The Art of Law in Shakespeare

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Introduction

And though you be a Magistrate of wit, and sit on the Stage at Black-Friers, or the Cock-pit, to arraigne Playes dailie, know, these Playes have had their triall alreadie, and stood out all Appeales; and do now come forth quitted rather by a Decree of Court, then any purchas’d Letters of commendation.

Thus, two actors from the King’s Men, Henry Condell and John Heminges, introduced ‘To the great Variety of Readers’ the complete works of William Shakespeare in the First Folio edition of his plays, published in 1623. For Condell and Heminges, to be a ‘Magistrate of wit’ in the theatre was to inhabit the role of playgoer. The honorific title was bestowed on regular members of the audience at the Blackfriars and Cockpit Playhouses (the latter was rebuilt in 1618 as the Phoenix, after the Cockpit was seriously damaged by rioting in 1617). The juridical language employed by Condell and Heminges in the above Introduction to the First Folio, with its references to magistracy, arraignments, trials, appeals, acquittals and decrees of the court, not only suggests a level of acquaintance on their part with the institutional processes and practices of English law, but implies also that audiences were familiar with the terminology of legal procedure and acted as lawgivers of a sort, passing judgement on the relative merits of the plays under scrutiny.

The insistent use by Condell and Heminges of metaphor drawn exclusively from the quotidian dealings of judges, lawyers and their clients, recalls the inventory of juridical minutiae and legal artefacts, cited by Hamlet as he contemplates the erstwhile profession of the person whose skull he handles in the graveyard prior to his more famous encounter with Yorick’s skull. If the skull belonged to a counsellor or an attorney, then for all of the lawyer’s acquired experience in cases, tenures and tricks, and his familiarity with technical arcana such as recognisances, vouchers and fines, the end or ‘fine of his fines’ was ‘to have his fine pate full of fine dirt’ (5.1.105–106). The language of early modern English law was

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1 Mr. William Shakespeares Comedies, Histories, & Tragedies. Published according to the true Originall Copies (London, Isaac Jaggard and Ed. Blount, 1623) sig. A3.r. As well as being actors in the King’s Men (known as the Lord Chamberlain’s Men prior to the accession of James I in 1603), Condell and Heminges (various spellings of his name include ‘Heminge’ and ‘Hemmings’) were sharers in the Globe and Blackfriars Theatres. See C Connell, They gave us Shakespeare: John Heminge and Henry Condell (Boston, Oriel Press, 1982); KE Pogue, Shakespeare’s Friends (Connecticut, Praeger, 2006) 129–31; EK Chambers, The Elizabethan Stage, 4 vols (Oxford, Clarendon Press, 1923) 2: 310–11, 320–23.


exclusive: its technical terms were comprehensible only to early modern English lawyers. To complicate matters further, its juridical procedures were implemented in three languages: English, Latin and a bastardised form of Norman French, known as law-French. Thorough knowledge of common law was the product of many years' study at the Inns of Court, during which time (according to Sir John Dodderidge) the vigour of youth was wasted.

For lawyers of the early modern period, common law conformed to the Ciceronian definition of law as 'right reason in agreement with nature' ('recta ratio naturae congruens'). Throughout this book, I consider at length the correlation between law and nature, and the identification of common law with a higher moral law, inscribed by God in the hearts of men. Whilst common lawyers subscribed readily to the Thomist definition of natural law as those precepts of eternal law concerning the behaviour of beings possessed of reason and free will, they distinguished between the 'right reason' of law conformable with nature and the artificial means through which law might be understood and expounded. This was the difference between the natural reason of common law and the art of law as practised by common lawyers. The distinction was articulated by Sir Edward Coke in his report of Prohibitions del Roy (1607), as he sought to justify the argument that 'the King in his own person cannot adjudge any case'; this despite the fact that the courts were the king's courts or curiae regis:

Then the King said, that he thought the law was founded upon reason, and that he and others had reason, as well as the Judges: to which it was answered by me, that true it was, that God had endowed his Majesty with excellent science, and great endowments of nature; but his Majesty was not learned in the laws of his realm of England, and causes which concern the life, or inheritance, or goods, or fortunes of his subjects, are not to be decided by natural reason, but by the artificial reason and judgment of law; which law is an act which requires long study and experience, before that a man can attain to the cognizance of it …

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4 For extensive discussion of and references to the three languages of common law, see Chapter 1, text to nn 15–23, 47–49, 69–72, below.
5 On Dodderidge and legal education at the Inns of Court, see Chapter 1, text to n 14, below.
7 On the correlation (identified by Cicero) between law, reason and nature, and the application of this principle to the art of horticulture, see Chapter 3, text to nn 50–51, below.
8 See for example, The Reports of Sir Edward Coke and Le Primer Report des Cases of John Davies, discussed in Chapter 4, text to nn 36–37, below.
9 Question 94, 'Of the Natural Law (In Six Articles)' in St Thomas Aquinas, Summa Theologica ( Pars Prima Secundae).
11 ibid, 65. On 'artificial reason', see also, Chapter 1, n 158, below.
Somewhat more succinctly, in a later study and with reference to the requisite professional skills of the twenty-first-century lawyer, James Boyd White insisted that ‘Like Greek, law is a language that must be learned’ (a sentiment with which Coke would probably agree, having previously declared that English law was first recorded ‘in the Greek tongue’). The phrase ‘artificial reason’, employed by Coke in the context of the lawyer’s craft, is not unambiguous. Coke intended the King to understand that the practice of law was dependent for its successful reception and resolution on the technical skills of the lawyer (in accordance with the linguistic origins of ‘artificial’ in Latin *artificium*, meaning workmanship or art); but an alternative definition of ‘artificial’ equates the lawyer’s craft with insincerity, falsehood and affectation (a dichotomy which I analyse in Chapter 1, below). In Coke’s own words, and in support of the latter interpretation, it may reasonably be stated that ‘law is an act’. It was probably the cynical interpretation of ‘artificial reason’ that Hamlet had in mind when he asked of the putative lawyer’s skull: ‘Where be his quiddities now, his quillities, his cases, his tenures, and his tricks?’ (5.1.97–98).

