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Retributivism Gone Mad: Shakespeare's *Measure for Measure*

My work as a law professor teaching both Criminal Law and Constitutional Law has, from the very beginning of my sense of vocation as a teacher and scholar, been preoccupied by what has always struck me as among the most profound injustices inflicted mindlessly by American criminal law, namely, overcriminalisation in general and the overcriminalisation of consensual adult sex in particular (see Richards, 1982). Much of my work then and later studied normative arguments critical of such overcriminalisation, attempting to show that deontological arguments of human rights (rooted in Kant and Rawls's reinterpretation of Kant – Rawls was my teacher as an undergraduate at Harvard College) gave a better way of making such liberal arguments than the classic utilitarian arguments of John Stuart Mill in *On Liberty* (Mill, 2006).[1] Both Mill and my liberalism were critical of the populist moralistic arguments that supported such injustices that cannot be justified on grounds of justice or harms to self or others. There was, I came increasingly to believe, another way of exposing and criticising the populist force of such arguments, namely, looking closely at the psychology of the moral emotions on which they were based. And there was one play of Shakespeare that, more than any other work by him or anyone, absorbed me in this project, namely, *Measure for Measure,* a work I studied, among other works by Shakespeare, both in my co-authored

[1] *On Liberty* first published in 1859; *The Subjection of Women* first published in 1869.

book with the psychiatrist, James Gilligan (Gilligan and Richards, 2022) and a later book of my own (Richards, 2023). My focus here, drawing upon my earlier work, is what we learn about toxic political emotions like strong retributivism from this astonishing play.

There are two quite different form of retributive argument at play in the justification of criminal law, a strong retributivism at war with liberal values, and a constrained retributivism consistent with such values. Strong retributivism calls (1) for a moral wrongdoing as a necessary and sufficient condition for punishment, and (2) that the metric of punishment must precisely match the wrongdoing inflicted, the lex talionis (thus, the death penalty for intentional homicide). In contrast, constrained retributivism does not regard culpable moral wrongdoing as a sufficient condition but only a necessary condition and rejects a populist understanding of such wrongs, limiting the scope of such wrongs to grounds of justice and harms to self or others, and rejects as well the lex talionis, replacing it with the weaker requirement that the metric of more serious crimes should be reflected in more serious sentences. In general, in contrast to strong retributivism which is backward looking, constrained retributivism only allows any punishment if it affects forward looking purposes of general and special deterrence, protection, and reform. The emphasis on effectiveness leads to skepticism about prisons that do not deter, but lead to recidivism, and a corresponding emphasis on non-punitive forms of detention that do both protect and reform (Gilligan and Lee: 300–324). This article addresses the political psychology of strong retributivism.

American criminal justice rests on a strong retributivism gone mad, which is the subject matter of Shakespeare's dark comedy, *Measure for Measure,* written in the period of the nihilistic tragedies, *Hamlet* and *Troilus and Cressida*. It is, like the earlier *The Merchant of Venice,* a play about law and justice, and, like *Merchant*), a woman's voice (Isabella in *Measure*, Portia in *Merchant*) is the voice that protests and resists injustice. On the verge and in the midst of his nihilistic tragedies, Shakespeare uses women, neither of whom is staying within their patriarchal roles, to give voice to resisting injustice, a character we find again only in later plays after the great tragedies (Hermione in *Winter's Tale, Imogen* in *Cymbeline*). Both are not conventional patriarchal women: Portia, quite wealthy, falls in love with one of her suitors, Bassanio, and, to save Bassanio's

friend Antonio (a probably gay man in love with Bassanio) from a charge by Shylock for failure to pay his debt, Portia breaks role and dresses and acts as a competent male lawyer, who secures Antonio's acquittal. However, Portia is complying with her father's patriarchal script for choosing a husband, but uses it to her own ends, choosing the man she loves. Isabella, in contrast, is more radically outside patriarchy. She is a nun (or, in training to be a nun), has apparently very much chosen the role but, if anything, wishes "a more severe restraint" (*Measure for Measure*, 1.4.4), and prides herself in the play on her virginity and is morally shocked that her brother, Claudio, had had premarital sex with Julietta (resulting in her pregnancy), and is charged criminally with fornication. Though she is personally morally repelled by her brother's immorality, she agrees to plead for his life before Angelo, the authority now in charge of such matters in Vienna (the Duke had left, but is in fact incognito in the play as a friar, observing what happens in his absence); Angelo has condemned Claudio to death, retributivism gone mad.

