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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

values; and to consider, as broadly as possible, how literature and literary thinking might influence and might have already influenced law and legal thinking.

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 obligations⁵; for Hart, our ‘internal perspective’ gives to orders their meaning and their morality⁶; 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 stem from the fact that we have developed principles that cohere together as a whole and collectively matter to us.⁸ In all these writers, one gets 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 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 decree 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-legitimizing, 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

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. 1823¹⁴

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

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: akin to 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 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 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 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 Winters' 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.

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 determined³⁰), 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 *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, *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 consider 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 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. 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).

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 Striers 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 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.

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, dissenting in part). 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. 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
 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, 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. '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.'³⁷

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 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.³⁸ In the end a law that required us to risk ourselves in order to rescue others might not just be pointless;³⁹ it might even destroy the very virtue of sacrifice, which lies because it operates as a *freely* chosen gift from one to another.⁴⁰ The redemptive power of sacrifice exhibited by Isabella and Mariana at the end of *Measure for Measure* derive 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 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 knowledge of the texts, 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 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).⁴⁴

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.’⁴⁵ 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.⁴⁶

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 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.⁴⁷

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.⁴⁸ Relying rather more on the Courts of Love⁴⁹ 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.

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.

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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* (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.
- 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).
- 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).
- 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);

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- 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* (Boston: Houghton Mifflin, 1997).
- 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.
- 32 See below; the complete judgments are archived on the Court's web site, <http://www.mcgill.ca/shakespearemoot/trials/judges04-05/> .
- 33 *The Bard de la Mer (Du Parcq v Pedersen; Pedersen v Vidaloca)*, [2005] 3 C. of Sh. 1, below, p. [?] [footnotes omitted]
- 34 *Id.*, p. [?] [footnotes omitted]
- 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. [?]
- 37 *Id.*, p. [?]
- 38 Scarry, 'The Made-Up and the Made-Real,' pp. 214-20.
- 39 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).
- 40 Jacques Derrida, *The Gift of Death*, trans. David Wills (Chicago: University of Chicago Press, 1995).
- 41 *The Bard de la Mer (Du Parcq v Pedersen; Pedersen v Vidaloca)*, [2005] 3 C. of Sh. 1, below, p. [?]
- 42 Peter Goodrich, *Law in the Courts of Love: literary and other minor jurisprudences* (London & New York: Routledge, 1996).
- 43 *The Bard de la Mer (Du Parcq v Pedersen; Pedersen v Vidaloca)*, [2005] 3 C. of Sh. 1, below, p. [?]
- 44 *Id.*, p. [?]
- 45 Cover, 'Nomos and Narrative,' p. 18.
- 46 *The Bard de la Mer (Du Parcq v Pedersen; Pedersen v Vidaloca)*, [2005] 3 C. of Sh. 1, below, p. [?]
- 47 Desmond Manderson, *Proximity, Levinas, and the soul of law* (Montreal: McGill-Queen's University Press, 2006).
- 48 Martha Nussbaum, *Poetic Justice* (Boston: Beacon Press, 1996).
- 49 Goodrich, *Law and the Courts of Love*.
- 50 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.
- 51 *The Bard de la Mer (Du Parcq v Pedersen; Pedersen v Vidaloca)*, [2005] 3 C. of Sh. 1, below, p. [?]
- 52 *Id.*, p. [?]
- 53 *Id.*, p. [?]

Not Drowning, Waiving: Responsibility to Others in the Court of Shakespeare

Statement of Facts

Three close friends went on a camping holiday to Bleak Island, a secluded maritime reserve. They were Gabriel Pedersen, Jean du Parcq and Chris Vidaloca. After a couple of leisurely beers, Gabriel and Jean went sailing in Gabriel's small sailing boat, 'The Bard de la Mer', while Chris lay drowsily in the sun.

Out to sea, Gabriel, who was an experienced sailor, continued to drink heavily, much to Jean's alarm. Within a couple of hours, Gabriel had become extremely inebriated, and Jean seriously concerned. Jean turned the boat toward shore, but an argument broke out, in the course of which Gabriel struck Jean violently. She fell overboard, whereupon Gabriel collapsed insensibly in the bottom of the boat. Jean, bleeding and unable to reach the boat, began to signal frantically to the shore for help.

The boat and Jean were both now easily visible from shore. Chris, who had stayed ashore because of a fear of sharks, saw the drowning woman and the bloom of blood, but she did nothing. Fortunately for Jean, another boat happened by and rescued her from death. Unhappily, the rescue came too late to save her from permanent injury.

As a result of the lengthy deprivation of oxygen, Jean suffered irreparable brain damage and she now requires round-the-clock institutional care. Both the fall in the water and the delay in the rescue are causally related to these injuries.

On trial for criminal assault brought under a private prosecution, the Court held that, owing to his intoxication, Gabriel was not responsible for his actions.¹ In a parallel action for civil negligence, Gabriel's maritime insurance company sought to join Chris as second defendant, but the Court determined that neither the common law nor the Civil Code of Québec imposes a duty of rescue in these circumstances.² The plaintiff succeeded against Gabriel and damages in the amount of \$2.5 million were awarded.

Before the Court of Shakespeare, the guardians of Jean du Parcq sought a declaration holding Gabriel criminally responsible for the assault on Jean du Parcq; and a judgment affirming the trial judge's determination of civil liability. Gabriel Pedersen, through his insurer, HR&G, argued that the defendant was not legally responsible for his actions; and that Chris Vidaloca should be held jointly liable for breaching a duty of care to the plaintiff.

¹ *R v. Daviault*, [1994] 3 S.C.R. 63 (Supreme Court of Canada); *R v. Robinson*, [1996] 1 S.C.R. 683 (Supreme Court of Canada).

² See *Osterlind v. Hill*, (1928) 263 Mass. 73, 160 NE 301 (Supreme Court of Massachusetts); *Horsley v. MacLaren*, ('*The Ogopogo*'), [1972] S.C.R. 441 (Supreme Court of Canada); *Civil Code of Québec*, Article 1457. See also Tony Honoré, 'Are Omissions Less Culpable?' in Peter Cane and Jane Stapleton, eds., *Essays for Patrick Atiyah* (Oxford: OUP, 1991), pp. 31-52; *Farwell v Keaton*, (1976) 396 Mich. 281; 240 N.W.2d 217 (Supreme Court of Michigan).

Justice Paul Yachnin (dissenting in part)

I. The Law of Conscience and the Court of Shakespeare

The Bard de la Mer case brings to the fore an interpretive issue of great importance for the Court of Shakespeare. Shakespeare tends to regard institutionalized law with skepticism and tends to treat matters that would usually be resolved by positive law (that is, law as something made) as matters primarily to be settled by natural law (law as something found).¹ What we might call the Shakespearean law of conscience amounts to an idea of the good and the just as it is found in the individual conscience, the judgment of people as a collectivity when they are informed by conscience, the word of God and divine authority generally, and the realm of nature, which is for Shakespeare the ‘the book of God,’ but usually with the writing smudged (Anselm Kiefer’s blasted, melted books are still books—works of art and intelligence made by an intending hand).² In her judgment in this case, Jordan J provides an admirable account of this fundamental dimension of Shakespeare’s law: ‘These extra-positive sources establish a moral law and rules of ethical conduct that are designed to enhance the social well being of Shakespeare’s subjects. They create a legal domain guaranteed by the concept of human dignity, and an agreement to preserve and promote such moral values as loyalty, honesty, fidelity, fortitude, and fairness.’³ Of course, there is nothing systematic or transparent about Shakespeare’s representation of law, but he is nevertheless consistent in preferring the law that is found in the fabric of the world and the human conscience to the law that is created by people.

How are we to translate Shakespeare's law of conscience (a natural law, which can be discerned by careful labour, in the human heart, the mind of God, and, as I shall argue, the waves of the sea) into the law that we make in dialogue with his plays? Is a guilty conscience in Shakespeare a life sentence in our Court? If a given act should, by his moral standards, arouse a guilty conscience in the actor, is it also punishable by the Court? One way to deal with the problem is simply to emulate Shakespeare's division between moral and legal domains. That would mean that matters outside the law in Shakespeare are similarly outside the jurisdiction of the Court. When advocates Matt Frassica and Erika Kurt mount their spirited defense before this Court of Chris' failure to come to the aid of her drowning friend, they tell us that while we would certainly admire Chris if she had put her life at risk in an effort of rescue, we cannot find her guilty of any crime for not doing so. 'In the Law of Shakespeare,' they say, 'altruistic interventions that are unmotivated by duty or self-interest have positive value precisely because of their status as freely-given sacrifices rather than as legal obligations.'⁴ No matter how appealing this approach might be, however, we are prevented from emulating Shakespeare's division of law and morality by the very nature of the task that the Court of Shakespeare imposes on us, which is to make law out of the *whole* of Shakespeare, including his representations of actions that are outside the institutionalized law in the worlds of the plays.

Another, opposite resolution is to re-imagine the Court of Shakespeare as itself a court of conscience, as thereby fully consonant with Shakespeare's views about what is essential

in the law, where the Court's judgment speaks something like a Shakespearean poetry of justice and repentance rather than the more mundane language of law and penalty. Think of how Angelo sweeps aside all legal process (replacing it with a characteristically harsh conscientious justice) when the realization of the Duke's perspicacity bursts upon him. In the Vienna of *Measure for Measure*, the statute law is ineffectual and absurd; the police are moronic; only intimate knowledge of the individual heart learned by way of self-reflection or conversation with others or ducal surveillance can bring about justice:

O my dread lord,
 I should be guiltier than my guiltiness,
 To think I can be undiscernible,
 When I perceive your Grace, like pow'r divine,
 Hath look'd upon my passes. Then, good Prince,
 No longer session hold upon my shame,
 But let my trial be mine own confession.
 Immediate sentence then, and sequent death,
 Is all the grace I beg.⁵

The movement toward a law of conscience is the thrust also of Goodrich J's judgment in this case, which sentences the woman on the beach (the one who 'did nothing') to a poetically just literal/littoral sentence (Goodrich is more merciful toward Chris than is Angelo toward himself):

As Chris Vidaloca was at a distance from the scene of Jean's suffering it is only appropriate that she be sentenced to repair her omission in the same form. Her failure was semiotic and so too should be her recompense. The Court thus orders that Chris Vidaloca write to Jean every day until she is relieved of her present state by cure or the longer term cure of death. The correspondence must be in the form of original compositions or poems that are addressed to Jean in the spirit of amicable or familiar letters. Their goal is to be that of augmenting friendship and increasing desire. The two must become friends again and the distance that prevented Chris Vidaloca from acting should be traversed and mended.⁶

This is an attractive and arguable approach, but it is open to strong objections.⁷ The judgment renders a wise and moving account of the distance between souls and the labour required to close that distance, but it collapses the distance that needs to be maintained between Shakespeare and the Court of Shakespeare, the space without which there can be no dialogue between what Jordan calls 'the caste of groundlings' (that is, us) and Shakespeare's plays, and without which we would cease to be able to discern the important ways in which Shakespeare's represented world and his law of conscience differ from our world and the law that the Court calls upon us to make.

The Bard de la Mer illustrates just how wide a distance lies between his world and ours. The distance is a matter of both the historical situation and the aesthetic dimension of Shakespeare's art. Important is the fact that 'this great gap of time'⁸ is not an obstacle, but rather one of the key enabling conditions of our law-making. The law is a 'living tree'—a living, growing, changing thing, responsive to changing conditions, but also

rooted firmly and grandly in the past. Hans-Georg Gadamer has argued that distance is the ground of valid historical knowledge: ‘Time is no longer primarily a gulf to be bridged because it separates; it is actually the supportive ground of the course of events in which the present is rooted.’⁹ The distance is also an effect of the fullness, meaningfulness, and coherence of Shakespeare’s dramatic narratives as against the quotidian messiness of ordinary life. More about this in what follows. Finally, it can be noted that we are, after all, only following Shakespeare’s practice: he evidently believes that the world is ‘law-full,’ but he almost always respects the gap between that intuition about the nature of the world and the world as it is experienced and as it can be grasped by those who live in it. We do the same with him when we exercise our analytic powers in order to adapt his literary vision of law as something that permeates the world to the actual world of modernity (as far as we are able to make it out).

II. Bleak Island v. Shakespeare

Something bad happened to the ‘three close friends’ on holiday. [...] But what happened at Bleak Island is not like a play by Shakespeare. An idyllic camping holiday at a secluded marine preserve, three good friends taking some time away, became in a few short hours a nightmare that tore apart the bonds of friendship. A close friend became a deadly assailant. Another friend stood by watching and did nothing. A vital, independent woman was metamorphosed by violence, inaction, and the sea into a brain-damaged patient requiring life-long care. These three close friends suffered a sea-change more dire than one is able to find in Shakespeare. In *Twelfth Night*, the twins, who each thinks the

other has drowned, are brought together at the end in joyful reunion. 'If it prove,' says Viola, 'Tempests are kind and salt waves fresh in love'.¹⁰ In *The Tempest*, almost everyone seems to perish in the storm, but in reality not a hair on anyone's head is mussed.¹¹ Shakespeare's sea is usually kinder and is always more responsive to human needs than was the sea off Bleak Island. Of course, fates worse than permanent disability befall some of Shakespeare's characters, although these fates are usually caused by other people and not by the sea. Duncan is stabbed to death in his bed,¹² many others are poisoned (Hamlet, father and son), some beheaded (Macbeth, Buckingham in *Richard III*), some smothered (Desdemona). Lavinia is raped and mutilated by the sons of Tamora.¹³ The sons are later baked in a pie for their mother to eat.¹⁴ The Earl of Gloucester has his eyes gouged out right before our horrified eyes.¹⁵ The counselor Antigonus is eaten by a bear (fortunately for us, the bear has the presence of mind to chase him off-stage before eating him).¹⁶ But nothing that happens in Shakespeare combines suffering and disaster with quite the degree of ordinariness that characterized the Bleak Island events. On the island, it was nothing more momentous than drunkenness and bad timing.¹⁷ In Shakespeare, things can get much worse than they got on Bleak Island, but the events are never so accidental-seeming or so ordinary. Shakespeare's calamities are set within worlds that are characterized by humanly meaningful time, space and nature (even bears follow humanly meaningful scripts), as well as by an aspiration toward 'lawfulness,' the condition of being filled through and through with an objectively real moral order. We could call this an aspiration toward a Christian ideal of universal providential justice except that Shakespeare has the uncanny ability of

preserving the forms and feelings of Christianity while jettisoning its particular doctrinal content.¹⁸

Bard de la Mer is more like our world than like Shakespeare's because the intentions, feelings, and personal histories of Jean, Chris, and Gabriel are incidental rather than essential to the story that enfolds them. Gabriel just happened to get drunk (not to say that he wasn't at fault for drinking on the boat), he just happened to hit Jean, she was on the boat on a whim, in the wrong place at the wrong time, and Chris, back on the beach, 'did nothing.' That's all. In spite of attempts by counsel on both sides of the case to characterize Chris' inaction as a kind of desperate paralysis on account of her fear of sharks or, alternatively, as a blithe indifference to the distress of her friend, all we have as a certainty is the fact of her inaction. We are similarly disallowed from thinking about whether Gabriel had a history of violence or alcoholism, or if he harboured a secret loathing for Jean, or if Chris was in love with Gabriel and insanely jealous of Jean (so that's why she left her to drown). And this prohibition against dreaming up a back story or a complex web of motives squares perfectly with the utterly everyday quality of the recounted events. Nothing so inconsequential or meaningless could take place in a Shakespeare play, where every act is pregnant with general human meaning and particular personal history, even if and perhaps especially where the significance of acts is hard to define. This is true even in a play like *King Lear* with its strikingly skeptical questioning of divinity and justice; the gods whose judgment of events guarantees that some actions are definitively good and some definitively evil are present, although they are present as the audience (or the implied audience) rather than present explicitly in the

text. The natural settings also in Shakespeare are full of meaning. The sea of *Twelfth Night* or *The Tempest* cares about the fate of people. It is an embodiment and instrument of a characteristically Shakespearean secularized and numinous Providence. And when, as also happens, the sea is not kind, it nonetheless remains of a piece with human concerns and an instrument of a kind of Providence. In *The Winter's Tale*, where the sea drowns the sailors that take part in the exposure of the infant Perdita (this takes place at the same time and for the same reason as the demise of Antigonus), it's still performing as an moral agent vis-à-vis human actions. In her judgment, Jordan J says that the Law of Shakespeare relies on 'a general sense of a natural order that forces acceptance of hardship and even death.'¹⁹ Shakespeare's sea is clearly a feature of this order. In contrast, the Bleak Island sea is just a body of water.