In *Shakespeare’s Imaginary Constitution*, I noted that while Coke was neither a dramatist nor a friend to actors, he recognised and embraced the dramatic medium through which English law manifested itself to its audience (as I discuss in Chapter 2 below, with reference to the trials for High Treason that he prosecuted as Attorney-General on behalf of the crown, Coke’s style of advocacy might fairly be described as histrionic). Critics have suggested that Coke was to English-speaking lawyers what Shakespeare was to the English written word. In his Introduction to the Arden edition of Shakespeare’s earliest Roman tragedy, *Titus Andronicus*, Jonathan Bate notes the use made by the eponymous hero of ‘the language of the law’. As Titus prepares to kill his ravaged and mutilated daughter Lavinia, he claims that there is ‘A pattern, precedent, and lively warrant’ (5.3.43) for slaying her. Bate goes on to argue that the reliance of Titus on precedent, as

12 JB White, *The Edge of Meaning* (Chicago, University of Chicago Press, 2001) 224; Coke, 3 Reports (1602) 2: ‘To the Reader’, viiia; see Chapter 4, text to n 27, below.


16 The precedent to which Titus refers is the story of the centurion Verginius in Livy’s *History of Rome*, in which the father stabbed his daughter Verginia with a butcher’s knife, in so doing freeing her from enslavement to the decemvir Appius: Livy, *The Early History of Rome: Books 1–5 of the History of Rome from its Foundation*, A de Selincourt (trans) (Harmondsworth, Penguin, 1960) 220. On precedent in the plays of Shakespeare, see Chapter 3, n 14 and text to n 14, below.
the legitimising factor in the decision to murder his daughter, ‘makes him into the voice of the English common law, a dramatic antecedent to Sir Edward Coke’.17 Scholars have argued that the promotion by Coke of a system of precedent, on which the foundations of modern common law were built, not only gave history an exalted status in the governance of seventeenth-century England, but also ensured that history threatened to supplant reason as the primary, identifiable basis of judicial decision-making.18

The meaning of ‘history’ is central not only to the form in which law was determined and described in the early seventeenth century, but also to the replication and representation of history and law in Shakespearean drama of the Jacobean period.19 The contribution of Coke to the understanding and interpretation of history was of paramount importance, especially in relation to the origins of English law and the legitimacy of English (and subsequent British) monarchy. The idealised version of British history described by Coke in his prefaces to the thirteen parts of The Reports derives its authority from two principal sources: Historia Regum Britanniae by Geoffrey of Monmouth, and De Laudibus Legum Angliae by Sir John Fortescue.20 For Geoffrey of Monmouth, Britain was ‘the best of islands’; while for Coke (and in much the same tone) it was ‘the happy island’.21 Coke was indebted both to Geoffrey of Monmouth and Fortescue for promulgating the myth of the Trojan King Brutus and associating him with rebuilding the city of Troy in London (as Troia Nova or Troyovant) and founding a corpus of English law.22 Brutus, the archetype of English law and British kingship who (according to Fortescue) ruled both royally and politically (dominium politicum et regale),23 became for Coke an iconic symbol of the principle of limited

17 Bate (ed), Titus Andronicus, Introduction, 28.
19 Goodrich argues that ‘history is the reality (the trauma) of legal practice and tradition the narrative logic of its development’: P Goodrich, ‘Poor Illiterate Reason: History, Nationalism, Common Law’ (1992) 1 Social & Legal Studies 7–28, 8.
20 Historia Regum Britanniae was completed c 1136; see Geoffrey of Monmouth, The History of the Kings of Britain, L Thorpe (trans) (London, Penguin, 1966) Introduction, 9-45. De Laudibus Legum Angliae was completed c 1470 and published in Latin c 1545, as de politica administracione, et legisbus ciudibus florentissimi regni Anglie, commentarius; on its first publication in English; see Chapter 4, n 128, below.
21 Geoffrey of Monmouth, History of the Kings of Britain, 53, Pt i.2; Coke, 3 Reports, ‘To the Reader’, xb. On the possible influence of Thomas More’s Utopia over Coke’s description of Britain, see Chapter 5, text to nn 47–48, below.
22 J Fortescue (Sir), De Laudibus Legum Angliae, J Selden (ed) (London, R Gosling, 1737) 23–24. On the promotion by Fortescue and Coke of the legend of Brutus, see Chapter 4, text to nn 26–29, below; also, Chapter 3, text to nn 15–16, below.
23 On the distinction made by Fortescue between dominium politicum et regale and dominium regale, see J Fortescue (Sir), ‘The Governance of England’ in S Lockwood (ed), On the Laws and Governance of England (Cambridge, Cambridge University Press, 1997) 83–84; see also, Chapter 2, text to n 176, below.
monarchy, according to which the king was accountable to Parliament and restricted in the exercise of prerogative power by the definitive authority of common law.\textsuperscript{24} From Fortescue especially, Coke inherited the idea of the immemorial origins of English law, of the unbroken continuity of a legal system founded in custom and immune to interference from successive invading forces (Romans, Saxons, Danes and Normans). Despite the irrefutable fact of invasion, Fortescue insisted that English law maintained its integrity; common law was immutable and for all time:

