

In the *Tout Court* of Shakespeare: Interdisciplinary Pedagogy in Law

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The Shakespeare Moot Project

A great civilization, said Robert Cover, is to be judged by the quality of its law no less than its literature or engineering or science. In particular he meant by law a *nomos*, which is to say a way of being in the law experienced by members of that community, a way in which their law is seen to be related to their literature, and their engineering, and their science, as part of a continually relevant cultural interaction.¹ The measure of interaction is the measure of the connection between law and its citizens, and ultimately the measure of civilization itself.

I have for a long time been looking for ways to properly integrate methods of interdisciplinary thinking into my writing and teaching. Typically one does this by using literary or other texts to shed light on the law: Melville's *Billy Budd*, Sophocles' *Antigone*, Kafka's *The Trial*. Law "and" literature seeks to place these two distinct disciplines next to each other so as to teach us about the social reality or moral values that law "itself" might take into account. The approach was perhaps pioneered by James Boyd White, and most eloquently defended by Martha Nussbaum.² But this is a form of parallel play and not in any sense a real integration of methods. My commitment to an interdisciplinary approach is far stronger than any mere comparativism or, if I may coin a phrase, conjunctivitis might suggest. Law is a literature and, which is more, literature is law—in its form, its power, its interpretive strategies, its discursive effects.

Now one might respond by insisting that law cannot be conjured out of nothingness: it requires a specific *institutional* form to authorize and enforce it. But that is entirely to confuse cause and effect. The common law of England and the European civilian tradition—not to mention more limited jurispru-

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1. Robert M. Cover, *Nomos and Narrative*, 97 *Harv. L. Rev.* 4, 4–6 (1983).
2. White, *Heracles' Bow: Essays on the Rhetoric and Poetics of Law* (Madison, 1985); White, *The Legal Imagination: Studies in the Nature of Legal Thought and Expression* (Boston, 1973). Martha Craven Nussbaum, *Poetic Justice: The Literary Imagination and Public Life* (Boston, 1995).

dential events such as the "courts of love" in medieval France³—emerged by and large as literatures in the first place (explicitly so in the case of the reception of Roman law into medieval Europe) and then gained their authority over time at least as much because of the social need they filled and the practical respect they accrued.⁴ The question of form is undoubtedly relevant to legal—as to any—meaning and rhetoric, but institutionalization within specific state-driven structures is not.⁵

The treatment of law as if its meaning and its legitimacy were somehow separate from the cultural forces that give birth to it and in relation to which it is understood has led scholars from John Austin and H. L. A. Hart to Richard Posner⁶ to make of law a mere *technic* for dispute resolution, and a purely hermetic practice beholden to nothing but its own logic. The failure to appreciate that law's value stems from its cultural *integration* has amounted to a systematic impoverishment of its capacities and of its relevance to the community as a whole. Our students, in particular, have thus been deprived of the resources by which they might come to feel that law is integrally connected to the things in their lives that have on other occasions and in other ways inspired and formed their identity, whether we are talking about music, or art, or philosophy, or literature. Even from a more practical point of view it is hard to see where a narrowly confined understanding of law could ever locate the content and spirit of ethics and justice that is meant—somehow, in ways rarely thought through—to animate it. Without such a personal inspiration and without such a theoretical integration, the lawyers thus produced, born of a betrayed idealism, are every bit as cynical as one might imagine.

I have often wondered how best to dramatize some of these issues: to ask students to imagine what it might be like to experience the birth of law, and to invite them to be responsible for the emergence of its interpretive and normative principles; to encourage them to explore the interpretive connections and differences between literature and law in a real setting; to provide a forum in which students and teachers can think carefully about how our normative beliefs find their way into and through objective legal texts, forming and yet being constrained by the texts' meaning. In particular, I have always thought that any sufficiently rich body of textual material could serve as the basis of a legal system and would pose very similar questions as to how those texts become binding and meaningful under the day-to-day pressures of judicial reasoning. Moreover, I think there is a real advantage in approaching these complex questions indirectly,⁷ offering therefore to teach students about

3. Peter Goodrich, *Law in the Courts of Love: Literature and Other Minor Jurisprudences* (New York, 1996).
4. Harold Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, Mass., 1983).
5. Roderick Macdonald, *Office Politics*, 40 *U. Toronto L.J.* 419 (1990); Roderick Macdonald, *Lessons of Everyday Law* (Montreal, 2002).
6. Austin, *The Province of Jurisprudence Determined* (New York, 1995). Hart, *The Concept of Law* (Oxford, 1961). Posner, *Law and Literature: A Misunderstood Relation* (Cambridge, Mass., 1988).
7. See also Desmond Manderson, *Statuta v Acts: Interpretation, Music, and Early English Legislation*, 7 *Yale J.L. & Human.* 317, 323–24 (1995).

the idea of law (or *droit* or *Recht*)—its genesis and evolution, its structures of reasoning and rhetoric, and the relationship of facts to texts to norms—without ever making the mistake of reducing it to the content of any particular “law” (or *loi* or *Gesetz*) whatsoever. As Shakespeare puts it in sonnet 23:

When most I wink, then do mine eyes best see,
For all the day they view things unrespected,
But when I sleep, in dreams they look on thee,
And darkly bright, are bright in dark directed.

This past year I have had the good fortune to put these ideas into effect, with the birth at McGill University of the Shakespeare Moot Project. The project is explicitly interdisciplinary; it brought together four graduate students in English literature, under the direction of Paul Yachnin, a well-known Shakespearean scholar and my colleague in this enterprise, and an equal number of advanced students in law. Each team paired a student in law with one in literature. They worked together, as applicants or respondents, on a fictional legal problem of some complexity and controversy, as will be made apparent below. They were asked to prepare a *factum*, and then two moots were held to argue the case orally before a specially commissioned moot court consisting of myself, Paul Yachnin, and Michael Bristol, also from the department of English.

The rules of procedure of the court are explained as follows: the sole “Codex, Digest, and Institutes” of the court comprise the complete plays of William Shakespeare. So the questions our students had to think through were as follows. *If* Shakespeare were the law, what arguments on the basis of the plays would they make? What normative and legal position emerges from the best reading of the plays most relevant to this problem? What is Shakespeare’s own understanding of law in relation to other social forces? Centrally, the students were asked to think about the natural disagreement that was likely to emerge—between different interpretations of passages and plays, between the principles espoused by different players in the dramas, and between different plays. They were asked to give advice to the court on the interpretive strategies that would allow the court to decide and to judge faced with these inescapable choices.

