

# An Everyday Lawyer's Shakespeare

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This summer, I enjoyed a unique opportunity to explore Shakespeare's critique of law with a small group of students and a dear colleague in a study abroad program at the University of Arkansas Rome Center. I want to share my reflections on this singularly rewarding experience.

## I. The Background—Why Rome and Why Shakespeare?

Vibrantly aging, monumentally scarred, Rome reminds us how our institutions, especially our political, moral, and legal institutions, progress and regress cyclically, inspiring both hope and despair. What visitor to the Eternal City, standing in the Colosseum or the Forum's ruins or sampling the culture of centuries and millennia past, fails to wonder at this paradox? Great literature too, surviving over centuries, testifies to similar contradictions. What mind trained in law, upon encountering Shakespeare's *Julius Caesar* or *The Merchant of Venice* fails to wince as the playwright indicts our political, moral, and legal institutions for offending liberty, mercy, and justice? Rome and Shakespeare's plays—two great products of human imagination—offer an ideal combination for examining the role of law in Western society and reconsidering law's most fundamental purposes.

Few Arkansans, indeed, relatively few members of the University of Arkansas community, know much about the extraordinary resource our state has in the University of Arkansas Rome Center, located in Palazzo Taverna, one of Rome's oldest palaces. The Center has operated as a University

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program for over thirty years, during which time it has especially served to enrich the Architecture program.<sup>1</sup> Over the years, the Center's academic offerings have expanded to include a broad curriculum. The Center now has programs in Architecture and Design, Fashion Design, Business and Economics, Arts, History and Humanities, and Language. The University's Office of Study Abroad invites faculty from all disciplines to propose summer programs for the Rome Center.

In response to such a request, my friend and colleague, Dr. Joseph Candido, of the University's English Department, and I pitched an idea to offer Law students and Humanities students six credits toward their respective degrees over a five-week summer session. Although we knew of the scholarly overlap between the fields of literature and law, neither of us had previously taught in this interdisciplinary specialty. (While the University of Arkansas School of Law does not regularly offer a course of this nature, some alumni will fondly recall that the inimitable Professor Al Witte taught a popular law and literature seminar for many years after his official retirement and until his death a few years ago.) For our classroom sessions, we selected plays revolving around law, justice, and governmental institutions; for the international experience, we worked with the enthusiastic Rome Center staff to schedule visits for our group to some of Rome's most impressive cultural and legal institutions. Given the University's broad interest in exposing more students to international educational experiences, our proposal received a warm and encouraging reception.

We settled on five plays, one for each week of the session: *Julius Caesar*; *Richard II*; *Henry V*; *The Merchant of Venice*; and *Measure for Measure*. The first three plays raise questions of law as an instrument of society in the broadest sense—how a society uses law (or fails to use it) to establish and preserve the institutions of government. The last two plays target law as an instrument of society in the narrower sense of individual rights, obligations, and constraints in commercial and criminal law contexts. My main purpose here is not to discuss all the legal

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1. General information about the Rome Center is available at [<https://perma.cc/664F-ES4N>].

themes we covered but to explore what we can learn about the practice and administration of law from great literary portrayals of legal systems and institutions in action. I believe these lessons hold as much value for practicing lawyers as they do for students and scholars of literature and law. Part II of this Article provides a broad overview of the legal context of each play, as well as other background on our summer program. Part III offers more specific reflections on selected aspects of each play that raise issues of particular interest to lawyers.

## II. The Plays and the Program

*Julius Caesar* contrasts autocratic and representative forms of government, thereby raising timeless issues of governmental legitimacy, succession in political leadership, and civil unrest.<sup>2</sup> Shakespeare's version of Rome's violent transformation from republic to empire, especially when considered in light of contemporary examples of tyrannical regimes, reinforces the legendary connection between liberty and eternal vigilance.<sup>3</sup> *Richard II* portrays a king deposed as much by his own weakness and banality as by a nobility in revolt.<sup>4</sup> It reveals an evolving relationship between monarch and subjects in medieval England's feudal social structure, highlights the roots of private property rights under our common law system, and exposes political theology and the important connection between religion and law. Our study of legal institutions of government continued with *Henry V*, Shakespeare's account of one of England's most revered political and military heroes.<sup>5</sup> Henry's quest for the French throne reflects a nascent code of war, along with seeds of international law. *The Merchant of Venice* explores law's role in private and commercial matters.<sup>6</sup> While Shakespeare's Shylock

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2. See R.A. Foakes, *An Approach to Julius Caesar*, 5 SHAKESPEARE Q. 259, 259-62 (1954) (analyzing character dialogue to show some prominent themes in the work).

