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Justice Unrepresented

John Leubsdorf*

One of the many wonderful features of *Representing Justice*¹ is its exploration of the ambivalence of the traditional depiction of Justice. Justice's blindfold suggests both impartiality and moral or factual blindness; her sword cuts through obfuscations and complexities but also inflicts pain and death. Other contributions to this Issue develop further ambivalences: Bennett Capers considers whether Justice's blindness makes her color-blind;² Peter Goodrich asks whether her blindfold obstructs her vision or rather makes it impossible for us to see her.³ Yet the ambivalence does not stop there.

Much that we would wish to incorporate in a portrait of Justice is missing from the familiar image of the Goddess with the Scales. True, leaving things out of a depiction can sharpen our perception of what remains. Yet it is also true that focusing on what has been omitted can help us move beyond what is familiar. As artists sometimes portray a figure by drawing the negative space around it, looking for what is absent from an image can clarify what is present.

I. THE PHASES OF JUSTICE

Justice, at least procedural justice, is a process, not a single event. Typically, it involves an act or series of acts, a dispute arising from those acts, a claim, a response, a decision, and that decision's effects.⁴ Unless we know something of these, we will find it hard to decide if justice has indeed been rendered. The absence of some of these stages—the interchange between claimant and respondent, and decision by a third

* Professor of Law, Rutgers School of Law–Newark. Thanks to David and Susan Cole for their help. This Essay is for Andrew DeShong.

1. JUDITH RESNIK & DENNIS CURTIS, *REPRESENTING JUSTICE: INVENTION, CONTROVERSY, AND RIGHTS IN CITY-STATES AND DEMOCRATIC COURTROOMS* (2011).

2. I. Bennett Capers, *Blind Justice*, 24 *YALE J.L. & HUMAN.* 179 (2012); I. Bennett Capers, *On Justitia, Race, Gender, and Blindness*, 12 *MICH. J. RACE & L.* 203 (2006).

3. Peter Goodrich, *The Foolosophy of Justice and the Enigma of Law*, 24 *YALE J.L. & HUMAN.* 141 (2012).

4. See generally William H. Simon, *Courthouse Iconography and Chayesian Judicial Practice*, 24 *YALE J.L. & HUMAN.* 419 (2012).

party—will usually lead us to describe the process as unjust even if it somehow reaches the right result. Even legal systems that rely more than ours on self-help and revenge turn out on closer examination to proceed through a series of steps.⁵ And, of course, it is precisely the replacement of an injured person's swift revenge by a process that includes neutral adjudication that is essential to our usual idea of justice.⁶

The traditional sculptural depiction of Justice leaves out, or at least flattens, the process of justice. Justice's scales may symbolize the act of deciding, and her sword the execution of judgment, but the presentation of evidence and argument is, at best, only alluded to by the empty pans of the scales. This depiction of Justice looks like a single overwhelming intervention that holds in its hands both decision and enforcement.

Resnik and Curtis show us a more phased picture of justice: *The Justice of Cambyses* (1498) by Gerard David.⁷ In four scenes presented on two panels, this diptych shows us the judge Sisamnes's acceptance of a bribe, his arrest while sitting on the judicial throne, his gruesome flaying, and the installation of his son and successor on a throne now covered by his father's skin. That certainly covers the crime, its punishment, and the punishment's deterrent impact, but even here there is no representation of the trial. King Cambyses simply steps in and orders the execution—an abruptness consistent with his usual portrayal as a murderous tyrant.⁸

Homer's Shield of Achilles presents a still more complete picture—or rather, a verbal description of a picture—of the phases of justice:

There, in the *Forum* swarm a num'rous train;
 The subject of debate, a townsman slain:
 One pleads the fine discharg'd, which one deny'd,
 And bade the publick and the law decide:
 The witness is produc'd on either hand;
 For this, or that, the partial people stand:
 Th'appointed heralds still the noisy bands,
 And form a ring, with scepters in their hands;
 On seats of stone, within the sacred place,
 The rev'rend elders nodded o'er the case;
 Alternate, each th'attesting scepter took,
 And rising solemn, each his sentence spoke.
 Two golden talents lay amidst, in sight,

5. CLINTON BAILEY, *BEDOUIN LAW FROM SINAI AND THE NEGEV: JUSTICE WITHOUT GOVERNMENT* (2009); *NJAL'S SAGA* (Robert Cook trans., 2001).