The idea was thus to map a supreme court’s constitutional work as closely as possible: secondary literature on the plays would of course be relevant, but only insofar as it aided the court in forming a sound interpretation of the material before it; cases from other jurisdictions were met, as always, with a studied and polite disdain. Shakespeare, the whole of Shakespeare, and nothing but Shakespeare—this was to be the truth of our jurisprudence. This of course made the project radical and strongly interdisciplinary. It was not a question of the law *of* Shakespeare, an attempt to recreate in substance or style the relevant legal environment of the sixteenth century.⁸ It was not a question

8. The difference between the law *of* Shakespeare and the law *in* Shakespeare, see *infra* note 9, is certainly not perfectly bounded. Many authors treat both concurrently, looking at Shakespeare’s legal context as well as how his plays reflect general problems or well-written fact patterns. See generally George W. Keeton, *Shakespeare’s Legal and Political Back-*

of the law *in* Shakespeare, an exercise in determining the law as it appears to operate in those of the plays that have a strong legal component.⁹ It was rather a question of Shakespeare *as* law.¹⁰ We were to proceed upon the assumption that the whole of the corpus had acquired the status of binding statute: precisely the posture of "as if" that underscores every legal system in one way or another. Shakespeare was to be our law, *tout court*.

The students immediately established a powerful rapport among themselves and with their teammates. Their enthusiasm and their love of learning proved infectious, and they were soon studying a wide range of theoretical material on the nature of law and legal interpretation, including Cover, Hart, Fuller, Dworkin, Goodrich, and Derrida, as well as the abundant secondary literature in Shakespearean studies.¹¹ Furthermore, the students proved model interdisciplinary scholars: they taught each other, and this of course applied to Paul and me no less than to our students. The law students taught the English students about the preparation and presentation of a factum, practice and procedure in a courtroom, oral argument, and much else besides. The graduate students in English gave the lawyers a crash course in Shakespearean studies and used their far superior knowledge of the plays to invaluable effect. And, at the same time, each learned a great deal about the practices in which

ground (London, 1967); Paul S. Clarkson & Clyde T. Warren, *The Law of Property in Shakespeare and Elizabethan Drama*, 2d ed., 6 (New York, 1968); Darryl J. Gless, *Measure for Measure, the Law, and the Convent* (Princeton, 1979); Edna Zwick Boris, *Shakespeare's English Kings, the People, and the Law: A Study in the Relationship Between the Tudor Constitution and the English History Plays* (Rutherford, 1978); Theodor Meron, *Henry's Wars and Shakespeare's Laws: Perspectives on the Law of War in the Later Middle Ages* (Oxford, 1993).

9. Edward J. White, *Commentaries on the Law in Shakespeare* (St. Louis, 1911); William Lowes Rushton, *Shakespeare's Legal Maxims* (Liverpool, 1907); C. K. Davis, *The Law in Shakespeare* (St. Paul, 1884); Daniel J. Kornstein, *Kill All the Lawyers? Shakespeare's Legal Appeal* (Princeton, 1994); Dennis R. Klinck, *Shakespeare's Richard II as Landlord and Wasting Tenant, in Un-Disciplining Literature*, eds. Kostas Myrsiades & Linda Myrsiades, 190 (New York, 1999); Theodor Meron, *Bloody Constraint: War and Chivalry in Shakespeare* (Oxford, 1998); George W. Keeton, *Shakespeare and His Legal Problems* (Buffalo, 1987) (1930); O. Hood Phillips, *Shakespeare and the Lawyers* 84-140 (London, 1972); William M. Hawley, *Shakespearean Tragedy and the Common Law: The Art of Punishment* (New York, 1998); John Denvir, *William Shakespeare and the Jurisprudence of Comedy*, 39 *Stan. L. Rev.* 825 (1987); Jules Gleichér, *The Bard at the Bar: Some Citations of Shakespeare by the United States Supreme Court*, 26 *Okla. City U. L. Rev.* 327 (2001); Laurie Rosenzweig Blank, *The Laws of War in Shakespeare: International vs. Internal Armed Conflict*, 30 *N.Y.U. J. Int'l L. & Pol.* 251 (1998); Robert W. Peterson, *The Bard and the Bench: An Opinion and Brief Writer's Guide to Shakespeare*, 39 *Santa Clara L. Rev.* 789 (1999).
10. Ian Ward, *Shakespeare and the Legal Imagination* 15-19 (London, 1999), comes closest to this idea. He makes the argument that Shakespeare can be seen as supporting the idea of a communitarian society. He nonetheless readily recognizes that any reading of Shakespeare actually shows more about the interpreter—Marxist, patriot, postmodern deconstructionist, or new historicist—than about Shakespeare himself.
11. Cover, *supra* note 1; Hart, *supra* note 6; Lon Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 *Harv. L. Rev.* 630 (1958); Ronald Dworkin, *Law's Empire* (Cambridge, Mass., 1986); Peter Goodrich, *Reading the Law: A Critical Introduction to Legal Method and Techniques* (New York, 1986); Peter Goodrich, *Legal Discourse: Studies in Linguistics, Rhetoric, and Legal Analysis* (New York, 1987); Jacques Derrida, *Before the Law*, in *Acts of Literature*, ed. Derek Attridge, 181 (New York, 1992); Jacques Derrida, *The Law of Genre*, in *Acts of Literature*, *supra*, 221; Jacques Derrida, *Force of Law: The Mystical Foundation of Authority*, 11 *Cardozo L. Rev.* 919 (1990) [hereinafter *Force of Law*].

they met as friends rather than strangers, such as how and why interpretation takes place, different argumentative strategies, and so forth. It is my belief that everyone engaged in this project came away with a strong sense of the interdisciplinary *connection* between bodies of knowledge that I hope will be of continuing significance to them.

