The Bahd of New England: Citing Shakespeare in the First Circuit

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By Eugene Morgulis

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I. Introduction

Legal scholars have spilt much ink analyzing the way in which the works of William Shakespeare addressed the practice and morality of law.¹ Despite all the discourse on the subject of the Law in Shakespeare, however, there has been very little on the subject of Shakespeare in the Law.² This is surprising, considering the fact that judges quote Shakespeare in their opinions more often than they do any author in history.³

A search for the word “Shakespeare”⁴ on the legal research website WESTLAW returns 1,262 federal and 1,745 state cases,⁵ including 53 cases in the United States Supreme Court. The present inquiry will focus on the First Circuit⁶ and the states therein,⁷ which display 113 and 77 such references, respectively. Of these 190 cases, 119 (76 in federal courts and 43 in state courts) actually refer to the person or the works of William Shakespeare. The remaining 71 cases, which are not discussed herein,

¹ See, e.g., Judge Richard Posner, LAW AND LITERATURE 90 (Harvard Univ. Press 1988); see also Ian Ward, Shakespeare, the Narrative Community, and the Legal Imagination, in LAW AND LITERATURE 117 (Michael Freeman and Andrew Lewis eds.) (Oxford Univ. Press 1999).


³ See infra Part IV; The Blue Book, familiar to all law students, even has a distinct citation form for Shakespeare, THE BLUE BOOK: A UNIFORM SYSTEM OF CITATION R.15.8(c)(iv), at 136 (Columbia Law Review Ass’n et al. eds., 18th ed. 2005). The judges discussed herein do not subscribe to a uniform method.

⁴ Searching for “William Shakespeare” would prove under inclusive, as, in citing, many simply attribute the work to “Shakespeare,” omitting the first name.

⁵ As of March 18, 2008.

⁶ The choice of the First Circuit as opposed to any other is based, in part, on the author’s personal geographic ties. This Circuit also ranks among the highest in citations of Shakespeare, following the Seventh Circuit’s 123 invocations, and the Second Circuit’s impressive 189. The Circuits with the fewest references are the Federal Circuit (with 56), the Eighth (with 53), and the Tenth (with 47).

⁷ The number of references to Shakespeare in the states that comprise the First Circuit are as follows: Maine 7, Massachusetts 29, New Hampshire 8, Puerto Rico 0, and Rhode Island 33.
contain either an individual or entity named Shakespeare\textsuperscript{8} or a reference to William Shakespeare in the facts of the case.\textsuperscript{9}

When looking at the vast number of opinions in nearly 250 years of First Circuit jurisprudence, 119 cases is a miniscule amount. This paper does not purport that there exists a rich, untapped vein of Shakespearean scholarship in First Circuit judicial opinions. To be clear, decisions discussing bankruptcy,\textsuperscript{10} narcotics trafficking,\textsuperscript{11} derivative actions,\textsuperscript{12} and trademark disputes\textsuperscript{13} reveal very little about Shakespeare and his work. Nor does this paper suggest, and the data do not support, the idea that judges are spuriously employing Shakespearean allusions to supplant the laws of this nation. Nonetheless, while these opinions do little to illuminate the finer points of the Bard’s plays and sonnets, they do afford an interesting and often amusing glimpse into the minds of the judges who author them. These references are not merely gaudy verbal flourishes; they are tools judges employ to add persuasive force to their decisions. A careful study of juridical discourse would be remiss to neglect them.

Part II of this paper compiles these references by year, judge, type of action, work referenced, location of reference in the opinion, and particular line quoted. Part III categorizes and analyzes the various themes evoked by judges’ employment of

\textsuperscript{8} See, e.g., Pure Distributors, Inc. v. Baker, 285 F.3d 150 (1\textsuperscript{st} Cir. 2002) citing to Fury Imports, Inc. v. Shakespeare Co., 625 F.2d 585, 588 (5th Cir.1980).

\textsuperscript{9} See, e.g., Burke v. City of Portland, 2000 WL 761799 at *8 (“[P]laintiff was obstructing the free passage of foot traffic on the sidewalk while he was reading Shakespeare, with a small sign beside him and a skillet in front of him.”).

\textsuperscript{10} See, e.g., In re Public Service Co. of New Hampshire, 884 F.2d 11 (1\textsuperscript{st} Cir. 1989).

\textsuperscript{11} See, e.g., U.S. v. Rodriguez, 215 F.3d 110 (1\textsuperscript{st} Cir. 2000).

\textsuperscript{12} See, e.g., In re Blinds To Go Share Purchase Lit., 443 F.3d 1 (1\textsuperscript{st} Cir. 2006).

\textsuperscript{13} See, e.g., L.L. Bean, Inc. v. Drake Publishers, Inc., 811 F.2d 26 (1\textsuperscript{st} Cir. 1987).
Shakespeare’s words. Lastly, Part IV speculates as to the reason why Shakespeare enjoys such prominence, looking for clues in the ways judges quote other authors.

II. General Observations

a. Years

Immediately evident, in looking at the data, is the fact that most references to Shakespeare have occurred since 1980. Between 1845 and 1979, judges within the First Circuit quoted or even mentioned the Bard in only 15 cases. Of the remaining 104 cases, 25 were in the 1980s, 49 in the 1990’s, and 30 were between 2000 and early 2008. The highest number of cases referencing Shakespeare in any two-year period was 14 in 1994 and 1995, followed by 11 in 1998 and 1999.\textsuperscript{14} In speculating as to why these references appeared so infrequently in the past, Domnarski points to Justice Jackson’s observation that, at one time, “a good literary style was evidence of poor legal craftsmanship.”\textsuperscript{15} Of course, while a number of highly respected modern judges, such as Richard Posner and Antonin Scalia, are known for their elegant and witty opinions,\textsuperscript{16} great judges of the past were not all immune to “good literary style.”\textsuperscript{17}

\textsuperscript{14} Perhaps not coincidentally, Shakespeare surfaced in a good deal of 1990s pop culture. 13 films during the 1990s (4 in 1996 alone) were based on the works of Shakespeare, including two different versions of both \textit{Hamlet} and \textit{Romeo and Juliet}. Shakespeare Movies, http://absoluteshakespeare.com/trivia/films/films.htm (last visited on April 5, 2008). Also, the film \textit{Shakespeare in Love} won the Academy Award for best motion picture in 1999. Awards for \textit{Shakespeare in Love}, Internet Movie Database, http://imdb.com/title/tt0138097/awards (last visited on April 5, 2008).

\textsuperscript{15} Domnarski, \textit{supra} note 2, at 323 quoting Letter from Justice Robert Jackson to Irving Dilliard, (August 17, 1938) from the Papers of Robert Jackson, Library of Congress, Box 8.


