

Terms of Art

Occasional Dispatches from the Intersection of Language & the Law

Of Bench & Bard

David Franklin

IN THE 1990 DEFAMATION CASE of *Milkovich v. Lorain Journal Co.*, the Supreme Court dramatized the importance of a spotless reputation by quoting from Act III, scene III of *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.*

Chief Justice Rehnquist, writing for the Court, did not linger over the fact that the speaker of these undying lines was Iago, a character whose good name does not even last until the end of Act V. Instead, he simply used the passage to illuminate the historical development of defamation law.

As the *Milkovich* example suggests, Shakes-

peare has become something of an all-purpose authority for judges. A citation to *Macbeth* or *Julius Caesar* carries almost as much persuasive punch as a “(Hand, J.)” or even a “(Holmes, J., dissenting).” The phenomenon is not entirely new: as long ago as 1893 the Supreme Court looked to *Timon of Athens* for help in construing the word “expressly.” (The quoted passage: “I am sent expressly to your lordship.”) The tendency to put Shakespeare’s words to quasi-authoritative use stems naturally from the great playwright’s unmatched insight into the conflicting strands of the human personality: what Keats called Shakespeare’s “negative capability.”

It may also stem from the fact that Shakespeare was learned in the law. My evidence for this conclusion does not include the numerous brawls and attendant lawsuits in which the poet apparently found himself entangled in his hometown of Stratford. Nor do I join

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Justice Stevens in strongly suspecting that the plays were in fact written by Edward de Vere, the Seventeenth Earl of Oxford. (Stevens's unorthodox views can be found in his essay *The Shakespeare Canon of Statutory Construction*, 140 U. PA. L. REV. 1373 (1992).) My evidence-in-chief is the language of the verse itself. Legal nomenclature is ubiquitous in Shakespeare, perhaps more so than terminology from any other field of endeavor. To take just one well-known example, when the poet concludes Sonnet 116 with the famous couplet

*If this be error, and upon me proved,
I never writ, nor no man ever loved*

we can be sure he understood the technical meaning of words like "error" and "writ."

But I stray from my theme, which is not Shakespeare's use of the law, but the law's use of Shakespeare. It would be impossible, of course, to catalog all the appearances of Shakespeare in judicial opinions, in part because countless Shakespearean coinages have been assimilated effortlessly into the language and consequently appear in opinions without attribution. Everyday words like "hurry," "assassination," and "monumental" were invented by the Bard; the term "foregone conclusion" first appeared in *Othello*, and Hamlet was the first to mix method and madness (in so many words). Judge Posner likes to explain seeming surplusage in contracts and statutes with the idea that the drafters wanted to "make assurance doubly sure." Although Posner doesn't credit Shakespeare, Macbeth gave the same explanation (actually "make assurance double sure") for his plot to kill Macduff despite the witches' assurances that he need fear no man "of woman born." (Macbeth goes on for good measure to kill Macduff's wife and children "at one fell swoop," another phrase that has become so ensconced in the language as to have obtained the status of cliché.)

Judges use Shakespeare in a variety of ways, not just as authority for historical propositions about defamation law. Perhaps the most

manageable way to illustrate this variety is to focus on a single play. Rather than choose either of the overtly "legal" plays (*The Merchant of Venice* and *Measure for Measure*) it seemed wisest to head straight for the literary motherlode: *Hamlet, Prince of Denmark*. Quotations from *Hamlet* demonstrate the full range of juridico-Shakespearean stratagems, arrayed here from least to most sophisticated. (Many of the following come from the pen of the aforementioned Judge Posner, law-and-literature buff and apparent *Hamlet* devotee.)

The Belabored Chestnut. From a district court opinion penned at the nadir of the state action requirement, holding that a publicly licensed tavern's refusal to serve women violated the Equal Protection Clause:

Quite apart from the differences between tending a bar and being served at one, we take judicial notice that the vast majority of bars and taverns do cater to both sexes. Without suggesting that chivalry is dead, we no longer hold to Shakespeare's immortal phrase "Frailty, thy name is woman." Outdated images of bars as dens of coarseness and iniquity and of women as peculiarly delicate and impressionable creatures in need of protection from the rough and tumble of unvarnished humanity will no longer justify sexual separatism. At least to this extent woman's "emancipation" is recognized.

The Riposte Hackneyed. From one of Justice Brennan's many spirited dissents: "[M]ethinks my Brothers and Sister protest too much about their general discussion of the writ [of habeas corpus]." As might be expected, judges in dissent (and even more often, judges in the majority responding to judges in dissent) often protest that their colleagues "protest too much."