In both *The Merchant of Venice* and *Measure for Measure,* Shakespeare brings his theater of love's mirror to the law as he found it in Elizabethan England (Richards, 2023). *Measure for Measure*, for example, was played in the inns of court, effectively the law schools of the period, and thus draws upon the development of the common law during this period in which one of the titans of English law, Lord Coke, played a central role. It was Edward Coke who urged his readers in 1602:

> next to thy duty and piety to God… and thy honour to thy parents, yield due reverence and obedience to the common laws of England; for of all laws (I speak of human) these are the most equal and most certain, of greatest antiquity, and least delay, and most beneficial and easy to be observed.
>
> (Baker: 34)

And,

> It was only seven years in the following reign [James I] that Coke CJ made his famous assertion that a statute would be held 'utterly void' if it was repugnant, impossible to be performed, or against common right or reason, as where it authorized proceedings contrary to the principles of natural justice.
>
> (Baker: 173–74)

England would never adopt a principle of judicial review of statutory law of the sort suggested here by Coke, but it does reflect a principle of judicial interpretation that statutes, when not specific, should be interpreted in light of common law principles of human rights, that are now increasingly embraced by the judiciary in Britain in part under the impact of the European Convention on Human Rights which the 1999 Human Rights Act has incorporated into British law (Craig: 11–312; Sedley, 2011). That historical tradition was being invented by Coke, among others, in Elizabethan England, and it is the background, I believe, of the remarkable critical edge of both *Merchant* and *Measure for Measure*. England, under Elizabeth and certainly under the Stuart monarchs who followed, was not yet the constitutional democracy it was to become at the end of the 17th century (the Glorious Revolution, which empowers parliament on Lockean grounds of the right to revolution to dethrone James II and choose another, William and Mary). England under Elizabeth, not yet a democracy, was on its way to becoming one, and Coke himself admired and admired Elizabeth (who had appointed him attorney-general in 1594) for her respect for the common law (in contrast to her successor, John Baker: 82–83). James I and his successor, Charles I, whose lack of respect for constraints on his power would precipitate the English Civil War, Charles's execution, and Cromwell's abortive experiment with republican government) (Richards, 2024).

There is a larger point which these Elizabethan developments in the common law suggest about the character of legal argument in a developing as well as a developed constitutional democracy, namely, that legal argument in a common law tradition of an independent judiciary grounded in the protection of the rights of the citizen both against other citizens and the state takes an increasingly egalitarian form, extending and expanding love's mirror to one's fellow citizens as one's equals. Both these plays, a comedy and a dark comedy, reflect this democratic dynamic – the one for a despised minority (Jews), the other for Puritanically condemned sexualities. Of the two, *Measure for Measure* indicts strong retributivism directly and cogently.

Merchant is ostensibly a comedy (no one dies at the end), but there is a tragedy at the center of the play, namely, the Jewish moneylender Shylock, who has been the subject of anti-Semitic insults and even assaults by businessmen like Antonio and his friends. Shylock's humiliation is not like Richard III's

over any physical defects, but it is, like the humiliation of Richard, enforced by a culturally imposed and reinforced stigma (like Edmund's bastardy in *Lear* or Othello's race), in Shylock's case, Christian anti-Semitism; his humiliation as a Jew in anti-Semitic Christian Venice has been worsened personally by his daughter's abandonment of him to marry a Christian, which included stealing money and prized treasures of her father (a ring given him by his wife). Shylock has loaned money to Antonio, a man who hates him, but, initially as a joke, required on default a pound of his flesh. Antonio's animus to Shylock is explicit even as Shylock considers whether to make the loan; Shylock questions:

> Shall I bend low and in a bondman's key,
> With bated breath and whispering humbleness,
> Say this: 'Fair sir, you spat on me on Wednesday last,
> You spurned such a day; another time,
> You called me dog: and, for these courtesies,
> I'll lend you this much moneys.'
>
> (1.3.119–124)

To which Antonio responds:

> I am like to call thee so again,
> To spit on thee again, to spurn thee to.
> If thou wilt lend this money, lend it not
> As to thy friends, for when did friendship take
> A breed for barren metal of his friend?
> But lend it rather to think enemy,
> When, if he break, thou mayst with better face
> Exact the penalty.
>
> (1.3.125–132)

Shylock's humiliations by Antonio and others, including the traumatic loss of his daughter, elicits this response when queried whether he will indeed enforce the pound of flesh allowed him if Antonio defaults, and to what end:

> To bait fish withal; if it will feed nothing else if will feed my revenge. He hath disgraced me and hindered me half a million, laughed at my losses, mocked at my gains, scorned my nation, thwarted my bargain, cooled my friends, heated mine enemies, and what's his reason? I am a Jew. Hath not a Jew eyes? Hath not a Jew hands, organs, dimensions, senses, affections, passions? Fed with the same

> food, hurt with the same weapons, subject to the same diseases, healed by the same means, warmed and cooled by the same winter and summer as a Christian is? If you prick us do we not bleed? If you tickle us do we not laugh? If you poison us do we not die? And if you wrong us shall we not seek revenge? If a Jew wrong a Christian, what is his humility? Revenge! If a Christian wrong a Jew, what should his sufferance be by Christian example? Why revenge! The villainy you teach me I will execute, and it shall go hard but I will better the instruction.
>
> (3.1.48–66)

Such shaming of his manhood elicits from Shylock such revenge, and the same irrationality of prejudice he ascribed to Antonio's anti-Semitism leads to the same kind of response when the Venetian judge questions why he would inflict such a penalty, namely, he has no reason:

> You'll ask me why I rather choose to have
> A weight of carrion flesh than to receive
> Three thousand ducats. I'll not answer that!
> But say it is my humour. Is it answered?...
> Some men there are love not a gaping pig!
> Some are mad if they behold a cat!
> And others, when the bagpipe sings i'th'nose…
> Cannot retain their urine for affection,
> Maistrice of passion, sways it in the mood
> Of what it likes or loathes. Now, for your answer
> As there is no firm reason to be rendered
> Why he cannot abide a gaping pig,
> Why he a harmless necessary cat,
> Why he a woolen bagpipe, but of force
> Must yield to such inevitable shame
> As to offend himself being offended
> So can I give no reason, nor I will not,
> More than lodged hate and a certain loathing
> I bear Antonio, but I follow thus
> A losing suit against him! Are you answered?
>
> (4.1.39–61)