The case that Yachnin and I developed, after a careful discussion of current issues within our respective disciplines, appears below. It centers on an issue that is of abiding importance to both Shakespeareans and jurists: the proper relationship between a duty of obedience and a duty of justice. That issue formed the centerpiece of the Hart-Fuller debate almost fifty years ago, of course, and invites consideration as to the nature of interpretation and legal legitimacy itself.¹² Shakespeare's understanding of the duty to obey kingly authority, weighed against the duty to resist it, is equally contentious, and recent scholarship on the issue offers a range of different readings.¹³ Indeed, from the first, we felt the need to try and limit the legal materials. For various reasons, the case eventually centered on *Henry V* and *The Winter's Tale*, both of which concern in different ways the conflict between injustice and authority, and *The Merchant of Venice*, whose elaborations on mercy, justice, and law are well known. The arguments relating to these cases in our jurisprudence were argued with enormous vigor and care, and their general tenor will emerge from the judgment that I have, for the benefit of posterity, appended below.¹⁴

Other cases made a brief appearance and might repay more careful study, including *Richard III*, *Titus Andronicus*, and *Macbeth*. How a reading of these cases might affect the court's decision here is, no doubt, a problem for future courts. To date we have only the one decision, one precedent from which the law of the Court of Shakespeare will steadily build and evolve. It seems certain that there will be further cases. Over 100 people attended the court's inaugural sitting. Already we have had to triple the size of the course for next semester, and I have had to field several inquiries from other universities wishing to participate.

Statement of Facts

The facts in this case may be simply put. Karl Heinrich was born in Germany in 1920. During the Second World War he joined the SS, attaining the rank of Oberleutnant. Thereafter he was appointed to various positions in the administrative framework of the extermination camps, ultimately as a senior guard at Sobibor death camp and then at Chelmno. There he super-

12. H. L. A. Hart, *Positivism and the Separation of Law and Morals*, 71 *Harv. L. Rev.* 593 (1958); Fuller, *supra* note 11.
13. Paul Yachnin, *Shakespeare and the Idea of Obedience: Gonzalo in the Tempest*, 24 *Mosaic* 1 (1991); Richard Strier, *Faithful Servants: Shakespeare's Praise of Disobedience*, in *The Historical Renaissance*, eds. Heather Dubrow & Richard Strier, 104 (Chicago, 1988).
14. I have not included the text here of the concurring judgments of Justices Yachnin and Bristol. Those will in due course be found at the Web site of the Shakespeare Moot Project, which is now being developed. Meanwhile, hard copies are on file with the author and available on request.

vised, although he did not actively participate in, the murder of many thousands of Jews from all over occupied Europe. Since 1951, however, he has lived quietly and reputably in Canada. A previous indictment against him failed for lack of evidence in circumstances similar to those which prevailed in *Demjanjuk*.¹⁵ Although evidence of his general involvement in these dark events is now clear, the attorney general for Canada has refused to mount a further prosecution in view of Heinrich's advanced age and the frailty of his condition, citing the *Pinochet* decision.¹⁶ Amnesty International now appeals to this court, not on the ground that Karl Heinrich's conduct was a crime against humanity, but on the ground that his behavior breached the laws of Shakespeare, and seeks from us an order of mandamus to require the attorney general to commence a prosecution.

Heinrich, who was granted standing to intervene before this court, argues that to follow the lawful orders of the Nazi regime evidences no crime against the laws of Shakespeare, a jurisdiction in which the duty to obey is highly prized and little regard is shown for the values of contemporary human rights. He quoted the following statement made by the defendant in the *Eichmann* trial:

It was my misfortune to become entangled in these atrocities. But these misdeeds did not happen according to my wishes. It was not my wish to slay people. The guilt for the mass murder is solely that of the political leaders . . . I would stress that I am guilty of having been obedient, having subordinated myself to my official duties and the obligations of war service and my oath of allegiance and my oath of office, and in addition, once the war started, there was also martial law.

. . . This obedience was not easy. And again, anyone who has to give orders and has to obey orders knows what one can demand of people. I did not persecute Jews with avidity and passion. That is what the government did. Nor could the persecution be carried out other than by a government . . . I accuse the leaders of abusing my obedience. At that time obedience was demanded, just as in the future it will also be demanded of the subordinate. Obedience is commended as a virtue. May I therefore ask that consideration be given to the fact that I obeyed, and not whom I obeyed.¹⁷

Heinrich argues furthermore that, given his age and ill health, the attorney general's decision is appropriately merciful. This court, on its first day of sitting, has to determine—or at least begin to determine—the relationship of obedience to conscience within its jurisdiction, and of mercy to law. In addition, we have to begin to consider the interpretive and constitutional

15. Cr.A. 347/88, *Demjanjuk v. State of Israel*, 47(4) P.D. 221 See also online <<http://www.us-israel.org/jsource/Holocaust/Demjanuk1.html>>.

16. *R. v. Bartle and the Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet* (No. 1), [2000] 1 App. Cas. 61 (1998) (appeal taken from Q.B. Div'l Ct.); *R. v. Bartle and the Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet* (No. 3) [2000] 1 App. Cas. 147 (1999) (appeal taken from Q.B. Div'l Ct.).

17. Cr.C. (Jm.) 40/61, *Attorney General v. Eichmann*, 45 P.M. 3, 36 I.L.R. 5; *aff'd* Cr.A. 336/61, *Eichmann v. Attorney General*, 16 P.D. 2033, 36 I.L.R. 277, available at <<http://www.nizkor.org/hweb/people/e/eichmann-adolf/transcripts/Appeal/Appeal-Session-07-07.html>>. See also Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (Harmondsworth, 1976).

principles that will govern our relationship, as judges, with the authoritative texts that constrain our authority: the collected plays of William Shakespeare.

Judicial Opinion of Manderson, J.

The question before us today pertains above all to identity and the sense in which it remains possible to speak of one. Who is Karl Heinrich? Is he the man who once worked as a senior guard at Sobibor and Chelmo, names that will live in infamy? Is he still that man, some fifty and more years on? Times change and so do we. At what point is it right to continue to attribute past conduct to present bodies? The nature of identity is fraught philosophically and has become increasingly so in the past several generations, as the social construction of selfhood has become more and more apparent. Identity is a narrative, an artifice that permits us to connect into a pattern of meaning the many different parts we play—the distant child, the foolish youth, the weary soul—so that it makes sense to us and to those around us. Identity is the myth that makes of Jaques' seven ages of man one story.¹⁸

But the law—any law—requires a stronger commitment to identity than that. There is no law without responsibility, no responsibility without agency, and no agency—which implies and must imply a course of action understood by the actor as having meaning and consequences *across* time—without some enduring sense of identity. It is this sense of responsibility over time and into the future that makes us, as Kant insisted, moral beings. In the first place, the respondents in this case have sought to deny to their client, Mr. Heinrich, any agency in the war and therefore deny to him the sense of having an identity. I mean by this that the ideal of obedience to which Heinrich defers—the principle of “following orders” originally articulated, in this context, by Adolph Eichmann—is precisely a defense of the virtue of *abandoning* one's own sense of judgment in favor of that of another, whether that of a superior, a superior officer, or a superior regime. The word *obey* derives, to be sure, from the Latin *audire* meaning to listen, but it implies something rather more than mere comprehension. To obey requires a kind of action in response to or *ob-* (which is to say, on account of) our having listened. So to obey is to submit to the decision of another, regardless of our own judgment, and to comply with the other's instructions simply because they have been issued. It is therefore an act of conscious submission that places our human identity—who *we* are, what *we* want to do, what *we* judge—in suspended animation.¹⁹ An obedient actor is a machine. The irony is that our own culture, and most particularly our legal culture, takes this obligation to obey very seriously indeed. But we cannot avoid the grave moral implications it imports. Every demand for obedience is nothing less than a subjugation of our own capacities, whether for good reason or ill, to the agency and identity of another. Certainly society could not exist unless we authorized someone else, in many different situations, to make binding and conclusive determinations on our behalf. A recognized legal

18. *As You Like It*, act 2, scene 7 (2.7).

