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## THE (COMIC) TRAGEDY OF FORMALISM IN SHAKESPEARE'S *THE MERCHANT OF VENICE*

JOSH NISKER<sup>†</sup>

### ABSTRACT

*William Shakespeare's The Merchant of Venice addresses various legal issues and themes, with perhaps none being so pronounced as the struggle between formal positivism and natural law. Ostensibly, The Merchant of Venice dramatizes the dangers of rigid adherence to formalism and the triumph of natural law through Portia's legal defeat of Shylock. On a more profound level, Shakespeare's portrayal of the Venetian trial scene raises grave concerns about the essential nature and manner of that defeat. While Portia is originally positioned as a sympathetic proponent of natural law, she is soon revealed as one of its grossest violators. Thus, the play ultimately functions as a cautionary exposé on the hypocrisy of power, the abuse of fair process, and the grim reality that the law may be exploited to malicious and unnatural ends.*

*This paper begins by addressing the philosophical foundations of natural law, and the profound influence that natural law bore on English Renaissance writers. This is necessary to frame the next section of the paper, which explores the tension between natural law and positive law in The Merchant of Venice. Here it is argued that Shakespeare's portrayal of natural law in the Act IV trial scene operates as a dramatic reflection of the English legal system and its inherent failings. The paper also contends that The Merchant of Venice dramatizes the emerging conflict between equity and common law in Shakespeare's England. The final section highlights various abuses of natural justice within the play as further violations of natural law.*

*Ultimately, The Merchant of Venice calls upon the audience to "judge the judge." By exposing grave deficiencies in the English legal system (as expressed through the fictional Venetian system), the play obliges the*

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*audience to make a critical moral judgment on the proper administration of justice. As this paper submits, the audience must reach a moral and rational conclusion in accordance with natural law.*

## INTRODUCTION

F. Lyman Windolph wrote that, “*The Merchant of Venice* is one of Shakespeare’s most charming comedies—so charming, indeed, that we are inclined to forget that it is altogether without morals.”<sup>1</sup> Shakespeare’s famous play addresses various legal issues and themes, with perhaps none being so pronounced as the struggle between formal positivism and Natural Law. Ostensibly, *The Merchant of Venice*<sup>2</sup> dramatizes the dangers of rigid adherence to formalism and the triumph of Natural Law through Portia’s legal defeat of Shylock. On a more profound level, Shakespeare’s portrayal of the Venetian trial scene raises grave concerns about the essential nature and manner of that defeat. While Portia is originally positioned as a sympathetic proponent of Natural Law, she is soon revealed as one of its grossest violators. Thus, the play ultimately functions as a cautionary exposé on the hypocrisy of power, the abuse of fair process, and the grim reality that the law may be exploited to malicious and *unnatural* ends.

### I. NATURAL LAW IN RENAISSANCE ENGLAND

In order to bring the relevant issues to bear, it is necessary to address the philosophical foundations of Natural Law. Once established, these principles will be explored in light of their dramatic significance in *The Merchant of Venice*.

Richard Devlin identifies three central themes to Natural Law, or *lex naturalis*. First, Natural Law claims to be “universal, immutable, eternal, objective, and beyond any particularized political or historical context.” Second, the validity of a law depends on its content, and not just its form. Third, Natural Law is “superior to human law and therefore has the justificatory and censorial power to determine whether enacted (i.e. positive) laws are morally binding.”<sup>3</sup> These themes will be explored by

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<sup>1</sup> F. Lyman Windolph, *Reflections of the Law in Literature* (New York: Books for Libraries Press, 1956) at 46 [Windolph].

<sup>2</sup> William Shakespeare, *The Merchant of Venice*, ed. by David Bevington, (New York: Bantam Books, 1988).

<sup>3</sup> Richard F. Devlin, “Mapping Legal Theory” (1994) 32 *Alta. L. Rev.* 602 at 604-605.

way of a brief historical and philosophical account of Natural Law and its principles.

