

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

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ABSTRACT

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

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

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natural law.

*Ultimately, *The Merchant of Venice* calls upon the audience to “judge the judge.” By exposing grave deficiencies in the English legal system (as expressed through the fictional Venetian system), the play obliges the audience to make a critical moral judgment on the proper administration of justice. As this paper submits, the audience must reach a moral and rational conclusion in accordance with natural law.*

**SHAKESPEARE’S FAMOUS PLAY ADDRESSES VARIOUS
LEGAL ISSUES AND THEMES, WITH PERHAPS NONE BEING SO
PRONOUNCED AS THE STRUGGLE BETWEEN FORMAL
POSITIVISM AND NATURAL LAW. NATURAL LAW
LAW. OSTENSIBLY, *THE MERCHANT OF VENICE*²
DRAMATIZES THE DANGERS OF OF A RIGID ADHERENCE TO
FORMALISM AND THE TRIUMPH OF NATURAL LAW. NATURAL
LAW. NATURAL LAW THROUGH PORTIA’S LEGAL DEFEAT OF
SHYLOCK. ON A MORE PROFOUND LEVEL,
SHAKESPEARE’S PORTRAYAL OF THE VENETIAN TRIAL
SCENE RAISES GRAVE CONCERNS**

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

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

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NATURAL THESE THEMES WILL BE EXPLORED BY WAY OF A
BRIEF HISTORICAL AND PHILOSOPHICAL ACCOUNT OF
NATURAL IT WAS REGARDED AS UNIVERSAL LAW
BECAUSE IT ORDAINED THAT CERTAIN RULES OF CONDUCT
ARE “SO JUST THAT THEY ARE BINDING ON ALL OF
MANKIND.”⁷ NATURAL LAW COULD THUS BE
CONTRASTED WITH HUMAN LAWS, WHICH ARE APT TO
FREQUENT VARIATION AND ARBITRARINESS IN SUBSTANCE
AND PROCEDURE. THUS, ACCORDING TO THE CLASSICAL
PHILOSOPHERS, A MAN ACTED IN CONFORMITY WITH THE
LAW OF NATURE

THE CLASSICAL MODEL OF NATURAL

⁴ Richard F. Devlin, “Mapping Legal Theory” (1994) 32 *Alta. L. Rev.* 602 at 604-605, para. 6 (QL).

⁵ R.S. White, *Natural Law in English Renaissance Literature* (Cambridge: Cambridge University Press, 1996) at 4.

⁶ George W. Keeton, *Shakespeare’s Legal and Political Background* (London: Sir Isaac Pitman & Sons Ltd., 1976) {Adam – the publication date I have is 1967 – perhaps the author has a different edition?} at 67-68.

⁷ White, *supra* note 4 at 1.

⁸ White, *supra* note 4 at 1.

⁹ White, *supra* note 4 at 1. *ibid.*

¹⁰ Keeton, *supra* note 5 at 68.

¹¹ The two limbs of Natural Justice are *audi alteram partem* (the right to be heard) and *nemo iudex in parte sua* (no person may judge his or her own cause). The second tenet of Natural Justice, *nemo iudex*, has particular significance to *The Merchant of Venice* and will be discussed in this paper.

NATURAL LAW WAS REVIVED BY MEDIEVAL AND RENAISSANCE CHRISTIAN THEORISTS, REACHING A HIGH WATERMARK WITH ST. THOMAS AQUINAS IN THE THIRTEENTH CENTURY. AQUINAS STATED THAT IF A HUMAN LAW IS AT VARIANCE IN ANY PARTICULAR WITH NATURAL LAW WHILE CLASSICAL AND EARLY MEDIEVAL NATURAL LAW ADDITIONALLY, THEY INSISTED THAT BOTH REASON AND CONSCIENCE ARE G-D-GIVEN¹⁴ FACULTIES.¹⁵

AQUINAS IDENTIFIED FOUR TYPES OF LAW IN HIS FAMOUS WORK *SUMMA THEOLOGICA*: ETERNAL, NATURAL, HUMAN, AND DIVINE.

