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Courts? Before and After 9/11

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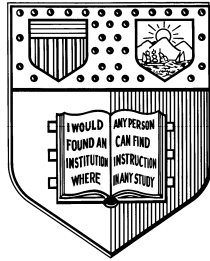
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### **Book Review: The Myth of Law and Literature**

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“The Myth of Law and Literature”  
Bernadette Meyler<sup>1</sup>

Reviewing Thane Rosenbaum, *The Myth of Moral Justice: Why Our Legal System Fails to Do What's Right* (New York: HarperCollins, 2004).

In *The Myth of Moral Justice*, Thane Rosenbaum generates an ambitious and idealistic plan for a rapprochement between law and morality, between emotion and reason, and between law and its literary representations. Laudable and inspiring, Rosenbaum's project remains flawed in several ways that are traceable back to his reliance on aspects of law and literature scholarship. Unfortunately, Rosenbaum's attempt to replace the myth of moral justice with a truly moral legal system depends itself on a particular set of myths about law and literature.

Rosenbaum's acknowledgements express indebtedness to the “law and literature movement,” and *The Myth of Moral Justice* draws upon classic strands of this approach. In suggesting how the law could be brought into closer connection with what he calls morality,<sup>2</sup> Rosenbaum advocates replacing the current legal system with a new paradigm, one that would emphasize the ability of all participants in a case—whether victims, or perpetrators, or bystanders—to express their feelings with dignity in a public narrative. The wrongdoers in this legal drama would offer sincere apologies, and the sufferers would fully express the harms they had endured (Chap. 11). Tragedy would be averted, however, through a restorative process (33; 39; Chap. 12). So firm is Rosenbaum's belief in the power of narrative that he maintains, “Put simply: The story itself is and provides its own remedy. . . . If nothing else gets accomplished, if criminals go free and tortfeasors succeed in causing further negligence, the telling of the story, by itself, is still the morally correct outcome” (58). Rosenbaum even seems to echo Milton's often-quoted statement that “Truth will win out in the free marketplace of ideas,” insisting that the proliferation of narratives he envisions will lead us to the truth, rather than to a legal version of the facts (76-78).<sup>3</sup> Indeed, he excoriates the rules of evidence and civil procedure as “severely undermin[ing] truth and storytelling” (107-08).<sup>4</sup> At the same time, however, the storytelling must be carried out in public view; as a result, Rosenbaum criticizes arbitration and mediation, which he sees as leading to secret settlements and failing to air all parties' grievances.<sup>5</sup>

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<sup>1</sup> Assistant Professor of Law, Cornell University.

<sup>2</sup> Rosenbaum vehemently contrasts this “private morality” with “legal ethics,” and with “justice” as currently conceived within the legal system, which he considers “immoral justice.” (19)

<sup>3</sup> Although expressing the belief that truth will emerge from the narratives recounted in the legal process, Rosenbaum disparages First Amendment absolutism and the law's treatment of hate speech (273-80).

<sup>4</sup> See also Rosenbaum, 116-117 (“A [C.P.L.R. Rule] 12(b)(6) motion to dismiss is the ultimate ‘dis,’ because it results in the opposite of storytelling.”)

<sup>5</sup> See, e.g., Rosenbaum, 210 (“Sometimes the injured require a larger stage than a conference room. A face-to-face encounter without a public venue, or the creation of a

This emphasis on narrative draws upon a strand of law and literature scholarship that emerged out of feminism and critical race studies.<sup>6</sup> As those extolling narrative in that context insisted, “The cure [to racial and gender subordination] is storytelling.”<sup>7</sup> For Rosenbaum, this statement has acquired an application beyond subordinated groups, to all aggrieved parties who express their injury through seeking out legal proceedings; storytelling is the cure to the indignity that the legal system has foisted upon all.

