

Saint John's Law Review
Spring 1998

Articles

***237 CAN FORMALISM CONVEY JUSTICE? - OATHS, "DEEDS," & OTHER LEGAL SPEECH
ACTS IN FOUR ENGLISH RENAISSANCE PLAYS**

Andrew N. Adler [FNa1]

Copyright © 1998 St. John's Law Review Association; Andrew N. Adler

Table of Contents

I.	Introduction	238
II.	Oaths as Speech Acts	242
	A. Introduction to Speech Act Theory ..	242
	B. Oaths	244
III.	Formalism & Equity	246
IV.	The Revenger's Tragedy	250
	A. Relevant Plot Summary	250
	B. Discussion	251
V.	Arden of Faversham	259
	A. Relevant Plot Summary	259
	B. Discussion	260
VI.	Every Man in His Humour	272
	A. Relevant Plot Summary	272
	B. Discussion	273
VII.	Volpone	279
	A. Relevant Plot Summary	279
	B. Discussion	280

VIII. Conclusion 289

***238** I. Introduction

At one time, a person's solemn oath was taken very seriously by the English legal system. Indeed, for many centuries, the system relied upon oaths as unassailable proof of veracity. An Englishman haled into court for allegedly owing a debt had the option of trial by "wager of law." [FN1] If this defendant swore that he did not owe the money and could find eleven people to testify to his credibility, then the defendant would automatically win. Nobody cross-examined the vow-takers, for the tribunals assumed that very few people would lie under oath. [FN2] After all, one's immortal soul stood at risk.

But, as professional oath-takers increasingly constellated at the courthouse doors, wager of law became a subject ripe for ridicule. In Slade's Case, [FN3] the famous lawsuit culminating in 1602, Edward Coke helped to convince the royal judges to curtail wager in their courts when he asserted that, "experience now proves that men's consciences grow so large that the respect of their private advantage rather induces men to perjury." [FN4] At around the same date, the government also began gradually to reduce its reliance on oaths of allegiance. [FN5]

Yet suspicion about the efficacy of oaths began long before ***239** 1602, [FN6] and the procedural reform that effectively installed the jury system in place of trial by oath-taking actually encouraged a new tide of perjury. [FN7] On the other hand, the ritual of swearing apparently sufficed to assure the honesty of many Britons into the seventeenth century and beyond. [FN8] Thus, it is argued, the controversy in Slade's Case demarcates, at most, one of many perceived crises in a continuing battle against lies in the courtroom.

Still, English theater in the decade before and following Slade's Case dramatizes a suspicion of oaths while exploring alternative possibilities for securing reliable evidence in a world which may have seemed increasingly devoid of trust and piety. This Article will consider four major plays--Arden of Faversham, The Revenger's Tragedy, Every Man in His Humour, and Volpone. In each, the oath can be juxtaposed against some other form of legal "speech act" [FN9] serving, in effect, as an oath-substitute. Such substitutes often consist of solemnly-made written texts, such as legislation and other official decrees, or privately signed and sealed documents. Other oath-substitutes include the confession ***240** and the signet ring. Each of these types of legal speech act will be discussed as it arises in the context of the plays below. While each of the oath substitutes is distinct, there exists an overarching similarity among them, namely, each device attempts to prevent perjury and uncertainty through greater formalism than the mere spoken oath permits.

In practice, any formal method may prove more flexible and more unpredictable than anticipated. Yet whether or not the inherent plasticity of formalism engenders justice is another matter, and the four plays enact various aspects of the interrelationship: The Revenger's Tragedy and Volpone, for example, arguably

show that flexibility of law leaves room for abuse. In contrast, Arden of Faversham demonstrates that inflexibility also aids the unscrupulous, while Every Man in His Humour paints another nuanced picture of formalism in tension with justice.

This Article hopes to achieve two objectives. First, it tries to show how literature can offer insights into legal issues. We will see that oath-substitutes gained ascendance in a climate of serious debate within the legal profession. Yet these four great plays demonstrate, in an irreducibly literary environment, some major premises, critiques, and conclusions of the legal debate. Indeed, as will be discussed below, the plays arguably anticipate a famous solution offered years later by the legal profession. [FN10] However, the fundamental difficulties remain to this day and force us to re-investigate the underlying questions--what is justice? and how is it tied to conventions of language? This Article asserts that drama may assist us in answering these questions, as the theatrical perspective actually directs our attention to speech-act material: on stage, actors can capture the full force of words through their gestures and intonation, and a written dramatic text often sets the stage, as it were, provoking the reader to construct a performance from the action-oriented words. [FN11] Moreover, while we cannot entirely reconstruct the modes of performance and reception of four-hundred-year old texts, it seems that Renaissance audiences and playwrights had a particularly *241 keen appreciation of legal issues. [FN12] In fact, some evidence exists that Thomas Middleton [FN13] and Ben Jonson [FN14] became deeply involved with the jurisprudence of their day. [FN15] By analyzing these plays within their historical environment, we might learn from their sagacity. [FN16]

This Article's second objective is to advance our understanding of these plays as literary texts. Many critics have produced brilliant analyses of each, yet quite a few interpretations are marred by a relatively weak grasp of the plays' legal allusions. Much remains to be explored by scholars trained in law schools. [FN17]

*242 Before turning serially to each of the specific plays, this Article briefly analyzes oaths via the apparatus of speech act theory (Part II) and outlines the merits and failings of legal formalism (Part III).

II. Oaths as Speech Acts

A. Introduction to Speech Act Theory

This Article makes use of several key terms, defined here and illustrated in an example below. A speech act is a statement which, by its very utterance (oral or written), puts into effect the contents of the utterance. Thus, a speech act does something, such as asking, commanding, or promising. [FN18] Performative utterance is a synonym for speech act. [FN19] Felicity conditions are the set of conditions necessary for the statement to function as a speech act; [FN20] while perlocutionary consequences are those consequences which may result from a successful speech act. [FN21] A misfire occurs when not all of the felicity conditions are present. Finally, a statement is said to have proleptic force if the statement will produce some predictable consequences.

(Cite as: 72 St. John's L. Rev. 237)

A classic example of a speech act is the legally-operative words exchanged in a wedding ceremony which by their very utterance join the couple in matrimony if all relevant felicity conditions are present. Throughout some centuries of English history, the couple married themselves with the exchange of the words, "I take thee to be my lawful wedded wife [or husband]" or by responding "I do" to the familiar inquiry "Do you take" Almost all speech act theorists suggest that the wedding officiant's statement, "I hereby pronounce you husband and wife," constitutes an even better example of a speech act. [FN22] In English Canon law, however, it makes absolutely no difference to the validity of *243 the marriage whether or not the priest said these words. [FN23]

For an example, then, let us imagine a couple in twelfth century England. In front of a priest, each member of a couple recites the "I take thee . . ." formula. This exchange of words marries the couple, if and only if relevant felicity conditions obtain. Such conditions include that one member of the couple is a man and the other member is a woman, and that the utterances are not made in the context of a theatrical production.

The perlocutionary consequences of this speech act include that the children of the couple are deemed "legitimate," and so forth, although perlocutionary consequences can encompass less likely or less foreseeable effects, such as the potential deterioration in the couple's relationships with their unmarried friends. A misfire would occur if, for example, the statements were uttered as part of a staged drama--then, the actor-"bridegroom" and the actor-"bride" would not be married merely by any exchange of words.

John Searle [FN24] helpfully distinguishes five broad classes of speech acts: assertives, also known as constatives, which commit the speaker to the truth of the proposition asserted (e.g., "I swear that . . ."); directives, which attempt to get the listener to do something (e.g., "I order you to . . ."); commissives, committing the speaker to a future course of action (e.g., "I swear to . . ."); expressives, which comprise conventional acts such as thanking, greeting, and congratulating; and declarations, those acts which, if performed felicitously, actually bring about the state of affairs proposed (e.g., marrying a couple). [FN25]

This Article follows the so-called conventionalist strand of speech act theory in asserting that societal protocol defines the *244 felicity conditions of any given speech act. [FN26] To be effective, a speech act must "count as" a particular kind of communally understood commitment or undertaking. [FN27] Hence, in the words of Sandy Petrey, "[t]o know whether a marriage has been performed, . . . we must also know the conventions observed by a community where the words were spoken." [FN28]

B. Oaths

In Searle's nomenclature, oaths constitute a commissive/constative hybrid. Myron Gochnauer applies Searle's framework and consequently suggests that the felicity of an oath depends in part upon the subjective intentions of the speaker. [FN29] However, when discussing the speech of dramatic characters who

(Cite as: 72 St. John's L. Rev. 237)

do not issue soul-searching soliloquies, it is important to examine the speakers' objective manifestations of intent. This position reflects the conception of intention most helpful for reading literature. [FN30]

Since "word is bond" represented the "master figure by which feudal society defined itself," [FN31] layers of supplemental conventions coalesced around the core concept of keeping one's solemn pledge. *245 The best playwrights exploit and challenge the old conventions, and thus force spectators to question the essential (felicity) conditions for, and the perlocutionary consequences of, "correctly" taking an oath.

For example, one key convention submits that a coerced oath never binds the speaker in the eyes of God. If a dramatic character apparently breaks his vow without retribution, an audience member who knows the conventions of oath-taking can work backwards and form the hypothesis that the character did not undertake the oath voluntarily at the outset. Yet perhaps the character instead has merely used the (minor amount of) coercion present at his vow-taking as an excuse to repudiate his promise. [FN32] In that case, the play interrogates the convention that God punishes the repudiator.

Clearly, however, a character's oath or curse might have proleptic force that extends beyond the supernatural. First, natural causes can often explain why individuals attempt or are compelled by others to keep their promises. For instance, legal action for breach of contract or perjury may provide the motivation needed to bind a speaker. In addition to such expected perlocutionary effects, we might also anticipate rhetorical or structural consequences for the dramatic action. For example, if three different characters, as opposed to just one, declare the same oath verbatim, the likelihood that the oath will succeed often rises. [FN33]

*246 III. Formalism & Equity

The oath-substitutes considered below are more formal than oaths because in all contexts they demand relatively rigid felicity conditions in the hope of attaining mechanically deducible outcomes in a whole class of cases. [FN34] The "seal" may serve to exemplify legal formality: affixing a wax impression of one's personal seal upon certain contracts and titles to real estate used to self-authenticate those documents. [FN35] In medieval England, once a person sealed documents, he could not easily dispute their contents or escape the obligations that the sealed writing imposed.

'Now when anyone in court puts in as proof of his debt a charter made by the other party or some ancestor of his, the other party either acknowledges the charter or does not. If the debtor does not acknowledge the charter, he may deny or contradict it in two ways: either by admitting in court that the seal is his but denying that the charter was made by, or with the consent of, himself or his ancestor, or by denying completely both seal and charter.

In the first case, where he acknowledges the seal publicly in court, he is strictly bound to warrant the charter and to observe without question the agreement set out in the charter as it is contained therein; and he should blame his own poor custody if he suffers damage because his seal was poorly kept.' [FN36]

Seals played a mandatory role in many solemn transactions; for example, a person could not transfer land without sealing the transfer instrument. [FN37] Consistent with this regime of severe formalism, if the seal physically fell off or mice ate it, the instrument *247 ostensibly ceased to carry legal force. [FN38]

A legal system may favor such formalism for a number of related reasons. First, the solemn ceremony involved in attaching a seal "visibly demonstrate[s] the serious nature of certain promises . . . providing security, stability, and certainty." [FN39] People attribute importance to ultra-formalized rituals for the same reasons that apply, to a lesser degree, to public oath-taking: God is watching, and prevailing convention accepts the ritual as the way to accomplish a particular goal. [FN40] Second, sealed writings and the like provide relatively trustworthy evidence of the existence and content of a promise, independent of witnesses' biased recollections. [FN41] As one 1541 case opined, oral communication is "naked breath." [FN42] Third, because formalities require time (e.g., heating and impressing the wax), they help individuals to think before they act. [FN43] Ideally, people will bother to seal (and hence potentially enforce) only socially useful transactions. [FN44] In the process, the parties might even clarify details not contained in their informal negotiations. [FN45] Fourth, formalism promotes predictable results. An objective test of enforceability and a visible sign of authenticity help draw a bright line that laymen and lawyers alike can use to settle disputes quickly, without resorting to convoluted and resource-consuming questions about the parties' *248 intentions and other extraformal matters. Such predictability leads to economic efficiency and security in personal affairs. [FN46]

Yet once someone invokes the legal system to support formalism, injustice and inefficiency can follow. As mentioned above, formalism is affiliated with two opposing kinds of judicial failure--overzealous inflexibility and hidden flexibility. On the one hand, judges who always strive to avoid doctrinal loopholes effectively bolster overreaching and fraud (e.g., the victimization of gullible people who sign misleading papers). On the other hand, judges who find or create loopholes foster unpredictable and arbitrary outcomes. Recent commentators therefore tend to encourage judges to abandon the pretense that legal decisions can be totalized or contained by pre-existing, formalized structure and instead to acknowledge responsibility for advancing justice. As Derrida states,

A decision can only come into being in a space that exceeds the calculable program that would destroy all responsibility by transforming it into a programmable effect of determinate causes . . . Even if a decision seems to take only a second and not to be preceded by any deliberation, it is structured by this experience and experiment [experience] of the undecidable. [FN47]

But, a few astute scholars also insist that formalism works precisely because many non-lawyers and lawyers rely upon the illusion of determinacy in providing a stable, efficient basis for commercial and private transactions. [FN48] Hence, encouraging judges to introspect or to candidly admit the diverse underlying rationales for their holdings may not only awaken malevolent judges to new ways of twisting the system, but the strategy may provoke a self-fulfilling trend toward intolerable uncertainty. [FN49]

This discussion touches upon only some of the issues regarding the relative advantages and problems with evidentiary formalism. Clearly, however, no facile solution emerges. Hence, it should not be surprising that the English legal system became embroiled in a centuries-long debate about the proper place of *249 "equity." It was not primitive incomprehension which prompted the central common-law courts to lag behind the local courts and the Lord Chancellor in recognizing remedies for fraud and duress, [FN50] but rather the sophisticated pro-formalist stance of the common law courts. Indeed, both the common law and equity courts really shared the same problem: how best to balance formalist and anti-formalist visions. [FN51] We should not, then, fault the plays under consideration in this Article for ignoring the jurisdiction of equity. [FN52] Besides the fact that the Chancery had limited power and could not, for instance, reverse legislation or upset a wager of law tainted by perjury, [FN53] plays that perceptively anatomize formalism indirectly comment upon what occurs in formalism's absence.

Furthermore, the plays' concentration on formalism brings out some important insights about the practice of judging. One such insight investigates how the law establishes itself upon certain fictions, especially those which ignore the potential failures of formalism. The most important fiction probed in the four plays, which we might label the "fiction of self-authentication," maintains that a legal speech act will be given full and immediate effect. Typically, characters fantasize that once legislators enact a statute or once a landowner seals and delivers title to property, the law will be enforced--every word inviolate.

Enormous problems inhere in this perspective. Even under the best circumstances, agents need to interpret the words. Once *250 again Derrida perceives the fundamental danger:

[O]ne cannot reach the law, and in order to have a rapport of respect with it, one must not have a rapport with the law, one must interrupt the relation. One must enter into relation only with the law's representatives, its examples, its guardians. And these are interrupters as well as messengers. [FN54]

Essentially, no matter how precise the felicity conditions, a performative utterance can misfire. Moreover, as time elapses and circumstances change, the interpretive task imposed upon the law's representatives becomes more burdensome. In fact, delegation may actuate a crisis of authority and obliterate the advantages of formalism, especially if the agents deliberately read the message in a perverse or uncooperative fashion. [FN55] Yet, the law does not acknowledge the crisis.

IV. The Revenger's Tragedy

A. Relevant Plot Summary

The Revenger's Tragedy [FN56] was probably written by Thomas Middleton, although its authorship has also been credited to Cyril Tourneur. [FN57] The play was first performed around 1607. In the play, set in Italy, Vindice vows to avenge the assassination of his betrothed at the hands of the lecherous Duke.

