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ON EMPATHY IN JUDGMENT (MEASURE FOR MEASURE)

KENJI YOSHINO*

On the first day of confirmation hearings for Justice Sonia Sotomayor, I sat in a freezing television studio. As a long-time supporter, I had resolved to give her my little all. This meant granting all media requests, such as this one to sit for hours in a studio waiting for a break in the action that would permit commentary. The anchor sitting next to me cheerfully expressed her hope that one of the senators would not use up his or her allotted ten minutes. I shot her a pitying look.

Since 1987, when Judge Robert Bork “borked” himself by actually answering questions, the value of confirmation hearings as “get-to-know-you” events has diminished dramatically. The incentive in these hearings is for the senators to say as much, and for the nominees to say as little, as possible. In 1993, Justice Ruth Bader Ginsburg stated the rule that has come to bear her name. With the circumspection that has marked her career, she said she planned to give “no hints, no forecasts, no previews.”¹

What the confirmation hearings *do* provide is a national opportunity to reflect on the proper role of a judge. The battle lines here were clearly drawn. President Obama stated that he would look for the quality of “empathy” in nominating judges.² This inflamed many conservatives. Senator Jeffrey Sessions, the ranking Republican on the Senate Judiciary Committee, characterized the empathy standard as a dangerous departure from the rule of law.³ To have empathy for some, he said, was to have prejudice towards others.⁴

What I found troubling about this particular conversation was that many individuals behaved as if we were having it for the first time. In fact, we have been having this conversation for centuries, if not for millennia. We cycle through three conceptions of judging—one that values empathy too much, leading to the erosion of the rule of the law; one that errs in the opposite direction, asking for “strict

* Chief Justice Earl Warren Professor of Constitutional Law, NYU School of Law. This Article grew out of a Baker-Hostetler Lecture I had the privilege to deliver at the Cleveland-Marshall College of Law. I am grateful to faculty members at the Cleveland-Marshall College of Law for their hospitality. I am also indebted to Robert Ferguson, Rachel Jones, Betsy Lerner, Bernadette Meyler, Virginia Smith, and David Weber, for incisive comments on the piece. I thank Emma Dunlop, Graham Ballou, and Ari Lazarus for excellent research assistance and reference librarian Annemarie Zell for tracking down sources with tireless efficiency.

¹ Adam Liptak, *Path to the Supreme Court: Speak Capably, Say Little*, N.Y. TIMES, July 12, 2009, at A1.

² *Obama’s Remarks on the Resignation of Justice Souter*, N.Y. TIMES, May 1, 2009, <http://www.nytimes.com/2009/05/01/us/politics/01souter.text.html>.

³ See, e.g., Kathy Kiely & Joan Biskupic, *Sotomayor’s Remarks Cap Emotional Day*, USA TODAY, July 14, 2009, at 1A.

⁴ *Id.* (“Empathy for one party is always prejudice against another.”).

construction” of the “letter of the law”; and, finally, one that realizes that judging is a good deal messier, more human, and complex than either extreme would indicate.

*Measure for Measure*⁵ presents these models by brilliantly playing off three senses of the title. The first sense of “measure for measure” is the Christian one, coming from the Sermon on the Mount:

Judge not, that ye be not judged.
 For with what judgment ye judge, ye shall be judged: and with what
 measure ye mete, it shall be measured to you again.
 And why beholdest thou the mote that is in thy brother’s eye, but
 considerest not the beam that is in thine own eye?
 Or how wilt thou say to thy brother, Let me pull out the mote out of thine
 eye; and, behold, a beam is in thine own eye?
 Thou hypocrite, first cast out the beam out of thine own eye; and then
 shalt thou see clearly to cast out the mote out of thy brother’s eye.⁶

This ethic of judgment is in fact an ethic of non-judgment—because we are all sinners, none should cast the first stone. Vincentio, Duke of Vienna, originally stands for this ethic of “empathy” in the play.

The second sense of “measure for measure” is the Old Testament ethic of commensurability, in which the punishment fits the crime. As it says in *Exodus*: “if any harm follows, then you shall give life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burn for burn, wound for wound, stripe for stripe.”⁷ This principle of retribution stands at the opposite extreme from the Duke’s conception of forgiveness. Angelo, the Duke’s deputy, stands for the *lex talionis* in the play.

The final sense of “measure for measure” is pagan, flowing from antiquity. This is the sense of judging “with measure,” guided by Aristotelian temperance or the Archimedean mean. This kind of justice leads to less conclusive results than either of the other two, requiring more human agency and discretion. It is represented by Escalus, the wise older advisor whose name means “scales.”

The play persuasively presents the third model—the *via media*—as the best. It demonstrates that no sane person would wish to live in a world governed either solely by empathy, or solely by the letter of the law. As usual, Shakespeare got there first. This play’s insight should inform contemporary conversations about judging. The play should operate as a clearance move, instructing us to eliminate the extreme positions at the outset. We are never speaking solely about “empathy” or “the rule of law,” but are confronting competing values that must always be balanced against each other.

* * *

Measure begins with Duke Vincentio lamenting over how he has let Vienna slip into anarchy through mistaken kindness. The central problem with Vienna’s laws is that they are overly harsh—one act of sex outside marriage, for instance, is

⁵ WILLIAM SHAKESPEARE, *MEASURE FOR MEASURE* (Kenneth Myrick ed., Signet Classic 1987) (c. 1598). All subsequent citations to the play are by act, scene, and line number.

⁶ *Matthew* 7:1-5.

⁷ *Exodus* 21:23-25.

punished with death. One wonders why the Duke has not agitated to make these laws more reasonable, but the play takes them to be fixed. Consequently, the Duke has used his powers to prevent any of the laws from being enforced for some indeterminate period of time: the young gentleman Claudio says nineteen years,⁸ while the Duke puts it at fourteen.⁹ Critics attribute the discrepancy to authorial oversight, but, at the risk of bardolatry, I have always viewed this to be deliberate. One symptom of a confused state is that it has no collective memory, no sense of when things began to fall apart.