Shylock's answer to the outrage as his refusal to accept offers of money to abandon his claim leads him to make an argument of justice that his claim, if based on irrational prejudice, is no worse than the Venetian acceptance of slavery:

> What judgement shall I dread, doing no wrong?
> You have among you many a purchased slave,
> Which, like your asses, and your dogs and mules,
> You use in abject and slavish parts,
> Because you bought them. Shall I say to you,
> 'Let them be free, marry them to your heirs,
> Why sweat they under burdens? Let their beds
> Be made as soft as yours, and let their palates
> Be seasoned with such viands' You will answer:
> 'The slaves are ours.' So do I answer you.
> The pound of flesh which I demand of him
> Is dearly bought; 'tis mine, and I will have it.
> If you deny me, fie upon your laws:
> There is no force in the decrees of Venice.
> I stand for judgment: answer, shall I have it.
>
> (4.1.88–102)

Shylock, very much the product of a guilt culture, offers an argument that his claim is no more unjust than the irrational prejudices that sustain the institution of Venetian slavery which inflicts harms on innocent people. But, nothing in his argument, itself rooted in rage at being shamed, justifies what he proposes to do: shame submerges guilt, and for Shylock, tragically so. He is hoist on his own petard when rejecting Portia's plea for mercy she demands that he enforce the penalty according to its terms but may not violate the law of homicide, killing Antonio, which he cannot and will not do. The punishment inflicted on him for attempted murder is, of course, grotesque – not only the financial loss, but converting to Christianity. While features of Venetian law (slavery) are questioned in the play, Venetian justice is not; indeed, Portia successfully uses it to save the life of Bassanio's friend. Shylock is defeated by the same legal argument he embraced against Antonio, now turned against him, exemplifying the egalitarian force of common law principles.

Measure for Measure is also a comedy (no one dies, and the main penalties at the play's end are, hilariously, requiring marriage), but it is a much darker comedy written after *Hamlet*, retaining features of its moral nihilism. Its nihilism takes the form of a criticism of the claims of strong retributivism as a basis for criminal justice, namely, that it is necessary and sufficient for punishment that there be a moral wrong, and the nature of punishment is to be determined

by the nature of the wrong (thus, death for killing). The play focusses on the criminalisation of two forms of consensual sex: the commercial sex business of Mistress Overdone and Pompey, her servant, and the non-commercial loving sex of Claudio with Juliet, now pregnant, who shortly intend to marry. The play questions the first comically, the second tragically.

The criminalisation of commercial sex is questioned by Pompey in the hilarious scene in which Escalus, a lord acting in Angelo's place, tries to deal with the illiterate constable, Elbow's, rage at an alleged insult to his wife by the tapster, Froth, working for Mistress Overdone, represented before Escalus by Pompey. It is Pompey who questions the move criminally to prosecute commercial sex, as both inhuman and unenforceable:

> ESCALUS How would you live, Pompey? By being a bawd? What do you think of the trade, Pompey? Is it a lawful trade?
>
> POMPEY If the law would allow it, sir.
>
> ESCALUS But the law will not allow it, Pompey; nor it shall not be allowed in Vienna.
>
> POMPEY Does your worship mean to geld and splay all the youth of the city?
>
> ESCALUS No, Pompey.
>
> POMPEY Truly sir, in my poor opinion, they will to't then. If your worship will take order for the drabs and the knaves, you need not to fear the bawds.
>
> ESCALUS There is pretty orders beginning, I can tell you. It is but heading and hanging.
>
> POMPEY If you head and hand all that offend that way but for ten year together, you'll be glad to give our a commission for more heads: if this law hold in Vienna ten year, I'll rent the fairest house in it after three pence a bay. If you live to see this come to pass, say Pompey told you so.
>
> (2.1.222–240)

Escalus is threatening beheading for commercial sex, but he dismisses Pompey only with a warning.

Even Escalus, however, "grieves me for the death of Claudio" (2.1.276). Here strong retributivism's injustice is unavoidably and tragically visible, even for Escalus and Shakespeare's audience. What counts as wrongs (fornication, consensual sex of a couple not married or not yet married, but here intending to marry) and the severity of the punishments that strong retributivism requires

(death for commercial sex or for fornication) raise the question, at the heart of the play, of whether such a rigid system of punishment imposes standards that impose unreasonable demands on our human nature that no one, including the officials making and executing the laws, can reasonably comply with (leading to the moral corruption of justice and judges, not only in the play Angelo but the constable, Elbow). The play thus raises the question whether strong retributivism is not the reasonable working out of a guilt morality, but rather a shame morality in which injuries to patriarchal manhood unleash a retributive rage inflicting on the malefactor precisely the injuries one has oneself suffered or thinks oneself to have suffered. It is striking, in this connection, that the play itself works within a patriarchal culture of men controlling women's sexuality, unleashing its violence when men and women defy such control.