¹² Thomas Aquinas, *Summa Theologia* (New York: Benziger Bros., 1947), at 95, 2 (in Treatise on Law, First Part of the Second Part). Aquinas built upon St. Augustine's theory that there is no law unless it is just.

¹³ Devlin, *supra* note 3 at 604 para. 6.

¹⁴ As a note to the reader, Judaism prohibits an individual to write out the full name of the Divine—as such, “G-d” will be used as a substitute.

¹⁵ White, *supra* note 4 at 2-3. White states that this advancement in natural law was prompted, in part, by a fear that a reliance on the universal faculty of reason would eliminate the need for G-d.

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¹⁸ A.P. d'Entrèves, *Natural Law: An Historical Survey* (New York: Harper and Row, 1951) at 7 (emphasis added).

**THE PRIMARY TENET OF NATURAL LAW
NATURAL LAW THESE INCLUDE THE PRESERVATION
OF LIFE AND EQUALITY AMONG INDIVIDUALS.²³**

¹⁹ Divine Law, or the will of G-d revealed through the Old and New Testaments, is not relevant to this discussion.

²⁰ Keeton, *supra* note 5 at 72.

²¹ Aquinas, *Ssupra* note 10 at 91,2, 2.

²² Aquinas, *supra* note 10 at 94, 2. *Ibid* at 94, 2.

²³ White, *supra* note 4 at 4.

²⁴ White, *supra* note 4 at 4.

²⁵ Keeton, *supra* note 5 at 72.

²⁶ White, *supra* note 4 at 8.

²⁷ Which will be discussed below.

**WHILE PENALTY CLAUSES WERE ENFORCEABLE BY THE
COMMON LAW OF CONTRACT, THEY COULD STILL BE
DEFEATED BY THE COURTS OF CHANCERY.³¹ THE
CHANCELLORS OF EQUITY DECLARED THAT SUCH
INIQUITOUS CONTRACTS WERE VOID AS CONTRARY TO
NATURAL LAW SEVERAL THEORISTS ASSERT THAT THIS
STRUGGLE HAD A PROFOUND INFLUENCE ON
SHAKESPEARE’S TRIAL IN *THE MERCHANT OF VENICE*.³⁵**

²⁸ There are two primary locations in *The Merchant of Venice*: Venice, which is the satiric centre of mercantilism, and Portia’s Belmont, the centre of the romantic subplot.

²⁹ Keeton, *supra* note 5 at 140

³⁰ Keeton, *supra* note 5 at 140 and 136 and 140.

³¹ White, *supra* note 4 at 159. Described by White as “England’s court of Natural Law.”

³² White, *supra* note 4 at 159. Described by White as “England’s court of Natural Law.”; *Supra* note 4 at 159. ADAM – should this come at the beginning? I can’t remember what we said about this.

³³ Windolph, *supra* note 1 at 55.

³⁴ Windolph, *supra* note 1 at *Ibid.* at 53-54. A professional rivalry between these two individuals emerged into a personal hatred. Ellesmere, the Lord Chancellor, would allow losing litigants to recommence their proceedings in Chancery and often issued injunctions against victorious common law litigants, preventing them from enforcing the court’s judgment. Lord Chief Justice Coke’s common law courts countered by holding people in contempt if they refused to comply with the court’s judgment.

³⁵ Windolph, Andrews, and Kornstein all submit that Shakespeare dramatizes, on one level or another, this equity/common law conflict. White, on the other hand, states that Shakespeare’s courtroom makes no references to equitable or common law procedure. White accepts the equity argument to a point, but only to the extent that the trial represents the *larger* struggle between Natural and Positive Law. Justice Posner likewise submits in *Law and Literature: A Misunderstood Relation* (Cambridge: Harvard University Press, 1988) at 97 that “[n]o equitable principles actually inform the law of Venice as it is presented in the play.” While Justice Posner makes some astute observations, I believe his argument is subverted by the fact that the Venetian court upholds the English common law of contract, and that an equitable remedy is awarded to Antonio at the conclusion of the trial.

