“MORTALITY AND MERCY”: MEASURE FOR MEASURE AND THE LAW

by

VIRGINIA R.STEPHENS

(Under the direction of Christy Desmet)

ABSTRACT

In this paper I argue that Shakespeare uses the legal troubles of the fictional city of Vienna to illustrate dramatically the conflict which occurred in late sixteenth and early seventeenth century England between different modes of justice, specifically those practiced by the common law court, the ecclesiastical court, and the court of chancery. My central argument is that the characters of Duke Vincentio, Angelo, and Escalus all represent different means of enacting justice, and I ultimately conclude that in the world of the play, just as in the England it represents, blind adherence to one philosophy of justice leads to the abuse of power and a failure on the part of the law to protect subjects from their rulers. The play presents a solution to the problem it identifies through the character of Isabel, who, as a result of her encounters with various visions of justice, comes to express the message implicit in Measure for Measure—that a fully realized system of justice embodies the multiple desires of the community that it serves.

INDEX WORDS: Measure for Measure, Shakespeare, Crime, Justice, Law, Mercy, Courts, England, the Reformation
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by

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For my mother, my primary text.
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CHAPTER 1

INTRODUCTION

In the final act of Measure for Measure, when Isabel confronts Duke Vincentio with Angelo’s crimes, she cries out for “justice, justice, justice, justice” (5.1.25). Her almost nonsensical repetition of the word underscores the hollowness of its meaning in the world of the play, in which the law is omnipresent, but justice seemingly absent. According to Cicero, “[t]here are two types of injustice: one committed by people who inflict a wrong, another by those who fail to ward off from those on whom it is being inflicted, although it is in their power to do so.” (Love’s Knowledge 25). Both types are clearly present in the play, but it is the latter—authority that perverts truth, grace, and the law, and then calls it good government—that unbalances the fragile civic order of Vienna. Harold Bloom insists that

[…] if you fall into the error of applying moral realism to Measure for Measure, then you will conclude that the Duke, Angelo, Claudio, Isabella, and Mariana all are crazy, with the Duke as the craziest of all. Clearly the play is a fantastic story, a deliberate wildness, as outrageous as Twelfth Night or The Winter’s Tale. (1)

But how outrageous is this tale of justice? How outlandish is Shakespeare’s depiction of a justice system arbitrated by one man, a man who has very little interest in, or compassion for, his subjects? The representatives of sanity in this play might well be the gleefully unrepentant Pompey and the remorseless Barnardine, who apparently share the belief that if one ignores justice, as embodied by the law, it will most likely go away.
Whether ignoring it, invoking it, or enforcing it; any character of significance in the play is either operating the gears or caught in the machinery of the law. The cast can, in fact, be divided almost evenly between those who in some way administer the law—the Duke, Escalus, Angelo, the Provost, Elbow, and Abhorson—and those who are its subjects—Claudio, Lucio, Froth, Isabella, Mariana, Juliet, and Mistress Overdone. Trafficking in both lawlessness and in the law is the character of Pompey, who begins as a pimp but in the spirit of rehabilitation is made an executioner’s assistant.

Traditionally, critical examinations of the play concentrate upon its religiosity. However, because the law occupies so much imaginative space in Measure for Measure, many studies look closely at the two marriage contracts or question the validity, on the grounds of desuetude, the law against fornication.¹ Its content has also prompted critical-philosophical musings on the nature of justice. As early as 1815, A.W. Von Schlegel wrote that “the piece takes improperly its name from the punishment; the true significance of the whole is the triumph of mercy over strict justice; no man being himself so free from errors as to be entitled to deal it out to his equals” (quoted in Geckle 49-50). The content of the play has attracted many lawyer-critics who weigh in on Shakespeare’s legal accuracies and inaccuracies or on Isabella’s skills as a defense lawyer, and who examine the laws of England and the continent to find some statute that resembles the one which drives the action of the play. While this search has produced a thorough historical and legal context for Measure for Measure, searching for a law, one law, will not resolve the difficulties of this troubling play.

¹ According to Daniel Kornstein, “[d]esuetude means that a law has been nullified through disuse […] a finding of desuetude neither strikes the statute off the books nor activates it; the finding means only that the prosecution fails on grounds of desuetude” (46). This concept, it is important to note, derives from Continental, not English law, which has no provision for ‘dead’ laws.
In her 1982 essay on marriage contracts in *Measure for Measure*, Margaret Scott pointedly remarks in her introduction upon the fact that “[n]o other of Shakespeare’s plays has provoked more anxious fossicking among extrinsic and sometimes extraneous materials” (790). It is difficult to avoid ‘fossicking’ because the play presents so many challenges to cogent interpretation that the temptation to escape from the irregularities of the text into the more straightforward pages of bawdy court records and moral homilies is at times irresistible. The difficulties *Measure* presents to readers has engendered a criticism of complaint that has perhaps become, after 300-odd years, a genre of its own.

That the play is messy is inarguable. Its temporal setting is uncertain; its laws are fantastic; its spirituality hazy, and its morality alarming. However, neither these elements nor the play’s uncomfortable conclusion constitutes the problem of this “problem” play. If we take Vienna to be a dramatic reflection of Shakespeare’s London at the turn of the sixteenth century, then it is possible to insist that the point of the play is its unruliness, and that *Measure* is in fact a logical and accurate staging of contemporary social, religious, and political upheavals and the manner in which these interconnected problems were addressed by law within an England in the midst of a transitional period. The responsibilities of rulers, the obligations of a government to its poor, and the birth pains of a hegemonic national religion might all be glimpsed in the text. What the play is primarily about however, is disastrous bureaucracy, the kind that makes pimps state-sanctioned killers, and more specifically, the chaotic and culturally pervasive judicial systems of sixteenth and early seventeenth century England. However fantastic the play’s setting, and however unlikely its fairy-tale laws, its foundation in reality is indisputable when it comes to the question of law: not a *specific* law, (the critical search for the latter being at what Scott levels her charges of “fossicking”), but rather the spirit of Western law. The play asks the unanswerable:
how do we control the laws that control us, and how do we maintain a legal system that is at
once humane and effective? The conflicts and irregularities within the text of Measure for
Measure reflect a debate that remains unresolved. Thus, the play’s troublesome ending, if not
dramatically symmetrical or emotionally satisfying, is true to its subject.

Measure for Measure is concerned with definitions. By closely examining the radical
divide that occurs between the active law and the intellectual construct of justice, the play
questions whether the applied law ever adequately expresses the principles that supposedly
underlie it. In Law and Literature, Richard Posner examines the legal constructs that appear in
Measure and also undergird Anglo-American law. By way of illustration, he presents a table of
the intrinsic dichotomies of the system. He explains: “[t]he left-hand column of the table below
[…] describe[s] law as an abstraction, a thing apart from the people charged with responsibility
for enforcing the law and adjudicating disputes.” Furthermore, the term “law” represents “‘hard
cases’ (meaning, not as it has come to mean, cases that are difficult, but cases that reach harsh
results, showing that head and heart are firmly separated)” (120). An excerpt of the table serves
as a helpful map of what is plaguing Vienna:

<table>
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<th>Table of Legal Antimonies</th>
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<td>law          equity</td>
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<tr>
<td>law          mercy</td>
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<tr>
<td>law          justice.</td>
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<td>rights       needs. (120)</td>
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The Duke seeks to restore moral and civic order through equitable, merciful, and just action by
way of the law. The right-hand side of Posner’s table appears to imply that these three elements
may actually work in opposition to the efficient function of the law, but he instead argues that
Western thought depends upon equity, mercy, justice, and the needs of the community to temper intractable law. To attempt to shield strict rule of law from the influence of any one of these concepts is the antithesis of law. In fact, according to Posner “[t]he mixture is not inconsistent with the idea of law; it is the idea of law” (121). The complexity involved in balancing these elements, for leaning too heavily on any one of them might fatally tip the scales of justice, is played out in the text of *Measure for Measure*. Claudio, under the law of Vienna, is sentenced to die for impregnating Julietta, whom he claims to be betrothed to and certainly makes a convincing appearance of intending to love and provide for, legally wed or not. For Claudio to be shown mercy based upon the particular circumstances of his case undermines the immutability of the law and creates an argument for clemency for both Lucio and Angelo, who, while infinitely less sympathetic are (in the singular vision of the law) essentially guilty of the same crime. Justice, or perhaps more specifically law, is of necessity blind to details.

To return to Posner’s table, which he uses to illustrate the inescapability of “legal antinomies” and to emphasize that “[b]oth the extreme of hyperlegalism and the opposite extreme of a purely discretionary system of justice are found only in primitive societies. Mature societies mix strict law with discretion” (121); we find, in fact, that in order for law to function it must somehow contain the elements that counter it. So what of Vienna with its “strict statutes and most biting laws”? (1.2.19). It is certainly inaccurate to call the rule of law under the Duke discretionary. By his own admission, it is negligence, not mercy, that has caused Vienna’s purulence, but his choice of Angelo as the lance to heal his wounded city is certainly an expression of what Posner terms “hyperlegalism.” The city of Vienna is a vivid metaphor for the conflict between rule of law and discretion, and its fictional struggles resonate with the very real
events occurring in contemporary England, events of which Shakespeare was almost certainly aware.