What is beyond dispute is that the city is in chaos. As the Duke says:

We have strict statutes and most biting laws,
 The needful bits and curbs to headstrong jades,
 Which for this fourteen years we have let slip;
 Even like an o'er-grown lion in a cave
 That goes not out to prey. Now, as fond fathers,
 Having bound up the threatening twigs of birch,
 Only to stick it in their children's sight
 For terror, not to use, in time the rod
 Becomes more mock'd than fear'd: so our decrees,
 Dead to infliction, to themselves are dead,
 And Liberty plucks Justice by the nose,
 The baby beats the nurse, and quite athwart
 Goes all decorum.¹⁰

The cascade of images cumulates. The unenforced laws are compared to bridles that have slipped off their horses, a lion too fat to leave its cave, and, finally, the spared rod that spoils the child. With the last image, Vincentio introduces a subtler problem with unenforced laws than simple inefficacy—unenforced laws diminish the credibility of government because “the rod becomes more mock'd than fear'd.”¹¹ Albert Einstein opposed Prohibition because he feared unenforceable laws would lower “the prestige of government.”¹² In this sense, an unenforced law is worse than no law at all.

The obvious solution would be for the Duke to announce a new era of enforcement. Indeed, the Friar to whom the Duke makes this speech points out that he might be more effective than Angelo in restoring order: “It rested in your Grace / To unloose this tied-up justice when you pleas'd; / And it in you more dreadful would have seem'd / Than in Lord Angelo.”¹³ The Duke, however, fears being a

⁸ 1.2.165.

⁹ 1.3.21.

¹⁰ 1.3.19-31.

¹¹ 1.3.26-27.

¹² Albert Einstein, *My First Impressions of the U.S.A.*, BERLINER TAGEBLATT, July 7, 1921, reprinted in ALBERT EINSTEIN, IDEAS AND OPINIONS 3, 6 (Carl Seelig ed., Sonja Bargmann trans., Wing Books 1988) (1954).

¹³ 1.3.31-34.

hypocrite, and (less to his credit) being *seen* as a hypocrite. So he pretends to leave the city, assigning the task of reform to a deputy. (It may be no accident that this strategy seems to use *The Prince* as its playbook—Shakespeare had his Richard III vow to “set the murderous Machiavel to school.”¹⁴) The Duke makes a poor first impression—he has not only let the state break down, but wants someone else to fix it.

The Duke at least chooses his deputy with care. He first summons Escalus, the elder of his two advisors. The Duke rightly praises Escalus’s knowledge of statecraft. Yet after meting out his praise, the Duke makes Angelo, the younger advisor, his deputy. Angelo is the true mirror image of the Duke, rigid as the Duke has been lax. He is repeatedly characterized by others as super- or sub-human. We discern that the Duke is using him, rather than the more reasonable Escalus, to force the state to the other extreme. The Duke also suspects Angelo of not being as pure as he seems. Angelo’s name recalls the most favored angel Lucifer, who falls from grace.

After the Duke takes his ostensible leave, we experience Vienna’s lawlessness directly when Angelo and Escalus hear a case. The constable Elbow hauls the pimp Pompey and the bartender Froth into court. Productions of this play sometimes cut scenes of comic relief involving low characters. But this scene is crucial because it links the breakdown of the law to the breakdown of language itself. Elbow, whose name suggests a kink or crookedness, is the archetype of the lowly constable who served without pay in the English villages, following other incompetent Shakespearean policemen like Dull in *Love’s Labour’s Lost* and Dogberry and Verges in *Much Ado About Nothing*. He cannot get his words straight: “I am the poor Duke’s constable, and my name is Elbow. I do lean upon Justice, sir, and bring before you two notorious benefactors.”¹⁵ He means “the Duke’s poor constable,” and “two notorious malefactors,” but the judges need time to piece this together. When Pompey protests his innocence, Elbow says, “Prove it before these varlets here, thou honorable man, prove it.”¹⁶ Escalus cottons on: “Do you hear how he misplaces?”¹⁷ Angelo does, but has already lost patience. He leaves the court, hoping Escalus will “find good cause to whip them all.”¹⁸ With this show of pique, his clay feet show beneath his judge’s robes.

The bawd Pompey begins to bait the hapless constable. Elbow uses “respected” for “suspected” in saying that Pompey’s “mistress is a respected woman.”¹⁹ Pompey replies that Elbow’s “wife is a more respected person than any of us all.”²⁰ The outraged Elbow cries out: “Thou liest, wicked varlet! The time is yet to come that

¹⁴ WILLIAM SHAKESPEARE, KING HENRY VI, PART 3 3.2.193 (John D. Cox & Eric Rasmussen eds., Arden Shakespeare 2001) (1590).

¹⁵ 2.1.47-50.

¹⁶ 2.1.85-96.

¹⁷ 2.1.87.

¹⁸ 2.1.136.

¹⁹ 2.1.160-61.

²⁰ 2.1.162-63.

she was ever respected with man, woman, or child.”²¹ Poor Escalus asks: “Which is the wiser here, Justice or Iniquity?”²² Escalus is referring to the medieval morality plays, in which Justice and Iniquity were personified. Justice would always triumph in those pageants, but her victory in Vienna is less assured. By riffing off Elbow’s malapropisms, Pompey not only evades judgment but tricks the constable into insulting himself and his wife.

Elbow’s mistakes are funny but, on reflection, no laughing matter. Law is language with violent consequences. This violence is easier to see in *The Merchant of Venice*, where Portia’s and Shylock’s competing interpretations of the flesh bond are a matter of life and death. Yet when the constable confuses legal terms—as he muddles “battery” and “slander”—we see that Elbow’s misuse of legal language could have effects as dire as a more sophisticated person’s manipulation of it. In *Merchant*, the characters who misuse words in this way are the clown Launcelot Gobbo and his father. Portia and Shylock, whatever their faults, do not “misplace” words. Here, however, the law has become crooked at the most primal level.

Whether viewed from on high or low, Duke Vincentio’s lax reign has failed. In depicting the dangers of such a lawless world, *Measure* reveals itself to be a more complex play than *Merchant*. For all its problems, *Merchant* resolves into the feel-good message that human beings should be more merciful. Portia should have been more merciful to Shylock, who should in turn have been more merciful to Antonio. Anyone who thinks this message through, however, will become suspicious of it. A society with too much mercy, and too little law, is a society in which no one would wish to live. *Measure*, written eight years after *Merchant*, is in this regard a more mature play.