3. Though quoted in one form or another by many great American politicians, the origins of the phrase "eternal vigilance is the price of liberty" came from John Philpot Curran, an eighteenth-century Irish lawyer and politician, in a speech about the necessity of electing local officials. See RESPECTFULLY QUOTED: A DICTIONARY OF QUOTATIONS 200 (Suzy Platt ed., 1992).

4. WILLIAM SHAKESPEARE, KING RICHARD II (Mary Carolyn Waldrep & Jim Miller eds., 2015).

5. WILLIAM SHAKESPEARE, HENRY V (Lerner Publ'g Grp. 2016).

6. WILLIAM SHAKESPEARE, THE MERCHANT OF VENICE (Lerner Publ'g Grp. 2015).

stands for the strict letter of the law, his Portia deploys legal trickery to administer law alternatively with mercy and vengeance. *Measure for Measure* invokes fundamental debates about criminal law, punishment, mercy, abuse of official power, and how the exercise of discretion affects the rule of law.<sup>7</sup> Together these last two plays bring to the fore Shakespeare's obsession with the competing values of certainty and mercy in law.

Of course, our sessions also covered purely literary aspects of each play, such as "characterization, setting, tone, imagery, and symbolism" (as Dr. Candido's syllabus specified). For present purposes, however, I address such considerations only incidentally as they bear on certain legal themes. These important matters of literary art rightfully belong to the domain of my most capable colleague, who presented them with passion and flare, much to the advantage of all of us. I have neither the training nor the aptitude to speak to their role in the program. Instead, I say merely that while anyone interested in the law can learn something from Shakespeare's portraits of law in action, a Shakespearean scholar's guidance opens a door to a far richer experience. I was, accordingly, a student in literary appreciation and, at the same time, a teacher of legal concepts.

In addition to learning about both literature and law, our program had yet a third component, taking place outside the classroom and made possible by our location and educational setting. In a series of Rome tours, as well as during a weekend trip to Florence and Verona, we visited many iconic venues, including the Colosseum, the Forum, the Vatican, and some of the world's most important museums. These events offered the kind of cultural and historical environment that defines the special value of studying abroad. The precious experience of well-planned international travel in an educational program expands a student's outlook and promotes a sense of global citizenship. We visited the Italian Parliament, two international law firms, and the headquarters of the United Nations Food and Agriculture Organization and the United Nations World Food Programme. Additionally, two Italian lawyers on the Center's faculty, as well as a Shakespearean scholar from a major Italian

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7. WILLIAM SHAKESPEARE, *MEASURE FOR MEASURE* (N.W. Bawcutt ed., 1991).

university, volunteered time with us. These special events included a class session on comparative juvenile justice issues, a private tour of ancient ruins not open to the general public, and a live performance adapting scenes from several of Shakespeare's plays to a contemporary soldier's post-war struggles.

Beyond offering our students experiences generally associated with any study abroad program, several of these events contributed to our specific learning objectives. The Forum and other ancient Roman sites, of course, had a tangible connection to *Julius Caesar*. Our stop in Verona, which supplemented the Center's traditional weekend in Florence, held special significance because of the connection to two of Shakespeare's plays (*Romeo and Juliet* and *Two Gentlemen of Verona*). Stephan Wolfert's one-man play, *Cry "Havoc!"*, which we attended at the invitation of Roma Tre University, invoked many famous Shakespearean scenes, and it challenged us to consider Shakespeare's depiction of war in a contemporary context.<sup>8</sup> Visiting two United Nations organizations headquartered in Rome, and especially our afternoon at the U.N.'s World Food Programme, inspired classroom discussions about international legal institutions as instruments of global society. Finally, the meetings at the Rome offices of two international law firms provided ties to the program's review of international and comparative law.

As mentioned, I offer this overview merely as background. Part III develops my heartfelt reasons for writing about this summer's Literature and Law program.

### **III. Drawing on Human Experience to Explore Law as a Social Institution**

Studying great literary treatments of law promises a rare opportunity for a law professor and his students to discuss and debate the most fundamental questions about law as an instrument of society—the kind of big-picture questions that a contemporary law school curriculum necessarily compresses due to the practical demands of learning legal doctrine and the kind

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8. See Laura Collins-Hughes, *Using Shakespeare to Ease the Trauma of War*, N.Y. TIMES (Mar. 9, 2017), [<https://perma.cc/KML6-J8VW>].

of professional luxury for which practicing lawyers and judges can spare even less time as they attend to the pressing demands of clients and cases. I can report, delightfully, that our program delivered on that promise beyond my own high expectations.