(Cite as: 72 St. John's L. Rev. 237)

Vindice's brother, Hippolito, adds fresh motivation by reporting that he has been asked by Lussurioso, the Duke's heir, to get Vindice's and Hippolito's sister (Castiza) to sleep with Lussurioso. Vindice *251 at once sees the possibility of revenge in this situation: he disguises himself as the procurer Piato and gains access to the ducal household. Disguised, he also tempts the virtue of his sister, who spurns Lussurioso's suit, although their mother tries to persuade her to yield.

The sons of the newly-married Duchess (Ambizioso, Supervacuo, and Younger Son) are as evil as their stepbrothers (Lussurioso and the bastard, Spurio). Their misdeeds are described below. Vindice and Hippolito succeed in poisoning the Duke. Later, during the celebrations of his succession to the dukedom, Lussurioso is murdered by the same pair, who are aided by fellow conspirators. Ambizioso, Supervacuo, and Spurio also die violently in the ensuing confusion, after which Vindice and Hippolito, expecting the gratitude of the newly-elevated duke, Antonio, confess to the old Duke's assassination. But Antonio, fearful of their future intentions, orders their immediate execution.

B. Discussion

In *The Revenger's Tragedy*, agents' treachery and misinterpretation contaminate several formal speech acts. This dynamic operates repeatedly, beginning in the first act, when the judges begin to pronounce a death sentence upon Younger Son, the unrepentant rapist. One judge commences, "This be the sentence . . . Confirmed, this be the doom irrevocable." (I.ii.67, 76). The Duchess realizes that, under normal circumstances, the judges' words kill. Thus, she begs the judges not to complete their sentence (a sentence is both a grammatical unit and a penalty meted out): "Death too soon steals out of a lawyer's lip." (I.ii.69). [FN58] But, at the last moment, the Duke issues his first command of the play: "Hold, hold my lord . . . We will defer the judgement till next sitting" (I.ii.82, 84). This deferral of judgment, which causes the judge's speech act to fail, opens up a space for "flattery and bribes" (I.ii.90) to corrupt subsequent official procedures.

*252 The problem of the deceitful agent is exemplified in the memorable scene where Vindice, disguised as Piato, has poisoned the Duke. The dying Duke calls desperately to Hippolito, then quickly learns that Hippolito has conspired all along with Piato:

Duke: Oh Hippolito--call treason!

Hippolito: Yes my good lord. Treason, treason, treason!

[Stamping on him.]

Duke: Then I'm betrayed. (III.v.154-56).

Here, the agent dutifully calls treason as commanded, yet by mockingly taking the performative power of the command to its extreme, he commits treason by (and while) saying the word. [FN59]

Many characters notice such perversions of command and long for an incorruptible agent. The Duchess appeals to Heaven, the "unbribed everlasting law" (I.ii.162), and both Hippolito and Vindice swear upon their swords, their "bribeless officer[s]." (I.iv.57; cf. I.iii.174). In Hippolito's case, at least, one may doubt the oath's efficacy. When Hippolito tries to "bind [his

(Cite as: 72 St. John's L. Rev. 237)

friends] all in steel to bind [them] surely," they respond, "[w]e swear it and will act it." (I.iv.58, 65). This formula concedes that the oath alone does not guarantee action. As J. Hillis Miller notes, the unreliable initial promise seems to demand a second performative--the intention to keep and act upon the promise. [FN60]

The oath-taking conspirators do successfully revolt against the ducal authority, once they "prepare for deeds, [and] let other times have words." (V.ii.29). The revenge apparently fulfills Vindice's promise to his sword. By conventions of the day, Vindice might gain release from his unnatural vow to Lussurioso to prostitute his own sister (I.iii.160-65), while Vindice's own, arguably moral, promise of revenge receives supernatural proleptic force. In this light, the play conceivably reflects a "deeply moral and deeply traditional" [FN61] viewpoint.

***253** This interpretation, however, is not wholly convincing. As the conspirators accomplish their revenge in Act V, Scene iii, strange portents (thunder and a comet) signal a divine presence. But, few critics believe that these portents demonstrate approval of blood-letting. [FN62] God might be watching, but the principal characters pay Him lip service at best. Indeed, a number of critics contend that "[c]raft, not morality, distinguishes Vindice from his enemies." [FN63] In particular, one study remarks that Vindice's fall into corruption accelerates when he vows to seduce his sister and mother: "Through his oath, [Vindice] has thrust himself into the dilemma of being damned if he does not attempt the seduction or damned if he makes the vicious trial of his mother's and sister's virtues." [FN64]

Let us now return to oath-substitutes. With one exception, the official, juristic speech acts in *The Revenger's Tragedy* all fail spectacularly in inception or effect. Consider the key scenes in which Ambitioso and Supervacuo attempt to have their stepbrother Lussurioso executed [FN65] and their brother Younger Son released from prison. First, they urge the Duke to forgive Lussurioso, in the expectation that their pleas will promote the opposite effect. The crafty ruler perceives their stratagem yet initially plays along:

Duke: You have prevailed

My wrath, like flaming wax hath spent itself, . . .

Go, let him be released. . . .

Go, let him be released. (II.iii.91-93, 96). ***254** So far, the Duke has issued two commands, the first passive and the second active. When pressed more explicitly by Ambitioso and Supervacuo, however, the Duke pretends to change his mind and issues the following statement to them:

Here then receive this signet;

Doom shall pass. Direct it to the judges.

He shall die ere many days;--make haste. (II.iii.100-03).

The plotting brothers have good reason to believe that they have obtained some measure of control over their stepbrother's destiny, for they now hold the Duke's signet ring. As in the case of the Chancery seal matrix, discussed below, [FN66] whoever physically possessed the signet ring held the same legal

(Cite as: 72 St. John's L. Rev. 237)

authority as the ring's original owner. Yet, since Supervacuo is a corrupt agent himself, he understands that if the enormous power of the ring is again delegated, it can again be subverted:

[I]f the signet come
 Unto the judge's hands, why then his doom
 Will be deferred till sittings and Court-days,
 Juries and further; faiths are bought and sold,
 Oaths in these days are but the skin of gold. (III.i.3-7).

That is, the signet conjures no more lasting purchase upon events than would a spoken oath. Therefore, Supervacuo and Ambitioso circumvent the judges, deliberately "mistaking" their father's meaning and directly addressing the wardens:

Ambitioso: Officers, here's the duke's signet, your firm warrant, Brings the command of present death along with it Unto our brother the duke's son. . . . (III.iii.1-3).

At this point, the conspirators have deliberately enhanced the odds for fatal consequences of the Duke's speech act, for the sub-agents (i.e., the wardens) have not been bribed. Indeed, the wardens give many assurances that they will obey the "warrant" immediately and without reflection. (III.iii.8, 15-16, 27). [FN67] As is intimated also in Arden of Faversham, a duly executed (signed) ***255** death warrant usually effectively "executes" its victim, for its wording typically is relatively unambiguous and directed at relatively cooperative interpreters.

The Revenger's Tragedy, however, ingeniously explores the extraordinary case of the failed death warrant. [FN68] It first demonstrates the typical case--a speech act that actually succeeds from beginning to end. As soon as the brothers leave his presence, the Duke objectively manifests his true intentions to some noblemen who genuinely sue for Lussurioso's deliverance: "Rise my lords, your knees sign his release: / We freely pardon him." (II.iii.122-23). Unbeknownst to the two plotting brothers, the nobles then remove Lussurioso from prison. (III.ii). Notice, here, how the pardon operates. First, the Duke forms a signifying intention at a particular moment (he signals that he desires the prisoner released). Second, he formalizes his intention via a stylized command and a signature. [FN69] That is, the Duke deems the suitors' act of kneeling to function as an authorized (if non-customary [FN70]) signature. We never learn exactly how the prisoner obtains freedom on the basis of the Duke's words and the "signature." They yield the magical power of an idealized speech act.

In contrast, conditions are amiss from the start of the scene between the Duke and the two conspiring brothers. While the Duke guesses the brothers' concealed intentions, they do not guess his. He wants Lussurioso pardoned; however, his spoken ***256** words imply that he wants Lussurioso to die soon. Exactly how soon remains ambiguous--"ere many days" (II.iii.103)--although the audience knows that the Duke believes that he will obtain Lussurioso's release in a matter of minutes. Even more improvidently, the Duke gives away his signet ring, the "powerful token" (III.iv.41) which functions as an unconditional signature. Consequently, the Duke's intentions wither away. The ring cannot begin to ventriloquize them, and he now falls prey to his interpreters. Notice, then, how the two scenes of pardoning juxtapose a "serious" and a "non-serious" performative, thus illustrating the parasitic relationship between the two kinds

of speech act. [FN71]

We have left Supervacuo and Ambitioso at the prison gates, where they contemptuously call the wardens "[f]ine fools in office" (III.iii.27) for harkening so briskly to the spurious death warrant. Meanwhile, the conspiring brothers have sent a letter to Younger Son, the imprisoned brother whom they have vowed to free. [FN72] The letter reads: "Brother, be of good cheer . . . Thou shalt not be long a prisoner . . . We have thought upon a device to get thee out by a trick." (III.iv.8, 10, 12).

But, the audience already suspects an irony. We know that Lussurioso has already left his cell, and soon we will survey the full extent to which the conspiring brothers themselves stand as "foolish officers" at the mercy of their own cooperative sub-agents' misreadings. It turns out that the wardens interpret Ambitioso's command--to execute "our brother, the Duke's son" (III.iii.3)--to refer to Younger Son. When Younger Son demands verification directly from his older brothers, the guards repeatedly assure him that the signet ring, along with their memory of his brothers' words, suffices to authorize Younger Son's death. (III.iv.43, 50, 55). Next, a prison guard (mis)interprets the letter. For instance, "Thou shalt not be long a prisoner" (III.iv.62) is deemed true because Younger Son is about to die. Younger Son is, of course, horrified by this analysis, and he proclaims, "A villainous Duns [FN73] upon the letter: knavish exposition!" (III.iv.62). *257 Younger Son thus learns that "textualism"--whereby the interpreter refuses to consider extratextual data--comprises an positively disastrous hermeneutical technique. The fact that such literal or "plain meaning" interpretation then enjoyed and still enjoys widespread usage in legal circles [FN74] adds a sense of urgency to the scene.

The fable of misinterpretation culminates in Act III, Scene vi, which opens with Ambitioso and Supervacuo arguing about who should take credit for contriving the plot to dispatch Lussurioso. (The two still believe that the scheme has worked.) Ambitioso claims that, while Supervacuo first articulated the plot, Ambitioso independently formulated the idea:

Ambitioso: Sir, I say 'twas in my head.

Supervacuo: Ay, like your brains then: Ne'er to come out as long as you lived. (III.vi.12-14).

Next, Ambitioso alludes to his own bright idea:

Ambitioso: This night our younger brother shall out of prison: I have a trick.

Supervacuo: A trick? Prithee what is't?

Ambitioso: We'll get him out by a wile.

Supervacuo: Prithee what wile?

*258 Ambitioso: No sir you shall not know it till it be done,
For then you'd swear 'twere yours.

[Enter an officer with a bleeding head in his hand.] (III.vi.26-29).

Ambitioso propounds the absurdity of believing a person's oath concerning that person's unspoken intentions. This view aligns, of course, with speech-act theorists who deny the relevance of subjective intent, and it aligns well with the scene just prior, in which two other conspiring brothers discuss the aspirations for and reality of swearing upon inner thoughts:

(Cite as: 72 St. John's L. Rev. 237)

Hippolito: Prithee tell me Why may not I partake with you? You vowed once To give me share to every tragic thought.

Vindice: By th' Mass I think I did too: Then I'll divide it to thee. The old duke, Thinking my outward shape and inward heart Are cut out of one piece--for he that prates his secrets, His heart stands o' the outside--hires me by price. (III.v.4-11).

This Article's analysis of legal performatives helps to show unity within the play in another way, too, for it links heretofore unexplored portions of the text to the theme of bastardy and counterfeiting in *The Revenger's Tragedy* recently charted by Michael Neill. [FN75] Neill explains why counterfeiting became a capital offense in the most serious sense of that phrase:

Impressed upon a coin, the image of a monarch authenticates and protects the integrity of the coinage while simultaneously expressing its intrinsic value: the coin is stamped with the king's authority as the son is stamped with the authenticating features of his father. Thus offenses such as clipping, gilding, restamping, and counterfeiting . . . amounted to iconoclastic degradation of the royal image and a bastardizing usurpation of royal authority. The excessive anxiety that attaches to such activities in the early modern period, however, reflects the beginnings of a major shift from an intrinsic to a representational notion of money value which significantly destabilized what had been felt as a fixed and essential relationship between the royal image and the value of the currency on which it was displayed. [FN76]

Analogously, speech acts risk destabilizing the law because *259 they cannot guarantee essential authority after they are delivered to "representatives" (i.e., agents). J. Hillis Miller must have pondered this insecurity when he compared performatives, and particularly promises, to counterfeit coins. [FN77] In theater replete with references to counterfeiting, the same understanding may lie in *Supervacuo's* declaration that courtroom "[o]aths in these days are but the skin of gold." (III.i.6). This line conveys not only that jurors accept bribes but also, more subtly, that perjury--a form of counterfeiting--flouts the monarch's authority.

Additionally, as Younger Son's wardens lead him to execution, he shouts:

Stay, good authority's bastards: since I must
Through brothers' perjury die, oh let me venom
Their souls with curses. (III.iv.73-74).

Ironically, Younger Son will indeed die as an (unintended) result of his brothers' perjury. [FN78] Moreover, his brothers' commands achieve the force of law because authority has been bastardized. The signet ring contains the ruler's unique signifier (i.e., his seal). Once transmitted, the naked uniqueness falls prey to the perils of re-presentation, to the subversions of the wicked and the incompetent. [FN79]

V. Arden of Faversham

A. Relevant Plot Summary

Arden of Faversham, penned by an unknown playwright, was first performed in 1592. [FN80] In it, Alice plots with her lover, Mosby, to murder her husband,

(Cite as: 72 St. John's L. Rev. 237)

Thomas Arden. Arden suspects *260 but cannot prove that the two are lovers, yet he often ventures away on business. Greene, a neighboring landowner, complains to Alice that Arden has stolen Greene's land and hence his livelihood. In the opening lines of the play, Arden has received title to real estate formerly owned by the Abbey of Faversham. Alice convinces Greene to help kill Arden, and Greene hires Shakebag and Black Will for the task. Michael, Arden's servant, also joins the conspiracy. Apparently by luck, however, Arden escapes five different attempts on his life.

Reede, a sailor, begs Arden to return land which Reede claims Arden has illegally or unethically appropriated. When Arden refuses to admit wrongdoing or to return the land, Reede curses Arden. One night soon thereafter, Alice manages to get Arden to play backgammon with Mosby. During the match, the murderers take Arden by surprise. Alice's guilty conscience and some bloody physical evidence lead to the arrest of the malicious characters, who are ultimately sentenced to death.

B. Discussion

In Arden of Faversham, some characters seem to imbue oaths with power even as they break and ridicule such oaths. This ambivalent posture coincided with the larger society's struggle to keep faith in its solemn pledges in the face of mounting evidence that such faith was naive and dangerous.

In the first act, Mosby has sworn not to sleep with Alice until Arden dies. Alice mocks Mosby, pointing out that she herself has broken her marriage vow and maintaining that:

Oaths are words, and words is wind,
And wind is mutable. Then I conclude
'Tis childishness to stand upon an oath. (I.436-38).

Mosby responds, "Well proved, Mistress Alice; yet, by your leave, / I'll keep mine unbroken whilst he lives," and Alice then assents, "[a]y, do." (I.439-41). It is possible that this exchange signifies only that the two agree that their temporary sexual abstinence will goad them on to commit their murderous task. On the other hand, Mosby hints here that he will keep his vow, notwithstanding any "logical" arguments (such as Alice's syllogism), because a vow has special status (beyond its mere "words" and beyond mere enlightened self-interest in dealings with other people).

Greene also apparently attaches special status to oaths, *261 somewhat laughably directing religious language toward the hit man, Black Will: "Remember how devoutly thou hast sworn / To kill the villain; think upon thine oath." (III.80-81). [FN81] Similarly, Reede fervently pronounces a lengthy curse upon Arden in God's name. (XIII.30-38, 42-53).

