WHAT IS INJUSTICE?

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Abstract. Throughout Western history, theorists have explained injustice by starting with some idea of justice. They have made justice fundamental, and the notion of injustice merely derivative of it. Since, after 2500 years of theory, we lack any consensus about what justice is, it would be easy to conclude that injustice is equally indeterminate. However, injustice is not the sheer “opposite” or “negation” of justice. Plato set the stage for two millennia of justice theories by identifying “harmony” as justice’s essential attribute. Aristotle refined that project by adding the element of “measurement,” which has continued to structure programmatic justice theories through to our own time. Despite those efforts, criteria for harmony or measurement constantly clash. Injustice arises not from the “failure” of justice, but from the incommensurability of rival notions of justice. Those conflicts can never fully emerge in standard law reports, not even in so-called “hard cases,” since the whole of any given legal system, in the context of ordinary litigation, can never be in question. By contrast, the law and literature movement suggests that fictional texts, insofar as they are free from such institutional constraints, show how injustice arises not merely from the violation of norms of justice, but from their active pursuit and application. Examples from Sophocles, Shakespeare, and Milton are cited to examine the ways in which injustice arises from constant clashes within and among any criteria of justice.

Keywords: injustice, jurisprudence, justice theory, law and literature, legal theory

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This even-handed justice
Commends th’ingredients of our poisoned chalice
To our own lips. (Shakespeare, Macbeth 1.7.10 – 12)

Introduction

“Those who reproach injustice do so because they are afraid not of doing it but of
suffering it. So, Socrates, injustice, if it is on a large enough scale, is stronger, freer, and
more masterly than justice.” (Republic 1.344c) Such a declaration is as remarkable today
as when Plato wrote it. Generations of readers have witnessed how Socrates’ pugnacious
interlocutor—a prominent Greek in his own right, named Thrasymachus—praises
injustice. Generations of readers have witnessed how Socrates embarrasses him.

Thrasymachus concocts an almost anthropomorphised Justice and Injustice, like Virtue
and Vice, squaring off on a cosmic battlefield.

However, Socrates and Thrasymachus share one crucial assumption. Scholars have
perennially overlooked it, arguably thinking it to be too obvious for comment. What
Socrates and Thrasymachus both assume, and what most of us assume, is that justice and
injustice form a mutually exclusive pair. We presuppose that the two concepts mutually
define, and mutually exclude, each other—not so much as a matter of empirical
observation, but as a sheer tautology. Injustice negates justice, and justice negates

1 [author’s affiliations deleted for peer review]. Ideas in this article were first presented at [reference deleted for peer
review]. Many thanks to all participants, and to [reference deleted for peer review / RC] and [reference deleted for peer
review / JM] for their comments. Foreign translations into English are mine, unless otherwise indicated.

2 Citations of Plato refer to PLATO: COMPLETE WORKS (John M. Cooper, ed. 1997), unless otherwise indicated. For
abbreviations of Plato’s works, see id. at 1746.
injustice. Theorists seeking to explain injustice often do so by examining its supposed opposite. They often attempt to spell out the conditions of a just society in detail, on the assumption that injustice is, or results from, the absence or negation of those conditions. After all, if “unhappy” is the opposite of “happy,” and “untrue” the opposite of “true,” then surely “injustice” and “justice,” too, must be mutually defined opposites. According to Aristotle, “if the unjust (ἀδικον) is unfair (ἀνισον), [then] the just (δικαιον) is fair (ἰσον).” He pronounces that observation “to be true to everyone without argument.”

(Nic. Eth. 5.3.1131a13 – 14 [Irwin])

However, 20th Century thinkers as different as Wittgenstein and Heidegger challenge what were once such self-evident axioms of human reason. They cast doubt on the notion that our immediate thought processes presuppose lucid “definitions,” let alone definitions that would draw their meanings from strict, binary relationships of mutual exclusion. On that view, it is questionable whether we understand injustice by reference to some prior concept of justice. If, in the blink of an eye, we witness a powerful adult brutally beat an infant child, we can grasp the injustice immediately and overwhelmingly. In that split second, our minds do not race through definitions of justice. We do not

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3 See Part II infra.
7 The point is not that strict, formal logic has been shown to be “false,” but only limited in explaining how we know and understand the world. The view that logic records not real-world observations, but merely tautological or definitional relations among concepts was commonplace by the mid-20th century. See, e.g., Alfred Jules Ayer, Language, Truth and Logic 77 (New York: Dover, 1952). Within the bounds of formal logic, alternatives to binarism have long been recognised. See, e.g., Grzegorz Malinowski, Many-Valued Logics, in The Blackwell Guide to Philosophical Logic 309 – 35 (L. Goble, ed. 2001).
perform some compulsory mental exercise, whereby (a) first, we formulate a definition of justice, choosing, for example, between liberal, paternalist, utilitarian and communitarian theories; and then, (b) on the basis of that choice, reach a conclusion as to whether or not the beating counts as the “opposite” of justice. Most people go through life giving little thought to theories of liberalism, utilitarianism, paternalism, communitarianism, or other such ethical or political doctrines. Yet they have no trouble recognising such brutality as unjust. That is not to say that people generally agree on all instances of injustice. Disagreement can certainly arise about whether a mild, disciplinary beating of a child counts as injustice. One modest generalisation nevertheless seems accurate. Most of us have some sense of injustice that does not depend on a prior, articulated definition of justice.

That disjunction between the concepts of justice and injustice, the sense that we can grasp injustice without having any detailed concept of justice, seems confirmed by our longstanding disagreements about justice. Western intellectual history, running from Plato to Aquinas, Machiavelli, Rousseau, Kant, Marx, or Rawls, yields anything but agreement. Those centuries of theories bear witness to perpetual controversy. Yet it still remains the case that we know immediately, without needing two millennia of theory, that an adult brutalising an infant is manifestly unjust.

In this article, I shall question the assumption that the concept of injustice fundamentally arises out of some determinate concept, or theory, of justice. The truth is precisely the opposite: it is injustice that provides the more immediate and primary concept. Justice is, by comparison, the more derivative, tentative notion. Our long intellectual tradition has undertaken an odd task in seeking to derive the more immediate
and primordial concept from the vaguer, more elusive one.

I begin, in Part I, by asking why conventional justice theories fail to explain injustice. In complex social and political contexts, justice necessarily relies on detailed theory, drawing upon factors—legal, ethical, political, economic, sociological, or cultural—that are not easily agreed upon. Injustice is different. We see that it is often readily recognised without requiring such theoretical underpinning. The concepts of justice and injustice share important overlaps, but are not binary opposites. They involve categorically different kinds of experiences and inquiries, and we understand them in very different ways. In Part II, I argue that, despite the enormous variety of justice theories, Plato and Aristotle correctly identify unifying feature among those, both ancient and modern, which recommend detailed normative and institutional solutions. In particular, as Aristotle anticipates, such theories, called “programmatic” justice theories, always involve concepts of measurement, such as theories of just distributions and rectifications.

The problem, however, as explored further in Part III, is that the theoretical complexity of justice theories means that their incommensurability leaves them in an intellectual standoff, with injustice as the result. Such shortcomings in law are not fully evident even in “hard cases,” insofar as the full legal system within which such cases arise are never at issue. By contrast, literary works, as the law and literature movement has suggested, are free from such institutional constraints. Landmark texts such as the ancient Antigone, or the early modern Macbeth and Paradise Lost, show how injustice does not primarily arise, as our traditional binarism would have it, from the breach of any obvious norm of justice, but from the opposite, namely, from the collapse of any
uncontested notion of justice, and from the conflicting criteria that result. In Part IV, a more detailed examination is undertaken of Shakespeare’s *The Merchant of Venice*. That play merits special attention, as its socio-legal world, in several respects, mirrors the conditions of early modernity. It displays a proto-capitalist world in which the pursuit of the just constantly, and intractably, leads to injustice.

I. The Failure of Traditional Justice Theory

The word “injustice,” in its sheer etymology, suggests that one reality depends upon the negation of a prior reality, called “justice.” That etymology persists in Western languages, both ancient (ἀδικία, iniustitia) and modern (ingiustizia, injusticia, Ungerechtigkeit). Standard dictionaries reiterate that etymology. The *Oxford English Dictionary* indicates as its first definition of “injustice” precisely “[t]he opposite of justice.”8 In *The New Oxford Dictionary of English*, we find “lack of fairness or justice.”9 *Webster’s New Universal Dictionary* defines “injustice” as “the quality of being unjust or unfair.”10 *Webster’s Third New International Dictionary* includes the cognate notions “unfairness” and “iniquity,”11 which, of course, are no more determinate than “injustice” itself. Other definitions do suggest some affirmative, yet ultimately inadequate content. For example, a definition like “violation . . . of the rights of another”12 applies only within the context of rights-based legal regimes, in which rights

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12 *Id.*
are assumed to equate with, or to protect, justice. That example would not apply, for example, in many non-Western, or in Marxist or certain other communitarian regimes, in which rights, in the traditional, individualist sense, can be viewed as positively damaging to justice and to social cohesion. How, then, are we to understand the concept of injustice?

**A. Isolated and Systemic Injustice**

At first glance, the concepts of “justice” and “injustice” do seem to pair off logically, mutually defining each other. Specific instances of injustice often appear to be sheer negations of justice. Assume, for example, that a suspect is falsely accused of a crime, that a husband is violent, or that a child is starving. In each of those cases, our sense of injustice is “built in” from the outset. Injustice, in each case, simply “negates” the justice that we ordinarily understand to be represented by truthful accusations, or civility in husbands, or care for children. By extension, we grasp the “doing” of justice in those cases as sheer negations of the injustice: the falsely accused suspect is released, or the violent husband is restrained, or the starving child is fed. (There is more than one possible result of the negation in that latter sequence. Equally plausible, for example, would be: the false accusation is punished, the violent husband is prosecuted, the child’s parents are investigated.)

From the assumption that justice manifests through truthful accusations, peaceful

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13 The brief entry in BLACK’S LAW DICTIONARY adds nothing to the standard Oxford English or Webster definitions. See BLACK’S LAW DICTIONARY 857 (Bryan A. Garner, ed., 9th ed. 2009). The OXFORD DICTIONARY OF LAW omits entries altogether for “injustice” or “unjust.” See THE OXFORD DICTIONARY OF LAW 284, 569 (Jonathan Law & Elizabeth Martin, eds., 7th ed. 2009). However, it includes “justice,” defined as a “moral ideal . . . not synonymous with law” since “it is possible for a law to be unjust.” Id. at 310.
husbands, and nourished children, in-justice does indeed appear, tautologically, to be
plain and simple “not-justice”: the accusation is false, the husband is violent, the child is
starving. Just as obviously, just as tautologically, justice re-surfaces when those
negations are, in turn, plainly and simply negated, becoming, so to speak, “not-not-
justice”: the falsely accused suspect is released, the violent husband is restrained, the
starving child is fed. Such simple sequences of injustice negating justice, and justice
negating injustice, seem, then, to confirm our age-old assumption that justice and
injustice define each other in mutually exclusive pairings.

Those who accept that traditional, binary view will freely admit that not all examples
are straightforward. More complex propositions, such as “Strict regulation of markets
promotes a more just society,” or “The death penalty achieves natural justice,” would
ordinarily spark more controversy than “Children should be nourished.” Nevertheless,
traditional, binary logic teaches that, if we can attribute “justice” even in the harder cases,
then “injustice” denotes merely some opposite state of affairs. Accordingly, on the
traditional view, certain specific applications may raise difficulties, yet that strictly
binary, mutually defining relationship between justice and injustice remains intact.

But the complexities run deeper. Justice and injustice matter most where false
accusations, violent husbands, or starving children do not arise only as isolated
occurrences. Unjust things can certainly happen in random, atypical ways. However,
injustice counts most when it occurs not as spontaneous, offhand incidents, but within
cumulative, socio-political processes. The child deliberately left to starve in Stockholm
is a tragedy, for which we might easily generate the typical sequences of common-sense,
tautological binarisms (“It is just for a child to be nourished,” “It is therefore unjust for a
child to be starved,” “It is therefore just for a starved child to be fed,” etc.). By contrast, thousands of children starving in Ethiopia, under circumstances of gross and systemic deprivation, are not an isolated tragedy, but a pervasive, full-blown crisis.\(^{14}\) In that more systemic case, the problem with reducing justice and injustice to mutually exclusive pairings is not that it is logically incorrect, but that it becomes uninformative, even trivial.

Systemic injustices demand that we examine whole systems and regimes, from multiple and often opaque points of view—historical, political, economic, legal, ethical, socio-cultural. Theories about the kinds of norms, institutions or processes that would produce justice in such a case are necessarily complex, and inevitably produce age-old disagreements, e.g., between free-marketeers and social-democrats, or between liberals and communitarians, or between ethical universalists and cultural relativists. (Such conflicting perspectives can also apply equally to purely isolated instances, such as false accusations or violent husbands. Indeed, that fact confirms \textit{a fortiori} the suggestion that justice and injustice do not primarily apply to “isolated events,” but principally concern broad and systemic social processes.)

It would be odious to claim that we must first stake out agreement on such complex disputes before we can decide whether the mass starvation of children is unjust. The problem lies not with identifying such a crisis as unjust. Rather, to say that it is unjust \textit{because} it represents the negation of, for example, a Kantian ideal of justice, but not a Thomist one; or the negation of a utilitarian ideal, but not a socialist one, is altogether a more speculative matter. The mass starvation of children is manifestly unjust, even while

\(^{14}\) Crises resulting solely from natural catastrophes, such as earthquakes, cannot be called unjust per se. However, human action often affects their effects, e.g., through the impact of corruption on prevention or relief. See generally, e.g., \textit{Transparency International, Annual Global Report} 2009 (2010).
any given theory of what would constitute justice in such a situation remains controversial. And if the mass starvation of children is manifestly unjust, then certainly, tautologically, the nourishment of the children represents justice. In that obvious sense, the strict binarism remains true. However, the proposition that the children require nourishment only begs the important questions. What kind of regime will assure that the children receive nourishment? Greater market regulation? Or less? Imposition of absolute and universal human rights? Or respect for local, cultural, non-universal values? Coercive outsider intervention in Ethiopia’s politics? Or diplomatic non-intervention?

For describing entire systems of (“macro”) justice or injustice, as opposed to the aforementioned sequences of purely isolated (“micro”) instances, the simple binarism, the straightforward symmetry, collapses. An immediate, visceral sense that mass starvation of children is unjust seems widespread among ordinary people who otherwise give little thought to, and have little formal training in, economic, sociological, or ethical theories of justice.  

Consider a second example. At the socio-political, “macro” level, it is easy enough to argue, as a formal matter, that the propositions “Swedish state laws and practices are fundamentally just” and “Swedish state laws and practices are fundamentally unjust” stand in a binary, mutually exclusive relationship to each other. But such ordinary binarisms take us no further. It may be easy enough to designate as mutually exclusive the propositions “Swedish state laws and practices are fundamentally just” and “Swedish state laws and practices are fundamentally unjust.” However, without considerable

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normative and empirical scrutiny, over a range of factors (and we might not even agree
about those factors, or about how to scrutinise them), there is no common-sense way of
knowing which, if any, of those two propositions to adopt. Once an entire system or
process, as opposed to an isolated act, is at issue, any scrutiny requires detailed theories
of, or assumptions about, what justice is in general. Even with those, we may fail to
settle upon on a clear-cut pronouncement that “Swedish state laws and practices” are
“just” or “unjust” simpliciter.\textsuperscript{16}

Notions of systemic injustice, then, do not merely mirror-image our notions of
systemic justice, in the way that our notions of justice and injustice might so easily flip-
flop as applied to randomly isolated events, or to general but abstract propositions
opposed in purely formal terms. Unlike the necessarily detailed and theoretical approach
required for assessing the Swedish state, we do not perforce draw upon any such
elaborate political or social theory to ascribe injustice to Soviet purges and gulags, Pol
Pot’s killing fields, the trans-Atlantic slave trade, Hutus upon Tutsis, Mao’s Great Leap
Forward, or Auschwitz. Most writing about such events—be it in standard, expository or
journalistic prose or broadcasting; or in narrative accounts, such as those of Primo Levi or
Elie Wiesel—assumes the injustice to be evident. When theorists like Hannah Arendt\textsuperscript{17}
or Emmanuel Lévinas\textsuperscript{18} build broader conceptual perspectives around such events, they

\textsuperscript{16} One anonymous reader notes that our grasp of injustice without theory is not altogether different from our
understanding of justice. “It is easier to explain what is unjust about a system, than to explain what a just system would
be like. But then, it is possible to grasp the justice of some actions (e.g., releasing a prisoner who has been falsely
convicted) and even just features of some systems, without a theory of justice, too.” Confidential communication of 6
Dec. 2010 (on file with author). It is important to emphasise, then, that the focus of the present analysis is upon
systemic justice and injustice, and not on acts pondered in isolation, which, as I have suggested, mislead us as to the
nature of justice and injustice, precisely because they can be tidily lined up to form binary, mirror-image pairings.

\textsuperscript{17} See, e.g., HANNAH ARENDT, EICHMANN IN JERUSALEM (2006).

\textsuperscript{18} See text accompanying note 15 supra.
do so already assuming our basic sense of injustice, and not for purposes of *de novo* assertion of those events’ injustice to a public that might otherwise have no clue about whether genocide or systemic oppression are or are not unjust. Systemic injustice is grasped without theory; systemic justice is not.

I do not mean to suggest that controversies about systemic justice are hopeless, or that we lack constructive ways forward in the face of disagreement. That question would reach far beyond my present discussion. My claim is only that concepts of justice, in such cases, never bypass rigorous theoretical modelling, while the injustice remains manifest. And yet if the injustice is manifest, then what is it? What is injustice? It seems incorrect to persist in the belief that some articulated justice theory would first have to be provided, allowing us to perform a prior mental negation, before we could grasp the injustice of massive child starvation. Rather, it is our sense of injustice that stakes out the prior ontological moment, and from which we then extrapolate in order to theorise about justice. Indirect, negatively defined terms such as “un-just” and “in-justice” are poorly suited to describe the immediate, systemic realities to which they apply. Justice theory and injustice theory are qualitatively different kinds of theories. They must certainly overlap, but do not merely collapse into each other as two sides of the same coin. Theories of justice can certainly shed light on any theory of injustice, but cannot merely substitute for it. Both concepts must be theorised in their own right, without one merely subsuming the other.

The observation that injustice can be grasped without theory does not mean that a theory of injustice is superfluous. To say that we can immediately “grasp” much injustice is not to say that we have perfectly understood it. However, the failure of any mirror-
image relationship to the concept of justice confirms that a theory of injustice must be written in a way very different way from programmatic justice theories. By definition, programmatic theory has a constructive element. It is a step-by-step attempt to achieve the object in question, which would be ridiculous for a theory of injustice. On the other hand, particularly in the recent, Anglo-American tradition, there is often uneasiness about the kind of “essayistic” political or legal theory that cannot be applied with immediate and constructive utility. Crucial, then, to a theory of injustice is the need to identify not only its object, “What is injustice?” but also its method, “Which approaches are appropriate to the study of injustice?”

