Eagleton, Judge Posner, and *Shylock* v. *Antonio*

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The appearance of Richard Posner's *Law and Literature* in 1988 may be taken to mark the institutionalization of a convergence of interests.[1] One might be tempted to speak, as Posner does, of a law and literature 'movement'. But movement suggests direction, and it is not clear that there is or should be any single general direction taken by those interested in exploring the connections between law and literature. The real question about law and literature, as Posner himself indicates, is not what specific goal the exploration is directed toward, but whether any rich or fruitful results are to be expected from this adventure.[2] If you stick in your thumb, will you pull out a plum? With this general concern in mind, I want in what follows to look at the interchange between literary critic Terry Eagleton and Judge Posner himself concerning some legal aspects of Shakespeare's *The Merchant of Venice*.

Eagleton's views can be found in his short book *William Shakespeare*.[3] The discussion there, although it is about law, justice, and mercy, is not plausibly connected to recent developments in the law and literature 'field'. And clearly it was the absence of informed consideration of legal questions raised in the play that prompted Posner to offer corrective judgments. But although Eagleton's notions about the nature of law may seem poorly grounded, Posner's responses do not always appear to me to be particularly helpful. Damagingly, Posner offers his legal observations without any attempt to connect them to a broader vision of what *Merchant* might be about — this despite his suggestion that *Merchant*, along with Shakespeare's *Measure for Measure*, are among the minority of literary works, just because in them, legal issues are central to their meaning.[4] I believe that there are more plums here than Posner has got hold of, and that his suggestion about the importance of legal material in *The Merchant of Venice* can be more fully vindicated by further consideration of some of the detail of the play.

The case of Shylock and Antonio, the merchant of Venice, is of course familiar enough. To supply his friend Bassanio with money for a campaign of

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[1]R. Posner, *Law and Literature, A Misunderstood Relation* (Cambridge: Harvard University Press, 1988).

[2]*Ibid.* at 13.

[3]T. Eagleton, *William Shakespeare* (Oxford: Basil Blackwell, 1986).

[4]Posner, *supra*, note 1 at 15.

courtship to be addressed to Portia, a wealthy heiress, Antonio borrowed three thousand ducats for three months from Shylock, a Jewish money-lender. The instrument of the loan would appear to have been a kind of conditional bond, obliging Antonio to allow Shylock to have a pound of Antonio's flesh cut off nearest his heart, taken by Shylock himself. According to the bond, this obligation would have been defeated if Antonio repaid the loan at the prescribed time and place. The bond thus fixes a determinate penalty in case of non-payment — precisely the function of a conditional bond. In the event, the loan was not repaid at the prescribed time and place because six of Antonio's ships, on which he had depended for money, were apparently lost at sea in an unusual run of bad luck. Antonio then evidently refused to allow Shylock to take his pound of flesh, so that Shylock sued on the bond.

The complex and difficult judgment is presented in Act 4 of the play, strangely enough by Portia the heiress, now disguised as a legal scholar, and apparently acting with the authority of the court. The elements of the judgment are as follows:

> (1) The instrument binding Antonio to Shylock was a valid bond (4.1, 175-6).
> (2) The court was obliged to enforce the bond by giving Shylock specific performance, *i.e.*, by allowing Shylock to cut the pound of flesh (4.1, 214-5).
> (3) Although the bond was valid, the words of the bond had to be construed narrowly, so that while the pound of flesh could be taken, no blood could be taken (4.1, 302).
> (4) The shedding of any blood by Shylock would lay him open to the penalty of the confiscation of all his property (4.1, 305-308).
> (5) Any cutting of either more or less than a pound of flesh by Shylock would lay him open to the penalty of death (4.1, 302-328).
> (6) Shylock was in fact guilty of seeking by direct or indirect attempts the life of a citizen, *viz.* Antonio, with the result that he was subject to the penalty of death, confiscation of one half his property by the state, and confiscation of the other half by Antonio, his intended victim (4.1, 344-359).

Reactions to this unusual case and to the remarkable judgment have been, of course, various. The main contentions of this paper are that the extraordinary features of Portia's judgment are controlled by ancient metaphors whose significance has been largely forgotten, and that the need for the recovery of these metaphors emerges precisely from a consideration of the legal peculiarities in the disposition of the dispute. This is not the view of Posner or Eagleton. What both emphasize is the literalness of Portia's judgment. Eagleton expresses the view that it is Shylock who has respect for the spirit of the law and Portia who does not.[5] Focussing on Portia's narrow construal of the words of the bond which rules out the shedding of blood, Eagleton complains that it threatens "to bring the law into disrepute", "eroding the essential impartiality of law", by

[5]Eagleton, *supra*, note 3 at 30.

