.

There is also a certain reflected luster in associating the Bard’s words with the author’s thoughts. When the reference is apt, legal writing gains stature from the association.¹⁸

15. WILLIAM SHAKESPEARE, *ROMEO AND JULIET* act 2, sc. 2, l. 59 (over 74 citations).

16. See *State Farm Mut. Auto. Ins. Co. v. Harper*, 188 S.E.2d 813, 819 (Ga. Ct. App. 1971).

17. WILLIAM SHAKESPEARE, *PERICLES, PRINCE OF TYRE* act 2, sc. 1, l. 167.

18. See, e.g., WILLIAM SHAKESPEARE, *LOVE’S LABOUR’S LOST* act 4, sc. 3, l. 27.

[H]e draweth out the thread of his verbosity finer

Caveat: in the age of page limits, judges enjoy more freedom to embellish opinions than do attorneys to embroider briefs. Ensure that a passage materially advances, illustrates, or punctuates your argument. Sometimes the loftiness of the language goes well beyond the needs of the mundane, quotidian squabbles that contend before courts.¹⁹ Quoting Shakespeare may, indeed, be “gilding the lily”—a common misquote of this passage:

Therefore, to be possess'd with double pomp,
To guard a title that was rich before,
To gild refined gold, to paint the lily,
To throw a perfume on the violet,
To smooth the ice, or add another hue
Unto the rainbow, or with taper-light
To seek the beauteous eye of heaven to garnish,
Is wasteful and ridiculous excess.²⁰

In this instance the conflation of the two lines may be an improvement over the original. One can appreciate why the more ponderous “with taper-light to seek the beauteous eye of heaven to garnish” has not gained a similar following.

Other courts have also been careless about quotations, substituting “glitters” for “glisters,”²¹ or placing “Methinks” at

Than the staple of his argument.

Id. Said of a particularly tedious and empty legal argument. See *Complete Auto Transit, Inc. v. Chauffeurs*, 848 F. Supp. 848, 851 (N.D. Ind. 1994).

Oft expectation fails, and most oft there
Where most it promises.

WILLIAM SHAKESPEARE, *ALL'S WELL THAT ENDS WELL* act 2, sc. 1, l. 223. A nice fit for almost any breach of contract case. See *Thienes v. Harlin Fruit Co.*, 499 S.W.2d 223, 230 (Mo. Ct. App. 1973):

Not since Joan de Pucelle [sic—la Pucelle is correct] in Shakespeare's *Henry VI, Part I*, attempted to defend herself from a capital charge by proclaiming herself a virgin and then, seeing that particular defense was unlikely to prevail, informed the judge that she was with child, has anyone argued a judicial point with a more breathtaking lack of concern for consistency.

Ligon v. Middletown Area Sch. Dist., 584 A.2d 376, 379 (Pa. 1990).

19. *In re Ogilvie*, 373 N.Y.S.2d 281, 283 (Sup. Ct. 1975) (quoting WILLIAM SHAKESPEARE, *SONNET* 116, in discussion of whether court should waive 10-day waiting period for marriage license).

Let me not to the marriage of true minds
Admit impediments.

Id.

20. WILLIAM SHAKESPEARE, *KING JOHN* act 4, sc. 2, l. 16. See also *State v. Moore*, 645 S.W.2d 109, 110 (Mo. Ct. App. 1982).

21. WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE* act 2, sc. 7, l. 66 (“All that glisters is not gold.”). Although every unabridged published edition includes

the wrong end of “the lady doth protest too much.”²²

On one occasion a near fit was enhanced by a Freudian misquotation. Defendant, after promising marriage, disappeared and, in time, was discovered to have married another. The court remarked that, like Petruchio in *The Taming of the Shrew*, he “wooed in haste and means to repent at leisure.” The actual line is “woo’d in haste and means to *wed* at leisure.”²³

Context is seldom an impediment when words fit the drafter’s intent. Irritated by a vexatious litigant’s repeated filings, the court remarked, “Look, where it comes again!”—a line actually spoken in reference to the reappearance of the ghost of Hamlet’s father.²⁴

Apart from embellishing legal writing with lofty language, Shakespeare sometimes drives decisions in substantive ways, or at a minimum supports conclusions towards which the court may tilt—a form of literary precedent brightening strings of dreary case citations. The most direct substantive use is the area of censorship of allegedly obscene or otherwise objectionable publications. When opposing censorship, if a litigant can add Shakespeare to the balance, the sheer *gravitas* of Shakespeare’s name may tilt the scales. The U.S. Supreme Court and lower courts have struck down restraints on free speech if they would, when applied as written, include Shakespeare.²⁵ Never mind that Shakespeare is filled with sex and lewd innuendo (so much so that scholars devote entire books to the sub-

“glisters,” the on-line version of the plays available at the web sites substitute “glitters.” See *supra* note 7.

