Re-presenting Justice: Visual Narratives of Judgment and the Invention of Democratic Courts

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Figure 1.
Lady of Justice, 2002,
William Eicholtz, Victoria
County Court, Melbourne,
Australia.
Photographer: Ken Irwin.

Reproduced with the permission of the sculptor and the Liberty Group, owner and manager of the Victoria County Court Facility.

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I. PUZZLES OF LEGIBILITY AND OF LEGITIMACY

This six-meter aluminum windswept female form hangs as if a shingle on a busy street corner in Melbourne, Australia.[1] What possessed designers in 2002 to put this odd image outside a building and assume that passers-by would connect the imagery to courts, rather than see the figure as a warrior princess, an opera singer, or find it incomprehensible? Why do readers of this volume recognize this image as "Justice," and why does that legibility matter today?

Those questions reflect one theme in *Representing Justice: Invention, Controversy, and Rights in City-States and Democratic Courtrooms*,[2] in which we explored the relationship, over centuries, between courts and democracy. The visual narratives adorning adjudication reveal the disjuncture between contemporary iterations of adjudication and their historic antecedents. Rulers of all kinds have needed to enforce their laws and, over centuries, enshrined Justice as their marker. More recent social movements have transformed adjudication into a democratic practice, and courthouses have come to replace Justice as an icon not only of adjudication but of government more generally. Thus, even as the pictorial recedes, the material presentations continue to reveal the ideological premises of adjudication.

A brief preview of the components of our argument is in order. First, adjudication is proto-democratic, in that courts were an early site of constraint on government. Even in eras when judges were obliged to be loyal servants of monarchies and of republican states, judges were bound by rules dictating their treatment of disputants and instructing them to "hear the other side." By publicly resolving disputes and punishing violators, rulers acknowledged through rituals of adjudication that something other than pure power legitimated their authority. Because performance required an audience, it was an avenue for power to shift as

1. Figure 1 is a photograph by Ken Irwin of an aluminum *Lady of Justice*, created by William Eicholtz in 2002 and set above the front entrance of the Victoria County Court, a building designed by Daryl Jackson of SKM Lyons Architects, which serves as an intermediate trial court with both civil and criminal jurisdiction. *See* COUNTY COURT OF VICTORIA, http://www.countycourt.vic.gov.au (last visited Feb. 6, 2012). Our thanks to Chief Judge Michael Rozenes of the County Court of Victoria for assistance in obtaining permission to reproduce the image, to the Challenger Financial Services Group and the Liberty Group, and to the sculptor, William Eicholtz, for permitting reproduction of this figure.

2. JUDITH RESNIK & DENNIS CURTIS, REPRESENTING JUSTICE: INVENTION, CONTROVERSY, AND RIGHTS IN CITY-STATES AND DEMOCRATIC COURTROOMS (2011). The images reproduced in the Color Plates and in this Essay, with the exception of Figures 11, 14, 15, and 17-20, are republished in relationship to our book, *Representing Justice*.

spectators became active observers, able to see and eventually to judge state provision of dispute resolution services. Public adjudication was thus one of the means by which sovereign power moved toward the populace.

Second, democracy changed adjudication. Aspects of modern adjudication—obligatory public access, judicial independence, critical appraisals of procedural fairness, and equal access of all persons—are the result of political and social movements of the past three centuries that render today's courts novel. During the Renaissance, the public was invited to watch spectacles of judgment and of punishment. Yet, while witnessing power, the public was not presumed to possess the authority to contradict it. Unruly crowds were a possibility, prompting (as Michel Foucault famously charted) the privatization of punishment.[3]

But over time, court proceedings became obligatorily public, as illustrated in the 1676 Charter of the English Colony of West New Jersey, which provided that "in all publick courts of justice for trials of causes, civil or criminal, any person or persons . . . may freely come and attend."[4] A century later, the new states in North America took this precept to heart, as the words "all courts shall be open,"[5] coupled with clauses promising remedies for harms to persons' property and person, were reiterated in many of their constitutions. The practice of "publicity," to borrow Jeremy Bentham's term, enabled what Bentham called the "Tribunal of Public Opinion"[6] to assess government actors. As Bentham explained, while presiding at trial a judge is "under trial."[7]

From the baseline of the Renaissance, the public's new authority to sit in judgment of judges and, inferentially, of the government, worked a radical transformation. "Rites" turned into "rights," imposing requirements that governments provide "open and public" hearings and respect the independence of judges. As spectators became active participants ("auditors," again to borrow from Bentham[8]), courts became one of many venues contributing to what twentieth-century theorists termed the "public sphere"—disseminating information that shaped

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3. *See* MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 7-8 (Alan Sheridan trans., 1979).

4. CHARTER OR FUNDAMENTAL LAWS OF WEST NEW JERSEY, AGREED UPON, at ch. XXIII (1676), *reprinted in* SOURCES OF OUR LIBERTIES 188 (Richard L. Perry ed., 1959).

5. *See, e.g.*, CONN. CONST. of 1818 art. I., § 10. *See generally* Judith Resnik, *Fairness in Numbers: A Comment on* AT&T v. Concepcion, Wal-Mart v. Dukes, *and* Turner v. Rogers, 125 HARV. L. REV. 78, 80-81, 104-105 (2011) [hereinafter Resnik, *Fairness in Numbers*].

6. JEREMY BENTHAM, *Constitutional Code* (1843), *in* 9 THE WORKS OF JEREMY BENTHAM 41 (John Bowring ed., Edinburgh, Tait 1843); FREDERICK ROSEN, JEREMY BENTHAM AND REPRESENTATIVE DEMOCRACY: A STUDY OF THE *CONSTITUTIONAL CODE* 26-27 (1983).

7. JEREMY BENTHAM, *Rationale of Judicial Evidence* (1827), *in* 6 BENTHAM, *supra* note 6, at 355.

8. *Id.* at 356.

popular opinion of governments' output.[9]

Courts were not only contributors to the public sphere but were also transformed by new ideas about the position of the judge and by a deepening sense of equality before the law. Instead of subservience to rulers, judges gained the status of independent actors, authorized to stand in judgment of the very power that gave them their jurisdiction. The circle of those eligible to come to court enlarged radically, and the kinds of harms recognized multiplied. But it was only in the twentieth century that all persons gained rights in many countries to be in courts, in all the roles—from litigants, witnesses, jurors, lawyers, and (yet more recently) judges. (As Adriaan Lanni reminds us, Athenian democracy was "open, accessible, and participatory" for only a "privileged group of male citizens."[10])

Formal principles of equal treatment entitled a host of claimants to be heard and treated with dignity, whatever their race, class, ethnicity, or gender. Constitutions and transnational conventions insisted that such hearings be both "public" and "fair," permitting litigants and judges to assess whether a particular process met the demands of justice. The transnational codification of the 1966 United Nations Covenant on Civil and Political Rights summarized these new tenets by proclaiming that "everyone shall be entitled to a fair and public hearing by a competent independent and impartial tribunal established by law."[11]

A measure of success can be seen from the rising number of filings in courts. A few numbers from the United States are exemplary. In the twenty-first century, state courts deal with some fifty million civil and criminal cases (traffic cases aside) annually.[12] The growth in the federal courts, which handle a tiny fraction of that volume (about 365,000 civil and criminal filings, and more than a million bankruptcy petitions) reflects twentieth-century commitments to courts. Fewer than 30,000 cases were brought before the federal courts in 1901; ten times that number were filed by 2001.[13] Growing dockets beget judges. In the

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9. *See* JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 97-98 (William Rehg trans., 1996); JÜRGEN HABERMAS, THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY (Thomas Burger trans., 1991).

10. Adriaan Lanni, *Publicity and the Courts of Classical Athens*, 24 YALE J.L. & HUMAN. 119, 120 (2012); *see also* STEVEN JOHNSTONE, DISPUTES AND DEMOCRACY: THE CONSEQUENCES OF LITIGATION IN ANCIENT ATHENS 10-11, 18-20 (1999).

11. International Covenant on Civil and Political Rights art. 14, Dec. 16, 1966, G.A. Res. 2200 (XXI)A, U.N. Doc. A/6316.

12. NATIONAL CTR. FOR STATE COURTS, COURT STATISTICS PROJECT, EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2008 STATE COURT CASELOADS 20 (2010), *available at* http://www.ncsconline.org/D_Research/csp/2008_files/StateCourtCaseloadStatisticsFINAL.pdf.

13. These data are drawn from the Administrative Office of the U.S. Courts, Federal Judicial Caseload Statistics and from the American Law Institute's 1934 study of the business of the U.S.

middle of the nineteenth century, fewer than forty federal trial judges sat in courtrooms around the entire United States. By 2001, more than 650 authorized judgeships existed at the trial level. Judges and cases—and money and politicians—beget courthouses. In 1850, virtually no buildings owned by the federal government bore the name "courthouse." The occasional federal courtroom was tucked inside custom houses or in spaces borrowed from states or private entities. In contrast, by 2010, more than 550 federal courthouses—so named—had been built.[14]

The nature of rights changed as well, as whole new bodies of law emerged, restructuring family life, responding to domestic violence, reshaping employee and consumer protections, and recognizing indigenous and civil rights. Courts rescaled in local and national contexts to cope with rising filings. Crossing borders, governments came together to create multi-national adjudicatory bodies, from the "Mixed Courts of Egypt" and the Slave Trade Commissions of the nineteenth century to the contemporary regional and international courts, such as the European Court of Justice and the International Criminal Court.

Third, returning to legibility of the Melbourne *Justice* and previewing the pictures to come, the female Virtue Justice was once one of many Virtues displayed in public buildings. Unlike her siblings, however, she is a remnant of the Renaissance that remains legible to a diverse audience. We—onlookers—know her because governments of all stripes have deployed her to bolster their legitimacy as they imposed violence (reallocating property as well as limiting liberty) in the name of the state. Over time, Justice became a symbol of government, and courts came to be an obligation of governance, such that segregated facilities—courthouses, purpose-built structures dedicated to a specific function—became commonplace.

Yet the new equality puts pressure on the visual displays within courthouses. As women and men of all colors gained recognition as rights holders, entitled to sue and be sued, to testify, and to judge, a female figure of Justice became less an abstraction and more a representation of a person. But who should decide how "she"—Justice—is to look? Once, elite groups of rulers and patrons controlled commissions—filling courthouses with portraits of elder statesmen along with the draped (or naked) female figure of Justice. But during the twentieth century, conflicts over Justice's color and shape came to the fore. Protests, detailed below, erupted in the 1930s about a "mulatto" Justice in a federal

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courts. For additional details, see RESNIK & CURTIS, *supra* note 2, at ch. 7-9; and Judith Resnik, *Building the Federal Judiciary (Literally and Legally): The Monuments of Chief Justices Taft, Warren, and Rehnquist*, 87 INDIANA L.J. (forthcoming 2012).

14. *See* RESNIK & CURTIS, *supra* note 2, at 139-74.

courthouse in Aiken, South Carolina.[15] The result was to put the image behind drapes. In contrast, in the same era, a mural on the Ada County Courthouse in Idaho displayed an "Indian" with hands tied behind his back and about to be strung up by gun-carrying men.[16]

Pressures of another kind are undermining the public and didactic practices of adjudication, which brings us to our fourth point. Democracy has not only changed courts but also challenged them profoundly. Egalitarianism poses deep problems for polities that have thus far been unwilling to commit the resources that would support all the adjudicatory opportunities promised. As the ranks of rights holders expanded, nations responded not only by creating more judgeships and more courthouses but also by moving some forms of adjudication offsite, to administrative tribunals and to procedures that have come to be known by the acronym ADR—alternative dispute resolution. The resulting fragmentation and privatization of adjudication has profound implications for the democratic character of courts.

One example comes from the United States federal system. In 2008, four times more judges (often termed hearing officers) sat inside federal agencies than inside federal courts, and these administrative judges rendered tens of thousands of decisions in disputes brought by recipients of government benefits, such as veterans, employees, and immigrants seeking adjustment of their status.[17] In some respects, this evolution has served to increase the domain of adjudication, because agencies have modeled their decisionmaking processes after those of courts. Yet this work occurs with judges less insulated from oversight by the executive and legislature and at sites generally inaccessible to outside onlookers. Many other claimants are dealt with by private providers, such as the Better Business Bureau and associations of arbitrators, where no rights of access for third parties exist and where no obligations of transparent accounting are imposed.

For those cases that remain within the courts, judges press litigants to avoid the public processes of adjudication whenever possible. In the 1990s, England and Wales reformatted procedural rules to facilitate settlements,[18] and in 2008, the European Community issued a directive that

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15. *See* JACK IRBY HAYES JR., SOUTH CAROLINA AND THE NEW DEAL 63-64 (2001); discussion *infra* notes 152-154.

16. John Miller, *Idaho's Lynching Murals To Get Explanations*, INDIAN COUNTRY TODAY, Oct. 19, 2007; *see also* discussion *infra* notes 154-156.

17. *See* Judith Resnik, *Migrating, Morphing, and Vanishing: The Empirical and Normative Puzzles of Declining Trial Rates in Courts*, 1 J. EMPIRICAL LEGAL STUD. 783 (2004).

18. *See* LORD WOOLF, HER MAJESTY'S STATIONARY OFFICE, ACCESS TO JUSTICE: FINAL REPORT TO THE LORD CHANCELLOR ON THE CIVIL JUSTICE SYSTEM IN ENGLAND AND WALES (July 1996); Hazel Genn, *What is Civil Justice For? Reform, ADR, and Access to Justice*, 24 YALE J.L. & HUMAN. 397, 401-02 (2012).

all national courts promote mediation of cross-border disputes.[19] Parallel movements across borders have shifted the ideology of judging away from the public acts of adjudication toward more private managerial roles, overseeing lawyers and promoting conciliation.[20] With the devolution of adjudication to agencies, the outsourcing to private providers, and the reconfiguration of court-based processes toward settlement for both civil and criminal cases, the occasions for public observation of and involvement in adjudication are diminishing. By 2010, in the federal courts of the United States, trials began in only two of one hundred civil cases, and the decline in the rate of trials (despite decades in which filings had risen) gained the moniker of the "vanishing trial."[21]

A dramatic example of the retreat from courts came from decisions by all branches of government in the United States after the terrorist destruction of the World Trade Center's Twin Towers in September of 2001. Eschewing both the federal and the longstanding military court system, the Department of Defense created a detention camp at Guantánamo Bay, a United States naval base in Cuba. "Camp Justice" is the makeshift name, reflecting the ad hoc efforts that have pieced together rules of procedure and evidence, at a venue to which the public does not have ready access and at which military personnel dispatch individuals to serve as prosecutors and as judges.

Although one might be tempted to bracket the rules for alleged terrorists as unique responses to horrific events, a close analysis of other government regulations shows the continuum on which the decisionmaking regime at Guantánamo Bay sits. Ordinary prisoners confined in the United States and ordinary individuals in administrative agencies also have few opportunities for independent judges to decide claims of right in public. Despite the many affirmative iterations in state, national, and international documents of "open courts" and independent judges for all "persons," these aspects of adjudicatory processes are in jeopardy. Most governments neither structure practices nor adequately fund their justice systems to make good on promises of equal justice before the law.

The shift toward privatization of adjudication has many causes, from a lack of resources to the view that alternative forms of conflict resolution are more accurate, less expensive, and more user-friendly. Others see a political backlash, in that some "repeat players" found the glare of

19. *See* Council Directive 2008/52, art. 1, 2008 O.J. (L 136) 3 (EC).

20. *See* Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

21. *See* RESNIK & CURTIS, *supra* note 2, at 306-14; Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004).

adjudication disruptive to business practices or governance policies and successfully "played for the rules" by limiting the reach of courts and by constricting access.[22]

Michel Foucault documented governing powers eager to maintain control by privatizing the technologies of punishment.[23] Today, adjudication itself is in the process of being removed from public purview, making the exercise and consequences of public and private power harder to ascertain. Although built with cutting-edge technologies, new courthouses are at risk of becoming anachronistic. Illustrative is the docket of one new transnational court—the International Tribunal for the Law of the Sea. From its creation in the 1990s through 2008, a total of fourteen cases came before it.[24]

Thus, the diminution in the aegis of adjudication and incursions on courts' authority are masked by a spate of courthouse building projects creating architecturally important structures that are, in various respects, distant from the needs for adjudication and the daily activities of judges.[25] Many new courthouses, often clad in glass to mark justice's transparency, celebrate courts without embodying reflections on the problems of access, the histories of injustices under the rubric of the rule of law, and the complexity of rendering just judgments.

Fifth, the movement away from public adjudication is a problem *for* democracies because adjudication has important contributions to make *to* democracy. By democracy, we speak not of majoritarian political processes but rather of aspirations for lawmaking through egalitarian methods that foster popular input into governing norms and impose robust constraints on both public and private power. Furthermore, by courts, we focus on the quotidian activities of ordinary litigation rather than only on the outcomes of the highest judicial bodies. Constitutional scholars debate the legitimacy of judicial review in democracies, while we argue that adjudication itself is a democratic process, which reconfigures power as it obliges disputants and judges to treat each other as equals, to provide information to each other, and to offer public justifications for decisions, based on the interaction of fact and norm. Courts' mandate to operate in public endows the audience—the public—with the ability and the authority of critique. Through such participatory parity,[26] public processes

22. Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974).

23. FOUCAULT, *supra* note 3, at 8-11.

24. RESNIK & CURTIS, *supra* note 2, at 265-72.

25. *See* Judith Resnik, Dennis Curtis & Allison Tait, *Constructing Courts: Architecture, the Ideology of Judging, and the Public Sphere*, *in* LAW, CULTURE & VISUAL STUDIES (Richard Sherwin & Anne Wagner eds., forthcoming 2012).

