

“A Jest’s Prosperity”: The Idea of Contract in Sixteenth- and Early Seventeenth-Century Literature

Gerald Hammond

ABSTRACT

This paper traces in the literature of the Renaissance, the period in which contract began to emerge as a major element in English law, the cultural grounds which make up part of the complex reason by which mutuality became so essential in the history of England, both inside and outside of literature. The premise of this study is that, contrary to certain fashionable theories of law as an instrument of power, law is in fact enabling; it derives its justification (a “reasonable fiction”) not by force but through mutual benefit. English law differs from continental laws in the sixteenth and seventeenth centuries in that the English law acknowledged its justification in the people. As a result of the influence of English Protestantism and the work of English lawyers, the king of England was seen no less than the people as subject to the law, and his relationship with the people was contractual; it was based on the mutual-benefit philosophy of contract rather than on statute. The English brand of Protestantism can likewise be seen as based on a contract with God in which God offers salvation for obedience and the human, in response, offers obedience for salvation.

KEY WORDS

jurists/lawyer
common law
protestant model
fictionalizing
statute

contract
community
transaction
mutuality

My title derives from an early Shakespeare play, *Love's Labour's Lost*. At its denouement the courtship of the four noble lady visitors from France by the Duke of Navarre and three of his courtiers is suddenly shattered by news of the King of France's death. The princess and her ladies prepare hastily to leave and the young men entreat them to make the commitment which, through the entire play, they have tried to engineer. The ladies' resistance is based upon the objection that, from the moment they first encountered them, the four young men have been oath-breakers. Having made solemn binding promises to each other, to which they were signatories on a deed, to pursue learning and abstain from worldly pleasures for three years, they have, at the first temptation, broken their promises and can not accordingly be trusted. As the princess tells Navarre, "Your oath I will not trust"[5:2:794], and she stipulates accordingly a form of contract in which he will undertake to remove himself from the world for a year while she mourns her father.¹ If he keeps his side of the bargain, sealed by their clasping of each other's hands, he may consider her, and she consider him intited in the other's heart—i.e. intited, meaning having a legal claim. My title comes from the wittiest of the four ladies, Rosaline, in her final confrontation with the wittiest of the four lords, Berowne. She makes a similar contract with him, the terms, if anything, harsher because he is required to spend a year telling jokes in a hospital:

You shall this twelvemonth term from day to day
 Visit the speechless sick, and still converse
 With Groaning wretches; and your task shall be,
 With all the fierce endeavor of your wit.
 To enforce the pained impotent to smile.[5:2:850-54]

To his protest that this asking too much, she responds with what I take to be a form of definition of contract:

A jest’s prosperity lies in the ear
 Of him that hears it, never in the tongue
 Of him that makes it... [861-63]

Rosaline’s purpose is to get Berowne to see that the world is a place of transactions, and for transactions to work properly, there must be consideration for others. Even a jest, the lightest and most trivial of utterances, should be properly negotiated, so that the benefits derived are mutual ones. The teller considers the person whom he tells the jest to. The jest is not an opportunity just to exhibit oneself, to show how wise and witty one is, but it must also be framed with the design to increase the comfort and happiness of the hearer. This kind of consideration is vital to an understanding of the law of contract. Such a law is not simply a codifying of individual rights, it is a means of preserving and developing community. As Richard Posner puts it, trying to counter fashionable views that Law is essentially an instrument of power,

Much law is enabling (one might even say liberating) rather than prohibitory—for example, contract law, which enables people to make binding commitments, and property law and corporate law, which encourage investment. Form facilitates; it does not just constrain.²