It is almost impossible to briefly describe the legal system, or more precisely, systems that evolved during the period when *Measure for Measure* was composed. When advancing an argument that Shakespeare’s fictional Viennese justice system is a dramatic representation of any one of these systems, it is difficult not to concede to Margaret Scott’s insistence that “since *Measure for Measure* is not a history play, even of the rather unhistorical Shakespearean kind, it is unlikely to contain much detail which accords specifically with a given historical situation.” She concludes her argument by warning that “it is ill advised to predicate any exact correspondence between Vincentio’s world and our own,” (793) and her conclusion—that it is useless to sift through the minutiae of canon law for a statute which explains or excuses away the judicial inconsistencies of the play—is onerous, for if there is no law to right the imbalance of this uneven work, how then, are we to judge it?

If Vienna’s laws do not represent any particular English (or French, or German, or Roman) statutes, the situation arising from the enforcement of its fictional law corresponds to and comments upon the multiple systems of justice struggling for ascendancy in England between about 1500-1650. Furthermore, the play’s representation of real bureaucratic turmoil through the metaphor of what Scott calls “storybook law,” and its depiction of what happens when justice gets tangled up in questions of rules is prescient. Of the very real historical woes besetting the English judicial system of the period under consideration, legal historian J. H. Baker writes: “[ . . . ] in some ways those controversies formed the first phase of the seventeenth-century constitutional revolution” ([Legal Profession and Common Law](#) 205). It is perhaps ridiculous (and far off-topic) to suppose that Shakespeare anticipated the tremendous events
upon the horizon. But it is reasonable to assume that trouble was brewing and that the text of *Measure for Measure* reflects that trouble.

Much of the current criticism concerning *Measure for Measure* addresses particular legal issues at stake in the play, specifically, the presence of the two marriage contracts. Although approaching the text from this direction is fruitful because contract law is the juncture at which the many disparate elements of the play come together, arguing for *per verba de praesenti* or *per verba de futuro* alone does not make sense of the corruption and confusion in Vienna.² Although the plays frequently address the pitfalls of verbal contracts (and the uncertainties of language, and the failure of love), this odd play is seemingly unconcerned with making a specific comment on the laws concerning nuptials. However, it does explicate the peculiarities of the English legal system and functions as a mirror, one which distorts as often as it clearly reflects the failings of a legal system which was structured to administer mercy, equity, and strict justice independently of each other. An examination of the post-Reformation English judicial system reveals that those who availed themselves of the court might find each of these elements, but rarely together.

The vagaries inherent in a judicature that divided its rulings between, to borrow Posner’s terms again, the discretionary and the hyperlegal, generated feelings of ambivalence amongst those subject to its laws. Historian Martin Ingram puts it best when he explains that “all legal institutions in this period faced similar difficulties and similar opportunities; and all had to work within a climate of popular opinion which, though largely accepting the rule of law, did not

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² The two different types of marriage contract often cited to explain the legality of Claudio and Julietta’s betrothal. According to *Shakespeare’s Legal Language: A Dictionary*, by B. J. and Mary Sokol, “[t]hese held that even a private and verbal agreement to marry either immediately or in the future (*per verba de praesenti* or *per verba de futuro*) would immediately create a valid marriage, prohibiting marriage with any other person, and *de praesenti* contracts needed no further steps to confer full married status” (289). As I state above, I do not think the presence or lack of contract is what is legally at stake in the play, but I am by no means dismissing its relevance—the question of contract occurs too often within the canon to be ignored, all charges of fossicking aside.
regard the courts and legal practitioners as an unmitigated blessing” (27). This judicial inconsistency often resulted in rulings that ranged from ludicrous to terrifying, for the system was a somewhat unhappy marriage of feudal retributive justice, Christian mercy, and local custom and it was a nearly constant presence in the life of English citizens. For the purposes of this study, three branches of the legal system: the Chancery court, the court of Common Law, and the Ecclesiastical court, serve to illuminate particular problems in Measure for Measure, but it is important to recognize that these branches were but a small part of what was a labyrinthine judicature. Measure for Measure underscores the dangers of adhering to a singular vision of justice, and argues that the best possible system of governance by law leaves itself open to the possibility of more than one right way, and even more importantly, recognizes that its relationship with the community it professes to govern should be the cornerstone of any expression of justice.
CHAPTER 2

“Grace is Grace”? : THE DUKE AS FATHER CONFESSOR

The figure of Duke Vincentio in the costume of a Friar operates as a revealing metaphor for the shifting dynamic of power between the church and the state in England in the century or so following the Reformation. While in disguise, Vincentio proselytizes on behalf of the law, but fails to win any new converts, thus illustrating the increasing weakness of ecclesiastical authority—a weakness that, in England, resulted from the encroachment upon its powers by the monarchy and the secular courts. Let us examine briefly some of the legislation that led to this loss of power. In 1532, Henry VIII proposed a statute that would invalidate any ecclesiastical law that conflicted with the secular laws of England, and furthermore, would give the king and the secular courts precedence over those laws that were permitted to remain intact (Rodes 12). Twenty-seven years later, Elizabeth I continued her father’s work with the Act of Supremacy, which “gave the queen power, generally speaking, to do anything that might lawfully have been done by any kind of ecclesiastical authority in the past” (Rodes 157). These acts, along with a multitude of other legislative and bureaucratic changes, greatly constricted ecclesiastical authority over the English people. The church’s attempts to re-define itself and to find a foothold in late sixteenth and early seventeenth century England resonate with the cowled Vincentio’s activites in Vienna.

Despite the great changes wrought by the Reformation, the presence of the ecclesiastical court in the everyday life of a sixteenth century English citizen can hardly be overstated.³

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³ As stated earlier, mining the vein of law rather than religion seems a more rewarding approach to the important questions of the text. However, to ignore the presence of the church would be obtuse because in contemporary (and
Although the church suffered blows to its judicial powers and the shrinking of its jurisdiction, Ralph Houlbrooke claims that “[a]fter an initial period of uncertainty, then, the church courts found an assured place in the post-Reformation judicial and administrative structure.” He continues: “[a] rapidly growing number of litigants brought cases before the courts, so that by the 1560’s they were handling more cases between parties than at any time since the beginning of the century” (16). In his history of the ecclesiastical courts, which restricts itself to the period of 1570-1640, Martin Ingram stresses that

[t]he importance of law and legal institutions in the society of Elizabethan and early Stuart England is hard to exaggerate. Government, whether royal, ecclesiastical, or seigneurial, was largely channeled through legal forms, and as a result the boundaries between judicial and administrative action were far less clearly drawn than is the case today. (27)

Ingram also reminds us that the modern notion of individual privacy had not yet begun to take shape: “If the work of the church courts in policing the moral and religious behaviour of the population is at first sight apt to appear intrusive, it must be recalled that they worked within a wider context in which a good deal of legal supervision was a normal part of life” (28). The common thread of argument in the legal and social histories used to research this work is simply this: most English citizens could expect, for one reason or another, to appear in court at least once in their lives. J. H. Baker expands upon this notion in The Legal Profession and the Common Law, positing that “[i]f English society… possessed any common characteristics, a

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present day) Western law, theology is (to date) an inextricable factor. This argument about the law in Measure for Measure, specifically where it intersects with the church, is modeled upon Donna Hamilton’s contention, in Shakespeare and the Politics of Protestant England, that “[i]t is also possible to situate the study of Shakespeare and his plays within an ecclesiastical context that is primarily political as opposed to theological. In shifting the focus away from theology and towards politics, such an approach shifts the focus away from doctrine and in the direction of the institutional life of the English church, and of how that institutional life functioned in relation to other contemporary institutions, especially in areas of discipline and obedience” (3).
community of attitudes and aspirations, it was in no small measure the inns of court and chancery which (almost without design) brought it about” (98). Baker’s belief that the culture of the law and the courts shaped and even defined the ethos of the community of London (and elsewhere in England) reveals the extent to which law infiltrated everyday life and the potential for discord resulting from the omnipresence of the law, discords that surface in the text of Measure for Measure.

In contrast to Ingram and Houlbrooke’s enthusiastic assertions that the church courts were experiencing a resurgence in business after the upheavals of the early part of the Reformation, Richard Wunderli contends that “litigants had drifted away from London church courts long before the Reformation because of the haphazard, ineffective nature of ecclesiastical justice” (4). In Shakespeare’s Legal and Political Background, George Keeton agrees with Wunderli, noting that “[b]esides the Common Law courts and the Chancery, Elizabethan England was familiar with numerous other courts of special jurisdiction,” including “the Church courts, now cut off from Rome and shorn of some important branches of the jurisdiction they had once exercised. Already their subordinate status was leading to inefficiency and decline” (5). What distinguishes Wunderli’s study from Houlbrooke and Ingram’s is its setting. He concentrates upon the city of London, whereas they work primarily from the records of densely populated, but rural counties. Despite this very important difference, all three studies agree upon one point: because the power the ecclesiastical courts had to inflict punishment for the crimes over which it had jurisdiction was quite limited, its authority depended greatly upon the cooperation of the community.

