



# (Mis)representing Justice on the Early Modern Stage

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*Early modern notions of justice tended to be strongly linked to procedural ideals, casting the state rather than the individual as the guarantor of just order, even if specific officials and systems could be identified as falling short of those ideals. In this essay, I trace some early modern perceptions of the proper means of attaining justice and then explore how those means are represented in the period's drama. As I show, although Renaissance literature's supposedly "intima[te] . . . engagement with the law" has become a critical staple, there is a striking mismatch between the ways justice was done in early modern England and the judicial processes depicted on stage. I offer a number of explanations for why an accurate portrayal of English judicial procedure may have eluded Shakespeare and his contemporaries and delineate the (not necessarily detrimental) consequences of this misalignment for the dramatic representation of justice.*

**F**RANCIS Bacon famously declared that revenge is "a kind of wild justice; which the more man's nature runs to, the more ought law to weed it out." The law's function, to Bacon's mind, appears to be the regulation of justice: it channels what is in nature a source of chaos into a force of order. Conversely, following the private impulse to revenge threatens the very existence of legal structure, "for as for the first wrong, it doth but offend the law; but the revenge of that wrong putteth the law out of office."<sup>1</sup> This strong connection between state institutions and the administration of justice is a constant in Bacon's thought. Elsewhere he argues that "kingdoms and governments are but accessories to justice; for there would be no need of them if justice could be carried on without."<sup>2</sup>

<sup>1</sup> Bacon, *The Essays or Counsels Civil and Moral*, ed. Brian Vickers (Oxford: Oxford University Press, 1999), 10 ("Of Revenge").

<sup>2</sup> Bacon, *Essays*, 150 ("Justice").

In early modern drama, the state is generally figured as playing a similar role in ensuring the just (rather than wild) punishment of perpetrators, even if it regularly fails in carrying out this mandate. Characters receive fair or, more often, unjust treatment at the hands of rulers or low level officials, and corruption among those officials is the most common obstacle to justice, with systemic injustice as a distant secondary cause. However, both such systemic shortcomings and the specific failures of agents operating within a not inherently flawed system imply an alternative institutional ideal of how justice ought to be carried out—officials can only appear corrupt by deviating from an unstated or explicit correct form and attitude, and systems can only appear unjust by failing to correspond to a procedural desideratum that would otherwise ensure a just (if not necessarily individually beneficial) treatment of a case. Put less abstractly, early modern notions of justice tended to be strongly linked to procedural ideals, casting the state rather than the individual as the guarantor of just order, even if specific officials and systems could be identified as falling short of those ideals. In this essay, I will trace some early modern perceptions of the proper means of attaining justice and then explore how those means are represented in the period's drama. As I will show, although Renaissance literature's supposedly "intima[te] . . . engagement with the law"<sup>3</sup> has become a critical staple, there is a striking mismatch between the ways justice was done in early modern England and the judicial processes depicted on stage. I will offer a number of explanations for why an accurate portrayal of English judicial procedure may have eluded Shakespeare and his contemporaries and delineate the (not necessarily detrimental) consequences of this misalignment for the dramatic representation of justice.

#### JUSTICE AND DUE PROCESS

Since the English Middle Ages, the state's ability to do justice has been intimately linked to the observance of legal "due process"—the kinds of formalities, rituals, observances, and prescribed practices that legal actors (lawyers, judges, jury members, accusers, witnesses, and culprits) have to engage in so that justice can be attained. More concretely, in the words of Magna Carta's clause 39,

<sup>3</sup> Subha Mukherji, "'Understood Relations': Law and Literature in Early Modern Studies," *Literature Compass* 6 (2009): 706. Mukherji herself offers a rather more nuanced account of the relationship between early modern literature and law.

No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgement of his equals or by the law of the land. (qtd. from translation available at <http://www.bl.uk/treasures/magnacarta/>)

Process, then, is something both vague and specific at the same time. “The law of the land” is obviously to some extent mutable and historically contingent. In that sense due process might take radically different forms from one century to another, or, in fiction, from one imaginary “land” to another. The second component, however, is far less malleable: the meaning of “lawful judgement of his equals” has remained fairly stable. What the barons imagined as the bedrock of justice in 1215, and what legal thinkers into the seventeenth century and beyond upheld as essential to a fair trial, is the jury—a body of lay judges composed of the culprit’s equals.

Strictly speaking, this claim is somewhat of an oversimplification, but it is almost impossible not to simplify when addressing the staggeringly complex legal system of early modern England. Not all courts used juries, and from the mid-sixteenth century on, if not earlier, a number of minor offenses could even be punished summarily by local justices of the peace.<sup>4</sup> However, most issues of fact, and virtually all criminal matters, were decided by juries. In all serious cases, particularly felonies, trial by “God and country” (or in practice by twelve men) constituted due legal process, and throughout the sixteenth and seventeenth centuries, writers associated the state’s very ability to do justice with the jury system.<sup>5</sup>

Given this intimate connection between jury and justice, it may be puzzling to discover that not a single play written between the opening of the first commercial theaters in the 1570s and their closure in 1642—a period of over seventy years—depicts this kind of trial. This is surprising not just from a legal but also from a dramatic point of view. When early modern English women and men went to the theater, the legal processes that they saw at work in plays often bore a close resemblance

<sup>4</sup> See Thomas A. Green, *Verdict According to Conscience: Perspectives on the English Criminal Trial Jury, 1200–1800* (Chicago: University of Chicago Press, 1985); and John Bellamy, *The Criminal Trial in Later Medieval England: Felony before the Courts from Edward I to the Sixteenth Century* (Toronto: University of Toronto Press, 1998), esp. 93–133.

<sup>5</sup> Cf. Sir John Baker’s assessment that “by the Tudor period nearly all issues of fact in the common law courts were tried by a jury of twelve men” (*The Oxford History of the Laws of England: 1483–1558*, vol. 6 [Oxford: Oxford University Press, 2003], 351).

to those they were familiar with from their everyday lives—justices of the peace, for instance, were stock figures of Renaissance drama.<sup>6</sup> In one sense, it could be argued that playwrights found it difficult to imagine legal proceedings that *did not* follow the English model. When Hieronimo, not just a mad avenger in Thomas Kyd's *Spanish Tragedy* (c. 1587) but also the knight marshal of Spain, encounters three citizens who appeal to him for legal assistance, the exchange is couched in (English) common law terms—one of the citizens wants to bring an action on the case, and all three of them have procured writs to further their legal claims.<sup>7</sup> There is nothing especially "Spanish" about this scene, and the instability of its supposed setting is entirely typical of the way that early modern plays produce a perversely familiar sense of the foreign. But this sense of familiarity, which often takes the place of the expectedly exotic or strange, evaporates almost without fail in scenes in which justice is supposed to be done. The representation of trials on stage universally eschewed the kind of referentiality that we find elsewhere in early modern drama, replacing an English, community-based system of judgment with a largely phantasmatic or at best pseudo-continental summary jurisdiction.