**B. The Partial Incommensurability of Justice and Injustice**

Even within strict, formal logic, the antinomy between “justice” and “injustice” is less than straightforward. If $j$ represents a postulated set of circumstances in which justice prevails, it is not the case that circumstances falling outside that set $j$ necessarily represent injustice. Many circumstances bear no relationship either to justice or to injustice. Consider first a trivial example. Assume that I live under that set of just circumstances $j$. Assume further that my cactus grows more lavishly if I play Mozart, and no other music. That does not mean that I violate the circumstances of justice if I play David Cassidy for it, causing it to grow less lavishly. That choice may make me a worse gardener, but not an unjust person. The contrary of “just circumstances” is not necessarily “unjust circumstances.” It can also be “neither just nor unjust.”

Clearly not all circumstances that happen to be co-extensive with justice, such as playing Mozart for my cactus, are necessary to, or help to promote justice. Deciding
which circumstances are and are not necessary or helpful for justice, and in what combinations or degrees, is rarely straightforward. To cite a less trivial example, assume that jury trials produce just outcomes for fraud cases involving less than €1 million. That does not, in strict logic, mean that trials without juries in those cases would produce less just outcomes. It is possible that the outcomes would be similar. It may also be that the justice in those cases further depends on additional elements of the legal system or of the society (for example, non-jury trials might produce more just results in a society embroiled in civil conflict).

The set \( i \) of circumstances constituting injustice is not merely everything falling outside the set \( j \) of circumstances constituting justice. Each set contains different kinds of elements. Relationships between conditions in set \( i \) and conditions in set \( j \) must certainly exist, in complex relationships, but not in simple binary relationships. We cannot straightforwardly isolate one element within \( j \), then assume it to have an obvious opposite, falling within set \( i \). Now take a third example. Even if it is true that, under a given set of circumstances \( c_1 \), a minimally regulated market fosters just social conditions, that does not mean that, under some other set of circumstances \( c_2 \), a more regulated market fosters injustice. The relationships between markets and social conditions is more complex, not only as a matter of logic, but as a matter of sociology and economics.

That brief logical analysis suggests that injustice does not merely include everything not falling under the (already theoretically problematical) category of “justice.” Nor, however, does that observation mean that no relationships of simple opposition, or mutual exclusion, between the concepts of justice and injustice can ever be found. The simpler sequences of binarisms noted at the outset are plausible enough, as far as they go.
Those relationships nevertheless become more complex as their broader socio-political contexts are introduced. While it would be inaccurate, then, to attribute “total incommensurability” to the concepts of justice and injustice, as there is certainly some partial overlap between them, the two concepts remain only partially commensurable. Therefore, they are also partially incommensurable.

C. Some Consequences of Partial Incommensurability

That partial incommensurability of justice and injustice entails several points concerning the ways in which the concepts are construed. Of particular interest are the implications for rationalist versus irrationalist ethics, and absolutist versus relativist ethics, as well as for the status of pragmatism, empiricism and utilitarianism. Although each of those issues raises complexities beyond the scope of this article, a passing mention is in order.

1. Rationalism and Irrationalism

The partial incommensurability of justice and injustice places one limit on rationalism, and another on irrationalism. It limits rationalism, as we have seen, by challenging any notion that we grasp injustice through a logical negation of some prior, articulated understanding of justice. When, for example, Immanuel Kant purports, through the application of the famous categorical imperative, to generate essential norms of a legal system, he leaves ample doubt about whether he has had hit upon a regime of justice to which people would generally wish to subscribe. He leaves indeterminate, then, the question about what would count as injustice, aside from the sheer negation of those norms.
At the same time, that partial gap, but partial overlap, between the concepts of “justice” and “injustice” sets a limit to irrationalism. It bars the naïve suggestion that, because we can grasp injustice immediately and intuitively, we can also grasp justice the same way—that we “just don’t need theory.” Some great minds, looking askance at the whole enterprise of abstract theory, have doubted that a sense of justice requires abstract reasoning. “We’ve needed centuries” quips Voltaire, “to discover only some of the laws of nature. The wise man needs but a day to know the duties of man.”

Setting aside the questionable truth of that claim even on its own terms, our conspicuous dearth of “wise men,” renders such a maxim useless.

2. Absolutism and Relativism

Those limits on rationalism and irrationalism also entail limits both on ethical absolutism and on ethical relativism. In view of the ongoing disagreements not only about the substance of justice theory, but even about the criteria relevant to it—legal, ethical, political, economic, sociological, or cultural—ethical relativism becomes tempting. If we then proceed to combine ethical relativism with simplistic binarism, we run the risk of falsely extrapolating from the indeterminacy of justice to a view that injustice must, by definition, be equally indeterminate. Insofar as the simplistic binarism is mistaken, then, that extrapolation is equally mistaken. Even if the controversies surrounding justice theory mean that it rarely delivers uncontested results, the urgent realities, and the ethical primacy, of injustice stand on their own to highlight the

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19 See generally, IMMANUEL KANT, METAPHYSIK DER SITTE, in 8 WERKAUSGABE (1968).

20 (“Il a fallu des siècles pour connaître une partie des lois de la nature. Un jour suffit au sage pour connaître les devoirs de l’homme.”) VOLTAIRE, DITIONNAIRE PHILOSOPHIQUE 313 (1993)
implausibility of relativism.

Yet the immediacy of injustice does not dictate any obvious justice theory, hence the equal impossibility of ethical absolutism. Certain inflictions of harm unquestionably, and in that sense absolutely, result in injustice, such as political corruption leading to mass starvation. A sheer negation would suggest that prevention or redress of the injustice entails an equally absolute instance of justice, e.g., the political corruption should be eliminated. Once again, however, that latter claim is too question-begging as to specific ends and means to amount to a theory, let alone an absolutist one. The sheer diversity of theories that might support the claim preclude us from recognising any one of them as absolute. In post-Holocaust ethical theory, Auschwitz certainly stands for the unacceptability of relativism, for the proposition that some acts can only be seen as categorically unjust, as unjust under any defensible ethics. Yet no single programmatic justice theory emerges as a result. Auschwitz yields great certainty about injustice, but little certainty about justice. Any concept of justice, and its criteria of measurement, will inevitably face rival concepts.

3. Pragmatism, Utilitarianism, Reformism

Given the failures of two millennia of justice theories, leaving aside the further problems raised here, it comes as no surprise that some would wish to push aside the whole idea of justice theory, not in Voltaire’s naïve sense of relying on some intuitive “wisdom,” but in the constructive sense of “just tackling society’s real problems,” along

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21 See text accompanying note 15 supra.

22 That attribution applies particularly to Voltaire’s remark accompanying note 20 supra. Voltaire is hardly naïve about ethics or politics. His scepticism towards systematic approaches to justice is nevertheless of interest, as it survive well after his death. Cf. generally, e.g., Leo Tolstoy’s essay, Second Epilogue, in WAR AND PEACE 929 – 64 (Louise Maude
pragmatic or utilitarian lines. The problem, of course, is that pragmatism and utilitarianism must still make choices about desirable ends, subject to the same opaque or conflicting criteria that trouble justice theory.

Reformism meets a similar fate. By “reformism” I mean the decision to avoid thinking about justice or injustice outside the limits imposed by the existing legal order, according to a sentiment familiar particularly to activists-turned-lawyers, “The system may not be perfect, but better to make small improvements within it than to remain powerless outside of it.” That approach is commonly felt to avoid the traps of philosophy, by sticking to “what works.” But it does not avoid philosophy any more than any other stance. It assumes the existing regime to provide some sufficient, and in that sense sufficiently just, basis for reform to be practicable—which only raises the question, what are the grounds for that assumption, and how can theories of justice or injustice shed light upon it? That question will be of particular importance in Parts III and IV

**D. The Trap of Binarism**

We are confronted with an odd predicament, in which we name the more immediate, more concrete, ontologically prior thing (injustice) only via the vaguer, more abstract, more ontologically remote thing (justice). Ordinarily, it would make more sense to do the opposite, namely, to render the more obscure or abstract concept easier to grasp by starting with a concrete one. For example, concepts like “inadequate” and “incomplete” seem to draw their meanings fairly straightforwardly from “adequate” and “complete.”

We end up with two different concepts of injustice. We can write *injustice* to denote the concrete, immediate, everyday reality that surrounds us. We all experience it, directly & Aylmer Maude, trans. 1993).
or indirectly, from time to time, and I am suggesting that it requires a distinct theory. By contrast, we can use the hyphenated *in-justice* to represent the traditional, misleading usage, which denotes *the negation* of whatever it is that is signified by one or another of the familiar justice theories.

That second concept’s notional inversion, whereby the more immediate and familiar concept is defined in terms of one that is less familiar, is deeply “Platonist,” albeit not altogether Platonic. Platonism represents a school carried on long after the philosopher’s death, encompassing Jewish, Christian and Muslim traditions. It emphasises Plato’s account of “noumenal” reality, i.e., ultimate reality inaccessible to human perception, notably the famous “Forms.” The Forms are paradoxically opposed to, and yet are the very essence of, our perceived, phenomenal realities. (e.g., Phd. 103e

When we venture to discuss law in expressly ethical terms, although few of us today would call ourselves Platonists, we still fall into binarism’s Platonist trap. *Injustice*, the thing that we actually know, everyday, here and now, a peremptory social reality, bears no name at all, except for the derivative, negatively-defined, question-begging notion, displayed by its etymology, *in-justice*. Any attempt to find a substitute, a word not derived from an otherworldly abstraction, instead containing its own immediately descriptive content, shows us how far astray our Platonist mental universe has led us. What other word might we use to denote injustice as an immediate, palpable reality, and not merely a derivative one, not merely an intellectual afterthought?

The problem is not really about finding the right word. Since I am accusing our

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23 The degree to which all of Plato’s thought reduces to his metaphysics of Forms remains uncertain. In other important works, such as Crito, Protagoras, Gorgias, Phaedrus, or Laws, as well as such “aporetic” dialogues as Euthyphro, Lysis, Laches, Charmides or Meno, the role of the Forms, or of any decisively noumenal reality which would resolve problems of the everyday, phenomenal world, remains unclear.
traditional, familiar concept of being too abstract, derivative and question-begging; and since I am accusing it of failing to capture some immediate and palpable realities, one might think I am simply looking for a concept that does not take the linguistic form of a negative. One might propose using terms that are not so obviously linguistic derivatives, such as, for example, “vice” or “evil.” No sooner are such substitutions proposed, however, than does it become clear that the problem is not merely linguistic. The Manichaean vintage of those words leaves them as arbitrary and indeterminate as “injustice.” A more neutral, judicially familiar term like “unconscionable” might seem preferable, since, as it happens, the modern English language no longer contains the distinct word “conscionable” that it negates. The problem nevertheless remains that a word like “unconscionable” carries no more obvious content than words like “vice” or “evil.” The problem is not fundamentally one of definition, but of substance. What the concept of injustice requires is a fuller theoretical content, and not merely a new word.

II. Injustice as the Negation of Harmony or Measurement

If the concepts of justice and injustice are nevertheless partially commensurable, then it is worthwhile to ask how far classical justice theories illuminate the concept of injustice. Plato and Aristotle mistake the concept of injustice insofar as they deem the relationship between the two concepts to be strictly binary. However, insofar as the two concepts share some degree of overlap, their approaches shed some light. For Plato, and particularly for the long shadow of Platonism that he will cast, justice arises out of disunity. For Aristotle, it arises out of mismeasurement—application of the wrong

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24 *The Oxford English Dictionary* designates “conscionable” as “apparently obsolete.” 3 OED, supra note 8, at 755
criterion, or misapplication of the right one. Aristotle’s contribution already marks the
limit of the overlap. I shall argue that subsequent criteria, such as Aquinas’s divine
justice, Rousseau’s general will, or Kant’s categorical imperative, succeed and fail in
classifying injustice only insofar as they incorporate the success or failure of
Aristotle’s criteria.

A. Plato’s Shadow: Injustice as Disharmony

“[A] harmony is something invisible, without body, beautiful and divine in the attuned
lyre, whereas the lyre itself and its strings are physical, bodily, composite, earthy and
akin to what is mortal.” (Phaedo 85e – 86a) In comparing order in the soul (ψυχή) or in
the universe (κόσµος), to the perfectly tuned lyre (cf. Laches 188d), Plato suggests that
there is only one state of being perfectly tuned, but infinite states of being un-tuned.
Similarly, there is only one state of a body in perfect health, but infinite kinds and
combinations of illness (Meno 72d; Republic 4.405d – 06b); only one state of a soul, or a
city, that is perfectly just, but infinite ways for them to be unjust (cf. R. 4.445c).

The classical model can be imagined as placing justice as a fixed point at the centre
of a sphere. That fixed centre represents the perfectly just society.25 By contrast, the
infinite points filling the surrounding area represent the endless real and hypothetical
varieties of unjust societies, some relatively more just as they approach nearer to the

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25 The concept of “society” in this context can translate πόλις (polis), meaning “city-state,” but also πολιτεία (politeia),
which Plato and Aristotle use to mean “constitution.” Plato’s Greek title for The Republic is indeed πολιτεία, the
English deriving, and maintained through tradition, from Cicero’s Latin phrase res publica. See, e.g., PLATO, THE
centre, others relatively less just as they move further away from it. Justice is then seen to function as the solution to problems of injustice, indeed as the single explanation and disposition of them. It lends pristine unity to the endless and murky diversity of injustices, infusing order into chaos.

There is nevertheless some irony to that metaphor of justice at the centre of a conceptual sphere. The centre of a sphere is a single mathematical point, infinitely, hence vanishingly small. It has no substantive content—not an impressive showing for the ultimate reality of justice. It suggests an illusory quality to any corresponding ideal of perfect and eternal justice. The sphere contains relatively greater or lesser degrees of justice, but perfect justice remains elusive. Contrary to what one might suppose, Plato seems by no means unaware of that defect, or irony, in the classical concept. He suggests as much through his reminders that ideal justice probably cannot be attained. (R. 9.592b) He avoids any precise definition of justice, preferring only to describe various elements that would be conducive to it. (e.g., R. 4.432b – 443e) Moreover, the Form of Justice is not Plato’s only way of invoking ideal justice. Equally prominent are his various “golden age” scenarios of perfect justice, so extravagant as to leave a strong impression that the notion of the pervasively just regime remains in the realm of fantasy. (e.g., Statesman 268d – 74; Laws 4.713b – e). In Part III.B below, I shall argue that such an insight is crucial when we turn to similar “golden age” scenarios depicted, with similar irony and scepticism in Western literature of early modernity.

Plato, then, may be under no illusion about the questionable status of the concept of justice. The broader Platonist tradition, however, and much of Western thought,

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26 Plato and Aristotle comment extensively upon better and worse forms of constitutions. (e.g., R. 8.543a – 569c; Pol. 2.1 – 6.8).
nevertheless mirror that classical model of justice, in which justice is one and unified—in
contrast to injustice, which is depicted as varied and divergent. For Augustine, the
earthly society (civitas terrena) can take countless forms, but the realm of divine law
(civitas dei) only one.27 For Aquinas, the eternal law (lex aeterna), God’s justice, is only
one and is eternal, while human law (lex humana) is changeable, with endless and
conflicting varieties.28 Dante’s Paradiso, proceeds on a single course of, so to speak,
ever grander “tuning,” as all souls in heaven converge within a perfectly harmonised
unity; meanwhile, his Inferno is a cauldron of division and cacophony, as the souls of the
unjust, not only suffer, but also perpetuate Hell’s endless variety of torments.29 Hobbes
provides detailed counsel to the sovereign organ, seeking to perfect that institution into
something supremely unified30, without which humanity is plunged into disunity and
divergence so absolute as to result in the unmitigated “war of every one against every
one.”31

After the 17th century, once post-Hobbesian contractarian theories gain greater depth,
a variation emerges, albeit still under the Platonist shadow. No longer does some
substantively fixed perfection represent ideal justice. Instead, justice comes to be
distinguished by procedural components. Justice no longer emerges out of a model of
static perfection. It now acquires a constitutional dimension. Its crucial elements are the

29 DANTE ALIGHIERI, LA DIVINA COMMEDIA (A. M. Chiavacci Leonardi, ed. 2007). The importance not only of a poetic
vision of justice, but of political and legal institutions, to Dante’s thought is confirmed in De Monarchia, in which the
reconciliation of divine and human justice is sought. See DANTE ALLEGHERI, ON WORLD-GOVERNMENT (De
Monarchia) (Herbert Schneider, trans. 1949).
30 THOMAS HOBBES, LEVIATHAN chs. 22 – 30 (J. C. A. Gaskin, ed. 1998).
31 Id. at ch. 13.
deliberative, transparent, more-or-less flexible *procedures* for adopting and applying law (although the same could be said of any fundamentally deliberative model of government, reaching even as far back as Aristotle’s (cf., e.g., *Pol.* 8.4), and is not limited only to those based on the more modern social contract theories). For Locke, it is a more constitutionalised form of citizen-based and rights-based law which represents the ideal, and the deviations from that ideal (feudal, aristocratic, monarchical, despotic, absolutist) which represent the defective types. That procedural turn is in evidence, but still reflects an attempt to identify, if not the substantively perfect, then the procedurally optimal regime, with departures from it constituting instances of injustice. Rousseau finds justice only in the univocal “general will” (*volonté générale*), contrary to the disparate and discordant “will of all” (*volonté de tous*). The general will, too, is procedural. It does not, like the city of God, entail a perfect and eternally fixed system of norms. Rather, the general will offers the ideally just way for a community to negotiate and re-negotiate the character or content of its norms and arrangements in an ongoing dialogue. With the advent of modernity, then, and the emphasis on more procedural or constitutionalised models, there nevertheless persists the Platonist image of justice as unity and injustice as disunity.

Also interesting is Marx’s post-contractarian approach. If it is hard to imagine a

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33 See, e.g., *id.* at ch. II (discussing natural rights).
34 See, e.g., *id.* at ch. XVIII (discussing tyranny).
35 Jean-Jacques Rousseau, *Du Contrat Social*, II.iii, in *3 Oeuvres Completes* 371 (Bernard Gagnebin et al., eds. 1964) [hereafter OC].
36 See, e.g., *id.*, I.vii, at 362 (discussing public deliberation).
theorist more hostile to anything resembling Platonist idealism\textsuperscript{37}, it is remarkable that, in Engels’s words, \textit{Das Kapital} explains not “what the thousand year reign of communism will look like” (i.e., as an ideal type), but only “what things will not be like”\textsuperscript{38} (i.e., in terms of the many unjust institutions that are to be overcome, there will not be private property, or a class structure, or militarism), a tendency certainly noticeable in much of the Marxist corpus. Marx constantly documents the endless manifestations and permutations of oppression—injustice—throughout history. However, the precise norms or arrangements of the communist society, Marx’s just society, are assumed only as a loose, guiding ideal, never explained with precision. Marx surely imagines some kind of inclusive, participatory community, which collectively deliberates and embraces norms and arrangements in an ongoing way. If communist society represents humanity’s final stage, an end of history, then it does indeed stand as an ideal form for a just society, in contrast to the long history of successive forms of unjust societies, all unjust in their historically characteristic ways.\textsuperscript{39}

That long Platonist shadow, identifiable in theories otherwise retaining little of Plato, hints at how our theoretical tradition reflects our language. “In-justice,” \textalpha-\textdeltikia, becomes negatively defined not because we lack experience of it, but because there is so much of it, in so many forms, drenched in so much controversy, that it overwhelms us.

