

“SUSPICION IS NO PROOF:” LEGAL PROOF AND PROBABILITY  
IN PRACTICE AND FICTION IN EARLY MODERN ENGLAND

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## ABSTRACT

LISA-JANE KLOTZ: “Suspicion is no Proof:” Legal Proof and Probability  
in Practice and Fiction in Early Modern England  
(under the direction of Reid Barbour and Ritchie Kendall)

Legal proof comes under scrutiny in theatrical criminal trials in early seventeenth-century England. I maintain that probability is a bundle of related concepts that have received different emphases in different cultures at different times; that the practice of adjudicating alleged crimes via England’s adversarial, jury-oriented, and performance-based system involved both established and emerging concepts of probability; and that plays including Ben Jonson’s Volpone, John Webster’s The White Devil, and Shakespeare’s Measure for Measure expressed some of the tensions concerning these differentiated notions and the practices that relied on them.

Practices consistent with the modern meanings of probability were already present in the law courts of early modern England, though they were articulated according to older, rhetoric-based definitions of probability or labeled as something other than probability. This elasticity in the way probability is conceived and put to use shows up in the three plays under consideration here. Volpone mocks the tools which triers of fact use to gauge witness credibility—oath-taking, consideration of reputation, expectations about how guilty or innocent people “act” in court—and satirizes the expectations that jurors share about what guilt should look like and the “show” the accused should put on, thus incarnating an everyday kind of “expectation” probability that becomes the focus of the mathematicians’ attempts to devise a calculus modeled on “the reasonable man” later in the seventeenth century. In The White Devil the drawing of inferences from circumstantial evidence in

Vittoria's trial invokes the same kind of probabilistic reasoning which supposedly bolsters jury verdicts, yet the performativity of her testimony complicates the probability underlying law's epistemology of near-certainty. Measure for Measure reifies the epistemological or degree-of-belief probability inherent in the emerging standard of proof—the “satisfied conscience,” yet in the depiction of the processes of judgment also explores a skeptic's argument against law's claim to near-certainty.

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## Chapter One

### Introduction

“Historians are always affected by their upbringing and background; inevitably and unconsciously we dig out from the rubble of the past just those treasures that our contemporary interests and prejudices induce us to seek there.”<sup>1</sup> I was a twenty-six year old deputy district attorney, fresh out of law school, and I’d been handed my first jury trial. The case was hardly major—the defendant was charged with being in public while under the influence of heroin—but I still had to prove the charge beyond a reasonable doubt, just as if it had been a murder charge. But what did that mean? What was “a reasonable doubt,” and what did it mean to go beyond one? Whether cast as a state of mind involving “firm conviction,” “sure belief,” or “moral certainty,” reasonable doubt seemed to involve a high degree of probability that almost reached the level of certainty. But still, what did probability mean?

I set aside these questions when I resigned from the practice of law and took up the study of literature. At first I resisted seeing any connections between law and the literature I was reading, but gradually I could not ignore them any longer. While reading Measure for Measure I noticed that the standard of proof as applied to Barnardine’s case was “undoubtful proof,” and that got me wondering: What was the actual standard of proof in criminal trials in early modern England?

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<sup>1</sup> Lawrence Stone, The Crisis of the Aristocracy (Oxford: Oxford UP, 1965) 5.

In general the standard of proof, however it is formulated, is built on the conclusions to several other questions. In what manner should the juror think about the evidence, or how can the juror form knowledge on which the judicial system will rely? And at what degree of certainty is the juror obliged to convict, or how thoroughly persuaded must the juror be to exercise these judgments?<sup>2</sup>

Early modern drama seems a strange forum for pursuing these questions but as I discovered, the stage served as a prime venue for the “fictional realization” of such questions, as Joel Altman says.<sup>3</sup> Principles and practices of criminal justice were interwoven in contemporary drama, with perhaps one-third or more of Elizabethan and Jacobean plays including a trial, an arraignment, or a lawsuit.<sup>4</sup> Dramatists depicted litigation not just because trials and court actions lent themselves to dramatic treatment, but also because theater audiences in London included large numbers of lawyers and students from the Inns of Court, where many plays were performed. Moreover, on the level of experience, legal obligations entangled people at every social rank in early modern life; indeed, among men of property, participation at some level in the processes of the law, willingly or not, was perhaps their most important unifying characteristic.<sup>5</sup> Law was a cultural and ideological force so widely diffused in English society that it informed many notions and actions of the population at large, though it was also an embodiment of the ideas and aspirations of the groups which

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<sup>2</sup> Steve Sheppard, “The Metamorphoses of Reasonable Doubt: How Changes in the Burden of Proof Have Weakened the Presumption of Innocence,” 78 Notre Dame Law Review 1165 (2003) 1169.

<sup>3</sup> Joel B. Altman, The Tudor Play of Mind: Rhetorical Inquiry and the Development of Elizabethan Drama. (Berkeley: U of California P, 1978) 3.

<sup>4</sup> Tim Stretton. Women Waging Law in Elizabethan England. (Cambridge: Cambridge UP, 1998) 63.

<sup>5</sup> Cynthia B. Herrup, The Common Peace: Participation and the Criminal Law in Seventeenth-Century England (Cambridge: Cambridge UP, 1987) 7.

ruled that population.<sup>6</sup> Law enforcement in particular depended on a high level of popular participation; in the absence of any formal investigatory body like the modern police department, law enforcement was initiated when citizens reported a crime. This grass roots involvement ensured that many people had first-hand knowledge of how the law operated in terms of how suspects were apprehended, how investigation was conducted, and what types of narratives and physical evidence made for persuasive proof versus mere suspicion. Arguably, participation in the justice system diffused concepts of factfinding and equitable judgment throughout the culture. Involvement in civil litigation also was widespread; from 1550 to 1650, almost every court in the country enjoyed a growth in business which far outstripped population growth.<sup>7</sup> Trials involving the aristocracy also multiplied (though the population of nobles increased as well), with nineteen cases reported during Henry VIII's reign, seven during Mary's reign, twenty in the time of Elizabeth, and 123 cases reported in James's reign.<sup>8</sup>

Playwrights, too, confronted themes of law and litigation because they had personal experiences of them. Perhaps a majority of Elizabethan, Jacobean and Caroline playwrights and writers had a connection with the law or personal experience with the law courts.<sup>9</sup> Some had legal training or were attached to Inns of Court. Francis Beaumont (who once described the Blackfriars playhouse as a court where "a thousand men in judgement sit") was a member of the Inner Temple and his father was a judge in the Court of Common Pleas. Thomas

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<sup>6</sup> J.A. Sharpe, Crime in Early Modern England, 1550-1750 (New York: Longman, 1999) 204.

<sup>7</sup> Sharpe 206.

<sup>8</sup> William Cobbett and Thomas Howell, eds, Cobbett's Complete Collection of State Trials, vol. 1-4. (London: R. Bagshaw, 1809-1820), vol. 1-2.

<sup>9</sup> Stretton 63-64.

Lodge was a student at Lincoln's Inn, while John Marston, John Ford, and Sir Thomas Overbury (as well as, almost certainly, John Webster) were members of the Middle Temple.<sup>10</sup> While these playwrights studied but did not practice law, a few barristers did write plays for specific occasions at the Inns: John Roo's interlude performed at Gray's Inn in 1526; Gascoigne's adaptation of Ariosto's Supposes at Gray's in 1566; Sackville and Norton's Gorboduc performed at the Inner Temple in 1561.<sup>11</sup> Many more playwrights appeared on the other side of the law, as litigants in civil disputes or defendants in criminal proceedings, including Shakespeare, Webster, Middleton, and Lodge. Ford, Middleton, Dekker, and Rowley were sued for libel in Star Chamber after coauthoring Keep the Widow Waking (1624). Ben Jonson not only was prosecuted for killing a fellow actor, but was imprisoned twice more for offending figures of authority with his plays, the second time after coauthoring Eastward Ho (1605) with George Chapman and John Marston. Marlowe too was arrested several times, for fighting and on suspicion of heresy.<sup>12</sup>

A number of poets and philosophers also had personal experience with law and legal process. On the Continent Montaigne, Luther, and Calvin all studied law;<sup>13</sup> Petrarch spent seven years as a law student.<sup>14</sup> In England the chambers of the Inns of Court provided a space where the law student's literary imagination—or pretensions—could merge with his

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<sup>10</sup> Stretton 63-64.

<sup>11</sup> Prest, Barristers 194.

<sup>12</sup> Stretton 65.

<sup>13</sup> Myron P. Gilmore, Humanists and Jurists: Six Studies in the Renaissance (Cambridge: Harvard UP, 1963) 67.

<sup>14</sup> Gilmore vii.

legal imagination. Donne, Campion, and John Davies wrote poetry while studying at the Inns,<sup>15</sup> and other students went on to write notable poetry, including Raleigh and Chapman.

Legal processes inherently contain elements of drama, and drama is well-suited to represent the conflicts of law. Some of the most epistemological paradigms in law appear to be narratively structured, including motivation, crime, and punishment.<sup>16</sup> In both law and drama a story is told primarily through language, not action, and through conflict, suspense, climax, and resolution. The moral and political conflicts in criminal cases make the criminal courtroom the most visible of all narrative arenas. Tragedies including classical Greek dramas and English revenge tragedies share a fundamental structure with legal procedure, for both rely on the build-up of proof and scenes of discovery.<sup>17</sup> To accomplish a change from ignorance to knowledge concerning some crucial aspect of the plot, the playwright often relies on the same instruments of proof available to the forensic orator—probable incidents, signs, and infallible signs.<sup>18</sup> Both legal proof and tragic recognition rely on the reading of these elements. Revenge tragedies in particular are forensically-oriented; the audience knows who committed the murder but the plot nonetheless is driven by the revenger's uncertainty, his detection of the signs of guilt and his evaluation of the "proof." But English comedies of errors based on the Roman intrigue comedies of Terence and Plautus also follow a legal

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<sup>15</sup> Wilfrid R. Prest, The Rise of the Barristers: A Social History of the English Bar, 1590-1640 (Oxford: Clarendon P, 1986) 193.

<sup>16</sup> Guyora Binder and Robert Weisberg, eds, Literary Criticisms of Law (Princeton: Princeton UP, 2000) 261.

<sup>17</sup> Kathy Eden, Poetic and Legal Fiction in the Aristotelian Tradition (Princeton: Princeton UP, 1986) 10.

<sup>18</sup> Eden 10-11.

forensic structure, albeit a more investigatory one involving the detection of facts, the drawing of inferences from characters' statements and from circumstances (especially the navigation of characters' intentions in light of their actions), and the logical or probable progression of plot. This interest in intrigue as evidential seems to be new in early modern English drama; George Gascoigne's Supposes is based on the plot of Aristotle's I Suppositi, which in turn was based on Terence and Plautus and their use of signs. Forensic narrative structured around an Aristotelian concern with the artificial and persuasive ordering of inartificial proofs and signs links intrigue plays and tragedies with trials; more importantly, neoclassical ideas of narrative, proof and probability are diffused throughout early modern English culture by way of popular plays. The pervasiveness of law in early modern English culture is evident when writers take Terentian and Plautine-type plots and twist or wring the comic intrigue through a serious adjudication as in Sidney's Arcadia or Shakespeare's A Comedy of Errors. Moreover, other types of law-driven plays exist, including the three I will consider in this dissertation.

If law informs what we see on the stage, the stage sometimes informs law in direct ways. Both Edward Coke and Francis Bacon incorporated entertainment they saw on stage into their work as lawyers. Coke, who had a prodigious memory, echoed Gaunt's speech five years after Richard II was last performed: at the Norwich assizes, Coke was giving his charge to the grand jury, reminding his listeners of the Gunpowder Plot. Had the plot succeeded, he recalled:

Only this had their horrible attempt taken place. This sea-environed island, the beauty, and the wonder of the world. This so famous and far-renowned great British monarchy, had at one blow endured a recoverless ruin, being overwhelmed in a sea of blood, all those evils, should have at one instant happened . . . Our conquering nation, conquered in herself: her fair and fertile bosom, being by her own native (though foul unnatural children) torn in pieces, should have been

made a scorn to all the nations of the earth. This so well planted, pleasant, fruitful world, accounted Eden's paradise, should have been by this time, made a place disconsolate, a waste and desert wilderness, generally overrun with herds of blood-desiring wolves.<sup>19</sup>

Bacon found dramatic appeal and political expediency in casting Essex as a somewhat tragic hero in his account of the trial, written at the Queen's request to reverse public opinion which believed that Essex had been convicted on insufficient proof. To those who would use it, the theater could provide the government with interpretative frameworks by which an accused's actions could be presented to the public as evidence of guilt.

Further, the humanist tradition of poetics, taught to every schoolboy in early modern England, encompassed legal and political as well as literary works and helps explain the perceived analogies among these activities in the early modern period. Renaissance poetics was shaped by a rhetorical tradition stemming from Aristotle, Cicero, and Quintilian; for these classical writers, rhetoric or persuasive argument was primarily a practical skill that politicians and lawyers needed, one that drew on the resources of the poet.<sup>20</sup> Thus, the methods and concerns of the classical orator were similar to and may have influenced the classical formulation of poetical theory.<sup>21</sup> For Aristotle, rhetoric and poetry informed each other; in the Poetics he specifically identified rhetorical techniques of argumentation that would help the poet produce the illusion of verisimilitude.<sup>22</sup> Moreover, the spectators at a tragic drama and the jury at a legal trial should behold, as if with their own eyes, an action

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<sup>19</sup> Allen D. Boyer, Sir Edward Coke and the Elizabethan Age (Stanford: Stanford UP, 2003) 287-288.

<sup>20</sup> Victoria Kahn, Wayward Contracts: The Crisis of Political Obligation in England, 1640-1674 (Princeton: Princeton UP, 2004) 16.

<sup>21</sup> Kathy Eden, Poetic and Legal Fiction in the Aristotelian Tradition (Princeton: Princeton UP, 1986).

<sup>22</sup> Kahn 17.

that has been so skillfully represented that they will, in Aristotle's view, learn from that representation not only what happened but why.<sup>23</sup> And they will be moved in both cases to fear and pity and to make judgments in accord with those emotions.<sup>24</sup> The forensic rhetoric of not only Aristotle but also Cicero (*De Inventione*) and Quintilian (*Institutiones Oratoriae*) pervade early modern poetics even though they are about proving guilt and innocence and were read as rhetorical texts; indeed, Ben Jonson told William Drummond to do so. Moreover, by learning the everyday ethics and aesthetics instilled by the grammar schools, writers learned how to appeal to audiences according to those audiences' moral beliefs. Peter Mack might not be too dogmatic when he writes, "The grammar school created the Elizabethan audience."<sup>25</sup> In turn, it seems plausible to argue that the experiences of playgoers in watching plots based on the structures of forensic rhetoric must have affected how juries thought of evidence, what they considered to constitute proof as opposed to suspicion, and the proportions of certainty and doubt they were willing to accept before voting to convict defendants.

Given these connections (and many more), it is easy to find effusive claims for drama's pivotal role as a force for change in early modern England. Drama responded and contributed to changes in society and culture; it articulated widespread anxieties, aired dissonant points of view on philosophical and practical issues, and expressed everyday dilemmas, grievances, and frustrations. In fictionalized settings dramatists were able to suggest and explore hypothetical modes of action, formulate political expectations, instill

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<sup>23</sup> Eden 5.

<sup>24</sup> Eden 5.

<sup>25</sup> Peter Mack, *Elizabethan Rhetoric: Theory and Practice* (Cambridge: Cambridge UP, 2002) 47.



changed attitudes and shape new thinking.<sup>26</sup> With corresponding ambition, I wanted this project to be about what proof looked like in actual and stage trials and what people thought about it—the sufficiency of proof in actual practice. I wanted to argue that these plays modeled what guilt could look like and thus altered public expectations about proof in criminal trials and about probability in general. Instead, I discovered that early modern writers (and presumably their audiences) were not concerned with the sufficiency of proof in the ways we are today. My twenty-first century concerns with the technical measure and weight of proof had to give way to *their* concerns about the prospect of the mistaken factfinder.

I had started out wondering why the absence of juries in stage trials was so striking, but I ended up appreciating the anomaly of John Webster’s inclusion of an informal jury of ambassadors in The White Devil. Along the way I had to give up trying to describe practices of the general public—the people who filled the theaters, jury boxes, and courtrooms—and the attitudes that must have driven them, or as Debora Shuger says, “how the conceptual structures visible in texts diffused into social behavior.”<sup>27</sup> I also found company in Katharine Eisaman Maus, who notes that even though it is “no coincidence that a period of great theater should also be ‘a great age of litigation,’” we cannot insist on “a direct or unequivocal *influence* either from the theater to the courtroom or vice versa. Our relative lack of

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<sup>26</sup> Martin Butler, Theatre and Crisis 1632-1642 (Cambridge: Cambridge UP, 1984).

<sup>27</sup> Debora Shuger, Habits of Thought in the English Renaissance (Toronto: U Toronto P, 1997) 5, n. 13.

information about the details of most Renaissance trials renders this kind of claim tenuous or impossible to make.”<sup>28</sup>

So, I have approached the question of how proof and probability depicted on the stage relates to proof and probability as experienced in the courtroom as one suggesting correspondences but also awkward incongruities which reprimand my law-trained (and perhaps innate) efforts at synthesis. The comparison of ideas containing multiple strands and nuances such as probability with their material practices resists tidy analyses and neat conclusions, and defies the privileging of one strain of thought, one type of character, or one genre. I have tried to follow Altman and Graham Bradshaw in reading plays whole rather than piecemeal and in treating them as usually incarnating a dialectical or dialogical structure, with opposing sides of an issue such as oathtaking or reputation being expressed by different characters or sometimes even by the same character.<sup>29</sup> Further, the plays seek to strike a balance between mimesis on the one hand and the creation of an alternate world of meaning on the other, a world where legal evidence epistemology is modified because it does not always (or often?) do justice and its factfinding process, on which people’s lives and liberties depend, gets guilt and innocence right on stage despite human error.

Recent work in early modern English law and literature has begun to explore connections between proof in actual and theatrical criminal trials. Barbara Shapiro has published several books which draw parallels between classical rhetoric and Anglo-American law, as well as between law and intellectual developments in science, philosophy, and religion. While she does address notions of proof and the transformation of standards from

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<sup>28</sup> Katharine Eisaman Maus, Inwardness and Theater in the English Renaissance (Chicago: Chicago UP, 1995) 3.

<sup>29</sup> Graham Bradshaw, Shakespeare’s Scepticism (Brighton, Sussex: Harvester P, 1987).

certainty to probability, she does so very broadly, on the level of theory rather than practice, and without consideration of dramatic representations of proof in fictional trials. John Langbein has attempted to reconstruct the procedures followed in gathering evidence and proving guilt in ordinary criminal trials, but without consideration of cultural contexts. Luke Wilson has worked with the relationships between the emerging law of contract and dramatic representations of intention and agency; his focus, thus, is on contract law. Victoria Kahn's intellectual history treats contract as a metaphor or theory for political formations between subjects and rulers, and Charles Ross similarly compares the law of fraudulent conveyances in Elizabethan England with contemporary literature, treating the literary borrowings as metaphors for fraud, deception, and ethics.<sup>30</sup> This dissertation has more in common with several forthcoming books which explore relations between evidence and proof in court and on stage.<sup>31</sup>

As a law and literature project, this dissertation uses literature to understand law only to the extent that both are cultural practices; in other words, I avoid using literature to explicate law *as* law. Literature may be about broad legal issues such as justice and fairness, and also may refer with some precision to narrower legal topics such as witness credibility. But fiction writers do not represent the law directly; instead, they offer literary representations of what are or were general cultural practices. In trials lawyers think about what has to be proved; in plays writers think about what has to be plotted. Certainly the plot

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<sup>30</sup> Charles Ross, Elizabethan Literature and the Law of Fraudulent Conveyances: Sidney, Spenser, Shakespeare (Burlington, VT: Ashgate Pub. Co. 2003).

<sup>31</sup> Among these forthcoming works are Lorna Hutson's book entitled The Invention of Suspicion: Forensic Realism in Renaissance Drama, Subha Mukherji's Law, Evidence, and Representation in Early Modern Drama (Cambridge University Press), Dennis Kezar's Solon and Thespis: Law and Theater in the English Renaissance (Notre Dame Press), and Holger Schott Syme's work-in-progress entitled Trial Performances: Theatre and the Law in Early Modern England, 1550-1625.

is an argument, a proof, but there cannot be strict correspondences between legal procedures and cases and theatrical legal procedures and legal conflicts. Conversely, because law and literature both belong to a single web of cultural assumptions, beliefs, values, ideas, and institutions, I believe that understanding the development of legal concepts and practices (to the extent they are recoverable) might expand our understanding of literary representations of those concepts and practices.<sup>32</sup> Certainly, literature can comment on or criticize law, while law's processes can be structured using literary systems such as narrative.<sup>33</sup> Law may be used to understand literature, as in explaining legal terminology and allusions, and the comparison of literary to actual cases may reveal representations of cultural practices in literature. Further, examining law in its cultural and historical contexts may help to expose societal attitudes and competing political interests that also help to shape literary expression. My argument begins with Essex's nemesis, who like Essex found himself on the wrong side of the law and at the center of a show trial which ultimately cost him his life.

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<sup>32</sup> For example, literary scholar Alexander Welsh examines legal sources for the eighteenth-century view that "circumstances cannot lie." He concludes that, from the mid-eighteenth-century, "narratives built on carefully managed circumstantial evidence," employing a third-person narrator who presents, summarizes, and evaluates the evidence, became the dominant novelistic form. Strong Representations: Narrative and Circumstantial Evidence in England (Baltimore: Johns Hopkins UP, 1992).

<sup>33</sup> Legal scholars continue to develop theories of the relationship between evidence and narrative. See Bernard S. Jackson, Law, Fact and Narrative Coherence (1988); William Twining, Rethinking Evidence: Exploratory Essays (Evanston: Northwestern UP, 1990); Nancy Pennington and Reid Hastie, "A Cognitive Theory of Juror Decision Making: The Story Model," 13 Cardozo Law Review 519 (1991); Richard Lempert, "Telling Tales in Court: Trial Procedure and the Story Model," 13 Cardozo Law Review 559 (1991).

## 1. English Law or Spanish Inquisition?

In his 1603 trial for treason, Sir Walter Raleigh fought for the right to confront his sole accuser, Lord Cobham. Cobham had implicated Raleigh in a plot to overthrow the king, but later recanted.<sup>34</sup> Edward Coke, playing the outraged prosecutor, convinced the court that Raleigh had no right to confront his accuser, especially since the law at that time did not require that treason be proved by witnesses testifying in the defendant's presence (as it previously had, and would again when the repealed statute had been reenacted).<sup>35</sup> Indeed, Coke argued that treason was now a common law offense, and under the common law "a man might be condemned *without a witnesse, onely upon presumption*" (my italics).<sup>36</sup> Without the statute's protection Raleigh was forced to admonish Coke that, "if you condemne me upon bare inferences, and will not bring my accuser to my face: you try me by no law but by the Spanish inquisition."<sup>37</sup>

Bare inferences; presumptions; surmises: these fancies cannot support conviction and a death sentence, Raleigh argued, and as translator of Sextus Empiricus' Hypotyposes, Raleigh would have known how to criticize the validity of signs and inferences.<sup>38</sup> But one of the judges, Raleigh's enemy Lord Cecil, argued that the inferences were sufficient. He responded to Raleigh's charge of unfair process by reiterating the pregnant circumstances that Raleigh

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<sup>34</sup> Anonymous, The Arraignment and Conviction of Sir Walter Rawleigh, At the Kings Bench-Barre at Westminster (1619), Early English Books Online, ProQuest Company (May 2, 2003) 15.

<sup>35</sup> For a discussion of the Edwardian treason statutes, see John G. Bellamy, Law and Society in Late Medieval and Tudor England (New York: St. Martin's P, 1984) 42.

<sup>36</sup> Rawleigh 16-17.

<sup>37</sup> Rawleigh 18.

<sup>38</sup> Richard H. Popkin, The History of Skepticism from Savonarola to Bayle (Oxford: Oxford UP, 2003) 18-19.

scoffed at. “Against these probabilities,” Cecil reasoned, “the presumptions before alledged, were laid altogether, to fortify my Lord Cobham’s accusation, in the ordering whereof Master Attorney shewed great wisdom and care in his Majesties businesse.”<sup>39</sup> But Raleigh would not accept the totality of the circumstantial evidence, responding both wittily: “Presumption must proceed from precedent of subsequent facts,” and desperately: “All your suspitions, and inferences, are but to fortify my Lord Cobhams accusations; My Lord Cobham is the onely man that doth accuse me. My Lord Cobham lives and is in the house, let him maintaine his accusations to my face.”<sup>40</sup> In the end, powerless to force the court to call Cobham to the stand, Raleigh could only implore the jury (unsuccessfully):

If you would be content to be judged upon suspitions and inferences,<sup>41</sup> if you would not have your accusation subscribed by your accuser. If you would not have your accuser brought to your face (being in the same house too) where you are arraigned, if you would be condemned by an accusation of one recanted and truly sorrowfull for it, if you in my case would yield your bodyes to torture, loose your lives, your wives, and children, and all your fortunes upon so slender proof. Then am I ready to suffer all these things.<sup>42</sup>

As Raleigh’s trial illustrates, a nascent acceptance of circumstantial evidence as proving probable guilt conflicted with a tradition which valued only direct, more certain evidence of guilt. In felony trials jurors grappled with questions of knowing, doubting, and believing, and their answers meant life or death, literally, for the accused. A disrespect for probability, tainted as it was by the medieval preference for authority, the Reformation zeal for assurance, and the anti-skeptical goal of attaining certain knowledge in science, coexisted

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<sup>39</sup> Rawleigh 20.

<sup>40</sup> State Trials, vol. 2, p. 26; Rawleigh 20.

<sup>41</sup> “Presumptions,” not suspitions and inferences, in the State Trials version (vol. 2, p. 25).

<sup>42</sup> Rawleigh 21.

with the everyday reading of signs and making of inferences that jurors relied on in reaching their verdicts. Thus, the indeterminacy of probability could be tolerated in social situations, in evaluating literature, and sometimes in making legal or other arguments aimed at persuasion, but not in the epideictic rhetoric of the common law's defenders, including Edward Coke.

Raleigh's predicament serves as just one example of how early modern English culture tried to know things for sure, tried "to discover hidden intentions or truths in a post-Reformation world in which the rise of casuistry, heresy, equivocation, studied silence, and concealment made certainty of such knowledge impossible, torture and legal investigation notwithstanding."<sup>43</sup> The difficulty of proving facts which are not subject to universally acknowledged proof or disproof becomes apparent in the course of the sixteenth century, in the clash between the authorities and heretics. "Either transubstantiation does or does not occur; the Pope either is or is not the supreme head of the church on earth: but how might the truth or falsity of such propositions possibly be established once a social consensus about them has broken down?"<sup>44</sup>

Throughout most of its history in philosophy, probability has been used without definition or with only a cursory attempt at definition, and definitions have often appeared inconsistent, even when offered by a single writer. In English, the concept of the probable derives from the Latin *probabilis*, meaning the provable and the *approvable*, which in turn

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<sup>43</sup> Maus 77-78.

<sup>44</sup> Maus 77-78.

derives from the verb *probare*, meaning to test (*probe* is a modern derivative) or approve.<sup>45</sup>

That in turn comes from *probus*, meaning simply virtuous or good (and giving us the modern *probity*). “Many of the English cognates are not only judicious in their connotations but positively judicial: in addition to *probe* and *probity* there are *probation* and *probate*.”<sup>46</sup> But logic as well as the law is represented in such other English cognates as *proof* and *prove*.

Other modern derivatives more directly convey the connection in Latin with virtue in *probus*: *improve*, *reprove*, and *reprobate*.<sup>47</sup>

These modern meanings existed in early modern England, where dictionaries recorded “probable” as signifying “Which may be prooued”,<sup>48</sup> “that may be easily proued to be true”;<sup>49</sup> while “probability” indicated a “Great appearance of truth”.<sup>50</sup> The OED also captures these senses: in its earliest manifestations, and as most frequently noted as being used in early modern England, “probable” meant “capable of being proved; demonstrable, provable” (earliest citation: 1485) and “such as to approve or commend itself to the mind; worthy of acceptance or belief; rarely in bad sense, plausible, specious, colourable” (earliest

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<sup>45</sup> Robert Newsom, *A Likely Story: Probability and Play in Fiction* (New Brunswick, NJ: Rutgers UP, 1988) 9-20.

<sup>46</sup> Newsom 19-20.

<sup>47</sup> Newsom 19-20.

<sup>48</sup> John Bullokar, *An English Expositor: Teaching the Interpretation of the hardest words vsed in our Language* (1616), *Early English Books Online*, ProQuest Company, July 10, 2004; Henry Cockeram, *The English Dictionarie: Or, An Interpreter of Hard English Words*, *Early English Books Online*, ProQuest Company, July 10, 2004.

<sup>49</sup> Robert Cawdry, *A Table Alphabeticall, or the English expositor, containing and teaching the true writing and vnderstanding of hard vsuall English words, borrowed from the Hebrew, Greeke, Latine, or French, &c.*, *Early English Books Online*, ProQuest Company, July 10, 2004.

<sup>50</sup> Cockeram. An interesting bit of trivia: John Webster contributed an eight-line commendatory poem to the first edition of Cockeram’s *English Dictionarie* in 1623. Charles R. Forker, *Skull Beneath the Skin: The Achievement of John Webster* (Carbondale: Southern Illinois UP, 1986) 159.



citation: 1387).<sup>51</sup> The OED Online notes that this meaning has merged into the modern one: “having an appearance of truth; that may in view of present evidence be reasonably expected to happen, or to prove true; likely”. The earliest cited usage of this more modern meaning is in 1606, but examples of this usage mostly come from the nineteenth century. The anonymous author of the True Report also equated probability with plausibility when he wrote: “by any probabilitie of argument” and “their improbable sect”.<sup>52</sup> Thus, probability was not about statistical expectations or frequencies, but similarities which suggest closeness to truth and which warrant belief.

The dictionaries’ description of probability as a “likeness,” a “colour” or “appearance” of truth does not necessarily imply that probability was thought of as a deceptive simulacrum of the truth (though it sometimes was)<sup>53</sup>. Rather, “appearance,” “likeness, and “colour” belong to a pervasive Western use of the language of vision as a metaphor for intelligibility in general. To the extent that concepts can be made intelligible or are capable of being “proved” in logic and dialectic, they became “prove-able” or “probable.” In medieval scholastic thought, these modes of proof conformed to rules of logic and were formal, in that sense. However, Italian humanists of the fifteenth century began to include, in their treatises on dialectic, “informal” modes of proof that we would think of as rhetorical strategies such as proof by analogy, example, simile, comparison, enthymeme, etc. The metaphor of vision is frequently used in relation to these forms of proof; metaphor is said to throw great light on a concept, for example, and concepts are said to be “opened up”

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<sup>51</sup> OED Online.

<sup>52</sup> Anonymous. A True Report of the Late Apprehension and Imprisonment of John Nichols Minister at Roan (1583), Early English Books Online, ProQuest Company (May 2, 2004) 29, 30.

<sup>53</sup> My thanks to Lorna Hutson for the information and perspectives offered in the following three paragraphs.

by proofs.

The humanists' inclusion of “informal” proofs in their treatises on logic and dialectic sanctioned the use of merely “probable” argumentation in their declamations, unlike the scholastics who strived to adhere to strictly logical disputations. The “probable” argument was thus not disqualified for offering less than absolute demonstrative certainty, and humanism allowed argument about what cannot certainly be demonstrated, which includes most of human affairs, especially law and politics.

Thus, “probability” did not necessarily compete with “truth,” though such a relation might seem to be implied by the notion of a “colour” or “appearance” of truth. Nor did probability “point to” truth as a signpost would, but it did draw out, make tangible to thought, or make available to discursive contemplation and evaluation something that was hidden and unintelligible.

Until the end of the seventeenth century, then, “probable” essentially allowed for a flexible relationship among various stages of doubt and belief.<sup>54</sup> A proposition could be probable and hence worthy of belief and still possibly be wrong or untrue. Conversely, a proposition could be false and yet accepted as probable; as Quintilian acknowledged, true things may not be credible, and false things may be plausible.<sup>55</sup> Later I will argue that early modern concepts such as the satisfied conscience, precedent, expectation, and inference were related strands of probabilistic thought, as much a part of early modern English habits of thought as were plausibility and provability.

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<sup>54</sup> The post-Baconian generation was able to move on to more probabilistic ground because it did not need to flatly oppose skepticism; by then, skepticism was losing ground (Shapiro, Probability 267-68).

<sup>55</sup> Quintilian, The Orator's Education, vol. 1-2, Donald A. Russell, ed. and trans. (Cambridge: Harvard UP, 2001) vol. 2, book 4.2, 237.

Much later in the seventeenth century, probability would be conceived as falling primarily into one of two categories (though overlap and interdependence was taken for granted): qualitative probability, also known as epistemic or degree-of-belief probability, and quantitative probability, which mathematically measures the frequency of events. The empirical and the epistemic issues in probability shaped discussions on the nature and acceptability of evidence, proof, belief, and truth in early modern Europe. But the subjective and objective sides of probability could not be so cleanly separated in practice. When David Hume showed in 1737 how probability could be used to validate inductive evidence, opinion and knowledge became only differences of degree, not kind.<sup>56</sup> The shift to a mathematical theory of probability started with Laplace in 1812; his definition of the probability of an event as the ratio of the number of favorable cases to all possible cases enabled scientists to calculate degrees of uncertainty numerically in respect to a variety of events in the social and physical worlds,<sup>57</sup> including phenomena involving large-scale regularities such as gambling problems, actuarial computations, and demographic patterns. Though the emphasis in probability theory had shifted more toward the frequency or ratio of events in the world and less toward assessments of epistemic certainty, probability continued also to refer to incomplete knowledge about both esoteric and everyday matters that produced only partial or moral certainty, not absolute certainty.<sup>58</sup>

Today, the objective and subjective sides of probability have collapsed on one another; probability has to do with uncovering the lawful in randomness, and with degrees of

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<sup>56</sup>J.L. Heilbron, ed, "Probability and Chance," The Oxford Companion to the History of Modern Science (Oxford: Oxford UP, 2003) 677-678.

<sup>57</sup> Heilbron 677-678.

<sup>58</sup> Heilbron 677-678.

ignorance and doubt; objective frequencies of events also involve subjective degrees of confidence in an expected outcome, as when we say “I’m ninety percent sure I won’t be at the party,” or “the odds are better than fifty-fifty that you will be promoted.”<sup>59</sup> Indeed, epistemological probability first served as a metaphor for statistical probability, but the widespread adoption of statistical methods as a basis for scientific argumentation has reversed our understanding, so that we now use statistical probability as a metaphor for epistemological probability.<sup>60</sup> We use other terms for what was formerly spoken of as one or another aspect of probability. Credibility, verisimilitude, argumentation, the preferable, the plausible, and the non-demonstrable;<sup>61</sup> certainty, belief, frequency of events (even if statistics tell me that Chapel Hill gets X inches of snow per year, I still form a belief with a measure of certainty about it), evidence, opinion, authority, expectation, and precedent (precedent does not implicate frequency of occurrence or quantification—it is not the number of precedents that is important but the degree of likeness)—all these terms refer in their own way to some aspect of knowledge which is not demonstratively certain.

This entanglement of the subjective and objective may make us unclear about what we mean by “probability,” but it does not mean that we are conceiving different kinds of probability. Some philosophers and intellectual historians argue that historically, probability has been conceived differently at different times and in cultures. Lorraine Daston writes of the mathematical theory of probability as a distinct conception; Ian Hacking argues that

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<sup>59</sup> Ritchie 2.

<sup>60</sup> David Ritchie, “Statistical Probability as a Metaphor for Epistemological Probability,” Metaphor and Symbol 18.1 (2003) 1.

<sup>61</sup> Edmund F. Byrne, Probability and Opinion: A Study in the Medieval Presuppositions of Post-Medieval Theories of Probability (The Hague: Martinus Nijhoff, 1968) 47.

around 1660 a modern notion of probability is born, one that makes the mathematical theory possible. Other historians such as Shapiro see a fundamental continuity in the history of probability, but with shifts in meaning which involve different aspects of probability becoming dominant at different moments. I concur with Newsom who writes that “the various ideas that go under the name of *probability* all do indeed belong to the same conceptual family. This means that quantitative probability and qualitative probability are of a kind”.<sup>62</sup> Because particular writers usually refer only to specific aspects of probability, the concept has come to seem like several concepts.

This is not to say that probability is not also culturally inflected; in fact, I believe that the different emphases different strands of probability have been given over time indicate variations in the anxieties, preoccupations and assumptions of different cultures. Probability is defined at the intersection of the “real,” or actual experience, and “fiction” or the imitation of the real. To us it is improbable to think that a rape victim would marry the rapist and thereby erase the violation; in ancient Athens and Rome and in early modern England this outcome was appropriate and desirable. Eighteenth-century audiences made sense of Hamlet by way of Freud’s theory of the Oedipal complex; we scoff at such improbable explanations today. In literary terms, I think that Paul Ricoeur argues persuasively that, while probability is in one sense a form of logic and hence is an objective value, it also must be believable. This credibility or persuasiveness is a subjective judgment, and this judgment occurs in the relationship between the audience and the work.<sup>63</sup>

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<sup>62</sup> Newsom 56.

<sup>63</sup> Paul Ricoeur, Time and Narrative, tr. Kathleen McLaughlin and David Pellauer (Chicago: U Chicago P, 1983) vol. 1, 31-51.

Nonetheless, in this dissertation I would like to stress the continuities rather than the incongruities among early modern varieties of probability and our modern ones. The poetic decisions that make sense—are probable—to us in a culture very different from early modern England's, and the workings of the common law jury system which are recognizable despite our fundamentally different system—these subsets where modern and early modern probability overlap are the focus of this dissertation. I operate under the hypothesis that concepts of probability from Aristotle to the present share a fundamental unity; though particular criteria of probability have developed and the kinds of evidence implied by those criteria have changed, the *shape* of probability as we understand it is essentially the same as it was in seventeenth-century London or ancient Athens. Consequently, the probability that jurors worked with in inferring guilt or innocence from circumstantial evidence in court and that some playwrights staged in early modern England is recognizable to us today.

The satisfied conscience as epistemic probability and the process of drawing inferences from circumstances which served as evidence were accepted practices which could yield plausibility, though the concept of circumstances *as* evidence and of evidence as leading to an acceptable level of less-than-certain truth arose after the Royal Society's publication of the Port Royal Logic in 1662. Written in French by Antoine Arnauld and Pierre Nicole and entitled La Logique ou l'art de penser or The Logic or the Art of Thinking, this text was promptly translated into Latin and English and underwent many reprintings in the late seventeenth and early eighteenth centuries. It proved to be seminal and widely used because it was the first work to associate probability with a measurable quantity; in other words, it made a clearly conceptualized distinction between the testimony of people and the evidence of things. Thus, epistemic probability as we know it was present in early modern

England, but not categorized at length as such until quantitative probability provided a contrast.

