



BOOK REVIEW

The Drama of the Pardon, the Aesthetics of Governing and Judging

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I. Introduction

It is an easy gibe to say that Donald Trump brought reality TV to the Presidency, but it is worth taking a closer look at the aesthetic rules he brought to politics. As emperor of his shows, he made subjective choices of winners and losers, creating anxiety and suspense. He then became the disruptor of rules and norms of government, and among his devices has been the presidential pardon—both actual and threatened.¹ And when the potential beneficiaries came to include his arguably criminal confederates, he provoked political controversy and sent legal experts into frenzied speculation about what law—if *any law*—governed pardoning itself. The venerable purpose of clemency (including pardons and commutations) is for the ruler to harmonize justice and mercy,² and often in so doing to solidify his political power by displaying his moral power. But could a President pardon his allies to benefit himself? By reworking the pardon into a threat of magisterially arbitrary disruption of the

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1. In his most recent wave of acts of clemency Trump issued pardons to several well-known figures convicted of white-collar crimes and a commutation to a former governor convicted of political bribery. See Peter Baker et al., *The 11 Criminals Granted Clemency by Trump Had One Thing in Common: Connections*, N.Y. TIMES (Feb. 19, 2020), <https://perma.cc/W6US-U7XT>.
2. Consider Illinois Governor George Ryan's 2003 commutation of all of the state's death sentences based on his view that the death penalty had been handed down arbitrarily or prejudicially, see Jodi Wilgoren, *Citing Issues of Fairness, Governor Clears Out Death Row in Illinois*, N.Y. TIMES (Jan. 12, 2003), <https://perma.cc/M4GT-BC9F>, or Ohio Governor Richard Celeste's 1990 commutation of the murder sentences of women convicted of killing their abusive spouses before the advent of the battered spouse defense, see Associated Press, *At End of Term, Ohio's Governor Commutes Death Sentences for 8*, N.Y. TIMES (Jan. 11, 1991), <https://perma.cc/Z9K7-KKNW>, or recent commutations of long-time drug offense prisoners to express social regret about the mandatory sentences under the War on Drugs, see, e.g., Neil Eggleston, *President Obama Announces 46 Commutations in Video Address: "America Is a Nation of Second Chances,"* THE WHITE HOUSE (July 13, 2015 12:35 PM ET), <https://perma.cc/J36D-ADTX>.

settled legal order in transparent self-interest, Trump has held the polity in thrall. Choose your cliché—is the pardon *deus ex machina* or Damoclean sword?

The subject of Meyler’s *Theaters of Pardoning*³ is too inherently important to require a timely relevance as a justification. But the controversy over Trump’s pardons provides a perversely useful parallel to the book’s main themes: that to control the political sphere a ruler must control the cultural sphere; that to serve as a mechanism of such control the pardon must be theatrical, that is, to best exercise the legal authority of the pardon, the ruler must follow a certain aesthetic of performance; and that in the flowering of the English Renaissance theater, a specific and (to be frank) very strange literary genre—the tragicomedy—was the cultural medium that modeled the effective pardon.

Theaters of Pardoning is at once a work of political science, constitutional theory, literary history, and jurisprudence, but for purpose of this review it also exemplifies a distinct achievement in that area broadly called “law and literature.”⁴

Much law and literature work involves examining how creative literature, especially novels and plays, depicts legal institution; that work is important but it hardly forges new interdisciplinary ground. With somewhat more innovation, some work examines legal actions for their literary qualities, such as how judicial decisions rely on artful narratives of facts to achieve legal authority,⁵ or how legal events, even enactments of statutes, operate expressively to achieve cultural authority beyond the instrumentally legal.⁶ Far less common is scholarship that shows how legal authority and literary form interact catalytically in the conduct of government and adjudication.⁷ *Theaters of Pardoning* is the one of the rare works that accomplishes just that.

Meyler sets the predicate for this achievement by demonstrating how early seventeenth-century English drama served at once as high art, popular

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

4. “Law and literature” is one name for an array of scholarship that emerged a few decades ago as part of the movement toward more interdisciplinary legal scholarship but also as an academic rival or antidote to the domain of law and economics. *See generally* GUYORA BINDER & ROBERT WEISBERG, *LITERARY CRITICISMS OF LAW* (2000) (describing the development of the law and literature movement).