6. See, e.g., AESCHYLUS, *THE EUMENIDES*.

7. See RESNIK & CURTIS, *supra* note 1, at 38-41, plates 10, 11.

8. For a later presentation, see THOMAS PRESTON, *A LAMENTABLE TRAGEDY MIXED FULL OF PLEASANT MIRTH CONTAINING THE LIFE OF CAMBISES, KING OF PERCIA* (1569).

The prize of him who best adjudg'd the right.⁹

Here we have the subject of the dispute, pleadings, public trial with witnesses, and judgment. Little of this complex process is depicted or implied by the statues of Justice adorning so many courthouses.

II. THE PEOPLE OF JUSTICE

Homer's description differs from the Goddess with the Scales in another way: it is thronged with people, all of them participating in the litigation. Justice is an encounter among human participants, those whose own concerns are at stake, and those who join in discussing, promoting, or resisting an appropriate decision, which will in turn have its effects on still other people. By contrast, statues of Justice may contain no humans at all if one conceives of the being they present as a Goddess, a personification, or an ideal. That conception would be especially plausible in Continental law courts, where judges sit in groups and opinions are almost always anonymous.

Even if one regards the statue as symbolizing an individual, common-law judge, that representation leaves the judge scarcely human: grandiose but stony like the Commendatore's statue in Mozart's *Don Giovanni*, and dependent on a mechanical decision mechanism. And what has become of the jurors? Indeed, what has become of appellate courts that sit in panels? Where are the lawyers?¹⁰ What about the spectators, whose importance was recognized in Homer and in Athens¹¹ and continues to this day?¹² What about the clerks and marshalls? After all, even in Homer's time the heralds who kept order were thought to merit mention.

The most important absentees are the litigants themselves. As Lon Fuller said,

[T]he distinguishing characteristic of adjudication lies in the fact that it confers on the affected party a peculiar form of participation in the decision, that of presenting proofs and reasoned arguments for a decision in his favor. Whatever heightens the significance of this participation lifts adjudication toward its optimum expression. Whatever destroys the meaning of that participation destroys the integrity of adjudication itself.¹³

9. THE ILIAD OF HOMER: TRANSLATED BY ALEXANDER POPE, at XVIII.577-90 (Steven Shankman ed., 1996) [hereinafter ILIAD]; see RESNIK & CURTIS, *supra* note 1, at 25.

10. See RESNIK & CURTIS, *supra* note 1, at 372-75 (describing a courthouse tribute to a pro bono lawyer).

11. See generally Adriaan Lanni, *Publicity and the Courts of Classical Athens*, 24 YALE J.L. & HUMAN. 119 (2012).

12. See, e.g., *Presley v. Georgia*, 130 S. Ct. 721 (2010); *Kirk v. Commonwealth*, 944 N.E.2d 135 (Mass. 2011); RESNIK & CURTIS, *supra* note 1, at 293-305.

13. Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 364 (1978).

Statues of Justice do not include the litigants, even in the form of the tiny figures that formerly occupied the scales.¹⁴

One has to wonder why construction committees elect to place before our courthouses the figure of a single person, bearing the judicial scales and sword. What are the rest of us supposed to think, as we enter and leave the courthouse, of the judicial process so portrayed? Very likely courthouse planners, who nowadays aspire to communicate openness and diversity,¹⁵ thought of Justice not as the whole shebang, but as a sort of guardian angel presiding over and inspiring the human participants in adjudication. Perhaps the planners were unaware of the possibilities that their adherence to the traditional sole figure excluded, or shied away from the controversy that alternatives might provoke.¹⁶ But there are indeed alternatives.