Put differently, the Sermon on the Mount may be a good guide for individuals, but not for states. The Duke adheres to the Sermon on the Mount, but his Christ-like failure to judge has led to a disintegration of the rule of law. In *Titus Andronicus*, the rule of law fails because of a distinctively un-Christian vengefulness. In *Measure*, it fails of Christian charity.

* * *

Angelo’s ascension marks the stern return of law. Angelo begins to enforce all laws against the unwitting populace. He proclaims that brothels in the city will be pulled down. He expedites the criminal docket, as we see when a prisoner who has languished in prison for nine years is tried and sentenced to death. Most importantly, he condemns the young gentleman Claudio to death for fornication with his fiancée Julietta. As Mistress Overdone exclaims: “Here’s a change indeed in the commonwealth!”²³

With respect to Claudio, the sense of injustice is extreme. I imagine the Vienna of this play to be like the middle panel of Hieronymus Bosch’s *The Garden of Earthly Delights* (c. 1503)—a panorama of fantastical debauchery that fascinates and terrifies. Yet unlike the hardened bawds in the play, Claudio is married to Julietta in all but name. As Claudio protests to Lucio: “You know the lady; she is fast my

²¹ 2.1.164-66.

²² 2.1.169.

²³ 1.2.96.

wife, / Save that we do the denunciation lack / Of outward order.”²⁴ The couple has entered into the *sponsalia de praesenti*, a mutual recognition of each other as husband and wife. They have not formally married only because they are waiting for her dowry.

Moreover, the statute they have violated—like the other statutes in Vienna—has not been enforced in fourteen years or more. Even if the couple were aware of this law, they were not on notice that “the drowsy and neglected act”²⁵ would be enforced against them. Under Roman law, statutes that had been unenforced for a long period of time could be invalidated by the courts under the doctrine of desuetude. To add insult to injury, the anti-fornication statute is draconian, mandating death within three days. This violates a notion of proportionality, suggesting that Angelo is not doling out “an eye for an eye.” But in Angelo’s puritanical worldview, the punishment fits the crime.

Angelo’s enforcement of Vienna’s sex laws could be described as Puritanical in the literal sense. Known for standing on the letter of the law, the Puritans were often pejoratively called “precisians” or “precise²⁶ men.” The adjective “precise” shadows Angelo throughout the play—Vincentio says, “Lord Angelo is precise,”²⁷ and Claudio calls him “the precise Angelo.”²⁸ Like Angelo, the Puritans in early modern England recommended that fornication be made a capital crime.²⁹ Shakespeare had every reason to take this recommendation personally, because his wife Anne Hathaway gave birth to their daughter Susanna six months after their hasty marriage.³⁰ The playwright seems to have identified with Claudio, as he changed the source material for this play, in which Claudio’s counterpart is prosecuted for rape. In making Claudio’s crime fornication, Shakespeare makes the young man’s circumstances his own.

Yet it would be a mistake to read the play as a screed against moralism, as Claudio’s sister Isabella, a virtuous if complex character, is the real moralist of the play. Claudio asks the “bawd” (or pimp) Lucio to get her to intercede with Angelo on his behalf. We first meet her at the convent, where she is about to become a nun. In five lines, Shakespeare establishes her character.

Isabella. And have you nuns no farther privileges?

Nun. Are these not large enough?

Isabella. Yes, truly; I speak not as desiring more,
But rather wishing a more strict restraint

²⁴ 1.2.136-38.

²⁵ 1.2.159.

²⁶ HENRY MARTYN DEXTER & MORTON DEXTER, *THE ENGLAND AND HOLLAND OF THE PILGRIMS* 105 (1905).

²⁷ 1.3.50.

²⁸ 3.1.93.

²⁹ 6 HAVELOCK ELLIS, *STUDIES IN THE PSYCHOLOGY OF SEX* 376 (Echo Library 2007) (1911).

³⁰ STEPHEN GREENBLATT, *WILL IN THE WORLD: HOW SHAKESPEARE BECAME SHAKESPEARE* 120 (2004).

Upon the sisters stood, the votarists of Saint Clare.³¹

The order of Saint Clare was famously strict—its members became known as the “Poor Clares” for taking their vow of poverty so seriously. For Isabella to wish for more restraint is priggish, and the way she asks for it seems designed to show off her own devotional attitude.

If we imagine Isabella’s life in Vienna, however, we might look on her with kinder eyes. We meet four other women in this play: the “fornicatress” Julietta, the abandoned Mariana, the madam Mistress Overdone, and the nun Francisca. With these models of womanhood in lawless Vienna, it seems understandable that a frightened girl might want to enter the strictest nunnery in town. As we understand today, one of the costs of a lawless society is that its public spaces become unsafe. Peace in this play is found within enclosures—Isabella’s nunnery, Mariana’s “moated grange,”³² Angelo’s house “circummur’d with brick.”³³

Whatever we make of Isabella, she is the perfect foil for Angelo. Their first exchange is comically brief because they quickly agree that Claudio’s sin is execrable and that the rule of law must be upheld. Isabella faintheartedly asks Angelo if the law is not a trifle harsh. Angelo curtly disagrees. This is enough for Isabella: “O just but severe law! / I had a brother, then: heaven keep your honor.”³⁴ I like Northrop Frye’s summary: “Isabella: ‘I understand you’re going to cut my brother’s head off.’ Angelo: ‘Yes, that is the idea.’ Isabella: ‘Well I just thought I’d ask. I have to go now; I have a date with a prayer.’”³⁵

The outraged Lucio persuades Isabella to try again. Her second, more impassioned plea unmistakably echoes Portia’s famous “quality of mercy” speech from *Merchant*. Here is Portia:

The quality of mercy is not strain’d,
It droppeth as the gentle rain from heaven
Upon the place beneath. It is twice blest:
It blesseth him that gives and him that takes.
'Tis mightiest in the mightiest, it becomes
The throned monarch better than his crown.
His sceptre shows the force of temporal power,
The attribute to awe and majesty,
Wherein doth sit the dread and fear of kings:
But mercy is above this sceptred sway,
It is enthroned in the hearts of kings,
It is an attribute to God himself;
And earthly power doth then show likest God’s
When mercy seasons justice: therefore Jew,
Though justice be they plea, consider this,

³¹ 1.4.1-5.