26. Nancy Frasier offered the term "participatory parity" in explaining that the public sphere

both teach about democratic practices of norm development and offer the opportunity for popular input to produce changes in legal rights. The redundancy of various claims of rights enables debate about the underlying legal rules. The particular structural obligations of trial level courts have advantages for producing, redistributing, and curbing power in a fashion that is generative in democracies.

In sum, courts as we know them today are recent inventions. The constitutive elements—open access, independent judges authorized to sit in judgment of the state and to assess the fairness of their own as well as other decisionmaking procedures, equal and dignified treatment of all participants—are outgrowths of social movements that transformed the meaning of legal "personhood," the idea of justice, and the obligations of government.

Our account is not only a reconstruction of a many-century history of the idea of "courts" and a normative exploration of the utility of courts for democratic orders. Our aim is also to make plain the fragility and contingency of the twentieth-century project for which the word "court" has become a shorthand. While monumental in ambition and often in physical girth, the durability of courts as active sites of public exchange before independent jurists ought not be taken for granted. Like other venerable institutions of the eighteenth century—the postal service and the press—courts are vulnerable. The continuation of accessible court services for ordinary disputants seeking state assistance is far from assured.

Representing Justice documents these claims by tracing facets of the imagery that became the political iconography of European town halls and by exploring the development of purpose-built structures that came to be called courthouses. We move across oceans and ideas to map the elaboration of rights that shifted the paradigm of legitimacy for governments. Like the other authors joining in this Symposium, we probe the relationships among courts, democracies, and political signification through puzzling about the intelligibility, import, and durability of buildings, images, and texts.

Here, we have a more limited set of ambitions—to glimpse facets of the argument. By probing old imagery, we aim to deepen an appreciation for what is new inside courtrooms, as well as to draw attention to how the visual and political history illuminates but cannot sustain democratic courtrooms. Required instead are new idioms and images to denote the

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delineated in Jürgen Habermas's discussion was too unitary a description of the many dynamic sites of exchange in democracies. *See* Nancy Fraser, *Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy*, *in* HABERMAS AND THE PUBLIC SPHERE 109 (Craig Calhoun ed., 1992).

struggles, failures, and challenges that democratic justice entails.

II. RENAISSANCE VIRTUE REDEPLOYED

The designers of the 2002 Victoria County Court in Australia were not alone in their confidence that a hulking, draped women with sword and scales marked a building as a courthouse. In Zambia, a *Lady Justice* (Figure 2) stands outside a high court,[27] just as in Brazil, another (Figure 3) is seated in stone outside the 1960s courthouse designed by Oscar Neimeyer as part of the Brasilia government complex.[28]

Justice is also regularly seen in commerce, as a catalogue cover (Figure 4) from a law book purveyor, Mathew Bender, makes plain.[29] The photographed *Justice* has, since 1812, stood (first in wood and then in



Figure 2. *Lady Justice*, circa 1988, High Court of Zambia, Lusaka, Zambia. Photographer: Elizabeth Brundige.

Reproduced courtesy of the photographer.

27. The photograph of *Lady Justice*, Figure 2, was provided by and is reproduced with the permission of Elizabeth Brundige, the photographer. The statue, erected during the presidency of Dr. Kenneth Kaunda, marks the entrance to the High Court of Zambia in Lusaka.

28. Figure 3 is a photograph of *Justice*, by the sculptor Alfredo Ceschiatti. Installed in 1961, it is made of granite and measures about 11 feet by 4.6 feet (3.30 meters by 1.48 meters). Our thanks to Director Jarbas Silva Marques of the Office of Historic and Artistic Patrimony of Brazil (Diretoria de Patrimônio Histórico e Artístico–DePHA) and to the Directoria de Patrimônio Histórico e Artístico–DePHA for permission to reproduce the image.

29. Matthew Bender & Co. Inc., allowed us to reproduce the photograph in Figure 4, the statue on the top of New York City Hall, that was on a catalogue cover in 1986; Matthew Bender claims no copyright as to any part of the original photographic or architectural works depicted.

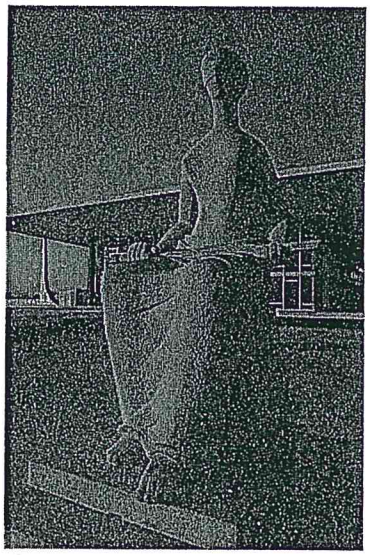


Figure 3. *Justice*, Alfredo Ceschiatti, 1961, Supreme Federal Tribunal, Three Powers Square, Brasilia, Brazil.

Provided and reproduced courtesy of the Directoria de Patrimônio Histório e Artístico-DePHA.

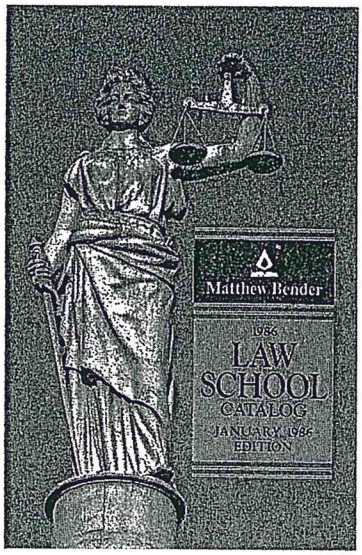


Figure 4. *Justice*, John Dixey, circa 1812, on top of New York City Hall, from the cover of the Matthew Bender *1986 Law School Catalog*.

Reproduced with the permission of Matthew Bender & Company, Inc., a member of the LexisNexis Group. Matthew Bender claims no copyright as to any part of the original photographic or architectural works depicted in this image.



Figure 5. *Column of Justice* (Cosimo de Medici as Justice), attributed to Romolo del Tadda, circa 1565-1570, Piazza della Santa Trinita, Florence, Italy. Photographer: Allison Tait.

Reproduced courtesy of the photographer.

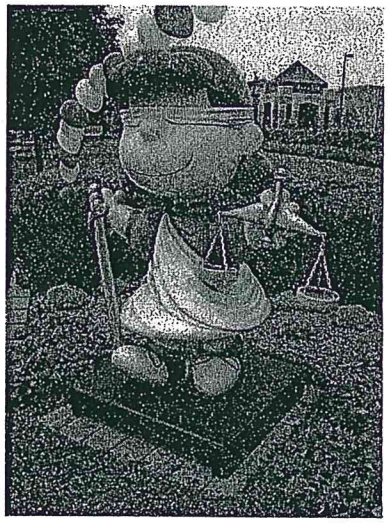


Figure 6. *Lady Justice Lucy*, Jim and Judy Brooks, 2002, William Mitchell College of Law, St. Paul, Minnesota.

Provided and reproduced courtesy of the William Mitchell College of Law.

copper[30]) on top of New York's City Hall.[31] Her stance echoes that of a sixteenth-century statue—*Lorenzo d'Medici as Justice* (Figure 5)—that continues to tower over a square in Florence, Italy.[32] His stance was, in turn, repeated by other rulers, exemplified by a seventeenth-century painting by Peter Paul Rubens depicting Maria de Medici as Justice adorned with scales and sword; a parallel eighteenth-century portrait, by Verrio, of England's *Queen Anne as Justice*;[33] and a mural on the streets of Bagdad in which Saddam Hussein was shown with sword and scales.[34] A contemporary parallel is *Lady Justice Lucy* (Figure 6), which stood in 2002 in front of William Mitchell College of Law in St. Paul, Minnesota as part of that city's celebration of the cartoonist Charles Schultz,[35] and which serves as a reminder that Justice is also regularly deployed in jest.

Yet a pause is in order to reflect on the oddity of all that we have shown. How utterly weird it is to look at a statue of a chunky child, draped, blindfolded and holding sword and scales, and find it legible rather than incoherent and, moreover, see it as an obvious reference to law.

That these images are experienced as ordinary is a tribute to the political energies of diverse governments that have produced and reproduced this shared referent. The claim is not that Justice is ubiquitous

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30. The Municipal Building, dating from 1803-1812, was designed by John McComb Jr. and Joseph Francois Mangin. The original sculpture, commissioned by the building's architects, was a "mass-produced" object made by William H. Mullins's studio. The figure, "depicted without a blindfold, was the work of John Dixey, a sculptor trained in London." *See City Hall Roof Restoration Project*, OFFICE OF THE MAYOR, http://www.ci.nyc.ny.us/html/om/html/cityhall.html (last visited Feb. 12, 2012).

31. A nineteenth-century travel guide quoted a once-famous 1819 poem (called *Fanny*, by Fitz-Greene Halleck):

> And on our City Hall a Justice stands
> A neater form was never made of board
> Holding majestically in her hands
> A pair of steelyards and a wooden sword,
> And looking down with complaisant civility
> Emblem of dignity and durability.

WILLIAM LORING ANDREWS, THE JOURNEY OF ICONOPHILES AROUND NEW YORK IN SEARCH OF THE HISTORICAL AND PICTURESQUE 27-28 (1897).

32. The image in Figure 5 is provided and reproduced with permission of Allison Tait. The Column of Justice, a gift of Pope Pius IV, has been in use since 1565 and commemorates the Battle of Montemurlo.

33. Verrio's *Queen Anne as Justice*, Hampton Court Palace, circa 1704, is reproduced in RESNIK & CURTIS, *supra* note 2, at 83 fig.63.

34. A photograph of that mural, described as "Mural of Saddam Hussein with the Scales of Justice," was published on April 23, 2007 in the *New York Times* to accompany the story *U.S. Seeks Solid Core to Fix Iraq's Broken Legal System*. A reproduction can be found in RESNIK & CURTIS, *supra* note 2, at 6.

35. The artists Jim and Judy Brooks did a series of sculptures entitled *Looking for Lucy* as a public arts summer event sponsored by the Capital City Partnership and the City of St. Paul, Minnesota. Our thanks to William Mitchell College of Law for providing us with the image in Figure 6 and permission to reproduce it.

(we do not offer imagery from all social orders, past or present) but rather that an array of practices—political, visual, literary, and social—produced through activities ranging from imperial conquests and colonialism to democratic governments, professional organizations, commercial entrepreneurs, and news media have shaped a trans-temporal and transnational set of references and processes that have traction. As political propaganda, Justice has had a remarkable run.

III. PUBLIC PERFORMANCE

The obvious questions are what renders these portrayals comprehensible, what histories produced them, and what they imply for contemporary social ordering. As documented by Kathryn Slanski,[36] Joseph Manning,[37] and Adriaan Lanni,[38] sovereigns in ancient Mesopotamia, Egypt, and Greece all relied on public performance of their adjudicatory powers.[39] These events were not free-form but were located in terms of place (such as the "gate of the city,"[40] or outside a temple,[41] or in the agora and other markets) as well as in terms of process.[42] Instructions organized the interactions, giving disputants, witnesses, and jurists role-obligations. Their acts, performed before an audience, were recorded in clay, stone, and papyrus.

Manning offers the term "connective justice"[43] to capture the interdependent communal obligations understood in ancient Egypt to bridge (or to join) "divine and human worlds."[44] Judgment processes were part of social orders aiming for stability. But, as Steven Fraade comments, the communal structure of these exchanges should not conceal that, even when bounded and didactic, the point was to organize state violence.[45]

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36. Kathryn E. Slanski, *The Law of Hammurabi and Its Audience*, 24 YALE J.L. & HUMAN. 97 (2012).

37. J.G. Manning, *The Representation of Justice in Ancient Egypt*, 24 YALE J.L. & HUMAN. 111 (2012) [hereinafter Manning, *Representation of Justice*]; *see also* J.G. Manning, *Order and Law: Shaping the Law in a New State*, *in* THE LAST PHARAOHS 819-62 (Raymond Westbrook ed., 2003).

38. Lanni, *supra* note 10.

39. Roman practices over several centuries are detailed in essays in SPACES OF JUSTICE IN THE ROMAN WORLD (F. De Angelis ed., 2010.) The function of the legal regime is analyzed in CLIFFORD ANDO, LAW, LANGUAGE AND EMPIRE IN THE ROMAN TRADITION (2011).

40. Slanski, *supra* note 36, at 99.

41. Manning, *Representation of Justice*, supra note 37, at 113. Passages in the Hebrew Bible also mention "judgment at the gate." *See Psalms* 119:137. Architects of the Israeli Supreme Court's 1992 building cited such references as influencing their design. *See* RESNIK & CURTIS, *supra* note 2, at 209.

42. Slanski, *supra* note 36.

43. Manning, *Representation of Justice*, *supra* note 37, at 114 n.14 (relying on JAN ASSMANN, THE MIND IN ANCIENT EGYPT 2002).

44. *Id.* at 118.

45. Steven D. Fraade, *Violence and Ancient Public Spheres: A Response*, 24 YALE J.L. & HUMAN. 137 (2012).

Public adjudicatory performances were then (as now) in service of the preservation of the authority of the polities that produced them.

Didactic judgment practices, accompanied by pictorial and textual directives, continued through the Medieval periods into Renaissance Europe. Indeed, courts could be understood to have been the "first municipal governments," brought into being to decide disputes and then acquiring additional administrative functions.[46] By the end of the twelfth century, European town leaders had begun to construct civic spaces to augment the open-market squares, churches, and private residences that were sometimes used for communal business.[47]

Evidence in Italy of public buildings devoted specifically to governance date from that era and a bit later in Northern Europe.[48] The emergence of such buildings is linked to the growth of urban centers, the development of interest in and the need for law, and conflicts over power in which empires sprawled and receded. Civic leaders sought to express (sometimes competitively) their locale's prosperity by investing in building projects to mark and to make their identities. This interest in "civil self-fashioning"[49] resulted in structures—styled town hall, town house, rathaus, or civic palace—"clearly designed to dominate" their environs.[50] And within, rooms were designated for holding court.

IV. INSCRIBING JUDICIAL SUBSERVIENCE

What do the material records teach about adjudication then? In a world with limited literacy and no or few printed materials,[51] the visual arts were—as Ruth Weisberg explains in her essay for this Symposium—a key medium of instruction, serving as mnemonic aids.[52] Rulers relied on depictions of

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46. DAVID NICHOLAS, THE GROWTH OF THE MEDIEVAL CITY: FROM LATE ANTIQUITY TO THE EARLY FOURTEENTH CENTURY 141-45 (1997) (surveying the "folkmoot" of London, the "alderman" in Denmark, the "scabini" of the Low Country, the "jurés and échevins" in France, the "rat" or council in Germany, and various other configurations of guilds, citizens, councilors, and assemblies).

47. ROBERT TITTLER, ARCHITECTURE AND POWER: THE TOWN HALL AND THE ENGLISH URBAN COMMUNITY, 1500–1640, at 92-93 (1991).

48. *See, e.g.*, KRISTIN ELDYSS SORENSEN ZAPALAC, "IN HIS IMAGE AND LIKENESS": POLITICAL ICONOGRAPHY AND RELIGIOUS CHANGE IN REGENSBURG, 1500–1600, at 26-55 (1990); Colin Cunningham, *For the Honour and Beauty of the City: The Design of Town Halls*, *in* 2 SIENA, FLORENCE AND PADUA: ART, SOCIETY AND RELIGION 1280–1400, at 29-54 (Diana Norman ed., 1995) [hereinafter ART, SOCIETY AND RELIGION]; and Juergen Schulz, *The Communal Buildings of Parma*, 26 MITTEILUNGEN DES KUNSTHISTORISCHEN INSTITUTES IN FLORENZ 279, 280-82 (1982).

49. Fabrizio J. Nevola, *Per Ornato Della Città: Siena's Strada Romana and Fifteenth-Century Urban Renewal*, 82 ART BULL. 26, 27 (2000).

50. 2 ART, SOCIETY AND RELIGION, *supra* note 48, at 32.

51. *See* LUCIEN FEBVRE & HÉNRI-JEAN MARTIN, THE COMING OF THE BOOK: THE IMPACT OF PRINTING, 1450–1800, at 21-60 (David Gerard trans., photo reprint 2000). Febvre and Martin estimated that in 1500 about 20 million volumes were available; by 1600, 200 million books were in circulation. *Id.* at 262.

52. *See* Ruth Weisberg, *The Art of Memory and the Allegorical Personification of Justice*, 24 YALE

than on the act of judgment.[63]

When, however, depictions of the Last Judgment moved into courtrooms and onto printed books about law, the scenes came to resemble the places and the work that the pictures were meant to influence.[64] Heavenly judgment was imagined to look like what authorities structured for earthly judges. The convergence can be seen in pictures such as the fifteenth-century painting, the *Courtroom Scene with Last Judgment and Portrait of Niclas Strobel* (Figure 7) that hung on a wall of the Town Hall of Graz in Austria,[65] and which follows a formula found in other such paintings, in which the bottom half depicts human judgment and the parallel top half depicts a divine court.[66]



Figure 7.
Courtroom Scene with Last Judgment and Portrait of Niclas Strobel, fifteenth century, Stadtmuseum Graz, Austria.
Reproduced courtesy of the Stadtmuseum Graz.

63. Hall, *supra* note 60, at 89.

64. Displays of the Last Judgment in Northern Europe were found in the Town Halls of Regensburg, Lüneburg, Basel, Kampen, Louvain, Bruges, Nuremberg, Graz, Danzig, Emden, Bautzen, and Haarlem. *See* HARBISON, *supra* note 54, at 54-58, 177-80; WOLFGANG SCHILD, ALTE GERICHTSBARKEIT: VOM GOTTESURTEIL BIS ZUM BEGINN DER MODERNEN RECHTSPRECHUNG 12-28 (1980).

