

SHAKESPEARE, LAW,  
AND MARRIAGE

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PUBLISHED BY THE PRESS SYNDICATE OF THE UNIVERSITY OF CAMBRIDGE  
The Pitt Building, Trumpington Street, Cambridge, United Kingdom

CAMBRIDGE UNIVERSITY PRESS  
The Edinburgh Building, Cambridge, CB2 2RU, UK  
40 West 20th Street, New York, NY 10011-4211, USA  
477 Williamstown Road, Port Melbourne, VIC 3207, Australia  
Ruiz de Alarcón 13, 28014 Madrid, Spain  
Dock House, The Waterfront, Cape Town 8001, South Africa

<http://www.cambridge.org>

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First published 2003

Printed in the United Kingdom at the University Press, Cambridge

*Typeface* Adobe Garamond 11/12.5 pt.    *System* L<sup>A</sup>T<sub>E</sub>X 2<sub>ε</sub> [TB]

*A catalogue record for this book is available from the British Library*

*Library of Congress Cataloguing in Publication data*

Sokol, B. J.

Shakespeare, law, and marriage / B. J. Sokol and Mary Sokol.

p. cm.

Includes bibliographical references (p. ) and index.

ISBN 0 521 82263 7

1. Shakespeare, William, 1564–1616 – Knowledge – Manners and customs.
  2. Marriage in literature.
  3. Shakespeare, William, 1564–1616 – Knowledge – Law.
  4. Marriage – England – History – 16th century.
  5. Marriage – England – History – 17th century.
  6. Law and literature – History – 16th century.
  7. Law and literature – History – 17th century.
  8. Law in literature.
1. Sokol, Mary, 1945–    II. Title.

PR 3069.M32.S65 2003

822.3'3 – dc21 2003048481

ISBN 0 521 82263 7 hardback

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## CHAPTER I

### *Making a valid marriage: the consensual model*

#### SPOUSALS

I have heard lawyers say a contract in a chamber  
*Per verba de presenti* is absolute marriage:—  
Bless heaven, this sacred Gordian, which let violence  
Never untwine.

Today it is almost unbelievable that a valid marriage could have been created as informally as it was seen to be in John Webster's play *The Duchess of Malfi*. Yet the above few words, spoken by Webster's Duchess,<sup>1</sup> quite properly describe the simple process that allowed willing couples to be married in Shakespeare's age.<sup>2</sup>

The Duchess's remark makes an explicit (if perhaps defensive) reference to legality, and also refers to an indissoluble Gordian knot. In so doing, she correctly claims that the secret union she is about to form with her steward Antonio will be 'absolute marriage'. She then marries privately, without any written licence or other form of permission from Church or state. She is not married in a church. There are no clergy present, and no religious rites. Her family play no part and there is no more publicity than the witnessing presence of a waiting woman. No particular formal words or ritual words are spoken. Rather, she and Antonio express, using highly figurative language, their agreement to be married. Because they are not prohibited from giving such consent (by 'impediments' of incest, bigamy, or incapacity to express consent), they are then immediately and irrevocably married.

In this scene Webster portrays the creation of a valid and binding marriage by what was known as spousals. Through the Duchess Webster foregrounds a legal opinion that was relevant to such a case. Shakespeare also repeatedly portrayed marriage by spousals, but with much less bluntness, and frequently (as we shall see) with more ambiguity. This accords with a

general difference between Shakespeare and some of his rivals: Shakespeare continually relied on the recognition of the principles, procedures, oddities, and enigmas of contemporary laws concerning marriage, but his handling of such matters was typically complex, ingrained, and implicit rather than simplified, highlighted, or explicit.<sup>3</sup> We shall see, for example, that Shakespeare dealt with divorce repeatedly and in many different ways, yet did not fill his plays with the technical legal details and legal jargon found, for instance, in Ben Jonson's *Epicoene* concerning the laws of divorce.

In our conclusion we will offer an assessment of Shakespeare's characteristically complex modes of treating issues arising from the law concerning marriage. But first it is necessary to set out and discuss the circumstances and history of that law, and to match matters arising from such discussions with the dramatic instances on which they bear.

The present chapter will begin such an analysis at its natural starting point, by considering in detail the consensual model of marriage that allowed marriage formation by spouses. We will reserve the term 'spousals' here to mean the act that formed the contract constituting a valid marriage.<sup>4</sup> As we have seen, this sort of contract was made by the two consenting parties, and by them alone. Their consent (expressed in the present tense) was all that was required by law to form a valid marriage. The marriage was then indissoluble and, except for arguments over evidence of spousals, incontestable.

That notwithstanding, a marriage by spousals alone, although legally binding and valid, had serious limitations. It was quite possible both to be legally married, and yet to be fined by the church courts for marrying in a 'clandestine' manner, that is, without church solemnisation.<sup>5</sup> Such marriages were disapproved of, but not uncommon. In a notorious example, the church courts summoned the Queen's Attorney General, Sir Edward Coke, to answer charges that in 1598 he had privately married the young widow Lady Elizabeth Hatton without either a church blessing or a public ceremony.

