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# PRACTICAL BENEFITS OF LITERATURE IN LAW, AND THEIR LIMITS

*James L. Robertson\**

My literature is confined to the effort to make it in the form of judicial decisions, and I occasionally manage to slip a phrase past the negative vigilance of my brethren.<sup>1</sup>  
- O. W. Holmes to Lewis Einstein (1914)

## I. INTRODUCTION AND OVERVIEW

The job description for a good judge should include “the wisdom of Solomon, the patience of Job and the humanity of Shakespeare.”<sup>2</sup> Many do not always understand the humanity component. At best we sense it least, but this is like not sensing how our lives would be lacking if all music had ended with Mozart, if we never had Beethoven’s odd number symphonies, Wagner or the great Russians among whom only Tchaikovsky is appreciated appropriately. Or if baseball had remained in the Dead Ball Era, so that we celebrated only the glories of Cy Young and Ty Cobb and Honus Wagner. Or if we had nothing beyond Newtonian physics with which to understand and explore the natural world, or could see only what Galileo could see of the wonders of the Universe. Or if to light our way through the social, political and economic phases of life, all we had were what Plato and Aristotle and Thucydides taught, and the practices of the Romans who followed. If I am right in these, that we do not appreciate—much less engage appropriately—the humanity component of good legal practice, what follows may help.

A few years back, Justice Evelyn Keyes of Texas argued<sup>3</sup> that one can never become “a great judge without a thorough grounding in what the humanities, including literature, as well as the law itself, really do have to teach us.”<sup>4</sup> She closed with a more elaborate version of the same provocative point, *viz.*, with such a grounding “he has at least the possibility of becoming a great judge, which, without these attributes, he can never be.”<sup>5</sup> The more modest “a very good judge” might taste better. That aside, I am taken with the positive

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1. Letter from Oliver Wendell Holmes, Jr. to Lewis Einstein (Apr. 17, 1914) in *THE HOLMES-EINSTEIN LETTERS: CORRESPONDENCE OF MR. JUSTICE HOLMES AND LEWIS EINSTEIN, 1903-1935*, 89 (James Bishop Peabody ed. 1964).

2. *Cheek v. Ricker*, 431 So.2d 1139, 1143 (Miss. 1983) (Robertson, J., in a prior life).

3. Evelyn Keyes, *The Literary Judge: The Judge as Novelist and Critic*, 44 *HOUSTON L. REV.* 679 (2007). Justice Keyes sits on the Texas Court of Appeals, First District.

4. *Id.* at 680.

5. *Id.* at 701.

points made.

The law most assuredly is a dimension of the humanities. It has arisen from human experience and governs human behavior. Law creates opportunities. Its end is a society in a continuous process of becoming and in which we should want to live. Keyes also notes the other side of the coin, “[O]nly a morally literate and humanistically informed people can maintain a free society against the dehumanizing forces of totalitarian ideology and destructiveness that constantly assail it, for only then will they know what is at stake.”<sup>6</sup> “Ay, there’s the rub.”<sup>7</sup>

Today I point to instances where judges (including yours truly, in a prior life) have turned to the humanities, particularly literature, to enrich the message of their adjudications. I focus on four cases, and the strategies by which each was adjudged. Almost ninety years ago, a night watchman drowned in the Savannah River trying to save his dog, and the question was how the court should see his widow’s claim for workers’ compensation death benefits.<sup>8</sup> The Supreme Court of Georgia did something special.

The other three are from Mississippi. One was about hunters headlighting and slaughtering deer at night and out of season, and how we should understand and punish their misdemeanor behavior.<sup>9</sup> Then there was the litigational contretemps of a church-led effort to ban beer in a college town, its gratuitous consequences for unsuspecting long time area residents, and what insights should be brought to bear beyond the technical rules of public referenda.<sup>10</sup> Finally, there is a case about a cultural war over access to a fine fishing hole where not everyone with a license could go and fish.<sup>11</sup>

I will present the Georgia case first and in full. Then, I will walk through more familiar and lesser categories of legal resort to the humanities—and illustrations of each—well used and sometimes not so well used. At all levels good judges practice humanity by being good observers and good listeners, by being on guard lest they take themselves too seriously.

Expect no panaceas. Some may see my case no stronger than the exchange between the Baptist and the Methodist familiar in my part of the world, *viz.*, the Baptist: “How can you possibly believe in infant baptism?” The Methodist:

6. *Id.* at 699. Though I accept the general point, I’d want to know a little more about what lies within and without “totalitarian ideology and destructiveness.” *Id.* I might add the dehumanizing forces of ordinariness and malaise and poverty, of religious intolerance within and without Christianity or Judaism, and of unawareness of wonders, missed times to dream.

7. WILLIAM SHAKESPEARE, *HAMLET* act 3, sc. 1, ln. 65 in *THE PLAYS AND SONNETS OF WILLIAM SHAKESPEARE* (William G. Clarke and William A. Wright eds., 1952) (subsequent citations to Shakespeare are from this edition).

8. *Montgomery v. Maryland Casualty Co.*, 151 S.E. 363 (Ga. 1930). See *infra* notes 12-36 and accompanying text.

9. *Pharr v. State*, 465 So. 2d 294 (Miss.1984). See *infra* notes 250-59 and accompanying text.

10. *City of Clinton v. Smith*, 493 So.2d 331 (Miss. 1986). See *infra* notes 260-74 and accompanying text.

11. *Dycus v. Sillers*, 557 So. 2d 486 (Miss. 1990). See *infra* notes 275-80 and accompanying text. I authored the controlling opinions in *Pharr*, *City of Clinton*, and *Dycus*. I remain of the view that a larger than ordinary, literature-based stratagem was useful in all three cases. The extent to which the stratagem may have been well executed or over time has succeeded is for others to judge, within the court of public opinion, and on a case by case basis.

“Believe in it?!? Hell, I’ve seen it done!” My faith is that a fair number of those who peruse these pages may emerge with a better feeling about the law and adjudication and how they may be practiced, though it may be necessary to withdraw for a while from the get-and-spend world and the entertainment of your hand-held electronic device of choice. The pause that refreshes is the reflective pause.

## II. A JUDICIAL PAEAN TO “MAN’S BEST FRIEND”

*Montgomery v. Maryland Casualty Co.*,<sup>12</sup> is a workers’ compensation case. A night watchman for a boat repair service along the Savannah River drowned in the river on his employers’ premises, and his widow claimed workers’ compensation death benefits. It seems the watchman regularly brought his dog to work. On the fateful night, the dog jumped or fell into the river. The watchman followed into the water to save the dog, but, as fate would have it, could not save himself. Without surprise, this was not a death covered under the compensation act. Many a court would have matter-of-factly brushed it off and affirmed the compensation commission’s denial of benefits. Many a state supreme court would have denied certiorari after the court of appeals had affirmed.

Justice Stirling Price Gilbert of the Supreme Court of Georgia did something wonderful, a paean to the dog and his contributions to the quality of our lives, as man’s best friend and otherwise. In his autobiography, Gilbert tells of his childhood and of “my most loyal friend and companion, . . . in courage and intelligence and indeed loyalty, . . . an aristocrat among animals.”<sup>13</sup> He had named his “bench-legged, rather long-bodied mongrel” appropriately: “Lion!”<sup>14</sup> How *Montgomery* came to be should be told in Gilbert’s words.

After I had become a Justice of the Supreme Court of Georgia, a case involving a dog fell to me for writing the decision. Immediately the memory of my dog Lion filled my mind. In fact, my heart was touched, for no man ever loses his regard for a loyal playmate, whether human or beast. There came over me a desire to seize the opportunity to place on the enduring pages of the decisions of our Supreme Court a tribute to the dog, which would also be in some sense a memorial to Lion.<sup>15</sup>

And so Justice Gilbert turned to history and literature, philosophy and poetry. To be sure, the court syllabus states, “It may be added that the dog was probably in no danger of drowning and that the humane act of the watchman in endeavoring to rescue him constituted in itself the only element of danger.”<sup>16</sup>

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12. 151 S.E. 363 (Ga. 1930), *aff’g* *Montgomery v. Maryland Casualty Co.*, 146 S.E. 504 (Ga. App. 1929).

13. Stirling Price Gilbert, *A Georgia Lawyer: His Observations and Service*, 15 (1946).

14. *Id.*

15. *Id.* at 15-16.

16. *Montgomery*, 151 S.E. at 363.

Gilbert affirmed the humanity of the court<sup>17</sup> as it affirmed the denial of death benefits. He began by reminding us that:

[f]rom the dawn of primal history the dog has loomed large in the art and literature of the world, including judicial literature. So it doubtless will be until the “crack of doom.” In metal and in stone his noble image has been perpetuated, but the dog’s chief monument is in the heart of his friend, “man.” As a house pet, a watchdog, a herder of sheep and cattle, in the field of sport, and as the motive power of transportation, especially in the ice fields of the far north, as well as in the Antartics [sic], the dog has ever been a faithful companion and helper of man. In the trackless forests of the new world he was on the firing line of civilization in the task of subduing all enemies, whether savage man or wild beast.<sup>18</sup>

Gilbert then turned to the world of classical mythology, where:

[w]e find in astrology the dog star is “the brightest star in the heavens; the Aplha [sic] of the constellation Canis Major,” and in Greek mythology Cerberus is the watchdog at the entrance to the infernal regions. Diana, the goddess, had her deer hounds, and literature is enriched by the story of Odysseus’s (Ulysses’) dog Argos. After twenty years of war and wandering this king of Ithaca returned, unrecognized in his beggar rags even by Penelope, but as he entered the courtyard: “Lo! A hound raised up his head and pricked his ears. In times past the men used to lead the hound against wild goats and deer and hares, but as then despised he lay in the deep dung of mules and kine. There lay the dog Argos, full of fleas. Yet even now, when he was aware of Odysseus standing by, he wagged his tail and dropped both his ears, but nearer to his Lord he had not strength to draw. Odysseus looked aside and brushed away a tear. Therewith he passed into the fair-lying house and went straight to the hall, to the company of the proud wooers. But upon Argos came black death, even in the hour that he beheld his master again, in the twentieth year.”<sup>19</sup>

Gilbert adds that:

[m]asters of the brush have pictured the dog on canvas everlasting, among them Landseer, Blake, Tracy, and Andrea

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17. Gilbert added one regret, “that the greatest dog-lover among my associates on the Bench, Justice [Samuel C.] Atkinson, was disqualified from participating in the decision because he was related to one counsel in the case.” Gilbert, *supra* note 13 at 16.

18. *Montgomery*, 151 S.E. at 364.

19. *Id.*

del Sarto. The last-named painted “Tobias accompanied by the angel Raphael.”<sup>20</sup>

For reasons not clear Gilbert only scratches the surface there. No doubt his art teacher has posthumously taken a ruler to once young Price Gilbert’s knuckles for not at least continuing art appreciation in his adult year so that, by the time he became a Justice, he was moved by the great rendering of the emotions in a dog’s face in Thomas Hovenden’s “Breaking Home Ties.”<sup>21</sup> The young man’s sister consoles his heartbroken dog as his master is about to leave rural America for a job and new life in the city. Hovenden’s poignant masterpiece conjures images of a young Price Gilbert, a “Georgia Country Boy,” leaving his home in rural Stewart County in 1879 for Nashville and Vanderbilt University, and Lion’s lament at his master’s matriculation. Renoir’s “Portrait of Alfred Bérard with His Dog,”<sup>22</sup> a hunter resting against a tree, with his indispensable canine companion, calls to mind Gilbert’s memory in later years. “I spent many happy hours in the fields and forests with my dog and my gun.”<sup>23</sup> And how could a man so learned in the arts have made no mention of Winslow Homer’s “A Huntsman and Dogs.”<sup>24</sup> Canine portraitists Maude Earl<sup>25</sup> and John Emms<sup>26</sup> deserved a nod as well.

But back to the insights that Gilbert did include:

Among many of the most beautiful of nature’s plants and trees, we have the dog-wood, dog-daisy, dog-laurel, dog-rose, dog-violet, and the like; there are dog days; the dog watch (on ship board); there is dogma, doggery, dog-latin, and the “dogged”; as Shakespeare wrote: “Doth dogged war bristle his angry crest and snarl in the gentle eyes of peace.” King John, act IV, scene 3. Holy Writ abounds with his mention, as, “A living dog is better than a dead lion,” Ecclesiastes, ix:4. “Who loves me loves my dog” is a French proverb of the thirteenth century, and in substance has figured in the literature of many writers, including St. Bernard, of Clairvaux and Erasmus.<sup>27</sup>

The Justice from Georgia further reminded us that:

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20. *Id.*

21. “Breaking Home Ties” (1890) PHILADELPHIA MUSEUM OF ART, American Art, Gallery 111 <http://Philamuseum.org/collections/permanent>.

22. “Portrait of Alfred Bérard with His Dog” (1881) PHILADELPHIA MUSEUM OF ART, European Art 1850-1900, Gallery 161 <http://Philamuseum.org/collections/permanent>.

23. Gilbert, *supra* note 13 at 15.

24. “A Huntsman and Dogs” (1891) PHILADELPHIA MUSEUM OF ART, American Art, Gallery 111 <http://Philamuseum.org/collections/permanent>.

25. “Maude Earl” WIKIPEDIA, [https://en.wikipedia.org/wiki/Maude\\_Earl](https://en.wikipedia.org/wiki/Maude_Earl) (last visited Mar., 30, 2016).

26. “John Emms” WIKIPEDIA, [https://en.wikipedia.org/wiki/John\\_Emms\\_\(artist\)](https://en.wikipedia.org/wiki/John_Emms_(artist)) (last visited Mar., 30, 2016).

27. *Montgomery v. Maryland Casualty Co.*, 151 S.E. 363 (Ga. 1930).

[p]oets great and small, their pens inspired by the Olympic maid, have paid tribute to the dog. Lord Byron, who was devoted to his “Boatswain,” wrote him:

“But the poor dog, in life the firmest friend,  
The first to welcome, foremost to defend,  
Whose honest heart is still his master’s own,  
Who labors, fights, lives, breathes for him alone.”  
And again:

“‘Tis sweet to hear the watch dog’s honest bark  
Bay deep mouthed welcome as we draw near home.”<sup>28</sup>

And, of course, more Shakespeare:

The great bard of Avon, in his *Julius Caesar*, makes Brutus, say, “I had rather be a dog and bay the moon, than such a Roman.” And in *Macbeth* Shakespeare gives us quite a catalogue of dogs: “Hounds and greyhounds, mongrels, spaniels, shoughs, water-rugs and demi-wolves; the swift, the slow, the subtle, the housekeeper, the hunter.” And in *Midsummer Night’s Dream*, speaking of hounds, he says: “Their heads are hung with ears that sweep away the morning dew; crook-knee’d and dew-lapp’d like Thessalian bulls; slow in pursuit, but match’d in mouth like bells, each unto each:

“Such gallant chiding; for, beside the groves,  
The skies, the fountains, every region near  
Seem’d all one mutual cry. I never heard  
So musical a discord, such sweet thunder.”

In modern times Thompson, in “Major Jones’ Courtship,” makes his hero to boast of owning two of the best coon dogs in the settlement, describes the music they make in pursuit, and concludes: “It puts me in mind of what Shakespeare sez about dogs:

“I never herd sich powerful discord,  
Sich sweet thunder.”<sup>29</sup>

And other poets of whose heritage goes back to the British Isles:

Sir John Lucas, in a poem “To a Dog,” pictures his “wraith in a canine paradise” where the

“\*\*\* little faithful barking ghost

May leap to lick my phantom hand.”

And so with other poets almost without number, among whom are Chaucer, Sir Walter Scott, Alexander Pope, Kipling, Trowbridge, Ruskin, and of course Stephen O. Foster, the author of so many beautiful southern melodies. It was he who wrote of “Old Dog Tray”:

“Old dog Tray’s ever faithful;

Grief cannot drive him away;

He is gentle, he is kind-

I shall never never find

A better friend than old dog Tray.”<sup>30</sup>

Back to the glory that was Greece:

Some 3,000 years before Christ Socrates wrote <sup>[31]</sup>: “When I see some men, I love my dog the more.”

Baron Curvier considered the dog “the most complete, the most singular and the most useful conquest man has gained in the animal world.”

Xanthippus, father of Pericles, had a dog, which leaped into the sea and swam along the galley side to follow his master, but finally fainted and died away near the island of Salamis. And Plutarch says: “That spot in the island which is still called the Dog’s Grave is said to be his.”

29. *Id.* at 365.

30. *Id.*

31. Of course, we have no evidence that Socrates ever wrote anything. What we know of what Socrates thought and said is a function of Plato having taken down the words of his great teacher.



It is said that dogs bore their part in the siege of Troy, at Marathon, and in the battle of Salamis.

Herodotus said: "In whatsoever house a cat has died by a natural death, all those who dwell in this house shave their eyebrows only; but those in whose house a dog has died, shave their whole bodies."

Alcibiades' dog is now represented in marble at Duncombe Hall, England.<sup>32</sup>

Gilbert then doubled back to the noble canines of the ancients and those not so ancient:

There was Prince Llewellyn and his greyhound "Gelert"; Sir Isaac Newton and his "Diamond"; Mirabeau and his "Chico"; "Diomed," about whom his master, John S. Wise, wrote a book; Josephine and her "Fortune" that left a scar on Napoleon's leg; and Sir Walter Scott and his dozens of dogs.

Relics of dogs were found among the ruins of Herculaneum beside the forms of Roman sentries. In the late World War the dog shared the dangers of their soldier-masters in flood and field and trench.

Lord Byron had graven on a marble shaft this tribute to his dog: "Near this spot is deposited the remains of one who possessed beauty without vanity, strength without insolence, courage without ferocity, and all the virtues of man without his vices. This praise, which would be but meaningless flattery, if inscribed over human ashes, is but a just tribute to the memory of Boatswain, a dog, who was born at Newfoundland, 1803, and died at Newstead Abbey, November 18, 1808."<sup>33</sup>

And to political leaders and judges:

In like vein Alexander H. Stephens wrote for his sagacious poodle Rio: "Here rest the remains of what in life was a satire on the human race, and an honor to his own—a faithful dog."

Senator George Graham Vest said: "The one, absolute, unselfish friend that man can have in this selfish world, the one that never deserts him, the one that never proves ungrateful or treacherous, is his dog."

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32. *Montgomery*, 151 S.E. at 365.

33. *Id.*

Tributes might be multiplied almost without number. Like man, not all dogs are good dogs. They have left behind them records showing every degree of good and bad. One poet's commentary has been judicially recognized in *Woodbridge v. Marks*, 14 Misc. Rep. 368, 36 N. Y. S. 81, 82:

“That dogs delight to bark and bite,

For God hath made them so.”

In the case just cited it was said:

“Conceding the highest place here or hereafter to this companion of man which is claimed by any one, even to the faith of the Indian:

““That in the happy hunting grounds

His faithful dog shall bear him company.’

“Still in the walks of life he must give way to the interests of man.”

For further judicial discussion, see *State v. Langford*, 55 S. C. 322, 33 S. E. 370, 74 Am. St. Rep. 746; *Wiley v. State*, 22 Barb. (N. Y.) 506; *Strong v. Georgia Ry., etc., Co.*, 118 Ga. 515, 45 S. E. 366.<sup>34</sup>

Acknowledging his sources:

For many of the facts stated above, [Gilbert gives] credit . . . to “Pippa Passes, And Rather Doggily,” a little classic by William C. Jones, from which I quote as follows: “When the house is still and only the wind is abroad, Pippa muses by the fire at her master's feet, black muzzle white paws, and in her eyes that question which troubled the soul of Tamas Carlyle, ‘Is the universe friendly or nay?’ The hearth is red, fleecy the rug, the shadows flickering warm; but Pippa is too staunch a terrier to leave danger or doubt unchallenged. She sniffs the unseen, then turns a more disquieted glance to the being in the chair. That damp, twitching nose senses truth beyond the oracle of his book, news beyond his radio's find. A growl, snarls, a rush to the window, a dash to the locked door. She lunges and scratches, and leaps, back bristled, flanks heaving, teeth snapping, in her throat a hubbub that would rejoice the heart of three-headed

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34. *Id.*

Cerberus. The master is roused. What skulker, what power of darkness? A witch, perchance. Worse! It is that ancient anathema of a good dog's world, the dragon that would upset all seven of the tailwagging heavens; it is Grimalkin, the Stray Cat. A wild charge to the back fence, followed by a ferreting of every nook which might harbor the foe, so placates Pippa that she returns with tail as high as a bobbed tail well could be, and soon is aslumber on the rug. \*\*\* When a dutiful ox dies, no epitaph is writ; rather he is flayed for the parsimonious tanner. When a mule goes the way of all flesh, no mound is reared, serviceful though his years have been. When a lambkin lies still and stark on the trencher, even the poet who was wont to rhyme on the pretty innocent will regale himself with one of its chops. But when a certain little creature, having a bark at one end and a bit of tail at the other, with a flea or two between, takes leave for the isles of the blest, the lords of earth look foolish while their ladies weep, and humanity feels a tug at the heart."

A recent story, "Hound of Heaven," tells of a fox terrier after death, floating through the clouds, the cold winds blowing through his whiskers, finally landing at the pearly gates of canine heaven, and fresh upon his admission he is engaged in mortal combat with "Hodge," the famous cat, pet of Samuel Johnson.<sup>35</sup>

In the end, the decision:

From what has been said it will not be difficult to ascertain where the sentiment and inclination of the court would lead. The court, however, is a court for the correction of errors and we must be guided by the law. The law of the case will be found in the headnotes.<sup>36</sup>

I do not doubt the watchman's widow was disappointed in the decision. She had probably been told by her lawyer that the case was a long shot. The lawyer showed fidelity to his public professional responsibility by pursuing the widow's case all the way, as his fee was almost certainly contingent upon success. Gilbert understood that the court had before it a sad happening for all, a tragic circumstance for the widow. Still, he faithfully applied the law. If a valuable piece of the employer's boat repair equipment had fallen into the water, and the watchman perished while trying to recover it, the widow's claim would no doubt have succeeded. That the law cuts square corners that the courts should respect does not mean judges do not realize they are making decisions that will be tough for some to swallow. A court's public disclosure of the humanity of

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35. *Id.* at 365-66.

36. *Id.* at 366.

the matter for decision is within the highest traditions of the judiciary. It enhances the credibility of the judgments of all courts. What Price Gilbert did would have been difficult, if not impossible, without resort to the literature and lore of human history.<sup>37</sup>

### III. WHAT MAKES FOR A GOOD ADJUDICATIVE OPINION?

#### *A. The Practical Need for Humanizing the Blunt Instrument We Call Law*

Law is a social fact. Its efficacy turns on its acceptance by the community and by the country.<sup>38</sup> Credibility of the opinions of judges promotes acceptance of legal practice. Of course, credibility at its core turns on how close the adjudicative opinion comes to marshalling full facts and data, identifying—understanding—and declaring the appropriate rules of law, and reliably applying the law to the facts. This is no mechanical process,<sup>39</sup> and speeding ticket precision is seldom possible. Often overlooked is that the credibility—and acceptance—of an adjudication also turns on the extent to which the judge shows that he senses the humanity of the matter. There are cases that can be decided only one way. There are few cases where there is not at least something that should be said for the losing party. There are no cases that do not arise from human activity and experience.

Credibility is enhanced when judges put their points well, but good writing does not come easy to judges (nor to the young law clerks who ghost draft ninety-plus per cent of so many opinions). More often than not, men and women emerge from law school with their writing skills impaired, not enhanced. Those skills take a further hit from the current culture of legal practice until, with one rationalization or another, the soon not quite so young lawyer is assigning the writing component of his or her practice to a paralegal or a new fresh caught lawyer. The river rolls on. I've heard judges argue the relative unimportance of the writing aspect of judging as compared with all else. One way or another, the judge's chambers should learn to convey a written sense of the practical human reality in each case adjudged—and do it with a touch of style.

Well written opinions are important for those affected, to those in the jurisdiction who (often with the advice of counsel) want to know how to order their affairs. Practical reality is also important to those interested persons not quite so sure of the nuances of the rule of law, to those whose sense of justice

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37. As best I can discern, Gilbert's opinion has been mentioned but once in his home state, *Ward v. Benge*, 136 S.E.2d 911, 912 (Ga. App. 1964), with citations to three nice earlier cases involving dogs, but nothing beyond case cites. The Court of Appeals of Maryland gave Justice Gilbert's effort a friendly nod in *State v. Collins*, 790 A.2d 660, 671-672 (Md. 2002). *Miller v. Clark County*, 340 F.3d 959 (9<sup>th</sup> Cir. 2003) involved a sheriff's deputy's use of a police dog to "bite and hold" the arm of a car theft suspect. The question in the civil action was whether this use of the police dog was excessive force under the Fourth Amendment. Judge Ronald C. Gould had a lengthy footnote about the "value to human society of skilled police dogs." *Id.* at 967 fn. 13. *Montgomery* is among the dog cases included. The footnote is pleasant reading but doesn't seem to fit and enrich the adjudication at hand nearly so well as Gilbert's *Montgomery* opinion.