³² 4.1.sd.

³³ 4.1.28.

³⁴ 2.2.41-42.

³⁵ NORTHROP FRYE, *NORTHROP FRYE ON SHAKESPEARE* 146 (Robert Sandler ed., 1986).

That in the course of justice, none of us
Should see salvation: we do pray for mercy,
And that same prayer, doth teach us all to render
The deeds of mercy.³⁶

Isabella articulates the identical sentiments to Angelo:

No ceremony that to great ones longs,
Not the king's crown, nor the deputed sword,
The marshal's truncheon, nor the judge's robe,
Become them with one half so good a grace
As mercy does. . . .
Why all the souls that were, were forfeit once,
And He that might the vantage best have took
Found out the remedy. How would you be
If He, which is the top of judgment, should
But judge you as you are? O, think on that,
And mercy then will breathe within your lips
Like man new made.³⁷

These matched pleas form a portal between the plays. Both express the New Testament ethic of “judge not lest ye be judged.”³⁸ The contention is that God could have condemned us all, but chose to show us mercy, meaning we should emulate him in not judging each other.

In *Merchant*, Shylock does not engage Portia's arguments, but simply stands on his bond. This, in part, reflects Shylock's status as a private citizen. The Renaissance worldview was clear that individuals should always show mercy, but that rulers sometimes needed to be cruel to be kind. Machiavelli's *The Prince* for instance, said that rulers would be more criticized for too much lenity than for too much justice.³⁹ Unlike Shylock, Angelo is a ruler. So Shakespeare allows Angelo to answer Isabella's plea for mercy with devastating cogency.

Angelo also begins his case by standing—or hiding—behind the law: “It is the law, not I, condemn your brother.”⁴⁰ Later, he will also describe himself as “the voice of the recorded law.”⁴¹ His role as magistrate is not to judge the laws, but merely to apply them. If Vincentio can be seen as the “activist judge” who refuses to apply laws he does not like, Angelo is the opposite. Moreover, Angelo does not understand this strict application to be inconsistent with mercy. To the contrary, he

³⁶ 4.1.180-99.

³⁷ 2.2.59-63, 73-78.

³⁸ *Matthew* 7:1.

³⁹ NICCOLÒ MACHIAVELLI, *THE PRINCE* 58 (Quentin Skinner & Russell Price eds., Cambridge University Press, 1988) (1532).

⁴⁰ 2.2.80.

⁴¹ 2.4.61.

believes that mercy inheres in rigorous evenhandedness: “I show [pity] most of all when I show justice; / For then I pity those I do not know.”⁴²

This is a powerful point. We often think of criminal proceedings as concerning only the people involved in them. This is not the case. Any special accommodation we make to particular defendants constitutes bias against the rest of the world. The play has already suggested this danger. Escalus pleads for Claudio’s life in part because Claudio comes from a good family: “Alas, this gentleman, / Whom I would save, had a most noble father.”⁴³ But if Claudio were pardoned on that ground, it would be a grave injustice to individuals not lucky enough to travel in the same circles as the sovereign. In our own times, we have seen the resentment spawned by executives who use their pardon power in arbitrary ways. President Gerald Ford arguably lost the 1976 election because he pardoned President Nixon; President Clinton’s reputation was smirched when he dispensed pardons during his last day of office based on personal relationships.

Angelo also makes arguments about deterrence that will be familiar to any modern criminal lawyer. Criminal law distinguishes between two kinds of deterrence—specific deterrence and general deterrence. Specific deterrence is about preventing the criminal from committing another offense. Angelo invokes this argument when he says that the individual condemned to death “answering one foul wrong, / Lives not to act another.”⁴⁴ General deterrence uses the criminal as an example to prevent others from committing the same crime. Angelo deploys this contention as well: “Those many had not dar’d to do that evil / If the first that did th’ edict infringe / Had answer’d for his deed.”⁴⁵

Perhaps most powerfully, Angelo refutes the core contention (made by Vincentio, Isabella, and Escalus throughout the play) that he, as a sinner himself, cannot judge others. He finds a way to judge while evading the charge of hypocrisy loaded into the New Testament sense of “measure for measure.” As he says to Escalus:

I not deny
 The jury passing on the prisoner’s life
 May in the sworn twelve have a thief, or two
 Guiltier than him they try. What’s open made to justice,
 That justice seizes. What knows the laws
 That thieves do pass on thieves? ’Tis very pregnant,
 The jewel that we find, we stoop and take’t,
 Because we see it; but what we do not see,
 We tread upon, and never think of it.
 You may not so extenuate his offence
 For I have had such faults; but rather tell me,
 When I that censure him do so offend,
 Let mine own judgment pattern out my death,

⁴² 2.2.101-03.

⁴³ 2.1. 6-7.

⁴⁴ 2.2.104-05.

⁴⁵ 2.2.92-94.

And nothing come in partial. Sir, he must die.⁴⁶

Angelo's distinction between God's justice and human justice is marked by an appealing humility. Justice can only judge what it sees. Unlike God, humans cannot see everything. So purveyors of human justice admit, as they must, that the guilty can sometimes try the guilty. But this does not mean human beings who judge each other are necessarily compromised, so long as they are willing to submit to the same laws when they are caught.

In Angelo, Portia might have found a foeman worthy of her steel. Isabella is certainly not up to refuting his comprehensive case against mercy. Indeed, she ends up conceding that her love for her brother has made her say things she did not mean: "O pardon me, my lord; it oft falls out / To have what we would have, we speak not what we mean. I something do excuse the thing I hate / For his advantage that I dearly love."⁴⁷

Yet Shakespeare only permits Angelo's vision an intermediate victory. As the Duke (watching in disguise) points out, everything depends on whether Angelo can live up to his ideals: "If his own life answer the straitness of his proceeding, it shall become him well: wherein if he chance to fail, he hath sentenced himself."⁴⁸ In other words, Angelo should be careful in what measure he metes, because that measure will be meted unto him. What is fascinating—and chilling—about Angelo is that he is entirely complacent about his rectitude.

