

Rethinking the “Spectacle of the Scaffold”: Juridical Epistemologies and English Revenge Tragedy

PERHAPS NOTHING GOES SO WITHOUT saying in the current state of literary studies as the recognition that Michel Foucault’s work has reversed a traditional assumption of literature’s opposition to, or detachment from, regimes of government. In *Discipline and Punish* Foucault argued that the human sciences and the history of penal law were part of a single “epistemological-juridical formation” originating in investigative procedures that administered pain in the name of eliciting the truth of a crime and displaying its purgation. He traced an unbroken line from the twelfth-century church’s establishment of confessional and inquisitorial techniques of juridical investigation through the early modern arrogation of such techniques to the power of the sovereign state, to demonstrate that such judicial investigation has been the “crude, but fundamental element in the constitution of the empirical sciences” from the eighteenth century onward.¹ Literary scholars have responded to this suggestion of an investigative and penal element in all humanist discourses by ingeniously reconfiguring what were once considered merely formal and generic questions.²

Among such questions are those of critics of English Renaissance tragedy who have either chosen to see it as anticipatory of Foucauldian discipline in its capacity to fashion self-regulating subjects, or have brought to the traditional critical preoccupation with its violence a new awareness that spectacles of legally inflicted pain are demonstrations of sovereign power. Thus, of the latter critics, Karen Cunningham has interpreted Christopher Marlowe’s theatrical representations of violence as conscious subversions of the attempts of Tudor monarchs to establish their

ABSTRACT Michel Foucault’s analysis of penal torture as part of a regime of truth production continues to be routinely applied to the interpretation of English Renaissance drama. This paper argues that such an application misleadingly overlooks the lay participation that was characteristic of English criminal justice. It goes on to explore the implications of the epistemological differences between continental inquisitorial models of trial and the jury trial as it developed in sixteenth-century England, arguing that rhetorical and political differences between these two models are dramatized in the unfolding action of Shakespeare’s *Titus Andronicus*. / REPRESENTATIONS 89. Winter 2005 © The Regents of the University of California. ISSN 0734–6018, electronic ISSN 1533–855X, pages 30–58. All rights reserved. Direct requests for permission to photocopy or reproduce article content to the University of California Press at www.ucpress.edu/journals/rights.htm.

authority through elaborately staged public executions, while of the former, Steven Mullany has seen Shakespeare's *Measure for Measure* as a critical reflection on the rise of "a theater of apprehension," producing in its audience a form of self-awareness that served as "an expanded avenue of access for social and cultural control."³

Common to both "disciplinary" and "spectacular" emphases in the Foucauldian interpretation of Renaissance tragedy, however, has been the underlying assumption that English judicial investigations are always identified with, and administered by, the state. It is also assumed, in accordance with Foucault's Kantorowiczian understanding of early modern monarchy, that this state has taken over the theological claims to truth and inquisitorial methods of the church. There is simply no room, in these accounts of the relationship between early modern English theater and early modern penal culture, for any understanding of the workings of criminal justice as being thought of, historically, as a communal responsibility, dependent on lay instigation and lay participation in judgment. When, for example, James Shapiro proposes a competitive relation between the Elizabethan theater and state spectacles of punishment, he quotes from a contemporary source that cutpurses caught pilfering at a play might be tied to a post on the stage for the people to wonder at. "When actors punish cutpurses onstage," asks Shapiro, "is it still theater? Theater within theater? A *state* within theater?"⁴ Likewise, when Elizabeth Hanson introduces her cultural-historical argument that Renaissance England saw the emergence of a new tendency to construe people as objects of official investigative knowledge, she quotes Hamlet's anger with Guildenstern for trying to "pluck out the heart of my mystery," commenting that "Hamlet's imagery here links his situation both to the culmination of many discovering operations of the Elizabethan state, the extraction and display of the traitor's heart at execution, and to moments of resistance to such operations."⁵ While both Shapiro and Hanson are insightful about the relationship between theater and penal practice, they encourage us to overlook the possibility that the detection of criminality and the right to judge it may have figured in popular English consciousness as, at least in part, the responsibility of the people. Sticking with Hanson's example of *Hamlet* for the moment, we could ask what happens to her suggestion of a state monopoly on operations of discovery when we acknowledge the narrative importance of the play's detective element. What should we make of the well-known fact that Hamlet himself pursues, as a kind of amateur detective, the same kind of judicial investigation into another's conscience and hidden motives that Rosencrantz and Guildenstern have been employed to make into his? The play's compulsion as drama depends not just on our sense of Hamlet's resistance to being constructed by state powers of investigation but also on our identification with his own detective impulse, his enthusiasm for fiction as a means to aid him in the probing of questions of guilt. Indeed, when Hamlet prepares Horatio to look out for signs of Claudius's "occulted guilt" revealing itself in his reaction to the play, Horatio responds by wryly identi-

ifying himself with the community's traditional responsibility to help victims of crime in their detective work: "If a steal aught while this play is playing / And scape detecting, I will pay the theft," he assures Hamlet.⁶ The joke here depends on people recalling the custom of assessing the entire community—the hundred—for payment of compensation to the victim if, after a hue and cry, a criminal had not been tracked down and apprehended.⁷ What, then, happens to a Foucauldian reading when we acknowledge the traces of a communal justice system informing the representation of Hamlet's own investigation? Such an acknowledgment would also involve recognizing that the activity of lay detection figures, in such revenge tragedies as *Hamlet*, not simply as a subject of mimetic representation, but as a hermeneutic principle, an aspect of *plot*, on which the intelligibility and credibility of dramatic action and of character depends.

Without, then, denying that Foucault's analysis has made the violence of the Renaissance theater newly legible, I want in this paper to argue for the value of shifting our attention from the Renaissance theater's visual impact (its "stagings," "spectacles," or "displays" of violence) in order to think, instead, about the forensic rhetoric of plot. I want, further, to suggest that even in revenge tragedy, the bloodiest of genres, the shaping epistemology of plot is not that of Foucault's "spectacle of the scaffold" but is, rather, derived from the common ground that English dramatists perceived to exist between the forensically based plots of Latin intrigue comedy and the popular practices of detection and evidence evaluation that defined their own culture of trial by jury.⁸ In the final stages of my argument I will show how *Titus Andronicus*, a play once likened to "a broken down cart, laden with bleeding corpses from an Elizabethan scaffold," is actually a perfect example of how Elizabethan revenge tragedy is self-consciously plotted to distinguish the participatory, open, and adversarial jury trial from the inquisitorial system Foucault described.⁹

The connection I am proposing between English revenge tragedy and the detective plot is not completely without precedent in critical discourse, but it has not been developed in ways that take seriously the idea that a participatory justice system might have had an impact on dramatic epistemology and vice versa. In 1923 T. S. Eliot observed that the element of plot in plays such as Shakespeare's *Hamlet* and Thomas Kyd's *Spanish Tragedy* seemed to point less to their supposed Senecan sources than to the plots of modern detective drama, but he did not speculate as to the cause.¹⁰ More recently John Kerrigan has explored links between the tracking motifs of tragedy, revenge drama, and detective fiction from Sophocles to Sherlock Holmes, suggesting that all these genres express a universal expiatory impulse toward retribution. However, although Kerrigan's sense of the Sherlock Holmesian affinities of Elizabethan revenge tragedy is informed by work on the links between the poetics of Greek tragedy and Greek forensic oratory, he warns against applying the Greek parallel directly to sixteenth-century England: "Greek legal process," he writes, "had for centuries before *The Orestia* more closely resembled TV drama than did, for instance, the assize courts known to Kyd (who was by training a legal scriv-

ener).¹¹ Perhaps; and yet the Athenian legal system did resemble that of sixteenth-century England inasmuch as Athenian cases were often decided by a panel of lay judges or *dikasts*—a kind of jury.¹² And it is the Anglo-American jury trial, according to Carol Clover, that is the key to understanding the extraordinary generativity of plot and plotting strategies in twentieth-century popular genres, such as the TV drama to which Kerrigan likens the forensic plots of Greek tragedy. Clover emphasizes the jury trial’s characteristic appeal, through the oral presentation of evidence in the courtroom, to the evaluative ingenuity and generic expectations of the audience-as-jury.¹³ What seems helpful about Clover’s model, by contrast with Kerrigan’s, is the way it links the investigative energy of the plot or narrative structure of the film or drama to an emotional and intellectual appeal to the audience *as lay judges*, thus throwing the emphasis simultaneously on the audience’s intellectual capacity to puzzle out what the plot presents as “evidence” and on its ethical arbitration of what that evidence implies. Sixteenth-century English revenge tragedy, while not presenting us with competing narratives of the facts as such, nevertheless makes a similar open-ended appeal to our capacity as equitable moral arbiters of the case.¹⁴

As Joel Altman says of Hieronimo in Kyd’s *Spanish Tragedy*, only the theater audience is finally in a position to “judge him in the light of all the circumstances,” and thereby to “show compassion for the cause.”¹⁵ Compassion for Hieronimo’s cause, incidentally, is necessarily also awareness of the need for regime change. Likewise, in the last scene of *Titus Andronicus*, Lucius addresses a “gracious auditory” of Roman senators, telling them of the wrongs that have driven Titus to murder their emperor and empress, while Marcus, Titus’s brother and a Roman tribune, asks them to “judge what cause had Titus to revenge.”¹⁶ Here, as in Horatio’s charge to tell Hamlet’s story, the theater audience assumes the position of the “people” who are to be judges of all the circumstances that led to the regicidal massacre, and, as such, to participate in an act of critical judgment that has both moral and political dimensions. What are the implications of such an appeal to the audience? In order to find out, we have to start by revisiting Foucault’s political anatomy of early modern penal practice so as to compare the epistemological foundations of criminal jurisdiction in early modern France and England.

Foucault’s “Spectacle of the Scaffold” and the Roman-Canon System of Proof

Foucault’s governing metaphor of the scaffold as spectacle or theater—the political spectacle of intense pain that reaffirms the body of the king and hence the body politic—has, I have already suggested, become routinely used in the criticism of the English Renaissance tragedy. And yet, in Foucault’s argument, the ordinary spectacle of penal violence is integrally related to *a specific system of evidence*

evaluation that, in its underlying logic, bears no relation to the English understanding of evidence or of what constitutes or who decides the “truth” of what happened in a criminal case.