The resisting voice of Isabella in *Measure for Measure* comes from a very different place from Portia's. She is moved by love of her brother, though, as a nun and thus a virgin, she condemns the immorality of fornication. Isabella is much more outside patriarchy than Portia, who must comply with her father's instructions on how to choose a man to marry (an arranged marriage); it happens that she falls in love with one of her suitors, who happens correctly to answer the questions her father required suitors to answer. For this reason, Isabella's moral voice is altogether more radical and independent in its criticism of retributivism than Portia's, and the play's study of the psychology of retributivism more revelatory.

It is the profligate Lucio, a friend of Claudio's, who, learning of his friend's punishment, calls upon Isabella to intervene. And it is Lucio, whose lightly and falsely claiming to the disguised duke that Vincentio is in fact a libertine like himself, that so infuriates the now undisguised duke, that he requires Lucio at the play's end to marry a woman he has seduced (marriage as just punishment, certainly not death).

Isabella's brother, Claudio, has been condemned to death for fornication, though he wants to marry Julietta, now pregnant. Claudio and Julietta are clearly in love. Claudio insists on the rigor of the law, death for consensual sex offenses, and Isabella begs for pity. The following exchange follows:

> ANGELO I show it most of all when I show justice,
> For then I pity those I do not know,
> Which a dismiss'd offence would after gall,

> And do him right that, answering one foul wrong,
> Lives not to act another. Be satisfied;
> Your brother dies tomorrow; be content.
>
> ISABELLA So you must be the first that gives this sentence,
> And he that suffers. O, it is excellent
> To have a giant's strength, but it is tyrannous
> To use it like a giant…
>
> ISABELLA Could great men thunder
> As Jove himself does, Jove would ne'er be quiet,
> For every pelting petty officer
> Would use his heaven for thunder; nothing but thunder
> Merciful Heaven,
> Thou rather with thy sharp and sulphurous bolt
> Splits the unwedgeable and gnarled oak,
> Than the soft myrtle. But man, proud man,
> Dress'd in a little brief authority,
> Most ignorant of what he's most assur'd –
> His glassy essence – like an angry ape
> Plays such fantastic tricks before high heaven
> As makes the angels weep; who, with our spleens,
> Would all themselves laugh mortal….
>
> ANGELO Why do you put these sayings upon me?
>
> ISABELA Because authority, though it err like others,
> Hath yet a kind of medicine in itself
> That skins the vice o'th'top. Go to your bosom,
> Knock there, and ask your heart what it doth know
> That's like my brother's fault. If it confess
> A natural guiltiness, such as his,
> Let it not sound a thought upon your tongue
> Against my brother's life.
>
> ANGELO [aside] She speaks, and 'tis such sense.
>
> (2.2.101–143)

Isabella's very appeal to "[a] natural guiltiness, such as his" in Angelo has unleashed in him a violent sexual passion for Isabella. Isabella exposes in Angelo what he cannot see, his repressed sexual desires, and, shamed by her recognising what is true but of which he is ashamed, his shame overwhelms his sense of guilt, exploding into sexual violence. It is, he says, quite new to his experience:

> What's this? What's this? Is this her fault or mine?
> The tempter, or the tempted, who sins most, ha?
> Not she; nor doth she tempt; but it is I
> That, lying by the violet in the sun,
> Do as the carrion does, not as the flower,
> Corrupt with virtuous season. Can it be
> That modest may more betray our sense
> Than woman's lightness? Having waste ground enough,
> And pitch our evils there? O, fie, fie, fie!
> What dost thou, or what art thou, Angelo?
> Dost thou desire her foully for those things
> That make her good? O, let her brother live!
> Thieves for their robbery have authority,
> When judges steel themselves. What, do I love her,
> That I desire to hear her speak again?
> And feast upon her eyes? What is't I dream on?
> O cunning enemy, that, to catch a saint,
> With saints dost bait thy hook! Most dangerous
> Is that temptation that doth goad us on
> To sin in loving virtue. Never could the strumpet
> With all her double vigour, art and nature,
> Once stir my temper: but this virtuous maid
> Subdues me quite. Even till now
> When me were fond, I smil'd, and wondered'how.
>
> (2.2.163–187)

The consequence is that Angelo offers to save her brother's life if she will sleep with him, in effect, not just sex, but rape, which horrifies her. Having discovered his villainy she threatens to go public, but, as Angelo points out, his authority and reputation would lead no one to believe her, a now conspicuously acknowledged feature of such men and their denials, only recently questioned (#MeToo). The Duke, incognito as a friar, learns of this, and proposes to Isabella that Mariana, a woman abandoned by Angelo for shabby reasons, would be willing to substitute for her without Angelo's knowledge, and thus save her brother. Mariana agrees, and Angelo sleeps with her, believing her to be Isabella, but then betrays his promise, ordering Claudio to be executed, which the Duke stops, though he does not tell Isabella (who believes her brother has been executed). When the Duke formally returns to Vienna, Isabella and Mariana publicly accuse Angelo of his villanies, which he denies. When the Duke finally

reveals himself and condemns Angelo to death, it is Isabella, who has suffered so much from his tyrannies, that, at Mariana's urging, begs for mercy, and he is forgiven. And, suddenly, the Duke, now convinced of Isabella's remarkable qualities and virtues, proposes marriage. The play does not portray her answer. In most productions I have seen, she is shocked and dismayed.