## 2. Conclusion

This dissertation, then, locates three major dramas by prominent playwrights within the cultural practices of law which the plays represent on stage. These plays problematize the common law's procedures for establishing knowledge by finding "facts" and detecting truth as well as lies. Across the genres of comedy, tragedy, and tragicomedy, a skepticism concerning the ability of the common law trial to find facts and render judgments is tempered by a reaffirmation of those processes and their ability to arrive at correct results despite their susceptibility to yielding mistaken inferences and to being fraudulently manipulated. The Avocatori of Volpone get gulled, the ambassadors of The White Devil equate accusations with proof, and Escalus in Measure for Measure gets blinded by Angelo's seeming rectitude and in his wrath validates Angelo's arguments as to why humans cannot be trusted to judge. Still, in these plays the thoroughly unreliable process of trial, dependent on easily refuted assumptions about the capacity of people to perceive, apprehend, interpret and judge, nonetheless brings about just and factually correct results.

I hope to make a beginning in exploring how the forensically-oriented emerging discourse of probability functioned as a site for culture-wide debates about the grounds for knowing and believing, and how probability came to encapsulate some of the contested and uncontested assumptions in early modern English epistemology. A larger project would focus on the various discourses of probability that circulated in the aftermath of the Reformation

and the revival of skepticism, but this project is limited to law and three stage trials/quasi-trials.



## Chapter Two

“No Hinge Nor Loop to Hang a Doubt On:”<sup>1</sup>

### Satisfaction, Conscience, and Probability

The criminal courts of early modern England entrusted jurors to satisfy their consciences that guilt had been proven. This standard of proof consisted of a state of certain belief, in which all doubts had been persuaded away. It also involved what to several contemporary theorists seemed the necessity to use probabilistic reasoning in drawing inferences from circumstantial evidence. I argue that despite the frequently asserted objective of certainty and the comparative inadequacy of probability, it was recognized that jurors often could not reach the expected state of sure belief without a probabilistic, analogizing type of reasoning. Probability was inconsistently treated among theorists and practitioners including Coke, Lambarde, and Dalton in the context of the grand jury and its determination of whether the evidence amounted to something more than suspicion but less than proof, and the trial jury where its acceptability was unclear. On the level of theory, probability was a fluid, even volatile source of contention within the English common law judicial system, but on the level of practice, it was unavoidable whenever a jury considered circumstantial or indirect evidence—in other words, in the overwhelming majority of criminal trials.

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<sup>1</sup> “Othello,” The Norton Shakespeare, Ed. Stephen Greenblatt, Walter Cohen, Jean E. Howard, Katharine E. Maus (New York: W.W. Norton & Co., 1997) 3.3.368-369.

## 1. The Issue of Sources

The state of English law reporting in the early seventeenth century makes discerning the standard of proof a challenge. The law reporting system did not thoroughly document criminal cases. Lawsuits were widely reported, by lawyers for lawyers, but felony trials were largely ignored in the descriptive reports. Lawyers would have had little interest in recording felony cases since defense counsel were always prohibited and prosecutors absent in routine felonies, in contrast to lawsuits between parties which always required lawyers.<sup>2</sup> Several sources do exist, though none offers anything near the verbatim recording of proceedings that would provide sure grounds for establishing what the standard of proof was.

Records of trials before the central royal courts and the assizes (circuit courts) in early modern England were collected in various nominative reports, named for the lawyer or judge who compiled them; many of these reports were later bundled and made available as the English Reports. Still later, the English Reports and older reports known as the Year Books were gathered, with cross-references, into The English Digest, and the Digest was later expanded to include cases adjudicated throughout the British Empire (The English and Empire Digest). These reports were meticulously kept, but they mostly report on civil cases; the few criminal case reports merely state the rule or principle for which the case stands, not enough information from which to deduce ordinary procedure.<sup>3</sup> The Digest's silence about

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<sup>2</sup> John Langbein, Prosecuting Crime in the Renaissance (Cambridge: Harvard UP, 1974) 77-78.

<sup>3</sup> The English and Empire Digest, annotated, "Criminal Law and Procedure," vol. 14 and 15 (London: Butterworth, 1924). Under the heading "Burden of Proof," the oldest entry is dated 1801 and simply states, "Negative Averments: In general the rule is considered to be, that a party is not required to prove a negative, but it lies on the other side to prove the affirmative of that which he insists on (Le Blanc, J.). R. v. Stone (1801), 1 East, 639; 102 E.R. 247" (Digest, v. 14 p. 430). Under the related heading "Sufficiency of Proof" the oldest entry comes from 1608 and merely notes, "Of corpus

procedure in general and the standard of proof in particular suggests that judges and defendants, and the lawyers who compiled the reports, were unconcerned with the standard of proof circa 1610.<sup>4</sup> Apparently, either no standard of proof existed—unlikely, given the practical need for one—or it was so taken for granted that no reporter thought to mention it. The government rolls and calendars which exist for criminal cases are even less informative: they merely identify the defendant, witnesses, judges, and jurors; record the charge and a very brief description of the defendant’s alleged acts; and describe the disposition of the case (e.g., “guilty, hanged”).

More expansive and useful accounts appear in the State Trials which offer narratives of sensational trials, mostly for political crimes such as treason. Procedurally, the State Trials are too unusual to represent cases of ordinary felony: each state trial featured judges and a jury handpicked by the Crown for that particular case; was prosecuted by the Crown’s powerful Solicitor General and Attorney General (as opposed to no prosecutor in mundane cases); and proceeded in the spotlight, with monarch and powerful elite paying close attention. Also, the reports are reconstructions from memory, a problem in itself,<sup>5</sup> made

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delicti:—confession of accused—R v. Perry (1608), 14 State Tr. 1312” (Digest, v. 14 p. 432). The only other entry from the early seventeenth century concerning proof states: “Confession of accused: to prove identity—where a felon is condemned, and escapeth and is retaken, upon confession that he is the same party execution may be awarded. Middleton’s Case (1617), Poph. 131; 79 E.R. 1233” (Digest, v. 14. p. 438).

<sup>4</sup> Similarly, the juror oath does not mention a standard of proof: “You shall well and truly try and true deliverance make between our sovereign lord the king and the prisoners at the bar whom you shall have in charge, and a true verdict give according to your evidence. So help you God.” J.H. Baker, “Criminal Courts and Procedure at Common Law 1550-1800,” Crime in England 1550-1800, Ed. J.S. Cockburn (Princeton: Princeton UP, 1977) 36.

<sup>5</sup> The report of More’s trial was drawn principally from a manuscript composed by his son-in-law more than 20 years after the events (Langbein, Prosecuting Crime 78). The pamphlet account of Raleigh’s trial (“Rawleigh”) claims to be “copied” by Thomas Overbury; Overbury did, reportedly, take copious notes at the trial. Robert. Lacey, Sir Walter Raleigh (New York: Atheneum, 1979) 333.

worse when the writer was not present at the trial. And, as popular reports of crimes against the state, the State Trials convey a strong political bias in favor of the Crown, almost never in favor of the defendant (the report of Thomas More's trial seems to be the exception to the rule). By contrast, ordinary criminal cases usually were tried several at a time, unnoticed by the Crown and unreported; though notorious cases would have received widespread local attention, they still would not have risen to the level of the emotionally-charged political spectacles that the State Trials tended to be.<sup>6</sup> Nonetheless, this problem of representativeness does not render the State Trials useless here. Like the State Trials, the trials depicted in the plays are not run-of-the-mill cases but sensational ones. Further, it is unlikely that a different standard of proof applied in sensational cases; indeed, the evolution of the standard of proof from satisfaction to satisfied conscience to beyond reasonable doubt suggests no division between notorious and mundane felony trials. Moreover, all of the theatrical trials I examine are set abroad, in jurisdictions whose cultural habits and adjudication systems differed considerably from England's. The arguments I will make about how the plays represent and do not represent English legal procedures and English attitudes do not and cannot suggest direct correspondences between practice and stage, but rather suggest a very English concern with proof and procedure, and an English predilection for verbal proofs, that gets refracted through the foreign settings.

Sensationalist pamphlets written by nonlawyers, usually anonymously, for sale to the general public also narrate the testimony and verdicts in extraordinary cases, but because they aim to entertain the general public, they are usually written as cautionary tales, heavy on the moralizing, lauding godliness and vilifying people who do not profess faith in God or

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<sup>6</sup> Langbein, Criminal Trial 266. As late as the 1730s, a single Old Bailey session lasted two to five days and processed 50 to 100 felony cases (Langbein, Criminal Trial 271).

lead conventional lives. Hence the pamphlets are somewhat fictionalized approximations of what happened at trial.<sup>7</sup> Lay readers were also the target audience for the collected reports known as the Old Bailey Session Papers, which describe trials arising from crimes in London and the contiguous county of Middlesex beginning in 1674. I have relied on pamphlets with the recognition that, as discourses of popular entertainment, they provide only an approximation of what happened at trial, but their treatment of trials and their status as a genre in and of themselves speak to widespread attitudes, perceptions, and issues.<sup>8</sup>

For the reasons below, I believe that the standard of proof of satisfied conscience in capital cases was generally understood and thus received no amplification from the courts. While other aspects of the process seem to have been somewhat flexible, as evinced by discrepancies between indictments and convictions, the standard of proof most likely developed and spread by custom and the fact that Crown judges heard criminal cases across the land when they rode on the assize circuit.

## 2. From God's Judgment to the Jury's

For much of its history, England had no codified standard of proof. Juries were required to return true verdicts, but scholars assume that they acted without any exact legal standards as to the expected level of certainty in criminal cases. Not until the end of the seventeenth century did jurists and lawyers begin to draw explicit, elaborate connections between the amount of certainty that jurors should have before convicting a defendant and

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<sup>7</sup> John Langbein, "The Criminal Trial Before the Lawyers," 45 University of Chicago Law Review 263 (1978) 267-268.

<sup>8</sup> Please recognize that many pamphlets contain no page numbers, or page numbers in certain sections but not in the author's preface. Therefore, some of my citations also lack page numbers.

the ideals of moral certainty and reasonable doubt that have prevailed since then. In this chapter I argue that the standard of the satisfied conscience was already customary early in the seventeenth century, though not “exact” in the sense of being codified.

The jury trial as a mode of proof in early modern England, particularly the level of certainty jurors expected to achieve, can best be understood in relation to the modes of proof which preceded it and which influenced juror and community expectations. Before jury trials, the accused would be tried by systems of so-called “supernatural proofs” which were believed to reveal certain guilt or innocence.<sup>9</sup> Trial by ordeal could be by water or fire. In the ordeal of cold water, an accused would be thrown into a pool of blessed water<sup>10</sup> with a rope tied around his hips.<sup>11</sup> Clergy read the signs: If the accused’s body sank, then he had been proved innocent, for the purity of the water had accepted him, but if the water repelled him and he floated, he was condemned.<sup>12</sup> (Since people usually float, the accused rarely was convicted). In the ordeal of hot water, the accused would have to pluck an object from a cauldron of boiling water;<sup>13</sup> in the similar ordeal by fire, he would have to briefly hold a hot iron bar in his hand.<sup>14</sup> The hand was then bound and inspected a few days later; if the burn had festered, God was deemed to have identified him as guilty.<sup>15</sup> In any event, the final result

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<sup>9</sup> J.H. Baker, An Introduction to English Legal History 2<sup>nd</sup> ed. (London: Butterworths, 1979) 5.

<sup>10</sup> Trisha Olson, “Of Enchantment: The Passing of the Ordeals and the Rise of the Jury Trial,” 50 Syracuse Law Review (2000): 110.

<sup>11</sup> George Fisher, “The Jury’s Rise as Lie Detector,” 107 Yale Law Journal 575 (1997): 585, n. 17.

<sup>12</sup> Fisher 585 n17, n18.

<sup>13</sup> Olson 110.

<sup>14</sup> Baker 5.

<sup>15</sup> Baker 5.

was God's unmistakable and certain judgment.<sup>16</sup> The same medieval theory of divine intervention in judicial affairs that provided the basis for trial by ordeal justified trial by battle for the nobility.

For regular folk who understandably wanted to avoid ordeal, trial by compurgation, also called trial by oath or wager by law, could be had. Compurgation required either the accused or accuser to swear to the truth of his or her case "on the holy evangels," backed up by a number of neighbors (over time, eventually twelve) as "oath-helpers who testified to his or her credibility."<sup>17</sup> Presumably, a dishonest person would be unable to find so many character witnesses<sup>18</sup> and therefore would confess or take his chances with trial by ordeal. In compurgation, the witnesses were the evidence; there was no evaluation of credibility of finding of facts.

Custom was altered by command in 1215, when Pope Innocent III and the Fourth Lateran Council forbade priests from officiating at ordeals, possibly because public confidence in their efficacy was undermined by the collusion of priests with the accused—in other words, the accused were let off<sup>19</sup> possibly because of higher-level theological and scientific doubts.<sup>20</sup> Following suit, in 1219 Henry III ordered the substitution of judgment by neighbors for the ordeal in English non-ecclesiastical courts, and by the end of the thirteenth century ordeal had been largely superseded. As for compurgation, it was adapted as the

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<sup>16</sup> Olson 110.

<sup>17</sup> Baker 5.

<sup>18</sup> Baker 64-65.

<sup>19</sup> John H. Wigmore, A Kaleidoscope of Justice, Containing Authentic Accounts of Trial Scenes From All Times and Climes (Washington, D.C.: Washington Law Book Co., 1941) 6.

<sup>20</sup> Baker 64.

population grew; eventually, jurors no longer personally knew the accuser and accused and no longer came to court as jurors/witnesses with their own knowledge about the litigants and the dispute. Instead, they came solely as jurors. The need for partiality in judgment necessarily shifted to its opposite: a juror could be excused from the panel if the accused or accuser claimed the juror was partial toward the other party. Compurgation survived into the eighteenth century as an alternative to jury trial and was often chosen as a more rational procedure. Exactly when the first criminal jury trial took place in England is difficult to say, though Fisher opines that it took place in 1220 at Westminster.

To pinpoint with one hundred percent accuracy the degree of proof the medieval juror expected to support a conviction would require more explicit sources than are extant.

Langbein argues that, in the absence of any evidence to determine what standard of proof jurors should accept, the jury required not certainty, but only persuasion. Sheppard disagrees and suggests that the very term “conviction” connotes an expectation of certainty rather than mere persuasion, as does the jurors’ obligation to swear that their conclusions were true—an obligation not likely to be met by persuasion to a lesser degree than certainty.<sup>21</sup> But jurors were required to swear only that they *believed* their verdict to be true. Further, it seems to me that, whereas ordeal, battle, and compurgation yielded certain resolutions that people could accept without doubt, judgment by one’s peers must have seemed simply in contrast to those other systems to be subject to error.

Most likely, satisfaction, and probably the satisfied conscience, were the standards that developed almost immediately. Since the efficacy of any judicial system depends on its

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<sup>21</sup> Steve Sheppard, “The Metamorphoses of Reasonable Doubt: How Changes in the Burden of Proof Have Weakened the Presumption of Innocence,” 78 Notre Dame Law Review 1165 (2003): 1174-1175.



ability to generate public confidence in its judgments, trust in the jury rests on the public's perception of juries' application of standards which are generally familiar and widely accepted. Satisfaction was a measure of judgment in general, and the added gravity of the proceeding which could cost the accused his life meant that jurors would have expected a higher level of confidence in their verdict than they did in their everyday affairs. Therefore, though proof of certain guilt was not required and might not have been deemed possible when judgment was made by humans rather than by God, certain belief free from doubt was still desired. In other words, a shift occurred from the belief that judgment of guilt signified that the accused truly was guilty, to an expectation that the jury truly believed him to be guilty. The shift might be considered one from an ontological question to an epistemological one.

I support my argument with an examination of satisfaction which, paired with conscience, forms a more extreme state of mind than general satisfaction. I further argue in subsequent chapters that the level of certainty which the government reports and pro-government pamphlets project—and arguably exaggerate—is both affirmed and questioned by the plays. The plays deal in contingency, unlike the reports of trials. Thus, the English courtroom was one of the few places where the capacity of human reason or the unskeptical possibility of knowledge was assumed, and the stage was one of the places where that assumption could be interrogated.

### 3. The Standard of Proof in Early Modern England

The standard of the satisfied conscience was so widely accepted that it was rarely mentioned in the reports and pamphlets. No other standard appears, though usually cases mention nothing approaching a standard at all. Reporters recounting the sixteenth-century trials of Thomas More and Anne Boleyn criticized the flimsiness of the evidence, yet made no mention of the standard of proof. This silence does not suggest an alternative standard, but does indicate that most reporters—lawyers and laymen—did not consider the standard of proof an issue worth mentioning, or did not conceive of a standard distinct from the everyday, elastic gradations of satisfaction. Accordingly, a legal dictionary of the early seventeenth century, John Cowell's The Interpreter (1607, 1658),<sup>22</sup> does not include satisfaction; neither does a much later one, Thomas Blount's Nomo-lexikon (1670).<sup>23</sup>

Some reports in the early century that mention a standard at all refer to “satisfaction” instead of “satisfied conscience,” which appears more frequently later in the century. Examples include these pamphlet accounts of sensational murder trials: “Know that I was credibly satisfied” as to the truth of the testimony;<sup>24</sup> “satisfie the jury”,<sup>25</sup> “satisfie the

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<sup>22</sup> John Cowell, The Interpreter (1607), Early English Books Online, ProQuest Company, June 7, 2004.

<sup>23</sup> Thomas Blount, Nomo-lexikon (1670), Early English Books Online, ProQuest Company, June 7, 2004.

<sup>24</sup> Anonymous, The Araignment and burning of Margaret Ferne-seede (1608), Early English Books Online, ProQuest Company, May 2, 2003.

<sup>25</sup> Anonymous, The Lives, Apprehensions, Arraignments, and Executions, of the 19 late Pyrates (1608), Early English Books Online, ProQuest Company, (May 2, 2003) 32.

world”.<sup>26</sup> Nonetheless, a few reporters do explicitly tie satisfaction to the conscience, including the trials of Lady Frances and Robert Carr for the murder of Thomas Overbury (Francis Bacon prosecuted both cases). Though notions of the nature, function, and authority of conscience varied “from the conception of the mere exercise of the ordinary judgement on moral questions, to that of an infallible guide of conduct, a sort of deity within us,”<sup>27</sup> I argue that the legal principle of the “satisfied conscience” fell midway between these two poles, and remained largely unchanged from its origins sometime after 1215 through the early seventeenth century. Only in the latter decades of the century did satisfied conscience become refined as moral certainty and eventually as reasonable doubt. I base my argument on various depictions of conscience in writings about law; the jury trial’s deep roots which had about 300 years to thicken before the Reformation; and the familiar process of drawing inferences in making decisions which was familiar to jurors and an ordinary part of their everyday lives, although they were expected to aim for a higher level of certainty than in their daily decisions.

In general, satisfaction was a fluid concept that functioned in courts of law, the court of public opinion, church courts, and the court-like venue of Catholic confession and penance. “To satisfy” conveyed a wider range of meaning than it does today. These meanings were so much a part of the common understanding that, of four general usage dictionaries published between 1607 and 1626, only one offers a definition of “satisfaction” (none refer

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<sup>26</sup> Anonymous, The Apprehension, Arraignment, and Execution of Elizabeth Abbott (1608), Early English Books Online, ProQuest Company, July 2, 2003.

<sup>27</sup> OED Online.

to “satisfy”): “a making amends for wrongs, or displeasures.”<sup>28</sup> This meaning as well as all of the shades of meaning noted by the OED Online<sup>29</sup> imply certainty and determinacy, a sense of making wrongs right or restoring order and equilibrium, as when a debtor repays his creditor, a desire is fulfilled, a malefactor makes restitution to the person he wronged, or a lawbreaker pays his debt to society. In restoring equilibrium or making wrongs right, satisfaction echoes the confessional meanings it held in Catholicism rather than the Lutheran and Calvinist “obligation to be punished.”<sup>30</sup> In court, satisfaction carried a meaning tailored to the process at hand: “To furnish with sufficient proof or information; to assure or set free from doubt or uncertainty; to convince.”<sup>31</sup>

The standard of proof required that jurors have a sure belief *without doubt* that the defendant was guilty as charged. Sidney in The Old Arcadia represents a very English-sounding standard of proof: that of “assured satisfaction” or “assured persuasion” as expressed by Euarchus in first finding the two defendants guilty and then sentencing them to death.<sup>32</sup> Intriguingly, Sidney’s fictional judge hints at a weighing of satisfaction in relation to the evidence and to the judge’s own skill at and experience in judging: “and then gathering as

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<sup>28</sup> Robert Cawdry, A Table Alphabeticall, or the English expositor, containing and teaching the true writing and vnderstanding of hard vsuall English words, borrowed from the Hebrew, Greeke, Latine, or French, &c. Early English Books Online, ProQuest Company, July 10, 2004.

<sup>29</sup> 1) paying off or discharging a debt or obligation; 2) making compensation or reparation for a wrong or injury, or to atone for an offence; 3) meeting or fulfilling a wish, desire, or expectation, or making oneself or another content; 4) putting an end to an appetite or want—often a sexual desire—by fully supplying it; 5) answering sufficiently an objection or question; 6) complying with a request; 7) solving a doubt or difficulty; or 8) furnishing with sufficient proof or information to convince.

<sup>30</sup> William J. Rewak, “Book III of Paradise Lost: Milton’s Satisfaction Theory of the Redemption,” Milton Quarterly 11.4 (1977): 99.

<sup>31</sup> OED Online.

<sup>32</sup> Philip Sidney, The Old Arcadia, ed. Katherine Duncan-Jones (Oxford: Oxford UP, 1999) 349, 355.

assured satisfaction to his own mind as in that case he could, not needing to take leisure for that whereof a long practice had bred a well grounded habit in him,” he then pronounced his verdict.<sup>33</sup> Similarly, in announcing his verdict Euarchus swore that, “what this day I have said hath been out of my assured persuasion what justice itself and your just laws require.”<sup>34</sup> This factfinder, at least, measured his assurance in relation to the evidence, the laws of the jurisdiction, and his concept of justice; quite possibly Sidney gave voice to the unspoken expectations of English jurors in criminal trials.

The fact that doubt, not just reasonable doubt could trigger an acquittal or partial verdict<sup>35</sup> often compelled prosecutors, judges, and reporters—all agents who were motivated to uphold the righteousness of the English jury system—to describe the evidence in cases as so strong that no doubts could possibly remain. For example, in the pamphlet account of Raleigh’s trial, the reporter noted that “here my Lord cheife Justice desired my Lord Cecil, and my Lord of Northampton to satisfie the Jury, that there was no condition of favour promised to my Lord Cobham for writing this last letter;” in other words, to lay to rest *any* doubt concerning Cobham’s veracity.<sup>36</sup> Similarly, in the trial of Robert Carr for the murder of Thomas Overbury, Bacon as prosecuting attorney promised:

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<sup>33</sup> 349.

<sup>34</sup> 355.

<sup>35</sup> In rendering a partial verdict, jurors would take it upon themselves to convict the defendant on a lesser charge—one that the defendant was not formally charged with, but that he necessarily must have committed in the commission of the more serious charge, as where a jury convicts an accused thief only of trespassing, or convicts him only of petty theft rather than grand theft.<sup>35</sup> The accused thus escaped the death penalty.

<sup>36</sup> Anonymous, The Arraignment and Conviction of Sir Walter Rawleigh, At the Kings Bench-Barre at Westminster (1619), Early English Books Online, ProQuest Company, (May 2, 2003) 24.

to carry the day . . . upon *sure grounds*; we shall carry the lanthorn of justice (which is the evidence) before your eyes upright, and so be able to save it from being put out with any ground of evasion or vain defence, not doubting at all, but that the evidence itself will carry that force, as it shall need no advantage or aggravation.<sup>37</sup> (my italics)

And in 1619 a reporter observed of a trial jury:

Upon the Oathes and deliberated inquiries of 15 reputed honest and conscionable men, now all Causes are begun to be consulted of: and least they should erre in the Termining, and guiding of their Verdict, *if ought they doubt*, they addresse themselves unto the reverend Judges, and Honourable Benchers, to be by them of their doubts resolved, in the matter informed, how to proceed justly, truly, and conscionable.<sup>38</sup> (my italics)

Seen in the light most favorable to the government, satisfaction resulted when the mind had been persuaded and was freed from doubt or, as Bacon wrote in another context, “[I]f a man will begin with certainties, he shall end in doubts; but if he will be content to begin with doubts, he shall end in certainties.”<sup>39</sup> In the context of criminal trials, these “certainties” would have amounted to near-certainty, as close to a state of undoubting as the evidence, the laws, and the jurors’ concepts of justice allow. Naturally, jurors would have wanted to have all their doubts erased in capital cases involving such grave consequences; a frank acknowledgement of the inevitability and acceptability of doubt would not have done much to satisfy jurors’ consciences and enable them to sleep peacefully after sending a defendant to his death—and quite possibly several defendants in a single case or in multiple cases adjudicated in a single day.

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<sup>37</sup> William Cobbett and Thomas Howell, eds, Cobbett’s Complete Collection of State Trials, vol. 2, (London: R. Bagshaw, 1809-1820) 970.

<sup>38</sup> Anonymous, London’s Cry: Ascended to God, and entred into the hearts, and eares of men for Revenge of Bloodshedders, Burglainers, and Vagabonds (1619), Early English Books Online, ProQuest Company, (June 1, 2003).

<sup>39</sup> Francis Bacon, “The Advancement of Learning,” Francis Bacon, Ed. Brian Vickers, (Oxford: Oxford UP, 1996) 147.

The expected “end in near-certainties,” along with gradations in satisfaction, indicates that jurors distinguished among degrees of persuasion—and certainty. One could rest in a state of complete persuasion—have “full satisfaction,”<sup>40</sup> or transition from less to “more full (sic) satisfaction,”<sup>41</sup> or aim merely for “better satisfaction.”<sup>42</sup> Hence individual jurors might have asked themselves, “How satisfied am I?” With satisfaction perceived on a sliding scale of certainty, the greatest degree of certainty in convicting accused felons was lodged in the conscience; this is the faculty that jurors attempted to free from doubt. The expectation that the conscience must be satisfied by the evidence constrained jurors to convict a defendant only when they themselves held an inner “conviction” that the defendant was guilty—not a state of absolute certainty as Sheppard argues, but a state of certain *belief*. Conversely, jurors would have been compelled to acquit or render a partial verdict if they harbored doubt that prevented them from attaining that inner conviction of “full satisfaction.” Thus, doubt was supposed to be extinguished by proof; if any doubt remained, the jury was not supposed to send the defendant to his execution.

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<sup>40</sup>Jeremiah Dyke, The Burning Bush Not Consumed Wherein, either under all deepe sense of Wrath, or hardnesse of Heart, one may iudge, whether he be the Childe of God, or not, &c. Chiefly receiving full satisfaction, concerning the sinne against the Holy Ghost (1627); Thomas Morton, A Full Satisfaction Concerning a Double Romish Iniquitie; hainous Rebellion, and more then heathenish Aequivocation (1606), Early English Books Online, ProQuest Company, July 10, 2004.

<sup>41</sup> Anonymous, A True Report of the Late Apprehension and Imprisonment of John Nichols Minister at Roan, and his confession and answers made in the time of his durance there. Whereunto is added the satisfaction of certaine, that of feare or frailtie have latly falle in England (1583) 6, Early English Books Online, ProQuest Company, May 2, 2004.

<sup>42</sup> Humfrey Barwick, A Breefe Discourse, Concerning the force and effect of all manuall weapons of fire, and the disability of the Long Bowe or Archery, in respect of others of greater force now in use. With sundrye probable reasons for the verifying thereof: the which I haue done of dutye towards my Soueraigne and Country, and for the better satisfaction of all such as are doubtfull of the same, Early English Books Online, ProQuest Company, June 7, 2004.

Conscience played a role in juror decision making from at least the late fifteenth century and probably much earlier. Jurors swore to give their verdicts “according to your evidence and your conscience.”<sup>43</sup> About seventy years later Thomas More asserted that the juror must have a “sure and certain persuasion & belief in his own conscience,” a conscience that has been “induced reasonably.”<sup>44</sup> Later still, in 1607 James I reminded jurors in general that they were not to base their verdicts on mechanical rules (as in the Continental system), but rather on their individual consciences:

To which host of persons also the Law of this our Realme doeth ascribe such trust and confidence, as it doeth not so absolutely tye them to the evidences and proofes produced, but that it leaveth both supply of Testimonie, and the discerning and credit of Testimonie to the Juries consciences and understanding.<sup>45</sup>

And in the late seventeenth century, Matthew Hale noted “it is the conscience of the jury, that must pronounce the prisoner guilty or not guilty.”<sup>46</sup>

In case reports of the early seventeenth century, conscience most often appears as a kind of inner voice, within the individual yet apart from him. This inner voice carries more authority than ordinary judgment yet less than an infallible god. Thus, we see conscience described as almost a separate living entity that can be scourged,<sup>47</sup> shipwrecked,<sup>48</sup> quieted,<sup>49</sup>

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<sup>43</sup> Barbara Shapiro, A Culture of Fact: England, 1550-1720, (Ithaca: Cornell UP, 2000) 22, citing a reference to a 1465 case.

<sup>44</sup> Debellacyon, quoted in Shapiro, Culture 22.

<sup>45</sup> King James I, A Proclamation for Jurors, October 5, 1607, Early English Books Online, ProQuest Company, February 4, 2003.

<sup>46</sup> History of the Pleas of the Crown, quoted in Shapiro, Culture 22.

<sup>47</sup> True Report 28.

<sup>48</sup> Dyke 113.

<sup>49</sup> Rawleigh 15.



and have a nail driven through it.<sup>50</sup> (In *Volpone*, Celia offers her conscience as a witness to corroborate her testimony in court, but the Avocatori reject it as “no testimony” (4.2.195-97)). As a component part of each individual, conscience acts as neither a mechanical device nor an inner deity, but instead as a voice of reason, and hence serves as adviser: “No counsel but a pure conscience,”<sup>51</sup> witness: “convicted with the testimony of his own conscience,”<sup>52</sup> and “inner tribunal.”<sup>53</sup> When not conceived as a voice of reason, conscience could be reason’s companion; one pamphlet writer cast conscience as a member of a triumvirate of distinct yet linked modes of making knowledge: “Reason, Conscience, and Law, these are the Guides and Lights to informe [the jurors’] Understanding, to Speake, to judge, and deeme of the Cause and Prisoner.”<sup>54</sup>

In keeping with More’s argument and example, a juror could be expected to stick by his imperfect conscience, against the other jurors and even against the whole world. As John Maynard wrote in 1699:

If any of them happen to join in a Verdict, &c. with the rest, against *his* Opinion, or not thoroughly satisfied in their *own* private judgment, such a Verdict, &c. though never so true and good in itself, yet makes the Party or Parties, as aforesaid, not satisfied, certainly forsworn, at least *in foro Conscientia*, as to their Conscience.<sup>55</sup>

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<sup>50</sup> *True Report* 22.

<sup>51</sup> “Trial of Edmund Campion,” *State Trials*, vol. 1 p. 1051.

<sup>52</sup> “Trial of Everard Digby,” *State Trials* vol. 2, p. 187.

<sup>53</sup> Barbara Shapiro, “Beyond Reasonable Doubt” and “Probable Cause:” *Historical Perspectives on the Anglo-American Law of Evidence* (Berkeley: UC P, 1991) 14.

<sup>54</sup> *Londons Cry*.

<sup>55</sup> Maynard, John, *A Guide to Juries* (1699), *Early English Books Online*, ProQuest Company, (June 2, 2003) 25.

Steadfastness was desired even though the conscience could be fallible; even the Catholic orthodoxy that More cleaved to, as espoused by Aquinas, held that while *synderesis* (remorse or the feeling that one has done a moral wrong) can never be mistaken, *conscientia* can, “since evil may arise in the syllogism by which the universal propositions of the former are misapplied to mistaken conclusions.”<sup>56</sup> In other words, the operations of *synderesis* can be impeded and rationality vitiated where ethical propositions are willfully and habitually misapplied.<sup>57</sup> The will, though naturally inclined to submit to the practical conclusions of the *conscientia*, may be moved to err in its acts of free choice when reason’s apprehension of the good is defective or perverted by the passions.<sup>58</sup> Thus, even though conscience was considered to be essential in court as a guarantor of justice, it could also be misled. Under the Thomistic view, the satisfied conscience would be deemed fallible; hence, sure belief in the verdict was all jurors could be asked to achieve.

Reformation modifications of Catholic and scholastic teachings on conscience, and Reformation debates about the nature, function, and authority of conscience would not have altered the tradition and practice of jurors, I argue. The various theories about the conscience do not differ enough to change the juror’s task. In theory, the Lutheran and Calvinist disparagement of “the light of reason” as too feeble and subject to individual will to offer any reliable guidance, and their concomitant assertion that conscience may enlighten only

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<sup>56</sup> John S. Wilks, The Idea of Conscience in Renaissance Tragedy (New York: Routledge, 1990) 12. In linking conscience to *synderesis*, Christopher St. German bolstered not only the English Chancery system of equity after it had been divorced from the Catholic church, but also, indirectly, the legitimacy of the jury system. If people through their consciences could discern self-evident propositions which compelled their assent, without regard to idiosyncratic taste or judgment, then jurors could be trusted to “know” the truth and to distinguish the guilty from the innocent.

<sup>57</sup> John S. Wilks, The Idea of Conscience in Renaissance Tragedy (New York: Routledge, 1990) 13.

<sup>58</sup> Wilks 13.

through God's will and grace, would have undercut the satisfied conscience as an effective instrument for guiding jurors to right decisions. The followers of Calvin in particular would have been conflicted as jurors, believing the conscience not to be an intellectual and rational instrument by which individuals discern right from wrong and judge the actions of others as well as themselves, but instead to be a conduit by which God communicates to and engenders guilt and shame in the recipient. Only if a juror believed himself to be faithful and obedient to the Scriptures could he trust his conscience to resist passions and wickedness in judging the accused. Anglican jurors who adhered to the abstractions of their theology, though, in general would have had less difficulty exercising their conscience. "For while both Anglican and Puritan alike accepted man's spiritual corruption after the fall, Anglicans insisted that of all man's faculties, reason had remained unimpaired; in the sphere of nature, man was capable of choosing the good, and this unaided by transfusions of redemptive grace".<sup>59</sup>

But none of these variations of the Catholic tradition of conscience necessarily impede the workings of the satisfied conscience, nor do they alter the relation between conscience and the evaluation of evidence in a court of law. Protestant divines also explored the roles of circumstances and of reason in making moral decisions under conditions of less than perfect certainty. English casuists of the sixteenth and seventeenth centuries rejected purely emotional or intuitive moral outcomes in favor of analysis of rational moral choices, or decision-making based on evaluation of the entire situation in which the decision maker found himself.<sup>60</sup> In English Protestant casuistry people were to be their own strict judges; the judgment of conscience thus could not involve deferring to the authority or the wishes of

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<sup>59</sup> Wilks 4.

<sup>60</sup> Shapiro, Doubt 15-16.

another person. Indeed, in conflicts over moral choices conscience could be seen as functioning as both deity and judge, “a little God sitting in the middle of men’s hearts, arraigning them in this life as they shall be arraigned for the offenses,” at the day of judgment; conscience was therefore the “highest judge that is or can be under God”.<sup>61</sup>

This vision of conscience as interrogator and judge is not inconsistent with the Catholic reasonable conscience, and grew more widespread as the century proceeded. The rational conscience partly countered skepticism’s increasing influence on “the way in which evidence [was] measured, probability calculated, institutions and conventions assessed, and the mind itself situated”.<sup>62</sup> The “doubting conscience” increasingly would be endorsed as “a tool for attending more rigorously to natural circumstances; for improving the way in which human beings know things; and for repairing the way in which human beings live, interact, and aspire to the heroic stature originally bestowed on them by God”.<sup>63</sup>

In implicating the juror’s conscience and thereby putting his salvation on the line, the judicial system was geared to ensure the highest degree of certainty possible. The practice of making jurors accountable to God for their verdicts would not necessarily have altered fundamentally in response to variations in theology. Thus, differing notions of conscience would not necessarily have altered the meaning of conscience as jurors had practiced it for generations. Allowances must be made “for inconsistencies and contradictions of belief; religious attitudes amongst the seventeenth-century laity had by no means set hard”.<sup>64</sup> The

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<sup>61</sup> William Perkins, quoted in Shapiro, Doubt 15-16.

<sup>62</sup> Reid Barbour, Literature and Religious Culture in Seventeenth Century England (Cambridge: Cambridge UP, 2001) 16.

<sup>63</sup> Barbour 17.

<sup>64</sup> Wilks 6.

concepts of conscience that jurors must have brought with them into the courtroom, even if seemingly inimical to the process of judging, would have been elastic enough to enable jurors to evaluate testimony according to the expectations they brought with them to court.

It was assumed that the sole purpose of judicial factfinding was to search for the objective truth that lies beyond, and is independent of, the law. Thomas Wilson made a vivid connection between *a priori* truth and judicial factfinding in a sample exordium:

As Nature hath ever abhorred Murder, and God in all ages most terribly hath plagued bloodshedding, so I trust your wisdoms (most worthy Judges) will speedily seek the execution of this most hateful sin. *And where as God revealeth to the sight of men the knowledge of such offenses by diverse likelihoods and probable conjectures:* I doubt not, but you being called of God to hear such causes, will doe herin as reason shall require, and as this detestable offence shal move you, upon rehearsal of the matter.<sup>65</sup> (my italics)

Significantly, as an advocate for the justice system, Wilson—and other pro-government agents including prosecutors, judges, and writers of pamphlets—cast probabilities as dependent on *a priori* truths rather than on contingencies. Probabilities connoted the way things are likely to happen, but likelihood depended on likeness—similarity—between the facts at hand and, in the most immediate sense, fact situations that were known through experience, story, or generalized assumptions to have happened. Wilson’s argument bypasses the conception of probability as depending on similarities between the facts of the case and the factfinder’s sense of what *could* happen in actuality. Wilson wants his audience to view themselves as detectors of the truth as pointed out to them by the hand of God; he wants to minimize Quintilian’s argument that untrue things can be deemed probable and true things

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<sup>65</sup> Thomas Wilson, *The Arte of Rhetorique*, Ed. G.H. Mair (Oxford: Clarendon, 1909) 92.

can seem most improbable. In other words, probability need not always be envisioned as a contingent state.

Over the course of the seventeenth century, the satisfied conscience would come to seem less connected to *a priori* truths and more reliant on the universal but limited human reason. In the following pages, I argue that in the early century, the differing values which underlay the portrayal of the satisfied conscience as perceiving *a priori* truths and yielding ontological certainty and the satisfied conscience as consisting of merely subjective belief coexisted without much consequence for the daily workings of the criminal courts. Because of its long tradition, the ordinariness of the process of drawing inferences from circumstantial evidence, and the practical necessity of arriving at verdicts, the jury system most likely continued to employ a discrete notion or body of notions of conscience even as skeptics and reformers pressured those notions in other arenas. Montaigne, himself a trained lawyer, might declare that the laws of conscience arise from custom and blind us from seeing “the true visage of things”, and partisan advocates in court might seek to banish probability from the courtroom, but the English criminal courts continued to grind on, preoccupied with the business of rooting out and punishing lawbreakers. The consequences of these pressures would be played out on stage though, where judgments of guilt truly corresponded to crimes committed by the accused, but the haphazard process by which that true guilt is adjudicated calls the warrants for those judgments into question.

