

Law Imitating Art: American Judicial Opinions Performing *The Merchant of Venice*

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A fascinating conversation about the relationship between law and literature has evolved over the last 30 years, has resulted in a growing number of course offerings on the subject at American law schools,¹ and has engaged a number of leading scholars in a continuing discussion about the nature of the enterprise.² The dialogue has included much ado about Shakespeare, including numerous articles about the depiction of law in Shakespeare's plays,³ an argument for courses in law and drama,⁴ and the application of literary examples from Shakespeare's dramas in teaching and understanding a diverse body of law and legal practice.⁵

Another approach, which is employed less frequently, has examined the way in which judicial opinions employ Shakespeare's texts in making a persuasive rhetorical argument in support of the decision.⁶ It is only coincidence that the Folger Shakespeare Library is just across East Capitol Street from the United States Supreme Court, but it is fact that Shakespeare has been cited and quoted by American courts more often than any other literary figure or dramatist. American courts have cited all 37 of Shakespeare's plays, and attributed Shakespeare quotations can be found in more than 800 judicial opinions.⁷

Four earlier articles have looked generally at the way in which Shakespeare's work has been used in judicial opinions.⁸ In this essay I extend that research and present an analysis of the ways in which American courts have made rhetorical use of a particular play, Shakespeare's *The Merchant of Venice*, from 1864 to 2004.⁹ In doing so, I follow neither the contemporary critical polemics that frame some scholarship nor the empirical counting and categorization of quotations found in other articles but, rather, an extended and close reading of the text in context of the cases.

The Merchant of Venice is one of two plays by Shakespeare that are most often seen as having a primarily legal theme, and its unique relevance to the relationship between law and literature has been recognized and explored by both Professor James Boyd White and Judge Richard Posner, while Richard Weisberg has suggested that it should be in the Canon of texts for law and literature studies.¹⁰ Scholars have concluded that "Shakespeare shows a quite precise and mainly serious interest in the capacity of legal language to convey matters of social, moral, and intellectual substance,"¹¹ and I will argue that American judges have shown a mainly serious interest in the capacity of Shakespeare's dramatic language to convey matters of legal substance.¹²

American courts sometimes have drawn upon Shakespeare's *The Merchant of Venice* for literary inspiration, but judges also have used the play to support ideas and ground major arguments, to make historical points, to justify granting mercy to an accused, to convey insight to the punished, to explain the strict letter of the law, and to help provide a rationale to support judgments that could have been decided against what the courts deem as moral or just. Appellate courts have also examined the use of the play during trials by attorneys attempting to conjure up emotions in juries.¹³ This essay demonstrates that American judges have provided a new forum for a unique and applicable performance of *The Merchant of Venice* in situations of everyday life, speaking not only to the parties in the case but communicating with a larger audience of citizens.

The Merchant of Venice is a text that involves separate but intertwined stories within one text, one aspect of the play involving romantic relationships, one on family obligations between parents and their children, and another focusing on a legal contract scenario. Courts citing the play in judicial opinions have used lines primarily from the romantic and the legal themes of the play. For example, the notion that “all that glitters is not gold” from the “casket scene” has been incorporated in judicial opinions, although the most cited sections of the play involve issues related to a legal contract and enforcement of that contract.

The trial scene in Act IV of the play presents conflict and tensions between strict construction of the law and the latitude allowed for interpretation. While it can be argued that the scene involves neither justice nor mercy,¹⁴ American judges have found Shakespeare’s play to provide useful examples for visualizing the tension between strict adherence to the letter of the law and the opportunity for mercy or equity in the pursuit of justice by modern actors in the courtroom and appellate drama. Well over one hundred court opinions have used the relevant quotations from *The Merchant of Venice* to help resolve those dilemmas. This essay identifies three main ways the courts have employed and incorporated lines from *The Merchant of Venice* into their decisions: (1) for creating dramatic effect; (2) as lessons about the law and legal system; and (3) to emphasize the importance of mercy to justice.

I. THE PLAY AS A JUDICIAL RHETORICAL TOOL

Shakespeare’s characters in *The Merchant of Venice* made profound points of legal significance that could be used for dramatic effect and to make or support legal arguments. This section examines how courts have used Shakespeare’s play and rhetorically incorporated it in judicial opinions.

A. Use of the Play for Dramatic Effect in Court Decisions

Most of the courts that incorporated *The Merchant of Venice* into judicial opinions did so with the purpose of creating dramatic effect. Courts have used a quotation from the play to lead into an opinion or end an opinion, but most courts incorporated lines from the play into the body of the decision.¹⁵ One Court incorporated the words from the play into the factual scenario of a case to give emphasis to action.¹⁶ The Court stated, “Codfish’s ‘ship of rich lading wreck’d on the narrow seas;’ it defaulted on the loans and eventually filed for bankruptcy. In the meantime, it was ‘never heard a passion so confus’d, so strange, outrageous, and so variable as [Girod] did utter in the streets. ‘My daughter! O my ducats! O my daughter!’”¹⁷ The Court then cited from the play to emphasize its decision in the case, concluding, “To hold that the Municipality’s guarantee of the loan was not for a public purpose and was in violation of the Puerto Rico constitution would be to throw out decades of economic progress as a result of legislation consistently upheld by the Puerto Rico courts. ‘It must not be; there is no power in Venice that can alter a decree established; ‘Twill be recorded for a precedent, and many an error, by the same example, Will rush into the state; It cannot be.’”¹⁸

One attorney presented what the Court deemed an “unintelligible” brief, which began, “When the defendant first appeared in Court, it was involuntarily, he being already in the custody of a fellow Shakespeare would probably have called old ‘Bottom’ the weaver, but who we all know as the Sheriff from down there at the County Slammer.”¹⁹ The State filed a motion to strike the brief, partly because the brief was filled with assertions that were unsupported by the record and included “pejorative characterizations.”²⁰ The reviewing Court in that case pronounced its decision with a witty retort that cited words from the Bard: “We would be perfectly justified in striking defendant’s brief, but, as Shakespeare would probably have said, ‘The quality of mercy is not strain’d.’ The State’s motion is denied.”²¹

While courts used excerpts from the play to emphasize their decisions, courts also used excerpts from the play to conclude the whole of the Opinion, accenting its decision in the case. In regard to the Equal Protection Clause, *DeRonde v. Regents of the Univ. of California* concerned a constitutional right to have an application considered on its own merits without regard to race.²² In this opinion, the court stated, “We close with a quotation from Shakespeare, who so eloquently reminds us that competition on the basis of merit alone is the lifeblood of a democratic society:

For who shall go about
To cozen fortune, and be honorable
Without the stamp of merit? Let none presume
To wear an undeserved dignity.
O, that estates, degrees and offices
Were not derived corruptly, and that clear honor
Were purchased by the merit of the wearer!
How many then should cover that stand bare!
How many be commanded that command!
How much low peasantry would then be gleaned
From the true seed of honor! and how much honor
Pick'd from the chaff and ruin of the times,
To be new varnished!”²³

Similarly, another Court incorporated a quotation from the play prior to making its final judgment. In *People v. Cacioppo*, the defense used a quotation from Keat’s “Ode to a Nightingale” as emotive support for one of its arguments. In response, the Court countered with a quotation from *The Merchant of Venice*: “Perforce ‘[this] night methinks is but the daylight sick.’ The judgment of conviction is affirmed.”²⁴

Although some courts used words from Shakespeare’s play at the end of their Opinions, other courts rhetorically placed excerpts from *The Merchant of Venice* in the introduction of opinions to lead into the facts and analysis of the case.²⁵ One Court, which decided *American Radio-Telephone Serv. v. PSC of Maryland*, began its Opinion by stating, “It was the Bard of Avon who first suggested, ‘It is a wise father that knows his own child.’”²⁶ The Court went on to lead into its discussion of the case, “In this case, the Public Service Commission of Maryland has had greater difficulty in determining the lineage of a ‘grandfather.’”²⁷ The Dissenting Circuit Judge in *Crowley Marine Services, Inc. v. National Labor Relations Board*, relied on the play to introduce her Dissenting Opinion prior to a discussion and analysis of the case, stating:

His reasons are as two grains of wheat hid in two bushels of chaff; you shall seek all day ere you find them, and when you have them, they are not worth the search.

William Shakespeare,
The Merchant of Venice, Act I, sc. i.

The court’s per curiam opinion knocks down the modest, but real, requirement that a union requesting information from an employer explain, at the time of its request, the relevance, or at least potential relevance, of information not ordinarily pertinent to its role as bargaining representative. In its place, the court leaves a flattened, if not phantom, hurdle. Accordingly, and for the reasons set forth below, I would grant the petition for review.²⁸

Another Court introduced its court opinion with the statement of the bond made by Shylock to Antonio, “This kindness will I show--Go with me to a notary, seal me there Your single bond; and, in a merry sport, If you repay me not on such a day, In such a place, such sum or sums as are Expressed in the condition, let the forfeit Be nominated for an

equal pound Of your fair flesh, to be cut off and taken In what part of your body pleaseth me.”²⁹ The Court subsequently referred to the tenor of an attorney’s argument in the case as “Shakespearean kindness.”³⁰

The United States District Court for the Middle District of Pennsylvania used the play to set up the scene for its analysis and decision.³¹ In this employment discrimination case, the Court began by referring to the case as one of “a modern rendition of the age-old parable of a son being punished for the sins of his father,” noting citations to the parable in Euripides’s *Phrixus* (frag. 970), Horace’s *Odes* III (6:1), and Shakespeare’s *The Merchant of Venice* (Act III, sc. 5, line 1, “The sins of the father are to be laid upon the children”).³² Additionally, the Court of *Village of San Jose v. McWilliams and McWilliams* twice referenced *The Merchant of Venice*—both to introduce the Opinion and conclude the Court’s analysis of the case. In the Court’s introduction of the case, it established one of the parties as seeking receipt of a “pound of flesh,” noting by comparison the facts of this case with the literary text of Shakespeare:

n1 William Shakespeare, *The Merchant of Venice* 1.3 & 4.1 (1596). According to the Village’s attorney this appeal is not about the debt (bond); it is a “matter of principle.” Similarly, in *The Merchant of Venice*, Shylock, the money lender, when offered several times the debt (bond) refused, stating the bond was forfeit and he wanted his “pound of flesh.” Id. It was only through the rather creative reading of the law by Balthasar (a doctor of laws, who was in fact Portia in disguise) that the result was avoided. Id. Portia read the contract as allowing the taking of the pound of flesh, but not the drawing of any blood (because it was not mentioned). Id. As we shall see, no such creative reading of the law was available here to save the debtors’ petition.³³

When concluding its analysis, the Court again noted by comparison that a party, the Village, was seeking its “pound of flesh,” similar to that being sought in *The Merchant of Venice*, “In *The Merchant of Venice*, the Duke of Venice sought to find a way to deny Shylock his ‘pound of flesh,’ but admitted he must grant it under the law.”³⁴

Courts also used excerpts from the play as sheer dramatic effect. For example, one Court remarked, “We turn to the courtroom scene in *The Merchant of Venice* for the conclusive answer to the argument of Virginia that the policies and endorsements imposed on Liberty and Lloyds contractual duties to make good to Queen the loss arising out of the collision of the Queen bus and the Perkins car. It was not ‘so nominated in the bond.’”³⁵ Desire by a man for a police officer’s wife, jealousy of the officer, and death of the pursuing man by the officer who shot him during a jealous confrontation led to the case of *Rivera v. Medina*. The Court, when determining that the officer acted outside the color of the law when he shot the man of his own accord rather than by legal duty as a police officer, applied portions of the text of *The Merchant of Venice* as applicable to the Court’s decision in the case, remarking:

Their prior relationship had an element that is traditionally the source of great anguish; the sentiment Shakespeare referred to as:

“How all the other passions fleet to air,
As doubtful thoughts, and rash despair,
And shuddering fear, and green-ey’d jealousy.”