Angelo is a rigid Puritanical retributivist, indeed a retributivist gone mad, clearly committed to a fanatically demanding Puritanical guilt morality. How and why does Isabella's resisting voice so unhinge him? The key is both an accusation and an appeal. The accusation is:

> But man, proud man,
> Dress'd in a little brief authority,
> More ignorant of what he's mot assur'd –
> His glassy essence – like an angry ape
> Plays such fantastic tricks before high heaven
> As makes the angels weep; who, with our spleens,
> Would all themselves laugh mortal….

The appeal is:

> Knock there, and ask your heart what it doth know
> That's like my brother's fault. If it confess
> A natural guiltiness, such as his,
> Let it not sound a thought upon your tongue
> Against my brother's life.

Angelo through Isabella's accusation and appeal sees himself as the sexually vulnerable man he is, a sensual vulnerability his self-righteousness had repressed and denied. As a man exercising authority in a patriarchal culture, he experiences the sexual feelings he now knows himself to have as shaming the kind of control he had always previously prided himself on having. Such shaming elicits what is, in effect, a proposal of nonconsensual sex, rape. All pretense to the guilt morality that had condemned Claudio to death for consensual sex is abandoned, as what he experiences as Isabella's moral and psychological truth strips him naked of his Puritan mask, shame eliciting violent sex.[2]

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[2] I am indebted for this point to a student, Q Adams.

There is a brilliant fierceness in Isabella's voice which is so dazzling and moving in her challenge to Angelo's self-righteousness, but also shocking when she goes to tell her brother both of Angelo's hypocrisy and her refusal, sure, since he has "a mind of honour," that he will support her commitment to her chastity over all else, "More than our brother is our chastity." 2.4.184. Claudio does initially agree with her, but then reflects "Death is a fearful thing," to which Isabel responds, "And shamed life a hateful," leading a speech by Claudio that could have come from *Hamlet*:

> Ay, but to die, and go we know not where;
> To be in cold obstruction, and to rot;
> This sensible warm motion to become
> A kneaded clod; and the delighted spirit
> To bath in fiery floods, or to reside
> In thrilling region of thick-ribbed ice;
> To be imprison'd in the viewless winds
> And blown with restless violence round about
> The pendent world: or to be worse than worst
> Of those that lawless and incertain thought
> Imagine howling, – 'tis too horrible,
> The weariest and most loathed worldly life
> That age, ache, penury and imprisonment
> Can lay on nature, is a paradise
> To what we fear of death.
>
> (3.1.117–131)

Claudio is in effect answering the Duke's earlier plea to him to accept death:

> Be absolute for death: either death or life
> Shall thereby be the sweeter. Reason thus with life:
> If I do lose thee, I do lose a thing
> That none but fools would keep. A breath thou art,
> Servile to all the skyey influences
> That dost this habitation where thou keep'st
> Hourly afflict. Merely, though art Death's fool;
> For him thou labour'st by thy flight to shun,
> And yet run'st toward him still. Thou are not noble;
> For all th'accommodations that thou bear'st
> Are nurs'd by baseness. Thou'rt by no means valiant;
> For thou dost fear the soft and tender fork

> Of a poor worm. The best of rest is sleep;
> And that thou oft provok'st, yet grossly fear'st
> Thy death which is no more. That art not thyself;
> For thou exists on many a thousand grains
> That issue out of dust. Happy thou art not;
> For what thou hast, forget'st. Thou art not certain;
> For thy complexion shifts to strange effects
> After the moon. If thou art rich, thou'rt poor;
> For, like an ass whose back with ingots bows,
> Thou bear'st thy heavy riches but a journey
> And Death unloads thee. Friend has thou none;
> And thine own bowels which do call thee sire,
> The mere effusion of thy proper loins,
> Do curse the gout, serpigo, and the rheum
> For ending thee no sooner. Thou hast nor youth, nor age,
> But as it were an after-dinner's sleep
> Dreaming on both; for all thy blessed youth
> Becomes as aged, and doth beg the alms
> Of palsied eld: and when thou art old and rich,
> Thou hast neither heat, affection, limb, nor beauty
> To make thy riches pleasant. What's yet in this
> That bears the name of life? Yes in this life
> Lie hid moe thousand deaths; yet death we fear
> That makes these odds all even.
>
> (3.1.4–41)

Claudio had responded to the Duke ironically:

> I humbly thank you.
> To sue to live, I find I seek to die,
> And seeking death, find life. Let it come on.
>
> (3.3.42–44)

His response to Isabel, which she rejects contemptuously and angrily, is quite different, now weighing life as incommensurably valuable to her sense of honor which values her virginity more than her brother's life. Her response is extraordinary in its shamed rage:

> O, you beast!
> O faithless coward! O honest wretch!
> Wilt thou be made a man out of my vice?