\textsuperscript{17} Justices Benjamin Cardozo and Oliver Wendell Holmes, Jr. come to mind. See, Brady Coleman, \textit{Lord Denning and Justice Cardozo: The Judge as Poet-Philosopher}, 32 RUTGERS L.J. 485, 486-78 (Winter 2001) (describing Cardozo’s style as “straightforward and plain, yet elegant and occasionally lyrical.”).
b. Judges

One judge emerges from the First Circuit and the states therein as the undisputed Shakespearean heavyweight. It should surprise no one familiar with First Circuit jurisprudence that this honor goes to Judge Bruce M. Selya of the United States Court of Appeals for the First Circuit. Judge Selya’s 34 cases referencing Shakespeare handily eclipse the 10 authored by the next most frequent citers of the Bard, Justice Robert G. Flanders, Jr. of the Rhode Island State Supreme Court. Judge Selya has also achieved distinction among judges in the Northeast for liberally peppering his opinions with obscure words such as philotheoparoptesism (the burning or boiling of heretics) and sockdolager (a final, decisive blow). Such juridical logorrhea has readers of his opinions reaching for Webster’s Dictionary as much as for Black’s.

c. Types of Cases

References to Shakespeare can be found in all manner of legal action from the common divorce to the murder case. Of the 119 First Circuit cases referencing

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18 In one case, May v. Penn T.V. & Furniture Co., Inc, 686 A.2d 96 (R.I. 1996), Judge Flanders quotes Shakespeare an unparalleled four times. The vast majority of other cases venture but one reference or quotation.

19 “I don’t believe there are obscure words -- just neglected ones.” Judge Bruce M. Selya, How Appealing’s 20 Questions, http://howappealing.law.com/20q/.

20 U.S. v. Sepulveda, 15 F.3d 1161, 1185 (1st Cir. 1993).

21 See, e.g., U.S. v. Jimenez, 512 F.3d 1, 4 (1st Cir. 2007).


23 See, e.g., Rosenberg v. Rosenberg, 595 N.E.2d 792, 793 (Mass.App.Ct. 1992) (Husband argued that former-wife did not need alimony, as her needs were met by the capital asset allocation. The court responded, “[t]he answer to that point may be King Lear’s cry, ‘O, reason not the need!’ Shakespeare, King Lear, Act II, sc. 2.’”).

5
Shakespeare, 24 are criminal, 7 deal with bankruptcy, 7 are civil rights actions under U.S.C. §1983, and the rest involve various civil claims such as defamation, personal injury, and breach of contact.

d. Works Referenced

Not only is there no pattern in the types of actions, in which judges cite Shakespeare, there is likewise no pattern in the particular works they cite. The most commonly referenced work is *Hamlet*, which has been mentioned or quoted in 24 cases. Next is *Romeo and Juliet*, mentioned in 16 cases, followed by *Macbeth*, which appears in 14. *The Merchant of Venice* has 9, while *King Lear* has 8. *The Second Part of King Henry IV* is referenced in 6 cases, but the *First Part of King Henry VI* is only referenced in 4. The tragedies of *Othello* and *Julius Caesar* join the histories of *King Richard II* and *King John* and the comedies of *A Midsummer Night’s Dream* and *All’s Well that Ends Well* in having 3 case references apiece. Each of *King Henry V*, *The Tempest*, *Much Ado About Nothing*, *As You Like It*, *Troilus and Cressida*, and *King Richard III* are mentioned in 2 cases. Finally, appearing in but one case each are *Twelfth Night*, *A Comedy of Errors*, *Measure for Measure*, *Love’s Labours Lost* (though mentioned 3 times therein), and *King Henry VIII*. Only three cases quote Shakespeare’s sonnets.

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24 State v. Reyes, 705 A.2d 1375, 1377 (R.I. 1998) (Opining on the evidentiary weight of defendant’s flight, the court stated, “in beating a hasty retreat from the place where he had so lately hovered over the slain Frias, Reyes ‘started like a guilty thing [u]pon a fearful summons.’” William Shakespeare, *Hamlet*, act I, scene i.)


26 Donworth v. Sawyer, 47 A. 521, 524 (Me. 1900) (fortunately, this was not a case concerning marital relations).

27 Almond v. R.I. Lottery Comm’n, 756 A.2d 186 (R.I. 2000) (“But by not enforcing the State Constitution’s bicameralism and presentment requirements in this case the Court risks reducing these provisions to little more than ‘bare ruined choirs where late the sweet birds sang.'” *Sonnet 73*); Situation
There is seemingly little correlation between facts of a case and the plot of the play quoted in it. For instance, one might expect that The Merchant of Venice, which deals primarily with the relationship between creditors and debtors, would naturally provide useful quotes for bankruptcy cases. However, in the 7 such cases citing Shakespeare, only two reference that particular play. The closest connection between legal action and plot has been in the quotation of Othello in defamation cases. In Nassa v. Hook-SupeRX, Inc., for example, Judge Flanders writes of one’s reputation as “an intangible but much-prized piece of personalty that Shakespeare dubbed ‘the immortal part’ of each person.” Judge Selya takes a slightly different approach in Kassel v. Gannett Co., Inc. Noting the uncertainty inherent in calculating damages in defamation suits, he cites Othello as proposing the contrary, writing “cf. W. Shakespeare, Othello, Act III, sc. iii, 11. 155-61 (‘he that filches from me my good name [r]obs me of that which not enriches him [a]nd makes me poor indeed.’).”

Management Systems v. ASP Consulting Group, 535 F.Supp.2d 231, 248 n.11 (D. Mass. 2008) (quoting the entirety of Sonnet 18, which begins “Shall I compare thee to a summer’s day?”); and Ex parte Suzanna, 295 F. 713, 715 (D. Mass. 1924) (quoting Sonnet 116 on the meaning of marriage: “Let me not to the marriage of true minds / Admit impediments; love is not love / Which alters when it alteration finds.”).

Both opinions were written by Judge James E. Yacos. In re Keniston, 60 B.R. 742, 744 (D. N.H. 1986) (“The record of the trial of this matter, involving the literal language of the ‘document you signed’ as opposed to the underlying intent of the parties, has a good bit of the flavor of Shakespeare’s ‘The Merchant of Venice’ in that regard.”); In re Durrett, 187 B.R. 413, 418 n.10 (D. N.H. 1995) (“It is not clear that Congress intended by chapter 11 to give creditors a legal right in that body [of the debtor]. Cf. ‘Merchant of Venice’ by William Shakespeare.”).

790 A.2d 368 (R.I. 2002).

Id. at 372. The full line is, “Reputation, reputation, reputation! O, I have lost my reputation! I have lost the immortal part of myself, and what remains is bestial.” WILLIAM SHAKESPEARE, OTHELLO, act 2, sc. 3.