65. The painting is by an unknown artist; an inscription dates the painting to 1478, more than a decade after the central worldly figure, identified as Niclas Strobel, had held the town offices of judge and mayor. *See* TROESCHER, *supra* note 54, at 172. Our thanks to Otto Hochreiter, Katharina Gabalier, and Franz Leitgeb, who directed us to the source for Figure 7 and to Stadtmuseum Graz for providing us with the image and permission to use it.

66. *See* ZAPALAC, *supra* note 48, at 48-53.

Throughout "the fifteenth and especially the sixteenth century in northern Europe it became standard practice to have a Last Judgment painted on the wall behind the judges' bench."[58]

But what was to be shown? The *Gospel of Matthew*, an oft-cited text, described that the "Son of Man . . . will sit in state on his throne," surrounded by angels, with the nations gathered about him.[59] "He will separate men into two groups, as a shepherd separates the sheep from the goats," and "he will say to those on his left hand, 'The curse is upon you; go from my sight to the eternal fire that is ready for the devil and his angels.'"[60]

How were these phrases translated pictorially? During many centuries after the lifetime of Jesus, the answer was not often. Art historians have found relatively few images before the thirteenth century that referenced the Last Judgment.[61] Thereafter, the theme became common in many churches, with scenes of Jesus separating sheep from goats or apocalyptic endings of the world.[62] Dante's *Divine Comedy*, completed in 1314, provided additional inspiration, prompting some detailing of the horrors of hell. Many famous renditions—such as Michelangelo's *Last Judgment* in the Vatican's Sistine Chapel—focused on resurrection rather

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Mike Widener and translated by Stella Burch Elias, Yale Law School 2010.

58. SAMUEL Y. EDGERTON, JR., PICTURES AND PUNISHMENT: ART AND CRIMINAL PROSECUTION DURING THE FLORENTINE RENAISSANCE 32 (1985). Such scenes were then less common in Italy. *Id.* at 33.

59. *Matthew* 25:31-32. Unless otherwise noted, references to Biblical text in this Essay are from THE NEW ENGLISH BIBLE WITH THE APOCRYPHA (Charles Harold Dodd ed., 1970).

60. *Matthew* 25:31-46. Other biblical references, such as verses from *Psalms*, identified the Lord "seated on [his] throne" as a "righteous judge." *Psalm* 9:4; *see also Luke* 22:30 (in which Jesus tells the disciples, "you shall eat and drink at my table in my kingdom and sit on thrones as judges of the twelve tribes of Israel"); *Proverbs* 20:8 ("A king seated on the judgment-throne has an eye to sift all that is evil"); *Psalm* 9:8-9 ("The Lord thunders, he sits enthroned for ever: he has set up his throne, his judgment-seat. He it is who will judge the world with justice"). One can also find in *The Second Letter of Paul to the Corinthians* 5:10 a reference to "the tribunal of Christ." Another text, less often cited, is *The First Letter of Paul to the Thessalonians* 4:16-17 ("because at the word of command, at the sound of the archangel's voice and God's trumpet-call, the Lord himself will descend from heaven; first the Christian dead will rise, then we who are left alive shall join them, caught up in clouds to meet the Lord in the air"). Marcia Hall also pointed to Paul's writing that on the final day

> the Lord himself will descend from heaven with a cry of command, with the archangel's call, and with the sound of the trumpet of God. And the dead in Christ will rise first; then we who are alive, who are left, shall be caught up together with them in the clouds to meet the Lord in the air.

Marcia B. Hall, *Michelangelo's Last Judgment: Resurrection of the Body and Predestination*, 58 ART BULL. 85, 89-91 (1976). Other possible sources for Last Judgment scenes include catechetical texts, materials from St. Augustine's *De Civitate Dei (The City of God) of 413–26 CE*, and literature, such as Dante's *Divine Comedy*. *See* ERWIN PANOFSKY, EARLY NETHERLANDISH PAINTING 270-310 (1953); Janey L. Levy, *The Keys of the Kingdom of Heaven: Ecclesiastical Authority and Hierarchy in the Beaune Altarpiece*, 14 ART HIST. 18, 19-27 (1991).

61. One earlier representation is at the sixth-century Church of St. Apollinare Nuovo in Ravenna, Italy, where mosaics depict Christ separating sheep from goats. *See, e.g.*, BOUILLET, *supra* note 54, at 10. Another well-known mosaic Last Judgment is in the Torcello Cathedral from the twelfth century. *Id.* at 57.

62. *Id.* at 60; EDGERTON, *supra* note 58, at 23.

allegorical scenes of religious and classical narratives to link their regimes to god, prosperity, power, and peace.[53] The visual record demonstrates that, while superficially similar, the role of the judge was radically different. Unlike today's independent jurist, protected from government oversight, the judge then was repeatedly instructed to be subservient to higher authorities—to the Christian God and the civic rulers that embodied that power. Judges were warned that they, as well as those whom they judged, were subjects required to demonstrate obedience and loyalty.

This point was made in scenes of the Last Judgment,[54] which gained a particular place of honor in northern Europe, where some municipal laws required that the image be posted in courtrooms.[55] One oft-cited source came from provisions written between 1330 and 1386 in Magdeburg Province[56] and adopted in various localities. A sixteenth-century edition explained:

> When and where the judge sits in judgment, in the same place and in the same hour, God sits in his heavenly court, above the judges and above the magistrates. And so a judge in the town hall should have painted the strict court of our Lord Jesus Christ. This is so that he should think of the Court of our Lord; and that he should also think that he is a judge of the people, that God has saved with his precious blood. And so David speaks: "Juste judicate filii hominum. Judge fairly, you children of men, when you judge according to worldly measures (that is, you judge men on the earthly level, God will judge whether your judgment was just or unjust) the same judgment will be passed in the same hour over you, it is fair, and so it was of you that the Prophet David speaks."[57]

J.L. & HUMAN. 259, 262 (2012); *see also* LINA BOLZONI, THE GALLERY OF MEMORY: LITERARY AND ICONOGRAPHIC MODELS IN THE AGE OF THE PRINTING PRESS (Jeremy Parzen trans., 2001).

53. 2 ART, SOCIETY AND RELIGION, *supra* note 48, at 29; *see also* CHRISTIAN-NILS ROBERT, LA JUSTICE DANS SES DECORS, XVE–XVIE SIÈCLES (2006).

54. *See* ZAPALAC, *supra* note 48, at 194 n.8. Several authors have catalogued the many displays of the Last Judgment in German and Dutch Town Halls. *See, e.g.*, L'ABBE BOUILLET, LE JUGEMENT DERNIER DANS L'ART AUX DOUZE PREMIER SIÈCLES (1894); CRAIG HARBISON, THE LAST JUDGMENT IN SIXTEENTH CENTURY NORTHERN EUROPE: A STUDY OF THE RELATION BETWEEN ART AND REFORMATION (1976); URSULA GRIEGER LEDERLE, GERECHTIGKEITSDARSTELLUNGEN IN DEUTSCHEN UND NIEDERLÄNDISCHEN RATHÄUSERN (1937); WOLFGANG PLEISTER & WOLFGANG SCHILD, RECHT UND GERECHTIGKEIT IM SPEIGEL DER EUROPÄISCHEN KUNST (1988); SUSAN TIPTON, RES PUBLICA BENE ORDINATA: REGENTENSPIEGEL UND BILDER VON GUTEN REGIMENT, RATHAUSDEKORATIONEN IN DER FRÜHEN NEUZEIT (1996); GEORG TROESCHER, WELTGERICHTSBILDER IN RATHÄUSERN UND GERICHTSSTÄTTEN, *in* 11 WEST GERMAN YEARBOOK FOR ART HISTORY 129-214 (1939).

55. Contemporary discussions of this requirement of German law refer either to such provisions as from the Magdeburg Laws or rely on Ulrich Tengler, writing a legal treatise in the early 1500s. *See, e.g.*, GERALD STRAUSS, LAW, RESISTANCE, AND THE STATE: THE OPPOSITION TO ROMAN LAW IN REFORMATION GERMANY 195 (1986); ZAPALAC, *supra* note 48, at 48-49, 76-68.

56. TROESCHER, *supra* note 54, at 148. These multivolume codes in various versions were adopted in different city-states. *See, e.g.*, PAUL LABAND, DAS MAGDEBURG-BRESLAUER SYSTEMATISCHE SCHÖFENRECHT AUS DER MITTE DES XIV (Scientia-Verlag 1967) (1863).

57. *Sechsich Weychbild und Lehenrecht*, art. XVI, fol. XXVIIb (Leipzig, Michael Blum 1537). These materials, from the Lillian Goldman Yale Rare Book Library, were located for us by Librarian

The Graz version could be read as a vertical diptych with two discrete scenes. On the bottom, the jurist (Strobel) presides over what has been identified as an oath-taking, with counselors and spectators watching. At the top, Christ, arms outstretched, sits on a heavenly throne surrounded by counselors—Mary kneeling on his left, and a male on his right. The symmetry created through the layout and coloration (red drapery for both the jurist and Christ, with beige, black, and red clothes for figures in both Earth and heaven) could suggest that one kind of judgment parallels the other.

But the two male spectators, leaning over the sides of the benches and plausibly representing the public, have their gazes focused heavenward, as do three of the seated councilors. By following their eyes and looking at the middle section of the painting, in which the spectators share space with small, naked embodied souls (either being raised to heaven or condemned to hell), one can understand that, instead of two scenes, depicted is a single integrated moment in which Jesus is present in the earthly court.[67] He does not parallel the human judge but waits on the court's earthly decision in order to render his own judgment on the living characters in the courtroom. The mid-ground depiction of human souls in transit—to heaven or hell—underscores what flows from such heavenly judgment.

Art historians debate whether the deployment of the Last Judgment in town halls was an effort to use religion to bolster the legitimacy of secular rule[68] or evidence of the intermingling of the secular and the religious.[69] Yet others understood the two categories to be intermingled in a form of "civic Christianity."[70] Our interest is in how the selection of text and image reflected an understanding of the role of a judge. The walls that surrounded judges provided insistent public reminders of the vulnerability of judges and of the judged, both positioned as subjects before a higher authority.

The imagery of the Last Judgment lost its centrality in town halls long before its religiosity became problematic for secularizing societies. In Germany and elsewhere, Last Judgment scenes were replaced with other historical narratives harkening back to classical and biblical traditions and, in later centuries, by the abstraction of the Virtue Justice.[71] Explanations for the eclipse vary depending on the emphasis placed on changing economic

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67. The spectators' placement "confused the viewer's perspectival understanding of the scene," making "impossible a comfortably distinct reading of two scenes as discrete events." *Id.* at 49.

68. *See* EDGERTON, *supra* note 58, at 22; HARBISON, *supra* note 54, at 52.

69. ZAPALAC, *supra* note 48, at 34-35. Zapalac also detailed how court-based processes affected Church liturgy, with popular dramas positing trials involving Christ and the Devil and with legal texts portraying Mary as a lawyer defending humanity before Jesus.

70. *See* DAVID HERLIHY, MEDIEVAL AND RENAISSANCE PISTOIA: THE SOCIAL HISTORY OF AN ITALIAN TOWN, 1200–1430 (1967).

71. ZAPALAC, *supra* note 48, at 27-31, 72-81.

conditions, political theories, and religious ideology in the Reformation's wake. One could read the retreat from Last Judgment depictions to represent a secularization of the act of judging, a decline in religious authority, a shift in theology away from redemption, or an embrace of humanism enamored with classical narratives and of analogies to heroic personages and communities.

The imagery changed, but instructions on judicial subservience remained on the walls by way of other narratives drawn from a tradition called *exempla virtutis*—acts, "worthy of imitation," and a subset, *exempla iustitiae*, providing lessons about justice.[72] One oft-displayed scene was *The Judgment of Cambyses* (Figures 8 and 9).[73] The story comes from the *Historiae*, written by Herodotus around 440 B.C.E. and describing the rule of King Cambyses, said to have lived some hundred years earlier.[74] According to Herodotus, upon learning that the judge, Sisamnes, was corrupt, Cambyses ordered him flayed alive. Thereafter, Cambyses appointed Otanes, the son of Sisamnes, to serve as a jurist and forced the son to preside on a seat made from the skin of his father.[75]

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72. *See* ELIZABETH MCGRATH, 1 RUBENS: SUBJECTS FROM HISTORY, TEXT & ILLUSTRATIONS (1997), *in* 13 CORPUS RUBENIANUM LUDWIG BURCHARD 7, 33-35 (Arnout Balis ed., 1997). As McGrath explained, a tradition of didacticism that lined the "walls of Renaissance palaces and town halls" relied on "citation of some deed or saying of the past." *Id.* at 34; *see also* Hugo van der Velden, *Cambyses for Example: The Origins and Function of Exemplum Iustitiae in Netherlandish Art of the Fifteenth, Sixteenth and Seventeenth Centuries*, 23 SIMIOLUS: NETHERLANDS Q. HIST. ART 5, 9 (1995) [hereinafter Van der Velden, *Cambyses for Example*].

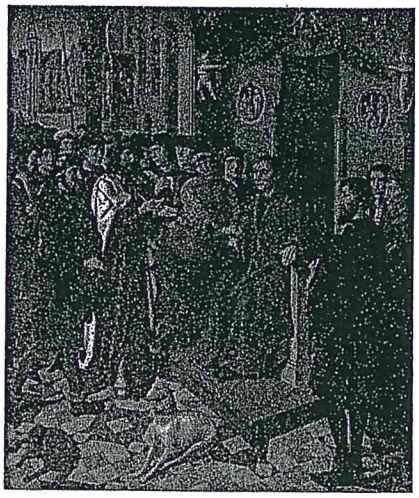
73. *See* ROBERT, *supra* note 53, at 24, 74-79; Hans J. van Miegroet, *Gerard David's Justice of Cambyses: Exemplum Iustitiae or Political Allegory?*, 18 SIMIOLUS: NETHERLANDS Q. HIST. ART 116, 117 (1988) [hereinafter Van Miegroet, *Justice of Cambyses*]; Hugo van der Velden, *Cambyses Reconsidered: Gerard David's Exemplum Iustitiae for Bruges Town Hall*, 23 SIMIOLUS: NETHERLANDS Q. HIST. ART 40, 44-49 (1995) [hereinafter Van der Velden, *Cambyses Reconsidered*].

74. Cambyses was the son of Cyrus the Great, who conquered Babylon in 539 B.C.E. Cambyses ruled from around 530 to 521 B.C.E. *See* HERODOTUS, THE HISTORIES, bk. 3 at 95, 170, 171 (Aubrey de Selincourt trans., 2003); *see also* GERALDINE PINCH, EGYPTIAN MYTHOLOGY: A GUIDE TO THE GODS, GODDESSES, AND TRADITIONS OF ANCIENT EGYPT 34 (2002) (noting that a king who was likely Cambyses existed and conquered Egypt in 525 B.C.E).

75. HERODOTUS, *supra* note 74, bk. 5 at 25-26. One translation is:

> Darius left as general of all the troops upon the sea-coast Otanes, son of Sisamnes, whose father King Cambyses slew and flayed, because that he, being of the number of royal judges, had taken money to give an unrighteous sentence. Therefore, Cambyses slew and flayed Sisamnes, and cutting his skin into strips, stretched them across the seat of the throne whereon he had been wont to sit when he heard cases. Having so done Cambyses appointed the son of Sisamnes to be judge in his father's room, and bade him never to forget in what way his seat was cushioned.

HANS JORIS VAN MIEGROET, GERARD DAVID 143 (1989) [hereinafter VAN MIEGROET, GERARD DAVID].



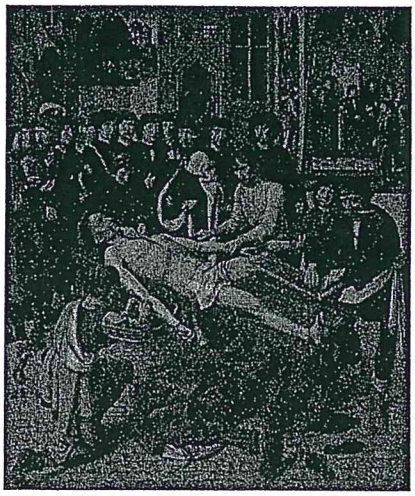


Figure 8. *Arrest of the Corrupt Judge*, left panel. Figure 9. *Flaying of the Corrupt Judge*, right panel. *The Justice (Judgment) of Cambyses*, diptych, Gerard David, 1498, Musea Brugge, Belgium.

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From the thirteenth century onward, versions of this story can be found in European compilations of classical stories and by the seventeenth century, regularly portrayed in European town halls.[76] Dozens of images exist, but the vividness of the *Judgment of Cambyses* by the Flemish artist Gerard David is noteworthy.[77] This work, commissioned in the late fifteenth century for the City Hall of Bruges, was hung in 1498 and can now be seen in that city's museum.[78]

The painting, a diptych with panels almost six feet high and five feet wide, includes four scenes.[79] Toward the back of the first panel (Figure 8), behind the arches and under a canopy, one can see the red-robed judge Sisamnes standing near another figure from whom he is accepting a bag of money. In the center scene, Cambyses (dressed not as a Persian emperor but like a king

76. LEDERLE, *supra* note 54, at 44-45 (chronicling the image in painting, glass windows, and carvings in Münster, Emden, Gdańsk, Konigsberg, Thorn, and Breslau); Van der Velden, *Cambyses for Example*, *supra* note 72, at 11-16.