22. WILLIAM SHAKESPEARE, *HAMLET, PRINCE OF DENMARK* act 3, sc. 2, l. 351 (It falls after “much.”).

23. WILLIAM SHAKESPEARE, *THE TAMING OF THE SHREW* act 3, sc. 2, l. 19 (emphasis added).

24. WILLIAM SHAKESPEARE, *HAMLET, PRINCE OF DENMARK* act 1, sc. 1, l. 88; *Florida Mun. Liab. v. Mead Reinsurance*, 1993 U.S. Dist. LEXIS 7150 (S.D. Fla. 1993); see also WILLIAM SHAKESPEARE, *THE MERRY WIVES OF WINDSOR* act 3, sc. 5, l. 131 (“The rankest compound of villainous smell that ever offended nostril.”) cited in *Varjabedian v. City of Madera*, 572 P.2d 43, 49 n.9 (Cal. 1977) (This was a nuisance case, although the line actually referred to Mistress Ford’s unwashed laundry.).

25. See *Hannegan v. Esquire, Inc.*, 327 U.S. 146, 157 (1946) (concluding that the postmaster must extend second class rates to *Esquire* magazine); *United States v. One Book Entitled Ulysses by James Joyce* (Random House, Inc. Claimant), 72 F.2d 705, 707 (2d Cir. 1934) (A. Hand, J.); *Papermill Playhouse v. Millburn Township*, 472 A.2d 517, 522 (N.J. 1983) (quoting *Hannegan*, 327 U.S. at 157).

ject).²⁶ Nevertheless, if the statute or regulation would ban Shakespeare, the statute must fall. If a witness opines that Shakespeare is “somewhat pornographic,” the witness is somewhat suspect.²⁷ Similarly, if attaching responsibility for teenage suicide to a dramatic work would deter the staging of *Hamlet* or *Romeo and Juliet*, the cause of action must fail.²⁸ Such is the stature of this glover’s son.

Engaging Shakespeare as the expert arbiter of the definition of “obscene” is only fair. Shakespeare was a wordsmith in the truest sense. With pen as hammer and paper as anvil, he forged (note the double meaning of this word) not only the word “obscene,” but over 1,685 other new words.²⁹ In all, he used over 21,000 words (compared, for example, to Racine’s paltry palate of only 2,000).³⁰

It is curious that courts invoking Shakespeare to invali-

26. See MICHAEL MACRONE, NAUGHTY SHAKESPEARE (1998); ERIC PARTRIDGE, SHAKESPEARE’S BAWDY (1968); FRANKIE RUBINSTEIN, A DICTIONARY OF SHAKESPEARE’S SEXUAL PUNS AND THEIR SIGNIFICANCE (2d ed. 1995). Indeed, “bowdlerize,” a word for expurgating suggestive language from literary works, comes from attempts by Thomas Bowdler, a straight-laced Edinburgh physician, to edit Shakespeare to suit the evolving prudery of the nineteenth century. Thomas Bowdler considered the works so stained with words and expressions of indecent nature that none would permit them, uncorrected, to be read or heard by one’s daughter. To correct this, he published his *Family Edition* of Shakespeare in 1818.

27. See *People v. Watson*, 325 N.E.2d 629, 631 (Ill. App. Ct. 1975) (*rev. on other grounds*).

28. See *McCullum v. CBS, Inc.*, 249 Cal. Rptr. 187, 189 n.4 (1988) (involving a song by John “Ozzy” Osbourne allegedly persuaded plaintiffs’ son to commit suicide). The court notes that there are sixteen suicides depicted in Shakespeare’s dramatic works. The court does not cite the plays, and this author knows of only thirteen suicides in the dramatic works: *Romeo and Juliet* (*Romeo and Juliet*), Portia, Cassius and Brutus (*Julius Caesar*), Ophelia (*Hamlet*), Othello (*Othello*), Lady Macbeth (*Macbeth*), Eros, Mark Antony, Cleopatra, Charmian, Iras (*Antony and Cleopatra*). Adding the poems, Lucrece (*The Rape of Lucrece*) makes fourteen. One reaches sixteen by including the comic “suicides” of Pyramus and Thisbe (*A Midsummer-Night’s Dream*). Moreover, two of these deaths, Lady Macbeth’s and Ophelia’s, may or may not have been suicide. Hamlet also speaks positively of suicide in his “to be or not to be” speech, but he could not bring himself to do it because “conscience does make cowards of us all.” WILLIAM SHAKESPEARE, *HAMLET, PRINCE OF DENMARK* act 3, sc. 1, l. 85.