Traditionally, the study of Western culture—literature and the other arts, history, philosophy, religion, and ethics, but especially literature that withstands the test of time—figured prominently in the education of Anglo-American lawyers.<sup>9</sup> From before our country's founding, literary stalwarts have influenced our country's leading legal minds. The Bible and Shakespeare influenced eighteenth and nineteenth century lawyers at least as much as did Blackstone.<sup>10</sup> At a time when lawyers earned admission to the bar through apprenticeships, their formal education was firmly linked to the humanities. More recent generations of students, however, have arrived at law school with degrees in any undergraduate discipline, ranging from anthropology to zoology. This transition brought intellectual diversity to law training and it well serves society's needs for legal specialization. Along the way, however, the profession lost some of its shared understanding of the human experience that once came from a common background in great literature.

The law and literature movement offers one way to keep the humanities alive in legal education.<sup>11</sup> Our program explored how Shakespeare depicted law in the five plays we studied, and we debated whether his observations, and especially his implicit criticisms of law, were accurate for the times in which the plays were set and, more importantly, the extent to which they continue to apply today.

The fundamental legal dilemmas that Shakespeare developed in these plays are timeless. Indeed, what makes for great literature is its timelessness—its ability to speak beyond its own era and situation to core issues of human existence. Shakespeare's masterful understanding of the human condition,

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9. See generally Charles R. McManis, *The History of First Century American Legal Education: A Revisionist Perspective*, 59 WASHINGTON U. L. Q. 597 (1981).

10. See, e.g., Madeline Sapienza, *A Little Touch of Shakespeare at the American Bench and Bar*, 22 VT. B.J. & L. DIG. 20, 20-22 (1996).

11. See generally Richard A. Posner, *Law and Literature: A Relation Reargued*, 72 VA. L. REV. 1351 (1986); Richard Weisberg, *What Remains "Real" About the Law and Literature Movement?: A Global Appraisal*, 66 J. LEGAL EDUC. 37 (2016).

coupled with his literary talent, enabled him to encapsulate in a five-act structure some of the greatest problems and challenges that face every human being and every social experience, from love to law.

Part II of this Article mentioned the broad legal and societal problems each of the five plays addresses. This Part extracts from those problems certain conflicts and tensions that continue to plague law in modern societies. As I regularly reminded the students, studying literary treatments of law provides a precious opportunity for briefly setting aside the practical and theoretical aspects of the law to look at universal questions about law and legal systems. These were the issues that dominated our classroom discussions, and they illustrate that law students, lawyers, judges, legislators, and governmental leaders can learn much from great literary engagements with law. To a few of my favorites, I now turn.

*Julius Caesar*, *Richard II*, and *Henry V* challenged us to debate how and how well law and legal institutions can order society politically. Each play raises distinct but related questions about the role of law in governing a complex society.

The first play we studied, *Julius Caesar*, leaves the reader or audience puzzling why and how the Roman Republic failed, especially given the elegance with which Shakespeare's Brutus and Cassius expressed the ideals of freedom and liberty centering the republic's legal structure and, with equal force, pleaded the compelling case for resisting Caesar's strongman rule. Questions much like these remain matters of first principles today.

We debated the disconcerting implications of the play's compelling case for the Roman republic as an abstract ideal, which Shakespeare sets in conflict with the more concrete benefits a strong, unitary, and autocratic leader seemingly promised for the expanding empire. We asked whether better legal institutions, and, in particular, a modern constitutional democracy with its dedication to the rule of law, can secure a government of, by, and for the people against the threat of tyranny. As one might expect, our class discussions tended to assume that Western society has progressed beyond the need for autocratic rule. But doubts remained. What should we make of Caesar's assassination that provoked a civil war, which in turn

exchanged a 400-plus years' experiment in representative government for rule by emperors lasting almost as long? Must we conclude simply that military means can always repeal liberty supported solely by legal institutions? Or, might better-conceived and managed legal institutions have resolved the conspirators' concerns, avoided the breakdown in civil order, and saved the republic? Do the legal institutions of modern constitutional democracies provide adequate alternatives to violence as the means for ousting a popular demagogue? Can Shakespeare's *Julius Caesar*, Mark Antony, Brutus, and Cassius offer any useful lessons for today's political leaders and dissenters?

