CHAPTER 1

The Semblance of Virtue

Law, Nature, and Shakespeare

It is a fair generalization of our times to say that the law figures into literature as some type of ordeal the characters must battle through. If it takes the form of a trial, their plight is often unjust; heroes persevere against judicial badgering until they are exonerated. If the law takes the form of rules or imperatives, it often becomes a prohibition the characters labor under, an institutional hindrance they must get past to achieve freedom and happiness. In drama, the law has always provided a certain theatrical tension, but is in itself rather deadly. Few would watch a staged trial for the trial's sake alone. Rather, the dramatic payoff comes in seeing whether the characters will endure. We have come to think that, in art, freedom lies outside the law; indeed, that nature itself lies outside the law. It is a dramatic gauntlet to be run, or a psychological mechanism to be shed.

That this should be so is not without justification in human experience. As Frank Kermode has explained, the discord between what is just and what is real harkens back to one of the first things we learn about the world as children, when we cry that something "isn't fair."[1] When we grow up and experience the law in its more institutional sense, it plagues us with its seeming obtuseness, its capriciousness, its inability to redress the very evils it is supposed to guard against. No wonder then, Kermode continues, the law and the legal profession should be so frequently excoriated in drama:

> The animus against the legal profession arose partly . . . because of its habit of obscuring its operations in jargon unintelligible to nonlawyers, but more because of a natural fear of men who, though visibly merely men and theologically sinners, could, by wearing furred gowns and

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> other insignia, exercise dreadful powers as the representatives of the great judge, God himself.[2]

To the common man, it frequently seems the lawyer, the judge, and the educated—all those who pronounce the law's shibboleths and make use of its labyrinths—can escape its clutches, while the rest are left to hang. What a relief it is, then, to escape from the "law," if only for a while. The antihero, the confidence man, the rebel without a cause, are only some of the modern protagonists who must (and often do) outwit the law's representative.

As modern as this line of thought may be, there is a long history behind it, at least insofar as law is cast in opposition to pleasure. By the Renaissance, the idea was already old, and Shakespeare made good use of it: revelry in the forest, the midnight carryings-on of confused lovers, the shenanigans of agreeable fools, lost in their cups—all far from the staid and stultifying court. *As You Like It* and *A Midsummer Night's Dream* are chief examples. At the heart of these familiar themes is the whole tradition of topsy-turvy Maytime, boy bishops, and carts put before horses. It is an old, old story.

But it is not the whole story, especially not when it comes to Shakespeare. For alongside the tradition to which I have alluded is another, equally old, and no less dramatic story. It is one in which law is used to actually bring about freedom, happiness, community, and, most important, the dignity of persons and things that comes with sheer, simple integrity. "Integrity" here is meant not only in the sense of honor, but also in the more fundamental and existential sense of something actually being what it says it is, consistent with its nature. In the primary plays under analysis in this book—*Measure for Measure*, *Troilus and Cressida*, *The Merchant of Venice*, and *All's Well That Ends Well*—that is precisely the problem: a disjunction of essential proportions; and in these plays, that is a problem the law can help mend. In fact, Shakespeare uses the law and its various instruments as a device to help us through these plays, to bring the events to resolution. Here, law not only "is" something, it also "does" something. It is what makes these works the playwright's most philosophical and most fascinating.

Historically, of course, all except *The Merchant of Venice* have been unpopular works. And all four, from time to time, have been included in a category known as "problem plays." From Ernest Dowden's first accumulation of "dark and bitter" dramas into a separate group, through F. S. Boas's designation of his own grouping as "problem" works to a series of commentators that includes E. M. W. Tillyard, W. W. Lawrence, Ernest Schanzer, William Toole, A. P. Rossiter, Northrop Frye, R. A. Foakes, Peter Ure, Richard Wheeler, Vivian

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Thomas, and Richard Hillman, the debate over which plays, and what criteria, should constitute the category has continued.[3] Scholars have struggled to unlock the dramas' unsettling secrets.

Recently, the idea of a separate category for "problematic" works has met with less approval, and the tag has become more convenient than significant. In fact, all of these works have risen greatly in popularity, perhaps due to a modern taste for what seems grim and complex. That is not to say the historical commentators were wrong in suspecting something constitutive in these plays—be it dark, bitter, tragicomic, romantic, satiric, or otherwise. They do resonate with each other, thematically and dramatically. However, my own reason for this focus is not to argue for any particular play's inclusion in, or exclusion from, the old category, or to propose a new definition for constituting the category itself. My assessment starts with certain integrative characteristics among these works: like other Shakespearean comedies, they all involve marriage; but in these plays, there is a marked emphasis on the relationship between marriage and law. Characters either observe marital imperatives or ignore them, and are either aided in marriage by legal instruments or have their marriages frustrated through legal maneuverings. Together, legal marriage can help restore the order and health of the societies portrayed in the action by restoring integrity. When in conflict, marriage and law reflect the disorder of those societies, which worsens as the play progresses.

Scholars have long been aware of the legal aspects in Shakespeare. It has been the subject of various works, especially those concerned with speculation on Shakespeare's legal training. The nineteenth century witnessed a lively debate on the matter. Often conducted by those in the legal field, the analyses centered, predictably, on the plays considered here. Scholars examined the playwright's employment of trial scenes, judges, clerks, and accompanying criminal and judicial systems for clues that might explain or disprove assertions that Shakespeare's "lost years" were spent in the world of the Inns.[4] It is my contention that the extensive use of contractual and transactional terms and concepts in these plays, coupled with Shakespeare's well-recorded legal dealings, is sufficient evidence that the playwright had a working knowledge of the judicial system.

Other early scholarship included taxonomic studies—also conducted by lawyers and judges—that identified the plays' legal terms and maxims, explaining them to lay readers.

Some of these are enlightening, offering insights that reveal details that might otherwise be overlooked. Nevertheless, many legal commentators either submit the plays to the rigors of forensic cross-examination—for example, analyzing the grounds of Portia's case—leave their studies at the level of defining terms, or

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belabor the complexities of the law in the Renaissance without attempting to explain what their observations mean to the plays as plays; that is, how they help interpret the dramatic events as they unfold.

