Shakespeare and Legal Ethics

James Doyle Inn of Court, Madison, Wisconsin

November 19, 2025

An ethics CLE written by Tim Kiefer, based on “Was Shakespeare Right About Lawyers? A CLE on Civility and Professionalism,” by Richard H. Willis, Coastal Inn of Court, South Carolina

Henry VI, Part II – "Let's kill all the lawyers"

The "let's kill all the lawyers" scene from "Henry VI Part II" (Act IV Scene 2) raises the questions of:

- What responsibility do lawyers have to defend the rule of law?; and

- What responsibility do lawyers have to reform the legal system?

Wisconsin's attorney's oath is codified at SCR 40:15. Taking the oath is a requirement "to qualify for admission to the practice of law" in Wisconsin. SCR 40:15. "It is professional misconduct to . . . violate the attorney's oath." SCR 8.4.

The attorney's oath requires lawyers to "support the constitution of the United States and the constitution of the state of Wisconsin" and to "maintain the respect due to courts of justice and judicial officers," which suggest that lawyers have an ethical responsibility to defend the rule of law.

No ethics rule explicitly *requires* lawyers to work toward systemic reform of the legal system, but SCR 20:6.4 does *allow* legal reform work, even if the proposed reform could positively or negatively affect a client's interests:

> A lawyer may serve as a director, officer or member of an organization involved in reform of the law or its administration notwithstanding that the reform may affect the interests of a client of the lawyer. When the lawyer knows that the interests of a client may be materially benefited by a decision in which the lawyer participates, the lawyer shall disclose that fact but need not identify the client.

SCR 20:6.4, "Law reform activities affecting client interests"

Merchant of Venice – “to mitigate the justice of thy plea”

In the courtroom scene from “Merchant of Venice” (Act IV Scene 1), we confront the ethics question of whether zealous advocacy has limits. While in this scene Shylock is not represented by counsel, we can easily imagine a situation where he was. Would a lawyer representing Shylock be ethically bound to zealously advocate for Shylock’s maximum advantage, assuming that is what Shylock directed his lawyer to do?

The ABA Comment to Wisconsin SCR 1.3 states: “A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client.”

The Wisconsin Court of Appeals has held that there are limits to zealous advocacy:

> This case presents the best and worst of lawyering. [Attorney Theodore] Johnson's conduct was in keeping with the highest standards of professionalism. He accommodated [Attorney Christopher] Cieniawa's request for an enlargement of the time for responding to the initial request for interrogatories and production of documents. He attempted to arrange mutually acceptable dates for Michael Friedman's deposition. He unilaterally extended additional time for the Friedmans to supply the supplemental interrogatory responses and production of documents long after the Friedmans were in default under Judge Carlson's order to compel.
>
> Cieniawa responded with intransigence or silence. He acted unprofessionally, using the law as a tool to obstruct and delay. His conduct demeaned the profession and himself. As with society in general, we lamentably see an increasing amount of incivility in the practice of law. As a

> result, all courts must remain vigilant to check this kind of conduct at the outset and to sanction it within the bounds of proper discretion. We also observe that lawyers have a duty to discipline themselves. While our profession has an abundance of rules and standards governing lawyer conduct, the fact remains that "[t]he legal profession is largely self governing." SCR 20 (Preamble: A Lawyer's Responsibilities).
>
> In this case, both attorneys zealously represented their clients. However, **zealous advocacy has its limits** — a fact lost on an increasing number of lawyers. In the final analysis, Cieniawa's undisciplined zeal and purposeful intransigence in this case cost his clients their day in court—a consequence which lawyers should also bear in mind.

Geneva Nat. Community Ass'n, Inc. v. Friedman, 228 Wis. 2d 572 (Ct. App. 1999) (**bold emphasis** added)

In Shylock's case, the contract terms were either unconscionable or void as against public policy. *See, e.g., Aul v. Golden Rule Ins. Co.,* 2007 WI App 164, 304 Wis. 2d 227, ¶¶ 25-26 (unconscionable contracts) and *State v. Rippentrop,* 2023 WI App 15, 406 Wis. 2d 692, ¶¶ 48-49 (Graham, J.) (void as against public policy contracts). SCR 20:3.1, the frivolous argument rule, states that "a lawyer shall not . . . knowingly advance a claim or defense that is unwarranted under existing law," and attempting to enforce an unconscionable or void contract might fall within that category.

Hamlet – “the skull of a lawyer”

While not violating the Rules of Professional Conduct for Attorneys as set forth in SCR Chapter 20 will keep you out of trouble with the Office of Lawyer Regulation, is it enough to merely refrain from committing ethical violations? The graveyard scene from “Hamlet” (Act V Scene 1) asks the big-picture questions of what it means to be part of the legal profession, and what we want our legacy to be.

SCR 20:6.1 states that “every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least 50 hours of pro bono publico legal services per year.” This 50-hour rule is voluntary and aspirational. The ABA comment to this rule states that “personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer.” Do you agree with the ABA comment?

In the graveyard scene, Hamlet picks up the skull of Yorick, “the king’s jester.” In today’s America, the modern-day equivalent of royal jesters, such as late-night talk show hosts, stand-up comedians, and online influencers, often command more prestige and power than do lawyers. Should today’s law students be aspiring to serve clients and work for justice, or is the everyday grind of law practice not equal to telling jokes and posting memes on Instagram or TikTok?

The prophet Micah wrote that we should “do justice, and love kindness.” (Micah 6:8.) The book of Proverbs tells us to “speak up for those who cannot speak for themselves, for the rights of all who are destitute. Speak up and judge fairly, defend the rights of the poor and needy." (Proverbs 31:8-9.) Regardless of whether you come from the faith tradition from which these words were first written, can these words provide a guide for practicing law in a way that goes beyond the minimum requirements set forth in the attorney ethics rules?

Additional Materials

1. “Zealous advocacy has its limits” -- *Geneva Nat. Community Ass'n, Inc. v. Friedman*, 228 Wis. 2d 572 (Ct. App. 1999)

2. Richard H. Willis essay on “Henry VI”

3. Richard H. Willis lecture on “Merchant of Venice”

4. Richard H. Willis lecture on “Hamlet”

5. Thomas Regnier, “The law and Hamlet: death, property, and the pursuit of justice” (2011)

Geneva Nat. Community Ass'n, Inc. v. Friedman

Decision Date: 02 June 1999

Docket Number: No. 98-1010. , 98-1010.

Citation: Geneva Nat. Community Ass'n, Inc. v. Friedman, 228 Wis.2d 572, 598 N.W.2d 600 (Wis. App. 1999)

Parties: GENEVA NATIONAL COMMUNITY ASSOCIATION, INC., and Geneva National Condominium Master Association, Inc., Plaintiffs-Counter-Defendants-Respondents-Cross-Appellants, v. Michael E. FRIEDMAN and Christine J. Friedman, Defendants-Counter-Plaintiffs-Appellants-Cross-Respondents.

Court: Wisconsin Court of Appeals

228 Wis.2d 572

598 N.W.2d 600

GENEVA NATIONAL COMMUNITY ASSOCIATION, INC., and Geneva National Condominium Master Association, Inc.,

Plaintiffs-Counter-Defendants-Respondents-Cross-Appellants, v. Michael E. FRIEDMAN and Christine J. Friedman, Defendants-Counter-Plaintiffs-Appellants-Cross-Respondents.

No. 98-1010.

Court of Appeals of Wisconsin.

Submitted on briefs April 26, 1999.

Decided June 2, 1999.

*574 On behalf of the plaintiffs-counter-defendants-respondents-cross-appellants, the cause was submitted on the briefs of *Christopher A. Cieniawa* and *Mark J. Weidman* of Chicago. Wis.2d 574

On behalf of the defendants-counter-plaintiffs-appellants-cross-respondents, the cause was submitted on the brief of *Theodore N. Johnson* of *Godfrey, Neshek, Worth, Leibsle & Conover, S.C.* of Elkhorn.

Before Snyder, P.J., Nettesheim and Wilk,[1] JJ.

NETTESHEIM, J.

This is an appeal and cross-appeal in a condominium foreclosure case. Geneva National Community Association, Inc., and Geneva National Condominium Master Association, Inc. (the Association), sought foreclosure based upon the failure of Michael E. and Christine J. Friedman to pay their share of the condominium's common expenses. After the Friedmans failed to comply with the Association's discovery requests and an order compelling discovery, the trial court struck the Friedmans' answer and counterclaim and granted a default judgment to the Association. The Friedmans appeal this ruling. We affirm. We also affirm the trial court's order rejecting the Friedmans' postjudgment motion for reconsideration.

*575 Alternatively, the Friedmans contend that the default judgment is defective because it fails to include all the recitals required by § 846.10(1), STATS. Under the facts of this case, we hold that the judgment was not required to recite all of the provisions of the statute. Wis.2d 575

The Association cross-appeals a postjudgment order granting the Friedmans a twelve-month period of redemption. We hold that the trial court properly granted this period of redemption pursuant to §§ 703.16(8) and 846.10(2), STATS.

In summary, we affirm the judgment and the postjudgment orders. We will recite the relevant facts as we discuss the issues.

THE FRIEDMANS' APPEAL

SANCTION-BASED DEFAULT JUDGMENT

FACTS AND PROCEDURAL HISTORY

The Association commenced this foreclosure action against the Friedmans on May 19, 1997. The complaint alleged that the Friedmans owned Unit 12-50 of the Association's condominium and that they had failed to pay their proportionate share of common expenses incurred by the Association. The Association sought a judgment of foreclosure and other related relief. The Friedmans timely filed an answer and counterclaim.

On July 22, 1997, the Association served the Friedmans with interrogatories and a request for production of documents. The request sought these materials within thirty days. On August 27, after the thirty-day deadline had expired, the Friedmans' attorney, Christopher Cieniawa,[2] asked the Association's *576 attorney, Theodore Johnson, for an added two weeks to respond to the request. Johnson agreed. Wis.2d 576

However, the Friedmans did not respond within the added time agreed to by the Association. On September 30, 1997, more than sixty days after the initial request, the Association brought a motion to compel discovery. The motion was scheduled for October 30, 1997. Within one week after the filing of the motion to compel, the Friedmans provided responses to the Association's interrogatories, but they did not produce the requested documents.

While waiting for the hearing on the motion to compel, Johnson requested convenient dates from Cieniawa for the taking of Michael Friedman's deposition. Cieniawa instead told Johnson that he should provide a formal notice of deposition. Johnson did so by notice of deposition dated September 16, 1997, which scheduled Michael Friedman's deposition for October 7, 1997. Johnson scheduled the deposition to coordinate Friedman's deposition in another case so that Friedman, an Illinois resident, would need to make only one trip to Wisconsin for both depositions.

However, on October 2, 1997, only three working days before the scheduled deposition, Cieniawa sent a letter by facsimile to Johnson advising that other matters precluded his attendance at the deposition and that "a rescheduling of the deposition will be necessary." Johnson responded the same day by facsimile stating that he would not agree to a postponement of the deposition. Johnson noted, "You were given an opportunity to provide me with dates for the deposition and did not." Johnson also noted in his letter that the prior discovery responses were "completely nonresponsive" and that the Friedmans still had not provided the documents which the Association had requested. *577 Finally, Johnson warned Cieniawa that the Association would seek sanctions. Wis.2d 577

Johnson appeared at the scheduled deposition together with another member of his law firm. Neither Cieniawa nor Michael Friedman appeared.

This prompted a sanctions motion by the Association. The motion was scheduled at the same time as the Association's previously filed motion to compel. The Association's sanctions motion sought, among other relief, an order barring the Friedmans from producing evidence in support of their counterclaim, striking the Friedmans' answer and a default judgment.

The hearing on the Association's motions was heard by Judge James L. Carlson.[3] Following the hearing, Judge Carlson issued an order granting the Association's motion to compel. The order directed the Friedmans to provide supplemental answers to the Association's interrogatories, to comply with the Association's request for documents and to pay attorney's fees and costs in the amount of $351. These actions were to be performed within five days. The order also directed Michael Friedman to submit to a deposition within thirty days. The order did not expressly grant or deny the Association's motion for sanctions, but it did state:

> IT IS FURTHER ORDERED that in the event the Defendants do not comply with all of the orders as stated herein that the court will consider further sanctions including but not limited to striking the Defendants' pleadings and default judgment.

The Friedmans do not quarrel with Judge Carlson's order on this appeal. *578 On November 14, 1997, Michael Friedman submitted to a Wis.2d 578 deposition. However, the Friedmans did not otherwise comply with the balance of Judge Carlson's order to compel. On December 16, 1997, Johnson wrote to Cieniawa complaining about this state of affairs. Noting that the five-day deadline imposed by Judge Carlson had long expired, Johnson stated he would extend the deadline for one additional week. Cieniawa did not respond. On January 5, 1998, Johnson again wrote to Cieniawa noting that more than two weeks had passed since his previous letter. Again, Cieniawa did not respond.[4]

This prompted a further motion for sanctions by the Association which was

heard by Judge Michael S. Gibbs. It is Judge Gibbs's rulings that we review on appeal. At the hearing, after listening to the arguments of both attorneys, Judge Gibbs found that the Friedmans "have willfully failed to comply with the order of Judge Carlson." Judge Gibbs struck the Friedmans' pleadings and granted default judgment to the Association.[5] Later, Judge Gibbs denied the Friedmans' motion for reconsideration. At this hearing, Judge Gibbs described the Friedmans' conduct as "dilatory" and "egregious and ... made in bad faith and for the purpose of delay."

The Friedmans appeal from the judgment and the order denying reconsideration.

DISCUSSION

Section 804.12(4), STATS., provides that a court may impose the sanctions recognized by *579 § 804.12(2)(a)1, 2 and 3 for a party's failure to Wis.2d 579 appear at a duly noticed deposition, for failure to respond to duly served interrogatories and for failure to respond to a duly served request for production of documents. Such sanctions include:

> 1. An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
>
> 2. An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting the disobedient party from introducing designated matters in evidence;
>
> *3. An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party.*

Id. (emphasis added).

[1, 2]

A trial court's decision to dismiss a cause of action or to strike a pleading as a sanction is discretionary and will not be disturbed unless the party claiming to be aggrieved by the decision establishes that the trial court has erroneously exercised its discretion. *See Milwaukee Constructors II v. Milwaukee Metro. Sewerage Dist.,* 177 Wis. 2d 523, 529, 502 N.W.2d 881, 883 (Ct. App. 1993). A discretionary decision will be upheld if the trial court has examined the relevant facts, applied a proper standard of law, and, utilizing a demonstrated rational process, reached a conclusion that a reasonable judge could reach. *See id.* at 529-30, 502 N.W.2d at 883. The question is not whether this court as an original *580 matter Wis.2d 580 would have imposed the sanction. Rather, it is whether the trial court erred in the exercise of its discretion in doing so. *See id.* at 530, 502 N.W.2d at 883.

However, these severe sanctions should not be employed for violation of "trivial procedural orders." *Johnson v. Allis Chalmers Corp.,* 162 Wis. 2d 261, 275, 470 N.W.2d 859, 864 (1991). Instead, because of the harshness of the result, these sanctions should be used only in cases of "egregious conduct" on the part of the noncomplying party. *See id.* In addition, the sanction of dismissal or striking a pleading is a misuse of discretion if the aggrieved party can establish a clear and justifiable excuse for the delay. *See id.* at 273, 470 N.W.2d at 863.

In this case, we count ten instances of dilatory and obstructive conduct on the part of the Friedmans or their attorney which frustrated what should have been a routine discovery process. First, the Friedmans failed to timely respond to the Association's interrogatories and request for production of documents within the thirty days recited in the request. Second, after Johnson agreed to give the Friedmans an additional two weeks, the Friedmans still had not complied with the request, forcing the Association

to file a motion to compel. Third, Cieniawa spurned Johnson's attempts to arrange convenient dates for the taking of Michael Friedman's deposition. Instead, Cieniawa told Johnson to provide formal notice of the deposition. Fourth, after Johnson complied and formally noticed the deposition giving three weeks advance notice, Cieniawa summarily notified Johnson a mere three working days in advance of the deposition that he was unavailable and that he would not appear. Fifth, after Johnson notified Cieniawa that he would not agree to rescheduling the *581 deposition, Michael Wis.2d 581 Friedman failed to appear at the deposition. Sixth, the Friedmans failed to comply with Judge Carlson's order to compel directing them to provide supplemental interrogatory responses within five days. Seventh, the Friedmans failed to comply with Judge Carlson's order to compel directing them to produce the documents requested by the Association within five days. Eighth, the Friedmans failed to comply with Judge Carlson's order to compel directing payment of the attorney's fees and costs within five days. Ninth, Cieniawa failed to respond to Johnson's December 16, 1997 letter complaining about this noncompliance but nonetheless extending the deadline by an additional one week. Tenth, Cieniawa failed to respond to Johnson's further letter of complaint of January 5, 1998.

Moreover, this record reveals multiple advance warnings to the Friedmans and Cieniawa about the likely consequences if their conduct continued. When Cieniawa advised that he would not attend the deposition, Johnson warned in his response letters of October 2 and October 6, 1997, that the Association would seek sanctions if the Friedmans persisted in their refusal to comply with the discovery requests. And, in fact, the Association's motion for sanctions expressly sought an order striking the Friedmans' counterclaim and granting a default judgment. Most importantly, Judge Carlson's order to compel granted the Friedmans a reprieve from the Association's concurrent motion for sanctions by warning the Friedmans that if they did not comply with the order to compel, *"the court will*

consider further sanctions including but not limited to striking the Defendants' pleadings and default judgment." (Emphasis added.) Finally, Johnson's December *582 16, 1997 letter threatened to refer the Wis.2d 582 matter back to the trial court.

In granting the Association's sanctions motion, Judge Gibbs aptly noted that "Judge Carlson's order on November 7 was very clear. It also set forth a very clear warning what would happen or what could happen in the event there was a failure to comply with his order." Judge Gibbs found the Friedmans' conduct to be willful. We agree. On the Friedmans' motion for reconsideration, Judge Gibbs detailed, as we already have, the persistent pattern of conduct by the Friedmans and Cieniawa. The judge labeled the conduct "dilatory" and "egregious and ... made in bad faith and for the purpose of delay." Again, we fully agree. In addition, the record shows no "clear and justifiable" excuse for the conduct. *See Johnson,* 162 Wis. 2d at 273, 470 N.W.2d at 863 (quoted source omitted).[6]

The conduct of Cieniawa is especially offensive when compared to that of his adversary, Johnson. When Cieniawa sought an extension of the deadline for responses to the Association's interrogatories and request for documents, Johnson readily agreed. We note that this extension was granted after the initial deadline *had already expired*. When Johnson asked Cieniawa for convenient dates for Michael Friedman's deposition, Cieniawa "stiffed" Johnson by telling him to *583 provide a Wis.2d 583 formal notice of deposition. Johnson then coordinated the deposition with another case so that Friedman would not have to make separate trips to Wisconsin. Cieniawa responded by summarily attempting to cancel the deposition with only three working days advance notice to Johnson. Even after the Friedmans violated the five-day limit of Judge Carlson's order to compel, Johnson continued to offer Cieniawa and the Friedmans additional time to respond. Cieniawa responded with silence.