875 F.2d 935 (1st Cir. 1989).

Id. at 948.
e. Locations of References

Gleicher, writing about references to Shakespeare in Supreme Court opinions, observes that justices use them “much in dissenting opinions, where rhetorical flourish is especially suitable.”33 The same cannot be said of the judges within the First Circuit. Of all the references to Shakespeare, only 3 appear in dissenting opinions.34 Nor are these references mostly demoted to mere footnotes. Most appear in the bodies of opinions. Moreover, a good number have prominent positions in introductions (9)35 and conclusions (12).36

Judges within the First Circuit seem especially fond of invoking the Bard at the opening of a case, putting their egos aside to give Shakespeare the very first word.37 “[O]nce more unto the breach, dear friends, once more,”38 writes Judge Selya, as he embarks through the perilous minefield of administrative law.39 “Oft expectation fails, and most oft there, [w]here most it promises,”40 begins Judge Lindsay, granting a motion

33 Gleicher, supra note 2, at 327.
35 See, e.g., Nani v. Vanasse, 2003 WL 24274579 at *1 (R.I.Super. 2003) (“As the Court commences its examination of the record, it is reminded of William Shakespeare’s observation that ‘Some Cupid kills with arrows, some with traps.’ William Shakespeare, Much Ado About Nothing, a 3, sc. 1.”); see also, Long v. Atlantic PBS, Inc., 681 A.2d 249, 250 (R.I. 1996) (“Two former business associates and the corporation that once employed them, all now claiming to be ‘more sinned against than sinning,’ . . . . William Shakespeare, The History of King Lear, scene 10, line 60.”).
36 See, e.g., In re San Juan Dupont Plaza Hotel Fire Litigation, 907 F.2d 4 (1st Cir. 1990) (J. Selya concurring) (“All’s well that ends well.”); see also, In re Advisory Opinion to the Governor, 732 A.2d 55 (R.I 1999) (“Our [legal] revels now are ended.” Shakespeare, The Tempest, act 4, sc. 1.”).
37 Shakespeare has the opening line of 13 cases, 7 belonging to Judge Selya.
38 WILLIAM SHAKESPEARE, KING HENRY THE FIFTH, act 3, sc. 1.
39 Strickland v. Commissioner, Maine Dept. of Human Services, 96 F.3d 542, 544 (1st Cir. 1996).
40 WILLIAM SHAKESPEARE, ALL’S WELL THAT ENDS WELL, act 2, sc. 1.
to dismiss in a case involving the alleged promise of a lifetime employment contract.\textsuperscript{41}

Regardless of whether this is effective or distracting, such opening lines set a rather high bar for the rest of the opinion. As Horace advised, “[b]egin your work with modest grace and plain, [n]ot like the bard of everlasting strain.”\textsuperscript{42}

\textit{f. Lines Quoted}

Although \textit{Hamlet} is the most quoted play, there exists not a single reference to its most famous line, “[t]o be, or not to be?”\textsuperscript{43} Rather, the most frequently quoted line is Juliet’s musing, “What's in a name? That which we call a rose, by any other name would smell as sweet,”\textsuperscript{44} which appears in 13 cases, accounting for all but 3 references to \textit{Romeo and Juliet}.\textsuperscript{45} Quotations of \textit{Macbeth} similarly favor one line. In this case, it is the observation that “[p]resent fears are less than horrible imaginings,”\textsuperscript{46} which accounts for 8 of 14 references to \textit{Macbeth}.\textsuperscript{47} In each case, the quote compliments the Court’s refusal

\begin{footnotes}
\item[43] \textit{WILLIAM SHAKESPEARE, HAMLET}, act 3, sc. 1.
\item[44] \textit{WILLIAM SHAKESPEARE, ROMEO AND JULIET}, act 2, sc. 2; Domnarski makes the same observation. Domnarski, \textit{supra} note 2, at 324.
\item[45] Of the other three cases, one merely cites \textit{Romeo and Juliet} as an example of a written work. Matthews v. Freedman, 157 F.3d 25, 27 (1\textsuperscript{st} Cir. 1998). One cites the titular pair as an example of lovers who would violate modern statutory rape laws. U.S. v. Cadieux, 500 F.3d 37, 46 (1\textsuperscript{st} Cir. 2007). And one opens with the line “parting is such sweet sorrow.” Vega v. Kodak Caribbean, Ltd., 3 F.3d 476, 478 (1\textsuperscript{st} Cir. 1993) (quoting \textit{WILLIAM SHAKESPEARE, ROMEO AND JULIET}, act 2, sc. 2).
\item[46] \textit{WILLIAM SHAKESPEARE, MACBETH}, act 1, sc. 3. It appears that Judge Selya has a monopoly on this line.
\item[47] It appears that Judge Selya has a monopoly on this line.
\end{footnotes}
to engage in conclusory speculation about hypothetical harms.\textsuperscript{48} Though a few lines appear more frequently than others, judges do use a rich and varied assortment of Shakespearean quotations, as explored in the next Part.

III. Common Themes

Others who have written about the use of Shakespeare in judicial opinions attempt to place the various references into distinct categories. Domnarski, for example, separates them into the following: ornamental quotations, quotations invoked because of their relationship to the opinion, quotations used to jab litigants or judges who disagree, quotations which are misused or seem out of place, and quotations which are aptly used.\textsuperscript{49} Gleicher takes a much broader view, separating the references into coincidences of name (which are not actually references to William Shakespeare), two categories for references to Shakespeare generically as a man or a writer (which are not very interesting), and one final category for references as sources of evidence.\textsuperscript{50} The fallacy of creating such categorization schemes is in aspiring to place the references into mutually exclusive boxes. For instance, it is absurd to say that a line from Shakespeare placed into a 21\textsuperscript{st} century judicial opinion is only sometimes ornamental.\textsuperscript{51} Gleicher is more careful about his scheme, but so much so that he relegates all the interesting quotations into a single

\textsuperscript{48} See, e.g., Dudley v. Hannaford Bros. Co., 333 F.3d 299, 310 (1\textsuperscript{st} Cir. 2003) (“Hannaford's . . . prediction that the ruling will promote a host of social ills seems farfetched. \textit{Cf.} W. Shakespeare, \textit{Macbeth}, act I, sc. 3, l. 134 (1606) (warning that '[p]resent fears are less than horrible imaginings’’); see also, Inmates of Suffolk County Jail v. Rouse, 129 F.3d 649, 662 (1\textsuperscript{st} Cir. 1997) (“This is neither the time nor the place to press an inherently speculative claim of harm to come. . . Quite often, '[p]resent fears are less than horrible imaginings.' William Shakespeare, \textit{Macbeth}, act 1, sc. 3 (1605)’”). It is curious that the same line is presented as both supporting and contradicting (as evidenced by the signal \textit{cf.}) the same point.

\textsuperscript{49} Domnarski, supra note 2, at 318.

\textsuperscript{50} Gleicher, supra note 2, at 328.

\textsuperscript{51} It is always ornamental!
group. Instead of squeezing them into ill-fitting categories, it is more instructive to look at the various ideas the quotes mean to convey, their common thematic elements.

a. Support

A judge’s citation of a particular line may express support for a contention. This is most clearly visible in the context of definitions, where a line from Shakespeare illuminates the usage of a term. Both Gleicher and Domnarski make this observation. Gleicher writes that “[f]our [Supreme Court] cases use Shakespeare as an authority to establish the meaning of legal terms,” citing *Magone v. Heller*\(^{52}\) (defining “expressly”), *Coy v. Iowa*\(^{53}\) (defining “confront”), *Lilly v. Virginia*\(^{54}\) (also defining “confront”), and *Browning-Ferris Industries v. Kelco Disposal, Inc.*\(^{55}\) (defining “fine”).\(^{56}\) Domnarski, looking at a broader spectrum of cases, likewise observes that Shakespeare has helped define such words as “conspire,” “murder,” “inundation,” “shuttle,” “contaminate,” and “daylight,” among many others.\(^{57}\) In the First Circuit, only eight cases use Shakespeare in connection with construing a word’s meaning. For instance, discussing the scope of “contaminate,” a Court writes, “[a] thing may be contaminated when it is corrupted by the touch or contact of an external object, even though it does not itself change in form or substance. ‘Shall we now contaminate our fingers with base bribes?’”\(^{58}\)

\(^{52}\) 150 U.S. 70 (1893).