The Merchant of Venice III, ii, 108. The previous relationship between the parties overshadowed the fact that Medina was on-shift, in uniform, and carrying his service weapon. The “green-ey’d” monster of jealousy, which was mutual between Medina and Ortega, had taken over for some time and was the underlying personal relation between them.³⁶

In another case, a plaintiff entered into an agreement where the defendant was to supply sterling silver castings.³⁷ Under law reviewed in that case, articles, such as the castings, can only be marked with the words “sterling” or “sterling silver” if the article contains a certain percentage of pure silver.³⁸ To this legal situation, the court replied, “The Bard of Avon,

dealing with a somewhat different (but equally suspect) precious metal, captured the essence of the plaintiff's jeremiad poetically: 'All that glitters is not gold/ Often have you heard that told.'"³⁹

Moreover, *United States v. Powell* was a case before the United States Air Force Court of Criminal Appeals, in which an officer was convicted at a general court-martial for rape and conduct unbecoming an officer. An issue on appeal to the United States Air Force Court of Criminal Appeals was whether the prosecutor in the case improperly exercised a peremptory challenge by basing it, at least in part, upon the gender of the challenged member of the venire. The lower court found that the prosecutor's challenge of the venire member was valid as not based on gender. The appellate Court noted that the prosecutor's demeanor and credibility in providing an explanation for the challenge of the female venire member was critical in the lower-court judge's determination of the issue of whether the prosecutor acted with intent to exclude a potential jury member due to gender. The Court also noted that the prosecutor's demeanor and credibility were important in the appellate review of the lower-court judge's ruling on the issue. The Appellate Court used the Bard's words from *The Merchant of Venice* to support its decision on the case and amplify the difficulty inherent in the Court's review of the issue:

The standard of review in this area of the law is difficult to apply because a judge is attempting to peer into an attorney's heart by relying on his or her words.
In law, what plea so tainted and corrupt
But, being seasoned with a gracious voice,
Obscures the show of evil.⁴⁰

The Court concluded that the prosecutor provided a gender-neutral explanation for the exercise of the peremptory challenge.

Although the use of Shakespeare's play has been employed by jurists solely for the purpose of dramatic effect, there often proved a more substantial rationale for the use of the play by jurists, most notably to make and bolster legal arguments within judicial opinions. For while all of the courts' citations to *The Merchant of Venice* obviously incorporated dramatic effect through the use of the literary text, many of the courts' references to the play were incorporated with a direct or implied precedential effect. However, one court that referenced the text of Shakespeare specifically denounced any precedential effect of the play. In *Ewen v. Wilbor*, the Court rejected the Appellant's argument that a desired rule controlling the obligation of the guarantor "is the principle Shakespeare had in mind when he wrote *The Merchant of Venice*, and put into the mouth of Portia the famous judgment that made waste paper of Shylock's bond."⁴¹ Here, the Court declined to use the play as precedent, as requested by Appellant's attorney, when remarking, "The judgment of Portia did anything but 'make waste paper of Shylock's bond.' On the contrary it converted it into an instrument by which the hapless Jew was robbed of all he had; nor have we understood that Portia's judgment was or is law in this or any other country."⁴²

B. Use of the Play to Make Arguments

Argumentation is the communicative process of making, supporting, or criticizing claims in an attempt to prove a point and persuade. In justifying court decisions, judges frequently chain arguments together to weave a mixture of fact, proof, and persuasion. Along the way, many courts seek to be creative, and such creativity can be seen in the judicial use of *The Merchant of Venice* to make legal arguments. As was discovered in the analysis of judicial opinions that referenced the play, legal lessons from the play could readily work in some cases but fail in others. The play has been used by jurists to make arguments by stating how the play's legal lessons apply or do not apply to certain contemporary

legal issues. For example, one court recognized, “Portia succeeded with such an argument (*Merchant of Venice*, Act IV, scene i), but we deal here with fiscal realities, not pounds of flesh.”⁴³ Yet the court in *Reed v. King*⁴⁴ adopted the more prevalent view of the courts that cited the play—that lessons from *The Merchant of Venice* could effectively be woven into modern decisions of the court to make or bolster arguments. In *Reed v. King*, the issue was whether the seller of a house had to disclose that the house was the site of a multiple murder. Although such a case appears to be one that would have nothing to do with the legal arguments in Shakespeare’s *The Merchant of Venice*, the Court in that case cited Act II, scene ii, of the play to argue, through adoption of the playwright’s words, “truth will come to light; murder cannot be hid long.”⁴⁵ The Court effectively borrowed words of the Bard to argue that the truth of the house’s history would become known.

Two courts used the phrase “all that glitters is not gold” from the *The Merchant of Venice*, Act II, scene vii, to argue that some things that seem alluring may, in the end, not be desirable. A New Jersey court used the quotation to argue that legal precedent an attorney thought fit his case actually did not apply. The New Jersey Court in *B. F. Hirsch, Inc. v. Enright Ref. Co.*,⁴⁶ informed an attorney that the law that he cited had changed, discussing how the Third Circuit vacated the RICO portion of the Court’s previous judgment that the attorney used to support a main contention in his case. The Court replied, “Alas, ‘all that glitters is not gold.’”⁴⁷ Although it is arguable that *The Merchant of Venice* has nothing to do with modern jurisprudence, such an argument is being collectively refuted by the courts through the application of the play to illuminate modern legal issues. What is shown by a review of judicial opinions that reference the literary text is that the Bard’s words have been repeatedly drawn upon by jurists to make legal arguments and clarify points of law.

The literary text of *The Merchant of Venice* allows judges to make arguments both directly and metaphorically. In a case dealing with evidence found inside the body of a crime victim, which the prosecutor wanted to extract and produce at trial, a Court determined that the issue turned on the Fourth Amendment rights of the individual.⁴⁸ The Court deciding that case incorporated the legal lessons of *The Merchant of Venice* in the following manner:

I have been unable to find a case, and none has been cited, holding that a witness to a crime may be compelled by either the state or the defendant to undergo procedures involving the cutting open of his flesh and the invasion of his person in order to obtain evidence either for or against the state. If the defendant has this right, of course, the state also has it. Never since the *Merchant of Venice* does there appear to be a case where the cutting open of a person not directly accused of guilt to obtain a pound of flesh was sanctioned, and even that involved... one of the parties litigant. Surely this cannot be done without a search warrant?⁴⁹

In re Keniston referred to the difference between literal language in a signed document as opposed to the underlying intent of the parties.⁵⁰ The Court referenced *The Merchant of Venice* because a situation similar to the one in that case was discussed in the play—Shylock’s demand for a pound of flesh from the character Antonio if Antonio failed to meet the demands of a bond. It was the opinion of the Court in *In re Keniston* that the case it was deciding had “a good bit of the flavor of Shakespeare’s *The Merchant of Venice*...”⁵¹ This Court was able to conjure up all of the insights inspired by Shakespeare to argue that the use of literal language in deciding the case would certainly be unfavorable. In *South Dakota v. Allison*, a dissenting judge wrote against the factual and legal basis for the majority’s decision. Using Shakespeare’s *The Merchant of Venice* to reinforce his position that an appropriate course of action for the State was with a civil remedy, the dissenting judge argued, “Even Shakespeare’s creditor in *The Merchant of Venice* was denied his pound of flesh nearest the heart.”⁵² In an analysis of political speech protections, the Court in *National Life Ins., Co. v. Phillips Publ., Inc.* used the play in reference to commercial speech and commercial interests.⁵³ This Court opined, “A corporation’s reputation interest is

primarily commercial. To paraphrase Shylock, 'If you prick them they do not bleed.' Nor do corporations have the same intense interest in dignity that so defines society's interest in protecting private individual plaintiffs."⁵⁴

Jurists have also used the *The Merchant of Venice* for a variety of symbolic purposes in making arguments. In *Boyle v. Pine Beach Club* the Court was looking for evidence of intent.⁵⁵ The Court sought to show that a person intended to interfere with a contract and found such intent in the use of "hardball" tactics, while incorporating *The Merchant of Venice* into the opinion as symbolic identification. The court referenced the play to show intent by a party in the case to engage in poor contract practices by merely stating the name of the play to enthematically visualize and demonstrate a negative intent to act. The Court in *In re Estate of Shoptaw* cited the play through incorporation and paraphrase for symbolic argumentation, stating, "What makes this result particularly irksome is the realization that in some areas the United States does not exact the pound of flesh merely because it is 'so nominated in the bond.'"⁵⁶

The courts cited above have certainly shown creativity in judicial opinion writing. Although there is a fine line between a court's use of a literary text to make a legal argument and to support a legal argument, jurists were more apt to use excerpts from the play to support the rationale for their legal decisions.

C. Use of the Play to Support Arguments

Jurists have shown, through their incorporation of Shakespeare's *The Merchant of Venice* in rendering judicial decisions, that this literary text provides ample examples to support modern legal argument. One Court cited the play in reference to a case regarding a debtor and entertainment items such as a stereo and camcorder, which the Court referred to as "personal property which facilitates day-to-day living in the Debtors' household."⁵⁷ This Court used Shakespeare's comments in *The Merchant of Venice* to justify this contention, stating, "Moreover, should we not trust the debtors' request to have music in his house? After all, 'the man that hath no music in himself... let no such man be trusted.'"⁵⁸ Although courts citing *The Merchant of Venice* to support arguments or justify a decision in a case did so while agreeing with the Bard, The United States District Court for the Western District of North Carolina, in a Memorandum and Order affirming a United States Magistrate Judge's dismissal of the plaintiff's claims, cited from the play instead to support action in opposition to the play's textual position. This U.S. District Court opined that the common law of North Carolina and the United States generally will not penalize the innocent beneficiaries of a slayer's employee benefit policy—remarking for support, "While it may be true that 'the gods visit the sins of the father upon the children,' this Court will not do so."⁵⁹

In support of arguments, courts have also incorporated the name of the play, references to the play, or excerpts from the play metaphorically. For example, in an analysis of general law of contractual obligations, a court used the play as a metaphor for the facts in the case, stating: "Were specific performance required, the state, if it made an unwise or unfortunate bargain, might find itself in the position of Antonio, who, having agreed to forfeit a pound of his flesh upon failure to repay 3000 ducats, could not obtain mercy from Shylock even though friends offered to repay the debt many times over. Obligees with less of a point to prove than Shylock would nonetheless be in a position to extract an onerous settlement from the state."⁶⁰ The Court in *In Re Save Venice New York, Inc.* merely indicated the relevance of *The Merchant of Venice*, when supporting its decision: "Thus we see no reason to believe that a modern merchant of Venice would not expand on the traditional Venetian products listed by the Board, to begin marketing products or services related to such goods."⁶¹

Other courts used the play by incorporation through example.⁶² For instance, when dismissing a charge that a defendant operated a cabaret under the law when he sponsored “Cafe Figaro Chamber Concerts,” the Court used a number of literary works to support an argument of the importance of music.⁶³ One literary work cited was, of course, from *The Merchant of Venice* as argued by the court: “The man that hath no music in himself, Nor is not mov’d with concord of sweet sounds, Is fit for treasons, stratagems, and spoils; Let no such man be trusted.”⁶⁴ And another court compared the government’s request for partial summary judgment as similar to “Shylock’s pronouncement to the Duke: ‘The pound of flesh which demand of him is dearly bought, is mine, and I will have it. If you deny me, fie upon your law!’”⁶⁵ That court found that it was in a situation where it could grant the motion and create an unreasonable rule of law or deny the motion and both parties would lose.⁶⁶

In a concurring opinion, U. S. Supreme Court Justice Byron White spoke of the need for sentencing decisions to “respond to the reasonable goals of punishment.”⁶⁷ In a footnote, Justice White quoted from *The Merchant of Venice*, “Thy fathers’ sins, O Roman, thou, though guiltless, shall expiate,” to support the contention that there is “an intuition that sons and daughters must sometimes be punished for the sins of the father [and the desire for punishment of such innocents] may be deeply rooted in our consciousness.”⁶⁸ Justice White warned that punishment that conforms to retributive instincts more than “to the Eighth Amendment is tragically anachronistic in a society governed by our Constitution.”⁶⁹

In *United States v. Auerbach*, the fact that co-defendants signaled a heightened appearance of unity because they were father and son actually worked against them when a motion was made for severance that was more compelling without the relationship.⁷⁰ As comment to the Court’s analysis in *Auerbach*, it cited *The Merchant of Venice*: “Yes, truly; for look you, the sins of the father are to be laid upon the children.”⁷¹

In deciding the level of participation of a son in a case, the Court in *Miller v. Commissioner* said there was no evidence supporting an assertion that the actions of a son, George Junior, were fraudulent.⁷² But, the Court found evidence “clearly” indicating that the father, George Senior, intended to defraud the government.⁷³ In applying *The Merchant of Venice* to the Court’s decision, the Court opined, “with deference to Shakespeare, the fraud of the father is not the fraud of the son,” and noted Shakespeare’s line “The sins of the father are to be laid upon the children.”⁷⁴ Other courts also cited the same quotation for support through example.⁷⁵ And, in *Eiben v. Epstein and Sons Int’l, Inc.*, the Court cited a passage from the play to analogize it to the case at hand: “Eiben’s belief that the new plans were derived from and were substantially similar to his earlier drawings is much like Portia’s contention that the contracted-for-pound of flesh could not be extracted unless it were done without any accompanying drop of blood... but here Eiben’s consent to use of his work ‘for information and reference’ necessarily carried with it the right to use his drawings as the basis for the new plans covering the revisions in use of the space.”⁷⁶

Courts have also sought the Bard’s words in *The Merchant of Venice* to help clarify terms in support of arguments. One Court, which decided *Redevelopment Auth. of Philadelphia v. Lieberman*, used the play as a means to analyze and understand the meaning of a concept.⁷⁷ The court did this by seeing how Shakespeare interpreted the concept “to take,” stating: “When ‘property’ is viewed from the standpoint of the mental or abstract concept, the meaning of ‘to take’ is that expressed by Shakespeare, when, after the judgment of the court, the Merchant of Venice says: ‘You take my house when you take the prop/That doth sustain my house; you take my life/When you do take the means whereby I live.’ The condemnee in this appeal expressed the same sentiments when testifying about his liquor license.”⁷⁸ The *In re*

Bank of New York Court debated the term “issue,” analyzing the presumption that “issue” means lawful issue and not illegitimate offspring.⁷⁹ In an analysis of this presumption, the Court looked to “its roots in an earlier society where there was no sense of injustice in the teaching that the sins of the fathers were to be visited upon their children and succeeding generations.”⁸⁰ The Court used literary words of Shakespeare (Act III, scene v) and Exodus, 20:4, to demonstrate this presumption in earlier societies.