At a more practical level, we analyzed the funeral speeches that Shakespeare masterfully crafted for Brutus and Mark Antony.<sup>12</sup> We learned to appreciate how those speeches demonstrate principles of effective oral advocacy. In this regard, we found especially useful a trial lawyer's analysis of the orators' display of closing argument skills.<sup>13</sup> While Brutus shows how to defend an unpopular action succinctly, Julius Caesar's steadfast defender Mark Antony illustrates how to persuade a collection of common citizens having the power to decide the case; he effectively demonstrates how to grab a jury's attention and open the jurors' minds with a powerful first line, then he weaponizes the opponent's own words, uses irony and self-deprecation to advantage, drives home a key point with demonstrative evidence (recall that Antony had Caesar's bloody corpse at hand), employs credible passion to build an emotional crescendo, memorably sums up the winning argument, and ends by showing the jury a clear path to the decision for his cause.

For our program's overall objectives, however, what is most important about *Julius Caesar* is that it was, as already mentioned, the first of three plays we used for an extended exploration of law as the foundation of a just society. Because Shakespeare's *Julius Caesar* does not deal directly with the relationship between Roman law and Rome's transition from a

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12. See WILLIAM SHAKESPEARE, *JULIUS CAESAR* act 3, sc. 2 (Lawrence Mason ed., 1919).

13. Peter W. Murphy, *In re Julius Caesar, Deceased: Whoever Wrote "Shakespeare" Knew a Few Things About Closing Argument*, 30 AM. J. TRIAL ADVOC. 71 (2006).



representative form of government to one controlled by an all-powerful emperor, we supplemented the playwright's account with our own review of the characteristics of the legal institutions of the republic. We noted with particular interest that Brutus, Cassius, and the other conspirators had no effective legal recourse to resist Caesar's popular ascension to extra-legal power, leaving them to decide, on behalf of their countrymen, whether Romans would "rather Caesar were living, and die all slaves, than that Caesar were dead, to live all free men?"<sup>14</sup>

With these thoughts in mind, we moved on to a play set 1300 years later in England that presents some remarkable similarities to the competing cases for and against a Caesar-like ruler. *Richard II* depicts a king deposed in part because he disregarded rights fixed in the hearts of English nobility from the time of Magna Carta. According to the play, chief among the king's offenses was his refusal to respect private property rights. Richard's crude manipulations of his royal power prevented Henry Bolingbroke from inheriting his father's title and estate as Duke of Lancaster.<sup>15</sup> For reasons only vaguely suggested by Shakespeare, English law at the time gave Bolingbroke no effective legal forum to protest the forfeiture. Richard's confiscation of Lancaster's property, however, struck a sympathetic chord with other noblemen, who perceived similar threats to their own property rights. This decision, while arguably within the king's legal power, left Bolingbroke in position to mount the uprising that ultimately left Richard in the dungeon at Pomfret Castle and Bolingbroke on the throne as Henry IV.

As a property law professor, I find no better illustration of law as an instrument of society than the history of English land law, which serves as a backdrop to the play's central action. *Richard II* invited me to take the students on a dive into selected aspects of feudal services and incidents and to consider the importance of property law principles to the whole of Anglo-American law. The modern law school curriculum affords but little time to expose the historical and theoretical bases for our property law system. Yet lawyer and citizen alike will scarcely

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14. See SHAKESPEARE, *supra* note 12, at act 3, sc. 2.

15. See SHAKESPEARE, *supra* note 4, at act 2, sc. 1.

appreciate the central place that private property occupies in our democracy without understanding something of the feudal origins of our property law and the important limits on governmental authority over property rights that began with Magna Carta and evolved century after century, ultimately in favor of a propertied class, with such Parliamentary developments as the Statute Quia Emptores, the Statute of Uses, the Statute of Wills, and the Statute of Tenures, to name a few.<sup>16</sup>

In addition to this central reason for including *Richard II* in the program, we also used an important secondary character in the play, the Duke of York, to begin a discussion on legal institutionalists and the concept of the rule of law that we would continue for the balance of the program. York, uncle of both King Richard and of the treasonous Bolingbroke, offers a remarkable instance of a politically influential figure distinguished by a steadfast commitment to the law and legal process and a strict adherence to convention. We used the contemporary label “institutionalist” for this type, found not only in *Richard II* but in one form or another in each of the five plays. Arguably, in *Julius Caesar*, Brutus represents the highest form of institutionalist. However, the class also discovered lesser versions of the type in *Henry V’s* Fluellen, as well as in Antonio as the title character of *The Merchant of Venice*, and in *Measure for Measure’s* Angelo (albeit there with disturbing irony). It was, however, York who best portrayed the institutionalist for our purposes. Employing legalistic maneuvers and subtle rationalizations, York gradually evolved in stages, first as a loyalist who resolutely stands by the duly anointed king despite Richard’s enormous political mistakes and ethical malfeasances, and later as the political actor who invokes legalisms to mediate Richard’s manufactured abdication and who gradually and tentatively switches allegiance to Henry, until he finally manages to convince himself to accept Bolingbroke as Richard’s rightful successor, even being the one to call Bolingbroke to Richard’s throne and hailing “long live Henry, fourth of that name!”<sup>17</sup> Still later in the play, after

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16. See CORNELIUS J. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 21-25 (1962).