5. *See id.* at 22-23.

6. *Cf. id.* at 6-8 (discussing the “expressive conception of literature” and the “appropriat[ion]” of humanistic disciplines by “lawyers and legal scholars”).

7. Two remarkable examples involve the strategic manipulations of the theatrical potential of trials to achieve political ends. *See* Guyora Binder, *Representing Nazism: Advocacy and Identity at the Trial of Klaus Barbie*, 98 *YALE L.J.* 1321, 1323, 1357 (1989) (recalling a defense lawyer’s conversion of the trial of a war criminal into a dramatic meta-trial of French collaborationist government); Robert A. Ferguson, *Story and Transcription in the Trial of John Brown*, 6 *YALE J.L. & HUMAN.* 37, 38-40 (1994) (explaining how an abolitionist leader exploited the aesthetic effects of trial procedures to achieve martyrdom).

entertainment, and civic participation.⁸ The playhouse was a democratized marketplace of cultural attitudes and political sentiments. It was infused with law—its plays and masques were often performed right within the Inns of Court and with an overlap of legal and theatrical personnel.⁹ And at a time of political upheaval and challenges to royal power, it became a venue for the populace to observe a ceremonial spectacle that could serve the ruler’s practical needs. But the heart of the book’s contribution to law-literature scholarship lies in its demonstration of how the aesthetic development of the genre of tragicomedy both mirrored and influenced adjustments in the strategy of royal pardoning employed to buttress sovereignty. The King needed to perform the art of the pardon in the face of the increasing democratic and revolutionary threats to sovereignty. Thus theater became the law-literature equivalent of the economist’s natural experiment. The monarch himself would attend, and he could draw direct lessons on how to reimagine lawmaking, judgment, punishment, and mercy to maintain his reign.

Part II summarizes how the general concept of the pardon manifested itself in both government and theater as represented by the distinct rules of the tragicomedy. Part III considers how, by Meyler’s reckoning, this law-literature interaction helps us understand the pivotal moment in English history when King James had to address his biggest revolutionary threat and yet misunderstood an available lesson from Shakespeare. Part IV shows how the aesthetics of remission continued to evolve as challenges to sovereignty strengthened and new strategies were needed to salvage it. I conclude with a brief speculation about the legacy of the theatrical pardon for today.

II. Generic Concepts of the Pardon as Theater

Theaters of Pardoning depicts numerous stages of development of the pardon tragicomedy, encompassing a wide variety of playwrights. This category of drama is very heterogeneous, but a key argument of the book is that there is a core generic concept of this literary form, and in this Part I will try to define that concept. But note that we might better say that there are actually two generic concepts.

One is the abstract idea of the role and value of the pardon. The ruler has uncovered and defeated wrongdoers who have posed threats to the realm or to social and moral order. When pardoned, the wrongdoers are not exculpated on the merits; judgments for their wrongdoing remain clear and harsh, but the penalty is remitted. As a political matter, the unpredicted munificence of the Sovereign in performing the remission serves to strengthen the sovereignty and the Sovereign’s power of future judgment. In its bluntest form, the act of forbearance, whether as individual mercy or abrogation of unjust laws or

8. See MEYLER, *supra* note 3, at 5-6.

9. *Id.* at 6.

general indemnity, is itself a great demonstration of sovereign power.¹⁰ That forbearance to punish may induce a mixture of anxious relief and terrified awe in the Sovereign's subjects and thereby enable to Sovereign to reset the rules for the subjects' future conduct. Thus it can be a kind of sadistic generosity.¹¹