The concept of Natural Law originated with the Pre-Socratic philosophers, was adopted by Plato, and was positively received by other classical theorists such as Aristotle and Cicero.<sup>4</sup> This first development of Natural Law was premised as a principle of order, based on reason, which was said to regulate the universe.<sup>5</sup> It was regarded as universal law because it ordained that certain rules of conduct are “so just that they are binding on all of mankind.”<sup>6</sup> Natural Law could thus be contrasted with human laws, which are apt to frequent variation and arbitrariness in substance and procedure. Whereas human laws vary with political, cultural, and historical contexts, Natural Law was said to be discovered by the light of human reason and knowable to all people at all times.<sup>7</sup> Thus, according to the classical philosophers, a man acted in conformity with the Law of Nature when he lived in accordance with the dictates of his reason, irrespectively of any Positive Law to the contrary.<sup>8</sup> The universal character of Natural Law is particularly evident in the concept of natural justice, the precepts of which exist independently of statutory declaration.<sup>9</sup>

The classical model of natural law was revived by medieval and Renaissance Christian theorists, reaching a high watermark with St. Thomas Aquinas in the thirteenth century. Aquinas stated that if a human law is at variance in any particular with natural law, it is no longer legal, but rather “a perversion of law.”<sup>10</sup> While classical and early medieval Natural Law theorists conceived Natural Law on a

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<sup>4</sup> R.S. White, *Natural Law in English Renaissance Literature* (Cambridge: Cambridge University Press, 1996) at 4.

<sup>5</sup> George W. Keeton, *Shakespeare’s Legal and Political Background* (London: Sir Isaac Pitman & Sons Ltd., 1967) at 67-68.

<sup>6</sup> White, *supra* note 4 at 1.

<sup>7</sup> White, *supra* note 4 at 1.

<sup>8</sup> Keeton, *supra* note 5 at 68.

<sup>9</sup> The two limbs of natural justice are *audi alteram partem* (the right to be heard) and *nemo iudex in parte sua* (no person may judge his or her own cause). The second tenet of natural justice, *nemo iudex*, has particular significance to *The Merchant of Venice* and will be discussed in this paper.

<sup>10</sup> Thomas Aquinas, *Summa Theologia* (New York: Benziger Bros., 1947) at 95, 2 (in Treatise on Law, First Part of the Second Part). Aquinas built upon St. Augustine’s theory that there is no law unless it is just.

rational foundation alone—that of a universal law discovered through human reason—medieval and Renaissance Christian philosophers added the notion of conscience to the Natural Law equation and theorized that there existed an integral relationship between law and morality.<sup>11</sup> Additionally, they insisted that both reason and conscience are G-d-given<sup>12</sup> faculties.<sup>13</sup> Thus, with Aquinas, the law of nature became a thoroughly moral principle which generated and authorized all human laws. It came to be regarded by Renaissance theorists as “essential justice, the origin and test of all positive laws, and the ultimate measure of right and wrong.”<sup>14</sup>

Aquinas identified four types of law in his famous work *Summa Theologica*: Eternal, Natural, Human, and Divine. The first three are of particular significance to this paper.<sup>15</sup> Eternal law, the Law of G-d, exists in the mind of G-d and controls the universe. However, as Aquinas indicated, not all of G-d’s Law is discoverable to humans.<sup>16</sup> Aquinas thus described Natural Law as “the participation of the eternal law in the rational creature,” referring to the extent to which eternal Law may be discovered by right reason.<sup>17</sup> The primary tenet of Natural Law is that “good is to be done and pursued, and evil is to be avoided,” and from this all other Natural Law principles flow.<sup>18</sup> These include the preservation of life and equality among individuals.<sup>19</sup> Human Law is devised from the “operation of human reason, and is the product of the application of the precepts of natural law to human circumstances.”<sup>20</sup> While Natural

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<sup>11</sup> Devlin, *supra* note 3 at 604.

<sup>12</sup> As a note to the reader, Judaism prohibits an individual to write out the full name of the Divine—as such, “G-d” will be used as a substitute.

<sup>13</sup> White, *supra* note 4 at 2-3. White states that this advancement in natural law was prompted, in part, by a fear that a reliance on the universal faculty of reason would eliminate the need for G-d.

<sup>14</sup> A.P. d’Entrèves, *Natural Law: An Historical Survey* (New York: Harper and Row, 1951) at 7 (emphasis added).