29. See BILL BRYSON, *MOTHER TONGUE* 70 (1990). William Shakespeare used the word “obscene” three times: *KING HENRY IV, PART ONE* act 2, sc. 4, l. 340; *LOVE’S LABOUR’S LOST*, act I, sc. 1, l. 321; *THE LIFE AND DEATH OF KING RICHARD THE SECOND*, act 4, sc. 1, l. 173. Concededly, *obscenus*, the Latin root for “obscene,” had existed for some time. See generally JEFFREY MCQUAIN AND STANLEY MALLESS, *COINED BY SHAKESPEARE: WORDS AND MEANINGS FIRST PENNED BY THE BARD* (1998).

30. See BLOOM *supra* note 6, at 391.

date restraints on speech never cite the passages of Shakespeare that would run afoul of the strictures. For example, in invalidating regulations banning seven “offensive” words from radio during times children may listen, the court of appeal noted that the FCC’s “Order would prohibit the broadcast of Shakespeare’s *The Tempest* or *Two Gentlemen of Verona*” (not to mention the Nixon tapes).³¹ The court leaves it to the reader’s curiosity, industry, and patience to find which, if any, of the words appears in the plays.³² Courts seem to assume as common knowledge that the vocabulary and sexual content of Shakespeare’s works would offend the restrictions—a curious form of judicial notice for a literary icon.³³ Indeed, it is not un-

31. The anatomically correct Starr Report, however, uses only one of the offending words, and only one time. See <<http://starreport.excite.com/toc.html>>.

32. See *Pacifica Found. v. FCC*, 556 F.2d 9, 17 (D.C. Cir. 1976), *rev’d*, *FCC v. Pacifica Found.*, 438 U.S. 726 (1978) (5-to-4). Although reversing the D.C. Circuit, the five in the majority agreed that the words were not “obscene,” but merely “indecent.” The FCC could “channel” them to times when children were less likely to hear them. The broadcast inciting the suit occurred at 2:00 p.m. on Tuesday, October 30. One would have thought that most children old enough to comprehend should have been in school.

Justice Brennan, in a vigorous dissent, again invoked Shakespeare: “The rationales could justify the banning from radio of a myriad of literary works, novels, poems, and plays the likes of Shakespeare . . .” *Id.* at 771 (Brennan, J., dissenting). Although Justice Brennan does not name the offending plays, he does helpfully quote several passages from the Bible that would equally be banned. *Id.* at 771 n.5 (Brennan, J., dissenting).

The case was spawned by a complaint about the broadcast of a recorded monologue by George Carlin from an album entitled “Occupation: Foole.” *Id.* Perhaps Carlin was himself invoking the well-known license Shakespeare’s fools enjoyed to speak truth to authority.

I must have liberty
Withal, as large a character as the wind
To blow on whom I please, for so fools have.

WILLIAM SHAKESPEARE, AS YOU LIKE IT act 2, sc. 7, l. 65.

33. If one includes puns, the FCC may have faulted Shakespeare for four of the seven offending words. As near as this author can discover, the following passages are the only ones the FCC would consider unsuitable for the young because they contain one of the proscribed words. WILLIAM SHAKESPEARE, *TITUS ANDRONICUS* act 2, sc. 3, l. 144 (“The milk thou suck’dst from her did turn to marble,/ Even at thy teat thou hadst thy tyranny.”); WILLIAM SHAKESPEARE, *ROMEO AND JULIET* act 1, sc. 3, l. 57 (“[W]ere not I thine only nurse,/I would say thou hadst suck’d wisdom from thy teat.”); WILLIAM SHAKESPEARE, *KING HENRY VI, PART TWO* act 4, sc. 6, l. 1 (“And here, sitting upon London Stone, I charge and command that, of the city’s cost, the pissing conduit run nothing but claret wine this first year of our reign.”); WILLIAM SHAKESPEARE, *TWO GENTLEMAN OF VERONA* act 4, sc. 4, l. 16 (“[H]e had not been there, bless the mark, a pissing while but all the chamber smelt him.”) (Launce, referring to the behavior of his dog, Crab, at a banquet); WILLIAM SHAKESPEARE, *THE TEMPEST*, act 4, sc. 1, l. 199 (“Monster, I do smell all horse-piss at which my nose is in great indignation.”);

til the dissent that one is first introduced to the seven words commanding so much judicial attention. The seven words appear below—if you are of gossamer sensibilities, do not read this footnote.³⁴

There is some irony in using Shakespeare as a free speech icon. Shakespeare, himself, was subject to censorship. All plays, including Shakespeare's, were censored by the Master of Revels.³⁵ Unlike today, it was religious heresy or political criticism, not bawdy language, that attracted the censor's pen. This was serious business: government agents tortured Thomas Kyd and may have murdered Christopher Marlowe, both popular playwrights of Shakespeare's day.³⁶ As the political climate changed, Shakespeare altered numerous passages in later editions of the plays. In 1600, Shakespeare's company

WILLIAM SHAKESPEARE, *MERRY WIVES OF WINDSOR* act 5, sc. 5, l. 11 ("Send me a cool rut-time, Jove, or who can blame me to piss my tallow?"). On its face, this is pretty mild stuff. The reference to "piss my tallow," being about neither urine nor tallow, is, however, far cruder than it appears on its face.