#### 4. Satisfactory Probability: Drawing Inferences from Circumstances

England's criminal justice system, therefore, depended on the push and pull between the evidence that provided grounds for satisfaction and the conscience that enabled the juror to believe that his assessment of the evidence was correct. The evidence necessarily was shaped by (one could say it even consisted of) the jury's impressions of the content of the testimony—the plausibility of the stories told—as well as the trustworthiness of the accused and the accuser.<sup>66</sup> The subjectivity of these judgments left conscience open to John Selden's criticism that the breadth of the Chancellor's conscience equaled the length of the Chancellor's foot. This subjectivity consisted of the unquantifiable measuring of similarities involved in judging witness credibility and the content of testimony. In determining what they believed to be true, jurors compared what they heard and saw in court with their own experiences and understanding of human nature—at least that is how commentators including John Maynard and James I described the jury's obligations. Theorists tried to reconcile the ideal of certainty with the practice of inductive probability: jurors often could not reach the expected state of sure belief without a probabilistic, analogizing type of reasoning.

Legal issues of fact are shaped by the same normative values that mold the law. What are considered to be “facts” and hence proof are to an extent formed by cultural norms diffused through commonplaces, general truths, and cultural materials such as ballads, pamphlets, and plays. Through these generalizations, jurors engage in inductive analysis,

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<sup>66</sup> Cynthia B Herrup, The Common Peace: Participation and the Criminal Law in Seventeenth-Century England (Cambridge: Cambridge UP, 1987) 148.

essentially seeking analogies between what they see and hear in the courtroom and what they know of truthtelling and normal behavior from their own experiences and beliefs:

The inductivist analysis . . . presupposes . . . that when a jurymen takes up his office his mind is already . . . stocked with a vast number of commonplace generalizations about human acts, attitudes, intentions, etc., about the more familiar features of the human environment, and about the interactions between these two kinds of factor, together with an awareness of many of the kinds of circumstances that are favorable or unfavourable to the application of such generalization. Without this stock of information in everyday life he could understand very little about his neighbours, his colleagues, his business competitors, or his wife. He would be greatly handicapped in explaining their past actions or predicting their future ones. But with this information he has the only kind of background data he needs in practice for the assessment of inductive probabilities in the jury-room. . . . The inductive probability of the proposed conclusion on the facts before the court depends just on the extent to which the facts are favourable to some commonplace generalizations that connect them to the conclusion.<sup>67</sup>

Thus, the jurors' process of determining what the facts are begins with a comparison between the circumstances testified to and the presuppositions and beliefs that jurors bring to court. This process, I believe, would not have been substantially different in early modern England. The term "circumstantial evidence," though, would have been controversial, evoking the skeptics' argument that human knowledge is never static, but is always momentarily constructed by a confluence of circumstances such as age, health and comfort, wakedness, time, movement, and bias, to the extent that no one can assess the truth of any one circumstance<sup>68</sup> or discern if anything is always and universally true regardless of the circumstances in which one finds oneself. Witness testimony was particularly vulnerable to the charge of being a mere collection of unrelated circumstances. Edmund Campion, for one,

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<sup>67</sup> L. Jonathan Cohen, The Probable and the Provable (Oxford: Oxford UP, 1977) 274-275.

<sup>68</sup> Barbour 16.



on trial for treason in 1581 pressed his jurors to sift through the evidence—the degrees and kinds—and render their verdict according to proof, not fancy, surmise, or circumstance:

...be the theft but of an halfpenny, witnesses are produced, so that *probabilities*, aggravations, invectives, are not the balance wherein justice must be weighed, but witnesses, oaths, &c. ... Who seeth not but these be odious *circumstances* to bring a man in hatred with the Jury, and no necessary matter to conclude him guilty? ... What could be more *unlikely*? ... These matters ought to be proved and not urged, declared by evidence and not surmised by fancy ... All that is yet laid against us, be but bare *circumstances*, and no sufficient arguments to prove us Traitors ... for want of proof we must answer to *circumstances*. ... we pray that better Proof may be used, and that our lives be not brought in prejudice by conjectures.<sup>69</sup> (my italics)

Other defendants were quick to criticize the weakness of the inferences drawn against them when circumstantial indirect evidence was involved. In his 1554 trial for treason, Nicholas Throckmorton protested: “You cannot extend Wyat’s devices to be mine, and to bring me within the compass of Treason; for what manner of reasoning or proof is this, Wyat would have taken the Tower, *ergo* Throckmorton is a traitor?”<sup>70</sup> And Raleigh griped, “You have not proved any one thing against me by direct Proofs, but all by circumstances.”<sup>71</sup> Similarly, in a 1608 prosecution against English pirates who preyed on English fishermen, several of the accused begged that, because no witness had yet identified them, “their Lordships would be mercifull unto them, and not to cast away their innocent lives upon *mere* presumptions”<sup>72</sup> (my italics). And in one murder case, the reporter piously praised the court for its caution which prevented a case of mistaken identity “on *slight* presumptions”<sup>73</sup> (my italics).

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<sup>69</sup> State Trials, vol. 1, pp. 1053-55.

<sup>70</sup> State Trials, vol. 2, p. 26.

<sup>71</sup> State Trials, vol. 1, p. 874.

<sup>72</sup> Pirates 61.

<sup>73</sup> Abbott.

Further, because the process of judging testimony necessarily involved probabilities despite probability's theoretical insufficiency, theorists attempting to justify the system as rationally coherent and fundamentally just were vexed by inconsistency. Practitioner-theorists expressed reservations similar to Selden's about the subjectivity involved when jurors weeded weak inferences from probative ones. Nonetheless, they supported the use of indirect evidence. Bacon continued to spurn probability,<sup>74</sup> yet he also endorsed the use of inferences and presumptions as tools for deriving religious doctrine from revelation<sup>75</sup> and for use in rhetoric, specifically in court. In The Advancement of Learning he used the following as an example of the importance of preparation in the invention of sciences:

[W]e see the ancient writers of rhetoric do give it in precept, that pleaders should have the Places ['commonplaces'—editor's note] whereof they have most continual use ready handled in all the variety that may be; as that, to speak for the literal interpretation of the law against equity, *and contrary*; and to speak for presumptions and inferences against testimony, *and contrary*.<sup>76</sup> (my italics)

John Maynard, too, urged the outright rejection of probability as the measure of guilt yet approved the use of indirect evidence and inferences, provided the connection between fact and conclusion is close:

If the Principal, or the rest, be true, these must be so too, and cann't possibly be otherwise, and thus become needles to be proved, being before proved, as and by the necessary consequences of the other Proof; so he that proves a Shadow, proves also a Body, since there must be a Body to cause it.<sup>77</sup>

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<sup>74</sup> Bacon, Advancement 222.

<sup>75</sup> Bacon, Advancement 291.

<sup>76</sup> Bacon, Advancement 223.

<sup>77</sup> John Maynard, A Guide to Juries (1699), Early English Books Online, ProQuest Company (June 2, 2003) 64-65.

In contrast, invalid inferences are those which “may cause a different Judgment or Punishment, or that aggravate the Fault, make it greater, of another Nature, or any wise alter it, and therefore are not to be presumed, but must be proved.”<sup>78</sup>

Like Bacon and Maynard, Coke expressed complex views on inferences and the probability they require. Of grand juries Coke wrote, “Any Indictment was not to be found but on Credible Witnesses, and plain and direct Proof; and never upon Probabilities or Inferences... And the Proof... ought to be more clear than Light. Every Jury must always remember, they may presume nothing but Innocency.”<sup>79</sup> But concerning proof at trial—in land title cases at least—Coke in the *First Institute* adopted the categories of proof devised by William Durantis: presumptions *temeraria* (light), *probabilis* (derived from suspicion and fame), and *violenta* (so probable that a judge could convict).<sup>80</sup> Though not expressed in the context of criminal law, Coke’s authorization of verdicts based on presumptions *violenta* was extended to criminal cases, notably by himself in his prosecution of Raleigh, as in his argument that defendants at common law may be convicted without witnesses and based solely on presumptions. Juries could convict on the basis of “violent presumption,” while lesser presumptions—“probable presumptions”—could serve as a basis for decision in pretrial procedure.<sup>81</sup> But Coke also cautioned against the rash use of presumptions in capital cases (other than Raleigh’s), warning that judges should “in cases of life judge not too hastily

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<sup>78</sup> Maynard 64-65.

<sup>79</sup> quoted in Maynard 80-81.

<sup>80</sup> Shapiro, *Doubt* 205.

<sup>81</sup> Shapiro, *Doubt* 208-09.

upon *bare* presumptions”.<sup>82</sup> And Gilbert later asserted that even a violent or probable presumption “non est Factum”.<sup>83</sup>

At stake is the strength of the inferences, which must add up to sure belief, to proof rather than the possibility of being proved later. Accordingly, probable proof could be delegitimized as empty rhetoric or mere plausibility by those who urged the jury to acquit. Edmund Campion declaimed:

The wisdom and providence of the laws of England...is such as proceedeth not to the trial of any man for his life and death by shifts of probabilities and conjectural surmises, without proof of the crime by sufficient evidence and substantial witnesses. For, otherwise, it had been very unequally provided that upon the descanting and flourishes of affected speeches, a man's life should be brought into danger and extremity, or that, upon the persuasion of any orator or vehement pleader without witness *viva voce* testifying the same, a man's offence should be judged or reputed mortal.<sup>84</sup>

Thus, as Barbara Shapiro has argued, probability in the sense of plausibility could be shunned in court because the “realm of the ‘probable’ rather than the logically certain was traditionally the realm of rhetoric,” and rhetoricians and their tools were to be mistrusted because they had the power to sway their audiences to any desired opinion through their “skill with words and arguments and by playing on the emotions, biases or commonly held views” of their audiences.<sup>85</sup> Probability's role in popular persuasion without regard to the

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<sup>82</sup> quoted in Shapiro, Doubt 209.

<sup>83</sup> quoted in Shapiro, Culture 19.

<sup>84</sup> State Trials, vol. 1, p. 1054.

<sup>85</sup> Barbara Shapiro, Probability and Certainty in Seventeenth-Century England (Princeton: Princeton UP, 1983) 229, 6.

truth of its propositions, it was believed by some, made probability “unsuitable if not dangerous to truth-seekers”<sup>86</sup> and hence inappropriate in a court of law.

In essence, those concerned with the sufficiency of inferences were arguing against the connection between inferences and truth—the lack of likeliness inherent in circumstantial evidence, or the subjectivity of the inductive process. Those who could be expected to argue for the probity of circumstantial evidence—prosecutors—generally took a different tack, routinely painting the evidence as being so strong as to leave no doubt at all of the defendant’s guilt. Interestingly, the English agents of the state bypassed probability even though as far back as Cicero, prosecutors argued successfully that probabilities could be added together to amount to near certainty or near proof. The Raleigh trial is unusual in that it fell to Cecil, instead of the prosecuting attorney Coke, to offer the more pragmatic argument to convict his rival Raleigh, namely that the probabilities could be “aggregated” to satisfy the conscience that Raleigh was guilty of treason. “Against these probabilities,” Cecil reasoned, “the presumptions before alledged, were laid altogether, to fortify my Lord Cobham’s accusation, in the ordering whereof Master Attorney shewed great wisdom and care in his Majesties businesse.”<sup>87</sup> The more similarities that could be bundled together to make the fact situation at hand more like one which indisputably proved guilt—more like a case involving the defendant’s confession—the more compelled the jurors would be to believe Raleigh to be guilty, and all of the inferences would corroborate Cobham’s shaky accusations.

This bundling and weighing of presumptions for and against guilt is consistent with the principle and practice of following precedent by which English judges made and remade law. By searching for similarities between the issues of law in the case before the bench and

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<sup>86</sup> Shapiro, Probability 229.

<sup>87</sup> Rawleigh 20.

cases that had previously been decided, judges reified the analogical reasoning that jurors used in comparing the alleged facts with facts of cases that had already been decided and with what they knew of human nature. Those earlier cases might have been cases that jurors themselves heard—jurors tended to be called for service repeatedly, and usually heard several cases in one sitting. Or those earlier cases might have been notorious ones that jurors heard about in ballads, read about in pamphlets, or saw enacted on stage. Thus, the accused and the citizens who judged him knew how to characterize what had happened in terms of “self-defense” or “provocation” or “mistaken identity” or “malicious prosecution;” they had seen criminal trials, previously served on criminal juries, heard or read of notorious cases, and seen provocative trials staged. Consequently, the idea and the practice of adding inferences for guilt together and then comparing them with already established examples of guilt would have been accepted in the context of trials.

Thus, despite the self-interested objections of a Raleigh or a Campion and the more abstract concerns of a Coke or a Bacon, jurors unavoidably drew inferences from indirect or circumstantial evidence, and if the type and number of inferences was sufficient, then they could add up to a satisfied conscience. Indeed, in searching to satisfy their consciences, English juries could and did convict on indirect evidence which on the Continent sufficed merely to instigate investigation by torture.<sup>88</sup> Whereas modern thought views inferences as producing results that are only probably true, or a state of mind that something is true more likely than not, early modern jurors must have viewed inferences as capable of delivering sure belief, a state of mind indicating that they believe something to be true. The emphasis has shifted from an inner, personal belief to an assessment of statistical frequencies.

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<sup>88</sup> John Langbein, Prosecuting Crime in the Renaissance (Cambridge: Harvard UP, 1974) 205-06.

As Raleigh's trial shows, probability was not categorically shunned in court. Like a coin, probability could be presented as having one side—the similar, plausible, or provable, which in bulk could persuade and satisfy the conscience—and another side, the merely similar, merely plausible, and uncertain.

### 5. Familiar Plots: Reading Witnesses and Expecting a “Good Show”

Despite the arguable inadequacy of probability as a measure of proof, jurors necessarily gauged similarities whenever they judged witness credibility and the probity of circumstantial evidence. Without rules of evidence to protect the accused from unfair inferences of guilt, without defense counsel or prosecutors to frame the issues, English felony trials relied more heavily on juror perceptions of the credibility of eyewitnesses, character witnesses, and the defendants themselves than our trials today. The speed of felony jury trials, the disparity in power—defendants were not allowed sworn witnesses, only unsworn witnesses (if they could get witnesses to come to court at all), the sweeping nature of the charge to the jury, which focused on the general issue of guilt or innocence rather than on extenuating circumstances: all further encouraged jurors to rely on their impressions of the witnesses and defendant.<sup>89</sup> These impressions constitute a type of circumstantial or indirect evidence, and they allowed jurors to infer guilt from details about the witnesses' demeanor and social status. Thus, jurors were expected to make connections and measure similarities between what they saw and heard in court on the one hand, and what they knew of human nature and behavior on the other.

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<sup>89</sup> Herrup 141-42.

Jurors came to court with expectations about how an innocent person acts, what guilt looks like, what stories are plausible. Their expectations must have been influenced by the fictionalized accounts of trials they would have encountered in popular culture—the ballads, pamphlets, reports, and plays that would have provided entertainment and topics for conversation. In the following chapters, I will argue further that the plays speak to popular perceptions of what happens at real criminal trials.

Even those members of the populace who were not qualified to sit on juries (women, and men who earned below a specified income) would have had an idea about what trials were like and how effective the law—and the monarchy—were at apprehending the guilty and protecting the innocent. The expectations of these playgoers would have been influenced by the popular literature that was widely read and that depicted infamous criminals or shocking crimes. Much of this popular literature presented stereotypes and cliches, often reiterating the theme of youthful indiscretions burgeoning into full-blown murders and heartfelt (and instructive) repentance before execution. The defendant was supposed to see the error of his ways and, facing the gallows, was expected to make “a good end” with a speech describing his woeful fall from grace and warning his audience to learn from his example.

Trialgoers also expected to see a good show, whether as jurors or spectators. Even though the defendant was allowed no counsel or sworn witnesses, every defendant had a chance to convince his audience of his sincerity, through what Thomas Smith described as the “altercation” between a defendant and his accusers. The defendant had free rein to tell his story and to interject comments during the testimony of victims or witnesses (though his



accusers and his judges were equally free to intervene).<sup>90</sup> Most cases involved defendants who attempted to offer explanations that were as plausible—“probable”—as those offered by their adversaries.<sup>91</sup> I do not think it anachronistic to claim that jurors would have evaluated the likelihood of the event occurring in the manner described in the testimony; they thus would have relied on their own understanding of “human nature” and “the real world.”<sup>92</sup> The plausibility of factual content of their testimony, though, was intertwined with whether the jury thought they were truthful people, in and out of court. Thus, telling an “improbable” tale could “overthrow” the testimony of the defendant or witness and “set aside” his credit.<sup>93</sup>

An accused’s innocence, inseparable from his character, was self-evident; one needed no special training to express (or discern) it. The attributes of a good life—love of God and monarch, belief in obedience and neighborliness—signaled that one was likely to abide by law, while the elements of a bad life—sloth, greed, and drunkenness—signaled that one was generally immoral and hence likely to break the law:

Since crime was sinful, the struggle against criminality was the collective equivalent to the personal struggle for good character—a continuing battle between the weakness of humanity and its potential. Touchstone said it simply and logically in Eastward Ho!: ‘Of sloth comes pleasure, of pleasure comes riot, of riot comes whoring, of whoring comes spending, of spending comes want, of want comes theft, of theft comes hanging . . .’<sup>94</sup>

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<sup>90</sup> Herrup 141-42.

<sup>91</sup> Herrup 146.

<sup>92</sup> James P. Timony, “Demeanor Credibility,” 49 Catholic University Law Review 903 (2000) 911.

<sup>93</sup> Gilbert, quoted in Shapiro, Culture 19.

<sup>94</sup> Herrup 4.

Hence, criminal defendants often attempted to show that government witnesses possessed low moral character, that they were of “ill fame” or lacking in integrity.<sup>95</sup> Thomas More attempted to show that Richard Rich had been notorious as a “common lyar” and a man of “no recommendable fame.”<sup>96</sup> In the 1608 case of the English pirates, the judge instructed the jury to “weigh the condition of [the defendants’] lives”.<sup>97</sup> Also in 1608, Margaret Ferne-seede might have thought she would help her own credibility by admitting to being a bawd and an adulterer while denying involvement in the murder of her husband. Unfortunately for her, her son and neighbors testified to her bad character: she kept a boyfriend, sold all her husband’s goods supposedly to flee with her young lover, and previously had attempted to poison her husband.

Typically, jurors ask themselves whether this particular person is the kind of person who would do the act charged.<sup>98</sup> In other words, they try to picture whether the defendant fits the part. Quintilian recognized this habit of thought; he stressed that the orator’s credibility depends in part on his ability to match character with action. For example, a thief should be shown to be covetous. Early modern jurors were no different from modern jurors in that, when deciding whether to believe a defendant or any witness, they wanted to know his respect for the truth (and how fairly and accurately he observes, recites, and narrates the events at issue).<sup>99</sup> Like us, jurors must have made daily credibility assessments in their

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<sup>95</sup> Shapiro, Culture 16.

<sup>96</sup> Shapiro, Culture 16.

<sup>97</sup> Pirates 30.

<sup>98</sup> Timony 909.

<sup>99</sup> Timony 909.

professional, social, and personal lives. In gauging the extent to which someone is sincere, jurors would have considered a variety of commonsense indices such as demeanor, bias, reputation, and plausibility. Fundamentally, people in and out of court measure sincerity by way of analogy:

A juror may compare the statements of the witness to the juror's own experience of education. The witness may testify, for example, that it took a certain amount of time to walk a city block. The juror may compare that statement with her own experience of walking city blocks. A juror may also compare the characteristics of the particular witness to what he believes is typical of a person in the witness' situation. Thus, a witness who testifies about a personal tragedy may be judged against the reaction expected of an individual who has suffered that or similar harm.<sup>100</sup>

In the category of witness demeanor, jurors would have read nonverbal cues in the way witnesses look, sound, or behave, such as attitude, tone of voice, facial expressions, gestures, manner of dress, accent, and manner of speech and formed subjective impressions about the witness's veracity.<sup>101</sup> Such behaviors as hesitation or readiness to answer, making or avoiding eye contact, weeping, exhibiting anger, are subjective factors that might indicate evasiveness, defensiveness, rationalization, or sincerity to a juror.

In addition to demeanor, jurors consider character in the form of reputation. Character witnesses played a complicated and significant role. At trial their purpose was to exonerate the defendant, to testify that he was of such good reputation that he could not be presumed to have committed the offense".<sup>102</sup> In the early seventeenth century, character evidence not only was freely allowed, but was crucial to many juries' decisions. Herrup claims that "the

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<sup>100</sup> Stephen I. Friedland, "On Common Sense and the Evaluation of Witness Credibility," 40 Case Western Reserve Law Review 165 (1990) 176-177.

<sup>101</sup> Friedland 177.

<sup>102</sup> T.A. Green, Verdict According to Conscience: Perspectives on the English Criminal Trial Jury, 1200-1800 (Chicago: U of Chicago P, 1985) 281.

overriding issue was the character of the accused,”<sup>103</sup> while Stephen more moderately reports that “under the Stuarts evidence was freely given of particular crimes or misconduct, unconnected with the matter in issue, committed by the prisoner. Evidence of his good character was also admitted”.<sup>104</sup> Many cases that ended in partial verdicts “were the result of a combination of circumstantial considerations and considerations touching the defendant’s background and character. Later in the century, the Old Bailey reports often would “recite that the lack of character evidence for the accused was material to his conviction, and they also report instances of acquittals based heavily on character evidence. When character evidence was not volunteered, jurors sometimes asked for it”.<sup>105</sup> At the very least, character evidence provided routine and important grounds from which jurors could infer likely guilt or innocence. Again, by analogizing, jurors would have measured how closely the witness matches the images in their minds, images of truthfulness or dishonesty, innocence or guilt, and these images would have come from cultural materials:

Not that jurymen are incapable of disagreeing with one another in their assessment of the probability with which a proposed conclusion has been proved from undisputed facts. But on any rational reconstruction of their disagreement (when prejudice, personal sympathy, sectional spite, and other irrational factors may be disregarded) the disagreement must normally be due to differences of opinion about the kinds of circumstances that are favourable or unfavourable to the application of some particular commonsense generalization. The main commonplace generalizations themselves are for the most part too essential a part of our culture for there to be any serious disagreement about them. They are learned from shared experiences, or taught by proverb, myth, legend, history, literature, drama, parental advice, and the mass media. . . . But there is still room for occasional disagreement, even within

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<sup>103</sup> Herrup 4.

<sup>104</sup> Sir James Fitzjames Stephen, A History of the Criminal Law of England, vol. 1. (London: Macmillan and Co., 1883) 499.

<sup>105</sup> John Langbein, “The Criminal Trial Before the Lawyers,” 45 University of Chicago Law Review 263 (1978) 305.

the same culture, about the kinds of circumstance that are favourable or unfavourable to the application of some particular commonsense generalization. . . . No one disagrees, for example, with the generalization that witnesses who have taken the oath normally tell the truth so far as they know it. But it is relatively easy to disagree about what kinds of grimace, posture, or evasiveness in a witness tend to indicate that this generalization does not apply to him.<sup>106</sup>

One source for these types of generalizations would have been the popular pamphlet accounts of crime.<sup>107</sup> Principally, the eventual defeat of the criminal, in the decisive form of an execution, was central to the story. Good must triumph; the irrational and disorderly underworld of the delinquent must be crushed by the order and rationality of the law. In addition, the account must contain enough sensational details to excite or titillate the reader.

The pamphlets (and ballads, both as heard and in printed lyrics) primarily focused their readers' attention on the last warnings of the damned. Felonies violated "basic Biblical injunctions; they were sinful acts as well as crimes."<sup>108</sup> As Herrup reports, one hundred nineteen criminal cases "indicted in eastern Sussex between 1592 and 1640 ended with orders for execution; of these, all but two concerned direct transgressions of the Ten Commandments."<sup>109</sup> Proof of penitence was frequently offered in the "last dying speech" or "last dying confession" which the criminal supposedly delivered. Such speeches usually conveyed that the criminal accepted the justice of the sentence and acknowledged he deserved it; a warning to those present to avoid a similar fate; and a confession not only of

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<sup>106</sup> Cohen 275.

<sup>107</sup> The following discussion is largely derived from J.A. Sharpe, Crime in Early Modern England, 1550-1750 (New York: Longman, 1999) 228-236.

<sup>108</sup> Herrup 3

<sup>109</sup> Herrup 3.

the crime which had brought the final reckoning, but also of a career of past sinfulness, marking the cultural conflation of crime and sin.

Making a good end by way of a gallows speech not only provided a moral lesson, but also confirmed the verdict and the overall efficacy of the judicial system. These displays of confessed guilt helped perpetuate the appearance of certainty in jury verdicts and helped generate faith in the judicial system. And when defendants refused to follow the script, reporters found ways to condemn them even further—rather than question the correctness of the conviction. In one case, even after conviction the court officials went to great lengths to extract the confession which would confirm the jury’s verdict and the sentence of death. The magistrates visited the convicted killer in her cell and attempted

by all meanes to have her make it plaine by confession, which was so cleere by evidence, which shal for ever from hence stop scandalls tongue for speaking against their government and deserved such a Chronicle . . . to record their uprightness the Justice of their actions, which ages shold not weare out, nor death deface, but should live as an example to men, while to the world was left any posteritie.<sup>110</sup>

The magistrates were clearly concerned that the public might lose faith in the criminal justice system if it were perceived that an innocent woman had been convicted and executed. When their efforts failed, they sent a reverend to convince her but she did not relent. Finally at the place of execution, the sheriffs tried but were not successful. They then had the witnesses brought in, and the witnesses once more identified Abbott as the woman who had lodged with the victim and engaged in certain behaviors consistent with guilt; by inference, she was the killer. The sheriffs then “beggd” her to confess, or at least admit that she knew the victim, but Abbott refused and was executed. To bolster the government’s case and make it serve as a cautionary tale, the reporter declared that, “it is evident, the devil whom she

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<sup>110</sup> Abbott.

served, had fully hardned her heart, and she that would die unpurging her soule of one sinne, it is to plaine she was guiltie of the other.”

The more sophisticated reports of state trials, still meant for general consumption, also sought to shore up public faith in the judicial process. In writing an account of his prosecution of the Somersets for the murder of Overbury, Bacon shaped the facts into a familiar narrative of a fall from grace (almost a *de casibus* tragedy, only the fall was Overbury’s) and a righteous punishment. He first sought to put a different spin on the public perception of Overbury as a poor victim: “because we are not now upon point of civility, but to discover the truth to the face of justice; and that it is material to the true understanding of the state of this cause; Overbury was naught and corrupt, *the ballads must be amended for that point*”<sup>111</sup> (my italics). Similarly, in writing an account of the prosecution of Essex, Bacon endeavored to “set the record straight:”

yet because there doe passe abroad in the hands of many men divers false and corrupt Collections and Relations of the proceedings at the arraignment of the late Earles of Essex and Southampton: and againe, because it is requisite that the world doe understand as well the praecedent practices and inducements to the treasons, as the open & actuall Treasons themselves (though in a case of life it was not thought convenient to insist at the triall upon matter of inference or presumption, but chiefly upon matter of plaine and direct proofes) therefore it hath beene thought fit to publish to the world . . .<sup>112</sup>

What Bacon presented to the world was a declaration summing up the Crown’s narrative of the actions, words, and deeds leading up to what must have seemed, then as now, a very timid attempt at rebellion.<sup>113</sup> Public perceptions of the Essex scandal also needed to be

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<sup>111</sup> Francis Bacon, “The Charge Against Somerset for Poisoning Overbury,” Francis Bacon, Ed. Brian Vickers (Oxford: Oxford UP, 1996) 314-325.

<sup>112</sup> Francis Bacon, A Declaration of the Practices & Treasons attempted and committed by Robert late Earle of Essex and his Complices, Early English Books Online, ProQuest Company, July 14, 2005.

<sup>113</sup> Bacon, Essex.

corrected because “it doe appeare by divers most wicked and seditious Libels throwen abroad, that the dregs of these treasons, which the late Earl of Essex himselfe a little before his death, did terme a Leprosie, that had infected farre and neere, do yet remaine in the hearts and tongues of some misaffected persons.”<sup>114</sup> Bacon’s narrative sounds strikingly like prose fiction, with a compelling arc to the story, rhetorical flourishes, most notably Essex depicted as Satan, shifting shape to practice his deceptions and further his schemes, and pointed commentary and moralizing by the author. Bacon glosses over unfavorable aspects of the trial, such as the motives of the accused (such as Blunt) to lie to save themselves, and emphasizes instead the penitence of the conspirators and their stated wish that they had confessed rather than been tried by proof. He goes so far as to call the story a tragedy whose second Act was the presentation of Essex to the Queen.

The link between writings about law, juror expectations about how defendants and witnesses should act, and the stage is made explicit, again by Bacon in reference to the Overbury case. As Vickers notes, Bacon made several analogies in letters and in court between the trial and the stage. In a letter he describes the prosecution as staging its case: “I have distributed parts to the two serjeants’, as if they were actors being assigned their roles, having instructed them not to strike too high a note, ‘that the matter itself being tragical enough, bitterness and insulting be forborne’”.<sup>115</sup> In the event the Countess confessed the indictment, Bacon intended that the proceedings “not be a dumb show,” but instead

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<sup>114</sup> Bacon, Essex.

<sup>115</sup> “Overbury” 690.



summarized the proceedings and the crimes that were discovered.<sup>116</sup> In his speech at the Countess's trial Bacon created an extended metaphor for the conspiracy and its discovery:

The great frame of justice (my Lords) in this present action, hath a Vault, and it hath a Stage; a Vault where these works of darkness were contrived; and a Stage, with steps, by which they were brought to light . . . I will reserve [the case against Somerset] until tomorrow, and hold myself to that which I called the stage or theatre, whereunto indeed it may be fitly compared: for that things were first contained within the invisible judgments of God, as within a curtain, and after came forth, and were acted most worthily by the King, and right well by his ministers.<sup>117</sup>

Bacon extends this theatrical imagery to the four conspirators who already had been executed, whose lesser involvement made them “the actors and not the authors” of the murder.<sup>118</sup> He finishes off his metaphor with a witticism, “But (my Lords) where I speak of a stage, I doubt I hold you upon the stage too long”.<sup>119</sup>

Thus, the fictionalized trial often was a forum for living cautionary tales and, when it came to punishing the convicted, for the example of repentance. The popular literature thus helped fashion popular ideas on crime and dramatized satisfaction and guilt as equivalent to certainty to the general public—the same public that attended plays (and some of whom sat on juries). But the fictional trial might or might not follow the template of the fictionalized trials that were the stuff of pamphlets and ballads. Volpone, The White Devil, and Measure for Measure all offer more complex perspectives on aspects of English criminal justice, as I will show.

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<sup>116</sup> “Overbury” 690.

<sup>117</sup> “Overbury” 690-691.

<sup>118</sup> “Overbury” 691.

<sup>119</sup> “Overbury” 691.

## 6. A Practice and a Discourse of Probability

In Much Ado About Nothing, Shakespeare stages a scene in which the bumbling constable Dogberry attempts to direct an examination which will record and preserve evidence that the accused men committed a crime. Instead of asking the two accusing witnesses what they saw and heard, the foolish constable asks the accused men such irrelevant and conclusionary questions as, “Do you serve God?” and “Are you false knaves?” Fortunately the Sexton impatiently takes over and proceeds to conduct a more evidentiary investigation by asking the two witnesses what they heard the accused men say.

In practice the duty to take down testimony fell to the justices of the peace. They were laypeople, appointed for a term to act as judges of minor cases and, increasingly, to act as investigators in examining witnesses, writing reports of the witnesses’ testimony, supplying those reports to the clerk of the assize court or quarter sessions where grand and petty juries would be sitting, and reading those reports as evidence at trial if the witnesses failed to appear. In a provocative argument, Langbein maintains that during Mary’s reign, two statutes concerning the power of justices of the peace to grant bail to felony suspects and to commit felony suspects to jail had the effect of encroaching on and narrowing their power.<sup>120</sup> The bail statute newly required that two justices agree to allow bail after one took down the suspect’s examination. The later committal statute newly required the examination of suspects ordered to be held in custody pending trial. Langbein argues that these two statutes worked together as an attempt to remedy the discrepancy that had resulted when

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<sup>120</sup> Langbein, Prosecuting Crime.

bailed suspects were subject to forensic examination before release but jailed suspects were not.

In Langbein's view, these two statutes encroached on the traditional power of the justices of the peace. Previously, and based on long tradition, justices had the jurisdiction to try petty—not capital—felonies, while serious felonies were under the jurisdiction of the assize courts; nonetheless, justices could only try these lesser felonies in the presence of a quorum of the common law justices of the peace. With the Marian statutes, justices of the peace no longer had the jurisdiction to hear and try cases—all felonies were tried by the assize judges. Through this narrowing of the justices' power and their roles in the judicial system, the Marian statutes affected a transfer of felony trial jurisdiction to the assize courts. With their primary role now being one of evidence gathering and submission, the justices of the peace were crucial participants in the indigenous development of the English law of criminal evidence. Neither Roman nor canon law, but common law drove the development of the English law of criminal evidence; hence, to a large extent Langbein disagrees with Shapiro.

Despite the importance of the justices of the peace in developing rules of evidence in criminal law, Langbein notes that the status of the examinations the justices recorded is uncertain. The statutes did not explicitly require that the accused or witnesses be examined under oath, and yet Elizabethan justices tended to administer oaths anyway—as indeed Lambarde urges justices to do in his handbook, in order to preserve evidence for court in the event that a witness dies or does not appear at trial. In the Eirenarcha Lambarde expressly intends to provide examples for justices of the peace to use as guidelines so that they will know how to distinguish material facts from immaterial ones and when to detain a suspect in

custody or release a suspect due to insufficient cause.<sup>121</sup> He offers a taxonomy breaking down categories of suspicion based on whether they existed before the alleged crime (precedent), arose concurrently with the crime (present), or after the crime (subsequent). Precedent circumstances correspond approximately to the modern concepts of motive and capability (including intent or “will to do the fact”), while present circumstantial evidence corresponds to opportunity and includes such factors as time, place and occasion.

Lambarde’s table of suspicions, a kind of *indicia*, are more forensically based than Dalton’s, which first appeared thirty-nine years after Lambarde’s first edition and are more classically-oriented. In The Country Justice, Dalton takes up Lambarde’s mantle and sets out to create a community of justices of the peace so that they can perform better and improve the reputation of their profession.<sup>122</sup> Justices were mostly isolated from each other, living in rural areas, and the level of training they received was spotty and inconsistent. Like Lambarde, Dalton counsels justices to take examinations “upon oath” so that it may be read or delivered to the jury at trial in the absence of the witnesses. Moreover, Dalton advises justices of the peace to take and certify exculpatory evidence since the justice’s function is to inform the king and the trial judges “of the truth of the matter.”

Barbara Shapiro makes huge claims about the prevalence of the use of Dalton’s handbook and the consequent dissemination of his taxonomy of the “Causes of Suspicion” into England. Without digressing into that debate, I would like to suggest that in examining the witnesses, writing down their testimony, and ordering that testimony into written narratives, the justices of the peace organized—perhaps even orchestrated—the stories the

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<sup>121</sup> William Lambarde, Eirenarcha: or of the office of the Justices of Peace...Gathered 1579: first published 1581: and now secondly revised, corrected and enlarged (London: Ralph Newberry, 1592).

<sup>122</sup> Michael Dalton, The Country Justice (1618, 1622). New York: Arno P, 1972.

witnesses would tell before the grand jury and, if an indictment ensued, at the trial. Their narratives provided retrospective reconstructions of “facts” which piece together evidence that is unclear or in conflict. Only in retrospect could a catalyst for the subsequent events—the beginning of the story—be distinguished from among other events. Indeed, acts which had been done in secret could not have been understood as making a beginning at the time they were done. Jurors and spectators at these trials must have been influenced by the narratives they heard and, more importantly, by the way that the justice of the peace ordered competing narratives into a form, giving them shape resembling a beginning, middle and end. In this way, narrativity and probability in the sense of causation underscored essential similarities between jury trials and stage trials.

## 7. Conclusion: The Fiction of Certainty

Trial practices are poised between skepticism and anti-skepticism; they rest on the assumption that guilt and innocence can be discovered, and yet also assume that true certainty cannot be attained. Legal presumptions and legal fictions—for example, that the man married to a woman who bears a child is the child’s father—are used to fill in gaps where knowledge is uncertain. Prosecution of suspected crimes—or, for that matter, litigation of civil matters between individuals—could not take place in a climate of absolute skepticism, where “nothing can be known and no decision be worthy of acceptance.”<sup>123</sup> Instead, in the early seventeenth century, English law evinced an epistemology “of probability . . . in which decision making could not be delayed indefinitely on the grounds of

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<sup>123</sup> Shapiro, Culture 31.

insufficiently certain knowledge.”<sup>124</sup> The legal system operated—and had for centuries—on the belief that “ephemeral ‘facts’ of human action could be established with a high degree of certitude and that ordinary persons had sufficient ability to evaluate testimony for credibility . . . in order to arrive at impartial, truthful verdicts guided by their intelligence, reason, and conscience.”<sup>125</sup> Further, skepticism is a recipe for acquittal, not conviction, and most felony defendants were convicted.

The standard of proof emphasizes how a juror should feel after the verdict. The satisfied conscience standard asks jurors to recognize that they are dealing with a person’s life, and to decide she is guilty only if they are confident that they will not be nagged by doubts about the correctness of their decision. (This standard contrasts with the modern American standard in civil cases, which merely asks jurors to make the best decision they can and then forget about it). Though it reached for a high degree of certainty, and was often depicted as reaching certainty, the standard of proof in early modern England incorporated probability in the analogizing that jurors did as they assessed credibility and plausibility.

The courtroom supplies a primary rhetorical image for the activity of knowledge-gathering. The plays discussed in this dissertation offer images of the judicial process complicated by perjured testimony and egregious misinterpretations of evidence, yet still always arriving at the correct and just verdict. The plays thus simultaneously assert and refute absolute skepticism and express some of the cultural attitudes and beliefs that would make constructive skepticism and objective probability possible later in the century.

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<sup>124</sup> Shapiro, Culture 31.

<sup>125</sup> Shapiro, Culture 32.

## Chapter Three

“It Being the Office of a Comic Poet to Imitate Justice.”<sup>1</sup>

### Plot and Probability in Volpone

Broadly speaking, Quintilian’s injunction that orators must instill in their listeners an intensity of conviction that trumps more abstract issues regarding probability also applies to playwrights, who must convince their audiences to suspend disbelief and accept the plot as credible. To overcome an audience’s skepticism, the orator must, according to Cicero, make his narrative seem plausible by seeding it with details that usually appear in real life. By incorporating the necessary, the orator may achieve likeliness or verisimilitude, as Cicero did when he injected comments about the mundane (such as a husband’s patience in waiting for his wife to get ready to go out) in his model oration, Pro Milone.

While no one would accuse Ben Jonson’s plays of being wedded to “surface realism,”<sup>2</sup> in the trial scenes in Volpone he goes to some trouble to mimic actual court procedures, to evoke “a surrounding reality.”<sup>3</sup> He includes a “Notary” to certify that witnesses have been sworn and depicts the Avocatori deciding which witnesses to believe via conventional tools actually used in real trials: considering the numbers of witnesses on each side; considering reputation; relying on assumptions and expectations about human behavior—namely, that people do not act against their own self-interest. Jonson has a precise

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<sup>1</sup> Ben Jonson, Epistle prefacing Volpone, Ed. Alvin B. Kernan (New Haven: Yale UP, 1962) 32.

<sup>2</sup> Alexander Leggatt, Ben Jonson: His Vision and His Art (New York: Methuen, 1981) 258-259.

