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# COMMONWEALTH AND COMMODITY: SHAKESPEARE'S "KING JOHN"

ROBERT J. DELAHUNTY<sup>†</sup>

## INTRODUCTION

Shakespeare's *King John*,<sup>1</sup> ("KJ") although now seldom performed,<sup>2</sup> is a searching and profound study of the theory and

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<sup>1</sup> WILLIAM SHAKESPEARE, *KING JOHN* (L.A. Beaurline ed., 1990) [hereinafter *KJ*]. All references are to this edition.

There are scholarly debates both about the date of *KJ* and its relationship to another Elizabethan drama, *The Troublesome Raigne of King John* (1591) [hereinafter *TR*], which has been attributed to George Peele, the possible co-author of Shakespeare's *Titus Andronicus*. See *TR*, in 4 *NARRATIVE AND DRAMATIC SOURCES OF SHAKESPEARE: LATER ENGLISH HISTORY PLAYS 72–151* (Geoffrey Bullough ed., 1966).

On the question of precedence, "[t]he balance of scholarly opinion favours an earlier date for *The troublesome reign*, with *King John* dating from the mid 1590s, but this is clearly a question upon which certainty is not possible." PETER LAKE, *HOW SHAKESPEARE PUT POLITICS ON THE STAGE: POWER AND SUCCESSION IN THE HISTORY PLAYS* 195 (2016). If *KJ* is later than *TR*, then Shakespeare followed the plot line of *TR* closely—so much so that *KJ* might be considered a kind of collaboration with Peele. *Id.* That said, there are significant differences between the two plays, including their treatment of characters and motivations. See Beatrice Groves, *Memory, Composition, and the Relationship of King John to The Troublesome Raigne of King John*, 38 *COMP. DRAMA* 277, 278, 285 (2004).

As for the date of *KJ*, "[t]he balance of scholarly opinion . . . favours a date somewhere around 1595 and a close link between *King John* and *Richard II*." LAKE, *supra*, at 184. Preoccupied as it is with issues of succession and legitimacy, *KJ* was extraordinarily timely. Queen Elizabeth I, having ascended the throne in 1558, remained unmarried and childless as she approached the age of sixty-two. Despite the absence of lawful issue, she had refused to designate her successor and had even prohibited Parliamentary discussion of the topic. See Susan Doran, *The Queen*, in *THE ELIZABETHAN WORLD* 35, 44–45 (Susan Doran & Norman Jones eds., 2011); Peter Lane, "*The Sequence of Posterity*": *Shakespeare's King John and the Succession Controversy*, 92 *STUD. IN PHILOLOGY* 460, 460–62 (1995); J.E. Neale, *Peter Wentworth (Continued)*, 39 *ENG. HIST. REV.* 175, 181 (1924). Inevitably, however, the succession issue was a matter of consuming public debate in various media, including pamphlets, treatises, and plays—such as *KJ*. See Gertrude Catherine Reese, *The Question of the Succession in Elizabethan Drama*, 22 *STUD. IN ENG.* 59, 59–60 (1942). Thus, although *KJ* is set some three hundred years earlier, it bristles

practice of government.<sup>3</sup> With rare finesse, it interweaves the themes of law, legitimacy, and power to create intricate, fascinating, and subversive patterns. Shakespeare creates a moral universe in which self-interest alone appears to govern, nothing is stable and everything is negotiable—a universe lacking “all direction, purpose, course, intent.”<sup>4</sup> It is, as one critic put it, “a world in which absolute standards of value do not exist . . . *King John* . . . confronts the question of how one lives in a world without value.”<sup>5</sup> Or as another critic wrote, the action “takes place in a world stripped . . . of any source of absolute value or legitimacy.”<sup>6</sup> The only major character who proves capable of acting selflessly and restoratively is illegitimate—a figure whose birth makes him marginal, at least at first, to the world he attempts to save. Yet from that same debased universe, a legitimate order eventually emerges and a vision of the common good checks the forces that tend to disintegration.

Law, legitimacy and power engage in many-sided interactions in *KJ*. Shakespeare shows us that power may be compelled to submit to law, but that power designs and uses law to serve its purposes.<sup>7</sup> Law stands in judgment over power, but without power, law has no effect.<sup>8</sup> He also shows that power can

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with speeches and events that Shakespeare’s audience would undoubtedly have applied to the all-important succession issue. See Lane, *supra*, at 462 (*KJ* “thoroughly, almost systematically . . . engages the specific issues entailed in the succession crisis of the 1590s”); LAKE, *supra*, at 184.

<sup>2</sup> For a review of criticisms of the play over the centuries and a description of contemporary and earlier audiences’ reactions to it, see A.J. Piesse, *King John: Changing Perspectives*, in *THE CAMBRIDGE COMPANION TO SHAKESPEARE’S HISTORY PLAYS* 126, 127–28 (Michael Hattaway ed., 2002).

<sup>3</sup> Contrast R.A. FOAKES, *SHAKESPEARE AND VIOLENCE* 83 (2003) (*KJ* deals “not in the end very satisfactorily, with issues of politics and war”). Although the critics generally fault the play, one appreciative critic was the great Shakespearean scholar Emrys Jones. While acknowledging the play’s weaknesses, Jones nonetheless found it to be “absurdly underrated” and argued that because of the figure of the Bastard Falconbridge, it “comes within hailing distance of *Hamlet*.” EMRYS JONES, *THE ORIGINS OF SHAKESPEARE* 235, 246 (1977).

<sup>4</sup> *KJ*, *supra* note 1, at act 2, sc. 1, l. 580.

<sup>5</sup> David Womersley, *The Politics of Shakespeare’s King John*, 40 *REV. ENG. STUD.* 497, 502 (1989).

<sup>6</sup> LAKE, *supra* note 1, at 229.

<sup>7</sup> See ERNST H. KANTOROWICZ, *THE KING’S TWO BODIES: A STUDY IN MEDIAEVAL POLITICAL THEOLOGY* 147 (1997) (While English King “was ‘under the law,’” it remained “at the same time the unique position of the king” that “Law could not legally be set in motion” against him and so that the King “was in some respects above and beyond the Law”).

<sup>8</sup> On the latter point, see Robert Cover, *Foreword: Nomos and Narrative*, 97 *HARV. L. REV.* 4, 4–5, 7 (1983). For an exploration of the question in the context of

claim and accrue legitimacy, but lack of legitimacy can weaken power to the point of undermining it.<sup>9</sup> Thus, even if legitimacy may be indispensable to power, power may equally be indispensable to legitimacy.<sup>10</sup> Finally, Shakespeare shows that law can create the nimbus of legitimacy; but the legitimacy that law confers may prove false.<sup>11</sup> The lawful need not be the legitimate, nor the legitimate the lawful. Power, legitimacy, and law are interdependent, but often at odds with each other.<sup>12</sup>

In rightful kingship, power, legitimacy and law are conjoined. The crucial problems explored in *KJ* all flow from a kingship that is illegitimate.<sup>13</sup> As in many of Shakespeare's greatest works—*Lear*, *Macbeth*, *Hamlet*, *Richard II*, and *The Tempest* among them—the questions of succession and usurpation are at the center of the drama.

The first Act of the play explores the idea of the ruler's legitimacy; after alluding repeatedly to John's illegitimacy, the rest of the play is an extended reflection on the consequences of such illegitimacy. The pivotal point comes with the compromise of peace between England and France in Act II, scene i, proposed

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international relations, see generally Jonathan D. Greenberg, *Does Power Trump Law?*, 55 STAN. L. REV. 1789 (2003).

<sup>9</sup> Thus, Shakespeare shows John as in many ways a capable King, administrator and general, as he in fact was. See, e.g., *KJ*, *supra* note 1, at act 3, sc. 4, ll. 1–3 (French King lamenting John's military success); *id.* at act 1, sc. 1, ll. 24–26 (John planning a *Blitzkrieg* in France). Nonetheless, like Henry VI, but for very different reasons, John is a “weak” King. See MICHAEL MANHEIM, *THE WEAK KING DILEMMA IN THE SHAKESPEAREAN HISTORY PLAY* 133–34 (1973). John hemorrhages power, makes disastrous compromises and resorts to vicious methods—all because he is lacking in legitimacy.

<sup>10</sup> Thus, the claim of the French Dauphin to England's crown is defeated, not by reference to law, but because of his military losses. *KJ*, *supra* note 1, at act 5, sc. 2, ll. 10–14. Likewise, Prince Arthur's claim, though legally strong, fails when the French withdraw their support for it. *Id.* at act 2, sc. 1, ll. 548–55.

<sup>11</sup> For instance, John has himself crowned a second time in order to emphasize his right to rule. But in the eyes of his nobility, his effort to confirm the legality of his rule merely undermined it—and they tell him so frankly and at length. See *id.* at act 4, sc. 2, ll. 1–39. John also receives the crown a *third* time from the Papal legate. *Id.* at act 5, sc. 1, ll. 1–4.

<sup>12</sup> This is certainly *not* to say that Shakespeare was propagandizing for a particular point of view. Although the play presents some political positions in a more favorable light than others, Shakespeare's method is dialectical, not didactic. Peter Lake gets this exactly right: that “what was *not* being made was a case; rather, a narrative template, or a series of narrative templates, a nexus of sometimes loosely connected images, tropes and associations, were being provided, through which elements in the audience could or might interpret both the play and the times.” LAKE, *supra* note 1, at 181.

<sup>13</sup> See *id.* at 197 (“the issue of legitimacy [is] at the very center of the play”).

by the citizens of the disputed city of Angiers. The great speech on “commodity” by John’s bastard nephew, Philip Falconbridge, (by then, Sir Richard Plantagenet) provides the conceptual key to understanding this moral universe. Philip rightly perceives that the bargain struck by the English and French monarchs—a bargain that flows from John’s awareness of the weakness of his claim to the Crown—is based only on expediency, not honor or justice. The taint on John’s Crown causes him to betray the interests of his realm; the lure of gain induces the French King to abandon the just and honorable cause—bringing Arthur to the throne—that he has sworn to serve. The moral world has become decentered and, as Philip sees, only “Commodity” rules.<sup>14</sup>

But, as the action will thereafter show, “commodity” devours itself. Values are destabilized; loyalties evaporate; “a king’s oath” proves worthless and rulers are “forsworn, forsworn”;<sup>15</sup> “the antique and well-noted face/Of plain old form is much disfigured”;<sup>16</sup> the King’s foot “leaves the print of blood where’er it walks”;<sup>17</sup> “law itself is perfect wrong”;<sup>18</sup> and religion is instrumentalized to serve raw power politics. Betrayal is piled upon betrayal in a furious and widening cycle. The French King and the Duke of Austria betray their sworn pledges to Arthur. Then the French King, on the instigation of the Roman legate,

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<sup>14</sup> See *KJ*, *supra* note 1, at act 2, sc. 1, ll. 577–78 (the Bastard saying that the world is subject to “this vile-drawing bias,/This sway of motion, this Commodity”). “Commodity” here is “a synonym for the narrow pursuit of material self-interest, usually deployed in direct contrast to the defence of the common good.” LAKE, *supra* note 1, at 204.

<sup>15</sup> *KJ*, *supra* note 1, at act 3, sc. 1, ll. 10 & 101.

Oaths were . . . central to medieval life, and this was, in many ways, a society built upon oaths . . . This was true throughout society but was particularly acute in the case of the king. The kingly office was so powerful and its authority so pervaded society that if a king’s word was regarded as unreliable there were inevitably troubling consequences for the stability and good functioning of politics and society as a whole.

Andrew Spencer, *The Coronation Oath in English Politics*, in *POLITICAL SOCIETY IN LATER MEDIEVAL ENGLAND: A Festschrift for Christine Carpenter* 38, 42–43 (2015). Later English monarchs understood the significance of keeping their sworn promises. Elizabeth I made a point of telling a Parliamentary delegation in 1566, “I will never break the word of a prince spoken in a public place, for my honour’s sake.” Elizabeth I, *Queen Elizabeth I of England (b. 1533, r. 1558-1603) Selected Writing and Speeches*, MODERN HISTORY SOURCE BOOK (1998), <https://sourcebooks.fordham.edu/mod/elizabeth1.asp#Response%20to%20a%20Delegation%20on%20her%20Marriage>.

<sup>16</sup> *KJ*, *supra* note 1, at act 4, sc. 2, ll. 21–22.

<sup>17</sup> *Id.* at act 4, sc. 3, l. 26.

<sup>18</sup> *Id.* at act 3, sc. 1, l. 189.

reneges on the treaty he has made with John. The legate purports to relieve John's subjects of their duty of allegiance and to bless them for revolting. John betrays Arthur, but is frustrated because John's accomplice Hubert betrays John. John is reconciled with the Church, which then opportunistically discards its alliance with the French; but the French refuse to heed the Church, instead pursuing their war against the English. The English earls betray their sovereign, John, and ally with the invading French, only to be themselves betrayed by the French Dauphin. Finally, John is betrayed by a monk who poisons him in revenge for his attacks on the Church.

Lacking legitimacy, untethered by law, unsanctioned by religion, the quest for power and profit consumes itself. Just as an ecosystem depends on the strength and vitality of the apex predator,<sup>19</sup> the moral order requires a rightful ruler; without one, it will collapse. In exploring the modalities of power, legitimacy and law, *KJ* necessarily broaches the destructive effects of illegitimate rule on a society. "For princes are the glass, the school, the book/Where subjects' eyes do learn, do read, do look."<sup>20</sup> Or as *KJ* puts it, "inferior eyes/ . . . borrow their behaviours from the great."<sup>21</sup>

Shakespeare seems to project onto the late Middle Ages the dominating presence of "commodity" in his own early modern England. "Competition was in many ways the keynote of the [Elizabethan] age. Each man must push himself to the front, without too much scruple about means, or be elbowed aside."<sup>22</sup> How then, if at all, are the effects of "commodity" to be arrested?

When Tudor political writing referred to "commodity," it "almost regularly placed [it] in opposition to the idea of 'commonwealth.'"<sup>23</sup> Thus, in the Sermon of the Plough, delivered

<sup>19</sup> Sarah Zielinski, *What Happens When Predators Disappear*, SMITHSONIAN (July 18, 2011), <https://www.smithsonianmag.com/science-nature/what-happens-when-predators-disappear-32079553/>.

<sup>20</sup> WILLIAM SHAKESPEARE, *THE OXFORD SHAKESPEARE: THE COMPLETE SONNETS AND POEMS*, 51 (Colin Burrow ed. 2002) (quoting WILLIAM SHAKESPEARE, *THE RAPE OF LUCRECE*, ll. 615–16 (1594)).

<sup>21</sup> *KJ*, *supra* note 1, at act 5, sc. 1, ll. 50–51.

<sup>22</sup> VICTOR KIERNAN, *SHAKESPEARE: POET AND CITIZEN* 4–5 (1993).

<sup>23</sup> JONES, *supra* note 3, at 242; *see also* ALAN CROMARTIE, *THE CONSTITUTIONALIST REVOLUTION: AN ESSAY ON THE HISTORY OF ENGLAND, 1450-1642* 86–87 (2006). The idea of a "commonwealth" was a common topic of Tudor political thought, and was often associated with proposals for social reform (if of a conservative cast). *See generally* NEAL WOOD, *FOUNDATIONS OF POLITICAL ECONOMY: SOME EARLY TUDOR VIEWS ON STATE AND SOCIETY* (1994); Arthur B.

in London's St. Paul's Church in 1548, Hugh Latimer, formerly Bishop of Worcester under Henry VIII, asked, "For what man will let go, or diminish his private commodity for a commonwealth? And who will sustain any damage for the respect of a public commodity?"<sup>24</sup> John Hales, also in 1548, wrote to the Lord Protector Somerset that

if there be any way or policy to make the people receive, embrace, and love God's word, it is only this,—when they shall see that it bringeth forth so goodly fruit, that men seek not their own wealth, nor their private commodity, but, as good members, the universal wealth of the whole body.<sup>25</sup>

A statute from the reign of Mary Tudor condemned those who pursued "their private Wealths and Commodity [ignoring] the Commonwealth of the Handicraftsmen, and other poor People."<sup>26</sup> The BRIEF DISCOURSE OF ROYALL MONARCHIE (1588) speaks of "good" commonwealths as those "which tende only vnto

Ferguson, *The Tudor Commonweal and the Sense of Change*, 3 J. BRIT. STUD. 11 (1963). The Tudor idea of "commonwealth" could express "a genuine and instrumental ideology of membership, participation, common interest. 'Commonwealth' was interchangeable with 'republic,' at least in Latin." Patrick Collinson, *The State as Monarchical Commonwealth: 'Tudor' England*, 15 J. HIST. SOC. 89, 93 (2002); see also DIARMAID MACCULLOCH, TUDOR CHURCH MILITANT: EDWARD VI AND THE PROTESTANT REFORMATION 122–26 (2011).

<sup>24</sup> PROJECT CANTERBURY, SERMONS BY HUGH LATIMER, <http://anglicanhistory.org/reformation/latimer/sermons/plough.html>; see also Thomas Lever, *The Sermon in the Shrouds of St. Paul's Church (1550)*, in EDWARD ARBER (ED.), THOMAS LEVER SERMONS 19, 33 (1870) (contrasting "private commodity" with "the common wealth"). Ralph (or Raphe) Robinson's 1551 translation of Sir Thomas More's UTOPIA also contrasts commodity to commonwealth: "[W]hen I consider . . . all those common-wealths which now a-days any where do flourish . . . I can perceive nothing but a certain conspiracy of rich men procuring their own commodities under the name and title of the commonwealth." THOMAS MORE, UTOPIA 382–83 (Raphe Robinson trans., 1808) (1551), [https://archive.org/stream/mostpleasantfrui00morerich/mostpleasantfrui00morerich\\_djvu.txt](https://archive.org/stream/mostpleasantfrui00morerich/mostpleasantfrui00morerich_djvu.txt). And although he uses the term "commodity" in a different sense, John Stow makes the same contrast in his SURVEY OF LONDON (1633), <https://quod.lib.umich.edu/e/eebo/A13053.0001.001?view=toc>, when he laments the enclosure of common lands for the purpose of creating private summer houses and gardens. These changes, he thought, were

not so much for use or profit, as for shewe and pleasure, bewraying the vanity of mens mindes, much unlike to the disposition of the ancient Citizens, who delighted in the building of Hospitals, and Almes-houses for the poore, and therein both imployed their wits, and spent their wealths in preferment of the common commodity of this our City.

*Id.* at 476.

<sup>25</sup> PATRICK FRASER TYTLER, ENGLAND UNDER THE REIGNS OF EDWARD VI AND MARY 115 (1839).

<sup>26</sup> See WHITNEY R.D. JONES, THE TREE OF COMMONWEALTH, 1450-1793, 62 (2000).

th'adunancement of the publicke profit," and of "ill, and wicked" ones "tending altogether vnto their owne priuate commoditie, and not vnto the benefit of their country."<sup>27</sup>

But Shakespeare does more than merely recapitulate commonplace thinking. Rather, he uses the contrariety between "commonwealth" and "commodity" to map out the conflict, evident in his own society, between a receding feudal order and an emerging modern one. "Shakespeare belonged to a period of half-dawn, when an old order and its panorama of life were fading or crumbling and a new one was only fitfully taking shape."<sup>28</sup> In that emerging order, soon to be delineated by Thomas Hobbes, "commodity" or the pursuit of self-interest becomes the governing principle, and pre-modern notions of "honor" are devalued and disparaged.<sup>29</sup> In the play, Shakespeare (so to say) foreshadows, encounters, and disarms Hobbes. As Shakespeare depicts it, a world founded entirely on the principle of "commodity" inherently veers towards self-destruction.<sup>30</sup> In the crisis that such a world must eventually undergo, "happy he, whose cloak and censure can/ Hold out this tempest."<sup>31</sup> To survive disintegration, such a world must be rescued from itself. Although the idea of honor may seem archaic and the pursuit of it is prone to violence, only a figure who embodies that idea can be its rescuer—a figure who deliberately prefers "honour" to "land."<sup>32</sup> In sum, *KJ* points towards what was likely to have been Shakespeare's ideal: "a community with a natural harmony of its own, growing out of men's feelings for one another and for the common tasks."<sup>33</sup>

Part I begins, as does *KJ* itself, with the French ambassador questioning the King's legitimacy, and continues with a dispute

<sup>27</sup> CHARLES MERBURY, A BRIEF DISCOURSE OF ROYALL MONARCHIE 7 (1581), <https://quod.lib.umich.edu/e/eebo2/A72894.0001.001?view=toc>.

<sup>28</sup> KIERNAN, *supra* note 22, at 7.

<sup>29</sup> THOMAS HOBBS, LEVIATHAN (1651); *see also* LAURIE M. JOHNSON BAGBY, THOMAS HOBBS: TURNING POINT FOR HONOR 56–57 (2009); C.B. MACPHERSON, THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM—HOBBS TO LOCKE (1965).

<sup>30</sup> The "Bastard," who in this interpretation is central to the play, recognizes this problem early on. The world, he says, "of itself is peisèd well,/ Made to run upon even ground." What causes it to deviate from its proper order is that "this advantage, this vile-drawing bias,/ This sway of motion, this Commodity,/ Makes it take head from all indifferency,/ From all direction, purpose, course, intent." *KJ*, *supra* note 1, at act 2, sc. 1, ll. 575–80.

<sup>31</sup> *Id.* at act 4, sc. 3, ll. 155–56.

<sup>32</sup> *Id.* at act 1, sc. 1, l. 164.

<sup>33</sup> KIERNAN, *supra* note 22, at 11–12.



between two brothers over their inheritance. The problem of just title reverberates throughout the play. Part II explores the development and moral growth of Philip Falconbridge/Sir Richard Plantagenet—“The Bastard”—the play’s central character and if there is one, its hero. Part III analyzes the two concepts whose polar opposition structures the play: “commonwealth” and “commodity.” The contrast between these two ideas is found elsewhere in Tudor literature, but Shakespeare gives it a new resonance and depth. The service of one or the other of these ideals drives the plot, while providing an implicit reflection on economic and cultural trends in Shakespeare’s own time. Part IV returns to the action of the play, analyzing Shakespeare’s dramatization of the world of commodity in operation. Part V considers a world restored—that is, a world in which legitimacy is reestablished, the national community of England survives foreign invasion and civil war, and the sense of solidarity and common purpose is renewed.

## I. THE PROBLEM OF JUST TITLE

### A. *The Embassy Scene*

We first see King John,<sup>34</sup> with his mother Queen Eleanor at his side, receiving the French ambassador Chatillon.<sup>35</sup> Even as Chatillon speaks to John, he questions his right to rule: Chatillon addresses himself merely to “the majesty, the borrowed majesty

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<sup>34</sup> On the historical King John, see generally MARC MORRIS, KING JOHN: TREACHERY AND TYRANNY IN MEDIEVAL ENGLAND (2015); STEPHEN CHURCH, KING JOHN AND THE ROAD TO MAGNA CARTA (2015); MAGNA CARTA (WITH A NEW COMMENTARY BY DAVID CARPENTER) (2015); DAVID CARPENTER, THE STRUGGLE FOR MASTERY: BRITAIN 1066-1284, 263–99 (2003); W.L. WARREN, KING JOHN (1997). For a brief sketch of the historical Queen Eleanor, see *id.* at 17–20.

<sup>35</sup> If John does not meet the French demands, Chatillon warns, Arthur’s rights will be enforced by “fierce and bloody war.” *KJ*, *supra* note 1, at act 1, sc. 1, l. 17. Chatillon has been sent as what Shakespeare’s contemporary Alberico Gentili categorized as an “ambassador of war,” i.e., “one who has been sent without right of command in the name of a prince or state to declare war or give notice of some other hostile intention.” ALBERICO GENTILI, THE FIRST BOOK ON EMBASSIES, CH. VI, p. 16 (Gordon J. Laing trans. 1924) (Gentili occupied an important place in Elizabethan culture. See CHRISTOPHER N. WARREN, LITERATURE & THE LAW OF NATIONS, 1580-1680, 33–37 (2015)). The ambassador Caius Lucius brings a similar declaration of war from Caesar Augustus in *Cymbeline*. WILLIAM SHAKESPEARE, CYMBELINE, at act 3, sc. 2, ll. 59–66 (New Cambridge Shakespeare, Martin Butler ed., 2005) [hereinafter *Cymbeline*]. Shakespeare depicts declarations of war of this kind in *Henry V* as well. See FREDERIC J. BAUMGARTNER, DECLARING WAR IN EARLY MODERN EUROPE 80–81 (2011).

of England.”<sup>36</sup> And he comes directly to the point, telling John “to lay aside the sword/Which sways usurpingly” over England’s domains, yielding to the “most lawful claim” of Prince Arthur, the eldest son of John’s late elder brother Geoffrey, and thus England’s “right royal sovereign.”<sup>37</sup> John, who was the fifth and youngest son of King Henry II and younger brother of his predecessor Richard Coeur de Lion, must yield the Crown to England’s rightful and legitimate ruler, Arthur. Under the rules of primogeniture as Shakespeare presents them here,<sup>38</sup> Arthur’s

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<sup>36</sup> *KJ*, *supra* note 1, at act 1, sc. 1, l. 4.

<sup>37</sup> *Id.* at act 6, sc. 1, ll. 9–15. The historical Arthur was born several months after his father Geoffrey’s death, and must have been conceived very shortly before it. See MORRIS, *supra* note 34, at 67.

<sup>38</sup> “Primogeniture,” a form of lineal succession, came to dominate medieval Western Europe. In the common form of “agnatic” primogeniture, the eldest living son and his male offspring received the inheritance. Scholars have argued that this system resolved coordination and other problems that characteristically beset autocracies more efficiently than alternative succession orders. These alternatives included elective monarchy and agnatic seniority—a form of succession primarily practiced in the Slavic countries. See Andrej Kokkonen & Anders Sundell, *Delivering Stability—Primogeniture and Autocratic Survival in European Monarchies 1000–1800*, 108 AM. POL. SCI. REV. 438, 440–41 (2014). Lineal succession also had the attraction of enhancing the sacred nature of kingship—the monarchy would fall into the hands of the eldest child of the established King—i.e., someone formed and chosen in the womb by an inscrutable God, not into those of someone elected by men. See MOODY E. PRIOR, *THE DRAMA OF POWER: STUDIES IN SHAKESPEARE’S HISTORY PLAYS* 88 (1973).

Primogeniture began establishing itself in Western Europe in the eleventh century. But only once in the period between 1066—the date of the Norman Conquest of England—and 1216—the end of John’s reign—did the English crown pass from a father to his eldest surviving son: the crown passed from Henry II to Richard Coeur de Lion, John’s immediate predecessor. On two other occasions in that early period, the eldest legitimate son was deliberately passed over. See CHRIS GIVEN-WILSON & ALICE CURTEIS, *THE ROYAL BASTARDS OF MEDIEVAL ENGLAND* 6 (1984). And at one point, Henry II may have considered designating John, his favorite son, as heir to the English Crown in preference to his elder son Richard. See MORRIS, *supra* note 34, at 36–37.

In the “fully developed” English common law, the principle of primogeniture implies that the “daughters, grand-daughters and other female descendants of an eldest son who died in his father’s lifetime will exclude that father’s second son.” However, “[i]n the twelfth century, . . . this principle was still struggling for recognition.” Application of the principle of primogeniture, outside as well as within the context of royal succession, generated legal conflicts in that early period: one type of case that “must have been common” was “a contest between the younger son and his nephew, the son of his dead elder brother.” If “the question between the uncle and nephew is neatly raised,—then we must fall back on the maxim *Melior est conditio possidentis*; he who is first to get seisin can keep it.” II SIR FREDERICK POLLOCK & FREDERICK WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 297–98* (Liberty Fund, Inc. 2008) (2d ed. 1898). That, of course, is the situation dramatized in *KJ*.

claim is stronger than John's.<sup>39</sup> For dramatic reasons, Shakespeare simplifies what was in fact a more complicated and less certain legal issue.<sup>40</sup>

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<sup>39</sup> The French King Philip makes precisely this argument in a direct confrontation with John. Pointing to Prince Arthur, Philip says:

Geoffrey was thy elder brother born,  
And this his son, England was Geoffrey's right,  
And this is Geoffrey's.

*KJ*, *supra* note 1, at act. 2, sc. 1, ll. 104–06.

<sup>40</sup> The question of royal succession was not settled at the time John took the throne in 1199. "Beginning with the [Norman] Conquest [of 1066] and continuing through the reign of John, nearly every translation to the crown raised . . . questions about the governing principle of succession." HOWARD NENNER, *THE RIGHT TO BE KING: THE SUCCESSION TO THE CROWN OF ENGLAND 1608–1714* at 1 (1995).

[P]recedence in blood was not yet clearly established. Feudal custom in the matter was hardening, but there was no uniformity between one part of the Angevin empire and another: the customs of England, Normandy and Anjou [the lands over which John's dynasty ruled] were at variance.

WARREN, *supra* note 34, at 48–49; *see also* GIVEN-WILSON & CURTEIS, *supra* note 38, at 6 (stating that, at least before John, "uncertainty over the succession" was common, and "what therefore constituted a 'legitimate' king was always open to question."); EDNA ZWICK BORIS, *SHAKESPEARE'S ENGLISH KINGS, THE PEOPLE, AND THE LAW: A STUDY IN THE RELATIONSHIP BETWEEN THE TUDOR CONSTITUTION AND THE ENGLISH HISTORY PLAYS* 132–33 (1978); PETER SACCIO, *SHAKESPEARE'S ENGLISH KINGS: HISTORY, CHRONICLE, AND DRAMA* 190 (2d ed. 1977) (discussing how "no formal rule existed" to decide whether John or Arthur was King).

A law book attributed to Rannulf de Glanvill, Henry II's justiciar, and the tutor of King John, is undecided as to whether a younger brother or the son of a dead older brother has a better claim to a feudal inheritance. *See* Austine Lane Poole, *From Domesday Book to Magna Carta, 1087–1216*, in 3 *THE OXFORD HISTORY OF ENGLAND* 243, 429 (1951). Although Glanvill favors the nephew, he gives arguments on both sides. Glanvill wrote

[L]ineal descendants are always preferred to collaterals. When, therefore, anyone dies leaving a younger son, and a grandson born of an eldest son already dead, a great legal problem arises as to which is to be preferred to the other in that succession, namely, whether the son or the grandson. Some have sought to say that the younger son is more rightly heir than such a grandson, on the ground that since the eldest son did not survive until the death of his father he did not survive until he was his heir; and therefore, so they say, since the younger son survived both father and brother, he rightly succeeds to his father. Others, however, have taken the view that such a grandson ought in law to be preferred to his uncle; for, since that grandson was born to the eldest son and was heir of his body, he ought to succeed to his father in all the rights which his father would have if still alive. I agree with this if his father was not 'forisfamiliated' by his grandfather. A son can be 'forisfamiliated' by his father in his father's lifetime if the father assigns a certain part of his land to the son and gives him seisin of it in his lifetime at the request and with the full agreement of the son, so that he is fully satisfied with such part. In such a case the heirs of the body of that son cannot claim, against their uncle or anyone else, any more than their father's part from the remaining part of the inheritance of

His demands refused, Chatillon departs. Although John has robustly defended his claim to the Crown in public,<sup>41</sup> he holds a whispered conversation with his mother. He alludes to the basis of his claim to the English Crown: it rests on “strong possession and our right” and the knowing Eleanor, who has a clearer view of the situation disagrees:

Your strong possession much more than your right,  
Or else it must go wrong with you and me.<sup>42</sup>

Eleanor reminds John that his claim rests on possession, or in other words on power, “much more” than on legitimacy or on law.<sup>43</sup> If he was seeking reassurance from her that he had just title to the Crown, she does not give it.<sup>44</sup>

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their grandfather, even though their father could have done so had he survived their grandfather.

RANNULF DE GLANVILL, TRACTATUS DE LEGIBUS ET CONSUEITIDINES REGNI ANGLIE QUI GLANVILLA VOCATUR [THE TREATISE ON THE LAWS AND CUSTOMS OF THE REALM OF ENGLAND COMMONLY CALLED GLANVILL], Bk. VII at 77–78 (G.D.G. Hall ed., trans. 1965) (2d ed. 1983) (footnotes omitted). Writing during the reign of Edward I, and so after John and Glanvill, “Britton” opined clearly in favor of the superiority of the nephew’s claim over the uncle’s. See BRITTON, SUMMA DE LEGIBUS ANGLIE QUE VOCATUR BREITONE, 314–315 (Francis Morgan Nichols trans., 1865), <https://babel.hathitrust.org/cgi/pt?id=njp.32101068568342;view=1up;seq=7> (last accessed Feb. 22, 2019).

By 1377, when Richard II succeeded to the throne, the question had been settled in the nephew’s favor: “Richard, a child of ten, was at common law his grandfather’s heir, and so succeeded to Edward III’s throne rather than deferring to a powerful adult uncle,” Thomas of Woodstock, the Duke of Gloucester, fourteenth son of Edward III. NENNER, *supra* note 40, at 2. In his *Richard II*, Shakespeare portrays that King as the paradigm of hereditary legitimacy, as reflected, for example, in the speeches of John of Gaunt, the Bishop of Carlisle, and King Richard himself. See WILLIAM SHAKESPEARE, THE TRAGEDY OF RICHARD THE SECOND (Barbara A. Mowat & Paul Werstine eds.) [hereinafter *Richard II*] act 1, sc. 2, ll. 37–41, the Bishop of Carlisle, *id.* at act 4, sc. 1, ll. 125–27 and King Richard himself, *id.* at act 3, sc. 2, ll. 54–57.

<sup>41</sup> John was later to defend his claims stoutly before the Papal legate Cardinal Pandulph, speaking of himself as “a sacred king . . . [W]e under God are supreme head . . .” *KJ*, *supra* note 1, at act 3, sc. 1, ll. 147, 155. Likewise, in confronting the King of France, John claims a “just and lineal” right to the throne. See *id.* at act 2, sc. 1, l. 85.

<sup>42</sup> *Id.* at act 1, sc. 1, ll. 40–41.

<sup>43</sup> Similarly, in *King Edward III*, Prince Philip, the youngest son of the usurping French King John, assures his father that his claim to the French crown will prevail over that of Edward of England:

I say, my lord, claim Edward what he can,  
And bring he ne’er so plain a pedigree,  
’Tis you are in possession of the crown,  
And that’s the surest point of all the law . . .

WILLIAM SHAKESPEARE, KING EDWARD THE THIRD, act. 3, sc. 1, ll. 107–10 (Giorgio Melchiori ed., 1998) [hereinafter *Edward III*]. In *The Tempest*, Prospero’s rulership

Then Shakespeare swiftly presents us with a scene that conveys, in miniature, the theme of the play as a whole.<sup>45</sup> Let us call it “the Judgment Scene.” In this scene, Shakespeare dramatizes the issue of succession to an estate of land in Northamptonshire in order to foreground the larger, dominating question of the play: the rightful succession to the Crown of England. The idea of kingship in England was historically linked to legal notions of real property,<sup>46</sup> and Shakespeare here plays on those associations. A banal legal dispute between an elder and a younger brother over a plot of land becomes the miniaturization of the grander dispute.

### B. *The Judgment Scene*

The King is called upon to adjudicate a question of rightful succession: which of two brothers has legal title to their late father’s land.<sup>47</sup> The brothers are, putatively, sons of the late Sir

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over his island is based, essentially, on power, although Caliban arguably had a greater right to it through inheritance from his mother, the witch Sycorax, who had ruled before Prospero’s arrival. See WILLIAM SHAKESPEARE, *THE TEMPEST* 25 (Stephen Orgel ed., 1987). That is so, at least, unless Caliban was a bastard “got by the devil himself.” *Id.* at act I, sc. 2, l. 319.

<sup>44</sup> Nearly all critics read this and other scenes to show that Shakespeare intends both his audience and the characters in the play to consider John’s kingship illegitimate or at best highly questionable. Only on that assumption do many of John’s decisions make sense, including his massive concessions of Angevin lands to France, his second coronation, and his attempt to have Prince Arthur murdered. Even the Bastard, a loyalist to John, recognizes that Arthur is the legitimate heir to the throne. See *KJ*, *supra* note 1, at act 4, sc. 3, ll. 140–45; see also LAKE, *supra* note 1, at 196–97. For a minority view, see BORIS, *supra* note 40, at 132–34.

<sup>45</sup> Some critics have found the structure of the opening of *KJ* strange because it moves so rapidly from the embassy scene to the judgment scene without giving adequate attention to John’s “situation.” See Robert Adger Law, *On the Date of King John*, 54 *STUD. IN PHILOLOGY* 119, 124 (1957). I suggest, however, that the two scenes—which show the King performing, respectively, his foreign affairs and domestic functions—illustrate John’s “situation” very well. The King’s adjudication of a dispute over rightful inheritance takes up the central issue of the play and begins to reveal its many aspects.

<sup>46</sup> See J.H. BURNS, *LORDSHIP, KINGSHIP, AND EMPIRE: THE IDEA OF MONARCHY 1400-1525*, 60–61 (1992). In Shakespeare’s *Richard II*, the King’s uncle, the Duke of York, draws attention to the resemblance between the inheritance of property and of a crown. Rebuking Richard for confiscating John of Gaunt’s estate on his death, and so ousting John’s rightful heir the Duke of Hereford, York asks Richard “how art thou a king/But by fair sequence and succession?” *Richard II*, *supra* note 40, at act 2, sc. 1, ll. 198–99.