The second generic concept is the theatrical presentation of the pardon. One might imagine that in terms of literary genres the pardon would be fit for romance or comedy, with their typical resolutions in harmony and unity. But as depicted by Meyler, the pardon play as it developed in the specific political context of King James's realm is more complex and equivocal.¹² It depicts suffering and evil in ways that resemble a revenge tragedy, with the protagonist facing down a villainous opponent and ultimately destroying the opponent and the opponent's allies in brutal retribution.¹³ But the pardon play of this era does not deliver on the expectation of such savage satisfaction of revenge. The pardon play may also resemble at the start a heroic Greek tragedy, but it does not lead the audience through the experience that Aristotle's *Poetics* places at the core of the great Greek play—a catharsis of “pity and fear” as a step toward a clarifying if sobering wisdom about the human condition.¹⁴ The pardon play does avoid disaster for the characters and the realm, but at its pivotal event, the remission of the deserved punishment, does not end in romantic or comic harmony. Rather, the aptly named tragicomedy offers its own, hybrid experience, riddled with political machinations and offering the audience mainly the satisfaction of an opportunity for intellectual and contemplative resolution. In defining the aesthetic of the pardon tragicomedy, Meyler brilliantly shows how the pardon tragicomedy must have a kind of anti-aesthetic to fulfill its political purpose.¹⁵ The pardons are anticlimaxes that disrupt the usual expectations of both tragedy and comedy. In the pardon tragicomedy, as we are on the verge of a classic reversal with judgment imposed on a wrongdoer—the reversal Aristotle's *Poetics* identified as the key plot point

10. *See id.* at 72.

11. An analogy is provided in a famous essay by Douglas Hay. *See Douglas Hay, Property, Authority and the Criminal Law, in Albion's Fatal Tree: Crime and Society In Eighteenth-Century England 17-63* (1975). Hay describes a regime in which the Parliament imposed mandatory capital punishment for a number of property crimes, but where executive discretion spared the offender in most of the cases. He views this as an elite conspiracy to induce fear and deference in the lower classes. *See id.* at 18-22.

12. *See MEYLER, supra* note 3, at 75-91.

13. The genre of revenge tragedy is really a modern characterization of a type of drama, often traced back to the Roman Seneca of the first century but mostly associated with the Elizabethan and Jacobean eras in the Renaissance (epitomized by Hamlet of course). The plot centers around a central character who has a serious grievance against a formidable opponent, who is often a Machiavellian villain. Its stylized elements usually include a play within a play or a dumb show, soliloquies by the hero and others, mad scenes, a vengeful ghost, and spectacular gore. *See Fredson Bowers, ELIZABETHAN REVENGE TRAGEDY, 1587-1642, at 41-42, 71-72* (1971).

14. ARISTOTLE, *POETICS* (Penguin Classics 1997) (c. 335 BC).

15. *See MEYLER, supra* note 3, at 16-17.

in a tragedy—the playwright implicitly shouts, “Stop the tragic music!”. The miracle of remittance occurs—but it is a very compromised, equivocal miracle. The penalty is not inflicted, but there is no moral exoneration, no forgiveness, no expression of sympathy. The Sovereign has demonstrated its power in the hope that it has induced the mixture of awe, respect, and anxious relief that serves its purpose. The audience is left to assess the Sovereign’s success.¹⁶

As Meyler further elaborates the distinct aesthetic features of the pardon, a key plot mechanism involves how the Sovereign manifests its presence in the action. The Sovereign must ultimately be an overwhelming force but as a strategic matter not necessarily a highly visible presence. To reinforce that he is above the ordinary law, the ruler may need to be outside the drama. In some pardon plays, the Sovereign does not even deign to appear as a human character; in others, the Sovereign appears in disguise.¹⁷ The ruler must be, in a sense, a non-person to avoid the appearance of believing himself personally wronged and hence judging in his own case. The act of pardon must appear to be magisterially un-self-interested. That requirement explains the political context of the pardon drama: In conventional law, to be a subject of pardon the wrongdoing may be take the form of egregious crime or immorality. But, in order to ensure there is no private or personal interest at stake, in the pardon drama the wrongdoing must threaten the public order—and hence, as we see in the course of the book, it often takes the form of revolutionary violence.¹⁸

Meyler has uncovered some great subtleties about what we might call the dramaturgy of government. The pardon tragicomedy manipulates several perspectives: Within the play the Sovereign tries to be a shadowy “actor” over events, in a politically instrumental way. But the audience observing those actions is invited or required to have at least two distinct perspectives. While, as Meyler notes, juries were rarely directly represented in Renaissance drama, in pardon plays the spectators sit to render verdicts about the propriety of the remission and its consequences.¹⁹ But more broadly the spectators sit as kind of constitutional convention, rendering judgment not just on particular outcomes but on the proper balancing of law and mercy in the post-pardon regime. And yet there is one more perspective—that of the ruler as spectator. A king attending the theater can treat the play as a model for his political strategy and the audience as kind of political focus group.²⁰

