Love on Trial: Nature, Law, and Same-Sex Marriage in the Court of Shakespeare

Desmond Manderson and Paul Yachnin*

* Desmond Manderson, Professor, Faculty of Law, McGill University; Canada Research Chair in Law and Discourse; Paul Yachnin, Tomlinson Professor of Shakespeare Studies, Department of English, McGill University.

To be cited as: (2004) 49 McGill L.J. 475
Mode de référence : (2004) 49 R.D. McGill 475

Explanatory Note

The McGill Shakespeare Moot Project is a radical interdisciplinary exercise now in its second year. As I have explained at greater length elsewhere,[1] the project pairs graduate students in English literature with law students. Their assignment is to prepare a factum on a contemporary and contentious legal problem and to argue it orally before a specially commissioned moot court comprising myself, my English partner in this endeavour, Professor Yachnin, and several guest judges.

What has *made* the project so radical in its approach to teaching and understanding questions of interpretation is this: the rules of procedure of our Court state that the sole "Codex, Digest, and Institutes" of the Court are to be treated as emanating from the complete works of William Shakespeare. So the questions our students have to think through are as follows: *if* Shakespeare were the law, what arguments on the basis of the plays would they *make*? What normative and legal position emerges from the best *reading* of the plays most relevant to this problem? What is Shakespeare's own understanding of law in relation to other social forces? Centrally, the students are asked to think about the natural disagreement that is likely to emerge—between different interpretations of passages and plays, between the principles espoused by different players in the dramas, and between different plays. The students are required to assist the court in determining how it ought to decide and to judge faced with these intrinsic choices.

Shakespeare, the whole of Shakespeare, and nothing but Shakespeare is to *constitute* our jurisprudence. This, of course, makes the project interdisciplinary in a very strong sense. It is not a question of the law *of* Shakespeare, an attempt to recreate in substance or style the relevant legal environment of the sixteenth century.[2] It is not a question of the law *in* Shakespeare, an exercise in determining the law as it appears to operate in those of the plays that have a legal component.[3] It is rather a question of

[1] Desmond Manderson, "In the *Tout Court* of Shakespeare: Interdisciplinary Pedagogy in Law" (2004) 54 J. Legal Educ. 283 [Manderson, "Interdisciplinary Pedagogy"].

[2] Many authors also treat both concurrently, looking at Shakespeare's legal context as well as how his plays reflect general problems or well-written fact patterns that remain interesting to analyze. See generally George W. Keeton, *Shakespeare's Legal and Political Background* (London: Sir Isaac Pitman & Sons, 1967); Paul S. Clarkson & Clyde T. Warren, *The Law of Property in Shakespeare and the Elizabethan Drama*, 2nd ed. (New York: Gordian Press, 1968); Darryl J. Gless, Measure for Measure, *the Law, and the Convent* (Princeton: Princeton University Press, 1979) at 61-89; Edna Zwick Boris, *Shakespeare's English Kings, the People, and the Law: A Study in the Relationship Between the Tudor Constitution and the English History Plays* (Rutherford: Fairleigh Dickinson University Press, 1978); Theodor Meron, *Henry's Wars and Shakespeare's Laws: Perspectives on the Law of War in the Later Middle Ages* (Oxford: Oxford University Press, 1993).

[3] See generally Edward J. White, *Commentaries on the Law in Shakespeare* (St. Louis: F.H. Thomas Law Book, 1911); William Lowes Rushton, *Shakespeare's Legal Maxims* (Liverpool: Henny Young & Sons, 1907); C.K. Davis, *The Law in Shakespeare* (St. Paul: West, 1884); Daniel J. Kornstein, *Kill All the Lawyers?: Shakespeare's Legal Appeal* (Princeton: Princeton University Press, 1994); Dennis R. Klinck, "Shakespeare's *Richard II* as Landlord and Wasting Tenant" in Kostas

Shakespeare *as* law.[4] We proceed upon the assumption that the whole of the corpus has acquired the status of binding statute: precisely the posture of "as if" that underscores every legal system in one way or another.[5]

If the task then seems somewhat strange, it thereby draws our attention to the same strangeness at the heart of other interpretative exercises—such as trying to decipher what Shakespeare means or trying to determine what a constitution mandates. Indeed, as one develops a new legal system one glimpses in the first place the importance of the very aspects of our own that are so fundamental to our thinking as to pass utterly without comment. The Anglo-American legal system, for example, structures the world in quite particular terms: public law, private law, family law, et cetera. If the Court of Shakespeare were simply to allocate plays, for example, according to these prefabricated divisions, then we would have done nothing but replicate that which already exists. We would have reinvented the same.[6] But the first and greatest power of taxonomy is that it conceives of the world a certain way and divides it along those lines and no other. This is the Court of Shakespeare's first order of business and it rightly insists on an authentic Shakespearean division: comedy, tragedy, history. One immediately thinks of Jorge Luis Borges' famous story of the Chinese encyclopedia, and of Foucault. The classification system by which "a certain Chinese emperor" divided the animal kingdom is now such a cliché as to bear no repetition. I refer the reader to anything written about Foucault in the past twenty years; or about Borges, or animals, or China for that matter. The classification to which the quote belongs is as polymorphous as the classification system to which it refers. Still, the point is important. Faced with the bizarre *otherness* of someone else's

---

Mysiades & Linda Mysiades, eds., *Un-Disclosing Literature: Literature, Law, and Culture* (New York: Peter Lang, 1999) 190; Theodor Meron, *Bloody Constraint: War and Chivalry in Shakespeare* (Oxford: Oxford University Press, 1998); George W. Keeton, *Shakespeare And His Legal Problems* (Buffalo: William S. Hein, 1987); O. Hood Phillips, *Shakespeare and the Lawyers* (London: Methuen & Co., 1972) at 84-140; William M. Hawley, *Shakespearean Tragedy and the Common Law: The Art of Punishment* (New York: Peter Lang, 1998); John Denver, "William Shakespeare and the Jurisprudence of Comedy" (1987) 39 Stan. L. Rev. 825; Jules Gleicher, "The Bard at the Bar: Some Citations of Shakespeare by The United-States Supreme Court" (2001) 26 Okla. City U.L. Rev. 327; Laurie Rosenweig Blank, "The Laws of War in Shakespeare: International vs. Internal Armed Conflict" (1998) 30 N.Y.U. J. Int'l L. & Pol. 251; Robert W. Peterson, "The Bard and the Bench: An Opinion and Brief Writer's Guide to Shakesepeare" (1999) 39 Santa Clara L. Rev. 789.

[4] Ian Ward, in *Shakespeare and the Legal Imagination* (London: Butterworths, 1999) at 15-19, seems to come the closest to this idea. He argues that Shakespeare can be seen as supporting the idea of a communitarian society. He nonetheless readily recognizes that any reading of Shakespeare actually shows more about the interpreter—whether she is a Marxist, a patriot, postmodern deconstructionist, or new historicist—than about the bard himself.

[5] The posture of "as if" is both law's greatest strength and its greatest imaginative limitation. For a peculiarly succinct exposition of the dynamics of the problem, see the concurring judgment, *infra*, of Macdonald J. in this case: [2004] 2 C. of Sh. 1; (2004) 49 McGill L.J. xx at xx.

[6] Jorge Luis Borges, "Pierre Menard, Author of the *Quixote*" in *Collected Fictions*, trans. by Andrew Hurley (New York: Viking, 1998) 88.

order of things, one is struck by "the limitation of our own, the stark impossibility of thinking *that*."[7]

Once past the initial strangeness of a new legal vocabulary, one is struck most by the sameness of the problems faced by legal systems. The essence of each and every law, like the essence of each and every literature, involves a problem: the passage of time. The aporia of time is the aporia of law.[8] *All* laws find their application at a time different from their initial promulgation: bluntly put, their applicability over time and to various persons is what makes them laws. That is the principle behind the prohibition of bills of attainder.[9] But to breathe life into these general pronouncements, these "laws", therefore requires us to take an imaginative leap that the original text cannot predict or prevent. Often enough the leap is so small as to pass unnoticed; sometimes even in the common law, it asks us to decide whether a decomposing snail, for example, is like or unlike a local council's fire fighters.[10] The more established and general the law, the more acute becomes the problem. It is true that in the law of Shakespeare, we are being asked to apply the works of a playright to a circumstance four centuries removed. But the constitutional courts of other countries face problems equally difficult if slightly less dramatic. The constitutions of the United States, Canada, and Australia make no mention of space travel, the Internet, or genetically modified organisms. This tells us nothing significant about how they are to be treated. The passage of time at the heart of law *obliges* us to be imaginative; it demands of us that we think about the ideas and purposes that underscore the specific (and therefore partial and imperfect) statements of the law.

The first case decided by the Court, *In re Attorney General for Canada; ex parte Heinrich*,[11] asked whether a World War II concentration camp guard ought to be brought to trial fifty years later. The Court was therefore asked to confront the jurisprudential problem of the extent to which obedience is a virtue or a necessity within a legal system, through the lens of *Henry V* and *The Merchant of Venice*. And it was asked to confront the literary problem of Shakespeare's own conception of individual responsibility in the face of governmental authority, through the lens of H.L.A. Hart and Lon Fuller. The yoking together of theory and practice in *both* directions proved an unusually illuminating experience for all concerned. Law gave to the literature the sharper edge of lives at stake; literature gave to the law the richer depth of worlds imagined.

---

[7] Michel Foucault, *The Order of Things: An Archaeology of the Human Sciences*, trans. by Éditions *Gallimard* (London: Travistock Publications, 1970) xv; Jorge Luis Borges, "John Wilkins' Analytical Language" in Elliot Weinberger, ed., *Selected Non-Fictions*, trans. by Esther Allen *et al.* (New York: Viking, 1999) 229.

[8] Richard Beardsworth, *Derrida and the Political* (London: Routledge, 1996) at 101.

[9] See U.S. Const. art. I, § 9. On the principle of legislative generalizability, see *Kable v. Director of Public Prosecutions (N.S.W.)* (1996), 189 C.L.R. 51 (H.C.A.).

[10] *Donoghue v. Stevenson*, [1932] A.C. 562; *Pyrenees Shire Council v. Day* (1998), 192 C.L.R. 330, 151 A.L.R. 147 (H.C.A.).

[11] [2003] 1 C. of Sh. 1; Manderson, "Interdisciplinary Pedagogy", *supra* note 1.

This year's case was an even more topical question: same-sex marriage. The serendipitous recognition of the importance of this and related questions by the upcoming special issue of the McGill Law Journal, "Beyond Sexuality",[12] both evidences this topicality, if proof were needed, and provides the Court with a highly appropriate forum in which to present its findings. Drawing its impetus from the recent *Halpern* decision in Ontario,[13] in *Attorney General of Canada v. Pete Pears, Ben Britten & Others* the Court of Shakespeare was asked to consider the meaning and importance of marriage as an institution and to determine whether "the union of a man and a woman" was a necessary component of it.

