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## Introductory Themes: Images of Evenness

### The Scales of Justice

We are used to seeing Justice figured as a strong woman, bearing a sword, sometimes crowned with sprigs of a plant – laurel or grain stalks – blindfolded perhaps, and surely bearing scales. Most of us, I would bet, assume that the scales merely reproduce the message of the blindfold: that justice is impartial, not a respecter of persons, which means it is blind to the social status of the people before it. The blindfold is a late addition to the iconography of Justice. It dates from the early sixteenth century, whereas scales have been associated with Egyptian Maat, Greek Dike, and Roman Lady Aequitas for a couple of millennia longer than that.

The scales overflow with productive meanings – for starters, are they properly represented in Justice’s hand as even or tipped? – but the blindfold quickly degenerates into absurdity if we think on it too closely. Do you want to blindfold someone with a sword? It may not be wise to have her unable to see what she is striking, unless you do not give a damn about how much it costs to do justice; collateral damage, though unfortunate, must be borne. Blind justice morphs into blind fury. And how is she supposed to read the scales, if she is blind? This troubled early representers of Justice; some thus gave her two faces like Janus, with the side bearing the sword prudently left unblindfolded.<sup>1</sup>

Blindness – or being blindfolded as in the game of blindman’s bluff, where the purpose was to make you stumble around like a fool – was never an iconographic virtue before Justice made it one in the early-modern period; blindness was traditionally associated with stupidity and irrationality, as in Blind Cupid, or with lack of righteousness, as

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in Exodus 23.8: “And you shall take no bribe, for a bribe blinds the officials, and subverts the cause of those who are in the right.” But by the late fifteenth century, blindness, at least with respect to justice, had changed its valence. It was now a virtue: it kept her from favoring the rich, the beautiful, the powerful, though it still left her to be swayed by educated accents or sexy voices, and to be repelled by those who did not smell good. Thus some early-modern depictions of her and of her judges show them with stumps instead of hands, amputated so as to be bribeproof, an image made all the more necessary because surely one of the unintended meanings of blindness was that the blind often had their hands extended begging for alms.<sup>2</sup> And it was standard folk wisdom that many of those blind beggars were shamming their blindness anyway. Another problem with the blindfold, as any little kid knows, is that it is seldom peekproof.

So remove the blindfold, or the “scales” from your eyes, a metaphor that I wager has at least once in your life sent you into a tizzy of confusion at just how an old bathroom scale managed to get on your eyes. But it was not that kind of scale. No one, not even in the New Testament, would walk around like that.<sup>3</sup> The scales that are to fall from your eyes are the crusty kind that cap softer living tissue beneath, by which are meant those disfiguring cataracts that we now seldom see in the Western world. It is the balance-beam scales I want to focus on, particularly with regard to the question I just raised. How are they to be represented in Justice’s hand – even or tipped? We have competing cultural stories to draw on and different legal jobs to do.

If it is evidence that is being weighed so that a decision can be made, we want the balance tipped one way or the other, or if it is defendant’s negligence being weighed against plaintiff’s, the balance must be tipped against the defendant or he is off the hook, and likewise if it is sins weighed against good deeds, or sins against the soul that authored them, as in images of judgment at death or on Doomsday.<sup>4</sup> Holding someone to answer depends on imbalance. Tipping makes the decision.

Submitting a dispute to the judgment of scales has long been understood to be something of an ordeal. The scales are of an ilk with carrying a hot iron, or plunging an arm into boiling water to extricate

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a stone, or flipping a coin, or pulling petals off daisies to determine whether she loves you or loves you not. Zeus resorts to an ordeal of scales more than once in the *Iliad* to tip tides now in favor, now against, Troy, using them purely as a device to make a decision independent of having to come up with reasons to justify it.<sup>5</sup> That is why legal historians have referred to ordeals as “irrational” modes of proof, though perhaps “a-rational” would be more apt. Ancient Indian law actually provided for a formal ordeal of the balance scale. The person obliged to undergo the ordeal got on the scale, which was then balanced by placing the appropriate weights in the other pan. Then she stepped down, had a writing placed on her head, heard exhortations about the evils of untruth, and got back on her pan. She had better weigh the same.<sup>6</sup>

The earliest evidence we have of scales used in judicial-like proceedings comes from ancient Egypt, in depictions of the judgment of the dead – the psychostasia – in which a person’s heart or soul lies in one pan and the ostrich feather of the goddess Maat in the other. Some think that the decision goes against the soul if the heart is lighter than the feather,<sup>7</sup> others if it is heavier,<sup>8</sup> but it would seem that the idea of a feather in the balance requires the scales to be level both before and after, that the judgment point is maintaining evenness, not a tipping. The soul must be light as a feather; in effect it should weigh nothing. Hence the usual portrayals of the psychostasia in the Books of the Dead have the pans balanced.<sup>9</sup> In this case, as in the Indian ordeal, the scales need not require tipping to decide the outcome.

