

Accomplished with What She Lacks

LAW, EQUITY, AND PORTIA'S CON

Thomas C. Bilello

Abstract. Scholars have expended significant critical energy in mining The Merchant of Venice for equitable principles. Portia's "quality of mercy" speech is often cited as an equitable rejoinder to Shylock's demand for his bond's penalty. Examining early modern constructions of equity, this article will argue that there is little evidence of equity at work in the play. Rather, Portia's use of the law is unprincipled, and guided only by her desire to defeat Shylock.

Critics have long looked to the tension between law and equity in understanding Shakespeare's *The Merchant of Venice*.¹ This tension is rooted in Shylock's demand for his bond's notoriously onerous penalty, a pound of the debtor's flesh. The bond itself memorializes a loan made by Shylock to Bassanio, which the merchant Antonio is obligated to repay. When Antonio fails in his repayment obligation, Shylock brings suit for enforcement of the bond's penalty. Portia, recently married to Bassanio, conceals her identity and arrives at court in the guise of a Doctor of Laws from Padua apparently called upon to direct the Duke's decision. While acknowledging the "strange nature [of] the suit,"² Portia grants that the "law / cannot impugn" Shylock as he proceeds.³ Both the Duke and Portia appeal to Shylock, imploring him to be merciful in enforcing his demand for the penalty. When their pleas fail, Portia allows the enforcement of the penalty but only as strictly construed. The bond, Portia holds, allows for the taking of precisely one pound of the debtor's flesh—no less, no more—and not "[o]ne drop of Christian blood."⁴ This ruling renders the bond's penalty practically unenforceable. Portia then uses Shylock's

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attempt to enforce the penalty in court as the basis for an attempted murder charge, pursuant to which he is effectively dispossessed. Portia's highly technical reading of the bond—whereby the mere attempt to enforce it is itself a crime—dooms Shylock.

Critics generally agree that the play's court scene examines the conflict between the rigor of common law literalism and the flexibility of equitable construction.⁵ George W. Keeton, for example, argues that, in restricting Shylock's recovery to precisely one pound of flesh and no blood, Portia moves from common law to equity, analogous to a strict accounting of foreclosures on estates made in satisfaction of a debt.⁶ Mark Edwin Andrews imaginatively (and somewhat controversially) reconstructs the trial scene to depict litigants moving from the common law court, where Shylock's bond is held to be enforceable, to Chancery in order to obtain what is effectively an injunction of that holding.⁷ The "injunction" is in the form of the court-imposed no-blood condition. More recently, Stephen A. Cohen identifies in Portia's ruling the use of an Aristotelian notion of equity, specifically that the no-blood condition equitably preempts the injustice that would otherwise result by enforcing the bond.⁸ Yet in the face of this broad agreement, various scholars (including most recently B.J. Sokol and Mary Sokol) continue to argue that the trial in *The Merchant of Venice* has no connection to either the operation of equitable construction or English equity jurisdiction.⁹ Given such agreement, this claim begs investigation.

To explore this claim, we must first define equity and determine where in the play such equity may be located. If we cannot find equity to be in operation, we must then be prepared to provide an alternative in understanding the operation of the court. I will argue that Portia's judgment has little to do with justice or equity. Instead, she is motivated more by her desire to protect Antonio, her new husband's confidant. Indeed, by inserting herself by artifice into the legal proceedings to enforce the bond, Portia converts the law to an instrumentality of her will. Interestingly, the criticism of the court scene largely ignores the significance of Portia's fraud. For even were Portia not professionally unqualified to provide guidance on the disposition of the case—she is, after all, "an unlesson'd girl, unschool'd, unpractic'd"¹⁰—her direct personal interest in its disposition renders her judgment fatally partial, and is itself disqualifying. Yet, by disguising herself and effacing her bias, she appropriates the mechanisms of the court. To that extent, Portia succeeds brilliantly: she obtains Antonio's release from the bond, thereby relieving Bassanio from his moral debt and, by requiring Shylock's conversion to Christianity, ensures his elimination from

the usury market. But her performance in the courtroom cannot be viewed apart from her bias, which ultimately acts as a corrupting influence upon the court's decision. I will therefore argue that the court's operation can be best understood not in terms of the conflict between law and equity but rather in the exertion of Portia's will through her disingenuous use of the law.

The notion of equity as understood in sixteenth century England is commonly traced to Aristotle's discussion of *epieikeia* as developed in his *Nicomachean Ethics*.¹¹ There, Aristotle examines the concepts of "justice" and "equity." The law, Aristotle argues, is developed as a collection of general rules. While the mechanical application of these general rules is legally just, such application may be problematic in particular cases owing to that rule's very generality. In order to correct this defect, equity requires that the rule be applied as if the lawgiver "were present" and "had known of this particular case."¹² Thus, equity operates as "a corrective to what is legally just," where the strict and unreflective application of law would be inconsistent with the lawgiver's intention.¹³ Aristotle takes great pains to avoid the implication that the mechanical application of law may result in injustice. Indeed, by definition, such application of law is always legally just. The conflict between the law's generality and the varied, fact-specific situations to which the law is applied may at times not allow us to "speak correctly in universal terms," or may in some respects "[miss] the mark" or result in a "shortcoming."¹⁴ Still, the "law is none the less correct. For the mistake lies neither in the law nor in the lawgiver, but in the nature of the case."¹⁵ Accordingly, while the strict application of law is always just, it may not always be equitable. Equity then supplements positive law, as a principle of construction extending the lawgiving or legislative function to the person or body responsible for its application.¹⁶

For Aristotle, equity speaks to the imaginative reconstruction of statutes in a manner consistent with the intent of the legislator. Aristotle does not address the practical difficulties resulting from this construction, which include the requirement that the personal will of the judge be suppressed. As Carlton K. Allen argues, the principle of equitable construction

leaves many doubts open and has sometimes led to [judicial] refinements [of law] which border very closely on fiction. We are on slippery ground when we speak of doing that for the law which the law has not done for itself; and the principle of equity following the law has, in common experience, sometimes meant that equity follows at such a respectful distance that the law is quite lost to view, or else strides out so boldly that it outstrips, not to say outwits, the law.¹⁷

This increased emphasis on jurisprudence injects a measure of flexibility into the law, while reducing its certainty. It also amplifies the role of the judge in each particular case, empowering him to determine whether the law is indeed in conflict with equity and, if so, what equity requires.