A second thread of the law and literature movement is woven through *The Myth of Moral Justice*, one sometimes identified as the “humanistic” approach.<sup>8</sup> According to this account, literature provides an insight into values beyond and above those compassed by law—ones that the law would do well to regard. Literature likewise expresses the emotional valences that legal proceedings suppress. Rosenbaum continually resorts to the literary and filmic in *The Myth of Moral Justice*—from Shakespeare to Camus to *The Practice*—as prime sources of trenchant critiques of the legal system. The law’s rationalist perspective, Rosenbaum opines, “deprives legal standards of also being influenced by the subjective, irrational, spiritual, and internal dynamics of the human experience” (29). Literature provides both a critique of the law and a supplementary, emotionally attuned vision of the reasons people seek out the law and how the law ultimately fails them.

Although one might imagine from reading *The Myth of Moral Justice* that the law and literature movement remains healthy and is, indeed, thriving, two recent articles published in arguably the top journals of the literary and legal professions respectively case some doubt on this assumption. In her contribution to the regular feature on “The Changing Profession” in *The Publications of the Modern Language Association*, Columbia University English Professor Julie Stone Peters attempted to explain the failures of law and literature to bridge the gulf between law professors’ fantasies about the literary and literary scholars’ attempts to ground themselves in the “reality” provided by law.<sup>9</sup> Likewise, Yale Law Professor Kenji Yoshino investigated in the *Yale Law Journal* “why law and literature is anemic and why it will not die.”<sup>10</sup> These two critiques of law and literature illuminate certain problems that Rosenbaum’s book shares. The most notable consist in an excessive faith in narrative, and a belief that literature provides

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public record, may fail to achieve a complete moral remedy. Even mediation, . . . where apologies have proven most effective, is limited as a mechanism for creating moral repair, precisely because it ends in a hushed settlement agreement and not in a public ceremony that aspires to truth- and storytelling.”); 243 (“[G]iven some of the themes of moral justice, mediation falls short, because it suffers from the lack of a public setting and the creation of a public record, and the absence of community involvement”).

<sup>6</sup> Julie Stone Peters, “Law, Literature, and the Vanishing Real: On the Future of an Interdisciplinary Illusion,” *PMLA* 20, no. 2 (2005): 446-48.

<sup>7</sup> Richard Delgado, *quoted in* Peters, *supra* n. 6, 447.

<sup>8</sup> See Peters, *supra* n. 6, 444-45.

<sup>9</sup> See generally Peters, *supra* n. 6.

<sup>10</sup> Kenji Yoshino, “The City and the Poet” *Yale Law Journal* 114 (2005): 1838.

the direction in which law *should* tend rather than a description of the qualities and necessary boundaries of law as an institution.

Peters' "Law, Literature, and the Vanishing Real" commences with a fictionalized depiction of a seminar incorporating professors of both law and literature that is recognizable to anyone who has participated in a similar event. The climax of the event occurs when the literature professor co-directing the seminar storms out of the room, but the signs of disrepair are evident much earlier. The individuals within each discipline endorse a phantasmatic vision of the other field, the Shakespearean exclaiming how he would "like to use law to end poverty, racism, and war" and a family law professor expressing the desire to "recognize the power of legal narrative as a tool of liberation for women and people of color."<sup>11</sup>

Examining three phases of law and literature—those of "humanism," "hermeneutics," and "narrative," Peters then illuminates how the supposedly interdisciplinary project of law and literature became one of redisciplining, where each discipline exaggerated the characteristics of the other: "Law seemed, to the literary scholar longing for the political real, a sphere in which language really made things happen. Literature seemed, to the legal scholar longing for the critical-humanist real, a sphere in which language could stand outside the oppressive state apparatus, speaking truth to the law's obfuscations and subterfuges."<sup>12</sup> The only way to escape this interdisciplinary impasse, Peters insists, is to move beyond these illusions and into a disciplinary flexibility and multiplicity that will confute standardized attempts at definition. Hence she sees with optimism the replacement of "law and literature" by something like "law, culture, and the humanities."<sup>13</sup>