Angelo's lack of self-knowledge is his Achilles' heel. In this play, as in all of Shakespeare, self-knowledge is a foundation for knowing anything else. The Duke rises in our estimation when Escalus states that Vincentio has "above all other strifes, contended especially to know himself"⁴⁹—though significantly, Escalus never says that Vincentio succeeds in that contention! In contrast, we know Lear is a bad ruler when Goneril describes her father as someone who "hath but slenderly known himself."⁵⁰ The link between governing the self and governing the state is as old as Plato, and recurs throughout the Shakespearean corpus. Self-knowledge in the plays is always a necessary, though never a sufficient, prerequisite of good governance.

Angelo believes himself to be in perfect control of self, and, therefore, of state. The Duke intuits this when he says, "Lord Angelo is precise; / Stands at a guard with Envy; scarce confesses / That his blood flows."⁵¹ Lucio concurs that Angelo is "a man whose blood / Is very snow-broth: one who never feels / The wanton stings and motions of the sense."⁵² Lucio relates Angelo's coldbloodedness with a lack of sexual desire. He later speculates that Angelo "was begot between two stockfishes,"⁵³ or two dried fish, rather than through human procreation, and that

⁴⁶ 2.1.18-22.

⁴⁷ 2.4.116-20.

⁴⁸ 3.2.249-51.

⁴⁹ 3.2.226.

⁵⁰ 1.1.291.

⁵¹ 1.3.50-52.

⁵² 1.4.57-59.

⁵³ 3.2.105.

Angelo himself is “ungenitured,”⁵⁴ or lacking genitals. Brought into the world through asexual reproduction, Angelo is seen to be sexless himself.

Almost all of the laws represented in the play are sex laws—laws against brothels, procuring, prostitution, and fornication. Sexuality in this play stands in for natural sin, following the Biblical idea that Adam and Eve fell through sexual knowledge. The two “saints” of the play—Isabella and Angelo—are cast as such because they seem immune to sexual temptation. But the broader point here is that neither fully accepts his or her humanity. This, in Shakespeare as in life, is folly.

Isabella is practically a case study of sexual repression. When arguing with Angelo about how important her chastity is to her, she says: “Th’ impression of keen whips I’d wear as rubies, / And strip myself to death as to a bed / That longing have been sick for, ere I’d yield / My body up to shame.”⁵⁵ This is a fully realized vision of sadomasochistic sexuality, especially coming from a novice nun proclaiming the importance of her chastity. As Harold Bloom says, “Had the Marquis de Sade been able to write so well, he might have hoped to compete with that.”⁵⁶

Isabella’s barely repressed sexuality works like a magnet to draw out Angelo’s. In pleading for Claudio, she asks him:

Go to your bosom,
Knock there, and ask your heart what it doth know
That’s like my brother’s fault. If it confess
A natural guiltiness, such as is his,
Let it now sound a thought upon your tongue
Against my brother’s life.⁵⁷

Isabella has made this argument—unsuccessfully—before, but this time she addresses Angelo’s body as well as his mind. Angelo must acknowledge that he feels sexual lust, and feels it for the woman who poses the question: “She speaks and ’tis such sense / that my sense breeds with it.”⁵⁸ What attracts Angelo to Isabella is their mutual coldness: His lust for her burns like ice burns.

No one is more startled than Angelo when he feels his desire for Isabella: “Ever till now / When men were fond, I smiled and wondered how.”⁵⁹ I love the ruefulness of this line, which almost evokes a vision of him shaking his head in wonderment at his own frailty. When he marvels, “Blood, thou art blood,”⁶⁰ the line is saved from tautology by expressing his new knowledge that his blood is not “snow broth,” but human blood.

Unfortunately, Angelo is not humanized by his desire, but plummets directly from angelic heights to diabolical depths: “I have begun / And now I give my sensual

⁵⁴ 3.2.167.

⁵⁵ 2.4.100-04.

⁵⁶ HAROLD BLOOM, *SHAKESPEARE: THE INVENTION OF THE HUMAN* 365 (1998).

⁵⁷ 2.2.137-42.

⁵⁸ 2.2.143-44.

⁵⁹ 2.2.186-87.

⁶⁰ 2.4.25.

race the rein.”⁶¹ He threatens Isabella that if she does not sleep with him, he will not only kill Claudio, but torture him before doing so. This dynamic has present-day resonances as well. How many reformers have we seen today who, when they slip, slip with a vengeance? Now as then, it is dangerous not to know how much is pent up behind one’s internal walls.

While Angelo’s human flaws come as a surprise to him, they do not surprise the Duke. He has put Angelo in charge in part to test him: “Hence we shall see / If power change purpose, what our seemers be.”⁶² The Duke’s suspicions of Angelo’s bad character may arise from his knowledge of Angelo’s relationship with the Viennese gentlewoman Mariana. As the Duke informs Isabella, Angelo was engaged to Mariana through a “pre-contract” known as the *sponsalia de per verba de futuro*, or a promise to marry in the future. Angelo broke off this engagement because Mariana’s dowry did not meet his expectations. This engagement brings Angelo’s situation closer to Claudio’s, with two key distinctions. Legally, Angelo’s case can be distinguished favorably from Claudio’s because Angelo has not had sexual relations with his fiancée. But morally, Angelo has behaved much more poorly—unlike Claudio, he seems to have been motivated by money, rather than love. In addition, Angelo has shown himself a “semer”—while his actual reason for breaking the engagement is the absence of the dowry, he has spread the rumor that he has withdrawn from the engagement because he has learned something negative about Mariana’s reputation.