The defamation case *Jaszai et al. v. Christie’s et al.*, in which the Court determined that an allegation of defamation was instead a protected opinion, the Court included the use of an excerpt from *The Merchant of Venice* to clarify a type of person. The Court noted:

When we place the statement complained of (“I have no reason to take this man seriously”) alongside the four-part Steinhilber test, we are ineluctably led to the conclusion that it is pure opinion:

(1) Every person who takes himself seriously would like to be taken seriously by others. But whether this desired result has been fully achieved in any given instance must remain uncertain and ambiguous. Shakespeare wrote of “a sort of men.”

“With purpose to be dress’d in an opinion Of wisdom, gravity, profound conceit; As who should say, ‘I am Sir Oracle, And, when I ope my lips, let no dog bark.’” (Merchant of Venice.)

Even were the canine audience to fall silent, the human reception of the Oracle could still range along a spectrum from reverential awe to hysterical derision, and a statement of a mildly negative view (e.g., that the Oracle should not be taken seriously) would be an opinion entitled to expression without incurring tort liability.⁸¹

Additionally, another Court used an excerpt from the play to clarify the character of an individual. *In re Amy B.* was an unreported Opinion in which the Superior Court of Connecticut, written by Honorable Francis J. Foley, III, used the play to add emphasis to its critical review of a parent who, according to the Court when determining to dissolve his parental rights, acted manipulatively and self-absorbed, failed to maintain a reasonable degree of responsibility for the child, and who possessed, borrowing from Shakespeare, “what a goodly outside falsehood hath.”⁸²

The Court in *United States v. Magalong*, a case before the United States Navy-Marine Corps Court of Criminal Appeals, sought to clarify terms by comparison and contrast. The dissenting opinion wrote of the difference between Court duties and responsibilities versus Clemency. The dissent clarified its analysis of clemency, which involves bestowing mercy, and the view that the duty of the Court is not to treat the appellant better than he or she deserves, but to assure that justice is done. The Court amplified its discussion of mercy versus judicial duty with words from the Bard: “Shakespeare made this distinction when, in the ‘Merchant of Venice,’ he wrote, ‘And earthly power doth then show likest God’s, When mercy seasons justice.’”⁸³

Moreover, courts use the play as persuasive authority in support of arguments. For example, a Pennsylvania Court in 1896 used Portia’s words as persuasive authority in its decision as if Shakespeare’s courtroom drama was an actual case upon which legal precedent rested.⁸⁴ This court supported its decision as follows:

An examination of the records now before us leads us to the conclusion that this is a proper case for the application of the principle enunciated by Portia in a celebrated case reported by Shakespeare in the *Merchant of Venice*. The plaintiff was permitted in that case to secure the pound of flesh, ‘nominated in the bond,’ if he could do so without taking a drop of blood. Blood had not been stipulated for in the covenant on which the plaintiff sued. This limitation did not deny the right, but it affected the remedy. This case presents a somewhat similar question.⁸⁵

A paternity suit was the object of another use of *The Merchant of Venice* as persuasive authority.⁸⁶ The Court appeared to use the play as a form of solid proof with precedential effect. The Court remarked, “as Shakespeare told us in *The Merchant of Venice*, ‘it is a wise father that knows his own child.’ We cannot say then that the trial court erred in finding that testimony that Russell Mestdagh believed he was Barry Noel’s father was unconvincing on the issue of paternity.”⁸⁷ This court was quoting from a similar Missouri Court decision, *Simpson v. Blackburn*, wherein that Court relied on the same quotation from *The Merchant of Venice* to support the point that a man could not know that another man was not the father of a child in question.⁸⁸

A Washington Court, in the case *Power, Inc. v. Huntley*, used persuasive authority from a West Virginia Court that used the play “to answer the argument of subsequent financial chaos, saying that if it were to avoid its clear duty because of a claimed expediency, ‘Twill be recorded for a precedent, And many an error, by the same example, Will rush into the State: it cannot be.’”⁸⁹ The Washington Court used this quotation to lead into and support its holding in the case. In *St. Luke’s Episcopal Hospital v. Great West Life & Annuity Insurance Company*, the Court relied on Shakespeare’s words, “What, wouldst thou have a serpent sting thee twice?” when determining, “[u]nder the rule of ‘once bitten, twice shy,’ the court will construe the scope of ERISA narrowly under the example of Memorial. The court concludes that ERISA does not preempt St. Luke’s common-law negligence and statutory and common-law negligent misrepresentation claims.”⁹⁰

Another Court viewed Shakespeare’s play also as if it was a real legal action rather than fiction envisioned by the great Bard. This Court stated, “[s]ince courts have traditionally, from the time of *The Merchant of Venice*, viewed a forfeiture out of all proportion to the breach of contract as an unenforceable penalty, our courts have attempted to...”⁹¹ Perhaps this Court means that courts of Shakespeare’s day viewed forfeiture this way, perhaps this Court viewed the trial of Shylock and Antonio as a real trial, or perhaps this court viewed *The Merchant of Venice* like many other courts have, as persuasive precedent employed to support legal conclusions. It is clear, however, that Shakespeare’s play has become a fixture in American judicial argument.

II. DEBATING THE LESSONS AND USES OF SHAKESPEARE’S PLAY

Just as the authorship of Shakespeare’s texts has served as a point of controversy,⁹² so have the themes in *The Merchant of Venice* served as the impetus of controversy. Lessons inspired by legal uses of *The Merchant of Venice*, particularly by attorneys rather than jurists, have conjured up negative impacts and controversial legal debates about the influences of the play on society and the legal system. The character of Shylock, who is often cited as the metaphor for a greedy or selfish party in a case, proves to be the most controversial legal example. In analysis of the courts’ treatment of *The Merchant of Venice* in judicial opinions, the question is begged: if the play is truly the thing, what is the thing the play is teaching through the use of it in the legal arena?

Many Jewish individuals and groups have been unsettled about the negative stereotypes of Jewish people portrayed in *The Merchant of Venice*, notably the character of Shylock who was contrasted with Christians in the play’s courtroom scene. For example, the television production of *The Merchant of Venice* with Laurence Olivier provoked uneasiness in the Jewish community, and the Anti-Defamation League of B’nai B’rith protested its production.⁹³ One writer proclaimed that “Portia is not *law*... Portia is the incarnation of callous ill-will toward those who are not included within the circle of her favor and benevolence.”⁹⁴ Along a similar strain, a petitioner in a 1949 case, *Rosenberg v. Board of Educ. of New York*, wanted *The Merchant of Venice* removed from student reading lists because the play engendered hatred of

Jews.⁹⁵ The Court in that case saw no reason to compel the suppression of the play, and left it to the Board of Education to decide whether to use the play in education or not.⁹⁶

Attorneys have attempted to use *The Merchant of Venice* to conjure up negative perceptions about cases and parties. The issue in *United States v. Weiss*⁹⁷ was whether a prosecutor's statements to a jury, which referenced *The Merchant of Venice* and ideas of greed and corruption, evoked a stereotype of "Shylockian Jews" and improperly implied that Weiss acted in accord with this stereotype. The prosecutor used the play during the trial as symbolism when referring to Weiss's case as being the "Merchants of Franklin Square," while adding, "merchants of greed, deceit and corruption."⁹⁸ The Defendant and *amicus curiae* Agudath Israel of America argued that the prosecutor's comments were uncalled for because the play has "long served to perpetuate negative stereotypes about the Jewish people by virtue of its memorable villain, Shylock, whose insistence on exacting his pound of flesh 'has become a metaphor for cruel and relentless greed.'"⁹⁹ However, the Court concluded that the racially-prejudicial comments about the play by the prosecutor did not result in a "probability of prejudice," because the prosecutor only slightly referred to the play, and the comments "could not have triggered a prejudiced response unless the listener made a further connection with the play's anti-Semitic overtones."¹⁰⁰ Also, the court opined, "Any possibility of taint is further attenuated by the fact that the statements allude only to the title of the play and to its title character, Antonio, and not to Shylock, the villainous Jew."¹⁰¹ Of course, the dissent responded, "The problem is not one of literary analysis but of a common negative stereotype. Shylock, a dominant figure in *The Merchant of Venice*, is a negative stereotype, all too familiar to those who have never read the Bard or even to those whose last passing acquaintance with him was as high school sophomores."¹⁰²

A discussion of interest on debts led one Court to discuss the history of charging interest, and the Court quoted Shylock's following comment about Antonio: "He hates our sacred nation, and he rails, Even there where merchants most do congregate, On me, my bargains, and my well-won thrift, Which he calls interest..."¹⁰³ And in *Kramer v. McCormick*, this Court spoke of loaning as a profession that has not been held in high esteem, where historians demean lenders and "playwrites have derided them."¹⁰⁴ However, one Court viewed a defendant's reference to "ounce of flesh," an alteration from "pound of flesh," in the play, as contemptuous.¹⁰⁵ The defendant in *State v. Conliff* was found in contempt of court with the maximum conviction of \$100, ten days in jail, and costs, after he stated to the judge, "Are you ready for your ounce of flesh now, your honor?"¹⁰⁶ Alternatively, the dissent contended, "depending upon the totality of the circumstances, it [defendant's statement] could constitute such an attack upon the administration of justice as to constitute punishable contempt, and more than a mere personal comment directed at the judge. Such factors as defendant's tone of voice, facial expression, if any, and physical gestures, if any, are not in the record. Nor does the record reflect whether those present could easily hear the remark."¹⁰⁷

In *Todd v. Rochester Community Schs.*, a plaintiff complained that *Slaughterhouse-Five* should not be used in public schools because it "contains and makes reference to religious matters."¹⁰⁸ The Court in that case used *The Merchant of Venice* as an example to show that materials should not be banned just because they contain some religious references.¹⁰⁹ The Court remarked that it is not unconstitutional to have a book in public school merely because it "contains and makes reference to religious matters."¹¹⁰ The Court asserted that the plaintiff's desires to ban books on the basis of religious reference would be repugnant to the First and Fourteenth Amendments to the United States Constitution. This Court used various literary examples to support its contention. One example was from the *The Merchant of Venice*, in which the court opined: "If plaintiff's contention was correct, then public school students could no longer marvel at Sir Galahad's

saintly quest for the Holy Grail... and Shakespeare would have to delete Shylock from *The Merchant of Venice*... Our Constitution does not command ignorance.”¹¹¹ Similarly, Justice Sandra Day O’Connor, who delivered the Opinion of the United States Supreme Court in *National Endowment for the Arts, et al. v. Finley*, made a reference to an attorney’s argument that a particular amendment would prevent the funding of Jasper Johns’ flag series, *The Merchant of Venice*, *Chorus Line*, *Birth of a Nation*, and the *Grapes of Wrath*.¹¹² Moreover, *Collin v. Smith* is a well known case in First Amendment law in which the Court looked at the First Amendment right of Nazi demonstrators in the village of Skokie, Illinois, and a vague ordinance that the Court said should not apply to the demonstration.¹¹³ The Court found that the use of the ordinance in that case would be overbroad and contended, “the ordinance could conceivably be applied to criminalize dissemination of *The Merchant of Venice* or a vigorous discussion of the merits of reverse racial discrimination in Skokie.”¹¹⁴ Such a comment about the play implies reference to the long cited negative impact of the play on the Jewish community.¹¹⁵ These cases demonstrate that although the use of *The Merchant of Venice* as legal examples presents legal questions of its own, it is also a literary text that the courts are in a position to defend as well as use to make and support their legal decisions.

