

## Such incitement

DAVID HAWKES

Rebecca Lemon

TREASON BY WORDS

Literature, law and rebellion in Shakespeare's  
England234pp. Cornell University Press. \$39.95; distributed  
in the UK by NBN. £20.95.  
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Dennis Kezar, editor

SOLON AND THESPIA

Law and theater in the English Renaissance  
352pp. University of Notre Dame Press. \$37.50;  
distributed in the UK by Eurospan. £24.95.  
978 0 268 03313 2An illumination in the 1584 Charter of Emmanuel College, Cambridge; from *Elizabethan Jacobean Style* by Timothy Mowl (Phaidon, 978 0 7148 2882 4)

Fictional literature has come into conflict with the law since Plato expelled the poets from his Republic. It is not just that fictional writing often breaks laws, such as libel or blasphemy, but that fiction is implicitly opposed to the very idea of law. In principle, the law aspires to logic, or at any rate objectivity, while fiction treats such matters as irrelevant, even impossible. The border between these ostensibly opposed discourses, however, has often proved porous. Mere falsehood is easily refuted by logic, but fiction is not falsehood, as Sir Philip Sidney noted in his *Defence of Poesy*: "for the poet, he nothing affirmeth, and therefore never lieth". Sidney's opponents, the Puritans who were campaigning against the theatre, retorted that this was precisely what made fiction dangerous. Logic has no weapons to use against the pretensions of fiction. Fictional narratives construct an alternative, seductively appealing, mode of meaning to logical argument. They do not refute logic, but they inflict a far more damaging wound by ignoring it.

In a later *Defence of Poetry*, Shelley acknowledged the subterranean power this bestowed on fiction when he described poets as "the unacknowledged legislators of the world". Where legal discourse uses logic to reach an objective judgment, fiction deploys rhetoric to influence the subjective psychological laws that form habits and thoughts. His assertion that the unacknowledged legislation of poets was more influential than the explicit legislation of lawyers is still debated by legal and literary theorists. The recent "law and literature" movement has produced several intriguing studies of the relation between these discourses, and *Solon and Thespis*, edited by Dennis Kezar, and Rebecca Lemon's *Treason by Words* are exciting additions to that corpus. They both suggest that fiction and the law are mutually determining. As Kezar puts it in the introduction to *Solon and Thespis*: "We believe that theater and law... require the other for themselves to be fully understood". For some, this intimacy is all the more reason to police the boundaries between law and fiction with vigilance. Kezar quotes the famous American lawyer Alan Dershowitz's claim that "When we import the narrative form of story-telling into our legal system, we confuse fiction with fact and endanger the truth-finding function of the adjudicative process". But, as he showed during his work for the defence of both Claus von Bülow and O. J. Simpson, Dershowitz is himself an expert at

using narrative and constructing stories. His suspicion of fiction surely springs from a keen awareness of its persuasive power. In his memoir, *The Best Defense*, Dershowitz declares that "Once I decide to take a case, I have only one agenda: I want to win. I will try, by every fair and legal means, to get my client off – without regard to the consequences". Since he goes on to admit that "almost all of my clients have been guilty", this clearly involves a systematic subordination of logical objectivity to rhetorical persuasion. Dershowitz is also known as an apologist for the use of physical torture in interrogation. Perhaps, if truth is so easily manipulated by rhetoric, the only way to extract it is through a direct, forcible appeal to the body. As *Solon and Thespis* and *Treason by Words* remind us, this conception of truth was part of conventional legal theory during the sixteenth and seventeenth centuries. Among the Early Modern notions that are currently enjoying a revival is the concept of "treason by words". This idea depends on the quasi-magical stance that the utterance of particular words causes, or actually amounts to, an objective effect in the real world. The idea that, for example, "glorifying terrorism" constitutes a crime is repugnant to liberal thinkers because of its clear violation of freedom of speech. But as Rebecca Lemon's illuminating book shows, the view that words could in themselves constitute treason, even if they did not issue in any treasonous acts, was widely

accepted in Elizabethan and Jacobean England.

Lemon begins by noting that, during the reigns of Elizabeth I and James I, treason was almost entirely verbal rather than actual. There were no successful treasonous enterprises, and even the two serious attempts to overthrow the monarch, the Essex rebellion and the Gunpowder Plot, were conducted with greater success on paper than in practice. This leads her to ask a question that seems apposite to our own time: "What happens to our notion of the crime [of treason]... when we approach it not as violent action but as a verbal phenomenon?". She reminds us that the Treasons Act of 1534 condemned "certain types of language as treason out of a fear that they both prompt and constitute violent action", and she quotes from the Act itself, which criminalizes those who "maliciously wish, will or desire by words or writing, or by craft imagine, invent, practice or attempt any bodily harm to be done or committed to the King's most royal person". To imagine doing something, to make a mental image of an act, was conceived as tantamount to forming an intention to do it. This line of thought explains why witches could be held guilty of attempted murder because they stuck pins in images of their intended victims, and more recent attempts to bring legal sanctions against particular speech-acts bespeak the same magical mentality.

