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“Our Cities Institutions” and the Institution of the Common Law

Bernadette Meyler*

I. INTRODUCTION

What, in the context of law, does “reasoning from literature” mean? Depending on the inflection, the phrase might suggest that literature can set in motion a process of *reasoning*—rather than imagining, or emoting, or simply appreciating. Although this reasoning could take a number of forms—*analogizing*, *distinguishing*, and *extrapolating*, among others—it would, presumably, have consequences for law. With another emphasis, the expression might imply that the lawyer or legal scholar should bring her ordinary tools of analysis to bear in relation to another object, that of *literature*. Taking the activity of reasoning as a paradigmatic feature of legal practice, “reasoning from literature” would then indicate the application of the lawyer’s method outside its usual field of inquiry. In both cases, the phrase proposes a juxtaposition of approach with subject matter that counters everyday conceptions of the relationship between the fields of law and of literature. In both cases too, the phrase gives the impression that reasoning from literature might have consequences for law.

The associations upon which this interpretation rests might themselves be subject to critique: are scholars in the humanities not always “reasoning from literature,” and do legal materials themselves not often employ rhetoric in a way that contravenes reason? Along these lines, Peter Brooks’s contribution to the Symposium elegantly turns the logic of the assignment around, indicating how techniques of interpretive reasoning derived from literature can serve as a resource for identifying illogic in

* Professor of Law and English, Cornell University; Mellon/LAPA Fellow in Law and the Humanities, Princeton University. This Article, like the others in the Symposium, grew out of a session at the 2010 AALS annual meeting organized by Jessica Silbey on the topic of “Reasoning from Literature.” It benefited greatly from comments received at that session, at a University of Virginia Law School faculty workshop, and at a Symposium on “Shakespeare, in Theory” at the Rutgers Center for Cultural Analysis, and from discussions with Kenji Yoshino, Henry Turner, Matt Smith, and Susanna Blumenthal.

law.¹ Rather than questioning the terms of the categories, this Article instead investigates *whose* reasoning is involved in the reference to reasoning from literature. The dynamics of reasoning from literature, I contend, vary according to historical period, and they are significantly affected by the composition of the audiences of both literature and law.²

To elucidate this claim, the Article focuses on contextualizing and analyzing a particular example of reasoning from literature, the outlines of which can be sketched through examining the relationship between William Shakespeare's *Measure for Measure* and the writings of Sir Edward Coke. This example was produced between the spaces of theater and law during the first decade of the seventeenth century and pertains to reasoning from drama rather than from other genres. Where the reasoning entailed occurred, or in whom, is difficult to locate precisely. Part of it may have circulated through those early law schools called the Inns of Court, snippets might have been heard in King James I's chambers, and fragments could have been pieced together from conversations on the streets of the city. In each of these fora, erstwhile spectators could have deliberated about the legal and political arguments presented by the plays they had seen. Those deliberating might have ranged from the King to the common subject, and from the object of Stuart law enforcement to the intimates of early modern legal institutions.

Within these discussions, the conflicts of a community that would become engaged in civil war only a few decades later began to ferment. Through the pressures and resistances of each social group, the early modern constitution was formed and reformed. In particular, the vexed issues surrounding the distribution of government and the scope and force of law's reach augured later concerns about a separation of powers. Whereas by the end of the seventeenth century the relevant point of resistance against the King would be provided by Parliament's legislative capacity, in the earlier part of the period, the common law "ancient constitution" that J.G.A. Pocock famously identified furnished the primary pressure against monarchical power.

Performed before King James I in 1604, as well as played for other audiences, *Measure for Measure* foregrounded questions about the location and grounds of judicial authority that, only a few years later, Sir Edward Coke would raise in opposition to James himself. On the one hand, the play rehearses older monarchical fears about exposing the king to censure through his involvement in the legal system, and, on the other, it explores new possibilities for the autonomy of judicial procedure from

1. Peter Brooks, *Literature as Law's Other*, 22 YALE J.L. & HUMAN. 349 (2010).

2. For a more detailed discussion and critique of the various possible approaches to law and literature, see Bernadette Meyler, *The Myth of Law and Literature*, 8 LEGAL ETHICS 318 (2005) (reviewing THANE ROSENBAUM, *THE MYTH OF MORAL JUSTICE: WHY OUR LEGAL SYSTEM FAILS TO DO WHAT'S RIGHT* (2004)).

the sovereign. From both vantage points, the king should not judge in person—but the rationales differ. Whereas the former perspective sees the king himself as avoiding the recrimination of his subjects by only pardoning, rather than judging, in person, the latter view envisions judgment as properly residing solely with those who have adequately learned the art. Although staging the problems that arise from the king's act of judging in person, the play itself refrains from definitively endorsing either of the justifications for preventing him from doing so; instead, it leaves the various sets of spectators to formulate and dispute new rationales within the forum of politics.

These several groups may well have arrived at disparate conclusions about the meaning of the spectacle they witnessed. While each character, the Article contends, presents a model of judging, *Measure for Measure* simultaneously suggests the potential flaws in each of these visions. Depending on the extent of the particular audience member's identification with one vantage point over another, he may have either recognized or failed to acknowledge these conflicting characteristics. Hence King James I could easily have ignored the imperfections in the character of Duke Vincentio, with whom many critics have identified him, and he could have exited the performance quite content to have been glorified by the play, leaving other audiences to speculate about the Duke's anomalous attributes.

How the early modern audiences of drama and law were mutually constituted furnishes the subject of Part II of this Article. Part III then turns to the political context that rendered the question of whether the King could judge in person pressing. In order to illuminate this setting, Part III focuses on the jurist Sir Edward Coke, whom Foucault claimed as one of the originators of a "historico-political discourse" and J.G.A. Pocock also analyzed as emblematic of a specific kind of historiography. Although Coke's pronouncements contravening the King's capacity to judge in person post-dated the first performances of *Measure for Measure*, both Coke's explicitly legal and political interventions and the play's representations emerged out of a similar set of concerns that pervaded the early years of King James I's reign. Turning to *Measure for Measure* itself, Part IV elaborates how the contrast between the characters of Angelo and Escalus stages the merits—and drawbacks—of an institutionalized judicial role as opposed to impromptu adjudication by the sovereign. Part V then confronts the figure of the Duke, whose portrayal, it argues, raises the other early modern argument against the King's act of judging in person—the prudential one presented by absolutist French theorist Jean Bodin in his *Six Livres de la République*. Neither Coke's nor Bodin's stance appears entirely appealing in the light *Measure for Measure* casts upon them, and the play sits uneasily situated between the two political theories, inciting speculation about alternatives to both.

II. ACTIVE AUDIENCES

During the early modern period, particularly close connections linked the participants in and spectators of drama and law; the same individuals even assumed these various capacities at disparate times. Shakespeare's *Twelfth Night* and *Comedy of Errors*, among other plays, were performed at the Inns of Court, and the budding lawyers of the Inns themselves staged masques and entertainments.³ Even the moots, aimed at instructing these burgeoning practitioners in their trade, boasted a theatrical dimension.⁴ The regular theaters, including the nearby Blackfriars, and the Globe, also attracted members of the legal profession as well as a range of other spectators.⁵ Several of the playwrights had, like John Marston, themselves studied—or at least lived—at the Inns, and some of their works bear the marks of this apprenticeship.⁶ The norm of openness of judicial proceedings—reaffirmed by Sir Edward Coke—may also have allowed playwrights to sit in on cases being decided.⁷

The legal practitioners of early modern England were thus furnished

3. See generally ADWIN WIGFALL GREEN, *THE INNS OF COURT AND EARLY ENGLISH DRAMA* (1965) (1931) (discussing the interconnections between the two areas in the early modern period); ROBERT R. PEARCE, *A HISTORY OF THE INNS OF COURT AND CHANCERY* 81-128 (1848) (detailing the nature of the masques and holiday revels).

4. For a reconstruction of the dynamics of moots and readings at an earlier period, see J.H. Baker's essay on "The Third University of England" in *The Common Law Tradition: Lawyers, Books, and the Law* 3-28 (2003). Building on the Inns of Court's tradition of moots and the less official practice of debating cases over dinner, Karen Cunningham has argued for the theatrical relevance of moots, contending, in particular, that Shakespeare's *Measure for Measure* should be interpreted as falling within the same genre. See Karen Cunningham, *Opening Doubts Upon the Law: Measure for Measure*, in 4 *A COMPANION TO SHAKESPEARE'S WORKS* (Richard Dutton & Jean E. Howard eds., 2005).