16. MEYLER, *supra* note 3, at 14-15.

17. *See, e.g., id.* at 33 (describing Duke Vincentio’s disguise as a friar in *Measure for Measure*). This contrived suppression of personal selfhood may involve theatrical tricks, such as the use of disguise or the dramatic letter of pardon delivered to the executioner. *See id.* at 15 & n.45.

18. *See id.* at 83-84.

19. *Id.* at 12-13.

20. *See id.* at 8.

III. Shakespeare and King James: Art Meets Law and Law Meets Art

Meyler traces many refinements of the tragicomic pardon genre, mapping them along a clear trajectory—the gradual erosion of royal sovereignty. Thus, the core idea of the triumphant and manipulative pardon by an almost all-powerful Sovereign turns into something more and more strategic and defensive, as the Sovereign tries to keep that pardon power alive as a political art form to maintain sovereignty. Here the exemplary play is Shakespeare’s most famous “problem comedy.”

A. *Measure for Measure*

Measure for Measure, first performed in 1604, affords Meyler the opportunity to study the direct interaction of theater and governmental rule because of King James’s interest in the play and his complicated relationship to it.²¹ A minimal summary of the plot is as follows: Vienna is rife with depraved behavior, and to cleanse the realm its Duke strategically absents himself, and appoints Angelo in his stead, along with Escalus as councilor. Angelo then rules with a ruthless moralism and arranges that Claudio be tried and sentenced to death for impregnating his fiancée Juliet. Claudio’s sister, Isabella, about to take her vows as a nun, begs Angelo for mercy on behalf of her brother. As Angelo denies her request, he falls into a lusty passion for her and then extorts her by demanding that she submit to his advances in exchange for a pardon for Claudio. Meanwhile, the Duke has been lurking around Vienna disguised as a friar, and he alerts Juliet that Claudio will soon die. Horrified by Angelo’s proposition, Isabella visits Claudio in prison and tells him she cannot save him. But the Duke overhears the conversation and then tells Isabella that if she purports to accept the proposition he will arrange for Mariana, Angelo’s jilted former fiancée, to deceive Angelo and take Isabella’s place. Sensing that Angelo is preparing to double-cross Isabella, the disguised Duke pulls off a scheme to deceive Angelo by sending him the head of a dead prisoner as a substitute for Claudio’s. In the last stage of the scheming, Mariana goes to bed with Angelo in the guise of Isabella. As further plot twists unfold, the Duke unmask himself in a grand public display, and the play ends with a resolution whereby Angelo is forced to marry Mariana, Claudio and Juliet are reunited, and the Duke himself proposes to Isabella.

So, not for nothing is *Measure for Measure* called a “problem comedy.” Its conflicts and their very equivocal resolutions occur in an atmosphere of nervous political maneuvering rather than martial battle and magisterial triumph. The Duke is not Athena as divine problem-solver from the *Oresteia* but rather the pragmatic operator having to finesse his way with popular will and legal institutions.²² Meyler observes that the Duke is less concerned with

21. WILLIAM SHAKESPEARE, *MEASURE FOR MEASURE* (J.W. Lever ed. 1994).

22. *Id.* at 42.