Conduct such as Cieniawa's "harms not only the parties, but also the judicial system's effectiveness." *Aspen Servs., Inc. v. IT Corp.,* 220 Wis. 2d 491, 498, 583 N.W.2d 849, 852 (Ct. App. 1998) (quoted source omitted). Supreme Court Rule 20:3.4 provides, in part, that a lawyer shall not: "(a) unlawfully obstruct another party's access to evidence"; "(c) knowingly disobey an obligation under the rules of a tribunal"; "(d) in pretrial procedures, ... fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party." Cieniawa violated these rules.

In addition, Cieniawa's conduct violated the Standards of Courtesy and Decorum for the Courts of Wisconsin. These standards provide, in part:

> (1) [L]awyers ... shall at all times do all of the following:
>
> (a) Maintain a cordial and respectful demeanor and be guided by a fundamental sense of integrity and fair play in all their professional activities.
>
> (b) Be civil in their dealings with one another ... and conduct all court and court-related proceedings, whether written or oral, *including discovery proceedings,* with civility and respect for each of the participants. *584 ....
>
> Wis.2d 584
>
> (d) Abstain from any conduct that may be characterized as uncivil ... or *obstructive.*
>
> ....
>
> (g) In scheduling all hearings, meetings and conferences, be considerate of the time schedules of the participants and grant reasonable extensions of time when they will not adversely affect the court calendar or clients' interests.
>
> ....
>
> (3) Lawyers shall do all of the following:

> (a) Make all reasonable efforts to reach informal agreement on preliminary and procedural matters.
>
> ....
>
> (c) Abstain from pursuing or opposing discovery arbitrarily or for the purpose of harassment or undue delay.
>
> (d) If an adversary is entitled to assistance, information or documents, provide them to the adversary without unnecessary formalities.

SCR 62.02 (emphasis added).

While the Standards of Courtesy and Decorum are not enforceable by the Board of Attorneys Professional Responsibility, *see* SCR 62.01, their violation can nonetheless carry serious consequences to the merits of a given case. In *Aspen Services,* this court cited to the rules of professional conduct and the standards of decorum in affirming a trial court's denial of a request for significant attorney's fees. *See Aspen Services,* 220 Wis. 2d at 497, 583 N.W.2d at 852 ("[Aspen] is mistaken in its belief that the Rules in SCR 62 and SCR 20 cannot be the basis for imposing a sanction for incivility during litigation."). *585 The same holds true here. Wis.2d 585 Cieniawa's conduct violated some or all of the rules of professional conduct and the standards of decorum which we have cited—particularly those relating to discovery. Although Judge Gibbs did not cite to these rules or standards, they additionally support his ruling. *See Wester v. Bruggink,* 190 Wis. 2d 308, 317, 527 N.W.2d 373, 377 (Ct. App. 1994) ("[W]hen the trial court's holding is correct, we may uphold on grounds other than those used by the trial court.").

This case presents the best and worst of lawyering. Johnson's conduct was in keeping with the highest standards of professionalism. He accommodated Cieniawa's request for an enlargement of the time for

responding to the initial request for interrogatories and production of documents. He attempted to arrange mutually acceptable dates for Michael Friedman's deposition. He unilaterally extended additional time for the Friedmans to supply the supplemental interrogatory responses and production of documents long after the Friedmans were in default under Judge Carlson's order to compel.

Cieniawa responded with intransigence or silence. He acted unprofessionally, using the law as a tool to obstruct and delay. His conduct demeaned the profession and himself. As with society in general, we lamentably see an increasing amount of incivility in the practice of law. As a result, all courts must remain vigilant to check this kind of conduct at the outset and to sanction it within the bounds of proper discretion. We also observe that lawyers have a duty to discipline themselves. While our profession has an abundance of rules and standards governing lawyer conduct, the fact remains that "[t]he legal profession is largely self-governing." *586 SCR 20 (Preamble: A Lawyer's Responsibilities). N.W.2d 586

In this case, both attorneys zealously represented their clients. However, zealous advocacy has its limits—a fact lost on an increasing number of lawyers. In the final analysis, Cieniawa's undisciplined zeal and purposeful intransigence in this case cost his clients their day in court—a consequence which lawyers should also bear in mind.

[3]

We hold that Judge Gibbs did not err in the exercise of discretion by striking the Friedmans' pleadings and granting default judgment to the Association.[7]

SUFFICIENCY OF THE DEFAULT JUDGMENT

Next, the Friedmans complain that the judgment fails to comport with the requirements of § 846.10(1), STATS., governing foreclosure judgments.[8] This statute provides: *587 N.W.2d 587

> If the plaintiff recovers the judgment shall describe the mortgaged premises and fix the amount of the mortgage debt then due and also the amount of each instalment thereafter to become due, and the time when it will become due, and whether the mortgaged premises can be sold in parcels and whether any part thereof is a homestead, and shall adjudge that the mortgaged premises be sold for the payment of the amount then due and of all instalments which shall become due before the sale, or so much thereof as may be sold separately without material injury to the parties interested, and be sufficient to pay such principal, interest and costs; and when demanded in the complaint, direct that judgment shall be rendered for any deficiency against the parties personally liable and, if the sale is to be by referee, the referee must be named therein.

Id. In addition, § 840.07, STATS., governing default judgments provides:

> No default judgment may be granted unless evidence supporting the court's findings and conclusions is in the record. *588 N.W.2d 588

In this case, after Judge Gibbs granted a default judgment to the Association, Johnson correctly observed that the Association would have to provide the court with evidence in support of its claim. He proposed that he do so by affidavit. The Friedmans did not object and Judge Gibbs approved this procedure. Thereafter, Johnson submitted his own affidavit and that of Scott Lowell, the president of the Association. These affidavits set out the amount due and owing from the Friedmans for past due condominium assessments, late charges and attorney's fees, all in the amount of $34,009.50. Attached to Lowell's affidavit was a breakdown and summary of the assessments and charges.

We begin by noting that § 840.07, STATS., does not expressly require a hearing. Rather, the statute requires that "evidence supporting the court's

findings and conclusion is in the record." *Id.* While this evidence will oftentimes be produced via a formal default judgment hearing, the statute envisions that the evidence can exist without such a hearing. Since the Friedmans did not object to the manner in which the Association proffered its evidence, we conclude that the issue narrows to whether the judgment satisfied the requirements of § 846.10(1), STATS.

Based on the Association's affidavits, Judge Gibbs entered findings of fact, conclusions of law and a default judgment. As pertinent to § 846.10(1), STATS., the judgment recites the amount due ($34,009.50); describes the property; allows recovery for any additional assessments, attorney's fees, interest and costs which become due prior to the sale; and grants a deficiency judgment in the event the sale proceeds are insufficient. However, the judgment is silent as to the remaining matters covered by the statute. Nonetheless, *589 we conclude that these omissions are N.W.2d 589 not fatal to the judgment.

[4]

Because this is not a mortgage foreclosure case, but rather a foreclosure based on the Friedmans' failure to pay condominium assessments and charges, we observe that certain provisions of § 846.10(1), STATS., cannot be sensibly applied to this case. For instance, the breakdown of the Friedmans' account shows that the past monthly assessments were varying amounts, not a constant fixed amount as with a conventional mortgage note. Thus, it was not practical or possible for the judgment to state with certainty "the amount of each instalment thereafter to become due, and the time when it will become due." Section 846.10. We therefore hold that this omission does not defeat the validity of the judgment. Likewise, since the property involved is a condominium unit, it stands to reason that the property cannot be sold in parcels. Therefore, the failure of the judgment to so state or to further address a possible sale of a portion of the property also

does not defeat the validity of the judgment.

That leaves only the failure of the judgment to state whether the property is the Friedmans' homestead. We first observe that neither the Association nor the Friedmans ever claimed that the condominium was the Friedmans' homestead. More importantly, at the reconsideration hearing, Judge Gibbs observed: "[T]here is nothing in front of me that indicates that this property ... *was used for any purposes other than that of a second home for the owner."* (Emphasis added.) This observation was correct. At his deposition, Michael Friedman expressly admitted that the condominium was a second home for the family. A person may only have one homestead at a time. *See Moore v.* *590 *Krueger,* 179 Wis. 2d 449, 458, 507 N.W.2d 590 N.W.2d 155, 159 (Ct. App. 1993).

Since it was established that the property was not the Friedmans' homestead, we must next address whether the judgment's failure to recite this fact renders the judgment unenforceable. Section 846.10(1), STATS., does not state that a foreclosure judgment must recite that the property is not a homestead. Rather, the statute says that the judgment must recite "whether any part thereof is a homestead." *Id.* We conclude that when the evidence establishes that the property is not a homestead, it follows that the judgment need not state whether any part thereof is a homestead. The obvious purpose of the homestead recital is to protect the mortgagor's homestead exemption if such applies.[9] That purpose does not exist in a case such as this where the entire property is not homestead property in the first instance.

THE ASSOCIATION'S CROSS-APPEAL

The Association cross-appeals Judge Gibbs's postjudgment order granting the Friedmans a twelve-month period of redemption.[10]

Section 703.16(8), STATS., provides that "[a] lien may be enforced and foreclosed by an association ... in the same manner, and subject to the same requirements, as a foreclosure of mortgages on real property in *591 this state." Section 846.10(2), STATS., grants a twelve-month period N.W.2d 591 of redemption for a "one- to 4-family residence that is owner-occupied at the commencement of the foreclosure action."

[5]

We do not think this statutory language and the legislative intent could be made any clearer. Condominium foreclosures are governed by the same rules applicable to mortgage foreclosures. *See* § 703.16(8), STATS. One of the rules of mortgage foreclosures is that a twelve-month period of redemption applies to a one-to four-family residence which is owner-occupied when the foreclosure action is commenced. *See* § 846.10(2), STATS. Judge Gibbs correctly construed these statutes.

The Association contends, however, that since condominiums are a creature of statute, the legislature would have expressly recited the twelve-month period of redemption in ch. 703, STATS., governing condominiums. But the legislature has functionally accomplished the same result by invoking in § 703.16(8), STATS., the rules otherwise applicable to real estate foreclosures. As noted, those rules include the twelve-month period of redemption set out in § 846.10(2), STATS.

The Association also cites to *City Lumber & Supply Co. v. Fisher,* 256 Wis. 402, 41 N.W.2d 285 (1950), a mechanic's lien foreclosure case. There, in support of a request for a period of redemption, the property owner noted that the mechanic's lien statute provided that the general statutory provisions governing foreclosure of real estate mortgages should apply and that the latter statutes provided a period of redemption. *See id.* at 405, 41 N.W.2d at 287. However, the supreme court noted that the mechanic's lien

statute was qualified by further language stating, "as far as applicable unless otherwise provided in this chapter." *Id.* The court then *592 observed that another provision of the mechanic's lien statute N.W.2d 592 expressly provided that such foreclosure sales "shall be absolute and without redemption." *Id.* at 404, 41 N.W.2d at 286. Thus, the supreme court held that there is no right of redemption from a sale in proceedings to enforce a mechanic's lien. *See id.* at 407, 41 N.W.2d at 288.

Unlike *City Lumber,* in this case there is no statutory provision which creates an exception to the general right of redemption set out in § 846.10(2), STATS. The rationale of *City Lumber* does not support the Association's argument. To the contrary, the case supports the Friedmans' position.

We affirm the order granting the Friedmans a twelve-month period of redemption.

CONCLUSION

We hold that Judge Gibbs did not err in the exercise of discretion in striking the Friedmans' pleadings and in granting a sanction-based default judgment to the Association. We further hold that the judgment is not rendered unenforceable because it did not recite all of the provisions of § 846.10(1), STATS. Finally, we hold that the Friedmans were properly granted a twelve-month period of redemption.

By the Court.—Judgment and orders affirmed.

[1.] Circuit Judge S. Michael Wilk is sitting by special assignment pursuant to the Judicial Exchange Program.

[2.] Cieniawa is an Illinois attorney who was permitted to appear pro hac vice in

this matter.

[3.] The Friedmans have not provided us with a transcript of this hearing.

[4.] Later, the Friedmans moved for summary judgment.

[5.] Thus, Judge Gibbs was not required to address the motions for summary judgment which both parties had previously filed.

[6.] At the reconsideration hearing, Judge Gibbs made this finding as to the Friedmans' failure to timely pay the costs and attorney's fees. However, we read the judge's remark as aimed at the entire panoply of the Friedmans' conduct since the court addressed the totality of the conduct at the hearing. Moreover, even without this express finding, Judge Gibbs's finding that the Friedmans' conduct was dilatory, egregious and taken in bad faith is tantamount to a determination that the conduct was neither justified nor excused.

[7.] The Friedmans also contend that Judge Gibbs erred because the Association's motion for sanctions was based only on their failure to pay the attorney's fees and costs previously awarded by Judge Carlson. While that narrow reading of the Association's motion is technically correct, the Friedmans overlook that the motion cited to all of the provisions of Judge Carlson's order. Moreover, the exhibits attached to, and in support of, the motion included Johnson's letters complaining about all of the Friedmans' failings under Judge Carlson's order—not just the nonpayment of the fees and costs. Finally, the hearing on the motion before Judge Gibbs explored all of the intransigent conduct on the part of the Friedmans and Cieniawa. We reject the Friedmans' argument on this point.

[8.] The Association's argument on this issue includes a claim that the Friedmans waived their objections because they did not object to the judgment within the five-day limit imposed by the Walworth County Circuit Court Local Rules. A local rule may not conflict with a state statute. *See Community Newspapers, Inc. v. City of West Allis,* 158 Wis. 2d 28, 32-33, 461 N.W.2d 785, 787 (Ct. App.

1990). However, a local rule may impose a more restrictive time limit than an equivalent state statute. *See id.* at 32, 461 N.W.2d at 787. Here, the parties do not alert us to any statute which imposes a time limit for objecting to a proposed judgment. To that extent, the local rule may be valid. But in this case, the Association seeks to invoke a local rule which imposes a time limit to override a state statute which substantively decrees what a foreclosure judgment must recite. Whether a local rule may be employed to that end is questionable. However, we need not reach this question since we nonetheless agree with the Association's argument on the merits.

[9.] The homestead recital in a foreclosure judgment also serves to instruct "whether the part of the homestead premises not included in the exempt homestead can be sold separately therefrom." Section 846.11, STATS. That purpose is not served in a case such as this where the entire property is not homestead property.

[10.] This order was entered following a hearing on the Friedmans' motion to quash the scheduled sale of the property.

“The First Thing We Do, Kill All The Lawyers…”*- Henry VI*, Part 2, 4.2

“The more I think about it old Billy was right
Let's kill all the lawyers kill 'em tonight
Don't want to work you want to live like a king
But the big bad world doesn’t owe you a thing…”
”Get Over It” - Don Henley and Glenn Frey, The Eagles, 1994

The most well-known Shakespeare line about lawyers - found on bumper stickers, coffee cups, T-shirts, in social media, popular music, even featured in a 1985 US Supreme Court dissent by

Justice John Paul Stevens (*Walters v. National Ass'n of Radiation Survivors*, 473 US 305 , n.24 (1985)) - comes from one of Shakespeare's least known plays - *Henry VI, Part 2*, written in 1591.

Because the play is so rarely performed, the line is generally understood even by Shakespeare fans at its most superficial level, devoid of context. This level - what we all recognize as a "lawyer joke" - was intended to get a knowing laugh from the audience, and it usually does.

Why is this line funny? Or as the poet asks, "Tell me why a hearse horse snickers, hauling a lawyer's bones?" (Carl Sandburg, "The Lawyers Know Too Much" - 1922.)

Like many of Shakespeare's most quotable lines, this one is spoken by a despicable character, Dick the Butcher. Dick is part of Jack Cade's rebellion, a peasants' uprising instigated by the House of York during the early years of the Wars of the Roses. Cade and his band of ruffians play a prominent, mostly comedic role in several scenes in *Henry VI Part 2*.

Cade's Rebellion -1450

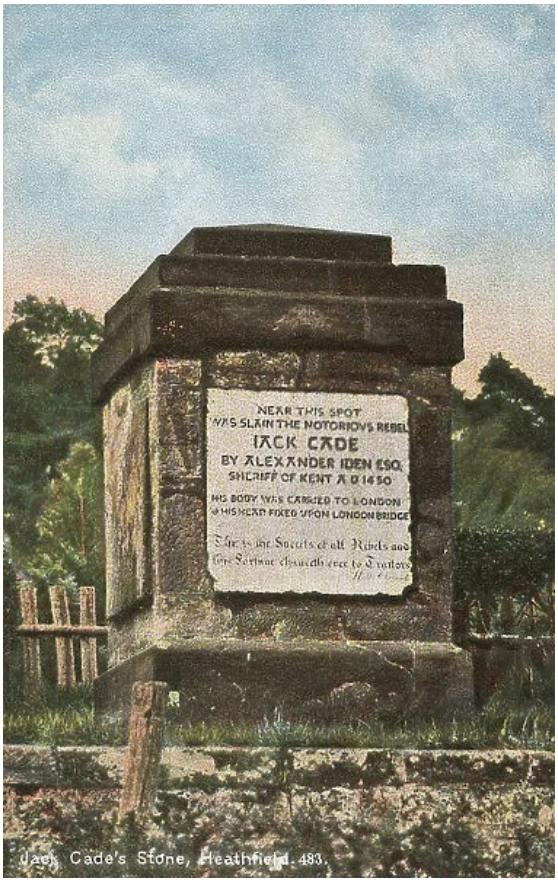
The actual history of Cade's Rebellion is interesting. King Henry VI, of the House of Lancaster, a weak king during a troubled time in English history, has attempted to reinstitute a new brand of feudalism to drive the lower classes in English society back onto the land. Plague, foul weather, and civil war have caused a severe food and labor shortage, leading to rampant inflation and social unrest, particularly in the south of England. Henry and Parliament have enacted strict laws designed to increase the power of the landed gentry over their tenants, adding to the years of tenancy before land or crops can be owned, exacting crippling taxes on the means of production and severely restricting freedom of travel.