I focus on Shakespeare not simply because he is a cultural icon, but because of the time in which he wrote and the medium which he wrote for. The turn of the sixteenth and seventeenth centuries saw the emergence in England of forms and practices which have had a massive influence upon social and political structures across the world. As Liah Greenfeld has argued, in her recent book on nationalism, the England of the sixteenth century was, in many respects, the first nation state: a phenomenon which she characterises as one in which “a ‘people’... is seen as the bearer of sovereignty, the central object of loyalty, and the basis of collective solidarity.”³ England was able to resist the movement of other European states towards highly centralised, despotic power structures, in no small part because of the resistance of the lawyers. A code of common law, long established and deep rooted, enabled men like John Selden, in the first half of the seventeenth century, to resist Stuart divine right of kings ideology. To quote David Berkowitz, Selden’s study of the history of English institutions “revealed no example of a *lex regia* or of a voluntary denial of the principle that law stemmed from the people.” The Stuart case was novel and unacceptable because “it directly contradicted

a long-established legalistic philosophy in which law came first, and government, whether monarchy or otherwise, came second."⁴

In this respect, particularly in relation to constitutional law, but in a manner extending to all other branches of English law, the key point to emphasise is its non-teleological nature. The legal systems of Continental Europe, whose primary orientation was towards law enacted by the state, evolved an essentially teleological legal philosophy, whereby the interpretation of laws is goal directed. At its most extreme, to quote Sheal Herman, "it directs us to interpret a rule by focusing on its social purpose, even if we end up ignoring what it seems to command."⁵ English law, instead, tends towards a tradition and precedent based system, one of case law, powered by literalism and conceptual reasoning. While in Europe statute law has a major importance, to the extent that legislators and judges may be seen as a team, working together towards identifiable goals, English law tends to see statutes as impediments and obstacles, even as excrescences which disfigure the otherwise "lovely harmony of the common law."⁶ Herman's paper on this contrast is aimed at revealing the difficulties which Britain has today in accommodating its legal practices to those of the European Economic Community, and he ends it by observing how easy it was (and may still be) for teleological systems to collaborate with Fascist and other totalitarian ideologies. In contrast, the literal and conceptual English method presents an obstacle to ideologies. To move the discussion back to the seventeenth century, the Stuart apologists for a divine right of kings ideology, through which the king might claim to be an absolute law maker, found themselves in a continuous losing battle against jurists like John Selden, who argued that law had primary place over government. The English model was not statute but contract, a method of negotiated agreement common to all, including the king.

Common law, it should be emphasised, was exactly that: something common to all and common among all. In many respects Shakespeare offers a good example. Nearly anonymous, unlike his larger than life contemporary Ben Jonson, the facts of his life that we can be sure of are relatively few and nearly all of them based upon his frequent engagement with the law, as litigant, witness, or signatory to contracts.⁷ In this context Shakespeare's medium, the theatre, is important, for what he dramatised was, by definition, what interested his audience. The emerging bourgeois society of 1590s London, early citizens of the first nation state, according to Liah Greenfeld's analysis, were interested in blood and battles, romantic love, the royal court, and, from the evidence of Shakespeare's plays, the nature of law.

It does not need obviously legal plays like *The Merchant of Venice* of

Measure for Measure to show this audience fascination with legal issues. Even as early as the first part of *Henry VI*, probably Shakespeare’s first play, we see legal issues dramatised powerfully in Act 2:4, the pivotal scene in the play, as Shakespeare explores the outbreak of the war of the roses. For his setting he chooses the Temple Garden, a garden located in the precincts of the Middle Temple and Inner Temple in the Inns of Court. The argument which develops there, as each side picks a red or a white rose, is essentially a constitutional legal debate, conducted between young aristocrats who are, to all intents and purposes, law students. The scene is scattered with legal terms as the future of England is debated not in the chivalric honour codes which we might have expected, but through the legal language of *plead, party, the right, object, subscribe, opinion*, and so on. Shakespeare’s actors are performing a significant object lesson for an English audience, that law rules everything, including, and especially, the king’s right to the throne. The emphasis is non-teleological. The issue of the rightful succession is not settled by defining who, in the present circumstances, is the ideal person to be the monarch. It is argued instead on a basis of rights as interpreted through precedent.