In the recent past, the study of law and literature has become an independent scholarly enterprise, with Shakespeare as one of its primary interests. The movement's inception can be traced to James Boyd White's *The Legal Imagination*, in which the author proposed that the legal imagination might be defined by comparing it with other types of imagination, such as that of writers and poets.[5] In efforts to illuminate both law and literature, scholars in the area apply legal analysis and perspectives to literary texts, or apply literary analysis to legal texts. In my view, the most valid employment of "law and literature" involves the use of legal insight to help provide an understanding of literary concerns. Otherwise, the literature becomes merely a point of departure, a platform upon which legal points can be made, or political agenda furthered.

In essence, scholarship on the law in Shakespeare's plays has tended to follow two paths. Literary scholars have provided classic treatments of broad themes, such as "mercy" and "justice," and by assuming broad definitions proceed to explain their dramatic significance. However, these assumptions are often without particular reference to the historical meanings and significance of the legal concepts involved in the plays. On the other hand, legal scholars have spotted in Shakespeare's works evidence of positive law in the Renaissance. But rather than explore how the playwright uses these ideas dramatically, they have drawn back to explain and argue over the historical context of legal concepts. Although literary and legal scholars provide important analyses, their approaches can either read too shallowly in the law to fully explain its dramatic consequence, or too deeply in the law to explain that consequence at all. Mine is an integrated approach to Shakespeare's use of the law, an approach that applies a nuanced consideration of legal concepts—here, marriage instruments—to explain the dramatic development of the plays that employ them. It is my contention that Shakespeare's problem plays illuminate meliorative roles that law can play in drama. But before turning to that analysis, it will be helpful to note, briefly, the law as it was understood in Shakespeare's time.[6]

In Renaissance England, the understanding of the law's philosophical underpinnings was basically that of Thomas Aquinas: law is an ordinance of reason for the common good, promulgated by him who has care of a community.[7] In addition, Aquinas's four types of law were behind what Elizabethan men and women actually meant when they used the term:

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Eternal law:	the law of God, which exists in his mind and controls the universe.
Natural law:	the part of the eternal law discoverable to man.
Human law:	the law derived from the operation of human reason and the product of the application of the precepts of natural law to human circumstance. The good ruler carried out this law in harmony with divine and natural law.
Divine Law:	the law revealed to man by the Church and Scripture.[8]

Aquinas's thought remained influential in Renaissance England, especially the idea of the law of nature, which both justified and limited man's authority.[9] Richard Hooker's *Of the Laws of Ecclesiastical Polity* (1593) reflects Thomistic thought and testifies to its continued orthodoxy:

> Now that law which, as it is laid up in the bosom of God, they call Eternal, receiveth according unto the different kinds of things which are subject unto it different and sundry kinds of names. That part of it which ordereth natural agents we call usually Nature's law: that which Angels do clearly behold and without any swerving observe is a law celestial and heavenly; the law of Reason that which bindeth creatures reasonable in this world, and with which by reason they may most plainly perceive themselves bound; that which bindeth them, and is not known but by special revelation from God, Divine law; Human law, that which out of the law either of reason or of God men probably gathering to be expedient, they make it a law.[10]

In his study on the natural law in Renaissance literature, R. S. White points out that while there was a tradition of skepticism regarding the natural law model, especially after the Reformation, this alternative revolved around a changed perspective on the natural law itself. Rather than set in the human heart and mind, as Aquinas had held, Calvin and the other "skeptics" placed the natural law in God's will and in the sovereign's fiat.[11] Even so, argues White, the skeptic's model remained that of Aquinas, and though the skeptical model eventually won out during the Enlightenment, it was not yet so in Renaissance England:

> Spenser and Sidney were generally more Calvinist than, for example, Shakespeare, More and Milton, but even they accepted some kind of

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> Natural Law model, accessible to the reader's understanding as a basis for morally judging characters' actions. The evidence points rather to the anti-Calvinist, Hooker, contemporary of Shakespeare, Webster, and Ford, as the spokesman for the Establishment view.[12]

Although the natural law model might be variously theorized and portrayed, it was still the same basic model.[13] It cannot be proven what Shakespeare knew of these works or those of continental writers on the subject, but his association with the Inns of Court and its members, as well as the use of natural law ideas in his plays, for example, the "law of nations" in *Troilus and Cressida* and *Henry V*, are evidence of his acquaintance with the concepts.

Of course, it is the distance between what is right and what is law, between what is just and what is done in the name of justice, that leaves the playwright room to work; or as Frank Kermode would have it, it is "the gulf that exists between the loftiest representations of Justice as the obedient performance of properly authorized and incorruptible human agents, and things as they inevitably were" that proves rich in dramatic possibility.[14] The conflict between notions of the law provides much tension in Shakespeare's plays. When law is challenged on one level—be it eternal, natural, or positive—the conflict has ramifications on other levels, and in ways that permeate the human psyche. In *Hamlet*'s Denmark, for example, the laws of succession, entitlement to land, adultery, and incest are all at play. They are matched by conflicts that recur in Hamlet himself. In addition to a discord outside, among men, there is a discord inside, within each man. The harmony that man can make of his world, and in himself, when things are ordered—and the disharmony when things are not—is a fact with which Hamlet is all too well acquainted: "how like an angel . . . how like a god" man may be, and yet how like a "quintessence of dust."[15] This awareness of man's potential for both greatness and ruin is part of Hamlet's own greatness; it is also accountable for his woe. For knowledge of the laws of heaven, of nations, and of entitlement does not inevitably result in their observance. Dramatic conflict follows.

Again, it is my contention that the plays discussed here illuminate meliorative roles that law can play in drama. To that end, I will explain what the law, taking the form of legal instruments, does in the four plays considered, and what it means to a literary understanding of these works. These plays are best suited for this analysis, for unlike other comedies, they not only involve a high concentration of societal institutions—governmental, judicial, and ecclesiastical—but also portray these institutions under siege. Disorder reigns at the beginning of these plays, and things must be set to rights.