<sup>47</sup> The King appears to be sitting in the *Curia Regis*, or King’s Court, which comprised his chief administrative officers, who were probably assembled for the reception of the French Ambassador. The sheriff is introduced into the King’s

Robert Falconbridge, a gentleman of Northamptonshire, knighted in the field by King Richard Coeur de Lion, John's elder brother, for his services in the Third Crusade. Robert, the younger of Sir Robert's sons, claims that his elder brother Philip is a bastard, born to his mother Lady Falconbridge during her marriage to his father, but by another man. Philip's illegitimacy, the younger Robert contends, should deny him a share of Sir Robert's estate.<sup>48</sup> Further, Robert argues that his father's will disinherited Philip because Sir Robert was well aware that he was not Philip's sire: "Upon his deathbed he by will bequeathed/His lands to me, and took it on his death/That this my mother's son was none of his."<sup>49</sup> For his part, Philip contends that he is indeed the natural, as well as the legal, son of Sir Robert and Lady Falconbridge.<sup>50</sup>

Immediately, the question, not only of Philip's legitimacy, but also of John's, is put before us. As King, John is expected to adjudicate just title to a piece of land. His authority to adjudicate the case is one aspect of his Crown, a royal prerogative or duty.<sup>51</sup> But John's claim to the Kingship is in

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presence by the Earl of Essex, who was at that point the Chief Justiciar of England. See GEORGE W. KEETON, *SHAKESPEARE AND HIS LEGAL PROBLEMS* 2 (1930).

<sup>48</sup> That was, indeed, for long the law of England, according to the medieval English lawyer or law book known as "Bracton." See Paul Brand, *The Age of Bracton*, 89 *PROC. BRITISH ACAD.* 65 (1996); SAMUEL E. THORNE, *BRACON ON THE LAWS AND CUSTOMS OF ENGLAND* 186 (1968) ("Illegitimates born of unlawful intercourse, of persons between whom there could be no marriage, are completely excluded from every benefit."); see also SIR JOHN FORTESCUE, *ON THE LAWS AND GOVERNANCE OF ENGLAND: IN PRAISE OF THE LAWS OF ENGLAND* 55 (Shelley Lockwood ed., 1997) ("the law of the English does not allow children born out of wedlock to succeed, proclaiming them merely natural and not legitimate"); B.J. SOKOL & MARY SOKOL, *SHAKESPEARE'S LEGAL LANGUAGE* 23–31 (2000).

<sup>49</sup> *KJ*, *supra* note 1, at act 1, sc. 1, ll. 109–11. As we see later in the play, deathbed utterances had a particular ring of truth, as with those of the dying French Count Melun. *Id.* at act 5, sc. 4, ll. 22–28. See generally Harriet C. Frazier, "Like a Liar Gone to Burning Hell": *Shakespeare and Dying Declarations*, 19 *COMP. DRAMA* 166 (1985).

<sup>50</sup> *KJ* does not make clear the legal nature of the case before the King, but in *TR*, possibly a predecessor play to *KJ*, the case seems to involve a breach of the King's peace and a riot. By John's time, such cases were actionable in royal courts. See *TR*, *supra* note 1, at act 1, sc. 1, 73–80; Sir Frederick Pollock, *The King's Peace in the Middle Ages*, 13 *HARV. L. REV.* 177, 179 (1899). If the dispute is instead viewed as a case involving succession to land, then it was considered a secular matter so that, again, jurisdiction lay in the royal courts. See Norma Adams, *Nullius Filius—A Study of the Exception of Bastardy in the Courts of Medieval England*, 6 *U. TORONTO L. J.* 361, 362 (1946); KEETON, *supra* note 47, at 2.

<sup>51</sup> It was a traditional view that "the act which best exemplifies good monarchy is the act of rendering justice: the act, in most cases, of making judgment. . . . In England, the prince's original constitutional function was to act as judge." JANE

APTEKAR, *ICONS OF JUSTICE: ICONOGRAPHY & THEMATIC IMAGERY IN BOOK V OF THE FAERIE QUEEN* 14 (1969). The roots of this idea lay in Biblical texts such as 1 Kings 10:9 (Geneva Bible 1599) (“Blessed be the Lord thy God, which loved thee, to set thee on the throne of Israel, because the Lord loved Israel forever, and made thee king to do equity and righteousness”). In the medieval period, the King was conceptualized as the Living Law and the Living Justice. See KANTOROWICZ, *supra* note 7, at 131–34. The Tudor legal historian William Lambard[e] followed this tradition when insisting that “the King ought only to be the *Judge* of his people.” WILLIAM LAMBARD, *ARCHEION, OR, A DISCOURSE UPON THE HIGH COURTS OF JUSTICE IN ENGLAND* 97 (rev’s ed. 1635), [http://eebo.chadwyck.com/search/full\\_rec?SOURCE=pgimages.cfg&ACTION=ByID&ID=V8667](http://eebo.chadwyck.com/search/full_rec?SOURCE=pgimages.cfg&ACTION=ByID&ID=V8667). In a speech to the Star Chamber in 1616, King James VI and I (King of Scotland and Elizabeth I’s successor as King of England) insisted that the King personally performed a judicial function. See KING JAMES VI AND I: *POLITICAL WRITINGS* 205–06 (Johann P. Sommerville ed., 1994) [hereinafter KING JAMES VI AND I].

Shakespeare and other Elizabethan artists depicted Kings in the performance of their judicial functions. *Richard II* opens with the King sitting as a judge, and King Leontes in *The Winter’s Tale* presides over the trial of Queen Hermione. Elizabeth I was herself represented in Tudor art and literature by the figure of Astraea, the celestial Roman virgin associated with Justice. See Frances Yates, *Queen Elizabeth as Astraea*, 10 *J. WARBURG & COURTAULD INSTITUTES* 27, 65–72 (1947). Sir John Davies’ poem *Astraea: Hymne I* was an acrostic, the beginning letters of whose lines spelled out the Queen’s name. See SIR JOHN DAVIES, *HYMNES OF ASTRAEA IN ACROSTICK VERSE* (1599), <https://quod.lib.umich.edu/e/eebo/A19923.0001.001/1:2?rgn=div1;view=fulltext>. In Edmund Spenser’s allegory *THE FAERIE QUEENE*, an enthroned Elizabeth—in the figure of Queen Mercilla—is represented as being “about affaires of common wele,/Dealing of Iustice with indifferent grace,/And hearing pleas of people meane and base./ Mongst which as then, there was for to be heard/The tryall of a great and weightie case.” EDMUND SPENSER, *THE FAERIE QUEENE: BOOK V, Canto IX*, 36 (1596).

The question of whether the monarch may personally sit and decide cases proved to be a test of strength between King James and Sir Edward Coke. In *Cawdrey’s Case* (1591), decided before James ascended the English throne, Coke wrote that “the kingly head of this politic body is instituted and furnished with plenary and entire power, prerogative, and jurisdiction to render justice and right to every part and member of this body . . . in all causes ecclesiastical or temporal . . .” J.R. TANNER, *TUDOR CONSTITUTIONAL DOCUMENTS A.D. 1485-1603*, 372, 373 (2d ed. 1930). However, in *Prohibitions del Roy* (1607), Coke ruled, in direct contradiction to the views of King James, that the royal judges did not sit merely as delegates of the King, and that

the King in his own person cannot adjudge any case, either criminal, as treason, felon, etc. or betwixt party and party, an adjudged in some Court of Justice, according to the law and custom of England; and always judgments are given, *ideo consideratum est per Curiam*, so that the Court gives the judgment . . . and the Judges are sworn to execute justice according to law and the custom of England.

*Prohibitions del Roy* (1607), EWHC KB J23, 77 ER 1342, 12 Co.Rep. 64 (Eng.), <http://www.bailii.org/ew/cases/EWHC/KB/1607/J23.html>. Coke’s conclusion was based primarily on the argument that the judges possessed a distinct professional expertise not available to lay persons such as the King:

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

itself doubtful. His mother has just told him that it depends on “strong possession,” not on right.

Nonetheless, John decides the case by reference to the law, which a rightful King must administer and to which he is himself subject.<sup>52</sup> Bastards could not inherit real property.<sup>53</sup> But in this case, the rule of decision, provided by the common law of adulterine bastardy,<sup>54</sup> posits a strong, even un rebuttable, presumption<sup>55</sup> in favor of the legitimacy of Philip, the elder of the two brothers.<sup>56</sup>

and judgment of law, which law is an act which requires long study and experience.

*Id.* On Coke’s conflict with the Crown, see Conrad Russell, *Whose Supremacy?—King, Parliament and the Church 1530-1640*, 4 *ECC. L.J.* 700, 704–05 (1997).

<sup>52</sup> See JOHN OF SALISBURY, *POLICRATICUS* 29 (Nederman ed. & trans. (1990)) (citing Justinian).

<sup>53</sup> See SOKOL & SOKOL, *supra* note 48, at 23–31.

<sup>54</sup> See generally SIR HARRIS NICHOLAS, *A TREATISE ON THE LAW OF ADULTERINE BASTARDY, WITH A REPORT OF THE BANBURY CASE AND OF ALL OTHER CASES BEARING UPON THE SUBJECT* 1 (1836), <https://ia802704.us.archive.org/22/items/atreatiseonlawa00knolgoog/atreatiseonlawa00knolgoog.pdf>.

<sup>55</sup> See ALISON FINDLAY, *ILLEGITIMATE POWER: BASTARDS IN RENAISSANCE DRAMA* 24 (1994) (“[C]hildren who were quite obviously illegitimate often had their legal legitimacy maintained. Under English civil law it was extremely difficult to establish the paternity of a bastard born within marriage and disinherit him. The child of an adulteress was regarded as legitimate and its maintenance the responsibility of the mother’s husband unless either impotence or non-access of the husband could be proved.”); Howard Elisofon, *A Historical and Comparative Study of Bastardy*, 3 *ANGLO-AM. L. REV.* 306, 312 (1973). “The reluctance of English law to bastardize any child born to a married woman goes back to at least the 12th Century.” R.H. Helmholz, *Bastardy Litigation in Medieval England*, 13 *AM. J. LEG. HIST.* 360, 369 (1969).

<sup>56</sup> Once a husband had recognized a child as his, that recognition could not be recalled. Indeed, unless the husband promptly *rejected* the child, it would be legitimized.

“Fleta,” an old English law book from the late thirteenth century, see *FLETA SEU COMMENTARIUS JURIS ANGLICANI* xii (G.O. Sayles, ed. & trans., 99 Selden Society 1983), <http://www.heinonline.org.ezp1.lib.umn.edu/HOL/Page?collection=selden&handle=hein.selden/seldseng0099&id=12>, considers the case of “suppositious birth,” saying that, “even if [the women] are pregnant, it is not, however, probable that they should have conceived by their husbands.” He continues:

If therefore there should be any such, born [to his wife] or suppositious, any prudent man will straightaway cause him to be removed from the house and from all support, since by bringing him up the true heir might be disinherited, for *if he is once acknowledged it will not be possible later to disown him.*

*FLETA SEU COMMENTARIUS JURIS ANGLICANI* 31 (H.G. Richardson & G.O. Sayles, eds. & trans., 72 Selden Society 1955) (emphasis added), <http://www.heinonline.org.ezp1.lib.umn.edu/HOL/Page?collection=selden&handle=hein.selden/seldseng0072&id=40>. This rule explains why Sir Robert’s attempt to disavow Philip on his deathbed was rejected: he had not “straightaway” removed him from the house.



Although bastards have historically suffered severe liabilities in Western legal systems,<sup>57</sup> the presumption of legitimacy was solidly established in the common law of Shakespeare's period. In his *Brief Treatise* on the law of wills (1590), the Tudor legal scholar Henry Swinburne wrote:

[I]f, after the Marriage, another Man have carnal Conjunction with his Wife, shall the Husband be deemed the Father of that Child, which is not only born, but begotten during Marriage: For then, by all Laws, the Husband is presumed to have gotten the Child himself, and not the Adulterer, albeit another had to do with her besides her Husband.<sup>58</sup>

Or as stated in 1629 by Sir Edward Coke:

By the common law if a husband be within the foure seas, that is, within the jurisdiction of the king of England, if the wife hath issue, no prooffe is to be admitted to prove the child a bastarde (for in that case, *filiatio non potest probari*) unless the husband hath an apparent impossibilitie of procreation.<sup>59</sup>

In its application to the matter in hand, the presumption decisively favors Philip over his younger brother Robert. Even if it were true, as Robert affirmed, that Philip was conceived while Sir Robert Falconbridge was in Germany, even if “[l]arge lengths of seas and shores/Between my father and my mother lay” at the time, and even if Philip was born “[f]ull fourteen weeks before the course of time” measured by Sir Robert's return,<sup>60</sup> nonetheless Sir Robert was not absent for the entire course of his wife's pregnancy, but had returned well before Philip's birth. Thus, the law presumed Philip to be his child.<sup>61</sup>

The common law presumption was considered a wise and quieting rule that aimed at preserving order and peace within households and in the realm at large.<sup>62</sup> It abated suits between

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<sup>57</sup> For a superb review of the legal history, see John Witte, Jr., *Ishmael's Bane: The Sin and Crime of Illegitimacy Reconsidered*, 5 PUNISHMENT & SOC'Y 327 (2003).

<sup>58</sup> HENRY SWINBURNE, A TREATISE OF TESTAMENTS AND LAST WILLS Part IV at 298 (6th ed. 1743), <http://lawlibrary.wm.edu/wythepedia/library/SwinburneTreatiseOfTestamentsAndLastWills1743.pdf>.

<sup>59</sup> SIR EDWARD COKE, FIRST PART OF THE INSTITUTES OF THE LAWE OF ENGLAND 244 (Francis Hargrave & Charles Butler eds., 15th ed. 1629).

<sup>60</sup> *KJ*, *supra* note 1, at act 1, sc. 1, ll. 99–113.

<sup>61</sup> “It is true that Sir Robert Falconbridge was in Germany at the time when Philip was conceived; but he returned home before Philip was born, and so may not deny Philip's legitimacy.” KEETON, *supra* note 47, at 8.

<sup>62</sup> According to Lord Mansfield, “[i]t is a rule founded on decency, morality, and policy that the husband and wife should not be permitted to say after marriage that

family members after a father's death, and it protected the reputations of husbands and wives from (justified or unjustified) attack. Finally, it guarded the interests of children whose legitimacy might be suspect.<sup>63</sup> Even in an age of paternity testing, the rule has a lingering legal afterlife, as seen in the 1989 U.S. Supreme Court case *Michael H. v. Gerald D.*<sup>64</sup> But the presumption is a legal fiction. Shakespeare here and elsewhere is aware that legal fictions, like poetic fictions, can serve the ends of justice.<sup>65</sup> Nevertheless, he also knows their inherent imperfections. He recognizes that this particular legal fiction yields an unjust result in some applications—"unjust," at least, if succession depends on legitimacy of birth.<sup>66</sup>

Here that fiction yields a seemingly unjust result: Philip seems obviously not to be the child of the same father as his putative brother Robert. In physique, height, manner, and personal forcefulness, they are palpably different. As Philip, whom John immediately sizes up as a "mad-cap"<sup>67</sup> remarks, he is visibly different from Robert, who bears a close resemblance to Sir Robert:

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they have had no communication, and that, therefore, the offspring is spurious." GUY LUSHINGTON, *THE LAW OF AFFILIATION AND BASTARDY* 112 (Henry Delacombe Roome ed., 3d ed. 1916) (quoting Lord Mansfield, in *Goodright v. Mass* (1777), 2 Cowp. 591).

<sup>63</sup> "What led the English common lawyers to impose upon husbands the duty of acknowledging as their own any children born to their wives was the desire to prevent the disinheritance of legitimate children." GIVEN-WILSON & CURTEIS, *supra* note 38, at 45.

<sup>64</sup> 491 U.S. 110, 129 (1989).

<sup>65</sup> See R.S. WHITE, *NATURAL LAW IN ENGLISH RENAISSANCE LITERATURE* 105 (1996) (arguing that for Shakespeare, "legal fictions and poetic fictions alike . . . are properly used as problem solvers in order to achieve a state of equity and 'natural' peace"). But, as White also points out, Shakespeare parodies legal fictions, as in Touchstone's speech in *AS YOU LIKE IT* act 5, sc. 4, ll. 65, 90–97. Other poets have also mocked their (frequent) absurdity. See, e.g., WILLIAM EMPSON, *LEGAL FICTION* (1928).

<sup>66</sup> The presumption was also known to yield *absurd*, not only unjust, results. "For instance, it was said that if a husband was in France at any time when conception could have taken place, the child was legitimate, no matter how clear the adultery. The reason: the husband might have slipped across the Channel at night." Helmholz, *supra* note 55, at 370. However, in Shakespeare's *Richard III*, Richard Duke of Gloucester argues for his claim to the throne on the grounds that his late brother, Edward IV, had actually been a bastard (despite the presumption of legitimacy), because his father, the Duke of York, had been away in France for *the entirety* of his mother's pregnancy with Edward. WILLIAM SHAKESPEARE, *RICHARD THE THIRD*, act 3, sc. 5, ll. 85–88 (New Cambridge Shakespeare 2d ed., Janis Lull ed., 2009) [hereinafter *Richard III*].

<sup>67</sup> *KJ*, *supra* note 1, at act 1, sc. 1, l. 84.

Compare our faces and be judge yourself.  
 If old Sir Robert did beget us both  
 And were our father and this son like him,  
 O old Sir Robert, father, on my knee  
 I give heaven thanks I was not like to thee!<sup>68</sup>

Instead, as both John and Eleanor swiftly appreciate, Philip resembles his natural father, Richard Coeur de Lion: John describes Philip to Eleanor as “perfect Richard.”<sup>69</sup> Nonetheless, Philip’s likeness to King Richard (and unlikeness to Sir Robert Falconbridge) has no legal weight.<sup>70</sup>

In ruling in favor of Philip’s claim, John undoubtedly does legal justice: the common law presumption cannot be bent. Indeed, John underscores that the law cannot be bent even to serve a King’s will.<sup>71</sup> John tells Robert that even if his brother Richard Coeur de Lion had been Philip’s natural father and demanded him of Sir Robert, “[m]y brother might not claim him, nor your father/Being none of his, refuse him.”<sup>72</sup> John’s

<sup>68</sup> *Id.* at act 1, sc. 1, ll. 79–83.

<sup>69</sup> *Id.* at act 1, sc. 1, l. 90.

<sup>70</sup> According to Swinburne’s BRIEF TREATISE, even though a child “be very like the Adulterer, yet shall the Husband be deemed the Father.” This is so even though it is said that “Nature hath so provided, that each Thing do beget that which is like unto it self.” Swinburne argues that the child may look like the adulterer because “the Mother’s serious Cogitation or firm Imagination [of the adulterer] at the Time of Conception” may impress his “Form or Similitude” on the infant. SWINBURNE, *supra* note 58, at 299.

<sup>71</sup> See C.M.A. McCauliff, *The Right to Resist the Government: Tyranny, Usurpation, and Regicide in Shakespeare’s Plays*, 14 ILSA J. INT’L & COMP. L. 9, 13–16 (2007); Sir John Baker, *Human Rights and the Rule of Law in Renaissance England*, 2 NW. J. INT’L HUM. RTS. 1 (2004). See generally STEPHEN GREENBLATT, TYRANT: SHAKESPEARE ON POLITICS (2018). Shakespeare dramatizes this view of kingship in other works as well. Thus, to avoid the imputation of tyranny, King Henry VIII, in the play of that name, says, “We must not rend our subjects from our laws/And stick them in our will.” WILLIAM SHAKESPEARE & JOHN FLETCHER, KING HENRY THE EIGHTH (ALL IS TRUE), act 1, sc. 2, ll. 93–94 (Gordon McMullen ed., Arden ed. 2000) [hereinafter *King Henry VIII*]. Later in the same play, Cardinal Wolsey demands to be shown a written commission from the King before he surrenders the Great Seal to the noblemen who come to seize it from him: even if (as they claim) “the King’s will” comes “from his mouth expressly.” Wolsey insists that the law requires proof of “more than will or words to do it.” *Id.* at act 3, sc. 2, l. 236.

<sup>72</sup> *KJ*, *supra* note 1, at act 1, sc. 1, ll. 126–27. At this point, John may be alluding to a point of English law concerning adoption rather than bastardy. English law, like feudal law generally, did not recognize the possibility of adoption (though foster paternity was known, as was adoption *de facto*). Hence, King Richard could not have adopted Philip even if he had desired to do so and Sir Robert had consented. See SIR THOMAS SMITH, DE REPUBLICA ANGLORUM III, vii, p. 134 (Mary Dewar ed. 1982) (“[W]ee have no manner to make lawfull children but by marriage, and therefore we know not what is *adoptio* or *arrogatio*”); Leo Albert Huard, *The*

conclusion: “My mother’s son did get your father’s heir,/Your father’s heir must have your father’s land.”<sup>73</sup>

In representing John as subjecting himself to the law, Shakespeare is underscoring that John is not (yet) a lawless tyrant,<sup>74</sup> but rather is acting as a good king should. The idea that the King was subject to the law was entrenched in English common law—although opposed by elements of the Roman civil law tradition—and eventually came to be incorporated into the King’s coronation oath.<sup>75</sup> King James I told Parliament in 1604 that “I will euer preferre the weale of the body, and of the whole Common-wealth, in making of good Lawes and constitutions, to any particular or private ends of mine . . . . A point wherein a lawfull King doeth directly differ from a Tyrant.”<sup>76</sup> Thus, Shakespeare is here situating John in a central current of English political and constitutional thought<sup>77</sup>—though Tudor

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*Law of Adoption: Ancient and Modern*, 9 VAND. L. REV. 743, 745–46 (1956). For a review of post-classical Western European adoption law and practice, see KRISTIN ELIZABETH GAGER, BLOOD TIES AND FICTIVE TIES 40–50 (2014), <https://muse.jhu.edu/book/33788>.

Nonetheless, although adoption was a legal impossibility, “bastards who were publicly acknowledged by kings or aristocrats could be admitted into the legitimate family as long as it was on the family’s terms.” FINDLAY, *supra* note 55, at 41. We see this in *KJ* itself, when Queen Eleanor tells Philip, “I am thy grandam, Richard, call me so.” *KJ*, *supra* note 1, at act 1, sc. 1, l. 168.

<sup>73</sup> *KJ*, *supra* note 1, at act 1, sc. 1, ll. 128–29.

<sup>74</sup> The tradition of thinking about tyranny to which Shakespeare was heir traced back to Plato and Aristotle. It had distinguished between tyrants by usurpation (who had entered upon office with defective title) and tyrants who (whether legitimate or not) ruled for their private benefit, not for the public weal. Of course, a tyrant might be both: thus, Lord Bacon described Richard III as “tyrant both in title and regiment.” FRANCIS BACON, BACON’S HISTORY OF THE REIGN OF KING HENRY VII 5 (J. Rawson Lumbey ed., 1885) (1662), <https://ia802707.us.archive.org/5/items/baconshistoryre00lumbgoog/baconshistoryre00lumbgoog.pdf>. And George Buchanan, the Scottish political thinker who had served as James VI’s tutor, opined that a tyrant by usurpation, even if seeming to govern lawfully, could not purge his original offense and always remained a tyrant. See GEORGE BUCHANAN, LAW OF KINGSHIP 93–94 (Roger A. Mason & Martin S. Smith trans. & eds., 2006). When we first see Shakespeare’s King John, he is presented as a tyrant by usurpation, but not by misrule. See generally Robert S. Miola, Julius Caesar and the Tyrannicide Debate, 38 RENAISSANCE Q. 271, 274–75 (1985).

<sup>75</sup> Henry VIII attempted by will to revise the Coronation Oath that his son, Edward VI, was to take, so as to affirm royal supremacy over the law; but the effort failed. William Huse Dunham, Jr., *Regal Power and the Rule of Law: A Tudor Paradox*, 3 J. BRIT. STUD. 24, 39 (1964).

<sup>76</sup> KING JAMES VI AND I, *supra* note 51, at 142.

<sup>77</sup> Dunham’s old but comprehensive study, *supra* note 75, remains highly valuable. See also RONALD KNOWLES, SHAKESPEARE’S ARGUMENTS WITH HISTORY 59–61 (2002); R.W.K. Hinton, *English Constitutional Doctrines From the Fifteenth Century to the Seventeenth: I. English Constitutional Theories from Sir John*

monarchs and apologists fostered claims of royal absolutism.<sup>78</sup> Among other major authors of Shakespeare's period, Richard Hooker,<sup>79</sup> Sir Thomas Smith,<sup>80</sup> Sir Thomas Elyot,<sup>81</sup> George

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*Fortescue to Sir Thomas Eliot*, 75 ENG. HIST. REV. 410, 412 (1960) (discussing difference between common and civil law views of royal power).

<sup>78</sup> See Dunham, *supra* note 75, at 25 ("Elizabethan doctrine left still undecided the question: which law—that of the Crown (*lex coronae*) or that of the Kingdom (*lex parliamenti*)—was to rule supreme?"); Jack Benoit Gohn, Richard II: *Shakespeare's Legal Brief on the Royal Prerogative and the Succession to the Throne*, 70 GEO. L.J. 943, 943 & n.2, 953–54 (1982). Thus, Tudor absolutists argued that the fact that the King answered to God alone necessarily placed him above the reach of human laws. See, e.g., WILLIAM TYNDALE, THE OBEDIENCE OF A CHRISTIAN MAN 8 (Thomas Russell, ed., 1582), <https://www.richard-2782.net/obediencechristianman.pdf> ("[T]he king is in this world without law; and may at his lust do right or wrong, and shall give an account only to God"). In a similar vein, the Bishop of Salisbury, John Jewel, affirmed in 1562 that "[p]rinces are to be obeyed as Men sent by God, and whosoever resists them, resists the Ordinances of God." JOHN JEWEL, THE APOLOGY OF THE CHURCH OF ENGLAND 63 (1685), <https://quod.lib.umich.edu/e/eebo/A46876.0001.001?view=toc>. See also CERTAIN SERMONS OR HOMILIES (1547) AND A HOMILY AGAINST DISOBEDIENCE AND WILLFUL REBELLION (1571) (Ronald B. Bond ed., 1987). Stuart thinkers in Shakespeare's period also elaborated on the doctrine of the divine right of Kings. See, e.g., EDWARD FORSET, A COMPARATIVE DISCOURSE OF THE BODIES NATURAL AND POLITIQUE 22–23 (1606) <https://babel.hathitrust.org/cgi/imgsrv/download/pdf?id=mdp.35112104161171;orient=0;size=100;seq=11;attachment=0> (monarch compared to a god). The doctrine that the King rules by divine right is dramatized in the late (possibly 1600) play *Sir Thomas More* when More calms a riot by appealing to it. ANTHONY MUNDAY AND HENRY CHETTLE, SIR THOMAS MORE, act. II, sc. 6, ll. 112–18 (John Jowett ed., 2011).

In addition to claims based on divine right, a more "Machiavellian" conception of kingship rested on naked power. This viewpoint is dramatized in Robert Greene's 1598 play, *The Scottish History of James the Fourth*, where the flatterer Ateukin counsels the King:

You have the sword and sceptre in your hand;  
 You are the king; the state depends on you;  
 Your will is law . . . .  
 But if the lamb should let the lion's way,  
 By my advice the lamb should lose her life.

ROBERT GREENE, THE SCOTTISH HISTORY OF JAMES THE FOURTH, act I, scene 1, ll. 376–8, 384–5 (Malone Society Reprint 1921) (1598), <https://archive.org/details/scottishhistoryo00greeuoft/page/n35>.

<sup>79</sup> In the LAWS OF THE ECCLESIASTICAL POLITY Bk. VIII, c. ii, 13–14 (1554–1600), Hooker writes:

I am not of opinion that simply always in kings the most, but the best limited power is best: the most limited is, that which may deal in fewest things; the best, that which in dealing is tied unto the soundest, perfectest, and most indifferent rule; which rule is the law; I mean not only the law of nature and of God, but very national or municipal law consonant thereunto. Happier that people whose law is their king in the greatest things, than that whose king is himself their law. Where the king doth guide the state, and the law the king, that commonwealth is like an harp or melodious instrument, the strings whereof are tuned and handled all by one, following as laws the rules and canons of musical science. Most divinely therefore

Buchanan<sup>82</sup> and Robert Parsons<sup>83</sup> distinguished kings from tyrants in terms of their willingness to follow the law. In *Serjeant Browne's Case* (1532), the Judges advised the King that while he had discretion whether to imprison a subject, he could not use his power contrary to law, for example, by detaining the prisoner without trial.<sup>84</sup> Bishop John Ponet, an Anglican who fled from persecution during the reign of the Catholic Queen Mary Tudor, wrote boldly in 1556 that

kinges and princes ought, bothe by Goddes lawe, the lawe of nature, mannes lawes, and good reason, to be obedient and subiecte to the positie lawes of their countrey, and maie not

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Archytas maketh unto public felicity these four steps, every later whereof doth spring from the former, as from a mother cause; ὁ μὲν βασιλεὺς νόμιμος, ὁ δὲ ἄρχων ἀκόλουθος, ὁ δὲ ἀρχόμενος ἐλεύθερος, ἃ δ' ὅλα κοινωνία εὐδαιμόνων; adding on the contrary side, that “where this order is not, it cometh by transgression thereof to pass that the king groweth a tyrant; he that ruleth under him abhorreth to be guided and commanded by him; the people subject under both, have freedom under neither; and the whole community is wretched.”

3 RICHARD HOOKER, THE WORKS OF THAT LEARNED AND JUDICIOUS DIVINE MR. RICHARD HOOKER WITH AN ACCOUNT OF HIS LIFE AND DEATH BY ISAAC WALTON, Book VIII. ch. ii, 13–14 (John Keble, R.W. Church, & F. Paget eds., 7th ed., 1888), <http://oll.libertyfund.org/titles/hooker-the-works-of-richard-hooker-vol-3>.

<sup>80</sup> Thomas Smith distinguished several forms of tyranny (in opposition to kingship), of which one was “in the maner [sic] of their rule.” Even a king who assumed office legitimately might become a tyrant of this kind (as Smith says, Nero, Domitian and Commodus were). SMITH, *supra* note 72, at 53.

<sup>81</sup> In THE BOKE OF THE GOUVERNOUR, Elyot admonished the King to avoid the example of the Biblical King Saul, and to deal justly with his subjects on peril of divine punishment. SIR THOMAS ELYOT, THE BOKE OF THE GOUVERNOUR, II, c.1, 95–96 (1537) <https://quod.lib.umich.edu/e/eebo/A21287.0001.001?view=toc>.

<sup>82</sup> See BUCHANAN, *supra* note 74, at 58–59 (“the law should be yoked to the king to show him the way when he does not know it or to lead him back to it when he wanders from it . . . Kings, therefore, although free in all other respects, have this one limit to their authority, that their speech and actions should conform to the precept of the law”); *id.* at 106 (Scottish coronation oath requires Kings to “give a solemn promise to the entire people that they will observe the laws, customs, and ancient practices of our ancestors”).

<sup>83</sup> ROBERT PARSONS, S.J, A TREATISE CONCERNING THE BROKEN SUCCESSION OF THE CROWN OF ENGLAND 39–40 (1655) <https://quod.lib.umich.edu/e/eebo/A91489.0001.001?rgn=main;view=fulltext> (“When a King declineth once from his Dutie, he becometh a Tyrant; And as a good King's end and Office is to make happie his Common-wealth; so the Butt of a Tyrant is to destroy the same: A King ruleth according to equitie, oath, conscience, justice, and law prescribed unto him; and a Tyrant is enemy to all these conditions.”) [written before the death of Elizabeth I].

<sup>84</sup> *Serjeant Browne's Case*, 93 SELDEN SOC'Y 183, 184 (1532, misdated 1540) (J.H. Baker ed. 1977).

breake them, and that they be not exempt from them, nor maie dispense with them, onles the makers of the lawes geue them expresse autoritie so to doo.<sup>85</sup>

At the outset of Elizabeth's reign, Bishop John Aylmer admonished her that "it is not she that ruleth but the laws, the executors whereof be her judges."<sup>86</sup> One "Charles Merbury, Gentleman" wrote in *A BRIEFE DISCOURSE OF ROYALL MONARCHIE, AS OF THE BEST COMMON WEALE* (1581) that "our Prince is subject unto lawes both ciuill, and common, to customes, priuliges, couentantes, and all kinde of promises, So farre forth as they are agreeable vnto the lawe of God."<sup>87</sup> And in a masterful survey of Tudor constitutional thought, the great historian G.R. Elton concluded that in the Elizabethan period,

authoritative opinion held that the royal prerogative was a set of rights defined in the law and subject to its rule, and that this rule is to be found in the common law and in explicatory acts of Parliament. It follows that the king was still, as in the thirteenth century, held to be under the law . . .<sup>88</sup>

These conceptions of tyranny and of good kingship could be found in the Bible and gradually became a core part of the English constitutional tradition:<sup>89</sup> even medieval English writers on kingship maintained that the King was subordinate to the law, although what they understood by that was likely not what later thinkers took them to mean.<sup>90</sup> As in the Tudor period, moreover, the medieval authorities differed among themselves.<sup>91</sup>

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<sup>85</sup> JOHN PONET, *A SHORTE TREATISE OF POLITIKE POWER* [unnumbered page] (1556), <https://quod.lib.umich.edu/e/eebo/A09916.0001.001/1:5?rgn=div1;view=fulltext>. See also WHITNEY R.D. JONES, *THE TREE OF COMMONWEALTH, 1450-1793* at 81–82 (2000).

<sup>86</sup> JOHN AYLMER, *AN HARBOROWE FOR FAITHFUL AND TRUE SUBJECTS AGAINST THE LATE BLOWN BLAST CONCERNING THE GOVERNMENT OF WOMEN* (1559), <https://quod.lib.umich.edu/e/eebo/A00060.0001.001?view=toc> (quoted in Dunham, *supra* note 75, at 46).

<sup>87</sup> MERBURY, *supra* note 27, at 44.

<sup>88</sup> G.R. Elton, *The Rule of Law in Sixteenth-Century England*, in *TUDOR MEN AND INSTITUTIONS: STUDIES IN ENGLISH LAW AND GOVERNMENT* 265, 277 (Arthur J. Slavin ed., 1972).

<sup>89</sup> See CARPENTER, *MAGNA CARTA*, *supra* note 34, at 251–55, 265–73; SMITH, *supra* note 72, at 95–97.

<sup>90</sup> See JOHN OF SALISBURY, *supra* note 52, at 28 ("There is wholly or mainly this difference between the tyrant and the prince: that the latter is obedient to law, and rules his people by a will that places itself at their service."). This does not equate to "constitutionalism," however, if that is taken to mean the principle that "ordinary law defines the monarch's power." CROMARTIE, *supra* note 23, at 9.

<sup>91</sup> See Andrew M. Spencer, *Dealing with Inadequate Kingship: Uncertain Responses from Magna Carta to Deposition, 1199-1327*, in *THIRTEENTH CENTURY*

The historical King John himself seems to have embraced some form of the doctrine of royal supremacy, even while “attempt[ing] to disguise his authoritarian innovations by maintaining that they lay within the law and had the sanction of ancient custom.”<sup>92</sup>

So Shakespeare’s John begins by ruling legally, not tyrannically. Yet in doing legal justice, John seems to disregard a higher form of justice. A King who holds title through power, but not law, awards title through law but not through legitimacy. The legal fiction of legitimacy turns a blind eye to the truth, and so to justice.

*But:* Can we be confident that John’s ruling, though legally sound, is unjust? Is what we have just called a “higher form” of justice truly just? *Should* legal title follow actual—rather than presumptive—legitimate descent? The play gives us reasons for doubt—reasons that call into question the very idea of “legitimacy.”

### C. *The Ambiguities of “Legitimacy”*

To begin with, the presumption of legitimacy, though creating a legal fiction, may in fact accord with truth. The characters in the judgment scene agree that Philip is so visibly different from Robert that they could not have descended from the same father; and the audience can see those differences for itself. Furthermore, it was an Elizabethan commonplace to think that a noble son would inherit not merely the appearance, but also the virtue, of his noble father.<sup>93</sup> Thus, Richard III’s brothers were “two mirrors” of their father’s “princely semblance.”<sup>94</sup> But

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ENGLAND XVI: PROCEEDINGS OF THE CAMBRIDGE CONFERENCE, 2015 at 71, 73 (Andrew M. Spencer & Carl Watkins eds., 2017).

<sup>92</sup> Ralph V. Turner, *England in 1215: An Authoritarian Angevin Dynasty Facing Multiple Threats*, in *MAGNA CARTA AND THE ENGLAND OF KING JOHN* 10, 21 (Janet S. Loengard ed., 2010).

<sup>93</sup> Henry Peacham, who represented orthodox opinion, wrote that “as for the most part, we see the children of Noble Personages to beare the lineaments and resemblance of their Parents: so in like manner, for the most part, they possesse their vertues and Noble dispositions.” HENRY PEACHAM, *THE COMPLEAT GENTLEMAN* 14 (G.S Gordon ed. 1906) (1634), <https://ia802205.us.archive.org/0/items/peachamscomplea00peacgoog/peachamscomplea00peacgoog.pdf>. So, in *Richard III*, Richard’s accomplice Buckingham tells Richard that he has spread the word that Richard is “the right idea of your father,/Both in your form and nobleness of mind.” *Richard III*, *supra* note 66, at act 3, sc. 7, ll. 13–14.

<sup>94</sup> *Richard III*, *supra* note 66, at act 2, sc. 2, l. 52. The inference of a child’s legitimacy from its resemblance to its royal father also appears in *The Winter’s Tale*. WILLIAM SHAKESPEARE, *THE WINTER’S TALE*, at act 2, sc. 3, ll. 97–107, act 5, sc. 1, ll.



the deformed Richard III himself was a “false glass” of his father<sup>95</sup>; Richard Coeur de Lion did not resemble his father Henry II<sup>96</sup>; and John and his elder brother Richard were also strikingly different in appearance.<sup>97</sup> If appearances settled the matter, Philip would be no more—and no less—Robert’s elder brother than Richard was John’s.