And, during all that Time, wherein those several Nations and their Kings prevailed, England has nevertheless been constantly governed by the same Customs, as it is at present: Which if they were not above all Exception Good, no Doubt but some or other of those Kings, from a Principle of Justice, in Point of Reason, or mov’d by Inclination, would have made some Alteration or quite abolished them .\textsuperscript{25}

The identical observation was made by Coke in the preface to Part Two of The Reports:

If the ancient laws of this noble island had not excelled all others, it could not be, but some of the several conquerors and governors thereof, that is to say, the Romans, Saxons, Danes, or Normans, and specially the Romans, who (as they justly may) do boast of their civil laws, would (as every of them might) have altered or changed the same.\textsuperscript{26}

Continual references to the antiquity of common law, in both De Laudibus and The Reports, lend some (albeit limited) credibility to the mythical quality of the history narrated by Fortescue and Coke. If English law was (as these writers claimed) ancient and had existed since ‘time out of mind of man’,\textsuperscript{27} then the argument that the Trojan Brutus had landed in Totnes, slain the Devonian and Cornish giants, journeyed eastward to establish a new Troy on the banks of the Thames, and bequeathed its citizens a code of laws (written in the Greek tongue),\textsuperscript{28} has at least the faintest complexion of historical accuracy. The quest by Coke to convince readers of the veracity of his arguments concerning the ancientness of English law

\textsuperscript{24} On Richard Hooker and the Bractonian interpretation of kingship as subordinate to God and law, see Chapter 2, n 187, below.
\textsuperscript{25} Fortescue, De Laudibus, 30–31.
\textsuperscript{26} Coke, 2 Reports (1602), 1: ‘To the Learned Reader’, x. The same claim was made by Coke in various of the prefaces to The Reports, and especially in relation to the Norman conquest; see Coke, 3 Reports, 2: ‘To the Reader’, vib–viia; also, Chapter 5, text to nn 44–46, below. Spelman argued that common law derived from Germanic sources: ‘I think the foundation of our Laws to be laid by our German Ancestours, but built upon and polished by materials taken from the Canon Law and Civil Law.’ According to Spelman, those who believed both that Brutus had founded common law and that the English legal system had successfully resisted infiltration and corruption by subsequent Roman, Saxon, Danish and Norman invaders, were ‘like them that make the Arcadians to be elder than the Moon’. H Spelman (Sir), Of the Law-Terms: A Discourse (London, Matthew Gillyflower, 1684) 81, 87–88; see JGA Pocock, The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century (Cambridge, Cambridge University Press, 1987) 96–97.
\textsuperscript{27} Coke, 3 Reports (1602), 2: ‘To the Reader’, viia.
\textsuperscript{28} Geoffrey of Monmouth, History of the Kings of Britain, 71–74, Pt i.15–17.
was given considerable heft by his authorial style, which conveyed the impression of a biblical prophet, seer or Druidical lawgiver. He informed readers that:

Never shalt thou find any that hath excelled in the knowledge of these laws, but hath sucked from the breast of that divine knowledge, honesty, gravity, and integrity, and by the goodness of God hath obtained a greater blessing and ornament than any other profession to their family and posterity …

The prophetic tone of the seer was not confined to the prefaces: in his reporting of the cases themselves, the same aura of divine, oracular wisdom was invoked, notably in the most famous of all his reports, Postnati. Calvin’s Case. There, he wrote that counsel for the plaintiff had ‘followed the counsel given in God’s book’, emphasising the importance of past judgments to the present juridical situation: ‘… (for out of the old fields must come the new corn) & diligenter investiga partum memoriam, and diligently search out the judgments of our forefathers’. He concluded this passage with characteristic allusions to an immemorial past; but he incorporated also an elliptical reference to The Book of Job, thereby skilfully interweaving the tenets of municipal and divine law:

For we are but of yesterday, (and therefore had need of the wisdom of those that were before us) and had been ignorant (if we had not received light and knowledge from our forefathers) and our days upon the earth are but as a shadow, in respect of the old ancient days and times past, wherein the laws have been by the wisdom of the most excellent men, in many successions of ages, by long and continual experience (the trial of right and truth) fined and refined …

Calvin’s Case was a seminal, judicial decision in determining the constitutional rights and obligations of those Scottish subjects of King James VI born after his accession in 1603 to the English throne as James I, and is a source of extensive analysis in Chapter 4, below.

In the above exegesis on the reported history of English law, I have placed great emphasis on the mythography provided by Coke and his judicial predecessor, Fortescue. The invocation of classical antiquity, in the person of Brutus of Troy, is of especial relevance to James I, and of his efforts to mould a united British nation from its disparate kingdoms of England, Scotland, Wales and Ireland. The conceit of a British nation emerging from the ashes of Troy did not originate in

29 On references by Coke to the Druids, and the Druidical foundations of English law, see Raffield, Shakespeare’s Imaginary Constitution, 44–47; also, P Goodrich, ‘Druids and Common Lawyers: Notes on the Pythagoras Complex and Legal Education’ (2007) 1 Law and Humanities 1–30. Regarding claims made on their behalf to be the founders of English law, Spelman was as dismissive of the Druids as he was of Brutus: Spelman, Of the Law-Terms, 87.
30 Coke, 2 Reports, 1: ‘To the Learned Reader’, x–xi.
31 Coke, Postnati. Calvin’s Case, 7 Reports (1608) 4: 1a, 3b. For extensive discussion of Calvin’s Case, see Chapter 4, text to nn 63–81, 134–38, below. The relevant passage from Job reads as follows: ‘For enquire, I pray thee, of the former age, and prepare thyself to the search of their fathers: (For we are but of yesterday, and know nothing, because our days upon earth are a shadow;)’, The Book of Job, 8.8–9 (Authorised King James Version of The Bible).
the Jacobean era. The aspirations of unified nationhood, of a new civilisation emerging triumphant from the ashes of the old, were addressed directly in Virgil’s *Aeneid* and applied by propagandists, polemicists and poets to the post-Henrician, English nation-state.\textsuperscript{32} In *The Faerie Queene*, written between 1590 and 1596, Edmund Spenser wrote that ‘noble Britons sprong from Troians bold,/ And Troynovant was built of old Troyes ashes cold.’\textsuperscript{33} The depiction of Elizabeth I as a divine figure—at various times, Astraea, Venus, Gloriana and Diana—was apparently not incompatible with the description of her as the ‘beauteous Queen of second Troy’, as she was described in a song entitled ‘The Nymphs to their May Queen’,\textsuperscript{34} written by Thomas Watson and sung to the Queen on the occasion of her visit to the Earl of Hertford at Elvetham Park in September 1590.\textsuperscript{35}