When critics of English Renaissance drama cite Foucault’s “famous description of punishment,” focusing on his pronouncements that “public torture and execution must be spectacular,” they seem to forget that public torture was only half of the story.¹⁷ In fact, the *spectacle* of punishment in which the condemned body participates acquires its meaning in Foucault’s account only in relation to the regulated *secret* administration of torture prior to the sentence. The tortured body affirms, “open for all to see, the truth of the crime,” because that truth has already been arrived at according to “rigorous rules” and “formal constraints” governing the professional judges’ weighing, in secret, of different kinds of evidence, of which a confession extracted under torture was one.¹⁸ These procedures, as Foucault explains, had been defined in the Middle Ages and elaborated by Renaissance civilians: they are known to legal historians as the “Roman-canon system of evidence,” for they derive from ecclesiastical inquisitorial tribunals. The Roman-canon system was established as part of the penal code in France a century after the abolition of the judicial ordeal and was further codified in the Ordinance of Blois (1498), the Ordinance of Villers-Cotterets (1539), and, beyond the Renaissance, but within the period Foucault treats, the criminal ordinance of 1670.¹⁹ Briefly, its main features were that it was an inquisitorial system—that is to say, it did not depend on criminal accusations being made by injured parties in the community—and it was operated in the name of the crown, by professional judges. From preliminary investigation through examination of the accused, confrontation, examination of defense witnesses, “*question extraordinaire*,” or torture to the conviction, the process was entirely conducted in secret.

Foucault’s account, stressing the symmetry and interdependence of public spectacle and secret examination of evidence, dwells less on the stages of preliminary inquiry, accusation, and confrontation than it does on the theory of legal proofs that dictated the judge’s procedure from stage to stage. Foucault describes, vividly, the meticulous “penal arithmetic” that the Roman-canon system adapted from Roman orators’ discussions of “artificial proof.”²⁰ According to this arithmetic, as Barbara Shapiro has written,

two unexceptional witnesses constituted a full proof, one doubtful and one unexceptional witness, added up to something more than a half proof, but not a full proof. Other types of evidence, such as “common fame” or private, as opposed to public, documents, also were considered half-proof. . . . In criminal causes, one witness—no matter how good or how reliable—could never result in conviction. Without a confession, two witnesses were absolutely essential. In this way the law encouraged and, indeed often required, the torture of the accused in order to produce a confession.²¹

As one of Foucault’s sources, Adhémar Esmein, observed in his 1882 study, the aim of the process was to devise a set of mechanical rules for weighing the evidence

regardless of the opinion of the judge: “mis en face de ces preuves,” Esmein writes, “il doit nécessairement condamner; peu importe dans l’une ou l’autre hypothèse sa conviction intime. . . . Le juge est comme un clavier, qui répond inévitablement lorsqu’on frappe certaines touches.”²² Once the proofs added up, there was no possibility of contradictory evidence of the accused’s innocence, of the so-called “fait justificatif” weighing against conviction.²³ Foucault sums up the paradoxical tendency of this process to the extraction of confession through torture: “Written, secret, subjected, in order to construct its proofs, to rigorous rules, the penal investigation was a machine that might produce the truth in the absence of the accused. And by this very fact, though the law strictly speaking did not require it, this procedure was to tend necessarily to the confession.”²⁴ It is, of course, this secretly produced confession, “complement to the written, secret preliminary investigation,” that Foucault analyzes at length as the coerced, ritualized production of an authenticating guarantor of the rightness of the conviction, both in the form of torture and of public execution. Hence it is that he insists on the distinction between the unrestrained torture of modern investigations and this torture, which “occupied a strict place in a complex penal mechanism,” a two-part evidentiary mechanism for producing truth.²⁵

**English Jury Trial:
Witness Testimony as Evidence
Rather than Proof**

That the sixteenth-century English system of criminal justice in no way resembled this “penal mechanism” has not deterred the application of Foucault’s model of the juridical production of the French monarch’s power to its English counterpart. And this is not surprising. For while, as is well known, the abolition of judicial ordeal in England in 1215 resulted not, as in France, in the extension of the Roman-canon inquisitorial system to criminal procedure, but in the establishment of trial by jury, other points of similarity between the French and English penal systems have seemed to override this difference. Foucault himself notes, perhaps because of the role model of jury trial, that England was “one of the countries most loath to see the disappearance of the public execution.”²⁶ And, in any case, what Renaissance critics have learned from Foucault is how to read accounts of public executions as dramatic texts.²⁷ There are no transcripts of what took place at the oral jury trial (apart from treason trials), and there has been a corresponding tendency to underestimate the impact of its diffusion of habits of thought and practice through the culture. Publication by J. S. Cockburn of indictments recorded from the assize courts of the Home Circuit for the reigns of Elizabeth and James in the ten volumes that make up the *Calendar of Assize Records* (1975–82), along with Cockburn’s articles analyzing his findings, has surely done much to deter taking jury trial in the sixteenth and seventeenth centuries seriously. Cockburn’s reserva-

tions about the possibility of meaningful evaluation of evidence taking place in jury trial are many and are reiterated in various places. I will take up his arguments at a later stage, but for the moment it is enough to note that he has, in addition to quoting very selectively from the contributions to the debate over the role of the jury in the late seventeenth century, used statistics derived from records of jury service and from the indictments to paint a very bleak picture of an institution in decline: an institution incapable of acting independently to find the facts in criminal cases and increasingly intimidated by a powerful judiciary.²⁸

John Langbein's *The Origins of Adversary Criminal Trial* would seem to support Cockburn's view, since its sketch of the criminal trial in the sixteenth and seventeenth centuries stresses the speed of the arraignments, and the lack of provision of defense counsel for the accused, and the lack of any rules of evidence.²⁹ Even Langbein's earlier work on justices of the peace (JPs) has been interpreted as proving that jury passivity increased. In this work Langbein analyzed the so-called Bail and Committal Statutes of Mary Tudor's reign, 1555 and 1556 respectively, that required justices of the peace to take pretrial examinations of suspects before either granting them bail or imprisoning them.³⁰ Elizabeth Hanson has used Langbein's earlier work, and Cockburn's critique of it, to argue that the effect of the Marian statutes was to deprive the jury entirely of its role in producing, through the verdict, an account of the truth as they saw it. The legislative force granted to pretrial investigations by justices of the peace, Hanson writes, made them "into sorts of Crown prosecutors." "In short," she concludes, "the production of an account of a crime was now supposed to be in the hands of the investigating justice rather than the jury."³¹

Why, then, make an issue of the limited application of Foucault's model of the production of knowledge/power to the English judicial system? Precisely because, for all its inadequacies, the English jury system implied a completely different epistemology; one that I think, came to be integrally associated, in the wake of the Marian Bail and Committal Statutes, with the very rhetorical structures of probability on which dramatists were beginning to rely for composing plot and character. As I shall argue, the developments in pretrial investigation that Elizabeth Hanson's Foucauldian argument finds to be producing the equivalent of France's top-down model of state control over criminal investigation may be interpreted quite differently, especially in relation to the plotting of dramatic narrative, and the representation of criminal justice on the stage.

In order to understand the distinctive epistemologies of jury trial, as opposed to trial by the Roman-canon law's system of proof, we need to start with the difference between the ways each system approached the "witness." In the Roman-canon system, as we've seen, a witness was part of the tariff of *proof*. In the German *Carolina*, for example, it is stipulated that "when a crime is proved with at least two or three credible good witnesses, who testify from a true knowledge, then there shall be . . . judgement of penal law according to the nature of the case."³² In English jury trial,

however, nothing bound the jury to accept the testimony of witnesses. This freedom, which originated in the idea that the jury's verdict came from their own knowledge of the facts, modulated into unlimited discretion in the evaluation of evidence given by witnesses. Thus, Christopher St. German, writing in 1533 against Thomas More, distinguished "suche witnes, as be sometye brought in to the kingis courtis, to giue evidencis to an enquest" from "the wytnesse . . . in the spyrytuall courte, that shall acqyte or condempne the parties." In the common law, "the iurie be not bounde alwey to folowe tho wytnes . . . For their saying there, is but as an evidence, whiche the iurie shuld not be bounde to beleue, but as the truthe is."³³ St. German's point, that the "saying" of a witness in a common-law court was "but as an evidence" became a commonplace.³⁴ A royal proclamation for jurors, issued in 1607, declared that the law of the realm placed such confidence in jurors "as it doeth not absolutely tye them to the evidences and proofes produced, but that it leaveth . . . the discerning and credit of the Testimonie to the Juries consciences and understanding."³⁵

Between 1533 and 1670 jurors ceased to be self-informing and became entirely reliant on testimony presented in court. Legal historians refer to the jury's becoming "passive," but contemporaries naturally did not characterize their role in this way. Indeed, where Foucault portrays an ancien régime epistemology of judgment based on a medieval canonist tradition of "knowledge of the truth, knowledge of the offender, knowledge of the law," the sixteenth-century English epistemology of judgment could rather be said to be based, as Barbara Shapiro has written, on "great faith both in witness observers and in jurors as 'judges of fact,'" that is, as evaluators of contradictory witness-testimony.³⁶ Although Langbein's research on the rise of the justice of the peace as pretrial investigator has been interpreted as producing the justice as equivalent to a continental crown prosecutor, his own argument actually specifies that the passing of Marian Bail and Committal Statutes breathed new life into jury trial, shaping a different role for the trial jury *as evaluators of evidence*. The requirement that JPs examine suspects and bind witnesses to testify, he proposed, tended to organize the oral production of evidence ready for the trial.³⁷ From 1557 onward, chapters on "Evidens" appear in books on criminal procedure, such as Sir William Staundforde's *Les Plees del Coron* (1557) and Ferdinando Pulton's *De Pace Regis et Regni* (1609).³⁸ The wording of indictments, and records of justices taking recognizances, make it clear that the witnesses were bound to bring evidence before the jury.³⁹ Hanson argues that the rise of pretrial investigation by justices of the peace is, like the sudden and transitory appearance of torture as part of political criminal procedure in this period, symptomatic of a more general "rise towards hegemony in this period of . . . 'analytico-referential discourse': discourse that assumes that truth is an objective condition, external both to the mind that perceives it and the language that describes it."⁴⁰ This formulation elides the rhetorically based discourse of probability from which the scientific discourse of fact emerged. Though Hanson argues that the "developing practices of

criminal investigation” in the period “began to make both the facts of the crime and the guilt of the perpetrator objects of mystery and methodical discovery,” this argument occludes the participation of lay jurors in the finding of “fact” that, pace Hanson’s use of the term, was thought of not as an object of methodological discovery, but as a contentious or conjectural issue. A “fact” was a deed allegedly done. So, as Barbara Shapiro puts it, “‘fact’ in the legal context did not mean an established truth but an alleged act whose occurrence was in contention.”⁴¹