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4 I do not wish to belabor the thoroughly explored and well-documented point that Shakespeare himself resided briefly at Grays Inn (where lawyer were housed and trained) and was likely involved in multiple lawsuits, but merely to mention in passing that he was apparently no exception to the litigious spirit of his times. See for example, ‘Kill All the Lawyers?’: Shakespeare’s Legal Appeal, by Daniel J. Kornstein, Shakespeare’s Legal and Political Background, by George W. Keeton, or “Renaissance Equity and Measure for Measure,” by John W. Dickinson.
Wunderli’s description of “the haphazard and ineffective” church courts might certainly be applied to Vincentio’s activities as a friar. There is, of course, no ecclesiastical court in the play. The church itself is, in many ways, peripheral: The convent of St. Clare, where we first meet Isabella, is enclosed by physical walls as well as by spiritual restraints that serve to ward off the outside world. Friar Thomas, the Duke’s companion and co-conspirator, also seems outside, or, at least, safely walled away from the teeming city. Despite its isolation, however, the church becomes an important presence in the play when the Duke takes on the disguise of a Friar, bringing the church to the community in an attempt to bring the community to order. In his Friar’s robe he is looking for a way to wedge open the law so that it both manifests and governs the will of the community. What he finds, of course, is a community that is anything but receptive to the spirit of reform that he hopes to promulgate. Ingram aptly summarizes the problem of the divide between community mores and moral prescriptions as embodied by the written law: “Not all forms of behavior which the law proscribed were regarded as reprehensible in the local community.” His conclusion speaks to the conflict at the heart of the play:

Problems could arise if the courts, whether secular or ecclesiastical, tried to enforce new values and standards of behavior far in advance of popular acceptance [italics are mine] or to insist too rigourously [sic] on the prosecution of matters which were not regarded very seriously in the parishes. (32)

Much of the trouble in the play springs from a lack of popular acceptance for the laws its rulers, Angelo and Vincentio, are attempting to enforce. The text of Measure for Measure suggests, particularly in the early scenes of the play, that the Duke’s valorization of what is apparently an outdated sexual morality will not be well received in the community he is trying to govern.
In the opening act of the play, the Duke instructs Angelo to “[i]n our remove be thou at full ourself / Mortality and mercy in Vienna / Live in thy tongue and heart” (1.1.43-45). The Duke gives no hint of his awareness of the turmoil within the city until the end of Act I, during his meeting with Friar Thomas. However, by the second scene of Act 1 we have a fair idea of how the community regards the law through the badinage between Lucio and two unnamed gentleman:

Lucio. Thou conclud’st like the sanctimonious pirate, that went out to sea with the Ten Commandments, but scraped one out of the table. / 2. Gent. “Thou shalt not steal”? / Lucio. Ay, that he raz’d. / 1. Gent. Why, ‘twas a commandment to command the captain and all the rest from their functions; they put forth to steal. (1.2.7-14)

The first Gentleman’s comment prefigures Pompey’s in Act 2, when he responds politely to Escalus, who has just warned him to stop procuring: “I thank your worship for your good counsel; {aside} but I shall follow it as the flesh and fortune shall better determine” (2.2.252-254). These members of the community express the dissonance between the laws of Vienna and the willingness of its subjects to be ruled by these laws. The Duke (or Angelo, for we do not know who, exactly, decides to re-institute the sexual statute in question) is not merely pressing for a more efficient prosecution of the existing criminal code. He is unearthing a law (or laws) that has not been observed, as the text tells us, for almost twenty years (1.2.168). In his study Shakespeare and The Legal Imagination, Ian Ward observes that “[g]overnment […] is about harmony, and harmony is about the balancing of interests within the political community, between the public interest of the body politic and the private interest of its constituents.” Ward continues, with a nod to the pimp Pompey’s economic realism, “[t]he ravages of the market, as
much as the dynamics of human nature, immediately question any community which seeks to define itself in accord with any imagined morality” (87). The law that Vincentio and his deputy Angelo seek to enforce fails to achieve the necessary balance described by Ward. As a result of the renewal and active enforcement of the vice laws under Angelo, Vienna is commanded to abandon its principal means of subsistence, institutions that likely enable a good portion of its citizenry to make their living.

One of the problems the Duke must face when he begins his campaign to reform his city is a citizenry that actively resists the reinstatement of the law. In order to make his subjects obey, Vincentio must determine how law and penalty function in relationship to each other as a means for preventing and punishing crime. In Act 2, he explains to Friar Thomas that effective laws require enactment, not merely the threat of punishment: “Now, as fond fathers, Having bound up the threat’ning twigs of birch, / Only to stick it in their children’s sight / For terror, not to use, in time the rod / {Becomes} more mock’d than fear’d” (2.2.23-27). However, despite his apparent belief that for a law to work its subjects must have good reason to fear breaking it, he adopts a different way of bringing his people to the law. Angelo, Vincentio’s appointed deputy, embraces capital punishment as a way to deter crime, but the Duke attempts to reform from within—getting to the soul of his subjects in the guise of a father confessor. The degree to which each method meets with success is one of the central dilemmas of the play and poses the most vexing question faced by Western law: determining to what degree punishment should intersect with and inform lawmaker.

In the previous paragraph, I suggest that in order for a law to work, the subjects of the law must, to a certain extent, accept the logic, or more particularly, the justice of it. In addition, they must also understand and accede to the consequences of violating that law. Paul Hair’s
introduction to his collection of church court records, *Before the Bawdy Court*, explains the necessary balance between punishment and the willingness to be punished:

In the current jargon, the social discipline of the church courts was paternalist. It was indeed truly paternalist in the relative mildness of its discipline (we have seen that the church courts compare favourably with the secular courts in their lack of bloodshed and severe corporal punishment . . . though this comparison, it must be conceded, is not entirely a fair one). It can of course be argued that the mildness derived not from the explicit ideology—the canon law—but from the implicit consent of the populace: mild punishments were all they were willing to take for peccadilloes. (28)

Early in the play we recognize that certain members of the community capitulate to the newly invoked laws. But what about Barnardine? Or Pompey? (Or Angelo?) Does the leniency practiced by the Duke, or for that matter, the threat of death bring about a positive change in their souls? We see no evidence in the closing act of the play that any of these characters has a changed understanding of the law or is even slightly less disposed to commit another crime, if necessary. Although the Duke adopts a merciful model of justice, he is inconsistent in its practice. Wunderli claims that even prior to the Reformation, when the church court had greater power to impose corrections upon malefactors, the people “felt that they could no longer find stringent justice in church courts” and therefore “they sought justice in secular city courts,” which “was much harsher than church court justice” (2). If we take this as truth, we might see that Vincentio’s relative benevolence, as much as Angelo’s harshness, fails to produce an increased regard for the law within the community of Vienna.
If Angelo chooses to terrify the citizens of Vienna into obedience with the threat of loss of life and limb, Vincentio opts for a different sort of threat. His decision to try to sway the souls, rather than threaten the lives of his subjects, reflects the relatively subordinate position of ecclesiastical authorities after the Reformation. According to Martin Ingram, “by this period it was generally accepted that the penalties of the church courts could touch neither life, limb nor property” (52). By the middle of the sixteenth century, the church courts’ most fearsome punishment was excommunication. Clearly, this threat would only carry weight with a certain portion of the population, the portion least likely to run seriously afoul of the law. When the Duke sets out in his Friar’s disguise to penetrate the conscience of his people, he meets with some success. But with whom? Claudio, the first victim of the new adherence to the vice laws, says resignedly as he is led away to prison: “Thus the demigod, Authority, / Make us pay down for our offense by weight / The words of heaven: on whom it will, it will; / On whom it will not, so, yet still ‘tis just” (1.2.120-23). Claudio’s acceptance of the terms of his arrest appears genuine, and although he subsequently objects to his death sentence, it is a protest born of fear rather than the sense that an injustice is being committed, for he and Juliet are far from hardened criminals.

When the Duke, disguised as a Friar, appears in Juliet’s cell she makes no protest on behalf of herself or Claudio, but instead submits to his ‘spiritual’ examination and freely acknowledges her complicity in the crime for which Claudio is sentenced to die. While hearing her confession Vincentio asks, “Repent you, fair one, of the sin you carry?” and she replies, “I do; and bear the shame most patiently” (1.2.19-20). We have no reason to suspect that her remorse is merely the result of being apprehended. Her response to the Duke’s question “Love you the man that wrong’d you?” is admirable in its clarity: “Yes” she says simply, “as I love the
woman that wrong’d him” (1.2.24-25). Claudio and Juliet’s willing acceptance of the harsh and arbitrary rule of the law illustrates the problem with authority in the play, a problem identified by Harold C. Goddard in his essay “Power in Measure for Measure.” Goddard writes:

Those with power may sedulously inculcate in subjects the illusion that there is a necessary connection between law and justice as the very cement of the state, without which the political structure would collapse (as well it might); but philosophically, any mental structure erected on this illusion is built on quicksand. (24)

Juliet, and to a perhaps lesser degree, Claudio understand that they have, in the eyes of the law, committed a crime. They accept the illusion that Goddard describes above. But the community of which they are members does not view them as criminal and furthermore, does not view the law that imprisons them as just simply because it is law. Although the Duke is dressed as a Friar and casts his desire for reform into spiritual terms, as Ingram reminds us, “in early modern England the notions of ‘sin’ and ‘crime’ were not clearly differentiated” (3). The same is apparently true in Vienna. This blurring between sin and crime complicates the way Claudio should be judged, according to the standards of his community.