Consider, for example, Ben Shahn's *Passion of Sacco and Vanzetti*, a work with many incarnations, the most elaborate of which is a mural at the University of Syracuse.¹⁷ (Needless to say, none can be found in a courthouse.) Here, Judge Lowell is barely visible, looking out through a window in his courthouse as if from the prison of the law. The defendants, Sacco and Vanzetti, loom large front and center. In some versions, they are in their caskets. Demonstrating members of the public stand to the left, and on the right are Harvard's President Lowell and the other members of the commission that upheld the conviction. So justice—or rather injustice—is presented as a public and political struggle that



Figure 1. *The Passion of Sacco and Vanzetti*, Ben Shahn, 1931-1932.

Art © Estate of Ben Shahn/Licensed by VAGA, New York, NY.

14. RESNIK & CURTIS, *supra* note 1, at 20, 23.

15. *Id.* at 166-68, 183-91.

16. *Id.* at 108-26.

17. Figure 1; see BEN SHAHN AND "THE PASSION OF SACCO AND VANZETTI" 110 (Alejandro Anreus ed., 2001).

involves many people, some of them neither parties, witnesses, jurors or judges.

III. THE APPEARANCE OF JUSTICE

To the visual sense—indeed, not just to the visual sense—justice and injustice are often hard to distinguish. In a trial overshadowed by the threat of lynching, “although every form may have been preserved,” one may still inquire, as Justice Holmes did in the Leo Frank case, “whether they have been more than an empty shell.”¹⁸ Shakespeare provides two obvious examples of such sham trials: in *The Merchant of Venice* Portia disguises herself as a jurist in order to bring about Shylock’s condemnation, while in *Measure for Measure* the Duke makes Angelo the judge at his own trial to unmask his villainy more dramatically.¹⁹ On the other hand, justice may have been done even when the appearance of justice is lacking.²⁰ Of course, politically engaged artists such as Ben Shahn and Orozco²¹ are only some of those who have found ways to depict injustice, but this usually involves departing from what is likely to be seen in a just or unjust court and from the traditional iconography of justice. That iconography provides little to tell us whether what we are seeing satisfies the requirements of justice.

Dieric Bouts’s *The Justice of Emperor Otto III* (1468-82),²² a diptych of the same genre, period and function as *The Justice of Cambyses*,²³ shows the difficulty of distinguishing justice from injustice by its appearance. In the left panel, a count is beheaded on charges of making advances to Otto’s wife, who can be seen in the background making those charges to Otto. In the right panel, the count’s wife proves his innocence, undergoing the ordeal by carrying a bar of hot metal, and Otto orders his own wife burned at the stake for her false accusation. Two cruel deaths inflicted by the law, but which one is just and which one unjust? Today, we might be skeptical of a sentence based on the private accusation of the judge’s

18. *Frank v. Mangum*, 237 U.S. 309, 346 (1915) (Holmes, J., dissenting). Frank was indeed later lynched, a victim of anti-semitic prejudice. See LEONARD DINNERSTEIN, *THE LEO FRANK CASE* (rev. ed. 2008).

19. WILLIAM SHAKESPEARE, *MEASURE FOR MEASURE*, act 5, sc. 1; WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE*, act 4, sc. 1.

20. See, e.g., *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988); *R. v. Bow St. Metropo. Stipendiary Magistrate*, [2000] 1 AC 119 (H.L. 1999) (Eng.). In these cases, courts set aside decisions by judges who should have disqualified themselves because of an appearance of partiality, while professing belief that the judges had in fact been impartial.