The House of York takes advantage of this social unrest to foment a violent uprising in the heart of traditional Lancaster country. An armed mob of thousands of hungry men and women burn, pillage, and rampage through Kent. As they advance on London, its leaders prepare for a pitched battle.

The targets of the uprising are the institutions of local government attempting to enforce these oppressive laws, namely minor court magistrates and officials, many of whom were murdered at the hands of the mob.

The rebel mob advance all the way to London Bridge, where they are turned back, and Cade and his lieutenants are eventually captured and executed.

Interestingly, the historic Jack Cade has become a folk martyr in rural Southern England. There is a monument to him on Cade Street in Heathfield, East Sussex, erected in 1791.



Jack Cade's Stone, Heathfield. 483.

Shakespeare's audience would have known this story, and perhaps felt some affinity for the rebels' cause, understanding their desire to overthrow an oppressive legal system by killing the lawyers and public officials responsible for enforcing it.

As lawyer and Shakespeare scholar Daniel Kornstein observed in writing about this scene in his book, *Kill All the Lawyers*, in a popular revolution the first ones in line for the gallows or guillotine are often the intellectual elites - ie, the lawyers - thought to be responsible for enacting and enforcing bad laws.

The Three Interpretations

Now, with some context supplied, one can better understand the line on a deeper level than the lawyer joke.

The second level, which I call the ABA interpretation, is the understanding that while lawyers are the frequent butt of cynical jokes, they also uphold the Rule of Law, which is necessary to organized society. Without laws and lawyers, there would be anarchy.

Shakespeare understood this very well. Indeed, one of his most common themes is the need for "la via media," the middle way - a balance between not enough law, resulting in anarchy, and too much law, resulting in tyranny. Shakespeare's audience had experienced both extremes, making the characteristics of a good king one of Shakespeare's most popular subjects.

Misguided populists like Cade and his band, who espouse an economic philosophy not unfamiliar in today's world (no more money, free food and clothing, and no small beer), but cannot deliver on their promises, cause unrest and violence. Laws and lawyers stand in the way of this.

The remainder of the scene illustrates this point, as the rebels put the Clerk of Chatham, a minor court official, on trial for the "crime" of being literate. The indignant Clerk asserts that he can indeed write his name, and is promptly convicted, sentenced to death, and hustled off to be hung by the enthusiastic mob, "with his pen and inkhorn around his neck."

The scene is intended to be both shocking and darkly funny. Of course, no one wants to live in a world like this, now or in Shakspeare's time. People may dislike certain aspects of the law ("the law's delay" - *Hamlet*) and lawyers ("dreaming on fees…" *Romeo and Juliet*) but we are necessary to an orderly, prosperous and just society.

According to the ABA, the real meaning of the line is that lawyers are the bastion that protects against anarchy. The rebels know this, hence the need to kill us all.

But it is the third level of meaning that is the most subtle and interesting.

To appreciate it fully, one needs to become familiar with the series of plays that make up the *First Henry Tetrology*, culminating in the defeat of Richard III and the ascendency of the House of Tudor. These early history plays illustrate the disastrous effects on the common folk of tyrannical self-interested nobles squabbling for power. Imagine the impact on a small nation of a brutal civil war that lasted 30 years. Think *Game of Thrones* without the dragons and zombies. That was the Wars of the Roses.

Despite the caricature of Jack Cade and his followers, did they have a legitimate beef against the existing social order? Of course. Was Henry VI a bad king? Yes! Were his methods oppressive? You betcha.

What is the duty of lawyers in the face of bad laws and oppressive government? Our oath spells this out. Yes, we are bound to support the Rule of Law, even when we may disagree with it, but we are also called upon to "oppose the rectitude of the State," where necessary to effect needed social change. ABA Model Oath, Preamble.

Don't forget that sometimes the revolutionaries ARE the lawyers. See Boston, 1776.

Yes, Cade's methods may have been abhorrent, but his cause may have been legitimate.

So let's not kill ALL the lawyers. Just the bad ones.

Merchant of Venice - “Is that the law?”

Prologue

Before launching into an introduction of the legal issues in this play, a disclaimer of sorts is necessary. Or maybe better said, a heads up.

I taught this play two years ago in my Law and Literature Class. Before the class met, I got an email from a student who was upset by the language in the play and the virulent anti-Semitism of some of the characters. Rather than explain that just because a character espouses racist views doesn’t necessarily make the author or the work racist, I listened to her concerns.

I told her, I think somewhat to her surprise, that I thought she was dead right.

Merchant of Venice - and Othello, as we will discuss tomorrow - are racist plays.

And they are also about racism.

I don't see how they can be read otherwise.

What do I mean by that? I mean that Shakespeare starts by having his characters ascribe stereotypical characteristics to Shylock and Othello based on their race. And their religion. He then allows their humanity to transcend the stereotype. But there is no question that the stereotype is offensive to contemporary playgoers.

Was it this offensive in 1600? I don’t know, but I don't think so. But I do think the transcendence was a surprise to his audience. How else can we account for the play’s continued ability to hold our interest and confound our expectations?

The question in my mind is, does it matter? Does the racism in the play invalidate it? Or is it instead an integral part of the story. And can we learn something from this?

I think so. I told my student, I think you can handle this, and we as a class can handle this. I hope I was right.

As for Shylock, when he wrote the play in 1596, Shakespeare clearly had in mind Marlowe's The Jew of Malta, written in 1589. Marlowe's Barabas was a darkly comedic villain. He was one dimensional. He is eaten up with greed. He poisons his own daughter and boils his victims alive. The character was played in a red fright wig and large red prosthetic nose, like the traditional costume of King Herod from the earlier medieval Christian mystery plays that were the precursors to English theater.

(It is interesting to note that images of clowns today still bear the echoes of antisemitic portrayals of medieval Jewish characters.)

The play was wildly successful, and Shakespeare was not above imitation at the early stages of his career.

But I submit to you, Shakespeare's later plays show that he found it impossible to write a one-dimensional character. I think this is because WS invited his audience into his character's mind. He let us see and hear the character's inner thoughts.

For example, explaining to the audience why he seeks to enforce his flesh bond against Antonio, Shylock says:

"He hath disgraced me, and
hindered me half a million; laughed at my losses,
mocked at my gains, scorned my nation, thwarted my
bargains, cooled my friends, heated mine
enemies; and what's his reason? I am a Jew. Hath
not a Jew eyes? hath not a Jew hands, organs,
dimensions, senses, affections, passions? fed with
the same food, hurt with the same weapons, subject
to the same diseases, healed by the same means,
warmed and cooled by the same winter and summer, as
a Christian is? If you prick us, do we not bleed?
if you tickle us, do we not laugh? if you poison
us, do we not die? and if you wrong us, shall we not

revenge? If we are like you in the rest, we will resemble you in that. If a Jew wrong a Christian, what is his humility? Revenge. If a Christian wrong a Jew, what should his sufferance be by Christian example? Why, revenge. The villany you teach me, I will execute, and it shall go hard but I will better the instruction."

Shakespeare writes Shylock as a human being, not a caricature, and because of this, when he is destroyed in the trial scene, even though he intended to kill Antonio, we feel pathos for him. We understand his anger and heartache at the betrayal by his daughter and the theft of his treasure, which he justifiably blames Antonio for, as he had a hand in enabling it.

Antonio spits on Shylock in the marketplace, calls him a dog, kicks him, and what's worse, loans money on no interest, which hurts Shylock's legitimate lawful business. And he tells Shylock he will likely do it again. We see why he hates the Christians of Venice. Who wouldn't?

Merchant is a unique work, in that I know of few others that have seen as drastic a reinterpretation over the centuries of its performance. Scholars point to Edmund Kean, the leading Shakespearean actor in the 19th century as being the first to portray Shylock as a sympathetic figure, and in so doing, moved the play from relative obscurity to one of the most performed in the Shakespeare canon.

My point is the lines in the play supporting the sympathetic portrayal of Shylock weren't inserted. They were there all along.

I offer this explanation not to defend the author, but to explain why I think the play is important and worthy of study.

We will ask the same question about Othello - is it racist, or about racism, or both? Be thinking about that as you read or watch it.

Background

Next to Measure for Measure, Merchant of Venice, written in or around 1598, is Shakespeare's most "legal" play. It is unique because it has a stand-alone trial scene that comprises the entire Act 4, which can be understood and enjoyed without any reference to the other parts of the play (although familiarity with the back story helps of course.)

If one accepts the description of a "trial" to include a test (as in "trials and tribulations", the trials of Hercules, etc.), there are actually three "trials" in MoV - the "lottery" of the caskets in Act 3, the trial of the bond in Act 4, and the promise of the rings in Act 5.

Each trial has a "legal" underpinning. The Caskets are part of the will of Portia's late father, which provides that Portia can only inherit his huge estate if she marries, and that her suitor must choose the correct casket in order to win her hand. If the suitor makes the correct choice, she must marry him. If he chooses incorrectly, he must agree to remain a bachelor for the rest of his life.

Setting aside for the moment the doubtful enforceability of the promise to "never look favorable at a lady" if the suitor makes the wrong choice, the will clearly binds Portia in an oppressive and unwanted manner. It deprives her of the power to make her own decisions about her life. The theme of the oppressive power of fathers to control their daughter's marital prospects is common in the plays - Romeo and Juliet, As You Like It, The Tempest, Cymebline, Alls Well That Ends Well, Taming of the Shrew.

The legal bases of the other trials are apparent: a bond, in the case of the pound of flesh trial, and a marriage vow, in the promise of the rings. Each of these legal instruments in some way binds the parties to something that restricts their freedom. This echoes the theme of the three main "outsiders" in the play, who struggle against some form of legalistic social oppression. Portia (and to some extent, Jessica and Nerrissa), oppressed by gender inequality and parental authority; Antonio, oppressed by Venetian laws and social and religious mores forbidding same sex love; and Shylock, oppressed by racial and religious hatred of Jews, and the concomitant legal restrictions imposed upon him.

While the promise of the rings is not oppressive in a legal sense, it does expose the vapidity of Bassanio and Gratanio, who fail it miserably. It is difficult to characterize marriage vows as oppressive per se, but then again, it depends on whose ox is being gored. Enough said on that touchy subject.

Each of these “trials” presents a fundamental jurisprudential conflict between Legal Formalism (strict adherence) vs. Legal Realism (a tempering of the harshness of literal interpretation with concepts of equity.) This dialectic can be described in other related terms - Justice vs Mercy, Natural Law vs Legal Positivism, God’s Law vs man’s law.

Because the case of Shylock vs Antonio is the most complete illustration of these points, we will focus our legal lens on that scene.

The Merry Bond

Bassanio, a handsome but improvident young gentleman of Venice, aspires to improve his social and economic condition by marrying well, or “up” as they say. He is part of a crowd of Venetian “party boys” who associate with the older, wealthy, unmarried bachelor, the Merchant Antonio, and likely presume on his hospitality and generosity.

Antonio has a special affinity for Bassanio. While it was more thinly veiled in Shakespeare’s time, I think it is safe to say that Shakespeare strongly implies an unrequited same sex passion that Antonio feels for Bassanio. Bassanio is clever and manipulative enough to realize that Antonio is attracted to him, and is willing to do him favors out of the affection Antonio feels but knows he cannot consummate. (No wonder Antonio is sad at the beginning off the play. This aspect of the play is painful for modern audiences and portrays Bassanio in a bad light.)

Bassanio has seen Portia of Belmont, and she has seen him, and the attraction is immediate and mutual. Bassanio is handsome and charming, and Portia is rich and beautiful. But Bassanio lacks the funds necessary to portray himself to Portia as a wealthy Venetian. So, he asks to borrow 3000 ducats from Antonio. This is quite an ask - roughly equivalent to $100k in today’s money.

Antonio responds immediately to his young friend's request, though imagine if you will the heartache of being asked to fund the courtship of a rival for one's affection. His funds are tied up in his ships, but he expects them to come in. Against his better judgment he breaks his custom of never borrowing or lending money on interest, and suggests they go to Shylock for the loan.

Act 1, Scene 3 is the discomfiting interaction between Shylock, Antonio and Bassanio in which the Bond is negotiated and sealed. Bassanio is the borrower. Antonio is to be the guarantor. Shylock is the lender. The amount is 3000 ducats payable in three months.

But as the deal is struck, the terms shift a bit. Both the lender and the borrower acknowledge the spite and distrust they feel for one another. The loan is not to be repaid by Bassanio, but by Antonio. There is to be no interest. But the collateral is unusual - "an equal pound of the merchant's flesh, to be cut off and taken from what part of your body pleaseth me." Bassanio begins to get cold feet when he hears this and urges Antonio to forget it. But by this time Antonio's ego has been challenged by Shylock. He agrees to the terms or what is essentially a wager, at arms' length, between sophisticated parties of equal bargaining power.

I do not hold to the interpretation of the scene that Shylock somehow tricks Antonio, that the pound of flesh is not to be taken literally. I think they see each other with clear and contemptuous eyes. As Antonio says, "I am as like to call thee so again (a cur), to spit on thee again, to spurn thee too. If thou wilt lend this money, lend it not as to thy friends, but lend it rather to thine enemy, who if he break, thou mayest with better face exact the penalty." (I, 1)

The risky nature of the bond seems more like a school yard dare than a business deal. Antonio responds as if he thinks he has out-negotiated Shylock. But when an offer sounds too good to be true, it's usually because it is. Shylock gets this. Antonio doesn't.

The Lottery of the Caskets - "All that glisters is not gold…"

I commend these preliminary scenes to your reading or viewing, though we will not deal with them in class unless you want to. Suffice to say these scenes confirm the opinion of many that Merchant is a racist play, and that Shakespeare's audiences thought racial, cultural and national derogatory stereotypes were funny.

They also give us insight into an aspect of Portia's character. She desperately wants Bassanio to choose the correct casket, and doesn't really trust him to do so. (He is handsome but not very bright.) So, she violates the oath to her father and the terms of the will by giving him a hint. He chooses correctly. But by the hint, Portia shows us that she is willing to bend the law to get what she wants. This becomes important in the pound of flesh trial.

Shylock vs Antonio - "I crave the law…"

This is my favorite scene in all of Shakespeare. I will not explicate it for you. We will watch it in class.

But I want to point out the underlying legal structure of the scene, because it tracks closely the elements of forensic rhetoric that were taught to lawyers at the Inns of Court.

According to Cicero's text on rhetoric (i.e., persuasive speaking), De Inventione, forensic or judicial rhetoric had five elements. The first was "case or controversy." What are the facts? What happened? Do the facts create a justiciable controversy, something to be decided?

The second element was "the question." What does the court or jury need to decide?

The third is the applicable law that forms the basis of the claim.

The fourth is any contrary laws that would overrule or operate contrary to the primary legal claim - in other words, the defenses.

The fifth element is "the right." Not only must the case be decided according to the law, but the answer must also comport with our sense of right and wrong.

It is as if Shakespeare had this book open in front of him when he was writing this scene. It is certainly plausible that Shakespeare was familiar with these elements, as Rhetoric was part of a grammar school and university education. Of course, this also fuels the skeptics who insist that William Shakespeare of Stratford lacked the education necessary to write plausibly about legal issues.

As you know from reading the scene, Shylock argues for a literal interpretation of the bond. He threatens the Duke with the prospect that if his suit is denied, Venice will lose its reputation for fair administration of commercial law. He rejects the offer of three times his principal. He insists on his pound of flesh.

Portia, disguised as a Doctor of Laws, leads Shylock into a trap. She first establishes that she believes the bond is enforceable as written and that Antonio is in default. She suggests that Shylock accept the offer of three times the principal, expecting he will reject this, because he intends to kill Antonio by lawful means, by taking his pound of flesh.

She urges Shylock to be merciful, in the oft quoted lines, “the quality of mercy is not strained.” But I she makes this plea in a way that would only appeal to Christian sensibilities, and not Old Testament Jewish notions of Justice. “Therefore, Jew, though justice be thy plea, consider this, that in the course of justice none of us should see salvation.” She knows that personal salvation is not part of Shylock’s religious creed. She anticipates he will reject her advice, and of course he does.

She then turns the tables on him. She “out-literals” him. “Tarry a moment.” Shylock may have his pound of flesh, but nothing more. “No jot of blood.” Shylock pauses and realizes he has been had. He tries to accept the settlement offer, but it is too late. He offers to simply accept his principal. Nope. All he can get is the pound of flesh. He then withdraws his claim altogether.

But then is Portia merciful? Does she follow her own admonition? No in the least.

She somehow converts a civil proceeding into a criminal one, and indicts and convicts Shylock of threatening the life of a citizen of Venice.

> “Tarry, Jew.
> The law hath yet another hold on you.
> It is enacted in the laws of Venice,
> If it be proved against an alien
> That by direct or indirect attempts
> He seek the life of any citizen,

The party 'gainst the which he doth contrive
Shall seize one half his goods; the other half
Comes to the privy coffer of the state,
And the offender's life lies in the mercy
Of the Duke only, 'gainst all other voice.
In which predicament I say thou stand'st,
For it appears by manifest proceeding
That indirectly, and directly too,
Thou hast contrived against the very life
Of the defendant, and thou hast incurred
The danger formerly by me rehearsed.
Down, therefore, and beg mercy of the Duke."

Shylock is speechless. The swift reversal has overcome his wits. He is surrounded by his enemies. He has no choice but to throw himself upon the mercy of the court.

Interestingly, both the Duke and Antonio seem taken aback by Portia's "justice." They exercise some degree of mercy, though not much. Antonio is awarded half of Shylock's wealth, with the other half going to the state.

Portia then lets Antonio play judge. "What mercy can you render him, Antonio?" Read the lines carefully:

Antonio: So, please my lord the Duke and all the court
To quit the fine for one half of his goods,
I am content, so he will let me have
The other half in use, to render it
Upon his death unto the gentleman
That lately stole his daughter.
Two things provided more: that for this favor
He presently become a Christian;
The other, that he do record a gift,
Here in the court, of all he dies possessed
Unto his son Lorenzo and his daughter.

Antonio gives up his share of the fine, on the condition that it be bequeathed to Jessica and Lorenzo, that Shylock convert to Christianity, and that whatever Shylock has left at his death will also go to his daughter and son in law.

Shylock accepts the penalty and departs. The film shows Shylock's exclusion from his home and culture in the Jewish Ghetto, one of the logical outcomes of his forced conversion.

Some scholars argue that Shakespeare's audience would have viewed the forced conversion as a favor to Shylock, in that it makes salvation (the Christian Heaven) available to him. I seriously doubt this. I think they would see it as close to utter destruction and be gleeful.