I asked my law students if they could recall whether Lady Justice’s scales are tipped or even. With few exceptions, they went for tipped, their quizzical looks revealing, however, that they had no recollection whatsoever and were taking a blind stab at it. I suggested that metaphors like “tipping the balance” may have prompted their “recovered memory,” such memories being little more than phantoms of suggestibility. That led to blank looks, for they had no idea that the balance in that metaphor referred to a scale to begin with, the very word *balance* meaning “two pans,” “two plates.” I then asked what they thought was being weighed; most looked even blanker. Some suggested “the evidence”; some said guilt or innocence, and a few, it

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being the case that our classrooms have uninterrupted wireless Internet access, abandoned their e-mail and porn sites to Google for an answer to present as a product of their own thoughtfulness. I told them not to waste their time, that I had already done the Googling. A casual perusal of more than a hundred representations of Justice in statuary and paintings from the sixteenth century on revealed even pans outweighing tipped by 5 to 1.<sup>10</sup> I asked whether they had ever thought of justice as “getting even.” Nods of agreement. So it seems, said I, have most depictees of Lady Justice.

I suppose that what prevents us from recognizing the sheer obviousness of the primacy of the notion of justice as evenness is that, in the law school world at least, burdens of proof weighing on one party, and not on the other, seem less dead a metaphor than restoring or striking the balance. But mostly it is because we were raised with images of Santa, or St. Peter, or God weighing our good deeds against our bad. Unless we were culpably blind to our own faults, we knew we needed cartloads of grace to have the balance come out in our favor. Imbalance was the image that threatened to put coal in our stocking. Many of us first came to question the omniscience of Santa, God, and our parents – rather than give them credit for mercifulness – when we got our gifts no matter how bad we were.

Although the notion of “tipping the balance” as the decision point is very much with us, the more ancient and deeper notion is that justice is a matter of restoring balance, achieving equity, determining equivalence, making reparations, paying debts, taking revenge – all matters of getting back to zero, to even. Metaphors of settling accounts, in which evenness is all, run deep. If the scales are tipped we are still “at odds”; there is no end of the matter until the pans regain their equipoise. The work of justice is to reestablish right order, to restore a prior supposed equilibrium that has been disturbed by some wrongful act or some debt owed but not paid. In corrective justice, evenness, not tipping, is the end point.

We can make a compromise between depictions of tipping and balance if we understand that Justice may be required to answer two different kinds of questions with her scales. There is the question of who must pay. Here your good deeds and your bad, or competing evidence,

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may be weighed. The question may also be decided by Zeus throwing random weights into the pans. The tipping of the scale makes a decision one way or another, pretty much a-rationally, the scales functioning mostly as an ordeal in this phase, even when we think it is evidence we are weighing.

Once the scales have singled you out as having to answer we must now reemploy them to determine *how much* you must answer for. Here the matter can be concluded only when we know the full measure of the harm you are responsible for. For this the scales need to settle finally at even, and rather than behaving irrationally they are pretending to a kind of essential rationality: the rationality of calculation and the marketplace. But the question that is answered by tipping – the question, that is, of whether to hold someone liable or whom to hold liable – is preliminary, whereas the question that is answered by evenness is the remedial question, the question of resolution, and the core justice question. And thus the iconographic and conceptual primacy of depictions of evenness.

The scales are the signature emblem of the trader, those people who are taken as the torchbearers for a particular view of rationality as economic rationality (though even they only occasionally behave as economic theory orders them to). It is a standard archaeological deduction that when scales are found among the grave goods, the skeleton they accompany was involved in trade. And in the Viking Northlands a substantial number of these skeletons are female, just like Lady Justice, Maat, Dike, and Aequitas.<sup>11</sup> Scales are tools of the marketplace, the stuff of everyday settling accounts. Lady Justice borrows her defining instrument from the defining instrument of precisely those people mistrusted from time immemorial as sharp practicers. But justice cannot shake its connection to measuring value, setting prices, and exchange, so borrow from the trader it must. To this day we find it hard to conceptualize corrective justice independently of the language of the marketplace, of debts incurred and accounts settled, of setting value and establishing prices, of obligations discharged in full, of paying for and paying back, and of satisfaction. In the Babylonian *suq* of 1800 B.C. the scales had to end up even or else there was no conclusion to the transaction. The same is true for remedial justice.