<sup>3</sup> Leggatt 265.

interest in the workings of justice, as evidenced in the care he takes with the warrant and amnesty in Every Man In His Humour, the hue and cry and the consequences of its failure in A Tale of a Tub, and the trial scene in Volpone. But the mimicry of procedure is not Jonson's object. Making the plot probable *is* his aim. And the incorporation of these patent practices in Volpone enables Jonson to achieve verisimilitude by exposing a latent feature of the English jury trial: the performativity involved in giving and receiving testimony which in turn illuminates some of the expectations that triers of fact (whether judge or jury) bring to their judgments.

The play shows two kinds of probability at work when the trier of fact receives and makes decisions about testimony: expectation and precedent. Both types, which are closely related, involve finding an equilibrium between the circumstances of an individual case and the commonplace. In the context of trials, expectation occurs before testimony begins; it is wrapped up in commonplace notions of what guilt and innocence look like, or should look like. Precedent is the flip side of the coin, occurring after testimony has been received, when the trier compares and contrasts the testimony with examples in mind from prior cases, experience, art, and history—every cultural practice and product by which the trier develops and maintains beliefs about human behavior. In receiving testimony-performances, the spectator-judge or spectator-juror makes decisions influenced by performativity's relation to the epistemological link supposed to exist between testifying, truth-telling, and truth-detecting.

In Volpone the judges employ expectation probability by which they compare the particular circumstances of this unique case—and each law case is unique—to their expectations about how guilty and innocent people act in court, how husbands treat wives



and fathers treat sons, how people act in their own self-interest. All these expectations hold true in most circumstances, most of the time, and recursively derive from precedent based on example from art and history, prior cases, popular culture, and surely the judges' own experience. In the absence of precedent, the judges are at a loss and can only resort to supernatural explanations for behavior they cannot interpret according to example.

The play complicates the presumption that there is any probable connection between truth and sworn testimony; between reputation and truth-telling; indeed, between testimony and truth at all, since all testimony is at heart a performance. Truth remains independent of law's discourses and exists to be discovered, but the tools sanctioned by law may not get the job done. Thus, Jonson's satire on greed also spoofs the anti-skeptical warrants that underlie law's claim that jurors or judges can discern truth through the testimony-performances of accuser, accused, and witnesses. In mocking the tools which triers of fact use to gauge witness credibility, Volpone satirizes the expectations that jurors share about what guilt should look like and the "show" the accused should put on.

In this chapter I argue that Jonson exposes the hidden probabilistic reasoning at work when triers of fact evaluate witness credibility. Oathtaking and the communal judgment reflected in the witness's reputation at best supply an inconsistent link to truth-telling and truth-detecting. Moreover, the judges' expectations about what guilt looks like further invoke probabilities that are incongruent with the certainty of the judges' (wrong) conclusions. Jonson's treatment of the patent probabilities of oathtaking and reputation and the latent probabilities of performativity suggests some of the skepticism and distrust with which some members of the general public might have looked on the English jury system.

## 1. Jonson's Legal Precedents

Jonson seems to have infused Volpone with details gleaned from his long acquaintance with lawyers and law students and drawn from his own experience inside courtrooms. As a student of William Camden's to age fifteen or sixteen, Jonson was admitted into "a community of learned men that widened Jonson's horizons throughout his career"; from within this circle, Jonson particularly became friends with John Selden.<sup>4</sup> Jonson's circle of friends and acquaintances included law students and barristers at the Inns of Court, a particularly literary generation of Inns residents. As Riggs notes, seven of the poets who published satires or epigrams between 1593 and 1601<sup>5</sup>—or about half the total number of published satirists—belonged to the Inns.<sup>6</sup> In 1599 Jonson dedicated Every Man out of His Humour to the Inns of Court (and later would dedicate Volpone to the universities of Cambridge and Oxford), noting that: "when I wrote this *Poeme*, I had friendship with divers in your societies; who, as they were great Names in learning, so they were no lesse Examples of living. Of them, and then (that I say no more) it was not despis'd."<sup>7</sup> Members who resided at the Inns and were known to have been on friendly terms with the young Jonson include Francis Bacon, John Selden, John Donne, Francis Beaumont, Thomas Overbury, Richard Hoskins, Sir John Harington, Christopher Brooke, Richard Martin, Sir

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<sup>4</sup> David Riggs, Ben Jonson: A Life (Cambridge: Harvard UP, 1989) 192-193.

<sup>5</sup> Davies, Goddard, Guilpin, Lodge, Marston, Owen, and Harington (Riggs 56).

<sup>6</sup> Riggs 56.

<sup>7</sup> Riggs 56.

John Salusbury, Benjamin Rudyerd, Thomas Bond, and Henry Goodyere.<sup>8</sup> Later in life, Jonson continued to find camaraderie with “a coterie of gentlemen about town,” most of whom were lawyers, scholars, courtiers, or a combination of the three.<sup>9</sup> Jonson’s connections to lawyers were especially close in this period of his life, between 1613 and 1616, when he published commendatory poems for Selden, among other jurists; wrote an epigram for Chief Justice Coke; and benefited from “being included in a fraternity of lawyers and clerics who viewed literature as a gentlemanly avocation.”<sup>10</sup>

Possibly, Jonson attended one of the revels which the Inns put on at Christmas. In addition to ceremonies, a large part of the revels consisted of speeches filled with “hyperbolic courtly language, metaphoric clichés, Ciceronian periods, and rhetorical flourishes”, but apparently these stylistic features were not being satirized; instead, they seem meant to be exercises in high-flown, traditional rhetoric for which the theatrical skits called.<sup>11</sup> The revels at Gray’s Inn and at the Middle Temple were similar to each other and indicate that, as Fortescue suggested, the exercises in argumentation and rhetoric of the revels provided training for the well-rounded gentleman and would-be courtier as well as the prospective lawyer.<sup>12</sup> Lawyers and law students were, next to courtiers, the most important patrons and benefactors of contemporary writing; they also provided a significant part of the

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<sup>8</sup> Riggs 56.

<sup>9</sup> Riggs 192.

<sup>10</sup> Riggs 192-193.

<sup>11</sup> Philip J. Finkelpearl, John Marston of the Middle Temple (Cambridge: Harvard UP, 1969) 41.

<sup>12</sup> Finkelpearl 51-52.

audience at playhouses, both public and private.<sup>13</sup> Voltore's oratory, the over-the-top descriptive testimony of Corbaccio, Corvino, and Lady Would-Be, and the farcical courtroom antics of the conspirators, so contrary to the decorum expected in real courtrooms, resembles and might have been inspired by the exuberant and irreverent playacting of the law students at the Inns.

Jonson's intimacy with the law and lawyers did not end there, for he was jailed three times—twice for co-writing seditious material for the stage ( The Isle of Dogs in 1597 and Eastward Ho! In 1605), and once for murder (in 1598). On this latter charge he was prosecuted and convicted, and escaped the gallows only by pleading (and proving) benefit of clergy; he bore the telltale brand on his thumb for the rest of his life. He was also accused of slander after writing Poetaster (1601) and Sejanus (1603). For a playwright who never formally studied law, Jonson was personally and directly familiar with the machinery of justice, and after his own experiences was well-equipped to make its processes and principles serve his dramatic plots. Moreover, as an erstwhile actor, Jonson would have had an eye for the performativity of the English adversarial trial and the complex relationship among oathtaking, reputation, and role playing.

## 2. Tried and True? Oaths, Reputation, and Probability

Jonson's emphasis on the role of oaths and reputation—the non-performative aspects of testimony—shows them to be weak epistemological tools. In this section I examine how Jonson exposes the probability underlying the conventions of oaths and reputation evidence.

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<sup>13</sup> Finkelpearl 26-27.

Early in the century, no single factor carried as much *potential* meaning in judging credibility as the swearing of an oath to tell the truth. Sworn testimony could signify certain truth, presumed truth, probable truth, or no relationship to truth at all. In the medieval Church courts, “the observation of an oath involved the immortal soul, and ‘Dame Perjury’ led her followers to hell.” On these grounds, the Church courts exercised jurisdiction over alleged breaches of promises or contracts; enforcement could be induced by threat of excommunication.<sup>14</sup> In the days of trial by ordeal, “when the act of swearing was considered more important than the matter sworn to,” a perjured witness “risked being struck by heaven on the spot. Oaths originally were elaborate, ceremonious to a degree. Each detail must be correctly repeated after the judge, and if an oath-taker fumbled it was because God impeded the perjured tongue.”<sup>15</sup>

By the early seventeenth century and undoubtedly long before, oaths no longer held the awesome power they once had. In early modern England the rhetoric and meaning of oaths was much less stable. Oaths were still demanded on the most solemn occasions; justices of the peace, jurors, witnesses<sup>16</sup> all took oaths, and anyone wishing to enter civil services was required to take the Oaths of Allegiance and Supremacy. Indeed, Reformation concerns with conscience may have helped preserve the use of oaths in court, though this

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<sup>14</sup> Susan Brigden, New Worlds, Lost Worlds: The Rule of the Tudors, 1485-1603 (New York: Penguin Putnam, Inc., 2000) 165.

<sup>15</sup> Catherine Drinker Bowen, The Lion and the Throne: The Life and Times of Sir Edward Coke (London: Hamish Hamilton, 1957) 130.

<sup>16</sup> “The evidence you shall give to this jury between our sovereign lord the king and the prisoner at the bar shall be the truth, the whole truth, and nothing but the truth. So help you God” (J.H. Baker, “Criminal Courts and Procedure at Common Law 1550-1800,” Crime in England 1550-1800, Ed. J.S. Cockburn (Princeton: Princeton UP, 1977) 38.

custom was grounded in earlier epistemological beliefs.<sup>17</sup> As late as 1608, Edward Coke as a trial judge could press a jury to believe the state's sworn witnesses over a murder defendant's staunch denial of guilt because God was speaking through the oaths they had taken:

here is further evidence to satisfie you, though if but this in my conscience in this case I thinke it sufficient, that here are severall witnesses above two or three, *who say upon their oaths directly she is the woman, not such as sweare rashly or indiscreetly*, but say as such there bee from many other women, *and as if God himselfe would give because to put truth in their oaths*, sent another woman before, who was heinously suspected for the fact, whom they refused to be she, and indeed was proved after by other testimony it was not: and *as if by their othes*, though she was hidden in darknesse, he would bring her once to her deserved shame.<sup>18</sup> (my italics)

The inconsistency is interesting. On the one hand, Coke implies that God speaks through sworn witnesses. On the other hand, he distinguishes this case from other cases where witnesses have sworn "rashly or indiscreetly." Coke's juxtaposition of the sacred and profane echoes Dekker and Webster's juxtaposition of "perjured" and "sacred oath" in The Famous History of Sir Thomas Wyatt (1607):

Heere is no perjur'd Counsellors to sweare  
A sacred oath, and then forswear the same,  
No innovators here, doth harbor keepe,  
A stedfast silence, doth possesse the place,  
In this the Tower is noble being base. (ll.1325-29)

Certainly oaths had been proven to be bendable as well as breakable, as in the trial of Thomas Cranmer, and jurors did not need Thomas More to tell them that witnesses "myght swere false."<sup>19</sup> As Shapiro summarizes, "Perjury became a statutory crime during the same

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<sup>17</sup> Shapiro, Culture 12-13.

<sup>18</sup> Anonymous, The Apprehension, Arraignment, and Execution of Elizabeth Abbott (1608), Early English Books Online, ProQuest Company, July 2, 2003.

<sup>19</sup> Quoted in Barbara Shapiro, A Culture of Fact: England, 1550-1720 (Ithaca: Cornell UP, 2000) 20.

period in which witness testimony became routine.”<sup>20</sup> In civil actions, by the 1590s defendants in contract actions were opting not to wager their law—defend themselves by bringing in sworn oath-takers—because relying on oath-takers had come to be seen as “tantamount to admitting liability and refusing to pay the debt due. A gentleman would not, dared not wage his law even when confronted with a packed jury or an obviously unfounded claim.”<sup>21</sup>

Others were also increasingly skeptical of oath-helping. In his Pierce Penniless pamphlet, Thomas Nashe had mocked the “knights of the post,” professional oath-helpers who “would swear you anything for twelve pence”.<sup>22</sup> Shakespeare also was familiar with the knights of the post and the cheapening of the wager of law; Falstaff spoke of buying “a commodity of good names,” a phrase which might have come from the 1597 “muckraking satire,” The Discoverie of the Knights of the Poste.<sup>23</sup>

Prosecution witnesses testified under oath while the defendant and his witnesses could not (until 1696 in treason cases, 1702 for other felonies). Thus, jurors *could* resolve questions about witness credibility by simply choosing to believe the prosecution witnesses’ sworn testimony over the unsworn testimony of the defendant and his witnesses.<sup>24</sup> Some judges attempted to reduce the imbalance by exhorting defendants and their witnesses to

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<sup>20</sup> Shapiro, Culture 20.

<sup>21</sup> Allen D Boyer, Sir Edward Coke and the Elizabethan Age (Stanford: Stanford UP, 2003) 125-126.

<sup>22</sup> Boyer 125-26.

<sup>23</sup> Boyer 133.

<sup>24</sup> George Fisher, “The Jury’s Rise as Lie Detector,” 107 Yale Law Journal 575 (1997) 3.

stand in fear of God and tell the truth, while others tipped the scales further in favor of the Crown by warning juries against attaching too much weight to the defendant's evidence.<sup>25</sup>

Later legal scholars who had their own agendas would claim that early modern jurors believed that "if a man came and swore to anything whatever, he ought to be believed unless he was directly contradicted,"<sup>26</sup> or that, as Gilbert would write of a later time, jurors began with the "benign and human" presumption that witnesses "do not falsify or prevaricate."<sup>27</sup> Possibly, as Shapiro argues, oaths were assumed "to enhance the probability of testimonial truth but not to ensure it,"<sup>28</sup> and gradually even this assumption faded.<sup>29</sup> Still, in the early seventeenth century it seems that jurors sometimes put their faith in oaths, and sometimes presumed that sworn testimony was truthful until contradicted, and sometimes disregarded oaths altogether.

Plays such as Volpone though, leave no ambiguity that oaths may be mere empty rhetoric while, on the other hand, I know of no play depicting a trial or quasi-trial in this period which argues for the automatic credibility of sworn testimony. Jonson takes the epistemology of swearing one step further by demolishing any pretense that taking an oath serves as a sign—either certain, presumable, or probable—of truth-telling. In staging the trial in Volpone, Jonson shows the oath as irrelevant in court; it no longer functions as a guarantor

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<sup>25</sup> J.S. Cockburn, A History of English Assizes, 1558-1714 (Cambridge: Cambridge UP, 1972) 121.

<sup>26</sup> Sir James Fitzjames Stephen, A History of the Criminal Law of England, vol. 1. (London: Macmillan and Co., 1883) 399-400.

<sup>27</sup> Quoted in Shapiro, Culture 20.

<sup>28</sup> Shapiro, Culture 31.

<sup>29</sup> Barbara Shapiro, Probability and Certainty in Seventeenth-Century England (Princeton: Princeton UP, 1983) 186.



of truth, or even an indicator of likely truth, because some witnesses forswear themselves, and some of those who do not swear falsely nonetheless unwittingly testify to untruths. The bright line between truth and the appearance of truth is muddied rather than clarified by the relation between truth and swearing in the Avocatori's courtroom.

The first witness called to the stand enacts this ambiguity. He is a sworn witness who does not lie—but does not tell the truth either. When Avocatore 1, the most rational of the judges, requests Voltore to produce some “proofs” to back up his claims, the lawyer calls Corbaccio to the stand, and Jonson emphasizes that this witness offstage has taken an oath to tell the truth. The character who earlier had said of doctors, “[T]hey kill / With as much license as a judge” (1.4.32-33) now must convince such judges that he not only took the shocking step of disinheriting his son, but that he had good reason to do so. But Corbaccio does not lie in court. Earlier, Mosca had lied to Corbaccio and told him that Bonario found out that Corbaccio disinherited him and, vowing to kill him, came to Volpone's house with sword drawn, looking for him. Thus, Corbaccio actually testifies to what he believes, based on what Mosca told him happened. Even Corbaccio's claim that Bonario is not his biological son might not be a lie, since he might now believe it to be true. Still, later Mosca will declare to Corbaccio that he “perjured” himself, perhaps meaning that Corbaccio's testimony was factually untrue, regardless of whether Corbaccio believed it to be true (5.3.74).

Lady Would-Be also occupies a murky region between truth and untruth, although she is apparently unsworn when she identifies Celia as the woman disguised as a man whom she found conversing with Sir Politic Would-Be. Lady Would-Be does not lie because she believes that Celia is the culprit, based on what Mosca has told her and on the testimony she has heard. She perhaps assumes Celia to be the cunning strumpet she confronted, and thus



considered to link testimony to certain truth at best and probable truth at least, reputation may link testimony only to probable truth at most, and in Jonson's hands reputation suffers further for being relative, subject to diminishment, false, and antiquated.

Reputation's relativity is established quickly in Volpone's equating of gold with virtue and honor, Mosca's assertion that virtue is easy to come by for the rich, and Corvino's justification for prostituting Celia. As the conspirator most concerned with protecting his reputation, he is susceptible to Mosca's sly implication that, were Corvino to offer Celia to Volpone as a cure for his ailments, only "one or two" people would know about it; hence, Corvino simultaneously could ensure that he will be Volpone's heir and protect his reputation as the husband of a chaste young woman. To show the depths to which his greed will sink him, Jonson has Corvino echo Falstaff's indictment of honor—his own honor, not merely an abstract idea—as "a breath; / There's no such thing in nature: a mere term / Invented to awe fools" (3.7.38-40). As for his wife's fame, Corvino now tries to see it as nothing more than a "jig," a farce; besides, Corvino would not advertise the fact that he prostituted his wife to Volpone: "as if I would go tell it, / Cry it, on the Piazza!" (3.7.48-49). Instead, taking his cue from Mosca, he points out that no one will know about it except himself, the dying Volpone, Mosca whose silence Corvino has purchased, and Celia, who of course will not publicize her deed—or his. Specifically, Mosca assures the worried Corvino that Voltore does not know the truth about his attempt to prostitute Celia to Volpone; instead, Mosca has "devised a formal tale"—an "elaborately constructed" or "circumstantial" tale—to "salve" Corvino's reputation (4.4.6-7).

Because reputation's value as a commodity is always relative, it necessarily is subject to diminishment—indeed, it may be shown to have no value at all, and to be a mere

counterfeit. To shake the judges' faith in Celia and Bonario's sterling reputations, Voltore casts Celia and Bonario as impostors, dissemblers only pretending to virtue. At first the judges greet Voltore's representations with skepticism; Avocatore 1 remarks, "These be strange turns!" and Avocatore 2 replies, "The young man's fame was ever fair and honest" (4.5.61-62). They are still laying greater importance on reputation as a reliable source of knowledge than on the unnaturalness and unlikeliness of the lawyer's characterizations of these two seemingly—and reputedly—honest young people. But the advocate plays on the judges' awareness that appearances can be deceiving: "So much more full of danger is his [Bonario's] vice, / That can beguile so under shade of virtue" (4.5.61-62). Celia and Bonario's reputations begin to weigh less in the balance against the (well-scripted and executed) performances of the conspirators.

Jonson most pointedly satirizes how empty the rhetoric of reputation can be in Lady Would-Be's attack on her husband and Peregrine. Coming from Volpone's house where she, if not his mistress, is at least his would-be mistress, she expresses shock (with great and false indignation, I imagine) at this surprising side of her husband's character:

I had thought, the *odour, sir, of your good name*  
 Had been more precious to you; that you would not  
 Have done this *dire massacre on your honour—*  
 One of your gravity, and rank, besides—  
*But, knights, I see, care little for the oath*  
*They make to ladies; chiefly their own ladies.*  
 (4.2.23-28, my italics)

Lady Would-Be is a laughingstock here, but her point is well-taken. The social values underlying the ideals of reputation and oathkeeping are old-fashioned, the stuff of romantic tales. In Jonson's satire, swearing is a mere antique formality in court, a quaint practice from

the days of knights and dragons, and reputation is similarly irrelevant in a world where appearances often deceive.

In Jonson's trial, neither oath nor reputation aids the process of factfinding and truth gathering. This skeptical, even cynical disintegration of the bedrock underlying the epistemology of the criminal courts—the connection between testimony and truth—is nothing new; certainly early modern jurors contended with the possibility that testimony might be false. But they might not have conceived the extent to which their construction of testimony was guided or shaped by expectations about performances. The instability of the ancient tools of oath and reputation makes performativity even more crucial to decision making.

### 3. Judging Likenesses: What is Guilt Supposed to Look Like?

On January 27, 1606 eight Gunpowder plotters stood trial in Westminster Hall on charges of high treason. The trial lasted only a day but commanded high prices as a public spectacle; one member of Parliament complained that while he had paid ten shillings for standing room, others had been allowed into the same enclosure for much smaller sums.<sup>30</sup> Whether they paid to witness the spectacle or not, trialgoers expected to see the players—the defendants, witnesses, and prosecutors—put on a good show, much as playgoers expect to see actors put on a good show.

Even if the trier negotiates the shoals of oath and reputation and forms an accurate belief about the veracity of witnesses, the factor of performativity complicates, even reverses

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<sup>30</sup> "Guy Fawkes," Oxford Dictionary of National Biography Online, Oxford UP, 7 November 2005, citing the Parliamentary Diary of Robert Bowyer, Ed. D.H. Willson (1931) 10.

that assessment. Despite praise of the jury system by its apologists such as Coke and later Hale, testimony interpreted according to expectations about performance challenges the background assumption that triers of fact can accurately read witnesses. In Volpone the Avocatori feel their way through decisions about guilt and innocence based on what seem to be reasonable expectations about human behavior that prove to be wrong. Their expectations mislead them into misunderstanding the testimony-performances which they, as spectator-judges, receive.

Voltore underscores the analogic reasoning, the search for likenesses that will guide and satisfy the court:

I would ask,  
With leave of your grave fatherhoods, *if their plot*  
*Have any face or color like to truth?*  
Or if, unto the dullest nostril here,  
It smell not rank and most abhorred slander?  
I crave your care of this good gentleman,  
Whose life is much endangered by this *fable*;

(4.6.29-49) (my italics)

The judges are susceptible to being persuaded—exactly the goal of the jury system. They preside over an interrogatory process that spotlights both sides of an issue. On the one hand, the sterling reputations of Celia and Bonario plead that their allegations be believed. On the other hand, the social status of Corvino and Corbaccio, and their superior positions as husband and father, respectively, require that they be believed. On the one hand, Celia and Bonario's story is too preposterous to be accepted. On the other hand, Corvino and Corbaccio would not deliberately set about to damage their own reputations. On one side are just two witnesses, Celia and Bonario; on the other are five witnesses. On the one hand, the court has Voltore's notes revealing the conspiracy; on the other, the court has the expulsion of the demon that possessed Voltore and drove him to write those false notes. The crux of their

judgments, though, lie in their reception of the testimony-performances they perceive. Specifically, they have expectations before testimony begins and then search for precedents during and after the testimony-performances.

In comparing Celia and Bonario's allegations to the familiar forms of truth as they know it, the Avicatori are confused because if the accusations are true, then the accused—Corvino, Corbaccio, and Volpone—have done deeds which are impossible to believe, according to the judges' expectations. Moreover, the judges must negotiate competing expectations. They expect that people of good reputation, like Celia and Bonario, would not make up such lies. On the other hand, they expect that people do not act against their own self-interest: a husband would not shame himself and soil his good name by prostituting his wife; a father would not disinherit his legitimate son in favor of a rich old man to whom he is unrelated by blood; a healthy man would not pretend to be bedridden for three years, and a *magnifico*, a man of relatively high social stature and, hence, virtue would not attempt rape. These actions cannot be reconciled with what the judges expect based on the social station of the conspirators and the underlying assumption that no one would deliberately do something to undermine his or her reputation. It is reasonable to expect that people act to enhance their reputation and social standing, not hurt it. And while Celia and Bonario stand to gain if the judges believe their allegations, the Avicatori never consider that the conspirators might also stand to gain from their own counter-allegations.

Though diabolical deeds surely stand out in examples from history, to the court Celia and Bonario's allegations are so extreme as to depart from art, history, and experience, which supply no precedent—no model—for this outrage or for the judges' response to it.

After hearing Celia and Bonario's initial off-stage testimony, which conflicts with the judges' collective expectations, the judges attempt to make their story plausible by searching for "example"—precedent from art and history—and find none:<sup>31</sup>

4 <sup>th</sup> Avocatore.	The gentlewoman has ever been held Of unproved name.
3 <sup>rd</sup> Avocatore.	So the young man.
4 <sup>th</sup> Avocatore.	The more unnatural part, that of his father.
2 <sup>nd</sup> Avocatore.	More of the husband.
1 <sup>st</sup> Avocatore.	I know not to give His act a name, it is so monstrous!
4 <sup>th</sup> Avocatore.	But the impostor, he is a thing created T' exceed example.
1 <sup>st</sup> Avocatore.	And all after-times!
2 <sup>nd</sup> Avocatore.	I never heard a true voluptuary Described but him.

(4.5.3-10).

Recursively, the lack of precedent will in turn fuel the judges' expectations in future cases—"all after-times."<sup>32</sup>

Just as Celia and Bonario's allegations lack probability because they are so contrary to expectation, so is their performance after the plotters have launched their counter-attack. The judges expect people who are falsely accused to act a certain way, to defend themselves and their good names. Innocent people defend themselves by passionately denying the accusations, bolstering their testimony or their credit with witnesses, and accusing their accusers, because it is in their self-interest to beat the charges and clear their names. Guilty

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<sup>31</sup> Kernan 150, n. 9.

<sup>32</sup> Kernan 150, n. 9.



people cannot hide their guilt; it will be revealed in their facial expressions, voice, gestures, bad reputations, or confessions. But here, the villains perform the part of innocent victims, vociferously attacking Celia and Bonario and vigorously supporting their mutual stories, while the innocents—Celia and Bonario—act like guilty people. Celia declines to contradict her husband, and her reticence signals shame and guilt rather than excessive modesty.

Everything she does is read as signaling guilt: her exclamation “I would I could forget I were a creature” as Voltore is about to produce his proofs; her fainting, which affords Corvino and Voltore the opportunity to claim she is feigning—giving a false performance; her offering of her conscience as her only evidence to support her accusations; her subsequent request for mercy for her husband. Bonario too similarly refuses to contradict his father in court, instead choosing to “sit down, / And rather wish my innocence should suffer, / Than I resist the authority of a father” (4.5. 112-114). Avocatore 2 exclaims, “This is strange!” because to the judges, it makes no sense for an innocent party to prefer to risk punishment than defend himself. To these judges, Celia’s excessive—and ridiculous—submissiveness to her husband, and Bonario’s similarly excessive deference to his father in court, provide especially damning evidence of the falseness of their accusations.

The judges also are misled by their expectations concerning the self-interest of the parties. It is self-interest that both underlies the judges’ assumptions that a husband and a father would not tarnish their own reputations, and undoes the conspiracy before the judges’ eyes. But the conspirators *were* acting in their own interests when Corvino prostituted Celia and Corbaccio disinherited Bonario. And in fact, in the end it is Volpone’s decision to act *against* his own self-interest and to expose the plot that rectifies the judges’ errors.

While the judges misread Celia and Bonario's performances because they are not what judges expect, they are gulled by the most blatantly false performances of all—Volpone's role as an invalid brought to court on a stretcher, and Voltore's spasmodic expulsion of a demon on the courtroom floor. In a sense, the judges get gulled because they are capable of seeing only what they expect to see. When they witness an event that they could not foresee and which has no precedent, they can only conclude that supernatural forces are at work. Celia and Bonario must have been born monsters; this is the only plausible explanation for the incongruity between their angelic exteriors and golden reputations, and the filthy deeds they commit:

2<sup>nd</sup> Avocatore. 'Tis pity two such prodigies should live.

1<sup>st</sup> Avocatore. Let the old gentleman be returned with care.  
I'm sorry our credulity wronged him.

4<sup>th</sup> Avocatore. These are two creatures!

3<sup>rd</sup> Avocatore. I have an earthquake in me!

2<sup>nd</sup> Avocatore. Their shame, even in their cradles, fled their faces.

4<sup>th</sup> Avocatore. You've done a worthy service to the state, sir,  
In their discovery.

(4.6.55-60)

Even after the decidedly human truth is revealed, the judges, including the relatively rational Avocatore 1, make fools of themselves by continuing to cast the whole affair as a kind of supernatural phenomenon. Whereas earlier, a demon was responsible for the lawyer's written confession, and monstrous birth responsible for the depravity of Celia and Bonario, now heaven is responsible for the conspirators' overreaching and the subsequent revelation of truth:

1<sup>st</sup> Avocatore. The knot is now undone by miracle!

2<sup>nd</sup> Avocatore. Nothing can be more clear.

3<sup>rd</sup> Avocatore. Or can more prove  
These innocent [Celia and Bonario].  
(5.12.95-98)

Nothing can be more clear? This Avocatore must be more confused than ever, for it is no miracle that undoes the knot, but avarice on the part of Mosca and pride on the part of Volpone. When nothing in experience or learning provides a model for understanding the inexplicable, the judges turn mystics. Ironically, the process of reasoning by analogy, of relying on expectation and precedent, leads these judges' to the most unlikely, unexpected, and unprecedented conclusion of all.

In contrast to the expectation and precedent underlying the judges' decisions is the certainty of their conclusions. Having received the performances and interpreted them in accord with their *a priori* expectations, the judges will be hard-pressed to entertain doubts, despite the doubts they retained initially after hearing Celia and Bonario's testimony. They were able to doubt that a husband would prostitute his wife, that a father would disinherit his legitimate son, and that a *magnifico* would feign a lingering and debilitating illness. Now, however, after direct evidence of Celia and Bonario's adultery and their dishonest characters, and Voltore's slippery slope argument that no one's reputations including the judges' will be safe if these slanderers are not silenced, the judges are *certain* that they have convicted the real wrongdoers. As Francis Bacon urged in another context,<sup>33</sup> they began with doubts and ended with certainties, but contrary to Bacon's perspective, the process buries rather than exposes truth. Once their minds are made up, the judges become ridiculously resolute,

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<sup>33</sup> Francis Bacon, "The Advancement of Learning," Francis Bacon, Ed. Brian Vickers (Oxford: Oxford UP, 1996) 147.

proving themselves so unwilling to entertain doubts that they prefer to believe the most unnatural and monstrous “fact” of all—that Voltore is possessed by a demon that compelled him to write lies and which flees before their very eyes.

Thus, Jonson exposes the mechanism—the probabilistic reasoning—inherent in the trier of fact’s assessment of witness credibility. Contrary to the claims of legal theorists such as Coke and Bacon, in early modern England the question as to when testimony warrants belief was wrapped up in varieties of probability, though they were not articulated or theorized as such until later in the century. Then, expectation in particular would be singled out and would be seen as involving reasonableness. The notion that reasonableness could be quantified into a “calculus of good sense” as Daston describes it could not have occurred earlier because expectation was based on analogy, not frequency of occurrence. It seems to have been a common practice, used to make daily judgments which involve finding an equilibrium between the particular circumstances of a given situation and commonplace understandings, as well as to determine witness credibility.

#### 4. “As we expect for happy men”: Jonson’s Normative Poetics

However integral expectation was to Volpone, it was equally if not more fundamental to Jonson’s non-dramatic poetry, and more vexed. For Jonson, the status of expectation is important to his poetry yet also complex and shifting, and problematic in its status and accessibility. Expectation can mediate between nature and custom but it also can be vulgar and misguided. Jonson would ground expectation in rationality and natural law, but he also knows that natural law must be adapted to custom. Therefore, he attempts to stabilize

expectation within the consent of the learned and the consent of the good. The learned and good are not synonymous with the aristocracy, though, for Jonson criticizes the aristocracy for its excesses, its frivolity, and its narcissistic patronage which induces poets to praise the elite as they are rather instruct them as to what they ought to be. But in this pre-aleatory (to borrow Ian Hacking's term) conceptual space as well, expectation and probability, as consisting of degrees of belief, can be transgressed or manipulated to provoke reassessment or explication of assumptions, commonplaces, beliefs, and the values that lie beneath them.

Jonson placed himself within the classical tradition that held that a poet's duty was to provide his audience with instruction about life and art. In the prologue to Volpone Jonson specifies the normative purpose of his poetry: "To mix profit, with your pleasure," while avoiding the charge of "railing" and, with regard to his plays, avoiding the criticism that he took too long to write them. The concept of probability is built into the normative purpose, for norms are what a society expects and presupposes to be the measures of a happy—in Jonson's formulation, a good and blessed—life, one in which pleasure is reconciled to virtue (and perhaps, virtue is reconciled to pleasure?).

Norms corroborate or codify what a particular society holds dear. Therefore, the work of the normative poet, even in the "office of a comic poet" is quite serious, as Jonson says in the dedicatory epistle which accompanies Volpone: "to imitate justice, and instruct to life, as well as purity of language, or stir up gentle affections" (ll. 115-116). But poetry and the poets who fashion it cannot achieve a normative purpose if poet and poetry lack social standing. Hence, the reputation of poetry and the ethos and reputation of poets are matters of central concern to Jonson. He defends the reputation of poetry itself in the dedicatory epistle:

[T]he too much license of poetasters in this time hath much deformed  
their mistress, that, every day, their manifold and manifest ignorance doth stick

unnatural reproaches upon her; but for their petulancy it were an act of the greater injustice either to let the learned suffer, or so divine a skill (which indeed should not be attempted with unclean hands) to fall under the least contempt.

(ll. 12-18)

And while Jonson's final plea on behalf of poetry is tied to his plea for continued patronage, he most likely with sincerity desires to:

raise the despised head of poetry again, and stripping her out of those rotten and base rags wherewith the times have adulterated her form, restore her to her primitive habit, feature, and majesty, and render her worthy to be embraced and kissed of all the great and master-spirits of our world.

(ll. 122-127)

Poesy as practiced by unworthy men must be repaired, and the place to start is with the poet himself. The man cannot produce poetry worthy of the name without first striving to achieve an ideal virtue, by which his art and self will function as examples for society:

[I]f men will impartially, and not asquint, look toward the offices and function of a poet, they will easily conclude to themselves the impossibility of any man's being the good poet without first being a good man. He that is said to be able to inform young men to all good disciplines, inflame grown men to all great virtues, keep old men in their best and supreme state, or, as they decline to childhood, recover them to their first strength; that comes forth the interpreter and arbiter of nature, a teacher of things divine no less than human, a master in manners; and can alone, or with a few, effect the business of mankind . . .

(ll. 19-28)

The reputations of serious poets such as Jonson, and of poetry itself, have suffered from the patronage system, which robs poets of the freedom to instruct the aristocracy and correct their bad behaviors:

I cannot but be serious in a cause of this nature, wherein my fame and the reputations of divers honest and learned are the question; when a name so full of authority [that of poet], antiquity, and all great mark, is, through their insolence, become the lowest scorn of the age; and those men subject to the petulancy of every vernaculous orator that were wont to be the care of kings and happiest monarchs.

(ll. 89-95).

This denigration of the office of poet has spurred Jonson to indignation and, more importantly, to disassociate himself and his work from them; they have driven him to “stand off from them” in all his actions. This severance can be seen in Volpone, in which Jonson has labored to restore or “reduce not only the ancient forms, but manners of the scene: the easiness, the propriety, the innocence, and last, the doctrine, which is the principal end of poesie, to inform men in the best reason of living” (ll. 100-103). He boasts that Volpone is no mere copy of other playwrights’ work and involves none of the expected conventions which were fashionable in comedy at the moment, such as stock cowards (“quaking custards”) or gullible fools. Rather than steal jests “from each table,” Jonson has made “jest, to fit his fable”. He has achieved the norm of decorum:

And so presents quick comedy refined,  
As best critics have designed;  
The laws of time, place, persons he observeth,  
From no needful rule he swerveth.  
(ll.29-32)

What is more, he presents his unified and hence verisimilar or “probable” comedy without any animosity or bitterness, thus promising that his language will suit his comic tone and purpose.

Jonson goes further in the preface to The Alchemist, complaining not only about the unnatural excesses of the popular playwrights but also the shortcomings in his audience’s powers of discernment.<sup>34</sup> He seems frustrated by the conflict between the norms he wishes to instill and the expectations of theatergoers. In this “age in poetry,” readers and auditors are more likely to be tricked or taken in, “especially in plays,” where “the concupiscence of jigs and antics so reigneth, as to run away from nature and be afraid of her is the only point of art

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<sup>34</sup> Ben Jonson, “The Alchemist,” Drama of the English Renaissance: The Stuart Period, Ed. Russell A. Fraser and Norman Rabkin (New York: MacMillan, 1976) 144-190.

that tickles the spectators.” Poets are to blame for having grown “so obstinate contemnners” of art and “presumers on their own naturals” or natural ability that they deride the degree of effort and labor that poets such as Jonson invest in their art, and go so far as to mock the vestiges of classicism in Jonson’s work when they do not understand them. Playgoers are also to blame for rewarding these ignoramuses, who ironically are “esteemed the more learned and sufficient” by the multitude and their depraved “vice of judgment” which leads them to “favor common errors.” The public’s enjoyment of the indecorum in his competitors’ plays rankles Jonson:

For they commend writers as they do fencers or wrestlers; who, if they come in robustiously and put for it with a great deal of violence, are received for the braver fellows; when many times their own rudeness is the cause of their disgrace, and a little touch of their adversary gives all that boisterous force the foil.<sup>35</sup>

Jonson warns his readers:

[T]here is a great difference between those that (to gain the opinion of copy) utter all they can, however unfitly, and those that use election and a mean. For it is only the disease of the unskillful to think rude things greater than polished, or scattered more numerous than composed.<sup>36</sup>

So it is not the faculty of judgment itself that Jonson criticizes, but the exercise of that faculty by uninformed or unschooled individuals.

Similarly, in the prologue to The Alchemist Jonson defends for his “judging spectators” his normative purpose, which is not “to grieve,” but to “better” human beings. The times he lives in make this task excessively difficult, for “the age” Jonson lives in “doth endure / The vices that she breeds, above their cure.”<sup>37</sup> Nonetheless, “when the wholesome

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<sup>35</sup> 144.

<sup>36</sup> 144.

<sup>37</sup> ll. 13-14.



remedies are sweet, / And, in their working, gain and profit meet,” then the playwright  
“hopes to find no spirit so much diseased, / But will with such fair correctives be pleased.”<sup>38</sup>

Jonson expresses his own expectations that his play’s offer of “gain and profit” will be  
welcomed and understood by the playgoing public. Jonson “doth not fear who can apply”  
because:

If there be any that will sit so nigh  
Unto the stream, to look what it doth run,  
They shall find things, they’d think, or wish, were done;  
They are so natural follies, but so shown,  
As even the doers may see, and yet not own.  
(ll. 20-24)

Virtues are apparent to all, but the vices of particular people may not be perceived by those  
people because of the way Jonson disguises those individuals in his play. Thus, Jonson aims  
to show vices to all spectators while protecting himself from a charge of slander. No  
spectator will be able to identify any actual persons, only the vices, which the poet is  
determined to correct through instruction and delight. Jonson conveys that he could not  
expect to achieve his normative ends by shaming any individual or tarnishing that person’s  
reputation; success will be possible only if he abstracts those vices.

In the Induction to Bartholomew Fair, Jonson through his scrivener offers a mock  
contract between the author and spectators, in which Jonson seeks to restrain and educate his  
audience’s expectations.<sup>39</sup> The author will provide a play “sufficient” and “merry, and as full  
of noise as sport, made to delight all, and to offend none; provided they have the wit to think  
well of themselves.” In return, Jonson entreats his audience to be mindful of the requirements

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<sup>38</sup> ll. 15-16; 17-18.

