Images of Justice

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Strong and appealing visions shape lives and actions profoundly. Consider how Martin Luther King's *I Have a Dream* vision, aligned with his philosophy of nonviolence, personal courage and self-sacrifice, propelled the ultimate integration of public facilities in America. In contrast, the Black Panther symbol and Black Power rhetoric energized an entirely different movement to address repression and the aftermath of a historical era that embraced the enslavement of large groups of people. Or consider how Gandhi used nonviolent protest in India to shift power from "haves" to "have nots" in a manner that was inconceivable before or without his vision.

The strength, clarity and appeal of different images of justice help determine the acceptability and success of the processes associated with those images. For any system of justice to be acceptable to parties who believe that an injustice has occurred, the ideal behind and the workings of the process itself must be consistent with a clear and compelling vision of fairness.

While vision and reality can part company from time to time, buffeted by the exigencies of particular situations, one cannot stray far from the heart or soul of an enterprise without jeopardizing its fundamental health and well-being. In an effort to capture the vision behind the three major dispute resolution processes, this essay will present an image of a judge, an arbiter and a mediator. The analysis will note how current practices, in many respects, have strayed from these images and point out the danger of having a process divorced from a compelling "justice" rationale.

Litigation

Standing straight and tall in public places, a blindfolded woman holds up scales. Since she is blindfolded, she cannot be swayed by gender, race, wealth, or other influences or advantages that one party might hold. On her scales, disputing parties rest their case: the best they can muster for them-

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1. Lela P. Love is a clinical professor of law and director of the Kukin Program for Conflict Resolution at Benjamin N. Cardozo School of Law. This essay is dedicated to individuals who have in their careers or personal lives stepped forward to rescue and revive victims of the inexorable working of systems of "justice." Most notably, in my own experience, Barry Scheck (Cardozo's Innocence Project) and Russell Weatherspoon. Thanks to Dan Weitz, Simeon Baum and Martin Love for thoughtful comments and suggestions.

selves and the worst they can present about the other side. The matter is weighed on these scales in public view, and the balance resolves the matter.

The scales themselves get more precisely balanced after each weighing, after each case. The weight and moment of precise and particular factors are calibrated, and the blindfolded lady announces how much factors weigh, this time, and for all time.

Should a party suspect that the scales were out of balance or the blindfold had been lifted, he may appeal to higher authorities to test the integrity of the process.

This lady is accessible to all, rich and poor alike. Like the other commanding woman standing at the Golden Door in NYC harbor with a torch of liberty, she says, "Give me your tired, your poor, your humbled masses yearning . . . . " And if one party invokes her aid, the other must answer and counter-weight the scale, or risk an unfavorable verdict. He must also risk the power behind this blindfolded figure—the power of the state to take and give property and liberty.

If Martin Luther King were delivering an *I Have a Dream Speech* about the process this blindfolded woman symbolizes it might sound something like this:

> *I have a dream that every person can bring a claim to a public place and an intelligent, experienced and impartial third party chosen or appointed by democratic process will assess the facts, apply the law and determine the outcome. The whole world will watch to keep this forum honest.*
> *I have a dream that this forum will be accessible, the procedures straightforward, efficient and understandable, the costs appropriate, and the determination speedy.*
> *I have a dream that judges will help define, clarify, and broadcast our public norms by focusing all their attention on the explication of the law as it intersects with the facts of each case.*
> *I have a dream that every judge is charged with ensuring that his or her corner of the dispute resolution universe offers a fair and clean playing field. No judge will try to coerce settlement by threatening parties with onerous outcomes. Every judge will treat each party with courtesy and respect.*

Arbitration

Wise, sophisticated, trusted, and honored in his community, the arbitrator is chosen by the parties who can agree that whatever such a person decides is just. The arbitrator does not wear blindfolds because the parties trust his discretion. On the other hand, the arbitrator cannot meet privately with a party, because the parties do not trust each other.

The arbitrator stands, aloof from the parties, arms folded in skepticism, but listening attentively for each clue which will piece together the puzzle of facts he must see clearly.

The gift the arbitrator gives the parties is a prompt decision informed by his expertise in the particular arena. His decision is bound to favor one party over the other, but his quick and precise award will allow the parties to move on with their lives and their businesses.

There is no appeal from this arbitrator because, in choosing him, the parties chose to live with what he decides. Thus, the power of the arbitrator is immense, once conferred by the parties, and is further bolstered by the blindfolded lady who will ensure that his awards are honored.

