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Twitter, *King Lear*, and the Freedom of Speech

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and

Judicial Allusion as Ornament: A Response to John Curtis's, 'Twitter, *King Lear*, and the Freedom of Speech'

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Abstract: *On 27 July 2012, in his judgment following ‘The Twitter Joke Trial’, the Lord Chief Justice of England & Wales quoted from King Lear (Folio). The trial was the first time a British Court had considered the use of Twitter in the context of a bomb hoax. The judgment was hailed as ‘a victory for common sense’, reversing decisions of two lower courts. It now provides authority against similar prosecutions. This paper argues that the use of a four-hundred-year-old Shakespearean text in negotiating modern legal principles is of considerable cultural significance – both through using the familiar to respond to the new – and by invoking Shakespeare’s voice within the powerful social mechanism of the law courts. It also considers the advantages and disadvantages of literary allusions within legal proceedings, contrasting these two widely reported judgments.*

This piece is adapted from a transcript of: King Lear, Twitter and the Da Vinci Code given as part of the Sidelights on Shakespeare lecture series at University of Warwick on 29 November 2013.

Professor Gary Watt provides a response to Curtis’s critical reflection, considering judicial allusion as logic or ornament.

Keywords: Shakespeare, Law Courts, Twitter, literary allusion

Introduction¹

In July 2012, in a landmark case now known as ‘The Twitter Joke Trial’, Lord Judge, the Lord Chief Justice of England and Wales gave a judgment that was praised as ‘a victory for common sense’.² In the course of delivering the Court’s decision, his Lordship chose to refer to Edgar’s final speech in the last scene of *King Lear* (Folio).³ The case, formally recorded as

¹ This piece is adapted from a transcript of: *King Lear, Twitter and the Da Vinci Code* given as part of the *Sidelights on Shakespeare* lecture series at University of Warwick on 29 November 2013. The original presentation also included an analysis of *Baigent and Leigh v Random House* [2006] EWHC 719 (Ch) and on appeal [2007] EWCA Civ 247. In that case, Mr Justice Peter Smith had used a coded message in his judgment.

² Lord Judge, served as Lord Chief Justice of England and Wales from 1 October 2008 until 30 September 2013. In this case, Lord Judge sat with Mr Justice Owen and Mr Justice Griffith Williams. The judgment was delivered by Lord Judge and represented the collective decision.

³ The earlier Quarto text attributes the speech to Albany.

Director of Public Prosecutions v Paul Chambers,⁴ had reached the upper echelons of the Royal Courts of Justice during June 2012. It was the first time that the English courts had engaged with Twitter as a format for delivering menacing communications. The judiciary's use of a 400 year-old Shakespearean text to negotiate electronic social media and modern legal principles is, I suggest, interesting and significant, both in the use of the familiar to respond to the new – and through invoking Shakespeare's voice within powerful mechanism of the law courts.

This analysis sets out the background to the charges and the court proceedings, it then considers the judgment within the context of the aims of judicial opinion-writing before focussing on and three types of rhetoric: logos, pathos and ethos. Through exploring the rhetorical potential of this literary allusion, the critique highlights Shakespeare's apparent acceptability and utility in the legal discourse. Given that there are calls for a more diverse judiciary, one that represents and reflects society, the piece invites us to consider: Is a Shakespeare-quoting judiciary good or bad?⁵

Background

Paul Chambers was an accountant. He was aged 26, lived near Doncaster and had a Twitter account with some 600 followers. In January 2010, he was planning to fly from Robin Hood Airport in South Yorkshire to visit a female friend in Belfast. Snow caused the airport to close and on 6 January, Chambers posted on his Twitter timeline:

Crap! Robin Hood Airport is closed. You've got a week and a bit to get your shit together, otherwise I'm blowing the airport sky high!⁶

The tweet could be seen by Chambers' followers and located by anyone browsing the internet. Nothing significant happened until five days later when an airport security manager saw the

⁴ [2012] EWHC 2157 (Admin).