17. SHAKESPEARE, *supra* note 4, at act 4, sc. 1.

Bolingbroke has reigned as King Henry IV for a time, York proves himself again to be a consummate institutionalist by placing loyalty to his sovereign over his own family when York discovers his son has conspired against the new king. Who can say, even in the mind of the strongest advocate for the rule of law, where to draw the line between a profile in courage and a lack of humanity?

With *Henry V* we continued seeking after legal institutions that establish and preserve governmental legitimacy and that provide for rightful succession in political leadership, but the play also introduced another fundamental role of law in society. Henry V reigned from 1413 to 1422, a time during which international law, especially a code to regulate the conduct of war among nations, was emerging.<sup>18</sup> The play presents an ideal opportunity to gain a historical perspective on legal principles governing relations between sovereign states.

The play begins as Henry V, whose questionable claim to the throne derived from his father's treasonous ouster of Richard II, solicits and ultimately accepts what we suspect he must recognize as tainted and debatable legal advice to support his own claim to the French throne.<sup>19</sup> Henry consults with two ecclesiastics, the Archbishop of Canterbury and the Bishop of Ely, to decide whether his contemplated invasion of France would constitute a just war. In keeping with English social institutions of the time, these two men functioned not only as religious leaders but also as powerful political figures and trained legal experts qualified to advise the king on such matters.<sup>20</sup> The two churchmen crafted a plausible interpretation of French law to support Henry's ambitions because they knew that a war of conquest in France could provide much needed revenue that they believed would stop a bill pending in Parliament to confiscate church property.

A natural place for us to begin our study of the play was with a lawyer's analysis of the arguments that Henry's legal counselors provided to him. This exercise served triple duty

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18. Theodor Meron, *Shakespeare's Henry the Fifth and the Law of War*, 86 AM. J. INT'L L. 1, 1-4 (1992).

19. See SHAKESPEARE, *supra* note 5, at act 1, sc. 2.

20. See Robert J. Delahunty, *The Conscience of a King: Law, Religion, and War in Shakespeare's King Henry V*, 53 J. CATH. LEGAL STUD. 129, 130-31, 139-42 (2014).

because we could not only debate the questionable reasoning behind the legal advice, but we could also examine the significant conflict of interest that, according to Shakespeare, motivated that advice, and we could advance our understanding of the connection between religion and law that *Richard II* first suggested.<sup>21</sup>

This was, however, only the beginning. Henry's decision to invade France and the decisions he made in conducting the war allowed us to study the origins of international law and the principles of just war as then understood by the Christian countries of Europe, to which modern international law still owes much. The play testifies both to the power and limitations of customs in European international relationships, derived to a considerable extent from the religious beliefs European rulers of the time shared and from a largely unwritten code of chivalry to which the upper military echelons of the distinct societies at least nominally subscribed.<sup>22</sup> As among nations, these forces, unlike the obedience of royal subjects, owed whatever authority they could claim more to a shared belief system and sense of honor than to any institutionalized body of law possessed of effective enforcement power. In this, we saw the notion, if not the reality, of an international rule of law to which sovereign powers might voluntarily conform to help keep territorial chaos in check.

In the end, *Henry V* suggests the hope of an international legal order at the same time that it raises doubts about the very notion of a law of war. Even for those who conclude that the just war theory of the time supported Henry's invasion of France, the play leaves unanswered some disturbing and still timely questions about war crimes. Henry's decisions during the siege of Harfleur and in the battle of Agincourt (where Henry ordered the killing of French prisoners of war) continue to inspire heated debates among international scholars, lawyers, and jurists.<sup>23</sup>

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21. *Id.* at 139-57.

22. *See* Meron, *supra* note 18, at 2-21.

23. *See* Delahunty, *supra* note 20, at 131-37; Meron, *supra* note 18, at 1-2, 16, 21. A 2010 C-SPAN program exploring these issues features three current justices on the U.S. Supreme Court and top lawyers engaged in an imaginary case in which Henry V has been tried for war crimes. *Judgment at Agincourt*, C-SPAN (Mar. 16, 2010), [<https://perma.cc/83R2-XDPV>].

