

The Outsider in Law Literature and Ethology

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The object of this paper is to explore the way in which literature, law and ethology intersect in the treatment of the outsider by the group and the way in which the genres examine and act out the drama of the outsider in crisis.

For these purposes an outsider means a member of a minority group, identified on say racial, economic or age characteristics, but nonetheless a part (and often an important part) of a given community.

The outsider is dependent on the group for identity, livelihood, even survival. There is a mutualism between the outsider and the group which is broken, to the detriment of the outsider, at a moment of crisis of some form.

The outsider at the crisis point strives, either individually or as a group, to claim rights, territory and protection from the group but these are denied. This denial is the trigger for the outsider's convenient and apparent self-destruction which is acted out in trials both fictional and real.

The drama is not just of the individual's self destruction but also a portrayal of the social and economic violence characterising western capitalist society whose generally even-handed law, when dealing with the outsider, is at times cathected by a hostile and oppressive spirit.

Such dramas can be seen in *The Merchant of Venice*, *Richard II*, the 1969 trial of the US activist Bobby Seale and the problems of Aborigines in contemporary Australian courts.

Courts and the Outsider in Shakespeare

A. Venture Capital in The Merchant of Venice

The title itself is an allusion to *merchantman*, a trading ship used by venture capitalists who speculated on the value of the cargo while still at sea. They exist now in the form of futures dealers or junk bond holders.

The dialogue of Act I amongst the merchants revolves around venture capital, business and the cares of business. Salerio says of the merchant Antonio "Your mind is tossing on the ocean; There where your argosies with portly sail - Like seigniors and rich burghers on the flood,..." Enter Bassanio, friend of Antonio and suitor of Portia, who is broke and wants a stake to gamble on another venture.

He is willing to throw all the capitalist dice in the form of his friend Antonio's fortune, reputation and ultimately life in order that he can continue to gamble venture capital once again and enable him to compete with the other suitors of Portia. Antonio, to assist his friend, borrows from Shylock

The all or nothing culture of gambling inherent in the lifestyles of the merchant venture capitalists is drawn in high relief by Shakespeare's depiction of Portia's marriage suit. At the edict of her father in his will the young woman and any would be suitor must abandon any claim to choice or courtship to the casket pick-a-box. The aspiring husband, allowed one choice only, is forced to make the ultimate venture of his luck: if he chooses correctly Portia and her fortune are his, if not he must lose the woman, the money and the freedom to take another wife.

By this device the will of Portia's father is made into a vice squeezing at human happiness, in the form of a meaningful love relationship between man and woman, by insisting on the strait-jacket of the game of chance.

B. Shylock the Outsider: Seeker of Justice

The play's centre appears to be the dramatic contrast between Christian and Judaic ethics but this is only superficially so. If one looks at Christian doctrine subscribed to by those in 16th Century England, the major element is Christ's intervention in man's fate. By his death and resurrection we are rescued from our past and from both internal and external influences. Christians are not mere shiploads of cargo on the high seas at the mercy of chance and the elements, but are saved by divine intervention. However there is no mention of divine intervention in the fortunes of the royal merchants' class.

Indeed Antonio, the spokesperson for the venture capitalists, condemns Shylock for taking interest because this form of business is not venture capitalism, involving as it does no transaction with fortune and hence it is unethical in a merchant's eyes.

Antonio conveniently forgets the social barriers between them make Shylock an outsider and by preventing him from entering the merchant class leave him few commercial opportunities beyond moneylending.

Also overlooked by Antonio is the social bonding among the venture capitalists which provides a source of interest free capital for its members on the basis of *if I*

lend you money interest free you'll return the favour. They are members of an exchange club whose loyal liberality amongst themselves is equalled by the rigid exclusion of others, especially Jewish commerce.

The venture capitalist fraternity is self-contained and with the exception of Antonio's sudden requirement is in no need of Jewish money or money lenders. While they have each other it appears they have no need of either God or women. Or do they?

New and unusual circumstances create a need for Jewish money and a successful marriage which ironically becomes the backdrop against which the outsider Shylock pleads for a place in the sun and the right to avenge wrongs wrought against himself and his people.

Bassanio having married Portia is forgiven after a valueless ring is given to the disguised Portia after she has successfully enabled Antonio to avoid payment of his debt to Shylock.