"deploying exactly the kind of subjective paltering it exists to spurn."[6] Any text, Eagleton says,

> can be understood only by going beyond its letter, referring it to the material contexts in which it is operative and the generally accepted meanings which inform and surround it. Portia's reading of the bond, by contrast, is 'true to the text' but therefore lamentably false to its meaning. There is nothing 'false' about her reading in itself, which the text, taken in isolation, will certainly bear out; it is just that her interpretation is too true, too crassly literal, and so ironically a flagrant distortion. Portia's ingenious quibbling would be ruled out of order in a modern court, and Shylock (given that his bond were legal in the first place) would win his case.[7]

But this pays too much attention to Portia, and not enough to the oddness of the law itself. Clearly, the law upheld in Shakespeare's Venice needs no Portia to bring it into disrepute: it is barbarous as it stands. First, there is the fact that Shylock's bond is apparently legally valid despite the fact that it would evidently licence him to commit at least a criminal assault on Antonio, if not murder. It seems clear that in sixteenth century English law the bond would have been void for the reason given by Littleton in a case in 1458: "the cause that it is avoided, is so that no deed be executed as emboldens a man to do something against the law."[8] Eagleton is committed to the idiosyncratic view that the reputation and the impartiality of a legal system are threatened if it refuses to enforce contracts requiring the commission of what would otherwise be at least assault causing bodily harm. To the extent that the law of Shakespeare's Venice regards such contracts as valid, Venetian law must seem more appealing to Eagleton than contemporary Anglo-American law which rejects such contracts.

More tellingly, Shakespeare's Venetian law grants specific performance to Shylock rather than money damages to compensate him for what he loses by Antonio's refusal to allow him to cut his pound of flesh. In the sixteenth century in England, this remedy would have been unavailable to Shylock at common law even if his bond had not been illegal: he would presumably have had to take money. This is because of the forms of action that would have been available to him. First, although it is natural to interpret the agreement between Shylock and Antonio as involving a conditional bond, the normal action available on such a bond — the action of debt *sur obligation* — required that the penalty for nonperformance of the condition be a fixed sum of money.[9] Since the penalty in Shylock's conditional bond is for a pound of flesh, the common law would have forced him to try other routes. Now, his complaint is based on

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[6]*Ibid.* at 37, 41 and 38.

[7]*Ibid.* at 37.

[8]8 Edw. IV, M. f. 20, pl. 35; cited in A.W.B. Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit* (Oxford: Clarendon Press, 1975) at 110.

[9]J.H. Baker, *An Introduction to English Legal History*, 2d ed. (London: Butterworths, 1979) at 289.

Antonio's failure to allow him to take his pound of flesh as required by their *agreement* — that is, on Antonio's non-feasance, and so he might have tried to bring an action either of *covenant* or of *assumpsit*. Although the first of these originally allowed a claim for specific enforcement, by 1345 it became impossible to obtain in covenant any remedy other than monetary damages.[10] And since the action of *assumpsit* involved a writ of trespass on the case, here too the only available action would have been for monetary damages, as with all actions of trespass. It is true that at common law, an action in detenue or in 'debt in the *detinet*' might have allowed Shylock to claim not money but the, or a, pound of flesh nearest Antonio's heart, rather than a sum of money — but only if the pound of flesh amounted in law to *a piece of personal property* in which Shylock could have acquired rights. It seems clear, however, that as a thesis about the acquisition of property this would have been denied. That is why Shylock could only have got money damages at common law, even if his bond had been legal.

If Shylock had looked instead to the equitable jurisdiction of Chancery, he would have had to convince the Chancellor that good conscience required that he be allowed to take his pound of flesh; if, as one would imagine, the Chancellor were of the opinion that good conscience required a payment of money in place of the pound of flesh, Shylock would then have had no avenue of appeal.[11] In Shakespeare's Venice, however, it would appear that the court has no power at all to order a money payment in place of specific performance. The mere validity of the bond is taken to determine a method of enforcement that not merely may, but must involve the commission of an assault causing bodily harm. "You must prepare your bosom for his knife," (4.1, 241) Portia says, as if she could not order a substitute payment. The crudity of the law and harshness of its application are patent.

Not surprisingly the crudity and harshness of the law array themselves against Shylock himself. He is finally found guilty of seeking by direct and indirect attempts the life of Antonio. We should note how very unlikely it is that he should have been found guilty of attempted murder or assault according to the present law of attempts. There is no evidence that he at any time has sought to enforce his bond by self-help — that is, by forcibly taking what the bond allowed him against Antonio's will. There is no evidence that he has been unwilling to await the court's decision on the lawfulness of the bond before acting. There is no evidence that he would disregard the court's decision on the

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[10]*Ibid.* at 266.

[11]Simpson, *supra*, note 8 at 596. On Milsom's view, the Chancellor would apparently have had to have been convinced that Antonio's conscience should be quickened, so that he might do his duty and give up the pound of flesh; but as this would absurdly make suicide virtually a duty for him, Shylock could not hope to win. See S.F.C. Milsom, *Historical Foundations of the Common Law*, 2d ed. (Toronto: Butterworths, 1981) at 91.

bond if it went against him. On the contrary, Shylock's willingness to wait on the court is obvious: as soon as it is made clear that he is so much as *likely* to commit a crime in exacting what he is legally allowed, he proposes an alternative course of action. It is not clear that any conduct of Shylock's is sufficiently proximate to the killing or assault of Antonio to constitute what we should now call an attempt.