Although in the case of Sir Robert and Philip, appearances are *not* deceptive, Shakespeare has put us on our guard, both here and after. Later in the play, John asks: “Doth not the crown of England prove the king?”<sup>98</sup> John soon learns that it does not. When the French King Philip betrays Prince Arthur’s cause and makes a bargain with John, Arthur’s mother Constance reproaches him: “You have beguiled me with a counterfeit/Resembling majesty, which being touched and tried,/Proves valueless.”<sup>99</sup> And when Hubert, John’s confidant, yields to young Arthur’s pleas and reneges on his promise to John to cut out Arthur’s eyes, Arthur gratefully exclaims: “O now you look like Hubert. All this while/You were disguised.”<sup>100</sup>

The argument from appearances, then, is a plausible, but by no means infallible, test for truth—or for legitimate descent. That, of course, is one reason behind the presumption of legitimacy. And recognition of that fact begins to make the idea of legitimacy seem problematic. We see this somewhat later in the play. When John’s mother Eleanor encounters her rival, Arthur’s mother Constance, Eleanor challenges Arthur’s legitimacy: “Thy bastard shall be king/That thou mayst be a queen and check the world.”<sup>101</sup> Constance’s answer is equivocal: she does not give Eleanor the lie directly, but instead says, “My bed was ever to thy son [Geoffrey] as true/As thine was to thy husband.”<sup>102</sup> This is not so much a straightforward denial as a

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123–25 (New Cambridge Shakespeare, Susan Snyder & Deborah T. Curren-Aquino eds., 2007) [hereinafter *The Winter’s Tale*].

<sup>95</sup> *Richard III*, *supra* note 66, at act 2, sc. 2, l. 54.

<sup>96</sup> WARREN, *supra* note 34, at 1.

<sup>97</sup> Richard was a towering six feet, four inches, John was a stockily built five feet, five inches. *King John*, ENGLISH MONARCHS, [http://www.englishmonarchs.co.uk/plantagenet\\_3.htm](http://www.englishmonarchs.co.uk/plantagenet_3.htm). (last visited Mar. 27, 2019). John did however resemble his elder brother Geoffrey: according to Geoffrey of Wales, “one was corn in the ear, the other corn in the blade.” WARREN, *supra* note 34, at 31.

<sup>98</sup> *KJ*, *supra* note 1, at act 2, sc. 1, l. 273.

<sup>99</sup> *Id.* at act 3, sc. 1, ll. 99–101.

<sup>100</sup> *Id.* at act 4, sc. 1, ll. 125–26.

<sup>101</sup> *Id.* at act 2, sc. 1, ll. 122–23.

<sup>102</sup> *Id.* at act 2, sc. 1, ll. 124–25.

*Tu quoque* argument: are we to infer that *both* queens may have been unfaithful, and so that *both* John and Arthur may be illegitimate?<sup>103</sup> If so, that undermines Constance's next point, which reasons from appearances: "[T]his boy [Arthur] [is]/Liker in feature to his father Geoffrey/Than thou and John in manners."<sup>104</sup>

In these exchanges, Shakespeare is playing on the double nature of the idea of "legitimacy": legitimacy as a matter of lawful birth or descent and legitimacy as a matter of right. Philip's legal claim to be Sir Robert's successor rests on the fact that he was born during his mother's lawful wedlock to his putative father. He would nonetheless be "illegitimate" if he were not—as in truth he is not—his lawful father's son. But the law, by a fiction, "legitimizes" him. For all that, Philip is in a deeper sense not a "legitimate" heir to the man the law deems to be his father—because of his real—though not legal—bastardy. Law "legitimizes" one who is otherwise not legitimate.<sup>105</sup>

But does law's authority destroy the "legitimacy" of Philip's claim *as a matter of justice or abstract right*? Perhaps yes—or so it seems from his half-brother Robert's point of view. Or perhaps not—if we reflect that Robert's claim of right cannot in justice hinge on the wrongness of his adulterous mother's action in conceiving Philip. For why should the sin of Lady Falconbridge require the disinheritance of the innocent Philip? Later in the play, Constance complains to Eleanor that by "[t]he canon of the law," "[t]hy sins are visited in this poor child" "[b]eing but the

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<sup>103</sup> See FINDLAY, *supra* note 55, at 26–27.

<sup>104</sup> *KJ*, *supra* note 1, at act 2, sc. 1, ll. 125–27. The French King Philip also emphasizes the physical resemblance between Arthur and his father Geoffrey. *Id.* at act 2, sc. 1, ll. 99–102.

<sup>105</sup> Likewise, as Shakespeare and his audience well knew, law could *delegitimize* an otherwise legitimate heir—even a royal one. See *Act of Succession 1534* (declaring Mary, daughter of Henry VIII and Catherine of Aragon, illegitimate); *Second Succession Act of 1536* (declaring Elizabeth, daughter of Henry VIII and Anne Boleyn, illegitimate); *Third Succession Act of 1543* (returning both Mary and Elizabeth to the royal succession). These three acts can be found in TANNER, *supra* note 51, at 382–88, 389–95, 397–400. For close analysis of the Succession Acts, see Thomas Regnier, *Did Tudor Succession Law Permit Royal Bastards to Inherit the Crown?*, IV BRIEF CHRONICLES 39 (2012–13).

second generation/Removed from thy sin-conceiving womb.”<sup>106</sup> In speaking of the “canon of the law,” Eleanor means the Holy Scripture.<sup>107</sup>

Shakespeare is consistently putting severe pressure on the very idea of “legitimacy”—and thus of “justice.” Even the divine “canon of the law,” it seems, can be regarded as an injustice. Is legitimacy a matter of fiction or of fact, of law or of justice, of power or of right? The answers are desperately important because legitimacy is at the foundation of the social and political order, whether of the household or of the kingdom. Yet they are also exasperatingly elusive.

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<sup>106</sup> *KJ*, *supra* note 1, at act 2, sc. 1, ll. 179–82. There were Tudor writers who complained of the injustices inflicted on illegitimate children. William Clerke, *The Triall of Bastardie*, EARLY ENGLISH BOOKS ONLINE, <https://quod.lib.umich.edu/e/eebo/A18994.0001.001?rgn=main;view=fulltext>, (last visited Mar. 27, 2019), argued that “though [a bastard’s] parents be the worst, their vileness shall not blemish him at all, if virtue beares him up: . . . *Non est eius culpa qui nascitur* . . . it is not his default that is borne.” But English law was untroubled by the injustice of disinheriting the illegitimate child, deeming that to be a more powerful deterrent to begetting or conceiving such a child than a law that punished the parents instead. See FORTESCUE, *supra* note 48, c. XXXIX at 56 (“the law which punishes the progeny of the offender prohibits the sin more effectively than the law which punishes only the guilty. From this you may observe how zealously the law of England prosecutes illicit intercourse when it not only judges the offspring thereof illegitimate but also forbids them to succeed to the parental inheritance.”). Indeed, English law did not punish the sinning parents at all. See Alan Macfarlane, *Illegitimacy and Illegitimacy in English History*, in BASTARDY AND ITS COMPARATIVE HISTORY 71, 73–74 (Peter Laslett, et al. eds., 1980).

<sup>107</sup> That the sins of the father were visited on the children was Biblical teaching. See *Exodus* 20:5 (Geneva Bible) (“I am the Lord thy God, a jealous God, visiting the iniquity of the fathers upon the children, upon the third generation and upon the fourth of them that hate me.”). This applied to the illegitimate children of adulterers. *Deuteronomy* 23:2 (Geneva Bible) provided that “[a] bastard shall not enter into the Congregation of the Lord: even to his tenth generation shall he not enter into the Congregation of the Lord.” *Hosea* 2:4–5 (Geneva Bible) condemned the illegitimate children of an adulteress:

And I will have no pity upon her children: for they be the children of fornication. For their mother hath played the harlot: she that conceived them, hath done shamefully: for she said, I will go after thy lovers that give me my bread and my water, my wool, and my flax, mine oil and my drink.

The teaching of the *Wisdom of Solomon* 3:16–18 (King James) was similar:

As for the children of adulterers, they shall not come to their perfection, and the seed of an unrighteous bed shall be rooted out. For though they live long, yet shall they be nothing regarded: and their last age shall be without honour. Or, if they die quickly, they have no hope, neither comfort in the day of trial.

See also *Ecclesiasticus* 23:23–25 (Geneva Bible).

#### D. *Richard's Will*

Overlying and deepening these bafflements, there is another pervasive irony in the judgment scene.

In ruling as he does, John sets aside Sir Robert's will, on which the younger Robert has also based his case. Thus, by John's ruling, a testator's decision, even if based on the desire to uphold legitimacy, is—lawfully—denied the effect of law.<sup>108</sup> But John's legal claim to the Crown rests in part on the—purported—will of his elder brother Richard Coeur de Lion.<sup>109</sup> Eleanor hints at the existence of this will when she says to Constance, “Thou unadvised scold. I can produce/A will that bars the title of thy son.”<sup>110</sup> The chronicler Raphael Holinshed affirms that Richard left his Crown to John.<sup>111</sup> A learned and controversial treatise on succession by the Jesuit Robert Parsons, the *Conference about the next succession*,<sup>112</sup> however, which Shakespeare may have known

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<sup>108</sup> “English law did not recognize, for several centuries after [John's] period, the right to alter the line of succession to land by will.” KEETON, *supra* note 47, at 4–5.

<sup>109</sup> It appears that “[on] his deathbed” Richard Coeur de Lion “named John as his heir.” SACCIO, *supra* note 40, at 191. But Richard “muddied the waters by declaring for Arthur in 1190 and later for Otto of Brunswick, and later still for John.” Furthermore, “each of the lands over which Richard ruled had a choice as to which of Richard's relations they might choose as their lord.” CHURCH, *supra* note 34, at 71. See also MORRIS, *supra* note 34, at 67 (Richard's designations of both Arthur and John); *id.* at 102–03 (situation at time of Richard's death).

<sup>110</sup> *KJ*, *supra* note 1, at act 2, sc. 1, ll. 191–92.

<sup>111</sup> *TR*, *supra* note 1 at 25. Holinshed's CHRONICLES was a major source for *KJ*, as for other Shakespearean history plays. See LAKE, *supra* note 1, at 188–94.

<sup>112</sup> Robert Parsons, S.J. (pseudonym “Doleman”) et al., *A Conference About the Next Succession to the Crown of England: Divided into Two Parts*, EARLY ENGLISH BOOKS ONLINE, <https://quod.lib.umich.edu/e/eebo/A56468.0001.001?rgn=main;view=fulltext> (last visited Mar. 27, 2019). Parsons (or Persons) (1546–1610) was a leading English Jesuit writer and controversialist who lived much of his life in exile abroad. See John Hungerford Pollen, *Catholic Encyclopedia: Robert Persons*, NEW ADVENT, <http://www.newadvent.org/cathen/11729a.htm> (last visited Mar. 27, 2019). On Persons as “Doleman,” see VICTOR HOULISTON, CATHOLIC RESISTANCE IN ELIZABETHAN ENGLAND: ROBERT PERSONS'S JESUIT POLEMIC, 1580–1610, 57 (2007); see also THOMAS H. CLANCY, S.J., PAPIST PAMPHLETEERS: THE ALLEN-PERSONS PARTY AND THE POLITICAL THOUGHT OF THE COUNTER-REFORMATION IN ENGLAND, 1572–1615, 62–72 (1964).

Shakespeare may have been acquainted with some of Parsons' work, perhaps in draft form. On the possible impact of Parsons' (or Persons') work on *KJ*, see LAKE, *supra* note 1, at 182–84. On the impact of Parsons' work on the Elizabethan succession debate (and so on the Elizabethan stage, where that debate was in large part conducted), see M.J.M. Innes, *Robert Persons, Popular Sovereignty, and the Late Elizabethan Succession Debate*, 62 HIST. J. 57 (2018); Patrick Martin & John Finnis, *Caesar, Succession, and the Chastisement of Rulers*, 78 NOTRE DAME L. REV. 1045, 1045–51 (2003).

at least in draft form, says that Richard designated Arthur as his heir apparent.<sup>113</sup>

Shakespeare is playing here into the contemporary debate “pitting testamentary disposition of the Crown . . . against the operation of the laws of primogeniture.”<sup>114</sup> If Sir Robert’s will cannot prevail over the common law rule concerning legitimacy, why should King Richard’s will prevail over Arthur’s legal claim to the throne?<sup>115</sup> In denying effect to Sir Robert’s will, is John not casting doubt on Richard’s? In holding the Crown, John is denying the title of the eldest son of his elder brother. Yet in the judgment scene he sets aside a will that favors a younger brother, like himself, in order to grant title to an elder brother.

On the other hand, it was certainly arguable that a King could bequeath his kingdom by designation or by will even in derogation of the claims of lineage. The question was not merely an academic one in Tudor England. As he neared death, the young King Edward VI, successor to Henry VIII, sought to overturn the arrangements for succession laid down in his father’s will of December 30, 1546<sup>116</sup> by creating a “devise,”

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<sup>113</sup> “The *Fifth Son* of King *Henry* the II was named *John*, who after the death of his Brother *Richard* by help of his Mother *Eleanor*, and of *Hubert* Archbishop of *Canterbury*, drawn thereunto by his said Mother, got to be King, and put back his Nephew *Arthur*, whom King *Richard* before his departure to the War of the *Holy Land*, had caused to be declared *Heir apparent*, but *John* prevailed.” PARSONS, *supra* note 112, at 18.

<sup>114</sup> Lane, *supra* note 1, at 465. Elizabeth’s father Henry VIII (like Richard I) had left a death-bed will contravening the principle of primogeniture (by passing over the line of his elder sister Margaret Tudor in favor of the line of his younger sister Mary Tudor). *Id.* Elizabeth’s claim to the Crown was partly based on the will of Henry VIII, even if the Third Succession Act (1543) was legally a more important consideration. See NENNER, *supra* note 40, at 38; MORTIMER LEVINE, *TUDOR DYNASTIC PROBLEMS 1460–1571*, 98 (1973). *KJ* “virtually forces its viewer to consider the effect of Henry’s will.” Lane, *supra* note 1, at 467.

<sup>115</sup> In *TR*, Arthur denies that even if Richard left a will designating John as his successor, it would be legally ineffective:

But say there was, as sure there can be none,  
The law intends such testaments as voyd,  
Where right discent can no way be impeacht.

*TR*, *supra* note 1, at sc. 2, ll. 526–28.

Contemporary historians affirm that the law on this point was uncertain, certainly in John’s time. According to WARREN, *supra* note 34, at 48, “[t]he fact that John had been designated heir by Richard on his deathbed was influential but not decisive.” Others agree that the real or supposed wishes of the dying king were potentially powerful but not dispositive. SACCIO, *supra* note 40, at 190. “Designation did not of itself lead to approval,” and “feudal law gave Arthur the better claim.” BRYCE LYON, *A CONSTITUTIONAL AND LEGAL HISTORY OF MEDIEVAL ENGLAND* 267 (1960).

<sup>116</sup> In relevant part, Henry’s will had provided:

written in his own hand, in 1553.<sup>117</sup> In its final form, Edward's devise excluded his half-sisters Mary and Elizabeth from the succession, leaving the Crown instead to his first cousin once removed, the Lady Jane Grey,<sup>118</sup> and her male heirs. The dying Edward summoned several of the leading judges and lawyers of his realm, read out his devise to them, and instructed them to put it into due legal form. According to the later testimony the Lord Chief Justice of the Common Pleas, Edward Montagu and others objected to the King that the devise was illegal because "it was directly against the act of succession [of 1543] which was an act of parliament which could not be taken away by no such device."<sup>119</sup> Fearing that to assist Edward might constitute treason, the judges and lawyers initially refused to execute Edward's instructions. It was only after a subsequent face-to-face encounter with the angry and insistent King—and obtaining a pardon from him to cover their actions—that they complied.<sup>120</sup> Further, Edward is supposed to have agreed to seek Parliamentary ratification for his action, though he died before Parliament met. After Edward's death, Lady Jane Grey did in fact claim the throne under the devise and held it for a very brief period, but was ousted by Edward's half-sister Mary, who claimed under Henry's will.

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As to the succession of the Crown, it shall go to Prince Edward and the heirs of his body. In default, to Henry's children by his present wife, Queen Catharine, or any future wife. In default, to his daughter Mary and the heirs of her body, upon condition that she shall not marry without the written and sealed consent of a majority of the surviving members of the Privy Council appointed by him to his son Prince Edward. In default, to his daughter Elizabeth upon like condition. In default, to the heirs of the body of Lady Frances, eldest daughter of his late sister the French Queen. In default, to those of Lady Elyanore, second daughter of the said French Queen. And in default, to his right heirs. Either Mary or Elizabeth, failing to observe the conditions aforesaid, shall forfeit all right to the succession.

21 LETTERS AND PAPERS, FOREIGN AND DOMESTIC, HENRY VIII, PART 2 SEPTEMBER 1546–JANUARY 1547, 320–21 (James Gairdner & R.H. Brodie eds., His Majesty's Stationary Office, London 1910), available at BRITISH HISTORY ONLINE, HENRY VIII DECEMBER 1546, 320–21, <https://www.british-history.ac.uk/letters-papers-hen8/vol21/no2/pp313-348> (last visited March 24, 2019).

<sup>117</sup> See ERIC IVES, *LADY JANE GREY: A TUDOR MYSTERY* 137 (2009).

<sup>118</sup> Lady Jane Grey was a daughter of Lady Frances Grey, the Duchess of Suffolk, who in turn was a daughter of Princess Mary Tudor, the younger sister of King Henry VIII and a daughter of King Henry VII.

<sup>119</sup> IVES, *supra* note 117, at 148.

<sup>120</sup> *Id.* at 147–48.

Legal historians continue to debate whether Edward had the authority to will the Crown to Jane.<sup>121</sup> There is strong evidence that Montagu's account of the matter, given after Edward's half-sister Mary had succeeded in ousting Jane, was false and self-serving, and that both the King and his Council had the judges' and lawyers' full support—including Montagu's. Moreover, Professor Eric Ives has made a plausible case that the 1543 Act of Succession<sup>122</sup> was not, in fact, an obstacle to Edward's plan: Edward was merely exercising the same inherent royal prerogative that Henry had relied on when, despite considering both Mary and Elizabeth illegitimate and so disqualified by the common law from holding the Crown, he had designated them as successors.<sup>123</sup> Nonetheless, Mary Tudor, not her cousin Jane, established herself as the monarch. If law arguably pointed one way, history and practice pointed in the opposite direction; the legal question had no definitive answer.

This question was debated by Tudor legal scholars and others. The Tudor legal scholar Henry Swinburne considered the "deep and dangerous Question" whether a King could overcome the claim of lineal descent and designate his successor by will.<sup>124</sup> Swinburne wrote that "as well by the Civil Law as by the Canon Law (with which the Law of this our Realm of England do in this Point seem to join,) it is unlawful for a King to give away his Kingdom from his lawful heirs."<sup>125</sup> Swinburne prudently noted, however, that "in the End" the question is "to be decided and ruled by the dead Stroke of uncivil and martial Canons, than by

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<sup>121</sup> See Margaret Wood, "My Devise for the Succession", L. LIBR. CONGRESS: IN CUSTODIA LEGIS (July 10, 2014), <https://blogs.loc.gov/law/2014/07/my-devise-for-the-succession/>. The legal question is extremely tangled. It implicates several issues, including whether Edward VI had the inherent, extra-statutory right to designate the successor to his claim; whether, if he had such power, it was unlimited, or could only be exercised in favor of members of a particular class of persons; whether, if again he had such inherent power in the *absence* of any statute, that power had been restricted by the Third Succession Act; whether, again assuming that Edward had such a power, it has been preempted by the last will of Henry VIII; and whether the Third Succession Act (either standing alone or when coupled with the Second) had delegated *Parliament's* authority to Henry to designate the successor to the crown, or was merely *declarative and confirmatory* of an exclusively *monarchical* authority to do so.

<sup>122</sup> See *Third Succession Act, 1543, 35 Hen. 8 c.1*, in J.R. TANNER, TUDOR CONSTITUTIONAL DOCUMENTS A.D. 1485–1603, 397 (1922).

<sup>123</sup> IVES, *supra* note 117, at 142–44, 148–49, 166–68.

<sup>124</sup> SWINBURNE, *supra* note 58, pt. 2, c. xxvii at 118.

<sup>125</sup> *Id.* pt. 2, c. xxvii at 117.

any Rule of the Civil or Canon Law.”<sup>126</sup> Another Tudor writer, Bishop John Ponet, was less equivocal. In a *SHORTE TREATISE OF POLITIKE POWER*,<sup>127</sup> Ponet argued that the King could not designate his successor by will, at not least without the consent of Parliament.<sup>128</sup> Although Swinburne thought that the King could not disinherit lawful heirs as successors, he marshalled Biblical and historical precedents suggesting that the King could, perhaps, designate his successor by will. The precedents included Moses, “a Man to whom God did speak as it were Face to Face, [who] left the Principality or Government of the Israelites” to Joshua, who was not one of the Levites, Moses’ own tribe, and King David, who bypassed his elder son Adoniah in favor of Solomon.<sup>129</sup> Secular precedents also lay to hand. The childless Edward the Confessor, England’s last Anglo-Saxon king, had purportedly designated the Duke of Normandy, later William the Conqueror, as his successor.<sup>130</sup> In *Macbeth*, King Duncan of Scotland breaks with the Scottish rule of “tanistry” to designate his eldest son, Malcolm, as his successor.<sup>131</sup> In Christopher Marlowe’s *Massacre at Paris*, the dying Henry III of France designates Henry of Navarre as heir to the French crown.<sup>132</sup> Tudor historians, following Plutarch and Suetonius, wrote that Julius Caesar had designated his nephew Octavian as

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<sup>126</sup> *Id.* at 118.

<sup>127</sup> PONET, *supra* note 85, at unnumbered page, <https://quod.lib.umich.edu/e/eebo/A09916.0001.001?view=toc>.

<sup>128</sup> See Dunham, *supra* note 75, at 44.

<sup>129</sup> SWINBURNE, *supra* note 58, at 116–17.

<sup>130</sup> Jessica Nelson, *The Death of Edward the Confessor and the Conflicting Claims to the English Crown*, GOV.UK (Jan. 5, 2016), <https://history.blog.gov.uk/2016/01/05/the-death-of-edward-the-confessor-and-the-conflicting-claims-to-the-english-crown/>.

<sup>131</sup> WILLIAM SHAKESPEARE, *MACBETH*, act 1, sc. 4, ll. 35–39 (A.R. Braunmuller, ed., Cambridge University Press 2008) (1623) [hereinafter *MacBeth*]. See A.R. Braunmuller, *Introduction* to WILLIAM SHAKESPEARE, *MACBETH* 16 (A.R. Braunmuller, ed., Cambridge University Press 2008) (1623).

<sup>132</sup> CHRISTOPHER MARLOWE, *THE MASSACRE AT PARIS*, sc. xxii, <http://www.online-literature.com/marlowe/massacre-at-paris/23/>.



heir.<sup>133</sup> Nonetheless, Shakespeare does not and cannot accept these precedents in *KJ*: to do so would give John too strong a claim to the throne.

*E. Succession by a foreigner*

In addition to being in possession of the Crown and to being Richard's heir by will, John could potentially have made a third argument for his claim: that Arthur's foreign birth precluded him from the English kingship by virtue of the common law rule prohibiting aliens from inheriting.<sup>134</sup> Legal arguments for and against the application of this property-inheritance rule to the royal succession were common in Elizabethan England, often in connection with the claims of the (foreign) Scots Queen Mary or (later) her son James VI to succeed Elizabeth.<sup>135</sup> Queen

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<sup>133</sup> See *Plutarch's Lives of the Noble Grecians and Romans: Life of Marcus Brutus* (Sir Thomas North Trans., 1579), in 5 NARRATIVE AND DRAMATIC SOURCES OF SHAKESPEARE 106 (Geoffrey Bullough ed., 1964); *Suetonius's Historie of Twelve Ceasers* (Philemon Holland Trans. 1606), in 5 NARRATIVE AND DRAMATIC SOURCES OF SHAKESPEARE 155 (Geoffrey Bullough ed., 1964); WILLIAM FULBECKE, AN HISTORICALL COLLECTION OF THE CONTINUALL FACTIONS, TUMULTS, AND MASSACRES OF THE ROMANS AND ITALIANS 17 (1601).

Another kind of succession-by-designation occurs in *Hamlet*. King Fortinbras of Norway, before dying in personal combat at the hands of Hamlet's father, had forfeited "all those his lands/Which he stood seized of" to the victor, under "a sealed compact,/Well ratified by law and heraldy." WILLIAM SHAKESPEARE, *HAMLET, PRINCE OF DENMARK*, act. 1, 86–89 (Philip Edwards, ed., Cambridge University Press 2003) (1603) [hereinafter *Hamlet*].

<sup>134</sup> See John Stubbs, *The discoverie of a gaping gulf vvhwhereinto England is like to be swallowed by another French marriage, if the Lord forbid not the banes, by letting her Maiestie see the sin and punishment thereof*, n.p. (1579), <https://quod.lib.umich.edu/e/eebo/A13109.0001.001?view=toc>; *Edward III*, *supra* note 43, at act 1, sc. 2, 106–23; POLLOCK & MATTLAND, *supra* note 38, at 483–84; Lane, *supra* note 1, at 468–71. The common law rule that an alien may not inherit land is noted in *M'Ilvaine v. Coxe's Lessee*, 6 U.S. 280, 290 (1805).

<sup>135</sup> The Elizabethan controversy is reviewed in Susan Doran, *Polemics and Prejudice: A Scottish King for an English Throne*, in DOUBTFUL AND DANGEROUS: THE QUESTION OF SUCCESSION IN LATE MEDIEVAL ENGLAND 215, 215–19 (2014) and in LEVINE, *supra* note 114, at 110–11. Controversialists included Robert Parsons and John Leslie, the Bishop of Ross. See PARSONS, *supra* note 112, Part II, c. V, at 87–88 (noting both the view that "[James] is excluded, by the common laws of England from succession to the Crown, for that the said laws do bar all strangers born out of the Realm, to inherit within the Land" and the contrary view that "this axiom or general Rule cannot any way touch or be applied to the succession of the Crown, first, for that as hath been declared before, no Axiom or Maxim of our Law can touch or be understood of matters concerning the Crown, except express mention be made thereof, and that the Crown is priviledged in many points that other private heritages be not. And secondly, for that the Crown cannot properly be called an Inheritance of Allegiance or within Allegiance"); and JOHN LESLIE, A DEFENCE OF THE HONOUR OF THE RIGHT HIGHE, MIGHTYE AND NOBLE PRINCESSE MARIE QUENE

Elizabeth herself was careful to point out to a Parliamentary delegation in 1566 that she was “born in the realm.”<sup>136</sup> But Shakespeare wants to stack the deck in favor of Arthur’s legitimacy and against John’s; and so this legal issue goes unmentioned in the play.<sup>137</sup>

## II. THE BASTARD

### A. *Sir Richard Plantagenet*

The next episode acquaints us more deeply with the character who will dominate most of the play thereafter: Philip Falconbridge, soon to be Sir Richard Plantagenet, or “the Bastard.”

Asked by Eleanor if he will disclaim his newly-won title to Robert, and instead take his chances in her and John’s service, Philip agrees: “Brother, take you my land, I’ll take my chance.”<sup>138</sup> Philip is quickly rewarded. John knights him and renames him on the spot:

From henceforth bear his name whose form thou bearest:  
Kneel thou down Philp, but arise more great,  
Arise Sir Richard and Plantagenet.<sup>139</sup>

Can we say that Philip, now Sir Richard, has begun to grasp and to accept the primacy of power over legitimacy and law? He has renounced what law has given him, notwithstanding his

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OF SCOTLANDE AND DOWAGER OF FRANCE WITH A DECLARATION AS WELL OF HER RIGHT, TITLE & INTERESTE TO THE SUCCESSION OF THE CROWNE OF ENGLANDE, AS THAT THE REGIMENTE OF WOMEN YS CONFORMABLE TO THE LAWE OF GOD AND NATURE 62 ET SEQ. (1571), <https://quod.lib.umich.edu/e/eebo/A05352.0001.001?rgn=main;view=fulltext> (“But to retorne againe vnto your onlie supposed Maxime, whiche you make so generall cōcerninge the dishabilitie of persōs borne beyonde the seas: yt ys verie plaine, that yt was never taken to extēde vnto the crowne of this realme of Englāde, as yt maie appeare by kinge Stephē, & by kinge Hērie the secōde, who were both strāgers & Frēch mē. And borne oute of the kīges allegiāce, and neither vvere they the kinges children immediate nor theirē parētēs of the allegiāce, And yet they haue bene alwayes accepted lawfull kinges of Englande, nor theirē title vvas by any man at any time deffaced or comptrolled for any suche consideration or exceptiōn of forren birthe.”). See also Paul Brand, *The Origins of ‘Alien Status’ in the English Common Law*, 39 J. LEG. HIST. 18 (2018).

<sup>136</sup> Elizabeth I, *supra* note 15.

<sup>137</sup> It is therefore arguable that the play subtly supports the claim of James VI to succeed Elizabeth.

<sup>138</sup> *KJ*, *supra* note 1, at act 1, sc. 1, l. 151.

<sup>139</sup> *Id.* at act 1, sc. 1, ll. 159–62.

illegitimacy, for the chance of reaching for fame and power.<sup>140</sup> We might wonder also whether, in this respect, Philip/Richard is acting like his Lion-Hearted father, who took unlawful possession of Philip/Richard's mother, exercising kingly power in defiance of spousal right and law.<sup>141</sup> The new Knight calls himself a "mounting spirit," and vows to "smack of observation" of his royal surroundings, as any "bastard to the time"<sup>142</sup>—any opportunistic, self-promoting courtier<sup>143</sup>—would do. He quickly emerges as a vivid and entertaining character—snarky, tough-minded, wisecracking, the consummate outsider-as-insider, as old a stage figure as the Vice of a morality play,<sup>144</sup> as contemporary as any of Shakespeare's other Machiavellians.<sup>145</sup> Yet if "[t]he bastard . . . is habitually figured [in Renaissance drama] as a creature who reveals the 'unnaturalness' of his begetting by the monstrous unkindness of his nature,"<sup>146</sup> Sir Richard the Bastard does not fit that mold. Instead of giving us a stock theatrical type, Shakespeare has refashioned and complicated it.

As the play gradually makes clear, Sir Richard the Bastard is not truly in step with the *zeitgeist*. He observes a collapsing moral universe, clear-sightedly cuts to its heart, is not deceived by it,<sup>147</sup> and yet escapes its corruption. Although he has set out

<sup>140</sup> "I am not Sir Robert's son./I have disclaimed Sir Robert and my land;/Legitimation, Name, and all is gone." *Id.* at act 1, sc. 1, ll. 246–48.

<sup>141</sup> Lady Falconbridge claims that Richard "seduced" her "[b]y long and vehement suit." *Id.* at act 1, sc. 1, l. 254–55. The seduction of a married woman was of course unlawful. Compare *Edward III*, *supra* note 43, at act 2, sc. 1, ll. 261–71, 425–27; and act 2, sc. 2, ll. 144–47.

<sup>142</sup> *KJ*, *supra* note 1, at act 1, sc. 1, ll. 206–08.

<sup>143</sup> And not only courtiers, but common people seeking to rise as well. The English forces invading France under John are populated by young men "[w]ith ladies' faces and fierce dragons' spleens" who have "sold their fortunes at their native homes" and "bear[] their birthrights proudly on their backs." *Id.* at act 2, sc. 1, ll. 68–70. Compare the "lawless resolute" who flock to the young Fortinbras' planned invasion of Denmark in *Hamlet*, *supra* note 133, at act 1, sc. 1, l. 98.

<sup>144</sup> See L.A. Beaurline, *Introduction* to WILLIAM SHAKESPEARE, KING JOHN 33 (L.A. Beaurline eds., Cambridge Univ. Press 1990); FOAKES, *supra* note 3, at 89.

<sup>145</sup> On the "Machiavellianism" of the Bastard, see generally Robert Weimann, *Mingling Vice and "Worthiness" in King John*, 27 SHAKESPEARE STUD. 109, 114–16 (1999). On the Elizabethans' (and Shakespeare's) interest in and views of Machiavelli, see PHILIP BOBBITT, THE GARMENTS OF COURT AND PALACE: MACHIAVELLI AND THE WORLD THAT HE MADE 9–14 (2013); F.J. LEVY, TUDOR HISTORICAL THOUGHT 237–43 (1967).

<sup>146</sup> Michael Neill, *'In Everything Illegitimate': Imagining the Bastard in Renaissance Drama*, 23 Y.B. ENG. STUD. 270, 272 (1993).

<sup>147</sup> Speaking immediately after being knighted, the Bastard explains that he intends to study his new social environment at the Court with great care. His

to master the ways of what he recognizes to be a “mad world” ruled by “mad kings,”<sup>148</sup> and to beat it at its own game, he is still appalled by the cruelty and evil of it. Viewing the dead body of the innocent child Arthur, he exclaims:

I am amazed, methinks, and lose my way  
Among the thorns and dangers of this world.<sup>149</sup>

The Bastard’s reaction to the death of Arthur is, as one critic wrote, “the real touchstone of his whole character.”<sup>150</sup>

### B. *The Transformation of the Bastard*

Though critics have rightly detected moral growth in the Bastard, his true qualities are apparent from the very start.<sup>151</sup> His renunciation of his fortune, viewed from one angle, is of course what an ambitious “mounting spirit” might well do. But it is also a decision for truth and for authenticity—a decision that almost none of the other major characters would take. The Bastard *is* a bastard, and by discarding his fictive legal status as a legitimate son of a wealthy Northamptonshire gentleman, he

observations are intended to “strew the footsteps of [his] rising,” and so he “mean[s] to learn” to “avoid deceit.” Nonetheless, he also says that he “will not practice to deceive.” *KJ*, *supra* note 1, at act 1, sc. 2, ll. 214–16. His study of deception is a defensive measure: he will not practice it, but he intends that no one practice it on him.

<sup>148</sup> *Id.* at act 2, sc. 1, l. 562.

<sup>149</sup> *Id.* at act 4, sc. 3, ll. 140–41.

<sup>150</sup> Adrien Bonjour, *The Road to Swinstead Abbey: A Study of the Sense and Structure of King John*, 18 *ELH* 253, 268 (1951).

<sup>151</sup> Thus, early on, when he forces his mother to admit that his natural father was Richard Coeur de Lion, his attitude towards her, though firm, is also marked by consideration, courtesy and kindness:

Madam, I would wish a better father.  
Some sins do bear their privilege on earth,  
And so doth yours: your fault was not your folly,  
Needs must you lay your heart at his dispose,  
Subjected tribute to commanding love,  
Against whose fury and unmatched force  
The aweless lion could not wage the fight,  
Nor keep his princely heart from Richard’s hand.  
He that perforce robs lions of their hearts  
May easily win a woman’s. Ay, my mother,  
With all my heart I thank thee for my father.

*KJ*, *supra* note 1, at act 1, sc. 1, ll. 260–70. Even the Bastard’s bold and mocking speech “establishes at once his credentials, vigour, honesty, and lack of self-importance.” FOAKES, *supra* note 3, at 84–85. For further discussion of the Bastard’s character and motives, see WARREN CHERNAIK, *THE CAMBRIDGE INTRODUCTION TO SHAKESPEARE’S HISTORY PLAYS* 84–90 (2007); Piesse, *supra* note 2, at 137–39. For a less favorable judgment than advanced here, see Beaurline, *supra* note 144, at 35.

chooses integrity, with all its risks.<sup>152</sup> *His* Machiavellianism is momentary and shallow—a posture, not a policy. As the play unfolds, Sir Richard the Bastard proves to be a figure of bravery, honor and command, unlike almost any other in the play. He comes to resemble heroic figures whom Shakespeare’s audiences might recall, like Don Juan of Austria—another royal bastard, son of the Emperor Charles V and half-brother of King Philip II of Spain, who was celebrated as the victor of Lepanto. At the very least, in a morally murky universe, he represents a force that tends towards the good. On a stronger view, the Bastard becomes “something like the hero” of the play,<sup>153</sup> a model of what a rightful king might be<sup>154</sup>—if not a King himself, then as a King should be, the embodiment of the nation.<sup>155</sup>

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<sup>152</sup> See Robert C. Jones, *Truth in King John*, 25 *STUD. IN ENG. LIT., 1500–1900* at 397, 399 (1985) (“[T]he Bastard Shows a fundamental awareness of and allegiance to the ‘right and the true,’ appealing to a solid sense of right-mindedness that is readily distinguishable from mere law.”).

<sup>153</sup> LAKE, *supra* note 1, at 198.

<sup>154</sup> Several historical persons have been suggested as the model for the Bastard, including Richard I’s illegitimate son Philip of Cognac; Dunois, the Bastard of Orleans; the thirteenth century figure Faukes de Brent; Thomas Neville, the bastard son of William Neville, Lord Faulconbridge; and the Tudor period figure and friend of Henry VIII, John de Verten. See Jacqueline Trace, *Shakespeare’s Bastard Faulconbridge: An Early Tudor Hero*, 13 *SHAKESPEARE STUD.* 59 (1980). But none of these historical models is a particularly close fit, and the character of the Bastard seems to be largely a creation of Shakespeare’s and of the author—George Peele?—of the (earlier?) *TR*.

Given that the character of Bastard is a composite of different historical figures, I suggest that it was drawn in part from the royal Habsburg bastard Don Juan of Austria, the half-brother of King Philip II of Spain. See Sir CHARLES PETRIE, *DON JOHN OF AUSTRIA* (1967).