The first serious attempt to discriminate between linguistic and actual treason was made



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by the government. In response to the Gunpowder Plot, James I made all his subjects swear an oath of allegiance. His purpose was to separate political obedience from religious conformity, so that Catholics and Puritans could accept his temporal authority without violating their consciences. He explicitly discounted thought-crimes like "wishing" or "imagining" that had been mentioned in the 1534 Act, and announced that no one would be charged with treason "if hee breake not out in some outward acte". Barring such "breaking out", the consciences of the King's subjects would be left free.

But the Pope refused to recognize the distinction between violations of conscience and actual crime, and he forbade English Catholics to take the oath. In a brilliant analysis of John Donne's *Pseudo-Martyr*, Lemon shows how the papal prohibition stimulated the emergence of free-speech theory. A former Catholic himself, Donne did not assert the authority of the King over that of the Pope. Rather, he denied that either the Pope or the King held authority over the conscience: he installed the individual conscience as the truly sovereign power. Treason against the conscience was worse than treason against any external authority, and since James was not asking them to violate their consciences, Catholics were free to disobey the Pope and swear temporal allegiance to the King.

Donne's work opened the way to the free-speech theory that came to fruition in Milton's *Areopagitica* and would be enshrined in the First Amendment to the American Constitution. Such theory is rather embattled today, because

of its rigid opposition to ideas like "treason by words". Lemon recalls Cicero's maxim "inter arma enim silent leges" ("the laws fall silent during wartime"), which features in Ben Jonson's *Catiline*. She argues that the play's treatment of Cicero demonstrates Jonson's conviction that "treason can be productive of tyranny". A Ciceronian suspension of the rule of law, which allows the government to suppress speech it considers treasonous, actually manifests the tyranny of which the treasonous speech accuses the government. According to Rebecca Lemon, both Jonson and Donne "suggest . . . that tyranny emerges through a particular style of exercising power over the conscience and will of subjects: invoking discretionary power to rule over the law, even for the good of the state, spells tyranny". Classical and Renaissance republicanism view the law as the means of liberation from the tyranny of arbitrary rule. This is one reason why Puritans of the Early Modern period believed that "licence" to disobey the law was an instrument of royal tyranny.

*Solon and Thespis*, edited by Dennis Kezar, examines one such "licensed" institution: the London public theatres, which operated physically outside the law, in the "liberties" of the South Bank of the Thames, beyond the writ of the Puritan-dominated city corporation. The plays performed there seemed to provide a particularly enticing form of rhetorical reality, a visible alternative to the realm of logic and reason. It was widely believed that the monarchs encouraged the extra-legal playhouses, in

order to inculcate idolatrous habits in the populace, and to distract them from corruption in the government and neo-popey in the Church. As the seventeenth century wore on, the Puritan demand that the rule of law should be imposed on the theatres acquired revolutionary overtones.

The essays collected in *Solon and Thespis* focus on the complicated relation of the law and the theatre in Early Modern England. Frances Teague's analysis of *Volpone's* trial scene, in the light of the Gunpowder Plot, and Debora Shuger's study of defamation as a political tactic are especially instructive, but the volume's most provocative piece is "The Law versus the Marketplace in Jonson's *Bartholomew Fair*" by Paul Cantor. Like many other recent critics of Renaissance drama, Cantor believes that opponents and defenders of the theatre alike used it as a synecdoche for the market economy, and he correctly finds the two spheres explicitly linked in *Bartholomew Fair*: "Jonson understood that critics of the marketplace inevitably become critics of the theater as an especially conspicuous example of market principles". Jonson's play certainly mocks characters like the Puritan Zeal-of-the-Land Busy and the Mayor Adam Overdo for their attempts to suppress the Fair, and such figures clearly allude to the Puritan anti-theatricalists. But despite writing for the stage himself, Jonson had a great deal of sympathy for its critics, and this sympathy extended to critics of the marketplace. Cantor neglects this aspect of *Bartholomew Fair*, and his essay comes close to presenting Jonson as a radical free-marketier: "The mayor's idea of regulating the economy is to do every job himself, a telling image for the ultimate consequences of government intervention in the economy". Cantor does admit that "in its economic views, *Bartholomew Fair* is anomalous among Jonson's works", and that plays like *Volpone* and *The Alchemist* are ferocious satires of the market mentality. This does not, however, shake his conviction that *Bartholomew Fair* "seems to contrast the rigid and stultifying world of law with the fluid and vibrant world of the marketplace". But the fact that the play attacks the critics of the market does not mean that it celebrates the market itself. The merchants, traders and common who inhabit Jonson's Fair are at least as venal and corrupt as the officials who try to regulate it and, if they are free of hypocrisy, they also lack virtue. Cantor's contention that "entering the marketplace represents a kind of liberation" for the play's female characters is hard to sustain in view of the fact that, as he concedes, several of them "quite literally enter the marketplace - that is, are enlisted into prostitution". In fact, the marketplace, like the theatre, imposes its own laws. These laws may often contradict both the law of the land and the laws of logic, but they are no less rigid than either of these. It may be that, as the republican theorists of Ancient Rome and Early Modern England understood, tyranny does not consist in an overly rigid enforcement of the law, but on the replacement of the objective laws of logic by arbitrary laws such as those of the marketplace, individual whim, or mere fiction. When this happens, rhetoric becomes a legal matter, certain kinds of statement become criminal, and the notion of "treason by words" gains new currency. Both *Treason by Words* and *Solon and Thespis* examine the consequences of such developments. Their analyses are incisive and their warnings timely.

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