So, what do we make of this? Is it what Shylock deserves? Is it according to the law? Does it comport with our notions of right and wrong? Or is it a fraud perpetrated on an outsider who dared to enforce what he thought was the law?

The Resolution

The play ends with the recovery of the rings, the disclosure of Portia and Nerrisa's true identities, and a consummation of the two marriages. Antonio learns that his ships were not wrecked, and have come to port.

Portia's victory is complete. She has escaped the dictates of the will, gotten her man, rescued and enriched Antonio, destroyed Shylock, and asserted her intellectual and economic power over the men in her life. If there is any question who will wear the pants in this family, the play leaves little doubt.

Conclusion

What can we learn from this play about Shakespeare's view of the balance of Justice and Mercy? Keep in mind that "mercy" in a rhetorical sense was seen as a synonym of "equity." The Court of Venice, like the English Common Law courts (Common Pleas and King's Bench) is a court of law, not equity. It cannot force a fair resolution. Only the Chancery court could do that in Shakespeare's time.

This division was a source of conflict at the Inns of Court. Merchant reflects this conflict.

As we will see, Shakespeare poses the questions but does not answer them. We do not really know if his audiences would have viewed the outcome as unjust, or Shylock's just dessert.

Modern audiences' sympathies clearly lie with Shylock by the end of the scene. I prefer this ending. But the Shakespeare I admire most doesn't take sides. He allows the audience to answer the questions he poses. Can strict adherence to Law be a good thing? Sure, in most cases. Can too much equity "make a scarecrow of the Law?" (To quote Measure for Measure.) Sure, in some situations.

We are left here to ponder who is the real "winner" in this play? Portia? She gets a husband, yes, but maybe not a very good one who is truly worthy of her. Antonio? He gets Shylock's money, and his ships come in, but he misses out on what he wants most - the love of Bassanio. Shylock? He escapes with half his goods and his life. I have a feeling we have not heard the last of him.

Is anyone interested in writing a sequel?

The Skull of a Lawyer - *Hamlet* and the Rule of Law

As the late Professor Tom Regnier of the University of Miami Law School wrote, *Hamlet* is not on its face a “legal” play, in the sense that *Merchant* or *Measure for Measure* are. There are no trial scenes and very few direct references to law. While the play contains many activities that would be clearly illegal in both Shakespeare’s England and Hamlet’s Denmark – no less than nine deaths brought about by arguably unlawful means – King Hamlet, Lord Polonius, Ophelia, Rosencrantz and Guildenstern, Laertes, Gertrude, Claudius and finally Hamlet himself – there are no legal consequences of these actions. Instead, the legal issues are integrated into the story. Thus, while the play is not really about the Law, we can still analyze it through a legal lens.

So, what is the play about?

At its most basic core, it is a revenge tragedy that incorporates a narrative trope that can be traced back to ancient Norse and Roman legend – the “Hero as Fool.” The protagonist pretends to be mad to enable him to exact revenge on the antagonist.

The story’s source is Saxo Grammaticus’ *Gesta Danorum (*AD 1200*)*, the first written history of Denmark. Amleth’s (meaning “mad or crazy” in Old Norse) father Horwendil is murdered by his brother Feng, who then marries Gerutha (Horwendil’s wife and Amleth's mother). Amleth pretends to be mad to save himself from Feng. He is exiled to England guarded by two of Feng's retainers, who carry a death letter. Amleth alters the letter to order the deaths of the retainers. He then marries the King of England’s daughter and returns to Denmark. After a celebratory feast, he burns the Feng’s Great Hall full of drunken nobles and murders his uncle, thereby avenging his father.

Hamlet is not Shakespeare’s only revenge tragedy. Titus Andronicus, Coriolanus, MacBeth, the first Henry plays, Romeo and Juliet, Othello, Julius Caesar, several others deal with characters seeking revenge or retribution for a perceived wrong done to him or his family. Nor is it the only play where a character uses feigned madness as a disguise to carry out a deception. Think Edgar disguised as Tom o’ Bedlam in King Lear.

Revenge can be viewed as a private remedy for a personal wrong. “You shot my brother, now I gotta shoot you,” from American Western lore. Or “An eye for an eye”, in Old Testament terms. To be acceptable, the degree of revenge exacted should be justified and proportional to the wrong. If not, it presents the danger of escalation. For that very reason, it did not take English

law long to take the authority to act out of revenge away from the wronged party and vest it in a higher authority – God, the King or the State - precisely because private revenge – self-help - had a way of getting out of hand and becoming disproportional.

The version of Hamlet we know today traces its origins through a French translation of Saxo's story by Francois de Belleforest in 1570, which introduced Hamlet's melancholy, and served as a source of the so-called *Ur-Hamlet* performed in 1589, likely written by Thomas Kyd, which introduced the ghost to the plot. It is thought that a young apprentice playwright Will Shakespeare may have had a collaborative role in the authorship of the *Ur-Hamlet*, as well as a role in the performance, as the King's ghost.

(We can perhaps digress here a moment to clear up an unfounded myth that *Hamlet* was inspired by Shakespeare only son Hamnet, who died of plague in 1596, at the age of 11. This is unlikely. Amleth soon became Amlet, pronounced "Hamlet." The name was common in Shakespeare's time, and ironically William Shakespeare's happiest comedies were written following the death of his son. All we can safely conclude is the similarity of the names is a coincidence.)

Hamlet Production History (borrowed from "The Internet Shakespeare Editions")

Hamlet appears to have been written over the winter of 1599-1600. It was first performed on 1600 or 1601 by the Lord Chamberlain's Men, who were to become the King's Men in 1603 when James VI of Scotland came to the English throne. Richard Burbage took the role of Hamlet. Tradition proposes, with uncertain authority, that Shakespeare played the Ghost.

Hamlet has one of the most unusual of earliest recorded performances. It was performed in 1607 on board the East India Company's ship, The Dragon, lying off the coast of Sierra Leone. The captain notes in his journal that the acting of it kept 'my people from idleness and unlawful games.

On dry land, the play's theatrical success and popularity has continued unabated since its first performances. The title page of the 1603 quarto edition tells us that it has been played 'by his Highness Servants in the City of London, as also in the two universities of Cambridge and Oxford, and elsewhere'. Court records note that it was performed before King James in 1619 and before King Charles in 1637.

The English Civil War and Cromwell's Interregnum closed the London theaters for 25 years. When the theatres were reopened with the restoration of the Stuart monarchy in 1660, Hamlet was among the first plays to be shown in revival. It was particularly popular with the Inns of Court. Performances were staged at the Lincoln's Inn Fields, with innovative scenic effects showing views in perspective by means of movable painted flats. These were the first productions to employ female actresses in female roles.

Hamlet has remained at the pantheon of western literature for 400 years. I suggest it has remained fresh and relevant because it deals, as many of Shakespeare's plays, with universal issues about what it means to be human. To be or not to be.

So, bear with me for a little while. We will talk about that line, I promise you. But first:

Hamlet and the Law

There are four readily identifiable legal subjects in the play:

- The law of homicide and the insanity defense
- The law of suicide
- The law of political succession
- Private revenge vs institutional due process of law

Homicide

Hamlet is written as English law is developing from defining murder based on the legal status of the victim – "the Kings lawful subject" vs "outlaw" – to an inquiry into the mind of the killer – "with malice aforethought." (Interestingly, Shakespeare coined the phrase "in cold blood" and is the first reported use of the term "premeditated.") The idea that a killing should be considered murder only upon a showing of "mens rea" – a bad mind – malicious intent – is a departure from past legal doctrine which held that because a court or jury cannot know what is in the mind of a person, intent is not an element of the crime. It is the act itself that matters.

Lord Coke is famous for writing in 1590 that intent can be inferred from a defendant's words and actions. Shakespeare's forays into the minds of his characters, through soliloquys where the protagonist talks to himself, or directly "breaks the fourth wall" and talks to the audience, is a newly invented literary device that happens to also reflect this development in English law. As

Hamlet says in Act II, “There is nothing either good or bad, but thinking makes it so.” A growing understanding of the inner workings of the mind usher in the concept of criminal intent.

How this is reflected in the play is best illustrated by Hamlet’s killing of Polonius in Act 3, Scene 4. Recall that in Scene 3, Hamlet refrains from killing Claudis as he is praying in his chapel, because he doesn’t want to send him to heaven. Hamlet tells us he’d rather kill Claudius while he is sinning (presumably with Gertrude) and send him to hell.

He then heads to Gertrude’s bedchamber, where unbeknownst to him, Polonius has hidden himself behind a tapestry to spy to his conversation with the Queen. Hamlet cruelly berates Gertrude, and she calls out for help. Polonius echoes her cries, and Hamlet swiftly stabs through the tapestry, thinking he has killed Claudius (“How now, a rat! Dead for a ducat, dead? Nay, is it the King?”). He is genuinely surprised to find that he has made a mistake.

Is the killing of Polonius a “murder?” Is it in self-defense? Heat of passion? Mistake? Accident? Does misplaced intent matter? Is Hamlet in his right mind? Or as he tells Laertes, in a “state of distraction?” Does the re-appearance of the ghost matter? Does it matter that Hamlet sees the ghost but not Gertrude? Does it matter that he extracts a confession (of sorts) from Gertrude?

All of these “legal” questions spring from the scene and a developing understanding of the legal definition of “murder” in Elizabethan England.

The Insanity Defense

The reported use of insanity as a defense to criminal activity in England dates from the 14th century. The defense, if successful, either allowed the defendant to return home or be incarcerated until he was granted a royal pardon. After 1542, a defendant who became insane prior to his trial could not be tried for any crime, up to and including high treason.

During the 18th century, the test to determine insanity was narrowed, with defendants required to prove that they could not distinguish between good and evil, and that they suffered from a mental disease which made them incapable of understanding the consequences of their actions. The current wording comes from the *M’Naghten* rule, based on the trial of Daniel M’Naghten in 1843.

Importantly, the rule in Shakespeare’s time had two prongs. The defendant had to be suffering from a “disease of the mind,” where either he could not distinguish between right and wrong, or

he honestly believed what he was doing was right. This is an important distinction in the play, as Hamlet sees himself as “heaven’s scourge.” In other words, he is acting as a sort of avenging angel, in his official capacity as the rightful heir, punishing treasonous acts against the State. He may be right about this, as to Claudius. But Polonius? Or his erstwhile friends, who he “trusts as adders fanged,” Rosencrantz and Guildenstern? (Hamlet doesn’t literally kill them but instead sends them to their deaths by altering the letter to the King of England.)

As for Hamlet’s actual mental state, although he tells several people he is faking his madness – Horatio, Renaldo, Marcellus, Rosencrantz, Guildenstern and Gertrude – he exhibits multiple symptoms of “Type 2 Schizophrenia” so complete that one would think Shakespeare had the Diagnostic Symptoms Manual 5th Edition open as he was writing the play. Hamlet suffers from anxiety, depression, bi-polar disorder, narcissistic personality disorder, suicidal thoughts and probable sexual disfunction. He lacks empathy and feels no remorse. The most obvious symptoms of schizophrenia are his hallucinations. He sees and converses with a ghost. A strong case can be made that when he kills Polonius, he is suffering from a mental disorder so severe that he thinks he is doing the right thing.

Shakespeare audiences and scholars have debated for centuries the question of Hamlet’s true state of mind. Is he feigning madness? Yes – he says so several times. But is his mental state also disturbed by the sequence of events that unfold in the course of the play? His father’s death, his mother’s betrayal, Claudius’s usurpation, his loss of his inheritance, Ophelia’s betrayal, madness and death, his friends’ betrayal, the ghost’s appearance, the mania of the Mousetrap scene, the accidental killing of Polonius, the exile and encounter with the pirates, the graveyard scene. Is this not enough to drive someone crazy?

As for the mutual killing of Laertes by Hamlet and Hamlet by Laertes in the fencing bout, one could argue that because this was part of a legal contest or sport, it was not actionable. The problem with this of course is Laertes knew his sword was “envenomed,” while Hamlet did not. So had Laertes survived, he would have been guilty of murder.

As for Claudius, had Hamlet survived, what is the actual evidence of his guilt in killing his brother? No one hears his “confession” except Hamlet. Many productions play the confession as Claudius’s inner thoughts. Priest penitent privilege could apply. While there is sufficient circumstantial evidence to suspect Claudius (for example, there are no snakes in Denmark capable of a lethal bite – although I’m not sure Shakespeare knew that), proof beyond a

reasonable doubt is another matter. Presumably the murder plot against Prince Hamlet could be shown by documentary evidence (the intercepted letter).

I have no answers to these interesting questions. My opinion is no more valid than yours. I believe Hamlet is not of sound mind when he kills Polonius, even though he says he is. But after his exile and return, he seems to be a changed man. The graveyard scene shows someone who has finally decided “to be,” though he knows not exactly when he will be. As he says to Horatio after his prescient meditation on death, “If it be now, 'tis not to come: if it be not to come, it will be now: if it be not now, yet it will come: the readiness is all.” (Act 5, Scene 2.)

Others view Hamlet as a cold-blooded killer. The genius of the play is that it is capable of many plausible interpretations.

The Law of Suicide

While clearly a secondary issue to the main plot, the cause of Ophelia’s madness and death - by suicide or accident – is a fascinating legal and psychological question.

Conventional interpretations of the play assign the victim role to poor Ophelia. I believe she is far more than the frail flower we see in film versions.

What is Ophelia and Hamlet’s back story? She reminds me of the small-town high school girlfriend left behind by the college bound boyfriend. Did Hamlet seduce her before he left for Wittenburg? Director Kenneth Branagh seemed to think so. Is she pregnant with Hamlet’s child? Her veiled gifts of flowers during the madness scene suggest as much and more, and have implications that are lost on modern audiences, but that Shakespeare’s audiences would have recognized.

> “There's rosemary, that's for remembrance; pray you, love, remember. And there is pansies, that's for thoughts. ... There's fennel for you, and columbines. There's rue for you; and here's some for me. We may call it herb of grace o' Sundays. Oh, you must wear your rue with a difference. There's a daisy. I would give you some violets, but they wither'd all when my father died. They say he made a good end.”

Fennel (flattery) is for the King and Queen. So is columbine (foolishness). Rue is for sorrow and bitterness and was also considered an abortifacients medicine in medieval times. Women engaged in adulterous affairs were encouraged to drink tea made of rue to avoid unwanted

pregnancy. That's why Ophelia says it is an "herb o' grace on Sunday," when carnal sins are confessed. In this scene, some directors play Ophelia in a gown showing she is pregnant. This makes her possible suicide all the more poignant. She may be also killing a future king.

The two gravediggers' comic debate on the law of suicide is the only scene in the play that directly introduces a legal problem. Ophelia is to be buried in consecrated ground. "Make her grave straight" means west to east, so that at the Second Coming she can emerge from her grave facing the rising sun. But if she caused her own death, she is to be buried out of Christian burial, according to church law.

Suicide was not only a mortal sin, but it was also (somewhat absurdly) unlawful. The comic enactment of the elements of a drowning by the gravedigger illustrates this point. "If the water comes to him, he drowns not himself. But if he goes to the water, he is guilty of taking his own life."

This discussion would have been recognized by the lawyers in the audience as referencing a famous legal case from the 1550s, *Hale vs Petitt*. A protestant judge who had supported the ill-fated Lady Jane Grey (the protestant Queen for two weeks, until deposed and executed by the Roman Catholic Queen Mary – "bloody Mary," not Mary Queen of Scots), jumped off London Bridge in an effort to avoid being captured and executed as a traitor. His death was ruled a suicide. But because suicide was a capital offence, seconds before he died, his estate would have escheated to the State (i.e., the Queen) instead of his heirs, by operation of law. The Royal Court used this strained rationale to deny the judge's widow her inheritance, which was quite significant. Queen Mary envied the Judge's country palace. In Shakespeare's time it was dangerous to have a house nicer that the Queen's.

The gravediggers are justifiably puzzled by this legal fiction. But because a coroner's inquest has ruled on it and declared Ophelia's death an accident, it is the law of the case.

Notwithstanding this, the nature of Ophelia's funeral also suggests that the Priest thought her death was a suicide. The funeral rites were sparse and perfunctory. It suggests the funeral is a cover-up, and the Priest and attendees know it.

Why do Claudius and Gertrude need Ophelia's death to be accidental? How does Gertrude know the facts of the drowning in such elaborate detail? Was she an eyewitness? If not her, then who? Why was no effort made to save the drowning maiden? Who profits from her death?

Are Ophelia's flowers deliberate messages to Claudius and Gertrude? Sort of an "I know what you did last summer" threat? Dead girls tell no tales, and they don't give birth to little princes.

What if Claudius (and possibly Gertrude as well) arranged a convenient accident for Ophelia because they feared she knew too much. At the time of her death, Claudius assumes Hamlet has been killed by the King of England. Ophelia would be the only one who could rat him out, if Hamlet had told her what he suspected. As my kids say, "just sayin'…"

This interpretation converts Ophelia from a one-dimensional character into a complex figure in an increasingly layered plot. Shakespeare was fond of contrasts. Hamlet loses a father but cannot bring himself to act. Ophelia also loses a father, and answers Hamlet's existential question about being or not being, in a horrifying way – she "her own quietus makes." The tragedy deepens.

The Law of Succession

There is a choice of law issue in every one of Shakespeare's legal plays. What law applies? The law of the setting? In this play, 13th century Denmark? Or the law that the playwright would be familiar with – English law in 1600? Or the audience's law – then or now? I think the answer is all three.

But as for Denmark, it helps to understand both the law of inheritance and the law of succession. These laws help explain the timing of events and the motivation of the characters.

In Denmark, monarchy wasn't inherited. Like the ancient gatherings of Norsemen to choose a leader through a process known as the "witten" – Danish Kings were elected from a slate of powerful nobles. Hamlet explains to Horatio in Act 1 that Claudius has "stepped between the election and my hopes." Hamlet returned to Elsinore following the news of his father's untimely (and implausible) death, expecting to become the next King, only to find that Claudius had beaten him to the punch, by marrying Getrude and getting himself elected King.

So why the rush? Danish inheritance law explains this. In 13th century Demark, when the husband died, his estate passed to the first-born son, not the wife. That is unless the wife remarried within a month. If that was the case, the inheritance was divided so that the widow had a dowery of sorts, to attract a new husband. But to maintain this, she had to act fast. This makes sense. Married women are safe. Rich single women cause potentially disruptive competition (see *Merchant of Venice*, for example, or *Cymbeline*.)