Thanks to the power of spousals to form valid marriages, a remarkable autonomy (almost unimaginable today) was theoretically available to men and women in Shakespeare's England. This autonomy derived from the logic that mutual consent alone was required for marriage. Yet spousals were also the starting point for what may seem an illogicality. This was that they created a wholly legal, yet not a wholly licit, marriage. For although spousals made a marriage that was binding and valid, yet marriage by spousals alone was viewed as an offence by both society and Church law. This contradiction was regarded by many contemporaries as unsatisfactory,

and especially by families who deplored the excessive freedom – as they saw it – allowed a bride and groom.

Other difficulties over spousals arose from the definition of consent itself. According to Henry Swinburne's important (if not entirely reliable) *Treatise of Spousals or Matrimonial Contracts*, written c. 1600,<sup>6</sup> consent to marry was legally understood to be an inward state, constituted by a sober and well-considered intention. No particular formula of words or deeds was required to give valid consent; a variety of signs, not all of them even verbal, was accepted as sufficient to indicate the existence of this consenting state. Not surprisingly, there were often difficulties in the interpretation of such signs, as seen in many cases contested in church courts.

Indications of inward states by words or gestures are also fundamental to drama. Law courts, like theatre audiences, may find that this is problematic because communication and verification of 'authentic' inner intent is not an easy matter.<sup>7</sup> For the law of evidence in disputed marriage cases, as for the theatre, the opinions of spectators were crucial. In contested cases over spousals two witnesses at the least were required by the church courts, which caused many problems.<sup>8</sup> As we shall see in chapter 6, witnesses (including lawyers and clergy) could be punished or even excommunicated if they had attended clandestine marriages. Also, witnesses to marriages or marriage negotiations could be biased in favour of one party or the other, or like Shakespeare himself they may have had unreliable memories.<sup>9</sup>

Confusion about spousals was a lively topic which often inspired Elizabethan or Jacobean playwrights. We will see that, regardless of the period or locale of his dramatic settings, Shakespeare's depictions of marriage usually mirrored the laws and practices of contemporary England. Yet, because those laws were so perplexing, Shakespeare's plays also often posited or mooted extremely complex situations concerning spousals. Whether he used mirror-like modes of representation, or fantastically mooted complexities, it does seem that Shakespeare was somewhat spousal obsessed; representations of spousals are found in a wide variety of his dramatic settings, and they serve many differing dramatic purposes.

We may get a sharper sense of the sort of problems created by the contemporary marriage laws by noting briefly the failure of one attempt at reform. The post-Reformation statute 32 Hen. VIII c.38 (1540) set out to remedy an alleged abuse due to the 'usurped Power of the Bishop of Rome'.<sup>10</sup> This abuse was that church courts would invalidate a marriage (as bigamous) whenever either man or wife were shown to have previously made an earlier marriage contract (spousals) with another party. So a longstanding consummated marriage, perhaps with children, could be undone by disclosure of

a prior unconsummated contract. But this Act of 1540, far from curing the problem, itself turned out to be the cause of further abuses. The Act is titled 'An Act concerning Pre-contracts of Marriages, and touching Degrees of Consanguinity'.<sup>11</sup> The 'pre-' in the term 'pre-contracts' implies that after a spousal contract some further legal steps were needed to form a binding marriage, which was not true.<sup>12</sup> However, 'pre-' does correctly indicate that spousals were generally understood to be only part of a marriage process to be accompanied by public announcement, church solemnisation, and various celebrations.

To prevent longstanding marriages being overturned, the Act deemed 'lawful good just and indissoluble, notwithstanding any [prior] Pre-contract or Pre-contracts of Matrimony not consummate with bodily Knowledge' any marriage that is made 'within this Church of *England* . . . being contract and solemnised in the Face of the Church, and consummate with bodily Knowledge or Fruit of Children or Child'. The Act removed from the church courts powers to dissolve such a subsequent consummated marriage, claiming to put right a source of notorious abuse. However, only eight years later this Act was repealed by 2 & 3 Edw. VI c.23 (1548), because it had itself resulted in unforeseen 'ungodly' abuses, or 'divers Inconveniencies (intolerable in manners to Christian Ears and Eyes)'. Risking offence to ears and eyes, the Act did name the abuses where feigned pre-contracts served lust: 'Women and Men breaking their own Promises and Faiths . . . set upon Sensuality and Pleasure'.<sup>13</sup> The legislators' good intentions had overlooked the human propensity to act on 'bodily Lust'; attempts at legal regulation of 'Faith and Truth' had allowed the pretext of (an invalid) marriage to be used for seduction.