#### WHAT WAS A TRIAL?

Exactly what was a trial in Shakespeare's England? The most intuitive response might be something not all that different from what trials are today: a public tribunal under the oversight of a judge, during which an accusation is leveled against an accused, supported by evidence in the form of testimony, and contested by the culprit, ending in the verdict of a jury. All of those things did indeed take place in early modern English courtrooms, but most of them, surprisingly, were not technically part of the trial itself. As Edward Coke argued in the *Third Part of the Institutes*, "the indictment is no part of the triall, but an information or declaration

<sup>6</sup> For some examples, see Bertil Johansson, *Law and Lawyers in Elizabethan England as Evidenced in the Plays of Ben Jonson and Thomas Middleton* (Stockholm: Almqvist and Wiksell, 1967). For a more analytical perspective, see Lorna Hutson, *The Invention of Suspicion: Law and Mimesis in Shakespeare and Renaissance Drama* (Oxford: Oxford University Press, 2007), 303–46.

<sup>7</sup> Kyd, *The Spanish Tragedy*, in *English Renaissance Drama*, ed. David Bevington, Lars Engle, Katharine Eisaman Maus, and Eric Rasmussen (New York: W. W. Norton, 2002), 3.3.46–128. For play dates I have relied on Alan B. Farmer and Zachary Lesser's excellent *Database of Early English Playbooks* (<http://deep.sas.upenn.edu/>), with exceptions noted as applicable.

for the King"; yet more strikingly, "the evidence of witnesses to the Jury is no part of the triall, for by law the tryall . . . is not by witnesses, but by the verdict of twelve men, and so a manifest diversity between the evidence to a Jury, and a tryall by Jury."<sup>8</sup> The trial itself is entirely the jury's responsibility (consequently, Coke calls its members the "*tryers* of the prisoner"<sup>9</sup>). Trials consisted, strictly speaking, not of the evidence gathered or the accusations made but of their *assessment*.

The significance of Coke's point goes beyond mere technicality. The central place of the jury in the constitution of a particularly English kind of justice is evident everywhere in the early modern literature on legal process. In *De Republica Anglorum* Sir Thomas Smith repeatedly comes back to the "xii men" as one of the factors that crucially distinguish English trials "from the fashion used either in Fraunce, or in Italie, or in any other place where the Emperors lawes and constitutions (called the civill lawes) be put in use."<sup>10</sup> Writing about Chancery, Smith notes that in this court the *usual and proper* form of pleading of England is not used, but the form of pleading by writing which is used in other countries according to the civil law; and the trial is not by twelve men, but by the examination of witnesses as in other courts of the civil law.<sup>11</sup>

"Proper" here has its full range of meanings, from propriety to property: the common law's dense rules of pleading and the public, oral trial in front of a jury are England's *own*, as deeply connected to the land and its history, from time immemorial, as the common law itself. Chancery's adoption of continental process is cast as a profoundly un-English move, improper in every sense.<sup>12</sup> In Smith's distinction between

<sup>8</sup> Coke, *The Third Part of the Institutes of the Laws of England* (London, 1644; Wing C4960), 26–27.

<sup>9</sup> Coke, *Third Part of the Institutes*, 29.

<sup>10</sup> Smith, *De Republica Anglorum* (London, 1583; STC 22857), Hr.

<sup>11</sup> Smith, *Republica Anglorum*, H3v–H4r, my italics.

<sup>12</sup> Peter Goodrich has written persuasively about early modern lawyers' effort to declare "the common law tradition as being radically separate—in geographical, historical, linguistic, and institutional terms—from all other contemporary discourses," particularly those of continental origin; see "*Ars Bablativa: Ramism, Rhetoric, and the Genealogy of English Jurisprudence*," in *Legal Hermeneutics: History, Theory, and Practice*, ed. Gregory Leyh (Berkeley: University of California Press, 1992), 44. On the jury's role in maintaining the distinctions between common law and conciliar or equity law, see Jonathan Woolfson, *Padua and the Tudors: English Students in Italy, 1485–1603* (Toronto: University of Toronto Press, 1998), 61–62. Writing over a hundred years later, Matthew Hale still shared Smith's sense of the jury trial's superiority; see Barbara Shapiro, "*Beyond Reasonable Doubt*" and "*Probable Cause*": *Historical Perspectives on the Anglo-American Law of Evidence* (Berkeley: University of California Press, 1991), 195.

“trial . . . by twelve men” and “examination of witnesses” we recognize Coke’s later separation of trial and evidence: whereas the civil law relies on evidentiary rules (including a certain arithmetic of proof) and in a sense suspends judgment—never properly *trying* the evidence—the common law arrives at verdicts through the twelve men’s consideration of whatever is put in front of them. Continental modes of achieving justice, according to Smith, rely on documents and judges tallying witness statements, whereas England’s own method entrusts judgment to Englishmen; witnesses can help, but they are not necessary as justice is ultimately a matter of individual and collective judgment.

In a similar vein, Chief Justice Popham told Sir Walter Raleigh during his treason trial in 1603 that Raleigh was wrong to say that “the common Trial of England is by Jury and Witnesses”; instead, it proceeds “by Examination: if three conspire a Treason, and they all confess it; here is never a Witness, yet they are condemned.”<sup>13</sup> Popham’s terminology is confusing when juxtaposed with that of Smith and Coke, but “examination” for him clearly is of a different order. What he means by the term seems to be what they mean by “trial”: the process of twelve jurors assessing the credibility of a particular set of charges, whether supported by witness testimony or not.<sup>14</sup> The essence of that process for all these writers clearly rests in an interaction between the jury and the various narratives and observations collected during the arraignment. From that perspective, the real trial might be said to happen off-stage, when the “tryers of the prisoner . . . go to some place to consider of their evidence . . . until they be agreed of their Verdict: & when they are agreed, they all come again into the Court, and take their places.”<sup>15</sup> What defined the common law method of trying cases, then, was not its public nature alone, as vital an aspect as that may have been. It was the semi-private moment when the twelve men of the inquest put the case to the test—made trial of it—before delivering their verdict. If this is what “trial” meant in early modern jurisprudence, however, no English theater ever staged a trial scene before 1642.

<sup>13</sup> T. B. Howell, ed., *A Complete Collection of State Trials . . . from the Earliest Period to the Year 1783*, vol. 2 (London, 1816), 18. See also Baker, *Oxford History*, 361: “A jury in theory needed no formal evidence to support their verdict. . . . the common law did not require any particular number of witnesses to prove a fact.”

<sup>14</sup> For additional discussion on these points, see Hutson (*Invention of Suspicion*, 75–78), especially her discussion of the idea of “boulting out of the truth” (77).