The above exception notwithstanding, royal iconography of the Elizabethan period usually depicted the monarch in terms of her quasi-divinity: the virginal deity, sent to earth to found a new Golden Age in England. The character of Brutus and in particular the story of his epic journey from Italy to England (via Greece, Mauretania and Aquitaine), as related by Geoffrey of Monmouth, was more aptly applied to James I, especially regarding the founding of a dynasty. The goddess Diana spoke to Brutus in a dream, prophesying that ‘for your descendants it will be a second Troy. A race of kings will be born there from your stock and the round circle of the whole earth will be subject to them.’\textsuperscript{36} In the contemporaneous mythology of English kingship, the unbroken chain of ‘British’ kings had ended with the death of Cadwallader (in 682 AD), whose Welsh origins were provided as proof of the legitimacy of Tudor rule and its foundation in 1485 under Henry VII, born in Pembroke in 1457. The Tudor dynasty was represented as forging the historical link with Cadwallader: Owen Tudor, grandfather of Henry VII, claimed to be descended from him.\textsuperscript{37} James I—father of five children by the time of his accession to the English throne\textsuperscript{38}—was to be the founder of a nation, Britain, and (unlike his Tudor predecessor) the begetter of kings. Like his mythical forebear Brutus, James I had made an epic journey to London from a foreign land; the King started the journey south from Edinburgh upon his accession to the English throne on

\textsuperscript{32} See Raffield, *Shakespeare’s Imaginary Constitution*, 34–35.
\textsuperscript{35} For an account of the royal visit, see A Strickland, *Lives of the Queens of England, from the Norman Conquest*, 8 vols (London, Henry Colburn, 1844) 7: 149–53; the author records that the song was sung by ‘six fair virgins, crowned with flowers, three of them representing the graces and three the hours,’ ibid, 150.
\textsuperscript{36} Geoffrey of Monmouth, *History of the Kings of Britain*, 65, Pt i.11.
\textsuperscript{38} Only three of these children—Henry, Elizabeth and Charles—lived to see their father succeed to the English throne. Margaret (b 1598) and Robert (b 1602) died soon after their births, respectively in 1600 and 1602. Two more daughters—Mary (b 1605) and Sophia (b 1607)—died as babies.
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24 March 1603. The ‘wandring Brute’ of Virgil’s Aeneid became ‘a second Brute’ in the person of James I, and consequently (according to William Herbert): ‘The golden age begins with Iacobs raigne.’

The propagation of originary myth was a salient feature not only of the various poetical and ‘historical’ accounts of British kings and their ancestors; it was also, as I have indicated above regarding Fortescue and Coke, the primary device through which the antiquity and unimpeachable genealogy of common law were asserted. The publication of law reports in the Elizabethan period represented a turning point in the manner in which the body of common law was disseminated, and the style in which the reports themselves were written. The anonymous Year Books, recorded in manuscript form, were notable for their lack of narrative logic and coherent form: they provided discursive accounts of juridical proceedings, while often failing to record either matters of legal principle or the ratio decidendi itself. The publication of law reports in printed form enabled and encouraged the development of authorial skills, more commonly associated with the poet than the judge or the law reporter. Concomitant with the enhanced poetic craft of the judge and the law reporter (in both of which capacities Coke excelled), the printed word facilitated the development of more sophisticated interpretative or hermeneutic skills among the legal fraternity.

Martha Nussbaum has noted the phenomenon of the ‘poet-judge’ and synonymously the ‘literary judge’. He was uniquely equipped to give equitable judgments, compliant always with the Aristotelian requirement of epieikeia or natural equity. Equity was demonstrably a notable feature of judgments in the courts

39 On the journey south, the royal party was entertained at various locations. On the performance at Althorp on 25 June 1603, before Queen Anne and Prince Henry, of Ben Jonson’s A Particular Entertainment of the Queen and Prince at Althorp (subtitled A Satyr), see Raffield, Shakespeare’s Imaginary Constitution, 126–27, 130–31; also, EK Chambers, The Elizabethan Stage, 4 vols (Oxford, Oxford University Press, 1923) 3: 391.


43 MC Nussbaum, Poetic Justice: The Literary Imagination and Public Life (Boston, Beacon Press, 1995) 80, 82; see also Kantorowicz, who characterised the pre-modern judge as a poet, incorporating the fictions of natural law into quotidian juridical practices: EH Kantorowicz, Selected Studies (New York, J Augustin, 1965) 118.

44 On epieikeia, see The Nicomachean Ethics, Bk V.X.1137b25–30: ‘This is the essential nature of equity; it is a rectification of law in so far as law is defective on account of its generality. This in fact is also the reason why everything is not regulated by law: it is because there are some cases that no law can be framed to cover, so that they require a special ordinance’: Aristotle, The Nicomachean Ethics, JAK Thomson (trans) (London, Penguin, 2004) 141.
of common law throughout the Elizabethan period, and especially in the resolution of contractual disputes. Hence in his report of *Eyston v Studd*, heard by the court of Common Pleas in 1574 (concerning the terms of a disputed lease and the subsequent eviction of the plaintiff by the defendant), Edmund Plowden reflected on the nature of equity, which he insisted was an essential component of common law. By definition, appealing as they did to the ‘sense’ rather than the ‘letter’ of the law, equitable judgments were contingent upon the imaginative and humane facilities of the judges.