77. Gerard David, who lived from about 1460 to 1523, came into focus in the nineteenth century through James Weale. *See* W.H. JAMES WEALE, GERARD DAVID: PAINTER AND ILLUMINATOR 6-7 (1895). For interpretative disagreements about the Brugges diptych, *compare* Van der Velden, *Cambyses Reconsidered*, *supra* note 73, *with* Van Miegroet, *Justice of Cambyses*, *supra* note 73.

78. WEALE, *supra* note 77, at 8-9, 13. David received payments in 1488, 1490, and "after arbitration in 1498," an additional sum, totaling fourteen pounds, ten shillings. *Id.* at 13.

79. Figures 8 & 9, photographs of the David Cambyses, are reproduced with permission of the Musea Brugge, Groeningemuseum. The original frames formed a single whole; each panel is five feet and eleven inches by four feet and eight inches. In 1794, the panels were taken by the French and then returned in 1816 to the Town Hall before being relocated to the Museum of the Academy in 1828, where they were restored. For a time, a copy (with variations, entitled *Flaying of Sisamnes*) hung, during the nineteenth century, in the Law Courts of Bruges. WEALE, *supra* note 77, at 13 & n.1.

"wearing a royal coronet in German fashion"[80]) accuses Sisamnes, who is seated on his judicial, high-backed chair.

In the right-hand panel (Figure 9), the corrupt judge is being flayed alive. (Reproductions cannot duplicate the experience of looking at the larger-than-life, brilliantly colored original, offering gory details startling in their specificity.) Toward the back, on the right side, is a smaller scene that provides the denouement. The new judge—the son Otanes—is seated on his father's skin, draped over the judge's bench.

Competing interpretations exist of both the Cambyses story and the reasons for its placement in the 1498 City Hall of Bruges. Classical historians identified Cambyses as a king gone mad—a monarch condemned to a perpetual state of rage and drunkenness because, wrongly drawn into war with Egypt, he had killed its sacred bull.[81] If the flaying of the judge Sisamnes is put in the context of the other noxious acts attributed to Cambyses, the story is about a crazy king using his power in gruesome ways.[82]

An alternative reading, however, and one that dominated the story's deployment during the Medieval and Renaissance periods, was that Cambyses was a king who wisely sanctioned an unjust judge. The scene—set forth in town halls, on commemorative medals, tapestries, and reproduced in prints—served regularly as an *exemplum iustitiae*, warning all judges about how to behave appropriately. Portrayals of the Cambyses story can be found in many town halls, including those of Mons, Gdańsk (Danzig), and Brussels,[83] along with other *exempla* to make the point that rulers had the power "to guarantee the utter impartiality of the judgments handed down."[84]

V. APPROPRIATING VIRTUE

We have traced some of the strands of the didacticism in the public performance of justice and two of the narrative images that once were common in places of judgment. Today's courtrooms no longer feature such imagery. Instead, Justice has come to serve as a signpost for a courthouse. Hence, a bit more of her pedigree is in order before pondering

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80. VAN MIEGROET, GERARD DAVID, *supra* note 75, at 145.

81. HERODOTUS, *supra* note 74, bk. 3 at 95-97.

82. As one commentator noted, the Roman and Greek sources on this story provided an "acute sense of the barbaric," such that one would feel the "harsh justice of antiquity." JULIAAN H.A. RIDDER, GERECHTIGHEIDSTAFERELEN VOOR SCHEPENHUIZEN IN DE ZUIDELIJKE NEDERLANDEN IN DE 14DE, 15DE, EN 16TH DE EEUW 55-56 (1989).

83. *See, e.g*, Jerzy Miziolek, *Exempla Iustitiae at Arthur's Court in the Context of Dutch and Flemish, German, and Italian Art*, *in* NETHERLANDISH ARTISTS IN GDAŃSK IN THE TIME OF HANS VREDEMAN DE VRIES 73, 77-78, 153 fig.9 (2006).

84. Van der Velden, *Cambyses Reconsidered*, *supra* note 73, at 49.

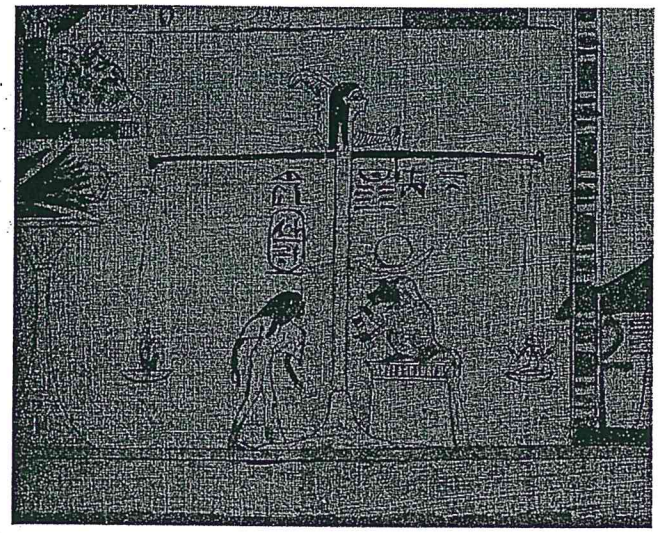


Figure 10.
Maat, Papyrus Nodjnet, *Book of the Dead*, circa 1300 B.C.E.

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the complexity of contemporary iterations.

The roots of the personification are traced to the Egyptian ideal *Ma'at*, a concept that, as Manning explains, is linked to judgment and often shown with the image of a balance.[85] Because the "universal sense" of the term *Ma'at* has no precise modern equivalent,[86] Egyptologists offer several words to capture what *Ma'at* encompassed: "truth, justice, righteousness, order, balance, and cosmic law,"[87] a "divine order,"[88] a "stability,"[89] and an "evenness"[90] that stood in contrast to and overcame chaos. Depictions of *Ma'at* included a feather alone,[91] with a pedestal or base denoting foundational importance,[92] and a woman with an ostrich feather tucked under a band on her head. At times that female (also called *Ma'at*) can be seen holding a balance or, as in Figure 10[93] (a fifteenth-century-B.C.E. detail from one of hundreds of papyri sheets now called Egyptian *Books of the*

85. Manning, *Representations of Justice*, *supra* note 37, at 114.

86. ERIK HORNUNG, IDEA INTO IMAGE: ESSAYS ON ANCIENT EGYPTIAN THOUGHT 136 (Elizabeth Bredeck trans., 1992). He described the "Sanskrit word rta" as coming "closest." *Id.*

87. PINCH, *supra* note 74, at 159.

88. *Id.* at 4, 7.

89. JOYCE TYLDESLEY, JUDGEMENT OF THE PHARAOH: CRIME AND PUNISHMENT IN ANCIENT EGYPT 18 (2000).

90. HORNUNG, IDEA INTO IMAGE, *supra* note 86, at 139. *Ma'at* is regularly contrasted with injustice and disorder. *See* SIEGFRIED MORENZ, EGYPTIAN RELIGION 110-36 (Ann E. Keep trans., 1973).

91. Erik Hornung, *Ancient Egyptian Religious Iconography*, *in* CIVILIZATIONS OF THE ANCIENT NEAR EAST 1711, 1721-25 (Jack M. Sasson ed., Miriam Lichtheim trans., 1995). As in other iconographical traditions, an attribute associated with one figure could also be connected to another. For example, in Egyptian imagery the feather also signified the air god Shu. PINCH, *supra* note 74, at 160.

92. HORNUNG, *supra* note 86, at 134.

93. Figure 10, copyrighted by the Trustees of the British Museum, is reproduced with their permission. The papyrus from the Nedjmet *Book of the Dead* may have come from the Royal Cache at Deir el-Bahari, Egypt; it is dated around 1070 B.C.E., the time of the Twenty-First Dynasty.

Dead[94]), she herself forms the centerpiece of the scales.[95] An oft-repeated explanation of the scene is that at death, a person's heart (said to direct a person's will, feelings, thoughts, and character) was weighed against an ostrich feather (representing *Ma'at*) to determine where that person would go in the afterlife.[96]

Ma'at's female form served as a predecessor to a series of Greek and Roman goddesses (Themis, Dikê, and Iustitia),[97] all justice-engaged and linked to ruling powers. More than a dozen Roman emperors between the first and fourth centuries C.E. broadcast their special relationship through their coins. The ruler's representation was on one side and, on the other, a figure of Justicia, sometimes standing, other times seated on a throne, and holding various objects including a cornucopia, a sceptre, scales, and a bundle of rods (fasces) emblematic of Roman government officials' authority. Helen North explained that Dikaiosynê/Justicia was the sole classical Virtue with such a recognizable "type" in ancient art,[98] and scholars credit the Roman writer Aulus Gellius as the source for Medieval portrayals of Justicia's "stern appearance and keen gaze."[99]

Moving forward in time, Justice imagery became entwined with the Catholic Church which, unlike Jewish and Islamic traditions, regularly deploys personifications. Female figures identified as Justice can be found in Christian art from as early as the fifth century.[100] Those stern-gazed women did not, however, always come with scales. Rather, Medieval art frequently affixed scales to another figure, the oft-winged male St. Michael who

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94. The title *Book of the Dead* is a "term coined in the nineteenth century for a body of texts known to the Ancient Egyptians as the Spells for Going Forth by Day." PINCH, *supra* note 74, at 26.

95. In some texts Ra, *Ma'at*'s father, is described as weighing *Ma'at*. *See* MAULANA KARENGA, MAAT, THE MORAL IDEAL IN ANCIENT EGYPT: A STUDY IN CLASSICAL AFRICAN ETHICS 64 (2004).

96. An excerpt from Spell 30b is:

> O my heart of my different ages! Do not stand up as a witness against me, do not be opposed to me in the tribunal, do not be hostile to me in the presence of the Keeper of the Balance . . . . Do not tell lies about me in the presence of the god; . . . Thus say Thoth, judge of truth, ... Hear this word of very truth. I have judged the heart of the deceased, and his soul stands as a witness for him. His deeds are righteous in the great balance, and no sin has been found in him.

THE EGYPTIAN BOOK OF THE DEAD, THE BOOK OF GOING FORTH BY DAY, BEING THE PAPYRUS OF ANI, ROYAL SCRIBE OF THE DIVINE OFFERINGS OF ALL THE GODS, WRITTEN AND ILLUSTRATED CIRCA 1250 BCE, at text accompanying plate 3 (Raymond O. Faulkner & Dr. Ogden Goelet Jr. trans., 1994).

97. *See* HELEN NORTH, FROM MYTH TO ICON: REFLECTIONS OF GREEK ETHICAL DOCTRINE IN LITERATURE AND ART (1979); Dougal Blyth & Tom Stevenson, *Personification in Greek Literature and Art*, *in* MEGAN JENKINSON, UNDER THE AEGIS: THE VIRTUES 117 (Peter Shand ed., 1997).

98. NORTH, *supra* note 97, at 178 n.3.

99. Michael Evans, *Two Sources for Maimed Justice*, *in* 11 SOURCE: NOTES IN THE HISTORY OF ART 12 (1982).

100. *See* ADOLF KATZENELLENBOGEN, ALLEGORIES OF THE VIRTUES AND VICES IN MEDIEVAL ART 28 (Alan J.P. Crick trans., 1964).

functioned as a "psychopomp" leading souls to judgment.[101] While the use of scales (then often called a balance) to represent judgment is shared by Babylonian, Egyptian, Greek, Roman, Jewish, and Christian texts and imagery, St. Michael formed a bridge from Egyptian eschatology across Christian imagery to the Renaissance Virtue Justice.[102] That relationship can be seen by comparing *Saint Michael Weighing a Soul*, circa 1450 (Figure 11)[103] with the *Iusticia* (*Justice*) (Figure 12),[104] shown with her billowing robes, scales, and sword in a mid-sixteenth century print by Cornelis Matsys.

We place Justice in another context in Figure 13, a collage of four figures illustrating that she was once part of an assembly rather than a solo actor.[105] For centuries, the foursome of Justice, Prudence, Fortitude, and Temperance were known as the Cardinal Virtues.[106] Derived from discussions by Plato, Cicero, and St. Thomas Aquinas,[107] the set sometimes appeared alongside the theological trio of Faith, Hope, and Charity.[108] Those Virtues, in turn, overlapped with others, now less well known, in depictions of an epic battle with Vices.

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101. *See* Mary Phillips Perry, *On the Psychostasis in Christian Art II*, 22 THE BURLINGTON MAG. FOR CONNOISSEURS 208, 208 (1913).

102. S.G.F. BRANDON, THE JUDGMENT OF THE DEAD: AN HISTORICAL AND COMPARATIVE STUDY OF THE IDEA OF A POST-MORTEM JUDGMENT IN THE MAJOR RELIGIONS 45 (1967).

103. Figure 11, a Greco-Byzantine image, an oil on a panel, is reproduced courtesy of the Yale Art Gallery (no. 1934.85, gift of Walter L. Ehrich, PH.B 1899). Our thanks to Kate Ezra, David Odo, Elizabeth Grey, and David Wharples, for their help in identifying relevant images, mounting the exhibit from Jan.-May of 2011 in the Yale Art Gallery, and facilitating the reproduction rights for this image as well as for Figure 17 (Albrecht Dürer, *Sol Iustitiae*).

104. Figure 12, *Justice*, by Cornelis Matsys, circa 1543-1544, is reproduced courtesy of the copyright holder, the Warburg Institute, University of London, and provided with the assistance of Elizabeth McGrath.

105. Figure 13 is a composite of *Justice*, Cornelis Matsys, circa 1543-1544; *Prudence*, Agostino Veneziano, 1516; *Temperance*, Agostino Veneziano, 1517; and *Fortitude*, Marcantonio Raimondi, circa 1520. The images are reproduced courtesy of the copyright holder, the Warburg Institute, University of London, and provided with the assistance of Elizabeth McGrath.

106. *See generally* KATZENELLENBOGEN, *supra* note 100; JENNIFER O'REILLY, STUDIES IN THE ICONOGRAPHY OF THE VIRTUES AND VICES IN THE MIDDLE AGES 112 (1988); Selma Pfeiffenberger, The Iconology of Giotto's Virtues and Vices at Padua (1966) (unpublished Ph.D. dissertation, Bryn Mawr College) (on file with author).

107. *See* PLATO, THE REPUBLIC bk. iv, 427e, at 93 (G.M.A. Grube trans., 1974) (to be "wise, brave, moderate, and just"); Cicero, *De Natura Deorum*, *in* 19 CICERO IN TWENTY-EIGHT VOLUMES, at xiii, xviii (Harris Rackham trans., 1979). Platonic virtues became a part of Christian thought during the fourth century via the work of St. Ambrose, and then through Isidor of Seville, Rabanus Maurus, Peter Lombard, to Thomas Aquinas and into many works of art. *See* EMILE MÂLE, THE GOTHIC IMAGE: RELIGIOUS ART IN FRANCE OF THE THIRTEENTH CENTURY 110 n.4 (Dora Nussey trans., 1958). Another thirteenth-century source is the *Somme le Roi* (often translated as *The Book of Vices and Virtues* but literally "Summation for the King"). *See* ROSEMOND TUVE, ALLEGORICAL IMAGERY: SOME MEDIAEVAL BOOKS AND THEIR POSTERITY 57-143 (1966); Rosemond Tuve, *Notes on the Virtues and Vices, Part 1*, 26 J. WARBURG & COURTAULD INST. 264 (1963); Rosemond Tuve, *Notes on the Virtues and Vices, Part 2*, 27 J. WARBURG & COURTAULD INST. 42 (1964).

108. 1 *Corinthians*, the source cited for the three theological Virtues, can be translated as: "And now abideth faith, hope, charitie, these three, but the greatest of these is charitie." *See* 1 *Corinthians* 13:13 (King James). A more recent translation presents them as "faith, hope, and love," with the "greatest of them all" as love. *See* 1 *Corinthians* 13:13.



Figure 11.
Saint Michael Weighing the Soul.
Reproduced courtesy of the Yale University Art Gallery. Gift of Walter L. Ehrich, Ph.B 1899.



Figure 12.
Iusticia (Justice), Cornelis Matsys, circa 1543-1544.
Copyright: Warburg Institute, University of London.



Figure 13. Top, left to right: *Iusticia* (Justice), Cornelis Matsys, circa 1543-1544; *Prudence*, Agostino Veneziano, 1516. Bottom, left to right: *Temperance*, Agostino Veneziano, 1517; *Fortitudo* (Fortitude), Marcantonio Raimondi, circa 1520.

Copyright: Warburg Institute, University of London.

Called the *Psychomachia* after a famous fifth-century allegorical poem by Prudentius describing Christianity's triumph over paganism, the conflict enacted the moral struggle for a person's soul, as seven Virtues were pitted against a symmetric group of seven Vices.[109]

Virtues typically took the female form—reflecting their relation to Egyptian, Greek, and Roman goddesses,[110] as well as the feminine gender of the Latin nouns that they represented.[111] By the late Middle Ages, artists had come to use the male form for certain Vices.[112] How and why words, activities, or abstractions came to be gendered is a topic explored in feminist and in critical theory, for the iconography reflected, produced, and codified sex-role divisions, encoded in various myths.[113]

In practice, which Virtues and Vices were in combat varied in numbers and names,[114] and Justice was not regularly portrayed in the conflict until the twelfth century.[115] By the late Medieval period, Church leaders were using these images to school a wide and diverse audience on the moral and religious obligations embodied in various Virtues—Hope, Faith, Charity, Prudence, Temperance, and Fortitude, as well as Justice. Those

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109. The *Psychomachia,* dating from around 405 C.E., became a popular text during the Middle Ages. Prudentius's invention, to name and personify the Virtues and Vices, replaced abstractions with combatants in conflict, offering the "first sustained personification allegory," with a revolutionary impact. *See* MACKLIN SMITH, PRUDENTIUS' "PSYCHOMACHIA": A REEXAMINATION 3-6 (1976); *see also* S. GEORGIA NUGENT, ALLEGORY AND POETICS: THE STRUCTURE AND IMAGERY OF PRUDENTIUS' "PSYCHOMACHIA" 7-16 (1985).