<sup>39</sup> Ben Jonson, “Bartholomew Fair,” Drama of the English Renaissance: The Stuart Period, Ed.  
Russell A. Fraser and Norman Rabkin (New York: MacMillan, 1976) 193-239.

of decorum: Do not expect types of entertainment that you would not see at an actual fair, do not expect to see entertainments from fairs of long ago. Do not expect features popular in other—and other types—of plays, such as a Caliban. Do exercise your own judgment, rather than taking your cue from and following the lead of other spectators, and do remain fixed in your judgment in weeks to come instead of allowing your judgment to be altered by the opinions of others who “sit on the bench” as judges of plays, even if they “indict and arraign plays daily.”<sup>40</sup> But Jonson also mocks the kind of opinion fixed in ignorance and unaltered by new insights, as those spectators who decided years ago that The Spanish Tragedy or Titus Andronicus were the best plays ever. Judgment should not be so fickle as to alter with every challenge nor with a desire to fit in, nor should it be so entrenched as to withstand thoughtful modification. Jonson will not indecorously “make nature afraid in his plays, like those that beget *Tales*, *Tempests*, and such like drolleries, to mix his head with other men’s heels, let the concupiscence of jigs and dances reign as strong as it will amongst you”.<sup>41</sup> Only fitting actions and entertainments will appear in his play; hence, “if the puppets will please anybody, they shall be entreated to come in.”<sup>42</sup> And, he jokes, though his “Fair” is not actually taking place in Smithfield, like its model, nonetheless he has “observed a special decorum,” for the theater is as “dirty” and “stinking” as the fairgrounds at Smithfield. Still, the author trusts that his spectators will appreciate the need for their imagination, as with all plays; if not, then Jonson will distrust their ability to judge and discern the real from the imagined in their lives in general, and they will be subject to gulling, for if they will not

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<sup>40</sup> ll. 112-113.

<sup>41</sup> ll. 137-142.

<sup>42</sup> ll. 142-143.

appreciate that a baby or a hobbyhorse appearing onstage are not the real thing, then they can be tricked into buying what seem to be real babies or horses in other situations, and will sustain either monetary loss or loss of face through being made laughingstocks.

Thus, the prefatory materials to his plays convey Jonson's normative purpose as well as his notions on the proper functioning of reputation and expectation in human judgment. In "Timber," too, Jonson's main interest is the faculty of judgment, and he shows his judgment at work as he chooses among authors and passages and discriminates among types of conduct and styles.<sup>43</sup> What is needed to improve society, Jonson says, is the wise exercise of judgment, neither slavishly adopting another's point of view (not even Aristotle's) nor unthinkingly remaining steadfast in one's opinion:

For to many things a man should owe but a temporary belief, and a suspension of his own judgment, not an absolute resignation of himself, or a perpetual cavity. . . . We must not go about like men anguished, and perplexed, for vicious affectation of praise: but calmly study the separation of opinions, find the errors have intervened, awake antiquity, call former times into question; but make no parties with the present, nor follow any fierce undertakers, mingle no matter of doubtful credit, with the simplicity of truth, but gently stir the mold about the root of the question, and avoid all digladiations, facility of credit, or superstitious simplicity; seek the consonancy, and concatenation of truth; stoop only to point of necessity, and what leads to convenience.<sup>44</sup>

Judgment, the virtue of the poet, and the purpose of poetry are intertwined:

Then make exact animadversion where style hath degenerated, where flourished, and thrived in choiceness of phrase, round and clean composition of sentence, sweet falling of the clause, varying an illustration by tropes and figures, weight of matter, worth of subject, soundness of argument, life of invention, and depth of judgment.<sup>45</sup>

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<sup>43</sup> Thomas Greene, The Vulnerable Text: Essays in Renaissance Literature (Columbia: Columbia UP, 1986) 201-202.

<sup>44</sup> Ben Jonson, "Timber, or Discoveries," Ben Jonson and the Cavalier Poets, Ed. Hugh Maclean (New York: W.W. Norton & Co., 1974) 412.

<sup>45</sup> "Timber" 412-413.

The normative purposes of both poetry and the poet are further cemented in the nature of language, which transparently reveals the speaker's or writer's mind, "Language most shows a man: Speak that I may see thee. It springs out of the most retired, and inmost parts of us, and is the image of the parent of it, the mind."<sup>46</sup>

Interestingly, this connection between thought, mind, language, and virtue echoes similar sentiments expressed by Jonson's friend, the lawyer John Hoskins. Indeed, much of "Timber" restates passages from Hoskin's popular Directions for Speech and Style. In his dedicatory epistle Hoskins opines:

The shame of speaking unskilfully were small if the tongue were only disgraced by it. But as the image of the king in a seal of wax, ill represented, is not so much a blemish to the wax or the signet that sealeth it as to the king whom it representeth, so disordered speech is not so much injury to the lips which give it forth or the thoughts which put it forth as to the right proportion and coherence of things in themselves, so wrongfully expressed. Yet cannot his mind be thought in tune whose words do jar, nor his reason in frame whose sentences are preposterous; nor his fancy clear and perfect whose utterance breaks itself into fragments and uncertainties. Were it an honor to a prince to have the majesty of his embassy spoiled by a careless ambassador? And is it not as great an indignity that an excellent conceit and capacity by the indiligence of an idle tongue should be defaced? Careless speech doth not only discredit the personage of his speaker but it doth discredit the opinion of his reason and judgment, it discrediteth the truth, force, and uniformity of the matter and substance. If it be so, then, in words which fly and escape censure, and where one good phrase begs pardon for many incongruities and faults, how shall he be thought wise whose penning is thin and shallow? How shall you look for wit from him whose leisure and whose head, assisted with the examination of his eyes, could yield you no life and sharpness in his writing?<sup>47</sup>

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<sup>46</sup> "Timber" 411.

<sup>47</sup> John Hoskins, Directions for Speech and Style, ed. Hoyt Hudson (Princeton: Princeton UP, 1935) 2.

Correspondingly, Jonson presumes that the language of the learned is imbued with the best judgment; it is the most decorous, for the learned have the knowledge and wit to adapt their discourse to different social situations. He therefore bases his normative poetics on the language of the learned which itself is based on custom: the consent of the learned as to what is good and blessed, pleasurable and virtuous, and what should be imitated. Examples of the learned appear in “To Penshurst,” where the lord and lady exhibit “The mysteries of manners, arms and arts” and preside over a microcosm of exemplary hospitality, generosity, abundance, and harmony.<sup>48</sup> Another example is provided by William Camden, whom Jonson praises for his erudition, his judgment (“sight”), and for what he does as well as what he says:

What name, what skill, what faith hast thou in things!  
 What sight in searching the most antique springs!  
 What weight and what authority in thy speech!  
 Man scarce can make that doubt, but thou canst teach.<sup>49</sup>

Thus, the practices and customs of the learned provide the norm for lesser contemporaries. All people of lesser degree should emulate the discourse and manners of these elite, and these refinements in judgment may be conveyed through poetry, whose study, as Aristotle claims, ideally “offers to mankind a certain rule, and pattern of living well, and happily; disposing us to all civil rules of society.”<sup>50</sup> Jonson thus builds into his scheme and urges poets to follow the standards, habits, and patterns that create and reinforce expectations in the most educated readers and auditors, and in turn to express those norms in their work

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<sup>48</sup> “To Penshurst,” Ben Jonson and the Cavalier Poets, Ed. Hugh Maclean (New York: W.W. Norton & Co., 1974) 21-23, ll. 98.

<sup>49</sup> “To William Camden,” Ben Jonson and the Cavalier Poets, Ed. Hugh Maclean (New York: W.W. Norton & Co., 1974) 6, ll. 7-10.

<sup>50</sup> “Timber” 414.

and in their personal conduct. But it is also appropriate, Jonson says, to deviate from the expected, under specified conditions. Thus limited in usefulness and constrained in concept, expectation like other varieties of probability cannot be severed from the faculty of judgment.

Jonson believed in the ideal that dramatic (as well as historical) writing could be a means for recovering the lessons of the past,<sup>51</sup> yet his repeated frustration at the playgoing public's failure to "get" what he was doing—attempting to reform "manners and mores"—suggests that Jonson sought greater success through his non-dramatic poetry, a medium perhaps more conducive to the normative poet's goal of instructing and delighting. Jonson's poetic vision of the moral hero attempts to mediate between the ideals of his masques and the satire of vice in his drama. Jonson's normative values in particular were Stoic—natural law, right reason, and virtue formed the moral foundations of good poetry and would connect the wise person to the greater cosmos through adherence to duty, yet the wise could depend only on themselves.<sup>52</sup> Thus, true poetry would not and could not lie.

This high calling implicates the moral center and social reputation of the poet himself.<sup>53</sup> Jonson adopts the classical idea that a good poet understands virtue, but a Jonsonian poet also has a social obligation, and the decorous way he lives his life not only serves as a model for society, but also shows him how to compose his art.<sup>54</sup> The Stoic notion of the centered self assumes that one who has the maximum in self-knowledge will achieve

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<sup>51</sup> Reid Barbour, John Selden: Measures of the Holy Commonwealth in Seventeenth-Century England (Toronto: U Toronto P, 2003) 61.

<sup>52</sup> Barbour 61.

<sup>53</sup> Barbour 66.

<sup>54</sup> The following argument is based on lecture notes from Professor Reid Barbour, English Literature of the Seventeenth Century, fall 1999.

maximum constancy in a world prone to vicissitude. In an unstable world, one can only strive to control one's future by controlling oneself. Jonson offers a different take on the Stoic idea of constancy, arguing that appropriate responses must be made to changing circumstances. He thus implicates the classical notion of prudence.

The poet's virtue, in part, empowers poetry to instruct readers—the power elite as well as more ordinary citizens—in how to live a good life and a blessed life (*vita bona* and *vita beata*), one ruled by moderation, right reason, and the pleasure of being hospitable in moderation and in proportion to the social setting: convivial in a tavern, festive at a fair, magnificent at court, congenial in a country house. In “To Sir Robert Wroth,” Jonson envisions the happy life which is good because it is appropriately comprised of pleasure—enjoyments and comforts—and virtue—the Stoic ideal of living a contemplative life retired from active involvement in the frenzy of ambition, competition, passions. The Wroth of the poem is blessed because he “canst love the country,” regardless of whether his removal from the city and court is “by choice, or date, or both”.<sup>55</sup> He is further “blessed” for living “with un-bought provision” (ll. 14-15). In the pastoral idyll of his estate, Wroth can make his own content, and can strive to remain innocent of the armed conflict, labor for lucre, materialism, and political power of his peers at court and in the city. In the country Wroth's state, both internal and external, is well; Wroth should not desire more or different, but should recognize that, “howsoever we may think things sweet, / [God] always gives what He knows meet, / Which who can use is happy” (ll. 97-99). Decorum itself is a principle derived from God. If Wroth can entreat God to show him how to successfully negotiate or find balance between

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<sup>55</sup> “To Sir Robert Wroth,” Ben Jonson and the Cavalier Poets, Ed. Hugh Maclean (New York: W.W. Norton & Co., 1974). 24-26, ll. 1-2).

two conflicting duties—“To do thy country service, thyself right,” without fearing death or want, then Wroth’s life can exemplify the norm of the good and blessed life.

On stage, Jonson found it difficult to reconcile his normative purpose with the audience’s expectations of entertainment and the wide range in their education, tastes, and judgment. Thus, in a dramatic comedy like Epicoene, Jonson could satirize the centered self; as Greene points out, Morose caricatures the centered self and the practiced judgment and discernment that in part define that self:

My father, in my education, was wont to advise mee, that I should  
always collect, and contayne my mind, not suffering it to flow loosely; that  
I should looke to what things were necessary to the carriage of my life, and  
what not: embracing the one, and eschewing the other. In short that I should  
endeare myself to rest, and avoid turmoile: which now is growne to be another  
nature to me.

(5.258)<sup>56</sup>

But in his poetry, the ideal could be controlled and deployed in service of the poet’s normative purpose. The virtue of the centered self is expressed in the trope of the circle. His emblem of the broken compass and the circle imagery that appears throughout his work signal that he sees his task as a writer as attempting to complete a broken circle or “expose the ugliness of its incompleteness.”<sup>57</sup> Jonson focuses on process, movement, repair, and revision. Like ideal poetry, the ideal life must be revised. To be a good poet and lead a good, blessed life, one must wisely choose what to imitate and prudently use one’s own experience to transform what one is imitating. No model should be swallowed whole nor repudiated altogether. There should be nothing superfluous in one’s life or writing. Decorum is modulated by adaptability, and is focused on the audience’s expectations rather than the

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<sup>56</sup> Greene 204.

<sup>57</sup> Greene 194.



speaker's needs. It must make allowance for spontaneity, necessity, and the need not to give offense, and to avoid obscenity.

If poetic custom were to confirm and direct the expectation of good and rational people, then Jonson would have to strive to recover and redeem poetry from the frivolity, flattery, and dishonesty that came from its association with court culture. In popular perceptions, at James's court pleasure was seldom regulated by virtue. Therefore, Jonson would have to strive to reform court culture. In his Pindaric "Ode to Cary and Morison" Jonson seeks the consent of the learned to the ideals of moral heroism, and to his choice to imitate Pindar, whose odes celebrated the dignity and vitality of athlete-heroes. Jonson imitates the ceremonial purpose of Pindar's odes, which were performed during communal celebrations in temples, halls, and the streets, and invoked moral precepts such as the proper reverence for the gods, the true nature of nobility, and the duties of the hero. Thus, Jonson's Cary and Morison embody the true nature of nobility. They are not athlete-heroes, but moral heroes.

In the "Ode" the poet also adopts the role of priest in order to promulgate both traditional and revised expectations for behavior in early Stuart England.<sup>58</sup> Jonson celebrates and officiates over the customs and rituals of his normative yet dynamic society, but also understands that such customs and values cannot be entrusted to the public at large. Indeed, even the great and good men whom he praises must be directed or held to their heroic virtues by Jonson himself. Though moral norms should come naturally to society through the consent of the learned and good, Jonson believes that the duties and virtues of a social order

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<sup>58</sup> Barbour 78-79.

and good poetry alike must be made, remade, repaired, and praised.<sup>59</sup> Constant vigilance by poet-priests is essential to the renewal and maintenance of the moral society, so much so that one wonders if correcting an immoral society would require any greater effort.

As a “fair example” of virtue and honesty, the two aristocratic friends celebrated in the poem embody “a law” for society at large, but their perfect example of mysterious love is also daunting to their less perfect contemporaries, who probably would reply that such ideals are fictions to be read and admired rather than goals to be achieved.<sup>60</sup> In the “Ode” Jonson advanced normative poetry as far as it could go, sustaining an analogy between the good life and the good poem, which share the qualities of proportion, fullness, and beauty.<sup>61</sup> He defines the ideal of nobility by what nobility is not as well as what it should be. Nobility is not long life, nor busy meddling, nor flattery. Instead, it is “simple love of greatness, and of good; / That knits brave minds, and manners, more than blood.”<sup>62</sup> A good life, like a good poem, should be brief but decorous and proportionate. Thus, he preaches decorum as the ordering principle of nature, art, and the normative life. His principle of decorum largely comprises revisions of the Stoic ideals of submission to natural law, removal from action in order to achieve a state of imperturbability, and the rational centered self guided by reason. Jonson adopts as moral norms the Stoic virtues of “shame, faith, honor, and regard of right,” but modifies the rule of natural law and the removal from the active life, advocating instead

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<sup>59</sup> Barbour 79.

<sup>60</sup> Barbour 79.

<sup>61</sup> Barbour 79.

<sup>62</sup> “To the Immortal Memory and Friendship of that Noble Pair, Sir Lucius Cary and Sir H. Morison,” Ben Jonson and the Cavalier Poets, Ed. Hugh Maclean (New York: W.W. Norton & Co., 1974) 76-79, ll. 105-106.

that life should be measured by deeds done with decorum, and should be patterned and ordered like a poem. But Jonson realized that this rule of decorum, as conceived as well as presented, could not be rigid or harsh or else people would perceive it as being impossible to achieve.<sup>63</sup> Moreover, Jonson recognized that, paradoxically, a rule of behavior must be flexible enough to “accommodate and measure the changeable circumstances of experience.”<sup>64</sup>

In Jonson’s poetry, aristocrats ought to deliver moral and spiritual leadership yet often encourage parasitic, willful, and violent behaviors in their hangers-on.<sup>65</sup> Experience thus complicated Jonson’s ideal that the good poet is the best adviser and rule for others.<sup>66</sup> Thus, panegyric poets must avoid being made into parasites by the aristocratic patronage system.<sup>67</sup> Jonson prefaces many of his praise poems with rules on how not to praise dishonestly, how not to flatter a patron by showing him as he wishes to be instead of telling him what he should be. Similarly, in his exaltation of Roman ideals, Jonson needed to avoid the pitfalls of Roman self-aggrandizement and parasitism in order to emulate the civility of Rome and incorporate its essential virtues into his normative poetics as a model for a pious British society.<sup>68</sup>

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<sup>63</sup> Barbour 79.

<sup>64</sup> Barbour 80.

<sup>65</sup> Barbour 100.

<sup>66</sup> Barbour 80.

<sup>67</sup> Barbour 93.

<sup>68</sup> Barbour 96.

Jonson in his Pindaric ode sought to consolidate the truths that his society expected would make good, happy, and pious aristocrats, the leaders of British society.<sup>69</sup> In his ode Jonson “imagines that normative poetry, natural law, musical proportion, and the specific social arrangement of the English aristocracy fuse (if only rarely) in one heroic embodiment”.<sup>70</sup> “Jonson conceives his poetic imitation as the careful placement of verbal stones in a wall celebrating a rational and dutiful piety,” and seeks in the verbal monuments of classical Rome the formula of “beautiful artistry that might buttress the expected truths of a society” against the destructive forces of time.<sup>71</sup>

For Jonson, normative poetry can and must be reformed, without diminishing the power it derives from expectation and familiarity.<sup>72</sup> Aristotle understood expectation to be a dynamic force capable of being “incited to a frenzy by musical poetry or restrained in its passions by law,”<sup>73</sup> and Jonson might have understood it this way as well. His friend John Selden certainly did; in his commentaries on the Arundel marbles, Selden “acknowledges how easily ancient formulae of measuring, stabilizing, and representing expectations can be distorted, especially in the act of earnest imitation,” and especially when the measure of social expectation is based on nature.<sup>74</sup>

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<sup>69</sup> Barbour 101.

<sup>70</sup> Barbour 102.

<sup>71</sup> Barbour 102.

<sup>72</sup> Barbour 102.

<sup>73</sup> Barbour 107.

<sup>74</sup> Barbour 109.

Jonson's Cary and Morison ode epitomized the extent to which normative poetics sought to engender its virtues and duties in heroic men and women.<sup>75</sup> The centered self is not enough; one must act and fulfill duties to the social order, as Morison did:

All offices were done  
By him, so ample, full, and round,  
In weight, in measure, number, sound,  
As, though his age imperfect might appear,  
His life was of humanity the sphere.  
(ll. 48-52).

But Jonson makes it impossible to know when the self is centered, because centering depends on being natural, but we do not and cannot know what is natural. For the aristocracy, nature is presupposed by rank or birthright, but it also takes art and revision to become a centered self. Only when noble birth is educated by honest arts will a state of nature be achieved. By suggesting that being born noble is not the same as being noble, Jonson transgresses a social norm. Further, in Jonson's scheme, the centered self functions by way of correspondences between the center of the circle and its circumference; thus, the norm operates at both ideal and practical levels. But ironically, the pattern offered at the end of the ode—the created, revised norm of ideal friendship—is too singular to be copied. Jonson tries to offer a lucid explanation of the norm of nobility, subordinating noble birth to the noble mind which in turn spurs noble action.

In the Pindaric ode Jonson celebrates the aristocratic Cary and Morison while wrestling with the problem of how distantly the heroes of a religious society should reside from the restrictions on the rest of humanity, perhaps as far away as Castor and Pollux among the stars.<sup>76</sup> So too Jonson urges Cary to live on in embodiment of the dead Morison,

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<sup>75</sup> Barbour 115.

<sup>76</sup> Barbour 116.

who remains a distant ideal glimmer; so too Jonson idealizes Sidney's birthplace, Penshurst, yet satirizes the many members of the aristocracy whose degeneracy and competition are all too human.<sup>77</sup>

Jonson's normative poetics are committed to the basic tenets of Sidney's Apology, that poetry is superior to philosophy and history in teaching humans what they should do in life.<sup>78</sup> The arbitration of norms in a society depends on human artifice, on the devices that channel human action such as positive law, and the powerful forces that move the human spirit such as those unleashed through poetry, music, or divine inspiration. In the "Ode" Jonson praises not largesse or grandness but decorum and finesse, in an attempt to mediate between greatness and goodness. Decorum governs the changes in language and finds a middle ground in all periods. Custom both creates and is derived from norms.

Contemporary critics charged that, just as Jonson failed to live up to his own ideas, violating rules against physical excess (he was fat and drank a lot), irrational fetishes, and mental quirks, his poetry violated social decorum by exaggerating social mobility and the achievement of status by artifice rather than by education or birthright, and by setting up a counterculture which celebrated the lone Stoic who believes in bold action based on rationalism, a move away from the normative church of England to Catholicism. Furthermore, Jonson gave space to countercultures in his plays, which tend toward topical satire and thus challenge the social norms and customs established by the aristocracy, the church, and king and court. His plays also tended to indulge in topical satire rather than the modeling of timeless examples of moral heroes such as the ones adulated in the ode. Jonson

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<sup>77</sup> Barbour 116.

<sup>78</sup> Barbour 117.

defined himself as a normative poet “in opposition to the conventional understanding of satire, stage plays, and patronage”;<sup>79</sup> in so many ways, he contradicted expectation while attempting to reform it.

## 5. Conclusion

Jonson makes the trial scenes the most important objects of mimesis in the play, incorporating swearing, reputation, and expectations concerning the performance of guilt and innocence. When Jonson wrote Volpone, the quality of the assessments juries made must have been a prevalent issue, for one year later James was compelled to make the following Proclamation:

So in the triall of any of the Commons . . . there is no person whatsoever of that body by rule of Law exempted, in respect of his qualitie and degree onely, from the service upon Juries: whereas on the contrary part the Law hath limited, that none serve, except he have a certaine proportion of Freehold. And yet notwithstanding, Time and abuse have so embased the estimation of this service, and altered the use thereof, as Sheriffs, Undersheriffes, Bailiffes, and other inferiour Ministers, do not onely spare Gentlemen of qualitie, in a kind of awe, and unwillingnesse to offend hem, but do likewise for lucre, gaine and reward, forbear to returne many of the ablest and fittest persons; *So that the service oftentimes resteth upon such as are either simple and ignorant, and almost at a gaze in any cause of difficultie, or else upon those that are so accustomed and inured to passe and serve upon Juries, as they have almost lost that tendernes of Conscience*, which in such cases is to bee wished, and make the service, as it were an occupation and practice.<sup>80</sup> (my italics)

I can think of no better way to describe the Avocatori than as “almost at a gaze in any cause of difficultie.” We witness their frustrated attempt to unknot the perplexing action through

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<sup>79</sup> Richard Helgerson, Self-Crowned Laureates: Spenser, Jonson, Milton and the Literary System (Berkeley: UC P, 1983) 182.

<sup>80</sup> King James I, A Proclamation for Jurors, October 5, 1607, Early English Books Online, ProQuest Company, February 4, 2003, 169.

rational expectations shaped in part by precedent, yet likeliness has completely turned into unlikeliness, and vice versa.

Conceptual as well as practical distinctions between trials and plays become softened by customs such as paying to attend a sensational trial. In the Epilogue, Jonson makes explicit this overlap between courtroom and stage, jurors and playgoers. In his closing argument to his arbiters, Volpone asks to be spared punishment for his “crime” (“fact”)—his performance in the play:

Now, though the fox be punished by the laws,  
He yet doth hope there is no suff<sup>r</sup>ring due  
For any fact which he hath done ‘gainst you.  
If there be, censure him; here he doubtful stands.  
If not fare jovially, and clap your hands.  
(5.12.153-156)

In aligning the similarities between judging performances on stage and in court, Jonson “asks us as judicious spectators to look at a collection of fools—who turn out to be ourselves.”<sup>81</sup>

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<sup>81</sup> Leggatt 226.



## Chapter Four

### “Those Brittle Evidences of Law:”<sup>1</sup> Perspective, Performativity, and Induction in The White Devil

The Venice which Volpone and his cohorts inhabit differs from Vittoria’s Rome only because it is less corrupt. Both worlds are riddled with uncertainty, false appearances, and moral ambivalence, so that almost nothing can be known for sure. The Italian settings, though, merely showcase the theatricality of everyday English life; indeed, this theatricality is accentuated by the self-conscious performances in Volpone and The White Devil, as the theater audience watches an actor on stage performing his role while simultaneously his character plays to one or two onstage auditors as well.

Interpreting performances, whether on stage or off, demands the constant practice of induction—reading people by reasoning from signs, from surface to interior, from behavior to motivation, from seeming to being. Jury trials compress this practice, for the jury’s process of decision making supposedly involves inductive and interpretive skills so fundamental to everyday social interactions that codified rules and specialized legal expertise are not required. “A guilty secret is ‘discovered’; a previously hidden criminal fact is brought into

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<sup>1</sup> John Webster, The White Devil, Ed. Christina Luckyj (New York: Norton & Co., 1996) 3.2.90. Because in Albuquerque I lack access to the Works of John Webster edited by Gunby et al., I am using the New Mermaids edition, Christina Luckyj, ed. (New York: Norton & Co., 1996). I am, however, able to use some notes on critical commentary I took from Gunby’s edition while I was in Chapel Hill.

view; hermeneutic uncertainty is followed by resolution”,<sup>2</sup> and the mystery is solved not by application of esoteric knowledge, but by the everyday process of induction. But the social judgments that jurors make daily in their own lives, and that theoretically equip them for their role in the trial, are notoriously subject to error. Further, jurors not unlike playgoers carry expectations about the ways that guilty and innocent people should—and do—act. Thus, the trial as a practice that makes and uses knowledge “exacerbates a sense of the inconclusive character of circumstantial evidence, and by its pressure toward a verdict, forces a certain repression of the hermeneutic difficulties involved in obtaining ‘conviction’”.<sup>3</sup>

In The White Devil, John Webster explores the performativity of the jury trial. Vittoria’s trial lacks a formal jury; instead, the ambassadors constitute an informal jury and the theater auditors a pseudo-jury. Indeed, the presence of a formal jury would have deprived the theater audience of this perspective, of watching Vittoria’s testimony as a jury. Compelling the theater audience to receive “testimony” and make a decision about it “confounds knowledge with knowledge” (as Flamineo says), for Vittoria’s language and demeanor send ambiguous signals about guilt, subject to opposing interpretations, while the audience *knows* she is guilty of adultery. Inductive reasoning which supposedly bolsters jury verdicts is shown to be complicated by performativity, exposing the probability underlying law’s epistemology of near-certainty.

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<sup>2</sup> Katharine Eisaman Maus, Inwardness and Theater in the English Renaissance (Chicago: Chicago UP, 1995) 107.

<sup>3</sup> Maus 117.

## 1. Webster's Legal Briefs: Representing Law in The White Devil

We cannot know for sure if Webster is the “John Webster” who registered as a law student at the Middle Temple, but the plays which derive their plots, settings, conflicts, and imagery from the law courts and the legal profession provide evidence that Webster was trained in law and acquainted with practitioners of law. The White Devil alone is sprinkled with legal metaphors such as “opening a case hard,” “thinking on the motion,” offering “counsel without fee,” and images such as Isabella’s swearing never to sleep again with her husband “As if in thronged court a thousand ears / Had heard it, and a thousand lawyers’ hands / Sealed to the separation” (2.1.256-258). Certainly references to corrupt judges (Francisco presumes that one will blackmail the rogues listed in Monticelso’s black book) and villainous lawyers (one appears to Flamineo as a devil; others are also named in Monticelso’s blacklist) were conventional, but Flamineo’s dig at the inefficacy of oaths in court, made while he pretends he has been shot by Vittoria and Zanche,<sup>4</sup> is so incongruous with the scene that it seems to be a comic mockery of the convention of law-bashing itself. Like a lawyer trained to argue at least two sides of every issue, Webster criticizes lawyers yet also mocks those who criticize lawyers.

As in Volpone, the participation of court officials including a chancellor and registrar suggests likeness to an actual court of law. More profoundly, Webster’s portrait of the courtroom takes its structure from both secular and ecclesiastical English courts. In the Crown’s criminal courts, the vast majority of cases—all cases except those involving

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<sup>4</sup> “Will you be perjured? What a religious oath was Styx that the gods never durst swear by and violate? O that we had such an oath to minister, and to be so well kept in our courts of justice” (5.6.124-127).

aristocratic defendants or highly publicized, notorious crimes—proceeded without a prosecuting attorney, and defense counsel were never allowed. Further, defendants were not permitted to see a copy of the indictment beforehand or obtain a list of the state’s witnesses, and although judges might (or might not) allow them to call witnesses on their own behalf, such witnesses were not allowed to testify under oath. Customarily, judges often acted as de facto prosecutors, assisting the accuser in questioning the accused and hinting quite openly to the jury to find the defendant guilty. In the ecclesiastical courts too the judge could choose to proceed by “inquisition,” a method of trial in which he himself acted as the accuser. Possibly, in the ecclesiastical courts the judge would proceed on his own personal knowledge or on common fame, but certainly judges in the Crown courts were unrestricted in using common report as proof against the defendant. In the ecclesiastical courts, though, the judge proceeded without a jury, and he had the power to imprison a defendant without delivering a formal verdict.<sup>5</sup> And since it was the province of the ecclesiastical courts in England to deal with such offences as adultery, procuration, incontinency, and drunkenness, it is likely that absent the suspicion of murder, Vittoria’s trial would have taken place in such a court because the actual subject of the examination is immorality.<sup>6</sup>

Because there was little they could do for themselves, criminal defendants were thrown almost entirely on the mercy of the presiding judge, and the dramatic power of such a situation seems not to have been lost on Webster. Essentially, “defendants had no weapons but their tongues, and a good deal depended on their ability to keep their wits about them and to summon up any knowledge they might have of legal procedure (which accounts for the

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<sup>5</sup> Dena Goldberg, Between Worlds: A Study of the Plays of John Webster (Waterloo, Canada: Wilfrid Laurier U P, 1987) 53-54.

<sup>6</sup> Goldberg 54.

considerable knowledge of law possessed by the general population of the time).”<sup>7</sup>

Conceivably, defendants who lacked witnesses or at least credible witnesses might have no resort but to object to the proceedings, a tactic which was hardly likely to win the sympathy of the bench or the jurors but which might at least gain them support from the gallery. Since it was desirable for the Crown “to gain approval of its judicial acts, particularly in cases involving public figures,” a defendant’s ability “to play to the gallery” might prove an effective weapon, and in some cases, such as the trials of Essex and Southampton, the defendants apparently were concerned with producing an impact on the audience.<sup>8</sup>

Webster captures the essence of this disparity in power. Like Essex, Vittoria may be seen as casting herself in “the role of innocence betrayed,”<sup>9</sup> but the better view is that she portrays herself as the victim of unfair suspicions and accusations lacking proof—a far different stance than one which projects innocence. In order to put on this show, she must eliminate the insipid prosecuting lawyer and his Latin legal jargon,<sup>10</sup> which can only impede communication between herself and her audiences—the onstage audience of ambassadors, and the theater audience. With the ejection of the lawyer/prosecutor, Monticelso becomes the

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<sup>7</sup> Goldberg 44-45.

<sup>8</sup> Goldberg 45.

<sup>9</sup> Goldberg 45.

<sup>10</sup> Goldberg points out that the dialogue involving Vittoria and the lawyer echoes an episode in the Raleigh trial, when Sir Walter like interrupts a torrent of obscure rhetoric by Coke with a few effectively simple words: “I pray you to whom or to what end speak you all this? I do not understand what a word of this means, except it be to tell me news.” Raleigh interrupts because, by making fun of the rhetoric, he hopes to please the crowd, and because he wants to make sure that the real issues will not be obfuscated in the course of the trial by ‘fustian’ (bombast). Goldberg asserts that Vittoria’s strategy is identical (55).

prosecutor as well as the judge, and he is a more formidable opponent and symbol of the combined power of church and state.

Like Jonson, Webster satirizes the judicial system's epistemology and warrants by mocking reputation and precedent. As in *Volpone*, reputation<sup>11</sup> functions as an underlying hermeneutic throughout, but here it interacts with its volatile cousin, rumor. We might expect rumor to prove an unreliable and treacherous influence on reputation, capable of destroying a good reputation with falsehoods, but in this play rumors for the most part are true. Thus, when Monticelso tells Camillo, "'tis given out / You are a cuckold" (2.1.329-330), it is a fact that Camillo has been cuckolded by Vittoria. When Francisco tells Monticelso, "It is reported you possess a book / Wherein you have quoted, by intelligence, / The names of all notorious offenders / Lurking about the city" (4.1.29-32), Monticelso promptly hands the book to Francisco. Cornelia has heard a rumor that Marcello is to duel with someone, and indeed he is committed to dueling with Flamineo. We can accept as probably true the rumor that Lodovico has been a pirate during his banishment and Brachiano's assertion that "all the world" speaks ill of Vittoria while she serves out her sentence in the house of convertites.

More importantly, in Webster's Rome rumors customarily are accepted as true, at face value, without critical examination or any process of *judgment*. Thus, lies are easily disseminated as rumors which produce false "knowledge," as when Zanche informs Flamineo that she and Vittoria plan to kill him and then "give it out" that he killed himself (5.6.144-145). More metaphorically, Flamineo himself has been fooled by "False report / Which says that women vie with nine Muses / For nine tough durable lives" (5.6.252-254).

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<sup>11</sup> For a discussion of how, for women, sexual reputation and honor were at the center of popular notions of credit, see Laura Gowing, *Domestic Dangers: Women, Words, and Sex in Early Modern London* (Oxford: Clarendon P, 1996).

This quickness to accept surface appearances rather than to probe deeper for hidden truth adds flesh to the skeleton of contingencies, relativities, and probabilities by which the play is structured.

Webster plays with the fundamental mechanism of English common law, the principle of precedent and its probabilistic assessment of likenesses, seemingly for the sheer fun of it—and to interest his law-trained friends and followers. Since examples and precedents in this play are empty of meaning and value, probability and specifically legal probability becomes an inappropriate basis for prediction, offering nothing relevant to imitate. Whereas in Volpone precedent proves misleading and incapable of functioning as an epistemological instrument, in The White Devil it does not mislead so much as prove a neutral mechanism to be used for good or ill.

Throughout the play Webster offers “example” as a principle corrupted by inconsistency and, hence, a powerful device for establishing norms of *bad* behavior. In the very first scene Gasparo and Lodovico, the future assassins of Brachiano, Vittoria, Zanche, and Flamineo are commenting on Lodovico’s sentence of banishment for having conned several noblemen out of their fortunes:

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|-----------|--|
| Gasparo.  | You have acted certain murders here in Rome,<br>Bloody and full of horror.   |
| Lodovico. | ‘Las they were flea-bitings:<br>Why took they not my head then?  |
| Gasparo.  | O my lord<br>The law doth sometimes mediate, thinks it good<br>Not ever to steep violent sins in blood.<br>This gentle penance may both end your crimes,<br>And in the example better these bad times. |
| Lodovico. | So, but I wonder then some great men scape<br>This banishment; there’s Paulo Giordano Orsini,  |

The Duke of Brachiano, now lives in Rome,  
And by close panderism seeks to prostitute  
The honour of Vittoria Corombona,  
Vittoria, she that might have got my pardon  
For one kiss to the Duke.

(1.1.31-44)

If taken at face value, Gasparo's example argument does not make sense. How will leniency better bad times, especially when the judicial system turns a blind eye to murder? Gasparo is most likely being sarcastic, mocking the justification that defenders of the system would offer. While Lodovico's banishment might provide a precedent that will deter future scam artists or influence the sentencing of those who are convicted, his getting away with murder fleshes out the precedent: the corrupt state and its judicial system will punish lesser crimes while turning a blind eye to more grievous ones. In the play's final Act, Webster returns to Lodovico, who gleefully imagines new and unprecedented ways to murder which will bring him fame: "O my lord! / I would have our plot be ingenious, / And have it hereafter recorded for example / Rather than borrow example" (5.1.74-77). And Flamineo expresses conflicting desires to believe in and reject precedent—precedents of bad behavior, of course. He acknowledges that Brachiano is now his "precedent" in proving that women cannot be trusted; offers an aphorism ("Man may his fate foresee, but not prevent") as "precedent" for "all that do ill"; and concludes with a vow to neither seek nor serve as precedent:

I do not look  
Who went before, nor who shall follow me;  
No, at myself I will begin and end:  
"While we look up to heaven we confound  
Knowledge with knowledge."

(5.6.254-258)

Flamineo expresses disillusion with ideals; for him truth and knowledge alter with circumstance, as they would to one governed solely by short-term self-interest.



Even idealistic sentiments about the value of precedent are tainted, and not what they seem on the surface. Cornelia chastises Vittoria and Brachiano for their adultery: “The lives of princes should like dials move, / Whose regular example is so strong, / They make the times by them go right or wrong” (1.2.285-187). Underlying Cornelia’s ideal is an incongruity: princes’ consistent example should dictate the times for either right or wrong. In other words, consistency in either moral or immoral behavior is what her metaphor expresses; princes need to set a consistent example, not a consistently good one. With similar irony, Monticelso instructs Brachiano to model virtue for his young son, for “It is a more direct and even way / To train to virtue those of princely blood / By examples than by precepts” (2.1.101-103), and the boy naturally will strive to imitate his father above all others. Of course Monticelso has no business advising anyone to set a moral example, despite his status as a cardinal.

The final word on precedent belongs to Webster himself. In his substitute for an epilogue he boasts that the actors had praised his play for offering “the true imitation of life, without striving to make nature a monster” (5.6.304-305). Webster ironically praises his “imitation” of the contingencies and relativities of life in general and legal epistemology in particular, for the shifting grounds on which knowledge is constructed in the play challenge any normative effect—good or bad—that might be established by example, pattern, and “imitation of life.”

Overall then, Webster’s use of law in this play substantiates a more sustained and intimate association than was usual between playwright and law.

## 2. Confounding Knowledge with Knowledge: Induction and Perspective

In 1609 Francis Beaumont referred to Blackfriars theater as a court where “a thousand men in judgment sit”.<sup>12</sup> A year later in The Alchemist, Jonson’s character Face, in an address that simultaneously resembles an epilogue and a closing argument, requests the audience to acquit him of his ill-gotten gains.<sup>13</sup> Writing The White Devil in the same time period (1610-1612), Webster not only plays with parallels between jurors and playgoers but also blurs boundaries between audience and players, as when Flamineo and Lodovico turn on each other, and Marcello in an aside urges the theater audience to “Mark this strange encounter” (3.3.65).

