William Shakespeare and the
Jurisprudence of Comedy

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Most people believe that Shakespeare's jurisprudential opinions are all summarized in the bloodthirsty cry: "The first thing we do, let's kill all the lawyers."¹ This essay argues, to the contrary, that Shakespeare's plays illuminate basic facets of our legal experience that the rule-oriented positivist jurisprudence of the twentieth century conceals, providing an alternative approach to legal theory.

Shakespeare, of course, had nothing so pretentious as a "theory" of anything, law included. He wrote plays, not treatises. But those plays present an imaginative picture of social interaction which argues that human passion, not legal rules, must be the starting place for a theory of law: The major task of jurisprudence must be to create legal institutions that transform human passion into a force for social regeneration, rather than to spin out justifications for sterile rules and often violent repression.

It would oversimplify, but not distort, the history of twentieth century Anglo-American jurisprudence to characterize it as having adopted a "statist" conception of law, limiting legal theory to the study of the use of public force through the application of preexisting rules.² This preoccupation with the application of rules has spilled over into constitutional theory, with its ceaseless search for a "neutral" method of articulating and applying constitutional norms.³ Where this rule-oriented approach is least able to explain the data—for instance, in the creation of remedies for violations of equal protection—the tendency

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has been to ignore the data rather than question the theory.  

Shakespeare's "jurisprudence of comedy" would reject both the
statist model's focus on the application of rules and its inattention
to the question of remedy. I hope to demonstrate the Shakespearean
approach by analyzing three of his plays: The Merchant of Venice, Measure for
Measure, and The Tempest. In these plays, we see two possibilities for law:
It can become a tool of apology and unjustified repression, or it can
help bring about social regeneration, successfully fulfilling the twin
goals of liberation and reconciliation.

In Part I of this article, I describe the relation of comedy to law.
Parts II, III, and IV are devoted to a discussion of the plays. Finally, in
Part V, I attempt to apply the insights gleaned from my analysis of
Shakespeare's works to a contemporary constitutional issue: the vexing
problem of race discrimination.

I. THE RELATION OF COMEDY TO LAW

Tragedy and comedy each have a unique dramatic trajectory. While
tragedy follows the protagonist from triumph to defeat, comedy charts
the movement from repression to liberation. Each form also has its
own dramatic focus. Tragedy is concerned with the transformation of
the individual, whose progress from youthful vigor to death follows a
natural rhythm. Comedy, on the other hand, deals with the need for
social regeneration, a process that is often symbolized by the transfer
of control from one generation to the next.

This social focus alone makes comedy more relevant to law than
tragedy. There is, however, another characteristic of comedy that
makes it especially germane to a discussion of legal issues. Tragedy is
ruled by the iron hand of Fate, while comedy is the child of Fortune. Comedy, then, better expresses our postmodernist sensibility, which
rejects the notion that any fixed, preordained order—whether optimis-

4. See Fiss, The Supreme Court, 1978 Term—Foreword: The Forms of Justice, 93 HARV. L. REV. 1
(1979); see also Chayes, The Role of the Judge in Public Law Litigation, 89 HARV. L. REV. 1281
(1976).
7. See id. at 331-33.
8. In The Merchant of Venice, for instance, Shylock and Antonio leave the stage, and therefore
the world, to Portia, Bassanio, and their generation.
9. The "resemblance of the rhetoric of comedy to the rhetoric of jurisprudence has been
recognized from the earliest times." N. Frye, supra note 5, at 166. This is not to say that law
can never have a tragic aspect. Although this article argues from the comic perspective, we
should not forget that law can and often does have tragic potential as well. See the discussion
of Romeo and Juliet, note 65 infra.
10. Compare Romeo and Juliet, act V, scene iii, lines 109-12 (Riverside ed. 1974) ("O here /Will I set up my everlasting rest /And shake the yoke of inauspicious stars /From this worldwearied flesh.") with The Tempest, act I, scene ii, lines 178-84 (Riverside ed. 1974) (describing
how Fortune brought Prospero's enemies to his island).
tic or pessimistic—governs human existence. If law is an attempt to bring a regenerative order to an otherwise chaotic world, then comedy is its fictive analogue.

According to Northrop Frye, Shakespeare's comedies are all of a certain type: They share a 3-stage development, moving from repression to liberation to reconciliation. Thus, at the beginning of the comic action, the representatives of the potential new society—normally young lovers—are blocked by the irrational, repressive laws of their elders. The comic drive reverses the situation, placing the young firmly in control. This reversal comes about not through violence, but through the liberation of the "blocking" characters from the "bad humors" that have caused their repressive behavior. The recognition on the part of blocking characters of the obsessional, mechanical nature of their former behavior leads to some form of reconciliation at the end of the play, normally a wedding scene marking the triumph of fertility over sterility.

Legal theory must help create institutions that can accomplish a comic transformation of American society, fostering liberation and reconciliation. The following analysis of Shakespeare's comedies not only develops this analogous relationship of comedy to law, but also emphasizes how precarious is the balance between legal method that fulfills its comic potential and that which merely accelerates the social cycle of violence and repression.

II. THE MERCHANT OF VENICE

In Frye's sense, The Merchant of Venice must be seen as a failed comedy because the necessary reconciliation never really comes off. The main blocking character, Shylock, is vanquished, not reconciled. For this reason, The Merchant of Venice sounds to the modern ear more like irony than comedy, the Jew an easy scapegoat for Christian violence and greed. Regardless of its ultimate categorization, however, The Merchant of Venice illustrates many of Shakespeare's insights into both human nature and law. It is, therefore, an essential ingredient of any discussion of his "jurisprudence."

13. See note 49 infra.
14. See notes 12-13 supra and accompanying text; see also N. Frye, A Natural Perspective, supra note 12, at 91.
15. Readers who last read The Merchant of Venice in high school might appreciate a short plot summary. Antonio, a wealthy Christian merchant, borrows money from his Jewish adversary, Shylock, in order to finance his friend Bassanio's trip to woo Portia, a wealthy heiress. Shylock only makes the loan on the condition that, if it is not repaid, he is entitled to a pound of Antonio's flesh. The debt is not repaid and Shylock sues on the bond, only to be frustrated by the arguments of the same Portia disguised as a judge-advocate.
A. Law and the Emotive

Portia gives us the bald truth about legal method in the first act of *The Merchant of Venice*:

The brain may devise laws for the blood, but a hot temper leaps o'er a cold decree . . . .16

And, as the play unfolds, the truth of this maxim is demonstrated not once, but three times.

The first, of course, is the famous trial scene, which is often read as a contest between Shylock's "hard" law17 and Portia's "soft" mercy.18 But in truth, law, in the sense of preexisting rules, plays no important role in this scene. Shylock's problem is not sloppy drafting, nor is it lack of precedent to support his case. His problem is that the judge is partial to the defendant and has come to court in an elaborate disguise in order to thwart Shylock's suit. Clearly, Shylock's bond will not be upheld. As the saying goes, it's better to know the judge than the law.

Passion overcomes reason a second time when Bassanio breaks his promise to Portia never to part with his wedding ring. In spite of his protestations to the contrary—"But when this ring / Parts from this finger, then parts life from hence . . . ."19—Bassanio does, in fact, give the ring away, albeit in gratitude and to a disguised Portia. Once again, hot temper leaps o'er the cold decree.