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**LYON CALLS THE TRIAL SCENE “ONE OF THE MOST
ASTONISHING MOMENTS IN OUR DRAMATIC HISTORY.”³⁸**
[Adam R. G6] **HOWEVER, AS ZIOOILKOWSKI STATES, “THE
FOURTH ACT COMES CLOSER TO A TRAVESTY THAN TO A
REPRESENTATION OF A TRIAL.”⁴⁰ AS WILL BE
DEMONSTRATED, THE CONFLICT OF LAWS IN THE PLAY IS
NOT CLEAR-CUT, NOR EASILY RESOLVED, AND THE TRIAL
RAISES A HOST OF SUBSTANTIVE AND PROCEDURAL
CONSIDERATIONS.**

**THE TRIAL COMMENCES IN WHAT IS DESCRIBED AS “A
COURT OF JUSTICE” BEFORE THE VENETIAN DUKE.**

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³⁷ While White and Posner submit that equity does not figure very prominently in *The Merchant of Venice per se*, I only accept this argument, if at all, to the extent that equity is dramatized within the larger Natural LawNnatural Llaw rubric (as White does). However, as will be addressed below, equity figures palpably in terms of the remedy awarded to Antonio, and arguably as an agent of Natural LawNnatural Llaw in trumping Shylock’s common law bond.

³⁸ John Lyon, *Twayne’s New Critical Introductions to Shakespeare: The Merchant of Venice* (Boston: Twayne Publishers, 1988) at 98.

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⁴⁰ Theodore Ziolkowski, *The Mirror of Justice: Literary Reflections of Legal Crises* (Princeton: Princeton University Press) at 175.

⁴¹ Theodore Ziolkowski, *The Mirror of Justice: Literary Reflections of Legal Crises* (Princeton: Princeton University Press, 1997) at 175.

SHYLOCK, CONTEMPTUOUSLY REFERRED TO BY THE COURT AS “JEW,” SEEKS “THE DUE AND FORFEIT OF [HIS] BOND” FROM ANTONIO.⁴² WHILE THE COURT IMPLORES SHYLOCK TO GIVE “A GENTLE ANSWER,” SHYLOCK ENTERTAINS NOTHING OF THE SORT, IN SPITE OF THE FACT THAT BASSANIO OFFERS HIM TWICE (AND LATER THREE TIMES) THE AMOUNT OWED.⁴⁴ SHYLOCK, DRIVEN BY REVENGE AND A BITTER HATRED TOWARDS ANTONIO,⁴⁶ DEMANDS THE POUND OF FLESH THAT HE IS RIGHTLY OWED UNDER VENETIAN LAW. HE STEADFASTLY CLINGS TO THE LAW—HE “CRAVE[S] THE LAW”⁴⁸—AND REPRESENTS A

⁴² Shakespeare, *supra* note 2 at IV.i ln. 37.

⁴³ Shakespeare, *suSupra* note 2 at IV.i ln. 37.

⁴⁴ Shakespeare, *supra* note 2 at IV. i ln. 34. Bassanio is able to repay the debt, albeit late, due to his newfound relationship with Portia.

⁴⁵ Shakespeare, *supra* note 2 *Ibid.* at IV. i ln. 34. Bassanio is able to repay the debt, albeit late, due to his newfound relationship with Portia.