Two further passages, making puns on the f— and the c— words, may have also offended the FCC. In *Henry V*, Katherine, Henry's French bride, struggles with the English words for parts of the body:

Katharine: De foot, et de count? O seigneur Dieu! Ces sont mots de son mauvais, corruptible, gros, et impudique, et non pour les dames d'honneur d'user.

Translation: Le foot and le count! O, Lord! Those are naughty words, wicked, coarse, and immodest and [are] not for fine ladies to use.

WILLIAM SHAKESPEARE, *HENRY V* act 3, sc. 4, l. 56. Perhaps the FCC would have added *Hamlet* to the list for the following exchange between Hamlet and Ophelia:

Hamlet: Lady, shall I lie in your lap?

Ophelia: No, my lord.

Hamlet: I mean, my head upon your lap?

Ophelia: Ay, my lord.

Hamlet: Do you think I meant country matters?

WILLIAM SHAKESPEARE, *HAMLET*, act 3, sc. 2, l. 120.

Possibly to show he is no literary prude, Justice Stevens, writing for the majority in *FCC v. Pacifica Foundation*, *supra*, makes the following assertion about a pre-Shakespeare work with one of the offending words:

[The] Miller's Tale would not be likely to command the attention of many children who are both old enough to understand and young enough to be adversely affected by passages such as: 'And prively he coughte hire by the queynte.' *THE CANTERBURY TALES*, CHAUCER'S COMPLETE WORKS 58 l. 3276 (Cambridge ed. 1933).

Id. at 750 n.29. Perhaps—if the broadcaster spelled, rather than read, the passage.

34. OK, you were warned. Here they are, but spelled backwards: Kcuf, tihs, ssip, rekcufrhtom, rekuscoc, tnuc, and tit.

35. See MACRONE, *supra* note 26, at 15-16.

36. See BLOOM *supra* note 6, at 363, 340.

narrowly escaped serious trouble when, on the eve of the Earl of Essex's attempted rebellion against Elizabeth, it performed *Richard II*, a play depicting revolt and regicide. To stay on the windy side of politics, Shakespeare may also have suppressed his own play, *Troilus and Cressida*. Apparently, the play was never performed by Shakespeare's troupe or, indeed, by anyone until the twentieth century.³⁷ Our time could hardly be more different—we pride ourselves in open religious and political exchange, but wilt at naughty words.

Unlike today's screen writers, during Shakespeare's Quentin Tarantino period, Shakespeare could write revoltingly violent work and seldom resort to any of the seven naughty words. For example (and this *is* the worst example), if Joe Bob Briggs were to review *Titus Andronicus* (he may, since *Titus* is in production), the review might read something like this:

1 gang rape atop husband's corpse;
 3 severed hands;
 1 severed tongue;
 2 severed heads;
 2 severed jugulars;
 2 murdered children served to their mother in a coffin-shaped pie;
 1 dismemberment/barbecue
 1 live burial
 2 infanticides
 1 insecticide

Plus numerous due process violations and acts of GRATUITOUS VIOLENCE. Parents need not worry, though—only one reference to breast-feeding.³⁸ Joe Bob says, "Check it out."³⁹

Apart from suggesting a clue to the original meaning of "obscene," Shakespeare also impacts substantive law when other words, so critical to the law, require definition. It is not uncommon for courts to start with the word as used by Shakespeare—a variation on the "original intent" school of constitutional, or statutory, interpretation. Indeed, former Solicitor

37. See *id.* at 327, 344.

38. WILLIAM SHAKESPEARE, *TITUS ANDRONICUS* act 2, sc. 3, l. 144 ("The milk thou suck'dst from her did turn to marble,/ Even at thy teat thou hadst thy tyranny.").

39. For real Joe Bob Briggs reviews of drive-in movies see *The Acme Joe Bob* Page (visited Feb. 17, 1998) <<http://www.acmewebpages.com/joebob/index.html>>.

General Charles Fried, in one of the more imaginative attempts to bend the Bard to his legal purpose, employed a Shakespeare sonnet to argue for the “original intent” canon of constitutional construction.⁴⁰

Reliance on Shakespeare as an arbiter of meaning is a bit surprising since he created much of his own vocabulary— “at least one tenth [of the words used by Shakespeare] had never been used before.”⁴¹ He just made them up! By beginning analysis with Shakespeare’s meaning, perhaps courts are merely recognizing the prerogative of the inventor to give content to the invention.