A final example of passion overcoming a preexisting rule involves Portia's promise to adhere to her father's bizarre procedure for choosing her husband. She must accept any suitor, no matter how loathsome, who chooses the right casket. Since there are only three caskets—one gold, one silver, and one lead—and many suitors, this seems to the audience, and one suspects to Portia, a very risky game of chance. Luckily, only her true love, Bassanio, chooses the correct (lead) casket.

17. "I stand here for law." *Id.* act IV, scene i, line 142; *see also id.* act IV, scene i, lines 260-63 (where Shylock cannot practice charity because it is not "in the bond").
18.
The quality of mercy is not strain'd,
It droppeth as the gentle rain from heaven
Upon the place beneath. It is twice blest:
It blesseth him that gives and him that takes.
'Tis mightiest in the mightiest, it becomes
The throned monarch better than his crown.
His sceptre shows the force of temporal power,
The attribute to awe and majesty,
Wherein doth sit the dread and fear of kings;
But mercy is above this sceptred sway,
It is enthroned in the hearts of kings,
It is an attribute to God himself;
And earthly power doth then show likest God's
When mercy seasons justice.
*Id.* act IV, scene i, lines 184-97.
19. *Id.* act III, scene ii, lines 183-84.
Bassanio's choice seems odd because we know that, in explaining to Antonio his reasons for courting Portia, Bassanio first mentions her wealth: "In Belmont is a lady richly left . . . ." He is not a man who in principle prefers lead to gold. One possibility, of course, is that Bassanio is a master psychologist and has seen through the trap set by Portia's father. Yet when all the facts are considered, this reading seems incomplete. Portia is clearly smitten with Bassanio, and she is not by nature passive. If she would masquerade as a judge to aid Antonio, one suspects that she would do much more to obtain the husband of her choice. And the text bears out this suspicion. Portia directs that music be played as Bassanio ponders his choice, and the audience (and Bassanio) hear the following lyrics:

Tell me where is fancy bred,
Or in the heart or in the head?
How begot, how nourished?

All. Reply, reply.
It is engend'red in the [eyes],
With gazing fed, and fancy dies
In the cradle where it lies.
Let us all ring fancy's knell.
I'll begin it. Ding, dong, bell.

All. Ding, dong, bell.21

Note the uncommon number of words that rhyme with "lead," a fact that could be accented in their enunciation.22 Thus Portia, too, is led by passion to violate the terms of her promise.

B. The Apologetic Function of Law

A second contemporary jurisprudential issue adumbrated by The Merchant of Venice is the hegemonic or apologetic function of law. Law is far from always being a sword combating injustice; rather, it is often an important social ingredient in the maintenance of an unjust status quo.23 Injustice that would shock us if stripped to its essence is magically transformed when cloaked in pleasing legal forms. Bassanio, himself an expert on concealing less pleasant motives in pleasing forms, makes this point explicitly:

The world is still deceiv'd with ornament.
In law, what plea so tainted and corrupt
But, being season'd with a gracious voice,
Obscures the show of evil.24

20. Id. act I, scene i, line 161.
21. Id. act III, scene ii, lines 63-72 (emphasis added). This interlude is the only instance in the play where words are put to music.
24. The Merchant of Venice, supra note 16, act III, scene ii, lines 74-77.
The trial scene is just such an "ornament." Earlier I noted that the law, in the sense of preexisting rules, played no important role in Shylock's downfall. This is not to say, however, that the trial scene is not central to the play's dramatic structure. This point can be clearly illustrated simply by narrating the play's events without the trial scene. Imagine that, at the beginning of Act IV, the Duke enforces by decree the same results we find in the actual play's trial scene. He might say to Shylock:

Sir, I find your attempt to enforce a contract for a pound of flesh inhumane. I am not going to enforce it. In fact, I am not going to allow you to retrieve the principal of your loan to Antonio. Instead, I am going to take one-half of all your property and give it to Antonio as an interest-free loan for the rest of your life. I am going to do this despite the fact that Antonio is your sworn enemy who has often spat upon you. At your death, that property will be given to Lorenzo, who against your will eloped with your daughter, who took much of your wealth with her. Lorenzo will also inherit the rest of your property. Finally, it will be required that you convert to Christianity.

We, the audience, would be shocked by such a harsh response to an attempt to enforce what was, after all, a freely bargained contract. Yet our response to the actual play, which enforces this exact result, is joy, not outrage. Our divergent reactions to these two narratives stem from Shakespeare's use of pleasing legal forms in the trial scene. The play's harsh denouement becomes palatable when "season'd" with the law's "gracious voice."

Law also performs its apologetic function in The Merchant of Venice by concealing from the Christians the violence they share with the Jews. In the trial scene, Portia emphasizes the difference between Christian mercy and Jewish revenge. But as René Girard has aptly pointed out, the more strenuously the Christians attempt to differentiate themselves from their Jewish antagonists, the more strikingly similar they appear.

Certainly Antonio and Shylock share more qualities than they admit. Both are middle-aged men of great wealth, wealth connected with Venice's lucrative foreign trade. Moreover, wealth seems to have brought neither Antonio nor Shylock happiness; each is decidedly melancholy. In fact, in a world obsessed with money, Shylock and Antonio stand

25. See notes 17-18 supra and accompanying text.
27. Everyone in Venice, Christian and Jew, displays this obsession. Shylock is the most outspoken in his cry: "My daughter! O my ducats!" The Merchant of Venice, supra note 16, act II, scene viii, lines 15-16; see also id. act III, scene i, lines 83-90, 110-12. But Bassanio's sidekick Gratiano is only slightly more subtle in his boast upon Bassanio's winning of Portia's hand: "We are the Jasons, we have won the fleece." Id. act III, scene ii, line 241. Certainly, the two brides, Portia and Jessica, are under no illusions as to the part money plays in their suitors' proposals. Portia swears to Bassanio:

Though for myself alone
I would not be ambitious in my wish
To wish myself much better, yet for you,
apart in that they are among the few characters who appear driven by motives other than pecuniary gain. It is love for his kinsman Bassanio that leads Antonio to enter into the fateful bond with Shylock. And Shylock refuses great pecuniary gain in order to have his pound of flesh. Asked for some reason for this irrational behavior, Shylock replies:

So I can give no reason, nor will I not,
More than a lodg’d hate and a certain loathing
I bear Antonio . . . .

Further, Antonio and Shylock resemble each other in that they are both quick to anger and capable of violence. Shylock’s violent nature is evidenced by his suit for a pound of flesh; Antonio’s capacity for violence, though less obvious, is not less present in the text. He concedes, for instance, that he spat on Shylock three times—symbolically, perhaps, a more violent act than Shylock’s suit on the bond. This is not the only indication of his virulent hatred of Shylock, who asserts:

He hath disgrac’d me, . . . laugh’d at my losses, mock’d at my gains, scorn’d my nation, thwarted my bargains, cool’d my friends, heated mine enemies; and what’s his reason? I am a Jew.

Finally, in defending himself against the charge of cruelty, Shylock reminds Antonio that he is a member of slave-owning Venetian society:

You have among you many a purchas’d slave,
Which like your asses, and your dogs and mules,
You use in abject and in slavish parts
Because you bought them.

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I would be trebled twenty times myself,
A thousand times more fair, ten thousand
times more rich . . . .

Id. act III, scene ii, lines 150-54. And Jessica delays her elopement to reenter Shylock’s house and “gild [her]self / With some more ducats.” Id. act II, scene vi, lines 49-50.