Hanson’s lack of interest in the dialogic process by which legal “truth” was supposed to emerge is clear from her glossing of the word “boulting”: “boulting,” she says, means “sift” and is a synonym for “try.” However, sixteenth-century uses of the word “boulting” suggest a definitive connection between “sifting” and pro-et-contra argument, as when Sir Thomas Smith writes, in explanation of having composed his *Discourse of the Commonweal* dialogues: “that kind of reasoning seems to me best for boulting out of the truth which is used by way of dialogue or colloquy, where reasons be made to and fro, as well for the matter intended as against it.” Similarly, Sir Matthew Hale writes in praise of jury trial, as opposed to Roman-canon trial by witnesses, “that by this Course of . . . open Examination, there is Opportunity for . . . any of the Jury . . . to propound occasional Questions, which beats and boults out the Truth much better than when the Witness only delivers a formal Series of his knowledge without being Interrogated.”⁴²

Poetic Invention and Legal Concepts of Probability

For my purposes, the most significant consequence of the statutory requirement that justices take pretrial examinations is the way in which that requirement focuses attention on the rhetorical probability of any given narrative of the facts. Examining suspects and binding witnesses to give evidence to the jury meant that justices were required to be aware of problems of coherence, consistency, and motivation, indeed, of the *arguability of likelihood* in any case. Thus, the Surrey justice of the peace Bostock Fuller records examining Thomas Kylock, having accused Edward Rogers, “vppon a verye slyght suspicion of ffelonye of stealing of a horse,” which, he says, “being examined on bothe sydes before me hath noe probabilytye & the sayde Thomas dothe now relinquyshe his accusacon in that kynde & dothe onely accuse him of suspicion for being in an Alehouse at Blechingly in suspicious manner.”⁴³ The fact that Justices routinely took such examinations after 1557 meant that they were necessarily made aware of the resemblance between their analysis of evidential probability and the rhetorical techniques of probable argument disseminated by such texts as Cicero’s *De Inventione* and Quintilian’s *Institutio Oratoria*. These treatises were translated and adapted to the uses of rhetoric generally, though in fact they were specifically concerned with forensic rhetoric, with

establishing a case for the guilt or innocence of the defendant in a legal case.⁴⁴ Both Cicero's and Quintilian's works stress that the orator's goal is the probable or plausible narration of facts in the law courts, and both devote a considerable amount of space to the analysis of techniques of proof, which are very nearly coextensive with what we think of as rhetorical invention. Quintilian divides his technical or artificial proofs into *signa aut argumentis aut exemplis* ("signs, arguments or examples"), and signs are further divided according to their degrees of certainty (that is, pregnancy is a certain sign of intercourse, but bloodstains may be the sign of slaying a victim or of a nosebleed). Arguments include enthymemes, but also the "places" of argument (*argumentorum loci*), which may either be attributes of the fact (such as cause, time, place, occasion, means) or of the person (such as birth, nationality, sex, fortune, kin, disposition, habits, friends, and so forth). Here Quintilian's treatment overlaps with Cicero's discussion of inference (*coniectura*) or suspicion (*suspicio*) in book 2 of *De Inventione*, which concerns what in common law is the "issue of fact," what Cicero calls the "conjunctural state of the case." Cicero suggests the usefulness of these forensic strategies to poets and dramatists. He writes, for example, of the importance of establishing the credibility of an impulse if one is arguing that the accused did something on impulse.⁴⁵

It is crucial that we appreciate how quickly these techniques were disseminated in sixteenth-century England, and not just in Latin, or to an elite. Quintilian's arguments about proof entered schoolboy consciousness through Erasmus's *De copia*, whence they influenced vernacular writing.⁴⁶ Grammar-schoolboys read the plays of Terence with commentaries that analyzed the plays' comic deceptions according to Quintilian's schematization of proofs; some of those same schoolboys went on to write vernacular drama, others went on to work in the courts, or served as jurors.⁴⁷ English justices of the peace responded to the new duties imposed on them by the Bail and Committal Statutes by turning to the very same discussions of artificial proof. William Lambarde's 1581 *Eirenarcha*, a popular and much-reprinted manual for justices of the peace, was expanded in its 1588 edition to include a much fuller discussion, in book 2, chapter 7, of the examination of suspects for felony, including a table of the "causes of Suspition," which, as Barbara Shapiro explains, is an easy-to-follow diagram of Cicero's discussion of the conjunctural state of a case.⁴⁸ As Shapiro notes, schemes similar to Lambarde's are found in Richard Crompton's enlargement of Sir Anthony Fitzherbert's *L'Office et Authoritie de Justices de Peace*, in Thomas Wilson's *Arte of Rhetorique*, and in Michael Dalton's *The Country Justice*.⁴⁹

Jury Trial: Hearing and Judging Witnesses on Both Sides

The question that necessarily arises at this point concerns the accessibility of this discourse of suspicion and probability to the jury, who were judges of the

fact. Here we need to return to Cockburn's influential arguments, which, insisting that juries were the passive instruments of the judiciary, incapable of exercising judgment, have caused literary critics to ignore the possibility that participation in the justice system diffused concepts of fact-finding and equitable judgment through the culture. Against Cockburn's arguments, we need to consider those of Thomas Green and Cynthia Herrup, which tend in the opposite direction. It is first important to register that there were two kinds of jury: a "grand jury," whose function it was to consider bills of indictment drawn up by clerks of assize on the presentment of evidence from justices and victims of crime, and a "petty" or "trial" jury, who heard witnesses on both sides in open court, and delivered the verdict based on the evidence they had heard. If the grand jury decided the evidence was sufficient for a trial to take place, they endorsed the indictment as a *billa vera*, or a true bill, and if there was not enough evidence, they returned it as *ignoramus*. A *billa vera* meant the case went to trial before the "petty" or "trial" jury.

The initiative in identifying a crime and bringing it to the notice of the grand jury was shared by constables, justices, and ordinary people. While the direct participation of the victims in bringing charges might seem to give a charter to personal vengeance, Cynthia Herrup argues that in practice "a rudimentary notion of probable cause" acted as a restraint; "grand juries," she notes, "repeatedly show their preference for cases based on solid, witnessed detection over those built from circumstantial inference."⁵⁰ Notions of probability, then, informed practices of investigation by wronged parties, even before an indictment was endorsed. And while Cockburn bases part of his case against the adequacy of jury trial on sources critical of the grand juries, it seems that what these critics objected to was the grand juries' habit of foreclosing the possibility of a full and open trial of the evidence in a court, by dismissing a murder indictment as an accidental slaying "*per infortuniam*," thus taking it upon themselves to judge the facts of the case instead of leaving it to the trial jury. Zachary Babington's *Advice to Grand Jurors in Cases of Blood* (1677), which draws on his forty years' experience as a clerk to the assizes in Oxford, says repeatedly that grand jurors should not think they are bound by their oaths to "*observe the Circumstances of every Fact before them*," but are to leave those circumstances to the judgment of the trial jury on the oral presentation of evidence.⁵¹ While the accused may prove innocent and the charge may "lessen and decrease . . . even to nothing, upon a full Examination and Debate of the whole matter, by hearing of Parties, and Witnesses, of both sides, and receiving . . . such a scrutiny and narrow search . . . into all the circumstances and aggravations of the Offence," it is not up to the grand jury to anticipate this "full Examination and Debate," mainly because the grand jury only hears accusing witnesses, and hears them in a private chamber, not in the public courtroom.⁵² If there seem to be extenuating circumstances, Babington goes on, such as the accused being a child, it is "not the Grand Jury (who see not the Child) but the Court and the other Jury shall inspect the Child, shall judge whether . . . upon hearing him speak, he may be thought capable of malice."⁵³

Clearly, then, Babington's criticism of the grand jury is not proof that the petty or trial jury was thought incapable of judging evidence; it is rather proof that both grand jury and trial jury were thought capable of this, but that only the trial jury had access to witnesses of both sides, to a full, public debate, and to hearing the accused speak.⁵⁴

A main plank in Cockburn's case against the possibility that juries were capable of judging evidence is his finding of numerous inconsistencies in the surviving indictments for the Home Circuit. He notes a dramatic case in 1616 in which a man was convicted at the Sussex assizes on an indictment alleging simply larceny at Horsham, Sussex, when a clerk's note on the indictment read, "it appeared upon evidence that this was robbery upon the highway in Surrey," a much more serious offence, and less likely to be regarded with clemency by the jury.⁵⁵ However, the discrepancy between indictments and what emerged as evidence in the oral trial does not seem necessarily to invalidate the jury's consideration of evidence. Zachary Babington said endorsing the indictment as *billa vera* only meant endorsing "that which for substance seems to them (*prima facie*) to be a probable truth . . . although they have no proof of all the Aggravations and Circumstances that attend the Fact," because this evidence may appear upon "the further enquiry of another Jury." Babington quotes Sir Edward Coke's important distinction between indictment and oral trial: "*An Indictment is no part of the Tryal, but an Information . . . For by Law the Tryal in that case is not by Witnesses, but by the Verdict of Twelve men, and so a manifest diversity between the Evidence to a Jury, and a Tryal by a Jury.*" Addressing the jury on the Overbury murder trial, Coke warned, "*Jurors were not to expect a direct and precise proof of every point laid in the Indictment.*"⁵⁶

Another of Cockburn's arguments against the jury's ability to exercise responsible judgment is based on the speed of felony trials. Sir Thomas Smith's *De Republica Anglorum* suggested that only two or three prisoners were tried before a single jury, but Cockburn finds that that number grew between 1559 and 1588 to reach a maximum, on average, of eight before it began again to decline. On the strength of such figures, he concludes, there is "no way in which meaningful jury discussion could have taken place." Thomas Green, however, points out that jurors deliberated not after each case but toward the end of a two- or three-hour period of testimony; for the few difficult cases, he concludes, there may have been ample time.⁵⁷ William Walwyn, defending jury trial against Henry Robinson's proposal to do away with it in 1651, argued, against Robinson's objection, that keeping deliberating jurors without victuals increased the possibility of false verdicts. He argued that "they have had time enough at Trial . . . to be fully satisfied from the examination of Witnesses, in the right state of the Cause; which then they are to look to, and to clear all their scruples by what questions they please . . . before they discharge Witnesses."⁵⁸ There are instances of the jurors retiring to deliberate and then returning to ask further questions concerning the facts. A manuscript report of a case at the Old Bailey in 1616, in which a servant was arraigned for have taken diverse belong-

ings from her mistress and placed them within a trunk, records that “the jury in this case departed from the bar and returned and asked the advice of the court, whether it was proved that the trunk was removed out of the house for any of this time.”⁵⁹ Clearly the jury wanted, in spite of the evidence for felonious intent, to argue that the case was not one of burglary on the grounds that nothing was actually removed from the house. In this case, as in the others reported in the same manuscript, the jury was deliberating and trying to exercise a kind of equitable judgment.