It is at first glance paradoxical that in last year's problem the Attorney General refused to recognize this Court's jurisdiction, insisting that the Court of Shakespeare improperly usurped the legal supremacy of Canada. This year, the Attorney General has purportedly brought the action now before the Court, having lost in the Canadian courts his or her earlier attempt to preserve the orthodox definition of marriage. Perhaps under conditions of modern pluralism, such as pertain in the world today, this shift in strategy simply depicts a political response to the multiplication of normative orders.[14] Or perhaps under conditions of modern sovereignty, this simply describes governments as they are: pragmatic bodies with no particular commitment even to abide by their own rules, always prepared to select the structure that best suits their interests on any particular day.[15] But perhaps—just perhaps—the two are not unrelated, and the hollowness we detect in the latter amplifies the resonances of the former. In which case, we see here a tiny shard of a highly pertinent problem confronting the role and rule of law in the current global political environment: our story mirrors in miniature one of the ways in which the modern state continues ironically to undermine its own legitimacy exactly as and by insisting on its own untrammeled power.[16]

Although a very different kind of problem, the present case starkly raised fundamental questions of interpretation that combine both substance and form. As a matter of form, how we are to interpret a fixed document, such as a constitution or a play, in rapidly changing social conditions, continues to trouble and provoke courts

---

[12] Issue 4 of Volume 49.

[13] *Halpern v. Canada (A.G.)* (2003), 65 O.R. (3d) 161, 225 D.L.R. (4th) 529 [*Halpern*].

[14] See, for example, developments in the United Nations; European Community Law; the International Criminal Court.

[15] See *e.g. Rasul, Shafiq, et al. v. Bush, President of U.S., et al.*, Docket #03-334 (United States Supreme Court, cert. granted); *Al Odah, Fawzi K., et al. v. United States, et al.*, Docket #03-343 (United States Supreme Court, cert. granted). See also *Migration Amendment (Excision From Migration Zone) Act* 2001 No. 127, 2001 (Australia).

[16] See Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, trans. by Daniel Heller-Roazen (Stanford: Stanford University Press, 1998); Giorgio Agamben, "We Refugees", trans. by Michael Rorke, online: The European Graduate School <http://www.egs.edu/faculty/agamben/agamben-we-refugees.html>; Department of State, *National Security Strategy of the USA* (September 2002), online: U.S. Department of State <http://usinfo.state.gov/topical/pol/terror/secstrat.htm>.

everywhere. As a matter of substance, how we are to interpret a settled institution, such as marriage or the law, in rapidly changing social conditions, likewise continues to trouble and provoke communities everywhere. Again, the singular strength of the Shakespeare Moot Project is that it allows us to understand these problems as related to each other, and furthermore, as natural and inevitably occurring interpretative challenges, rather than as anomalies to be ignored or eliminated.

Furthermore, the problem has once more brought sharply into focus several important questions in contemporary Shakespearean studies, including his conception of hetero and homosexuality in light of his undoubted respect for orthodox social forms. The Shakespearean canon strongly esteems both self-fulfillment in love and respect for community norms of propriety: esteems each as separately compelling and as mutually constitutive. The difficulty for this jurisdiction is that his texts do not tell us *how* this balance should be struck, and, being Shakespeare, ambiguity and tension are inherent and ineradicable elements. We are faced then, with a literary problem equivalent to the "rights critique" in the jurisprudence of the Anglo-American common law.[17] The language of value—like the description of rights as "trumps"[18]—fails to tell us what to do when they clash. It is sometimes said that "rights talk" thereby generates heat but no light on the resolution of social problems. The same danger awaits us here.

The question posed by this case is of both abiding and contemporary significance. The current debate on "same-sex marriage" has attracted widespread interest, a curious sociological phenomenon that need not detain us now. In this debate, the question of the nature and purpose (the two are necessarily joined together[19]) of marriage is central. The dispute is often posed as pitting traditionalists against radicals; those for whom the conventional meaning of marriage must be respected against those for whom all institutions are ultimately subject to the pragmatic needs of public interest as we conceive it now. The former distrusts change, and the latter discards continuity.[20] There is a third way that seeks to understand these two dimensions in light of each other: that way is law.[21] In law, as opposed to politics, we do not seek to trump tradition with policy or vice versa, but rather to arrive, through a dialogic engagement, at a better understanding of them both. If law has any merit, and any necessary connection to justice in the world, it lies in this, and the Shakespeare Moot Project is committed to exploring it.

Why should anyone care what we decide here today? This Court has always defended its jurisprudence on the grounds that Shakespeare is not just postulated as a

---

[17] See Martha Minow, "Interpreting Rights: An Essay for Robert Cover" (1987) 96 Yale L.J. 1860; Mark Tushnet, "An Essay on Rights" (1984) 62 Texas L. Rev. 1363.

[18] Ronald Dworkin, *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1977) at 184-205.

[19] Michael S. Moore, "A Natural Law Theory of Interpretation" (1985) 58 S. Cal. L. Rev. 277.

[20] Ronald Dworkin, *Law's Empire* (Cambridge, Mass.: Harvard University Press, 1986) at 87-150.

[21] *Ibid.* at 151-176.

constitutive force in our modern culture: it *is* such a force. The normative force of law in this jurisdiction derives from the cultural force of its sources; perhaps it might be said that in other legal systems the relationship between cause and effect is more nearly reversed.[22] In particular, the case of *Pears and Britten* does not take sides as between orthodox and heretical understandings of marriage, if I may put matters so crudely.[23] Rather, it provides us with an unparalleled opportunity to interrogate the claims and heritage of the conventional claim itself, which have rarely been subject to the kind of close and critical reading that this case offers. Any claim for the "essential nature" of marriage meets a most important proving-ground here. If the core values of our culture's understanding of the institution of marriage are enacted[24] in Shakespeare—and the Court of Shakespeare works on the assumption that they are—then what this case decides is of great importance to the social debate that has engendered it. And if those core values are not memorialized in Shakespeare, then one wonders where one ought to look next.

Desmond Manderson

This case may be cited as *Attorney General of Canada v. Pete Pears, Ben Britten & Others*, [2004] 2 C. of Sh. 1; (2004) 49 McGill L.J. 482.

---

[22] Jacques Derrida plays with the complexity of just this relationship of authorities: Jacques Derrida, "Force of Law: The 'Mystical Foundation of Law's Authority'" (1990) 11 Cardozo L. Rev. 919 and Jacques Derrida, "Before the Law" in Derek Attridge, ed., *Acts of Literature* (New York: Routledge, 1992) 181 at 199.

[23] See Desmond Manderson, "Apocryphal Jurisprudence" (2001) 23 Stud. L. Pol. & Soc'y 81.

[24] It is hardly a coincidence that enactment is at once both legal and theatrical in its resonances. For as plays are both productive and performative, so too are legal judgments. The concept of the Act, whether the Act of a drama or the Act of Parliament in each case implies a performance with constitutive power: see Desmond Manderson, "*Statuta* v. Acts: Interpretation, Music, and Early English Legislation" (1995) 7 Yale J. L. & Human. 317.

Attorney General of Canada *Appellant*

v.

Pete Pears, Ben Britten and Others *Respondents*

INDEXED AS: CANADA (A.G.) *V.* PEARS

Neutral citation: 2004 SHC 1

Present: Bolongaro,[25] Bristol,[26] Folkerth,[27] Kasirer,[28] Macdonald, Manderson, and Yachnin JJ.

Marriage — Definition of marriage — Same-sex marriage — Whether same-sex couples can be granted civil marriage licences — "Armenian argument" — Identity — Responsibility — Respect for the integrity of social institutions — Stability — Desire — Love — Cuckoldry — Bastardy — Paternity — Long-term personal relationships

Jurisprudence — Legal taxonomy — Legal methodology — The Comedies — Flexibility — Faith — Reason

The following is the judgment delivered by

MANDERSON J. —

I. Balancing Values

[1] Pete Pears and Ben Britten, along with seven other gay and lesbian couples, applied for civil marriage licences. As is by now well known, the Court of Appeal for Ontario held that the common law definition of marriage as "the lawful and voluntary union of one man and one woman to the exclusion of all others" infringed the couples' equality rights under the *Canadian Charter of Rights and Freedoms*,[29]

[25] Eugenio Bolongaro, Assistant Professor, Department of Italian Studies, McGill University; unpublished judgment on file with the Court.

[26] Michael D. Bristol, Greenshields Professor of English, McGill University, unpublished judgment on file with the Court.

[27] Wes Folkerth, Assistant Professor, Department of English, McGill University.

[28] Nicholas Kasirer, Dean, Faculty of Law, McGill University.

[29] *Halpern*, *supra* note 13.

mandated a redefinition of that law as would permit marriage between couples of the same sex, and ordered marriage licences to be issued to the applicants forthwith. In the case before us, the Attorney General of Canada,[30] seeing little hope in appealing the matter in any jurisdiction bound by as circumscribed a constitutional conception as the Charter, has brought the case to the Court of Shakespeare. He argues now that same-sex marriage is contrary to the laws of Shakespeare and furthermore, that any such change to the common law would be inconsistent with it.

[2] My Lords, in *Heinrich's Case*, I insisted that the question of law's identity is crucial to the issue of interpretation.[31] In that case, we were confronted by the nature of individual identity and the identity of our law. The two were seen to be mutually implicated. On the one hand, the identity—the meaning, coherence, and responsibility—of law matters to itself, as a question of functional good faith. Indeed, the doctrine of precedent to which this Court adheres stems precisely out of our need as jurists to understand our actions here against some larger narrative and some greater good. On the other hand, it is apparent that this responsibility is itself bound to respect the identity and the responsibility of the individuals to whom we are ultimately answerable. Only thus does law fulfill its purpose and achieve the legitimacy to which it constantly aspires.

[3] This case presents itself slightly differently, and counsel for the applicants insists we owe social institutions, too, respect for their integrity,[32] by which is meant their essential character. There are two initial problems with this proposition. First, it is not at once apparent why we ought to treat an institution like marriage with the same respect that we accord persons. Religious bodies, no less than legal ones, have their own crises of identity and relevance to navigate; but it is not for us to solve these problems for them. Neither is the court connected by bonds of mutual recognition to derivative bodies such as corporations, still less to a social "institution"—indeed, *concept* might be a better term—like marriage.

[4] Secondly, it is a fallacy to assume that the preservation of identity demands aspic or formaldehyde. We are a court, not a charcuterie or a morgue. Identity is not a narrative of being but a narrative of *becoming*. Change, therefore, of whatever kind, is not the enemy but the very catalyst and lodestar of identity, the means by which we come to know ourselves at the moment of our passing. Many things change in fulfillment of our identities, as individuals or as institutions, and the question is what and why. So were it simply a question of applying the previous jurisprudence of this Court to the issue before us, there would be little problem. The individual identity of

---

[30] A fictional character invented for the purposes of this case and these judgments. Any relationship or resemblance between the "Attorney General of Canada" and any Attorney General of Canada living or dead is purely coincidental.

[31] *Re Attorney General for Canada; ex parte Heinrich*, [2003] 1 C. of Sh. 1, at 5-6 per Manderson J. [*Heinrich's Case*]; Manderson, "Interdisciplinary Pedagogy", *supra* note 1.

[32] Denise Réaume, "Is Integrity a Virtue?: Dworkin's Theory of Legal Obligation" (1989) 39 U.T.L.J. 380.

respondents ought to be respected in preference to that of an institution as nebulous as "marriage", and the interests of that identity are surely served best by permitting them to fully proclaim their relationships. Indeed, in legitimating the change that is sought by the respondents, we would be honouring the narrative of becoming—the transformative potential unleashed by faith in our true and underlying purposes—of both the persons and the institutions in question.

