

THE MERCHANT OF VENICE, ACT IV, SCENE 1

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Many lawyers and judges have been inspired by legal masterpieces such as *The Bramble Bush*, or *The Path of the Law*, or *The Nature of the Judicial Process*.¹ But long before I met a lawyer or subjected myself to torture by case method, my interest in the law was piqued by the trial scene in Shakespeare's masterpiece, *The Merchant of Venice*.

This short essay does not permit a full analysis of *Merchant*, or even just its trial scene. Much ink has been devoted to these topics.² Instead, my purpose is to explain why this snippet of literature deserves a place alongside the great law-based books as an inspiration to lawyers and judges.

For those who have forgotten or repressed the story of *The Merchant of Venice* to make room for canons of construction or other legal principles, here is a reminder of the essential facts relating to the trial scene: The moneylender Shylock lends 3000

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1. See Karl N. Llewellyn, *Bramble Bush* (Oceana Publications 1981); Oliver Wendell Holmes, *The Path of the Law* (Kaplan Publ. 2009); Benjamin N. Cardozo, *The Nature of the Judicial Process* (Yale U. Press 1991).

2. See e.g. Thomas C. Bilello, *Accomplished with What She Lacks: Law, Equity, and Portia's Con*, 16 L. & Lit. 11 (2004); Daniela Carpi, *Law, Discretion, Equity in The Merchant of Venice and Measure for Measure*, 26 Cardozo L. Rev. 2317 (2005); Daniel J. Kornstein, *Fie Upon Your Law!* 5 Cardozo Stud. L. & Lit. 35 (1993); Randy Lee, *Who's Afraid of William Shakespeare?: Confronting our Concepts of Justice and Mercy in The Merchant of Venice*, 32 U. Dayton L. Rev. 1 (2006); Daniel H. Lowenstein, *The Failure of the Act: Conceptions of Law in The Merchant of Venice, Bleak House, Les Miserables, and Richard Weisberg's Poethics*, 15 Cardozo L. Rev. 1139, (1994); Trisha Olsen, *Pausing Upon Portia*, 19 J.L. & Religion 299 (2004); Kenji Yoshino, *The Lawyer of Belmont*, 9 Yale J.L. & Human. 183 (1997). This essay addresses only the trial scene. It does not address the "three caskets" story, the ring story, or the story of Jessica, Shylock's daughter, and Lorenzo, the Christian. Cf. *Yale Shakespeare* 155-56 (Wilbur L. Cross & Tucker Brooke eds., Yale U. Press 1993).

ducats to his enemy, Antonio.³ The contract memorializing the loan does not call for interest, but provides that if Antonio fails to repay the debt on time, he must sacrifice a pound of flesh, to be taken from “nearest his heart,”⁴ a penalty sure to result in Antonio’s death. Antonio wants the money to lend to his friend Bassanio so that he can court the beautiful Portia.⁵ Antonio relies confidently on his laden ships’ safe return to enable him to repay the loan.⁶ After we later hear that the ships have vanished at sea,⁷ Shylock demands enforcement of the contract, bringing us to the trial scene.

In an attempt to save Antonio’s life, Portia, who is by then Bassanio’s betrothed, enters the courtroom disguised as Balthasar, a Doctor of Laws.⁸ She questions Shylock, who demands to enforce the contract as written, despite Antonio’s friends’ offer to recompense Shylock more than the value of the debt. Portia delivers the beautiful and moving “quality of mercy” speech, entreating Shylock to have mercy on Antonio.⁹ She tells him of the Godlike goodness of mercy, but Shylock refuses the judge’s entreaty.¹⁰

Shylock insists that he seeks only what the contract entitles him to, neither more nor less.¹¹ He is pleased when Portia notes the importance of enforcing agreements. But she then turns the tables. She observes that the contract says nothing about spilling any blood and warns Shylock that, if he draws any of Antonio’s

3. William Shakespeare, *The Merchant of Venice* act 1, sc. 3, ll. 1-11 (William Lyon Phelps ed., Yale U. Press 1957) [hereinafter *Merchant*].