<sup>15</sup> Coke, *Third Part of the Institutes*, 29–30.

## STAGING INJUSTICE

The claim that early modern plays contain no trials at all is, of course, a deliberate exaggeration. For one thing, jury trials were not the only form of judicial tribunal known to sixteenth-century audiences. As we have already seen, justices of the peace had summary jurisdiction for certain minor offenses and trespasses; the equity and conciliar courts, Chancery, Star Chamber, and a multitude of local and specialized institutions did not use juries. And yet, the most immediately English form of justice, that most proper to the common law, was trial by "God and Country"—and it is that mode of procedure that early modern playwrights unflinchingly avoided in their representations of scenes of justice.

One might argue that the reason for this absence is that the majority of staged trials take place abroad and often in the past: *Sejanus's Rome*, the "Jewry" of *The Jewes Tragedy*, *Measure for Measure's* Vienna, *Chabot's* France, and the Florence of *The White Devil*, to name a few. But it is impossible to know if this is a cause or a symptom, if playwrights considered foreign judicial procedures more suited to dramatic representation or if they chose foreign settings, often of the most amorphous kind (how Viennese exactly is William Shakespeare's Vienna?), because they felt uncomfortable portraying English trials.

It is certainly true that the judicial scenes in plays set "abroad" generally reflect critically on the distinctions between English and continental legal customs. In many of those plays we find an association of summary, especially royal jurisdiction with judicial arbitrariness. Think, for instance, of the Viceroy of Portugal in *The Spanish Tragedy* (1587), quick to condemn Alexandro to death on the basis of Villuppo's unsubstantiated report and without letting the accused speak (1.3.59–92). Kyd's play, however, can hardly be said to offer delegation of judicial power as a particularly convincing alternative (this seems to be the system in Spain, where Hieronimo as knight marshal is supposed to oversee the administration of justice—a system much closer, as we saw above, to the situation in England than to the Spain of Kyd's day). "Foreign" scenes of judgment frequently lack the essential probing quality of English trials. They precisely fail to "try" anything, generally reach conclusions predictable from the start, and make little effort to render convictions convincing. *The White Devil* (1612),<sup>16</sup> in which judge and prosecutor are

<sup>16</sup> John Webster, *The White Devil*, in *English Renaissance Drama*, ed. Bevington et al., 3.2. *The White Devil's* trial scene has generated a range of important interpretations, some of which are relevant for my argument here; see, in particular, Subha Mukherji, who sug-

the same person, is an obvious example, as is George Chapman and James Shirley's *Chabot, Admiral of France* (1622/35). In that play a corrupt king's corrupt chancellor forces two judges to sentence the eponymous hero to death after a trial during which the same judges declared all charges either invalid, insubstantial, or meaningless.<sup>17</sup> Injustice here is positively aided by the private nature of the trial as well as by the fact that the verdict rests in the hands of two legal professionals: the "country" is explicitly excluded from proceedings, at least to the extent that "country" metonymically refers to the people rather than to the monarch.

Arbitrary decisions remain a regular feature of foreign judicial processes even in comedies, where it often takes equally arbitrary events to prevent the worst. Thus, in John Fletcher and Philip Massinger's *The Lovers' Progress* (1623/34),<sup>18</sup> Caliste is narrowly saved by Lisander's entry from the King's personal justice; notably, the royal judge subsequently leaves the sentencing of the play's villains, the perjured conspirators Clarinda and Malfort, to "the criminall judge" (Mmm3r). In Fletcher's *Queen of Corinth* (1617), the facts of the case at hand—a double rape—are never investigated at all, as the "trial" centers on the question which of the two victims should be granted her desired retribution.<sup>19</sup> The common theme in these plays (others include *Two Merry Milk-Maids* [1619], Robert Davenport's *The City-Night-Cap* [1624], *Dick of Devonshire* [1626], and Shirley's *Arcadia* [1640]) is that while the innocents are ultimately spared, the happy resolution comes about *in spite of* an inadequate system of justice rather than because of it.

Since judicial corruption and summary jurisdiction are so closely linked in the "foreign" plays, it is not surprising that few of them feature markedly just, let alone perceptive judges. In *Volpone* (1606), the court with its questionable *Avocatori* can't take much credit for the detection

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gests, mistakenly to my mind, that the presence of the foreign ambassadors at Vittoria's trial "carr[ies] overtones of the procedures of trial by peers in early modern England" (*Law and Representation in Early Modern England* [Cambridge: Cambridge University Press, 2006], 148); and Luke Wilson, "The White Devil and the Law," in *Early Modern English Drama: A Critical Companion*, ed. Garrett A. Sullivan, Jr., Patrick Cheney, and Andrew Hadfield (Oxford: Oxford University Press, 2006), 225–36.

<sup>17</sup> Chapman and Shirley, *The Tragedie Of Chabot Admirall Of France* (London, 1639; STC 4996), E1r–E4v.

<sup>18</sup> Fletcher and Massinger, *The Lovers Progress*, in Francis Beaumont and John Fletcher, *Comedies and Tragedies* (London, 1647; Wing B1581), Iii4r–Mmm3v. Subsequent citations will be noted parenthetically.

<sup>19</sup> John Fletcher, *The Queene of Corinth*, in Beaumont and Fletcher, *Comedies and Tragedies*, Aaaaaa1r–Ccccc4r.

of Volpone and Mosca's scam;<sup>20</sup> and the same is true of the judges in Cyril Tourneur's *Atheist's Tragedy* (1609).<sup>21</sup> These plays almost universally imply that the absence of a jury is a predicament and a serious obstacle to justice. Judges emerge as poor triers of fact, no matter how qualified they are as legal experts, and trial by legal professionals is implicitly cast as distinctly inferior to trial by God and country.<sup>22</sup>

At the same time, the apparent fundamental distinction that these texts maintain between English and all other systems of justice does not prevent a degree of cross-pollination, as we already saw in the case of *The Spanish Tragedy*. On the contrary, the very difference between systems enabled the occasional construction of intriguing parallels and oblique commentary. In William Hemminges's *The Jewes Tragedy* (1626),<sup>23</sup> set in ancient Palestine and Rome, we discover that

It was, and is the custom 'mongst the *Jews*,  
That the Delinquent, how e're guilty, yet  
He fairly should enjoy the priviledge  
Of his Accusers opposition,

(sig. B3v)

a right as cherished in seventeenth-century England as in Hemminges's "Jewry." The court's response to Iehochanan's demand, however—and this is a considerably less predictable twist—also follows English trial practice: his request is "grant[ed]" but that does not lead to the appearance of witnesses; instead, the high priest commands a clerk to "Read their Accusations" (B4v), and both prisoners accept this as an adequate alternative to face-to-face confrontation.<sup>24</sup> Chapman's *Tragedy of Byron* (1608)<sup>25</sup> uses a similar parallel to rather different ends. The protagonist's

<sup>20</sup> Ben Jonson, *Volpone, or The Fox*, ed. Brian Parker, rev. ed., Revels Plays (Manchester: Manchester University Press, 1999), 4.5–6, 5.10, and 5.12.