19. See the discussion of obedience in Desmond Manderson, *From Hunger to Love*, 15 *Law & Literature* 87, 107–08 (2003).

judgment often gives rise to just such a presumption of authorization. The question for this legal system, as for any, is at what point there ceases to be a *good reason* to place our selfhood in escrow, whether the origin of the claim is a legal structure or otherwise.

Second, the respondents appeal to the passage of time since that war to suggest that Heinrich is no longer a man who can be punished for the past. The attorney general's decision is couched in terms of the age and ill health of the defendant, and this aspect of the case is articulated as quite distinct from whether his behavior was criminally wrongful. But this could hardly be a reason, in and of itself, if Heinrich had committed these acts last week. The law does not vary its jurisdictional intensity in inverse proportion to one's bodily integrity. So it seems to me that the plea to senescence and infirmity, even if it falls short of an appeal to senility itself, must assume that there is some material significance to the *pastness* of the past. It is not simply Heinrich's age and health that are at issue here. It is that he is old *now*, and that he was young *then*. Perhaps it is also that he is sick *now*, and he was healthy *then*. To be sure, the respondents did not articulate this issue as clearly as they might, but the sense of a responsibility that retreats with and because of the passage of time, and of the depredations of time, must lie back of their argument. A palpable air of change and loss and mortality grounds their plea. Fifty years have gone by. The court should muster what mercy it may for, look, the court of time shows none. There is a sense, then, that as we get older and closer to death, our responsibility for our former conduct gradually diminishes. Mercy is just this: drawing a line, starting again, moving on to something newborn and innocent. It is a virtue that asks us to recognize the human capacity for redemption and reinvention. It makes a virtue out of change and the inconstancy of our identity. And the question for this legal system, as for any, is how and when mercy as distinct from justice ought find a home within it. To what extent are we to let the past stay past?

Respondents have sought to make Heinrich, literally, an *outlaw*—through an argument built on obedience in the first place and drawing on *Henry V*, and mercy in the second place, drawing on *The Merchant of Venice*. Identity is suspended by the first argument and fractured by the second. The question is: will the law consent to take away this man's identity—by which I mean precisely his capacity for responsibility—in this manner? Can it do so and still remain law?

It is not just the respondent's identity that is at stake. It is this court's. With this case, my learned colleagues and I begin the process of constitution building, and how we go about it matters. More than this, the question of identity is central to the task of interpretation. We must lay down guidelines here as to the manner in which the disparate body of work that comprises "the law of Shakespeare" is to be read. Already the key word has been smuggled in: *body*. No matter the actual origins or authors or purposes that incited the production of the Shakespearean *corpus*, in order to interpret it we are required to treat it as a whole, as a coherent story—as a body of literature, or of jurisprudence, or of both. Mythical or not, no serious interpretation is possible without such an overarching narrative.

The question of identity is necessary in order to meaningfully undertake any interpretive exercise, but it is particularly important for law. Law itself must have an *identity*—a narrative that ties together its parts and allows them to be read as a story of becoming. Otherwise, as the arguments of the applicants and respondents in this case make abundantly clear, we are left with only isolated instances, each contending against each other. Meaning requires that our law be provided with an identity that allows its identification to proceed, just as responsibility requires that our subjects be treated as having identities of their own. The very concept of obedience and respect for law—placed by the respondents here as somehow *opposed* to the idea of moral responsibility—asks of citizens that they too should understand law as more than a wilderness of instances, but rather as the embodiment of some coherent story. Only thus can it mean anything to ask of citizens that they *respect* the law.

As Justice Yachnin himself puts it in his concurrence, the question is: how is this court therefore *legitimately* to impose an interpretive model that allows the legal materials here to form an identity, a narrative that will invite the assent of the community from whom all legitimacy ultimately derives? This is not purely a problem with the law of Shakespeare. Far from it. Indeed, the English common law itself is an altogether more disparate body of materials, not united in time, thematics, ideology, style, or authorship. It is, if I may recall Pirandello for a moment, a case of several characters in search of an author. Still we speak about the “law” as if it too had an identity, a story—a trajectory. Why? Because without it, law would be an outlaw to itself.

Law begins life as pure fiction and pure theater—a claim to an unfounded coherence, and a vector that unites the “real world” with some ideal state of affairs that it depicts. Jurisprudence is narrative, as Robin West said.²⁰ Ironically, the works of Shakespeare are much *less* fictional than any other legal system known to this court. They depict the muddied, messy, contingent, and contradictory world in ways that categorically resist simplification or moralizing. And the characters within Shakespeare that themselves attempt to extract “rules” of life and simply to apply them positivistically are, by and large, portrayed as figures of folly or fun. Think of Polonius with his shopping list of morals; think of Shylock and his obsession with the literal. A Daniel come to judgment!—hardly.²¹ Embedded within the “law of Shakespeare” is an initial caution: the world is not a code and we do injustice if we try to make it one. Legal systems have typically begun with the arrogance of the formulation of manifestos and commandments. The law of Shakespeare must begin with a proper and just humility.

It is the origin of law in this narrative social endeavor that Robert Cover insists upon, and the respondents were right to remind us of it.²² Their mistake is then to attempt to yoke the implications of this perspective to the literalism of H. L. A. Hart. I do not know whether I have ever seen an odder couple. Respondents argue that the relevant community that we are to take

20. Jurisprudence as Narration, 60 N.Y.U. L. Rev. 145 (1985).

21. Hamlet, 1.3; The Merchant of Venice, 4.1.

22. Cover, *supra* note 1.

into account in order to determine the meaning of the law of Shakespeare is the community of characters within the plays themselves.²³ In the first place this thought experiment asks us to treat Shakespeare's characters as if they were "real people" leading real lives, a process that would no doubt lead this court eventually to have to rule on the tastes and beliefs and histories of the characters when they are *off stage* as well as on. This is not Shakespeare: this is Tom Stoppard, and he is not the law in this jurisdiction.

