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The Trials of Shakespeare: Courtroom Drama and Early Modern English Law

Paul Raffield*

I. INTRODUCTION

The last decade of the sixteenth century and the first decade of the seventeenth witnessed dramatic developments in the scope and structure of the English legal system. The Elizabethan era was a litigious age, and by the 1590s the two principal courts of common law—the Court of King’s Bench and the Court of Common Pleas—were competing with each other for business, especially in the burgeoning area of contract law.¹ Theirs was a rivalry played out between courts within the same jurisdiction, that of the common law. The major complicating factor in the English juridical process during this period was the professed competence of alternative courts to determine legal actions. By far the most influential of these (both in juridical and political terms) were the ecclesiastical courts and the Court of Chancery. The influence of the former was experienced at all levels of English society, ranging from the parochial ‘bawdy’ courts to the diocesan consistory courts and (at the highest level) the Ecclesiastical Court of High Commission. Established as they were to try ecclesiastical causes, there was an overlap between the jurisdiction of the church courts and that of the courts of common law, in particular and obviously where the boundaries between spiritual and temporal matters were

* School of Law, University of Warwick, UK. I formulated many of the ideas in this essay while completing *Shakespeare’s Imaginary Constitution: Late-Elizabethan Politics and the Theatre of Law* (Hart Publishing, 2010); I am grateful to Hart Publishing for permission to reproduce brief extracts from that book.

¹ The competition between the two courts was not always friendly: as Baker states, ‘[t]he Common Pleas judges sitting in the Exchequer Chamber treated their King’s Bench brethren with open contempt’: JH Baker, *An Introduction to English Legal History* (Butterworths, 2002) 344. On contract law and its application by the courts in the Elizabethan period, see JH Baker, ‘New Light on *Slade’s Case*’, pp 393–432 and JH Baker, ‘Origins of the “Doctrine” of Consideration, 1535–85’, pp 369–91, both in JH Baker, *The Legal Profession and the Common Law: Historical Essays* (Hambledon, 1986); David Ibbetson, ‘Sixteenth Century Contract Law: *Slade’s Case* in Context’ (1984) 4 *Oxford Journal of Legal Studies* 295. More generally, see JH Baker and SFC Milsom, *Sources of English Legal History: Private Law to 1750* (Butterworths, 1986); AWB Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit* (Clarendon Press, 1975).

blurred. For common lawyers, protective of their status as guardians of an ancient and indigenous jurisprudence,² the primary source of discontent with the expansive claims of the ecclesiastical courts (especially those of the Court of High Commission) was the foundation of these institutions in a foreign jurisdiction: the civil law. The administrative and judicial functions of the ecclesiastical courts were enacted by civil lawyers, while the *ex officio mero* prosecutions of High Commission had an historical basis in Roman canon law. During the 1590s, resentment among common lawyers focused on attempts by the Crown to enforce the imperium of the monarch through its effective sequestration of the Court of High Commission (as various cases that were heard in the courts of common law demonstrated).³ A similar threat to the juridical sovereignty of the courts of common law was posed in the first two decades of the seventeenth century by the ascendancy of the Court of Chancery (the court of the king's conscience, in which it was claimed that Equity tempered the rigour of the law) under the Chancellorship of Lord Ellesmere, with the active support of James I.⁴ The personal and professional antagonism between Sir Edward Coke (Chief Justice of the Common Pleas from 1606, and Chief Justice of the King's Bench from 1613) and Ellesmere was a major contributory factor to the monumental clash of jurisdictions, leading in 1616 to Coke's dismissal from the Bench and to the decree of James I that, where there was conflict between common law and Equity, decisions of the Court of Chancery were of superior authority to those in the courts of common law.⁵

2 'Whence we, who are the Ministerial Officers, who sit and preside in the Courts of Justice, are therefore not improperly called, *Sacerdotes* (Priests): The Import of the Latin Word (*Sacerdos*) being one who gives or teaches Holy Things': Sir John Fortescue, *De Laudibus Legum Angliae*, John Selden (ed) (R Gosling, 1737) 4–5.

3 See especially *Caudrey's Case. Of the King's Ecclesiastical Law, The Reports of Sir Edward Coke, Knt In English*, George Wilson (ed), 7 vols (Rivington, 1777) 5 *Reports* (1605) 3: Preface, ia; see John Guy, 'The Elizabethan Establishment and the Ecclesiastical Polity' in John Guy (ed), *The Reign of Elizabeth I: Court and Culture in the Last Decade* (Cambridge University Press, 1995) 126–49, 130–9; LF Salt, *Church and State in Early Modern England, 1509–1640* (Oxford University Press, 1990). For local accounts of the activities of the 'bawdy' courts, see ERC Brinkworth, *Shakespeare and the Bawdy Court of Stratford* (Phillimore, 1972); ERC Brinkworth, *The 'Bawdy Court' of Banbury: The Act Book of the Peculiar Court of Banbury, 1625–1638*, RK Gilkes (ed) (Banbury Historical Society, 1997).

4 Coke recorded that Ellesmere had 'told the king that he as chancellor was keeper of the king's conscience and therefore whatsoever the king directed in any case he would decree accordingly', CUL, MS II.5.21 fo 47v. For an extensive discussion of Equity in the 16th and 17th centuries, its rules, literature and authorities, and the equitable jurisdiction of the Lord Chancellor, see WS Holdsworth, *A History of English Law*, 17 vols (Methuen, 1924) 5: 215–338; also Dennis R Klinck, *Conscience, Equity and the Court of Chancery in Early Modern England* (Ashgate, 2010).

5 On the personalisation by Coke and Ellesmere of the dispute over the respective jurisdictions of common law and Chancery, culminating in Coke's dismissal as Chief Justice, see JH Baker, 'The Common Lawyers and the Chancery: 1616' in Baker, *The Legal Profession and the Common Law* (n 1) 205–29. On the conflict of 1615–16 between Coke and Ellesmere, see LA Knafla, *Law and Politics in Jacobean England: The Tracts of Lord Chancellor Ellesmere* (Cambridge University Press, 1977) 155–81; JP Dawson, 'Coke and Ellesmere Disinterred: The Attack on the Chancery in 1616' (1942) 36 *Illinois Law Review* 127.

It is my intention in this essay to examine these juridical developments, as represented in three plays by Shakespeare: *The Merchant of Venice*, *Measure for Measure* and *The Winter's Tale*. Shakespeare's interest in and considerable technical knowledge of English law and legal procedure is instanced in all of the above works,⁶ each of which embodies different and specific areas of jurisprudence, which underwent major developments (and in some cases, transformation) during the period in which the plays were written. My discussion of *The Merchant of Venice* is confined to an exploration of conscience and the elevated status of the mutual promise in late Elizabethan contract law. I argue that juridical developments in the 1590s marked a paradigmatic shift of emphasis from the management of commodities and debt to the regulation of human, societal conduct.⁷ My interest in *Measure for Measure* lies in exploring the extent to which the rival jurisdictions, outlined above, affected the quotidian activities and lives of individual subjects. The conviction of Claudio, and the subsequent sentence of death, for the statutory criminal offence of fornication may have been a dramatic invention, but it was not that far removed from the clamorous demands made by a vociferous 'puritan' minority in the latter part of Elizabeth's reign and at the accession of James I.⁸ The trial presided over by the Duke, in Act 5 of *Measure for Measure*, demonstrates the arbitrary nature of prerogative rule and has clear parallels with proceedings in the Court of Chancery. It would be nearly 150 years after *Measure for Measure* was written that the principle of the separation of powers was delineated in Montesquieu's *L'Esprit des lois*, but disquiet was already being articulated during the reign of James I, concerning the King's asserted right to sit in judgment in *curiae regis*.⁹ This contentious constitutional and political issue is

6 As BJ Sokol and Mary Sokol note, '[t]he language of the law was common currency in Shakespeare's litigious age ... it is anachronistic to assume that only lawyers were learned in the law': BJ Sokol and Mary Sokol, *Shakespeare's Legal Language: A Dictionary* (Athlone, 2000) Introduction, 1–2; see JF Andrews (ed), *William Shakespeare: His World, His Work, His Influence*, 3 vols (Charles Scribner's Sons, 1985). On Shakespeare's personal involvement with the law courts, see Charles Nicholl, *The Lodger: Shakespeare on Silver Street* (Allen Lane, 2007).

7 Of contract law in the 1590s, Zurcher argues that 'the common law logic of the *consideratio* (like that of *mens rea*) was throwing open the finally insoluble problem of the knowability of intention': Andrew Zurcher, 'Consideration, Contract and the End of *The Comedy of Errors*' in Paul Raffield and Gary Watt, *Shakespeare and the Law* (Hart Publishing, 2008) 19, 36.

8 Philip Stubbes asserted that 'who so lusteth after a woman in his hart, hath committed the fact alreedy, and therefore is guiltie of death for the same': Philip Stubbes, 'The Horrible Vice of Whoredome in Ailgna' in *The Anatomie of Abuses* (Richard Iones, 1583) H2r. The word 'puritan' in late Elizabethan England was notoriously imprecise. I use it here in the sense in which Collinson describes it: 'Puritan was a term of stigmatisation, which in Shakespeare's England was bandied about freely and loosely as a weapon against a certain kind of excessive religiosity and scrupulous morality': 'William Shakespeare's Religious Inheritance and Environment' in Patrick Collinson, *Elizabethans* (Continuum, 2003) 219, 236; see also Peter Lake, *Anglicans and Puritans? Presbyterianism and English Conformist Thought from Whitgift to Hooker* (Unwin Hyman, 1988); Peter Lake, 'Puritan Identities' (1984) 35 *Journal of Ecclesiastical History* 112.