#### HISTORY

The failure of Henry VIII's 1540 attempted legal reform illustrates how efforts to regulate marriage were fraught with difficulties and paradoxes in Tudor England (indeed they still are today). Such problems had a long European history. Most difficulties over marriage contracts still relevant in Shakespeare's age had their beginning in disagreements between canonists in twelfth-century Europe on the requirements for the formation of a valid marriage.<sup>14</sup> One view, supported by Gratian and the Bolognese school, argued that all that was necessary to make a valid contract of marriage was the consent of both parties to the marriage. Subsequent consummation would then make the marriage indissoluble, but if such a contracted marriage was unconsummated, a second consummated contract would be valid and take

precedence over the unconsummated first contract.<sup>15</sup> An alternative view was put forward by Peter Lombard and the Parisian school of canonists, who considered that if the formulation of Gratian was accepted it would raise difficult theological questions about the nature of the marriage between the Virgin Mary and St Joseph. Lombard's argument was that a contract of marriage could be made in two ways: by *verba de praesenti* or *verba de futuro*. The former, words of present consent, immediately created a valid marriage. Nothing more was needed.<sup>16</sup> So an unconsummated contract using words of present consent would take priority over any subsequent marriage, whether or not consummated. However, a contract formed by words of future consent could be dissolved by mutual agreement unless it had been followed by consummation, and if unconsummated would not take priority over a subsequent consummated contract. A contract formed by words of present consent could not be dissolved either unilaterally or by agreement.

A contract *per verba de futuro* could be conditional, with, for example, a condition relating to payment of a marriage portion or the agreement of a parent. In this case the contract did not become a valid marriage until the performance of the condition, unless the marriage was consummated. So, although a marriage *per verba de futuro* could be dissolved by mutual agreement if not consummated, one *per verba de praesenti* could not.

In the late twelfth century Pope Alexander III in a number of decretals accepted the views of Peter Lombard and the Parisian school, in which merely *verba de praesenti* formed a valid marriage.<sup>17</sup> So the consent of parents, or other family, or lords, was not necessary for validity. Nor was endowment at the church door a requirement. Importantly, neither lack of public ceremony nor lack of priestly blessing would invalidate such a marriage. But there were certain circumstances in which no valid contract of marriage could ever be entered into. Here a dirimentary impediment acted to prevent a valid marriage being formed. Impediments included lack of capacity on the part of either party to contract marriage, duress, pre-contract, or prohibitions on marriages between parties related in some way. Evidence of an impediment could prevent a marriage taking place, and could also be produced in a suit for nullity or divorce.<sup>18</sup>

The parties' consent, the sole fact to be established, could be given by words, or by signs such as the giving and receiving of a ring and handfasting,<sup>19</sup> or by the agency of a third party.<sup>20</sup> Handfasting meant the joining of hands accompanied by mutual agreement to be married, either immediately or in the future; giving of a ring could include an exchange of parts of a ring or gifts of other jewellery or even silver coins. Sometimes the

consent giving was performed in public, but a private exchange of words or gestures of consent was common and just as binding.

#### THE CHURCH COURTS AND MARRIAGE FORMATION

Because William I had transferred jurisdiction over matters of spiritual and moral concern from local courts to church courts (although this transfer was not completed until the twelfth century), the enforcement of the law of marriage in later medieval and early modern England was the concern of the Church. So, although the English common law dealt with disputes concerning real property (land) arising from marriage, from the mid-twelfth century until the mid-nineteenth century litigation about formation of marriage took place in the church courts.

By adopting Pope Alexander's consensual model for marriage formation the Western Church also accepted an individualistic view of marriage, in which (in theory) the importance of control by family, feudal lord, king, or church solemnisation was subordinated to individual consent.<sup>21</sup> Perhaps inevitably, this model gave rise to many contentious cases in church courts. In contrast to the present age, in medieval and early modern England there were large numbers of cases concerning the formation of marriage, and few for separation or divorce.<sup>22</sup> The reason for this can be found in two causes: the absence of any Church-required or state-required formalities for making a marriage valid, and the lack of any agreed formula of words to be used by contracting parties.<sup>23</sup>

The jurisdiction of the church courts was divided into non-contentious matters (mostly administrative, such as probate of wills, or grant of marriage licences), and contentious matters, which included disputes over contracts of marriage, divorce, affiliation and custody, support orders, and investigation and punishment of public and private immorality.<sup>24</sup> Contentious cases could be brought as 'instance' cases, or else as *ex officio* ones. Instance cases were the most common. Many of these were brought by one of the parties to an alleged marriage asking for its enforcement, while the other party denied marriage had ever taken place. Alternatively, in multi-party instance cases the court typically considered competing claims by several parties all claiming that the marriage they had entered into was valid, for example where a man had 'married' several women. Often unresolved questions of inheritance of property or legitimacy of children prompted such cases.

Marriage was also often at issue in *ex officio* church court cases, which were usually instigated by an archdeacon, a rural dean, or the bishop himself on

the report of suspicious circumstances made to him by a court official, parish officer, or occasionally a third party. These were disciplinary prosecutions for moral and religious offences such as fornication, adultery, wife-beating and neglect, drunkenness, or other breaches of the peace. After Henry VIII forbade the teaching of canon law, the work of the English church courts was undertaken by lawyers trained at university in Roman civil law, referred to by Shakespeare as 'civil doctors'.<sup>25</sup> Although the church courts' records were in Latin, their proceedings were conducted in English so that litigants and witnesses were heard. The large number of prosecutions for marital and sexual offences explains why the church courts were colloquially known as 'bawdy courts', and why their records are of interest to social historians. Long after the Reformation, English church courts continued to play an important role in the public regulation of private morality.

