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SYMPOSIUM

"As if" – the Court of Shakespeare and the Relationships of Law and Literature

Desmond Manderson

Faculty of Law, McGill University

I. Law and the Day After

The McGill Court of Shakespeare is now in its fourth year. Each year the Court imagines and constructs a new case to be mooted, and assigns students to argue the case before it in a public trial. Without wishing to trespass too much on previous explanations I have written about this process,[1] this is not about the law in Shakespeare's time, or what Shakespeare says about law: it is something far more radical. The Court thinks of Shakespeare simply as law, just as we think of the Civil Code or the judgments of the Supreme Court as law. By a process of dramatic invention and indirection, the project seeks to model and to explore the nature of interpretation, the development of a legal tradition, and the way in which value and meaning intersect in the creation of law and literature alike.

Clearly there are pedagogic elements to this task. The Court presents those who participate in it, whether as judges, as legal counsel, or as audience – clients have they none, but spectators a-plenty – with an unusual opportunity to create an organic and responsive *model* for the ways in which resources to articulate social values can be developed; to explore the ways in which traditions of legal and textual interpretation are developed and modified; to offer new insights into the normative implications of a body of work of supreme cultural significance; to explore the particular nature of Shakespeare's drama, and of literature generally, as a forum for the explorations of normative social values; and to consider, as broadly as possible, how literature and literary thinking might influence and might have already influenced law and legal thinking.

Address for correspondence: Desmond Manderson, Faculty of Law, McGill University, 3644 Peel Street, Montréal, Québec H3A 1W9, Canada. E-mail: desmond.manderson @mcgill.ca

1. Desmond Manderson and Paul Yachnin, "Love on Trial: Same-sex marriage in the Court of Shakespeare," *McGill Law Journal* 49 (2004), pp. 475–511; Desmond Manderson, "In the *tout court* of Shakespeare: Interdisciplinary pedagogy in law," *Journal of Legal Education* 54 (2004), pp. 283–302.

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Pairing Law students with graduate scholars in English, the Court encourages a depth of connection between the discourses of law and the humanities that is rarely achieved. Law and English students learn about the processes of reasoning and analysis in another discipline, and they come to appreciate the cultural embeddedness of these forms. At the same time, students develop their skills of argument in a new and challenging context. Above all, those who participate in the Court of Shakespeare find themselves at a rare moment of creativity. They do not study the emergence and nature of a legal system. They build one.

1. But what is strange or literary about "the court of Shakespeare"? It claims a universal jurisdiction and in that, perhaps, shows itself a creature of this century. The territorial conception of modern law, very much its defining feature over the previous few centuries,[2] is no longer so automatically assumed. One need look no further than the International Criminal Court to find a contemporary claim to law unbounded by space.[3] Perhaps it is as well to remind ourselves that jurisdiction by consent or allegiance is not, however, such a radical innovation. The Catholic Church, of course, claimed and continues to claim legal authority over its adherents no matter where they reside; the law of admiralty is no less universal amongst those who consent to be bound, regardless of where they live.[4]

Indeed, when we think a little more carefully, it becomes apparent that the coincidence of space is neither (always) a necessary nor (ever) a sufficient condition for legal authority over subjects. For Fish, our membership of a particular "interpretative community" creates the binding nature of obligations[5]; for Hart, our "internal perspective" gives to orders their meaning and their morality[6]; for Cover, the origin of law itself no less than the trajectory of its interpretative commitments derives from membership in a community characterized by "a common body of precept and narrative" in which "discourse is initiatory, celebratory, expressive, and performative."[7] Ronald Dworkin, too, is at pains to insist that those "associative communities" which *legitimately* extract obligations from us, are not born out of the bare fact that we happen to share the same lump of earth, but emerge because we have developed principles that cohere together as a whole and collectively matter to us.[8] In all these writers, one gets

2. Nicholas Blomley, *Law, Space, and the Geographies of Power* (New York: Guildford, 1994); Shaun McVeigh, *Jurisprudence of Jurisdiction* (London: UCL Press, 2005); Desmond Manderson, *Legal Spaces* (Special Issue, volume 9 *Law, Text, Culture*, 2005).
3. William Driscoll, Joseph Zompetti, and Suzette Zompetti, eds., *The International Criminal Court: Global Politics and the Quest for Justice* (New York: IDEA, 2004).
4. William Tetley, *International Maritime and Admiralty Law* (Montréal: I.S.P., 2003).
5. Stanley Fish, *The Authority of Interpretive Communities* (Cambridge: Harvard University Press, 1980).
6. HLA Hart, *The Concept of Law* (Oxford: Clarendon Press, 1960).
7. Robert Cover, "Nomos and Narrative," *Harvard Law Review* 97 (1983), pp. 12–13.
8. Ronald Dworkin, *Law's Empire* (Cambridge, Mass: Belknap Press, 1986), pp. 176–216.

the sense that law emerges and is maintained little differently in a State, a city, or a world, than in the small worlds that comprise it: clubs, societies, families, friends, religions or unions. In each case, what makes law, law, is a complex and fluid combination of happenstance and commitment.