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Sharp practice is not confined to market traders; it is also the great suspicion that burdens administrators of the law. Imagine an artist deciding how to represent Lady Justice's scales. Even if the story he wants to dramatize requires a tipping of the scales, he might still wish to depict them in equipoise. At what point, for instance, in the judicial process is our Lady Justice to be figured? At the beginning of the proceeding, ready to judge those who come before her? Or after she has heard the case? Do we want her there as an Idea, merely overseeing but not participating, or there doing the gritty business of judging? Don't we want to know that Justice has just scales, ones that are in balance at the beginning of the process? To represent the scales as tipped, as in the weighing of evidence or the quality of one's deeds, is to have faith that the scales were not rigged to begin with.<sup>12</sup> Tipped scales may surely indicate judgment, but it can also suggest corrupt judgment. Better perhaps to figure her with the scales in equipoise and the pans empty to show she at least starts out an honest lady.

Not that evenness and balance cannot fall prey to sharp practice. Evenness pretends to uniqueness and exactitude, there being an infinite number of ways a scale can be imbalanced – things can be out of whack by an inch or by a mile; but there is only one point in the universe that renders them balanced. In geometry a point has no thickness, but the balance point of the scale comes in varying thicknesses; if too many degrees of precision are demanded, justice becomes impossible, or at least impractical. Ask Shylock. There has to be some play in the joints that allows for imaginative and creative restorations of equilibrium or for dealing practically with a reality that is always more complex than even the precisest of rules can get a grip on. That useful play in the joints, though, also left space for shenanigans. It was not only a matter of how inaccurate the scales might be but also of the negotiability of exactly what was to be weighed against what. What did you put in the other pan to balance my eye, my honor, my blood?

Perfect balance may be achievable only in the symbolic mode. Or we find it a relief so to believe. For in our relativistic and uncertain moral world we have come to want to believe that the values at stake in matters of justice, in all but the simplest disputes, may be

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incommensurable. But let us not rush to that (lazy?) comfort so quickly. Commensuration is just what the scales hold out as the highest image of justice. And though in the end pure equivalence may not be achievable, we shall see that many a lawmaker, and many an avenger, was an expert at devising practical systems of equivalences. At times they were inspired to realize balance in sublimely fantastic and poetically powerful ways. Can't we think that much of the poetry in poetic justice is precisely a commitment to perfect balance and fitness and to the belief that justice, and the passion for it, has a powerful aesthetic as well as moral component?<sup>13</sup>

Difficult questions of commensuration were faced and resolved in some fashion all the time.<sup>14</sup> What if the societies that first used the imagery of balance, equity, evenness did not have coinage or units of account? The scales themselves suggest a lack of coinage. That is why they are necessary. If you have to weigh coins to tell how much they are worth, coins are not working as coins but as ingots.<sup>15</sup> The medium of payment must be weighed out, and hence standardized units of weight – shekels and pounds – end by becoming units of account before they become the names of coins. So people buying goods or getting justice had to weigh out silver, or barley, or iron, or blood, maybe even eyes and teeth and other body parts. In other words, justice is not quite separate from the story of money and its origins, of primitive money, and how to measure value – largely how to measure human value in serious cases – and thus it is also not separate from notions of honor: how to value my honor, my kin, my life, against your honor, your kin, your life.

The story to be told in this book is one of how imaginative and smart people were about measuring and meting, valuing, and getting even. We will see that people were pretty good at making trade-offs, at weighing and balancing harms, pains, suffering, benefits, favors, and human worth, at measuring eyes and teeth, arms and legs, this person's life against that person's. Although paying back, getting even, and revenge are often the subject of our most vivid fantasies, theirs was a social, political, and legal world in which getting to even was the very stuff of the practical. And I suppose lurking not very far beneath my text is a vaguely teasing suggestion that the talionic world of payback and

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getting even will not be unfamiliar to us, if not as an official matter writ large in public discourse, then surely in the schoolyard, the workplace, the pub, the street, on the highway, in conversation, in the bedroom, in matters of love as well as hate.

**Just about Words**

The story I have to tell has a lot of threads. Let us begin with the diction of evenness, both in big matters of justice and in very little matters indeed, such as the filler words we use to give rhythm or to buy time in our sentences, one step up from *um* and *ah*.

*Even and Odd*

Our word *even* is *jafn* in Old Norse; they are clearly cognate words deriving from the same Germanic root. *Jafn* lies at the core of Norse notions of justice, so that the word for justice is often rendered as evenness (*jafnað*); injustice, as unevenness (*ójafnað*). (The negative prefix *ó* corresponds to the English negative prefix *un* or *in*, and the *ð*, or *eth*, is pronounced as our *th*). A bully, a man who shows no justice or equity in his dealings, is an “unevenman” (*ójafnaðarmaðr*) (*maðr* = man in the nominative case). A just man, on the other hand, is even, of even temper and fair in his dealings (*jafnaðarmaðr*). Of one such unevenman it is said that “no one got any justice from him, he fought many duels and refused to pay compensation for the men he killed and no one got payment for the wrongs that he did.”<sup>16</sup> It is not that the unevenman in question kills that makes him unjust, but that he kills and then refuses to pay for the damage. Behaving justly means paying for the people you kill, the harms you inflict. Literally paying. Then you are no longer unjust, for you have restored the balance. An even man evens things out. I do not wish to overstate the case. A rich person could not go around killing for the hell of it and then pay compensation and be excused from being blamed for his unevenness, his arrogance, or his bullying. He still had to kill under some reasonable claim of right.