Controversies over the character of Shylock and religious ideologies related to the play stem from certain legal uses of the case, most notably by attorneys who have used the play to evoke negative reactions in juries over facts, issues, and people. Although the majority of courts using legal examples from *The Merchant of Venice* provide meritorious lessons for the legal community, some lessons, such as those attempted by jurists and attorneys to demonstrate greed, have been arguably impertinent. In 1921, the Court in *United States v. Heitler*, reviewed a case in which an attorney characterized a defendant, Heitler, as faking an alibi, and the attorney remarked of Heitler, “How much like Shylock he looked. He demanded his pound of flesh and he bled his victims.”¹¹⁶ An additional argument by the attorney was the impetus for an objection by opposing counsel on the basis that it was appealing to prejudice based upon the nationality of Heitler, who the attorney making the comment stated was a Jew.¹¹⁷ However, the attorney remarked, “if any one of you thinks it has reference to religion in this case, you cannot decide on race or religion. Race or religion has no bearing in this case any more than sympathy or prejudice. As to whether the defendant Heitler impressed you as playing a part or not, that is for you to say, and is a proper statement for counsel to argue.”¹¹⁸ The reviewing Court, noting that Shylock was immortalized by Shakespeare as a Jew, justified the attorney’s use of Shylock in the courtroom. The Court stated:

...but the character pictured by the master’s pen in the Merchant of Venice has been found in all ages, among all races, and in all businesses. Unfortunately, no race has a monopoly of him--no age that does not produce too many of him. Thus it is, when one is selfish, covetous, grasping, when he drives a hard and onesided bargain, he is not infrequently referred to as a Shylock. It was not for the court to determine the wisdom of the reference, or the appropriateness of the characterization. The court was merely to determine whether there was any evidence to justify the argument.¹¹⁹

As a few courts pointed out, as demonstrated in *Heitler*, although Shakespeare’s character Shylock was Jewish, reference to his character was not to be perceived as supporting a religious slur, but instead works to demonstrate an example of important legal merit that is applicable to modern legal factual scenarios.

The Court in *Gross v. Blecker*¹²⁰ determined that an attorney’s argument to a jury by reference to *The Merchant of Venice* was not an improper attack on Jewish individuals. The attorney paralleled the bargain in the case to the bargain between Shylock and Antonio. The Court determined that the attorney’s argument did not “savor of an appeal to racial or religious prejudices.”¹²¹ However, the Court additionally remarked, “If, however, the characterization of Shylock is

subject to the construction evidently assumed by appellants, it lampoons a great people. But there is no reason to suppose that counsel had any intention, by his remarks, to lampoon the Jews, nor is there any evidence in the record that appellants are Jews.”¹²²

The Courts have also employed reference to Shylock to provide a character example of a type of individual or an individual’s actions. In *United States v. Bigelow*, the Court found clear error in a lower court’s decision concerning the calculation of the defendants’ sentences and vacated all three sentences ordered by the lower court.¹²³ In the appellate court Opinion, the Court used the play as a metaphor to accentuate comments about the actions of the defendants that were “violent and unacceptable.”¹²⁴ In discussing the defendant, the court stated, “As Shylock learned when his collection attempts became too violent, ‘For as thou urgest justice, be assured/Thou shall have justice, more than thou desirest.’”¹²⁵ And, the *Ryan v. American Natl. Inv. Co.* Court used Shylock as a metaphor for the plaintiff, stating, “This the plaintiff refused to accept, insisting, like unto the money lender in *The Merchant of Venice*, upon the letter of his bond.”¹²⁶

The Court in *Browner v. District of Columbia* warned against being neither a borrower or a lender and was critical of Shylock in its analysis.¹²⁷ That Court stated, “Perhaps because so many of us have to live on credit and envy those who have the cash, it is fair to say that, rightly or wrongly, money lenders in general and users in particular have not been dealt with kindly in Holy Scripture, in literature, or in judicial rhetoric.”¹²⁸ The Court went on to state through example that “the Bard” Shakespeare “also introduces us to Shylock, perhaps the most famous (or infamous) money lender in all of fiction, who seeks to exact a pound of his anti-Semitic enemy’s flesh as liquidated damages for failure to repay a loan.”¹²⁹

At the turn of the century, the *Lyman v. Kansas City & A.R. Co.* Court questioned, “What would be the consequences of granting the prayer of this bill?”¹³⁰ The Court stated that a bill that the plaintiff wanted enforced was of selfish spirit, adding, “He seems to care naught about how confounded the confusion, how far-reaching the disaster of the disruption, to result from his late discontent, if, only, like his prototype in *The Merchant of Venice*, he can have his bond.”¹³¹

With such perceptions of Shylock, and legal uses thereof, it is easy to see why some in the Jewish community believe the play, and negative aspects resulting from the play, degrade and perpetuate a negative stereotype of Jewish individuals. While courts have recognized the perception of the play as negative on the Jewish community,¹³² courts citing reference to the play have largely countered that perception with discussions of the play’s merit, and they have cited the case largely to demonstrate worthy legal lessons, such as the importance of mercy and justice.

III. THE IMPORTANCE OF MERCY AND JUSTICE

Several of the substantive incorporations of *The Merchant of Venice* in court opinions are about the importance of mercy and justice in the legal system as a whole and in judicial decisions.¹³³ In fact, many of the judges citing the play concluded that the play conveys legal lessons about mercy and justice, or, as it has been referred, Shakespearian poetic justice. The primary theme of the play, a binding contract in which a legal conflict leads to issues of mercy and the strict letter of the law, has provided courts with several examples from which to draw when addressing modern legal issues. For example, in determining whether a person was bound to a contract, the *Shumaker v. Utex Exploration Co.* Court rationalized, “Legal justice does not always comport, at least on the surface, with poetic justice.”¹³⁴ When referring to “poetic justice,” the court cited the character Portia, who stated: “This bond doth give thee here no jot of blood; The words expressly are a pound of flesh.”¹³⁵ Many of the judges arguing for Shakespearian mercy over the strict letter of the law, however, were dissenting judges speaking against the decision of the court’s majority.

“Justice is no absolute term,” another Court remarked.¹³⁶ That court determined that permitting all that the law may allow might do an injustice, rather than justice, to another person. In reference to this argument, the court referred to Shylock, stating that he was “entitled under the law to his pound of flesh, but, as we see it today, it would have been an injustice for him to have taken it. Justice is a nice balance of the equities.”¹³⁷ The court then reminded the reader of the Opinion that such was not the case under the old common law of England; however, “[w]hen our Constitution was adopted, and today, justice means the law tempered by the principles of equity.”¹³⁸

In *United States v. France, The Merchant of Venice* was used to discuss the Court’s rationale of fair judgments under the circumstances of the case.¹³⁹ The Court referred to the courtroom scene of Act IV in the play, the most cited section by American jurists, when discussing how a mother and wife might not be “the sort of hardened, violent offender whom Congress had in mind when it enacted the Comprehensive Crime Control Act of 1984.”¹⁴⁰ The Court further remarked, “We doubt that the purposes of punishment, even society’s interest in retribution against those who violate its norms, are well served by imprisoning [the mother/wife] for five years, separating her from her daughters and the husband, her ‘victim,’ with whom she has apparently reconciled.”¹⁴¹ Here again a court looked to the lessons of Shakespeare when administering justice.

A Mississippi Court in 1985 stated that “staying in” after school was a valid punishment for mischievous students, valid under the discretion of the school board.¹⁴² Depriving the students of certain student privileges was deemed valid along with remedying the harm caused by the female students. This Court opined, “special ‘extra’ learning tasks might be assigned, such as reading and memorizing selections by Shakespeare. *The Merchant of Venice* would not be inappropriate, where these two girls could learn from Portia that ‘the quality of mercy is not strain’d’ and that ‘earthly power doth... show likest God’s when mercy seasons justice...’”¹⁴³ The Court went further to state that the two girls could then teach this lesson from Portia to “their principal, their superintendent, their school board, and their community.”¹⁴⁴ In this case, the Court not only used the play in administering the law, but recommended that the play serve as a moral lesson for the subjects of the case, a lesson they should then teach to others.

A military court discussed sentence appropriateness, stating that it “involves the judicial function of assuring that justice is done and that the accused gets the punishment he deserves. Clemency involves bestowing mercy--treating an accused with less rigor than he deserves. Shakespeare made this distinction when, in *The Merchant of Venice*, he wrote, ‘And earthly power doth then show likest God’s, When mercy seasons justice.’”¹⁴⁵ Another military court discussed mercy in relation to Shakespeare and *The Merchant of Venice*, citing the same passage as *United States v. Healey*, but adding, “The general power to exercise clemency belongs to the sovereign. Thus, it has been said that ‘Clemency is the ornament of princes.’”¹⁴⁶ Still another military court, in *United States v. Brown*, spoke of mercy while quoting Shakespeare’s play; arguing that mercy, or clemency, is “above the sceptred sway. It is enthroned in the hearts of kings.”¹⁴⁷ Moreover, the case *Maier v. Orr* dealt with a discharge of a female member of Air Force.¹⁴⁸ In reference to a federal court order for the Air Force to do more than pledged (to re-enlist her with promotions, longevity pay, and a six-year early retirement that she would have received prior to the discharge), the Court cited *The Merchant of Venice* in a footnote, “So shines a good deed in a naughty world.”¹⁴⁹

When discussing a judge’s equitable discretion, the *In re Freleigh* Court cited from Portia’s speech, “The quality of mercy is not strained./ It droppeth as the gentle rain from heaven/ Upon the place beneath...”¹⁵⁰ The Court said that Portia’s speech was “cast in terms of mercy but is thought by some scholars to have been influenced by, and perhaps even

to have influenced, English equity practice.”¹⁵¹ The Court in this case was using the play as a small addition to its discussion of equity and cases of civil contempt where there exists an issue of proper sanctions and equitable discretion.

The dissenting judge in *De La Garza Perales v. Casillas* used the play as an artful transition and led into an elegant and short conclusion of dissent.¹⁵² The judge cited the following lines from the play:

The quality of mercy is not strain'd, It droppeth as the gentle rain from Heaven
Upon the place beneath: it is twice blest;
It blesseth him that gives and him that takes;
'Tis mightiest in the mightiest; it becomes
The throne'd monarch better than his crown . . .
Mercy is above this sceptred sway;
It is enthroned in the hearts of kings,
It is an attribute to God himself.¹⁵³

Even though the judge primarily seemed to use the quotations from the play as an artful, poetic conclusion, the quotations also relayed the judge's view about the quality and importance of mercy in its decision. Other jurists have mirrored such lessons of mercy.

In response to a plaintiff's comments, criticisms, and “lack of grace,” one Court stated that the plaintiff in the case “should remember the admonition... ‘Though justice be thy plea, consider this, That, in the course of justice, none of us Should see salvation. We do pray for mercy, And that same prayer doth teach us all to render The deeds of mercy.’”¹⁵⁴ In another case, the dissent urged mercy on an old man who lived an altogether moral life. The dissent in *In re Green*, thought that an eighty-three year old man who practiced law in Illinois for sixty years should not be disbarred, particularly because, up until the incident in the case, he never previously engaged in activities of professional misconduct.¹⁵⁵ The dissent in that case called the majority's decision to disbar him “Draconian.”¹⁵⁶ The dissent used a lesson from *The Merchant of Venice* in its rationale that “[t]he respondent is just one of the many attorneys who have been dragged to the bottom by Greylord's black wake. I do not in any way excuse or condone his conduct, and acknowledge that some sanction is only just. But justice should be tempered by mercy.”¹⁵⁷

In addition to using *The Merchant of Venice* to justify merciful and just decisions, courts also used the play to show how such results should be reached in the legal system. Some courts used the play to show that just results come from avoiding unjust and unconscionable means and ends. Other courts used the play to show that the setting of good precedent by judges is necessary to foster equitable and just laws. And finally, other courts used the play to show that attorneys have a strong role in assuring that justice is served.