21. RESNIK & CURTIS, *supra* note 1, at 349-66.

22. Figure 2; see CATHELINE PÉRIER-D’IETEREN, *DIERIC BOUTS: THE COMPLETE WORKS* 45-57, 61-62, 70-71, 298 (2007).

23. RESNIK & CURTIS, *supra* note 1, at 38-41, plates 10, 11; see *supra* text accompanying notes 7-8.

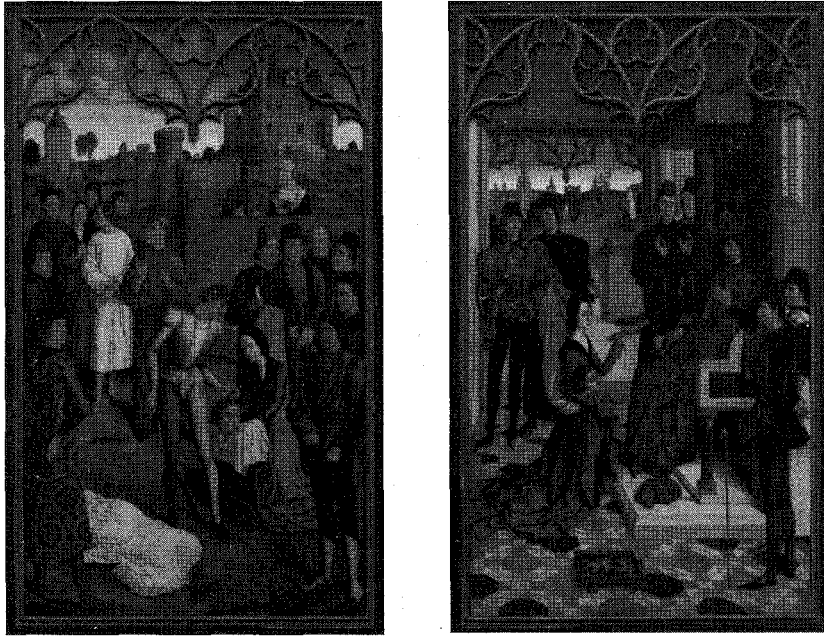


Figure 2. *The Justice of Emperor Otto III*, Dieric Bouts, 1468-1482.

© Royal Museums of Fine Arts of Belgium, Brussels. [Grafisch Buro Lefevre, Heule.]

wife; but we might also doubt the veracity of the ordeal. And not just today: some people in the Middle Ages believed that one could trick the ordeal.²⁴ So if we the viewers can tell that the count's execution was unjust, and his accuser's just (if burning at the stake can be just), it is less because of anything we see in Dieric Bouts's picture than because we have heard the story on which it is based.²⁵

In the traditional depiction of Justice, even the scales provide no guaranty of justice. They are presumably meant to symbolize impartiality because they remain in equilibrium until the trial begins, but they can also suggest a mechanical and therefore inhuman decision procedure. Is it the whole person who is to be weighed, as in depictions of judgment after death,²⁶ or just the merits of the case? Is the prevailing party the one whose claims are more weighty, as we moderns are likely to assume, or is weight rather the sign of defeat, as in the *Iliad*:

Low sinks the scale surcharg'd with *Hector's* fate;
Heavy with death it sinks, and hell receives the weight.²⁷

24. JOSEPH BÉDIER, *THE ROMANCE OF TRISTAN AND ISEULT* 119-29 (Hilaire Belloc trans., 1994).

25. JACOBUS DE VORAGINE, *THE GOLDEN LEGEND* 380 (William Granger Ryan trans., 1993).

26. RESNIK & CURTIS, *supra* note 1, at 20-24.

27. *ILIAD*, *supra* note 9, at XXII.271-76. The same interpretation of the scales appears in VIRGIL, *AENEAD*, at XII.1054-57 (Penguin Classics 1997) (John Dryden trans., 1697); and JOHN MILTON,

And perhaps the scales of Justice appraise neither the litigants nor their claims: “the balance she holdeth are not to weigh the right of the cause, but the weight of the bribe.”²⁸ Looking at the apparatus does not disclose how it is being used.

In the same way as Justice’s scales and her blindfold symbolize not just impartiality but also blindness and inaccessibility,²⁹ the meaning of her drapery and of the robes of real judges is ambivalent. The robe suggests that the judge has discarded all merely personal concerns in the quest for impartiality.³⁰ But in doing so, the judge may have divested himself or herself of humanity, like the newly elected Pope in Brecht’s *Galileo*, who becomes more distant and institutional as he dons his vestments,³¹ or like the antislavery judges described by Robert Cover, who felt obliged by their role to hand down proslavery decisions.³² Alternatively, it may turn out that the robe covers the criminal who committed the crime for which another is being tried.³³ Perhaps judges should imitate Chief Justice Doe of New Hampshire, who wore no robe and presided in country clothes—though that too would be no assurance of unadorned justice.³⁴

The intriguing experiment of Oscar Chase and Jonathan Thong³⁵ similarly suggests that the appearance of justice is untrustworthy. They find that law students rate their moot court judges more highly when the judges wear judicial robes and preside in a real courtroom.³⁶ Perhaps, as the authors observe, the students are not mistaken because robes and courtroom inspire the judges to fill more perfectly the judicial role.³⁷ Becoming a judge exposes one to the powerful influence of tradition and expectation that help constitute that role, and possibly the trappings and

PARADISE LOST, at IV.990-1015.