\textsuperscript{37} Cf. text accompanying note 44 infra.

\textsuperscript{38} Marx’s \textit{DAS KAPITAL}, writes Friedrich Engels, does not explain “wie es denn eigentlich im kommunistischen Tausendjährigen Reich aussehen werde” [“what the thousand year reign of communism will look like”]. Marx explains only “wie die Dinge nicht sein sollen . . . .” [“what things will not be like”]. Friedrich Engels, Einführung in DAS KAPITAL, in 16 KARL MARX & FRIEDRICH ENGELS: WERKE 216 (Institut für Marxismus-Leninismus beim ZK der SED, eds. 1956).

\textsuperscript{39} That view is famously summarised in KARL MARX & FRIEDRICH ENGELS, MANIFEST DER KOMMUNISTISCHEN PARTEI, in 4 KARL MARX & FRIEDRICH ENGELS 4 WERKE 461, \textit{id}.
Justice, on those classical accounts, enjoys the advantage of unity and coherence, notwithstanding the glaring disadvantage of never having existed. What Plato and Platonism nevertheless bequeath is an understanding of injustice as disunity, disharmony, or discord. There is surely truth to that observation—injustice does seem to include those—but it remains vague. The classical tradition errs in assuming that we can understand the disharmony by locating some concept of justice that will clear it up.

Each classical theory, on its own, mirrors that model of one, ideal justice at the core, surrounded by multiple forms of injustice. However, when we place those classical theories together, it is precisely the opposite image that emerges. Suddenly it is they that form an irreconcilable diversity. In comparison, it is our core sense of injustice, as something immediate and grievous, which seems to provide the more real conceptual core, and something far more palpable than an abstract, infinitely small point. It is that sphere of injustice which we must attempt to understand. Our endless sequence of justice theories, and their infinite modifications and applications, branching out in all ideological directions, create a limitless sphere of points, whose departure from core injustice creates ongoing dispute and uncertainty.

**B. Aristotle’s Shadow: Injustice as Failed Rectifications or Distributions**

How do classical justice theories propose that we overcome the disharmony of injustice, in order to achieve the harmony of justice? Plato and Aristotle provide the first two steps. We have seen that, from Plato and Platonism there emerges the first, whereby it is ideal justice that is designated as that which is real and essential, while injustice is left over as a derivative concept. That is the classical model now being challenged, although (in view
of the partial commensurability of the concepts of justice and injustice) the Platonic understanding of injustice as disharmony certainly does hold some truth.

A second step is taken by Aristotle, and has proved equally durable. It casts a second shadow over Western theory. Of particular interest are “constructive” or “programmatic” theories, which proceed beyond the level of sheer commentary, to recommend comprehensive normative and institutional content. Programmatic theory does not only challenge existing or proposed law or politics, but also proceeds to recommend specific institutional arrangements. Most programmatic theories retain two core Aristotelian elements, however far they may stray from Aristotle on other points. Those two elements Aristotle places under the heading of “special justice” (Nic. Eth. 5.2.1130 b30), and are famously known as “distributive” justice (NE 5.2.1130 b31; NE 5.3) and “rectificatory” (or “corrective”) justice (NE 5.2.1131 a1; NE 5.4).

To be sure, it is not those forms of special justice, but rather “general justice” (NE 5.1.1129 b26 – 1130 a14) that, for Aristotle, embodies justice in the broadest, most inclusive sense. General justice is “complete virtue (ἀρετή) in relation to another.” (NE 5.1.1129 b27) It includes law’s embeddedness in broader social systems of ethics and politics.40 Not all later legal, political or ethical theories will agree with Aristotle on that point. Insofar as much of the history of legal theory nevertheless consists in a search for distinctive characteristics of law, and of its routine, everyday mechanics, the two points from Aristotle that recur throughout the subsequent history of programmatic justice theories emerge in his theory of special justice, with its central components of distribution and rectification.

At the mass, societal, “macro” level, Aristotle identifies, as the objects of a
distribution, “anything . . . that can be divided among members of a community who share in a political system,” including wealth or resources. \(NE\ 5.3.1130^{b}1 – 2 [Irwin]\)

At variance with modern justice theories, Aristotle will exclude from the ranks of such “members” women and slaves. \(Pol.\ 1.3 – 7; 12 – 13\) However, his account of distributive justice is written in formal terms, confirming that an act still counts as a distribution despite any disagreements on the criteria used to decide what makes it just, e.g., regarding those who participate or benefit. Aristotle claims that “if the people involved are not equal, they will not [justly] receive equal shares.” \(NE\ 5.3.1131^{a}22 – 3 [Irwin]\) That formula can indeed apply such that two citizens receive equal shares of a distribution from which slaves, as unequals, are excluded. But it can just as accurately mean, in modern contexts of taxation and redistribution, that, for example, all adult nationals and legal aliens count as citizens for the sake of the distribution, but not dependent minors or illegal aliens; or all adult nationals and legal aliens earning below, but not those earning above, some specified annual income. By contrast, as to rectificatory justice, at the more “micro” level of parties involved in specific transactions, which can be “both voluntary and involuntary” (our traditional principles of contract and tort providing some close analogies), the aim is “to restore . . . to equality” a harm done by one party and suffered by another. \(NE\ 5.3.1132^{a}4 – 7 [Irwin]\)

If we consider recent liberal theory, we see how those two elements of law, distributions and rectifications, continue to form the very core of programmatic justice theories. We find, for example, two leading theorists, John Rawls and Ronald Dworkin, who, between them, deliver precisely those two components of special justice: Rawls devises a “theory of justice” focussed upon the problem of distribution of resources

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40 See, e.g., DAVID BOSTOCK, ARISTOTLE’S ETHICS 54 – 8 (2nd ed. 2000).
throughout society as a whole; Dworkin’s inaugural texts focus on adjudication, justice through the framework of lawsuits, indeed generally along the familiar, bi-polar model of rectificatory justice.

We can certainly examine or postulate positive legal systems lacking adequate regimes of distributive or rectificatory justice. We cannot, however, easily imagine programmatic justice theories that would lack foundations or proposals for them. Classical theories reflect Aristotle in prescribing just distributions and rectifications, diverging only in how that justice is determined. Even writers making no extensive reference to Aristotle seem to work out the institutional details of justice in ways that render just distributions and rectifications decisive for their projects. Rousseau’s “general will” or Kant’s “categorical imperative” certainly reflect Platonism, insofar as justice is conceived as single and unified. However, they also reflect Aristotle, insofar as they aim to provide procedural contexts within which fair distributions and rectifications are ascertained and held to account.

What distinguishes other programmatic theorists from Aristotle, then, is not that they reject distributive or rectificatory justice, but that they propose different criteria for the distributions and rectifications. Marx again provides an outstanding comparator, as he aims to surpass the methods and lexicon of the classical philosophical tradition. In fact, he effectively recapitulates Aristotelian “special justice.” Although Marx describes

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41 See John Rawls, A Theory of Justice (2nd ed. 1999).
42 See Ronald Dworkin, Taking Rights Seriously (1977); Ronald Dworkin, Law’s Empire (1986).
43 Kant famously performs that task at great length. See text accompanying note 19 supra.
44 See, e.g., Karl Marx, Kritik des Gothaer Programms, in 19 Karl Marx, Friedrich Engels: Werke 15 – 24, supra note 38.
perfected communism only in general terms\textsuperscript{45}, it can hardly forego fundamental
distributive and rectificatory justice, even if it would radically re-define them, having
overthrown capitalist means of achieving them. When Marx cites Louis Blanc’s maxim,
“From each according to his ability, to each according to his need!”\textsuperscript{46}, he adopts a rule for
justice in squarely distributive language. How Marx would approach rectificatory justice
is less clear, as he avoids providing sufficient detail about what counts as properly
individual interests once property and means of production are collectivised. Yet the idea
that we would be left utterly bereft of any kind of individual justice (even one, for
example, that would use education instead of a penalty as a remedy) would seem
implausible, and far too utopian for a thinker who otherwise ridicules utopian theories.

Aristotle, on Blanc’s formula, would impute the less valued “ability” to a slave,
while Marx, at the other extreme, would abolish slavery outright. Aristotle would
distribute much of the city’s land into the private holdings of male, citizen, heads of
household; Marx would abolish private property, male-citizen privilege, and even private
families, altogether, subjecting land instead to universal distribution, not through private
ownership, but through communal use, according to individuals’ needs and to their
abilities to keep the land productive. Marx, and \textit{a fortiori} less radical theorists, may
change the terms of distribution and correction, but in no way eliminate them; they
remain guiding principles for Marx’s views of justice and injustice, or, to use his less
classical vocabulary, domination and oppression. (Departures from prevailing concepts
of justice, which might cast doubt upon Aristotle’s precepts, can be found in such writers
as Foucault or Derrida. Unlike Marx, however, those writers shun any alternatives that

\textsuperscript{45} See text accompanying note 38 \textit{supra}.

\textsuperscript{46} (“Jeder nach seinen Fähigkeiten, jedem nach seinen Bedürfnissen!”), \textit{MARX, supra} note 44, at 21.
If the various programmatic justice theories all require just distributions and rectifications, why would they fail to provide adequate concepts of justice or injustice? Why not define injustice as the lack, or failure, of distributive justice, or of rectificatory justice, or of both—a failure caused either through application of the wrong criteria for distributions and rectifications, or through misapplication of the right ones? The problem remains that the great divergence of theories may certainly leave the core elements of distributive and rectificatory justice intact, but also leaves them as empty formulas, devoid of practical content. They assure us that we need distributive and rectificatory justice, but they diverge on what those kinds of justice require.

C. “To each his own”

One major thinker does challenge Aristotle’s concepts of special justice, arguably before they have been fully elaborated, and that is Plato. Early in The Republic, the interlocutor Polemarchus cites the Athenian poet Simonides as saying, “it is just (δίκαιον) to give to each what is owed to him.”\(^{47}\) (R. 1.331e) That account, later captured in the Latin maxim suum cuique ("Jedem das Seine," “to each his own”), entails the kinds of distributive and rectificatory concepts that Aristotle will explore in detail. Ultimately, the whole of The Republic’s ideal polis will be concerned with discovering what each individual should have, do, or expect—and in that sense what is “owed” to each. (R. 4.433b, e)

That, however, is the enquiry Polemarchus fails to undertake. Polemarchus

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\(^{47}\) Although Plato’s ideas are generally seen as emerging earlier, basic concepts of distributive and rectificatory justice are persuasive precisely because they correspond to ordinary intuitions and to everyday legal norms and practices. Cite some commentary. See, e.g., JULIA ANNAS, AN INTRODUCTION TO PLATO’S REPUBLIC 24 – 6 (1981)
construes “give to each what is owed to him” in the conventional sense of performing contracts, paying debts, punishing crimes, and the like, wholly within the context of existing economic, political and legal circumstances. That definition is certainly not to be dismissed lightly. Like Aristotle’s concepts of distributive and rectificatory justice, which are forms of “to each his own,” such a maxim characterises much of what the law is and does. But Polemarchus imagines no critical examination of the broader socio-political regime within which such acts arise. In tyrannical or oligarchic regimes, “give to each what is owed to him” would be the very recipe for injustice. It would merely assure that arbitrarily obtained power and wealth are preserved and perpetuated.

On a reformed reading (eliminating, for example, the obvious problems of slavery or subordination of women), Aristotle might be said to avoid such abuses, insofar as he situates special, i.e., distributive and rectificatory, justice within a regime of virtue-based general justice, and within a republican, citizen-based polis. (Pol. 7.1 – 14) However, Plato’s suspicions reach further. What he distrusts is a concept of justice so fundamentally focussed upon the allocation of material goods, however fair that allocation purports to be. Insofar as The Republic’s programmatic entail distributive or rectificatory justice, it is within a context in which private property has already been abolished, at least for those who hold any political power. (3.415d – 4.421c) The maxim “to each his own,” albeit still formally applicable to such a regime, substantively results in maintaining a status quo of collectivised interests. It loses the assumption of pervasive determination of individual rights or interests.

At best, then, “give to each what is owed to him” begs the questions, “What should be owed to whom? Which regimes of rights, duties, property, etc. should be adopted in
the first place?” It remains an empty maxim for justice until such terms have been clarified. When Plato does give it substance in *The Republic*, he imagines a society so liberated from the values of commerce as to make the words “give to each what is owed to him” sound, not technically false, but too mercenary to be accepted at face value. By comparison, Blanc’s and Marx’s, “From each according to his ability, to each according to his need”\(^{48}\) certainly represents one instantiation of “to each his own,” albeit within the expressly articulated context of collectivised property.

Far from endorsing Polemarchus’s contribution, even as a rough starting point, Socrates roundly refutes it with arguments (*R.* 1.331e – 336b), which, even if they can be rebutted through replies subtler than any that Polemarchus musters, still underscore the need for a critical understanding of the broader social and political arrangements, without which the maxim’s truth remains unsatisfactory. Nevertheless, if Plato and Aristotle do both ultimately adopt their own regimes of “to each his own,” however moderate (in Aristotle’s case) or radical (in Plato’s case), they may be; if they merely differ on the correct criteria as to what counts as everyone’s “own,” as many political philosophers differ from each other on such particulars, why would Plato reject the whole idea, at least in the purely formal version stated by Polemarchus? Why not just agree with Polemarchus, then proceed to enquire into the meaning of “to each his own” under his own vision of collectivised property? Why so misleadingly suggest that the rule is altogether wrong?

**D. “The just is equal”**

In Chapter 5.5 of the *Nicomachean Ethics*, directly following the chapters on distributive

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\(^{48}\) See text accompanying note 46 *supra.*
and rectificatory justice, Aristotle points to an answer. He speaks of a further concept of justice, called “reciprocity” in the exchange of goods and services. (NE 5.5.1132b32) Reciprocal justice is embodied par excellence, albeit not exclusively, by money: “[A]ll things that are exchanged must somehow be commensurable. It is for this end that money (νόµισµ[α]) has been introduced, and it becomes in a sense an intermediate (µέσον); for it measures (µετρεῖ) all things . . . .” (NE 5.5.1133a18 – 20; cf. Pol. 1.9) Aristotle does not merely recognise, but positively praises reciprocal justice, and money as its exemplary tool, indeed as a crucial means by which “the city holds together.” (NE 5.5.1132b34)

On few points could Plato and Aristotle differ more robustly. In The Republic, Plato admits currency and trade, for purposes of meeting basic needs. (R. 2.371b) However, he condemns commerce that extends further, to sheer accumulation or consumption of ever more material goods.49 (R. 2.372e – 373c, cf. 4.416d, 5.464b – c) The Republic is pervasively constructed to avoid a legal regime primarily driven by, and engineered to support, the dictates of the market. (R. 4.425c – 426a; 426e) Aristotle certainly does not favour unlimited accumulation of property or wealth (Pol. 1.9). But he sees management of wealth more as a skill to be cultivated (NE 4.1) than as a necessary evil to be kept to an absolute minimum. The problem with Polemarchus’s maxim “to each his own” is not that Plato imagines no role whatsoever for distributions or rectifications. The problem is that Polemarchus—son of the merchant Cephalus, who, not being an Athenian, has engaged in none of the activities of citizenship, but instead has made his life in Athens by accumulating wealth, indeed through selling arms—has cited a formula steeped in

49 [reference deleted for peer review]
50 ANNAS, supra note 47, at 23 – 34.
values determined not by collective, social welfare, but only, indifferently, by profit-driven commerce. (In a swipe at Cephalus and his family, *The Republic* explains offensive warfare as something decadent, undertaken for purposes of accumulating more property than we need to live well or justly. (*R.* 2.373d – e))

It is not merely wealth as an object of legal regulation that is key here, but rather Aristotle’s descriptions of distributive, rectificatory, and reciprocal justice, such that all things can be assigned precisely measured values, rendering them infinitely, indifferently, interchangeable. On a larger scale, that notion recalls the concept of “being as presence,” “Sein als παρουσία, Anwesenheit,” which Heidegger will trace back to Aristotle, and will deem altogether foundational to the worldview associated with European modernity. 51

Two millennia later, Descartes will theorise all of time, space and matter as measurable precisely in terms of universally fungible, interchangeable points, by which the uniqueness, the irreducibility of any thing in space, or of any moment in time, can be bypassed, and can be rendered superfluous for practical purposes. 52 One is reminded also of the famous frontispiece to Hobbes’s *Leviathan*, in which the monarch’s body is composed of countless, faceless and interchangeable points—each one a human being. 53 Such images of human beings and affairs reduced to indifferently interchangeable and empty shells will continue to haunt Western modernity into our own time, as witnessed, for example, in George Grosz’s works *Metropolis* 54 or *Republican Automatons* 55.

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52 See, e.g., *id.* at 89 – 101.
53 Reproduced by Prof. Sam Basu, Willamette University, available at http://www.willamette.edu/~sbasu/poli212/leviathan/LeviathanFrontispiece.htm (visited 11-Dec-10)
Those Cartesian points in space and time eerily perform the same function as does money for Aristotle. One point on graph $X$ equals, *qua* sheer abstract point, any other point. Within that Cartesian scheme, what reduces space and time to their supposed essence, and simultaneously makes them technologically useful, is that process of abstracting them from their uniqueness, and rendering them into equivalent, infinitely interchangeable “points.” Justice, space, time, matter—ultimately everything we can experience in the universe—all fall under our apprehension and control by becoming objects of measurement. They function as money does. Money is valuable not primarily in itself (particularly today, when it is a sheer token of credit, bearing little inherent worth through the paper or metal used to make it), but through its ability to render any two sets of things, however distinct, functionally comparable and interchangeable. Justice is achieved through precise but fungible, universally indifferent, measurements of value.

“[A]ll goods must have a price set on them; for then there will always be exchange, and, if so, association (κοινωνία).” (*NE* 5.5.1133α29 – 30) In Aristotle’s slave-holding society, as in our own globalised world of human trafficking, even human beings are not beyond being bought and sold.