the spirit of remission than in reasserting the legitimacy of his rule through “canny” tactical maneuvering.²³ Further, the remissions through pardons have complex aspects that leave the audience without great clarity or satisfaction. Remission can be harshly conditioned (as by the enforced marriage)²⁴ and carries ambiguous results (Shakespeare never tells us if Isabella accepts the marriage proposal).²⁵ The state is essentially restored but spectators left uncertain: Meyler calls the play’s end an “incitement for political reflection.”²⁶ The Duke leaves the audience uncertain as to the future allocation of power over general lawmaking and individual judgment in the realm, and as to whether the future will be a restoration or a new regime. But Meyler points out another telling feature of the play: While, as Meyler wryly comments, the Duke appears in the very un-magisterial mode of an officious sort of meddler who engineers and incites many of the “nefarious deeds” in the play, he is also thereby a subtle orchestrator.²⁷ He engineers all the bad deeds that he pardons,²⁸ all the while stepping into the action in disguise so that any affronts he encounters will not redound against his true sovereignty.²⁹ In that sense, we might infer that the Duke has recognized instability in his realm. He precipitates malfeasance and disloyalty to shake up the compromised condition of the state, then imposes judgment and remits punishment so as to reset the public order in a way that sustains his power. We can imagine that Shakespeare used the Duke to model for the populace (and for a ruler in attendance) a way that the pardon might help in navigating a precarious phase of English history.

B. King James’s Literary Incompetence

So here is how the remarkable law-literature encounter is set: At the turn of the seventeenth century, King James faced a number of rebellions against his sovereignty, but the most dramatic (pun intended) challenge came from the famous Gunpowder Plot of 1605 led by the legendary Guy Fawkes. Most relevant to our subject here, the true challenge for James was what to do after the Plot was thwarted and the plotters arrested. Should he use blunt monarchical force to punish them? Should he do so only after he allowed the courts or Parliament to try them? Should he issue a classic pardon to dramatize his majesty? Or if such grandiosity was no longer feasible, were there subtler tactical alternatives?

King James was being pulled in various directions. The increasing power of Parliament posed an obstacle to reliance on raw sovereign power for any

23. *Id.* at 41.

24. *See id.* at 39.

25. *Id.*

26. *Id.* at 72.

27. *Id.* at 50.

28. *Id.* at 39.

29. *Id.* at 53.

resolution. He also faced a strong counter-force in Lord Chief Justice Coke, who remonstrated that judging wrongdoers belonged to the common law courts, arguing that the customary reasoning power of judges took historical precedence over the King's claim of natural reason.³⁰ Moreover, Lord Coke would oppose any pardoning by James that violated the principle that a pardon cannot be done in the grantor's self-interest.³¹ Here, Meyler reminds us that James had himself attended *Measure for Measure* a year before the Plot and therefore had before him Shakespeare's model of how a ruler might work his way through this kind of quandary.

Consider how James might have interpreted the play: He might have paid close attention to the specific, carefully calibrated steps by which the Duke first stands outside the drama to observe the malfeasance of his subjects and then reenters to deliver pardons and to restore his rule. Thus, he might have gleaned a cautionary lesson that if sovereigns proceed very deliberately in orchestrating events, they might be able to deploy a version of the pardon to deal with resistance, but with the admonition that this deployment must be *performed* with theatrical care and flair. Meyler's point here is that a thoughtful understanding of the play might have enabled James to titrate his mixture of punishment and mercy delicately so as to optimize his remaining sovereign power.

Alas, despite the availability of the Shakespearean model, James seems to have convinced himself that his model for resolution lay in another work: the Book of Revelations, with its violent eschatological purgation of rebels.³² In his mind, this model itself involved the idea of pardon, but not in the way of the theater. As if acknowledging Lord Coke's admonition that he not pardon in his self-interest, James drew on theology to fashion a remarkable rationalization about pardoning in making a statement to Parliament: He imagined that the failure of the Plot was God's pardon of England—but also of *him*.³³

As Meyler nicely observes, “one would expect the alignment of God as supreme king with particular political kings to result in a claim comparing James's treatment of his subjects with God's actions toward [James himself].”³⁴ The divine message then might have been to pardon, not punish. Instead, James says that *he*—a privileged object of God's deeds—has been pardoned and thereby empowered to carry out a purging to save the realm from destruction by the

30. *Id.* at 54.

31. *Id.* at 63.

32. *See id.* at 85; *see also Revelations*.

33. “I must crave a little pardon of you, That since Kings are in the word of god it selfe called Gods, as being his Lieutenants and Vice-gerents on earth, and so adorned and furnished with some sparkle of the Divinitie; to compare some of the workes of god the great king, towards the whole and generall world, to some of his workes towards mee” MEYLER, *supra* note 3, at 85 (quoting James VI and I, Speech to Parliament of 9 November 1605, in *POLITICAL WRITINGS* 147-48).