<sup>21</sup> Tourneur, *The Atheist's Tragedy*, ed. Brian Morris and Roma Gill, New Mermaids (London: Ernest Benn, 1976).

<sup>22</sup> The issue is complicated by the contrast between common law and equity, or equity and "justice," which, as generations of critics have established, underwrites many scenes of judgment in the period's drama. See Mark Fortier, *The Culture of Equity in Early Modern England* (Aldershot: Ashgate, 2005).

<sup>23</sup> Hemminges, *The Jewes Tragedy* (London, 1662; Wing H1425). Subsequent citations will be noted parenthetically.

<sup>24</sup> As I argue at great length elsewhere, the reading out of pretrial examinations and confessions could replace live witnesses in early modern criminal trials as well; see my *Theatre and Testimony in Shakespeare's England: A Culture of Mediation* (Cambridge: Cambridge University Press, 2011), chapters 1 and 2.

<sup>25</sup> George Chapman, *The Conspiracie, and Tragedie of Charles, Duke of Byron* (London, 1608; STC 4968). Subsequent citations are noted parenthetically.

treason trial is constructed as a mirror image of the traditional English procedure for arraigning peers as outlined in Coke's *Third Part of the Institutes*, including the removal of the prisoner from the court during deliberations.<sup>26</sup> However, as the French peers refuse to participate in Byron's arraignment (see O3v), the trial goes ahead without a jury and moves, apparently inexorably, to its "plotted iudgements" (Q3r). In a sense, then, the procedure holds the potential for fairness (to the extent that it resembles the English process) but loses that potential in its realized, perverted, un-English, and juryless form. Chapman's play, like Hemmings's, also dramatizes a moment of face-to-face confrontation and in that moment seems to problematize the question of how witness testimony attains credibility. Byron is persuaded to confirm that La Fin, a witness that the court (unbeknownst to him) has waiting in the wings, is a credible and honest man, only to see him brought in to deliver his statement incriminating Byron (see P2r). The issue in the play is not so much whether La Fin is in fact honest but that the only way that his testimony can be verified is through a quasi-objective confirmation of his general credibility. Beyond that, the witness's words need not be assessed at all: in the absence of a jury, the Chancellor can conclude that the charge has been "prou'd" "by witnesses [and] His letters and instructions" (P4v). In other words, the French mode of judicial truth-finding to which *Byron* ultimately reverts is by witness—as indeed it was<sup>27</sup>—not by trial. The play thus doesn't attack the value of testimony as such, but implicitly insists on the need for a particular procedure, the kind of procedure in place in England, for putting testimony to the test.

The representational arsenal of early modern drama was clearly well suited to critiquing judicial systems that fail to follow common law procedure and as a consequence fail to produce just verdicts.<sup>28</sup> But whereas

<sup>26</sup> The arraignment of the Duke of Buckingham (based on Edward Stafford, 3rd Duke of Buckingham) in Shakespeare and Fletcher's *All is True* also follows that procedure and is reported rather than staged.

<sup>27</sup> See John Langbein, *Torture and the Law of Proof: Europe and England in the Ancien Régime* (Chicago: University of Chicago Press, 1976); and Andrea Frisch, *The Invention of the Eyewitness: Witnessing and Testimony in Early Modern France* (Chapel Hill: North Carolina Studies in the Romance Languages and Literatures, 2004).

<sup>28</sup> Again, the exact relationship between this notion of justice and equity could be explored further. For instance, one might argue that in the trial (if that is what the encounter between Shylock and Portia constitutes) in *Merchant of Venice*, strict justice is defeated by fair equity (although it is by no means clear that Portia really stands for the latter); at the same time, the very haphazardness of the outcome seems to suggest that the kind of tribunal envisioned there, where the verdict inevitably lies in the hands of one judge (first the Duke, then Portia), is inherently flawed.

vivid scenes of injustice in action were common on Elizabethan and Jacobean stages, those same theaters seem to have been incapable of portraying the indigenous and positive counterpart to foreign injustice: common law trials leading to truthful outcomes. Justice in its most English form could be discussed in the drama of the period, but it was never shown in the moment of its administration. Constantly alluded to as judicial arbitrariness's righteous other, intimately associated with an autochthonous English legal identity, it yet inevitably eluded the playwright's grasp. Like the peers at Byron's arraignment, juries on the early modern stage refuse to show up for the trial.

There is a single, satirical exception to this observation. In the anonymous *Swetnam the Woman-hater Arraigned by Women* (1618),<sup>29</sup> a jury of sorts returns a guilty verdict. The play features three trial scenes: two in which the case is decided by a pair of judges, neither of which yields just results, and one, the mock-arraignment of Misogynos *alias* Swetnam, which is modeled, at least superficially, on a London court. The two summary tribunals are marked by precisely that inability to "try" the facts of the case that I traced above. As the first judge opens the case against Leonida and Lisandro, he announces that

Th'offence wherewith you both stand tax'd withall,  
 Appeares so *manifest* in grosse, that now  
 We need not *question* all particulars  
 In publique here.

(D3r; my italics)

Putting the charges against the prisoners to the test is expressly not the purpose of the procedure. By contrast, Swetnam's trial by a court of women follows the common law model in some detail. Roles are assigned:

Madame, we make you  
 Ladie Chiefe Iustice of this Female Court,  
 Mistris Recorder, I. *Loretta*, you,  
 Sit for the Notarie: *Crier*, she:  
 The rest shall beare inferior Offices,  
 As Keepers, Seriants, Executioners.

(I4r)

And as is proper, a jury is empanelled: "Mother, goe you and call a Iurie full, / Of which y'are the fore-woman" (I4r). Formal procedure

<sup>29</sup> *Swetnam, the Woman-hater, Arraigned by Women* (London, 1620; STC 23544). All subsequent citations will be noted parenthetically.