⁴⁶ Shylock’s reasons for hating Antonio may be viewed as threefold. First, Antonio lends money interest-free which costs Shylock significant business. Second, he abuses Shylock because he is a Jew, spurning, kicking, and spitting at him when he passes him in the street (Antonio is hardly a sympathetic character in this regard). Third, Shylock despises Christians for their mistreatment of him, their “stealing” of his daughter Jessica (who absconded with her love Lorenzo and converted to Christianity), and the theft of his jewels by those same two individuals. In addition to his obsession with positivism, which will be explored immediately, Shylock’s seeking of revenge further polarizes the Jew from principles of Natural Law by offending Christian morality and forgiveness. However, as I will also demonstrate, the Christians prove no better in this respect.

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DEPRAVED ADHERENCE TO PPOSITIVISM:

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- 48 Shakespeare, *supra* note 2 at IV.i ln. 204.
49 Shakespeare, *Ssupra* note 2 at IV.i ln. 204.
50 Shakespeare, *supra* note 2 *Ibid.* at IV.i ln. 99-103.

**THROUGHOUT THE SCENE, SHYLOCK DEMANDS NOTHING
 BUT THE LAW, AND REPEATEDLY “STANDS FOR JUDGMENT.”
 HOWEVER, AS IT IS CERTAIN THAT THE CUTTING OF THE
 POUND OF FLESH WILL CAUSE ANTONIO’S DEATH, THE
 ENGLISH LEGAL PRACTICE OF ENFORCING PENALTY
 CLAUSES STANDS IN STARK OPPOSITION TO NATURAL
 LAW.⁵⁵ SHE BECOMES AN ADVOCATE OF NATURAL
 LAW.**

UNABLE TO APPEAL TO SHYLOCK’S HUMANENESS

⁵¹ Antonio acknowledges the state of Venetian contract law, the commercial necessity of enforcing bonds in a mercantile state, and the inability to change the law as prescribed. In Act III, Scene iv he states (at ln. 26-31):

The Duke cannot deny the course of law;
 For the commodity that strangers have
 With us in Venice, if it be denied,
 Will much impeach the justice of the state,
 Since that the trade and profit of the city
 Consisteth of all nations.

⁵² White, *supra* note 4 at 164.

⁵³ As will be discussed below, the nature of Portia’s role is highly suspect.

⁵⁴ Shakespeare, *Supra* note 2 at IV.i ln. 193.

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⁵⁷ Mark Edwin Andrews, *Law versus Equity in The Merchant of Venice* (Boulder: University of Colorado Press, 1965) at xi.

⁵⁸ Shakespeare, *Supra* note 2 at IV.i ln. 231-32.

⁵⁹ Shakespeare, *supra* note 2 at IV.i ln. 256-57 and 260. Shylock is so formalistic in his devotion to “the law” that when Portia suggests a surgeon be brought to tend to Antonio’s wounds, “lest he do bleed to death,” Shylock responds: “Is it so nominated in the bond? ... I cannot find it; ’tis not in the bond.” Shakespeare, *supra* note 2 at *Ibid.* at IV.i ln. 256-57 and 260.” ADAM – same issue as before

HUMANITY (OR LACK THEREOF), PORTIA SUCCUMBS TO HIS
EXACTING DEMANDS—SHE STATES:

: [T]“THERE IS NO POWER IN VENICE
/ CAN ALTER A DECREE ESTABLISHED [

DESPITE THIS CONCESSION, PORTIA CUNNINGLY PROVES
THAT IT IS INDEED POSSIBLE TO “DENY THE COURSE OF
LAW.”⁶¹

SHE PORTIA ACCORDINGLY, SHYLOCK WILL STAND IN
VIOLATION OF VENETIAN LAW UNDER PENALTY OF DEATH
AND FORFEITURE OF HIS ESTATE. REALIZING HE CANNOT
EXACT HIS BOND WITHOUT STANDING IN BREACH OF IT,
SHYLOCK REMITS AND ASKS FOR HIS PRINCIPAL IN DEFEAT.

