

The Law Whistles:
A Case Study of the Trials of Hermione and Perdita in *The Winter's Tale*.

by

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A Thesis Submitted to the Faculty of
The School of Letters of the University of the South
in partial fulfillment of the requirements for the degree
of Master of Arts in English and American Literature

May 2011

Sewanee, Tennessee

Approved:

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Abstract

The trial scenes at the heart of *The Winter's Tale* present powerful metatheatrical episodes that also serve as legal exemplars in the use (or misuse) of evidence and argument. Legal analysis of this text yields surprising riches amazing to both legal and Shakespearean studies. The type of forum, whether public or private; the nature of the audience, whether peers or the public; and the type of evidence, whether of pattern or practice, admissions against interest, demonstrative or character, inform the analysis. *The Winter's Tale* builds legal texts of circumstantial evidence, weighted both wrongly and rightly, into a morally transformative, redemptive drama.

In the play, the evidence adduced in three consecutive tribunals rationally, although erroneously, builds from Leontes' suspicions to the jailing of Hermione on charges of adultery with Polixenes, to his conviction and consignment to the flames of his infant daughter Perdita, and then to a formal capital indictment for high treason that includes Hermione's conspiracy with Polixenes and Camillo to murder the King. Fittingly, as the dramatic and legal tension mounts, trials begun in private spaces (a Queen's sitting room and a King's bedchamber) move to the climatic public forum.

This shift of venue from private to public spaces does not obscure or alter the nature of the evidence. The textual evidence proffered on all charges is both purely circumstantial and cumulatively ambiguous. Circumstantial evidence is indirect in nature, consisting of inferences arising from facts woven into a chain of events offered to support a conclusion. The weight of the circumstantial evidence at trial must therefore support Leontes' charges against Polixenes and Hermione but, at the same time, serve as a basis for something other than a revenge tragedy. The King cannot begin this case as a

madman if the full force of the tragedy, or the ultimate comic redemption, of the play is to work. There must be some logical, textual basis for his version of the events as crimes. The cogency, completeness, and strength of the evidence become crucial in this regard, especially when facing the Delphic scale of moral certainty. Arguments by both prosecution and defense establish the requisite legal, but ultimately tragic, tension. Leontes' arrangement of the chain of events into the "facts" of adultery and conspiracy, though plausible, is wrong. When circumstantial evidence is at issue and is, as here, the sole basis supporting guilt, the quality of the evidence must be stringently tested. Conviction on "pure surmises" (3.2.119) is, as Hermione argues, "rigor, not law" (121).

The facts and inferences underlying circumstantial evidence should be carefully sifted and evaluated in light of the standard of the burden of proof. Leontes argues temporal and pattern or practice evidence; testimony and actions as admissions against interest; in order to support his surmises from the evidence to proof of Hermione's, Polixenes, and Camillo's guilt. Paulina and Hermione respond with demonstrative evidence of physical appearance and character evidence to rebut his charges. The oracle, the ultimate truth-teller, renders the verdict -- testing Leontes' case and finding it wanting. Tragedy immediately ensues, although the seeds of comic redemption are sown in the previous forums.

Shifting texts with narratives supporting innocence or guilt are familiar to both literary scholars and lawyers. Applicable of legal analytical principles to the trial scenes in *The Winter's Tale* yields results of benefit to both fields. Untwisting one strand of scholarship provides surprising results. This being done, "let the law [and literature] go whistle, I warrant you." (4.4.23)

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Introduction

In *The Winter's Tale*, William Shakespeare works the grand themes of tragic suffering, transformation, and redemption through the warp and woof of trial proceedings. Trial scenes appear in his other plays, including *Othello*, *Henry VIII*, *King Lear*, *Measure for Measure*, *King John*, *A Midsummer Night's Dream*, and of course *The Merchant of Venice*.¹ Yet *The Winter's Tale* stands out even in this company, in part because of the length, lucidity, and modernity of its prosecutions.

Each of the first three acts revolve around a trial; respectively, two in private (Hermione's imprisonment and Perdita's abandonment) and one in public (Hermione's arraignment for adultery and conspiracy).² The procedural rules implicated are clear and detailed in the flow of the dialogue as well as the action. Such length and lucidity permit use of this text as a modern legal case study, an analysis similar to trial advocacy training from a transcript of a legal proceeding or a Socratic hypothetical situation. By contrast, none of the trial scenes in the other plays illustrate so many elements of this method of analysis as well as *The Winter's Tale*.

Procedure apart, thematically the trials here provide a pivot between the tragic and comic action of the plot that also renders the play unique. The prosecutions, comprising the first three acts, close in a verdict simultaneous with the death of Mamillius, the abandonment of the infant Perdita, and the seeming death of Hermione. Yet the action does not end with tragedy. In the comic pastoral scenes which ensue, an old shepherd discusses with his son the true identity of Perdita, whom they have raised as

a member of their family. Out of the mouth of the simple son comes an unwittingly witty description of the legal consequences of revealing truth:

She being none of your flesh and blood has not offended
the King, and so your flesh and blood is not to be punished
by him. Show those things you found about her, those secret
things, all but what she has with her. This being done,
let the law go whistle, I warrant you. (4.4.817-23)

In short, his "sister" is not guilty of presuming to marry a prince, well above her station in life as a shepherdess, because she is, in fact, not the shepherd's daughter but a princess.

On a grander scale, the law's ability to discern and respond to realities underlying deceptive appearances sounds the realities of a trial as well as the play. Nowhere else in literature, legal or otherwise, does the personified law go whistle.³ This startling and delightful image illuminates a work focused on trials and their consequences. On one level, once the truth about Perdita's birth is known, the law can be disregarded "go whistle," similar, in modern usage to "go pound sand."⁴ Even more delightfully, however, this line also shows the law, like the audience, letting out an astounded whistle at the unexpected fulfillment in the magical actions of the plot.

I argue that a close reading of the mechanics of the trial scenes in *The Winter's Tale* enhances literary criticism of the play by showing Shakespeare's deft use of legal procedure in the larger dramatic and thematic context of this work. Likewise, I argue that a trial advocate can readily recognize and utilize the relevant technical insights through the time-honored case study method. I conclude that an application of legal principles to the trial proceedings in *The Winter's Tale* enlarges our understanding of the text.

As to my methodology, studies of the Elizabethan common law and the Shakespearean canon have established a well-respected niche of scholarship. Trial advocacy techniques constitute an equally well-established legal discipline. There is, however, no work directed to the intersection between the two. While most lawyers are aware of the famous courtroom scene in *The Merchant of Venice*, the other plays are rarely, if ever, included in the law school curriculum. And while skilled in textual exegesis, literary scholars have not explored the potential of the text as a transcript of an actual proceeding -- much less as an important teaching tool of what to do and what not to do in a trial, a case study method of trial advocacy. Because three scenes in *The Winter's Tale* are, after all, trials, the methodology I employ here takes the text-as-transcript and case study analysis as a framework. The results, I submit, offer surprising insights worth a whistle by both disciplines.

A. Background

The Winter's Tale is one of Shakespeare's final works, produced in 1610-1611 and published solely in the 1623 First Folio. Along with *The Tempest*, it belongs in what is termed the romantic, or tragi-comic genre.⁵ The play opens with tragic action that continues through the first three acts and then transforms into a comic resolution. Both *The Winter's Tale* and *The Tempest* end in a wedding, with redemption a central theme in the former and forgiveness in the latter. The redemptive theme in *The Winter's Tale*, involving the resurrection and return of Hermione and Perdita to Leontes, arises from the legal processes put into play by Leontes' jealousy. Such an intense focus on the law as a plot engine sets it apart from the rest of the canon.

Trials, as well as plays, unfold as staged narrative spectacles. They possess a beginning, middle, and end. In trials, opening and closing arguments bookend the presentation of evidence. The courtroom is the stage; the judge and jury, the spectators. Effective legal strategy tailors the message and its delivery to its audience. A case tried before a judge will be handled differently from a case tried before a jury. The type of evidence presented, whether direct or circumstantial or a combination of the two, further adds content and contour to a trial. Forum in the background, evidence and argument in the foreground, give shape to the proceedings.

A trial scene embedded in a play, like other metatheatrical elements, bears careful scrutiny for its parallels to the main dramatic action, its resonance with the legal and plot processes in the work as a whole, and its thematic and juridical integrity. Yet the converse of this unexceptionable proposition also holds true. Just as trial scenes inform dramatic elements, the courtroom proceedings in Shakespeare's plays also yield lessons in trial advocacy for the practitioner. The trial scenes at the heart of *The Winter's Tale* prove unusual in this regard: serving not only as powerful thematic episodes, but also providing legal exemplars in the use (or misuse) of forum, evidence, and argument. Manipulation of facts into a coherent whole in order to create a scenario for each side of a dispute is the very definition of trial advocacy. Presumably, truth will emerge. *The Winter's Tale* beautifully explores this presumption: at its core, a discourse on the eventual appearance of truth and morally transformative reality. As advocates know, there is no better stage for such a theme than a courtroom, and Shakespeare may well have been the consummate advocate.⁶

Using the narrative spectacle of a queen's arraignment, Shakespeare addresses the various modes of truth-seeking at issue in every trial. In doing so, he profoundly comments on both the moral and the legal truth of the process. The techniques for adversarial confrontation gain prominence when opposing inferences can be drawn from the same facts: Hermione's guilt of Leontes' charge of adultery with Polixenes, or her innocence, as maintained by the Queen and her advocate, Paulina. The pitfalls of this procedure, together with the consequences of evidentiary misinterpretation set up in the text of *The Winter's Tale* trial scenes, dovetail into an exploration of the legal techniques for obtaining a verdict on purely circumstantial evidence. Such an analysis proceeds by consideration of the forum, of the presentation of evidence, of the arguments from the evidence, and of the final truth-speaking, or verdict.⁷ Further, "trials," in the broader sense of temptations and suffering, lay the predicate for redemption in this play.

I. The Forums and Rules of Procedure for the Trial Scenes in *The Winter's Tale*

The trial scenes in *The Winter's Tale* flow in and out of the functional equivalents of a courtroom: first, private tribunals in semi-private spaces, then a formal and public session. The nature of the forum, the advocate, the audience, the language of the advocate's argument, and the appearance of justice in the forum are factors considered in assessing the appropriateness of the legal techniques used as well as their effectiveness. The actions taken here drive the trajectory of the plot to tragedy in the first three acts and sow the seeds of comic redemption with which the play closes. The legal nuances of these scenes remain relevant and instructive outside, as well as inside, their dramatic function in the text as a whole.

The first part of a Jacobean criminal trial, as in the modern period, belongs to the prosecution. Leontes, Antigonus, and the King's lords stride into the Queen's sitting room, sweeping away domesticity, intimacy, and poignancy. Later, in an aside, Leontes learns of Camillo's departure with Polixenes for Bohemia, taking this news as confirmation of his wife's unfaithfulness with his lifelong friend. Leontes alleges that Polixenes is the father of Hermione's unborn child. Thus the prosecutor's charge is laid.

Before the audience of peers of the realm of Sicilia,⁸ Leontes hotly charges: "She's an adult'ress" (2.1.97), and again,

I have said

She's an adult'ress; I have said with whom.

More, she's a traitor and Camillo is

A federary with her, and one that knows

What she should shame to know herself. . . . (108-12)

Emotional displays before a like-minded captive audience often serve as effective tools for an advocate, whether a prosecutor in a non-public setting, such as a grand jury room, or for a civil lawyer in a deposition in a conference room. The operative requirement for such a strategy to work, especially relevant here, is that the advocate and the audience must in some sense be "peers." An emotional condemnation of murder by a prosecutor would have a very different effect on a jury of soldiers who killed in combat than on a jury of the families of murder victims. Leontes' rage and his charge resonates with this audience's (as well as Shakespeare's) awareness of the dire consequences to the realm of a queen's adultery.