The Old Bailey cases recorded in this manuscript, probably written by the young barrister Arthur Turnour, are revealing in relation to another of Cockburn’s arguments, which is that the jury—which he describes as “illiterate, impressionable, inexperienced”—was increasingly, in this period, intimidated by the bench, and so could not have given verdicts based on their own judgment of the probabilities. Cockburn himself offers statistics to show that jury literacy increased rapidly over the seventeenth century.⁶⁰ Evidence for the intimidation of juries, however, cuts both ways. If, as Cockburn argues, jurors were being sent to Star Chamber from the 1580s and through James’s reign for finding fact contrary to the judge’s view of the evidence, then this in itself is evidence not of jury passivity but of an ongoing struggle between bench and jurors, between the official definitions of culpability, and the views of the community.⁶¹ Thomas Green’s *Verdict According to Conscience* narrates a shift in the means juries used to “nullify,” as he puts it, the rigor of the official law on homicide.

Throughout the medieval period, patterns of jury acquittal suggest a discrimination, which anticipated the later legal distinction between murder and manslaughter, between acts of homicide that had offended against the standards of the community and those of a less serious nature. Transformations in the sixteenth century, particularly the shift from a self-informing jury to a trial based on evidence, increased the scope for judicial instruction of juries, as well as for judicial intimidation, making this kind of jury discretion more difficult to exercise without an evidential basis. However, developments that led to the decision in *Bushel’s Case* (1671), that a judge may not punish or threaten to punish any juror for his verdict, tell a tale not of jury passivity, but of case after case of confrontation between jury and bench over the implications of the evidence. Moreover, although *Bushel’s Case* emerged from confrontation between judge and jury over the political trial of the Quakers William Mead and William Penn, the history of judicial intimidation leading up to it included cases of homicide, in which juries were said to have encroached on the judge’s privilege of finding law rather than fact, because they brought a verdict of death “*per infortunium*,” or by misadventure, when the judge would have it murder. In other words, the question of fact-finding involved inferences about intent, and it was, as Green writes, “this problem that lay at the heart of future tensions between judge and jury.”⁶² When considerations of intent mitigate decisions about guilt, what is taking place is equitable judgment. As Bernadette Meyler has

shown, seventeenth-century debates on the role of the jury increasingly ascribed to it the conscionable, equitable role once ascribed to the Lord Chancellor in Chancery.⁶³ Nor was this kind of confrontation between judge and jury over questions of guilt limited to homicide cases. The cases recorded by Turnour in 1616 show juries being intimidated by the judge, Thomas Coventry, but trying all the while to make equitable distinctions on the evidence. In one case, where three men were indicted for burglary, but “the evidence proved that only one brake the house and tooke the goodes,” the jury found only that one guilty of burglary, and the rest of larceny, which was “capable of clergy.” But Coventry opposed them, and obliged them to find all three guilty of burglary.⁶⁴ Finally, in the late-seventeenth-century literature on the importance of the jury as an instrument of resistance to political tyranny, we find not only that jury trials from the reigns of Elizabeth and James have become part of a narrative of intimidation and resistance but also that the ordinary practice of decision-making in felony cases has become the basis for a theory of the jury’s capacity to decide both law and fact. “Is it not every Day’s practice,” asks John Hawles in *The Englishman’s Right*,

that when Persons are indicted for *Murther*, the Jury does not only find them *guilty* or *not guilty*, but many times, upon hearing and weighing of the Circumstances, brings them in either *guilty* of *Murther*, *Manslaughter*, *per Infortunium*, or *se defendendo*, as they see Cause? Now do they not herein complicately [*sic*] *resolve* both Law and Fact?⁶⁵

As Matthew Hale wrote, “the Jurors are not only Judges of Fact, but many times of the truth of Evidence, and if there be just Cause to disbelieve what a Witness swears, they are not bound to give their verdict according to the Testimony of that Witness.”⁶⁶

Enough has been said, I hope, to show that the epistemology of the jury trial, with its hearing of witnesses on both sides, and its contested freedom to evaluate witness testimony both as to the fact and the question of felonious intent, differed in significant ways from the epistemology of the inquisitorial trial described by Foucault in *Discipline and Punish*, in which the sworn testimony of a witness was part of a calculable tariff of proof totaled up in secret by a professional judge. Moreover, English writers on the common law liked to suggest that their oral trial bore a closer resemblance to the forensic oratory of the Roman republic than did the continental inquisitorial trial. Sir Thomas Smith’s *De Republica Anglorum*, written in Toulouse, emphasizes as the main distinction between the English “common” and French “civilian” systems the fact that the English witnesses and evidences are heard “openly, that not only the xij, but the Judges, the parties and as many as be present may heare what ech witness doeth say . . . Although this may seem strange to our civillians now, yet who readeth *Cicero* and *Quintilian* well shall see there was no other order or maner of examining witnesses or deposing among the Romans in their time.”⁶⁷ At criminal jury trial, Smith glosses what witnesses say as “*indices* or tokens which we call in our language evidence.”⁶⁸ Given Smith’s earlier reference to Quin-

tilian, it seems likely that his translation of evidence as *indices* here refers to Quintilian's discussion of probabilities, also called by Quintilian *signa non necessaria*, *indicia* or *vestigia* (traces). In Smith's account, then, the open jury trial, conducted in the vernacular and based on jury evaluation of the *indices* or probable signs, was thought to hold a defining place in the *Republica Anglorum*, just as the centrality of forensic oratory had defined the Roman republic, its imperial decline marked, in Quintilian's view, by the decline of its regard for forensic techniques of proof.

The Displaced Jury Trial in *Titus Andronicus*

I want now to offer a reading of Shakespeare's *Titus Andronicus* as a play that presents political tyranny as the refusal of an open hearing of the evidence. The example of *Titus Andronicus* might seem perverse, given the play's tendency to be read, by critics as far apart ideologically as Francis Barker and John Dover Wilson, as continuous with and exploitative of the hangman's trade rather than as taking a critical interest in the political importance of participation in the criminal justice system.⁶⁹ Even more recently, Karen Cunningham's Foucauldian reading of *Titus* has developed her analysis of Marlowe's drama in similarly arguing that Shakespeare's mutilated bodies work to unsettle the Tudor monarchies' uses of spectacular public executions to uphold their own authority and truth.⁷⁰ My suggestion, however, would be that such an interpretation gives us no insight into why the play's action follows the precisely plotted temporal sequence that it does. The play's temporal shape or plot, in other words, is conceived as an adaptation of the error-based plot of Roman comedy to the form of a jury trial.⁷¹ The errors of a comic plot become deceptions as to the facts of a recent homicide, and the middle acts of the play represent the characters trying to reason out, from the uncertain, ambiguous probabilities of evidence, what the true facts are. I have already mentioned that the schoolroom analysis of Roman or Terentian comedy tended to emphasize characters' uses of the same kinds of probable reasoning from uncertain signs that Sir Thomas Smith, as we've seen, associated both with jury trial and with a republican conception of the function of oratory. *Titus Andronicus* is also concerned with the difference between republican and imperial governments, especially as distinguished by their systems of justice.⁷² It used to be thought that the play's anachronistic inclusion of both republican and imperial institutions was attributable to its general incompetence, but the republican/imperial contrast plays out tellingly in the course of the tragedy as the distinction between an open, participatory justice system, and one that, like the Roman-canon law system, precludes public inquiry and treats artificial proofs as incrementally adding up to guilt. After presenting Rome's rapid fall into imperial, hereditary rule through Titus's crucial misjudgment in act 1, scene 1, Shakespeare sets in motion a version of the Terentian

erotic intrigue plot as a plot of incrimination, in which the villains employ a rhetoric of probability to frame the guilt of the Andronicii family. The subsequent refusal, by Rome's emperor, to allow for an open examination of the deceptive evidence is followed by scenes of an extraordinary mixture of pathos teetering on the brink of farce, in which Lavinia's mutilated and speechless person embodies the uncertainty of evidence as to the question of her condemned brothers' guilt. The slow and painful attempts of Marcus, Titus, and young Lucius to interpret Lavinia's signs are a displaced form of inquiry into the evidence denied by official justice, the outcome of which inquiry is communicated to the wider Roman world by the corroborating proof represented by Aaron's paternity of Tamora's child.

The play's Terentian action, as I see it, begins in what I would call the opening of act 2 (though Jonathan Bate's new Arden edition makes this scene continuous with act 1), a scene in which Tamora's sons Chiron and Demetrius threaten one another as competitors for the love of Lavinia, Titus's daughter, while Aaron, their mother's lover, fashions the sons' libidinous rivalry as instrumental to his own stratagem. This scene represents a new departure, the introduction of a distinctly *comic*, bustling energy, the kind of energy we associate with intrigue. It follows the play's somber, stately, but nonetheless eventful opening, in which Titus, returning victorious from war with the Goths to bury twenty-one of his twenty-five sons in the family tomb, has also sealed Rome's terrible political fate by choosing as Rome's emperor Saturninus (and with him the principle of primogeniture) instead of Bassanius, who stood for the principle of popular election. Bassanius's betrothal to Titus's daughter, Lavinia, then hinders Saturninus, who wished to acknowledge Titus's support by the usual means of marrying his daughter and allying the Andronicii with the imperial throne. In the ensuing tussle over who should marry Lavinia, Titus's political fortunes take a decisive turn for the worse when Saturninus, in anger, turns to woo Tamora, Queen of the Goths, as his empress. As Titus had pitilessly ordered the slaughter of Tamora's eldest son in the first moments of the play, this sudden elevation of the Queen of the Goths bodes nothing but ill for his entire family. His lack of judgment and misplaced trust in authority is once again shown, however, in his readiness to believe that her intercessions with her husband on his behalf are made in good faith, and he invites Saturninus and Tamora to join his family in a hunting party. So when Tamora's lover, Aaron the Moor, remains onstage to comment on these violent reversals of political and family fortune after the rest of the cast has left, we have the sense, I think, not of the continuation of a scene, as Bate's stage directions would suggest, but of the play's shift into a new discursive mode. And it is this new mode, I would argue, that, as it turns out, is signposted for us as a gruesome, tragic-farcical version of the erotic intrigue plot of Roman error-based comedy.