Hamlet bemoans that Gertrude has remarried within a month. His overly sexualized mind immediately assigns this haste to female intemperance, lust, and a lack of feeling for her late husband. He sees his mother as over-sexed, and it gnaws at him. Perhaps Freud is right in suggesting Hamlet is the poster boy of the Oedipus Complex. He has mommy issues.

Hamlet's psychological complexes mask his ability to see the truth that the audience sees clearly. Claudius and Getrude are in love. This depth of affection could not have happened overnight. Is Gertrude in on the conspiracy? Is this a Lord and Lady Macbeth situation? Is their confederate Polonius also in league with the king-slayer?

The contemporary novelist John Updike seemed to think so. In 2000 he wrote a prequel to *Hamlet*, called *Gertrude and Claudius*. In it he imagines a sort of King Arthur/Guinevere/Lancelot love triangle that has King Hamlet as an older and aloof husband, busy with affairs of state, possessing military prowess but lacking sensitivity. He is the fighter. His younger brother Claudius is the lover.

King Hamlet and Getrude cannot conceive a child. In her loneliness and frustration, she falls in love with Claudius. Prince Hamlet is the result. It is clear to everyone in Elsinore who the real father is. Hamlet grows up to be a privileged whiny self-obsessed mama's boy. It is a very interesting theory.

But enough Elsinore intrigue. The legal point is this can be a political play as well. Hamlet hates Claudius because he has been denied a kingship and an inheritance that should have been rightfully his by law, if only Gertrude could have remained faithful to her husband's legacy. "Frailty, thy name is woman."

Self-Help vs. the Rule of Law – "The Law's Delay"

Shakespeare and his audience understood well that England's great charter, Magna Carta, stood for among other things the uniquely English legal principle that the King is not above the Law. Contrast this with the rest of Europe in the 16th and 17th Centuries, where the King was the law, and by divine right. *Richard II* is all about this. "Down, down I come like glistering Phaeton." Is the Law supreme, or the King?

The most quoted lines Shakespeare wrote – from the most famous soliloquy, appears early in the play. Abundant ink has been spilled over the meaning of "to be or not to be." Let us consider it in full. But as you consider it, listen with your lawyer's ears.

To be, or not to be: that is the question:

Whether 'tis nobler in the mind to suffer

The slings and arrows of outrageous fortune,

Or to take arms against a sea of troubles,

And by opposing end them? To die: to sleep;

No more; and by a sleep to say we end

The heart-ache and the thousand natural shocks

That flesh is heir to, 'tis a consummation

Devoutly to be wish'd. To die, to sleep;

To sleep: perchance to dream: ay, there's the rub;

For in that sleep of death what dreams may come

When we have shuffled off this mortal coil,

Must give us pause: there's the respect

That makes calamity of so long life;

For who would bear the whips and scorns of time,

The oppressor's wrong, the proud man's contumely,

The pangs of despised love, **the law's delay**,

The insolence of office and the spurns

That patient merit of the unworthy takes,

When he himself might his quietus make

With a bare bodkin? Who would fardels bear,

To grunt and sweat under a weary life,

But that the dread of something after death,

The undiscover'd country from whose bourn

No traveler returns, puzzles the will

And makes us rather bear those ills we have

Than fly to others that we know not of?

Thus conscience does make cowards of us all;

And thus the native hue of resolution

Is sicklied o'er with the pale cast of thought,

And enterprises of great pith and moment

With this regard their currents turn awry,

And lose the name of action.

To some extent Hamlet is debating whether to live on his knees or die on his feet. He is contemplating suicide, although I like to think it is a “suicide mission” he sees for himself, rather than an actual bare bodkin. Challenging Claudius will likely lead to Hamlet’s death. It is in a sense suicidal for him to try it. He knows this. And he would do it if he did not fear the “something after death” that he knows not of.

But what if he is really asking himself, “Should I take the law into my own hands, and kill Claudius, or should I let it the law take its course?” Consider how he characterizes “the whips and scorns of **time**” (not from a rival, but of time) – mostly in legalistic terms – “the oppressor’s wrong, the proud man’s contumely (scorn), the insolence of office,” and most tellingly, “the law’s delay.”

Time is his enemy. If he waits, what of it? A rival child of Claudius and Gertrude? Possibly, but given her age, probably not. An invasion by Norway? Possibly – they are nervous about that. Will his inheritance be frittered away by a drunken king? Maybe.

But I suggest his real concern is the same as poor goofy real King Charles the Third's. Hamlet is a middle-aged man of nearly 35 years, if the loopy Gravedigger's math is correct. He is worried about time. He doesn't want to wait another 25 years to be King. Claudius is probably in his early 50s. Hamlet's chance may never come.

He is - or should be – worried about Claudius. If Claudiu can murder a brother, he can certainly kill a nephew.

Hamlet sees himself as an educated, civilized man – "What piece of work is a man, how noble in reason, how infinite in faculties, in form and moving, how express and admirable in action, how like an angel in apprehension, how like a god!" He is not a warlike Viking, but a renaissance prince. He is contemplative. Much like a lawyer, he sees two sides to every question. Much like a lawyer, he loves to hear himself talk.

He wants to believe in the Rule of Law to come to his aid. What if he could expose Claudius' misdeeds to the lords and ladies of the Danish court? Surely the people would overthrow Claudius and elect him.

Is this why he stages the Mousetrap, instead of just killing Claudius? And once Claudius signals his guilt, by running from the Mousetrap in front of everyone there, hasn't Hamlet won?

Is Hamlet's tragic flaw that he too contemplative? Too much a lawyer? With the rat in his trap, he manages to jerk defeat from the jaws of victory. He blows his triumph by a rash, impetuous and unlawful act. He stabs someone he thinks is Claudius, confident that he has exposed him as a murderer. But he kills Polonius instead.

A final thought – Hamlet's actions in the last scene – are these the justifiable planned execution of an enemy and traitor to Denmark? Or are they a desperate attempt to recover some of his self-respect, knowing that he will shortly be dead? Yes, he kills Claudius, but to what end? Denmark falls easily into the hands of its enemy Norway. No wonder Fortinbras honors Hamlet as a noble soldier. He did his work for him.

> Fortinbras: Bear Hamlet, like a soldier, to the stage;
>
> For he was likely, had he been put on,
>
> To have proved most royally: and, for his passage,

The soldiers' music and the rites of war

Speak loudly for him. “

“Why may not that be the skull of a lawyer…”

I do not hold to exclusively to a legal interpretation of this play. It transcends that. In so many ways, Shakespeare at his best is about everything.

But in looking at this work though a legal lens, it is appropriate to end where we began, with the title of this piece: “Why may not that be the skull of a lawyer?”

“There's another. Why may not that be the skull of a lawyer?

Where be his quiddits now, his quillets, his cases, his tenures,

and his tricks? Why does he suffer this rude knave now to knock

him about the sconce with a dirty shovel, and will not tell him

of his action of battery? Hum! This fellow might be in's time a

great buyer of land, with his statutes, his recognizances, his

fines, his double vouchers, his recoveries. Is this the fine of

his fines, and the recovery of his recoveries, to have his fine

pate full of fine dirt? Will his vouchers vouch him no more of

his purchases, and double ones too, than the length and breadth

of a pair of indentures? The very conveyances of his lands will

scarcely lie in this box; and must th' inheritor himself have no

more, ha?”

What is Hamlet saying to us as lawyers? That our lives in the law eventually go down to dust? As Horatio replies, “Een so, my lord.”

If we all wind up as a bit of clay to keep the wind away – which I accept as our inevitable fate, then what's the point?

As great as this play is, it doesn't answer that question, does it? Shakespeare doesn't answer questions, he only asks them.

But I suspect he expects an answer from us.

And to answer that question, I turn to some of my other favorite literary works.

Many of my contemporaries, perhaps some of yours as well, will tell you they first decided to become a lawyer by reading or seeing *To Kill a Mockingbird*. I am no longer a member of the cult of Atticus Finch, although I confess, I was once. It took being in the play with some African American friends to open my eyes to Atticus's flaws.

My inspiration to be a lawyer comes from a far less lofty novel, J.D. Salinger's *The Catcher in the Rye*. I hope you have read it, but if you have not, then you have a treat in store. I will not spoil the entire novel for you, but I want to tell you about the title.

I have the book in my pocket. Let me read you a paragraph or two about what Holden Caufield says about lawyers:

> "Lawyers are alright, I guess — but it doesn't appeal to me", I said. "I mean they're alright if they go around saving innocent guys' lives all the time, and like that, but you don't do that kind of stuff if you're a lawyer. All you do is make a lot of dough and play golf and play bridge and buy cars and drink Martinis and look like a hot-shot. And besides, even if you did go around saving guys' lives and all, how would you know if you did it because you really wanted to save guys' lives, or because you did it because what you really wanted to do was be a terrific lawyer, with everybody slapping you on the back and congratulating you in court when the goddam trial was over, the reporters and everybody, the way it is in the movies? How would you know you weren't being a phony? The trouble is you wouldn't."

Holden tells his little sister Phoebe what he really wants to be when he grows up – a catcher in the rye:

> “Anyway, I keep picturing all these little kids playing some game in this big field of rye and all. Thousands of little kids, and nobody's around - nobody big, I mean - except me. And I'm standing on the edge of some crazy cliff. What I have to do, I have to catch everybody if they start to go over the cliff - I mean if they're running, and they don't look where they're going I have to come out from somewhere and catch them. That's all I do all day. I'd just be the catcher in the rye and all. I know it's crazy, but that's the only thing I'd really like to be.”

Isn’t that what Lawyers are supposed to do? The best ones, that is? Don’t they catch their clients before they start to go over a cliff? Aren’t we, at our best, all Catchers in the Rye?

But I digress. With all due respect, I defiantly reject Prince Hamlet’s nihilism. He’s wrong. The end is not all silence. It is, as Pericles said of the heroes of the Peloponnesian War, who died to save Athens and the ideal of Democracy:

> “Each for his own memorial earned praise that will never die, and with it the grandest of all sepulchres, not that in which his mortal bones are laid, **but a home in the minds of men.”**

That was written 2400 years ago. Its still with us. Dust will not be the fines of our fines. Our deeds will see to that.

Good lawyers will always have a home in the minds of men.

This is the lesson I take from Hamlet. And if someday someone holds my skull in his hand and says, “This might be the skull of a lawyer,” why I will be a mighty proud ghost indeed.

Thus ends my catechism.

RHW – 12/28/24

The Law in *Hamlet*:

Death, Property, and the Pursuit of Justice

Thomas Regnier

Hamlet is not, on its face, a "legal" play in the way that *Merchant of Venice* and *Measure for Measure* are legal plays. It has no trial scenes, no discourses on the purposes of law and punishment, and no critique, as such, of the legal system. But a closer look at the play shows that legal issues are integrated into the fabric of the drama at key points. The subtlety and accuracy of the law in *Hamlet* suggest that its author had sophisticated legal training of the sort that comes from formal study, not casual conversation. This casts doubt on the traditional theory that the man from Stratford wrote the plays of the Shakespeare canon.

As well as analyzing the law in *Hamlet*, this article will consider how the evidence of legal knowledge in the play impacts the hypothesis, believed by many, that Edward de Vere, the 17th Earl of Oxford, was the real genius behind Shakespeare's plays.[1] We know that de Vere studied law from an early age with his tutor, Sir Thomas Smith. De Vere also enrolled at the Inns of Court—Gray's Inn, to be precise—where the common law of England was taught. Of course, evidence of legal knowledge in Shakespeare's plays does not prove that Oxford wrote the plays. Many noblemen of his day studied at the Inns of Court; and others, such as Francis Bacon, were greater legal minds than Oxford was likely to have been.

But *Hamlet* contains legal issues that parallel watershed events in Oxford's life, particularly events that concerned homicide and property law. This article briefly explores aspects of law in *Hamlet*: ecclesiastical law, law of homicide, property law, and, more generally, law as an instrument of justice and revenge, and notes some of the parallels to legal issues that directly involved de Vere during his life.

I. Ecclesiastical Law: Ophelia's "Maimed Rites"

R.S. Guernsey wrote in 1885 that *Hamlet* showed "the most thorough and complete knowledge of the [ecclesiastical] and statute law of England, relating to

the burial of suicides that has ever been written."[2] The alert reader may well respond, "What does the law of England, whether ecclesiastical or statutory, have to do with *Hamlet*, which takes place in Denmark?"

The answer for *Hamlet* is the same as for all of Shakespeare's plays: English law permeates the plays, even those set in foreign countries. The law of the foreign setting may be a factor in some plays, but most of the legal rules and jargon are from English law. This is the law with which Shakespeare's audience, whether nobility or common folk, would have been most familiar.

A. Law of Suicide

Guernsey argued that *Hamlet* reflected the English law regarding suicides at the time of its writing, rather than the laws in Denmark at the time of the historical Hamlet's life (about 700 CE, before Christianity was introduced in Denmark). Understanding the law of suicide is crucial to understanding the controversy regarding Ophelia's burial rites. "Her death was doubtful" (5.1.182),[3] as the priest tells Laertes, by which he means it is questionable whether Ophelia's death was an accident or a suicide. This doubt created some thorny legal issues because of the tension that existed between statutory law and ecclesiastical law regarding suicides, especially when insanity was a factor.

Ophelia's death was "doubtful" because, once she fell into the brook, she appears to have made no attempt to save herself. Instead, she "chanted snatches of old lauds [hymns], / As one incapable of her own distress" (4.7.182–83). This behavior is consistent with Ophelia's having gone to the brook intending to kill herself. But given what the audience has already seen of Ophelia's madness, insanity is the more likely explanation of her inaction.

B. Ecclesiastical Law versus Statutory Law

Under ecclesiastical law, a person who voluntarily caused her own death was not entitled to Christian burial, even if she were insane. The secular law, however, had by Shakespeare's time developed a more nuanced understanding of voluntariness: an insane person could not, by definition, *voluntarily* kill herself because her mind was too disturbed for her to make any decision for which she could be held responsible. If the coroner, the official of the Crown who presided over the inquest, found that the deceased had been insane at the time of her death, then she could not have killed herself voluntarily and her death was, therefore, not a suicide.

The Church would grudgingly accept the coroner's verdict and give Christian burial rites to the deceased—but only in the parish churchyard. Even so, the parish priest, who was the legal holder of the church lands, could decide where in the cemetery the deceased would be buried. Suspected suicides were often buried at the fringes of the churchyard.

C. "Make Her Grave Straight"

As Guernsey explains, those who received Christian burial were buried with their bodies lying along a "straight," or east–west axis, the same alignment on which the church itself stood. The head was to the west, the feet to the east. Any other positioning, such as north–south, indicated that the deceased person was not entitled to the full rites of Christian burial.[4] Such "crooked" burials in unconsecrated ground went to stillborn infants and excommunicated persons, as well as to suicides.

Thus, when one gravedigger tells the other at the beginning of Act 5, "make her grave straight. The crowner hath sat on her, and finds it Christian burial" (5.1.3), he is telling the other to dig the grave east–west.[5] The thrust of the statement is that the coroner has ruled Ophelia's death involuntary, probably due to insanity, and that she therefore receives basic Christian rites.

If the coroner were to determine, however, that a person was sane at the time of the suicide (a rare finding), the deceased's personal property was forfeit to the Crown, and the coroner, rather than a priest, buried the body, often at a crossroads.

D. "What Ceremony Else?"

When Hamlet first sees a funeral procession in the churchyard, not knowing that it is Ophelia's funeral, he immediately recognizes the "maimed rites" and their significance: "This doth betoken / The corse [corpse] they follow did with desperate hand / Fordo its own life" (5.1.175–76). After an apparently perfunctory service by the priest, Laertes asks, "What ceremony else?" (5.1.180). The priest's response encapsulates the compromise between secular and holy law:

> Her obsequies have been as far enlarged
> As we have warranty. Her death was doubtful,
> And but that great command o'ersways the order,
> She should in ground unsanctified been lodged
> Till the last trumpet....
>
> (5.1.181–85).

The "great command" is the statutory law of England, which recognized the monarch as the head of the Church. It also bound the priest to abide by the coroner's verdict that Ophelia be accorded Christian burial. Thus, we know from the text that Ophelia's burial included some of the features of a full Christian burial, namely, an east–west ("straight") grave in consecrated ground.

But Guernsey notes that the funeral left out such optional trappings as torch bearers, cross bearer, sprinkling of holy water, singing of psalms or hymns, blessing, smoking censer, and Eucharist (Holy Communion, or Lord's Supper).[6] The omission of so many potentially available signs of respect toward the deceased would naturally seem an insult to the mourning Laertes.

The priest goes on to hint that Laertes should be thankful that the "great command" has done as much as it has for Ophelia. Without it, "for charitable prayers, / Shards, flints, and pebbles, should be thrown on her" (5.1.185–86). Guernsey explains that this was a reference to the custom in some parts of England (derived from heathen Teutons' method of executing criminals) of burying suicides at crossroads, driving a stake through the body, and allowing passersby to throw stones and flints at the stake.

The priest reminds Laertes that the Church has allowed the strewing of flowers for Ophelia and the use of garlands (a token of virginity). The priest has, as Guernsey says, "fulfilled the letter of the law, and rung the bell [a required part of the Christian ceremony, even for doubtful deaths] and . . . given her an honorable place of burial and a straight grave."[7]

In other words, Ophelia received the bare minimum of Christian burial rites. Shakespeare's use of a few key phrases—"make her grave straight," "Christian burial," "maimed rites," "What ceremony else?," "Her death was doubtful," "great command," "ground unsanctified"—shows that he perfectly understood the tension between statutory law and ecclesiastical law regarding the burial of suicides.

II. Law of Homicide: "King's Lawful Subject" versus "Malice Aforethought"

Thomas Glyn Watkin's 1984 article, "Hamlet and the Law of Homicide," explores the law governing the many homicides in the play.[8] Once again, English law rules. Watkin notes that homicide law in Shakespeare's time had undergone a transformation since medieval times. Stated simply, medieval law focused on the legal status of the victim; the more modern view focused on the state of mind of the accused killer.

A. Law of Homicide: The Old Rule

Watkin explains that, under the medieval system, it was no crime to kill felons who fled or resisted arrest, prisoners who assaulted their jailers, highway robbers, burglars who broke into one's house at night, or members of an unlawful assembly who resisted a justice of the peace's order to disperse. The common denominator of all these victims is that none was "the King's lawful subject." By their actions they had forfeited the law's protection; therefore, killing them was not a crime.