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In other works, notably the festive comedies, conflict resolution comes about during an escape from the court. According to C. L. Barber's highly influential book on those plays, by leaving their "everyday world" for the "holiday world"—a transition that mimics the festive holidays, or "revels," of Renaissance England—the characters and the audience go through "release to clarification."[16] When they return to their everyday lives, having mocked all that is "unnatural," they have a clearer view of where they are in the world, a "heightened awareness of the relation between man and 'nature.'"[17]

That is not the case in the problem plays, as Barber himself notes.[18] There is no release to a holiday world here. With the possible exception of Belmont in *The Merchant of Venice*, the problem plays are set in the everyday world from start to finish. False appearances are especially deceptive in this realm, where vice, corruption, and war disfigure the locales; death looms in the background. Like the festive comedies, a spoiler of some sort works to frustrate the happiness of the protagonists. But here his effects are more far-reaching; the protagonists' society is also at stake, as is the integrity necessary to its preservation.

Although these plays seem unrelated to Barber's ideas regarding nature and the festive comedies, nature does figure into the problem plays, but in conjunction with law, rather than revelry. For in these more sober comedies, it is societal institutions—most prominently, the law—that act as the device to bring about a change vis-à-vis nature. Whereas the main characters in the festive comedies celebrate nature by escaping *to* her, the main characters in the problem comedies run *from* her, or scant her in some fashion. For example, the Duke scolds Angelo in *Measure for Measure* for hoarding the graces nature has lent him, a failure that in turn makes him ignorant of the "nature of the people." But nature must be acknowledged in the everyday world too, and the law, with its ceremonies and duties, is one means to ensure that observance.

A few words of clarification about the meaning of *nature* are in order. Hooker mentions the age-old system of creation based on plenitude (God's desire that the world should be populated), gradation (creation is arranged hierarchically, descending from God), and continuity (the unbroken chain of creation). According to R. S. White, the natural law theory had as its central preoccupation "[t]he survival of humanity effected first through propagation (writers call it love) and secondly through avoidance of killing, which translate into the central subjects of Renaissance imaginative literature, sexuality (comedy) and murder (tragedy)."[19] These ideas are also evident in Shakespeare's plays, where what is meant by nature is the idea of plenitude, abundance, generation—one of the principles in the "great chain of being." From this perspective, the principle is an aspect of man's nature, his raison d'être: to create

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more "being." In the generative process, to state the obvious, life springs from life; being is multiplied (hence, Benedick in *Much Ado About Nothing*: "the world must be peopled"); when this principle is ignored or frustrated or, worse still, persecuted, then being—reality—is depleted. Another process replaces it, whereby what *is* turns upon itself, consuming its own existence (hence, Ulysses in *Troilus and Cressida*: "Power into will, will into appetite, And appetite, an universal wolfe . . . [at] last eat up himself"[20]) (1.3.120–24). In these four plays, the law plays a crucial role in the unfolding of this dynamic.

By way of explaining dramatic effect, Barber points out connections between nature, holidays, and the festive comedies:

> The underlying movement of attitude and awareness is not adequately expressed by any one thing in the day or the play, but is the day, is the play. Here one cannot say how far analogies between social rituals and dramatic forms show an influence, and how far they reflect the fact that the holiday occasion and the comedy are parallel manifestations of the same pattern of culture, of a way that men can cope with their life.[21]

The same can be said for analogies between the legal rituals and dramatic forms in the problem plays. Here, Shakespeare makes extensive use of the legal culture that was part of everyday Elizabethan life. In particular, legal instruments—contracts, bonds, sureties—are the means that turn the action and transform the characters. On the whole, such instruments secure a changed relationship between parties: Contracts create unions; bonds and sureties engage one person to stand as a guaranty for another. It is important to note that in Shakespeare these terms are nearly always reserved for use in the contexts of marriage and fellowship. Within these contexts he often plays with the double meanings of words—for example, commercial *bonds*, *bonds* of friendship, marriage *bonds*, and even *bonds* of restraint. Far from functioning only in an ancillary capacity, they have both thematic and dramatic purposes. An exploration of the history, nature, and use of these instruments, and their relationship to marriage, will reveal how the playwright employs them to build plots and to create an integrated universe of meaning.

Contracts and marriage have an ancient association, as betrothal agreements between families are some of the earliest known legal arrangements. Such transactions specified not only the parties involved, but also designated other terms. These might include dowries to be paid, properties to be exchanged, and alliances to be formed in support of the new union. To a significant extent, the concepts even overlap semantically. Like *wergild*, the "man-price" paid to ran-

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som a family member from a warring clan, *wed* stems from the Anglo-Saxon word meaning "to wager." Legal historians Sir Frederick Pollock and F. W. Maitland tell us that in early law, the term even acted as a noun; a "wed" was a type of "gage" or pledge, which acted to bind a contract.[22] Somehow, it was this token that accomplished the binding.

Similarly, the notion of "binding" lies within the etymological history of "contract." The word comes from the Latin *contractus*, the past participle of *contrahere* (to draw together). In his plays and sonnets, Shakespeare uses *contract* a few times as a verb, in the sense of "pull together," for example: "Didst contract and purse thy brow together"; [23] "aches contract and starve your supple joints;[24] or "to shorten," for example: "to contract the time."[25] However, the term is by and large reserved as a noun, meaning "an agreement to marry," or the marriage itself.[26] It is in this sense that it plays a prominent role in the plays under consideration here.