<sup>15</sup> Divine Law, or the will of G-d revealed through the Old and New Testaments, is not relevant to this discussion.

<sup>16</sup> Keeton, *supra* note 5 at 72.

<sup>17</sup> Aquinas, *supra* note 10 at 91,2.

<sup>18</sup> Aquinas, *supra* note 10 at 94, 2.

<sup>19</sup> White, *supra* note 4 at 4.

<sup>20</sup> Keeton, *supra* note 5 at 72.

Law exists independently of Positive Law, any discordance between the Law of Nature and the Law of Humans must render that Positive Law void. Natural Law is thus regarded as the basis, authority, and standard for all human laws.

Aquinas' theory of Natural Law permeated Renaissance thought and found great favour among theorists such as Suárez and Grotius. While Renaissance legal theorists accepted the existence of two spheres of justice—G-d's Law and Human Law—the concept was nevertheless invoked to justify social hierarchies that violated the natural notion of equality, such as the divine right of kingship and racial subjugation. Still, this concept dominated Renaissance thought and profoundly influenced the writers of the period. As White states, the Renaissance imaginative writer thought of literature, in a sense, as performing the “function of G-d.” The writer was figured as:

[A] controlling deity of a constructed world of human beings who make, obey, and break their own laws within that world, and must stand judged and often condemned by themselves, their fictional peers, readers, and audiences in the universal court of Natural Law.<sup>21</sup>

The thematization of morality in Renaissance literature thus requires characters and readers to make moral judgments against the Natural Law milieu, and this literary usage is particularly evident in Shakespeare's *The Merchant of Venice*.

The trial scene in *The Merchant of Venice* dramatizes the conflict between Positive Law and Natural Law, as the Venetian legal system betrays the Natural Law tenets of respect for human life, equality among humans, and an individual's right to a fair process. Although the characters escape condemnation from their fictional peers in the face of gross violations of Natural Law, the play requires the audience to critically evaluate the procedural and substantive qualities of the Venetian law (as an expression of English law)<sup>22</sup> in order to reach a moral and rational conclusion in accordance with Natural Law. Ultimately, the play obliges the audience to judge the judge.

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<sup>21</sup> White, *supra* note 4 at 8.

<sup>22</sup> Which will be discussed below.

## II. NATURAL VERSUS POSITIVE LAW IN *THE MERCHANT OF VENICE*

The plot of *The Merchant of Venice* is driven by a bond between Shylock, a Jewish usurer, and Antonio, the title merchant of the play. Antonio agrees to give his bond in guaranty of a loan for his good friend Bassanio, a spendthrift who wishes to woo Portia, the rich heiress of Belmont. A “penalty clause” is attached to the bond, and Antonio pledges a pound of his flesh if the sum is not repaid to Shylock within three months. When Antonio’s overseas mercantile ventures fail and render him in default of his payment, Shylock seeks satisfaction of the penalty before a court of law. This scene, which will be addressed in depth below, is the climax of the play and the centre of much literary and legal scrutiny.

While *The Merchant of Venice* is set outside of England, it is significant to note that Shakespeare often displaced the action of his plays in order to tackle contemporary English issues and avoid political backlash. For example, although much of the play takes place in Venice,<sup>23</sup> the Venetian court applies English law “and the trial of the action on the bond is approached in strictly Common Law terms.”<sup>24</sup> Furthermore, the penalties attached to common money bonds in Shakespeare’s England were fully enforceable by law.<sup>25</sup> While penalty clauses were enforceable by the common law of contract, they could still be defeated by the courts of Chancery.<sup>26</sup> The chancellors of equity declared that such iniquitous contracts were void as contrary to Natural Law, and as Windolph notes, they granted injunctions:

[R]estraining moneylenders, even after legal judgments had been entered in their favor, from collecting more than the actual amount of the loans together with interest at the lawful rate.<sup>27</sup>

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<sup>23</sup> There are two primary locations in *The Merchant of Venice*: Venice, which is the satiric centre of mercantilism, and Portia’s Belmont, the centre of the romantic subplot.

<sup>24</sup> Keeton, *supra* note 5 at 140

<sup>25</sup> Keeton, *supra* note 5 at 136.

<sup>26</sup> White, *supra* note 4 at 159. Described by White as “England’s court of Natural Law.”