It is worthwhile to bear in mind the ordinariness of *Bard de la Mer* as against the consequentiality and meaningfulness of Shakespeare because it will remind us about the need to recalibrate what happens in the plays when we are seeking to determine the law of Shakespeare for our world. Recalibrating Shakespeare in the work of making Law is like what we do in the Court of Shakespeare itself when we assign the grades to the mooted teams. Each team includes a Law student and an English grad student. Law marks on a curve and a B+ is entirely respectable while in graduate English anything less than A- is tantamount to failure. We employ a special set of marks (Excellent, Very Good, Good, etc) that is scaled differently for English and Law students in order to reflect the grading standards appropriate to each group. Just as fairness is served in the

course by taking account of the differing measures of judgment in the two participating disciplines, so justice in the Court will be served by scaling Shakespeare's world to ours.

The principle of recalibration is a useful supplement to Jordan J's analysis of the provenance and authority of law in Shakespeare. Most important in her analysis is the dimension of the law that derives from extra-positive sources—natural and divine law—and that is not enforced by police or government but by 'the vague and amorphous yet powerful courts of opinion that deliver sentences that ennoble or degrade the subject and . . . by the hope and fear of last judgment and the afterlife.'²⁰ Since we must make law for the modern world, we will need to adjust the measure of our judgment so as not to act as if we making law in a play-world.

The plays hold the characters to a very high standard. That is because the inner moral states of the characters are tied to the morally saturated world in which they live. Because the subjectivity of the characters is connected to the objective reality of a 'lawful' world, what we would usually think of as actions within the sphere of morality acquire the binding quality of actions under the law. We don't usually expect employees to be willing to put their lives on the line for their employers, even where the employee-employer relationship is of long standing and involves more than money and service. Yet when we watch or read *Othello*, we approve Emilia's willingness to die in order to exonerate her mistress' good name. More than that, we welcome her extraordinary courage with our tears, and we would blame her if she suddenly backed down from her loyalty to Desdemona at the crucial moment. At just the moment when her face should be

flooding with the terrible knowledge of her husband's evil-doing, she refuses to see the truth; she reverts to the weary cynicism she expressed when she told Desdemona that all men, even Othello, are jealous ingrates;²¹ she still thinks she might make it up with Iago. Her marriage with him is no paradise, but it is at least a source of food, shelter, sex, and respectability. She would be breaking the law of the play-world, which discovers its highest good in the truth and salvific radiance of Desdemona, and we would, justifiably, condemn her. Someone in Emilia's position in the real world would not be breaking any laws if she declined to die beside her mistress. In the real world, the dead bodies of employers, even excellent ones, do not possess the objective qualities of truth and salvific radiance.

Recalibrating Shakespeare is one aspect of the 'living tree' principle well established in the Court,²² and it is particularly important to practice recalibration because the nature of the Court of Shakespeare obliges us to transform one kind of thing (literature) into another kind (law). In order to do this, we need to bear in mind the differences between the world of Shakespeare and what we account to the best of our understanding to be the real world. If someone like my imagined Emilia came before the Court, someone, say, who had declined to risk everything for the well-being of an employer (an employer who was a paragon of virtue, beauty, and goodness), choosing instead to continue living a dull and unrewarding life, we would need to take care to temper our judgment so as not to be guided too rigorously by the admirable example of the Emilia of Shakespeare's imagination. All of this, of course, is not to suggest that the principle of recalibration could permit us at any point to say that the examples and principles we find in

Shakespeare do not apply to the cases that come before the Court. It is only to say that the measure of our world differs from the measure of his because, in our world, people's inner moral condition is not connected to the objective reality of a 'lawful' world.

III. Who Is To Blame?

The primary question is, whose fault was it? The Court has heard eloquent and inventive—though not always convincing—arguments—from a number of points of view. The first argument to deal with is that Jean was to some degree the author of her own misfortune. There is a weak version and a strong version of this argument, and both of them are wrong. The weak version is that she should not have gone sailing with Gabriel in the first place because he had been drinking. Since she did something that she must have known was risky, she must bear some of the blame for her misfortune. Against this it can be said that the 'couple of leisurely beers' that each consumed in advance of boarding the boat were not likely to have caused or to have been seen to cause Gabriel's impairment. Jean did not know that he was going to start drinking 'heavily'; indeed she was alarmed by it, and eventually she tried to wrest control of the boat from him.

The strong version is based on the metaphor of ship-of-state. Jean was a mutineer against the captain of the ship, a rebel against the lawful monarch; therefore, Gabriel's use of force was justified:

The complainant [Jean] seized control of the defendant's [Gabriel's] ship, placing both the ship and its passengers in danger. The ship and its occupants comprise a micro-community that operates smoothly under the protection of its hierarchy, requiring leadership and servility to work properly. It fell to the defendant, who occupies the role of leader in this hierarchy, to attempt to protect the best interests of all involved by acting to regain control of the vessel. It was to this end that he struck the applicant and, for this reason, his actions are authorized by law.²³

This is contradicted by the facts. Gabriel's drinking to excess placed the boat in danger. Having lost control of himself, he was in no condition to regain control of anything, much less a boat at sea. Jean was neither mutineer nor rebel; she was trying to save the boat, herself, and her poor, stupid, drunk friend. The argument is wrong also because the analogy will simply not bear the weight of the conclusion. Gabriel was not a king and Jean was not his subject. If they were king and subject, that would complicate matters, but it would by no means make the argument persuasive. Shakespeare tends to value political loyalty, but there is no expectation that subjects will be slavishly and self-destructively obedient to their rulers.²⁴ In any case, they were not the inhabitants of a miniature floating state; they were two friends having a good time on a small boat until matters took a turn toward disaster. Jean, trying to save them both, was without fault.

Chris was on the beach when all this was going on. She 'saw the drowning woman and the bloom of blood, but she did nothing.' She has been harshly denounced for her inaction and condemned by the majority of my learned colleagues. Her crime, according

to Goodrich J, is the ‘breach of the exorbitant ethical demand of amity’: ‘Chris Vidaloca disrupted the symbolic bond of friendship by virtue of her spectacular failure to express any concern for her wounded and drowning friend.’²⁵ For Jordan J, this crime against friendship, which is serious enough in its own right, is compounded by Chris’ abrogation of her natural duty ‘to help another human being in need, in distress, or in danger.’²⁶

We expected Chris to act more or less like Shakespeare’s Emilia, but she disappointed us by acting like my Emilia—saving her own skin rather than risking her life for her friend. We see, in light of the powerful, text-based arguments of my learned colleagues, that Chris seems to have violated the law of Shakespeare. The law demands punishment and restitution (although I can note that my colleagues alleviate the harshness of their judgments against Chris by way of the sentences that they impose, which have mostly to do with healing of the violated friendship between the two women). I reiterate that the Court cannot emulate Shakespeare’s division of legal and moral domains; I also acknowledge that the evident risk of shark attack that Chris faced cannot deter the Court from bringing judgment against her for her violation of the law of friendship and her failure to help another human being in distress. Sharks or no sharks, we demand that she get into the water and attempt to save her friend.

Yet I cannot help but think that there is something unreasonable in this condemnation of Chris. Counsel to this Court have suggested that Chris’ desire to preserve her own life might have been a legitimate reason for her not to attempt the rescue.²⁷ Does Shakespeare provide any foundation for this claim?

He knows that people want to live. That much is hardly surprising. He tends to represent the desire to go on living as lesser to a range of higher goods—personal dignity, friendship, love, family, nation, faith. That is why we applaud Romeo's determination to die with Juliet and Emilia's willingness to risk everything for her dead mistress. That is why Hamlet despises his own instinct for survival and why he characterizes it as cowardly, womanly, and common. That is why Claudio insists so shrilly on his own willingness to die before exploding into his desperate appeal to his sister to save his life. Yet, 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

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.²⁸

The instinct for survival might be craven, womanly, or common, but Shakespeare's drama recognizes it as a fundamental part of human nature.²⁹ Given that Shakespearean tragedy is always also a critique of tragedy from the point of view of ordinary life and that comedy is always in part a celebration of ordinary life, it is clear that the instinct for survival has some purchase among the competing values in the drama. We remember Romeo praising the vitality of the apparently dead Juliet's beauty, then killing himself to be with her, when all the while she lives indeed and is only drugged. Life is plainly visible in her beauty, but rashness and a bent toward tragic outcomes make him blind to the blooming life before his eyes. Othello's jealousy and uxoricide are particularly poignant against the background of a love that had the potential to live and grow in wedded domesticity. 'The heavens forbid,' Desdemona says in the face of Othello's romantic, tragedy-tending extremism, 'But that our loves and comforts should increase / Even as our days do grow'.³⁰ The conclusion of *The Winter's Tale* brings us into a strangely enchanted version of this world of ordinary human aging and burgeoning marital comforts by staging ordinary life and corporeal warmth as a miracle. Taking his wife's hand after a sixteen-year hiatus in hand-holding, during which time he thought her

dead, Leontes says, ‘O, she’s warm! / If this be magic, let it be an art / Lawful as eating’.³¹

It is worth noting also that the instinct for survival acquires a political dimension at a number of moments, and that these moments reverse the ideological polarity of, say, Hamlet’s princely contempt for his own desire for life in the direction of a populist, survivalist ethos. The courtiers in the first scene of *The Winter’s Tale* joke about the growth of the young prince and the people’s unkillable desire to go on living:

Camillo: . . . it is a gallant child . . . They that went on crutches ere he was born desire yet their life to see him a man.

Archidamus: Would they else be content to die?

Camillo: Yes; if there were no other excuse why they should desire to live.³²

The joke is worth attending to because the point of it is that the people’s desire to go on living is independent of their loving allegiance to their rulers. This hinted-at political dimension of ordinary people’s survival instinct is given much fuller treatment at the start of *Coriolanus*, where the starving Roman plebs make their case for economic and civil justice in the face of Menenius’ fable about the body politic and Martius’ threat of violence, and also in *Henry V*, where the common soldiers speak powerfully to the disguised King about the gap between the deaths of ordinary men and the grand political ambitions of kings.³³

This is not to suggest that Chris' inaction was politically meaningful, but rather only to insist that the instinct for survival is not an entirely contemptible motive in Shakespeare. In view of her anxiety about sharks and the spread of blood in the water, it is not unreasonable to assume that she feared for her life. Jason MacLean and Lisa Stokes-King speak encouragingly about 'an absence of sharks,' but it must be said that in waters either known to be or feared to be frequented by sharks, and in the presence of a 'palpable bloom of blood,' an absence of sharks must always also be an anticipation of sharks.³⁴ Since also we know nothing for certain about Chris' emotional state (is her face a mask of horror and fear? is she blankly indifferent? is she glad?), we are obliged to give her the benefit of the doubt. It is, in any case, not a very great doubt. The combination of her avowed anxiety about sharks in general, her fear of sharks in that place in particular, and the presence of blood in the water suggests strongly that she was motivated by an instinct for survival. Given that Shakespeare's drama recognizes that the instinct for survival is one value competing among others (sometimes being put in its place, sometimes triumphing, sometimes serving as the basis of a subtle critique), we can hardly condemn her for her inaction. Someone like Hamlet would know well what she was likely suffering in those long moments on the beach; at some level, he would take her part.

Gabriel, the last of the three, was an experienced sailor who drank so much he lost control of his boat and himself. He struck his friend and then fell unconscious. Regardless of the outcome of his drunkenness, his criminal misconduct as captain in itself is clear. What, however, is the degree and kind of his misconduct with regard to the assault on Jean? Jordan J finds him guilty of criminal assault. Goodrich J finds him responsible for

inflicting the wound that has put Jean's life into a period of suspension, a hiatus whose only end seems likely to be her death. Can a person who does not know what he is doing be guilty of a crime? The matter is complicated here since Gabriel seems to have made an automaton of himself.

In their argument for Gabriel's guilt, learned counsel analyze the parallel between his assault on Jean and Hamlet's killing of Polonius. They say that both Gabriel and Hamlet chose to submit themselves to a mental state that they knew to be likely to cause harm (drunkenness and feigned madness respectively) and are therefore both responsible for their actions. They also claim that, '[e]ven if Hamlet were involuntarily mad instead of feigning madness, Hamlet still accepts responsibility for his harmful actions.'³⁵

As a character, Hamlet is notorious for his complexity and elusiveness, but he is straightforward in his refusal to accept criminal responsibility for the death of Polonius. Laertes' last words are an invitation to Hamlet to exchange forgiveness and a profession of forgiveness. Hamlet's response suggests sympathy for Laertes and expresses *his* forgiveness of Laertes, but it contains no indication that he, Hamlet, feels that he needs to be forgiven:

Laertes: Exchange forgiveness with me, noble Hamlet.

 Mine and my father's death come not upon thee,

 Nor thine on me!

Hamlet: Heaven make thee free of it! I follow thee.³⁶

In their exchange before the fencing match, Hamlet does accept responsibility for the killing of Polonius, but he does so in terms of pardon, which is a speech act appropriate to civil matters, rather than in terms of forgiveness, which is appropriate to sinful or criminal wrong-doing. This distinction is well understood by Laertes, who restates it in terms of honour and nature:

Hamlet: Give me your pardon, sir. I've done you wrong,
But pardon't, as you are a gentleman.
This presence knows,
And you must needs have heard, how I am punish'd
With a sore distraction. What I have done,
That might your nature, honor, and exception
Roughly awake, I here proclaim was madness.
Was't Hamlet wrong'd Laertes? Never Hamlet!
If Hamlet from himself be ta'en away,
And when he's not himself does wrong Laertes,
Then Hamlet does it not, Hamlet denies it.
Who does it then? His madness. If't be so,
Hamlet is of the faction that is wronged,
His madness is poor Hamlet's enemy.
Sir, in this audience,
Let my disclaiming from a purpos'd evil

Free me so far in your most generous thoughts,

That I have shot mine arrow o'er the house,

And hurt my brother.

Laertes: I am satisfied in nature,

Whose motive in this case should stir me most

To my revenge, but in my terms of honor

I stand aloof, and will no reconciliation,

Till by some elder masters of known honor,

I have a voice and president of peace

To keep my name ungor'd. But till that time

I do receive your offer'd love like love,

And will not wrong it.³⁷

The parallel is telling, but not along the lines stated by Frassica and Kurt. That Hamlet seeks pardon while 'disclaiming from a purpos'd evil' suggests that the killing of Polonius is a civil rather than a criminal matter. His defense of himself is classic and important, the key issue going back at least as far as *Oedipus the King*. As Sophocles struggles to make clear through the person of the tortured Oedipus, a person cannot be guilty of a crime in the absence of an intent to commit the crime. Gabriel was extremely unlikely to have been able to form any such intent at the moment of the assault against his friend Jean.

IV. Orders

In view of Jean's guiltlessness, Chris' legitimate desire to go on living, and the evident harm Gabriel did to Jean, we uphold the lower court's finding of civil liability solely against Gabriel Pedersen and HR&G Insurance Group. We take comfort in the fact that the original ruling was an act of justice and also of consideration of the needs of the injured party, who requires a reliable supply of funds for her medical care, which HR&G's sole liability will assure and which might have been endangered by a finding of Chris Vidaloca's joint liability. In view of Gabriel's drunkenness, which was willful, and his assault against Jean, which was not, we find that the lower court erred, not in finding Gabriel not guilty of criminal assault, but in failing to find him guilty of the lesser charge of criminal negligence. We sentence him to the following penalty: on the next anniversary of his drunken assault against Jean du Parq, Gabriel Pedersen is to set off from his home port in the Bard de la Mer (ample food and water will be afforded him as well as the instruments requisite for the voyage), and he is to find his way to Bleak Island, where he will spend a period of twelve months alone with his thoughts. At the conclusion of his year of solitary confinement, and provided that he has survived both the voyage out and the year on Bleak Island, he is to be rescued and brought safely home to his place of origin.