4. *Id.* at ll. 149-52; act 4, sc. 1, ll. 253-54 (“‘Nearest his heart:’ those are the very words.”)

5. *Id.* at act 1, sc. 1, ll. 162-86.

6. *Id.* at act 1, sc. 3, ll. 157-60.

7. *Id.* at act 3, sc. 1, ll. 1-19.

8. *Id.* at act 4, sc. 1, ll. 143-69.

9. *Id.* at ll. 184-205.

10. *Id.* at ll. 197-201 (including this statement by Portia: “Though justice be thy plea, consider this, / That in the course of justice none of us / Should see salvation”), 206-07 (referring to Shylock’s refusal to consider another’s payment of Antonio’s debt as an alternative to the agreed-upon penalty). One author notes that a good “trial lawyer who had been around the block a few times would have advised Shylock that it is always risky and dangerous to reject a settlement recommended by the trial judge, no matter how airtight the case might seem.” Kornstein, *supra* n. 2, at 38.

11. *Merchant, supra* n. 3, at act 4, sc. 1, ll. 206-07 (“My deeds upon my head! I crave the law / The penalty and forfeit of my bond.”).

blood, he will have committed attempted murder, a serious crime under Venetian law.¹²

The shift in Shylock's fortunes is stunning. From appearing initially as the greedy yet probably victorious litigant, Shylock swiftly becomes the loser in every sense. Not only does the court deny him his pound of flesh, he also cannot recover the money he loaned to Antonio.¹³ Worse still, Shylock is threatened with death, forced to give half of his fortune to Antonio and the other half to the State, and required to convert to Christianity (even if only in name).¹⁴

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As an adolescent, I found the powerful message and beautiful cadence of Portia's "quality of mercy" speech moving. I admired a woman who could so eloquently entreat others to act in accord with their higher nature. Although I did not know then the names of the legal concepts involved, the premises seemed not open to debate: that civilized communities enforce commercial contracts generally, yet do not allow people to be killed for not paying monetary debts—especially when the borrower's friends offer to repay the loan, but the lender simply declines to accept the money. On that commonsense level, I saw little relationship between the contract entered into and the required forfeiture of Shylock's estate and renunciation of his religion. My sense of playground justice told me that the outcome was simply not fair. Shylock had fulfilled his end of the bargain by loaning the money, and yet he lost everything. Antonio, who had failed to fulfill his end, wound up receiving half of Shylock's estate.¹⁵

It was not until my second exposure early in high school that I began to appreciate the complexity, treachery, and irony in the trial scene. Shylock's character developed some subtlety. Experiences born of his religion, his livelihood, the culture of discrimination in Venice, and his relationship with his daughter

12. *Id.* at ll. 306-13.

13. *Id.* at ll. 337-45.

14. *Id.* at ll. 348-393.

15. *Id.* at ll. 381-88. In fairness I should note that Antonio held the money in trust for Jessica and Lorenzo. *See id.* at ll. 389-93.

influenced his view of the world, leading to his unconscionable demands. And Portia, the erstwhile heroine in my younger years, assumed other dimensions—some not so pleasing. Although I still admired her bravery, creativity, and beautiful words, other aspects of her character proved decidedly flawed. On this reading, she appeared vindictive, unwilling to let the parties settle the case on amicable terms, and herself the vengeful pursuer of the figurative pound of flesh.

The next reading, while a law student, focused on the legal aspects of the trial scene: freedom of contract, “plain meaning,” provisions void as against public policy, the intent of the drafters, mutual mistake, and the like.¹⁶ Is the contract fully contained in the words on a page, or is there room for something more? If words are clear, can we look behind them to determine purpose? Can we avoid clear language that calls for a resolution that violates public policy?¹⁷ Does any equivalent of the Uniform Commercial Code provide default rules to supply omitted terms or supplement stated terms? If so, was Portia simply wrong in asserting that Shylock could take no blood? And what is the proper remedy? Fairness seems to dictate that Antonio repay the loan. But if the contract is void, how can Shylock enforce it? Does Portia go too far in demanding the forfeit of Shylock’s estate? The renunciation of his religion? Should she countenance the threat to his life?