28. JOHN LYLly, MIDAS (1592) (spelling modernized). For Renaissance depictions of scales in a commercial context. See, for example, Petrus Christus’s 1449 painting *A Goldsmith in His Shop* (at the Metropolitan Museum of Art, in New York) and Quentin Matsys’s 1514 painting *The Moneylender and his Wife* (at the Louvre, in Paris).

29. RESNIK & CURTIS, *supra* note 1, at 62-72; Capers, *supra* note 2; Goodrich, *supra* note 3.

30. Similarly, for lawyers to wear robes in court may promote equality among them and prevent their dress style or cost from influencing the trier. JOHN LEUBSDORF, MAN IN HIS ORIGINAL DIGNITY: LEGAL ETHICS IN FRANCE 34 (2001); Charles M. Yablon, *Judicial Drag: An Essay on Wigs, Robes and Legal Change*, 1995 WIS. L. REV. 1129, 1141 (1995); see Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 684-86, 688-89 (1995).

31. BERTOLT BRECHT, LIFE OF GALILEO, at sc. 12 (John Willett trans., 2008).

32. ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS (1984).

33. HEINRICH VON KLEIST, THE BROKEN JUG (John T. Krumpelmann trans., 1962) (1808); WILLIAM SHAKESPEARE, MEASURE FOR MEASURE; Italo Calvino, *A Judgment*, in ADAM, ONE AFTERNOON AND OTHER STORIES 133 (Archibald Colquhoun & Peggy Wright trans., 1983).

34. JOHN PHILIP REID, CHIEF JUSTICE: THE JUDICIAL WORLD OF CHARLES DOE (1967).

35. Oscar G. Chase & Jonathan Thong, *Judging Judges: The Effect of Courtroom Ceremony on Participant Evaluation of Process Fairness-Related Factors*, 24 YALE J.L. & HUMAN. 221 (2012).

36. *Id.* at 236.

37. *Id.* at 238.

the suits of judgeship exert some of that power. Indeed, they may also inspire the litigants, counsel, and jury to rise to the occasion. But perhaps only the appearance and not the reality of justice is present, and the students are experiencing placebo justice rather than the real thing.

And even if an observer could see that the scales are truly balanced and the judges are both humane and impartial, procedural fairness cannot guaranty the justice of a trial unless the substantive law to be applied is just. Grant Gilmore famously claimed that “in Hell there will be nothing but law, and due process will be meticulously observed.”³⁸ In the apartheid era, the South African courts made impressive efforts to pursue procedural justice, but the result was often the enforcement of unjust laws.³⁹ Would an observer of a trial have seen justice or injustice? To distinguish between the two, it would have been necessary to look outside the courthouse.

IV. THE PLACES OF JUSTICE

Where is Justice to be found? According to an old tradition of which Peter Goodrich reminds us, she has fled to the heavens.⁴⁰ Yet we continue to represent her here on earth, nowadays almost exclusively in courthouses.⁴¹ That may reflect increased belief in law as the most promising source of social justice. But focusing on courts as the potential seat of justice may blindfold us by distracting our gaze from other sites where she may be pursued.