The resemblances between the English (King) John and (the bastard) Philip and those between (King) Philip and (the bastard) Juan are not insubstantial. Both Philip and Juan were powerful soldiers and commanders (Don Juan was the victor of the Battle of Lepanto); both of their royal kinsmen were usually seen as cautious and crafty. Don Juan at one point was interested in a royal marriage to Mary, Queen of Scots; in *TR*, though not in *KJ*, the ennobled Philip later proposed that he be married to Blanche, the daughter of the King of Castile. See *TR*, *supra* note 1, at sc. 2, ll. 584–87 (colloquy between Philip and Blanche); scene 4, ll. 790–96 (colloquy between Philip and Eleanor); LAKE, *supra* note 1, at 199. Philip’s repeated taunting of the Duke of Austria, the slayer of Philip’s father Richard Coeur de Lion, could imply that “Austria” is somehow his shadow or double. Furthermore, Don Juan of Austria was unquestionably known to Shakespearean audiences. He was so celebrated that King James VI of Scotland wrote a poem entitled *Lepanto*. JAMES VI, *THE POEMS OF JAMES VI. OF SCOTLAND* 197 (James Craigie, ed. 1947), [http://xtf.lib.virginia.edu/xtf/view?docId=chadwyck\\_ep/uvaBook/tei/chep\\_1.1243.xml](http://xtf.lib.virginia.edu/xtf/view?docId=chadwyck_ep/uvaBook/tei/chep_1.1243.xml). And John Webster’s *The Devil’s Law Case* also refers to Lepanto:

When do we name Don John of Austria,  
The emperor’s son, but with reverence? . . .

To be sure, many critics have discerned a severe disjuncture in Shakespeare's presentation of the Bastard's character. Peter Lake, for example, finds that the Bastard "undergoes a transformation . . . . [He] casts off his persona as an outsider, a bemused, amused and amusing, spectator of, and commentator upon, the doings of his elders and betters, a sort of comic chorus or vice, and instead emerges as a figure of heroic force and vigour."<sup>156</sup> Julia Van de Water took a far more extreme interpretative position. According to her,

[I]n the first three acts [the Bastard] is little more than a thinly disguised vice, and in the last two the embodiment of active and outraged nationalism: the English patriot . . . . Strangely enough, no one writing on this play has noticed—or admitted—that the two bear absolutely no relation to each other. Not one element of the character of the first three acts survives in the Bastard of the concluding ones . . . . Obviously, we have two distinct characters under the name of the Bastard.<sup>157</sup>

Lake's interpretation is surely much closer to the dramatic truth than Van de Water's for at least three reasons.

First, as already discussed, Shakespeare presents the Bastard from the very start as endowed with noble qualities. True, even in the presence of royalty, he behaves in a "madcap" way, and his speech is slangy, jocular, edgy and offensive. Yet despite—or because of—all that, Queen Eleanor proclaims him to be "[t]he very spirit of Plantagenet."<sup>158</sup> And even in his first appearance, he begins to demonstrate the loyalty, courtesy, and bravery that become increasingly prominent in the play: he tells Eleanor, "I'll follow you unto the death";<sup>159</sup> he parts on amicable terms from his nephew;<sup>160</sup> and he displays delicacy and

. . . seventy-one; the battle of Lepanto

Was fought in't, a most remarkable time.

JOHN WEBSTER, *THE DEVIL'S LAW CASE*, act 4, sc. 2, ll. 328–35. It has also been suggested that Shakespeare used Don Juan as a model for his character Don John in *Much Ado About Nothing*. See FINDLAY, *supra* note 55, at 105–06; Neill, *supra* note 146, at 274. If so, it is plausible to see Don Juan here.

<sup>155</sup> See Derek Cohen, *History and the Nation in Richard II and Henry IV*, 42 *STUD. ENG. LIT.* 293, 296 (2002); Bonjour, *supra* note 150, at 271.

<sup>156</sup> LAKE, *supra* note 1, at 222. See also FOAKES, *supra* note 3, at 88–89.

<sup>157</sup> Julia C. Van de Water, *The Bastard in King John*, 11 *SHAKESPEARE Q.* 137, 143–44 (1960).

<sup>158</sup> *KJ*, *supra* note 1, at act 1, sc. 1, l. 167.

<sup>159</sup> *Id.* at act 1, sc. 1, l. 154.

<sup>160</sup> *Id.* at act 1, sc. 1, l. 163 ("Brother by th'mother's side, give me your hand."); *id.* at act 1, sc. 1, l. 180 ("Brother adieu, good fortune come to thee.")

consideration in his dealings with his mother.<sup>161</sup> Certainly, he also exhibits some of the unattractive qualities of an *arriviste* who has abruptly and unexpectedly been catapulted, on a royal whim, from the provincial gentry to kinship with the royal family and life at the royal Court. He resolves to observe and follow the manners of the “worshipful society” in which he has suddenly found himself—and “not alone in habit and device,/Exterior form, outward accoutrement/But from the inward motion.”<sup>162</sup> But he is also intensely mindful that he has now been recognized as the son of Richard Coeur de Lion and that he must accordingly live up to that kingly and knightly standard: “My father gave me honour.”<sup>163</sup>

It is true, of course, that the Bastard ends his soliloquy in this opening scene by proclaiming that he will advance himself by flattery. He says he will

Deliver

Sweet, sweet, sweet poison for the age’s tooth,  
Which, though I will not practise to deceive,  
Yet to avoid deceit, I mean to learn,  
For it shall strew the footsteps of my rising.<sup>164</sup>

But at no later point in the play do we find him practicing a flatterer’s arts. Indeed, in the next scene in which he appears in the presence of royalty, he insults the Duke of Austria,<sup>165</sup> mocks the Dauphin’s courtly language to the Princess Blanche, John’s niece,<sup>166</sup> and persuades Kings John and Philip—after urging them, “Your royal presences be ruled by me”<sup>167</sup>—to join forces in an attack on the city of Angiers. They agree—though this is a plan that he tells them himself is “wild counsel.”<sup>168</sup> Still more cheekily, and as if to underscore the gullibility of Kings, this untried novice in statecraft asks them if his advice “[s]macks . . . not something of the policy?”<sup>169</sup> Far from seeing the Bastard as serving up “sweet poison” to persons of rank and title, we see him behaving towards them with familiarity, even insouciance.

<sup>161</sup> *Id.* at act 1, sc. 1, ll. 250–76.

<sup>162</sup> *Id.* at act 1, sc. 1, ll. 205, 210–212.

<sup>163</sup> *Id.* at act 1, sc. 1, l. 164.

<sup>164</sup> *Id.* at act 1, sc. 1, ll. 212–16.

<sup>165</sup> *Id.* at act 2, sc. 1, ll. 133–46, 290–94.

<sup>166</sup> *Id.* at act 2, sc. 1, ll. 504–09.

<sup>167</sup> *Id.* at act 2, sc. 1, l. 377.

<sup>168</sup> *Id.* at act 2, sc. 1, l. 395.

<sup>169</sup> *Id.* at act 2, sc. 1, l. 396.

Second, Shakespeare shows the Bastard gaining ever-greater self-assurance and a growing sense of mastery over his radically new social environment. This is true even within the frame of the first three acts of the play. Consider his taunting and provocation of the Duke of Austria, the killer of his royal father Richard.<sup>170</sup> This conduct might be considered merely coarse, repeated, and unnecessary rudeness. But the Bastard may intend this disrespect to signify that he is on the same level as the Duke, or even a higher one: a gentleman may freely demean his inferiors.<sup>171</sup> Or the Bastard's insults may be calculated to ensure that the Duke will accept his challenge and meet him in hand-to-hand conflict—thus giving the Bastard the opportunity to kill him.<sup>172</sup>

Shakespeare may also be making a subtle psychological point here. Under Elizabethan conventions, a nobleman should not engage in mortal combat with one who was not noble.<sup>173</sup> Even more, it was debatable whether an aristocrat had an obligation to fight against a bastard at all.<sup>174</sup> By fighting the

<sup>170</sup> See *id.* at act 2, sc. 1, l. 5. In fact, the Duke of Austria who had captured Richard had had nothing to do with his death. See FOAKES, *supra* note 3, at 85.

<sup>171</sup> See the remarks of Cloten in *Cymbeline*, *supra* note 35, at act 2, sc. 1, ll. 865–80.

<sup>172</sup> It is clear from the Bastard's first encounter with the Duke that he means to fight him. See *KJ*, *supra* note 1, at act 2, sc. 1, ll. 139–40, 145–46.

<sup>173</sup> In Edmund Spenser's *The Faerie Queene*, Calidore is dismayed that Tristan, who is “no knight,” has slain a knight, “which armes impugneth plaine.” EDMUND SPENSER, *FAERIE QUEENE: BOOK IV, CANTO II, 7* (1596). The Clown in *The Winter's Tale* complains that the pretended courtier Autolycus “denied to fight with me this other day because I was no gentleman born.” *The Winter's Tale*, *supra* note 94, at act 5, sc. 2, ll. 109–10. Edmund is challenged to a duel by the unidentified Edgar in *King Lear*, Edmund accepts, observing that “thy outside looks so fair and warlike” and “thy tongue some say of breeding breathes,” though noting that “[b]y rule of knighthood” he might refuse. WILLIAM SHAKESPEARE, *KING LEAR*, act 5, sc. 3, ll. 165–68 (New Cambridge Shakespeare 2d ed., Jay L. Halio ed., 2005) [hereinafter *King Lear*]. Jack Cade ludicrously knights himself in *Henry VI* in order to be qualified to fight with a nobleman. WILLIAM SHAKESPEARE, *THE SECOND PART OF HENRY THE SIXTH*, act 5, sc. 2, ll. 112–18 (New Cambridge Shakespeare, Michael Hattaway ed., 1991) [hereinafter *Henry VI, Pt. II*]. And according to Sir Fulke Greville's *Life of Sir Philip Sidney*, when Sidney asked the Queen's permission to duel the Earl of Oxford, Elizabeth “la[id] before him the difference in degree between Earls, and Gentlemen.” SIR FULKE GREVILLE, *LIFE OF SIR PHILIP SIDNEY* 67 (CLARENDON PRESS 1907) (1652), <https://ia801406.us.archive.org/9/items/sirfulkegrevill00grevgoog/sirfulkegrevill00grevgoog.pdf>; see also VICTOR KIERNAN, *THE DUEL IN EUROPEAN HISTORY: HONOUR AND THE REIGN OF ARISTOCRACY* 51–53 (1988) (demonstrating the social practice of dueling in the early modern period functioned to reinforce the sense of aristocratic class solidarity).

<sup>174</sup> In *The Booke of Honor and Armes*, Richard Jones discusses the question “Whether a Bastard may challenge a Gentleman to Combat.” Jones concludes:



Duke, the Bastard establishes beyond question his aristocratic (indeed, royal) status—and he does so, not on John’s or Eleanor’s initiative, but on his own. Moreover, in the end, he kills Austria. Although this is a matter Shakespeare downplays—the Bastard simply says, in less than two lines, “Austria’s head lie there,/While Philip breathes”<sup>175</sup>—killing the Duke surely marks a major step forward in the Bastard’s self-transformation from an on-the-make provincial nobody to the scion of a royal house. Not only has the Bastard killed the man who killed his father, but by defeating the warrior who had defeated Richard Coeur de Lion, he proves himself to be a greater warrior than either—and so, perhaps, the greatest warrior of his time.<sup>176</sup>

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For that by lawe no Bastard can inherit the lands and honors of his supposed father, it may be reasonable doubted, whether he be of such condition as may challenge a Gentleman to trial of Armes. Notwithstanding, for that such impediment proceedeth not from the Bastard himselfe, and that no man ought iustlie be repulsed sauing such as are condemned, or infamed for their owne viletie, me thinks that Bastardie ought not to disable a man to bee admitted vnto Combat. . . . Wherevpon wee conclude, that euerie Bastard hauing well and vertuouslie serued in the warre, or that for his good merite hath aspired to beare charge of reputation in the Armie, ought be receiued to fight with anie priuate Gentleman or Soldier, because men so borne, haue not onelie been oftentimes aduanced to honor, but they and their posteritie also, haue attained and continued in high dignitie and greatest estimation.

RICHARD JONES, THE BOOKE OF HONOR AND ARMES 33–34 (1590), <https://quod.lib.umich.edu/e/eebo/A11862.0001.001?view=toc>. Shakespeare may be glancing at this issue in a short exchange between the Bastard and Lord Salisbury. The Bastard has intervened to prevent the outraged Salisbury from hacking Hubert to pieces in the mistaken belief that Hubert has murdered Arthur. Drawing his sword, the Bastard orders Salisbury, “Keep the peace, I say.” Salisbury replies, “Stand by, or I shall gall you, *Falconbridge*.” *KJ*, *supra* note 1, at act 4, sc. 3, l. 93 (emphasis added). Earlier in the same scene, Salisbury had been more respectful to the Bastard, calling him “Sir Richard.” *Id.* at act 4, sc. 3, l. 41. In calling him “*Falconbridge*,” Salisbury seems to be alluding to his illegitimate origins, which would usually unfit him to combat a nobleman.

<sup>175</sup> *KJ*, *supra* note 1, at act 3, sc. 2, ll. 4–5. Contrast the striking displays of a defeated enemy’s severed head as a trophy of battle in *King Henry VI*, of Hastings’ head in *Richard III*, of the rebel Cade’s head in *Henry VI*, and the gruesome use of severed heads to make a pie in *Titus Andronicus*. See WILLIAM SHAKESPEARE, THE THIRD PART OF KING HENRY THE SIXTH, act 1, sc. 1, ll. 18–24 (New Cambridge Shakespeare 2d ed., Alan Hughes ed., 2006) [hereinafter *Henry VI, Pt. III*]; *Richard III*, *supra* note 66, at act 3, sc. 5, l. 23; *Henry VI, Pt. II*, *supra* note 173, at act 5, sc. 1, ll. 64–71; WILLIAM SHAKESPEARE, TITUS ANDRONICUS, act 5, sc. 3, ll. 59–62 (New Cambridge Shakespeare 2d ed., Alan Hughes ed., 2006) [hereinafter *Titus Andronicus*].

<sup>176</sup> Although it takes place off-stage, the combat between the Bastard and the Duke was presumably a “duel” in the sense defined by John Selden: “*the bodily opposition of two combatants, both ayiming at victorious successe*.” JOHN SELDEN, DUELLO OR SINGLE COMBAT: FROM ANTIQUITIE DERIUED INTO THIS KINGDOME OF

In other ways, too, the Bastard is also shown acquiring the habits of responsibility and command. For instance, he has rescued Queen Eleanor from the French, even though her own son John has failed to do so and believes her taken.<sup>177</sup> And John entrusts the Bastard with the vital mission of raising funds for war by plundering the assets of the English Church<sup>178</sup>—a task the Bastard carries out with ruthless efficiency.<sup>179</sup> The Bastard's departure for England on this mission concludes with a warm exchange that demonstrates the enduring affection of the Bastard and Eleanor for each other. Surely, these scenes indicate the Bastard's deepening understanding of his royal status, and of the responsibilities attached to it.

Third, of course, is the Bastard's horrified reaction to the death—which he believes to be murder—of Prince Arthur. A sudden, spontaneous, unfeigned, and emotionally-charged response like that is compelling evidence of one's true character.

### III. COMMODITY AGAINST COMMONWEALTH

#### A. *What is "Commodity"?*

The start of *KJ*'s second act marks a new direction in the play's action. The first act explored the themes of law and legitimacy; the second act begins to reveal the world of "Commodity" in operation. What clasps the two parts together is the illegitimacy of John's kingship. John's illegitimacy has set the world askew, and his fumbling efforts to cure his problem only aggravate it. The play thus becomes an extended thought-experiment about the nature of a world governed by "Commodity," or the pursuit of self-interest. In essence, the action from Act II onwards consists of a series of betrayals and counter-betrayals, culminating in John's death by treachery and the accession of a new and legitimate King. Understanding Shakespeare's intentions requires a clear understanding of the idea of "Commodity," and also of what opposes it—the idea of "Commonwealth."

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ENGLAND, WITH SEUERALL KINDES, AND CEREMONIOUS FORMES THEREOF FROM GOOD AUTHORITY DESCRIBED, 3 (1610), <https://quod.lib.umich.edu/e/eebo/A11870.0001.001?rgn=main;view=fulltext>. Selden notes that duels are often fought "[f]or prooffe of Manhood." *Id.* at 7. The Bastard has proven his spectacularly here.

<sup>177</sup> *KJ*, *supra* note 1, at act 3, sc. 2, ll. 5–8.

<sup>178</sup> *Id.* at act 3, sc. 3, ll. 6–11.

<sup>179</sup> *Id.* at act 3, sc. 4, ll. 171–73 (referencing speech of Pandulph).

### 1. George Buchanan and “expediency”

Shakespeare’s vision of the world of Commodity had been foreshadowed by one of the leading political thinkers of his period. In his 1579 dialogue, *The Law of Kingship*, the Scottish philosopher George Buchanan sought to refute the idea that “expediency” provided the foundation of human society.<sup>180</sup> Buchanan’s partner in the dialogue was the young Thomas Maitland.<sup>181</sup> Maitland proposes that “expediency” is “virtually the mother of justice and equity,” who first brought humans together in civic or political life.<sup>182</sup> Before that, they had lived “a wandering, nomadic existence without laws or settled habitations.”<sup>183</sup> Buchanan recoils at this idea. He reminds Maitland of an opposing and truer vision of human political community: “there is a much more ancient motive for men associating together and a much earlier and more sacred bond of fellowship between them.”<sup>184</sup> Following Cicero’s *On Invention*, Buchanan contends that human beings emerge from a solitary condition into social life.<sup>185</sup>

[E]ven when the attractions of expediency are absent, [men] nevertheless willingly assemble together with creatures of their own kind . . . [W]ere someone to have in abundance all those things which are meant to ensure his safety or to please and delight his soul, he would still think his life disagreeable without human intercourse.<sup>186</sup>

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<sup>180</sup> Buchanan’s purpose in writing the book was “to justify the deposition of Mary Queen of Scots in 1567.” Johann Sommerville, *The Social Contract (Contract of Government)*, in GEORGE KLOSKO, *THE OXFORD HANDBOOK OF THE HISTORY OF POLITICAL PHILOSOPHY* 573, 578 (2011). Buchanan’s former pupil, King James VI and I, may have had Buchanan’s ideas in mind when writing his 1598 *Trew Law of Monarchy*. See generally ROGER A. MASON, *KINGSHIP AND THE COMMONWEAL: POLITICAL THOUGHT IN RENAISSANCE AND REFORMATION SCOTLAND* 215–41 (1998). Buchanan is also an early source of the social contract theory—a fact that explains certain resemblances between ideas about “the origins of [human] society” and those of Thomas Hobbes. See Sommerville, *supra*, at 573–74, 577–78.

<sup>181</sup> For background, see W.S. McKechnie, *Thomas Maitland*, 4 *SCOTTISH HIST. REV.* 274, 274 (1907).

<sup>182</sup> BUCHANAN, *supra* note 74, at 47 (the editors have translated Buchanan’s Latin into modern English).

<sup>183</sup> *Id.* at 46.

<sup>184</sup> *Id.* at 47.

<sup>185</sup> See 2 QUENTIN SKINNER, *THE FOUNDATIONS OF MODERN POLITICAL THOUGHT: THE AGE OF REFORMATION* 340–41 (1978).

<sup>186</sup> BUCHANAN, *supra* note 74, at 17, 19.

True, there are apparent exceptions to the general rule of sociability, such as “Timon the Athenian, and... Bellerophon the Corinthian.”<sup>187</sup> But their eccentric conduct resulted from “a diseased mind rather than a natural force.”<sup>188</sup>

Moreover, not only are humans naturally sociable, but God has caused them to be guided by “a kind of light before [their] soul by which [they] could distinguish base from noble things.”<sup>189</sup> Humans have an inherent propensity to cooperate with one another and to pursue the common enterprises. Accordingly, they form

those communities of men bound by the law which are called commonwealths. The various parts of these commonwealths want to be linked together... in order to balance reciprocal duties, to labour for the common good, to ward off common dangers, to provide for mutual benefits, and, by sharing these things, to secure the goodwill of all towards all.”<sup>190</sup>

A human society founded on the principle of expediency and the denial of sociability is, according to Buchanan, inherently self-destructive. “[I]f each person were to pursue his own private advantage, surely that self-same expediency would break up human society rather than unite it.”<sup>191</sup> Rather than being the mother of justice and equity, expediency is merely “their handmaiden and one of the guardians of a well-ordered commonwealth.”<sup>192</sup>

Although Buchanan’s ideas were well known to leading Tudor political, intellectual and artistic figures, as well, of course, as to King James I,<sup>193</sup> it is no part of my argument that Shakespeare was directly influenced by him. Rather, I cite Buchanan only to show that other leading Tudor era thinkers besides Shakespeare had a sense that the social world could not hold together if its operative principle was “commodity” or, to use Buchanan’s term, “expediency.” And that process of disintegration is exactly what Shakespeare seeks to map in the latter part of *KJ*.

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<sup>187</sup> *Id.* at 19.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* at 47.

<sup>192</sup> *Id.* at 50.

<sup>193</sup> See James E. Phillips, *George Buchanan and the Sidney Circle*, 12 HUNTINGDON LIBRARY Q. 23, 36 (1948).

## 2. What is the “Commonwealth”?

But if Shakespeare is contrasting the pursuit of “commodity” with an ideal of the “commonwealth,” what kind of commonwealth does he have in mind? The only answer, I think, is that Shakespeare is opposing the idea of the national community—England or, perhaps, Britain—against a kind of individualism that is founded on self-interest.<sup>194</sup>

I say “national community” and not “nationalism” advisedly, for it is not my argument that Shakespeare was an early English nationalist. Apart from anything else, Shakespeare is too critical and many-sided to offer a worshipful vision of the English nation and state: Shakespeare *represents* rather than *advocates*. Thus, even *Henry V*, which is the most “nationalistic” of all his plays, is far more dialectical than didactic.<sup>195</sup> Moreover, Shakespeare’s “nationalism” (to call it that) is not limited to the confines of *England*, but sometimes extends to the Welsh and Scottish peoples and nations as well.<sup>196</sup> Yet English nationalism is abundantly evident in *KJ*: Arthur dies with the cry “England keep my bones,”<sup>197</sup> and the Bastard derides the rebellious nobles for “ripping up the womb/Of your dear mother England.”<sup>198</sup> That should not be at all surprising.<sup>199</sup> Shakespeare lived in a period

<sup>194</sup> The question whether “individualism” and “nationalism” are, so to say, twinned developments will not be considered here. See ERNEST GELLNER, *NATIONS AND NATIONALISM* 91 & n. 1 (1983) (raising question whether “the early emergence of national sentiment in England” might be due to the rise of individualism).

<sup>195</sup> See Robert J. Delahunty, *The Conscience of a King: Law, Religion, and War in Shakespeare's King Henry V*, 53 *J. CATH. LEGAL STUD.* 129, 130 (2014).

<sup>196</sup> Shakespeare referred to “England” 460 times, of which 435 came before the accession of the Scottish King James VI & I to the English throne in 1603. Of his 64 references to “Britain,” 49 occur after that date. Christopher Wortham, *Shakespeare, James I and the Matter of Britain*, 45 *ENG.* 97, 120 n.1 (1996). “There is no patriotic affirmation of England as distinct from Britain in Shakespeare’s plays after 1603.” *Id.* at 107. Before 1603, Shakespeare had not always distinguished “England” from “Britain.” John of Gaunt’s famous speech in *Richard II* talks of “this sceptered isle,” which surely must include Wales and Scotland—but then conflates them into “this England.” *Richard II*, *supra* note 40, at act 2, sc. 1, ll. 45, 55.

<sup>197</sup> *KJ*, *supra* note 1, at act 4, sc. 3, l. 10.

<sup>198</sup> *Id.* at act 5, sc. 2, ll. 152–53.

<sup>199</sup> Devotion to England is clearly present in other plays as well. In *Henry VI, Pt. III*, Gloucester declares that “if my death might make this island happy . . . I would expend it with all willingness.” *Henry VI, Pt. III*, *supra* note 175, at act. 3, sc. 1, ll. 149–51. In *Richard II*, the King “weep[s] for joy” on returning from Ireland to England, and Bolingbroke. *Richard II*, *supra* note 40, at act 3, sc. 2, l. 4. Upon going into exile, he speaks of the “sweet soil” of England, “[my] mother and my nurse that bears me yet.” *Id.* at act 1, sc. 3, ll. 313–14.

when the English people, and not only the English,<sup>200</sup> were increasingly aware of having a specific “national” identity.<sup>201</sup> This is true whether one considers government, law, religion, history, or literature.

The Henrician breach with Rome seems to have made England more conscious of its differences from the Continental nations, and the continuing threat from the Catholic powers, notably Spain, reinforced Protestant Englishmens’ sense of apartness.<sup>202</sup> The ruling of Pope Clement VII in Henry VIII’s

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<sup>200</sup> “Lawyer,” one of the speakers in the dialogue known as LEICESTER’S COMMONWEALTH (1584) observes that the people of Germany, the Lowlands, France and Portugal would all strongly prefer to be governed by a ruler of their own nationality, even if of a different faith, to a foreign ruler of the same faith. LEICESTER’S COMMONWEALTH: THE COPY OF A LETTER WRITTEN BY A MASTER OF ARTS OF CAMBRIDGE AND RELATED DOCUMENTS 50 (Dwight C. Peck ed., 1985; reprinted in pdf format 2006) (1584), <http://www.dpeck.info/write/leic-comm.pdf>. Note that the pagination in the reprinted edition differs from that in the original.

The authorship of LEICESTER’S COMMONWEALTH remains unknown. It is likely the work of several hands belonging to or associated with the “Catholic Court party,” including Charles Arundell. *Id.* at 21–25.

<sup>201</sup> See Hans Kohn, *The Genesis and Character of English Nationalism*, 1 J. Hist. Ideas 69, 69–75 (1940).

Tudor nationalism often had a harsh, assimilationist edge to it. The 1536 statute incorporating Wales into England, The Acte for Lawes & Justice to be ministred in Wales in like fourme as it is in this Realme, 27 Hen. VIII c. 26 (Eng. and Wales), <https://web.archive.org/web/20080102012041/http://www.statutelaw.gov.uk/content.aspx?activeTextDocId=1517920&versionNumber=1>, complained of the use of the Welsh language, stating that “the people of the same Dominion have and do daily use a speche nothing like ne consonaunt to the naturall mother tonge used within this Realme.” Section 20 of that Act made English the only language of the law courts and barred those who used Welsh from appointment to any public office in Wales.

Likewise, Tudor policy towards Ireland envisaged an Ireland anglicised. The whole island would be governed by English, not Irish, law, administered by officials operating ‘county government’, as against a variety of systems subject to the wills of Old English magnates or Irish chiefs. The policy of ‘surrender and regrant’ would make Irish landholding recognisable in Lincoln’s Inn. The Gaels were to be won over to English manners, and ultimately, no doubt, to the English language. C.S.L. Davies, William Cecil, Ireland, and the Tudor State, *by Christopher Maginn*, 128 Eng. Hist. Rev. 1224, 1225 (2013) (book review). In that spirit, the poet Edmund Spenser’s *A View of the State of Ireland* was a comprehensive assault on traditional Irish laws, customs, religion and language. As one of the characters in that dialogue stated, “it hath ever beene the use of the conquerour, to despise the language of the conquered, and to force him by all meanes to learne his.” EDMUND SPENSER, *A VIEW OF THE STATE OF IRELAND* 70 (Andrew Hadfield & Willy Maley eds., 1997) (1633).

<sup>202</sup> See Philip Schwyzer, *Nationalism in the Renaissance*, OXFORD HANDBOOKS ONLINE (Jun. 2016), <http://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199935338.001.0001/oxfordhb-9780199935338-e-70>. On Renaissance nationalism, see generally CASPAR HIRSCHI, *THE ORIGINS OF NATIONALISM: AN ALTERNATIVE HISTORY FROM ANCIENT ROME TO MODERN GERMANY* (2012).

divorce case that the King or his proxy must appear before and submit to a Papal tribunal in Rome enraged English public opinion: as Cardinal Wolsey wrote, “If [Henry] appears in Italy, it will be at the head of a formidable army.”<sup>203</sup> The preamble of the 1534 Statute in Restraint of Appeals<sup>204</sup> declared that “this realm of England is an empire, and so hath been accepted in the world, governed by one Supreme Head and King having the dignity and royal estate of the imperial Crown of the same.”<sup>205</sup> In Elizabeth I’s celebrated speech to her troops at Tilbury on the eve of the arrival of the Spanish Armada, she said, “I know I have the body but of a weak, feeble woman; but I have the heart and stomach of a king, and of a king of England too . . . .”<sup>206</sup> The great festival of Accession Day, celebrated across the whole of England each November 17, the date on which Elizabeth had succeeded her Catholic sister Mary Tudor, was a day of bell-ringing, bonfires, feasting, spectacles, sermons, and tributes to the Queen. It was a kind of cross between a medieval holy day and a secular anniversary that glorified the monarchy and united Elizabeth’s subjects in the sense of membership in a national community.<sup>207</sup>

Tudor religion also nourished the growth of national identity.<sup>208</sup> For English readers as for Protestants elsewhere in Europe, the Bible furnished, in the form of the ancient Israelite commonwealth, a “‘developed model’ of nationhood.”<sup>209</sup>

Vernacular translations of the Hebrew Bible, beginning with William Tyndale’s translations from the 1520s and Myles Coverdale’s printing of the first complete English version of the

<sup>203</sup> See A.F. POLLARD, *HENRY VIII* 206 (1902).

<sup>204</sup> THE TUDOR CONSTITUTION: DOCUMENTS AND COMMENTARY § 177 (G.R. Elton ed., 2d ed. 1982).

<sup>205</sup> The rhetoric of “empire” found here should be interpreted in terms of “nationhood,” and is evidence of a rising English national consciousness. See Stewart Mottram, *Reading the Rhetoric of Nationhood in Two Reformation Pamphlets by Richard Morrison and Nicholas Bodrigan*, 19 *RENAISSANCE STUD.* 523, 524, 528–29 (2005).

<sup>206</sup> See Queen Elizabeth I, *Speech at Tilbury* (July 1588) (transcript available at <http://www.bl.uk/learning/timeline/item102878.html>).

<sup>207</sup> See Ray C. Strong, *The Popular Celebration of the Accession Day of Queen Elizabeth I*, 21 *J. WARBURG & COURTAULD INSTS.* 86, 88 (1958).

<sup>208</sup> See PATRICK COLLINSON, *THIS ENGLAND: ESSAYS ON THE ENGLISH COMMONWEALTH IN THE SIXTEENTH CENTURY 167–92* (2011).

<sup>209</sup> See Diana Muir Appelbaum, *Biblical Nationalism and the Sixteenth Century States*, 15 *NAT’L IDENTITIES* 317, 322 (2013) (internal quotation marks and citations omitted).

Bible in 1535,<sup>210</sup> powerfully stimulated the growth of English national consciousness.<sup>211</sup> Readership of English translations of the Bible was widespread: by the latter half of the sixteenth century, “with an English population of six million, half a million copies of an English Bible were bought.”<sup>212</sup> King Henry VIII complained in 1545 that “the Word of God, is disputed, rhymed, sung, and jangled in every Ale-house and Tavern . . . .”<sup>213</sup> Likewise, in his Preface to the “Great Bible” (or “Cranmer Bible”) of 1540,<sup>214</sup> Archbishop Thomas Cranmer assumed that its readership would include

all maner of persons, menne, wemen, younge, olde, learned, unlearned, ryche, poore, priestes, laymen, lordes, ladyes, offycers, tenauntes, and meane menne, virgynes, wydowes, lawters, marchauntes, artifycers, housebandmen, and all maner of persones of what estate or condicion so ever they be . . . .<sup>215</sup>

In *If You Know Not Me, You Know Nobody* by Thomas Heywood (1570s[?]-1641), the Lord Mayor of London, upon learning the news that Elizabeth’s half-sister Mary has died and that Elizabeth is now sovereign, presents the new Queen with a purse and a Bible. Elizabeth movingly declares:

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<sup>210</sup> On these and other translations from the Tudor and Jacobean periods, see generally DAVID DANIELL, *THE BIBLE IN ENGLISH: ITS HISTORY AND INFLUENCE* (2003).

<sup>211</sup> David Aberbach, *Nationalism and the Hebrew Bible*, 11 *NATIONS & NATIONALISM* 223, 232–33 (2005). Aberbach goes so far as to say that “[p]articularly in the Elizabethan period, . . . the Bible was the chief inspiration of nationalism.” *Id.* at 234.

<sup>212</sup> David Daniell, *Reading the Bible*, in *A COMPANION TO SHAKESPEARE* 158, 165 (1999).

<sup>213</sup> King Henry VIII, *A FAMOUS SPEECH OF KING HENRY THE EIGHTH, MADE IN THE PARLIAMENT HOUSE THE 24. OF DECEMBER, IN THE 37. YEARE OF HIS MAJESTIES REIGNE. ANNO DOM. 1545.: TENDING TO CHARITY AND CONCORD, AND THEREFORE NECESSARY FOR MEN OF THESE TIMES* (printed 1642), <https://quod.lib.umich.edu/e/eebo2/A86208.0001.001?view=toc>. Some years earlier, in 1543, Parliament had enacted the Act for the Advancement of True Religion, 34-35 Henry VIII, c. 1, which prohibited the reading of the English Bible by “women, artificers, apprentices, journeymen, serving-men of the rank of yeoman and under, husbandmen and laborers.” The fact that such a measure was considered necessary, however, indicates that such people *were* often reading the Bible.

<sup>214</sup> On the Great Bible, see DANIELL, *BIBLE IN ENGLISH*, *supra* note 210, at 204–09.

<sup>215</sup> *Archbishop Thomas Cranmer’s Preface to the Bible (1540)*, ORDER OF CENTURIONS, <http://orderofcenturions.org/documents/cranmerpreface.html> (last visited Feb. 18, 2019).



An English Bible, thanks my good Lord Maior,  
 You of our bodie and our soule haue care,  
 This is the Iewell that we still loue best,  
 This was our solace when we were distrest,  
 This booke that hath so long conceald it selfe,  
 So long shut vp, so long hid; now Lords see,  
 VVe here vnclaspe, for euer it is free:  
 VVho looks for ioy, let him this booke adore,  
 This is true foode for rich men and for poore....<sup>216</sup>

And food indeed it became for “rich men and for poore.” Immediately after Henry VIII’s 1538 injunction ordering the Great Bible to be read in parish churches, William Maldon recorded a group of “dyuerse poore men in the towne of chelmysford...on svndays dyd syt redyng in lower ende of the churche, & manye wolde flocke abovt them to hear thyr redyng . . . .”<sup>217</sup> John Day, “the most innovative and industrious popularizer of the Bible,” cultivated an audience of lower-class readers; he published the Bible in six octavo parts (1549-51) in order to enable the poor to purchase it in separate sections.<sup>218</sup> Tyndale’s wish for the “democratization of the Bible”<sup>219</sup> came very close to fulfillment:

I would desire that all women should reade the Gospell and Paul’s epistles, and I wold to god they were translated in to the tonges of all men. So that they might not only be read and knowne of the scotes and yryshmen, But also of the Turkes and saracenes. . . . I wold to god the plowman wold singe a texte of the scripture at his plowbeme, and that the wever at his lowme with this wold drive away the tediousness of tyme.<sup>220</sup>

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<sup>216</sup> THOMAS HEYWOOD, IF YOU KNOW NOT ME, YOU KNOW NO BODIE; OR, THE TROUBLES OF QUEENE ELIZABETH (1605), <https://quod.lib.umich.edu/e/eebo/A03208.0001.001?rgn=main;view=fulltext>.

<sup>217</sup> *The Narrative of William Maldon of Newington*, in RECORDS OF THE ENGLISH BIBLE: THE DOCUMENTS RELATING TO THE TRANSLATION AND PUBLICATION OF THE BIBLE IN ENGLISH, 1525–1611, 268, 269 (Alfred W. Pollard ed., 1911).

<sup>218</sup> JOHN N. KING, ENGLISH REFORMATION LITERATURE: THE TUDOR ORIGINS OF THE PROTESTANT TRADITION 128–29 (1982).

<sup>219</sup> David Ginsberg, *Ploughboys versus Prelates: Tyndale and More and the Politics of Biblical Translation*, 19 SIXTEENTH CENTURY J. 45, 46 (1988).

<sup>220</sup> *Id.*

Biblical knowledge in turn nourished national pride. Under the Tudors, England was viewed as a “covenantal” nation,<sup>221</sup> and the English as a people chosen by God.<sup>222</sup> Writing on the birth of Henry’s son Prince Edward in 1537, Hugh Latimer exclaimed to Thomas Cromwell, “God give us all grace to yield due thanks to our Lord God, God of England! for verily he hath shewed himself God of England, or rather an English God, if we consider and ponder well all his proceedings with us from time to time.”<sup>223</sup> William Tyndale identified England with biblical Israel: “As it went with their kings and rulers, so shall it be with ours. As it was with their common people, so shall it be with ours.”<sup>224</sup> Likewise, John Lyly, in his *EUPHUES AND HIS ENGLAND* (1580), wrote of England as “a new *Israel*, [God’s] chosen and peculier people,”<sup>225</sup> and Sir Richard Morison, in a pamphlet attacking Cardinal Reginald Pole, compared England to Israel as a nation chosen by God.<sup>226</sup> Richard Hooker’s *Ecclesiastical Polity* too, remarks that “our estate is according to the pattern of God’s own ancient elect people.”<sup>227</sup> By the beginning of the seventeenth century, “the Judaic characterizing of God’s Englishness, and of

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<sup>221</sup> See Anthony D. Smith, *Nation and Covenant: The Contribution of Ancient Israel to Modern Nationalism*, 151 *PROC. BRIT. ACAD.* 213, 237 (2007). Even as early as 1377, Edward III’s Chancellor Adam Houghton had told Parliament that the English were the new Israelites. *Id.* at 233.

<sup>222</sup> See John W. McKenna, *How God Became an Englishman*, in *TUDOR RULE AND REVOLUTION: ESSAYS FOR G.R. ELTON FROM HIS AMERICAN FRIENDS* 25, 42–43 (Delloyd J. Guth & John W. McKenna eds., Cambridge Univ. Press 1982).