The Aphorism Disavowed. Two excerpts from Judge Posner of the "Remember what Shakespeare said? That's *not* what I mean" variety:

Hamlet's dictum that "there is nothing either good or bad but thinking makes it so" has limited scope in federal litigation.

and

That “there’s a special providence in the fall of a sparrow” is not the contemporary philosophy of antitrust.

The Law and Literature Lecture. This object lesson in legal accountability comes from a recent Judge Posner opinion:

There is no evidence that Palmer was fired because of her mental illness. She was fired because she threatened to kill another employee. The cause of the threat was, we may assume, her mental illness – as when Hamlet said, apologizing to Laertes, “Was’t Hamlet wrong’d Laertes? Never Hamlet./ If Hamlet from himself be ta’en away,/ And when he’s not himself does wrong Laertes,/ Then Hamlet does it not; Hamlet denies it./ Who does it then? His madness.” But if an employer fires an employee because of the employee’s unacceptable behavior, the fact that that behavior was precipitated by a mental illness does not present an issue under the Americans with Disabilities Act.

The Elizabethan Understatement. From a 1984 opinion by this column’s favorite jurist, Judge Selya: “Although Tirado was appellant’s second cousin, he proved to be, like Hamlet’s uncle, ‘A little more than kin, and less than kind.’ He was, in fact, a government informer with a tape recorder in his boot.”

The Apt Deployment. Co-conspirators were sentenced under a felony-murder guideline after one of the bombs they were carrying exploded, killing one of their comrades. Judge Posner picks up the story:

So there is no anomaly in the fact that the appellants in this case received heavier punishments “merely” because of the accident that Mares blew himself up with one of his bombs. The greater anomaly would be if his death had not affected their punishment in the slightest. Not everyone would agree. Hamlet thought it poetic justice that a bomber should be blown up by his own bomb – hoist by his own petard (“petard” means bomb). We have to decide whether the draftsmen of the federal sentencing guidelines took Hamlet’s position.

Not surprisingly, the petard-hoist is a favorite trope of the judiciary (Judge Selya has used it nine times by my count) but I can find no other usages in cases actually involving bombs.

The Hermeneutics Lesson. Sometimes judges put a meta-interpretive spin on Shakespeare, using his timeless verse to demonstrate how meanings can change, or can be informed by context. One example comes from a 1984 opinion, again by Judge Posner:

[A]lmost everyone today thinks that “a custom more honored in the breach than the observance” means a custom that is not observed. That is what the expression viewed in isolation seems plainly to mean. But if you go back to the passage in Hamlet from which the expression comes (Act I, sc. iv, lines 8-20), you will see that the custom referred to is that of getting drunk on festive occasions, and that what “a custom more honored in the breach ...” actually means is a custom better disregarded than observed. The point is general: context, in the broadest sense, is the key to understanding language.

(Posner’s diagnosis seems accurate: every other use that I could track down by the federal judiciary of the “more honored in the breach” formula gets it wrong.)


Another example comes from Judge Easterbrook, who faced in a 1987 case the delicate interpretive questions of whether a baler is a “hay loader” and whether a haybine is a “mower.” Although the statute in question used the word “mower,” Judge Easterbrook concluded that it would be wrong to say that the statute covers only machines called “mowers”:

This is so in part because language evolves. Janitors have become custodians; garbage collectors have become sanitary engineers; hearing examiners turned into administrative law judges; referees in bankruptcy are now bankruptcy judges; employees are terminated rather than fired, and spies are “terminated with extreme prejudice” rather than assassinated. The longer the time, the more the language changes. Hamlet says to Guildenstern in Act II, scene 2: “I am but mad north-north-

west: when the wind is southerly I know a hawk from a handsaw." He means that he is feigning madness, shown because he can tell one bird from another when he wants. (To Shakespeare, a "handsaw" was a heron – or so some scholars believe. We stand clear of the debate about what exactly this line means.)

A similar discussion of the hawk-and-hand-saw example can be found in Raoul Berger's 1977 book, *Government by Judiciary*.

Readers interested in these issues should consult Walter Domnarski's thorough article, *Shakespeare in the Law*, in the August 1993 issue of the Connecticut Bar Journal, from which several of these examples are drawn. As he correctly points out, the Shakespearean quotations that work best tend to be the more obscure ones. Few things are more disappointing

than a bankruptcy opinion that suddenly breaks out into "Neither a borrower nor a lender be," or a discussion of sentencing that notes that the quality of mercy is not strained. Domnarski offers other advice to judges tempted to spice up their lawsuits with a bit of Shakespeare: Don't be gratuitous. Don't be obscure. Make sure you understand the meaning of the passage in its original context. Perhaps the best advice comes from Hamlet himself: "Suit the action to the word; the word to the action." 

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