<sup>27</sup> Windolph, *supra* note 1 at 55.

In fact, Shakespeare's England was marked by an emerging conflict between the courts of common law and equity, between Chief Justice Edward Coke and Lord Chancellor Ellesmere.<sup>28</sup> Several theorists assert that this struggle had a profound influence on Shakespeare's trial in *The Merchant of Venice*.<sup>29</sup>

The Act IV trial scene in *The Merchant of Venice* may be viewed as pitting Natural Law and (to a lesser extent) equity against formal positive law.<sup>30</sup> Lyon calls the trial scene "one of the most astonishing moments in our dramatic history."<sup>31</sup> However, as Ziolkowski states, "the fourth act comes closer to a travesty than to a representation of a trial."<sup>32</sup> As will be demonstrated, the conflict of laws in the play is not clear-cut, nor easily resolved, and the trial raises a host of substantive and procedural considerations.

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<sup>28</sup> Windolph, *supra* note 1 at 53-54. A professional rivalry between these two individuals emerged into a personal hatred. Ellesmere, the Lord Chancellor, would allow losing litigants to recommence their proceedings in Chancery and often issued injunctions against victorious common law litigants, preventing them from enforcing the court's judgment. Lord Chief Justice Coke's common law courts countered by holding people in contempt if they refused to comply with the court's judgment.

<sup>29</sup> Windolph, Andrews, and Kornstein all submit that Shakespeare dramatizes, on one level or another, this equity/common law conflict. White, on the other hand, states that Shakespeare's courtroom makes no references to equitable or common law procedure. White accepts the equity argument to a point, but only to the extent that the trial represents the *larger* struggle between Natural and Positive Law. Justice Posner likewise submits in *Law and Literature: A Misunderstood Relation* (Cambridge: Harvard University Press, 1988) at 97 that "[n]o equitable principles actually inform the law of Venice as it is presented in the play." While Justice Posner makes some astute observations, I believe his argument is subverted by the fact that the Venetian court upholds the English common law of contract, and that an equitable remedy is awarded to Antonio at the conclusion of the trial.

<sup>30</sup> While White and Posner submit that equity does not figure very prominently in *The Merchant of Venice per se*, I only accept this argument, if at all, to the extent that equity is dramatized within the larger Natural Law rubric (as White does). However, as will be addressed below, equity figures palpably in terms of the remedy awarded to Antonio, and arguably as an agent of Natural Law in trumping Shylock's common law bond.

<sup>31</sup> John Lyon, *Twayne's New Critical Introductions to Shakespeare: The Merchant of Venice* (Boston: Twayne Publishers, 1988) at 98.

<sup>32</sup> Theodore Ziolkowski, *The Mirror of Justice: Literary Reflections of Legal Crises* (Princeton: Princeton University Press) at 175.

The trial commences in what is described as “a court of justice” before the Venetian Duke. Shylock, contemptuously referred to by the court as “Jew,” seeks “the due and forfeit of [his] bond” from Antonio.<sup>33</sup> While the court implores Shylock to give “a gentle answer,” Shylock entertains nothing of the sort, in spite of the fact that Bassanio offers him twice (and later three times) the amount owed.<sup>34</sup> Shylock, driven by revenge and a bitter hatred towards Antonio,<sup>35</sup> demands the pound of flesh that he is rightly owed under Venetian law. He steadfastly clings to the law—he “crave[s] the law”<sup>36</sup>—and represents a depraved adherence to positivism:

The pound of flesh I demand of him  
Is dearly bought, is mine, and I will have it.  
If you deny me, fie upon your law!  
There is no force in the decrees of Venice.  
I stand for judgment.<sup>37</sup>

Throughout the scene, Shylock demands nothing but the law, and repeatedly “stands for judgment.” The law is clearly on Shylock’s side, and there is no dispute as to the enforceability of the bond.<sup>38</sup> However,

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<sup>33</sup> Shakespeare, *supra* note 2 at IV.i ln. 37.

<sup>34</sup> Shakespeare, *supra* note 2 at IV. i ln. 34. Bassanio is able to repay the debt, albeit late, due to his newfound relationship with Portia.