It is noteworthy that Leontes' language in this forum is debased, a far cry from the grave formal rhetoric of such a momentous charge in a public setting. He expressly calls attention to his linguistic choices in addressing Hermione:

O thou thing,
 Which I'll not call a creature of thy place
 Lest barbarism, making me the precedent,
 Should a like language use to all degrees,
 And mannerly distinguishment leave out
 Betwixt the prince and beggar. (103-08)

Leontes' tailoring of tone and word choice to the vileness of the charge and the accused offers a textbook example of effective trial advocacy. A prosecutor will often refer to a criminal defendant not by his or her given name and certainly not by a courtesy title of Mr. or Ms., but by the label "defendant" or "the accused." Likewise, plaintiffs' attorneys refer to their clients by first name, while defense counsel use the label of "plaintiff." Going beyond these naming limits even for a good reason is, however, perilous with a jury. Leontes does go further, not only refusing to give Hermione the title due to her but inappropriately name-calling her "A bed-swerver, even as bad as those / That vulgars give bold'st titles" (114-15). The "vulgars" Leontes condemns are, in fact, himself and his own "titles" for Hermione, his Queen. Trial advocates do not explicitly draw the jury's attention to their naming tactics; Leontes' self-reference is perhaps driven by the dramatic need to underscore the thematic joining of opposites throughout this play, here the topsy/turvy reversal of high birth and vulgar behavior. His speech may also be read as an apology for violating the mannerly norms of even a private forum and proceeding.

If so, the apology is fleeting, as he next moves toward abolishing any legitimate proceeding at all.

In this private area before an audience of peers, Leontes oversteps the bounds of a prosecutor by seeking to become witness, judge, and jury to condemn Hermione.⁹ While heated argument will often come close to such a limit, the notion that a defendant is guilty simply because the prosecutor has made an accusation is always implicit. In modern procedure, this potential problem is addressed in jury selection, where it is important for the defense to ask if any potential juror believes a person guilty simply because she or he has been indicted. Be that as it may, the sheer weight of the state (of course here Leontes is the state) presents a strong prejudice for jurors to overcome. This inequality provides much of the basis for the modern presumption of innocence for the accused.

Hermione has no advocate and no such presumption here.¹⁰ Over the protests of Antigonus and the lords, Leontes dictates: "Away with her to prison / He who shall speak for her is afar off guilty" (126-27). The King justifies his actions on the ground that he has pronounced the charge, and he therefore does not have to prove it true -- the legal *ipse dixit* argument.¹¹ Rejecting his lords' advice, Leontes boldly describes the heart of a tyrant:

Why, what need we

Commune with you of this, but rather follow

Our forceful instigation? Our prerogative

Calls not your counsels, but our natural goodness

Imparts this, which if you -- or stupefied

Or seeming so in skill -- cannot or will not
 Relish a truth like us, inform yourselves
 We need no more of your advice. The matter,
 The loss, the gain, the ord'ring on 't is all
 Properly ours. (196-205)

And then he pauses, perhaps hears himself, and blinks. Foreshadowing the outcome of the trial, which in turn mirrors the plot, Leontes recognizes that because "in an act of this importance 'twere / most piteous to be wild"; therefore, "I have dispatched in post / To sacred Delphos, to Apollo's temple" (219-20). The King does care for the opinion of his audience:

Though I am satisfied and need no more
 Than what I know, yet shall the oracle
 Give rest to th' minds of others, such as he
 Whose ignorant credulity will not
 Come up to th' truth. (228-32)

With this concession, Leontes resolves to "speak in public, for this business / Will raise us all" (236-37). Ironically, so it does.

Effective advocates explicitly embrace the judicial process, claiming it will vindicate their causes. Leontes, the consummate prosecutor, does the same. Yet his sleight of hand should be noted despite his self-congratulation. Does he really reject tyranny by embracing a consultation with the oracle and a public forum? After all, he decides to consult the oracle well after he has judged Hermione guilty and consigned his pregnant Queen to prison. In addition, a fact so obvious that it is ignored without

comment, Leontes tries, condemns, and convicts the child she is carrying, a potential heir or heiress to the throne. Antigonus notes the impact of Leontes' charges on Mamillius: "Be certain what you do, sir, lest your justice / Prove violence, in the which three great ones suffer: / Yourself, your queen, your son" (153-55). Shockingly, no one in this forum comments on the unborn child. Tyranny perhaps stays within bounds, but only to a limited degree.

b. A Private Forum: The Defense's Response

The second private tribunal in *The Winter's Tale* legally reads as a continuation of the first forum. The plot structure follows the flow of a trial, which follows the flow of the narrative -- the prosecution first and then the defense. If the prosecutorial private forum can be likened to a grand jury proceeding, this second private defense proceeding is akin to a preliminary hearing. Procedurally, the prosecution must show more probably than not that the defendant is guilty of the charges before the case is bound over to the grand jury. Strategically, defense counsel may choose not to waive this proceeding in order to have an opportunity to discover at least some of the prosecutor's evidence underlying the charge.¹²

The dramatic focus thus shifts from Leontes' charges to Hermione's defense. That defense, in a twist woven into the fabric of the trial within the play, concentrates less on Hermione's guilt or innocence than on the fate of the concomitantly bastardized Perdita. It is almost as if the mother's guilt is temporarily conceded for purposes of the debate over the infant that consumes the action at this point. Such a strategy by the defense proves successful to a point: Hermione's trial is deferred while Perdita's fate is resolved and she is spared immediate execution. Concurrently, Leontes continues to unravel

personally, but at a faster pace, descending further into tyranny in this forum. His vicious edicts issued against the newborn baby are ameliorated only by Paulina's advocacy. The degree of her effectiveness is, of course, the point of any adversarial proceeding, where the defense attorney stands between the accused and the accusations. As Paulina puts it, "Upon mine honor, I / will stand betwixt you and danger" (2.2.79-80). Leontes, like too many prosecutors, overcharges, forcing his opponent to narrow the issues and, in this case, the punishment. In the structure of the play, the seemingly small triumphs of the defense in this scene largely set the stage for the play's redemptive processes, a consequence worthy of consideration by any advocate.¹³

As before, the nature of the forum, the advocate, the audience, the language of the argument, and the appearance of justice in the proceeding are factors to be considered in assessing the action. The parallels between the first two forums are ones of contrast more than comparison, but both underscore the ritualistic nature of the legal action. Continuity in place and procedure, despite changes of tone, audience, advocate, and eventual outcome, define these two particular dramatic moments, as well as, in general, the common law's search for truth. The repetition between the scenes is compelling. Like the earlier accusation, the defense forum is a semi-private space, with an audience of peers. It bears noting that here the peers are lords, with no ladies present.¹⁴ In the previous forum, Leontes served as his own advocate, who, with vulgar, graphic, and inappropriate sexual language, argued Hermione's guilt in front of both lords and ladies. Paulina's defense of Hermione and Perdita in front of the lords uses elevating, not debasing, words and images. There is an implicit recognition by all present of Leontes' tyranny, since his moral choices range solely between casting a baby into the fire or

abandoning her to savage beasts on a deserted seacoast in winter. Paulina's redemptive role as defense counsel¹⁵ empowers the courtiers to overrule Leontes' initial death sentence, setting the stage for Perdita's rescue and thereby beginning the magical unfolding of the comedic portion of the play.

As with the prosecution, the defense in *The Winter's Tale* takes place in a semi-private space, a chamber in the palace of Sicilia, where the King is attended by his courtiers. Unlike the previous scene, however, the atmosphere is already dark, not a site for joking or pleasant domesticity. Mamillius is ill and a sleepless Leontes has commanded that he not be disturbed (2.3.14-20, 36-37). Paulina, carrying the newborn infant, seeks to enter but is warned by a servant to go no further. She disregards the command, the tension becomes palpable, and the defense begins. Unlike Shakespeare's more famous female advocate, Portia, who disguises herself as a man,¹⁶ Paulina in *The Winter's Tale* argues that her sex best equips her to represent Hermione and her baby:

These dangerous unsafe lunes i' th' King, beshrew them!

He must be told on't, and he shall. The office

Becomes a woman best. I'll take 't upon me.

.....

Commend my best obedience to the Queen.

If she dares trust me with her little babe,

I'll show t' the King and undertake to be

Her advocate to th' loud'st. (2.2.38-41, 45-48)

The reference in this speech to "her" advocate¹⁷ is unclear since Paulina jointly represents both Hermione and the baby, although Perdita is the focus of the subsequent

proceedings. Does Paulina thus begin with a legally impermissible conflict of interest¹⁸ because of her joint defense of two clients? As Paulina tells the jailer:

This child was prisoner to the womb, and is
 By law and process of great nature thence
 Freed and enfranchised, not a party to
 The anger of the King, nor guilty of,
 If any be, the trespass of the Queen. (73-77)

The daughter's case, then, is stronger than the mother's and does not require Hermione to be innocent in order for Perdita to prevail. In modern procedure, fairness would require a separate advocate to look out for the child's interests -- a guardian *ad litem*.¹⁹ Where improper joint representation does occur, a conviction will be set aside if a defendant can demonstrate actual prejudice in the conduct of the trial.

One could argue that this dual defense does in fact prejudice Perdita. Leontes' rage and threats of execution result in Paulina's walking away from the forum, albeit on threat of being pushed out of the door, and leaving her client with Leontes, Antigonus, and the lords:

Look to your babe, my lord; 'tis yours. Jove send her
 A better guiding spirit. -- What needs these hands?
 You that are thus so tender o'er his follies
 Will never do him good, not one of you.
 So, so. Farewell, we are gone. (2.3.161-65)

Is Paulina abandoning one client to save another? Not at all. Her parting admonition to the lords illuminates her strategy throughout to do the best for her clients under the

circumstances: that is, to steer Leontes away from ordering the baby's immediate death by fire and to remove the focus in this forum from Hermione. To do so, she must persuade the courtiers to influence Leontes. Because her strategy equally benefits both clients, her joint representation is not prejudicial.

In order to influence the lords, Paulina must overcome Leontes' gender hostility. Earlier, she uses the words "beshrew" (2.2.38) and "loud'st" (48) in becoming Hermione's and Perdita's advocate to foreshadow her eventual reception by Leontes. The trial scene is replete with his claims of Paulina's over-assertiveness, a predicament familiar to female defense counsel. Such bias leaves her no choice but to combat the charges of shrewishness or aggressiveness. Exaggerated politeness may be one measured response to such irrationality, as shown when Paulina leaves the chamber, saying, "I pray you, do not push me" (2.3.160). Pugnacity without alienating decision-makers is a hallmark of effective defense counsel, given the extraordinarily difficult task of overcoming their hostility to a criminal defendant. While a fine line to walk, Paulina does it successfully. As Antigonus notes, "When she will take the rein I let her run, / But she'll not stumble" (62-63). Similar techniques -- attack, laced with politesse and firmness -- can effectively expose a bullying prosecutor like Leontes.

On entering the scene, Paulina immediately takes charge, asking the lords to "be second to me," then challenging them, "Fear you his tyrannous passion more, alas, / Than the Queen's life?" (31-33). She moderates to a softer note, although perhaps as lawyers do, overstating her abilities: "I / Do come with words as medicinal as true, / Honest as either, to purge him of that humor / That presses him from sleep" (42-45). To Leontes, she pleads:

Good my liege, I come --
 And I beseech you hear me, who professes
 Myself your loyal servant, your physician,
 Your most obedient counselor, yet that dares
 Less appear so in comforting your evils
 Than such as most seem yours -- I say I come
 From your good queen. (64-70)

Throughout this scene, Paulina holds the baby. In a dramatic appeal to Leontes' sympathy, she lays down his newborn child, an elegant, effective visual summation: "The good queen, / For she is good, hath brought you forth a / daughter -- / Here 'tis -- commends it to your blessing" (79-82). Paulina's elevated language, including the repetition of "good" liege and "good" queen²⁰ in her address is a far cry from the vulgarity of Leontes' earlier charges against Hermione, contrasting here with his debased response:

This brat is none of mine.
 It is the issue of Polixenes.
 Hence with it, and together with the dam
 Commit them to the fire. (119-22)

Echoing the previous scene, Paulina cries:

I'll not call you tyrant;
 But this most cruel usage of your queen,
 Not able to produce more accusation
 Than your own weak-hinged fancy, something

savors,

Of tyranny, and will ignoble make you,

Yea, scandalous to the world. (149-55)

Seething with anger, Leontes attempts to justify himself to Antigonus and the lords:

On your allegiance,

Out of the chamber with her! Were I a tyrant,

Where were her life? She durst not call me so

If she did know me one. Away with her! (156-59)

The King again seeks to justify his tyranny by actions he claims inconsistent with being a tyrant, first consulting the oracle and now sparing Paulina from execution.