If a party were delivering an *I Have a Dream* speech about arbitration, it might sound something like this:

> *I have a dream that I can create my own forum and choose my own arbiter.*
> *I have a dream that a special and wise expert in the particular arena of the dispute, whom I trust, can hear my dispute, and I can accept his or her judgment and put the matter behind me, win or lose.*
> *I have a dream that my dispute can be resolved in a private place, so that the indignities, dangers, and damages of a public forum do not compound the upset and anger of being in conflict.*
> *I have a dream that arbitrators are charged with ensuring that their corner of the dispute resolution universe offers a fair and clean playing field. No arbitrator will try to coerce settlement by threatening parties with onerous outcomes. Every arbitrator will treat each party with courtesy and respect.*

Mediation

In this image one sees a figure sitting with the parties, her hands reaching towards each of them as if to support them in telling their tale or to caution them in listening to each other to weigh the matter more carefully. It is also possible that her outreached hands are pointing to the parties to remind them of their responsibility for dealing thoughtfully with their situation and each other, understanding the opportunities and risks inherent in various choices, and summoning their creativity in addressing the conflict.

The figure is not alone or aloof. Her outstretched arms form a bridge between the parties, so that communication and positive energy can flow again. Her presence is a catalyst setting in motion the potential that the parties hold.

Unlike the blindfolded lady, the mediator sees all that is offered unprotected by formal procedure or rules of evidence. Unlike the arbitrator or the judge, the mediator may meet with the parties together or listen to them privately so that each nuance of meaning and each atom of possibility are captured and offered back, in their most palatable form, for the parties.

The mediator's features are hazy, since the focus and light remains on the disputing parties. Her presence, however, exudes optimism, respect, and confidence in the parties' capacity. She brings an energetic and urgent sense that justice can be done by the parties' own hands.

If a mediator were delivering an *I Have a Dream* speech about mediation, it might sound something like this:

> *I have a dream that I can offer a safe and private place for parties in conflict to come and sit together at a table.*
> *I have a dream that I can help disputing parties tell their stories and explain their feelings and values to each other in a manner that might enable one another to understand more clearly and perhaps build or preserve their relationship.*
> *I have a dream that the dispute can be resolved in a private place, so that the indignities, dangers, and damages of a public forum do not compound the upset and anger of being in conflict.*
> *I have a dream that I can assist parties in discovering or constructing outcomes that seem reasonable and optimal to them.*

How do current practices and trends part company with the blindfolded lady? In 1853, in his novel *Bleak House*, Charles Dickens sounded an alarm about the state of the courts:

> "This is the Court of Chancery . . . which gives to monied might the means abundantly of wearying out the right; which so exhausts finances, patience, courage, hope; so overthrows the brain and breaks the heart; that there is not an honorable man among its practitioners who would not give–who does not often give–the warning, 'Suffer any wrong that can be done you, rather than come here.'"[2]

Similar sentiments have been echoed by eminent jurists and scholars. In 1982, Chief Justice Warren Burger summarized dissatisfaction with litigation: "Our system is too costly, too painful, too destructive, too inefficient for a truly civilized people."[3] In addition to the shortcomings pointed out by Dickens and Burger, other trends jeopardize the accuracy and integrity of the image presented by the blindfolded "justice". For example, the system of plea bargaining in criminal cases has virtually supplanted trial by a jury of peers,

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2. CHARLES DICKENS, Bleak House (first published in 1853), Penguin Classics 1971, at 51.

3. Warren Burger, Isn't There a Better Way?: Annual Report on the State of the Judiciary, Remarks at the Mid-Year Meeting of the American Bar Association (Jan. 24, 1982), *in* 68 A.B.A. J. 274, 275 (1982).

which places heavier charges, stiffer penalties, and the displeasure of the prosecutor and judge on the scales for any defendant so brash as to claim innocence and seek trial. Also, judges must manage and move heavy dockets, which places a premium on administrative and management skills over and above qualities and capacities necessary to weigh matters precisely and to articulate norms eloquently.[4] Finally, the expectation that judges become mediators of their own cases tempts the blindfolded lady, under the guise of "mediator", to coerce the parties into settlement out of fear of displeasing this mediator-judge.[5]

What happened to the wise arbiter and his efficient process? By the 1990's scholars and practitioners were saying that arbitration had been ruined.[6] The key features of arbitration—simplicity, low cost, finality, and speed—have been eroded by lawyers who bring in the cumbersome attributes of litigation—formality, delay, great quantities of paper, motions, appeals, and high cost.[7] Additionally, the proliferation of arbitration clauses in employment and consumer agreements, places where it is unlikely that there is meaningful consent to an alternative form of conflict resolution, undermines the contractual feature of arbitration as a process emanating from and built by the parties themselves. So arbitration shifts to being a litigation look-alike, but without the protections of litigation's publicly chosen judge, public forum, and appeals process or arbitration's protections of truly informed party consent and party-chosen neutral(s).

What is happening to mediation? As lawyers are taking training programs geared towards "spinning the mediator" to gain a competitive advan-

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4. *See State of the States: Dispute Resolution in the Courts*, THE CARDOZO ONLINE JOURNAL OF CONFLICT RESOLUTION, *www.cardozo.yu.edu/cojcr*, quoting Daniel Weitz, N.Y.S. ADR Coordinator, stating: "Judges are often measured, reviewed and critiqued by the degree to which they can move cases along within certain time frames . . . A certain 'judicial badge of honor' has even evolved for those judges who have developed a reputation for being 'great settlers.'"

