

To Have Justice, Stop Deifying Judges

by Lev Tsitrin



There are two sides to every story, we are told. This is especially true of stories told in the courts of law. Stakes there are high, both plaintiff and defendant claiming to be in the right, and giving their side of the story as a proof. Their stories colliding, how should a judge arrive at a fair decision?

Before this question can be answered, we need to define what's "fair." Since "all is fair in love and war," the stories given to the judge – otherwise known as "argument" – may well be coated with half-truths, if not outright lies, or may not be particularly relevant. Those accretions should first be removed, so the facts of the case could stand revealed in their naked truth. Only then can a judge establish who is right and who is wrong, so the adequate, "fair" decision could be made. The hard part is the first step, that of establishing

facts. Once it is known what's true and what's not, making a "fair" decision in which truth prevails, is easy.

There are strict court procedures aimed at establishing this truth, referred to as "due process of the law." Plaintiff and defendant present their factual and legal argument to the judge, rebutting each other's claims in the process. This done, the judge weighs their respective claims, rubbing parties' arguments against each other to remove the fluff of untruth, and fuses two conflicting stories into a single true one, awarding the victory to the party that is in the right.

Needless to say, judge's impartiality is of the utmost importance if this procedure is to work. We constantly hear this word, but rarely give much thought to its meaning. Impartiality literally means that judge is not a party to the case (and has to recuse himself if he is), and thus he cannot not introduce his own argument, he cannot make "stories" for the parties – his role is limited to evaluation of argument provided by lawyers. This is what the ubiquitous images of Lady Justice depict, showing Justice as impartially blindfolded and weighing on her scale plaintiffs' argument against that of the defendant. This is what judges mean when telling us (like Chief Justice Roberts did during his nomination) that judges neither pitch nor bat, but only call balls and strikes, or when Justice Kavanaugh assured us that a judge is just an umpire.

But what if a judge refuses to limit his role to merely weighing what's given him by plaintiff and defendant? What if he does "pitch and bat," violating "due process of the law" and acting as a lawyer to the party he wants to win, rather than as a mere "umpire" awarding victory to the winning argument, irrespective of whose this argument is?

The answer is – nothing.

If a judge piles his own argument on one party's tray of the

scale of justice, or removes it from the other – all to decide the case the way he wants to, not the way he has to, nothing can be done to correct him. We hear of “checks and balances,” but a federal judge cannot be checked by other branches of the government, judicial branch included. Honesty is merely voluntary and optional; a judge is within his rights to rule dishonestly.

This right was given him in a landmark case *Pierson v Ray*, in which judges self-servingly decided that they deserve the right to act from the bench “maliciously and corruptly.” Sue the judges for fraud (as I did when judges chose to adjudicate their own, rather than lawyers’ argument in *Overview Books v US*) – and they will throw at you *Pierson v Ray* which declares, in essence, that whatever a judge does from the bench, is legal. It makes judges unassailable and unaccountable, letting them violate “due process of the law” and obstruct justice all they want. *Pierson v Ray* magically turns judges from mere human incarnations of due process into arbitrary arbiters of what is law. Instead of the “rule of law,” it gives us “rule of judges.”

This absence of accountability turns judges into all-powerful gods. By definition, gods are unaccountable, gods are arbitrary; since *Pierson v Ray* makes judges arbitrary and unaccountable it deifies them.

Why should judges be unaccountable as if they were divinities, is not at all clear. Per Construction, the judiciary is merely one part of the government, not gods controlling it from the outside. In a democracy, the government in its entirety, judges included, should be controlled by citizens. The workings of judges should be subject to public criticism and press scrutiny, just like that of legislators and presidents.

Yet this is not happening. One would think that the story that the full third of US government – the federal judiciary – is officially and proudly “corrupt and malicious” should be on

front pages of every paper, the headlines of huge size screaming the word "sensation!" But somehow, this is not the case: not only do the judges treat themselves as gods by shielding themselves with *Pierson v Ray* – the press does it too, by refusing to shed disinfecting sunlight of public scrutiny on the way cases are decided. And we ourselves treat judges with proactive, unthinking, slavish reverence not accorded the members of two other branches – executive and legislative.

Perhaps we fall into line and don't allow ourselves to criticize judges because of the instinctively-felt fear that anarchy will result if the ultimate authority of a judge gets questioned. This attitude, however, absolves judges from the need to earn our trust, since they get it anyway. They get respected proactively and unconditionally, just as gods are respected – because of who they are, irrespective of how badly they act.

This arrangement allows for the "corrupt and malicious," arbitrary decision-making that is the polar opposite of justice. Justice is a result of application of "due process," not of judges' whim. If we want to have justice, we should condition our respect for judges on their performance. Just as with other branches, we need to verify before we trust, looking into whose argument judges adjudicate, and kicking off the bench those judges who violate the due process by adjudicating, fraudulently and illegally, their own argument instead of that of the plaintiff and defendant.

Throughout history, the rulers who wanted to be unaccountable, declared themselves gods. Once Christianity became dominant in Europe and precluded deification of humans, European kings adopted a closely similar tactic, claiming that their rule has been authorized by God, by citing as precedent the anointment of biblical kings. Judges, as an extension of royal power, shared its divine origin and nature; hence, judicial decision-making, no matter how arbitrary, was not subject to second-

guessing and criticism any more than were royal proclamations. Both were, in a sense, the will of God. American Revolution got rid of the monarchy – but, bizarrely, retained the monarchical, unaccountable, arbitrary way of administering justice: while the executive and the legislature are subject to a measure of a public control through press scrutiny and elections, federal judges are as irrationally revered by the public as they were under monarchical rule. They are held in awe by the public as if they were gods rather than government, as if they were infallible high priests officiating in a holy temple of civics, declaring from on-high what's legal and what's not by reading mysterious signs inscrutable to the uninitiated – rather than being government bureaucrats who themselves must verifiably follow the law in their decision-making process – due process of the law, in their case. Justice is the first victim of our deification of judges, and we all suffer from injustice that can turn life into a Kafkaesque theater of the absurd.

By failing to force judges to follow due process, we get the rule of judges rather than the rule of law. Our monarchical judiciary should be recast in a republican model; we should start treating judges as government they are, not the gods they are not, the press examining judicial decision-making process, and shedding disinfecting light of public scrutiny on judicial obstruction of justice from the bench. Leaving judiciary in its present, monarchical, arbitrary, “corrupt and malicious,” form, is not an option. We are a republic, and all three branches of the American government – including the judiciary – must follow the republican model of government and be accountable to the public, not just two,

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