Nevertheless, in *Shakespeare's Legal and Political Background*, G.W. Keeton puts forward an extraordinary suggestion to the contrary. He assumes that between Portia's announcement of the court's award of the pound of flesh, and her later qualification the award to exclude blood, Shylock must actually move to cut the flesh. By preparing the way for this criminal attempt, according to Keeton, Portia carefully lays a surer foundation for Antonio's defence than that offered by the more startling prohibition against shedding a drop of blood:

> Had she raised the question of the "drop of blood" earlier, this defence [based on criminal attempt] would have been inoperative — otherwise the Duke would have recollected the same law and stopped the trial. To bring an action on the bond is not a criminal attempt — the action is too remote from the final consequence — that is, the removal of the pound of flesh, and Antonio's ensuing death. But Shylock, having obtained a decision on the effect of the bond, has been earnestly whetting his knife, and has actually been on the point of making an incision when Portia stopped him. This is clearly a criminal attempt, and as such a felony. At this date all felonies were punishable by death and forfeiture of the goods of the deceased. Portia, by consummate skill, has caught Shylock at last in his own net; the theatre rocks with applause.[12]

This view is neither attractive nor defensible. It takes Portia's skill to be exercised in encouraging a criminal attempt which would not have been committed if she had raised the issue of the blood earlier. But this smacks of entrapment, which would nowadays prevent a conviction (in North America) or mitigate sentence (in England). In any case Keeton's view seems to rest on a misconception about remoteness and proximity in the law of attempts. Smith and Hogan trace the doctrine of proximity to a dictum of Park B. in *Eagleton* (1855); before that, they say, the court "inclined to the view that *any* act done with intent to commit a felony or a misdemeanor was an offence" — that is to say, any act whether proximate or remote.[13] Similarly, Stuart cites a 1614 Star Chamber case (*Priest*) in which the Court specified that "all inceptions, preparations and combinations" to commit felonies were punishable.[14] If we understand the law of

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[12]G.W. Keeton, *Shakespeare's Legal and Political Background* (London: Sir Isaac Pitman & Sons, 1967) at 145.

[13]*Eagleton* (1855) Dears CC 515, [1843-60] All ER Rep 363, 24 LJMC 158, 26 LTOS 7, 19 JP 546, 1 Jur NS 940, 4 WR 17, 3 CLR 1145, 6 Cox CC 559, 14(1) Digest (Reissue) 107; cited in J.C. Smith & B. Hogan, *Criminal Law*, 4th ed. (London: Butterworths, 1978) at 252; observation at 251.

[14]*Priest* (1614), 2 Hon. St. Tr. 1033, cited in D. Stuart, *Canadian Criminal Law*, 2d ed. (Toronto: Carswell, 1987) at 536.

Shakespeare's Venice in these terms, there is no need, as there would be in modern law, to find an act relatively proximate to Antonio's death in order to ensure Shylock's guilt. What we should nowadays count as non-criminal *preparation*, too remote from intended harm, is, I suggest, sufficient to convict Shylock in his own harsher milieu. Portia has no need to entrap him: under an unfettered law of attempts, Shylock is guilty of a crime before the trial begins. I shall later suggest that this is of considerable importance. For the moment, concerning those who along with Keeton regard the play's legal treatment of Shylock as appropriate, I point out that they evidently favor policies concerning entrapment or attempt which few authorities would advocate today. Shylock is bad and bitter: in that respect Terry Eagleton might have been right in suggesting that he represents the spirit of the Venetian law that applies to him.[15] By our own legal standards, however, it is not easy to see him as a criminal. But this is just to say that our laws are not the appalling ones of Shakespeare's Venice.

What is Portia's role in these circumstances? Recall that Eagleton represents her as false to the spirit of law. Even her "quality of mercy" speech he regards as "metaphorical excess in the service of crabbed literalness" — the literalness which he finds exemplified in her ruling that the bond permits no bloodshed. Posner on the other hand says that Portia represents the spirit of equity — not in the historical Chancery sense but in the sense connected with Aristotle's use of the term "*epieikes*", recently translated by Terence Irwin as "decent."[16] Posner says:

> In legal terms one might say that Portia personifies the spirit of equity — the prudent recognition that strict rules of law, however necessary to a well-ordered society, must be applied with sensitivity and tact so that the spirit of the law is not sacrificed unnecessarily to the letter.[17]

But Posner immediately, and somewhat confusingly, qualifies this by insisting that the spirit of equity in the play is entirely apart from its legal substance. The "quality of mercy" speech he sees as an appeal to mercy divorced from legal argument.[18] This might have been reasonable if he were talking about equity in a technical legal sense; in the sense in which Aristotle uses the term "epieikes," however, equity is explicitly linked to forgiveness or *legal pardon*.[19] I shall return to this later. It is equally clear that Posner sees nothing equitable in any case in Portia's "no jot of blood" argument, which he calls "hypertechnical." Here he stands with most commentators, including Eagleton. E.F.J. Tucker,

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[15]Eagleton, *supra*, note 3 at 40.

[16]See Aristotle, *Nicomachean Ethics*, V. 10, VI.II. "Epieikes" is standardly translated as "equitable"; for Irwin's account, see Aristotle, *Nicomachean Ethics*, trans. T. Irwin (Indianapolis: Hackett Publishing Company, 1985) at 392.