As a law student, one’s vision constricts. The law student’s myopic focus on legal doctrine contrasts sharply with the child’s broader focus on fairness and justice. We hope some balance re-emerges once we become lawyers and judges.

When I was asked to write this piece for *The Journal*, I read *The Merchant of Venice* yet again. On this reading, I was struck anew by the tension between judicial discretion and the rigid, technical application of the written law. I was also struck by Portia’s unusual role as a legal advisor in the Duke’s court.

16. See Laurence H. Tribe, *Comment*, in Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 74 (Princeton U. Press 1998) (discussing judges’ reliance on such interpretive tools as “legislative intent,” “plain meaning,” and “original meaning”).

17. Cf. Kornstein, *supra* n. 2, at 39 (“Rather than a strained, legalistic interpretation, Portia could have right away invoked the public policy against absurd contracts such as Shylock’s. No court in any civilized society would even entertain the thought of enforcing a contract penalty calling for the death of one party.”).

Unlike today's judges, Portia questions the litigants.¹⁸ The audience silently applauds Portia's plea for mercy, entreating Shylock to accept payment from others and not demand enforcement of the contract terms. And the audience objects to Shylock's unreasonable demand to enforce the contract as written. It is this demand that Portia exploits by noting that the contract as written does not allow Shylock to take any of Antonio's blood.

Although Portia cleverly moves the parties away from the literal words of this contract, does she go too far in swinging the outcome in Antonio's favor? Where is her judicial restraint? The specter of judicial activism hovers over this portion of the scene: Does judicial discretion threaten arbitrariness, a particularly bad result in a commercial setting?¹⁹ These sophisticated parties had known the risks and bargained for this specific outcome. How much judicial tinkering should we allow? Should Portia have interjected her sense of equity?²⁰

Viewing the trial scene from a judge's perspective, I find myself fascinated with the issues of judicial ethics that arise from Portia's behavior. Is her judgment clouded by the fact that the life of her lover's friend and benefactor hangs in the balance? Is she still admirable or should she have revealed her biases? Does she suffer from an irreconcilable conflict of interest?²¹ I leave these inquiries to professors of professional responsibility.

18. *But cf.* Bilello, *supra* n. 2, at 24 (arguing that Portia's imitation of a judicial officer allows her to "usurp[] the judicial role . . . through fraud" and that through such action "[s]he has misappropriated the Duke's (and thus Venetian) authority, thereby arguably acting with more criminal liability than Shylock, who does no more than present his good faith claim").

19. *Cf.* Kornstein, *supra* n. 2, at 42-44 (discussing the relationship between law and discretion, and articulating the view that "Shylock stands for every minority member who ever sought protection in the safety of clear, precise, written law instead of the personal value judgments of a prejudiced local official").

20. *Compare* Yoshino, *supra* n. 2, at 202 (noting that "both the trial scene and the casket scene reveal that, in this play, there may be no such thing as law that is not inflected by equity"), *with* Carpi, *supra* n. 2, at 2321 (finding that the application of the law of equity is threatened by the trial scene because "the result is certainly not equitable and justice is not served").

21. *See* Bilello, *supra* n. 2, at 12 ("Portia's judgment has little to do with justice or equity. Instead, she is motivated by her desire to protect Antonio, her new husband's confidant. . . . [H]er direct personal interest in [the trial's] disposition renders her judgment fatally partial.").

Those who favor dispute resolution must watch with disappointment as Portia thwarts two offers of settlement between the parties. Once she announces that Shylock cannot have his pound of flesh because such a remedy violates the laws of Venice, Shylock agrees to accept three times the amount loaned, which Bassanio readily agrees to pay.²² Portia, however, frustrates the deal.²³ Shylock then announces that he will accept simply the return of the principal.²⁴ Bassanio again agrees.²⁵ And Portia again says no.²⁶ She demands that Shylock receive all that is coming to him.²⁷ The parties were on the path toward reaching an amicable—and legal and conscionable—settlement. But Portia, perhaps smelling victory, has become so engrossed in her crusade that she acts unreasonably. The charity of which she spoke so eloquently moments earlier has evaporated.²⁸ What light do Portia's actions shed on judges who might have an interest in a case or might otherwise become too impressed with their powers or trial skills?