<sup>35</sup> Shylock’s reasons for hating Antonio may be viewed as threefold. First, Antonio lends money interest-free which costs Shylock significant business. Second, he abuses Shylock because he is a Jew, spurning, kicking, and spitting at him when he passes him in the street (Antonio is hardly a sympathetic character in this regard). Third, Shylock despises Christians for their mistreatment of him, their “stealing” of his daughter Jessica (who absconded with her love Lorenzo and converted to Christianity), and the theft of his jewels by those same two individuals. In addition to his obsession with positivism, which will be explored immediately, Shylock’s seeking of revenge further polarizes the Jew from principles of Natural Law by offending Christian morality and forgiveness. However, as I will also demonstrate, the Christians prove no better in this respect.

<sup>36</sup> Shakespeare, *supra* note 2 at IV.i ln. 204.

<sup>37</sup> Shakespeare, *supra* note 2 at IV.i ln. 99-103.

<sup>38</sup> Antonio acknowledges the state of Venetian contract law, the commercial necessity of enforcing bonds in a mercantile state, and the inability to change the law as prescribed. In Act III, Scene iv he states (at ln. 26-31):

The Duke cannot deny the course of law;  
For the commodity that strangers have

as it is certain that the cutting of the pound of flesh will cause Antonio's death, the English legal practice of enforcing penalty clauses stands in stark opposition to Natural Law and the preservation of life. Thus, it is not only Shylock, but positive law itself that threatens Antonio's life and freedom.<sup>39</sup>

Portia enters the court disguised as Balthazar, a doctor of laws, on behalf of the famous lawyer Bellario. When Bellario is unable to attend court, Balthazar is sent in his stead to lend "his" legal expertise.<sup>40</sup> Whereas Shylock demands the law, his bond, and judgment, Portia speaks in favour of justice. In her famous speech, beginning "the quality of mercy is not strained," she extols the virtues of mercy as "an attribute to G-d himself,"<sup>41</sup> and aligns herself with the Christian Renaissance conception of Natural Law.<sup>42</sup> Andrews contends that, read in light of sixteenth-century English jurisprudence, it becomes evident that Portia's speech offers far more than "a sermon on the virtues of mercy." Rather, Shakespeare

[W]as holding up a mirror for all to see the dramatic climax of an age-old conflict between the common law courts which dispensed unmitigated 'justice' by the strict letter of the law, and the courts of chancery where 'mercy seasons justice' to do equity.<sup>43</sup>

Portia, seeking to season justice with mercy, beseeches Shylock to "be merciful. / [T]ake thrice thy money; bid me tear the bond."<sup>44</sup> She becomes an advocate of Natural Law in appealing to Shylock's morality, and by attempting to spare Antonio's life from the strict legal appli-

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With us in Venice, if it be denied,  
Will much impeach the justice of the state,  
Since that the trade and profit of the city  
Consisteth of all nations.

<sup>39</sup> White, *supra* note 4 at 164.

<sup>40</sup> As will be discussed below, the nature of Portia's role is highly suspect.

<sup>41</sup> Shakespeare, *supra* note 2 at IV.i ln. 193.

<sup>42</sup> Once again, the Renaissance theorists aligned natural law with reason and conscience, which they regarded as G-d-given faculties.

<sup>43</sup> Mark Edwin Andrews, *Law versus Equity in The Merchant of Venice* (Boulder: University of Colorado Press, 1965) at xi.

<sup>44</sup> Shakespeare, *supra* note 2 at IV.i ln. 231-32.

cation of the penalty. Despite her passionate pleas, however, Shylock adamantly requests satisfaction of his bond.<sup>45</sup>

Unable to appeal to Shylock's humanity (or lack thereof), Portia succumbs to his exacting demands—she states:

[T]here is no power in Venice  
Can alter a decree established [...].  
A pound of that same merchant's flesh is thine.  
The court awards it, and the law doth give it.<sup>46</sup>

Despite this concession, Portia cunningly proves that it is indeed possible to “deny the course of law.”<sup>47</sup> As Shylock prepares to cut the pound of flesh nearest Antonio's heart, Portia interjects and states:

This bond doth give thee here no jot of blood;  
The words expressly are ‘a pound of flesh.’<sup>48</sup>