28. Id. act IV, scene i, lines 59-61. It is interesting to note that both Antonio and Shylock try to divide reality between commercial Venice, where harsh market relations control, and a haven like Belmont, where the law of affection dominates. See Olsen, The Family and the Market: A Study of Ideology and Legal Reform, 96 Harv. L. Rev. 1497 (1983). Yet each finds the distinction unstable. Antonio’s act of love for Bassanio makes him prey to Shylock; Jessica uses her position of affection in Shylock’s heart to deliver herself and his goods to the Christian enemy.

29. See The Merchant of Venice, supra note 16, act I, scene iii, lines 111-13, 130-31.

30. Id. act III, scene i, lines 54-58. Shylock and Antonio vie with each other in the fabrication of racial slurs. In this, they are like the rest of Venetian society: Christian hates Jew and vice versa; everyone disdains blacks. Note Portia’s remark after the Moorish prince chooses the wrong casket: “Let all of his complexion choose me so.” Id. act II, scene vii, line 79. In an earlier scene, Portia manages to playfully slander almost every nationality in Europe, except her own. Id. act I, scene ii, lines 39-99. And later, Launcelot the clown is teased for getting a Moorish slave pregnant. Id. act III, scene v, lines 37-39.

31. Id. act IV, scene i, lines 90-93. The text also makes clear that much of Antonio’s trade is with Africa and Latin America—places which, during Shakespeare’s time, were sites of colonial brutality. Koffler, Terror and Mutilation in the Golden Age, 5 Hum. Rts. Q. 116 (1983).

Nor were the Christians of Elizabethan England immune from the temptations of violence. William Bassett quotes the following orders by an English commander on a raid in Gaelic Ireland in the 1570s:
One might conclude that the only real distinction between the violence of Shylock and Antonio is that Shylock's is raw and open while Antonio's is deeply embedded in and shielded by the legal and social structure.

Venice, then, is a world where passion rather than reason drives the legal engine. But this passion is destructive rather than constructive: Law becomes a tool by which majorities subjugate minorities and by which they conceal their identity with those they scorn and oppress. It is this harsh portrayal of the Venetian world that keeps *The Merchant of Venice* from being a "true" comedy, at least in Frye's sense of the term. Since Shylock is defeated rather than integrated, the necessary reconciliation never takes place. Although—perhaps because—it is not truly comic, this portrayal of law certainly has contemporary descriptive merit. It is not, however, the only potential for law that Shakespeare shows us.

### III. Measure for Measure

Shakespeare, in *Measure for Measure*, provides a "law" play with a truly comic ending. As *Measure for Measure* begins, the Duke of Vienna, leaving on a journey, appoints Angelo as his deputy with authority in his absence to "enforce or qualify the laws / As to [his] soul seems good." The first case to come before Angelo involves Claudio, who, in impregnating his fiancee Julietta, has technically violated the seldom-enforced law against fornication. Angelo, like Shylock, believes the law must be "hard" to be efficacious, and he sentences Claudio to death.

Isabella, Claudio's sister, approaches Angelo to plead for her brother's life. Predictably, she, like Portia, argues for "lawful mercy," but Angelo is obdurate: "It is the law, not I, condemn your brother." At this point, however, the heretofore self-righteous Angelo falls prey

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32. See notes 12-14 *supra* and accompanying text.
33. See text accompanying notes 66-130 infra.
35. See, e.g., *id. act II, scene i, lines 1-4* ("We must not make a scarecrow of the law, / Setting it up to fear the birds of prey, / And let it keep one shape, till custom make it / Their perch and not their terror.").
36. *Id. act II, scene iv, line 112*; see also note 18 *supra* and accompanying text.
37. *Measure for Measure, supra* note 34, act II, scene ii, line 80.
to Isabella’s beauty and/or innocence and offers her a corrupt bargain: He will spare Claudio if she will sleep with him.

Isabella, who is as self-righteous in her chastity as Angelo is in his legality, goes to Claudio to tell him of the tainted offer, confident that “had he twenty heads to tender down / On twenty bloody blocks, he’d yield them up / Before his sister should her body stoop / To such abhorr’d pollution.” Claudio, however, takes a more pragmatic view, arguing that “what sin you do to save a brother’s life . . . becomes a virtue.” Isabella retorts in rage: “I’ll pray a thousand prayers for thy death, / No word to save thee.”

At this point, the Duke reappears disguised as a friar to engineer the comic resolution. He counsels Isabella to accept Angelo’s offer, but conspires to put Angelo’s former fiancee Marianna in her place. Marianna, whom Angelo jilted when her promised dowry did not materialize, still loves him and quickly agrees to the ruse. The Duke/Friar also arranges, without Isabella’s knowledge, to rescind Claudio’s death sentence. After the reprieve has been effectuated and the “bed trick” played on Angelo, the Duke arranges an informal trial where Isabella accuses Angelo not only of soliciting a bribe, but also of violating her virginity. Now Isabella speaks no longer of mercy, but demands “justice, justice, justice, justice!”

After some machinations, Angelo admits his guilt and asks: “[L]et my trial be mine own confession. / Immediate sentence then, and sequent death, / Is all the grace I beg.” The Duke accedes to Angelo’s request, ostensibly to allow the reciprocation of violence:

The very mercy of the law cries out
Most audible, even from his proper tongue,
“An Angelo for Claudio, death for death!”
Haste still pays haste, and leisure answers leisure;
Like doth quit like, and Measure still for Measure.
Then, Angelo, thy fault’s thus manifested;
Which though thou wouldst deny, denies thee vantage.
We do condemn thee to the very block
Where Claudio stoop’d to death, and with like haste.

Of course, the Duke knows that Claudio still lives. His harsh sentence is really given to allow Isabella to plead a second time for mercy, this time for her enemy. She does so, but in a peculiarly unrhetorical way:

Look, if it please you, on this man condemn’d
As if my brother liv’d. I partly think

38. Id. act II, scene iv, lines 180-85.
39. Id. act III, scene i, lines 154-36.
40. Id. act III, scene i, lines 146-47.
41. Id. act V, scene i, line 25.
42. Id. act V, scene i, lines 371-73.
43. Id. act V, scene i, lines 410-19.
A due sincerity governed his deeds,
Till he did look on me. Since it is so,
Let him not die. My brother had but justice,
In that he did the thing for which he died;
For Angelo,
His act did not o'ertake his bad intent,
And must be buried but as an intent,
That perish'd by the way. Thoughts are no subjects,
Intents but merely thoughts.\(^{44}\)

At the play's end, Claudio is reunited with Julietta, Marianna's marriage with the chastened Angelo is arranged, and the Duke proposes marriage to what one supposes is a somewhat surprised Isabella.

Several parallels can be drawn between The Merchant of Venice and Measure for Measure. In each, the spirit of legality is vanquished by mercy. Angelo, the main "blocking" character in Measure for Measure, shares with Shylock the vice of legality. To this he adds lechery where Shylock adds miserliness. There are also parallels between Portia and Isabella. Each turns the tables on the blocking character and each makes a moving rhetorical call for mercy in the face of "hard" justice.

More important, however, are the differences between Isabella and Portia. Portia calls for mercy in the way a defense attorney always will when she has a weak case on the law. But, given the opportunity, she turns on Shylock: "Tarry, Jew, / The law hath yet another hold on you."\(^{45}\) She then goes on to strip Shylock of all his wealth. Isabella, in contrast, manifests in her plea for Angelo's life the mercy that she earlier asked of him. Isabella has been liberated from the self-righteous rigidity that earlier caused her to call for her brother's death.

