EYE FOR AN EYE

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author of

Faking It and *The Anatomy of Disgust*

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Eye for an Eye

For Joseph Weiler:
soldier, teacher, friend

And if any mischief follow, then thou shalt give life for life,
Eye for eye, tooth for tooth, hand for hand, foot for foot,
Burning for burning, wound for wound, stripe for stripe.

Exodus 21.23–25

Preface: A Theory of Justice?

This book is, in its peculiar way, a theory of justice, or more properly an antitheory of justice. It is an antitheory because it is not abstract. It is about eyes, teeth, hands, and lives. It is an extended gloss on the law of the talion: an eye for an eye, a tooth for a tooth, measure for measure. In its biblical formulation, the talion puts the body – lives, eyes, hands, teeth – front and center as *the* measure of value. True, the body has always provided us – until the metric system relieved it of the task – with feet to measure length, fathoms (the measure of the arms spread out from tip to tip) to measure depth, hands to measure the height of horses, ells (from elbow) to measure cloth, even pinches to measure salt.

But the talion cuts deeper than this. For what it means to do is measure and value *us*. Thus, it prices John's life as equal to Harry's. Or if Harry is a loser and his life is not quite a life, it might measure John's worth as the sum of Harry's and Pete's. The talion states the value of my eye in terms of your eye, the value of your teeth in terms of my teeth. Eyes and teeth become units of valuation. But the talion doesn't stop there. Horrifically enough, it seems to demand that eyes, teeth, and lives are also to provide the means of payment. Fork over that eye, please.

The talion (the same Latin root supplies us with *retaliate*) indicates a repayment in kind. It is not a talon – not an eagle's claw – of which I must inform my students and even remind an occasional colleague. It is easy to excuse the misunderstanding. After all, the difference between talion and talon is but the difference of an *i*. And then one has to try hard not to imagine a bird of prey or carrion-eater swooping down

and leaving one looking like poor Gloucester: out vile jelly, where is thy lustre now?

This book cares about matter and the facts of the matter. It is the result of years, more than thirty now, of scholarly immersion into revenge cultures. And in some small way it is my revenge on academic discussions of justice that have painted revenge as an unnuanced Vice in a morality play. Too often these discussions have the oppressive style of complacent and predictable sermonizing: lip service to, or defenses of, various safely proper positions. Would that academics had the knowledge (and irony) of a middling singer of an heroic tale.

I care about what people thought, what they actually did, what they wrote, and the stories they told, not just yesterday, but 2,500 years ago too. My themes cannot be reduced to a single encapsulable thesis. People are too smart and too inventive, the variability of daily experience too complex, to be so easily cabined. If a characterization of the book's genre is required, it is best seen as an historical and philosophical meditation on paying back and buying back – a meditation, that is, on retaliation and redemption.

In short, the book is about settling accounts, about getting even, with all that is implied by the mercantile diction of paying, owing, and satisfying obligations. Talionic cultures tended to be honor cultures, and that meant that more was required of the talion than measuring arms and legs, eyes and teeth: honor was at stake. These were cultures that were not the least bit embarrassed at taking the full measure of a man or a woman. The entire moral and social order involved sizing people up; that's what honor was, and still is, all about. They thus developed a talent for measuring complex social and moral matters that justice, in their view, demanded be taken into account for there to be justice worthy of the name. How could such measuring be avoided when people – their bodies and parts thereof, as I will show in detail – also might have to serve as the means of payment for the debts they owed or the judgments entered against them? There are hard costs to looking at the world this way, and they knew that too.

I admire the talent for justice these people had, but as the reader will discern I am at times ambivalent about them and my own admiration for them. I stand in awe and admire, but from a safe distance; and

courage permitting, I am not about to edge more than a foot or two closer. But because I may not have the moral qualities to be a completely respectable member of their kind of culture does not mean that I am about to reject their wisdom and clarity of vision. Our cowardice aside, on a higher ground, our cultural and political commitments to equal dignity for everyone are what keep most of us (and even me) from wanting to go back there. But we are hypocrites: we tolerate a lot more inequality than the garden-variety honor society would ever tolerate. They policed and maintained a rough equality among the players that were admitted to the honor game with a vengeance.