IT IS ENACTED IN THE LAWS OF
VENICE,
IF IT BE PROVED AGAINST AN
ALIEN
THAT BY DIRECT OR INDIRECT
ATTEMPTS

⁶⁰ Shakespeare, *supra* note 2 at IV.i*ibid.* at ln. 216-17 and 297-98.

⁶¹ Shakespeare, *supra* note 2 at III.iv ln. 26.

⁶² Shakespeare, *supra* note 2 *Ibid.* at III.iv ln. 26.

⁶³ Shakespeare, *supra* note 2 *Ibid.* at IV.i ln. 305-06.

⁶⁴ Shakespeare, *supra* note 2 at IV.i *Ibid.* at ln. 309.

⁶⁵ Shakespeare, *supra* note 2 at IV.i *Ibid.* at ln. 313.

⁶⁶ Yet this criticism may be slightly tempered by the fact that Portia, like Shylock, merely enforces the law as it stood.

⁶⁷ Shakespeare, *sSupra* note 2 at IV.i ln. 344-45.

**WHILE PORTIA JUSTLY DEFEATS SHYLOCK'S BOND WHICH
SECURES ITS AUTHORITY IN A BASE, "UNNATURAL" LAW OF
CONTRACT, SHE THEN RELIES ON AN EQUALLY CORRUPT
ALIEN STATUTE TO PUNISH HIM IN THE FACE OF NATURAL
LAW**

NATURAL LAW UNDER THE ALIEN STATUTE, NON-CHRISTIANS WERE NOT REGARDED AS CITIZENS OF VENICE. AS “ALIENS,” THEY WERE THUS SUBJECT TO HARSHER PENALTIES THAN “CITIZENS” FOR THE COMMISSION OF EQUAL CRIMES. BY FAILING TO TREAT PERSONS AS EQUALS, THIS STATUE REPRESENTS A GROSS VIOLATION OF NATURAL LAW ALSO THAT OF THE COUNTRY WHICH UPHOLDS IT. KEETON IDENTIFIES THIS STATUTE AS HOLDING A PARTICULAR SIGNIFICANCE, AS “[T]HERE WAS ALSO A SIMILAR LAW IN ENGLAND, [WHICH] THE AUDIENCE VERY WELL KNEW.”⁷¹ AS SUCH, THE PRESENCE OF THIS STATUTE REVEALS THE HYPOCRISY INHERENT IN THE LEGAL SYSTEMS OF FICTIONAL VENICE AND SHAKESPEARE’S ENGLAND, AS NATURAL LAW NATURAL LAW NATURAL LAW IS WELCOMED BY EQUITY IN ONE HAND (THE TROUNCING OF PENALTY CLAUSES IN BONDS), YET BLINDLY SHUNNED BY THE OTHER (THE PERSECUTION OF MINORITIES).⁷³

⁶⁹ Although this violation may have not been readily apparent to Shakespeare’s fictionalized characters, nor to his audience, as the persecution of minorities was likely justified as “natural.”

⁷⁰ Who has, on several instances, revealed herself to be of questionable character. Kornstein even goes to the extreme of calling her “a world-class equal opportunity hate-monger.” Daniel J. Kornstein, “Fie Upon Your Law!” (1993) 5 *Cardozo Stud. L. & Lit.* 335 at 4545 (JSTOR).

⁷¹ Keeton, *supra* note 5 at 145.

⁷² Keeton, *Ssupra* note 5 at 145.

⁷³ *Supra* note 29 at 97. In fact, Shylock’s marginalized status as a Jewish “alien” may provide a reasonable explanation as to his strict interpretation of the Venetian law. As Justice Posner states, “for such a victim of discrimination, it is entirely logical and reasonable to trust in the apparent severity of a rigid but certain interpretation of law rather than in the discretion of a system that has already shown its bias... But he who lives by the letter of the law may perish by it, too.”