Shakespeare is not the only dramatist of the time to be so taken with law. As Richard Posner suggests, it is at least arguable that Marlowe’s *Faustus* has his chief claim to modernity lying in his commitment to contractual obligation, for “he substitutes the sanctity of contract for the sanctity of God.”⁸ That Shakespeare thought similarly is apparent from among many examples, his play *King John*. From Reformation times John had been hailed as a proto-Protestant king of England, heroic in his opposition to Papal power.⁹ Shakespeare presents just such a figure to his audience, a key scene of the play being Act 3:1 in which the Papal legate, Cardinal Pandulph, persuades King Philip of France to break the oath which he had made to John, contracting peace between the two nations. Philip’s dilemma is that he sees the oath which he has sworn as being as firm and binding as a marriage contract. Pandulph counters this argument by asserting that God’s wishes, articulated through the Pope, override even so solemnly agreed a contract:

O let thy vow

First made to heaven, first be to heaven perform’d,
That is, to be the champion of our Church!
What since thou swor’st is sworn against thyself,
And may not be performed by thyself,
For that which thou hast sworn to do amiss

Is not amiss when it is truly done;
 And being not done, where doing tends to ill,
 The truth is then most done not doing it.
 The better act of purposes mistook
 Is to mistake again; though indirect,
 Yet indirection thereby grows direct,
 And falsehood falsehood cures, as fire cools fire
 Within the scorched veins of one new burn'd.
 It is religion that doth make vows kept,
 But thou hast sworn against religion,
 By what thou swear'st against the thing thou swear'st,
 And mak'st an oath the surety for thy truth
 Against an oath; the truth thou art unsure
 To swear, swears only not to be forsworn,
 Else what a mockery should it be to swear!
 But thou dost swear only to be forsworn,
 And most forsworn, to keep what thou dost swear....

[265-87]

This speech, with its casuistic quasi-legal arguments, coming from the mouth of the Papal legate, is meant to fascinate and to appall an English audience of the 1590s. Most of all, it enlightens its audience to the nature of English identity as something absolutely dependent upon the sancity of contractual obligation, extending from high to low in society, and not to be overridden by divine or by royal power. The legate's arguments are teleological, based upon an ideology which believes that it understands God's wishes for the world and which relegates all law, including contractual obligation, to this higher goal. The English tendency, if I can caricature it a little, sees God, like the king, as one party to a contract which requires mutual agreement—an attitude which is inherent in Milton's aim to justify God's ways to men so that they may properly understand their contract with Him. In this context English Protestantism is of fundamental importance.

There are signs, way back in Anglo-Saxon culture, that English society was peculiar precisely because of its deeply entrenched legalism. This expresses itself most interestingly in a strange attachment to the Old Testament, and a dogged reluctance not to have its legal codification overridden by the New Testament's insistence on the spirit rather than the letter. King Alfred's prefixing of his codification of the laws of England with the commandments of Exodus is, so far as I know, without parallel elsewhere in Europe.¹⁰ And when England went over to the Lutheran Reformation, it did

so in ways distinctively different from European Protestantism. While Luther emphasised the New Testament’s infinite superiority over the Old, and, a little later, Calvin developed a theology in which man could transact nothing with God, English Protestantism took its cue from William Tyndale and evolved a theology of contract.¹¹ Tyndale’s own Bible translation gives a significant set of clues to how the English people began to think and act: one example being the extraordinary care with which he revised his version of Genesis so that a variety of terms indicating agreement or promise, such as *bond* and *testament*, were all now untypically rendered by the one word *covenant*, a word with well-developed legal contractual senses.¹²

It is tempting, at this point, to draw, as Peter Goodrich does, a clear line of development from biblical covenant, through the emergence of contract law, to the development of the social contract as defined by Rousseau.¹³ This is acceptable if we think in general terms of the development of Western culture, but I think that such an idea disguises the differences between the development of law and culture in Catholic countries and in Protestant ones. In Protestant England, which clung hard to its common law tradition, the contract, whether legal or social, tended to be one specific to the individual, rather than one to which all individual cases were made to fit. Again, I shall use a word which I used at the beginning of this paper in discussing *Love’s Labour’s Lost*, the individual’s dilemma was subject to *consideration*. And again, Rosaline’s contract with Berowne seems a good one to build on. Berowne’s task is specific to him, recognizing his special talent, to tell jokes, and his special vice, to tell jokes whatever the situation. He has to learn that words involve transactions, and that within a transaction each party must be given consideration. There is a receiver of the word, the ear which hears it, as well as the giver of the word, the tongue that tells it: and social prosperity lies in mutual profit from it.