If the point were simply “money is at the root of all evil,” the insight would hardly be new. It would reject Aristotle’s view of justice, but without explaining why it is that his notion of law, like our own, deems money so central. For Aristotle, currency (νόμισμα) arises from usage and custom, as part and parcel of, indeed as a paradigmatic embodiment of law (νόμος). (*NE* 5.5.1133β14 – 15) Money, not merely or primarily as

accumulated private wealth, but above all as the tool of assigning value and exchanging things accordingly, becomes not, as for Plato, a problem for society. Rather, as long as we adhere to distributive and rectificatory justice, consisting of precise measurement (μέτρον) of value, money becomes absolutely essential to society as community or “association” (κοινωνία): “Money (νόμισμα), then, acting as a measure (μέτρον), makes goods commensurate and equates them; for neither would there have been association (κοινωνία) if there were not exchange, nor exchange if there were not equality, nor equality if there were not commensurability.” (NE 5.5.1133b15 – 18) Law achieves justice through the currency of measurement, as that without which there would be no community. On Aristotelian logic, in-justice, ἄ-δικία, must be the binary opposite—the mis-measurement by which community ultimately breaks down altogether. Measurement or “the measure” (μέτρον) defines not only reciprocal, but also distributive and rectificatory justice: “in any kind of action in which there is a more and a less there is also what is equal (ἴσον). […] And since the equal is intermediate (μέσον), the just will be an intermediate.”56 (NE 5.3.1131a13 – 14)

From such observations, it would be easy to make a familiar move. It would be easy to chastise Aristotle for making measurement essential to law, and money essential to measurement. Aristotle could then be charged with collapsing human life into sheer commodity, abandoning those selfsame community values that his notion of general justice would appear to foster. In keeping with a particular 20th century approach, we could even go so far as to decry that strand of Aristotelian abstraction for—as such analyses usually run—lying at the very root of all that has gone wrong within alienated,

56 Cf. Irwin’s “fair” (ἴσον), capturing an alternative sense of CWA’s expressly quantifying concept of “equal.”
disintegrated, materialist, consumerist, de-sacralised Western civilisation.

The crucial train of reasoning, however, is not that Aristotle makes measurement essential to law, and then money essential to measurement. Rather, he deems measurement essential to law, as specially exemplified, but by no means exhausted, through money as a tool of measurement. In other words, it is not money as such, but, more fundamentally, measurement that drives the norms and procedures of “special justice,” and that undergirds programmatic theories of justice right through to Rawls and Dworkin. Money certainly stands as an exemplary way in which measurement is performed; but money qua money (abstracted from any inherent value of a piece’s face value as sheer metal) serves no function other than measurement. It is not measurement that exists for the sake of money, but money that exists for the sake of measurement. Measurement, for Aristotle, comes to underlie not only positive law, but all of justice and all of ethics,

There are three kinds of disposition, then, two of them vices, involving excess and deficiency and one an excellence, viz. the mean (µεσότητος), and all are in a sense opposed to each other; for the extreme states are contrary both to the intermediate state and to each other, and the intermediate to the extremes; as the equal is greater relatively to the less, less relatively to the greater, so the middle states (µέσαι) are excessive relatively to the deficiencies, deficient relatively to the excesses, both in passions and in actions. (NE 2.8.1108b 12 – 19)

Even matters rarely subject to formal legal procedures accord with justice through a
principle of correct measurement, or proportion ("sym-metry," σῦμμετρία, i.e., σῦμ-μετρία, in the etymological sense of “measuring together”), represented by the “mean,” which is “intermediate” (μέσος) between extremes of excess and defect,

[A]s we see in the case of strength and of health . . . both excessive and defective exercise destroys the strength, and similarly drink or food which is above or below a certain amount destroys the health, while that which is proportionate (σῦμμετρος) both produces and increases and preserves it. So too is it, then, in the case of temperance and courage and the other excellences. (*NE* 2.2.1104a12 – 19)

I challenge Aristotle’s distributive, rectificatory and reciprocal justice not because he may be wrong about measurement as the essential element of justice, but because he may be right about it. If he is, measurement may well exemplify justice once we all agree on what justice is. Until then, disagreements about justice mean that measurement is constantly being used to achieve results that may not be just at all—that may be altogether unjust. That problem must be examined in the remainder of this article.

**III. Injustice as the Limit of Harmony and Measurement**

Aristotle’s concept of justice explains not only decisive elements of any programmatic justice theory, but also the operation of norms and processes within existing legal systems. Those are no small achievements. The concept of justice nevertheless continues to generate disagreement and conflict. Injustice certainly does arise, *assuming* some given system of legal norms, from applications of the “wrong criteria” of
measurement, or from the wrong applications of “the right criteria.” However, no serious examination of injustice can merely assume legal norms to be “given.” The grosser the injustice, the more the Aristotelian notion of measurement exposes its limits. The injustices of Auschwitz are scarcely illuminated, in any non-trivial way, by calling them the “application of a wrong measure.”

One problem with examining that conflict is that clashes of worldviews never emerge out of conventional legal materials. It is a commonplace that even a case report for a highly controversial dispute—as might be decided, for example, by the International Court of Justice, the European Court of Human Rights, the US Supreme Court, and a fortiori lower or more ordinary courts or tribunals—can reflect only those elements of the clash which can be translated into the recognised norms of the system. For example, in the US Supreme Court case of Edwards v. Aguillard, concerning a Louisiana law requiring that creation science be taught alongside evolution, it is not the full-blown merits of empirical versus theological world views that the Justices examine (or have any calling or competence to examine). The Court reviews only the question of the law’s compatibility with a norm, the Establishment Clause of the First Amendment, within a legal order otherwise formally accepted by the litigants. If any party objects to the entirety of the legal order, such an objection becomes irrelevant, as is any argument not specifically concerning the Establishment Clause or other law relevant to the litigation.

If case reports, in which disputes emerge in sharp relief, fail to reflect any clashes of justice theories outside our already established and compulsory framework, which materials fill that gap? The law and humanities movement sheds light on that problem. The movement has shown that works of fiction can illuminate law in a variety of ways.
In some cases, of course, literary texts do promote a deeper appreciation of social conflicts arising within the bounds of established law.\textsuperscript{58} Older works can also illuminate problems of legal history.\textsuperscript{59} In other cases, the texts provide models for specific modes of legal, particularly judicial, thought and writing.\textsuperscript{60} Within the context of legal theory at issue here, the advantage of fictional texts will be their ability to mirror political, ethical or legal controversies, which, unlike disputes recorded in case reports, are not formally bound to the norms of any legal system, and often specifically invite contemplation of alternative legal norms or regimes.

\textbf{A. Antigone: Conventional versus Critical Perspectives}

The Antigone story\textsuperscript{61} has long been read as representing the standoff between positive and natural law.\textsuperscript{62} (e.g., \textit{Antig. sc. 2}) Polyneices, Antigone’s brother, had been barred from his share of power by his brother Eteocles. In retaliation, he has lead troops against the family homeland of Thebes. The brothers kill each other, leaving their uncle Creon on the throne. As it is Eteocles who has defended Thebes, his body receives full interment rites. Antigone insists upon a burial for Polyneices, too, in accordance with religious requirements. Creon forbids it, on grounds of Polyneices’ treasonous war. After Antigone disobeys, Creon sentences her to death.

The clash can be interpreted in various ways. On the one hand, it is possible for an

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\textsuperscript{58} One popular example is \textsc{André Dubus III}, \textit{House of Sand and Fog} (2001).
\textsuperscript{59} See, e.g., \textsc{Ian Ward}, \textit{Shakespeare and the Legal Imagination} (1999).
\textsuperscript{60} See, e.g., \textsc{Dworkin}, \textit{supra} note 42 (1998).
\textsuperscript{61} Citations of Antigone refer to \textsc{Sophocles}, \textit{The Three Theban Plays} (Robert Fagles, trans., London: Penguin, 1984).
\textsuperscript{62} See, e.g., \textsc{G.W.F. Hegel}, \textit{1 Ästhetik} 217 – 8, 448 (4\textsuperscript{th} ed., Berlin: Aufbau, 1984). See also, e.g., \textsc{Wayne Morrison},
individual like Antigone to accept the prevailing legal order in general, dissenting only on one point. It is often in that light that the problem of civil disobedience is presented. \((Cri. 50d – e)\) Such a case could be called “limited civil disobedience.” Beyond the bounds of the dispute, the background, positive legal order is generally accepted. By analogy, Dr Martin Luther King never preached general rebellion against American law or government. He enthusiastically praised core American values\(^{63}\), insisting only that they be applied on their own expressly egalitarian terms, and not be betrayed through discriminatory application.\(^{64}\) Antigone’s predicament resembles a familiar “hard case,” the only difference being that, in the Dworkinian hard case, each of the opposed positions finds persuasive support in positive law. By contrast, insofar as \emph{Antigone} is read only as a case of limited civil disobedience, that is true only of Creon’s position, which represents positive law. Antigone’s views have no such basis, being rooted solely in a moral code. Hence the play’s traditional reading as a standoff between positive and natural law.

A second kind of clash is weightier, namely, where the very legitimacy of the background political and legal system is challenged. That is what Polyneices does in waging war on Thebes. It is what revolutionary figures, from Marx, to Malcom X, to Ayatollah Khomeini, would advocate in our own time. The question as to whether, or the degree to which, the conflicting parties in such disputes represent genuinely contrasting views of justice, and the degree to which they merely seek power grabs, is complex and

\(^{63}\) See, e.g., Martin Luther King, Jr., \emph{The March on Washington Address}, in \emph{Classics of Moral and Political Philosophy} 1209 – 11, 1210 (Steven M. Cahn, ed. 2002) (praising “the magnificent words of the Constitution and the Declaration of Independence”).

\(^{64}\) \emph{Id.}
often subjective. As Machiavelli observed, the most brutal power grab can gain the semblance of legitimacy over time by garnering popular approval; conversely, a regime accepted as legitimate from the outset can lose legitimacy by squandering public support. Few sides of any political conflict can be classified in all-or-nothing ways as either “solely justice-based” or “solely power-driven.”

Antigone’s dilemma arises out of the more complex web of Theban myths, including in particular that of her father Oedipus. These stories were adopted in various renditions, by various poets, not only in Greece, but in Rome, and again in early modern Europe. By the 17th century, the Theban cycle particularly came to symbolise ever-loomming questions of political legitimacy, a crisis perpetuated when the crown passes within the blood line to Creon—Oedipus’s uncle through his mother Jocasta, and then brother-in-law after his mother becomes his wife. Certainly by the time of Sophocles, which is also the age of Socrates and the Sophists, ongoing debates about the foundations and legitimacy of any political power, and about whether democracy claims greater legitimacy, provide a context within which the problem of legitimacy comes to be represented by a congenital “curse,” a spectre of illegitimacy, haunting a power that rules by lineal descent. Hence Antigone’s defiance of “the good fortune of kings, / Licensed to say and do whatever they please.” (Antig. sc. 2)

65 See Niccolò Macchiavelli, Il Principe chs. VIII – IX (Giorgio Inglese, ed., Turin: Einaudi, 1995). The idea persists in early modernity, e.g., around historical reflections on improved conditions in Rome under Augustus, or degenerated ones under Nero. See, e.g., Pierre Corneille, Cinna, in 1 Œuvres Complètes 4.3.1247 – 8 et passim (Georges Couton, ed. 1987); Jean Racine, Britannicus, in 1 Œuvres complètes 1.1.25 – 34 (Georges Forrestier, ed. 1999).


67 Symbolic references to royal or imperial incest as means of casting doubt on the legitimacy of a regime are not infrequent throughout history. See, e.g., Herodotus, Histories 3:31 (Robin Waterfeld, trans. 2008).

68 See generally, Bié, supra note 66.
Even if Polyneices represents merely a violent challenge to the existing order, undertaken not in the interest of justice, but only of personal power, Antigone wages a more principled, ethical challenge. She certainly undertakes a limited civil disobedience, if we assume that her aims reach no further than the appropriate burial for her brother. On the other hand, she is no Martin Luther King. She never praises the existing order as such, never merely asks that it be more fully realised. By opening the door to disobedience based on ethical principle, Antigone heralds the possibility of more thoroughgoing challenges to the legitimacy of the regime as a whole. To that extent, her challenge becomes more than a conflict of natural *versus* positive law within an otherwise neutral order. Creon’s sentence of death upon Antigone for her disobedience, leaving aside the positive-law or natural-law justice of the substantive norm (and, after all, the dispute is a “hard case” precisely because the denial of burial to a violent traitor, if problematical, is not altogether outrageous), relies for its legitimacy upon the legitimacy of Creon’s own position of power.

We must look beyond the justice or injustice of the death sentence “on the society’s own terms,” because, within the Theban cycle, it is precisely the foundations of power in that society that are in question. (An alternative way of making that point is to say that any society’s “own terms” always include the actual engagement, or the latent possibility, of a critical stance towards that society’s norms, principles or foundations.) If Antigone’s execution is an injustice, it is not primarily because of the illegitimacy of Creon’s specific edict concerning Polyneices, but because of the questionable legitimacy of the regime and the ruler pronouncing it. Importantly, as the text never tires of repeating, Creon’s authority is challenged insofar as it binds Antigone, who, as a woman, retains a
diminished status in the political community. Antigone rejects her sister Ismene’s admonition, “We are only women . . . The law is strong” Antig. Prol.) Antigone resists a regime in which she has no say, not only because it is monarchical, but because she is not even a male subject of it.

Antigone might at first appear to leave us with nothing more than an aporetic “hard case,” insofar as we uncritically accept the background regime as fixed or uncontested, and, within it, Creon’s legal and Antigone’s moral claims as “equally weighed.” Above all, however, injustice in Antigone arises from the incommensurability of Creon’s regime with the spectre of its own illegitimacy, awakened by a woman who challenges it. On that reading, injustice is not merely, as classical theory would have it, the result of a disharmony, nor merely of a wrong norm (or “measure”) being applied. Injustice arises from the crisis of law and legitimacy itself—a crisis of the very means of ascertaining any uncontested harmony, any uncontested measure of justice—which renders suspect any edict of such heavy moral significance, let alone one entailing Antigone’s death. There would nevertheless be a problem in proclaiming Antigone altogether right, in view of the real harm Polynoeices has caused to Thebes. What would constitute justice, then, is far from clear. Yet the injustice of Antigone’s death is manifest.

A regime’s ethical foundations are called into question when there are no obvious means of arbitrating between two or more competing models of the political or legal order, based on different notions of legitimacy. Incommensurability between justice and injustice, and among various justice theories inter se, arises not merely because of disagreements on political, ethical, economic, legal, sociological or cultural norms, but because of disagreements about what even counts as an appropriate political, ethical,
legal, or, concomitantly, economic, sociological or cultural element, and what relationship should obtain among those elements. As a result, in any specific dispute, that clash about theories or visions of justice mirrors a clash about the criteria, i.e., the measures of justice that can be applied, even if the disposition of the dispute within any positive law must suppress any reference to norms not recognised within that system.

B. *Macbeth: Law and Power*

Clashes in conceptions of justice emerge conspicuously within societies confronting sudden or rapid change. Emblematic of Attica in the age of Plato and Aristotle is the decline from its “golden” fifth century. Athens had risen meteorically as an economic, military and maritime power. Her legal system had required fundamental shifts to accommodate an increasingly robust, trade-based, indeed consumerist economy, with its inevitable shifts towards increased, and more complex, contractual and financial transactions. From Plato’s perspective, it is the legal system’s pervasive support for transactions in pursuit of individual enrichment, at the expense of community cohesion, that leads to Athens’s military, political and economic undoing. (cf. *Republic* 8.562b)

We must not exaggerate historical comparisons over great stretches of time and culture. Nor, however, can we overlook some similar upheavals that herald the West’s transition from medieval feudalism into political, commercial and legal modernity. That transition certainly emerges in philosophical writings of early modernity, but also in its art. Nowhere is it starker than in Shakespeare, born into a European Renaissance in

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70 [reference deleted for peer review]
71 *Id.*
which those political and economic shifts accompany an already established revival of ancient Greek and Roman thought. Scarcely a play in the corpus fails to record those historical shifts, and the crises of law and justice that they entail.\(^{72}\)

In *Macbeth*, Shakespeare re-visits a type he had already explored in such figures as Bolingbroke (*Richard II, Henry IV, Pt. 1, Henry IV, Pt. 2*), the Bastard of Falconbridge (*King John*), or Edmund, Bastard son of the Duke of Gloucester (*King Lear*).\(^{73}\) Crucial to such characters is that they have long been seen as embodying the emerging politics of modernity. They possess the skills that spur them both precariously to challenge, yet also precariously to rise within an existing political order.\(^{74}\) Plays such as *Richard II* and *King John* are overshadowed by the strategically mythicised memories of a bygone “golden age” of justice, represented, respectively, by the worlds of Edward III (*R2*, 1.2.17; 2.1.40 – 66) and Richard the Lionhearted (*Jn.* 1.1.85 – 9, 134 – 45, 160 – 2, 167). Shakespeare, in one sense, adds *Macbeth*’s murdered, “virtuous” King Duncan (*Mac.* 1.7.18) to those ranks. I shall argue, however, that he does so ambiguously, and, in so doing, invites us to look more closely at the legends shrouding Edward III or Richard the Lionhearted. Those mythically harmonious worlds turn out to play roles similar to Plato’s deliberately and ironically mythologised “golden ages,” which serve more to challenge than to promote notions of ideal justice.

On a surface reading, Macbeth’s brutal murders appear as manifest injustice. Like

\(^{72}\) See generally, e.g., *Ward, supra* note 59.


\(^{74}\) Rackin and Ward, for example, examine such characters with reference to Renaissance Machiavellianism. *Ward, supra* note 59, at 35, 39 – 44; *Phyllis Rackin, Stages of History: Shakespeare’s English Chronicles* 54 – 55, 62, 66 – 8, 72 – 6 (1990). See also *Terry Eagleton, William Shakespeare* ch. 1 (1986); *Jonathan Dollimore,
Antigone’s disobedience, they breach existing norms of positive law. The only question usually posed is, why does he commit them? Answers might range from the fallen state of man, to the supernatural powers of the “weird sisters,” to psychoanalytic theories of Macbeth’s unconscious drives.\(^{75}\) As with Antigone, the risk of such a reading is that it assumes the background socio-legal order as unproblematical. It seeks to evaluate justice only on that society’s “own terms.” Again, the point of any theory of injustice is that it is precisely the established order which must be examined, and not merely taken for granted as an uncontested background. Literary theory has increasingly observed that we cannot meaningfully put the apparent injustice, or “evil,” of a character like Macbeth on trial without scrutinising the justice or injustice of that background regime.\(^{76}\)

As \textit{Macbeth} opens, the regime boasts a standard veneer of legitimacy. Macbeth praises Duncan’s kingly “virtues” (\textit{Mac.} 1.7.18). The nobles, including Macbeth, declare their loyalty to the regime (\textit{Mac.} 1.4.22 – 7). At a deeper level, however, Macbeth, like Richard III, far from committing injustice by attacking the existing order, draws the society’s own socio-political premises to their logical conclusion.\(^{77}\) Those premises are clear enough. (a) The king Duncan rules, as does Creon, solely through the privilege of lineal descent; and (b) that privilege of monarchy through lineal descent can be maintained only through brute force (however individually “virtuous” may be those who gain power through it).