When Lucio arrives at the convent to tell Isabel of her brother Claudio’s arrest, she asks what he has been detained for. Lucio (voicing the general opinion—at least the portion we are privy to) replies, “For that which, if myself might be his judge, / He should receive his punishment in thanks: / He hath got his friend with child” (1.4.27-28). Unlike the ecclesiastical courts in the period under consideration, the fictional judicial system of Vienna is able to sentence Claudio to death for fornication, thus possessing the teeth necessary to enforce the law effectively. However, the law concerning fornication, even when coupled with capital
punishment, has seemingly done little to alter the mores of those most likely to violate its tenets, and perhaps more significantly, fails to express the implicit morality of the community it is intended to govern.

It is never totally clear if the citizens of Vienna object to the law against fornication or to its abrupt and terrifying exaction under Angelo. Those who break the law against fornication (with the exception of Lucio and Angelo) appear to do so out of economic necessity (or the belief that there are mitigating circumstances which exempt them) rather than from an inclination towards crime. As Pompey patiently explains to Escalus upon his arrest and interrogation for pimping, “Truly sir, I am a poor fellow that would live.” An affronted Escalus responds: “How would you live Pompey? by being a bawd? What do you think of the trade, Pompey? is it a lawful trade?” whereupon Pompey replies, “If the law would allow it sir,” (2.1.223-227), presenting a solution that the authority figures in the play overlook from first scene to final act. Reflecting upon the state of things in Vienna, Mistress Overdone sighs, “Thus, what with the war, what with the sweat, what with the gallows, and what with poverty, I am custom-shrunk” (1.2.82-84). Pimp and prostitute recognize what Duke and deputy do not: Vienna’s troubles do not spring from a natural proclivity for vice amongst its citizens, but rather from the ways in which the population has been forced to cope with destitution. Vienna is a city that is disenchanted with its lawmakers and its laws, for they fail to recognize and reflect the spirit and the needs of the community.

The Duke sets out, in his Friar’s hood, to bring his people around to the law. His first “converts” are Claudio and Juliet. Although there are clearly qualifying factors in their case—Claudio’s claim to Lucio that they were married, save the banns and the existence of a dowry, and the simple fact that neither of them denies their relations with the other—they accept their
imprisonment. Claudio even comes to accept the idea of his death at the conclusion of Vincentio’s catechism. So what sort of change has the Duke produced? The sentences of the church courts, according to Ingram, “were not primarily designed to exact retribution for offences. They were intended to reform the culprit” (3). Measure for Measure questions the efficacy of reforming ‘culprits’ who are criminals according only to the law, not the community of which they are members. If reform requires some degree of consensus and cooperation—and for laws to be effective they must be absorbed into the ethos of a community—then Vincentio has failed. The only people who seem to agree wholeheartedly that the law in question is sound are Angelo and Isabel. And obviously, Angelo is not inextricably bound to its principle. Isabel, at least until the conclusion of the play, is a novice, and intends to withdraw from the community at large. They do not perceive themselves as connected to the citizens who are victims of the law, even when the victim is a blood relative.

The disconnection that occurs between the law and its subjects in Vienna is only one of the consequences of the social erosion undermining its civic structure. As Ian Ward advises us, however, “[i]t is not the absence of laws in Vienna which has led to the breakdown of social morality. The essential problem lies in their lax execution.” He continues: “[i]t is the Duke who is unable to execute his own laws for the benefit of its own commonwealth. Pompey’s later appointment as the new hangman, as well as Barnardine’s indefinite survival in gaol, only adds to the feeling that the administrative heart in Vienna is thoroughly corrupted” (84). Angelo imprisons the couple and sentences Claudio to death, and Vincentio piously manipulates them into expressing remorse, but to what end? Vincentio does not bring the greater (and patently criminal) portion of his community around to the law, nor does he change the law to reflect more accurately the moral and social structure of his city.
The increasing irrelevance of the ecclesiastical courts in early modern England was the combined result of social, religious, and geographic shifts following the reformation. The break with Rome, the increasing power of the monarchy and the secular courts, and the exodus from rural areas to growing cities all contributed to their loss of authority to dispense justice and maintain order within communities. Those bringing their grievances to trial grew frustrated with the church courts’ inability to assign and carry out punishment upon transgressors. Unlike the ecclesiastical courts, Vincentio has the power to impose harsh sentences on subjects who break the law. Whether his initial failure to do so springs from what he claims is an unwillingness to play the tyrant (1.2.36), or from the realization that even the threat of death (and possibly, damnation) fails to awaken any sense of moral or civic duty in men like Lucio or Barnardine is unclear. Of the post-reformation ecclesiastical court Robert Rodes concludes that “[c]onsidered as a legal system, it suffered from a pastoral orientation that disposed it to excessive leniency and ineffective sanctions” (188). This criticism certainly holds true of Vincentio’s attempts at achieving order in his city. The dispensing of empty and toothless judgments upon an unmindful populace brings the Duke’s campaign in Vienna to an end, one which leaves the stage crowded with what appear to be thoroughly unrepentant souls.

This chapter begins with a question. Very early in Act 1, Lucio claims that “Grace is grace, despite of all controversy” (1.2.24-25); the text of Measure for Measure plumbs that claim and presents several different conclusions. In Vincentio’s case, grace is not, in fact, grace. What looks like mercy on his part is actually a reluctance to abide by his own system of law, and failing that, to reform the system so it might restore order to Vienna, a city devoured by “too

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5 See J. H. Baker’s An Introduction to English Legal History for an alternate account of the expansion and subsequent demise of the ecclesiastical courts in the sixteenth and seventeenth century. Baker’s hypothesis rests upon the abuse of the ex officio oath. A parallel might be made between Vincentio’s activities as ‘Father Confessor’ and the use of the oath by church officials in criminal cases.
much liberty” (1.2.125). While Shakespeare’s depiction of Vincentio’s attempt to reform his community probably is not a conscious representation of the workings (and failings) of the ecclesiastical courts it does, however, elucidate the real historical struggle of these courts to maintain their relevance, particularly in London. The Duke’s attempt to bring his people around to the law without invoking dire punishment, even in the face of the indifference of a Lucio, or the utter remorselessness of a Barnardine, is at least very like the quandary of the ecclesiastical courts, which were almost wholly responsible for upholding social control within communities without possessing effective means to do so.6 Of the judicial work of the church after the Reformation, Rodes concludes “[i]t wrapped a number of fornicators in white sheets for the edification of their neighbors, but it never became a true nemesis of the ungodly” (190). And indeed, in the conclusion of the play, neither has the Duke. His appointment of Angelo is perhaps a concession to the fact that to restore order to Vienna, something more stringent than a spiritual awakening is required.

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6 See Martin Ingram’s Church Courts, Sex and Marriage in England, 1570-1640, or Ralph Houlbrooke’s Church Courts and the People During the English Reformation, 1520-1570 for complete accounts of the business of the ecclesiastical courts
CHAPTER 3
“When judges steal themselves”: ANGELO AND THE ABSOLUTE LAW

In England, the vacuum created by the diminishing power of the church courts was filled rapidly by the newly powerful civil courts. In particular, the court of common law, under the direction of a succession of ambitious and influential judges achieved a brief ascendancy at the close of the sixteenth century. In the world of Measure for Measure, while the Duke, clad in ecclesiastical garb, enacts his rather fruitless campaign of reform, Angelo, his appointed deputy, practices the precepts of another branch of law. Where the Duke, as Friar, works for an interpenetration of his people and the law, Angelo’s energies seem to be aimed at eliminating humanity from the administration of law. His project reflects the guiding principles of English common law, particularly those evinced by the judicial actions of Sir Edward Coke, the king’s Chief Justice, and a controversial and powerful presence in the civil court system in the late sixteenth and early seventeenth centuries. Coke and his supporters believed that law was, in its natural state, perfect, and that those justices who meddled with its precepts through the application of equity or other ameliorative practices threatened to corrupt the law’s perfection.

While the character of Angelo is almost certainly not a dramatic representation of Coke, he embodies the extreme end of the philosophy described above, and his role in the play describes the problems that arise from a legal philosophy that believes too fervently in the inviolability of the letter of the written law.

In order to understand Angelo’s view of the law—a view that results in his downfall—we must first examine early modern attitudes towards the law. As J. H. Baker explains in An
Introduction to English Legal History, law was conceived as something discovered (rather than created), therefore existing in a state of (natural) perfection. The prevailing notion regarding the evolution of the law was that “[i]f man’s reason does not change, the law cannot change; it is only the application of old ideas to new circumstances which creates the appearance of change” (195). Laws were not inherently good or bad—they accrued virtue (or vice) as they passed through the hands of a lawmaker. In short, “the progress of legal history is a slow revelation and refinement of essentially immutable ideas” (195). Quoting Coke, Baker notes:

[…] it was ‘a maxim of policy, and a trial by experience’ that the alteration of any fundamental point of the common law was dangerous, ‘for that which hath been refined and perfected by the wisest men in former succession of ages, and proved and approved by continual experience to be good and profitable for the common wealth, cannot without great hazard and danger be altered or changed.’ (195)

Coke’s view was that legislative reform, specifically reform based upon the premise of equity (or mercy) or in any principle outside of the writ of law itself, would only vitiate the pure spirit of law. Furthermore, because a law was, in its essence, pure, it must be abided by strictly, no matter what the contingencies of a particular case. The common law, as stated above, was meant to serve the commonwealth. In order to do so the law must address the universal, rather than the specific details of a case. To allow for mitigating circumstances was to allow for an assault on the absolute authority of law, and in the view of the defenders of the common law, any attack on the law was an attack upon divine order that created the potential for chaos.