Commenting on the resistance of Dickens’s Mr Gradgrind to the ‘exuberance of imagination’, Nussbaum argues that literature and the literary imagination are ‘subversive’: literature ‘is the enemy of political economy’ because it does not reduce humanity to a definitive ‘tabular form’. It was precisely this imaginative exuberance which enabled the judges in *The Case of the Dutchy of Lancaster* (and other cases of the Elizabethan period reported by Plowden) to employ the visual imagery of the two conjoined bodies of the king (bodies natural and politic) as a means of representing the principle that the crown was accountable to law, as interpreted by its judges. It is fair to say that in the first decade of Jacobean rule, Coke extended the imaginative boundaries of law reporting (as instanced by the numerous quotations from *The Reports*, included throughout this book) initiated by Plowden in the 1570s. Coke thereby gave voice to the autonomous subject of law and his putative claim to irrefutable constitutional status; this in the face of a government which increasingly sought to impose law by recourse to the exercise of extensive prerogative powers.

The broad premise of this book is that during the first decade of Jacobean rule, the arts of law and drama developed contiguously, the one aesthetic form learning from and imitating the other. A brief glance at even a handful of Shakespeare’s plays reveals the author’s enduring fascination with law and legal procedure: the agon of the trial is represented to great dramatic effect in, for example, *The Merchant of Venice*, *Measure for Measure*, *King Lear* and *The Winter’s Tale*. The intrinsic drama of the courtroom is only one aspect of the law, but it is one with which Shakespeare was evidently fascinated. To the question, ‘Was Shakespeare familiar with the law reports?’ the answer is almost certainly ‘Yes’. For the anonymous

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47 Plowden, *Case of the Dutchy of Lancaster, Commentaries*, 1: 213. On the interpretation by Kantorowicz of the medieval theory of the king’s two bodies, see Chapter 2, text to nn 131–53, below. For references to recent scholarship on the subject of Plowden, Kantorowicz and the juridical application of the above theory, see Chapter 4, n 140, below.
48 The first edition of Plowden’s *Commentaries or Reports* was published in 1571, and such was its success that a second edition (with additional cases) was published in 1578. As Plowden justly claimed in the preface, they ‘excell any former book of reports in point of credit and authority’: Plowden, *Commentaries*, 1: ‘The Preface’, xi. In systematic manner, each report is preceded by a note of the pleadings, followed by a record of the judgment itself.
49 On the articulation by Coke of a social contract between governor and governed, see Chapter 4, text to n 51, below.
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author of *Thomas of Woodstock, or King Richard the Second, Part One*, written between 1591 and 1595, *The Commentaries or Reports of Plowden* prompted the line: ‘for I have plodded in Plowden and can find no law …’ (5.6.35–36). The play ends prematurely on that line, the last page of the manuscript having been lost. The line is spoken by the character of Nimble, who informs the audience that he ‘was once a trampler in the law’ (5.6.23); ‘trampler’ being Elizabethan slang for ‘attorney-at-law’.50 The suggestion that there was no law in *The Commentaries or Reports* of Edmund Plowden is peculiar, although the line may allude to Nimble’s rudimentary knowledge of law, given that attorneys comprised the junior branch of the legal profession. But if Nimble found no law in Plowden, then it seems that Shakespeare did. The drowning by suicide of Sir James Hales and the juridical proceedings following his death, as narrated by Plowden in the report of *Hales v Petit*, provided one source for the suicide of Ophelia in *Hamlet*, and for the paraphrasing by the gravedigger of words spoken by counsel in that case: ‘if I drown myself wittingly, it argues an act, and an act hath three branches—it is to act, to do, to perform’ (5.1.10–12).51

In the plays of Shakespeare, law (especially in its juridical context) and drama appear to be indivisible phenomena, linked by their shared rhetorical schemes. There is no evidence in any of the records of the Inns of Court that Shakespeare had enrolled as a student there,52 but his plays repeatedly demonstrate that the institutional heart of the legal community in London was a place with which

50 P Corbin and D Sedge (eds), *Thomas of Woodstock or King Richard the Second, Part One* (Manchester, Manchester University Press, 2002) 186, n 23. The word ‘trampler’ is used repeatedly in Middleton’s *A Trick to Catch the Old One*. There, the attorney Harry Dampit describes himself as follows: ‘a trampler of time, say, hee would bee up in a morning, and be here with his Serge Gowne, dasht up to the hams in a cause, have his feete stincke about Westminster hall and come home agen, see the Galleouns, the Galleasses the great Armadoes of the Lawe …’; T Middleton, *A Trick to Catch the Old One* (London, George Eld, 1608) (Act 1) sig. B3.v.