Leontes is refuted by the arguments of the lords, clearly influenced by Paulina's defense. He first orders Antigonus to throw the babe in the fire to punish him, "for thou sett'st on thy wife" (177). Antigonus denies this accusation: "I did not, sir. / These lords, my noble fellows, if they please, / Can clear me in 't" (178-80). They do indeed testify that Paulina acted on her own agency, voicing one of her arguments:

And on our knees we beg,

As recompense of our dear services

Past and to come, that you do change this purpose,

Which being so horrible, so bloody, must

Lead on to some foul issue. We all kneel. (186-90)

It is critical that in this forum, unlike act 1, where Leontes unilaterally consigns Hermione to prison, the lords, persuaded by Paulina's advocacy, oppose him, albeit on bended knee, in a dramatic and affecting moment. They present the possibility of an

outcome different from the one he purposes -- a pivotal moment in the play. The function of a jury as the conscience of the community is beautifully illustrated, while dramatically the seeds of Leontes' redemption are sown.

Confronted with the unanimous verdict of his courtiers, Leontes reluctantly retreats from ordering the immediate death of Perdita, although he still maintains, "better burn it now / Than curse it then" (193-94). Accusing Antigonus of being "so tenderly officious" (197) with Paulina, Leontes asks, "What will you / adventure / To save this brat's life?" (200-02). The nobleman offers his own life: "I'll pawn the little blood which I have left / To save the innocent" (206-07). The sovereign accepts, ruling that if the courtier fails to dispose of the child, the sentence is death to him and "to thy lewd-tongued wife, / Whom for this time we pardon" (213-14). Antigonus leaves to carry out Leontes' orders to abandon Perdita in a savage and deserted place outside the kingdom, "Where chance may nurse or end it" (224). Chance, the possibility of redemption, and the gods now enter the action of the play.

c. **The Public Trial and Its Outcome**

Hermione's trial date is set by the return to Sicilia of the messengers sent for Apollo's oracle. When told of their landing, Leontes swiftly responds, certain of vindication:

Prepare you, lords.

Summon a session, that we may arraign
Our most disloyal lady; for, as she hath
Been publicly accused, so she shall have
A just and open trial. (246-50)

Then, as now, an arraignment is the first step in a criminal trial proceeding.²¹ Accusations and charges precede indictments; indictments precede arraignments; and arraignments, trials.

Has there in fact been, as Leontes claims, a public accusation or charge against Hermione before the indictment? If so, it must have occurred offstage either before or after the prosecutorial grand jury proceeding of the first forum. Hermione contends at the public sessions that she is on "every post / Proclaimed a strumpet." (3.2.108-09). The charges referenced here as requiring a "just and open trial" may be suggested by Leontes' stated intent following the order to imprison the Queen "to speak in public, for this business / Will raise us all" (2.1.236-37). Certainly, in the twenty-three days since the messengers have traveled between Sicilia and Delphos (2.3.243), there has been time to make public accusations or charges. The failure to give her formal public notice of the charges against her prior to an arraignment, although unusual, is not fatal to the prosecution nor should it be here.²² The procedure of Leontes' "just" trial, however, begins with a taint, which includes Hermione's imprisonment for at least twenty-three days, possibly on private rather than public charges.

Remarkably, despite the intense focus of the text up to this point on the accusations against Hermione, her consignment to prison, and Perdita's sentence, no formal legal proceedings have occurred in the private forums in the play. There has not been even a semblance of what is considered due process. At a minimum, this includes notice of the charges and an opportunity to respond. Leontes really does exercise the tyranny he disavows -- cowardly acting as a tyrant by teaspoons, sending for the oracle instead of executing Hermione, and ordering Perdita abandoned rather than burnt. The

public session of act 3 marks the first time there is a proceeding within the bounds of due process.²³ While the formality of a public arraignment and trial may seem hollow in light of the unjust private proceedings, the change in forum is, in fact, significant, and the outcome surprisingly altered.

From a legal perspective, the record of Hermione's public trial in the text is abbreviated. The indictment is read, she responds, Leontes makes a very brief rebuttal, the verdict follows. Yet brevity does not deny justice: the public trial contains the necessary elements which, when combined with the preceding actions, gives the appearance of a lawful proceeding. The movement of the private forums into the crescendo of the public trial does not admit repetition of the prior process. Thus, since the audience is already familiar with the details of the case, the fact-finding function of a trial can be deleted. Further, at least a subset of the lords and ladies present here have been witnesses in some combination throughout the earlier events. The prosecution and the defense have no dispute as to the facts of the case; rather, the critical issue is the interpretation of the facts.

The brevity of the trial presentation may also stem in part from the apparent haste with which all the sessions are convened. The text does not disclose the length of time between the landing of Cleomenes and Dion in Sicilia and the start of the trial, though at the end of act 2 they are reported to have landed "an hour since" (2.3.238) and are "hasting to th' court" (240). The sense is indeed that of haste, a rush to yet another judgment by Leontes. Tellingly, the proceedings start *before* the messengers arrive from the coast (3.2.132).²⁴ Fairness is generally understood to include sufficient time to prepare a defense. As with the offstage ambiguity of the public accusation, the brevity

here again taints Leontes' "just and open" trial. Despite the speed, however, a defense strategy has roughly begun in the private forum, where Paulina has spoken on Hermione's behalf in defense of the child. Only Hermione's own voice has not yet been raised, and that will be the last element added to the customary charge, response, and decision of this trial.²⁵

The quiet, grave solemnity of the trial ritual lends an aura of justice to the proceeding, especially following the emotionalism of the private forum where Perdita's fate is determined. As part of the formality, officers of the court,²⁶ along with peers, are present. Leontes opens the trial with a brilliant prosecutor's tactic, claiming that the public session is necessary not only to try Hermione on an as-yet-unspecified charge but, equally as important, to vindicate himself of the charge of tyranny:

This sessions, to our great grief we pronounce,
 Even pushes 'gainst our heart: the party tried
 The daughter of a king, our wife, and one
 Of us too much beloved. Let us be cleared
 Of being tyrannous, since we so openly
 Proceed in justice, which shall have due course
 Even to the guilt or the purgation.
 Produce the prisoner. (1-8)

The indictment is read by an officer of the court:

Hermione, queen to the worthy Leontes, King of
 Sicilia, thou art here accused and arraigned of
 high treason, in committing adultery with Polixenes,

King of Bohemia, and conspiring with Camillo
 to take away the life of our sovereign lord the King, thy
 royal husband; the pretense whereof being by circum-
 stances partly laid open, thou, Hermione, contrary to
 the faith and allegiance of a true subject, didst coun-
 sel and aid them, for their better safety, to fly away by
 night. (13-22)

The audience of peers, as well as the theater-going audience, having witnessed the first two forums, knows that the indictment, as indictments are wont to do, overcharges Hermione. The accusation of adultery alone would satisfy the prosecution as grounds for treason;²⁷ however, a charge of conspiracy to commit murder is added. Though the prosecutor's darling,²⁸ the catchall of conspiracy, is alleged in the first private forum, the indictment is the first time the scheme is specified as one to murder Leontes. Even a crime as broad as conspiracy requires proof of some actions in furtherance of the intention of the conspiracy. Hermione's alleged involvement -- counseling Camillo and Polixenes to leave Sicilia at night -- even if true, seems remarkably unconvincing evidence of a plot to murder Leontes. Further, the audience already knows that Camillo has devised the plan in order to save Polixenes' life. The "circumstances partly laid open" (18-19) are weakly charged, and the actions alleged in support of this conspiracy are simply implausible. The taints in this proceeding continue, shading this "just and open" trial.

Hermione enters her plea in response to both counts of the indictment: adultery and conspiracy. She follows the proper legal procedure at arraignment, entering her plea of not guilty. In doing so, she comments on the evidentiary basis of the case against her:

Since what I am to say must be but that
Which contradicts my accusation, and
The testimony on my part no other
But what comes from myself, it shall scarce boot me
To say "Not guilty." (23-27)

Declaring herself innocent of all charges, Hermione accuses Leontes of the tyranny he seeks to disclaim through the trial process: "I doubt not then but innocence shall make / False accusation blush and tyranny / Tremble at patience" (31-33). Effective advocacy requires a theme, and Hermione introduces that of the defense: her virtuous character, together with an attack on whether the pre-determined result of the proceeding is indeed "just." Nor is she impressed with the public venue of this "open" trial, stating that she is the daughter of a king, the wife of a king, and the mother of a prince, "here standing / To prate and talk for life and honor fore / Who please to come and hear" (41-43). That defense rejects the claims made by Leontes for the forum and effectively focuses the audience's attention on the flaws in the truth-seeking process. Keeping the forum and its flaws in the foreground is textbook trial advocacy for the defense.

Regardless of the defects of the trial procedure, Hermione proceeds with her defense, choosing to testify on her own behalf. It is a general tenet of criminal defense strategy that in order to be acquitted, a defendant must take the stand and respond to the prosecution's arguments.²⁹ Most defendants do not, relying instead on the presumption of

innocence, usually because such testimony opens the door to evidence of past criminal convictions and other evidence of bad behavior.³⁰ The single most important choice for a defendant is whether or not to testify. Hermione's trial strategy consistently expresses her defense theme, relying upon her own virtuous character evidence.³¹ She admits what she can and denies what she does not know.

[M]y past life hath been as continent, as chaste, as true,

As I am now unhappy. . . .

.....

For Polixenes,

With whom I am accused, I do confess

I loved him as in honor he required,

With such a kind of love as might become

A lady like me, with a love even such,

So and no other, as yourself commanded,

Which not to have done, I think, had been in me

Both disobedience and ingratitude.

.....

Now, for conspiracy,

I know not how it tastes, though it be dished

For me to try how. All I know of it

Is that Camillo was an honest man;

And why he left your court, the gods themselves,

Wotting no more than I, are ignorant. (34-36, 65-72, 76-81)

Like any good defense counsel, Hermione has left no argument of Leontes unanswered.

In rebuttal, Leontes improperly goes beyond the scope of the indictment. He embroiders his charges of conspiracy, adding vague actions taken by Hermione in collusion with Camillo and Polixenes *after* they have left Sicilia. Convinced by his own eloquent indignation, the King brings a cruel new charge against the defendant -- the presumed death of Perdita. He blames her for his cruelty: "Thy brat hath been cast out . . . / No father owning it -- which is indeed / More criminal in thee than it" (93-95). Such acts, as well as those charged, merit punishment: "so thou / Shalt feel our justice, in whose easiest passage / Look for not less than death" (95-97). Any pretense of fairness disappears in this rebuttal: "our justice" is fatally unjust. Any lingering doubts from the private forums evaporates; Leontes is now unquestionably a tyrant. And Hermione responds, arguing that the prosecution has failed to meet its burden of proof:

Therefore proceed.

But yet hear this. . .

.....

[I]f I shall be condemned

Upon surmises, all proofs sleeping else

But what your jealousies awake, I tell you

'Tis rigor, and not law. Your Honors all,

I do refer me to the oracle.