Paternity does not dictate personality, and, like one’s children, the progenitor of a word has only modest power to cabin its future character. For example, Shakespeare’s “obscene” suggested repulsive, indecent, or offensive with perhaps a hint of sexuality. The dominant sexual connotation the word carries today is our own contribution to its meaning. Sir Christopher Wren, architect of St. Paul’s Cathedral, would have been displeased had a seventeenth century critic called the cathedral “obscene,” but he was doubtless pleased when James II called the edifice “awful”—meaning it was solemnly impressive and sublimely majestic. Doubtless, too, modern English architects were less pleased when today’s critics assert that “[M]ost modern architecture in Britain was awful.”⁴²

Shakespeare’s facile use of metaphor and simile also renders his works an especially fertile source when attempting to show a word’s possible multiple meanings.⁴³ Invoking the

40. Charles Fried, *Sonnet LXV and the ‘Black Ink’ of the Framers’ Intention*, 100 HARV. L. REV. 751 (1987).

41. See BILL BRYSON, *MOTHER TONGUE* 69 (1990). This is likely an overstatement. Many words may have enjoyed currency, but they appeared *in writing* for the first time in the quartos and folios of his plays. See also JEFFREY MCQUAIN & STANLEY MALLESS, *COINED BY SHAKESPEARE: WORDS AND MEANINGS FIRST PENNED BY THE BARD* viii (1998) (putting the “most likely estimate” at approximately 1,500 new words).

42. See Paul Goldberger, *A Royal Defeat*, THE NEW YORKER, July 13, 1998, at 55. Prince Charles’ sentiments were as unambiguous in our times as Charles II’s comments were in his. Prince Charles referred to an addition to the National Gallery as “a monstrous carbuncle on the face of a much loved and elegant friend.” *Id.* at 52. In Shakespeare’s day, he might even have called it “obscene.”

43. “Shakespeare . . . used the term ‘inundation’ to convey the forced acquiescence of his British subjects to a seemingly overwhelming French invasion:

‘Now keep your holy word: go meet the French,
And from his holiness use all your power

poet's well-known license, Shakespeare may use the same word as verb, auxiliary verb, noun, and proper name.⁴⁴

Less influential, perhaps, but still useful is a passage suggesting judicial restraint when litigants request expansive remedies for narrow problems. In *Much Ado About Nothing* Don Pedro remarks:

What need to bridge much broader than the flood?
The fairest grant is the necessity.
Look, what will serve is fit.⁴⁵

Curiously, the "remedy" this passage presages is not one available under even the most expansive writ of equity. To win the fair Hero's love for the love-struck Claudio, Don Pedro proposes this remedy: he will assume a disguise at a masked ball, declare he is Claudio, woo Hero in Claudio's name, and win her love for Claudio. While untangling the aftermath of *Love's Labor's Lost* has long been a specialty of equity, a writ of love is still a notoriously elusive judicial remedy.⁴⁶

Strong drama demands dramatic tension, so it is not surprising for courts to lift passages from the same play to support opposing arguments. Courts often cite Portia's quality of mercy speech from *Merchant of Venice*⁴⁷ to temper the harsh

To stop their marches fore we are inflam'd.
Our discontented countries do revolt,
Our people quarrel with obedience,
Swearing allegiance and love to soul
To stranger blood, to foreign royalty.
This *inundation* of mistemper'd humour
Rests by you only to be qualified."

Wagner v. Director, 658 F. Supp. 1530, 1536-37 n.7 (C.D. Cal. 1987) (emphasis added) (involving a flood damage case quoting William Shakespeare. THE LIFE AND DEATH OF KING JOHN act 5, sc. 1, l. 15). "In fact, the sterile application of such definitions often misses the broader understanding of terms woven into the language and terminology of a homogeneous group." *Id.*; see also *Virgin Islands v. Zachary*, 24 V.I. 244, 247 (1989) (declaring that one may be "under the influence" after taking the Host at church on Sunday) cited in *Virgin Islands v. Tongue*, 34 V.I. 56, 60 (1996) (arguing that the phrase, when not further defined, does not give adequate notice of the proscribed motor vehicle driving behavior); WILLIAM SHAKESPEARE, SONNET 15. "The stars in secret influence comment." WILLIAM SHAKESPEARE, SONNET 15.

For a list of no fewer than thirty-one words that courts have turned to Shakespeare to help define, see Domanarski, *supra* note 4, at 321-22.