⁵ For a recent monograph on judicial diversity see: Rackley, Erika. (2013). *Women, Judging and the Judiciary: From Difference to Diversity*. Abingdon, Oxon: Routledge.

⁶ Judgment at paragraph 12. The facts as set out here are drawn from the judgment and press reports of the case

tweet. It was reported to the Police and on the 13th of January, 2010, officers arrested Chambers on suspicion of involvement in a bomb hoax. He was interviewed and asserted that his tweet was a joke and that it was not intended to be menacing. On the advice of the Crown Prosecution Service, Chambers was charged under Section 127 of the Communications Act 2003. That section provides:

A person is guilty of an offence if he ... sends by means of a public electronic communications network a message or other matter that is grossly offensive or of an indecent, obscene or menacing character.⁷

Chambers pleaded ‘not guilty’ but was convicted by a District Judge in the Magistrates Court and ordered to pay a fine with costs. Given that his professional standing was now compromised with a criminal record, he lost his job. An appeal followed to the Crown Court. There, the conviction was upheld by another Her Honour Judge Davies and two lay justices. The Crown Court took the view that an ordinary person reading the tweet would be alarmed. The Court noted public concerns regarding terrorist activity and the unnecessary disruption that could be caused by false security alerts. Unusually, the Crown Court also asked for more senior judges in the Administrative Court to confirm that the case had been approached correctly. The case was listed before Lord Justice Gross and Mr Justice Irwin. They did not issue a decision and referred matters to a court of three judges, headed by the Lord Chief Justice. Media interest had grown considerably. Newly appointed counsel for Chambers was John Cooper QC.

At the final hearing in June 2012, Cooper did not simply attack the logic of the lower courts’ decisions but developed his arguments with creative flair. He submitted that a measure of latitude was required when considering such communications. In proceedings and in support of this contention, he drew two poetic parallels, saying that literal interpretations would mean that John Betjeman could be arrested for writing “Come friendly bombs and fall on Slough” ... and that Shakespeare himself would have been in trouble for penning the words “Let’s kill all the lawyers.” In response to Cooper’s *Henry VI* reference, Lord Judge is reported as

⁷ Judgment, paragraph 2

responding: ‘that was a good joke in 1600 and it is still a good joke’.⁸ Judgment was reserved and one month later, on 27 July, Lord Judge read out the Court’s decision, attracting worldwide comment.⁹ With 38 paragraphs and running to around 6,500 words, the judgment is not overly long or complex but the time between the closing of arguments and the Court’s decision suggests that it was crafted with care.

His Lordship began with a recitation of the legislation and explained terms such as ‘Twitter’, ‘tweet’, and ‘followers’. He then set out the facts. At paragraph 28, Lord Judge developed his analysis, referring to Franklin D. Roosevelt’s 1941 State of the Union Address (more commonly known as the Four Freedoms speech). Here, the opinion strongly identifies itself with ideology and giving the emphatic reassurance:

The 2003 Act did not create some newly minted interference with the first of President Roosevelt’s essential freedoms – freedom of speech and expression. Satirical, or iconoclastic, or rude comment, the expression of unpopular or unfashionable opinion about serious or trivial matters, banter or humour, even if distasteful to some or painful to those subjected to it should and no doubt will continue at their customary level, quite undiminished by this legislation.

Lord Judge continued:

Given the submissions by Mr Cooper, we should perhaps add that for those who have the inclination to use Twitter for the purpose, Shakespeare can be quoted unbowdlerised, and with Edgar, at the end of *King Lear*, they are free to speak not what they ought to say, but what they feel.¹⁰

The judgment also incorporates references to the academic textbook *Smith and Hogan on Criminal Law* (13th Edition) and to the Oxford English Dictionary (shorter version) together with quotations from two other eminent English judges, Lord Bingham and Lord Justice

⁸ See, for example: <http://www.theguardian.com/law/2012/jun/27/twitter-joke-appeal> [last accessed 28.02.2014]

⁹ See, for example: <http://edition.cnn.com/2012/07/27/world/europe/twitter-court-reaction>.