Portia uses poetry and intelligent legal argument to take control of the situation and rescue the beleaguered merchants. Her vehicle is the hapless outsider and his appeal to Venetian justice. Portia must achieve her result disguised as a male because as a woman she is just as much an outsider as Shylock.

Portia's speech on the unstrained quality of mercy is designed to reach for a settlement outside a court, to rewrite the contract for the benefit of both parties and in particular to save Antonio's life.

Shylock's heart is not moved by Portia's oratory and he rebukes her claiming that merchants do not live like Christians but rather like venture capitalists who having won slaves treated them like slaves. Shylock's intransigence taunts the Christians that in keeping slaves they are ignoring God's command, as contained in St Paul's letter to Philemon: "no longer a slave but better than a slave, as a dear brother".

Shylock requests justice which, of course, he gets with a vengeance.

C. The Torn Loyalties of the Outsider

Shylock is destroyed by his own plea but the court drama also destroys the apparent moral rectitude of the merchants. Bassanio gives his wedding ring to the young and brilliant (male) advocate, thus denying a commitment to his wife Portia and doing so in favour of a cabalistic loyalty to Antonio.

There is a lot more to *The Merchant of Venice* especially the re-vitalising force of sexuality and its ability to transcend class barriers and racial taboos, thereby linking disparate groups such as the elite with the outsiders or the rich with the rich. The old are left by the wayside stripped of their power, wealth and identity. Its a middle-class play and a typical comedy where a happy ending covers the underlying tragedy.

The cross class, cross racial linking is Shakespeare's way of sweeping problems under the carpet but it does show the socio-economic crisis of the times. Christian moneylenders were becoming more prominent and socially acceptable in 16th

century London. The ghetto, losing its exclusive and pivotal position as a source of cash was itself coming under threat and the court scene in *Merchant* is the dramatic setting for the self-destruction of the Jewish socio-economic group, conquered by the Christian mercantile class hungry for power and wealth.

The battle takes place in the court: a world of absolutes, its binary logic can tolerate no shades of grey. Shylock exploits this by insisting on his contractual rights, rights to which even an outsider is entitled but Portia uses the court to deny these rights (or to have them redefined to exclude his claim) and then goes on to destroy him.

Shylock the outsider perceives violation in relation to Jessica who elopes with the gentile Lorenzo, squanders his money and runs off dressed as a boy to live with Portia. In Shylock's lament "My ducats, my daughter" is represented the duality of his loyalties. Now his economic basis is gone and he is finished.

D. Faith, Fortune and Divine Intervention

Just as there is no place for Christian mercy so there is no place in the merchants' epistemology for divine intervention. They do not pray for their ships. The hazards of business are only over-ridden by the friendship amongst the band of royal merchants, not by any appeal to God's help. Just as mercy is an intervention in the harsh consequences of one's action, circumstance, fate, and is an amelioration of the hazards of existence, so God's help could be invoked for the protection of ships at sea. Yet nowhere does the dialogue about the perils of venture capital in *The Merchant of Venice* refer to divine intervention.

The capitalists do invite human intervention amongst friends. Antonio answers the bond of friendship by pawning his credit and ultimately his life for his friend Bassanio.

In answering the call Bassanio leaves his wife on their wedding day, borrowing from her to repay Antonio's bond and offering to sell her for his friend's life.

Antonio's gratitude to his lawyer is such that he pleads for the wedding ring to be given to the lawyer: "let his deservings and my love withall, Be valued against you wife's commandment".

Antonio's appeal is a paradigm of the three casket test Bassanio has undergone. The word "deserving" refers to the silver casket and the word "love" or lust to the golden casket. Both these in Antonio's speech are set against the icon of obedience and commitment, the lead casket, which Antonio denigrates by devaluing Bassanio's wife's (ie Portia's) love and Bassanio's commitment to her.

Whilst this in turn is an echoing of the Christian doctrine of justification by faith for which the merchants have no use in their ventures, as they do not ask for (and presumably do not believe in) God's help in the mercantile arena, paradoxically, merchants live by blind faith. This faith in their venture makes them hazard all, chance all, risk all for any amount of credit, as Antonio has demonstrated. This money is not lent on the basis of desert or worth (the silver casket) since Bassanio the borrower is a poor risk. Nor is it lent out of greed because it was not to benefit the lender Antonio.

The emptiness of this blind faith in chance is a parody of the fullness of God's grace by which the Christian is given the faith to commit him/herself to abide by God's commandments (the lead casket), whereas a merchant relies on fortune, not the ingenuity and/or plan of the venture. It is fortune that brings home the ship.