The early modern church courts were often portrayed by later historians as unpopular – at best ineffective (failing to pursue offenders), and at worst corrupt. However, more recently such opinions have been criticised because they were based on evidence provided by the writings of contemporary Puritans who wanted a more strenuous enforcement of public moral discipline, or the pronouncements of common lawyers critical or jealous of the Church's jurisdiction.<sup>26</sup>

#### SHAKESPEARE AND MAKING A MARRIAGE

The making of a marriage by mutual consent is either described or portrayed in nearly every one of Shakespeare's plays. For instance, Shakespeare often alludes to or portrays marriage formation by handfasting, as in *The Winter's Tale* 1.2.104–7, *Cymbeline* 1.5.78, *All's Well That Ends Well* 2.3.177, *The Winter's Tale* 4.4.381–2, and *The Tempest* 3.1.88–91. Also, in Shakespeare's plays, words of consent to marriage are sometimes replaced by gestures indicating consent.<sup>27</sup> Thus, following Claudio's marriage-contracting words, 'Lady, as you are mine, I am yours. I give away myself for you, and dote upon the exchange', bashful Hero of *Much Ado About Nothing* speaks with no lines audible to the assembled witnesses or the theatre audience. She only whispers in Claudio's ear, and probably also makes her intent outwardly known by taking Beatrice's merry advice to: 'Speak, cousin. Or, if you cannot, stop his mouth with a kiss, and let not him speak, neither' (*ADO* 2.1.288–92).

Indeed, the word 'contract' is almost exclusively reserved in Shakespeare's use for spousal contracts that established marriages.<sup>28</sup> However, the converse is not the case. The making of a marriage contract is variously called by

Shakespeare a spousal, espousal, contract, pre-contract or just marriage. This variety of terms matches the frequency of Shakespearian portrayals of marriage formation. The multiplicity of terms Shakespeare used also alerts us to a nuanced awareness of the practical and theoretical perplexities over marriage contracts in his age.

Some fine distinctions arise where the dramatic portrayal of spousals by Shakespeare is not accompanied by its explicit identification as a marriage. An example lies in the marriage by spousals made between Ferdinand and Miranda in *The Tempest*. There is no basis for the suspicion expressed by one critic that a *per verba de futuro* contract is implied by the wording of their agreement to marry.<sup>29</sup> Rather, they clearly undertake spousals *per verba de praesenti*. For Miranda's 'I am your wife, if you will marry me' (*TMP* 3.1.83) is not in any way a future promise, and if it is conditional the condition is immediately met in Ferdinand's reply to her question 'My husband then?', which is 'Ay, with a heart as willing / As bondage e'er of freedom. Here's my hand.' To this Miranda offers her reply in the form of a traditional handfasting: 'And mine, with my heart in 't' (3.1.88–91). The couple's intention here could not be clearer: it is to express a mutual, immediate, full and unconditional consent to be married, which in turn does make them married. What is odd is that Prospero subsequently makes what he calls the 'gift' of Miranda to Ferdinand, calling this transaction a 'contract' (4.1.8, 4.1.19). For Prospero knows that the pair have already privately expressed their mutual consent. What he has in mind will be discussed in chapter 5, on marriage solemnisation.

Since, if there were no impediments, genuine consent created a marriage, it was typical and correct for contracted parties awaiting (or even in the absence of) church solemnisation of the marriage to be referred to as a 'husband' or 'wife' (as are Kate in *The Taming of the Shrew* 2.1.317 and Antonio in *Measure for Measure* 4.1.70). Yet there was simultaneously a widespread notion that unsolemnised 'betrothal' was different from a solemnised and consummated marriage, and so the language of Shakespeare's plays contains over a dozen references to the betrothed or betrothing, usually referring to eager lovers, and most probably indicating those having undertaken *de futuro* spousals and not yet having solemnised or consummated their union.

Falstaff as a recruiting officer plans to extort money from unwilling 'contracted bachelors, such as had been asked twice on the banns' (*1H4* 4.2.17–18). A gloss on the status of Falstaff's victims as 'contracted bachelors' raises interesting distinctions. 'Bachelors' was mainly used by Shakespeare to specify unmarried men (as in 'Are you a married man or a bachelor?'

JC 3.3.8). But sometimes marriage law made for ambiguity, as in *A Midsummer Night's Dream* 2.2.65 where Hermia calls Lysander a 'virtuous bachelor' in a context in which their marital status following betrothal is at issue. Hermia denies Lysander's wish to sleep by her side, despite his claim that their 'Two bosoms [are] interchained with an oath; / So, then, two bosoms and a single troth' (*MND* 2.2.55–6). So, as far as Hermia was concerned, but not Lysander, betrothal is not full marriage.<sup>30</sup> Both in some sense were right; the Church condemned his wish to consummate a marriage before solemnisation, but it also saw those who were 'interchained with an oath' as fully married.

Claudio's remark, made in response to Hero's father's suggestion that it was he, Claudio, with whom she had had sexual relations before the church ceremony, very probably closely mirrored a typical social attitude (although not Prospero's attitude in *The Tempest*). This attitude is clearly expressed when Romelio in John Webster's *The Devil's Law-Case* holds that 'no scandal' will attach to a pregnancy out of wedlock if a 'precontract' is believed to have been previously 'exactly done'.<sup>31</sup> Claudio says that if he had been Hero's sexual partner, then their status as pre-contracted would 'extenuate the forehead sin' (*ADO* 4.1.50). It is difficult to be certain if the spousals of Claudio and Hero were made *per verba de praesenti*, for, as we have mentioned, Hero's whispered words are not heard by any witness.<sup>32</sup> But even if they had been made *de futuro*, the alleged intercourse would have made the spousals irrevocable.