38. H.L.A. Hart, *THE CONCEPT OF LAW* 100-110 (2d. ed. 1994).

39. This is the core concern of my recent polemic: James L. Robertson, *Variations on a Theme By Posner: Facing the Factual Component of the Reliability Imperative in the Process of Adjudication*, 84 MISS. L.J. 471 (2015).

includes hopeful feelings about the law, that on balance it does us more good than harm. Such feelings come when judges show their understanding of the humanity of the matter at hand. One cannot show such understanding without having that understanding; this is one few can fake. Margaret V. Turano puts the point, “Lawyers and judges need to understand the lives of the human beings they deal with.”<sup>40</sup> She follows with Samuel Johnson’s definition of law as “human wisdom acting upon human experience for the benefit of the public.”<sup>41</sup> Law, after all, “is not an art or a science, but a service,”<sup>42</sup> a service to humanity.

What I say here is not inconsistent with my sober sense that in the real world the stuff we call law is a blunt instrument, in every real and practical sense of the proverb, that is all too often less than reliably brought to bear.<sup>43</sup> Humanity lives with the most sobering reality of them all—that law and legal practice at best seldom yield but a crude approximation of justice and that these seldom function at their best.<sup>44</sup> How many times have you heard it said that in most lawsuits everyone loses, and the practical question is who can emerge having lost the least?

I understand this, though I do not doubt we are a better community for our law and legal system—warts and all—than we should be without them. We should make our way out of the law’s fog, and look to the light of literature and in it well-worded reflections on humanity. Luminous literature abounds, penned by the poet, the essayist, the polemicist, the novelist, the playwright and even by judges. “The cat will me[o]w and [every] dog will have his day.”<sup>45</sup>

### *B. Modest Profits from a Practical Dose of Literature in Law*

The latter part of the 20th Century saw the rise of lots of “law and” movements, foremost the field of law and economics. Law and literature have long learned from each other. They began to be discussed together a bit more often in the 1980s, and much has been said since.<sup>46</sup> I am not trying to enter that conversation as I understand it, certainly not to fill perceived gaps, add insights, or correct the errors of others. Some may see a connection between what I say here and with what appears a loosely organized field where many go off in directions that do not interest me.<sup>47</sup> I am aware of the activity and have a

40. Margaret V. Turano, *Moments of Grace: Lawyers Reading Literature*, 72 N.Y. ST. BAR J. 12, 14 (2000).

41. *Id.* at 15.

42. RICHARD A. POSNER, REFLECTIONS ON JUDGING 354 (2013).

43. Robertson, *Variations*, *supra* note 39, at 501-09.

44. I have sensed this for years, and said it many times, though in slightly differing ways. See James L. Robertson, *A Life Sentence Served by an Innocent Man*, CAP. AREA B. ASS’N NEWSL. (CABA, Jackson, Miss.), June 2011, at 8, 10, <http://www.caba.ms/newsletters/caba-newsletter-june2011.pdf>

45. WILLIAM SHAKESPEARE, HAMLET act 5, sc.1, ln 315.

46. See RICHARD A. POSNER, LAW AND LITERATURE (3rd ed. 2009). John M. DeStefano III, *On Literature as Legal Authority*, 49 ARIZ. L. REV. 521 (2007) will reward reading; bear in mind that he is speaking of an earlier edition of Judge Posner’s work. I have already mentioned Keyes, *supra* note 3 and Prof. Turano, *supra* note 40. See also Law and Humanities Institute, “Law and Literature Scholarship: A Chronological Bibliography,” <http://docs.law.gwu.edu/facweb/dsolove/LHI-Bibliography.htm> (last visited Mar. 30, 2016); “Law and Humanities Blog: A Blog about Law, Literature, and the Humanities,” <http://lawlit.blogspot.com/> (last visited Mar. 30, 2016).

47. Most of Keyes’ article is a critique and refutation of larger claims of others for the use of literary

passing acquaintance with its offerings.

People associated literature and law long before the “law and” movements.<sup>48</sup> We have always had literate lawyers—Thomas Jefferson, Abraham Lincoln, Oliver Wendell Holmes, Jr.,<sup>49</sup> Clarence Darrow,<sup>50</sup> William Alexander Percy,<sup>51</sup> and many others. Reliable judging is about communication, and it is about persuasion, whatever else it may also be about. Few lawyers can “write like an angel,” once said of Cardozo,<sup>52</sup> or like Learned Hand or Robert Jackson. Holmes wrote with a particular grace and civility, and he could be brief. Rhetorical brevity persuades where turgid logic, however impeccable, leaves us unmoved. Use of literature can help, though at best it only sets a tone, gives the reader pleasure, and otherwise enhances practical acceptance of the adjudication and its ultimate reliability.

I take it as a given that writing well and with clarity is a function of one reading what has been written well over the centuries. I knew this before the summer of 1962 when I received the package called “Things To Do Before Beginning Law School,” or some such, and being told to read, among others, BILLY BUDD by Herman Melville, THE OX BOW INCIDENT by Walter Van Tilborg Clark, and THE TRIAL by Franz Kafka. These works had not been assigned just because they were well written, although each was well written (and one translated into English), albeit in styles differing from the other two. I had learned enough in high school to sense that “brush up your Shakespeare, and start doing it now”<sup>53</sup> was advice appropriate perennially, as “man’s inhumanity to man”<sup>54</sup> has been and is an activity without beginning or end. This assignment gave a jump start to my journey toward understanding the ambiguity of all things human.

The practical value of literature in adjudications can be like that of legislative facts, or, perhaps I should say, more in the nature of a source of the ideas and information that fall under that amorphous umbrella called legislative facts, at least since the day of Kenneth Culp Davis.<sup>55</sup> Holmes called these “the

techniques in law. Keyes, *supra* note 3. Posner has held forth at greater length on a broader range of such claims, claims that strike me facially as without merit, though I do not believe either is giving the late Ronald Dworkin his due. Lawyers have such a hard time presenting fairly the works of those with whom they disagree, and doubtless I am as bad as others. Unlike some, I confess error I am forced to face. A generation ago, I studied and taught Dworkin, particularly LAW’S EMPIRE, and with great profit and pleasure. RONALD DWORKIN, LAW’S EMPIRE (1988).

48. And, as well, long before the two volume I: THE WORLD OF LAW, THE LAW IN LITERATURE (Ephraim London ed. 1960) and II: THE WORLD OF LAW, THE LAW AS LITERATURE (Ephraim London ed. 1960). And before that Cardozo’s LAW AND LITERATURE AND OTHER ESSAYS AND ADDRESSES, SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO 339 (1938).

49. OLIVER WENDELL HOLMES, JR., THE ESSENTIAL HOLMES (Richard Posner ed. 1989).

50. CLARENCE DARROW, THE STORY OF MY LIFE, Chapter 35, *A Year In Europe* (De Capo Press 1996) (1932).

51. W. A. PERCY, LANTERNS ON THE LEVEE (1940).

52. SANFORD LAKOFF, MAX LERNER; PILGRIM IN THE PROMISED LAND 87 (1998).

53. COLE PORTER, KISS ME, KATE (1948).

54. Robert Burns, “Man was made to mourn: A Dirge” (1784).

55. I have recently set forth at some length my thoughts on the role of legislative facts in the reliability imperative that to my mind is categorically an inexorable part of the process of adjudication. Robertson, *Variations*, *supra* note 39.

secret root from which the law draws all of the juices of life.”<sup>56</sup> Appropriate literary allusions may enrich a judge’s sense of a case, that something should be done, and with an idea or two what that something might be. And of the adjudicative narrative that should follow. I share James Boyd White’s view that “the law . . . works by narrative.”<sup>57</sup> A sense of the humanity of all affected people, and of the four dimensional fixes in which they find themselves in space-time. This becomes important if you sense I may be right when I say that many appeals can be decided in two or more ways without intellectual dishonesty on the part of the writing judge.<sup>58</sup>

Many fear legal language. A lawyer never uses one word when two or three will do just as well. Faulknerian sentences abound but seldom with grace or poetic effect, or intelligibility to the uninitiated. The best legal writers befuddle many; resort outside the law often aids understanding. When Edmund Tyrone a/k/a Eugene O’Neill remembered his days at sea, reflecting that “I belonged, without past or future, within peace and unity and a wild joy, without something greater than my own life, or the life of Man, to Life itself! To God, if you want to put it that way,”<sup>59</sup> his autobiographical father suggested “there’s the makings of a poet in you.” The son responded, “No. . . . I just stammered. That’s the best I’ll ever do. . . . Stammering is the native eloquence of us fog people.”<sup>60</sup>

Lawyers and judges stammer, too. And worse, as when judges tell men to turn square corners.<sup>61</sup> Firing off legalese leaves less penetrable the language of lawyers and judges, enhances their repute as fog people remote from humanity. It impairs acceptance of their arguments, opinions and judgments. Fog can permeate a city, a courthouse, a court and its mind, its proceedings and judgments.<sup>62</sup> Lest we forget, the Kafkaesque nightmare has its origin in a trial.<sup>63</sup>

### C. The Story-Telling Nature and Needs of Good Adjudications

Understanding is important, for those who come across the opinion of the

56. OLIVER WENDELL HOLMES JR., *THE COMMON LAW* 35 (1881). The above is but a line in the four page passage with which Holmes concludes Lecture I, appearing in its entirety at pages 34-38, which should be required reading, if not memorization, for all appellate judges.

57. JAMES BOYD WHITE, *Telling Stories in the Law and in Ordinary Life: The Orestia and “Noon Wines,”* in *HERACLES’ BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW* 168 (1985).

58. Robertson, *Variations*, *supra* note 39, at 486-87.

59. EUGENE O’NEILL, *LONG DAY’S JOURNEY INTO NIGHT*, act 4, in *EUGENE O’NEILL, COMPLETE PLAYS, 1932-1943*, at 812 (Library of America 1988).

60. *Id.* at 812-813.

61. *See, e.g.*, *Rock Island, Arkansas and Louisiana Railroad v. United States*, 254 U.S. 141, 143 (1920) (Holmes, J.) (“Men must turn square corners when they deal with the government.”); *FMC Stores v. Borough of Morris Plains*, 100 N. J. 418 (1985).

62. CHARLES DICKENS, *BLEAK HOUSE* 1-2 (1853).

63. FRANZ KAFKA, *THE TRIAL* (Schocken Books, 1998) is one of a number of English translations available. The Court of Appeals of Georgia makes a nice use of this one in the context of explaining why service of process really is necessary before a defendant may be proceeded against, *viz.*, without process “all that would be necessary to obtain a judgment and levy on a man’s property and possessions would be to inform him by whatsoever means that there was in fact a suit pending against him, and throw the burden on him of checking out the rumor, a situation that would indeed lead to the nightmare situations envisioned by Kafka in *The Trial*.” *Holloway v. Frey*, 202 S.E.2d 845, 847 (Ga. App. 1973).

court a generation after the fact, when memory of the brouhaha that gave rise to the case has dissipated or been forgotten. Comfort in reading facilitates understanding. A conversational tone can be a godsend, easing the way to all else, and it can keep the reader reading.

People tend to believe a lot of storytelling goes on in the courthouse, as well it should, so long as we are clear about the sorts of stories that are allowable. Professor White reminds us that story telling takes place at each stage of a case, from “the story the client tells . . . . It ends in story, too, with a decision by a court or jury, or an agreement between the parties, about what happened and what it means.”<sup>64</sup> Then the “final legal version of the story [which] almost always includes a decision or an agreement about what is to remain unsaid. Beyond the story is a silence it acknowledges.”<sup>65</sup>

Richard Posner has a useful exposition that he calls “Legal Narratology.”<sup>66</sup> There is common sense in Posner’s point that adjudicative opinions should respect “craft values . . . , notably *impartiality* . . . , *scrupulousness* and *concreteness*.”<sup>67</sup> The traditional *res gestae* rule is alive and well in my home state,<sup>68</sup> though it has not been formally brought forward in the Mississippi Rules of Evidence.

Rules require that appellate briefs state the facts.<sup>69</sup> I have often urged young lawyers to write their statement of the facts as a free-standing narrative. The idea is to present the facts so that a reader with an ordinary sense of justice reading only that narrative, and if there were no law to the contrary, would feel that your client has the better of the case.<sup>70</sup> No lawyer can do this without a strong sense of humanity. It is a bit more difficult today, as rules try to constrain fact statements to the issues presented. Still, a good writer should be able to slip congenial allusions, phrases, and even paragraphs past the negative vigilance of the gate keepers who check the briefs for form.

With a touch of stealth, one should be able to practice good narrative writing style without incurring the wrath of those well-meaning but unimaginative souls who people our appellate courts. In no event should the record be distorted or bad facts left out, lest your adversary pounce upon them. Keep an eye on the question the court should decide. The stories of most flawed and all too human litigants can be told so that the reading judge will feel a tug their way before the first word of law is brought to bear.

Similarly, the opinions of judges, particularly appellate judges, should be

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64. WHITE, *supra* note 57.

65. *Id.*

66. POSNER, LAW, *supra* note 46.

67. *Id.* at 424.

68. See VICTORIA C. FERREIRA, MISSISSIPPI EVIDENCE 65 & n.23 (4th ed. 2001); see also *Burleson v. State*, 166 So. 3d 499, 511 (¶36) (Miss. 2015); *Batiste v. State*, 121 So. 3d 808, 831-832 (¶33) (Miss. 2013); *Wade v. State*, 583 So. 2d 965, 967 (Miss. 1991); *Collins v. State*, 513 So. 2d 877, 879 (Miss. 1987); *Hemmingway v. State*, 483 So. 2d 1335, 1337 (Miss. 1987); *Anderson v. State*, 154 So. 3d 42, 56 fn. 6 (¶44) (Miss. Ct. App. 2014); *Parks v. State*, 950 So. 2d 184, 187 (¶13) (Miss. Ct. App. 2006); *Townsend v. State*, 933 So. 2d 986, 991 (¶13) (Miss. Ct. App. 2005).

69. FED. R. APP. P. 28(a)(6); MISS. R. APP. P. 28(a)(4).

70. This approach is hardly original with me. I heard it years ago, perhaps in law school, or in some reading long since forgotten, except as to substance.



presented in narrative form. I have said before that:

every appeal includes a story worth telling, and worth telling as well as it may be told, because each case is about flawed and hopeful people worth caring about even when it is also about the entities and institutions they have created, the prejudices they profess, the mistakes they have made, or the meanness of their manners.<sup>71</sup>

In telling the stories of their clients:

[c]ounsel may draw upon literature, history, science, religion, and philosophy for material for his argument. He may navigate all rivers of modern literature or sail the seas of ancient learning; he may explore all the shores of thought and experience; he may, if he will, take the wings of the morning and fly not only to the uttermost parts of the sea but to the uttermost limits of space in search of illustrations, similes, and metaphors to adorn his argument. He may reach the uttermost heights of attainable eloquence, soar into the empyrean heights where his shadow may fall on the loftiest mountain top, as the eagle in its loftiest flight. He may borrow from every source, modern and ancient, such materials as he needs for his argument. He may clothe the common occurrences of life in the habiliments of poetry and give to airy nothings a habitation and a name. He may weave of words a rhetorical bouquet that enchants the ear and mesmerizes the mind. He may make the learning of the ages the servant of his tongue. His argument may be as profound as logic and learning can make them. He may give wing to his wit and play to his imagination so long as he does not imagine fact not in evidence, which the court does not take judicial knowledge of, or does not go out of the record for the facts not in evidence.<sup>[72]</sup> . . . As to the facts in evidence, he may array them in such figures and form and clothe them with such ideas and conclusions as he can conjure up in his mind for the best interest of his cause.<sup>73</sup>

Many believe that this oft-quoted text was plagiarized from the brief said to have emanated with the pen of lawyer/poet William Alexander Percy, the historical poet laureate of the Mississippi Delta.<sup>74</sup> In Mississippi, it has become

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71. Robertson, *Variations*, *supra* note 39, at 488.

72. This wonderful 1930 judicial utterance was penned before there was thought of what has become today's understanding of legislative facts, which emerged like Athena from the head of Zeus with the original Advisory Committee Note to FED. R. EVID. 201 (1972 Proposed Rules).

73. *Nelms & Blum v. Fink*, 131 So. 817, 820-21 (Miss. 1930).

74. See James L. Robertson, *Captain Percy, Patriot*, CAP. AREA B. ASS'N NEWSL. (CABA, Jackson, Miss.), (October 2012), at 6, <http://www.caba.ms/newsletters/caba-newsletter-october2012.pdf>. Formally,

the canonical statement of the nature and scope of final argument at trial, brought forward in substantial part in later cases.<sup>75</sup>

If lawyers have such latitude, such encouragement as in *Nelms & Blum*, so do judges, and even more so—particularly appellate judges not constrained to point a particular jury in a particular case to a particular verdict, but rather to penetrate the fog or soar above it. Optimal reliability in fact is our end game in the practice of adjudications.<sup>76</sup> Adjudications enjoy optimal credibility with the rest of us when judges care enough to use well the gift of language to explain their rulings reliably. Of course, that means no analytical gaps in judicial opinions: no “2 plus 4 plus x plus y plus z equals 21” logic, a structural flaw in so many reported appellate adjudications. Many opinions convey no sense the judge sees that the x, y and z steps are even there. I hope to go beyond that practical goal today, to talk of ways to “clothe the common occurrences of life in the habiliments of poetry [. . . , to] weave of words a rhetorical bouquet that enchants the ear and mesmerizes the mind.”<sup>77</sup>

#### *D. Knowing the Multiple Audiences that Appellate Judges Write For*

Appellate judges write for a number of audiences, audiences with differing needs and interests.<sup>78</sup> Not every opinion should be directed to the same audience. Some should be directed to multiple audiences with quite different interests, needs, and abilities to understand the case. One interested consumer may be annoyed that the opinion speaks to others with differing needs and interests, but that consumer has a complaint only if his needs and interests are not addressed. Appellate opinions should be organized so that the consumer can readily identify the parts he needs and fast forward past the rest.

The appellate judge writes for the parties. The opinion should show that the court understands the activity that gave rise to the case. It should decide the case concretely and tell the parties how so and why. I was among those judges often accused of setting out the facts beyond the bare minimum necessary that the legal analysis could be understood. My defense is that setting out the facts at length has a disciplinary effect. It helped me make sure I had not skimmed across the top too quickly, that I had not been too blinded by dubious deference standards.<sup>79</sup>

Setting out the facts at length also says to the parties that the judge cares what happened that led to the litigation.<sup>80</sup> Not that the unsuccessful party is

*Nelms & Blum* was authored by Justice George H. Ethridge, in his day the most literate member of the Supreme Court of Mississippi, but with a literary style noticeably different from Percy’s.

75. See, e.g., *Dycus*, 875 So. 2d at 172 (¶160); *Profit Mgt. Development, Inc. v. Jacobson, Brandvik and Anderson, Ltd.*, 721 N.E.2d 826, 839 (Ill. App. Ct. 1999); *Brewer v. State*, 704 So. 2d 70, 73 (¶19) (Miss. 1997); *Williams v. State*, 595 So. 2d 1299, 1309 (Miss. 1992); *Shell v. State*, 553 So. 2d 887, 899 (Miss. 1989); *Johnson v. State*, 416 So. 2d 383, 391-392 (Miss. 1980); *Gray v. State*, 351 So. 2d 1342, 1346 (Miss. 1977).

76. This is the central thesis of my lengthy exposition in Robertson, *Variations*, *supra* note 39. Today’s effort is about one means appropriate in some cases to the end of optimal reliability in adjudications.

77. *Nelms & Blum*, 131 So. at 820-21.

78. See discussion in DeStefano, *supra* note 46, at 525-26.

79. See, e.g., *Harveston v. State*, 493 So. 2d 365, 366-70, 371-73 (Miss. 1986) (Robertson, J., in a prior life); see also Robertson, *Variations*, *supra* note 39, at 552-564.

80. I do not mean to imply that this is easy. Getting the facts right is so very important, particularly on

going to be persuaded; you should strive for the “‘A’ for effort” though you know it will seldom be bestowed. I always thought, if you were going to tell a man he had to spend ten years in prison, that it was not asking too much that you tell him why as well as practicable, and that you should start with a very clear narrative statement of the facts of what he did that offended what particular section of the criminal code and in what practical factual context. And, most important, tell him why his defenses do not fly.

Of course, an appellate judge is always writing for fellow judges, first and foremost to satisfy a majority of one’s colleagues. I once sat on a court where, with fewer than five votes, you were writing only to let off steam at the risk of making clear the position the majority rejected. Past that, a judge writes for others at the appellate level who in time might be called on to revise or extend what the judge has written, and for those lower court judges who have to understand and apply the law in never-quite-identical factual contexts.

Judges write for the bar as well. I recall times when I was writing to fill gaps in what was already in the books, to make the next lawyer’s or judge’s task a little easier. Three cases dealing with whether tidal or fresh waters were public waters or were eligible for private ownership are particularly in point.<sup>81</sup> In the late 1980s, the history and lore and legislative facts of these matters were available only in scattered and hard-to-find fragments. I went beyond the basics to fill the gaps, each case building on the one before it. Lawyers and judges handling such cases today have the research tools to revise and extend and improve upon my efforts, as much, if not more, than I managed with what once was all we had.

To return to a point above, *Dycus v. Sillers* is a long opinion. It is filled with facts, history, potomology engineering, and more than a bit of literature, the humanity of the culture of fishermen. The opinion is organized so that lawyers and judges who on a particular day do not need all of these points may readily identify, study and cite the particular points they do need.<sup>82</sup>

In many cases, I tried to write for the hypothetical average intelligent and informed person on the streets who, for whatever reason, might need to read and understand the case.<sup>83</sup> As I have before, I take exception to Holmes when he said:

The reason why a lawyer does not mention that his client wore a white hat when he made a contract, while Mrs. Quickly would

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those collateral facts that contribute to the humanity of the matter at hand, but are not critical to the precise adjudication. Nothing impeaches the credibility of an opinion in the eyes of the unsuccessful party as much as when he sees the court saying that the operative events occurred on January 10 of a particular year, when everyone knows it all happened on June 10 of that year.

81. See *Cinque Bambini P’ship v. State*, 491 So. 2d 508 (Miss. 1986), *aff’d sub nom.* Phillips Petroleum Co. v. Mississippi, 484 U.S. 469 (1988) (Public Tidelands Trust); *Dycus*, 557 So. 2d 486 (small man-made lake off larger oxbow lake once a part of the Mississippi River), discussed below; *Ryals v. Pigott*, 580 So. 2d 1140 (Miss. 1990) (whether the waters of the Bogue Chitto River in southwest Mississippi were public *vis a vis* the claims of riparian landowners).

82. See, e.g., *Fulop v. Suta*, 847 So. 2d 893, 898 (¶18) (Miss. Ct. App. 2002) (Southwick, J., dissenting); *Davis v. Davis*, 643 So. 2d 931, 934 (Miss. 1994).

83. See Robertson, *Variations*, *supra* note 39, at 489, (citing and quoting POSNER, *supra* note 35).

be sure to dwell upon it along with the parcel gilt goblet and the sea-coal fire, is that he foresees that the public force will act in the same way whatever his client had upon his head.<sup>84</sup>

But we want the case to be understandable by Mrs. Quickly, too, and to be congenial as well. More broadly, reliability is enhanced when the reader sees the parties as people, and not mere automatons.<sup>85</sup> Holmes proves too much, for describing the way Mrs. Quickly would think of the parties changes nothing in the way “the public force will act.”<sup>86</sup> It rather enriches the opinion of the court, as Holmes enriched his article.

Finally, the appellate judge is writing for the future. As a practical matter, each adjudication has a forward-looking component. The rule of precedent assures no less. This legislative dimension of the decision needs to be explained as best can be. Sometimes it is enough to cite prior precedents that articulate the point. Saying something that looks a bit ahead is important. Otherwise, the case’s meaning will be left for implication by others, albeit years removed from the social milieu in which it arose and was decided, though all law by its nature and practical import faces the challenge of “adapting life to the continuous change in social and economic conditions.”<sup>87</sup> Given the advent of the Internet, and the resources and technologies to come, I know only that more and wider audiences soon will be able to access more readily what judges have done and what those on the bench now and in the future will do. Beyond this, Chief Justice Charles Evans Hughes once suggested that “a dissent in a court of last resort is [sometimes written as] an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed.”<sup>88</sup>

#### *E. An Under-Used Strategy for Talking with Judicial Audiences*

In time, I stumbled onto a mode for writing—in appropriate cases—an opinion, that it would catch the eye of the media who would present attractive reports of the court and the humanity of what it had done.<sup>89</sup> With or without the media’s accelerant, the word spread, though I have no way of quantifying its effect. With 20-20 hindsight, my efforts to tap into literature and related lore, not altogether fictional, could stand a bit more polish. By and large, those who may not have cared for my less traditional approach never let me know their

84. Oliver Wendell Holmes Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 458 (1897).

85. Robertson, *Variations*, *supra* note 39, at 608.

86. *Id.*

87. *Albritton v. City of Winona*, 178 So. 799, 805-06 (Miss. 1938).