¹⁰ Judgment, paragraph 28.

Sedley.¹¹ Reversing the previous decisions and quashing the conviction, Lord Judge stated that the lower courts had reached a conclusion that was not, on the facts, available to them. The lower courts had, he said, given too much emphasis to the involvement of the police – which had only been as a matter of routine – and not enough weight had been given to the way in which people had actually responded. Importantly, there was nothing to suggest that a person with ‘reasonable fortitude’ would have been alarmed by Chambers’ tweet.¹² The decision was welcomed by Chambers’ supporters, including comedians Stephen Fry and Al Murray.¹³

So with dictionaries, textbooks, leading barristers, popular satirists, Shakespeare, top judges and an American president all in harmony, the occasion highlights an unusual intersection of Law and Literature, of culture and intertextuality, one that provides an ideal opportunity for interdisciplinary discussion. With that in mind, I offer the following thoughts on judgments as a repository of rhetorical literature and on the specific contribution that the Shakespearian reference makes to this case.

Judgments as Rhetoric and Literature

The written decisions of the English judiciary attract little attention from scholars outside of the Law and although the scope of this article does not permit for a detailed discussion of judicial writing styles, it is suggested that judgments represent an under-explored resource for those interested in language and how meaning is conveyed. Judges use semiotics, narrative and rhetoric in ways that will be familiar to scholars interested in performance theory, Literature and/or linguistics. There are some (perhaps many) features that distinguish judgments from other literary writing: a judge does not have an artist’s choice of subject matters and judges are more constrained than artists in their mode of delivery. Clarity, factual accuracy and presenting an unequivocal decision are objectives that may not govern artistic responses and judicial opinions provide more limited opportunities for humour, irony and plot devices. Ultimately however, Law like Literature concerns itself with the study and

¹¹ Judgment, paragraphs 29 and 37, referring to *DPP v Collins* [2006] 1 WLR 308 (Divisional Court) and [2006] 1 WLR 2223 (House of Lords).

¹² Judgment, paragraphs 33 and 34.

¹³ See: <http://www.telegraph.co.uk/technology/twitter/9432444/Twitter-joke-trial-authorities-akin-to-The-Stasi-says-Al-Murray.html>. [last accessed 28 February 2014].

interpretation of texts. Likewise judgments are texts that reflect important aspects of our culture, providing a valuable perspective on society and human relations.

Having outlined their wider importance, it must be acknowledged that the literary quality of judgments varies but generally judgments share common features: they come at the end of cases, explain the issues, state the relevant law, apply the law to the facts and provide a conclusion that is expressed in absolute and compelling terms. They are rhetorical compositions mapping competing narratives against an evidential matrix. An advocate is charged with advancing a client's case, explaining how actions and intentions fit within their 'theory of a case'. An advocate's account is, of necessity, partisan. A judgment is different. Like an advocate's argument - it should be clear and persuasive but it goes wider and is more complex. It is heteroglossic, its macrostructure accommodates conflict; it links submissions with documentary evidence and witness testimony; it may refer to legislation, to common law principles; it may incorporate the wisdom of other judges, expounded in quotations from cases that have precedential value. Above all, judgments seek to demonstrate an objective, systematic approach to the issues at hand, showing that the decision results from careful, balanced analysis rather than arbitrary whim. On that basis, we can legitimately ask: what place can judicial rhetoric have in a legal decision?