is followed ("Clarke of the Peace, / Reade the Indictment" [I4v]) and the prisoner is commanded to plead. Following Swetnam's astonishing "not guilty" plea, the court produces "firme Euidence" (K1r) in the form of the woman-hater's books, whose titles are read out and whose authorship is confirmed by Swash, Swetnam's manservant. The only slight wrinkle is that the jury, which consists of just "*two Old Women*" (my italics), declares its emphatic verdict of "Guiltie, guiltie, guiltie" (K1r) *before* the evidence is entered. Atlanta, "Mistriss Recorder," finally passes sentence at the end of the tribunal. It is Swash, the only man present apart from Swetnam, who makes the single major effort to contravene common law process in his suggestion to let the prisoner "be gag'd still: / Then you are sure what e'r you say to him, / He cannot contradict you" (I4r), but the female "officials" ignore him and grant Swetnam the right to defend himself in court. The play seems to suggest that it is the *form* of the final trial that allows it to produce a just outcome,<sup>30</sup> whereas the first two tribunals were inherently and structurally flawed—possibly because, as Aureus says, the second trial of Leonida and Lisandro incongruously unites "Equitie and Iustice" (E3r). The women's procedure is imperfect, to be sure—and significantly, imperfect precisely in its use of the jury—but it is also such an improvised, imitative, and mocking affair that perfection ought not to be expected. However, its approach to the case as a question yet to be decided, as an issue in need of corroboration, and the fact that it at least gestures toward the jury as the proper institution to determine the credibility of the evidence produced, combine to make this trial, perhaps perversely, the closest that any stage trial comes in the period to representing the common law's way of doing justice.<sup>31</sup> But *Swetnam the Woman-hater*, despite its deep involvement in the polemical exchange triggered by the real-life Swetnam, is not set in England: its main plot derives from Spanish romances, and it takes place in a Sicilia not entirely unlike that of *The Winter's Tale*. Common law procedure, therefore, functions less as

<sup>30</sup> Cf. *The Atheist's Tragedy*, where the French "form of law" (5.2.225) directly leads to an unjust execution that is only avoided when the real villain, D'Amville, accidentally brains himself and confesses as he lies dying.

<sup>31</sup> The rhetoric of legal proceedings marked the entire polemical exchange between the real-life Swetnam and his female antagonists: Swetnam's own misogynist pamphlet, titled *Arraignement of Lewd, idle, forward and unconstant women*, was answered, among others, by Ester Sowernam's *Ester hath hang'd Haman*, which promised to "arraigne him" "at the same barre where he did vs the wrong" (quoted in Betty S. Travitsky, "The Possibilities of Prose," in *Women and Literature in Britain, 1500–1700*, ed. Helen Wilcox [Cambridge: Cambridge University Press, 1996], 246–47).

a marker of nationality in this play than as an abstract signifier of judicial righteousness.

#### UNSTAGEABLE JUSTICE

Abstraction remains a key characteristic of legal procedures in plays set in England—the *notion* of trial by jury informs more than a few plays, but it never manifests itself in concrete form on stage. For one thing, even in cases where a proper criminal trial is implied, the arraignment itself is often simply bypassed. Thus, in William Rowley, Thomas Dekker, and John Ford's *The Witch of Edmonton* (1621)<sup>32</sup>, we see Elizabeth Sawyer's arrest (5.1.77–83), but we do not encounter her again until her execution (5.3.20 SD). More interestingly, the second scene of the wildly collaborative *Book of Sir Thomas More* (c. 1593/1603)<sup>33</sup> opens with a stage direction detailing an elaborate recreation of a London courtroom:

An arras is drawn, and behind it, *as in sessions*, sit the Lord Mayor, Justice Suresby, and other Justices, [and the Recorder], Sheriff More and the other Sheriff sitting by. Smart is the plaintiff, Lifter the prisoner at the bar. (2.0 SD; my italics)

However, the courtroom scene does not begin until *after* the cutpurse Lifter “hath been tried; the jury is together” (2.5). The verdict is delivered a little later not by the foreman but by the Recorder, who commands the culprit to “stand to the bar. / The jury have returned thee guilty; thou must die” (150–51). This scene is remarkable for its attention to detail<sup>34</sup>—following Lifter's sentence, the officials collect money for the burial of poor prisoners (153–56); the Lord Mayor is portrayed as presiding over a court occupied with “weightier business” (1) and joins the cutpurse's trial when it is almost over; and the setting itself is a credible version of London's special criminal jurisdiction, in which gaol de-

<sup>32</sup> Rowley, Dekker, and Ford, *The Witch of Edmonton*, in *Three Jacobean Witchcraft Plays*, ed. Peter Corbin and Douglas Sedge, Revels Plays (Manchester: Manchester University Press, 1986), 143–209.

<sup>33</sup> Anthony Munday, Henry Chettle, Thomas Dekker, William Shakespeare, and Thomas Heywood, *Sir Thomas More*, in *The Oxford Shakespeare: The Complete Works*, ed. John Jowett, William Montgomery, Gary Taylor, and Stanley Wells, 2nd ed. (Oxford: Oxford University Press, 2005), 813–42. I follow the dates for the original and revised versions of the play proposed by Scott McMillin, in *The Elizabethan Theatre and “The Book of Sir Thomas More”* (Ithaca, NY: Cornell University Press, 1987).

<sup>34</sup> A certain kind of scenic realism is a characteristic of the play as a whole and was probably one of the reasons that Edmund Tilney, the Master of the Revels, demanded so many changes.

liveries were held at least five times a year at the Old Bailey, before the mayor or the recorder and “some or all of the common-law judges.”<sup>35</sup> The absence of the jury is masked, to a degree, by the scene’s placement between arraignments, but the awkward delivery of the verdict marks a breakdown of the play’s apparent realism—as Coke noted, *noblemen* were informed of their peers’ judgment by the lord steward after it had first been publicly rendered in the prisoner’s absence, but “in the case of another subject . . . the verdict is given in his presence.”<sup>36</sup> The play thus shows Lifter being treated, incongruously, like a lord.<sup>37</sup>

In its shift from a close representation of actual judicial practice to a theatrical fiction of legal process, *Sir Thomas More* provides an illustration of a pervasive paradigm. Plays like it, English histories and domestic tragedies drawn from sensational murder cases, repeatedly perform exactly that kind of maneuver, gesturing toward procedural realism only to withdraw their promise as soon as the moment that Coke defines as the trial proper is about to arrive. Given the general investment in the common law trial as the guarantor of justice that I traced above, these undelivered mimetic promises prove particularly problematic in didactic tragedies like the anonymous *Warning for Fair Women* (1599), where the action culminates in a climactic trial scene meant to affirm the villains’ guilt and drive home the play’s moral message (crime doesn’t pay; murder will out, if necessary by quasi-miraculous means). The very attention that those plays pay to the details of criminal prosecutions and the judicial process detrimentally foregrounds their eventual lapse in representational rigor once the prisoners’ arraignments get under way.

Like *Arden of Faversham*, *Warning* stages a series of scenes of detection, reducing the investigation of the murder of the London merchant George Sanders to a sequence of revelations (first descriptions of George Browne, the suspect, are matched to descriptions of the mur-

<sup>35</sup> Baker, *Oxford History*, 285; see 278–89 for London’s intricate system of courts. The capital had no justices of the peace, whose functions were taken over by the mayor and aldermen.

<sup>36</sup> Coke, *Third Part of the Institutes*, 30.