> Is't not a kind of incest, to take life
> From thine own sister's shame? What should I think?
> Heaven shield my mother play'd my father fair:
> For such a warped slip of wilderness
> Ne'er issued from his blood. Take my defiance,
> Die, perish! Might but my bending down
> Reprieve thee from thy fate, it should proceed.
> I'll pray a thousand prayers for thy death;
> No word to save thee.
>
> (3.1.135–145)

Women under patriarchy exist in the ways they may shame men when they deviate from the role assigned them, for example, having sex with a man not their husband, or having sex at all when it compromises the virginity men value in women they marry. Isabel is, as a nun soon to be outside the role women play under patriarchy in men creating alliances through arranged marriages. But, her views on chastity are precisely what patriarchy demands of women, which she has come to accept, as she put it to Angelo when he proposes sex with her:

> (…) were I under the terms of death,
> Th'impression of keen whips I'd did wear as rubies,
> And strip myself to death as to a bed
> That longing have been sick for, ere I'd yield
> My body up to shame.
>
> (2.4.100–103)

It is precisely because Isabel is so outside patriarchy that she can understand and indict the injustice in Angelo as a high priest of the guilt culture anxious to enforce its demands, however mad, but her own rage at her brother arises from her own sense of pride in accepting what patriarchy so values, her virginity; her brother, shaming her, elicits her own angry violence:

> (…) Take my defiance,
> Die, perish! Might but my bending down
> Reprieve thee from thy fate, it should proceed.
> I'll pray a thousand prayers for thy death;
> No word to save thee.
>
> (3.1.142–146)

The moral nihilism of *Hamlet* and *Troilus and Cressida*, both questioning the patriarchal codes of male honor, including retributive violence, extends in *Measure for Measure* to the sexual codes enshrined in retributive criminal justice, including the role women's virginity plays in such codes. Isabella is herself almost Hamlet-like in both indicting such codes and yet identifying with and enforcing them. What makes *Measure for Measure* so psychologically brilliant and astute is that it addresses and unmasks the injustice of laws that criminalise acts when there is no good argument of either justice or harm that justifies such criminalisation. Such laws arise from failures of self-knowledge, holding others to standards to which one could not reasonably hold oneself. It is a form of moral hypocrisy, masked by the pride taken in a patriarchal manhood and womanhood that fails to acknowledges one's own human vulnerabilities and imposes on others and oneself demands no one can or should reasonably be asked to comply with.

The larger question *Measure for Measure* raises for me about contemporary American criminal justice is whether its critique applies not only to American overcriminalisation of sex offenses but drug offenses as well resulting in a racialised mass incarceration of people of color, imposing in this domain standards not reasonably applied to others and indeed rationalising America's legacy of cultural racism, sexism, and homophobia. The critique extends as well to our continuing use of the death penalty and solitary confinement, and even to a prison system that, as Jim Gilligan has argued, imposes more harms than it remedies. On this view, American criminal justice rests on a retributivism gone mad, and the politicians who mindlessly embrace it are our contemporary Angelos, hypocritical in imposing demands they cannot and do not reasonably comply with.

Even beyond that, the play brilliantly puts a mirror up to the injuries to the psyche that patriarchal demands impose on human sexuality, whether the sexuality of Angelo or that of Isabella, both of whom have been compelled to deny loving sexuality, *indeed to condemn it even unto death.* Shakespeare's plays touch on these destructive and self-destructive patriarchal demands in many diverse ways, but no play exposes the traumatic injuries to the psyches of legal officials, as perpetrators of such injustice, as well as the victims of injustice, locked into a cycle of violence they mindlessly act out.

Jim Gilligan and I have argued in our co-authored book (James Gilligan and David A.J. Richards, *Holding a Mirror up to Nature: Shame, Guilt, and Violence in Shakespeare*) that both the tragedies of 6th–5th century Athens and those of Elizabethan and Jacobean England reflect and study the transition from a highly patriarchal autocratic shame culture to a less patriarchal, more democratic guilt culture. In his brilliant book of the shame culture of the American South before the Civil War, Bertram Wyatt-Brown, defines it demands of "primal honor," (1) "immortalising valor," "particularly in the character of revenge against familial and community enemies," (2) "opinions of others, as an indispensable part of personal identity and gauge of self-worth," (3) "physical appearance and ferocity of will as signs of inner merit," (4) defense of male integrity and mingled fear and love of woman," and (5) "reliance upon oath-taking as a bond." (Wyatt-Brown: 34). Southern patriarchal women, themselves rigidly confined to a code placing them on an asexual pedestal forbidding sex outside marriage and defining their roles in marriage as in service of the dynastic aims of their fathers, husbands, brothers, and sons, are, like the women of ancient Sparta, the enforcers of patriarchy, shaming the men (including their sons) who would not fight or fight well in wars (Wyatt-Brown: 35, 39–40, 51). In contrast, guilt cultures, like the Quakers, "directly challenged the tenets of honor…[C]ondemned as subversive for shattering custom, the Friends made themselves walking testaments of pious shamelessness." Appealing to an independent moral conscience of equal respect and nonviolence critical of dominant patriarchal hierarchies, "[t]hey adopted the Beatitudes and tried to live by them… Like the early Christians, Quakers appealed largely to the honorless – the servant and tenant classes, the cottagers of Wales, the small artisans of England," (Wyatt-Brown: 75) and, one should add, to women resisting not only slavery and racism, but sexism (see Richards 1998). It is such guilt cultures whose later development leads to constitutional democracies based on the right of conscience and gender equality as a constitutional value, both critical of community values of racism, sexism, anti-Semitism, and homophobia based on the repression of conscience and speech.