5. *See* James J. Alfini, *Risk of Coercion Too Great*, DISPUTE RESOLUTION MAGAZINE (Fall 1999) at 11 (concluding that judges should not mediate cases assigned to them for trial).

6. *See generally* LEONARD L. RISKIN AND JAMES E. WESTBROOK, DISPUTE RESOLUTION AND LAWYERS (2nd ed.) 585-588 (noting ways in which arbitration is becoming more like litigation and is losing its essential characteristics) and Kimberlee K. Kovach and Lela P. Love, *Mapping Mediation: The Risks of Riskin's Grid*, 3 HARV. NEG. L. REV. 71, at 90-91 and accompanying footnotes, (discussing how arbitration has lost much of its appeal due to becoming more like litigation).

7. *See id.*

tage, and mediation (as arbitration has done) is becoming more legalized[8], mediation, too, might stray from the image of a mediator as a bridge between the real parties. For example, in many programs parties file pre-mediation confidential briefs with the mediator which often resemble litigation papers, rather than having features specifically targeted towards mediation. There is also a tendency for attorneys to choose (on behalf of their clients) mediators with extensive litigation or judicial experience who are expected to provide case evaluations, transforming mediation into an adjudicatory process.[9] A logical result of these trends may be that, like arbitration, mediation may move away from its roots and become an attorney-dominated, adversarial and ever more costly proceeding.[10]

In 1966 Martin Luther King and Stokely Carmichael participated in the "March Against Fear", a walk from Memphis, Tennessee to Jackson, Mississippi organized by leaders of the civil rights movement. During that march, tension developed between King and Carmichael. King was committed to nonviolence. At one point the members of the Mississippi Highway Patrol shoved demonstrators, and Carmichael bitterly complained. An activist committed to nonviolence teased Carmichael about his reaction: "You see, Stokely, the difference between you and the military is that a soldier has singleness of purpose. When you get shoved you get confused. If you're really not nonviolent, you ought to get a gun and be a guerilla."[11] Before the march was over, Carmichael's group broke away from the others and adopted the slogan, "Black Power!" Many date this incident as the beginning of the Black Power Movement.[12]

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8. *See The Director as Futurist: Jack Hanna Previews 'Coming Attractions' in ADR,* 4 ADR REPORT no. 4,at 3-4 (Feb. 2000)(noting that mediation is becoming more adversarial, hostile and confrontational).

9. In a survey of 600 members of the Hillsborough County (Fla.) Trial Lawyers Section by Martha J. Cook, Esq., in which 160 lawyers responded, 90% of the respondents indicated that they would prefer "evaluative" mediation. *See* Martha J. Cook, Hillsborough Survey (1997); *see also* Kovach & Love, *supra note 6,* footnotes 70 and 72 and accompanying text at 85 (discussing an attorney preference for "evaluative" mediation).

10. *See* Mary W. Holden, *As Courts Overflow, Mediation Flourishes,* CHICAGO LAWYER, Mar. 1997, at 20 (quoting James J. Alfini: "Arguably what happened to arbitration is that lawyers got a hold of it and turned it into a mini-adjudication. I worry that's going to happen to mediation as lawyers colonize the field."). *See generally* Kovach & Love, *supra* note 6, at 92-98 (discussing the mutation of mediation).

11. Attributed to Rev. James M. Lawson, Jr., who has been termed by historians the nonviolent strategist of the civil rights movement and was a close advisor to Martin Luther King. Unpublished manuscript, written for the L.A. Time Magazine by historian Spencie Love, *Profile of James M. Lawson, Jr.* (1998)(on file with author).

12. *Id.*

Like Stokely Carmichael confronted by brutal Mississippi officers, the blindfolded woman might get confused when she is charged with settling cases and managing overwhelming dockets. When we impose an arbitrator on parties who have not accepted that person as their decision-maker, the rationale for the process becomes muddled. They will be confused as to why the process is "just." When we ask a mediator to stand back and judge the matter, she will get confused. We need to keep the images clear and true so that, at least, we have guide stars and, at best, we have meaningful alternatives when we seek systems for responding to the crisis of conflict.

In this new millennium, we should continue to build novel processes, like the mini-trial, the summary jury trial, neutral experts, non-binding arbitration, medene (mediation combined with early neutral evaluation), arb-med and med-arb,[13] but each new process must have a clear rationale and norms of practice which place it in the constellation of processes offering parties a coherent method of achieving justice. Since we already have powerful, workable images and processes, we must guard and develop our systems, procedures, protocols, and trained skilled practitioners to deliver on the promises these ideas and symbols hold out. We must block trends that run counter to formative visions. Whether our processes are pure or hybrids, to keep their power they must keep close to their heart and soul, as King and Gandhi kept close to the visions they held dear. The processes and the practitioners in them must remember their point of origin.

13. For summary definitions and descriptions of these and other dispute resolution processes, *see* RISKIN & WESTBROOK, supra note 6, at 1-11.