5. In *The Shakespearean Stage*, Andrew Gurr details the variation from the late 1590s through the reign of King Charles I in the range of spectators frequenting the amphitheatre playhouses like the Globe as opposed to the hall playhouses, such as Blackfriars, which reopened only around the turn of the century. Whereas, in the 1590s, "with only the amphitheatres open to all Londoners, people from the whole social gamut, male and female, attended plays," including, as Thomas Nashe listed, "Gentlemen of the Court, the Innes of the Court, and the number of Captaines and Souldiers about London," by the 1620s, the inhabitants of the Inns of Court were found more regularly at Blackfriars. See ANDREW GURR, *THE SHAKESPEAREAN STAGE, 1574-1642*, at 11-12; 16-17; 216-18 (3d ed. 1992).

6. For an account of Marston's particular connection with the Inns of Court and its relation to his writing, see PHILIP J. FINKELPEARL, *JOHN MARSTON OF THE MIDDLE TEMPLE: AN ELIZABETHAN DRAMATIST IN HIS SOCIAL SETTING* (1969). Finkelpearl also lists a number of writers who lived at the Inns during the sixteenth and seventeenth centuries, including "More, Ascham, Turberville, Googe, Gascoigne, Sackville and Norton, North, Lodge, Fraunce, Raleigh, Harrington, Campion, Donne, Bacon, Davies, Marston, Ford, Beaumont, Shirley, Davenant, William Browne, Wither, Denham, Carles, Carew, Suckling, and Congreve." *Id.* at 19.

7. The U.S. Supreme Court provided a thumbnail sketch of the history of openness of judicial proceedings in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 564-67 (1980). According to one recent account of Westminster Hall, "The business of the courts attracted a huge variety of visitors who included sightseers such as Lady Margaret Hoby in 1600, and law students . . ." J.F. WEBER, *THE SOCIAL WORLD OF EARLY MODERN WESTMINSTER* 162 (2005). As J.H. Baker has explained, however, the courts at Westminster were rather makeshift and operated in the interstices of the other activities of the venue. See J.H. Baker, *Westminster Hall, 1097-1997*, in *THE COMMON LAW TRADITION*, *supra* note 4, at 247-62. As a result, access may have been more theoretically available than practically sought.

with ample material for reasoning from literature—and the reasoning of disparate playwrights may itself have been influenced by the proximity of contexts for legal experiences. The range of those who could have reasoned legally from drama was not, however, restricted to those who studied law for professional purposes. Just as Shakespeare's works depict a wide variety of participants in the legal arena, from criminals, to constables, to jurors, to justices of the peace, to the Lord Chief Justice, to the King, the spectators of his plays included those involved with the law in a lay capacity as well as the sovereign.

Many spectators may, indeed, have experienced the law as individual jurors rather than as trained participants. Members of all classes could attend the early modern theater and "[a]mphitheatres, baiting-houses, prize-fights and whorehouses were always within reach for the great majority of the working population as well as the wealthy."⁸ In her recent work on *The Invention of Suspicion*, Lorna Hutson examines the connection between the epistemological positions of the dramatic spectator and of the juror in sixteenth- and seventeenth-century England, contending that an "appeal to the audience *as lay judges* . . . throw[s] the emphasis simultaneously on to the audience's intellectual capacity to puzzle out what the plot presents as 'evidence' and on its ethical arbitration of what that evidence implies" and that "Sixteenth-century English revenge tragedy, while not presenting us with competing narratives of the facts as such, nevertheless makes a similar open-ended appeal to our capacity as equitable moral arbiters of the case."⁹ Audience members were thereby asked to reason from literature as though they were jurors deciding a case by reasoning from the evidence before them.

At the same time, however, a number of plays also boasted royal audiences at court, including Shakespeare's *Hamlet*, *Measure for Measure*, and *Merchant of Venice*, the last of which King James ordered to be played again in 1605.¹⁰ Both James and his son, King Charles I, permitted their wives to participate in masques or other amateur theatricals, to the opprobrium of some subjects, including William Prynne, who excoriated such activity in his infamous 1633 anti-theatrical screed *Histrionomastix*.¹¹ Both James and Charles also manifested an active

8. GURR, *supra* note 5, at 12.

9. LORNA HUTSON, *THE INVENTION OF SUSPICION* 69-70 (2007).

10. Alvin Kernan has argued persuasively that *Hamlet* would have been performed before James I at Hampton Court during the Christmas season of 1603. ALVIN KERNAN, *SHAKESPEARE, THE KING'S PLAYWRIGHT: THEATER IN THE STUART COURT, 1603-1613*, at 30-31 (1995). *Measure for Measure* was itself dramatized at Whitehall during the same season the subsequent year—played for the King on December 26, 1604. *Id.* at 53. In *English Court Theater, 1558-1642*, John Astington discusses James's request for Shakespeare's *Merchant of Venice*. JOHN ASTINGTON, *ENGLISH COURT THEATER, 1558-1642*, at 182-83 (1999).

11. See generally WILLIAM PRYNNE, *HISTRIONOMASTIX* (1633) (an anti-theatrical pamphlet aimed in part against Queen Henrietta Maria); SOPHIE TOMLINSON, *WOMEN ON STAGE IN STUART DRAMA* (2006) (treating the performances of Queens Anna and Henrietta Maria, among others).

involvement in the world of drama, and the latter even annotated copies of others' dramatic writings.¹² More broadly, a natural alliance proposed itself between the sovereign and the stage in the theatrical displays of a monarchy justified on the basis of the divine right of kings.¹³ Another form of reasoning from literature was thus that of royal law-makers themselves, who could evaluate the impact of legal determinations like theirs within the world of the play.

Although these various kinds of spectators often frequented disparate venues and the types of entertainments that they witnessed sometimes differed in either the subjects represented or the lavishness of the presentation, the plays of early modern England were, in many instances, designed to be accessible to several types of audience members. This convertability characteristic of some drama manifests itself quite vividly in the alternate openings of Ben Jonson's 1614 *Bartholomew Fair*. On the one hand, Jonson composed a poetic "Prologue to the King's Majesty," emphasizing the variegated quality of the play's characters by proclaiming that

Your Majesty is welcome to a fair;
Such place, such men, such language and such ware,
You must expect: with these, the zealous noise
Of your land's faction, scandalized at toys, . . .
These for your sport, without particular wrong,
Or just complaint of any private man,
Who of himself or shall think well or can,
The maker doth present: and hopes tonight
To give you for a fairing, true delight.¹⁴

King James, for whom the play was performed, is here offered a bird's-eye view of controversies characteristic of those experienced in his state—although the play supposedly refrains from representing any actual "private man" or slandering such an individual by pointing out his misdeeds. At the end, the King is asked to render judgment from above; as the Epilogue observes, "This is your power to judge, great sir, and not/ The envy of a few."¹⁵

On the other hand, the prose Induction, for the production at the Hope, in Southwark, insists on the "grounded judgements" of the spectators, punning on the relationship between the status of those standing beneath the stage, in the arena, and the idea of a well-anchored verdict; in this

12. GURR, *supra* note 5, at 20 ("Charles himself read plays, and marked his copies with appreciative comments.").

13. KERNAN, *supra* note 10, at 1-23.

14. Ben Jonson, *Bartholomew Fair*, in 2 THE SELECTED PLAYS OF BEN JONSON 153 (Martin Butler ed., 1989) (Prologue).

15. *Id.* at Epilogue ll. 9-10. The Epilogue's comment here about the King's power to judge may itself represent a sly comment on the controversies between Coke and James about the location of the judicial power.

manner, the play is supposed to be comprehensible to the ordinary spectator, “for the author hath writ it just to his meridian, and the scale of the grounded judgements here, his play-fellows in wit.”¹⁶ Not simply one ordinary spectator is envisioned here, however; in contrast to the singular vantage point of the King, the Induction emphasizes the multiple perspectives of the popular audience, comprised of those who have paid “six penn’orth, . . . twelve penn’orth, . . . eighteen pence, two shillings,” or even “half a crown,” and of the “curious and envious” and “favouring and judicious” as well as the “grounded judgements and understandings.”¹⁷

The author requires an initial covenant and “articles of agreement” with the audience members, but this contract covers only the conditions for spectatorship, not attendees’ ultimate verdicts on the play.¹⁸ Those judgments remain part of the exercise of the spectators’ “free-will,” an exercise that the language of the Induction seems to analogize not only with the activity of judges but also with that of jurors.¹⁹ The character of the “Scrivener” insists that “every man here exercise his own judgement, and not censure by contagion,” and “not . . . be brought about by any that sits on the bench with him, though they indict, and arraign plays daily.”²⁰ By maintaining that every man should judge according to his own conscience, a word the Induction itself uses elsewhere, and that he should not indict without searching it, the Scrivener appeals to the standard of judgment applied by the early English jury, as well as alluding to judges sitting on the bench.²¹ According to this Induction, the collective judgment of the common audience consists in a sum of individual decisions, which combine into a common verdict through popular “suffrage.”²²

These several types of audience would have approached Shakespeare’s *Measure for Measure* in a manner informed by their particular legal and political vantage points. As the following Part attempts to demonstrate, a transformation was occurring in the ideology of the common law during

16. *Id.* at Induction ll. 57-93.