*Measure for Measure stu*dies the fraught psychology of an emerging guilt culture that will later lead to the emergence of British constitutional democracy in the Glorious Revolution of 1688. We can see the fraught psychology (an

emerging guilt culture challenging the still dominant shame culture) in both Angelo and Isabella, both of whom not only endorse guilt over sexuality as such, but call for the violence of a death penalty as the appropriate punishment. What the play shows us is that such a conception of sexuality enforces unreasonable standards on others that its enforcers (Angelo) cannot themselves comply with and indeed are moved hypocritically to violate. These are not standards justified by arguments of justice and harm to self or others that apply democratically to all persons, as guilt cultures based on treating persons as equals require. Paradoxically, it is precisely Angelo's violence in imposing the death penalty on Claudio and attempting the rape of Isabella, and Isabella's violence against her brother's plea, that shows us the perils of an emerging guilt culture that conceals from itself its perpetuation of precisely the patriarchal gender stereotypes that rationalise violence (thus, the unjust violence of the Trojan War elicited by Helen's adultery, betraying her patriarchal role in an arranged marriage). Both Angelo and Isabella experience shame in enforcing patriarchal gender stereotypes of sexuality, and shame, as it does in cultures still patriarchal or dominantly patriarchal, submerges and erases guilt.

From this perspective, the appeal of strong retributivism has never been its upholding reasonable standards of justice and harm to self and others, but its psychological appeal to persisting patriarchal gender stereotypes or race or ethnicity or gender or sexual orientation experienced as at threat from forms of liberal resistance. It is the experience of such threat or fear of such threat to oneself as a patriarchal man or woman that rationalises, as strong retributive justice, the lex talionis, what is in fact tribal vengeance at outsiders.

It illuminates the power of this psychology in a period of transition from a shame to guilt culture, illustrated by *Measure for Measure,* to compare the similar exploration of this psychology in the oldest play in the canon, *The Oresteia, a* celebration by the Athenian patriot and playwright, Aeschylus, of the transition from the blood vengeance of the older shame culture embodied in the Furies, the culture of *The Iliad* and *the Trojan War*, to the guilt culture of democratic Athens and its jury system which acquits Orestes of what, for the Furies, is the gravest of wrongs, the murder of one's mother to whom one is related by blood (in contrast, Clytemnestra's murder of her husband, Agamemnon, is less grave because a wife is related to her husband not by blood, but

by law). What makes Aeschylus's portrait of this transition so psychologically profound is that, as he praises the democratic institutions of Athens because tribal blood vengeance is replaced by democratic norms based on guilt and accountability that in this case acquit the murderer of his mother (thus, ending the cycle of vengeance), he shows us the persisting patriarchal patterns that in fact invisibly subvert the justice of acquittal – the jury of democratic citizens, unable to concur, does not acquit, but the goddess Athena (who was not born of a mother, but from the head of Zeus the patriarch) break the tie and on the advice of yet another patriarchal god, Apollo, agrees that much worse than killing a mother is killing a king.

As Apollo puts the point in his reply to a Fury:

> FURY Zeus, you say, instructed you to tell him
> To honor his father this way? Where is the honor
> A pious person also owes to his mother?
>
> APOLLO They are by no means equivalent. Consider:
> first, he was a man, and second, a king,
> to whom the gods had given the right to rue,
> and third, he was a hero and therefore deserved
> a better death…
>
> (Aeschylus: 138)

And Apollo then goes on, appealing supposedly to science, that it is the man, not the woman, "who is the only parent," (Aeschylus: 139) a claim Apollo argues Athena's birth from Zeus's head, supports. It is thus the patriarchal gods who crucially justify the murder of a mother by a son on patriarchal normative and pseudo-scientific grounds.

The putative transition from a shame to a guilt culture thus reflects the continuing power even under a democracy of patriarchal values that are, in fact, inconsistent with democracy, and, in the case of Athens, clarify its tragic flaws as a democracy – the subjection of women, slavery, and imperialism, all of which were parts of its legacy to later democracies. The tangled psychology of this incomplete and self-destructive transition in *The Oresteia* is illustrated at the play's end by the domestication of the Furies, who lose their moral voices and take up their roles as patriarchal women in Athenian culture, "no longer the Furies but the Eumenides, the goddesses we honor." (Aeschylus: 151).

What makes *The Oresteia* so psychologically brilliant is that, like Shakespeare later in *Measure for Measure*, it shows us the underlying contradictory forces in the psychology of the transition from a shame to guilt culture. What is celebrated as overcoming the violence of the cycle of violence of tribal clans, overcoming propensities to civil war in Athens itself, is displaced to the violence of slavery and the subjection of women and imperialistic wars that would end the Athenian democracy. The price for Aeschylus is importantly the silencing of women's moral voices who play no role as democratic citizens in the Athenian democracy much, so history shows, to its cost.