88. CHARLES EVANS HUGHES, *THE SUPREME COURT OF THE UNITED STATES* 67-68 (1928); CHRISTOPHER P. BANKS AND DANIEL M. O’BRIEN, *THE JUDICIAL PROCESS; LAW, COURTS AND JUDICIAL POLITICS* (2013); *see also* *Com. Of Pa. v. Local Union 542*, *Intern. Union of Operating Engineers*, 388 F.Supp. Charles 155, 175 fn. 37 (E. D. Pa. 1974); *Prairie View A & M University v. Chatha*, 381 S.W.3d 500, 522 (Tex. 2012) (Jefferson, C.J., dissenting).

89. *See* below the story of *Pharr v. State*, 465 So. 2d 294 (Miss.1984), of *City of Clinton v. Smith*, 493 So. 2d 331 (Miss. 1986), and of *Dycus v. Sillers*, 557 So. 2d 486 (Miss. 1990). Others had practiced this strategy years earlier. *See, e.g., Montgomery v. Maryland Casualty Co.*, 151 S.E. 363, 364-66 (Ga. 1930). My research skills in the mid-1980s were less than what they should have been.

thoughts, with the exception of a few colleagues who never quite got it and said so.<sup>90</sup> The ever-present reality was that without five votes, my efforts were of no avail.

### III. FORMS OF LITERARY ALLUSIONS THAT THE LAW MAY USE WITH PROFIT AND PLEASURE

#### *A. Use of Fictional Characters*

Lawyers and judges have long used the names of famous fictional characters to make a point. Arthur Conan Doyle's larger-than-life, sharp-as-a-tack detective Sherlock Holmes is a perennial choice, and in contexts that vary almost as much as those Shakespeare makes available.<sup>91</sup> In 1980, the Supreme Court of the United States ("SCOTUS") wrote that, "[i]n ascertaining the meaning of a statute, a court cannot, in the manner of Sherlock Holmes, pursue the theory of the dog that did not bark."<sup>92</sup> In 2006, a judge on the Fourth Circuit disagreed, resorting to Holmes in dissent on a point of plain error:

The majority's observation about the silence of all Fourth Circuit panels calls to mind the Sherlock Holmes mystery *Silver Blaze* . . . . Holmes was investigating the theft of an expensive race horse named Silver Blaze from a stable and the death of Silver Blaze's trainer. Another investigator asked Holmes if there was any particular aspect of the crime that was worthy of attention . . . . Holmes . . . pointed out that the failure of the watch dog to bark when Silver Blaze was stolen showed that the watch dog knew the thief . . . . As in *Silver Blaze*, the failure of any Fourth Circuit panel applying *Hughes* and its progeny to "bark" at the fourth step of the plain-error analysis is compelling.<sup>93</sup>

Some judges make general references. "This may seem like an improbable scenario, and doubtless it is, but Conan Doyle's writing about Sherlock Holmes teach that, when all explanations of an occurrence are improbable, the more improbable ones must be rejected and the least improbable accepted as true."<sup>94</sup> "This is a very mysterious case. I don't know anybody short of a Sherlock Holmes that could unravel it in a satisfactory manner."<sup>95</sup>

Years ago and not even in a criminal law context, the Supreme Court of

90. *Pharr*, 465 So. 2d at 305; *City of Clinton*, 493 So. 2d at 342; and *Dycus*, 557 So. 2d at 508-509.

91. Sherlock Holmes' eminence in literature and law is well known. See, e.g., POSNER, LAW, *supra* note 46, at 419-24. Holmes video series are easily accessible. I advise the under fifty set that, while Benedict Cumberbatch is entertaining and Basil Rathbone still has loyal devotees, Jeremy Brett is Sherlock Holmes. Then read the stories.

92. *Harrison v. PPG Industries, Inc.*, 446 U. S. 578, 592 and fn. 8 (1980).

93. *United States v. Smith*, 443 F.3d 254, 280 (4th Cir. 2006) (dissenting opinion, citing ARTHUR CONAN DOYLE, *Silver Blaze*, in THE COMPLETE SHERLOCK HOLMES, 335, 347, 349 (1927)).

94. *Tilford v. Commissioner of Internal Revenue*, 705 F.2d 828, 832 (6th Cir. 1983) (dissenting opinion).

95. *Hoover Motor Express, Inv. v. Thomas*, 65 S.W.2d 621, 624 (Tenn. App. 1933).

Mississippi explained that “[t]o impute negligence of the driver to the appellee . . . would be to require the quickness of thought and the vigilance of a Sherlock Holmes.”<sup>96</sup> Likely readers got it when, for a change of pace, the court later said, “The prescience of a Hercule Poirot was hardly requisite to a belief that earlier that afternoon Gandy had been involved in unlawful cocaine trafficking, . . . ,”<sup>97</sup> *en route* to deciding a point of probable cause. And likely more so today, given David Suchet’s charming portrayal that the BBC has made widely available. Invoking Sherlock Holmes or, at times, Agatha Christie’s Hercule Poirot does not decide cases. When apt, such uses may save fifty or more words in the opinion, or add a touch of color that makes the opinion congenial to many readers with little risk of offending others.

Shakespeare’s Shylock is another favorite. A good many years ago, a court told a debtor he could quote Portia to his creditors, “[b]ut if, like Shylock, the creditors should fail to appreciate the beauty of this advice, and should demand to the utmost the pound of flesh, the law of Georgia, unlike that of Venice, affords no avenue by which the unfortunate debtor can ‘get back at’ his adversary.”<sup>98</sup> In an assault case where the victim was said to be “a usurer and a loan shark,” the court said, “[o]ur law affords one various means of dealing with Shylock, but self help acts of violence are not among them.”<sup>99</sup> As with any such exercise, judicial authors do not always take care that the image suggested by the fictional name dropped fits the case, *viz.*, “[t]he usurious toll which the majority has imposed upon subsequent litigants who are in Mr. McCoy’s position in the interest of judicial economy and efficiency is a blatant deprivation of due process reminiscent of Shylock and his pound of flesh.”<sup>100</sup>

Other fictional figures make their appearance in the law reporters. Years ago, the Supreme Court of Mississippi had struck down a Progressive Era amendment to the state’s constitution providing for a populist, California style initiative and referendum legislative process, though the court acted on arguably quite specious grounds.<sup>101</sup> Almost seventy years later, the Attorney General sought to resurrect of the old I & R amendment. Concluding its discussion of the dubious decision of 1922, the court said, “[t]here the matter lay, dormant, for lo these many years, a Rip Van Winkle or a Sleeping Beauty, depending on one’s point of view.”<sup>102</sup> A year later the court again invoked Washington Irving’s best known character, *viz.*, “the majority’s ruling permits anyone having a prior conviction used at the sentencing phase [of a capital murder trial] or for enhanced punishment to use a Rip Van Winkle approach to circumvent [the] plain statutory prescription of our post-conviction collateral relief act.”<sup>103</sup>

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96. *Columbus & Greenville Railway Co. v. Fondren*, 121 So. 838, 842 (Miss. 1929).

97. *Gandy v. State*, 438 So. 2d 279, 283 (Miss. 1983).

98. *Boston Mercantile Co. v. Ouldcarter Co.*, 51 S.E. 466, 468 (Ga. 1905).

99. *Black v. State*, 506 So. 2d 264, 267 (Miss. 1987).

100. *McCoy v. Colonial Baking Company, Inc.*, 572 So. 2d 850, 864 (Miss. 1990) (dissenting opinion).

101. *Power v. Robertson*, 93 So. 769, 775-77 (Miss. 1922).

102. *State ex. rel. Moore v. Molpus*, 578 So. 2d 624, 630 (Miss. 1991).

103. *Culberson v. State*, 612 So. 2d 342, 346 (Miss. 1992).

### B. The Fictional Circumstances of Fictional Characters

Another case concerned the question of whether a search warrant for a certain building reached private quarters separately occupied by another:

The use of the B suffix to indicate the address of private quarters in a larger building is neither new nor unusual. . . . An old address of that type, and one widely known among the English-speaking peoples of the world, is that of the rooms occupied by Sherlock Holmes at 221B Baker Street, London.<sup>104</sup>

Fictional characters and their circumstances in familiar settings can enrich an appellate opinion. Few educated in our public schools half a century ago would miss the point, made in a neglected child case, when the court said, “we are sensitive to the fact that, under the authority legalistically granted the Youth Court in our Youth Court Act, Tom Sawyer could have been held a child in need of supervision, in which event Muff Potter may have been hanged.”<sup>105</sup>

In a different vein, the court drew from *LES MISERABLES*, when it stated, “we agree with appellant that Inspector Javert’s devotion to an immutable and inexorable code of laws which categorically demanded and required punishment is not the basic concept of law in this state. In passing, it was Javert’s fanatical dedication to his adamant belief which ultimately caused his self-destruction.”<sup>106</sup> Sabrina Suan was charged with assisting an inmate to escape.<sup>107</sup> One question was the arguable remoteness of her acts of assistance from another’s act of escape: “Whether Fauchelevent’s secreting Jean Valjean in a convent after his November 1823 bolt to freedom would be a violation of Section 97-9-29 is not before us, although the Javerts of the world would surely press the point.”<sup>108</sup>

In a *Terry* stop drivers’ license check, the officers found heroin.<sup>109</sup> In rejecting defendant’s Fourth Amendment objections, the court explained that, “[t]his is not an instance of an indefatigable Inspector Javert mercilessly pursuing, harassing, and hounding his quarry through Paris sewers or Kendall County highways by concocting excuses to detain him.”<sup>110</sup> In 2013, Minnesota’s Justice Paul H. Anderson, speaking for himself and Justice Alan C. Page,<sup>111</sup> made full and persuasive use of Inspector Javert and Jean Valjean to articulate the injustice of the court’s denying that it had inherent authority to expunge the record of a young woman’s forgery conviction.<sup>112</sup> However appealing and appropriate the analogy to Victor Hugo’s powerful literary creation, the point seems out of place where the issue was separation of powers authority of the judicial branch, not the merits of the case. Of course, the lines of demarcation between the branches of government are more of a continuum, so that to some the story of Javert and Valjean may have been used with effect.

104. *Mayes v. Till*, 266 So. 2d 578, 580 (Miss. 1972).

105. *In Interest of M.R.L., M.L.L., and V.L.*, 488 So. 2d 788, 789 (Miss. 1986).

106. *Jenkins v. Borodofsky*, 211 So. 2d 874, 876 (Miss. 1968).

107. *Suan v. State*, 511 So. 2d 144, 146 (Miss. 1987).

108. *Id.* at 146. *LES MISERABLES* had opened on Broadway five months before *Suan* was handed down.

109. *Kothe v. State*, 152 S.W.3d 54, 58 (Tex. Crim. App. 2004).

110. *Id.* at 66.

111. Yes, that Alan Page, former Purple People Eater with the Minnesota Vikings (1967-78), but a Justice of the Supreme Court of Minnesota since 1993.

112. *State v. M.D.T.*, 831 N.W.2d 276, 300-02 (Minn. 2013) (Anderson, P., dissenting).

### C. Fictional Cases

Fictional cases commonly known can make a point, though as with non-fictional citations of authority, the potency of the point flows from the factual and procedural proximity of the case cited. In 1959, Justice Tom Clark concluded a brief opinion thusly:

Much has been said of late of the law's delay,<sup>113</sup> and criticism heaped on the courts for it. This case affords a likely Exhibit A. It looks as if Scales' case, like *Jarndyce v. Jarndyce*, will go on forever, only for the petitioner to reach his remedy, as did Richard Carstone there, through disposition by the Lord.<sup>114</sup>

Chief Judge Boyce Martin of the Sixth Circuit used a lengthy quotation from *BLEAK HOUSE* to punctuate his dissent in a case involving a ten year delay.<sup>115</sup>

Closer to home, we find "This is the third appearance of this case before this court. It bids fair to rival the famous fictional case of *Jarndyce v. Jarndyce . . .*, but we venture the hope that its issues will somehow be finally determined before reaching the tragic consummation there described."<sup>116</sup> In a prior life, I once likened the process in a case to *Jarndyce v. Jarndyce* and then eased a few of Dickens' lines into my concurring opinion.<sup>117</sup>

The core substantive issue in *State ex rel. Collins v. Jones*<sup>118</sup> was whether Mississippi should make a Progressive Era return to an elective judiciary. The war was waged on grounds of constitutional *stare decisis*, the amendment process having been before the supreme court in 1900, fourteen years earlier.<sup>119</sup> Justice Sam C. Cook closed his dissent with Shakespeare:

In the celebrated case of *Shylock v. Antonio*, Bassanio makes a powerful appeal to the judge to depart from the fixed rules and find a rule to fit the special case. I quote the appeal and the reply of the wise and just judge, viz:

Bassanio: 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.

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113. Recall a line from Hamlet's famous soliloquy, viz.: "For who would bear the whips and scorns of time, the oppressor's wrong, the proud man's contumely, the pangs of despised love, *the law's delay* [etc.]." WILLIAM SHAKESPEARE, *HAMLET* act 3, sc. 1, lns. 70-72 (emphasis added). See *infra* note 162.

114. *Scales v. United States*, 360 U.S. 924, 926 (1959) (citing in n.2 the well-known fictional and forever litigation at the center of Charles Dickens' *BLEAK HOUSE* (1853)).

115. *Becherer v. Merrill Lynch, Pierce, Fenner and Smith Inc.*, 193 F.3d 415, 444 (6th Cir. 1999) (Marin, Jr., B., dissenting).

116. *Armstrong v. Jones*, 22 So. 2d 7, 8 (Miss. 1945).

117. *Jones by Jones v. Harris*, 460 So. 2d 120, 123, 124, 126 (Miss. 1984) (three justice concurring opinion).

118. *State ex rel. Collins v. Jones*, 64 So. 241, 256 (Miss. 1914).

119. *State ex rel. McClurg v. Powell*, 27 So. 927 (Miss. 1900).



Portia: It must not be; there is no power in Venice  
Can after 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.<sup>120</sup>

Shakespeare's use of the King's English was as powerful as ever. Justice Cook's selection of the passage to make his point was also on the mark. The *Jones* majority no doubt sensed its sting, and stood firm.

#### *D. Literary Insights into the Law*

Judge Learned Hand's light still shines though it has been more than fifty years since his service on the U. S. Court of Appeals for the Second Circuit came to a close. Of many Hand jewels of value in our context, one stands out:

I venture to believe that it is as important to a judge called to pass on a question of constitutional law, to have at least a bowing acquaintance with Acton and Maitland, with Thucydides, Gibbon and Carlyle, with Homer, Dante, Shakespeare, and Milton, with Machiavelli, Montaigne and Rabelais, with Plato, Bacon, Hume and Kant, as with the books which have been specifically written on the subject.<sup>121</sup>

I think of several names I would add. One was a generation younger but outlived Hand by less than a year.

The law or the foibles thereof figure often in Faulkner's fiction. Likely, few citizens have sensed the significance of the courthouse, as did Faulkner, or expressed such sentiments so well:

But above all, the courthouse; the center, the focus, the hub; sitting looming in the center of the county's circumference like a single cloud in its ring of horizon, laying its vast shadow to the uttermost rim of horizon; musing, brooding, symbolic and ponderable, tall as cloud, solid as rock, dominating all; protector of the weak, judiciate and curb of the passions and lusts, repository and guardian of the aspirations and the hopes . . .<sup>122</sup>

\* \* \* \* \*

. . . [B]ecause it was theirs, bigger than any because it was the sum of all, it must raise all of their hopes and aspirations level

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120. *State ex rel. Collins*, 64 So. at 261 (Cook, J., dissenting) (quoting from WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE* act 4, sc. 1, lns. 214-222).

121. LEARNED HAND, *Sources of Tolerance*, in *THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND* 66, 81 (Irving Dillard ed. 1952).

122. WILLIAM FAULKNER, *REQUIEM FOR A NUN* 35 (1950).

with its own aspirant and soaring cupola, so that, sweating and tireless and unflagging, they would look about at one another a little shyly, a little amazed, with something like humility too, as if they were realising, or were for a moment at least capable of believing, that men, all men, including themselves, were a little better, purer maybe even, than they had thought, expected, or even needed to be.<sup>123</sup>

I do not see how a person can read Faulkner and not, whenever in the presence of a courthouse, feel a certain sense of awe and humility and pride and thankfulness, and make a silent self-promise to do better. The courthouse endures mischief and shenanigans, adjudications of doubtful reliability, and the crude approximation of justice that people practice there, and it stand and prevails.

#### *E. A Pithy Quote Can Set the Tone, If It Fits*

Quoting a non-legal source is one of the tricks of the trade; you avoid the baggage all literate lawyers and judges have in some, sometimes many, quarters. Preferably the quote is pithy *and* emanates from a source with clout. Literary allusions should be chosen with the audience(s) in mind, though to the well-read they come naturally.

In the context of a trial judge acting without notice to the parties, a Fifth Circuit Judge steeped in the humanities wrote, “[t]hey [the litigants] cannot read over the judge’s shoulder, or penetrate his memory. Nor can we. From Shakespeare’s Hamlet to Albee’s Tiny Alice, soliloquies and asides have been shared with the audience.”<sup>124</sup> And in another case, “Indeed, after reading the complaint, ‘[o]ne can hardly resist but to say ‘something is rotten in [this] state’ of affairs.”<sup>125</sup>

Other Shakespearean allusions have given pleasure though without carrying the day. Counsel for an accused challenged the grammatical construction of the indictment, focusing on “‘a patently inappropriate period.’”<sup>126</sup> This prompted the defense to analogize the state’s argument to Lady Macbeth’s familiar “Out damned spot! Out, I say!” to which yours truly, speaking for the court observed, “[t]he retort would be telling in the classroom or in a court of the literati. Alas, it has meager force in a court of law.”<sup>127</sup> Defense counsel failed to see the limited practical potency in a court of law of even an on-point quote from Shakespeare.

A few years earlier, a dissenting judge in my state publicly (and likely

123. *Id.* at 37 (1950). The body of Faulkner’s work is a rich minefield of twisted, at times tortured and at other times uplifting tales of humanity caught in legal conundrums. See, e.g., *The Law and Southern Literature Symposium*, 4 MISS. C.L. REV. 165, 165-329 (Spring 1984), devoted almost entirely to Faulkner’s work; Michael A. Wolf, *William Faulkner, Legal Commentator: Humanity and Endurance in Hollywood’s Yoknapatawpha*, 77 MISS. L.J. 957 (2008).

124. *Soley v. Star & Herald Co.*, 390 F.2d 364, 369-70 (5th Cir. 1968) (Goldberg, J.).

125. *Courtemanche v. Bibbo*, 2004 WL 2820943 at \*8 (R.I. Sup. Ct. 2004) (alluding to WILLIAM SHAKESPEARE, *HAMLET* act 1, sc. 2, ln. 90 (“[s]omething is rotten in the state of Denmark”)).

126. *Henderson v. State*, 445 So. 2d 1364, 1367 (Miss. 1984).

127. *Id.* at 1367 (referring to WILLIAM SHAKESPEARE, *MACBETH* act 5, sc. 1, ln. 38).

knowingly) laid the veritable egg. The context was plaintiffs' request for attorneys' fees after a successful Voting Rights Act challenge to Mississippi's legislative apportionment.<sup>128</sup> The majority awarded fees.<sup>129</sup> Understand that over the years, U.S. District Judge William Harold Cox had acquired the reputation as a soft-spoken curmudgeon who opposed most rays of legal light employed to penetrate what was once Mississippi's "closed society."<sup>130</sup> Dissenting from the fee award, Judge Cox quoted Macbeth, *viz.*, "Life's but a walking shadow, a poor player, That struts and frets his hour upon the stage, And then is heard no more; it is a tale told by an idiot, full of sound and fury, signifying nothing."<sup>131</sup> As most, if not all, know, these words capture Macbeth's reflection at being told of the death of that most evil dominatrix, Lady Macbeth. Judge Cox knew all of this, and well knew his reputation; indeed, he seemed at times to relish it, so that he cared not that his *Connor* dissent left lawyers and many others chuckling that here was an instance for calling to mind the facts and holding of the familiar case of *Pot v. Kettle*.

A literary allusion can have effect where it fits. Disparate judges and courts have sensed a value in citing or quoting Walt Whitman's *Song of the Open Road* to set a tone.<sup>132</sup> The allusion must be chosen with care. Does it make and strengthen the point, or, as with Judge Cox's passage from *Macbeth*, leave one exposed to telling counter attack? Such allusions are a form of general propositions that, without more, do not decide concrete cases,<sup>133</sup> of which Justice Holmes would say "I will admit any general proposition you like and decide the case either way."<sup>134</sup> Take the familiar question of whether some judge-made rule of law should be changed. A quote often trotted out is from Holmes, *viz.*:

It is revolting to have no better reason for a rule of law than that it was so laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.<sup>135</sup>

No one has come along since Holmes who could use words with such effect. One must be sure Holmes' quote works in the context proffered.

128. *Connor v. Winter*, 519 F.Supp. 1337 (S. D. Miss 1981).

129. *Id.* at 1344.

130. See JAMES W. SILVER, *MISSISSIPPI: THE CLOSED SOCIETY* (1964).

131. *Connor*, 519 F.Supp. at 1348 (Cox, W., dissenting) (citing and quoting WILLIAM SHAKESPEARE, *MACBETH* act 5, sc. 4, lns. 24-28).

132. See, e.g., *Papachristou v. City of Jacksonville*, 405 U.S. 156, 164 (1972) (citing and quoting Vachel Lindsay and Henry David Thoreau as well); *International Ass'n of Machinists v. Street*, 367 U.S. 740, 775 (1961) (Douglas, J., concurring); *Mayor and Aldermen of City of Vicksburg v. Vicksburg Printing and Publ'g Co.*, 434 So. 2d 1333, 1336 (Miss. 1983) (Robertson, J., in a prior life).

133. Robertson, *Variations*, *supra* note 39, at 551 n.328, and accompanying text (citing, *inter alia*, *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting)).

134. Oliver Wendell Holmes Jr., "Letter to Harold Laski" Feb. 19, 1920, in *THE ESSENTIAL HOLMES* 38 (Posner ed. 1992).

135. Oliver Wendell Holmes Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

Recently, Justice David E. Nahmias of the Georgia Supreme Court used it to bring attention to practical problems with the state's "end-of-term common law rule" and to explain that the General Assembly needs to do something.<sup>136</sup> I once used it on a rule traced only to the time of Henry VIII.<sup>137</sup> Close enough, but what about a dubious rule laid down only fifty years ago? Past that, quoting Holmes is almost as risky as quoting the Bible; a diligent adversary can always come up with an equal and opposite quotation. In this instance, Holmes put forth more than once his reluctance to overrule precedent with quite articulate reasons therefor.<sup>138</sup> The reluctant can always come back with Hamlet's thought that we should "rather bear those ills we have [t]han fly to others that we know not of,"<sup>139</sup> but that only puts the burden of persuasion on those who would overrule, which is where it ought to be anyway. And there is a sense in which Holmes' lines from *The Path* are too long. In some quarters the quote may be seen overused, and it may be time for a fresh one, different in tone and texture.

One might turn to Faulkner for an opening shot at fossilized law seen a source of inconvenience today. Try lawyer Gavin Stevens' oft-quoted descriptive insight, "The past is never dead. It's not even past."<sup>140</sup> No matter that Faulkner *qua* Stevens was speaking in a different context. Nor is it fatal that the line has been used elsewhere, and famously so.<sup>141</sup> But does it fit? Does it add "oomph" and authority for the particularized argument to come, the argument that a particular rule or doctrine is bad and should be gotten rid of today? Few arguments fall flatter than those tethered to inapt quotes.<sup>142</sup> "The past" is the outdated law, which is "not even past," but do we not have something of a forced fit after that?<sup>143</sup> The Fifth Circuit massaged the words a bit, finding that "under the Louisiana Law Civil, the past is not dead . . . the past will not die . . . , indeed, the past is not even past."<sup>144</sup> The Faulkner/Stevens quote seems to fit in Judge Carlton Reeves' opinion granting a preliminary injunction against enforcement of Mississippi laws forbidding same-sex marriages, where it is followed by "[s]even centuries of strong objections to

136. *Moon v. State*, 696 S.E.2d 55, 58-59 (Ga. 2010) (Nahmias, J., concurring).

137. *Billiot v. State*, 478 So. 2d 1043, 1048 n.2 (Miss. 1985).

138. Holmes, "Twenty Years in Retrospect," in *THE ESSENTIAL HOLMES* 151 (Posner ed. 1992).

139. WILLIAM SHAKESPEARE, *HAMLET* act 3, sc. 1, lns. 81-82.

140. Faulkner, *supra* note 122, act 1, sc. iii, at page 80.

141. "The Past Isn't Even Dead. It Isn't Even Past" *THE ATLANTIC*, <http://www.theatlantic.com/daily-dish/archive/2008/03/-the-past-isnt-dead-it-isnt-even-past/218789/> (last visited Mar. 31, 2016) (speech of then-Senator/Candidate Barack Obama, Mar. 18, 2008).

142. In *Turner v. Irvin*, 246 S.E.2d 127 (Ga. App. 1978) (defendant's dog knocked plaintiff from his motorcycle, causing personal injuries), the Court of Appeals affirmed summary judgment for the defendant, who had no prior knowledge that the dog had a dangerous propensity. A concurring judge took note of "widespread interest in the law . . . legally extending and affording the dog's 'first bite' privilege . . . to humans," and elaborated a bit, then stating, "[t]o this William Faulkner did not agree," quoting Faulkner's famous line from his Nobel Prize acceptance address, concluding that man "will prevail because he alone among creatures has a spirit, a soul capable of compassion, sacrifice, love and endurance." The concurring judge then added, "[s]ince man has a free will he is responsible for his acts." *Id.* at 128. Using this Faulkner quote in this context comes across about like making a \$100 bet in a penny ante poker game. And that's before you get to the fact that the "free will" conclusion just doesn't fit.