17. *Id.* at ll. 87-89; 103-05.

18. *Id.* at ll. 75-185. For an elegant treatment of the dynamics of contract within the plot of *Bartholomew Fair* as well as in its Induction, see LUKE WILSON, *THEATERS OF INTENTION* 114-48 (2000).

19. Jonas Barish has noted as well that “Jonson seemed to think of the good audience as a kind of jury, assembled to render a verdict on a work of art.” JONAS BARISH, *THE ANTI-THEATRICAL PREJUDICE* 134 (1985). At the end of *The Alchemist*, the character Face similarly invokes the rhetoric of jury trial, telling the spectators that “I put myself/ On you, that are my country.” Ben Jonson, *The Alchemist*, in *SELECTED PLAYS*, *supra* note 14, at 3 (Act 5, sc. 5, ll. 162-63).

20. Jonson, *supra* note 14, at Induction ll. 113-14; 121-23.

21. See generally JAMES Q. WHITMAN, *THE ORIGINS OF REASONABLE DOUBT: THEOLOGICAL ROOTS OF THE CRIMINAL* (2008) (considering how the religious understanding of conscience affected early modern judges’ and juries’ approach to their task); TOM GREEN, *VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY 1200-1800* (1985) (discussing the rhetoric of conscience in English debates about the role of the jury).

22. Jonson, *supra* note 14, at Induction l. 180.

the first decade of the seventeenth century that might have particularly influenced the perspectives of the members of the Inns of Court who frequented the nearby theaters. In a series of cases and disputes with King James I, Sir Edward Coke was in the process of bolstering the history of the common law in order to provide the judicial edifice with some independence from the sovereign and, in doing so, to furnish support for bourgeois liberties. While J.G.A. Pocock's account of the role of Coke's writings in the development of modern historiography has become generally familiar, Michel Foucault's similarly insightful story about Coke's role has enjoyed less prominence.

III. SIR EDWARD COKE'S "HISTORICO-POLITICAL DISCOURSE"

Contrary to received wisdom, Niccolo Machiavelli and Thomas Hobbes cannot be identified as "the theorists of the war in civil society."²³ Instead, Hobbes's insistence on the pervasiveness of the war of all against all in the state of nature and the importance of instituting government out of this primal conflict was aimed at neutralizing the history of actual wars, and, in particular, that of the Norman Conquest.²⁴ In sum, "far from being the theorist of the relationship between war and political power, Hobbes wanted to eliminate the historical reality of war, as though he wanted to eliminate the genesis of sovereignty."²⁵ So, at least, Michel Foucault claimed in *Society Must Be Defended*, a seminar delivered at the Collège de France in 1975-1976.²⁶ In recovering this genesis of sovereignty—or the multiple accounts thereof—Foucault turned to the construction of what he designated as the first modern historico-political discourse in

23. MICHEL FOUCAULT, *SOCIETY MUST BE DEFENDED* 18 (David Macey trans., 2003).

24. *Id.* at 89-90.

25. *Id.* at 97.

26. *Measure for Measure*, among other Shakespeare plays, has been glossed by a number of critics in a Foucauldian manner, which emphasizes the discourse of violence and the Duke's surveillance of the other characters throughout the play. The extant work, however, often falls prey to Lorna Hutson's critique of employing Foucault to understand early modern English drama; as Hutson has persuasively argued, Foucault's accounts of criminal procedure are influenced by the French inquisitorial tradition rather than the English model, and hence obscure aspects of the English tradition. According to Hutson:

[T]he Foucauldian genealogy depends on a history of prosecution techniques and a system of proof in early modern criminal law that is specifically French. Where Foucault portrays an *ancien régime* epistemology of judgment based on a 'system of "legal proofs" . . . known only to specialists' and speaks of 'the singularity of this judicial truth,' the sixteenth-century English epistemology of judgment could rather be said to be based on the participation of lay persons (justices, victims, neighbours, jurors) in deciding what was to count as knowledge.

HUTSON, *supra* note 9, at 6. Unlike *Discipline and Punish*, however, Foucault's seminars, including *Society Must Be Defended*, demonstrate an attunement to the specifically English context of judicial thought and valuably places this thought within a theory of the relationship between historical and political discourses. In this respect, *Society Must Be Defended* resembles J.G.A. Pocock's classic *Ancient Constitution and the Feudal Law*, although emerging out of a very different tradition and set of concerns. See J.G.A. POCKOCK, *THE ANCIENT CONSTITUTION AND THE FEUDAL LAW: A STUDY OF ENGLISH HISTORICAL THOUGHT IN THE SEVENTEENTH CENTURY* (1957).

seventeenth-century England and traced the resurgence of a similar set of narratives in eighteenth-century France. Among the central figures in this story, Foucault identified the seventeenth-century English jurist and politician, Sir Edward Coke, who served in such diverse positions as Attorney General, Chief Judge of the Court of Common Pleas and King's Bench, and Member of Parliament during the reigns of Queen Elizabeth, King James I, and King Charles I.²⁷

At stake in the creation of a new historico-political discourse was the assertion of a particular kind of national—or, as Foucault put it, race—struggle and the resuscitation of an earlier right in opposition to the power claimed by the king.²⁸ The genre that this historico-political discourse assumed broke sharply from extant Roman models of history; explaining why the new approach constituted an anti-Roman “counter-history,” Foucault elaborated that, under it,

[t]he history of some is not the history of others. It will be discovered, or at least asserted, that the history of the Saxons after their defeat at the Battle of Hastings is not the same as the history of the Normans who were the victors in that same battle. It will be learned that one man's victory is another man's defeat.²⁹

Rather than partaking in “the Roman history of sovereignty,” this genre resembles a “biblical history of servitude and exiles,” in which the “goal is not to establish the great, long jurisprudence of a power that has always retained its rights, or to demonstrate that power is where it is, and that it has always been where it is now,” but rather, “to demand rights that have not been recognized, or in other words, to declare war by declaring rights.”³⁰ Instead of insisting on the continuous inheritance of power, this historico-political discourse unearthed a subterranean right in order to bring it back to life.

In specifying the right asserted by the new historico-political discourse in England, Foucault turned to Coke, and contended that it consisted in “a set of Saxon laws.” As he maintains:

The major influence here was a jurist called Coke, who claimed to have discovered [*The Mirrors of Justice*] . . . [and] made it function as a treatise on Saxon right. Saxon right was described as being both the primal and the historically authentic—hence the importance of the manuscript—right of the Saxon people, who elected their

27. For these and other biographical details of Coke's life and career, see CATHERINE DRINKER BOWEN, *THE LION AND THE THRONE: THE LIFE AND TIMES OF SIR EDWARD COKE, 1552-1634* (1990); and ALLEN D. BOYER, *SIR EDWARD COKE AND THE ELIZABETHAN AGE* (2003).

28. FOUCAULT, *supra* note 23, at 69, 105-07.

29. *Id.* at 71.

30. *Id.* at 73, 77.

leaders, had their own judges* [*The manuscript has 'were their own judges'], and recognized the power of the king only in time of war; he was recognized as a wartime leader, and not as a king who exercised an absolute and unchecked sovereignty over the social body. Saxon right was, then, a historical figure, and attempts were made—through research into the ancient history of right—to establish it in a historically accurate form. But at the same time, this Saxon right appeared to be, and was described as, the very expression of human reason in a state of nature.³¹

Although grounded in a historical narrative, the right uncovered was a natural right. In content, it entailed a quasi-democratic method of self-governance, including the availability of trial by jury—or, in the manuscript's phrasing, the ability of the people to be their own judges.

Coke elaborated extensively on the nature of this right enshrined in the ancient common law. As Foucault suggested, this right helped establish a particular type of resistance to the power of the king. In part, it constrained the capacity of the king to make law without the consent of Parliament. Even more centrally, it restricted the scope of the king's judicial power. Within Coke's conception of the common law, the institutions of the legal system themselves subsisted beyond the reach of the king's sovereignty, furnishing an ancient constitution that present rulers could not alter and that undergirded the subjects' rights.³² Rather than being opposed principally to more democratic legislative decision-making, the king's power was contrasted with the right embodied in the common law and its institutions.