Confronting the same state of disrepair in the "law-and-literature enterprise,"<sup>14</sup> Yoshino's "The City and the Poet" advocates re-evaluating and reintroducing the much-reviled Platonic approach to the place of poetry in relation to the state.<sup>15</sup> Plato famously excluded poets—at least of the imitative variety—from his ideal polity in the *Republic*, although dialogues like the *Phaedrus* and the *Laws* qualify this seemingly stark stance. According to Yoshino, Plato's reasoning remains salient both in assessing what "literature" can bring to legal processes and in determining why a narrative impulse may clash with legal scholarship. The Platonic critique of poetry consists, for Yoshino, in the notion that poetry is false, irrational, and seductive.<sup>16</sup> From his account of Plato, Yoshino extracts three maxims: "poetry can be permitted only if it does not conflict with state functions"; "poetry cannot evade being held accountable to those functions by asserting

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<sup>11</sup> Peters, *supra* n. 6, 422.

<sup>12</sup> *Ibid*, 448.

<sup>13</sup> *Ibid*, 451.

<sup>14</sup> Yoshino, *supra* n. 10, 1836.

<sup>15</sup> See, e.g., Jacques Derrida, *Plato's Pharmacy*, in *Dissemination*, trans. Barbara Johnson (Chicago: U of Chicago P, 1983): 61.

<sup>16</sup> *Ibid*, 1838.

the defense that it is ineradicable”; and “poetry will only be permitted if it can affirmatively show that it can fulfill state functions.”<sup>17</sup>

Attempting to apply this Platonic paradigm to the law and to legal academia, Yoshino focuses largely on the third of the criteria he articulates, which he dubs the “virtue defense,” and which entails “showing that [poetry’s] ‘doctrines seem the same as or better than’ those of the state.”<sup>18</sup> Examining the Supreme Court’s shifting stance on whether to admit victim impact statements in death penalty cases, statements that unquestionably do reach jurors emotionally, Yoshino explains that, in deciding to allow these narratives into the courtroom, the Supreme Court ultimately expressed a normative view about the weight of emotion that the law should permit to be mustered on the side of the state in relation to that brought in by the defendant in the form of character testimony.<sup>19</sup> After expressing disagreement with this result, although not the Platonic method employed to reach it, Yoshino then turns to the use of narrative in legal articles, and, in particular, Columbia Law Professor Patricia Williams’ story of being excluded from a Benetton store, presumably on account of race.<sup>20</sup> While the reader may respond to this account with emotion, the genre of legal scholarship, in contrast to that of a criminal trial, should, Yoshino believes, be sufficiently flexible and open to experimentation to permit the employment of personal stories.<sup>21</sup> In both cases, the “virtue defense” is what will redeem literature—or fail in trying.

It may not be incidental that, although he does not address this point, Yoshino’s examples all consist in autobiographical statements, and ones that may not, he acknowledges, possess the same problems of “falsity” as the poetry Plato targets for criticism.<sup>22</sup> By its very nature, autobiography clouds the distinction between truth and falsity. It is in autobiography that the greatest claims for veracity are made and also the most significant departures from an exact account of “the facts.” The subject of autobiography, rather than articulating the contours of a pre-determined self, presents a picture already outlined by the genre into which she is inscribing herself. As Natalie Zemon Davis discovered of tales told by pardon seekers in sixteenth-century France,

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<sup>17</sup> *Ibid*, 1859.

<sup>18</sup> *Ibid*.

<sup>19</sup> Yoshino, *supra* n. 10, 1883-84.

<sup>20</sup> *Ibid*, 1885.

<sup>21</sup> *Ibid*, 1894.