Portia points out that if Shylock sheds “[o]ne drop of Christian blood”<sup>49</sup> in his cutting of Antonio's flesh, he will himself breach the express wording of the contract which stipulates a pound of flesh, no more and no less. Accordingly, Shylock will stand in violation of Venetian law under penalty of death and forfeiture of his estate. Shylock, who has demanded “the law” throughout the entire hearing, can only say in bewilderment: “Is that the law?”<sup>50</sup> Realizing he cannot exact his bond without standing in breach of it, Shylock remits and asks for his principal in defeat. Thus, Portia ousts Shylock's bond by employing a more literal reading than Shylock himself propounded. She craftily uses formalism to defeat itself, and her hyper-technical interpretation not only reveals the ludicrousness of the English law of contract (as expressed through the fictional Venetian law), but renders a just result in accordance with

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<sup>45</sup> Shakespeare, *supra* note 2 at IV.i ln. 256-57 and 260. Shylock is so formalistic in his devotion to “the law” that when Portia suggests a surgeon be brought to tend to Antonio's wounds “lest he do bleed to death,” Shylock responds: “Is it so nominated in the bond? . . . I cannot find it; 'tis not in the bond.”

<sup>46</sup> Shakespeare, *supra* note 2 at IV.i at ln. 216-17 and 297-98.

<sup>47</sup> Shakespeare, *supra* note 2 at III.iv ln. 26.

<sup>48</sup> Shakespeare, *supra* note 2 at IV.i ln. 305-06.

<sup>49</sup> Shakespeare, *supra* note 2 at IV.i at ln. 309.

<sup>50</sup> Shakespeare, *supra* note 2 at IV.i at ln. 313.

principles of Natural Law. As stated, the legal practice of enforcing penalty clauses not only threatens Antonio's life, but affronts human conscience and morality by allowing Shylock to exact revenge (and in such a reprehensible manner). This law is irreconcilable with the Natural Law principle that "good is to be done and pursued, and evil is to be avoided," and as such, Natural Law properly renders that positive law void in *The Merchant of Venice*.

Having defeated Shylock's bond and preserved the order of Natural Law, Portia may rightly be viewed as one of Shakespeare's greatest heroines. This acclaim should be short-lived, however, as she proceeds to tear down the very institution she sanctified in her sermon on mercy. In doing so, Portia reveals her true colours as a malevolent hypocrite and abuser of the law.<sup>51</sup> As Shylock prepares to leave court, denied his principal and burdened with Antonio's forfeiture, Portia exclaims: "Tarry, Jew! / The law hath yet another hold on you,"<sup>52</sup> and she proceeds to state that:

It is enacted in the laws of Venice,  
If it be proved against an alien  
That by direct or indirect attempts  
He seek the life of any citizen,  
The party 'gainst the which he doth contrive  
Shall seize on half of his goods; the other half  
Comes to the privy coffer of the state,  
And the offender's life lies in the mercy  
Of the Duke only.<sup>53</sup>

While Portia justly defeats Shylock's bond which secures its authority in a base, "unnatural" law of contract, she then relies on an equally corrupt Alien Statute to punish him in the face of Natural Law.<sup>54</sup> Under the Alien Statute, non-Christians were not regarded as citizens of Venice. As aliens, they were thus subject to harsher penalties than citizens for

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<sup>51</sup> Yet this criticism may be slightly tempered by the fact that Portia, like Shylock, merely enforces the law as it stood.

<sup>52</sup> Shakespeare, *supra* note 2 at IV.i ln. 344-45.

<sup>53</sup> Shakespeare, *supra* note 2 at IV.i ln. 346-54.

<sup>54</sup> Although this violation may have not been readily apparent to Shakespeare's fictionalized characters, nor to his audience, as the persecution of minorities was likely justified as "natural."

the commission of equal crimes. By failing to treat persons as equals, this statue represents a gross violation of Natural Law; and the law not only brings Portia's character into question,<sup>55</sup> but also that of the country which upholds it. Keeton identifies this statute as holding a particular significance, as "[t]here was also a similar law in England, [which] the audience very well knew."<sup>56</sup> As such, the presence of this statute reveals the hypocrisy inherent in the legal systems of fictional Venice and Shakespeare's England, as Natural Law is welcomed by equity in one hand (the trouncing of penalty clauses in bonds), yet blindly shunned by the other (the persecution of minorities).<sup>57</sup> Although one of the maxims of the court of Chancery is that "he who seeks equity must do equity," the state allows individuals to soil this principle with their unclean hands.