This play leaves open the prospect that the above vows and curses have proleptic strength. After all, these vows and curses all condemn Arden, who does eventually "succumb." Indeed, a couple of scholars have insisted that the arrival of Reede's curse immediately prior to Arden's death indicates that the author wanted the audience to perceive the curse's effectiveness as God's accumulated judgment against the rapacious Arden. [FN82] Michael Marsden has

(Cite as: 72 St. John's L. Rev. 237)

suggested that we should take the magical power of oath-taking seriously in this play because the text contains several other folk motifs of the supernatural. [FN83] Additionally, the tremendous rhetorical power of oaths somehow infects Arden's controlling logic and alters the characters' fates in ways beyond the merely psychological. [FN84]

Still, other scenes cast doubt upon the possibility of prolepsis: Greene and Mosby, who apparently do not break their vows, fare no better (for keeping their word) than other characters in *262 the play, most of whom make oaths solely as bravado and keep them, if at all, solely out of self-interest. Such pervasive indifference to oaths is displayed, for instance, when Greene makes Alice swear to uphold their bargain. Although Alice asks for the penalties of perjury if she lies, we do not doubt she would break her word if expedient:

Greene: Will you keep promise with me?

Alice: Or count me false and perjured whilst I live.

Greene: Then here's my hand (I.526-28).

Similarly, Black Will once intones, when dissatisfied with the agreed-upon remuneration, that "a bargain is a bargain" (III.68-69), even though the bounty on Arden's head later changes and even though Black Will expressly claims to uphold only useful vows (III.82-84). Furthermore, while Michael repeatedly tells himself that he has "sworn," "promised," and "vowed" to participate in the murder, we later learn that he really acts primarily out of fear of Shakebag and Black Will, who in turn have "sworn" his death if he infringes his own vow. (III.197-99, IV.64-71).

In this play, we cannot trust any character's word, not Mosby's word to Alice, nor even Alice's word to herself. (Further, Alice, in particular, masterfully manipulates people by constructing and performing roles, even managing to explain away the incriminating exposure of her "inner" desires after she calls out Mosby's name in her sleep.) [FN85] The solemnity with which the characters speak rarely if ever guarantees veracity or lasting success. Yet in the midst of the apparent truth of Alice's (self-referential and thus paradoxical) taunt that words are "wind," two legal allusions reveal a way in which words can retain power--namely, through written governmental decrees.

Shakebag makes reference to legislation as a form of supreme text: "He's dead as if he had been condemned by an Act of Parliament if once Black Will and I swear his death." (II.100-01). An "Act," of course, constitutes a piece of written legislation. Since Parliament had (at least in 1613) "absolute power in all cases, [including] trying capital cases," [FN86] Shakebag correctly esteems *263 the tremendous force of an "Act." Arguably, the text approved in Parliament engenders immediate action more than almost any other text can; it comprises a performative utterance par excellence. [FN87]

Shakebag creates a fantasy that his spoken oath will also virtually enact its own words. But, this play repeatedly illustrates that vows do not necessarily perform. God does not strike the perjurer dead, and Shakebag has to swear Arden's death more than "once" before he succeeds.

In contrast, by commanding extraordinary power, legislation animates one of the central concerns of this play. Neither Greene nor Reede can effectively contest the legality of Arden's title to the Abbey of Faversham because the

(Cite as: 72 St. John's L. Rev. 237)

characters all remain in the grip of the governmental edicts that authorize Arden's ownership. Henry VIII had dissolved and plundered England's monasteries, [FN88] and in 1539, twelve years before the play's action takes place, Parliament promulgated a law designed to place beyond all doubt both the king's authority to grant the monasteries' land to private parties and those private grantees' right to the land as against various legal claims. [FN89] The legislation rehearsed all of the "magic" words required for secure ownership of the land. [FN90]

The playwright uses these "magic" words in the initial lines of the play when Arden receives letters patent from the king giving Arden the Abbey of Faversham. [FN91] These documents met *264 all of the necessary formalities for ownership of the land, as the playwright takes pains to show. This formality is paramount since the common law courts in Tudor England used formality as an eminently practical surrogate for validity. Conceivably, one way in which the play might subtly accentuate the gravity of Arden's letters patent is by using the word "deeds" to describe these letters. A "deed" means any sealed instrument, especially one transferring real estate. Yet "deed" also means "act," which hints that the documents, although not issued in Parliament, have performative power. This "deed" /"act" wordplay was routinely noticed by English courts. [FN92]

As in many other Renaissance plays, Arden's view of the law contains a plausible message: (1) that formalism succeeds in controlling outcomes but (2) that such outcomes can prove immoral. Before turning to Arden's demonstration of immorality, it pays to confirm that the play's view about formalism in real estate law accurately reflects our understanding of the prevailing legal environment of the 1590's.

In medieval England, nobody paid much attention to the *265 precise wording of legislation, for parliamentary acts were available only in unofficial versions, often corrupted or incomplete. [FN93] Sometimes, prominent medieval jurists actually helped to draft statutes, [FN94] which probably led to relatively restrictive readings of those statutes. Tudor times, however, heralded a new concept of legislation and a new reverence for the written text: "Legislative texts were now drawn with such skill by Crown lawyers . . . that the judges were manifestly being discouraged from the creative exegesis they had bestowed on medieval statutes." [FN95]

Judges occasionally continued to deviate from the literal meaning of the written words, [FN96] but we should not overestimate how often judges resorted to the "equity" or "spirit" of the statute. The English never widely recognized such expansive statutory interpretation. [FN97] Indeed, it is tempting to conclude, with Manderson, that when legislation began to refer to itself as "Acts" rather than just as "Statutes," a "crucial milestone" had been reached. The legal profession began to see legislation as actively setting events in motion by virtue of its mere semantic proclamation. [FN98] Yet we should proceed to stress several related provisos overlooked by Manderson.

First, Renaissance lawmakers knew that statutes would always require some interpretation by judges. Whether a statutory preamble recited Parliament's intentions or simply the enactment's formal validity [FN99] depended to a great

(Cite as: 72 St. John's L. Rev. 237)

extent upon whether *266 Parliament found it necessary to reign in its judicial audience. This wrangling obscured evidence that "the law" as a whole achieved more or less formality: in those eras when judges responded in accordance with the government's wishes, the government could afford to write short, polite laws, but this did not mean that Parliament thought itself relatively powerless in such cases.

Second, at the end of the fifteenth century, the enacting formula changed from "the King . . . doth ordain, enact, and establish" [FN100] to the formula still used today: [FN101] "Be it therefore enacted, ordained and established by the King our sovereign lord" [FN102] Manderson suggests that the altered form clearly conveys that the monarch began to order agents to satisfy his wishes. [FN103] But, one professional linguist concludes that the phrase reads "as though the point of the Act were to make a petition rather than to enact law." [FN104] Certainly, we should remain cautious when drawing conclusions based upon textual study with respect to how the legal system understood its mission.

Third, late sixteenth and early seventeenth century statutory law contained disorganized, overlapping, piecemeal, and clashing directives. The "ungodly jumble" of real estate law, in particular, presented great challenges to conservative interpretation and, hence, presented prime opportunities for lawyers and judges to open loopholes, instilling insecurity in the booming market for land. [FN105]

With these facts in mind, we can still confidently suggest that formalism preserved a influential place in Arden's world. The play chooses to emphasize this formal domain by focusing on the effects of a carefully worded statute, the 1539 monastery law, and by ignoring equity. Arden next obliquely examines corrupt legal agents. Here, agents are both formalistic and potentially *267 biased towards Arden at the expense of his enemies.

Functionaries in the Court of Augmentations [FN106] probably would have heard private disputes concerning monastery land. That tribunal closely allied itself with the Chancery. [FN107] Nonetheless, the Court of Augmentations almost always reached its judgments guided by the common law, not equity, and "[m]ost if not all of the court's central officers . . . were by training common lawyers." [FN108] Furthermore, the Chancery, if anything, contributed to the formal legitimacy of the transfer of monastic property, since Chancery officers sealed the deeds. [FN109] Indeed, although in reality coerced, most monasteries submitted voluntary "deeds of surrender" to Chancery, which then rubber-stamped the transaction. [FN110] The amenability to such schemes by a forum supposedly answering to conscience alone might have had something to do with the fact that "no less a person than the Lord Chancellor himself already had expectations of a share of the proceeds" from the "very first surrender of monastic lands." [FN111]

Arden also might have expected a share in the immoral patronage system. The historical figure upon whom the character is based worked in the Court of Augmentations before he married, and his wife was the stepdaughter of that court's chancellor. Thus, Arden arguably reaped the spoils of an exclusive, corrupt bureaucracy [FN112] that maintained its exclusion through formalistic manipulation.

Yet James Keller contends that Arden might have acquired his land in a routine, legal, and relatively ethical fashion. [FN113] Keller notes, for example, some limited evidence that the Court of Augmentations by and large established a reputation for fairness. *268[FN114] Even if this were the case, Arden's documents, signed by the king, would still present a formidable barrier to any legal claims--strong or frivolous. Moreover, it is possible to dispute Keller's analysis and thus advance the theory that Arden stole the abbey land.

Keller writes that Greene's account of Arden's acquisition "could also suggest that the men simply made competitive offers for the same land, and such a scenario seems not only possible, but also likely in the rush to acquire cheap land. Under these circumstances, Arden would simply have been more successful in expediting his claim." [FN115] Yet Keller's own source, Youngs, explicitly states that: "Only by accident was more than one individual seeking to buy any particular property at one time, and there is no evidence of competitive offers." [FN116]

Now, conceivably, Arden offered to buy the abbey before Greene did, in which case Arden logically should have a superior right to buy. But, since no routinized mechanism existed to deal with (apparently infrequent) near-simultaneous offers, unscrupulous favoritism could take root in the administrative procedures wherein Arden presumably expedited his claim. [FN117]

Arguably, too, Keller misinterprets the play's text in an effort to ground his "competitive offer" hypothesis. Greene complains that "all former grants / Are cut off, whereof I myself had one . . ." (I.461-62), to which Keller responds, "[t]he use of the phrase 'cut off'. . . suggests that a process has been interrupted, rather than a contract nullified." [FN118] Yet "cut off" is a very common term of art in property law meaning "the premature termination of the [preceding] estate." [FN119] Hence, it seems plausible that, in *269 the context of the play, the phrase harbors this technical connotation. [FN120]

Legalistic metaphors add further depth to the mood of inexorable formalism. When Mosby questions Arden about the Abbey lands, Arden responds:

As for the lands, Mosby, they are mine
By letters patents from his majesty.
But I must have a mandate for my wife;
They say you seek to rob me of her love. (I.300-03).

Love becomes, for Arden, the rent from possession of Alice, confirmed by judicial order ("mandate"). Yet, earlier, Alice brilliantly fantasizes a method to evade both oral and written speech acts:

Sweet Mosby is the man that hath my heart;
And [Arden] usurps it, having nought but this,
That I am tied to him by marriage.
Love is a god, and marriage is but words;
And therefore Mosby's title is the best.
Tush! Whether it be or no, he shall be mine
In spite of him, of Hymen, and of rites. (I.98-104).

Alice casts aspersions upon the usual manner of gaining ownership. "Title" to

(Cite as: 72 St. John's L. Rev. 237)

her heart is "usurp[ed]" by Arden on the strength of mere "words" (marriage vows and marriage contract), whereas Mosby retains a superior legal claim based upon the "god," "Love." (Usurpation connotes the illegal termination of the estate.) Alice next entirely rejects the jurisdiction of the law. She commands, "[h]e shall be mine," demanding title to Mosby just as Mosby can rightfully demand title to her.

But, while anyone can say, "[h]e shall be mine," such a statement does not conventionally transfer ownership unless pronounced by a dictator. So, as the action unfolds, Alice's illusion, like Shakebag's, collapses. Her extreme imprecations and methods cannot stay the requirement of governmental acquiescence in title transfer. [FN121] In fact, Alice's fantasy prefigures its *270 own collapse. Alice claims that "marriage is but words," forgetting that a marriage ceremony, the quintessential legal speech act, carries permanent consequences. In the final line of her speech, she remembers that marriage is also a god (Hymen)--with powers to rival the immortal Love. Mosby, too, allows himself a "fantasy of ownership" in which he is "sole ruler of [his] own" (VIII.36), "a fantasy that at the same time reveals its very instability," according to Garrett A. Sullivan, Jr. [FN122]

Analogously, even in the aftermath of Arden's murder, the unethical letters patent still control the living. Only Reede remains alive and capable of reaping any benefit, and he probably will not retrieve his tenancy. True, Alice had maintained that, once Arden received the Abbey land, "whatsoever leases were before / Are void for term of Master Arden's life." (I.466-67). She then declared that "[w]hen he is dead . . . the lands whereof my husband is possessed / Shall be intitled as they were before." (I.523-25). Alice is claiming not that Arden himself acquired only a life estate in the property, but rather that on his death, the lease revives, presumably with rent payable to Arden's heirs. What Alice perhaps is alluding to here (though in a garbled way) is the effect of the dissolution legislation, and the subsequent Crown grant, upon a prior lease for years by the abbey. [FN123] Apparently however, Alice is lying and merely is giving Reede false hope of profit if and when Arden dies. [FN124]

Perhaps, to argue further for the remarkable unity within this drama, one could even compare the letters patent with Arden's corpse. His body mysteriously bled in Alice's presence and thus "[s]peaks" unassailable evidence of her guilt (XVI.5-6): "It *271 bootless is to swear thou didst it not." (XVI.16). [FN125] In addition, the corpse's imprint uncannily remains on the Abbey land. (Epilogue.12-13). So, too, the letters patent speak ex cathedra, silencing any opposing oaths; and they, too, leave their imprint on the land long after their original contractors have died. Thus, the legal documents' tenacious power attains the symbolic status of a supernaturally immortal, physical omnipresence. [FN126]

Anglo-American law still conceives some real estate deals as having everlasting effect. The most basic conveyance of land will contain phrases such as "to X and his heirs forever" and "these covenants to run with the land forever." Naturally, the majestic rhetoric sometimes does not deliver what it promises: lawyers sometimes contest deeds and successfully topple the intended perpetuity. [FN127] Nevertheless, Arden exuberantly highlights the relative tenacity of a particular kind of real estate ownership, viz., land bestowed by

(Cite as: 72 St. John's L. Rev. 237)

letters patent under the monastery dissolution statutes.

One can partially reconcile other recent academic work with the view set forth in this Article. David Attwell declares that Arden "can be said to endorse the replacement of corrupt patronage with the principles of proper title and ethical constraint." [FN128] He discusses Shakebag's allusion to legislation in relation to Parliament's consolidation of power. [FN129] This Article points out a specific form of unethical governmental control in statute-making, *272 interpreting, and implementing. But, unfortunately in this case, the government itself must dictate the principles of proper title, for "proper envelops both propriety and property": [FN130]

one achieves proper title and thus appropriates land only via principled propriety--that is, via a rule-based, conventional legal speech act.

Sullivan also analyzes the status of real estate in this drama and concludes that the play nostalgically "resists a reductive rent-based relationship between landlord and tenant." [FN131] "The estate . . . is understood in the play not in terms of individual ownership of land, but as the management of a set of hierarchized social relations." [FN132] Yet Arden also repeatedly refers to the details of individual ownership and its consequence, "fragmenting land 'into freely alienable parcels'. . . carv[ing] space into fungible units and, in doing so, effac[ing] the social." [FN133] Sullivan takes "social" to include those obligations and loyalties that arise uniquely between two particular people. [FN134] But, again, formal legal speech acts require only conventional behavior, not social behavior. [FN135] Unique circumstances are exactly what formal action wants to elide.