<sup>37</sup> The same thing happens in *Arden of Faversham* (1591), where the Mayor announces the sentences handed down—one assumes—by an offstage court: “listen to the sentence I shall give: / Bear Mosby and his sister to London straight, / Where they in Smithfield must be executed; / Bear Mistress Arden unto Canterbury, / Where her sentence is she must be burnt; / Michael and Bradshaw in Faversham must suffer death” (*Arden of Faversham*, in *English Renaissance Drama*, ed. Bevington et al., 18.27–32). Subsequent citations will be noted parenthetically.

derer; then Browne is identified by a miraculously surviving victim).<sup>38</sup> These scenes lead up to Browne's trial in the court of King's Bench and are full of specific procedural details—for one, as Browne is being “conveyd / To the Justices of the Bench at Westminster,” a “Gentleman” is sent along to “take in writing his confession” (H3v) following sixteenth-century judicial practice. As careful as the play is in constructing the machinery of justice, however, it also falls short of its own goals: the stage direction opening the trial scene has “some” enter “to prepare the iudgement seat to the Lord Maior, Lo. Iustice, and the foure Lords, and one Clarke, and a Shiriff” (H3v). Browne was in fact tried in King's Bench,<sup>39</sup> but the court described here is something else altogether, despite the reference to “the [King's] Bench at Westminster.” Judging from its personnel, so carefully enumerated by the playwright, it is the same court that *Thomas More's* Lord Mayor had just left at the beginning of that play, London's own gaol delivery sessions at the Old Bailey.<sup>40</sup> More importantly, the text is careful to clarify why there is no jury on stage, clearly mindful that its absence is potentially troubling: as the Lord Justice explains, “Master Shiriff ye shal not need to returne any Jury to passe upon him, for he hath pleaded guiltie, and stands conuict at the barre attending his iudgement” (H4r). Browne's arraignment is in fact no trial at all: his confession condemns him. Following the pronouncement of Browne's death sentence, however, Anne Sanders and Anne Drurie, indicted as accessories to the murder, are brought in. They both plead “not guiltie” and ask to be tried in the correct formula, “By God and by the Countrey” (Iv).<sup>41</sup> A few lines earlier, the Lord Justice had commanded the Sheriff to “prepare / Your Jurie readie” (Ir), but now, when called for, no one appears: the country is a no-show. The insis-

<sup>38</sup> Anon., *A Warning for Faire Women* (London, 1599; STC 25089), G1v–H1v.

<sup>39</sup> See Arthur Golding, *A Briefe Discourse of the Late Murther of Master George Sanders* (London, 1573; STC 11985), A4v. For critical commentary on the play and its relationship to the real-life case, see Joseph H. Marshburn, “‘A Cruell Murder donne in Kent’ and Its Literary Manifestations,” *Studies in Philology* 46 (1949): 131–40; Lena Cowen Orlin, *Private Matters and Public Culture in Post-Reformation England* (Ithaca, NY: Cornell University Press, 1994); Katherine Craik, “Shakespeare's *A Lover's Complaint* and Early Modern Criminal Confession,” *Shakespeare Quarterly* 53 (2002): 437–59; and most recently, Mukherji, *Law and Representation*, 95–134.

<sup>40</sup> In this instance, the tendency of London playwrights to imagine all criminal courts as analogous to the London sessions (as in *Swetnam*, where Atlanta's “Mistriss Recorder” has the same function as the Recorder in *More*) distorts the very authenticity that the play strives to achieve.

<sup>41</sup> Another historical inaccuracy, though doubtless committed for the sake of theatrical expediency occurs when the two women are tried in the Guildhall almost three weeks after Browne's trial (Golding, *Briefe Discourse*, B1v).

tence on an accurate representation of judicial ritual on which the entire scene seemed to turn up to this point—the use of the right phrases, the attempt to get the personnel right, the reading of two indictments at full, anti-dramatic length—suddenly evaporates here to be replaced with the kind of rhetoric familiar to summary jurisdictions: “Fie mistress Sanders, you doe not wel, / To vse such speeches, when ye see the case, / Is *too too manifest*” (Iv), Lord tells one of the prisoners, replacing “trial” and its associations of skepticism and analytical rigor with the language of apparent, always-already predetermined guilt that might be more suitable to the kind of (continental) tribunal that Chapman depicted in *Byron*. After a brief confrontation between Sanders and the crown’s only witness, Roger Clement, the Lord Justice reports various other charges against her that are “thought” (I2r) to be valid and then summarily moves, without offering either woman the chance to respond or the announcement of a jury verdict, to pronounce their sentence: “to be briefe, / You shal be carried . . . / Unto the place of execution, where / You shal al three be hang’d til you be dead” (I2v).<sup>42</sup>

What *Warning for Fair Women* eschews, despite its ostensible realism, is any moment of deliberation: whereas in *Thomas More* we are at least told that a jury is making its decision off stage, in this play a carefully created atmosphere of common law trial stands in stark contrast to the tribunal with which we are ultimately presented. No matter how much early modern plays might foreground a tone of realism and faithful adherence to actual legal procedure in their English judicial scenes, they ineluctably revert to summary jurisdiction in the end.

#### THE AUDIENCE AS JURY?

One explanation for the absence of onstage juries is that the period conceived of the theater itself as following the structure of a quasi-legal process, with the audience adopting the part of the jury. Joel Altman, Phyllis Rackin, and more recently and with remarkable erudition Lorna Hutson have posited that the audience plays the jury’s role in the early modern theater: witnessing some of the crimes, and hearing some of the evidence, theatergoers were encouraged to engage in probabilistic thinking and pass moral judgment.<sup>43</sup> But this parallel breaks down in

<sup>42</sup> The third culprit is Roger Clement himself, who was included in the indictment but only features in the scene as a witness.

<sup>43</sup> See Altman, *The Tudor Play of Mind: Rhetorical Inquiry and the Development of Elizabethan Drama* (Berkeley: University of California Press, 1978), esp. 280–82; Rackin, “The

a number of ways. For one thing, while early modern jurors doubtless made moral judgments, their primary task—and in strict legal terms, their only task—was to determine the facts of a case, to assess whether the narrative offered by the indictment and borne out by the evidence marshaled in its support appeared credible. Theater audiences rarely find themselves in such a position. Unlike juries, spectators do not “try” the facts of a play, even if some plots deliberately blur the line between truth and lies. (Is old Hamlet a ghost or a demon? Was Hermione unfaithful?) While some plays might plant seeds of doubt along the way, resolutions tend to be fairly clear, at least on the factual level: in the end, there is little question that Claudius did kill Hamlet’s father, that Iago was behind the machinations of *Othello*, that Desdemona was faithful, that Cassio was set up, and that Leontes was wrong. But more importantly, even where doubts remain (how much did Gertrude really know? Do the weird sisters see or shape the future?), whatever an audience thinks will not change the outcome of the play. “We” might be convinced that Hamlet’s mother was an accessory to his father’s murder or “we” might believe her to be innocent, but either judgment is extrinsic to the play itself, even in the early modern theater (although it might have been more likely to find audible expression there). Unlike a jury’s verdict, which forms an integral part of the judicial process, the audience’s verdict is of economic and aesthetic importance but not part of the performance in the same sense—unless it is delivered by the citizen’s wife from *Knight of the Burning Pestle*. Put more concretely, a jury in the case of *R. vs. Gertrude of Denmark* may conclude that the queen is guilty of conspiracy to murder and pass a verdict leading to her execution, thus participating in the plot of Gertrude’s life (and death). An audience watching *Hamlet* may be persuaded that Gertrude is innocent and consequently (though not necessarily) find her death an inappropriate dramaturgical choice, but the queen will die no matter what her spectators think. While certain factual questions, then, remain open to debate in early modern (or any other) plays, the audience never plays the participatory role on the level of the plot that juries play in trials.