In theological terms the mutual profit lies in man’s appreciation that God’s word is meaningful to each individual; so that Tyndale directs the readers of his Bibles to scrutinise the scripture and work out of themselves just what it is that God promises to each of them. Goodrich, incidentally, points out that *contract* derives from *con-traho*, meaning ‘drawing together,’ an etymology which associates it with *religion*, conjectured to derive from a verb meaning ‘to bind together.’¹⁴ In Protestant thinking men are bound together by their mutual contracting with God, so Tyndale instructs his New Testament readers:

The right way: yea and the only way to understand the scripture unto our salvation, is, that we earnestly and above all things,

search for the profession of our baptism or covenants made between God and us. As for an example: Christ saith (Matt.5) Happy are the merciful, for they shall obtain mercy.¹⁵

The nature of a contract, as it has finally evolved, is that it involves mutuality. To say that it is one party promising another something, and the second party promising reciprocally is to misrepresent it slightly, because such a paradigm plays down this element of mutuality. To take the religious example: if God promises me mercy, this is only a promise. If I promise God obedience, this too is only a promise. What God seeks is the contract, whereby He promises me mercy, I understand this promise and in return I promise obedience, a promise whose sincerity He understands. Without this two-way, simultaneous process, what we have is not a contract but merely a gift. If I offer to pay you £ 100 for nothing there is no contract; just as if you offer to give me a painting there is no contract. Only when I offer you the £ 100 for the painting does it become a contract.

Here I have to be careful. For me to argue that English contract law in the seventeenth century was premised upon mutuality would be misleading. As Adams and Brownsword argue, mutuality only becomes an essential feature of English contract law in the nineteenth century, and it did so for complex reasons. Up until then, as they write, the view that contracts were "bilateral transactions, in which each of the parties exchanges obligations" was not the primary one. Instead, enforceable contract was determined by "having regard to the circumstances in which the promise was made."¹⁶ So much is clear. My aim in this paper is to trace, in the literature of the period in which contract began to emerge as a major element in English law, the cultural grounds which make up part of the complex reason by which mutuality became so essential.¹⁷ So, I began by pointing towards Rosaline's view of Berowne's jests. These jests will turn into contracts when his hearers get some value from the hearing of them as he gets value from the telling. In their book *Postmodern Jurisprudence*, Costas Douzinas and Ronnie Warrington offer a definition of the essence of English national identity:

An Englishman is liable, not because he has made a promise, but because he has made a bargain... According to Cheshire and Fifoot's *Law of Contract*, this is the gist of both law and Englishness. The text goes on to explain that behind all contracts 'lies the basic idea of assent'... Contract law is a collection of doctrines and rules which regulate the manifestation of intentions and the meeting of minds... In either case, contract law is about

the circulation of messages and letters and the agreement about intentions and meanings; that is, a theory of communication and a hermeneutics.¹⁸

For Tyndale, at the root of the English Reformation, the messages and letters were the text of the Bible, hence the imperative to translate and circulate it to every English man and woman; and hence, too, the emphasis which English Protestantism laid, through preaching, upon the explanation of the intentions and meanings of this text. The act of faith, so central to Protestantism, is essentially one of mutual commitment, as Tyndale put it in translating Luther’s Prologue to the Romans:

Faith is then a lively and steadfast trust in the favour of God, wherewith we commit ourselves altogether unto God, and that trust is so surely grounded and sticketh so fast in our hearts, that a man would not once doubt of it, though he should die a thousand times therefore. And such trust wrought by the holy ghost through faith, maketh a man glad, lusty, cheerful and true-hearted unto God and to all creatures.