Though the cause of this reversal is unclear, we sense the importance of Marianna's plea to her. After all, Marianna is much more Angelo's victim than Isabella and still she can forgive. But we also sense that Isabella has experienced the "self-enlightenment"\(^{46}\) that Frye tells us is typical of comedy: She has seen herself in Angelo, recognizing that his self-righteousness mirrors her own and that his lechery is in some ways a more forgivable vice than her own cold indifference to her brother's plea. The curiously unrhetorical quality of her plea for Angelo's life is itself eloquent testimony that it is easier to talk mercy than practice it.\(^{47}\) More important than Isabella's actual words, perhaps, is the fact that she joins Marianna on her knees to make the plea. Unlike

\(^{44}\) Id. act V, scene i, lines 444-53.

\(^{45}\) The Merchant of Venice, supra note 16, act IV, scene i, lines 346-47.

\(^{46}\) N. Frye, supra note 5, at 188; see also note 12 supra; text accompanying notes 12-13 supra.

\(^{47}\) Though it is Isabella, not Portia, who attempts to bridge the all-important gap between thought and action, Portia too recognizes the difficulties inherent in such an attempt. Note, for example, Portia's speech which immediately precedes her declaration that "hot temper leaps o'er a cold decree":

If to do were as easy as to know what were good to do, chapels had been churches, and poor men's cottages princes' palaces. It is a good divine that follows his own
Portia, Isabella’s passion for revenge has been transformed into sympathy, the emotion which Roberto Unger calls the social face of love.\textsuperscript{48} At the end of \textit{Measure for Measure}, the forces of the new society are firmly in control of Vienna, the anti-comic characters are reincorporated into society, and the obligatory marriage festivities are about to commence. The comic action is complete.\textsuperscript{49} However, the simple structure of the play does not allow full exploration of the interaction between the comic goals of liberation and reconciliation and the social need for controlling violence. It is not until \textit{The Tempest}, Shakespeare’s final play, that these ideas are given the complex treatment they deserve.

\textbf{IV. The Tempest}

In \textit{The Tempest}, Shakespeare explores more deeply the connection between justice and reconciliation adumbrated in \textit{Measure for Measure} and introduces the important theme of repression and its justification. Twelve years before the play’s action begins, Prospero, the bookish Duke of Milan, was deposed by his brother Antonio. Prospero and his toddler daughter Miranda were abandoned to die at sea, but miraculously found refuge on a small island. There Prospero rules over a citizenry which consists of his daughter; his servant, the spirit Ariel; and his slave, the monster Caliban.

As the play opens, Prospero, who is also a magician, has raised a storm which drives the ship carrying his old enemies to the island. The play itself follows three groups of the ship’s passengers as they are led about the island by Ariel under Prospero’s instructions. The first group consists only of Ferdinand, son of Prospero’s enemy Alonso and heir to the kingship of Naples. In true comic fashion, Prospero, after suitable trials, matches Ferdinand with his daughter Miranda. The second group consists of the court party, including the villain Antonio, his henchman Sebastian, and Alonso. Ariel first thwarts Antonio and Sebastian’s attempt to assassinate Alonso, and then brings all three to a proper state of penitence for their role in Prospero’s overthrow. The third group consists of the drunken clowns Stephano and Trinculo who, in burlesque fashion, unsuccessfully conspire with Caliban to overthrow Prospero in his island kingdom.

At the play’s end, each group has found its proper comic station.

\textsuperscript{48} R. Unger, \textit{Law in Modern Society} 206 (1976).

\textsuperscript{49} With its comic transformation and festive conclusion, \textit{Measure for Measure}, unlike \textit{The Merchant of Venice}, illustrates the typical structure of Shakespeare’s comedies and romances. For other examples, see \textit{As You Like It}, \textit{All’s Well That Ends Well}, \textit{A Midsummer Night’s Dream}, \textit{Much Ado About Nothing}, \textit{The Taming of the Shrew}, \textit{The Tempest}, \textit{Twelfth Night}, and \textit{The Winter’s Tale} each of which follows Frye’s comic movement from repression to liberation and reconciliation.
Ferdinand and Miranda prepare to wed and lead the new society. Antonio, Sebastian, and Alonso are freed of their anti-comic humors and are thus reincorporated into the new society. Finally, Caliban and his cohorts are safely in custody.

Some critics see Prospero as a symbol of the divine, but I think it more helpful to see him as a judge in the sense that Portia and Isabella "judge" Shylock and Angelo. In fact, the parallel between Prospero's "art" and that of a contemporary judge seems irresistible. Each possesses a form of "rough" magic gained from "secret studies"; Caliban makes clear that Prospero's power, like that of a judge, comes from books: "Remember / First to possess his books; for without them / He's but a sot, as I am . . . ." And Prospero's power, also like a judge's, can be used either to liberate or to imprison. Prospero leaves no doubt in Ariel's mind that his magic can be used punitively: "If thou more murmur'st, I will rend an oak / And peg thee in his knotty entrails till / Thou hast howl'd away twelve winters."

In *The Tempest*, the resolution of the drama is in Prospero's hands. He is the one who must choose between revenge and reconciliation. In truth, his case for revenge is much stronger than that of either Portia or Isabella, neither of whom actually suffered any injury. Prospero, in contrast, was left at sea to die with his infant daughter and has spent twelve years on a deserted island, facts that make his eventual choice of mercy even more moving:

Though with their high wrongs I am strook to th' quick,
Yet, with my nobler reason, 'gainst my fury
Do I take part. The rarer action is
In virtue than in vengeance.

Prospero's decision to choose mercy over revenge seems to be based on a number of factors. First, he, like Isabella, sees something of his own passionate nature in his enemies: "Shall not myself, / One of their kind, that relish all as sharply / Passion as they . . . ." Prospero also seems to realize that his own naive trust in his brother has implicated him in Antonio's evil: "and my trust, / Like a good parent, did beget of him / A falsehood in its contrary, as great / As my trust was, which had indeed no limit . . . ." So too, he is probably influenced by the remorse of his enemies, especially that of Alonso, who pleads: "Thy dukedom I resign, and do entreat / Thou pardon me my wrongs." But one senses, in the final analysis, that it is not only compassion but also "nobler reason" which urges forgiveness, a necessary

52. *Id.* act I, scene ii, lines 295-97.
53. *Id.* act V, scene i, lines 25-28.
54. *Id.* act V, scene i, lines 22-24.
55. *Id.* act I, scene ii, lines 93-96.
56. *Id.* act V, scene i, lines 118-19.
precondition to the installation of the new generation. Ferdinand and Miranda cannot head a new society in which his father, her uncle, is in chains. Revenge is a luxury that Prospero simply cannot afford if his larger plans are to be fulfilled. Instead, he chooses to forget, cutting off Alonso’s apologies: “There, sir, stop. / Let us not burden our remembrances with / A heaviness that’s gone.”

Prospero shows no such gentleness with Caliban, a fact that makes the reader uneasy because it may evidence an unconscious racism. Caliban persuasively argues that Prospero has stolen his inheritance: “This island’s mine, by Sycorax my mother / Which thou tak’st from me.” And Prospero admits that he profits from Caliban’s enslavement: “We cannot miss him. He does make our fire, / Fetch in our wood, and serves in offices / That profit us.” Still, it is possible for Prospero to justify his harsh treatment of Caliban because Caliban is a repeat offender. Prospero claims to have tried to nurture Caliban, only to be betrayed: “I have us’d thee, / (Filth as thou art) with human care, and lodg’d thee / In mine own cell, till thou didst seek to violate / The honor of my child.”