<sup>223</sup> Letter from Hugh Latimer to Oliver Cromwell (Oct. 19, 1537), in *SERMONS AND REMAINS OF BISHOP HUGH LATIMER, SOMETIME BISHOP OF WORCESTER, MARTYR 1555*, 385 (George Elwes Corrie ed., Cambridge Univ. Press 1845).

<sup>224</sup> Aberbach, *supra* note 211, at 234.

<sup>225</sup> JOHN LYLY, *EUPHUES AND HIS ENGLAND*, in 2 *THE COMPLETE WORKS OF JOHN LYLY* 205 (R. Warwick Bond ed., Oxford Univ. Press 1902) (1580).

<sup>226</sup> Sir Richard Morison, *An invective ayenste the great and detestable vice, treason wherein the secrete practises, and traiterous workinges of theym, that suffrid of late are disclosed. made by Rycharde Morisyne*, n.p. (1539), <http://ota.ox.ac.uk/tcp/headers/A07/A07726.html> (“Waye well the accidentes, the chaunces, the progresse, and thende of thinges, that haue fortunated, and than Englande see, whether thou haue not mo causes to thynke that god tendereth the helthe, welthe, and honoure of thy gouernour, and oure dere and dredde soueraygne lorde: than euer Israell hadde to thynke so by kinge Dauid, or any other.”). John Stubbs reworks these themes; he too considers the English an elect nation, a “kingdome of light,” in contrast to papistical France, a “kingdome of darknesse.” And he marshals the minatory example of Biblical kings, most prominently Solomon, in warning Elizabeth off the marriage to Anjou. Stubbs, *supra* note 134.

<sup>227</sup> HOOKER, *supra* note 79, at 340.

England's prominent place under divine watch and ward, had achieved the power of a paradigm. It was a commonplace of commonplaces—a simple matter of fact.”<sup>228</sup>

Tudor monarchs, with clerical support, often applied Biblical images and themes to themselves. King Henry VIII enjoyed being compared to the Biblical heroes, Kings David and Solomon; indeed, the “model of Old Testament kingship [was] a crucial element in Henry's understanding of his role as Supreme Head of the Church of England.”<sup>229</sup> Preachers frequently compared Henry's successor, King Edward VI, to King Josiah,<sup>230</sup> as well as to Solomon.<sup>231</sup> In his *Sermon Preached Before the Queenes Maiestie at Richmond* (1575), Richard Curteys, the Bishop of Chichester, compared Henry VIII to the “noble Moses,” who had led the English Church out of the “Egipt of error”; Edward VI to Joshua, who had brought the Israelites into the Promised Land; and Queen Elizabeth herself to “a gracious Debora, by whome God...caused his Churche of Englande to prosper . . . .”<sup>232</sup> Not to be outdone, Archbishop Edwin Sandys hailed the Queen in a 1579 sermon: “Our Deborah hath mightily repressed the rebel Jaben: our Judith hath beheaded Holophernes, the sworn enemy of Christianity: our Hester hath hanged up that Haman, which sought to bring both us and our children into miserable servitude.”<sup>233</sup> In Shakespeare's *Henry VIII*, Archbishop Cranmer, assuming the role of a prophet when baptizing the infant Princess Elizabeth, likens her to the Biblical Queen of Sheba: “Saba was never/More covetous of wisdom and fair virtue/than this pure soul shall be.”<sup>234</sup>

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<sup>228</sup> Michael McGiffert, *God's Controversy with Jacobean England*, 88 AM. HIST. REV. 1151, 1152 (1983).

<sup>229</sup> RICHARD REX, *HENRY VIII AND THE ENGLISH REFORMATION* 167 (2d ed. 2006).

<sup>230</sup> PETER MARSHALL, *HERETICS AND BELIEVERS: A HISTORY OF THE ENGLISH REFORMATION* 304 (2018).

<sup>231</sup> MACCULLOCH, *supra* note 23, at 14–15, 62–63, 104.

<sup>232</sup> PETER E. MCCULLOUGH, *1 SERMONS AT COURT: POLITICS AND RELIGION IN ELIZABETHAN AND JACOBEAN PREACHING* 82 (1998).

<sup>233</sup> Edwin Sandys, *A Sermon Preached in York, at the Celebration of the Day of the Queen's Entrance into Her Reign*, in *THE SERMONS OF EDWIN SANDYS: TO WHICH ARE ADDED SOME MISCELLANEOUS PIECES* 75, 81 (John Ayer ed., Cambridge Univ. Press 1841); *see also* Edward O. Smith Jr., *The Elizabethan Doctrine of the Prince as Reflected in the Sermons of the Episcopacy, 1559–1603*, 28 HUNTINGTON LIBR. Q., Nov. 1964, at 2–4.

<sup>234</sup> *Henry VIII*, *supra* note 71, act 5, sc. 4, at ll. 23–25. There was a corollary to the view that the English were a chosen people and their rulers the counterparts of Biblical kings. For if God had elected England, He also demanded much from it, and

Tudor iconography reinforced the same messages. In the magnificent Window 4 of the Chapel of King's College, Cambridge, Henry VIII is depicted as King Solomon receiving the Queen of Sheba: to secure the identification, Henry's monogram "HR" was inserted on a shield at the top of the panel. The Cambridge image of Henry as Solomon in turn derived from a 1534 miniature by Hans Holbein, in which the Queen of Sheba, representing the Church, paid homage to a Solomon who was clearly recognizable as Henry.<sup>235</sup> Likewise, the iconography in Elizabeth's coronation pageants presented her as the prophetess Deborah from the Book of Judges, "The Judge and Restorer of Israel."<sup>236</sup> Indeed, Elizabeth referred to herself as "the nursing mother of Israel."<sup>237</sup>

Like their monarchs, Tudor churchmen, historians, lawyers and writers exhibited strong nationalist tendencies. Through their extensive researches into English ecclesiastical history, which included recovering and editing ancient texts, Anglican scholars such as Archbishop Matthew Parker and his associates defended the reformed religion, traced the origins of the English national church to pre-Roman sources, and fostered a belief in the "distinctive worth of English history."<sup>238</sup> Even before the

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would punish its failings severely. And if its rulers were comparable to David and Solomon, their spiritual responsibilities were commensurate. In a "prophetic" Lenten sermon of breathtaking audacity preached before the Queen herself on February 28, 1569, Edward Dering sounded these themes. Recalling both faithful and faithless Biblical monarchs, he enjoined the Queen to follow the pattern of the former and avoid the example of the latter. Edward Dering, A Sermon preached before the Queenes Maiesty the 25.day of February, by Maister Edward Dering (1569), <http://www.digitalpuritan.net/Digital%20Puritan%20Resources/Dering,%20Edward/Individual%20Works/A%20Sermon%20Preached%20Before%20the%20Queen's%20Majesty.pdf>.

<sup>235</sup> See CAROLA HICKS, *THE KING'S GLASS: A STORY OF TUDOR POWER AND SECRET ART* 160–61 (2007). Henry also prominently displayed tapestries that portrayed him as both Solomon and King David. *Id.* at 162. In adopting these motifs, Henry was echoing the writings of the Provost of King's College (and later Bishop of Hereford) Edward Fox, whose 1534 treatise *DE VERA DIFFERENTIA* by comparing Henry to Moses, Josiah, David and Solomon. *See id.* at 160.

<sup>236</sup> ELIZABETH'S CORONATION PROCESSION (1559), *reprinted in* TUDOR TRACTS 1532–1588, 365, 387 (A.F. Pollard ed., E. P. Dutton & Co. 1964); JOHN GUY, *TUDOR ENGLAND* 250 (1988).

<sup>237</sup> Barry Shaw, *Thomas Norton's "Devices" for a Godly Realm: An Elizabethan Vision for the Future*, 22 *SIXTEENTH CENTURY J.* 495, 505 (1991).

<sup>238</sup> Benedict Scott Robinson, "Darke Speech": *Matthew Parker and the Reforming of History*, 29 *SIXTEENTH CENTURY J.* 1061, 1064 (1998). *See also* Rosamund Oates, *Elizabethan Histories of English Christian Origins*, in *SACRED HISTORY: USES OF THE CHRISTIAN PAST IN THE RENAISSANCE WORLD* 165 (Katherine Van Liere, Simon Ditchfield & Howard Louthan, eds., 2012); LEVY, *supra* note 145, at 114–18.

Tudor period, lawyers like Sir John Fortescue had emphasized the age and continuity of the English common law, and praised its superiority to Roman law.<sup>239</sup> When Fortescue's *IN PRAISE OF THE LAWS OF ENGLAND* was first printed in about 1543, the *Epistle to the Reader* stated that "our laws excel not only the constitution of the Roman Caesars, but also those of every other nation, in prudence, justice and equity."<sup>240</sup> Such jurisprudential ideas are reflected in Shakespearean drama.<sup>241</sup>

Other Tudor literature also celebrated the special character of the English nation and its language. The English language developed powerfully during the Tudor period. "Shakespeare's century had opened with English as a poor language, an uncertain mixture of Middle English, court French and the barbarous Latin of the professions. . . . From 1500 until around 1530, . . . no one would have dreamed that English could carry any worthwhile freight at all."<sup>242</sup> Sir Thomas More had published his famous *UTOPIA* in Latin in 1516, and it was not published in English until 1551, after his death.<sup>243</sup> But as Richard Foster Jones showed in his classic study *THE TRIUMPH OF THE ENGLISH LANGUAGE* (1953), starting around the last quarter of the sixteenth century English speakers, writers, and readers began to hold their native language in greater esteem, considering it to have become a worthy rival of French and Italian or even of Latin and Greek.<sup>244</sup> Thus, the Tudor antiquarian Richard Carew

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<sup>239</sup> FORTESCUE, *supra* note 48, at c. XVII. Elizabethan and Stuart lawyers and judges like Sir Edward Coke and Sir John Davies urged claims for the superiority of English common law. See RICHARD HELGERSON, *FORMS OF NATIONHOOD: THE ELIZABETHAN WRITING OF ENGLAND* 81, 87 (1992). In the Preface Dedicatory to his *IRISH REPORTS*, *e.g.*, Davies affirmed that "our native *Common Law* is far more apt and agreeable than the *Civil* or *Canon* law, or then any other written Law in the world besides." SIR JOHN DAVIS, *LES REPORTS DES CASES & MATTERS EN LEY, RESOLVES & ADJUDGES EN LES COURTS DEL ROY EN IRELAND* [n.p.] (1674). See also REBECCA BRACKMANN, *THE ELIZABETHAN INVENTION OF ANGLO-SAXON ENGLAND: LAURENCE NOWELL, WILLIAM LAMBARDE AND THE STUDY OF OLD ENGLISH* 203–05 (2012); Virginia Lee Strain, "The Winter's Tale" and the Oracle of the Law, 78 *ELH* 557, 558–59 (2011).

<sup>240</sup> CROMARTIE, *supra* note 23, at 100–01.

<sup>241</sup> See Brian Lockey, *Roman Conquest and English Legal Identity in Cymbeline*, 3 *J. EARLY MOD. CULTURAL STUD.* 113, 115–16 (2003).

<sup>242</sup> Daniell, *supra* note 212, at 160.

<sup>243</sup> *Id.*

<sup>244</sup> RICHARD FOSTER JONES, *THE TRIUMPH OF THE ENGLISH LANGUAGE: A SURVEY OF OPINIONS CONCERNING THE VERNACULAR FROM THE INTRODUCTION OF PRINTING TO THE REFORMATION* 278–79 (1953). Even earlier, in 1362, English had displaced French as the language for pleadings in the King's courts—a significant

sought, in his *Epistle concerning the excellencies of the English tongue* (1595-6?) to “proue that our English Langwadge for all or the most is macheable, if not preferable, before any other in vogue at this daye . . . .”<sup>245</sup> William Tyndale defended his English translation of the Bible as against the Latin Vulgate on the grounds that “the properties of the Hebrew tongue agree a thousand times more with the English than with the Latin.”<sup>246</sup> Shakespeare’s characters too extol their native (or adopted) language. In Shakespeare’s and Fletcher’s *Henry VIII*, Katherine of Aragon, despite her Spanish origins, insists that Cardinal Wolsey speak to her, not in Latin, a “strange tongue,” but in English—a language she associates with “open dealing.”<sup>247</sup> And when Richard II exiles Thomas Mowbray abroad, Mowbray laments:

My native English, now I must forego:  
And now my tongue’s use is to me no more  
Than an unstringed viol or a harp,  
Or like a cunning instrument cased up,  
Or, being open, put into his hands  
That knows no touch to tune the harmony.<sup>248</sup>

National pride played some part, albeit not a dominant one, in this development; and the praise of the English language in turn nourished national pride. Among other writings, Samuel Daniel’s pamphlet *A DEFENCE OF RHYME* (1603), which argues that rhyme is suitable for English poetry despite being unknown in Greek and Latin, broadens out into the praise of English customs and institutions:

looke vpon the wonderfull Architecture of this state of *England*, and see whether they were deformed times, that could giue it such a forme. Where there is no one the least pillar of Maiestie, but was set with most profound iudgement and borne vp with the iust conueniencie of Prince and people. No Court of Iustice, but laide by the Rule and Square of Nature, and the best of the best commonwealths that euer were in the world. So strong and substantial, as it hath stood against al the storms of factions, both of belief & ambition, which so powerfully beat vpon it, and

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turning point that reflected the “strident” nationalism growing out of the prolonged conflicts with France. REX, *supra* note 229, at 84.

<sup>245</sup> Richard Carew, *The Excellency of the English Tongue (? 1595–6)*, in 2 ELIZABETHAN CRITICAL ESSAYS 286 (1904).

<sup>246</sup> Ginsberg, *supra* note 219, at 50.

<sup>247</sup> *King Henry VIII*, *supra* note 71, at act 3, sc. 1, ll. 40–46.

<sup>248</sup> *Richard II*, *supra* note 40, at act 1, sc. 3, ll. 163–67.

all the tempestuous alterations of humorous times what soeuer.  
Being continually in all ages furnisht with spirites fitte to  
maintaine the maiestie of her owne greatnes, and to match in  
an equall concurrencie all other kingdomes round about her  
with whome it had to incounter.<sup>249</sup>

Tudor poets and writers other than Shakespeare joined the chorus of praise for England and its people. Michael Drayton's lengthy POLYOLBION, a huge topographic description of England and Wales, celebrated "Albion's glorious Ile . . . My England . . . for which I undertook, This strange *Herculean* toyle."<sup>250</sup> In Book I, 57 of Edmund Spenser's THE FAERIE QUEEN, the Red Knight—identified with England's traditional patron St. George—views from a mountain top both the heavenly Jerusalem and its earthly image, England:

The new *Hierusalem*, that God has built  
For those to dwell in, that are chosen his.

Though using classical rather than Biblical imagery, George Peele's play THE ARRAIGNMENT OF PARIS (published in 1584 but first performed c. 1581) is similar in spirit. There the goddess Diana acclaims England as "Elyzium . . . A kingdom that may well compare with mine/An ancient seat of kings, a second Troy,/Y-compassed round with a commodious sea:/Her people are y-clepèd Angeli."<sup>251</sup>

Indeed, there is a substantial body of scholarship that finds that England was a nation even before the Norman Conquest in 1066.<sup>252</sup> "Historians of medieval England have no reservations about referring to medieval England as a nation and as a state, indeed as a nation-state."<sup>253</sup> The distinguished medievalist Maurice Powicke placed the birth of English nationalism in the

<sup>249</sup> Samuel Daniel, *A Defence of Ryme* (1603), RENASCENCE EDITIONS, <http://www.luminarium.org/renascence-editions/ryme.html> (last visited Feb. 28, 2019).

<sup>250</sup> MICHAEL DRAYTON, POLY-OLBION, First song, l.1, Thirtieth song, ll. 341–42 (1612), <http://poly-olbion.exeter.ac.uk/the-text/full-text/song-1/>.

<sup>251</sup> GEORGE PEELE, THE ARRAIGNMENT OF PARIS, act V, sc. 1, ll. 74, 76–9 (1584), <http://elizabethandrama.org/wp-content/uploads/2019/02/Arraignment-of-Paris-Annotated.pdf>.

<sup>252</sup> See AZAR GAT WITH ALEXANDER YAKOBSON, NATIONS: THE LONG HISTORY AND DEEP ROOTS OF POLITICAL ETHNICITY AND NATIONALISM 147–49, 217–20 (2013); ADRIAN HASTINGS, THE CONSTRUCTION OF NATIONHOOD: ETHNICITY, RELIGION AND NATIONALISM 35–43 (1997).

<sup>253</sup> Rees Davies, *Nations and National Identities in the Medieval World: An Apologia*, 34 RBHC 567, 572 (2004), [https://www.journalbelgianhistory.be/nl/system/files/article\\_pdf/BTNG-RBHC,%2034,%202004,%204,%20pp%20567-579.pdf](https://www.journalbelgianhistory.be/nl/system/files/article_pdf/BTNG-RBHC,%2034,%202004,%204,%20pp%20567-579.pdf).

1290s, in the reign of King Edward I,<sup>254</sup> and G.C. Coulton accepted that English nationhood was the most developed in Europe by that period, although France did not long lag behind.<sup>255</sup> The sense of an English national identity took hold in large part because of the influence of the Crown: “English nationhood was a creation of English kingship and of the remarkably extensive and ubiquitous power which its kings came to exercise throughout the country at a remarkably early date. This was the regnal solidarity . . . which was such a vital ingredient in the making of English nationhood.”<sup>256</sup>

It is therefore certainly not anachronistic to attribute to Shakespeare, and his audiences,<sup>257</sup> a sense of England/Britain as a national community. Machiavelli, who died about thirty years before Shakespeare’s birth, was a Florentine patriot who fervently desired the redemption of Italy and who labored for decades to that end. “[Machiavelli’s] life proves that love of country was one of his deepest and lasting passions.”<sup>258</sup> Why should Shakespeare not have felt similar emotion towards England? Some of his characters praise England in almost mystical terms, as when the Queen encourages her husband Cymbeline, King of Britain, when faced with the threat of a Roman invasion:

Remember, sir, my liege,  
The kings your ancestors, together with  
The natural bravery of your isle, which stands  
As Neptune’s park, ribbed and paled in  
With oaks unscalable and roaring waters,  
With sands that will not bear your enemies’ boats,  
But suck them up to th’topmast.<sup>259</sup>

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<sup>254</sup> MAURICE POWICKE, *THE THIRTEENTH CENTURY, 1216–1307*, 528 (2d ed. 1962).

<sup>255</sup> See G.C. Coulton, *Nationalism in the Middle Ages*, 5 *Cambridge Hist. J.* 15, 33 (1935).

<sup>256</sup> Davies, *supra* note 253, at 573. See also Susan Reynolds, *Medieval Origines Gentium and the Community of the Realm*, 68 *HIST.* 375, 384–86 (1983).

<sup>257</sup> Writing in 1592, Thomas Nashe, in the person of “Pierce Penilesse,” remarks on the “tears of ten thousands spectators at least” watching Shakespeare’s *Henry VI* as they imagined the “brave Talbot (the terror of the French) . . . fresh bleeding.” THOMAS NASHE, *PIERCE PENILESS, HIS SUPPLICATION TO THE DEVIL* 30 (1592), [http://www.oxford-shakespeare.com/Nashe/Pierce\\_Penilesse.pdf](http://www.oxford-shakespeare.com/Nashe/Pierce_Penilesse.pdf). See also Kiernan, *supra* note 22, at 105.

<sup>258</sup> MAURIZIO VIROLI, *REDEEMING THE PRINCE: THE MEANING OF MACHIAVELLI’S MASTERPIECE* 58 (2014). See also MAURIZIO VIROLI, *MACHIAVELLI’S GOD* 35–37 (Anthony Shugaar trans. 2010).

<sup>259</sup> *Cymbeline*, *supra* note 35, at act 3, sc. 1, ll. 16–22.



Shakespeare's rhetoric no doubt made a mighty contribution to the *creation* of English national identity. But it is no less true that a sense of such identity *preceded* Shakespeare, and that he drew upon it.

The vital tension in *KJ*, then, is the opposition between the pull of "commodity" and the demands of the national community, of "regal solidarity." And this interpretation explains the growing power and allure of the Bastard's personality as it develops through the play. For in his dedication to the Crown—not simply to the *person* of his uncle John, but to the *institution* of the monarchy—he is serving *England*, the national community, regardless of the cost to himself. "England" and "the Crown" are, in this play, essentially identical.

#### IV. THE WORLD OF COMMODITY

##### A. *The Siege of Angiers*

After Act I, the scene shifts from the court of England to the fields of France. John has arrived at breakneck speed to enforce his "just and lineal" claim and take possession of the city of Angiers.<sup>260</sup> The French King Philip, joined by the Duke of Austria, stand with their armies opposed to John. Philip has pledged to Prince Arthur and his mother Constance that he will espouse Arthur's cause, eject the usurper John, and place Arthur on the throne of the Angevin Empire. Philip claims divine sanction for this intervention: challenged by John to identify the source of his "great commission" to serve Arthur, Philip replies that he holds it from

[T]hat supernal judge that stirs good thoughts  
 In any breast of strong authority  
 To look into the blots and stains of right.  
 That judge hath made me guardian to this boy[.]<sup>261</sup>

John likewise claims divine sanction: he purports to be acting as "God's wrathful agent."<sup>262</sup>

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<sup>260</sup> *KJ*, *supra* note 1, at act 2, sc. 1, l. 85.

<sup>261</sup> *Id.* at act 2, sc. 1, ll. 112–16.

<sup>262</sup> *Id.* at act 2, sc. 1, l. 86.

Both Philip and the Duke of Austria have made *sworn* pledges to Arthur. Philip says that his right hand “[i]s most divinely vowed upon the right” of Arthur.<sup>263</sup> Presenting himself as Arthur’s vassal, Austria says:

Upon thy cheek I lay this zealous kiss  
As seal to this indenture of my love.<sup>264</sup>

Austria’s action recalls the traditional ceremony in which a vassal paid homage to his liege—a ceremony in which a kiss was given to confirm a promise of fidelity.<sup>265</sup> Normally, the lord bestowed the kiss, not the person rendering homage.<sup>266</sup> Given the power differential between the Duke and Arthur, is Shakespeare hinting at which of them is *truly* the master here? In any case, Shakespeare leaves us in no doubt of the outward strength of the French and Austrian commitment to Arthur.

Furthermore, Arthur’s allies insist on the justice of their cause. Austria unctuously observes that “[t]he peace of heaven is theirs that lift their swords/In such a just and charitable war.”<sup>267</sup> King Philip calls his arms “just-borne,”<sup>268</sup> and punctiliously follows the usual requirements for justice in waging war, including by forbearing combat until he receives word that Chatillon’s embassy to John has failed<sup>269</sup> and by announcing that his war aims are limited solely to vindicating Arthur’s titles.<sup>270</sup> Even the Bastard describes Philip as a King “whose armour conscience buckled on,/Whom zeal and charity brought into the field/As God’s own soldier.”<sup>271</sup>

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<sup>263</sup> *Id.* at act 2, sc. 1, l. 238.

<sup>264</sup> *Id.* at act 2, sc. 1, ll. 19–20.

<sup>265</sup> See J. Russell Major, “Bastard Feudalism” and the Kiss: *Changing Social Mores in Late Medieval and Early Modern France*, 17 *J. INTERDISC. HIST.* 509, 513 (1987). Even outside the context of paying homage, a kiss could solemnize a promise: “the Frankish king Gunthramm sealed a pact with his nephew by kissing him.” *Id.* at 511. Kissing remained part of the ritual of paying homage in England during the later Middle Ages and even in the Tudor period: Sir Edward Coke considered the kiss to be an element of giving homage. See SIR EDWARD COKE, COMMENTARY ON LITTLETON, Pt. 1, Bk. 2, sec. 85 (1853), <https://ia800203.us.archive.org/12/items/cu31924021661693/cu31924021661693.pdf>.

<sup>266</sup> See NICOLAS J. PERELLA, THE KISS SACRED AND PROFANE 129 (1968).

<sup>267</sup> *KJ*, *supra* note 1, at act 2, sc. 1, ll. 35–6.

<sup>268</sup> *Id.* at act 2, sc. 1, l. 344.

<sup>269</sup> *Id.* at act 2, sc. 1, ll. 44–50. See Delahunty, *supra* note 195, at 150 (discussing the Elizabethan use of “last resort” criterion for just war).

<sup>270</sup> *KJ*, *supra* note 1, at act 2, sc. 1, ll. 241–46.

<sup>271</sup> *Id.* at act 2, sc. 1, ll. 564–66.

Claims of dynastic succession were certain to be frequent; they were often complicated and obscure as well.<sup>272</sup> And at least in medieval Europe, perhaps not much was at stake in them, other than the interests of the dynastic family itself. Nonetheless, Shakespeare's characters seem untroubled in maintaining that disputed claims to succession may serve as just causes for war. Shakespeare's Henry V seeks out expert counsel from the Archbishop of Canterbury on the succession to the French throne before deciding that he has just cause to wage war against France.<sup>273</sup> Henry proclaims himself to be God's instrument in waging that war,<sup>274</sup> and after his victory, Henry publicly ascribes the successful outcome not to himself, but to God.<sup>275</sup> Before the battle on Bosworth Field, depicted in Shakespeare's *Richard III*, the Duke of Richmond, soon to become Henry VII, tells his men to "remember this:/God, and our good cause, fight upon our side."<sup>276</sup> And in *Titus Andronicus*, Saturninus, who claims the right of succession to the Roman imperial crown over his younger brother Bassianus, mobilizes the patricians to "[d]efend the justness of my cause with arms."<sup>277</sup> In assuming that wars fought over dynastic succession can have just cause, these characters seem to follow Elizabethan opinion.<sup>278</sup>

With John's arrival, the two armies are arrayed outside the city of Angiers. John claims that the city is his, and Philip claims it on behalf of Arthur. The citizens of Angiers refuse to decide who has the better claim to their loyalty. Self-protectively, they avoid declaring for either side. Instead, they say that they will accept the claim of the victor—whoever it may be—and shut their gates to both Kings. From the safety of their towers, they

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<sup>272</sup> "Dynastic succession only functioned smoothly if a ruler lived long enough to produce a competent male heir old enough to assume the reins of power. In an era of high infant mortality and minimally effective medical care, disputed successions occurred with great frequency." DANIEL H. NEXON, *THE STRUGGLE FOR POWER IN EARLY MODERN EUROPE: RELIGIOUS CONFLICT, DYNASTIC EMPIRES, AND INTERNATIONAL CHANGE* 8 (2009).

<sup>273</sup> See Delahunty, *supra* note 195, at 137–49.

<sup>274</sup> WILLIAM SHAKESPEARE, *HENRY THE FIFTH*, act 4, sc. 1, ll. 162 (Gary Taylor ed., 1982) [hereinafter *Henry V*].

<sup>275</sup> *Id.* at act 5, chor. ll. 20–22.

<sup>276</sup> *Richard III*, *supra* note 66, at act 5, sc. 3, ll. 253–54.

<sup>277</sup> *Titus Andronicus*, *supra* note 175, at act 1, sc. 1, l. 2.

<sup>278</sup> See PAOLA PUGLIATTI, *SHAKESPEARE AND THE JUST WAR TRADITION* 121 (2010); MATTHEW SUTCLIFFE, *THE PRACTICE, PROCEEDINGS, AND LAWS OF ARMES* c. I, (1593), <https://quod.lib.umich.edu/e/eebo2/A13D173.0001.001?view=toc>.

Behold  
 From first to last the onset and retire  
 Of both your armies, whose equality  
 By our best eyes cannot be censured.  
 Blood hath bought blood, and blows have answered blows,  
 Strength matched with strength, and power confronted power;  
 Both are alike, and both alike are we.  
 One must prove greatest. While they weigh so even,  
 We hold our town for neither, yet for both.<sup>279</sup>

The citizens' position echoes John's: title belongs to whichever side comes to hold possession, and so power, not right, decides.

Further, the citizens try to cloak their neutrality—or rather, disloyalty to their rightful sovereign—in language that Shakespeare's audience might have understood as religious: a “greater power than we,” the citizens say, precludes them from taking sides.<sup>280</sup> For the citizens, neither side can claim to be waging a “just” war, because the question of justice is humanly undecidable. And even victory in the conflict will not betoken the judgment of God.<sup>281</sup>

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<sup>279</sup> *KJ*, *supra* note 1, at act 2, sc. 1, ll. 325–33.

<sup>280</sup> *Id.* at act 2, sc. 1, l. 368. It is arguable, however, that the citizens are referring here to their own fear, not to God.

<sup>281</sup> Belief in the ubiquity of Providence was widespread in Shakespeare's period. See generally ALEXANDRA WALSHAM, *PROVIDENCE IN EARLY MODERN ENGLAND* (1999). This belief extended to wars and battles. See G. GEOFFREY LANGSAM, *MARTIAL BOOKS AND TUDOR VERSE* 42–44 (1951). It was a common Elizabethan view (perhaps even the “orthodox” one) that “God was the sole dispenser of victory.” Paul A. Jorgensen, *A Formative Shakespearean Legacy: Elizabethan Views of God, Fortune, and War*, 90 *PMLA* 222, 225 (1975). As Richard Hooker succinctly put it, “[I]t is God who giveth victory in the day of war.” HOOKER, *supra* note 79, at Book VIII, ch. 2, 5. Or, as Christopher Marlowe's Queen Isabella put it, “Successful battles gives the God of kings/To them that fight in right and fear his wrath.” CHRISTOPHER MARLOWE, *EDWARD THE SECOND* sc. 19, ll. 19–20 (Charles R. Forker ed., 1995). In Shakespeare's *King Lear*, in Edgar's victory in combat over Edmund, and the deaths of Goneril and Regan, Albany sees “the judgment of the heavens, that makes us tremble.” *King Lear*, *supra* note 173, at act 5, sc. 1, l. 269. And, the plain French citizen pronounces that the English King Edward III will defeat the French King John II because “'tis a rightful quarrel must prevail.” *Edward III*, *supra* note 43, at act 3, sc. 2, l. 35.

“War” providentialism had its roots in the Bible. See, e.g., *Exodus* 15:1–10 (Geneva Bible); *Deuteronomy* 20:3–4 (Geneva Bible). We find it expressed frequently by Shakespearean characters. See, e.g., *Henry VI, Pt. III*, *supra* note 175, at act 2, sc. 5, l. 13. Queen Elizabeth I herself subscribed to it, as evidenced by her 1588 prayer of Thanksgiving for the defeat of the Spanish Armada. See THOMAS SOROCOLD, *SUPPLICATIONS OF SAINTS: A BOOKE OF PRAYERS* 267 (1612), <http://downloads.it.ox.ac.uk/ota-public/tcp/Texts-HTML/free/A12/A12610.html>. Elizabeth's reflections on the cause of her victory reflected a widely-held English view, not least among her clergy.

The two armies seem on the point of battle with each other when the Bastard puts forward an unexpected, perhaps prankish, suggestion. The Bastard has already shown himself to favor a violent solution. Although fully aware of the horrors that a clash of arms would bring, he has seen in violence the “glory” of “majesty,” when “the rich blood of kings is set on fire.”<sup>282</sup>

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See Paul A. Jorgensen, *Elizabethan Religious Literature for Time of War*, 37 HUNTINGTON LIBR. Q. 1, 3, 15 (1973). For example, one preacher in November 1588 compared her to the Biblical King David, whom God had also favored over a stronger opponent. See JOHN PRIME, *THE CONSOLATIONS OF DAVID, BREEFLY APPLIED TO QUEENE ELIZABETH* (1588), <https://quod.lib.umich.edu/e/eebo2/A10110.0001.001?view=toc>. Elizabethan newspapers also commonly ascribed (English and Protestant) victories in battle to the special providence of God. See David Randall, *Providence, Fortune, and the Experience of Combat: English Printed Battlefield Reports, circa 1570–1637*, 35 SIXTEENTH CENTURY J. 1053, 1058 (2004).

“War” providentialism crossed denominational boundaries: the Reformer John Calvin, the Protestant author John Foxe, the English Catholic, Cardinal William Allen and (later) Oliver Cromwell all accepted it. See *id.* at 1060 & n.42, 1064 & n.66; Blair Worden, *Providence and Politics in Cromwellian England*, 109 PAST & PRESENT 55, 55–56, 67–68, 81–82 (1985). Thus, Allen wrote (before the defeat of the Armada) that:

These fiftie yeares there was neuer Catholike army which stooede to it, but had the victorie: by mistrustinge God, by ouermuche trusting man, by flying or auoidinge the battell, by yeildinge or cōpoundinge, sundry great & Godly atēpts haue bene frustrated: but in manly and cōfident combating for God and the Church, none at all.

WILLIAM ALLEN, *AN ADMONITION TO THE NOBILITY AND PEOPLE OF ENGLAND AND IRELAND CONCERNINGE THE PRESENT VVARRES MADE FOR THE EXECUTION OF HIS HOLINES SENTENCE, BY THE HIGHE AND MIGHTIE KINGE CATHOLIKE OF SPAINE, LVIII* (1588), <https://quod.lib.umich.edu/e/eebo/A16774.0001.001?rgn=main;view=fulltext>.

Hardly a trace of this providentialism, however, can be found in the siege of Angiers. The citizens’ reference to a “greater power” seems to express agnosticism rather than providentialism. And the Bastard squarely says that “Fortune shall cull forth . . . her happy minion” as victor. *KJ*, *supra* note 1, at act 2, sc. 1, ll. 391–92. The universe Shakespeare is depicting here is close to being a godless one.

<sup>282</sup> *KJ*, *supra* note 1, at act 2, sc. 1, ll. 352–60. During the sixteenth century, views about warfare began to undergo change. Skepticism about both the possibility of justice in war and about its glory spread and deepened. The ideal of knighthood dimmed. “The growing anonymity of the individual warrior, the indiscriminate death dealt by shot and ball: these factors, it was claimed, had ruined war as a finishing school for the knightly character.” John Hale, *War and Opinion: War and Public Opinion in the Fifteenth and Sixteenth Centuries*, 22 PAST & PRESENT 18, 23 (1962). Among Shakespeare’s contemporaries, this attitude is reflected in Lord Bacon: “The wars of latter ages seem to be made in the dark, in respect of the glory, and honour, which reflected upon men from the wars, in ancient time.” FRANCIS BACON, *OF THE TRUE GREATNESS OF KINGDOMS AND ESTATES*, <https://www.westegg.com/bacon/true-greatness.html>.

But at the same time, this tendency “was met by a vigorous reaction, a deliberate re-inflation of the military virtues and splendours, which amounted to a positive cult of war.” Hale, *supra*, at 23. Thus, in the Preface to his *Of the Knowledge*

Annoyed by a “contemptuous city”<sup>283</sup> that is unwilling to enter the fray, he proposes to the two Kings that instead of fighting each other, they “[b]e friends awhile, and both conjointly bend/Your sharpest deeds of malice on this town . . . . I’d play incessantly upon these jades,/Even till unfencèd desolation/Leaves them as naked as the vulgar air.”<sup>284</sup> Once the fate of Angiers has been determined, the Bastard says, the English and French forces can turn on each other:

Then in a moment Fortune shall cull forth  
Out of one side her happy minion,  
To whom in favour she shall give the day,  
And kiss him with a glorious victory.<sup>285</sup>

Although the Bastard disparages his own idea as “wild counsel” for he clearly understands that he is not a member of the foreign policy establishment, the Kings agree to it. But the citizens of Angiers checkmate the Bastard’s idea with one of their own. They dangle a compromise before the Kings: let King John marry his niece Blanche of Castile to King Philip’s eldest son, Lewis the Dauphin. Queen Eleanor seizes on the proposal and urges it on John: it will secure the title to his Crown.

Son, list to this conjunction, make this match,  
Give with our niece a dowry large enough,  
For by this knot thou shalt so surely tie  
Thy now unsure assurance to the crown.<sup>286</sup>

John bites, and Philip follows. They arrange a marriage between Blanche and Lewis, to which Blanche will bring a dowry almost equal to the Angevin Empire in France,<sup>287</sup> along with thirty

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*and Conduct of Warres*, Thomas Proctor praised war as an art fit for Kings: it was “that arte, wheareby, kinges rule, & are ruled and conquered, which erecteth, buyldeth establisheth, encreaseth, beautifieth estates, the ende and fruites whereof, is honour most highe, euen aduanced to the skyes, flowinge wealthe, fame neuer faylinge or forgotten, victorie and dominion withe out boundes.” THOMAS PROCTOR, *OF THE KNOWLEDGE AND CONDUCT OF WARRES* (1578) <https://quod.lib.umich.edu/e/eebo/A10148.0001.001/1:4?rgn=div1;view=fulltext>. The Bastard clearly aligns himself with the latter tendency. By giving him a speech that exalts war, Shakespeare seems consciously to be archaizing him.

<sup>283</sup> *KJ*, *supra* note 1, at act 2, sc. 1, l. 384.

<sup>284</sup> *Id.* at act 2, sc. 1, ll. 379–80, 385–87.

<sup>285</sup> *Id.* at act 2, sc. 1, ll. 391–94.

<sup>286</sup> *Id.* at act 2, sc. 1, ll. 468–71.

<sup>287</sup> For the extent of the Angevin Empire, see the map in HUGH KEARNEY, *THE BRITISH ISLES* 128 (2d ed. 2006).

thousand marks.<sup>288</sup> Almost as an afterthought, Arthur will be compensated with the lordship of Angiers.

This compromise outcome is a victory for peace and diplomacy, and a setback for violence.<sup>289</sup> The *buergerlich* values of the citizens of Angiers have prevailed over the Bastard's "feudal" values of glory and violence. But it is also a victory for "commodity." To be sure, Angiers' proposal looks like a win/win situation: neither King need risk losing his kingdom; ordinary soldiers and civilians will be spared the sufferings of conflict; and the "rich fair town" of Angiers<sup>290</sup> will escape unscathed. Likewise, the Bastard's proposal looks like a lose/lose situation: Angiers will be leveled, both armies will suffer badly, and the final outcome will be uncertain. It seems at first as if what will come to be called a "capitalist" ethos delivers a morally superior result to a "pre-capitalist" one.<sup>291</sup>

But of course, Shakespeare does not let things rest there. There *is* a loser: Arthur, the rightful King of England. And his loss is accomplished by a King's betrayal of his oath. In a stroke, King Philip has proven false to Arthur and to God.