Thus Claudio alludes to widespread toleration of the 'sin' that legally would turn a *de futuro* marriage contract made sincerely into a full marriage. Such toleration was not extended to those who made insincere promises of marriage for dishonest purposes. Such cases are often treated satirically by Shakespeare. So the scurrilous Lucio is said to have 'promised' Kate Keepdown 'marriage' (*MM* 3.1.458–60), and Falstaff has egregiously broken faith in a long relationship with Mistress Quickly (during 'twenty-nine years come peascod-time', she says in *Henry IV, part 2* 2.4.387).

Proffering a promise of marriage to seduce or for other illicit purposes was an offence. If accepted, such an offer constituted a valid marriage contract, which if unfulfilled could result in fines and an order to do penance in the church courts. This situation is travestied when the Lord Chief Justice is forced to adjudicate when he comes upon a street brawl between Falstaff and the officers attempting to arrest him for his debt to Mistress Quickly. Showing great attention to detail, yet failing to name the two witnesses required by church courts, Quickly claims that Falstaff owes her:

Marry, if thou wert an honest man, thyself, and the money too. Thou didst swear to me upon a parcel-gilt goblet, sitting in my Dolphin chamber, at the round table, by a sea-coal fire, upon Wednesday in Wheeson week, when the Prince broke thy head for liking his father to a singing-man of Windsor – thou didst swear to me then, as I was washing thy wound, to marry me, and make me my lady thy wife. Canst thou deny it? Did not goodwife Keech the butcher's wife come in then, and call me 'Gossip Quickly' – coming in to borrow a mess of vinegar, telling us she had a good dish of prawns, whereby thou didst desire to eat some, whereby I told thee they were ill for a green wound? And didst thou not, when she was gone downstairs, desire me to be no more so familiarity with such poor people, saying that ere long they should call me 'madam'? And didst thou not kiss me, and bid me fetch thee thirty shillings? I put thee now to thy book-oath; deny it if thou canst. (*2H4* 2.1.87–105)

Not minding giving false testimony to the Chief Justice, Sir John does deny it, supplying a marvellous overplus of detail himself:

My lord, this is a poor mad soul, and she says up and down the town that her eldest son is like you. She hath been in good case, and the truth is, poverty hath distracted her. But for these foolish officers, I beseech you I may have redress against them. (*2H4* 2.1.106–10)

The Chief Justice is not impressed, and comes to the point succinctly:

You have, as it appears to me, practised upon the easy-yielding spirit of this woman, and made her serve your uses both in purse and in person . . . Pay her the debt you owe her, and unpay the villainy you have done with her. The one you may do with sterling money, and the other with current repentance. (*2H4* 2.1.116–23)

The Chief Justice has not got sufficient evidence of a marriage contract having been formed, despite the alleged oath on a 'parcel-gilt goblet', and so merely orders a repayment of the debt and repentance for using her sexually. Here the judge either responds to a lack of proven serious consent, which would invalidate spousals according to Swinburne, or possibly his actions reflect a weakness in existing legal means to control 'moral' offences, much complained of by Puritans.<sup>33</sup>

Moving to the opposite end of the social hierarchy, we may note that when Shakespeare dramatised marriages involving important property or political negotiations, the contingent nature of a conditional *de futuro* contract makes the concept of a marital 'pre-contract' unproblematic. Both Princess Margaret in *Henry VI, part 1* and Princess Katherine in *Henry V* agree to marriage with kings of England conditional on their fathers' approval, surely meaning political approval. The former responds with justified caution to Suffolk's proxy wooing (*1H6* 5.5.83), the latter directly to

Henry V, but in broken English: 'Dat is as it shall please de *roi mon père*' (*H5* 5.2.243–5).

Shakespeare mainly reserved the term 'spousal' as a synonym for a marriage made in contexts involving great social or dynastic significance. It seems that for him 'spousal' was an elevated term, mainly useful for bearing political import. Political does not mean honourable, necessarily. For instance, when the odious Saturninus chooses, on very dubious grounds, to marry the barbarian enemy Queen Tamora (*TIT* 1.1.261–2), he exits to the Pantheon saying: 'There shall we consummate our spousal rites' (1.1.334).

Less dishonourably, Henry V cements territorial gains in war by means of his marriage with Katherine of France. Katherine's mother Queen Isabel comments:

God, the best maker of all marriages,  
Combine your hearts in one, your realms in one.  
As man and wife, being two, are one in love,  
So be there 'twixt your kingdoms such a spousal  
That never may ill office or fell jealousy,  
Which troubles oft the bed of blessed marriage,  
Thrust in between the paction of these kingdoms  
To make divorce of their incorporate league.

(*H5* 5.2.354–61)

Isabel's metaphor of a secure 'spousal' of the kingdoms, with no fear of future divorce, conveys a vain hope, as revealed in the play's final chorus a few lines later. Her use of marriage as a figure for a close bond employs the term 'spousal' because the bond will be between great nations.