Even then, Prospero accepts responsibility for Caliban’s fate (“[T]his thing of darkness I / Acknowledge mine . . . .” and holds out the possibility of future pardon (“As you look / To have my pardon . . . .”)). Prospero’s handling of Caliban reminds us that violence that cannot be redeemed must at least be controlled. If Prospero seems uneasy about Caliban’s fate, his ambivalence becomes a judge who must wield power with neither vengeance nor naivete. Self-righteousness, like revenge, is a vice to be resisted. As Shakespeare puts it elsewhere: “Be certain what you do . . . lest your justice / Prove vio-

57. Id. act V, scene i, lines 198-200.
58. See O. Mannoni, Prospero and Caliban 106-08 (2d ed. 1964) (describing the relationship between Prospero and Caliban as a symbol of European imperialism in the New World); see also Lawrence, The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism, 39 Stan. L. Rev. 317 (1987) (discussing problem of unconscious racist motivation in constitutional law). For a discussion of the “Caliban problem” in a modern context, see text accompanying notes 94-100 infra.
59. The Tempest, supra note 10, act I, scene ii, lines 331-32.
60. Id. act I, scene ii, lines 310-13.
61. Id. act I, scene ii, lines 345-48.
62. Id. act V, scene i, lines 275-76.
63. Id. act V, scene i, lines 293-94.
64. See the Duke’s description of the judge in Measure for Measure:
He who the sword of heaven will bear
Should be as holy as severe;
Pattern in himself to know,
Grace to stand, and virtue go;
More nor less to others paying
Than by self-offenses weighing.
Measure for Measure, supra note 94, act III, scene ii, lines 261-66; see also notes 51-52 supra and accompanying text (discussing Prospero’s role as judge in The Tempest).
V. THE JURISPRUDENCE OF COMEDY

A. The Uses of Literature

Those trained in the rigors of legal method might respond to the foregoing with the good faith question: "What does this have to do with reality, much less legal reality?" Shakespeare’s comedies do seem quite fantastic if viewed as "case histories." The "casket scene" in The Merchant of Venice and the "bed trick" in Measure for Measure strain our credulity. And The Tempest seems complete fantasy—a world of magicians, fairies, and monsters. It is difficult to believe that these works have any relevance to the gritty reality that "real" judges face.

Yet, in truth, there is much lawyers can learn from literature and particularly from Shakespeare. First, literature provides a good antidote to the rule-centered emphasis of positivist jurisprudence that is so influential in modern legal education. The richness of the literary creation reflects the complexity of human motivation which law’s abstract categories both oversimplify and distort.66 It is impossible to understand Shylock if we limit ourselves to concepts such as "general" and "specific intent" and "reasonable man."67 The element of plot in a literary narrative highlights the dynamic, diachronic quality of social reality which is slighted by the legal paradigm’s emphasis on the application of static rule to freeze-frame fact.68

   In Romeo and Juliet, Shakespeare demonstrates how law, instead of transforming potentially violent passion, can actually be violence’s ally. The play opens with two Capulet retainers plotting how to attack the Montagues without violating the law: "Is the law of our side if I say ay?" Romeo and Juliet, supra note 10, act I, scene i, lines 47-48. When a scuffle occurs, law enters, in the character of the Prince, to lay down the rule: "If ever you disturb our streets again / Your lives shall pay the forfeit of the peace." Id. act I, scene i, lines 96-97. Since the law has contented itself with proclaiming a rule, rather than involving itself in the causes and possible cure of the "ancient grudge" between the two clans, it is not surprising that violence soon erupts and a series of killings occurs. This cycle of violence ends only with the deaths of Romeo and Juliet. Only shared grief can bring the Montagues and Capulets to recognize their common humanity, and to realize too late the sacrificial roles they have forced on their children: "Poor sacrifices of our enmity." Id. act V, scene iii, line 304. And only this tragedy can awaken the Prince to a more comic view of law, one which looks beyond rules and sanctions: Seal up the mouth of outrage for a while,
   Till we can clear these ambiguities,
   And know their spring, their head, their true
descent ....
   Id. act V, scene iii, lines 216-18. The ambiguities of which the Prince speaks are the "brawling love" and "loving hate" which mark our emotional lives, id. act I, scene i, line 176, passions a statist conception of law cannot even understand, much less transform. See Cover, Violence and the Word, 95 Yale L.J. 1601 (1986) (discussing the connection between law and violence).
68. For an enlightening discussion of the importance of action in drama, see M. Nuss-
The study of literature also reminds the lawyer that all interpretation is an active exercise; we must work out the meaning of The Tempest if it is to rise above its improbable plot. And literary works, because of their complexity, insist upon the possibility of more than one interpretation, as the discussion of Prospero and Caliban makes clear. This potential pluralism of interpretations is concealed by positivist jurisprudence's claim to objectivity, which presents the contingent as "natural."\(^{69}\) Literature also undermines legal theory's pretensions to science by overtly appealing to the emotions as well as the intellect. Any study of human relations, law included, that divorces itself from our emotional responses is a sham. In fact, one senses that it is because Isabella and Prospero responded to their ethical dilemmas with more than cold reason that they made the correct decisions.\(^{70}\)

Literature can also show us the illusory quality of what we accept as reality. According to Northrop Frye, Shakespeare used fantastic plots for a purpose—to show us an "illusion more real than reality."\(^{71}\) In The Tempest, the hard-headed pragmatists Antonio and Sebastian find that their plot to assassinate Alonso is illusion. It is Prospero's bag of magic that constitutes the real. Frye argues that it is to warn us of the illusory nature of what we call reality that Prospero makes his famous "dreams" speech:\(^{72}\)

> And like the baseless fabric of this vision,  
> The cloud-capp'd tow'rs, the gorgeous palaces,  
> The solemn temples, the great globe itself,  
> Yea, all which it inherit, shall dissolve,  
> And like this insubstantial pageant faded,  
> Leave not a rack behind. We are such stuff  
> As dreams are made on; and our little life  
> Is rounded with a sleep.\(^{73}\)

Once the hackneyed positivist distinction between "discovering" and "making" law is rejected, one is faced with the modernist realization that the judge, like Prospero, helps create the "baseless fabric" of social reality. The social order is not a preexisting framework to be "discovered," but a cultural artifact of which law is an important constituent.\(^{74}\) Legal interpretation looks not so much for "an intention hidden behind the text, but [for] a world unfolded in front of it."\(^{75}\)

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\(^{69}\) See Gordon, Historicism in Legal Scholarship, 90 Yale L.J. 1017 (1981).

\(^{70}\) See M. Nussbaum, supra note 68, at 312-17.

\(^{71}\) N. Frye, The Myth of Deliverance, supra note 12, at 78.

\(^{72}\) N. Frye, A Natural Perspective, supra note 12, at 159.

\(^{73}\) The Tempest, supra note 10, act IV, scene i, lines 151-58.


\(^{75}\) P. Ricoeur, Hermeneutics and the Human Sciences 93 (1981); see also J. White, The Legal Imagination 859-61 (1973).
And it is the judge's province to help shape that world through legal decisionmaking.