110. Blyth & Stevenson, *supra* note 97, at 117-124.

111. *See* MARINA WARNER, MONUMENTS & MAIDENS: THE ALLEGORY OF THE FEMALE FORM, at xxi, 63-76, 152-54 (1985).

112. In the Prudentius verse, both Virtues and Vices were female. One oft-cited example of the female-male contrast is Giotto's *Virtues and Vices* (1305-06) in the Padua Chapel where Folly, Injustice, and Infidelity were given male form. *See* Bruce Cole, *Virtues and Vices in Giotto's Arena Chapel Frescoes, in* THE ARENA CHAPEL AND THE GENIUS OF GIOTTO 369-94 (1998).

113. The gendering of allegorical figures was not random. In twelfth-century churches, the Vice Unchastity is a female in hell—usually shown in a revolting posture, her naked body entwined by serpents, which feed on her breasts and sexual organs. Sometimes, too, she is accompanied by the Devil, who assumes an intimate relationship with her. The "typical 'male' Vice, on the other hand is either Pride or Avarice, the former denoting the chief failing of the feudal nobles, the latter that of the middle class." Henry Kraus, *Eve and Mary: Conflicting Images of Medieval Woman, in* FEMINISM AND ART HISTORY: QUESTIONING THE LITANY 77, 81 (Norma Broude & Mary D. Garrard eds., 1982); *see also* EMMA STAFFORD, WORSHIPING VIRTUES: PERSONIFICATION AND THE DIVINE IN ANCIENT GREECE 27-35 (2000); Carol J. Clover, *Regardless of Sex: Men, Women, and Power in Early Northern Europe*, 68 SPECULUM 363, 366-68, 380 (1993); Jacques de Ville, *Mythology and the Images of Justice*, 23 LAW & LITERATURE 324 (2011).

114. *See* ORTON W. BLOOMFIELD, THE SEVEN DEADLY SINS: AN INTRODUCTION TO THE HISTORY OF A RELIGIOUS CONCEPT, WITH SPECIAL REFERENCE TO MEDIEVAL ENGLISH LITERATURE 65 (1952); ERWIN PANOFSKY, STUDIES IN ICONOLOGY: HUMANISTIC THEMES IN THE ART OF THE RENAISSANCE 224 (1962). The *Index of Christian Art* listed 227 different images, including 109 Virtues, arranged from Abstinence to Wisdom, as well as 118 Vices. *See Virtue & Vice: The Personifications, in* 2 INDEX OF CHRISTIAN ART 241-49 (2000) (listing images of Justice).

115. In the *Prudentius* text, Justice was not a major combatant. NUGENT, *supra* note 109, at 35-40, 76.

terms, their personifications, and import formed a "common currency."[116]

A. From Ostriches to Eyes: The Attributes of Justice

As Figure 13 illustrates, Virtues were identified through attributes as well as explained in texts addressing their interdependencies, hierarchies, and distinctions. The depictions varied by period, place, and artistic impulse, such that any particular Virtue can be found with an odd lot of attributes. Justice, for example, held cornucopias, lictor rods, orbs, books, and tablets and appeared with a mix of animals and birds including dogs, snakes, ostriches, and cranes.

Over time, certain accoutrements came to dominate, as the figures in Figure 13 also illustrate. *Prudence* and *Temperance* are drawn from a well-known series painted by Raphael for a room in the Vatican's *Stanza della Segnatura*.[117] The 1516 print by Veneziano shows *Prudence* with a mirror,[118] as well as sporting a second face (that of a bearded old man) at the back of her head. Explanations were that the retrospective glance captured Prudence's ability to comprehend the past while the mirror permitted contemplation—all required for the introspection entailed in the practical wisdom which Prudence embodied.[119] Veneziano's *Temperance* has a bridle, one of her stock attributes used to symbolize self-restraint.[120]

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116. O'REILLY, *supra* note 106, at 92.

117. Veneziano's drawings of Prudence and Temperance are after Raphael's frescoes in the *Stanza della Segnatura*, named for the Pope's "*Segnatura Gratiae et Iustitiae*" (the Signature of Grace and Justice), the Highest Court of the Holy See, which met there during the sixteenth century. *See* CHRISTIANE L. JOOST-GAUGIER, RAPHAEL'S STANZA DELLA SEGNATURA: MEANING AND INVENTION (2002). Pope Julius II, who held office from 1503 to 1513, used the room as a library and private office. Edgar Wind suggested that Raphael's *Prudence*, *Temperance*, and *Fortitude* were doubled, simultaneously referencing both a Cardinal and a Theological Virtue. *See* Edgar Wind, *Platonic Justice, Designed by Raphael*, 1 J. WARBURG & COURTAULD INST. 69 (1937). Joost-Gaugier disagreed, identifying them as the Three Graces, referring to the three daughters of Zeus (Justice, Peace, and Lawfulness), linking the "(Greek) Graces, the (Roman) Justinian, and the (Christian) Gregory" to portray a "grandiose concordance or harmony of Greek law, Roman law, and Christian law." JOOST-GAUGIER, *supra*, at 146. Our discussion uses the images to illustrate depictions of the Cardinal Virtues.

118. Veneziano (Agostino dei Musi) was born in Venice around 1490 and died in Rome, sometime after 1536. From 1514 to 1536, he worked with Marcantonio Raimondi (whose *Fortitude* is also depicted in this collage). *See* THE ENGRAVINGS OF MARCANTONIO RAIMONDI, at xv (1981). The drawings of *Prudence* and *Temperance*, both marked AV for Veneziano, are catalogued in 27 THE ILLUSTRATED BARTSCH: THE WORKS OF MARCANTONIO RAIMONDI AND OF HIS SCHOOL 53 (1978). Raphael may have modeled the original fresco after Giotto's *Prudence* in that both are Janus-faced, with a female figure on one side and a bearded man at the back. Further, some credit Giotto as the first to associate the mirror with Prudence. *See* Pfeiffenberger, *supra* note 106, at ch. 5. Mirrors, like other objects connected to various Virtues, had multiple meanings. When attached to the Virgin Mary, Humility, Charity, or Faith, the mirror was explained as indicative of divine insight or purity. When Prudence looked in the mirror, some read it as a "symbol of the Socratic *nosce te ipsum*" (know thyself). *See* ART TREASURES OF THE VATICAN: ARCHITECTURE, PAINTING, SCULPTURE 22 (1975).

119. *See* Quentin Skinner, *Ambrogio Lorenzetti: The Artist as Political Philosopher*, 72 PROCEEDINGS BRITISH ACAD. 48 (1986).

120. HELEN L. NORTH, SOPHROSYNE: SELF-KNOWLEDGE AND SELF-RESTRAINT IN GREEK

Fortitude, from around the same period and attributed to Marcantonio Raimondi,[121] wears a helmet with a small lion perched on top and holds a broken column—all references to power, endurance, and strength.[122]

One did not need to travel to Rome to see such displays. Joining an array of other images, the Virtues were catalogued and popularized in the compendia of graphic allegories and emblems produced during the sixteenth century by Andreas Alciatus in his 1531 *Index Emblematicus*[123] and by Cesare Ripa in his 1593 *Iconologia*.[124] Along with a few books on

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LITERATURE 13 (1966). Cesare Ripa explained that the "personification of Temperance is a woman . . . who holds a bridle . . . . As a bridle restrains a horse, so does temperance hold appetites in check." *See* CESARE RIPA, BAROQUE AND ROCOCO PICTORIAL IMAGERY: THE 1758–1768 HERTEL EDITION OF RIPA'S "ICONOLOGIA" WITH 200 ENGRAVED ILLUSTRATIONS 149 (Edward A. Maser ed., 1971) [hereinafter RIPA, MASTER EDITON]. In works from fourteenth-century Tuscany, Temperance was shown with a vessel as if pouring liquid, or with an hourglass, both said to express moderation. Skinner, *supra* note 119, at 49.

121. Marcantonio Raimondi (c. 1480-1534) was an important source for the dissemination of Raphael's designs. *See* LISA PON, RAPHAEL, DÜRER & MARCANTONIO RAIMONDI: COPYING AND THE ITALIAN RENAISSANCE PRINT (2004); Elizabeth Broun, *The Portable Raphael*, *in* THE ENGRAVINGS OF MARCANTONIO RAIMONDI 20-42 (1981); Lisa Pon, *Marcantonio Printmaking/Printing Marcantonio*, *in* CHANGING IMPRESSIONS: MARCANTONIO RAIMONDI & SIXTEENTH-CENTURY PRINT CONNOISSEURSHIP 60-71 (1999). The image shown in Figure 13 is indexed in J.D. PASSAVANT, 6 LE PEINTRE-GRAVEUR 87, no. 99-015 (1864). The print can also be found in MADELINE CIRILLO ARCHER, THE ILLUSTRATED BARTSCH: THE ITALIAN MASTERS OF THE SIXTEENTH CENTURY 64, no. 2801.083 (1995).

122. Fortitude's attributes include a lion, sometimes shown "trampled underfoot" or with "its jaws . . . wrenched open in Herculean fashion;" alternately, a lion's skin is "worn as a trophy" or displayed on a medallion or shield. O'REILLY, *supra* note 106, at 198. Fortitude, also discussed (pace Plato) as courage is often shown with a broken column or a tower to evoke strength. *See* Skinner, *supra* note 119, at 51. *See generally* WILLIAM IAN MILLER, THE MYSTERY OF COURAGE (2000).

123. Andreas Alciatus (or Andrea Alciato or Alciun or Alciati) was born in Italy and was a professor of Roman law who taught at Bourges, France from 1529 to 1533 and later at Pavia and Bologna, Italy. Alciatus's emblem treatise, a diverse collection of moralizing short poems, epigrams, and illustrations, was first published in 1531 and thereafter in some 150 editions. *See* 1-2 ANDREAS ALCIATUS, THE LATIN EMBLEMS: INDEX EMBLEMATICUS (Peter M. Daly ed., 1985) (unpaginated edition with numbered emblems).

124. Cesare Ripa, whose original name was Giovanni Campani, was born in Perugia around 1560. Although known today for its illustrations, the first edition of Ripa's *Iconologia* was published without pictures in Rome in 1593; Ripa did not likely have direct involvement in the drawings in subsequent editions. *See* Stefano Pierguidi, *Giovanni Guerra and the Illustrations of Ripa's* Iconologia, 61 J. WARBURG & COURTAULD INST. 158, 167, 174-75 (1998). The first illustrated "Ripa" was published in 1603, followed by more than forty editions in eight languages, many of which were selective renditions or extrapolations. Ripa's centrality to twentieth-century iconography comes through the work of Mâle, Erwin Panofsky, and Gombrich. *See* ERNST GOMBRICH, SYMBOLIC IMAGES: STUDIES IN THE ART OF THE RENAISSANCE (1978); ERWIN PANOFSKY, MEANING IN VISUAL ARTS (1955); Ernst Gombrich, *Icones Symbolicae: The Visual Image in Neo-Platonic Thought*, 11 J. WARBURG & COURTAULD INST. 163, 183 (1948). Access to the various compilations is facilitated by YASSU OKAYAMA, THE RIPA INDEX: PERSONIFICATIONS AND THEIR ATTRIBUTES IN FIVE EDITIONS OF THE ICONOLOGIA (1992).

In our discussions, we rely on CESARE RIPA, ICONOLOGIA (New York, Garland Publ'g Co. 1976) (Padua, Italy, Pietro Paolo Tozzi 1611) [hereinafter RIPA, PADUA–1611]; 1-2 CESARE RIPA, ICONOLOGIA (Torino, Italy, Fògola Editore 1988) (Padua, Italy, Pietro Paolo Tozzi 1618) [hereinafter RIPA, PADUA–1618]; CESARE RIPA, ICONOLOGIE (New York, Garland Publ'g Co. 1976) (I. Baudoin ed., Paris, Chez Mathieu Guillemot 1644) [hereinafter FRENCH RIPA–1644]; CESARE RIPA, ICONOLOGIA (Soest, Davaco 1971) (Amsterdam, Dirck Pietersz Pers 1644) [hereinafter DUTCH RIPA–1644]; RIPA, MASER EDITION,

Egyptian hieroglyphs (published between 1499 and 1505),[125] these texts standardized a lexicon for artists and viewers. Their works were illustrated, embellished, and widely reproduced as printing presses permitted multiple editions and extrapolations in various languages. Through didactic and repetitive invocations in art and literature, on tarot cards, in the designs for the coats of arms of burgher states and ruling families in middle Europe, and in political and theological theorizing, Ripa's Virtues and Alciatus's emblems provided a common set of references across a broad geographical span for some two hundred years.

Justice imagery was then more wide-ranging than the reduction that is commonplace today. In a version of Ripa published in 1611 in Padua, seven Justices are described—a Divine Justice ("Giustitia Divina") and six variations on "Worldly Justices"[126]—Justice ("Giustitia"), Justice According to Aulus Gellius ("Giustitia . . . che riferisce Aulo Gellio"), Principled (or Strict) Justice ("Giustitia retta"), Rigorous Justice ("Giustitia rigorosa"), Justice of Pausanius in the Eliaci ("Giustitia di Pausania ne gl'Eliaci"), and Justice on the medals of Hadrian, Antoninus Pius, and Alexander ("Giustitia delle Medaglie d'Adriano, d'Antonio Pio, & d'Alessandro").[127] A 1644

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supra note 120; 1-2 CESARE RIPA, ICONOLOGY (New York, Garland Publ'g Co. 1976) (George Richardson ed., London, G. Scott 1779) [hereinafter RIPA, RICHARDSON EDITION]. Translations of the French and Italian are by Allison Tait.

The Richardson edition was the "very last iconology in the tradition of Ripa." *See* Thomas Fröschl, *Republican Virtues and the Free State: Conceptual Frame and Meaning in Early Modern Europe and North America*, *in* ICONOGRAPHY, PROPAGANDA, AND LEGITIMATION 255, 263 (1998). While continuing to evoke "divine secrets or hidden realities," emblems' allegorical emphasis was moving to accommodate demands for "reason and commonsense." *See* MICHAEL BATH, SPEAKING PICTURES: ENGLISH EMBLEM BOOKS AND RENAISSANCE CULTURE 261 (1994).

125. *See* ALISON SAUNDERS, THE SIXTEENTH-CENTURY FRENCH EMBLEM BOOK: A DECORATIVE AND USEFUL GENRE 5-6, 71-95 (1988).

126. Erwin Panofsky, *Blind Cupid*, *in* STUDIES IN ICONOLOGY: HUMANISTIC THEMES IN THE ART OF THE RENAISSANCE 109 n.48 (1962).

127. RIPA, PADUA–1611, *supra* note 124, at 201-04. Two of those descriptions, of "Justice According to Aulus Gellius" and of "Justice," are detailed hereafter; this note discusses the remaining five. "Justice of Pausanias," referencing the Greek traveler and geographer Pausanius of the second century C.E., became famous in the Renaissance through his *Description of Greece*. Ripa called for:

> A woman of beautiful bearing, richly adorned, who with her left hand clutches an old, ugly woman and beats her with a stick. And this old woman, called Pausania, represents injury, from which just judges must always be kept, such that the truth is not hidden from them and they are able to listen patiently to each person's defense.

Id. at 202.

A second, "Principled Justice" or "Strict Justice," was to be:

> A woman with a raised sword, regal crown, and scales; on one side of her, there is a dog signifying friendship and a serpent on the other signifying hate. The raised sword denotes that Justice should not bend to either side, neither for friendship nor for hatred of any person. . . .

Id. at 203-204.

The third, "Rigorous Justice," was:

> A skeletal figure like that used to depict death, in a white robe . . .

Paris edition showed four illustrations—of Justice, Justice Inviolable, Justice Rigoureus, and Justice Divine (Figure 14).[128] All are garbed in robes; two of the four have scales and sword, a third holds scales and an orb, and one is shown without objects in hand.

> we can see her face, feet and hands with a bared sword and scales. . . . This figure teaches us that rigorous justice does not pardon any crime, no matter the excuse given . . . just like death, who is not touched by excuses and who has no regard for the station or quality of the person. . . . The fearsome aspect of this figure demonstrates that this sort of Justice is frightening to the people and that there is no occasion for the law to be interpreted lightly.

Id. at 204.

A fourth was "Justice on the medals of Hadrian, Antoninus Pius and Alexander." Hadrian was the Emperor of Rome from 117 CE to 138 C.E., succeeded by Antoninus Pius, who served from 138 to 161 CE. Alexander the Great was the Greek king of Macedonia who ruled from 336 to 323 B.C.E. and conquered a large swath of the European and Asian continents. This Justice was:

> A seated woman wearing a bracelet and holding a scepter in one hand and a chalice in the other. She is seated because it befits the gravity of a wise person and it is for this reason that judges render decisions while seated.

Id. at 203.

A fifth, the only one deemed "Divine," was:

> A woman of singular beauty, dressed in gold and with a gold crown on her head, above which a dove is circling; she has hair scattered across her shoulders with eyes upturned, looking away from low concerns, and is holding in her right hand an unsheathed sword and scales in the left. There is every reason to portray this figure as exceedingly beautiful because she is a part of the divine being . . . that is all perfection and beauty. She is dressed in gold to demonstrate, through the nobility and splendor of this metal, the excellence and sublime nature of Justice. The crown of gold is to show that she has power over all other earthly powers. The balance indicates that divine Justice regulates all actions just as the sword signifies the punishment of criminals. The dove signifies the Holy Ghost, third member of the Holy Trinity . . . .