E. *Contractual Rights: Vehicle for the Outsider's Demise*

It is the opposite of true faith; it is a hubris of the form that undid Alan Bond, Christopher Skase and more recently John Spalvins. We, like Shylock, condemn their arrogance, their attacks on the monetary system. We also condemn their *playing with other peoples's money*. If these venture capitalists are brought before the Courts the rivalry for our affection for the venture capitalists on the one hand and the aggrieved shareholders on the other is played out in the financial pages of our daily newspapers.

The Spedley companies investigation is one such instance: it would have been more sympathetically conducted in 1980 than it was in 1990. One would have given the companies the chance to trade their way out of trouble. The provisions of the *Trade Practices Act, 1974*, might have been used to keep the creditors at bay.

But now we, either as newspaper reader or editor, are more like the creditor Shylock; unkind, unreasonable, unforgiving, and not prepared to compromise.

Shylock's pursuit of revenge became his undoing. He was asking for punishment upon the merchants for their insults to him. As set out in Portia's speech our sympathy is weighed in the balance. Mercy and justice are her theme but in reality the suit is a contractual one and at least modern equity would allow the contract to be paid in the form of damages. Furthermore, the suit is a fake anyway: the contract involves the taking of the life of a Christian, it is illegal, hence unenforceable.

The nicety of the wording of the contract - a pound of flesh - is not what Shylock is thinking about with the life of Antonio about to be poured out in the Court. On the other hand the nicety of the wording *is* used to destroy him. It would not have been lost on the audience that it takes two to make a contract; so that if Shylock is guilty then so is Antonio.

Since the contract was unenforceable, Shylock simply could have demanded the return of his money and kept his livelihood. It is the literal meaning of the contract rather than the substance that is used against Shylock to destroy him. The apparent pardoning is a travesty of Christian mercy which is given out of love as Portia later shows towards her husband but *not* to the Jew.

The letter of the law is applied with all its undercurrent of hostility to the broken outsider who has appealed to *justice*.

F. *The Immolation of the Outsider: Richard II*

The role of the Court is again considered in *Richard II*. The socio-economic setting is one of transition from a feudal to a capitalist king. The transition culminated in the War of the Roses, a civil war leaving nobles decimated and the Tudor kings absolute. Henry VIII was to cement his control with the takeover of the Church.

In his move to depose Richard, Bolingbroke gathers followers when they see the exploitation by the king and his government means the ruining of the land and the theft of their inheritance. As shown by the murder of Richard's uncle and the confiscation of Gaunt's property, Richard is no proper king.

Meanwhile, prompted by Carlisle, Richard claims he is the anointed king, appointed by God who will keep him king: "Not all the water in the rough rude sea Can wash the balm from the anointed king;/ The breath of wordy men cannot depose The deputy elected by the Lord".

Richard's faith in royal divinity is severely shaken when he is told his friends are dead: "For God's sake let us sit upon the ground And tell stories of the death of kings". Richard goes on to despair: "Go to Flint Castle, there I'll pine away".

At Flint Richard ignores his own sovereignty and offers to submit to his own demise. He comes down to the "base" Court to speak to Bolingbroke. Later at Westminster he hands the crown to Bolingbroke: "Here cousin seize thy crown", and later "With mine own tears I wash away the balm". He uses his own sovereignty to *unking* himself who, according to John of Salisbury's jurisprudence, was "father and husband to the realm".

Utterly powerless he divorces himself from England, his bride, and later is separated from his natural wife and still later from his natural life.

Richard is at Westminster on trial pleading his own cause, but not in any way challenging the authority of the court. He is merely now an actor in a play of regicide being asked to read out his own alleged crimes to the people. Richard has been discharged, stripped of his followers, put on trial and deposed. Richard then is an ex-rex, no power, no place to go.

It could be said Richard is needed as the scapegoat to expiate the sins of the nobility. Fear and anger are the progenitors of guilt; and the nobility of Richard II were very angry and very fearful. Bolingbroke is angry with Richard for confiscating his wealth and exiling him and is the tap to the general hostility to the King.

Ethology: Love and the Outsider's Survival

A. Shylock and Appeasement

While proceedings before courts are thought to be conducted dispassionately, Shakespeare has seen the undercurrent of anger in a trial. In *The Merchant of Venice* Shylock is angry with Antonio for the insults. This anger is fuelled by the elopement of his daughter and the stealing of his money. In turn the court gets angry with Shylock for threatening the life of Antonio.