In addition to serving as an antidote to positivism and a reminder of the contingent nature of what we call reality, literature also provides us with powerful imaginative models of alternative realities. Shakespeare's plays are not copies of reality, nor are they blueprints for social reform. They are narratives that possess an aesthetic autonomy. Yet neither are they merely pretty ornaments sealed off from our most basic human concerns. They stand in what Max Black calls an "interactive" relation with society, and one product of that interaction is the illumination of possibilities for social relationships that our hard-headed realism has overlooked. Art, on one level, reflects the society that creates it; on another, it creates the future of that society. It is in this very important sense that law imitates art. Law, like society, is simultaneously reflective and creative—it is truly "such stuff as dreams are made on." The crucial question is which dreams or legal fictions to pursue.

Ironically, Shakespeare also unconsciously teaches us that great artists, like their readers, are vulnerable to the vice of ethnocentric stereotyping. The modern reader of Shakespeare's "comedies" cannot be insensitive to Shakespeare's choice of a Jew to be the villain in The Merchant of Venice or a "primitive" Caliban to be the butt of European jokes in The Tempest. This limitation does not rob Shakespeare's plays of their beauty and wisdom any more than Aristotle's sexism invalidates the contemporary study of his philosophical works, but it should warn us of the tendency toward ethnocentrism in any intellectual effort, including law.

B. Legal Imitation: The Comic Approach

The starting point for a Shakespearean view of law is an insistence on the passionate nature of human beings. The life of the law is not logic, but passion. While the idea of a lawsuit asking for a pound of flesh strikes us as barbaric, Shylock's emotional stance ("If I can catch him once upon the hip, / I will feed fat the ancient grudge I bear him." has a very contemporary ring. In fact, most of the seemingly intractable problems we face today in constitutional law—abortion, gay rights, pornography, prayer in schools, affirmative action—resemble the conflict between Shylock and Antonio in that the narrow legal issue is only a symbol of the much larger passionate struggle, a struggle in which legal rules play a largely instrumental and subservient role. And

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77. M. Black, Models and Metaphors 38 (1962).
78. See C. Geertz, Local Knowledge: Further Essays in Interpretive Anthropology 22 (1983).
80. The Merchant of Venice, supra note 16, act I, scene iii, lines 42-43.
just as a better Venetian commercial code will not cure the hate Antonio and Shylock bear one another, no "neutral principle" exists that will cure the mutual fear and disdain felt by both sides in the abortion debate. The comic jurisprudence would recognize that law that consists merely of a sterile and rational system of rules will only operate in a vacuum. Human law must account for human passion.

The comic view of law would also recognize that moral norms are usually created at the community level, rather than by the state. The jurisprudence of comedy would therefore replace the liberal focus on the relationship between the individual and the state with an emphasis on the relationships between competing moral and legal visions within that state. It would underscore the necessity for the state to mediate through its law between these insular legal universes and thereby mend tears in the larger social fabric. In The Merchant of Venice, for example, the coexisting Christian and Jewish universes incorporate very different views on the lending of money a conflict that, triggered by the foundering of Antonio's ships, rends the social fabric. Law must aim at repairing the fabric, rather than aggravating the tear.

Yet if the state is not the primary creator of social norms, neither is it merely a conciliator or "honest broker" between competing factions. The state also represents a legal tradition with its own demands on insular communities. In particular, it seeks to prevent the more powerful communities from devouring the weaker. It must constantly guard against repression of change aimed at perpetuating the status quo.

Here a comic conception of law would focus on liberation, the continuing need to dismantle the status quo and combat its tendencies toward sterile rigidity and violent repression. In Shakespeare, this liberation never requires upsetting the existing social order, but for contemporary legal theory to accept such a concept of liberation would be a cruel hoax. There is no need for us to accept a sixteenth century royalist's conception of liberation any more than we endorse that century's racism. Shakespeare's expertise is not in politics, but in the depiction of an imaginative model of human interaction; it is our task to draw insights from that model that have relevance to contemporary

81. Wechsler, supra note 3.
82. The traditional structure of a lawsuit, which necessarily creates winners and losers, exacerbates the problem by tempting each group to define its victories in terms of its adversaries' defeats.
83. Thus Isabella responds to Angelo's argument that his decision to execute Claudio is justified: " 'Tis set down so in heaven, but not in earth." Measure for Measure, supra note 34, act II, scene iv, line 49. Rules may work under idealized circumstances, but in the real world attempts to do justice by the rules may prove as heinous as the crime itself.
84. See Cover, supra note 2.
87. For instance, when in The Winter's Tale a prince falls in love with a shepherdess, it turns out that she is in truth a princess who was abandoned as a child. The Winter's Tale, supra note 65, act V, scene ii, lines 1-5, 49-58.
problems. I would urge Roberto Unger’s concept of “empowerment”—a society where no one’s social fate is determined by race, sex, class, or other morally irrelevant factors—as a more ambitious contemporary analogue to Shakespeare’s concept of liberation.88

Finally, the jurisprudence of comedy would urge that there can be no true liberation unless there is also reconciliation with former oppressors. Without reconciliation, the use of violence to subjugate our enemies will either set off another cycle of reciprocal violence89 or succeed in annihilating our enemies, making us the type of society we abhor.90 We must learn to have some forbearance for those whose ideals differ radically from our own. Reconciliation requires, if not forgiveness, at least acceptance, since wrongdoers can only begin to admit their responsibility and make reparation for their wrongs when they are accepted as members of the community.91

Yet reconciliation does not always occur. There remain the Calibans, who reject reconciliation in pursuit of revenge. Caliban replies thus to Prospero’s charge that he attempted to rape his young daughter:

O ho, O ho, would’t had been done!
Thou didst prevent me; I had peopled else
This isle with Calibans.92

We must never ignore Caliban’s claims of injustice, nor dehumanize him. Perhaps his goal is not revenge, but revolution. But neither do we have to uncritically accept his version of reality or remain vulnerable to his hate. There are no happy endings that allow us to escape the need to use power or to rest easily in its use. This is, perhaps, contemporary legal theory’s most perplexing problem: the moral imperative to act without the consolation of certainty that our acts are morally justified. A comic jurisprudence has no final solution to Prospero’s dilemma, which is also our own; but a necessary starting point must be discussions between Prospero and Caliban about their essential sameness and inevitable differences and the moral justifications, if any, for Prospero’s power.93

The contemporary relevance of these issues—the complex, emo-

88. R. Unger, supra note 86, at 584.
91. See J. Westlund, supra note 12, at 31. The suddenness of Angelo’s conversion in Measure for Measure may strike us as unrealistic. Yet Angelo’s change of heart is true to life in that, while we often feel passionately about issues, there is an instability in our passions that permits sudden reversals. Unger points out that while lust is a vice allied to hate, it also contains the seeds of love. R. Unger, supra note 11, at 180-81. So too, art may telescope time; the individual instantaneous conversion we see on the stage may occur over generations in society.
92. The Tempest, supra note 10, act I, scene ii, lines 349-51.
93. I would like to thank John Powell for pointing out to me the necessity for a dialogue on the issues of sameness and difference.
tional nature of human conflict, the need to acknowledge the multiplicity of legal and social realities, the critical roles of liberation and reconciliation—becomes clear when the jurisprudence of comedy is applied to a modern constitutional problem. The following section discusses the issue of racism and equal protection in light of the lessons we have learned from Shakespeare's works.

C. Racism and Comedy

An examination of J. Anthony Lukas' award-winning study of the attempt to desegregate the Boston school system illustrates how a comic perception of law might affect our perception of a contemporary constitutional issue. Lukas' sensitive portrayal of the human dimension of a concrete legal issue not only demonstrates the ineffectiveness of our current approach to equal protection, but also highlights the factors that any successful alternative approach must address.