In the end, Portia merely applies Venetian (or English) law as Shylock did, and should not be regarded as the lesser for doing so. What ultimately makes Portia more reprehensible, however, is her brazen hypocrisy in abandoning the natural morality and compassion which she so ardently advocated. She is not only a violator of Natural Law, but a traitor to it. Whereas Portia preached mercy to Shylock earlier in the scene, she hypocritically reverses the appeal when the balance of power shifts in Antonio's favour. As Kornstein states, Portia does not "season justice with mercy." Instead,

[H]er inconsistency between word and deed is vast. The gulf between her preaching about mercy [...] and her vengeful punishment of Shylock is unbridgeably wide [...]. [S]he practically begs Shylock to be merciful, and [...] she acts with extraordinary cruelty to him only moments later.<sup>58</sup>

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<sup>55</sup> Who has, on several instances, revealed herself to be of questionable character. Kornstein even goes to the extreme of calling her "a world-class equal opportunity hate-monger." Daniel J. Kornstein, "Fie Upon Your Law!" (1993) 5 *Cardozo Stud. L. & Lit.* 35 at 45.

<sup>56</sup> Keeton, *supra* note 5 at 145.

<sup>57</sup> *Supra* note 29 at 97. In fact, Shylock's marginalized status as a Jewish "alien" may provide a reasonable explanation as to his strict interpretation of the Venetian law. As Justice Posner states, "for such a victim of discrimination, it is entirely logical and reasonable to trust in the apparent severity of a rigid but certain interpretation of law rather than in the discretion of a system that has already shown its bias... But he who lives by the letter of the law may perish by it, too."

<sup>58</sup> Kornstein, *supra* note 55 at 45.

While Portia could have yielded the instant she defeated Shylock's bond, she goes on to punish him. Portia thus stands in violation of Natural Law on several accounts: through her strict use of the anti-Semitic Alien Statute (which opposes Natural Law in its substantive content), and in her merciless exacting of revenge against the Jew.<sup>59</sup>

Having invoked the Alien Statute, Portia uses the law to appropriate Shylock's estate and subject his life to the mercy of the Duke. She orders Shylock to the ground, like a dog, to beg for the Duke's clemency. The Duke, who proves to be the only semi-compassionate one of the lot, spares Shylock's life and the portion of his estate that would otherwise go to Venice. Antonio, on the other hand, is not so kind. When asked by Portia "[w]hat mercy can you render him[...]"<sup>60</sup> he spitefully requests that Shylock be converted to Christianity and that he hold the other half of the Shylock's estate "in use" for the Jew's reviled daughter and her Christian husband.<sup>61</sup> The drafting of a deed of use clearly raises equitable considerations, as the common law penalty clause is trumped and substituted in favour of an equitable construct. In a way, Shylock's trial mirrors the conflict of laws present in Shakespeare's England, and the trial's questionable resolution casts grave doubt over the administration of justice in such a system. While the court's drafting of a deed of use may be viewed as the triumph of equity over the perverse application of the common law, any reader who realizes this malicious pretense of justice will have a healthy skepticism. Equity rightly defeats the penalty in Shylock's bond, but it is improperly carried to unjust ends

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<sup>59</sup> Several theorists, such as Zuckert and Bernthal, have maintained that Portia represents New Testament mercy while Shylock stands for Old Testament "justice" (i.e. an eye for an eye; revenge). However, when one considers the undeniably punitive aspect of Portia's judgment, this renders the biblical assessment untenable. Renowned Shakespearean scholar Harold Bloom likewise dismisses this notion in *Shakespeare and the Invention of the Human* (New York: Riverhead Books, 1998). While it is unclear *why* Portia persecutes Shylock in the manner that she does (anti-Semitic indicators aside), it appears that she returns the very vengeance the Jew sought against Antonio. This stands in opposition to the laws of Christian morality, which informed the Renaissance conception of natural law.