2. It is certainly true that the enforcement of law is an intrinsic part of how we experience it, and the "court of Shakespeare" has no enforcement apparatus at all.[9] But all the writers I have just referred to insist that the dimension of force and the dimension of commitment are sociologically distinct, existing in different ways and in different balances depending on the community and the issue in question. As Cover puts it, "there is a radical dichotomy between the social organization of law as power and the organization of law as meaning."[10] Moreover, while the force in question might be more or less explicit, more or less physical, law as such *cannot* be said to exist without the dimension of interpretative practices articulating normative commitments over time. The Court of Shakespeare finds these binding commitments in a particular and discrete body of texts – the complete works of Shakespeare – just as a religion finds them in the Qur'ān or Torah, or the people of Quebec find them in the *Code Civil*,[11] or the people of the United States in their Constitution. Or rather in each case the courts are on a continual quest to find them, since a final and determinative reading will always elude us.

3. What makes the Court of Shakespeare unusual is therefore neither its universal jurisdiction nor its primary allegiance to a text. Nor, to mention a third feature, the fact that it claims this interpretative jurisdiction without ever having been granted it by another body's degree or society's acclamation. This is the problem of Kelsen's *grundnorm*: if law is defined as a systemic structure of authorized rule-making, who authorized the first law that authorized the rest?[12] Yet the Court of Shakespeare is not alone in facing this problem. *All* legal systems face some such crisis at their point of origin; they are in the end parthenogenetic or self-legitimating, and can only wait to see if future populations will have rallied around the flag that they hopefully and speculatively hoist. Legal systems are judged successes or failures, real or fantasies, by the future not the present.[13]

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9. Robert Cover, "Violence and the Word," *Yale Law Journal* 95 (1986), p. 1601; Austin Sarat and Thomas Kearns, eds., *Law's Violence* (Ann Arbor: University of Michigan Press, 1993).
10. Cover, "Nomos and Narrative," p. 18.
11. Jean-Maurice Brisson and Nicholas Kasirer, eds., *Code Civil du Quebec – Edition critique* (Montréal: Yvon Blais, 2004–5).
12. Hans Kelsen, "The Pure Theory of Law," *Law Quarterly Review* 50 & 51 (1934), pp. 477 and 517.
13. Jacques Derrida, "Déclarations d'indépendence" in *Otobiographies* (Paris: Galilée, 1984), pp. 13–32.

There is a plaque at Rugby School bearing the following inscription:

THIS STONE
COMMEMORATES THE EXPLOIT OF
WILLIAM WEBB ELLIS
WHO WITH A FINE DISREGARD FOR THE RULES OF
FOOTBALL
AS PLAYED IN HIS TIME
FIRST TOOK THE BALL IN HIS ARMS AND RAN WITH IT
THUS ORIGINATING THE DISTINCTIVE FEATURE OF
THE RUGBY GAME
A.D. 1823[14]

Here too, then, William Webb Ellis' (no doubt apocryphal) act of illegality becomes recognized, but only retrospectively, as an act of legal foundation. Does the Court of Shakespeare make law? It's far too early to tell.

Not only at its point of origin but in its daily operation, law is fundamentally a claim and not yet a reality. The Kantian model for law is the categorical imperative: "Act as if the maxim of your action were by your will to turn into a universal law of nature."[15] *As if.* As Derrida remarks,

> This 'as if' … almost introduces narrativity and fiction into the very core of legal thought, at the moment when the latter begins to speak and to question the moral subject. Though the authority of the law seems to exclude all historicity and empirical narrativity, and this at the moment when its rationality seems alien to all fiction and imagination … it still seems *a priori* to shelter these parasites.[16]

Law is *necessarily* hypothetical, and this in two ways: first by acting "as if" certain textual fragments – an Act of Parliament, for example – will have definite social consequences (which is by no means self-evident, always partial, and sometimes downright unrealistic); and second because the articulation of a not-yet-existent future is precisely the sole aim of law. Law is necessarily utopian, oriented towards a promise which it attempts to bring about but which does not yet exist.[17] In this way too, no less than in its textual orientation, law and literature are mutually implicated. Law is nothing but a fiction made real by the faith that others vest in it – in a word, myth.[18]

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14. Paul Morgan, *A History of Rugby* (London: Sutton, 2004).
15. Immanuel Kant, *The Groundwork of the Metaphysics of Morals* (1785), p. 422.
16. Jacques Derrida, "Before the Law," in *Acts of Literature* (New York: Routledge, 1992), p. 190.
17. Olivier Abel, *Paul Ricoeur: la promesse et la règle* (Paris: Michalon, 1996); see too Cover, "Nomos and Narrative"; Boaventura de Sousa Santos, *Towards a New Common Sense* (London: Routledge, 1995), chapter 1.
18. Desmond Manderson, "From Hunger to Love," *Law and Literature* 15 (2003), pp. 87–142 at 87–101; Roland Barthes, *Mythologies* (New York: Jonathan Cape, 2001).