That question is addressed here by way of illustration and through consideration of three types of Aristotelian rhetoric that are at play in the *Chambers* judgment: logos, pathos and ethos. For present purposes, logos can be taken as referring to logic whereas pathos relates to more emotive arguments: appeals to what may perhaps be referred to as 'fairness', 'the spirit of the law' or 'natural justice'. Pathos is not necessarily the opposite of logic, but it is different. We may be suspicious of arguments connected with emotions but they have a place, particularly when logic appears to falter. Ethos relates to personal credibility and moral character, why we may instinctively believe one person over another. It may be inferred from elements such as someone's title, their affiliation, appearance and gravitas. Ethos is less about what is said as opposed to who says it. It can be pre-logical in the sense that prior knowledge of the speaker's credentials prime our reactions before a word is uttered. The next sections takes these each of these types of rhetoric in turn.

Logos

The judgment in *Chambers* commences with an ostensibly ‘logical’ approach, reviewing events, legislation and some cases that have some similarities to the events in issue. Indeed, it could be contended that the Shakespearian reference is ornamentation and irrelevant to the decision. It, like the Roosevelt one, could be eradicated from the text without interfering with the pattern of legal reasoning that follows the exposition. As such the literary allusion could be viewed as inconsequential, but such an approach presupposes that there is there is a single answer, deducible by logic alone and that subordinates other rhetorical considerations.

In resisting the notion that this judicial decision is ‘all about logic’ it is noteworthy that the two criminal courts would presumably have claimed that they had also approached the matters ‘logically’. The two criminal courts would have been satisfied that their conclusion was ‘logical’ – indeed commensurate with the requisite standard of proof, they must have been ‘sure’ that guilt was made out. The prosecution was also undertaken on the basis that a cogent case could be substantiated and the prosecution was likely to succeed. The two-judge Administrative Court appears to have been split on the merits, necessitating the three-judge constitution. In each instance, the same evidential matrix had been mapped against the same statutory framework and permitted different courts to come to different conclusions. Moreover, the central question in *Chambers*, was whether the message was of a ‘menacing’ character. Science and mathematics could not assist in determining that. What is different about Lord Judge’s judgment? Why was it that his judgment commanded popular assent? The simple assertion that it is more ‘logical’ is unsatisfactory. The differentiating elements are, I suggest, that pathos and ethos contribute to it being ‘a victory for common sense’ – the decision seeks to combine the judicial logic that is evident from the review of the facts but it also displays empathy and deploys maxim, harnessing pathos and ethos, partly at least, through Shakespeare. Logic is not easily divorced from rhetoric and is interlinked with structure. An exhaustive recitation of events coupled with ponderous analyses of cases and statutes will not necessarily make for a clear judgment, nor for one that is persuasive. Long boring and ‘technically correct’ may fit stereotypical expectations of judges but will not always be good in terms of winning and maintaining public confidence in the judiciary. Indeed, some jurists accept that aesthetics have a place in ‘great’ opinions noting judgments can be enhanced with sincerity and empathy, accompanied by ‘the mnemonic power of alliteration and antithesis, proverb and maxim’. If narrative can be conceived as the essential information that takes us on a journey from ‘proposition A’ to ‘conclusion B’, then rhetoric

can be conceived as how we get there. Rhetoric can ease the syllogistic pathway that characterises legal analysis or make it more difficult to follow.

The Shakespearian reference can be seen as part of a signposting device that highlights the importance of free speech and introduces two extra-legal authorities to support the legal logic. The analogy comes at a crucial point in the judgment as the opinion shifts from the recitation of facts to values and analysis. Its deployment represents the Court's attempt to signal in plain terms where it is going and that its understanding and considerations will extend beyond 'black letter' law – none of Hamlet's 'quiddits' or 'quillits' are to be expected.

Pathos

In this case, the quotation is not just more legal language, it is a literary artefact, inserted and locked within the recorded decision, a cultural link with the legal principle of responsible free speech, a concept that we agree with and one that has a powerful emotional association with *King Lear*.