Anger and fear are generally considered to be the two basic emotions that we feel especially in times of stress. They are expressions of the fight-or-flight response with which we are programmed to cope in emergency situations. In ethological terms, a full frontal threat gesture of a dog baring its teeth creates in the recipient a

flight-or-flight response. Fear or anger then is a way of anticipating an attack and so enhances the probability of survival.¹

In biological terms these emotions are accompanied by automatic involuntary responses which prepare the body for action about to occur, fight or flight. Adrenalin increases as do heart rate and respiration.

In a group the emotions of fear and rage are conveyed to those about us. Animals have a way of displacing these emotions when fight-or-flight is inappropriate. In a dominance confrontation the weaker might turn its back to the threatening dominant thereby inviting a ceremonial mounting by the dominant, as in the case of chimpanzees. In the case of canines, the subservient might expose its throat to the dominant. These appeasement gestures dissipate the threat of aggression.

In the Court fight between Antonio and Shylock, Antonio offers money in the hope he can appease the aggressor. The latter not being part of the group, either does not understand the appeasement gesture, or refuses to acknowledge it. Ironically, an appeasement gesture, placing oneself in a totally vulnerable position, dissipates the aggression. This can only happen when both members of the confrontational dyad understand the body language, understand the convention.

Rarely does a confrontation among animal groups result in the complete defeat of one of the combatants. Ethologists postulate the reason language was developed in animal groups was that group survival could not tolerate the constant fighting and drawing of blood and death associated with such fighting. Consequently hierarchy and power are established; challenges to the hierarchy occur infrequently. Appeasement gestures often replace fight-or-flight response to danger.

There remains the emotions of rage and fear whether the attack is real or imaginary. Anything likely to weaken us is seen as a threat to our capacity to survive. The sense of being threatened occurs when we sense situations such as disapproval, exploitation, frustration or humiliation. Fear and anger are responses to a perceived threat to our survival.

B. Outsiders and Illusions of Power

Graylin postulates that because a human infant is capable of neither fight nor flight its survival cannot depend on its own activity but on the protection of others.² Within the first twelve months of life a child becomes aware its survival comes from other people in the environment. When the infant reaches the self/other differentiation stage a response to separation is expressed in terms of fear and later rage.

Into the child's development comes socialization; the child learns to smile and to postpone for lengthy periods, expressions of rage. Graylin suggests the greatest

1 W.B. CANNON, *BODILY CHANGES IN PANIC, HUNGER, FEAR AND RAGE* (Appleton-Century 1915). See discussion of Cannon's book in W. GRAYLIN, *THE RAGE WITHIN: ANGER IN MODERN LIFE* (Simon Schuster 1984).

2 GRAYLIN, *Supra* note 1.

fear for a human is not to be weak in the face of danger but to be unloved. He observes "...the rage involved in crimes of passion is often extraordinary."³

To lose the only love one feels capable of, to lose "the undeserved" love when one feels unlovable and unentitled to love is to be stricken at the heart of ones security; "crimes of passion" are more accurately "crimes of humiliation".⁴

The Merchant of Venice devotes a considerable number of lines to describe how the unlovable are not entitled to love. His daughter's humiliation of him is the final trigger of the rage Shylock experiences and expresses in the Court scene. Even his friend Tubal recognised this: "But Antonio is certainly undone". Consequently in the trial scene, Portia's speech about mercy and a good Christian and the Jew emphasises that Shylock in his present state is unlovable: stress, betrayal and anguish generate the angry response in Shylock who has been told, by Antonio, his daughter and now the Court, he is unlovable.

Any criticism can be seen as a questioning of power and competence. In the perception of others are our strength and power. The Peacock throne of Iran at its most powerful moment was stripped of its power by a revolution of the people. Power is given to not owned by a ruler.

On the individual level both parent and child maintain their relationship when the illusions of power are not tested. The child needs the parents' love to reassure it of its lovability and worthiness. In *The Merchant of Venice* Shylock's relationship with his only daughter degenerates from love to hate to loathing. When his "lovableness" is under threat he reacts with rage. Shylock's threshold of rage has been considerably lowered by his daughter's betrayal.