44. See the use of "will" in WILLIAM SHAKESPEARE, SONNETS 135-36 (1973).

45. WILLIAM SHAKESPEARE, MUCH ADO ABOUT NOTHING act 1, sc. 1, l. 414.

46. For some interesting attempts, see Peter Gudrich, *Law in the Courts of Love: Andreas Capellanus and the Judgements of Love*, 48 STAN. L. REV. 633 (1996).

47. WILLIAM SHAKESPEARE, THE MERCHANT OF VENICE act 4, sc. 1, l. 256.

application of rules with a touch of equity.⁴⁸ Indeed, some argue that the speech reflected the jurisdictional tensions at the time between common law courts (Shylock's position) and the courts of equity (Portia's position), and that the play may have influenced the ultimate triumph of equity over law in the 1616 case of *Glanville v. Courtney*.⁴⁹ Yet from the same scene courts cite this passage when declining the invitation "to do a great right, do a little wrong," and allow appealing facts to alter a rule compelling a harsh result:

Twill be recorded for a precedent,
And many an error, by the same example
Will rush into the state. It cannot be.⁵⁰

That is, hard cases make bad law.

Compare also this paean to "reputation" from *Othello*:

Good name in man and woman, dear my lord,
Is the immediate jewel of their souls.
Who steals my purse steals trash;
'tis something, nothing;
'twas mine, 'tis his, and has been slave to thousands;
But he that filches from me my good name
robs me of that which not enriches him,
And makes me poor indeed.⁵¹

This popular passage has been cited no fewer than fifty-two times.⁵² Judicial enthusiasm for this passage is curious, since the speaker, Iago, is one of the greatest liars and villains in all literature—described by Swinburne as "the most perfect

48. The phrases "quality of mercy" or "qualities of mercy" appear in twenty cases expounding equitable principles. Fifteen are cases from the United States Supreme Court.

49. W. NICHOLAS KNIGHT, *SHAKESPEARE'S HIDDEN LIFE*, 178-90, 280-86 (1973). See Kornstein is very dubious of Knight's conclusion. DANIEL J. KORNSTEIN, *KILL ALL THE LAWYERS? SHAKESPEARE'S LEGAL APPEAL* 89 (1994).

50. *Rand v. State*, 341 S.W.2d 9, 13 (Ark. 1960) (citing WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE* act 4, sc. 1, l. 296 in dissent where majority apparently was overly concerned with precedent); *Power, Inc. v. Huntley*, 235 P.2d 173, 180 (Wash. 1951) (citing Shakespeare's passage, the court states it cannot avoid its clear duty because of a claimed expediency, including subsequent financial chaos).

51. WILLIAM SHAKESPEARE, *OTHELLO, THE MOOR OF VENICE* act 3, sc. 3, l. 178.

52. See, e.g., *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 11 (1990); *Onasis v. Christian Dior*, 472 N.Y.S.2d 254, 260 (Sup. Ct. 1985), *aff'd*, 110 A.D.2d 1095 (1985); *Katz v. Superior Court*, 141 Cal. Rptr. 234, 244 n.11 (1977).

evildom, the most potent demi-devil,"⁵³ and by Harold Bloom as "uniquely equipped, by experience and genius, to entrap spirits greater than his own in a bondage founded upon their inner flaws."⁵⁴ Iago employs the lines to incite Othello, through lies and false innuendo, into an irrational, jealous and homicidal rage. So dissembling a villain seems an unlikely referent for reasoned judgment.

The counter passage, from the same play and character, has been cited only once. Reputation is:

an idle and most false imposition: oft got without merit, and lost without deserving.⁵⁵

Courts citing the same scene or the same play supporting opposing principles?—Recall the Devil and Scripture.

In addition to Shakespeare's newly minted words, many of his passages, like emancipated children, free themselves from their context and live independent lives. The sheer eloquence of a passage may insure its independence. In truth, Shakespeare's plays and characters are so subtly nuanced that, like fractals, study reveals layer upon layer of meaning, text and subtext. While some of these layers may be the labored product of literary critics, for whom believing is seeing, most of Shakespeare is far more subtle than the context-free use made of his words.

Because many opposing propositions find support in Shakespeare, it is not surprising that an apt reference to the Bard does not always carry the day in court. On the issue of whether unlimited punitive damages were barred by the Eighth Amendment, Associate Justice Sandra Day O'Connor found herself in the dissent despite her reference to Esculus' warning in *Measure for Measure*:

But I'll amerce you with so strong a fine

53. BLOOM *supra* note 6, at 453. For a similar passage from a more credible source, consider Mowbray's speech from *Richard II*:

The purest treasure mortal times afford
Is spotless reputation;—that away,
Men are but gilded loam, or painted clay
Mine honour is my life. Both grow in one:
Take honour from me, and my life is done.

WILLIAM SHAKESPEARE, *RICHARD II* act 1, sc. 1, l. 177.