In many ways, the Renaissance marriage contract resembled the everyday commercial contract between English citizens. Legal historian A. W. B. Simpson explains that the concept of the contract arose from the action of "assumpsit":

> [C]ommon law courts in the early sixteenth century permitted actions to be brought for damages for the breach of parole promises; in the course of the century the action for breach of promise was (according to taste) embellished or marred by the evolution of a doctrine of consideration. At the turn of the century, again after a great deal of dithering, *assumpsit* was allowed to take over the job previously done by the writ of debt *sur contract*. Thereafter the action of *assumpsit* is regarded as *the* contractual action.[27]

Although it did not have to be written, the standard contract required some kind of an agreement between the parties, "agreement" being the central notion behind any contract.[28] In a real sense, the contractual agreement brought two or more people together for a specific purpose, to accomplish a specific end. Simply put, each of the parties sought something, be it money or the performance of some act, from the other party. And each of the parties committed himself or herself in some way to perform that which the other party anticipated under the contract. This exchange, the meeting of the others' expectations, amounted to what the law now calls "consideration."

Consideration may be understood as the conferral of a benefit on the other (e.g., A agrees to paint B's house for a certain amount) or the sufferance of a

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detriment required by the other (e.g., A promises not to open a business within fifty miles of his former employer, B, in exchange for a certain amount). Scholars argue as to how and from whence the doctrine was originally derived.[29] Simpson observes that in the medieval law from whence assumpsit arose, there was a sense in which the notion of quid pro quo was at root; however, this principle was not well developed in medieval law, and he cautions against a too precise correlation.[30] J. H. Baker traces the first appearance of the clause to 1539. In the King's Bench decision of *Marler v. Wilmer* (1539), KB 7/1111, m. 64, the bench required a connection between a "recited bargain and the undertaking to perform it":

> The local court gave judgment for the plaintiff, upon demurrer, and the defendant brought a writ of error in the King's Bench. One of the points assigned for error was "that it does not appear in the declaration for what cause (*quam ob causam*) he made the aforesaid undertaking, either for money paid beforehand, or receipt of part of the aforesaid good, and so *ex nudo pacto non oritur actio*."[31]

Baker says that some "linking phrase" between the recital and the assumpsit was needed to explain the undertaking.

However, the doctrine actually came about, it was in the late sixteenth century that the term *consideration* came into common use. In the 1587 action of *Manwood and Burstons' Case*, the word was said to signify, among other things, grounds for suits in which a man "is damnified by doing anything or spends his labour at the instance of the promiser," although he receives no benefit in return.[32] Naturally, a party could challenge a contract for failure to receive any value from it. Therefore, the contract anticipated an agreement in which each party received something of value from the other.

Because marriages were typically "contracted," and because dowries were a typical part of any marriage contract, it is not surprising that there was a debate over whether a promise to pay money in respect of a marriage was an actionable claim. The cases of *Joscelin v. Shelton* (1557) and *Hunt v. Bate* (1568) discuss marriage in terms of consideration. Schools of thought differed, says Simpson, as evidenced by the 1566 case of *Sharrington v. Strotten*:

> The first was to explain the rule by saying that (in the standard case of a father's promise on his daughter's marriage) the father derived a benefit or some gain or advantage, from the marriage . . . [the second, pro-

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> pounded by Plowden] who was concerned to argue in favour of the view that natural parental or family love and affection was a sufficient consideration, [and it] does not stress this idea of benefit; why marriage is a good consideration in the eyes of the law is because nature instils into man a desire to look after his blood, and so marriage as good consideration is not an example of a wider principle about benefit, but instead an example of a wider principle which recognizes natural love and affection as good consideration.[33]

This is important because in the plays to be discussed here, the idea of a "worthy" marriage, that is, one of "true value," and instances of "dowerless" marriages are crucial elements. Therefore, part of the historic background for the dramas is this dimension of the contract that, as has been seen, overlaps with a dimension of marriage.[34]

The ceremonial history of contractual formation also overlaps with that of marriage formation. Pollack and Maitland allude to the ancient hand-clasp as another means by which bargains were historically bound in western European societies:

> It is possible to regard this as a relic of a more elaborate ceremony by which some material "wed" passed from hand to hand; but the mutuality of the hand-grip seems to make against this explanation. We think it more likely that the promisor proffered his hand in the name of himself and for the purpose of devoting himself to the god or the goddess if he broke faith.[35]

The handclasping between the contracting parties is similar to the practice of placing one's folded hands within those of another, in the manner of subjection: "The feudal, or rather the vassalic, contract is a formal contract and its very essence is fides, faith, fealty."[36] The resemblance between the feudal relationship of faith and fealty in this ceremony—with its clasping of hands between parties who receive mutual value from each other—and the ceremony of the marriage contract is even stronger when ceremonial traditions of land transactions are placed alongside each other. Homage, which tied the tenant to the lord, required the tenant to kneel on both knees before his master, with his head uncovered and his hands held between the lord's as he pledged his faith. In addition, the tenant pledged an oath of fealty concerning the lands received of him. P. S. Clarkson and C. T. Warren quote Thomas Littleton's description of the ceremony:

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> And when a freeholder . . . [swears] fealty to his lord, he shall hold his right hand upon a booke, and shall say thus: Know ye this, my lord, that I shall be faithfull and true unto you and faith to you shall bear for the lands which I claime to hold of you, and that I shall lawfully doe to you the customes and services which I ought to do, at the termes assigned, so help me God and his Saints; and he shall kisse the book.[37]

The ceremony is similar to that of "homage," which Clarkson and Warren say was intended to establish a "strong and intimate relationship" between lord and freeholder, with duties that arose on both sides.[38] The tenant owed his livelihood, the fruits of his husbandry, in part to the lord; in exchange, the lord owed the tenant his protection and providence.