The naturalistic fallacy, as it is often called, occurs elsewhere too. Respondents argue that when Antigonus is eaten by a bear in *The Winter's Tale* (3.3), this was not "law" for the purposes of this court, but rather "divine will."²⁴ Elsewhere they attempt to rule the dictates of morality out of court, so to speak, too. Such an approach is an attempt to look for the law as it was experienced by the characters themselves—the law *in* Shakespeare. But this limits our judicial freedom inappropriately, as I understand my learned colleagues on the bench likewise to have decided. There is no god in Shakespeare but Shakespeare, no bear at all either divinely ordained or otherwise, no morals or personages of any kind or description. There are only words, and these words now form our law—the law *of* Shakespeare. Understanding these words requires of us judgment, whether one is a judge or a literary critic or a theatergoer, and a good judgment will provide textual evidence as to the way in which Shakespeare's texts provide, in their action or language, their speeches, characterizations, and plots, evidence to support that judgment. But the judgment must be ours. My learned colleagues, we are judges and we must judge. Neither god, nor Shakespeare, nor any bear can bear it for us.

Second, the suggestion that we should treat the characters themselves as the relevant interpretive community will lead us down the road to another fallacy, that of originalism. It is clear to me that this court is far less capable of surmising the "intent" or "values" of either characters or author in early modern England than in our own society. How could any such claim be anything other than the sheerest guesswork? We are aware that the Supreme Court of the United States of America, a body of almost comparable jurisdictional mandate to our own, believes otherwise, finding in its own distant past a *legitimacy* and a *certainty* to its interpretive judgments that it cannot find in the present day.²⁵ Of course this is utter nonsense, and the Supreme Court's adoption of the doctrine of original intent is a grievous error that I hope this court will never follow.²⁶ The reason I imagine that that Court has been attracted to the doctrine is not that the past was any more just or certain than the present. It is only that its complexities have receded from us; generalizations are easier to come by; and those who might disagree are no

23. Respondent's brief (Murphy & Drouin) (unpublished, on file with the Shakespeare Moot Project).

24. Respondent's brief (Lithwick & Jain) (unpublished, on file with the Shakespeare Moot Project).

25. See, e.g., *Harmelin v. Michigan*, 501 U.S. 957, 975 (1991).

26. See also the comprehensive critiques in Dworkin, *supra* note 11, at 114–50; Mark Tushnet, *Red, White and Blue: A Critical Analysis of Constitutional Law* (Cambridge, Mass., 1988).

longer around to express their dissent. So original intent protects the Court from criticism. The court of Shakespeare, I hope, will engage with its task without such timorous legerdemain.

Shakespeare is a text, an assemblage of ideas and values and voices from which we, as a court, must try and extract meaning. It is a dimension, and our responsibility is to the text—all of it and only it. But it follows from the above remarks that the relevant interpretive framework can be no past community, either fictional (as the naturalistic fallacy would have it) or real (as the originalist fallacy would have it). Third and finally, then, there is only one community for which the interpretation *matters*: ours. In constitutional terms this is the doctrine of the “living tree” contended for by the applicant, and a commonplace in the constitutional literature: *McCulloch v. Maryland* offers an American example, *Engineers* an Australian one.²⁷

Let us recall that the point of an interpretive narrative strategy lies in its capacity to secure the assent of the ruled to our decisions, to allow them to amend their conduct or respond accordingly: as Cover says, “to submit, rejoice, struggle, pervert, mock, disgrace, humiliate or dignify.”²⁸ The extent to which it is law is the extent to which it is respected as law, and this in turn will depend on the extent to which our judgments of these texts match the best judgments, all things considered, of those whom we ask to attend to them. There are not two communities here, the judges who read the law and the citizens who read the judges (or three, since lawyers typically mediate between the two): the interpretive exercise is mutually implicated. This too is a feature of all law and not just the developing jurisprudence of Shakespeare. If we look at the origins of the English common law, or the European civilian tradition, both of which occurred in the late Middle Ages, we discover acts of imaginative fiction-making that claimed a hold on their communities precisely because of their abilities to *justify* their interpretations in relation to the understandings and the needs of the communities in which they were embedded.

The trappings of power and authority and force are a consequence of this social allegiance and not a cause of it. And often a very late consequence indeed: there was no regular police force in Europe until that of Bobby Peel, created in 1829. The failure to understand the nature of the interpretive task in law has led scholars from John Austin to H. L. A. Hart entirely awry. They have treated law as a “command,” or imagined that the attitude to law of its citizens was largely immaterial to its force.²⁹ This is the kind of error that has, in many parts of the world, led the law itself into utter disrepute. Is the law just a technical device? Is it an obscure rite? Is it an instrument for legitimation and corruption? Law’s redemption from this grave notoriety must begin as it has always begun—by seeking to *earn* the respect of the governed by the

27. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) (U.S., Marshall, C.J.); *Amalgamated Society of Engineers v. Adelaide Steamship Co.* (1920) 28 C.L.R. 129 (High Ct. of Australia).

28. Cover, *supra* note 1, at 8.

29. Hart, *supra* note 6, at 114, insouciantly remarks that such a attitude, though it might produce a citizenry “deplorably sheeplike” and lead them to the “slaughter-house,” would constitute a system of law nonetheless.

quality and care of our judgments. This task begins, above all, with the interpretive choices we make as a judiciary.

Where does this get us? It suggests an alternative interpretive model based upon the concepts I have outlined above: narrative, responsibility, and social relevance. These are all variations on the theme of identity. Narrative is the project by which this law will come to have an identity of its own. Responsibility is the project by which this law will seek to acknowledge the identity of its citizens. And relevance is the project by which we create an identity *between the two*: the *identification* of a legal system by and with a social community is what may eventually entitle us to reward the judgments we make today with the high honor of calling them law. So law itself, as Derrida points out, is at every moment a fiction whose entitlement to that name must await the uncertain judgment of posterity.³⁰ This too is a principle of humility that, in reminding us that our judgments have yet to be judged, many courts around the world would do well to recall.