A. Avoiding Unjust and Unconscionable Results

A few courts stressed the points that justice cannot come from unconscionable and inequitable agreements or decisions. The Court in *Leasing Serv. Corp. v. Justice*, began its opinion by stating that *The Merchant of Venice*, “tellingly illustrated the evil of agreements which exact a ‘pound of flesh.’”¹⁵⁸ This Court was specifically looking at unconscionable agreements as a matter of law. The Court stated that since three centuries ago when Shakespeare wrote the play, courts have “grappled with the problem of oppressive contracts through the doctrine of unconscionability. Originating in Equity as a form of relief against the harshness of penal bonds, this doctrine has been employed by courts to deny enforcement to harsh and unreasonable contract terms.”¹⁵⁹ Such harshness is seen in Shylock's desire to extract a pound of flesh that would ultimately kill the debtor, his proclaimed enemy.

Courts spoke of avoiding unconscionable results like the taking of a pound of flesh when fairer judgments could be found to suit both parties. One dissenting judge pointed this out with the use of the play to make his dissenting argument. The dissent in *Crockett v. First Fed. S & L Assn. of Charlotte* stated of a contract, “In my view, the money lender’s withholding of the approval of the transfer under these circumstances is unconscionable. The defendant, like Shylock in the *Merchant of Venice*, said, ‘So says the bond, doth it not, Noble Judge? Those are the very words.’”¹⁶⁰

The Court in *Adams v. Franco* recognized that the imposition of criminal liability on someone simply due to that person’s association with someone is “constitutionally defective.”¹⁶¹ In making points about the injustice of associational criminalization when no criminal act was actually committed by someone, the Court noted the statement in *Merchant of Venice*, “The sins of the father are to be laid upon the children”¹⁶² The Court here used the play to show the antithesis of Shakespeare’s words—that the sins of someone should not be placed upon an innocent person who did not commit such sins.

Finally, the *Eldridge v. Burns* Court used *The Merchant of Venice* as a basis for its discussion on contract restitutions that would be inequitable to a defendant.¹⁶³ This Court stated, “The decision generally follows that in Shakespeare’s ‘Merchant of Venice.’ The plaintiff, having demanded his pound of flesh is denied all relief and his payments are forfeited.”¹⁶⁴

B. Setting Good Precedent

Courts also used quotations from *The Merchant of Venice* to make the point that justice, equity, and mercy come from fair courts, judges, and judicial systems. For example, the dissent in *Hawner v. E-Z Mart Stores* argued against a judicial thumb on the scales, because such an act makes a party receive less than his due.¹⁶⁵ The dissent noted, “Wrest once the law to your authority: To do a great right, do a little wrong.”¹⁶⁶ And, the dissent in *People v. Hampton* saw the majority opinion as “misguided” and bolstered its reasoning in Shakespeare’s words: “The quality of that kind of mercy for this particular felon really is strained. Did not Bassanio appeal rightfully and successfully to the judge, in *The Merchant of Venice* (act 4, sc 1): ‘And I beseech you/ Wrest once the law to your authority,/ To do a great right, do a little wrong,/ And curb this cruel devil of his will.’? I vote to reverse for entry of an order affirming an errorless judgment of the trial court...”¹⁶⁷ In these two cases, the dissents wished to show the wrong precedent that the Court was establishing in its majority Opinion.

The dissent in *Commonwealth v. Pierce* used the words of Portia to speak against “incestuous citation”—that is, by quoting phrases in case law taken out of context, and citing them in a sufficient number of cases.”¹⁶⁸ Also, since the American legal system is based on precedent, the dissent warned against bad precedent due to the majority’s allowance of an omission in a judge’s charge to a jury. The dissent then reminded his readers of Bassanio’s request that the law be tailored to his needs, only for Portia to reply:

It must not be; there is no power in Venice
Can alter a decree established:
‘Twill be recorded for a precedent,
And many an error, by the same example,
Will rush into the state: it cannot be.¹⁶⁹

The dissent added: “Not to order a new trial in the case at hand would be to set our approval on an error and by that example, error could be cited as authority and a misleading signboard would rise on the highway of truth.”¹⁷⁰ Similarly,

the *Bridges v. Davis* Court used Portia's words cited above to urge respect for precedent.¹⁷¹ And, the dissent in *Wright v. State* attacked the "scheme" of the majority, warning that this "Twill be recorded for a precedent."¹⁷²

Some judges also stressed the importance of judges making good precedent. In providing a response to the "slight evidence rule," the *United States v. Durive* Court examined that Portia's ruling on Bassanio's "motion" should be considered in assessing a defendant's participation in a conspiracy.¹⁷³ The court stated, "'Twill be recorded for a precedent,/ And many an error by the same example/ Will rush into the [Circuit] it cannot be."¹⁷⁴ The Court noted that "Portia's purported concern was setting bad precedent in the 'State.'"¹⁷⁵

In a concurring opinion in *Rand v. State*, a judge stated that it agreed with another court that previously quoted from *The Merchant of Venice* after a reversal was made in the case.¹⁷⁶ These courts resolved, "'Twill be recorded for a precedent and many an error by the same example will rush into the state. It cannot be."¹⁷⁷ The courts stated that they could not sit back and affirm a conviction by placing a "stamp of approval on such evidence [in question] so as to be used in another case."¹⁷⁸ Along the same lines, the dissent in *Tatum v. Schering Corp.* remarked of the importance of admitting and correcting prior mistakes, stating: "Each Justice must decide what is a mistake that there is honor in admitting and correcting and of what we must say, 'Twill be recorded for a precedent' forever."¹⁷⁹

A judge should function from the Bench as "scrupulously free from and above even the appearance or taint of partiality," one Court proclaimed.¹⁸⁰ As a side-note to this Court's arguments that a judge should remain neutral, this Court cited Shakespeare's statement, "O wise young judge, how I do honor thee" as support of its contention that "the Judge is likely to be equated with the majesty of the law itself," therefore, "inappropriate remarks which might throw the scales out of balance should be omitted..."¹⁸¹

In justifying a difficult decision that went in opposition of his conscience, one judge stated, "Insistence on the part of the petitioner to her right to have support from her husband is tantamount to what Shakespeare has envisioned in his immortal play... Because she is married to the man, she insists on her 'pound of flesh', insists upon that with a degree of arrogance which indicates complete loss of sensibilities to the nicer things in life or even to the ordinary dictates of morals."¹⁸² To this judge, making decisions like this one is "not always pleasant."¹⁸³ *The Merchant of Venice* has been cited as precedent and cited to teach the lesson of the importance of precedent. Such uses of the play by jurists attempt to echo and impart the ideas of fair courts, judges, and judicial systems, perhaps as Shakespeare intended. Such courts employed the play to demonstrate the importance of precedent when balancing strict laws and granting mercy in the pursuit of justice.

C. The Ethical Role of Attorneys in Securing Justice

Judicial systems help maintain moral actions of legal players. Such is the lesson many courts citing *The Merchant of Venice* wish to demonstrate through the communication of the play to readers of their opinions. While some courts used *The Merchant of Venice* to show that a judge has a strong role in creating good law, other courts used the play to say that attorneys equally carry a strong responsibility to create just results and ethical legal practices. As one Court remarked, "Honorable men and women are plentiful in the profession of the law who fully fathom that membership within its ranks entails privileges, conditions and burdens."¹⁸⁴ However, in the modern legal profession, as existed in the day of Shakespeare, there are attorneys who practice the craft unethically. The *Day v. Rosenthal* Court used a comment from *The Merchant of Venice* to criticize an attorney who abused his profession, stating: "In law, what plea so tainted and corrupt but, being seasoned with a gracious voice, obscures the show of evil?"¹⁸⁵ Similarly, in the Connecticut case of *In*

re Casandra B, the Court (through an opinion written by Judge Foley who also wrote the *In re Amy B*. Opinion discussed earlier) used the same citation from *The Merchant of Venice* to criticize a social worker for attempting to practice law. The Court terminated parental rights and in the process used Shakespeare's play to critique the social worker for preparing the pleadings in the case for the parents in an effort to avoid "the irretrievable destruction" of the family's life. The Court opined: "It is unlikely that the social worker has any idea what procedural due process means, or whether it was satisfied when she filed the petition in this case." To accent its critique of the social worker, the Court cited Shakespeare's words: "The world is still deceived with ornament. In law, what plea so tainted and corrupt, But, being seasoned with a gracious voice, Obscures the show of evil?"¹⁸⁶ It was the belief of the Court that the social worker's attempt to practice law constituted a "considerable misuse of the social worker's limited time."¹⁸⁷

Another Court, which granted an attorney mercy from ethical sanctions, looked to Shakespeare as the impetus for its mercy. In *Hector Costa Del Moral v. Servicios Legales De Puerto Rico*,¹⁸⁸ the Court determined: "Although a review of the case law and the facts convince the Court that attorney Costa did not properly research the jurisdictional underpinnings of his complaint, in light of our dismissal of his complaint on the merits, we decline to impose sanctions pursuant to Rule 11."¹⁸⁹ The Court went on to state, "In this case, we will heed the bard's admonition and sweet refrain: 'The quality of mercy is not strained,/ it droppeth as the gentle rain from heaven/Upon the place beneath: it is twice blessed;/It blesseth him that gives and him that takes.'¹⁹⁰

Case preparation is, as pointed out by the Court in *Kneale v. Kneale*, "a most important part of the appeal," especially when the court is overburdened.¹⁹¹ In regard to this Court's concern over the insufficiency of evidence, the Court cited the play's character Bassanio as stating, "His reasons are as two grains of wheat hid in two bushels of chaff: you shall seek all day ere you find them, and when you have them, they are not worth the search."¹⁹² Similarly, another Court criticized an attorney's lack of preparation, but in this Opinion the Court criticized the attorney for mere citation to literary references and lack of required objective evidence. In *The People v. Lewis*, the Court reviewed a jury's verdict of death for First Degree Murder and noted the defense counsel's action of not presenting any evidence of mitigation in the penalty phase of the trial, but who instead offered, the Court noted, a "terse closing argument [that] was a plea for mercy based on biblical references and lines from William Shakespeare's *The Merchant of Venice*."¹⁹³

In an attempt to caution against using cases out of context, the Court in *Harris v. Superior Court* used Shakespeare's words "[t]he devil can cite scripture for his purpose" when seeking to show that attorneys must not "misconstrue the holding of an opinion in order to make it applicable to the facts of his or her client's cause."¹⁹⁴ This Court added, "[S]ome misimpressions are created by the reader or critic who takes a sentence or paragraph from an opinion, sometimes out of context, and analyzes it as a Shakespeare scholar would, or as though it were a verse from Holy Writ, discovering hidden meanings, innuendoes, and subtleties never intended."¹⁹⁵ However, even the use of a quotation from a play can be misinterpreted. Another Court felt the need to clarify its use of Shakespeare's words about the devil ("The devil can cite scripture for his purpose") when discussing an Attorney General who cited a case that failed to support his position.¹⁹⁶ The Court remarked, "That obviously applies only metaphorically and not literally to the current situation--its figure of speech does not of course suggest that the Attorney General has literally joined the forces of darkness."¹⁹⁷

It is important to the maintenance of justice to define terms in ways that support justice. In regard to document analysis and the role of the courts, the *United States Aviation Underwriters, Inc. v. Fitchburg-Leominster* Court used Portia's

actions as a mock-judge to make a point about literal interpretations of terms in documents.¹⁹⁸ This Court stated, “There is, indeed, literary precedent for such literal and narrow reading: Portia, a ‘rightful judge,’ refused to expand ‘a pound of flesh’ to authorize the shedding of even a ‘jot of blood.’”¹⁹⁹ The Court went on to state, however, “But we lack the playwright’s license. Literal exactitude is not the end of our quest.”²⁰⁰

Other courts debated rationales on how attorneys and judges should interpret documents. For example, when discussing the historical “conflict between the letter of the law and the spirit of the law,” the *Rosier v. Garron, Inc.* Court used the example of Shylock and Antonio as demonstrating the personification of the letter (Shylock) and spirit (Antonio) of the law.²⁰¹ The Court went on to state: “The urge to establish a society which is governed by the rule of law rather than the rule of men oftentimes leads courts themselves to prefer to follow an absurd rule which conflicts with their general concepts of equity...”²⁰² Other courts referred to the major legal issue in the play, whether to read a contract as written or give mercy to some Antonio. Portia read it both ways, reading the contract literally, while sparing Antonio’s life. Yet, there is a valid argument that great injustice was still done to the other party, Shylock, due to her interpretation of the bond.