Luckily, the Duke has remained in Vienna. He approaches Isabella disguised as a friar, and offers her counsel. The Duke suggests that Isabella accede to Angelo’s demands, but that Mariana keep the assignation under cover of night. This “bed trick” was a common conceit of the theater of this period, and also figures in *All’s Well That Ends Well*. It turned on the legal notion that sexual relations were enough to transform a *sponsalia de per verba de futuro* into an actual marriage. The plan is successfully carried out—Angelo believes Isabella has kept her side of the bargain. But Angelo further reveals his perfidy when he fails to keep his end. He sends an order to have Claudio executed because he fears Claudio will exact revenge on him. The busy Duke intercepts the order and ensures that the head of a pirate, Ragozine, is substituted for Claudio’s. To test her virtue and patience, the Duke, still disguised, tells Isabella that her brother has died, and that she should sue for justice when the Duke returns.

Like *Merchant, Measure* culminates in a public trial. When the Duke appears at the city gates, Isabella comes and asks for Justice. Angelo accuses her of being insane. True to Angelo’s own prediction, the Duke seems to credit Angelo’s account. But then the Duke reveals that he has been in Vienna in disguise, and Angelo realizes he has been observed all along.

The Duke asks Angelo if he has anything left to say for himself. Angelo does not—he longs only for death. The Duke agrees easily to this, saying that Angelo should marry Mariana to restore her honor, and then be executed. As Vincentio says:

The very mercy of the law cries out

⁶¹ 2.4.158-59.

⁶² 1.4.53-54.

Most audible even from his proper tongue:
 “An Angelo for Claudio; death for death.
 Haste still pays haste, and leisure answers leisure;
 Like doth quit like, and Measure still for Measure.”⁶³

Like Shylock, Angelo is hung with his own rope. He has eschewed a New Testament ethic of mercy for an Old Testament ethic of retribution: “If any harm follows, then you shall give life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burn for burn, wound for wound, stripe for stripe.”⁶⁴ This too, is recognized as a form of “measure for measure”—“An Angelo for Claudio; death for death.” Indeed, the Duke mimics Angelo’s own earlier line about how he shows pity “most when [he] show[s] justice.”⁶⁵ In the Duke’s keen phrasing, it is not the “justice” of the law, but the “mercy” of the law that cries out for retribution—putting Angelo to death is the only way of showing mercy to Claudio. Hypocritical as he has been until this point, Angelo understands this—he wishes to die.

Mariana intercedes on her fiancé’s behalf, asking that she not be mocked with a husband. As she says, “They say best men are molded out of faults, / And for the most part become much more the better / For being a little bad. So may my husband.”⁶⁶ This is a bit much. It is hard to say that Angelo is just a “little bad.” As Isabella has just pointed out, he is “a murderer,” “an adulterous thief,” “an hypocrite,” and “a virgin-violator.”⁶⁷ So in the end, only Isabella can plead for Angelo. Acknowledging this, Marianna asks her to kneel down beside her.

Isabella, unlike Portia, shows herself capable not only of speaking about mercy, but of giving it. Although she still believes Angelo has caused the death of her brother, she asks the Duke to spare Angelo’s life:

Most bounteous sir:
 Look, if it please you, on this man condemn’d
 As if my brother liv’d. I partly think
 A due sincerity govern’d his deeds
 Till he did look on me. Since it is so,
 Let him not die.⁶⁸

The Duke accepts her plea, pardoning Angelo so he can marry Mariana. In fact, he begins to dispense pardons all around. He reveals that Claudio is still alive, and then pardons him so he can marry his fiancée Julietta. In less than ten lines, he sentences Lucio to death for slandering him while Vincentio was in disguise as a friar, but pardons the bawd so he can marry the woman he has gotten pregnant. Finally, and most controversially for critics, he asks Isabella to marry him. She does not answer.

⁶³ 5.1.405-09.

⁶⁴ *Exodus* 21:23-25 (New King James).

⁶⁵ 2.2.101.

⁶⁶ 5.1.437-39.

⁶⁷ 5.1.41-43.

⁶⁸ 5.1.441-51.

There is something too quick about the last Act of the play. The pendulum has swung wide. The lawless Vienna of the play's inception has become a polity in which the laws have been remorselessly enforced. Yet once the problems of the other extreme are exposed, the Duke reverts to type. The state of Vienna seems poised to sink back into the lawless state it was at the inception of the play.

* * *

Shakespeare does offer a solution, though we have to look in the shadows of the play to find it. The solution finds a middle ground, focusing on the word "measure" in "measure for measure." This notion of temperance, or the *via media*, falls less within the Judeo-Christian tradition than it derives from teachings of antiquity. This solution is embodied here in the figure of Escalus, whose name, in Latin, means "scales." He is not a major character in the play, but deserves our close attention.

It is clear that Escalus is meant to be an iconic figure in the play. Escalus's name is the first word of the play, and in the first scene, the Duke offers a paean to his political wisdom:

The nature of our people,
Our city's institutions, and the terms
For common justice, y'are as pregnant in
As art and practice hath enriched any
That we remember.⁶⁹

The riddle posed in the first scene of the play is why Escalus is passed over in favor of Angelo when Vincentio chooses a deputy: "Old Escalus / Though first in question, is thy secondary."⁷⁰ The answer is that Vincentio wishes to push the state to the other extreme, which will only highlight Escalus's worth.

The play shows Vincentio's praise of Escalus to be richly deserved. Escalus's great virtue is that he is not doctrinaire. With respect to the Duke's laxity, he muses that "Mercy is not itself, that oft seems so / Pardon is the nurse of second woe."⁷¹ Yet Angelo's rigid justice is not to his liking either. He urges temperance: "Let us be keen, and rather cut a little, / Than fall, and bruise to death."⁷²

Perhaps most importantly, Escalus imposes his own conception of proportionality on the law. We could diagnose the real problem with Vienna as a legislative problem—its "strict statutes and most biting laws"⁷³ impose punishments grossly out of proportion to their crimes. This encourages judges to choose between two evils—the evil of non-enforcement with the attendant harm to the state's credibility, or the evil of enforcement with its attendant harm to the state's justice. Vincentio chooses the former evil, Angelo chooses the latter. Escalus finds a middle way.

To see how, it is instructive to compare Escalus's choice with Angelo's. Angelo does not look to the substantive fairness of the law produced by the legislature. In

⁶⁹ 1.1.9-13.

⁷⁰ 1.1.44-45.

