



BOOK REVIEW

**Introduction:
Book Review Symposium on
*Theaters of Pardoning***

Amalia D. Kessler*

Bernadette Meyler's *Theaters of Pardoning*¹ is a *tour de force* of legal, literary, and historical erudition, which packs a punch for key questions of law and justice today. Meyler traces the evolution of the pardoning power in seventeenth-century England from an association with royal to parliamentary authority. While pardoning was first conceived as a right of kingship, used to excuse acts of individual revenge, it came to be viewed as a legislative act, deployed to reconstitute the social and political fabric sundered by revolution. As a work of law and literature, Meyler's book explores these developments by examining a set of plays concerning pardoning that were written in the genre of tragicomedy and that she terms "theaters of pardoning." Drawing on a close reading of these plays, carefully contextualized in a broader legal, social, and political context, she shows not only that theater reflected developments in the law, but also that theater contributed to these by shaping ideas and practices of pardoning. Moreover, by situating her interventions in the context of a long tradition of political theory—ranging from Bodin to Agamben—she reflects on their normative implications for the present. Pardoning, she suggests, retains great potential as an instrument of forgiveness and mercy of the sort vital for reconstituting our frayed social and political order. However, she concludes, to experience these benefits, while avoiding dangerous uses of pardoning that threaten rule of law itself, we must break the linkage between pardoning and sovereignty forged centuries ago.

In this Book Review Symposium, four prominent, interdisciplinary scholars, including Meyler herself, each reflect on particular aspects of the book's many important contributions. Kenji Yoshino, a renowned professor of constitutional law and of law and literature, focuses attention on Meyler's exploration of "acts of oblivion." Issued in the wake of significant political upheaval, these were legislative enactments that aimed to restore social

* Lewis Talbot and Nadine Hearn Shelton Professor of International Legal Studies and Professor (by courtesy) of History, Stanford University.

1. BERNADETTE MEYLER, *THEATERS OF PARDONING* (2019).

harmony by affording a general amnesty. They functioned, however, not only to pardon wrongdoers by remitting their punishment, but also to erase the underlying events that required forgiveness in the first place. More particularly, they mandated that the very memory of these events be expunged from public knowledge and discourse.² Yoshino explores this seemingly distant and alien legal form, suggesting that it may have survived into the present in ways that we should find deeply troubling. Oblivion, he argues, serves to “commandeer citizens,” requiring the public as a whole to participate in a pardon of which many individuals might disapprove.³ Drawing on this critique, Yoshino concludes by exploring what light this history might shed on our present political moment. Although legislative acts of oblivion are long gone, President Trump, he claims, has encouraged another kind of oblivion, rooted in the executive branch and “more insidious.”⁴ Taking the form of a “torrent of false governmental speech,” such presidential gaslighting serves to erase the past just as surely as act of oblivion once sought to do, but perhaps even more effectively—by causing citizens to doubt what they otherwise know to be true—and without legislative checks.⁵

Peter Brooks, a highly esteemed scholar of comparative literature and of law and literature, situates Meyler’s study of seventeenth-century English tragicomedy in a broader early modern and pan-European context, asking “why pardon, mercy, and clemency become in this period—from the sixteenth through the eighteenth century—a dominant theatrical trope.”⁶ Meyler’s tracing of the pardon power from royal to parliamentary sovereignty is in line, he posits, with other artistic works, including not least Mozart’s famous opera *The Marriage of Figaro*, that favored a shift from more authoritarian to more representative forms of government and that understood this shift as linked in important ways to pardoning. While unconstrained rulers engaged in “retribution” or “conquest,” their more enlightened successors preferred pardon and clemency—a transformation that, as Meyler’s book suggests, was simultaneously represented and catalyzed by the literary shift from “the long tradition of revenge tragedy” to the tragi-comedy of “theaters of pardoning.”⁷ Looking beyond the early modern period, Brooks also reflects on the role of pardon in nineteenth-century Romantic drama, where, as in Victor Hugo’s work, it continued to “sound[] a central message of . . . forgiveness as crucial to social solidarity,” helping to facilitate “reconciliation” in “societies of deep inequality and patent social injustice.”⁸ Last but not least, Brooks emphasizes

2. Kenji Yoshino, *Acts of Oblivion*, 72 STAN. L. REV. ONLINE 65, 65-66 (2020).

3. *Id.* at 66.

4. *Id.* at 70.

5. *Id.* at 71-72.

6. Peter Brooks, *The Ends of Pardoning*, 72 STAN. L. REV. ONLINE 73, 75 (2020).

7. *Id.* at 75.