VI. Every Man in His Humour

A. Relevant Plot Summary

Ben Jonson wrote the remaining pair of plays discussed herein. Every Man in His Humour premiered in 1598 and was first published in the Folio edition of 1616. In this comedy, the elder Knowell wishes to have his son, Edward, and his nephew, Stephen, engaged in serious pursuits. The young gentlemen, however, prefer to entertain themselves among urban fools. The cast of fools includes Downright (a plain man), Wellbred (Downright's half-brother), Matthew (a bad poet), and Captain Bobadill (a cowardly braggart, who rooms in the lower-class lodgings of *273 Cob, a water carrier). At different points, Brainworm, Knowell's devious servant, assumes the disguise of a sergeant and a soldier. Justice Clement, the local justice of the peace, eventually investigates the fools' unruly behavior and re-establishes tranquillity.

B. Discussion

In Every Man in His Humour, [FN136] oaths become mere markers of class, [FN137] easily made and easily broken because individuals can so easily fake class position. Brainworm understands the absurd futility of oaths when, in disguise, he swears, "as I am a true counterfeit man of war, and no soldier!" (II.ii.23-24). Bobadill, who is merely a "sign o' the Soldier," and Stephen,

(Cite as: 72 St. John's L. Rev. 237)

who had at one time fecklessly loitered in a gentlemen's boot camp, both swear by their soldierhood. Wellbred asks, "what shall I swear by?" (IV.iii.33), and it hardly matters. Edward chooses to believe Wellbred in any event, and an oath would not have helped prove the latter's case. The elder Knowell, though, proffers a solution to the vacuity of soldierly oaths, chiding Brainworm, "[n]ay, nay, I like not those affected oaths; / Speak plainly, man; what think'st thou of my words?" (II.iii.129-30).

Unfortunately, at this point in the play, the solution fails. The whole problem, of course, is that people cannot discern "plain speaking" from lies, nor can they discern sincere oaths from "affected" oaths. In fact, in his next line, Knowell tests Brainworm: "I'll prove thee, if thy deeds Will carry a proportion to thy words." (II.iii.133-34). Actions may speak louder than words, but as these plays dramatize, both actions and words often constitute deceptive performances.

Two of the dozens of oaths in *Every Man* merit particular attention. First, an important and perilous moment occurs when Stephen swears "as I'm a soldier" that Matthew's plagiarized poems are "the best that ever I heard." (IV.i.102). On one level, someone who still trusts oaths would now have cause to believe that Matthew's verse is outstanding, for within the stereotype satirized in this play, persons of higher class simultaneously enjoy the privilege of making oaths and elevated cultural taste (i.e., *274 can correctly judge a poem's originality). On another level, Stephen's oath compares to swearing to the authenticity of a forged document. That is, Stephen uses the oral expedient of an oath to add evidentiary weight to the value of a plagiarized written text (i.e., Matthew's verse). In sum, Jonson's drama suggests that non-legal matters should gravitate towards closer scrutiny of texts rather than unthinking faith in the pompously-spoken word.

In a second example of a noteworthy oath in this play, *Every Man*, like *Arden*, contains a minor character's fantasy of a performative legal utterance. Here, a bruised Cob, having been attacked by Bobadill, confronts Justice Clement in Act III, Scene iii:

Cob: I go in danger of my death every hour, by his means; an I die within a twelve-month and a day, I may swear, by the law of the land, that he killed me.

Clement: How? how, knave? swear he killed thee? and by the law? What pretence? what colour hast thou for that?

Cob: Marry. . . both black, and blue; colour enough, I warrant you. I have it here, to show your worship.

[He shows his bruises.] (III.iii.87-96).

Cob asserts that, if he dies within a year and a day, the law will convict Bobadill of homicide. Even beyond the absurdity of Cob's aspirations to testify after his own death, he still only partially comprehends the law regarding evidentiary formality. Cob has ignored an element of the legal proof of causation: the year-and-a-day rule.

Due to a variety of reasons, the courts established an admittedly arbitrary time limit: if the victim died after the year-and-a-day limit, the law could not prosecute the attacker for homicide. [FN138] But, this doctrine did not mean that the victim's death *275 within the time limit mandated a finding that he had been "killed" by the attacker. To prove such a case, the prosecution had to

(Cite as: 72 St. John's L. Rev. 237)

further demonstrate that the defendant's attack was sufficiently grievous so as to "hasten the victim's death" and that no completely unforeseeable supervening event killed off the victim (e.g., while being transported to a doctor for trivial injuries caused by the attack--which transportation would not have occurred "but for" the attack--the victim was struck by lightning). [FN139] Justice Clement rightly upbraids Cob for assuming the automatic efficacy of sworn testimony based upon legal formulae ("by his means," "twelvemonth and a day"). Clement instead demands to see physical evidence, namely, Cob's bruised arm. After seeing Cob's arm, Clement grants Cob his warrant, but only after scaring him in order to teach him a lesson.

Moving from oaths to official documents, we discover that the judicial warrant holds a high place in this play, but only when it meets legitimizing formalities. The first of these formalities requires that the warrant be signed by a judge. In this instance, Cob's warrant for a surety of the peace is valid because a clerk, significantly named Roger Formal, writes it and Justice Clement approves and signs it. Clement's signature vouches that the warrant is not issued by virtue of a witness's mere oath or in an otherwise unreliable manner. The second formality requires that the warrant be properly served upon Captain Bobadill, with felicity conditions including the declaration, "I hereby arrest you in the king's name." When all of these preconditions coalesce, the warrant would attain performative power, and the arrestee would either have to submit or face official wrath.

But, when procedural irregularities arise, misfires occur, and Clement must forcefully intervene to reinstate the power of legal speech acts. In Act IV, Brainworm steals Formal's clothes and sells a spurious warrant to Matthew and Bobadill. Brainworm then impersonates a sergeant and tries to arrest Downright. Although Downright later threatens his captor, he originally obeyed the arrest because Brainworm claimed, "I have a warrant I must serve upon you." (IV.ix.37-38). In Act V, Clement chides Downright for failing to demand to see a written warrant. If that had occurred, Downright could have at least inspected it for authenticity. Such inspections obviously count as one reason *276 why the law should prefer written texts.

Next, Clement, the justice of the peace, berates Brainworm, whom he still believes to be a true sergeant, for Brainworm's use of the word "must." (V.i.118-41). Lawrence Levin, in his study of Clement, suggests that Clement disliked the use of "must" from a law officer because "[a] command that is unconditionally binding and seemingly irreversible is anathema to the law, which must be forceful but flexible." [FN140] In fact, however, one could attach an opposite interpretation, namely, that Clement realizes that the law works best when certain types of commands always produce a predictable result. For instance, a process server ideally should function as an automatic messenger of the written document. He should, without exception, physically deliver the actual warrant. As mentioned above, the signed warrant signifies that a higher official has ratified the arrest in due course. Presentation of the warrant helps assure the potentially violent arrestee of this prima facie integrity; thus, presentation helps maintain peace during legitimate arrests and helps subjects resist corrupt ones. In this light, Clement tells Brainworm that "must" is a useful word--it guarantees a healthy inflexibility in the law--and thus minor legal functionaries should not invoke the word vainly. Brainworm is punished for not delivering the warrant as he "must."

Taken together, all of the above analysis of this play refines and extends Levin's interpretation. According to Levin, a central theme in the play concerns the proper use of language in law-related discourse:

[B]y contrasting the socially cohesive and venerable English language with the humor characters who abuse that speech and thus cause social disorder, Jonson exposes man for the flawed, irrational creature he is. The connection between law and language, therefore, is readily apparent: when language is abused, whether through ambiguous speech or intentional deception, misunderstanding results and social order is threatened

Of all the individuals in the play, Clement is the only one who consistently and effectively opposes the perversion of language and punishes those guilty of abusing it. In Clement's first scene with Cob, the Justice takes Cob to task because he uses language imprecisely, for ambiguous statements can cause misunderstandings, *277 and officers of the law must be correctly informed in order to deal justly and maintain social harmony. Again, in the final act, when the major themes are reiterated and reinforced, . . . [Brainworm] is severely reprimanded by Clement for perverting the language of law for personal and illegal reasons. [FN141]

This Article has tried to show more specifically, first, how Cob and Brainworm use legally-operative language "imprecisely," and second, how English law directly counteracted the misuse of speech by doctrinally attaching decreased significance to juratory pronouncements in favor of intensified formalities. In fact, Justice Clement, in his sessions with Matthew and Cob, stages a relationship between language and law in a more concrete manner than Levin envisions. Clement, by ignoring oaths, more easily detects inauthentic documents (Matthew's stolen poems) and more easily adjudicates causation (i.e., could the law ever claim that Bobadill "killed" Cob?). Similarly, Clement demands strict adherence to warrant delivery, thereby helping to secure that the legal text remains untainted by spoken lies.

One can enlist these examples to fortify Levin's analysis of formality: Levin emphasizes the "formal, ritualistic ceremony" at the play's finale (in the Quarto version) as a celebration of social order. [FN142] For Levin, as we have seen, such social order arrives when individuals administer the law in a "forceful but flexible" manner (i.e., when Clement reprimands people for using words imprecisely or inflexibly). Thereby, Clement produces "justice tempered with mercy." [FN143] The "flexible" view roughly corresponds to the critique outlined in Part III of this Article regarding law's indeterminacy-- if "must" represents an illusion, then our legal system arguably should acknowledge and abandon this illusion.

This perspective, however, neglects the role of legal formalism as a linchpin of forceful justice. For example, it might seem that one should relax the technical rules for service of process when the arrestee possesses prior knowledge that a justice of the peace has authorized his apprehension. Similarly, it might seem that one should imprecisely interpret the time span countenanced by the "year-and-a-day" rule to allow redress of grievances that just happened to take place a year and two days ago. *278 Finally, the supremacy of letters patent and other formal documents militate against uninfluential and uninformed victims (as in Revenger's Tragedy and Arden). Still, the arguments advanced in Part III above suggest why the law might

(Cite as: 72 St. John's L. Rev. 237)

nonetheless wisely prohibit oral testimony from disputing the contents of formal documents.

Therefore, it behooves Clement not only to demand that his subjects swear with precision but, even more importantly, to demand that they invoke the "year-and-a-day" rule and the word "must" with precision. In this light, the Quarto finale's ceremony symbolically plays out the triumph of formalism.

As in *Arden*, though, Jonson's drama emphasizes the power of official decrees and downplays the phenomena that tend to vitiate such power in reality. Perhaps Clement represents "a law figure approaching his creator's conception of the ideal." [FN144] Yet, in reality, justices of the peace at that time usually had no legal training. [FN145] Clearly, then, a justice with Clement's eccentricities, but without his competence and integrity, could wreak terror with his pen. Alternatively, his written orders could lose their awesome power amid the misleading speeches of the world's Stephens and Brainworms. [FN146]

*279 VII. Volpone

A. Relevant Plot Summary

Volpone [FN147] (1605) perhaps represents Ben Jonson's most illustrious social satire. The action takes place in Venice. The main character, Volpone (Italian for "Fox"), and his servant, Mosca, play a cunning and profitable game with all who profess to be Volpone's friends. Volpone has no heirs, and since it is rumored that he owns a large fortune, many people court his favor and bring him valuable gifts hoping he will die soon and bequeath his estate to them. For three years, Volpone feigns a variety of diseases. Mosca assures each obsequious donor in turn that he is Volpone's sole heir. The dupes in this scheme include Corbaccio (an old gentleman), Corvino (a merchant), and Voltore (a lawyer). Meanwhile, a sub-plot involves a foolish English knight, Sir Politic Would-Be, and his wife.

Volpone, struck by the beauty of Corvino's wife, Celia, resolves to sleep with her. However, Bonario (Corbaccio's son) rescues Celia from the attempted rape. In the first of two courtroom scenes, Voltore represents Volpone against the accusations of Bonario and Celia. The advocate falsely accuses Bonario and Celia of plotting against Corvino. He claims that Bonario's father had disinherited his son in order to achieve Volpone's fortune. He also maintains that Bonario, enraged at losing his inheritance, had dragged the debilitated Volpone out of his sick bed and attacked him. Corvino, Corbaccio, and Lady Politic testify against the innocent pair, while Mosca whispers to them that they are helping justice. The trial ends well for the perjurers, while Bonario and Celia are taken into custody.

Next, Volpone, planning to escape Venice with his fortune, sends his servants to announce that he is dead and that Mosca is his only heir. Mosca parades around in the clothes of a patrician and takes control of Volpone's house and servants. When Mosca is called before the court, however, Volpone follows in disguise, suspecting that Mosca plans to keep the wealth for himself. Master and servant argue, and each tries to extort the lion's *280 share of the plunder for himself. When the judges, known as *avocatori*, seem ready to believe Mosca

(Cite as: 72 St. John's L. Rev. 237)

and order Volpone whipped, Volpone removes his disguise and confesses all. Thus, the second courtroom scene reveals the truth. The judges severely sentence each conspirator, including the greedy perjurers.

B. Discussion

In Volpone, Jonson deploys a critique of swearing and of oral commentary on written texts and a new way to prove truth via speech act. First, this comedy denigrates oath-giving in a world of misleading rhetoric and sham emotions. Sir Politic's oath--"[n]ow, by my spurs, the symbol of my knighthood" (IV.ii.29)--serves the same function as Stephen's martial oaths in *Every Man*. When almost anyone can simulate higher status, oaths are no longer supported by sincere and genuinely high status customs of "honor." [FN148] That is, we may expect that the merchant, Corvino, will scorn the term "honor" (III.vii.38-40), and in an era in which knighthoods were bestowed indiscriminately and sold, [FN149] we may also expect hollow oaths from people with titles.

In a deeper vein, even the sacred oath of trial witnesses becomes an empty ritual in a scene where, as Peggy Knapp insightfully notes, witnesses freely falsify and even "reasonably honest" judges would not easily divine the truth. [FN150] Thus, the avocatori pointlessly inquire, "[h]as he had an oath?" (IV.v.101) and, "[i]s he sworn?" (IV.v.117). "Multitude and clamor" unavoidably "overcome" the hidden truth, as Bonario fears, because Bonario cannot possibly present his "conscience" as such, but only within the imperfect mode of giving "testimony." (IV.vi.16-19). [FN151]

To make matters worse, Volpone, like *Revenger's Tragedy*, *281 dramatizes that authors cannot permanently embody their intentions in texts. Mosca acts out a fable of misinterpretation, claiming to have "interpreted" Volpone's nods to mean "Corvino" when Volpone dictated his will. (I.v.30-36). Were this the case, a judge reading the final product (Volpone's will, which was sealed, and is referred to as a "deed") may not notice the fraud. [FN152] Similarly, Voltore, Volpone, and Corvino stage a demonic possession during the second trial scene (V.xii), which allows Voltore to assert that his writings do not represent his "true" views. Here, oral/visual testimony of possession and dispossession is wholly unreliable: the judges cannot tell if this is a "true" possession. [FN153] Nevertheless, the staged testimony completely destroys the value of Voltore's written notes, which in a previous scene he contended would--without any external explication--"speak clear truth." (V.x.34).

Given the proliferation of perjury and the opacity of formal written texts, some (Celia, Bonario) may choose not to testify, while others may go further in saying (with Sir Politic) that "calumnies are answered best with silence." (II.ii.20). Yet in this play, as in present-day courts, confession under oath remains the most believed kind of communication. Once Volpone confesses, the judges are convinced--"[n]othing can be more clear. / Or can *282 more prove [t]hese [Bonario and Celia] innocent." (V.xii.96-97). Thus, the avocatori refuse to listen to another word. (V.xii.94). Indeed, a confession constitutes a "miracle" (V.xii.95)--akin to someone's conscience transfiguring into testimony: Bonario's seemingly vain hope in Act IV, Scene vi has been realized. As Paul de Man has noted, "[c]onfessions occur in the name of an absolute truth which is said to exist 'for itself'. . . and of which particular truths are only

derivative and secondary aspects." [FN154]

In his ground-breaking treatment, de Man shows that confessions are a special kind of speech act. One can, in fact, analogize the presumption of a confession's genuineness to the presumption of the transparency of words in a legal document or of the exalted status of oaths. Above, we have called such presumptions the "fiction of self-authentication." De Man mounts an analogous attack on the alleged reliability of the "voluntary" confession. [FN155] Essentially, unconscious guilt often motivates people to "stage . . . scene[s] of exposure" and, once accused, their need to confess escalates "as the only propitiation of accusation, including self-accusation for being in a scene of exposure The very act of confessing necessarily produces guilt in order to be functional." [FN156]

One can read about such false confessions not only in de Man and Dostoevsky, but also in legal and psychological case studies. The heightened risk of false self-inculcation emanating from the relatively coercive atmosphere of official legal proceedings has been extensively probed since the Supreme Court's decision in *Miranda v. Arizona*. [FN157] Yet people have worried about this problem for centuries, and indeed, a Renaissance audience might have found hints of a critique of confessions in *Volpone* itself.