It is true, of course, that spectators are frequently apostrophized in terms evoking notions of judgment in early modern prologues and epilogues.<sup>44</sup> But they are not called upon to assess the veracity of the narra-

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Role of the Audience in Shakespeare’s *Richard II*,” *Shakespeare Quarterly* 36 (1985): 262–81; and Hutson, *Invention of Suspicion*, passim, but esp. 69–70.

<sup>44</sup> See Leo Salingar, “Jacobean Playwrights and ‘Judicious’ Spectators,” *Renaissance Drama* n.s. 22 (1991): 209–34.

tive; they are asked to deliver a (kind) verdict on the worth of the play. Audiences in the theater are like audiences at trials: crucially important as witnesses to the respective representational activities of stage and court but not active participants in the sense that their judgment matters on the level of the plot. A theater audience's jeering or applause does not alter the course of a play, though it may end it. Spectators shutting down a show that they dislike still play their part, albeit in a radical fashion; but members of the audience who storm onto the stage to declare, say, that Hermione is innocent, mistakenly cross over from the world of the theater into the world of the play. They do not pass judgment—they interrupt the scene.

If audiences are supposed to assess the merits of a play, they therefore necessarily need to remain outside it. Even when they judge characters, they do not judge them from the same plane as other characters in the play might; instead they pronounce from without. Significantly, none of this entirely dissolves the similarity between theaters and courts of law, since in all of these regards, theater spectators are like audiences at a trial, who also assess the moral validity of the proceedings (whether the trial as a whole followed legal process and thus harnessed the process's power to do justice). Still, they do not interfere with the jury's verdict. While that does not make their function less important in the bigger picture—it is clear, for instance, that the crown was concerned with public opinion after the treason trials of both Robert Devereux, Earl of Essex and Raleigh, issuing printed reports of the proceedings that attempted to recreate the narratives constructed in court and detailing their evidentiary basis—the kind of judgment passed by audiences is clearly distinct from the judgment of a jury or a judge, always at one remove from the fact-finding activities of the trial itself. It is true that justice was a highly participatory process in early modern England, but audiences, in courtrooms or theaters, were witnesses to that process rather than immediate actors in it. Trials were public to ensure that “so manie as will or can come so neare as to heare it”<sup>45</sup> could watch and note that prisoners were in fact tried and not simply sentenced.<sup>46</sup> But

<sup>45</sup> Smith, *Republica Anglorum*, M1r.

<sup>46</sup> Hutson has recently emphasized the participatory nature of English trials in a determined effort to highlight the inapplicability of the Foucauldian model of *Discipline and Punish*, derived as it is from continental sources, to England; in addition to her *Invention of Suspicion*, see also “Rethinking the ‘Spectacle of the Scaffold’: Juridical Epistemologies and English Revenge Tragedy,” *Representations* 89 (2005): 30–58, and “Noises Off: Participatory Justice in *2 Henry VI*,” in *Shakespeare and the Law*, ed. Karen Cunningham and Constance Jordan (Basingstoke: Palgrave Macmillan, 2007), 143–66.

being present at someone's arraignment does not endow one with the authority of a trier of fact, regardless of whether it offers an opportunity to judge the propriety of the proceedings.

#### EXPLAINING THE ABSENCE

If the audience, then, could not take the jurors' place, why were there no onstage juries? I would suggest three possible explanations. For one, although the theater of the period thrived on its power to approach actuality asymptotically, conjuring up imaginary worlds and characters largely through words alone, actors as much as audiences were anxiously aware of the danger that representation might slip into reality. The numerous anecdotes of extra devils appearing during productions of *Doctor Faustus* are one symptom of that anxiety; another can be traced through incidents like the draconian fining of the players who, at the Fortune in 1631, "se[t] up an altar, a bason, and two candlesticks, and bow[ed] down before it upon the stage."<sup>47</sup> Putting a jury on stage, actually mimicking a full-scale common law trial, might simply have come too close to the real for comfort. In the course of the sixteenth century, English trials had become more and more like theatrical performances in their reliance on scripted speech acts: depositions had come to play an increasingly important role, but since they could not be entered into evidence in their material, written form, they had to be produced orally by the court clerk's ventriloquizing of absent witnesses' voices in court. Staging that process would have come dangerously close to revealing the shared logic of (fake) theater and (necessarily authentic) law.<sup>48</sup> Such a reading, however, follows perhaps rather too happily the old new historicist paradigm of subversion and containment—the theater gets preciously close to unveiling the inherent theatricality of justice but pulls back just in time.

A differently historicized account might be grounded in theater history, finding its answer in a combination of economic and dramaturgical factors. For one thing, the mere presence of twelve extra characters during a trial would almost certainly have involved hiring a large number of actors to play those mutes—likely an unconscionable expense. If the jury were to be presented in more detail, even more costly extra bit

<sup>47</sup> Andrew Gurr, *Playgoing in Shakespeare's London*, 2nd ed. (Cambridge: Cambridge University Press, 1996), 257. See also Gary Taylor, "Divine [ ]sences," *Shakespeare Survey* 54 (2001): 13–30, esp. 18–19.