Graylin's postulation is:-

[A]bandonment by a source of love is central to our earliest definition of death. It persists in the conception of death sustained by most adults. Death is not our non being. How can we visualise non being when the very act of visualising is an affirmation of being? To most of us death is being *there* somewhere, but cut off, isolated and abandoned. Betrayal is a stab at the heart. Betrayal is also a profound signal of worthlessness. If those who we assume are most valued abandon or discard us, what actual worth can we assume to possess? Betrayal is capable of generating the most direct and explosive outpourings of anger. When it is compounded by an affront to sexuality the danger is immense. To both genders, sexuality is a measure of worth and power.⁵

Shylock experiences: disapproval, betrayal and finally deprivation of a good deal of his wealth when his treasured possessions are stolen by his daughter. His livelihood is under threat.

When one's ability to work and earn a living is threatened (or in Shylock's case, damaged) one feels a reduction of self worth and self respect. Shylock's good sense

3 *Id* at 30.

4 *Id* at 31.

5 *Id* at 33.

is destroyed by his internal rage and he cannot see the opportunity to make a profit, a threefold profit; so it is the need to express this rage and violent retribution which provokes the Court to despise, deprive diminish and humiliate the self-immolating Shylock in its judgment.

C. *Death through Anger and Vulnerability*

Richard's Court does much the same to Bolingbroke. In Act I, while it is not clear what Bolingbroke's motive was, there is a suggestion that Mowbray was Richard's hatchet man in the systematic murder of Richard's uncles. Bolingbroke may have been afraid his father was next so wanted to use the Royal Court of Law to expose the murders and rapacious strategies of Richard.

Bolingbroke has no great hold on Richard. In his anger he seems to threaten through his attack on Mowbray. Bolingbroke is saying *I know you killed my uncle and I know you are using public money to repay private debts*. Knowing this and not wanting these charges to be aired, Richard asks Bolingbroke to bury the hatchet. For Bolingbroke and Mowbray, pride, anger and vulnerability would not allow it. They both demand justice. Both get justice of the Richard variety: capricious, autocratic and vicious.

In the trial by ordeal/combat if Bolingbroke were to win, Bolingbroke's accusations would be proved. By implication Richard would stand condemned. To avoid such censure Richard ensures that by demanding justice, Bolingbroke gets banishment, as does Mowbray since he knows too much: both being blinded by fear, anger and vulnerability, are willing victims of Richard's justice.

Later, when Gaunt is dying, the scandals of the Court are revealed especially Richard's deficit budgeting and his mortgaging of the assets of state. The irony of Gaunt about to meet his King and Judge, denouncing his earthly king and judge would not be lost on the audience. Richard is taunted by Gaunt for his poor economic management. The former responds by confiscating Gaunt's land to balance his budget. The Court of Richard is on trial again at the death bed of Gaunt. The accusation, deficit spending, is answered by asset sales: it is as if Richard by his confiscation is saying: *if you want a just government, pay for it*.

In doing so Richard shows his true colours: he is a closet socialist who nationalised the assets of the wealthy under the guise of fiscal rectitude. Meanwhile he has a war to fight in Ireland and needs more money. He raises heavy taxes and it is expected when he returns from Ireland he will be bankrupted. Richard is actually bankrupted another way when his supporters desert him. They either go home or go to Bolingbroke. He needs further asset sales.

Richard uses the device of setting one noble against another: accusations of treachery is a clever legal trick to confiscate the lands of the alleged criminals - the device used in Australia whereby a person convicted of a crime, who has substantial assets, can have them seized provided they are reasonably suspected of being the fruit of illegal activity. A wealthy person could be a notorious criminal, a low profile drug dealer or a clever entrepreneur allegedly in breach of the multiplicity of

statutory regulations. In modern times anyone can be an outsider. In Richard's Court they are Gaunt, Bolingbroke and Mowbray.

16th and 17th century audiences would have known the story of Richard II removing his opponents by promising a pardon, getting them to disband their army and then killing them. His promise to pardon was not written under seal but merely oral. The audience would have recognised the trickery in Richard was in keeping with historical character and would have responded to the threatening nature of the Royal Court where the opponent becomes the victim.

As has been said, the deathbed scene sees Richard condemned, foreshadowing the time when he too becomes the victim: at the end he appeals to God, the highest Court, to reaffirm his divinely ordained corporation sole, even though at Flint castle he knows he is defeated. He has lost his temporal power but still retains his spiritual power. For this reason Bolingbroke does not want to appear to depose him.