Let Apollo be my judge. (115-16, 118-23)

On one level, Hermione's argument does not reject the truth-delivering process of trials but simply the perversion of this proceeding by Leontes. On another level, her appeal to

divine law can be read as a rejection of the common law, including the trial itself.³² The distinction between the two is yet another illustration of how subtly Shakespeare uses the common law to comment upon the play's larger world of magical and divine law. "'Tis rigor, and not law" sounds one interpretation of the theme soon picked up by the shepherd's son: let the law go whistle.

Yet a further argument can be made that no dichotomy exists between the common and divine law here, and the whistling is that of amazement at this revelation. The consultation of the oracle has been an accepted part of the proceedings from the first private forum. Delphi's testimony by document is governed procedurally by the rules of admissibility for hearsay and authenticity.³³ The custodians of the document, Cleomenes and Dion, are called to testify. They are sworn in by an officer of the court; an evidentiary foundation for the chain of custody of the document is laid; and the verdict received: "Hermione's chaste, Polixenes blameless, Camillo a true subject, Leontes a jealous tyrant, his innocent babe truly begotten; and the King shall live without an heir if that which is lost be not found" (142-46).³⁴

The lords ceremoniously stand and accept the evidence as their verdict, "Now blessed be the great Apollo!" (147). Leontes does not. "There is no truth at all i' th' oracle. / The sessions shall proceed. This is mere falsehood" (151-52). His rejection of the verdict has tragic consequences: a servant enters to report Mamillius' death, Hermione collapses, she is declared dead by Paulina, and Leontes is undone. Painfully, instantly, he accepts the truth of the verdict. The trial is over, the tragedy is played out, but the consequences of the verdict reverberate through the next two acts.

II. The Presentation of Evidence and Argument in *The Winter's Tale*

The action within each forum, as with any trial, consists of the presentation of evidence and the argument from that evidence. In the trial scenes of *The Winter's Tale*, the charges of adultery and conspiracy rest on purely circumstantial and cumulatively ambiguous proof. There are no confessions, no eyewitnesses, no smoking guns. Circumstantial evidence is inherently indirect in nature -- inferences arising from facts woven into a chain of events offered to establish a fact. In general, a criminal conviction in such a situation requires that the chain of circumstances must be so "complete and of such a character," "so cogent and strong," as to establish guilt to a moral certainty.³⁵ The inferences arising from this kind of evidence must possess such clarity and strength as to rule out every reasonable hypothesis except guilt. The ambiguity implicit in such proof uniquely suits the transformative movement from trial to tragedy to redemption in *The Winter's Tale*.

For a transition to occur, the nature and quality of the circumstantial evidence at trial must support Leontes' charges against Polixenes and Hermione, while at the same time serving as a basis for something other than a revenge tragedy. The King cannot begin this case as a madman if the full force of the tragedy, or the ultimate comic redemption, of the play is to work. The cogency, completeness, and strength of the evidence becomes crucial in this regard, especially when facing the Delphic scale of moral certainty. Amazingly, Shakespeare's text withstands legal scrutiny both as a transcript of the evidence presented and as a cautionary tale for zealous prosecutors. The factual underpinnings here, well suited to arguments of innocence or guilt, include temporal and pattern and practice evidence; testimony and actions of admissions against

interest; demonstrative evidence of physical appearance; and character evidence.

Arguments by both prosecution and defense within the parameters of the forums and trial procedure establish the tragic tension, although Leontes' argument of the chain of events into the "facts" of adultery and conspiracy, while plausible, is wrong. When circumstantial evidence is at issue, a crucial question becomes that of the burden of proof. Conviction on "pure surmise" is, as Hermione argues, "rigor, not law."

a. Temporal and Pattern or Practice Evidence

Leontes' case slants the ambiguous evidence in the text in favor of guilt. This slanting is, of course, the duty of a prosecutor.³⁶ With Leontes acting as both prosecutor and investigator, however, nothing checks his faulty interpretation and tragic reliance on false inferences from the ambiguous facts. The facts Leontes interprets to arrive at his conclusion of adultery are intertwined with his questioning and denial of Perdita's paternity. In oracular hindsight, the links forged to form this chain of circumstantial evidence prove ephemeral. Reasonable, but erroneous, determinations of guilt reflect the force and the fear of well-argued circumstantial evidence. The horrific consequences of Leontes' misapprehensions of the facts could arise only from a compelling set of events gone wildly awry. Shakespeare supplies us with opposing interpretative decisions to be made in assessing the nuanced circumstantial evidence. One view, that of Leontes, the prosecution, leads to tragedy. The other, that of Hermione's defense, leads to magical transformation and restoration. Both are supported by the text: neither the defense nor the prosecution has a monopoly on truth. Only the oracle determines which view of the evidence prevails.

Even within the terms of Leontes' interpretation, Shakespeare provides both weak and strong circumstantial evidence. The case against Polixenes and Hermione implicates an important common law proof of paternity -- evidence of access.³⁷ Since there are two children, Mamillius and Perdita, born to Leontes and Hermione proofs of legitimacy for both must be considered. Leontes has no qualms about the case against Perdita; he briefly vacillates only when he considers the far less compelling evidence about his son and heir, Mamillius.

The contrast between the strength of the evidence for each child's paternity highlights both ends of the spectrum of proof arising from circumstantial connections. While Leontes errs in equating adultery with paternity, given that leap, the evidence supporting Perdita's bastardy is factually much stronger than any conjecture surrounding Mamillius' birth. The father's ultimate refusal to bastardize his son reflects his humanity, as well as his prosecutorial discretion. In Leontes' defense, any cause to suspect royal heritage, however slight, removes the debate from the realm of dispassionate rationality. Only very recently, with the advent of DNA technology, can fatherhood be established with certainty. Earlier, the common law relied on presumptions favoring legitimacy and the burden of proof to resolve this issue.³⁸ When the evidence is equally weighted on any issue, as often occurs with circumstantial evidence, the burden of proof should be the determinative factor in the outcome; a cautionary tale in light of the results of Leontes' advocacy.

The textual facts of access supply a far more compelling case for Perdita's bastardy than that of Mamillius. At the beginning of the critical second scene in act 1, where Leontes' jealousy moves from suspicion to prosecution, Polixenes dates his trip to

Sicilia: "Nine changes of the wat'ry star hath been / The shepherd's note since we left our throne / Without a burden" (1-3). This timing supports Leontes' case against Hermione, Polixenes, and Perdita. The Queen's apparent barrenness after Mamillius' birth, his friend's arrival in Sicilia, her swift pregnancy, a daughter's somewhat premature birth less than nine months later -- the chronology of these events alone might support a circumstantial evidence case. However, the fallacies inherent in an argument of cause and effect from temporal evidence are the hidden cracks in the foundation of Leontes' certainty. The unfortunate coincidence of Perdita's birth with Polixenes' visit may arguably be supported by similar circumstances surrounding Mamillius' birth, but only if Polixenes, Hermione, and Leontes were together at the time of Mamillius' conception. The temporal evidence may then be that of a pattern or practice,³⁹ with Hermione becoming pregnant only after a visit from Polixenes. The weakness of this argument is apparent in that a pattern or practice equating to cause and effect does not follow from merely one, or even two, instances. At the very most, an association between the events can be inferred. More significantly, the text does not specify such a sequence of events.

Any temporal evidence of an association between Mamillius' and Perdita's births is diminished by the issue of access. While he is the "young prince" (1.1.36) and "gallant child" (40), Mamillius' age is not explicitly given. Personified Time, however, moves the action sixteen years forward in act 4 after the boy's death in act 3. Florizel and Mamillius are less than a month apart in age (5.1.149-50), and Florizel is twenty-one years old (159-62). Mamillius must then be five when the play opens. Is there textual evidence of Polixenes' and Hermione's opportunity to conceive Mamillius almost six years before Polixenes' present visit to Sicilia? As with all of the circumstantial evidence in this case,

there is no clear-cut answer, although the great weight of the evidence comes down against such a scenario. Fundamentally, there are absolutely no explicit narrative details given of any previous encounter between Polixenes and Hermione. In fact, the text easily reads to the contrary. In tone, however, Hermione's pleas to Polixenes to extend his visit could seem allusions to a prior sexual encounter. A more determinative piece of evidence, the date of Leontes' ascension to the throne and parting from his boyhood friend Polixenes, is not given in the text.

As the play opens, a Bohemian gentleman, Archidamus, fulsomely praises the hospitality shown the Bohemians during Polixenes' present visit to Sicillia. Camillo responds by recounting the past history between the courts:

Sicilia cannot show himself over-kind to Bohemia. They were trained together in their childhoods, and there rooted betwixt them then such an affection which cannot choose but branch now. Since their more mature dignities and royal necessities made separation of their society, their encounters, though not personal, hath been royally attorneyed with interchange of gifts, letters, loving embassies, that they have seemed to be together though absent, shook hands as over a vast, and embraced as it were from the ends of opposed winds. The heavens continue their loves. (1.1.22-33)

No textual evidence suggests that this account is not accurate. If Polixenes has not been physically present in Sicilia during Leontes' reign until the present visit, the natural

reading of this passage supports Mamillius' legitimacy. That circumstance stands in direct contrast to the possible association of Perdita's conception with Polixenes' visit.

The same facts can, however, give rise to the same inferential arguments for the illegitimacy of both children, thus requiring an assessment of the strength of both cases. Perhaps suggestively, the preceding conversation between Archidamus and Camillo immediately turns to Mamillius and his merits as Sicilia's heir. That conversational juxtaposition between Polixenes' presence in Sicilia and the young prince's claim to the throne foreshadows the coming action. Archidamus calls Mamillius "a gentlemen of the greatest promise that ever came into my note" (36-38). A perplexing time marker lies buried in the image given by Camillo in responsive praise of Mamillius, "They that went on crutches ere he was born desire yet their life to see him a man" (41-43). Perhaps this time reference simply conveys the notion that no other heir has been born to Leontes and Hermione except for Mamillius, though "If the King had no son, they would desire to live on crutches till he had one" (47-48).

In order to support a case for the bastardy of Mamillius, Leontes, along with his wife Hermione and his friend Polixenes, would have parted for "their more mature dignities and royal necessities" (25) five years and nine months before Mamillius' birth. The question then becomes whether or not any evidence places the two suspected adulterers in physical proximity during this narrow window of time. Not surprisingly, none does. In addition, one strong piece of evidence implies that Polixenes was not in Sicilia when Mamillius was conceived. His legitimate son, Florizel, is the same age as Mamillius: "There was not a full month / Between their births" (5.1.149-50). Leontes' rejection of a case against Mamillius based on this circumstantial evidence of surmise,

conjecture, and innuendo heightens his miscalculation of the evidence as to Perdita. He struggles with doubt, plaintively asking, "Mamillius, / Art thou my boy?" (1.2.150-51), then later answering his own suspicions when speaking to Camillo:

Make that thy question, and go rot!
 Dost think I am so muddy, so unsettled,
 To appoint myself in this vexation, sully
 The purity and whiteness of my sheets --
 Which to preserve is sleep, which being spotted
 Is goads, thorns, nettles, tails of wasps --
 Give scandal to the blood o' th' Prince, my son,
 Who I do think is mine and love as mine,
 Without ripe moving to 't? Would I do this?
 Could man so blench? (392-401).

The father's deep sorrow for Mamillius' loss, a result of the train of events he puts in motion, is heightened by his guilt over these unfounded suspicions, however brief. Redemptively, Leontes' more founded, although equally erroneous, suspicions as to Perdita's paternity end in reunion.

b. Testimony and Actions as Admissions Against Interest

Circumstantial evidence can become more trustworthy when a party's words or actions seem to acknowledge guilt. Such a statement does not rise to the level of a confession but instead is argued to contain reliability as an admission against a party's interest.⁴⁰ This form of evidence perhaps appears in the sexually suggestive wordplay of Hermione's pleas to Polixenes. While the most potentially damning of all the evidence, it

too in the final analysis fails to bastardize Mamillius or to link the temporal evidence of Perdita's birth in a pattern or practice. The suspect conversation seems entirely in keeping with the magical reversal, transformative theme of the play, although in a darker, more ironic vein. It offers Leontes' weakest evidence of bastardy against Mamillius, who dies, leaving Perdita, against whom his evidence of bastardy is stronger, as the only living child and heir to the throne. Her marriage to Florizel legitimates Florizel as Leontes' co-heir and co-successor, clearly an unintended result of Leontes' errant interpretations of the evidence.