[5] Not so fast, not so simple. This is a Court of Shakespeare and it is abundantly clear that the textual progenitor himself manifested a strong commitment to institutions sacred and secular, the institution of marriage not least among them. Moreover, it is clear—both as a matter of fact and as a matter of self-evident Shakespearean law—that what we are pleased to call our identity is not simply a product of free choice or the autonomous exercise of preferences, but is itself an amalgam of interactions between personality, social constraint, and much else besides. So the existence of institutional constraint as a factor in the formation of the self is not in any way contrary to our prior commitment to identity, but rather its corollary. The question in the case before us is no longer just about identity as such, but about the *balance* to be struck between individual freedom and social expectation, the liberties that love invites against the stability that marriage offers. So our jurisprudence now asks us to confront the difficult problems that the previous case both elided and made possible, as a good jurisprudence should.

II. Characterization

[6] The first issue is invariably one of characterization. Among the whole corpus of Shakespeare, which texts are we to deem most relevant to an understanding of the case before us? This Court already has in place an established taxonomy—Histories, Tragedies, Comedies, Sonnets—within which each play, for example, represents a discrete enactment. These are the conceptions within which we must work to establish order and coherence. There may be other distinctions that we will find of some use as our task expands: early, middle, late; folio, quarto; first Act, last Act, and so forth. It is inappropriate to proceed further in the absence of a specific juridical question. Furthermore, I should add that such a structure is not complete, and this court has already identified plays that have an over-arching significance for us. We look to *The Winter's Tale* for guidance on the meaning of ethics and to *The Merchant of Venice* because it explores legal methodology and interpretation itself. These plays, at least, are not just about substantive issues that the Court of Shakespeare now seeks to treat juridically: they are about the nature of our jurisprudence itself.

[7] It is, however, already a law of Shakespeare that we look for relevant texts within this schema. Last year, the law of state action and individual responsibility found its natural focus in the Histories. One might say that these texts address the *constraints* that structure the relationship of persons to governments. This year has seen us confront the law of affect, of love and families, and the institutions that surround them, whose natural focus lies in the Comedies. One might say that these

texts address the *possibilities* that enrich the relationship of persons to each other and to society. The Tragedies, for their part, concern death and loss, destiny and obligation. One might say that these texts address the *obligations* that define our relationships to others and ourselves. Already such a structure implies the potential for new connections and alterations in our legal discourse: not just constitution but crime under the star of History; not just family but contract under the star of Comedy; not just succession but tort under the star of Tragedy. Suffice it then to say that the law with which we are asked to deal today is the law of Comedy, and belongs specifically to those that are customarily referred to as "the marriage plays". The "exacting criteria" of relevance adopted by this Court leads us at once to *Twelfth Night*, *As You Like It*, and *A Midsummer Night's Dream*, and in particular, to the mature Shakespearean comedy, *The Winter's Tale*.

III. The Nature of Desire

[8] Each of these plays ends with multiple marriages, whose celebration is marked by the joy of the whole community and the upholding of the natural order. It is, of course, in one sense undeniably true that not one of these marriages involves characters of the same sex. The statistics are overwhelming and have been pressed upon us by the applicants. But the argument is misleading. In the colloquial discourse of the Court, this has come to be known as the "Armenian argument". No Armenians get married in Shakespeare, but this would hardly lead us to conclude that there is an implied prohibition against it. (Although, in passing, it should be noted that throughout Shakespeare, including in *As You Like It*, "the Turk" appears as the very metonym for unchristian or heathen behavior.[33]) So the question is, on what grounds are we to deduce that a necessary feature of marriage prevents two gay men from participating in it, but not two Armenians? As Justice Bolongaro insists in his concurring judgment, a statistic is not a rule, though it may be a habit or a regularity.[34] Our legal system requires us to apply constant principles to ever-changing facts. In this case, the Court is asked to determine and to apply the principles that sustain Shakespeare's treatment of marriage: we are *not* asked to determine and apply the social facts and choices which then pertained. The distinction is crucial to the functioning of this or any jurisprudence.

[9] Law itself is a kind of marriage: "a marriage of true minds" and not of merely superficial features. It binds together a community of principle over great tracts of time, and to do so it must be able to accommodate a changing society. When

---

[33] "Why, 'tis a boisterous and a cruel style, A style for challengers. Why she defies me, Like Turk to Christian": William Shakespeare, *As You Like It* in G. Blakemore Evans & J.J.M. Tobin, eds., *The Riverside Shakespeare*, 2nd ed. (Boston: Houghton Mifflin, 1997) act 4, scene 3, lines 31-33 [*As You Like It*] (per Rosalind). All citations from the works of William Shakespeare refer to this volume.

[34] H.L.A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 1961); see Bolongaro J., unpublished judgment on file with the Court.

Shakespeare writes "love is not love which alters when it alteration finds," he does not mean us to think that love—or law—are inflexible. On the contrary, he means to say that the affect *behind* love—or law—which is to say, the principles that animate it, remains constant through all the passage of time and "bears it out even to the edge of doom."[35]

[10] Yet counsel for the respondents have at times forested the point too ardently. While the "living tree" doctrine is now firmly rooted in our legal methodology,[36] it cannot be applied uncritically. If it is simply used as a kind of shorthand to justify any result we want, we will lose the engagement between constitutive tradition and social policy that characterizes law's discourse. The suggestion that the same-sex marriage sought by the respondents is a new branch of the same tree that grew in Shakespeare's garden must be defended and not simply asserted. The metaphor provides the basis for a justificatory argument and not *res ipsa loquitur*.

[11] Above all, we are not dealing here with space travel. It is seriously misleading to contend that same-sex marriage was simply "out of the question" in Shakespeare's time, as if we are to treat it as some kind of technological innovation that the Elizabethans had not yet stumbled upon. Undoubtedly Phoebe, the moment she discovers that Rosalind is a woman, promptly declares "If sight and shape be true, / Why then my love adieu!"[37] But why does this response not indicate that such a relationship was, far from being simply unimaginable, in fact normatively repugnant? Or on the other hand, why does not the word *adieu* imply a sense of a lost possibility? The impossible is not in any way foregone; it does not incite regret.

[12] In truth, Shakespeare makes no judgment at all about Armenians or space travel—but he is very far from silent on the whole subject of homoerotic desire. It is in fact one of the singular features of the love on trial in these texts. The Sonnets, of course, are frequently interpreted as invoking in their general outline a strong flavour of homosexuality, and several of them display a striking sexual ambiguity. "Sonnet 20", for example, specifically presents same-sex attraction in a way that is at once both eroticized and impermissible.

> A woman's face with Nature's own hand painted
> Hast thou, the master mistress of my passion;
> A woman's gentle heart ...
> But since she prick'd thee out for women's pleasure,
> Mine be thy love, and thy love's use their treasure.[38]

---

[35] William Shakespeare, "Sonnet 116", lines 2-3, 12 ["Sonnet 116"].

[36] *McCulloch v. Maryland*, 4 Wheaton 316 (1819) (Marshall, C.J.); *Heinrich's Case*, *supra* note 31, Manderson and Yachnin JJ.

[37] *As You Like It*, *supra* note 33, act 5, scene 4, lines 120-21.

[38] William Shakespeare, "Sonnet 20", lines 1-3, 13-14 ["Sonnet 20"].

[13] In the plays under consideration, too, there are quite remarkable expressions of same-sex love and desire. The question of sexual licence seems at times powerfully fluid even to modern eyes. The marriage comedies in particular are riddled with themes of cross-dressing and sexual disguise. In *As You Like It*, wherein Rosalind spends half the play as the boy Ganymede, and in *Twelfth Night*, in which Viola disguises herself as Cesario, the masks and masques of gender create the instability, mystery, and sexual tension that provide the plays with their momentum.

[14] If we account the performance of these texts relevant to their interpretation, then the matter becomes still more giddying. For no women acted in Shakespeare's plays at all. One might conclude that gender was nothing but a performance. Throughout these comedies, some of the men dress up as women and some of the men who dress up as women dress up as men. Then some of the men dressed up as women dressed up as men fall in love with some of the men "prick'd out" with cod-pieces, and some of the men fall in love with some of the men dressed up as women dressed up as men when they stop dressing up as women; and finally, some of these men marry some of these other men. My Lords, every single marriage in these plays is a same-sex marriage.

[15] The argument goes both ways, for it is not only the case that Shakespeare treats the question of sexual difference very directly (which might help the argument of the appellants); it is also the case that Shakespeare treats the question of sexual difference with great flexibility (which might help the argument of the respondents). Furthermore, I use the performative argument with caution because, absent an ideology of original intent, this court's commitment remains to the texts and not any particular realization of them, original or otherwise. Nonetheless, it is appropriate to refer to these traditions inasmuch as they sustain and further illuminate a reading of the text to which we are disposed on other grounds.[39] In this case, it is entirely clear that Shakespeare conceives of love and attraction as ritual play, as performance, and as unanchored to sexual difference. Can there be an adoration more sincere than that of Antonio and Sebastian for each other,[40] or a commitment more passionate than that shown by Celia to Rosalind, her family forsaking for her sake:

> ... If she be a traitor,
> Why, so am I. We still have slept together,
> Rose at an instant, learn'd, play'd, eat together,
> And wheresoe'er we went, like Juno's swans,
> Still we went coupled and inseparable.[41]

[39] The interpretative value to be given to elements of performance might therefore be appropriately analogized with the treatment traditionally afforded to second reading speeches and other performative elements of legislative enactments in the common law tradition.

[40] See William Shakespeare, *Twelfth Night, or What You Will*, act 2, scene 1; act 5, scene 1, lines 210-11 [*Twelfth Night*].

[41] *As You like It*, *supra* note 33, act 1, scene 3, lines 72-76.

[16] Our jurisprudence clearly finds nothing unnatural or anomalous in the love of men for men or of women for women. This is the essential starting point of our legal analysis. At the same time, it is perhaps most accurate to say that Shakespeare understands desire as a powerful force, ludic and tormented. One is struck by the somewhat chance manner in which love appears to simply *befall* people throughout these texts.[42] Neither will nor justice have much to do with it. The matter receives its *reductio ad absurdum* in *A Midsummer Night's Dream*, where magic potions weave a spell that neither weavers[43] nor fairies can resist. And if a queen were to fall in love with an ass—that is only the predicament of love, its irresistible and unreasonable warp and weft, writ large.

IV. The Meaning of Marriage

[17] Desire transcends the law: it is lawless. This destabilizing and unruly power ultimately imperils the good order of the community. And it is here that Shakespeare's insistence on the institution of marriage comes to the fore. For our law must sharply distinguish between love and marriage. They are clearly different things. Indeed it is precisely the unpredictable power of desire that allows the two to be resolved within the structure of the plays, allowing desire to be shifted from person to person as the dramatic form demands, moving from unsuitable to suitable objects as required, or suddenly appearing where none before had been intimated. And in this moment of resolution, the triumph of the institution is indeed relentlessly hetero-normative. These are Comedies, and so in each case lawless desire and legal institution are ultimately aligned, the former finding satisfaction in the latter form. If this requires the author to proclaim a new and more socially acceptable configuration of desires, the playwright's pen will make it so. When Phoebe discovers Rosalind's sex, she immediately finds another: faith and fancy, as she says, neatly recombine.[44]

[18] The question for this court, so acutely posed by the Comedies before us, is what are we to do when desire *cannot* be so conveniently redrawn to suit our interests. It is true that the law of Shakespeare suggests that desire is itself constituted by institutional requirements—not to mention, of course, literary ones. Nevertheless, I think the power of desire to act capriciously and obstinately is by far the stronger message. This court has previously emphasized its humility. Were we to order Pete Pears and Ben Britten to go away and fall in love with more socially orthodox candidates, I do not think that they could do so. As judges, we find ourselves as arbiters of these lives but we are not its authors. The jurisprudence of this Court draws on Shakespeare. It does not claim to *be* him.