Richard knows this and seeks to create a drama portraying Bolingbroke's guilt in returning to England before his sentence is completed, raising an army against the King and holding the King captive. None of this could Bolingbroke deny, so stands accused and condemned.

Outsiders and the Use of State Power

Shakespeare devotes considerable poetry to the subject of the divine right of Kings. The King is a corporation sole created by God. Richard is a divinely appointed King, a saintly entity. Richard, the natural embodiment, by using his quite legitimate legal power to confiscate the assets of the alleged traitors, is corrupted in so acting, as indeed is the Court of Venice when it exercises its legitimate power to condemn Shylock to Christianity and to confiscate his property.

An implication could be that when the State uses its power to confiscate or take its citizens' assets, irrespective of the manner or rationale for doing so, there is a danger the exercise of that power is corruptible and corrupting.

Certainly Richard has used this power and he too is on trial for the abuse of it. Also on trial is the sovereignty of the King/State to make whatever law it wishes and then to exercise that law in whatever way it chooses. In the debate Richard has all the arguments; he is certain of his arguments but uncertain as to whether he merits being a King. This uncertainty is evidenced on his return from Ireland when he hears many of his supporters have deserted him and he starts his long soliloquy: "For God's sake let us sit upon the ground/And tell sad stories on the death of kings". He recognises the grave as a sure way of ending his divine reign and in fact the only effective way of doing so. He has lost faith in his own belief of being divinely ordained to be King and wallows in his unworthiness to be so.

The desertion of his followers, a massive breach of their commitment to him and of their oath of allegiance, reminds him of his breach of his own commitment of his marriage to England (as reflected in his own questionable commitment in the

marriage to his wife). He had raped, pillaged, confiscated the assets of the nobility to fructify into civil war. He has done this largely out of his own cupidity. We are reminded of the Portia pick-a-box; the three caskets in *The Merchant of Venice* the icons of cupidity (gold), merit (silver) and finally commitment (lead) similarly dramatised in the trial of Richard and Bolingbroke.

There are in effect two trials taking place. One of Richard who has lost his faith in God when he loses the desire to be King (God's anointed), his belief in his divine ordination, and finally the loss of his expectation that God will protect His own anointed. Although he appeals to God, the highest Court, he loses his faith and removes his crown. He has come before the Court to self-immolate having lost his own faith in his regal divinity and hence his divine source of justice.

In Bolingbroke's case he is on trial and stands condemned. His source of sovereignty has been received by force of arms and popular following not by divine ordination. His own faith in this mandate to rule convinced him to take the step of returning even though he was an exile. This faith is rewarded not only by a popular following but a noble following as well, equipped with arms and funds to challenge Richard. This Court scene is a double farce with Richard appealing to justice but disbelieving in the source of justice. Simultaneously Bolingbroke appeals to the Commons to condemn the crimes of Richard, but there is no right to condemn a divine entity who could do no wrong, was never under age, never sick and could never die.

The only way Bolingbroke could become King was for the throne to become vacant through death. Bolingbroke knows this and knows crowning by himself of himself is illegitimate, without legal basis.

The irony is that once Richard is dead and the crown vacant, Bolingbroke's filling of the vacancy could become legitimate if God were to bless him. To get God's blessing he promises to go on a pilgrimage and he does this. Bolingbroke, as Henry IV, seizes the Crown for greed (the choice of the golden casket) and his pilgrimage is to earn the Crown (the choice of the silver casket). Henry's death in the Jerusalem Chamber shows the emptiness of his promise, his worth and his desire. For if he were to make his promised pilgrimage he would have abandoned the Realm and broken his commitment to rule. By not going he cannot demonstrate penitence (and by implication worthiness). Finally because he cannot even rule his own son Prince Hal let alone the rebellious nobility, his grasp for the crown is as empty as his death.

Just as the use of the Court in *The Merchant of Venice* uncovers the moral bankruptcy of the ruling class, so the Court of Westminster reveals the moral bankruptcy of feudal England and the Divine Right of Kings; neither Richard nor Henry can be seen as "Father and Husband to the Realm".