The Kings' bargain has two keen critics: Constance in public and the Bastard in private. Constance strikes back hard against Philip's violation of his oath; the Bastard dwells on his betrayal of a just and honorable cause for war.

### B. Constance's Complaint

Informed by Lord Salisbury of the Kings' bargain, Constance is at first unable to bring herself to believe that Philip has betrayed her. "I do not believe thee, man;/I have a king's oath to the contrary."<sup>292</sup> Although the mild and gentle Arthur is reconciled to his loss and seeks to calm his mother,<sup>293</sup> Constance cannot be comforted. Again and again, she rails at King Philip's and the Duke of Austria's perjuries. To Salisbury, she says:

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<sup>288</sup> *KJ*, *supra* note 1, at act 2, sc. 1, ll. 526–29.

<sup>289</sup> *Cf. Hamlet*, *supra* note 133, at act 4, sc. 4, l. 52 (comparing war between Norway and Poland to a quarrel over "an egg-shell").

<sup>290</sup> *KJ*, *supra* note 1, at act 2, sc. 1, l. 552.

<sup>291</sup> Scholars note the emergence in late medieval and early modern England of more critical views of war and knighthood than had existed previously, resulting in part from the experience of the Hundred Years War, but also because of war's effects on the public well-being. See Ben Lowe, *War and the Commonwealth in Mid-Tudor England*, 21 *SIXTEENTH CENTURY J.* 171, 171 (1990).

<sup>292</sup> *KJ*, *supra* note 1, at act 3, sc. 1, ll. 9–10.

<sup>293</sup> *Id.* at act 3, sc. 1, l. 42.

France is a bawd to Fortune and King John—  
 That strumpet Fortune, that usurping John  
 Tell me, thou fellow, is not France forsworn?<sup>294</sup>

Towards King Philip, she is unrelenting:

You have beguiled me with a counterfeit  
 Resembling majesty, which being touched and tried,  
 Proves valueless. You are forsworn, forsworn.  
 You came in arms to spill enemies' blood,  
 But now in arms you strengthen it with yours.  
 The grappling vigour and rough frown of war  
 Is cold in amity and painted peace,  
 And our oppression hath made up this league.  
 Arm, arm, you heavens, against these perjured kings!  
 A widow cries; be husband to me, God!  
 Let not the hours of this ungodly day  
 Wear out the day in peace, but ere sunset,  
 Set armèd discord 'twixt these perjured kings.<sup>295</sup>

And she rounds on the Duke of Austria in similarly caustic terms:

Thou art perjured too,  
 And sooth'st up greatness. What a fool art thou,  
 A ramping fool, to brag and stamp and swear  
 Upon my party. Thou cold-blooded slave,  
 Hast thou not spoke like thunder on my side?  
 Been sworn my soldier, bidding me depend  
 Upon thy stars, thy fortune, and thy strength?  
 And dost thou now fall over to my foes?<sup>296</sup>

How would Elizabethan audiences have heard Constance's complaints? Would they have regarded royal perjury as gravely as she did? Very likely, yes, at least if they followed the opinions about oaths of legal and theological writers on that subject.

### C. *The Significance of Oaths*

Oaths had come to matter greatly in the England of Shakespeare's period. Demanding oaths was an important tool of governmental policy. Under Henry VIII, government-mandated oaths became

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<sup>294</sup> *Id.* at act 3, sc. 1, ll. 60–63.

<sup>295</sup> *Id.* at act 3, sc. 1, ll. 99–111.

<sup>296</sup> *Id.* at act 3, sc. 1, ll. 120–28.



an important medium through which the Henrician regime negotiated key aspects of its religious policy with the English populace . . . . [O]aths were a central way (if not the central way) in which Henry both coerced his subjects into obedience and secured their consent to many of his policies.<sup>297</sup>

Oaths of allegiance under Henry VIII and his successors were used as devices for screening out religious or political dissenters, including Catholics and Puritans, whose views were considered suspect or whose loyalty was questioned.<sup>298</sup>

Thus, King James I noted in a speech of 1603 to Parliament that some Catholic clergy in his realm maintained the doctrine of Papal supremacy, under which the Pope claimed “Imperiall civil power over all Kings and Emperors, dethroning and decrowning Princes with his foot as pleaseth him”: These clergymen, James contended, thought it “no sinne, but rather a matter of saluation,” for subjects “to doe all actions of rebellion and hostilitie” against their King “if he once be cursed, his subjects discharged of their fidelitie, and his Kingdome given a prey” by the Pope.<sup>299</sup> To counter the risk of such subversion, Parliaments in the Tudor and Stuart periods had enacted a variety of legislative measures, some of which required subjects to swear oaths of allegiance of different kinds. One such statute from James I’s reign, enacted after the discovery of the “Gunpowder Plot,” required the swearer to say, “I do from my heart abhor, detest and abjure as impious and heretical this damnable doctrine and position that princes which be excommunicated and deprived by the Pope may be deposed or murdered by their

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<sup>297</sup> JONATHAN MICHAEL GRAY, OATHS AND THE ENGLISH REFORMATION 4, 7 (2013). Even before Henry VIII’s breach with Rome, what were called oaths *ex officio* were used as an inquisitorial tool in certain cases in the struggle against heresy. The use of such oaths against suspected Lollards was permitted by a statute enacted under Henry IV in 1410. See BRIAN CUMMINGS, MORTAL THOUGHTS: RELIGION, SECULARITY & IDENTITY IN SHAKESPEARE AND EARLY MODERN CULTURE 141–44 (2018). But the imposition of *ex officio* oaths—which, by forcing the oath-taker to reveal private thoughts, often led either to perjury or to self-incrimination—was bitterly resented by nonconforming religious minorities, some of whom argued that ecclesiastical courts had no legal authority to require them. One scholar discerns allusions to the Tudor dispute over the legality of *ex officio* oaths in the trial scene of Act I of *KJ*. See DONNA B. HAMILTON, SHAKESPEARE AND THE POLITICS OF PROTESTANT ENGLAND 34–42 (1992).

<sup>298</sup> PETER MARSHALL, HERETICS AND BELIEVERS: A HISTORY OF THE ENGLISH REFORMATION 209–13 (2018).

<sup>299</sup> KING JAMES VI AND I, *supra* note 51, at 140.

subjects or any other whatsoever.”<sup>300</sup> Some English Catholics, including Robert Parsons, argued that they could not swear that oath without violating their consciences.<sup>301</sup> Indeed, the statute arguably required Catholics “to swear that the Pope was a heretic.”<sup>302</sup>

Oath-taking thus became a flashpoint in the theological and political controversies of the period. Unsurprisingly, therefore, English divines and jurists in the early modern period devoted considerable attention to oaths. They considered questions such as whether the Gospels permitted oaths; the meaning and kinds of oaths; the circumstances in which oaths should or should not be given or demanded; the purposes of the institution of swearing oaths; the proper objects by or on which to swear an oath; the consequences of a breach; and the grounds on which non-performance of a promissory oath might be excused.<sup>303</sup>

What is an oath? Above all, according to the Anglican theologian and bishop Robert Sanderson, an oath “is a religious act.”<sup>304</sup> The religious character of an oath had been emphasized as far back as Cicero.<sup>305</sup> The “great spiritual power of oaths in the sixteenth century” cannot be underestimated: oaths “did more than simply make people ‘aware of their new duty’; they made God the enforcer of their new duty.”<sup>306</sup>

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<sup>300</sup> THE STUART CONSTITUTION 1603–1688: DOCUMENTS AND COMMENTARY 448–59 (1966).

<sup>301</sup> See Robert Parsons, *The Judgment of a Catholicke English-Man, Living in Banishment for his Religion*, EARLY ENG. BOOKS ONLINE TEXT CREATION PARTNERSHIP 9 (1608), <https://quod.lib.umich.edu/e/eebo/A09102.0001.001?rgn=main;view=fulltext>.

<sup>302</sup> See LEO F. SOLT, CHURCH AND STATE IN EARLY MODERN ENGLAND, 1509–1640, 150 (1990). For later discussion, see M.C. Questier, *Loyalty, Religion and State Power, in Early Modern England: English Romanism and the Jacobean Oath of Allegiance*, 40 HIST. J. 311, 319 (1997).

<sup>303</sup> Studies of special value include GRAY, *supra* note 297; John Kerrigan, *Shakespeare, Oaths and Vows*, 167 PROC. BRIT. ACAD. 61 (2010); John Spurr, *A Profane History of Early Modern Oaths*, 11 TRANSACTIONS ROYAL HIST. SOC’Y 37 (2001). For a comprehensive study, see Helen Silving, *The Oath: I*, 68 YALE L.J. 1329 (1959); Helen Silving, *The Oath: II*, 68 YALE L.J. 1527 (1959).

<sup>304</sup> ROBERT SANDERSON, DE JURAMENTO, SEVEN LECTURES CONCERNING THE OBLIGATION OF PROMISSORY OATHS 6 (London, E.C. 1647) <https://quod.lib.umich.edu/e/eebo/A61779.0001.001/1:3?rgn=div1;view=fulltext>. Sanderson’s book “is a *summa* of mainstream casuistry on oaths.” Kerrigan, *supra* note 303, at 63.

<sup>305</sup> See 2 HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE ch. XIII sect. XIV (Indianapolis Liberty Fund, 2005), <http://oll.libertyfund.org/titles/grotius-the-rights-of-war-and-peace-2005-ed-vol-2-book-ii>.

<sup>306</sup> GRAY, *supra* note 297, at 9.

In a typical formulation, James Morice's *A briefe treatise of Oathes, exacted by Ordinaries and Ecclesiasticall Judges* (1600), defined an "oath" as

a calling or takinge to recorde or witnesse of the sacred Name of God, or God him selfe by the use of his holie Name, for the confirmation of the trueth of such thinges which we speake, or for the true performance of our promise. Or more brieflie: An oath is a confirmation of the will of man by the testimonie of God.<sup>307</sup>

The former kind of oath was called "assertory," the latter "promissory."<sup>308</sup> Morice also distinguished between "priuate" and "publique" oaths: The latter category included oaths of the kind most salient in *KJ*, such "[a]s where Kings and Princes sweare for the establishment of their leagues and conclusions of peace."<sup>309</sup>

*A Sermon Against Swearing and Perjury* of 1547, which was read in Elizabethan churches—and with which Shakespeare was likely familiar—insisted, against radical Protestants, that oath-taking was permitted by the Scriptures and had beneficial effects for the commonwealth.<sup>310</sup> At the same time, the homily warned of

what great danger it is to use the name of God in vain . . . . Of such men that regard not their godly promises bound by an oath, but wittingly and willfully break them, we do read in holy Scripture [of] . . . notable punishments . . . . God shew[s] plainly how much he abhorreth breakers of honest promises bound by an oath made in his name.<sup>311</sup>

In 1627, the Protestant divine Christopher White made the point more pithily: "Thy life, thy soule stands at stake," he warned the perjurer.<sup>312</sup>

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<sup>307</sup> JAMES MORICE, *A BRIEFE TREATISE OF OATHES EXACTED BY ORDINARIES AND ECCLESIASTICALL JUDGES, TO ANSWERE GENERALLIE TO ALL SUCH ARTICLES OR INTERROGATORIES, AS PLEASETH THEM TO PROPOUND. AND OF THEIR FORCED AND CONSTRAINED OATHES EX OFFICIO, WHEREIN IS PROUED THAT THE SAME ARE VNLAWFULL* 1 (1598), <https://babel.hathitrust.org/cgi/pt?id=mdp.35112204854204;view=lup;seq=9>.

<sup>308</sup> SANDERSON, *supra* note 304, at 17; Spurr, *supra* note 303, at 38.

<sup>309</sup> MORICE, *supra* note 307, at 2.

<sup>310</sup> Kerrigan, *supra* note 303, at 62.

<sup>311</sup> *A Sermon Against Swearing and Perjury*, in *The Book of Common Prayers* 1574, 73–74 (John W. Parker ed., 1850).

<sup>312</sup> CHRISTOPHER WHITE, *OF OATHES: THEIR OBJECT, FORME, AND BOND: THE PUNISHMENT OF PERJURIE, AND THE IMPIETIE OF PAPALL DISPENSATIONS* 19 (1627).

The King's Chaplain William Wake dwelt at length on the "particular Heinousness and Malignity" of perjury in *A Practical Discourse Concerning Swearing*:

He who Forswears himself, does thereby not only in a most desperate manner *Affront the Majesty of God*, and *Wound his own Soul*; but does, moreover, Render himself *criminal* towards his *Neighbour* also; and, as much as in him lies, Declare himself a *Common Enemy to Mankind*.<sup>313</sup>

Wake emphasized the naturalistic consequences of oath-breaking alongside the spiritual ones. A violation "is, above any other *Sin*, the most *injurious to Mankind*; as being, in its own nature, directly opposite to the *Peace and Security of the World*."<sup>314</sup> For "What *Practice* is there upon which the *Peace*, and *Welfare*, and *Security of Mankind*, does more depend, than upon the *Serious*, and *Sacred Use of an Oath*? It is this Unites Men into Society with Each Other; Secures to the Magistrate, the Obedience, and Help of the People; and to the People the Careful, and Regular Government of the Magistrate."<sup>315</sup>

Other writers shared Wake's opinion of the drastic social consequences of oath-breaking. Citing Aristotle, the Anglican ecclesiastical lawyer Richard Cosin wrote in 1593 that "hee that standeth not to his othe, or performs not what hee sweareth, turneth all the world vpside downe."<sup>316</sup>

The sense of obligation to fulfill one's oath could also derive from concern for one's honor or reputation, as well as from the fear of God or the desire to avoid socially destructive consequences.<sup>317</sup> It was a Renaissance commonplace that a gentleman's honor—and a King's honor above all—underpinned his word.<sup>318</sup> Shakespeare's Brutus in *Julius Caesar* carries the point even further by insisting that he and his fellows in the

<sup>313</sup> WILLIAM WAKE, *A PRACTICAL DISCOURSE CONCERNING SWEARING* 27 (1697), <https://quod.lib.umich.edu/e/eebo/A66244.0001.001/1:5.2?rgn=div2;view=fulltext>.

<sup>314</sup> *Id.* at 33.

<sup>315</sup> *Id.* at 44.

<sup>316</sup> RICHARD COSIN, *AN APOLOGIE FOR SUNDRIE PROCEEDINGS BY JURISDICTION ECCLESIASTICAL, OF LATE TIMES BY SOME CHALLENGED, AND ALSO DIUERSLY BY THEM IMPUGNED* pt. III, at 7 (Christopher Barker ed., 1593) <https://quod.lib.umich.edu/e/eebo/A19394.0001.001/1:13.1?rgn=div2;view=fulltext>.

<sup>317</sup> Spurr, *supra* note 303, at 51.

<sup>318</sup> See LODOWICK BRYSKETT, *A DISCOURSE OF CIVILL LIFE* 62–63 (R. Field ed., 1606) ("[T]here is nothing more fitting for a King then truth and veritie."); see generally CURTIS BROWN WATSON, *SHAKESPEARE AND THE RENAISSANCE CONCEPT OF HONOR* 97–98 (1960).

conspiracy to assassinate Caesar *not* take an oath because their simple promises as honorable Roman gentlemen are sufficient.<sup>319</sup> Shakespeare's Pericles likewise tells Helicanus, "I'll take thy word for faith, not ask thine oath:/Who shuns not to break one will sure crack both."<sup>320</sup>

Writers also discussed the questions, *on* and *by* what were oaths to be sworn?<sup>321</sup> In *KJ*, the Dauphin says that he and the English earls who are his allies have taken "the sacrament" to show that they will "keep our faiths firm and inviolable," as neither side does.<sup>322</sup> Christopher White noted that "other outward solemnities" might be added to oaths,<sup>323</sup> and swearing an oath on or with the consecrated host was an especially solemn gesture of this kind.<sup>324</sup> In Marlowe's *Massacre at Paris*, the Catholic Duke de Guise has his co-conspirators swear to join in the mass murder of Protestants "by the argent crosses in your burgonets."<sup>325</sup> Similarly, Hamlet demands that Horatio and his companions take an oath by laying their hands upon his cross-shaped sword.<sup>326</sup> In general, however, Protestant writers scorned the use of crucifixes, relics and the like to solemnize an oath,<sup>327</sup> though swearing with a hand on the Bible was not unusual.<sup>328</sup> And *by* what were oaths to be sworn? Like most Protestant divines, Thomas Hobbes answered that "there is no swearing by

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<sup>319</sup> WILLIAM SHAKESPEARE, *JULIUS CAESAR*, act 2, sc. 1, ll. 732-58 (New Cambridge Shakespeare 3d ed., Marvin Spevack ed., 2017) [hereinafter *Julius Caesar*].

<sup>320</sup> WILLIAM SHAKESPEARE & GEORGE WILKINS, *PERICLES, PRINCE OF TYRE*, act 1, sc. 2, ll. 128-29 (New Cambridge Shakespeare, Doreen DelVecchio & Antony Hammond eds., 1998). For a different reason, Juliet, who distrusts "lovers' perjuries," tells Romeo, "Do not swear at all." WILLIAM SHAKESPEARE, *ROMEO AND JULIET*, act 2, sc. 2, ll. 97, 118 (New Cambridge Shakespeare 2d ed., G. Blakemore Evans ed., 2003).

<sup>321</sup> Cosin analyzes these questions in detail. COSIN, *supra* note 316, at 29-37.

<sup>322</sup> *KJ*, *supra* note 1, at act 5, sc. 2, ll. 6-7.

<sup>323</sup> WHITE, *supra* note 312, at 14 (citing Genesis 24:2 and Daniel 12:7).

<sup>324</sup> Spurr, *supra* note 303, at 45.

<sup>325</sup> CHRISTOPHER MARLOWE, *THE MASSACRE AT PARIS*, sc. v, <http://www.online-literature.com/marlowe/massacre-at-paris/2/>.

<sup>326</sup> *Hamlet*, *supra* note 133, at act 1, sc. 5, ll. 144-60.

<sup>327</sup> Carol Z. Wiener, *The Beleaguered Isle: A Study of Elizabethan and Early Jacobean Anti-Catholicism*, 51 *PAST & PRESENT* 27, 44 (1971) ("The endless 'equipment' of Catholicism, the crosses, the images, the rosaries, were thought . . . to lure men away from the truth.").

<sup>328</sup> Spurr, *supra* note 303, at 46. In John Webster's *The Duchess of Malfi*, the evil Cardinal of Aragon has his mistress Julia swear by *kissing* a (poisoned) Bible. JOHN WEBSTER, *THE DUCHESS OF MALFI*, act 5, sc. 2, ll. 271-76 (John Russell Brown ed., 1964).

anything which the swearer thinks not God.”<sup>329</sup> Shakespeare explores this question in *Titus Andronicus*, where the unbelieving Aaron demands an oath from Lucius, and Lucius asks him, “who shall I swear by? Thou believest no god:/That granted, how canst thou believe an oath?”<sup>330</sup>

It was common ground that, as Sanderson put it, an “oath is in its own nature binding: insomuch, as if a man should swear without any intention to oblige himself, nay although he should swear with an intention not to oblige himself; neverthelesse, the oath taken, he becomes *ipso facto* obliged.”<sup>331</sup> But although both Protestants and Catholics staunchly affirmed the obligatoriness of oaths, there were characteristic confessional differences that set them apart.<sup>332</sup> In particular, Protestant writers vehemently denied the doctrine that the Pope had the authority to “dispense” with an oath: in *De Juramento*, Robert Sanderson sought at some length to refute that doctrine, specifically denying that the Pope could use dispensations to “absolve subjects of their Allegiance to Kings” or “null Leagues and Contracts made by Princes.”<sup>333</sup> Sanderson concluded in ringing tones that “neither Pope, nor Prince, nor Synod, nor Senate, nor Ecclesiasticall nor Secular Superiour, hath any right to dispense with Leagues, Contracts, Oathes, or to absolve any man from that Bond wherein before the Dispensation granted he was engaged.”<sup>334</sup> And the Jacobean Bishop of Winchester Lancelot Andrewes argued that the alleged papal power to dispense from oaths could destabilize international relations: “On this ground what shall be sure upon earth? What shall become of all . . . treaties . . . ?”<sup>335</sup>

Some Protestant thinkers also took a strong stand against the idea that changes in circumstances could justify or excuse the violation of an oath—the doctrine of *rebus sic stantibus*.

<sup>329</sup> THOMAS HOBBS, *LEVIATHAN* 73 (Everyman ed. 1914).

<sup>330</sup> *Titus Andronicus*, *supra* note 175, at act 5, sc. 1, ll. 72–73.

<sup>331</sup> SANDERSON, *supra* note 304, at 28.

<sup>332</sup> See Meg Lota Brown, *The Politics of Conscience in Reformation England*, 15 *RENAISSANCE AND REFORMATION* 101, 105 (1991); Janet E. Halley, *Equivocation and Legal Conflict Over Religious Identity In Early Modern England*, 3 *YALE J.L. & HUMAN.* 33, 35–36 (1991); Johann Sommerville, *The “New Art of Lying”: Equivocation, Mental Reservation, and Casuistry*, in *CONSCIENCE AND CASUISTRY IN EARLY MODERN EUROPE* 159, 168 (1988).

<sup>333</sup> SANDERSON, *supra* note 304, at 233.

<sup>334</sup> *Id.* at 241. See also WHITE, *supra* note 312, at 52.

<sup>335</sup> ARTHUR TAZER RUSSELL, *MEMOIRES OF THE LIFE AND WORKS OF THE RIGHT HONORABLE AND RIGHT REV. FATHER IN GOD LANCELOT ANDREWES, D.D. LORD BISHOP OF WINCHESTER* 207 (1860).

Denouncing the teaching of the Spanish Jesuit Suarez that “if there bee any eminent change, . . . the partie sworn may be excused for his Oath,” Christopher White argued, “Give way to this reason . . . , and farewell all promises, all compacts, all societie between man and man.”<sup>336</sup> In general, White taught, contracts were grounded on the law of nature and violations of them were impermissible “even when religion is made a pretence.”<sup>337</sup> White also strenuously insisted—as did other Protestants—that an oath given to heretics could be valid and binding. It was a common Protestant opinion that “the Catholic clergy and, above all, the Jesuits had discharged the laity from the obligation of all oaths and bonds given to heretics.”<sup>338</sup>

Protestants also challenged Catholic writers who, like Parsons, affirmed that “equivocating” under oath might be permissible, at least in certain circumstances.<sup>339</sup> In the treason trial of the Jesuit Father Henry Garnet in 1606, the Attorney General and prosecutor Sir Edward Coke denounced the Jesuit order for the doctrine of equivocation, “wherein, under the pretext of the lawfulness of a mixt proposition to express one part

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<sup>336</sup> WHITE, *supra* note 312, at 31–32. By contrast, Richard Cosin excused breaching an oath “when as some vnlooked for accident is discovered, or falleth out afterwarde; that was not thought vpon before.” COSIN, *supra* note 316, pt. 3 at 14.

<sup>337</sup> WHITE, *supra* note 312, at 50. However, White acknowledged that a promissory oath might be annulled if what was promised was impossible or illicit. *Id.* at 22. Shakespeare’s Salisbury echoes this common view when he declares, “It is great sin, to swear unto a sin;/But greater sin to keep a sinful oath.” *Henry VI, Pt. II*, *supra* note 173, at act 5, sc. 2, ll. 82–83. See Faye L. Kelly, *Oaths in Shakespeare’s Henry VI Plays*, 24 SHAKESPEARE Q. 357, 365–66 (1973).

<sup>338</sup> Spurr, *supra* note 303, at 50.

<sup>339</sup> Parsons offered a nuanced and restricted defense of equivocation:

So I say in this case, that albeit a man may without breach of truth, or offence of almighty God in certayne cases, equiuocate, or vse a doubtfull speach for a good and necessary end, either in oath, or out of oath, though the hearer doe not alwayes vnderstand it, or be deceyued therwith, . . . yet considering the tymes, and condfition therof, wherin Catholicks at this day liue in England, the offence, and scandall which Protestants, and some others, that vnderstand not the lawfulness therof, or will not vnderstand the same, do receyue, or raise thervpon; my wish and counsell to Catholickes should be to vse the benefit of this liberty most spa'ringly euen in lawfull things, and neuer but vpon great and vrgent, and occasions.

ROBERT PARSONS, A TREATISE TENDING TO MITIGATION TOVVARDES CATHOLIKE-SUBIECTES 546 (1611), <https://quod.lib.umich.edu/e/eebo/A09111.0001.001/1:17?rgn=div1;view=fulltext>. See Michael L. Carrafiello, *Robert Parsons and Equivocation, 1606–1610*, 79 CATH. HIST. REV. 671 (1993). For an overview of Jesuit thinking on this subject, see Stefania Tutino, *Jesuit Accommodation, Dissimulation, Mental Reservation*, in THE OXFORD HANDBOOK OF JESUITS, OXFORD HANDBOOKS ONLINE (Ines G. Zupanov ed., 2017), <http://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780190639631.001.0001/oxfordhb-9780190639631>.

of a man's mind, and retain another, people are indeed taught, not only simple lying, but fearful and damnable blasphemy."<sup>340</sup>

All of this strongly suggests that Constance's complaint of perjury would have resonated strongly in Elizabethan ears. As we have seen, Protestant Englishmen were deeply suspicious of Catholic claims about the Pope's powers to dispense with oaths, to relieve English Catholics of their allegiance to the Queen, and to authorize them to rebel against her or even murder her. For many such Protestants, the Reformation had heightened the sanctity of oaths, narrowed the grounds on which breaches of them might be excused, and done away with claims of Papal power to dissolve them. In that culture, Constance's outbursts would have found many sympathizers.

Shakespeare of course was well aware that *political* oaths like those Philip swore to Arthur and Constance were especially fragile. What incentive would the King of France have had to honor a commitment to a boy who could only "give [him] welcome with a powerless hand/But with a heart full of unstained love"?<sup>341</sup> In depicting Philip as faithless, Shakespeare is being true, it seems, to the insights of thinkers in the "realist" tradition of international relations, from Thucydides through Hobbes to the present.<sup>342</sup> And we see this cold realism in others of his plays, as when in *Henry VI Pt. I*, the Duke of Alençon advises the Dauphin Charles to make a truce with England despite its harsh terms, because "you break it when your pleasure serves."<sup>343</sup>

Nonetheless, Shakespeare does mean his audiences and readers to feel dismay at the moral condition of a world in which royal and ducal oaths made with such outward show of conviction are broken so swiftly and so lightly. Reverence for God, the sense of honor, and even long-term self-interest pull a King towards fulfillment of his oaths, despite the lure of "commodity." A King who will not keep the most deeply-sworn oaths cannot expect his

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<sup>340</sup> Frank L. Huntley, *Macbeth and the Background of Jesuitical Equivocation*, 79 PMLA 390, 390 (1964) (quoting 2 A COMPLETE COLLECTION OF STATE TRIALS 234 (T.B. Howell, ed. 1816)). The drunker porter in *Macbeth*, seems to be alluding to Garnet. *MacBeth*, *supra* note 131, at act 2, sc. 3, ll. 8–11.

<sup>341</sup> *KJ*, *supra* note 1, at act 2, sc. 1, ll. 15–6.

<sup>342</sup> For a critical survey of that tradition, see JACK DONNELLY, REALISM AND INTERNATIONAL RELATIONS 1–42 (2000).

<sup>343</sup> WILLIAM SHAKESPEARE, THE FIRST PART OF KING HENRY THE SIXTH, act 5, sc. 4, ll. 164 (New Cambridge Shakespeare, Michael Hattaway ed., 1990).



fellow monarchs—or his subjects—to be faithful to theirs to him. As Shakespeare will show us, the world of the “perjuring kings” is soon to become unstrung.

*D. The Bastard’s “Commodity” Speech*

Where Constance is passionate—alternately despairing and defiant—the Bastard is coolly analytical and diagnostic in his appraisal of the Kings’ bargain at Angiers. Constance appeals to Heaven for aid. The Bastard adopts the stance of a detached scientist studying the workings of the social world. Where Constance seeks comfort, the Bastard looks for knowledge.

The Bastard’s analysis of his uncle’s motivation cuts to the chase: “John, to stop Arthur’s title in the whole,/Hath willingly departed with a part.”<sup>344</sup> John is merely seeking to shore up his legitimacy by sacrificing a large part of his empire. Philip does not much fault John for that. But he is merciless in flaying the hypocrisy of King Philip:

France, whose armour conscience buckled on,  
Whom zeal and charity brought to the field  
As God’s own soldier . . . .<sup>345</sup>

And what led Philip from his professed course? In a word, *Commodity*:

This bawd, this broker, this all-changing word,  
Clapped on the outward eye of fickle France,  
Hath drawn him from his own-determined aid,  
From a resolved and honourable war,  
To a most base and vile-concluded peace.<sup>346</sup>

Philip’s crime, in the Bastard’s eyes, is to have sacrificed his honor in the pursuit of his interest.

But the Bastard quickly catches himself: “[W]hy rail I on this Commodity?”<sup>347</sup> His concern, he reminds himself, is not with moralizing about the world, but with understanding it. Moralizing, he suggests, is purely perspectival: were he himself rich, he would rail against the poor, just as now, in his poverty, he rails against the rich. He concludes and exits with two perplexing lines:

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<sup>344</sup> *KJ*, *supra* note 1, at act 2, sc. 1, ll. 561–62.

<sup>345</sup> *Id.* at act 2, sc. 1, ll. 564–66.

<sup>346</sup> *Id.* at act 2, sc. 1, ll. 581–85.

<sup>347</sup> *Id.* at act 2, sc. 1, l. 587.

Since kings break faith upon commodity,  
Gain, be my lord, for I will worship thee.<sup>348</sup>

Why “perplexing”? Because nothing in his later conduct shows the Bastard to be avid for “gain.” Just so, nothing in his later conduct shows him to be the flatterer he had said near the end of the Judgment Scene that he would study to become.

In fact, the only major character in the play who does *not* succumb to the lure of “commodity” is the Bastard.<sup>349</sup> We must remember that at the outset he is simply a “blunt fellow,” a youngster from the provincial gentry, who unexpectedly finds himself a King’s son and a royal favorite. His sudden rise seems to go to his head and make him giddy. He tries both to adjust to his new surroundings and to distance himself from them. Thus, he both imitates the language of the Court and yet mocks it—as when he parodies the Dauphin’s address to Blanche. Observing the behavior of princes and prelates in matters of statecraft at Angiers, he initially resolves to emulate them—and he recognizes that that will mean pursuing “commodity,” as they do. But even as he contemplates this plan, he realizes that the pursuit of commodity has skewed the world and set it on the wrong course.

Moreover, as befits a son of Richard the Lion Hearted, he prefers “honor” to “land,” and forsakes his lawful inheritance for that reason. That trait stays with him and eventually dominates his actions. The knightly conception of honor, as Victor Kiernan has brilliantly observed, is a matter that preoccupied Shakespeare all his life, and his writing is in some measure an effort in depicting “what was worthy in an old feudal-chivalrous tradition, debased now by courtiers and parasites . . . [Honor was needed in] rescuing men from a drift into moral skepticism or nihilism.”<sup>350</sup> And so it is here. Only because the Bastard behaves selflessly and with honor is he able to rescue England, restore legitimacy to the throne, protect the common good, and avert the disastrous consequences of unfettered self-interest.<sup>351</sup>

<sup>348</sup> *Id.* at act 2, sc. 1, ll. 597–98.

<sup>349</sup> See generally James Calderwood, *Commodity and Honour in King John*, 29 U. TORONTO Q. 341, 352 (1960).

<sup>350</sup> KIERNAN, *supra* note 22, at 15.

<sup>351</sup> It is important here to distinguish the kind of “honor” that is prepared to sacrifice the general welfare to personal glory and reputation from the kind of honor embodied in the patriotic prince. Hotspur can be taken as a Shakespearean figure who personifies the first kind of honor; Henry V as representative of the latter. See FREDERICK S. BOAS, *QUEEN ELIZABETH IN DRAMA AND RELATED STUDIES* 176 (1950) (“For all his dazzling gallantry [Hotspur’s] conception of honour is at heart

The inconsistencies between the Bastard's professions about himself and his actions are, then, more apparent than real. We should take the Bastard's statements about flattery and commodity more as expressions of disgust at the practices he is observing in his new courtly environment than as firm resolutions to adopt those practices himself. He finds himself enmeshed in a world in which toadying, perfidy and self-aggrandizement are pervasive. He reacts by exclaiming that he too must behave in those ways. But in fact, his true nature restrains him from such courses. In his disgust at his surroundings, he does not, in the end, capitulate to them. He changes them.

*E. The Treaty of Angiers*

John and Philip have made their peace. But what exactly have they done?

The two Kings' agreement is, in substance and effect, what would ordinarily be called a treaty of peace. The agreement differs formally in at least two ways from what contemporary international lawyers define as a "treaty": it is not—so far as we are told—in writing; and the parties to it are not "States," but Kings.<sup>352</sup> Furthermore, although treaties have been in existence for thousands of years,<sup>353</sup> the "very concept of treaty-making power as we know it" had not fully emerged in Shakespeare's time—let alone in the Middle Ages.<sup>354</sup> Nonetheless, it is reasonable to treat the Kings' agreement as functionally a "treaty." Four characteristics of this treaty are particularly relevant to the play.

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egotistical . . ."); Paul N. Siegel, *Shakespeare and the Neo-Chivalric Cult of Honor*, 8 CENTENNIAL REV. 39, 47, 61 (1964). The conception of honor that motivates the Bastard is far closer to Henry's than to Hotspur's: the Bastard consistently serves the Crown and State.

<sup>352</sup> See Robert J. Delahunty & John Yoo, *Statehood and the Third Geneva Convention*, 46 VA. J. INT'L L. 131, 140–41 (2005).

<sup>353</sup> "The earliest known peace treaty is the Treaty of Qadesh, concluded in 1269 BCE between the Hittite Emperor Hattusilis and Ramses II of Egypt." TANISHA M. FAZAL, WARS OF LAW: UNINTENDED CONSEQUENCES IN THE REGULATION OF ARMED CONFLICT 132 (2018).

<sup>354</sup> Peter Haggemacher, *Some Hints on the European Origins of Legislative Participation in the Treaty-Making Function*, 67 CHI. KENT L. REV. 313, 316 (1991).

First, this is a personal compact between the two Kings, not between the States of England and France. Although monarchs did occasionally seek parliamentary advice or approval,<sup>355</sup> medieval treaties were typically regarded as personal compacts.<sup>356</sup> Only gradually, beginning in Shakespeare's own time, did treaties come to be considered agreements between sovereign *States*.<sup>357</sup> Furthermore, because a treaty was conceptualized as personal to the monarchs who had made it, it might be deemed to have expired on the death of a King, and his successor might have to reaffirm his late predecessor's undertaking if it were to remain in effect.<sup>358</sup> "Henry VIII of England, for instance, justified his violation of a treaty between his father, Henry VII, and Archduke Philippe of Burgundy on the grounds that he was not personally party to it."<sup>359</sup> But no such consideration could justify dissolving the treaty between John and Philip.

Second, treaty-making was highly ritualized and sacralized.

[A] solemn treaty was proclaimed . . . and ratified by solemn oaths, usually on the gospels or on some relic . . . . The treaty was therefore a solemn contract, and to break it was perjury, a stain on honour and an ecclesiastical sin, which might incur the ultimate ecclesiastical sanctions (excommunication and interdict).<sup>360</sup>

To illustrate this point, consider a sermon preached in 1519 by the Tudor divine and diplomat, Richard Pace, in London's Saint Paul Church in the presence of King Henry VIII, his

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<sup>355</sup> See Theodor Meron, *The Authority To Make Treaties in the Late Middle Ages*, 89 AM. J. INT'L L. 1, 2 (1995).

<sup>356</sup> See Randall Lesaffer, *The Medieval Canon Law of Contract and Early Modern Treaty Law*, 2 J. HIST. INT'L L. 178, 182 (2000) ("[U]ntil the seventeenth or even eighteenth centuries, treaties have more to be considered as private *pacta* or *conventiones* between rulers than as public *foedera* between political entities.").

<sup>357</sup> Shakespeare's contemporary Balthasar Ayala argued that a prince entered into a treaty "not on his own behalf, but on behalf of the State," and therefore that "a prince is entirely bound by his deceased predecessor's contract and . . . the parties to the treaty continue to be subject to it." BALTHAZAR AYALA, *DE JURE ET OFFICIIS BELLICIS ET DISCIPLINA MILITARI LIBRI III* 82 (John Pawley Bate trans., 1912) (1582). But even in Shakespeare's time, the older view of treaties persisted.

<sup>358</sup> See FRANÇOIS L. GANSHOF, *THE MIDDLE AGES: A HISTORY OF INTERNATIONAL RELATIONS* 304 (1970).

<sup>359</sup> J. L. Holzgrefe, *The Origins of Modern International Relations Theory*, 15 REV. INT'L STUD. 11, 18–19 (1989). To avoid this outcome, some medieval treaties prescribed that the King's heir had to co-ratify the treaty. See Randall Lesaffer, *Peace Treaties and the Formation of International Law*, in *THE OXFORD HANDBOOK OF THE HISTORY OF INTERNATIONAL LAW* 71, 82 (2012).

<sup>360</sup> JOYCELYNE G. RUSSELL, *PEACEMAKING IN THE RENAISSANCE* 82 (1986).