Cognitive psychology acknowledges that an unexpected stimulus can simultaneously trigger several different thought patterns. Instinctively and rapidly, we seek connections to resolve the unexpected. It is not always possible to explain exactly what persuades us but the mention of *King Lear* prompts us to recall the play's moral conflicts, its allegorical themes and the raw emotions that produce the catharsis associated with the theatrical experience. The pathos of the play exerts a considerable pull on us and what follows is an attempt to show how this analogy may activate certain sentiments.

Morally, we value tolerance and diversity, and, broadly, people should be able to say what they feel. The *Lear* quotation reflects a modern, democratic agenda and a human right. We may connect on that level and find 'justice' in Lord Judge's decision. The idea that Shakespeare himself advocated free speech also allows for a flattering comparison and self-identification. Thematically, we may find a connection between the two storylines - *Lear* is a play about the nature of speech acts: the artificiality of the 'glib and oily art' is set against plain words; contrived speech is contrasted against spontaneous rage; the value attached to material artefacts and to nothing. The plot of the 'Twitter Joke Trial' is also about communication; powerful words transmitted across the ether, words that have had significant import conferred upon them but that were ultimately shown to be 'hollow'.

Symbolically, *Lear* has become a dominant post-modern allegory for a changing society and existentialism. The play takes us beyond the plight of an old man and a beggar roaming on a weathered heath. The old become vulnerable and renegotiate their place within the social structure, the young rise. Dysfunctional families, inheritance tax and arrangements for social care are themes from current affairs and to which the play speaks. Invoking *Lear* has a hard-hitting impact that would not come from citing a Shakespearian comedy or a lesser-known work.

Finally on pathos, there are also structural and tonal connections between Edgar's closing speech and judgments. Edgar's speech follows a succession of personal tragedies. His lines are delivered in a moment of stillness, they have a reflective quality, a quiet assertiveness as opposed to triumphalism. Judgments too follow the emotion of unpredictable, contested trials where liberty, livelihoods, careers and reputations may be at stake. A judgment concludes a case with measured solemnity that coincides with the tone of Edgar's final words at the end of the play:

The weight of this sad time, we must obey,
Say what we feel not what we ought to say
The oldest have borne most
We who are young shall never see so much.

Ethos

There is something more than logic and emotions here that is the ethos of the judgment: a cerebral, intellectual association that invites us to agree with the judgment because Shakespeare is quoted – along with an American President and the Oxford English Dictionary. The Shakespeare reference invites us to conceive of the Lord Chief Justice in another way too – not as a remote and powerful exponent of the Law but as a person with whom we share a literary culture. Shakespeare is deployed as reliable source of wisdom in the judgment and we may also infer that anyone who quotes from such a range of sources – literary, legal and political - is educated, more familiar with 'life' and, having appraised the issues from different viewpoints, is more likely to have reached a just decision. This in turn, tells us something

about Shakespeare's significance within the legal process. The deliberate choice to invoke Shakespeare confers a special status on him: his text is adapted to form the Court's own.

Conclusion

The deliberate choice to utilise Shakespeare represents an attempt to engage with a non-legal, popular source, to augment the opinion with more than pure logic. Removing the Shakespeare reference would change the judgment's form and style. The points on pathos and ethos have little to do with logic, rather they work on the basis of a shared understanding and our interest in a piece of literature – specifically Shakespeare's *Lear*. The Shakespeare reference is a rhetorical device, it follows the unfamiliar, technical language of legislation and a mundane account of the events. Auditors and readers are then confronted by the unexpected but familiar. The case is linked to political freedoms and a great literary work. It is a rhetorical device that is Brechtian, a literary *Verfremdungseffekt*, intended to capture the reader's attention and to win the reader's confidence.

We desire judgments by humans not by machines. In this case, the judges use Shakespeare to display their cultural and political heritage and to emphasise the humane considerations that apply in their decision-making. In doing so, they underscore that judges do not sit – and must not be perceived as sitting - in isolation from society but as part of it. In this case, Shakespeare forms part of an engagement strategy.