⁷¹ 2.1.280-81.

⁷² 2.1.5-6.

⁷³ 1.3.19.

his exchange with Isabella, he says “it is the law, not I, condemn your brother,”⁷⁴ relying on the idea that he is simply a conduit for the law’s administration. He does not ask if the law is a good law or a bad law, or whether the punishment is proportioned to the crime. His sense of “measure for measure” only goes to the procedural fairness of the law’s administration. So long as he would submit to punishment under the law if convicted, he can enforce it without compunction.

In contrast, Escalus suggests that this passivity about the substantive fairness of the law’s application is undesirable. He resists the idea that Claudio should be put to death for a single act of fornication. When he has discretion himself, we see him use it wisely. The first time Pompey comes before him, Escalus lets him off with a warning, which seems reasonable given that the laws are being newly enforced. The second time, however, he punishes him. Similarly, we hear that after “double and treble admonition,”⁷⁵ he has also punished the madam Mistress Overdone.

The three judges of the play can be seen as three aspects of the sitting sovereign, King James I. Like Vincentio, James acknowledged that he had been too lax at the beginning of his rule. Like Angelo, he engaged in practices that were viewed to be overzealous, such as pulling down the brothels in the suburbs of London. But the ultimate wisdom he bequeathed to his son in the *Basilicon Doron* (the “Kingly Gift”) was to find, like Escalus, the middle way.

I need not to trouble you with the particular discourse of the foure Cardinall vertues, it is so troden a path: but I will shortly say vnto you, make one of them, which is Temperance, Queene of all the rest within you. . . .

Vse Iustice, but with such moderation, as it turne not in Tyrannie: otherwaies *summum Ius, is summa iniuria*. . . .

And as I said of Iustice, so say I of Clemencie, Magnanimitie, Liberalitie, Constancie, Humilitie, and all other Princely vertues; *Nam in medio stat virtus*. And it is but the craft of the Diuell that falsly coloureth the two vices that are on either side thereof, with the borrowed titles of it, albeit in very deede they haue no affinitie therewith and the two extremities themselues, although they seeme contrarie, yet growing to the height, runne euer both in one: For *in infinitis omnia concurrunt*; and what difference is betwixt extreame tyrannie, delighting to destroy all mankinde; and extreame slackenesse of punishment, permitting euery man to tyrannize ouer his companion?⁷⁶

The King rules the state, but Temperance is to be the “Queene” over the King. The most hopeful theme of the Duke’s last soliloquy is that he recognizes and rewards Escalus: “Thanks, good friend Escalus, for thy much goodness; / There’s more behind that is more gratefull.”⁷⁷ The old advisor is not flashy or dramatic—he is

⁷⁴ 2.2.80.

⁷⁵ 3.2.187.

⁷⁶ JAMES I, *THE POLITICAL WORKS OF JAMES I* 37-38 (Charles Howard McIlwain ed., Harvard University Press 1918) (1599).

⁷⁷ 5.1.525-26.

much less memorable than either Angelo or Vincentio. But this could also be true of good judges.

* * *

Let me now return to the Sotomayor confirmation hearings. My motive here is not to focus on the particulars of her confirmation, which will soon be properly eclipsed by her work as a Justice. Rather, I seek to underscore how the hearings drew out an eternal conflict between alternative visions of judging.

The first model was that of the empathetic judge presented by the President who nominated Sotomayor. President Obama's adherence to this model dates back to his tenure as a Senator. In opposing the confirmation of Chief Justice Roberts, he stated:

The problem I face—a problem that has been voiced by some of my other colleagues, both those who are voting for Mr. Roberts and those who are voting against Mr. Roberts—is that while adherence to legal precedent and rules of statutory or constitutional construction will dispose of 95 percent of the cases that come before a court, so that both a Scalia and a Ginsburg will arrive at the same place most of the time on those 95 percent of the cases—what matters on the Supreme Court is those 5 percent of cases that are truly difficult. In those cases, adherence to precedent and rules of construction and interpretation will only get you through the 25th mile of the marathon. That last mile can only be determined on the basis of one's deepest values, one's core concerns, one's broader perspectives on how the world works, and the depth and breadth of one's empathy.⁷⁸

Obama would repeatedly return to the importance of empathy in judging. He used similar language to oppose the confirmation of Justice Samuel Alito. When asked during his presidential campaign how he would select his justices, he alluded to the same “empathy” standard on numerous occasions.⁷⁹

Not surprisingly, President Obama's empathy standard was extremely controversial. Karl Rove called it the new “code word for judicial activism.”⁸⁰ He was joined by a host of other politicians and commentators who believed that empathy was a threat to the rule of law.

It is always easier to dispose than to propose, so, to their credit, the President's opponents proffered a counter-model, embodied in the very Justice the then-Senator Obama had criticized. In his opening remarks during his 2005 confirmation hearings, Roberts articulated his vision of the role. “Judges are like umpires,” then-Judge Roberts said. “Umpires don't make the rules; they apply them. The role of an

⁷⁸ 151 CONG. REC. S10365 (daily ed. Sept. 22, 2005) (statement of Sen. Obama).

⁷⁹ See, e.g., Chris Weigant, *Is the Media Misinterpreting Obama's "Empathy" Dog Whistle?*, HUFFINGTON POST, May 7, 2009, http://www.huffingtonpost.com/chris-weigant/is-th-media-misinterpret_b_198389.html (discussing Obama's 2007 speech to Planned Parenthood); *The Situation Room* (CNN television broadcast May 8, 2008).

⁸⁰ Karl Rove, *'Empathy' is Code for Judicial Activism*, WALL ST. J., May 28, 2009, at A13.

umpire and a judge is critical. They make sure everybody plays by the rules. But it is a limited role.”⁸¹

Throughout the entire confirmation process, the project of Sotomayor’s opponents was to paint her as an “empathetic” judge who would simply vote for those with whom she identified. A famous thirty-three-word sentence was brandished as support for this proposition. In a 2001 speech at Berkeley, then-Judge Sotomayor said: “I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn’t lived that life.”⁸² The “wise Latina” comment was repeated ad nauseam as evidence that Sotomayor was racist at best and biased at worst.