9 Coke took issue with the claim made on behalf of James I that he was entitled to determine cases in person, arguing that 'the King in his own person cannot adjudge any case'. He conceded that the King was entitled to sit in the Court of Star Chamber, but then only 'to consult with the Justices, upon certain questions proposed to them, and not *in judicio*': Coke, *Prohibitions del Roy*, 12 *Reports* (1658) 7: 64a, 64b.

central to Act 3, Scene 2 of *The Winter's Tale* in which the King of Sicily, Leontes, presides over the trial of his wife, Hermione, for the alleged offence of adultery and (therefore, by virtue of the fact that she is the King's wife) High Treason. The common juristic thread that binds these plays together (in a period of authorship which spans approximately 15 years) is the emergence of the autonomous subject of law and the institutional relationship between that sentient political being and an increasingly centralised, expansive State.

II. SOCIETAS, CONSENSIO AND THE MERCHANT OF VENICE

In the early modern English legal system, an action for breach of contract would most likely have been brought in the Court of Common Pleas. In *The Merchant of Venice*, the introduction of Portia (disguised as Balthazar) into the trial of Antonio, and especially her meditation on 'The quality of mercy' (4.1.180), has tended to muddy the juridical waters for some critics, demonstrating what Dennis R Klinck describes as 'the apparent rift between the subjectivity of conscience and the necessary objectivity of law'.¹⁰ It is incorrect to state that Portia's participation in the trial represents 'a conflict between the courts of law and of equity (chancery) in Elizabethan England'.¹¹ Indeed, Gary Watt goes so far as to argue that '*The Merchant of Venice* is not a study in equity; it is a study in the absence of equity'.¹² Shylock's is an action for breach of contract. Antonio's debt is founded on a document under seal, and any subsequent cause of Shylock's would have been heard in a court of common law, specifically the Court of Common Pleas; although it must be noted that if a plaintiff sought specific performance of a contractual term (rather than damages for breach of contract), then the remedy lay in the Court of Chancery. Coke described the Court of Common Pleas as 'the lock and the key of the common law in common pleas, for herein are reall actions, whereupon fines and recoveries (the common assurances of the realm) do passe'.¹³ Of course, EFJ Tucker is correct to state of Act 4, Scene 1 of *The Merchant of Venice* that 'nothing remotely resembling this trial ever took place at Westminster Hall':¹⁴ the courtroom in *The Merchant* is an imaginary hybrid, which draws upon aspects of both the Court of Common Pleas and

¹⁰ Klinck (n 4) 4. All references to the text of the play are from *The Merchant of Venice*, JR Brown (ed) (Arden Shakespeare, 2006).

¹¹ Maxine Mackay, 'The Merchant of Venice: A Reflection of the Early Conflict between Courts of Law and Courts of Equity' (1964) 15 *Shakespeare Quarterly* 371. Knight expresses the mistaken belief that in *The Merchant of Venice*, Shakespeare 'is presenting Chancery procedure and advocating that it be used precisely along its theoretical lines of a superior court': W Nicholas Knight, 'Equity, *The Merchant of Venice* and William Lambarde' (1974) 27 *Shakespeare Survey* 93, 95.

¹² Gary Watt, *Equity Stirring: The Story of Justice beyond Law* (Hart Publishing, 2009) 217.

¹³ Sir Edward Coke, *The Fourth Part of the Institutes of the Laws of England, Concerning the Jurisdiction of the Courts* (E and R Brooke, 1797) 98.

¹⁴ EFJ Tucker, 'The Letter of the Law in *The Merchant of Venice*' (1976) 29 *Shakespeare Survey* 93, 97.

the Court of Chancery. Strict procedural reservations notwithstanding, it is reasonable to argue that the equitable ideology of the common law (traceable to the Aristotelian principle of natural equity or *epieikeia*) and the imaginative decisions of its judiciary are represented in Shakespeare's stylised vision of juridical procedure relating to disputes in private law.¹⁵ This observation is relevant to the argument that equitable judgments were demonstrably a feature of the courts of common law throughout the Elizabethan period, and especially in the resolution of contractual disputes. Hence in his report of *Eyston v Studd*, heard by the Court of Common Pleas in 1574 (concerning the terms of a disputed lease and the subsequent eviction of the plaintiff by the defendant), Edmund Plowden expounds at length on the nature of equity, 'which seems to be a necessary ingredient in the exposition of all laws'.¹⁶ Plowden cites with approval Aristotle, Bracton and St German on equity, before concluding that 'a man ought not to rest upon the letter only, *nam qui hæret in cortice*, but he ought to rely upon the sense, which is tempered and guided by equity'.¹⁷

Shylock seeks 'the due and forfeit of my bond' (4.1.37). The agreement to lend Antonio 3,000 ducats, and the notorious penalty clause, 'for an equal pound / Of your fair flesh, to be cut off and taken / In what part of your body pleaseth me' (1.3.145–7), was recorded under seal by a notary. JH Baker makes the important observation that actions for debt on an obligation formed the bulk of work for the Court of Common Pleas throughout the Tudor period. Baker makes the additional comment that '[s]ince the action of debt was brought to enforce the penal obligation and not the underlying agreement', the effect of such actions was to delay the fruition of consensual agreement as a crucial feature of modern contract law. The penalty rather than the relationship between the parties was at issue: deeds and conditions, rather than consent and mutual promise, were the salient features of actions for breach of contract.¹⁸ The issue of consensual agreement is central not only to the discussion of contract in the narrow, legalistic sense, but in terms also of *societas*: the bonds of association or fellowship that bind individuals into a community. In classical terms, *consensio* is an implicit feature of friendship: '*omnium divinarum humanarumque rerum cum benevolentia et caritate consensio*' ('agreement about divine and human affairs, accompanied by good will and

¹⁵ On *epieikeia*, see *The Nicomachean Ethics*, bk V.X.1137b25–30: 'This is the essential nature of equity; it is a rectification of law in so far as law is defective on account of its generality. This in fact is also the reason why everything is not regulated by law: it is because there are some cases that no law can be framed to cover, so that they require a special ordinance': Aristotle, *The Nicomachean Ethics*, JAK Thomson (trans) (Penguin, 2004) 141.

¹⁶ *Eyston v Studd*, *The Commentaries or Reports of Edmund Plowden*, 2 vols (H Watts, 1792) 2: 459, 466.

¹⁷ *Ibid.*, 467.

¹⁸ Baker, *Introduction to English Legal History* (n 1) 324. Weisberg states that Antonio's is 'a *simplex obligatio*, or single bond': Richard Weisberg, *Poethics, and Other Strategies of Law and Literature* (Columbia University Press, 1992) 95; this is the type of bond specified by Shylock: 'Go with me to a notary, seal me there / Your single bond' (1.3.140–1). On lawyers' definitions of the bond, see O Hood Phillips, *Shakespeare and the Lawyers* (Methuen, 1972) 102–16.

affection').¹⁹ Cicero's discourse on friendship, from which the above quotation is taken, must be supplemented by reference to Aristotle, and his insistence that

Friendship also seems to be the bond that holds communities together, and lawgivers seem to attach more importance to it than to justice; because concord seems to be something like friendship, and concord is their primary object—that and eliminating faction, which is enmity.²⁰

Amity and mutual trust are interdependent features of the ideal state described by Aristotle in Book VIII of *The Nicomachean Ethics* (as the above extract illustrates), in which friendship and justice are rendered coextensive and indivisible. The conflation of friendship (*philia*) with love (*erōs*) is a notable feature of Book VIII; the same may be said of the relationship between Antonio and Bassanio in *The Merchant of Venice*. The issue of unreciprocated homosexual longing by Antonio for Bassanio is addressed directly by AD Nuttall, who argues that 'in *The Merchant of Venice* same-sex solidarity becomes profound homosexual love, felt by one party only.'²¹ Of course, the terms of the loan (if indeed it is a loan, rather than a gift) by Antonio to Bassanio of 3,000 ducats differ dramatically from those of the loan made by Shylock to Antonio: once he has obtained the money from Shylock, Antonio will allow Bassanio 'To have it of my trust, or for my sake' (1.2.185). Nuttall makes the accurate observation that 'Bassanio is one of the half-contemptible young men who recur in Shakespearean comedy (Claudio, Bertram ...). He is very nearly a fortune-hunter ...'²² The issue of mutual reciprocity in true friendship is addressed by Aristotle, but in terms which are strongly redolent of the type of contractual relationship that was the focus of juridical debate at the time *The Merchant of Venice* was written (1596–7), and which have particular resonance concerning the relationship in the play between Antonio and Bassanio. The correlation between classical philosophy and Judaeo-Christian theology is never more apparent than in Aristotle's claim that 'friendship consists more in loving than in being loved.'²³ Aristotle delineates three types of friendship, founded respectively in utility, pleasure and goodness. While Antonio's friendship with Bassanio is based on the inherent goodness of the former,²⁴ Bassanio's friendship with Antonio is based on utility. Aristotle argues that people such as these 'do not love each other for their personal qualities, but only in so far as they derive some benefit from each other.'²⁵ Conversely, Antonio fits exactly the category of loving ben-

¹⁹ Marcus Tullius Cicero, 'Laelius, or On Friendship' in *On Living and Dying Well*, Thomas Habinek (trans) (Penguin, 2012) 82.

²⁰ Aristotle, *Nicomachean Ethics* 201, bk VIII.I.1155a22–25.

²¹ AD Nuttall, *Shakespeare the Thinker* (Yale University Press, 2007) 256.

²² *Ibid.*

²³ Aristotle, *Nicomachean Ethics* 213, bk VIII.VIII.1159a33–35.

²⁴ Nuttall (n 21) 257 claims that Antonio's love for Bassanio is 'the strongest example of Christian goodness in the play'.