In regard to interpreting a “bond,” the *United States Fid. & Guar. Co. v. Welch* Court spoke of not expanding policy terms as stated in a document through the use of “spurious interpretation.”²⁰³ This Court referred to “Shylock’s case,” that “appellant’s rights are limited to what is ‘nominated in the bond.’”²⁰⁴ And similarly, another Court took the perspective desired by Shylock when determining that the plaintiffs should receive the compensation stipulated in an agreement.²⁰⁵ The *Shannon & Luchs v. Mellon Bank* Court reinforced the similar position with the assertion, “in Shakespeare’s language, it is ‘so nominated in the bond.’”²⁰⁶

These courts have adopted the lessons of Shakespeare, lessons that continue to live today in the words of jurists who keep the Bard’s legal education alive. The majority of courts using the play on the subject of legal duties of the Bar have found that *The Merchant of Venice* provides a sound example for lawyers who should be careful to use precedent and evidence ethically. Lawyers should not cite precedent when such support has to be taken out of context to actually apply to the case at hand. Courts have used the play to point out that there exists an abundance of case holdings and much judicial rhetoric; as such, an attorney can find anything to support a point without misconstruing case law; and, therefore, there is no need, nor should there be, to resort to misrepresentation and unethical conduct. These courts have encouraged attorneys to use precedent wisely, with some of these courts echoing Shakespeare’s warning, “the devil can cite Scripture for his purpose.”²⁰⁷

IV. CONCLUSION

This contribution to the conversation concerning Shakespeare’s influence on law, language, and dramatic literature focused only on one play, *The Merchant of Venice*, as cited in American case law. While I have not cited in this article every quote from *The Merchant of Venice* used by the courts, a significant and representative selection from the last 140 years is fairly reflected. In staging this essay, I suggested that lines and language from the play are most often cited by courts for the following reasons: (1) for creating dramatic effect, borrowing Shakespeare’s words for more than a mere *bon mot* but because the Bard has a certain flare that expresses the point more elegantly than the words of the judge, her law clerk, or the attorneys who briefed the case; (2) as lessons about the role of law and the legal system in society, illuminating the ambiguous nature of technicalities, the contemporary constitutional culture that includes the Fifth, Sixth, and Eighth Amendments and rejects guilt by association implied in the “sins of the father,” and the available theories of

interpretation; and (3) to emphasize the importance of mercy to justice, a quality that transcends the underlying human motive of revenge represented by the “pound of flesh,” whether in the strict enforcement of contracts that would be impossible to fulfill or against public policy or in demanding the full force of retributive justice in criminal cases with mitigating circumstances.

However, this essay is more than a case note on *Shylock v. Antonio*. In addition to confirming the above propositions, I believe that the examples and discussion have made the case for two additional claims. First, judicial opinions are clearly rhetorical texts, making the argument for the result in each case, but, moreover, they can also be the scene for imaginatively restaging familiar literary dramas. Even if there is a certain postmodern fragmentation of the texts and their implicit arguments, they can be critically teased out and should not be dismissed as “so slight, tangential, and idiosyncratic”²⁰⁸ as to be without meaning. The opportunities for scholars to confirm or reject this conclusion are numerous and as yet hardly engaged. Second, this is a good thing, especially so because it assumes an audience. If the role and rule of law are to be understood by republican citizens, then judges must write and publish opinions that reflect a commitment to the conversation by connecting the results and giving them meaning in the public sphere.²⁰⁹ Shakespeare’s plays provide the shared stories and a metaphorical vocabulary that can facilitate this rhetorical transaction between the judicial author and the citizen audience as critic in the theatre of public affairs.

Notes

- ¹ Elizabeth Villiers Gemmette, *Law and Literature: An Unnecessarily Suspect Class in the Liberal Arts Component of the Law School Curriculum*, 23 Val. U.L. Rev. 267 (1989); William Domnarski, *Law and Literature*, 27 Legal Stud. Forum 109 (2003).
- ² James Boyd White, *The Legal Imagination* (1973); Robert Ferguson, *Law and Letters in American Culture* (1984); James Boyd White, *Heraclides’ Bow: Essays on the Rhetoric and Poetics of Law* (1985); Richard A. Posner, *Law and Literature: A Misunderstood Relation* (1988); Richard Weisberg, *Peothics and Other Strategies of Law and Literature* (1992); Ian Ward, *Law and Literature: Possibilities and Perspectives* (1995); and especially relevant to this essay, Daniel J. Kornstein, *Kill All the Lawyers? Shakespeare’s Legal Appeal*. (1994).
- ³ Frank Kermode, *Justice and Mercy in Shakespeare*, 33 Hous. L. Rev. 1155 (1996); Theodor Meron, *Shakespeare’s Henry The Fifth And The Law Of War*, 86 A.J.I.L. 1 (1992); Michael Jay Willson, *A View of Justice in Shakespeare’s The Merchant of Venice and Measure for Measure*, 70 Notre Dame L. Rev. 695 (1995); George Anastaplo, *Law & Literature and Shakespeare: Explorations*, 26 Okla. City U.L. Rev. 1 (2001); Robert Batey, *Kenneth Starr--Among Others--Should Have (Re)read Measure for Measure*, 26 Okla. City U.L. Rev. 261 (2001); Christopher A. Colmo, *Law and Love in Shakespeare’s The Merchant of Venice*, 26 Okla. City U.L. Rev. 307 (2001); C. M. A. McCauliff, *The Bard and the Bard: Mercy Tempers Strict Statutory Application in Shakespeare’s Measure for Measure*, 43 Catholic Law. 81 (2004); Charles Spinosa, *Shylock and Debt and Contract in The Merchant of Venice*, 5 Cardozo Stud. L. & Lit 65 (1993); B.J. Sokol & Mary Sokol, *Shakespeare and the English Equity Jurisdiction: The Merchant of Venice and the Two Texts of King Lear*, 50 Review of English Studies 417 (1999); John Denvir, *William Shakespeare and the Jurisprudence of Comedy*, 39 Stan. L. Rev. 825 (1987); Thomas C. Bilello, *Accomplished with What She Lacks: Law, Equity, and Portia’s Con*, 16 Cardozo Stud. L. & Lit. 11 (2004); Erin A. Cook, *Shining Lights at the Bar: Shakespeare’s Portia as a Model for Female Attorneys*, 30 Cumb. L. Rev. 517 (2000); Tim Spiekerman, *A Legitimate Crisis: Shakespeare’s King John*, 22 (4) Legal Stud. F. 535 (1998).
- ⁴ Jeffrey G. Sherman, *A Tax Teacher Tries Law and (Dramatic) Literature*, 37 Suffolk U. L. Rev. 255 (2004).
- ⁵ See, Anita L. Allen and Michael R. Seidl, *Interdisciplinary Approaches to International Economic Law: Cross-Cultural Commerce in Shakespeare’s The Merchant Of Venice*, 10 Am. U.J. Int’l L. & Policy 837 (1995); Edith Z. Friedler, *Shakespeare’s Contribution to the Teaching of Comparative Law--Some Reflections on The Merchant of Venice*, 60 La. L. Rev. 1087 (2000); Ken Masugi, *Race, The Rule Of Law, And The Merchant Of Venice: From Slavery To Citizenship*, 11 ND.J. L. Ethics & Pub Policy 197 (1997); Peter K. Yu, *Piracy, Prejudice, And Perspectives: An Attempt To Use Shakespeare To Reconfigure The U.S.-China Intellectual Property Debate*, 19 B.U. Int’l L.J. 1 (2001); Jonathan M. Hyman & Lela P. Love, *If Portia Were a Mediator: An Inquiry into Justice in Mediation*, 9 Clinical L. Rev. 157 (2002); Carrie Menkel-Meadow, *Portia Redux: Another Look at Gender, Feminism and Legal Ethics*, 2 Va. J. Soc. Policy & L. 75 (1994); Wayne R. LaFave, *Mapp Revisited: Shakespeare, J., and Other Fourth Amendment Poets*, 47 Stan. L. Rev. 261 (1995); Amy Ross, *Vienna Then and Now: The Impact of Shakespeare’s Measure For Measure on the Twenty-First Century Legal Profession*, 46 S.D. L. REV. 781 (2001).
- ⁶ Rhetorical critics who have examined the nature and uses of language in Shakespeare’s *Merchant* completely overlook the application, adaptation, and site of performance in judicial opinions, a rhetorical arena with real consequences for society. See, Jane Freeman, *Fair Terms and a Villain’s Mind: Rhetorical Patterns in The Merchant of Venice*, 20 Rhetorica 149 (2002); Sharon Schuman, *Authorizing Meaning in The Merchant of Venice*, 22 Text & Perf. Q. 47 (2002); Susan Oldrieve, *Marginalized Voices in The Merchant of Venice*, 5 Cardozo St. of L. & Lit. 87 (1993); Cary F. Jacob, *Reality and The Merchant of Venice*, 28 Q.J. of Speech 307 (1942); Lawrence Danson, *The Harmonies of The Merchant of Venice* (1978); but see, Peter Goodrich, *Legal Discourse: Studies in Linguistics, Rhetoric and Legal Analysis* (1987).
- ⁷ Robert W. Peterson, *The Bard And The Bench: An Opinion And Brief Writer’s Guide To Shakespeare*, 39 Santa Clara L. Rev. 789, 792-793 (1999). Peterson notes that the line regarding a “pound of flesh” from *The Merchant of Venice* is used metaphorically by courts in his survey of opinions with attribution to Shakespeare 35 times; however, it appears in judicial opinions an additional 254 times without attribution, indicating the extent to which Shakespeare’s story has become a part of contemporary American conversation, judicial and otherwise.