With this background, the unique ceremony by which property passed from man to man in medieval Europe, and which continued into the Elizabethan era, increases in importance. A written document was not essential to the conveyance of land, since it was the notoriety of the transaction that testified to its authenticity.[39] As a result, much attention was paid to the ceremony of livery. It generally occurred upon the land in question, between the donor and the donee, but it could also be performed within sight of the land, as long as the donee "entered" the property, that is, took possession, during the lifetime of the donor. The transaction was known as "livery of seisin," seisin being, for all intents and purposes, both ownership and possession.[40] Basically, it entailed the delivery of a clod of earth, a twig, a hasp of the door or—most significantly, for my purposes—its ring, which symbolized the whole of the land conveyed.[41] The publicly celebrated, publicly witnessed transfer of property by tokens such as these has obvious parallels with the marriage ceremony. Symbolic transfers in Germany could even take place in a church, so that any interested third parties could state their objections.[42] The church played a part in many medieval transfers in England as well; symbols of the exchange—knives, staffs, wands—could be placed on the altar, in front of a full chapter of monks, as testament to the transfer.[43]

This parallel has more than pure analogical import, and is more than just evidence of a quaint and colorful past. As S. E. Thorne points out, the public ceremony had a distinctive purpose. In his examination of the equivalent tradition in German law, he makes a claim that is important here:

> In an age that looked primarily to objective phenomena it was difficult to believe a man owner of land unless he actually enjoyed its benefits or at least possessed it. No more abstract idea as yet obtained, and to

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> make this concept of ownership explicit it was essential not only that the donee enter into possession but that the donor surrender his own possession and enjoyment: a process which took the form of the transfer of material symbols representing the land. . . . But these symbolic acts are not due solely to the incapacity of the primitive mind to conceive of a transfer of things without actual *traditio* [transfer], but owe a substantial part of their continuing importance to the necessity for proof. The Germanic customary law required that transactions not only be capable of being heard and seen but that they be actually heard and seen. Change of ownership must be made publicly and visibly, otherwise it will be unwitnessed and unprovable.[44]

In other words, an objectively verifiable event had to evidence the will of the parties, and act as testament to it. This provided both security against prior claims to title and against claims that the transfer had not occurred. The donor was required to vacate the land, relinquishing all title to it, and the donee was expected to enter and stay there. Seisin came to be closely connected to "enjoyment": "The man who takes and enjoys the fruits of the earth thereby 'exploits' his seisin, that is to say, he makes his seisin 'explicit,' visible to the eyes of his neighbors."[45]

The necessity of proof that the formal livery provided in land law had its formal counterparts in commercial law. Agreements could be oral, but the majority of actions on contracts brought in medieval common law courts were actions of debt *sur* obligation—also known as bonds. To recover, the creditor had to physically produce a sealed bond commemorating the debt in court and even had to aver that he had done so in his complaint. Any failure in this respect, any defacement, loss of seal—let alone loss of the bond itself—resulted in the creditor's loss of right.[46] In the four plays analyzed here, the legitimacy of contracts, and even children born in extracontractual unions, are often spoken of in terms of their being "sealed" or "unsealed," words with multiple meanings in Shakespeare.[47]

As Simpson observes, the instrument itself *was* the obligation; the creditor was strictly required to make proffer of the instrument in court.[48] This quality testifies to an association that we have lost sense of now. The material manifestation of the intangible debt was not so much evidence of a literalist, primitive frame of mind as it was evidence of a different perspective altogether: a fusion of the material and the ideational, not the former as a symbol of the latter. Again, in the four plays considered here, this notion will figure prominently.

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Property could also be "gaged" as security for a debt. Pollock and Maitland explain that *gage*, *engagement*, *wage*, *wages*, *wager*, *wed*, *wedding*, and the Scottish *wadset*, all spring from one root: "In particular we must notice that the word 'gage,' in Latin *vadium*, is applied indiscriminately to movables and immovables, to transactions in which a gage is given and to those in which a gage is taken."[49] The "movables" are chattel, or personal property, and the "immovables" are, of course, land and all that is permanently attached to it. The term *gage*, from which *mortgage* is also derived, amounted to what we would now consider security for a debt.[50]

Furthermore, with regard to land transactions, the conveyor could describe the type of estate he was conveying to the purchaser. An estate conveyed "to A and his heirs forever" would transfer an estate "in fee," which amounted to the complete conveyance of the title. Lesser estates might be conveyed in various forms, such as those that retained an interest in the land for the donor. For example, "to A during his lifetime, and the remainder to me and my heirs" would create a "life estate" in the donee, allowing him the use of the land during his lifetime. Upon his death, the estate would revert to the donor and his heirs. In the donor's utterance of these words, legacies for future generations could be provided for or, conversely, denied. These concepts too are prominent in the four plays discussed.

Knowledge of, and experience in, contractual requirements and ceremonies was common in Medieval and Renaissance England. E. W. Ives notes that only the Welsh surpassed the English in Shakespeare's time in resorting to the law courts. The common man knew his recourse at law and had no qualms about availing himself of it. Even those who were not litigants were familiar with the judicial system, as jury duty was a common occurrence in life:

> In Elizabethan society, the law entered into many concerns from which it is now excluded. Estate administration was a matter not of farming, but of court-keeping. How the craftsmen of the towns worked and what the peasants grew was controlled by the gild and the manor court. Law dominated public administration.[51]

Margaret Loftus Ranald uses the term *osmotic knowledge* for this kind of widely understood information: "the moral and behavioral assumptions that a 'reasonable man,' that delightful legal fiction, should somehow have learned, or at least understood."[52] It was the kind of thing people were adequately acquainted with, without having to be formally educated in.

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People also saw the courts as a means of recreation, a type of real theater that must have impressed the dramatists of the time. Kermode observes that legal jargon was entertaining in itself, and an easy "target for mockery," as evidenced by the gravedigger who amuses with the niceties and complexities of laws against suicide in *Hamlet*.[53] The double entendres so common in the comedies, often ribald, must have been irresistible when the bench used phrases such as "entry through X, to the benefit of Y."[54] Troilus and Cressida's sexual banter using the legal terminology of property transactions is a case in point. While literary critics might hope that the law derived its theatrical tendencies from early modern theater, Luke Wilson cautions that that is rarely so, largely because the two were so closely linked socially and institutionally.[55]

Shakespeare himself was not only a large landholder, and therefore necessarily underwent the formalities and ceremonies of contractual law, but was also a frequent litigant, asserting his rights and titles with zeal. He owned New Place and a total of 127 acres in Stratford, became a tenant of Rowington Manor, and owned the property in Blackfriars, London.