\(^{75}\) For an example of an essentially “private,” de-politicised analysis of Macbeth’s character, see, e.g., Kenneth Muir, “Introduction,” in ARD2 xiii – lxv, at xliii – lxii. Some recent criticism continues to maintain that focus. See, e.g., 
\(^{76}\) See generally, e.g., DOLLimore, \textit{supra} note 74. See also, e.g., POLITICAL SHAKESPEARE: ESSAYS ON CULTURAL MATERIALISM ch. 1 \textit{et passim} (Jonathan Dollimore & Alan Sinfield, eds. 2\textsuperscript{nd} ed., 1994).
\(^{77}\) That element of Richard III emerges within the context of the first tetralogy. See, e.g., [reference deleted for peer
Macbeth’s injustice, his own exercise of brute force, is no greater than that of Duncan, nor of any other of the noblemen who hold the regime in place. In Stephen Greenblatt’s words, “actions that should have the effect of radically undermining authority turn out to be the props of that authority. […] [M]oral values—justice, order, civility—are secured through the apparent generation of their subversive contraries.” The play may at first seduce us to believe otherwise, namely that the “evil” Macbeth attacks the “good” king. In so doing, it elicits our inclination to notice, and to respond more forcefully to, Macbeth’s immediate and personalised injustice than to the systemic, institutionalised injustice pervading the established order (parallel to the old truth that the dramatic plane crash gets more air time than thousands of routine car crashes). If that naïve reading suggests that Duncan is simply just, and Macbeth simply unjust, a critical reading indicates that Duncan’s injustice merely benefits from that selfsame conventional legitimacy which condemns Macbeth’s injustice.

As Antigone suggests, that socio-critical reading is not an entirely modern innovation. Cicero famously recounts the complaint of the pirate captured and punished by Alexander the Great. Alexander asks him, “What is your idea, in infesting the seas?” The pirate replies, “The same as yours, in infesting the earth! But because I do it with a tiny craft, I’m called a pirate: because you have a mighty navy, you’re called an emperor.” That story’s irony, which asks whether we mean anything more by “justice” than unthinking acceptance of existing power relationships, had already dominated discussions about justice in Plato’s Republic and Gorgias. (R. 1.338b – 2.368b; Grg.)

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79 St Augustine, 4.4 City of God 139 (John O’Meara, trans. 1984).
Certainly, one of the great Shakespearean questions is, “What drives Macbeth?” That question assumes Macbeth to be distinctly pathological, not because he wages violence on a peaceful, harmonious world, but because his failure to use violence in the way everyone else uses it makes him, superficially, seem violent in a way that the others are not. Yet audiences remain incorrigibly less inclined to ask, “What drives Macbeth’s society?” In the same way, the mass media today will noisily cover high-profile common criminals, yet have no comparable practice of assessing the established order as such. Our daily headlines read, *Paedophile Free To Work In Local School* and not *The Existing Socio-Political Order Singled Out For Serious Contemplation*. Ordinary legal practice recapitulates that pattern. Lawyers go to court to argue about the paedophile, not to argue about the existing socio-political order.

Some poets merely follow suit. The isolated, random injustice—or rather, the injustice which can be presented or mediatised as such—generates the more gripping surface drama. Other artists, however, exhibit the imbalance between our attention to the random event and our attention to the systemic forces underlying it. Those forces reveal more about injustice than we can learn from events treated in isolation—events put “on trial.” My aim is not simply to urge that we examine broader social and political forces. That suggestion is old, beginning in antiquity, with political theory itself, and augmenting with the “sociological turn” of the 19th century. Rather, my point has been that any such broad-based examination of law, politics, and society defeats the common intuition that justice and injustice are fundamentally to be understood as binary, mutually

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80 Understanding law and politics with reference to broader social forces becomes central, for example in *Max Weber, Wirtschaft und Gesellschaft* (Johannes Winckelmann, ed. 1972).
exclusive opposites.

A Marxist reading could go further, proclaiming Macbeth not the political villain, but the political hero. He may show no intention of establishing a better regime, but lays bare the contradictions within the existing one. Just as Shakespeare’s notion of “ambition” betokens more broadly the emerging, market world of fierce competition, Macbeth symbolically moves history out of feudalism by exposing, first, the contradiction between monarchy’s mythologised, divine-right legitimacy and the brute force upon which it leans; and, second, the contradiction between monarchy and its own reliance upon the same principle of meritocracy that renders monarchy superfluous. On that view, Macbeth’s, like capitalism’s, failure to create a better regime is unsurprising. The transition merely replaces one set of contradictions with another. Competition replaces divine right, but without overcoming the system’s reliance upon brute force.

That Marxist reading raises, of course, the old Dostoevskyan questions about how much brutality is justified, even if we accept the supposed benefit of “moving history forward.” Imagine that Macbeth were to establish not merely another monarchy, but a republic. Would the murder of one innocent individual, let alone the sadistic massacre of Macduff’s wife and children, be a just means to such an end? Is the sacrifice of one innocent life justified to save or improve the lives of others, perhaps of a whole people? In that instance, one measure of justice, such as a republican one, does not redeem, but merely clashes with a deontological one; that pursuit of a republican justice requires injustice. Christianity, Marxism, Kantianism or utilitarianism—so many programmatic justice theories—would provide very different resolutions, none of them satisfactory in
the sense of overcoming injustice. Justice remains baffling, while injustice becomes manifest.

C. Talbot: Merit and Myth

Shakespeare portrays the decline of feudalism in a number of plays. A recurring theme is the conflict between the older, feudal order of status-based privilege, and the newer, modern, meritocratic ethos. That conflict can be construed (even in Hegelian-dialectical terms) as a system producing precisely the forces that undermine it. In Western Europe, early modern monarchies centralise and consolidate power at the expense of the broad-based aristocratic class. From that moment on, the path to power lies less in privileged birth, and more in the acquisition of the knowledge and expertise required to achieve political office. The conspicuous, increasingly anachronistic exception to that rule becomes the monarchy itself. In order to monopolise power, the monarchy increasingly replaces a quasi-autonomous aristocratic class with a meritocracy, in the form of appointed officials under its own control. That absolute monarchy ends up in the ironic position of relying, to maintain its peremptory control, upon precisely that meritocratic principle, which, on its own logic, renders monarchy itself superfluous.

Meritocracy, no less than monarchy or democracy, rules only insofar as some brute power keeps it, too, in place. Of course, merit and brute power are not the same thing.

81 See text accompanying note 74 supra.
83 See, e.g., HOLDERNES, supra note 82, at 24 – 9.
84 Id.
85 Or, in Hegel’s terms “surpassed” (aufgehoben). See ALEXANDRE KOÈVE, HEGEL: INTRODUCTION À LA LECTURE DE HEGEL 173 – 95 (Raymond Queneau, ed. 1947) (examining the historical implications of Hegel’s master-slave
We usually see them as opposites. Bolingbroke’s superior skill is nothing without his and his allies’ armed troops.86 (R2, 3.2.196 – 9) Yet those soldiers’ skill is to follow orders, to obey power, regardless of their leaders’ merit. Merit stands not on its own, but only insofar as it is backed up by the very principle of force that it is supposed to overcome. As Rousseau would later observe, the world of meritocratic competition serves not to abolish, but merely to re-configure socio-political coercion. It serves not to eliminate state coercion, but rather adds the ever-spiralling rivalries among individuals,87 whose hallmark is the ever-more legalistic world. It serves not to reduce coercive relationships, but to proliferate them,88 merely replacing swords with litigation. The meritocratic order does not overcome recourse to brute force, but requires it more and more. Throughout the corpus, Shakespeare, far from naively welcoming the new meritocratic principle, repeatedly presents it through the ethically ambiguous lens of “ambition” (e.g., JC 1.2.314, 2.1.22, 3.1.82; 3.1.25 – 6, 3.2.74 – 96, 110; cf. R2, 1.3.127.2), which, as Macbeth suggests, is pressed as indifferently into the service of injustice as justice. Constant cynical remarks about who is “in” or “out,” “up” or “down” (e.g., Lr. 5.3.15; R2, 3.3.177, 192), the hallmark not of static feudalism but of socially mobile modernity, cast the same dim light upon the emerging ethos of meritocracy. In Part IV I shall argue that meritocracy, by constantly generating irreconcilable measures of justice, ends up at the heart of injustice.

Emblematic of idealised, “golden age” justice is the myth of pervasive harmony
dialectic).

86 Cf. RACKIN, supra note 74, at 124 (discussing Holinshed).
87 For a classic statement, see JEAN-JACQUES ROUSSEAU, DISCOURS SUR L’ORIGINE ET LES FONDEMENTS DE L’INÉGALITÉ PARMI LES HOMMES, in ROUSSEAU, in OC, supra note 35, at 109 – 236.
88 Cf. Rousseau’s famous dictum, “Man is born free, but is everywhere in chains,” in ROUSSEAU, supra note 35, at 351.
mystically shared among the members of the political community. Such a legend is evoked in *Henry VI, Part I*, in the character of Sir John Talbot, whom Shakespeare’s audiences nostalgically recognised as the quintessential chivalric hero of a lost age. On a first encounter, the Countess of Auvergne mocks the warrior, seeing him more as a weakling “dwarf” than a Titan,

> Is this the scourge of France?  
> Is this the Talbot, so much feared abroad [...] ?  
> I see report is fabulous and false.  
> I thought I should have seen some Hercules,  
> A second Hector, for his grim aspect,  
> And large proportion of his strong-knit limbs.  
> Alas, this is a child, a seely dwarf!  
> It cannot be this weak and writhled shrimp  
> Should strike such terror to his enemies. (*IH6*, 2.3.14 – 23)

As Talbot’s soldiers have secretly besieged the Countess’s castle, he replies with a riddle,

> . . . I am but shadow of myself.  
> You are deceived; my substance is not here.  
> For what you see is but the smallest part  
> And least proportion of humanity.  
> I tell you, madam, were the whole frame here,  
> It is of such a spacious lofty pitch;  
> Your roof were not sufficient to contain’t. (*IH6*, 2.3.50 – 6)

The enigma becomes clear when Talbot’s men burst in, taking the Countess as their prisoner, he and they flaunting their organic unity: “Talbot is but shadow of himself . . . /

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These are his substance, sinews, arms and strength.” (1H6, 2.3.62 – 3) That supposed harmony, “fabulous and false” after all, will soon be shattered, as the more banal English nobles, the power structure behind the myth, fail to deliver Talbot’s reinforcements, leading to his slaughter by the French. The play’s power-mongering nobles signify not the destruction of some earlier harmony, so much as the revelation that any such unity was always transient at best, illusory at worst.

Talbot and his men, like Macbeth’s King Duncan, never innocently stand aside from that broader regime of violence. They presuppose and perpetuate it, however “virtuously” they may appear to do so. As in Macbeth, what collapses along with the myth of harmony is a myth of justice. Plato had already suggested the illusory quality of myths of harmony in the same breath with which he holds up perfect justice as the ideal.\(^90\) Systemic injustice arises not from the breaches of just norms, but from the revelation that a supposed system of norms was only ever packaged as justice in the first place.

The mythic harmony of Edward III’s reign, depicted in the manifestly implausible fantasy of John of Gaunt’s famous “sceptered isle” speech (R2, 2.1.40 – 66), will face a similar rude awakening as Edward’s progeny take up generations of mutual cannibalism that will mark the entirety of Shakespeare’s English octology.\(^91\) Injustice rages all around us, while justice becomes thinkable only insofar as it is mythicised. The revelation is vividly symbolised when Edward’s grandson, Richard II, first pondering his unified image in a mirror, then smashes it into “an hundred shivers.” (R2, 4.1.279) Shakespeare constantly recounts that lost illusion with reference to the West’s greatest “golden age”

\(^90\) See Section II.A supra.

\(^91\) Cf. RACKIN, supra note 74, at 30. On the continuities and discontinuities of Shakespeare’s two historical “tetralogies” see, e.g., HOLDERNESS, supra note 82, at 1 – 12.
myth of all, perfect harmony in Eden. (Genesis 1.1. – 2.25; R2, 2.1.42)

The brief appearance of a recovered unity in the person of Henry V (whose regime Talbot represents as its last, pseudo-heroic vestige (cf. 1H6, 1.1.6 – 16)) will equally prove itself to be a sheer illusion (H5, Ep. 11 – 12), as England slips into a world in which, in Randall Martin’s words, “there is no foreign enemy to demonize, no epic hero to inspire patriotic sacrifice, and little evidence of the human kinship that, paradoxically, war seems sometimes to breed more readily than peace. Instead a nation turns on itself in epidemic savagery, dissolving its own foundations.” Henry V famously shows how the illusion of justice relies, above all, upon effective myth-making and propaganda. In other words, the most unjust actions can be painted in the colours of justice though the control of people’s perceptions.

Meritocracy is, by definition, a system of measurement. But so is feudal aristocracy. Only their criteria differ. Shakespeare avoids portraying one as justice and the other as injustice. Injustice in Shakespeare arises not out of the “failure” of one set of political forces (feudal, aristocratic, monarchical) to fulfil ideas of the other (meritocratic, republican, communist), which we would certainly expect from a straightforwardly binary failure of injustice to fulfil the ends of some justice theory. Rather, injustice emerges from the constant undermining of any given set of forces by any number or

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93 Cf. HOLDERNESS, supra note 82, at 116 – 24.
94 Cf. id. at 111 – 14.
95 Randall Martin, Introduction, in 3H6, OXF4, 1.
96 See, e.g., Cf. RACKIN, supra note 74, at 30, 72, 80, 82, 114 – 15. See also PAOLA PUGLIATTI, SHAKESPEARE THE HISTORIAN 137 – 53 (1996).
97 England’s history of peasant uprisings had long generated proto-Marxist discourses of abolition of private property and class hierarchy, which Shakespeare famously dramatises in Cade’s rebellion, 2H6, 4.2 – 7. See, e.g., WARD, supra note 59, at 138 – 40; PUGLIATTI, supra note 97, at 154 – 73.
combination of the others. Meritocracy and republicanism are undermined just as surely as feudalism or monarchy. Again, the point is not a nihilistic one, which would render meaningless any search for justice, although it might point to reasons why the familiar, programmatic theories end up being far more problematical than their authors would have wished. The point, rather, is that glaring injustices should be seen less as the right concept of justice “gone wrong,” and more as the perpetual crises surrounding any purportedly “right” theory of justice. As in Antigone, injustice abounds in Macbeth or in Shakespeare’s history plays, but not principally as the application of a “wrong measure.” There is no obvious concept, no theory or regime of justice that produces any such measure in an obvious or uncontroversial way. (Nor, incidentally, should we be fooled by the seeming reconciliation of merit and monarchy in the person of Henry V. That marriage proves too fragile and transient to provide, except in an ironic sense, the “model of kingship” that generations of readers have so desired.98)

D. Paradise Lost: The Social Construction of Injustice

Ongoing crises of legitimacy become acute by the 17th century. As modern states are emerging, the doubts raised by Shakespeare are echoed by such poets as Middleton, Milton, Corneille or Racine.99 Justice may remain ineffable and controversial in the human world. Yet surely, on the conventional readings, if God exists, perfect and omnipotent, then God’s justice must be definitive and eternal.100 In Paradise Lost, Satan, rebellious against that order, must therefore, by sheer binary logic, “incarnate”

98 See generally, e.g. Holderness, supra note 82, at 136 – 55; Pugliatti, supra note 97, at 137 – 53.
99 [reference deleted for peer review]
100 Id.
injustice.¹⁰¹ (PL 9.166)

But is Satan unjust because he has rebelled against God’s order, or does he rebel against God’s order because he is unjust? Plato had long ago put, effectively, the same question, “Is what is holy holy because the gods approve it, or do they approve it because it is holy?”¹⁰² (Euth. 10a) However we phrase the question, if, on either formulation, the latter option is true, then justice becomes autonomous, and God is superfluous. Yet the former option amounts to sheer autocracy: the just is just solely through the imposed will of the figure who holds the ultimate power, which we ordinarily see not only as anathema to legitimacy, but as the very definition of what we reject in absolute monarchy.

God’s divine order, on that second option (i.e., Satan rebels because he is unjust) “socially constructs” injustice as nothing other than disobedience per se. Unlike Macbeth, Milton’s Satan kills no one. His trespass, inducing Adam and Eve to disobey God, is, without more, certainly questionable as injustice. In our own, more prosaic world, we ordinarily look for independent harms, or positive goods, to persons or property as evidence of a norm’s legitimacy. We ordinarily view as despotic the notion of a legal prohibition that serves the purpose not of protecting goods or preventing harms, but merely of punishing or preventing nothing other the breach of the prohibition itself, for its own sake. If I, as King, forbid the playing of hopscotch for no reason other than that I forbid it, we might say, if we believe that not all law is just law, that breaches of the rule do not punish injustice so much as they fabricate it ab initio. Those who believe in God’s justice may, of course, explain the absence of rational explanation through God’s

mystery (“What God has decided, reason cannot fathom”103) However, since human justice, particularly within any programmatic concept, cannot so easily bypass reason, that view renders God’s justice not essential to, but irrelevant to human justice.

Milton’s Satan is not a degenerate, comic-book sadist with a pitchfork, but a political dissident. He exhorts the heavenly hosts,

> Will ye submit your necks, and choose to bend
> The supple knee? Ye will not, if I trust
> To know ye right, or if ye know yourselves
> Natives and sons of heaven possessed before
> By none, and if not equal all, yet free,
> Equally free; for orders and degrees
> Jar not with liberty, but well consist [with liberty – EH]. \(PL\ 5.787 – 93\)

That protest is answered not with a rational, let alone legitimate, explanation, but with a sheer rebuke \(PL\ 5.809 – 48\). Taking a step further than Antigone or Macbeth, Satan sets forth a political vision with which most of us in liberal modernity would agree (even those who would not construe the standard of equality with reference to God),

> Who can in reason then or right assume
> Monarchy over such as live by right
> [God’s] equals, if in power and splendour less,
> In freedom equal? or can introduce
> Law and edict on us, who without law
> Err not. \(PL\ 5.794 – 99\)

No such alternative order can emerge, however, when law is fixed by insuperable coercion. The conventional reading of that passage may see Satan damning himself,

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103 “Was Gott beschlossen hat, / Kann die Vernunft doch nicht ergründen.” Johann Sebastian Bach, *Tritt auf die Glaubensbahn*, CANTATA BWV 152 (1714) (text attributed to Solomo Frank).
undoing his own argument, when he refers to “us . . . without law,” as an admission of his injustice. Indeed, if we read “without law” as “without justice,” then Satan speaks an absurdity—surely if one lacks justice, then one “errs.” However, it is precisely that reduction of justice to imposed law that Satan questions in that passage. If we read “without law” as “without imposed law,” then we are faced with incommensurable justice theories. God’s punishment of Satan then becomes not the redress of injustice, but God’s own fabrication of injustice for the sheer sake of socially constructing his own order as justice. God is a tin-pot dictator. One man’s Satan is another man’s freedom fighter. God’s harmony is a coercive socio-political order.

When two or more parties insist on the legitimacy of conflicting regimes of law, such as secularism versus theocracy, or liberalism versus communitarianism, or capitalism versus communism, each regime based on different normative assumptions about human nature and human societies, the standoffs become entrenched. Each side invokes not merely different norms, but different vocabularies, appealing to different understandings of individual and social dynamics.\(^{104}\) When free-marketeers talk of individual fulfilment created through the maximising of wealth, while Marxists talk of individual alienation within consumer society, questions arise not merely about which side is “right” or “wrong,” but about whether any common assumptions, which might settle the argument, can be ascertained.