<sup>22</sup> Of the victim impact statements, Yoshino writes that “[Justice] Powell only touches on the possibility that the statements might not be true. The analogy between Platonic poetry and the victim-impact statement is weakest here, because the statements are presented as true and generally assumed to be so. This is what makes the case a hard one—presumably the Court would have no problem excluding purely fictional works describing the impact of murders on their victims.” (1871) In terms of the Benetton story, he asserts that, “Ironically, the real problem with Williams’s story is not that it is false but that it is not clearly false.” (1890)

autobiographical narratives are likely to play to the cultural concerns of the day and may assume a form that is more standardized than individualized.<sup>23</sup>

Literary theory has sustained a long-term fascination with autobiography, and deconstructive work, in particular, has focused upon the relationship between the identity supposed to exist before the commencement of the work of autobiography and that generated out of the language and rhetoric of autobiography itself. As Paul de Man once trenchantly inquired: “[A]re we so certain that autobiography depends on reference, as a photograph depends on its subject of a (realistic) picture on its model? We assume that life *produces* the autobiography as an act produces its consequences, but can we not suggest, with equal justice, that the autobiographical project may itself produce and determine the life and that whatever the writer *does* is in fact governed by the technical demands of self-portraiture and thus determined, in all its aspects, by the resources of his medium?”<sup>24</sup> The form of autobiography directs its energies toward insisting on the reality of its subject, while at the same time that very subject is constructed out of the generic conventions, and the language itself, of the autobiographical narrative.

The lack of identity between the position from which one is speaking and the content of one’s speech is what offends Plato about “imitative poets” in particular—in other words, those who speak in the first person through different characters rather than recounting a third-person narrative.<sup>25</sup> These poets ventriloquize without embodying, appearing to speak from a subject position that they might not “really” occupy, or might, in effect, only be persuading themselves to occupy.<sup>26</sup> It is, in part, this autobiographical effect that renders such imitative poets problematic to Plato. The two principal objections against poetry concern its impact on the auditor and its consequences for the poet himself. As we can discern from the tenth book of the *Republic*, mimesis possesses the drawback of representing “reality” at two removes; if the “forms” are, for Plato, the ideal, quotidian objects represent these forms in reduced version, while imitation copies

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<sup>23</sup> See generally Natalie Zemon Davis, *Fictions in the Archives: Pardon Tales and their Tellers in Sixteenth-Century France* (Palo Alto: Stanford UP, 1987).

<sup>24</sup> Paul de Man, “Autobiography as De-Facement,” in *The Rhetoric of Romanticism* (New York: Columbia UP, 1984): 69. See also, Jacques Derrida, *The Monolingualism of the Other*, trans. Patrick Mensah (Palo Alto: Stanford UP, 1998): 29 (“[I]t is well known that the *I* . . . called autobiographical, the *I* [*je-me*] of *I recall* [*je me rappelle*] is produced and uttered in different ways depending on the language in question. It never precedes them; therefore it is not independent of language in general. This is something well known but rarely taken into consideration by those dealing in general with autobiography—whether this genre is literary or not, whether it is considered, moreover, as a genre or not.”).

<sup>25</sup> It is in the third book of the *Republic* that Plato distinguishes among the types of poets. See generally, Plato, *Republic* bk. 3, 2d ed., ed. and trans. Allan Bloom (New York: Basic Books, 1991).

<sup>26</sup> Speaking to Adeimantus, Socrates inquires, “haven’t you observed that imitations, if they are practiced continually from youth onwards, become established as habit and nature, in body and sounds and in thought?” *Ibid*, 395d.

only these worldly realities, not the forms themselves.<sup>27</sup> Imitation thus shows the observer not the truth but rather a second-hand copy of it. At the same time, however, imitative poetry adversely affects the speaker by encouraging him to assume diverse personae rather than simply the best.<sup>28</sup> A similar drawback might be thought to characterize the rhetoric of the sophists—associated, not incidentally, with the law courts. The difficulty with imitative poetry for Plato is therefore two-fold; it confuses the listener as to the source of truth and it leads the speaker away from virtue.

What Plato does not emphasize is the distinctive force of the autobiographical narrative as the imitative poet performs it. The sympathy generated by the very appearance of a person calling upon our attention may endow the statements of the imitative poet with a particular force. The story that the autobiographical subject tells is embodied in the individual in front of the audience, or of the jury, and seems to issue a demand in the form of that presence.