Shakespeare sometimes used the related term 'to espouse' in similarly exalted metaphoric contexts (*LUC* 20; *H5* 4.6.26), and once in a parodic context. In this the ludicrously grandiloquent Pistol invites Nym to 'espouse' the diseased Doll Tearsheet (*H5* 2.1.75), a parody usage indicative of the fact that, like 'spousal', 'to espouse' is generally used by Shakespeare to indicate a politically important marriage. So King Richard III has his wife killed for dynastic reasons, and, wooing by proxy, obtains Queen Elizabeth's 'consent' that 'He should espouse Elizabeth her daughter' (*R3* 4.5.18). Fortunately, Richard is killed first. In a happier context, Pericles at Diana's shrine describes himself as 'the King of Tyre, / Who, frighted from my country, did espouse / The fair Thaisa at Pentapolis' (*PER* s.22.22–4), precipitating the play's second recognition scene between the royal husband and wife.

The complications of a politically important espousal are seen in *The First Part of the Contention* where the word 'espouse' is used twice to describe the marriage of King Henry VI and Margaret. We should first note the rule

governing marriage by proxy, or by a ‘Proctor’ (according to Swinburne): ‘A general Mandate to contract Marriage is not sufficient unless his [the actual husband’s] Ratification do follow.’<sup>34</sup> In the first instance Henry’s agreement to marry Margaret, made by his proxy Suffolk before many witnesses, appears to have been made in the present tense, and it is ratified by Henry’s gesture of a kiss:

SUFFOLK As by your high imperial majesty  
 I had in charge at my depart for France,  
 As Procurator to your excellence,  
 To marry Princess Margaret for your grace,  
 So, in the famous ancient city Tours,  
 In presence of the Kings of France and Sicil,  
 The Dukes of Orléans, Calaber, Bretagne, and Alençon,  
 Seven earls, twelve barons, and twenty reverend bishops,  
 I have performed my task and was espoused,  
 And humbly now upon my bended knee,  
 In sight of England and her lordly peers,  
 Deliver up my title in the Queen  
 To your most gracious hands, that are the substance  
 Of that great shadow I did represent –  
 The happiest gift that ever marquis gave,  
 The fairest queen that ever king received.

KING HENRY Suffolk, arise. Welcome, Queen Margaret.  
 I can express no kinder sign of love  
 Than this kind kiss. (CYL I.I.I–19)

But in the second instance the future tense is clearly used (‘shall . . . ere . . . May . . . next’), as seen in the written ‘articles of contracted peace’ between France and England:

Imprimis: it is agreed between the French King Charles and William de la Pole, Marquis of Suffolk, ambassador for Henry, King of England, that the said Henry shall espouse the Lady Margaret, daughter unto René, King of Naples, Sicilia, and Jerusalem, and crown her Queen of England, ere the thirtieth of May next ensuing. (CYL I.I.41–7)

The contract also specifies that no dowry will be given for Margaret (I.I.59), a crucial issue to be further discussed in chapter 4. For now we must note the important difference in the tenses of the two sequential agreements, ratified *de praesenti*, and *de futuro*, which raises a question over the status of the marriage.

In *Titus Andronicus* a diversity of tenses of the verb ‘espouse’ is used by the Emperor Saturninus to express his shifting marriage intentions.

Firstly, clearly in the future tense, Saturninus says he ‘will’ make Lavinia ‘Rome’s royal mistress, mistress of my heart, / And in the sacred Pantheon her espouse’ (*TIT* 1.1.240–2). After he obtains her father’s and Lavinia’s agreement to the marriage (1.1.244–52 and 1.1.271–3), his liking almost immediately shifts to the captive Queen Tamora, as noted above. Soon after, using the pretext of Bassianus’ claim of a prior promise,<sup>35</sup> Saturninus uses the present tense when he says of Tamora (as we have seen): ‘I lead espoused my bride along with me’ (1.1.325).<sup>36</sup> Thus we see that the words ‘spousal’ and ‘espouse’ are used repeatedly by Shakespeare to describe the marriages of the great and powerful, and we sometimes see the proper forms for the legality of spousal contracts bent by them.

The importance in marriage contracts of the distinction of tenses of a verb led Sir Frederick Maitland to comment wittily that making such a distinction legally crucial ‘was no masterpiece of human wisdom’ because, ‘of all people in the world, lovers are the least likely to distinguish precisely between the present and future tenses’.<sup>37</sup> Similar wit and perhaps more is exposed by Shakespeare in the wildly mooted circumstance of the ‘mock’ spousals of Orlando and Rosalind/Ganymede in *As You Like It*, a frolic which presents an extraordinary sort of liminal test case for questions over spousals.<sup>38</sup>

In this fantastic and highly contrived mooted, Rosalind in the disguise of the boy Ganymede, and moreover whilst play-acting the role of herself, exchanges definitively *de praesenti* spousal vows with Orlando.<sup>39</sup> In thus portraying the Ganymede character (quadruply played by a boy actor playing a girl who is playing a boy who is on request play-acting a girl) the play represents a parody of legal precision concerning spousals. In particular, Ganymede insists on the careful regulation and corrective revision of Orlando’s use of grammatical tense in the proceedings. So, when during the mock spousals Celia asks ‘Will you, Orlando, have to wife this Rosalind?’ (*AYL* 4.1.122–3), and Orlando replies ‘I will’, suggesting an ambiguously *de futuro* answer, Rosalind objects ‘Ay, but when?’ Then Rosalind dictates and Orlando repeats the formula *per verba de praesenti*: ‘I take thee, Rosalind, for wife.’ Rosalind/Ganymede then also replies definitively in the present tense: ‘I do take thee, Orlando, for my husband’ (4.1.122–31). All is then in order for a valid marriage by spousals, except for the gender of the participants.