At Leontes' request, Hermione sets out to persuade Polixenes to extend his visit to Sicilia after her husband has tried to do so and failed. She playfully examines the history between the two friends. The details Polixenes gives, while extremely vague, do not absolutely rule out a previous acquaintance with Hermione, and as such, his testimony supports an inference of access. The strongest evidence, however, in support of a potential for a previous relationship between Hermione and Polixenes is found not in details or inferences but in her puns and tone. While the definition of "is" has been of great importance in another charge of sexual misadventure, here the definition of "we," as used by Hermione, bears much scrutiny.

Responding to her questioning, Polixenes tells Hermione of his and Leontes' youth: "We were as twinned lambs" (1.2.85), who "knew not / The doctrine of ill-doing, nor dreamed / That any did" (87-89). She replies in the royal "we" with a sexual pun, "By this we gather / You have tripped since" (95-96).⁴¹ Polixenes returns to their youth, a time when both men were together:

Temptations have since then been born to 's, for

In this unfledged days was my wife a girl;
 Your precious self had then not crossed the eyes
 Of my young playfellow. (98-101)

Reading this passage in the prosecutorial light of an assumed prior acquaintance with Hermione, he may be pointing out a difference in age between the two women. His wife was a girl, but Hermione might have been older and perhaps pubescent when they met. Conversely, and again read in the light of an assumed previous acquaintance, Polixenes' statement could mean that her "precious self" had crossed his eyes before those of Leontes. Both interpretations require a large leap of logic. Neither one supports more than a shadow of an association to establish a prior acquaintance between these two.

At this point in the play, Hermione is just over eight months pregnant with Perdita. That pregnancy adds a visual layer of intimacy as she provocatively responds to Polixenes's claim of not having sinned until this point:

Of this make no conclusion, lest you say
 Your queen and I are devils. Yet go on.
 Th' offenses we have made you do we'll answer,
 If you first sinned with us, and that with us
 You did continue fault, and that you slipped not
 With any but with us. (103-08)

Hermione makes clear that the "offenses" at issue are sexual offenses -- "slipped" sounds like "slept," as well as suggesting a slip into sin, or sexual intercourse,⁴² echoing her previous use of "tripped." Leontes also uses the word in this sense, telling Camillo: "My wife is slippery" (335). Accepting the referent of "us" as "your queen and I," this

statement comes astonishingly close to an arch confession by Hermione that "you first sinned [by having sex]" with "us [your queen and I]" and that with "us [your queen and I]", you did continue fault, And that you "slipped [slept, sexually sinned] not with any but us [your queen and I]". Reading Hermione's "we" to be the royal "we" as in the "tripped" statement yields the same result. Only the referent of "you," whether plural in reference to both kings or singular in reference to Polixenes alone, is unclear.

Interpretative ambiguity rises to a new level here. The paucity of circumstantial evidence of Hermione's and Polixenes' acquaintance before his visit to Sicilia is trumped by her possible declaration of their previous relationship in her questioning of him. Faced with a weak circumstantial evidence case, an advocate pounces upon such a speech as a clear admission against interest highly probative of guilt. The unreliability of even confessional evidence is implicated here. Nothing is what it seems.

Leontes does not immediately react to this interchange, and it is unclear how much of it he even hears. Instead, he adds his testimony to the mix: "Is he [Polixenes] won yet?" (109), an unintentionally ironic comment using the language of successful courtship. The King of Sicilia praises his wife for persuading his friend to stay, though "At my request he would not" (111). He stresses that she has only once spoken "to a better purpose" (113). Hermione now examines her husband, asking, "What, have I twice said well? When was 't before?" (116), and, as with Polixenes, uses strongly suggestive sexual language: "Our praises are our wages. You may ride 's / With one soft kiss a thousand furlongs ere / With spur we heat an acre" (121-23). The "our," "we," and elision of "us" again primarily refer to Hermione, although perhaps including women in general, and continues a darker reading of the previous passages. She asks Leontes

again, "But once before I spoke to th' purpose? When? / Nay, let me have 't; I long" (127-28). Does she long for an answer to her question? While that is a natural reading, the tone of the passage also renders an erotic longing an option. The sexual references continue, transforming the meaning of her purposes past and present to conjectural admissions against her own interest.

Leontes continues piling evidence of inference upon inference for a previous association between Polixenes and Hermione. With growing unease, he likens the "purpose" of her present persuasion of Polixenes to their courting:

Why, that was when

Three crabbed months had soured themselves to death

Ere I could make thee open thy white hand

And clap thysel' my love; then didst thou utter

"I am yours forever." (129-34)

What an odd account by Leontes of his courtship and handfasting with Hermione.⁴³ Such profound bitterness might stem from competition with other suitors, perhaps including Polixenes. Hermione's "utterances" are statements of sexual exclusivity and access. If Polixenes were a prior suitor, Leontes now makes an evidentiary connection between her marriage to himself and her relationship with his friend/rival. And, lest there be any question as to the parallel to be drawn, Hermione clasps her hand (which her husband describes as "hot") with that of Polixenes in a stunning visual piece of demonstrative evidence (137-38). The couple's "paddling palms," "pinching fingers" (146), and her "virginalling / Upon his palm" (159-60,) tip the King's suspicions into proof of guilt.

In a play concerned with the movement of time, what can be made of the explicit three-months marker for Leontes' courtship? Rationally, nothing. Yet, at this point, the only other reference to an explicit period of time -- "nine changes of the wat'ry star" -- makes possible Perdita's bastardy, especially since she is also "something before her time delivered" (2.2.31). Mamillius' paternity seems implicated here, for the father first asks "Art thou my boy?" (1.2.151) soon after this second three-months timeframe is offered. Leontes stops well short of denying his son's legitimacy based on such weak and inconclusive evidence. However, the powerful aura of guilt arising from all these sketchy assumptions constitutes the very essence of circumstantial evidence drawn together in a seemingly rational and compelling, although ultimately erroneous, pattern. Advocates do well to remind juries, and themselves, of the pitfalls of unsupported suspicion.

Camillo's departure from Sicilia with Polixenes presents an example of demonstrative, instead of testimonial, evidence construed to be an admission against interest. A suspect's flight after an accusation of wrongdoing may be considered probative of guilt, even though the circumstances may not rise to the level of a confession.⁴⁴ Because of its ambiguity, evidence of flight alone cannot sustain a conviction unless the situation is such as to preclude any reasonable hypothesis except that of guilt. Here the evidence clearly does not meet this test. In fact, Camillo leaves Sicilia to avoid execution for failing to poison Polixenes as ordered by Leontes. Just as the stronger circumstantial evidence of Perdita's bastardy throws into relief the weakness of the case against Mamillius, here the strength of an actual plot by Leontes to have Camillo murder Polixenes contrasts with the weakness of the case against Polixenes,

Camillo, and Hermione for conspiracy to murder Leontes. Moreover, the irony of a proceeding conducted by a man guilty of criminal conspiracy who projects his own misdeeds (never confessed, never charged) upon others suffuses the action here.

Strikingly, the indictment read at the public session explicitly recognizes the problematic nature of the charge of conspiracy:

Hermione . . . thou are here accused and arraigned
of high treason, in . . . conspiring with Camillo to take
away the life of our sovereign lord the King, thy royal
husband; the pretense whereof being by circumstances
partly laid open, thou, Hermione, contrary to the faith
and allegiance of a true subject, didst counsel and
aid them, for their better safety, to fly away by
night. (3.2.13-22)

The prosecutor is required to prove the charges as set forth in the indictment. Leontes fails to establish the "circumstances partly laid open" which support an inference of a conspiracy among Hermione, Polixenes, and Camillo, based solely on the evidence of Camillo's flight. The case should be dismissed.

Leontes' inability to read the evidence rightly propels him into the conflated role of prosecutor, witness, judge, and executioner. Having tried Hermione and Polixenes in his mind and found them guilty of adultery, he suborns Camillo to murder Polixenes in a classic conspiracy. Conspiracy consists of an agreement to commit a crime and is, by its very nature, especially susceptible of proof by circumstantial evidence.⁴⁵ The evidence supporting this uncharged conspiracy between Leontes and Camillo to kill Polixenes is

simple, clear, and devastating -- in one sense no longer circumstantial, because the audience directly witnesses the formation of the plot. The King lays the groundwork with his courtier by accusing Hermione of adultery with Polixenes and specifying the objective of the conspiracy:

Ay, and thou,
 His cupbearer -- whom I from meaner form
 Have benched and reared to worship, who mayst see
 Plainly as heaven sees earth and earth sees heaven
 How I am galled -- mightst bespice a cup
 To give mine enemy a lasting wink,
 Which draft to me were cordial. (1.2.379-85)

Camillo acknowledges his opportunity, "Sir, my lord, / I could do this, and that with no rash potion, / But with a ling'ring dram that should not work / Maliciously like poison" (386-89). Camillo has one caveat: he will join the conspiracy and poison Polixenes,

Provided that, when he's removed, your Highness
 Will take again your queen as yours at first,
 Even for your son's sake, and thereby for sealing
 The injury of tongues in courts and kingdoms
 Known and allied to yours. (404-08)

Leontes agrees: "Thou dost advise me / Even so as I mine own course have set down. / I'll give no blemish to her honor, none" (409-11). The punishable conspiratorial agreement is made when Camillo responds "I'll do 't, my lord" (421).⁴⁶ The fact that he never intends to carry out the murder and immediately recants once Leontes leaves does not

change the formation of the agreement because a withdrawal from a conspiracy is effective only if communicated to the others involved.⁴⁷ Here, the evidence of Camillo's flight is a positive sign that he has not intended to murder Polixenes, a fact which can be read or misread only by Leontes to whom the withdrawal has not been communicated. The only element of a conspiracy lacking here is an overt act in furtherance of the conspiracy. The text does not reflect that Camillo or Leontes affirmatively prepares the cup for Polixenes or procures the poison, or takes any other step to effectuate their criminal agreement.

The much weaker case of the charge of conspiracy to murder Leontes involving Hermione, Polixenes, and Camillo is supported only by strained inferences the King draws from Camillo's and Polixenes' actions in leaving Sicilia. Told of his former friend's and his counselor's secret departure, Leontes assumes their guilt and readily identifies Camillo's co-conspirators. "Camillo was [Polixenes'] help in this, his pander / There is a plot against my life, my crown. / All's true that is mistrusted." (2.1.57-59). He then broadens the net to include Hermione: "She's a traitor, and Camillo is / A federary with her, and one who knows" (110-11) of her adultery with Polixenes. He concludes, making clear the nature of the evidence on which he relies:

Camillo's flight,

Added to their familiarity --

Which was as gross as ever touched conjecture,

That lacked sight only, naught for approbation

But only seeing, all other circumstances

Made up to th' deed -- doth push on this

proceeding. (211-17)

Yet again, Leontes misuses rational legal rules of evidentiary evaluation to support his inferential arguments, seeing all of the circumstantial evidence in the case "made up to th' deed" (216). This is dangerous ground for a prosecutor, as the King acknowledges. "If I mistake / In those foundations which I build upon, / The center is not big enough to bear / A schoolboy's top" (124-27). The center here, Hermione's and Polixenes' familiarity and Camillo's flight with Polixenes, does not hold for a charge of conspiracy. Leontes' case collapses, taking the world of Sicilia with it.

c. Demonstrative Evidence of Physical Appearance

In a play where a living woman cannot be distinguished from a statue, the relationship between a person's physical appearance and his or her likeness, as well as the likeness of one person to another, establishes an important motif. This theme is particularly suited to a legal argument that an individual's physical features offer a form of demonstrative evidence. Demonstrative evidence is the thing itself, a tangible exhibit at trial, as opposed to testimony.⁴⁸ Effective use of such demonstrative evidence in the courtroom is an important tool of trial advocacy, carrying with it dramatic import. In *The Winter's Tale*, besides the evidence previously discussed, the royal lineage of the heirs to the thrones of Sicilia and Bohemia is established by physical resemblance. When Leontes first sees Florizel, he says:

Your mother was most true to wedlock, prince,
 For she did print your royal father off,
 Conceiving you. Were I but twenty-one,
 Your father's image is so hit in you,

His very air, that I should call you brother,
 As I did him, and speak of something wildly
 By us performed before. (5.1.157-63)

A child's physical resemblance to his father here is espoused by Leontes as proof of paternity. Is this his appraisal of such evidence throughout? Or has he come full circle in act 5 to return to his evaluative visual powers operative at the start of the play? These are provocative questions in light of Leontes' previous responses to the same physical resemblance argument with his own children, Mamillius and Perdita.