Two 1607 encounters between King James I and Coke epitomized how the common law—for Coke—circumscribed the monarch's judicial power.³³ In the case of the *Prohibitions del Roy*, Coke's account of which Robert Cover referred to in "Nomos and Narrative" as "one classic formulation of the privileged hermeneutic position" of judges,³⁴ Coke maintained that the king lacked the power to judge in his own person. According to Coke, when James I asserted this ability,

it was answered by me, in the presència, and with the clear consent of all the Judges of England, and Barons of the

31. *Id.* at 105-06.

32. The conception and stakes of this "ancient constitution," as well as early modern English and French jurists' role in the development of historiography, were most famously explored by Pocock. See generally POCKOCK, *supra* note 26.

33. Although both of the incidents discussed appear to have occurred in 1607, Coke's notes on the proceedings were only published posthumously in the Twelfth Part of his *Reports* (1656). See 1 THE SELECTED WRITINGS OF SIR EDWARD COKE 478 [hereinafter SELECTED WRITINGS] ("Prohibitions Del Roy") (Steve Sheppard ed., 2003).

34. Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4, 42 (1983).

Exchequer, that the King in his own person cannot adudge any case, either criminall, as Treason, Felony, &c. or betwixt party and party, concerning his Inheritance, Chattels, or Goods, &c. but this ought to be determined and adjudged in some Court of Justice, according to the Law and Custom of England.³⁵

While the king represented his own reason as sufficient to ground his judgment, Coke insisted that

causes which concern the life, or inheritance, or goods, or fortunes of [the king's] Subjects . . . are not to be decided by naturall reason but by the artificiall reason and judgment of Law, which Law is an act which requires long study and experience, before that a man can attain to the cognizance of it . . .³⁶

Only the judges of the common law, who had mastered the methods of legal reasoning, possessed the privilege of judging English subjects. Despite the king's ability to appoint his magistrates, he could not substitute himself in their place.

Even the power to pardon, which might appear to pertain directly to the king's prerogative, was not, according to Coke, absolute. In a note on pardons, also from 1607, Coke observed that

the Law so regards the Weal-publick, that although that the King shall have the suit solely in his name for the redress of it, yet by his pardon he cannot discharge the Offender, for this that it is not only in prejudice of the King, but in damage of the Subjects.³⁷

In other words, to the extent that other subjects—rather than solely the king—were injured by an action or failure to act, the king could not excuse the one sued from the obligation he was supposed to fulfill. Nevertheless, in another, undated note on the king's dispensing power, Coke confirmed that “the Royall power to pardon Treasons, Murthers, Rapes, &c. is a Prerogative incident solely and inseparably to the person of the King,” which Parliament itself could not restrain.³⁸

Pertaining not only to the king, but to judgment in general, another fundamental principal of the common law was reaffirmed by Coke in *Bonham's Case* in 1610.³⁹ Quite apart from the controversies about whether *Bonham's Case* provides a precedent for judicial review, it clearly articulates the notion that it is improper for anyone to adjudicate in his

35. *Prohibitions Del Roy*, in *SELECTED WRITINGS*, *supra* note 33, at 479.

36. *Id.* at 481.

37. *Of Pardons*, in *SELECTED WRITINGS*, *supra* note 33 at 439.

38. *Case of Non Obstante, or Dispensing Power*, in *SELECTED WRITINGS*, *supra* note 33, at 423, 424.

39. *Bonham's Case*, in *SELECTED WRITINGS*, *supra* note 33, at 264, 275.

own case. As Coke wrote, "The Censors, cannot be Judges, Ministers, and parties; Judges, to give sentence or judgment; Ministers to make summons; and Parties, to have the moiety of the forfeiture, *quia aliquis non debet esse Judex in propria causa, imo iniquum est aliquem sui rei esse judicem*."⁴⁰ Although the rule that Coke cited appears universal in scope, its application to the King would generate particular difficulties. Even if one did not subscribe to the notion that any criminal offense also constituted a violation against the monarch conceived as sovereign, certain acts, like those of revolution or treason, would clearly pertain to the King himself. Were the King to judge these crimes, he would, thus, fall afoul of the prescription not to judge in one's own case.

The same year, Coke, in a conference of the Privy Council, propounded further restrictions on James I's capacity in the legal realm, determining that he could not prohibit new building in London by proclamation. Rather than simply opposing the king's power to that of the king in parliament, Coke suggested the role of the common law in this controversy. As Coke retrospectively recounted his statement, "the King cannot change any part of the Common Law, nor create any Offence by his Proclamation, which was not an Offence before, without Parliament."⁴¹ Among the precedents for this claim that he drew upon were included earlier judges' negative response when, under Henry VIII, "the Whore-houses, called the stews, were suppressed by Proclamation, and sound of Trumpet, &c."⁴²

A closer examination of Coke's writings thus reveals the extent to which an assertion of Saxon right against King James I entailed a defense of the domain occupied by the institutions of the common law and a cabining of the king's authority in the judicial arena. Placing *Measure for Measure* within this context suggests that the problems of this problem play may be, in part, ones shared with the historico-political discourse of early modern English jurists.

IV. TYRANNY AND JUDICIAL INSTITUTIONS IN *MEASURE FOR MEASURE*

For reasons pertaining to both the history of its production and its overarching dramatic structure, critics have often read Shakespeare's *Measure for Measure* as treating claims of sovereignty by divine right and staging a thinly veiled version of the newly ascended King James I in the character of Duke Vincentio.⁴³ Somewhat neglected, however, have

40. *Id.*

41. *Proclamations*, in *SELECTED WRITINGS*, *supra* note 33, at 486, 487.

42. As the source for this information, Coke cites Holinshed's *Chronicles*. *Id.* at 489.

43. In *Political Theologies in Shakespeare's England*, Debora Shuger furnished a detailed account of the early modern political and religious theory, on the one hand, and contemporaneous legal and political institutions, on the other, that intersect in the representation of sovereignty within *Measure for Measure*. See generally DEBORA KULLER SHUGER, *POLITICAL THEOLOGIES IN SHAKESPEARE'S ENGLAND: THE SACRED AND THE STATE IN SHAKESPEARE'S MEASURE FOR MEASURE*

remained the other characters' implicit theories of justice, including, in particular, those of Angelo and Escalus.⁴⁴ During the course of *Measure for Measure*, a series of judgment scenes and episodes of pardoning are staged, ones that range from censuring venial sin to condemning slander, the latter potentially an offense against the sovereign capacity of the Duke. As successive trials unfold in the play, several characters assume the role of judge, and each enacts and exposes his particular conception of legality. None of these models seems quite sufficient, however, and the text points out the inadequacy of each at the same time as supplementing their shortcomings with a set of pardons. Although these final pardons re-establish order, the audiences of the play are left, I would argue, not with a positive sense of the justice that can be achieved but rather with an account of the inadequacy of the alternatives.

At the commencement of *Measure for Measure*, the ruler of Vienna, Duke Vincentio, decides to absent himself from the city for an indefinite duration without providing reasons for his departure. Two individuals, named Escalus and Angelo, seem potentially appropriate as substitutes, but, again for reasons unknown at the outset, Vincentio chooses Angelo over Escalus. Once in power, Angelo immediately revives an old law against lechery that had fallen into desuetude and condemns the character Claudio to death for violating it by impregnating Mariana;⁴⁵ he also issues a "proclamation" mandating that "[a]ll houses [meaning houses of

(2001). Those who specifically identify the Duke with James often rely on the idea that *Measure for Measure* articulates principles that the King had propounded in *Basilicon Doron*—a text originally completed in 1598, but republished and promoted in London in 1603, after James had been proclaimed Elizabeth's successor. See J.P. Sommerville, Introduction, in *KING JAMES VI AND I: POLITICAL WRITINGS* (J.P. Sommerville ed., 1994), at xv, xxx. The connections between *Basilicon Doron* and *Measure for Measure* were most fully elaborated by Louis Albrecht, in his *Neue Untersuchungen zu Shakespeares Mass für Mass* (1914). J.W. Lever's introduction to the Arden edition provides a useful encapsulation of motifs that Shakespeare's play appears to have adopted and adapted from James's treatise; these include "the duty of rulers to display virtue in action" and the importance of "the principle of temperance, or of the Aristotelean mean." See WILLIAM SHAKESPEARE, *MEASURE FOR MEASURE* (J.W. Lever ed., The Arden Shakespeare, Second Series, 1965), at xlviii-xlix (this edition will be cited throughout). Lever also notes the resemblance between James's signature activities and those of the Duke—like James's public acts of mercy.