**IV. Injustice as Justice: The Merchant of Venice**

However modern the themes in *Macbeth* or Shakespeare’s history plays may seem, their ancient or feudal setting, can give them a remote feel. *The Merchant of Venice*, by
contrast, screams out its modernity. If Shakespearean drama constantly traces the shifts from feudalism into modernity, *The Merchant of Venice* presents that history not as a gradual transition, but as a *fait accompli*. Venice’s only aristocratic or monarchical figure, the Duke, is conspicuously neutered. We witness him only in the role of presiding magistrate, with little show of ultimate authority. He dispenses law in tentative, contingent terms, subordinate to the larger legal order (*MV*, 4.1.103 – 6) He lacks any aristocratic base that might otherwise support a more strongly monarchical power. Venice follows not any individual leader, but the faceless law of the market—in particular, a mercantile, proto-capitalist common law, which limits the ducal power.105

We must first sift through *Macbeth’s* medieval world in order to identify the values of ambition, competition, and meritocracy associated with modernity. *The Merchant of Venice* flaunts them. It lacks *Macbeth’s* bloodshed, but rivals, perhaps surpasses, *Macbeth’s* injustice. Neither coercion nor repression have disappeared. Modernity replaces feudal swords with the superficially peaceful procedures of writs and lawsuits.106 No single will controls Venice’s suit-and-tie world, as power is diffused through the Kafkaesque machinery of credit records and law reports. If injustice in *Macbeth* arises out of the incommensurability of monarchy and modernity, injustice in *The Merchant of Venice* arises out of modernity’s internal contradictions. Justice is purchased only at the price of injustice; no better ideal or regime of justice has any reality, nor any grasp upon the characters’ imaginations.

104 [reference deleted for peer review]
105 See, e.g., WARD, supra note 59, at 127 – 8; WILLIAM SHAKESPEARE’S *THE MERCHANT OF VENICE*: A SOURCEBOOK 7 – 15 (P. Cerasano, ed. 2003) [Hereinafter SOURCEBOOK].
106 Also replacing armed coercion is the rise of the surveillance state, as displayed in Henry V, Hamlet, Measure for Measure, The Winter's Tale, or The Tempest. See, e.g., Stephen Greenblatt, *Invisible Bullets, in Political Shakespeare,*
A. “Seated in the Mean”

A risk for modern viewers is to overlook the play’s economics. The famous loan for 3000 ducats means little to today’s audiences. In Western currencies nowadays, a figure like 3000 triggers at most the idea of a solid, but not an unusual amount. Shakespeare’s public would have recognised the sum as colossal. They would have expected no less from Venice’s reputation for wealth and decadent excess. Shylock’s incredulity at the news that his daughter has spent “fourscore ducats” in one night (MV 3.1.90 – 3), tantamount perhaps to thousands of Euros today, reminds us that this society does not deal in trifles.

When Antonio has four “argosies” (MV 1.1.9) abroad, when Portia attracts noble suitors from far and wide (despite lacking any noble title of her own), it becomes obvious that, in our day, they would occupy the positions of Dallas-style multi-millionaires. They exude the free-market extremes not of a moderately, but of a spectacularly wealthy Antonio and Portia, an abysmally indebted Bassanio, a meteorically ambitious Lorenzo. Neither Venice nor Belmont are places of economic moderation. Nowhere in the corpus are money, and money’s manifold legal trappings—finance, credit, interest, debt—regurgitated so compulsively, “Pay him six thousand . . . double six thousand, and then treble that” (MV 3.2.298 – 9); “Take thrice thy money” (MV 4.1.222, 229); “If every ducat in six thousand ducats / Were in six parts, and every part a ducat . . .” (MV 4.1.84 – 5) Money lives, breathes, and reproduces on its own (MV 1.3.92).

supra note 76, ch. 2.

107 See PEN2, at 113. See also Peter Holland, Introduction, in PEN2 at xxvi – xxviii.

108 See SOURCEBOOK, supra note 105, at 7 – 12.

109 See text accompanying note 118 infra.
Our first glimpse of Portia finds her melancholic, “aweary of this great world.” (MV 1.2.1 – 2) Her confidante, the lower-born, but still gentlewoman Nerissa, finds no cause, aside from Portia’s excessive wealth. “You would be [weary], sweet madam, if your miseries were in the same abundance as your good fortunes are.” (MV 1.2.3 – 4) Nerissa all but cites the *Nicomachean Ethics*110: “for aught I see, they are as sick that surfeit with too much as they that starve with nothing. It is no mean happiness therefore, to be seated in the mean.” (MV 1.2.4 – 7; NE 2. 2, 8 – 9) By recalling the plight of the poor, those at the other end of the culture of wealth and markets from which Portia so “richly” (MV 1.2.161) benefits, Nerissa suddenly throws Portia’s uncritically apolitical lament into an ethical and political context; and she does so in the language of comparison, of measurement. Nerissa places an entire regime of class and privilege in question.111

In Shakespeare’s feudal plays, mythical ideals of justice may be constructed around figures like Edward III, Henry VI, Talbot or Duncan, yet those figures nevertheless represent the flesh-and-blood of a commemorated past. Again reinforcing the play’s modernity, any such ideals in *The Merchant of Venice* take only the form of such packaged maxims, obscurely retrieved from Athenian (or Biblical) antiquity, lacking any comparable presence as a pervasive, deeply-felt point of reference. Lorenzo will invoke the Platonic image of cosmic harmony only late in the play, and then as something peripheral and other-worldly, lacking any ties to the characters’ here-and-now. Jessica is

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110 Shakespeare’s familiarity with Plato and Aristotle reflects that of ordinarily educated Renaissance figures. Platonic and Aristotelian ideals emerge in *The Merchant of Venice* as bygone, unrecoverable aspirations in Venice’s modern, competitive, market world. (e.g., *MV* 5.1.56, 62)

111 As “Nerissa” has never been a conventional Italian name, Shakespeare arguably derives it from nero (“black”), contrasting with the “golden” Portia (*MV* 1.1.170). Cf. text accompanying note 118 infra. The name points to the darker side to Portia’s ostensibly de-politicised idyll. Nerissa’s first words in the play, then, elicit Belmont’s sinister underbelly.
“never merry” by the “sweet” sounds that evoke it. (MV 5.1.68)

Portia’s socio-legal status is more complex than Macbeth’s. Even this woman of high economic rank, merely as a woman, is legally subject first to her father’s, then to her husband’s will. Portia’s dead father controls her destiny beyond the grave through his—written—will (MV 1.2.90, 2.1.15 – 19), blatantly emblematic of the woman’s legal subordination to men. If the more conventional bar to women’s choices in Shakespeare is the living father’s authority (MND 1.1.22 – 121; Rom. 3.5.124 – 5, 142 – 95, Ham. 1.4.88 – 136), The Merchant of Venice underscores its modernity by reducing that authority to an instrument binding in law, and therefore no longer needing the father whose will it expresses. That same political society which secures Portia’s privilege simultaneously assures that the will of a dead man, overpowers the will of a living woman. (MV 1.2.2 – 2) As I shall shortly argue, Portia can only secure justice for herself, securing as much power as possible within this man’s world, by simultaneously upholding and manipulating the very legal system which subordinates not only others, like the “alien” Shylock (MV 4.1.344) (a subordination in which she participates), but also her as a woman. Portia ends up doing nothing in this regime without drawing personal gain, as the only path to her own empowerment, and most so when her conduct appears altruistic. I shall argue that Venice is constructed so that any possibility of

112 Cf. B.J. Sokol & Mary Sokol, Shakespeare, Law, and Marriage 126 (2003). Other options, such as entry into chaste religious orders, impose their own limitations on women’s choices. (MND 1.1.65 – 6; Ado 4.1.239 – 41; MM 1.4.10 – 13)

113 On the legal and political implications of “will” in the Merchant of Venice, and in Shakespeare generally, see Richard Wilson, Will Power: Essays on Shakespearean Authority 131 – 9 et passim (Detroit: Wayne State University Press, 1993).


115 Much has been written about the status of Jews in Venice as legal aliens. See, e.g., Sourcebook, supra note 105, at 15 – 17 et passim.
justice constantly produces, and actively encourages, injustice.

The murky area between the extent to which a woman may, and the limit beyond which she may not exercise her liberty, is no oddity in the world of well-bred Shakespearean women. In *The Comedy of Errors*, Adriana, on the one hand, protests men’s socio-legal domination (*Err. 2.1.10 – 29; cf. Ado 4.1.300 – 1), yet, on the other hand, benefits from a socio-legal order that authorises her to command and to beat her household servant Dromio, precisely as her husband does. Portia half-protests her subordination to her father’s will, yet never shuns the wealth and privilege it brings, her means to empowerment within the bounds of the prevailing order. She both falls victim to her society’s injustice within the context of existing law and politics, yet will also, precisely in availing herself of the means to overcome that injustice, actively perpetuate the same injustice against others. Insofar as her subordinated status as a woman is clear, it now remains to consider how she aims to overcome that status by participating so ruthlessly in the regime’s oppressive institutions.

If we uncritically accept Venice’s prevailing socio-legal order “on its own terms,” then Nerissa’s counsel amounts to nothing more than the moralistic injunction that we should be more attentive to the poor when we enjoy our own good fortune. Here too, the more important question concerns those “terms” of Venetian law and society. The injustices in which Portia, and all the characters, will participate will not merely be the application of wrong measures, or the misapplication of right ones. Measurement itself is in crisis, constantly promising characters the only means of achieving the justice they seek at the expense of justice for others, with injustice the constant result. The privileged members of this hierarchical society, a slaveholding society (*MV 4.1.89*), cannot easily be
rendered “just” when they benefit from the socio-legal hierarchy. Nerissa might, then, on a conventional understanding of justice, be charging Portia with applying the wrong measure. However, her retort can also be read in more critical terms, as a challenge to the entire unequal order from which Portia benefits.

Portia’s reply to Nerissa avoids taking up any challenge that would require her to measure her conduct according to those same ethical principles which she will invoke not only to justify the socio-legal order, but to turn that order against Shylock. She pointedly dismisses the suggestion of scrutinising her own conduct in view of such principles: “It is a good divine [clergyman] that follows his own instructions.” (MV 1.2.13) Prophetic of her later, hypocritical role as advocate of justice, in which she will impose law, and its ethical values, upon Shylock, her socio-legal inferior, that disdain entails a jocular confession of hypocrisy, “I can easier teach twenty what were good to be done than to be one of the twenty to follow mine own teaching.” (MV 1.2.14 – 15) Portia can pummel Shylock within the safe framework of the legal order, and will do it with panache. What she can never do, without contradiction, is to defeat Shylock while challenging that socio-legal order. Although money, then, constantly exemplifies measurement-as-injustice in the play, measurement, at the most foundational level, proves pervasive beyond the play’s sheer commercial framework. Portia will measure Shylock according to the most fundamental principles of law and ethics from which she will exempt both herself and the other full-fledged, privileged Venetians.

Portia’s predicament is not that she lives within a clear ethos of justice, whose measure she either clearly fulfils or clearly betrays. Rather, she can only end up either suffering injustice, e.g., from men, or causing injustice, e.g., to the play’s various socio-

[116 [reference deleted for peer review]]
legal outsiders. Her inherited wealth, not aristocratic in origin, undoubtedly derives from the same source as Antonio’s or other wealthy Venetians’, that is, from commerce. The commercial ethos is inherently anti-aristocratic. Anyone with something to buy or to sell can enter the marketplace, society’s *pro forma* equaliser, regardless of rank or class. Marketplace justice is measured by marketplace equality. Yet that same justice can, consistent with its own principles, undermine marketplace equality. As an equal participant in the marketplace, Portia’s father has accumulated wealth, leaving him free to spend in any otherwise lawful way. He exercises the augmented socio-economic autonomy that it grants him, by attaching his daughter to property interests that leave her bereft of the selfsame autonomy (choice of a husband) that the sheer ethos of marketplace equality would grant. Far from overcoming women’s socio-legal dependency, already rooted in feudalism, Venice’s commercial world merely commodifies it. Portia’s father creates a lottery, reducing her to a prize trinket for the lucky suitor, regardless of her wishes.

The autonomy Portia inherits, along with her father’s wealth, she will exercise in the same way. She will manipulate the very principles of justice that she endorses, and from which her privilege derives. That same system of market-based justice which secures her father’s, and therefore her own wealth, will also augment the socio-legal autonomy which that wealth nourishes, and which secures her father’s will by abrogating hers. The market’s ethos of merit and competition translates into the lottery designed to measure the man who is best for Portia, granting her, like a commodity, to the highest bidder. The marketplace values that would perform justice in securing Portia’s father’s fortune, equally create a meritocratic competition with Portia as the object of purchase. Contrary
to the conventional ethos of the marketplace, which promises increasing prosperity (an increasing “pie”) in lieu of a zero-sum game, Venice’s market-driven regime does not even-handedly expand social autonomy for all rational actors. It fiercely expands some persons’ autonomy at the expense of others’.

Disguised in court, Portia joins those same ranks of privileged Venetian men who will crush the *de jure* alien, the socio-legal outsider Shylock, deprived of Venetian citizenship on grounds of his faith—Christian faith thus invoked to justify the existing socio-legal order. Neither Portia nor, as Shylock points out, the other Venetians ever demand “mercy” (*MV* 4.1.179) for Venice’s “many a purchased slave” (*MV* 4.1.89), but only for the play’s other privileged tycoon. Any such quest would require more than “justice” within the conventional rules and assumptions of the existing legal order, a step that Portia, as she had made clear to Nerissa, and shows in her later actions, has no intention of taking.

Moving on from Portia’s ineffable “weariness,” she and Nerissa next discuss the suitors arrived in hope of Portia’s “worth.” (*MV* 1.1.167 – 72; 1.2.29 – 30) In Shylock’s blunter words, “Moneys is [their] suit.” (*MV* 1.3.115) As a commodity117, as the “golden fleece,” to quote her future husband118 (*MV* 1.1.170), Portia is instrumentally valued for that profit motive. Portia’s wealth is the first of her attributes that Bassanio mentions. (*MV* 1.1.161) Similarly, we will only ever see Bassanio, who describes Antonio, with the obvious pun on “dear,” as his “dearest friend” (*MV* 3.2.291) interact with Antonio in

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118 Pierre Corneille’s *Médée* (1635) will bluntly render Jason as a social climber, using Medea solely for his own advancement. *PIERRE CORNEILLE, MÉDÉE*, in *OEUVRES COMPLÈTES* 333, *supra* note 65. The references to Antonio’s “argosies” (*MV* 1.1.9), in search of their own golden fleece (cf. *MV* 1.1.170), further recall Jason’s ship, and his fiercely
connection to the loan. Moneys are his suit, too. As Phyllis Rackin’s observes, “the pun on “dear” reduces the incommensurable value of what is loved to the commercial value of an expensive commodity.” Meanwhile, Lorenzo sues for a wealthy wife, eloping with the Jew’s daughter without her father’s consent. In seizing Jessica, Lorenzo will actively conspire in robbing, and as husband take possession of, the wealth Jessica steals from her father (MV 2.4.29 – 32), an arrangement later ratified and enforced by Venetian law. (MV 4.1.377 – 80).

In view of her desire for Bassanio, Portia does not find her predicament altogether tedious. (MV 3.2.111) Contriving a game whereby Nerissa names six of the suitors in turn (MV 1.2.31), Portia famously launches into the Shakespearean corpus’s exemplary litany of ethnic slurs, as each man is measured solely in terms of familiar national traits—the Neapolitan is a fool (MV 1.2.35, glossing “colt”), the German is crude (MV 1.2.72 – 5)—in a crescendo that culminates with her anticipatory branding of the Moroccan Prince, before he has even arrived, as having “the complexion of a devil.” (MV 1.2.109 – 10; cf. MV 2.7.79) In this world of masques (MV 2.4.23, 27), Portia will plead in court disguised as “Balthasar,” traditionally one of the eastern Magi, not only underscoring the recurring theme of de-sacralisation of the holy, but subsuming through mockery the image of the kind of oriental prince that the socio-outsider Morocco represents (and, at the same time, subsuming through mockery the name of her own

mercenary ventures.

119 Rackin, p. 101 (discussing R2, 2.1.57)
120 Portia’s roll-call of national stereotypes is not unprecedented. Master and servant play a similar game in The Comedy of Errors. (Err. 3.2.113 – 37) Unlike that exchange, however, Portia’s remarks pointedly reduce individual personalities to ethnic types.
121 Devils were customarily portrayed as black, not red. See, e.g., NS2, 1127 n. 1 (cf. NS2, 444 n 5); OXF4, 117, 152; PEN2, 113, 126.
socio-legal subordinate, the household servant Balthasar).

Given the significance of saints in the same Roman Catholicism whose God Portia will invoke to justify the legal system (MV 4.1.190 – 2), she strikingly notes her revulsion at marrying the dark-skinned alien, even if he had the character “of a saint.” (MV 1.2.109)

All foreigners, all aliens, will be shunned in favour of the indigenous Bassanio, who will serve as Portia’s ladder from her already-privileged status in backwater Belmont up through the highest echelons of Venetian society. The opaque, exogenous Other will be detested in favour of a reproduction of that which is endogenous, familiar, the copied self (with obvious irony on the characters’ constant profession of universalist Christian values). Shylock, too, like the foreign suitors, will be shunned by an elite Venetian power structure, to whose aid the disguised Portia will run as jurisconsultus ex machina. When the disguised Portia runs to assist Antonio in court, we are faced with the ethical equivalent of Baker & McKenzie working pro bono for Coca-Cola. The insider helps the insider in order to secure her own status. It is to Shakespeare’s credit that he has so cleverly charmed audiences to believe the opposite, that Portia’s gesture is altruistic, that that which ‘glisters’ must surely be gold. (MV 2.7.65)

Just as Portia’s father has made her a desired commodity, so does Portia pluck the foreign suitors, one by one, like goods from a shelf, mocking them as knockoff imports, not fully human; about the Frenchman, for example, “God made him, and therefore let him pass for a man.” (MV 1.2.47). Lynda Boose goes so far as to suggest that “it may well be Portia . . . who can best lay claim to being the signified “merchant” of the play’s

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ambiguos title. Shylock, too, will be merely another alien for disposal. Relentlessly throughout the play, Shylock will be addressed or referred to not by name, but only by his generic status, “Jew.” (*MV passim*) Portia, this wealthiest and most socially successful of Shakespearean women, will emerge as Shakespeare’s premier racist, outdoing even Iago precisely in her privileged nonchalance. Performances frequently soften that embarrassment by playing the suitors from Morocco and Aragon as comic figures, which they probably were on Shakespeare’s stage. However, serious and dignified performances of both roles are consistent with the text, and highlight the suggestion that the revulsion lies mostly in Portia’s mind.

Commodification is certainly measurement. It reduces the human to a paltry checklist, to which fungible, and cheaply rated, values can be attached: the Duke of Saxony’s nephew is a German; a German is vile when sober, and viler when drunk. (*MV* 1.2.72 – 5) Needless to say, such men appear manifestly inferior when measured against the native Bassanio’s—at this point, more presumed, through sheer appearances, than tested—refinement. More importantly, Portia presumably falls for Bassanio, knowing him no more than the other suitors, because his character is of no importance. It suffices that he is Portia’s key to Venetian power and rank.