But who gets to set the going price of a corpse? Does our killer give what he thinks is fair? Do the victim’s kin get to name their price? How does the balance get struck? How do we know we are even? Sometimes



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societies have laws that tell us how much a man of a certain status is worth; they provide a fixed *wergeld*, or man-price, that measures his legal rank and indicates how much you have to pay his kin if you kill him. This was the case in the Wessex of King Alfred in the ninth century, or the Kent of King Æthelberht in the seventh. In other places, such as saga Iceland, the price is set on a case-by-case basis but the prices actually assessed tended to cluster around certain customary amounts. Arbitrators set the value, or the parties themselves negotiated an appropriate payment.

In this light consider the word *odd*. The English word *odd* is borrowed from Old Norse. *Odd(i)* is Norse for a point, for a triangle, for a spit of land, and for an arrowhead or spearhead; in other words, *odd* indicates the effect of adding a third point outside the line formed by the two points that determine the line: the odd point makes of a line a triangle, an arrowhead, a spearpoint. They also used *odd* to indicate odd numbers, numbers that were not *jafn*. Now the plot thickens. One of the words they used to designate the person who cast a deciding vote in an arbitration panel was *oddman* (*oddamaðr*).<sup>17</sup> For us, “being at odds” means we are in the midst of a quarrel, and it meant that in Old Norse too; to resolve that quarrel you needed to get back to even.<sup>18</sup> To do that you often had to bring in an oddman, a *third* party, to declare when the balance was even again if the law did not so provide or the parties could not agree among themselves as to how to strike it. You needed odd to get even or you would forever be at odds.<sup>19</sup>

With two parties – an even number – the fear was that what you got was what the Greeks called *stasis*, gridlock, a kind of civil war, in which each side overvalues the harms it suffers and undervalues the harms it imposes on others, who think, as many of us do, that *getting even* means obliterating the other side.<sup>20</sup> You needed an oddman to undo stasis, not so much to break the tie as to convince each side that they were in fact tied. Or more imaginatively, as any parent with more than one child knows, to convince each child that he actually got the better deal.<sup>21</sup> It was the oddman’s job to prevent getting even from getting out of hand by selling both parties on a plausible conception of evenness.

In the interest of nuance, there exists also, however, a countermovement to the tendency to exaggerate our own injuries and understate

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the harms we inflict. The honor game might lead people to downplay the wrongs done them (You think you hurt me? Didn't even feel it) and to play up the harms they inflicted if there was some doubt that they had the capacity or character to get even (I clobbered the guy). Playing down the harms done you was a much cheaper way of dealing with insult and injury than having a thin skin that exposed you to the dangers of taking frequent revenge. And if you could effectively sell others that the downplaying of the harms done you was not motivated by cowardice but by real toughness, you preserved your honor on the cheap without looking cheap.

Do not dismiss all this as merely the warped theory of justice of a bunch of axe-wielding Vikings. Aristotle too made justice a matter of price-setting and related it to notions of reciprocity and balance.<sup>22</sup> Anne Pippin Burnett, a student of Greek tragedy, reminds us that for the Greeks "revenge was not a problem but a solution. It was a form of necessary repayment."<sup>23</sup> The pre-Socratics were even clearer that justice meant getting back to even; they conceived the entire cosmic order to be a matter of payback and revenge. Thus winter gets even with summer, summer with winter, hot with cold, and so on. And as Gregory Vlastos has noted, "To obtain justice was literally to 'get back the equal [or to even].' The underlying principle is that of an exchange: equal value rendered for value taken. The same words apply to the closure of a commercial transaction . . . and to the satisfaction of justice."<sup>24</sup> Early Greek cosmology's commitment to balance, evenness, equality, and giving as good as you get was forcefully reaffirmed more than two millennia later in Newton's third law of motion, as succinct a principle of getting even as there is, so that the horse's hoof that strikes the earth is paid back in kind by the earth, which hits the hoof no less forcefully.

As the Teutons and Greeks, so too the Latins.<sup>25</sup> Take our word *umpire*: it used to begin with an *n*. In Middle English it was *noumpere* when we borrowed it from French. But the *n* got detached from the beginning of *noumpere* and reattached itself to the indefinite article, so he became *an* umpire, as, analogously, a nadder, the snake, became an adder; and a napron became an apron, but napkin stayed napkin and nappie. (And compare the reverse migration of *n* when "an other" becomes "a whole nother" in our daily speech; or when Lear is