4. As opposed to these features, which the Court of Shakespeare shares with all legal systems, what is peculiar about the Court is that the causal relationship between institution and community appears inverted. The court imagines a community that will be bound by the law it creates, a community constituted by its shared belief in the value of the Court's founding texts and perhaps by its faith in the Court's own ability to render wise and just decisions – but this community does not yet exist. In this particular, it seems very different from courts that throughout history have emerged in *response* to a real need: either the need of a social power to impose itself, or the need of a social community to sustain itself. The Court of Shakespeare is like a *Field of Dreams*, constructed in the wild hope that "if you build it, they will come."[19] Like many an optimistic lawyer before it, the Court has hung up its shingle but still awaits its clients. Here, then, the Court likewise shows itself a child of its age: in the spirit of late capitalism, the Court seems to assume that need itself is capable of being invented.

In this case, the hypothetical nature not only of law's commands but, more surprisingly, law's community recalls Elaine Scarry's distinction between the made up and the made real.[20] All artifacts, she says, are "made up" – including law as well as poetry. But artifacts like law go through a second stage denied to works of art: we forget that they have been invented, and make them real through social action. The contrast is, of course, far too simplistic: many people do experience theatre and film precisely by suspending their disbelief and engaging with the characters *as if* they were real.[21] But there is also an element of undeniable truth to Scarry's dichotomy: that feeling of reality does not extend beyond the performance itself. No matter what we feel at the time, we leave the theatre. With law, it is different. When the performance is over, the "made real" of law continues to exert a hold over us. No-one who has sat in on the Court of Shakespeare could forget for a moment that the cases it hears are simply *performances* by students from Law and graduate students in English, teamed to argue a fictional case before a specially commissioned bench of resident and visiting scholars. And likewise no-one who has sat in on the Quebec Court of Appeal could forget for a moment that its decisions have real consequences that extend well beyond the time and place of judgment.

Again, the point is nevertheless a matter of degree. In societies in the process of collapsing, being born, or radically changing, many courts and other institutions have a similar air of unreality about them. The McCarthy hearings provide a relatively familiar example.[22] There was a time during

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19. Dir Kevin Costner, 1989.
20. Elaine Scarry, "The Made-Up and the Made-Real," in *Field Work: Sites of Literary and Cultural Studies*, Marjorie Garber, Paul Franklin and Rebecca Walkowitz, eds. (New York & London: Routledge, 1996), pp. 214–224.
21. As Stanley Fish points out, to engage with something "as if" it were real (or true) is fundamentally no different in its effects than if it *were* real or true: see *Doing What Comes Naturally* (Oxford: Clarendon Press, 1989).
22. See George Clooney, dir. *Good Night and Good Luck* (2005); Richard Fried, *Nightmare in Red: The McCarthy Era in Perspective* (Oxford & New York: Oxford University Press, 1990).

which Joe McCarthy had the power to "make real" his pronouncements. But at some point he lost his credibility so completely that no-one could any longer fail to notice that he was just making it up. The House Un-American Activities Committee (HUAC)still sat, but its status had drastically altered. This was a social phenomenon in which so many people were no longer prepared to "suspend their disbelief" that the Committee simply slid from reality to fantasy. As HUAC's chief judge, in a manner of speaking, McCarthy was probably the last to realize that he was no longer presiding over the law, but performing in a theatre.

So Scarry's distinction between the "made up" and the "made real" is indeed valuable, although I must insist that which counts as which is a social judgment in no way inherent in the form of something or the label affixed to it.[23] What makes the Court of Shakespeare an exercise in literature and not law is exactly the fact that not one person is yet prepared to accede to its jurisdiction or its judgments . . . the day after. It still awaits the society prepared to declare its love and need of it. Meanwhile, like an Old Testament prophet, the Court prepares the ground for something still to come. It does so by attempting to prove to a skeptical world the viability of its project.

II. Jurisprudence of the Court of Shakespeare

1. The judgments of the Court are developed through an arduous and secretive process the intricacies of which could hardly be revealed without some cost to the Court's nascent mystique.[24] But the Court's decisions, of which there are now three (with a fourth in process), are beginning to form a body of precedent which structures, reflects, and transforms – in a word, juridifies – our reading of the primary materials comprised by the Shakespearean canon itself. In the Court's first case, *In re Attorney General for Canada; ex parte Heinrich* [2003] 1 C. of Sh. 1,[25] the Court articulated the basic foundations of its own interpretative practice, and in addition explored the nature of responsibility in law. The Court (Manderson, Yachnin, and Bristol JJ) unanimously insisted that the Shakespearean corpus recognizes a responsibility that goes beyond a mere duty to "follow orders" and is the corollary of the respect for individual identity which the Shakespearean focus on character has helped to spawn. Speaking for the Court in that case, Justice Manderson wrote,

> This is the first law of Shakespeare: our responsibility to law is dependent on our relationship to its makers. It is a relationship that