The medieval system meant that an accidental killing, however, usually *was* a crime. If one were chopping down a tree and an innocent victim happened to walk nearby and be killed by the falling tree, the woodcutter would be prosecuted. The dead person had done nothing to take himself outside the law's protection, so he was still the king's lawful subject and killing him was a crime.

Even more perplexing to the modern mind is that, under the old system, killing in self-defense during a sudden brawl was not protected under the law—even if one refrained from killing until his back was to the wall and he had no choice. Why, one might reasonably ask, would it be lawful for a citizen to kill the burglar who breaks

into his home, but not the public brawler who means to kill the citizen?

The answer is that the brawler has not yet committed a crime. Because he has not forfeited the law's protection, he is still the king's lawful subject. Additionally, the law assumed that when a quarrel arose, both parties must be at fault to some degree. A person found to have killed in self-defense, however, could seek, and would usually obtain, a pardon from the king, as provided by the Statute of Gloucester of 1278;[9] but he had to forfeit his goods to the Crown for depriving the king of one of his lawful subjects.

A burglar, on the other hand, has already committed a crime by breaking into one's home and has thereby lost the law's protection. Killing the burglar was a lawful act even if he had not yet injured anyone or stolen any goods.

B. Law of Homicide: The New Rule

By Shakespeare's time, homicide law had gone through a series of gradual changes so that the legal analysis focused on the killer's state of mind, or *mens rea*, rather than the victim's legal status. In the 17th century, legal scholars, such as Sir Edward Coke (pronounced "Cook"), began to articulate the new state of the common law as it had evolved.

The new definition of murder was best expressed by Coke in his Third Institute, published in 1641: "Murder is when a man . . . unlawfully killeth . . . with malice fore-thought, either expressed by the party, or implied by law . . . ."[10] Coke's definition brilliantly captured the change in the law: the focus was no longer on the victim, but on the defendant; not merely on physical acts, but on the intentions behind them. Indeed, one of the great advances of modern law over medieval law has been modern law's consideration of a defendant's intentions as well as his actions.

When Coke said in his definition that "malice fore-thought" (or "malice aforethought," as it is more commonly termed) could be expressed by the party or implied by law, he meant that the killer could state his intentions or the law could infer intent based on his actions. For example, malice aforethought was assumed in willful poisoning cases[11] and incidents of stabbing a victim who had no weapon drawn or had not struck first.[12]

Watkin argues that Shakespeare, who wove the theme of the deceptiveness of appearances into *Hamlet* ("That one may smile, and smile, and be a villain" [1.5.108]), found such legal shortcuts too superficial. As the play demonstrates, a smooth assassin like Claudius or a creative actor like Hamlet could get away with murder, at least for a while, by disguising his intentions.

The new understanding of murder meant that killings in self-defense or by accident were no longer crimes because the killer had no malicious intent. By the time of Coke's writing in the 1600s, juries who found that the defendant had killed in self-defense could simply acquit, and pardon from the king was no longer necessary. Insanity became a complete defense to murder because, as discussed earlier in regard to suicide, an insane person was incapable of forming an intent for which he could be

held responsible.

One might say that murder and manslaughter were distinguished by their hotness or coldness. Murder involved "cold" blood, the murderer having had time to reflect on his action; the punishment was death. Manslaughter was a sudden killing driven by "the heat of the blood kindled by ire," as Coke said.[13] Manslaughter was punished by imprisonment for up to a year and branding of the thumb.

Watkin's article goes on to examine each of the killings in *Hamlet* in light of the changes in the law, demonstrating that Shakespeare had a keen appreciation of the subtleties of the law of homicide as it had developed in his time. This article summarizes several of Watkin's analyses.

C. Hamlet's Feigned Madness

Let us look at Hamlet's "antic disposition" (1.5.172), his feigning madness. Why would he pretend to be insane? In Saxo Grammaticus's *Amleth*, one of Shakespeare's sources for the *Hamlet* plot, the young protagonist pretends to be a simpleton in order to appear harmless while he plots his revenge against his uncle.[14] This may be a part of the strategy of Shakespeare's Hamlet, but Hamlet also reaps legal benefits from his charade—benefits that accrue because of the new state of the law. After all, insanity was a complete defense to murder. By feigning madness, Hamlet would escape all punishment, even forfeiture of goods, for the planned murder of his uncle.

Although Hamlet's pretended madness never becomes an issue in regard to Claudius' death, it comes in quite handy when he mistakenly kills Polonius. "What I have done," Hamlet later says of the killing, "I here proclaim was madness" (5.2.201–03). Gertrude backs up Hamlet's pretense of madness by telling Claudius that Hamlet, when killing Polonius, was "Mad as the sea and wind when both contend / Which is the mightier" (4.1.7–8). Claudius accepts the fiction and passes it on when he tells Rosencrantz and Guildenstern that "Hamlet in madness hath Polonius slain" (4.1.34). The courtiers would need no further explanation as to why Hamlet is not criminally prosecuted for Polonius' death.

D. The Rat Behind the Arras

Even if the madness defense hadn't worked in the killing of Polonius, Hamlet had a backup argument: he stabbed at the arras thinking a rat was behind it. While we know from the text that Hamlet hoped and believed Claudius was behind the arras, he cleverly shouted out, "How now? A rat? / Dead for a ducat, dead!" (3.4.27) as he stabbed, giving himself an excuse for the killing. Because the intent to kill a person is necessary for murder, a man who intends to kill a rat but accidentally kills a person instead is not guilty of murder.[15]

The rat-behind-the-arras excuse is a new twist that Shakespeare added to the plot. In the Belleforest version of the Hamlet story in *Histoires Tragiques*,[16] the counselor who eavesdrops on Hamlet's interview with his mother hides under a quilt; Shakespeare has Polonius, on the other hand, hide behind an arras.[17] One can see that

this makes a difference from a legal standpoint because of the new state of the law. Under the medieval rule, Hamlet's guilt in killing Polonius would have depended on whether Polonius was the "King's lawful subject" at the time of the killing. Clearly, Polonius would qualify as a lawful subject no matter where he hid, and Hamlet would be culpable for the death.

But under the modern rule, Hamlet's guilt depends on his intent. If he attacked a person who was hiding under a quilt, as in the Belleforest version, it would have been difficult to deny that he knew it was a person, not a rat, underneath. When Shakespeare places Polonius behind the arras, however, the rat excuse becomes plausible. One might see the rustling of an arras and assume that a rat, climbing the arras, caused the disturbance. Then one might stab at the arras, only to find that a person, not a rat, was behind it. This would not be murder because there was no evil intent. Thus, Hamlet was fortified with two legal defenses for killing Polonius: insanity and accident. Neither defense would have saved him under the medieval rules.

Could Hamlet have argued his innocence by saying that his killing of Polonius was accidental because he had actually meant to kill Claudius? This would not have worked because of the doctrine of "transferred intent." If one intended to kill a human being but, in the course of attempting the killing, accidentally killed another human, one was still guilty of murder. The unlawful intent transferred to the unintended victim.

Nor could Hamlet have based a plausible defense on a pretense that he thought Polonius was a robber. For that defense to work, he would have to ascertain before the killing that his victim actually *was* a robber. A quick peek behind the arras would have immediately cured him of that notion.

E. Rosencrantz and Guildenstern

One of Claudius' schemes to do away with Hamlet is to send him to England, accompanied by Rosencrantz and Guildenstern, with a written commission authorizing the English authorities to execute Hamlet. The scheme shows Claudius' typical craftiness: by arranging for the killing to occur in another jurisdiction, Claudius ensures that he cannot be tried for it in Denmark.

As we know, Hamlet turned the tables by substituting the order for his death with an order for the deaths of Rosencrantz and Guildenstern. For this act, Hamlet could have used a similar jurisdictional argument to Claudius': as Hamlet wrote the order while at sea, he was outside the jurisdiction of Denmark.

Hamlet could conceivably argue in the alternative that he killed in self-defense, but this is a weaker argument because self-defense usually requires an immediate threat to one's life. Watkin argues that Hamlet's situation subtly highlights the inadequacy of the law of homicide to "accommodate a killing done during the course of a protracted threat to the killer's own life."[18]

F. The Duel with Laertes

Claudius conspires with Laertes to kill Hamlet in a fencing match. Claudius suggests that Laertes use an unblunted sword. Laertes goes him one better and offers to put poison on the sword tip. Clearly, this will be a premeditated murder planned in cold blood with malice aforethought. Claudius assures Laertes that it will look like an accident.

But the always-clever Claudius, like Hamlet, has a backup legal justification: killing another as part of a *royally ordained* joust or tournament was not a felony. Since the duel will take place under the auspices of the King, Laertes (and Claudius, his co-conspirator) will have legal cover for their actions.

G. Poison, Poison, Poison

And in case the poisoned sword doesn't do the trick, Claudius has a backup for that as well: serve Hamlet some poisoned wine. Watkin points out that the play employs three of the four types of poisoning that Coke lists in his *Third Institute*: *gustu*, by taste, as with the poisoned wine; *contactu*, by touching, as with the poisoned sword used on Hamlet, Laertes, and Claudius; and *suppostu*, as with a suppository or the like, in this case, the poison that Claudius pours in his brother's ear before the action of the play begins.[19] Coke declared poisoning to be the most detestable kind of murder.

As for the poisoned wine, it is Gertrude, not Hamlet, who eventually drinks it. Here the principle of transferred intent comes into play. Since Claudius intended a person's death when he poisoned the wine, his malicious intent transfers to unintended victims and he is accountable for any human death that results from the device.

H. Hamlet Kills Claudius

Hamlet kills Claudius after watching his mother die of poisoning and hearing Laertes reveal that Claudius is responsible for Gertrude's death and for the poisonous plot that has fatally wounded both Laertes and Hamlet. By this time, the audience, which also knows about Claudius' killing of his own brother and has been waiting for hours for Hamlet to wreak his vengeance, is likely to consider Hamlet's killing of his uncle long overdue. Watkin argues, however, that the law would not see it that way.

Although Hamlet kills Claudius in what most observers would agree was the "heat of the moment," one must recall that the law necessarily inferred malice aforethought in at least two situations: (1) stabbing a person who has no weapon drawn and (2) willful poisoning. Hamlet kills Claudius by first, stabbing him, although there is no indication that Claudius has drawn a weapon, and second, forcing him to drink poison. Under the law, the only possible verdict is cold-blooded murder,[20] although the audience can plainly see that the killing of Claudius was nothing of the kind.

Watkin concludes that "Shakespeare can well be taken to have constructed this outcome as a direct comment on the law's overemphasis on appearances . . . ."[21]

Considering how deftly Shakespeare combined a moment of overwhelming passion with two actions that the law deemed to be cold and calculating, we may agree with Watkin that Shakespeare's irony is deliberate.

I. Oxford and the Law of Homicide

Edward de Vere, the Earl of Oxford, not only studied the law from an early age, he had a personal brush with homicide law at the age of 17. In 1567, he was practicing his fencing moves with Edward Baynam, a tailor, when a third person, Thomas Brincknell, a cook, joined them. We do not know exactly what happened, except that de Vere's sword somehow pierced the cook's femoral artery, killing him within minutes. If de Vere had not already studied the law of homicide, he had reason to do so now.

It seems unlikely that de Vere would have killed the cook with malice aforethought. Possibly, he and the cook quarreled and de Vere struck him in anger, which would have been manslaughter. Perhaps de Vere killed him accidentally in fencing practice, but this seems improbable, given the severity of the wound, which was four inches deep and an inch wide.

Or perhaps the cook attacked de Vere, who killed in self-defense. It is not clear whether the cook was armed. Although the Stabbing Statute was not enacted until 1603–04, it is unlikely that a jury of peers, even in 1567, would have accepted a self-defense argument for the armed killing of an unarmed man.

But whether de Vere's act was premeditated, provoked, accidental, or done in self-defense, he faced a penalty ranging from death (if it were murder) to imprisonment for up to a year (if it were manslaughter) to loss of personal property (if it were accident or self-defense). De Vere escaped all of these through a kind of legal hairsplitting that lawyer and Shakespeare commentator Daniel Kornstein has called "a metaphysical delight."[22]

The coroner's inquest found that the cook, who was drunk, "not having God before his eyes, but moved and deceived by diabolic instigation . . . ran and fell upon the point of [the Earl of Oxford's] foil . . . [and] gave himself . . . one fatal stroke . . . ."[23] This implausible conclusion made the death entirely the fault of the godless cook and absolved de Vere of any wrongdoing. Surely, it helped that de Vere was an earl and that his guardian, Sir William Cecil (later Lord Burghley), was an extremely powerful man.

De Vere, if he was Shakespeare, may have been satirizing the legal fictions that saved his own neck when he had the gravediggers in Hamlet discuss the rules of self-defense:

> **Second Clown** [Gravedigger]. . . . The crowner hath sat on her, and finds it Christian burial.
> **First Clown.** How can that be, unless she drowned herself in her own defense?
> **Second Clown.** Why, 'tis found so.
> **First Clown.** It must be *se offendendo*, it cannot be else.

(5.1.3–5)

The first gravedigger means "*se defendendo*," or self-defense, not "*se offendendo*," but here the lower class characters misstate the law, as they usually do in Shakespeare's plays.[24] The idea that one could drown oneself "in self-defense" (presumably to prevent oneself from killing oneself) is as zany a piece of illogic as to think that a man would commit suicide by running into another man's sword.[25] It is also a parody on legal treatises of the time that analyzed suicide by the same formulae as homicide while completely ignoring that in suicide the "murderer" and "victim" were the same person.[26]

De Vere may also have identified with both Claudius and Hamlet, who use their privileged positions, as well as some clever playacting, to get away with murder. Mark Anderson, a de Vere biographer who posits that de Vere was the man behind the Shakespeare plays, writes: "As with nearly all his crimes and misdemeanors, de Vere's acknowledgment of his rash and destructive behavior came later in life—in the form of words that are performed today on stages around the world."[27]

Watkin notes that some incidents in *Hamlet* "seem to be based on examples contained in discussions of homicide in legal works—for example, Shakespeare's introduction of the rat-killing pretext for the slaying of Polonius, not to mention the anticipation of Coke's language and analysis with regard to poisoning . . . ." Watkin says that Coke's analysis "may have been based on contemporary Inns of Court readings and discussions on which Coke later drew."[28]

When one considers that Coke's *Third Institute* was not completed until 1628 nor published until 1641, it is remarkable that the author of *Hamlet* (published in 1603–04) was so well-versed in Coke's legal analysis of homicide. The playwright must have kept up with the law of homicide as it evolved through the enactment of statutes and the publication of court opinions. Or perhaps he heard readings on the subject at the Inns of Court.

The detailed understanding of law evident in *Hamlet* suggests an author with formal legal training, who understood the nuances of the law and could arrange fact patterns in the play so as to align with the law as it existed in his time. This profile fits what we know of de Vere more closely than it fits what we know of the man from Stratford.

III. Property Law: Hamlet's Lost Inheritance

Property rights are a subtly recurring theme in *Hamlet*, as J. Anthony Burton demonstrated in an article published in the 2000–2001 *Shakespeare Newsletter*.[29] An understanding of English property law during Shakespeare's time increases our understanding of many of the main characters' actions and motivations.

A. King Fortinbras' Lands

As Burton notes, property references run throughout the play, beginning in the first scene when Horatio explains the military threat to Denmark from Norway.

Part of the background of the potential hostilities is that many years before, Hamlet's father, King Hamlet, had agreed to a wager based on a challenge by King Fortinbras of Norway (father of the young Prince Fortinbras who appears in the play). The terms were man-to-man combat to the death, the winner to take all the lands owned by the loser. King Hamlet slew King Fortinbras and assumed ownership of his lands.

Young Fortinbras, whose spirit is now "with divine ambition puff'd" (4.4.49), seeks to exact vengeance for his father's loss of land by attacking Denmark. When Fortinbras' uncle quashes that scheme, the young prince apparently settles on some worthless land in Poland as a substitute target. Having secured the services of some "landless resolutes"[30] (1.1.103)—possibly some impoverished younger sons who wish to make their fortunes in Fortinbras' army—he gains permission to march through Denmark. Perhaps in recognition of Fortinbras' claims on Denmark, Hamlet gives Fortinbras his "dying voice" (5.2.344) at the end of the play, as events come full circle and Norway reclaims its lost property, and more.

But immediately after Claudius murders King Hamlet, what happens to the lands that King Hamlet won in combat from King Fortinbras, as well as any other lands King Hamlet may have personally owned? Presumably, they would descend by inheritance to his eldest son, Hamlet. Hamlet would not have automatically inherited the crown because, in Denmark, the kingship was an elected position. (This is one of the few points of Danish law, rather than English, that figures into the plot.) Claudius managed, probably through superior political skills and his being at Elsinore when his brother died, to win the election over Hamlet.

The election would not, however, change Hamlet's inheritance rights to lands that his father had owned—lands that belonged to his family and did not go along with the crown. Hamlet should be living comfortably on the income from those lands, but the play suggests that he is living in genteel poverty. "Beggar that I am," he tells Rosencrantz and Guildenstern, "I am even poor in thanks" (2.2.250). When Claudius asks him how he fares, he replies, "Excellent, i' faith, of the chameleon's dish. I eat the air, promise-crammed" (3.2.82–83). This is a reference to the ancient belief that chameleons could live by eating air. Hamlet, a prince, cannot even afford good servants, for he tells Rosencrantz and Guildenstern that he is "most dreadfully attended" (2.2.247).

Hamlet may not be enjoying the income from his father's lands because of certain quirks in property law that could delay an inheritance. Burton argues that Claudius has skillfully manipulated the law so that Claudius, not Hamlet, is benefiting from Hamlet's inheritance and that Claudius' machinations threaten to delay Hamlet's inheritance indefinitely.

B. Gertrude's Dower

Under the Magna Carta, a widow had "dower" rights, which meant that when her husband died she was entitled to a life estate in one-third of the lands that he had owned during his lifetime. A "life estate" meant that the widow would possess the lands during her lifetime but she could not sell them or give them away during her life

or bequeath them to a person of her choice on her death. The widow's third would go to the heir, most often the eldest son, when she died.

After the husband's death, the widow was allowed to remain in her husband's house for 40 days (a period called the "quarantine," after the Italian word for "forty"), during which time her dower, i.e., her life estate in one-third of her husband's lands, would be assigned to her. The heir would take outright possession of the other two-thirds.