143. Faulkner, *supra* note 122, act 1, sc. iii, at page 80.

144. *Delaune v. United States*, 143 F.3d 995, 998 (5th Cir. 1998) (quoted in *Davis v. Davis*, 713 S.E.2d 694, 697 n.3 (Ga. App. 2011)).

homosexual conduct have resulted in a constellation of [s]tate laws that treat gay and lesbian Mississippians as lesser, ‘other’ people.”<sup>145</sup>

After honorable armed service in Iraq, Patrick Lett came home to Alabama only to become involved in his cousin’s cocaine sales operations.<sup>146</sup> To escape that world, Lett re-enlisted in the military and again rendered exemplary service to his country.<sup>147</sup> “Having pulled himself out of the world of illegal drugs and gone back to serving his country, Lett may have thought that he had left his past behind him. As Faulkner reminded us, however, ‘The past is never dead. It is not even past’.”<sup>148</sup> As fate would have it, one of Lett’s pre-re-enlistment sales had been to an undercover agent working with a task force charged to shut down Lett’s cousin’s drug sales operations.<sup>149</sup> The Faulkner quote fits in *Lett*. But not in our hypothetical case of an ordinary bad rule of law that needs to be set aside.

Try an alternative: “There is no present or future—only the past happening over and over again—now.”<sup>150</sup> Eugene O’Neill gives this line to James Tyrone, Jr., protagonist, in the course of a quasi-biographical depiction of O’Neill’s older brother.<sup>151</sup> There is no legal context, simply description. A touch of a normative tone, though O’Neill was not thinking of the law.<sup>152</sup> But it works.

“The past” is the outdated law.<sup>153</sup> “Happening over and over again” is a sensible precondition to a judicially legislated repealer.<sup>154</sup> Should not courts rid us of bad laws when they can, particularly those being applied “over and over again,” and particularly where their pernicious effects are being felt “now.”<sup>155</sup> Prior to June of 2015, judicial timidity came at the cost of an unjust or unreliable “present or future,” at least in the discrete corner of human activity where the bad rule had consequences.<sup>156</sup> The prospective change carefully made<sup>157</sup> in *Obergefell*<sup>158</sup> works no legally cognizable or otherwise measurable harm to anyone.

The O’Neill/Jim Tyrone quote also seems to fit the holding that legal bans on same sex marriage be enjoined, *viz.*, “the past, happening over and over

145. Campaign for Southern Equal. v. Bryant, 2014 WL 6680570, at \*24 (S. D. Miss., Nov. 25, 2014). The discussion above and for the next several pages holds for the purposes presented, notwithstanding the SCOTUS decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). See also Campaign for Southern Equal. v. Bryant, 791 F.3d 625 (5th Cir. 2015).

146. United States v. Lett, 483 F.3d 782, 783 (11th Cir. 2007).

147. *Id.*

148. *Id.* at 784.

149. *Id.*

150. EUGENE O’NEILL, A MOON FOR THE MISBEGOTTEN, act 3, in EUGENE O’NEILL, COMPLETE PLAYS, 1932-1943, at 920 (Library of America 1988).

151. *Id.*

152. O’Neill used the past *vis a vis* the future elsewhere in his later plays. See, e.g., EUGENE O’NEILL, LONG DAY’S JOURNEY INTO NIGHT, act 5, in EUGENE O’NEILL, COMPLETE PLAYS, 1932-1943, at 765 (Mary, O’Neill’s mother), and at 812 (Edmund/O’Neill) (Library of America 1988).

153. O’NEILL, MISBEGOTTEN, *supra* note 150 at 920.

154. *Id.*

155. *Id.*

156. *Id.*

157. *Obergefell* made it clear that “religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned.” *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015).

158. RICHARD A. POSNER, DIVERGENT PATHS: THE ACADEMY AND THE JUDICIARY 391-392 (2016).

again—now.”<sup>159</sup> Again, it doesn’t decide the case, but it does set a tone. It points the reader’s thinking in a definite direction.

A verse from W. H. Auden might be considered, when his fictional philosopher Malin muses:

We would rather be ruined than changed,  
We would rather die in our dread  
Than climb the cross of the moment  
And let our illusions die.<sup>160</sup>

Auden is heavy. Malin’s “thought” may fit in egregious settings, after softer approaches have been tried and failed. And where the point on its merits is one-sided so that the advocate has no reasonable fear of the tables being turned effectively. The problem with using Auden/Malin in the same-sex marriage issue is that it works for the true believers on both sides of the question. Use of Auden/Malin puts one at risk of being “[h]oist with his own petard . . .”<sup>161</sup>

A safer, arguably more benign example might be baseball’s antitrust exemption,<sup>162</sup> when no other professional sport is so protected and where the centerpiece of the historical debate—the so-called “reserve clause”<sup>163</sup>—has been eviscerated by other forces. But what about the fact that, because the reserve clause has been overcome by other forces,<sup>164</sup> a “fighting faith” that “time has overcome,” no one is likely to be “ruined” if *Federal Baseball*<sup>165</sup> remains on the books.

More pressing is the ever-increasing scientific evidence that eye witness testimony used in criminal prosecutions may not be nearly so worthy of credit as we have long thought.<sup>166</sup> At some point down the line, one might use Auden/Malin in arguing that the abuse of discretion scope of appellate review of evidentiary rulings should be abolished.<sup>167</sup>

A generation ago, there was foment in the law of employment at will.

159. O’NEILL, MISBEGOTTEN, *supra* note 150 at 920.

160. W. H. Auden, “The Age of Anxiety,” Part Six, *Epilogue*, in W. H. AUDEN, COLLECTED LONGER POEMS at 350 (1969).

161. WILLIAM SHAKESPEARE, HAMLET act 3, sc. 4, ln. 207 (“[h]oist with his own petard”).

162. Flood v. Kuhn, 407 U.S. 258 (1972).

163. Traditionally, the “reserve clause” bound a professional baseball player to the team with which he had a contract on a year to year basis, so that he could not negotiate with another team for a more advantageous contract than he was being offered by the team with which he had contracted. The only negotiating leverage available to the player under contract was withholding his services, in which event he would be paid nothing. The nature, history and effect of the “reserve clause” is explained in Flood v. Kuhn, 407 U.S. 258 (1972) and cases cited in the several opinions of different Justices.

164. See my piece, under the pseudonym of “The Road Lawyer,” *Of Forests and Trees: Musings on the Commerce Clause, the Affordable Care Act, and Baseball by the Bay*, CAP. AREA B. ASS’N NEWSL. (CABA, Jackson, Miss.), Aug. 2012, <http://www.caba.ms/newsletters/caba-newsletter-august2012.pdf>.

165. Fed. Baseball Club of Balt. v. Nat’l League of Prof’l Baseball Clubs, 259 U.S. 200 (1922).

166. See the many sources I have cited in Robertson, *Variations*, *supra* note 39, at 502-06 and 509-15; see also sources identified in American Law Institute, *Principles of the Law: Police Investigations* § 9.03, Reporters’ Note, 67-69, in Preliminary Draft No. 1 (Mar. 2, 2016). While Preliminary Draft No. 1 is just that, and is not the official position of the ALI, the sources identified in the Reporters’ Note are representative of recent thinking on this subject.

167. Robertson, *Variations*, *supra* note 39, at 552-564.

Several times, the court on which I sat trotted out the line from French poet, journalist, novelist, and Nobel Prize laureate, Anatole France, *viz.*, “[T]he law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread’.”<sup>168</sup> In another case, I took note that however clever the quote, there were voices of caution in other quarters.<sup>169</sup> In time, two exceptions have been recognized to Mississippi’s default rule of employment at will,<sup>170</sup> but it has otherwise weathered the storm of Anatole France’s facially persuasive insight, and in no less than forty-nine states.<sup>171</sup> An otherwise apt voice from the world of literature might lead to an inquiry, but we should be open to empirical analysis of consequences suggesting a quite different view.

#### F. Literary Sources with Clout

Before many audiences, a biblical saying written in Elizabethan English is hard to beat. Never mind that some other prophet has argued the opposite, as is so often the case. My favorite (arguably more appropriate in a political context) has always been, “and they shall beat their swords into plowshares, and their spears into pruning hooks: nation shall not lift up sword against nation, neither shall they learn war any more, . . .” found in Isaiah 2:4 and in Micah 4:3, juxtaposed against the Book of Joel, *viz.*, “Beat your plowshares into swords, and your pruninghooks into spears: let the weak say, I am strong.” Joel 3:10.<sup>172</sup> This reminds me of cases I’ve had decided on two-to-one panel votes.<sup>173</sup> More secularly minded lawyers twit their Christian friends with Matthew 5:21-48, arguably the greatest repealer clause of all time (within Christendom, at least), yet ignored a dozen times a day when some Old Testament injunction suits the author’s convenience or disposition.<sup>174</sup>

In 1912, the Supreme Court of Mississippi was challenged to measure the constitutionality of a statute making it illegal for an employer engaged manufacturing or repairing to work its employees more than ten hours a day.<sup>175</sup> *Lochner* had been handed down a few years earlier.<sup>176</sup> Justice Richard F. Reed summoned a range of rhetorical strategies, upholding the statute.<sup>177</sup> He turned to history to show that “[l]aws regulating the time when men shall labor are not

168. *Bobbitt v. The Orchard, Ltd.*, 603 So. 2d 356, 361 (Miss. 1992) (quoting *Shaw v. Burchfield*, 481 So. 2d 247, 254 (Miss. 1985), in turn quoting ANATOLE FRANCE, *LE LYS ROUGE* (1894), reproduced in 5 *WORKS OF ANATOLE FRANCE* 91 (W. Stephens transl. 1924)).

169. *See Perry v. Sears, Roebuck & Co.*, 508 So. 2d 1086, 1090-91 (Miss. 1987) (Robertson, J., concurring).

170. Jim Waide & Rachel Waide, *Exceptions to the Mississippi Employment at Will Doctrine Remain Viable*, *THE MISSISSIPPI LAWYER* 16-20 (Winter 2015).

171. RESTATEMENT (THIRD) OF EMPLOYMENT LAW, § 2.01, cmt. b., Appendix A to Reporters’ Notes (2015).

172. *Isaiah 2:4, Micah 4:3, Joel 3:10* (King James).

173. *Kelly v. Smith*, 485 F.2d 520 (5th Cir. 1973); and *Monsanto Co. v. Scruggs*, 459 F.3d 1328 (Fed. Cir. 2006).

174. *Matthew 5:21-48* (King James).

175. *State v. J.J. Newman Lumber Co.*, 59 So. 923 (1912) (*suggestion of error overruled by State v. J.J. Newman Lumber Co.* 60 So. 215 (1913)).

176. *Lochner v. N.Y.*, 198 U.S. 45, 45 (1905).

177. *Newman Lumber Co.*, 59 So. at 929.

new.”<sup>178</sup> Precedent after precedent was cited.<sup>179</sup> Reed saved his trump card for last, “the statutes governing Jehovah’s ancient people, Israel.”<sup>180</sup>

And notice the provision in Exodus 23:12, limiting the time in which the laborer shall work: “Six days thou shalt do thy work, and on the seventh day thou shalt rest; that thine ox and thine ass may have rest, and the son of thy handmaid and the so-journer, may be refreshed.”<sup>181</sup>

A generation ago, a school board was a bit heavy-handed in punishing two eleventh grade cheerleaders for their never fully explained but arguably sophomoric exuberance in painting part of a cheer on the school wall.<sup>182</sup> The parents of the girls were outraged and sued.<sup>183</sup> For all of the obvious reasons, the court was reluctant to legally second-guess the local school board’s actions.<sup>184</sup> Suggestions of alternative lesser punishments were proffered, including that the girls be required to memorize Portia’s famous words and then take on the challenging task of teaching their moral to the school board,<sup>185</sup>

Or perhaps 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 to God’s when mercy seasons justice,” Act IV, Sc. 1, lines 184, 196-97—and teach this to their principal, their superintendent, their school board, and their community.<sup>186</sup>

Shakespeare has long been a favorite in Georgia. I noted *Boston Mercantile* above and Justice John S. Candler’s use of the Bard’s words of wisdom imparted through Portia and Shylock.<sup>187</sup> A century ago, it was not unheard of that a literate lawyer used verse in his argument. More than this, and Judge Arthur G. Powell’s response, are found in a 1907 case:<sup>188</sup>

The argument of the plaintiff in error is unique, being presented in verse. However, when we compare the poetic argument with the record, we find that Shakespeare was correct in saying: “The poet’s eye, in a fine frenzy rolling, doth glance from heaven to earth, from earth to heaven, and, as an imagination bodies forth the forms of things unknown, the poet’s pen turns them to

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. *Clinton Mun. Separate Sch. Dist. v. Byrd*, 477 So. 2d 237, 238 (Miss. 1985).

183. *Id.*

184. *Id.* at 242 (high school discipline; Portia “quality of mercy” in *Merchant of Venice*).

185. *Id.*

186. *Id.*

187. *Bos. Mercantile Co. v. Ouldecarter Co.*, 51 S.E. 466, 468 (1905).

188. *Logan v. Irvin*, 57 S.E. 934 (Ga. App. 1907).



shapes, and gives to airy nothing a local habitation and a name,” and that Pope is not to be trusted in saying that “Truth shines the brighter clad in verse.” The “thoughts that breathe and words that burn” must not be allowed to override the merciless logic of the law, which dictates that appellate courts must not disturb a verdict supported by the evidence and approved by the trial judge.<sup>189</sup>

*Pyle v. State*<sup>190</sup> is a manslaughter case, which turned on a so-called dying declaration of the victim. In discussing the problem with such statements heard by a jury, Chief Judge Benjamin H. Hill added:

In the language of Sir Walter Raleigh: “A dying man is ever presumed to speak the truth.” And in the words of that mighty master of the human heart, Shakespeare (Richard II, act 2, scene 1), “The tongues of dying men enforce attention like deep harmony.”<sup>191</sup>

This line is a nice tone-setter, but what if the context is a challenge that the dying declaration rule<sup>192</sup> is without grounding in empirical evidence,<sup>193</sup> and leads to unreliable adjudications? Shakespeare and Sir Walter Raleigh pitted against O’Neill, or is it Holmes or Faulkner or Auden?

An obscure quote from *Hamlet* made its way into another case by Judge Powell, this one involving a prosecution for the illegal sale of intoxicating liquor.<sup>194</sup> A threshold question was the definition of “intoxicating liquor.”<sup>195</sup> With regard to a quotation from the Century Dictionary, Judge Powell added further on this definition the grave digger’s line from Shakespeare’s *Hamlet*, “Fetch me a stoup of liquor.”<sup>196</sup> So?<sup>197</sup>

I noted above the early workers’ compensation scope-of-employment case

189. *Id.* at 934.

190. *Pyle v. State*, 62 S.E. 540 (Ga. App. 1908).

191. *Id.* at 542.

192. See FED. R. EVID. 804(b)(2); O.C.G.A. § 24-8-804(b)(2); MISS. R. EVID. 804(b)(2). The challenge, of course, would have to be made before that entity which has the authority to alter or amend the rule, and through the appropriate rule-making processes. In my state the Supreme Court of Mississippi claims the authority to change rules of evidence on the fly without resort to the Rules Advisory Committee. See, e.g., *Hudspeth v. State Highway Comm’n of Mississippi*, 534 So. 2d 210, 213 (Miss. 1988).

193. Cf. Robertson, *Variations, supra* note 39, at 509-16. This is not the occasion to get into the serious questions being raised in various quarters regarding the reliability of trial evidence premises long taken for granted. See also Judge Posner’s concurring opinion in *United States v. Boyce*, 742 F.3d 792, 799 (7th Cir. 2014) (Posner, J., concurring) (questioning reliability of present sense impressions and excited utterances under FED. R. EVID. 803(1), (2)); see also O.C.G.A. §§ 24-8-803(1), (2) and MISS. R. EVID. 803(1), (2), only to show that the rumblings are enough that this is a credible context for considering eligible literary allusions, pro and con, and, of course, whether literary allusions have any function other than affording the spokesman a chance to show how well read he may be, and risk being hoist if he has invoked a less than apt allusion.

194. *Carswell v. State*, 66 S.E. 488, 488 (Ga. App. 1909).

195. *Id.*

196. *Id.* at 488 (quoting WILLIAM SHAKESPEARE, *HAMLET* act 5, sc. 1, ln. 68).

197. Likely I would have used it in *City of Clinton*, 493 So. 2d 331, see below, if I had properly brushed up on my Shakespeare before authoring that one.

arose from the act of a watchman who drowned while attempting to rescue a dog which had jumped or fallen into a river.<sup>198</sup> Justice Price Gilbert waxed poetic and added his finding that “[f]rom the dawn of primal history the dog has loomed large in the art and literature of the world, including judicial literature.”<sup>199</sup> Among many literary worthies, Gilbert cited and quoted Shakespeare at length, viz., *King John*, *Julius Caesar*, *Macbeth*, *Midsummer Night’s Dream*.<sup>200</sup> His opinion in *Montgomery* is presented in full, above.<sup>201</sup>

*State Highway Board of Georgia v. Shierling* arose from the condemnation of landowner’s property to build a public roadway.<sup>202</sup> One issue was whether the availability of the land for furnishing dirt to fill in the roadway should be admitted on the question of fair market value.<sup>203</sup> The Court of Appeals held that it was, provoking a passionate dissent, *inter alia*, “[m]ust the Highway Board, in effect, pay again and at soaring artificial prices for the dirt from the land which they condemn? If so, like Shakespeare’s jealousy, ‘which makes its own food on which it feeds,’ there is no end to the vicious cycle.”<sup>204</sup>

*Felker v. Johnson* takes us back to *Hamlet*, and to a passage as well-known as is obscure the “stoup of liquor” quote Judge Powell used in *Carswell*:

It might be well to remark that this case is one well illustrative of the “law’s delay” spoken of by Shakespeare, for the melancholy Dane in his famous soliloquy asks: “For who would bear the whips and scorns of time, the oppressor’s wrong, the proud man’s contumely, the pangs of despised love, the law’s delay, etc.”<sup>205</sup>

A moment here. In 1603, Shakespeare speaks through Hamlet and lists “the law’s delay” as one of seven trials of living so hard to bear that they might weigh in favor of suicide.<sup>206</sup> And so we have constitutional guarantees of a speedy trial,<sup>207</sup> augmented by statutes<sup>208</sup> and rules. Rules governing civil litigations are to be construed and applied so as “to secure the just, speedy, and inexpensive determination of every action and proceeding.”<sup>209</sup> In 1853, it took Charles Dickens more than 500 pages to say what Shakespeare said in three words—and the Sixth Amendment in only a few more. But, then, *Jarndyce and Jarndyce* was a civil case.

198. *Montgomery v. Maryland Casualty Co.*, 151 S.E. 363 (Ga. 1930).

199. *Id.* at 364.

200. *Id.* at 364-65.

201. See *supra* notes 12-39 and accompanying text.

202. 181 S.E. 885 (Ga. App. 1935).

203. *Id.*

204. *Id.* at 889 (Jenkins, P. J., dissenting).

205. *Felker v. Johnson*, 186 S.E. 144, 145 (Ga. App. 1936). See *supra* note 84.

206. WILLIAM SHAKESPEARE, *HAMLET* act 3, sc. 1, ln. 72.

207. U.S. CONST. amend. vi; MISS. CONST., art 3, § 26.

208. See Federal Speedy Trial Act, 18 U.S.C. §§ 3161-3174 (2008); see also similar state statutes and rules, e.g., D. Ak. Ct. R. 2.04 (1999); E. D. Ark. Speedy Trial Act Plan (2008); D. Ariz. Ct. R. LRCrim 12.2 (2011); Miss. Code Ann. § 99-17-1 (Rev. 2007) (270 day rule).

209. FED. R. CIV. P. 1; MISS. R. CIV. P. 1.

More recently, a plaintiff was allowed to stack uninsured motorist coverages but not to recover more than his actual damages.<sup>210</sup> Plaintiff's recovery of attorneys' fees and a bad faith penalty were denied.<sup>211</sup> Concerning the uninsured motorist statute, a concurring judge observed,

It is true that occasionally a verdict for bad faith is affirmed, but it is so rare as to be almost like Shakespeare's dissertation on the fishnet:

Help master, help! Here's fish hangs in the net like a poor man's right in the law; 'twill hardly come out.'  
(*Pericles*,  
*Prince of Tyre* 11:1)<sup>212</sup>

*Associates Financial Services Company v. Johnson* held it impermissible for a deputy sheriff to bid on and purchase property sold at judicial foreclosure conducted by his office.<sup>213</sup> The Georgia Court of Appeals reasoned:

Nor can a 'sham' sale to a third party be upheld, it appearing that in fact the third party bid off the property and bought it for the sheriff or his deputy. What the sheriff or his deputy may not do directly they can not indirectly do, for 'indirection thereby grows direct.'<sup>214</sup>

In *Collett v. State*,<sup>215</sup> Judge Randall Evans, Jr. practiced Polonius' teaching that "brevity is the soul of wit,"<sup>216</sup> saying, "[w]hen the case first came to this court, I wrote a lengthy dissenting opinion, . . . , but with no success whatsoever. But, as Shakespeare says, 'All's well that ends well'."<sup>217</sup>

Georgia Court of Appeals Judge Braswell Deen began, "'What's in a name?'" inquired Shakespeare's most celebrated heroine [Juliet], and appellant Napoleon Elijah Pope may well be asking the same question," noting that Pope had "four felony convictions already to his credit . . . [and that he was] bearer of names rich in connotations of temporal and spiritual power and glory, . . ."<sup>218</sup> Several years later, Judge Deen wrote that there is "a sizable quantum of evidence that tended to impeach appellant's disclaimers of having made or placed the signs, and otherwise to implicate him to such an extent as to permit a rational trier of fact to (as Shakespeare's Polonius expressed it) 'by indirections

210. *State Farm Mut. Automobile Ins. Co. v. Harper*, 188 S.E.2d 813, 817 (Ga. App. 1972).

211. *Id.*

212. *Id.* at 819 (Evans, J., concurring) (citing WILLIAM SHAKESPEARE, *PERICLES, PRINCE OF TYRE*, act 2, sc. 1, lns. 122-124).

213. *Ass'n's Fin. Serv.s Co. v. Johnson*, 197 S.E.2d 764, 766 (Ga. App. 1973).

214. *Id.* at 766 n.1 (citing WILLIAM SHAKESPEARE, *KING JOHN*, act 3, sc. 1, ln. 276).

215. 211 S.E.2d 198 (Ga. App. 1974).

216. WILLIAM SHAKESPEARE, *HAMLET*, act 2, sc. 2, ln. 90.

217. *Collett*, 211 S.E.2d at 198. Of course, ALL'S WELL THAT ENDS WELL is the name of the play, not a line in it, but see WILLIAM SHAKESPEARE, *ALL'S WELL THAT ENDS WELL*, Epilogue, lns. 335-36.

218. *Pope v. State*, 342 S.E.2d 330, 331 (Ga. App. 1986).

find directions out”<sup>219</sup>

*Matthews v. Douberly* concerns a thorny question of statutory construction and finds the Georgia Appeals Court invoking a Shakespearean line that has passed into common usage, “This case puts the spotlight on this legislative shortcoming and brings Shakespeare[’s Polonius] to mind: ‘Though this be madness, yet there is method in ‘t.’”<sup>220</sup> This line has been so familiar for so long that a century ago it was quoted without attribution.<sup>221</sup> Or just paraphrased, “If Skow were suffering from a madness, it was a madness with a method.”<sup>222</sup>

*Hamlet* offers another phrase that has enriched the prose of many an adjudication. Hamlet perceived the King’s purpose in having Rosencrantz and Guildenstern accompany him to England, and tells the Queen he will have the King “[h]oist with his own petard.”<sup>223</sup> Some cite this one with attribution,<sup>224</sup> but others do not see the need; the usage is so common.<sup>225</sup>

More so with the last two words of a line from Marc Antony’s reply to Brutus at the funeral of Julius Caesar, “When that the poor have cried. Caesar hath wept; Ambition shall be made of sterner stuff.”<sup>226</sup> An occasional opinion will provide a full quotation with a citation to Shakespeare’s play.<sup>227</sup> Over a hundred opinions are easily found declaring this litigational phenomenon or that in need of “sterner stuff,” without quotation marks or attribution.<sup>228</sup>

219. *Snipes v. Mack*, 381 S.E.2d 318, 319 (Ga. App. 1989) (quoting WILLIAM SHAKESPEARE, *HAMLET* act 2, sc. 1, ln. 66. Compare the quote from KING JOHN used in *Associates Financial* discussed above).

220. 428 S.E.2d 588, 589 (Ga. App. 1993) (citing WILLIAM SHAKESPEARE, *HAMLET* act 2, sc. 2, ln. 207-08).

221. *Georgia R.R. v. Hunter*, 71 S.E. 681, 681 (Ga. App. 1911).