The metaphors of healing that suffuse Rosenbaum's book recall Plato, with his emphasis on analogies with medicine,<sup>29</sup> but the medicine that Rosenbaum prescribes is not one compassed by the ancient philosopher. Although Rosenbaum insists, like Plato, on attaining the "truth," his methods of reaching it resort entirely to the autobiographical moment and remove any external safeguards relating to the presentation of fact. Dispensing summarily with the rules of evidence and civil procedure as not adequately respectful of the truth of narrative, Rosenbaum at the same time decries the lack of truth of many courts' findings of fact (154).

While maintaining that the truth will inevitably emerge from the fullest possible set of narratives, Rosenbaum also acknowledges that what he desires to give litigants is the license of a novelist:

A novelist knows the freedom that comes with narration, the liberty that arises out of the unconscious self. It brings expression to the soul, putting words in its mouth and flesh on bones broken by despair. Those wounded by business transactions gone bad, failed marriages and severed partnerships, negligent merchants, doctors, and service-providers, and the mischief of criminals, deserve an equivalent freedom. They need to be able to experience what the novelist already knows, and what the injured intuitively sense: that there is no way to heal emotionally from an injury if the story goes unheard and victims are denied their moral right to testify to their own pain. (61)

The autobiography of the litigants is already, under this account, a fictional construction, rather than a statement of pre-existing personal fact. As such, it could succumb to the problem that Plato diagnosed—that of persuading the speaker of the truth of an exaggerated narrative circumscribed by generic conventions—as well as to the difficulties in limiting the impact upon the judge and jury of sympathy with an

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<sup>27</sup> See *ibid*, bk. 10.

<sup>28</sup> See *supra* n. 26.

<sup>29</sup> For example, at the commencement of a chapter on "Story as Remedy," Rosenbaum explains that, "As a novelist, I appreciate the healing benefits that come from the telling of a story—even a fictional one" (61).

autobiographical account. Although the rules of evidence and civil procedure may artificially constrain storytelling, they represent at least an effort to generate a theater of alienation in which, as in a play by Bertolt Brecht, the illusion is constantly interrupted, and the audience members are reminded of their status as spectators.<sup>30</sup> In the absence of these techniques for distancing the judge and jury from the litigants' stories, the court or the state would have to provide them with critical tools that might take months or years to instill. Imagine, indeed, the difficulty of recruiting jurors if a three-month institute in critical thinking were a required prerequisite. Nor would Rosenbaum's proposal have the salutary effects on the perpetrators and victims that he imagines. While he envisions the law court becoming akin to a psychotherapeutic session, the difference of the former from the latter is that, in therapy, the falsity of the initial narrative one tells about oneself eventually emerges. Without the resistance represented by the therapist, the promised self-recognition would not occur in the courtroom.

If *The Myth of Moral Justice* subscribes, in this way, to "the power of legal narrative as a tool of liberation," it also recapitulates part of the humanistic project of law and literature. Throughout the book, Rosenbaum resorts to literature, drama, and film to supplement the rigors of the law by providing an emotional and moral vantage point. Lamenting the separation of law from morality, he identifies Immanuel Kant as the philosopher responsible for this divide and suggests that it must be eliminated through law's reform, by "joining . . . the legal and the moral" and "implant[ing] . . . human values . . . in the law" (316).<sup>31</sup> Inevitably, Shakespeare is one of the authors to whom Rosenbaum regularly refers. He returns to *The Merchant of Venice*, in particular, as a source of moral perspectives on the law. Analysis of the passages that Rosenbaum picks out from this play, however, and the treatment of the law elsewhere in Shakespeare's work demonstrate that Shakespeare is far from suggesting that law and morality become isomorphic. Indeed, Shakespeare's concern for and critique of the law focus upon its inevitably institutional nature. Although Shakespeare represents the processes of law as imperfect, he simultaneously emphasizes the necessary separation between law and ethics or religion, just as Kant would later do. Rosenbaum neglects this overarching emphasis by focusing not on plot or arrangement but rather on the characters' speeches taken in isolation.