- ⁸ William Domnarski, *Shakespeare in the Law*, 67 Conn. B.J. 317 (1993); Jules Gleicher, *The Bard at the Bar: Some Citations of Shakespeare by the United States Supreme Court*, 26 Okla. City U.L. Rev. 327 (2001); Robert W. Peterson, *The Bard And The Bench: An Opinion And Brief Writer's Guide To Shakespeare*, 39 Santa Clara L. Rev. 789 (1999); and, in a more limited fashion, David Franklin, *Terms Of Art: Of Bench and Bard* 1 Green Bag 2d 317. (1998).
- ⁹ An examination of the judicial use of *Hamlet* has been undertaken in Steven M. Oxenhandler, *The Lady Doth Protest Too Much Methinks: The Use of Figurative Language From Shakespeare's Hamlet in American Case Law*, 23 Hamline L. Rev. 370 (2000).
- ¹⁰ Richard Weisberg, *Peothics and Other Strategies of Law and Literature* 17 (1992).
- ¹¹ B J Sokol and Mary Sokol, *Shakespeare's Legal Language: A Dictionary* 3 (2000).
- ¹² For one trial judge's explanation of how he has learned from and applied the works of Shakespeare and other literary figures in real cases, see John C. Sheldon, *The Judicial Process: Shylock, Cordelia, and the Maine District Court*, 51 Me. L. Rev. 10 (1999).
- ¹³ The majority of courts that referenced an attorney's use of excerpts from *The Merchant of Venice*, either in appellate briefs or in arguments at trial, also commented on the attorney's arguments or countered the attorneys' uses of the play with creative retorts. There was only one case in which a reviewing court merely made reference, without comment, to an attorney's use of the play. The Court of Special Appeals in Maryland was reviewing a medical malpractice case of an alleged unnecessary post-accident surgery and merely noted the following statements by an attorney at trial: "Shakespeare said it years and years ago, in the play the Merchant of Venice. A pound of flesh. A pound of flesh. What price on it?..." *Mathews, et. al. v. Gary*, 133 Md. App. 570, 576; 758 A. 2d 1019, 1022 (2000).
- ¹⁴ Edmund B. Spaeth, Jr., *Symposium: How Do Judges Decide? A Course for Non-Lawyers*, 106 Dick. L. Rev. 773, 792-794 (2002).
- ¹⁵ See *In re Durrett*, 187 Bankr. 413, 418 (N.H., 1995) (reference to *The Merchant of Venice* when stating "It is not clear that Congress intended by chapter 11 to give creditors a legal right in that body"); *Brooks v. Martin*, 69 U.S. 70, 76-77 (1864) ("What profits the concern would ultimately give was a matter which, like the 'means' of Signor Antonio in the *Merchant of Venice*, was still 'in supposition'"); *Prays v. Perryman*, 213 Cal. App. 3d 1133, 1134 (1989) (dog bite case where the court related the defense theory "in essence" to the quotation from *Merchant of Venice* "since I am a dog, beware my fangs." *Merchant of Venice*, Act III, scene iii).
- ¹⁶ *FDIC v. Municipality of Ponce*, 708 F. Supp. 464 (1989).
- ¹⁷ *Id.* at 465, *citing Merchant*, Act II, scenes i and viii.
- ¹⁸ *Id.* at 467, *citing Merchant*, Act IV, scene i.
- ¹⁹ *People v. Willett*, 44 Ill. App. 3d 545, 547 (1976).
- ²⁰ *Id.*
- ²¹ *Id.* *citing Merchant*, Act IV, scene i.
- ²² *DeRonde v. Regents of the Univ. of California*, 102 Cal. App. 3d 221 (1980).
- ²³ *Id.* at 228, *citing Merchant*, Act II, scene ix.
- ²⁴ *People v. Cacioppo*, 264 Cal. App. 2d 392, 398 (1968) *citing Merchant*, Act V, scene i.
- ²⁵ See *McCauley v. State*, 405 So.2d 1350, 1351 (Fla., 1981) (concurring opinion led its discussion with a quotation from the play, "In law, what plea so tainted and corrupt but, being seasoned with a gracious voice, Obscures the show of evil?"); *TKU-Queens Corp. v. Mable Food Corp.*, 90 Misc.2d 48 (1977), *citing William Shakespeare, The Merchant of Venice*, Act IV, scene i (1597).
- ²⁶ *American Radio-Telephone Serv. v. PSC of Maryland*, 33 Md. App. 423, 424 (1976).
- ²⁷ *Id.*
- ²⁸ *Crowley Marine Services, Inc. v. National Labor Relations Board*, 344 U.S. App. D.C. 165; 234 F.3d 1295 (2000), *citing Shakespeare, The Merchant of Venice*, Act I, scene i.
- ²⁹ *Henslee v. D. M. Cent. Transp., Inc.*, 870 F. Supp. 764 (1994) *citing Merchant*, Act I, scene iii.
- ³⁰ *Id.*, at 765.
- ³¹ *Fogleman v. Mercy Hospital, Inc.*, 283 F.3d 561 (2002).
- ³² *Fogleman*, 283 F.3d at 564 and n.1.
- ³³ *Village of San Jose v. McWilliams and McWilliams*, 284 F.3d 785, 787-788, n. 1 (2002).
- ³⁴ *Village of San Jose v. McWilliams and McWilliams*, 284 F.3d at 794, n. 5, *citing Shakespeare, The Merchant of Venice*, Act III, scene iv.
- ³⁵ *Queen City Coach Co. v. Carolina Coach Co.*, 237 N.C. 697, 705 (1953).
- ³⁶ *Rivera v. Medina*, 988 F. Supp. 28, 33 (Puerto Rico, 1997), *citing Merchant*, Act III, scene ii.
- ³⁷ *Deborah Leslie, Ltd. v. Rona, Inc.*, 630 F. Supp. 1250, 1251 (R.I., 1986).
- ³⁸ *Id.*, at 1251.
- ³⁹ *Id.* *citing William Shakespeare, Merchant*, Act II, scene vii, (1597).
- ⁴⁰ *United States v. Powell*, 55 M.J. 633, 642 (2001), *citing The Merchant of Venice*, Act III, scene ii.
- ⁴¹ *Ewen v. Wilbor*, 1900 WL 3979, 3 (Ill. App. 1 Dist. 1900).
- ⁴² *Id.*
- ⁴³ *Haldorson v. State Sch. Constr. Fund*, 224 N.W.2d 814, 820 (1974).
- ⁴⁴ *Reed v. King*, 145 Cal. App 3d 261 (1983).
- ⁴⁵ *Id.* at 263.
- ⁴⁶ *B. F. Hirsch, Inc. v. Enright Ref. Co.*, 617 F. Supp. 49 (N.J., 1985).
- ⁴⁷ *Id.* at 51, *citing Merchant*, Act II, scene vii. See also *Johnson v. Commissioner*, T. C. Memo 1992-369 (1992) (court uses the statement "All that glitters is not gold" when referring to a failure to demand and recover bad debts).
- ⁴⁸ *Haynie v. State*, 141 Ga. App. 688, 697 (1976).
- ⁴⁹ *Id.*
- ⁵⁰ *In re Keniston*, 60 Bankr., 742 (1986).
- ⁵¹ *Id.* at 744.
- ⁵² *State of South Dakota v. Allison*, 607 N.W. 2d 1, 20, n.4 (S.D. Sup. Ct., 2000).
- ⁵³ *National Life Ins., Co. v. Phillips Publ., Inc.*, 793 F. Supp. 627 (1992).
- ⁵⁴ *Id.* at 648.
- ⁵⁵ *Boyle v. Pine Beach Club*, 185 Wis. 2d 709 (1994) (unpublished opinion).
- ⁵⁶ *In re Estate of Shoplaw*, 54 Wash. 2d 602, 606 (1959) *citing Merchant*, Act IV, scene i.

- ⁵⁷*In re Fraley*, 189 Bankr. 398, 400 (1995).
- ⁵⁸*Id.* at 400-01 citing *Merchant*, Act V, scene i.
- ⁵⁹*Woolbert and Godfrey v. Kimble Glass, Inc., Savings Program, and Kimble Glass, Inc. Salary Retirement Plan*, 54 F. Supp. 2d 539 (N.C., 1999), citing *Mothershead v. Schrimsher*, 105 N.C. App. 209, 212-13, 412 S.E.2d 123, 125 (1992) and Shakespeare, *The Merchant of Venice* Act III, scene v.
- ⁶⁰*Eckles v. State*, 306 Ore. 380, 402 (1986). See also *Cooper v. Carlson*, 511 P.2d 1305, 1311 (Alaska, 1973) (referring to a “pound of flesh” as a metaphor in reference to unconscionable awards in a legitimately arguable contract claim).
- ⁶¹*In Re Save Venice New York, Inc.*, 259 F.3d 1346, 1355 (2001).
- ⁶²See *In re Estate of Erlanger*, 145 Misc. 1, 130 (1932) (court cited *Merchant* when discussing the importance of the ring to a marriage ceremony); *Maruska v. United States*, 77 F. Supp. 2d 1035, 1036 (1999), citing *Merchant*, Act IV, scene 1 (“Reflective of Shylock’s protest, that ‘you take my life [w]hen you take the means whereby I live’ ... the Plaintiffs contend that their wages, as the legitimate fruits of their labor, and as the underpinning of all of their property holdings, should be constitutionally immune from the Federal income tax.”); *Fogel v. State*, 125 Tex. Crim. 431, 433 (1934) (“From reading the record before us it appears that the trial of this case was a fair reproduction of the characters depicted by Shakespeare in his *Merchant of Venice*); *Baumhoff v. St. Louis & K. R. Co.*, 205 Mo. 248 (1907) (court provides a detailed analogy of *Merchant of Venice* to the case on appeal, discussing “an old case, decided by a pseudo judge, one Portia...”).
- ⁶³*People v. Ziegler*, 29 Misc.2d 429, 436 (1961).
- ⁶⁴*Id.* at 436, citing *Merchant*, Act V, scene i.
- ⁶⁵*Gates v. United States* 33 Fed. Cl. 9, 13 (1995) citing *Merchant*, Act IV, scene i.
- ⁶⁶*Id.* at 13.
- ⁶⁷*Tison v. Arizona*, 481 U.S. 137, 183-84 (1987).
- ⁶⁸*Id.*
- ⁶⁹*Id.*
- ⁷⁰*United States v. Auerbach*, 745 F.2d 1157, 1160 (1984).
- ⁷¹*Id.* citing *The Merchant of Venice*, Act III, scene v.
- ⁷²*Miller v. CIR*, T. C. Memo 1989-461 (1989).
- ⁷³*Id.* at 33.
- ⁷⁴*Id.*, citing *The Merchant of Venice*, Act III, scene v.
- ⁷⁵For example, see *Misenheimer v. Misenheimer*, 312 N.C. 692, 698 (1985) (Court cites “the gods visit the sins of the fathers upon the children,” when it looks at the intent of the testator’s will to determine an “equitable result as far as the innocent children of John are concerned”).
- ⁷⁶*Eiben v. Epstein and Sons Int’l, Inc.*, 57 F.Supp. 2d 607, 612, n. 5 (Ill., 1999).
- ⁷⁷*Redevelopment Auth. of Philadelphia v. Lieberman*, 461 Pa. 208, 214 (1975).
- ⁷⁸*Id.*
- ⁷⁹*In re Bank of New York*, 53 A.D.2d 55, 56 (1976).
- ⁸⁰*Id.*
- ⁸¹*Jaszai et al. v. Christie’s et al.*, 279 A.D. 2d 186, 188-189 (2001).
- ⁸²*In re Amy B*, 1997 Conn. Super LEXIS at 28, citing *Merchant*, Act I, scene iii.
- ⁸³*United States v. Magalong*, 2002 CCA LEXIS 141, (2002), citing act IV, scene i.
- ⁸⁴*Miller v. Niedzielska*, 176 Pa. 409, 411 (1896).
- ⁸⁵*Id.*
- ⁸⁶*Retirement Bd. of the Police Retirement Sys. of Kansas City*, 652 S.W.2d 874 (Mo., 1983).
- ⁸⁷*Id.* at 880.
- ⁸⁸*Simpson v. Blackburn*, 414 S.W.2d 795, 805 (Mo., 1967). Also see *June B. v. Edward L.*, 69 A.D.2d 612, 614 (N.Y., 1979) (court used the same quotation from *Merchant* in paternity suit); *American Radio-Telephone Service, Inc. v. Public Service Commission*, *supra* note 13 (court began opinion with the quotation to fault the Public Service Commission of Maryland for its difficulty in determining the lineage of a grandfather).
- ⁸⁹*Power, Inc. v. Huntley*, 39 Wash. 2d 191, 203 (1951).
- ⁹⁰*St. Luke’s Episcopal Hospital v. Great West Life & Annuity Insurance Company*, 38 F. Supp. 497, 509 and n. 28 (1999), citing *Merchant*, Act IV, scene i.
- ⁹¹*Boyle v. Petrie Stores Corp.*, 136 Misc.2d 380, 390 (1985).
- ⁹²The true authorship of the Shakespeare texts has been the subject of much debate. Those who have been proposed as possible authors other than William Shakespeare of Stratford include: Sir Francis Bacon; Queen Elizabeth; William Stanley, 6th Earl of Derby; Christopher Marlowe; Edward de Vere, 17th Earl of Oxford; and Sir Edward Dyer. Modern debates about such authorship have primarily focused on William Shakespeare and Edward de Vere, 17th Earl of Oxford. In 1987, a Moot Court Debate was held at American University over whether William Shakespeare or Edward de Vere authored the Shakespeare Plays, in which judges for the debate were United States Supreme Court Justices Harry Blackmun, William Brennan, and John Paul Stevens. See also, Justice John Paul Stevens, *The Shakespeare Canon of Statutory Construction* 140 U. Pa. L. Rev. 1373 (1992), in which Justice Stevens wrote of the importance of studying humanistic values in relation to rules of law and discussed the canons of statutory construction related to the question whether the Seventeenth Earl of Oxford is the true author of the Shakespeare texts. Justice Stevens communicated his discussion of the canons in five Acts: (Act I) read the statute, (Act II) read the entire statute, (Act III) read the text in its contemporary context, (Act IV) if ambiguity still exists then consult legislative history, and (Act V) use common sense.
- ⁹³See Rita H. Silverman, *Sufferance is the Badge of All our Trive: A Study of Shylock in the Merchant of Venice* 40 (1981).
- ⁹⁴Abraham Morevski, *Shylock and Shakespeare*, 56(1967)..
- ⁹⁵*Rosenberg v. Board of Educ. of New York*, 196 Misc. 542, 543 (N.Y., 1949).
- ⁹⁶*Id.*
- ⁹⁷*United States v. Weiss*, 930 F.2d 185 (1991).
- ⁹⁸*Id.* at 196.
- ⁹⁹*Id.* citing Bronstein, *Shakespeare, The Jews, and The Merchant of Venice*, 20 Shakespeare Quarterly 3 (1969).
- ¹⁰⁰*United States v. Weiss*, at 196.
- ¹⁰¹*Id.*
- ¹⁰²*Id.* at 203.
- ¹⁰³*Riggs Nat’l Bank of Washington, D.C. v. Dist. of Columbia*, 581 A.2d 1229, 1253 n.34 (1990), citing *Merchant*, Act I, scene iii.