222. *United States v. Skow*, 62 F.App’x. 660, 662 (7th Cir. 2003); *see, e.g., Nace v. Boyer*, 30 Pa. 99, 103 (Pa. 1858); *Brandon v. Slade*, 47 So. 694, 698 (La. 1908); *State v. Sharp*, 135 S.W. 488, 496 (Mo. 1911); *Universal Concrete Pipe Co. v. Bassett*, 200 N.E. 843, 845 (Ohio 1936); *People v. Bassett*, 443 P.2d 777, 782 (Cal. 1968); *Simon v. Smith*, 470 So. 2d 941, 945 (La. Ct. App. 1985).

223. WILLIAM SHAKESPEARE, *HAMLET* act 3, sc. 4, ln. 207. (“hoist with his own petard”).

224. *Whitehead v. Food Max of Mississippi, Inc.*, 332 F.3d 796, 807 (5th Cir. 2003); *Keane v. Fox Television Stations, Inc.*, 297 F. Supp. 2d 921, 932 (S.D.Tex. 2004); *Trump Hotels & Casino Resorts v. Mirage Resorts, Inc.*, 963 F. Supp. 395, 404 n.7 (D. N. J. 1997); *Gathings v. Robertson Brokerage Co.*, 367 S.E.2d 423, 427 n.3 (S.C. Ct. App. 1988); *Frosburg v. State Dept. of Pers.*, 375 A.2d 582, 588 n.8 (Ct. Spec. App. Md. 1977).

225. *Allen v. Texas Dept. of Human Services*, 114 F.3d 1182, \*3 (5th Cir. 1997); *Immuno International A. G. v. Hillsborough County, Florida*, 775 F.2d 1430, 1432 (11th Cir. 1985); *Noxubee Cnty. Democratic Exec. Comm. v. Russell*, 443 So. 2d 1191, 1196 (Miss. 1983); *Bunch v. Schweiker*, 681 F.2d 249, 250 (4th Cir. 1982); *State v. Janvrin*, 441 A.2d 1144, 1145 (N.H. 1982); *Altergott v. Yeager*, 543 P.2d 1293, 1298 (Colo. App. 1975); *U. S. v. Alexander*, 495 F.2d 552, 553 (2d Cir. 1974); *Bacher v. Higgins*, 157 So. 800, 801 (La. Ct. App. 1934).

226. WILLIAM SHAKESPEARE, *JULIUS CAESAR* act 3, sc. 2, lns. 96-97.

227. *See, e.g., Baldwin v. Lawyers Mutual Ins. Co. of Kentucky*, 2011 WL 1598743, \*5 (Ky. Ct. App. 2011) (Lambert, J., dissenting).

228. *See, e.g., Newell v. State*, No. 2013-KA-00030-COA, 2014 WL 4695871, \*2 (Miss. Ct. App. Sept. 23, 2014) (“expert testimony should be made of sterner stuff”); *Gootee v. State*, 588 N.E.2d 584, 588 (Ind. Ct. App. 1992) (“proof beyond a reasonable doubt should be made of sterner stuff than this”); *Lowman v. Piedmont Exec. Shirt Mfg. Co.*, 547 So. 2d 90, 96 (Ala. 1989) (“*Stare decisis* should be made of sterner stuff than the mere fabric of this year’s fashion.”); *Fulton v. Mississippi Publishers Corp.*, 498 So. 2d 1215 (Miss. 1986) (Robertson, J., in a prior life) (“Claims of defamation must rest upon sterner stuff than the innuendo, speculation and conjecture the Fultons present to us this day.”).

*G. A Quotation Lawyers Should Resist and Leave to the Judges*

The law is not universally loved. Judges do things that are terribly unpopular, and sometimes with regret. In a Minnesota case, the court held:

These individual appellants are unable to recover the unjustly levied tax. Citizens are forced to bear the consequences of municipal iniquity and the possibility of local larceny. It is with regret that we find ourselves forced to conclude that the law here allows no recovery for appellants. We have some understanding of Flannery O'Connor's Mr. Shiflet who said,

'It didn't satisfy me at all.'  
 'It satisfied the law,' the old woman said sharply.  
 'The law,' Mr. Shiflet said and spit, "It's the law that don't satisfy me."<sup>229</sup>

In *THE ADVENTURES OF OLIVER TWIST*, Charles Dickens created a scene that attracts overly eager lawyers like the moth to the flame. First, the story:

'It was all Mrs. Bumble. She would do it,' urged Mr. Bumble; first looking round to ascertain that his partner had left the room.

'That is no excuse,' replied Mr. Brownlow. 'You were present on the occasion of the destruction of these trinkets, and, indeed, are the more guilty of the two, in the eye of the law, for the law supposes that your wife acts under your direction.'

'If the law supposes that,' replied Mr. Bumble, squeezing his had emphatically in both hands, 'the law is a ass a idiot. If that's the eye of the law, the law's a bachelor, and the worst I wish the law is, that his eye may be opened by experience.'<sup>230</sup>

At times, judges use the Mr. Bumble quote with effect. Judge Robert H. Jordan of the Court of Appeals of Georgia faced an argument that counsel had no duty to notify his adversary that there was a defect in a notice of deposition. The argument:

would allow counsel so inclined to 'sit back', allow the opposite party to proceed at considerable expense with the deposition only to have it thrown out on some defect in the notice. If the law is reduced to this, as Mr. Bumble said in *Oliver Twist*, "the

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229. *Country Joe, Inc. v. City of Eagan*, No. C4-98-618, 1998 WL 713481, \*3 (Minn. App. Oct. 13, 1998), quoting FLANNERY O'CONNOR, "The Life You Save May Be Your Own," in *COMPLETE STORIES* 145, 153 (1971).

230. The SCOTUS quoted this entire passage in *Califano v. Goldfarb*, 430 U.S. 199, 212 fn. 10 (1977).

law is an ass, a idiot.”<sup>231</sup>

U.S. Circuit Judge Harold DeMoss was on the mark with Mr. Bumble in a one-paragraph concurring opinion in 1993:

I concur in the reasoning and result of Judge King’s well-crafted opinion. We have simply said that the law is what Congress says is the law. However, on rare occasions, in the words of Mr. Bumble in Charles Dickens’ *Oliver Twist*, “. . . the law is a[n] ass,” and this is one of those occasions. To say that a person is “responsibly connected” to an action of a corporation simply by reason of being a minority shareholder of that corporation, flies in the face of both logic and reality.”<sup>232</sup>

Lawyers should take note of the experience of trial judges or hearing officers who invoke Mr. Bumble’s truism. In 2004, the South Carolina Court of Appeals handed the trial judge his teeth, but with a soft touch, quite adequate given Mr. Bumble’s stature in the public eye:

Upon finding that the granting clause of the 1937 deed constitutes a definite grant in fee simple, this court must hold that the purpose clause following the property description is ineffectual. The SCFC, therefore, owns the ten-acre parcel in fee simple absolute, notwithstanding any comments Mr. Bumble may care to make on the matter.<sup>233</sup>

In 1972, a U.S. Circuit Judge nicely turned the tables on an NLRB trial examiner. Without the preliminaries about the union campaign button at issue, we find:

The Trial Examiner opined below, “When general principles of labor law are determined by the eighth or the quarter of an inch as measured by rule or caliper, then it is time for ‘Bumble’ to turn over in his grave and repeat his famous observation, the ‘law is a Ass.’” We think, however, that it would be equally asinine, under the circumstances of this case, to ignore the size of the button and its capacity for being noticed.<sup>234</sup>

A year earlier, another Fifth Circuit Judge showed what a stuffed shirt those in his position can be:

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231. *Republic Nat’l Bank of Dallas v. Hodgson*, 183 S.E.2d 4, 6 (Ga. App. 1971).

232. *Hawkins v. Agric. Mktg. Serv., USDA*, 10 F.3d 1125, 1135 (5th Cir. 1993) (DeMoss, J., specially concurring).

233. *Hunt v. South Carolina Forestry Comm’n*, 595 S.E. 2d 846, 850 (S.C. Ct. App. 2004) (citing the trial judge’s use of Mr. Bumble’s exclamation).

234. *Davidson-Paxton Co. v. NLRB*, 462 F.2d 364, 368 (5th Cir. 1972).

Lord Coke is quoted as saying that reason is the life of the law. Charles Dickens, in *Oliver Twist*, had one of his characters say that the law is an ass. It may be that there are those in this day and time who would think it absurd for an appellate court to hold a trial court in error for failing to charge the jury that it might find a defendant not guilty of an offense which he did not deny having committed. Yet such is the law and reason is the life of the law.<sup>235</sup>

More recently, the Supreme Court of Mississippi said, “Charles Dickens wrote, ‘the law is an ass.’ It has been the experience of this writer that the law is never an ‘ass’; however, it is made to sometimes appear that way by judges or courts.”<sup>236</sup>

Lawyers would be wise to leave this one to the judges, however apt Mr. Bumble’s sage insight may be.

#### *H. Rhetorical Fictional Flourishes as Sources of Legislative Facts*

In certain circumstances the rules of evidence allow that the credibility of a witness may be impeached by showing that he had suffered a prior felony conviction. The probative force of a witness’s prior arson conviction was a central issue in *McInnis v. State*.<sup>237</sup> The court noted experience and understanding of a number of known categories of prior conviction formally at issue and then turned to William Faulkner’s short story, “Barn Burning,” to show added complexity in the act of arson:

More complex and profound is the character of Faulkner’s quasi-fictional barn burner, Ab Snopes who practiced “shabby and ceremonial violence”<sup>FN6</sup> half explained by

<sup>FN6</sup> Faulkner, “**Barn Burning**”, *Collected Stories* 20 (1977). See also Faulkner, *The Hamlet* 9-18 (1940).

this old habit, the old blood . . . which had run for so long (and who knew where, battenning on what of outrage and savagery and lust) . . .<sup>FN7</sup>

<sup>FN7</sup> “**Barn Burning**”, at 21.

Yet this is the same Ab Snopes of whom it was said

that the element of fire spoke to some deep mainspring of his . . . being, as the element of steel or of powder spoke to other men, as the one weapon for the

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235. *United States v. Skinner*, 437 F.2d 164, 166 (5th Cir. 1971).

236. *Frank v. Dore*, 635 So. 2d 1369, 1374 (Miss. 1994).

237. 527 So. 2d 84 (Miss. 1988).

preservation of integrity, else breath were not worth the breathing, and hence to be regarded with respect and used with discretion.<sup>FN8</sup>

<sup>FN8</sup>. “**Barn Burning**”, at 7-8.

Suffice it to say that little in the pyromania profile would shed any light on whether that individual was likely to be a truthful witness. And who knows if our general revulsion at Ab Snopes’ old blood generates the specific conclusion that he will likely lie.<sup>238</sup>

Does Faulkner inform the judicial understanding of how it should approach and apply MISS. R. EVID. 609(a)(1)? To some extent. Does it decide the issue in the particular case? Of course not. But is it not a plus that the court be a bit more cautious in this important evidentiary ruling than it might otherwise have been? And does not *McInnis* send a message to the future, the hardened traditional view of the supposed impeachment value of a criminal conviction notwithstanding? As sure as the Sun rises in the East, the time will come when the law backs away from evidentiary truisms that cannot be validated by reliable empirical investigation. “Time has upset many fighting faiths,”<sup>239</sup> and will again.

#### IV. A MORE EXTENSIVE USE OF THE HUMANITIES IN ADJUDICATION

I have presented a sampling of judicial resorts to literature that may be found in reported decisions. There are no doubt hundreds more of these and similar usages. The practice is familiar enough. There are books of quotations for lawyers and judges, and the Internet provides unlimited sources. Equally available are lists of fictional characters extending well beyond Sherlock Holmes and Shylock and even Mr. Bumble. To my mind, this need not be the limit. Every now and then a case comes along that calls for more, for a deeper scouring of the humanities and of literature in particular. One is the *Montgomery* case set out above. I present three more of these below. Judgments regarding the success of the stratagem, and its execution in particular instances, are for others, certainly so on the last three where yours truly played a part. The merit of its use is a function of the sense of humanity the law ought always demand of those who practice it, from whichever side of the bar.

##### *A. An Unexpected Find for Communicating with the Public and with the Future*

In the mid-1980s, I was unaware of Justice Gilbert’s efforts in *Montgomery*. But I had another penchant that served me at the time, albeit minimally. Baseball has long been my not altogether secular religion. I have known of *Flood v. Kuhn*<sup>240</sup> from the day it was handed down in 1972. I have always been

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238. *Id.* at 89.

239. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

240. *Flood v. Kuhn*, 407 U.S. 258 (1972).



annoyed by Justice Blackmon's purported paean to baseball.<sup>241</sup> Not that it was inappropriate or out of place; not at all. It is sophomoric. It could have been done better,<sup>242</sup> and maybe brought a touch of credibility to a decision otherwise difficult to defend.<sup>243</sup>

In the Fall of 1984, I was well into my second year of service on the Supreme Court of Mississippi. I had drawn the appeal of a man who had been convicted of headlighting deer and other game offenses.<sup>244</sup> Milton Pharr and three companions had come down from the Northeast Mississippi hill country. The charges against them arose from an out-of-season, dark-of-night poaching venture in the woods of rural Leflore County over in the Delta toward The River.

At some point after I drew the Pharr case, my generation-older colleague, Justice Roy Noble Lee, an avid outdoorsman, visited my office.<sup>245</sup> Roy was the senior and thus presiding member of the three-judge panel that would hear the appeal.

At the time, Roy and I had not developed much of a personal relationship, though a few months earlier he had provided me cover with a concurring opinion in a hot button capital murder case.<sup>246</sup> I was aware of his presence. Justice Lee's father had served on the Court, and briefly as Chief Justice at the end of his tenure. The Court had a rather unusual annual schedule of court sittings that was explained in substantial part by Roy's insistence that conflicts with hunting seasons be avoided.

At some point, Roy showed up at my office, unannounced, and in his soft, understated way, said, "Jimmy, I see you've got that deer headlighting case. I know you'll do a good job with it."<sup>247</sup> I was surprised—not sure I knew at the

241. *Id.* at 260-64. I was also aware of *Schlensky v. Wrigley*, 237 N.E.2d 776, 779 (Ill. App. 1968) (holding that under the business judgment rule the management of the Chicago Cubs could persist in day games only, over the objection of minority shareholders who saw greater profits in night baseball).

242. See CAP. AREA B. ASS'N NEWSL. [www.caba.ms/Archives/RoadLawyer](http://www.caba.ms/Archives/RoadLawyer) for my many musings about baseball and law over the past fifteen years or so, using the pseudonym of "The Road Lawyer." Prior to 2011, these were published in hard copy form in Hinds County Bar Association Newsletter, copies of which are also available at Archives.

243. I was not above citing Justice Blackmon's strategic ploy (but not the quality of its execution) in three cases discussed below, to the end that a SCOTUS use of the approach might give some traditionalist jurisprudes a precedent for accepting my use of literature and history in cases where it was otherwise appropriate. See Robertson, *Variations*, *supra* note 39 at 600 fn. 540. What I did in these three cases was beyond the experience of well-meaning colleagues and lots of lawyers.

244. MISS. CODE ANN. § 49-7-95 (1972).

245. The Court had a pre-hearing assignment system. I was responsible for a complete work-up—with the assistance of law clerks, studying the appellate record, reading the briefs, doing any needed supplemental or updating research, and generating a memorandum concisely summarizing what the appeal was all about, with a suggested outcome. Ordinarily, this would be before any other Justice knew about the case. This memo would go to a pre-assigned three-Justice panel, of which I would be one member. The appeal would be argued (in those days oral argument was available as a matter of right) and conferenced. If a majority of the nine Justices agreed with my recommendation, I would author the opinion of the Court.

246. See *Moffett v. State*, 456 So. 2d 714, 723-24 (Miss. 1984). I have told this story in a reminiscence piece following Justice Lee's death. See James L. Robertson, *Remembering Judge Roy Noble Lee, October 19, 1915 - January 21, 2015*, CABA NEWSLETTER, (Apr. 2015), <http://caba.ms/newsletters/caba-april-2015.pdf> (last visited Mar. 25, 2015).

247. This story has been told by others: Chris Shaw, *The Storied Career of former Chief Justice Roy Noble Lee*, CABA NEWSLETTER, (Jan. 2013), <http://caba.ms/newsletters/caba-newsletter-jan2013.pdf> (last visited Mar. 25, 2015).

time that I had a deer headlighting case on my list. Oral argument was several months away. Justice Lee was a close-to-the-vest guy, a former FBI agent, a long time district attorney. I had understood that Roy did not think judges should politic cases (unlike some of the others). This may have been only the second time he had visited my suite in the twenty-odd months we had served together.<sup>248</sup>

A week or so later, Roy came by again. “Jimmy, this deer headlighting case really is important,” and maybe a few carefully chosen but brief follow up words.

Understand that I have never been hunting in my life. My father saw to it that Santa Claus brought me a .410 gauge shotgun for Christmas 1952, after my twelfth birthday. That afternoon, we went to a family cabin on Lake Ferguson, an oxbow lake about eight miles north of Greenville, Mississippi, where we lived. With my father’s guidance, I fired at tin cans for a while. No critters around. It was too cold for snakes. My Christmas gift was left at the lake house. At some point in February, someone broke into the Cabin and helped himself to a number of items, including my once-fired .410 shotgun, ending my career as a would-be hunter. Thirty-two years or so later, I was serving on my state’s highest court, being told by a senior Justice of the importance of a deer headlighting prosecution, the appeal of which I had been assigned.

Justice Lee made several more visits, chatting at some point about the practical problems of game law enforcement: lack of staff, low pay, and how game wardens had a much tougher job than most law enforcement officers because of the physical and cultural environment in which offenders broke the law. I began to wonder if it was all because Roy knew I was not a hunter and was afraid I was out of my element with a case like this. Justice Lee hardly hid his view that poachers were the scum of the earth and needed to be put under the jail; those headlighting deer were worse. He never said, “You need to affirm this conviction.”

About a week before the oral argument, Justice Lee came by again. “Jimmy, if you can, I hope you’ll handle this case so that it can get some publicity.” Without being pre-committed to any particular outcome, I sensed I should try to accommodate my colleague. But how? *Pharr v. State* was not the first case I’d been assigned that arose from an activity I knew next to nothing about.

Fast forward to the *en banc* conference after oral argument. The court was split over whether Milton Pharr was guilty of one or multiple offenses. Was headlighting and killing two deer with continued headlighting thereafter three offenses, or was headlighting a single offense? We could discuss and disagree amicably on that. Any conviction affirmed would have satisfied the state gaming authorities, or so I sensed.

In 1984, I lived in Oxford, Mississippi, home of the late William Faulkner. I had read a fair sampling of Faulkner’s works. Hunting was a big part of life in Yoknapatawpha County and its environs. I was aware of the penchants and

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248. See *supra* note 227, re: the *Moffett* case for Justice Lee’s first visit to my office.

foibles of that famous fictional family of Snopeses. If a man would burn a barn,<sup>249</sup> he wouldn't bat an eye at poaching and headlighting a deer. Maybe Faulkner was the vehicle I might use to make *Pharr* seem a little less pedestrian. I could think of no other way to accommodate my elder colleague, and so I crafted an opinion consistent with the *en banc* majority's vote. Being of the view that an appellate opinion should be, in substantial part, a narrative, a story worth telling, I tried to set the story of Milton Pharr and his fellow poachers in Faulkner's world, particularly the part that formed the setting for GO DOWN, MOSES. That world included the social milieu that enhanced understanding of the matter at hand.

I set the tone with this opening paragraph:

Headlighting deer is a sorry form of human behavior made unlawful by the wildlife conservation laws of this state. The deer, usually a doe, hit with the blinding light stands stupified and is slaughtered. In addition to his unsportsmanlike conduct, the poacher operates at night and endangers others each time he fires. He is of Snopesean genre.<sup>250</sup>

After telling the story of what happened in the early morning hours of February 21, 1982, and setting out the procedural history of the case, I provided the broader context, the legislative facts, if you will, the cultural context in aid of understanding, including thoughts from earlier cases:

Our law is the witness and external deposit of the values and culture of our society.<sup>FN4</sup> Hunting and the outdoors have supplied much of that culture. They have informed our values and generated an ethical code of their own, much of which has been enacted within the wildlife conservation laws of this state.

<sup>FN4</sup> Cf. Holmes, *The Path of the Law*, 10 HARV.L.REV. 457, 459 (1897). (The law is the witness and external deposit of our moral life. Its history is the history of the moral development of the race.)

Our Presiding Justice Roy Noble Lee understands these truths. In *Strong v. Bostick*, 420 So.2d 1356, 1364 (Miss.1982), he included himself among the many men who feel that a person who has never seen squirrels jump from limb to limb in the deep swamp on a frosty Fall morning; or has never heard a wild turkey gobble in April or seen him strut during mating season; or has never watched a deer bound through the woods and fields, or heard a pack of hounds run a fox, or tree a coon (raccoon); or

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249. WILLIAM FAULKNER, *Barn Burning*, COLLECTED STORIES 20 (1977); WILLIAM FAULKNER, *THE HAMLET* 9-18 (1940).

250. *Pharr v. State*, 465 So. 2d 294, 296 (Miss. 1984).

has never hunted the rabbit, or flushed a covey of quail ahead of a pointed bird dog; or has never angled for bass or caught bream on a light line and rod, or taken catfish from a trotline and limb hook; has never lived.

420 So.2d at 1364 [Emphasis added]

Moreover, Justice Lee has reminded us that

Present generations owe posterity the obligation to protect and conserve wildlife, a valuable and essential natural resource, in order that future generations may have game and fish for their enjoyment, pleasure and benefit. 420 So.2d at 1364.<sup>251</sup>

It did not take an experienced hunter to know Roy's truth. I recalled a not dissimilar truth, uttered by one of our most literate Americans of a generation before my time. In the dark days of May of 1944, Judge Learned Hand challenged his countrymen to understand that:

"[L]iberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it. While it lies there it needs no constitution, no law, no court to save it."<sup>252</sup>

Love of nature and the will to conserve natural resources including *ferrae naturae* similarly lies in the hearts of men and women. How sad it was that people of limited understanding and vision felt they needed to preserve constitutionally "the right to hunt, fish and harvest wildlife."<sup>253</sup> Understanding Faulkner and the humanity of Learned Hand's wise insight would and always will be far more effective than any constitutional amendment, legislative law or court case could ever be.

But back to *Pharr v. State*. With a sense of the limits of the law, and the power of Faulkner's prose, I wrote for the court<sup>254</sup> that:

In fulfillment of that obligation, our legislature has made the sort of conduct with which we are here concerned unlawful. Yet, more than the public policy of wild game conservation is served by this legislation. We here enforce the positive law's embodiment of the ethics of the hunt.

With insight and sensitivity, our most literate hunter, speaking

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251. *Id.* at 297-98.

252. LEARNED HAND, *The Spirit of Liberty in THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND* 190 (Irving Dilliard 3rd ed. 1974).

253. MISS. CONST. art. III, § 12-A, H. Con. R. 30 (ratified Nov. 4, 2014).

254. *Pharr*, 465 So.2d at 298.

of his short story, “‘The Bear,’ has said pursuit is the essence of the hunt, but

“not only to pursue but to overtake and then have the compassion not to destroy, to catch, to touch, and then let go because then tomorrow you can pursue again. If you destroy it, what you caught, then it’s gone, it’s finished. And that to me is sometimes the greater part of valor. . . , not to destroy what you have pursued. The pursuit’s the thing, not the reward, not the gain.”<sup>FN5</sup>

<sup>FN5</sup> F. Gwynn & J. Glotner, eds., *Faulkner in the University* 271-272 (1959).

The thrill of the chase, the fair and honorable pursuit and not the kill undergird the ethics of the hunter.

This case concerned the slaughter of doe at night. As we review today’s facts, we recall that old Ike McCaslin en route to deer camp in the Delta once said

“The only fighting anywhere that ever had anything of God’s blessing on it has been when men fought to protect does and fawns.”<sup>FN6</sup>

<sup>FN6</sup> Faulkner, *Go Down, Moses* 339 (1940).

We juxtapose against Old Ike’s double entendre Henry Wyatt’s pragmatism:

“We don’t kill does because if we did kill does in a few years there wouldn’t even be any bucks left to kill, Uncle Ike”.<sup>FN7</sup>

<sup>FN7</sup> Faulkner, *Go Down, Moses* 347 (1940).

Mississippi’s rules regarding the nefarious hunting practices before the court seemed similar to the understanding and approach found in other states. And so I blended these:

Headlighting is unlawful in this state whether its victims be buck, doe or fawn. Variousy denominated “spotlighting”, “jacklighting”, “shining deer”, or simply “headlighting”, this conduct calls for more powerful words. Minnesota uses the term “nefarious”. *State v. Suess*, 236 Minn. 174, 183, 52 N.W.2d 409, 415 (1952). The New Mexico legislature has employed the descriptive “despicable”. *State v. Barber*, 91 N.M. 764, 765, 581 P.2d 27, 28 (1978). In this state “Snopesean” seems somehow appropriate.