References

The Telegraph

<http://www.telegraph.co.uk/technology/twitter/9432444/Twitter-joke-trial-authorities-akin-to-The-Stasi-says-Al-Murray.html> [last accessed 28 February 2014].

Judicial Allusion as Ornament: A Response to John Curtis's, 'Twitter, *King Lear* and the Freedom of Speech'

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John Curtis's paper contributes to the long-established interdisciplinary field of 'law and literature', and to one of its major sub-sets, which is 'law and Shakespeare'. The most common expression of 'law and literature' is in the form of 'law *in* literature' (for example, consideration of contract law in *The Merchant of Venice*), but Mr Curtis has taken the more unusual course of studying literature *in* law (where it takes the form of judicial allusion to the works of Shakespeare). John Curtis is a practicing barrister, so it is to his credit that he has not contented himself with the law *of* literature (for example, the law of copyright), and it is to his further credit that he has explored the possibility of law *as* literature in so far as he regards judicial judgment as a rhetorical text. One recalls Richard Weisberg's observation (itself an echo of something the American judge Benjamin Cardozo once wrote) that:

'the form of an opinion actively contributes to its correctness: style thus conceived is an element to be evaluated as part of the decision, not as (an) ancillary or merely ornamental element.'

Lawyers have traditionally been rather enthusiastic trespassers into the literary domain, perhaps emboldened by the knowledge that trespass is merely a civil (not a criminal) offence and by the fact that there is no liability for trespass unless there is damage done. The question that most exercises me as I consider the conduct of judges who allude to Shakespeare is whether there is any harm done. In Weisberg's language, does judicial allusion contribute to the 'correctness' of a judicial opinion, or is it merely an 'ornamental element'? John Curtis shares this concern. Noting that 'there are calls for a more diverse judiciary, one that represents society' he asks '[i]s a Shakespeare-quoting judiciary good or bad?'

Mr Curtis cites allusion to Shakespeare in a judicial decision as proof that the judicial decision is not 'all about logic'. In one sense it is true that allusion to Shakespeare is not logical in a deductive sense. Indeed, the rhetorical *argumentum ab auctoritate* (the appeal to authority) is

considered to be one of the weakest arguments syllogistically-speaking. In law, however, authority trumps logic. The lower court must in theory follow the higher court no matter how faulty the logic of the higher court might appear to be. The junior judge will respect the senior. The phenomenon is not restricted to judicial comity. Academic authors of the standard texts have sometimes been granted the sort of respect that is normally reserved for superior judgments, especially if the author of the text (inconvenient for the author, but convenient for the court) happens to be dead. It is a short step from this to the point where judges gild their speeches with the authority of dead poets and playwrights – Shakespeare, for example.

John Curtis does not consider the appeal to authority to be a form of special logic. It is not about *logos*, he says, but about *pathos* and *ethos*:

‘there is...something more than logic and emotions here that is the ethos of the judgment: a cerebral, intellectual association that invites us to agree with the judgment because Shakespeare is quoted – along with an American President and the Oxford English Dictionary.’

Is the appeal to literary authority a special form of lawyer’s logic or is it offered as a sign of the judge’s ethical make-up as a man or woman of classical education and humane sentiment? This, as a barrister might say, is a moot point.

So, is any harm done?

The answer may depend upon the nature of the author to whom allusion is made. John Curtis’s paper is based on a presentation he made on 29 November 2013 as part of the *Sidelights on Shakespeare* lecture series at University of Warwick. In that presentation, Mr Curtis observed that ‘in terms of literary references, the Courts may generally conclude: Shakespeare good, Dan Brown bad’. Perhaps Dan Brown isn’t sufficiently deceased to qualify as authority on a par with dead poets and the writers of legal treatises. Mr Curtis contrasted the positive reception afforded to Shakespearean allusion in the so-called ‘Twitter Joke Trial’, with the negative response to one High Court judge’s conceit of embedding a secret cipher into his judgment in a case concerning Dan Brown’s *The Da Vinci Code*. The offending judge, Mr Justice Peter Smith, protested that he did not see why a judgment ‘should not be a matter of