Chancellor Cardinal Wolsey, the Papal Legate Cardinal Campeggio and the French Ambassador. Pace preached on the Treaty of London (1518), or what Pace called “this most religious treaty.” The Treaty of London was, in effect, a non-aggression pact designed by Cardinal Wolsey and addressed to the menace of Ottoman power. King Henry VIII, King Francis I of France, the Holy Roman Emperor, the Papal States, and the other leading western European powers would ratify it.<sup>361</sup> Addressing the rulers of England and France, Pace said:

O happy pair of Kings! You are today about to give a most auspicious beginning to three things: to the treaty; to faith; and to peace . . . . So may immortal God bring it to pass that the joy we feel at this most healthful peace, formed and entered into in this church today, shall be solid and perpetual for all Christians. Of this inestimable blessing the sacred oaths with which this holy treaty has been confirmed give me a sincere hope. He who shall not fear to violate these oaths shall sink his body and soul together into the depths of Hell and the Gehenna of fire.<sup>362</sup>

Like the later treaty between Henry VIII and Francis I, the treaty between John and Philip was also sealed by oaths. When the Papal legate Cardinal Pandulph peremptorily demands that King Philip renounce the treaty and make war on England, Philip tells him that:

This royal hand [*i.e.*, John’s] and mine are newly knit,  
 And the conjunction of our inward souls  
 Married in league, coupled and linked together  
 With all religious strength of sacred vows;  
 The latest breath that gave the sound of words  
 Was deep-sworn faith, peace, amity, true love  
 Between our kingdoms and our royal selves.<sup>363</sup>

The sanctity of the Anglo-French treaty at Angiers, therefore, derived both from the religious nature of the oath which the two monarchs took and from the personal honor of the two

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<sup>361</sup> See generally Garrett Mattingly, *An Early Nonaggression Pact*, 10 J. MOD. HIST. 1, 12 (1938).

<sup>362</sup> Allen Z. Hertz, *Medieval Treaty Obligation*, 6 CONN. J. INT’L L. 425, 432–33 (1991) (quoting Richard Pace, *Sermon on the Treaty of London 1518*, from the Latin original, King’s Printer (1518), translated by David Russel, in RUSSELL, *supra* note 360, 240–41).

<sup>363</sup> *KJ*, *supra* note 1, at act 3, sc. 1, ll. 226–32.

monarchs.<sup>364</sup> Philip, therefore, quite understandably was dismayed at the Papal legate's command to breach the treaty—even if he has just breached his sworn agreement with Arthur.

Third, the Angiers treaty was also solemnized by the accompanying marriage ceremony between Philip's son Lewis and John's niece Blanche. Both in historical fact and in Elizabethan drama, treaties of peace and alliances were often conjoined with dynastic marriages. One marriage broker working on behalf of the proposed French marriage for Edward VI of England said that a treaty with France without a marriage alliance was “but a drye peax.”<sup>365</sup> Royal marriages between English and foreign monarchs and their heirs or other family members, like that of Henry VIII's daughter Mary to the Habsburg heir Philip, were carefully scripted and staged, with subtly inflected phrasing and gestures signifying the precise terms of the pact and expectations of the parties.<sup>366</sup> Shakespeare underscores the close linkage between peace treaties and dynastic marriages elsewhere. For example, in *Antony and Cleopatra*, peace between Antony and Octavian is cemented by the marriage of Octavian's sister Octavia to Antony.<sup>367</sup> Furthermore, Marlowe opens *The Massacre at Paris* with a royal marriage in which a “union and religious league” is to be “[k]nit in these hands thus joined in nuptial rites.”<sup>368</sup>

Fourth, Philip and John further solemnize their treaty by clasping each others' hands. Indeed, they seem to be holding each other by the hand even as Pandulph addresses them: he orders Philip, “Let go the hand of that arch-heretic.”<sup>369</sup> The gesture appears elsewhere in Shakespeare's works to represent the depth of a commitment: Antony and Octavian clasp hands to

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<sup>364</sup> See Lesaffer, *supra* note 356, at 193.

<sup>365</sup> RUSSELL, *supra* note 360, at 86 (quoting THE LETTERS OF WILLIAM, LORD PAGET OF BEAUDESERT, 1547–1563, 93 (1974)).

<sup>366</sup> See generally Alexander Samson, *Changing Places: The Marriage and Royal Entry of Philip, Prince of Austria, and Mary Tudor, July–August 1554*, 36 SIXTEENTH CENTURY J. 761, 761–62 (2005).

<sup>367</sup> WILLIAM SHAKESPEARE, ANTONY AND CLEOPATRA, act 2, sc. 2 at ll. 150–84 (New Cambridge Shakespeare 2d ed., David Bevington ed., 2005) [hereinafter *Antony and Cleopatra*].

<sup>368</sup> CHRISTOPHER MARLOWE, THE MASSACRE AT PARIS, sc. I, <http://www.online-literature.com/marlowe/massacre-at-paris/2/>.

<sup>369</sup> *KJ*, *supra* note 1, at act 3, sc. 1, l. 192.

seal *their* bargain;<sup>370</sup> in *The Tempest*, Prospero joins hands with the young couple Ferdinand and Miranda as they prepare to marry.<sup>371</sup>

Shakespeare, in short, could hardly have done more to express, in words, acts, and gestures, the sanctity and solemnity of the Anglo-French treaty at Angiers. The more shattering, then, is Philip's surrender to the Papal legate's demands that he forswear his oath, breach the treaty, and make war on England as "champion of our church."<sup>372</sup> Shakespeare has already shown us, in Act II, how John's illegitimacy leads directly to Philip's perjury. Now he shows how it leads to royal perjury a second time. The world John has made is unraveling ever faster; Commodity is undoing itself.

A King's perjury, for Shakespeare's audiences, strikes at the foundations of the social order. As Shakespeare's contemporary Jean Bodin explained:

Seeing then that faith is the only foundation and support of iustice whereon not only Commonweales, but all humaine societie is grounded, it must remaine sacred and inuiolable in those things which are not vniust, especially betwixt princes: for seeing they are the warrants of faith and oathes, what remedie shall the subiects haue against their power for the oathes which they take among themselues, if they be the first which breake and violate their faith.<sup>373</sup>

#### F. *Pandulph's Arrival*

The sudden arrival of the Papal legate, Cardinal Pandulph of Milan, triggers a new cycle of betrayals, oath-breaking, intrigue, and violence. Pope Innocent III has sent Pandulph to reprimand John for his refusal to allow the Pope's choice, Stephen Langton, to assume his duties as the new Archbishop of Canterbury.<sup>374</sup> If

<sup>370</sup> *Antony and Cleopatra*, *supra* note 367, at act 2, sc. 2, ll. 175–79.

<sup>371</sup> *THE TEMPEST*, *supra* note 43, at act 5, sc. 1, l. 255.

<sup>372</sup> *KJ*, *supra* note 1, at act 3, sc. 1, ll. 255, 267.

<sup>373</sup> JEAN BODIN, *THE SIX BOOKS OF THE COMMONWEALTH* 626 (Richard Knolles trans., 1606), <https://quod.lib.umich.edu/e/eebo/A16275.0001.001?page=viewtextnote;rgn=full+text>. Bodin makes an exception: "And in like case, if the Prince hath promised not to do a thing which is allowable by the law of nature and iust, he is not periured although he make breach thereof." *Id.*

<sup>374</sup> On the historical quarrel between Pope Innocent III and King John over the investiture of Stephen Langton, see JOHN C. MOORE, *POPE INNOCENT III (1160/61–1216): TO ROOT UP AND TO PLANT* 191–95, 212–15 (2009); PAUL WEBSTER, *KING JOHN AND RELIGION* 155–7 (2013) (outlining arguments of Pope and King). Innocent placed England under an interdiction, then excommunicated John, and finally came

John refuses to accept the Pope's decision, Pandulph warns, the Pope will excommunicate him, release his subjects from obedience to him, and canonize anyone who murders him. Moreover, Pandulph demands that the French break their newly-made treaty with England if John does not come to heel, and make war on England on Rome's behalf.<sup>375</sup> John refuses to obey; Philip hesitates; Pandulph threatens Philip with the same harsh

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close to deposing him. A sentence of excommunication had drastic consequences: one who incurred it was "excluded from the sacraments of the Church, and cut off from intercourse with his fellows. . . . In theory, to suffer the sentence of excommunication was the most serious disaster which could ever befall a man, because it cut at the roots not only of his life temporal but of life eternal." Rosalind Hill, *The Theory and Practice of Excommunication in Medieval England*, 42 *HIST.* 1, 1 (1957). Although the struggle between the two rulers took years to work out, Innocent eventually prevailed. Increasingly, John was beset "with the threat of domestic revolt, a possible papal sentence of deposition, and, with it, the prospect of French invasion." WEBSTER, *supra*, at 161. Central to the agreement John ultimately made with the Pope was John's "submission of the kingdom of England and lordship of Ireland to Pope Innocent III, to be received back as a papal fief." *Id.* at 162. Innocent's victory reflected the medieval Papacy's "enormous and immeasurable power as a moral force." JANE SAYERS, *INNOCENT III, LEADER OF EUROPE 1198–1216*, 78 (1994).

Innocent explained his understanding of the Papacy's authority over temporal rulers in the decretal *Novit Ille* of 1204, a document written to justify his claim to jurisdiction as mediator and arbitrator in ending the wars between King John and King Philip. Philip had denied that the Pope had such jurisdiction, and maintained that his dispute with John involved only feudal differences and hence was not subject to Papal judgment. Innocent countered by enjoining Philip to submit to his jurisdiction, "[f]or we do not intend to judge concerning a fief . . . but concerning sin [*i.e.*, wrongful violence], a judgment which unquestionably belongs to us, and which we can and should exercise against anyone . . . for we depend not on any human decree but on the divine law, our authority being not of man but of God." INNOCENT III, *Novit ille* (1204), in 1 *FONTES HISTORIAE JURIS GENTIUM: SOURCES RELATING TO THE HISTORY OF THE LAW OF NATIONS* 519 (1995). Innocent specifically affirmed that his authority extended as much to kings as others.

<sup>375</sup> The political and judicial powers of the medieval Papacy, embodied here in Pandulph, were sweeping. See Walter Ullmann, *The Medieval Papal Court as an International Tribunal*, 11 *VA. J. INT'L L.* 356, 357 (1971) ("Thus treaties between governments were submitted to the papacy for approval, confirmation and ratification, but treaties and compacts could also be annulled by the papal court without any foregoing papal ratification or confirmation. The papacy could, as indeed it did, give orders to belligerent parties to refrain from further belligerent action, to enter into peace negotiations or to establish a truce. . . . By the verdict of the papal tribunal governments could be changed and governmental power transferred to organs other than those who in actual fact possessed public power. In support of warring and hard pressed governments the papacy judicially ordered the dispatch of armed troops, just as it decreed that belligerent governments were to be assisted by other governments, provided always that the cause of the war was papally approved. By the same token the papal court could prohibit assistance to troops which had invaded or were about to invade territory. Rulers, including kings and emperors, were by the decision of the papal court deprived of their governing powers, either by formal deposition or by excommunication.").



treatment that Rome is meting out to John; Philip capitulates to Pandulph's demands. War breaks out, France is defeated, and Arthur falls into John's hands.

The action of the Pandulph scene would undoubtedly have touched off explosive associations in the minds of Shakespeare's audiences. Henry VIII had gone to war against France in 1513 in defense, he claimed, of the Church and the Papacy.<sup>376</sup> But events closer to the time of *KJ* were undoubtedly more salient. In 1570, Pope Pius V had issued the bull *Regnans in Excelsis*.<sup>377</sup> Pius

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<sup>376</sup> See REX, *supra* note 229, at 187. Henry wrote to the Emperor Maximilian that he and his ally Ferdinand of Aragon had answered the appeal of the Pope, "our Lord the Almighty God's most holy vicar upon earth," and he denounced the King of France because he "tears up the seamless robe of Our Lord Jesus Christ, plunders the patrimony of St Peter, and seizes the cities of the Holy Roman Church." *Id.*

<sup>377</sup> See PIUS V, *Regnans in excelsis*, in THE TUDOR CONSTITUTION, *supra* note 204, at 414–18. Influential Catholic apologists of the sixteenth and seventeenth centuries held that under the "indirect power" of the Papacy over temporal rulers, the Pope could depose a monarch. As formulated by the Jesuit Cardinal Robert Bellarmine, the theory was that although the Pope possessed no "direct" temporal power—rather, his power was spiritual only—nonetheless "on occasion" the Pope could intervene in temporal affairs for a spiritual end. As elucidated in a careful commentary on Bellarmine,

the power of the Pope 'extends' to the temporal order *casu*, on occasion. The occasion is created 'by a serious reason, especially a concern of faith,' 'the salvation of souls, or welfare of religion, the preservation of the Church,' or more in general, a 'necessity of the Church.' Moreover, the occasion is created by some deviation or default in the processes of the temporal order, that results in a spiritual danger. Judgment as to the existence of the occasion and its gravity rests, of course, with the Pope; but he may not 'at his pleasure falsely devise necessities,' and he must always act in view of a spiritual end.

John Courtney Murray, S.J., *St. Robert Bellarmine on the Indirect Power*, 9 THEOLOGICAL STUD. 491, 497 (1948). English Catholics like Robert Parsons subscribed to the doctrine of "indirect" Papal power. See PETER HOLMES, RESISTANCE & COMPROMISE: THE POLITICAL THOUGHT OF THE ELIZABETHAN CATHOLICS 153–54 (1982). Relying on his "indirect" power, a Pope might depose a King (and not merely declare him deposed). See Murray, *supra*, at 498. Bellarmine cited four historical incidents in which (he claimed) Popes had deposed reigning monarchs. See *id.* at 519; see also BERNARD BOURDIN, THE THEOLOGICAL-POLITICAL ORIGINS OF THE MODERN STATE: THE CONTROVERSY BETWEEN JAMES I OF ENGLAND AND CARDINAL BELLARMINE 132–56 (Susan Pickford trans., 2010); SKINNER, *supra* note 185, at 179–80 (noting that Sixtus V found Bellarmine's doctrine too concessive of Papal power); Thomas T. Love, *Roman Catholic Theories of Indirect Power*, 9 J. CHURCH & ST. 71, 76 (1967). By no means all British Catholics accepted Bellarmine's ideas about "indirect" Papal power. Beginning around the mid-1590s, some Catholics struck out in a different direction. See HOLMES, *supra*, at 199–204. For instance, the Scot William Barclay took issue sharply with Bellarmine over this matter. See WILLIAM BARCLAY, OF THE AUTHORITY OF THE POPE, WHETHER, AND HOW FARRE FORTH, HE HATH POWER AND AUTHORITIE OVER TEMPORALL KINGS AND PRINCES 28–33 (1611), <https://quod.lib.umich.edu/e/eebo/A68730.0001.001?rgn=main>

denounced the Queen as “Elizabeth, the pretended queen of England and a slave of wickedness,” excommunicated her, purported to depose her from the throne, absolved her subjects from their allegiance to her, and ordered her nobility and people to disobey her.<sup>378</sup> Elements in Elizabeth’s government seized the occasion to promote a “conspiracy theory, a vision of the threat at home and abroad, from Catholics plotting the downfall of the queen and realm.”<sup>379</sup> Although Pope Gregory XIII suspended Pius’ bull in 1580, it was renewed by Pope Sixtus V in 1588, in support of the planned invasion of England that year by the Spanish Armada.<sup>380</sup> Pandulph’s threats against John would surely have revived memory of these events in English theater audiences of the 1590s.<sup>381</sup> Furthermore, even after the defeat of the Armada in 1588, England still remained under threat of a foreign (Spanish) military intervention throughout the 1590s.<sup>382</sup> Queen Elizabeth I herself accused the King of Spain in 1591 of using English Catholics against her for domestic subversion.<sup>383</sup>

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;view=fulltext. Barclay also denied that the Pope could absolve subjects from their obligation of allegiance to their Kings. *See id.* at 138–45.

<sup>378</sup> PIUS V, *Regnans in excelsis*, in THE TUDOR CONSTITUTION, *supra* note 204, at 414–18. Unsurprisingly, Pius’ bull drew raking criticism from Protestant sources, e.g., BISHOP THOMAS BARLOW, BRUTUM FULMEN, OR, THE BULL OF POPE PIUS V (1681), <https://quod.lib.umich.edu/e/eebo/A69677.0001.001?view=toc>.

<sup>379</sup> LAKE, *supra* note 1, at 22.

<sup>380</sup> *See* SIXTUS V, *A declaration of the sentence and deposition of Elizabeth, the usurper and pretended quene of Englande 1588* (William Allen trans.), in 370 ENGLISH RECUSANT LITERATURE 1558–1640, n.p. (1977).

<sup>381</sup> *See* LAKE, *supra* note 1, at 215.

<sup>382</sup> *See* James Shapiro, *Revisiting “Tamburlaine: Henry V” as Shakespeare’s Belated Armada Play*, 31 CRITICISM 351, 355–58 (1989) (recurring Spanish threats to England during 1590s). After the Armada’s defeat, Spain began a naval rearmament program that quickly restored its sea power. “By 1591, 21 new galleons and 500 tons of naval ordnance had entered service, and in that year Spain’s reconstituted navy drove the main English fleet away from the Azores, where it had hoped to intercept the returning treasure fleet, and captured the *Revenge*. By 1598 Philip’s Atlantic fleet numbered 53 royal warships.” GEOFFREY PARKER, THE GRAND STRATEGY OF PHILIP II 272 (1998). In fact, Philip’s Atlantic fleet “became the largest sailing navy yet seen in Europe.” PAUL E.J. HAMMER, ELIZABETH’S WARS: WAR, GOVERNMENT AND SOCIETY IN TUDOR ENGLAND, 1544–1604, 162 (2003).

<sup>383</sup> ELIZABETH I, A DECLARATION OF GREAT TROUBLES PRETENDED AGAINST THE REALME BY A NUMBER OF SEMINARIE PRIESTS AND IESUISTS, SENT, AND VERY SECRETLY DISPERSED IN THE SAME, TO WORKE GREAT TREASONS VNDER A FALSE PRETENCE OF RELIGION WITH A PROUISION VERY NECESSARIE FOR REMEDIE THEREOF (London, the deputies of Christopher Barker printer to the Queenes most excellent Maiestie 1591), <https://quod.lib.umich.edu/e/eebo2/A21879.0001.001?view=toc>.

For English Protestants, International Catholicism continued to be a menacing and powerful foe.<sup>384</sup>

The figure of Cardinal Pandulph would also have reminded Shakespeare's audiences of another Cardinal, still living at the time and active in English affairs even from his exile. That was William Allen, whom Sixtus V created Cardinal of England in 1587, at the behest of King Philip II of Spain and in connection with the Armada that Philip and Sixtus were planning to launch against England. Allen, an Oxford-trained Catholic priest and scholar, had been energetic and influential in Queen Mary Tudor's attempts to restore Roman Catholicism in England during her brief reign, before her sister Elizabeth succeeded to the throne. After the short-lived Marian restoration, Allen went into exile and trained Catholic priests as missionaries to England.

Throughout the 1570s and 1580s, Allen played a central role in a series of unsuccessful Spanish plots to invade England. Allen's propaganda tract *An admonition to the nobility and people of England and Ireland concerninge the present vvarres made for the execution of his Holines sentence, by the highe and mightie Kinge Catholike of Spaine* (1588),<sup>385</sup> was addressed to English and Irish Catholics, and sought (unsuccessfully<sup>386</sup>) to enlist their support for the Armada.<sup>387</sup> The Pope intended that after the (expected) victory of the Spanish Armada, Allen would be installed as Papal legate and govern England.<sup>388</sup> His primary

<sup>384</sup> In many English minds, the interests of Spain and the Papacy were identified. Henry of Navarre exclaims in *The Massacre at Paris*, "Spain[] is the [council] chamber of the pope, Spain[] is the place where he makes peace and [war] . . ." CHRISTOPHER MARLOWE, *MASSACRE AT PARIS*, Sc. XIV, THE LITERATURE NETWORK (February 2, 2019), <http://www.online-literature.com/marlowe/massacre-at-paris/15/>.

<sup>385</sup> See generally ALLEN, *supra* note 281.

<sup>386</sup> See SUSAN DORAN, *ELIZABETH I AND RELIGION: 1558–1603*, 57 (Routledge 1994).

<sup>387</sup> Allen affirmed that English Catholics owed no loyalty to monarchs who, like Elizabeth, had been excommunicated, but rather were bound to "take armes against them." ALLEN, *supra* note 281, at XLII. Failure to rebel would cause them to "be as deeply excommunicated as she is . . ." *Id.* at LIII–LIIII.

<sup>388</sup> Allen tells us that the Pope intended

to send me as his Legate, with full commission & cōmaundment, to treat and deale from time to time, as well with the states of the realme, as with his holynes, and the kinges maiestie for the sweter maneginge of this godly and greate affaيرة, and with them to deliberate of all the beste meanes, how with the leaste damage of our cuntrie, nobillitie, and gentrie, and beste preservation of the whole people, this godly purpose of restoringe the Catholike religion, and putting the realme in order (as well for the title of

task would be to reorganize the English Church and State along lines favorable to Rome. Allen's appointment as Cardinal of England in 1587 positioned him to assume those responsibilities—the treaty between King Philip and Pope Sixtus that provided Papal funding for Philip's Armada had called for England practically, to become a Papal fiefdom, as it had been under King John.<sup>389</sup>

Allen was a Catholic hard-liner whose “blueprint for the reconversion included the removal of Queen Elizabeth, and the implementation of a sternly Catholic regime. He did not believe in the toleration of error, and he did not believe that Catholics and Protestants could live in peace together.”<sup>390</sup> Even a sympathetic biographer recognizes that “by any standard recognised in Elizabethan England, Allen was a traitor.”<sup>391</sup> Although Shakespeare's Pandulph is Italian, not English, his imprecations against John, and his role in spearheading the invasion of England by a foreign army, are unmistakably reminiscent of Allen.<sup>392</sup>

More importantly, some English Catholic thinkers, including Allen and Robert Parsons, were making claims about Papal political powers—to relieve subjects of their allegiance, to excommunicate kings, to depose them, to order their subjects to rebel against them, and to sanction foreign invasion and

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the croune as other controuersies that may fall, betwixt the Church and the common wealthe, or any membre therof, for what matter so euer, since the time that heresy, scisme, & disorder began) may be acheiued.

*Id.* at LI–LII.

<sup>389</sup> Sixtus declares to Philip, “Ut Apostolica Sedes restituatur redintegreturque ad census, iurisdictiones, iura et actiones, quas habebat in iisdem regnis, antequam Henricus octavus a Romani Pontificis et huius Sancte Sedis obedientia se subtraheret.” See ARNOLD OSKAR MEYER, ENGLAND AND THE CATHOLIC CHURCH UNDER QUEEN ELIZABETH 520–23 (Rev. J. R. McKee trans., 1967) (text in Latin), [https://babel.hathitrust.org/cgi/pt?id=uc1.\\$b755403;view=1up;seq=548](https://babel.hathitrust.org/cgi/pt?id=uc1.$b755403;view=1up;seq=548). Both “iurisdictiones” and “iura et actiones,” roughly translated as “jurisdictions” and “rights and claims,” respectively, are broad terms. This language is both sweeping and impressive in the papal power it asserts, and comes as close to functionally invoking England as a papal fief as possible without outright declaring this. See also SOLT, *supra* note 302, at 109.

<sup>390</sup> Eamon Duffy, *William, Cardinal Allen, 1532–1594*, 22 RECUSANT HISTORY 265, 280 (1995).

<sup>391</sup> *Id.* at 266.

<sup>392</sup> As if to underscore the reference to the events of 1588, Shakespeare has King Philip say after the French defeat that “[a] whole armado” of his ships has been lost. *KJ*, *supra* note 1, at act 2, sc. 4, l. 2.

conquest of their lands—that had distinct echoes in Pandulph.<sup>393</sup> Pandulph is portrayed as both a theologian and a lawyer, and Shakespeare gives him speeches that reflect his learning in those disciplines.

The key point is that Pandulph, like the Kings, is acting wholly in the service of Commodity.<sup>394</sup> One might have expected

<sup>393</sup> For example, Parsons had argued that because King John had sworn fealty to Pope Innocent III and had resigned the kingdoms of England and Ireland to him, England remained the “fief, feudal dependency, and tributary” of the Pope. See HOLMES, *supra* note 377, at 155–58 (1982). Pandulph alludes to John’s cession in the play when he says that after his reconciliation with Rome, John possesses the Crown “as holding of the Pope.” *KJ*, *supra* note 1, at act 5, sc. 1, l. 4.

But even if he was unacquainted with Parsons’ work, Shakespeare likely knew of John’s instrument ceding his kingdom to the Papacy. The Tudor Protestant historian John Foxe had published a translation of King John’s instrument in his widely read *BOOK OF MARTYRS*. John Foxe, *King John*, *BOOK OF MARTYRS* (1563), <http://www.exclassics.com/foxe/foxe49.htm>. And Shakespeare likely knew of the document through that source. See James H. Morey, Note, *The Death of King John in Shakespeare and Bale*, 45 *SHAKESPEARE Q.* 327, 330–31 (1994).

<sup>394</sup> Roman Cardinals and Papal legates in Elizabethan and Jacobean drama, like Cardinal Beaufort in *Henry VI* Pts. I & II, Cardinal Catesby in *Richard III*, the Cardinal of Aragon in John Webster’s *The Duchess of Malfi*, and the Cardinal of Lorraine in Christopher Marlowe’s *Massacre at Paris*, are often portrayed in a highly unattractive light. Their loyalty is also suspect. In Marlowe’s *Edward the Second*, the Archbishop of Canterbury (a Papal legate) threatens to “discharge these lords/Of duties and allegiance due” to the King unless he banishes his favorite, Gaveston. CHRISTOPHER MARLOWE, *EDWARD THE SECOND*, act 4, l. 61–62 (Charles R. Forker ed., 1995).

Anglican divines also expressed dislike of Papal legates. Bishop Jewel described them as “a crafty sort of Spies, as it were in ambush, in the Courts, Councils and Chambers of all Kings[.]” JEWEL, *supra* note 78, at 59–60. Christopher White holds up the perfidious Papal legate to Poland, Cardinal Sant’ Angelo, to scorn: the Cardinal ministered an oath to the King in a treaty with the Turks, then promptly urged the King to break it, arguing “Caesar for a Kingdome thought it lawfull to breake an Oath.” WHITE, *supra* note 312, at 48.

Pandulph has the hallmarks of these stereotypes: Shakespeare portrays him as a sceptic and Machiavellian with a pervasively naturalistic outlook. See Sidney C. Burgoyne, *Cardinal Pandulph and the “Curse of Rome”*, 4 *C. LIT.* 232, 236 (1977). In encouraging the dispirited Dauphin after the French defeat in the war he forced on France, Pandulph urges him to consider the workings of “Fortune,” not of Providence. *KJ*, *supra* note 1, at act 3, sc. 4, l. 119. He also urges the Dauphin to take comfort from the fact that John’s victory has led to the capture of Arthur—an event, he coolly and lucidly explains to the incredulous Dauphin, that “shall directly lead/The foot to England’s throne.” *Id.* at act 3, sc. 4, ll. 129–30. John will not rest easy while Arthur lives, and if the Dauphin invades, will be drawn ineluctably to kill him. But once John moves on Arthur, that evil deed “shall cool the hearts/Of all his people.” *Id.* at act 3, sc. 4, ll. 149–50. The common people, Pandulph continues, will “pluck away” the “natural cause[s]” of ordinary events, and “call them meteors, prodigies, and signs,/Abortives, presages, and tongues of heaven./ Plainly denouncing vengeance upon John.” *Id.* at act 3, sc. 4, ll. 156–59. (And this prediction does indeed come true. See *id.* at act 4, sc. 2, ll. 144–52). At that will be the moment

the representative of the Church to intervene in Anglo-French affairs for the purpose of sanctioning a treaty that, however unjust, at least prevented bloodshed. Alternatively, one might have expected Papal intervention in order to remind France of its broken pledges and to urge it to renew war on behalf of a wronged widow and her fatherless son. Neither is the case. The Papacy appears as a player in the game of European power politics. Its extraordinary effectiveness in that game comes from its unique ability and willingness to weaponize religion to serve its worldly purposes. Both in Shakespeare's play and in Shakespeare's Europe, the Papacy shows itself to be "a 'Western' power to be reckoned with in diplomatic and monarchical terms" that "[l]ike all other powers...was intent on reducing the rights of its neighbors."<sup>395</sup>

In his colloquy with John, Pandulph is brutal and direct. Once John has defied Innocent's order to install Stephen Langton as Archbishop, Pandulph hurls anathemas at him:

Then by the lawful power that I have  
Thou shalt stand cursed and excommunicate,  
And blessèd shall he be that doth revolt  
From his allegiance to an heretic,  
And meritorious shall that hand be called.  
Canonised and worshipped as a saint,  
That takes away by any secret course  
Thy hateful life.<sup>396</sup>

With Philip, however, Pandulph is somewhat less peremptory. His approach is two-fold. First, he threatens Philip, as he has threatened John, with the "peril of a curse" unless he "[l]et[s] go the hand of that arch-heretic" John "[a]nd raise the power of France upon his head."<sup>397</sup> When Philip hesitates, Pandulph

when the Dauphin may leap for John's crown: "You, in the right of Lady Blanche your wife, May then make all the claim that Arthur did." *Id.* at act 3, sc. 4, ll. 142–43. The Dauphin's failure to grasp this necessary causal sequence, Pandulph taunts him, only shows "[h]ow green you are and fresh in this old world." *Id.* at act 3, sc. 4, ll. 145–46. The Cardinal is clearly an old hand at the game of making and breaking Kings.

For Cardinal Pandulph, the world is ruled by Fortune or Necessity, not by God. His dismissal of a supernatural interpretation of events resembles the attitudes of the Stoic philosopher Cicero putting down the excitable, superstitious Casca in *Julius Caesar*, *supra* note 319, at act 1, sc. 3, ll. 34–35, or of the cynical Archbishop of Canterbury in *Henry V*, *supra* note 274, act 1, sc. 1, l. 57, for whom "miracles are ceased." See Delahunty, *supra* note 195, at 152–53.

<sup>395</sup> SAYERS, *supra* note 374, at 92.

<sup>396</sup> *KJ*, *supra* note 1, at act 3, sc. 1, ll. 172–78.

<sup>397</sup> *Id.* at act 3, sc. 1, ll. 191–94.

ratchets up.<sup>398</sup> Austria explains to Philip exactly what will result if the Church excommunicates him: “Rebellion, flat rebellion!”<sup>399</sup> The French people and nobility will not long brook an excommunicated King. Faced with that prospect, Philip surrenders and tells John, “England, I’ll fall from thee.”<sup>400</sup>

But Pandulph also pursues a second line of reasoning with Philip. He offers him a lengthy legal or casuistical argument (of thirty-four tedious lines) to show that his treaty oath is not binding.<sup>401</sup> Pandulph’s speech could easily be dismissed as gobbledy-gook, and no doubt that is how it should be performed on stage.<sup>402</sup> In all likelihood, it triggered a strongly derisive, anti-Papalist reaction in Elizabethan audiences. But let us examine it more closely.

### G. *Pandulph’s casuistry and coronation oaths*

The core of Pandulph’s reasoning is that Philip is caught in a moral conflict between two oaths, and that the only possible resolution of the conflict is for him to breach one of the oaths and fulfill the other. What are the oaths in conflict? One, plainly, is his newly-minted oath to John, in which he swore to a treaty of peace with England. Philip refers to this oath immediately before Pandulph launches into his speech: threatened by Pandulph if he attempts to “keep in peace that hand which thou dost hold,” Philip replies, “I may disjoin my hand, but not my faith.”<sup>403</sup>

The other oath is Philip’s coronation oath. According to Pandulph, this is a “vow/First made to heaven . . . to be the champion of our church.”<sup>404</sup> The two oaths are in conflict because if Philip keeps his sworn peace pact with England, he cannot

<sup>398</sup> *Id.* at act 3, sc. 1, ll. 255–61, 294–97.

<sup>399</sup> *Id.* at act 3, sc. 1, l. 298.

<sup>400</sup> *Id.* at act 3, sc. 1, l. 320.

<sup>401</sup> For a valiant attempt to parse out Pandulph’s speech line-by-line, see GERARD M. GREENEWALD, *SHAKESPEARE’S ATTITUDE TOWARDS THE CATHOLIC CHURCH IN KING JOHN* 121–39 (1938).

<sup>402</sup> See LAKE, *supra* note 1, at 218. The tortured reasoning in the Archbishop of Canterbury’s speech in *Henry V*, *supra* note 274, at act 1, sc. 2, l. 35 *et seq.*, is a similar compound of seeming legalism and unintelligibility. See Delahunty, *supra* note 195, at 142–51 (analyzing Archbishop’s speech).

<sup>403</sup> *KJ*, *supra* note 1, at act 3, sc. 1, ll. 261–62.

<sup>404</sup> *Id.* at act 3, sc. 1, ll. 265–67.

perform his earlier oath to be the Church's "champion" in the war against England that the Pope has suddenly enjoined on France.<sup>405</sup>

This conflict of sworn duties, Pandulph argues, places Philip in a kind of civil war with himself: "So mak'st thou faith an enemy to faith,/And like a civil war sett'st oath to oath,/Thy tongue against thy tongue."<sup>406</sup> Should Philip execute his oath to John and breach his coronation oath, he will have sworn "only to be forsworn/And most forsworn, to keep what thou didst swear [to John]."<sup>407</sup> In this conflict, he is bound by the earlier oath: "Therefore thy later vows, against thy first,/ Is in thyself rebellion to thyself."<sup>408</sup> "O, let thy vow/First made to heaven, first be to heaven performed,/That is, to be the champion of our church."<sup>409</sup> What ultimately resolves Philip's dilemma, Pandulph says, is "[i]t is religion that doth make vows kept,/But thou has sworn against religion."<sup>410</sup>

Pandulph's argument is by no means frivolous, despite its extreme opacity. Both Catholic and Protestant writers agreed on the special sacredness of the King's coronation oath. Indeed, the coronation oath encapsulated a complete conception of the ends of human society that was deeply sacral in character.

On the Catholic side, Robert Parsons' *Conference* observed that in the coronation of the King of France, the King was vested successively as a Priest, a Judge, and a Warrior.<sup>411</sup> Kingship embraced all three roles but, Parsons insisted, the King's religious role was the most important because the "chiefest and highest end that God and Nature appointed to every Commonwealth, was not so much the temporal felicity of the Body, as the *Supernatural* and *Everlasting* of the *Soul*."<sup>412</sup> All other functions of the "humane Commonwealth" are "ordained to

<sup>405</sup> According to Bertrand de Loque, the King's Coronation Oath makes him a guardian of the Church; hence, a King may justly wage war "for the defence of the Church, when a Prince being an enemy of God, and an Idolater would offer violence and oppresse it." LANGSAM, *supra* note 281, at 12 (quoting BERTRAND DE LOQUE, DISCOURSES OF WARRE AND SINGLE COMBAT (T. Eliot trans. 1591)).

<sup>406</sup> *KJ*, *supra* note 1, at act 3, sc. 1, ll. 263–65.

<sup>407</sup> *Id.* at act 3, sc. 1, ll. 286–87.

<sup>408</sup> *Id.* at act 3, sc. 1, ll. 288–89.

<sup>409</sup> *Id.* at act 3, sc. 1, ll. 265–67.

<sup>410</sup> *Id.* at act 3, sc. 1, ll. 279–80.

<sup>411</sup> For an analysis of Parson's account of the Coronation Oath, see HOLMES, *supra* note 377, at 149–52.

<sup>412</sup> PARSONS, *supra* note 112, at 163.



serve and be subordinate and directed” to this “*Higher End*.”<sup>413</sup> If we lose sight of this higher end, Parsons says, then we are left with a conception of human society as a mere “Assembly of Brutish Creaturs, maintained only and governed for to eat, drink and live in peace.”<sup>414</sup> Regrettably, he finds that “many Governours of our days, (though *Christians* in name,)” see no higher end “than Bodily Wealth, and a certain temporal King of Peace and Justice among their Subjects.”<sup>415</sup>

It follows, Parsons argues, that “the principal Care and Charge of a Prince and Magistrate . . . is, to look” to the higher ends of government.<sup>416</sup> And this ordering of human ends, and of the ends of government is reflected in the Coronation Oath:

[T]herefore we see that all the Princes Oaths which before you have heard recited to be made and taken by them at their *Admission* and *Coronation*, the first and principal Point of all other is about *Religion* and maintainance thereof, and according to this Oath also of Supreme Princes, not only to defend and maintain Religion by themselves in all their states, but also by their Lieutenants and under-Governours . . . .<sup>417</sup>

Parsons fortifies his argument by quoting and translating the oaths that the Roman Emperor Justinian imposed on his administrators, by which they swore “never at any time hereafter [to] be contrary” to the Church “nor suffer any other to be.”<sup>418</sup> Justinian’s oath, Parsons affirms, “hath remained for a Law and President [sic] ever since to all Posterity.”<sup>419</sup> Hence, Parsons concludes, a Prince or Magistrate who is not faithful to that duty “omitteth the first and principal part of his Charge, and committeth high Treason against his Lord and Master.”<sup>420</sup>

On the Protestant side, King James I defended a powerful conception of the King’s coronation oath that, like Parsons’, emphasized the priority of the King’s religious obligations.<sup>421</sup> In *THE TREW LAW OF FREE MONARCHIES*, James writes:

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<sup>413</sup> *Id.*

<sup>414</sup> *Id.* at 169.

<sup>415</sup> *Id.* at 164.

<sup>416</sup> *Id.* at 165–66.

<sup>417</sup> *Id.* at 167.

<sup>418</sup> *Id.* at 168.

<sup>419</sup> *Id.* at 169.

<sup>420</sup> *Id.*

<sup>421</sup> See MASON, *supra* note 180, at 227–28.