44. There are a few notable exceptions to this tendency. Ian Ward has observed that—in addition to the Duke—both Angelo and Escalus become justices during the course of the play; as he remarks, "There are three magistrates in *Measure for Measure*, and each presents a distinct approach." See IAN WARD, *SHAKESPEARE AND THE LEGAL IMAGINATION* 85 (1999). Likewise, in his forthcoming book on *Justice in Shakespeare*, Kenji Yoshino interprets *Measure for Measure* as a play about judging and he examines the three methods of judgment entailed, concluding that Shakespeare endorses Escalus's approach over the others. See KENJI YOSHINO, *JUSTICE IN SHAKESPEARE* (forthcoming 2011).

45. As Claudio speaks of Angelo's role in his punishment,

... this new governor
Awakes me all the enrolled penalties
Which have, like unscour'd armour, hung by th' wall
So long, that nineteen zodiacs have gone round,
And none of them been worn; and for a name
Now puts the drowsy and neglected act
Freshly on me: 'tis surely for a name.'

Act 1, sc. 2, ll. 154-160.

prostitution] in the suburbs of Vienna . . . be plucked down.”⁴⁶ It soon transpires that Angelo’s reign is one of tyranny when he himself attempts to seduce Claudio’s sister, the virtuous novice Isabella, in exchange for remitting her brother’s life.⁴⁷ Despite verging on tragedy at various points, the play achieves a comic conclusion when the Duke returns and pardons almost all of the offenders.⁴⁸ Justice itself seems to require at least one of these pardons, that of Claudio, who was condemned based on a law of which he lacked proper notice. Pardoning Claudio—the first object of the law’s revival—at the end of the play appears to be the only way that the law can remain in force without those newly implementing it appearing unjust.

At first blush, then, *Measure for Measure* addresses several problems with law-giving. It not only invokes the kind of legislation by proclamation that Coke would later condemn in relation to King James I—and claim was already illegitimate in the reign of Henry VIII—but also suggests the potential wrongfulness of prosecuting an individual under a long-dead law. The play has, indeed, been interpreted along these lines, viewed as involving the injustice to an individual that a law itself may generate or as pre-figuring the imminent controversies between King and Parliament over the location of legislative authority.⁴⁹

The principal events of the play, however, involve not law-giving but scenes of judgment and pardoning, ones that draw upon a particular juridical conception of early modern kingship. The work of several Elizabethan theorists of the state revealed, as Debora Shuger has contended, a juridical rather than a constitutional understanding, in which “[t]o govern is to dispense justice; that is the king’s primary role and it is also why the throne he sits on and the sword he bears are God’s.”⁵⁰ King

46. Act 1, sc. 2, ll. 86-89.

47. See act 2, sc. 4.

48. See act 5, sc. 1.

49. As Craig Bernthal has noted, emphasizing how the play depicts the connection between the law and those condemned under it, “The crimes in *Measure for Measure* are, in a sense, manufactured by the imposition of a long dead statute, a practice which Bacon warns against. The imposition of the statute creates a problem so that the state can flex its muscles by asserting control.” Craig Bernthal, *Staging Justice: James I and the Trial Scenes of Measure for Measure*, STUDIES IN ENGLISH LITERATURE, 1500-1900, 247, 256-57 (1992). It is worth noting here, however, that the legitimacy or lack thereof of retroactive legislation was far from established during the period. Although some commentators resisted such law-making, the Stuarts themselves provided a number of contrary examples. See JEROME HALL, THE GENERAL PRINCIPLES OF CRIMINAL LAW 59-60 (2d ed., 2005); Jerome Hall, *Nulla Poena Sine Lege*, 47 YALE L.J. 165, 170-72 (1937). For a discussion of the varieties of retroactive legislation and some of the objections that have been posed against them from Thomas Hobbes onwards, see Jeremy Waldron, *Retroactive Law: How Dodgy Was Dunyhoven?*, 10 Otago L. Rev. 631 (2004).

Focusing on the institutional location of the legislative power, Louise Halper has argued that *Measure for Measure* should be interpreted in light of the conflict between King and Parliament in early modern England. See generally Louise Halper, *Measure for Measure: Law, Prerogative, Subversion*, 13 CARDOZO STUD. LAW AND LIT. 221 (2001).

50. SHUGER, *supra* note 43, at 72-73 (2001).

James himself adopted this stance, observing that “Kings are properly judges” and advising his son, the future King Charles I, on the centrality of judgment to the capacity of a king.⁵¹ Nevertheless, as Coke’s writings demonstrate, the identification of judgment with the sovereign did not remain uncontested during the course of James’s reign; indeed, some of the most significant disputes to occur under his rule involved the relation between royal and judicial authority and between the prerogative and common law courts. It is, then, perhaps not surprising that, even in a play performed shortly after James’s ascension to the throne, questions concerning theories of judgment and the proper location of judicial power should be paramount.

From the very commencement of *Measure for Measure*, the character Escalus—identified as an “ancient Lord”⁵²—is associated with legal institutions. Indeed, the virtues of something like the “artificial reason” of the common law emerge in Escalus’s methods, and he is described in a manner that could recall Sir Edward Coke himself. As the Duke addresses Escalus:

Of government the properties to unfold
 Would seem in me t’ affect speech and discourse,
 Since I am put to know that your own science
 Exceeds, in that the lists of all advice
 My strength can give you. Then no more remains
 But that, to your sufficiency, as your worth is able,
 And let them work. The nature of our people,
 Our city’s institutions,⁵³ and the terms
 For common justice, y’ are as pregnant in
 As art and practice hath enriched any
 That we remember.⁵⁴

A number of words in this passage resonate with the language of the common law. Only here, in all of Shakespeare, appears the word “institution,” which would be featured the next year in John Cowell’s Latin treatise reconciling Justinian’s *Institutes* with English common law and which would also later be used in the title of Coke’s own *Institutes of the Laws of England*.⁵⁵ In the folio, the phrase “cities institutions” is itself

51. *Id.* at 73-74.

52. SHAKESPEARE, *MEASURE FOR MEASURE*, *supra* note 43, at 2.

53. The Arden edition modernizes the spelling of the Folio—“cities institutions”—to read “city’s institutions.”

54. Act 1, sc. 1, ll. 3-12.

55. See generally JOHN COWELL, *THE INSTITUTES OF THE LAWS OF ENGLAND DIGESTED INTO THE METHOD OF THE CIVILL OR IMPERIAL INSTITUTIONS* (1651; Latin ed. 1605). As Cowell explains the forms of common law and their relation to so-called civil institutions:

The civill law of *England*, (usually called Common Law) is πολύσημον [“with multiple meanings”], and hath a threefold Acceptation. For first, it is taken generally for that Law which the *English* use, distinguished from that of the *Romans*, and other Nations. Secondly, It is taken for these two Courts of

italicized—usually a typeface reserved for Latin or quotations, suggesting the status of the phrase as part of a specialized language.⁵⁶ The invocation of “common justice” on the subsequent line likewise recalls the “common law,” and the posited relationship between “art” and “practice” resembles Coke’s insistence on the relevance of long experience to excellence in judging. Although Escalus is not himself chosen as the Duke’s deputy, he does possess a “place,” and, speaking with Angelo, explains “A power I have, but of what strength and nature/ I am not yet instructed.”⁵⁷ Without stretching too far, one could see this power as an adjudicatory one. By failing to involve Escalus in the prosecution of Claudio and then ignoring Escalus’s advice about the case, Angelo could then be seen as tyrannously usurping a judicial power that would better assume an institutionally independent form.⁵⁸

Escalus’s mode of judgment is not, however, represented in an entirely positive light throughout the play. Escalus endorses a judicial model predicated on identification, both with the status and the interior state of the accused. This tendency evinces itself with particular clarity in Act 2, scene 1, where he sets the scene of judgment. At the commencement of this episode, before the trial of Pompey (a bawd) opens, Escalus provides two reasons why Angelo should treat Claudio mercifully. He first specifies that “this gentleman,/ Whom I would save, had a most noble father.”⁵⁹ He then continues by insisting, “Let but your honour know. . .

Judicature, commonly called the Upper Bench, and the Common Pleas. For when we say, the cognizance of any cause belongs to the Common Law, we did not intend to any Court Baron, County Court, Pypowder Court or such Courts, but to one of these two Judicatories, who do most strictly judge all causes according to the rule of the Common Law. Although there be many cases in which, both in the Chancery and Exchequer, Process are issued upon Originall Writs, and judgment given according to common Law. And thirdly, it is taken for that Law which we term Statute Law.” *Id.* at 3-4.

56. For a discussion of the italic typeface, see Mark Bland, *The Appearance of the Text in Early Modern England*, 11 *TEXT* 91, 97-98 (1998).