While Cover bears close attention as this court grapples with the question of the origin and nature of meaning, he says little about the phenomenology of judging itself. And here it seems to me that the theory which parallels most closely the arguments I have suggested is that of Ronald Dworkin. His idea of "law as integrity" captures these aspects very well.³¹ For Dworkin, the judicial record "matters . . . very much but only in a certain way."³² It is not the attitudes of the past per se that we need to defend, but the texts thus produced understood as emerging chapters in a "chain novel" that form a narrative of which we can be proud.³³ We respect the judgments of the past because they have helped to make us who we are: no account of contemporary values can fail to take account of beliefs strongly embedded in them. Our respect for precedent comes from our respect for our identity: it expresses a recognition of who we *were*. But at the same time the way in which we read these past judgments will depend on our understanding of our current values and problems, and asks of us that we tell a story in which our identity has changed and developed over time. Our interpretive practices come from our need for a narrative that seeks to relate these precedents to an overarching story of society "worth telling": it expresses a recognition of who we *are* and *will be*.

As is often said, every generation reimagines *Hamlet* according to the tenor of the times; the nature of a classic is precisely its capacity to flourish under these conditions of interpretive stress. And every generation, according to Dworkin, will read its law differently too. Each society will read these texts as a story illuminating where they have come from *and* where they are going. You might think of this as a travesty, but only, of course, if you thought that there was an objective "interpretation" from which other readings diverged. But this

30. Derrida, *Force of Law*, *supra* note 11, at 961-67; Richard Beardsworth, *Derrida and the Political* 101 (New York, 1996).

31. Dworkin, *supra* note 11, at 225-75.

32. *Id.* at 227.

33. *Id.* at 228-38.

is not the case: there is no "there" there. The history of the common law provides compelling evidence of the way in which the meaning of a particularly significant precedent emerges only in the work of later judges, reading—and reading in—in novel contexts. Interpretation is archeology—in reverse.

Indeed, Dworkin's integrity fits much better with the law of Shakespeare than with the Anglo-American common law. In the first place, the common law as chain novel suffers from the undeniable difficulty that very many authors with profoundly different motives and ideas have contributed to it. Reading it "as if" it were the product of a single mind is quite artificial. But the law of Shakespeare *is*, to the best of our knowledge, the product of one mind, one identity. It already has a coherence that is more than notional. Second, Dworkin ascribes to the judgments of the Supreme Court or the House of Lords a constitutive force over our very identity on which he would seem to depend if his theory of the social power of the judicially constructed narrative is to convince.³⁴ From the claim that these institutions really are the "capitals . . . of law's empire,"³⁵ legal pluralists like Macdonald might demur.³⁶ A better case can be made, as Harold Bloom, for example, does, that this constitutive and narrative power is located in writers like Shakespeare.³⁷ Compared to the linguistic, nationalistic, artistic, and philosophical contributions of the plays in particular, the role of the common law in the formulation of our identity must pale. If we are searching for a body of texts that we could single out as having *constituted* our identity, and as continuing to form a necessary resource in the narrative we develop about ourselves and our societies, we could not go past this body of work.

I have spent time on these questions so that we may proceed on a sound interpretive basis. It will not do to interpret the law of Shakespeare without an eye on the trajectory of meaning that unites his time and ours. Neither will it do to cite isolated passages from the plays as if they were themselves conclusive. We are searching for a unifying narrative of principle. As opposed to the statutory enactments of a legislature—and this is a key distinction in our emerging interpretive methodology—we cannot give to every line in Shakespeare equal value. We need to be able to judge the significance of passages no less than their meaning. In judging the merits of a particular argument we have to appreciate the importance of a particular discussion in a particular play, the status of that play in the canon itself, its social reception, and so forth. In particular it seems to me that the strongest argument will be that which identifies a certain passage or dramatic moment as being central to the resolution or understanding of a play, and will then provide us with substantial surrounding interpretive material to enable us to make sense of it. The first question is one of characterization: a matter of determining the play or plays that best speak to the themes before the court, as well as the elements or characters or scenes within those plays that allow us to form *justifiable*

34. *Id.* at 208–24.

35. *Id.* at 407.

36. See Macdonald, *supra* note 5.

37. Shakespeare: The Invention of the Human (New York, 1998).

judgments about the other characters or scenes. In relation to the present legal question, it is evident that *Henry V* and *The Winter's Tale* meet this exacting criterion. In my judgment, it is to these plays that we ought to look to determine the law in this matter.

We cannot avoid, however, the problem of *choice of law*, as the comparativists put it. Each play refers to others, each law to another, and in this inherent conflict there is no foundation for the choice to be made between them. The undecidable is walled up there, impenetrable as Kafka's "gate of the law." *Renvoi* say the lawyers, *envoi* say the philosophers, and sometimes Derrida's *différance* and *aporia*.³⁸ The equal impossibility of choosing between competing texts or interpretations and at the same time the necessity to choose is the ineradicable bottom line of judgment. "You must go on, I can't go on, I'll go on," are Samuel Beckett's words for the paradox of our time.³⁹ Dworkin's failing lies in imagining that the narratives of the law could ever be unified, if only a Herculean judge had enough time and resources to complete the task.⁴⁰ This seems quite unlikely. Certainly in Shakespeare it is clear that different characters within plays and different plays themselves have taken quite different positions on the virtues of obedience to law as against responsibility to conscience. This is what underlies the very *reality* of Shakespeare, his refusal—unlike a legal fiction—to speak in only one voice. How then are we to choose between them? Why Henry and not Falstaff—or Prince Hal?

The second step is a question of aesthetic centrality. Is the passage in question significant to our understanding of the play as a whole? This is what Dworkin means when he says that we have to decide whether certain precedents properly understood "fit" the narrative of the law (or in this case of the play) considered as a whole.⁴¹ To be bound by the narrative of the past is not to be bound by every bit of the past. We are committed to being a "community of interpretive principle," which is to say, committed to upholding what in a similar and equally compelling moment was called by Justice Brennan of the High Court of Australia the "skeleton of principle" of the law, but not committed to every node and ganglion on it, as he goes on to make clear:

It is not possible, a priori, to distinguish between [passages] that express a skeletal principle and those which do not. . . . Whenever such a question arises, it is necessary to assess whether the particular rule is an essential doctrine of [the play] and whether, if the rule were to be overturned, the disturbance to be apprehended would be disproportionate to the benefit flowing from the overturning.⁴²

As Dworkin himself insists, we cannot ignore central features of the narratives before us. But new interpretations remain possible, as long as they demonstrate a coherence with the text as a whole as we now understand it, and with

38. Jacques Derrida, *Différance*, in *Margins of Philosophy*, trans. Alan Bass, 1 (New York, 1982); Jacques Derrida, *Aporias*, trans. Thomas Dutoit (Stanford, 1993).