23. This is the real error that Scarry makes, confining terms like "art" and "law" to *a priori* and impermeable categories: "The Made-Up and the Made-Real," pp. 220–24.
24. See RB Stevens, *Law and Politics: the House of Lords as a judicial body, 1800–1976* (Chapel Hill: University of North Carolina Press, 1978).
25. Published in Manderson, "In the *tout court* of Shakespeare," pp. 289–301; the complete judgments are archived on the Court's web site, http://www.mcgill.ca/shakespeare-moot/trials/judges02–03/

must be marked by good faith; and it must preserve intact the soul – which is to say the identity and the capacity for the exercise of responsibility – of the subject. The exact parameters of this principle are no doubt not yet clear and future cases will be called upon to reassess its boundaries. But none of this was in any measure the nature of the Nazi regime which Heinrich served, with what alacrity we do not know. But if we are to protect his soul then we must recognize that he had an identity in this, and a responsibility in this, and demand therefore an accounting. He cannot hide behind the coattails of the lawful authority, because the law of Shakespeare as it emerges, in different ways, from each of *The Winter's Tale*, *Richard III*, and *Henry V*, agree with Lon Fuller on this point: there *was* no lawful authority.[26]

2. Yet by the time of the next case, *Attorney General of Canada v Pete Pears, Ben Britten & Ors.* [2004] 2 C. of Sh. 1,[27] a division could already be perceived on the Court. To the language of identity and responsibility, and an organic rather than an originalist approach to interpretation, the Court can be seen to add and elaborate a further term: faith. Faith, in the jurisprudence of the Court drawing largely on *The Winter's Tale*, is not here a religious term but indicates the trust and respect we ought show to others in consequence of their uniqueness and the irreducibility of their being. It is certainly the Court's consistent view that in cases like *The Winter's Tale*, *The Merchant of Venice*, and *Othello*, legal or quasi-legal proceedings draw out for us, by way of implicit contrast, how important are those things – like love, fidelity, and trust – that form the basis of a legal order and yet cannot ever be *proved* to law's remorselessly forensic satisfaction. So Hermione, for example, refuses to accede to King Leontes' demand that she put her love for him on trial and subject it to forensic interrogation:

Since what I am to say must be but that
Which contradicts my accusation, and
The testimony on my part no other
But what comes from myself, it shall scarce boot me
To say 'Not guilty'. Mine integrity
Being counted falsehood shall, as I express it,
Be so receiv'd.[28]

There is then, in the view of the Court of Shakespeare, a "beyond" to law, a *grundnorm*, which forms the basis of its authority and which ought to be respected but cannot be enforced by it.

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26. *In re Attorney General for Canada; ex parte Heinrich*, [2003] 1 C. of Sh. 1, pp. 298–99.
27. Published in Manderson and Yachnin, "Love on Trial," pp. 482–511; the complete judgments are archived on the Court's web site, http://www.mcgill.ca/shakespearemoot/trials/judges03–04/
28. *The Winter's Tale*, Act III, scene 2, 20–26. All reference to the works of William Shakespeare are from *The Riverside Shakespeare* (Boston: Houghton Mifflin, 1997).

But here the coherence of the Court begins to run aground. This case concerned the meaning and purpose of marriage as an institution. The majority of the Court (Manderson, Bolongaro and Macdonald JJ), facing an application for the recognition of "same sex marriage" brought by several gay couples, upheld a reading of Shakespeare filtered through distinctly modern eyes. For their Honours, Shakespeare's depiction of marriage as an intimate faith and a field of sacrifice that is world-creating (and law-founding) led them to reject the undoubtedly gendered *denouements* of the "marriage plays" as of only minor jurisprudential import. Yachnin J (dissenting) insisted to the contrary that we should not read Shakespeare with such liberal assumptions:

> In this view, the individual is less sacrosanct than are institutions such as kingship or marriage. Shakespeare is therefore a precursor but by no means the poet of modernity: so far as I am able to tell, he values same-sex relationships highly – in certain contexts he even places them above heterosexual couplings – but I do not believe that he provides any salient principles that should convince this Court to include same-sex love within the institution of marriage.[29]

Indeed, Yachnin J turns the notion of faith around. For him, the implication is rather that certain elements, such as love and faith between persons, *essential* as they are to legal civilization, stand necessarily and desirably outside the control of law. Drawing on his reading of some of the Sonnets (whose status as a binding or merely persuasive authority in the Court has yet to be determined[30]), his Honour argues that Shakespeare does not by any means disparage same-sex relationships; but at the same time Shakespeare refuses to incorporate them within the conservative institution of marriage that mattered so much to him. *A Midsummer Night's Dream*, furthermore, stands not only for established institutions, but also for the "dignity of *communities* and [for] the integrity and relative autonomy of . . . 'normative orders,' which derive their legitimacy from the communities from which they emerge."[31] It would appear, then, that Justice Yachnin is more committed to a less purposive interpretative practice of Shakespeare than either Manderson or (in this case) Bolongaro JJ; and his response to those things which all their Honours acknowledged to be "before" or "beyond" the law, is precisely to leave them be and to respect their otherness, their extra-legality, their freedom from the bonds of social order. For Yachnin J it is legal arrogance to presume that *its* processes of recognition are the ones that really matter.

Manderson and Bolongaro JJ, on the other hand, see the resolution of *A Midsummer Night's Dream*, for example, not as a return to the established order, but as its transformation and rejuvenation.

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29. *Attorney General of Canada v. Pete Pears, Ben Britten & Ors.*, [2004] 2 C. of Sh. 1, p. 502.
30. But see Macdonald J on this point: Id., p. 501.
31. Id., p. 511.