Ultimately, we viewed *Julius Caesar*, *Richard II*, and *Henry V* as a unified series that elicits philosophical discussions about the role of law in governmental institutions over the past two millennia. Each of these plays superficially defends, or at least accepts, a governmental system that vests ultimate control in a strong political leader whose legitimacy depends on fate, God, or simply raw power. *Julius Caesar* poses the unitary leader versus representative government question most directly and in circumstances that may have made the advantages of an all-powerful leader appear obvious to Shakespeare's audience. *Richard II* and *Henry V* add additional strains to the debate by invoking the relationship between religion and law, which undoubtedly made monarchy seem even more inevitable at the time. Yet, Shakespeare wrote in especially turbulent times for monarchy in Europe, and each of these plays tempts the modern reader to wonder whether for Shakespeare, as well as for some members of his audiences, these plays implied only an ambiguous or fatalistic acceptance of the governmental structure of England at the time. Might we read each play as a veiled prayer, uttered in hushed tones to evade the Elizabethan censors, for a political system at least minimally responsive to the will and aspirations of its citizens? One commentator reflecting on the broader implications of these plays argues that they "fit between a classical Aristotelian notion of natural law integrating the individual into a larger society and the later concept of individual rights in a limited, liberal constitutional state."<sup>24</sup> From that claim comes the suggestion "that these plays later had an important role in developing a better governmental system in the succeeding centuries."<sup>25</sup>

On a related, secondary matter, certain subplots in *Richard II* and *Henry V* raise issues about the royal prerogative to choose between the strict letter of the law and a more flexible application of the law, to exercise discretion in enforcing legal rules, and to grant mercy to individuals who violate legal precepts. These issues surfaced repeatedly in these plays; we addressed them especially in the context of several otherwise

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24. C. M. A. McCauliff, *The Right to Resist the Government: Tyranny, Usurpation and Regicide in Shakespeare's Plays*, 14 ILSA J. INT'L & COMP. L. 9, 13 (2007).

25. *Id.* at 16.

unrelated scenes. The first involved King Richard's abrupt and arbitrary decision to pretermite a trial by combat between two noblemen (Bolingbroke being one of them) who accused each other of treason and, instead, banish them both.<sup>26</sup> In another scene from *Richard II*, after Bolingbroke ascends to the throne as Henry IV, he grants his aunt's plea to pardon her son, who has been exposed as a traitor.<sup>27</sup> Next, in an early scene in *Henry V*, the king ostentatiously rejects the advice of three members of his court who press him to enforce the law strictly by punishing a commoner who had insulted Henry.<sup>28</sup> Later, the play twice portrays Henry as an especially merciful military commander. The first incident features Henry's compassionate orders to his victorious army upon entering the defeated town of Harfleur.<sup>29</sup> The other occurs after the Battle of Agincourt, when he pardons a common soldier.<sup>30</sup>

In each of these instances, the circumstances raise doubts about whether the royal motives were more self-serving than merciful. For example, when Richard stopped the trial by combat, he had political reasons for wanting both noblemen out of his way rather than allowing either of the two potentially dangerous enemies to survive the scheduled joust. Likewise, although Henry IV pardoned a conspirator against him at the behest of the traitor's mother (Henry's aunt), he simultaneously and summarily condemned the otherwise indistinguishable co-conspirators to death. We see a similar pattern when, early in *Henry V*, the king tricks three of his advisors into counseling against showing mercy to a commoner who had uttered insults to the king in order to turn those same arguments against them on charges of treason. Much later in the play, Henry's merciful declaration following his victory at Harfleur contrasts with the bloodthirsty warnings of indefensible atrocities that he issued as he threatened to resume the siege unless the town's mayor surrendered unconditionally. Finally, in the case of the disrespectful soldier, Henry's own deception of wandering in

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26. See SHAKESPEARE, *supra* note 4, at act 1, sc. 3.

27. See *id.* at act 5, sc. 3.

28. See WILLIAM SHAKESPEARE, HENRY V act 2, sc. 2 (Gary Taylor ed., 1982).

29. See *id.* at act 3, sc. 3.

30. See *id.* at act 4, sc. 8.

disguise among his men the night before the battle of Agincourt provoked the insults that the king later pardoned.

Thus, these scenes seem to praise the wisdom of a powerful leader who humanizes law with mercy only when taken at face value. On closer examination, each one exposes a tension between law as an objective and constant set of rules and law administered with broad discretion. Is justice through the wise exercise of mercy possible only when those who administer the law operate above it, or is the royal prerogative the antithesis of a just legal system?