One of the factors Lukas emphasizes is the variety of perspectives that different legal actors bring to a controversy. To Judge Arthur Garrity, the fight over desegregation in Boston was the story of an attempt by one federal judge to apply the Constitution's rules on equal protection to an all-too-common fact pattern, a metropolitan area segregated by race and class. Arthur Garrity seemed well-equipped for the job: He was a liberal, able Harvard-educated lawyer and a member of the ethnic group—Irish-Catholics—most likely to resist integration. Moreover, Garrity did not have to rely on controversial claims of de facto race discrimination; the plaintiffs were able to document countless acts of old-style de jure race discrimination by the Boston school authorities. Yet Garrity's attempts at reform must be counted a failure. He claimed that his decree was sabotaged by a "hate-mongering fringe" of his own Irish-Catholic community, but a more judicious verdict might be that his statist, rule-oriented approach to law and American liberalism's defensive approach to racism doomed Garrity's project from the start.

Alice McGoff is a prime example of the "hate-mongering fringe" that fought Garrity's decree. McGoff was a bartender's widow who lived with her seven children in a shabby public housing development in Charlestown, one of the neighborhoods into which black students were bused under Garrity's decree. McGoff did fight the decree, but from her perspective it was the hypocrisy of the "two toilet Irishmen" like Garrity, who supported busing in the city while their own children walked to private schools in the suburbs, that caused Boston's problems. McGoff's true anger was directed not at blacks, but at the

95. See notes 67-69 supra and accompanying text.
96. J. Lukas, supra note 94, at 238.
97. Id. at 247.
98. Id. at 269.
Irish-Catholic politicians who used working class whites as scapegoats in order to bolster their own national political ambitions.

If Alice McGoff thought Garrity’s order a betrayal, black families found it a disaster. Lukas describes the lives of the Twymons, a black welfare family in Roxbury whose teenagers were bused to Charlestown High to attend classes with the McGoff children. Rachel Twymon, the mother, saw integration as both a practical necessity and a sign of northern enlightenment. She tried to participate in the desegregation process, only to be repeatedly frustrated. When she attended a meeting of a biracial parents’ council, white parents refused to participate; when she went to Charlestown High for an “open house,” she was greeted with chants of “Niggers, go home!” The experience of Rachel’s daughter, Cassandra, was even more harrowing. She was forced to wait in long lines to pass through metal detectors in order to enter classrooms where white students refused to acknowledge her presence except by racist scrawls on the walls and desks. One day she and her fellow black students were trapped on the upper floors of the school building by a white mob; when she and her black classmates finally escaped, stones hailed down on their buses.

It is tempting for white liberals to dismiss the desegregation process in Boston as a clear example of “hot temper leaping o’er the cold decree” and to abandon the whole enterprise of racial integration as misguided from the start. The comic perspective would reject that reading because, as Charles Lawrence has pointed out, it is self-serving in two ways. First, it allows the white middle class to continue to reap the privileges of race and class at the expense of families like the Twymons. Second, it permits white liberals to accept those privileges while still feeling like heroes, courageous fighters for racial justice who have been frustrated by “racists” like the McGoffs and/or by the inferiority of blacks themselves. Thus, this reading would allow constitutional law to perform the same apologetic function for white Americans that Portia did for the Venetians in The Merchant of Venice, concealing from them their own violence.

Instead of concealing destructive passion, the jurisprudence of comedy would recognize it. In the American racial context, this means confronting racism rather than denying it. Racism is at root whites’ inability to recognize the common humanity they share with members of minority races. Instead of the empathetic response essential to social harmony, the racist renders the minority person, in Ralph Ellis

99. Id. at 288-300.
100. Id. at 299-300.
102. See notes 23-26 supra and accompanying text.
103. See Lawrence, supra note 58, at 350 & n.143; cf. R. Unger, supra note 11, at 100 (discussing the problem of mutual fear and mutual need).
son's memorable term, "invisible," replacing concrete human reality with a projection of the racist's own needs and fears. Racism is more than the acceptance of stereotypes of inferiority. At its most virulent, it labels the minority race as degraded or subhuman; at a minimum it regards minorities as "outsiders," outside the orbit of the majority's empathy.

Derrick Bell has skillfully portrayed this failure of empathy in his "chronicle of the amber cloud." Bell hypothesizes the outbreak of a strange epidemic in American suburbia that turns the skin of upper middle class white adolescents amber in color; its symptoms are a lack of ambition and an ennui that leads only to self-destructive acts.

After a massive research effort, a "cure" is found, but it costs $100,000 per child. America responds to the crisis with her characteristic charity, paying the high price to save her children. Black leaders then request that the same cure be provided to lower class black teenagers in the inner city, who exhibit the same symptoms of apathy and self-destruction because of the effects of racism. White America's response to this hypothetical has been manifested by its indifference to the millions of black teenagers who have grown up since 1954 under their own "amber cloud."

Traditional constitutional law hides racism in three ways. First, the "state action" requirement absolves the state from responsibility for all acts of discrimination that take place in the private sphere. Second, the slick distinction between de jure and de facto discrimination exoner-

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104. R. Ellison, Invisible Man (1952).
    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, warm'd and cool'd 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?

The Merchant of Venice, supra note 16, act III, scene i, lines 59-67. Moreover, racial stereotypes can easily become self-fulfilling prophecies: It is difficult for members of minority groups to resist the cultural stereotypes that define them as inferior and degraded. See Lawrence, supra note 58, at 322, 330. Shylock, for example, enforces his bond in part because he knows the Christians expect it of him: "I have sworn an oath that I will have my bond. / Thou call'dst me dog before thou hadst a cause, / But since I am a dog, beware my fangs." The Merchant of Venice, supra note 16, act III, scene iii, lines 5-7. But see note 115 infra.
107. See R. Unger, supra note 48, at 144 (discussing the distinction between strangers and insiders).
ates state acts that perpetuate racism unless specific intent to injure is proved.\footnote{Freeman, \textit{supra} note 23; see also note 96 \textit{supra} and accompanying text.} Third, the distinction between constitutional liability and remedy allows whites to feel that a particular injury has been remedied by a determination of liability, even if the remedy changes the status quo in no important way.\footnote{See, e.g., Pasadena City Bd. of Educ. \textit{v. Spangler}, 427 U.S. 424 (1976) (constitutional violation deemed remedied even though racial imbalance not cured).}

In contrast, the comic approach would not conceal or dismiss racism, but rather would attempt to address it within a context that allows healing. In many ways, Judge Garrity's condemnation of the "hate-mongering fringe" resembles Angelo's self-righteous condemnation of Claudio for fornication: Both are attempts to avoid guilt by projecting blame onto others. But if liberals like Garrity could join Isabella in recognizing in themselves the vices they spot so easily in others, a dynamic congenial to change might emerge. Alice McGoff might listen to Garrity if she did not think that he was just trying to displace guilt onto her.\footnote{Liberals' own analyses of American history show racism to be a pervasive fact\footnote{See generally E. Genovese, \textit{Roll, Jordan, Roll} (1974).} and about racism and its effects as a present reality.\footnote{See \textit{C. Brown, Manchild in the Promised Land} (1965); \textit{K. Clark, Dark Ghetto} (1965); \textit{E. Cleaver, Soul on Ice} (1968); \textit{M. Little, The Autobiography of Malcolm X} (1965).} We must also admit to ourselves, and persuade blacks, that we perceive our future as a common one. And we must address, by concrete action, the quiet despair with which many blacks face their daily existence.\footnote{Rachel Twymon, for example, was the beneficiary of several liberal reform efforts in addition to school desegregation: She received a welfare grant, lived in public housing, and had received a Small Business Administration loan. But none of these efforts could compensate for the fact that she was a middle-aged black woman with poor health and limited job skills trying to raise seven teenagers by herself in a racist society. Two of Mrs. Twymon's daughters became pregnant at age 13; her other daughter, Cassandra, left high school to live with her 39 year-old married lover. Of the four Twymon boys, three became involved with crime. However, human resiliency and the power of a mother's love should not be underestimated. One son later graduated from college and began studying to be a minister of the United Methodist Church. The other Twymon children also survived adolescence and appear to be making their way in life. See \textit{J. Lukas, supra} note 94, at 653.}