English legal theory is rooted firmly in both Greek and Roman legal tradition. If Measure for Measure explores some of the conflicting elements of the evolving English judicial system,
then the character of Angelo surely illustrates one of the most essential philosophical divisions in legal theory: the relationship of punishment to the effective administration of the law. Beginning with the ancient Greeks and Romans, whose considerations of law are the cornerstone of Western legal attitudes,\textsuperscript{7} Martha Nussbaum, in her essay “Equity and Mercy,” outlines the disputes that have shaped the law from its earliest beginnings. Of primitive conceptions of retributive justice and the more modern idea of equity, she explains:

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\text{[…] the primitive sense of the just […] starts from the notion that a human life is a vulnerable thing, a thing that can be invaded, wounded, or violated by another’s acts in many ways. For this penetration, the only remedy that seems appropriate is a counterinvasion, equally deliberate, equally grave. And to right the balance truly the retribution must be exactly, strictly proportional to the original encroachment. (89)}
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The notion of achieving justice by balancing violence with violence is echoed in the language of the Old Testament verse “[…] eye for eye, tooth for tooth […] burning for burning, wound for wound” (Exodus 21:24-25 Geneva ).\textsuperscript{8} In opposition to this older notion of justice is equity, which recognizes and honors what Nussbaum calls asymmetry; it takes into account the vagaries of life and dispenses a flexible sentence that considers the why of a crime as important as the what. On the other hand, Nussbaum writes, “the world of dike [justice] is a harsh and symmetrical world in which order and design are preserved with exceptionless clarity” (91). The Duke recognizes that Angelo inhabits this philosophical framework, which is why he selects Angelo for the job of enforcer in the first place.

\textsuperscript{7} See Russ McDonald’s \textit{The Bedford Companion to Shakespeare}, for a brief account of what Shakespeare was likely to have read, an account which assumes his familiarity with “[…] the work of the great poets, historians, orators, and essayists: Cicero, Virgil, Ovid, Horace, Suetonius, Livy, Seneca” (103).
\textsuperscript{8} Which in turn prefigures the Sermon on the Mount in Matthew, the biblical passage most closely associated with the play.
While it is easy to attack Angelo for his decision to prosecute the law to its fullest measure, it is not entirely fair. If Vienna’s woes spring from lawlessness, then the populace must be given a compelling reason to obey the law. Angelo does not understand vice, at least not until he is infected with it, and he is unable to be sympathetic, or in Nussbaum’s terms, to “judge with” the accused (94). Therefore, he sentences Claudio to death because that is what the law dictates. When Angelo takes office, he echoes the Duke’s reflections on the cost of leniency, declaring: “We must not make a scarecrow of the law, / Setting it up to fear the birds of prey, / And let it keep one shape, / till custom make it / Their perch and not their terror” (2.1.1-5). His sentencing of Claudio therefore is intended to restore the punitive measure of the law. In a city where the Duke’s dereliction of duty has spawned chaos, Angelo’s choice to invoke fully the consequences of the law seems a reasonable and ultimately necessary one. Harriet Hawkins identifies the text’s inversion of justice, noting that, “from the beginning of the play, the punishment of vice itself turns vicious” (85); she is correct, but it is necessary to add that under Angelo at least, the punishment of vice, vicious or not, is within the scope of the law. By the time we reach the last act it is easy to forget why Angelo is actually being punished, for he is guilty of the specific crime of sexual vice that haunts the city belonging to “the duke of dark corners,” but not for showing a lack of mercy to those condemned under the law.

It is important to recognize that Angelo’s decision to execute Claudio is perhaps excessive, but well within the bounds of the law. It is also important to remember that the Duke, despite the presence of his seasoned justice Escalus, chooses Angelo to head his city in his “absence.” His curious decision to appoint Angelo as his replacement in order to enforce the legislation that he has neglected is explained, perhaps, by Vincentio’s review of his deputy’s traits: “Lord Angelo is precise; / Stands at a guard with envy; scarce confesses / That his blood
flows; or that his appetite / Is more to bread than stone” (1.4.50-53). This bloodless precision apparently qualifies Angelo to exercise moral authority over a corrupt city. However, as Harold Goddard points out, the Duke in fact, “knows at the time he appoints his deputy of a previous act of turpitude on his part” (Bloom 25). The shadowy intersection between the desires of the Duke and the deeds of Angelo complicates the search for the source of the breakdown of justice in the play. It is never entirely clear if the Duke has specific strict statutes and biting laws in mind when he selects Angelo to enforce lapsed legislation, or if Angelo himself determines to focus upon vice law. However, there is little ambiguity in the Duke’s statement to Friar Thomas: “Therefore indeed my father, / I have on Angelo impos’d the office, / Who may, in th’ ambush of my name, strike home” (1.4.40-41). The Duke recognizes that Angelo will strictly adhere to the laws of the city, whatever they may be. While he may be indifferent to which laws Angelo chooses to revive, he seems to have a very clear vision of how he wishes his deputy to execute them upon the populace.

Of the Duke’s disturbing choice of a candidate guilty of breaking the very law he is empowered to enforce, Cynthia Lewis pointedly asks: “if Vienna’s moral landscape is really as bleak as the Duke portrays it to Friar Thomas (I.ii.19-31), then why should he entrust Vienna’s care to Angelo, who, in respect to his dealings with Mariana, reflects that landscape?” (274). A charitable view of Angelo might hold that he simply identifies the city’s most burning plight as sexual, and so chooses to pursue legislation that addresses that particular vice. He fails to recognize his own culpability under the reinstated law concerning fornication, a blindness that is made apparent by his response to Escalus’s suggestion that they show leniency to Claudio (in light of the circumstances of his case): “You may not so extenuate his offense / For I have had such faults; but rather tell me, / When I, that censure him, do so offend, / Let mine own
judgement pattern out my death, And nothing come in partial” (1.4.27-31). And indeed, nothing does, for from this point on the oppositions that define the play begin their balancing act. Robert Watson summarizes: “[i]f excessive liberty leads to excessive restraint, then excessive restraint, as the appointment of Angelo demonstrates, leads to excessive liberty, as the corruption of Angelo demonstrates” (414). As the action of the play progresses, Angelo’s moral authority swiftly crumbles, but his commitment to harsh and unwavering correction under the law does not.

The Duke’s unwillingness to govern according to the laws of the land seems to spring from laxity—he is not especially interested in performing his job, at least not the unpleasant aspects of it—not any uncertainty about the morality of exacting punishment on the guilty. We assume Vincentio turns his city over to his deputy Angelo because he wants to see justice done. The Duke’s concept of justice, at least in the early part of the play, is linked to a patriarchal vision of corporal punishment, for though he says to Angelo that he might “qualify the laws” (1.2.65), he reveals to Friar Thomas that he intends for Angelo to enforce them to their fullest extent—the same laws that he himself has neglected to put into effect. A relatively benevolent critical view of the Duke maintains that he is an amateur social theorist who uses his city and its citizens to conduct experiments in government. He concedes to Friar Thomas “twas my fault to give the people scope” (1.3.34), and in this admission there is a suggestion of a civic project gone awry. Angelo considers the question of mercy and its relationship to the law, but dismisses it as an impediment to justice, and to the preservation of a healthy society. He is, as a deputy, likely all too aware of the consequences of the Duke’s mercy-by-neglect. In the courtroom of a crime-ridden city, mercy is a luxury that justice cannot, perhaps, afford. Russ McDonald claims that the main problem of this problem comedy is “that the boisterous underworld is in danger of
fatally contaminating the entire civic structure of Vienna” (133), and Angelo’s rigid stance acknowledges the immediacy of this threat. When Isabella pleads, “yet show some pity,” Angelo responds tellingly, “I show it most of all when I show justice; / For then I pity those I don’t know, / Which a dismissed offense would after gall, / And do him right that, answering one foul wrong, / Lives not to act another” (2.2.99-104). By reconnecting the abstract law to concrete punishment, Angelo believes that he is preventing future crimes. For Angelo, mercy is a dangerous abstraction, but the workings of justice are simple. Those who break the law must be punished, or the law becomes merely empty (and fatally elastic) theory. In his second exchange with Isabel, which commences his fall, he says of Claudio: “His offense is so, as it appears, / Accountant to the law” (2.4.85). We, from our vantage point know this to be false. Claudio’s offense, and therefore his sentence, is accountant to Angelo and his desires—the law becomes irrelevant in the deciding of his fate.