²⁵ Aristotle, *Nicomachean Ethics* 204, bk VIII.III.1156a10–15. In mitigation, Nuttall argues that Bassanio 'loves sincerely with the little love of which he is capable': Nuttall (n 21) 256.

efactor, described by Aristotle in Book VIII.VII of *The Nicomachean Ethics*: ‘the author of a kindness feels affection and love for the recipient even if he [the recipient] neither is nor is likely to be any use to him.’²⁶ Diametrically opposed to the loving benefactor is the creditor (of whom Shylock is an archetype), whose concern for the debtor’s safety is predicated solely upon the expectation of repayment: ‘It is not affection that the lender feels, but a wish for the debtor’s safety with a view to reimbursement ...’²⁷

The issues of reciprocity and benefit and burden are of course central to the law of contract. A bare promise is not actionable at law: *ex nudo pacto non oritur actio*. The promise is binding only if consideration is provided for it, the benefit and burden acting as a symbol or badge of enforceability.²⁸ But, as I have suggested above with reference to Plowden’s report of *Eyston v Studd*,²⁹ the question of conscience loomed large in the Elizabethan legal landscape. The construed relationship between the parties, rather than the debt itself, became the focus of judicial attention in contractual disputes: the sacred and symbolic status of the promise (express or implied) took centre-stage. The impact on substantive developments in sixteenth-century English jurisprudence of Christopher St German’s *Doctor and Student* cannot be overestimated. The fact of its publication in English (rather than law-French or Latin) is evidence that St German’s treatise on law and conscience (written in the form of a dialogue between a Doctor of Divinity and a student of the common law) was intended for a wide audience.³⁰ Its broad readership notwithstanding, *Doctor and Student* was a set text at the sixteenth-century Inns of Court and, as John Guy has asserted, it ‘set a benchmark for lawyers and constitutional theorists.’³¹ Arguably more than any other single author, St German was responsible for elevating conscience to an unprecedented level in the resolution of private law actions. For St German, conscience and equity were inseparable from each other, not only in the narrow sense of justice dispensed by the Lord Chancellor in the Court of Chancery, but also in the exercise and enforcement of all laws: ‘And I counsel thee ... that in every

²⁶ Aristotle, *Nicomachean Ethics* 241, bk VIII.VII.1167b30–34.

²⁷ *Ibid.*

²⁸ The classic definition was provided in the 19th century, in *Currie v Misa* (1875) LR 10 Ex 153, 162: ‘A valuable consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other.’

²⁹ See above, text to nn 16 and 17.

³⁰ ‘[F]orasmuch as many can read English that understand no Latin, and some that cannot read English, by hearing it read, may learn divers things by it, that they should not have learned if it were in Latin; therefore, for the profit of the multitude, it is put into the English tongue rather than into the Latin or French tongue’: C St German, *Dialogues between a Doctor of Divinity and a Student in the Laws of England*, W Muchall (ed) (Robert Clarke, 1874) 99, Introduction, Dialogue II.

³¹ John Guy, ‘Tudor Monarchy and its Critiques’ in John Guy (ed), *The Tudor Monarchy* (Arnold, 1997) 88. Guy describes *Doctor and Student* as ‘a brilliant, comprehensive and systematic theory of law within an English context’: John Guy, ‘Thomas More and Christopher St German: The Battle of the Books’ in Alistair Fox and John Guy (eds), *Reassessing the Henrician Age: Humanist Politics and Reform 1500–1550* (Blackwell, 1986) 95, 102; see also John Guy, *Christopher St German on Chancery and Statute* (Selden Society, 1985).

general rule of the law thou do observe and keep equity. And if thou do thus, I trust the light of the lantern, that is, thy conscience, shall never be extincted.³²

There are several extracts from *Doctor and Student* which may prompt speculation that throughout *The Merchant of Venice* (and especially in the trial scene) Shakespeare was alluding to St German's work. See for example the claim at the start of chapter XVI that '[e]quity is a right wiseness that considereth all the particular circumstances of the deed, the which also is tempered with the sweetness of mercy',³³ which recalls immediately Portia's paean to mercy in Act 4, Scene 1. Consider also St German's warning that 'to follow the words of the law were in some case both against justice and the commonwealth',³⁴ which serves as an admonitory rebuke to the unconscionable nature of the penalty clause in Antonio's bond.³⁵ These textual and thematic similarities notwithstanding, it is probably more accurate to argue that insofar as *The Merchant of Venice* dramatises the issues raised by St German concerning mercy, conscience and the law, Shakespeare's play is reflective of contemporary judicial engagement with the tenets of renaissance humanism.³⁶ In the area of private law, it is evident that judges were looking increasingly to what St German termed 'the intent inward in the heart', when deciding cases. This applied especially to the question of whether a 'party should be bound by his promise' in contractual disputes.³⁷ An inventive approach to decision-making was apparent in the 1566 case of *Sharington v Strotton*, concerning the validity of a use or trust, and the beneficiary's contested equitable right under it to profit from land which was the subject of the disputed use. The defendant claimed that consideration for the creation of the use was provided by the natural love and affection owed by one brother to another. Plowden argued that '[t]he third consideration here is, the brotherly love ... For those who descend from one same parentage, and are joined nearest in blood, are by nature joined in love.'³⁸ It is perhaps surprising that judgment was given against the plaintiff, Catlyn CJ declaring that 'the brotherly love which he bore to his brothers, are sufficient consideration to raise the uses in the land'.³⁹ It is noteworthy of *Sharington v Strotton* that the case was heard in the Court of King's Bench (in Trinity term, 1566). The importance of natural love and affection to the question of sufficiency of consideration

32 St German (n 30) 44.

33 *Ibid.*

34 *Ibid.*

35 Weisberg (n 18) 95 remarks that no characters in the play 'even implicitly raise the nonenforceability of such a seemingly unconscionable clause'. Baker notes that by the end of the 15th century, Chancery had decided that it was unconscionable for a creditor to recover more than they had lost: 'If a creditor tried to extract more than the principal debt or actual damages, with reasonable costs, relief was made available': Baker, *Introduction to Legal History* (n 1) 325.

36 For an extensive collection of essays on the subject, see Jill Kraye (ed), *The Cambridge Companion to Renaissance Humanism* (Cambridge University Press, 1996).

37 St German (n 30) 177.

38 *Sharington v Strotton*, Plowden, *Commentaries* 1: 298, 306; *Sharington v Strotton* is discussed in JH Baker, 'Origins of the "Doctrine" of Consideration, 1535–1585' in Baker, *The Legal Profession and the Common Law* (n 1) 376–7.

39 *Sharington v Strotton*, Plowden, *Commentaries* 1: 309.

is linked to questions of conscience, and to the moral obligation of the autonomous subject of law to conduct his relations according to the Christian injunction to love thy neighbour. In general historical terms, this may be associated both with the influence of renaissance humanism and the ecclesiastical forebears of the common law judiciary. Baker refers to the progressive, modernising tendency of King's Bench, which he characterises as representing 'the legal renaissance of the sixteenth century',⁴⁰ anxious to extend its influence and business, and encroaching upon the traditional domain of the more reactionary Court of Common Pleas.⁴¹

In juristic terms, the dramatic conflict over the enforceability of Antonio's bond represents the theme of immutable law colliding with a flexible and humane, alternative model. In the Elizabethan legal system, this conflict was embodied by the disagreement between King's Bench and Common Pleas over the status of the promise in contract law. Dissension between the two courts reached its climax in *Slade's Case*, which commenced in King's Bench in 1596 and was finally decided in 1602, 'before all the Justices of England, and Barons of the Exchequer ...'⁴² The case represented the triumph of *assumpsit* (an action for trespass on the case, for breach of a promise or undertaking) over actions for debt, and victory for the progressive judges of King's Bench over their more traditionalist brethren in Common Pleas. In his description of the events preceding trial in *Slade's Case*, Coke's report conflates temporal and spiritual obligations: the plaintiff, John Slade, had sown wheat and rye on his land in Halberton, Devon, which the defendant, Humphry Morley, 'did assume, and then and there faithfully promised, that he the said Humph. 16l. of lawful money of Engl. to the afores. John in the feast of St. John the Baptist, then next following, would well and truly content and pay ...' Not only, it was alleged by the plaintiff, was the defendant 'litttle regarding' of his assumption and promise, but also he intended 'subtilly and craftily to deceive and defraud, the said 16l. to the said John, according to his assuming and promise.'⁴³ A majority of the judges determined that an action for *assumpsit* lay even though an existing remedy for debt was available, and, of great importance to the development of modern contract law, 'every contract executory imports in itself an *assumpsit*, for when one agrees to pay money, or to deliver any thing, thereby he assumes or promises to pay, or deliver it ...'⁴⁴

⁴⁰ Baker, 'New Light on *Slade's Case*' (n 1) 412.

⁴¹ The primary function of King's Bench was to hear 'all pleas of the crowne; as all manner of treasons, felonies, and other pleas of the crown which *ex congruo*, are aptly called *proprie causæ regis*, because they are *placita coronæ regis*': Coke, *Fourth Part of the Institutes* 71.

⁴² *Slade's Case* (1602) Coke, 4 *Reports* (1604) 2: 93a.

⁴³ *Ibid.*, (1597) 91a–91b; the report makes evident why an action on the case for *assumpsit* was preferable to an action for debt: Slade claimed that, as a result of Morley's non-payment, he 'hath sustained damage to the value of 40l. and thereof he bringeth suit' (*ibid.*, 91b). Slade was eventually awarded compensation of £26: the original sum of £16, plus damages of £10, 'which damages in the whole do amount to 26l.' (*ibid.*, 92a); in an action for debt, he would have been awarded only the original £16. *Slade's Case* and *Sharlington v Strotton* are discussed in relation to *The Comedy of Errors* in Raffield, *Shakespeare's Imaginary Constitution* (n *) 56, 62–64, 68–69.