Perhaps the most important early modern construction of equity can be found in Christopher St. German's *Doctor and Student*.¹⁸ In it, St. German builds upon Aristotle's formulation. According to St. German,

Equyte is a [ryghtwysenes] that consideryth all the pertyculer circumstaunces of the dede / the whiche also is temperyd with the swetnes of mercye. And [such an equyte] must alway be obseruyd in euery lawe of man / and in euery generall rewle therof / & that knewe he wel that sayd thus. Lawes couet to be relyd by equytye. And the wyse man sayth: be not ouer moch ryghtwyse for the extreme ryghtwysenes is extreme wronge[.]¹⁹

As in Aristotle's construction, equity becomes a corrective where applying "all that the wordes of the law gyueth" is to act "agaynst the lawe."²⁰ Equity requires, at times, that the "wordis of the lawe" be abandoned in favor of "reason and Justyce," in order to "tempre and myttygate the rygoure of the lawe."²¹ St. German echoes Aristotle in locating the problem of law in the failure of general rules: "It is not possyble to make any generall rewle of the lawe / but that it shall fayle in some case."²² Where the law of man would, by reason of its generality, offend the law of God or reason in any particular case, equity must step in as the exception "secretely vnderstande in euery generall rewle of euery posytyue lawe."²³ Equity is itself universal, to be observed "in euery lawe of man / and in euery generall rewle therof."²⁴ Further, as with Aristotle, equity is to follow the "intent of the lawe," rather than the strict "wordes of the lawe."²⁵ The judge must reconstruct the intent of the lawgiver in order to effectuate the equitable application of the law. For St. German (as well as other sixteenth century writers, such as Edward Hake), equity was not a set of principles in opposition to the law, but instead a method of interpretation or construction inherent therein.²⁶

St. German's use of the term "ryghtwysenes" may be understood by comparison to the likely source for his definition of equity. J.A. Guy traces St. German's concept of equity to the writings of the Parisian theologian Jean Gerson (1363–1429). Guy states plainly that "it is Gerson who unquestionably dictates the formulation" of St. German's discussion of equity in *Doctor and Student*.²⁷ Gerson's definition, as offered in his *Regulae Morales*, reads, "Equity is justice

[which] having weighed all the particular circumstances is tempered with the sweetness of mercy.”²⁸ One significant point of difference is St. German’s use of the term “ryghtwysenes” in place of Gerson’s “justice.” St. German’s substitution of the term “justice” avoids some of the difficulty faced by Aristotle, where “justice” is the strict application of the law even where such is not “equitable.” St. German can then posit a circumstance where the strict application of law does not result in justice:

[T]o folowe the wordes of the lawe / were in some case both agaynst Iustyce & the common welthe: wherfore in some cases it is *good and even* necessary to leue the wordis of the lawe / & to folowe that reason and Justyce requyreth / & to that intent equitye is ordeyned / that is to say to tempre and myttygate the rygoure of the lawe.²⁹

While St. German generally tracks Aristotle, he is more willing to discuss frankly the consequences of the failure of general law. St. German asserts that the mechanical application of law will, in some cases, be unjust.

If equity is operating in *The Merchant of Venice*, we should see some discussion of whether the law as applied is consistent with the legislator’s intention. There is, of course, no such discussion. Indeed, as Theodore Ziolkowski notes, the word “equity” never occurs in the play;³⁰ the discussion at court is whether the bond’s penalty is legally enforceable. Before the bond can be enforced, however, it must be established as lawful. Given the commercial successes of both Antonio and Shylock, the requisite legal formalities would be familiar to both. In fact, it appears that the parties agree to satisfy the formalities for its enforcement as it has been reduced to writing, sealed and notarized.³¹ Moreover, there appears to be an actual and intended agreement to the bond’s terms between the two, in that Antonio agrees to Shylock’s unusual proposal of a penalty not once but at least three times. Shylock states:

Go with me to a notary, seal me there
Your single bond; and in a merry sport
If you repay me not on such a day,
In such a place, such sum or sums as are
Express’d in the condition, let the forfeit
Be nominated for an equal pound
Of your fair flesh, to be cut off and taken
In what part of your body pleaseth me.³²

To this, Antonio responds, “Content, in faith, I’ll seal to such a bond.”³³ Again, after Shylock minimizes the value of the proposed penalty (“what should I gain / By the extraction of the forfeiture?”³⁴), Antonio confirms his agreement to its terms: “Yes, Shylock, I will seal unto this bond.”³⁵ Finally, the bond is in fact sealed before a notary and presented at court. Shylock’s description of the bond as entered “in a merry sport” suggests that both parties understood the penalty as in jest and not to be enforced. If so, Antonio may never have intended to be bound. This is, however, rendered moot when Antonio confesses the enforceability of the bond in open court.³⁶ Antonio’s confession means that the parties to the bond have no dispute as to its enforceability. Indeed, both Shylock and Antonio ask the court for the enforcement of the penalty: Shylock, in his repeated requests for “judgment” or “law,” and Antonio in his plea for “judgment.”³⁷ Without any dispute proffered by the litigants as to the legality of the bond or their stated desires, there is little for equity (or the court) to do: there appears to be no conflict between the law and the stated desires of the litigants for the court to resolve and therefore no room for equity to operate.