During *The Myth of Moral Justice*, Rosenbaum presents several readings of the central trial scene of *The Merchant of Venice*.<sup>32</sup> At this trial, Shylock attempts to redeem his bond for a pound of the merchant Antonio's flesh, and Portia, the wife of Antonio's friend Bassanio, who wooed Portia with the money Antonio had borrowed from Shylock, intervenes in the disguise of a "doctor of laws" from Rome. The Duke of Venice,

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<sup>30</sup> Bertolt Brecht, "The Street Scene" in *Brecht on Theatre: The Development of an Aesthetic*, ed. and trans. John Willett (New York: Hill & Wang, 1992): 121 (discussing the techniques of his epic theater of alienation).

<sup>31</sup> See also, Rosenbaum, 258 ("For Kant, the moral and legal are naturally and inexorably separate.").

<sup>32</sup> See generally, William Shakespeare, *The Merchant of Venice*, act 4, sc. 1, 2d ser. (London: Arden Shakespeare, 1964).

presiding over the trial, allows Portia to serve as judge in deciding the legal merits of the case, although he resumes his position as ultimate arbiter at the conclusion of the trial by remitting the life of Shylock, who would otherwise have been condemned to death.

Rosenbaum lauds the positions of both Shylock and Portia, emphasizing that Shylock's insistence on revenge is a proportionate response to the indignity that he has suffered at the hands of Antonio and his compatriots, including the elopement of his daughter (accompanied by his ducats) with one of Antonio's associates (50-51). At the same time, Rosenbaum views Portia's famous "mercy season[s] justice" speech as providing an alternative, restorative vision of justice (216-18). Nor does he see any difficulty in the fact that Portia is acting as judge in a case in which her own interests—in the form of her husband's friend Antonio and his pound of flesh—are implicated; rather, Rosenbaum explains, Shakespeare has discerned what is true in all trials, that the judge is somehow personally implicated (174).

What Rosenbaum fails to account for is the conclusion of the trial. Adopting the language of the law, Portia outdoes Shylock himself in legalism, and determines that he cannot spill any blood while cutting the pound of flesh from Antonio's heart. She then adduces another statute specifying that, if any alien (including, presumably, Jews) attempted to kill a citizen of Venice, half of his goods would be forfeited to the intended victim and half to the state, and his life would lie at the mercy of the Duke of Venice. The Duke exercises this mercy to spare Shylock's life, but the grant of pardon partakes more of a display of power than a restorative impulse. Indeed, it is conditioned on Shylock's conversion to Christianity. Although Shylock responds "I am content" in his penultimate statement in the play, the context demonstrates that he is far from being so.<sup>33</sup> The "Christian" mercy that Portia had lauded in the "mercy season[s] justice" speech is wielded by the Duke to suppress Shylock's Jewish heritage. The effect of the appearance of morality in the form of the Christian morality of the Duke and Antonio is to stifle the competing Jewish religious tradition that Shylock personifies.

The law, although presenting the appearance of injustice, is the medium in *The Merchant of Venice* through which the contestation of moral and religious values can occur. It is only at the point of the exercise of mercy—governed by discretion rather than law—that religious intolerance intervenes. While a pure pardon or a pure forgiveness would partake of an unconditional aspect, the Duke's mercy is granted only as part of an exchange. This point is equally applicable to contemporary legal proceedings; law—and precedent—provide the common ground upon which the contestation of disparate visions of justice can occur. Because several coherent interpretations of such precedent can be adduced, true argument about what the law is can occur, as Ronald Dworkin contended in *Law's Empire*.<sup>34</sup> Conceived of as an institution, law provides a forum and a language for the articulation of competing moral visions and represents an attempt to deal with deep-seated social conflicts through a vocabulary that does not explicitly partake of the values

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<sup>33</sup> See generally, Bernie Meyler, "Bakhtin's Irony," *Pacific Coast Philology* 32, no. 1 (1997): 105.

<sup>34</sup> Ronald Dworkin, *Law's Empire* (Oxford: Hart Publishing, 1988): 4-44.

of one side or the other. Of course, this ideal of institutional objectivity remains in many respects elusive, or even impossible, as legal realism and critical legal studies have taught us, but it furnishes an aspiration that is structurally important for the role of law in society.