Throughout the play—before, during, and after Vittoria’s trial—Webster elides distinctions between onstage and theater audiences and in so doing interrogates the reliability of judgments made by induction. More specifically, the elasticity of the audience-player relationship allows induction to be explored through perspectivism and performativity. While Volpone confounds the reliability of inferences drawn from human behavior, The White Devil goes further by exploring the role perspective plays in affecting what is seen and heard and therefore what raw material exists to be interpreted. In The White Devil perspective varies according to physical and psychological circumstances: the perceiver’s physical location relative to the speaker or even to other onstage perceivers, and the relative psyches of those involved as well. Inferences thus depend not so much on “facts,” but on more subjective and relative evidence, as when Brachiano interprets Vittoria’s dream

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<sup>12</sup> Andrew Gurr, Playgoing in Shakespeare’s London (Cambridge: Cambridge UP, 1996) 22.

<sup>13</sup> Ben Jonson, “The Alchemist,” Drama of the English Renaissance: The Stuart Period, Ed. Russell A. Fraser and Norman Rabkin (New York: MacMillan, 1976) 190.

differently from Flamineo. In the hands of its most extreme manipulator, Flamineo, perception is so flexible that, if people do not like what they see, they can alter the object or their relationship to it by looking at it a different way. Flamineo tells Camillo:

It seems you are jealous. I'll show you the error of it by a familiar example. I have seen a pair of spectacles fashioned with such perspective art<sup>14</sup> that, lay down but one twelve pence o'th'board, 'twill appear as if there were twenty; now should you wear a pair of these spectacles, and see your wife tying her shoe, you would imagine twenty hands were taking up of your wife's clothes, and this would put you into a horrible causeless fury.  
(1.2.98-106)

Other types of spectacles which do not change one's perspective nonetheless may shield one from harmful reality. In the first dumb show, Isabella's murderers don glass spectacles which cover their eyes and noses, thus protecting them from the deadly fumes which would rise from the poison spread on Brachiano's portrait.

Mental spectacles, so to speak, can combine the two functions of physical spectacles; they can shield one from harm by changing the way one looks at something one does not like. In his performance for Camillo, Flamineo cajoles Vittoria to sleep with Brachiano (not Camillo) by describing how her perspective of her place in the cosmos will change:

Thou shalt lie in a bed stuffed with turtles' feathers, swoon in perfumed linen like the fellow was smothered in roses, so perfect shall be thy happiness, that as men at sea think land and trees and ships go that way they go, so both heaven and earth shall seem to go your voyage.  
(1.2.152-157)

For Flamineo perspective influences how valuable a thing appears to be—and hence, how valuable it *is*. Seeming is being. In praising Mulinassar for his superiority and wisdom (not realizing he is Francisco in disguise), Flamineo remarks that:

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<sup>14</sup> Gunby's commentary in the Cambridge edition: "i.e. glasses cut in facets each providing a separate image" (267); Luckyj's in the New Mermaid: "perspective art: the skill of constructing a picture or figure so as to produce some fantastic optical effect. These spectacles were cut into facets so as to multiply the image twentyfold" (15, n. 100).

I never saw one in a stern bold look  
Wear more command, nor in a lofty phrase  
Express more knowing, or more deep contempt  
Of our slight airy Courtiers. He talks  
As if he had traveled all the princes' courts  
Of Christendom; in all things strives t'express,  
That all that should dispute with him may know,  
Glories, like glow-worms, afar off shine bright  
But looked to near, have neither heat nor light.  
(5.1.34-42)

What *actually* glows from a distance may, up close, not glow at all. And what looks to be real may only be a convenient illusion. Information about the physical world derived from the sense of sight—metaphorically, the source of insight and understanding—teeters on judgments made from signs whose significance is always and only open to interpretation.

### 3. Confounding Knowledge with Knowledge: Induction and Performativity

Given the uncertain reliability of signs, any knowledge constructed from them depends on an assessment of their relative weight, that is, of their relative probability.<sup>15</sup> As in many Jacobean plays, the performativity inherent in dissembling and pretension impugns the reliability of judgments made by induction and inference. Isabella pretends to spurn Brachiano; Flamineo feigns madness; Francisco pretends to love Vittoria; and Vittoria, Zanche, and Flamineo pretend to agree to Flamineo's mutual murder pact. More pointedly though, both before and after the trial the reliability of judgments made by induction is interrogated through the depiction of characters secretly watching and/or listening as one character—either aware of the secret auditor or not—interacts with another. Brachiano and the conjuror watch the dumb shows depicting the murders of Isabella and Camillo; the

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<sup>15</sup> David Ritchie, "Statistical Probability as a Metaphor for Epistemological Probability," Metaphor and Symbol 18.1 (2003): 1-11, 3.

tournament is observed by an onstage audience; and Lodovico, disguised as a hooded monk, remains onstage watching and listening to the exchange between Flamineo and Francisco about Brachiano's death. The practice is introduced and most extensively treated when Flamineo hides Brachiano in a closet while Flamineo talks to Camillo about how to sexually handle Vittoria.<sup>16</sup> Remarkably, Flamineo simultaneously speaks on two levels to his two different onstage auditors: he manages to persuade Camillo that his advice—to distance himself from Vittoria—will improve his sex life with her, while on another level, he is arranging for Vittoria to be sexually available to Brachiano. I think this scene can be played with Brachiano watching and listening or just listening. While Brachiano watches or listens Flamineo propositions Vittoria; while Camillo watches, Flamineo plays the part of Camillo's adviser; meanwhile, the theater audience watches Brachiano watching (or just listening to) Flamineo performing two roles and, of course, the actor playing to three audiences. And when Vittoria arrives and Camillo "walks aloof," Flamineo whispers to her, "I must now seemingly fall out with you" (1.2.128). Thus, in speaking with Vittoria Flamineo performs on three levels: he pretends to be angry with Vittoria; in cahoots with Camillo to get Vittoria to go to bed with him; and in cahoots with Brachiano to get Vittoria to go to bed with *him*. Camillo hears it all; Brachiano may both hear and see, or only see, or only hear Flamineo's performance. And while Camillo interprets Flamineo's words as referring to him—as persuading Vittoria to sleep with him—Vittoria and Flamineo understand that the suitor they are speaking of is Brachiano. In a sense, Camillo also plays a role, for in speaking with her

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<sup>16</sup> In the New Mermaids edition, Brachiano withdraws to eavesdrop on Camillo and Flamineo, at Flamineo's request, while in Gunby's Cambridge edition he just exits. But Gunby comments that: "Brachiano will be able to hear from 'within this closet'; he needs no cue to emerge after Camillo's exit, and may be observed by the audience behind an arras or door" (265).

he pretends punitively to withhold himself from Vittoria's bed, while actually he wants to be with her.

No sooner has Camillo departed and Vittoria and Brachiano begun their assignation when Cornelia enters, listening in secret (1.2.202). While she listens (presumably without watching), Vittoria and Brachiano are openly watched by Flamineo and Zanche. The courtship proceeds, punctuated with commentary made by Flamineo to Zanche, the theater audience, or both. Thus, Vittoria's account of her dream to Brachiano is presented with counterpoint: Flamineo's interpretation of it, which puts the most sinister construction possible on Vittoria's words, and Brachiano's own interpretation of it, in which he gallantly protects his beloved from her jealous husband and his own jealous wife. While some critics maintain that Vittoria "conspires to murder Camillo,"<sup>17</sup> really we only have Flamineo's interpretation of her dream as indicating her attempt to plant the idea of murder in Brachiano's brain.

Vittoria's dream, like her testimony, is open to interpretation, and reasonable interpretations based on plain language may be made. In Vittoria's trial, speech (and, presumably, body language) does not signify reliably or secure access to the truth. On the one hand, Vittoria personifies the kind of defiant innocence that accords with common expectations about how falsely accused defendants act—and should act—in court, even though she is guilty of committing adultery. On the other hand, her performance of outraged innocence contains subtle clues to her guilt.

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<sup>17</sup> Rosalind Ann Jones, "Italians and Others: The White Devil," Staging the Renaissance: Reinterpretations of Elizabethan and Jacobean Drama, Ed. David Scott Kastan and Peter Stallybrass (New York: Routledge, 1991). 251-262, 255; David Gunby, David Carnegie, and Anthony Hammond, eds, "The White Devil," The Works of John Webster Vol. 1 (Cambridge: Cambridge UP, 1995) 272, claiming that Brachiano may or may not be "too infatuated to notice" what Flamineo and Webster see clearly.

Cardinal Monticelso will take weak circumstantial evidence against Vittoria and make it seem strong in the eyes of his most important audience, the ambassadors. The Cardinal has “dealt discreetly” to arrange for the six lieger or resident ambassadors to be present in the audience specifically so that they will spread abroad the news that Vittoria is a whore. The theatricality of the judicial proceedings is underscored by the procession of ambassadors across the stage, which initiates the proceedings. “The costume and ceremonial of their arrival and individual crossing of the stage implies a formal spectacle of some magnitude”,<sup>18</sup> but more importantly this pageantry emphasizes the ambassadors’ position as players, individually and collectively, in the drama that constitutes the trial.

Monticelso and Francisco repeatedly address the ambassadors during the trial, as does Vittoria herself, “lending them at least quasi-judicial status.”<sup>19</sup> Monticelso immediately begins to attack Vittoria’s character by describing her in vivid metaphors as a whore before the audience that matters to him—the “Lords” or ambassadors whose presence he procured. After reciting the suspicious circumstances under which Camillo died, Francisco ends his litany with a directive, “Now mark each circumstance”<sup>20</sup> probably by shifting his attention from Vittoria to the ambassadors (3.2.119).<sup>21</sup> In the heat of battle, Vittoria criticizes Monticelso for equating her “just defence” with “impudence,” and in response Monticelso

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<sup>18</sup> Gunby 291.

<sup>19</sup> Gunby 289, 292.

<sup>20</sup> Camillo died even though he fell from the vaulting horse onto a floor spread with rushes, which would have cushioned his fall; he was a slender man and would not have fallen as hard as a heavier man would have; he fell a mere two feet yet instantly lost all capacity to move and to speak, rather than gradually succumbing to a worsening set of symptoms.

<sup>21</sup> Gunby 298.

again turns to the ambassadors (“See my lords, / She scandals our proceedings” (3.2.129-130).

The lawyer too addresses the “Most literated Judges,” the “Lordships” whose “Judgements” will decide Vittoria’s fate (3.2.26-27). He has switched from the singular “Lord Judge” (*Domine Judex*) of 3.2.10 to the plural, and in so doing may consider Francisco, or the ambassadors, or all of these officials together to be sitting in judgment with Monticelso.<sup>22</sup> Monticelso may be the only official judge, but Francisco may act as an unofficial chief judge, at least to Vittoria; when Vittoria objects to Monticelso acting as prosecutor and judge, she addresses her objection to “Honourable my Lord”—presumably, to Francisco, as if he were a chief judge with power to control the prosecutorial judge.<sup>23</sup> But it is for the ambassadors that Monticelso and Vittoria perform.

The ambassadors function as an informal panel of judges or a jury, a conflated grand jury and trial (petty) jury, which will simultaneously adjudicate the charges as being “true or good” and Vittoria guilty or not guilty of being an adulterer. Because Monticelso and Francisco have “nought but circumstances / To charge her with, about her husbands death” (3.1.4-5), they seek the ambassadors’ “approbation . . . to the proofs” of Vittoria’s “black lust,” which “shall make her infamous / To all our neighbouring kingdoms” (3.1.6-8). As Gunby notes, the ambassadors’ “approbation” conveys not only their approval but also the legal sense of “authoritatively declaring good or true.”<sup>24</sup> This sense is reinforced by the

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<sup>22</sup> Gunby 293.

<sup>23</sup> Luckyj 51.

<sup>24</sup> Gunby 289, citing the OED.



actual legal practice of having grand juries declare a bill of indictment “a true bill,” when they found the evidence sufficient to charge the accused with what we would call a felony.

As a comic figure, the lawyer’s strategy for prosecuting Vittoria was silly and illogical, based on *post hoc* fallacious reasoning; he asserts to Flamineo before the trial starts that, if it can be proved that Vittoria and Brachiano have kissed one another, then it can plausibly be suggested that they have had sex with one another and hence Vittoria is a strumpet and adulterer. “For to sow kisses (mark what I say), to sow kisses, is to reap lechery, and I am sure a woman that will endure kissing is half won” (3.1.23-25). But given the lack of proof, Monticelso must follow the ejected lawyer’s reasoning: if Vittoria is a whore, then she was one short step from committing adultery, and once she has become an adulterer, then one more short step leads her to murder. It would be too modern to assert that the lawyer suggests that adultery was her motive for committing murder, but his reasoning does build on her character as an adulterer. If she is an adulterer, the reasoning goes, then she has the dishonesty and lack of scruples that would enable her to be involved in her husband’s murder.

To compensate for the lack of witnesses against her, Monticelso “makes picturesque speeches, substituting loose and fanciful associations and vague hearsay for actual charges”.<sup>25</sup> He puts on a performance, playing the part of the upholder of virtue. Instead of proving that she has been unfaithful, he paints a general picture, a “character” of a whore, hoping that the ambassadors will associate that picture with the woman who stands before them. Character evidence—even outright character assassination—was permitted in the Jacobean courtroom, and Monticelso’s rhetorical tactics have the desired effect on the audience of ambassadors. When the French ambassador opines, “She hath lived ill”, the

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<sup>25</sup> Goldberg 56.

English ambassador agrees, though he tries to balance Vittoria's apparent guilt with the Cardinal's overheated assault, "True, but the cardinal is too bitter." After the trial the French ambassador will insist that "The proofes are evident" of Vittoria's guilt—presumably of adultery (3.2.17), and Lodovico too will note the "open and apparent guilt" of the adulteress, Vittoria (3.3.47-48).

In response, Vittoria must impugn the quality of the evidence against her, to convince the auditors that such evidence is insufficient to convict her of anything. From the outset Vittoria recognizes that the ambassadors are judging her, and like Monticelso, she addresses them directly (probably curtseying as she says "Humbly thus, / Thus low, to the most worthy and respected / Lieger ambassadors" (3.2.130-132)) and indirectly throughout the trial. But she also, arguably, draws in the theater audience as a pseudo-jury. Ostensibly, the ambassadors are the reason she argues for the proceedings to be conducted in the vernacular rather than in court Latin; of course, she wants the audience to which she is playing to *understand* her performance:

Vittoria.       What's he?

Francisco.      A lawyer that pleads against you.

Vittoria.       Pray my lord, let him speak his usual tongue,  
I'll make no answer else.

Francisco.      Why you understand Latin.

Vittoria.       I do sir, but amongst this auditory  
Which come to hear my cause, the half or more  
May be ignorant in't.

(3.2.12-15)

“This auditory” may encompass the theater audience as well as the ambassadors, and Vittoria may gesture toward the theater audience to include them,<sup>26</sup> particularly since both must decide for or against her.<sup>27</sup> Later, Vittoria may again appeal to both her stage audience of ambassadors and her theater audience, when Monticelso claims she received money from Brachiano as “Interest for his lust,” and Vittoria responds:

Who says so but yourself? If you be my accuser  
Pray cease to be my judge, come from the bench,  
Give in your evidence ‘gainst me, and let these  
Be moderators.

(3.2.225-228)

In speaking of “these,” Vittoria refers to the ambassadors and perhaps the theater audience.<sup>28</sup> She may solicit the theater audience’s support as if it were a jury, as well as the ambassadors’ support, and include both audiences/jurors in a wide sweep of her arm.<sup>29</sup> If so, the spectators may be asked to imagine that they are participating in the proceedings, not merely watching them. Further, if Webster was writing, “specifically for the Queen’s Men, he may be ensuring a sympathetic attitude towards Vittoria from the notoriously unsophisticated Red Bull auditory.”<sup>30</sup> Accordingly, Vittoria may include the theater audience overtly while Monticelso and Francisco include only the ambassadors.

Vittoria plays the role of victim, thwarting Monticelso who remains hampered by the lack of proof to substantiate his innuendoes and *ad hominem* attacks against Vittoria.

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<sup>26</sup> Luckyj 53; Gunby 293.

<sup>27</sup> Goldberg 57.

<sup>28</sup> Luckyj 63.

<sup>29</sup> Gunby 73.

<sup>30</sup> Gunby 293.

Francisco once again steps in as a kind of chief justice and co-prosecutor, subtly implying that Vittoria is guilty of murder even as he instructs Monticelso to drop that charge:<sup>31</sup>

My Lord there's great suspicion of the murder,  
But no sound proof who did it; for my part  
I do not think she hath a soul so black  
To act a deed so bloody; if she have,  
As in cold countries husbandmen plant vines,  
And with warm blood manure them, even so  
One summer she will bear unsavory fruit,  
And ere next spring wither both branch and root.  
The act of blood let pass, only descend  
To matter of incontinence.

(3.2.181-190)

Thus, Francisco intimates that though the state cannot prove Vittoria guilty of murder, she is guilty of murder nonetheless, and will suffer for it in time. Vittoria catches the inference and draws the audience's attention to it ("I discern poison / Under your gilded pills"), as if to stir the theater audience's sympathy for her, a lone female defendant pitted against the twinned powers of church and state (3.2.190-191). However, in typical fashion, Webster perverts the analogy; warm blood does not fertilize crops of any kind and, I believe, was not widely considered to be a fertilizer in early modern England or Europe. Hence, to those in the audience who detect the incongruity, Francisco actually asserts that her crime will go unpunished.

Similarly, both surface and deeper ironic meanings are built in to Vittoria's portrayal of a woman at the mercy of suspicions unaccompanied by proof. From the first, Vittoria's strategy is to make a favorable impression on the audience which also functions as her jury—both the stage audience/jury of ambassadors and the theater audience/jury. As to the ambassadors, Vittoria tries to show them that the disquisition on whores is irrelevant to her; makes the point that accusations without proofs reflect the character of the accuser rather

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<sup>31</sup> Gunby 300.

than the accused; and points out the gap between the implications of Monticelso's rhetoric (the "sum" of her faults) and the actual facts presented against her. But Webster complicates her performance of Innocence Abused and in so doing questions the reliability of signs and their interpretation. As Gunby notes, the more learned spectators also would have a competing perspective before them. The character of whore that the cardinal draws, while falling short of the standard of "sound proof" as Francisco notes, nonetheless reminds the theater audience that Vittoria has indeed committed adultery. Further, she indicts herself in several ways. In arguing that she rejected but was tempted by Brachiano's invitation to a tryst, she uses an incriminating Latin tag from Ovid indicating that only a woman who has not been solicited is chaste (3.2.198-202). Similarly, just a moment after tendering her modesty to the ambassadors, Vittoria refers to the charges against her as "feigned shadows of my evils" (3.2.146), implying that the charges brought against her are trumped up but also do not compare with her real crimes.<sup>32</sup> Further, in court she has committed breaches of decorum, in references to acts such as spitting in the wind and in cursing Monticelso; this coarse language and unladylike behavior contradict her elegant claims to refinement and modesty before the ambassadors. Vittoria's ironies, intentional and unintentional, may warn against taking what she says at face value, but greater danger lies in reading her performance as indicative of her innocence. Not only is her performance riddled with inconsistencies, but as the theater audience knows, she is not innocent of the charge of adultery. The audience therefore sees a display of how superficially convincing and, for those who catch the more subtle hints, how deeply incriminating feigned innocence can be.

In Volpone Celia and Bonario's extreme deference to their social superiors (her husband and his father) prevents them from speaking in their own defense and makes it

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<sup>32</sup> Gunby 73-75.



charges, and thus maintains a kind of thieves' honor) and turn her into an embodiment of oppressed innocence, a "diamond" against a background of "darkness." Thus, her "innocence," to the extent it exists, is formed in reaction to and performed in contrast to Monticelso's corruption and unfairness, rather than in any ideal or abstraction. But diamonds do not shine in the dark. They do not generate their own light, but merely reflect the light from nearby sources and, I believe, this characteristic of diamonds was known in early modern England. As Monticelso's performance is designed to obscure his lack of evidence, so Vittoria's performance aims to obscure her own lack of a defense against the charges that are, after all, true. Flamineo sees Vittoria's evocative performance for the sophistry it is. As Flamineo seemingly prepares to kill Vittoria, Zanche, and himself, Vittoria speaks in an effort to buy time, and Flamineo scorns her empty rhetoric:

Vittoria.        I prithee yet remember  
                      Millions are now in graves, which at last day  
                      Like mandrakes shall rise shrieking.

Flamineo.        Leave your prating,  
                      For these are but grammatical laments,  
                      Feminine arguments, and they move me  
                      As some in pulpits move their auditory  
                      More with their exclamation than sense  
                      Of reason or sound doctrine.

(5.6.63-70)

Sense of reason and sound doctrine: churchgoers may or may not value logic over emotional appeals, but jurors are *supposed* to evaluate testimony for soundness, using sense, reason, and doctrine. But jurors, like playgoers, may also be drawn into the action as participants while remaining observers and judges of it.

The ambassadors' presence as observers and unofficial jurors allows for the audience's perspectives to shift during the trial. "The ambassadors are now observed, now

observers of the action.”<sup>34</sup> A more formal onstage jury would have denied the theater auditors the opportunity to play the role of pseudo-jurors. The absence of a formal onstage jury enables the theater audience to judge Vittoria and the case against her in ways similar to a jury. The action during the trial scene, with its kaleidoscope of perspectives including those of Vittoria, Monticelso, Francisco, the French ambassador, the English ambassador, and Flamineo, may cause the audience to look from one character or set of characters to another, often unexpectedly, much like an actual trial. Further, drawing attention to the ambassadors allows the theater audience “a more detached assessment of the scene”<sup>35</sup> for, rather than just participating in the trial as the jury reacting to Vittoria’s and Monticelso’s “testimony,” the audience may also react to the onstage informal jury of ambassadors. Thus, the theater audience at once may be drawn in by Vittoria as extra jurors, yet held at a remove when their attention is drawn to the ambassadors. The shifts from jurors to spectators and back again soften the distinctions between the two roles and the two perspectives, of evaluating evidence and determining guilt on the one hand and evaluating the action and characters on the other. What both jurors and spectators share, though, is the expectation that they will be entertained by a good performance, and this expectation underscores similarities between the underlying narrativity of both the action on stage (the cause-and effect of plots) and the cause-and-effect plots inherent in testimonial “proof.”

Finally, Webster asks his audience to entertain another duality in perspectives. In his final attack on Vittoria’s character, Monticelso declares that Vittoria came from Venice “a most notorious strumpet,” and has continued as a strumpet in Florence, so notorious that:

I make but repetition,

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<sup>34</sup> Luckyj 51.

<sup>35</sup> Luckyj 62.



Of what is ordinary and Rialto talk,  
And ballated, and would be played o'th' stage,  
But that vice many times finds such loud friends  
That preachers are charmed silent.

(3.2.247-251)

Webster's ironic point is that Vittoria's vice *is* being played on the stage. Once again, the playwright asks his audience to participate simultaneously in the action of an imagined Rome, and in the cultural moment of playgoing in early modern England.

#### 4. Conclusion

Originally I wanted to argue that watching characters play to onstage auditors would have had certain effects on the theater audience, and that these effects would have influenced the ways that jurors conceived of evidence and interpreted testimony. But I could not draw these precise parallels, and I disagree with Goldberg's argument making such direct connections between Vittoria's trial and Raleigh's. Some similarities exist, and Webster may have had Raleigh in mind when he wrote The White Devil. It is true that, as Goldberg points out, after Raleigh appeared against Essex, he was attacked by mobs in the street, and then a few years later, when he was convicted of treason on less evidence than Essex and in a more openly hostile court, "he was forgiven by the people and soon transfigured into a new hero."

Goldberg thus argues that:

The fluid interchange between the world and the stage which is characteristic of Elizabethan life is nowhere clearer than in Webster's recreation of a form of audience response originally experienced in a nonliterary though highly theatrical situation. The popular dissatisfaction with Jacobean government that expressed itself in sympathy with those whom that government oppressed legally is paralleled by audience rejection of Monticelso's authority and consequent sympathy for Vittoria.<sup>36</sup>

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<sup>36</sup> Goldberg 59.

How do we know what Webster's many early modern audiences thought of Vittoria, as if all the playgoers shared the same opinions?

Luke Wilson also advocates a type of restraint in literary approaches to law-themed drama.<sup>37</sup> Within the context of The White Devil, he criticizes the approach of rhetorically-oriented scholars who see the spirit and functioning of equity within drama, and who argue that both drama and equity are concerned with intention, motive, and hypothetical questions. Wilson also criticizes as overly reductive the approach that sees theater as challenging law's fairness, ethical coherence, and philosophical value. But he overstates his case by not recognizing an approach in which theater criticizes but also can affirm law's practices and principles. Wilson favors an approach that compares plays to the actual practices of English ecclesiastical and common law courts, and argues that this play contains a mixture of both. He argues that the play is anti-equitable; it refuses to offer a humanizing supplement to the law or equity's admittedly technical rather than principled appeal to context. Further, Vittoria is anti-theatrical in refusing to make words reveal her identity and interiority in the trial. Wilson's whole argument is premised on the notion that the play withholds rather than asserts its jurisdiction—its *juris dictio*—its power to speak the law. In other words, this play is anti-equity, anti-law, and anti-drama. Wilson's argument thus opposes mine in that I argue that court and theater are brought together by Webster.

Wilson's approach points up the challenges in trying to meld new historicism with a more particularized historical approach. I hope only to maintain that Vittoria's trial stands as Webster's microcosm of an epistemological crisis, with conflicting or competing conclusions to be drawn from evidence consisting of words, actions, and demeanor. In the play, and

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<sup>37</sup> Luke Wilson, "The White Devil and the Law," Early Modern English Drama, ed. Garrett A. Sullivan, Jr. Patrick Cheney, Andrew Hadfield (Oxford: Oxford UP, 2006) 225-236.

sometimes in actual trials, law's brittle evidences do not secure access to truth; instead, they confound knowledge with knowledge, leaving Webster's characters and playgoers to substitute belief for knowledge.

## Chapter Five

### Undoubtful Proof In Measure For Measure

Having explored probability in the form of expectations in Volpone, and in relation to induction and the performativity of testimony in The White Devil, I now turn to the issue that instigated this whole project: the standard of proof. Unlike other plays, Measure for Measure explicitly identifies “undoubtful proof” as the standard of proof.

In Measure, the issues concerning proof and probability are diffused, not concentrated in trial scenes as in Volpone and The White Devil. Indeed, legal judgments are spread throughout the play, and yet the trial is only a quasi-trial; for the theater audience, there is no unfolding of proof before a trier of fact as in Volpone, and no testimony to receive and judge as in The White Devil. The quasi-trial is staged by a god-like figure, a master in control; it is a fantasy trial which seems to avoid the fallibility of judgment. Instead, the “trial” scene implicates the theater audience in discovering whether and how Angelo’s guilt will be found out and whether and how the Duke will reveal himself as the friar in disguise. From the theater audience’s perspective, the process of proving culpability is not what the trial is about.

A different perspective belongs to Escalus, though. He is onstage throughout the quasi-trial, and unlike the audience, he does not know of Angelo’s guilt, the Duke’s disguise, or Isabella and Mariana’s rigged testimony. For Escalus, the hearing *is* one of factfinding. “Undoubtful proof,” with its connotations of infallibility, suggests that one can and should

“begin in doubts, yet end in certainties,” a state of mind which sounds similar to the satisfied conscience. Yet the audience watches as Escalus’s reasonable conclusions are proved wrong; even when a reasonable person has no doubt, he can be wrong. Even jurors who have satisfied their consciences that the defendant is guilty can be fooled into believing an incorrect thing.

This standard of undoubtful proof gets complicated as its implications are played out, in the unfolding of a skeptic’s case for the contingencies within the concept of “undoubtfulness.” Measure for Measure thus registers a skeptical distrust of certainty while it also represents the untrustworthy quality of probability—and, conversely, complicates the relative superiority of probability to certainty. Shakespeare thus echoes the concerns behind Cecil’s canny observation that, for better or worse, certainty may indeed merely amount to the greatest degree of probability.

### 1. Roads Not Taken

My approach differs from those that consider the play in terms of its relations to Christian concepts of law. Elizabeth Marie Pope puts the play’s themes of equity and law in a Christian context by examining popular religious texts of Shakespeare’s day, including sermons and commentaries. She argues that Shakespeare does not reject ordinary Christian doctrine of the English Renaissance but “strengthens and holds it true to its deepest implications”.<sup>1</sup> Because people believed that the authority of all civil rulers was derived from God, the Duke moves through the play “like an embodied Providence,” which is why his

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<sup>1</sup> Elizabeth Marie Pope, “The Renaissance Background of Measure for Measure,” Shakespeare Survey 2 (1949) 66-82, 80.

character has allegorical overtones yet never slips into actual allegory.<sup>2</sup> In their capacity as God's substitutes, rulers have four privileges, but also corresponding duties owed to God and to the people, especially the administration of justice. To Pope, the play stands for the proposition that Christians should not, in the name of mercy, condone injustice; they (rulers and non-rulers alike) must judge as Christ would judge, which means something more than weighing each case according to common sense, yet also means showing mercy whenever possible.

Ronald Berman treats law as a metaphor used by Paul and Shakespeare; he argues that any doctrine in the play depends on certain Pauline ethical and psychological formulations. The Letter of Paul to the Romans does not "explain" this complex play, but it does illuminate the sensuality and righteousness of the protagonists. Romans does not furnish a scheme that simplifies, Berman claims; instead, it points to things unresolvable in human nature and thus furnishes the "problem" of this problem play.<sup>3</sup>

Darryl J. Gless aims to fill some gaps in the scholarship on cultural history and, in reaction to criticism that the play is a problem and is disjointed, to offer a coherent and thorough interpretation of Measure.<sup>4</sup> His methodology is to establish some of the play's intellectual and cultural backgrounds and thereby contribute to our understanding of Shakespeare's intellectual milieu by illuminating materials often ignored, neglected, or imperfectly understood. Much of his historical material is religious; since religion was chronically and violently controversial, Gless draws doctrinal points important for his

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<sup>2</sup> Pope 70-71.

<sup>3</sup> Ronald Berman, "Shakespeare and the Law," Shakespeare Quarterly 18 (1967) 142.

<sup>4</sup> Darryl J. Gless, "Measure for Measure," the Law, and the Convent, Princeton: Princeton UP, 1979.

argument from writings by leaders of each of the major divisions of Reformation Christianity—Catholic Erasmus, Anglicans such as Hooker and Perkins, Continental Reformers Luther, Calvin and Melancthon. Gless asserts that with a few exceptions, these writings (unlike conceptions of ecclesiastical governance and discipline) were common, not controversial, and drawn from contemporary English translations of the Continental reformers.<sup>5</sup>

According to Gless, the key issue in Measure for Measure criticism is whether, whatever diverse elements went into the play's composition, the play can be regarded as making the kind of consistent and integrative use of audience expectations that would make comprehensive interpretations possible.<sup>6</sup> Instead of determining that the play's seemingly incompatible elements render it internally inconsistent, we should ask whether there is some set of expectations, including a notion of the whole, which we can bring to the play and which will change our judgment of its diverse parts from one of apparent incompatibility to one of functional contrast.<sup>7</sup> Thus, Gless arrives at his book's thesis: what has not yet been provided in criticism of the play is a sustained dialectic between evolving notions of the text as a generic whole and notions of the significance of its complex detail.<sup>8</sup> To create and describe this dialectic in a satisfactory manner is to study the play in ways that resolve most of the problems it has presented to previous critics. In the process, we can recognize that

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<sup>5</sup> Gless xii.

<sup>6</sup> Gless 7.

<sup>7</sup> Gless 7.

<sup>8</sup> Gless 13.

many of those problems are illusory—that they are less the product of textual inconsistency than of the procedural inadequacies of critical practice.<sup>9</sup>

Law provides an example of the play’s deliberate vagueness. While the particular law with which Measure deals remains vague, “the law” in a larger sense pervades the texture of the play’s language.<sup>10</sup> Even today “law” retains remnants of its earlier, transcendent denotation, as when we use “law” to denote principles of conduct conceived to be of natural origin, or a divinely instituted code of behavior such as the Law of Moses. These definitions retain a somewhat archaic, realist quality that implies that laws are entities ontologically independent of humans, rules existing instead in a transcendent will.<sup>11</sup> Both classical tradition and contemporary orthodoxy conceived law not as a human construction, distilled from countless judicial and legislative decisions, but as a transcendent reality grounded in the ultimate pattern of cosmic order, God’s providence.<sup>12</sup> Hooker’s vision of a hierarchy of laws descending from the “first eternal law” of God is a common presupposition of early modern England. Other contemporary jurists, including Coke, exhibit belief in a hierarchy in which laws higher in status could nullify deviant human ones.<sup>13</sup> In England’s ecclesiastical courts, which had jurisdiction over crimes that were deemed primarily spiritual in nature, revealed law could be translated directly, if imperfectly, into the law of England.<sup>14</sup>

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<sup>9</sup> Gless 13-14.

<sup>10</sup> Gless 35.

<sup>11</sup> Gless 36.

<sup>12</sup> Gless 37.

<sup>13</sup> Gless 38.

<sup>14</sup> Gless 39.



Allusions to and dramatizations of the fundamental ideas of the Sermon on the Mount recur throughout Measure for Measure and ensure that this central statement of Christian law, especially its insistence on humane judgment, becomes a standard by which we judge Shakespeare's characters and their actions within the play.<sup>15</sup> The essence of Isabella's nature lies in her allegiance to a system of human-made laws that fundamentally conflict with other, transcendent laws to which the play's language persistently alludes.<sup>16</sup>

Gless asserts that the Duke devises similar cures for Angelo and Isabella because they are so alike. Angelo is monkish in his private life and in his enforcement of social law, reviving "old" laws, observing them himself, and demanding that others observe them without qualification and without reference to the essential burden of all legitimate law.<sup>17</sup> To operate correctly on Angelo, the law must engender a conviction of personal sinfulness, and the Duke brings this about.<sup>18</sup> On seeing brief but unmistakable tokens of penitence in Angelo, the Duke once again plays the part of an admirable ruler. He recognizes that severe public exposure of Angelo's depravity has reduced him to a state in which he may profit from mercy.<sup>19</sup> Shakespeare's earlier audiences would probably have easily recognized the conventional idea that Angelo's marriage represents an imperfect yet positive remedy for fornication.<sup>20</sup> The Duke brings about the restoration of outward and inward order by acting

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<sup>15</sup> Gless 50.

<sup>16</sup> Gless 141.

<sup>17</sup> Gless 226.

<sup>18</sup> Gless 223.

<sup>19</sup> Gless 230.

<sup>20</sup> Gless 231.

on both the spirit and the letter of law, paralleling the exemplar presented in the Sermon on the Mount. In contrast to Isabella's costume, his monastic garb sometimes very clearly represents the total dedication to Christ, while his charity represents what charity had meant to true monks and nuns.<sup>21</sup> Gless goes so far as to claim that the Duke cooperates with providence to make sure that good results from his subjects' various evils.<sup>22</sup> The comprehensiveness of the judgments meted out by the newly returned monarch to all the significant citizens of Vienna suggests the return of the divine justice whose perfect knowledge will end the need to keep judgment suspended.<sup>23</sup>

Stacy Magedanz revisits the debates about interpretation of the Sermon on the Mount.<sup>24</sup> The Anabaptists interpreted "judge not" to mean that no Christian could pass judgment on another, and therefore no Christian could serve as magistrate. Moderate reformers argued that Christians could not judge others in the private or spiritual realm, but were required to use their public authority to preserve social order. Shakespeare explores this debate, with Angelo articulating the moderate reformed view, Isabella articulating the Anabaptist view, and the Duke reconciling these opposed standards of public justice and private mercy. The hybrid standard the Duke adopts is equity, by which he moderates the law's requirements with consideration of particular circumstances, especially sinfulness. This mediation between public justice and private mercy allows the Duke to fulfill his obligations as ruler while maintaining his status as a good Christian.

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<sup>21</sup> Gless 247.

<sup>22</sup> Gless 249.

<sup>23</sup> Gless 254.

<sup>24</sup> Stacy Magedanz, "Public Justice and Private Mercy in *Measure for Measure*," *Studies in English Literature* 44.2 (2004): 317-332.

I also do not attempt to compare the play's laws to actual positive laws of early modern England, as some critics have done. Wilbur Dunkel provides a largely textual analysis, defending the play as a well-constructed comedy about administering law with justice and equity, and attempting a new historicist-type context. In the process, he makes huge assumptions and, in my view, is wrong about the legality of the marriage contracts.<sup>25</sup> J.W. Dickinson aims to illustrate the theory and practice of equity in Shakespeare's England, and claims that in Measure Shakespeare has changed the crude materials concerning equity found in his source into an important and integral part of the play, producing a lesson in Christian mercy. Dickinson defines mercy as an all-encompassing forgiveness, while equity fills in gaps in the law and considers the merits of the person requesting it. For Dickinson, the play opposes Christian mercy against rational equity.<sup>26</sup> O. Hood Phillips in Shakespeare and the Lawyers surveys what lawyers have written about the legal and non-legal aspects of Shakespeare's life and work.<sup>27</sup> Phillips situates Measure for Measure as presenting problems of law, justice, and government, especially the question of justice in relation to the individual. Phillips asserts that according to canon law Claudio and Juliet are not married, but according to civil law they are as good as married because neither is free to marry anyone else. Claudio's violation of the anti-fornication statute is an issue that pales in comparison with the moral issue of Isabella's refusal to dishonor herself to save her brother. Phillips mentions generally and briefly three critics who have commented on the issues of law and

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<sup>25</sup> Wilbur Dunkel, "Law and Equity in Measure for Measure," Shakespeare Quarterly 13 (1962) 247.

<sup>26</sup> J.W. Dickinson, "Renaissance Equity and Measure for Measure," Shakespeare Quarterly 13 (1962) 287-97.

<sup>27</sup> O. Hood Phillips, Shakespeare and the Lawyers (London: Methuen, 1972) 58-60, 132.

justice in the play, especially the question of whether Claudio and Juliet were legally married.

Gordon Ross Smith reads Measure in the context of the presumed contempt Shakespeare's audiences had for murderous kings and greedy aristocrats.<sup>28</sup> He argues that the play criticizes abuse of authority through its characters rather than its action. He further claims that by Elizabethan law, Claudio has committed no crime. The play concerns itself more with matters of state than with Christian doctrine, which theme would be contrary to contemporary theatrical trends, prevailing law, and recorded practice.

Measure for Measure has also been the subject of explorations into the use of law to illuminate literature, and vice versa. W. Moelwyn Merchant follows a traditionally historical approach in placing the play's legal questions in the context of Jacobean legal theories and controversies and in arguing that the play is purely a work of literature as opposed to a work advocating legal reform or education.<sup>29</sup> He asserts that the intellectual argument in the drama of Shakespeare's day achieves much of its tragic force by reflecting the legal strains which, at another level, would culminate in the execution of Charles I. He argues that an overly narrow concern with political structure has obscured the essentially legalistic turn of mind and word in which social problems were expounded. He calls for detailed studies in the legal vocabulary of Shakespeare and his contemporaries, for the numerous trial scenes in Jacobean drama require critical evaluation in relation to the structure of the plays, and especially in

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<sup>28</sup> Gordon Ross Smith, "Renaissance Political Realities and Shakespeare's Measure for Measure," Proceedings of the PMR Conference: Annual Publication of the International Patristic, Mediaeval and Renaissance Conference 7 (1982) 83-92.