\(^{56}\) Gleicher, *supra* note 2, at 333.

\(^{57}\) Domnarski, *supra* note 2, at 321 (citations omitted).

Commonwealth v. Deberry, the Court references the actor Bottom’s exchange about stage scenery from A Midsummer Night’s Dream in attempting to divine the elements of a wall: “Some man or other must present Wall; and let him have some plaster, or some loam, or some rough-cast about him, to signify wall; or let him hold his fingers thus, and through that cranny shall Pyramus and Thisby whisper.”

It is important not to overstate the persuasive force that judges expect from these quotations. A judge will not cite Shakespeare for lack of other sources, and unwarranted citation often draws skepticism. For instance, Justice O’Connor, in a partial dissent, supports the argument that the 8th Amendment’s use of the word “fine” encompasses private civil damages by referencing Shakespeare’s verse:

“I have an interest in your hate's proceeding,
My blood for your rude brawls doth lie a-bleeding;
But I’ll amerce you with so strong a fine,
That you shall all repent the loss of mine.”

Justice Blackmun, writing for the majority, retorted:

“Though Shakespeare, of course,
Knew the law of his time,
He was foremost a poet,
In search of a rhyme.”


61 Browning-Ferris, 492 U.S. at 290 (O’Connor, J. dissenting in part) (quoting WILLIAM SHAKESPEARE, ROMEO AND JULIET, act 3, sc.1) (emphasis added).

62 Id. at 265 n. 7; see also Gleicher, supra note 2, at 334.
In other words, while the drafters of the 8th Amendment and Shakespeare all chose their words carefully, they had quite different goals. Late-16th century poetry should not carry greater legal significance than the original meaning the founders penned 200 years later. Within the First Circuit, too, a judge’s overuse of Shakespeare may occasionally draw ire from the rest of the bench. In In re Advisory Opinion to the Governor, the majority gently reminds a dissenting judge, who invokes Shakespeare numerous times, that the Bard’s “unparalleled literary talents were not matched by his exposition of political or jurisprudential theory.” To drive the point home, the majority points out that Shakespeare wrote his famous soliloquy glorifying England (containing the line: “This blessed plot, this earth, this realm, this England”) at a time when the nation was an imperial autocracy.

Aside from a few incidents, judges are mindful of the evidentiary limitations of Shakespearean verse and most often employ it only as rhetorical support for general axiomatic propositions. It is not as if a judge (or her clerk) needs to scour pages of Shakespeare to find support for the idea that flight from the authorities might evidence guilt. Rather, the quotations come as afterthoughts, meant to show that the proposition forwarded is not merely the musing of a disconnected judge, but a universal truth. The most common example is the use of Juliet’s “What’s in a name?” line to support the idea that artificial nomenclature says little about an object’s substance. Justice Robert J.

64 Id. at 67.
65 Id. (quoting WILLIAM SHAKESPEARE, KING RICHARD II, act 2, sc.1).
67 WILLIAM SHAKESPEARE, ROMEO AND JULIET, act 2, sc. 2.
Cordy employed the line in his separate advisory opinion regarding same-sex marriage in Massachusetts, in which he disagreed with the majority’s contention that a system creating a divide of marriage for male-female couples and civil unions for same-sex couples was discriminatory.\textsuperscript{68} “The insignificance of according a different name to the same thing has long been recognized,” he wrote, citing Juliet’s lament for support.\textsuperscript{69} Another example of a judge using Shakespeare to provide rhetorical emphasis comes from \textit{United States v. Rodriguez},\textsuperscript{70} in which Judge O’Toole writes, “[t]here is no doubt that the probative value of evidence could be attenuated by the passage of time.”\textsuperscript{71} As support, he cites not only precedent, but also Prince Hal’s rebuke to Falstaff: “Presume not that I am the thing I was; For God doth know, so shall the world perceive, That I have turn’d away my former self; . . . .”\textsuperscript{72} In another case, Judge Mark L. Wolf, in upholding the suppression of the victim’s bloody clothing, suggests that a jury could become overly emotional when presented with such evidence.\textsuperscript{73} Noting that “[d]isplay of the clothing of the dead is an age-old strategy for inciting a desire for revenge,” he quotes at length from Marc Anthony’s eulogy of Caesar, in which he displays the slain emperor’s blood-stained toga to inflame the mob, which shouts in perfect unison, “Revenge! About! Seek! Burn!

\begin{itemize}
\item \textsuperscript{68} \textit{In re} Opinions of the Justices to the Senate, 802 N.E.2d 565, 572 (Mass. 2004) (Cordy, J. writing separately)
\item \textsuperscript{69} \textit{Id.}; for other representative examples, see S.E.C. v. SG Ltd., 265 F.3d 42, 47-48 (1\textsuperscript{st}. Cir. 2001) and Votolato v. Merandi, 747 A.2d 455, 460 n.3 (R.I. 2000).
\item \textsuperscript{70} 215 F.3d 110 (1\textsuperscript{st} Cir. 2000).
\item \textsuperscript{71} \textit{Id.} at 120.
\item \textsuperscript{72} \textit{Id.} at 120 n.11 (quoting \textsc{William Shakespeare}, \textit{The Second Part Of King Henry IV}, act 5, sc. 5)
\item \textsuperscript{73} U.S. v. Sampson, 335 F.Supp.2d 166 (D. Mass. 2004).
\end{itemize}
Fire! Kill! Slay! Let not a traitor live!”

b. Attitude

Often, judges use references to Shakespeare not to support a given proposition, but to frame a party or argument in a way that suggests the judge’s attitude toward it. These do not lend much persuasive force, but they do characterize their subject, summarizing the judge’s disposition and lending rhetorical emphasis. The meaning of some is quite conspicuous and painfully obvious. For example, when a decision opens with the line, “the dispute . . . can be described as ‘much ado about nothing,’” the plaintiff’s attorney should take it as a cue to have a seat before reading further. In many cases, the judge uses these kinds of quotations to say what she cannot. For example, in May v. Penn T.V. & Furniture Co., Inc., Judge Flanders seems so offended by the suggestion that a joint answer could waive another party’s defect of service of process defense, that he delivers a Shakespearean tongue-lashing: “The world is still deceived with ornament. In law, what plea so tainted and corrupt [b]ut, being seasoned with a gracious voice, [o]bscures the show of evil? . . .There is no vice so simple but assumes [s]ome mark of virtue on his outward parts.” Later in the opinion, Judge Flanders offers more of the Bard’s words, chiding the argument as “falser than vows made in wine.” The most direct example of this theme is Judge Lagueux’s admonishment,

74 Id at 185 n.9 (quoting WILLIAM SHAKESPEARE, THE TRAGEDY OF JULIUS CAESAR, act 3, sc.2).


76 686 A.2d 95 (R.I. 1996).