He entered into contracts for the sale of malt, negotiated a dowry for a young couple, and collected tithes owed to Stratford. Also, the Shakespeare family was involved in years-long litigation, stretching into 1597–99, involving a contract that his father had secured with land. Property William Shakespeare would have inherited was never recovered.[56]

The playwright's experience in this area was not uncommon. In his work on legal history, John Maxcy Zane explains that the Medieval England from which this legal process sprung consisted of communities in which business formed a large part of everyday life:

> [T]he main object of litigation was land. Land could not pass without livery of seisen, which was a public act, or by a death which was no less public. The neighborhood knew all about such facts. Legal rules and remedies grow as the intricacy of relations of men in society increases.[57]

Although the litigiousness of English society might imply that the law's ceremonial character made for more problems than it solved, Renaissance England was nonetheless a world in which ceremony, and the utterances pertaining thereto—the deed and the words—formed an inseparable whole. Dispensing of one or the other created problems, which might result in a challenge that the transaction had not occurred at all, or that the parties' relationships had not been altered in any way. By means of the public exchange of words and deeds, this challenge could be met, for the transaction had to be accomplished in full

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public view, and the relationship toward the object of the transaction—be it land, or chattel, or people—was thereby incontrovertibly changed.

In the plays under consideration here, the difference between the real and the unreal, between appearances and reality, has long been recognized as a central theme. This work will explain the roles that legal instruments play in resolving or complicating this aspect of the dramas. For example, marriages in *Measure for Measure* and *All's Well That Ends Well* are challenged on the grounds of their validity. They *seem* like marriages, but because of one contractual deficiency or another, do not actually amount to marriages. The same may be said for the commercial bond in *The Merchant of Venice*. On its face, it appears to be, and is presented to Antonio as, a simple arrangement for funds. And it is secured—jokingly—by a pound of flesh; or so it seems. In reality, the commercial bond has a much more deadly purpose, which Shylock intends to realize.

The relevance of this history of commercial contracting in England to Shakespeare's problem plays becomes even more clear when it is understood that these works not only contain a concentrated amount of legal instruments—contracts, bonds, wardships, wills, surety arrangements—which in turn play key roles in both the complication and resolution of the plots, but also contain, in reference to marriage and communal relationships, an extensive use of figurative language such as *reversions*, *remainders*, *fee*, *entails*, *title*, *deed*, *use*, *gage*, and *legacy*, among others. In the same vein, the characters in these plays are not merely betrothed *to* each other, nor are they merely friends *with* each other; instead, they are pledged under contracts of various sorts, bound under commercial obligations in another's behalf, or sworn as sureties for another's promises. Consequently, what might be a commonplace pastoral or agricultural image in the work of another playwright, for example, the sexual conceit of the lover "mowing" the fields of his beloved, "cropping" her flowers, gains a nuance of legality in Shakespeare's problem plays. A girl such as Mariana in *Measure for Measure* is instructed to exercise her "title" to her "husband" by "performing" a "pre-contract," and consummating it with "tilling" and "sewing." More is implied here than by a customary pastoral image of a temporary sexual union; Mariana is to claim exclusive rights to her husband by means of "performing" a marital contract. Later in the same play, Mariana will rely on the elements that constitute this contract—its oaths, its "locked hands," its public nature—in asserting her entitlement to Angelo. Helena in *All's Well That Ends Well* will use the same means to "prove" her contract with Bertram, to whom she has gained "lawful title" by the same means as Mariana to Angelo.

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In these plays, the pastoral-agricultural image retains its characteristic qualities: fruitfulness, the tilled and sewn earth. But that imagery is transformed by concepts native to contracts. The tilled, sewn, and fruitful earth signify rights and obligations of contracting parties whose relationship vis-à-vis each other is changed by means of the legal instrument. Nature is still present in the image, but she is not wild, nor is she opposed to the ordering principle of law. Indeed, in the problem plays, a valid legal instrument serves nature's generative ends. When duly performed, it provides integrity, a match between appearances and reality, necessary for nature to flourish. It is the challenge of invalidity—a lack of integrity of some sort, due to some cause—that works as the dramatic complication. In *Troilus and Cressida*, a play in which contracts and their elements are parodied, this lack of integrity is never rectified.

The contracts, bonds, and sureties, when performed properly, work to resolve the disjunctions that plague the societies. In *Measure for Measure*, supplying the missing elements of the marriage contracts remedies the separation between appearances and reality that characterizes Vienna. The valid contracts "contract" the parties, unifying relationships that had heretofore been lacking in either form or substance. In short, the legal instruments act as dramatic conceits, highlighting the theme of integrity.

Another important function of legal instruments in the problem plays is their effect on the community. *Bond* has several meanings: in its participial form, *bound*, it means "secured" or "entrusted." But bond can also signify a relationship between characters, or a legal instrument that secures a debt. *Surety* most often refers to the person who acts as security for an agreement, or the token that binds the transaction. Shakespeare connects both terms with marriage, the most significant instance of which occurs in *The Merchant of Venice*. Two bonds of opposed natures—one, a friendship bond, the other, a commercial bond—act to finance the marriage contract between Portia and Bassanio. Antonio also stands as Bassanio's surety in the match. The same sense of this term occurs in *All's Well That Ends Well*, in which the King of France acts as Helena's surety under her marriage contract with Bertram. The bonds and surety relationships in these plays serve a supporting role to the marriage contract, helping to enable it or, in the case of the commercial bond in *The Merchant of Venice*, threatening to undo it. Those who do not act in good faith can turn the very requirements necessary to effectuate a contract or bond, such as the security in *The Merchant of Venice*, or the contractual consummation in *All's Well That Ends Well,* on their heads. This amounts to the intentional frustration of the contract, or worse still, its perversion. Rather than serving as a means by which a civilized community

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exchanges needed things or accomplishes self-perpetuation through marriage and fellowship, the instruments are redirected to a private use, serving to satisfy only personal aims of lust, greed, or revenge. Antagonists such as Angelo, Bertram, Shylock, and, to a lesser extent, Pandarus, use legal instruments in this manner.