The scene in which Tamora's sons, Chiron and Demetrius, suddenly, and without motive or dramatic preparation, express love for Lavinia, bears a close structural resemblance to other English Renaissance imitations of the initiation of Ter-

entian plots of seduction. In such scenes the association between the erotic impulse and the prudential, paralogistic course of deception on which the lovers thereafter embark is expressed structurally in the deliberative dialogue between the lover and his intimate friend or servant and lexically in various metaphors of deceptive vision and blindness. For example, in Shakespeare's *Taming of the Shrew*, the servant Tranio shapes the erotic trance of his master Lucentio into an awareness of the need to assume a disguise in order to have sexual access to Bianca, the object of his affections. "If you love the maid / Bend thoughts and wits to achieve her," he advises, and proceeds to outline their predicament.⁷³ Lucentio catches on quickly with a scheme to gain access to Bianca alone, and "now 'tis plotted," concludes Tranio (*Taming*, 1.1.188). In *Titus Andronicus*, Aaron replies to Chiron's protestation, "Aaron, a thousand deaths would I propose / T'achieve her whom I love," with a similarly practical question: "T'achieve her how?" (1.1.580). In truly comic plots (the dialogue between Pyrocles and Musidorus in Sidney's *Old Arcadia* is another example) the deceivers are, of course, young lovers, and the deceit, while its object is the satisfaction of forbidden desire, is not murderously criminal, or at least not intentionally so. But for all its generic difference, *Titus* employs the same Terentian shorthand to set up its paralogistic criminal plot. Aaron's preparation of what Philip Sidney had called "the ground-plot" of a rhetorical invention comically realizes the spatial metaphor: we see him digging, burying gold under a tree. This gold is, itself, an artificial proof: an *indicium* or probable sign, which will help to incriminate the innocent.⁷⁴ Aaron's excavations recall the current spatial sense of "plot," a word that recurs in these scenes. "You do but plot your deaths," he had earlier advised Chiron and Demetrius when dissuading them from seeking to make love to Lavinia at court (1.1.577). "The forest walks," he goes on to suggest to them, "are wide and spacious, / And many unfrequented plots there are, / Fitted by kind for rape and villainy." (1.1.614–16). "Plot" thus fluctuates between spatial and rhetorical senses, and even in its spatial sense is endowed with agency in providing opportunity for deception and for lack of evidential traces: being "unfrequented," the forest's spaces present a contrast with the palace's plenitude of "tongues, of eyes, and ears": these plots are "ruthless, dreadful, deaf and dull" (1.1.627–28).

Act 2's woodland location is thus encoded as "plot" and as a "plotted" series of events that work to suppress sensory perception, to make the sight "dull," just as Terentian rhetorical emplotments of disclosure work, through the uses of artificial proof, to beguile the expectations of the audience and to make them believe what is not before their eyes. Thus Tamora, having praised the forest clearing in which she meets her lover as a *locus amoenus*, a place designed for amorous encounter, is quickly persuaded by him to shift from the delights of *eros* to the uses of inference, and her subsequent description of the same place as a "barren detested vale" forms part of a tour de force of probable reasoning in which she accuses Bassanius and Lavinia of having lured her to that spot with intent to torture her and enjoins her sons to avenge this wrong.

The forest plot, in this curious way, literalizes the Terentian transformation of seduction into paralogism; we, as audience, have no way of knowing whether it is “really” a delightful or a detestable place. Analogues in earlier and contemporary plays abound: in John Foxe’s Terentian play, *Titus et Gesippus*, for example, when Titus’s wily servant, Phormio, promises to think of a stratagem to ensure Titus’s appropriation of his best friend’s fiancée, he says he will look up his places of dialectic, so that “everyone’s eyes can be blinded” by his rhetorical powers of deception. In *The Taming of the Shrew*, Lucentio describes his plot to possess Bianca as a series of “counterfeit supposes” that “bleared” the eyes of their fathers (*Taming*, 5.1.107). Similar metaphors of sightlessness permeate the rape and murder scenes of *Titus*. After Chiron and Demetrius have killed Bassanius, dumping his body into the stage’s pit and dragging Lavinia offstage, we see Aaron leading Lavinia’s brothers, Quintus and Martius, to the same pit, with promise of finding game. Quintus’s apprehension is expressed as defective vision: “My sight is very dull, whate’er it bodes” (2.2.195). A similar nonnaturalistic myopia causes Martius to fall, conveniently, into the very pit where the corpse of Bassanius lies. This is, again, an almost comic literalization of the brothers’ readiness to “fall in” with Aaron’s plans, to capitulate to the plotted opportunity of the time and place. Neither brother exhibits any power of resistance. When Martius asks his brother to pull him out, Quintus again grants premonition more power than vision: “My heart suspects more than mine eye can see,” he replies. The discovery of the dead Bassanius, fulfilling the brothers’ sense of foreboding, causes Quintus, too, to fall into the same trap.

The emperor Saturninus arrives, promptly brought by Aaron to the scene. The Terentian comic plot, with its sequence of artificial proofs designed to blind the fathers and enable rape or consensual adultery, becomes here a test of the father’s—for which read here the magistrate’s—capacity for just judgment. In this regard, Saturninus represents, as Heather Kerr has written, “the dangers inherent in a civil law procedure,” which treats artificial proofs not as probabilities, but as part of a penal arithmetic, adding up to certainty.⁷⁵ Tamora’s production of the letter—earlier described by Aaron as “this fatal-plotted scroll” (2.2.47)—which appears to incriminate the brothers by referring to the bag of gold hidden under the elder tree, prompts comparison with Kyd’s *Spanish Tragedy*. In Kyd’s play, Hieronimo, having found the body of his son, receives a letter that claims to inform him (truly, as it happens) of the murderer’s identity. Hieronimo, a judge, refuses to credit the letter too quickly: “be not credulous,” he warns himself, resolving that he will “by circumstances try,” the letter’s testimony, for it may have been written to “entrap” him (3.2.48). Saturninus, however, crassly fails to examine the letter he receives. For him it functions not as an *indicium*, a probable sign needing further interrogation, but “as an inartificial proof.”⁷⁶ He deems no further trial necessary: the brothers will be dragged “from the pit unto the prison” there to languish until “we have devised / Some never-heard-of-torturing pain for them” (2.2.283–85). The syntax of the next exchange between Saturninus and Titus emphasizes the way in which the emper-

or's actions preempt the time and space of trial and uncertainty, in which evidence might be questioned, doubts aired, different hypotheses advanced. Titus kneels before Saturninus and begs, "That this fell fault of my accursed sons, / Accursed if the fault be proved in them—" (2.2.290–91); but the provisional, conditional quality of the curse is refused by the emperor: "*If* it be proved? You see it is apparent," he insists (2.2.292). It turns out that Titus himself found the letter—an incriminating detail he freely admits:

I did, my lord, yet let me be their bail,
For by my father's reverend tomb I vow
They shall be ready at your highness' will
To answer their suspicion with their lives. (2.2.295–98)

Here, of course, Titus invokes the contemporary practice of the justices of the peace as laid out by the Marian Bail and Committal Statutes; felony suspects could be granted bail, provided an examination was taken, witnesses bound over to give evidence before the jury. Saturninus refuses the request, denying the very category of "suspicion" that Titus has proposed:

Thou shalt not bail them. See thou follow me.
Some bring the murdered body, some the murderers.
Let them not speak a word: the guilt is plain;
For, by my soul, were there worse end than death
That end upon them should be executed. (2.2.99–303)

The horrors of Saturninus's reign are encapsulated in this: that mere suspects should be named murderers and sentenced to a "worse end than death," without a moment's thought given to open trial.

And the extent of that horror is made emblematically apparent in the next moment of the play, as Chiron and Demetrius bring Lavinia onstage, "*her hands cut off and her tongue cut out, and ravished.*" The young men taunt her with her inability to reveal their criminality: "So, now go tell, and if thy tongue can speak, / Who 'twas cut out thy tongue and ravished thee"; "Write down thy mind, bewray thy meaning so" (2.3.1–4). There could not be a clearer, nor cruder, symbolism of the previous scene's preemption of the possibility of disclosure. Critics have been troubled by the metaphorization of the violence done to Lavinia in what is, in fact, Marcus's extraordinarily humane and humanizing speech on encountering her in the woods.⁷⁷ Much more troubling, surely, is the jarring violence of the allegorical representation itself.