54. BLOOM *supra* note 6, at 464.

55. WILLIAM SHAKESPEARE, *RICHARD II* at act 2, sc. 3, l. 266. "Reputation is that by which we are known and is the total sum of how we are seen by others. Character, more philosophically, is the inner man; it is what we really are, not what we are thought to be." *Taylor v. State*, 346 A.2d 718, 720 (Md. 1975).

That you shall all repent the loss of mine.⁵⁶

Justice Blackmun, writing for the majority, dismissed the weight of this reference with a quatrain of his own:

Though Shakespeare, of course
Knew the Law of his time
He was foremost a poet,
In search of a rhyme.⁵⁷

Perhaps Justice Blackmun felt vindicated. In the previous year, the majority had found support in a passage from Shakespeare in a judgment from which Blackmun dissented. Considering whether placing a screen between the accused and an alleged sexual assault victim comported with the Sixth Amendment right to confrontation, the majority turned to Shakespeare to support its holding that it did not. Hearing a dispute between two of his lords, Richard II commands:

Then call them to our presence. Face to face
And frowning brow to brow, ourselves will hear
The accuser and the accused freely speak.⁵⁸

This passage helped persuade the majority that the Sixth Amendment required some form of vis-à-vis confrontation.⁵⁹ Dissenting, Justice Blackmun argued that, by the time of the ratification of the Sixth Amendment, the right to confrontation had become congruent with the right of cross-examination.⁶⁰

In *King Lear, Edmund*, the illegitimate son of Gloucester, cries out, "Now, gods, stand up for bastards!"⁶¹ Edmund may or may not have persuaded the gods, but centuries later he helped persuade a majority of the United States Supreme Court. Striking down, on equal protection grounds, discrimination against illegitimates, Justice Douglas ended his opinion with a reference to Edmund's speech claiming his right to equal treatment.

Why 'bastard'? Wherefore "base,"
When my dimensions are as well compact,
My mind as generous, and my shape as true
As honest madam's issue? Why brand they us

56. *Browning Ferris Indus. v. Kelco Disposal*, 492 U.S. 257, 290 (1989).

57. *Id.* at 265. & n.7.

58. WILLIAM SHAKESPEARE, *RICHARD II* act 1, sc. 1, l. 15.

59. *See Coy v. Iowa*, 487 U.S. 1012, 1016 (1988).

60. *See id.* at 1029 & n.3 (Blackmun, J., dissenting).

61. WILLIAM SHAKESPEARE, *KING LEAR* act 1, sc. 2, l. 22.

With 'base,' With 'baseness, bastardy—base, base'⁶²

Justice John Harlan, dissenting, pointed out that this passionate claim for equal treatment came from a perfectly despicable character. Edmund spends the entire play plotting against his father and legitimate brother, with the result that Edmund's co-conspirators gouge out his father's eyes on stage.⁶³ Without Justice Harlan's guidance, the similar gap between Iago's sentiments on reputation, above, and Iago's character has yet to temper courts' enthusiasm for citing Iago's speech.

Courts also cite Shakespeare to add a sense of inevitability to their conclusions. Few human conditions have escaped the Bard's attention, so a citation suggests that there is nothing new in this litigation that has not been addressed hundreds of years ago: been there, done that.

Annoyed by counsel's failure to include citations to the relevant record, one court made an imaginative use of Shakespeare to chide the offending lawyer:

Somewhere in the *Merchant of Venice*, one of Shakespeare's characters is made to say: 'his reasons are as two grains of wheat hid in two bushels of chaff, you may seek all day ere you find them and when you have them they are not worth the search.'⁶⁴

Note that the court gave no citation to the passage, leaving to counsel the pleasure of winnowing the wheat from the chaff of *The Merchant of Venice* to find it. A less charitable court might have said only: "Somewhere one of Shakespeare's characters is made to say"⁶⁵

Of the many passages yet to find a home in an opinion, two stand out as strong candidates. Given the twentieth century enthusiasm for sexual harassment cases, it is surprising that no court has yet quoted Shakespeare's description of the plight of the victim when confronted by the sexual advances of authority in *Measure for Measure*. Lord Deputy Angelo offers Isabel, who is pleading with the Deputy for her condemned

62. See *Levy v. Louisiana*, 391 U.S. 68, 72 n.6 (1968) (citing WILLIAM SHAKESPEARE, *KING LEAR* act 1, sc. 2, l. 6).

63. See *id.* at 78 & n.3 (Harlan, J., dissenting).

64. *Kneale v. Kneale*, 67 So. 2d 233, 234 (Fla. 1953). See also examples *supra* note 18.

65. One needn't seek far. The actual cite is WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE* act 1, sc. 1, l. 118.

brother's life, the classic quid-pro-quo of harassers:⁶⁶

Isabel: [W]ith an outstretch'd throat I'll tell the world
aloud

What man thou art.