Angelo’s unbending and often unreasonable execution of the letter of the law, despite extenuating circumstances, might be viewed as an exaggerated vision of Coke’s struggle to make the common law the foremost law of the land—with jurisdiction over the church courts, the powerful (and popular) Chancery courts, and finally (and for Coke, somewhat ruinously) even the king himself. Legal critic Daniel J. Kornstein asserts that Shakespeare’s employment of legal themes in Measure for Measure, particularly those related to common law versus equity, were intended “to tutor King James I,” for “Scotland’s law differed from England’s in having no separate jurisdiction for equity” (62).9 If this was in fact his intention, history reveals that he need not have worried. James I became an avid supporter of the court of Chancery, operating as

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9 Kornstein’s claim is explicated in a host of recent studies. For the purposes of this paper, Donna B. Hamilton’s Shakespeare and the Politics of Protestant England, and the collection Shakespeare as Political Thinker, edited by John Alvis and Thomas G. West made helpful connections between Measure for Measure, James I, and the evolving British legal system.
it did upon the principle of equity, a principle inimical to the common law. This alliance between
the king and the court of “conscience” was what Coke dreaded and spent his last years on the
bench opposing. To Angelo, the law, and those empowered to uphold it are not figures of
tyranny; rather, the vice that threatens to subsume the city is, and if it remains unchecked by the
law it will destroy what little civic order remains.10 He is apparently unable (or unwilling) to
distinguish between degrees of wrongdoing. When Isabel pleads for mercy on Claudio’s behalf,
Angelo replies that “It were as good / To pardon him that hath from nature stol’n / A man
already made, as to remit / Their saucy sweetness that do coin heaven’s image / In stamps that
are forbid” (2.4.42-46). To Angelo, unlawfully taking a life is no different than unlawfully
making one. His is not a seasoned view of justice, which according to Posner “mix[es] strict law
with discretion” (121), but rather that of an eager, but inexperienced junior officer. If we accept
this view, the near disastrous results of his appointment are hardly surprising.

Throughout the play we see evidence that Angelo is conflicted about his relationship to
the law, at once proclaiming that he is the law itself, but denying that his moral character in any
way influences his method of administering it. Richard Posner posits that “Angelo’s insistence
on enforcing the law to the hilt reflects a conception of law […] as something existing apart
from man” (118), a concept that continues to be a source of highly charged debate in Western
legal thought. In his essay “Chastity as a Political Principle,” Harry Jaffa reminds us that

[t]he commission that the Duke gives Angelo in the opening scene is not
nominally one to establish or institute the puritanical and tyrannical regime that in
fact follows. Angelo is given the discretion ‘so to enforce or qualify the laws / As

10 Though this is a topic for another paper, it is important to note the gravity of Vienna’s situation if, as a result of its
lawlessness, it descends into chaos. Lucio makes two separate references to the possibility of Vienna being involved
in a military action abroad (1.2.1-4, 1.4.49-52). The city’s domestic turmoil might certainly undermine any
possibility of military victory, as well as make it more susceptible to attack.
to your soul seems good’ (1.2.66-67). This means that the soul of the judge, rather than the soul of the laws, will be revealed by the manner in which the law is enforced. (Jaffa 198)

When Angelo takes power, he enforces the law without taking into consideration the circumstances of each case. He fails to recognize how his decisions at law reflect his unique, and questionable, morality. He believes that legislation is somehow separate from the lawmaker, or enforcer, and that it is neutral, absent of qualities, and wholly without virtue or vice. A justice who cannot distinguish between Juliet and Mistress Overdone is indeed blind, but also unjust. To Edward Coke, Sir Francis Bacon wrote, “you make the law lean a little too much to your opinion; whereby you show yourself a legal tyrant,” and the same accusation might certainly be leveled at Angelo, who fails to see that law is created and administered by human beings and thus imbued with human failings (qtd. in Knafla 126). In his eagerness to prove the absolute impartiality of the law, Angelo instead demonstrates how easily it can be manipulated to serve the desires of those who control it.

*Measure for Measure* illustrates the shortcomings of any system of justice that strictly adheres to positive law. When Isabel goes to plead for Claudio’s pardon, she is confronted with the problem of blind justice, which presents itself in Angelo’s declaration that “He’s sentenced; ‘tis to late” (2.2.55). Angelo’s vision of the law does not allow for particulars—the law is right, therefore he is right, and his sentencing of Claudio is as immutable as legislation itself. Isabella, urged on by Lucio, calls on him to mitigate the severity of Claudio’s sentence through an act of mercy, but Angelo responds, “Your brother is a forfeit of the law,” (2.2.71) and later claims that “It is the law, not I, condemn your brother,” (2.2.80). This act of rhetorical distancing is significant because in his next encounter with Isabella, Angelo suddenly revises his relationship
to the law: “I (now the voice of the recorded law) / Pronounce a sentence on your brother’s life” (2.4.61-62). His attempt to seduce Isabel depends upon his power over her, and that power depends upon his power, via the law, over her brother. His fall commences when he commits an act that, in the early scenes of the play, he would have declared impossible—manipulating the law to serve his own ends. Angelo begins outside of the law, but ends by inhabiting (and corrupting) it by attempting to satisfy his own desires. His abuse reveals the inextricable and often fallible human element in inherent in any system of law.

Angelo is brought to power to act as a corrective to the Duke’s over-lenient reign. His appointment illustrates the inherent flaw of positive law, which “turns into its opposite and becomes a wrong when carried to the extreme point of its limited nature and one-sided conception” (Ulrici, qtd. in Keeton 150). Advocates for the common law, which its defenders perceived as the true, ancient law of England--derived from natural law, not from the corrupt laws of man--feared that the more equitable view of justice espoused by the Chancery courts would lead to the breakdown of the English justice system, and they struggled to maintain the supremacy of the common law court over all other legislative bodies. However, the harsh and unyielding justice issuing from the common law courts resulted in a citizenry ill-disposed to bring their legal troubles before these courts. By the second decade of the seventeenth century, as a result of the king’s support, and its popularity with the people, the Chancery court became the highest court in England.
CHAPTER 4

“Mercy is not itself”: ESCALUS AND EQUITY

The court of Chancery, which had long been a part of the English judicial system, was, by the late sixteenth century, at the heart of the controversy described in this work’s introduction by J.H. Baker, a tumult that would eventually result in drastic changes in the organization and jurisdiction of all of the branches of the court systems. In the 1550’s, conflicts over jurisdiction arose between the court of common law and the court of Chancery. The common law judges’ strict adherence to the rule of law led plaintiffs to seek relief in the chancery, or equity courts. Central to the debate between the two courts was the relationship of the principle of equity to the writ of common law, and the question of which court—chancery or common law—had the power to make final judgments at law. Knafla writes that by 1598, “[…] the relations between courts of equity and common law had now entered the arena of public debate” (160). The result of all this upheaval was a changing attitude towards the law on the part of many jurists, who “believed that the common law had reached its greatest hour. “They felt,” writes Knafla, “that increased litigation and uncertainty in the law reflected a society of individuals in search of true justice.” (107). If Vincentio represents an increasingly ineffectual ecclesiastical justice, and Angelo the absolutist tradition of common law, then the other figure of authority in the play, Escalus, perhaps stands for equity, the idea that justice should consider particular circumstances, not the literal law when meting out punishment. The judicial concept of equity was well-

11 There are records of its existence dating from the reign of Richard II, but it is likely older (Intro. to Legal History 100)
established, and was also in many ways unique to England at the turn of the sixteenth century.¹² J.H. Baker reminds us that the equity court was “[…] no more a court of law than the Exchequer,” but was instead created as a result of the practice of pleading the king’s mercy after a judgement at law. This practice apparently became “[…] so common that such business had to be referred to special sessions of the council or parliament” (Intro. to Legal History 98, 99). Why would such a court be necessary? According to Baker, the chancellors of the equity court believed that “[t]hey were reinforcing the law by making sure justice was done in cases where shortcomings in the regular procedure, or human failings, were hindering its attainment by due process” (Intro. to Legal History 102). The courts of the late sixteenth century, particularly the court of common law, were in the process of modernizing their methods. However, the system was far from perfect, for, as Baker explains, “the growing strength of the substantive law could also work injustice, because the judges preferred to suffer hardship in individual cases than to make exceptions to clear rules” (Intro. to Legal History 102). This is the hyperlegalism that Posner describes and it is this same unwillingness to make an exception that contributes to Angelo’s downfall. Angelo’s rigid attitude towards the law leads to injustice, and it is especially contemptible because the text presents him with another way of administering the law that counters the harshness of positive law—an equitable way. Escalus attempts, and fails to instruct Angelo, and in doing so provides a short lesson about the complicated role equity plays in meting out justice by law.

In his 1962 essay, “Renaissance Equity and Measure for Measure,” John W. Dickinson addresses the prevailing critical notion that Measure is “a play illustrating Christian mercy as the highest form of justice or as a virtue superior to justice […],” and he argues that Shakespeare is

¹² Frequently, Measure for Measure is presented as a tutorial piece for James I. See Introduction.
concerned with another virtue, equity, and that *Measure for Measure* is a vehicle for exploring the relationship between equity and the workings of justice. According to Dickinson:

[d]efinitions of equity in the Renaissance derive from Aristotle’s discussion of it in Book V of the *Ethica Nichomachea*. Equity, says Aristotle, is not essentially different from justice, but it is rather a correction of the positive law which seeks to promote justice. All positive laws are stated as universals, ‘but about some things it is not possible to make a universal statement which shall be correct.’

