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'As if' – the Court of Shakespeare and the relationships of law and literature

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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 are there many – 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

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

of texts – the complete works of Shakespeare – just as a religion finds them in the Qran 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. *0*

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]

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

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

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 must be marked by good faith; and it must preserve intact the soul – whic

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*,

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 pratice 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*

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

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,

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

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. 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 in aid of others (Manderson J).

> 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. Against this, 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;
>
> To be imprison'd in the viewless winds,

And blown with restless violence round about

The pendant world; or to be worse than worst

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

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 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.[41]

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.[42]

> 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…[43]

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, drawing on her own unparalleled knowle

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.[48] Relying rather more on the Courts of Love[49] 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.[50]

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.[51]

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'[52]; 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.'[53] Even more than 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.

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[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.

[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* (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.

[9] Robert Cover, 'Violence and the Word,' *Yale Law Journal* 95 (1986), p. 1601; Austin Sarat and Thomas Kearns, eds., *Law's Violence*

[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/shakespearemoot/trials/judges02-03/ .

[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*