¹ This point is well made by Amanda Cockburn and Christine Stecura, Factum for the Respondent/Prosecutor, p. 13, on file with the Court: 'To realize justice, individuals require some liberty from the law to act ethically and in accordance with a higher order of justice.'

² See Anselm Keifer, 'Das Buch,' <http://hirshhorn.si.edu/collection/search.asp?Artist=Kiefer&hasImage=1>

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- ³ *The Bard de la Mer (Du Parcq v Pedersen; Pedersen v Vidaloca)*, [2005] 3 C. of Sh. 1, per Jordan J, below, p. [?].
- ⁴ Matt Frassica and Erika Kurt, Factum for the Respondent/Prosecutor, p. 14, on file with the Court. See also Cockburn and Stecura, p. 12, on file with the Court
- ⁵ *Measure for Measure*, Act V, scene 1, 366-74. All reference to the works of Shakespeare are from *The Riverside Shakespeare* (Boston: Houghton Mifflin, 1997).
- ⁶ *The Bard de la Mer (Du Parcq v Pedersen; Pedersen v Vidaloca)*, [2005] 3 C. of Sh. 1, per Goodrich J, below, p. [?].
- ⁷ It is not clear what benefit the brain-damaged Jean will derive from Chris' literary compositions.
- ⁸ *Antony and Cleopatra*, Act I, scene 5, 5.
- ⁹ Hans-Georg Gadamer, *Truth and Method*, 2nd ed. rev., trans. Joel Weinsheimer and Donald G. Marshall (New York: Continuum, 1993), p. 300.
- ¹⁰ *Twelfth Night*, Act III, scene 4, 383-4.
- ¹¹ *The Tempest*, Act I, scene 2, 217.
- ¹² *Macbeth*, Act II, scenes 1-2.
- ¹³ *Titus Andronicus*, Act II, scene 4.
- ¹⁴ *Id.*, Act V, scenes 2-3.
- ¹⁵ *King Lear*, Act III, scene 7.
- ¹⁶ *Winter's Tale*, Act III, scene 3.
- ¹⁷ In *Othello*, Cassio gets as drunk as Gabriel got on his boat; in the play, excessive drink does contribute to the unfolding of the tragedy, but the immediate effects of Cassio's befuddled rage are that Roderigo gets a beating and Cassio himself loses his position.
- ¹⁸ See Richard Strier, 'Shakespeare and the Skeptics,' *Religion and Literature* 32 (2000), pp. 171-95; Desmond Manderson and Paul Yachnin, 'Love on Trial: Nature, Law, and Same-Sex Marriage in the Court of Shakespeare,' *McGill Law Journal* 49 (2004), pp. 475-511, esp. pp. 504-6.
- ¹⁹ *The Bard de la Mer (Du Parcq v Pedersen; Pedersen v Vidaloca)*, [2005] 3 C. of Sh. 1, per Jordan J, below, p. [?].
- ²⁰ *Id.*
- ²¹ *Othello*, Act III, scene 4, 103-6.
- ²² *In re Attorney General for Canada; ex parte Heinrich*, [2003] 1 C. of Sh. 1.
- ²³ Blanchard and Elkins, Factum on file with the Court, pp. 6-8.
- ²⁴ *In re Attorney General for Canada; ex parte Heinrich*, [2003] 1 C. of Sh. 1, per Bristol J, on file with the Court.
- ²⁵ *Id.*, per Goodrich J, below, p. [?].
- ²⁶ *Id.*, per Jordan J, below, p. [?].
- ²⁷ Frassica and Kurt, Factum on file with the Court, p. 13.
- ²⁸ *Measure for Measure*, Act 3, scene 1, 115-31.
- ²⁹ See also Parolles' surprisingly affecting profession of his desire to go on living in *All's Well That Ends Well*, Act IV, scene 3, 330-40.
- ³⁰ *Othello*, Act 2, scene 1, 193-5.
- ³¹ *Winter's Tale*, Act V, scene 3, 109-11.
- ³² *Id.*, Act I, scene 1, 38-44.
- ³³ *Henry V*, Act IV, scene 1, 85-229.

³⁴ MacLean and Stokes-King, Factum on file with the Court, p. 13.

³⁵ Frassica and Kurt, Factum on file with the Court, p. 7.

³⁶ *Hamlet*, Act V, scene 2, 329-32.

³⁷ *Id.*, 226-52.

Justice Desmond Manderson

I. Two paradoxes

My lords, the case before us has given me enormous difficulty. It speaks to the most profound questions within our tentative jurisdiction: our relationship to each other and our relationship to the law. At its heart, our decision today embodies two paradoxes. The first is that law exists only because it is absent: if its authors were always present, there would be no need for interpretation since each word would constantly be refreshed by the breath of its maker. This is the catalyst of the first case that I take to be of paramount importance to our decision today: Duke Vincentio's 'haste from hence'¹ is the engine that sets *Measure for Measure* in motion. But such an absence is not mere theatrical artifice. All law is founded on such an absence, for were our dukes everywhere and at all times, the question of interpretation and the nature of rules would not be an issue. Our human insufficiency is a burnt offering to the law.

The second is that responsibility exists only when it is freely given: if we only replicate the commands laid down by others then it ceases to be *our* acceptance of a responsibility at all and instead the heavy hand of obedience weighing on us. This is the catalyst of the second case that I take to be of paramount importance to our decision today: the king's desire to 'shake all care and business from [his] age'² is the engine that sets *Lear* in motion. But the play presents a dark vision of people's responsibility to each other in the absence of constraint. So the paradox is partly the fragility of our feeling for each other.

Even more importantly, it is the following: if responsibility, like love, lights us up from within, then how can law speak of it without simultaneously diminishing it? Responsibility's legal insufficiency is a burnt offering to our humanity: but as *King Lear* shows, it is a dangerous gift indeed.

The unfolding of these two paradoxes in the plays provides a coruscating critique of the questions at the heart of the dispute before us: *Measure* is a critique of human law, and *Lear* a critique of human nature. Together I take them to be telling us something about the power of sacrifice and compassion to redeem us from these failings and to help us found a civil society (in the most literal sense of the words) in which help might come to those in need. But there is a tension between the two plays that I have struggled with. The goodness that *Lear* seeks as the only salvation for our ills cannot be found in *Measure's* law. Perhaps then a 'law of responsibility' is a contradiction in terms; perhaps any attempt to enact it will destroy it. Finally I have only found an answer to this problem by understanding the two paradoxes, and the two plays, as speaking of the same responsibility in distinct registers: the personal and the institutional. The question is how, in the end, one ought to balance them, and that is the question to which I return at the end of my judgment.

The issues themselves can be simply put. Three friends went to the beach and two of them went sailing. A storm blew up. The first was drunk, and the second did nothing, whereby the third was hurt. Comatose and wounded past repair, the plaintiff can no longer cry out. The law must answer her silence, and her two friends answer for it.

Undoubtedly, the arguments are different in their details; Gabriel Pedersen argues he is not responsible because although his actions might have caused Jean du Parcq's injury he was not in command of them, while Chris Vidaloa argues that although she was in command of her actions, they caused no injury. The first argument insists on maintaining the common law's distinction between act and intention, while the second insists on maintaining its distinction between act and omission. But, in a larger scheme, both raise a question of biblical, not to mention Shakespearean, proportions: am I my brother's keeper? To what extent does our law recognize a duty of care for others?

1. The question of intoxication need not detain us long, for it seems to me that the idea of responsibility or duty deriving from a specific relationship of authority and dependence is powerfully established in the law of Shakespeare. As Jordan J articulates so well in her judgment, there can be no doubt as to the responsibility that, in Shakespeare, feudal and familial relations entail, nor that the relationship of a captain of a ship to those on board falls into just such a category. Neither am I convinced that drunkenness does anything but intensify that responsibility. It is apparent that madness in Shakespeare – of which we might treat intoxication as a form – is always a kind of truth-telling. In *Hamlet* and in the later *Lear*, it reveals an essence that, like alcohol itself, has been distilled and purified. So too the jealous rages of the kings, Leontes in *The Winter's Tale* and *Lear*, which are themselves both a seductive intoxication and a madness, and characterized as such,³ reveal truths about the kings that the whole play struggles to redeem. These interruptions to our sobriety are not less ours for being outside our conscious will; they are never innocent and we are answerable for them. Accordingly I

have no doubt that the previous courts have erred in this matter. Notwithstanding the degree of his intoxication at the time, Gabriel Pedersen was criminally responsible for the assault on Jean du Parcq.

2. The elective indifference of Chris Vidaloca affords us a much sharper issue as to the extent of the duty of care. She watched her friend drowning and did not act: perhaps out of fear, perhaps due to panic, and perhaps for no articulable reason at all. No doubt we are all familiar with the limits of the common law, according to which it is well established that ‘the common law has neither recognized fault in the conduct of the feasting Dives nor embraced the embarrassing moral perception that he who has failed to feed the man dying from hunger has truly killed him.’⁴ Elsewhere it is explicitly stated, ‘A man on the beach is not legally bound to plunge into the sea when he can foresee that a swimmer might drown.’⁵ Is this the law of Shakespeare? That is the question before this court.

II. The origin of law

In King Lear, we see society literally stripped of its clothing and human beings reduced to their naked animal form: ‘Thou art the thing itself: unaccommodated man is no more but such a poor, bare, fork’d animal as thou art. Off, off you lendings!’ Human beings are ‘beasts’, ‘worms’, ‘flies’ and even a ‘monster of the deep.’ When first he castigates Cordelia for refusing to compromise her integrity by flattery, Lear dryly remarks, ‘Nothing will come of nothing. Speak again.’⁶ The drama insists upon the *nothingness*

of our human condition time and time again, etching it not only into Lear's speech but forcing him to recognize its truth in his bones and his spirit.

1. The absolute collapse of society and indeed of human decency in *Lear* – witness the brutality and contempt with which Gloucester is treated – is unremitting. On the one hand, we cannot look to human nature for salvation for it is precisely that nature which we are to understand as being random at best, vicious at worst. The bastard Edmund in particular dismisses as so much fatuous nonsense the idea that we are 'made' by the action of some plan or fate.

This is the excellent foppery of the world that when we are sick in fortune – often the surfeits of our own behavior – we make guilty of our disasters the sun, the moon, and stars, as if we were villains on necessity... An admirable evasion of whoremaster man, to lay his goatish disposition on the charge of a star! ... I should have been that I am, had the maiden'est star in the firmament twinkled on my bastardizing.⁷

So too, the gods or natural law appear only by their inactivity and their fickleness: 'like flies to wanton boys are we to the gods / they kill us for their sport.'⁸ There is no *deus ex machina* in *Lear* that puts right the world: what promise there is at the end of it is only of a slow and bitter recovery, step by human step.

On the other hand, neither does the play attribute the demise of legal authority as the reason for this tragic collapse. In this, *Lear* offers us an implicit critique of what will soon come to be recognizable as the Hobbesian position. For Thomas Hobbes, life is 'solitary, poor, nasty, brutish, and short.' Only a sovereign can keep us in order, forcing

justice upon us through obedience to a common and overweening power.⁹ Hobbes called this sovereign Leviathan: a ‘monster of the deep’ to be sure. But Hobbes’ argument that we are born in chains and *made* free by sheer force of law is no more sustained in *Lear* than Rousseau’s opposite syllogism, that we are born free and are everywhere enchained by force of law.¹⁰ Lear’s power is not snatched from him: he surrenders it through a legal act of sovereignty. And this does not lead to a power vacuum in and of itself, but only to a new sovereign, a new commonwealth. The problem is not that without a law-maker we cannot be good; it is that the law-makers themselves may be foolish, like Lear, or wicked, like his pelican daughters. It is therefore not the absence of legal sovereignty but its plenitude that brings anarchy in its wake.

Indeed, Lear fails to understand the irreducibly absolute nature of Leviathan’s power.¹¹ In giving it away, he yet claims to reserve for himself ‘an hundred knights / By you to be sustain’d,’ adding ‘Only we shall retain / The name, and all th’ addition to a king’.¹² As Lear soon discovers to his mounting horror, either one is sovereign or one is not. Sovereignty is fundamentally determined by ‘he who decides on the exception,’¹³ and that is precisely the power that Goneril and Regan wield mercilessly against him, whittling away what to Lear is a right and in law is only a discretion. The power to decide is the sovereign power. Ruthlessly exploited by Lear’s own delegates, such power is a social reality but we are surely left in no doubt by end of the play that there is nothing necessarily civilizing about it. Law’s absolute *unaccountability* is Goneril’s final word, thus summing up the very problem with law throughout the play: Albany demands that she confess the depths of her evil, to which she responds (as sovereigns always have,

from Caesar to Pinochet), ‘Say if I do, the laws are mine, not thine / Who can arraign me for’t?’¹⁴

So society’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 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. It strips all the trappings of the *social* from its characters, reducing them precisely to a ‘human nature’ that is not either ethical or unethical but purely a natural fact. Several elements come together throughout the play to expose the characters – notably the King and Gloucester – to a vulnerability so intense, so pitiless, so unremitting, that neither escape nor self-deception remains possible. 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.’¹⁵

2. 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. Our vulnerability is our salvation not because we have to defend

ourselves from each other, as Hobbes had it, but on the contrary because we *cannot*: instead this vulnerability calls out for a response that has no reason or purpose but just is. Responsibility comes from the recognition of the physical and unavoidable fact of need – no where so dramatically presented as in this text – that calls on our capacity without ever being able to enforce it. The central line, it seems to me, is this: ‘Poor Tom’s a-cold.’ Repeated, in one variant or another, half a dozen times throughout the play, it represents a naked appeal that can only state a need without ever making a demand. In this moment of need, though they cannot even articulate it as such, Gloucester and Lear find connection: a shoulder to lean on, a blanket to cover them, and someone, above all, to cut the loneliness of their fate. The failure of the characters to find hospitality in their *own* houses is of course strongly marked and indicates for us how far from an entitlement it is.¹⁶

As this court previously noted in *Attorney General of Canada v. Pete Pears, Ben Britten & Ors.*¹⁷ there is nothing natural or logical in such a responsibility; only something necessary. As Lear says, ‘O, reason not the need.’¹⁸ The duty of care is not the payment of an obligation, an agreement or an exchange, the enforcement of a legal right or the performance of a duty. It is a sacrifice, freely and willingly given, responsive to a physical need. As Gloucester explains, ‘I see it *feelingly*.’¹⁹ Such a feeling does not reason to a conclusion or deduce it from legal axioms. It does not *ask* ‘am I my brother’s keeper?’ – it acts because it must. Compassionate responsibility is a force that does not derive from law or morality, but gives rise to them.

In this Court we are always interested in the beginnings and the ends of the plays. It is legally significant, then, that in the very final scene, amidst the carnage of the world, it is Kent and Edgar who are entrusted with the realm. They are the only ones who have understood the origins of law. Having taken on their personal responsibilities, they find themselves encumbered with a new responsibility: a new beginning, a new society founded by the unavoidable sacrifice of caring for one another, and built upon the necessary and troublesome principle of hospitality.²⁰

With that resolution in mind then, let us return to Lear's mistake in his treatment of Cordelia in the very first scene:

Lear. Speak.

Cor. Nothing, my lord.

Lear. Nothing?

Cor. Nothing.