This threat, the use of legal instruments for other than their intended purposes, and the lack of integrity that results, was recognized in the law of Renaissance marital contracts. And the problem is one of which Shakespeare makes great dramatic use. Before the simplifications of the Marriage Act of 1753, the requirements for marriage were ambiguous in England. Marjorie Garber identifies at least five steps:

1. the written financial contract between the parents;
2. the spousal, or contract—a formal exchange of oral promises;
3. the proclamation of banns three times in the local church of one of the parties;
4. the wedding ceremony in the church;
5. the sexual consummation.[58]

Rings, too, though not required canonically, were a common aspect of matrimonial ritual. As Ranald observes, Shakespeare's lovers use rings, and they signify more than "a mere device of romantic recognition," but act as "a statement that a legal contract has in fact been made, for even in the most secret marriages, a ring was provided, if at all possible."[59] The York marriage service, was typical:

> The bridegroom "takes the ring with his three principal fingers and says after the priest, beginning with the thumb of the bride, *In nominee patris*, at the second finger, *et fillii*, at the third finger, *et spiritus sancti*, at the fourth or middle finger *amen*, and there he leave the ring, because according to the decree, in the middle finger there is a certain vein extending to the heart."[60]

In these four plays, rings and tokens play more than a figurative role; they amount to a kind of fused manifestation of the ideational and the material, like the "bond," or debt *sur* obligation.

The spousals themselves—the oral exchange that bound the two in the eyes of the Church—were of two kinds: *de praesenti* and *de futuro*. The latter was more akin to modern engagement promises, amounting to an intention

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to marry in the future. The parties did not enjoy a changed relationship with regard to each other, although it may be assumed that their perception in the community was changed. In addition, a *de futuro* contract was considered binding, that is, was transformed into a marriage, in the event the couple consummated their contract prior to the nuptials' public solemnization.

De praesenti contracts were of a different nature altogether. In essence, they amounted to a full-fledged marriage. These contracts involved a promise between the parties made in the present tense—"I take thee as my wife"—constituting what linguists would call a "performative speech act." That is, the act was performed by the very pronunciation of the words. The promise was one with the act, and accomplished the union by virtue of its utterance. Although the vows might be later solemnized publicly, the marriage itself was a foregone conclusion, binding in every way and capable of invalidating a later marriage. Because of their private nature, these marriages became known as "clandestine" or "handfast" marriages; subsequent consummation, or the lack thereof, had no effect on the validity of the *de praesenti* contract. However, the failure to consummate the marriage could be grounds for an annulment, since one of the contracts' purposes, the production of children, would be frustrated.

The difference between the two contracts turned on the expression of the will. R. H. Helmholz sets out the medieval distinction between them, centering on the verb that follows the expression of volition:

> Where that verb denoted the execution of a marriage, the contract was by *verba de presenti*. Where it denoted merely the initiation, the word constituted *verba de futuro*. "I will take you as my wife" therefore constituted only *verba de futuro*, because the verb "to take" refers to the start of a marriage relationship. But "I will have you as my wife" was a present contract since the act of having a woman as a wife denoted the desire to participate in an already existing union. To desire the results of marriage was, according to this view, quite different from desiring the beginning of marriage. He who wills the consequence (having) must already have willed the antecedent (taking).[61]

When it did not spring from intentional deceit, the trouble sprang, says Helmholz, from the apparent distinction that the layman made. To the layman, the formal solemnization and consummation made a marriage; to the Church, the present tense expression of the will to marry did so.[62]

Although recognized ecclesiastically, the *de praesenti* contract caused problems both before and after the Reformation. Since marriage was the province

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of ecclesiastical concerns, the trouble went to the very nature of the institution. The Church had long conceived marriage as a sacrament that the two parties, husband and wife, conferred upon themselves. It was witnessed by the Church and received her blessing, but she was not central to the contract's validity. The individuals were to become "one flesh," as Scripture commanded, under the contract, and were therefore truly "brought together" whether or not the Church played a part. The free-form nature of this type of contract, and the sole importance of intention, is related in Henry Swinburne's *A Treatise on Spousals*. The contracts could arise by "[w]hatsoever form of words, or by any other means, as Writings, Signs, Tokens &C."[63] Counterintuitive as it may seem, the contract that might justifiably have required a precise form in fact required hardly any.

To address this very issue, dowries, the agreement between the families, were used in the early church by Justinian to change the very basis of the marriage contract. His solution was to require dotal instruments. These written agreements as to the exchange of marital property were meant to act as proof of the valid marriage, and testify to the legitimacy of children produced from it. His idea was ultimately ineffective because of the doubt it cast on older marriages, but though it did not end clandestine marriage, dowry arrangements continued to be supported by the Church as a means of encouraging public marriage.[64]

Of course, Church witness was strongly advised, and grave punishments attached to parties who dispensed with it. Valid though the marriage may have been, the parties often had to do penance for marrying themselves privately. On ideological grounds, the Church could object that a private ceremony excluded a holy witness to the very institution responsible for the growth and vitality, the "fruitful multiplication," of society itself. Scripture used the marriage metaphor to describe the union of Christ and his Church; the Church was Christ's "bride."[65] Making a private affair of the sacrament shortchanged the affirming effects a marriage could have in acknowledging the Church's role in life. As political historians Allan Bloom and Harry Jaffa once remarked, marriage is "a part of political life, of civil society. One cannot purify it of its political element without depriving it of its substance."[66] A private marriage, by definition, excludes society's role, even investment, in the parties.