77 Id. at 96 n.2 (quoting WILLIAM SHAKESPEARE, THE MERCHANT OF VENICE, act 3, sc. 2).

78 Id. at 97 (quoting WILLIAM SHAKESPEARE, AS YOU LIKE IT, act 3, sc. 5).
“[w]ith apologies to Shakespeare, defendants' tale is ‘full of sound and fury, in the end signifying nothing.’” It is an amusing way to use the line, made infinitely more amusing when the reader realizes what the judge graciously omitted.

Other references are more subtly executed. In State v. Shanahan, Judge Sidney W. Wernick describes the defendant’s act of washing the victim’s blood off of himself:

“Such effort to conceal, by removing, the existence of bloodstains on the person . . . is enough to generate probable cause to believe that this . . . indicat[ed] guilt.” The Judge sarcastically adds, “[a] little water clears us of the deed.” By quoting Macbeth in this context, he effectively incorporates the whole of play, alluding to the idea that the mere removal of blood does not exonerate the murderer. The Judge casts the defendant as Lady Macbeth, who foolishly imagines that washing Duncan’s blood from Macbeth’s body will remove the taint of murder. Yet, her action, like the defendant’s, most certainly does not “clear the deed.” Macbeth’s murder haunts him, literally, later in the play, and Lady Macbeth’s guilt consumes her when she understands that no amount of cleaning will rid the stain of murder. With a simple quote, Judge Wernick invokes the

79 Zahn v. Yucaipa Capital Fund, 218 B.R. 656, 661 (D. R.I. 1998) (quoting WILLIAM SHAKESPEARE, MACBETH, act 5, sc. 5) It is unclear why the judge added the words “in the end.”

80 The actual quotation reads: “It is a tale told by an idiot, full of sound and fury, signifying nothing.” WILLIAM SHAKESPEARE, MACBETH, act 5, sc. 5 (emphasis added).

81 404 A.2d 975 (Me. 1979).

82 Id. at 981.

83 Id. at 982 n.8 (quoting WILLIAM SHAKESPEARE, MACBETH, act 2, sc. 2).

84 WILLIAM SHAKESPEARE, MACBETH, act 2, sc. 2 (“How easy it is then!”).

85 See id. at act 3, sc. 4.

86 See id. at act 5, sc. 1 (“Out, damn'd spot! out, I say!”).
timeless principle that once a crime attaches itself to one’s person, one cannot escape justice by washing it away.

c. Humor

“The mountains laboured with prodigious throes,
And, lo! a mouse ridiculous arose.”

The juxtaposition of the magnificent and the mundane is a theme unavoidable in most instances of a court’s quotation of Shakespeare. The Bard’s flowery poetry is out of place among the everyday interactions of modern life, and even more so when those interactions verge on the illicit. The contrast is humorous and even, at times, sarcastic. A wonderful demonstration of this effect comes from Judge Selya’s opinion in United States v. Polito. The facts were these: Defendant John Polito suffered a great heartbreak at the hands of Ms. Nicky French, who had absconded to parts unknown with a rival suitor. Desperate for information regarding her whereabouts, Mr. Polito turned to Agent Al Keaney of the Drug Enforcement Administration (DEA), who, while no doubt sympathetic, could not provide the information Mr. Polito sought. Hoping to get into Agent Keaney’s good graces, Mr. Polito took it upon himself to ensnare a drug dealer, anticipating some form of quid pro quo reciprocation. Accordingly, Mr. Polito

87 Horace, supra note 42, at ls.199-200.
88 856 F.2d 414 (1st Cir. 1988).
89 Id. at 415 n.2.
90 Id. at 416.
91 Id. at 417 (defendant stated at trial, “My only motivation was to find out information - to find out a drug dealer so I could get to Al Keaney and get information about Nicky.”)
set up three cocaine transactions, for which he was indicted and ultimately found guilty. It is against this background that Judge Selya sighs, “For aught that I could ever read, [c]ould ever hear by tale or history, [t]he course of true love never did run smooth.”

In casting the case in Shakespearean terms, Judge Selya transforms Polito, a cocaine trafficker, into one of the Bard’s romantic heroes, wandering the streets of Boston, his heart cleft in twain over the loss of fair Rosaline – pardon – Nicky. Giving Polito’s tribulations a Shakespearean spin does not make him more noble or sympathetic. It makes him farcical. Judge Selya achieves a similar effect in United States v. Graciani. After noting that the defendant attempted to cheat his buyer by substituting sugar for crack-cocaine, he adds, “[h]onor, even among thieves, may all too often be, in the bard’s phrase, ‘a mere scutcheon.’”

Other citations are less sarcastic, but humorous nonetheless. “What's in a name?” begins O’Connell v. Bruce. “[d]oes a municipal enactment smell as sweet legally whether it is called a resolution, an ordinance, or, for that matter, by any other name?” The Court ultimately resolved that, in the law of municipal procedure as in true love,

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92 The Court found that Polito did not partake in the illegal activity at the inducement of the DEA, and that he kept the profits from the illegal transactions. Id. at 415-16.

93 Id. at 415 n.2 (quoting WILLIAM SHAKESPEARE, A MIDSUMMER NIGHT'S DREAM, act 1, sc. 1)

94 “Why, then, O brawling love! O loving hate! O any thing, of nothing first create!” WILLIAM SHAKESPEARE, ROMEO AND JULIET, act 1, sc. 1.

95 61 F.3d 70 (1st Cir. 1995).

96 Id. at 73 n.2 (quoting WILLIAM SHAKESPEARE, THE FIRST PART OF KING HENRY IV, act 5, sc. 1).

97 710 A.2d 674 (R.I. 1998).

98 Id. at 675 (paraphrasing WILLIAM SHAKESPEARE, ROMEO AND JULIET, act 2, sc. 2).
substance triumphs over appellation. In a case involving an illegally-kept miniature horse, Judge Stephen J. Fortunato, Jr. characterizes Sonny, the lilliputian equine, in the following terms:

“When Shakespeare’s Richard III cried out to his deity and the fates to supply him with a horse in return for his kingdom, if Sonny (or one of his ancestors) had appeared from the underbrush into the clearing, the distraught king surely would have uttered an Anglo-Saxon expletive that would make an Elizabethan audience blush and then fallen on his sword.”

Many of these quotations are wholly unnecessary and serve as window-dressing for the opinion. They are playful, silly even. Perhaps aware of this departure from the august role of the adjudicator, some judges begin their references with hesitation. “If I may build on Shakespeare,” the Court politely begins in *Ricci v. Key Bancshares of Maine, Inc.*, continuing, “in court desperate diseases are not to be relieved by desperate appliances.” A few judges even apologize to the Bard himself, beginning their invocations “[w]ith apologies to William Shakespeare. . . .”

d. Perspective

There are times when Shakespeare does not seem out of place. In instances where the facts of a case are quite poignant and human, a word from the Bard seems appropriate

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99 Id.