Lear. Nothing will come of nothing. Speak again.²¹

The arc of the action, understood as a whole as the methodology of this Court requires of us, tells us that in this pivotal pronouncement, Lear is wrong. And this on two counts. In the first place, our duty of care for others (and love, with which it is closely associated here) comes precisely from 'nothing' – that is, it is due to no cause or reason. Secondly, Lear misconstrues the relationship of cause and effect. He assumes that 'nothing' gives us no reason to act. But the opposite is true. Only human nothingness, the infinite vulnerability of others, is capable of *inciting* compassionate responsibility from us. We

don't agree to be responsible: the nothingness of others summons us to be responsible. The realization of that nothingness, and the need for love and care that it draws forth as we 'see feelingly', is the first and most powerful generative force. So Lear must be reduced to nothingness, stripped of all power and sanity, so that he might comprehend just what a pure force this nothingness is as it acts on others, and how much can indeed come of it. It is not the end of the world, but the start of it.

I take this central work of the Court of Shakespeare's jurisprudence to be expressing, in the most extreme terms imaginable, the absolute priority of care for the vulnerable as a constitutive moment of the social world. Responsibility is the unreasoned and ungrounded nothing generated or constituted by the utter nothingness of the other. It stands before logic and contract. It is not imposed by law: on the contrary, it is the sacrifice that makes law possible.

3. Now I realize that the sacrifice of ourselves for another's need – and all action is a kind of sacrifice – might be read in *Lear* as governed by the characters' pre-existing roles. Cordelia and Edgar are children, as Kent is a servant of the King. When read narrowly, an emphasis on these prior relationships would strongly circumscribe the moments in which we owe a responsibility to act to save others. That is really no different from the common law, wherein liability for an *omission* to act only arises if some prior relationship existed which already imposed a positive duty.²² On standard negligence principles, no such prior relationship creating a positive responsibility existed here.

Indeed, my learned colleagues Jordan and Goodrich JJ, while not so limited in terms of their understanding of relationships, nevertheless share this assumption. For them, there *was* a prior relationship that imposed a duty of positive action on Chris Vidaloca: that relationship was friendship. The argument is attractive and it is certainly true, as Goodrich J implies, that friendship in the Middle Ages, and into Shakespearean times, had a depth of affect and a social importance that we have to some extent forgotten.²³ But we must never forget that it is a Court of Shakespeare we are building here, and our responsibility is first to maintain textual fidelity – though not obedience (see *In re Attorney General for Canada; ex parte Heinrich*²⁴) – to ‘the Court’s sole Institutes, Codex, and Digest, comprised by the works of William Shakespeare.’²⁵ This is our jurisdictional brief.²⁶ In reading *King Lear*, in particular, I am persuaded that the play operates to strip its characters of every claim they might make on others, including not least the formal roles they previously inhabited. The oscillation between Lear as King and Lear as fool is a constant theme of the middle Acts, and reaches its crescendo when Lear, ‘mad, crowned with weeds and flowers’ meets Gloucester. ‘Is’t not the King?’ ‘Ay every inch a king! / When I do stare, see how the subject quakes.’²⁷ Surely we are meant to take from this exchange the irony of his claim and the uselessness of his kingship. For by the time Lear is reunited with Cordelia, he has refashioned entirely his understanding of who and why he is.

Pray do not mock me.

I am a very foolish fond old man.

Fourscore and upward, not an hour more nor less,
 And to deal plainly, I fear I am not in my perfect mind.²⁸

This is no demand based on a *prior* relationship of fealty or parenthood, but a present observation of corporeal reality. *King Lear* presents a universal message about the origin of social obligations out of a cry of vulnerability which gets none of its force from the prior status or relationship of the parties. When the storm breaks over them, they are as nothing to each other and that's the point. 'Poor Tom's a-cold' is what matters and not just who poor Tom might have been.

III. Sacrifice and substitution

The essential character of this responsibility for others is further elaborated in what I take to be the first of the significant legal arguments in *Measure for Measure*: the condemnation of law as a kind of equation or balance. There is I believe a kind of contempt for the idea of contract in *Measure for Measure*. The law-maker Angelo tells Isabella that she can save Claudio her brother from the sentence of death he has passed upon her, if she gives up her chastity for it. Yet the idea that one can somehow swap virtue and life in this way horrifies her, and in her most furious moments, she condemns him saying, 'thy sin's not accidental, but a trade.'²⁹ Yet the idea of trading one body for another (the theme of prostitution is constant throughout the play) sinks to steadily more distasteful depths as the play goes on. The Duke substitutes Mariana for Isabella as the carnal object of Angelo's desire, as if there were nothing offensive in such a barter. And later still the death of Claudio is to be forestalled by the expedient substitution of

substituting Barnadine for him upon the executioner's block. Every body equal to every other body; every thing capable of measurement and equivalence. Such a notion of what it is to treat people justly meets its nadir and its epiphany in the final scene where the Duke proposes that the corrupt law-maker Angelo himself be made to suffer the sentence he had imposed upon Claudio.

'An Angelo for Claudio, death for death!'

Haste still pays haste, and leisure still for leisure;

Like doth quit like, and *Measure* still for *Measure*.³⁰

Yet at last the whole cycle of exchange of reprisal – the necessary logic of contractual justice, whose critique is foreshadowed in the title itself – is broken by the women, Isabella and Mariana, who alone seem to understand the importance of that which cannot be exchanged or substituted or prepared for in advance. Mariana does not want another husband or a better one, but only the Angelo she finally has. Only one act can accomplish this salvation: that Isabella should, on bended knee, plead for the life of the man who, when he had power over her, did her such a vicious wrong; that she should refuse to endorse the principle 'measure for measure' and 'an eye for eye'. Isabella stands to gain *nothing* by this act, and it is precisely the fact that her action is a sacrifice devoid of self-interest that resolves the play. A sacrifice is an act of responsibility that gains nothing: it is the opposite of contract. We are reminded, I think, that Lear too had a 'trade' in mind when he said that nothing comes of nothing; and that he was proved wrong. Once again we can see that everything comes of nothing.

This court has yet to pronounce upon the implications of such a critique for our law of contract itself, and it would be inappropriate for me to digress into that sphere in the absence of a specific case before us. For the present, it is important to note only that as we have already seen, in Portia's speech in *The Merchant of Venice*, in the decision that we rendered last year drawing largely on this court's jurisprudential crucible, *The Winter's Tale*, and now in *King Lear* and in *Measure for Measure*, sacrifice (for another) and not consent and exchange (to our own benefit) is understood throughout the jurisprudence of this Court as foundational to legal and social order.

IV. Responsibility and judgment

These cases instruct us as to the importance of our responsibility for others, and show us something of the circumstances in which we will have to answer the call that the vulnerable make to us. Yet since it cannot be the case that we must always answer every call for help made to us, the act of being responsible must be inseparable from an act of judgment and decision-making. The question is: what guidance can be given – what rules can be laid down – to guide us in determining when and how that responsibility should be exercised? *Measure for Measure*, I think, speaks in both direct and institutional terms to this very question, and this is the second of the significant legal arguments we find in it: the play is a textbook for critiques of the notion of legal rules.

1. Angelo is appointed the Duke's deputy precisely because of his commitment to 'stricture and firm abstinence', not least in the matter of legal interpretation. (*MM*, I.iii, 12)

We have strict statutes and most biting laws,
 (the needful bits & curbs to headstrong weeds),
 Which for this fourteen years we have let slip...³¹

And this he maintains in all rigidity, insisting that there is no choice but simply to follow the rules. 'It is the law, not I, condemn your brother. / Were he my kinsman, brother or my son, / It should be thus with him.'³²

Yet immediately the discourse of necessity collapses. Once again we are reminded that 'he who decides on the exception' is sovereign. The discretion to determine not only the meaning of words but whether or not they apply in *this* instance, is unavoidably a decision that Angelo must make. Not only does Angelo, like all judges, have a choice despite his protestations to the contrary, but Isabella, who has come to plead for her brother Claudio's life, urges it upon him.

O, it is excellent
 To have a giant's strength, but it is tyrannous
 To use it like a giant.³³

Furthermore, Angelo himself quickly welcomes the discretion that law gives him, seeing in it a way to satisfy his own desires (in this case, for Isabella herself). But we see here as severe a critique of strict literalism as any of the schools of ‘critical legal studies’ have developed over the past twenty years. Not only is the claim of judicial un-freedom false; the rhetoric of judicial subservience serves only to *mask* its exercise of power.³⁴ The ideology of legal positivism permits Angelo to conceal his desires from scrutiny and to hide behind the majesty of the law.³⁵

Who will believe thee, Isabel?
 My unsoil'd name, th' austereness of my life,
 My vouch against you, and my place i' th' state,
 Will so your accusation overweigh,
 That you shall stifle in your own report,
 And smell of calumny.³⁶

This is nowhere proved truer than in the epic last Act, in which Angelo contemptuously dismisses the charges brought against him by Isabella and Mariana. A law that believes that meaning is a surface phenomenon, and takes no account of its purposes or motives, allows Angelo to stand on the surface of his authority and haughtily dismiss the charges. While Isabella entreats the Duke to ‘let your reason serve to make the truth appear, where it seems hid, and hide the false seems true,’³⁷ the legal orthodoxy espoused by Angelo recognizes no methodology capable of discovering such a deeper truth. Angelo relies on the formal and literal legitimacy of what he has done, and no-one thinks to question it. Indeed, were it not for the Duke’s fortuitous knowledge of ‘the real truth’, the play makes

it abundantly clear to us that Isabella and Mariana would have no way of proving their point. Women have always been thus: outside the corridors of power and unable to convince those within that something else is going on. What is at stake for women is specific: a life, a love, a brother. But what is at stake for men is general: a system that legitimates their power and specifically operates *so as to* conceal its abuses.³⁸ The doctrine of rule literalism is a ready-made appeal to authority that makes unchallengeable the reality of the exercise of judgment. *Measure for Measure* shows us how miserably strict literalism fails as a factual description of the legal order, but how marvelously it succeeds as a rhetorical justification of it.

2. But the alternative to law-as-rules seems little better. Duke Vincentio is the model of a judge at the other extreme of discretion. His supposed goodness, or at least his authority, entitles him to do precisely as he sees fit. But the peril of whimsy that comes with unbounded discretion is evident throughout the play. What wreckage the Duke causes! – by his refusal to enforce his own laws, to intervene at the abuses he encounters, and even to disclose to Isabella the survival of her brother until such a time as it will please him to make the most of her reaction.³⁹ As we saw in *Lear*, the danger of an untrammelled sovereignty is that the sovereign is unanswerable to anyone. So it comes as no surprise that the Duke does not so much *propose* marriage to Isabella as announce it.⁴⁰ Like many judges and politicians, the Duke has grown so used to getting his own way that he cannot imagine not. Accordingly, if rules without discretion are a danger for the law, discretion without rules are too.

All the main characters in *Measure*, and this is the key to understanding its legal implications for this Court, are united in their refusal to take responsibility for their actions. Although he cloaks it in modesty, the Duke purposely absents himself so that others might take the blame for enforcing his laws. Although he cloaks it in legality, Angelo explicitly makes Isabella responsible for the choice that will speed or spare Claudio's death. Although she cloaks it in sanctity, Isabella tries to make the decision not to give in to Angelo's crude advances – and therefore her brother's death – Claudio's own, breaking down in fury only when he refuses to give her permission to sacrifice him to her immortality.⁴¹ Furthermore, as we have already seen, the appeal to rules made by both Angelo *and* Isabella precisely embodies the claim that, there being no interpretative choice, the constraint being 'strict', the outcome is simply not their fault. One after another our characters find ways to say that the decision and the responsibility for it is not *theirs*. At each point the decision is given to another, placed elsewhere, a deferral first prefigured in the disappearance and disguise of 'the absent Duke'. And what, finally, is a duke but the delegate of some absent king?⁴² There are four layers of irresponsibility here.

Only Escalus – surely his scales are those of justice – refuses the trap and offers us instead somebody at last prepared to accept responsibility without looking for a way out. Let us note therefore that Escalus' method is characterized by his interest in the lives before him, his attentiveness to the details that crowd incoherently upon him, and his ability to move beyond formal illegalities to the real problems that often find expression in them. Angelo, of course, has no patience for any of this, but merely hopes 'you'll find good cause to whip them all' and beats a retreat.⁴³ It is not, I believe, that Escalus has no

interest in rules or in his own accountability to them, but rather that he is prepared to think about what their purpose is in his world, and to craft a solution specifically sensitive to the experiences of the people before him. He is the master, not the slave, of the rules, and the master, not the slave of discretion. In this he is quite different from the other legal models we have been considering all of whom are enslaved or seduced (which comes to the same thing) by either one or the other.

3. Responsibility then asks us to accept that, as difficult and imperfect as the decision is, it is truly and only *ours* and we must answer for it. It requires of us a judgment that we will be called upon to justify by reference to the terms of law and to our own sense of the justice that law aims at. And it requires of us a fresh judgment that does not merely conform to some pre-existing rules but reassesses the application of those rules in light of the new circumstances calling for our reflection. That is what responsibility means, and what judgment means.

The singularity of judgment means, therefore, that we must be seriously attentive in two ways: first, to our *own* irreplaceability when we are called upon to be responsible, and second, to the uniqueness of the circumstances in which we are called upon to be responsible. We can escape neither of these elements by some sort of substitution – of a rule, of another, of a god, of a whim.⁴⁴ In *Measure for Measure*, the emergence of these ideas operates, it is true, interstitially, and in ironic contrast to rather than through most of the main characters. But this makes the idea of law the play articulates the more credible: it operates as a shadow or trace behind the modes of legality it critiques, and never

attempts to reduce to a prescriptive rule – or a speech – what by its own lights it cannot and should not.

V. On being alone

These two paramount texts connect our legal order with our social order. *King Lear* places the origin of law beyond law – in the act, repeated daily, of compassionate response. *Measure for Measure* places the beyond of law within it – in the act, singular and uncodifiable, of judgment. Responsibility, of any kind, is seen to involve a kind of sacrifice and a kind of specific and purposive (rather than simply rule-bound or simply discretionary) judgment; legal judgment, for its part, is understood as an institutional form of responsibility.

1. These plays respond directly to the predicament of Chris Vidaloca and Jean du Parcq. Chris' responsibility derives from Jean's utter vulnerability, indeed her incapacity to do anything but state a need. This responsibility had nothing whatsoever to do with the prior relationship of the two, but only to the breaking crisis in Jean's poor, bare, fork'd existence, which made her a slave to the storm and a victim of ingrateful man.⁴⁵ This responsibility could not be deferred: the predicament made the capacity to act uniquely Chris'. No doubt, Chris saw that there was nothing in it for her, and no agreement by which she had consented to be responsible for Jean's survival. That is the logic of the *quid pro quo*, of 'measure for measure', of trade and of deferred responsibility, that our jurisprudence roundly rejects. A sacrifice was called for. Yet

because responsibility also requires a judgment in the specificity of circumstances, the parameters of this sacrifice are not capable of being predicted and defined in advance. There is no *rule* that can be laid down and enforced in this, but I think it fair to say that the exercise of responsibility does not demand self-destruction. There seems to me no reason to assume that Chris Vidaloca was required to single-handedly rescue the plaintiff or be eaten by sharks in the attempt. She might have raised the alarm. She might have sought a telephone. She might only have rushed to the water's edge and given some comfort to Jean – and perhaps found there, in that solidarity that in fact *makes* her identity, the strength to conquer her fears more entirely. As Edgar says, 'Who alone suffers, suffers most i' th' mind.' In such circumstances, even 'bearing fellowship' with suffering matters.⁴⁶ But she did none of these things. The one thing that we can say with absolute confidence that responsibility requires, as we have seen it in our jurisprudence, is a *response*. That Chris did not do. I therefore hold that she breached the duty of care that this court, through *Lear*, recognizes, in the specific circumstances that *Measure for Measure* asks us (and her) to attend to.