52 There were links between Shakespeare’s neighbours in Stratford and the Middle Temple: Hotson notes that the chambers of ‘William Combe, M.P., of Warwick, Stratford, and London’ (a Benchers of the Middle Temple) were ‘taken over by his great-nephews, Shakespeare’s neighbours and friends, William and Thomas Combe’, and that Shakespeare’s ‘cousin’ Thomas Greene, a member of the Middle Temple since 1595, became Treasurer of the Middle Temple in 1629; L Hotson, *Shakespeare’s Sonnets Dated* (London, Hart-Davis, 1949) 44; see also, S Wells, ‘A close family connection: the Combes’ in P Edmondson and S Wells (eds), *The Shakespeare Circle: An Alternative Biography* (Cambridge, Cambridge University Press, 2015) 149–60; T Hamling, ‘His “cousin”’, Thomas Greene’ in ibid, 135–48; R Taylor, *Shakespeare’s Cousin, Thomas Greene, and his Kin: Possible Light on the Shakespeare Family Background* (1945) 60 *Publications of the Modern Language Association of America* 81–94. One of Greene’s ‘sureties’ when he joined the Inn was John Marston the dramatist, a fellow Middle Templar. By 1601, Greene was acting as solicitor for the Corporation of Stratford-on-Avon: ibid, 81. On Marston at the Middle Temple, see Chapter 1, text to nn 34–35, below.
he was familiar. The hapless Sir Andrew Aguecheek tells Sir Toby Belch that he ‘delight[s] in masques and revels sometimes altogether’ (Twelfth Night, 1.3.107–8), a reference to the seasonal revels of the Inns and a line that would have had especial comic resonance when Twelfth Night was performed at Middle Temple Hall in February 1602.\footnote{On the performance of Twelfth Night at the Middle Temple, see Chapter 1, n 180, below.} In the bucolic surroundings of his Gloucestershire estate, Justice Shallow fondly reminisces that he ‘was once of Clements-inn; where I think they will talk of mad Shallow yet’ (Henry IV, Pt. 2, 3.2.15–16), an allusion to the raucous behaviour of law students, of which there are numerous accounts in the records of the Inns.\footnote{For example, the records of Council at Lincoln’s Inn for 1550 include the following entry: [15 May] ‘Dodmer fined 5s for striking the Steward in Hall. Southewell fined 6s 8d for drawing his dagger on the Steward’: WP Baildon, JD Walker, R Roxburgh (Sir) (eds), The Black Books of Lincoln’s Inn, 6 vols (London, Lincoln’s Inn, 1897) 1: 293; see also Chapter 1, text to n 197, below. On Justice Shallow and the education of attorneys at the Inns of Chancery, see Raffield, Shakespeare’s Imaginary Constitution, 166–68.}

In Shakespeare’s Imaginary Constitution I noted that the first of Shakespeare’s Jacobean plays, Measure for Measure, ‘was a prophetic portrait of the Jacobean dawn’.\footnote{Ibid, 17.} In the present book, I develop themes explored in the earlier work, where I concentrated on the Elizabethan plays of Shakespeare and developments in law during the last decade of Elizabethan rule. In The Art of Law in Shakespeare, I reflect mainly on the representation of the legal institution in Shakespeare’s Jacobean plays. It is at least arguable that in these works Shakespeare focused more clearly than he had in the Elizabethan plays on the complex persona of the ruler (Measure for Measure, Macbeth, King Lear, The Winter’s Tale, Cymbeline and The Tempest all spring immediately to mind). This development is possibly not unconnected to the publication (in the late 1590s) of two major political works by James VI, concerning the art of kingship: The Trew Law of Free Monarchies (1598) and Basilicon Doron (1599), both of which were republished upon his accession to the English throne as James I.\footnote{See ibid, 183–84.} In these works, the distinctive and obsessive opinions of their author on the subject of kingship (with particular reference to the unlimited powers of an anointed king) were made available through the medium of print to a wide audience. The rationale of Jacobean kingship and the (often fractious) relationship between crown and common law is a primary theme of this book, as it is of the plays of Shakespeare considered herein.

If the legal themes of Shakespeare’s plays reflect acquired knowledge of English law, gained as much from friends, relatives and acquaintances, as from study of substantive law itself, they also demonstrate a crucial feature of the Jacobean state, which is that government was presented to the public as a form of theatre. In Basilicon Doron, James VI had declared ‘That a King is as one set on a stage, whose smallest actions and gestures, all the people gazingly doe behold’.\footnote{James VI, ‘Basilicon Doron’ in Sommerville (ed), King James VI and I, 49.} This was a
sentiment that he rehearsed in a speech, made as James I to both Houses of Parliament in March 1610: ‘As I have already said, Kings Actions (even in the secretest places) are as the actions of those that are set upon the Stages, or on the tops of houses’.\textsuperscript{58} Certain Jacobean plays of Shakespeare, such as \textit{Measure for Measure}, \textit{Othello}, \textit{Macbeth} and \textit{The Tempest}, were performed at the royal court, in the presence of James I, and the later plays (notably the ‘romances’—\textit{Pericles}, \textit{The Winter’s Tale}, \textit{Cymbeline} and \textit{The Tempest}) incorporated the unique theatrical form of the masque, which became increasingly popular at the court of James I.\textsuperscript{59} The correlation between the Jacobean masque and the juridical processes of English law is instanced by the shared theme of divine justice overseeing (and intervening in) the affairs of humankind.\textsuperscript{60} Coke and his contemporaries within the English legal institution described municipal law as nothing less than divine law, articulated by God’s earthly ministers, the lawyers and judges of common law.