Paulina eloquently argues Perdita's paternity from appearances. The baby literally becomes strategic demonstrative evidence. Taking the infant from Hermione's prison, she formulates her defense strategy:

We do not know
 How he may soften at the sight o' th' child.
 The silence often of pure innocence
 Persuades when speaking fails. (2.2.48-51)

Not softened, Leontes orders Paulina forced out of his chamber. When she lays Perdita at his feet before she leaves, he orders her to pick the baby up:

This brat is none of mine.
 It is the issue of Polixenes.
 Hence with it, and together with the dam
 Commit them to the fire. (2.3.119-22)

Paulina powerfully reists him, using the same metaphor Leontes later repeats in his greeting of Florizel:

It is yours.

And, might we lay th' old proverb to your charge,
 So like you 'tis the worse. -- Behold, my lords,
 Although the print be little, the whole matter
 And copy of the father -- eye, nose, lip.
 The trick of 's frown, his forehead, nay, the valley,
 The pretty dimples of his chin and cheek, his smiles,
 The very mold and frame of hand, nail, finger.
 And thou, good goddess Nature, which hast made it
 So like to him that got it, if thou hast
 The ordering of the mind too, 'mongst all colors,
 No yellow in 't, lest she suspect, as he does,
 Her children not her husband's. (123-36)

Strong words, and a vivid argument from demonstrative evidence. Leontes' continued rejection of Perdita and his consignment of her to abandonment reflect the depth of his passionate blindness on many levels, including a rejection of an evidentiary standard he eventually finds determinative with Florizel.

The seeds of Leontes' rejection of Perdita, and consequently of demonstrative evidence of paternity, arise in his questioning of Mamillius' paternity after the brief mock handfasting ceremony between Hermione and Polixenes. He asks his son, "What, has smutched thy / nose? / They say it is a copy out of mine" (1.2.154-56). The same image of printing, or copying, used by Paulina regarding Perdita and by Leontes regarding Florizel comes into play. The jealous King begins to question this evidence,

Yet they say we are
 Almost as like as eggs. Women say so,
 That will say anything. But were they false
 As o'erdyed blacks, as wind, as waters, false
 As dice are wished by one that fixes,
 No bourn 'twixt his and mine, yet were it true
 To say this boy is like me. (165-71)

Later he says, "Looking on the lines / Of my boy's face, methoughts I did recoil / Twenty-three years, and saw myself unbreeched" (194-96). He admits to Hermione, "Though he [Mamillius] does bear some signs of me, Yet you / Have too much blood in him" (2.1.71-72).

Though his vision clouds, Leontes stops short of not recognizing Mamillius: "Dost think I am so muddy, so unsettled" (1.2.393), as to "give scandal to the blood o' th' Prince, my son, / Who I do think is mine and love as mine" (398-99). This statement is a comment on the conclusiveness of the evidence of paternity from appearances, as well as Leontes' affection for his child. It also reflects the father's pragmatic need for an heir to preserve the political status quo and establish his lineage. As Mamillius exits from the stage and the play, he and his father poignantly speak,

LEONTES. How now, boy?

MAMILLIUS. I am like you, they say.

LEONTES. Why, that's some comfort. –

.....

Go play, Mamillius. Thou'rt an honest man. (256-59)

In these moments, Leontes reacts to the strength of demonstrative evidence. Apart from the declaration of the oracle, it is arguably the most conclusive evidence in the play, a visual DNA test. His rejection of nature reflected in the children's appearances requires divine intervention. However, the degree to which he accepts and relies on this evidence reflects the trajectory of his story and the play. It is a full circle: beginning with Leontes' questioning of Mamillius' resemblance, his blind rejection of Perdita's likeness, and then back to acceptance and recognition of Florizel's paternal stamp.

d. Character Evidence

Character evidence is the weakest form of circumstantial evidence. It is generally offered on the issue of a defendant's reputation for truthfulness if the defendant testifies in his or her own behalf. Testimony of prior good acts, along with as known repute, is admissible. This kind of evidence is offered by the defense to portray the defendant in a sympathetic light, as well as to bolster his or her truthfulness in proclaiming innocence.⁴⁹ In *The Winter's Tale*, character evidence is argued in support of Hermione's innocence throughout the private trials and in the public session. The need for divine intervention by the oracle underscores the issues inherent in relying solely on such testimony.

As Leontes, the skilled prosecutor, puts it in response to Camillo's description of Hermione as the "good queen," "'Good' should be pertinent, / But so it is, it is not" (1.2.275-76). Confronted with Leontes' accusations, Camillo is the first witness to testify regarding Hermione's virtue: "I cannot / Believe this crack to be in my dread mistress, / So sovereignly being honorable" (389-91). The double entendre of "crack" neatly covers

both purposes of character evidence: bolstering Hermione's truthfulness and adducing past virtuous behavior as a means of denying the charge.⁵⁰ Leontes, unpersuaded, and now aware of a courtier's response to his accusations, prepares his arguments to counter Hermione's supporting character evidence.

The King preemptively attacks his lords' opinion of Hermione's character while charging his wife in the second private forum, her chamber. His speech presents a fine example of a prosecutor's opening argument in a case where he anticipates a defense of character:

You, my lords,

Look on her, mark her well. Be but about

To say "She is a goodly lady," and

The justice of your hearts will theretofore add

"Tis pity she's not honest, honorable."

Praise her but for this her without-door form,

Which on my faith deserves high speech, and straight

The shrug, the "hum," or "ha," these petty brands

That calumny doth use -- O, I am out,

That mercy does, for calumny will sear

Virtue itself -- these shrugs, these "hum"s and "ha"s,

When you have said she's goodly, come between

Ere you can say she's honest. But be 't known,

From him that has most cause to grieve it should be,

She's an adult'ress. (2.1.82-97)

As noted before, Leontes' language attacks the nobler tone of Hermione's expected character evidence, insinuating a commonness and vulgarity in keeping with the charge. She counters, "Beseech you all, my lords, / With thoughts so qualified as your charities / Shall best instruct you, measure me" (136-38). They do so; after Hermione is taken to prison, their spokesperson affirms "that the Queen is spotless / I' th' eyes of heaven, and to you -- I mean / In this which you accuse her" (158-60). Antigonus and the other lords continue, at their peril, to plead for Hermione's virtue.

Paulina's defense of Perdita, as well as Hermione, rests on evidence of the mother's character. The advocate's theme is consistent, beginning with her retort to the jailer, "Here's ado, to lock up honesty and honor" (2.2.14). Echoing Camillo, she tells Leontes she has come "from your good queen," (2.3.70), to which he responds "Good queen?" (71). Paulina emphatically declares, "Good queen, my lord, good queen, I say 'good queen' (72-73), and again, "The good queen, / For she is good, has brought you forth a / daughter" (79-81). She hammers the only evidence available, the virtuous character of Hermione. Her repeated broad theme of spotless moral reputation lays the foundation for the Queen's own detailed testimony of innocence and chaste behavior. Ironically, Leontes' previous resentful testimony of "three crabbed months" (1.2.130) of wooing provides further circumstantial evidence of her chastity. She is not a woman lightly won.

In her own defense, Hermione begins by shrewdly acknowledging the general skepticism with which a defendant's declaration of virtue is received:

Since what I am to say must be but that
Which contradicts my accusation, and

The testimony on my part no other
 But what comes from myself, it shall scarce boot me
 To say "Not guilty." Mine integrity,
 Being counted falsehood, shall, as I express it,
 Be it so received. (3.2.23-29)

In a highly effective, although risky strategy, she uses a hostile witness, Leontes, to make her point:

You, my lord, best know,
 Whom least will seem to do so, my past life
 Hath been as continent, as chaste, as true,
 As I am now unhappy. (33-36)

Again, "I appeal / To your own conscience, sir, before Polixenes / Came to your court, how I was in your grace, / How merited to be so" (46-49). She eloquently responds to each charge against her. Her truthfulness is enhanced by admitting to valid portions of the charge, while denying the rest. Leontes' sarcastic rebuttal is unconvincing:

Your actions are my dreams.
 You had a bastard by Polixenes,
 And I but dreamed it. As you were past all shame --
 Those of your fact are so -- so past all truth,
 Which to deny concerns more than avails . . . (88-92)

Hermione's defense makes the best of the arguments available to her. As an advocate, she illustrates the deft use of notoriously weak testimony, that of trustworthy character. Although Leontes' view of the circumstantial evidence may seem stronger

than her case, the concept of a burden of proof, here supplied by the oracle, vindicates Hermione.

III. The Burden of Proof, Divine Intervention, and the Verdict

Advocates in *The Winter's Tale* recognize and argue that the edifice built by appearances, temporal associations, wordplay, conspiratorial agreements construed from flight, and inference rests on a shaky foundation. As noted before, Leontes recognizes the consequences of error in building such a circumstantial case:

If I mistake

In those foundations which I build upon,

The center is not big enough to bear

A schoolboy's top. (2.1.123-26)

No amount of prosecutorial argument from circumstances (sometimes termed smoke and mirrors) can hide the absence of direct evidence in the case against Hermione. In contrast with his acceptance of such proof of Hermione's guilt, Leontes himself requires direct, visual testimony when he initially orders Antigonus to cast Perdita into the fire: "Take it hence, / And see it instantly consumed with fire" (2.3.168-69), and "Within this hour bring me word 'tis done, / And by good testimony, or I'll seize thy life" (171-72).

It is a rare trial where the defense does not argue the burden of proof as applied to the evidence, and *The Winter's Tale* is no exception. Leontes' case rests on what Paulina tartly terms his own "weak-hinged fancy" (2.3.152). A pugnacious advocate, she points out that if one "once remove / The root of his opinion, which is rotten / As ever oak or stone was sound" (113-15), the case collapses. She is right. Beginning with a conclusion of guilt, Leontes weaves "The fabric of his folly, whose foundation / Is piled upon his

faith" (1.2.516-17). In legal terms, there is simply an insufficient evidentiary foundation for Leontes' claims. As Paulina points out to the jury of lords in the second private forum, the prosecution has failed to meet its burden of proof by excluding every reasonable hypothesis for the evidence except that of guilt. The burden of proof mandates that the prosecution's evidence meet a certain standard before it may be used for a conviction. When it does not, the defendant should be found not guilty.⁵¹ The legal engine for such a decision lies in defense argument to the jury and a request for an instruction by the judge to the jury on the standard of proof for circumstantial evidence. Having been properly instructed, Hermione's jury should acquit because Leontes has failed to meet his burden of proof of the charges.