The third act of the play opens with a ritualistic reenactment of Saturninus's proscription of open trial in the procession of tribunes as judges with Martius and Quintus in bondage, "*passing*" as the stage direction says, "*on the stage to the place of execution, and Titus going before pleading.*" The scene painfully protracts the inevitable execution: from the moment of the procession, and the judges' ignoring of Titus,

who lies down onstage and continues pleading to the stones of the street, the death of the brothers is an incontrovertible conclusion. Yet Aaron's exploitation of Titus's desperation opens out an excruciating, not to say torturing, expansion of the time between sentence and execution. In this interval, discussion between Marcus, Lucius, and Titus plays, at first indirectly and almost imperceptibly over the question of evidence. In attempting to reach out to, to feel for, and to understand the silent Lavinia, Titus and Marcus come to the point of identifying competing hypotheses of the origin and cause of her pain. Lucius, who falls fainting down at the sight of his wounded sister, begs her to speak the name of her attacker, and then, understanding that she cannot, begs Marcus to speak for her. Titus then characteristically claims possession of the outrage to his daughter: "It was my dear, and he that wounded her / Hath hurt me more than he had killed me dead." His speech turns to enumeration and demonstration of the wrongs threatening to overwhelm him, but when he comes to Lavinia's woes, his summary involves a mention of her brothers that excites a response in her:

Thou hast no hands to wipe away thy tears,
Nor tongue to tell me who hath martyred thee;
Thy husband he is dead, and for his death
Thy brothers are condemned, and dead by this.
Look, Marcus, ah son Lucius, look on her!
When I did name her brothers, then fresh tears
Stood on her cheeks, as doth the honey-dew
Upon a gathered lily almost withered. (3.1.107–14)

Marcus hazards the meaning of Lavinia's tears: "Perchance because they killed her husband, / Perchance because she knows them innocent" (3.1.115–16). Critics write of this play and of this scene without seeming to register at all the radical quality of the uncertainty that is being represented here.⁷⁸ We, of course, share Lavinia's recollection of the murder of her husband by Chiron and Demetrius, but Marcus and Titus, at this stage, really do not *know* whether or not Martius and Quintus are guilty of the murder of Bassanius, and, if they are, what relation that guilt bears to the inarticulate sorrow of Lavinia. An exchange that began with Titus's selfish desire to monopolize grief becomes, inadvertently, an engagement with the uncertainty of what Lavinia's emotions signify. Titus begins to interpret her tears as signs of the brothers' innocence: "No, no, they would not do so foul a deed: / Witness that sorrow that their sister makes" (3.1.119–20), but his very assurance sounds tentative. The next sign that Lavinia gives has been obscure even to the play's editors. After Aaron's ludicrously cruel deception of Titus, the heads of Quintus and Martius are brought onstage. There is, as Bate says, an implied stage direction at this moment, for Marcus says to Lavinia: "Alas, poor heart, that kiss is comfortless / As frozen water to a starved snake" (3.1.251–52). Samuel Johnson introduced a direction for Lavinia to kiss Lucius, which subsequent editors changed

to Lavinia kissing Titus. Bate, however, acutely realized that Lavinia must here *kiss the heads of her brothers*: such a kiss earns Marcus's sad comment on its lack of consolation, but this comment shows, in turn, how easily Lavinia's signs are misread, or ignored. Her kissing of the heads intends not comfort, but expiation, a demonstration of the brothers' innocence that remains an uncertain fact in the minds of her uncle and father.

The unfolding of the following scenes of domestic life among the broken remnants of the Andronicii convey a pathos in the normality of familial relations persisting under such conditions. But that pathos is not, I would argue, the scenes' primary purpose. The first scene of act 4 opens with the son of the banished Lucius, Titus's grandson, running away, terrified, from his aunt, who persists in following him while he is at his studies. Her movements are so pathetically opaque to him that he fears that her frantic ransacking of his books is a sign of her insanity. Her object, however, is a text: Ovid's *Metamorphoses*. On first encountering his wounded niece, Marcus's mind had immediately leapt to the textual source of her muteness: "But sure some Tereus hath deflow'ed thee, / And lest thou shouldst detect him, cut thy tongue" (2.3.26–27). *Lest thou shouldst detect him*—although Marcus appears to forget his own detective ingenuity in the scenes intervening between these words and act 4, it is he who, when Lavinia turns over her nephew's books, and comes to Ovid, begins to attend with excitement to her movements. He guesses that she means there were two rapists, "Confederate in the fact," and while Titus encourages Lavinia to "give signs," suggesting that her rapist may have been Saturnine, "as Tarquin erst," Marcus hits upon the device of enabling Lavinia to hold a stick steady in her mouth to write in the sand. She scrawls the word "*Stuprum*," (sexual defilement) and the names of Chiron and Demetrius. The language and action that has intervened since Marcus's accurate surmise of the Philomel-like quality of Lavinia's ordeal has highlighted, in a quasi-allegorical way, the process of trial, and the radical uncertainty of knowledge of the "fact" during that process.

Once Lavinia's signs have become intelligible thus, the fact has, unofficially, been proved and the guilt of Tamora's sons is no longer obscure to the Andronicii family and their supporters. It is still, however, only unofficial knowledge and, as such, is extremely dangerous in imperial Rome. The play now begins to move toward a more manifest proof of the erotic intrigue within which, as we have seen, was implied the whole plot of the Andronicii's downfall. Only at this point does it become obvious why Shakespeare chose to imagine Tamora's lover as a Moor. In the scene after Lavinia's revelation of the names of the rapists, Titus sends, by way of young Lucius, a message to Aaron and Tamora's sons revealing a knowledge of their guilt. Simultaneously, and without any preparation whatsoever, a nurse brings onstage Tamora's newly born baby. The appearance of this baby is described as an issue: "a joyful issue," according to Aaron, but the nurse replies that it is a "black and sorrowful issue." An issue, as Thomas Blount's law dictionary of 1670 put it, "hath divers applications; sometime being used for Children begotten between a

Man and Wife; . . . some for the point of a matter depending in Suite, whereupon the Parties joyn, and put their Cause to the Trial of Jury.” But Blount insists on the identity of these different significations: “in all these, it has but one signification, which is an effect of a Cause preceeding; as Children are the effect of the Marriage; [and] . . . the point referr’d to 12 Men is the effect of pleading.” In Shakespeare’s punning conception here, the baby’s coloring will clarify the issue before the jury in the last act. Paternity in this instance is not, as the old wisdom goes, the paradigmatic form of conjectural or uncertain knowledge, but a manifest, *inartificial proof*: The baby proves Aaron’s liaison with Tamora, which, as we saw, also generated their plot. Hence it is that when Aaron brilliantly declaims on the inferiority of whiteness in a speech defending the life of his son, he characterizes whiteness as the color that betrays guilt inadvertently, by blushing, while his son’s complexion announces frankly to his father and to the rest of the world, “Old lad, I am thine own” (4.2.123). The preservation of Aaron’s son’s life is crucial to the ensuing communication of the facts of his and Tamora’s guilt beyond the immediate circle of the Andronicus family in Rome, to Lucius and the Goth army, and finally, to the “gracious auditory” of the Roman citizens in the final speeches of the play.

In his essay on the occlusion of violence in the new historical “poetics of culture,” and in Renaissance tragedy, Francis Barker picked out a curious and chilling incident from act 4 of *Titus Andronicus*, in which a rustic figure, referred to in speech headings only as “the Clown,” happens to cross paths with Titus and some of his friends and kin. Titus in his assumed or real derangement of mind has persuaded his friends to help him shoot arrows into the air bearing letters to the Olympian gods with complaints about the departure of Justice from Rome. In the exchange between Titus and the Clown we learn that the latter is taking pigeons to the tribunal plebs to settle a legal dispute between his uncle and one of the emperor’s men. Titus asks the Clown to take a supplication to the emperor for him, and he wraps a knife in it, instructing the Clown to hold the knife “like an humble suppliant” (4.4.116). What happens when the Clown has an audience with the Emperor and presents him with Titus’s letters is, as Barker puts it, stunning. The Clown is “simply taken away to execution. Without cause given.”⁷⁹ It is the uncanny, enigmatic quality of the horror here that prompts Barker to trawl through the numbers of hangings recorded in the indictments of the Home Circuit Assizes for the years of Elizabeth’s and James’s reigns. The resulting statistics of deaths are indeed sickening, but it seems to me that Barker is mistaken in arguing that they gloss the otherwise unintelligible incident of the Clown’s arbitrary execution in the play. Barker says that the incident “lacks credence according to the positive norms of behavior in the play,” but, as I have tried to show, behavior in the play is not grounded in naturalistic representations of individuals, but gives emotional credibility to what are, in fact, emblematic dramatizations of political ideas about justice. In this sense, the arbitrariness of the Clown’s being sentenced to death is far from unintelligible. His death sentence is given moments after Saturninus has complained that Titus’s let-

ters sent to the Gods are politically motivated: “What’s this but libelling against the senate / And blazoning our injustice everywhere? A goodly humour, is it not, my lords? As who would say, in Rome no justice were” (4.4.17–20). Of course there is no justice in Rome, and the Clown’s being held responsible for the message he has carried from Titus is a vivid example of how Saturninus’s reign of terror maintains itself by silencing voices of opposition.

The Clown’s message from Titus enrages Saturninus, provoking him to reiterate that Titus’s sons died “by law for murder of our brother.” He next wants Titus to be dragged “by the hair” before him, no doubt to be dispatched after the manner of the Clown, but it is after the subsequent arrival of news that the Goths are on the march, with Titus’s banished son Lucius in command, that his plan changes. Saturninus fears Lucius because the citizens of Rome favor him; for this reason, Tamora proposes that she try to “enchant the old Andronicus,” hoping thereby to persuade him to intercede with his son for Rome’s safety. Tamora, of course, does not at this point know what the audience knows, which is that the child of which she has just been delivered is still alive and with Aaron on the outskirts of Rome. It is this child—proof of their collaboration in stratagems as well as sex—that forms the center of the next scene, in which Aaron is brought by a soldier of the Goths, before their commander, Lucius. Lucius threatens to kill the child, but Aaron bargains for its life, offering a frank confession of the all the facts of Bassanius’s murder and his sister’s rape. By this device, Lucius is put in possession of the crucial knowledge he lacked in act 3, scene 1; he spares the lives of Aaron and the child in order to have them as corroborative witnesses. In the final scene, after Titus has ingeniously managed to slit the throats of Chiron and Demetrius, baking them in a pie to be served to their mother, and then killing both Lavinia and Tamora, it is Lucius who, having killed Saturninus, proceeds to interpret the scene of slaughter to the Roman people:

Then, gracious auditory, be it known to you
That Chiron and the damned Demetrius
Were they that murdered our emperor’s brother,
And they that ravished our sister;
For their fell faults our brothers were beheaded. . . . (5.3.95–100)

Lucius, as he himself admits, digresses into a justification of his own joining with the Goths, but Marcus picks up the address to the jury:

Now is my turn to speak. Behold the child:
Of this was Tamora delivered,
The issue of an irreligious Moor,
Chief architect and plotter of these woes.
The villain is alive in Titus’ house,
And as he is to witness this is true,
Now judge what cause had Titus to revenge

These wrongs unspeakable, past patience,
Or more than any living man could bear.
Now you have heard the truth: what say you, Romans? (5.3.118–27)

“Behold the child,” is as much as to say, “here is the issue before you.” Once again, the literalization of metaphor edges toward farce: one is reminded of Laurence Sterne’s account of the decline of eloquence since the days when Roman orators wore capacious mantles, enabling them to pop out, at the critical moment, the required material proof: “a scar, an axe, a sword, a pinked doublet . . . but, above all, a young infant royally accoutred.”⁸⁰ But if the image borders on the absurd, its audacious embodiment of the intellectual structures of forensic reasoning, like other more brutal embodiments in the play (Lavinia’s mutilation, the brothers’ falling into the pit), assumes an awareness of both the poetic and political importance of questions of evidential probability and of the link between judicial and political participation. And perhaps the most significant effect of the construction of the play’s narrative around the motif of a displaced trial is the emergence, in acts 3 and 4, of a profound sense of the pathos of human beings’ opacity to one another, a sense that encourages critics and producers to disregard the play’s outrageous implausibility in the interests of breathing interpretative life into the *dramatis personae* as characters. And so, we could perhaps say, out of the forensic structure of the Renaissance detective plot emerges not Sherlock Holmes, but *Hamlet*.