(287)

Martha Nussbaum further defines the Aristotelian view of equity as an act of restoration, one which “[…] put[s] the law into the condition to which it aspires in the first place” (“Equity and Mercy” 93). Shakespeare, claims Dickinson, was aware of the concept of equity because of his personal experiences with the Court of Chancery, which under James became newly powerful, because of “[…] an acquaintance with its general tenets as discussed by moral and legal writers of his time […]”, and because of its presence in the plot of *Measure’s* source text, *Promos and Cassandra* (287). Citing a contemporary proverb about the court that “These three give place in court of conscience, / Fraud, accident, and breach of confidence,” Dickinson explains that the ‘court of conscience’ upheld the “enforcement of implicit moral obligations, rather than the strict letter of the law […]”, and he makes clear the influence that the existence of this judicial body may have had on the legal questions raised by the play (289-290).

When the Duke announces his departure, and his intention to place Vienna in Angelo’s hands, his deputy balks: “Now good my lord, / Let there be some test made of my mettle / Before

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13 See Russ McDonald’s *The Bedford Companion to Shakespeare*, for a brief account of what Shakespeare was likely to have read, an account which assumes his familiarity with “[…] the work of the great poets, historians, orators, and essayists: Cicero, Virgil, Ovid, Suetonius, Livy, Seneca” (103). Familiarity with any or all of these writers suggests knowledge of the concept of equity.
so noble and so great a figure / Be stamp’d upon it” (1.1.47-49). The Duke’s choice of Angelo is immediately suspect (apparently, even to Angelo) because the text presents another, more suitable option, Escalus. John Dickinson observes that early in the action, “[…] the Duke attests to Escalus’ thorough knowledge of the law, as well as his awareness of the ‘nature of our people’ (a significant quality considering his fellow judge Angelo’s lack of sympathy for those he governs) […]”(294). Vincentio’s speech is, at very least, puzzling:

Of government the properties to unfold / Would seem in me t’affect speech and discourse, / Since I am put to know that your own science / Exceed, in that, the lists of all advice / My strength can give you. Then no more remains / But that, to your sufficiency, as your worth is able, / And let them work. / The nature of our people, / Our city’s institutions, and the terms / For common justice, y’are as pregnant in / As art and practice hath enriched any / That we remember (1.1.3-13).

The Duke’s recognition that Escalus knows the citizens of Vienna, something that he cannot claim, given his predilection for “the life removed,” (1.3.7) suggests that he knows that logically, Escalus should be left in charge. But instead he chooses Angelo, who seems to share the Duke’s distaste for associating too closely with the citizenry of Vienna. The Duke’s motivation, at least initially, lies in seeing the law revivified, whether or not that is in the best interests of the citizens of Vienna.

Although he leaves Angelo in charge, Vincentio reminds him that Escalus is “first in question” (1.1.46). Upon learning of Claudio’s arrest, Escalus’s first piece of advice seems designed to encourage the practice of moderation integral to equitable judgment: “Let us be keen, and rather cut a little, / Than fall and bruise to death” (1.4.5-6). He instructs Angelo to
imagine himself in Claudio’s place, a sympathetic act of vision necessary to the practice of
equity. Nussbaum explains that in a mature and humane system of law (one that embraces equity
as a fundamental factor), that

[…] to perceive the particular accurately, one must ‘judge with’ the agent who has
done the alleged wrong. One must, that is, see things from that person’s point of
view for only then will one begin to comprehend what obstacles that person faced
as he or she acted. (‘Equity and Mercy’ 94)

Escalus encourages Angelo to make use of this sympathetic vision, reminds him of the
possibility of his own sinfulness, and asks him to judge Claudio’s wrongdoing accordingly:

That in the working of your own affections, / Had time coher’d with place, or
place with wishing / Or that the resolute acting of {your} blood / Could have
attain’d th’ effect of your own purpose, / Whether you had not sometime in your
life / Err’d in this point which now you censure him, / And pull’d the law upon
you. (1.4.10-16)

His instructions are in keeping with the role of the chancellor in the equity court, who “combined
the role of judge and jury, and in delving as deeply as conscience required into the particular
circumstances before him he did not make such a definite distinction between fact and law”
(Intro. to Legal History 105). Not only does he fail to acknowledge that he has indeed, “err’d in
this point,” he also fails to take into account Juliet and Claudio’s unique situation. Furthermore,
he suggests, somewhat outrageously, that one is only guilty of a crime if one is caught. While
this attitude may help us to understand his peculiar blindness to his own misuse of Mariana, it
does not bolster faith in his vision of justice. For Angelo a sympathetic view of the accused has
no place in the administration of the law, for “[w]hat’s open made to / justice / That justice
The guilt of those seized by the kind of justice Angelo describes results from their unluckiness in being at the wrong place at the wrong time as much as it does from the crimes they did or not commit. This blindness, as we shall see, is almost opposite to the mutual vision practiced by Escalus.

The Duke’s observations in Act 1 about his senior deputy’s knowledge of the citizens of Vienna are borne out by Escalus's work in the courtroom. Pompey, a pimp, and Froth, a tapster, are brought before Angelo by Elbow, a familiarly unintelligible constable. The ensuing confusion about who has done what to whom drives Angelo from the courtroom, but not before he expresses the departing wish that “you’ll find good cause to whip them all” (2.1.137). Escalus however, does not. He listens patiently to Elbow’s confused testimony and allows Pompey the chance to defend himself. Dickinson says of Escalus's adjudication:

In this action he has not used the full rigor of the law as he might have. We are not told directly why, but we know that this is the first time Pompey has been brought before him, that the charges against him are not adequately presented, and, moreover, that the law he is violating is one which only recently has begun to be enforced. Any of these circumstances—all relevant to the individual cases and none covered by the mere statement of the law itself—may justify Escalus' application of equity rather than the full rigor of the law. (295)

The courtroom scene accomplishes several things at once. It identifies the middle ground between the Duke’s laissez-faire approach to justice, and Angelo’s idea that trespassers are “forfeit of the law” (2.2.71), regardless of the circumstances of their wrongdoing. However, although Escalus’s methods appear far more just than either of his superiors, the play suggests that they are not the answer to what plagues Vienna. The Duke, Angelo, and even Escalus
concern themselves with law-breakers, but they fail to closely examine the law itself. A brief glance at some of the criminal activity in the play reveals a couple, who cannot afford to be legally wed, and a pimp and a procuress who are simply trying to make a living in a city where seemingly the only lucrative and legitimate occupations are jailer or hangman. What is perhaps at stake in curing what ails Vienna is not the way in which the law is administered, but the laws themselves, which express no consideration for the realities of the city’s social institutions or its economy.

As it presents the administrative approaches of the Duke, Angelo, and Escalus, the play seems to promote the latter’s equitable adjudication over the Duke’s benevolent neglect or Angelo’s punitive corrections. But equity, functional though it appears, does not work to unsnarl the most stubborn knots of the play. Shakespeare appears to argue that earthly justice must be tempered with mercy, because earthly judges are fallible. Supporting this premise is the idea of equity: the concept that justice should consider particular circumstances, not merely the literal law when meting out punishment. Something unsettling, however, lurks in the equitable resolution of the play. Mercy is inherent in the idea of equity, but in the text of Measure for Measure, mercy is suspect, for it is likely to be as erratic and flawed as the justice it amends. In his study, Shakespeare’s Legal and Political Background, George Keeton reflects on this problem:

That leniency is an evil is apparent from the opening scenes of the play; whilst Angelo’s single-handed effort to enforce the laws to the letter has inflicted unnecessary suffering, has done some good (in suppressing some brothels and imprisoning their proprietors), but has involved the downfall of the judge himself. Further, it has demonstrated that the same crime
may be, according to its circumstances, at once a comparatively venial
offence, requiring a slight measure of punishment, and an outrage for
which even capital punishment is appropriate. (386)

In Escalus’s case, is leniency an evil? We have no indication that his approach has made any real
difference in the moral or civic state of Vienna. Pompey, whom he lets go with a warning,
returns immediately to vice, and Mistress Overdone has appeared not once, but three times in
court. Furthermore, he does little to effect justice on a larger scale—namely, interfering with
Angelo’s brief reign of terror in any significant way, explaining to the Duke that “my brother-
justice have I found so severe, that he hath forc’d me to tell him he is indeed Justice” (3.2.252-
254). Perhaps describing Escalus’s moderation as evil is too harsh, but his judicial impotence
undermines any argument that the play endorses equity as the best possible system of law.

Despite its ameliorative actions, the presence of equity raises as many questions in
Measure for Measure as it resolves. J.H. Baker summarizes the problem as such: “[t]he essence
of equity as a corrective to the rigour of laws was that it should not be tied to rules. If, on the
other hand, no consistent principles whatever were observed, parties in like case would not be
treated alike; and equality was a requisite of equity” (Intro. to Legal History 109). The defect in
this equality is the potential, in the hands of the wrong judge, for a primitive weighing of the
scales, somewhat like what we see in Vincentio’s rulings at the play’s conclusion.