The themes and characters in *Merchant*, like the law, are multi-layered and complex.²⁹ Simple things—like writing a seemingly clear contract for the loan of money—may spin out of control. Character flaws become exaggerated; characters who believe they hold the upper hand become unyielding: first Shylock, who will be satisfied only by his pound of flesh, then Portia, who will be satisfied only by Shylock's complete ruin. The equitable result—repayment of the loan—emerges mid-scene, only to be lost amid the human foibles. Portia suggests

22. *Merchant*, *supra* n. 5, at act 4, sc. 1, ll. 318-20 (Shylock: "I take this offer then: pay the bond thrice, / And let the Christian go. / Bassanio: Here is the money.").

23. *Id.* at ll. 322-23 ("The Jew shall have all justice; soft! no haste:— / He shall have nothing but the penalty").

24. *Id.* at l. 337 ("Give me my principal and let me go.").

25. *Id.* at l. 338 ("I have it ready for thee; here it is.").

26. *Id.* at ll. 344 ("Thou shalt have nothing but the forfeiture").

27. *Id.* at l. 348-64 (describing the full penalty that the law will extract of Shylock if he attempts to collect the pound of flesh).

28. See *Lowenstein*, *supra* n. 2, at 1159 ("Most important, however, is the perception that the Christians, and especially Portia, hypocritically inflict cruelty on Shylock in the trial scene, rather than demonstrating the mercy that she supposedly stands for.").

29. It has been said that "[t]o write on the play is to wrestle with Proteus, to have it squirm away every time one thinks one has grasped a stable characterization of its central conflict." Yoshino, *supra* n. 2, at 189.

early on that justice is best when seasoned by mercy,³⁰ but then fails to liberally sprinkle any seasoning of mercy in this case.³¹

Merchant's short trial scene is a treasure. Each exposure reveals new riches. Reading the trial scene as a member of the bench serves as a reminder that judging involves more than simply announcing the law. Judges must exercise appropriate restraint, find balance between law and equity, and recognize inappropriate personal influences. For these reminders and other reasons, it deserves a spot on a judge's bookshelf.³²



30. *Merchant*, *supra* n. 5, at act 4, sc. 1, ll. 196-97.

31. *Cf. Lee*, *supra* n. 2, at 20 (“If Shylock got what he deserved, then what of Antonio, who ends the play wealthy, embraced by his old friends, and welcomed by their new spouses? If Antonio had gotten what he deserved, what would he have gotten: he who kicked, slurred, and sp[a]t on a man because the man was a Jew, who failed to live up to his financial obligations. . . . If justice does demand that people get what they deserve, then justice is, at best, in *Merchant* an inconsistent concept.”).

32. And indeed, more than a few judges seem to agree with me and keep a copy of *The Merchant of Venice* handy in their chambers. *See e.g. U.S. Aviation Underwriters, Inc. v. Fitchburg-Leominster Flying Club, Inc.*, 42 F.3d 84, 86 (1st Cir. 1994) (“There is, indeed, literary precedent for such [a] literal and narrow reading [of an insurance policy]: Portia, a ‘rightful judge,’ refused to expand ‘a pound of flesh’ to authorize the shedding of even a ‘jot of blood.’”) (quoting *Merchant*); *McCullough v. Waterside Assocs.*, 925 A.2d 352, 357 n. 8 (Conn. App. 2007) (explaining that “As we must, we merely follow the law as settled and refrain from allowing any disapproval of the plaintiff’s methods or practices to replace an inviolate rule of law. ‘Wrest once the law to your authority: To do a great right, do a little wrong.’”) (quoting *Merchant*); *Wright v. State*, 707 P.2d 153, 160 n. 4 (Wyo. 1985) (Brown, J., dissenting) (disagreeing with the precedent set by the majority and warning that “no power in Venice can alter a decree established. ‘Twill be recorded for a precedent, and many an error by the same example will rush into the State.’”) (quoting *Merchant*).