The political realm of voters, legislators, and executives includes many such sites. Any list of important acts of justice in our country should include the Civil Rights Acts of 1964 and 1965,⁴² and any list of unjust acts should include the presidential internment of Japanese Americans during World War II.⁴³ The courts did not perform these acts, but merely declined to strike them down.⁴⁴ Philosophical works on justice likewise contemplate implementation in the constitutional and legislative realm

38. GRANT GILMORE, *AGES OF AMERICAN LAW* 111 (1977).

39. STEPHEN ELLMANN, *IN A TIME OF TROUBLE: LAW & LIBERTY IN SOUTH AFRICA'S STATE OF EMERGENCY* (1992).

40. Goodrich, *supra* note 3; *see, e.g.*, EDMUND SPENSER, *THE FAERIE QUEENE*, at V.i.5, 11.

41. *See, e.g.*, RESNIK & CURTIS, *supra* note 1, at 2-5, 87-88, 100-01, 187, plates 17-19, 28.

42. Pub. L. No. 88-552, 78 Stat. 241 (1964); Pub. L. No. 89-110, 79 Stat. 437 (1965) (officially entitled the Voting Rights Act of 1965).

43. GREG ROBINSON, *BY ORDER OF THE PRESIDENT: FDR AND THE INTERNMENT OF JAPANESE AMERICANS* (2001).

44. *South Carolina v. Katzenbach*, 383 U.S. 301 (1966); *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964); *Korematsu v. United States*, 323 U.S. 214 (1944). Indeed, the Court has now intimated that it might hold the 1965 Act unconstitutional sometime in the future. *See Northwest Austin Munic. Util. Dist. No. 1 v. Holder*, 557 U.S. 140 (2009).

rather than mainly through the courts.⁴⁵ So when Amartya Sen places a representation of Justice on the slip covers of his book *The Idea of Justice*, he chooses Fra Angelico's drawing in which the Goddess is crowned and bears a globe and sword, but no balance. This Justice is not adjudicating a dispute between litigants, but ruling and reforming the earth.

In past centuries, people recognized such views by placing representations of Justice in city halls as well as courthouses.⁴⁶ True, adjudication often occurred in the municipal halls of cities like Amsterdam, Bruges, Geneva, and New York, but so did legislative and executive activities.⁴⁷ Ambrogio Lorenzetti's *Allegories of Good and Bad Government in Siena's Palazzo Pubblico* plainly include the latter, as do other representations of Justice placed far from any court.⁴⁸ Tellingly, modern explorations of Lorenzetti's theme are found in courthouses, not city halls or statehouses.⁴⁹ A representation of Justice can indeed be found amidst the multifarious artwork of the United States Capitol, but it dates from 1863.⁵⁰ Since then, Justice may not have left the earth, but she does seem to have abandoned our legislatures.

Finally, what about Justice in the lives of citizens, far from the mansions of government? The phases, people and appearances of adjudicatory and even legislative justice do not exhaust its meaning in our thoughts and endeavors. Micah's call to "do justice, and to love kindness, and to walk humbly with your God"⁵¹ was not directed primarily at magistrates. And it was not only of courts that Rabbi Shimon ben Gamliel was thinking when he said in the second century: "The world is sustained by three things: justice, truth, and peace."⁵² Justice is not wholly just when it is just in courtrooms.

45. See, e.g., JOHN RAWLS, *A THEORY OF JUSTICE* (1971); MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* (1983).

46. See, e.g., RESNIK & CURTIS, *supra* note 1, at 5, 33-39, 44-61.

47. *Id.* at 49-50, 134.

48. See *id.* at 25-30, 79-84, plates 6, 8; see also IZHAK ENGLAND, *CORRECTIVE AND DISTRIBUTIVE JUSTICE: FROM ARISTOTLE TO MODERN TIMES* 218-21 (2009).

49. RESNIK & CURTIS, *supra* note 1, at 30-33, plates 7, 9.

50. *Justice and History: Overview*, ARCHITECT OF THE CAPITOL, http://www.aoc.gov/cc/art/justice_and_history.cfm (last visited Feb. 15, 2012). Statues of Justice in the New York City Hall and Brooklyn Borough Hall likewise date from the nineteenth century. RESNIK & CURTIS, *supra* note 1, at 5, 139.

51. *Micah* 6:8.

52. *Pirke Avot* 1:18. The following prooftext, "Speak the truth to one another, render true and perfect justice in your gates," *Zechariah* 8:16, suggests that Rabbi Shimon did have in mind courts, which traditionally met in city gates.

Embodying Justice: The Iconography of the Courthouse