34. *Id.* at 85.

Apocalypse. In the end, as Meyler describes, James muddled his way to an awkward compromise. He passed the power of judgment over to Parliament, thereby ceding much of his authority.

Here we have perhaps Meyler's most striking insight: James's political errors reflected his failures of literary appreciation. *Measure for Measure* and other plays might have modeled for him ways to calculate the most effective dosages of condemnation and mercy so as to sustain some degree of power with respect to Parliament and to ensure his future powers of judgment. In literary terms, James miscast history as a revenge tragedy, which he then tried to turn into the cruder version of a tragicomedy: a comedy for the elect and a tragedy for the rest.³⁵ In the end, James evaded responsibility with the Parliamentary handover. He drew the wrong literary and political lesson, ignoring the Shakespearean version because he was "constrained by his own generic paradigm."³⁶

IV. Further Evolution of The Art of Remission

A. Later Plays

As the movement away from the sovereign pardon continued, its steps along the way were captured in new dramaturgic forms.³⁷ John Ford's *Laws of Candy* reflects an effort to sever the political and social utility of the pardon away from Sovereignty.³⁸ At a tensely transitional time in English government, its bizarrely complicated plot sets up conflicts between individuals who are then impelled to pardon each other. Drawing on Plato and the Stoics, the play situates the pardon in a law of nature mandating forgiveness, where the mutual compliance with this law maintains a modicum of stability in the realm.³⁹ Another stage is represented by Philip Massinger's *The Bondman*.⁴⁰ More than Ford, Massinger draws deeply on the Roman Seneca to promote a version of the pardon power called clemency: "a capacity for transcending particular grievances for the benefit of the whole" and to heal a factionalized populace.⁴¹

Like generic pardon, clemency is different from mercy. As Meyler explains the distinctions, mercy focuses on the object of suffering and disrupts the observer's tranquility through the experience of a sympathetic pain. By contrast, clemency is rooted in reason and self-restraint, which can be exercised

35. *See id.* at 91-92.

36. *Id.* at 76.

37. *See id.* at 111.

38. JOHN FORD & PHILIP MASSINGER, *THE LAWS OF CANDY* (Stage Door 2018) (c. 1619-23).

39. MEYLER, *supra* note 3, at 29.

40. PHILIP MASSINGER, *THE BONDMAN: AN ANTIEN STORIE* (Benjamin Townley Spender ed., Princeton University Press 1932) (1624).

41. MEYLER, *supra* note 3, at 144-45.

by either monarch or republic.⁴² And here again, Meyler forcefully reminds us that the political and moral concepts of pardon are inseparable from their aesthetic presentations: In Massinger's play, the forgiven wrongdoers and bondmen themselves are concerned with popular representation of their actions so as to protect their reputations.⁴³ Just as a ruler performs pardons in a certain way, the forgiven subjects must perform the state of being pardoned, acting as if they had never been revolutionaries.⁴⁴

So too there is a pair of plays by Cosmo Manuche, *The Just General*⁴⁵ and *The Banish'd Shepherdess*,⁴⁶ written at the cusp of a political transition. Manuche dramatizes a perhaps futile last effort at linking the pardon with sovereignty when sovereignty has become fragile and treachery rife. In another subtle titration of judgment, the king's subordinates "create a theatrical punishment for low-level [rebels], but the royal family" does the pardoning.⁴⁷ But, as shown by Meyler, the pardon "becomes unstable since [it is] grounded in the friable rock of the king's majesty."⁴⁸ Thus we see how "tragicomedies participate[d] in the seventeenth-century transformation of the pardon power from a monarchical gift to a legislative act by conjuring up increasingly revolutionary . . . violence and proposing solutions."⁴⁹

B. The Art of Oblivion

The final key iteration in Meyler's history of pardoning is a wholly counter-intuitive one—The Indemnity and Oblivion Act of 1660 by which Parliament enacted a mass immunity to the anti-royalist rebels as part of the Restoration of the monarchy under Charles II.⁵⁰ As recounted by Meyler, oblivion was an innovation in the history of remission because its effect was general,⁵¹ "reorient[ing] . . . law away from the specificity of judgment."⁵² It did so by taking the form of legislation, as opposed to the more traditional acts of individual clemency through common law judging or executive declaration. It did not implicate pardon's traditional prohibition of judging in one's own case,

42. *See id.* at 148.