fun' (quoted on the BBC news website). Mr Curtis informed his *Sidelights on Shakespeare* audience that the Court of Appeal upheld the judge's decision, but that their lordships were dismissive of Smith J's literary device. Like a tutor reviewing a student submission, Lord Justice Lloyd observed that Smith J's judgment 'is not easy to read or to understand' and that the learned judge should perhaps have spent less time incorporating a coded message 'on which nothing turns' and more time on 'the preparation, checking and revision of the judgment'.

The whole episode is somewhat reminiscent of an ancient dispute recorded in Tacitus. Tacitus reports that the people of Rome objected to the Emperor Nero's propensity to play the lyre and to write poetry; the people asked: '[d]oes expert attention to effeminate music and songs contribute to justice, or does it make the knights who serve as judges give better verdicts?'. Tacitus posits this unconvincing defence in the mouths of Nero's allies: they ask, 'why should it be degrading even for a judge to listen with legitimate enjoyment to fine words?' (Tacitus, 2008, xiv). Enjoyment (or in Mr Justice Peter Smith's term 'fun') is a very welcome aspect of engagement with literature and the arts, and for students it is essential, but enjoyment should not be the primary aim of a judge or jurist when it comes to the business of applying and improving the law.

This is not to say that 'expert attention to...music and songs' cannot 'contribute to justice' and cannot help those 'who serve as judges give better verdicts'. I think it can make a positive contribution, for example by improving aesthetic judgment and cultivating empathy, but no such advantages are likely to flow from mere formal indulgence in literary allusion. The call for more humane legal discourse is not a call for judges to decorate their speech with literary allusions. I therefore take issue with the assumptions underlying a survey carried out by an academic who searched the leading legal databases for instances of judicial citation of literature (Henderson, 2008) and, finding that '[l]ess than one-half of one percent of all appellate opinions contains a reference to a work of literature', concluded that the law and literature movement has by that measure 'failed to exert sufficient influence on judges to move from an unknowable tacit influence to a citation-rich explicit one'. An empiricist mindset has blinded this surveyor to the true aim of law's engagement with literature, which is not to capture the literature, but to release the law. Leaving aside the surveyor's problematically narrow definitions of 'reference' and 'literature', I disagree with his assumption that increased judicial citation of literature would mark the success of law and

literature scholarship. It would more likely indicate its failure. There is nothing pleasing about judgments gilded with inappropriate and possibly insincere quotations from non-legal literature. The same can be said of florid and periphrastic advocacy. Aristotle forbade rhetoricians from ‘speaking outside the subject’ before the dicasts because he considered it ‘wrong to warp the dicast’s feelings, to arouse him to anger, jealousy or compassion, which would be like making the rule crooked which one intended to use’ (Aristotle, 2014). I would not go so far as to forbid literary allusion, but it would be better to have none than to have it as a mere formal embellishment to speech.

We should wonder whether literary allusions are applied to judges’ statements and advocates’ submissions as mere ornament. Are they there to make a weak case look stronger or perhaps to make a bad lawyer look better? These are important questions to ask, after all (to conclude, which seems appropriate, with a quote from Shakespeare):

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?

The Merchant of Venice, Act 3 scene 2

References

Aristotle (2014) *The Art of Rhetoric* 1354a, Available online at <http://rhetoric.eserver.org/aristotle/rhet1-1.html>, based on the translation by Rhys Roberts (Accessed 31 March 2014)

Henderson, M.T. ‘Citing Fiction’ *The Green Bag: An Entertaining Journal of Law*, 11(2), Winter 2008, pp. 171–85, Available at www.greenbag.org

Tacitus, C. (2008) *The Annals of Imperial Rome*, Oxford: Oxford University Press