⁴⁴ *Slade's Case* (1602) Coke, 4 *Reports* (1604) 2: 94a.

The coupling of ‘assumption’ and ‘promise’ is significant in signalling the incorporation of Judaeo-Christian injunctions to love one another (and specifically in the Epistle of Paul to the Ephesians, the insistence upon mutual trust between ‘fellow-citizens’)⁴⁵ into common law doctrine, especially into those doctrines governing private relations between subjects of law. In symbolic terms, the decision in *Slade’s Case* represented the formal acknowledgment of civic responsibility, which hitherto had been unrecognised by the courts: the bonds of trust between citizens which are essential not only for the growth of a commercial society, but also for the development of *societas* and the cohesion of English society as a whole.⁴⁶ The start of proceedings in *Slade’s Case* coincided with the period in which *The Merchant of Venice* was written. Of greater interest than whether the trial scene in *The Merchant* represented proceedings in Chancery, Common Pleas or King’s Bench (like all Shakespeare’s trial scenes, it is an imaginary amalgam of various extant sources) is the reflection in the play of contemporary juristic and philosophical debate concerning the capacity of conscience to direct the development of the English legal institution.

III. MEASURE FOR MEASURE AND THE JACOBAN DAWN

Elizabeth I died on 24 March 1603. In 1598 and 1599 her successor, James VI of Scotland, had written and published two works on the role of kingship and the constitutional relationship between king and subject. These were respectively *The Trew Law of Free Monarchies* and *Basilicon Doron*.⁴⁷ Immediately prior to his accession to the English throne, James revised *Basilicon Doron* and in 1603 a new edition was published in Edinburgh and London. The publication of these works prior to the succession brought James’s opinions on the divine provenance of monarchy to a wide audience, curious about the constitutional, political and religious slant of their likely future king. The probable form that Jacobean kingship would take is intimated within the first few pages of *The Trew Law*, in which James describes monarchy as ‘the trew paterne of Divinitie’, the king as ‘a naturall Father to all his Lieges’, and the obedience owed a king by his subjects ‘as to Gods Lieutenant in earth, obeying his commands in all things ... acknowledging him a Iudge

⁴⁵ Ephesians 2.19.

⁴⁶ On the growth and effects of commercial society in early modern England, see C Muldrew, *The Economy of Obligation: The Culture of Credit and Social Relations in Early Modern England* (Macmillan, 1998).

⁴⁷ *Basilicon Doron* was ostensibly intended as a practical guide to kingship for James’s eldest son, Henry. Prince Henry was 4 when *Basilicon Doron* was written; he died at the age of 18 in 1612. The subtitle of *Basilicon Doron* is *His Maiesties Instructions To His Dearest Sonne, Henry The Prince*. The book is prefaced by a sonnet, the last lines of which reads: ‘Your father bids you studie here and reede. / How to become a perfit King indeed’: James I, ‘Basilicon Doron’ in Johann P Sommerville (ed), *King James VI and I: Political Writings* (Cambridge University Press, 1994) 1. The subtitle of *The Trew Law of Free Monarchies* is *The Reciprocal and mutuall duetie betwixt a free King and his naturall Subjects*.

set by GOD over them, having power to iudge them ...⁴⁸ Of the various claims made by James for the power of the king, arguably the most alarming for jurists and common lawyers was the explicit assertion that ‘the King is above the law ...’⁴⁹ If *The Trew Law* were to serve as a template for Jacobean kingship, then it is apparent that the monarch was to be a divinely ordained *parens patriae* and omnipotent judge and lawgiver.

The first new play of Shakespeare’s to be performed in the reign of James I was *Measure for Measure*. The title is the only one in all of his plays to be derived from the Bible, the relevant passage occurring in the Gospel according to St Matthew:

Judge not, that ye be not judged. For with what judgment ye judge, ye shall be judged: and with what measure ye mete, it shall be measured to you again. And why beholdest thou the mote that is in thy brother’s eye, but considerest not the beam that is in thine own eye?⁵⁰

At the start of *Basilicon Doron* James refers directly to Matthew 7.1–3, adapting the meaning of the passage to reflect the onerous responsibility of kingship: ‘A moate in anothers eye, is a beame into yours: a blemish in another, is a leprous byle into you ...’⁵¹ We learn from the accounts of the royal court revels for Christmas 1604 that a play was performed before James I in the Banqueting House in Whitehall on 26 December: ‘By his Matis plaiers: On St Stivens night Mister Shaxberd ... A play Caled Mesur for Mesur.’⁵² The London playhouses had been closed between March 1603 and April 1604, due to a severe outbreak of plague.⁵³ For the purposes of the present analysis, it is noteworthy that in his first sole-authored dramatic work since *Troilus and Cressida* in 1602, Shakespeare should have written a play that appears to be preoccupied with the themes of law, morality and the ethics of governance.

The Duke in *Measure for Measure* is not James I, although he shares with James a predilection not only for interfering in the quotidian business of the legal institution,⁵⁴ but also for investing his role as supreme magistrate with spiritual authority of arguable legitimacy. Unlike James I, Shakespeare’s Duke does not claim to be God’s lieutenant on earth, although when the Duke remarks to the Provost on the imminence of dawn, ‘Look, th’unfolding star calls up the shepherd’ (4.2.177–78), the association with Chris-

⁴⁸ James I, ‘The Trew Law of Free Monarchies’ in Somerville (n 47) 64, 65, 72.

⁴⁹ *Ibid.*, 75.

⁵⁰ Matthew 7.1–3. The ‘measure for measure’ passage recurs in Luke 6.37–38; this is followed by the same parable of the ‘mote’ and ‘beam’ blinding the hypocrite to his own faults: Luke 6.41–42. References to the text of the Bible are from the Authorised King James Version.

⁵¹ James I, ‘Basilicon Doron’ in Somerville (n 47) 12.

⁵² PRO AO3/908/13 in WR Streitberger (ed), *Collections Volume XIII: Jacobean and Caroline Revels Accounts, 1603–1642* (Malone Society, 1986) 8. On The King’s Men and the St Stephen’s Day performance of *Measure for Measure*, see JH Astington, ‘The Globe, The Court and *Measure for Measure*’ (1999) 52 *Shakespeare Survey* 133.

⁵³ On plague and the playhouses, see Andrew Gurr, *The Shakespearean Stage, 1574–1642* (Cambridge University Press, 1992) 78; EK Chambers, *The Elizabethan Stage*, 4 vols (Clarendon Press, 1923) 4: 345–51.

⁵⁴ See n 9 above.

tian allegory is unavoidable. At least one critic has noted of this line that ‘one wonders if he may not be thinking of himself and his office.’⁵⁵ It was not until 1610 that James observed to Parliament that ‘[a]s I have already said, Kings Actions (even in the secretest places) are as the actions of those that are set upon the Stages.’⁵⁶ In the same speech he informed his audience that ‘I must conclude like a Grey Frier, in speaking for my selfe at last.’⁵⁷ The parallels with Shakespeare’s Duke, who spends most of the play disguised as ‘a true friar’ (1.3.49), are striking. But James’s obsessions with secrecy, disguise and surveillance were apparent long before *Measure for Measure* was performed for him in 1604. As early as 1599, in *Basilicon Doron*, the advice to his son on kingship included the suggestions that he should ‘delite to haunt your Session, and spie carefully their proceedings’ and ‘let it be your owne craft, to take a sharpe account of every man in his office.’⁵⁸ During the coronation celebrations of 1604, an incident was recorded that gives some indication of the new king’s predilection for disguise and surveillance. *The Time Triumphant* notes that James secretly visited the Royal Exchange in the City of London prior to the celebrations, ‘hearing of the preparation to be great, aswell to note the other thinges as that was desirous privately at his owne pleasure ... thinkeing to passe unknowne ...’ He was spotted by ‘the wylie Multitude’ and the doors of the Exchange had to be shut in order to keep out the crowd. James contented himself instead with spying on ‘the Marchantes from a Windowe all below in the walkes not thinking of his comming’.⁵⁹

It is James’s peculiar obsession with the conflation of governance and theology that accords most strongly with the Biblical themes of *Measure for Measure*. In his speech at the opening of Parliament in March 1604, James adapted a passage from the Epistle of St Paul to the Ephesians in order to justify at the start of his reign a providential model of kingship: ‘What God hath conioyned then, let no man separate. I am the Husband, and all the whole Isle is my lawfull Wife; I am the Head, and it is my Body; I am the Shepherd, and it is my flocke ...’⁶⁰ I have noted above Shakespeare’s use of the ‘shepherd’ metaphor

⁵⁵ EM Pope, ‘The Renaissance Background of *Measure for Measure*’ (1949) 2 *Shakespeare Survey* 66, 71. Pope notes that ‘the Duke moves through so much of the action of *Measure for Measure* like an embodied Providence ... his character has such curiously allegorical overtones, yet never quite slips over the edge into actual allegory’ (*ibid.*). All references to the text of the play are from *Measure for Measure*, Brian Gibbons (ed) (Cambridge University Press, 2006).

⁵⁶ James I, ‘A Speach To The Lords And Commons Of The Parliament At White-Hall, On Wednesday The XXI. Of March. Anno 1609’ (1610) in Sommerville (n 47) 184.

⁵⁷ *Ibid.*, 203.

⁵⁸ James I, ‘Basilicon Doron’ in Sommerville, *ibid.*, 45, 46.