In Chapter 1, I explore the influence of neoclassical, rhetorical techniques over the development of juridical procedure in early modern England. This chapter is the only one in which I make extensive reference to the Elizabethan period. It was in the sixteenth century that, due to major advances in printing technology, ‘medieval books poured from the press’ (to borrow Maitland’s phrase).\textsuperscript{61} This was also the period, it will be argued, in which the development by lawyers of rhetorical skills (in both oral and textual forms) shaped a distinctive aesthetics of English law. The sixteenth century witnessed the unprecedented mass publication of ancient philosophical and rhetorical works, such as those by Plato, Aristotle, Quintilian and Cicero. Also of great significance for the expanding legal profession was the outpouring of rhetorical manuals, the most popular of which (Sir Thomas Wilson’s \textit{The Arte of Rhetorique}) was published in eight editions between 1553 and 1585 and studied by inner barristers at the Inns of Court.\textsuperscript{62} In the first section of Chapter 1, I examine the form and content of legal education at the Inns (based as it was on the rhetorical skills of forensic oratory). This leads me to discussion of a particular form of Elizabethan and Jacobean drama, which satirised an insular legal profession that was perceived to be acting in the interests only of its members, and actively seeking to exclude the laity from comprehension of its arcane language and practices. Included in this section is a discussion of a Jacobean, academic play by George Ruggle, entitled \textit{Ignoramus}, performed before

\begin{itemize}
\item \textsuperscript{58} James I, ‘Speech to Parliament, 21 March 1610’ in ibid, 184; see Chapter 4, text to n 17, below.
\item \textsuperscript{59} Lindley makes the important observation that the court masque was not merely ‘an elaborate frame for nothing more nor less than an aristocratic knees-up’, but rather that it was through ‘the intellectual seriousness of the programme underlying the text and its solid foundation of classical learning that it is able to reach transcendent truths’: D Lindley (ed), \textit{Court Masques: Jacobean and Caroline Entertainments}, 1605–1640 (Oxford, Oxford University Press, 1995) Introduction, x–xi. See also, G Heaton, \textit{Writing and Reading Royal Entertainments: From George Gascoigne to Ben Jonson} (Oxford, Oxford University Press, 2010).
\item \textsuperscript{60} On the correlation between masques and the form of Jacobean government, see Chapter 4, text to nn 178–86, below; also, Chapter 5, text to nn 170–212, below.
\item \textsuperscript{61} See Chapter 1, text to n 11, below.
\item \textsuperscript{62} See Chapter 1, text to n 5, below.
\end{itemize}
James I at Cambridge in 1615. In the following section, I examine the medium of satire through analysis of the epigrams of Sir John Davies (lawyer, judge and poet). These pithy verses, which launched scathing attacks aimed at the mendacity and venality of his fellow barristers, were published in 1599, only to be burned in the same year following the Proclamation of the Bishops’ Ban. In the final section of Chapter 1, I examine the ‘little academe’ of Love’s Labour’s Lost (the only Elizabethan play of Shakespeare’s considered in the present study) in the context of the English legal institution, noting the extraordinary similarities between the enclosed and self-referential world of the King of Navarre’s court and the legal academy at the Inns of Court.

In Chapter 2, the setting moves from the cloistered environs of the Inns of Court to the theatrical space of the courtroom, and specifically the ‘show trials’ for the offence of High Treason. I use the tragedy of Macbeth as a framework in which to investigate the themes of treason, tyranny, usurpation and regicide, concentrating on the manner in which the legal institution addressed these momentous issues of state. Macbeth was written in 1606, less than one year after the failed attempt to murder James I and the Royal Family (as well as prominent members of the Government) in the Gunpowder Plot. Central to my analysis is the subsequent trial of the plotters and references made therein to the unimaginable breach of ordo naturae, which would have eventuated had they succeeded in their attempt to assassinate an anointed king. Relevant also is the earlier trial (in 1586) of Mary Stuart, Queen of Scots, mother of the future King James I of England. Pejorative narratives of the Stuart queen’s tempestuous life may have provided inspiration for the characterisation of Shakespeare’s Lady Macbeth, a thesis that gains credibility from the depiction of Mary in George Buchanan’s imaginative account of the part played by Mary and the Earl of Bothwell in the murder of her second husband, Lord Darnley.63 In this chapter, I consider also the trial of Sir Walter Raleigh in 1603, which is noteworthy for legal historians insofar as it highlights issues concerning the status of evidence in treason trials of this period. I characterise the trial of Raleigh as a form of morality play, dramatising the pitiful and inevitable downfall of its tragic subject. In the final section of Chapter 2, I reflect on the significance of providential theories of kingship (as discussed comprehensively by Kantorowicz in The King’s Two Bodies) and attempt to reassess the relevance of late medieval political theology to changing perceptions of governance in Jacobean England.

Prompted by the comparison made by Ronald Dworkin in Law’s Empire between the chain novel and the system of precedent in common law,64 the primary thesis

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63 G Buchanan, Ane Detectioun of the duinges of Marie Quene of Scottes, touchand the murder of hir husband, and hir conspiracie, adulterie, and pretensed marriage with the Erle Bothwell (London, John Day, 1571).

64 ‘In this enterprise a group of novelists writes a novel seriatim; each novelist in the chain interprets the chapters he has been given in order to write a new chapter, which is then added to what the next novelist receives, and so on’: R Dworkin, Law’s Empire (London, Fontana, 1986) 229.
of Chapter 3 is that at the level of historiography the body of common law may reasonably be described as a collection of stories, linked to each other by their institutional history, and passed down by privileged storytellers or narrators. The title of The Winter’s Tale derives from a genre of stories, told around the fire to ward off the privations of winter. Traditionally, such ‘idle tales’ were unrealistic and possessed of a happy ending. Such is the ‘romance’ of The Winter’s Tale, in which the landlocked kingdom of Bohemia is given a coast and a desert, the god Apollo acts as witness and judge in the trial of Hermione, and the grisly death of Antigonus after his Exit, pursued by a bear (SD 3.3.57) invariably elicits uproarious laughter from the audience. The relationship between art and nature is a theme that I explore throughout Chapter 3, with reference to The Winter’s Tale. My starting point is the dialogue between Polixenes and Perdita, concerning the legitimacy of horticultural techniques, including that of grafting (4.4.79–108). The metaphor of budding scions being grafted onto existing rootstock had been of particular relevance to the business of political succession, as Elizabeth I approached the end of her reign, with no natural heir to the throne. In subsequent sections, I attempt to identify a symbolic correlation between law and horticulture, both of which enterprises, for early modern jurists and horticulturists alike, required the application of art to nature in order to produce an image of nature itself. I consider in some detail the case of Sharington v Strotton (1555–56), in which images drawn from the natural world (including allusions to the horticultural technique of grafting) were invoked by counsel for the defendant (one Edmund Plowden) in a dispute concerning an entailed interest in a manorial estate. Plowden’s imaginative advocacy proved successful, as the judges were unanimous in finding for the defendant. The final section of this chapter, on the arts of portraiture and politics, is related to the reappearance of Hermione (whom her husband Leontes believed to be dead), ‘standing like a statue’ (5.3.20). Leontes describes the warm-blooded ‘statue’ as ‘an art / Lawful as eating’ (5.3.110–111) because the particular aesthetic form which he apprehends appears to derive from nature itself. I consider here the relationship between law, art and kingship, by reference not to statuary, but rather to iconic royal portraiture of the late medieval and early modern periods.