Id. at 202-03.

The Dutch edition from 1644 provides the same list of seven as did the 1611 Padua edition. The seven Justices did not, however, reappear in all Ripa editions. In RIPA, PADUA–1618, *supra* note 124, for example, only two ("Justice According to Aulus Gellius" and "Justice") are mentioned. Moreover, slightly different descriptions can be found. By the 1758 Hertel edition, Justice is reduced to one image, and she is shown "blindfolded, for nothing but pure reason, not the often misleading evidence of the senses, should be used in making judgments." RIPA, MASER EDITION, *supra* note 120, at 120. Richardson's 1779 edition retained the blindfold and noted, "She is sitting with a bandage over her eyes. The white robes and bandage over her eyes, allude to incorrupt justice, disregarding every interested view, by distributing of justice with rectitude and purity of mind, and protecting the innocent." 2 RIPA, RICHARDSON EDITION, *supra* note 124, at 21.

128. Our thanks to Mike Widener, Rare Book Room librarian in the Lillian Goldman Law Library, for assistance in reproducing this image, from Cesare Ripa's *Iconologie* (1644). This image can also be found in Judith Resnik, Dennis Curtis, Allison Tait & Mike Widener, *The Remarkable Run of a Political Icon: Justice as a Sign of the Law*, on display in the Rare Book Exhibition Gallery from Sept. 19 through Dec. 16, 2011 and accessible on the web at http://library.law.yale.edu/exhibits/justice-sign-law.

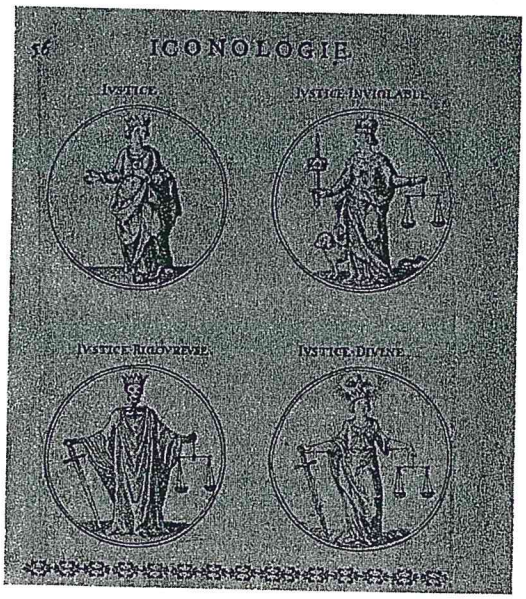


Figure 14. *Iconologie*, Cesare Ripa, Paris, Mathieu Guillemot, 1644.

Reproduced courtesy of the Rare Book Collection, Lillian Goldman Law Library, Yale Law School.

Moreover, and unlike the Melbourne 2002 version (Figure 1), all are clear-sighted. Ripa's *Justice According to Aulus Gellius* (Figure 15)[129] had "acute vision" and "piercing eyes,"[130] as well as a necklace on which

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129. Gellius was a Latin grammarian of the second century C.E. who authored *Noctes atticae (Attic Nights)*. Gellius's description—"luminibus oculorum acribus"—was translated by Theodore Ziolkowski as a "piercing gaze" and, he argued, congruent with a line from an Athenian author, Menander, who ascribed to Dikê an "eye that sees everything." *See* THEODORE ZIOLKOWSKI, THE MIRROR OF JUSTICE: LITERARY REFLECTIONS OF LEGAL CRISES 99, 106 (1997).

Figure 15 is from Ripa's *Della Novissimi Iconologie*, published in 1625 in Padua, and provided, courtesy of the Beinecke Rare Book and Manuscript Library, with the assistance of Mike Widener; it is also available on the web-based display, Resnik et al., *supra* note 128. One detailed description comes from RIPA, PADUA–1611, *supra* note 124, also illustrating "Justice According to Aulus Gellius." Ripa instructed that she should be:

> A woman who is a beautiful virgin, crowned and dressed in gold who, with honesty and discipline, shows herself worthy of reverence, with eyes of the most acute vision and a necklace around her throat that is decorated with an eye. Plato said that Justice sees all and that from ancient times priests were called seers of all things. From whence Apuleius swore by the eye of the Sun and Justice together to show that one is as insightful as the other . . . [and they are] qualities that ministers of Justice must have, because they must also be able to discover truth and, in the manner of virgins, must be exempt from passion, not . . . corrupted by flattery, gifts, or anything else . . . . To indicate Justice and intellectual integrity the ancients used a jug, a basin, a column—as is verified on old marble sepulchers and by diverse antiquities, such that Alciatus said: A good judge must be pure of soul and clean of hands, if he wishes to punish crime and avenge injury.

Id. at 201-02. Note what was not mentioned—scales, sword, or other implements or animals.

130. RIPA, PADUA–1611, *supra* note 124, at 201; *see also* 1 RIPA, PADUA–1618, *supra* note 124, at 188; Theodore Ziolkowski, *The Figure of Justice in Western Art and Literature*, 75 INMUNKWAHAK: J. HUMAN. 187, 199 (1996).



Figure 15.
Justice According to Aulus Gellius, Cesare Ripa, 1625.

Reproduced courtesy of the Rare Book Collection, Lillian Goldman Law Library, Yale Law School.



Figure 16.
Justice, Giulio Romano (School of Raphael), 1520, detail of the ceiling of the Sala di Costantino, Vatican Palace, Vatican State.

Reproduced courtesy of the Library of Congress, Washington, D.C.

"an eye is portrayed" because "Plato said that Justice sees all and that, from ancient times, priests were called seers of all things."[131] Ripa posited that only one of his seven "Justices" was to sport a blindfold, as well as many other attributes, including an ostrich. A 1611 Padua edition explained:

> A woman dressed in white with bandaged eyes; in her right hand she holds a bundle of rods, with an axe, and in her left hand a fiery flame, together with these things she has an ostrich at her side, and holds a sword and scales.
>
> This is the type of Justice that is exercised in the Tribunal of judges and secular executors.
>
> She is wearing white because judges should be without the stain of personal interest or of any other passion that might pervert Justice, and this is also why her eyes are bandaged—and thus she cannot see anything that might cause her to judge in a manner that is against reason. The bundle of rods with the axe, used in ancient times in Rome to show . . . that justice must not be remiss in punishing wrongdoing but that justice must also not be precipitous . . .
>
> The ostrich teaches us that the things that come before justice, however intricate they may seem, must be tirelessly unraveled with a patient spirit, as the ostrich digests iron, that most durable material, as many authors recount.[132]

Ripa was not the first to put an ostrich on Justice, as a return to the Vatican murals of the early 1500s makes plain. In addition to the Virtues that Raphael painted for the *Stanza della Segnatura* that we showed above, Giulio Romano provided a large-scale Justice (Figure 16), [133] holding scales and an ostrich for the *Sala di Costantino* (Room of Constantine). Another well-known example is Luca Giordano's 1670 *Allegoria della Guistizia oppressa*, "Justice Disarmed."[134]

Scholars have various explanations for why an ostrich, seen in other renditions, was once a plausible attribute for Justice.[135] One possible source is the Egyptian *Ma'at* (Figure 10) who, as noted, was sometimes represented by an ostrich feather[136] or holding or forming scales on which a feather was

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131. RIPA, PADUA–1611, *supra* note 124, at 201.

132. This passage can be found in both the 1611, *id.* at 203, and the 1618, RIPA, PADUA–1618, *supra* note 124, at 188, editions from Padua under the description of Justice ("Giustitia").

133. Figure 16 is provided courtesy of the Library of Congress. Romano, who lived from 1499 to 1546 and was Raphael's student, was born in Rome. *See* FREDERICK HARTT, GIULIO ROMANO (1958); Frederick Hartt, *Raphael and Giulio Romano: With Notes on the Raphael School*, 26 ART BULL. 67, 80 (1944).

134. *See* RESNIK & CURTIS, *supra* note 2, at 78 fig.57.

135. *See* Liana de Girolami Cheney, *Giorgio Vasari's Astraea: A Symbol of Justice*, 19 VISUAL RESOURCES 283, 290 (2003).

136. PINCH, *supra* note 74, at 159-60.

weighted against an individual's heart.[137] Another connection comes from Christianity. Medieval texts mention ostrich eggs hanging from church vaults,[138] and Medieval lore posited that ostriches deserted their eggs, which hatched instead through the warmth of the sun. An aphorism attributed to Albertus Magnus proffered the link—that, if "the sun can hatch the eggs of the ostrich, why cannot a virgin conceive with the aid of the true sun?"[139] Under this line of interpretation, Guilio Romano's Vatican *Justice* has scales to represent the exacting nature of Justice and the bird to reference Christ's origins. Moving from theology to political economy, another explanation for the ostrich is that the powerful family of the Medicis used a diamond ring with three ostrich feathers, explained as demonstrating that the "bearer is eternally just, since ostrich feathers (believed all to be the same length) symbolized Justice."[140]

The ostrich is long gone as a sign of Justice, and the "fiery flame" and bundle of rods and axe (the fasces), which Ripa also commended, are uncommonly seen. But a "bandage" over the eyes (today's blindfold), which Ripa proposed be worn by only one of his seven Justices, has become familiar—as illustrated by the opening images of the Melbourne *Lady of Justice* (Figure 1), the 1961 *Justice* in front of Brazil's Supreme Federal Tribunal (Figure 3), and the 2002 *Lady Justice Lucy* (Figure 6).

While valorized today, the blindfold (as well as blindness) was, in earlier centuries, wholly negative. In Mesopotamia and Egypt, sun gods—the sources of light that enabled sight—were gods of justice.[141] Thereafter, the Greeks and Romans put a representation of the sun at the center of their zodiacs. Christianity embraced "sol Iustitiae"—Christ—as the God of Light, who will "appear ablaze when he will judge mankind."[142] Albrecht Dürer's rendition (Figure 17), circa 1499, puts scales and sword on the wide-eyed and haloed Christ-Justice, perched on a lion.[143]

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137. Virpi Harju, *The Artistic Faces of Justice*, *in* OIKEUDEN KUVA: BILDEN AV RATTEN OCH RATTVISAN 284 (2000) (translation provided by Kirsti Langbein).

138. *See* Creighton Gilbert, *"The Egg Reopened" Again*, 56 ART BULL. 252, 253 (1974); Millard Meiss, *Ovum Struthionis*, *in* STUDIES IN ART AND LITERATURE FOR BELLE DA COSTA GREENE 95 (Dorothy Miner ed., 1954).

139. Meiss, *supra* note 138, at 95 (discussing an egg in Mantegna's San Zeno altarpiece).

140. Francis Ames-Lewis, *Early Medicean Devices*, 42 J. WARBURG & COURTAULD INST. 122, 127-29 (1979). The three feathers, said to represent the three Theological Virtues of Faith, Hope, and Charity, were argued by others to come from a "moulting falcon," a symbol of the faithful. *Id.* at 129.

141. Egyptian ideology conceived of the "solar eye," or "Eye of Ra," and spoke of Ra as the "creator sun god." *See* PINCH, *supra* note 74, at 19, 68-69. The eye of Horus, or udjat eye, was described as sharing a significance represented by *Ma'at*, "that justice and harmony ruled once more." *See* ERIK HORNUNG, IDEA INTO IMAGE: ESSAYS ON ANCIENT EGYPTIAN THOUGHT 142-43 (Elizabeth Bredeck trans., 1992).

142. *See* THE COMPLETE ENGRAVINGS, ETCHINGS AND DRYPOINTS OF ALBRECHT DÜRER 52, no. 25, *Sol Justitiae*, or *The Judge* (Walter L. Strauss ed., 1972).

143. The photograph of the engraving in Figure 17, from the Fritz Achelis Memorial Collection and a gift of Frederic George Achelis, B.A. 1907, No. 1925.23, comes from the Yale University Art Gallery and is reproduced with its permission.



Figure 17. *Sol Iustitiae*, Albrecht Dürer, 1499-1500.

Provided and reproduced with the permission of the Fritz Achelis Memorial Collection, Yale University Art Gallery. Gift of Frederic George Achelis, B.A. 1907, No. 1925.23.

Such imagery is predicated on classical and biblical texts that repeatedly cast light as representing truth and darkness as misguidedness. In both the Hebrew Bible and the New Testament, blindness precluded a person's entry into holy areas. Likewise, blind animals could not be offered to the gods.[144] To be struck blind[145] was, in turn, a form of punishment imposed by God.

144. *Leviticus* 21:18 ("No man with a defect shall come, whether a blind man, a lame man, a man stunted or overgrown."); *Leviticus* 22:22 ("You shall present to the Lord nothing blind, disabled, mutilated, with running sore, scab, or eruption, nor set any such creature on the altar as a food-offering to the Lord.").

145. *Job* 11:20 ("Blindness will fall on the wicked.")

Moreover, when humans punished each other, they sometimes put blindfolds on their victims. Jesus himself was made sport of by being blindfolded, mocked, and beaten.[146]

As for the relationship between judgment and sight, according to Exodus, "bribery makes the discerning man blind and the just man give a crooked answer."[147] Job reads: "The land is given over to the power of the wicked, and the eyes of its judges are blindfolded."[148] Isaiah proclaims: "The prophets should be the eyes of the people, but God has blindfolded them."[149] These biblical lessons became fixtures in Medieval and Renaissance literature and art, which reiterated that bandaged, covered, or blindfolded eyes—as well as those who were physically blind—signified profound limitations.

Exceptions exist. Sightless seers dot Greek epics,[150] and both Homer and Milton provide conspicuous examples of visionaries whose insights came from sources other than their eyes.[151] Not only was the "bard . . . expected to be blind,"[152] but a few literary figures were ennobled by or compensated for their blindness.

Yet the dominant motif was that "blindness is indissolubly linked with distress."[153] That point was vividly made by two familiar fixtures in Medieval Europe, *Synagoga* and *Ecclesia*, found "on ivory tablets, in stained-glass windows, on church implements, in manuscript miniatures, and in monumental statuary,"[154] and readily comprehensible to all, "whether educated or illiterate."[155] Synagoga, "a purely Christian creation," was deployed to signify the Old Testament and, sometimes, Jews in general.[156]

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146. *Mark* 14:65 ("Some began to spit on him, blindfolded him, and struck him with their fists."). In earlier translations the phrase "cover his face" was used in lieu of the word blindfold. *See also Luke* 22:63 ("They beat him, they blindfolded him, and they kept asking him, 'Now, prophet, who hit you?'").

147. *Exodus* 23:8.

148. *Job* 9:24. In older translations available online, including the King James, Geneva, Rheims Douai, and others, the translation was "covereth the face."

149. *Isaiah* 29:10 (The Good News Bible with Deuterocanonicals/Apocrypha, Today's English Version). Again, the term was translated in earlier versions as "hath he covered."

150. *See* WILLIAM R. PAULSON, ENLIGHTENMENT, ROMANTICISM, AND THE BLIND IN FRANCE 1-9 (1987).

151. Natalie Kononenko-Moyle, *Homer, Milton, and Aşik Veysel: The Legend of the Blind Bard*, 3-4 HARV. UKRAINIAN STUD. 521, 521 (1979-80).

152. *See* MOSHE BARASCH, BLINDNESS: THE HISTORY OF A MENTAL IMAGE IN WESTERN ART 28-29 (2001); Kononenko-Moyle, *supra* note 151, at 521. "On His Blindness" reflected on the role that the loss of sight played in bending his "soul" to serve his "maker." *See* JOHN MILTON, *Sonnet XVI*, *in* COMPLETE SHORTER POEMS 327-28 (John Carey ed., 1971).

153. BARASCH, *supra* note 152, at 83.

154. WOLFGANG S. SEIFERTH, SYNAGOGUE AND CHURCH IN THE MIDDLE AGES: TWO SYMBOLS IN ART AND LITERATURE 96 (Lee Chadeayne & Paul Gottwald trans., 1970).

155. BARASCH, *supra* note 152, at 84.

156. MICHAEL CAMILLE, THE GOTHIC IDOL: IDEOLOGY AND IMAGE-MAKING IN MEDIEVAL ART 178 (1991). The name has various spellings, including Synagogue, Sinagogue, and others. Some depictions of Synagoga were aggressively hostile, reflecting antagonism toward Jews and the spread of anti-Semitism.

Ecclesia stood for the New Testament and, at times, Christianity.