57. Act 1, sc. 1, ll. 79-80.

58. The play likewise represents Escalus as concerned about the integrity of the systems of judicial administration. When he encounters the clearly incompetent constable Elbow, Escalus makes plans to replace him:

Esc. Come hither to me, Master Elbow: come hither, Master constable. How long have you been in this place of constable?

Elbow. Seven year and a half, sir.

Esc. I thought, by the readiness in the office, you had continued in it some time.—You say seven years together?

Elbow. And a half, sir.

Esc. Alas, it hath been great pains to you: they do you wrong to put you so oft upon’t. Are there not men in your ward sufficient to serve it?

Elbow. Faith, sir, few of any wit in such matters. As they are chosen, they are glad to choose me for them; I do it for some piece of money, and go through with all.

Esc. Look you bring me in the names of some six or seven, the most sufficient of your parish.

Act 2, sc. 1, ll. 254-270.

59. Act 2, sc. 1, ll. 6-7.

Had time coher'd with place, or place with wishing,/ Or that the resolute acting of your blood/ Could have attain'd th'effect of your own purpose,/ Whether you had not sometime in your life/ Err'd in this point, which now you censure him."⁶⁰ Considering the worth of the judge as well as the accused, Escalus here passes almost seamlessly from a comparison based on Claudio's "place" to one grounded in his "purpose," or intention.

Angelo, by contrast, rejects both these modes of analogy, first responding to Escalus's own speech with the assertion that "The jury passing on the prisoner's life/ May in the sworn twelve have a thief, or two,/ Guiltier than him they try."⁶¹ In other words—if the term "may" is emphasized—Angelo explains that any attempt to compare the judge's interior purpose with that of the accused will not provide sufficient, or even relevant, material for a judgment, and that this lack impedes identificatory judgment enough that it should not occur.⁶² He then claims subsequently, in dialogue with Isabella, that "Were he my kinsman, brother, or my son,/ It should be thus with him."⁶³

The discrepancy between Angelo's and Escalus's judicial procedures finds itself instantiated in the former's incapacity to achieve any closure when faced with the "misplacing" constable Elbow and far-from-transparent situation that follows.⁶⁴ After asking several questions, including an inquiry that attempts to correct Elbow's accusation against "two notorious benefactors" into one against "malefactors," Angelo abandons the interpretive effort to Escalus, and finally departs from the premises, claiming: "This will last out a night in Russia/ When nights are longest there. I'll take my leave,/ And leave you to the hearing of the

60. Act 2, sc. 1, ll. 8-15.

61. Act 2, sc. 1, ll. 19-21.

62. Escalus's assertion that the judge should consider his own shortcomings in rendering judgment bears more relation to decisions governed by equity than to those reached through the application of positive law. In cases of equity, the judge considers his relationship of obligation towards the plaintiff in rendering a decision, and arrives at a verdict in the absence of adequate standards of measurement. Likewise here, the judge is asked to evaluate the internal similarities between himself and the accused, resemblances that one cannot precisely calculate. As Kathy Eden writes, "The equitable man pities and pardons the *hamartêma* of a man like himself, just as the spectator at a tragedy is bound to do." KATHY EDEN, *POETIC AND LEGAL FICTIONS IN THE ARISTOTELIAN TRADITION* 59 (1986).

Several critics have contended that equity lies at the heart of *Measure for Measure*. Debora Shuger includes an extended discussion of the theory of equity and the courts of equity in *Political Theologies in Shakespeare's England*, *supra* note 43, at 72-101, and a number of others have pointed out specific connections. See Andrew Majeske, *Equity's Absence: The Extremity of Claudio's Prosecution and Barnardine's Pardon in Shakespeare's Measure for Measure*, in 21 *LAW AND LITERATURE* 169, 170 n.6 (2009) (enumerating the commentators arguing for the relation between *Measure for Measure* and an early modern conception of equity). As Andrew Majeske has persuasively argued though, the pardons at the end of *Measure for Measure* remain more disruptive than equitable and controvert the possibility of reading the play as simply endorsing equity over justice. See *Majeske, supra*.

63. Act 2, sc. 2, ll. 81-82.

64. The judicial procedure in this scene bears some resemblance to the Marian pretrial examination, as John Langbein has described it. See JOHN LANGBEIN, *THE ORIGINS OF ADVERSARY CRIMINAL TRIAL* 40-47 (2003).

cause;/ Hoping you'll find good cause to whip them all."⁶⁵ This statement simultaneously establishes Angelo's inability to elicit facts and judge when the crime is not immediately evident and his concomitant desire to ensure punishment. Escalus, attending carefully to each individual's testimony, unlike Angelo, still reaches an impasse, however, since neither the plaintiff nor the defendants present tenable objects of identification. Nor can he elicit satisfactory answers from the constable Elbow. Although Escalus recognizes that someone is culpable, he proves unwilling to pass judgment when supplied with insufficient information and tends instead towards lenity.⁶⁶ Thus he pardons the defendants for the future, and he allows their motives time to reform. Apparently only continued repetition of the crime after they have been clearly informed as to the nature of the law can, in his view, finally confirm the malevolence of their intentions.

Several of Escalus's comments from this scene illuminate the fraternity cemented by equality that he espouses, the actualization of which ultimately results in a flawed type of judgment. Like the Duke, who in Act 1, while still in agreement with Angelo's perspective, asserts that "Liberty plucks Justice by the nose,/ The baby beats the nurse, and quite athwart/ Goes all decorum,"⁶⁷ Escalus juxtaposes Justice with an opposite that, through its negation, demonstrates what the term "Justice" itself means for him. Inquiring "Which is the wiser here, Justice or Iniquity?,"⁶⁸ Escalus suggests the commensurability of justice and equity, a correlation that he realizes Angelo does not acknowledge; in Act 3, scene 1, he contrasts his own stance with that of Angelo, of whom he still speaks using the language of kinship, asserting that "my brother-justice I have found so severe that he hath forced me to tell him he is indeed Justice."⁶⁹ Escalus here describes the separation between the individual justice who functions within the law, inside a system where his role can also be fulfilled by "brother-justices," and the one who enters the scene in a personal capacity, like Angelo; while the former retains a working partnership with personification—going so far as to dine with a character

65. Act 2, sc. 1, ll. 133-36.

66. As Escalus instructs Elbow, "Truly, officer, because he hath some offences in him that thou wouldst discover if thou couldst, let him continue in his courses till thou know'st what they are." Act 2, sc. 1, 182-85. Towards the end of the scene, Escalus releases Pompey with a warning, simply telling him not to offend again: "in requital of your prophecy, hark you: I advise you, let me not find you before me again upon any complaint whatsoever; no, not for dwelling where you do." Act 2, sc. 1, 241-44.

Escalus's tendency toward lenity when confronted with less than perspicuous proof also recalls Jim Whitman's argument about early judges' hesitance to incur the blood guilt that would follow from wrongful conviction in cases involving the death penalty. See WHITMAN, *supra* note 21, at 1049.

67. Act 1, sc. 3, ll. 29-31.

68. Act 2, sc. 1, ll. 169-70..

69. Act 3, sc. 2, ll. 246-48

designated only as “Justice”⁷⁰—the latter attempts to incorporate Justice within himself, disguising his mortal frame as a perfect concept.

Escalus’s very affiliation with Angelo as a “brother-justice,” however, occasions problems. When the Duke, still disguised as a Friar, in Act 5 denounces the state of Vienna, Escalus’s allegiance to his fellow rulers, both Duke Vincentio himself and Angelo, causes him to ignore the methodical pursuit of justice and instead cry out “Slander to th’state! Away with him to prison!”⁷¹ The testimony provided in this scene is almost as contradictory as that which Escalus had attempted to sort through in the earlier trial he conducted. In this instance, however, unlike the earlier one, Escalus reaches a prompt decision about culpability; because those maligned by the concealed Duke’s statements are individuals with whom Escalus retains an identificatory bond, he condemns everyone who brought a complaint without trying to discern whether he or she has committed perjury or spoken the truth. The “pity” or mercy by which Escalus claimed to have “wrought” here is exposed as a gesture based on the logic of identification, a logic that will not lead inevitably towards a just outcome.