2. Yet there is a final difficulty and it is perhaps the greatest. The sacrifice of responsibility is imprescriptable in two ways. First, it must be freely given – a gift for the benefit of another, as Isabella gave to Angelo and Paulina wrung from Leontes. It cannot be forced out of someone. Second, as we have seen, it reflects a singular or unique judgment that cannot be codified and determined in advance. How then can this legal system speak about it without destroying it? There is a danger that any legal code will

suffer, by the very rigidity of language which law's absence (like the Duke's) forces on it, the fate against which Angelo warns us:

We must not make a scarecrow of the law,
 Setting it up to fear the birds of prey,
 And let it keep one shape, till custom make it
 Their perch and not their terror.⁴⁷

My Lords, every law makes a 'scarecrow of the law,' ossifying itself in the act of repetition. The question raises for me, in the acutest form, the tragedy of law itself, if by tragedy we mean a paradox or, as has sometimes been said, an inescapable contradiction of principles. I am uneasy on this point, and in particular mindful of our decision in *Ex parte Heinrich*, which required us to act, first and foremost, with humility. Judgment is inevitably an act of hubris, just as legislation is inevitably an act of ossification.

I think that nevertheless there are two responses to this question. The first response is that if rule-making is not possible in such a situation as this, except in the most general terms, then judgment might yet be. I do not intend to prescribe rules and define circumstances too closely, but we are asked here to cast judgment on a specific event, *after* it has happened. Escalus at least gives us cause to hope that while difficult and requiring patience, this at least remains possible. Our capacity to provide a sympathetic and detailed response to complex specificity unites as kindred spirits the playwright's art and the judge's craft.

Furthermore, if by responsibility we mean a response to an event that demands action, then I believe that judgment is an aspect of that responsibility.⁴⁸ The judge too is called upon to *respond*, in circumstances that should not be deferred or avoided. Our judgment here today will not solve Jean's problems. But it is a worse deferral to be silent when I am asked to speak; to refuse to judge when I am singled out. Chris Vidaloca, who can no longer speak for herself, deserves the voice of recognition and, yes, of judgment that this Court can provide. Perhaps that is all, in fact, this court can do.

The second response is to recognize more concretely the nature and limits of our jurisdiction. I might have decided this case otherwise were the Court of Shakespeare armed with intelligence agents and police, ready to scour the beaches to *compel* such a sacrifice. Certainly, law ought to be constantly mindful of its violence, its immanence 'in a field of pain and death.'⁴⁹ But the Court of Shakespeare as it is now, however, is constitutional in the purest sense: its only power (and even that the very 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 'legitimate force' alone sells its body too dear and its soul too cheap. In this court, at least, 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 on a mythical island. *Lear* too is not only a performance of the unmaking and making of the world. It is also – like *The Bard de la Mer* – an intervention in our effort to get people to 'see feelingly' this responsibility, and not to weigh up everything in terms of the 'measure for measure' of self-interest. So the constitutive power of imaginative language, whether in literature or judgment, is not

simply a force that imposes itself upon the freedom of the individual, since it forms that individual in the first place. Such words do not compel a person to be responsible; instead, in the best of circumstances, they make responsibility a better part of their personhood. The constitutive power of language, which is this Court's only resource, a resource not of enforcement but of transformation, is law's hopeful fiction — and fiction's hopeful law.

VI. Orders

In the matter of *Du Parcq v Pedersen*, I rule in favour of the private prosecution (an action brought by du Parcq's guardians) and grant the declaration sought. I hold that, notwithstanding the degree of his intoxication at the time, Gabriel Pedersen remains criminally responsible for the assault on Jean du Parcq.

In the cross-action of *Pedersen v Vidaloca*, I rule that, although her action was a pure omission, Chris Vidaloca was also responsible for breaching the duty of care she owed to du Parcq. Such a recognition of the burden of responsibility does not of course suggest that Pedersen was not responsible too. The court's jurisdiction does not extend to any ruling concerning apportionment or payment.

¹ *Measure for Measure*, Act I, scene 1, 53.

² *King Lear*, Act I, scene 1, 53.

³ *Id.*, 146; *Winter's Tale*, Act II, scene 3, 72.

⁴ *Jaensch v Coffey*, (1984) 58 ALJR 426, 439 per Deane J.

⁵ *Sutherland Shire Council v Heyman*, (1985) 157 CLR 424 per Brennan J.

- ⁶ *King Lear*, Act III, scene 4, 106-8; Act II, scene 4, 267; Act IV, scene 1, 33-6; Act IV, scene 2, 49; Act I, scene 1, 90.
- ⁷ Id., Act I, scene 2, 118-33.
- ⁸ Id., Act IV, scene 1, 36-37.
- ⁹ Thomas Hobbes, *Leviathan* (Oxford: Oxford World's Classics, 1998 [1651]), chapters XIII, XVII, XVIII.
- ¹⁰ Jean-Jacques Rousseau, *The Social Contract* (Oxford: Oxford University Press, 1994 [1762]), Book I chapter 1.
- ¹¹ In recent years the argument has been made forcibly and influentially by Carl Schmitt, *The Leviathan in the State Theory of Thomas Hobbes* (Oxford: Greenwood Press, 1996) and *Political Theology: Four Chapters on the Concepts of Sovereignty* (Cambridge: MIT Press, 1985). See Giorgio Agamben, *The State of Exception* (Stanford: Stanford University Press, 2004).
- ¹² *King Lear*, Act I, scene 1, 133-6.
- ¹³ Schmitt, *Political Theology*.
- ¹⁴ *King Lear*, Act V, scene 3, 158-9.
- ¹⁵ Id., Act IV, scene 1, 18-9; Act III, scene 2, 20; Act IV, scene 6, 33.
- ¹⁶ Id., Act III, scene 6, 104. Act III, scene 7, 27-41, esp. 40; Act II, scene 4.
- ¹⁷ [2004] 2 C. of Sh. 1; Manderson and Yachnin, 'Love on Trial', pp. 475, 496-7 per Manderson J.
- ¹⁸ *King Lear*, Act II, scene 7, 264.
- ¹⁹ Id., Act IV, scene 4, 149.
- ²⁰ See the theory of hospitality in Emmanuel Levinas, *Otherwise than Being, or Beyond Essence*, trans. Alphonso Lingis (The Hague: Nijhoff, 1981); Jacques Derrida and Anne Douformantelle, *On Hospitality* (Stanford: Stanford University Press, 2000).
- ²¹ *King Lear*, Act I, scene 1, 86-90.
- ²² *Hargrave v Goldman*, (1963) 110 CLR 40; *Dorset Yacht Co. Ltd v Home Office*, [1970] AC 1004
- ²³ See Peter Goodrich, 'Laws of Friendship,' *Law & Literature* 15 (2003), p. 23; *Law in the Courts of Love* (London & New York: Routledge, 1996); Norbert Elias, *The Civilizing Process* (Oxford: Blackwell, 2000); Jacques Derrida, *The Politics of Friendship* (London & New York: Verso, 1997); Desmond Manderson, 'From Hunger to Love', *Law and Literature* 16 (2004), p. 87.
- ²⁴ [2003] 1 C. of Sh. 1; Desmond Manderson, 'In the *Tout Court* of Shakespeare,' *Journal of Legal Education* 54 (2003), p. 283.
- ²⁵ *Rules of Court* available from the Court Registrar.
- ²⁶ Shaun McVeigh, ed., *Jurisdiction of Jurisdiction* (London: University College London Press, 2005).
- ²⁷ *King Lear*, Act IV, scene 6, 80, 107-8.
- ²⁸ Id., Act IV, scene 7, 58-62.
- ²⁹ *Measure for Measure*, Act III, scene 1, 148.
- ³⁰ Id., Act V, scene 1, 409-11.
- ³¹ Id., Act I, scene 3, 19-21.
- ³² Id., Act II, scene 2, 80-2.
- ³³ Id., Act II, scene 2, 107-8.
- ³⁴ For a recent exchange of views on the question of judicial activism and social power, see Frank Carrigan, 'A Blast from the Past: The resurgence of legal formalism,' *Melbourne University Law Review* 27 (2003), p. 163; John Gava, 'Another Blast from the Past, or why the left should embrace legal formalism,' *Melbourne University Law Review* 27 (2003), p. 186.

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- ³⁵ A similar argument is developed in relation to the rule of law in the eighteenth century: Douglas Hay, 'Property, Authority, and the Criminal Law' in Douglas Hay et al, eds., *Albion's Fatal Tree* (New York: Pantheon, 1975).
- ³⁶ *Measure for Measure*, Act II, scene 4, 154-9.
- ³⁷ *Id.*, Act V, scene 1, 65-7.
- ³⁸ The parallel with the relationship of Antigone and Creon is inescapable: Sophocles, *Antigone*, trans. Reginald Gibbons and Charles Segal (Oxford: Oxford University Press, 2003).
- ³⁹ *Measure for Measure*, Act IV, scene 3, 109-11.
- ⁴⁰ *Id.*, Act V, scene 1, 491-3, 534-7.
- ⁴¹ *Id.*, Act III, scene 1, 60 et seq.
- ⁴² And a king for an absent emperor, or an absent God.
- ⁴³ *Id.*, Act II, scene 1, 137.
- ⁴⁴ Again, without too long a digression into the realms of philosophy, the argument at this point comes close to the concept of responsibility in Levinas: see 'Substitution,' in *Collected Philosophical Paper*, trans. Alphonso Lingis. (Dordrecht & Boston : Martinus Nijhoff, 1987) and in chapter 5 of *Otherwise Than Being* (Dordrecht & Boston : Martinus Nijhoff, 1981). See generally Desmond Manderson, *Proximity: Levinas and the soul of law* (Montreal: McGill-Queen's University Press, 2006), esp. chapter 7.
- ⁴⁵ *King Lear*, Act III, scene 2, 19 & 9.
- ⁴⁶ *Id.*, Act III, scene 6, 104-7.
- ⁴⁷ *Measure for Measure*, Act II, scene 1, 1-4.
- ⁴⁸ In another context, the argument and the problem has been explored from varying perspectives in Marinos Diamantides, *Levinas, Law, Politics* (London: GlassHouse Press, 2006).
- ⁴⁹ Robert Cover, 'Violence and the Word', *Yale Law Journal* 95 (1986), p. 160; Austin Sarat, ed., *Law, Violence, and the Possibility of Justice* (Princeton: Princeton University Press, 2001).

Justice Peter Goodrich

It is curiously a Roman tradition to divide the calendar into law terms. Sir Henry Spelman in *Of the Law Terms*, a treatise devoted to the topic, puts it as follows. A law term comes from the Greek *terminus* – ‘signifying bound or end or limit of a thing, here particularly of law matters’.¹ The terms of the law were the set limits within which the courts would sit, and it was during these terms alone that the business of law could be transacted, pleas heard and judgments handed down. The law terms were the *dies juridicos* and were the licit forum of judicial pronouncement. Their boundary or end came in the form of the *dies non juridicos* which were later, more simply and more poetically termed *dies non*, or non-law days. The *dies non* had various definitions. For the civilians they were *Dies FERIALES*, days of leisure, or intermission. They were also sometimes termed *dies nec fasti*, meaning vacation days when the Praetor could not speak judicially but was entitled to speak freely. For the canonists the non-day was a festival, a holy day ‘sequestered from troublesome affairs of human business and devoted properly to the service of God and the Church – *Dies pacis Ecclesiae*’.²

The *dies non* bracket or hold the law term in suspension. The intermission connotes a time between, a thoroughly juridical yet shadow space of the interlinear, the between the lines, the glossed, the found, the interposed, the before of the law, the measure for measure. The vacation of law was equally a time of exemption, of passing between terms. It was, by connotation, also a time of mourning occasioned by ‘the death of a Bishop or some other Spiritual person, till the Bishoprick, or other Dignity be supplied with

another'.³ Here again the *dies non* signals not only a time between, a suspension, but also and quite technically a state of exception or internal limit of law which the Romans titled *iustitium* – a standstill, an interval or cessation of law.⁴

The British too had a comparable moment and concept of exception which we find again in Spelman who remarks somewhat strangely in the very same context of law terms that 'our British are little to the purpose: they judged all controversies by their priests the Druids, and to that end met but once a year'.⁵ There is a certain sense then in which the Druidical British are by origin in a space of suspension of law, and if we turn to Selden's *Janus Anglorum* we find that the Druids, immediately depicted as the first philosophers and guardians of the law, 'used Greek letters', did 'not in a Hall of Justice, nor in an Inns of Court, but in that secret and holy retirement of Pythagoras learn those Institutes of Law'.⁶ The law came from a 'silent recess', from its own *dies non* or curiously Pythagorean metempsychosis in which the soul lived again and again. And on the other side of the *dies non* was the rite of sacrifice which bound the law to its mysterious and sacred interior. The most grievous punishment that the Druids imposed was 'excommunication, that is, they forbid him to come to sacrifice'.⁷

The excommunicated, in Selden's now Roman terminology, existed outside the law. They were shunned, contagious, and neither to be fed nor respected.⁸ Pronouncing interdiction from a space of exception, the Druids instituted exceptions and linked law directly to rites both immemorial and sacred. That mythic past, with its explicit links to an unwritten law occasionally glimpsed in Greek letters or Latin texts captures a sense of

the sacral origin or mysterious beginning of law. For Spelman it also connotes a past in which there were no terms or limits of law, where *dies* and *dies non* cohabited, term and non-term blended into each other and common law existed outside of any juridical restraint, both prior to and sequestered from the days of human business or the troublesome stuff of the law terms.

As a Court of Shakespeare, as a literary jurisdiction or theatre of justice and truth as I am wont to call it,⁹ we need to be most mindful of those limits of law, those suspensions and exceptions that both define the case at hand and impose the necessary logic of our requisite determinations. We begin in this case with the time that the Court sits and specifically with the *dies non* of its peculiar jurisdiction. I have given some detail because I will argue here that the site of judgment, the non-term and, if I may put this as politely as the position of being a guest judge allows, the non-place of sitting, is in a dual sense determinative of the proper reasoning of this case. Where we are, our judicial *Dasein*, both temporally and cartographically will dictate how we speak, our proper illocution, our requisite force.

The first point to be made is that this is a memorable occasion, that we address a tragic set of hypothetical circumstances, in the space and site of the *dies non*. We are addressing the exception and we need to do so in exceptional terms. These are precisely terms that suspend law or more technically that exceed law because theatre is prior to law, because literature, as Manderson J likes to observe, is intrinsic to law, because literature *is* law.¹⁰ It is the measure of measure, the form and the substance of what is said. And here

literature is very literally law for us. It is so in various senses. Literature belongs to the *dies non*, to the intermission, the between the lines of law, the recess, the mystery or poetics of forensic invention. The space of literary legislation, of poet lawgivers, is specifically out of term, in a time of suspension of law, in the space of the exception, and it couldn't be otherwise. The origin of law has to be outside of law, in a creative or feminine space, intermittent and amatory. The law of literature is the *lex amicitia*, the before the law of law, and belongs within the affective space of a common language that precedes and post exists the mere temporality of law, the limits of the law terms.

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, which is signaled by the opening words of the survivors who have reached the island in the second act of *The Tempest*: 'Beseech you Sir, be merry: you have cause, / So have we all of joy; for our escape / Is much beyond our loss' and then his injunction: 'few in millions / Can speak like us: then wisely (good Sir) weigh / Our sorrow with our comfort'.¹¹

Put in its proper rhetorical form, the figure of the island is that of *topothesia*, 'a feigned description of a place' according to Henry Peacham, a 'counterfeit of place' in Puttenham.¹² In either case, we capture a point beyond the limit of law, outside the term,

the space of invention or of inscription itself. The site of judgment thus impels the content of judgment, where we speak from, determines what we speak of and here that means that we are driven by occasion and place to address and to apply an affective and literary law, a law of love, that meets the theatre of the occasion, the stage or *mise en scène*. Our purpose in judging, our cause, is that of mourning a grievous injury and repairing a wounded friendship, be it, as fate will decide, in reality, memory or imagination. What matters is the judgment of literature, the recess of imagination, the Druidical or indeed Pythagorean sense of sacrifice and hence of letting go, of being done, of moving on.

The figure of *topothesia* marks most usually the advent of the laws of love, the aesthetic court or loveday that develops from the poetic Latin sentiment, Vergil not Ovid in this case, *amor vincit omnia*, and which gains later expression in the injunction *pactum legem vincit et amor iudicium* (agreement prevails over law, and love conquers judgment), taken here from Chapter 49, 5a of the *Leges Henrici Primi* or Law of Henry I.¹³ That too is the prevailing law of the island in Shakespeare and it requires, as Gonzalo puts it, that we wind up the watch of our wit and let it strike. The law of the place, the insular *lex terrae*, will determine the appropriate outcome, the just resolution, the preservation of the parties. Let me move then, philosophical prelude or digression to the side, to our facts.