[17]Posner, *supra*, note 1 at 96.

[18]*Ibid.* at 97.

[19]*Nicomachean Ethics*, VI, 11.

however, is perhaps a lone exception.[20] Tucker argues that given the extraordinary nature of Shylock's bond, equity in the sense of fairness or decency permits and indeed requires a restrictive interpretation of the words of the bond, in order to avoid a plainly defective result. As a point about the principles of equity in the sense of decency, this may be correct and a point against Posner and Eagleton. But it is not in accordance with a strange and important feature of Portia's judgment which appears to be ignored by all commentators. Portia finds not merely that the express words of the bond give Shylock no jot of blood so that he may not take any blood. In addition, there is a severe penalty that will attach to Shylock's shedding of any drop of Christian blood — complete confiscation of property. What needs to be pointed out is that it is unreasonable to imagine that this penalty could follow from the mere interpretation of the words of the bond as such. For drawing on an often discussed analogy, suppose that Shylock had contracted with Antonio for leave to cut a slice of melon instead of a pound of flesh.[21] Suppose, too, that for some odd reason, the proper interpretation of the contract allowed no jot of juice to be spilled. And suppose Shylock cut the melon anyway, incidentally spilling the juice. We are surely not to imagine that *this* unwarranted spilling could possibly result in the entire confiscation of his property just because the spilling was prohibited according to the bond. But if not, we must suppose that what distinguishes the melon case from the flesh case is some independent prohibition on the shedding of any of Antonio's blood *which comes from outside the bond.* In that case, however, Portia's interpretation of the bond can be seen to be dictated not by equity or decency. Rather the operative elements will be the existence of this legal prohibition against even the slightest bloodshed, together with a principle of interpretation requiring that bonds be construed so as to minimize, if not eliminate, their illegality. But if this is correct, then Eagleton and Posner are wrong, too. For they regard Portia's insistence on taking the flesh without the blood as dependent on a mere legal quibble or a hypertechnical argument concerning the wording of the bond. The severe penalty for the shedding of Antonio's blood in this case indicates that something more significant is at stake according to the applicable law.

But what is the applicable law? What sense could there be in a law that allowed Shylock to take the pound of flesh but only without any drop of blood? The applicable law, I tentatively suggest, is the law of the Pentateuch, Jewish law; and as such its sense might have been expected to be clearer to Shylock himself than to any other character involved in Shylocks's trial, though it is the last thing he might have expected.

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[20]See E.J.F. Tucker, "The Letter of the Law in *The Merchant of Venice*" (1974) 29 *Shakespeare Survey* 93.

[21]For the source of the analogy see F.O. Haynes, *Outlines of Equity* (Philadelphia: T. & J.W. Johnson, 1858) at 20.

In advancing this suggestion, there is perhaps a preliminary hurdle to be gotten over. Would it have been imaginable to anyone in the sixteenth century that a Venetian court should apply non-Venetian law? Legally speaking, this is a question about the history of the conflict of laws — the history of the doctrines and rules designed to assist courts in the deciding of cases containing 'foreign' or 'alien' elements. Already by 1607, English courts were dealing with cases involving the enforcement of foreign judgments.[22] And in the sixteenth century, the French jurist Dumoulin had put forward the view that, where different laws might apply to a contract, the law which governs the contract should be the law intended by the parties.[23] Of course, what Portia says is that the penalties which Shylock risks are laid down "by the laws of Venice" (4.1.307), and this may seem to scotch the idea that Jewish law might have any application here. To this there are three replies. The first is a conceptual one, having to do with the notion of conflict of laws. What must be kept in mind is that when a Venetian court decides which rules to apply in a given dispute, the rules or doctrines that it uses to make that preliminary decision must be a matter of the *Venetian law concerning contracts*. And so if Portia were to apply Jewish law to Shylock's case, that would have to be in accordance with the laws of Venice, just as she says. Of course, this makes the legal situation somewhat complex. But this leads to a second reply. For the law in *Merchant* must be complex, if the plot of the play is to make any sense at all. If the rules which made it dangerous for Shylock to proceed against Antonio were in any way obvious, we should have to wonder why Shylock should have thought that he could succeed in court — one would have supposed that as a money lender, he would have been familiar with the law of debtor and creditor. A complicated conflicts approach to the trial makes his apparent ignorance somewhat more credible than it otherwise would be. Finally, technicalities aside, there is from the theatrical point of view, a very sharp irony that accrues to the play on the supposition that the body of law which condemns the alien Shylock is one which he cannot as a Jew repudiate.

I suggest, then, that we should look to Jewish law for the prohibition against Shylock's taking of any blood. This will involve the rejection of the claim accepted by Eagleton and Posner that in prohibiting Shylock from taking blood, Portia focusses on the narrow letter of the law. Doubtless there is a sense in which she pays attention to the letter of the law. But, at the heart of her judgment there is a powerful metaphor drawn from two kinds of sources, both of which can be found in the Pentateuch.