And Tyndale goes on to use a financial metaphor to clinch the point:

For through faith is a man purged of his sins, and obtaineth lust unto the law of God whereby he giveth God his honour and payeth him that he oweth him, and unto men he doeth service willingly wherewithsoever he can, and payeth every man his duty.¹⁹

Move forward a hundred years and we find George Herbert, in a poem significantly titled “Obedience,” exploring the nature of the contract between men and God in secular legal terms. The poem begins with an image of transferring legal title to a lord’s estate:

My God, if writings may
Convey a Lordship any way
Whither the buyer and the seller please;
Let it not thee displease,
If this poor paper so as much as they.
On it my heart doth bleed
As many lines, as there doth need

To pass itself and all it hath to thee.
 To which I do agree,
 And here present it as my special Deed.²⁰

The crucial point here is that the transfer of title is effected through writing, the words of the poem in fact. "This poor paper" is Herbert's contract with God, containing sufficient lines as are necessary to transfer the title of Herbert's heart to God. This, it turns out as the poem develops, is part of a contract, not a gift, for it is bound up with God's transfer of something valuable to Herbert, outlined in stanza six:

Besides, thy death and blood
 Showed a strange love to all our good:
 Thy sorrows were in earnest; no faint proffer,
 Or superficial offer
 Of what we might not take, or be withstood.

In earnest is a technical term, meaning "money paid to secure a contract." God's suffering was the sum which he paid to secure Herbert's heart; and Herbert, being a true Englishman, is intent upon the transaction being a contract, hence his emphasis in the next stanza upon the need for this not to be God's gift to him, but, instead, a mutually agreed bargain:

Wherefore I all forgo:
 To one word only I say, No:
 Where in the Deed there was an intimation
 Of a gift or donation,
 Lord, let it now by way of purchase go.

Because it is mutually agreed it is enforceable. This is the gist of Herbert's poem, that by writing the words, signing the deed as it were, he is a fully committed Christian, open to punishment if he fails to keep his side of the bargain.

The point is not only a religious one, but a social one as well. The ladies at the end of *Love's Labour's Lost* are trying to get the lords to see that they belong to a society which has obligations of mutual consideration. What we observe in the sixteenth century is a watershed in English cultural history, a movement from a pre-modern society, bound together by laws of duty and trespass, to a modern one, bound together by laws of mutual agreement. I quote from De Lloyd J. Guth:

What the sixteenth century witnessed was the steady unravelling of the debt-duty basis for moral obligation which had overtly buttressed the English legal system. Obligation remained in law, to be sure, but it gradually came to be defined, in a sense secularized, as contractual and consensual agreements enforceable per se by the common law and customary courts. Simple obligations made in debt, whether oral or written, had previously been made for accomplished exchanges of benefits, usually money for goods; such obligations had to be translated, in the eyes of later law, into formalized contracts based on future performance. By the seventeenth century and the later age of contract, obligation was strictly limited to this world, where benefit and promise could be measured in terms of enforceability and where the obligation remained personally externalized, no longer one reserved to moral duty and conscience....²¹

And Guth goes on to make the social point most radically, claiming that

The metaphors of debt, along with the dominance of the action of debt, gave way to newer metaphors associated with the emerging law of contract... these new legal realities accompanied, and perhaps made necessary, the seventeenth century’s creation of “society” in earth-bound minds, as the reason and root for enforcing obligations.²²

To convey the new society new words, or at least new meanings, developed. One such was a word which I have used several times in this paper in its apparently “old” sense, that is *consideration*. *Consideration* emerges in the seventeenth and eighteenth centuries, to quote the *O.E.D.*, with a “precise technical meaning,” namely “anything regarded as recompense or equivalent for what one does or undertakes for another’s benefit; especially in the law of contracts.” More simply it is “the thing given or done by the promisee in exchange for the promise,” the *O.E.D.* citing from a 1641 dictionary of legal terms, “consideration is the material cause of a contract, without the which no contract can bind the party: this consideration is either expressed... or is implied.”