102 Id. at 377-78 (quoting WILLIAM SHAKESPEARE, HAMLET, act 4, sc. 3); see also, In re Public Service Co. of New Hampshire, 99 B.R. 155, 175 n.11 (N.H. Bkrtcy. Ct. 1989) (paraphrasing WILLIAM SHAKESPEARE, THE FIRST PART OF KING HENRY IV, act 3, sc. 1) (“In the present case I would be bold to paraphrase Shakespeare slightly: . . . ‘I can call Plans forth from the vasty Deep of my computer’s memory bank.’”).

103 See 218 B.R. at 661; see also 1998 WL 34100601 at *1.
in their context. When the subject matter meets the eloquence of the prose, the result is not sarcastic, but sincere and noble. One such case is *Barreto Rivera v. Medina*,\(^4\) which involves an action under § 1983 for excessive force in the shooting of Ortega by police officer Medina.\(^5\) The men were fighting, in part, over the affections of Ortega’s wife, who Medina accused Ortega of physically abusing.\(^6\) Though Ortega was unarmed, Medina pulled his service weapon and fired, killing him.\(^7\) In granting summary judgment for the defendant, Judge Pieras holds that Medina was not acting under color of law when he shot and killed Ortega.\(^8\) He writes that their anguished relationship and ultimate altercation were personal, solemnly adding, “[h]ow all the other passions fleet to air, [a]s doubtful thoughts, and rash despair, [a]nd shuddering fear, and green-ey’d jealousy.”\(^9\) The quote works well because it humanizes the judgment. It reminds the reader that the emotional conflict that led to Ortega’s death is universal. Far from the stoic council that renders a decision from on high, the Court, in invoking Shakespeare, becomes sympathetic and human.

Another case showcasing apt usage of Shakespearean quotation is *District Attorney for Suffolk District v. Watson*,\(^10\) ruling on a motion for declaratory judgment on the constitutionality of the newly enacted Massachusetts capital punishment statute.

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\(^5\) *Id.* at 29.

\(^6\) *Id.* at 30.

\(^7\) *Id.*

\(^8\) *Id.* at 33.

\(^9\) *Id.* (quoting **W**ILLIAM **S**HAKESPEARE, **T**HE **M**ERCHANT OF **V**ENICE, act 3, sc. 2).

\(^10\) 411 N.E.2d 1274 (Mass. 1980).
Chief Justice Hennessey takes his cues from Supreme Court history and local jurisprudence, stating that imposition of the death penalty runs contrary to Article 26 of the Massachusetts Constitution, as it violates the State’s standards of decency. In his concurrence, Justice Liacos echoes Chief Justice Hennessey’s reasoning, but looks further to Aristotle, Sir Francis Bacon, Kant, Milton, and the Bible for guidance regarding the nature of death. He gives Shakespeare three nods as well, two from Measure for Measure and one from Hamlet. As discussed earlier, Shakespeare cannot offer much assistance in interpreting the language or intent of a statute. Judges do not use Shakespeare in this (or any other) context to describe the law. Instead, they find him effective in reminding the reader that these are more than just sterile words on a page. In these cases, judges quote Shakespeare to inject a sense of universality into the opinion, displaying its existence within the theater of human experience.

111 See MA CONST. Pt. 1, art. 26 (amended in 1982 to add that “[n]o provision of the Constitution, however, shall be construed as prohibiting the imposition of the punishment of death.” Id., art. 116).

112 Id. at 655-60.

113 Id. at 675 (Liacos, J., concurring).

114 Id. at 679-81 n.7-14. The use of Kant is odd, considering the philosopher’s position that some murders require capital punishment. See Eric Blumenson, Killing in Good Conscience: What's Wrong with Sunstein and Vermeule’s Lesser Évil Argument for Capital Punishment and Other Human Rights Violations?, 10 N. CRIM. L. REV. 210 n.13 (Spring 2007) (referencing Immanuel Kant, METAPHYSICS OF MORALS 98 (Mary Gregor ed. & trans., 1996)). The Bible, likewise is an odd choice, as it mandates capital punishment for crimes including murder, insulting or striking one’s father, and kidnapping (Exodus 21:12-17), not to mention adultery, incest, and male homosexuality (Leviticus 20:10-16).

115 411 N.E.2d at 680 n.10, 11, 13.

116 Id. (“Ay, but to die, and go we know not where; To lie in cold obstruction and to rot; This sensible warm motion to become [a] kneaded clod; and the delighted spirit [t]o bathe in fiery floods, or to reside [i]n thrilling region of thick-ribbed ice; To be imprison’d in the viewless winds, And blown with restless violence round about [t]he pendent world ....” and “The weariest and most loathed worldly life, that age, ache, penury and imprisonment, can lay on nature is a paradise, to what we fear of death.” WILLIAM SHAKESPEARE, MEASURE FOR MEASURE, act 3, sc.1.)

117 Id. (“[T]he dread of something after death – [t]he undiscover'd country from whose bourn [n]o traveller returns. . . .” WILLIAM SHAKESPEARE, HAMLET, act 3, sc.1)
IV. Why Shakespeare?

None of the themes discussed above require that Shakespeare be the author to evoke them. Yet, as noted earlier, judges cite Shakespeare more often than any literary figure in history. Not only does he beat out his contemporaries, but also authors who might have more relevant insights into modern life. One could simply say that Shakespeare enjoys such prominence in judicial opinions because he is the most prolific writer of the English language. Indeed, dictionaries define the term “Shakespeare” as “[a] person comparable to Shakespeare, esp[ecially] being pre-eminent in a particular sphere.”

Furthermore, many libraries and book stores separate Shakespeare from other authors, placing his work in its own section. Still, disposing of the question in such manner is highly unsatisfactory, and a deeper inquiry seems warranted.

a. Possible Explanations

Domnarski offers some explanations, writing that Shakespeare is the “preeminent writer on the issues of fairness and justice,” and, “[m]ore than any other writer in our language Shakespeare has examined the way people live in the real world.”

The first observation provides little insight, whereas the second does not withstand close scrutiny. For instance, John Updike has also produced a large body of work, examining the way which people live in the real world. His work arguably reflects life more accurately than Shakespeare’s world of kings, witches, and ghosts, and yet, Updike is quoted in only two

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118 Christopher Marlowe, for example, is referenced (not even quoted) but once in all jurisprudence. Lee v. Runge, 404 U.S. 887, 892 (Douglas, J., dissenting).


120 Domnarski, supra note 2, at 318.

121 Id. at 350.
federal cases. Other authors such as Ernest Hemingway and Charles Dickens, both illustrious chroniclers of human drama, are similarly neglected.