<sup>29</sup> W. Moelwyn Merchant, "Lawyer and Actor: Process of Law in Elizabethan Drama," English Studies Today, Third Series: Lectures and Papers Read at the Fifth Conference of the International Association of Professors of English Held at Edinburgh and Glasgow August 1962, Duthie, G. I., ed., (Edinburgh: Edinburgh UP, 1964) 107-124.

relation to contemporary practice in the courts, to determine the degrees of dramatic flexibility and the reasons for apparently willful variation from actual procedure; further, the partisanship of the dramatists needs close charting. He notes that the play is a legal argument in itself, and generalizes that drama foreshortens events, telescoping a whole tale into five acts, similar to the compressed summary of narrative and evidence in a court of law, and that drama demands the rapid evaluation of character and the artfully pointed relation of motive, act and retributive consequence. In these ways, drama becomes a parody or analogue of the process of justice. The trial scenes in Jacobean drama frequently correlate with legal structure. Thus, Merchant makes an early plea for an interdisciplinary approach to literature involving law.

W. Nicholas Knight makes enormous assumptions in using the play and legal history to argue that Shakespeare affected English jurisprudence through instruction in equity, case law, and precedent in Measure.<sup>30</sup> Perhaps Richard J. Schoeck had this kind of work in mind when he called for further and more rigorous scholarship into connections between Shakespeare and law.<sup>31</sup> Rather than focus on the biographical question of whether Shakespeare was a lawyer, scholars should explore more interesting avenues, including the legal ideas in Shakespeare's work; the presence of lawyers and law students in Shakespeare's audience and the question of Shakespeare's relationship to the Inns of Court; drama in the Inns; and Shakespeare as seen by lawyers of our day. Trivial work about Shakespeare and the law has been done because of a lack of serious scholarship or competent legal argument—a

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<sup>30</sup> W. Nicholas Knight, Shakespeare's Hidden Life: Shakespeare at the Law 1585-1595 (New York: Mason & Lipscomb, 1973).

<sup>31</sup> Richard J. Schoeck, "Shakespeare and the Law," Shakespearean Research Opportunities: The Report of the MLA Conference 7-8, (1972-4) 61-74.

hazard of interdisciplinary approaches, Schoeck wrote. He envisioned an approach that melded literary criticism and legal history with the social history necessary to convey the importance of law in early modern England times and provide the whole picture. An exemplar of the work he advocates illuminates the play by putting legal language and allusions in context, not as merely decorative but as integral to the play's dramatic structure and frequently relied on to achieve audience rapport by the legality or quasi-legality of the language, action or atmosphere; explores law as a theme with popular appeal to audiences; and gives a sense of Shakespeare's use of the basic and continuing metaphor of the law.

John D. Cox seeks to defend the play by locating it within medieval traditions.<sup>32</sup> His genre study argues that the play owes more of its dramaturgy to the medieval convergence of the sublime and the humble than it does to the Jacobean heroic-style treatment of images of the monarch in masques. Shakespeare's play harkens back to a set of medieval plays in which old rigid law replaces new Christian law and the reconciliation of mercy with justice. Cox reacts to Pope's argument and claims that she pointed out the right questions concerning the play's background, but she relied on sources—doctrinal treatises, sermons and humanist essays concerning kingship—which are less credible sources for Shakespeare's sense of tradition than is drama.

Craig Bernthal presents a new historicist analysis based on the premise that literature helps define the legal ideology of its period. He maintains that Measure could have provided a fictional nexus that allowed early modern audiences to interrogate and interpret certain recent judicial events in a variety of ways, including the execution of Raleigh and the last-

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<sup>32</sup> John D. Cox, "The Medieval Background of Measure for Measure," Modern Philology 81 (1983) 1-13.

minute pardons of his co-conspirators.<sup>33</sup> More specifically, Bernthal argues that the Duke was created in response to the theatricality of James's actions in staging the gallows reprieves of Raleigh's cohorts. Bernthal notes that early modern audiences may have recognized that the confusion over sexual sin in Vienna mirrored the quagmire of English marriage law, in which different jurisdictions applied different rules for the formalization of marriage and in which even the various rules were only sporadically and irrationally enforced. He detects irony in having substantially the same action treated with utterly different legal consequences.<sup>34</sup>

To Daniel Kornstein, Shakespeare's law plays have relevance today because they affect our thinking about legal issues arising in current cases. Measure for Measure raises issues that "still trouble our law" such as "law intersecting with morality," "how much public support and respect law needs, whether or not to enforce dead-letter statutes, [whether] it is better to interpret laws strictly or equitably . . . the effect of power on human nature, how judges may be corrupt, and how important mercy is."<sup>35</sup> Kornstein endeavors to prove that Measure for Measure argues for certain legal principles over others, and that contemporary jurisprudence, to the extent it does not conform to the "message" of Measure for Measure, must be reformed.

To prove this claim, Kornstein draws parallels between the myriad legal issues raised in the play and those raised in the 1986 United States Supreme Court decision in Bowers v.

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<sup>33</sup> Craig A. Bernthal, "Staging Justice: James I and the Trial Scenes of Measure for Measure," Studies in English Literature 1500-1900 32:2 (1992) 247.

<sup>34</sup> Bernthal 260.

<sup>35</sup> Daniel J. Kornstein, Kill All the Lawyers? Shakespeare's Legal Appeal (Princeton: Princeton UP, 1994) 35.

Hardwick, in which the Court held that Georgia's anti-sodomy statute violated no fundamental rights (Bowers was overturned in the case of Lawrence v. Texas, 2004). In Kornstein's view, the cases of Bowers v. Hardwick and Vienna v. Claudio reflect such similar issues that each helps illuminate the other. "Both turn on laws used to enforce morals and regulate private behavior. Both raise the issue of public respect for law and statutes that had not been enforced. Both put offenders at risk of extreme punishment for minor infractions. Both involve questions of power. And both stand for theories of mercy and legal interpretation," considered together, these two texts help us "better understand both the Supreme Court's decision and Shakespeare's work, as well as glimpse some of the unresolved problems of law and humanity."<sup>36</sup>

With these parallels in mind, Kornstein compares and contrasts several broad categories of legal issues in the two texts: law and morality, privacy, public respect for law, dead-letter statutes, cruel and unusual punishment, abuse of power, sexual harassment, legal interpretation, and the art of judging. Kornstein speculates whether, "In light of Bowers...the antifornication law in Measure for Measure would be, under American law of today, an unconstitutional violation of Claudio's fundamental right of privacy." He acknowledges that "it may be unfair to impose our own legal notions on an earlier epoch" but proceeds in the belief that doing so "may shed some light on how various doctrines interrelate and have developed."<sup>37</sup> Kornstein concludes that the Bowers court would probably have struck down the statute in Vienna v. Claudio because, "Shakespeare's law involves intimate choices by an

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<sup>36</sup> Kornstein 37.

<sup>37</sup> Kornstein 43.



unmarried adult heterosexual couple to have sex and to have children” and these choices have been recognized by the Court to be Constitutionally protected.<sup>38</sup>

A society that uses law to enforce its morals must be sure to gauge accurately those public morals. Both Measure and Bowers, Kornstein asserts, recognize that "law needs widespread public respect."<sup>39</sup> The Bowers court tried to show that the Georgia law had widespread public support, while Angelo tried to correct a situation where laws lacked public respect and so became mere "scarecrows" of the law.<sup>40</sup> Angelo's own hypocritical acts make it easy to discredit his vision of law, but that vision does find support, Kornstein argues, with the Duke (who compares unenforced laws to “an o'ergrown lion in a cave / That goes not out to prey”) and, surprisingly, with Lucio (who describes disobedience and license "which have for long run by the hideous law / As mice by lions”). From Measure and Bowers, accordingly, Kornstein concludes that, in our day, “Perhaps we do generate respect for law if it is enforced. But that would only seem to be true for law in accord with overall public sentiment. To enforce unpopular, harsh laws does not win public respect; it is not good statecraft. It is, rather, a form of tyranny.”<sup>41</sup>

Both the play and the case have something to say about this problem of nonenforcement of laws, or "dead-letter statutes." Neither the antifornication law in Measure nor the antisodomy law in Bowers had been enforced or obeyed for years, raising the specter of arbitrary or selective prosecution. In both cases, Kornstein claims, “We see the difference

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<sup>38</sup> Kornstein 44.

<sup>39</sup> Kornstein 44.

<sup>40</sup> Kornstein 45.

<sup>41</sup> Kornstein 46.

between normal prosecutorial discretion and a consistent, total failure of prosecution over time, which allows a statute to fall into disuse, thus triggering the concept of desuetude,”<sup>42</sup> by which a law is deemed nullified through disuse. Reading the play “from this perspective reactivates the vital concept of desuetude, which itself has fallen into disuse.”<sup>43</sup> It seems Kornstein would approve using the play to introduce the doctrine of desuetude to a law school class.

Unfair enforcement of laws raises the related issue of fair punishment. The Eighth Amendment to the U.S. Constitution bans “cruel and unusual punishments.” The majority in Bowers did not address this issue, since there had been no prosecution, no conviction, and no sentence imposed on Bowers. And of course, English citizens in Shakespeare’s day did not enjoy any such constitutional protection. Nonetheless, Kornstein applies the American doctrine to Measure for Measure despite the inadvisability of doing so: “Analyzed under American constitutional law circa 1993, the death penalty imposed on Claudio would surely violate the Eighth Amendment as an impermissible cruel and unusual punishment. But it is an open question, even more so than usual, whether it is fair or proper to evaluate an old penalty by today’s standards.”<sup>44</sup> Kornstein cannot resist applying contemporary American law to the play, determining that:

Claudio’s expressed terror at being executed corresponds to a punishment being cruel and unusual if it is degrading to human beings. Angelo’s reliance on the death penalty for its deterrent effect is reminiscent of the many pages written by the Supreme Court [in other cases] on whether such deterrence occurs. When Isabella points out that no offenders have actually been executed, she is underscoring exactly how arbitrary and unusual is the actual

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<sup>42</sup> Kornstein 47.

<sup>43</sup> Kornstein 49.

<sup>44</sup> Kornstein 50.

use of the death penalty. But most clear of all is the notion, referred to by the Supreme Court, of excessiveness in the sense that the penalty cannot be unnecessary, a pointless infliction of suffering measured against the seriousness of that particular crime.<sup>45</sup>

Against this backdrop, Kornstein reports that the Court has held “such penalties—like the one that may apply in Measure for Measure—to be unconstitutional...”<sup>46</sup>

Statutes that prescribe excessive penalties engender questions of mercy. The Bowers case did not involve such an issue, but Kornstein notes that Chief Justice William Rehnquist cited Isabella’s lines about the difference between thoughts and actions in a 1980 Supreme Court case. Isabella says:

For Angelo,  
His acts did not o’ertake his bad intent,  
That perished by the way. Thoughts are no subjects,  
Intents but merely thoughts.

Rehnquist, characterizing Isabella’s lines as “’express[ing] sound legal doctrine’” led the Court in reaffirming that, “’In the criminal law, both a culpable *mens rea* and a criminal *actus reus* are generally required for an offense to occur.’”<sup>47</sup> Hence, Kornstein notes, crime is limited only to offenses against public, not private morality, and to “acts, not thoughts, mental reactions, and ideas.”<sup>48</sup> Further, Escalus’s defense of Angelo’s severity (“Mercy is not itself that oft looks so. / Pardon is still the nurse of second woe”) supports “a discretionary approach to mercy also.”<sup>49</sup> Kornstein seems to argue that mercy in defining and punishing

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<sup>45</sup> Kornstein 51.

<sup>46</sup> Kornstein 51.

<sup>47</sup> Kornstein 54.

<sup>48</sup> Kornstein 54.

<sup>49</sup> Kornstein 54.

crimes, as advocated in the play, survives in the contemporary American philosophy that only acts and not mere intentions may constitute crimes.

Measure for Measure reflects not only contemporary law, but also its essential concern—“power, its nature, its effects on character, and what happens when it is delegated.”<sup>50</sup> Isabella’s lines (“O, it is excellent / To have a giant’s strength, but it is tyrannous / To use it like a giant”) “should be carved in every courtroom, right next to “In God We Trust.” Every judge, every powerful government official, every business executive, every military officer—everyone who exercises power—should recite those lines before going to sleep each night.”<sup>51</sup>

In the play, abuse of power intersects with questions of law and morality, resulting in sexual harassment. “Angelo uses his position of power over Isabella in a classic quid pro quo situation: her body for her brother’s life.”<sup>52</sup> Having duly noted the presence of sexual harassment in the play, Kornstein suggests the play identifies the cause of sexual harassment: “it is perhaps not too far afield to suggest that the play involves the relationship between sexual repression and the law ... authority without the understanding of equity leads to repressive legalism, which in turn can repress the sex impulse.”<sup>53</sup> The antifornication law and the repressed natures of Angelo and Isabella present “a modern argument against sexual repression”<sup>54</sup> for “When such sexually repressed people assume positions of power and

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<sup>50</sup> Kornstein 54.

<sup>51</sup> Kornstein 55.

<sup>52</sup> Kornstein 56.

<sup>53</sup> Kornstein 57.

<sup>54</sup> Kornstein 57.

interpret the law, difficulties arise...Measure for Measure is a warning about the appropriate psychological makeup of people involved in the law.”<sup>55</sup>

This theme, and all the others, is subordinate to “one all-encompassing legal theme” in the play, that is, “a theory of legal interpretation.”<sup>56</sup> Shakespeare’s grand theme makes an enduring contribution to jurisprudence in its

sensible and balanced approach to the fundamental problems of law: how to control human behavior effectively by means of rules. By eschewing extremes, Shakespeare comes up with a theory of moderation that blends law and discretion...into a workable system of legal interpretation.<sup>57</sup>

For Kornstein, Angelo “symbolizes the notion of law as something apart from the people responsible for enforcing the law;” he reflects “the hackneyed thinking of those who believe that judges find but never make the law, and to some degree it is a type of judicial restraint.”<sup>58</sup> At its best, Angelo’s concept of law

represents an effort to find in law safety from arbitrary power, to find protection in law’s objectivity and impersonality. Arbitrariness is the negation of the law. Rigid adherence to rules regardless of consequences is one way to prevent government from showing favoritism or abusing discretion...Insofar as Angelo’s law enforcement did not swerve because of Claudio’s [high] social status, Angelo acted in the highest tradition of blind justice that draws no distinction among defendants...we see Angelo’s theory as...an abuse of a good thing, not the essence of a bad thing.<sup>59</sup>

The Duke teaches Angelo a painful lesson about his concept of law. The Duke, with Escalus,

takes a more moderate view of law, seeing it as administered by people and softened by realism, politics, equity, mercy, justice, discretion, and

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<sup>55</sup> Kornstein 58.

<sup>56</sup> Kornstein 58.

<sup>57</sup> Kornstein 58.

<sup>58</sup> Kornstein 59.

<sup>59</sup> Kornstein 59.

flexibility... The spirit of the law, not the letter, should inform the decision. According to the duke and Escalus, a judge can and should make the law in interpreting it.<sup>60</sup>

In that vein, Shakespeare addresses the “fallible nature of human judgment,”<sup>61</sup> focusing not on the accused’s guilt but the judge’s. In doing so the playwright raises issues that resonate today:

Shakespeare asks the final, fundamental, subversive questions: is any man or woman fit to sit in judgment on a fellow human being? Shakespeare thus challenges all the assumptions of society. He subjects human justice to a devastating cross-examination... As we from time to time consider nominees for the Supreme Court and lower courts, we should remember the opening speech in Measure...<sup>62</sup>

In that speech the Duke asserts that “A judge should understand ‘the nature of our people’...our ‘institutions’... ‘the terms for common justice.’”<sup>63</sup> Thus, the “prudent theory advanced by Shakespeare, and congenial to ourselves, is that law should be enforced, but in moderation,” recognizing “the realities of human nature” in both “aggravating and mitigating circumstances.”<sup>64</sup> In the final analysis, the Bowers case reflects this age-old conflict, for the Court “seems to echo Angelo in interpreting the Georgia anti-sodomy law as a valid statute. The majority declines to exercise any discretion in upholding the law, so as to avoid the ‘imposition of the Justices’ own choice of values.’”<sup>65</sup>

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<sup>60</sup> Kornstein 60.

<sup>61</sup> Kornstein 61.

<sup>62</sup> Kornstein 61-62.

<sup>63</sup> Kornstein 62.

<sup>64</sup> Kornstein 62.

<sup>65</sup> Kornstein 62.

Joel Levin asserts that Measure for Measure reflects contemporary friction between law and equity, and that Shakespeare incorporated equity to ameliorate the harshness of traditional rules and to allow for the new and emerging idea of tolerance.<sup>66</sup> The marriage contracts are illegal and do not deserve the treatment of equity because they are immoral; they exist in the play as props to bring about justice by demonstrating toleration. An act might be consistently tolerated and condemned at the same time by the same person. The Duke ultimately allows wrongdoing to exist because mercy is inappropriate and the law does not need reform. The point of the play is to legitimize the role of equity by allowing it to operate as part of the governing structure. Equity does not justify rules but justifies nonenforcement of rules.

Other critics have focused on the play's engagement with concepts of justice. In the vein of literary explication in the context of Renaissance legal philosophy, Harold Skulsky maintains that Measure's confusion stems not from its mixing of genres but from the tension between justice and moral choice.<sup>67</sup> Angelo as judge is motivated by two convictions: that he must hand down the recorded law as opposed to making decisions, and that uniformity and accuracy in carrying out the law is the one rational requirement for fair punishment. Skulsky identifies Angelo's position with Coke's concept of artificial reason, which results from legal scholarship, not natural reason. Angelo's opponents insist that a judge must use judgment where warranted to draw the fine distinctions that human predicaments demand. To avoid injustice, the anti-Angelo argument goes, law must be not merely carried out but applied *with* discrimination. The principle of equity—that the injustice of an act is not strictly a function

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<sup>66</sup> Joel Levin, "The Measure of Law and Equity: Tolerance in Shakespeare's Vienna," Law and Literature Perspectives, Ed. Bruce L. Rockwood (New York: Peter Lang, 1996) 193-207.

<sup>67</sup> Harold Skulsky, "Pain, Law, and Conscience in Measure for Measure," Journal of the History of Ideas 25 (1964) 147-68.

of positive law but somehow inherent in the nature of the act itself—is subject to two interpretations, both current in the Renaissance, and each relevant to the public condemnation of Claudio’s penalty: that punishment serves as both corrective pain and a deterrent. Puritans were eager to submit to the full power of the law because it was predictable power and not violence. In Measure, both judicial and ducal supremacy are revealed as forms of arbitrary power, motivated by the goal of political supremacy rather than the general welfare. Punishments must be suited not to the gravity of crimes or to deterrence but to the satisfaction of a vindictive sovereign. Deterrence versus vengeance is uppermost in the legalist mind of the sixteenth century. The juxtaposition of Claudio and Barnardine leads to a rejection of Angelo’s Puritan view and reduction to absurdity of the equitable justification for punishment.

Paul Hammond takes a rhetorical approach, setting the play within the context of the early modern English view that bad arguments can serve to surprise a reader into a perception.<sup>68</sup> He argues that the play makes bad arguments to show that ordinary modes of thought, legislation, and persuasion cannot articulate, let alone solve, the complex problems of love and sex, justice and mercy, exploitation and responsibility.

Dieter Mehl believes that Measure for Measure was on Tournear’s mind when he wrote The Revenger’s Tragedy, since the later play shares themes, concerns, and verbal and situational echoes with Measure.<sup>69</sup> Both works express “the worried obsession of two dramatists with the concepts of divine order, justice, mercy, and retribution,” as well as “the

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<sup>68</sup> Paul Hammond, “The Argument of Measure for Measure,” English Literary Renaissance 16:3 (1986) 496-519.

<sup>69</sup> Dieter Mehl, “Corruption, Retribution and Justice in Measure for Measure and The Revenger’s Tragedy,” Shakespeare and His Contemporaries: Essays in Comparison, Ed. E.A.J. Honigmann (Manchester: Manchester UP, 1986) 114.



longing for a community in which corruption is exterminated by whatever might be the most efficient measure.”<sup>70</sup> The nature of human and divine justice is a central concern; in Measure human justice demands death for death, and divine justice seems to demand the same in Revenger’s. Divine justice in Measure, at least in Isabella’s plea, becomes a marker of the difference between God’s prerogative and human presumption.<sup>71</sup> The heaven that delights in Tourneur’s revenge is part of the play’s oppressive Calvinist world, whereas Isabella and Vincentio look up to a different kind of heaven.<sup>72</sup> There is no doubt about Revenger’s concept of justice, but with Measure critics have found the ending unsatisfactory because it fails to resolve the conflict between the ethic of the Gospel and the necessity of retributive law.<sup>73</sup> Revenger’s carries the self-destructive justice of the moralist plays to its extreme, while Measure promotes the proper institutions for the administration of justice. This is consistent with Measure’s concern with the nature of government and the enforcement of general justice, as opposed to Revenger’s concern with retribution and private grudges. Measure fosters a clear sense that law and justice are forms of protection and education rather than instruments of retaliation and chastisement. The law of an eye for an eye is overruled by Isabella’s discovery of mercy, and by comic reconciliation and beneficent stratagems. In Revenger’s the revenger feels he is the only person denied justice, and he therefore must be judge and executioner. All his actions are based on the principle of

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<sup>70</sup> Mehl 115.

<sup>71</sup> Mehl 118.

<sup>72</sup> Mehl 119.

<sup>73</sup> Mehl 122.

“measure for measure,” but he never sues for grace or repents. The Revenger’s Tragedy ends with no clear indication that Antonio is against revenge in principle.<sup>74</sup>

Richard S. Ide focuses on morality and justice rather than on law.<sup>75</sup> He strives to mix formalism with historicism, to avoid reading texts as cultural artifacts and to avoid decoding textual signs of social embeddedness, while also avoiding the imposition of old formalist-style false unities, harmonies, and ideological closure on texts. In his reading, the play thwarts our expectation that the Duke will reward the virtuous and punish the vicious in accord with dramatic tradition. Instead, the Duke’s actual decisions are complicated by his marriage proposal, which together undermine conventional standards for the rational, impartial distribution of justice.

Finally, some critics have considered Measure for Measure in the context of early Stuart politics and political theory. Leonard Tennenhouse aims to shed light on the transitional moment of James’s accession by examining the disguised ruler plays, which revise the conventions of romantic comedy.<sup>76</sup> He compares ideas in the texts with events that involved James’s rule, and assumes that certain modes and genres become popular because they elaborate a culture’s collective fantasy about the origins and limits of power. In gratifying one anxiety the monarch might create another, as the disguised ruler plays show. As to Measure, Tennenhouse contends that Vincentio literally fulfills the terms of the law while changing the institution of law from one serving the interests of the power class to one

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<sup>74</sup> Mehl 124.

<sup>75</sup> Richard S. Ide, “Shakespeare’s Revisionism: Homiletic Tragedy and the Ending of Measure for Measure,” Shakespeare Studies 20 (1988) 105-46.

<sup>76</sup> Leonard Tennenhouse, “Representing Power: Measure for Measure in its Time,” Genre 15 (1982) 139-56.

that maintains traditional values. The throwing off of the disguise suggests change has occurred when it has not.

M. Lindsay Kaplan argues that the Duke condemns Lucio not because Lucio's slanders malign the ruler's good government, but because Lucio exposes the state's own slanderous practices.<sup>77</sup> Slander figured as theater in political and poetical practices in late sixteenth and early seventeenth century England. The monarchy identified the theatrical impersonation of actual people, especially figures of state, as slander to distinguish it from the state's own practice of publicly humiliating criminals and dissidents.<sup>78</sup> And drama that criticized the state or challenged the status quo was labeled slander and condemned, while dramatic slander that supported the ends of the state was condoned.<sup>79</sup> Although the authorities who attempted to control slander represented it rhetorically as a threat to the peace of the realm, in practice slander functioned as the state's own method of punishment and maintaining dominion. This is the argument of Measure for Measure.<sup>80</sup> Kaplan claims that Lucio poses a threat to the state because he usurps the Duke's ability to deploy slanders.<sup>81</sup> She further claims that Lucio's apparently fictitious remarks contain truths that call into question the Duke's ability to rule, and therefore constitute seditious slander.<sup>82</sup> The Duke chooses to expose and slander Angelo rather than merely rectify the situation. By posing as a

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<sup>77</sup> M. Lindsay Kaplan, "Slander for Slander in Measure for Measure," Renaissance Drama 21 (1990) 23-54.

<sup>78</sup> Kaplan 28.

<sup>79</sup> Kaplan 31.

<sup>80</sup> Kaplan 31.

<sup>81</sup> Kaplan 32.

<sup>82</sup> Kaplan 38.

slanderer and promoting slander, Vincentio maneuvers almost all of the characters present in the last scene into positions of subservience. He strengthens his authority by comparing it to Angelo's.<sup>83</sup> Ultimately the Duke's ploy fails because he alienates the spectators he wants to impress; they identify with the disgraced criminal rather than with the ruler.<sup>84</sup> Thus, attempts in early modern England to discredit the slanderous aspects of the theater could backfire against the state by calling into question the ruler's own use of theatrical power to expose and punish contrarians.<sup>85</sup>

Laura Knoppers melds feminism and new historicism, reconciling what she sees as two usually opposing approaches.<sup>86</sup> She aims to consider the play's gender as well as social and political contexts, specifically by situating Measure for Measure in relation to the actual shaming practices of church and state for sexual offenses. She attempts to reinsert women into the contextualization of the play, which new historicists failed to do, and address the seeming absence of the prostitutes Mistress Overdone and Kate Keepdown from the play. Measure's apparent shaming of men for political reasons masks an underlying process of juridical shaming for the female characters. Under the guise of comic correction and transformation, Isabella undergoes a process of punitive, juridical shaming that leaves her a silent spectacle, a stand-in for the prostitutes who do not appear. The political shaming of Angelo depends on this sexual shaming of Isabella, even though she wants to become a nun. The Duke shames Isabella to destroy Angelo's reputation, and then restores her honor in

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<sup>83</sup> Kaplan 43.

<sup>84</sup> Kaplan 45-46.

<sup>85</sup> Kaplan 47.

<sup>86</sup> Laura Lunger Knoppers, "(En)gendering Shame: Measure for Measure and the Spectacles of Power," English Literary Renaissance 23:3 (1993) 450-471.

order to redeem his own. Isabella's silent response to the Duke's proposals of marriage links her with the spectacle of the silent and absent prostitutes. All in all, the play thus reinforces gendered shaming rituals.

In a loosely-knit essay, Barbara Tovey argues that the play's deepest antagonism is between Angelo and Isabella on the one hand and the Duke on the other.<sup>87</sup> The play raises a political question: What is the proper relation between the rule of law and rule by the discretion of a wise and benevolent leader? Rigid law enforcement without regard to the circumstances of each particular case results in injustice and cruelty, while ruling without law results in chaos and corruption. The marriage of the Duke and Isabella (Tovey assumes that Isabella accepts the Duke's proposal) will prove a marriage of opposites in the best sense, allowing each to correct the other's defects. Isabella, like Angelo, believes that moral rules have no exceptions and that violation of a rule cannot be mitigated by extenuating circumstances; her arguments in favor of mercy for Claudio were made merely to sway Angelo. In a very pro-Duke reading, Tovey asserts that his deficiencies as a ruler stem from his philosophical nature which, as Plato theorized, makes people unfit to rule because it can distract them from the demands of governing and cause them to recognize in themselves the vices that they are obligated to correct in others. Thus, if the Duke disregards the law, he does so for unselfish reasons, to bring about the greater good for his polity, and he achieves that goal.

To Louise Halper, the play captures a political moment which positions prerogative based on divine right against law based on custom or nature but not divinity, a moment often

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<sup>87</sup> Barbara Tovey, "Wisdom and the Law: Thoughts on the Political Philosophy of Measure for Measure," Shakespeare's Political Pageant: Essays in Literature and Politics, Ed. Joseph Alulis (Lanham, MD: Rowman & Littlefield, 1996) 61-75.

taken as the starting point of the conscious development of the Anglo-American conception of the rule of law, as well as the inception of the quarrel between king and parliament that led to revolution.<sup>88</sup> Measure can be read as pro-prerogative or, as Halper reads it, as an intervention which opposes the claims of law but is not necessarily monarchist; to this end, she uses Brecht's adaptation of Measure as a guide. In her reading the play rejects any self-referential claims of law to fairness, universality and justice, a rejection that a short time later in the Revolution came to be similarly expressed by "the most principled" of the revolutionaries.<sup>89</sup>

Halper pits a "royalist" reading of the play against a "subversive" one. In her royalist reading, the play questions whether human law is trustworthy compared to the divine mercy available to a true ruler.<sup>90</sup> As with James's pardons of Raleigh's co-conspirators, the pardons and unexpected escapes from execution that close the play show that it is not the law but the monarch who brings the proceedings to a just conclusion. The statute against fornication remains in effect, and its enforcement remains wholly within the Duke's discretion.<sup>91</sup> In a subversive reading which focuses on the lower-class characters that royalist readings must ignore, Halper writes that the officers of the law are incompetent, the judges especially the Duke and Angelo are subject to the influence of rich, and the law itself is changeable.<sup>92</sup> Thus, the play points to the problematic idea of the rule of law; the representation of neutrality is

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<sup>88</sup> Louise Halper, "Measure for Measure: Law, Prerogative, Subversion," 13 Cardozo Studies in Law and Literature (2001) 221-69.

<sup>89</sup> Halper 221.

<sup>90</sup> Halper 235.

<sup>91</sup> Halper 242.

<sup>92</sup> Halper 248.

inconsistent at best, false at worst. The lives of the common people under law are no more ordered, predictable, or safe than they would be under some other alternative. As Brecht interpreted it, Measure argues for a more communal and collective discourse than that offered by the developing legal rhetoric portraying the rule of law as protecting the rights of the individual market participant.<sup>93</sup>

Debora Shuger offers an approach that combines intellectual history with a broad yet selective reading of the play, in an effort to resurrect the question: What does the play mean?<sup>94</sup> She maintains that Measure for Measure “is a sustained meditation on its own political moment—the political moment of James’s accession,” but also of the Reformation’s aftermath, and offers itself as a guide and witness to that moment.<sup>95</sup> She proclaims that her book is not about Measure and does not present a reading of the play, but uses the play as a basis for rethinking English politics and political thought *circa* 1600. In the process Shuger raises questions that are broadly political, such as: Why does Shakespeare associate punishment with sexual regulation? Why would a play specifically about secular government focus on punishing illicit sex? Why is the state in the person of its ruler associated with the sacrament of penance? Her book *is* about the nature of Christian rule and construes the structure of Tudor-Stuart politics in extremely different terms from those found in recent histories, partly because these histories take into account the constitutional struggles to come, and partly because they define the political so as to exclude the religious ideals that inform

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<sup>93</sup> Halper 252.

<sup>94</sup> Debora Shuger, Political Theologies in Shakespeare’s England (NY: Palgrave 2001).

<sup>95</sup> Shuger, Political Theologies 1.

early modern thinking on government and its properties.<sup>96</sup> Simultaneously, her book is about political theology in post-Reformation England as it pertains to the convulsive events and issues of its own historical moment—the rule of law, the right of privacy, the bearing a ruler’s private misconduct has on his public authority, the evangelical politics of sexual regulation and compulsory virtue. These issues have relevance to our own contemporary times in events such as the Clinton-Lewinsky scandal and the end of apartheid in South Africa. For Shuger, contemporary events shed light on historical materials, and the historical on the contemporary.<sup>97</sup>

In this project Shuger adopts a hermeneutic eschewing the standard literary critic’s search for hidden meanings, nuances, and ambiguities, focusing instead on the obvious. She assumes that texts do not usually omit, conceal, or make ambiguous their important issues. If Shakespeare had thought it important for the audience to realize that the Duke was doing something improper in disguising himself as a friar, the play would have indicated so. The fact that no one in the play, not even other friars, objects to the Duke’s strategy, or even suggest that there could be an objection, means that the issue does not matter in this play. Ditto the ethics of the bed trick and Isabella’s response to the Duke’s offer of marriage—if her response had been crucial, it would have been scripted.<sup>98</sup> To use silences and opacities as the starting point for an inquiry into political landscape would be unavailing, since an argument cannot illuminate one obscurity by means of another. She therefore attends to what the play makes clear, explicit, and overt, since only what is evident can serve as evidence of

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<sup>96</sup> Shuger, Political Theologies 1-2.

<sup>97</sup> Shuger, Political Theologies 4.

<sup>98</sup> Shuger, Political Theologies 5.



something else, and Shuger wishes to use the play as evidence of something else. Hence, she is interested in the obvious—that the Duke cares about his subjects’ readiness to die, that he forces Angelo and Lucio to marry the women they have wronged, that Angelo defends the strict uniform enforcement of the law, and that the law makes premarital sex a capital offense. These issues are fundamental to the play’s meaning, to its “truth;” their importance is signaled by their clarity, and attending to the obvious will make the play more, not less significant and interesting.<sup>99</sup>

Shuger places the play within its historical moment, which she defines as the “relevant proximate past;” in this case, that past extends to the early Tudor prerogative courts and Protestant state. Focusing historical inquiry on the present time of present things, as the synchronic approach of cultural studies and new historicism does, often distorts the actual rather than yielding a thick description of it. As Augustine says, people recall past things into their present, as when we read a poem and construe the line presently under our gaze by recalling the relevant preceding lines. Conversely, Shuger tries to keep the future and our knowledge of seventeenth-century politics from seeping into her analysis of Measure for Measure or its political moment.<sup>100</sup>

The contemporary belief that illicit sex erodes the moral foundations of personality and that the ethical order of the state hinges on the private virtues of public officials has obvious bearing on Measure. Both claims are built into the plot, which centers on a ruler whose yielding to lust sparks acts of injustice and abuse of power. Angelo’s moral collapse follows the trajectory put down in the Book of Homilies, which is one reason why the play

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<sup>99</sup> Shuger, Political Theologies 6.

<sup>100</sup> Shuger, Political Theologies 7.

does not support a reading in which sex is a private matter, irrelevant to the conduct of public life and hence outside the state's jurisdiction. The play satisfies the Duke's sense that sexual license leads to social injustice—to the victimization of the weak and oppression of the innocent, to Lucio's child abandonment and Angelo's sexual extortion. Angelo's interior decay and fall bear on the work's political argument, especially the anti-Machiavellian topos throughout the play that suggest a good ruler must be a good person. In Measure for Measure, this trite-sounding claim has unexpected and complex political implications.<sup>101</sup>

Shuger distinguishes political theology from its secular contemporary, political theory. Measure for Measure is best understood in the context of the cultural debate over whether the state constitutes the primary *locus* of the sacred, and if so in what sense, since other sacred *loci* existed (such as the church of Rome) through which grace entered the social body to restore and redeem it. Measure is about sacred *loci*, Christian social order, and the relation of Christ's kingdom to England.<sup>102</sup>

Angelo equates the Duke with "power divine," but we are not used to thinking about early modern kingship in terms of the monarch's likeness to God rather than his conflict with Parliament.<sup>103</sup> The Duke sees himself as God's substitute; in his soliloquy at 3.2 beginning "He who the sword of heaven will bear," he argues that a ruler who is as weak and sinful as other people has no right to judge them, which is why the bearer of heaven's sword must be a holy man. But to argue that the exercise of public authority requires personal holiness because it is morally wrong to punish another for one's own offenses does not answer

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<sup>101</sup> Shuger, Political Theologies 38.

<sup>102</sup> Shuger, Political Theologies 47.

<sup>103</sup> Shuger, Political Theologies 54.

Angelo's claim that "What's open made to justice, / That justice seizes. What knows the law / That thieves do pass on thieves?" By implication, Angelo's moral character has no necessary bearing on his public administration of justice, since as he later tells Isabella, it is not he but the law that condemns her brother. But Angelo reverses himself and recognizes that to possess Isabella, he is willing to undermine his own moral identity as well as the foundations of civic moral order: "Thieves for their robbery have authority / When judges steal themselves." If the ruler or judge is not a good man, he cannot be a good ruler.<sup>104</sup>

The link between a ruler's private virtue and his public authority becomes clearer when the good ruler/good man motif resurfaces in a conversation between the Friar-Duke and the Provost. In defending Angelo against the Provost's charge that "It is a bitter deputy," the Duke argues that a ruler becomes tyrannous not because he fails to abstain from vice, but because he does not subdue "in himself [that] which he spurs on his power / To qualify in others"—in other words, because he exempts himself from the laws, from the restraints and prohibitions on desire that he imposes on his subjects. His personal conduct thus affects the nature of his authority. A ruler who allows himself pleasures his own laws forbids, while condemning lesser people for doing the same, perverts heaven's sword. To punish for faults of one's own liking is in effect to confirm that might equals right. Isabella makes this point explicitly in pleading for her brother's life.<sup>105</sup>

The politics of Measure for Measure rests on the contrast between the sacred ruler and the hypocritical judge. As advocate and enforcer of sexual regimentation Angelo represents the Puritan understanding of the *regnum Dei*, in contrast to the vision of Christian

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<sup>104</sup> Shuger, Political Theologies 64.

<sup>105</sup> Shuger, Political Theologies 66.

society figured by the Duke's actions. But Angelo's hypocrisy in punishing others for his self-offenses means that he also stands for unjust or tyrannous authority, in contrast to the Duke as bearer of heaven's sword.<sup>106</sup> This second contrast is not between two different ideological camps, such as absolutists and republicans, but between images of good and bad power within a single political vision. This relation between the Duke and Angelo has been shaped by a way of thinking about politics and distinguishing good from bad power which would be irrelevant to the constitutional issues of the mid-century. The alternatives are not divine right versus popular election, but divine mimesis versus private ambition. Measure for Measure implies that in the absence of a sacral ruler to bring peace from above, it would be every person for himself or herself, and the winner would take all.<sup>107</sup> Thus, the Duke embodies and enunciates what seems to have been the dominant understanding of monarchy *circa* 1600, and Angelo's characterization—his hypocritical severity and his descent from unrighteousness into injustice—is also politically conceived.<sup>108</sup>

In this political conception, the Duke is consistent with the Tudor concept that a king provides justice for his people as the one who defends the weak against the craft and violence of the strong, and thus acts in God's stead.<sup>109</sup> In English legal and political thought *circa* 1600, the ruler's absolute powers derived from his obligation to deliver justice to his subjects, even if the positive law did not afford it, and to make justice happen where it cannot be brought about by due process. The sacral sovereign decides the exceptions, having the

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<sup>106</sup> Shuger, Political Theologies 68.

<sup>107</sup> Shuger, Political Theologies 69.

<sup>108</sup> Shuger, Political Theologies 71.

<sup>109</sup> Shuger, Political Theologies 74.

discretionary authority to use mercy, provide equitable relief, and to qualify the law as seems right according to his conscience. This is the kind of authority the Duke exercises in the final scene where he ignores Vienna's anti-fornication statute and instead sentences Claudio to marry his fiancée, pardons Angelo and Barnardine, and in general brings about justice without due process.<sup>110</sup>

Measure for Measure is about the conflict between mercy and strict law, but it also seems to resemble the workings of equity.<sup>111</sup> The Duke tells Isabella of how Angelo wronged Mariana; he plots to compel Angelo to recompense Mariana through the bed trick. In addition, Mistress Overdone's account of how Lucio abandoned Kate Keepdown after she became pregnant; the final judgment scene where the Duke pardons Claudio, Angelo, and Lucio and sentences each "only" to marry the woman he wronged; those offenses and the Duke's responses to them resemble the kinds of cases adjudicated in Chancery, as well as Chancery's way of dealing with them.<sup>112</sup> Further, except for Isabella's argument that Angelo did not actually commit any crime—and this is a huge exception—the reasons adduced or implied for pardoning him are the considerations of equity—the possibility of the accused's repentance, the overall moral tenor of his life, and his wife's happiness. But these are not the kind of extenuating circumstances that modern legal historians associate with the equity administered in Tudor-Stuart prerogative courts. While social justice issues of might and right inform the subplots leading to the compelled marriages of Angelo and Mariana, Lucio and Kate, the emphasis has shifted from public evils to the well-being of private

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<sup>110</sup> Shuger, Political Theologies 81.