The first sources are relatively familiar. They form part of the Jewish dietary laws. Jews are permitted of course to eat meat, flesh; but they are not permitted to eat flesh with the blood in it. The prohibition appears at least five

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[22]J.G. Collier, *Conflict of Laws* (Cambridge: Cambridge University Press, 1988) at 9.

[23]P.M. North, *Cheshire & North's Private International Law*, 10th ed. (London: Butterworths, 1979) at 21.

times in the Pentateuch, first at Genesis 9:4-6, when the proscription against eating the flesh of animals with the blood in it is explicitly connected with the prohibition of homicide. Genesis 9 was a Sunday Morning Proper Lesson in Shakespeare's time, which he might have heard in church; and Richmond Noble finds verbal echoes of Genesis 9:6 in four other plays of Shakespeare.[24] Other relevant passages are Leviticus 7:26-27, Leviticus 17:10-14, Leviticus 19:26, and Deuteronomy 12:23-25. Verbal echoes from Leviticus and Deuteronomy can be found in seven other plays of Shakespeare.[25] So information about the dietary laws would appear to have been at Shakespeare's fingertips. As part of dietary laws the distinction between flesh with blood and flesh without blood has been, until relatively recently, a part of the constant consciousness of Jews, as one of the elements of their religion that sets them apart or isolates them from non-Jews. When Shylock, for instance, accepts the dinner invitation "to feed upon/the prodigal Christian," Bassanio, he goes unable to eat any meat, even if it comes from no unclean animal and has not been prepared with milk; for if it is game, it will almost certainly not have been taken from an animal whose blood was buried upon slaughter (Leviticus 17:13); nor will it then have been properly broiled, or soaked, covered in salt, and washed to remove the (remaining) blood. Eagleton startlingly suggests that in seeking Antonio's flesh, Shylock aims at a kind of black mass or a grotesque parody of a eucharistic fellowship.[26] Of course, on the assumption of transubstantiation, a Jew who took communion, consuming the flesh and *blood*, would at the very least violate Jewish dietary laws.[27]

The echo of the dietary laws in Portia's blood proscription would be, of course, irrelevant, if Shylock's interest in Antonio's flesh could not be associated with eating. But the association can be made out without dragging in black masses, on the basis of three Pentateuchal passages prohibiting Jews from taking usury. The passages are Exodus 22:25, Leviticus 25:35-38 and

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[24]R. Noble, *Shakespeare's Biblical Knowledge* (New York: Macmillan, 1935) at 282.

[25]*Ibid.* at 283.

[26]Eagleton, *supra*, note 3 at 43.

[27]Might Shakespeare himself have appreciated the incongruity of Jewish dietary laws and the Catholic doctrine of the eucharist? Given the assumption that he was aware of the Pentateuchal blood proscriptions, the answer must depend on whether he understood the Catholic doctrine, as opposed to the reformed doctrine of the Church of England. Since there is evidence that Shakespeare's father died a recusant Catholic, this understanding would appear to have been readily available — see R. Fraser, *Young Shakespeare* (New York: Columbia University Press, 1988) at 47. Such understanding would also have been available in John Foxe's *Book of Martyrs, The Acts and Monuments of the Church*, the fourth edition of which appeared in 1583, and the fifth, later used by Shakespeare as the source of Act V of *Henry VIII*, in 1597, about the time of *Merchant*. The tribulations of Archbishop Cranmer portrayed in *Henry VIII* are linked by Foxe to Cranmer's attack on the Catholic doctrine of transubstantiation at the time of the notorious *Six Articles* in 1539; see Foxe, *The Acts and Monuments of the Church* (New York: Robert Carter, 1855) at 570 and 896.

Deuteronomy 23:20. In each case, the Hebrew word which the Geneva Bible renders as "usury" is *neshekh*, which, as it happens, means "bite".[28] In the great twelfth century codification of Jewish law, the *Mishneh Torah*, Maimonides asks about usury, "Why is it called *neshekh* (biting)?" He answers, "Because the usurer bites, inflicting pain on another person and *eating his flesh.*"[29] A similar suggestion can be found in the great Biblical commentators Rashi (eleventh century), and Nahmanides (thirteenth century). This Jewish learning found its way into Christian thought through the work of Nicholas of Lyra, a Franciscan widely thought to be an apostate Jew, who around 1330 produced a frequently reprinted commentary on the whole Bible. Concerning Exodus 22:25 — which the Geneva Bible familiar to Shakespeare translates "ye shalle not oppresse him with usurie" — Nicholas says:

> In Hebrew it is written: *Do not put a bite upon him*, and by "bite" usury is understood. The reason is, as Rashi says, that just as the bite of snake is little noticed or felt at first but afterwards swells up so that the effect of the little bite spreads through the whole body, so usury is not felt to be bad at the beginning, but afterwards it rears itself up, and *eats the whole substance of a man.*[30]

Nicholas is held to have been a great influence on Luther, and given the revival of interest in Hebrew scholarship associated with the Reformation, it is not surprising that some of the Hebrew lore about usury should have penetrated various circles in sixteenth century England. *Circa* 1556 there appeared not one but two English translations of a work on usury by the early German Reformer Wolfgang Musculus, who pointed out that in Hebrew usury "is named Neschech, of byting, because at the last it biteth him, which payeth vantage."[31]