Notes

I would like to thank the editorial board of *Representations* for stimulating and helpful criticism of an earlier draft. Special thanks to Victoria Kahn, David Bates, Jeff Knapp, Carol Clover, Cathy Gallagher, and Tom Laqueur for specific criticisms. Thanks also to Cathy Shrank and Phil Withington for giving me a chance to deliver a version at Aberdeen University’s Sawyer Seminar in March 2003.

1. Michel Foucault, *Discipline and Punish: The Birth of the Prison*, trans. Alan Sheridan (Harmondsworth, U. K., 1979), 23, 225.
2. David Miller, for example, has elegantly reinterpreted the question of the relationship between detective fiction and its possible antecedents in the nineteenth-century novel. “The detective story,” he argues, “first emerges as an aborted function *within* the novel.” The tendency of nineteenth-century novels to marginalize professional police and detective forces, absorbing and dispersing their investigative function through the community, “acquires its widest resonance,” he goes on, “as a parable of the modern policing power that comes to rely less on spectacular displays of force than on intangible networks of productive discipline”; *The Novel and the Police* (Berkeley, 1988), 51.
3. Karen Cunningham, “Renaissance Execution and Marlovian Elocution: The Drama of Death,” *PMLA* 105 (1990): 209–22; Steven Mullaney, *The Place of the Stage: License, Play, and Power in Renaissance England* (Chicago, 1988), 113–14.
4. James Shapiro, “‘Tragedies Naturally Performed’: Kyd’s Representation of Violence,”

- Staging the Renaissance: Representations of Elizabethan and Jacobean Drama*, ed. David Scott Kastan and Peter Stallybrass (New York, 1991), 107 (my italics).
5. Elizabeth Hanson, *Discovering the Subject in Renaissance England* (Cambridge, 1998), 1.
 6. *Hamlet*, in *The Riverside Shakespeare*, ed. G. Blakemore Evans (Boston, 1997), 3.2.87–89.
 7. See Cynthia Herrup, *The Common Peace: Participation and the Criminal Law in Seventeenth-Century England* (Cambridge, 1987), 70. See also Marianne Constable, *The Law of the Other: The Mixed Jury and Changing Conceptions of Citizenship, Law, and Knowledge* (Chicago, 1991), 13–14.
 8. For the forensic basis of the plots of Roman comedy, see Adele C. Scafuro, *The Forensic Stage: Settling Disputes in Graeco-Roman New Comedy* (Cambridge, 1997).
 9. *Titus Andronicus*, ed. John Dover Wilson (Cambridge, 1948), xii.
 10. T. S. Eliot, “Introduction,” in *Seneca, His Tenne Tragedies Translated into English*, ed. Thomas Newton (1581) (London, 1927), xxiii.
 11. John Kerrigan, *Revenge Tragedy: Aeschylus to Armageddon* (Oxford, 1996), 27 and 59–87. On connections between Greek tragedy and Greek legal process, see Kathy Eden, *Poetic and Legal Fiction in the Aristotelian Tradition* (Princeton, N.J., 1986).
 12. See S. C. Humphreys, “The Evolution of Legal Process in Ancient Attica,” in *Tria Corda: Scritti in onore di Arnaldo Momigliano* (Como, 1983), 229–51, which discusses the same passage in the *Iliad* to which Kerrigan refers for his sense of the drama of Athenian legal process; see also the definition of “*dikasteria*” (popular court) as being made up of “jurors” in *The Oxford Classical Dictionary*, ed. Simon Hornblower and Anthony Spawforth, 3d ed. (Oxford, 1996), 452.
 13. Carol J. Clover, “Law and the Order of Popular Culture,” in *Law in the Domains of Culture*, ed. Austin Sarat and Thomas R. Kearns (Ann Arbor, Mich., 1998); see also Carol Clover, “God Bless Juries!” in *Refiguring American Film Genres*, ed. Nick Browne (Berkeley, 1998), 255–77.
 14. For an example of a scandalous reading of *Hamlet* as open-ended about the question of whodunit, see W. W. Greg’s “Hamlet’s Hallucination,” published in the *Modern Language Review* (1917): 393–421. Greg argued that the insensibility of Claudius to the dumb show’s enactment of his alleged crime proved that Claudius was innocent and that Hamlet had hallucinated the ghost. John Dover Wilson’s agitation at Greg’s “specious paralogism” resulted in the writing of *What Happens in Hamlet* (Cambridge, 1935).
 15. Joel B. Altman, *The Tudor Play of Mind: Rhetorical Inquiry and The Development of Elizabethan Drama* (Berkeley, 1978), 281–82.
 16. *Titus Andronicus*, ed. Jonathan Bate (London, 2002), 5.3.95, 5.3.124. Further references to the play in this Arden edition will be in the text.
 17. See, for example, Daryl W. Palmer, “Histories of Violence and the Writer’s Hand: Foxe’s *Actes and Monuments* and Shakespeare’s *Titus Andronicus*,” in David M. Bergeron, ed., *Reading and Writing in Shakespeare* (Newark, Del., 1996), 82–115, 83.
 18. Foucault, *Discipline and Punish*, 36–37.
 19. See A. Esmein, *Histoire de la Procédure Criminelle en France* (Paris, 1882); John H. Langbein, *Prosecuting Crime in the Renaissance: England, Germany, France* (Cambridge, Mass., 1974), 129–313; Barbara Shapiro, *Probability and Certainty in Seventeenth-Century England* (Princeton, N.J., 1983), 173–78; John H. Langbein, *Torture and the Law of Proof: Europe and England in the Ancien Régime* (Chicago, 1977); Lisa Silverman, *Tortured Subjects: Pain, Truth, and the Body in Early Modern France* (Chicago, 2001).
 20. Foucault, *Discipline and Punish*, 37.
 21. Shapiro, *Probability and Certainty*, 174.
 22. Esmein, *Histoire*, 261.

23. Langbein, *Prosecuting Crime*, 238; Esmein, *Histoire*, 147.
24. Foucault, *Discipline and Punish*, 37.
25. *Ibid.*, 39.
26. Foucault, *Discipline and Punish*, 14.
27. See Cunningham, "Renaissance Execution," 210–11.
28. See J. S. Cockburn, "Early Modern Assize Records as Historical Evidence," *Journal of the Society of Archivists* 5 (1975): 215–31; "Trial by the Book? Fact and Theory in Criminal Process," *Legal Records and the Historian*, ed. J. H. Baker (London, 1978); "Introduction," *Calendar of Assize Records: Home Circuit Indictments Elizabeth I and James I* (London, 1985); "Twelve Silly Men? The Trial Jury at Assizes, 1560–1670," *Twelve Good Men and True: The Criminal Jury in England, 1200–1800*, ed. J. S. Cockburn and Thomas A. Green (Princeton, N.J., 1988), 158–81. For examples of Cockburn's misleading use of quotations as evidence of jury inadequacy, see "Twelve Silly Men?" 159. Here he cites (1) an insinuation that juries were illiterate from a pamphlet by Sir Samuel Starling, the Lord Mayor of London, who was responding hostilely to the jury that had conscientiously acquitted the Quakers Mead and Penn in 1671 (on this see Thomas Green, *Verdict According to Conscience: Perspectives on the English Criminal Trial Jury, 1200–1800* [Chicago, 1985], 228–29); (2) the Jesuit Robert Parsons's 1590 description of English jurors as "silly," an adjective that did not, at that time, mean foolish, but rather "unlearned," "unsophisticated" [*OED*, 2nd ed., s.v. "silly"]; (3) Zachary Babington's 1677 description of the composition of juries as a "scandal," a criticism that occurs in a pamphlet otherwise devoted to upholding the importance of the open evaluation of evidence by the trial jury; see note 51.
29. John H. Langbein, *The Origins of Adversary Criminal Trial* (Oxford, 2003).
30. Langbein, *Prosecuting Crime*.
31. Elizabeth Hanson, "Torture and Truth in Renaissance England," *Representations* 34 (Spring 1991): 53–84, 62, 54.
32. Langbein, *Prosecuting Crime*, 284.
33. Christopher St. German, *Salem and Bizance* (1533), in *The Complete Works of St. Thomas More*, ed. John Guy et al. (New Haven, Conn., 1987), 10:361.
34. See, under "jury," Thomas Blount, *Nomo-Lexicon, A Law Dictionary* (London, 1670). See also Barbara Shapiro, *A Culture of Fact: England, 1550–1720* (Ithaca, N.Y., 2000), 11.
35. "A Proclamation for Jurors," Hampton Court, 5 Oct. 1607, in *Stuart Royal Proclamations*, ed. James F. Larkin and P. L. Hughes (Oxford, 1973), 1:167–71.
36. Shapiro, *Culture of Fact*, 13.
37. Langbein, *Prosecuting Crime*, 118–25. J. S. Cockburn attacked Langbein's view in "Early Modern Assize Records" and "Trial by the Book?" However, Cockburn's suggestion that "the Marian legislation . . . quickly proved an unattainable ideal," in "Early Modern Assize Records," 227, seems to be contradicted by manuscript records of justices taking examinations. See, for example, "Henry Townsend's 'Notes of the office of a Justice of the Peace,' 1661–3," ed. R. D. Hunt, *Worcestershire Historical Society*, n. s. 5 (Leeds, 1967), appendix B. Also see note 39.
38. Langbein, *Prosecuting Crime*, 122; Sir William Staundforde, *Les Plees del Coron* (London, 1583), fols. 163–64v; Ferdinando Pulton, *De Pace Regis et Regni* (London, 1609), fols. 204v–6.
39. See Granville Leveson-Gower, esq., "Note Book of a Surrey Justice," in *Surrey Archaeological Collections* (London, 1888), 9:161–232, 177; *William Lambarde and Local Government*, ed. Conyers Read (Ithaca, N.Y., 1962); Cockburn, *Calendar of Assize Records*.
40. Hanson, "Torture and Truth," 54.