Kings are called Gods by the prophetical King *David*, because they sit upon GOD his Throne in the earth, and have the count of their administration to give unto him....[I]n the Coronation of our owne Kings, as well as of every Christian *Monarche*, they give their Oathe, first to maintaine the Religion presently professed within their countrie, according to their lawes, whereby it is established, and to punish all those that should presse to alter, or disturbe the profession thereof . . . .<sup>422</sup>

In appealing to the extraordinary weight and sanctity of Philip's coronation oath, then, Pandulph is engaging in mainstream casuistry that does not carry a specifically Roman stamp. Moreover, though Shakespeare deliberately makes his argument sound like legalistic gibberish, at its core it is a powerful and persuasive one. It was a straightforward argument that if two oaths conflicted, the incompatible commitments had to be weighed against each other, and the weightier one had to prevail.<sup>423</sup> Shakespeare's Pandulph argues very differently from the Pandulph in *TR*, who "in the name of . . . the Pope" absolves Philip of his oath to John on the grounds that the excommunicated English King is now "an heretike" with whom an oath is "unlawful."<sup>424</sup> By contrast, Protestant divines like Robert Sanderson considered oaths sworn to heretics to be binding, and criticized Catholics (and Jesuits) for maintaining the opposite.<sup>425</sup> Shakespeare's Pandulph engages in more sophisticated, less denominationally-specific, reasoning that makes no allusion to Papal authority.

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<sup>422</sup> KING JAMES VI AND I, *supra* note 51, at 64–65.

<sup>423</sup> In *All's Well that Ends Well*, Diana explains to Bertram why an oath to be true in adultery would not be binding as against the marital vow: "This has no holding,/To swear by Him whom I protest to love,/That I will work against Him." WILLIAM SHAKESPEARE, *ALL'S WELL THAT ENDS WELL*, act 4, sc. 2, ll. 27–29 (New Cambridge Shakespeare 2d ed., Russell Fraser ed., 2004). And Cloten tells Imogen in *Cymbeline* that a marital promise that constitutes a "sin against/Obedience, which you owe your father" is "no contract, none." *Cymbeline*, *supra* note 35, at act 2, sc. 3, ll. 105–09.

<sup>424</sup> *TR*, *supra* note 1, at sc. 5, ll. 1008–09.

<sup>425</sup> See SANDERSON, *supra* note 304, at 122 ("[I]t is lawfull to swear unto an Infidel, Heretick, or perjured person; it was done by the Patriarchs, *Isaac* and *Jacob*, also by *Joshua*, and the Princes of the people of *Israel*; these made leagues with strangers and Infidels, and on both sides confirmed their mutual faith by solemn oathes. *Secondly* I say, that faith given unto such is in any wise to be kept. We use to object unto Papists, that they hold *faith not to be kept with Hereticks*."). See also WHITE, *supra* note 312, at 47–48.

But even if Pandulph's reasoning is much sounder than it appears to be, it is nonetheless offered in the service of Roman power-political aims, not of spiritual ones. True, a supernatural conception of the ends of human society that is hallowed and compelling lurks hidden behind Pandulph's speech: the conception of society embedded in the coronation oath and expounded by Parsons. Pandulph has no real interest in that conception; rather, he trades on it in order to pervert it.

#### H. *Dissolution*

After Pandulph's disruption of the Anglo-French treaty, events begin to spiral out of control. France suffers defeat in its crusade against England, and Arthur falls in John's hands. As Pandulph had foreseen, John cannot bear to see the boy alive. John tries to inveigle Hubert into murdering Arthur, while maintaining plausible deniability concerning his instigation of the crime. Obviously, no monarch would wish to be seen guilty of regicide, or any crime like it.<sup>426</sup> As Macbeth reflects when

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<sup>426</sup> In Marlowe's *Edward the Second*, Queen Isabella admits to her lover Mortimer that she would like to see her husband "be dispatched and die," but only "so it were not by my means." CHRISTOPHER MARLOWE, *EDWARD THE SECOND*, sc. 22, ll. 44–45 (Charles R. Forker ed., 1995). Mortimer later authorizes Edward's murder in writing, but "cunningly": he relies on equivocation—a Latin pun—to conceal his true intent. See *id.* at sc. 24, ll. 5–15. In Webster's *Duchess of Malfi*, when Bosola comes to collect his reward from Duke Ferdinand for killing the Duchess of Malfi at Ferdinand's behest, Ferdinand disingenuously asks, "By what authority didst thou execute/This bloody sentence? . . . Did any ceremonial form of law/Doom her to not-being? Did a complete jury/Deliver her conviction up i'th' court?/Where shalt thou find this judgment registerd/Unless in hell? See: like a bloody fool/Thou'st forfeited thy life, and thou shalt die for't." JOHN WEBSTER, *DUCHESS OF MALFI* act 4, sc. 2, ll. 290–97 (John Russell Brown ed., 1994). In *King Lear*, Edmund gives an "officer" a paper whose contents are not revealed but that be a warrant for killing the imprisoned Lear and Cordelia. Edmund tells him that "thy great employment/Will not bear question," but does not overtly say that he is to commit murder. *King Lear*, *supra* note 173, at act 5, sc. 3, ll. 27–28.

John's unsuccessful attempt to evade responsibility for (what he takes to be) the murder of Arthur and to place the blame on Hubert would surely have reminded Shakespearean audiences of Queen Elizabeth I's role in the execution of Mary, Queen of Scots. Although Mary had been held for years in English captivity, she was nonetheless suspected of plotting against Elizabeth. G.R. Batho, *The Execution of Mary, Queen of Scots*, 39 SCOTTISH HIST. REV. 35, 38 (1960). In 1586, the "Babington plot" to murder Elizabeth was discovered. *Id.* The Queen's Elizabeth's Privy Council and Parliament denounced Mary as the principal conspirator in the plot. *Id.* Under pressure, Elizabeth pronounced a death sentence on Mary, but delayed its enforcement. *Id.* Elizabeth probably hoped that someone would murder Mary, so relieving her of responsibility for a fellow monarch's death. *Id.* at 38–39. Finally, on February 1, 1587, Elizabeth summoned her Secretary of State William Davison and signed the warrant for Mary's death. *Id.* at 39. Elizabeth continued to waver (or

considering killing King Duncan, regicides “but teach/Bloody instructions, which being taught, return/To plague the inventor.”<sup>427</sup> To John’s exasperation, Hubert proves slow to take the hint, but eventually yields, though not until after obtaining John’s written authorization for the deed.<sup>428</sup> Face-to-face with the innocent boy, however, Hubert feels the pangs of conscience and spares him (thus betraying John). Arthur falls to his death in an attempt to escape from prison. Although Hubert is unaware of Arthur’s fatal accident, the English earls, the common people and the Bastard all suspect him of having murdered him at John’s behest. Hubert at first conceals from John that he has left Arthur alive, and John then treacherously rounds on him as Arthur’s killer. Hubert thereupon brandishes a warrant that proves John’s “hand and seal” for what Hubert did.<sup>429</sup> John may have sought to entrap and betray Hubert, but the culture of suspicion that John has created has led Hubert to mistrust, and so outfox, him.

Meanwhile, England is drifting into civil war and foreign invasion. Horrified at what they assume is John’s murder of Arthur, the English earls decide to rise up against him. They solemnly revoke their oaths of fealty to John by swearing, on the

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purported to), but her counsellors took action, and Mary was executed on February 8. *Id.* Learning of Mary’s death, “Elizabeth reprimanded the [Privy] Council ‘exceedingly’ for carrying out the death sentence.” *Id.* Indeed, Elizabeth was “genuinely distraught . . . not at the death but at the manner of it, which, in her eyes and in those of her fellow-sovereigns, constituted sacrilege.” *Id.* In a letter to Mary’s son, James VI, Elizabeth described Mary’s death as a “miserable accident which (far contrary to my meaning) hath befallen.” Melissa Koeppen, *The True Executor of the Execution of Mary, Queen of Scots*, 6 CONSTRUCTING THE PAST 4, 8 (2005) (quoting Elizabeth I, *Letter to James*). And in what appears to be a further attempt to deflect blame, Elizabeth ordered Davison to be held prisoner in the Tower of London. Batho, *supra*, at 39. For a close review of the (sometimes murky) facts, see Melissa Koeppen, *The True Executor of the Execution of Mary, Queen of Scots*, 6 CONSTRUCTING THE PAST 4 (2005), <http://digitalcommons.iwu.edu/constructing/vol6/iss1/4>.

<sup>427</sup> *MacBeth*, *supra* note 131, at act 1, sc. 7, ll. 8–10.

<sup>428</sup> This would appear to be a death warrant for Arthur, similar to the sealed “commission” that King Claudius issues to his English subjects for Hamlet’s beheading. See *Hamlet*, *supra* note 133, at act 5, sc. 2, l. 26. But Shakespeare leaves us in some uncertainty. We hear nothing of a warrant or commission when John persuades Hubert to kill Arthur. *KJ*, *supra* note 1, at act 3, sc. 3. When the executioner accompanying Hubert into Arthur’s cell asks him to produce “your warrant [for] the deed,” *Id.* at act 4, sc. 1, l. 6, he appears to mean a warrant for *blinding*, not killing, Arthur. And so it seems when Hubert gives Arthur that “warrant” to read. *Id.* Only when Hubert shows John the “warrant” he has issued does it appear to authorize Arthur’s *execution*. *Id.* at act 4, sc. 2, ll. 206–15.

<sup>429</sup> *KJ*, *supra* note 1, at act 4, sc. 2, l. 215.

body of Arthur, to exact revenge on John. They decide to cross over to the side of the French, who have mounted an invasion of England under the Dauphin's command. And a *grande peur* is sweeping over England.<sup>430</sup> The common people are "strangely fantasied,/Possessed with rumours, full of idle dreams,/Not knowing what they fear, but full of fear."<sup>431</sup> Popular religion begins to show its force: A "prophet" from the streets of Pomfret is attracting a large following by predicting that John will lose his crown "the next Ascension Day at noon."<sup>432</sup> John glumly reflects: "My nobles leave me, and my state is braved,/Even at my gates, with ranks of foreign powers./Nay, in the body of this fleshly land,/This kingdom, this confine of blood and breath,/Hostility and civil tumult reigns/Between my conscience and my cousin's death."<sup>433</sup>

John has been reconciled with the Church, and has received Pandulph's promise to dismiss the French army. But here Pandulph is blind-sided by his former pupil, the Dauphin, who teaches a breathtaking lesson in cynicism to his old master. When Pandulph instructs the Dauphin to abandon his campaign against John, the Dauphin tells him that in the game of European power-politics that Pandulph has been playing,<sup>434</sup> Rome's protection for England no longer counts for anything. Rome is now, for France, just another sovereign State, not a higher spiritual power:

Your grace shall pardon me, I will not back.  
I am too high-born to be propertied,  
To be a secondary at control.  
Or useful servingman and instrument  
To any sovereign state throughout the world.  
Your breath first kindled the dead coals of wars  
Between this chastised kingdom and myself  
And brought in matter that should feed this fire,  
And now 'tis far too huge to be blown out  
With that same weak wind which enkindled it.  
You taught me how to know the face of right,

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<sup>430</sup> Compare GEORGES LEFEBVRE, *THE GREAT FEAR OF 1789: RURAL PANIC IN REVOLUTIONARY FRANCE* (Joan White trans., 1973).

<sup>431</sup> *KJ*, *supra* note 1, at act 4, sc. 2, ll. 143–45.

<sup>432</sup> *Id.* at act 4, sc. 2, l. 151.

<sup>433</sup> *Id.* at act 4, sc. 2, ll. 243–48.

<sup>434</sup> Fittingly, the Dauphin treats power-seeking as a game. To Pandulph, he says, "Have I not here the best cards for the game/To win this easy match played for a crown?" *Id.* at act 5, sc. 2, ll. 105–06.

'Acquainted me with interest to this land,  
 Yea, thrust this enterprise into my heart;  
 And come ye now to tell me John hath made  
 His peace with Rome? What is that peace to me?<sup>435</sup>

Tutored by Pandulph, the “green” Dauphin has ripened. He has come to claim England’s crown from John for himself, by virtue of his marriage to Blanche—exactly as Pandulph had advised him to do. In England, Rome has lost control of the nobility and the people; in France, it has lost the crown and the state. Lacking any moral standing, the Papacy is contemptuously thrust aside; Pandulph has lost his chips and is out of the game. When Pandulph asks for “leave to speak,” the Bastard brusquely interrupts, “No, I will speak,” and the Dauphin says, “We will attend to neither./ Strike up the drums, and let the tongue of war/Plead for our interest.”<sup>436</sup> The “tongue of war” silences all other voices; raw power alone governs the affairs of states.

The French army at first sweeps all before it: The Bastard tells the King, “All Kent hath yielded; nothing there holds out/But Dover Castle. London hath received,/Like a kind host, the Dauphin and his powers.”<sup>437</sup> In desperation, John makes the Bastard the commander of the royal armies. “Have thou the ordering of this present time,” John tells him.<sup>438</sup> John, in effect, has all but abdicated in favor of the Bastard in the crisis of the French invasion.

Like the earls, the Bastard has been appalled by Arthur’s death, which he too initially ascribes to Hubert. Although he defends Hubert from the earls’ attempt to kill him on the spot, the Bastard rounds on Hubert once the earls have departed:

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<sup>435</sup> *Id.* at act 5, sc. 2, ll. 78–92.

<sup>436</sup> *Id.* at act 5, sc. 2, ll. 163–65.

<sup>437</sup> *Id.* at act 5, sc. 1, ll. 30–32.

<sup>438</sup> *Id.* at act 5, sc. 1, l. 75. John’s decision to entrust the defense of his Crown to the Bastard signifies more than his confidence in his nephew. Bastards were believed to have special energy, vigor and passion—the “composition, and fierce quality” of which Edmund the Bastard speaks in *King Lear*. *King Lear*, *supra* note 173, at act 1, sc. 2, ll. 11–12. Peacham remarks in *THE COMPLETE GENTLEMAN*, *supra* note 93, at 9, that “many times,” when bastards “stand . . . in the head of the troopes,” they may “prove better then [sic] the legitimate.” John Donne attributed the supposed “spirit” of bastards to the circumstances of their conception: “those meetings in stolne love are most vehement, and so contribute more spirit then the easie and lawfull.” *JOHN DONNE, IUENILIA OR CERTAINE PARADOXES AND PROBLEMES* 31 (2d ed. 1633). The stereotype may go back to the Biblical depiction of Abraham’s illegitimate son, Ishmael, of whom the Angel of the Lord declared, “he shall be a wild man.” *Genesis* 16:12 (Geneva Bible).

Here's a good world! Knew you of this fair work?  
 Beyond the infinite and boundless reach  
 Of mercy, if thou didst this deed of death,  
 Art thou damned, Hubert.<sup>439</sup>

Hubert persuades the Bastard that he has not murdered Arthur. The disclosure plunges the Bastard into utter dismay. He gives voice to a sudden and overpowering emotion, seeming to acknowledge the legitimacy of Arthur's claim to the throne:

Go, bear him in thine arms.  
 I am amazed, methinks, and lose my way  
 Among the thorns and dangers of this world.  
 How easy dost thou take all England up!  
 From forth this morsel of dead royalty,  
 The life, the right, the truth of all this realm  
 Is fled to heaven.<sup>440</sup>

For the third and final time, the Bastard is astounded by the density of the evil in the world around him: on his first occasion in court, when he ostensibly resolves to become a royal flatterer and toady; then, after the treaty of Angiers, when he discerns the effects of "commodity" in human affairs; and finally now, when he sees that the pursuit of regal power can snuff out the life of an innocent child. His reaction on the last occasion is so heartfelt and spontaneous that it surely provides the essential clue to his true character. What moves him above all is protecting "[t]he life, the right, the truth of all this realm."

Thus, his mind turns immediately from the dead prince to the thought of England in its agony:

And England now is left  
 To tug and scramble and to part by th'teeth  
 The unowed interest of proud-swelling state.  
 Now for the bare-picked bone of majesty,  
 Doth dogged war bristle his angry crest  
 And snarleth in the gentle eyes of peace.<sup>441</sup>

Again, we can mark the moral development of the Bastard: The fierce warrior who wanted to raze Angiers to the ground now wishes for the return of "gentle peace." The Bastard sees only one way forward:

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<sup>439</sup> *KJ*, *supra* note 1, at act 4, sc. 3, ll. 116–19.

<sup>440</sup> *Id.* at act 4, sc. 3, ll. 139–45.

<sup>441</sup> *Id.* at act 4, sc. 3, ll. 145–50.

I'll to the king.  
 A thousand businesses are brief in hand,  
 And heaven itself doth frown upon the land.<sup>442</sup>

Whether John is legitimate or not, he is in *fact* England's king, and the defense of England depends on serving him. The only real alternative to John at this critical juncture is the French Lewis, and it does not even occur to the Bastard that England should be ruled by a foreign king.

So the Bastard seeks to rally John to the defense of the realm. And then he goes into combat, seeking to vanquish the French and their noble English allies. As the Bastard has foreseen, the Papal legate's intervention to end the war proves futile. The Bastard succeeds: Lord Salisbury bitterly remarks, "That misbegotten devil Falconbridge/In spite of spite, alone upholds the day."<sup>443</sup> But with the earls' defeat comes the knowledge that the French are poised to betray them. The dying French Count Melun seeks out the earls to tell them of Lewis' multiple perjuries:

Seek out King John and fall before his feet,  
 For if the French be lords of this loud day,  
 He [*i.e.*, Lewis] means to recompense the pains you take  
 By cutting off your heads. Thus hath he sworn,  
 And I with him, and many more with me,  
 Upon the altar at Saint Edmundsbury,  
 Even on that altar, where we swore to you  
 Dear amity and everlasting love.<sup>444</sup>

The English and the Bastard win the first round, helped by the destruction of the French supply fleet and the defection from the French side of the earls. But then the English too suffer an unexpected reversal: Half of the Bastard's forces are taken by the tide and devoured in the Lincoln Washes.

While the fate of his kingdom remains undecided, John lies dying, poisoned by a monk. Elizabethans lived in constant dread that their Queen might be poisoned by a Catholic or Spanish agent, and no doubt the manner of John's death struck a nerve for that reason.<sup>445</sup> In any case, it is fitting enough that the last

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<sup>442</sup> *Id.* at act 4, sc. 3, ll. 157–59.

<sup>443</sup> *Id.* at act 5, sc. 4, ll. 4–5.

<sup>444</sup> *Id.* at act 5, sc. 4, ll. 13–19.

<sup>445</sup> It was widely believed that "[u]rged on by the Pope, the Catholic powers were now committed to murder and treachery as instruments of their cause." JOHN BOSSY, *GIORDANO BRUNO AND THE EMBASSY AFFAIR* 32–33 (1992). In 1584, the Spanish Ambassador to England, Don Bernardino de Mendoza, was implicated in



great betrayal in the play is of the King himself, at the hands of the Church he at first betrayed and then befriended. John is carried out in a litter into an orchard at Swinstead Abbey, to bid farewell to his heir Prince Henry and the assembled nobility. The Bastard arrives just in time to tell the King the bad news: “The Dauphin is preparing hitherward,/Where God He knows how we shall answer him.”<sup>446</sup> Hearing this, John dies. The Bastard utters a great dirge for the dead King, expressing not only his unswerving loyalty to his uncle, but also his resolve to prevent the “perpetual shame” of foreign conquest. It is at once poignant and fiery:

Art thou gone so? I do but stay behind  
To do the office for thee of revenge,  
And then my soul shall wait on thee to heave,  
As it on earth hath been thy servant still.—  
Now, now, you stars that move in your right spheres,  
Where be your powers? Show now your mended faiths,  
And instantly return with me again  
To push destruction and perpetual shame  
Out of the weak door of our fainting land.<sup>447</sup>

At that moment, word comes that the French, through Pandulph’s offices, are seeking peace. The invasion has failed, and England has been saved.

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the “Throckmorton plot” to assassinate the Queen. Legal experts including Alberico Gentili advised the Privy Council that because Mendoza enjoyed diplomatic immunity, he could not be criminally prosecuted for conspiracy, but should be ordered to return to Spain. See Margaret Buckley, *Origins of Diplomatic Immunity in England*, 23 U. MIAMI L. REV. 349, 353 (1966); Montell Ogdon, *The Growth of Purpose in the Law of Diplomatic Immunity*, 31 AM. J. INT’L L. 449, 462–63 (1937). Nearer to the time of *KJ*’s first production, Elizabeth’s personal physician, Dr. Rodrigo Lopez, a Portuguese-Jewish fugitive from the Inquisition who had been raised as a Catholic, was accused in 1594 of having conspired with Spanish agents to poison the Queen. The Earl of Essex took the lead in investigating and prosecuting Lopez. On very dubious evidence, and despite Elizabeth’s apparent belief that he was innocent, Lopez was put to death in June 1594. See Philippa Bernard, *Roderigo Lopez, Physician to the Queen*, 15 EURO. JUDAISM 3 (1981).

In his THANKFUL REMEMBRANCE OF GOD’S MERCY, George Carleton, the Bishop of Colchester, lays out a detailed account of the “Lopez plot.” GEORGE CARLETON, THANKFUL REMEMBRANCE OF GOD’S MERCY 163 (3d rev. ed. 1627), <https://ia800203.us.archive.org/27/items/thankfvllremembr00carlrich/thankfvllremembr00carlrich.pdf>. Carleton includes an engraving of Dr. Lopez seeking a bribe for poisoning the Queen. *Id.* at 164. Carleton contends that “[t]his practice of poisoning is one of those sinnes which Popes have brought into their Church,” *id.* at 195, and that the Spanish “are found to be more bold in the practise of this sinne then others.” *Id.* at 197.

<sup>446</sup> *KJ*, *supra* note 1, at act 5, sc. 7, ll. 59–60.

<sup>447</sup> *Id.* at act 5, sc. 7, ll. 70–78.

## V. A WORLD RESTORED

We turn finally to the end of the play when, after John's death, the question of succession to the Crown returns. This is the point at which legitimacy may either be restored or, once again, lost.

There is a tense moment, immediately after John's death, when the nobles eye each other, waiting for someone to make the first move.<sup>448</sup> Will it be the Bastard, who by his personal charisma, soldierly gifts and royal (if illegitimate) birth could in justice, if not in law, claim to be king? After all, John has recognized his nephew's superior qualities and has made him generalissimo of England's forces in its defense against the invading French Dauphin's claim to John's crown. All that seems to stand between Richard and the Crown is the young Prince Henry, John's son, and the Bastard has just seen, in Arthur's death, how easily young princes can be dispatched. Indeed, as Shakespeare presents Henry, he seems to recall Arthur.<sup>449</sup> This is the Bastard's moment of probation.

Even assuming that royal bastards lacked a lawful claim to inherit the throne,<sup>450</sup> they could nonetheless present severe

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<sup>448</sup> See CHERNAIK, *supra* note 151, at 89.

<sup>449</sup> To his "ally" Austria, Arthur says, "I give you welcome with a powerless hand/But with a heart full of unstained love." *KJ*, *supra* note 1, at act 2, sc. 1, ll. 14–15. Henry, in the presence of the Bastard and the earls, says, "I have a kind soul that would give thanks,/And knows not how to do it but with tears." *Id.* at act 5, sc. 7, ll. 108–09. The difference is not in the innocent and vulnerable princes, but in the power-brokers they are addressing.

<sup>450</sup> Thus, Shakespeare's Richard III urges his accomplice Buckingham to give out that Richard's nephews are bastards, in order to preclude their claims to the throne. See *Richard III*, *supra* note 66, at act 3, sc. 5, l. 76; and at act 3, sc. 7, ll. 4–5. And, indeed, the prevailing view in Shakespeare's period was that a royal bastard could not inherit the Crown. See Anne McLaren, *Political Ideas: Two Concepts of the State*, in *THE ELIZABETHAN WORLD* 92, 96 (Susan Doran & Norman Jones eds., 2010). Thus, Elizabeth I had invalidated the marriage of Lady Katherine Grey to the Earl of Hertford in order to ensure that their children would be illegitimate, and hence ineligible to lay claim to succeed her (as they could have done under the will of Henry VIII). *Id.* at 97–98; Reese, *supra* note 1, at 63. Likewise, the Scottish royal bastard, James, Earl of Moray, was precluded from inheriting his father's throne because of his illegitimacy—as had been the rule in Scotland since the late thirteenth century. See Alexander Grant, *Royal and Magnate Bastards in the Later Middle Ages: The View from Scotland*, *COMP. STUD. IN SOC. & HIST.* 11–12, 34 (1996), [http://eprints.lancs.ac.uk/59145/1/GRANT\\_01\\_BASTARDS\\_NEW\\_EPRINT\\_REF\\_1\\_.pdf](http://eprints.lancs.ac.uk/59145/1/GRANT_01_BASTARDS_NEW_EPRINT_REF_1_.pdf). Cardinal Allen argued the Elizabeth herself was illegitimate and hence was "incapable of succession to the crown of England." WILLIAM ALLEN, AN ADMONITION TO THE NOBILITY AND PEOPLE OF ENGLAND AND IRELAND CONCERNINGE THE PRESENT VVARRES MADE FOR THE EXECUTION OF HIS HOLINES SENTENCE, BY THE HIGHE AND MIGHTIE KINGE CATHOLIKE OF SPAINE IX (1588), <https://quod.lib.um>

threats to the legitimate heirs.<sup>451</sup> “When the rules governing the succession were ill-defined might not a royal bastard be considered a possible candidate for the throne?”<sup>452</sup> And from the first, we have seen the Bastard to be bold, decisive, unafraid of risk, a “happy minion” of Fortune.<sup>453</sup>

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ich.edu/e/ebo/A16774.0001.001?rgn=main;view=fulltext. King Henry VIII seems to have considered designating his bastard son, Henry Fitzroy, Duke of Richmond and Somerset, as his heir. See LEVINE, *supra* note 114, at 54. He showered his son with significant titles and offices, appears to have considered making him King of Ireland, and contemplated marrying him into the Emperor Charles V's family. See POLLARD, *supra* note 203, at 183–84. Further, the Second Succession Act of 1536 included a clause empowering Henry to designate his successor. See LEVINE, *supra* note 114, at 66–67. Well-informed observers, including the Imperial Ambassador Eustace Chapuys, believed that Henry intended to name Fitzroy as his successor. See BEVERLEY A. MURPHY, *BASTARD PRINCE: HENRY VIII'S LOST SON 172–73* (2001). But absent such a statutory provision and a designation implementing it, Henry Fitzroy would have been barred by common law—and even then, Henry was not authorized to will his Crown away from any surviving lawful issue.

At least in standard accounts, the prohibition on the succession of royal bastards had been established in England by 1135, some two generations before King John. On those accounts, illegitimacy prevented the accession of Henry I's eldest, but illegitimate, son, Robert Earl of Gloucester, to the throne in 1135, even though Robert was popular and fit to rule. See ROBERT BARTLETT, *ENGLAND UNDER THE NORMAN AND ANGEVIN KINGS 1075–1225*, 9 (2000); Robert B. Patterson, *Anarchy in England, 1135–54: The Theory of the Constitution*, 6 ALBION 189, 192–93 (1974); see also Kathleen Thompson, *Affairs of State: The Illegitimate Children of Henry I*, 29 J. MEDIEVAL HIST. 129 (2003). “By the end of the twelfth century, Geoffrey ‘Plantagenet’s’ maternity made him a virtual non-starter” for succession to the Crown. GIVEN-WILSON & CURTEIS, *supra* note 38, at 42. Recent scholarship has modified the prevailing view. See SARA MCDUGALL, *ROYAL BASTARDS: THE BIRTH OF ILLEGITIMACY, 800–1230*, 3–9 (2017). Still, even on the revisionist view, “[b]y the thirteenth century, . . . kings, like priests, were not supposed to be children of extramarital sex . . . Kingship had become firmly associated with religious office, and by extension with ideas of legitimate birth.” *Id.* at 9.

<sup>451</sup> Thus, King James VI and I warned his own son not to follow the example of James's father James V who, “in begetting [a] bastard [James, Earl of Moray],” “bred the wracke of his lawfull daughter and heire, [Mary, Queen of Scots].” KING JAMES VI AND I, *supra* note 51, at 41. Moray was later declared legitimate and at one point was considered a possible successor to the Scottish throne and a plausible husband to Elizabeth of England. See Anne McLaren, *The Quest For a King: Gender, Marriage, and Succession in Elizabethan England*, 41 J. BRIT. STUD. 259, 274–75 (2002). He eventually became Regent of Scotland.

<sup>452</sup> GIVEN-WILSON & CURTEIS, *supra* note 38, at 17. Some Elizabethan lawyers contended that merely acceding to the Crown, in itself, cured any earlier defect, including bastardy. And both Queen Mary and her half-sister Queen Elizabeth I had come to the throne under the statutory imputation of bastardy. See NENNER, *supra* note 40, at 38–39.

<sup>453</sup> *KJ*, *supra* note 1, at act 2, sc. 2, l. 391. If the Bastard indeed had been a “Machiavellian,” he might well have tried to seize the opportunity presented by John's death. Machiavelli had taught in the famous Chapter 25 of *The Prince* that “it is better to be impetuous than cautious, because Fortune is a woman and it is necessary, in order to keep her under, to cuff and maul her. She more often lets

Yet the Bastard recognizes the force of legitimacy and law. He must believe that, as a bastard, he has no rightful claim to the Crown and, in any case, he has shown no sign whatever of desiring it. And this is so even though the Bastard knows full well that John was not legitimate: Arthur was. Nonetheless, even if John was a usurper, he had been crowned. Although his (three) coronation ceremonies did not confer legitimacy on John—he remained a usurper whose claim rested on power and possession, not legitimacy and law—the fact that Henry was the eldest son of a solemnly crowned King sustained Henry’s rightful claim to the throne.<sup>454</sup> Three coronations could not retrospectively legitimize John as King but, at least in the Bastard’s eyes, they seem to seal the succession in favor of Henry. More importantly, Henry is the eldest surviving legitimate grandson in the male line of succession to Henry II, John’s father. Thus, the Bastard enjoins Henry to “put on/The lineal state and glory of the land.”<sup>455</sup> And so Henry does.

Moreover, the Bastard wants “gentle peace” to return to England. He must realize that if he were to leap for the Crown, he would plunge England back into the civil war it is just escaping, and invite the renewal of the French invasion. He has seen firsthand what John’s illegitimacy has cost England, and as one who passionately loves the country, he does not want to be the cause of still more disasters to it. What England needs above all is internal unity against the threat of a foreign foe. Further, the Bastard has promised John on his death bed that he will “stay behind” only to “revenge” him, and that he will remain John’s servant in the afterlife as in this one. Surely he could not keep that promise to a dying man if he tried to snatch the crown away from his son. Finally, the earls have hardly been able to disguise their contempt for him in the past; he has earned the enmity of the Church; and his army has been depleted by the

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herself be overcome by men using such methods than by those who proceed coldly.” NICCOLO MACHIAVELLI, *I MACHIAVELLI: THE CHIEF WORKS AND OTHERS* 92 (Allan Gilbert ed., trans.) (1958).

<sup>454</sup> More precisely, it gives Henry a better claim to the throne than John. “As the heir of a crowned king, Henry had a better title than John; just as Henry V’s was better than his father’s.” L.A. Beaurline, *Commentary*, in WILLIAM SHAKESPEARE, *KING JOHN* 169 n.102 (L.A. Beaurline ed., 1990) (explaining the meaning of “lineal” in *KJ*, *supra* note 1, at act 5, sc. 7, l. 102); see also WILLIAM SHAKESPEARE, *THE SECOND PART OF KING HENRY THE FOURTH*, act 4, sc. 5, l. 220–22 (New Cambridge Shakespeare 2d ed., Giorgio Melchiori ed., 2007).

<sup>455</sup> *KJ*, *supra* note 1, at act 5, sc. 7, ll. 101–02.

debacle at the Lincoln Washes. The desire for peace, loyalty to his uncle, and the counsels of prudence would together thwart the drive of ambition—even if the Bastard felt that drive.

Would Henry III be the legitimate ruler if Arthur were still alive? His claim would have been doubtful—almost as doubtful as John’s, from whom Henry took his own. Moreover, if John had not actually murdered Arthur, he certainly intended and conspired to do so; and Arthur’s accidental death would surely not have happened but for John’s imprisonment of him. So Henry’s crown rests on John’s *double* wrong: first, John’s usurpation; second, John’s role in Arthur’s death. Can legitimacy really derive from such squalid sources? Shakespeare’s answer here seems to be: *Yes*.

As Shakespeare presents the scene—it is a kind of investiture—the assembled nobility acquiesces in Henry’s claim to the Crown. The English monarchy is represented as, in a certain sense, elective as well as hereditary. The King’s claim to just title depends on the support of other power-holders, not merely on right of birth. True, the King must at least *seem* to rule by lineal right unless he is a conqueror, like William of Normandy. But no less important is his acceptance by those over whom he rules—or rather, by the most powerful of them.

This is a pragmatic solution to the problem of legitimacy. Is it *too* pragmatic? Should we conclude that monarchy is simply a means by which the powerful (what we might now call “the political class”) sustains its rule? Does the form of monarchy simply enable the power holders to “go on governing as before”?<sup>456</sup>

Not, I think, as Shakespeare shows it. As Edward Shils and Michael Young argued in their celebrated 1953 article *The Meaning of the Coronation*, any stable, large-scale society depends on a “general moral consensus.”<sup>457</sup> And that consensus is personified, enacted, given substance and materiality, in the character of the Monarch. Of course, the consensus is likely to be incomplete and, of course, it can be challenged, subverted and even destroyed: It is certain to be, to some degree, precarious. But without a “fairly far-reaching agreement on fundamental standards and beliefs,” the society cannot hold together.<sup>458</sup> John

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<sup>456</sup> Edward Shils & Michael Young, *The Meaning of the Coronation*, 1 SOC. REV. 63, 64 (1953), <http://journals.sagepub.com/doi/pdf/10.1111/j.1467-954X.1953.tb00953.x>.

<sup>457</sup> *Id.* at 65.

<sup>458</sup> *Id.*

could not embody that consensus because he himself too obviously deviated from, and outraged, it. But Henry can, or at least might, embody it. That is the note on which the play concludes.

Legitimacy, Shakespeare is demonstrating, cannot be *merely* a question of power or possession.<sup>459</sup> Constance's bitter comment after the French King has abandoned her son Arthur's cause—that "*he that holds the kingdom holds the law*"<sup>460</sup>—is in fact emphatically *not* the "grim truth."<sup>461</sup> The entire action of *KJ*, from beginning to end, tells against it.

#### CONCLUSION

In *KJ*, Shakespeare presents us with a world pervaded, like that of Hobbes, with "a perpetual and restless desire of power after power, that ceaseth only in death." That world is unstable and cannot last. The relentless pursuit of power leads only to ever greater extremes of violence. Promises and oaths are broken as lightly as they are given. In a world where words are worthless, social trust collapses. England under John is successively wracked by Papal interdiction, foreign invasion, domestic unrest and civil war.

What is missing is a sense of solidarity, of common purposes, values and commitments, of a shared way of life. John's England must recover that sense, or it will "[l]ie at the proud foot of a conqueror."<sup>462</sup> The Bastard's mission is to restore the sense of a national community.

England faces three mortal enemies: the Papacy; France; and its own internal dissidents, the earls. Only the monarchy is capable of holding all three in check. To the Papacy, the monarch can say, "we under God are supreme head."<sup>463</sup> To France, it can threaten "rage . . . [t]hat nothing can allay, nothing but blood, / The blood and dearest-valued blood of France."<sup>464</sup> And it can tell its traitorous nobility to "blush for shame," for they are

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<sup>459</sup> Even after John's *second* coronation, his nobles hint—to his face—at his illegitimacy: "If what in rest you have in right you hold . . ." *KJ*, *supra* note 1, at act 4, sc. 2, l. 55 (emphasis added).

<sup>460</sup> *Id.* at act 3, sc. 1, l. 188.

<sup>461</sup> Sigurd Burckhardt, *King John: The Ordering of this Present Time*, 33 *ELH* 133, 145 (1966).

<sup>462</sup> *KJ*, *supra* note 1, at act 5, sc. 7, l. 113.

<sup>463</sup> *Id.* at act 3, sc. 1, l. 155.

<sup>464</sup> *Id.* at act 3, sc. 1, ll. 341–43.

“degenerate . . . ingrate revolts . . . ripping up the womb/Of your dear mother England.”<sup>465</sup> To serve England, then, one must serve the monarchy. And the Bastard unswervingly does that.

The play thus presents English nationalism as a unifying, integrative force, opposing both foreign threats and internal dissolution. Indeed, it appears to be the only force that can resist the corrosive effects of “Commodity” as restless power-seeking. In this play, nationalism does the work that religion signally fails to do. Religion in this play is in a state of final decay. At the level of Kings, Cardinals, and Princes, it is a cynical game of power politics; at the level of the people of Pomfret, it is apocalyptic terror.<sup>466</sup>

The restoration of the national community is largely the work of the Bastard—who is essentially a figure of Shakespeare’s invention, not of history. The Bastard is a liminal figure, with one foot in the feudal past and one foot in modernity. He is both illegitimate and legitimate, both the son of a great English King and the product of the Midlands *petite noblesse*, an adventurer and soldier of fortune, but also a man who willingly gives away a comfortable estate for the sake of honor. He is, so to say, a fusion of Wolsey and Hotspur. On the one hand, he resembles an efficient, centralizing Tudor administrator, bound to the King by the very fact of his uncertain origins, energetically enforcing the King’s orders, carrying out his confiscations, mobilizing and captaining his armies. On the other hand, he resembles a proud, provincial nobleman of ancient lineage, devoted to feudal violence and personal honor. Shakespeare seems to have meant him to be a kind of epitome of Tudor England, mindful of its medieval past, but preparing to encounter the modern age.

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<sup>465</sup> *Id.* at act 5, sc. 2, ll. 151–53. This is the Bastard speaking, but as he says, John’s “royalty doth speak in me.” *Id.* at act 5, sc. 2, l. 129.

<sup>466</sup> There is an exception to this: the dying Count Melun speaks movingly and with the voice of true piety. See JONES, *supra* note 3, at 236–37.