8. *Id.* at 76, 78.

the unique methodological contributions of Meyler’s book and, in particular, its focus on the mutual influences of law and literature. It is a “rarity in law and literature scholarship,” he observes, to read a book in which “the traffic flows both ways.”⁹

A prominent professor of criminal justice and law and literature, Robert Weisberg begins his comments where Brooks’s end—namely, by reflecting on the uniqueness of Meyler’s deeply interdisciplinary approach to law and literature. The book, he notes, is rare in law-literature scholarship in its ability to “show[] how legal authority and literary form interact catalytically in the conduct of government and adjudication.”¹⁰ Reflecting on how Meyler manages to achieve this feat, he suggests that she treats Stuart theater as “the law-literature equivalent of the economist’s natural experiment.”¹¹ In particular, Meyler carefully attends to the institutional setting in which her theaters of pardoning were developed and performed, examining the various ways that they facilitated forms of mutual influence between literary and legal/political actors. In Weisberg’s words, “[t]he playhouse was a democratized marketplace of cultural attitudes and political sentiments”; its plays were “often performed right within the Inns of Courts and with an overlap of legal and theatrical personnel”; and “[t]he monarch himself would attend.”¹² Weisberg goes on to explore particular ways that Meyler attends to law and literature’s mutual influence. These include, for example, her striking suggestion—based partly on the fact that King James I attended a performance of Shakespeare’s *Measure for Measure* just one year before the Gunpowder Plot seeking his death—that “James’s political errors reflected his failures of literary appreciation.”¹³ In concluding, Weisberg reflects on Meyler’s argument for a resurgence of the pardon power decoupled from sovereignty. Like her, he embraces pardoning in its “modern, legitimately merciful mode,” while also cautioning against the continued risk of “the Executive . . . exploit[ing] the theatrical power of the pardon for both good and meretricious ends” as we have witnessed in the case of President Trump.¹⁴

Meyler’s own remarks mine the vein with which Weisberg concludes, exploring the implications of her book for President Trump’s uses of the pardon power. Trump, she suggests, has returned to an early-modern conception of pardoning as “one of the marks of sovereignty, or a supreme power above the law.”¹⁵ Like Weisberg, she emphasizes Trump’s aesthetic, theatrical approach

9. *Id.* at 79.

10. Robert Weisberg, *The Drama of the Pardon, the Aesthetics of Governing and Judging*, 72 STAN. L. REV. ONLINE 80, 81 (2020).

11. *Id.* at 82.

12. *Id.*

13. *Id.* at 88.

14. *Id.* at 90-91.

15. Bernadette Meyler, *Trump’s Theater of Pardoning*, 72 STAN. L. REV. ONLINE 92, 93 (2020) (internal quotation omitted).

to pardoning, as opposed to the more “routine or bureaucratic” approach preferred by his predecessors in recent decades.¹⁶ While past presidents mostly made pardons on the basis of recommendations presented “without fanfare” by the Office of the Pardon Attorney, Trump has instead issued pardons in highly public, theatrical ways that serve to place “Trump himself . . . front and center and . . . to aggrandize his own power.”¹⁷ Pointing to such examples as Trump’s pardon of Sheriff Joe Arpaio, who was convicted of criminal contempt for his continued violation of the constitutional rights of Latinx drivers in Arizona, Meyler also argues that Trump’s pardoning operates as a “rejection of law.”¹⁸ Moreover, Trump has threatened to pardon himself. This position, she argues, stands at odds with the common law conception of pardoning explored in her book, which treated pardoning as a form of judging, such that a king’s self-pardon would violate the prohibition against a judge deciding his own case. Because the Supreme Court interprets constitutional provisions “against the backdrop of pre-constitutional common law,” there are good grounds, she asserts, for courts to construe the Article II pardon power “as limited by the prohibition against judging in one’s own case.”¹⁹ In concluding, Meyler acknowledges that “Trump has highlighted the reasons for skepticism about pardoning within a democratic society” but she urges reform aimed not at eliminating pardoning but instead at democratizing it.²⁰

Meyler’s call to “democratize pardoning” raises a set of difficult and profound questions that lay outside the scope of her book. But if there is one major point of agreement between the contributors to this symposium—other than their admiration and enthusiasm for the book’s scholarly achievement—it is the importance of some such reform for the well-being of our troubled but enduring democratic project. It is a testament to Meyler’s work that she has set the stage for such an engaging and vital conversation.

16. *Id.* at 95.

17. *Id.* at 92, 94.

18. *Id.* at 95-98.

19. *Id.* at 100.

20. *Id.* at 101.