It may nevertheless be with some surprise that we find in the English case of *Sanderson* v. *Warner* (1622) Ley C.J. expressing the view that some usury is lawful and that the usury which the common law condemned "fruit un common trade de biting usury."[32] In fact, however, the metaphorical association of usury or interest with biting or eating flesh is hardly limited to the Bible. In Aristophanes' *Clouds*, a work probably unknown to Shakespeare, Strepsiades claims that he is afraid to sleep "daknomenos/hupo tes dapanes kai tes phates kai ton khreon" — "*eaten up* by expenses and stables and debts" (ll. 11-12). In Lucan's *Pharsalia* the phrase "usura vorax" occurs (l. 181) — a possible source,

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[28]Maimonides, *Mishneh Torah*, P. Birnbaum, ed. and trans. (New York: Hebrew Publishing, 1967) at 283 (my italics).

[29]For Shakespeare's familiarity with the Geneva Bible among others, see Noble, *supra*, note 24 in c. IV.

[30]Nicholas de Lyra, *Glossa Ordinaria* V. 1 (Paris: n.p., 1590) at 704, (translation and italics mine).

[31]W. Musculus, *Of the Lawful and Unlawful Usurie Amongest Christians* (n.p., 1556) pages not numbered.

[32]*Sanderson* v. *Warner* (1622), Palm. 291, 2 Rolle Rep. 239; cited in Simpson, *supra*, note 8 at 514.

one might have said, of Justice Leys' "biting usury". With "usura vorax" we come to a form of the metaphor that we can be certain that Shakespeare was familiar with in some form, for Marlow had rendered it as "devouring usury" in his 1593 translation of the first book of Lucan.

Yet there is strong evidence not only that the phrase "biting usury" has its source in the Hebrew Bible, but that this was very widely known. For in fact, from the mid-sixteenth century onward in England, the text of Exodus 22:25 was the center of a heated, public, theologico-political debate about whether there was any acceptable rate at which money might be lent at interest. The commercially-minded argued that what the Bible prohibited was not lending at interest, but only lending at oppressive rates, at rates that would bite. In a dialogue entitled *A Discourse Upon Usury* (1572), Thomas Wilson (Master of the Court of Requests, Secretary of State under Elizabeth, briefly Dean of Durham) put the argument into the mouth of a civil lawyer:

> Let us go to the very word of usury in the hebrue tong. It is calledde a bitinge, of this woorde *Neshech*, whiche is nothinge else but a kind of bitying, as a dog useth to bite or gnawe upon a bone; so that he that byteth not, doth not commit usurye. For usurie is none other thinge than a bitinge, as I saide, of the verye Etimologie and proper nature of the woorde, otherwise it cannot be called *Neshech*, as the Hebricians say, and so call usury of biting onely.[33]

To this sort of reasoning John Jewel (1522-1571), Bishop of Salisbury had provided an answer in the undated dialogue *De Usura*:

> Indeed, some usury is harsher, some gentler; a wealthy merchant who makes a profit from a loan at interest is hurt less than a pauper who is *eaten up* [*exeditur*] by usury and cannot pay back the principal. Nevertheless I hope that it can be shown in its place, that even in the most moderate interest-taking there is a bite [*morsum*].[34]

Wilson himself expressed his own answer in which a connection is made between usury and blood:

> ...[F]or not onely bytynge usury, but all usury is against charitie, because it is iniurious, sinful and directly against god, even as theafte is, bee it never so lytle. But styll you runne to dymmyshe thys offence, wyth shewinge that a peny upon a 100li. biteth not. Wel, I saye unto you it is an iniurye, it is a wrong, it is a thinge forbidden by god, and therefore a synful deede, saye you what you wil. Ther is difference in dede betwyxte the byting of a dogge, and the bytinge of a flea, and yet, althoughe the flea doth the lesse harme, yet the flea doth byte after her kynde, yea and draweth blood too.[35]

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[33]T. Wilson, *A Discourse Upon Usury*, R.H. Tawney, ed. (New York: Augustus M. Kelley, 1963) at 241.

[34]J. Jewel, *De Usura* in *The Works of John Jewel, The Fourth Portion*, J. Ayre, ed. (Cambridge: Cambridge University Press, 1850) at 1294 (my translation).

[35]Wilson, *supra*, note 33 at 259.

These themes were recapitulated in a set of sermons by Miles Mosse publicly delivered at Bury St. Edmunds and published in 1595, three years before Shakespeare wrote *The Merchant of Venice*:

> [I]f I oppresse not my brother, if my usurie be not so great as it bite or devour him: I am not for lending in that sort condemned by the law of God. Yea, and that the scripture onely forbiddeth *biting usurie*, may appeare (say they) also by the nature and *Etimologie* of the word, which the holy Ghost useth to that purpose. For usurie is called in the hebrewe tongue Naeschach, which is as Lavater and others have truly observed, signifieth *Morsus*, bitinge or guawing of a thing. And it is a worde borrowed as some thinke, from the biting or stinging of a serpent: as others have judged from the guawing or tyring of a dogge upon a bone. So that, unlesse *usurie* be Naeshach, *biting*, unless by it a man sting his neighbor, as a serpent; or pray upon him as a dogge upon a carrion: some holde opinion that it is not forbidden in the worde of God.[36]

In his classic account of these and related matters, Tawney makes clear that this sort of material on usury was broadcast widely and repeatedly: "Sermon was piled upon sermon, treatise upon treatise."[37] M.M. Mahood notes that in Shakespeare's day "everyone had to attend his or her parish church or risk having to pay a sizable fine."[38] If so, we may conclude that Shakespeare must have heard many sermons. It hardly strains the imagination to suppose that at a time of continued debate about the theological status of usury, he should himself have heard sermons which made the connection between usury and the biting or eating of flesh.