Another possible explanation suggested by Domnarski, is that “[m]ore than any other writer, [judges] turn to Shakespeare for help in their quest to be recognized and to endure.” The extent to which this is true, however, is unclear. Surely judges expect to be read, but they cannot think that occasionally citing Shakespeare, amusing though it may be, will infuse their opinions with timelessness beyond their substance. Those judges that have endured throughout legal history have not staked their prominence on offhand literary references. This brings up another interesting question: For whom are these references intended? Are the judges playing to an audience or writing for their own amusement? While it is admittedly speculative, a hard look at this assortment of references and quotations points at least as much to the latter as to the former.

b. Citation of Other Authors

Rather than speculate about the nature of Shakespearean citation in and of itself, it is instructive to explore how judges cite other authors as well. Though none appear as

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123 Hemingway appears in two First Circuit cases. See Eagle Eye Fishing Corp. v. U.S. Dept. of Commerce, 20 F.3d 503, 504 n.1 (1st Cir. 1994) (the case involved a fine for the possession of a marlin tail, which Judge Selya describes in Hemingway’s words: “higher than a big scythe blade and a very pale lavender above the dark blue water.” Ernest Hemingway, The Old Man and the Sea 99 (Chas. Scribner’s Sons 1952)); see also, McGuire v. Reilly, 122 F.Supp.2d 97, 104 n.11 (D. Mass. 2000) (referencing Hemingway’s short story Hills Like White Elephants).

124 Dickens appears in 11 First Circuit cases. See, e.g. Chief Judge Hornby’s admonishment: “If the law supposes that, . . . the law is a ass – a idiot [sic].” Bissell v. Breakers By-The-Sea, 7 F.Supp.2d 60, 61 (D. Me. 1998) (quoting Charles Dickens, The Adventures of Oliver Twist (Oxford Univ. Press 1987)).

125 Domnarski, supra note 2, at 348.
often as Shakespeare, some clearly rise above the rest. Mark Twain, though quoted only a handful of times within the First Circuit,\textsuperscript{126} appears in over 500 federal cases.\textsuperscript{127} Lewis Carroll, too, enjoys over 800 references in all federal cases, though only 15 in the First Circuit. He is most often cited to characterize a party’s argument as circular, paradoxical, or altogether nonsensical: “To say that a misrepresentation is immaterial because the culprit could have accomplished the same result by breaking yet another law is a proposition more suitable to Lewis Carroll than to the lexicon of federal statutory interpretation.”\textsuperscript{128} Both Twain and Carroll are prominent literary figures, so their frequent citation makes sense. What is puzzling is why figures such as Dickens and Hemingway, who are at least as prominent (if not more so), appear so infrequently.\textsuperscript{129} One thing seems clear: quality of authorship does not guarantee citation.

As noted above, judges employ some of Shakespeare’s passages, such as “What’s in a name? That which we call a rose, by any other name, would smell as sweet,” far more often than others.\textsuperscript{130} When examining judges’ use of other authors’ quotations, one finds a similar tendency to dwell on common phrases. One example, similar to Juliet’s line in both meaning and floral imagery, is Gertrude Stein’s “a rose is a rose is a rose,”

\textsuperscript{126} See, e.g., Stamp v. Metropolitan Life Ins. Co., 466 F.Supp.2d 422, 431-32 (D. R.I 2006) (“Mark Twain famously quipped that ‘there are three kinds of lies: lies, damn lies, and statistics.’”)

\textsuperscript{127} The reports of Mark Twain’s citation have been greatly exaggerated by the fact there exist a number of banks, parks, and elementary schools named after him that come up in cases’ facts. Still, looking through the cases, it is clear he is quoted or referenced quite often. See, e.g., PGA Tour, Inc. v. Martin, 532 U.S. 661, 701 (Scalia, J. dissenting) (“Many, indeed, consider walking to be the central feature of the game of golf-hence Mark Twain’s classic criticism of the sport: ‘a good walk spoiled.’”)

\textsuperscript{128} U.S. v. Ven-Feul, Inc., 758 F.2d 741 (1st Cr. 1985) (the Court goes on to describe in length Alice’s realization that it does not matter whether eating the cake will make her grow or shrink, as either scenario affords her a means of escape. Lewis Carroll, ALICE’S ADVENTURE IN WONDERLAND 8-9 (Delacorte Press ed. 1966)).

\textsuperscript{129} See supra notes 123 and 124.

\textsuperscript{130} See supra Part II.f.
which appears in 15 First Circuit cases, and over 100 cases in all federal circuits. Both Tolstoy and Dostoyevsky receive similar treatment. Tolstoy’s “[h]appy families are all alike; but every unhappy family is unhappy in its own way,” is quoted in 41 federal cases, while Dostoyevsky’s “the degree of civilization in a society is revealed by entering its prisons” is invoked in many cases involving prison conditions. Neither author is cited for any other proposition. Likewise, citations of Robert Frost mostly quote one of two lines: “Good fences make good neighbors,” and “Two roads diverged in a wood and I / I took the one less traveled by / And that has made all the difference.” The first was the subject of some contention between Supreme Court Justices Breyer and Scalia in *Plaut v. Spendthrift Farm, Inc.* Justice Scalia, writing for the majority notes that “[s]eparation of powers, a distinctively American political doctrine, profits from the advice authored by a distinctively American poet: Good fences make good neighbors.” In his dissent, Justice Breyer reminds Justice Scalia that the line is not meant to be taken

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131 *See, e.g.*, Coté v. Wadel, 796 F.2d 981, 983 (7th Cir. 1986) (“To paraphrase Gertrude Stein, for purposes of diversity jurisdiction a corporation is a corporation is a corporation.”)


134 *See, e.g.*, Mauro v. Arpaio, 188 F.3d 1054, 1065 (9th Cir. 1999) (Schroeder, J. dissenting).

135 66 appear in all federal cases, 3 of which are in the First Circuit.


139 *Id.* at 240.
literally, as Frost cautions, “[b]efore I built a wall I'd ask to know / [w]hat I was walling in or walling out.”

**c. Shakespeare is Not Bound by Context**

Shakespeare is not only distinct from the pool of heavily cited authors in that he has the lion’s share of references. Of all those invoked frequently by judges, Shakespeare alone resists being pigeonholed. For instance, as noted above, Lewis Carroll appears often, but only as an embodiment of absurdity. In these opinions, most authors see a lifetime of work reduced to a line or two. None enjoys anywhere near the diversity of Shakespeare. It does not serve to say that Shakespeare wrote about a greater variety of subjects than any other author. Even if this were true, the original contexts of Shakespeare’s words are rarely the same as the contexts in which judges invoke them.

When placed into a judicial opinion, most of his lines are completely divorced from their original subjects. In fact, it is the ability to shift easily between contexts, not the contexts themselves, that helps explain the frequent and multifarious citations of Shakespeare. Perhaps one reason judges cite him as opposed to other authors is that they can easily pluck a few of his lines without incorporating the baggage of the rest of the work. This helps explain why other quotable authors, such as the eminently quotable Oscar Wilde, appear so infrequently.

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140 *Id*. at 245 (Breyer, J., dissenting). Looking at the text of the poem, Justice Breyer has the better of the argument. *Mending Wall* is Frost’s critique of his neighbor’s unthinking fealty to a dubious maxim.