⁵⁹ Gilbert Dugdale, *The Time Triumphant* (R B, 1604) Bv; Gibbons notes that Robert Armin, of Shakespeare’s company, claimed to have written *The Time Triumphant* and that he based it on Dugdale’s observations: Gibbons (ed), *Measure for Measure*, Introduction, 22. In Shakespeare’s play, there is a possible allusion to the events recorded in *The Time Triumphant*, when the Duke declares: ‘I love the people, / But do not like to stage me to their eyes: / Though it do well I do not relish well / Their loud applause and aves vehement’ (1.1.67–70).

⁶⁰ James I, ‘A Speech, As It Was Delivered In The Upper House Of The Parliament ... On Munday The XIX. Day Of March 1603 [1604]’ in Sommerville (n 47) 136.

in *Measure for Measure*,⁶¹ but what is striking about this extract from James's speech to Parliament is his willingness to take passages from the Bible and interpret them non-contextually, in accordance with his singular opinions on kingship. In the Epistle of St Paul to the Ephesians, the relevant passage reads as follows: 'For the husband is the head of the wife, even as Christ is the head of the church: and he is the saviour of the body' (Ephesians 5.23).⁶² Prior to his accession to the English throne, James made extensive reference to the First Book of Samuel, in justification of his claim to sacral kingship. In terms of the common law judiciary, the reliance on and particular interpretation of 1 Samuel 8.5 in *The Trew Law* was contentious and disturbing. Given the theme of the chapter—the replacement of judges with kings—the inclusion in *The Trew Law* of 12 verses from 1 Samuel 8 is noteworthy, especially the last four verses:

Nevertheless the people refused to obey the voice of Samuel; and they said, Nay; but we will have a king over us; / That we also may be like all the nations; and that our king may judge us, and go out before us, and fight our battles. / And Samuel heard all the words of the people, and he rehearsed them in the ears of the LORD. / And the Lord said to Samuel, Hearken unto their voice, and make them a king. (1 Samuel 8.19–22)

It is probable that James was influenced in his interpretation by the exegesis on 1 Samuel 8 provided by Jean Bodin. In *Les Six livres de la république*, published in 1576, Bodin describes a divinely appointed monarchic order in which sovereign princes are God's 'lieutenants for commanding other men'.⁶³ It is noteworthy in this context that the Lancastrian Chief Justice, Sir John Fortescue, should have referred to the same Biblical passage in *The Governance of England*, citing *On Princely Government* by St Thomas Aquinas in support of the antithetical thesis that judges, not kings, were the ultimate arbiters of constitutional and political sovereignty:

The children of Israel, as Saint Thomas says, after God had chosen them as 'his own people and holy realm', were ruled by Him under Judges 'royally and politically', until the time that they desired to have a king such as all the gentiles, which we call pagans, then had, but they had no king but rather a man who reigned upon them 'only royally'. With which desire God was greatly offended, as well for their folly, as for their unkindness since they had a king, which was God, who reigned upon them politically and royally.⁶⁴

⁶¹ See text to n 55 above.

⁶² In *Measure for Measure* Pompey alludes to the same verse when asked if he can 'cut off a man's head': 'If the man be a bachelor, sir, I can; but if he be a married man, he's his wife's head, and I can never cut off a woman's head' (4.2.1–4).

⁶³ Jean Bodin, *On Sovereignty*, Julian H Franklin (trans and ed) (Cambridge University Press, 1992) 46, bk I.10. Bodin's interpretation of 1 Samuel 8 goes even further than James in its exposition of the Biblical text as an *apologia* for sacral kingship: 'Contempt for one's sovereign prince is contempt towards God, of whom he is the earthly image. That is why God, speaking to Samuel, from whom the people had demanded a different prince, said 'It is me they have wronged' (*ibid*).

⁶⁴ Sir John Fortescue, 'The Governance of England' in Shelley Lockwood (ed), *On the Laws and Governance of England* (Cambridge University Press, 1997) 81, 84; Aquinas is thought to have written only the first book

James and the common lawyers demonstrated similar differences of interpretation over another Biblical source, Psalms 82, and the reference to gods in the line, 'I have said, Ye are gods' (Psalms 82.6). The opening line of Psalms 82 is 'God standeth in the congregation of the mighty; he judgeth among the gods.' Although in the Torah 'Elohim' is used to describe the God of the Hebrews and the Creator of mankind, the word 'Elohim' (אֱלֹהִים) is the plural of the common Canaanite word for 'god': 'el' (אֵל). 'Elohim' was subsequently translated variously as 'judges', 'gods' or 'rulers'.⁶⁵ In *The Reverse or Back-Face of the English Janus*, John Selden stated emphatically (with explicit reference to Psalms 82) that 'the Eternal and sacred Scriptures themselves do more than once call Judges by that most holy name *Elohim*, that is, *Gods*', while James I claimed of the same verse in Psalms 82 that 'Kings are called Gods'.⁶⁶ James I referred to Psalms 82 again in his speech to Parliament in 1610, where his description of the divine status with which he attributes kings is notable for its stridency: 'For Kings are not onely GODS Lieutenants upon earth, and sit upon GODS throne, but even by GOD himselfe they are called Gods.'⁶⁷

England was not a theocracy. The church and the state were separate, albeit complementary institutions, united by the figure of the monarch, who was head of both. But it is fair to state that municipal law was founded in the tenets of Judaeo-Christian theology. As the Elizabethan jurist William Fulbecke stated in his advice to prospective lawyers: 'For religion, Justice, and law do stand together ... where God is not, there is no truth,

of *On Princely Government* and the first four chapters of the second book. Ptolemy of Lucca completed the work, and it is his contribution in Book II.VIII.IX to which Fortescue refers above. On the influence of medieval political theology on early modern theories of kingship, see EH Kantorowicz, *The King's Two Bodies: A Study in Medieval Political Theology* (Princeton University Press, 1957). For recent criticism of Kantorowicz, see Lorna Hutson, 'Not the King's Two Bodies: Reading the "Body Politic" in Shakespeare's *Henry IV, Parts 1 and 2*' in Victoria Kahn and Lorna Hutson (eds), *Rhetoric and Law in Early Modern Europe* (Yale University Press, 2001) 166, 170–1; David Norbrook, 'The Emperor's New Body? *Richard II*, Ernst Kantorowicz, and the Politics of Shakespeare Criticism' (1996) 10 *Textual Practice* 329; Jennifer R Rust, 'Political Theology and Shakespeare Studies' (2009) 6 *Literature Compass* 175.

⁶⁵ See JM Hoffmann, *In the Beginning: A Short History of the Hebrew Language* (New York University Press, 2006).

⁶⁶ John Selden, *The Reverse or Back-Face of the English Janus*, R Westcot (trans) (Thomas Basset & Richard Chiswell, 1682) 4; James I, 'The Trew Law' in Somerville (n 47) 64.

⁶⁷ James I, 'Speech To The Lords And Commons Of The Parliament' in Somerville (n 47) 181. Shuger notes that the language of divine right 'could serve different ends', and the claim that 'authority existed by divine right could simply mean that it was legitimate': Debora K Shuger, *Political Theologies in Shakespeare's England: The Sacred and the State in 'Measure for Measure'* (Palgrave, 2001) 58. While the proposition that monarchic authority derived from God was not controversial, the extent of the king's purported powers under the early Stuart monarchs was contentious; hence, the various attempts by the courts of common law (and later, Parliament) to impose limits on the legitimate scope of the king's authority. For the argument that institutional authority in early modern England was commonly accepted as divinely ordained, see Conrad Russell, 'Divine Rights in the Early Seventeenth Century' in John Morrill, Paul Slack and Daniel Woolf (eds), *Public Duty and Private Conscience in Seventeenth-Century England: Essays Presented to GE Aylmer* (Clarendon Press, 1993) 101; for an alternative perspective to Russell's, see Johann P Sommerville, *Politics and Ideology in England, 1603–1640* (Longman, 1986) 3–4.

there is no light, there is no lawe.⁶⁸ We see the influence of theology in *The Merchant of Venice*, specifically in Portia's plea for mercy, which recalls the Biblical injunction to 'love ye your enemies, and do good, and lend, hoping for nothing again' (Luke 6.35). The next verse encapsulates the theme of Portia's great courtroom speech: 'Be ye therefore merciful, as your Father is merciful' (Luke 6.36). It is noteworthy that, as Nuttall has observed, '[u]sually Shakespeare steers clear of theology, but in *The Merchant of Venice* a breach is made and theology streams in. In *Measure for Measure* the stream becomes a flood.⁶⁹ Shakespeare gives us a supreme magistrate who interferes in the spiritual (as well as the temporal) lives of his subjects. Dressed in the garb of a friar, he urges Claudio to 'Be absolute for death' (3.1.5) because earthly existence is 'a thing / That none but fools would keep' (3.1.7–8). Later he condemns Pompey for his sins, urging him to 'Go mend, go mend' (3.2.24), and ordering Elbow to take him to prison for his 'filthy vice' (3.2.20). In the dealings he has with his subjects, the Duke manifests indistinctness between spiritual and temporal concerns: in the case of Claudio, the felon stands convicted and sentenced to death for the sin of fornication, the offence of which is recorded in the 'strict statutes and most biting laws' (1.3.20) of Shakespeare's Vienna.