The pair shown in Figure 18, crafted around 1230, remains in place on the south portal of the Strasbourg Cathedral,[157] near two areas (outside and indoors) that served in the thirteenth century "as courts of law," where marriages were ceremonialized, municipal laws determined, oaths taken, and tributes given.[158] Unlike that ramrod-straight, crowned, sharp-eyed, regal woman (*Ecclesia*, the "bride of Christ"), *Synagoga* is slumped and her rod broken. Her eyes are covered by a blindfold that was her "principal motif," demonstrating that she was blind to the "light" of Christianity.[159] Blindfolded, not blind, was the point, for the willful refusal to comprehend

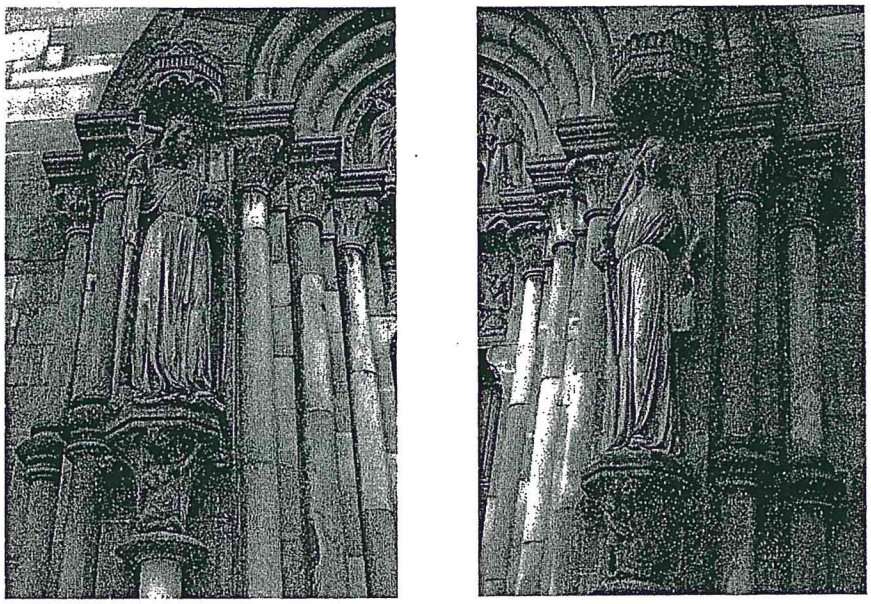


Figure 18. Personification of *Ecclesia* (left) and *Synagoga* (right), Strasbourg Cathedral, Strasbourg, France. Photographer: Rama, Dec. 15, 2006.

Reproduced with the permission of the photographer via Wikimedia Commons.

See Sara Lipton, *The Root of All Evil: Jews, Money and Metaphor in the Bible Moralisèe*, 1 MEDIEVAL ENCOUNTERS 301-22 (1995).

157. The two are "perhaps the most celebrated exemplars of their genre." *See* Nina Rowe, *Idealization and Subjection at the South Portal of Strasbourg Cathedral, in* BEYOND THE YELLOW BADGE: ANTI-JUDAISM AND ANTISEMITISM IN MEDIEVAL AND EARLY MODERN VISUAL CULTURE 179 (Mitchell B. Merback ed., 2008).

158. Bernd Nicolai, *Orders in Stone: Social Reality and Artistic Approach; The Case of the Strasbourg South Portal*, 41 GESTA 111, 112-13 (2002). Comparable sets of Ecclesia and Synagoga—in stone or on stained glass—from roughly the same period can be found at the Cathedrals of Rheims and of Bordeaux in France, as well in several German cathedrals, including in Bamberg, Magdeburg, and Worms, and in England at Lincoln, Salisbury, and Canterbury. The well-known figures on the west facade of the Cathedral of Notre Dame in Paris (near a door called the "Portal of the Last Judgment") are nineteenth-century versions, perhaps replicating earlier images.

159. SEIFERTH, *supra* note 154, at 29-32.

the "light of redemption"[160] could be remedied.[161]

Synagoga was not the sole embodiment of the harm that blindfolds imposed. Renaissance images placed a blindfold on Eros to mark the misguided nature of love, engendering foolishness and confusion.[162] Renaissance depictions of Fortuna—including illustrations in some versions of Ripa's *Iconologia*—often showed her blindfolded to denote irrationality and randomness.[163] Blindfolds also adorned images of executed criminals, shown hanging and disgraced.[164] The general negativity associated with blindfolds prompted Erwin Panofksy to conclude that, aside from a valorized blindness in Homer and in the blindfolded Justice (a "humanistic concoction of very recent origin"), blindness was "always associated with evil."[165]

B. The Polyvocal Blindfold: Foolish and Impartial Judges

Panofsky's suspicion of Justice's blindfold is borne out by turning to another important European image, *The Fool Blindfolding Justice* (Figure 19).[166] This woodcut, sometimes attributed to Albrecht Dürer,[167] was one of more than a hundred illustrations for the book *The Ship of Fools*.[168] Written by Sebastian Brant in 1494,[169] subsequently printed in many languages,[170] and full of "middle-class moralizing," the volume was popular through the seventeenth century.[171]

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160. BARASCH, *supra* note 152, at 79, 83. For example, Giotto showed Synagoga turning her head left toward darkness and away from the "light that is Christ in the Gospel of John." Laurine Mack Bongiorno, *The Theme of the Old and the New Law in the Arena Chapel*, 50 ART BULL. 11, 13-14 (1968).

161. *See* Nina Rowe, *Synogoga Tumbles, a Rider Triumphs: Clerical Viewers and the Fürstenportal of Bamberg Cathedra*, 45 GESTA 15, 26 (2006).

162. *See* Panofsky, *supra* note 126, at 95-128; Edgar Wind, *Orpheus in Praise of Blind Love*, *in* PAGAN MYSTERIES IN THE RENAISSANCE 53 (1968).

163. *See, e.g.*, RIPA, MASER EDITION, *supra* note 120, at 152.

164. Ambrogio Lorenzetti's *Allegory of Good Government* in Siena, discussed in RESNIK & CURTIS, *supra* note 2, at 25-30, provides one such example. RANDOLPH STARN, AMBROGIO LORENZETTI: THE PALAZZO PUBBLICO, SIENA 70-71 (1994). Shown is a blindfolded man hanging, with his coat blowing in the wind.

165. Panofsky, *supra* note 126, at 109.

166. The 1494 image of *The Fool Blindfolding Justice*, reproduced as Figure 19, was provided by the Beinecke Rare Book and Manuscript Library, Yale University.

167. The 1494 image of *The Fool Blindfolding Justice*, like the other illustrations in the volume, was not signed, and its attribution is debated.

168. *See* SEBASTIAN BRANT, THE SHIP OF FOOLS (Edwin H. Zeydel trans., 1944).

169. Brant, born in Strasbourg, had been a student at the University of Basel and did a doctorate in law before returning to Strasbourg to serve as "an active and respected legal advisor." Kathleen Wilson-Chevalier, *Sebastian Brant: The Key to Understanding Luca Penni's "Justice and the Seven Deadly Sins,"* 78 ART BULL. 238 (1996). An "imperial loyalist," Brant moved from Basel in 1501, after the city left the Holy Roman Empire and joined the Swiss Confederation. ZIOLKOWSKI, *supra* note 129, at 100.

170. *See* JOHN VAN CLEVE, SEBASTIAN BRANT'S *THE SHIP OF FOOLS* IN CRITICAL PERSPECTIVE, 1800–1991, at 85 (1993). A first edition in Latin was published in 1497, a Dutch-Flemish edition in 1500, and one in English in 1509. BRANT, *supra* note 168, at 24-31.

171. *See* Wilson-Chevalier, *supra* note 169, at 236-38. Erasmus is said to have found Brant



Figure 19 (left).
The Fool Blindfolding Justice, Albrecht Dürer, 1494, a woodcut illustrating Sebastian Brant's *Ship of Fools*, Basel, Switzerland.

Reproduced courtesy of the Beinecke Rare Book and Manuscript Library, Yale University.

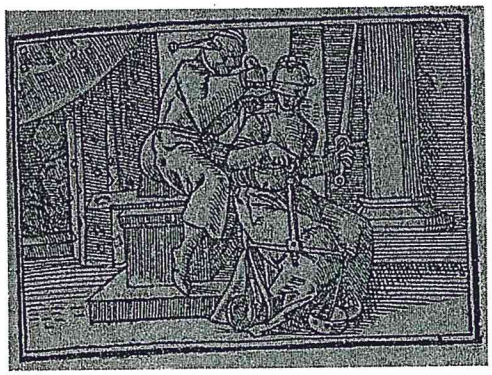


Figure 20 (right).
Stultifera navis mortalium, Sebastian Brant, 1572, Basel, Switzerland.

Reproduced courtesy of the Beinecke Rare Book and Manuscript Library, Yale University.

The Fool Blindfolding Justice accompanies a chapter entitled "Quarreling and Going to Court" with an italicized header, "He'll get much raillery uncouth / Who fights like children tooth for tooth / And thinks that he can blind the truth." The woodcut is one of the earliest images known to show a Justice with covered eyes.[172] The deployment was derisive (as Peter Goodrich's discussion in this Issue explores)[173] and the 1572 Basel edition (Figure 20) made the point all the more vivid by showing the Fool pushing Justice off her throne as he blindfolded her.[174] Indeed, a reader of *The Ship of Fools* can have no doubt that Brant, a noted lawyer and law professor, trained (as he said at the front of his book) in both civil and canon law, saw blindness as a fault. Brant made the point in his preface (warning against "folly, blindness, error, and stupidity of all stations and kinds of men"[175]), and the chapters that follow repeatedly equate blindness with sin, ignorance,

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"incomparable." *Id.* at 238. As Ziolkowski put it, few modern readers "would suspect that the work was favorably compared by its contemporaries to Homer's *Odyssey*." ZIOLKOWSKI, *supra* note 129, at 98.

172. BRANT, *supra* note 168, at ch. 71, 236-37 ("Quarreling and Going to Court"). Several identify this image as the first to add a blindfold to Justice. *See, e.g.*, WOLFGANG PLEISTER & WOLFGANG SCHILD, RECHT UND GERECHTIGKEIT IM SPIEGEL DER EUROPÄISCHEN KUNST 206-07 fig.340 (1988).

173. Peter Goodrich, *The Foolosophy of Justice and the Enigma of Law*, 24 YALE J.L. & HUMAN. 141, 156-57 (2012).

174. Figure 20, from Sebastian Brant, *Stultifera Navis Mortallum* (1572), is provided courtesy of the Beinecke Rare Book and Manuscript Library, Yale University and with the assistance of Mike Widener.

175. BRANT, *supra* note 168, at 57.

and mistakes.[176]

Various hypotheses have been advanced about why the blindfold gained currency in law and how its meaning shifted over time.[177] The once-hostile gesture of affixing a blindfold has been attributed to skepticism about law and judges in the context of both the Reformation and the Inquisition. Sebastian Brant's book portrayed the German legal system in disarray, plagued by local and foreign advocates able to manipulate lay judges who ought, instead, to be loyal to Roman written law.[178] In 1495, the year after the first edition of *The Ship of Fools*, Emperor Maximilian formally adopted Roman law,[179] and in 1507 the Bamberg Code was instituted in another effort to guide lay judges. It too had illustrations of blindfolded and dunce-capped judges,[180] leveling critiques parallel to that of Brant—that jurists needed eyes to follow the superior Roman statutory law rather than customary law.[181]

But Ripa's *Iconologie* offered an alternative reading of covered eyes

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176. *See, e.g.*, *id.* at 168 ("Blind justice is and dead indeed.").

177. For example, Kissel argued that the blindfold was emblematic of a growing separation of powers, whereas Christian-Nils Robert posited that the blindfold was bivalent, as a "gesture that is both madness and truth" ("un geste tout à la fois fou et vrai"). *See* CHRISTIAN-NILS ROBERT, LA JUSTICE: VERTU COURTISANE ET BOURREAU 88 (1993).

178. BRANT, *supra* note 168, at ch. 71, 236-37 (illustrated by *The Fool Blindfolding Justice*), provides the following verses:

> Now of that fool I would report
> Who always wants to go to court,
> And amicably end no suit
> Before he's had a hot dispute
> When cases would protracted be,
> And men from justice hide or flee. . . .
> A foreign speaker must be brought
> Imported here from far-off port,
> That he may well pervert the case
> And cheat the judges to their face.

179. STRAUSS, *supra* note 55, at 56-57, 65, 261-63.

180. In the illustration, reproduced by Kohler and Scheel at LXI from a 1507 edition, seven blindfolded jurists, including six lay judges, or "Schöffen" (who are all dressed the same), and one presiding judge or "Richter" (dressed differently to denote his higher status, as well as sitting in the place of honor and with a rod of office), are all wearing jesters' caps as well as blindfolds. The image, known as *The Tribunal of Fools*, includes a legend on the scroll shown above the heads that reads: "Out of bad habit these blind fools spend their lives passing judgments contrary to what is right." Another translation is: "To pass judgments repugnant to what is right and out of sheer bad habit, is the whole life of these blind fools." Ziolkowski, *supra* note 130, at 207.

181. *See* STRAUSS, *supra* note 55, at 56-95. The 1532 publication of the *Carolina* "obliged lay judges who were 'not learned, experienced, or practiced in our imperial laws . . . to seek counsel' in criminal matters 'at the nearest university, city, or other source of legal knowledge.'" *Id.* at 83 (quoting and translating Article 219 of the *Carolina*). Whether the local law was itself traditionally German or already reflected aspects of Roman law is debated, as Europe was a "mosaic" of many different versions of local practice. *See* Constantin Fasolt, *Hermann Conring and the European History of Law*, in POLITICS AND REFORMATIONS: HISTORIES AND REFORMATIONS (ESSAYS IN HONOR OF THOMAS A. BRADY, JR.) 113, 116-23 (Christopher Ocker, Michael Printy, Peter Starenko & Peter Wallace eds., 2007).

that renders positive the deliberate occlusion of sight—serving to buffer against, instead of being the source of, missteps. Justice's bandaged eyes (along with her white robes) showed no "stain of personal interest or of any other passion that might pervert Justice;" "thus she cannot see anything that might cause her to judge in a manner that is against reason."[182] Or, as a 1644 Dutch edition reads: "Her eyes are bound to show that the judge, in evaluating a given case, is not tempted away from using reason."[183]

In an Alciatus emblem, *The good Prince in his Council* (Figure 21),[184] its central figure can likewise be found (depending on the edition) with covered eyes; the explanation (given via a 1542 German version) was "that he may recognize no-one's status and . . . judge according to his council."[185] A French edition of 1536 put it slightly differently: "Their prince, deprived of his sight, cannot see anybody, and he judges by due sentence according to what is said in his ear."[186] In a world in which demands for law were multiplying, the blindfold marked that a judge was

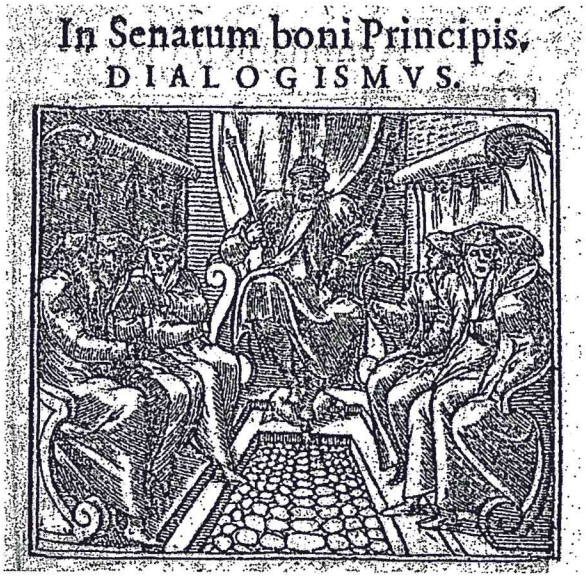


Figure 21. *The good Prince in his Council*, emblem from the *Complete Works of Andreas Alciatus*, vol. 4, 1582.

Reproduced courtesy of the Rare Book Collection, Lillian Goldman Law Library, Yale Law School.

182. RIPA, PADUA–1611, *supra* note 124.

183. DUTCH RIPA–1644, *supra* note 124, at 432; *see also* RIPA, MASER EDITION, *supra* note 120, at 120; 2 RIPA, RICHARDSON EDITION, *supra* note 124, at 21.

184. The image in Figure 21, from the Alciatus volume, appears courtesy of the Rare Book Collection of the Lillian Goldman Law Library at Yale Law School.

185. 2 ALCIATUS, DALY EDITION, *supra* note 123, at emblem 145 and motto (from the 1542 German).

186. *Id.* at emblem 145 & motto (from the 1536 French).

supposed to abstain from corrupt, self-interested dealing. Lutheran theology might also have provided justification, for truth was to come from inner light.[187] Moreover, the blindfold also protected the jurist through providing anonymity, thereby depersonalizing the imposition of violence entailed in legal sanctions. Rather than what the judge cannot see, the blindfold could be read to represent what disputants and the public cannot see.

As semioticians know well, the blindfold—now, as then—has no singular meaning. Elsewhere in Alciatus's work, blindness was shown to be a punishment. For example, in the emblem called "Just Vengeance," Ulysses puts his stake into the eye of the Cyclops and blinds him[188]—explained in the 1549 Italian version to demonstrate that the wrong-doer "may suffer bad things, since he caused them." Ripa likewise proffered a blindfold to exemplify the indiscriminate force of "Ambizione" (Ambition).[189] Ripa also proffered a blindfold for a man called "Errore" (Error), who—cloaked and with covered eyes—accompanied "Ignoranza" (Ignorance),[190] a female sometimes also blind; a lack of knowledge put them in "the shadows" rather than in the "light" of wisdom.[191] Peter Bruegel's *Justice*, circa 1559, which Bennett Capers engages in this Issue and about which we wrote in our book, wears a blindfold (as well as a headdress resembling that used by courtesans or dunces) as she stands in the midst of scenes of torture and mayhem.[192]

The double valence of the blindfold persists today. While many contemporary Justices, such as those shown at the outset, valorize the

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187. *See* OTTO RUDOLF KISSEL, DIE JUSTITIA: REFLEXIONEM ÜBER EIN SYMBOL UND SEINE DARSTELLUNG IN DER BILDENDEN KUNST 90, nn.155, 156 (1984); *see also* ZAPALAC, *supra* note 48, at 26-55. Martin Jay argued that the Reformation embraced the "Hebrew interdiction of images" as a way to "resist what Augustine had famously called the 'lust of the eyes,'" and thus made the blindfold no longer a sign of inferiority but a marker of "neutrality." *See* Martin Jay, *Must Justice Be Blind?*, *in* LAW AND THE IMAGE 19-21 (Costas Douzinas & Lynda Nead eds., 1999); *see also* ROBERT JACOB, IMAGES DE LA JUSTICE: ESSAI SUR L'ICONOGRAPHIE JUDICIARE DU MOYEN ÂGE A L'ÂGE CLASSIQUE 234-36 (1994). Yet, in addition to arguing that the "love of truth" to bring "light," *id.* at 90, Luther also wrote: "Therefore he must be quite blind, have his eyes and ears closed, neither see nor hear, but go straight forward in everything that comes before him, and decide accordingly." Martin Luther, *The Large Catechism*, *in* TRIGLOT CONCORDIA: THE SYMBOLICAL BOOKS OF THE EV. LUTHERAN CHURCH 565 (F. Bente & W.H.T. Dau trans., 1921). Further, "[W]hat kind of judge would he be who should blindly judge matters which he neither heard nor saw?" Martin Luther, *Secular Authority: To What Extent It Should Be Obeyed*, *in* MARTIN LUTHER: SELECTIONS FROM HIS WRITINGS 384 (John Dillenberger ed., 1962). Moreover, as we detail, various derisive or ambiguous examples of the blindfold can be found throughout Northern Europe. *See* RESNIK & CURTIS, *supra* note 2, at 69-75.