Unlike Escalus, Angelo views the world and constructs verdicts according to the paradigm of Christian, and particularly Puritan, religious tenets,⁷² a perspective revealed especially in Act 2, scene 2, immediately following the trial over which Escalus presides. Surrounded by semantic fields associated with Puritanism, like the terms “precise” or “seemer,” Angelo himself enacts a predestinarian vision through the attitude towards speech acts that he assumes. His very name, while conjuring angelic associations, would also denote “I announce” in Greek, and designates the very problem that he creates, the difficulty of proclaiming the law at the same time as instituting it and condemning based on it. In this case, as in that of the objects of Angelo’s judgments, an illusion of transparency coats the relevant speech acts, which seem to name and do immediately and on their surface. As Angelo asserts, “What’s open made to justice,/ That justice seizes. . . ‘Tis very pregnant,/ The jewel that we find, we stoop and take’t,/ Because we see it; but what we do not see,/ We tread upon, and never think of it.”⁷³ The fact that he conflates announcing the law with enforcing it, as though the latter followed immediately from the former, is additionally demonstrated by his response to Isabella in Act 2, scene 2, that “It is the law, not I, condemn your brother.”⁷⁴ Despite appearances,

70. Act 2, sc. 1, ll. 275-76.

71. Act 5, sc. 1, ll. 320-21.

72. In the Arden edition, J.W. Lever notes some of the language associating Angelo with Puritanism. See act 1, sc. 3, notes to ll. 50-54.

73. Act 2, sc. 2, ll. 21-26.

74. Act 2, sc. 2, l. 80. This line bears a striking similarity to Gracian’s gloss on Augustine that Jim Whitman treated in *The Origins of Reasonable Doubt*. According to Gracian, “When a man is

this statement does not indicate that Angelo simply maintains an unobtrusive role in the process of judgment.

While he would appear to eschew considerations of intentionality, deeming them contained within the crime, Angelo himself displays an excess of volition. Again in Act 2, scene 2, when Isabella asks that he divorce punishment of Claudio from condemnation of Claudio's crime, he replies, "Condemn the fault, and not the actor of it?/ Why every fault's condemn'd ere it be done: Mine were the very cipher of a function/ To fine the faults, whose fine stands in record,/ And let go by the actor,"⁷⁵ insisting on his own agency as sovereign embodiment and executor of the law. Subsequently Isabella aptly describes Angelo's "purpose surfeiting,"⁷⁶ revealing the intentional overflow that characterizes his speech acts.

Angelo's statement that the "fine stands in record," while susceptible to a secular interpretation based on the pre-existence of a paradigm of punishment prescribed by a particular law, also alludes to a divine temporality, by which every sin, since already encompassed within God's knowledge, could be seen as condemned in advance, but would at the same time require a type of human recognition accomplished only by censuring the criminal. Given this vision of time, delay serves no possible function, so Angelo insists on the immediacy of Claudio's punishment, almost collapsing the moment of—necessarily verbal—judgment into that of physical execution. No pardon appears possible according to this scenario, and, as Angelo tells Isabella, referring to Claudio, "He's sentenc'd, 'tis too late."⁷⁷ Nor does Angelo see himself as an exception to this rule when in Act 5 he finds the Duke privy to his nefarious actions; as he then implores,

O my dread lord,
I should be guiltier than my guiltiness
To think I can be undiscernible,
When I perceive your Grace, like power divine,
Hath looked upon my passes. Then, good prince,
No longer session hold upon my shame,
But let my trial be mine own confession.
Immediate sentence, then, and sequent death
Is all the grace I beg.⁷⁸

killed justly, it is the law that kills him, not you." See WHITMAN, *supra* note 21, at 47 (quoting GRACIAN, *DECRETUM PARS SECUNDA*). As Whitman elaborated, canon law developed two rationales for this conclusion: "In part, it was a doctrine about killing without passion; in part, it was a doctrine about procedure." *Id.* Under both rationales, Angelo's judicial efforts would fall short; he is certainly unable to reign in his passion, and Escalus bests him in the realm of procedure.

75. Act 2, sc. 2, ll. 37-41.

76. Act 5, sc. 1, l. 105.

77. Act 2, sc. 2, l. 55.

78. Act 5, sc. 1, ll. 364-72.

Any vision of pardon is here supplanted by the frame of an inexorable logic of automatic punishment, one that must be negated by the temporal fold allowing Claudio to return to life, or return on stage alive.

Angelo hence espouses an immediacy in the relation between law and its execution that bypasses the procedural aspects of judgment, an immediacy that the play represents as tyrannical. Furthermore, the surfeit of will connected with both Angelo's imposition of punishment on Claudio and his attempted seduction of Isabella stands as a negative contrast to Escalus's more methodical mode of judicial inquiry. The procedural emphasis and institutions of the common law emerge as powerful counterparts to the workings of tyranny; yet they remain insufficient as embodied in Escalus because of the status-based emphasis of his approach. Examining the contrast between Angelo's and Escalus's judicial orientations suggests a nascent common law justification for prohibiting the King from judging in person; at the same time, however, the common law itself does not emerge from the play's representation unscathed.

V. SLANDERING THE JUDGE

After examining the excesses of Escalus's identifications and Angelo's orientation towards exteriority, it might be tempting to see Duke Vincentio, who seeks the hidden behind what is manifest, as constituting a holy *deus ex machina* and providing the only viable model of judgment. Such a conclusion would, however, too hastily ignore the fact that the Duke himself had engineered the entire situation, in a sense inciting the nefarious deeds that occur during the course of the play.⁷⁹ As his own rhetoric demonstrates, the Duke has in certain respects criminalized himself by reviving the dead law and injuring his subjects. This culpability can only be erased through the sovereign's act of pardoning, which, on the one hand, re-instates his own majesty, so that pardon in this instance serves the sovereign himself rather than the individual remitted from punishment. Pardoning, on the other hand, however, absolves the law of its relation to the sovereign's intention, and generates a gap between sovereign and law. Despite the failure of events or executions

79. Although many have viewed the Duke as a figure for the divine, some writers on the play have begun to question his anointed status. See, e.g., Huston Diehl, "Infinite Space": *Representation and Reformation in Measure for Measure*, 49 SHAKESPEARE Q. 393, 410 (1998) ("When, in the final act, [Shakespeare] makes his own activity as dramatist visible through a Duke who constructs fictional narratives, traffics in substitutions, manipulates desire, cleverly scripts comic endings, and seeks to reform his audiences, he depicts his central character as an imperfect, even a bungling playwright"); Arthur L. Little, Jr., *Absolute Bodies, Absolute Laws: Staging Punishment in Measure for Measure*, in SHAKESPEAREAN POWER AND PUNISHMENT 113, 125 (Gillian Murray Kendall ed., 1998) ("The play invites its audience to mock and pull back from the Duke's construction of himself as its one and only serious subject. The play challenges its offstage audience not to heed the absolutism demanded by a measure for a measure but to fancy at least that some kind of critical difference exists between a punishment and a marriage. The play's real mockery seems to be directed at the Duke.").

that should have taken place in the play to happen, by its end the "institution" of government has irrevocably altered.⁸⁰

Throughout the middle of *Measure for Measure*, the Duke assumes the religious role of Friar, and he confesses various individuals—albeit in the sacred rather than juridical sense—attempting to learn their most intimate secrets and intentions. This effort proves successful in almost all cases except that of Lucio, whose motives always remain to some extent concealed. In Act 5, the Duke accuses and convicts him of "slander," reinforcing his judgment with the words "yet here's one in place I cannot pardon,"⁸¹ a phrase that refers the crime of slander to the Duke's status as sovereign—his place—and almost implies the idea that majesty cannot pardon sedition against the state. Several lines later, employing the more personal term "forgive," he addresses Lucio with the words "Thy slanders I forgive, and therewithal/ Remit thy other forfeits,"⁸² an alteration in diction that might imply a personal forgiveness rather than political pardon of defamation.

In Act One, however, the Duke had already expressed worries about slander to Friar Thomas as he explained why he had substituted Angelo in his own place, claiming: "I have on Angelo impos'd the office [of again enforcing the law];/ Who may in th'ambush of my name strike home,/ And yet my nature never in the fight/ To do in slander."⁸³ This statement associates slander with a mortal, and even revolutionary, violence that it shares only with the law's verbal re-establishment and imposition. Angelo's sentencing of Claudio can be identified as his act of "striking home" (as though in a duel), while Vincentio has artfully parried the counter-thrust that would "do him in." Because the Duke has ceded only his position as sovereign—his "name"—rather than his own person—his "nature"—to Angelo, he imagines in advance, however, that he will avoid the fatal wound; only Angelo's nature, not his own, will be subject to slander. The results of Angelo's reanimation of the law confirm the Duke's fears about what might have happened had he himself taken on the task of imposing legal order; indeed, Angelo speaks to Isabella of his judgment as "the sentence/ That you have slander'd so."⁸⁴

The sovereign's fear of generating slander through imposing the law recalls sixteenth-century French political theorist Jean Bodin's rationale for recommending that the King avoid judging in person. As Bodin claimed in *Les Six Livres de la République*, doing so might disfigure the King's reputation.⁸⁵ After explaining how judging in person could

80. Act 1, sc. 1, l. 10.

81. Act 5, sc. 1, l. 497.

82. Act 5, sc. 1, l. 517-18.

83. Act 1, sc. 3, ll. 40-43.

84. Act 2, sc. 4, ll. 109-10.

85. See JEAN BODIN, *LES SIX LIVRES DE LA RÉPUBLIQUE* 380-88 (Gérard Mairet ed., 1993) (1576)

undesirably accentuate the vices rather than virtues of the sovereign, Bodin elaborated why it would be inexpedient for even the most upstanding of Kings to engage in this activity. According to Bodin's account, meting out punishment personally will only bring the disapprobation of the ones condemned; hence these subjects should only be given the opportunity to "vent their anger" on appointed judges, not the sovereign himself.⁸⁶ The representation of the Duke thus also suggests the advisability of divorcing the sovereign from the exercise of judgment, but for a reason different from Coke's—to conserve the honor of the King in the public eye rather than to establish the autonomy of the common law system.