The change in language followed the change in practice. Very shortly after *Love’s Labour’s Lost*, in 1602, the King’s Bench ruled, in what is known as *Slades Case*, that plaintiffs in contract cases could prefer trial by

jury rather than “wager of law,” a system by which, if you could enrol eleven worthy fellow citizens to take an oath that you did not owe the money, then the court would rule in your favour. The use of written deeds had gradually developed as tight-knit communities became looser associations over greater distances, with “wager of law” becoming increasingly anachronistic. The ruling in Slades Case marked the emergence of modern English contract law. In one commentator’s words, it was seen as “part of a trend towards the development of modern contract law as a mechanism for redressing the balance between the weak and the strong.”²³

In the same year, the last full year of Elizabeth’s reign, a vital contract case was heard, one which students in law schools and universities in England are still referred to. This was *Pinnel’s Case*, in which the judges ruled that when the method of performance of a contract is varied so as to benefit the creditor in some way, then a new consideration has to be found. So, for example, if I contract with you to paint your house for £ 100, and the original contract involves my promising to give it three coats of paint; then if, in the course of the painting I find that it needs only two coats—and you agree with me that it needs only the two, I may still be liable for the third coat unless some further consideration is involved. But this consideration need not be equivalent to the value of a third coat: to quote *Pinnel’s Case*, it may be, for instance, “a hawk, horse or robe.”²⁴ In essence, English and American law is determined by agreement between parties based on reasonableness not fairness. Judges do not attempt to estimate whether or not the contract is an equal one between the two parties, for this would involve a commitment towards a goal directed legal system. Instead they are principally concerned with ensuring that the contract involves some form of reciprocity, no matter if the benefit which one party receives is much greater than the benefit of the other party. Here the theological model is useful, for it is clearly arguable that God’s promise to man of eternal life is far more weighty than man’s promise to God of his obedience.²⁵

From the Protestant theological model there emerges the idea of the contractual nature of social organisation. In all relationships and transactions, from high to low, we are bound to each other by a set of mutually negotiated considerations. This, in effect, is what Harold Berman describes in his account of what he terms “the renewal of law in the West from the sixteenth century on.” This renewal, he relates, was based upon the fact that “the Protestant concept of the individual will became central to the development of the modern law of property and contract.”²⁶

The political ramifications of this movement were immense, summarised by Howard Nenner, who traces in the seventeenth century the

gradual, inexorable reduction of royal power through an idea that all political discussion in England was largely a matter of law:

Law was the touchstone of politics... Throughout the century virtually every important controversy was formulated, and every position justified, in legal language and common law paradigms.²⁷

He goes on to make the vital point that very often the legal process was an inherently fictionalising system:

It was of little consequence that the law itself might sometimes be distorted. What was at the heart of constitutional development was this important matter of legal configuration. Substance, if necessary, could always be sacrificed to form, reality to fiction....²⁸

Here the poets and dramatists meet the lawyers and politicians, for the law of contract, in its English form, becomes an essentially fictionalizing process. Consideration, the key element in the bargain which each English individual makes with other English individuals, is a matter of giving narrative form to the otherwise chaotic complexities of social life. To some, especially those of the critical legal studies school, the realization that so much of the law is fiction is one which vitiates it, removing whatever claim it may have to be the central force in social organization. To others the law's capacity to keep constructing narratives is its salvation's. Stanley Fish, notably, rejoices in this constant fictionalizing. In "The Law Wishes to Have a Formal Existence" he locates this quality in the idea of consideration. It is consideration, he writes, which is "part of the law's general effort to disengage itself from history," which makes "the act of contracting... purely rational," and which acts as the mechanism for constructing a complex fiction, a telling of "two stories at the same time." In his analysis of the function of consideration in the case of *Webb v McGowin*, Fish judges that the legal interpretation of the "contract" in this famous case helps "transform an instantaneous and instinctive response to an unanticipated situation of crisis into a deliberative and considered act."²⁹ Just such a transformation is Rosaline's aim when she counsels Berowne to treat his jests as contracts, making what was instinctive and unmeasured become deliberate and considered.