Angelo: Who will believe thee, Isabel?

My unsoil'd name, the austereness of my life,
My vouch against you, and my place i' the state,
Will so your accusation overweigh,
That you shall stifle in your own report
And smell of calumny. I have begun;
And now I give my sensual race the rein;
Fit thy consent to my sharp appetite;
Lay by all nicety and prolixious blushes,
That banish what they sue for; redeem thy brother
By yielding up thy body to my will.⁶⁷

Today one may doubt whether high "place i' the state" supports the same presumptions of either sexual propriety or credibility.

Shakespeare frequently commented on doubtful paternity, and courts often cite these passages.⁶⁸ Legitimacy was an is-

66. WILLIAM SHAKESPEARE, *MEASURE FOR MEASURE* act 2, sc. 4, l. 223. The passage has not escaped commentators. See KORNSTEIN, *supra* note 49, at 56-57.

67. WILLIAM SHAKESPEARE, *MEASURE FOR MEASURE* act 2, sc. 4, l. 223. One federal court cited this scene in holding that sexual favors bestowed on an official constitute "benefit" within the meaning of the relevant official misconduct statute. *People of Guam v. Camacho*, 103 F.3d 863, 867 (9th Cir. 1994).

68. WILLIAM SHAKESPEARE, *KING JOHN* act 1, sc. 1, l. 161 (quoted in *S.D.W. v. Holden*, 80 Cal. Rptr. 269, 271 (Ct. App. 1969); *Wareham v. Wareham*, 72 5 Cal. Rptr. 465, 471 (Ct. App. 1961)).

King John: Sirrah, your brother is legitimate;
Your father's wife did after wedlock bear him;
And, if she did play false, the fault was hers;
which fault lies on the hazards of all husbands
That marry wives.

Id.;

Zounds! I was never so bethump'd with words
Since I first call'd my brother's father dad.

Id. at act 2, sc. 1, l. 599;

When my dimensions are as well compact,
My mind as generous, and my shape as true,
As honest madam's issue? Why brand they us
With base?"

WILLIAM SHAKESPEARE, *KING LEAR*, act 1, sc. 2, l. 12;

It is a wise father that knows his own child.

WILLIAMS SHAKESPEARE, *THE MERCHANT OF VENICE* act 2, sc. 2, l. 102 (quoted in *Retirement Bd. of the Police Retirement Sys. of Kansas City v. Noel*, 652 S.W. 2d 874, 880 (Mo. 1983) (where the court rejected a man's belief that he, rather than

sue of considerable relevance in a system of primogenitor and hereditary peerage. Shakespeare's frequent, and somewhat cynical, references to it may also reflect his own fear of female sexuality.⁶⁹ One wonderful passage, however, seems to have escaped judicial notice. Comparing the disputed offspring's features to those of the father (the earliest form of DNA test) was perhaps more necessary in Shakespeare's time than today. In *The Winter's Tale*, the mother's friend confronts the doubting King Leontes with the child's resemblance to him, right down to the king's unpleasant frown:

Leontes: This brat is none of mine;
 It is the issue of Polixenes:
 Hence with it; and, together with the dam
 Commit them to the fire!
 Pauline: It is yours;
 And, might we lay the old proverb to your charge,
 'So like you, 'tis the worse.' Behold, my lords,
 Although the print be little, the whole matter
 And copy of the father; eye, nose, lip,
 The trick of's frown, his forehead, nay, the valley,
 The pretty dimples of his chin and cheek, his smiles,
 The very mold and frame of hand, nail, finger . . .⁷⁰

Only after five acts does Leontes finally accept the legitimacy of his child.

If "brevity is the soul of wit,"⁷¹ and there are those who "are reputed wise/For saying nothing,"⁷² this essay is already too long by half. Click on your web browser and enjoy perusing what courts have done with Shakespeare.⁷³ Perhaps "somewhere" in this collection is a grain of wheat to nourish your own work. In any event, you will have some fun in the search.

his paramour's husband, was the father of the child)).

69. See BLOOM, *supra* note 6, at 462.

70. WILLIAM SHAKESPEARE, *THE WINTER'S TALE* act 2, sc. 3, l. 159.

71. WILLIAM SHAKESPEARE, *HAMLET, PRINCE OF DENMARK* act. 2, sc. 2, l. 136. But apparently not when a brief with no citations is only three pages long. *State v. Eichstedt*, 567 A.2d 1237, 1241 (Conn. App. 1989).

72. SHAKESPEARE, *THE MERCHANT OF VENICE* act 1, sc. 1, l. 96.

73. *Santa Clara Law Review* (visited Mar. 8, 1999) <<http://www.scu.edu/lawreview>>