---

[42] Valerie Traub, *Desire and Anxiety: Circulations of Sexuality in Shakespearean Drama*, (London: Routledge, 1992).

[43] It is surely not a coincidence that Bottom is a weaver by trade.

[44] *As You Like It*, *supra* note 33, act 5, scene 4, line 150.

[19] We imagine our life as a comedy and frequently live it as a tragedy; but law treats it as a melodrama. In comedy, conflict dissipates; in tragedy, it endures; in melodrama, the legal form, we *resolve* and we do so by choosing sides: winners and losers, heroes and villains. This is the distinctive legal structure, and I do not think that as a court—whether a court of appeal or a Court of Shakespeare, or a court of love[45]—we can avoid it. My Lords, we are obligated to judge. And in that sense, unlike, perhaps, in the comedies, where all's well that ends well, something has to give. The issue is: what and why?

[20] The difficulty that we have in answering that question does not simply arise from the hetero-normative nature of the comedies' resolution. That, as I have indicated, is a function of our legislator or author's power to accommodate desire in institutions without compromise, a power that this Court does not have open to it. In this jurisdiction, we cannot simply pair people off as we might wish. Rather it arises because Shakespeare sets great store by marriage. This is not a value that can just be set aside in this jurisdiction. There is, of course, a voluminous secondary literature on this subject as on everything, though this Court treats such scholarship as emanating from a particularly dubious provenance.[46] Like all courts, we prefer to read as little as we can, so that our minds may be unclouded and our judgments appropriately dogmatic. In this at least, I believe we have succeeded beyond our expectations.

[21] Marriage marks not the end of these plays, but their necessary culmination. No reading of the laws of this jurisdiction can fail to take into account the authority afforded to Hymen, God of Marriage, at the end of *As You Like It.*

> Peace ho! I bar confusion,
> 'Tis I must make conclusion
> Of these most strange events.
>
> ...
>
> Wedding is great Juno's crown,
> O blessed bond of board and bed!
> 'Tis Hymen peoples every town,
> High wedlock then be honoured.[47]

Clearly then these texts honour marriage as the means by which the confusion that natural and lawless desire wreaks is to be harnessed in the service of the community. In what way does this stabilization transpire?

---

[45] See Peter Goodrich, *Law in the Courts of Love: Literature and Other Minor Jurisprudences* (London: Routledge, 1996).

[46] See Lisa Hopkins, *The Shakespearean Marriage: Merry Wives and Heavy Husbands* (New York: St. Martin's Press, 1998); Richard Weisberg, "'Then You Shall Be His Surety': Oaths and Mediating Breaches in *The Merchant of Venice*", in *Poethics and Other Strategies of Law and Literature* (New York: Columbia University Press, 1992) 94.

[47] *As You Like It*, *supra* note 33, act 5, scene 4, lines 125-27, 141-44.

[22] The production of children is no doubt central to Shakespeare's understanding of the virtue of marriage. This is the point most strongly stressed by the applicants, who insist that since same-sex couples can never naturally create children, they are prevented from partaking in the rites of marriage. Hymen's hymn insists on the "blessed bond of board and bed" to people in every town. So too in *Twelfth Night*, Viola castigates Olivia as to the importance of leaving the world a copy.[48] We find a similar sentiment in several of the early Sonnets: "But if thou live rememb'red not to be, / Die single, and thine image dies with thee."[49] It is true, however, that the Sonnets nevertheless sustain a dialectic of immortality, elsewhere maintaining the reproductive holiness of the word. "So long as men can breathe or eyes can see, / So long lives this [poem], and this gives life to thee."[50] Our jurisprudence values not just copulation but the carbon copy too. Moreover, these arguments ultimately do not suffice. Rooted in expedience, they provide a reason to value marriage as an institution for the production, protection, and upbringing of children; they do not provide us a reason to think that *only* child-bearing unions can partake of it. Indeed, as expediency changes over time and in the face of changing reproductive technologies, such an argument would eventually allow us to think of marriage as an entirely flexible structure.

[23] We must choose, therefore, between two interpretations of the central role of marriage in the canon. On one, it represents the satisfaction and regulation of desire, and the fulfillment of individual identity, which this Court has already affirmed that our jurisprudence holds dear. There is plenty in the Comedies to affirm such a reading. On the other, it represents the subjugation of desire to community interests and to the upholding of the virtues of acceptance of the established order. Certainly we can point to the many marriages in Shakespeare that appear in some sense forced (I use the term in its aesthetic as well as its literal sense). But just as this Court must avoid arguments from expediency, it must avoid arguments from statistics.

[24] It seems to me that the *theory* of marriage, if I can put it that way, is given its most rigorous articulation in *The Winter's Tale*. And there it indicates something deep and difficult. The sense of the power of blood lines and, on the other hand, the threat of bastardry, looms heavily over this seminal text. The lineage of blood, sanctified in marriage, comports a sense of honour and of responsibility that binds the community. The immanent collapse of the kingdom is there directly tied to Leontes' failure to produce a legitimate heir; to the reckless abandonment of his daughter; and to the injustice visited upon his wife, wrongly accused of infidelity.[51] In the play's final scene, it is his rekindled faith that ultimately restores peace, order, and good government. "It is requir'd / You do awake your faith," solemnly instructs Paulina, a figure of fierce integrity throughout.[52] Marriage then, is not just about happiness or

[48] *Twelfth Night*, *supra* note 40, act 1, scene 5, lines 241-43.
[49] William Shakespeare, "Sonnet 3", lines 13-14.
[50] William Shakespeare, "Sonnet 18", lines 13-14; see also "Sonnet 20", *supra* note 38.
[51] William Shakespeare, *The Winter's Tale* [*Winter's Tale*].
[52] *Ibid.*, act 5, scene 3, lines 94-95.

desire—though there is plenty of that to go around—but about our faith in something greater than ourselves; about our faith in the future. Like law, marriage is about meaning *over* time and not just *in* time. Our question is whether the *natural* blood lines wrought by children are necessary to the fulfillment of that meaning, from one generation to the next.

[25] My Lords, it is clear that children—natural born children—are central to this text. They are the subject of Leontes' willful desecration of his house—"No I'll not rear / Another's issue" he concludes, casting out his daughter and condemning his wife[53]—and of the oracle's curse under which his kingdom labours—"[T]he King shall live without an heir, if that which is lost be not found"[54]—and which threatens its collapse—"What dangers, by his Highness' fail of issue, / May drop upon his kingdom, and devour / Incertain lookers-on."[55] It is equally clear that legitimate, blood relationships are taken to impart to society an order that cannot be counterfeited. This is particularly clear in the case of Perdita who, raised by a shepherd far from the court of Sicilia, cannot but betray her true and high-born origins:

> This is the prettiest low-born lass that ever
> Ran on the green-sord. Nothing she does, or seems,
> But smacks of something greater than herself,
> Too noble for this place.[56]

And it is the truth in her blood that finally sanctions her marriage to a prince and ends her perdition.

V. The Nature of Anxiety

[26] In order to put these elements in context, however, we need to begin with the climactic scenes of King Leontes' madness. Though governed by his emotions as a person, nevertheless as a king he is a law-giver ruled by evidence. Irrationally suspicious of his wife Hermione, he even sets up a trial in a forlorn attempt to "be clear'd / Of being tyrannous, since we so openly / Proceed in justice, which shall have due course."[57] But the precise point of the first Acts is to demonstrate that Leontes, in seeking *proof* of his wife's fidelity, cannot but be disappointed. It is not merely that Leontes is blind to that of which everyone else is entirely certain.[58] It is not merely that even the clearest words of the oracle do not convince him.[59] In Leontes' state of

[53] *Ibid.*, act 2, scene 3, 193-94.
[54] *Ibid.*, act 3, scene 2, lines 134-36.
[55] *Ibid.*, act 5, scene 1, lines 27-29.
[56] *Ibid.*, act 4, scene 4, lines 156-58.
[57] *Ibid.*, act 3, scene 2, lines 4-6.
[58] *Ibid.*, act 1, scene 2, lines 425-30; act 2, scene 1, lines 140-45.
[59] *Ibid.*, act 2, scene 3, lines 130-33.

anxiety and distrust, such proof is, literally and ultimately, unavailable. "You're liars all," he concludes; "There is no truth at all i' th' oracle ... [T]his is mere falsehood."[60] Even Leontes' own newborn child, taken by Paulina incontrovertibly to bear the markings of both her parents,[61] is misread by Leontes to bear the hallmarks of a bastard. It is the *failure* of law to satisfy this obdurate heart, and its inevitable corruption, that we are forced to confront here. In the face of such a failing, all law becomes tyrannical. One cannot place love on trial.

[27] Hermione insists upon the impossibility of ever properly satisfying this skepticism, of ever sating this unquenchable demand, when she is forced by the law to defend herself. Leontes wants objective proof of something subjective—something like love or trust. And she tells him plain that he will *never* get enough of it.

> Since what I am to say must be but that
> Which contradicts my accusation, and
> The testimony on my part no other
> But what comes from myself, it shall scarce boot me
> To say "Not guilty". Mine integrity,
> Being counted falsehood, shall (as I express it)
> Be so receiv'd.[62]

Do not look to the law to heal your own conscience, she says. And it is this lesson as to what it is that marriage does that transcends law and cannot be secured by it, that we must, as a court, hold fast to here. It heals what law cannot.

[28] We are dealing then with the *beyond* of law. On the one hand, desire is essentially lawless in Shakespeare and stabilized by the bonds of marriage. On the other hand, so too is anxiety, jealousy, and distrust. We see in the kingdom of Sicilia that they are equally destabilizing. The core of Leontes' anxiety, furthermore, lies in just that question of paternity. He is afraid of cuckoldry and bastard issue and will not be comforted. Will not because, again, cannot. The certainty he seeks is not available. The truth of Perdita's paternity is to be found written on the body: but not everyone can see it. Leontes sees it too: but only when his heart is ready.[63] *The Winter's Tale* drives home for us the point that the anxieties that surround paternity, like those that surround love,[64] are not automatically resolved by marriage. Marriage, as Leontes shows us directly and explicitly, does *not* produce natural children: it naturalizes all the children thus produced. Far from being an essentially natural institution, it is a quintessentially cultural one. This necessary ambiguity inheres in all the children "of"

---

[60] *Ibid.*, act 2, scene 3, line 146; act 3, scene 2, lines 140-41.
[61] *Ibid.*, act 2, scene 3, lines 93-103.
[62] *Ibid.*, act 3, scene 2, lines 22-28.
[63] *Ibid.*, act 5, scene 1, lines 227-28.
[64] William Shakespeare's *The Tragedy of Othello, the Moor of Venice* makes the same point in a different context.

a marriage, legitimate or illegitimate, adopted, inherited, or even artificially inseminated. Marriage removes all question of this insecurity from the legal realm—it *bars* confusion not by rendering it impossible but rather by forbading us from inquiring into it—but it cannot do so from the psychic and the physical realm. It generates heirs and cuckolds willy-nilly.