Unlike the Continental model, in which contracts and laws tend to have a shared goal, the English non-teleological system actually generates a

multiplicity of narratives all with different endings. Start to look at sixteenth and seventeenth-century literature in this light and you begin to see what a dominant mind-set this is. I could point you towards Andrew Marvell's "Horatian Ode," in which Cromwell's contract with the English nation is so carefully worked out in the second half of the poem. I shall, however, close with Shakespeare: not with a fairly obvious example such as Portia, who tells Shylock that mercy itself is a form of contract, to the mutual benefit of he who gives it and he who receives it; but to the more unlikely one of the young man sonnets. They begin with a complaint that the young man will contract with none but himself. Sonnet 1 describes him as being "contracted" to his "own bright eyes"; and Sonnet 125, the last full sonnet in the sequence, offers a final plea to the cold and ungenerous young man to enter into a mutual exchange:

No, let me be obsequious in they heart,
 And take thou my oblation, poor but free,
 Which is not mix'd with seconds, knows no art,
 But mutual render, only me for thee.³⁰

"Mutual render," regardless of the value of what I give you and you give me, is the reasonable fiction at the heart of English contract law.

Notes

¹ All Shakespeare references in this paper are to *The Riverside Shakespeare*, Boston: Houghton Mifflin, 1974.

² Richard A. Posner, *Law and Literature: A Misunderstood Relation*, Cambridge, Mass. & London: Harvard University Press, 1988, p.152.

³ Liah Greenfeld, *Nationalism: Five Roads to Modernity*, Cambridge Mass. & London; Harvard University Press, 1992, p.3. In fact, Greenfeld says very little about the role of Law in the emergence of the nation state, a slightly surprising omission given the range of topics which it treats.

⁴ David Berkowitz, *John Selden's Formative Years*, Washington: Folger Books, 1988, p.77.

⁵ Sheal Herman, "Quot Judices Tot Sententiae: A Study of the English Reaction of Continental Interpretive Techniques," in Csaba Verge, ed., *Comparative Legal Cultures*, Dartmouth Publishing Co.: Aldershot, 1992, p.146. Herman's essay was originally published in *Legal Studies*, 1, 1981, pp. 165-89.

⁶ Herman, p.179.

⁷ For details and transcriptions, see Samuel S. Schoenbaum, *William Shakespeare: A Documentary Life*, Oxford: Clarendon Press, 1975. It is of incidental interest to this paper that Shakespeare's will contains the word *consideration* four times on its first sheet: for the text, see the Riverside edition, pp. 1832-33.

⁸ Poster, p. 100.

⁹ John Bale's early Reformation play *King John* was a crude but influential propaganda piece designed to act out Protestant England's defiance of Papal bullying.

¹⁰ "In a profound sense, all the early English writing, poetic as well as practical discourse, in Latin and the vernacular, is written within the biblical ambiance. The consequences are sometimes surprising. When Alfred drew up his code of laws, he began by enacting the Mosaic laws of Exude. xx-xxiii." Geoffrey Shepherd, 'English Versions of the Scriptures Before Wyclif,' in G.W.H. Lamps, ed., *The Cambridge History of the Bible*, vol.2, Cambridge: Cambridge University Press, 1969, p. 367.

¹¹ For detailed arguing of this point, see William A. Clebsch, *England's Earliest Protestants, 1520-1535*, New Haven & London: Yale University Press, 1964, pp. 181-204.

¹² The *O.E.D.* records *covenant* in the sense "a mutual agreement between two or more persons...a compact, contract, bargain," from c.1300. *Changing* words such as *bond* or *testament* to *covenant* seems to have been Tyndale's primary purpose in issuing the revision. For the full list of revisions, see J. I. Mombert, ed., *William Tyndale's Five Books of Moses Called the Pentateuch*, Fontwell: Centaur Press, 1967, pp. ciii-cviii.