And what of those deemed not good enough to play? These were often treated to shame and aggressive contempt if they had recently been legitimate players in the game, or callously if they never had been. We pity such souls and make them the objects of our official moral and political solicitude. The concern of those who were players in the honor game, however, looked more in the other direction: up. They directed their wary and hostile gaze toward the one amongst them who was getting too good to play the game with *them* – toward the person, that is, who might soon seek to rule over them, to be their lord. Was it already too late to cut him back down to size?

Those not fit to play in the game stood on the sidelines and, you guessed it, asked God (or their gods), whom they cast first and foremost as an avenger, to take revenge for them: "O Lord, thou God of vengeance,/ thou God of vengeance, shine forth" (Ps. 94.1), "for the Lord God of recompenses shall surely requite" (Jer. 51.56). The low wanted accounts settled too, and though today we talk about that demand in terms of distributive justice, it was understood by them to be a conventional claim for corrective justice, for getting even, for taking back the eyes and teeth, their respect and well-being, that had been taken from them. Those above the game watched too, from the skyboxes, and taxed, which often came in the form of claiming the right to deliver "justice" to these vengeful, feuding people of honor below; and for the justice they delivered they claimed a cut of the action and charged a pretty penny.

In Chapter 1 I start by asking how we are supposed to understand the scales of Lady Justice, and I take off from there. The scales of

course are there to measure, for Justice is about meting or measuring. The words *mete* and *measure* mean the same thing. And if you will pardon the vulgar pun, much of the book is also about meat. Human meat. Shylock will thus have a chapter unto himself.

The discussion ranges widely in space and time, from Hammurabi to the biblical eye for an eye, to the early Anglo-Saxon kings who made pricing humans and their severed parts one of the organizing themes of their legislation, to the witty and tough-minded world of saga Iceland, to the Venice of Shylock and Antonio, even to the Big Whiskey, Wyoming, of Clint Eastwood's *Unforgiven*. And finally to our own day, where I may give some small offense. For in making man the measure of all things, but mostly of value itself, we must value people, price them under some circumstances, rank them so as to know how to pay back what is owed, though not as the economists do: it runs deeper than that. And this stark evaluation and ranking of human beings offends – sometimes with good reason, sometimes for no good reason at all.

The talion puts valuation at the core of justice; it is about measuring. At times it is no more exotic than our worker's comp schedules are. Body parts had their price then; they have their price now. Our tort law has as one of its commonly expressed goals to make the victim "whole" by substituting money for the body part he lost, just as the talion looks to make someone whole but sometimes in a strikingly different sense. In an honor culture you have a choice about how to be made whole: by taking some form of property transfer as we do today, or by deciding that your moral wholeness requires that the person who wronged you should again be your equal and look the way you now look. In some not-so-bizarre sense a commitment to equality might argue for such a result, if not always at the end of the day, then perhaps as a starting point for some hard bargaining. Obviously there is more to it than that, at least 250 pages more.

Really to trade an eye for an eye? A live man for three corpses? A pound of flesh for three thousand ducats? Back then? You bet. Right now? How do we measure the cost of war? In dollars? Not so that you will feel the costs. Dollars are not the proper measure of all things. It is still man (and woman) who is the measure: the body count. And in

a symbolic way man is also the means of payment: the dead soldier is thus understood to have paid the ultimate price.

There is so much more to an eye for an eye than meets the eye.

I have paybacks to make too, paybacks of gratitude: Annalise Acorn, Wendy Doniger, Don Herzog, Robin West, and Stephen D. White read the whole manuscript and provided copious comments and observations that have made this work much better than it would otherwise have been. Special thanks too to Peter DiCola and Kyle Logue for the help they gave me in particular sections where I cut across domains in which I had little knowledge and no sophistication. I also owe thanks for particular observations to Elizabeth Anderson, Omri Ben-Shahar, Daniel Halberstam, Madeline Kochen, Bess Miller, Eva Miller, Doron Teichman, Yoram Shachar, and Katja Škrubej. And as always to my wife, Kathleen Koehler, who manages to clear enough of the deck of our lively household so that I can find the peace and quiet to contemplate revenge.

I have often cited readily accessible modern translations for many of the early texts I use on the assumption and with the intention that this book will appeal beyond some of the narrow disciplinary boundaries to which it will probably be confined.

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ONE

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.[1]

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

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.[2] 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.[3] 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.[4] 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

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.[5] 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.[6]

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,[7] others if it is heavier,[8] 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.[9] 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

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.[10] I asked whether they had ever thought of justice as "getting even." Nods of agreement. So it seems, said I, have most depicters 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,