The issue of Christian morality and its relationship with the law is raised by James I in *Basilicon Doron*, and was a cause for concern among those who, towards the end of Elizabeth's reign, conjectured over the extent to which religion might impinge upon the juridical processes of the Jacobean State. In a long passage on marriage and sexual morality, James quotes St Paul's statement that 'the fornicator shall not inherit the Kingdome of heaven', before claiming that 'lawes are ordained as rules of virtuous and sociall living ...'⁷⁰ That fornication should be made a capital offence was advocated by Philip Stubbes in *The Anatomie of Abuses*, published in 1583. His proposed punishment for fornicators, prostitutes and adulterers was explicit and uncompromising:

[They] should drinke a full draught of Moyses cuppe, that is, tast of present death or els, if yt be thought too severe (for in evill, men will be more mercifull, than the Author of mercie him selfe, but in goodnesse, fare well mercy,) than wold GOD they might be cauterized, and seared with a hote yron on the cheeke, forehead, or some other part of their bodye that might be seene, to the end the honest and chast Christians might be discerned from the adulterous Children of Sathan.⁷¹

In English law punishment for offences against sexual morality (which did not extend to the death penalty) was within the jurisdiction of the church courts, and it is likely anyway that Claudio was already legally married to Juliet at the time sexual intercourse between them took place, having contracted *sponsalia per verba de praesenti*: 'Upon a

⁶⁸ William Fulbecke, *A Direction or Preparative to the Study of the Lawe Wherein is showed, what things ought to be observed and used of them that are addicted to the study of the Law* (T Wight, 1600) Bv, C2r.

⁶⁹ Nuttall (n 21) 268.

⁷⁰ James I, 'Basilicon Doron' in Sommerville (n 47) 39, 43.

⁷¹ Stubbes, 'Due Punishment for Whoredome' in *Anatomie of Abuses* (n 8) H6r.

true contract / I got possession of Julietta's bed—/ You know the lady, she is fast my wife ...' (1.2.126–28).⁷² To this extent, the juridical procedure depicted in the play is an example of 'story-book law'⁷³; but it is not far removed from (rather it is identical to) the theocratic vision of Stubbes, for whom retribution for sinful intent is a central tenet of the godly (and therefore ideal) State. Before his sudden change of judicial mind, the Duke pays homage to such theocratic (and talionic) ideologies by sentencing Angelo to death for committing crimes which have no apparent victim, unless Angelo's immortal soul can be accounted one: 'Haste still pays haste, and leisure answers leisure; / Like doth quit like, and measure still for measure' (5.1.403–404). The stern retributive justice of Stubbes demands Angelo's death, and in a precise inversion of equitable principles the Duke declares that '[t]he very mercy of the law cries out for it' (5.1.400). In Act 5 of *Measure for Measure*, the problem is not that access to law is denied or deferred. Indeed, the particular form of proceedings has certain features in common with procedure in the early Chancery; notably its relative informality, the inquisitorial style and the absence of a jury.⁷⁴ The problem with the 'justice' dispensed by Shakespeare's Duke is that it represents the irrational exercise of arbitrary and unrestricted power. James I claimed that

where the rigour of the Law in many cases will undoe a Subiect, there the Chancerie tempers the Law with equitie, and so mixeth Mercy with Iustice, as it preserves men from destruction.⁷⁵

Such is the equitable justice dispensed by the Duke at the end of *Measure for Measure*. But what if the conscience of the king does not permit access to his merciful judgment? What if his conscience decrees that mercy should be withheld, or dispensed only partially? It is to this issue that I turn in the final part of the article, concerning the trial of Hermione in *The Winter's Tale*.

I conclude this section by noting that the openness of juridical proceedings is an obvious feature of the trial in Act 5 of *Measure for Measure*, held outdoors, at the gates of the city.⁷⁶ There, in an extraordinary demonstration of judicial discretion, the Duke pardons

⁷² On the distinction between *de praesenti* and *de futuro* marriage contracts, see Raffield, *Shakespeare's Imaginary Constitution* (n *) 204–6. In *Basilicon Doron*, James I described fornication as a 'breach of Gods law' and 'amongst other grievous sinnes, that debarre the committers amongst *dogs and swine, from entry in that spirituall and heavenly Ierusalem*': James I, 'Basilicon Doron' in Somerville (n 47) 39.

⁷³ AD Nuttall, "'Measure for Measure": The Bed-Trick' (1975) 28 *Shakespeare Survey* 51, 53.

⁷⁴ See JL Barton, 'Equity in the Medieval Common Law' in RA Newman (ed), *Equity in the World's Legal Systems* (Bruylant, 1973) 139; also WJ Jones, *The Elizabethan Court of Chancery* (Oxford University Press, 1967).

⁷⁵ James I, 'A Speech In The Starre-Chamber, The XX. Of June. Anno 1616' in Sommerville (n 47) 214.

⁷⁶ Lambarde notes that the Israelites 'did pronounce their *Judgements* in the Gates of every Citie, to the end, that both all men might behold the indifferencie of their proceedings, and that no man should need to goe out of his way to seeke *Iustice*': William Lambard, *Archeion, or: A Discourse Upon the High Courts of Justice in England* (1591) (Henry Seile, 1635) 6. Of particular interest is the fact that, in a chapter entitled 'The Court of Equitie, or Chancerie', Lambarde states that a good Chancellor will 'provide, that the Gate of *Mercie* may bee opened in all Calamitie of Suit: to the end, (where need shall bee) the Rigour of *Law* may bee amended' (*ibid.*, 73).

Claudio and Barnardine and condemns Angelo and Lucio to death, before commuting their sentences to marriage: respectively to Mariana and Kate Keepdown. In English law, the supreme court of the king's prerogative was the Court of Chancery. The Jacobean Chancellor, Lord Ellesmere, distinguished between two types of power, which he claimed pertained to the judicial role of Lord Chancellor as head of the Chancery. The first type was an 'ordinary power': '*Ordinata potentia*, is where a certain order is observed, and so it is used in positive law.' The second type was an 'absolute power': '*Potentia absoluta*', which Ellesmere claimed to be '*lex naturae*',⁷⁷ the scope of which was apparently unlimited.⁷⁸ In Shakespeare's Vienna, '[m]ortality and mercy' live in the 'tongue and heart' of the ruler (1.1.44–45). In Jacobean England, murmurings were heard to the effect that the exercise of kingly conscience should be constrained by the authority of law. The last prophetic word on this must go to Timothy Tourneur, a barrister of Gray's Inn. Writing in 1616 of 'the high power of the Chancellors', he issued the following warning:

And thus in a short time they will enthrall the common law (which yields all due prerogative), and by consequence the liberty of the subjects of England will be taken away, and no law practised on them but prerogative, which will be such that no one will know the extent thereof. And thus the government in a little time will lie in the hands of a small number of favourites who will flatter the King to obtain their private ends, and notwithstanding the King shall be ever indigent. And if these breeding mischiefs are not redressed by Parliament the body will in a short time die in all the parts.⁷⁹

IV. LOVE, TREASON AND ART IN THE WINTER'S TALE

The offence of which Hermione stands charged is unequivocally recognised in English law as criminal. It is High Treason, one of the most heinous of all criminal offences. In accordance with juridical procedure in criminal cases, the indictment is read out in the presence of the accused:

Hermione, queen to the worthy Leontes, king of Sicilia, thou art here accused and arraigned of high treason, in committing adultery with Polixenes, king of Bohemia, and conspiring with Camillo to take away the life of our sovereign lord the king, thy royal husband ... (3.2.12–17)⁸⁰

⁷⁷ Lord Ellesmere, *Certain Observations Concerning the Office of the Lord Chancellor* (Henry Twyford and John Place, 1651) 44.

⁷⁸ In *Rooke's Case* (1599), Coke argued that the exercise of judicial discretion 'ought to be limited and bound with the rule of reason and law': Coke, *Rooke's Case*, 5 *Reports* (1605) 3: 99b, 100a; in *Keighley's Case* (1609), he again argued that discretion was 'to be intended and interpreted according to law and justice': Coke, *Keighley's Case*, 10 *Reports* (1614) 5: 139a, 140a.

⁷⁹ BL MS Add 35957 fo 55v, translated and quoted in Baker, 'The Common Lawyers and the Chancery: 1616' (n 5) 222.

⁸⁰ All references to the play are from *The Winter's Tale*, JHP Pafford (ed) (Arden Shakespeare, 1963).

This is a stage that was immediately recognisable to audiences in the Tudor and early Stuart eras, that of the great show trial. I refer above to the story-book law of *Measure for Measure*.⁸¹ In a case such as Claudio's, the punishment for fornication would have been enforced by the church courts, rather than the courts of common law. And despite the best efforts of extreme moralists such as Stubbes, the death penalty was not an available sentence for sexual intemperance. It should be noted in passing that for the ordinary subject of law, the juridical consequences of fornication were of a highly visible temporal nature, involving ritualised public humiliation, the performance of penance in a public place, and excommunication from the parish community.⁸² In addition, secular authorities were complicit in the prosecution of offences under ecclesiastical law. For example, regarding the duties of constables, William Lambarde notes:

[T]hat if information be given to any such officer, that a man and a woman bee in adulterie, or fornication together, then the officer may take companie with him, and that if he finde them so, hee may carry them to prison.⁸³

Similarly, in *The Merchant of Venice*, the dramatic depiction of an action for breach of contract may be described as story-book law. As I have noted, by the time the play was written, the Court of Chancery had decided that it was unconscionable for a creditor to recover more than he had lost and if he tried to recover an amount greater than the principal debt (together with reasonable costs), then the debtor would be granted relief.⁸⁴ Indeed, such was Harley Granville Barker's scepticism about the reality of Antonio's bond that he described *The Merchant of Venice* as 'a fairy tale'.⁸⁵

The depiction of law in *Measure for Measure* and *The Merchant of Venice* contrasts starkly with that in *The Winter's Tale*. In the former plays, realistic urban locations provide the mise-en-scène for the dramatic enactment of imaginary laws. In English law, penalty clauses such as that incorporated into Antonio's bond were considered uncon-

⁸¹ See text to n 73 above.