- ¹⁰⁴*Kramer v. McCormick*, 59 Md. App. 193, 195 (1984) (court was referring to Shakespeare's rendition of Shylock as loaner).
- ¹⁰⁵*State v. Conliff*, 61 Ohio App.2d 185 (1978).
- ¹⁰⁶*Id.*, at 186.
- ¹⁰⁷*Id.* at 197.
- ¹⁰⁸*Todd v. Rochester Community Schs.*, 41 Mich. App. 320 (1972).
- ¹⁰⁹*Id.* at 329.
- ¹¹⁰*Id.*
- ¹¹¹*Id.*
- ¹¹²*National Endowment for the Arts, et al. v. Finley*, 524 U.S. 569, 582 (1998).
- ¹¹³*Collin v. Smith*, 578 F.2d 1197 (1978).
- ¹¹⁴*Id.* at 1207.
- ¹¹⁵*See also Monteiro v. The Tempe Union High School District*, 158 F. 3d 1022, 1030, n. 12 (1998) (court noted the offensive nature of the play).
- ¹¹⁶*United States v. Heitler*, 274 F. 401, 410 (Ill., 1921).
- ¹¹⁷*Id.*
- ¹¹⁸*Id.*
- ¹¹⁹*Id.*
- ¹²⁰*Gross v. Blecker*, 105 S.W.2d 202 (1937).
- ¹²¹*Id.* at 285.
- ¹²²*Id.*
- ¹²³*United States v. Bigelow*, 914 F.2d 966 (1990).
- ¹²⁴*Id.* at 996.
- ¹²⁵*Id.* at 975-76, citing *The Merchant of Venice*, Act IV, scene i.
- ¹²⁶*Ryan v. American Natl. Inv. Co.*, 7 Utah 2d 95, 97 (1957).
- ¹²⁷*Browner v. District of Columbia*, 549 A.2d 1107 (1988).
- ¹²⁸*Id.* at 1108.
- ¹²⁹*Id.* at 1108-09, citing *Merchant*, Act I, scene iii.
- ¹³⁰*Lyman v. Kansas City & A.R. Co.*, 101 F. 636, 643 (1900).
- ¹³¹*Id.*
- ¹³²*See e.g. Wexner v. Anderson Union High Sch. Dist. Bd. of Trustees*, 258 Cal. Rptr. 26, 38 (1989). (court cited *Merchant* as being objectionable and one that people would want to ban due to the play's views of anti-Semitism).
- ¹³³*Johnson v. State*, 501 So. 2d 158, 159 (Fla., 1987) (The first words of the court were "The quality of mercy ... becomes The throned monarch better than his crown." *Merchant*, Act IV, scene i.); *Uninsured Employers' Fund v. Hoy*, 23 Md. App. 1 (1974) (In discussion of workman's compensation, court noted "And earthly power doth then show likest God's When mercy seasons justice." *Merchant*, Act III, scene ii).
- ¹³⁴*Shumaker v. Utex Exploration Co.*, 157 F. Supp. 68, 78 (Utah, 1957).
- ¹³⁵*Id.* citing *The Merchant*, Act IV, scene i.
- ¹³⁶*American-Hawaiian S.S. Co. v. United States*, 124 F. Supp. 378, 381 (1954).
- ¹³⁷*Id.*
- ¹³⁸*Id.*
- ¹³⁹*United States v. France*, 886 F.2d 223 (1989).
- ¹⁴⁰*Id.* at 227.
- ¹⁴¹*Id.* at 227-28. *See Merchant*, Act IV, scene 1, at 184.
- ¹⁴²*Clinton Mun. Separate Sch. Dist. v. Byrd*, 477 So. 2d 237, 242 (Miss., 1985).
- ¹⁴³*Id.* citing *Merchant*, Act IV, scene i.
- ¹⁴⁴*Id.* at 242.
- ¹⁴⁵*United States v. Healy*, 26 M.J. 394, 395 (1988) citing *Merchant*, Act IV, scene i.
- ¹⁴⁶*United States v. Lanford*, 6 U.S.C.M.A. 371, 378 (1955).
- ¹⁴⁷*Brownd*, 6 M.J. 338, 345 (1979), citing *Merchant*, Act IV, scene i.
- ¹⁴⁸*Maier v. Orr*, 754 F.2d 973 (1985).
- ¹⁴⁹*Id.* at 980, citing Shakespeare, *The Merchant of Venice*, Act V, scene i, at 90.
- ¹⁵⁰*In re Freleigh*, 894 F.2d 881, 886 (1989), citing *Merchant*, Act IV, sc. i, ll.
- ¹⁵¹*Id.*, citing E.G., Knight, *Equity*, "The Merchant of Venice" and William Lambarde, 27 Shakespeare Survey 93 (1974).
- ¹⁵²*De La Garza Perales v. Casillas*, 903 F.2d 1043 (1990).
- ¹⁵³*Id.* at 1053, citing Shakespeare, *The Merchant of Venice*, IV, c. 1597.
- ¹⁵⁴*Monroe v. United Air Lines, Inc.*, Docket No. 79 C 360,3 slip opinion (Ill., 1983) citing *The Merchant*, Act IV, scene i.
- ¹⁵⁵*In re Green*, Docket No. 65942 (Ill., 1988).
- ¹⁵⁶*Id.*
- ¹⁵⁷*Id.* citing *The Merchant*, Act IV, scene i.
- ¹⁵⁸*Leasing Serv. Corp. v. Justice*, 673 F.2d 70, 71 (1982).
- ¹⁵⁹*Id.*
- ¹⁶⁰*Crockett v. First Fed. S & L Assn. of Charlotte*, 289 N.C. 620, 642 (1976), citing *Merchant*, Act IV, scene i.
- ¹⁶¹*Adams v. Franco*, 168 Misc.2d 399, 403 (N.Y., 1996).
- ¹⁶²*Id.* citing *Merchant*, Act III, scene v.
- ¹⁶³*Eldridge v. Burns*, 76 Cal. App. 3d 396 (1978).
- ¹⁶⁴*Id.* at 433.
- ¹⁶⁵*Havner v. E-ζ Mart Stores*, 825 S.W.2d 456, 462 (1992).
- ¹⁶⁶*Id.* citing *Merchant*, Act IV, scene i.
- ¹⁶⁷*People v. Hampton*, 384 Mich. 669, 685 (1971).

- ¹⁶⁸*Commonwealth v. Pierce*, 515 Pa. 153, 172 (1986).
- ¹⁶⁹*Id.*, citing *The Merchant of Venice*, Act IV, scene i; quoting *Commonwealth v. Edwards*, 394 Pa. 335, 339 (1959).
- ¹⁷⁰*Id.*
- ¹⁷¹*Bridges v. Davis*, 303 S.W.2d 870, 871-72 (1957).
- ¹⁷²*Wright v. State*, 707 P.2d 153, 160 (1985), citing *Merchant*, Act IV, scene i.
- ¹⁷³*United States v. Durrive*, 902 F.2d 1221, 1225 (1990).
- ¹⁷⁴*Id.* citing *The Merchant of Venice*, Act IV, scene I, lines 220-22.
- ¹⁷⁵*Id.*
- ¹⁷⁶*Rand v. State*, 232 Ark. 909 (1960).
- ¹⁷⁷*Id.* at 917, citing *Merchant*, Act IV, scene i.
- ¹⁷⁸*Id.*
- ¹⁷⁹*Tatum v. Schering Corp.*, 523 So. 2d 1042, 1063 (Ala. 1988) (dissenting opinion), citing *Merchant*, Act IV, scene i.
- ¹⁸⁰*People v. De Jesus*, 42 N.Y.2d 519, 523 (1977).
- ¹⁸¹*Id.* citing *Merchant*, Act IV, scene i.
- ¹⁸²*Jones v. Jones*, 189 Misc. 186, 187 (1947).
- ¹⁸³*Id.*
- ¹⁸⁴*Day v. Rosenthal*, 170 Cal. App. 3d 1125, 1180 (1985).
- ¹⁸⁵*Id.* citing *Merchant of Venice*, Act III, scene ii.
- ¹⁸⁶*In re Casandra B*, 1997 Conn. Super LEXIS 2925 at 17, n4.
- ¹⁸⁷*In re Casandra B*, 1997 Conn. Super LEXIS at 18.
- ¹⁸⁸*Hector Costa Del Moral v. Servicios Legales De Puerto Rico*, 63 F. Supp. 2d 165, 172-173 (1999).
- ¹⁸⁹*Id.*
- ¹⁹⁰*Id.*
- ¹⁹¹*Kneale v. Kneale*, 67 So. 2d 233, 234 (Fla., 1953).
- ¹⁹²*Id.*, citing *The Merchant*, Act I, scene i.
- ¹⁹³*The People v. Lewis*, 25 Cal 4th 610, 628; 22 P.3d 392, 404 (2001).
- ¹⁹⁴*Harris v. Superior Court*, 3 Cal. App. 4th 661, 666 (Cal. 1992) citing *Merchant*, Act I, scene iii.
- ¹⁹⁵*Id.* quoting Leflar, *Some Observations Concerning Judicial Opinions*, 61 Colum. L.Rev. 810, 817 (1961).
- ¹⁹⁶*United States ex rel. Green v. Peters*, WL 8258, 17, n. 11 (1994).
- ¹⁹⁷*Id.*
- ¹⁹⁸*United States Aviation Underwriters, Inc. v. Fitchburg-Leominster*, 42 F.3d 84, 86 (1994).
- ¹⁹⁹*Id.* citing *Merchant*, Act IV, Scene 1, lines 306-313.
- ²⁰⁰*Id.*
- ²⁰¹*Rosier v. Garron, Inc.*, 156 W. Va 861, 872 (1973).
- ²⁰²*Id.*
- ²⁰³*United States Fid. & Guar. Co. v. Welch*, 854 F.2d 459, 461 (1988).
- ²⁰⁴*Id.* citing *Merchant*, Act IV, scene i.
- ²⁰⁵*Shannon & Luchs v. Mellon Bank*, 690 F. Supp. 419, 423 (1988).
- ²⁰⁶*Id.* citing *Merchant*, Act IV, scene i. See also *Caruth v. United States*, 566 F.2d 901, 905 (1978) (provision deals with parties' abilities to change contract terms in only a certain situation, not including instruments not "changed, but only those carried out literally as 'nominated in the bond.'" citing *Merchant*, Act IV, scene ii.).
- ²⁰⁷*Merchant*, Act I, scene iii. See *In re Eberhardy*, 102 Wis. 2d 539, 603 (1981) citing *Merchant*, Act I, scene iii. ("If, as Shakespeare tells us: "The devil can cite Scripture for his purpose," it is obvious that mere man-made law is likewise readily available"); *Delmarva Power & Light Co. v. Eberhard*, 247 Md. 273 (1967) (court cites "the devil can cite Scripture for his purpose" in regard to the decision of how "public easements" would be defined in the context of a particular statute. *Merchant*, Act I, scene iii.); *Middleton Dev. Corp v. Gust*, 44 Mich. App. 71, 79 (1972) citing *Merchant*, Act I, scene iii. (dissent quoted from *Merchant* in order to remind those who take a particular interpretation of "public easements" that Shakespeare thought that "the devil can cite Scripture for his purpose"); *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 469 (1966) ("There is more than enough scripture upon the subject to enable any devil to cite some of it for his purpose").
- ²⁰⁸ Gleicher, *supra* note 8 at 353.
- ²⁰⁹ Here I have in mind and concur with the arguments of Frank Michelman, *Law's Republic*, 97 Yale L.J. 1493 (1988) and James Boyd White, *Justice as Translation: An Essay in Cultural and Legal Criticism* 92 (1990).