Sotomayor and her proponents quickly walked it back. Sotomayor characterized the sentence as a “rhetorical flourish that fell flat,”⁸³ while the White House stated that she would probably have “chosen her words differently”⁸⁴ if given the opportunity. Sotomayor also insisted that she disagreed with the President that a judge should follow his or her “heart,” observing that there was “one law” and that the job of the judge was to apply it.⁸⁵

I find *Measure*, Shakespeare’s deepest meditation on the role of a judge, to be a useful framework through which to filter this controversy. Senator Jeff Sessions could be understood to be playing Angelo to Obama’s Vincentio. Sessions characterized Obama’s “empathy” standard as leading to the deterioration of the rule of law, and, more specifically argued that it would in fact lead toward bias—“Empathy for one party is always prejudice against another.”⁸⁶ This claim echoes Angelo’s claim that he shows mercy most when he shows justice “for then I pity those I do not know.”⁸⁷ As I have previously acknowledged, this is a powerful point.

Yet we must also remember that Angelo falls in the play, and that his fall is inevitable because of the intrinsically untenable position he attempts to hold. In attacking Sotomayor’s “wise Latina” comment, Sessions appeared to believe that pure neutrality was in fact possible. Like Angelo, he believed that judgment could be a relatively mechanical enterprise, like being an umpire. This in turn suggested that a judge’s experiences as a Caucasian or a male would not “color” his experience. In Angelo’s case, the fantasy is not that he will transcend a particular demographic characteristic, but that he can transcend his humanity altogether. We see that fantasy

⁸¹ Bruce Weber, *Umpires v. Judges*, N.Y. TIMES, July 12, 2009, at WK1.

⁸² Judge Sonya Sotomayor, *A Latina Judge’s Voice*, Address at the University of California Berkeley School of Law Symposium: Raising the Bar (Oct. 26, 2001), available at http://berkeley.edu/news/media/releases/2009/05/26_sotomayor.shtml.

⁸³ See, e.g., Charlie Savage, *A Nominee on Display, but Not Her Views*, N.Y. TIMES, July 16, 2009, at A11.

⁸⁴ See, e.g., Joe Klein, *The Return of the Hot-Button Issues*, TIME, June 4, 2009.

⁸⁵ See, e.g., Michael Muskal, *Sotomayor, Senators Make Nice—For Now*, L.A. TIMES, June 3, 2009.

⁸⁶ See, e.g., Kathy Kiely & Joan Biskupic, *Sotomayor’s Remarks Cap Emotional Day*, USA TODAY, July 13, 2009.

⁸⁷ 2.2.102.

in the idea that “[i]t is the law, not I, condemn your brother,”⁸⁸ or that he is but “the voice of the recorded law.”⁸⁹

Sotomayor ultimately prevailed over Sessions, but did so on his terms. Her recantation of the claim that experience could affect how one judged was probably the most politic thing she could do. It preserved a fantasy about how Americans wish to perceive the law today. But without faulting her for making a strategic decision when the stakes were so high, I still wish to express regret that she was put under such pressure to do so. The thirty-three words, when viewed in context, are clearly a rejoinder to the claim made by the first female United States Supreme Court Justice, Sandra Day O’Connor. Asked whether being a woman made a difference to how she judged, Justice O’Connor stated that she believed “A wise old man and a wise old woman will reach the same conclusion in deciding cases.”⁹⁰ Again, this was clearly the most politic thing for Justice O’Connor to say.

But after she ascended to the bench, Justice O’Connor did not always walk this talk. In a 1994 case concerning peremptory strikes of female potential jurors, for instance, she observed that “[a] plethora of studies make clear that in rape cases, for example, female jurors are somewhat more likely to vote to convict than male jurors.”⁹¹ She continued that “though there have been no similarly definitive studies regarding, for example, sexual harassment, child custody, or spousal or child abuse, one need not be a sexist to share the intuition that in certain cases a person’s gender and resulting life experience will be relevant to his or her view of the case.”⁹²

In making her “wise Latina” comment, then-Judge Sotomayor was simply saying what Justice O’Connor was doing on the bench. As should be obvious, this did not lead to the breakdown of the rule of law. As President Obama might say, in ninety-five percent (or much more) of the cases, I doubt it would be possible to guess whether an opinion was written by a woman or a man. But in some cases, life experience as a woman—or man—will matter.

Viewed in this light, President Obama’s “empathy” standard makes him look much more like Escalus than like Vincentio. He was careful to say that when the law was clear, judges should apply it. What he had the temerity to do was to puncture the fantasy that judges could simply be the “voice of the recorded law.” It was not his adherence to Vincentio’s model of judgment, but his resistance to Angelo’s model of judgment, that occasioned resistance. But Angelo’s model of judgment is pure fantasy, as evidenced by the Chief Justice himself. As some of the Democrats on the Judiciary Committee pointed out, Chief Justice Roberts claimed only to be an umpire, but has in fact been an active player in many cases that have come before him.

The President has never advocated a model of pure empathy devoid of law. The converse statement could not be made of some of his opponents. After Judge Sotomayor was successfully confirmed, Senator Sessions stated that he was at least

⁸⁸ 2.2.80.

⁸⁹ 2.4.61.

⁹⁰ See, e.g., Chuck Raasch, *Sotomayor Speech at Center of Court Nomination*, USA TODAY, June 4, 2009.

⁹¹ *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 148-49 (1994) (O’Connor, J., concurring).

⁹² *Id.*

convinced Obama would no longer use the word “empathy.” It seemed that Sessions wanted a law that was entirely devoid of empathy.

My problem with confirmation hearings is not that they are occasions to have a national debate about the proper role of empathy in judging. To the contrary, I welcome such debate and contestation. My problem is that these conversations focus so much on extreme models of judging that should be eliminated before the debate begins because both extremes are clearly non-starters. Shakespeare understood that neither an ethic of pure empathy nor pure law was tenable, because judging from its inception has concerned the question of how fairly to apply general rules to particular circumstances. We have had a long time to struggle with the competing principles that make this a timeless predicament. We cannot expect to solve it, but we can approach it with greater measure.