Marriage of a man with a boy was of course not legal, but marriage by proxy was. Could Ganymede/Rosalind serve as a proxy for herself? There is no sign here of the outward duress or inward reservation that could invalidate spousals (although a slight halting in line 130 might indicate a

brief mental hesitation, many marriages go forward with these). But is the spirit of play-acting or teasing fun here effectively a mental reservation? For Swinburne denies that matrimony is contracted when ‘words of the present time are uttered in *Jeast* or *Sport*, for such wanton words are not at all obligatory in so serious a matter’, and such an excuse had been used in reality to invalidate Elizabethan spousals.<sup>40</sup> Perhaps the crux of the matter lies in the question of whether or not Rosalind is wholly serious despite her love-jesting, and it may be implicit that this may be not yet fully known to herself.

The greatest perplexities for Shakespearian critics over marriage have arisen in response to Shakespeare’s dramatisations of wholly unrealistic ‘bed tricks’. Such tricks involve sexual consummation lacking the element of ‘pure and perfect’ mutual consent essential to establish a marriage insisted on by Swinburne.<sup>41</sup> Swinburne further details the circumstances in which sexual intercourse following a *de futuro* contract was taken to imply the consent forming an immediate marriage – this is only when it is undertaken ‘with that affection, which doth become Man and Wife’.<sup>42</sup> In Shakespeare’s dramatic bed tricks such sincere affection is impossible, since one of the parties does not know the true identity of the other. Alternatively, in these circumstances, a ‘mistake of person’ was an impediment rendering the marriage void. The resulting anomalies have often been discussed, pre-eminently in relation to *Measure for Measure*.<sup>43</sup>

In this play Duke Vincentio, disguised as a friar, encourages Mariana to substitute for Isabella and have sexual relations with Angelo, saying:

Nor, gentle daughter, fear you not at all.  
 He is your husband on a pre-contract.  
 To bring you thus together ’tis no sin,  
 Sith that the justice of your title to him  
 Doth flourish the deceit. Come, let us go.  
 Our corn’s to reap, for yet our tilth’s to sow.  
 (MM 4.1.69–74)

The Duke as friar therefore authorises sexual consummation obtained by stealth where there is a marital ‘pre-contract’. The problem long noted is that the same disguised Duke formerly condemned Juliet, pregnant following an apparent pre-contract with *her* lover. He even asked her ‘Repent you, fair one, of the sin you carry?’ (2.3.20), which strangely contrasts with his ‘no sin’ advice given later in the play.

Indeed Vincentio’s disapproval of Juliet is heavily driven home. Having elicited that she loves ‘the man that wronged you’, and so having determined

that the transgression (if any) was mutual, he encourages her to feel extra guilt, promulgating a double standard: 'Then was your sin of heavier kind than his.' He shows satisfaction at her shame, 'I do confess it and repent it, father. / . . . I do repent me as it is an evil, / And take the shame with joy', and then terrorises her with her lover's death (2.3.20–41).

What is the difference between what the Duke encourages Mariana to do and so heavily condemns in Juliet? Juliet's lover Claudio has explained:

Upon a true contract,  
I got possession of Julietta's bed.  
You know the lady; she is fast my wife,  
Save that we do the denunciation lack  
Of outward order. This we came not to  
Only for propagation of a dower  
Remaining in the coffer of her friends,  
From whom we thought it meet to hide our love  
Till time had made them for us. But it chances  
The stealth of our most mutual entertainment  
With character too gross is writ on Juliet.

(*MM* 1.2.133–43)

We have no reason to disbelieve him.

The play also makes parallel considerations of dowries the cause for the omission of the marriage ceremonies of Juliet and Mariana. Only Juliet's Claudio is more loving than Mariana's Angelo. As the Duke says of the latter:

[Mariana] should this Angelo have married, was affianced to her oath, and the nuptial appointed; between which time of the contract and limit of the solemnity, her brother Frederick was wrecked at sea, having in that perished vessel the dowry of his sister. But mark how heavily this befell to the poor gentlewoman. There she lost a noble and renowned brother, in his love towards her ever most kind and natural; with him, the portion and sinew of her fortune, her marriage dowry; with both, her combinate husband, this well-seeming Angelo. (*MM* 3.1.215–25)

In the play's long resolving final scene, the fact that he spoke of marriage with Mariana is at first half-denied by Angelo, but finally he admits he was 'contracted to' her (5.1.214–21; 5.1.372–3). Then there is no more doubt that Angelo was Mariana's 'combinatè husband' than that Juliet 'upon a true contract' was 'fast' Claudio's 'wife'.<sup>44</sup>