Still, St. German’s notion of equity may be implicated if, by enforcement of the bond’s penalty (the law demanded by Shylock), the application of Venetian law results in a violation of the law of God or the law of nature. To enforce the bond’s penalty, the argument might run, is to enforce an unnatural agreement that offends the physical integrity of the person, and no person should be held to such contracts. This is perhaps similar to the common critical comment that such a bond should be unenforceable as against public policy, which has been proffered by numerous critics.³⁸ Nonetheless, the court neither enjoins the enforcement of the penalty, nor mitigates its recovery. Instead, the court expressly finds the bond and its penalty enforceable. “You must prepare your bosom for his knife,” Portia directs Antonio,

For the intent and purpose of the law
Hath full relation to the penalty,
Which here appeareth due upon the bond.³⁹

The suggestion in Portia’s legal judgment is that the law supporting enforcement of the penalty was intended to operate in this manner. This may be understood as implicating equity, as, for both Aristotle and St. German, the judge is to mitigate the application of law in a manner so as to carry out the legislator’s intent. Indeed, Stephen A. Cohen concedes “the principle of intent

is emphatically not the basis of Portia's equitable decision."⁴⁰ Instead, as Cohen recognizes, both the spirit and letter of the law support Shylock's claims. However, where the spirit and letter of the law coincide, equity (as construed by both Aristotle and St. German) has no role as there exists no need to ameliorate the law's rigor. The mechanical application of general law is appropriate under those circumstances. In this case, Portia does not attempt to limit the law's application to the bond, but applies it rigidly, formally, mechanically. Her reference to the law's intent merely adds credibility to her ruling. If, as Cohen argues, the legislator's intent has no role in Portia's ruling, then the notions of equity discussed above are not implicated in the play.

While equity is conspicuously absent, mercy is featured prominently in the court scene. Yet equity is not itself mercy, even if it is merciful in effect. Professor Keeton, an expert in English equity jurisdiction, is careful to distinguish "mercy" from "equity":

Equity is not mercy—it is a higher conception of justice itself than is to be found in the common law—but the impoverished Elizabethan nobleman must have regarded the relief which the court of Chancery awarded him in respect of bonds which he could not honour and estates which he could not for the moment redeem as “dropping like the gentle rain from heaven.”⁴¹

Some commentators, in attempting to understand Portia's "quality of mercy" speech as an appeal to (or echo of) equity, elide this distinction. However, Portia's appeal is not to the court for an equitable mitigation of the bond's penalty, but is an appeal to Shylock's sympathy for the compromise of his penalty. Though B.J. Sokol and Mary Sokol conclude "Portia asks Shylock for human mercy, not the bench for the benefit of an equitable remedy,"⁴² they do so without elaboration. Portia's "quality of mercy" speech has been cited as important in understanding the operation of equity in this scene, and I would like to examine its operation here.⁴³

At court, both the Duke and Portia urge Shylock to be merciful and to drop his demand for the bond's penalty, accepting instead monetary damages. Interestingly, neither Portia nor the Duke characterizes mercy as a function of the court or judge. Upon his arrival in court, the Duke tells Shylock that the world expects him to "show thy mercy" and forgive not only the penalty but a portion of the principal as well.⁴⁴ When Shylock rebuffs this suggestion, the Duke asks, "How shalt thou hope for mercy, rend'ring none?"⁴⁵ Portia similarly probes Shylock's willingness to be merciful. After Antonio agrees to the

bond's legal sufficiency, Portia states, "Then must the Jew be merciful,"⁴⁶ to which Shylock responds, "On what compulsion must I?"⁴⁷ In her response, Portia acknowledges that such cannot be compelled:

The quality of mercy is not strained,
It droppeth as the gentle rain from heaven
Upon the place beneath.⁴⁸

That is to say, as Shylock suggests, that he cannot be compelled by the state or its laws to be merciful. Rather, his "earthly power" will "show likest God's / When mercy seasons justice."⁴⁹ After importuning Shylock, Portia "pray[s] for mercy."⁵⁰ She has spoken

To mitigate the justice of thy plea,
Which if thou follow, this strict court of Venice
Must needs give sentence 'gainst the merchant there.⁵¹

The justice discussed here is akin to Aristotle's notion of justice—that of the strict application of law. Justice for Shylock is the collection of his penalty. Portia asks that he mercifully compromise his lawful claim, and accept less than his legal entitlement.

Portia's plea reminds us of Aristotle's extension of the concept of equity to individual action:

A man is equitable who chooses and performs acts of this sort, who is no stickler for justice in a bad sense, but is satisfied with less than his share even though he has the law on his side. Such a characteristic is equity; it is a kind of justice and not a characteristic different from justice.⁵²

Aristotle develops an analogy between the equitable goals of the judge and that of private individuals. Just as the judge is to be guided by notions of equity in the application of the law, so must individuals operate equitably toward each other in private transactions. Shylock's repeated demands for justice, then, ignore the inequity that, at the level of private transactions, would result at the enforcement of the bond's penalty. Although his penalty may be provided for by the law, and as such may be just in the Aristotelian sense, his insistence on its enforcement distinguishes it as inequitable.

Of course, equity has another meaning apart from that examined above. Equity also refers to the authority of the English equity courts, including the Chancery court. English equity jurisdiction developed under the authority of

the Chancellor, and generally sought to provide relief from the overly rigorous holdings in common law courts.⁵³ It is well accepted that, by the sixteenth century, the Chancery court routinely granted relief from the collection of bond penalties where such would impose undue hardship on the debtor, and monetary damages would suffice.⁵⁴ According to A.W.B. Simpson, Chancery courts began to draw a distinction between a “penalty,” designed to encourage the obligor’s performance *in terrorem*, and “liquidated damages,” a bona fide covenant for the payment of possible future damages.⁵⁵ The penal bond fell into decline due in part to the reluctance of the Chancery courts to enforce penalties. Courts worked to avoid enforcing penalty provisions in bonds, and granted relief from bond penalties in, for example, cases of “extreme hardship or oppression.” Such equitable injunctions became increasingly common in the reign of Elizabeth I. According to Sir George Cary, if a person bound by penalty fails to make timely payment as provided for by the bond, but tenders payment in short order thereafter, “Chancery will compel the obligee to take his principal, with some reasonable consideration of his damages.”⁵⁶ Such damages would typically consist of interest and demonstrable costs.

While it appears that the penal bond’s disfavor developed at least in part after the writing of *The Merchant of Venice*, English courts were relieving debtors from penalty from at least the fourteenth century. For example, in *Umfraville v. Lonstede*,⁵⁷ the defendant entered into a bond to deliver a document to the plaintiff as of a certain date. The bond included a penalty requiring payment of a sum if the defendant failed to deliver as required. When the defendant failed to deliver the document as agreed, the plaintiff sued for the penalty. There appears to be no question of fact as to the defendant’s failure to deliver. However, the defendant tendered delivery of the document at court, citing his prior absence “beyond the sea” (along with his wife’s apparent failure to follow his request to deliver in his stead) and argued that the plaintiff had not been harmed by his failure to deliver. The plaintiff relied on the words of his bond in his prayer for recovery. The court, distinguishing the desired recovery as a “penalty” and not a “debt,” asked, “What equity would it be to award you the debt when the document is tendered and you cannot show that you have been damaged by the detention?” The court held that the plaintiff must wait seven years for his judgment.