⁸² Punishment usually involved performing penance in a white sheet before the congregation during the Sunday church service. The following is an example, from the records of the church court of Stratford-upon-Avon, for May 1606: 'Anne Browne alias Watton: upon suspicion of incontinence with John Sadler: she appeared: admitted that she was pregnant by John Sadler: ordered public penance in a white sheet in the parish church on two Sundays, and in the market place and to certify on the next court day after child-birth': Brinkworth, *Shakespeare and the Bawdy Court* (n 3) 131.

⁸³ William Lambarde, *The Duties of Constables, Borsholders, Tythingmen, and such other lowe and Lay Ministers of the Peace* (Thomas Wight, 1602) 18.

⁸⁴ See n 35 above. Henderson notes that by the mid-16th century 'Chancery was already intervening against penal bonds quite frequently ... By 1582 Chancery's intervention was even more frequent ... The highly impressional reports I have heard for the 1590s indicate that by that time Chancery's intervention was almost routine': EG Henderson, 'Relief from Bonds in the English Chancery: Mid-Sixteenth Century' (1974) 18 *American Journal of Legal History* 298, 299.

⁸⁵ Harley Granville-Barker, *Prefaces to Shakespeare: The Merchant of Venice* (BT Batsford, 1958) 335. For a discussion of the reality of law in the play, see Gary Watt, 'The Law of Dramatic Properties in *The Merchant of Venice*' in Raffield and Watt (n 7) 237.

scionable; while the penalties for fornication (albeit humiliating) did not involve loss of life. This last statement notwithstanding, the consequences of committing adultery were, if proven to the satisfaction of the court, fatal to the queen consort of an English king. It is in this respect that the presentation of law in *The Winter's Tale* differs from the highly fictionalised accounts in *Measure for Measure* and *The Merchant of Venice*. In contrast to these two plays, the setting of *The Winter's Tale* is a fairy-tale realm (or rather, two realms) of palaces and rural idylls, in which characters exit, pursued by bears; the landlocked Bohemia is endowed with a coast; and Apollo is the principal witness and judge in a treason trial. It is to the Oracle at Delos (sacred birthplace of Apollo, described in the play as 'Delphos') that Leontes dispatches two of his lords, in order that the guilt or innocence of his wife may be irrefutably established. Divine judgment is duly passed down: 'Hermione is chaste; Polixenes blameless; Camillo a true subject; Leontes a jealous tyrant' (3.2.132–3), to which the bystanders at the trial respond: 'Now blessed be the great Apollo!' (3.2.137). Shakespeare signals the importance of Apollo by continuous reference to the god's absent presence: in the trial scene alone the word 'Apollo' occurs six times. The influence of Apollo, god of the arts, is present throughout. The final, magical scene of the play witnesses the confluence of art and life, of the imaginary transformed into reality, as the 'statue' of Hermione is seen to breathe, move, and embrace her penitent husband. In the words of Leontes: 'If this be magic, let it be an art / Lawful as eating' (5.3.110–11).⁸⁶

The fantastical invocation of Apollo notwithstanding, the trial of Hermione is an accurate depiction of the early modern treason trial. The brutal realism of the scene is especially shocking when contrasted to the 'fairy-tale' form and tone of the rest of the play. Indeed, the continuous references to Apollo serve to emphasise the artifice of law. In the classical imagery employed by Nietzsche in *The Birth of Tragedy*, art (which for the purpose of the present analysis I take to include law in its juridical context) 'derives its continuous development from the duality of the Apolline and Dionysiac'.⁸⁷ In the aesthetic scheme imagined and related by Nietzsche, these two opposing artistic powers 'spring from nature itself'.⁸⁸ The Apolline represents the ordered dreamland of artistic illusion, creating aesthetic artefacts that are based on observation of natural phenomena. It was with the Apolline dreamland that the English legal institution and the English theatre of the early modern period sought to align themselves, formally distinguishing between participant and spectator, actor and audience, lawyer and subject of law.⁸⁹ In

⁸⁶ On art and ethics in *The Winter's Tale*, see James A Knapp, 'Visual and Ethical Truth in *The Winter's Tale*' (2004) 55 *Shakespeare Quarterly* 253.

⁸⁷ Friedrich Nietzsche, *The Birth of Tragedy*, Shaun Whiteside (trans), Michael Tanner (ed) (Penguin, 2003) 14.

⁸⁸ *Ibid.*, 18.

⁸⁹ On the representation of the Nietzschean dreamland in the rituals of the early modern legal profession, see Paul Raffield, 'The Separate Art Worlds of Dreamland and Drunkenness: Elizabethan Revels at the Inns of Court' (1997) 8 *Law and Critique* 163.

its institutional manifestation law is an aesthetic construct, and the representation of law in the trial scene of *The Winter's Tale* serves to emphasise both the potential violence and the artistic derivation of all jurisprudential models. In the Bohemian scenes of Act 4 we encounter a procession of images relating to the application of artificial reason to the natural world, of which the most notable is the sheep-shearing festival of Act 4, Scene 4. During that scene a conversation takes place between Polixenes and Perdita, of less than 30 lines, in which the debate concerning nature and artifice is central to the dramatic action. While collecting flowers for festive garlands, Perdita informs Polixenes that she will not use 'streak'd gillyvors' (4.4.82)—gillyflowers—because they are 'nature's bastards' (4.4.83). Her horticultural knowledge is of uncertain provenance and extent, but she tells Polixenes that 'I have heard it said / There is an art which, in their piedness, shares / With great creating nature' (4.4.86–88). Perdita's principal objection to the gillyflower is that it is the product of mankind's unnatural interference with nature: hence her use of the adjective 'streak'd', suggesting painting, and the pejorative reference to the 'art' which creates their 'pied' colours. Polixenes responds with a defence of all such artistic endeavours:

Yet nature is made better by no mean
 But nature makes that mean: so, over that art,
 Which you say adds to nature, is an art
 That nature makes. You see, sweet maid, we marry
 A gentler scion to the wildest stock,
 And make conceive a bark of baser kind
 By bud of nobler race. This is an art
 Which does mend nature—change it rather—but
 The art itself is nature. (4.4.89–97)

In other words, the art derives from nature and is used for the benefit and enjoyment of all; therefore it is a legitimate use to which human reason may be put. Returning to the trial of Hermione in Act 3, High Treason was of course considered to be an offence against nature, and the art of the subsequent trial was to dramatise the crime. Treason was both an act of betrayal and an offence against natural law. As Coke stated in *Postnati. Calvin's Case*, 'ligeance is due to the natural body' of the king;⁹⁰ and as he later affirmed: 'Treason is derived from trahir which is treacherously to betray. Trahue, Betrayed, and Trahison, per contractionen, Treason, is the betraying it self.'⁹¹ Betrayal of the mon-

⁹⁰ Coke, *Postnati. Calvin's Case*, 7 Reports (1608) 4: 1a, 10b.

⁹¹ Sir Edward Coke, *The Third Part of the Institutes of the Laws of England* (W Lee & D Pakeman, 1644) 4. The Statute of Treasons of 1352 (25 Ed.3. cap.2) had specified that 'when anyone attempts to compass or imagine the death of our lord the king ... what extends to our lord the king and to his royal majesty must be adjudged treason'. The Treasons Act 1534 (26 Hen.8. cap.13) specified that High Treason was committed by those who 'do maliciously wish, will or desire by words or writing, or by craft imagine, invent, practise, or attempt any bodily harm to be done or committed to the king's most royal person, the queen's or the heirs apparent, or to deprive them of any of their dignity, title or name of their royal estates ...'

arch was an offence against nature and God because the king was appointed by God, from whom natural law descended. Natural law represented those precepts of eternal law governing the behaviour of rational, autonomous beings. Applying the Ciceronian definition of law, if '[t]rue law is right reason in agreement with nature',⁹² then it follows that High Treason is an offence against law, nature and reason.

The historical precedents for the charge against Hermione of adultery and High Treason were provided by the trial in 1536 of Anne Boleyn and the attainder in 1542 of Catherine Howard.⁹³ But in relation to the trial of Hermione in *The Winter's Tale*, the trials for High Treason of Essex, Raleigh, and the Gunpowder Plotters provided more recent precedents, both for the dramatic structure of that scene and its emotive language. A striking feature of the numerous trials for High Treason during the reign of Elizabeth I is the personalisation of the relationship between Queen and subject; of the depicted love, demonstrated by the monarch for the defendant through the various acts of patronage; and of the inexplicable betrayal of that love by the defendant. The issue for the court was not primarily one of establishing the guilt or innocence of the defendant,⁹⁴ but rather of providing a stage upon which the narrative of betrayal might be enacted. The defendant on a charge of High Treason had no legal advisers in court; the constitutional principle of *audi alteram partem* ('hear the other side') was considered irrelevant and inappropriate, as Coke explains:

And after the plea of not guilty, the prisoner can have no Councell learned assigned to him to answer the king's Councell learned, nor to defend him. And the reason thereof is, not because it concerneth matter of fact, for *Ex facto jus oritur*: but the true reasons of the law in this case are: First, that the testimonies and the proofs of the offence ought to be so clear and manifest, as there can be no defence of it.⁹⁵

⁹² Marcus Tullius Cicero, *The Republic* in *On the Republic, On the Laws*, Clinton W Keyes (trans) (Harvard University Press, 1928) 211, bk III.XXII.

⁹³ On 21 January 1542, a Bill of Attainder was passed by Parliament, making it Treason for a queen consort to fail to disclose her sexual history to the king within 20 days of marriage, or to incite someone to have adultery with her (33 Hen.8 cap.21). See Eric Ives, *The Life and Death of Anne Boleyn* (Blackwell, 2005) 289; Retha M Warnicke, *The Rise and Fall of Anne Boleyn* (Cambridge University Press, 1989) 163; Joanna Denny, *Katherine Howard: A Tudor Conspiracy* (Portrait, 2005). On the depiction of the above trials in *The Winter's Tale* and *Cymbeline*, see respectively M Lindsay Kaplan and Katherine Eggert, "'Good queen, my lord, good queen": Sexual Slander and the Trials of Female Authority in *The Winter's Tale*' 89 and Karen Cunningham, 'Female Fidelities on Trial: Proof in the Howard Attainder and *Cymbeline*' 1, both in Frances E Dolan (ed), *Renaissance Drama and the Law* (Northwestern University Press, 1994).