In the limited time our program reserved for these first three plays, we simply noted with interest such questions of justice, mercy, and discretion. We paused on the episodes of imperial mercy mentioned above only long enough to recognize the competing principles that often create true dilemmas for any legal system. The last two plays we studied, which focus predominantly on how law affects individuals, allowed us to devote our primary attention to whether and how those who administer the law in specific cases can, and should, exercise discretion or dispense mercy to ameliorate harsh results of clear legal precepts.

Perhaps none of Shakespeare's plays has generated as much reflection on law over the years as has *The Merchant of Venice*.<sup>31</sup> The play's most popular themes for lawyers and legal critics include: the roles of retribution and mercy in a just legal system; the relative benefits and costs of choosing between the letter of the law and contextual considerations when resolving a legal dispute; the inherent ambiguity of words; principles for interpreting contract language; how to resolve two legal rights in conflict; the proper status of commercial law and the sanctity of contract in society; the legal treatment of women, ethnic minorities, and outsiders; the cases for and against dead-hand control of people and wealth by means of a last testament; and the extent to which a lawyer's clever tricks can and should affect legal outcomes. In class, we touched on each of these topics, some primarily as matters for literary criticism and

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31. A search of Westlaw for "Merchant of Venice" reveals over 800 law review articles and 200 cases nationwide that mention the play.

interpretation, others primarily as legal questions, and several as perennial material for both literature and law.

The play places the law-mercy debate at center stage, which it famously develops in the context of contracts and the proper legal ordering of a society that thrives on commerce. Shakespeare exaggerated the problem by inserting the “pound of flesh” term into the bond Shylock ultimately insists the court must enforce to protect the commercial values central to Venetian society.<sup>32</sup> In less sensational ways, however, modern courts continue to struggle to balance the sanctity of contract against harsh contractual terms or seemingly unfair or illogical results.<sup>33</sup> In class, we used the plot, its fascinating characters, and especially the trial scene to debate multiple questions. Must a court interpret a contract strictly according to the words the contracting parties used, without the slightest regard for what the parties must have intended those words to mean? Should the law tolerate or even encourage the kind of rhetorical tricks that Portia, disguised as a respected doctor of the law, successfully employed to relieve Antonio of his burdensome bond and to punish Shylock for refusing the court’s pleas to settle the dispute on reasonable terms? Can a just legal system develop legal principles to strike unconscionable bargains and to interpret enforceable ones flexibly? More broadly, whether for contracts or in other fields, can the law establish an acceptable boundary between rational judicial discretion and arbitrary judicial power?

Portia’s use of legal stunts in service of justice (or at least arguably for that purpose), together with the related problem of tempering the letter of the law with mercy and wise discretion, became our central focus. The play’s depiction of this dilemma furnishes one of the clearest examples of how lawyers, judges, law professors, law students, and anyone else concerned with our legal system can learn from Shakespeare. As many readers of this Article will recall, Shylock, a Jewish moneylender much despised and yet much needed by Venetian society, brought his case to enforce the forfeiture term of the bond given to Shylock

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32. See WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE* act 4, sc. 1 (The Univ. Soc’y 1901).

33. See, e.g., David Campbell, *The Incompleteness of Our Understanding of the Law and Economics of Relational Contract*, 2004 WIS. L. REV. 645 (2004).



by his Christian archenemy, Antonio, to secure repayment of a debt of Antonio's dear friend Bassanio. Because neither Bassanio, as principal, nor Antonio, as surety, was able to pay the debt on the date set in the bond, according to the bond's terms, Shylock could demand a pound of Antonio's flesh.

The court scene begins as Shylock and Antonio appear before the duke who rules in Venice.<sup>34</sup> The duke promptly reveals himself to be a legal institutionalist by announcing he will order the forfeiture if the bond is enforceable under Venetian law. The duke, however, presses Shylock to show mercy by voluntarily accepting a generous settlement offer that Antonio and Bassanio present. Portia, disguised as a learned doctor of the law, appears as the duke's designated legal advisor, performing a function roughly like a court-appointed special master. After reviewing the bond and questioning the parties, Portia advises that the bond is indeed enforceable. In her "[t]he quality of mercy" speech, she eloquently reprises the duke's plea for Shylock to show mercy, yet she recognizes that he has no obligation to do so now that the bond's performance deadline has passed.<sup>35</sup> The duke, constrained by law as expounded by Portia, orders the forfeiture. Just as Shylock raises his knife to Antonio's breast, however, Portia clarifies that the law requires that the bond must be honored strictly according to its precise words, which "doth give thee here no jot of blood[.]"<sup>36</sup> Shylock, realizing that Portia's legal interpretation foils his pursuit of vengeance against Antonio, agrees to settle. But Portia declares it too late for that because the court has already rendered judgment; Shylock may take the pound of flesh, but only if he can secure it without shedding blood; the law affords him no alternative remedy. Next, Portia announces that Shylock must lose all his wealth and must beg the duke's mercy for his very life under the application of obscure provisions of the Venetian code dealing with any alien who threatens the life of a Venetian citizen. Without waiting for a formal request, the duke relieves Shylock of the death sentence, but on conditions that not only