F.W. Maitland describes this injunction as “an indefinite postponement of that judgement which is dictated by the rigour of the law” and as such a “premonition of Equity.”⁵⁸ More to the point, while occurring some two hundred years prior to Shakespeare’s writing of *The Merchant of Venice*, *Umfraville* is

one example of how a bond's penalty might be dealt with by a court of equity. Further, it supports the notion that such equitable remedies were well established at the time of the writing of *Merchant*.⁵⁹ Yet the Venetian court does nothing similar to *Umfraville*.

Not unlike *Umfraville*, Bassanio—the recipient of the loan proceeds but an apparent third party to the bond—offers the full repayment of the debt to Shylock in open court, and with generous interest. Bassanio offers Shylock fully two times the loan proceeds, which, considering the three-month loan period, Richard Posner calculates to be equivalent to an annual interest rate of four hundred percent.⁶⁰ In fact, Bassanio states that he will pay Shylock ten times the amount owed if he will forego his penalty⁶¹ (such repayment to be made of course from his new wife Portia's riches). Shylock refuses, demanding his penalty under the bond. Unlike *Umfraville*, however, the court does not ask Shylock for proof of his damage in light of the amounts proffered. Instead, Portia maintains her formalist approach to the language of the bond in ruling that the penalty is fully enforceable under its strict terms: "A pound of that same merchant's flesh is thine. / The court awards it, and the law doth give it."⁶²

Portia's literalist reading of the bond's terms is dramatically foreshadowed by Shylock's legalistic view of his obligation to Antonio. Shylock argues, and Portia concedes, that he cannot be legally compelled to show mercy. In preparing for the enforcement of the penalty, Portia then asks Shylock to "[h]ave by some surgeon . . . on your charge, / To stop his wounds, lest he do bleed to death."⁶³ Shylock asks, "Is it so nominated in the bond?"⁶⁴ Of course, it is not. Portia responds that it is not the bond, but charity, that demands he act so. Instead, Shylock sees his relationship to Antonio in commercial terms, and as wholly contained in the bond. Shylock is not compelled to do anything for Antonio not provided for in the bond, including obtaining and paying for the assistance of a physician. To this extent, Antonio is commodified. Just as Shylock argues that he owes no duty to the "muttons, beefs, or goats" purchased and sold for their flesh, neither does he owe a duty to Antonio. More pointedly, while in court Shylock compares Antonio to "a rat"—a vermin with no commercial value—and his refusal of the bond's repayment to the exercise of his legal option to collect the penalty:

What if my house be troubled with a rat,
And I be pleas'd to give ten thousand ducats
To have it ban'd?"⁶⁵

Shylock offers no more reason for his refusal of repayment more than “a lodged hate and a certain loathing / I bear Antonio.”⁶⁶ The loss of his three thousand ducats becomes his purchase price for Antonio’s life. Shylock’s position announces the stillbirth of the friendship desired by him at the formation of the “merry bond.”

Shylock’s narrow reading of his obligation to Antonio gives Portia license for her narrow reading of the bond’s penalty:

This bond doth give thee here no jot of blood;
 The words expressly are “a pound of flesh.”
 Take then thy bond, take thou thy pound of flesh,
 But in the cutting it, if thou dost shed
 One drop of Christian blood, thy lands and goods
 Are by the laws of Venice confiscate
 Unto the state of Venice.⁶⁷

While the bond’s penalty is enforceable by Shylock, any attempted enforcement exposes him to criminal liability if he varies from its strict terms. Indeed, Portia goes on to say that Shylock will be sentenced to die where he takes either “more / Or less than a just a pound.”⁶⁸ Sensing Shylock’s defeat, Portia taunts him: “[A]s thou urgest justice, be assur’d / Thou shalt have justice more than thou desir’st.”⁶⁹ Shylock has not, in fact, ever asked for “justice.” His demand has been for “the law,” that is to say, its strict application without mitigation. Justice is not Shylock’s concern except to the extent that an appeal to “justice” may mitigate his receipt of law. Yet Portia’s subtle transformation of Shylock’s plea from law to justice will certainly obtain a different end. Portia seeks to impose an Aristotelian “justice,” the rigorous application of law. But as Aristotle suggests, this justice is not necessarily equitable. Portia’s notion of imposing a “justice more than thou desir’st” gestures toward the equitable mitigation of law’s application that St. German found necessary.

Cohen argues that Portia’s hyper-technical reading of the bond, specifically in its separation of blood from flesh, was a common tactic exercised by equity courts when attempting to discourage the collection of a common law judgment:

[T]he courts of equity would often thwart a common-law award by placing such stringent restrictions and protections on the property to be seized as frequently to make the path of least resistance that taken by Shylock, the “voluntary” non-collection of the award.⁷⁰

Keeton's position is that the property-like accounting required of Shylock—"Shed thou no blood, nor cut thou less nor more / But just a pound of flesh"⁷¹—is akin to that required by equity courts in debtor-creditor transactions. Both positions fail to recognize that equity courts had long established remedies for debtors with respect to the enforcement of penalties. The court's typical method of equitable relief was to simply not enforce the penalty, and instead assess money damages. But Portia's desire is to provide legal support for Shylock's enforceability of the bond, so that the attempt to enforce it—or, more accurately, intent to enforce, as no physical attempt is apparent—can be prosecuted as attempted murder under the alien statute. Her goal is neither "justice" nor "equity," but the redemption of her husband's friendship with Antonio through the defeat of Shylock.