As he prepares to resume control of his city, the Duke declares that a just ruler must
above all, possess self-knowledge, and as a result, “[m]ore nor less to others paying / Than by
self-offenses weighing, / Shame to him whose cruel striking / Kills for faults of his own liking”
(3.2.265-268). This is often cited as a moment of epiphany, the place where Vincentio revises his
relationship to justice. The speech does not seem, however, to be about justice, but rather—about
punishment. The Duke’s manner of righting the wrongs of the action represents a return to the idea of *dike*, and a turning away from mercy. There is a relentless symmetry in his sentencing of each offender, and true to the precepts of retributive justice, his decisions do not take into account the particulars of each case, or the desires of each party. His work is a distorted version of what Escalus has been trying to accomplish. Because equity, at least in the context in which we are considering it, depends upon the character of the judge who dispenses it, it is dangerously violable. The greatest flaw in the system is described by Escalus himself, who (in a disquieting echo of Angelo), admits “Mercy is not itself, that oft looks so; / Pardon is still the nurse of second woe” (2.2.283-284). While the application of equity tempers the extremity of Vienna’s laws, it does not reform them, nor does it restore, in any significant sense, order to its streets.
CHAPTER 5

“Truth is truth”: ISABELLA’S JOURNEY TO JUSTICE

At the close of Measure for Measure, as Isabella kneels with Mariana, we have returned to the idea of sympathy, the sympathy which Nussbaum defines as the ability to trade perspectives with another, and we, like Isabel, are meant to see that sympathy is necessary to truly enact mercy. The introduction to this thesis rejects positioning Measure for Measure in a primarily theological context. We have been talking of justice and crime, and of the ways in which laws are administered, not of sin and redemption. If we see Measure for Measure as an indictment of the separation and the struggle among the ecclesiastical, the common law, and the chancery courts, and Isabel’s character, as a nave—the central place where the spokes of the conflicting legal philosophies of the play come together—her metamorphosis has little to do with Christian redemption and everything to do with a mature vision of secular justice. Isabel’s action, her choice to join with Mariana, fully embodies all of the principles we have been examining: mercy, equity, and the written law, and it shows how these three elements must all be present in a healthy system of justice.

Isabel’s journey begins when she exits her convent in the company of Lucio. When she first appears before Angelo to plead for her brother, she is “[a]t war ‘twixt will and will not” (2.2.32). Although she admits that her brother has committed a crime, one which she “abhor[s]” (2.2.29), she seems to speak on the part of mercy, instructing the judge to imagine himself in Claudio’s place. However, Isabella’s concept is not Nussbaum’s compassionate “judging with”;
it is a world-view which assumes that every human heart is guilty of, at the very least, bad intentions. Nussbaum writes,

to perceive the particular accurately, one must ‘judge with” the agent who has done the alleged wrong. One must, that is, see things from that person’s point of view for only then will one begin to comprehend what obstacles that person faced as he or she acted. (94)

The shift in perspective that Isabel proposes to Angelo is not motivated by a desire that he recognize Claudio’s humanity, for Isabella’s condemnation of her brother is in some ways even harsher than Angelo’s, but instead springs from the notion that he has no right to judge her brother because he himself is not free from sin. What she asks of Angelo on behalf of Claudio is something she herself is incapable of extending to her brother. When Claudio asks her to submit to Angelo’s desires so that his life might be spared, Isabel retorts, “I’ll pray a thousand prayers for thy death, / No word to save thee” (3.1.145-146). Her idea of what should motivate mercy recalls the Duke’s view that “when vice makes mercy, mercy’s so extended, / That for the fault’s love is th’ offender friended” (IV.iii.112-13). Both Isabella and Vincentio pervert the idea of mercy, which should be generated by love and an admission of mutual humanity, not by guilt and the knowledge of a shared vice. For Isabel, at least initially, the quality of mercy is as abstract as the quality of justice is for Angelo. Like Angelo, she is unable to see with other eyes. She cannot conceive of slipping like her brother, and she fails to recognize how Angelo’s rigidity reflects her own.

Throughout most of the play, Isabel clings to the idea that mercy should be given only to the deserving. Her attitude towards crime and punishment reflects those of the Duke and Angelo, respectively. She seems to agree with them that too much freedom is a bad idea, and that
transgressions should automatically result in punishment. Living in a world of moral absolutes, Isabel fails to comprehend how mercy, and more specific to the argument posed by this paper, justice, transcends the imagined boundaries of good and evil. Her limited vision of the possibilities for a merciful justice, or for that matter, a just mercy is revealed when Isabella goes to her brother’s prison cell to explain her unwillingness to trade her virginity for his life. He is understandably dismayed and pleads with her to reconsider. She turns on him in a rage, declaring “O fie, fie, fie! / Thy sin’s not accidental, but a trade / Mercy to thee would prove itself a bawd, / ‘Tis best that thou diest quickly (3.1.147-150). Isabel’s logic is that mercy, like justice, should be granted only to the virtuous. She is not considering Claudio’s intentions, just his actions. When the Friar/Duke takes Isabel to meet Mariana and she learns of Mariana’s betrayal and abandonment at the hands of Angelo, her response is strikingly similar to the declaration she made to her brother: “What a merit were it in death to take this poor maid from the world! / What a corruption in this life that it will let this man live! / But how out of this can she avail?” (3.1.231-34). How indeed, when death is the only solution Isabel can imagine for the trials faced by both her brother and Mariana? Isabel does not yet see that order and harmony are possible through a commitment to earthly justice and by engaging, not removing herself, from the lives, both sinful and virtuous, that intersect her own.

Isabel cannot extricate herself from her own fatalism until she becomes fully involved in her community and fully engaged with the souls that populate it. Not until the close of the play do Isabel’s struggles with the idea of clemency result in a radical transformation. When she kneels with Mariana before the Duke in order to plead for Angelo, it is evident that Isabella has a new understanding of the meaning of mercy and a sense that justice might be served, even in Vienna. Nineteenth-century critic Anna Jameson remarks that in this scene, “Isabella’s
conscientiousness is overcome by the only sentiment which ought to temper justice into mercy, the power of affection and sympathy” (qtd. in Geckle 77). Jameson is only half-right, because Isabel does not seem, at this pivotal moment, overcome by emotion, but rather, in full possession of her wits, which have allowed her to make a reasoned decision about the quality of mercy. At this moment, she has embraced the complexity of human nature, in which virtue and vice are closely intertwined. Robert Bennett argues that Isabel’s decision

[...] to join Mariana against the Duke embraces mercy as a balancing component of fallen nature, mercy as an incorporate element in justice, because in the ever-changing nature of human experience, justice exists in the resolution of contending forces, not in single laws or simple retributive equivalents. (147)

Mercy, Isabel at last understands, involves not merely looking beyond the bad to the good, but fully recognizing the presence of both bad and good in every human being.

At the conclusion of the play, Isabel confronts the Duke with Angelo’s crimes and insists that “truth is truth / To th’ end of reck’ning” (5.1.45-46). Her claim (which strangely echoes Lucio’s “grace is grace”), and her conduct toward the disgraced Angelo reflects an understanding of the law which has been deepened by her experiences outside the convent walls. Isabel’s decision to prostrate herself with Mariana is often figured as the result of the Duke’s manipulating her into an act of generosity, not as an act inspired by her own changed consciousness. But because her words to the Duke reveal a deeply nuanced understanding of a complexly human justice, figuring Isabella as his moral marionette undermines her own hard-won and imaginative response to Angelo’s crimes. To Vincentio she pleads:
Look, if it please you, on this man condemn’d / As if my brother liv’d. I partly think / A due sincerity governed his deeds, / Til he did look on me. My brother had but justice, / In that he did the thing for which he died; For Angelo, / His act did not o’ertake his bad intent, / And must be buried but as an intent / That perished by the way. (5.1.444-53)

Her argument is simple: Angelo intended to commit a crime, but was thwarted. Claudio did commit a crime and was caught. Claudio’s death is unfortunate, but lawful, but to execute Angelo would be wrong, for “[t]houghts are no subjects, / Intents but merely thoughts” (5.1.453-54). This is mercy seasoned with logic, and it is a mercy that does not disregard the law. Isabel’s plea is for a vision of justice that incorporates all of these elements and that refuses to see the multiplicity of life, and the circumstances of those who run afoul of the law with a single eye.
CHAPTER 6

CONCLUSION

Robert Bennett’s words, “justice exists in the resolution of contending forces,” recall the driving argument of Measure for Measure. Shakespeare, through the metaphorical city of Vienna, illustrates the conflicts that raged in the English judiciary and eventually led to dramatic reforms of both the system and its laws. Almost three hundred years later and an ocean away, Oliver Wendell Holmes wrote, “[t]he first requirement of a sound body of law is, that it should correspond with the actual feelings and demands of the community, whether right or wrong” (qtd. in Blount 24) This is at once an attractive and troublesome concept, one which continues to divide considerations of Western justice along the lines described in this work. It is the same concept that turned Europe upside down and paved the way for constitutional democracy and the modern ideal of human rights. We might do well to heed the play’s warning that clinging to a single ideology of justice results in a blindness that is not just—no remedy for a state in turmoil.

Temporally and philosophically, Measure for Measure is located at the crossroads of the primitive and the modern age of law, but the play’s often dark, though ultimately hopeful vision of a system that is struggling, and sometimes failing to achieve a humane, rational means of protecting its subjects, possesses a striking immediacy to the present century’s struggles to define justice in a global context. The argument that the play presents is simple: before we presume to judge another, we must first look deeply within ourselves, and furthermore, think deeply about how we would like to be judged. This act of imaginative communion may perhaps bring us
closest to a justice system capable of engendering transformation and redemption to a world community whose only common trait is being human.
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