[29] The structure of the marriage plays strongly supports this understanding, for throughout the texts that which is *beyond* the reach of law—love and desire (both heterosexual and homoerotic), anxiety and all the emotions—are depicted as belonging to a natural order, or indeed disorder, that our government cannot rescind but must somehow discipline. As the respondents so eloquently argued, in each we see a contrast between the forest and the town: between the lawless, natural realm, and that of cultural control.[65] In *A Midsummer Night's Dream*, this is the fairy wood; in *As You Like It*, the forest of Arden(t); in *Twelfth Night*, a "forest-like confusion of disguises and identities"[66] provides the psychic place for this comedic and chaotic freedom. Our characters flee to the forest in order to explore their natures, and the very term "natural law" amounts to a contradiction in terms. They are then finally reconciled to the town. The marriages in these plays provide an emphatic celebration of the triumph of *cultural* order over and against the buffeting winds of our emotions and our fears.

VI. Good Faith Before the Law

[30] On the one hand, marriage is a cultural, not natural, thing in the law of Shakespeare. On the other, the positive law of marriage cannot by itself stabilize the anxieties and desires that eddy through and around it. What can? The answer, particularly in *The Winter's Tale*, is this: faith. Faith is the rock that saves us when evidence cannot, when law becomes farce, and when reason runs out. Yet—and here the applicants in this case have completely misunderstood the purport of the play—faith is not given a remotely religious or even sacred character, still less an inflexible institutional form. It is faith or trust in the particular other, an interpersonal commitment that gives without demand and that trusts without proof and without the law, that marks the solution to the problems of Sicilia. It is the shepherd's innocent faith in the innocent child that rescues her. The love of Florizel and Perdita are likewise marked by honour and faith.[67] Indeed, Florizel claims to be virtuous

[65] See Rose and Smith, factum for the respondent, on file with the Court.
[66] *Ibid.* at para. 19.
[67] *Winter's Tale*, *supra* note 51, act 4, scene 4, lines 30-34.

> ... since my desires
> Run not before mine honour, nor my lusts
> Burn hotter than my faith.[68]

So too Leontes swears to support Florizel when his father, king of Bohemia, forbade him to marry such a low-born lass, only because "[y]our honour [is] not o'erthrown by your desires."[69]

[31] Admittedly, King Polixenes prohibits their marriage because Perdita is thought to be a shepherd's child, and only the discovery of her true bloodline saves the day. But the jurisprudence of this Court requires us to judge the words of Shakespeare, all things considered, and not just to treat every character as equal law-givers in our sight. It is the message of the play and not the words of every character that we are here to enforce. As to any legal system, we owe it responsibility and not blind obedience. I cannot but think that the irony of Polixenes' position, no less than the injustice of his inflexibility, ought govern our reading. Faith and honour mark out Florizel as such a worthy character and render Polixenes' judgment less than admirable. This faith refers not to the lad's commitment to the established order or to his father's rules by which he refuses to abide, but to Perdita herself.

> [Your dignity] ... cannot fail, but by
> The violation of my faith, and then
> Let nature crush the sides o' th' earth together,
> And mar the seeds within! Lift up thy looks.
> From my succession wipe me, father, I
> Am heir to my affection.[70]

[32] Against lawless desire, then, faith is a bulwark and a promise. Against lawless anxiety, too. It is above all with Leontes that our thesis makes its strongest case. His distrust having destroyed his marriage and apparently killed his wife, it is trust that brings her back. For sixteen years he mourns Hermione's loss and regrets his hot-blooded foolishness; but it is not enough. He still loves Hermione but it is not enough. Love, without something else to temper it, may be entirely foolish as Leontes showed; may be jealous and destructive as we know from the law of *Othello*. When faced with an apparently lifeless statue in Hermione's image, only one thing will suffice.

> It is requir'd
> You do awake your faith. Then, all stand still.
> On; those that think it is unlawful business
> I am about, let them depart.[71]

---

[68] *Ibid.*, act 4, scene 4, lines 32-34.
[69] *Ibid.*, act 5, scene 1, line 230.
[70] *Ibid.*, act 4, scene 4, lines 476-80.
[71] *Ibid.*, act 5, scene 3, lines 95-96.

[33] Leontes must do what he could not do before. He must *believe* in someone, beyond the proof, beyond the evidence, beyond contract and rationality. He must surrender his anxieties to them and for them and trust in something impossible and literally unfounded. Then and only then does Hermione come back to life, step down from the pedestal on which—in one sense or another—she has been placed throughout the play, and find her marriage restored. The oracle had said, of course, that "the king shall live without an heir, if that which is lost be not found."[72] But there is something tautologous in this were the heir (Perdita) and the loss the same. In fact, more is meant. Leontes has lost, and must find, his faith.

[34] The business of faith in another, like the business of desire or emotion, *is* unlawful: it cannot be compelled, structured, or forced. Paulina says so, as we have seen, and insists upon it, and Leontes confirms it.

> If this be magic, let it be an art
> Lawful as eating.[73]

But the unlawfulness of faith is the opposite of these other lawless things. It does not endanger the law; it engenders the law. It is not *beyond* the reach of law, but *before* the law—the foundation without which law would not be possible.[74] It is lawful *as*—just like—eating. This faith is not abstract; it is concrete and personal and interpersonal. Without it, we could have no trust and no capacity to communicate with each other. How then could we ever hope to build the most basic blocks of civilized society, let alone the glories of law or literature? It is not the fear of the wrath of some Hobbesian Leviathan that begins us on the path to law.[75] It is rather that first, unprovable, unjustifiable, step that has no reason to back it up but hope and trust, that allows us to talk to each other in peace and to fall asleep at night. This faith stabilizes both desire and anxiety by directing them to the well-being of *another*, not to me. And then law can begin to do its work.

[35] I cannot help but see here prefigured the ethical work of Emmanuel Lévinas, who writes,

> Am I my brother's keeper? These questions have meaning only if one has already supposed that the ego is concerned only with itself, is only a concern for itself. In this hypothesis it indeed remains incomprehensible that the absolute outside-of-me, the other, would concern me. But in the "prehistory" of the ego posited for itself speaks a responsibility. ... It is through the condition of being hostage [to another] that there can be in the

[72] *Ibid.*, act 3, scene 2, lines 135-36.
[73] *Ibid.*, act 5, scene 3, lines 110-11.
[74] See Franz Kafka, "Before the Law" in *Parables and Paradoxes* (New York: Schocken Books, 1974) at 61-79; Jacques Derrida, "Before the Law", *supra* note 22.
[75] Thomas Hobbes, *Leviathan* (Oxford: Oxford University Press, 1929).

> world pity, *compassion*, pardon and proximity—even the little there is, even the simple "After you, sir." The unconditionality of being hostage is not the limit case of solidarity, but the condition for all solidarity.[76]

And again

> It is then not without importance to know if the egalitarian and just State in which man is fulfilled (and which is to be set up, and *especially* to be *maintained*) proceeds from a war of all against all, or from the irreducible responsibility of the one for all, and if it can do without friendship and faces[77]

[36] Certainly there is always a risk in a society that is built not on force but on faith. One might still be betrayed, and it is that risk that Leontes must painfully learn to accept. One might sometimes be tricked or, indeed, cuckolded. This is, indeed, the importance of the rogue Autolycus to the play. He is not just there for comic relief. He trusts no one and deceives them all for his own amusement and self-interest.

> Ha, ha, what a fool Honesty is! and Trust, his sworn brother, a very simple gentleman! I have sold all my trompery; ... They throng who should buy first, as if my trinkets had been hallow'd and brought a benediction to the buyer; by which means I saw whose purse was best in picture, and what I saw, to my good use I rememb'red.[78]

[37] Yet it is not just the case that Autolycus works as a catalyst for good despite himself. It is rather that a society built on trust must take the risk of exploitation, and is *worth* it. A world in which one assumes that those around us are psychopaths is not a world that I would want to live in, and not a world in which law could begin to, let alone could, make a difference.

[38] Shakespeare, as always, acknowledges the complexity of reality. We live in a world in which honesty is far from universal. But that is the price we must pay if we are to have a community at all—if the possibility of communication without violence is ever to exist. That is not to say that we do not have rules to deal with "the bad man of the law",[79] but it is not the assumption from which we start.

> It is extremely important to know if society, as currently constituted, is the result of a limitation of the principle that man

---

[76] Emmanuel Lévinas, *Otherwise Than Being or Beyond Essence*, trans. by Alphonso Lingis (Pittsburgh: Duquesne University Press, 1998) at 117.

[77] *Ibid.* at 159-60.

[78] *Winter's Tale*, *supra* note 51, act 4, scene 4, lines 595-604.

[79] Oliver Wendell Holmes, "The Path of the Law" (1897) 10 Harv. L. Rev. 457.

> is a wolf for man, or if on the contrary it results from a limitation of the principle that man is *for* man.[80]

[39] Our responsibility for others, which proceeds from friendship and faces, is not an exchange and is never guaranteed. Sometimes we are mistaken and place our trust erroneously. Some men are lone wolves: *auto* meaning self-interested, and *lykos* from the Greek for wolf. Such men are predatory, individualistic, and without faith. But, my Lords, it cannot be otherwise. We cannot prove, in advance, which among us is Hermione and which is Autolycus, for it is our good faith that *each* rely upon. We must proceed in the absence of proof.

[40] Indeed, the purity of this faith that lies before the law is found most strongly in the characters of Paulina and Camillo. The resoluteness of the former in defence of Hermione establishes her as the ethical rock of the play. The irresoluteness of the latter in his allegiances establishes him as the "ethical canary" of the play.[81] The departure of Camillo from the court of Sicilia in Act I sounds the alarm of Leontes' moral failure to recognize the faith and honour of his wife; his departure from the court of Bohemia in Act IV sounds the alarm of Polixenes' moral failure to recognize the faith and honour of Florizel for Perdita. While Paulina, then, is a model of good faith, Camillo responds to the faith of others. We learn from the presence of one what we discern from the departure of the other. The betrothal of the two in the last speech of the play[82] does not reflect the gratuitous heteronormativity of the plays, as the applicants have suggested. This is not a marriage of fancy or desire, and it has nothing whatsoever to do with the production of children; she is, after all, an "old turtle" on a "wither'd bough".[83] Rather, their pairing emphasizes above all the role of honour, worth, and honesty in marriage.[84] The liaison is necessary to the play because it binds together faith to faith and trust to trust and therefore confirms the arc traced by the play. If it is an arranged marriage, so to speak, it has been arranged to teach us what marriage really means.

[41] Marriage is important, then, because it recognizes the trust for another flawed and imperfect human being without which we could not have the glimmerings of law. Children hold a paramount place in *The Winter's Tale* not because they are necessary to marriage, or *proof* of love or honour, but rather because they are the blessing that faith bestows. Only in this way can we cease to commodify children and marriage alike, a commodification that the jurisprudence of *The Winter's Tale* expressly rejects. If I may borrow a pun that is well worked throughout the play, children are not the issue: faith is the issue and children are the issue of faith.