Still, critics see Portia's performance at court as admirable. Posner, while acknowledging that she is an "imposter" with "an undisclosed interest in the outcome of the trial"⁷² nevertheless refers to Portia in almost reverent tones:

Portia personifies the spirit of equity—the prudent recognition that strict rules of law, however necessary to a well-ordered society, must be applied with sensitivity and tact so that the spirit of the law is not sacrificed unnecessarily to the letter.⁷³

Posner recognizes that "no equitable principles actually inform" the action in the play,⁷⁴ yet he (like many others) seems too willing to discount the fatally compromised position held by Portia qua judge. She is, after all, wife to Bassanio, Antonio's self-described "dear friend."⁷⁵ Antonio sealed to Shylock's bond in order to secure funds for Bassanio in his courting of Portia.⁷⁶ When Shylock brings his action, Bassanio makes plain to Portia his relationship to Antonio, and the import of Shylock's suit.⁷⁷ "Is it your dear friend that is thus in trouble?" asks Portia, to which Bassanio answers,

The dearest friend to me, the kindest man,
The best-condition'd and unwearied spirit
In doing courtesies, and one in whom
The ancient Roman honor more appears
Than any that draws breath in Italy.⁷⁸

Portia resolves to protect Antonio from the bond's penalty by paying Shylock many times the principle, "Before a friend of this description / Shall lose

a hair through Bassanio's fault."⁷⁹ When she understands that Shylock will not allow the monetary satisfaction of his bond, Portia develops a strategy intended to defeat Shylock. However, this defeat requires that she engage an elaborate fraud—in her words, the “device”⁸⁰—upon the Duke of Venice and others at court. This fraud undermines any justice or law available in court, as Portia has predetermined Shylock's fate; the Venetian courts become simply the forum for Shylock's destruction. That the court will find the bond's penalty unenforceable is a *fait accompli*. To that extent, neither justice nor the law is available to Shylock.

To insert herself into the operation of the court, Portia must conceal her identity, and sends to her respected cousin, Bellario, for the garments typically worn by a Doctor of Laws. These garments serve to efface both her gender and her sympathies to the debtor Antonio. It is interesting to note that, in rehearsing her transition from woman to man, Portia identifies the most characteristic male trait as the “tell[ing] of quaint lies.”⁸¹ While the lies rehearsed are those of a boy and, as such, not significant, the suggestion is that dissembling defines the male character. By obscuring her gender, Portia perpetrates the first lie, an ironic and necessary step to her entry into the exclusively male court. Of course, her disguise remains in place throughout the trial, which provides her the credibility with the litigants and the Duke required to defeat Shylock.

Bassanio's soliloquy before the caskets is telling, and foreshadows Portia's double role in court. As Bassanio begins to analyze the three caskets that will determine whether he has won Portia's hand in marriage, he speculates as to the meaning of their adornments:

So may the outward shows be least themselves—
The world is still deceiv'd with ornament.
In law, what plea so tainted and corrupt
But, being season'd with a gracious voice,
Obscures the show of evil?⁸²

Just as the ornamentation of the gold and silver caskets conceals the suitor's failure in the loss of Portia, so do Portia's garments conceal the evil of her bias. The popularity of Portia's overly legalistic reading of the bond becomes the “ornament” with which her “tainted and corrupt” judgment is obscured. Indeed, the spectators at court all but demand that Portia use her offices to manipulate the effect of the law, to view the law as a means to the end of

punishing Shylock. Bassanio, in demanding that Shylock accept monetary damages in lieu of his penalty, begs Portia to

Wrest once the law to your authority:
To do a great right, do a little wrong,
And curb this cruel devil of his will.⁸³

Bassanio understands that Venice is governed by rule of law, yet determines that the law, in this particular case, should be used to spare Antonio from the enforcement of the penalty. The law, then, becomes the mere instrumentality to Antonio's deliverance.

Portia resists Bassanio's open prayer for the manipulation of law. "It must not be," she proclaims:

[T]here is no power in Venice
Can alter a decree established.
'Twill be recorded for a precedent,
And many an error by the same example
Will rush into the state. It cannot be.⁸⁴

While Portia argues for the primacy of the rule of law ("no power in Venice / Can alter a decree established"), her contrived enforcement of the penalty suggests otherwise. By usurping the judicial role, Portia has arrogated the power to declare the bond void. Because her power to judge is obtained through fraud perpetrated against the Duke, the court, and the litigants, she has no right to act as an agent of the court. She has misappropriated the Duke's (and thus Venetian) authority, thereby arguably acting with more criminal liability than Shylock, who does no more than present his good faith claim for enforcement of an agreement to the court.

If equity is in fact absent, it should be remembered that this play is more about a sublegal desire for revenge than the legal process that constrains and controls that desire; the legal process merely acts to mediate the desire. Shylock's action to enforce the bond's penalty stems from an "ancient grudge"⁸⁵ he bears Antonio. This grudge is based both in commerce and religion:

I hate him for he is a Christian;
But more, for that in low simplicity
He lends out money gratis, and brings down
The rate of usance here with us in Venice.⁸⁶

Antonio abuses Shylock for both his business of lending money at interest and for his Jewishness. Shylock has long suffered Antonio's verbal and physical insults. Antonio calls him "misbeliever" and "cut throat dog." He spits on Shylock's "Jewish gaberdine" and beard, and kicks him.⁸⁷ Worse, Antonio is unrepentant: "I am as like to call thee so again, / To spet on thee again, to spurn thee too."⁸⁸ Despite these hostilities, Antonio recognizes a commercial necessity in Shylock. He demands that the loan be made, but as to an enemy, so that if the bond is not repaid, Shylock may "with better face / Exact the penalty."⁸⁹ Shylock's stated desire, however, is to forget the indignities perpetrated by Antonio, and make the loan without interest, as between friends:

I would be friends with you, and have your love,
 Forget the shames that you have stain'd me with,
 Supply your present wants, and take no doit
 Of usance for my moneys.⁹⁰

As a token of this friendship, Shylock proposes the penalty as a pound of flesh, and the bond is executed.

Charles Spinosa suggests that Shylock is instinctively working to establish a rapport with Antonio, "to explore and deepen his bitter relations with" him.⁹¹ The bond, Spinosa argues, is Shylock's attempt to normalize their interactions. However, we must read Shylock's proposal in the context of his desire for revenge against Antonio, stated not one hundred lines prior to his proposal: "If I can catch him once upon the hip, / I will feed fat the ancient grudge I bear him."⁹² Thus, even if Shylock's desire is to peaceably resolve his conflict with Antonio, the penalty he proposes serves as a safety valve, an alternative and final method of resolution. The bond will either generate the goodwill that Shylock seeks, or be used to destroy Antonio.