¹³ "In a purely descriptive sense we may chart the contract in terms of its progression from theocratic pact or covenant of biblical derivation requiring obedience to an unwritten law (nature), to the more positive and legalistic contract or social treaty establishing political sovereignty and a coincidental power of secular nomination." Peter Goodrich, *Languages of Law: From Logics of Memory to Nomadic Masks*, London: Weidenfeld & Nicolson, 1990, p. 153.

¹⁴ The *O.E.D.* says that the Latin *religion-em* is "of doubtful etymology, by Cicero connected with *relegate* to read over again, but by later authors with *relegate* to bind."

¹⁵ This sentence is taken from Tyndale's preface, "W.T. Unto the Reader," to his 1534 New Testament; in David Daniel, ed., *Tyndale's New*

Testament, New Haven & London: Yale University Press, 1989, p.4.

¹⁶ John N. Adams and Roger Brownsword, *Understanding Contract Law*, 2nd. edition, London: Fontanal, 1994, p. 28.

¹⁷ Adams and Brownsword make the revealing point that the contract law which emerged through the eighteenth and nineteenth centuries in England was not, as we might imagine, something which gave "greater certainty" to the commercial classes: "This is not to say that it does not cover many commercial situations. It is simply that what had emerged was surprisingly out of touch with the world of commerce whose tool it might have been supposed to be" (29).

¹⁸ Costas Douzinas and Ronnie Warrington, *Postmodern Jurisprudence: The Law of Text in the Texts of the Law*, London & New York: Routledge, 1991, p. 127.

¹⁹ Daniel, *Tyndale's New Testament*, p. 213.

²⁰ Full text of the poem in Louis Marts, ed., *George Herbert and Henry Vaughan*, Oxford: Oxford University Press, 1986, pp. 91-93.

²¹ Text taken from J.C. Smith and David N. Weisstub, eds., *The Western Idea Of Law*, London & Toronto: Butterworths, 1983, p. 30. Guth's essay, titled "The Age of Debt. The Reformation and English Law," appeared originally in D. J.Guth and J. W. McKenna, eds., *Tudor Rule and Revolution: Essays for G. R. Elton From His American Friends*, Cambridge: Cambridge University Press, 1982, pp. 70-85.

²² Smith and Weisstub, p. 31.

²³ Quoted by Adams and Brownsword, p. 27.

²⁴ G.H. Trestle, *An Outline of the Law of Contract*, London: Butterworths, 1989, p. 44.

²⁵ On the other hand, of course, it is possible to argue that man's promise is the greater for he has more to lose from the contract than does God.

²⁶ Smith and Weisstub, p. 291. The original from which this is extracted is Harold J. Bremen, *The Interaction of Law and Religion*, New York: Abandon Press, 1974.

²⁷ Smith and Wsisstub, p. 433. The original is Howard Nunnery, *By Colour of Law*, Chicago: Chicago University Press, 1997.

²⁸ Smith and Weisstub, p. 434.

²⁹ This essay appears in Stanley Fish, *There's No Such Thing as Free Speech...And It's a Good Thing Too*, Oxford: Oxford University Press, pp. 102-119; my quotations are from pp. 157, 158, 163, 164.

³⁰ For a reading of the young man sonnets, nos. 1-126, as a sequence, see my *The Reader And Shakespeare's Young Man Sonnets*, Macmillan: London, 1981. Stephen Booth, in his edition of the Sonnets, takes *contracted* in Sonnet 1 to mean "betrothed to," with a secondary sense of "draw together into"; and of *mutual render* in Sonnet 125 he writes, "although the topic of mutual exchange relates to the commercial metaphors in lines 6 and 11, the topic seems new and sudden." (*Stephen Booth, ed., Shakespeare's Sonnets Edited With Analytical Commentary*, Yale University Press: New Haven & London, 1977, pp. 136, 428. The *O.E.D.* records *contract* as a verb meaning "to enter into an agreement or contract, esp. a business or legal engagement," from 1530.