First sentence: ‘Three close friends went on a camping holiday to Bleak Island ...’ Start then with the Island, the bleak noun, with which, on which, and next to which the events occur. A double *topothesia*. We are on an island deciding events that happened on

another island. Utopia doubled or in classical terms an exemplary site of *duplicem sententiam* or double meaning and dual law.¹⁴ There could be no stronger signal that this is veritably the space of exception, a site of suspended law, a time outside of term. And then we read on to learn that the events that occasion this dispute occur on a small sailing boat, The Bard de la Mer, itself nominally a further signal of a poetics that must needs be applied to the utopics or indeed heterotopics of the boat, off an island, where close friends are on vacation or intermission.

1. First then the tragedy or wounding. Gabriel, ‘after a couple of leisurely [I would prefer intermittent] beers’, takes Jean sailing in his small boat.’ They embark as friends. It is worth observing that Jean is not entirely innocent. She knows Gabriel. She is a close friend of Gabriel. And she knows that Gabriel has been drinking. She consents to a certain risk in boating plain and simple. She consents to a further risk in embarking with a friend whom she knows to have been drinking. And then there is the augmented risk in the presence of alcohol on the boat. To that we must add that she remains passive while Gabriel continues drinking. We can pause to note that according to *The Law of Drinking*, subtitled *A Solemn Joviall Disputation, Theoreticke and Praticke*, in which the playwright Brathwait sets down the Civil law on drinking, women should be wary of their strength in relation to male trespasses to the person occasioned while drunk. They should shun such company is the general rule.¹⁵ She does not follow that advice. Nor does she act until Gabriel is furiously drunk. And then her chosen act is to seize the tiller from, if not the Archangel Gabriel at least the Captain Gabriel. There were likely other possible courses of action. She could have signaled other boats, sought help, waited, or

trusted to fate. But she didn't. She took the tiller, she aimed the rudder homewards.

Gabriel struck her and the rest is tragedy. She lies now in a coma, unseeing and unheard.

Friendless and in an institution.

The argument has been made and ably made that being drunk, enraged, provoked, and furious, Gabriel was not responsible for his actions. They claim that he was not himself. That he was another. Counsel for the defendant strongly urged in oral argument that Gabriel could not be held responsible because drunkenness and rage made him another to himself. Fate took over and abrogated both consciousness and conscience. I took him to be suggesting in essence that Gabriel's inebriation constituted the corporeal equivalent of the state of exception. I have taken account of that argument but here take occasion to point out that if Gabriel seeks the protection of the exception he must be subject to its *nomos* and specifically to the laws of amity that govern there. And by the same token, Emma Blanchard's brilliant and legally correct claim that what happens on a boat stays on a boat, because the Captain is sovereign and makes his own law, is similarly an evasion of the affective and relational issues, the questions of the amicable and of the amatory that must be raised here. Most succinctly, as Shakespeare put it: 'The limits of friendship ... are straight, and there can be no friend where an inequality remaineth.'¹⁶ And likewise, slightly earlier, Worcester to the King: 'We were the first and dearest of your Friends: / For you, my Staff of Office did I break'. And Gabriel should have done the same.

While I take the arguments made as to the special jurisdiction that should govern respectively, the drunk and the gubernatorial, very seriously, I differ as to the relevant governing considerations. 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. That will upend them soon enough. But back to Gabriel's violence and his responsibility. Drunk or sober, violence is the loss of capacity, the occasion when the reason of communication runs out, when words fail and mute limbs or wordless force speak in their place. Gabriel's responsibility is now and sober, tragic and extreme. He has caused Jean to suffer irreparable brain damage. Whatever justifications or excuses he might plead in law, they have no hold upon a court of love, and here a court of mourning, which must seek to find a way in which Gabriel can understand and let go of the wound he inflicted and the life he has suspended.

It is a melancholy task. A human being has been put into a state of suspension. A life has been more or less drowned out. Gabriel must take responsibility for that outcome and the Court must find a means for ensuring that he both account for his behaviour and make amends to his grievously injured friend. Friendship, to borrow from Aristotle's *Ethics*, here precedes justice and dictates the proper law.¹⁷ If friendship is to be restored,

‘sovereign amity’ repaired then it must be for the foreseeable future a one-sided development, a singular reparation, an insular affair. The route that the Court must take is nonetheless clear. As Gabriel is the cause of the injury, so Gabriel must play a principal role in repairing it. There are plenty of precedents to such effect from the courts of love and I have no hesitation in enjoining that Gabriel be ordered to spend all of his leisure time attending to Jean. For the duration of her injury or until her death, whichever is the longer, Gabriel Pedersen is to care for, nurse, and comfort Jean. He is specifically to ensure that she be cared for in bright and colorful surroundings. She is to be played music of a soothing and uplifting kind which Gabriel will either procure by means of employing minstrels or at other times by performing himself. He is also 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.

Gabriel is to suspend his own life and sacrifice all of his leisure to the cause of making good the wound that he has inflicted, and in undoing what he has done. He is in effect to live with his friend, to devote all of this energy and his amity to her recovery. He is to treat her as a friend and as if she were conscious and in doing so he will unquestionably relive and take responsibility for what he has done and if he cannot cure her he will at least cure himself. And on that latter topic the Court also orders that for the duration of this injunction Gabriel is banned from drinking alcohol without the express consent of Jean du Parcq. As far as possible his affective sacrifice should mirror that of Jean’s corporeal suffering. If feasible they should recover in tandem, together, as friends. If not, if as seems darkly likely Jean dies without recovering consciousness, then Gabriel has bid

her amicable farewell and has made such amends for her and for himself as amity enjoins.¹⁸ Then can we say with Horace: ‘Fecundi calices, quem non facere disertum?’ [These fruitful cups, whom have they not made learned?].¹⁹ Harsh lessons, bitter mead, and yet in some measure, we have to stake a belated claim to the truth of the maxim *in vino veritas*. Else drunkenness is simply sin, and inebriation no more than wasted life.

2. The second question before the Court is that of the civil liability of Chris Vidaloca. You will recollect that she remained intransigently and throughout on the beach of Bleak Island. She watched events unfold, she saw Jean’s peril clearly, ‘but she did nothing’. She witnessed Jean’s signals for help, she saw the bloom of blood in the water, ‘but she did nothing’. It has been forcefully urged by counsel for Chris Vidaloca that however deplorable her inaction might seem, she was under no legal duty to act. To do nothing is to attract nothing in blame. So it was argued and the claim was put forward very eloquently that if there was a duty owed to friends it must be derived either from family ties or employment relations. Outside of those two realms, friends act out of *caritas* or not at all. Whichever it be, it is precisely not a matter of duty but simply a matter of will. Love, as King Lear discovered to his eternal sorrow, can no more be enjoined than a personal relationship of employment can be extended beyond the tolerance of the parties who work together.

It should be clear by now that while it is quite correct to assert that there is no positive duty to act in matters of law, we are dealing here with the state of exception, with a series

of exceptions, with an island, a boat, a drowning person, and an unconscious drunk. So many islands and yet as we know, ‘no man is an island’ and friends in particular hold all things in common.²⁰ According to the laws of amity that are applicable here it is necessary to understand Chris Vidaloca’s omission in a Shakespearean and fully semiotic sense. To omit is to fail to send, an absence of signals, a non-sending. This will prove crucial. Start with Sonnet 42, ‘my friend and I are one’. It is the basic axiom of the *lex amicitia* that a wound to the friend is a wound to the self and while it might well be the case that in the law of tort or some legalistic Renaissance version of the concept of the neighbour and of her duty of care, we are entitled to calculate risk or express indifference through inaction, the opposite is the case in the jurisdiction of love. The argument is worth making in detail.

According to the Edicts of Love promulgated in Paris in the 1660’s the greatest of all wrongs against love was that of nonchalance.²¹ Insouciance, indifference, lack of concern, coldness, omission in the sense of absence of gifts or lack of communication were all contrary to the laws of love. Passivity was the death of love. Put that together with our circumstances here. Chris Vidaloca, a close friend, has embarked upon a vacation with Gabriel and Jean. She has left the public space of flattery and pretence, of offices and duties, and entered the intimate sphere of friendship in the utopian space of a remote island. While we might make the nominal argument that the fact that she visited a remote island ‘reserve’ should entitle her to be reserved, to preserve her reserve, that argument cannot hold in the context of the exception. If anything is necessary in the state of exception, it is action, decision, law-giving for each and every one of us. That becomes

our exceptional responsibility when located in the exception. Chris failed to live up to the calling of friendship by ignoring the call of her friend. Such nonchalance exhibited willful indifference, a lack of love, a breach of the exorbitant ethical demand of amity that had put her on the beach in the first place.

Chris could have argued that she was asleep, and that in a dream she saved her friend. She could have argued that she did what she could, that being unable to swim, or even incapacitated by fear, she nobly failed to rescue Jean. The spirit was willing but the body failed her. She could have made those arguments but she did not. Nor, I am pleased to say, have her representatives stooped to such circumlocutions. She failed to act and she admits that failure. There is considerable hope for her. She may indeed regain the grace of friendship. That is where the law of love leads and after a brief digression I will recommend an order that is similar in motive to that issued for Gabriel.

The common law of Shakespeare's time still recognized the philosophical duties of the law-giver. Although these were not any longer the sacrificial dictates of the Druids, the state of exception or *dies non* still played, as adverted to earlier, a considerable role in defining when lawyers could speak and when they were to remain, exceptionally of course, silent. The non-lawday was a love-day, a day of reconciliation, a time outside the term of the law. Here each was to make their own law and through such lawmaking reach agreement, compromise claims, communicate with each other and speak across the divide of enmity or the separations engendered by discord or the failure of amity: 'For thy sweet love remembered such wealth brings / that then I scorn to change my state with kings'.²²

The *dies non* was certainly not without *nomos*. We find, and this is the nub of the digression, that the non law-day, the festival days or *dies feriales* suggest also in common law a strange exception, a *iustitium* of sorts, a suspension of law in favour of a greater *nomos* or cause, be it spiritual peace or the mysteries of pagan religious rites. The *dies feriales* were also days of mourning, of release and preparation for a new law. According to this law Chris Vidaloca disrupted the symbolic bond of friendship by virtue of her spectacular failure to express any concern for her wounded and drowning friend. She offered no words, no exclamations, no signals for help, no cries of distress. It was as if she was not there, as if she had died to friendship and to life alike. That requires comment and correction. Even if we accept, as we must, that Chris Vidaloca has in the main harmed herself by allowing harm to Jean, it seems unlikely that she could have saved Jean. It is even a somewhat open question as to whether, had she acted promptly and demonstratively, she would have altered the fate that Jean suffered one iota. That is not the point. Her nonchalance was an offence within the jurisdiction of love.

Just by way of excess, as superfluous additional reasoning, I will also and gratuitously point out that even under common law and in a court of record appropriate to intermission or leisure, Vidaloca would likely have been held responsible. I have dwelt in detail upon the setting, the *dies non*, the space of leisure and of mourning that the law recognized as being exceptional. Common law in fact had an interim solution as well in the form of itinerant leisure courts. There was a law of the festival and of the fair. It was dispensed by the Court of Pipowders or more anciently Piepowders.²³ Either way, the

Court was coeval with the fair and took its name from the dust on the feet of those who came to it. Leisure was active and in motion. It was a path traveled, a libidinal hiatus, an interruption of law or at least of the normal term and jurisdiction. The disturbances of the fair went for judgment by the dusty footed of the dusty footed and we can glimpse there in no uncertain terms a reference to equity and its exceptions.

The figure is that of *synecdoche*, the Court is named by reference to a moving part. It is the figure of 'quick conceit' or rapid argument and by extension of a shift from one register to another, an association associatively made. It is also a species of *topothesia*, the reference to feet and flight has always introduced a court of love, a literary law, Mercury returning from the sacrifice.²⁴ The dusty feet are those of literature and mercy. In more conventional terms the same point can be made by referring to this justice of leisure as a recognized forum of conscience. The foot has long been recognized as the measure of equity, it varied with the length of the Chancellor's foot, and indeed it was positively sesquipedalian or a foot and a half long according to Sir Edward Coke. We have to admit that Chris Vidaloca, by such foundational criteria, was again at fault. She never moved. No use of the feet, no dust thrown up, nor sand sprayed. Enough however of antique scenes and their curious measures, of dusty feet and dusty tomes.

As Chris Vidaloca was at a distance from the scene of Jean's suffering it is only appropriate that she be sentenced to repair her omission in the same form. Her failure was semiotic and so too should be her recompense. The Court thus orders that Chris Vidaloca write to Jean every day until she is relieved of her present state by cure or the longer term

cure of death. The correspondence must be in the form of original compositions or poems that are addressed to Jean in the spirit of amicable or familiar letters. Their goal is to be that of augmenting friendship and increasing desire. The two must become friends again and the distance that prevented Chris Vidaloca from acting should be traversed and mended. Bear in mind that Chris Vidaloca is almost an anagram of Cordelia, for the very image of someone who without duty but replete with an exorbitant love travels, moves, journeys to her father, her friend. Chris Vidaloca lacks only the 'e', a missing letter that could either by the figure of *synchisis* or confusion of letters simply be replaced by an 'a', making the phonetically similar Cordalia. It sounds the same, there is precedent for it, and as Derrida was wont to put it, it makes no *différance*. Or by truncation we could reduce the name to Cord, a common root that means both cord or string, and heart or affective bond. The string of her correspondence should in this theory restore the bond of their hearts. What is necessary is an originary writ, an epistolary justice, good governance through chirographics, calligraphy and correspondence. That is my hope and that is my injunction.

3. 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. We could do worse than cite the motto chiseled into the wall above the bench of Shakespeare's Court. *Honeste vivere, non laedere, suum cuiusque tribuere*. In Shakespeare's law that means 'live an amorous life, observe the law of amity, remain true.' In other words, to understand what the motto

means is a humanistic enterprise. It requires patience, a willingness to learn, an openness to memory and history, and here to mourning and healing. What is done is done but the friends remain and their friendship needs attention, conversation, understanding. To repair friendship requires that we repair to the law of friendship. Our judgment is the exception and it is of and on the exception. To this it has to be added that the exception is sovereign. It is the emblematic moment of law-giving, the instance of absolute invention. That is the nature of *nomos*. There is no *melancholia juridica* without a prior *lex laetans* or gay science of law.

In this regard I am minded to include a short addendum in response to comments made by my fellow panelist and professor of English literature, Richard Strier. He finds the time to berate the lack of legal definition in the determinations of his fellow discussants and curiously includes me in that ambit of imprecision. He cannot tell if 'Justice Goodrich' agrees or disagrees, with the finding of criminal negligence. The answer, of course, is neither. It is precisely from such legalistic pedantry, such deterministic conclusiveness, that a court of Shakespeare, of literature or love should in my view seek to escape. The literary court enters new ground, that is its excitement and its promise, the non-place of the *dies non*. There is then a dangerous slippage, a cautious non-supplement, that I perceive in Justice Strier's forensic deliberation. It touches a crucial structural point. It is very simple. When other disciplines engage with law they have a seemingly implacable tendency toward adoption of an extremity of legalism that even lawyers would hesitate to engage.

It is a small point, a peevish aside perhaps, a little beef. There appears an almost uniform desire to abandon literature in favor of law. There is a curious reverence, an accession to hierarchy, a seemingly pre-conscious willingness amongst literary scholars to adopt the protocols and unnecessary niceties of law. The conversation stoppers of legal monologue are wielded against the spirit of the literary in the name of the fictions of law. If there is any purpose to a court of love or to a law of Shakespeare it has to reside not only in the introduction of a novel body of substantive rules but also in a sea change in method and diction. If Shakespeare's law is simply and only to be treated as law in the same sense as lawyers' law then where is the rub? What is the point? What difference does it make? In my view it upends the purpose of the interdisciplinary encounter, which from the lawyer's point of view should be to introduce a Shakespearean ethos into the ambit of law. The alternative is simply to legalize the Shakespearean, to reduce literature to the rule of law. And there is neither fun nor purpose in that. Gay science or bust.