In the Queen's trial, the oracle at Delphi functions as the jury. While the peers are present and may perform this role in the private forums, Leontes' lapses into tyranny abolish their freedom even to influence, much less determine, the outcome. The essence of tyranny consists of disregard of the rule of law. Ironically, the only charge in the public session which can be and is proven by the evidence reveals that Leontes is, indeed, a tyrant. He seeks to refute this accusation by inquiring of the oracle at the end of act 1 and then by denying it in his opening argument at the public session. While the lords ratify the oracle's decision, they do not initiate it. At least in this forum, unlike the private venues, they appear solely in an advisory capacity, making it doubtful whether they can gainsay Leontes' decisions.

Faced with such a court, Hermione begins her closing arguments with a reference to another trier of fact:

If powers divine

Behold our human actions, as they do,
 I doubt not then but innocence shall make
 False accusation blush and tyranny
 Tremble at patience. (3.2.29-33)

This line of reasoning can be cast as a jury nullification defense, an appeal where defense counsel in closing explains that a verdict of acquittal cannot be set aside, and asks the jury to disregard the law by voting their conscience as the community in favor of the defendant. Hermione concludes:

If I shall be condemned
 Upon surmises, all proofs sleeping else
 But what your jealousies awake, I tell you
 'Tis rigor, and not law. Your Honors all,
 I do refer me to the oracle.
 Apollo be my judge. (118-23)

It is noteworthy that both the burden of proof and an appeal to a higher power end the trial. Principles of advocacy place defense attorneys' strongest arguments at the conclusion of their closing. Counsel will often begin by telling the jury it is their last chance to address them before the prosecution's rebuttal and the start of deliberations, then end with a final strong note. The technical lawyering in the submission of Hermione's case to the jury of the oracle is fine stuff indeed.

The oracle duly renders the verdict:

Hermione is chaste, Polixenes blameless, Camillo
 a true subject, Leontes a jealous tyrant, his innocent

babe truly begotten; and the King shall live without
 an heir if that which is lost be not found. (142-46)

Leontes is understandably stunned and first rejects the pronouncement as false. Yet told of Mamillius' death, Leontes submits. "Apollo's angry, and the heavens themselves / Do strike at my injustice" (160-61). Hermione collapses, is borne away, and is pronounced dead by Paulina. The King realizes the falsity of his case and confesses to the prime pitfall for prosecutors: "I have too much believed mine own suspicion" (167). Ironically, while the oracular verdict is just, the immediate effects of the prosecution and defense in arriving at the verdict are catastrophic.

The verdict and its rejection by Leontes result in tragedy. Because of "Thy tyranny / Together working with thy jealousies" (198-99), Paulina condemns him to despair, unalleviated by a lifetime of penance, "still winter, / in storm perpetual, could not move the gods / To look that way thou wert" (233-35). Spring does come, but the legal proceedings seem to conclude in a decidedly cold justice. Or do they? By the terms of the oracle and the remaining action of the play, Perdita's eventual return to Sicilia with Florizel, Polixenes, and Camillo constitutes the two comic and redemptive acts of the play. The seeds of that redemption lie in the lords' refusal to bow (at Paulina's urging) to Leontes in the second private forum; on bended knees, they persuade him not to cast Perdita into the fire (2.3.184-90). Not cold proceedings, but a brave and wonderful image sums up the legal analysis of the play: an advocate and lords pleading for and kneeling between innocence and the wrath of a blood-thirsty tyrant. The seeds sown in the cold winter legal tragedy blossom into a spring of poetic redemption and pastoral wonder.

Conclusion

This paper has looked at Shakespeare's text in *The Winter's Tale* as a case study in trial advocacy. The text has been as closely read as the facts of a Socratic hypothetical propounded to a law student by a criminal law professor. The student is given the forum and the audience -- whether private or public, jury or non-jury. Some information about the jurors is included. The listener then must consider the main points, among others, of these questions: "How would you prosecute the Queen of Sicilia and her infant daughter based on the purely circumstantial evidence given in the transcript? How would you defend her? Which evidence proves persuasive and probative? Which does not? Is the King of Sicilia guilty of tyranny? Of conspiracy? And what of the case against Camillo and the King of Bohemia?" The answers require strategic decisions. The student will need to develop a theme for the case, a persuasive narration of the facts, in order to be effective. She will have to consider how to handle witnesses, how to treat the evidence, and how to preserve an appellate record.

The results will not be *The Winter's Tale*. Shakespeare might, however, recognize this pedagogy as it was exercised in the Inns of Court.⁵² And he might also confess to using similar methodology in his drama.⁵³ The law, as well as literary criticism, lets out an amazed whistle when confronted with a literary text that withstands this scrutiny.

Notes

1. Phillips 84-88 estimates that two-thirds of the canon have one or more trial scenes. His estimate, however, loosely defines "trial scenes," including pantomime such as Falstaff's trial in *The Merry Wives of Windsor* and Richard's off-stage trial by battle in *Richard II*.

2. While mistakenly limiting the trial in *The Winter's Tale* to the public prosecution of Hermione, Kornstein 976-77 is correct in arguing that by comparison to the more famous trial in *The Merchant of Venice*, "it is at least as fascinating, and in some ways more so, especially from a legal point of view," concluding that it is "one of the greatest as well as one of the least appreciated courtroom scenes in all literature."

3. Crystal 498 defines "whistle, go" as "carry on to no purpose, waste." Compare this definition with note 4.

4. The online Urban Dictionary defines "pound sand" as follows: "The origin of the expression 'go pound sand' is from a longer expression – “not to know (have enough sense to) pound sand down a rathole.’ Filling rat holes with sand is menial work, and telling someone to pound sand down a hole is like telling them to go fly a kite. The expression dates to at least 1912 and is common in the midwestern United States."

5. For examples, see Bierman 385.

6. What little is known of Shakespeare's life includes the fact that he was familiar with the law, both as a litigant and a witness. Lawyers frequented the theaters, and some of Shakespeare's plays were performed at the Inns of Court. None of these encounters, however, account for the innate understanding of advocacy and deft trial touches of the courtroom scenes in *The Winter's Tale*. While some might argue that Shakespeare must

have been an aristocrat based on his plays, a stronger (but equally specious argument) can be made that Shakespeare was a lawyer.

Although not adopting this argument, Raffield and Wyatt 4-19 is an excellent source on this topic, exploring the strong affinities between drama and the law during Shakespeare's career. "Like the law courts, Shakespeare's theater was a place of trial and testing, and law, like theater, relied on narratives that posited and analyzed conceptions of motive, character, intention and origin." The law "embraced the rhetoric and oratory of the stage and sought to convince judge and jury by using the arts of persuasion."(1). With trials, "the public can on occasion witness inquests or trials as virtual 'morality plays'" (4-5). And, especially pertinent to the present argument, "a recurring Shakespearean concern" of the "instability of evidence" (13) is placed within the context of the law.

7. *Verdict* comes from the Latin term *veredictum*, literally "to speak the truth." Lawyers' closings have several stock arguments, one of which is to ask the jury to speak the truth – of course, their client's truth. And, whether the lawyers make this argument or not, as in *Lamb v. State*, 2010 WL 2546424 (Ala. Cr. App. June 25, 2010) judges often instruct juries on the meaning of *verdict*.

8. Only a peer, a landed aristocrat, could sit on a jury for a trial of another peer. See *Eyewitness to History*, a fascinating synopsis of contemporary accounts of an Elizabethan trial for high treason.

9. An argument can also be made that the first private forum, devoted to the prosecution, is akin to a grand jury proceeding. Grand jury proceedings are secret, with

only the prosecutor, witnesses, and jury present. This degree of intimacy between the advocate for the government and the jury can result in indictments based on flimsy evidence. The relationship is summed up by the legal adage that a prosecutor can get a grand jury to “indict a ham sandwich.” *United States v. Hayes*, 376 F.Supp. 2d 736, 741 & n.8 (E.D. Mich. 2005).

10. Langbein 14-16 explains that in the sixteenth and seventeenth centuries in felony trials, other than treason, neither the prosecution nor the defendant was routinely represented by counsel. As Langbein and his sources recognize, however, exceptions to this rule were on the rise during Shakespeare’s time. And, to some degree, the procedure of *The Winter’s Tale* reflects this change: while Leontes represents himself as the prosecutor, Paulina steps forward to aid Hermione and Perdita in the private sessions, and Hermione represents herself in the public sessions.

11. *Black’s* 847 defines *ipse dixit* as “[Latin ‘he himself said it’] something asserted but not proved.”

12. In *Brady v. Maryland*, 373 U.S. 83 (1963), the Court ruled that, with the noteworthy exception of exculpatory evidence, a defendant has no right to discovery in a criminal proceeding.

13. Defense counsel’s arguments for conviction on lesser-included offenses, sentencing leniency, place of incarceration, and similar non-liability relief may be the most effective representation possible of his or her client.

14. Despite the gender criticism of this play, no note has been made of this critical legal factor. Garber 827-51 is silent on the subject. Yet any lawyer representing

a female defendant would raise a challenge to an all-male jury. Under *Batson v. Kentucky*, 476 U.S. 79 (1986) and its progeny, *J.E.B. v. Alabama*, 511 U.S. 127, 129 (1994), neither race nor gender may be used as a basis for a prosecution's jury selection.

15. The name *Paulina* is the feminine form of Paul, an allusion to St. Paul and his redemptive message of grace over law. Girard 193-219 makes this perceptive point.

16. In Jordan and Cunningham 109-27, Thomas C. Bilello considers an interesting view of Portia, faulting her for being a fraud for posing as a man, but primarily for being a non-lawyer: "the gowns efface her gender, but, more important, her usurpation of the mechanisms of the court." *Id.* at 124. Practicing law without a license is, in this view, Portia's sin.

17. According to the OED, *advocate* was first used as early as 1384 in the technical legal sense of "a person employed to plead a cause on behalf of another in a court of law." The more general sense of "a person who pleads for or speaks on behalf of another" was recognized later, including Shakespeare's usage in that sense in 1597 in *Richard III*, 1.3.87, "an earnest advocate to pleade for him."

18. *Cuyler v. Sullivan*, 446 U.S. 335 (1980) is the seminal case prohibiting criminal defense counsel from representing multiple clients with conflicting defenses.

19. A guardian *ad litem* is "a special guardian appointed by the court to prosecute, or defend, in behalf of an infant" in a legal proceeding. *Burkett v. State*, 439 So. 2d 737, 746 (Ala. Cr. App. 1983).

20. The word *good* is repeated twelve times in reference to Hermione from act 1 to act 3.

21. *Black's* 116 defines an arraignment as "the initial step in a criminal prosecution whereby the defendant is brought before the court to hear the charges and to enter a plea."

22. Typically, an arrest warrant will be a defendant's first notice of charges against him or her. A warrant requires attestation by the complaining witness, which may be the State, that there is probable cause to believe a crime has been committed and that the defendant has committed it. The suspect is then taken into custody to answer the charges. A preliminary hearing will ensue, and then a grand jury proceeding. In a common law jurisdiction, however, the warrant procedure is not essential, and a defendant may be taken into custody once the grand jury has returned an indictment. *Ex Parte Walker*, 972 So. 2d 77 (Ala. 2007), provides an example of this procedure.

23. See Langbein 13-16 for the elements of such a proceeding.

24. In the last lines of act 2, Leontes is told that the messengers have arrived at the coast of Sicilia. Act 3 opens with Cleomenes and Dion discussing the events of their travel to the oracle, their sealed message, and their hope that it will clear the Queen. They request fresh horses. The text does not tell us when they actually arrive at the trial, but their presence is not noted until it is almost concluded and Hermione appeals to the oracle (3.2.126). A plausible inference is that they arrived before the trial began and are only now being called by Hermione to give the oracle's testimony.

25. Jordan and Cunningham 4-5 quote Sir Thomas Smith in making this point:

This is to be understood, although it will seem strange to all nations that do use the civil law of the Roman emperors, that

for all life and death there is nothing put in writing but the indictment only. All the rest is done openly in the presence of the judges, the justices, the quest, the prisoner, and so many as will or can come so near as to hear it, and all depositions and witnesses given aloud, that all men may hear from the mouth of the depositors and witnesses what is said.