41. Shapiro, *Culture of Fact*, 15.
42. Hanson, "Torture and Truth," 53; *A Discourse of the Commonweal of This Realm of England*, attributed to Sir Thomas Smith, ed. Mary Dewar (Charlottesville, Va., 1969), 13; Sir Matthew Hale, *The History of the Common Law of England*, ed. Charles M. Gray (Chicago, 1971), 164.
43. Granville Leveson-Gower, esq., "Note Book of a Surrey Justice," *Surrey Archaeological Collections* 9 (1888).
44. For example, explicitly forensic material from Cicero's *De Inventione* finds its way into Juan Luis Vives, *De Consultatione*, "of Counsel"; see Juan Luis Vives, "De Consultatione," in *Opera in duos distinctos tomos* (Basel, 1555), sigs. N5r–O5v, where Vives's source is Cicero, *De Inventione*, 2.4.16. Ann Moss finds *De Inventione* influential for Renaissance thought generally in *Printed Commonplace Books and the Structuring of Renaissance Thought* (Oxford, 1996); on the transmission of *De Inventione* in the Middle Ages and Renaissance, see John O. Ward, "From Antiquity to Renaissance: Glosses and Commentaries on Cicero's *Rhetorica*," in *Medieval Eloquence*, ed. James J. Murphy (Berkeley, 1978), 25–67.
45. Quintilian, *Institutio Oratoria*, book 5. In the translation by H. E. Butler in 4 vols. (Cambridge, Mass., 1920), this book appears in 2:154–369. Cicero, *De Inventione*, trans. H. M. Hubbell (Cambridge, Mass., 1949), 2.5.16; 2.9.28–29; 2.9.31; 2.10.32; 2.12.38; 2.12.42.
46. Desiderius Erasmus of Rotterdam, *On Copia of Words and Ideas*, trans. Donald B. King and H. David Rix (Milwaukee, Wisc., 1999), 57–68.
47. See Marvin Herrick's account of Jodocus Willichius's commentary on *Andria* 359–69, in *Comic Theory in the Sixteenth Century* (Urbana, Ill., 1950), 182–83.
48. See Barbara Shapiro, "Classical Rhetoric and the English Law of Evidence," in *Rhetoric and Law in Early Modern Europe*, ed. Victoria Kahn and Lorna Hutson (New Haven, Conn., 2001), 54–72, 62–66. Shapiro is slightly misleading when she says that "William Lambarde's popular manual of 1581 provides the 'Causes of Suspicion' in a Ramist-style diagram," because the diagram does not appear in the 1581 edition. See William Lambarde, *Eirenarcha, or of the office of the Iustices of the Peace, in foure bookes* (London, 1614), 217. Prefacing the diagram, he writes: "Touching the points that may ingender Suspition . . . I take it not unserviceable to insert here, such a Briefe (or minute) thereof as I haue collected out of Cicero, and others, whereunto all the rest (which all the wit of man may inuent) will easily be referred."
49. Sir Anthony Fitzherbert and Richard Crompton, *L'Office et Authoritie de Justices de Peace* (London, 1584), ed. P. R. Glazebrook (London, 1972), fol. 75, "Causes de Suspicion de Felony & Murder . . . Ceux sont escries in le Lieux de Arte de Rethorique, compose per Master Wilson, fol. 17"; see Thomas Wilson, *The Arte of Rhetorique* (1553), ed. G. H. Mair (Oxford, 1909), 86–92.
50. Herrup, *Common Peace*, 68.
51. Zachary Babington, *Advice to Grand Jurors in Cases of Blood* (London, 1677), sig. A7v.
52. *Ibid.*, 94.
53. *Ibid.*, 110.
54. It seems to be commonly thought that witnesses for the accused could not be heard. See, for example, Karen Cunningham, "'Scars Can Witness': Trials by Ordeal and Lavinia's Body in *Titus Andronicus*," in *Shakespeare's Early Tragedies: A Collection of Critical Essays*, ed. Mark Rose (Englewood Cliffs, N.J., 1995), 65–78, who writes, "figures accused of crime could offer no witnesses in their defense," 71. See Langbein, *Origins of Adversary Criminal Trial*, 53–56, for a refutation of this misconception, which seems to

- be based on the appallingly unlimited discretion of the prosecution in treason trials. Every source I have read describes jurors in ordinary felony trials as hearing witnesses on both sides. Henry Townsend wrote, “Evidences: [f.105v] The Judges usually heare evidence on the behalf of the prisoner, but not upon oath, yet with a chardg to speake the truth as before God on oath . . . and then leave the same to the Jury”; “Notes of the office of a Justice of the Peace,” 95.
55. See Cockburn, “Early Modern Assize Records,” plate 3; “Trial by the Book?” 61–63; “Introduction,” 77–84.
 56. Babington, *Advice to Grand Jurors*, 123–25, 113–14, 136. Cockburn refers to “Sir Edward Coke’s characteristic sophistry” on this point, “Early Modern Assize Records,” 221, but since Babington was a clerk of assize, and actually drafted indictments, it is to be supposed that he knew about the practice, as well as the theory.
 57. Cockburn, “Twelve Silly Men,” 179; also Cockburn, “Introduction,” 110–11; Green, *Verdict According to Conscience*, 150–52, n. 179.
 58. William Walwyn, “Juries Justified; or, a Word of Correction to Mr. Henry Robinson,” in *The Writings of William Walwyn*, ed. Jack R. McMichael and Barbara Taft (Athens, 1989), 443.
 59. “Le jury en cest cas depart de le barr et reviendront et demand le advise del court, entant que ne fuit prove que le truncke fuit remove hors del meason al ascun temps”; J. H. Baker, “Criminal Justice at Newgate, 1610–1627: Some Manuscript Reports in the Harvard Law School,” *Irish Jurist* 8 (1973): 307–22, 313. The reports begin in Law French and then shift into English.
 60. Cockburn, “Twelve Silly Men,” 178, 162–63.
 61. Cockburn, “Introduction,” 70–72.
 62. Green, *Verdict According to Conscience*, 120 and passim. See esp. 200–249 and Green’s comments on Cockburn’s statistics on jury acquittals of nonclergiable highway robberies, which Green sees as evidence of jury discretion, since the bench was rarely reluctant to send offenders to the gallows (151 n. 179).
 63. Bernadette Meyler, “Substitute Chancellors: The Role of the Jury in the Contest Between Common Law and Equity,” unpublished paper delivered at the Law, Culture, and Humanities Conference, New York, March 2003. I am grateful to Bernadette Meyler for letting me read her unpublished work.
 64. Baker, “Criminal Justice at Newgate,” 313.
 65. Sir John Hawles, *The Englishman’s Right: A Dialogue Between a Barrister at Law and a Jurymen* (London, 1764), 13–14, 15–16.
 66. Hale, *History of the Common Law*, 164.
 67. Sir Thomas Smith, *De Republica Anglorum*, ed. Mary Dewar (London, 1982), 99–100.
 68. Smith, *De Republica*, 114.
 69. Dover Wilson, *Titus Andronicus*, xii; Francis Barker, “A Wilderness of Tigers: *Titus Andronicus*, anthropology, and the occlusion of violence,” in *The Culture of Violence: Tragedy and History* (Chicago, 1993), 143–205, 169–79.
 70. Cunningham, “‘Scars Can Witness,’” proposes a similarity between the Tudor state execution and the early medieval trial by ordeal, arguing that Shakespeare reveals that the meanings of mutilated flesh are more ambiguous than Tudor monarchs would like. However, she does also note in her perceptive discussion that the “archaic solution” of ordeal is rejected “and replaced in the play’s final scene by a rhetorical mode that is closely linked to trial by jury” (76). My position would be that Lavinia’s mutilations are not forms of trial by ordeal, and the play’s emplotment throughout corresponds to the epistemology of trial by jury.

71. On the error-based plot of Roman comedy, see Altman, *Tudor Play of Mind*, 130–47, and Lorna Hutson, *Usurer's Daughter* (London, 1994), 163–87.
72. T.J.B. Spencer, “Shakespeare and the Elizabethan Romans,” in *Shakespeare Survey* 10 (Cambridge, 1969), 32.
73. *Taming of the Shrew*, in *Riverside Shakespeare*, 1.1.178–79.
74. Sidney writes that in poetry, the narration is “but a ground-plot for a profitable invention”; see Philip Sidney, *A Defence of Poetry*, ed. Jan Van Dorsten (Oxford, 1966), 53. On the relationship between the rhetorical and spatial senses of “plot” and “plat” in this period, see Lorna Hutson, “Fortunate Travelers: Reading for the Plot in Sixteenth-Century England” *Representations* 41 (Winter 1993): 83–103.
75. See the excellent analysis by Heather Kerr, “Aaron’s Letter and Acts of Reading: The Text as Evidence in *Titus Andronicus*,” *AUMLA: Journal of the Australasian Universities Language and Literature Association* 77 (1992): 1–19. Kerr’s analysis of this episode in *Titus Andronicus* is the only one I have come across that engages with the play’s highly self-conscious rhetoric of probability.
76. Kerr, “Text as Evidence in *Titus Andronicus*.”
77. See, for example, Heather James’s comments on this speech in her excellent “Cultural Disintegration in *Titus Andronicus*: Mutilating Titus, Virgil, Rome,” in *Violence in Drama* (Cambridge, 1991), 123–140, 129.
78. A notable exception is Karen Cunningham, “‘Scars can Witness,’” 73.
79. Barker, “A Wilderness of Tigers,” 165–68.
80. Laurence Sterne, *The Life and Opinions of Tristram Shandy* (Harmondsworth, U.K., 1967), 196.