The comic goal in equal protection law must be a two-fold liberation: the liberation of the Twymons from the fetters of class and race, and the liberation of the McGoffs and the Garritys from the "bad humors" of racism and self-righteousness. Whites will have to be the primary actors in this drama. We must educate ourselves about slavery as a historical fact\footnote{Charles Reich has pointed out to me that one problem with litigation in the Boston...} and about racism and its effects as a present reality.\footnote{It would be a mistake to overstate the role that law, especially litigation,\footnote{116.} can play in what is essentially a problem of interpersonal rela-}
tions. However, constitutional law can play an important, if secondary, role as a forum not for recrimination, but for dialogue between different subcultures over the future of our society. Just as Prospero could not escape the problem of Caliban, so judges can never abdicate the responsibility for judgment. They do, however, have the duty to stretch their imaginations to understand minority perceptions of the acts of majoritarian political agencies, and to force those agencies to search for solutions to public policy problems that will not injure minority interests.

The comic perspective would argue further that liberation must be accompanied by a parallel move toward reconciliation, an intentional refusal, like Prospero’s, to dwell on past wrongs. “Noble reason” counsels the need for reconciliation rather than vengeful fury. But it is important to remember that Prospero’s choice for reconciliation came after he had secured power over his enemies; up until then, his anger proved an effective catalyst to action. This underscores an important duality to anger: It can either prove an effective antidote to despairing acquiescence in injustice, or it can become impacted, clouding judgment and provoking further reciprocal violence. Perhaps Shylock provides an object lesson in the second potential for anger: His anger at Venetian racism ultimately proved self-destructive.

Finally, there is undoubtedly an ethnocentrism endemic to constitutional interpretation to which criticism is a necessary antidote. But criticism that dehumanizes partners in the dialogue risks provoking a cycle of recrimination or, worse yet, stony silence. Derrick Bell’s theory of “interest convergence” in race relations runs this risk. Bell argues that racial reforms only take place when they serve white as well as minority interests. This critique can be seen as a truism, and a very hopeful one at that. Of course people only change when it is in their self-interest to do so. The crucial point is that human beings are capable of changing their perceptions of self-interest. But Bell’s theory can also be taken as an ungenerous description of the past and a pessimistic prediction for the future, ascribing to whites the inability to rise above context is that a court case inevitably focuses on the immediate controversy between working class whites and blacks, pushing to the background the systemic inequalities that disadvantage both groups. For a more optimistic view of court-initiated reform, see Denvir, Towards a Political Theory of Public Interest Litigation, 54 N.C.L. REV. 1133 (1976).

117. See R. Unger, supra note 11, at 105-07. Huck Finn’s sudden recognition of the common humanity he shares with the slave Jim is perhaps American literature’s most moving example. See M. Twain, Adventures of Huckleberry Finn 76-81 (H. Smith ed. 1958).


119. See generally Freeman, supra note 23; Lawrence, supra note 58, at 381-87.

120. I would like to thank Trina Grillo for clarifying my thoughts on this section, especially on the duality of anger.

121. R. Unger, supra note 11, at 124-34.


123. D. Bell, Race, Racism and American Law 437-44 (2d ed. 1980).
venal self-interest or to perceive where their true self-interest lies. In a similar vein, Professor Lawrence explains law school affirmative action efforts in admissions as an ideological artifice that transforms the negative reality of race discrimination into the "positive image of color-blind meritocracy."\(^\text{124}\)

Professors Bell and Lawrence may be writing good history, but it strikes me as bad psychology to rob would-be white reformers of the self-esteem necessary to sustained effort. A comic perspective would not condemn reforms because they represent a morally ambivalent compromise between selfish attachment to the status quo and a radical "just" solution.\(^\text{125}\) Rather, it would praise them as positive moral acts in their own right, acts whose consequences will make further moral demands on reformers in the future.\(^\text{126}\)

This comic conception of reform as the difficult search for joint solutions to common problems is one that I am confident both Professors Bell and Lawrence would be happy to embrace. In a sense, their professional lives are a bet on its viability. Their writing reflects a frustration with what they perceive as a cynical approach to affirmative action on the part of majority institutions. Still, it seems to me that "noble reason" urges that criticism be aimed at finding some basis for future cooperation, even if that basis now can be no more than mutual fear.\(^\text{127}\)

Liberation can never be achieved by means of any one discrete reform. It may start with the racism that permeates the lives of the Twymon children, but inevitably it will have to confront the shackles of class that limit the lives of the McGoff family, and those of sexism that shackles both Rachel Twymon and Alice McGoff. The reallocation of resources, both material and psychological, that is necessary for these reforms will transform or, to use Frye's term, "regenerate"\(^\text{128}\) American society.

CONCLUSION

There is no preordained end to history. Whether our future is a tragic or a comic one will be determined by the concerted acts of individual men and women. We may achieve Miranda's "brave new world,"\(^\text{129}\) or perhaps not. To some extent, our fate will be determined

\(^{124}\) See Lawrence, supra note 101, at 854.


\(^{126}\) See Unger, supra note 86, at 618 ("The most characteristic recourse of the subversive mind [is] to transform the deviant into the dominant for the sake of a vision that becomes clearer in the course of the transformation itself, a vision that ends up redefining what it began by promoting."). It is important to admit, however, that concrete reforms can cause good faith controversy between people of goodwill. For instance, affirmative action in law school hiring will often require transformation of, or compromise with, conceptions of merit which academics do and should take seriously.

\(^{127}\) See Lawrence, A Dream: On Discovering the Significance of Fear, 10 Nova L.J. 627 (1986).

\(^{128}\) N. Frye, A Natural Perspective, supra note 12, at 136.

\(^{129}\) The Tempest, supra note 10, act V., scene i, line 83.
by the uses to which we put law. This article argues that Shakespeare’s comedies show us one possible script for law to follow, one based not on the neutral application of hard rules, but on fostering reconciliation between individuals and groups divided and united by their capacity to love and hate.

Such a reconciliation may seem unlikely to lawyers who pride themselves on their hard-headed pragmatism, and the foregoing may all sound foolishly optimistic. But this is the type of gamble the jurisprudence of comedy welcomes, secure in the belief that life is Fortune with which we can grapple, not Fate to which we must submit. In Shakespeare, the fool often speaks wisdom.

130. But remember Isabella’s plea to the Duke in Measure for Measure—"Make not impossible / That which but seems unlike; 'tis not impossible . . . ." Measure for Measure, supra note 34, act V, scene i, lines 51-52—and the Duke’s reply—"If she be mad . . . /Her madness hath the oddest frame of sense . . . ," id. act V, scene i, lines 60-61.