<sup>111</sup> Shuger, Political Theologies 97.

<sup>112</sup> Shuger, Political Theologies 98.

individuals—of Mariana, Kate, and Kate’s child. This shift is underscored by the Duke’s pardon of Barnardine in the hopes that he might reform his ways under the guidance of Friar Peter. In focusing on the welfare of individuals, the Duke does not address the question of how freeing such an unrehabilitated criminal is likely to affect the health of the commonweal.<sup>113</sup>

The Duke’s concern for the individual good was held to be a concern for the moral and spiritual good of individuals that characterized the penitential justice of the church courts, but he is a temporal ruler. His actions conform to canon law and its intersection with equity, occupying a cultural site where the sacred inform the secular order of the state—a sacral *locus*.<sup>114</sup> This crossover of the penitential justice administered by the Christian courts into the play’s representation of secular justice, as shown in the Duke’s treatment of Barnardine especially, evokes not the actual workings of Tudor-Stuart polity, but scattered similar points of contact.<sup>115</sup> For example, like Vincentio, James viewed himself as accountable to God for his subjects’ salvation.<sup>116</sup> Also, the rule against executing those unable to repent due to insanity suggests that one way the state exercises its spiritual jurisdiction over individual subjects is through the justice system.<sup>117</sup>

Like Angelo’s sentencing of Claudio, the Duke’s pardon of Barnardine engages the central issues dividing Anglicans from Puritans, and concerns the nature of Christian

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<sup>113</sup> Shuger, Political Theologies 101.

<sup>114</sup> Shuger, Political Theologies 102.

<sup>115</sup> Shuger, Political Theologies 109.

<sup>116</sup> Shuger, Political Theologies 110.

<sup>117</sup> Shuger, Political Theologies 114.

community. Puritanism typically rejected the penitential in favor of penal justice,<sup>118</sup> while Anglicans typically defended penitential justice as bound up with an ideal of Christian community that tended to mix the good with the evil rather than distinguishing among types of sinners as Puritanism did.<sup>119</sup> Moreover, the writers of murder pamphlets usually depicted public executions as penitential rituals, where the condemned repented and warned spectators not to take the path to crime and sin that he had taken. The authorities tried to have criminals repent probably because this solicitude ratified the state's claim to be concerned for people's eternal welfare, to administer penitential justice, rather than to reinforce the ideological legitimacy of the state and thus encourage conformity and obedience, as Lake and Sharpe claim.<sup>120</sup>

Measure for Measure concerns the Christian community that is the state, and it directs our attention to Tudor-Stuart sites where temporal power, especially the temporal justice system, gets invested with a penitential character.<sup>121</sup> In post-Reformation England, the state and the temporal courts incorporate penitential elements, but in Measure and the pardons of Barnardine, Angelo, and Lucio, the soteriological and pastoral aims of Christian justice *replace* the penal sentences of the law.<sup>122</sup> The issue dividing Anglicans and Puritans concerned the ungodly, people like Lucio and Barnardine—whether one should assume that they might someday repent, whether one should base one's actions on that assumption, or

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<sup>118</sup> Shuger, Political Theologies 118.

<sup>119</sup> Shuger, Political Theologies 122.

<sup>120</sup> Shuger, Political Theologies 128-129.

<sup>121</sup> Shuger, Political Theologies 130.

<sup>122</sup> Shuger, Political Theologies 131.

whether there are differences among sinners, with some sinners being unredeemable. The Duke extends his mercy to those who common sense as well as Puritanism would label castaways.<sup>123</sup>

The pardon of Barnardine exemplifies the crossover of penitential modes into temporal governance that the Duke brings about, and evokes a model of Christian polity that goes back to the patristic era. Augustine's letters enunciate the political claims that the Duke's conduct hints at—that the state and its rulers have a responsibility for the eternal welfare of their subjects, and that the specifically Christian character of the state manifests itself most importantly in its administration of justice—in pardoning, reconciling, and redeeming transgressors rather than punishing them, all of which is a distinctly un-Puritan vision of godly rule. Thus, two main strands of Christian political thought exist—one based on penance, the other on law, and the play as Shuger reads it suggests that penitential justice might work as an alternative to the penal system.<sup>124</sup>

## 2. Ensuring Conviction Beyond all Doubt

It has been argued that Measure for Measure comprises a discourse in and about probability. Tracey Gau compares Measure to Aristotle's On Rhetoric, arguing that Shakespeare uses Aristotle's notion of probability to show the indeterminacy of language's ability to define human values.<sup>125</sup> Aristotle's presentation of probability "represents" the way

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<sup>123</sup> Shuger, Political Theologies 132.

<sup>124</sup> Shuger, Political Theologies 137.

<sup>125</sup> Tracey Gau, "Aristotle's On Rhetoric and Shakespeare's Measure for Measure: Notions of Probability," Conference of College Teachers of English Studies 63 (1998) 92-102.



Shakespeare uses classical antecedents to shape the arguments of his characters. The characters primarily engage in judicial rhetoric, either accusing or defending another, and all fail to communicate or persuade. These failures allow the audience to see performed the gradations inherent in the concept of justice, while the concept of probability allows them to observe the idea of thinking in degree. Thus, On Rhetoric provides a rhetorical framework in which to see the play as judicial discourse mainly based on probability, as well as ethos and pathos but not logos. Shakespeare produces paradoxes out of dichotomies such as choice and intent, power and powerlessness, and shows that probability pervades all areas of human communication, sometimes leaving the audience with a conclusion but not a resolution.

Nonetheless, explicitly and implicitly, Measure proffers something that sounds akin to satisfied conscience as the standard of proof, and considered in the context of the play amounts to certainty. Explicitly, undoubtful proof is the standard of proof in the murder case against Barnardine. He has long been imprisoned on a charge of murder, yet the Duke refrained from either setting him free or ordering his execution because there was doubt about his guilt; Barnardine's "fact, till now in the government of Lord Angelo, came not to an *undoubtful proof*" (4.2.136-37, my italics).<sup>126</sup> Not only has his guilt been proved beyond all doubt, but under Angelo's administration, Barnardine's guilt is "Most manifest, and not denied by himself" (4.2.139). Undoubtful, manifest, not denied—the evidence has produced a state of certainty in the minds of the Provost, the Duke, and Angelo, and the play does nothing to suggest that they are wrong. After nine years, Barnardine's case has finally been resolved with certainty, proven by evidence and perhaps confirmed by confession—though in

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<sup>126</sup> William Shakespeare, The Arden Edition of the Works of William Shakespeare: Measure for Measure, Ed. J. W. Lever, rpt. ed (London: Methuen, 2001).

“not denying” the truth of the charge, Barnardine may merely have remained silent, and neither confessed nor denied the charge. All of the other accused persons in this play confess their crimes; the more minor reprobates (Lucio, Pompey, Mistress Overdone) do not confess in a judicial proceeding but do make out-of-court admissions of guilt. These confessions and admissions implicitly underscore that certainty—undoubtful proof coupled with confession—is the de facto standard of proof in the Duke’s realm, much like the Continental system which aimed for certain proof and preferred to get it by confession, even if obtained under court-ordered torture.

Karen Cunningham compares the practice of moots at the Inns of Court to the dialectic of Measure for Measure.<sup>127</sup> In imaginary cases argued by law students at the Inns, the common law was figured not as a self-interpreting code that could be applied to particular cases, whether by a literalist like Angelo or interpretationists like Escalus and Isabella, but as a prompt for speculating, for imagining challenges to its operations. Similarly, the play requires characters and audiences to consider competing views of the elements of city life yet these evaluations produce little consensus. Instead of resolving its debates, Measure leaves them argued but unanswered.<sup>128</sup>

Considered as an instance of dramatic mooting, Measure directs its audience away from the idea that character and personality are fixed, individualized things that change and toward the idea that identity is improvisational and social. The play focuses on the process of forging communal selves in a common language and aims more at raising than resolving

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<sup>127</sup> Karen Cunningham, “Opening Doubts upon the Law: Measure for Measure,” A Companion to Shakespeare’s Works, Vol. IV, The Poems, Problem Comedies, Late Plays, Ed. Richard Dutton and Jean E. Howard, Oxford: Blackwell (2003) 316-332.

<sup>128</sup> Cunningham 319.

issues such as pregnancy and marriage or leniency and rigidity in executing law.<sup>129</sup> Like moot cases, Measure invokes the language of conjecture and conditionality to heighten the point that every view is provisional and under construction.<sup>130</sup>

Cunningham further places the play in the context of what she sees as a communal identity and common language evidenced in legal aphorisms. By the early seventeenth century, mooting at the Inns has ceased to shed light on legal principles and instead clouds them, according to Bacon. In one line of argument that historians have made, mooting no longer represents law as serving court-centered power; instead, mooting constitutes a counter-process that undermines and threatens royal authority. Cunningham quotes a source which quotes Bacon as describing mooting's conjectural bases as challenging legitimate authority and obscuring rather than illuminating law; mooting's purpose is to open the law upon doubts, not to open doubts upon the law.<sup>131</sup> While mooting was perceived as influential in shaping legal judgments, its capacity to open doubts upon the law was also perceived as undermining parliamentary and royal prerogatives, and as disseminating among a wide range of subjects an equally wide range of ways of imagining issues of social and political importance. Thus, the position of mooting was outside of and often against what a monarch or parliament might prefer.<sup>132</sup> Measure for Measure positions itself to dramatize in a speculative way the conscience of the community and the effect of performance that relates

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<sup>129</sup> Cunningham 318.

<sup>130</sup> Cunningham 323.

<sup>131</sup> Cunningham 328-329.

<sup>132</sup> Cunningham 329.

to social contracts, specifically marriage. The play is neither anti-Jacobean nor pro-divine right, and makes its strongest statement simply by opening doubts upon the law.<sup>133</sup>

If the play is an example of dramatic mooting, then the standard of undoubtful proof coupled with confession is subject to interrogation. That interrogation begins with the argument that confession is not enough; to ensure full certainty, confession must be accompanied by the consent of the offender to his or her punishment. To Lars Engle, the requirement of confession is one factor that suggests that Measure presents a case study of authority issues in a community strongly influenced by Montaignean skepticism.<sup>134</sup> The Duke is a skeptic who fears the social consequences of authoritative skepticism and sees the disturbing emergence in Vienna of skeptical conventionalism about morality, law, and religion. The play stages encounters between moral authority and resistant subjects that also constitute clashes between absolutism and skepticism, or between disguised skeptics trying to invoke absolutes and open skeptics resisting that invocation.<sup>135</sup> Engle makes use of what Richard Rorty calls perspectival thinking redescription. Such redescription—for example, of Claudio's act with Juliet, altering it from a natural act to a capitol offense—thwarts or bypasses the available, stabilizing hierarchies of description, raises the possibility that dialogic redescription can reach no end, and forces one to think of truth as a fluctuating human commodity rather than a natural or God-given certainty. Redescription is pervasive in Montaigne and Shakespeare.<sup>136</sup>

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<sup>133</sup> Cunningham 329.

<sup>134</sup> Lars Engle, "Measure for Measure and Modernity: The Problem of the Sceptic's Authority," Shakespeare and Modernity, Ed. Hugh Grady (London: Routledge 2000) 85-104.

<sup>135</sup> Engle 88.

<sup>136</sup> Engle 88.

Engle notes parallels between Montaigne's comments on religion and law, on the one hand, and Lucio's comments on religion and the Escalus/Elbow scenes on law, on the other hand. Escalus and the Duke seek but do not find absolute principles to enforce; instead, they see linguistic slippage, social change, and moral relativity. They are reduced to issuing warnings and threats and trying to promote redescriptions which their subjects are reluctant to internalize.<sup>137</sup> As a skeptic, the Duke has a problem with law enforcement which is part of a more general problem concerning social authority. He regards his authority as provisional, based on social customs and legitimized by a habit of consent; both custom and habit are mutable, and thus authority is vulnerable.<sup>138</sup> Law enforcement can only be safely accomplished by a mechanism of social consultation like a jury trial or by the consent of the offender to his punishment.<sup>139</sup> The play is full of attempts—some partly successful—to obtain the consent of the offender to his or her punishment; the Duke is particularly persistent in attempting to obtain them. Even before the Duke becomes directly involved, the Viennese seem prone to accept and internalize their punishments.<sup>140</sup> But as Claudio shows, the play proposes a limit to the skeptic's attempt to displace his judicial authority to punish offenders onto the religious consent of subjects: they can be persuaded to feel guilty, but not to will their own deaths.<sup>141</sup>

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<sup>137</sup> Engle 97.

<sup>138</sup> Engle 98.

<sup>139</sup> Engle 99.

<sup>140</sup> Engle 99.

<sup>141</sup> Engle 101.

A successful prosecution is one in which the accused “accepts and internalizes” his punishments.<sup>142</sup> Claudio is the prime example; as he is paraded through the streets in irons to deter others from fornication, he concludes:

Thus can the demigod Authority  
Make us pay down for our offence, by weight,  
The bonds of heaven. On whom it will, it will;  
On whom it will not, so; yet still ‘tis just.  
(1.2.112-15)

“‘Tis just”; Claudio feels he deserves his punishment even though it is administered arbitrarily in relation to others who have committed the same crime. He also blames himself for his arrest and punishment, telling Lucio that “this restraint” comes not from unjust laws or law enforcement, but “From too much liberty” (1.2.117). Under Vincentio’s tutelage, Claudio even comes to believe he prefers death to life (3.1.42-43). He seems “an authority’s dream subject: one in whom punishment inspires not resistance or the unraveling of a social fabric, but rather reflective justification of the punishment and attendant moral commentary on the natural evils of the self which make exercises of supervisory authority necessary.”<sup>143</sup> Juliet, too, offers the same submission and self-blame; she repents and takes “the shame with joy” (2.3.35-36). Compliance is not static; Claudio reverses himself when death draws nearer but acquiesces again when Isabella condemns him so harshly for suggesting she might sacrifice her chastity for his life after all. Correspondingly, the state refrains from carrying out its death sentence against Barnardine, who has not denied the charges yet refuses to “consent to die” “for any man’s persuasion” (4.3.55, 59). The proof of Barnardine’s guilt may be undoubtful and confirmed by his refusal to deny it, but without his consent to

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<sup>142</sup> Engle 99.

<sup>143</sup> Engle 99.

punishment, the state lacks the “conviction” to impose the sentence. Ultimately, this “proven” murderer will be rewarded with the Duke’s pardon of his crimes.

Megan Matchinske also sees political implications in the requirement of confession in Shakespeare’s *Vienna*. Matchinske sees parallels between the offices of church and state; in the person of the disguised duke-as-friar, both church and state share jurisdiction to prepare the people to face God’s judgment and his dispersal of their souls. Both church and state desire “to unite conscience with conduct, and thought with action.”<sup>144</sup> The complexity of this task, especially in the administration of law, is made apparent in Barnardine’s refusal to accept execution as his deserved sentence.<sup>145</sup> The play continually questions the state’s ability to yoke conscience and conduct, yet also attempts to depict the state as having the authority to access secret thoughts and recast them in acceptable forms.<sup>146</sup> The vacillations of the relatively compliant Claudio also suggest that attempting to direct a subject’s conscience to bring about a particular type of conduct will prove elusive. More specifically, Claudio’s vacillations between accepting his punishment as legitimate and rejecting it as deriving from an arbitrary and personal tyranny illustrates a potential weak link between criminal prosecution and moral reform. That Claudio can perceive his sentencing as unjust—even though he later accepts it—reveals that state power to regulate behavior is limited at best.<sup>147</sup>

This policy of achieving full certainty and conviction contrasts with the fallibility of the judgments Escalus makes in the quasi-trial scene. The audience had already seen Escalus

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<sup>144</sup> Megan Matchinske, *Writing, Gender and State in Early Modern England* (Cambridge: Cambridge UP, 1998) 114.

<sup>145</sup> Matchinske 115.

<sup>146</sup> Matchinske 116.

<sup>147</sup> Matchinske 117.

functioning as a judge in the hearing involving Pompey, Froth, and Elbow; his judgments there can be compared to the judgments he makes in the quasi-trial scene. He decides to believe Angelo's denials because on the one hand, he knows personally of Angelo's abstemiousness, knows his reputation for scrupulous standards and behavior, while on the other hand, the women accusing Angelo give conflicting testimony. Clearly they have conspired with someone else to slander Angelo and by extension to weaken the state. Isabella portrays Innocence Abused but Escalus has good reason to find her performance unbelievable. He has no doubt that Angelo is innocent and that Isabella, or Mariana, or more likely both women are lying. As a judge trying to discern the facts, Escalus is right to suspect that someone has provoked Isabella's claim that she submitted to Angelo's blackmail and had sex with him and Mariana's conflicting claim that she made love with Angelo at the same moment as Isabella's tryst with him. At the Duke's urging ("Do with your injuries as seems you best, / In any chastisement" (5.1.255-56), Escalus, until now the exemplar of judicious rationality, vows not only to torture the ladies but also a priest, Friar Lodowick: "Take him hence! To th' rack with him!" (5.1.309), and orders the Provost to "lay bolts enough upon him, let him speak no more" (5.1.343), though preventing the accused priest from speaking would serve to inhibit rather than elicit his confession. In his outrage Escalus sees the chaste lady Mariana and the would-be nun Isabella as "giglets" or lewd women. His lack of doubt as to Angelo's innocence turns out to be injudicious rather than warranted.

The stability of this legal system based on certainty is further shaken as Vincentio and Angelo make contradictory assertions as to the foundations of law's authority and its claims to fairness. For Vincentio authority derives from the judge's knowledge of himself and his conscience:



He who the sword of heaven will bear  
 Should be as holy as severe:  
 Pattern in himself to know,  
 Grace to stand, and virtue, go:  
 More nor less to others paying  
 Than by self-offences weighing.  
 Shame to him whose cruel striking  
 Kills for faults of his own liking!  
 (3.2.254-61)

This is Vincentio's ideal judge, and he tells the Provost—perhaps disingenuously—that Angelo embodies that ideal (though Vincentio's estimation of Angelo seems to change when he learns of Angelo's warrant to expedite rather than vacate Claudio's ordered execution):

...his life is parallel'd  
 Even with the stroke and line of his great justice.  
 He doth with holy abstinence subdue  
 That in himself which he spurs on his power  
 To qualify in others; were he meal'd with that  
 Which he corrects, then were he tyrannous;  
 But this being so, he's just.  
 (4.2.77-83)

And yet the Duke's *performance* of a trial underscores the instability of law as the Duke conceives it. In the dialogue that is Measure for Measure, Ervene Gulley argues that on the one hand, law is an abstract system with which people try to reach accommodation that will serve the best interests of all. On the other hand, law is a theatrically manipulated construct serving the vision of individuals with power.<sup>148</sup> In moments of significant conflict, characters whose circumstances force them to act while depriving them of reliable guides validate their actions by scripting, directing, and performing those actions as legal process. Law becomes theater.<sup>149</sup>

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<sup>148</sup> Ervene Gulley, "'Dressed in a Little Brief Authority:' Law as Theater in Measure for Measure," Law and Literature Perspectives, Ed. Bruce L. Rockwood (New York: Peter Lang 1996) 53-80, 56.

<sup>149</sup> Gulley 53-54.

The administration of law is, inevitably, performance—the refraction of general principles through individual acts. The layered, competing scripts that structure the play suggest that law in practice is inevitably performance and that only through performance can the shape of law be determined.<sup>150</sup> The legal theater that forms the subject of Measure is both a literal and metaphorical representation of theater’s identity with the dialectic of legal discourse, which creates a set of questions that define and depend on a world of thought and action; creates a set of roles and voices by which meanings will be established and shared; and does much to constitute communities and polities.<sup>151</sup> This play affirms law as a necessary and powerful principle, yet also shows that principle in practice as being necessarily shaped by human interpreters, out of the specific circumstances that are conceived as implicating law.<sup>152</sup> Thus, legal theater such as that presented in Measure suggests that the constructive operation of law in human affairs will have some theater in it.<sup>153</sup>

Moreover, Vincentio’s stance is immediately called into doubt by Isabella. She wonders whether such ideal self-knowledge is attainable and observes that one can be fooled into thinking one knows oneself:

But man, proud man,  
Dress’d in a little brief authority,  
Most ignorant of what he’s most assur’d—  
His glassy essence . . . (2.2.119-21)

A judge should judge himself before he judges prisoners brought to him; as Vincentio tells Angelo, “be you judge / Of your own cause” (5.1.68-69). But the Duke’s reliance on

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<sup>150</sup> Gulley 68.

<sup>151</sup> Gulley 69.

<sup>152</sup> Gulley 67-68.

<sup>153</sup> Gulley 68.

conscience and self-knowledge also opens the door to prerogative, and this power to override law wrecks the certainty of its judgments. Vincentio tells Angelo, “Mortality and mercy in Vienna / Live in thy tongue, and heart” (1.1.44-45), and “Your scope is as mine own, / So to enforce or qualify the laws / As to your soul seems good” (1.1.64-66). Vincentio explicitly transfers to Angelo the power to enforce but also interfere with law, to modify or vacate it, and to mitigate punishment as Angelo sees fit, bounded only by his heart and soul—his conscience. On the view being articulated by the Duke, tyranny turns not on the unequal enforcement of the laws, or the subjection of the law to the ruler’s will, but rather on the moral condition of the judge who, if he is guilty of the same sin or crime as the person he is judging, is acting tyrannically if he condemns the accused, no matter how guilty that person is.<sup>154</sup> But the law is subject also to the ruler’s will and prerogative, not just his conscience, as underscored by Friar Thomas’s reminder to the Duke that, “It rested in your Grace / To unloose this tied-up justice *when you pleas’d*” (1.3.31-32, my italics). And Vincentio’s own complaint that the license for nonmarital sex which his inaction has granted to the citizens has resulted in a situation where “Liberty plucks Justice by the nose” (1.2.28), can also encompass liberty in the sense of the Duke’s prerogative. His license to act according to his own discretion has been a kind of liberty by which the law’s claims to justice and fairness have been weakened.

Angelo’s philosophy of law is just the opposite. In Angelo the city has a ruler who spurns the subjectivity of conscience and instead proclaims his intent to inject fairness into the judicial system through neutral enforcement of the laws. He comes out against not only prerogative, but also the principle that a judge in a court of law may only judge fairly if he

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<sup>154</sup> Peter Lake, The Antichrist’s Lewd Hat: Protestants, Papists and Players in Post-Reformation England (New Haven: Yale UP, 2002) 660.

lets his conscience guide him. Angelo believes in the evenhanded administration of justice, by which all who commit a specified crime will receive the same punishment, without regard to mitigating or aggravating circumstances. Compassion or pity, rather than being a principle by which to mitigate harsh punishment, is instead merely the flip side of prerogative. If a ruler may issue orders based on his conscience, or his will, or his whim, then the outcome is the same: the subjects standing before him will be treated with partiality; offenders who have been convicted of the same crime may receive vastly different sentences. Indeed, under the Duke's hand the accused Barnardine remained imprisoned for nine years, escaping execution because his "friends wrought reprieves for him" (4.2.135). To hold the line against partiality in any guise, Angelo asserts that fairness inheres not in a sentence mitigated by the defendant's individual circumstances, but by consistent and predictable treatment of all who commit the same offence:

I show it [pity] most of all when I show justice;  
For then I pity those I do not know,  
Which a dismiss'd offence would after gall,  
And do him right that, answering one foul wrong,  
Lives not to act another. (2.2.101-05)

Angelo's concept of law removes the subjective weighing of inferences from the process of judging. He makes law a thing apart from human interference and influence; it is abstract, neutral, and presumably founded on universal principles impervious to human meddling. Indeed, Angelo behaves as if the law which he claims obligates him to order Claudio's execution were the immutable moral law of God rather than an inherently imperfect and pliable human law.<sup>155</sup> "It is as if the sin or offence for which Claudio is to be executed were being viewed from the perspective of a just and omnipotent god, not that of a

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<sup>155</sup> Lake 660.

fallen and fallible human magistrate; the criteria in play are those of divine not human judgment.”<sup>156</sup> Isabella’s brother is “a forfeit of the law,” not of Angelo’s will or discretion. He speaks of law as an entity separate from the human administrator who must be impartial even in judging his own kin, telling Isabella, “It is the law, not I, condemn your brother; / Were he my kinsman, brother, or my son, / It should be thus with him. He must die tomorrow” (2.2.80-82). The absolutism of this perspective is immediately called into question by Escalus, who conflates Angelo the man with the disembodied justice Angelo believes he is administering: “my brother-justice have I found so severe that he hath forced me to tell him he is indeed Justice” (3.2.246-48).

No one in the play questions the legality of Angelo’s prosecution and sentencing of Claudio, just its fairness; the collective conscience of the community “upon the very siege of justice” (3.2.96), cannot alter Angelo’s enforcement of the letter of the law. Against this steadfastness, the Duke and Isabella conspire to subvert the sentence Angelo has legally imposed on Claudio.<sup>157</sup> Further marking the instability of law, Angelo complicates his own position. He lists in rapid succession three different justifications for enforcing law to the letter, first distinguishing temptation from fall and intent to commit a crime from action: “‘Tis one thing to be tempted, Escalus, / Another thing to fall” (2.1.17-18). Next, Angelo argues that the court can only prosecute crimes made known to it; it cannot concern itself with unreported crimes, even crimes committed by jurors:

I not deny  
The jury passing on the prisoner’s life  
May in the sworn twelve have a thief, or two,  
Guiltier than him they try. What’s open made to justice,  
That justice seizes. What knows the laws

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<sup>156</sup> Lake 660.

<sup>157</sup> Halper 245.

That thieves do pass on thieves?  
(2.1.18-23)

Finally, Angelo prevents scrutiny of his first two points by rapidly launching into a third, claiming that fairness lies in consistent treatment under the law:

You may not so extenuate his offence  
For I have had such faults; but rather tell me,  
When I that censure him do so offend,  
Let mine own judgment pattern out my death,  
And nothing come in partial. Sir, he must die.  
(2.1.27-31)

But the law's ability to know truth through its judges is suspect as shown by the Provost's comment to Angelo: "Under your good correction, I have seen / When, after execution, judgment hath / Repented o'er his doom" (2.2.10-12). Angelo, too, is unable to differentiate his power to act under the law from his will to act regardless of law:

Angelo.        I will not do't.  
  
Isabella.       But can you if you would?  
  
Angelo.        Look what I will not, that I cannot do.  
  
Isabella.       But might you do't, and do the world no wrong,  
                  If so your heart were touch'd with that remorse  
                  As mine is to him?  
  
Angelo.        He's sentenc'd, 'tis too late.

(2.2.51-55)

Angelo says that he will not, not that he cannot, and when pressed he skirts the issue by claiming it is too late to reverse the sentence (though, at the end of the play, the Duke does just that: he renders sentences, issues pardons and then modifies the sentences). The judicial neutrality Angelo idealizes may be a fraud at worst and humanly impossible at best.

Further, as Matchinske argues, Angelo's confession at the end expresses the proper subjection to the state's authority to punish crime. Yet Angelo's crime, more than all the rest, epitomizes the real problem of judgment and control. His corrupt authority not only abuses and threatens principles of state control and obedience, but also deceives more than any of the other offenses committed in the play. Angelo's denial of guilt, right up to the play's conclusion, suggests that conscience has no necessary connection to conduct, that judgments that claim to be morally certain may lack connection to conscience, and that Angelo's profession of repentance has been engineered only by the presence of a concealed, omniscient authority in the person of the Duke-Friar.<sup>158</sup>

Angelo also cannot help underscoring law's temporality; rather than being rooted in bedrock, impervious to time, law's legitimacy is entirely fashioned and refashioned in the here and now. The state must keep vigilant in enforcing its laws to prevent the people from altering those laws *by custom*; Angelo tells Escalus and the Justice:

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.

(2.1.1-4)

As he begins to proposition Isabella, Angelo proclaims "I—*now* the voice of the recorded law / Pronounce a sentence on your brother's life" (2.4.61-62, my italics). And, in a reversal of his previous ideology which banished conscience and any partiality from the administration of justice, Angelo hypothesizes that, "Thieves for their robbery have authority, / When judges steal themselves" (2.2.176-77). At last, he depicts law's legitimacy as residing in his office and his personal reputation, not in a more abstract or absolute source:

How might she tongue me! Yet reason dares her no,

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<sup>158</sup> Matchinske 117.

For my authority bears so credent bulk  
That no particular scandal once can touch,  
But it confounds the breather.

(4.4.23-26)

Isabella captures the conundrum:

O perilous mouths,  
That bear in them one and the self-same tongue  
Either of condemnation or approof,  
Bidding the law make curtesy to their will,  
Hooking both right and wrong to th' appetite,  
To follow as it draws!

(2.4.171-76)

The judge's authority, temporary and changeable as clothing, is illusory and prone to "err like others" (2.2.135).

Thus, subject to alteration by custom, by prerogative, by conscience-guided mitigation and aggravation, law is mutable and shifting, subordinate to whatever ducal policy holds currency, as the following exchange about the legality of prostitution shows:

Escalus: Is it a lawful trade?

Pompey: If the law would allow it, sir.

Escalus: But the law will not allow it, Pompey, nor it shall not be allowed in Vienna.

(2.1.223-26)

The law does not allow prostitution now, but it may in the future; moreover, as Pompey has learned by experience, the law may not but the Duke might allow it by choosing not to enforce the law. What is legal is whatever the ruler's actions—or inactions—allow to be legal. Rather than the rule of law, the will of the ruler reigns in Vienna. Angelo immediately orders that all the brothels be shut down, then amends his order to close only the brothels in the suburbs while allowing those in the city to remain in business. The city brothels would have been closed too but, as Pompey says, "a wise burgher put in for them" (1.2.92). Claudio



also wonders whether he is being made an example by way of Angelo's office or Angelo himself: "Whether the tyranny be in his place, / Or in his eminence that fills it up, / I stagger in" (1.2.152-54). Because the previous holder of the office did not so act, Claudio concludes that the tyranny emanates from Angelo, who "for a name / Now puts the drowsy and neglected act / Freshly on me: 'tis surely for a name" (1.2.158-60).

Rather than being rooted in universal order, separate from human rule and immune to human manipulation, law as presented by both Vincentio and Angelo is a human social construct that preserves the prerogative of the ruler to overrule law while leaving citizens subject to a jumbled and shifting mix of rule and prerogative. By adhering to a standard requiring that all doubts be persuaded away, the play affirms that uncertainty is inherent in the measuring of probabilities that fact finding entails. At the same time, the play removes judgment from the jury's jurisdiction and the jury itself from the process. The temporality of law and the relativity of its legitimacy are made transparent. As a play of indeterminate genre (dark comedy or tragicomedy?) the play acts on the normative impulses of comedy—here, to make law's judgments more certain—and the skeptical sensibilities of early Stuart tragedy, which make transparent the futility of attempting to know truth with absolute certainty. The play offers a recognition that only degrees of certainty are possible; it injects probability and contingency into the concept of certainty as the constructive skeptics would do later in the century. As dark comedy or tragicomedy, Measure for Measure offers a perspective, an unconventional, skeptical one, to the "doubts about the possibility of clear judgment,"<sup>159</sup> which pervade the contemporary tragedies Othello and Hamlet.

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<sup>159</sup> David Daniell, "Shakespeare and the traditions of comedy," The Cambridge Companion to Shakespeare Studies, Ed. Stanley Wells, rpt. ed (Cambridge: Cambridge UP, 1994) 116.

### 3. Conclusion

The satisfied conscience standard impelled jurors to act on their own beliefs and to be fully satisfied that their beliefs were supported by the great weight of the testimony—whether that weight fell on the state’s or defendant’s side of the scales.<sup>160</sup> In finding facts and weighing credibility, jurors were to look inside themselves for the measure, not to arithmetical quarter, half, and full proofs as on the Continent.

Given the overt rejection of yet implicit reliance on probabilistic reasoning in court, we find neither a wholesale acceptance nor rejection of probability in Measure. Confessions and a willing acceptance of punishment, including capital punishment, enable the play to erase the hard task of judging credibility and the probabilistic drawing of inferences of actual courtroom practice. The undoubtfulness of proof—its absolutism—is at odds with the biased enforcement of law under both Vincentio and Angelo. Angelo’s thesis that judicial neutrality ensures consistency is embedded in a world of prerogative, marking his thesis as suspect and encouraging the audience’s skepticism. Vincentio’s thesis that conscience and self-knowledge are better guides to fair adjudication is similarly embedded and marked. The law’s authority to try anyone is represented as questionable, given certainty’s inconsistency and undesirability in the play, and its therefore questionable superiority to the mix of inferences and probability of the Raleigh trial. Escalus represents the reasonable judge or juror who may have “begun in doubts, yet ended in certainties” and still gotten it wrong. Embedded within the contingencies of this play, undoubtful proof becomes a standard that ironically ensures fallible belief.

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<sup>160</sup> T. A. Green, Verdict According to Conscience: Perspectives on the English Criminal Trial Jury, 1200-1800 (Chicago: U of Chicago P, 1985) 273-74.

The Duke's dispensations of marriage at the end incorporate both the conscience-guided mitigation based on individual circumstances that his thesis supports, and the one-punishment-fits-all principle of Angelo's thesis. Angelo and Lucio are ordered to marry, and for each the order constitutes a life sentence which rectifies the wrong each committed against their respective brides. As for Claudio, the Duke does not order marriage, but instructs him to "restore" the woman he "wrong'd." This charge is issued after the sentences of marriage, in the midst of the Duke's final words of advice and thanks. Marriage is of course what Claudio has wanted all along; he is now in a stronger position to marry Juliet over her family's objections. State-directed marriage is thus, simultaneously, a resolution which reckons the individual circumstances of the three men *and* a blanket prescription. This paradox resembles the one in the certainty-probability binary.

A complementary way to look at the play's conclusion is to see it as resulting from a skeptic's failed experiment in the invocation of an absolute. According to Engle, the Duke imposes a universal sentence that illustrates the skeptic's general problem in enforcing social reform.<sup>161</sup> As a Montaignean skeptic, the Duke realizes that there is no universal foundation for the enforcement of justice.<sup>162</sup>

The Duke's judgments are not so comprehensive as to suggest that the perfect knowledge of divine justice has filled the void left by fallible human justice. Instead, Measure for Measure suggests that in the world of contingent practices, certainty may only achieve a debatable greater or lesser degree of probability. Measure for Measure reifies the epistemological or degree-of-belief probability inherent in the emerging standard of proof—

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<sup>161</sup> Engle 101.

<sup>162</sup> Engle 102.

the “satisfied conscience,” yet in the depiction of the processes of judgment also explores a skeptic’s argument against law’s claim to near-certainty.

## Chapter Six

### A Conclusion

I should explain here some of the choices I have made. Throughout this dissertation, I have been defining performativity as theatricality—the self-conscious presentation of oneself as a particular persona, aimed to elicit a specific reaction or set of reactions from a particular audience. I have not attempted to theorize performativity, whether in the vein of Austen, Butler, or anyone else, and theorization might be something I will have to try in the future. I have also, for the sake of convenience, deliberately used the term “felony” anachronistically; of course, crimes were not designated felonies or misdemeanors in early modern England. Instead, there were capital crimes which we would consider felonies today—robbery, burglary, rape, murder and the like—and “trespasses” which today are considered misdemeanors or torts.

It appeared to me most useful to limit my time frame to plays that were written and first staged, and trials that took place, around 1600-1620. Not only did this limitation allow me to focus on three of the greatest trials and quasi-trials ever staged, but it also made sense in the context of contemporary tensions between skepticism and antiskepticism, the training and experiences of these particular playwrights, the well-known presence of law students and lawyers among the playgoing public, the widespread experience of ordinary people with litigation and as consumers of pamphlet accounts of sensational crimes, and the common perception, at least in London, that the Raleigh and Essex trials were unfair and unproved.

Probability may have always been part of the jury trial, but with the Reformation and the new (old) skepticism, those adjudicatory practices seem to have come under scrutiny. I excluded plays that fell within this time frame but that did not involve questions of proof (The Merchant of Venice), or that treated trials more incidentally than the ones I chose (The Winter's Tale).

I also chose to focus solely on criminal trials, where the need for persuasive proof is more pressing than in civil trials.<sup>1</sup> Further, the absence of lawyers in all non-sensational criminal trials suggests that juries considered testimony without the type of spin placed on evidence by advocates; hence, we see at least the opportunity for a more direct, less mediated encounter between jurors and evidence. In addition, issues of proof in criminal trials are more directly based on actions, or accounts of actions, rather than written contracts, deeds, etc., and therefore relate more directly to the stage.

This project evolved from a perception that, before the renewed development of systematic theories of probability in the late seventeenth century, there was anxiety about probability and its unavoidable relation to legal proof that had not been fully explored by historians of literature, science, or law. These studies had not considered the implications of probability as it was played on the stage or, for that matter, in nondramatic works I had originally intended to consider, such as Arcadia and The Faerie Queene. Further, this anxiety was not evident in the trial reports or the treatises of such luminaries as Edward Coke,

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<sup>1</sup> Legal scholars continue to explore the application of probability theories to evidence and the standard of proof of “preponderance of the evidence” in civil cases. These include Jonathan L. Cohen, The Probable and the Provable (Oxford: Oxford UP, 1977); Robert Timothy Reagan, “Supreme Court Decisions and Probability Theory: Getting the Analysis Right”, 77 University of Detroit Mercy Law Review 835 (2000); Ronald J. Allen, “Theories of Inference and Adjudication: A Reconceptualization of Civil Trials”, 66 Boston University Law Review 401 (1986).

Matthew Hale, and Thomas Smith. When I began, I could not have foreseen that so many other literary scholars would embark on similar projects.<sup>2</sup>

How does one understand the difference between certainty and uncertainty, and why is one ever justified in believing in an uncertainty? In attempting to address this question, I have found that the multiple yet related senses of probability cannot be contained within a linear or single-stranded explanation; undeniably, seventeenth-century texts of all types of philosophical inquiry—literary, religious, philosophical, medical, scientific, legal—refer to “probability” of one hue or another, giving testament to probability’s shades of meaning and subtleties of usage. Additionally, in practice, our brains working from prior experience tell us what is possible, probable, and plausible, as well as impossible, improbable, and implausible, and plays affect those perceptions and judgments. The uncertainty of early modern English verdicts was perceived by some as a deficiency in the human capacity to judge behavior, to read external signs as indicators of inwardness and intentions, whereas after Locke this uncertainty is praised for its relative surety. I want to continue trying to answer questions about early modern English conceptions of and practices involving probability by approaching uncertainty and probability as historical and cultural issues brought to life on the stage and in court and diffused throughout the culture.

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<sup>2</sup> Among the forthcoming works that explore relations between evidence and proof in court and on stage are Lorna Hutson’s The Invention of Suspicion: Forensic Realism in Renaissance Drama, Subha Mukherji’s Law, Evidence, and Representation in Early Modern Drama (Cambridge University Press), Dennis Kezar’s Solon and Thespis: Law and Theater in the English Renaissance (Notre Dame Press), and Holger Schott Syme’s work-in-progress entitled Trial Performances: Theatre and the Law in Early Modern England, 1550-1625.

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