**WHILE PORTIA COULD HAVE YIELDED THE INSTANT SHE
DEFEATED SHYLOCK’S BOND, SHE GOES ON TO PUNISH HIM.
PORTIA THUS STANDS IN VIOLATION OF NATURAL LAW**

**HAVING INVOKED THE ALIEN STATUTE, PORTIA USES THE
LAW TO APPROPRIATE SHYLOCK’S ESTATE AND SUBJECT
HIS LIFE TO THE MERCY OF THE DUKE.**

⁷⁴ *Supra* note 298 at 97. In fact, Shylock’s marginalized status as a Jewish “alien” may provide a reasonable explanation as to his strict interpretation of the Venetian law. As Justice Posner states, “for such a victim of discrimination, it is entirely logical and reasonable to trust in the apparent severity of a rigid but certain interpretation of law rather than in the discretion of a system that has already shown its bias... But he who lives by the letter of the law may perish by it, too.” *Supra* note 28 at 97 – Again, before or after – as well, author name??.

⁷⁵ Kornstein, *Supra* note 554 at 45.

⁷⁶ Several theorists, such as Zuckert and Bernthal, have maintained that Portia represents New Testament mercy while Shylock stands for Old Testament “justice” (i.e. an eye for an eye; revenge). However, when one considers the undeniably punitive aspect of Portia’s judgment, this renders the biblical assessment untenable. Renowned Shakespearean scholar Harold Bloom likewise dismisses this notion in *Shakespeare and the Invention of the Human* (New York: Riverhead Books, 1998). While it is unclear *why* Portia persecutes Shylock in the manner that she does (anti-Semitic indicators aside), it appears that she returns the very vengeance the Jew sought against Antonio. This stands in opposition to the laws of Christian morality, which informed the Renaissance conception of Natural Lawnatural law.

**SHE ORDERS SHYLOCK TO THE GROUND, LIKE A DOG, TO
BEG FOR THE DUKE’S CLEMENCY. THE DUKE, WHO
PROVES TO BE THE ONLY SEMI-COMPASSIONATE ONE OF
THE LOT, SPARES SHYLOCK’S LIFE AND THE PORTION OF
HIS ESTATE THAT WOULD OTHERWISE GO TO VENICE.
ANTONIO, ON THE OTHER HAND, IS NOT SO KIND. WHEN
ASKED BY PORTIA “[W]HAT MERCY CAN YOU RENDER
HIM[...]?”,⁷⁷ HE SPITEFULLY REQUESTS THAT SHYLOCK BE
CONVERTED TO CHRISTIANITY AND THAT HE HOLD THE
OTHER HALF OF THE SHYLOCK’S ESTATE “IN USE” FOR THE
JEW’S REVEILED DAUGHTER AND HER CHRISTIAN
HUSBAND.⁷⁸**

**AS THE CHARACTERS CONSTANTLY REFER TO HER)WHICH
THE CHARACTERS CONSTANTLY REFER TO HER AS). THIS
DILEMMA IS NOT EASILY RESOLVED. IT IS IMPERATIVE
THAT THE AUDIENCE**

⁷⁷ Shakespeare, *supra* note 2 at IV.i ln. 376.

⁷⁸ Presumably, Antonio requests Shylock’s conversion not only to punish the Jew, but also to redeem his Jewish soul. However, as the Christians in the play do not come off any better than the evil Shylock, this may realistically be viewed as a lateral move at best.

⁷⁹ Shakespeare, *Ssupra* note 2 at IV.i ln. 376.

⁸⁰ Presumably, Antonio requests Shylock’s conversion not only to punish the Jew, but also to redeem his Jewish soul. However, as the Christians in the play do not come off any better than the evil Shylock, this may realistically be viewed as a lateral move at best.

⁸¹ Expert legal advisor to the Duke. Both Ziooilkowski, *supra* note 31 and White, *supra* note 4, make this observation.

⁸² White, *supra* note 4 at 5.

⁸³ Windolph, *supra* note 1 at 46.