Money and markets provide a backdrop that would satisfy Marxist analysis to a considerable degree. It would be overstatement, however, to reduce the characters and

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126 The Nurse’s racism in Titus Andronicus is admittedly cruder (*Tit.* 4.2.59 – 68), but still cannot match Portia’s, in view of Portia’s paramount role. Similarly, if Gratiano’s anti-Semitism is more overt, Antionio’s seems more calculated, over time, and from someone who has benefitted from the selfsame credit-driven economy for which he
action to sheer economic activity. Portia’s successive remarks certainly arise within, and derive from, a competitive market context that serves as Venice’s socio-economic “superstructure” (Überbau). However, it is not economic activity that is at issue in an unqualified sense in such passages. What is directly and immediately occurring is measurement as such—measurement that is always in part reflected through money, but also goes beyond it, never merely collapsing into it. Those justice theories that would condemn one system of measurement, merely to replace it with another, take too little heed of the problem of measurement itself.

One might object that Portia’s fault is not measurement per se, but rather mis-measurement, extrapolating from simple appearances and stereotypes, which eclipse the complexity of human beings. The ethics of The Merchant of Venice would, on that reading, remain conventional. The play’s injustices and hypocrisies would make sense as mis-measurements in view of supposedly just, correct measurements in each situation. But do they? If it is unjust for Portia to reduce humans to stock figures, then it is just to refrain from doing so. If it is unjust for Antonio to spit on Shylock, then it is just to refrain from doing so. Those ordinary, isolated, “micro” binarisms are straightforward enough (even if it did take several centuries for them to be recognised). But what, within any broader theory of justice, does “refrain” mean? Should Antonio show, along Christian lines, selfless and unreserved love for Shylock? Or is Antonio, along contemporary liberal lines, entitled to hate Shylock, as long as he commits towards Shylock no unlawful action? Or should Antonio, along Marxist lines, positively join forces with Shylock to overthrow the prevailing regime of socio-political hierarchy and private ownership? The same questions can be put to Portia. Should she freely exercise reviles Shylock.
her intra-ethnic preferences, as long as she does so like a good liberal—as long as she obeys the letter of the law, which cannot control such predilections? Should she hurry as enthusiastically to the aid of Venice’s oppressed as she runs to help its most privileged?

Any of those ethical readings is notionally consistent with the action. The play might just as easily be said to presuppose any or none of them, or indeed to be eliciting precisely the problem of ethical complexity, and theoretical indeterminacy, in situations of socio-political crisis. The play’s injustices are not sheer negations of some “underlying” model of justice, i.e., of right measure. There is endless measurement going on in the play, at the root of countless injustices; yet the way in which they are or may be mis-measurements, incorrect measurements, which would somehow presuppose some prior understanding of the correct ones, remains opaque.

Justice may indeed consist largely in measurement; the problem is that injustice too takes on the same quality, insofar as the criteria for justice remain opaque or controversial. Measurement can be identified at the origin of both justice and injustice, but not merely as mirror-image opposites or straightforward negations of each other. Two millennia of justice theorists may have overlooked that principle-versus-practice discrepancy, but Plato suspects it all along. Although The Laws will make concessions to legal rules qua fixed criteria for measuring out justice and in-justice, The Republic and Statesman are rule-sceptical; they cast doubt on whether justice can emerge out of law-as-rules. In both works, Socrates understands, as Polemarchus did not, that no rule can be said to create justice until we first agree upon the justice of the background regime, which, we have seen, remains an elusive task. In The Merchant of Venice, that very act of measurement, far from achieving justice, becomes the premier tool of injustice.
B. “The means whereby I live”

The first scene of *The Merchant of Venice* introduces the play just as the second will introduce Portia, mischievously indulging the melancholies of the privileged. (cf. *AYL* 2.1.26; *TN* 1.1.1 – 8) Antonio wonders why he is sad. More recent interpretations, influenced by gender theory, have examined Antonio’s crisis of homoerotic companionship with Bassanio. (MV 2.8.50) Another possible reading focusses on Antonio’s anxiety about his commercial expeditions (*MV* 1.1.8 – 40), but which Antonio expressly denies (*MV* 1.1.41 – 45); and that denial cannot be dismissed, particularly since the play highlights Antonio’s privilege when it makes him complacent about his investments.

If, for argument’s sake, we take Antonio at his word, and it is neither wealth as such, nor love as such, that depress him, could it be a more basic force? The play tells little about Antonio’s sorrows, but much about his passions. What echoes like a thunderbolt is his unmitigated hatred for Shylock. Shylock recalls that history, and Antonio eagerly confirms it. Shylock protests that Antonio calls him “dog” (*MV* 1.3.107, 123; cf. 2.8.14) and “cur” (*MV* 1.3.114; cf. 3.4.18), invective not far removed from Portia’s mockery of the foreign suitors. He kicks (“spurms”) (*MV* 1.3.114) and spits (*MV* 1.3.121) on Shylock’s beard (*MV* 1.3.113), associated with his faith (*Leviticus* 19:27), and on Shylock’s pious garment, his “Jewish gaberdine” (MV 1.3.108). Antonio, far from

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127 [reference deleted for peer review]
128 Cf., e.g., CAM4, 77; PEN2, 110.
130 A “sober” garment that Graziano, particularly vicious towards Shylock (*MV* 4.1.122 – 37; 359 – 96), will himself
denying the charges, positively relishes them: “I am as like to call thee so again, / To spit on thee again, to spurn thee too.” (MV 1.3.125 – 6) It is Antonio’s position of socio-legal superiority which warrants him to spit, kick and affront Shylock publically, with Shylock powerless to reply, much less to retaliate.

Antonio’s passions are not limited to, nor do they principally consist in, spitting, kicking, or verbal abuse. Above all, his efforts have been directed at Shylock’s ruin: “He hath . . . thwarted my bargains” (MV 3.1.48; cf. 1.3.39 – 40, 43 – 6), cries Shylock, to the tune of “half a million.” (MV 3.1.46 – 7) In an economy in which 3000 ducats are enormous, the activity here can be nothing less than Antonio’s concerted effort, over a long time, to destroy, effectively to kill, Shylock by all means.131 Shylock’s references to rats infesting a ship (MV 1.3.19 – 22) or a home (MV 4.1.42 – 44), compared also to thieves (MV 1.3.20) suggest as much—a pestilence gnawing at the foundations of his life: “You take my house when you do take the prop / That doth sustain my house; you take my life / When you do take the means whereby I live.” (cf. MV 4.1.370 – 72; cf. Ecclesiastes 34:22) It concurs with the parasitic quality of Venice’s web of socio-economic relationships. In view of the general acceptance of lending at interest in our own time132, it can be difficult to imagine an analogy to Shylock’s situation. One can imagine, for example, a powerful, ethnically white business willing to forego profit, and

wear, not, as Shylock does, for devotional purposes, but out of sheer self-interest. (MV 2.2.171)

131 In today’s terms, the loss would have to hover, at the very least, at millions of Euros. See text accompanying note 107 supra. It is admittedly remarkable for such a fact to be tossed almost imperceptibly into Shylock’s diatribe. Some observers have noted the garbled, “confused” (MV 2.8.12) nature of Shylock’s anger, which could cast doubt on the figure’s accuracy. On the other hand, little in the play would suggest that Shylock’s claims, even when they are jumbled in his rage, are factually incorrect. To the contrary, Shylock’s manner is generally noted for candour, in contrast to the Christians’ dissembling hyperbole. Shylock stings with inconvenient truths, not with wild fabrications. 132 Of course, part of the play’s irony lies in the fact that lending at interest was already lawfully practiced by London’s Christians, even while they preached against it. See note 141 infra.
thereby superficially appearing to benefit the community, by offering cheaper goods, but with the sole intention of undercutting the prices in a black-owned shop. (cf. MV 1.2.39 – 40; 3.3.1 – 2, 21 – 4) A community value benign in the abstract—providing low prices for consumers, particularly benevolent, for example, in low-income areas—becomes repulsive in its aims and effects.\textsuperscript{133}

If Shylock will seek Antonio’s life overtly, albeit within the bounds of law, it is because Antonio has long sought Shylock’s life, surreptitiously, “playing the system,” within the bounds of law and legally sanctioned privilege. That unequal measure gives the lie to the Duke’s later insistence on a “difference of spirit” (MV 4.1.363) between benign Christians and vengeful Jews.\textsuperscript{134} (The Duke’s bias is evident at the beginning of the trial, in his informal chat with Antonio. (MV 4.1.2 – 4)) The Jew certainly is vengeful—on the assumption, as Portia, Antonio, Bassanio, the Duke, and all privileged Venetians must assume, that the existing order is inherently just. In this legalist, proto-capitalist world, Shylock’s bodily self-defence cannot be sought through the heroic-aristocratic drawn swords of Hamlet and Laertes. He seeks it through the legally sanctioned contractual instrument.\textsuperscript{135} “Those,” like Antonio, “who wield power can afford to dispense with exact justice from time to time, since they, after all, control the rules of the game. It is less easy or intelligent for outcasts like Shylock, whose sole protection lies in the law, to conjure it away so cavalierly.”\textsuperscript{136}

But why Antonio’s original loathing of Shylock? “[W]hat’s his reason?,” Shylock

\textsuperscript{133} Boose, supra note 124, at 249.

\textsuperscript{134} Cf. Wilson, supra note 113, at p. 132; Girard, supra note 117, at 356.

\textsuperscript{135} In Shakespeare’s time, the common law became a weapon for the merchant class’s assertion of political power against the aristocracy. See, e.g., Wilson, supra note 113, at 132 – 34; Ward, supra note 59, at 131.

\textsuperscript{136} Eagleton, supra note 74, at 41.
asks, and answers, “I am a Jew.” (MV 3.1.49), “He hates our sacred nation.” (MV 1.3.43)
And why does Antonio feel such hatred? If he and other Venetians hate the practice of
lending at interest, why not just avoid it, as Antonio simultaneously does it, while
professing never to have done it? (MV 3.1.65 – 6) If avoidance of the practice were to
place him at a competitive disadvantage against other Venetian merchants (although no
such suggestion is ever made), then his gripe would have to be directed against the
entirety of his fellow Venetians who benefit from the practice, and not solely against
those who simply do their bidding.

C. Speculum pincipum

Contemplating the proposed loan, Shylock asks if he may speak to Antonio. Bassanio
proposes that all three meet for dinner. Meal invitations are a precarious affair in
Shakespeare. They are often aborted or disrupted, constantly betokening fractured
relationships, often with grim links to lawlessness or injustice. (e.g., Tit. 5.3; AYL 2.7;
Tim. 3.7; Mac. 3.4; Tmp. 3.3) In *The Comedy of Errors*, constant references to broken
and altered dinner engagements crucially subordinate this social intercourse to the forces
of the market. 137 (e.g., Err. 1.2.21 – 6) Shylock ironises 138 (MV 1.3.27 – 32; 2.5.11 – 15),
“to smell pork, to eat of the habitation which your prophet the Nazarite conjured the devil
into.” 139 (MV 1.3.27; Matthew 8:28 – 34). In displaying knowledge of Christian
Scripture, the standard by which the Venetians measure the Jew, though not themselves,

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138 If the passage is an aside (OXF4 1.3.31 – 3, differing from NS2, NCS and PS), then Shylock’s response is not necessarily a refusal, but only a hint of Shylock’s conflicted feelings.
Shylock suggests that his adherence to Judaism is informed. It is deliberated. It is not the “blind,” “stubborn Jewry” (R2, 2.1.55; cf. MV 1.3.106, 4.1.31 – 3) of the “faithless Jew.” (MV 2.4.37) His comment suggests a reason for that choice, namely Christians’ hypocritical practice of their own professed principles.140

Hypocrisy, in law as in ethics, is the failure to measure up to the standard by which one measures others. It by definition invites questions about the hypocrite’s own failure. But it also raises a question about whether the measure applied by the hypocrite is even the correct one. One of the play’s hallmark displays of hypocrisy emerges when Antonio, asking Shylock to lend to him at interest, insists that he never otherwise engages in that practice (MV 1.3.71), and famously imputes sin (MV 1.3.94 – 5) to Shylock’s scriptural defence (MV 1.3.67 – 86) of it. Antonio and Shylock disagree on the right measure—whether or not it is consistent with biblical law to lend money at a profit (or at “interest,” the term itself being in question (MV 1.3.71 – 2); after all, if interest is merely another form of profit141, then it is no less evil than Antonio’s gigantic business ventures). In imputing to Shylock a Satanic mis-reading of the Bible, a breach of natural law, Antonio creates a compound hypocrisy, falsely—hypocritically—accusing Shylock of hypocrisy.

Under classical Christian law, certainly of Shakespeare’s time, only one ethics can

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140 Cf. SOURCEBOOK, supra note 105, at 12 – 13 (noting Venetians’ well-known assimilation of Christian belief into their commercial interests).

141 See Walter Cohen, The Merchant of Venice and the Possibilities of Historical Criticism, 49 ENGLISH LITERARY HISTORY 765 – 89 (1982); John Drakakis, Historical Difference and Venetian Patriarchy, in THE MERCHANT OF VENICE 23 – 53 (Nigel Wood, ed. 1996). If Aristotle expresses some doubt about retail trade, he is downright censorious of usury. (Pol. 1.10.1258b2 – 7) Conspicuously, however, Shylock is never accused of having engaged in usury as such at any prior time (i.e., charging extortionate, as opposed to reasonable interest rates), nor of any unethical business practice. Under English law in Shakespeare’s time, up to ten percent interest was permitted, thus perforce deemed non-usurious. SOURCEBOOK, supra note 105, at 15.
be called absolutely unethical, namely, the code of unqualified sin, or evil. At the very moment of committing his own compound hypocrisy, Antonio compares Shylock to Satan. \((MV\ 1.3.94 – 95; \text{ cf.}, \text{ parodically, } MV\ 2.2.19 – 22)\) Shylock never draws any such comparison. He never equates Christianity with evil \textit{per se}. His measure for Christians is not Jewish standards, but their own standards. If Shylock does indeed “cite Scripture for his purpose” \((MV\ 1.3.94)\) of making money, the point of the Scripture he cites is to explain the substantive equality of, despite the surface veneer of any difference in ethical measure between, Antonio’s and Shylock’s equal “purposes” of earning profit through their respective occupations—businesses equally dependent upon each other, insofar as Antonio’s mode of commercial venture, in an increasingly complex and expanding economy, critically relies upon Shylock’s mode of finance through loans. In parallel, it is at the moment when Lorenzo learns that he shall collect Jessica, along with the “gold and jewels” he steals from Shylock, that he responds with a Christian natural-law reference—”If e’er the Jew her father come to heaven / It will be for his gentle daughter’s sake.” \((MV\ 2.4.33 – 34)\) Similarly, it is at the moment that Jessica first throws Lorenzo and Graziano one casket of stolen valuables, then promises to return with even more, that Graziano, opportunistically reversing his own stereotypes, exclaims “a gentile, and no Jew.” \((MV\ 2.6.51)\)

We can return now to the dinner invitation. Shylock continues, “I will buy with you, sell with you, talk with you, walk with you, and so following, but I will not eat with you, drink with you, nor pray with you.” \((MV\ 1.3.29 – 32)\) Trivially enough, in buying, selling, talking and walking, Jews are equal in Venice. It is because of their religion, the laws governing how they eat, drink and pray, that they are consigned to alien, as opposed
to citizen status. Bassanio uses dinner to seal a financial transaction; for Shylock, meals retain their sacred and sacramental character. The Venetian and Jewish worlds are governed by opposed systems of natural, higher law. Judaism fails the Venetian measure of biblical law; the Jews must therefore remain outsiders to the civic community.

Pre-Holocaust readings typically abstracted the play’s action from any political context, uncritically accepting the legally enforced class system of the Venetian Christian world by accepting it as a neutral backdrop. From that perspective, as isolated, “micro” events, Shylock’s speech and actions are certainly excessive, even cruel. But when the background social world is grasped as a set of rigorous, socio-political forces, flourishing within Venetian law, the socio-legally inferior Shylock offers the dominant Venetians precisely what they offer him, the same injustice that they coercively impose to preserve their hierarchy. He offers the Venetians their own injustice back to them on the terms their own laws dictate, precisely equal measure (cf. MM 5.1.401 – 3), mirror-imaging the Venetians’ insistence, proclaimed by Portia, that it is they who are merely meeting out Shylock’s own measurement to him. (MV 4.1.301 – 66) “Shylock appears most scandalous,” writes René Girard, “when he stops resembling himself to resemble the Venetians even more.”

Antonio has deployed Venice’s socio-legal hierarchy against Shylock’s life, setting the measure for Shylock’s famous bargain. Antonio perpetuates his injustices within, and as an integral part of, his society’s legal regime; Shylock’s move is not to commit injustice within a just world, but to translate that injustice from the blissfully anonymous and systemic to the crudely immediate and overt. Immediate and overt injustice is a crime; anonymous and systemic injustice is merely the neutral background of the way
things are.

Unsurprisingly, post-Holocaust readings risk swinging to the other extreme, stylising Shylock altogether as victim. Yet that simplification fails to explain the injustice of Shylock’s scandalous suit. The point of Shylock’s character is not that he is exceptionally just, but that his injustice, far from departing from his Venetians’ norms, altogether recapitulates them, and never exceeds that practiced, with impunity, by the citizen Venetians. Shylock’s ominous speculum principum surpasses any in Richard II or Richard III, precisely because it mirrors not the older model of power ultimately invested in one sovereign, but rather the new, Foucauldian model of power ubiquitously disseminated through social and economic pressures and practices.