The critique arises when the courtroom spectators try to decide what fuels Volpone's confession:

*283 Whipped?

And lose all that I have? If I confess,

It cannot be much more. (V.xii.82-83).

This explanation seems insufficient: Why should Volpone confess if it might cause him any more harm? Why not cut his losses and slink away?

One approach would focus on Volpone's psychology, as opposed to the play's structure. Any number of modern critics cogently discover a flaw that brings the villains, by their own greedy hands, to the point at which the fox is about to throw off his disguise and confess. The flaw does not become (literally) fatal [FN158] until after Volpone blurts out his admission. Still, one takes just a small step to argue that Volpone's despondency, confusion, humiliation, loneliness, or anger at his fall--and his concomitant envy of Mosca's rise--lead him irrationally to plummet further by revealing his crimes.

An alternative psychological explanation would posit that Volpone savors the performative aspect of confession: he gains the spotlight and artistic closure, and he can even attempt the "ultimate con," gathering sympathy in the end by telling the truth. [FN159] Shoshana Felman has written about the pleasures of speech acts in general; [FN160] Michel Foucault has dwelt upon the pleasures of confession in particular. [FN161] One can suppose, then, that the very performative pleasures that cause Volpone to swear false oaths leads him addictively to seek further delight in the same vein. Hence, his confession--the ultimate virtuoso performance. What better way for Volpone "[t]o make a snare for [his] own neck[] and run / [His] head into it wilfully [[,] with

(Cite as: 72 St. John's L. Rev. 237)

laughter!" (V.xi.1-2).

***284** Crucially, however, the same kinds of complex yet irrational motivations can cause innocent people to stage dramatic scenes of exposure. Certainly, it would not occur to most spectators, on the sole basis of their psychoanalyzing the protagonist, to ponder the question, "[i]f Volpone were innocent, would he still confess?" Yet the play points us in that direction with an allusion to the problematic stance of torture as a means of proof.

On the Continent, from the mid-1200's to the mid-1700's, application of torture comprised a "routine and judicially supervised" method that strived to "eliminate human discretion from the determination of guilt and innocence." [FN162]

Torture was not supposed to be used to elicit an abject, unsubstantiated confession of guilt. Rather, torture was supposed to be employed in such a way that the accused would disclose the factual detail of the crime . . . [[that] 'no innocent person [could] know' [Several other safeguards were also established to protect the defendant.]

Alas, these safeguards never proved adequate to overcome the basic flaw in the system. Because torture tests the capacity of the accused to endure pain rather than his veracity, the innocent might. . . 'confess things that they never did.' If the examining magistrate engaged in suggestive questioning, even accidentally, his lapse could not always be detected or prevented.

These shortcomings in the law of torture were identified even in the Middle Ages and were the subject of emphatic complaint in the Renaissance [FN163]

In contrast to the Continentals, the British never systematically used torture to investigate crime. [FN164] One historian argues that this difference derives from the fact that the English jury never required as high a standard of proof for conviction as the "certainty" demanded on the Continent. [FN165] Nevertheless, on rare occasions, the English authorities did resort to torture as a ***285** means of encouraging confessions in ordinary cases of suspected burglary, counterfeiting, and the like. [FN166] Torture had its heyday in England during the 1580's and 1590's; after 1602, torture rapidly receded, and it virtually disappeared from England after 1640. [FN167] So, it stands to reason that, in the chronological period under discussion in this present Article, Englishmen would have been aware of the merits and disadvantages of torture. [FN168] Jonson himself "possessed a sophisticated grasp" of the Venetian justice system, including the details of the torture chamber. [FN169]

Viewing an English play set in Italy, a Renaissance audience might have interpreted Bonario's response to Voltore's sarcasm in the following courtroom exchange as a serious invitation to torture:

Voltore: Perhaps [Volpone] doth dissemble!

Bonario: So he does.

Voltore: Would you ha' him tortured?

Bonario: I would have him proved.

Voltore: Best try him then with goads, or burning irons; Put him to the strappado; I have heard The rack hath cured the gout, 'faith, give it him, And help him of a malady; be courteous. I'll undertake, before these honoured fathers, He shall have yet as many left diseases As she has known adulterers, or

thou strumpets. (IV.vi.28-37).

After having watched by this point numerous scenes of protested innocence, the audience may begin to wonder how to separate the truly innocent from the counterfeits. The first proffered method involves torture. This method is plausible, for, remarkably, Italy continued to sanction torture precisely because torture remained the only available means of certain proof, once society chose no longer to rely upon the oath and trial by ordeal. [FN170] By the close of Act IV, this play has demonstrated the futility of oaths and the audience, as yet, has no assurance that the perjurers *286 will ever be undone. [FN171] Next, the play offers what seventeenth-century spectators would view as a highly controversial and unappetizing yet plausible alternative to oaths--namely, torture to achieve evident justice.

This very plausibility might have set Renaissance audience members to ponder why they should eventually reject that solution. In the above lines, Voltore insinuates that torture can make its victims deny the existence of their (actual) gout or practically anything else. [FN172] To audience members who can cognitively place torture in the same category as other confession-inducing environments, Voltore's words also imply that not all torture-free confessions are truthful either.

Recall further that Volpone seems afraid of physical pain, and this fear alone might spur him into the immediate confession:

Whipped?

And lose all that I have? If I confess,
*287 It cannot be much more. (V.xii.82-83).

Of course, the court eventually sentences Volpone to a punishment far worse than whipping, but arguably Volpone had hoped for leniency.

In addition, Voltore's statement about his client's remaining diseases indicates that torture does not necessarily unearth crime, especially if the examinee hires a good lawyer. This point reappears in the less extreme context of "voluntary" confession when Voltore successfully retracts his own truthful and self-incriminating confession. (V.xii).

But, here we find dramatized in Volpone a second critique of the confession as substitute for the unadorned oath. Since psychological inquiry cannot always distinguish true from faked admissions, and since characters can effortlessly retract true admissions (and engage in a host of other solemn deceptions), we must look to generic conventions to explain why the court automatically believes Volpone's last-minute confession. Canfield provides just such a structural rationale for why the villains' oath-breaking irresistibly dooms them. [FN173] He observes how they mock religious, chivalric, and moral rhetoric throughout, and thus a sublimely appropriate finale proclaims that some inscrutable power has re-established the fine traditions of keeping one's word:

In short, Volpone seems designed to finally wrest control of the Word from those who would appropriate it, perjure and pervert it, threaten to empty it of all meaning, and turn it into a mere instrument of gain or, even worse, of sheer play. The Word . . . appears throughout most of the play to have degenerated from its divine original (the Logos), to have lost its divine sanction. But in

the nick of time it is reappropriated to its sociopolitical function of binding men and women together by the promise that their aristocratic code is ultimately efficacious, that it has real meaning and Real support. [FN174]

Still, ever since Volpone's premiere, audiences must have recognized this comic convention as such. Theater-goers would by and large perceive that, in their own lives and in the halls of justice, swearing does not guarantee divine witness. In fact, until morality arrives in the "nick of time," the play itself reinforces *288 that perception in many ways, as discussed above. [FN175] Finally, Jonson employs the confession as the mechanism of the deus ex machina. [FN176] Consequently, recognition of the convention of punishing perjury might allow spectators to ponder whether the absolute truth of sworn confessions represents a mere convention as well.

* * * * *

Renaissance theater features several other memorable confessions. One in particular is so germane to this Article that we should not overlook it. In The Revenger's Tragedy, Vindice's plot triumphs completely, until at the last moment he boasts to Antonio of his role as assassin. The horrified Antonio surprises Vindice with a death sentence and the explanation, "[y]ou that would murder him would murder me!" (V.iii.105). Vindice then utters these lines:

When murderers shut deeds close this curse does seal 'em: If none disclose 'em, they themselves reveal 'em!

This murder might have slept in tongueless brass

But for ourselves, and the world died an ass. (V.iii.111-14).

Here, confession is a curse that seals a deed; that is, in the legal connotation, a spoken performative functions to authorize a writing. (A legal deed by definition cannot become effective until sealed with wax.) Without the spoken component, the document would remain closed, useless, and in that sense mute or "tongueless" even though physically permanent as a brass tablet. Yet the oral speech act with the power to vivify the brass writing is none other than voluntary confession. Apart from this speculative interpretation of these lines as a juridical parable, however, Vindice's stunning finale typifies the egomaniacal, compulsive pleasures of confession and, as such, contains an implicit critique of confessions' validity.

*289 VIII. Conclusion

In seventeenth century England, dissatisfaction with the solution in Slade's Case heightened as hired witnesses perjured themselves as much as those who used to wage law. Sir Matthew Hale even proposed "to reintroduce wager of law, or to require some 'signal ceremony' or writing to bind the parties." [FN177] In 1677, however, the legislature adopted another answer, the Statute of Frauds. This law sought to prevent perjury by making certain classes of oral contract completely unenforceable without evidence in writing. Yet due to the complexity of the problems addressed in this Article, the subsequent history of the statute revealed flaws:

Strict enforcement of its terms could easily have protected more frauds than it was designed to prevent. Courts of law and equity therefore took

(Cite as: 72 St. John's L. Rev. 237)

every opportunity to limit its scope by construing it in such a way as to promote the policy of inhibiting frauds; but this policy only added to the obscurity of some of the provisions. [FN178]

In hindsight, we might claim that the plays studied in this Article anticipate both the value and the shortcomings of the unprecedented emphasis on writing demanded in later years by the Statute of Frauds. In any event, the tragedies and comedies exhibit fascinating and entertaining perspectives on these sophisticated issues.

Ironically, if these present interpretations seem to read too much into plays that might at first glance appear only tangentially related to the role of formalism in justice, the plays themselves seem to comment upon the inevitability of re-interpretation. For, these playwrights were highly sensitized to the issues of performance versus text-creation because of the artistic, legal, and economic implications of publication. [FN179] It makes *290 sense, then, that they were intrigued by documents, such as deeds and legislation, that ostensibly served by legal fiat as "authorized" or "final" versions.

[FNal]. Associate, LeBoeuf, Lamb, Greene & MacRae, New York, NY. A.B., Harvard University; J.D., University of Michigan; M.A., LL.M., New York University. The author wishes to thank John Baker, Arthur Kinney, and Avital Ronell for their comments on earlier drafts.

[FN1]. See John H. Baker, *An Introduction to English Legal History* 64-65, 265, 268 (2d ed. 1979) (discussing wager of law in debt and covenant); see also S.F.C. Milsom, *Historical Foundations of the Common Law* 314-60 (2d ed. 1981) (discussing wager of law). Procedure in places other than the royal common law courts differed. But, after the mid-sixteenth century, "practical justice in all but minor matters became coterminous with the law of Westminster Hall" (i.e., the central common law courts). Baker, *supra*, at 272. Where pertinent, this Article discusses other jurisdictions.

[FN2]. See Baker, *supra* note 1, at 64-65.

[FN3]. *Slade v. Morley*, 4 Co. Rep. 91 (1597-1602), reprinted in J.H. Baker & S.F.C. Milsom, *Sources of English Legal History* 419-20 (1986). This Article touches upon only one of the numerous and complex issues in *Slade's Case*, a decision which inaugurated the modern law of contract.

[FN4]. Baker & Milsom, *supra* note 3, at 441.

[FN5]. See Frances A. Shirley, *Swearing & Perjury in Shakespeare's Plays* 20 (1979) (discussing the importance of oaths in court and government proceedings despite a decrease in reliance on them around 1600).

(Cite as: 72 St. John's L. Rev. 237)

[FN6]. See J. Ralph Lindgren, *Seals, Oaths and the Primacy of Ritual*, in *Conscience, Consensus, & Crossroads in Law* 222-25 (Roberta Kevelson ed., 1995) (discussing the penalties contained in the Code of Hammurabi and the Old Testament for lying under oath, in addition to the severe penalties for juror perjury contained in the English royal constitution by the end of the twelfth century); 5 Eliz. Ch. 9 (Eng.) (codifying the prohibition of perjury in the central secular courts by order of Parliament in 1563).

[FN7]. See Baker, *supra* note 1, at 65 (discussing defendants' ability to hire professional perjurers and the court's provision of same); Milsom, *supra* note 1, at 418 (discussing the Star Chamber's treatment of perjury in addition to statutory remedies). In Restoration England, oath-taking "flourished" in the courts and elsewhere, and the practice retained some utility despite widespread knowledge that "oaths were a snare to the conscientious and an opportunity for the unscrupulous." John Spurr, *Perjury, Profanity and Politics*, 8 *Seventeenth Cent.* 29, 46 (1993). Spurr concludes that, "[t]here never was... a golden age when all oaths were revered and were, in St. Paul's words, an end to all strife.... The power of the oath to compel truth was--and still is in the English legal system--a necessary myth...." *Id.* at 45.

[FN8]. See Charles Spinosa, *The Transformation of Intentionality: Debt and Contract in The Merchant of Venice*, 24 *Eng. Lit. Renaissance* 370, 375-76 (1994) (citing Baker, *supra* note 1, at 65) (discussing how many defendants took wagers of law quite seriously); see also Spurr, *supra* note 7, at 29 (explaining how many people in Restoration England "clung to oaths as a guarantee of truth and of performance").

[FN9]. For definitions and applications of speech acts, see generally Sandy Petrey, *Speech Acts and Literary Theory* 59-69 (1990) (discussing the importance of speech acts in literary theory); Keir Elam, *The Semiotics of Theatre and Drama* 156-70 (1980) (defining speech acts in various contexts); John R. Searle, *Speech Acts* (1969); *Speech Act Theory and Pragmatics* (John R. Searle et al. eds., 1980).

[FN10]. See *infra* part VIII (discussing the Statute of Frauds).

[FN11]. See Elam, *supra* note 9, at 166-70 (discussing how acts and gestures, along with speech, enhance and can alter the meaning of what is said); Bernard J. Hibbitts, *Coming to Our Senses: Communication and Legal Expression in Performance Cultures*, [41 Emory L.J. 873, 953-54 \(1992\)](#) (arguing that evaluating words alone or gestures alone in performance media is unwise).

[FN12]. See Daniel J. Kornstein, *Kill all the Lawyers?* 234-35 (1994) ("Elizabethan England was a society enthralled by law....[L]egal allusions [in plays]... were a natural reflection of everyday life.").

(Cite as: 72 St. John's L. Rev. 237)

[FN13]. Thomas Middleton, most likely the author of *The Revenger's Tragedy*, was among the most prolific of the seventeenth-century dramatists. He was born in London in 1580 and died there in 1627. For information on his life and work, see generally J.R. Mulryne, *Thomas Middleton* (1979); Richard Hindry Barker, *Thomas Middleton* (1958).

[FN14]. Ben Jonson (1572-1637), the author of *Every Man in His Humour* and *Volpone*, is known not only for his plays but for his poetry. For extensive coverage of his life and work, see generally W. David Kay, *Ben Jonson: A Literary Life* (1995); David Riggs, *Ben Jonson: A Life* (1989); Rosalind Miles, *Ben Jonson: His Life and Work* (1986).