What makes *Measure for Measure* so different from *The Oresteia* is that nothing and no one can silence the moral voice of Isabella, a voice Shakespeare gives us in all its uncompromising moral force in indicting Angelo, and yet itself compromised by her own patriarchal idealisation of virginity. *Measure for Measure* thus explores the same tangled psychology of transition in the ways in which both Angelo and Isabella agree and indeed justify the justice of the strong retributivism inflicted on commercial and non-commercial sex in Vienna in terms of a Puritan guilt culture, but themselves continued to be motivated by the same patriarchal shame culture they believe they have transcended – thus, Angela's attempted rape of Isabel, and Isabel's fury at her brother's sex life (worthy, as she puts it, of death as he challenges the patriarchal culture of virginity Isabella idealises). In both cases, what appears as a justice based on guilt that eschews violence is in fact shame-driven humiliation over the gender stereotypes that uphold patriarchy.

It is difficult not to see in this astonishing play – in fact played probably before an audience of lawyers immersed in the development of the common law – the impact of the democratic principles of the common law as a constraint on arbitrary power starkly exemplified by a corrupt judge, Angelo. But, Shakespeare, perhaps the greatest psychologist in human history, focuses, like a lazer, on patriarchal injuries to loving sexuality and their consequences that place this play beyond its time and place, exposing something more universal in human cultures so imbricated with patriarchy, both ours and most others today. In our argument about this play in *Holding a Mirror up to Nature,* Jim Gilligan and I argue that the character of Duke Vincentio sets up the action

of the play, as Jim has in his work with violent men and alternatives to prison, as a social experiment in arbitrary power and then observes it in mufti, and draws from it the conclusion that strong retributive justice is no justice at all, but must be replaced by restorative justice.

There is another way of understanding the play, not inconsistent with Duke Vincentio as humane social scientist, rooted in a sound psychological understanding of the role of loving sexuality across the boundaries in a human and humane life and culture. Near the end of *Measure for Measure,* when Angelo's perfidy is finally exposed before all; and Angelo, struck by remorse, pronounces on himself the death penalty:

> (…) I crave death more willingly than mercy;
> 'Tis my deserving, and I do entreat it.
>
> (5.1.474–475)

What intervenes is the appeal of Mariana, whom Angelo had betrayed and inadvertently slept with (thinking her to be Isabella), to Isabella and Isabella's response:

> (…) Isabel!
> Sweet Isabel, do yet but kneel by me;
> Hold up your hands, say nothing: I'll speak all.
> They say best men are moulded out of faults,
> And, for the most, become much more the better
> For being a little bad. So may my husband,
> O Isabel! Will you not lend a knee?
> DUKE He dies for Claudio's death.
> ISABELLA [kneeling.] Most bounteous sir:
> Look, if it please you, on this man condemn'd
> As if my brother liv'd. I partly think
> A due sincerity govern'd his deeds
> Till he did look on me. Since it is so,
> Let him not die. My brother had but justice,
> In that he did the thing for which he died:
> For Angelo,
> His act did not o'ertake his bad intent,
> And must be buried but as an intent
> That perish'd by the way. Thoughts are no subjects;

> Intents, but merely thoughts.
> MARIANA. Merely, my lord.
> (5.1.434–453)

Isabella's argument would certainly not be valid as matter of law if Claudio had been executed, and is not valid either, since Claudio was not executed, as Angelo would certainly be guilty in some jurisdictions of an attempted murder (called by criminal lawyers the doctrine of impossible attempts). But, at this point in the play, what intervenes is the remarkable moral personality of Isabella herself, a woman whom Angelo would have raped. In a play about retributive justice, it is more moving even than Isabella's earlier powerful speech indicting Angelo's strong retributive punishment of her brother with death. It breaks out of the entire framework that the play had set up – a kind of Brechtian moment that challenges the order of things. It clearly startles and moves the duke, who responds at the end with a proposal of marriage, which leaves Isabella, who is never speechless, speechless; and the play ends.

Isabella acts on a love inexplicable in the retributive terms of the play, a love that defies boundaries and can value and extend radical empathy to persons in ways strong retributivism would condemn. Doing so is itself an act of love, and Shakespeare's art, again and again, is a work of love, So, love's mirror extends in this way not only to religions (Shylock) and ethnicities (Othello) that are unjustly despised, but to marginalised genders and sexualities (for example, gays, trans, and prostitutes) and, as I argue elsewhere (Richards, 2023: 212–226), to the most despised of all, violent criminals like Angelo.

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Retributivism Gone Mad: Shakespeare's *Measure for Measure*

Summary

Measure for Measure is ostensibly a comedy (no one dies, and the main penalties at the play's end are, hilariously, requiring marriage), but it is a much darker comedy than any other Shakespeare wrote written after *Hamlet,* retaining features of that play's moral nihilism. Its nihilism takes the form of a criticism of the claims of strong retributivism as a basis for criminal justice, namely, that it is necessary and sufficient for punishment that there be a moral wrong, and the nature of punishment is to be determined by the nature of the wrong (thus, death for killing). The play focusses on the criminalisation of two forms of consensual sex: the commercial sex business of Mistress Overdone and Pompey, her servant, and the non-commercial loving sex of Claudio with Juliet, now pregnant, who shortly intend to marry. The play questions the first comically, the second

tragically. The article explores the play's indictment of strong retributivism, and charts a path to an alternative, namely, restorative justice.

Keywords: *Measure for Measure*, justice, law, retribution

Słowa kluczowe: *Miarka za miarkę*, sprawiedliwość, prawo, zemsta

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