In the first place, we are concerned with most unsportsmanlike conduct. We do not purport to understand the physiological process within the deer hit with a bright light at night but find that it has been similarly described by courts in Ohio <sup>FN8</sup>, Minnesota<sup>FN9</sup>, Georgia <sup>FN10</sup> and Virginia <sup>FN11</sup>. As noted in *State v. Suess*, 236 Minn. 174, 52 N.W.2d 409 (1952),

<sup>FN8</sup>. *State Division of Wildlife v. Barker*, 8 Ohio St.3d 39, 457 N.E.2d 312 (1983) Jacklighting involves shining a light into the eyes of the deer. The deer will then freeze, making it an easy target for the hunter. 8 Ohio St.3d at 39, 457 N.E.2d at 313.

<sup>FN9</sup>. *State v. Suess*, 236 Minn. 174, 183, 52 N.W.2d 409, 415 (1952) (see quotation in text above).

<sup>FN10</sup>. *Stephens v. Lindsey*, 304 F.Supp. 203 (S.D.Ga.1969)

The illegal hunters ride along in an automobile and shine a light across the fields until the eyes of a deer are spotted. The light mesmerizes the deer and they can be easily shot. 304 F.Supp. at 204.

<sup>FN11</sup>. *Yeatts v. Minton*, 211 Va. 402, 403 n. 1, 177 S.E.2d 646, 467 n. 1 (1970) (quoting from *Stephens v. Lindsey*).

“ . . . such animals freeze in their tracks when the rays of a spotlight are suddenly cast upon them in the darkness of the night and are then easy prey to the deadly aim of an illegal hunter”. 236 Minn. at 183, 52 N.W.2d at 415.

Not only is headlighting unsportsmanlike vis’ a vis the deer, the genuine sportsman is deprived of legitimate hunting opportunities.

Poaching in general and headlighting in particular are the product of baser motives, the thrill of the quick and easy kill and the pursuit of profit. Precht, “To Catch a Poacher,” *Southern Outdoors* 38, 39 (Jan.-Feb.1982).

I rounded out the opinion with a brief discussion of other relevant concerns:<sup>255</sup>

Discharge of firearms at night presents obvious dangers.

Hunting after dark is universally condemned. See, e.g., Miss. Code Ann. § 49-7-59 (Supp.1983). One does not have to look far to find documented cases where deer headlighters have in the pursuit of their sorry course killed or wounded innocent bystanders <sup>FN12</sup>, game officials <sup>FN13</sup> and valuable livestock. <sup>FN14</sup>

<sup>FN12.</sup> United States v. Shaw, 701 F.2d 367, 376, 380, 383, 394 (5th Cir.1983) (nine year old boy killed by one claiming to have been headlighting deer near Natchez Trace).

<sup>FN13.</sup> Oney v. State, 397 A.2d 1374, 1376 (Del.1979) (deer spotlights fired on game official); Whitaker v. Jefferson Standard Life Ins. Co., 213 N.C. 376, 377, 196 S.E. 328, 328-29 (1938) (game warden killed by deer headlighters).

<sup>FN14.</sup> State v. Openshaw, 172 Mont. 511, 513, 565 P.2d 319, 320 (1977) (defendant shot steer while headlighting deer).

For these and other reasons, the practice of headlighting has been made unlawful in practically every state in the Union. State v. Morrison, 341 N.W.2d 635, 637-638 (S.D.1983) (cases cited therein). It has been made expressly unlawful by the legislature of this state and stiff penalties provided. Such, in and of itself, is not enough, however, for the Snopesean poacher infects our times, and

the woods and fields he ravages and the game he devastates will be the consequence and signature of his crime and guilt, and his punishment. <sup>FN15</sup>

<sup>FN15.</sup> Faulkner, Go Down, Moses 349 (1940).

Informed by these thoughts we proceed to our institutional responsibility: the right interpretation and application of the law followed by the adjudication of this criminal appeal.<sup>256</sup>

The opinions were finalized. Four justices thought Pharr had been subject to an unfair stacking of offenses. This was an arguable position, but I thought the dissent was a bit strong. The thick skin required of judges comes easy when you have five votes. On December 5, 1984, Pharr v. State was handed down. Deer season was still open. Would the press take notice, and, if so, how?

The next day the Jackson-based Clarion-Ledger, leading daily newspaper in

Mississippi, had a front page story, headlined: “Court fires Faulkner at deer spotlighters.”<sup>257</sup> What’s more, I was the subject of a political cartoon, for the first and only time in my life. I was depicted in judicial robe, legal opinion in one hand, happily befriending a deer with my other arm. The Court was no friend of deer headlighters or other poachers; that part was clear, but nothing in that cartoon suggested any affection for the so-called legitimate hunters either. Representing the Supreme Court of Mississippi, I had ruled for Bambi!

My strategy for getting publicity for the case had worked, but I am not sure it was the kind of publicity Justice Lee had wanted. I had not seen that my personal antipathy for deer hunting would be so apparent, much less that the public would be told so. I do not recall Roy ever saying another word to me about the case, although over time we developed a mutual respect and friendship.<sup>258</sup>

Others, however, commented freely. I doubt Milton Pharr was impressed. The four justice dissent made sure of that. I’m not sure the plight of the game warden was made any easier, though I have no knowledge one way or the other. Still, *Pharr* had communicated like no case I had been involved in. Lawyers and trial judges would mention *Pharr*, always with a smile. It was a center point of interest at a district bar Christmas gathering a couple of weeks later. For a time, I would be introduced at civic club and other non-lawyer functions with mention made of the deer headlighting case.

Only in the loosest sense was what happened after *Pharr* a function of my intent, and certainly not of Justice Lee’s intent. But there was no doubt that, if the Faulkner quotes, the references to his fictional band—the Snopeses—had been removed, no more note would have been taken than with any other case that affirmed multiple misdemeanor convictions, with relatively modest sentences.

Of course, I have no way of quantifying any good for society that had been accomplished. Nor can I measure whether my Faulkner and other literary references enhanced the credibility of the opinion, or gave anyone a sense that the court understood the humanity of the law. As above, these were not my thoughts as I was crafting the opinion. As takeaway, I realized I had stumbled on to a tool for communicating with some undetermined portion of the public.<sup>259</sup> And with some level of warm effect. At differing levels, I provided another object lesson for those who read judicial opinions and wonder, “What was the court thinking?”

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257. Tom Brennan, *Court Fires Faulkner at Deer Spotlighters*, THE CLARION-LEDGER, Dec. 6, 1984, at 1A.

258. See Robertson, *Remembering*, *supra* note 246.

259. I cited *Flood v. Kuhn*, 407 U.S. 258, 260-64 (1972) as precedent for my use of the strategy, knowing that traditionalists might balk. If the U. S. Supreme Court considered this legitimate, that ought to be worth something. I never let on at the time that “the Game” section in *Flood* is not well done, at least not in my opinion. Others had practiced this strategy years earlier and with far greater skill than *Flood*. See, e.g., *Montgomery*, 151 S.E. at 364-66, discussed above. My research skills in the mid-1980s were less than what they should have been.



*B. The Pharr Stratagem for Using Literature in a Legal Narrative Applied*

1. The City of Clinton Beer Ban Referendum Case

Several years later, another case came along that seemed to call for more than the traditional straight-forward appellate opinion—facts, procedural context, law, law application, adjudication.<sup>260</sup> Social, religious, economic and political passions and proclivities were at play and in conflict. The court was obliged to show publicly its understanding of the activity from which the case had arisen, or at least a majority of the justices thought so.

One must understand that the sale and use of alcoholic beverages is an issue which to this day vexes rural communities in the Bible Belt. Many counties and towns are still legally dry.

Clinton, Mississippi, lies a few miles west of Jackson, the largest city and capital of the state. Clinton is a college town, the center of which is Mississippi College, a private Baptist school. M.C. has always had its share of enrollees who find ways to experience that traditional student's rite of passage to maturity—drinking beer. In the mid-1980s, church forces in Clinton organized against the continued legal sale of beer.<sup>261</sup> A then-recent substantial enlargement of municipal corporate limits complicated the matter, though politically and culturally unrelated to the legal beer dispute.<sup>262</sup> Newly annexed rural vendors suddenly found their livelihood at risk when 52.5% of participating electors banned beer sales within the lately enlarged city limits – no matter that these worthies had established their businesses in good faith, complied with the law as it applied to them at the time, done business and sold beer for years, and without apparent public inconvenience.<sup>263</sup>

It would have been easy enough for the court to say that the referendum was or was not conducted in accordance with the law, and, if the former, the will of the majority must be accepted. As it turned out, there had been procedural irregularities.<sup>264</sup> The final judgment was not likely to put an end to the matter. Besides, the issue was certain to bobble up—time and again—in the state's more rural communities, particularly in those that were home to small private church-sponsored colleges and the state's numerous public community colleges, and where rural houses of blues and other 'tonks still flourish.

Recalling the takeaway from *Pharr*, and after a procedural and factual introduction to the case, I added these words for the court:<sup>265</sup>

260. *City of Clinton v. Smith*, 493 So. 2d 331 (Miss. 1986). *See also*, *Boardman v. United States Automobile Association*, 470 So.2d 1024, 1029 (Miss. 1985).

261. *Id.*

262. *Id.*

263. *Id.*

264. *Id.*

265. I continued to cite *Flood v. Kuhn* in support of my strategy, and for the same tactical reasons as in *Pharr*. By this time I had become aware of the then latest chapter in the litigational wars surrounding the Chicago Cubs and management's way of doing business, the sixty-four page opinion of Circuit Judge Richard L. Curry issued March 25, 1985, *Chicago Nat'l League Ball Club, Inc. v. Thompson*, No. 84CH 11384, slip op. at 5 (Cir. Ct. of Cook County, Mar. 25, 1985), *aff'g* 483 N.E.2d 1245 (Ill. 1985); *see also* Mark F. Hazelwood, *Constitutional Law: Cubs Lose on Justice Ward's Error*, 7 LOY. L.A. ENT. L. REV. 371 (1987).

Our law is not and must never be regarded as an end in and of itself but as a means to positive societal ends. One of those ends is the tolerant accommodation of the conflicting values, beliefs, fears and self-interests of a pluralistic people. We seek to structure and administer our law that we be enabled better to live and let live. This being so, rather than deliver an arid legal opinion, we regard it as appropriate that we have in mind that ambiguous slice of life implicated in today's controversy. <sup>FN2</sup>

<sup>FN2.</sup> Compare *Flood v. Kuhn*, 407 U.S. 258, 260-64, 92 S.Ct. 2099, 2100-2103, 32 L.Ed.2d 728, 732-33 (1972); and *Pharr v. State*, 465 So.2d 294, 297-99 (Miss.1984).

This case is but the latest in our people's seemingly unending struggle over the sale and consumption of alcoholic beverages. Few issues have so tested our fidelity to law, nor presented greater tensions within our law's capacity to accommodate the will of the majority with respect for the privacy, integrity and sensibilities of the individual. We have expended untold quantities of time, energy, oratory and money battling the bottle,<sup>FN3</sup> and as this case makes clear the end is not in sight. The lessons of three thousand years of the history of Western civilization are at least two: (1) that strong drink will be consumed by our people in varying quantities regardless of what the law may provide and (2) that such consumption will, as it always has, disturb us and our neighbors in forms ranging from inconvenience to tragedy, which from time to time will motivate some to employ the law to ban it.

<sup>FN3.</sup> A few of our many legal battles fought in a variety of contexts, include *Dunagin v. City of Oxford, Miss.*, 718 F.2d 738 (5th Cir.1983) (challenge to ban on advertising sale of alcoholic beverages); *Lee County Drys v. Anderson*, 231 Miss. 222, 95 So.2d 224 (1957) (legality of petition for beer sales referendum in Tupelo); and *Edmonds v. Delta Democrat Publishing Co.*, 230 Miss. 583, 93 So.2d 171 (1957) (libel action arising out of statewide liquor legalization referendum).

The spirit besieged today has long been with us. In Xenophon's *Anabasis* penned in 398 B.C. we find these words:

They had beer to drink, very strong when not mixed with water, but agreeable to those accustomed to it.

Beer has had its poetic defenders over the centuries. We recall John Still, bishop of Bath and Wells, fellow of Christ's College

in the late Sixteenth Century, for his lusty appreciation of “jolly good ale and old” in his poem *In Praise of Ale*. Of the power of malt, A.E. Housman perceived that

many a peer of England brews livelier liquor than the  
Muse, and malt does more than Milton can to justify  
God’s ways to man.<sup>FN4</sup>

<sup>FN4</sup> Housman, *A Shropshire Lad*, LXII, 91 (1984 ed.).

Ben Jonson regarded beer an inferior drink. It has always cost less than other alcoholic beverages, and for this reason has enjoyed widespread popularity among working class people and the poor. College students throughout the Western world—from the tables down at Mory’s to Heidelberg’s Inn of the Three Golden Apples, from the Warehouse<sup>[266]</sup> to the Crossroads<sup>[267]</sup> to the End Zone<sup>[268]</sup>—have had a special affection for beer, the encounter with which is almost a required rite of passage to young adulthood. It has emboldened many a student to olympian sophomoric heights, never to be forgotten nor, ‘tis hoped, repeated.<sup>FN5</sup> This in mind, as well that the scene of today’s controversy is a college town, we recall Richard Hovey’s tolerant reminder

<sup>FN5</sup> *Sepmeier v. Tallahassee Democrat, Inc.*, 461 So.2d 193 (Fla.App.1984), describes the saga of beer drinking streakers at Florida State University “with more courage than assets”. 461 So.2d at 194 n. 1.

that God is not censorious when his children have their fling.<sup>FN6</sup>

<sup>FN6</sup> Hovey, *A Stein Song*, reprinted in *The Stag’s Hornbook* 143, 144 (McClure ed. 1945).

More soberly, Thomas Jefferson, almost as famous as a connoisseur of fine wines as he was a political leader and theorist, wrote of beer in 1815:

I wish to see this beverage become common instead of  
the whiskey which kills one-third of our citizens and

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266. The Warehouse in Oxford, Mississippi was at the time a favorite watering hole for students at the University of Mississippi.

267. The Crossroads, in Oktibbeha County east of Starkville, Mississippi, was at the time the watering hole of choice for students at the Mississippi State University, and some of their more daring dates from Mississippi University for Women in Columbus, Mississippi.

268. The End Zone in Hattiesburg, Mississippi, was then the venue of choice for students attending the University of Southern Mississippi, and no doubt more than a few from church-related William Carey College.

ruins their families.

Not even beer always produces harmless endings, as the legal reports of this state and nation, reflecting as they do only the tip of the iceberg, are replete with cases of persons who have imbibed excessively and inflicted serious personal injury <sup>FN7</sup>, wrongful death <sup>FN8</sup>, and engaged in destructive and seemingly senseless criminal activity including murder <sup>FN9</sup>, manslaughter <sup>FN10</sup>, aggravated assault <sup>FN11</sup>, and threats of bodily harm to others <sup>FN12</sup>. We put our heads in the sand if we ignore the darker side of beer.

<sup>FN7</sup>. *Hill v. Dunaway*, 487 So.2d 807 (Miss.1986); *Griffin v. Holliday*, 233 So.2d 820 (Miss.1970); *Bradshaw v. Rawlings*, 612 F.2d 135 (3d Cir.1979).

<sup>FN8</sup>. *Saxton v. Rose*, 201 Miss. 814, 29 So.2d 646 (1947); *Hubbard v. Estate of Havlik*, 213 Kan. 594, 518 P.2d 352 (1974).

<sup>FN9</sup>. *Stevens v. State*, 458 So.2d 726 (Miss.1984); *Lambert v. State*, 462 So.2d 308 (Miss.1984); *Fairchild v. State*, 459 So.2d 793 (Miss.1984).

<sup>FN10</sup>. *Cook v. State*, 467 So.2d 203 (Miss.1985).

<sup>FN11</sup>. *Watson v. State*, 465 So.2d 1025 (Miss.1985); *Gray v. State*, 427 So.2d 1363 (Miss.1983) and *State v. Clements*, 383 So.2d 818 (Miss.1980).

<sup>FN12</sup>. *Swanson v. Wesley College, Inc.*, 402 A.2d 401 (Del.Super.1979).

The struggle to ban beer and other forms of booze suggests further reflections. Barroom settings and the availability of a choice of physiological aids have provided credible vehicles our poets, playwrights and philosophers have used to penetrate our souls. W.H. Auden begins *The Age of Anxiety* with four wartime lonlies [sic] in a New York bar and by the time Malin watches the sun rise from behind the East River has produced a powerful and prophetic declaration of hope, grounded in the sacrifice of the Christ. Eugene O'Neill employs a like setting as *The Iceman Cometh* teaches that the "lie of the pipe dream . . . [is] what gives life",<sup>269</sup> and confronts the inevitability of death as have

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269. Eugene O'Neill, per Larry Spade: "As the history of the world proves, the truth has no bearing on anything. It's irrelevant and immaterial, as the lawyers say. The lie of a pipe dream is what gives life to the whole misbegotten mad lot of us . . ." EUGENE O'NEILL, *THE ICEMAN COMETH*, act 1, in *COMPLETE PLAYS*,

few others. Albert Camus chooses an Amsterdam bar in *The Fall* from which his fallen lawyer, Jean Baptiste Clamence, teaches us that genuine and unreserved personal penitence is the sole valid prerequisite to “the right to judge others.”

In more popular mediums, the prime time television series, *Cheers*, and Billy Joel’s recent song, “Piano Man,” employ the barroom genre to make us laugh, cry and understand life. Without these and so many others, we would be the poorer. Yet we are poorer for the hardship, misery, crime and tragedy occasionally the proximate result of excessive consumption of alcoholic beverages. Our experience with strong drink is as rich with complexity and ambiguity as it is inevitable.

Our law is the witness and external deposit of the values and culture of our society. *Pharr v. State*, 465 So.2d 294, 297 (Miss.1984). Seldom has our law attempted to regulate an area of our lives where our values have been so in conflict. The best known expression of that value conflict in this state is the 1952 Whiskey Speech of former Circuit Judge Noah S. Sweat, Jr., of Corinth. That speech blends the sober with the delightful and bears recitation in its entirety.

My Friends:

I had not intended to discuss this controversial subject at this particular time. However, I want you to know that I do not shun controversy. On the contrary, I will take a stand on any issue at any time, regardless of how fraught with controversy it might be. You have asked me how I feel about whiskey. All right, here is how I feel about whiskey . . .

If when you say whiskey you mean the devil’s brew, the poison scourge, the bloody monster, that defiles innocence, dethrones reason, destroys the home, creates misery and poverty, yes, literally takes the bread from the mouths of little children; if you mean the evil drink that topples the Christian man and woman from the pinnacle of righteousness, gracious living into the bottomless pit of degradation, and despair, and shame, and helplessness, and hopelessness, then certainly I am against it.

But,

If when you say whiskey you mean the oil of conversation, the philosophic wine, the ale that is consumed when good fellows get together, that puts a song in their hearts and laughter on their lips, and the warm glow of contentment in their eyes; if you mean Christmas cheer; if you mean the stimulating drink that puts the spring into the old gentleman's step on a frosty, crispy morning; if you mean the drink which enables a man to magnify his joy, and his happiness, and to forget, if only for a little while, life's great tragedies, and heartaches, and sorrows; if you mean that drink, the sale of which pours into our treasuries untold millions of dollars, which are used to provide tender care for our little crippled children, our blind, our deaf, our dumb, our pitiful aged and infirm; to build highways and hospitals and schools, then certainly I am for it.

This is my stand. I will not retreat from it. I will not compromise.<sup>FN13</sup>

<sup>FN13.</sup> Judge Sweat's Whiskey Speech, together with an account of its origins, appear in M. Hughes, *Judge Sweat and "The Original Whiskey Speech"*, *The Jurist* (Vol. I, No. 2, Spring, 1986) at pp. 16-17.

Informed by these thoughts, we proceed to our institutional responsibility: the right interpretation and application of our law regarding beer sales referendum elections.<sup>270</sup>

The public effect of the Clinton beer referendum case was not unlike what we had seen in *Pharr*. The next day, the Clarion-Ledger had a front page story, "Clinton beer case goes belly up, says the bar."<sup>271</sup> I was pleased (as would have been my late friend, Soggy Sweat) with the balance-providing, emboldened, and bracketed insert, "We put our heads in the sand when we ignore the darker side of beer" — Mississippi Supreme Court. Did the quotes from the Bishop of Bath and Wells, from Housman, from Camus and the others form a part of the legal reasoning that led to the final adjudication in *City of Clinton v. Smith*? Of course not. Did Part III of the opinion persuade anyone to change his or her mind about whether the sale of beer should be legal? I doubt it. Did it add to anyone's sense that the Court had made a reliable and just decision? Maybe. But to some never knowable extent Part III did communicate to the public that the court had a humane understanding of the activity that had given rise to this case, and 'tis to be hoped at least a few of other cases past and to come.

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270. *City of Clinton v. Smith*, 493 So. 2d 331, 334-336 (Miss 1986).

271. Tom Brennan, *Clinton Beer Case Goes Belly up, Says the Bar*, *THE CLARION-LEDGER*, Aug. 17, 1986, at 1A.

Whether Part III works is for others to decide. Could it have been done better? A more deft hand, a more well-read author may have generated a better draft. Was a Part III type exposition appropriate in a formal judicial opinion of the highest court of the state? I think so, but not everyone agrees. My wise colleague and friend of years, Justice Armis Hawkins, said, “For my part, I would have preferred that Part III be omitted from the opinion.”<sup>272</sup> I hope I am not unfairly talking out of school when I say that, as we were discussing the case in panel conference, it was Justice Hawkins who reminded me of the Housman quote that “malt does more than Milton can to justify God’s ways to man,” and with a twinkle in his eye and other evidence of great delight.<sup>273</sup>

In *Flood v. Kuhn*, Chief Justice Burger and Justice White similarly suggested that Justice Blackmon’s section “The Game” was inappropriate.<sup>274</sup> “Stuffed shirts” such judges are commonly called, though it doesn’t mean they were not good judges.

I do recall that for a time in and after August of 1986 anecdotal evidence abounded, suggesting that in the aggregate Part III’s numerous references from literature and popular culture communicated a humanity about the court and its approach to such public issues. Again, at the risk of talking out of school, all nine justices serving on the Supreme Court of Mississippi in August of 1986 were social drinkers. Four were Baptists.

## 2. A Case About A Fine Fishin’ Hole

In 1990, a case arose amidst the contentious question of whether ordinary folk in the Mississippi Delta had places where they could fish.<sup>275</sup> As with deer headlighting in *Pharr* and beer drinking in *City of Clinton*, something more than the ordinary appellate opinion seemed appropriate. The introductory paragraph speaks for itself:

This is a case about a fishin’ hole. It lies in western Bolivar County near the River, and at birth was named Beulah Crevasse, though many have long called it the Merigold Blue Hole. People who can get there without trespassing on land want to enter and fish. Landowners and their long time lessee hunting club want just as badly to keep the public out. The relative scarcity of good fishing spots, landowners’ bona fide needs for protection of their valuable timber and water resources, club members’ desire for undisturbed aesthetic and sporting enjoyment of the blue hole they have long thought theirs, the violent life of Old Man River, notions of fish as *ferrae naturae*, and, as well, the human penchant for confusing want with right, desire with entitlement,

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272. *City of Clinton*, 493 So. 2d at 342 (Hawkins, J., specially concurring).

273. A few of my many cherished memories of my late friend Armis Hawkins are put forth publicly in Robertson, *Variation*, *supra* note 39, at 497, 513, 561, 571, 641, 675 (2015), and Robertson, *A Life*, *supra* note 44.

274. *Flood v. Kuhn*, 407 U.S. 258, 285 (1972).

275. *Dycus v. Sillers*, 557 So. 2d 486 (Miss. 1990).

and the familiar with the necessary—these and more form important background forces driving this civil warfare which we are charged to channel within the levees of the law.<sup>276</sup>

This opening is followed by a tale of the language and lore and life of fishing in the Deep South. Informally, my tale—presented below—is made up of some seven dimensions, hopefully flowing as easily as good fishing streams from each dip or bend to the next. The reader is told what he needs that he may feel and see with his several senses the cultural and natural dimensions of civil warfare before the court for decision. The full history of the case is then set out,<sup>277</sup> but it is not enough. Nor is conventional judicial narrative enough. This story of a case about a fine fishin' hole needs the touch of the poet, the novelist, the essayist, and so these are strung together, fresh caught and not so fresh caught excerpts from familiar and not so familiar pens, only two of which—those of Mark Twain and James Dickey—are without deep Mississippi roots.

Skip the footnotes as you read part II. Footnotes are a necessary scourge of legal writing, needed here to guard against the notion that what follows is just one big “fin whopper,” to plagiarize a favorite phrase of Nash Buckingham, noted below. Would that the footnotes could be presented as endnotes. So without more:

This is also a case about a people, the waters they fish, and a unique culture and lore. These form an ambiguous but real part of our life whose pulse is preserved in the product of our poets from the famous to the obscure.<sup>FN1</sup>

<sup>FN1</sup>. More often than we dare or can admit, law's lame language cannot convey the realities and mood of the matter the judge must adjudge. Compare *McInnis v. State*, 527 So.2d 84, 89 (Miss.1988); *City of Clinton v. Smith*, 493 So.2d 331, 334-36 (Miss.1986); *Pharr v. State*, 465 So.2d 294, 297-99 (Miss.1984); see also *Flood v. Kuhn*, 407 U.S. 258, 260-64, 92 S.Ct. 2099, 2100-2103, 32 L.Ed.2d 728, 732-33 (1972). Today's is such a case.