Needless to say, nothing in this disposition has anything to add with respect to the liability of the insurers, HR&G Insurance Group. As between Gabriel and Chris we find that insurance liability lies with Gabriel Pedersen and his insurer and not with Chris Vidaloa. Her blame was both too great and insufficient to warrant overturning the trial Court disposition of pecuniary liability. Her remedy is independent of it. So be it.

Exeunt.

¹ Sir Henry Spelman, *Of the Law Terms: A Discourse* (London: Gillyflower, 1614), p. 3.

² *Id.*, p. 4.

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- ³ Thomas Blount, *Nomolexicon: A Law Dictionary* (Savoy: Newcomb, 1670).
- ⁴ The principal source is Cicero, though the elaboration and interpretation of the concept is that of Giorgio Agamben, *State of Exception* (Chicago: Chicago University Press, 2005).
- ⁵ Spelman, *Law Terms*, p. 12.
- ⁶ John Selden, *Janus Anglorum facies altera* [1614], in Selden, *Tracts* (London: Basset, 1683), pp. 13, 16.
- ⁷ *Id.*, p. 13
- ⁸ Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Palo Alto: Stanford University Press, 1998), usefully develops the origins and significance of this exclusion from sacrifice.
- ⁹ In fact the *theatrum veritatis et iustitiae* is a phrase taken from a treatise of the same title by the baroque jurist Jean-Baptiste de Luca (1614-83). Discussion of the source and the maxim can be found in Pierre Legendre, *L'Inestimable objet de la transmission* (Paris: Fayard, 1985), p. 42.
- ¹⁰ Manderson, 'From Hunger to Love', p. 101; Goodrich, *Law in the Courts of Love*.
- ¹¹ *The Tempest*, Act 2, scene 1, 1-9.
- ¹² Henry Peacham, *The Garden of Eloquence* [1577] (London: Jackson, 1593 edn), p. 141 (sub verba topothesia); George Puttenham, *The Arte of English Poesie* (London: Field, 1589), p. 200 (sub verba topographia). The use of the figure is discussed in Peter Goodrich, 'Gay Science and Law', in Viki Kahn and Lorna Hutson, eds., *Rhetoric and Law in Early Modern Europe* (New Haven: Yale University Press, 2001).
- ¹³ Downer (ed), *Leges Henrici Primi* (Oxford: Oxford University Press, 1972), p. 164. We can also here note the poem *The Court of Love* which was for long attributed to Chaucer and which is printed in Skeat's edition of the *Complete Works of Geoffrey Chaucer* (Oxford: Oxford University Press, 1897), p. 409.
- ¹⁴ The *duplicem sententiam* is from the laws of love reported in Andreas Capellanus, *Tractatus de amore* [1176] (London, Arnold, 1982), and refers to the double meaning or dual face of the laws of love. Their jurisdiction and meaning was legal and amatory, positive and literary, literal and metaphoric.
- ¹⁵ Richard Brathwait, *The Law of Drinking* [1617] (New Haven: Tuttle, 1903), p. 73.
- ¹⁶ *Henry IV Part I*, Act V, scene 1, 122.
- ¹⁷ Aristotle, *Nicomachean Ethics* (1846 edn). For discussion, see Peter Goodrich, 'Laws of Friendship,' p. 23.
- ¹⁸ The full list of precepts or laws of amity, extant in Shakespeare's time can be found in Thomas Breme, *The Mirrour of Friendship* (1584), discussed in Peter Goodrich, 'The Immense Rumor,' *Yale Journal of Law and Humanities* 16 (2004), p. 199.
- ¹⁹ Horace, *Epistles*, 1.5.19.
- ²⁰ The source is again Cicero, *De amicitia*, and is well elaborated in Kathy Eden, *Friends Hold all Things in Common* (New Haven: Yale University Press, 2002).
- ²¹ The full panoply of references to the courts of love, to the *aresta amorum*, the *iudiciis amoris* and the *nouvelz droitz* and so on, will be made available just as soon as scholarly frailty permits, in Peter Goodrich, *Laws of Love: A Brief Manual* (forthcoming).
- ²² *Sonnet 29*. A version, I think of the 'Godlike amity' expressed in *The Merchant of Venice*, Act III, scene 4, 3. Well discussed by Laurie Shannon, *Sovereign Amity: Figures of Friendship in Shakespearean Contexts* (Chicago: Chicago University Press, 2002). See also Peter Goodrich, 'Amici curiae: Lawful Manhood and Other Juristic Performances in Renaissance England', in Lorna Hutson & Erica Sheen, eds., *Law and Politics in Renaissance England* (Basingstoke: Palgrave, 2004).
- ²³ It is purely a lexical aside, but the Court of Pipowders is a common enough reference. See Coke, *Institutes*, lib. 10, fol. 73. The etymology is given by Blount, *Nomolexicon*, op cit, s.v. Piepowders.
- ²⁴ Richard Brathwaite, *Mercurius Britannicus. Jurtdicialis censura; vel, Curialis cura* (c. 1640) The British Mercury is represented in the opening of the play in the form of two 'familiar friends', philosophers, headed – walking, ambulant, dusty footed -- to the trial of the law in the court of literature.

Justice Constance Jordan

Lord Mansfield told new judges to state their judgments and withhold their reasons, since their judgments were probably right and their reasons probably wrong.

--*Philip B. Kurland, Politics, the Constitution, and the Warren Court, 1970.*

I. Prologue

We readers of the law of Shakespeare, a virtual caste of groundlings inhabiting the United States and Canada in the early twenty-first century, regulate the conduct of our ordinary lives by rules devised by and agreed upon by statute and the common law, and upheld by state, provincial and federal courts. These rules go by the name of positive law. By contrast, we recognize the Law of Shakespeare as far more complex. Insofar as it can be read as positive, obligatory, and the basis for legal action, it embraces duties that inhere in the feudal order, as between lord and subject; and also duties that devolve from family relations, filial and fraternal. But more importantly, the Law of Shakespeare derives its validity from extra-positive sources, perhaps even more than from the customs and positive law of early modern England, imported (as they are) into the textual world of the plays.

These extra-positive sources establish a moral law and rules of ethical conduct that are designed to enhance the social well-being of Shakespeare's subjects. They create a legal domain guaranteed by the concept of human dignity, and an agreement to preserve and promote such moral values as loyalty, honesty, fidelity, fortitude, and fairness. They identify two particular subsets of duties: amicable, as between friends; and natural, as

between human beings in general. Shakespeare's natural law is consonant with Thomistic notions of natural law and not its later versions as represented by Machiavelli, Hobbes, and others. Finally, the Law of Shakespeare recognizes a second extra-positive source: divine law as interpreted by scripture and understood to refer to a transcendent order of things, informed especially by the doctrine of charity, and linked to the theological virtues of faith and hope.

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 among fellows. When judged as worthy of disapproval or disgrace, a person readily seeks support from his or her dearest and most reliable friends.¹ 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.² Knowledge of the terrible outcomes of divine justice may sway choice and determine behavior before and after the fact. Hope in beneficent endings may also affect personal decisions.³ Beyond doctrines of faith in divine law, law derived from extra-positive sources relies on a general sense of a natural order that forces acceptance of hardship and even death.⁴

Despite their extra-positive establishment, the Law of Shakespeare regards the courts of opinion and last judgment as valid courts. The law enforced by these courts is generally implied by the words and actions of Shakespeare's characters. Doctrine may obviously be

an issue: to whom is a person responsible for his or her salvation? Or doctrine may remain mysterious. Or be no more than emblematic, triggered by a visual cue.⁵

II. Cases

The case brought on appeal by the respondent Jean du Parcq ask this Court to determine the grave question of responsibility for the respondent's condition and suffering. The respondent Jean seeks to reverse the decision of the trial court and declare (1) Gabriel Pederson criminally culpable for her condition. The defendant Gabriel Pedersen, as subsumed by the HR&G insurance Co., seeks to reverse the decision of the trial court and hold (2) Chris Vidaloca civilly liable for Jean's condition.

1. The first matter before the court involves a definition of the role and the office of the defendant Gabriel: in what did it consist, what were its scope and their limits, how was its authority understood and manifested to Jean and Chris? It is hugely significant that Gabriel is not only the owner and captain of a ship, but that he had, in this case, a choice as to whether or not he would sail that ship and under what conditions. Moreover, he had the responsibility of sailing it not as its only passenger but with another person, Jean, on board. By a powerful analogy—one extensively registered in the world in which the Law of Shakespeare obtains—Gabriel's role is that of head of state: the responsibilities of a captain of a ship inhere in and are the same as those of a head of state. He is the commander-in-chief of a world in itself. He is responsible for the welfare not only of his ship, that materiality of the whole state, not only for himself, its captain,

but also for each and every one of his passengers, his subjects. 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.⁶ 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.⁷ 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.⁸ Further shadowing these figures is their realization in the historical queen of Shakespeare's law. As Elizabeth I announced to petitioners seeking redress from monopolies in 1601, she would henceforth use the prerogative in their interest, not that of the crown exclusively: 'though God hath raised me high, yet this I count the glory of my crown: that I have reigned with your loves.... I have cause to wish nothing more than to content the subjects, and that is a duty which I own'.⁹ Or, as the Protestant monarchomach John Ponet asserted, in a less conciliatory mood: 'Commonwealths and realms may live when the head is cut off and may put on a new head that is make them a new governor when their old head seek ... not the wealth of the whole body for the which he was only ordained'.¹⁰

At this point, the Court may reasonably ask whether any kind of mental incapacity is a mitigating factor: Can drunkenness, madness, hallucinatory episodes excuse the malfeasance of a head of state, the captain of a ship? This Court answers no. Insofar as a

person is captain and head, his responsibilities are not mutable, nor can they be mitigated, however much we may sympathize with his incompetence.¹¹ A drunk may appear to be fun to be with; he may enliven a house dulled by an obsequious management, but he cannot be left in charge of a household.¹² And this is not only because he has renounced his specific capacities to govern. Invariably, his incompetence leads to crucial defections in his government, indirectly but no less critically jeopardizing the welfare of the state as a whole. An incompetent captain of a ship must expect his crew to mutiny, as Jean did when she seized the tiller of Gabriel's ship. More commonly, he must expect his crew to jump ship.¹³ The situation of the disaffected subject, one who has lost confidence in the ability of his lord to conduct the business of state, is universally recognized. Castiglione testifies that a servant of a powerful but irresponsible lord has no choice but to leave his court: 'I believe [a gentleman] ... ought to forsake that service [of his lord] that among men shall put him to shame'.¹⁴ By sailing his ship with Jean on board, Gabriel, an experienced sailor and captain, assumes an absolute responsibility for her welfare. By drinking heavily and voluntarily, he gives up the abilities that allow him to discharge his office. He compounds this failure by retaliating aggressively against Jean, whose welfare was his absolute responsibility. Because once drunk he could no longer discharge the duties of his office, he did not come to her aid; indeed he deliberately took wild and destructive action against her.

2. The second matter before the Court requires a determination as to whether Chris should be held liable for Jean's condition and suffering because she made no attempt to rescue Jean. Has Chris no duties in this respect? How far and in what ways does the Law

of Shakespeare encompass duties, obligations and responsibilities that one person owes another? Are there specific kinds of relations in which these duties require exercise? These are vexed questions that need careful analysis. The Court assumes that it is irrelevant that Chris's exercise of a duty to rescue might not indeed have succeeded in preventing Jean's condition and suffering: Jean's condition may have been beyond melioration by Chris's rescue. In this case it is enough to determine whether or not Chris such a duty.

In the Law of Shakespeare, duty depends on the recognized relationship between the parties. The clearest are those which derive from the feudal order: a subject is required to assist his or her lord (just as a lord is required to protect a subject). Such duties are required even if their performance puts a subject at risk.¹⁵ Feudal duties may depend on a powerful sense of divine sanctions or simply on a commitment to preserving the state and its order of succession. It may consist in overt action or incline to subterfuge and deception.¹⁶ Its deceptions, though sinister and distortions of the truth, do not contravene the Law of Shakespeare. It may even mask as folly and yet declare or intend a valid political purpose.¹⁷

Next in the Law of Shakespeare are familial—filial and fraternal—duties. By acknowledging them but also insisting on their limits, especially in cases in which romantic desire moves a child to disobey a parent, the law declares them operative. The obedience of a child to a parent is normative.¹⁸ But it is also discretionary.¹⁹ Duties between siblings are similarly qualified, especially in light of divine law.²⁰

And, as this Court has declared, the Law of Shakespeare importantly registers other duties that can be described as amicable, as between friends. In the case before us, HR&G, the defendant, must prove that the responsibility for Jean was not Gabriel's alone but that Chris also had a duty in that regard, a duty of care; and that she must be held jointly liable with Gabriel. The duties to examine here are neither feudal nor familial but rather amicable and natural. The Law of Shakespeare imposes a strenuous duty upon friends. They are supposed to be ready to sacrifice their very beings to the interest and the welfare of their friends.²¹ They are expected to remain loyal in dangerous situations, surrounded by enemies, and never to deny a trust or commitment.²² They may be asked and sometimes agree to flout the law in the interest of preserving a friendship, to ask for or perform an illegal action. They readily engage in subterfuge and duplicity in order to help a friend. Amicable duties are said to bind friends together, as with hoops of steel.²³

The Law of Shakespeare also imposes upon its subjects a natural and universal duty, which in a sense supersedes any amicable duty. It enjoins a person to help another human being in need, in distress, or in danger. This is a duty that is to be recognized instantly and without reflection. It brings to consciousness a common humanity, a generic likeness and need, a commonality among all people. It is triggered by action, often understood emblematically.²⁴ It requires that one human being help another, even if it is at a cost to the helper. The performance of such duties engages the sympathies and approval of all who see them enacted, however dim-witted or duped the helper may be.²⁵ Sometimes underscored by obvious scriptural references, for example, to the prototype of all human

creation, Adam, or to the figures represented in divine law as shepherd and clown or fool, this duty cannot be identified with ‘altruism,’ a nineteenth century term and concept²⁶ - an abstraction referring to a generalized attitude of openness to human need and suffering. Unlike altruism, a natural duty in the Law of Shakespeare is enjoined in specific occasions although it covers a wide range of situations. A natural duty is not to interfere with duties required by divine law but does cover those that stop short of it. The Law of Shakespeare approves acts of mercy, provided they do not challenge the strictures of divine law.

III. Orders

1. Having willfully abandoned his duty as captain of a ship by sailing it when drunk, endangering his ship, its passenger, and himself, Gabriel Pedersen acted with thoughtless aggression toward his passenger Jean du Parcq and is guilty of criminal assault. The Court requires that he renounce his captain’s license and refrain from sailing in the future; it also requires that he cease and desist from any activity associated with traffic on the sea or any of its creatures, and from publishing maps, sea charts, or astronomical guides to the heavens designed to promote travel on any of the seas, or such large bodies of fresh water as the Great Lakes.

2. Having willfully denied an amicable and natural duty of care to her friend, Chris Vidaloca is jointly liable with HR&G insurance for damages to Jean du Parcq. The Court requires that Chris 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.