Shylock's "ancient grudge" is quickly stoked by the loss of his daughter and a certain part of his fortune to Lorenzo, a Christian. Shylock no longer speaks of the practical uselessness of the nominated penalty ("what should I gain / By the exaction of the forfeiture?"⁹³) but instead of his cemented desire to obtain it.⁹⁴ When asked by Salerio as to the usefulness of Antonio's flesh, Shylock's gracious veneer is gone, and revenge asserts its primacy: "if it will feed nothing / else, it will feed my revenge."⁹⁵ Shylock understands that Antonio has behaved cruelly to him because he is a Jew. For Antonio, Shylock is wholly other, viewed through the lens of his difference. Shylock is something less than fully human and Antonio treats him as such. Shylock, in his

“Hath a Jew not eyes” speech, interrogates the notion of difference by positing that those things at the base of humanity are common to both Christians and Jews. This, of course, extends to the base human desire for revenge:

And if you wrong us, shall
we not revenge? If we are like you in the rest, we
will resemble you in that. If a Jew wrong a Christian,
what is his humility? Revenge. If a Christian wrong
a Jew, what should his sufferance be by Chris-
tian example? Why, revenge. The villainy you teach
me, I will execute, and it shall go hard but I will
better the instruction.⁹⁶

The loss of his daughter solidifies Shylock’s desire for revenge, the strategy for which has already been established. The bond’s penalty remains commercially empty, as Shylock acknowledges, and at its core punitive. Antonio has subjected Shylock to physical insults that, when compared to the bond’s penalty, appear trifling. As such, Antonio’s example is “bettered.” Yet Shylock’s desire for revenge is undifferentiated. He seeks revenge not only against Antonio, but against all Christians under whom he has suffered. Shylock’s loss of his daughter, ducats, and jewels, compounded by his failure to locate Lorenzo, leaves him with “no satisfaction, no revenge.”⁹⁷ Yet the penalty has a commercial effect—Antonio’s absence from Venetian commerce will allow Shylock to control the lending market, to “make what merchandise I will.”⁹⁸

When next Shylock interacts with Antonio, gone is the suggestion of “kindness,” “love,” and “friendship.” These are instead replaced by Shylock’s desire for the bond’s penalty. Antonio, accompanied by his jailer and perhaps still under the impression that Shylock had desired his friendship, pleads: “Hear me yet, good Shylock [. . .] I pray thee hear me speak.”⁹⁹ Shylock, however, refuses to engage the merchant in conversation, repeating his demand for the bond’s penalty. Antonio recognizes that Shylock now seeks his life because Antonio has assisted Shylock’s debtors in satisfying their obligations. Antonio, then, has prevented Shylock from collecting the penalties of various other bonds. This interference, Antonio understands, is the reason “he hates me.”¹⁰⁰

Portia’s use of law is analogous to Shylock’s use of the bond: both seek to cloak revenge in the guise of authority. In this way, the law legitimates, and indeed enables, the blood-lust that its formalities attempt to control. Although Shylock’s attempt to defeat Antonio (through legal pursuit of his penalty under the bond) is at once legally protected and criminally actionable, Portia’s

destruction of Shylock is privileged. Portia, in her position as judge, can interpret and apply the law at her discretion. Her rulings establish the legality of the penalty and limit its recovery. The text of the play offers no indication that Shylock has made any overt attempt to foreclose on the bond—that is, to injure Antonio—without the court’s direction and approval. Still, Shylock is prosecuted under the alien statute, which states in substance,

If it be proved against an alien,
That by direct or indirect attempts
He seek the life of any citizen,
The party ’gainst the which he doth contrive
Shall seize one half his goods; the other half
Comes to the privy coffer of the state,
And the offender’s life lies in the mercy
Of the Duke only, ’gainst all other voice[.]¹⁰¹

Shylock does not defend against this charge, nor does Portia or the court offer the proof required for conviction. While it is clear that Shylock seeks some measure of personal, ethnic, or religious revenge in pursuing his pound of flesh, it is not clear whether Shylock takes any overt action, either “direct or indirect,” by way of ending Antonio’s life. Shylock appropriately looks to the bond’s enforcement through the courts of Venice and not through some lawless self-help. Consistent with this logic, if an action to enforce the bond in court is a criminal act, Portia acts as an accessory to that crime in that she, through her decision, provides Shylock with the legal right to pursue his penalty: Portia rules that the law will protect Shylock in obtaining his penalty.

Shylock looks to implicate Venetian law in carrying out his revenge. The common single bond, he argues, is legally enforceable and, as such, its penalty should be as well. Indeed, Shylock argues that Venetian law is compelled to enforce the bond for commercial reasons. Venice’s commerce is important, and the non-enforcement of arm’s-length commercial agreements risks loss of confidence from that sector. Antonio recognizes as much:

The Duke cannot deny the course of law;
For the commodity that strangers have
With us in Venice, if it be denied,
Will much impeach the justice of the state,
Since that the trade and profit of the city
Consisteth of all nations.¹⁰²

And, of course, Antonio is right. As Portia recognizes, the law must respect and enforce such private commercial agreements or risk losing the confidence of its merchants for want of certainty and predictability. Shylock understands this and forces the court to enforce his penalty. Indeed, that Shylock is no stranger to commercial transactions strongly suggests that he understood that the bond would not be viewed by the law as merely “merry sport,” but as binding. The law, then, becomes the agency, and the court the public forum, through which both Shylock and Antonio (through his agent, Portia) seek revenge.