Within the play, several passages explore the relationship between the law and a force that animates it, endowing the law itself with varying degrees of life. As the Duke asserts, employing metaphors mixed between plant and animal,

We have strict statutes and most biting laws,
The needful bits and curbs to headstrong jades
Which for this fourteen years we have let slip;
Even like an o'er-grown lion in a cave
That goes not out to prey. Now, as fond fathers,
Having bound up the threatening twigs of birch
Only to stick it in their children's sight
For terror, not to use, in time the rod
Becomes more mock'd than fear'd: so our decrees,
Dead to infliction, to themselves are dead. . .⁸⁷

While the law initially appears "biting," implying an executive power of its own, its carnivorous and leonine force has been mitigated through the intrusion of vegetation, represented by the overgrowth encompassing the lion. Even plant life is finally denied the law when the twigs, separated from their natural existence through being bound into a rod, are deprived of any effect at all through the allegorical father's refusal to use them. The implication at this point is that the laws must in some way regain life, but they can do so only through parasiting off an individual's—for example, Angelo's—intentionality. Speaking of Angelo himself, Lucio resumes the image of the lion, asserting that "He [Angelo], to give fear to use and liberty,/ Which have for long run by the hideous law/ As mice by lions, hath pick'd out an act. . ."⁸⁸ Finally expressing his own stance,

(detailing the reasons why it is inexpedient for the Prince to judge in person); JEAN BODIN, *SIX BOOKS OF THE COMMONWEALTH* 171-75 (M.J. Tooley trans., 1955); Bernadette Meyler, *Theaters of Pardoning: Tragicomedy and the Gunpowder Plot*, 25 *STUD. IN LAW, POLITICS, AND SOC.* 37, 52-53 (2002).

86. BODIN, *SIX BOOKS OF THE COMMONWEALTH*, *supra* note 85, at 174.

87. Act 1, sc. 3, ll. 19-28.

88. Act 1, sc. 4, ll. 62-64.

Angelo then claims at the very commencement of Act 2 that "We must not make a scarecrow of the law,/ Setting it up to fear the birds of prey/ And let it keep one shape till custom make it/ Their perch, and not their terror."⁸⁹ Here the image of the inanimate rod becomes converted into another bundle of sticks, the scarecrow, which Angelo insists on making move as though human. These passages emphasize the difficulty entailed in setting the law in motion as though intentional or animate despite its "death" to even itself. Although Angelo's judgment of Claudio under the old law appears to solve this problem, it does so only through the involvement of his own intentionality.⁹⁰

Returning to the Duke's attempt to foist the problem of reviving the laws onto Angelo, it becomes clear that Vincentio has indeed provided some justification for slander, a motive of which Lucio could avail himself. As M. Lindsay Kaplan observes, several of Lucio's comments indicate that he might be cognizant of Duke Vincentio's identity, even when he maligns the disguised Duke to his face.⁹¹ The presence of this possibility casts the Duke's omniscience into question, yet it is this very omniscience that allows commentators to consider the Duke divine in both capability and mercy. The manner in which Lucio slanders the Duke to his face, and yet in his symbolic absence, emphasizes this point. During the play, Lucio only defames the Duke when speaking with the Duke himself in his disguise as a friar. In doing so, Lucio criticizes the Duke precisely for his abdication and the failure to judge Claudio's case himself. As Lucio inquires of the disguised Vincentio, "Would the Duke that is absent have done this [i.e., condemn Claudio]? Ere he would have hanged a man for the getting a hundred bastards, he would have paid for the nursing a thousand. He had some feeling of the sport; he knew the service; and that instructed him to mercy."⁹² In one respect, then, Lucio might not be construed as slandering the Duke at all, because he is not spreading rumors about the Duke's nature to a third party, but rather addressing only the Duke himself. On the other hand, by slandering the sovereign in his absence, or perpetrating *scandalum magnatum*,⁹³ Lucio

89. Act 2, sc. 1, ll. 1-4.

90. When the Duke speaks as "the mercy of the law," requiring "Measure still for Measure," a logic that his subsequent pardonings call into question, he resorts to personifying the law and displacing his own agency onto it. What his statement demonstrates then is that, when the law talks, its only language is the *lex talionis*.

91. M. LINDSAY KAPLAN, *THE CULTURE OF SLANDER IN EARLY MODERN ENGLAND* 92-108 (1997).

92. Act 3, sc. 2, ll. 112-17.

93. See BLACK'S LAW DICTIONARY 1345 (7th ed. 1999), s.v. "*scandalum magnatum*": "Actionable slander of powerful people; specif., defamatory comments regarding persons of high rank, such as peers, judges, or state officials." Describing the origin of the crime, Kaplan writes that, "During the reign of Edward I, provision was made in 1275 to punish rumors defaming the reputation of a state official in the statute of *scandalum magnatum*—slander of a magnate." KAPLAN, *supra* note 91, at 21.

verges on committing a revolutionary offense.

Returning to the Duke's observation that Lucio is "one in place I cannot pardon," the phrase takes on additional significance. To the extent that Lucio's slander pertains to the Duke's office—or his "name"—the Duke may opt not to pardon his attack against the state. If the slander refers, however, merely to the private person of the Duke—his "nature"—Vincentio might not only forgive but also be prevented from himself judging. In discussing the problems caused by the sovereign's act of judging in person, Bodin emphasizes that they are particularly pronounced when the sovereign judges in his own case, violating the proscription that Coke would later reaffirm.⁹⁴ Instead, the King—or in this instance, the Duke—is left to forgive.⁹⁵

Although the Duke appears to take Bodin's advice, leaving not only judging but even the renewed enforcement of long-ignored laws to a substitute, his prudential decision to appoint another to impose draconian punishments falls subject to Lucio's censure. Hence the Duke does not commit the error of judging in person, but, by abdicating responsibility for the judgments that occur within the state he supposedly rules, he opens himself to the accusation of another kind of wrongdoing. The play thus provides no model of the ruler who refrains from judging in person on the basis of an acknowledgement that institutional competence might lie elsewhere rather than an assumption that the sovereign's majesty will be better served by pardoning.

VI. CONCLUSION

Perhaps appropriately for a play whose title connects it with the biblical injunction, "Judge not, that you be not judged. For with the judgment you pronounce you will be judged, and the measure you give will be the measure you get,"⁹⁶ *Measure for Measure* takes up the question of whether the King himself should judge his subjects in person. While suggesting reasons why those trained in the "cities institutions" might exercise greater judicial discernment than the sovereign and why the ruler himself might, for reputational reasons, avoid taking on the judicial capacity, the play also directs the spectators' attentions to the flaws in each of these positions. Despite the advantages of expertise that they possess, those appointed judges may run the risk of excessive lenity towards individuals of their own status and, in turn, rush to judgment

94. See Meyler, *Theaters of Pardoning*, *supra* note 85, at 53-54 (discussing Bodin's treatment of the problem caused by the King's act of judging in his own case); *supra* notes 39-40 and accompanying text (considering Coke's reservations about judging in one's own case).

95. It may be worth noting here that the Duke awaits Isabella's approval in the final scene before granting pardon to Angelo; this sequencing accords with Coke's concern that the King avoid pardoning when doing so might give away a right possessed by another of his subjects.

96. *Matthew* 7:1.

against those perceived as undermining the state. Likewise, while the sovereign may preserve himself from slander by refraining from judging in person, his act of imposing this office on another may itself represent an injustice. These and related dilemmas were left to the several audiences of *Measure for Measure* to resolve through their own deliberations after the end of the performance.