The Black Outsider: Victims without Choice

In these two plays of Shakespeare we see the Courts of law cannot handle an outsider and an appeal to the Court by an outsider is itself a destructive mechanism. It is not surprising then that in the 1969 street theatre *The Trial of*

Bobby Seale, we see Seale seeking a fair trial according to the liberal philosophy of the American Constitution, based in turn on the puritan rectitude of the founding fathers.⁶

Seale insists the country is on trial for public contempt and exploitation of American blacks. He wants to say in Court not only that it is his constitutional right to raise the public consciousness of this exploitation but that the trial has the potential to condemn the American people who have acted contrary to its opening words: "We hold these truths to be self-evident: that all men are created equal". He appears to be saying if he is on trial for raising public consciousness of exploitation, then the Court is failing to uphold the US Constitution and hence is illegitimate. This is what he means when he says "I do not recognise this Court".

Such an approach was used in *Coe v The Commonwealth* where the power of the Commonwealth of Australia was challenged as being limited by the Imperial law as it existed in 1788 which recognised the indigenous law of captive people such as the Australian Aborigines at the time of settlement.⁷

A similar approach was taken in *R v Porter* where the preliminary point was argued that as the accused was an Aborigine he was legitimately resisting the imposition of law as had been handed down during the course of white settlement. Consequently the use of a firearm against New South Wales Police was an act of war, not a criminal act.⁸

In the USA, Seale did not pursue the legitimacy argument to its logical conclusion. He implicitly recognised the Court in which he was standing by demanding his Constitutional right to a fair trial. In his view a fair trial was to be able to say the things he wanted to say and to do the things he wanted to do. At first the Court bound him so he was chained to a chair; thus his presence in the Court was guaranteed. Then, because Seale would not keep quiet, he was gagged.

It could be said Bobby Seale both appealed to the Chicago Court for justice but did not recognise the Court's legitimacy in dispensing it to him. On one occasion Seale recognised the Court by demanding the trial be conducted in the way he desired it to be.

Seale, like Richard, by appealing to a higher authority is reflecting the accounts given of the trial of Jesus by the Jews on the night before the crucifixion. Unlike Richard and Seale, Jesus is reported to have said nothing. So furious were the Court officials with Jesus refusing to defend himself they struck him. Thus the lack of power of the Jews over Jesus was demonstrated and so he had to be sent to the Romans for trial and punishment.

6 The street theatre was staged on the campus of the State University of New York in 1970 and witnessed by the author.

7 52 AUSTRALIAN LAW J. REP. 334 (1978)

8 Preliminary point taken at the trial held in the NSW District Court 1990. (Unreported decision)

In *The Merchant of Venice*, Shylock, who did not recognise the moral basis for Christian law, nevertheless submitted himself to it and was destroyed. Similarly, Richard had no need to appear before the Court of Westminster but did so. If Bobby Seale had chosen to remain silent on a charge of conspiracy against a group of people as disparate as a monastic priest, anti-war demonstrators, and a black power leader, who were amongst the 1200 or so outside the 1968 Democratic Party National Convention, there might have been a different outcome. If, like Uncle Tom, Seale had resisted passively the Chicago court would not have commanded his surrender, but Uncle Tom would have been an unlikely role model for a Black Power activist.

A number of hurdles have to be faced by any outsider coming before an Australian Court. If an Aboriginal or young person appears before a NSW Local Court there is a reasonable probability (in the case of a charge such as assault) the person might have appeared before the Magistrate earlier. It may be very difficult for a Magistrate to believe this person, whatever his or her disposition to do so, when the accused denies the charge or alleges self defence, when out of economic necessity on previous charges they have pleaded guilty.

In the case of more serious charges heard before say the NSW District Court, during the trial a Judge may not have in mind the past of the accused. Because the District Court does not sit in every town, only in major centres, an Aboriginal accused has considerable trouble and expense in collecting witnesses to testify on his or her behalf. In addition it is not uncommon for the police to seek, and obtain, an adjournment when *their* witnesses are not available on the day of the trial. This necessitates further trouble and expense for the accused in getting witnesses together again, not to mention the additional legal costs.

If we step back into another dimension the tribal memory of injustice, like Shylock's, so preys upon the mind of the accused that the only expectation is condemnation and denial of the opportunity to earn a living. The Jews in medieval Europe, the blacks in modern America and the Aborigines in Australia, all face steep hurdles in the form of financial insecurity and limited sources of income in changing economic times.