⁹⁴ A guilty verdict was not necessarily predetermined; Coke is at pains to point out that the trial procedure was fair, and that no argument might be offered by counsel for the Crown unless the defendant was present: '[A]s it was resolved by all the Justices of England in the reign of king H. 8. in the case of the Lord Dacres of the North . . . and upon so just a resolution the case succeeded well, for the Peers found the Lord Dacres not guilty', Coke, *The Third Part of the Institutes* 30.

⁹⁵ *Ibid.*, 29; on the law of treason in the sixteenth century, see John Bellamy, *The Tudor Law of Treason: An Introduction* (Routledge and Kegan Paul, 1979).

Coke was writing with the hindsight of having served as Attorney-General between 1594 and 1606, and of acting as leading counsel for the Crown in many of the trials for High Treason during this period, notably that of the Earl of Essex in February 1601. The trial of Essex was memorable for the emotive rhetoric employed by the actors—counsel, witnesses and defendant—and for the conspicuous emphasis placed upon love and loyalty. Coke argued that Essex and his conspirators ‘not only carried [High Treason] in their Hearts, but, for a continual Remembrance, kept in a black Purse, which my Lord of Essex wore on his Breast next to his Skin.’⁹⁶ In his address to the court, Serjeant Yelverton alluded to the love of the Queen for her subjects, emphasising the personal betrayal by Essex: ‘I much wonder that his Heart could forget all the Princely Advancements given him by her Majesty, and be so suddenly beflinted ...’⁹⁷ The emotive language of betrayal was most apparent in the evidence of Sir Robert Cecil, the Secretary of State, who declared to Essex: ‘I have loved your Person ... but you have a Sheep’s Garment in show ... I stand for Loyalty, which I never lost; you stand for Treachery, wherewith your Heart is possess’d ...’⁹⁸

That Essex was treacherous is at least debatable. At his trial on 19 February 1601, he claimed that his rebellious actions on 8 February were motivated by a desire to protect the Queen from those courtiers and advisers who ‘abused her Majesty’s Ears with false Information’, and that ‘I do carry as reverent and loyal Duty to her Majesty, as any Man in the World’. His co-accused, the Earl of Southampton, conceded that ‘[i]t was a foolish Action, I must needs confess, the going thro’ the Town’, but that their motive in taking to the streets had been to gain access to the Queen and disabuse her of the ‘factious and dangerous Courses’, down which she was being led (they claimed) by courtiers such as Baron Cobham, Sir Robert Cecil and Sir Walter Raleigh.⁹⁹ For Shakespearean scholars, the Essex Rebellion will forever be associated with the performance of *Richard II*, commissioned by supporters of the Earl and performed at the Globe on the afternoon of 7 February 1601, the eve of the uprising.¹⁰⁰ The presentation of a play in such circumstances, the central scene of which depicted the deposition of a king, was audacious. But my intention here is to focus on the intense language of love and personal betrayal that

⁹⁶ ‘The Trial of Robert Earl of Essex, and Henry Earl of Southampton, before the Lords, at Westminster, for High-Treason, the 19th of February 1600. 43 Eliz., *A Complete Collection of State-Trials, and Proceedings for High Treason*, 11 vols (C Bathurst, J & F Rivington, 1776–81) 1: 199; after listening to Coke’s opening address, Essex asked the court: ‘Will your Lordships give us our turns to speak, for he playeth the Orator’ (*ibid.*). His request was refused.

⁹⁷ *Ibid.*, 198.

⁹⁸ *Ibid.*, 205.

⁹⁹ *Ibid.*, 204. See Robert Lacey, *Robert, Earl of Essex: An Elizabethan Icarus* (Phoenix, 2001).

¹⁰⁰ For interpretations of this performance see Paul EJ Hammer, ‘Shakespeare’s *Richard II*, the Play of 7 February 1601, and the Essex Rising’ (2008) 59 *Shakespeare Quarterly* 1; Jonathan Bate, *Soul of the Age: The Life, Mind and World of William Shakespeare* (Penguin, 2008) 249. Worden argues that the play performed on 7 February was not Shakespeare’s *Richard II* but a dramatised version of Sir John Hayward’s *The First Part of the Life and Reign of King Henry IV*; see Blair Worden, ‘Which Play Was Performed at the Globe Theatre on 7 February 1601?’ (10 July 2003) 25 *London Review of Books* 22.

is a notable feature of both the late Elizabethan treason trial and the trial for treason of Hermione in *The Winter's Tale*. Immediately prior to the reading of the indictment Leontes announces that Hermione is 'Of us too much below'd', and in the following lines asks to 'be clear'd / Of being tyrannous, since we so openly / Proceed in justice, which shall have due course' (3.2.4–6). The public nature of proceedings cannot disguise the fact that in many instances the treason trial was a staged drama, the intended outcome of which was known in advance.

V. CONCLUSION

In the case of Essex, we are confronted by the fact of the complicated relations between the Virgin Queen and her intemperate favourite. The cult of Elizabeth was driven by the persona of kingship as reflected in the female mask: Astraea, Venus, Gloriana and Diana all figure largely in the literary and pictorial iconography of the Queen.¹⁰¹ The subject of law was drawn into an imaginary relationship with the monarch: his loyalty, devotion and emotional attachment were captured by the image of the Virgin Goddess and his imagined love for her.¹⁰² But the cult of Elizabeth depended for its efficacy on something more than belief in the transformative power of her iconic signs. It depended on the profession of love, and the willing subjugation of the individual to his divine (and therefore unattainable) innamorata. Selden referred to the Ovidian Golden Age, when subjects were governed not by positive law but 'by the guidance of vertue, and of those Laws which the Platonicks call the Laws of Second Venus'.¹⁰³ The law of love refers us back to the Aristotelian principle that amity or friendship is the basis of the *polis*, more important even than justice itself.¹⁰⁴ To commit treason, then, is to reject the law of love: the ultimate betrayal not only of the Queen, but of the community or *corpus mysticum* of which she is the head and her subjects the members. In the trial of Hermione, Shakespeare reflects the personalisation of relations between monarch and defendant that characterised Elizabethan and Jacobean trials for the offence of High Treason, in which the imperatives of love, loyalty and political allegiance were conflated and dramatically presented.

¹⁰¹ See Susan Doran, 'Virginity, Divinity and Power: The Portraits of Elizabeth I' in Susan Doran and Thomas S Freeman (eds), *The Myth of Elizabeth* (Palgrave Macmillan, 2003) 171; see also Roy Strong, *Gloriana: The Portraits of Queen Elizabeth I* (Pimlico, 2003). Christopher Haigh argues that 'the public Elizabeth was not a real person, but a cluster of images': Christopher Haigh (ed), *The Reign of Elizabeth I* (Macmillan, 1984) Introduction, 5.

¹⁰² On 'the manipulation of subjective attachment through the play of images' and 'the capture of the subject by the institution', see Pierre Legendre, *Law and the Unconscious: A Legendre Reader*, Peter Goodrich with Alain Pottage and Anton Schütz (trans), Peter Goodrich (ed) (Macmillan, 1997) 258.

¹⁰³ Selden (n 66) 11; on Selden and the 'laws of Venus', see Peter Goodrich, *The Laws of Love: A Brief Historical and Practical Manual* (Palgrave Macmillan, 2006) 6.

¹⁰⁴ See text to n 20 above.

Emotional attachment and willing obedience to the legal institution are contingent upon the persuasive power of the sign. The images and narratives of English law have been continuously adapted to suit the circumstances of its immediate condition.¹⁰⁵ Just as the crown—the image of the king—is ‘an hieroglyphic of the laws’,¹⁰⁶ so the plays of Shakespeare examined above are signs, unravelling in visual and aural images the complex emotional bond between the legal institution and the subject of law. In the words of Sir Philip Sidney, they provide ‘a speaking picture—with this end: to teach and delight’.¹⁰⁷ It is through the imagination and expression of an indestructible social order that Shakespeare is identifiable not only as an author of exhaustive emotional range and unsurpassed technical brilliance, but also, in Shelley’s terms, as an institutor of laws and a founder of civil society, a lawmaker for all time:

Poets are the hierophants of an unapprehended inspiration; the mirrors of the gigantic shadows which futurity casts upon the present; the words which express what they understand not; the trumpets which sing to battle and feel not what they inspire; the influence which is moved not, but moves. Poets are the unacknowledged legislators of the world.¹⁰⁸

¹⁰⁵ For a theoretical discussion of the adaptation of traditions to suit contemporary institutional circumstances, see Hans-Georg Gadamer, *Truth and Method*, William Glen-Doepel (trans), John Cumming and Garrett Barden (eds) (Sheed and Ward, 1979).

¹⁰⁶ Coke, *Postnati. Calvin’s Case*, 7 Reports 4: 11b.

¹⁰⁷ Sir Philip Sidney, ‘The Defence of Poesy’ in Gavin Alexander (ed), *Sidney’s ‘The Defence of Poesy’ and Selected Renaissance Literary Criticism* (Penguin, 2004) 10.

¹⁰⁸ Percy Bysshe Shelley, *A Defence of Poetry* in HA Needham (ed), *Sidney, An Apology For Poetry; Shelley, A Defence of Poetry* (Ginn & Co, 1931) 109.