One way out of the enigma of how the parallel spousals of Juliet and of Mariana can be treated so differently is to allege that the contracts in question are not of the same sort, one being *de praesenti* and the other *de futuro*. To imagine this possible is to suppose that, unlike Maitland's

'lovers', theatrical audiences were 'likely to distinguish precisely between the present and future tenses'. Against this could be argued the conventions of Shakespearian stage time, which often give more scope for temporal indeterminacy than for accurate time or tense accounting.<sup>45</sup> However, as we have seen, a fine distinction of grammatical tenses during a spousal declaration in *As You Like It* is fit matter for a Shakespearian jest, and so such distinctions were not invisible on stage.

Although there is little if anything in the text to distinguish them, commentators have long offered a variety of more or less considered opinions about the tenses in the spousals or marriage contracts in *Measure for Measure*.<sup>46</sup> In 1960 Schanzer carefully argued that Claudio's is a spousal *per verba de praesenti*, while Angelo's is *per verba de futuro*; the bed trick then converts the second type to the first.<sup>47</sup> However, various critics have argued just the opposite,<sup>48</sup> or that both couples were espoused by *verba de praesenti*,<sup>49</sup> or that the distinction of the cases would make no difference at all.<sup>50</sup>

There might be some help towards resolving this in the Duke's remark that Angelo's contract was set for solemnisation at a future time: 'the nuptial appointed; between which time of the contract and limit of the solemnity, her brother Frederick was wrecked at sea, having in that perished vessel the dowry of his sister' (*MM* 3.1.216–19). The mention of an appointed time here may suggest a *de futuro* contract, and perhaps one conditional on a dowry.<sup>51</sup> But there is reason to doubt that the contract Angelo had entered with Mariana was conditional upon a dowry, for then it would simply have been cancelled with the dowry's loss. On the other hand, if it had been an unconditional *de futuro* contract, since it had been unconsummated it could have been cancelled either by mutual consent (which was clearly absent on Mariana's side), or else under certain specific circumstances. According to Swinburne an 'Innocent Party' would be freed of such a contract if the other commits 'Fornication', or else if 'there is a Fame or common report, That there is some lawful impediment'.<sup>52</sup> Just such a reason for cancelling the contract had been falsely alleged, according to the Duke, by Angelo, who had 'swallowed his vows whole, pretending in her discoveries of dishonour' (3.1.228–9). At the play's end, some five years later, while unjustly acting as 'judge / Of [his] own cause' (5.1.165–6), Angelo again alleges that he had broken with Mariana partly for lack of dowry, but 'in chief / For that her reputation was disvalued / In levity' (5.1.218–20).

To repeat, for the rules are complicated, if theirs had been an unconsummated conditional *de futuro* contract contingent on a dowry, Angelo would not have had to disparage Mariana's chastity or reputation in order to cancel

the marriage contract. Of course he might have done this to save himself from gaining a reputation of being hard-hearted in his dealings. Yet the play may well imply that Angelo-the-rank-liar is newborn during the time of his deputyship; formerly an unkind man, he becomes worse in the pride of his over-powerful strict magistrate's role. But all these possibilities point to certain common conclusions. While Angelo considers his pre-contract void, Mariana and Vincentio do not, and the status of this contract is open to debate. This, unhappily for the age, was not an unusual sort of dilemma; problems like it were often heard in the church courts.

Some astute critics assess *Measure for Measure* as deliberately presenting flawed or disruptive arguments; from this it would follow that providing answers to difficult questions was not part of Shakespeare's design for the play.<sup>53</sup> Even so, the questioning of marriage contracts in the play may still mirror contemporary realities. These would be the realities of a 'marital limbo' in which some unfortunate people actually found themselves,<sup>54</sup> and the destabilising effect this possibility had on the idea of marriage as a firm basis for social order.

Yet some critics are dubious that English social and legal problems had any bearing on the marital concerns of *Measure for Measure*.<sup>55</sup> One offers instead that the play exhibits the legal conditions either of post-Tridentine Catholic Europe,<sup>56</sup> or else of some sort of 'self-enclosed' fairyland. The same critic also denies in the play the 'kind of authenticity to which a Henry Swinburne can attest', for *Measure for Measure* is not even a 'history play'.<sup>57</sup> Problems with these remarks are multiply instructive. Swinburne's book is proposed to be an exemplar for English marriage practices; no theoretical legal treatise bore such a relation with social practice, and certainly not Swinburne's, as we shall see. Moreover, Shakespeare's plays are embedded in a context of distinctly English law, regardless of genre or setting; as we have noted, even in the self-enclosed non-historical Forest of Arden references to the actual problems of English spousals proliferate like 'real toads in imaginary gardens'.

Significant questions over contracts forming marriages arise in at least fourteen Shakespeare plays.<sup>58</sup> Frequent court cases and attempts at legislative reform attest that corresponding issues were of great current socio-legal interest, and would have been easily recognised by many in Shakespeare's audience. So, despite some contrary views, marriage formation is not a topic that Shakespearians can afford to overlook.