But something happened before the 40-day quarantine period was over: Gertrude married Claudius. As Hamlet laments:

> Within a month,
> Ere yet the salt of most unrighteous tears
> Had left the flushing in her galléd eyes,
> She married. O, most wicked speed.
> (1.2.155–58)

In addition to the disrespect the "o'er hasty marriage" (2.2.57) shows for the memory of Hamlet's father,[31] it also leaves Hamlet with a legal difficulty. The marriage would give Claudius an arguable claim over Gertrude's lands—not of outright ownership, but of legal control—because, under the law, man and wife were one. Hamlet makes a bitter joke out of this legal principle in this repartee with Claudius:

> **Hamlet** [to Claudius]. Farewell, dear mother.
> **Claudius.** Thy loving father, Hamlet.
> **Hamlet.** My mother. Father and mother is man and wife, man and wife is one flesh—so, my mother.
> (4.3.50–51)

In theory, the remarriage should not have been a problem for Hamlet. His father's lands should have vested in him on his father's death, and Hamlet would have had the duty of assigning a third of the lands to Gertrude as her dower.[32] But in Shakespeare's time, successful legal actions over property usually involved interference with *possession*, based on the legal maxim, "Possession is nine-tenths of the law."[33] Since Hamlet was in Wittenberg when his father died, he was not in a position to take possession of his lands right away.

Elsinore was at least a 200-mile trip from Wittenberg, some of it over water. When King Hamlet died, it would have taken some time for a messenger to get the news to Hamlet; then Hamlet would have had to make the trek to Elsinore. In the meantime, Gertrude, as the widow, would have had a stronger claim to the late king's property than anyone but Hamlet. As her dower lands had not yet been carved out of the estate, she had a *potential* possessory right to any part of those lands.

Before Hamlet arrived at Elsinore, the crafty Claudius probably wasted no time in sewing up the kingship and cajoling Gertrude into agreeing to marry him. Perhaps he even sent a few of his hired Switzer guards to "safeguard" Hamlet's lands and collect

the feudal rents, on behalf of his queen-to-be and her son, of course. Thus, Claudius might be in *de facto* possession, though not *de jure*,[34] of Hamlet's inheritance long before Hamlet arrives at Elsinore to assert possession. This would leave Hamlet, legally, in a weak position: he could not claim that Claudius interfered with his possession because Hamlet never had possession.[35]

Furthermore, as Burton hypothesizes, Claudius may have made a premarital property settlement with Gertrude giving her a "jointure," a life estate in a predetermined portion of land that she would possess immediately upon Claudius' death. In exchange for the jointure, Gertrude would have waived her dower rights to one-third of Claudius' estate, if he should die before her.[36] The existence of a jointure agreement would explain Claudius' reference to Gertrude as a "jointress" (1.2.9), a term that scholars have perhaps been too quick to pass off as merely referring to Gertrude as a joint ruler or joint owner.[37] Literally, the word means a "woman who has a jointure."[38]

Shakespeare's audience would have accepted the idea that Gertrude would trade dower for jointure because widows often had to fight for their dower rights in court, whereas jointure agreements were readily honored.[39] But the jointure was usually much less valuable than the dower would have been.[40] Furthermore, the jointure arrangement would be a signal to Hamlet of legal trickery afoot because Gertrude's waiver of dower in exchange for the jointure would make it easier for Claudius to sell off any lands he might later acquire.[41]

Claudius' claim to control, though not ownership, of King Hamlet's still-undivided lands, would have arisen when he married Gertrude. But wouldn't Hamlet's claim, which arose when his father died, precede Claudius'? Not necessarily, as we learn from a 1562 case called *Hales versus Pettit*.

C. *Hales v. Pettit*

The case revolved around the suicide of Sir James Hales, a judge who had drowned himself in 1554. The coroner returned a verdict of *felo de se* (suicide: literally, "felon of himself"). At the time of his death, Hales and his wife Margaret jointly possessed a lease for a term of years to an estate in Kent.

The suicide verdict meant that the lease was forfeit to the monarch, Queen Mary,[42] and the Queen gave the lease to Cyriac Pettit, who took possession of the land.[43] Dame Margaret sued Pettit to recover the lands, claiming Pettit had trespassed. Her attorneys argued, ingeniously, that Sir James could not have killed himself in his lifetime:

> the death precedes the forfeiture, for until the death is fully consummate he is not a *felo de se*, for if he had killed another, he should not have been a felon until the other had been dead. And for the same reason he cannot be a *felo de se* until the death of himself be fully had and consummate. For the death precedes the felony both in the one case and in the other, and the death precedes the forfeiture.[44]

In other words, his act of jumping in the river was not suicide at the time the act occurred because no one had died from it at that moment; it did not become suicide, a felony, until he died. But at the exact moment of his death, the estate vested in his wife by right of survivorship. His attainder (the extinguishing of his rights for his committing a felony) did not occur until the coroner declared his death a suicide.

Cyriac Pettit's counsel countered that an act has three parts: the imagination, the resolution, and the perfection, or execution, and that the "doing of the act is the greatest in the judgment of our law, and it is in effect the whole."[45] The first gravedigger's pronouncement in *Hamlet* that "an act hath three branches—it is to act, to do, to perform" (5.1.8–9) is thus his garbled misstatement of the defense counsel's argument. Sir John Hawkins, Samuel Johnson's lawyer, appears to have been the first, around 1773, to notice that the gravediggers' discussion was a parody of *Hales v. Pettit*.[46]

The court found for Pettit, holding that the forfeiture had "relation" to Sir James' act. In other words, his jumping into the river and the ensuing death and forfeiture were all part of one continuous act:

> Sir James Hales was dead, and how came he to his death? It may be answered: by drowning; and who drowned him? Sir James Hales; and when did he drown him? in his life-time. So that Sir James Hales being alive caused Sir James Hales to die; and the act of the living man was the death of the dead man. And then for this offence it is reasonable to punish the living man who committed the offence, and not the dead man. But how can he be said to be punished alive when the punishment comes after his death? Sir, this can be done no other way but by [divesting] out of him, from the time of the act done in his life which was the cause of his death, the title and property of those things which he had in his life-time.[47]

Because the death by suicide included the illicit act of jumping in the river, any property right that the widow acquired at the moment of Hales' death arose at the same moment as the forfeiture to the Crown as a result of Hales' suicide.

The court held that when claims by the monarch and a subject arise simultaneously, the monarch wins: "in things of an instant the King shall be preferred."[48] But what does this have to do with *Hamlet v. Claudius*? Doesn't Hamlet's claim, which arose when his father died, precede Claudius' claim, which arose later, when he married Gertrude? Not necessarily.

The *Hales* case is significant not only for the holding about simultaneous claims; it is also important as an example of the doctrine of "relation back," which is still alive and well in modern law.[49] "Relation back" is a legal fiction that treats an act done at a later time as if it had been done at an earlier time. Thus, retrospectively, Sir James Hales forfeited his lease the moment he threw himself in the water, even

though he hadn't yet died of it and the coroner had not yet pronounced him a suicide.

Could Claudius use this legal fiction to argue that his claim to King Hamlet's lands arose simultaneously with young Hamlet's? Yes, because Claudius' claim ultimately relies on Gertrude's claim. The moment King Hamlet died, Gertrude had a claim to his still-undivided estate through dower, just as Hamlet had a claim through inheritance. When Claudius married Gertrude, he gained the right to make the claim on Gertrude's behalf. Claudius could then "relate back" his claim to the time of King Hamlet's death. Gertrude's claim becomes, retrospectively, the new King's claim from the moment of inception. And, as *Hales* tells us, a king's claim trumps a simultaneous claim by a subject.[50]

D. The Closet Scene: Gertrude's Child and the "Law's Delay"

Claudius' legal tricks do not deny Hamlet's inheritance for all time; they merely delay it. Gertrude's death would effectively end Claudius' claims, and Hamlet would inherit. But, as Burton explains, Claudius could play still another legal trump card: "tenancy by the curtesy." This provision in the law allowed that if Gertrude were to bear a child by Claudius, Claudius would then be entitled to a life estate in Gertrude's lands. In other words, Hamlet's taking of his inheritance could be further postponed even if his mother died. These circumstances give added meaning to Hamlet's fulminations about "the law's delay" (3.1.72) in the "To be, or not to be" soliloquy (3.1.56ff.).

But even more worrisome is the fact that Gertrude, after bearing Claudius a child, would be expendable. Claudius would no longer need her as the basis of his claim to Hamlet's inheritance. Perhaps this explains some of the significance in the mad Ophelia's saying, as she hands out herbs to members of the court, "There's rue for you, and here's some for me" (4.5.178–79). Arden editor Harold Jenkins has suggested that Ophelia speaks this line to Claudius because rue was a symbol of repentance.

Jenkins' reading is plausible, but might Ophelia be giving rue to Gertrude because common rue was thought to induce abortion? A little rue might save Gertrude's life and preserve Hamlet's inheritance at the same time. And perhaps Ophelia keeps some rue because she herself is pregnant, a possibility hinted at in her song about the "maid at your window . . . that out a maid / Never departed more" (4.5.54–55).[51]

At any rate, Gertrude's improvidence in marrying Claudius and thereby inadvertently delaying Hamlet's inheritance, is a subtext of the closet scene between Hamlet and Gertrude after the Mousetrap performance. When Hamlet tells her that Claudius killed her husband, she probably sees that Claudius has used her and that her life is in danger. When Hamlet tells her, "go not to my uncle's bed" (3.4.172), she understands that this is to ensure her own safety as well as to honor her late husband's memory.

E. Skull of a Lawyer

John Campbell, Lord Chief Justice of England, said in 1859 that the gravediggers' scene produces "the richest legal ore" in *Hamlet*.[52] This should be no

surprise to the reader by now, as this legal analysis of *Hamlet* has referred repeatedly to the graveyard scene. It now returns to that locale, where the two overarching themes of death and property reach their symbolic climaxes.

A graveyard is the perfect setting for talk of death, with old skulls being cast about and bodies being buried in the dirt, where they may return to dust. It is coincidentally a perfect setting for talk of property. For what is ownership of land but ownership of the dirt to which we all return? With reminders of death so near at hand, squabbles over property rights seem meaningless. One will soon enough have all the real estate one will ever need.

Death and property are the simultaneous subjects of Hamlet's speech on the "skull of a lawyer." Many theatergoers may be unfamiliar with this speech, or at least less familiar than with the "Alas, poor Yorick!" speech (5.1.148ff.), which follows it by about 60 lines. This speech is often omitted from performances because its many legal terms make it unintelligible to most audiences. But because it is perhaps the most densely legal passage in all of Shakespeare, it is worth understanding. As Hamlet and Horatio stand by the open grave in which the gravedigger is working and singing, the gravedigger tosses out a skull. Hamlet muses upon it:

> Why may not that be the skull of a lawyer? Where be his quiddities [subtleties] now, his quillets [evasions], his *cases*, his *tenures*, and his *tricks*? . . . This fellow might be in's time a great buyer of land, with his *statutes*, his *recognizances*, his *fines*, his *double vouchers*, his *recoveries*. Is this the fine of his fines, and the recovery of his recoveries, to have his fine pate full of fine dirt? Will his *vouchers* vouch him no more of his purchases, and double ones too, than the length and breadth of a pair of *indentures*? The very conveyances of his lands will scarcely lie in this box, and must the inheritor himself have no more, ha?
>
> (5.1.78–89, emphasis added)

For years, critics dismissed the "skull of a lawyer" speech as merely a mishmash of random legal terms. J. Anthony Burton, however, shines a spotlight on this previously underappreciated passage and explains how the speech ties in with the theme of lost inheritance that Shakespeare has woven into the plot since the first scene:

> The legal terms in this passage . . . all describe elements of collusive lawsuits and procedures commonly used to defeat the rights of heirs in order to facilitate sales of real property by the present owners. In the vocabulary of these actions, a *fine* ("final concord") ended a lawsuit in which the defendant defaulted by prearrangement; it was "final" because it concluded the rights of all interested persons, and not just the parties to the action. The legal record of the *fine* was an *indenture*. The *recovery* (or common recovery, because its most frequent use was in collusive actions) was more expensive and more secure: it required a law suit to proceed through all its stages (with substantial

> court fees for each party), upon pleadings which made ownership turn on the existence of a supposed warranty of title by a judgment-proof third party (usually the court bailiff) who was brought in as a witness by a *voucher*, but always failed to appear and testify. When there were multiple entails, fictitious witnesses were vouched in for each one; a *double voucher* added a second layer of protection to the rights acquired by the buyer, and so forth. A *recognizance* was a judicial acknowledgement of debt; and although not a lawsuit, it also lent itself to collusive misuse by placing a priority lien on the lands of the person giving it without requiring any proof that the obligation existed. A *statute* was similar, except that the acknowledgement of debt was not made in a court but before a mayor or chief magistrate. Hamlet's reference to *cases* and *tricks* embraces the entire arsenal of devices for leaving the inheritor with nothing at all.[53]

As Hamlet says, "and must the inheritor himself have no more, ha?" Claudius' legal shenanigans could mean that Hamlet's grave will be the only land Hamlet ever possesses. One might think that a court would see through Claudius' schemes and award Hamlet's inheritance to him. But this would overestimate the logic and predictability of the legal system: seemingly clear rules were often sidestepped through legal fictions. For example, the Statute *De Donis*[54] of 1285 expressly required "entailed" estates to remain within the family line. The inheritor could not sell or give away his estate; on his death it had to go to his lineal descendants. But the "fine and recovery" that Hamlet decries in the "skull of a lawyer" speech became a standard legal ruse for getting around the Statute *De Donis* and depriving heirs of their inheritance.

Still, one might ask: how did the litigants who used "fine and recovery" to defeat the rights of inheritors manage to fool the judges? The answer is that they didn't fool them. The judges knew exactly what was going on and were complicit in the deception.[55] Likewise, Claudius could, through a combination of questionable legal claims, brute force in the form of his guards, the intimidating power of the divinity that "doth hedge a king" (4.5.121), and the blessing of *Hales v. Pettit*, keep any claim by Hamlet tied up in court for years.[56]

F. Shakespeare's Legal Knowledge

As with the law of homicide, the author of *Hamlet* shows a detailed knowledge of the law of property and an ability to weave it subtly into the text of the play. Again, this is evidence of formal legal training. Additionally, the author's knowledge of *Hales v. Pettit* suggests that he was familiar with Law French, the corrupted form of Norman French that was the primary language of the English legal system.[57]

In Shakespeare's day, only two summaries of the *Hales* case included the court's holding regarding simultaneous claims: (1) the handwritten notebooks of the chief judge, Sir James Dyer,[58] and (2) Edmund Plowden's reports.[59] Both were written in Law French, a language not known to have been taught in the Stratford grammar

school. Dyer's reports were copied by hand and passed around in legal circles, but it is difficult to imagine how they might have come into the hands of a sometime actor from Stratford. They were finally translated into English and published in the 20th century.

Plowden's Reports were in published form in Shakespeare's time, but still not likely to be read outside of legal circles. Plowden's report on *Hales* is much longer and more legally dense than Dyer's (some sentences in the Plowden report are almost a page long), making it a difficult read for a mind lacking legal training, not to mention knowledge of Law French. Edward de Vere studied law at Gray's Inn, where Sir James Hales had been a member. It is possible that the lawyers there often discussed the *Hales* case, not only for its legal significance, but also for its connection to one of their own. De Vere would have thus been in a better position than the Stratford man to know about the case.

G. Oxford's Lost Inheritance

We have seen evidence in the plays of Shakespeare's legal training.[60] In addition, Shakespeare's works contain many correlations to Edward de Vere's life.[61] Both add to the considerable body of circumstantial evidence suggesting that de Vere was the real Shakespeare. De Vere has been caricatured as a profligate who misspent his family fortune in a life of luxury, but recent research by Nina Green reveals another side of the story and an additional connection between de Vere's life and *Hamlet*. Much of de Vere's family fortune was siphoned off into the purses of people who were ostensibly protecting him or his family.[62]

As Green explains, the trouble began in 1548, two years before de Vere was born. The Duke of Somerset, then Protector of the Realm during Edward VI's minority, abused his powerful position to extort most of the family lands from de Vere's father, the 16th Earl of Oxford, under the pretext of a marriage contract for the Earl's daughter.

Since the Oxford estate was entailed, and therefore by law required to remain within the Oxford bloodline,[63] Somerset had to resort to some fancy legal footwork to undo the entailment. He forced the 16th Earl to enter into an *indenture* and a *recognizance* binding the Earl to marry his daughter to one of Somerset's sons and to transfer the lands of the Oxford earldom to Somerset by means of a *fine*, i.e., a "final concord" of the kind that concluded collusive lawsuits depriving heirs of their inheritance. Thus, Somerset's actions exemplify the very type of behavior, and employ many of the same legal devices and terminology, that Hamlet rails against in his "skull of a lawyer" speech.

The damage to the Oxford estate was only partially undone by two private Acts of Parliament in 1552, after Somerset fell from power and was beheaded. For reasons that are not entirely clear today, the lands emerged from the legal maneuverings as no longer entailed, but as held by the 16th Earl of Oxford in trust.

Ten years later, in 1562, the 16th Earl died unexpectedly, shortly after having contracted a future marriage for his then twelve-year-old son, Edward de Vere. Because the intended bride was to be one of the Hastings sisters of Sir Robert Dudley's wife's

family, the 16th Earl appointed Dudley (later Earl of Leicester, and Queen Elizabeth's longtime favorite and reputed lover) as one of three trustees who would hold the lands of the Oxford estate in trust. The 16th Earl also named Dudley as a "supervisor" of his estate under a will that he wrote only five days before his death.

Dudley's appointments as trustee and supervisor left him with enormous power over the estate of Edward de Vere, who was now the 17th Earl of Oxford, but a ward of the Queen until age 21. Dudley was not rich at the time, but the 16th Earl's death and Dudley's positions as trustee and supervisor gave Queen Elizabeth an excuse to grant Dudley the Oxford lands during de Vere's wardship.

Green details how Elizabeth gave the predatory Dudley more power over the Oxford estate than the law allowed. Dudley quickly rose in prominence, becoming the Earl of Leicester in 1564. De Vere's lands appear to have been mismanaged under Leicester's stewardship, and the Queen repeatedly favored Leicester's financial interests over de Vere's.

An anonymous book, later known as *Leicester's Commonwealth*, was published in 1584, accusing Leicester of being an expert poisoner with designs on the crown. Might Leicester thus be a partial model for King Claudius, who poisons his brother to gain the crown? Is it possible that Leicester poisoned the 16th Earl of Oxford for his lands? "'A poisons him i' th' garden for his estate" (3.3.248), as Hamlet says during the Mousetrap performance. Note that Hamlet says, "estate," not "crown" or "queen." We will probably never know the truth about the 16th Earl's death; but, as Green notes, if de Vere even suspected Leicester of having a hand in his father's death, casting Leicester as the rapacious, poisoning villain in the greatest play of all time would be a suitable revenge. What is certain is that Leicester spoiled de Vere's inheritance, just as Claudius usurped Hamlet's.