In Renaissance Europe, Christians were becoming bankers, lending money and earning interest. Consequently the economic niche of the medieval ghetto was being eroded. Similarly, American blacks had been able to earn a living in rural Southern states as hourly paid labourers and piece workers, but by the 1960s mechanisation, depression and soil erosion had culminated in the elimination of this economic resource. Internal black migration to the Northern cities put pressure on the menial job markets in such cities as New York and Chicago. The 1960s also saw a growth in the population of Spanish-Americans, especially from Puerto Rico, who were successfully competing with the blacks for a place in this economic niche. Australian Aborigines are currently facing a similar situation.

Conclusions

The economic process during a time of change cathects literature and the legal system to act out the concerns of the people. In Shakespeare's time it was the tension between the absolute monarchy's rural based nobility and a growing mercantile class which threw into high relief legal and political fictions against the moral beliefs of the day.

In the USA 1968 was the end of a four year period of gigantic advances in civil rights accompanied by a rush of urban riots coupled with growing inflation due to an expensive and arguably illegitimate war in Vietnam and increasing unemployment. Violence in the streets of the major cities reflected these tensions.

To place on trial a black power leader for conspiracy to riot before the 1968 Democratic Convention was as farcical then as the contemporary Australian trial and conviction of a young person for saying "Fuck" to the police. It is not farcical though if we interpret both scenes to mean society is saying: *we don't need you as a labour resource anymore; we don't want you around anymore; we don't want you on our conscience anymore; here is a device to legitimate the destruction of you; throw yourself on our alter of justice.*

In Shylock's case the vehicle for victimisation is an appeal to strict interpretation of the contract; in Richard's an appeal to the divine legitimacy of Kingship; in Seale's a constitutional basis of law, while in Australia, especially for Aborigines, the appeal is to a foreign and increasingly expensive legal system.

In Australia, if a judge at first instance has erred on the facts there is virtually no appeal; and judges *are* human. To litigate is to risk facing impoverishment and the prospect of the Court making a grave mistake which is unlikely to be rectified. The High Court has in effect cut off any avenue of appeal in such cases, the client usually being invited to sue the lawyer, who is backed by an insurer, a formidable opponent.

In criminal law the NSW *Summary Offences Act* is reminiscent of Illinois conspiracy law: both are easily offended. Saying "fuck" to a policeman is like the invitation to say "Hi to Hyundai" but with Kafkaesque consequences. While street kids, Aborigines, or anyone else need not swear at police, often the level of tension and stress in a street confrontation is such that the use of such language is inevitable, made more so by the fact such language is a commonly accepted part of ordinary conversation. After use, the arrest, trial, conviction and punishment are inevitable; the offence is meaningless but indefensible.

Be it a civil or criminal process, such is the moral bankruptcy of Western justice an outsider is destroyed in its presence. If Christian justice is as Portia said it was then pardon for sins committed is its expression, a pardon to rehabilitate not destroy the offender. Even the penal system which commenced white settlement in Australia was more successful, as the prosperity of its descendants illustrates.

The legal system must not enrich either itself or the state in its administration of law but set in train the economic rehabilitation of the offender. When society comes to love its poor, its outsiders, its offenders, when we all come to believe in the icon

of the Statue of Liberty then justice might be expressed in the spirit as well as the letter of the law. In the words of Emma Lazarus written at the base of the statue:

Not like the brazen giant of Greek fame, With conquering limbs astride from land to land; Here at our sea-washed, sunset gates shall stand a mighty woman with a torch, whose flame is the imprisoned lightning, and her name Mother of Exiles. From her beacon hand Glows world-wide welcome; her mild eyes command the air-bridged harbour that cities frame. 'Keep, ancient lands, your storied pomp!' cries she With silent lips. 'Give me your tired, your poor, Your huddled masses yearning to be free, The wretched refuse of your teeming shore, Send these, the homeless, tempest-tossed to me, I lift my lamp beside the golden door!

Society needs to be reminded of its history - in this case its literary history - to see the inherent injustices of its legalistic beliefs and its courtroom dramatics. It also needs to see there have been and might still be a better spirit and a better system of law.

What this better spirit might be is suggested in Portia's loving forgiveness, in Bobby Seale's appeal to the US Constitution, in the poem of Lazarus. How it might be expressed is negatively portrayed in the destruction of the economic bases of Shylock's, Seale's and Porter's social group. The legal profession which has played its own part in creating outsiders of these social groups, now in such increasingly harsh economic and legislative times must concern itself with the reversal of the trend so the grace of Christian justice and not just its letter is given to the outsider in a full and forgiving rehabilitation to restore dignity and end the history of self-immolation.