[FN15]. See generally Bertil Johansson, *Law and Lawyers in Elizabethan England as Evidenced in the Plays of Ben Jonson and Thomas Middleton* 6 (1967) (proposing that both Jonson's and Middleton's knowledge of the law "is easily accounted for" by their association with the Inns of Court) (citing J. Hoffmann, *Die Gerichtsszenen im Englischen Drama Von Shakespeare bis zur Schliessung der Theatre*, 5-6 (1642)). In fact, both Jonson and Middleton were sent to jail for being too outspoken in matters the authorities did not want discussed. See Johansson, *supra*, at 6. Although Jonson was not a member of an Inn, playwrights "lived, wrote, had their beings, and produced their plays in close proximity to these centers of legal learning." Paul Clarkson & Clyde Warren, *The Law of Property in Shakespeare and the Elizabethan Drama* 286 (1942); see also R.S. White, *Natural Law in English Renaissance Literature* 73 (1996); Luke Wilson, *Ben Jonson and the Law of Contract*, 5 *Cardozo Stud. L. & Lit.* 281, 283 (1993) (discussing Jonson's exposure to a good deal of legal discussion during 1610, the crucial period in the history of contract). For a study of the frequency, complexity and accuracy of legal allusions in the plays of Jonson, Middleton and many others, see generally Clarkson & Warren, *supra*, at 6; O. Hood Philips, *Shakespeare and the Lawyers* 177, 191 (1972).

[FN16]. See Richard Weisberg, *Poethics and Other Strategies of Law & Literature* 210 (1992) (noting, in discussing equity, oath-taking and other aspects of Shakespeare's *The Merchant of Venice*, that "[i]n periods such as our own, when there is no binding culture or prevailing sense of rightness, flexibility is risky. Literature can bind us and help us to define a personal and communal voice.").

[FN17]. See Bruce L. Rockwood, *Introduction: On Doing Law and Literature*, in *Law and Literature Perspectives* 1-38 (Bruce L. Rockwood ed., 1996) (providing background on the law and literature movement).

[FN18]. See *supra* note 9.

[FN19]. "A performative utterance that is not an act does not exist." Shoshana Felman, *The Literary Speech Act: Don Juan with J.L. Austin or Seduction in Two*

(Cite as: 72 St. John's L. Rev. 237)

Languages 20 (Catherine Porter, trans., Cornell Univ. Press, 1983) (citing Emile Benveniste, *Problems in General Linguistics* 236 (M.E. Meek trans., Univ. of Miami Press, 1971)).

[FN20]. See Petrey, *supra* note 9, at 12-13 (discussing felicity conditions).

[FN21]. See *id.* at 16-17; Steven Davis, *Perlocutions*, in *Speech Act Theory and Pragmatics*, 37-54 (John R. Searle et al. eds., 1980).

[FN22]. See, e.g., Petrey, *supra* note 9, at 7.

[FN23]. See George Elliot Howard, 1 *A History of Matrimonial Institutions* 307-08 (Fred B. Rothman & Co. 1994) (1904); cf. Theodore Mackin, *The Marriage Sacrament* 606 (1989) (explaining that in the Catholic Church, it is the spouses who minister the marital sacraments, not the Church).

[FN24]. John Searle has been a Professor of Philosophy at the University of California at Berkeley since 1959. Prior to that time, he taught at Christ Church, Oxford and has held visiting positions at various colleges and universities. His works include *Speech Act Theory and Pragmatics* (John R. Searle et al. eds., 1980); John R. Searle, *Expression and Meaning: Studies in the Theory of Speech Acts* (1979) [hereinafter *Expression*]; John R. Searle, *Speech Acts* (1969). See Petrey, *supra* note 9, at 59 (discussing the work of John Searle).

[FN25]. See *Expression*, *supra* note 24, at 12-20; Petrey, *supra* note 9, at 60 (explaining Searle's five classes of speech acts); Felman, *supra* note 19, at 18-19 (discussing a variation of Searle's five categories).

[FN26]. See Petrey, *supra* note 9, at 82-3 (discussing Petrey's conventionalist stance).

[FN27]. See *id.* at 7-17 (using marriage as a very public example of a speech act that changes depending on societal expectations, mores and conventions).

[FN28]. *Id.* at 9.

[FN29]. See Myron Gochnauer, *Oaths, Witnesses and Modern Law*, 4 *Canadian J.L. & Jurisprudence* 67, 89 (1991) (noting that there are two kinds of oaths-- "swearing to" [do something] and "swearing that"--and separately analyzing the felicity conditions pertaining to each). For purposes of this Article, there is no significant difference between "swearing to tell the truth" and "swearing

(Cite as: 72 St. John's L. Rev. 237)

that" a given proposition is true.

[FN30]. See Jacqueline M. Henkel, *The Language of Criticism: Linguistic Models and Literary Theory* 156-63 (1996).

In Anglo-American law, subjective intent is examined much less frequently than objective intent. Some exceptions include: (i) doctrine of mistake in contract law, see [Peter Meijes Tiersma, Comment, The Language of Offer and Acceptance: Speech Acts and the Question of Intent, 74 Cal. L. Rev. 189, 230 \(1986\)](#); (ii) interpretation of wills, see [Michael Hancher, Dead Letters: Wills and Poems, 60 Tex. L. Rev. 507, 510-17 \(1982\)](#); and (iii) criminal law, see Joshua Dressler, *Understanding Criminal Law* 98-125 (1995). Actual subjective intention is occasionally claimed as the basis for judicial determination of legislative intent, although, in Western countries, that approach is currently dominant only in Sweden. See Aleksander Peczenik & Gunnar Bergholz, *Statutory Interpretation in Sweden*, in *Interpreting Statutes: A Comparative Study* 476-77 (D. Neil MacCormick & Robert S. Summers eds., 1991).

[FN31]. J. Douglas Canfield, *Word as Bond in English Literature From the Middle Ages to the Restoration* xii (1989).

[FN32]. See generally Shirley, *supra* note 5, at 72-79 (noting that numerous technicalities serve as rationalizations for Shakespearean characters to break their vows).

[FN33]. See Shirley, *supra* note 5, at 24-43 (discussing oaths as structure). "[R]epeated acts of swearing...also often function on their own as a leitmotif to emphasise the meaning of the play." *Id.* at 42-43. For a sophisticated view of the consequences of dramatic rhetoric, see Luke Wilson, *Renaissance Theater and the Legal Discourse of Intentional Action* 223- 28 (1992) (Ph.D. dissertation, University of California (Berkeley)) (University Microfilms International 1992, No. 9330783) [hereinafter *Renaissance Theater*]; Luke Wilson, *Hamlet: Equity, Intention, Performance*, 24 *Stud. Literary Imagination* 91, 98-99 (1991) [hereinafter *Hamlet, Equity*]; see also Felman, *supra* note 19, at 50-51, 66 (discussing the rhetorical force of repeated promises which she dubs the "Don Juan effect"); Anton P. Tchekhov, *Literary and Theatrical Reminiscences* 23 (S. S. Koteliansky ed. & trans., Benjamin Blom, Inc. 1965) (discussing how dramatic narrative has its own rules and expectations--"[i]f in the first chapter you say that a gun hung on the wall, in the second or third chapter it must without fail be discharged").

[FN34]. See [Frederick Schauer, Formalism, 97 Yale L.J. 509, 534-35 \(1988\)](#) (describing "rules" the author perceives constitute speech acts or performative utterances and their respective purposes). See generally Desmond Manderson, *Statuta v. Acts: Interpretation, Music, and Early English Legislation*, [7 Yale J.L. & Human. 317, 324 n.18](#) (1995) (discussing a brand of legal formalism developed by Ernest Weinrib currently under debate); cf. Dennis Patterson, *Law and Truth* 28-35 (1996) (criticizing Weinrib's theory).

(Cite as: 72 St. John's L. Rev. 237)

[FN35]. Lindgren, *supra* note 6, at 216-17 (discussing the history of sealing to authenticate).

[FN36]. *Id.* at 218-19 (quoting *The Treatise on the Laws and Customs of the Realm of England Called Glanvill*, bk.x., ch.12 (G.D.G. Hall ed. 1965)) (discussing the seal's history in Roman law). This discussion omits the role of equity. See *infra* text accompanying notes 50-52; *infra* note 152.

[FN37]. See [Eric Mills Holmes, Stature and Status of a Promise under Seal as a Legal Formality, 29 Willamette L. Rev. 617, 629-30 \(1993\)](#) (discussing the use of seals in real estate transactions).

[FN38]. See *id.* at 630 n.45 (indicating that by the late sixteenth-century an instrument would maintain its legal force even if the seal fell off or was eaten by mice).

[FN39]. *Id.* at 626.

[FN40]. See *id.* (discussing various rituals requiring the use of a seal); Lindgren, *supra* note 6, at 226-29 (describing seals and oaths as stereotyped rituals); *id.* at 217, 219 (discussing the presumed magical properties and sanctity of seals); Holmes, *supra* note 37, at 632 n.49 (indicating that both "the law courts...[and] the ecclesiastical courts enforced promises under seal").

[FN41]. See Holmes, *supra* note 37, at 627 (stating that seals provide evidentiary security in the event of controversy).

[FN42]. *Waberley v. Cockerel*, Dyer 51 (1541), reprinted in Baker & Milsom, *supra* note 3, at 258. During the Renaissance this view competed vigorously with the phonocentric notion that speech remains less apt to contain falsehoods than writing. See Elias L. Rivers, *Quixotic Scriptures: Essays on the Textuality of Hispanic Literature* 85-7 (1983) (discussing how, in an oral society, speech acts and performative utterances of honor, loyalty and promises took precedence over modern society's written bonds and contracts).

[FN43]. See Holmes, *supra* note 37, at 627 (suggesting that formalities "prevent rash and impulsive actions" because they require deliberation).

[FN44]. See *id.* (positing that "formalities deter legal enforcement of importune and socially undesirable agreements").

(Cite as: 72 St. John's L. Rev. 237)

[FN45]. See *id.* at 628 (discussing how the reduction of an agreement to writing helps clarify the details orally discussed).

[FN46]. See *id.* at 625 (designating certainty as an attribute of the seal).

[FN47]. Jacques Derrida, *Limited Inc.* 116 (1988).

[FN48]. See generally Duncan Kennedy, *Legal Formality*, 2 *J. Legal Stud.* 351 (1973); Schauer, *supra* note 34.

[FN49]. See, e.g., [Scott C. Idleman, A Prudential Theory of Judicial Candor, 73 Tex. L. Rev. 1307 \(1995\)](#) (discussing the discretion of judges in rendering their decisions); Scott Altman, *Beyond Candor*, [89 Mich. L. Rev. 296 \(1990\)](#) (discussing the manner in which judges' individual beliefs affect their decisions).

[FN50]. See Milsom, *supra* note 1, at 85 ("Fraud was beneath the notice of the king's judges rather than above their heads."); see also Baker, *supra* note 1, at 271 (discussing the gaps in the remedies of the common law courts).

[FN51]. See Hamlet, *Equity*, *supra* note 33, at 96 (citing Plowden's reading of Aristotle in describing a Renaissance debate which sought to conceptualize the theoretical similarities and disparities between law and equity--did equity fill a deficiency in law or fulfill law's own program?). This philosophical debate was complicated by jurisdictional competition. See, e.g., Theodore Ziolkowski, *The Mirror of Justice: Literary Reflections of Legal Crises 172-74* (1997) (discussing, most recently, the division between common law and equity as manifest in *The Merchant of Venice*).

[FN52]. If we overlay the contemporaneous rules of the English legal system, colorable fraud charges against private action are not pursued in *Volpone* and *Arden of Faversham*. Characters might have appealed from official misconduct in *The Revenger's Tragedy*, *Arden of Faversham*, and *Every Man in His Humour*. See *infra* parts IV-VIII (providing more detailed descriptions of these "equitable" concerns).

[FN53]. See Baker, *supra* note 1, at 93-94 (suggesting that the conscience of the Chancellor was "ordered by law...[as the] acts of a supreme legislature could not be upset by recourse to conscience").

[FN54]. Jacques Derrida, *Before the Law*, in *Acts of Literature* 203-04 (Derek Attridge ed. & Avital Ronell trans., Routledge, 1992).

(Cite as: 72 St. John's L. Rev. 237)

[FN55]. Many scholars have voiced specific concerns about time and agency using the vocabulary of speech act theory. See, e.g., Paul de Man, *Allegories of Reading* 273 (1979); Felman, *supra* note 19, at 66-68; Roberta Kevelson, *The Law as a System of Signs* 109-10 (1988); Heidi M. Hurd, *Sovereignty in Silence*, [99 Yale L.J. 945 \(1990\)](#). One should not overstate the general case however, for most illocutionary statements succeed at some pragmatic level. See Petrey, *supra* note 9, at 140-44.

[FN56]. Cyril Tourneur, *The Revenger's Tragedy* (Brian Gibbons ed., 1967). All further references are cited in the text.

[FN57]. There is a debate among scholars as to who is the true author of *The Revenger's Tragedy*. For many years it was credited to Cyril Tourneur, but more recently it has been credited to Thomas Middleton. See Michael Neill, *Bastardy, Counterfeiting, and Misogyny in The Revenger's Tragedy*, 36 *Stud. Eng. Lit.* 397 (1996); see also Allardyce Nicoll, *The Revenger's Tragedy and the Virtue of Anonymity*, in *Shakespeare and His Contemporaries* 309-16 (E.A.J. Honigman ed., 1962) (discussing the authorship debate).

[FN58]. Vindice later invokes the same conceit: "Why does yon fellow falsify highways / And put his life between the judge's lips" (III.v.75-76). Significantly, on three other occasions, characters refer to solemn words as "poison": when Vindice repudiates his oath to Lussurioso (I.iii.170), when Vindice speaks of "old men... that are so poisoned with the affectation of law words" (IV.ii.58-59), and when Gratiana recants her own declarations--"I spoke those words, and now they poison me: / What will the deed do then?" (IV.iv.136-37). For further poison imagery, see Daniel J. Jacobson, *The Language of The Revenger's Tragedy*, 38 *Jacobean Drama Stud.* 135-39 (1974).

[FN59]. My interpretation perhaps adds further "piquancy" to the placement of the stage direction as indicated above. Michael Cordner has insisted that the placement is correct, as opposed to E. A. J. Honigman's proposal to move the stage direction down by as much as ten lines. See Michael Cordner, *Stamping on a Duke: The Revenger's Tragedy III.v*, 37 *Notes & Queries* 205, 205-06 (1990). Incidentally, this vignette also prefigures Gratiana's realization of the self-condemning power of words, as quoted in the immediately preceding footnote.

[FN60]. See J. Hillis Miller, *The Ethics of Reading* 37 (1987).

[FN61]. Gamini Salgado, *Introduction to Three Jacobean Tragedies* 10, 27 (Gamini Salgado ed., Penguin Books 1969).

[FN62]. See V.iii stage directions at lines 37, 42; cf. IV.ii.192-97 (thunder apparently responds to Vindice's swords). For criticism, see Kellie Harrison Bean, *Tourneur's The Revenger's Tragedy*, 47 *Explicator* 8, 8-11 (discussing the

(Cite as: 72 St. John's L. Rev. 237)

significance of thunder in *The Revenger's Tragedy*).

[FN63]. Richard T. Brucher, *Fantasies of Violence: Hamlet and The Revenger's Tragedy*, 21 *Stud. Eng. Lit.* 257, 262 (1981). For a more balanced view, see Jonas A. Barish, *The True and False Families of The Revenger's Tragedy*, in *English Renaissance Drama: Essays in Honor of Madeleine Doran & Mark Eccles* 142 (Standish Henning et al. eds., 1976).

[FN64]. Arthur L. Kistner & M. K. Kistner, *Morality and Inevitability in The Revenger's Tragedy*, 71 *J. Eng. & Germanic Philology* 36, 40 (1972); see also II.ii.37-40, 100.

[FN65]. Lussurioso languishes in prison because of the following chain of events: The Duchess is enamored of the Duke's bastard son, Spurio. Vindice, disguised as Piato and hoping to divert Lussurioso from visiting Vindice's sister, tells Lussurioso of the Duchess's affair. Lussurioso, however, surprises not the guilty couple as he expects but his own father--who assumes that he himself is the object of his son's murderous intentions and packs him off to prison.

[FN66]. See *infra* note 91 (concerning wax seals); see also *supra* notes 35-38 and accompanying text.

[FN67]. The word "now" is the most frequently used adverb in *The Revenger's Tragedy*. See Scott McMillin, *Acting and Violence: The Revenger's Tragedy and its Departures from Hamlet*, 24 *Stud. Eng. Lit.* 275, 282-83 (1984). As a result, the play has been compared to *Hamlet* for its obsession with immediate action. See *id.* *Fantasies of immediate performative power abound* (for example, *Ambizioso's* "Excellent!--Then am I heir--duke in a minute") (III.i.12-13).