43. *Id.* at 164.

44. *See id.* at 164-65 (explaining that the bondmen themselves were "concerned with the popular representation of their actions" and how Graculo "encourage[d] a measure that would . . . erase the memory of the revolutionary activity"). In this sense, the play somewhat anticipates the later Act of Oblivion, discussed in Section IV.B below.

45. COSMO MANUCHE, *THE JUST GENERAL* (ProQuest 2011) (1652).

46. COSMO MANUCHE, *THE BANISH'D SHEPHERESS* (unpublished manuscript) (c. 1659-60).

47. MEYLER, *supra* note 3, at 194-95.

48. *Id.* at 176-77.

49. *Id.* at 174.

50. The Indemnity and Oblivion Act of 1660, 12 Cha. II c. 11 (Eng.).

51. MEYLER, *supra* note 3, at 31.

52. *Id.* at 201.

because it was not granted by the one aggrieved. Oblivion is not a command of the ruler but a law applied to the ruler himself.⁵³ Legally, oblivion does share at least one key feature with the pardon: It can turn mercy into harsher punishment for future treason by virtue of resetting the rules of political conduct.⁵⁴

But as a legislative generalization, oblivion would seem to have little to do with theaters of pardoning or with any aesthetic features. Indeed, since it purports to erase memory, oblivion would seem to lack the capacity for narrative—it would seem self-contradictory to conceive the moment of oblivion as having any purchase in the popular imagination. And since the oblivion law actually made it a crime to speak of things that were to be erased, it seems even more alien to anything performative or expressive.

But maybe not: Meyler nicely shows that oblivion does indeed have aesthetic entailments. For one thing, compliance with oblivion may require that subjects alter or contrive their public speech and behavior to reflect the erasure of their memory.⁵⁵ More broadly, in its anti-theatricality, its refusal to stage justice, oblivion involves what Meyler calls a “theatricality of concealment,” a political force without a scene and yet thereby present as an haunting shadow.⁵⁶

V. Conclusion

Meyler closes by contemplating the role of the pardon in a world of liberal democracy. The simple, blunt concept of the pardon as a theatrical act of triumphant power assertion by a sovereign seems anachronistic, just as the blunt Act of Oblivion, with its subtler and more insidious performative aspects, seems unimaginable in a modern democracy. But Meyler’s retelling of the example of pardoning as a cultural and political strategy in the English Renaissance helps us understand pardoning in its various forms as it deploys aesthetic tools proper for a particular context. Yes, there is Trump’s version of the pardon drama where he play-acts a kind of vulgar sovereign role. But to give Trump his due, there are also the commutations effected by the First Step Act,⁵⁷ where he acted out his strategic accommodation to what has become a bipartisan consensus about some degree of criminal justice reform. In its modern, legitimately merciful mode, when the Executive sees a correctable

53. *See id.* (explaining that oblivion violated a central tenet of pardoning—that the pardon be granted by the king rather than by Parliament).

54. *Id.* at 243. A haunting analogy is to the totalitarian idea of some revolutions of starting history anew, as when the Khmer Rouge in Cambodia declared Year Zero in 1975 as a signal that all previous history and transitions were nullities. *See* YEAR ZERO: THE SILENT DEATH OF CAMBODIA (Associated Television 1979).

55. *See id.* at 181.

56. *Id.* at 245.

57. First Step Act of 2018, Pub. L. No. 115-391, § 132 Stat 5194 (2018).

injustice neglected by the other branches, it operates without the anti-democratic dangers of sovereignty, and it can innocuously and even admirably dramatize the moment to reinforce the perception of its legitimacy. Most recent commutations of inhumanly long sentences for drug crimes have been beneficial public spectacles for our national apology for the War on Drugs. The mere possession of inherent pardon power in the Executive still invites the Executive to exploit the theatrical power of the pardon for both good and meretricious ends.