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34. See SHAKESPEARE, *supra* note 32, at act 4, sc. 1.

35. *See id.*

36. *See id.*

still require of him all his wealth, but even his conversion to Christianity.

These radically different versions of justice and mercy for Antonio and for Shylock most likely satisfied Shakespeare's audience, but they settle less comfortably on modern proponents of the rule of law. We might dismiss the play's legal themes by smugly resorting to now-settled doctrines of illegal bargains, unconscionable terms, restitution, and other equitable principles. But the play does not so much ask those who view it from a legal perspective what the law is or might be; rather, it speaks to how ordinary people (whether Shakespeare's audience then or the general public today) see the law. We ended our study of *The Merchant of Venice* with the distinctly uneasy suspicion that many in our own society, including some of the more cynical members of the legal profession, believe that law does not equal justice, no matter whether controlled by letter or spirit and even when it vests discretion in dukes or kings or judges to dispense mercy. What was even more disturbing was our apprehension that Portia's slick tricks portray a common perception of lawyers and the legal process.

Finally, *Measure for Measure* continued our consideration of the law-mercy-discretion dilemma, this time set in the realm of criminal law and official abuse of power and social position. Although the play attracts the attention of scholars in the law and literature field, relatively few legal thinkers outside that specialty know it well, if at all. I will not recount the plot in detail here, but I heartily recommend the play to anyone whose business is law. In brief, *Measure for Measure* troubles its characters and its audience with a series of dilemmas: what should those charged with the administration of law do when accepted social behavior mocks criminal prohibitions (think of today's federal marijuana laws); does the law or the prosecutor punish criminal violations; do moral principles stand above legal ones; who will listen when the politically powerful abuse the politically weak (think of the #MeToo movement); what is, and what should be, the relationship between law, morality, and religion; can we rely on a wise judge over wise laws to serve justice; and finally, does our society have a shared understanding of justice? Our collective responses to these questions were as ambiguous and unsettling as the play's

problematic concluding scene in which forced, threatened, and promised marriages theoretically account for the play's classification as comedy.<sup>37</sup>

*Measure for Measure* served as an especially fitting end to our study of Shakespeare's critique of law because it challenges everyone concerned with law to offer a workable definition of justice itself and demands legal institutionalists to defend their commitment to the rule of law in the face of recurring injustice. Although the play has been used to support widely divergent interpretations about law as an instrument of society, the conventional version sees it "as portraying the tension between law and discretion, between strict and loose construction of laws, between justice and mercy, between law and morality."<sup>38</sup>

### Conclusion

Law and literature, as an interdisciplinary field, best remains in the hands of scholarly specialists. But great literature about law, just as law itself, is too important to leave to the experts. For practicing lawyers, sitting judges, law students, and law professors, great literary explorations of law and legal institutions operate much as do the hypothetical cases law professors constantly use to challenge their students' grasp of legal concepts and their skill in formulating and assessing legal arguments. But unlike those hypothetical questions designed primarily to hone our technical understanding of the law, literature helps to humanize the development, practice, and administration of law. Over my career I have observed one overarching trait in the best lawyers, judges, and law professors I have been privileged to know—the wisdom to see, to assess, and to use law as an ever-improving instrument for the good of society. It is no coincidence, I submit, that an appreciation for great literature heavily influences so many of the very best legal minds. The experience of teaching in the University of Arkansas Literature and Law in Rome program renewed in me a commitment to supplement technical knowledge and practical

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37. See SHAKESPEARE, *supra* note 7, at act 5, sc. 1.

38. Daniel J. Kornstein, *A Comment on Prof. Halper's Reading of Measure for Measure*, 13 CARDOZO STUD. L. & LITERATURE 265, 267 (2001).

experience with great literature that explores legal problems and legal systems through the imaginative devices only the creative arts make possible.