[FN68]. The importance of this situation is underscored by similar explorations in several other plays of this period. Rosencrantz & Guildenstern's letter is sealed with Hamlet's father's signet. See William Shakespeare, *Hamlet* V.ii. 13-15, 49-50. More interesting theoretically are the "mispunctuated" death (Christopher Marlowe, *Edward II* V.iv.4); the empty box which Pedringano believes contains the king's pardon (Thomas Kyd, *The Spanish Tragedy* III.iv-vi); and the potential loopholes in Marlowe's *Doctor Faustus's* (worse than deadly) formal written pact with the devil. Keir Elam suggests that speech act analysis can account for the central events of Marlowe's *Doctor Faustus*. See Elam, *supra* note 9, at 168-69. For a new interpretation of the play's contract from the perspective of a law professor, see Daniel Yeager, *Marlowe's Faustus: Contract as Metaphor?*, [2 U. Chi. L. Sch. Roundtable 599](#) (1995).

[FN69]. Anglo-American law considers objectively-manifest intentions as paramount for interpreting signatures. See Michael Hancher, *The Law of Signatures*, in *Law and Aesthetics* 227, 230-32 (Roberta Kvelson ed., 1992). The law for interpreting the validity of a seal has shifted in recent times and now also

(Cite as: 72 St. John's L. Rev. 237)

privileges intent. See Holmes, *supra* note 37, at 634.

[FN70]. See Charles Spinosa, 'The name and all th' addition': King Lear's Opening Scene and the Common-Law Use, 23 *Shakespeare Stud.* 159 (1995) (discussing the authorization of non-customary legal speech acts).

[FN71]. "Non-serious" in deconstructive parlance means "stated without regard to whether the statement conforms to real intention." J. M. Balkin, *Deconstructive Practice and Legal Theory*, [96 Yale L.J. 743, 750 n.18 \(1987\)](#); see also *id.* at 750.

[FN72]. We can infer the brothers' promise from Younger Son's line: "I looked for my delivery before this; / Had they been worth their oaths." (III.iv.5-6).

[FN73]. *The Plays of Cyril Tourneur* 53 (George Parfitt ed., 1978). The term "Duns" refers to Duns Scotus, "whose name became synonymous with the most minute and pedantic textual study." *Id.*

[FN74]. In many situations, the legal community still speaks confidently of "unambiguous meaning." See, e.g., Stanley Fish, *There's No Such Thing as Free Speech and it's a Good Thing Too* 141-79 (1994); Clark D. Cunningham et al., *Plain Meaning and Hard Cases*, [103 Yale L.J. 1561 \(1994\)](#) (reviewing Lawrence M. Solan, *The Language of Judges* (1993)). In statutory interpretation, textualist doctrine has suffered a decline only recently, but it still apparently flourishes in England and in some state courts. See [William S. Jordan, III, *Legislative History and Statutory Interpretation: The Relevance of English Practice*, 29 U.S.F. L. Rev. 1, 18-20 \(1994\)](#); James P. Nehf, *Textualism in the Lower Courts: Lessons from Judges Interpreting Consumer Legislation*, [26 Rutgers L.J. 1, 81-83 \(1994\)](#). Only a few academics still defend any form of the "plain meaning" rule, which is, "[i]n other words, the language being plain, and not leading to absurd or wholly impracticable consequences...is the sole evidence of the ultimate legislative intent." [Caminetti v. U.S.](#), [242 U.S. 470, 490 \(1917\)](#); see also [Frederick Schauer, *The Practice and Problems of Plain Meaning: A Response to Aleinikoff and Shaw*, 45 Vand. L. Rev. 715, 717-41 \(1992\)](#). For citations to recent criticism of the rule, see [Nicholas S. Zeppos, *Judicial Candor and Statutory Interpretation*, 78 Geo. L.J. 353, 369 n.97 \(1989\)](#). In contrast, scholars understandably now recommend contextualist approaches to legislation. See, e.g., William N. Eskridge, Jr., *Dynamic Statutory Interpretation* (1994); George H. Taylor, *Structural Textualism*, [75 B.U. L. Rev. 321 \(1995\)](#). For a summary of four current approaches, see Peter C. Schanck, *The Only Game in Town: An Introduction to Interpretive Theory, Statutory Construction, and Legislative Histories*, 38 *U. Kan. L. Rev.* 815 (1990).

[FN75]. See Neill, *supra* note 57, at 401-02.

[FN76]. *Id.*

[FN77]. See Miller, *supra* note 60, at 39, 77.

[FN78]. Perjury was defined broadly in this era and would include a deliberate miscommunication of the Duke's commands. See Shirley, *supra* note 5, at 73.

[FN79]. By coincidence, Luke Wilson selects a remarkably similar example to elucidate the relationship between intention and delegation in law-related Renaissance drama. In Shakespeare's *Richard III*, Gloucester and Buckingham enact a charade to justify a hasty beheading. In the same scene, Buckingham "claims he is so good at deception that he can counterfeit the counterfeit" (Wilson's gloss for: "I can counterfeit the deep tragedian."). *Renaissance Theater*, *supra* note 33, at 17-21.

[FN80]. See generally *The Tragedy of Master Arden of Faversham* (Martin White ed., 1982). [hereinafter *Master Arden*, White]. All further references to the play are cited in the text. The debate over the play's authorship has produced a list of proposed names ranging from "well-known dramatists such as Greene and Peele to frankly eccentric suggestions such as Lord Oxford or the 6th Earl of Derby." *Id.* at xiv.

[FN81]. Black Will perhaps realizes that Greene takes swearing seriously, for Black Will then says, "[since] thou hast sworn, we dare discover all" (III.147). Nevertheless, treading on the safe side, Black Will delivers his secret with an explicit threat (V.60-63).

[FN82]. See *The Tragedy of Master Arden of Faversham* lxix-lxx (M. L. Wine, ed. 1973) [hereinafter *Master Arden*, Wine]; see also Henry Hitch Adams, *English Domestic or, Homiletic Tragedy* 104-06 (1943).

[FN83]. See Michael T. Marsden, *The Otherworld of Arden of Faversham*, *S. Folklore Q.* 36, 38 (1972).

[FN84]. See *id.* Julie Schutzman, for instance, finds in the play's structure and "controlling logic" a "suspended [moment] between the idea of Arden's murder and its inevitable--but much deferred--realization," which suspension "allows for an exploration of Alice's freedom that remains roughly contained between these two points." Julie R. Schutzman, *Alice Arden's Freedom and the Suspended Moment of Arden of Faversham*, 36 *Stud. Eng. Lit.* 289, 290-91 (1996). One important feature of this suspension dictates that Arden's death "becomes a necessary premise to Alice and Mosby's love." *Id.* In one respect, Schutzman's position points toward the self-interest inscribed in Alice and Mosby's rhetoric of abstinence: by unleashing impressive vows of chastity, the couple paradoxically spurs itself into action. Alice then adds to this rhetoric of vigilance with another hyperbolic oath: "[F]or I have sworn / That these mine eyes, offended with his sight, / Shall never close till Arden's be shut up" (XIV.83-85). Schutzman's

(Cite as: 72 St. John's L. Rev. 237)

essay also implies, however, a form of prolepsis, at least until the suspended moment passes and each character faces his or her ruin. See *id.* at 310-11.

[FN85]. See Frances E. Dolan, *Home-Rebels and House-Traitors: Murderous Wives in Early Modern England*, 4 *Yale J.L. & Human.* 1, 27 (1992); see also Schutzman, *supra* note 84, at 299.

[FN86]. Baker, *supra* note 1, at 180 (quoting Sir Henry Finch).

[FN87]. Searle and de Man discuss legislation as speech act. See *Expression*, *supra* note 24, at 1-25; de Man, *supra* note 55, at 270-77. In the 1980's, several legal scholars extended the analysis. See, e.g., Frederick Bowers, *Linguistic Aspects of Legislative Expression* 1-48 (1989); Dennis Kurzon, *It is Hereby Performed: Explorations in Legal Speech Acts* (1986); M.B.W. Sinclair, *Law and Language: The Role of Pragmatics in Statutory Interpretation*, [46 U. Pitt. L. Rev. 373 \(1985\)](#).

[FN88]. See generally Robert M. Adams, *The Land and Literature of England: A Historical Account* 125-28 (1983).

[FN89]. See Joyce Youngs, *The Dissolution of the Monasteries* 42-43, 81-89 (1971).

[FN90]. The statute boldly pronounced that the king "shall be vested, deemed and adjudged by authority of this present parliament, in the very actual and real seisin and possession... his heirs and successors for ever." 31 Hen. 8 ch. 13 (Eng.). Such language reinforced that the Crown would have full power to alienate (give away or sell) the property. See Youngs, *supra* note 89, at 83-84.

[FN91]. The author's use of the following words in the play's initial lines (I.3-7) signify his recognition of the formalities associated with acquiring ownership of land in that era: "Freely given": Given unconditionally. Also, perhaps, an attempt to void any competing claims to the land; "To thee and to thy heirs": A verbatim legal formula that granted the land to Arden (he could then sell it if he so chose, with the king's permission; he need not necessarily preserve it for his "heirs."); "Deeds": In the exact form of a real estate deed; "Sealed and subscribed": The wax seal remained a crucial step for defending against various objections to the enforcement of legal documents in England until quite recently; "With his name and the king's": Another formality, since the Lord Protector could act in the king's name in many ways without pretending that the king actually participated.

Then, Greene admits that:

[Arden] hath the grant of late,
Confirmed by letters patents from the king,

(Cite as: 72 St. John's L. Rev. 237)

Of all the lands of the Abbey of Faversham,
Generally intituled, so that all former grants
Are cut off, whereof I myself had one;
But now my interest by that is void. (I.458-63).

This admission repeats the evidence of prima facie validity of Arden's claims.

Responding to Greene, Alice reports that Arden "hath the grant under the Chancery seal" (I.468). This seal signifies the last official step required for the formalization of letters patent. First, the king would approve the transaction via royal warrant, and then the office of the Lord Chancellor would publish it via letters patent. See Youngs, *supra* note 89, at 125. Indeed, the Chancery silver seal matrix (used to emboss the seal onto documents) represented one of the most powerful formalities in history. Whoever was appointed to keep the seal matrix necessarily possessed the authority that the seal conveyed. See Baker, *supra* note 1, at 85. Thus, a "lord keeper of the great seal" legally had the same authority as a lord chancellor. *Id.*; cf. *The Revenger's Tragedy*, *supra* notes 56-79 and accompanying text.

[FN92]. "The deed likewise was an act done (factum), in that the specialty was sealed and delivered before witnesses as an 'act and deed.'" Baker, *supra* note 1, at 268. "Deed" is the Germanic equivalent of the Latin actum (cf. modern German Tat). See Kurzon, *supra* note 87, at 6.

[FN93]. See Baker, *supra* note 1, at 179-80.

[FN94]. See *id.* at 181.

[FN95]. *Id.* at 180.

[FN96]. See *id.* at 181.

[FN97]. On the place of literalism versus dynamic interpretation in Anglo-American legal history and theory, see *supra* note 74; see also Shael Herman, *The 'Equity of the Statute' and Ratio Scripta: Legislative Interpretation Among Legislative Agnostics and True Believers*, [69 Tul. L. Rev. 535, 558-60 \(1994\)](#) (explaining how the British became "legislative agnostic[s]," while the civilian inheritors of the same Aristotelian/Roman tradition became "true believers" in the equity of the statute); S.H. Bailey & M.J. Gunn, *Smith and Bailey on the Modern English Legal System* 265-67 (1991) (stating that the validity of English legislation could not be questioned in any court). Seventeenth-century dicta to the contrary was "controversial even at that time [[and was] not acted upon." *Id.*; Raoul Berger, *Original Intent: The Rage of Hans Baade*, [71 N.C. L. Rev. 1151, 1153-56 \(1993\)](#) (contesting the timing and extent of the shift to a purposive approach to statutory interpretation).

Luke Wilson is among those who overestimate the reach of equity of the statute in actual English practice. See Hamlet, *Equity*, *supra* note 33, at 93- 97.

(Cite as: 72 St. John's L. Rev. 237)

[FN98]. See Manderson, *supra* note 33, at 351. This transformation took place during the reign of Edward IV (1461-1470, 1471-1483). See *id.* at 352.

[FN99]. See *id.* at 347-48, 352, 356-57.

[FN100]. *Id.* at 360 (quoting 22 Edw. 4, ch. 7 (1483) (Eng.)).

[FN101]. See *id.*

[FN102]. 11 Hen. 7, ch. 15 (Eng.).

[FN103]. See Manderson, *supra* note 34, at 361.

[FN104]. Bowers, *supra* note 87, at 28. Unfortunately, Manderson ignores speech act theory.

[FN105]. See Reports from the Lost Notebooks of Sir James Dyer lxi-lxii (John H. Baker ed., 1994); Herman, *supra* note 97, at 559; Lee Ann Rappold, Hamlet and the Elizabethan Common Law 24-28 (1992) (Ph.D. dissertation, University of California (Santa Cruz)) (University Microfilms International 1992, No. 9312442) (quoting Baker, *supra* note 1, at 327).

[FN106]. The Court of Augmentations was established in 1536 and was responsible for all monastic properties and religious houses then being dissolved. See Youngs, *supra* note 89, at 94-95.

[FN107]. See *id.* at 91.

[FN108]. *Id.* at 100.

[FN109]. See *id.* at 73-74.

[FN110]. *Id.*

[FN111]. *Id.* at 30. See *id.* at 73-74, 81-85 (describing the process involved in the surrender of monastic lands).

[FN112]. See David Attwell, Property, Status, and the Subject in a Middle-Class

(Cite as: 72 St. John's L. Rev. 237)

Tragedy: Arden of Faversham, 21 Eng. Lit. Renaissance 328, 338 (1991).

[FN113]. See James R. Keller, Arden's Land Acquisitions and the Dissolution of the Monasteries, 30 Eng. Language Notes 20, 21-22 (1993). Keller concedes that Arden's "actions still reveal his avarice and his indifference to the suffering of others." Id. at 23. But, unlike most scholars, Keller does not find Arden's activities "wicked." Id.

[FN114]. See id. at 20-21.

[FN115]. Keller, supra note 113, at 22.

[FN116]. Youings, supra note 89, at 118. Youings also avers that "for those with the necessary capital there was rarely a shortage of opportunities for purchase, but little or no opportunity for haggling." Id. at 121. Greene offers to sell Mosby the Abbey lands. (I.293-95).

[FN117]. The play perhaps hints that the Crown inadvertently sold the same land twice, as sometimes happened. The author is indebted to John Baker for noticing this point. One can speculate that in such a case, nepotism could still taint any remedial measures afforded the purchasers.

[FN118]. Keller, supra note 113, at 22.

[FN119]. [Belleville Nat'l Bank v. Trauernicht, 445 N.E.2d 958, 961 \(Ill. App. Ct. 1983\)](#). Lawyers and judges have used this denotation for centuries. For example, at least ten different state appellate court decisions in America have invoked the term since 1940. See, e.g., [Ford v. Thomas, 633 S.W.2d 58, 59 \(Ky. 1982\)](#); [Fleck v. Fleck, 154 N.W.2d 865, 868 \(Iowa 1967\)](#); [Jones v. Burns, 74 So.2d 866, 868 \(Miss. 1954\)](#). One form of estate in land, the "fee tail," derives "from 'taille,' meaning 'cut off.'" [Trauernicht, 445 N.E.2d at 962](#).

[FN120]. Incidentally, Keller misses another legal term of art. Keller notes that Reede protests against Arden's wrongfully "detain[ing]" (Xiii.13) a plot of land. Id. at 22. "Wrongful detainer" denotes an "act... of withholding from a person lawfully entitled the possession of land or goods." Black's Law Dictionary 449 (6th ed. 1990).