And if there is something of Leicester in Claudius, there may be something of Queen Elizabeth in Gertrude.[64] When the twelve-year-old Edward de Vere became the Queen's ward in 1562, her legal position towards him was analogous to that of a mother to a son. A mother would be expected to do all she could to preserve her son's inheritance, but the doting Queen was so eager to advance Leicester that she was blind to de Vere's well-being.

Similarly, Gertrude rushed into a marriage with the smooth-talking Claudius, almost oblivious to the fact that her hasty marriage seriously jeopardized Hamlet's hopes of inheritance. Perhaps the closet scene, in which Hamlet turns Gertrude's eyes into her "very soul" (3.4.95), is de Vere's fictionalization of the frank talk he always wanted to have with Queen Elizabeth ("Mother, you have my father much offended" [3.4.10]), but never could because his advancement depended so much on her good favor.

IV. Hamlet's Imperfect Justice

Legal scholars have studied *Hamlet* not only for its understanding of substantive law; they have also considered its implications regarding the broader issues of law and justice. Daniel Kornstein and Richard Posner, for example, have analyzed *Hamlet* as

an instance of revenge literature. Kornstein notes that the law may benefit society as a way of channeling the passion of revenge, which might otherwise go unchecked. He cites Francis Bacon, who said, "Revenge is a kind of wild justice, which the more man's nature runs to, the more ought law to weed it out."[65]

Kornstein is one of the few commentators to suggest that Hamlet's delay in avenging his father's death is not a sign of cowardice or indecisiveness, but rather a noble sign of resistance to the primitive urge for revenge. Hamlet should elicit our respect because he does not sweep to his revenge in the unquestioning way that Laertes and Fortinbras pursue theirs. "The outcome of Hamlet's war with the primitive moral code is less important than the war itself," writes Kornstein. "The crucial point is that Hamlet was won to the side of violence only after a long inner struggle."[66]

Richard Posner, a judge of the U.S. Court of Appeals and a leading light of the "law and economics" discipline, notes that private revenge is not a cost-effective system. The net benefits of exacting revenge seldom outweigh the costs of time and effort spent on it, not to mention the increased chance that the friends and family of the object of one's revenge will retaliate against the revenger.

Posner notes that there can be no better illustration of the costliness of revenge than the unnecessary deaths of so many more-or-less good people in *Hamlet*. Although Claudius says, "Revenge should have no bounds" (4.7.133), the play demonstrates that it should. Posner argues that *Hamlet* represents Elizabethans' ambivalence toward revenge, based on the New Testament's rejection of it. "But if so sympathetic, so ultimately admirable a character as I think we are intended to find Hamlet . . . cannot negotiate the shoals of a revenge culture, it tells us a lot about such a culture."[67]

Both Kornstein and Posner find a lawyer-like quality in Hamlet's reflectiveness, his ability to see both sides of an issue, a trait found in outstanding legal minds. Posner sees the "To be, or not to be" soliloquy as epitomizing "the mind in equipoise."[68] Like a good lawyer, Hamlet does not merely accept the Ghost's word that Claudius killed his father: he seeks additional evidence.

Kenji Yoshino, a professor at New York University Law School, sees Hamlet's attempt to corroborate the Ghost's story as part of Hamlet's intellectual commitment to "perfect justice."[69] Yoshino makes Hamlet's delay in exacting revenge intelligible by pointing out that there are really two delays, both attributable to Hamlet's quest for perfect justice.

First comes the guilt phase, in which Hamlet must convince himself of the Ghost's truthfulness. Elizabethan audiences would have been instinctively skeptical of any ghost, knowing it might be a manifestation of the devil. Hamlet finds Claudius guilty by the evidence of his reaction to the Mousetrap performance. So far, so good. Hamlet knows he will not be taking revenge on an innocent man.

Next comes the punishment phase. But here again, Hamlet wants it to be perfect: the punishment must exactly match the crime. Hamlet forgoes the chance of killing Claudius at his prayers because Claudius, who had sent Hamlet's father to purgatory, would then be sent to heaven. As Yoshino says, "Perfect justice requires not just a life for a life, but a soul for a soul."[70]

Hamlet's perfect justice comes at the end, as Gertrude dies and Laertes reveals

Claudius' treachery. Knowing his own death is near, Hamlet must act immediately. By stabbing Claudius and then making him drink poison, Hamlet achieves poetic justice in having Claudius die by the same means as himself (poisoned sword) and Gertrude (poisoned wine), while ensuring that Claudius will not be saying any prayers that might get him into heaven. Because the poisoned sword and wine were Claudius' own traps for Hamlet, the poetic justice is all the more complete, as Claudius is "Hoist with his own petar[d]" (3.4.222).

But Hamlet's "perfect" justice comes at great cost: the many deaths, including Hamlet's, that would not have occurred if he had acted more swiftly. Yoshino criticizes Hamlet for adhering so stubbornly to his intellectual vision that he loses sight of the consequences to others. Hamlet's wild justice is a warning to all that revenge is never so sweet in the tasting as in the anticipation.

Conclusion

Laurence Olivier said of *Hamlet*, "You can play it and play it as many times as the opportunity occurs and still not get to the bottom of its box of wonders."[71] This analysis has attempted to show that, by exploring the rich legal ore in *Hamlet*, we may better understand the great debt that this wonder of a play owes to the subject of law. But if *Hamlet* can inspire legal scholars such as those cited here to consider the deeper meanings of law and justice, then it is a debt that *Hamlet* continues to repay.

Endnotes

[1] See, e.g., Ramon Jiménez, "The Case for Oxford Revisited," *The Oxfordian*, 11 (2009): 45–64, http://shakespeareoxfordsociety.wordpress.com/2011/03/08from-the-oxfordian-excellent-article-summarizing-the-case-for-oxford-as-shakespeare-now-available-online/; Mark Anderson, *"Shakespeare" by Another Name: The Life of Edward de Vere, Earl of Oxford, the Man Who Was Shakespeare* (New York: Gotham Books, 2005); Joseph Sobran, *Alias Shakespeare: Solving the Greatest Literary Mystery of All Time* (New York: Free Press, 1997); Richard F. Whalen, *Shakespeare—Who Was He? The Oxford Challenge to the Bard of Avon* (Westport, CT: Praeger, 1994); Charlton Ogburn, *The Mysterious William Shakespeare: the Myth and the Reality* (New York: Dodd, Mead & Co., 1984); J. Thomas Looney, *"Shakespeare" Identified in Edward de Vere, the Seventeenth Earl of Oxford* (New York: Frederick A. Stokes Co., 1920).

[2] R.S. Guernsey, *Ecclesiastical Law in Hamlet: The Burial of Ophelia* (New York: Brentano Bros., 1885), 5.

[3] Quotations from *Hamlet* are from the soon-to-be-published Oxfordian Shakespeare Series edition, Jack Shuttleworth, editor (Truro, MA: Horatio Editions, 2012). A condensed version of this article appears in the Oxfordian edition.

[4] The English antiquarian, Thomas Hearne (1678–1735), left orders that his grave be made "straight" east and west, by a compass. T.F. Thiselton Dyer, *Folk-lore of Shakespeare* (London: Griffith & Farran, 1883), 359.

[5] Samuel Johnson interpreted "straight" as east–west in his 1765 edition of *Hamlet*. Many modern editions define "straight" merely as "straightaway," "immediately," or the like.

[6] Guernsey, 43–44.

[7] Guernsey, 45.

[8] Thomas Glyn Watkin, "*Hamlet* and the Law of Homicide," *Law Quarterly Review*, 100 (1984), 282–310.

[9] 6 Edw. I, c. 9 (1278).

[10] Edward Coke, *Third Institute* (London, 1641), 47.

[11] 1 Edw. VI, c. 12 (1547) ("[A]ll willful killing by poisoning of any person or persons . . . shall be adjudged, taken, and deemed willful murder of malice prepensed

[aforethought].") (spelling modernized).

[12] 1 Jac. I, c. 8 (1603–04) ("[E]very person . . . which . . . shall stab or thrust any person or persons that hath not then any weapon drawn, or that hath not then first stricken the party which shall so stab or thrust, so as the person or persons so stabbed or thrusted shall thereof die . . . although it cannot be proved that the same was done of malice forethought, yet the party so offending, and being thereof convicted . . . shall . . . suffer Death as in case of Willful Murder.") (spelling modernized).

[13] Coke, 55.

[14] Saxo (Grammaticus), "Amleth, Prince of Denmark," in *The Danish History of Saxo Grammaticus* (c. 1185), trans. Oliver Elton (London: David Nutt, 1894).

[15] As legal commentator William Lambard wrote, "And if a man lay poison for rats, and another taketh it unawares, and die thereof, this is not any ways to be laid to the other's charge." *Eirenarcha* (London, 1581), 218, quoted in Watkin, 300 (spelling modernized).

[16] François Belleforest, "The Hystorie of Hamblet" in *Histoires Tragiques* (1570), trans. anon (London, 1608).

[17] In Belleforest's French version (1570), the counselor hid under a quilt; in Saxo's Danish version (c. 1185), he hid in some straw. The anonymous English translator of Belleforest, in 1608, modified the story to follow Shakespeare's version (1603–04) by placing the counselor behind an arras and having Hamlet cry, "A rat! a rat!" Thus, the placing of Polonius behind an arras appears to be Shakespeare's original device. Israel Gollancz, *The Sources of Hamlet* (London: Oxford University Press, 1926), 319–20.

[18] Watkin, 309.

[19] Coke's fourth type of poisoning was "*anhelitu*, by taking in of breath, as by a poisonous perfume" (Coke, 52).

[20] Members of the court cry out that Hamlet is guilty of treason for killing the King, but they are unaware that Claudius himself was a traitor for killing his brother, the previous king. Hamlet could have argued that killing a traitor is not treason.

[21] Watkin, 307.

[22] Daniel J. Kornstein, *Kill All the Lawyers? Shakespeare's Legal Appeal* (Princeton: Princeton Univ. Press, 1994), 104.

[23] The National Archives KB 9/619, Part 1, Item 13 (trans. Nina Green).

[24] In a sense, the gravedigger backs into the truth of the matter because suicide is in fact self-offense.

[25] In Shakespeare's *Julius Caesar* (5.5), Brutus commits suicide by running on his own sword—held, at Brutus's request, by Strato. But Brutus, in defeat, was acting on his Roman sense of honor. We have no reason to believe that Brincknell was acting on such motives.

[26] Watkin, 291.

[27] Anderson, 37.

[28] Watkin, 310.

[29] J. Anthony Burton, "An Unrecognized Theme in *Hamlet*: Lost Inheritance and Claudius' Marriage to Gertrude," *The Shakespeare Newsletter*, 50 (2000–2001): 71–106.

[30] In keeping with an awareness of the ubiquity of property themes in the play, the Oxfordian edition follows Burton and others in preferring the First Folio's "landless" to the Second Quarto's "lawless."

[31] Audiences in Shakespeare's day would have found Gertrude's behavior shocking: widows were expected to mourn their husbands for at least a year. Carla Spivack, "The Woman Will Be Out: A New Look at the Law In *Hamlet*," *Yale Journal of Law and the Humanities*, 20 (2008), 45.

[32] C.C. Langdell, "Classification of Rights and Wrongs," *Harvard Law Review*, 13 (1900): 544 ("Another ancient instance is the duty imposed by the common law upon the heir of a deceased person to assign dower to the widow of the latter. Here, again, the enforcement of this duty was the widow's only resource, as the title to all the land of which her husband died seized vested in the heir, both at law and in equity.").

[33] Burton, "An Unrecognized Theme in *Hamlet*," 82, note 17.

[34] "*De facto*" means, "Actual; existing in fact; having effect though not formally or legally recognized;" "*de jure*" means, "Existing by right or according to law." *Black's Law Dictionary*, 9th ed. (St. Paul: West Publ., 2009), 479, 490.

[35] Possession is one of the most important, but also one of the most ambiguous concepts in law. "In common speech a man is said to possess . . . anything of which he has the apparent control, or from the use of which he has the apparent power of excluding others." Possession does not necessarily coincide with legal title or ownership. Frederick Pollock and Robert Samuel Wright, *An Essay on Possession in the Common Law* (Oxford: Clarendon Press, 1888), 1–2.

[36] The Statute of Uses, 27 Hen. VIII, c. 10 (1535), required waiver of dower in exchange for a jointure.

[37] Burton, "An Unrecognized Theme in *Hamlet*," 104, notes 7, 8.

[38] *Black's Law Dictionary*, 915.

[39] Sue Sheridan Walker, "Litigation as Personal Quest: Suing for Dower in the Royal Courts, circa 1272–1350," in *Wife and Widow in Medieval England*, ed. Sue Sheridan Walker (Ann Arbor: Univ. of Mich. Press, 1993), 81–108; Eileen Spring, *Law, Land, & Family: Aristocratic Inheritance in England, 1300 to 1800* (Chapel Hill: Univ. of N.C. Press, 1993), 49.

[40] After the Statute of Uses (1535), the jointure was usually calculated so as to be worth 10% to 20% of the value of the marriage portion, i.e., the wealth that the woman brought to the marriage from her own family. The value of the husband's lands, which could be great, dropped out of the equation. Spring, 49–58. A woman who accepted a jointure would know at the time of marriage

exactly which lands would comprise her jointure. If she took dower instead, she couldn't be sure which lands she would get until after her husband's death. Even then, she might have to go to court to get her dower. Consequently, a woman was often willing to trade the potentially valuable, but uncertain, dower for the less valuable, but known, jointure.

[41] A widow's dower rights were interpreted to include a claim to one-third of the lands her husband owned during his life, *even lands he had sold*. Janet Senderowitz Loengard, "*Rationabilis Dos*: Magna Carta and the Widow's 'Fair Share' in the Earlier Thirteenth Century," in *Wife and Widow in Medieval England*, ed. Walker, 62–68. Buyers were therefore hesitant to buy lands that might later be subject to a widow's dower claim. But if the wife had already waived her dower rights, buyers could purchase with greater peace of mind. Spring, 48–49.

[42] Note that the penalty for suicide was forfeiture of chattels, i.e., goods, not land. But Hales did not own the land in *fee simple* (i.e., outright ownership), but rather leased it. A lease was considered a *chattel real*, which was inferior to a real property interest. Thus, it was subject to forfeiture along with other "chattels."

[43] Spivack argues that Ophelia's burial represents an inversion of the *Hales* case: whereas in *Hales*, a male's suicide leads to his forfeiture of land to a female monarch, Ophelia's suicide and burial "allow Hamlet to reclaim his kingdom and identity through a symbolic forfeit of land by the female Ophelia." Spivack, 35, 58–60.

[44] *Hales v. Petit*, 1 Plowden 253, 258, 75 Eng. Rep. 387, 395 (C.B. 1562).

[45] *Hales v. Petit*, 1 Plowden 253, 259, 75 Eng. Rep. 387, 397 (C.B. 1562).

[46] Burton, "An Unrecognized Theme in *Hamlet*," 71. Shakespeare satirizes the lawyers' arguments and the court's reasoning in the first gravedigger's further explanation: "If the man go to this water and drown himself, it is, will he, nill he, he goes, mark you that. But if the water come to him and drown him, he drowns not himself; argal [ergo], he that is not guilty of his own death shortens not his own life." (5.1.12–15).

[47] *Hales v. Petit*, 1 Plowden 253, 262, 75 Eng. Rep. 387, 401 (C.B. 1562).

[48] *Hales v. Petit*, 1 Plowden 253, 264, 75 Eng. Rep. 387, 404 (C.B. 1562).

[49] For example, Federal Rule of Civil Procedure 15(c), allows that an amended pleading may be treated as if filed at the same time as the original pleading, even if the amended pleading is filed after the statute of limitations has passed.

[50] My analysis diverges here from my earlier interpretation in "Could Shakespeare Think Like a Lawyer? How Inheritance Law Issues in *Hamlet* May Shed Light on the Authorship Question," *University of Miami Law Review*, 57 (2003): 377–428, and from Burton's interpretation, both of which posit that Claudius' and Hamlet's claims arise when Gertrude marries Claudius. I believe my current interpretation is more in line with English custom and law. See Langdell, *supra*, note 32.

[51] Spivack, 52–53.

[52] John Lord Campbell, *Shakespeare's Legal Acquirements Considered* (New York: D. Appleton and Co., 1859), 104.

[53] Burton, "An Unrecognized Theme in *Hamlet*," 104 (emphasis added).

[54] 13 Edw. I, c. 1 (1285).

[55] Thomas F. Bergin and Paul G. Haskell, *Preface to Estates in Land and Future Interests*, 2nd ed. (Brooklyn: Foundation Press, 1984), 31–32.

[56] In a separate article, Burton discusses Laertes' concerns that Claudius may be attempting to usurp Laertes' inheritance as well as Hamlet's. J. Anthony Burton, "Laertes's Rebellion as a Defense of His Inheritance: Further Aspects of Inheritance Law in *Hamlet*," *Shakespeare Newsletter*, 52 (2002): 60.

[57] *Black's Law Dictionary*, 964.

[58] *Hales v. Petyt* (1562), *I Reports from the Lost Notebooks of Sir James Dyer* 72, ed. J.H. Baker (London: Selden Society, 1994).

[59] *Hales v. Petit*, 1 Plowden 253, 75 Eng. Rep. 387 (C.B. 1562).

[60] Regnier, "Could Shakespeare Think Like a Lawyer?" 405–28.

[61] See generally, Anderson; see also Sobran, 181–204; Whalen, 85–94, 103–12.

[62] Nina Green, "The Fall of the House of Oxford," *Brief Chronicles I* (2009), 41-95.

[63] Specifically, by the aforementioned Statute *De Donis*, 13 Edw. I, c. 1 (1285).

[64] See Spivack, 37–40, 44–52, for extensive parallels between Gertrude and Queen Elizabeth.

[65] Kornstein, 94, quoting Bacon, "Of Revenge," in *Essays*, 18.

[66] Kornstein, 95.

[67] Richard A. Posner, *Law and Literature* (Cambridge: Harvard Univ. Press, rev. 1998), 84.

[68] Posner, 83.

[69] Kenji Yoshino, *A Thousand Times More Fair: What Shakespeare's Plays Teach Us About Justice* (New York: HarperCollins, 2011), 185–86.

[70] Yoshino, 201.

[71] Laurence Olivier, *On Acting* (New York: Simon & Schuster, 1986), 76–77.