> The governance of the fairy kingdom no less than the world of men is riven by discord in *A Midsummer Night's Dream*, and our lovers are forced to flee the city. Now the literal and metaphorical forests of these comedies allow the exploration of desire and of personal identity. The return to the city in these plays therefore marks a restoration, but by no means a return to the *status quo* . . . The forest allows us to explore our natures and our desires, and we do not return from it untouched.

III. The Limits of Law: The Dissents in *The Bard de la Mer*

The final case in the Court's first trilogy, *The Bard de la Mer (du Parcq v Pedersen; Pedersen v Vidaloca)* [2005] 3 C. of Sh. 1,[32] whose judgments are published elsewhere in this volume, has sharpened these related jurisprudential disagreements to the point of crisis. In this case, the Court (Manderson, Yachnin, Goodrich, Jordan and Strier JJ) turns its attention from political responsibility and legal regulation to the law's understanding of our personal obligations. The case (the statements of facts of which appear below) concerned a camping trip undertaken by three friends, in the course of which Gabriel Pedersen, a sailor, drunkenly struck Jean du Parcq, a non-swimmer, who fell into the water in the middle of an argument. The third friend, Chris Vidaloca, who saw the incident from the shore, did nothing to raise the alarm, and du Parcq, as a result of almost drowning, suffered irreparable brain injuries. The question in each case involves our duties to others. Is Pedersen responsible though he acted without intention? Is Vidaloca responsible though she did not act at all? How does Shakespeare and through him this Court conceive of our obligations to each other, whether as leaders, as friends, or as human beings?

On these points, the Court sought guidance from a range of texts, particularly *King Lear*, *Hamlet*, and *Measure for Measure*, which offer extended meditations on the limits of law, and on the human capacity for sacrifice and for selfishness. And students of the Court (and indeed of any court) will also be interested in the very different approaches their Honours took to these legal texts. Yachnin J's reasoning is highly dependent on, and makes considerable reference to, the arguments put during the moot process by learned counsel before the Court. The process of advocacy itself seemed, therefore, particularly pertinent to his conclusions. Manderson J focuses instead on the two central plays (in his Honour's opinion) and spends a considerable time evaluating in some detail those texts' trajectories and argument. Jordan J takes a very different textual approach. With her unsurpassed knowledge of the canon, she paints a complex picture of

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32. See below; the complete judgments are archived on the Court's web site, http://www.mcgill.ca/shakespearemoot/trials/judges04–05/

the principles of responsibility in Shakespeare, drawing on a broad sweep of references from the plays to do so. Goodrich J, for his part, places Shakespeare squarely within his historical and jurisprudential context and offers the court thereby a vision of what a court of literature, or love, might accomplish. If Goodrich J thereby implicitly suggests that the Court of Shakespeare ought to be a lot more creative in its conception of "law" than it currently is, Strier J explicitly suggests that the Court could be a lot more rigorous. His Honour places the judgments of this Court itself on trial, vigorously castigating the Court's practices and his colleagues' reasoning in *The Bard de la Mer* itself. Like any good court then, the Court of Shakespeare learns from both auto-critique and from the diverse rhetorical strategies of its participants.

1. On the responsibility of Pedersen, the Court ruled unanimously, for compendious evidence was presented to the Court that Shakespeare's primary understanding of personal responsibility is built around the notion of loyalties, stemming either from an office held or out of the specific social relationship of the parties. Either way, the captain of a ship is burdened with absolute obligations for the welfare of others. As Jordan J explains,

> To ignore or fail to perform the responsible duties of a captain of a ship is effectively to lose that office. Such ignorance or failure may be apparently quite innocent and devoid of malice; it may consist simply in taking attention from the business of the ship or the state. Conversely, it may consist in acts deliberately destructive of those for whom the captain has contracted a responsibility. To keep his (or her) office is above all not to fail in that responsibility. To misunderstand this distinction by, for example, flourishing the attributes of a captain while refusing or renouncing his responsibilities announces a catastrophe of the highest order.[33]

2. But on the second question, whether the law of Shakespeare would impose a duty to rescue upon Vidaloca, there is a sharp division in the Court. On the one hand, three of their Honours recognized such a duty either as likewise flowing from the established personal relations of the parties, in this case their prior friendship (Goodrich and Jordan JJ), or as part of a general human obligation to come to the aid of others (Manderson J). Indeed, even this point is somewhat unclear, since Goodrich J's argument is unusual. He does, it is true, refuse to amend the decision of the lower court (as noted by Strier J), which had held Chris Vidaloca's non-intervention legally blameless. But it seems to me that at the same time Goodrich J clearly insists on the recognition of a *distinct* duty to rescue within the context of a Court of Shakespeare or, as he elsewhere puts it, a "court of love." While Goodrich J would treat the question of punishment or penance very

33. *The Bard de la Mer* (*du Parcq v Pedersen; Pedersen v. Vidaloca*), [2005] 3 C. of Sh. 1, below, pp. 109–10.

differently from the common law jurisdictions that form the contrast to his reflections, it seems clear from his judgment that he believes the present Court ought to hold Vidaloca responsible for her inaction.

Manderson J, pursuing the Levinasian resonances he has articulated in previous judgments, reads *King Lear* in particular as a model for the redemptive power of sacrifice as a response to human need.