But Portia’s holding will likely degrade the confidence of the business community beyond that which merely not enforcing the bond’s penalty may have done. A conditional bond containing the penalty of a pound of flesh simply does not present a serious commercial appeal, and certainly plays no significant role in Venetian commerce. A holding that the bond’s penalty was unenforceable would not disrupt commerce. Any suggestion that Venetians would no longer have the freedom to enter into contracts based upon such a ruling would be countered by the acommercial nature of the bond’s voided penalty. However, Portia’s creative and overly narrow reading of the bond could be extended. Does a contract executed in Venice for the purchase of a lamb exclude any part not expressly identified? Does a contract for the purchase of a portion of land exclude flora not expressly nominated? Portia’s too-clever ruling suggests that Venice maintains an overly active judiciary, and as such does far greater harm to the notion of Venice’s freedom than the mere vitiation of the bond’s penalty.

Despite the many implications of her ruling, Portia ultimately acts to uphold and enforce Shylock’s bond. However, her hyper-technical and disingenuous reading renders its penalty unenforceable. Even though ruling that the bond is legal, Portia converts Shylock’s demand for its enforcement into a criminal attempt on Antonio’s life. This nonsensical juridical conclusion suggests that the “law” repeatedly demanded by Shylock is infinitely plastic and exists to be manipulated by a partial—and quite literally false—judiciary. As such, Portia, through Shylock’s condemnation, implicates the very laws and legal procedures of Venice. While nominally still inviolate, Venetian law becomes no more than the convenient instrument of Shylock’s demise, and the certainty desired by all with a stake in its commerce—including the Duke, Antonio, Shylock, and Portia—is compromised. Does it matter that Portia obtains her judicial power through deception if her ruling is in fact appropriate?

We need not reach this question, as she certainly overreaches in resolving the matter at hand. Not only does Portia render the bond's penalty effectively unenforceable, but she goes on to pursue Shylock personally, subjecting him to death, his estate to forfeiture, and his religious convictions to suppression. Thus, Portia's bias reduces the Venetian court to a forum of revenge rather than law. Her con, in donning the robes of the Doctor of Laws, is in deceiving the Duke into thinking that she is "accomplished / With that [she] lacks."¹⁰³ This is not simply a blue joke. Portia lacks actual authority to act on behalf of the court. The gowns efface her gender but, more importantly, her usurpation of the mechanisms of the court.

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1. William Shakespeare, *The Merchant of Venice*, in *The Riverside Shakespeare*, 2nd ed., G. Blakemore Evans, gen. ed. (Boston: Houghton Mifflin, 1997). All subsequent citations to the play will be to act, scene, and line of that edition.
 2. 4.1.177.
 3. 4.1.178–79.
 4. 4.1.310.
 5. Owen Hood Phillips, in his chapter cataloging criticism regarding the trial scene, states: "There is a fair measure of agreement among Shakespeare scholars that the trial scene in *The Merchant of Venice* (4.1) expresses the perennial conflict between law or strict justice on the one hand and mercy on the other." O. Hood Phillips, *Shakespeare & the Lawyers* (London: Methuen, 1972), 91. Phillips's use of the term "mercy" rather than "equity," while not uncommon, is problematic. I will discuss the distinction between the terms later in this paper. For a helpful overview of the critical debate concerning the operation of law versus equity in *The Merchant of Venice*, and the development of the "consensus" view, see Charles Spinosa, "Shylock and Debt and Contract in *The Merchant of Venice*," 5 *Cardozo Studies in Law and Literature* 65–85 (1993), at 82n3. For a survey of the literature on the theme of "law versus equity" in *Merchant*, see B.J. Sokol and Mary Sokol, "Shakespeare and the English Equity Jurisdiction: *The Merchant of Venice* and the Two Texts of *King Lear*," 50 *Review of English Studies* 417–39 (1999), at 421–28.
 6. George W. Keeton, *Shakespeare's Legal and Political Background* (London: Pitman, 1967), 144–46; see also *Shakespeare and His Legal Problems* (London: A&C Black, 1930), 18–20.
 7. Mark Edwin Andrews, *Law versus Equity in The Merchant of Venice* (Boulder: University of Colorado Press, 1965).
 8. Stephen A. Cohen, "'The Quality of Mercy': Law, Equity and Ideology in *The Merchant of Venice*," 27/4 *Mosaic*, 35–54 (1994).
 9. Sokol and Sokol, *supra* note 5 at 421–28, cite various dissenting opinions, including, among others, R.S. White, *Natural Law in English Renaissance Literature* (New York: Cambridge University Press, 1996), 164.
 10. 3.2.159.
 11. Aristotle, *Nicomachean Ethics*, Martin Ostwald, trans. (Indianapolis: Bobbs-Merrill, 1962), 141–42, book 5, chapter 10. Ostwald notes that the Greek noun *epieikeia*, translated by him as "equity" or "the equitable," must be understood broadly to "include any notion of decency, fair play, etc." *Id.*, at 141n1. Similarly, Carlton K. Allen understands *epieikeia* as "the general principle of fairness or equity." Carlton K. Allen, *Law in the Making* (London: Oxford University Press, 1964), 388.

12. Aristotle, *id.*, at 141.
13. *Id.*
14. *Id.*, at 141–42.
15. *Id.*, at 141.
16. For purposes of Aristotle’s construction, I will assume that the law is “applied” by one in the role of the judge.
17. Allen, *supra* note 11 at 390.
18. The text referred to throughout is *St. German’s Doctor and Student*, T.F.T. Plucknett and J.L. Barton, eds. (London: Selden Society, 1974). This dialogue was first published in England anonymously under the title *Hereafter foloweth a dyaloge in Englysshe bytwyxt a doctoure of dyuynyte and a student in the lawes of Englande, of the groundes of the sayd lawes and of conscience* [1530?].
19. *Id.*, at 95–97; all punctuation but terminal brackets as in the original.
20. *Id.*, at 97.
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*, at 95.
25. *Id.*, at 99.
26. See, e.g., Glenn Burgess, *The Politics of the Ancient Constitution: An Introduction to English Political Thought, 1603–1642* (University Park: Pennsylvania State University Press, 1992), 87. See also J.A. Guy, *Christopher St. German on Chancery and Statute* (London: Selden, 1985), 71. (“For St. German himself held that equity is not outside the law, but resides implicitly in and should be observed in every human law.”)
27. Guy, *id.*, at 72 (citing P. Vinogradoff, “Reason and Conscience in Sixteenth Century Jurisprudence,” 96 *Law Quarterly Review* 374–75 [1908]; and Z. Rueger, “Gerson’s Concept of Equity and Christopher St. German,” 3 *History of Political Thought* 1–30 [1982]).
28. Guy, *supra* note 26 at 72.
29. *Doctor and Student*, *supra* note 18 at 97.
30. Theodore Ziolkowski, *The Mirror of Justice: Literary Reflections of Legal Crises* (Princeton: Princeton University Press, 1997), 181.
31. See generally 1.3.143–77.
32. 1.3.144–51.
33. 1.3.152.
34. 1.3.163–64.
35. 1.3.171.
36. 4.1.181–82.
37. For Shylock’s demand for “justice,” see, e.g., 4.1.103; regarding his demand for “law,” see, e.g., 4.1.206–7. For Antonio’s demand for “judgment,” see, e.g., 4.1.80–83 and 4.1.243–44.
38. See generally Phillips, *supra* note 5 at 91–118; and Keeton, *Shakespeare’s Legal and Political Background*, *supra* note 6 at 132–33.
39. 4.1.245–49.
40. Cohen, *supra* note 8 at 49.
41. Keeton, *Shakespeare and His Legal Problems*, *supra* note 6 at 19.
42. Sokol and Sokol, *supra* note 5 at 426.
43. The whole of Portia’s “quality of mercy” speech, delivered in court to Shylock in her guise as the Doctor of Laws from Padua, is as follows:

The quality of mercy is not strain’d,
It droppeth as the gentle rain from heaven
Upon the place beneath. It is twice blest:

It blesseth him that gives and him that takes.
 'Tis mightiest in the mightiest, it becomes
 The throned monarch better than his crown.
 His scepter shows the force of temporal power,
 The attribute to awe and majesty
 Wherein doth sit the dread and fear of kings;
 But mercy is above this sceptred sway,
 It is enthroned in the hearts of kings,
 It is an attribute to God himself;
 An earthly power doth then show likest God's
 When mercy seasons justice. Therefore, Jew,
 Though justice be thy plea, consider this,
 That in the course of justice, none of us
 Should see salvation. We do pray for mercy,
 And that same doth teach us all to render
 The deeds of mercy. I have spoke thus much
 To mitigate the justice of thy plea,
 Which if thou follow, this strict court of Venice
 Must needs give sentence 'gainst the merchant there. (4.1.184–205)

44. 4.1.16–34.

45. 4.1.88.

46. 4.1.182.

47. 4.1.183.

48. 4.1.184–86.

49. 4.1.196–97.

50. 4.1.200.

51. 4.1.202–5.

52. Aristotle, *supra* note 11 at 142.

53. F.W. Maitland famously defines Equity as “that body of rules which is administered only by those Courts which are known as Courts of Equity.” F.W. Maitland, *Equity and the Forms of Action* (London: Cambridge University Press, 1909), 1. Maitland worked hard to avoid a general definition of such courts, saying: “Equity is now [. . .] a part of the law of our land. What part? That part which is administered by certain courts known as courts of equity. We can give no other general answer.” *Id.*, at 13–14.

54. Spinosa concludes similarly that, by the sixteenth century, Chancery courts commonly provided relief from onerous bonds provisions: “[I]t is important to point out that by the 1590s the Court of Chancery had developed the practice of giving relief when bonds imposed extreme hardship. Chancellors had done so since the fifteenth century. And without doubt the Chancery in Shakespeare’s day would have granted relief to an obligor such as Antonio who had missed the payment day but was willing to pay a short time after.” Spinosa, *supra* note 5 at 82n3. See also Richard A. Posner, *Law and Literature*, rev. and enlarged ed. (Cambridge: Harvard University Press, 1998), 107. Sokol and Sokol ask why Antonio never seeks equitable relief from the bond’s penalty when such was, at the time, an established fixture of jurisprudence: “[I]n Shakespeare’s time the opportunity for equitable relief from a conditional bond like Shylock’s was certainly available from such courts, and was well know to be so. This may raise a question: is there a discernible reason why no such relief is ever thought of during its trial scene or elsewhere?” Sokol and Sokol, *supra* note 5 at 426 (citing E.G. Henderson, “Relief from Bonds in English Chancery,” 18 *American Journal of Legal History* 298–306 [1974]; and J.H. Baker, *An Introduction to English Legal History* [London: 1990], 370–71.

55. A.W.B. Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit* (Oxford: Clarendon Press, 1975), 118–20.

56. Cited in Simpson, *id.*, at 119.

57. *Umfraville v. Lonstede*, Y.B. 2 & 3 Ed. II (S.S. ii), 58; cited in Allen, *supra* note 11 at 402.
58. Allen, *supra* note 11, at 402.
59. See note 54.
60. Posner, *supra* note 54, at 107.
61. 4.1.209–13.
62. 4.1.299–300.
63. 4.1.257–58.
64. 4.1.259.
65. 4.1.44–46.
66. 4.1.59–62.
67. 4.1.306–12.
68. 4.1.326–32.
69. 4.1.315–16.
70. Cohen, *supra* note 8 at 48 (citing Andrews, *supra* note 7 at 66; and Keeton, *Shakespeare's Legal and Political Background*, *supra* note 6 at 145).
71. 4.1.325–26.
72. Posner, *supra* note 54 at 107.
73. *Id.*, at 109.
74. *Id.*, at 110.
75. 3.2.261.
76. 1.1.161–76.
77. 3.2.258–66.
78. 3.2.291–96.
79. 3.2.299–302.
80. 3.4.81.
81. 3.4.69.
82. 3.2.73–77.
83. 4.1.215–17.
84. 4.1.218–22.
85. 1.3.47.
86. 1.3.42–45.
87. See, e.g., 1.3.111–12, and 1.3.117–19.
88. 1.3.130–31.
89. 1.3.135–37.
90. 1.3.138–41.
91. Spinosa, *supra* note 5 at 75.
92. 1.3.46–47.
93. 1.3.163–64.
94. 3.1.38–43.
95. 3.1.53–54.
96. 3.1.66–73.
97. 3.1.94.
98. 3.1.127–29.
99. 3.3.3, 11.
100. 3.3.21–24.
101. 4.1.349–56.
102. 3.3.26–31.
103. 3.4.61–62.