26. *Black's* 1119, "*Officers of the Court*," while including attorneys, is and was a broader term and encompasses bailiffs and other court personnel.

27. The Schauers analyze this charge, pointing out that adultery is for a queen, unlike a subject, treasonous and a crime in addition to that of fornication. The possible taint on the royal succession is grounds alone for the ultimate sentence imposed for treason -- execution. An alternate grounds for execution, conspiracy to commit murder, is not necessary in the indictment against Hermione.

28. The charge of criminal conspiracy has been said to be the "darling of the modern prosecutor's nursery," *Harrison v. United States*, 7 F.2d 259, 253 (2d Cir. 1925).

29. *Mauet* 75 recognizes this axiom.

30. *Doyle v. Ohio*, 426 U.S. 610 (1976), is the leading case on this issue.

31. Federal Rule of Evidence 404 codifies the common law of character evidence. Thus, if a defendant does take the stand and testify:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It

may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. ”

Hermione's defense relies on good character evidence, which to be proven must come from her testimony before other evidence on this issue can be admitted.

32. If read as an appeal to reject the law, this argument can be classified as a jury nullification argument. Such an argument recognizes that jurors have the *de facto* power to acquit without regard to the law or facts because the State cannot appeal a verdict of innocence. In this type of closing, defense counsel urges the jury to disregard the law and the facts -- to vote their conscience. Most common law jurisdictions permit such an argument, although not requiring the court to instruct the jury on their power of nullification if the argument is not made. *Gibson v. State*, 2011 WL 680204 (Ga. 2011).

33. Mauet 164, 170-218 discusses the general rules for establishing the hearsay exception for an unavailable witness; authentication of documents; and establishment of the chain of custody for a document or object.

34. Kornstein makes several interesting points. He wittily describes the next step after Cleomenes' and Dion's authentication and chain of custody evidence in the text, "like a celebrity at the Academy Awards ceremony, an officer then cuts through the seals -- and the suspense -- by announcing Apollo's judgment" (180). He also makes an amusing comparison between the Delphic oracle and the United States Supreme Court, "referring to the Court's exalted status and occasional lack of perception" as our modern symbol of "wise but ambiguous decision making in law" (181). Finally, Kornstein draws

an interesting parallel between the role of the Delphic oracle in *The Winter's Tale* and *Oedipus Rex*, noting that “Laius has his baby son left exposed on a lonely mountain where he is sure to die, just as Leontes does with Hermione's baby daughter”(179).

Unlike *Oedipus Rex*, however, Perdita’s survival ushers in the redemptive, not the tragic, portion of Shakespeare’s play.

35. *Woods v. State*, 789 So. 2d 896 (Ala.Cr.App. 1999) is illustrative.

36. Jordan and Cunningham 3-4:

The interpretation of evidence in criminal cases was the task of a jury, and Shakespeare's representation of law throughout the plays is informed by this popular agency, although it may not be directly dramatized. Evidence was routinely open to question, and it was understood that even well-intentioned witnesses could be mistaken about the act on which they reported. At trial, the the prosecution's task was to limit the meanings of evidence in order to fit it to a narrative of guilt. The defendant attempted, in in turn, to offer alternative interpretations in order to demonstrate the weakness the evidence.

This is certainly an apt description of the trials in *The Winter’s Tale*.

37. In act 1 of *King John*, Shakespeare sets out the Elizabethan legal standards for proof of royal bastardy. See Mowat and Werstine 212.

38. 41 *American Jurisprudence 2d*. § 45 sets out the legal standards used in the absence of DNA evidence.

39. With respect to other acts of wrongdoing, the court in *Winter Intern. Corp. v. Common Sense, Inc.*, 863 So. 2d 1088 (Ala. 2003) stated the rule relating to the introduction of pattern or practice evidence: “This Court has long held that evidence of past unrelated acts, so-called pattern-or-practice evidence, may be admissible in certain circumstances when fraud is alleged.” Since the probative value of the evidence has to outweigh its prejudicial impact, it is questionable whether Leontes would be permitted to prove timing for Perdita's birth, also a shaky assumption, as a pattern or practice for any other point.

40. *Radford v. State*, 726 So. 2d 756 (Ala.Cr.App. 1998), sets out the general rule with co-conspirator statements.

41. Mowat and Werstine note 14: "tripped: i.e., sinned ('trip' could also mean, specifically, 'copulate.')."’

42. Crystal 405 defines "slippery" as "faithless, unchaste, difficult to hold on to," citing *The Winter's Tale* 1.2.335.

43. Cook 151-184 describes handfasting rituals. The Sokols 17 define handfasting as "the joining of hands accompanied by mutual agreement to be married.”

44. *Belisle v. State*, 11 So. 3d 256 (Ala.Cr.App. 2007), discusses this rule.

45. The elements of criminal conspiracy are: (1) an agreement to commit a crime, (2) defendant's knowing and voluntary participation in the conspiracy, and (3) performance by at least one conspirator of an overt act in furtherance of the conspiracy. The government may show conspiracy “by circumstantial evidence and the extent of participation in the

conspiracy or extent of knowledge of details . . . does not matter if the proof shows the defendant knew the essential objective of the conspiracy.”

United States v. Reyes, 2010 WL 5297202 (11th Cir. 2010),

The textual evidence of the Leontes/Camillo conspiracy meets the first two prongs of this test but lacks evidence of an overt act in furtherance of the conspiracy since Camillo flees rather than take action toward poisoning Polixenes. Ironically, the textual evidence of the alleged Camillo/Polixenes/Hermione conspiracy meets only the overt act requirement, relying on the false inference arising from Camillo's and Polixenes' act of leaving Sicilia together.

46. Kornstein lauds Camillo's bravery in standing up to Leontes and "for disobeying, ends up triumphant" (189). It is true that Camillo emerges as the ultimate courtier, feigning obedience but obeying his conscience and following the true north of realities, not appearances.

47. *United States v. Jimenez Recio*, 537 U.S. 270 (2003), is a leading case on this topic.

48. See Mauet 1122.

49. *Putman v. Head*, 268 F.3d 1223 (11th Cir. 2001).

50. Kiernan notes "crack" as a punning word for the female genitals in Elizabethan parlance.

51. *Davidson v. State*, 759 So. 2d 1153 (Ala.Cr.App. 1998), describes the general burden of proof in a crime case -- beyond a reasonable doubt and to a moral certainty -- and then the specific burden for the prosecution in a circumstantial evidence case:

[I]n reviewing a conviction based on circumstantial evidence, “[t]he test to be applied is whether the jury might reasonably find that the evidence excluded every reasonable [hypothesis] except that of guilt.

52. Jordan and Cunningham 6 note that “the law in Shakespeare has often appeared to be a series of pretexts designed to test the wit of audiences, much as the moots rehearsed for students at the Inns of Court were intended to instruct them in fashioning artful argument.”

53. Raffield and Wyatt 4: “[T]he legal themes of Shakespeare's work. . . demonstrate a crucial feature of Elizabethan jurisprudence, which is that government was conducted and represented itself as theatre.”

Works Cited and Consulted

- American Jurisprudence*. 2nd ed. Vol. 41. Minneapolis: West Pub., 2012. Print.
- “Advocate, n.” OED Online. June 2012. Oxford UP. Web. 7 July 2012.
- Alexander, Mark. *The Shakespeare Law Library*. www.sourcetext.com/lawlibrary.
N.p., n.d. Web. 7 July 2012.
- Bierman, Elizabeth. "By Law and Process of Great Nature . . . Free'd." *William Shakespeare: The Romances*. Boston: Twayne Pub., 1990. Print.
- Black's Law Dictionary*. Ed. Bryan A. Garner. 8th ed. Minneapolis: West Pub., 2004. Print.
- Bryant Jr., John A. "Shakespeare's Allegory: *The Winter's Tale*." *The Sewanee Review* 63-2 (1995): 202-22. Print.
- Cook, Ann Jennalie. *Making a Match: Courtship in Shakespeare and His Society*. Princeton: Princeton UP, 1991. Print.
- "Crime and Punishment in Elizabethan England." EyeWitness to History. N.p. , 2010. Web. 7 July 2012.
- Crystal, David and Ben, eds. *Shakespeare's Words: A Glossary & Language Companion*. London: Penguin, 2002. Print.
- Frey, Charles H. *Shakespeare's Vast Romance: A Study of The Winter's Tale*. Columbia: U of Missouri P, 1980. Print.
- Garber, Marjorie. *Shakespeare After All*. New York: Anchor Books, 2004. Print.
- Giese, Loreen L. *Courtships, Marriage Customs, and Shakespeare's Comedies*. New York: Palgrave Macmillan, 2006. Print.

- Girard, Renee. "The Crime and Conversion of Leontes in *The Winter's Tale*." *Religion and Literature* 22-23 (1990): 193-219. Print.
- Jordan, Constance, and Karen Cunningham, eds. *The Law in Shakespeare*. London: Palgrave Macmillan, 2010. Print.
- Kierland, Stuart M. "'We need no more of your advice': Political Realism in *The Winter's Tale*." *Studies in English Literature. 1500-1900, Elizabethan and Jacobean Drama* 31-2 (1991): 365-86. Print.
- Kiernan, Pauline. *Filthy Shakespeare: Shakespeare's Most Outrageous Sexual Puns*. London: Quercus, 2006. Print.
- Kornstein, Daniel J. "A Just and Open Trial." *Kill All the Lawyers? Shakespeare's Legal Appeal*. Princeton: Princeton UP, 1994. Print.
- Langbein, John H. *The Origins of Adversary Criminal Trials*. Oxford: Clarendon Press, 2003. Print.
- _____. *Prosecuting Crime in the Renaissance: England, Germany, France*. Boston: Harvard UP, 1974. Print.
- Mauet, Thomas A. *Trial Techniques*. 8th ed. New York: Aspen Pub., 2010. Print.
- "Pound sand." Entry 1. *Urban Dictionary*. Urban Dictionary LLC, n.date. Web. 7 July 2012.
- Phillips, O. Hood. *Shakespeare and The Lawyers*. Oxford: Routledge Press, 2005. Print.

- Raffield, Paul and Gary Wyatt, eds. *Shakespeare and the Law*. Oxford: Hart Pub., 2008. Print.
- Schauer, Margery and Frederick. "Law as the Engine of State: The Trial of Anne Boleyn." *William and Mary Law Review* 22-1 (1980): 49-84. Print.
- Shakespeare, William. *Henry VIII*. Ed. Barbara A. Mowat and Paul Werstine. New York: Washington Square Press. - Folger Shakespeare Library, 2007. Print.
- _____. *King John*. Ed. Barbara A. Mowat and Paul Werstine. New York: Washington Square Press. - Folger Shakespeare Library, 2005. Print.
- _____. *Measure for Measure*. Ed. Barbara A. Mowat and Paul Werstine. New York: Washington Square Press - Folger Shakespeare Library, 2005. Print.
- _____. *Othello*. Ed. Barbara A. Mowat and Paul Werstine. New York: Washington Square Press - Folger Shakespeare Library, 2004. Print.
- _____. *The Merchant of Venice*. Ed. Barbara A. Mowat and Paul Werstine. New York: Washington Square Press - Folger Shakespeare Library, 2009. Print.
- _____. *The Tempest*. Ed. Barbara A. Mowat and Paul Werstine. New York: Washington Square - Folger Shakespeare Library, 2004. Print.
- _____. *The Winter's Tale*. Ed. Barbara A. Mowat and Paul Werstine. New York: Washington Square - Folger Shakespeare Library, 1998. Print.
- Sokol, B.J. and Mary. *Shakespeare, Law and Marriage*. Cambridge: Cambridge UP, 2003. Print.

Vanita, Ruth. "Mariological Memory in *The Winter's Tale* and *Henry VIII*."

Studies in English Literature 1500-1900, Elizabethan and Jacobean Drama 40-2

(2000): 311-37. Print.