<sup>60</sup> Shakespeare, *supra* note 2 at IV.i ln. 376.

<sup>61</sup> Presumably, Antonio requests Shylock's conversion not only to punish the Jew, but also to redeem his Jewish soul. However, as the Christians in the play do not come off any better than the evil Shylock, this may realistically be viewed as a lateral move at best.

which offend conscience, morality, and Natural Law. The Christians do not season justice with mercy, but rather poison it with hypocrisy, vengeance, and hatred. In the end, the Duke vows to recant his pardon should the judgment be refused, and a dejected and castigated Shylock leaves the court.

### III. NATURAL JUSTICE AND ITS ABUSES

Beyond the Christians' cruel abuse of Shylock, a close reading of *The Merchant of Venice* reveals further violations of Natural Law. In particular, the trial scene presents gross violations of a procedural derivative of Natural Law known as natural justice. There are two branches of natural justice that relate to the concept of procedural fairness: *audi alteram partem* (the right to be heard) and *nemo iudex in parte sua* (no person may judge his or her own cause). The second principle, *nemo iudex*, further requires that the decision maker be unbiased and independent, and this is of particular significance to the trial in *The Merchant of Venice*. Considering the trial in its procedural totality, one can hardly conclude that Shylock has received a fair hearing.

A significant procedural concern is raised by the role of Portia at trial. Portia assumes an assortment of roles, functioning as the disinterested *amicus curiae*,<sup>62</sup> passionate party advocate, and judge (as the characters constantly refer to her). This dilemma is not easily resolved. Portia begins the scene setting out the law and Shylock's right to the penalty, continues to preach in favour of mercy, and when Shylock refuses to relent she manipulates the law in Antonio's favour to defeat the bond and to punish the Jew. What began as a civil hearing to resolve the enforcement of a private bond transforms into a criminal trial, whereby Shylock is tried as an alien and found guilty before the court. While this multiplicity of roles and the dramatic turn in the trial were obviously literary imperatives, there is no question that Shylock's right to procedural fairness is violated.

In the same vein, Portia's involvement in the trial renders it impossible to regard her as an impartial decision maker. To use a legal term, there is a "reasonable apprehension of bias" raised by her participation. Portia arrives at court disguised as a doctor of laws in

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<sup>62</sup> Expert legal advisor to the Duke. Both Ziolkowski, *supra* note 31 and White, *supra* note 4, make this observation.

the place—and upon the recommendation—of the famous lawyer Bellario. The nature of that written reference is not entirely clear to the audience, for Portia is either lying as to her recommendation (that is, Bellario's letter is a forgery), or Bellario wrote the letter but lied as to Portia's identity. In either case, the audience is aware that Portia is defrauding the court. In doing so, Portia transplants herself into an adjudicative role, and one that becomes increasingly problematic when one considers her relation to Bellario, a principal in the action, and Antonio, a party to the bond. Throughout the trial she condescendingly refers to Shylock as "Jew," while Antonio is called by his proper name, which gives further evidence of an obvious bias on her part (and, likewise, of the social tenor of the day). In the end, Shylock is not only subject to an unnatural Law of the Alien Statute, but an unnatural process. Natural Law is abused on nearly every conceivable level, and this brings the entire Venetian (and by extension, English) justice system into disrepute.

## CONCLUSION

Shakespeare's portrayal of the trial scene in *The Merchant of Venice* reveals that "Natural Law [is] just as theatrically interesting as observance of it."<sup>63</sup> The dramatization of the struggle between positivism and Natural Law also demonstrates that it is an exceptionally complex issue, the play suffering a decidedly unresolved resolution. While Shylock represents a depraved adherence to formalism, his defeat provides the audience with no consolation as Portia abuses Natural Law to her own ends through substantive and procedural means. Ultimately, the spirit of the law proves no more righteous than the letter, and the audience is required to make a critical moral judgment on the nature and administration of justice: that both letter and spirit are corruptible. While the play may be "altogether without morals,"<sup>64</sup> it is imperative that the audience still possesses them.

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<sup>63</sup> White, *supra* note 4 at 5.

<sup>64</sup> Windolph, *supra* note 1 at 46.