Linking the flesh-eating metaphor with Jewish dietary law we get an explanation of the strict prohibition forbidding the usurer Shylock from taking even a drop of blood: to take usury is to eat flesh; for Shylock usuriously to take Antonio's flesh is for him to eat it; Jewish law requires that he eat it without the blood — that is, therefore, that he take it without the blood. Now what is penalty for the Jew who consumes blood? He is to be cut off from his people (Leviticus 7:27, 17:14). This, of course, is what ultimately happens to Shylock: he is forced to become a Christian, no longer to remain a Jew.

On this view of requirement that Shylock take no blood, Portia is evidently not a hypertechnical quibbler, a crabbed literalist. Rather, at least momentarily, she mataphorically puts on the guise of an Old Testament prophet. By turning the tables of the law on Shylock, she uses a metaphor to force him to recognize himself and the forbidden choice he has made, in a way bearing some resemblance to Nathan's treatment of David over the death of Uriah (2 Samuel 12 : 1-14). The interpretive payoff is then for Portia, a dramatic increase in moral

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[36]M. Mosse, *The Arraignment and Conviction of Usurie in Six Sermons* (n.p., 1595) at 133.

[37]R.H. Tawney, *Religion and the Rise of Capitalism* (New York: Harcourt, Brace, 1920) at 158.

[38]William Shakespeare, *The Merchant of Venice*, M.M. Mahood, ed. (Cambridge: Cambridge University Press, 1987) at 184.

authority, and for Shylock, a tragic discovery of his own identity of the kind Aristotle thought finest — the discovery of identity immediately attended by a reversal of fortune (*Poetics* 11).

A similarly non-literal approach can profitably be taken to what is perhaps the single oddest feature of Portia's judgment. After repeating to Shylock that he must shed no blood, she adds

> Therefore prepare thee to cut off the flesh.
> Shed thou no blood, nor cut thou less nor more
> But just a pound of flesh. If thou tak'st more
> Or less than a just pound, be it but so much
> As makes it light or heavy in the substance
> Or the division of the twentieth part
> Of one poor scruple — nay, if the scale do turn
> But in the estimation of a hair,
> Thou diest, and all thy goods are confiscate
> (4.1.320-328)

The bond says "a pound", and so Shylock must take exactly a pound. This is literal enough. But according to what possible law of contract should Shylock die if he takes *less* than is owed him? This surely cannot be deduced from the letter of the bond as the literalist approach of Eagleton and Posner would apparently suggest. Again, the bizarre legal penalty demands explanation. And again, I think we should turn to the Pentateuch — this time to the passages dealing with weights and measures, and in particular, to Deuteronomy 25:13-15. Here Jews are enjoined from keeping two sets of weights and measures, one large and one small, for the illicit purpose, evidently, of using whatever set would bring the most advantage in a particular transaction. The Geneva Bible tells us "thou shalt have a right and just weight: a perfit and a just measure shalt thou have that thy days may be lengthened in the land, which the Lord thy God giveth thee." There is in this an implied threat, which is made clearer in the contemporary translation by the Jewish Publication Society: "You must have completely honest weights and completely honest measures, *if you are to endure long on the soil...*"[39] The implication is that lack of perfect weights and measures will result in a curtailed future. This, I believe, gives Portia her cue. The context of the passage in Deuteronomy in fact increases the suggestion of threat, for immediately following it we are told that those who "do such things" (as, presumably, using inexact weights) and "all that do unrighteously, are abomination unto the Lord." If this were not dark enough, the chapter immediately ends with an instruction to "remember Amalek." Now Amalek is a type of the unrighteous man, who God tells the Jews "smote the hindmost of you, all that were feble behind thee, when thou wast fainted and weary, and he feared not

[39]*The Torah: The Five Books of Moses* (Philadelphia: The Jewish Publication Society of America, 1962) at 370.

God." I think it is not farfetched to see first an association between Antonio with the fainted and weary, and secondly between Shylock and Amalek who feared not God. What was to be done with Amalek? "Thou shalt put out the remembrance of Amalek from under heaven: forget not." It is not insignificant either that Deuteronomy 25 begins its catalogue of righteousness with the command that the loser of a judgment in court is not to be punished excessively. In linking the death penalty with inexact measurement on the part of an apparent victor in court who seeks an excessively punitive judgment, Portia forces Shylock to consider himself not merely as a Jew who must be cut off, but as an Amalek, worthy of *death* as an enemy of righteousness. That is why Shylock must beg for his life.