Many think fishing the most leisurely of leisure activities, the positive pursuit of the lazy. In describing his childhood in Yazoo County, Willie Morris recalls

We did cane-pole fishing, both to save money and because it was lazier, for we seldom exerted ourselves on these trips to Wolf Lake or Five Mile.<sup>FN2</sup>

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276. *Id.* at 487.

277. See Part III of *Dycus*, 557 So. 2d at 493-497.



<sup>FN2</sup> W. Morris, *North Toward Home* 75 (1967).

It was a leisure to be consumed and cherished, a spot in the shade preferred, and whether the fish were biting was secondary.

When the biting was good, we might bring home twenty or thirty white perch or bream or goggle-eye; when it was bad we would simply go to sleep in the boat. <sup>FN3</sup>

<sup>FN3</sup> *Id.*

But there was always a Miss Julia Mortimer, the local school marm, revered in time but then the scourge of every young Willie Morris, Miss Julia who'd "get behind some barefooted boy and push," said Uncle Percy. "She put an end to good fishing," <sup>FN4</sup>

<sup>FN4</sup> E. Welty, *Losing Battles* 235 (1970).

Outside the home, we boys was more used to sitting on the bridge fishing than lining the recitation bench. Now she wanted that changed, <sup>FN5</sup>

<sup>FN5</sup> *Id.* at 236.

Uncle Curtis remembered of Miss Julia.

Fishing is a part of the very life and being of many in Mississippi, as with Eudora Welty's enigmatic Billy Floyd, of whom "it was said by the old ladies that he slept all morning for he fished all night," <sup>FN6</sup> and who Jenny noticed when he walked down the street because "his wrist hung with a great long catfish." <sup>FN7</sup> Ellen Douglas' Estella, who had just given birth said "Baby or no baby, I got to go fishing after such a fine rain," <sup>FN8</sup> the same Estella in whose fishing style Douglas sees poetry, Estella who

<sup>FN6</sup> E. Welty, "At the Landing" in *Collected Stories* 243 (1980).

<sup>FN7</sup> *Id.* at 240.

<sup>FN8</sup> E. Douglas, "Hold On" in *Black Cloud White Cloud* 166 (1963).

addressed herself to the business of fishing with such delight and concentrationFalse She stood over the pool like a priestess at her altar, all expectation and

willingness, holding the pole lightly as if her fingers could read the intentions of the fish vibrating through line and pole. <sup>FN9</sup>

<sup>FN9</sup>. *Id.* at 171.

Then there is Walker Percy's Anna Castagna, Binx Bolling's mother, who "looks like the women you see fishing from highway bridges," <sup>FN10</sup> who sits on the porch overlooking the water at Bayou des Allemands and

<sup>FN10</sup>. W. Percy, *The Moviegoer* 148 (1961).

casts in a big looping straight-arm swing, a clumsy yet practiced movement that ends with her wrist bent in in a womanish angle. The reel sings and the lead sails far and wide with its gyrating shrimp and lands with hardly a splash in the light etherish water. Mother holds still for a second, listening intently as if she meant to learn what the fishes thought of it, and reels in slowly, twitching the rod from time to time. <sup>FN11</sup>

<sup>FN11</sup>. *Id.*

Many Mississippians, including our own Chief Justice Roy Noble Lee,

feel that a person who has never . . . angled for bass or caught bream on a light line and rod, or taken catfish from a trotline and limb hook, has never lived. <sup>FN12</sup>

<sup>FN12</sup>. *Strong v. Bostick*, 420 So.2d 1356, 1364 (Miss.1982), quoted in *Pharr v. State*, 465 So.2d 294 at 298.

Still, some of us are like Faulkner's Lucius Priest who at age 11, when Uncle Parsham asked, "Do you like to go fishing?," thought "I didn't really like it. I couldn't seem to learn to want-or maybe want to learn-to be still that long," but said quickly: "Yes, sir." <sup>FN13</sup> Lucius, being led to Mary's fishing hole,

<sup>FN13</sup>. W. Faulkner, *The Reivers* 248 (1962).

sat on the log, in a gentle whine of mosquitoesFalse  
Then I even thought about putting one of Lycurgus's  
crickets on the hook, but the crickets were not always  
easy to catchFalse [When nighttime finally fell and

Uncle Parsham returned,] “had a bite yet?” [Lucius finally confessed,] “I ain’t much of a fisherman,” I said, “how do your hounds hunt?” <sup>FN14</sup>

<sup>FN14</sup>. *Id.* at 249.

Binx Bolling was of Lucius’ mind, though it is doubtful they had *anything* else in common. “You know I don’t like to fish,” Binx said to this mother.

“That’s true,” she says after a while, “You never did. You’re just like your father. False. He didn’t like to fish?” <sup>FN15</sup>

<sup>FN15</sup>. W. Percy, *The Moviegoer* 149 (1961).

And so of Preston Cunningham, <sup>FN16</sup> even though his unwitting son, Carroll, had had a pond dug for him beyond the yard “stocked with bass and perch.”

<sup>FN16</sup>. B. Lowry, *Emma Blue* 34 (1978).

But even for those who warm to it so much more than Lucius and Preston and Binx, and maybe even Binx’ father, fishing is not the central motion of our outdoor life but is always second fiddle to the hunt. Not quite the afterthought, it is the interlude, the escape, relaxation, almost taken for granted until you can’t fish, not nearly so ennobling or paradoxical as hunting the deer, with its ritual rite of passage of adolescence and loss of innocence as when the old half-Indian Sam Fathers “dipped his hands into the hot blood” and marked young Ike McCaslin’s face teaching him humility and pride. <sup>FN17</sup>

<sup>FN17</sup>. W. Faulkner, *Go Down, Moses* 165, 350-51 (1942).

Perhaps it is because the fish is less like us-and more plentiful and more familiar, it is not the centerpiece but the analogy, the simile, as Ike thought as the bear disappeared into the woods:

It faded, sank bank into the wilderness without motion as he had watched a fish, a huge ole bass, sink back into the dark depths of its pool and vanish without even any movement of its fins. <sup>FN18</sup>

<sup>FN18</sup>. *Id.* at 209.

Or Eudora Welty’s “[m]uscadine spread under the waters rippling their leaves like schools of fishes.” <sup>FN19</sup> Will Barrett’s

“knee leapt like a fish.” <sup>FN20</sup> Gary, Larry Brown’s lonesome night hawk, found Connie “cold as a fish” <sup>FN21</sup> And from Beverly Lowry: Might have been pleasant. Looking at his white behind-the-ear skin. White as a cooked perch, Emma Blue wistfully thought after she had refused John Robert’s offer of a ride to school. <sup>FN22</sup>

<sup>FN19</sup> E. Welty, *supra*, note 6 at 251.

<sup>FN20</sup> W. Percy, *The Last Gentleman* 187 (1966).

<sup>FN21</sup> L. Brown, “Night Life” in *Facing the Music* 116 (1988).

<sup>FN22</sup> B. Lowry, *Emma Blue* 19 (1978).

Fish furnish less pleasant images. Again, Welty, describing the house after the floodwaters had receded:

“That slime, that’s just as slick! You know how a fish is, I expect,” the postmaster was saying affably to both of them, . . . “That’s the way a house is, been under water.” <sup>FN23</sup>

<sup>FN23</sup> E. Welty, *supra*, note 6 at 248.

Mississippi’s game fish are of many stripes, their personalities as different as our people. There are the bream, Nash Buckingham’s “matchless little marauders” <sup>FN24</sup>, but the biggest, little bigger than the size of your hand, <sup>FN25</sup> to any objective observer “the sweetest eatin’ there is.” <sup>FN26</sup> There are the perch and crappie, but little poetry about these.

<sup>FN24</sup> N. Buckingham, “Jailbreak” in *Game Bag*, 165 (1943).

<sup>FN25</sup> E. Douglas, *supra*, note 8 at 171.

<sup>FN26</sup> See J. Autry, “Fishing Day” in *Life After Mississippi* 3 (1989).

Then there is the large mouth bass, Buckingham’s “leviathans,” <sup>FN27</sup> “placed in the waters of the South so that fishermen have a preordained reason for idleness and spending money.” <sup>FN28</sup> Outdoorsman Jim McCafferty says of bass: “This savage fighter will attack the right crank bait with all the fury of a treed wildcat.” <sup>FN29</sup> Fishing for white bass on the oxbow lakes in the Delta, McCafferty exaggerates only slightly when he talks of

“his duels with bruising white bass tak[ing] on an image of a sheriff looking for the outlaws.” <sup>FN30</sup> David Chapman Berry, who grew up in the Delta, encounters the bass and is moved to poetry:

<sup>FN27</sup> N. Buckingham, “The Sally Hole” in *The Tattered Coat*, 55 (1939).

<sup>FN28</sup> G. Morris, “Fishing”, in *Encyclopedia of Southern Culture*, 1221 (1989).

<sup>FN29</sup> J. McCafferty, “White Bass Basics”, in *MS Outdoors* 8 (March, 1983).

<sup>FN30</sup> *Id.* at 16.

Stump in the pond, stump in my eye, My fly pops inches from the stump. Bass, all wrist, roiling deep in thought, wedge from the bottom of the headpan, and buckling the surface under the fly, blur through their tunnel of scales, shattering the mirrory surface, the fly engorged, the fly, the fly leading the bass by the lip. I break their heads with the butt of the Buck knife. They stiffen shimmering. Scaling rakes the silver off mirrors-my raw eye a dump of shimmers? I eat fish to keep my head stocked. Some fellows refinish mirrors, but I eat fish to restore ponds. Don't believe it that life's only a matter of how you look at it. Smell my hands. <sup>FN31</sup>

<sup>FN31</sup> D. Berry, “Bass” in *An Anthology of Mississippi Writers* (Polk and Scafidel eds.) 502 (1979).

Finally, is the ubiquitous catfish, of the family ictaluridae, the blue, the channel and the flathead, of whom legends transcend the fact-fiction dichotomy. A gargantuan catfish bumped into Marquette's canoe, almost prompting the French explorer to believe what the Indians had told him about the river's roaring demon. <sup>FN32</sup> Huckleberry Finn and Jim caught a catfish that was as big as a man and “weighed over two hundred pounds.” <sup>FN33</sup> Hodding Carter claimed to have “gigged a catfish that measured almost five feet in length.” <sup>FN34</sup> Though still regarded rough fish, channel catfish farming has become the nation's leading aquaculture industry with Mississippi producing an estimated 200,000,000 pounds of farm-raised catfish a year.

<sup>FN32</sup> Young, “Catfish” in *Encyclopedia of Southern Culture*, 378 (1989).

<sup>FN33</sup> M. Twain, *Huckleberry Finn* 60 (1885).

<sup>FN34</sup> H. Carter, *Man and the River: The Mississippi* 30-31 (1970).

The fisherman's tackle and gear vary widely, from the cane pole used to fish for bream and catfish. The legendary Kentucky reel is still the favorite of the bass fisherman. <sup>FN35</sup> Brooks Haxton tells of jug fishing. "[Y]ou took gallon jugs. Empty Clorox bottles were the best." <sup>FN36</sup> Hodding Carter jugfished for catfish.

<sup>FN35</sup> See Henshaw, "Evolution of the Kentucky Reel" in *Outing Magazine*.

<sup>FN36</sup> B. Haxton, "To Be a Jug Fisherman" *Dead Reckoning*, 84(1989). Haxton's powerful poem reminds us of other realities of jug fishing for catfish and for life.

In jug fishing-to explain to the uninitiated-empty, gaudily-painted gallon jugs float downstream, each dangling a heavy cord and hook and smelly bait from its corked mouth. The fisherman's boat follows lazily. When the catfish strikes, under go jug and fish and both remain there until the fish's strength is gone. There both erupt into the air and the fisherman approaches to pull in his catch. Incidentally, you don't scale a catfish. You nail him against a tree or barn and-since he has no scales, but a heavy, tough skin-you skin him. <sup>FN37</sup>

<sup>FN37</sup> H. Carter, *supra*, note 34 at 30-31 (1970).

*The Encyclopedia of Southern Culture* suggests a correlation between the economic and social stature of fishermen, the game fish they pursue, and the method they prefer to use. At the bottom of the economic scale, the preferred fishing is catfish/bream by cork or bobber fishing/bait casting, bass/spinner fishing is the choice of blue collar families, bass fly-rod fishing of white collar workers, and artificial fly fishing for native trout is the preserve of upper income professionals. <sup>FN38</sup>

<sup>FN38</sup> G. Morris, "Fishing", in *Encyclopedia of Southern Culture*, 1221 (1989).

The point is belied by Ellen Douglas' ten-year-old Ralph Glover, hardly a child of poverty or disadvantage.

“I brought my gig,” Ralph said, as they all trudged across the levee toward the Yacht Club. “I’m going to gig one of those great big buffalo or a gar or something.”<sup>FN39</sup>

<sup>FN39</sup> E. Douglas, *supra*, note 8 at p. 168.

Still few would deny Larry Brown’s truth:

The rich have never seined minnows to impale upon hooks for pond bass. The rich do not camp out. The rich have never been inside a mobile home.<sup>FN40</sup>

<sup>FN40</sup> L. Brown, “The Rich” in *Facing the Music* 38 (1988).

Not every Mississippi fisherman experiences what Mabry Anderson calls “the hypnotic lure of the outdoors.”<sup>FN41</sup> Consider the Yocono River, Faulkner’s Yoknapatawpha River, starkly seen by James Seay in his “Grabbling in Yokna Bottom.”<sup>FN42</sup>

<sup>FN41</sup> M. Anderson, *Outdoor Observations* 166 (1977).

<sup>FN42</sup> J. Seay, “Grabbling in Yokna Bottom” in *Let Not Your Hart* (1970).

The hungry come in a dry time

To muddy the water of this swamp river

And take in nets what fish or eel

Break surface to suck at this world’s air.

But colder blood backs into the water’s wood-

Gills the silt rather than rise to light-

And who would eat a cleaner meat

Must grabble in the hollows of underwater stumps and roots,

Must cram his arm and hand beneath the scum

And go by touch where eye cannot reach,

Must seize and bring to light

What scale or slime is touched-  
 Must in that instant-on touch-  
 Without question or reckoning  
 Grab up what wraps itself cold-blooded  
 Around flesh or flails the water to froth,  
 Or else feel the fish slip by,  
 Or learn that the loggerhead's jaw is thunder-deaf,  
 Or that the cottonmouth's fangs burn like heated needles  
 Even under water.  
 The well-fed do not wade this low river.

Mississippi is “the only state with a season for . . . [grabblin’].”  
<sup>FN43</sup> Others compelled to fish are left by law and society no choice but to fish in such undesirable places as the ramp at Ellen Douglas’ Lake Okatukla leading to the Phillipi Yacht Club.

<sup>FN43</sup>. J. Autry, “Grabblin’” in *Life After Mississippi* 10 (1989).

Even in this terrible heat, at noon on the hottest day of the year, breathing this foul, fishy air, there will always be a few people fishing off the terminal barges, bringing in a slimy catfish or a half-dead bream from the oily water, raising their long cane poles and casting out their bait over and over again with dreamlike deliberation, . . . <sup>FN44</sup>

<sup>FN44</sup>. E. Douglas, *supra*, note 8, 161-62 (1963).

Of course, mention of Huck Finn’s and Hodding Carter’s catfish tales suggests another inexorable feature of fishing, what Nash Buckingham called “finwhoppers.”

The worst of us get fed up and bored with pure, unadulterated lying. But a certain amount of rod and reel spoofing is absolutely essential to salve conscience, offset temptation and lend color. <sup>FN45</sup>

<sup>FN45</sup>. N. Buckingham, “Over the Brook Cedron,” in *Ole Miss* 111 (1937).



Barry Hannah tells us of water liars of another dimension in his story about “Farte Cove off the Yazoo River . . . where the old liars are still snapping and wheezing at one another.”

“MacIntire, a Presbyterian preacher, I seen him come out here with his son-and-law, anchor near the bridge, and pull up fifty or more white perch big as small pumpkins. You know what they was using for bait?”

“What?” asked another geezer.

“Nuthin. Caught on the bare hook. It was Gawd made them fish bite,” said Sidney Farte, going at it good.

“Naw. There be a season they bite a bare hook. Gawd didn’t have to’ve done that,” said another old guy, with a fringe of red hair and a racy Florida shirt. <sup>FN46</sup>

<sup>FN46</sup> B. Hannah, “Water Liars” in *Airships 5* (1978).

Like tales are told at the Coffee Shop off the square in Clanton, Mississippi, where the folks talk “local politics, football and bass fishing.” <sup>FN47</sup>

<sup>FN47</sup> J. Grisham, *A Time to Kill* 23-24 (1989).

Fishermen see a different world than the rest of us. According to Mabry Anderson, “Unless you are over forty years old and a bream fisherman, you probably think a cockroach is just a dirty black bug.” <sup>FN48</sup> They humanize these unhuman-like piscators, often talking the fish into the boat. <sup>FN49</sup> Lawyer Frank Wynne, a witness at trial, describing the contours of the Merigold Blue Hole, how the waters back out when the River is falling, lapses and tells of “a good fishing place” back where the waters come out of the woods and over the road. “I’ll tell you what, you can go in there and catch a nice bass,” and through the cold record his smile and priorities are seen.

<sup>FN48</sup> M. Anderson, *Outdoor Observations* 132 (1977).

<sup>FN49</sup> E. Douglas, *supra*, note 8, at 171; and Anderson, *Outdoor Observations* at 161, 163 (1977).

The waters as well compete for bragging rights. The night before on what Doc had called “the best river dragging he’d ever been on,” William Wallace had said “There is nothing in the world as good as . . . fish. The fish of the Pearl River.” <sup>FN50</sup> But

none is the source of more lore and awe than the Mississippi. David Cohn said in the Delta, folks “fear God and the Mississippi River.”<sup>FN51</sup> Mabry Anderson said, “The Old Man just rolls on and on and wipes out most of man’s mistakes each spring when it charges right out of its banks.”<sup>FN52</sup>

<sup>FN50</sup> E. Welty, “The Wide Net,” in *Collected Stories* 181 (1980).

<sup>FN51</sup> D. Cohn, *Where I Was Born and Raised* 43 (1948).

<sup>FN52</sup> M. Anderson, *Outdoor Observations* 41 (1977).

No man alive can bob about on its surface in a puny fourteen-foot boat when the gauge is showing fifty feet or more at Helena, Arkansas, without becoming a little more tolerant and just a little less sure of himself.<sup>FN53</sup>

<sup>FN53</sup> M. Anderson, *Outdoor Observations* 41 (1977).

Still some see a flood a blessing, some like Luke Wallin’s Watersmith and his sons Jesse and Bean and Robert Elmer who fish the Mock Orange Slough.

They waded in the muddy cool water up to their waists, False On their first pass they got a bucketful of bluegills and a small catfish. They wiped the mud and sticks from the net to try again.

“Every time the river floods,” Paw said, “it brings us all these here treasures.”

“Sho does,” Bean said.

“I think it’s fine,” Paw went on. “I think it’s right nice of the old river.”<sup>FN54</sup>

<sup>FN54</sup> L. Wallin, “The Redneck Poacher’s Son” in *I Mississippi Writers: Reflections of Childhood and Youth: Fiction* 618 (D. Abbott ed., 1985).

This is a case about a fishin’ hole, and the people who contest for it and care for it so variously, who are charged by the infinite to accept it in its ambivalence and antinomy. Such a fishin’ hole is Lake Chatula in the far southwest corner of Ford County which

in the spring . . . hold[s] the distinction of being the

largest body of water in Mississippi. But by late summer the rains were gone, and the sun would cook the shallow water until the lake would dehydrate. Its once ambitious shore lines would retreat . . . , creating a depthless basin of reddish brown water. <sup>FN55</sup>

<sup>FN55</sup>. J. Grisham, *supra*, note 47 at 11.

James Dickey has spoken of this connection between person and place, between man and a lake that once

. . . was deep flashing-

Tiny grid-like waves wire-touched water-

No more, and comes what is left

Of the gone depths duly arriving

Into the weeds belly-up:

one carp now knowing grass

And also thorn-shucks and seeds

Can outstay him:

\* \* \* \* \*

A hundred acres of canceled water come down

To death-mud shaking

Its one pool stomach-pool holding the dead one diving up

Busting his gut in weeds in scum-gruel glowing with belly-white

Unhooked around him all grass in a bristling sail taking off back-

blowing. Here in the dry hood I am watching

Alone, in my tribal sweat my people gone my fish rolling

Beneath me and I die

Waiting will wait out

The blank judgment given only

In ruination's suck-holing acre wait and make the sound  
surrounding NO

Laugh primally: be

Like an open-gut flash an open under-

water eye with the thumb

pressure to brain the winter-wool head of me,

Spinning my guts with my fish in the old place,

Suffering its consequences, dying,

Living up to it. <sup>FN56</sup>

<sup>FN56</sup>. J. Dickey, "Remnant Water" in *The Central Motion: Poems*, 1968-1979 108-109 (1983).

Beulah Crevasse is but ninety-two acres of not yet cancelled water, and to those who war so over it Dickey seems to say that, if you like it when it is beautiful and serene and full of life, you must accept it-love it-equally when it has been taken away by nature and become but a mudhole with a dead carp in it, or when it has been taken by man, by the social invention he calls law. Dickey had these in mind when he said of such waters

[Y]ou have to accept the "gone depths" as well as the real depths that used to be there when the lake was whole, the dead fish as well as the live ones, the repulsive aspects of the scene as well as the beautiful ones that have disappeared: and if you are left with "ruination's suck-holing acre" it is your due: you know this and accept it, even with a kind of exultation, because the bond between you and the lake still exists no matter what, and you can therefore "laugh primally," maybe no better than the dead belly-up fish but still, like he, in the old place, where you both belong, and know it.

We are informed by these thoughts, knowing that law is about life, that law is not an end but a means to the end of a society in which all should want to live, with its paradox and ambiguity, its

irony and contrariety even that the law has wrought. We proceed to our institutional responsibility: the right interpretation and application of our law regarding rights to these waters.<sup>278</sup>

The core social issue in *Dycus* was whether ordinary folk had reasonable access to waters in which to fish. The dispute arose in the cultural context, where many believed they had a natural right to fish. Many felt this “natural right” was being eviscerated as a practical matter as all of the good fishing holes in the Mississippi Delta were coming under the control of timber companies and their private hunting and fishing club lessees with exclusive and expensive membership criteria. I tried to show respect for that culture and social conflict (the legislative facts, if you will) through the literature and lore of fishing in Mississippi, though in the end the history and law made it clear that the waters at issue, the Merigold Blue Hole in Bolivar County, Mississippi, were susceptible of private ownership. I received a telephone call after *Dycus* was released and final from Chancery Judge William H. Bizzell, a very wise man from Cleveland, Mississippi, whom I have known for years. Judge Bizzell had recused himself from *Dycus* at the trial level because he knew all of the parties and the many others who would be affected by the decision; hence, we were free to discuss the case after the fact. Nothing pleased me more than Bill Bizzell’s statement, “The first part of your opinion (use of literature to explain the culture and social conflict) is more important than the legal analysis that comes later.”

On the other hand, Chief Justice Roy Noble Lee demurred and two others joined him.<sup>279</sup> Yes, the same Roy Noble Lee who deserves a bit of the blame for my literary efforts going back to *Pharr* in 1984, but who may not have been entirely pleased that my opinion in *Pharr* was seen as siding with Bambi. And who once waxed poetic himself such that I quoted him, hoping to keep his vote.<sup>280</sup> Whether I presented Part II of *Dycus v. Sillers* in a way that pleases is a matter of the tastes of the reader, who has every right to skip Part II altogether and get on with the more conventional stuff. In self-defense, I offer only that there is a reason why our schools teach poetry and prose, and not turgid lawyer talk.

#### V. THE AMBIGUITY OF ALL THINGS HUMAN, MOST PARTICULARLY MAN HIMSELF

In the late 1980s, the human circumstances of James Dycus and the other three Dycuses, and of Charley Allen and Allen Ford were unexceptionable. They loved to fish, for any number of the reasons captured in Part II of *Dycus*. The Sillers family was Delta aristocracy. They were landowners, whose lessee the Merigold Hunting Club dates back at least to 1922.<sup>281</sup> Each of the parties

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278. *Dycus*, 557 So. 2d at 487-93.

279. *Dycus*, 557 So. 2d at 508-09 (concurring opinion).

280. *Dycus*, 557 So. 2d at 488, (quoting *Strong v. Bostick*, 420 So. 2d 1356, 1364 (Miss. 1983)); see also *Pharr v. State*, 465 So. 2d 294, 298 (Miss. 1984).

281. Do not be misled by the current name and iteration shown on the website of the Secretary of State of Mississippi, viz., “Merigold Hunting Club (Established 2004), LLC.” Merigold Hunting Club, vintage 1922 is legally alive and well and in good standing. <https://corp.ms.sos.gov>.

believed they had rights the other denied. It was a conventional civil action on the surface, while a clash of cultures smoldered beneath. No real bad guys on either side, except perhaps in the eyes of their opponents.