> The world's collapse in *Lear* is not due to its lawlessness (though that is one of its consequences) nor is it remediable by God or by our human natures. Instead, what Lear's world lacks, at the beginning of the play, is a sense of any connection between us that would cause us to look after each other apart from our self-interest. The play attempts to discover that connection not by addition but by subtraction … The violent storm; the refusal of all shelter; nakedness; Gloucester's blindness; and Lear's madness. These elements combine to reduce the characters to that 'poor, bare, fork'd animal' which can no longer comprehend itself as having a role, a place, a plan, or hope. The characters are forced to give up. Gloucester says: 'I have no way and therefore want no eyes. I stumbled when I saw.' Lear too finally sees himself as he is, beneath the 'lendings' of State: 'a poor, inform, weak, and despis'd old man smelling, as must we all, of mortality.' Therein lies their redemption for, having taken us back to a time and a place *before* law, *King Lear* offers a way forward through the recognition by others of the fact of base human need.[34]

3. On the other hand, two judges reject such a burden as unreasonably broad and unresponsive to the specific difficulties, fears, and perils that acting to rescue the drowning du Parcq in this case would certainly have entailed Yachnin and Strier JJ, the dissenting judges, insist upon Shakespeare's recognition of human weakness or human fear. Drawing on *Measure for Measure*, Yachnin J insists that "however far it might be denounced by his sister or by himself, there remains something both fundamentally true and emotionally irresistible about Claudio's fear of death."

> Claud. Death is a fearful thing.
> Isab. And shamed life a hateful
> Claud. Ay, but to die, and go we know not where;
> To lie in cold obstruction and to rot;
> This sensible warm motion to become
> A kneaded clod; and the delighted spirit
> To bathe in fiery floods, or to reside
> In thrilling region of thick-ribbed ice;

34. Id., pp. 86–87.

> To be imprison'd in the viewless winds,
> And blown with restless violence round about
> The pendant world; or to be worse than worst
> Of those that lawless and incertain thoughts
> Imagine howling: 'tis too horrible!
> The weariest and most loathed worldly life
> That age, ache, penury and imprisonment
> Can lay on nature is a paradise
> To what we fear of death.[35]

"The instinct for survival," Yachnin J continues, "might be craven, womanly, or common [as Hamlet characterizes it], but Shakespeare's drama recognizes it as a fundamental part of human nature."[36] Sacrifice, for his Honour, may be desirable in Shakespeare's jurisprudence but it cannot be mandated. Strier J's argument is broadly similar, although for him Vidaloca's fear of sharks (a stipulated fact of the case) rather than her instinct for survival is most significant. *The Merchant of Venice* speaks tellingly of our impotence in the face of our fears:

> Some men there are love not a gaping pig,
> Some that are made if they behold a cat,
> And others when thew bagpipe sings i 'th' nose
> Cannot contain their urine . . .
> . . . there is no firm reason to be rendered
> Why he cannot abide a gaping pig,
> Why he a harmless necessary cat,
> Why he a woolen bagpipe, but of force
> Must yield to that inevitable shame
> As to offend himself being offended.[37]

"In the face of [Shakespeare's] vivid sense of the possibility and actuality of responses that are utterly automatic and beyond or beneath the control of the individual so afflicted, I judge that the 'laws of Shakespeare' lead us to take Chris's 'phobia' (as we would rightly call it) quite seriously indeed, and not hold her responsible for not being able to overcome it."[38]

And it is precisely here that the methodological crisis comes to a head – what does it mean to treat the Court "as if" it were law? The problem is in fact relevant in any legal system: what social facts that pertain to its own functioning does the court recognize, and which does it ignore? *Measure for Measure* is surely the foundational legal text here. It is a vicious satire on law itself, and on law's inability – perhaps even the immorality of attempting – to prevent

35. *Measure for Measure*, Act III, scene 1, 115–31.
36. *The Bard de la Mer* (*du Parcq v. Pedersen; Pedersen v. Vidaloca*), [2005] 3 C. of Sh. 1, below, p. 79.
37. *Merchant of Venice*, IV.i. 46–49, 52–57.
38. Id., p. 117.

humans from being all too human. The Duke's abstract disinterest, Angelo's rule fetishism, and Isabella's interpretative dogmatism, each capture a distinct critique of law and illustrate the failure of orthodox legal judgment to do justice to persons. Cautious of law's overweening confidence in its own irenic possibilities, the dissenting judgments instead insist on the *necessity* that law sometimes curb its own regulatory enthusiasms. In contrast, the majority's pious insistence on some sort of legal obligation to risk oneself for others, begins to sound as hollow as Isabella's. Indeed in prior cases both Manderson and Yachnin JJ have insisted that law needs to show itself humble in the face of social reality; and have recognized the power and importance of those ethical forces which are foundational to society yet operate "outside" or "before the law." But legal discourse seems remorselessly avaricious, and appears structurally unable to resist translating everything and anything into legal terms. Perhaps "law and literature" is more vulnerable than most movements to just such corruption by appropriation, as Elaine Scarry, for one, has argued.[39] In the end a law that required us to risk ourselves in order to rescue others might not just be pointless[40]; it might even destroy the very virtue of sacrifice, which lies because it operates as a *freely* chosen gift from one to another.[41] The redemptive power of sacrifice exhibited by Isabella and Mariana at the end of *Measure for Measure* derives from just such a moral and social freedom. To convert sacrifice into law threatens to destroy both.