39. *The Unnamable* 179 (New York, 1958).

40. Dworkin, *supra* note 11, at 239.

41. *Id.* at 229–30.

42. *Mabo v. Queensland (No 2)*, (1992) 175 C.L.R. 1 at 29 (High Ct. of Australia, Brennan, J.).

the values and principles that we believe those texts have themselves encouraged us to develop.

The third step is a matter of evaluating those moments of principle that seem to speak in two voices, both within and between plays. It is here that the idea of a narrative that speaks to a community of interpreters—us—and that allows us to see Shakespeare's project as embedded in our own, will assist us. In *The Winter's Tale* the legal judgment on Antigonus' awful obedience is tolerably clear and in favor of the applicants. In *Richard III* it is no less the case that the violence authorized by the king is meant to be interpreted by the community who view it as a matter of condemnation and not by any means a demonstration of immorality or license. The idea of a narrative that binds our judgment to the action and language of the plays is precisely what allows us to judge characters as having behaved wrongly, or to read certain speeches ironically.

The jurisprudence of *Henry V* is more difficult to decide. Henry's power as a king—including the powers of cruelty and of conquest—is skeletal to the play's narrative form, and it is on this point that the arguments of applicant and respondent differed substantially. One side presses Henry's apparent mandate of murder and pillage in times of war, the other cites his insistence, at another moment, on treating the French with civility and restraint.⁴³ But again it is simply not good enough to refer to facts about the plays as if that solves our interpretive problem: it most assuredly does not. The fact that bad laws are made and obeyed in Shakespeare does not tell us how we, as interpreters, are to judge them. Which matters more and why? The answer must come down to our reading of Henry the king himself. Is he well tempered or tempered like steel?

It is true—and it is a passage that might have been more strongly pressed by the respondents in defense of Heinrich's obedience to authority—that the soldiers with whom the king mingles on the eve of Agincourt conclude that "if our cause be wrong, our obedience to the King wipes the crime of it out of us" (4.1). That would appear to be precisely the argument made by Eichmann and now by Heinrich.

But not, I think, by the king. He does not agree; he rejects the consequences of the argument; he insists that "every subject's duty is the King's; but every subject's soul is his own" (4.1). We must conclude then that the soul is not, in the law of Shakespeare, subject to subjection. And this implied limit is sustained by the overall trajectory of Henry across several plays. Here it is clear that Shakespeare's narrative concerns the acceptance of responsibility as a matter of sacrifice and a matter of justice. The dismissal of Falstaff and the movement from Prince Hal to King Harry argues precisely about the importance of assuming the burdens of office and the irreducibility of those burdens to formulae. Yet the play also insists on a *relationship* between king and

43. The mandate to murder and pillage derives from Henry's soliloquy in 3.3. The civility and restraint argument comes from Henry V's justification for the execution of an English soldier, one Bardolph, who has looted a French church (3.6). For a discussion of these two passages, see Meron, *supra* note 9, at 157–60.

subject. The moral connection between the gentlest and the vilest of social conditions is built into the very structure of the play. It is dramatized most crucially when the king mingles with his soldiers on the eve of Agincourt, and then in the famous battle speech of act 5, scene 2: "we few, we happy few, we band of brothers." This is the very climax and legitimation of the play. It is the existence of this relationship and the acceptance of these responsibilities that justifies the king's claim to the obedience of his men. "His cause being just and his quarrel honorable," as King Henry insists to his men, is the precondition for the exercise of legitimate authority (4.1).

This can hardly be said to apply in the instant case. No doubt the justice of Henry's cause might be hotly disputed. Indeed it is probably right to describe his unprovoked invasion of France, as Justice Yachnin does, as "literally imperialistic." Nevertheless the king's commitment to justice as a legitimating ideal, and his insistence on binding his subjects to him in these terms, never falters. The very image that the play presents is of a young man coming to understand the demands that justice and responsibility make of him, and of a young king who inspires in his subjects enormous loyalty by the relationship he establishes with them. But in the case of the Third Reich, obedience was demanded not on conditions of justice, or honor, or connection (which we might decide, in retrospect, were not satisfied by King Henry's claim to France), but on no conditions at all. The Nazi concept of obedience was absolute, not conditional; it brooked no dissent; it countenanced no dialog or relationship between master and subject. It is not simply that the cause for which Heinrich served was neither just nor honorable: it is that these conditions were fundamentally *irrelevant* to the "legal" claim made on him.

Henry V may have been very much mistaken about the justice of his cause, but it mattered to him and it mattered to the obedience he asked of his men. On the one hand, the Nazi regime acted in secrecy, shame, and deception in the development and realization of what came to be called the final solution. Whatever efficacious consequences they thought it would achieve, they did *not* believe in its honor or justice themselves. (Indeed, they thought that as far as Jews were concerned, the terms were irrelevant.) On the other hand, they demanded from soldiers like Heinrich obedience unquestioned and regardless. It is *this* idea of obedience, not Henry's, that Heinrich now wishes our court to recognize as giving rise to legal obligations. This is a plea to instantiate as law the Shakespearean ideal of a villain, not the Shakespearean idea of a hero. We will not do so.

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—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. Yet none of this was in any measure the nature of the Nazi regime which Heinrich served, with what alacrity we do not know. 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 *The Winter's Tale*, from *Richard III*, and from *Henry V*, agrees with Lon Fuller on this point: there was no lawful authority.⁴⁴

The second law of Shakespeare is this: form and content ought agree. The interpretive methodology we pronounce today is not just that of the courts, as Hart and Dworkin seem erroneously to have concluded. Put simply, interpretation is responsibility and not simply obedience.⁴⁵ As such, it cannot be delegated to someone else. Certainly this court's reasoning, we hope, will be influential in future analyses of the problems before the courts. But it is logically impossible for us to make an *order* that this judgment be obeyed or even respected. Such a claim would only demonstrate a poverty of imagination, a distrust of the community we serve, and a conceptual schizophrenia. Other courts may suffer from such failings. We will not. Laws cannot be followed without further acts of interpretation, and as we have seen interpretation is a tricky business. If Heinrich had adopted the methodology we propose, he would not have simply surrendered his identity to the conclusory reasoning of others. That would be to hold his own identity to ransom. As we reject positivism in our interpretive strategies in order to determine the law of Shakespeare, so we reject it in our understanding of others' relationship to it.