As far as we know, C. R. Smith had bothered no one for years, save for those bothered by knowing beer was being sold and consumed. No evidence suggests the city fathers in Clinton, Mississippi, had any ulterior motives in their early 1980s annexation, other than to enlarge the municipal limits and increase Clinton's *ad valorem* tax base. Then Rev. Don Edwards and his followers—no doubt in good faith—engaged local government processes to ban beer, thus pitting Smith and the City against each other. Again, no bad guys, just ordinary folk with different views of the social norms that should hold sway in their community.

I find it hard to say much good about the Milton Pharrs among us, those of Snopsean genre who would “headlight,” render helpless, and then slaughter deer at night, well out of season. I take the fact that four respected colleagues largely sided with Pharr as evidence of another view. The drowning that led to *Montgomery* near Savannah, Georgia, *circa* 1930, the other case noted above, and the body of human conflicts beyond those few confirm a social fact. The “human heart in conflict with itself,”<sup>282</sup> to borrow a phrase from Faulkner, is not only the best grounding for good writing. It is the core cause of the ambiguity of all things human, exponentially expanding into conflict as populations grow and people try to live together.

On June 28, 1988, the Supreme Court of Pennsylvania decided *Commonwealth v. Neely*.<sup>283</sup> The opinion, authored by Justice Rolf Larson, begins:

The issue presented in this case is whether the trial court erred in refusing to instruct the jury that evidence of good character (reputation) may in and of itself, (or by itself or alone) create a reasonable doubt of guilt and, thus, require a verdict of not guilty.<sup>284</sup>

The Court answered, “Yes,” and reversed the convictions for recklessly endangering another person and for possessing an instrument of crime, ordering a new trial. Five justices concurred, one dissented, and a seventh did not participate.

Justice Larsen's majority opinion briefly reviews precedents in the field;<sup>285</sup> the dissent suggests he missed a few, or at least misread them.<sup>286</sup> Larsen presents a bit of judicial literature dating to 1890:

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282. See WILLIAM FAULKNER, *Address upon Receiving the Nobel Prize for Literature in Stockholm, Swed. (Dec. 10, 1950)*, in WILLIAM FAULKNER: ESSAYS, SPEECHES & PUBLIC LETTERS 119, 120 (Modern Library Paperback ed. 2004).

283. *Commonwealth v. Neely*, 561 A.2d 1 (Pa. 1989).

284. *Id.*

285. *Id.* at 2.

286. *Id.* at 4, fn. 1.

In *Cleary*<sup>287</sup> we recognized the importance of reputation evidence when we stated: “Of what avail is a good character, which a man may have been a lifetime in acquiring, if it is to benefit him nothing in his hour of peril?” *Id.*, 136 Pa. at 84, 19 A. at 1018 (1890). As my distinguished colleague, Justice James McDermott has commented:

“To offer evidence of an otherwise unblemished life is not a plea of mercy. It is, in fact, to be weighed against any present allegation to the contrary. Character evidence may give a name to damning combinations different than what they seem, and be the truth that sets one free.”<sup>288</sup>

Larsen then turns to literature:

Indeed the value of a good reputation has been highly regarded since antiquity. Reputation has been characterized as more valuable than riches, precious materials and gold: “A good name is better than great riches.” Cervantes, *Don Quixote* pt. ii, ch. 15 (1615); “A good reputation is more valuable than money.” Publilius Syras, *Sententive No. 108*. “A good name is better than precious ointment.” *Old Testament: Ecclesiastics, vii, 1*; “Reputation is a jewel.” Vanburgh, *The Provoked Wife* Act I, sc., 2; “The purest treasure mortal times afford. Is spotless reputation . . .” Shakespeare, *Richard II*, Act I, sc. 1, In. 177; “It is better to have nobility of character than nobility of birth.” (Unknown).

Famous scholars, philosophers and writers have analogized “reputation” to the dominating force that sustains life and to life itself: “Reputation is the life of the mind, as breath is the life of the body.” Gracian, *The Complete Gentlemen*; “Character is the governing element of life, and is above genius.” Frederick Saunders, *Stray Leaves*; “Good name in man and woman, dear my lord, Is the immediate jewel of their souls . . .” Shakespeare, *Othello*, Act iii, sc. 3, In. 155; “A good name is a second life, and the groundwork of eternal existence.” Bhascara Acharya, *Lilawati* (*Longfellow*, Kavanaugh ch. 4); “Take away my good name and take away my life.” Thomas Fuller, *Gnomologia* No. 4306; “Character is destiny.” Heraclitus (500 B.C.).

Other authors and luminaries teach us that reputation is virtually immutable:

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287. *Commonwealth v. Cleary*, 19 A. 1017 (Pa. 1890).

288. *Neely*, 561 A.2d at 2.

“A great character, founded on the living rock of principle, is, in fact, not a solitary phenomenon, to be at once perceived, limited, and described. It is a dispensation of providence, designed to have not merely an immediate, but a continuous, progressive, and never-ending agency. It survives that man who possessed it: survives his age,—perhaps his country, his language.” Edward Everett, Speech: *The Youth of Washington*, July 4, 1835;

“If you hear a mountain has moved, believe; but if you hear that a man has changed his character, believe it not.” Mohammedan Proverb.

Additionally, inspired writings show us that a good character/reputation ensures trustworthiness: “A good character carries with it the highest power of causing a thing to be believed.” *Idem*, *Rhetoric*; “Put more trust in nobility of character than in oath.” Solon, *Dioenes Loertius*, sec. 16; “Reputation is a hallmark: it can remove doubt from pure silver . . . .” Mark Twain (from an unmailed letter dated 1886); “Fame is a vapor, popularity an accident, riches takes wings, those who cheer today may curse tomorrow, only one thing endures—character.” Horace Greely.<sup>289</sup>

Larsen concludes:

Often a person takes a lifetime to build his or her reputation and when the dark clouds of life gather, one’s reputation may be all one has to ward off the impending downpour and at that moment it may be the *only* beacon of truth—truth is reputation’s reward.<sup>290</sup>

A nice flourish. In *Neely*, Justice Larsen marshaled literature that an adjudication be seen more reliable than it might otherwise have been. Justice John P. Flaherty saw flat and formal<sup>291</sup> the world whose four dimensional space-time the majority opinion showed rich with humanity.

Justice Larsen knew of dark clouds from personal experience. In 1983, he had been charged with “‘injudicious politicking’ on behalf of candidates for the Supreme Court.” After testimony from eighty-five witnesses and 5,000 pages of testimony, the State Board of Judicial Inquiry dismissed the charges by a six-three vote.<sup>292</sup> Darker clouds loomed. Larsen had long suffered depression.

289. *Id.* at 2-3.

290. *Id.* at 3.

291. *Id.* at 4, fn. 1.

292. Marylynne Pitz and Paula Reed Ward, *Rolf Larsen, former State Supreme Court Justice, Dies; Impeached Justice was a ‘Bebe in Robes’*, PITTSBURGH POST-GAZETTE, Aug. 13, 2014, <http://www.post->



Beginning in 1981, Larsen was said to have begun having his physician “write prescriptions in the names of his court employees. They would they have them filled and turn the medication over to their boss.”<sup>293</sup> He was charged and in April, 1994, acquitted of fourteen counts of drug fraud, but found guilty of two counts of criminal conspiracy.<sup>294</sup> Rolf Larsen was impeached and removed from office.

Shakespeare’s sense of irony was a great as his humanity. He brought both to bear in Marc Antony’s oration at Caesar’s funeral, that so many of us were made to memorize at least by the tenth grade. “The evil that men do lives after them; the good is oft interred with their bones.”<sup>295</sup> This is not the place for a summing up of the life of Rolf Larsen. What is easily googled shows a complex man who did good at times in the eyes of many, and who failed badly at other times in the eyes of others. An exegesis of the law of reputation evidence is beyond our scope today. Never mind that before and after *Neely* the dark clouds were gathering over Rolf Larsen and that his hour of peril was approaching. The ambiguity of all things human, most particularly man himself. The “human heart in conflict with itself,” perhaps for another besides Rolf Larsen. After all, about five minutes on the Internet reveals John P. Flaherty as a complex and colorful character who has had his moments,<sup>296</sup> however much of a stuffed shirt he appeared back on June 28, 1989.

## VI. A SUMMING UP

Evelyn Keyes suggests that “[t]he study of the humanities by lawyers and judges—preeminently literature, history, and moral and political philosophy—serves four great purposes essential to the maintenance of a free society founded upon respect for the equal dignity and worth of all.”<sup>297</sup> Her premises are agreeable enough, as points of beginning. I have tried to show how lawyers and judges can, should, and occasionally do, practice what they have learned in these points of study. To be sure, such practice should seldom be so overt as in the principal cases presented above, for prudential reasons and others. Practice need not always include the formal quotation; excessive quotations may be seen as high brow showing off, and with counterproductive effects. Inapt quotations compromise credibility. Lawyers and judges steeped in the humanities—may their tribe increase—should be discriminate in practice. There are limits to the literary dimension of the service they render.

The humanist appellate judge faces two practical realities. First, he cannot just decide that it is time for the court to speak on this or that point of humanity. The judge must wait for a case to arise, a case that is right. Appeals come in many varieties, the mix being beyond the control of the appellate court, except

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gazette.com/local/city/2014/08/12/Rolf-Larsen-former-state-Supreme-Court-justice-dies/stories/201408120178 (last visited Mar. 25, 2016).

293. *Id.*

294. *Id.*

295. WILLIAM SHAKESPEARE, *JULIUS CAESAR*, act 3, sc. 2., lns. 80-81.

296. See, e.g., John M. Baer, *A ‘Leprechaun’ May Succeed Nix; John Flaherty Next in Line*, PHILLY.COM, (Mar. 8, 1996). <http://articles.philly.com/1996-03-08/news/25639064> (last visited Mar. 25, 2016).

297. Keyes, *supra* note 3 at 699.

for those with certiorari jurisdiction. Most appellate judges still react with horror at the thought of rendering advisory opinions, though they confuse the familiar with the necessary. What is the precedential effect of an opinion of the highest court of the jurisdiction in a case of first impression, or modifying or overruling some common law rule, other than an advisory opinion that in future, factually analogous cases the rule of decision should be thus and such?

Second, without a majority vote of one's colleagues, an appellate judge can do nothing. I wrote *Pharr*, the deer headlighting case, as I did to the dual ends of adjudging the appeal consistent with my sense of a reliable application of the law, fairly read, to the full facts (and consistent with the majority vote) and to satisfy some extra-judicial concerns of presiding panel Justice Roy Noble Lee. In *Dycus v. Sillers*, the fishing hole case, I quoted (by then) Chief Justice Lee<sup>298</sup> to try to hold his vote, though he ultimately wiggled off the hook.<sup>299</sup> I thought Justice Hawkins would be pleased with my use of the Housman quote in *City of Clinton v. Smith*,<sup>300</sup> I was surprised at his special concurring statement.<sup>301</sup> No matter, as a majority joined each opinion.

"[T]he study of the humanities by lawyers and judges . . . increases the understanding and appreciation of our common heritage, culture, and values—and their alternatives."<sup>302</sup> This is Evelyn Keyes' first purpose. I take it as a shorthand version of Learned Hand's well-known statement quoted above.<sup>303</sup> The practice of the humanities by lawyers and judges comfortable doing so enhances the understanding and appreciation of others, communicating with "a morally literate and humanistically informed people."<sup>304</sup> The media assists following *Pharr* (in some ways a surprise) and *City of Clinton v. Smith* (there was a method in my madness there) were a bonus. Of course, no one can quantify these "increases." That Hand and Keyes offer faith-based beliefs, as Holmes held to his "can't helps,"<sup>305</sup> does not mean these are not based as well on experience, judicial and extra-judicial. I cannot separate effects found in my practice from others emanating from my nine years of teaching Jurisprudence and Legal Process at the University of Mississippi School of Law, my many talks made at continuing education programs and civic club meetings, my various extra-judicial writings, and my experience in living. I invite the thoughts of others regarding the extent to which there may be a social plus from lawyers and judges properly practicing the humanities beyond silent study.

As a second purpose, Keyes says "the study of the humanities by lawyers

298. *Dycus v. Sillers*, 557 So. 2d 486, 488 (Miss. 1990).

299. *Id.* at 508-509 (concurring opinion); see Robertson, *Remembering*, *supra* note 246.

300. *City of Clinton v. Smith*, 493 So. 2d 331, 335, fn. 4 (Miss. 1986).

301. *Id.* at 342. Lest the wrong impression be left, my regard for Justice Hawkins and his service to the law is made clear in my many references to his work in Robertson, *Variations*, *supra* note 39.

302. Keyes, *supra* note 3 at 699.

303. LEARNED HAND, *Sources of Tolerance*, in *THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND* 66, 81 (Irving Dillard ed. 1952).

304. Keyes, *supra* note 3 at 699.

305. See, e.g., Letter from O. W. Holmes to Sir Frederick Pollock (Aug. 30, 1929), in *THE ESSENTIAL HOLMES*, *supra* note 31, at 108; Letter from O. W. Holmes to Harold J. Laski (Jan. 11, 1929), in *THE ESSENTIAL HOLMES*, *supra* note 49, at 107; Letter from O. W. Holmes to Lewis Einstein (June 1, 1905), in *THE HOLMES-EINSTEIN LETTERS*, *supra* note 1, at 16.

and judges . . . acquaints us with different modes of perception and understanding of human predicaments and of the essential dignity and worth (or evil [or ambiguity]) of those caught within those predicaments . . .”<sup>306</sup> Professor Turano adds, “It helps us to understand human problems in ways we could not have before.”<sup>307</sup> Keyes points to “revelations of the dehumanizing experience of slavery captured by Toni Morrison’s *BELOVED* and of the holocaust in Elie Wiesel’s *NIGHT*.”<sup>308</sup>

Arguing again that our study of the humanities be translated into practice, I think of powerful works like *THE TRIAL* by Franz Kafka, *BILLY BUDD* by Herman Melville, *THE OX BOW INCIDENT* by Walter Van Tilborg Clark, or *PICKING COTTON: OUR MEMOIR OF INJUSTICE AND REDEMPTION* by Jennifer Thompson-Cannino, et al. (2009). For several years in the 1980s, I made talks about *THE TRIAL* and led group studies. I urged that it be required reading for judges. As recently as the Fall of 2014, I had a chance to visit with a recently retired judge who told me of his continuing self-reflection on *THE TRIAL*, having attended one of my sessions years ago. Reading Kafka enhances one’s appreciation of the predicament of persons caught up in legal conundrums, and not just in a criminal prosecution context.

The predicament of the unauthorized immigrant cries out for lawyers and judges who understand and practice an acceptance of humanity. I think of the moving testament of history in Emma Lazarus’ sonnet, “The New Colossus” (“give me your tired, your poor, . . .”), and of thrice seriously wounded Civil War veteran Holmes’ dissent in *Schwimmer*, the majority having denied citizenship to a fifty year old Quaker pacifist because she would not take up arms to defend the country.

And recurring to the opinion that bars this applicant’s way, I would suggest that the Quakers have done their share to make the country what it is, that many citizens agree with the applicant’s belief and that I had not supposed hitherto that we regretted our inability to expel them because they believe more than some of us do in the teachings of the Sermon on the Mount.<sup>309</sup>

Even without Lazarus, Holmes or anything beyond a fifth grader’s understanding of our history, how does any lawyer, judge, or other American not see the core reason why ninety-eight plus per cent so consciously place

306. Keyes, *supra* note 3 at 699.

307. Margaret V. Turano, *Moments of Grace: Lawyers Reading Literature*, 72 OCT N.Y.ST.B.J. 12 (2000).

308. Keyes, *supra* note 3 at 699.

309. *United States v. Schwimmer*, 279 U.S. 644, 654-55 (1929) (Holmes, J., dissenting); II *THE LAW AS LITERATURE* 592 (Ephriam London ed. 1960); *THE ESSENTIAL HOLMES* 324 (Posner ed. 1992). For the handful who may not know, Oliver Wendell Holmes, Jr., served for three years with the Massachusetts 20<sup>th</sup> Regiment, was thrice seriously wounded (Ball’s Bluff, Antietam and Mayre’s Crossing), and never wavered in his belief that some wars are necessary, the Sermon on the Mount notwithstanding. Arguably the second best articulation of the humanity of the Civil War was Holmes’ Memorial Day Address delivered in Keene, N. H., on May 30, 1884. See *THE ESSENTIAL HOLMES* 80-87 (Posner ed. 1992).

themselves at risk in the predicament of being an unauthorized immigrant, *viz.*, that each believes us more than we believe ourselves when we say to the world that our country recognizes the essential dignity and worth of each person, grants and secures freedom like no other, and that it really is the land of opportunity?

Child pornography gives rise to a more troublesome category of human predicaments, where few are without strong feelings. Justice Anthony Kennedy once wrote in such a case that:

William Shakespeare created the most famous pair of teenage lovers, one of whom is just 13 years of age. See *Romeo and Juliet*, act I, sc. 2, l. 9 (“She hath not seen the change of fourteen years”). In the drama, Shakespeare portrays the relationship as something splendid and innocent, but not juvenile.”<sup>310</sup>

In 2008, a dissenting judge drew from the unsuccessful defendant’s literature expert that a cross-section of “writers routinely publish such material,” reflecting humanity in its complexities and capacity to baffle, citing Alice Walker’s *THE COLOR PURPLE*, William Faulkner’s *ABSOLOM! ABSOLOM!* and Vladimir Nabokov’s *LOLITA*.<sup>311</sup>

Justice Keyes suggests a third purpose, *viz.*, that:

the study of the humanities by lawyers and judges . . . gives us the knowledge of evaluative and interpretive techniques and the ability to use them so that we better understand the nuances of words and the ambiguities in situations and in laws and are better able to discern the real issues lurking beneath the surface of an apparently simple (or deceptively complex) case.<sup>312</sup>

This one seems a combination of numbers two above and four below. It is important enough that a little redundancy does not hurt.

I said my sense of the point in “An Interpretive Stratagem” in a piece I wrote in 1994,<sup>313</sup> augmented recently.<sup>314</sup> Whence my thoughts of the “nuances of words”? “A word is . . . [but] the skin of a living thought . . . ,”<sup>315</sup> and that lawyers and judges should learn to hold at bay the “tyranny of labels.”<sup>316</sup> My

310. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 247 (2002).

311. *United States v. Whorley*, 550 F.2d 326, 348-349 (4th Cir. 2008) (dissenting opinion).

312. *Keyes*, *supra* note 3 at 699.

313. James L. Robertson, *The Law of Business Torts in Mississippi*, 15 MISS. C.L. REV. 13, 24-57 (1994).

314. Robertson, *Variations*, *supra* note 39, at 477-97.

315. *Towne v. Eisner*, 245 U.S. 418, 425 (1918) (Holmes, J.); *see also Thornhill v. System Fuels, Inc.*, 523 So. 2d 983, 1003 (Miss. 1988) (Robertson, J., concurring).

316. *See, e.g., Palko v. Connecticut*, 302 U.S. 319, 323 (1937); *McKinnis v. Mosley*, 693 F.2d 1054, 1057 (11th Cir. 1982); *U. S. v. Oreye*, 263 F.3d 669, 672 (7th Cir. 2001); *Nochowitz v. Ernst & Young*, 856 F. Supp. 457, 463 (N.D. Ill. 1994) (“‘Tyranny of labels’ is indeed a useful concept”); *J. L. Teel Co. v. Houston United Sales, Inc.*, 491 So.2d 851, 857 (Miss. 1986); *see also Albritton v. City of Winona*, 178 So. 799, 805 (1938) (“We must not permit ourselves to be subjected to the tyranny of symbols”).

concurrence regarding “the ambiguities in situations and in laws” is grounded in my long held faith in the ambiguity of all things human.<sup>317</sup> More recently, “We live life facing at least three certainties: death, taxes and the ambiguity of all things human.”<sup>318</sup>

Of course, there is the matter of being “able to discern the real issues lurking beneath the surface of an apparently simple (or deceptively complex) case.” I always thought that comes from “learning to think like a lawyer,” a sense of which one is supposed to begin to acquire in law school. I do not mean the rigid legal formalism once widely taught. Nor do I include the heavy dose of exam-less practice courses that have come to dominate so many third year curricula; those should be non-credit extracurricular experiences, like traditional moot court programs. I do include the broad liberal arts education all law school entrants ought to have. I say this, though I have known not a few lawyers learned in the humanities who as eighteen-year-olds got started along other paths.

I am not sure that whatever powers of discernment I may have may be a function of my study of the humanities, more than the influence of my mother who could have been a legitimate classics scholar, had she not taken the life path of so many women born *circa* 1906. I suspect a lifetime of reading and thinking and trying lawsuits and arguing points with others is within “the study of the humanities.” But this seems to be Keyes’ fourth “purpose.”

My attraction to the works of William Faulkner no doubt came from growing up and living in Mississippi. My attraction to Eugene O’Neill? From the awe of Faulkner’s Nobel Prize in the late 1950s, learning that he was the second such American after O’Neill, then becoming aware that many thought O’Neill’s best work was done after his Nobel in 1937, and immersing myself in those last plays. I’m sure I read Albert Camus’ *THE STRANGER* while in college, soon thereafter *THE REBEL* and *REFLECTIONS ON THE GUILLOTINE* and others, but in time I became fixated on *THE FALL*.<sup>319</sup> I suggest that the way *Montgomery*, *Pharr*, *City of Clinton* and *Dycus*—and *Neely*—were adjudged, better presented “the ambiguities in situations and in laws” in those cases, and “the real issues lurking beneath the surface.”

Keyes’ fourth purpose for the “the study of the humanities by lawyers and judges . . . [is that it] teaches us how to comprehend and express complex thoughts (English) and how to reason logically and soundly (philosophy).”<sup>320</sup> I agree, adding that “pragmatically” is well within “soundly,”<sup>321</sup> for those needing a reminder.

The function of this by now too long tale has been to show how resort to the humanities can—modestly—assist lawyers and judges in their becoming better

317. Thornhill, 523 So. 2d at 1006.

318. Robertson, *Variation*, *supra* note 39, at 478.

319. James L. Robertson, “A Fall of Fortuities (A Paean in Memory of John Hampton Stennis),” CABA NEWSLETTER, [www.caba.ms/Archives](http://www.caba.ms/Archives), posted (Nov. 2013), <http://caba.ms/newsletters/caba-newsletter-nov2013.pdf> (last visited Mar. 25, 2016).

320. Keyes, *supra* note 3 at 699.

321. I have recently noted my debt to Judge Richard Posner’s pragmatic approach to the law and legal reasoning. Robertson, *Variations*, *supra* note 39, at 573 fn. 273.

practicing lawyers and judges. When it comes to accepting from fortune or aspiration one's course on this planet, there is "no substitute for the experience of life as it is really lived,"<sup>322</sup> though we add an ungrudging acceptance of Holmes' truths that "time has upset many fighting faiths" and that the law "is an experiment, as all life is an experiment [and that] every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge."<sup>323</sup>

The humanities let us live and appreciate living, beyond the joy many find in religion, First Amendment and more secular varieties. The humanities expose us to the redemptive possibilities in a single lonely person with the courage to be, functioning, and hoping against all hope. And this, despite the objective evidence that there may not be much more to any of us than "a behaviorally conditioned blob of billions of subatomic particles held together by the gravitational interaction and made life-like by the electromagnetic interaction."<sup>324</sup> And despite Holmes' hunch when he "bet . . . that we have not the kind of cosmic importance that the parsons and philosophers teach," adding that "I doubt if a shudder would go through the spheres if the whole ant heap were kerosened."<sup>325</sup>

For my friends who are lawyers and judges, I recall Hamlet's advice to the fearful Horatio, "there are more things in heaven and earth than are dreamt of in your philosophy,"<sup>326</sup> with a respectful reminder that law occupies but a practical and service-oriented corner of our philosophy, properly understood. We have little or no authority outside that practical corner and should confine ourselves thereto. This said, lawyers and judges do have an opportunity that the proverbial blunt instrument which we work with daily be made and seen a bit more discerning. With hopeful hearts, we pursue optimal levels of reliability in adjudication, our opportunities for good legal practice made richer, for in the wake of tragedy Shakespeare with his great humanity still "speak(s) to the yet unknowing world how these things came about, . . . , lest more mischance, on plots and errors, happen."<sup>327</sup>

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322. *Id.*

323. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

324. *Wilbourn v. Hobson*, 608 So. 2d 1187, 1196 (Miss. 1992) (Robertson, J., concurring).

325. Letter from Oliver Wendell Holmes, Jr. to Lewis Einstein (Aug. 19, 1909) in *THE HOLMES-EINSTEIN LETTERS: CORRESPONDENCE OF MR. JUSTICE HOLMES AND LEWIS EINSTEIN, 1903-1935*, 50 (James Bishop Peabody ed. 1964). Also reprinted in *THE ESSENTIAL HOLMES* at xxii (Posner Ed. 1989).

326. *WILLIAM SHAKESPEARE, HAMLET*, act 1, sc. 5., lns. 167-168.

327. *Id.* at act 5, sc. 2, lns. 390-91, 405-06.







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