---

[80] Emmanuel Lévinas, *Éthique et infini: Dialogues avec Philippe Nemo* (Paris: Fayard, 1982) 74-75 [translation is mine].

[81] See Margaret Somerville, *The Ethical Canary: Science, Society and the Human Spirit* (Toronto: Viking, 2000).

[82] *Winter's Tale*, *supra* note 51, act 5, scene 3, lines 135-46.

[83] *Ibid.* at 132-33.

[84] *Ibid.* at 143-44.

[42] I have argued, then, that marriage in Shakespeare transcends the law precisely as a cultural or social counterpoint to the natural forces of desire and fear. But marriage represents neither the reification of children nor the glorification of personal happiness nor our obedience to the community. All of these things put marriage as a secondary consequence of our commitment to some primary goal. I believe that in *The Winter's Tale* it represents something primary: self sacrifice for another; trust in another. It is not the *product* of personal happiness, nor the *product* of community interests. It is the relational form that makes these things possible. It is constitutional. It follows then that our commitment to this constitutional good cannot be bound by a particular constellation of genders, and the lack of same-sex marriage in Shakespeare represents a fact about the times, and not a law.

VII. Marriage as the Union of Desire and Faith

[43] As to whether this Court is therefore at liberty to expand the relationships encompassed by marriage (*not* the meaning of marriage, which remains unchanged), I think the answer is tolerably clear. In each of the marriage plays, and of course in *The Winter's Tale*, we find a legal system that is destabilized by its rigidity. In *As You Like It*, we find a usurper in power, and the rightful claimants driven out. The governance of the fairy kingdom, no less than the world of men, is riven by discord in *A Midsummer Night's Dream*, and our lovers are forced to flee the city. Now the literal and metaphorical forests of these comedies allow the exploration of desire and of personal identity. The return to the city in these plays therefore marks a restoration, but by no means a return to the status quo. So in *A Midsummer Night's Dream*, the injustice of Egeus' claim to the legal right to "dispose of" Hermia[85] loses out to the strength of her love for Lysander, and her father's insistence on the application of the law—"I beg the law, the law, upon his head"—is overborne.[86] And in *As You Like It*, the authoritarian rule of the usurper is overthrown. The forest allows us to explore our natures and our desires, and we do not return from it untouched. We learn from it, and we do well to incorporate it in our government.

[44] This sense of the transformative and empowering potential of desire is central to the structure of the Comedies. Our jurisprudence does not leave its characters in the forest: they learn from their adventures, and are then welcomed back home. It is not correct, therefore, to argue that nothing ever has to give in this canon, or that the accommodation of desire and institutional legitimacy is seamless. It is not. Of course, as I have indicated, Shakespeare frequently plays with the desires of his characters. But when those desires prove too deeply rooted in their psychological makeup to be adjusted, it is the *institution* that must give way. The Comedies do not just represent this change as unavoidable, or as a compromise. Being a comedy and not a tragedy,

---

[85] William Shakespeare, *A Midsummer Night's Dream*, act 1, scene 1, line 155 [*Midsummer Night's Dream*].

[86] *Ibid.*, act 4, scene 1, line 52.

this consummation devoutly to be wished is characterized as a rebirth not a death, a gain and not a loss.[87] The recognition of desire is indeed a metaphor for the necessity of the legal system to learn from its citizens and to embrace change if it is to survive. But it is more: it represents a catalyst, precisely because this desire is beyond law's reach and therefore irrepressible.

[45] The legal structure of our jurisdiction, however, does not simply give desire free rein. It attempts to stabilize it by binding it to the principles of faith and self-sacrifice that we find central to our concepts of marriage. As we have seen, this is the lawlessness that makes law possible. Without this move—the multiple marriages that *end* all these plays—there would be no end to the circulation of desire and the exchange of bodies. This is not just socially destabilizing in both its literal and metaphorical senses. It is also psychologically untenable. Shakespeare presents very clearly the chaotic *nature* of desire and passion: its excitement but also its limits. And even more crucially, the plays represent attraction, if untethered by a true acknowledgement of our responsibility to others, as corrosive in its egotism. Thus Malvolio in *Twelfth Night* is mercilessly pilloried for confusing love with his own ambition.[88] So too, poor Jacques, alone of all the characters in *As You Like It*, condemns himself to remain in the forest. His own introversion befits him for the hermitage.[89]

> ... [I]t is a melancholy of mine own, compounded of many simples, extracted from many objects, and indeed the sundry contemplation of my travels, in which [my] often rumination wraps me in a most humorous sadness.[90]

Rosalind astutely concludes that Jacques has "sold ... [his] own lands to see other men's; then to have seen much, and to have nothing, is to have rich eyes and poor hands."[91] This captures much of the alienation by which Jacques is cursed. It has left him ill-equipped to relate to others. The curse of melancholy, which it is the comedies' business to abolish, lies in Jacques' inability to do more than *think* about others, and more than *feel* about himself.

[46] Marriage does not represent, then, the triumph of individual identity—love. Nor does it represent the triumph of social obligation—community. In this sense, our judgment here today must go beyond the simplistic dichotomy with which we began. Rather, marriage is best understood as the form that gives these two forces new meaning in *relation* to each other. If *Heinrich's Case* told us something about how identity gives birth to responsibilities, *Pears and Britten* tells us something about how responsibility gives birth to identity. In our jurisdiction, marriage is therefore a

---

[87] See William Shakespeare, *The Tragedy of Hamlet, Prince of Denmark*, act 3, scene 1, lines 63-65 [*Hamlet*].

[88] *Twelfth Night*, *supra* note 40, act 2, scene 5, lines 30-32.

[89] *As You Like It*, *supra* note 33, act 5, scene 4.

[90] *Ibid.*, act 4, scene 1, lines 15-20.

[91] *Ibid.*, lines 22-25.

necessity both for the society that experiences it as dynamic and constitutive; and for the individuals whose erotic attachments are thereby given a social role and a selfless symbolism. It forms the keystone that holds together the arch by which the forces of desire beyond the law, and faith before it, press against each other. So too, while marriage is a cultural institution, it is a form that harnesses our natural desire to our *natural* faith, giving meaning to the former and power to the latter. To deny to these respondents participation in the social institution of marriage would deprive them of this meaning, and us of their power.

[47] It is not simply that in our jurisdiction, there is nothing unnatural in these unions, although that much is clearly true. It is not only that the change being urged here is in keeping with the meaning of marriage, love, and desire in the works of Shakespeare, although that much is also true. More than this, the institutional pressure to which we respond today is itself natural and cultural at the same time. The dichotomy itself, which is the foundation of the applicants' case, is what ultimately collapses. Polixenes says as much in a passage in *The Winter's Tale* that strikingly rebuts the idea of a natural form that cannot change, or *natural* issue as claiming some kind of privilege.

> Yet Nature is made better by no mean
> But Nature makes that mean; so over that art
> Which you say adds to Nature, is an art
> That Nature makes. You see, sweet maid, we *marry*
> A gentler scion to the wildest stock,
> And make conceive a bark of baser kind
> By bud of nobler race. This is an art
> Which does mend Nature—change it rather; but
> The art itself is Nature.
> ...
> Then make [your] garden rich in gillyvors,
> And do not call them bastards.[92]

[48] What, asks Polixenes, is more natural than change? In our jurisdiction, of course, not just any change will suffice: it must be a change that is in keeping with the meaning of these texts, and with its reasons, principles, and arguments. I am satisfied that is the case here. In the law of Shakespeare, marriage is not, and never was, forbidden to same-sex couples. Furthermore, such an expanded definition is in keeping with its essential character.

> Let me not to the marriage of true minds
> Admit impediments; love is not love
> Which alters when it alteration finds,
> Or bends with the remover to remove.[93]

---

[92] *Winter's Tale*, *supra* note 51, act 4, scene 4, lines 89-98.
[93] "Sonnet 116", *supra* note 35, lines 1-4.

[49] My Lords, I find in favour of the respondents, and by a majority decision this Court rules accordingly. May Juno's swans be wreathed in Juno's crown.

The following is the judgment delivered by

MACDONALD J.[94] (concurring) —

[50] *No Writ of State*

Those who enraptured by mimetic text
Would prefix law's compass to symbolize
Ought once to hearken as a mother vexed
Indwells the unsaid in her infant's cries.

Interpretation frames the arguments
Upon whose truth canonic phrases draw,
As if alone our courts and parliaments
Could be the agents of the common law.

No writ of state, no gaze contemptuous,
Can make a novel love less loving seem,
Or claim to normalize the virtuous.
Exceptions prove the rule that rules redeem.

Such paradoxes lovers have sustained
Against the prince their dignity maintained.

The following is the judgment delivered by

YACHNIN J. (dissenting) —

[51] *Prohibition and Plurality: Same-Sex Love in the Court of Shakespeare*

This application is brought by the Attorney General for Canada on appeal from the judgment of the Court of Appeal for Ontario who, upholding a Divisional Court ruling that the common law definition of marriage infringed the equality rights of same-sex couples under the *Canadian Charter of Rights and Freedoms*, granted the following remedies to the respondents in these proceedings:

[94] Roderick A. Macdonald, F.R. Scott Professor of Constitutional and Public Law, Faculty of Law, McGill University.

(1) a declaration that the existing common law definition of marriage be invalidated to the extent that it refers to "one man and one woman";

(2) a reformulation of the common law definition of marriage as "the voluntary union for life of two persons to the exclusion of all others";

(3) an order that the declaration set forth in (1) and the reformulation set forth (2) have immediate effect;

(4) an order that the Clerk of the City of Toronto issue marriage licences to the respondents.

I. Introduction

[52] Overall, Shakespeare does not countenance the instrumentalization of marriage for the purpose of advancing the cause of social justice, and he does not set much store by what we would call equality rights. While his powerful representations of the inner lives of individual characters certainly provide something like a seedbed for the modern democratic ideals enshrined within the Charter, his drama also represents the nestedness of a rich and fulfilled inner life within social, natural, and divine structures—structures that are not clay in the hands of individuals or collectivities and not even bendable by the power of the state. In this view, the individual is less sacrosanct than are institutions such as kingship or marriage. Shakespeare is therefore a precursor but by no means the poet of modernity: so far as I am able to tell, he values same-sex relationships highly—in certain contexts he even places them above heterosexual couplings—but I do not believe that he provides any salient principles that should convince this Court to include same-sex love within the institution of marriage.

[53] The principal problem I have had in working through this case has to do with what Shakespeare's rejection of same-sex marriage might suggest about the destiny of the Court of Shakespeare itself. If Shakespeare can tell us only what we do not want to hear, can repeat only the same old exclusionary, heteronormative line that has long worn out its welcome among a majority of Canadians and Canadian legal practitioners, why then should we want to prolong this farce? As Bolongaro J. has it:

> The living tree is a model for an honest confrontation with our roots, a confrontation which recognizes the nourishment those roots have provided and may still provide but which is also willing to contemplate the possibility that those roots have withered, the tree is dead and needs to be cut down.[95]

[54] My sense early on about what Shakespeare had to say to us about same-sex marriage made me fear that he might, after all, be irretrievably outmoded—his tree

[95] Bolongaro J., unpublished judgment, on file with the Court.

might need to be cut down. The integrity of the Court, however, is troubled on the other side of the question too (that is, it is troubled even if we choose to see Shakespeare as an ally of the Charter, the modern ideal of equality rights, and the cause of same-sex marriage). What will be the fate of the Court if it begins to appear that Shakespeare can always be counted on to emerge as the reliable friend of modern liberal values? Might that not be seen to amount to, or might it not in fact be, a closing off of authentic engagement with the written law itself? On this side of the dilemma that faces the Court, then, the tree is already felled; we just pretend that it is still standing.