Shylock asks why he should lend interest to someone who perennially and publicly humiliates him for doing so. A round of contractual negotiation begins. Each proposed bargain highlights the measure that determines it. Shylock first asks whether he should performatively recapitulate the socio-political hierarchy, whether he should openly, and literally, display his inferior social measurement: “Shall I bend low.” He then continues in the language of formal, legal equality—the contractual consideration, the contractual measure, the quid pro quo: “and for these courtesies,”

Shall I bend low, and in a bondman’s key,

With bated breath and whisp’ring humbleness,

142 Girard, supra note 117, at 356.

143 According to Cerasano, “a post-Holocaust sensitivity requires that audiences question whether Antonio’s ‘punishments’ really fit Shylock’s ‘crimes’.” SOURCEBOOK, supra note 105, at 2. The pre-Holocaust question, by no means vanished today, was generally the opposite, namely, whether Shylock’s desired “punishments” really fit Antonio’s “crimes.”
Say this: “Fair sir, you spat on me on Wednesday last;
You spurned me such a day; another time
You called me dog; and for these courtesies
I’ll lend you thus much moneys”? (MV 1.3.119 – 24, emphasis added)

Antonio confirms that past conduct as his solid and fixed measure: “I am like to call thee so again . . .” (MV 1.3.125)  He then proposes the terms of the contract,

If thou wilt lend this money, lend it not
As to thy friends . . .
But lend it rather to thine enemy,
Who, if he break, thou mayst with better face
Exact the penalty. (MV 1.3.127 – 32)

On its own terms, the justice of the marketplace, in which we “exact the penalty” for a breached contract, may not set the benchmark for close “friends,” but it certainly sets it of other public and commercial relationships, despite the fact that most are not motivated by enmity as such. Antonio nevertheless adopts the measure of enmity to describe a contractual bargain involving a penalty for breach. Shylock counters by proposing Antonio’s own standard of friendship, whereby the legal regime is deployed to help fellow Venetians, other socio-legal insiders, by seeking, through legal means, the ruin of the socio-legal alien. (cf. MV 1.3.39 – 40)

Shylock will translate that complex web of “macro,” systemic relationships into an
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immediate, “micro” one, merged into the four corners of a recorded instrument. As Antonio does with fellow Christians (MV 1.3.39 – 40), in order to target Shylock’s life, so does Shylock precisely propose a loan without interest, in order to target Antonio’s. When Bassanio interjects, “This were kindness” (MV 1.3.138), a triple pun, launched from the first, obvious sense of “kindness” as amiability, also suggests, as a second meaning, “to do things as they are done by us, by our own kind, our own kin and kindred”\textsuperscript{144} (cf. Ham. 1.2.65). Coupled with that second meaning, the “kindness” additionally denotes equal measure, something done “in kind,” quid pro quo, but also done precisely “as we do it.” As to that “kindness,” that application of the Christians’ own measures, Shylock explains, “This kindness will I show.” (MV 1.3.139) As Antonio, through his position of socio-legal privilege, does with Shylock, so does Shylock, through Venetian law, seek Antonio’s life, “an equal pound”—“equal” glossed as “precise or just”\textsuperscript{145}, “stipulated as exact”\textsuperscript{146}—of Antonio’s flesh. (MV 1.3.145 – 7) Now it is Antonio who confirms with the same, three-tiered layering: “there is much kindness in the Jew.” (MV 1.3.149) The Jew now seems like us, acts like us, uses our justice, our measures; he is a gentile, i.e., “gentle\textsuperscript{147} Jew” (MV 1.3.173; cf. MV 2.4.33 – 4; 4.1.33): “The Hebrew will turn Christian; he grows kind.” (MV 1.3.174, emphasis added) Of course, when Shylock does “turn Christian,” conforming to the socially enforced standard of measure (MV 4.1.382, 386) it will be through that same coercive power structure from which the play’s injustices arise in the first place.

\textsuperscript{144} See Jay Halio, \textit{Introduction, in OXF4}, 1 – 83, 41.
\textsuperscript{145} PEN2, 118.
\textsuperscript{146} NS2, 1130; cf. CAM4, 89.
\textsuperscript{147} Cf. CAM4, 90.
D. “As Swift as Yours”

The Prince of Morocco’s opening words show him prescient of the power matrix he has entered. He confronts its system of measurement anticipatorily: “Mislake me not for my complexion” (*MV* 2.1.1), defending himself not in response to a declared aversion, but rather on the expectation of a presumed one: “I would not change this hue.” (*MV* 2.1.10)

For Aristotle, justice as measurement entails treating like persons or things alike. (*NE* 5.3.1131a10 – 23; *Pol.* 3.9.1280a8 – 12) In feigning to do Morocco justice by comparing him to the other foreign suitors, Portia cynically deploys that language of equal measurement in the service of injustice, i.e., arbitrary reduction of Morocco’s humanity to his “hue”: “Yourself, renownèd Prince, then stood as fair / As any comer I have looked on yet / For my affection.” (*MV* 2.1.20 – 2) That remark cannot be defended on grounds that Morocco, in choosing the golden casket, supposedly proves his unworthiness by failing to show good judgment, since that moment has not yet occurred. Morocco has only just arrived.

One feature of the play is the way in which socio-political inferiors assert equality by measuring their humanity against that of the privileged Venetians. They often do so not by immediate reference to refined human qualities, but rather through indirect reference, via an equalising of those same body parts by which baser humans, associated with manual labour, are otherwise measured and shown to be inferior, as anchoring inferiors in their bodies confirms their inferior rank.148 (Recall Maria in *Twelfth Night* referring to Viola: “we can hardly make distinction of our hands,” *TN* 2.4.143) Those same inferiors assimilate such characterisations into their tacit rebellions against the arbitrarily unequal measurement. Morocco is not of equal worth *simpliciter*, but of equal worth *despite* his
skin colour. Not merely he, but rather his face or gaze (his “aspect”) has frightened his enemies. *(MV 2.1.8)* He is not merely valorous, but rather need only be measured against “the fairest creature northward born” *(MV 2.1.4)* in order “to prove whose blood is reddest.” *(MV 2.1.7, emphasis added)* The point is not that indigenous, high-born characters are never spoken of with reference to their bodies—they certainly are, and particularly when they are being disparaged (e.g., *Lr.* 1.4.237 – 52; 2.2.385 – 90)—but only that aliens or subordinates are often referred to in that way conspicuously, sometimes relentlessly. It is not Shylock who distinctly measures out human worth in pounds of flesh. His entire Christian society does it through indirection; he therefore does it directly.

Shylock proclaims his equal measure of human qualities, in a similar build-up ascending from the human body to the human being, measuring himself precisely to the criterion set by the full-fledged humanity of the Venetians: “Hath not a Jew eyes? Hath not a Jew hands, organs, dimensions, senses, affections, passions?” *(MV 3.1.49 – 51)* Shylock’s whole vocabulary of blunt speech, alluding constantly to the organic and material, certainly teases out traditional myths of Christian spirituality and Jewish baseness. Beneath that veneer, however, it equalises surface hypocrisies, measuring Christians, who preach justice better than they practice it, with the common run of humanity. Barred from asserting socio-legal equality with Antonio, barred from spitting, kicking or insulting Antonio, or from undermining Antonio’s trade as Antonio undermines his, Shylock can only replace equal measure in the socio-legal sphere with equal measure in the organic and physical.\(^{149}\) *(MV 1.3.145 – 6)* It is at the moment of

\(^{148}\) [reference deleted for peer review]
\(^{149}\) Cf. *EAGLETON*, *supra* note 74, at 42 – 3, 45; *WATT*, *supra* note 139, at 245 – 9.
demanding such forfeit that actual scales of justice appear\(^{150}\), putting to us in age-old imagery the question as to whether justice is ever achieved, or only injustice forever perpetuated, through measurement.

Graziano, privileged as a Venetian, yet not of the highest ranks, assures his master of his own equal qualities through reference to an equally capable body part, in a characteristically Shakespearean moment of triviality-*cum*-rebellion: “My eyes, my lord, can look as swift as yours.” (*MV* 3.2.197) Curiously, in view of his vituperative attack on Shylock (*MV* 4.1.122 – 37; 359 – 96), Graziano meticulously measures out his comparison to his master, meticulously extrapolating from the human body to the human being.

You saw the mistress, I beheld the maid.

You loved, I loved; for intermission\(^{151}\)

No more pertains to me, my lord, than you.

(*MV* 3.2.197 – 200)

Portia, too, mounted as high on the social scale as she could wish, nevertheless faces the subordination of being a woman. Portia explains her socio-legal subservience to her father’s will with reference to a now-gendered physical attribute: “In terms of choice I am not solely led / By nice direction of a maiden’s eyes.” (*MV* 2.1.13 – 14; cf. *MV* 3.2.8)

When the servant Lancelot’s mental “fiend” counsels him to “run from this Jew my

\(^{150}\) Cf. *Watt*, supra note 139, at 244 – 5.

\(^{151}\) Glossed as “delay,” sluggishness being stereotypically attributed to lower ranks. (cf. *MV* 2.4.8 – 9, 45 – 6)

“Graziano has been as swift as Bassanio.” OXF4, 173; cf. CAM4, 133. Bassanio had already chided Graziano for “wild” conduct unbecoming of the higher classes. (*MV* 2.2.162 – 9)
master” (MV 2.2.1 – 2), its words are “use your legs.” (MV 2.2.4; cf. Err. 1.2.94) And when his “conscience” contradicts that voice, it similarly advises, “scorn running with thy heels.” (MV 2.2.7) Lancelot’s farcical crisis of ethics, the play’s whole show-down between justice and injustice warring bathetically in his mind (MV 2.2.1 – 25), and culminating in a decision that amounts to sheer pursuit of his perceived self-interest, lampoons the injustice propping up this world of professed Christian justice. It is immediately followed by the entrance of his father, Gobbo, whose blindness Lancelot will exploit for a prank (MV 2.2.26 – 90), echoing the more devastating deceit practiced by the child upon the father Shylock, who is blinded not by nature but by Venetian treachery, undergirded by its legal regime and that regime’s privileged members. Only fleetingly fooled into believing his son Lancelot is dead, Gobbo inadvertently announces the fate of Shylock who will indeed find himself bereft of “the very staff of [his] age” and his “prop.” (MV 2.2.57 – 8)

E. “As much as he deserves”

Few devices in Shakespeare so dramatically symbolise the precarious link between measurement and injustice as the play’s intermittently unfolding casket scenes. Each suitor’s worth must be measured, like Lear’s measurement of this daughters, and the disastrous political consequences that follow. The casket scene displays not Lear’s kind of publically decreed will, in the sense of desire, proclaimed by the fading feudal sovereign; but rather the legal will, the recorded, signed and sealed testament, of the emerging bourgeois paterfamilias, equally aimed at exercising a posthumous patriarchal and proprietary power through law. Portia’s father is not a deeply individualised Lear.
He is the absent, anonymous, fungible, any-old placeholder for the modern, “comfortable,” male head of household, just as the loved-before-known Bassanio might just as well be any privileged Venetian male. Portia’s father deploys law to stage his own ritual, whereby, or so he hopes, his “largest bounty,” his daughter and his fortune, “may extend / Where nature doth with merit challenge.” (Lr. 1.1.44 – 5)

If the prize of Lear’s old order is the aristocratic wealth of land, that of the new order is represented by caskets, each cast in metal, the obvious element of money and coinage, i.e., with transferable wealth. (The only wealth at issue in Shakespeare’s medieval historical dramas is land and its associated titles. No play in the corpus more insistently refers to moveable property and transient ownership, wealth or credit literally in motion, than The Merchant of Venice: Antonio’s far-flung ships, Shylock’s stolen valuables, Bassanio’s fleeting credit flow, the impending transfer of Portia’s wealth, the sequence of ring transfers. Land ownership per se is never mentioned.153)

Nerissa’s Aristotelian exhortation of embracing the mean between the extremes might well have pointed to the silver casket as the wise choice: cheaper than gold, dearer than lead, and therefore, following Aristotle, neither unduly prizing nor unduly disparaging of wealth. Yet the silver casket turns out to be another wrong choice in the market-driven universe. In this nascent modernity, one will not prosper by following some Aristotelian mean, no more than does Cordelia’s moderate “no more nor less” (Lr. 1.1.91), which would apply only the measure of moderation to wealth and its acquisition. The one who wins is the one willing to play the high-risk games that Antonio plays—

153 The Roman plays, albeit staging an earlier period of history, present an incipient kind of modernity: pre-modern, in the sense that it is still land, as an object of political and military conquest, which is the important property; yet modern in the sense that associated titles of nobility are already dispensed with in a functionally or formally republican context.
with spectacular material success in the long run—namely, to “hazard all he hath” (*MV* 2.7.9, 16; *MV* 2.9.90), in the competition of the marketplace, “in hope of fair advantages” (*MV* 2.7.19). That means, for Bassanio: willing to hazard, to sell even the life (*MV* 2.7.67) of that supposedly “dearest friend” and “kindest man” (*MV* 3.2.291; cf. *MV* 2.8.35) without whose gift Bassanio could not play.\(^{154}\)

When Morocco reaches the Aristotelian middle, the silver casket, he casts his entire being within terms of measurement. He, too, mirrors, yet also surpasses the lexicon of sheer money: “‘pause there, Morocco, / And weigh thy value with an even hand’” (*MV* 2.7.24 – 5) Morocco’s self-measurement will speak the language of masculine worth. Perhaps his merit does not “extend so far as to the lady”? And yet to be too “afeard of my deserving / Were but a weak disabling of myself.” (*MV* 2.7.29 – 30) If Morocco chooses wrongly, it is not because he lacks the universal and eternal enlightenment of some storybook wise man. Are we seriously to believe that Bassanio possesses it? Why would we assume that the merchant of Belmont, Portia’s father, can boast of any existential insights greater than that of knowing how to multiply his wealth; or that his “virtue” (*MV* 1.2.24) extends beyond Cephalus’s and Polemarchus’s mercantile concepts of keeping promises and paying debts?

The riddle of the caskets is locked less in universal and eternal truth, and more in the truths of modern markets. The fault of the Prince of Morocco (and Aragon) is not to choose wrongly in any absolute sense of mistaking some unwavering truth, but only in the relative sense of misapprehending the values of commercial success. Morocco can scarcely “hazard all he hath,” since he most probably has things, unlike Bassanio who has nothing to hazard except debt, and the life of his supposedly “dearest” friend. If

\(^{154}\) Cf. text accompanying note 119 *supra.*
Shakespeare, through a character like Bassanio, “created a new ideal: the love marriage”\textsuperscript{155}, it is because Bassanio has nothing else to contribute.

Nor, as Morocco suggests, can he ever realistically expect “as much as he deserves” from a society that will always, arbitrarily, define him \textit{a priori} as undeserving on grounds of his skin colour. By contrast, he can hardly be faulted for concluding that “the lady” Portia is “what many men desire,” since it as the riddle’s author who set his daughter up in precisely that commodified role. But the rule of marketplace success, as the play exhorts in every scene, is to apply a measure precisely opposite to the ones one preaches. This exotic, and in that same sense seemingly naïve outsider, could not possibly guess correctly. We are beguiled into overlooking the fact that, on all but superficial appearances of ethnicity, Morocco is so clearly the superior of the three main suitors—the only man who, on all available information, can actually boast some achievements. He is a would-be moor of Venice. Morocco can presumably bring Portia some of that wealth that she and her world hardly shun, and into which she has been so deftly assimilated. But what matters in the market world is not the feudal aristocrat’s static wealth, but the capitalist’s tools for increasing wealth. The debt-laden yet far from risk-averse Bassanio, in that world, is the wiser investment.

The suitor who does, by contrast, embrace Nerissa’s notion of the Aristotelian mean, the silver casket, is the play’s pre-eminently foolish character. Greek ideals may not be foolish in any eternal scheme, but have no place in free markets. The Prince of Aragon voices the play’s only lucid scepticism towards worth and measurement—towards a society where feudal privilege is supposedly to be supplanted by the new, market-driven ethos of meritocracy, yet where merit is acquired, traded, measured as just another

\textsuperscript{155} See Sokol & Sokol, \textit{supra} 112, p. 128 (quoting Dash).
commodity. Only a fool would take that Aristotelian course in this market world. The insights of this post-Armada, and therefore invariably laughing-stock Spaniard, collapse into fatuous platitudes, drowned in audience howls,

Why, then to thee, thou silver treasure-house.
Tell me once more what title thou dost bear.
“Who chooseth me shall get as much as he deserves”—
And well said too, for who shall go about
To cozen fortune, and be honourable
Without the stamp of merit? Let none presume
To wear an undeservèd dignity. (MV 2.9.33 – 9)

As we saw with Marx, the perils of measurement are perceived, yet are never surpassed,

O, that estates, degrees, and offices
Were not derived corruptly, and that clear honour
Were purchased by the merit of the wearer! (MV 2.9.40 – 2)

Remarkably, albeit a noble himself, Aragon challenges the existing socio-legal order,

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156 Any suggestion, then, that it would be distinctly Shylock, and not the whole of the play’s Christian-capitalist money-mongers, who falls short of an Aristotelian ideal of general justice, or who presses the law into unjust outcomes, see, e.g., Ward, supra note 59, at 131, is problematical. If, in a Marxist sense, Shylock has alienated his humanity to commerce, he is scarcely the only one to do so. Cf. R.W. White, Natural Law in English Renaissance Literature 163 (1996).
imagining arbitrary measurement replaced by meritocratic measurement,

How many then should cover that stand bare\footnote{\textit{Should wear hats who now stand bareheaded (before their social superiors).} NS2, 1144.},

How many be commanded that command?

How much low peasantry would then be gleaned

From the true seed of honour, and how much honour

Picked from the chaff and ruin of the times

To be new-varnished? (\textit{MV} 2.9.43 – 8)

Like the audience roar at the stage-fool Spaniard, the play’s socio-legal brutality will overwhelm any such ideal of just measurement. It will present this misbegotten fantasy, that there can be just measurement within this market world, with the head of a “blinking idiot” (\textit{MV} 2.7.53), impressed upon Aragon in no uncertain terms. (\textit{MV} 2.7.67, 72, 74, 79) Aragon, unlike Morocco presents no evidence of achievements to boast of, again raising the play’s incessant question about whether he measures up to his own meritocratic standard. Even if his wealth is purely inherited, it still outweighs Bassanio’s, leaving the motto of the lead casket distinctly unattractive. When Aragon despairs, “Did I deserve no more than a fool’s head?” (\textit{MV} 2.7.58), Portia, once again snaps back with stunningly cynical realism. If “[n]o man ought to be a judge in his own cause”\footnote{OXF4, 157 (citing Tilley)}, then Aragon’s notion of just measurement has not only “offended,” but done so in a way that surpasses his capacity to scrutinise: “To offend and judge are distinct offices, / And of opposèd natures.” (\textit{MV} 2.7.60 – 1) At the same time, if offending and judging refer to the
respective roles of Aragon and Portia, then Portia’s response refers to her own capacity to judge, which, as we have seen, she displays all too evidently throughout the play.

In the ring exchange sub-plot, Portia, certainly her father’s daughter, will have invented her own device to take, and to enforce, the measure of her husband’s worth. When Bassanio arrives, he is measured up as the most “likely . . . ambassador of love” on sight. \((MV 2.9.91)\) Portia then shows how law and justice are to be manipulated in this new world, as her will trumps her father’s after all. With all but a wink and a nod, she drops the hint that, although she will supposedly “never” be “foresworn” \((MV 3.2.11 – 12)\), she nevertheless “could teach” Bassanio “[h]ow to choose right.” \((MV 3.2.10 – 11)\) Suddenly, unlike the other suitors, Bassanio’s deliberations will be accompanied by well-rehearsed musicians, coaching him to follow not only his “heart” and “eyes,” but his “head.” And then for, so to speak, good measure, they will versify that admonition in the rhyming scheme “bred,” “head,” “nourishèd,” which, abracadabra, all rhyme with “lead.” \((MV 3.2.63 – 72)\) Bassanio immediately takes the hint: “So may the outward shows be least themselves.” \((MV 3.2.73)\)

Like her high-society counterpart Antonio, Portia has played and won the high-risk game. Instead of flatly defying the law set forth in her father’s will, she openly declares obedience to its “letter,” subverting its “spirit” (as, of course, Shylock is accused of doing), through tricks that might have failed, but have succeeded. Thus is measurement managed in our own socio-legal world. One swears allegiance to law, tricking it covertly within its own legal bounds. In that respect, measurement, the just as the fair and

\(^{159}\) Id.

\(^{160}\) “suitable,” NS2, 1145

\(^{161}\) On Portia’s overriding of her father’s will, see also Watt, supra note 139, at 241 – 43.
proportionate, can certainly produce justice, yet just as readily produces injustice.