This is not to say that Heinrich was free, either under the first law or the second, to do exactly as he pleased. We live in a world governed by discourse and mythology but not by fantasy. Behavior is constrained both by the instinct for self-preservation and by the very real forces that legitimate certain actions, enforce others, prevent still more. But this is a question of power—sometimes the power of law, sometimes that of rhetoric, sometimes that of guns. We do not know what interpretive freedom was in fact open to the respondent, what choices he made or did not make. He is not yet on trial here: the order for mandamus seeks only to have a trial so these questions may be determined and judgment made. We grant this order.

Finally, the question of mercy is easier to confront, though it does raise a further question of interpretive methodology. The appeal to mercy is an appeal to the passage of time, both physically as it bears upon the respondent, and psychologically as it suggests a statute of limitations to identity itself. The matter is complicated, however, by the behavior of the respondent, whose secrecy over his own identity for the past fifty years hardly establishes his bona fides in this regard. Surely, as Justice Bristol argues in his concurring decision, the delay in considering these matters is due entirely to the respondents' own conduct and he is estopped from bringing it forth in excuse. If precedent is required, then Polonius provides it: "This above all, to thine own self be true."⁴⁶ This is a cliché—which is to say, in biblical terms, a proverb, or in legal terms, a maxim of equity. These maxims can be identified within the law of Shakespeare by their broad social recognition and their reception into the

44. Fuller, *supra* note 11, at 655–61.

45. See Desmond Manderson & Naomi Sharp, *Mandatory Sentences and the Constitution: Discretion, Responsibility, and Judicial Process*, 22 *Sydney L. Rev.* 585 (2000).

46. Hamlet 1.3.

language in the past few hundred years. Like the maxims of equity,⁴⁷ the maxims of Shakespeare are no replacement for the development of holistic legal principles, but they can guide this court in the exercise of its discretion, of which the application of mercy is surely one clear instance. Heinrich has not been true, and cannot seek discretionary favors from the court.

If we move from maxim to precedent, it is evident that the relevant Shakespearean text on this point is *The Merchant of Venice*, and most particularly the dispute between Portia and Shylock on merciful as opposed to literal readings (4.1). What are we to make of this seminal passage? The complexity arises—and with Shakespeare there is always a complexity—because Portia for all her noble words on the quality of mercy applies the law with a strictness that not even Shylock had supposed. There is much to be said here as to the relationship of justice to law, and of literal to purposive interpretations, and we wait for later cases to explore it further. But we are interested here exclusively in the meaning of mercy. The applicants advance an ironic interpretation, suggesting that Portia's "ironic literalism" stems from the principle that mercy is not given to those who do not show it.⁴⁸ But here we run into a paradox, for Portia's literalism would therefore be understood as ultimately *dramatizing*, for Shylock's benefit, the injustice of untempered law. The meaning that we would take from this drama, as opposed to the mere fact of the decision that Portia rendered—and we have seen that the interpretation of the law of Shakespeare requires us to distinguish sharply between facts and meaning—must reinstate mercy as a skeletal principle in the narrative the play offers us. And, as Justice Yachnin has convincingly pointed out in his judgment, only this understanding can allow us to make sense of the mercy—or at least the interpretive inventiveness—Portia ultimately does show.

I might add, since it is a central interpretive principle that we must understand the narrative of a play within the context of its overall structure and design, that Portia's own *disguise* throughout this scene serves only to accentuate the idea of surface versus essential readings. One might further note that the play of disguise and of mistaken identity is itself a central feature of the Shakespearean canon. As this court works, in future cases, towards an understanding of the meaning of identity as a normative principle and as an interpretive ideal, we will have to explore the Shakespearean understanding of the play of identity, of the cross-currents and cross-gartering between person and persona, with the utmost care. To say that the law is concerned with the nature of identity as myth and as reality, and with constructing certain figurations of that identity, is no more true of this law than any other. But we have the advantage in this court of being able to rely authoritatively on a rich set of resources dealing with precisely this question. We do not have to be

47. See in particular Richard Francis, *Maxims of Equity* (London, 1727); see also John McGhee, *Snell's Equity*, 30th ed., 347-427 (London, 2000); *A Collection of Legal Maxims in Law and Equity*, ed. S. S. Peloubet (Littleton, 1985).

48. Applicant's brief (Bar-On & Savoie) (unpublished, on file with the Shakespeare Moot Project).

satisfied with the thin claims and assertions about human nature that one finds in less fortunate jurisdictions.

The problem with the plea of mercy, as I see it, is not that Portia's commitment to it falters. It is rather that mercy is essentially positioned as a consequence of justice and not a substitute for it. This much is inherent within the very idea of mercy; it expresses a kind of forgiveness. Elias Canetti remarks that "an act of mercy is a very high and concentrated expression of power, for it presupposes condemnation"⁴⁹ (the same point has been made, in a legal context, by Douglas Hay⁵⁰). Portia's speech insists similarly that mercy is an act that Shylock alone is entitled to bestow or withhold—entitled because the *justice* of his right has already been established. Antonio confesses the bond. *Then*, says Portia, mercy "seasons" justice; it "mitigates the justice" of the plea (4.1). It does not deny power but confirms it. Yet this is not in this case possible since we have not determined the very position of justice that would allow us to decide by whom and against what just conclusion mercy might be sought.

Mercy likewise then relies on identity: on an ownership of actions, acknowledged or established. For fifty years the respondent has simply refused any such ownership. The court does not *refuse* to grant mercy, because it is not yet within its discretion to do so. I venture to suggest, but without deciding the point in this case, that it may never be within its discretion in a case like this. The bond that tied together Shylock and Antonio in *The Merchant of Venice* does not tie this court to Heinrich, but him to those who died at Sobibor and Chelmo, and their families and their friends. This court has no *power*, no jurisdiction, to forgive. The denial of jurisdiction—the recognition of the limits of the law—is the most important and humbling act of legal identification that any court has at its disposal.

I therefore hold in favor of the applicant and, by a unanimous decision, this court issues the writ of *mandamus* against the attorney general requiring him to commence proceedings against the respondent Heinrich.

49. *Crowds and Power* 347 (London, 1984), quoted in John Ralston Saul, *On Equilibrium* 94 (Toronto, 2001).

50. *Property, Authority and the Criminal Law*, in *Albion's Fatal Tree*, eds. Douglas Hay et al., 17–63 (London, 1977).