IV. The Promise of Law: The Majority in *The Bard de la Mer*

Thus the conflict between those who think of law as a poisoned chalice which ought to hold sway within narrow limits, and those who think of it as an articulation of human ideals and possibilities, a conflict which first we saw in the contrast between Yachnin and Manderson JJ's judgments in *Pears*, *Britten*, is now brought more starkly into focus. In response, each of the majority judgments is sensitive to the poverty of mere homilies and each attempts to resolve the crisis, which is a crisis of law's legitimacy and relevance.

1. All three judges insist that the social voluntarism of the Court of Shakespeare – the peculiar inversion of cause and effect I noted in the first section of this essay – gives the Court a striking normative liberty. Thus the violence of law, which is precisely the minority judges' main concern with such a radical expansion of the idea of personal responsibility, is finessed by turning the institutional weakness of the Court of Shakespeare into its

39. Scarry, "The Made-Up and the Made-Real," pp. 214–20.
40. Lon Fuller, "The Case of the Speluncean Explorers," *Harvard Law Review* 62 (1949), pp. 616–645; Peter Suber, *The Case of the Speluncean Explorers: Nine New Opinions* (Routledge: New York, 1998).
41. Jacques Derrida, *The Gift of Death*, trans. David Wills (Chicago: University of Chicago Press, 1995).

singular virtue. The Court is not yet "made real" in Scarry's terms, say the majority – and thank goodness. Goodrich J, for example, offers the Court a very careful reflection on what a law that is a literature might really mean, going far beyond Shakespeare in the process and providing, in fact, a kind of historical background to the Court's more specific project. In connecting the Court to his own work on the nature and practice of "courts of love" in the Middle Ages, Goodrich writes:

> It remains to point out that our Court is of voluntary jurisdiction. It is, as I began by remarking, itself an exception, a court of love in an age of systems, it is a literary invention in a pragmatic era, it is powerless in a time when power often appears to be everything. Such are its virtues, its strengths.[42]

This powerlessness, or rather a power that proceeds purely by inciting a community into existence rather than by compelling it into submission, gives the court itself a degree of freedom that other courts, self-conscious of the violence implicated in their judgments, cannot match. So Goodrich J writes of the history and context of *dies non*, the days in which law cedes its seat to the "other" of law.[43]

> Shakespeare's Court sits on the island of Montreal. That is a fascinating and coincidental feature of this case. The island, and we know this most directly from *The Tempest*, is the cartographic equivalent of the *dies non*, the site of the exception, the 'green world,' a utopian place, as well as marking the miracle of our preservation, our survival of the generally inclement mode of our arrival. Put it more strongly, the scene of judgment, the island, itself institutes a literary court, a *lex amatoria* or law of love …[44]

So here we see most clearly the idea of law as embodying a language of utopian aspirations no less than a machine of pragmatic applications.

Legal authority is, like the literary imagination, diverse in its kinds and effects, an argument which Justice Jordan situates within Shakespeare's *own* understanding of the power of "extra-positive legal sources."

> Law derived from extra-positive sources is enforced not by a human police or government and is not the basis of legally codified decisions. Rather, it is enforced first by the vague and amorphous yet powerful courts of opinion that deliver sentences that ennoble or degrade the subject and thus establish reputation in society and

42. *The Bard de la Mer* (*du Parcq v. Pedersen; Pedersen v. Vidaloca*), [2005] 3 C. of Sh. 1, below, pp. 106–07.
43. Peter Goodrich, *Law in the Courts of Love: literary and other minor jurisprudences* (London & New York: Routledge, 1996).
44. *The Bard de la Mer* (*du Parcq v. Pedersen; Pedersen v. Vidaloca*), [2005] 3 C. of Sh. 1, below, pp. 99–100.

> among fellows. When judged as worthy of disapproval or disgrace, a person readily seeks support from his or her dearest and most reliable friends (Sonnet 29). Second, this law is enforced by the hope and fear of last judgment and the afterlife. Thus the integrity of a person is gauged by tests in this world but also by reference to judgment in the next (*Measure for Measure*, 2.4.184–85). Knowledge of the terrible outcomes of divine justice may sway choice and determine behavior before and after the fact (*Hamlet*, 3.3.73–75; 5.1.227–230).[45]

Manderson J comes to a similar conclusion, insisting (quoting Cover) on the "radical dichotomy between the social organization of law as power and the organization of law as meaning."[46] He appears to see in the Court of Shakespeare the possibility of a judgment "of meaning" uncontaminated by the injustice of enforcement.