[55] The answer to this threat to the integrity of the Court is steadfastness in our conversation with Shakespeare. Even if we do not like what he has to say, it is most important to attend to his view of things. It is not legitimate, and this is a point that my colleagues have also made, to offload what we do not like onto the "constraints" of Shakespeare's culture or the limitations of the literary forms that he adopted. His culture, after all, was as multifarious and complex as ours, and it is incredible to think that this extraordinarily inventive artist would have been constrained to make meanings he did not wish to have made by virtue of his choice of genre. It is important to allow his imaginative representations of life—even where they abrade our prejudices—to nurture our understanding of the issues that come before the Court. While I believe that the law of Shakespeare prohibits same-sex marriage, I suggest that this prohibition, if fully understood, does not lead to a dead end but rather toward a more pluralistic legal model of long-term personal relationships. This model is based on Shakespeare's ideal of the dignity of *communities* and on the integrity and relative autonomy of what Bolongaro J. (commenting on the points of counsel for the respondent) calls "normative orders", which derive their legitimacy from the communities from which they emerge.[96] To emphasize the importance of communities and their attendant normative orders within the larger Shakespearean social world is to ally the Court with the kind of modern Canadian thinking that has begun to provide differentiated legal regimes for historically differentiated communities. In a Shakespearean "community of communities", as I imagine it, the homosexual community becomes the author of its own language of love and substantially (if not procedurally) the legislator of its own forms of personal commitment (always, of course, bearing in mind the prohibition against same-sex marriage).

II. The Shakespearean Prohibition

[56] The recent argument for same-sex marriage, given memorable expression in *Halpern*, turns on the idea of the primacy of the rights of the individual over the traditional "rights" of social institutions (notice how even our expressive poverty vis-à-vis marriage sets us apart from Shakespeare, for whom marriage—whether called

[96] Pignoli and Wylde, factum for the respondent, on file with the Court.

Hymen, Juno, or Ceres—is very often a character with an identity and with attendant rights):

> Marriage is, without dispute, one of the most significant forms of personal relationships. For centuries, marriage has been a basic element of social organization in societies around the world. Through the institution of marriage, individuals can publicly express their love and commitment to each other. Through this institution, society publicly recognizes expressions of love and commitment between individuals, granting them respect and legitimacy as a couple. This public recognition and sanction of marital relationships reflect society's approbation of the personal hopes, desires and aspirations that underlie loving, committed conjugal relationships. This can only enhance an individual's sense of self-worth and dignity.[97]

We can note that the logic of the judgment, which is implicit in this paragraph, turns on the bipartite relationship between public recognition and legal sanction on the one side and individual self-worth and dignity on the other. Of course, the Ontario ruling also emphasizes the injustices suffered by homosexuals as a group, but the overall argument nevertheless turns on the primacy of the rights of homosexuals as individuals. The public and the individual have eyes only for each other. Marriage is instrumentalized in the justices' thinking as a long-standing, valued, but basically elastic social form that can and should be altered to advance the cause of the relationship between the individual person and the public. The Law is an institution of enlightened redress that is able to reveal exactly where public recognition of individual dignity has been long overdue and is able to persuade the sun of public legitimation to shine upon those who have been held in the dark for far too long.

[57] Shakespeare's moral universe is different from that of the Ontario justices; and it is different, I respectfully submit, from that of my fellow judges. Shakespearean characters do not often seek primary recognition from some entity called "society" or "the public"; instead, they turn their hungry gazes toward a variety of legitimating institutions and figures: the Court, the monarch, the community of warriors or lovers, their own fathers or the ghosts of their fathers (and more rarely their mothers), their children, their family or blood-line, the Dead, the English nation, the gods of War, Love, Nature, or Marriage, or the Christian god. It is worth noting the drama's general distrust of characters, such as the "vile politician" Henry Bullingbrook, who actively pursue the good opinion of the commons (as opposed to a character like Hamlet, who is simply loveable to the people on his own account).[98] It is also worth noting that characters who seek recognition from the Law are always frustrated (think of Lear accusing a join-stool or Hermione, in *The Winter's Tale*, denouncing her husband's

---

[97] *Halpern*, *supra* note 13.

[98] For Bullingbrook, see *The Tragedy of King Richard the Second*, act 1, scene 4, lines 20-36; William Shakespeare, *The First Part of Henry the Fourth*, act 1, scene 3, lines 239-56. For Hamlet, see *Hamlet*, *supra* note 87, act 4, scene 3, lines 4-5.

kangaroo court),[99] and they are often presented as foolish (like Justice Shallow in *The Merry Wives of Windsor*).[100] The process that confers value on the characters and that recognizes their dignity and worth is more multifarious than modern *public* legitimation.

[58] Importantly, all the legitimating institutions and figures in Shakespeare are characterized by numinousness and interconnectedness. The figure Hymen who appears on stage, as if by magic, at the end of *As You Like It* represents marriage as a sacred institution that is able both to "atone" the jumble of earthly relationships and to provide immense personal, familial, and social benefit:

> Then is there mirth in heaven,
> When earthly things made even
> Atone together.
> Good Duke, receive thy daughter,
> Hymen from heaven brought her,
> Yea, brought her hither,
> That thou mightst join [her] hand with his
> Whose heart within his bosom is.
> ...
> Wedding is great Juno's crown,
> O blessed bond of board and bed!
> 'Tis Hymen peoples every town,
> High wedlock then be honored.
> Honor, high honor, and renown
> To Hymen, god of every town![101]

[59] This is a moment of magic, spectacle, music, and high celebratory ritual, and we should not think, of course, that it is the playwright's last word about marriage. Contrary to the arguments of counsel for the appellant, which tend to overstate the case for the sacredness of wedlock, Shakespearean marriage is not a sacred institution *tout court*.[102] Shakespeare is too keen a social observer for that. Note that the impeccable and noble Orlando does not fall for Rosalind until after his bid for courtly notice is rejected by Duke Frederick, so that his desire to marry the princess has, to a very slight degree, the quality of a second choice in the overall social economy of legitimation.[103] In *The Taming of the Shrew*, Shakespeare situates marriage even more strongly within an economy, here not one of social capital but rather one resolutely of material goods—of dowries and jointures, lands and houses, revenues, "plate and

---

[99] William Shakespeare, *The Tragedy of King Lear*, act 3, scene 6; *Winter's Tale*, *supra* note 51, act 3, scene 2.

[100] William Shakespeare, *The Merry Wives of Windsor*, act 1, scene 1.

[101] *As You Like It*, *supra* note 33, act 5, scene 4, lines 108-15, 141-46.

[102] Anderson and Unger, factum for the appellant, on file with the Court; Coodin and Eldridge, factum for the appellant, on file with the Court.

[103] *As You Like It*, *supra* note 33, act 1, scene 2, lines 149ff.

gold", "hangings all of Tyrian tapestry", "cypress chests", livestock, et cetera.[104] Shakespeare's tendency is to redescribe apparently sacred institutions such as kingship and marriage in social and political terms, but the critical redescriptions that he develops are never radical or demystifying.[105] He always leaves his options open. Lear's kingship is shown to be dependent on wealth and military power rather than on divinity, but the suffering of the deposed king has nevertheless transcendent, world-shattering resonance. The economic and social side of marriage is highlighted in plays such as *Taming of the Shrew*, but marriage retains nonetheless its blessed power to atone earthly things—that is, it retains its capacity to elevate the scrappy Katherine and the mercenary Petruchio into a realm of loving mutuality and married dignity, as has been demonstrated with great regularity in countless performances of the play over the past several hundred years.

[60] In addition to this numinous quality, marriage in Shakespeare is also interconnected with a range of other sources of legitimation—most prominently the realm of the divine, the world of Nature, and the civility and productivity of town life (as Hymen's song makes clear). Indeed, the interconnectedness itself is a primary reason for the quasi-sacramental impression that each legitimating source is able to convey. Long ago, E.M.W. Tillyard argued that Shakespeare's universe was orthodoxly and rigidly Christian, with orderly sets of interrelated "correspondences" ranked within a grand hierarchical structure.[106] In the Tillyardian view, heterosexual marriage is sacred through and through on account of its place within a universal structure of corresponding gendered relationships—spirit and matter, ruler and state, rider and horse, sun and moon, et cetera—all being reflective of the loving rulership that obtains between the Christian God and His creation. Tillyard has been strongly and justly criticized by two generations of materialist scholars, whose work has shown that Shakespeare's representations of the world and the intellectual culture of the Renaissance in general were far more complex and controversial than Tillyard's "Elizabethan world picture" allowed.[107] On their own side, however, the materialist critics, sternly explaining everything in Shakespeare in the thorough going secular terms of social and political power, have been altogether blind to the persistence, however attenuated or subject to critique, of Christian ideas such as sacred kingship or sacramental wedlock; and they have been unable to grasp the tendency in Shakespeare to represent the moral universe as a loosely articulated network of legitimating figures and institutions.[108]

---

[104] William Shakespeare, *The Taming of the Shrew*, act 2, scene 1, lines 345-98.

[105] On Shakespeare and redescription, especially in the terms of the marketplace, see Lars Engle, *Shakespearean Pragmatism: Market of his Time* (Chicago: The University of Chicago Press, 1993).

[106] E.M.W. Tillyard, *The Elizabethan World Picture* (London: Chatto and Windus, 1948).

[107] See Jonathan Dollimore, *Radical Tragedy: Religion, Ideology, and Power in the Drama of Shakespeare and his Contemporaries* (London: Harvester Press, 1984).

[108] See Debora Kuller Shuger, *Habits of Thought in the English Renaissance: Religion, Politics, and the Dominant Culture* (Berkeley: University of California Press, 1990); Jeffrey Knapp,

[61] We can discern the consequences of this secularizing emphasis in Manderson J.'s reading of *The Winter's Tale*. According to my learned colleague's eloquent and forceful judgment, that play reveals that marriage is not sacred at all but rather is first of all a matter of having faith in another person. He says that "faith is the rock that saves us when evidence cannot, when law becomes farce, and when reason runs out." Faith of an entirely this-worldly kind is the whole ground of value: "faith is not given a remotely religious or even sacred character."[109]

At the end of *The Winter's Tale*, Paulina instructs the onstage audience:

> It is requir'd
> You do awake your faith. Then, all stand still.
> On; those that think it is unlawful business
> I am about, let them depart.[110]

She is not asking Leontes to arouse his faith in his dead queen or even in what appears to be the statue of the queen. She is insisting that the onlookers adopt a certain spiritual, physical, and mental disposition in advance of the ritual of depetrification. Faithfulness, stillness, and rational belief in the holiness of the ritual are simply appropriate under the circumstances, and they are also an effective way of helping to advance the magic. With a glance at the Church of England's idea of sacramental "participation",[111] Paulina is saying that Hermione's rebirth and the rebirth of her marriage depend in part on the faith of the congregated witnesses.[112] Her insistence on their faith is moreover of a piece with the faith in the truth of Apollo's oracle that she and Hermione have enacted over the space of a generation, the religious faith that caused the two women to suspend the royal marriage until the oracle was fulfilled by the finding of Perdita, the lost child. We should note the extraordinary depth of the women's faith, since, had Perdita not been found, Hermione would have gone into death at the end of her time without ever having been reunited with her repentant, beloved husband.