<sup>48</sup> For an extended version of this argument, see my *Theatre and Testimony*, chapter 3.

players would have been needed. A purely economic argument would not be enough, however. It only really applies to single playing companies and not as clearly to multi-company conglomerates, like those formed by the Queen's Men and Sussex's Men in 1593, and maybe by the Admiral's and Lord Chamberlain's Men in 1594; or the group that performed Jonson's *Bartholomew Fair* at the Hope in 1614, an amalgamation of the Lady Elizabeth's Servants and the Children of the Queen's Revels.<sup>49</sup> Such larger troupes could presumably have staged jury scenes relatively easily. The hypothesis also cannot explain why there are no juries in dramatic texts written for noncommercial performers, such as masques or academic plays, or in plays not intended for performance at all, like closet drama. That said, early modern drama developed as a medium for relatively small companies, with maybe no more than twelve or fourteen regular members even in the 1590s. Scenes with a larger number of clearly specified characters are rare, even if lists of *dramatis personae*, which could rely on doubling practices, were often much more capacious. It is possible that dramatists and players simply had not yet begun to invent the dramaturgical techniques necessary for staging a scene with twelve or more speakers. Even as crowded and dense a scene as the finale of *Cymbeline* caps out at eleven speaking roles. Consider Jonson's *Every Man Out of His Humour*, which, among other densely populated moments, features a central encounter between most of its characters set in St. Paul's:<sup>50</sup> despite the large number of actors on stage (at various times, between eleven and fourteen), the focus of the scene tends to be on no more than three or four speakers, with the others milling about mutely. Such scenes orchestrate a series of shifts of attention from one small group to another, but they do not accomplish the task of keeping focus on a group of a dozen characters at the same time. The idea of representing twelve supposed equals deliberating simultaneously may simply have been beyond what early modern playwrights would consider within their art's capacity. Then again, this argument really only applies to a jury imagined as engaged in deliberations; the mere representation of a body of twelve jurors listening to evidence would not seem to require any kind of remarkable dramaturgical effort.

<sup>49</sup> See R. A. Foakes, ed., *Henslowe's Diary*, 2nd ed. (Cambridge: Cambridge University Press, 2002), 21; and E. A. Horsman, ed., *Bartholomew Fair*, Revels Plays (Manchester: Manchester University Press, 1979), xxix.

<sup>50</sup> Jonson, *Every Man Out of His Humour*, ed. Helen Ostovich, Revels Plays (Manchester: Manchester University Press, 2001), 3.1.

While the larger question of why there are no juries at all remains a puzzle, then, yet another historical context might provide a further explanation for why no trials in the technical sense traced above can be found in early modern plays. For this, I return to Coke's *Institutes*. As we saw earlier, Coke figures the real trial taking place behind closed doors, after the "tryers of the prisoner . . . go to some place to consider of their evidence." And there is a reason for that privacy—disagreement. Privacy trumps publicity "until they be agreed of their Verdict," but "when they are agreed, they all come again into the Court, and take their places"—return, that is, to the procedural openness, accessible to all, so central to the common law courts' legitimacy. In other words, once the jury came back into the courtroom with a unanimous verdict, whatever disputes might have taken place behind closed doors remained there, replaced with the conclusive fiction of unequivocal-ity. The very notions of putting things to the test and questioning what might only appear "too too manifest" carry a corrosive potential that can only be contained by the closed door of the "place" to which the jury withdraws—and for that very reason, the door must remain shut even as what goes on behind closed doors comes to define the very Englishness of the common law trial. By the same token, while juries were occasionally fined for coming to blatantly willful and counterfactual conclusions, their verdicts could not be overturned on appeal.<sup>51</sup> Even though trials were governed by a kind of probabilistic thinking, as Hutson has forcefully argued, the outcome of those exercises in assessing the likelihood of divergent narratives was not a tentative conclusion open to further questioning and debate: it was, to all intents and purposes, the truth. As Matthew Hale argued later in the seventeenth century, a verdict, as opposed to a trial, is a statement of agreement "which carries in itself a . . . grea[t] Weight and Preponderation to discover the Truth of a Fact" since it "has the *unanimous* Suffrage and Opinion of Twelve Men."<sup>52</sup> The common law ideal of judgment by jury ultimately relies as much on agreement and conviction as on skepticism and inquisitiveness. Verdict and trial thus could not have functioned more distinctly, and the division between the logics underwriting the process and its result could not have been more absolute.

This may be why there are no compelling narratives of jury delibera-

<sup>51</sup> See Baker, *Oxford History*, 371; and Baker, *An Introduction to English Legal History*, 4th ed. (London: Butterworths, 2002), 517–18.

<sup>52</sup> Hale, *The History of the Common Law of England*, ed. Charles M. Gray (Chicago: University of Chicago Press, 1971), 167.

tions from this period—no *Twelve Angry Men* in early modern England. Juries in a sense always spoke with a unified voice, much as judges, who, according to Coke's opinion in *Peacham's Case*, always delivered their decisions as a body: "not . . . by fractions, but entirely according to the vote whereupon they should settle upon conference."<sup>53</sup> Hence all the things that make jury deliberations good drama—violent disagreements, prejudices, random likes or dislikes, fights, and so on—would have been precisely the sorts of things that an early modern writer might not have wanted to highlight, even though they likely were part of many actual jury trials. Such a depiction would obviously tend to undermine the unanimity suggested by the very notion of a verdict delivered by "the country." The dispute associated with the practice of "trying" facts is figured, after the fact, as a struggle between jurors and evidence, not as struggle among members of the jury, who are generally presented as acting and thinking in unison.

The absence of jurors' deliberations is particularly apparent—literally visible—in the theater. In prose pamphlets, say, mentioning the presence of a jury, its withdrawing and its return with a verdict is a matter of a few sentences. We know that the deliberation takes place even if we do not witness it directly. On stage, the same effect might have been achieved by the mere presence of twelve extra characters during trials, but as we have seen, no play calls for such a presence. This combination of mimetic, economic, and/or dramaturgical restraints, however, left the theater constitutionally incapable of depicting the kind of legal process that was supposed to guarantee justice. Unable to engage fully with the law of the land, drama instead developed and engaged with rather less locally specific notions of justice. Early modern law is therefore exactly what we do not find when we look at early modern dramatic portrayals of judicial moments. My point, however, is not that this constitutes a lapse in mimetic achievement, a disappointing failure to represent social or procedural reality with the requisite degree of accuracy. I would argue that we do need to acknowledge that a curious mismatch exists in this period between the means by which justice is attained in both plays and the culture from which they emanate. It should make a difference to realize that a particular procedural ideal, closely aligned with specific English ways of doing justice, simply has no recognizable role to play in the drama of the time. But this recognition is not merely an insight

<sup>53</sup> James Spedding, ed., *The Letters and the Life of Francis Bacon*, vol. 5 (London, 1861–74), 107.

into mimetic arbitrariness. Rather, it enables us to see that the division between real-world and theatrical procedures may be precisely what renders early modern plays so enduringly powerful in their treatment of issues of justice and injustice. In imagining worlds where the *legal* means of doing justice are either unattainable or systemically flawed, early modern playwrights also had to represent, debate, and put into play extra-legal notions of justice. Instead of a judicially or procedurally grounded concept of justice, then, dramatists had to (or chose to) contemplate and put into play less specifically contingent ethical principles. What this means, however, is that a properly historical reading of these jury-less plays requires a recognition of their deeply decontextualized character. In other words, reading Renaissance law and drama together must always also mean reading them apart.

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