In Chapter 4, I turn my attention to the imagining of nationhood, and the manner in which the arts of law, poetry and theatre played a crucial role in furthering the Jacobean project of creating a unified Britain from the kingdoms of England, Wales and Scotland (in Chapter 5, I consider the status of Ireland as a colony of
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Jacobean England). The symbolism of the epic journey is central to my analysis of the embryonic British state, for which reason I incorporate Virgil’s *Aeneid* (as well as Shakespeare’s *Cymbeline*) into the title of the chapter: ‘*Cymbeline*: Empire, Nationhood and the Jacobean *Aeneid*. The mythography of Troy and the associated legend of a British nation rising from the Trojan ashes is an underlying motif of this chapter. In juridical terms, the attempt by the Jacobean crown to create a British state from the separate kingdoms of England and Scotland found its apotheosis in *Postnati. Calvin’s Case*, heard in 1608.67 The case concerned the status under English law of an individual, born in Scotland after the accession of James VI to the English throne. Was the plaintiff an alien or a subject of English law? Such was the political and constitutional importance of this case that I dedicate most of the middle section of the chapter to its analysis, interweaving the theme of rival jurisdictions that is a central feature of *Cymbeline*. This chapter, more than any other in the book, is concerned with the mythical foundations of the British nation and the imaginative power of unwritten law to influence the shape of a political landscape. It is in this respect that Shakespeare presents myth in terms that Nietzsche was to describe as ‘the concentrated image of the world’.68 As Coke and his contemporary Sir John Davies noted, a law written only in the heart was better than all the written laws in the world,69 precisely because it was an imaginary phenomenon, capable of infinite interpretation and unconstrained by the inflexible boundaries of imperial edict or *lex scripta*.

In Chapter 5, I address the theme of imperial expansion with reference to *The Tempest*. My intention is not to provide a post-colonial critique of Shakespeare’s last sole-authored play (written in 1610–11), but is rather to analyse the work in its contemporaneous setting, identifying the expansionist ambitions of the English legal institution as much as the more general Jacobean project of imperial conquest in Ireland and the New World.70 I return to some of the ideas explored in earlier chapters, considering these in the context of developments that had

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67 Coke, Postnati. Calvin’s Case, 7 Reports, 4: 1a.
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taken place by the time Shakespeare completed *The Tempest*. Foremost of these is the role played by common lawyers in the governance of the state (I develop also the theme of resistance to tyranny, which I discuss in Chapter 2 in relation to *Macbeth*). The Inner Temple was described by the Elizabethan lawyer Gerard Legh as an island, metaphorically washed by the inspirational waters of the Hippocrene.\(^1\) Legh heralded the birth of a new empire of laws in the west; a sovereign English state, independent from Rome and Roman law, which embraced rather than denied its classical forebears.\(^2\) I develop the idea of a Jacobean empire of English laws, moving from the ‘island’ of law at the Inns of Court to the colonisation of Ireland and the New World (specifically, the colony of Virginia). Of especial interest in this chapter is the idea of the island as microcosm of the state, and in a section headed ‘Utopia and the Legal Imagination’ I make extensive reference to *Microcosmos: The Discovery of the Little World, with the Government Thereof*, by John Davies of Hereford. Written in 1603, and dedicated to James I, *Microcosmos* gives the reader a useful insight into early seventeenth-century opinion on the art of government (it has parallels in this respect with *Basilicon Doron* and *The Trew Law of Free Monarchies*, both written at the end of the sixteenth century). The emphasis placed by Davies of Hereford on the importance of action and resolution to the successful ruler; and conversely, on the dangers of excessive intellectual engagement, has especial significance to *The Tempest*, where Prospero admits to being distracted from ‘worldly ends’ (1.2.89) by his obsession with ‘bettering of my mind’ (1.2.90). This was considered (notably, by Davies of Hereford and James I) to be a fault in a temporal ruler, and was one that cost Prospero the dukedom of Milan. In the final section of the chapter, I reflect on the response of the Jacobean legal profession to the project of imperial conquest. I consider first the description by Sir John Davies of his experience in Ireland as Attorney-General, and conclude with reference to the stylised depiction of the New World and its indigenous population, in two masques presented by members of the Inns of Court at the Banqueting House in Whitehall.

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\(^1\) According to Legh, the Hippocrene ‘washte over tholde forworen Temples, dedicate to Godes, as places meete for Pallas Muses’, and the Inner Temple was an ‘Iland, wherein are the store of Gentilmen of the whole Realme, that repaire thither to learne to rule, and obeye by lawe, to yeelde there fleece to there prince and common weale’: G Legh, *The Accedens of Armory* (London, Rychard Tottel, 1576) ff 118r, 119v.