[62] This account of the women's faith suggests that the royal marriage, upon which the peace of the kingdom depends, is under Apollo's authority and that, once the marriage has been violated by Leontes' faithlessness, it can be restored only by faithful obedience to Apollo and then specifically by the miraculous return of the lost child. It is worth noting that the restoration of Perdita to her family depends in the first

---

Shakespeare's Tribe: Church, Nation, and Theater in Renaissance England (Chicago: University of Chicago Press, 2002).

[109] Manderson J. at para. 30.

[110] *Winter's Tale*, *supra* note 51, act 5, scene 3, lines 94-97.

[111] "The real presence of Christ's ... body and blood is not therefore to be sought for in the sacrament, but in the worthy receiver of the sacrament" (Richard Hooker, *Of the Laws of Ecclesiastical Polity*, vol. 2 (London: J.M. Dent & Sons, 1954) at 322).

[112] See Anthony B. Dawson, "Performance and Participation" in Anthony B. Dawson & Paul Yachnin, *The Culture of Playgoing in Shakespeare's England: A Collaborative Debate* (Cambridge: Cambridge University Press, 2001) 11.

instance on the emergence (handled with characteristic Shakespearean playfulness) of her natural, royal breeding, even in the sheepcote where she has been raised. Counsel for the appellant argued convincingly that individual interpersonal faith cannot be prised apart from religious faith: "The principle of faith is a type of surrender to the structural binding principle inherent in the sanctified higher order, represented in sanctified heterosexual marriage."[113]

[63] Since Shakespearean marriage, however much it is subject to social and political critique, remains a numinous source of human value—with characters such as Leontes, Rosalind, Viola, and Orlando turning to marriage for personal fulfillment and public legitimation—and since marriage is situated within a loosely networked moral universe that includes other legitimating institutions and figures, it follows that marriage is bigger than the characters whose lives it serves to enrich and justify. Marriage in Shakespeare is never instrumentalized in order to serve the interests of individual characters; rather, the characters are instrumentalized in order to fulfill the heterosexual nature of marriage. Olivia is made to marry Sebastian even though he is not the young man that she has fallen in love with because the man she loves is in fact a woman. To a degree, the plays permit characters to marry across lines of rank (Olivia is of higher rank than Sebastian), but homoerotic desire is, without exception, rechanneled along heterosexual lines. I do not on the strength of this argument insist that counsel for the respondent is wrong to suggest that "Shakespeare opens a forum for discussion on the nature of marriage."[114] With respect, I think that Shakespeare remains far more open-minded about marriage, than do the Justices of the Court of Appeal for Ontario about the nature of "the public", which is evidently for them a fully sacred source of legitimacy. I do conclude, however, that the forum that Shakespeare opens finds time and again that, while marriage can be prodded by various kinds of critique, it nevertheless retains its secure place in a moral universe and thereby proves its power to confer value upon those aspirants to committed heterosexual relationships, whose celebrations flood the endings of the comedies with light. In view of this account of Shakespeare's representation of marriage as naturally heterosexual, as effectively transcendent over the social conditions of marital practices, and as incapable of being made into an instrument for the fulfillment of the claims of either the vagaries of individual desire or the more weighty claims of individual human rights, I find for the appellant.

III. Same-Sex Love in the Shakespearean Plurality of Communities

[64] If we take the Sonnets at face value, we will conclude that Shakespeare was deeply in love with a young nobleman. In "Sonnet 20", he explicitly renounces the possibility of the physical consummation of his passion, but at the same time he praises

[113] Coodin and Eldridge, *supra* note 102.
[114] Rose and Smith, *supra* note 65.

the sublime love that develops between men far above the merely physical lovemaking that is practiced by men and women within an economy of biological reproduction:

> A woman's face with Nature's own hand painted
> Hast thou, the master mistress of my passion;
> A woman's gentle heart but not acquainted
> With shifting change as is false women's fashion;
> An eye more bright than theirs, less false in rolling,
> Gilding the object whereupon it gazeth;
> A man in hue all hues is his controlling,
> Which steals men's eyes and women's souls amazeth.
> And for a woman wert thou first created,
> Till Nature as she wrought thee fell a-doting,
> And by addition me of thee defeated,
> By adding one thing to my purpose nothing.
> But since she prick'd thee out for women's pleasure,
> Mine be thy love, and thy love's use their treasure.

[65] The degradation of heterosexual love to an interest-bearing activity among multiple partners in a biological marketplace is striking, especially coming, as "Sonnet 20" does, as the third poem after the "procreation" Sonnets, where the poet counsels the young man to achieve a natural kind of immortality by marrying and by fathering children. Striking also is the difference between the Sonnet and the Comedies that we have been considering. The Sonnet valorizes same-sex, male-to-male affection as the only kind of relationship capable of fostering authentic love (as opposed to "love's use"). The comedies shunt same-sex love aside—it is portrayed as essentially juvenile—in their pursuit of heterosexual marriage and the lovemaking that issues, often with beautiful promise, in the birth of children. We remember Rosalind's rooted desire to have Orlando's child, Hymen's song, Oberon's blessing on the three bridal beds at the end of *Midsummer Night's Dream*, and the poignant entrance of Helena, who was thought to be dead but whose body is quickening with new life (we are invited to feel the baby as she feels it): "Dead though she be, she feels her young one kick."[115]

[66] "Sonnet 20" changes none of the essential features of the opposition between homosexual and heterosexual love, but it changes fundamentally the way that opposition is valued. As in the comedies, biological sexual difference is decisive. Just like the characters in the comedies who are drawn initially toward same-sex partners, the poet declines absolutely to have any physical relationship with his same-sex beloved once his beloved's true sex is revealed. Biological sexual difference is a profound matter in the comedies: for all her role-playing and transvestism, Rosalind's female body exerts an irresistible hold on her. In the poem, biology is just as decisive, but it is trivialized—by adding a last minute prick to her creation, doting Nature serves her own physical needs and also happens to thwart the poet's desire.

---

[115] William Shakespeare, *All's Well That Ends Well*, act 5, scene 3, line 302.

[67] But not his love. His love for the young man is true and enduring precisely because it is not involved in biological reproduction. This is particularly attractive when we consider that fatherhood promises only a weird and self-destructive kind of immortality (since the child's youth and beauty can serve as a reminder of his father's youth and beauty only after those attributes, in the father himself, are lost and buried in his "deep-sunken eyes")[116]; "Sonnet 20", with its celebration of chaste homosexual love, belongs with those poems (e.g., 15, 18, 19) that promise a more sublime, poetic immortality: "So long as men can breathe or eyes can see, / So long lives this, and this gives life to thee."[117] What is emerging in the first flight of Sonnets, then, are two opposed ways of reckoning human love and two opposed ways of assuring personal immortality in the face of sublunary mutability. One is heterosexual, natural, physical, and sexually reproductive—an embracing of the natural processes of breeding, aging, and dying. The other is homosexual, artistic, platonic (for want of a better word), and literarily productive. What emerges in the first twenty Sonnets therefore is the articulation of two normative orders, with different ways of thinking and conferring value, different ways of "making love", and even different languages (note how the dominant values of "Sonnet 20" cause "love's use" and "treasure" to be ironically inflected).

[68] Shakespeare's high valuation of male-to-male love is a feature in a number of his plays as well.[118] In *Hamlet*, where heterosexual marriage is an unmitigated disaster, the most authentically loving relationship is between Hamlet and Horatio.[119] Roman plays such as *Julius Caesar* and *Coriolanus* also include emotionally complex and thematically central relationships between men; in *Antony and Cleopatra*, Enobarbus loves Antony so completely that he dies of a broken heart on account of his betrayal of his general.[120] As counsel for the respondents has pointed out, the Comedies feature forms of female-to-female attachment that are remarkable since they explicitly exclude men (Hippolyta's Amazon tribe, the younger Helen and Hermia, and Titania and her "vot'ress," all in *Midsummer Night's Dream*; Celia and Rosalind in *As You Like It*). These female-to-female love relationships (they are also all chaste and sisterly) are, as we have seen, shunted to the side by the rush toward heterosexual marriage, but they (especially Titania's sense of responsibility to her late votaress[121]) nevertheless are of a piece with Shakespeare's valorizing representations of same-sex, male-to-male love.

---

[116] William Shakespeare, "Sonnet 2", line 7.

[117] "Sonnet 18", *supra* note 50, lines 13-14.

[118] For Shakespeare's distrust of heterosexual, as opposed to homosexual, passion, see Stephen Orgel, *Impersonations: The Performance of Gender in Shakespeare's England* (Cambridge: Cambridge University Press, 1996).

[119] See *Hamlet*, *supra* note 87, act 3, scene 2, lines 53-74.

[120] William Shakespeare, *The Tragedy of Antony and Cleopatra*, act 4, scene 9.

[121] See *Midsummer Night's Dream*, *supra* note 85, act 2, scene 1.

[69] I suggest that the normative orders of heterosexual and homosexual love and the groupings from which these orders emerge are among the most prominent in Shakespeare's world of relatively autonomous communities. In *A Midsummer Night's Dream*, to take a strong example of Shakespeare's representational practice, there are three distinct groups—the Faeries, the Mechanicals, and the Aristocrats. The groups inhabit the same world, and their paths cross and re-cross, but they do not live by the same values and, although they all speak English, they do not in fact speak the same language.[122] Theseus is incapable of understanding the Mechanicals' motives for performing, which are self-seeking as well as altruistic; Bottom and his company cannot fathom the imaginative capacities of the courtly spectators; and the Faeries tend to view lost and distressful humans as if they were great wooden-headed dummies.[123] If Bottom were made to speak in Titania's language, he could not give adequate expression to his own meanings. Theseus would be lost in Bottom's homespun prose, as would the Faeries also. If the poet of "Sonnet 20" had only the language of heterosexual love that, as I have argued, is dominant in the Comedies, he could not begin to describe the ways in which he loved the "master mistress" of his passion.

[70] In conclusion, while Shakespeare prohibits same-sex marriage, his valorizing portrayal of same-sex love, especially in the Sonnets and in a number of the plays, and his representation of the world as a plurality of communities (each with its own relatively autonomous normative order and its own attendant special language) should encourage this Court to take the part of certain thinkers within the modern gay community who are deeply distrustful of the ongoing judicial initiative to include homosexuals within the fold of marriage.[124] In their view, marriage speaks the language of heterosexuality and is fundamentally alien to the historically situated culture and forms of expression and self-description of the gay community. On this account, furthermore, the Charter emerges, ironically enough, as a well-intentioned juggernaut of cultural uniformity. It remains to the gay community, therefore, to fashion its own model or models (these need not be chaste, of course) of interpersonal commitment and faith.

---

[122] See *ibid.*, act 3, scene 1, lines 125-201.
[123] *Ibid.*, act 5, scene 1, lines 19-23; act 3, scene 1; act 3, scene 2.
[124] See Pignoli and Wylde, *supra* note 96.