> The Court of Shakespeare as it is now, however, is constitutional in the purest sense: its only power (and even that the slightest) is, by words, to constitute or encourage certain habits of mind. I do not think that that is so very different from any legal system. Law understood as the action of force alone sells its body too dear and its soul too cheap. In this court, we do not force anyone to be responsible; we only hope to make them conscious of the responsibility they already have, even on a blasted heath, even in a mythical land. … So the constitutive power of imaginative language is not simply a force that imposes itself upon the freedom of the individual, since it forms that individual in the first place. [This Court's] words do not force a person to be responsible; instead, in the best of circumstances, they make responsibility a part of that personhood. The constitutive power of language is law's hopeful fiction – and fiction's hopeful law.[47]

For all these judges, the problem of force and sacrifice, ethics and necessity, are resolved by understanding the Court of Shakespeare as a *distinct* legal phenomenon, radically different in affect and effect from the State-sanctioned violence we are used to defining, perhaps too narrowly, as "law."

The three majority judges instead see in the Court the potential not only to create a new "code" but to go *beyond* one, and find in Shakespeare's work admiration for judgments and responsibilities (whether by judges, or courts, or individuals) that cannot be placed within the structure of a legal "system." In attempting to give expression to that element of legal judgment that must transcend the rules, their Honours use different language: for Goodrich J, the Shakespearean plays reference a "court of love"; for

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45. Id.
46. Cover, "Nomos and Narrative," p. 18.
47. *The Bard de la Mer* (*du Parcq v. Pedersen; Pedersen v. Vidaloca*), [2005] 3 C. of Sh. 1, below, p. 97.

Jordan J, they acknowledge a "divine law"; for Manderson J, they offer models of the singularity required of "responsible judgment." But all three judgments insist that Shakespearean law has within it an instability, a particularity, and a narrativity that always moves beyond the established rules. One might, perhaps, say the same thing about the common law.[48]

2. Justices Goodrich and Jordan go even further, and criticize the very dimensions of the fiction that establishes the Court. What sort of literary imagination is it, they ask, that mimics so unquestioningly the process and decisions of a standard trial? For their Honours, the normative possibilities of this special jurisdiction have been hitherto constrained by a most *un*-literary and orthodox approach to legal argument, enforcement and restitution.[49] Relying rather more on the Courts of Love[50] than on Shakespeare's own apparent understanding of law, Goodrich J insists that a court such as this ought properly speaking re-imagine not only the content of laws but their forms, purposes, and outcomes.[51]

> The function of the court of love, and by extension of Shakespeare's law, is to understand the operation of fate, the ineffable cause, the human consequences of adverse events. In such a context the arguments referred to are sadly unhelpful, indeed they must on reflection appear both pedantic and beside the point. All violence is in excess of language and beyond reason. Violence by definition violates, inverts, and unleashes chaos. We don't need lawyers to tell us that. Indeed kill them all as the Bard once said but all he meant I think was treat them from the space of exception and according to the norms of love. And that will upend them soon enough.[52]

Thus the Orders of both judges *reject* compensation and punishment – the allocation of blame and the individualizing of fault that seems so natural in a contemporary legal context – and focus instead on redemption. This also, perhaps, leads us to reflect upon the different meaning given to "justice" in literature and in law. Goodrich J, for example, requires Gabriel to "read poetry to her and even though she is unhearing and unseeing, he is to talk with her and so far as possible coax, cajole and cure her"[53]; Jordan J, for her part, requires Chris to "attend, as best she can and in every way possible, to Jean and to any dependents she may have, and to offer them affection and material help whenever they may need it."[54] Even more than

48. Desmond Manderson, *Proximity, Levinas, and the soul of law* (Montreal: McGill-Queen's University Press, 2006).
49. Martha Nussbaum, *Poetic Justice* (Boston: Beacon Press, 1996).
50. Goodrich, *Law in the Courts of Love.*
51. Again, see the formal innovation in the previous judgment of Macdonald J: *Attorney General of Canada v. Pete Pears, Ben Britten & Ors.*, [2004] 2 C. of Sh. 1, p. 501.
52. *The Bard de la Mer* (*du Parcq v. Pedersen; Pedersen v. Vidaloca*), [2005] 3 C. of Sh. 1, below, p. 102.
53. Id., p. 103.
54. Id., p. 113.

Manderson J, then, their Honours seek to respond to the moral perils occasioned by law's force on the one hand, and law's evasion of human nature on the other, by redefining what law and literature – understood as collaborators now rather than as opposed forces – can achieve and how.

In short, where the dissenting judges see law as in our society it is thought to be, and human nature as *it* is thought to be, and seek to reconcile them by vigorously separating them, the majority judges see law as it might be, and human nature as *it* might be, and seek to reconstitute them by ambitiously fusing them.

The judgments reproduced below offer the reader a more extensive *entrée* into the world of the court and the different legal choices now before it. Faced with such clear divisions concerning the ambits of the law-and-literature project, the limits of law, the relationship between Shakespeare's values and our own, and the precise implications of the Court's own founding fictions, the Court of Shakespeare is being forced to confront some of the most difficult issues in both jurisprudence and inter-disciplinarity. What follows is in some ways a primer on the different ways in which one might try and think through some of these questions, through an exploration of the legal and moral themes raised by the plays, and the fictitious case, at bar. The question of what it means for a court to treat its pronouncements "as if" its maxims were law proves to establish a relationship between fiction and law both fruitful, and difficult, to untangle.