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- ¹ *Sonnet 2*.
- ² *Measure for Measure*, Act II, scene 4, 184-85.
- ³ *Hamlet*, Act III, scene 3, 73-75; Act V, scene 1, 227-230; Act V, scene 2, 217-18.
- ⁴ *Cymbeline*, Act IV, scene 2, 271-72.
- ⁵ *Henry V*, Act IV, scene 1, 173-79; *Henry V*, Act II, scene 3, 7-10; *King Lear*, Act V, scene 3, 261 (stage direction).
- ⁶ *The Tempest*, Act I, scene 2, 89-116.
- ⁷ *Richard II*, Act II, scene 1, 57-65; Act III, scene 4, 54-66; *1 Henry IV*, Act III, scene 2, 32-59; *Henry V*, Act IV, scene 1, 228-231.
- ⁸ *King Lear*, Act I, scene 3, 17-19.
- ⁹ 'Golden Speech,' Leah Marcus, Janel Mueller, and Mary Beth Rose, eds., *Elizabeth I: Collected Works*, (Chicago: University of Chicago Press, 2000).
- ¹⁰ *A Short Treatise on Politike Power*, 1556, at <http://www.constitution.org/cmt/ponet/polpower.htm> .
- ¹¹ *King Lear*, Act IV, scene 7, 79-81.
- ¹² *Twelfth Night*, Act II, scene 3, 88-89; 120-22.
- ¹³ *Winter's Tale*, Act I, scene 2, 438-440.
- ¹⁴ *The Book of the Courtier*, trans. Thomas Hoby (London: David Nutt, [1561] 1900).
- ¹⁵ *King Lear*, Act I, scene 1, 156-58; Act III, scene 3, 13-15; Act III, scene 5, 146-151.
- ¹⁶ *Winter's Tale*, Act III, scene 2, 203; Act V, scene 3, 96-97.
- ¹⁷ *2 Henry IV*, Act IV, scene 2, 112; *1 Henry IV*, 207-209.
- ¹⁸ *Henry V*, Act V, scene 2, 248; *The Tempest*, Act IV, scene 1, 23-32.
- ¹⁹ *Winter's Tale*, Act IV, scene 4, 466-469; *Romeo and Juliet*, Act II, scene 2, 39.
- ²⁰ *Measure for Measure*, Act III, scene 1, 152-153.
- ²¹ *Hamlet*, Act I, scene 1, 131.
- ²² *Twelfth Night*, Act V, scene 1, 72-78.
- ²³ *Much Ado*, Act IV, scene 1, 327-330; *Measure for Measure*, Act IV, scene 1, 64-69; *Hamlet*, Act IV, scene 3, 63.
- ²⁴ *As You Like It*, Act II, scene 7, 165.
- ²⁵ *Winter's Tale*, Act III, scene 3, 112-115; Act IV, scene 3, 51-115.
- ²⁶ See Auguste Comte, who speaks of 'le droit d'autrui,' *Cours de philosophie positive*, 1830-42.

Justice Richard Strier (dissenting in part)

My lords, our situation as a bench is rather unclear. Let me review the facts of our judgments. My colleagues are unanimous on the matter of Gabriel's 'responsibility.' But even this is not fully clear. Goodrich and Manderson JJ hold Gabriel responsible in some general sense, and do not specifically address the issue raised by the lower court's decision with regard to the issue of 'criminal assault' on Jean. I take it that they are reversing the lower court's decision, but Goodrich J seems more intent on defining what he takes to be appropriate punishments or penances, and Manderson J on meditating on general issues. Justice Jordan wishes to overturn the lower court's ruling entirely, and find Pederson guilty of the charge of criminal assault. Yachnin J, on the other hand, wishes to accept the lower court's decision that Pederson is not guilty of criminal assault, but finds him guilty of the lesser charge of criminal negligence. I cannot tell whether Justices Manderson and Goodrich agree with Justice Jordan or Justice Yachnin in this regard.

With regard to the matter of Chris Vidaloca's joint civil liability with Gabriel Pederson for the condition of Jean du Parcq, the collective judgment of the court is even less clear.

Goodrich J finds Vidaloca not legally liable, and therefore (for complex reasons) supports the finding of the lower court, though does suggest punishment/penance for Chris.¹ Jordan J does find Chris jointly liable with Gabriel (and HR & G), and therefore would overturn the lower court's verdict. Manderson J seems to me implicitly (perhaps explicitly) to find Chris jointly liable-- but it is difficult to translate his philosophical meditation into legal terms.

Yachnin J finds Chris not legally liable, and therefore supports the ruling of the lower court.

I will provide my own judgments on the specifics of the case, but I will make some remarks about the facts given and the body of law to which counsel for both sides before this high court was directed to refer, and I will make some comments on the arguments put forth both by my colleagues and by the advocates in the version of the case for which I was on the bench.²

First of all, the statement of agreed facts contains a contradiction. This should not have been allowed, either by the judges or the counsel. Paragraph one of the statement states that Gabriel had consumed ‘a couple of leisurely beers’; whereas paragraph two states that Gabriel ‘continued to drink heavily.’ Now this should not have been allowed to stand. Either Gabriel was drinking heavily on shore, or he began to drink heavily on the boat. I take it that the latter is intended, since Jean’s alarm at the developing situation seems to be an important and stipulated fact, but the ambiguity should not have been allowed. The courts, both lower and higher, should have demanded the statement of the facts be rewritten. If Gabriel had been drinking heavily before sailing, Jean’s situation is altered, since she clearly should not have set out with him under those conditions. I take it that this is not intended, but the statement as presented unfortunately allows for this ambiguity. I reprehend this sloppiness, and regret that it was allowed to stand by the courts.

On the matter of the body of law -- that is, the corpus of Shakespeare’s writings -- our court deemed the following plays to be of ‘greatest importance and relevance’: *King Lear*, *Hamlet*, *Measure for Measure*, and *The Winter’s Tale*. Again, this seems to me not to have

been the best directions to counsel that the court could have given. *Lear* and *Hamlet* are good choices, since *Lear* definitely raises the question of the duty to intervene in a case of a crime, and perhaps in the case of physical necessity, and *Hamlet* unquestionably raises the issue of being in an irrational state as a mitigating factor in a crime (Hamlet claims that he was mad when he killed Polonius, and that Laertes should take this into account in how he thinks about Hamlet's relation to Polonius's death). *Measure for Measure*, on the other hand, is a very general meditation on the relation between any legal system and Christianity, and does not give any very clear guidance on how to settle a particular case (though Escalus, as Manderson J suggests, comes closest to providing a usable model). At the end of the play, it is not at all clear whether the legal situation in Vienna has been improved by the events of the play. Claudio is freed from punishment, which seems rational, but so is the murderer, Barnardine; and Lucio's punishment is very unclear. The pressure on law in *Measure* is from the sermon on the Mount, and this is not immediately relevant to the case at hand -- though it might be to a death penalty case. *The Winter's Tale* reinforces but does not add anything to the duties of intervention and care that issue from *Lear*, so it does not give counsel for either side any further 'legal' resources.

The plays to which counsel should have been referred instead of the latter two mentioned above are *Othello* and *The Merchant of Venice*. *Othello* directly presents a case of someone behaving very badly, perhaps criminally, when drunk -- the case of Cassio (who wounds Montano) -- and *The Merchant* contains, to my current recollection, the only discussion in Shakespeare of phobias. This latter topic, deeply relevant to the case -- since Chris's fear of sharks is a stipulated fact -- seems to me quite under-discussed in all the treatments of the

case, by judges and attorneys alike. Goodrich J strongly (though implicitly) suggests that, given the play's island setting, *The Tempest* should be part of the canon seen as especially relevant to this case. I see the point, but do not agree. *The Tempest* seems to me indeed relevant to the matter of appropriate punishment -- to which Goodrich J devotes much of his ruling -- but not to the issues of the case. In making my judgments on the case, I will try to show the special relevance of the parts of the law that I have indicated as well as appealing to the parts of the law that were indicated by the court as especially relevant.

With regard to the matter of Gabriel's responsibility, I believe that Jordan J has provided the ruling that most corresponds to the principles implied or enunciated in the canon, though I think that Yachnin J's reservations about the applicability of the canon to 'ordinary' cases is extremely wise and well-taken. I believe that, in the Court of Shakespeare, Gabriel should be found guilty of criminal assault on Jean, and therefore that the lower court's ruling should be overturned.

The argument against doing this, and siding with the lower court, has to do, of course, with diminished responsibility. But as counsel before this Court argued, madness and drunkenness are very different matters in Shakespeare. Madness is seen as at least partially exculpatory, as in Hamlet's speech to Laertes (though Hamlet, as counsel points out, may or may not actually be entitled to such a claim). Madness is pathetic or terrifying in Shakespeare (Ophelia and Lear respectively), and is not as idealized, I believe, as Manderson J suggests. Drunkenness, on the other hand, is willfully entered into, and is seen not as an excuse for wrongdoing but as an intensification of it. Moreover, Shakespeare

makes it clear that the circumstances in which drunkenness occurs are highly relevant to one's judgment upon it. In a tavern or at a party, it may well be harmless or even positive (depending on one's view of Falstaff and Sir Toby in these circumstances), whereas in a city at war (as in *Othello*) or on the part of the captain of a ship, it is clearly reprehensible and can lead to behavior that is properly seen as criminal. I believe that Yachnin J has made a compelling case for a lesser charge against Gabriel, but I do not think that this is what the body of law would lead one to conclude. Therefore, I feel bound to side with Jordan J here.

As Manderson J rightly says, responsibility is clearly the issue in all the aspects of *The Bard de la Mer*. The matter of Chris Vidaloca's responsibility (or lack thereof) for Jean's situation is the more interesting and complex part of the case, since all the Justices agree on Gabriel's responsibility (degree aside), and the issues with regard to Chris form the part of the case to which the particular body of law to which this court is bound seems to have more to say (than on the matter of responsibility, where I am not sure Shakespeare has any unusual views), and more of interest to say (than another body of law might).

Goodrich J strongly condemns Chris for her inaction -- which he characterizes, perhaps unfairly, as 'nonchalance' in a technical sense -- but since he finds her 'wrong against love' not to be of the sort that should make her jointly liable with Gabriel ('her blame was both too great and insufficient to warrant overturning the trial court disposition'³), I will focus more on the arguments made by Jordan J, who does find her jointly liable. I will, however, point out that my exceedingly learned colleague Goodrich J -- from whose historical divagations one cannot fail to learn -- assumes facts not in evidence when he states that

Chris 'admits [her] failure' to act on behalf of her drowning friend, and indulges in a practice of interpretation that this Justice finds suspect in asserting (rather militantly) that 'Chris Vidaloca' is 'almost an anagram for Cordelia.'

Justice Jordan, like Justice Manderson, sees the law of Shakespeare (as opposed to the common law) as placing an absolute obligation on persons to attempt to help anyone in their purview who are objectively in a state of acute and (at least potentially) immediately remediable distress. Jordan J helpfully calls this 'extra-positive' law, and that seems entirely apt. And 'duty' seems the right term to invoke. Such duties, as she says, can be familial, feudal, natural, or divine, though I believe that the latter is a very special case which complicates the whole matter of law (see my comments above on *Measure for Measure*). The key frame of reference in this case is natural or amicable 'law.' How impersonal this natural law is -- a matter insisted on by Manderson J -- is a question. The key instances of duty-bound intervention in *King Lear*, the play (as I have argued) that is most concerned with this issue, are put in personal and perhaps feudal terms: Kent intervenes out of a sense of duty to his King, and perhaps to Lear as a person; the Servant who attempts to prevent Cornwall from mutilating Gloucester does so in terms of a duty to his master ('I have served [you-- Folio only] ever since I was a child, / But better service have I never done you').⁴ Lear does seem to have a sense of the demand that objective need places on all who could potentially help ('shake the superflux to them'⁵) and Gloucester shares this sense ('distribution should undo excess, / And each man have enough'⁶), yet 'poor Tom' seems mainly an object of loathing rather than of pity in the play, and, with the exception of Gloucester's act of '[re?]distribution,' the acts of intervention on behalf of

others in the play are presented as personally as well as objectively motivated. Manderson J seems to me to make the text more (so to speak) Kantian than it is in stressing the impersonality of the demand to aid or intervene, but this element is clearly there, and merely to speak of feudal or personal ties seems wrong as well. Some mixture of the personal and the objective seems to be what, for Shakespeare, as for (say) Bernard Williams, constitutes morality.⁷ But in any case, it seems that Manderson and Jordan JJ are right that Shakespeare places extraordinary stress on the duty to act on behalf of others.

What this argument fails to take into account is not only Yachnin J's surely correct view that self-preservation is not held to be irrelevant by Shakespeare, together with the implied argument that Kent and company are extraordinary (he draws, it should be said, on *Othello* for the case of Emilia) and that what Catholic ethics calls 'works of supererogation' cannot and should not be legally commanded. What the argument fails, in my view, to take proper account of is, as I suggested above, the fact of Chris's fear of sharks. This is stipulated as a fact, and is quite prominent in the narrative of the events. It accounts for why Chris did not join Jean and Gabriel on the boat (when it would have seemed an entirely 'natural' thing to do) as well as for why Chris failed to jump into the water to attempt to rescue the drowning Jean. This 'fear of sharks' is, therefore, a major feature of Chris; it is, in fact, the only distinguishing feature given her (aside from enjoying sunbathing).

The Merchant of Venice is a play (in our case, a potential body of law) that has a very strong sense of the deep irrationality of many feelings and pieces of behavior. Solanio and Salerio, two intelligent and very eloquent Venetian aristocrats, find the 'sadness' with which the title

character (Antonio) is burdened just such an irrational matter, since Antonio rejects all obvious reasons for his state. Solanio gives up the attempt to find rational bases for Antonio's state of mind, observing finally that 'Nature hath fram'd strange fellows in her time.' He gives the example of persons who cannot be made to laugh by any joke, however funny, and the more striking contrary example of those who 'laugh like parrots at a bagpiper'.⁸ Shylock, in refusing to explain his hatred of Antonio -- even though he is fully capable of doing so when he sees fit⁹ -- presents the same view of the existence of deep irrationality in some persons that Solanio does. Shylock cites the case of 'Some that are mad if they behold a cat' -- a 'harmless necessary cat.' Even more strikingly, he too cites the effect of a bagpipe on certain persons: 'others when the bagpipe sings i' th' nose, / Cannot contain their urine.' A person of the latter sort is utterly helpless to prevent the disgusting and embarrassing reaction and 'of force / Must yield to such inevitable shame, / As to offend himself being offended'.¹⁰ In the case of such a 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. This phobia is part of the situation that we had to consider and part of what made the situation tragic. It seems reasonable to suppose that Chris was paralyzed with fear and perhaps with dread at the situation, but in any case, the law of Shakespeare, it seems to me, would lead us to pity rather than to condemn her. She has a much better case than Hamlet does for saying that she was, in her situation, a victim of something within her. That is how, I believe, the court of Shakespeare should rule.

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- ¹ The Editors of this publication are not sure that this characterizes the full import of Goodrich J's remarks, see *The Bard de la Mer (Du Parcq v Pedersen; Pedersen v Vidaloca)*, [2005] 3 C. of Sh. 1, per Goodrich J, above, p. [?] – for although Goodrich J does refuse to tamper with the lower court's verdict, he develops a proposed jurisprudence of the Court of Shakespeare which clearly does hold Chris Vidaloca responsible.
- ² Facta of Moth & Thompson, Blanchard & Elkins, on file with the court.
- ³ *The Bard de la Mer (Du Parcq v Pedersen; Pedersen v Vidaloca)*, [2005] 3 C. of Sh. 1, per Goodrich J, above, p. [?].
- ⁴ *King Lear*, Act III, scene 7. See Richard Strier, 'Faithful Servants: Shakespeare's Praise of Disobedience,' in Heather Dubrow and Richard Strier, eds., *The Historical Renaissance: New Essays in Tudor and Stuart Literature and Culture* (Chicago: University of Chicago Press, 1988), pp. 104-133; expanded in Richard Strier, *Resistant Structures: Particularity, Radicalism, and Renaissance Texts* (Berkeley: University of California Press, 1995), chapter 7.
- ⁵ *King Lear*, Act III, scene 4, 40.
- ⁶ *Id.*, Act IV, scene 1, 73-4.
- ⁷ See Bernard Williams, *Ethics and the Limits of Philosophy* (Cambridge: Harvard University Press, 1985), esp. chapter 10.
- ⁸ *Merchant of Venice*, Act I, scene 1, 51-56.
- ⁹ *Id.*, Act I, scene 3.
- ¹⁰ *Id.*, Act IV, scene 1, 56-8.