Moreover, on practical grounds it was nearly impossible for the Church, or anyone else for that matter, to ensure that a marriage had actually taken place. A man could pretend marriage with a woman, then deny the existence of the union after his lust was satisfied. Predictably, the courts were full of men who, having satisfied their lust, subsequently denied their responsibility.[67] If chal-

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lenged, there was no way to prove that the marriage existed—that the man was now a husband, that the woman was now a wife, or in the event the woman conceived, that a child was their legitimate offspring. Children born of such unions were unprovided for; they had no name and could not inherit.[68] In the case of competing claims to a husband or wife, medieval canon law resulted in gross inequities; for an earlier valid contract would prevail over a subsequent contract, even if the latter was solemnized in church and followed by years of cohabitation and children.[69] A sixteenth-century commentator, Richard Whytford, remarks on the extent of the abuse:

> The ghostly ennemy doth decyve manypsones by ye pretence & colour of matrymony in pryuate & secrete contractes. For many men whan they can not obteyne theyre unclene desyre of the woman wyl promyse marryage, & thervpon make a contracte promyse eche vnto other sayenge, Here I take thee Margery vnto my wyfe, I thereto plyght thee my trouth. And she agayne, vnto him in lyke maner. And after that done, they suppose they maye lawfully vse theyr unclene behauyour, and somtyme the acte and dede doth folow, vnto the great offence of god and theyr owne soules.[70]

Making the marriage public solved these problems; but in England there was no way for the Church to enforce the solution.

The story was different in Rome, at least after 1563. As part of the Council of Trent, called to address the Reformation and reunify the Christian Church, the Roman Catholic hierarchy passed a decree known as "*Tametsi*," on the reformation of Christian marriage.[71] As a result of the decree, no longer would private marriages of consent be considered valid in the eyes of the Catholic Church. Only those marriages celebrated before a priest, and witnessed by at least two people, would be recognized. The Catechism of the Council of Trent, under revisions around the same time as the decree itself, and finally distributed in 1566, conveys the thought behind this monumental change. The drafters say that the apostles "well understood the numerous and important advantages which must flow to Christian society from a knowledge, and an inviolable observance by the faithful of the sanctity of marriage," while ignorance of marriage only brought calamities on the Church. In explaining the nature of marriage, it is said, "Vice not infrequently assumes the semblance of virtue, and hence care must be taken that the faithful be not deceived by a false appearance of marriage, and thus stain their souls with turpitude and wicked lusts."[72] The drafters go on to describe wedlock as the "joining together of lawful wife and

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husband," "the conjugal union of man and woman," "contracted between two qualified persons," under a "natural contract imposing natural duties."[73] As a final warning, they state:

> But above all, lest young persons, whose period of life is marked by extreme indiscretion, should be deceived by a merely nominal marriage and foolishly rush into sinful love-unions, the pastor cannot too frequently remind them that there can be no true and valid marriage unless it be contracted in the presence of the parish priest, or of some other priest commissioned by him, or by the Ordinary, and that of a certain number of witnesses.[74]

The Catholic Church was not alone in its condemnation of clandestine marriages. Luther, Calvin, and Zwingli required public marriage celebrations with the approval of both sets of parents.[75]

But as commentators have pointed out, particularly in regard to the part these contracts play in *Measure for Measure*, this decree affected all of Christian Europe *except* England.[76] There, clandestine marriage, with its inherent problems, remained valid. The Anglican Church was under no obligation to either Rome or Luther. As a result, for the very same act, a man in France in 1563 would be considered a fornicator, while his counterpart across the channel would be considered a husband, if the Englishman deemed to acknowledge himself as such.[77] This is all the more interesting in light of the fact that Shakespeare's own marriage was hasty, Anne Hathaway being three months pregnant by the time of their nuptials.

Shakespeare did not use, or advocate the use of, one type of law as opposed to another, or condemn any particular legal or ecclesiastical system. Rather, he made dramatic use of what he knew of these and other legal differences. My approach looks to the law in order to deepen Shakespeare's artistic meanings, consulting legal history for elaboration on what Shakespeare's plays are doing *literarily*. Instead of using occurrences of legal terminology as points of excursion into legal minutiae, I will read the terms in context, and in consequence, of the play as a whole. While a legal historian might be interested in defining a word like *reversion* by its legal meaning—and reading the rest of a scene in terms of it—I will explain the legal meaning in hopes of deepening the artistic ideas, images, and themes in that scene. The play, in other words, will rule the law, not the other way around.

There is no doubt these are "knotty" works, complex in more ways than I can go into here, and they may be no less "dark" and "bitter" to those who find

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them so after I have made my case. Nonetheless, I believe there *is* a case to be made about these plays, as a consistent theme runs throughout them. The case depends on an understanding of several aspects of the law and thought of the age related to marriage, ceremonies, contracts, property, and nature, all working as a particular vehicle for Shakespeare's artistic powers. Through their interrelation, Shakespeare establishes a norm, to which he returns again and again, about law and the generative ends of nature—either dramatizing its observance or its frustration. Both made for good drama, so both appealed to him. In essence, Shakespeare takes the law and makes metaphoric use of it to achieve his literary ends. To say that something was or was not absolutely necessary to a marriage (e.g., rings, sexual intercourse, and so on), or to a contract or bond (e.g., a seal)—and therefore Shakespeare could not have used it—is to object to the imaginative use of something that has an objective, and strict, use in reality. It was not his aim to use, nor mine to explicate, literary means simply to dramatize the law.

The use of legal instruments in the dramas under review underscores their greater themes of integrity and generation/plenitude. In *Measure for Measure*, Shakespeare uses different types of contracts, their elements and attendant ceremonies, to highlight his main themes, while in *Troilus and Cressida*, he parodies these same elements and ceremonies, and demonstrates what flows from a perversion of contractual concepts. In *The Merchant of Venice*, there is a connection among bonds, sureties, and contracts that reveals how the law may be oriented toward nature, or perverted away from her. *All's Well That Ends Well* emphasizes especially the importance of contractual performance. I will also explain the significance of agents, who either help nature bring about her generative ends via legal instruments or work to frustrate nature by perverting those same instruments. Law and nature may be allies, or they may be enemies; whichever the case, Shakespeare makes plays from the dynamics of their relationship.

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