[FN121]. See Attwell, supra note 112, at 345 (explaining that Alice's efforts to "step outside of subject-positions conventionally allotted to her" were "self-defeating"); see also Dolan, supra note 85, at 28 (discussing the transitory nature of Alice's self-governance). But see Schutzman, supra note 84, at 292 (interpreting Alice's intent to kill her husband as functioning as a "realm of autonomy made possible by the very fact of its impermanence").

(Cite as: 72 St. John's L. Rev. 237)

[FN122]. Garrett A. Sullivan, Jr., 'Arden Lay Murdered in that Plot of Ground': Surveying, Land, and Arden of Faversham, 61 Eng. Literary Hist. 231, 245 (1994).

[FN123]. The author wishes to thank John Baker for recognizing these points. Apparently, tenants in Reede's position were routinely evicted by the new owners of monastery land, such as Arden. See Keller, *supra* note 113, at 22-23; but see Youngs, *supra* note 89, at 83, 113-14 (discussing the types of tenancies permitted and extinguished under the dissolution statutes).

[FN124]. Schutzman suggests that Alice's comment remains "a rhetorical manipulation that seems to be based more upon the exigencies of persuasive argument than the actual terms of Arden's acquisition." Schutzman, *supra* note 84, at 291.

[FN125]. This remark, directed to Mosby after he faces other damning tangible evidence in the same brief scene, could just as easily have been said to Alice to elicit her own confession.

[FN126]. For other interpretations of the significance of the corpse, see Marsden, *supra* note 83, at 41; Master arden, Wine, *supra* note 82, at lxxiv n.1, lxxx; Master Arden, White, *supra* note 80, at xxx; Sullivan, *supra* note 122, at 231, 246-48. Felman must be credited with linking the literary speech act with the "speaking body" in the French title of her *The Literary Speech Act--Le Scandale du Corps Parlant*. See Felman, *supra* note 19.

[FN127]. Particularly at the time of Arden's debut and the decade thereafter, land law fell into turmoil as new methods of making and breaking perpetuities were developed. See *supra* text accompanying note 105; Spinosa, *supra* note 70, at 158.

Ben Jonson incorporated a reference to this possibility in his *The Devil is an Ass* (II.iv.33-37), invoking lines he probably borrowed from *The Revenger's Tragedy*. See R.V. Holdsworth, *The Revenger's Tragedy, Ben Jonson, and The Devil's Law Case*, 31 Rev. of Eng. Stud. 305, 307 (1980).

[FN128]. Attwell, *supra* note 112, at 338.

[FN129]. See *id.* at 338, 332. Yet, in his analysis of Tudor efforts to control aristocratic violence, Attwell does not discuss the play's reference to the statute that forbids commoners from wearing swords. See *id.* at 333; Arden, I.311 (citing 37 Edw. 3 ch. 9 (Eng.)).

[FN130]. Jacques Derrida, *Signsponge*, in *Acts of Literature* 344, 358 (Richard Rand trans. & Derek Attridge ed., 1992).

[FN131]. Sullivan, *supra* note 122, at 243.

[FN132]. *Id.* at 245.

[FN133]. See *id.* at 242.

[FN134]. See *id.*

[FN135]. See Stanley Fish, *Is There a Text in This Class?* 225 (1980) (proposing the social/conventional distinction in speech act theory).

[FN136]. Ben Jonson, *Every Man in His Humour* (R. S. Knox ed., 2d ed. Methuen & Co. 1949).

[FN137]. Esoteric oaths such as "By the foot of Pharaoh!" allow the lower-caste characters to assume a gentlemanly facade. See Shirley, *supra* note 5, at 50-52 (discussing such "fashionable swearing").

[FN138]. One reason is that, until recently, doctors could not with any certainty determine whether a particular assault caused a chronic condition resulting in death years later. See D.E.C. Yale, *A Year And A Day In Homicide*, 48 *Cambridge L.J.* 202, 211 (1989). Both Continental and English courts invoke a "year-and-a-day" limit in other contexts besides criminal law. In the fourteenth-century poem, *Sir Gawain and the Green Knight*, the Green Knight supplies the "twelmonyth and a day" formula as part of his offer to enter into a legally-binding contract with a member of Arthur's court. Robert J. Blanch & Julian N. Wasserman, *Medieval Contracts and Covenants: The Legal Coloring of Sir Gawain and the Green Knight*, 68 *Neophilologus* 598, 600-01 (1984).

[FN139]. See Yale, *supra* note 138, at 208.

[FN140]. Lawrence L. Levin, *Clement Justice in Every Man in His Humor*, 12 *Stud. Eng. Lit.* 291, 296 n.5 (1972).

[FN141]. *Id.* at 297-98.

[FN142]. *Id.* at 299 n.8, 300.

(Cite as: 72 St. John's L. Rev. 237)

[FN143]. *Id.* at 300.

[FN144]. *Id.* at 293.

[FN145]. See Milsom, *supra* note 1, at 414-15.

[FN146]. Ben Jonson creates just such a dismaying justice of the peace, Adam Overdo, in his later play, *Bartholomew Fair* (first performed in 1614). It is no exaggeration to say that the action in *Bartholomew Fair* centers around legally-operative "licenses" and "warrants." Authority resides in the mere possession of these formal documents, while the "official" authority figures, particularly Overdo, rely on corrupt, literal-minded, hierarchy-bound agents.

The current author plans to analyze *Bartholomew Fair* in a forthcoming extended version of this Article. Some topics ignored by previous criticism that deserve to be explored include: (i) the significance of the play's linkage of spoken oaths and written licenses to "benefit of clergy" (I.iv.5- 8; III.v.241-42), wherein the mere act of memorizing or reading a set Biblical passage literally saved a convict's life, in a salient example of legal formalism; (ii) the relationship between Justice Overdo's soliloquy concerning the general problem of legal causation and his earlier soliloquy about the subsumed problems of temporality and agency (III.iii; II.i.29-42; IV.vi.89-90); in his later speech, Justice Overdo, like Justice Clement, shows physical evidence of a beating and speaks of incidental / proximate causation; (iii) the potential importance of Johnson's recital of consideration in the Induction (line 120), in addition to his whimsical requirements of signing and sealing the same document (lines 135-38); and (iv) a study of formal agents, from the scribes and clerks who pen the warrants (IV.ii.98-100; V.ii.104-05), to Mistress Overdo and His Majesty's Watch as Overdo's proxies, and to Busy, a corrupt fiduciary (V.ii.62-64). One can compare such agents to the audience members, who are asked to supply individual judgments. See Induction. Citations above are to line numbering in Ben Johnson, *Bartholomew Fair* (Eugene M. Waith ed., Yale Univ. Press 1963).

[FN147]. Ben Jonson, *Volpone, or the Fox* (Alvin B. Kernan ed., Yale Univ. Press 1962) [hereinafter *Volpone*, Kernan]. All further references to the play are contained in the text.

[FN148]. See C. L. Barber, *The Idea of Honour in the English Drama, 1591- 1700* (1957); see also James Hirsh, *Cynicism and the Futility of Art in Volpone*, in *New Perspectives on Ben Jonson* 106, 106-109 (James Hirsh ed., 1997) (describing how the characters in *Volpone* scorn "honor").

[FN149]. King James, soon after his ascension in 1603, created knights indiscriminately for political reasons. See *Volpone*, Kernan *supra* note 147, note to IV.ii.30.

[FN150]. Peggy Knapp, *Ben Jonson and the Publicke Riot: Ben Jonson's Comedies*, in

(Cite as: 72 St. John's L. Rev. 237)

Staging the Renaissance: Reinterpretations of Elizabethan and Jacobean Drama 164, 168, 169-70 (David S. Kastan & Peter Stallybrass eds., 1991).

[FN151]. As Levin notes, no Justice Clement figure materializes in Volpone to sort out ambiguous or unreliable testimony and to divine true facts amid the chaos of lies. See Levin, *supra* note 140, at 291, 307. The avocatori seem relatively corrupt, foolish, and sadistic. See also Hirsh, *supra* note 148, at 109-14.

[FN152]. Sealing the will: In another scene, Mosca tells Voltore that, "[t] he wax is warm yet" on Volpone's will. (I. iii. 46). Actually, the law of England did not require a will to be sealed or signed, but, for prudent evidentiary reasons, both were customary. See Clarkson & Warren, *supra* note 15, at 250-51. If Mosca had control over Volpone's seal, then the fraudulently-produced will would have more chance of success in probate.

The fraud would prosper even further if Mosca and Corvino had conspired to have (innocent) witnesses present. As with the seal, testators used witnesses for convenience of proof, rather than as a legal requirement. See *id.* at 253. Here, witnesses might be duped by the old man's nods into believing that he truly assented to Mosca's transcription.

This Article simply argues that the will appeared *prima facie* valid. Even in the Elizabethan and early Jacobean periods, judges used "general principles" of fraud to invalidate wills procured by methods such as those described in Volpone, once such fraud was proved in court. See *id.* at 270-71 (discussing the scene). An aggrieved suitor for Volpone's gold could also have argued that Volpone did not possess the sound mind necessary to make a will. "[B]y the time of the Elizabethan dramatists," such a requirement was "well settled and widely understood." *Id.* at 232.

[FN153]. A seventeenth-century audience would accept the possibility of witchcraft; and spurious symptoms of possession similar to the ones staged here are described in sources dating from 1599 to 1603. See Ben Jonson, Volpone or, the Fox 295 n.24-31 (R.B. Parker ed., Manchester Univ. Press 1983) [hereinafter Volpone, Parker].

[FN154]. de Man, *supra* note 55, at 279 (quoting Rousseau).

[FN155]. See *id.* at 278-301.

[FN156]. Peter Brooks, Storytelling Without Fear? Confession in Law and Literature, in *Law's Stories: Narrative and Rhetoric in the Law* 114, 124 (Peter Brooks & Paul Gewirtz eds., 1996) (footnote omitted) (emphasis added).

[FN157]. [384 U.S. 436 \(1966\)](#) (finding statements or confessions made by a person in custody during an incommunicado interrogation will not be admitted as evidence absent a showing that the detained was informed of, and voluntarily waived

(Cite as: 72 St. John's L. Rev. 237)

constitutional protection, which it is incumbent upon the government to provide). See generally Brooks, *supra* note 156, at 114-34 (providing an illuminating analysis from a literary perspective of several of the issues raised here).

[FN158]. See V.xii.125 ("This is called mortifying of a fox."). The multiple punning may include up to six different connotations, of which one is "sentencing to death." Volpone, Parker, *supra* note 153, at 302 n.125. Venice at that time was renowned for its severe and righteous judicial system. See David McPherson, *Shakespeare, Jonson, and the Myth of Venice* 37-38 (1990); Richard H. Perkinson, 'Volpone' and the Reputation of Venetian Justice, 35 *Mod. Lang. Rev.* 11, 12 (1940).

[FN159]. The idea of the "ultimate con" is borrowed from Canfield's elucidation of Chaucer's *The Pardoner's Tale*. See Canfield, *supra* note 31, at 87. For Volpone's artistic exhibitionism, see generally John W. Creaser, *Introduction to Volpone, or The Fox* 1, 17-34 (John W. Creaser ed., 1978); Alexander Leggatt, *The Suicide of Volpone*, 39 *U. Toronto Q.* 19, 29-30 (1969).

[FN160]. See Felman, *supra* note 19, at 28-32, 61-62, 101-12.

[FN161]. See 1 Michel Foucault, *The History of Sexuality* 62, 70-71 (Robert Hurley trans., 1980).

[FN162]. John H. Langbein, *Torture and Plea Bargaining*, 46 *U. Chi. L. Rev.* 3, 3-4 (1978).

[FN163]. *Id.* at 7-8. See generally John H. Langbein, *Torture and the Law of Proof: Europe and England in the Ancien Regime* 3-26 (1977) [hereinafter *Torture*]. Torture was common in Venice. See C.J. Gianakaris, *Jonson's Use of "Avocatori" in Volpone*, 12 *Eng. Language Notes* 8, 14 (1974); McPherson, *supra* note 158, at 37-38.

[FN164]. See *Torture*, *supra* note 163, at 9, 73.

[FN165]. *Id.* at 73-74, 77-80, 138; cf. Mirjan Damaska, *The Death of Legal Torture*, 87 *Yale L.J.* 860 (1978) (reviewing *Torture*, *supra* note 163).

[FN166]. See *Torture*, *supra* note 163, at 73-94.

[FN167]. See *id.* at 81-82, 134.

(Cite as: 72 St. John's L. Rev. 237)

[FN168]. See *id.* at 73-74, 88-90, 135-39; see also James Heath, *Torture and English Law* 92, 139-40 (1982).

[FN169]. Gianakaris, *supra* note 163, at 14.

[FN170]. See generally *Torture*, *supra* note 163.

[FN171]. Even spectators who stay confident that Jonson will provide a moral conclusion could still share the emotional impact of Volpone's "false ending," as described by Stephen Greenblatt:

In *Volpone*, instead of the emotion of multitude we have precisely the avoidance of depth in a vertiginous swirl of words.... And we, in the audience, participate in this flow, for we do not want Volpone to stop, any more than the crowd at a circus wants the tightrope walker to fall, though its enjoyment is predicated on that possibility.

Volpone's act culminates in the first trial scene. The latter half of act 4 has the feeling of a finale.... [I]n act 4 of *Volpone*, imposture unexpectedly triumphs: judgment fails, the innocent are condemned, and the fox is set free.

What is the effect on this "finale" ? For a moment, Jonson offers the audience a resolution precisely the reverse of the one he will finally provide. It is as if he were testing the spectators, forcing them to reexamine their own sympathies: "You have identified with Volpone.... All right, I give you Volpone's triumph." The audience must ask itself, "What would a world be like in which Volpone has triumphed?" In reply, it wills Volpone's ultimate downfall. Stephen Greenblatt, *The False Ending in Volpone*, 75 *J. Eng. & Germanic Philology* (1976), reprinted in *Ben Jonson's Volpone, or the Fox* 29, 30-31 (Harold Bloom ed., 1988).

[FN172]. Note that a popular myth held that the rack did cure the gout. See *Volpone*, Parker, *supra* note 153, at 252 n.33. This allusion by Voltore, though, does not significantly weaken the above argument. Volpone fabricates many ailments besides the gout, to which disease Bonario vainly hopes that Volpone will confess. Also, Voltore suggests several tortures besides the rack. (The rack and the manacles (or "strappado") were the two methods of choice in England.) See *Torture*, *supra* note 163, at 84-85. Indeed, the allusion ingeniously adds another dimension to Voltore's sarcasm: the rack will always "cure" the gout, either in reality or via the victim's desperate confession that he never had the disease.

[FN173]. See Canfield, *supra* note 31, at 101-04.

[FN174]. *Id.* at 104.

[FN175]. See also Hirsch, *supra* note 148, at 116 (discussing virtue and faith in divine intervention in *Volpone*).

(Cite as: 72 St. John's L. Rev. 237)

[FN176]. The "deus ex machina," a dramatic device used since the fourth-century B.C., refers to either the artificial appearance of a god at the end of a drama to resolve the plot (occasionally through use of a crane), or, more generally, "an improbable event that brings order out of chaos." 4 The New Encyclopedia Britannica 41 (15th ed. 1986); see also Merriam Webster's Collegiate Dictionary 316 (10th ed. 1993).

[FN177]. Baker, *supra* note 1, at 289.

[FN178]. *Id.* at 290 (footnote omitted).

[FN179]. See generally Richard Dutton, Ben Jonson: Authority, Criticism 104 (1996); Jonathan Haynes, The Social Relations of Jonson's Theater 134-35 n.24 (1992); Stephen Orgel, What is a Text?, in Staging the Renaissance: Reinterpretations of Elizabethan and Jacobean Drama 83-87 (David S. Kastan & Peter Stallybrass eds., 1991); Stephen Orgel, Making Greatness Familiar, in The Power of Forms 41-46 (Stephen Greenblatt ed., 1982) (discussing how theater was legitimized during the Renaissance by the high status that publication confers on plays); Mark Rose, Authors & Owners: The Invention of Copyright 9-30 (1993); John Feather, From Rights in Copies to Copyright: The Recognition of Authors' Rights in English Law and Practice in the Sixteenth and Seventeenth Centuries, 10 Cardozo Arts & Ent. L.J. 455 (1992).