To conclude these reflections, let us return to Posner's suggestion that Portia personifies "the prudent recognition that strict rules of law, however necessary to a well-ordered society, must be applied with sensitivity and tact so that the spirit of the law is not sacrificed unnecessarily to the letter."[40] This seems to me to be a serious misdescription of Portia's role. As we have seen the rules of law that figure in *The Merchant of Venice* are certainly strict enough — validating contracts permitting assault causing bodily harm, enforcing such contracts by requiring specific performance, treating as criminal attempts *any* acts directed toward the commission of a crime no matter how remote the act from the goal, punishing the shedding of a drop of blood with complete confiscation of property, and penalizing trifling inexactitude in the recovery of a debt with death. These rules are not merely strict, they are savage; and they can hardly be judged necessary to a well-ordered society. Departing from them as Portia does, requires nothing so exalted as an exercise of prudence — the barest minimum of rationality should suffice. Posner apparently misses all this because he is engaged in a battle with what he calls the 'radical' view of law which he associates with Eagleton, and which he characterizes as condemning all law as such.[41] Posner's own view seems to be that a blanket defense of law can be mounted entirely independently of the content of the particular set of laws under consideration at a given moment. The result is a debate about law conducted by Posner and Eagleton in terms so general as to obliterate the detail of the text nominally under discussion.

Nor does it seem to me that Portia applies the rules of law with tact and sensitivity, as Posner maintains. This is what Portia does: She brings forward a twisted and bitter man with a vicious purpose who has unknowingly committed a crime but who is evidently not dangerous. She makes a wondrous speech about mercy, which there is every reason to believe will mean nothing to him. (The editor of the New Cambridge Shakespeare *Merchant* reports that Ellen

[40]Posner, *supra*, note 1 at 96.

[41]*Ibid.* at 107. Posner associates this view with Roberto Unger and by explicit association, with the Critical Legal Studies movement. *Per contra* see text to note 43 *infra*.

Terry, the great nineteenth century actress, saw Portia's mercy speech "as a mere baiting of the trap, and delivered it to charm the stage and the house rather than to move Shylock."[42]) When the expected happens, and Shylock stands obdurate, Portia makes it clear that the whole thing has been a test: if *per impossibile* he had been won over, he would have been fully pardoned for his crimes; as it is, he is ordered to his knees to beg for his life. This is not tact and sensitivity, but rather a dazzling form of political pageantry about power and judgment, in which Shylock is forced to play out a role that he has evidently entirely misunderstood. In this pageant, the law is harsh, unremitting, and impenetrable. Given this state of affairs, the only expedient is for those with power generously to exercise their proper prerogatives to pardon and forgive. Those who do so, like the Duke and Antonio are fit to retain their position. Those, like Shylock, who rest their claims barely on the mysteries of a law whose import they do not grasp, must be deprived of what powers they have. In this, Portia is not the protector of the spirit of the laws against the letter, as Posner maintains; what she offers rather is a beautifully lacquered and very worldly defense of the prerogative of executive pardon to abate the law. It comes as no surprise at all to learn that in 1605 James I, who had exalted ideas of prerogative himself, should have watched *The Merchant of Venice* twice in three days. What is at stake here is not the *spirit* of the legal system but its *structure*. In the perhaps tendentious language of Critical Legal Studies, Portia can be seen as legitimizing a dominative structure of legal and political power, by making a show of how much worse things could be, but for the the institution of the prerogative of pardon.[43]

As a matter of fact, executive pardon nowadays play a decidedly minor role in Anglo-American law, and one in any case widely regarded with suspicion. Portia may dazzle, but as legal history has turned out she seems, at this moment anyway, to have backed the wrong horse. Significantly enough, among philosophers hostility to the institution of pardon derives from hostility to the idea that mercy should have any role to play in the penal law.[44] The business of the penal law is to do justice: if a penalty is unjust, then pardon, or forgiveness in the sense of forbearance to punish, is required by justice, not by mercy. Given the function of law, if a punishment is just, then mercy is out of place. In connection with the case of Shylock and Antonio, the moral point that must be kept in mind is that, *contra* Portia, it is justice and not mercy that requires you not to take a pound of flesh cut nearest the heart, from a creditor who comes late to you with a loan payment.

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[42]Mahood, *supra*, note 38 at 51.

[43]Compare M. Kelman, *A Guide to Critical Legal Studies* (Cambridge: Harvard University Press, 1987) pp. 284*ff*.

[44]See K.D. Moore, *Pardons: Justice, Mercy and the Public Purpose* (New York: Oxford University Press, 1989) and J. Murphy, "Mercy and Legal Justice" in J. Murphy & J. Hampton, *Forgiveness and Mercy* (Cambridge: Cambridge University Press, 1988).

Questions about legal detail in *The Merchant of Venice* have encouraged us to try to understand the play in terms of the legal, theological, and political context in which it first appeared. What we have extracted from that context has suggested, I believe, some novel ideas about relations between Shylock and Portia in the trial scene. This provides some vindication for Posner's suggestion that legal material is central to the meaning of the play, and I hope, for the broader claim that there are on occasion fruitful results to be gained from labor in the field of law and literature.