141 See supra Parts II.c-d.

142 One might suspect that, as judges seem to be fond of witty quips, Wilde would come up often. Yet, he is only quoted in 23 federal cases – often for the line, “[i]n this world there are only two tragedies. One is not getting what one wants, and the other is getting it.” Oscar Wilde, LADY WINDERMERE’S FAN, act 3. See, e.g., U.S. v. Traeger, 325 F.Supp.2d 860, 863 n.1 (N.D. Ill. 2004). Because the only thing worse than being talked about in judicial opinions is not being talked about in judicial opinions, Wilde also found his
d. Shakespeare is Safe

The conspicuous omission of certain authors from judicial opinions provides more clues to Shakespeare’s prominence. What does Shakespeare have that other great authors lack? The answer, it appears, is a degree of safety. It is difficult, for example, to quote Oscar Wilde without adopting a bit of his persona. His lines exude a vain foppishness that most judges would probably rather avoid. Shakespeare, on the other hand, remains aloof, mostly because much less is known about the details of his personal life. The same is true of Shakespeare’s politics. A judge might want to avoid even appearing to endorse a certain author with a well-defined political ideology for fear of betraying her own political leanings. The Bard enjoys a philosophical anonymity that more current authors do not, which also gives him greater rhetorical power. Whereas a quote from John Steinbeck\textsuperscript{143} or Ayn Rand\textsuperscript{144} might raise an eyebrow, no one could accuse a judge quoting Shakespeare of being a monarchist. Finally, Shakespeare affords a judge the opportunity to be whimsical, grandiose, or fantastical without seeming ridiculous.\textsuperscript{145}

\textsuperscript{143} No federal cases and a small handful of state cases quote or reference Steinbeck. See, e.g., Ex parte Briseno, 135 S.W.3d 1, 6 (Tex. Crim. App. 2004) (discussing exempting the mentally disabled from the death penalty: “Most Texas citizens might agree that Steinbeck’s Lennie should, by virtue of his lack of reasoning ability and adaptive skills, be exempt.”) (referencing John Steinbeck, Of Mice and Men (1937)).

\textsuperscript{144} No state cases and two federal cases reference Rand. See Carter v. Helmsley-Spear, Inc., 861 F.Supp. 303, 329 (S.D. N.Y. 1994) (“Like Howard Roark in Ayn Rand’s Fountainhead, plaintiffs wish to continue creating the Work regardless of the barriers to completion that are presented.”) and Miles, Inc. v. Scripps Clinic and research Foundation, 810 F.Supp. 1091, 1098 (S.D. Cal. 1993) (“[E]ven devotees of Ayn Rand could not dispute that the available protections provide adequate profit incentives for inventors.”).

\textsuperscript{145} The works of J.R.R. Tolkein, for example, are referenced sparingly – three times in state cases and once in a federal case. See, e.g. U.S. v. Schilling, 2006 WL 2472137 at *1 (N.D. Iowa 2006) (“With nearly as much trepidation as Frodo must have felt when he embarked on his journey to Morodor, this federal court begins its ascension up a similarly foreboding, albeit ‘legal,’ summit arising out of a land dispute between the United States and its Agency... and the defendants... Much like the power of the Ring carried by Frodo, which caused all who touched it to desire to possess it, both parties in this land dispute claim an ownership interest in a certain section of farm property. The court cannot retreat from parsing out the
e. A Final Explanation

Perhaps the likeliest reason that judges quote the Bard more than any other author is also the most mundane. Judges might use Shakespeare’s words more than others’ because those are the ones they have memorized. Students at all levels of academia inevitably encounter at least one of Shakespeare’s plays, and often find themselves forced to memorize certain portions of them. As poetry lends itself more easily to memorization than prose, it is unsurprising that judges would have retained it. This explanation further accounts for the relative dearth of contemporary authors in judicial opinions. It is also consistent with idea judges do not turn to Shakespeare for lack of other sources to support their opinions. Judges do not send their clerks to rummage through pages of Shakespeare to buttress weak arguments. They work with what they know. Perhaps the future will introduce a more contemporized canon to the judicial tool box, but Shakespeare’s prominence as the choice literary reference is unlikely to abate, having already withstood 400 years of competition.

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146 One unfortunately absent author is Kurt Vonnegut, who, despite a wealth of wit and insight, appears in only 4 federal cases and two state cases. See, e.g., U.S. v. Van Leuzen, 816 F.Supp. 1171, 1172 (S.D. Tex. 1993) (finding against defendants on violations of environmental protection laws, Judge Kent begins the Court’s opinion with Vonnegut’s prediction of humanity’s last words: “WE PROBABLY COULD HAVE SAVED OURSELVES, BUT WERE TOO DAMNED LAZY TO TRY VERY HARD. . . AND TOO DAMN CHEAP.”) (quoting Kurt Vonnegut, Jr., FATES WORSE THAN DEATH (1992)).

147 See supra Part III.a.

148 Since 2001, one state and three federal cases have referenced The Simpsons. See, e.g., Seawright v. American General Financial Services, Inc., 507 F.3d 967, 980 n.1 (Martin, J., dissenting) (noting that a contract requires and affirmative act of acceptance, Judge Martin quotes Homer Simpson’s “conversation” with God: “Here's the deal: you freeze everything as it is, and I won't ask for anything more. If that is OK, please give me absolutely no sign. [no response] OK, deal. In gratitude, I present you this offering of cookies and milk. If you want me to eat them for you, please give me no sign. [no response] Thy will be done.” The Simpsons: And Maggie Makes Three (Fox television broadcast, Jan. 22, 1995)).
V. Conclusion

The question left unanswered is a normative one. Should judges be quoting Shakespeare, or any other literary figure for that matter, at all? Such citation in a judicial opinion is mostly, to use a term from Shakespeare’s line of work, an aside. It is a wink to the audience, not meant for the other characters in the production, or rather, litigation. In a critique of Judge Selya’s writing style, Judge Nancy Gertner noted that sometimes her colleague “crosses the line,” adding, “[w]e're not gods on high. We need to be as clear as possible.” Judge Gertner has a point. What is a wink, if not smug? Perhaps some sets of facts are so delightfully absurd and some counsels’ arguments so spurious that they merit a winsome poke, but that cannot be said of all the cases that receive one. What is amusing to a disinterested reader or prevailing litigant might seem cruel to the losing party, whose legal rights have been affected. Where to draw the line is, of course, up to the judges themselves, who should be mindful to avoid adding Shakespearean insult to legal injury.

Despite the occasional risk of seeming inappropriate or insensitive, citation of Shakespeare can have a positive effect on the whole. This is especially true when judges use Shakespeare to lend perspective to an opinion, as discussed in Part III.d. Some use of literary references can actually help assuage the impression the judges are “gods on high” by connecting the case at hand and principles espoused therein to the greater human experience. In those cases that concern the very core of fundamental ideals such as justice, fairness, equality, and mercy, Shakespeare’s words might not only be appropriate, but welcomed.

149 Abel, The Sesquipedalian Septuagenarian, supra note 22.
In closing,

When judges wish to increase their word’s force
With classic quips from poetry or prose,
They often turn to Shakespeare, but of course,
And give those other hacks an up-turned nose.

The student who has spent the twilight hour
In libraries, engrossed in legal tomes,
Delights in such displays of verbal power -
Whether ‘tis from Cardozo or from Holmes.

But ye beware who don the hallowed robe
And thrust the Bard into the sphere of Law.
If you wish recognition ‘round the Globe,
Make sure to seek more Justice than guffaw.

The Law demands a roar and not a yelp.
Best stick to precedent; Old Bill can’t help.