Another play, *Measure for Measure*, more fully elucidates the crucial quality for Shakespeare of the institutional aspects of law and the problems with conflating the moral and the legal. The constraints on law as an institution are foregrounded in *Measure for Measure* by the appearance of the phrase “city’s institutions,” followed by “the terms for common justice,” within the opening lines of the play.<sup>35</sup> An early use of the word “institution” in the sense of “an established law, custom, usage, practice, organization, or other element in the political or social life of a people,” this reference constitutes the only employment of the term in Shakespeare’s work.<sup>36</sup>

In *Measure for Measure*, the Duke of Venice temporarily abdicates his position, leaving in his place the seemingly saintly, and presumably aptly named Angelo.<sup>37</sup> Marked by Puritan characteristics, Angelo immediately reinstates moral legislation that results in the character Claudio being condemned to death.<sup>38</sup> Attracted by the rhetoric and person of Isabella, Claudio’s sister, however, Angelo claims that he will refrain from having Claudio executed if Isabella agrees to satisfy his lust. Until the Duke’s return, the only person to whom Isabella can appeal against Angelo’s injustice is Angelo himself, placed in the position of ultimate judge. Angelo—who seems initially absolute for the law—becomes also absolutely personally involved in Claudio’s case. Angelo’s instatement of moral precepts as law is undercut by his own inability to abide by them, and his failure to remain objective is exposed as a violation of the fundamental principles of law. It was only a few years later, in *Bonham’s Case*, that Sir Edward Coke, in providing an early example of something like judicial review, insisted upon the idea that even a statute could not controvert the maxim that one cannot be a judge in one’s own case.<sup>39</sup> By exploring the boundaries of judging in one’s own case in both *Measure for Measure* and *The Merchant of Venice*, Shakespeare did not negate the institutional nature of law, but rather marked the line in the sand between the institutional and the personal, and between the legal and the moral.

In this exploration of the institutional aspects of law broadly defined—including the roles of the judge and jury as decision-makers, the function of precedent, and the

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<sup>35</sup> William Shakespeare, *Measure for Measure*, act 1, sc. 1, ll. 10-11, 2d ed. (London: Arden Shakespeare, 1968).

<sup>36</sup> *The Compact OED*, 2d ed, s.v. “institution.” The first reference occurred in a 1551 translation of More’s *Utopia*.

<sup>37</sup> See generally William Shakespeare, *Measure for Measure*.

<sup>38</sup> The Duke describes Angelo, for example, as “precise,” a term used to refer to Puritans. See William Shakespeare, *Measure for Measure*, act 1, sc. 4, ll. 54-57, supra n. 35 (“Lord Angelo is precise./ Stands at a guard with envy, scarce confesses/ That his blood flows or that his appetite/ Is more to bread than stone.”).

<sup>39</sup> 8 Coke’s Rep. 226 (1610).

mechanisms by which legal determinations are communicated to the public—lies a potentially productive route for scholarship in law and literature. Under this approach, literature—also broadly conceived to include a variety of cultural forms—can assist in understanding the construction of law as an institution and the constraints that this institutional quality imposes. Literature furthermore provides an ideal medium for testing the boundaries of law and trying out in theory what might, in future, be implemented in practice. Along other lines, literature can assist in fleshing out the cultural context of legal concepts, such as that of the “reasonable person,” to which Rosenbaum several times refers, or that of “intention.”<sup>40</sup> These versions of law and literature acknowledge the particularity of law, while at the same time refusing to present a mythic “truth” of the law that can be obtained through recourse to literature. Although no one would aspire to a prosaic vision of law and literature, it may be worth calling into question the myth of law and literature that underlies *The Myth of Moral Justice*.

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<sup>40</sup> See, e.g., Rosenbaum, 22-29. For an interesting treatment of the dynamic interaction between literary and legal conceptions of intention, see Luke Wilson, *Theaters of Intention: Drama and the Law in Early Modern England* (Palo Alto: Stanford UP, 2000).