188. *Id.* at emblem 172 ("Just Vengeance").

189. RIPA, MASER EDITION, *supra* note 120, at fig.31; RIPA, PADUA–1611, *supra* note 124, at 14; 1 RIPA, PADUA–1618, *supra* note 124, at 37-39 (invoking Seneca).

190. FRENCH RIPA–1644, supra note 124, at 61; RIPA, PADUA–1611, *supra* note 124, at 146-47; 1 RIPA, PADUA–1618, *supra* note 124, at 145.

191. RIPA, PADUA–1611, *supra* note 124, at 240-41; 1 RIPA, PADUA–1618, *supra* note 124, at 206-07. In the RIPA, MASER EDITION, *supra* note 120, at 125, this transforms into "Incredulity," and the entry cites Ripa's 1603 version at 68 ("Cecità della Mente") and at 222 ("Ignoranza"). Another figure of Ignorance is a man with "bandaged eye" to denote a figurative "blindness to all matters of the intellect."

192. RESNIK & CURTIS, *supra* note 2, at 70-72 & fig.53; I. Bennett Capers, *Blind Justice*, 24 YALE J.L. & HUMAN. 179, 188-89 (2012).

blindfold, cartoonists regularly rely on a blindfolded Justice to denote injustice. In 1988, for example, the *Los Angeles Times* ran the Paul Conrad cartoon in which a Justice holds a coat hanger instead of scales to suggest the cruder methods used to induce abortions prior to the Supreme Court's recognition that abortion rights (invoked through the case named *Roe v. Wade*) were constitutionally protected.[193] Justice, if banning abortions, is rendered blind to the harm of the coat hanger abortions that would ensue.

C. Sight, Wisdom, Knowledge, and Judgment

Given the competing implications of blindfolds in the sixteenth century, how did a positive valence gain dominance and why does that attribute continue to attract attention? Beginning in the seventeenth century, law's applications proliferated in growing urban centers. At the same time, political theory, science, and technology became preoccupied with explorations about how information was gathered and processed. As theorists from various disciplines became quizzical about the nature of knowledge, authority, God, and truth, the valence of open eyes to denote unimpeded receipt of knowledge shifted. Epistemological doubt—about the import of facts, the uncertainty of recollection, the imperfect interpretation of law, the flaws of decisionmakers—contributed to anxiety about judicial failures. Sight was no longer unproblematic, as reflected in a range of commentary, from Descartes's admonition of the need to escape the confusion of the senses[194] to Goethe's comment that Justice was blindfolded "to avoid being dazzled by imposters."[195]

The prior equation of knowledge with sight weakened as science began to show that eyes could play tricks, and that new optical instruments could alter sight. The camera obscura gained currency in the sixteenth century,[196] followed around 1600 by the invention of the telescope and the microscope[197] and by interest in the idea of probability.[198] Philosophers puzzled over the Aristotelian hierarchy of the senses, in part through what is known as the "Molyneux Problem."[199] In 1694, John Locke asked what

193. *Alternative to Roe vs. Wade*, L.A. TIMES, Nov. 21, 1988, at II5.

194. *See* RENÉ DESCARTES, MEDITATIONS ON FIRST PHILOSOPHY WITH SELECTIONS FROM THE OBJECTIONS AND REPLIES 24 (John Cottingham trans., 1986) ("I will now shut my eyes, stop my ears, and withdraw all my senses.").

195. JOHANNN WOLFGANG VAN GOETHE, TASSO 46 (Robert David McDonald trans., 1994).

196. *See* JONATHAN CRARY, TECHNIQUES OF THE OBSERVER: ON VISION AND MODERNITY IN THE NINETEENTH CENTURY 26-53 (1990).

197. *See* MARJOLEIN DEGENAAR, MOLYNEUX'S PROBLEM: THREE CENTURIES OF DISCUSSION ON THE PERCEPTION OF FORMS 18 (Michael J. Collins trans., 1996).

198. *See* IAN HACKING, THE EMERGENCE OF PROBABILITY: A PHILOSOPHICAL STUDY OF EARLY IDEAS ABOUT PROBABILITY, INDUCTION AND STATISTICAL INFERENCE 9-12 (1975).

199. The name comes from William Molyneux, who put the problem to John Locke in 1688. *See*

a "Man born blind, and now adult, and taught by his touch to distinguish between a Cube, and a Sphere of the same metal" would see and know if able to regain sight: could he distinguish between a cube and a sphere on first sight?[200] Molyneux's problem was not only a heuristic device. Physicians of the eighteenth century were intervening to cure a form of blindness caused by cataracts.[201] Blindness, once a state of irredeemable "otherness,"[202] became a "subject of intense cultural interest"[203] in science, philosophy, and the arts.[204]

By the eighteenth century, the blindfold on Justice had shed its connections to Synogoga's failures to see the light of Christianity, to jesters made buffoons because they could not see, and to the condemned, blindfolded before execution. Instead, when placed on Justice, the blindfold was turned into a symbol of law's commitment to rationality and even-handedness. The depiction of a Justice whose vision was obscured came to represent some sought-after quality—a needed neutrality, inner wisdom, a lack of distraction, or incorruptibility. Justice, blindfolded, could also denote the triumph of positivism and of a commitment to rationality.[205]

By the nineteenth century, the blindfold gained a reputation for marking a new idea about the position of the judge—independence. Didactic imagery from the thirteenth through the sixteenth century aimed to make judges acutely aware of their subservience to God (by way of Last Judgment scenes) and to rulers (*The Judgment of Cambyses* is illustrative). Judges and rulers were once seen appropriately intertwined,

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MICHAEL J. MORGAN, MOLYNEUX'S QUESTION: VISION, TOUCH AND THE PHILOSOPHY OF PERCEPTION (1977); PAULSON, *supra* note 150, at 21-23. Molyneux, a member of the Irish Parliament who lived from 1656 to 1698, had a wife who was blind. MORGAN, *supra*, at 6.

200. JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING 146 (Peter H. Nidditch ed., 1975); MORGAN, *supra* note 199; PAULSON, *supra* note 150, 21-23. Arguing that understanding came from mixing sensory perceptions and analytic interpretation, Locke posited that a person could not, at first sight, make the judgment required to distinguish and name the two objects. LOCKE, *supra*, at 146-47. Locke and Molyneux assumed that sight would follow analysis, and focused on what ideas came with the presumed "full range of visual experience." MORGAN, *supra* note 199, at 7.

Yet that view of "knowledge of space and depth [as] built up out of an orderly accumulation and cross-referencing of perceptions on a plane independent of the viewer" was an eighteenth-century attitude assuming the senses to be an "adjunct of a rational mind;" in the nineteenth century, the world became seen as organized by "exchange and flux," where knowledge was "bound up in touch." CRARY, *supra* note 196, at 59-62.

201. In 1728, the surgeon William Cheselden published an article describing an account of his operation on a young man who had cataracts. DEGENAAR, *supra* note 197, at 52.

202. PAULSON, *supra* note 150, at 8-10, 26-32.

203. *Id.* at 3.

204. In 1749, Diderot published his *Lettre sur les aveugles à l'usage de ceux qui voient (An Essay on Blindness in a Letter to a Person of Distinction)*, which engages the Molyneux problem. MORGAN, *supra* note 199, at 27-28. Morgan also translates Diderot's "Letter." *Id.* at 31-58.

205. The earlier deployment of religious imagery (Last Judgments and the Crucifixion) may have served as a buffer from local authority. *See* Robert Jacob, *Le jugement de Dieu et la formation de la fonction de juger dans l'histoire européenne*, 39 ARCHIVES DE PHILOSOPHIE DU DROIT 87-104 (1995).

as Alciatus's sixteenth-century emblem (Figure 21) illustrates. The sightless presiding jurist (called the Prince, King, or Judge, depending on the translation) was to render judgment according to the advice of his council, a group of men all shown sighted.

The development of the idea that judges were deployed by, but sat somehow independent of, state power constituted a shift in political theory, often credited to Montesquieu's 1748 proposition that "there is no liberty, if the judicial power be not separated from the legislative and executive."[206] The related notion is that judges have the power to sit in judgment of the state, their own employer. A few famous "folktales of jurisdiction," as Robert Cover called them, can be found in biblical and common law narratives in which brave judges stood their ground against threats of tyrannical kings; those judges insisted on their own authority to speak "truth to power."[207]

Not until after the Enlightenment did such extraordinary confrontations come to represent a required facet of the judicial role, positioned at a critical distance from the state. Indeed, the term "state" was not normally used until around 1600, when it then referred to the powers within the exclusive purview of a small set of ruling elites.[208] Over the centuries and across polities, commitments to some degree of individual liberty and popular opinion undermined premises that kings were the only incarnations of sovereignty interests.[209] Conceptions of civil liberty came to entail limitations on the state, including governments ruled by monarchs.

In this "march to modernity" (to borrow Theodore Rabb's book title), sovereignty shifted; the eighteenth-century preamble of the American Constitution opened with the phrase "We the People of the United States." That document also specified an independent sphere for judges. Building on the English Act of Settlement of 1701, the United States Constitution of 1789 required in its text that judges, once appointed, were to keep their jobs "during good Behaviour" and were to receive salaries that could not be diminished while they served.[210] In the wake of these new understandings, the blindfold was read to mark not only judges' neutrality as between parties but also that judges were untethered from the government that employed them.

Yet, while the attributes of scales and sword are generally taken for

206. 1 BARON DE MONTESQUIEU, SPIRIT OF THE LAWS 181 (1748).

207. Robert Cover, *The Folktales of Justice: Tales of Jurisdiction*, 14 CAP. U. L. REV. 179, 190 (1985).

208. *See* THEODORE K. RABB, THE LAST DAYS OF THE RENAISSANCE AND THE MARCH TO MODERNITY 48-49 (2006).

209. *See* QUENTIN SKINNER, LIBERTY BEFORE LIBERALISM 61 (1998).

210. U.S. CONST. art. III, § 1.

granted, the blindfold continues to provoke commentary about what it denotes about the relationships among sight, knowledge, wisdom, judgment, and justice, and about law's particular role in those productions. From art to political theory, new perspectives on the mind and the eye undermined the plausibility and the desirability of judging from a singular vantage point. The cubism of twentieth-century art broke the linear planes of earlier conventions to offer, simultaneously, views from multiple angles. Deconstructionism objected to the hegemony of a single meta-narrative confidently promulgated by one authoritative voice. These intellectual shifts constituted, as Jonathan Crary explained, a "rupture with Renaissance, or *classical* models of vision,"[211] which had posited an objectivity that the multiplication of images and texts rendered palpably subjective. A "spectator" sits passive, while an "observer" produces as well as receives information. Observers are not, however, autonomous, nor are their eyes "innocent;"[212] "embedded in a system of conventions and limitations," they (and we) are situated to see "within a prescribed set of possibilities."[213]

Yet embeddedness poses yet other problems, making the distancing that blindfolds suggest appealing to some. John Rawls provides the leading example in his 1971 volume, *A Theory of Justice.* Rawls relied upon the heuristic of reasoning "behind a veil of ignorance" to put one into an "original position" that precluded knowledge about one's own class, social status, abilities, intelligence, life plan, or generational situation and of the surrounding social, economic, or political order.[214] Veiled, one could develop principles without knowing whether one was "advantaged or disadvantaged . . . by the outcome of natural chance or the contingency of social circumstances."[215]

But reasoning behind veils and blindfolds has critics, as the contemporary debate in the United States about the desirability of a "color-blind constitution" makes plain. When Justice Harlan put forth the term "color-blind" in 1896, he wrote in dissent, protesting the Supreme Court's approval of segregated railway cars. Harlan spoke of the "eye of the law" when he insisted that the United States was a place without caste; the country had no "superior, dominant, ruling class of citizens" because

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211. CRARY, *supra* note 196, at 3. The "collapse of the camera obscura as a model for the condition of the observer" meant that there was no longer a fixed place, but instead multiple points of view, no longer one fixed source of light, but vision as present in the perception. *Id.* at 137.

212. *Id.* at 95 (citing 15 JOHN RUSKIN, THE WORKS OF JOHN RUSKIN 27 (1906) and describing the "innocence of the eye" as "a sort of childish perception of these flat stains of color . . . as a blind man would see them if suddenly gifted with sight").

213. *Id.* at 5-6.

214. JOHN RAWLS, A THEORY OF JUSTICE 136-37 (1971).

215. *Id.* at 12.

the Constitution was "color-blind."[216]

At that time, "colored" referred to dark skin—hence the name chosen in 1909 by the National Association for the Advancement of Colored People (NAACP).[217] That point was made again in the 1920s when twelve lawyers met in Des Moines, Iowa and formed the National Bar Association, an organization of "practicing attorneys of the Negro race"[218] that sought to eradicate the second-class citizenship of "the American of Color."[219] In 1896, when Justice Harlan aspired that the law's "eye" be "blind," he knew that, were the law to "see," it would (and did) discriminate against dark-skinned peoples.

Only much later, and in part as critical race theorists explored social constructions of the meaning of race, did the idea develop that everyone has a "color"—whether white, black, or part of the "rainbow" in between.[220] Toward the end of the twentieth century, white students and white employees lodged what are called "reverse discrimination" claims; they argued that they, too, had been subjected to unfair treatment based on the color of their skin. In 2007, on behalf of a majority of five, Chief Justice Roberts adapted Justice Harlan's metaphor when holding invalid an affirmative action plan that had taken into account the races and ethnicities of schoolchildren so that the lower schools in Seattle, Washington, and St. Louis, Missouri, might be somewhat diverse.[221] That interpretation chose "blindness" to all skin colors, rather than taking into account the different histories of blacks and whites that the historic laws of slavery and segregation had produced.

An eloquent rejection of that position comes from a 1920s poem, *Justice*, by Langston Hughes:

> That Justice is a blind goddess
> Is a thing to which we black are wise.
> Her bandage hides two festering sores
> That once perhaps were eyes.[222]

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216. Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

217. August Meier & John H. Bracey Jr., *The NAACP as a Reform Movement, 1909-1965: "To Reach the Conscience of America,"* 59 J. S. HIST. 3, 9-10 (1993).

218. ELMER C. JACKSON JR. & JACOB U. GORDON, A SEARCH FOR EQUAL JUSTICE BY AFRICAN-AMERICAN LAWYERS: A HISTORY OF THE NATIONAL BAR ASSOCIATION 14-16 (1999).

219. *Id.* at xi (quoting an inaugural address by its president, Thurman L. Dodson).

220. *See generally* Margalynne J. Armstrong & Stephanie M. Wildman, *Teaching Race/Teaching Whiteness: Transforming Colorblindness to Color Insight*, 86 N.C. L. REV. 635 (2008).

221. Parents Involved in Community Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007). Chief Justice Roberts's opinion quoted from the *Plessy* opinion. *Id.* at 731. Justice Clarence Thomas's concurrence used the phrase "color-blind" several times. *Id.* at 772, 780, 782. The impassioned dissent by Justice Breyer argued that prior cases had not followed the version of color-blindness proposed by Justice Thomas but rather had attended to the "asymmetry between that which seeks to *exclude* and that which seeks to *include* members of minority races." *Id.* at 830.

222. Langston Hughes, *Justice*, *in* THE COLLECTED POEMS OF LANGSTON HUGHES (Arnold

First published in the *Amsterdam News* in 1923, Hughes's *Justice* was part of his 1932 collection, *Scottsboro Limited*.[223] The title refers to the convictions of nine black young men ("the Scottsboro Boys"), taken from a freight train, charged in Alabama courts, found guilty of raping two young white women, and sentenced to death in 1931.[224] Hughes sparked and joined a chorus of protests, both national and international, about their treatment. In 1937, Alabama released four of the nine.[225] Almost a half-century later, in 1976, Alabama's Governor George Wallace pardoned the last living defendant, then still in prison.[226]

In the 1970s, when some 130 black judges met in Atlanta, Georgia to form their own organization within the National Bar Association (founded for the advancement of black lawyers), they embraced Hughes's approach. That Judicial Council, dedicated to the "eradication of racial and class bias from every aspect of the judicial and law enforcement processes,"[227] picked as its motto: "Let us remove the blindfold from the eyes of American justice." For an emblem, they selected a depiction of Justice taking her blindfold off her eyes (Figure 22).[228] As the Honorable George W. Crockett, addressing that first convention, explained:

> Justice is supposed to be blind. It treats all individuals alike—rich or poor, black or white, male or female. Well, it's time to remove the blindfold that gives the illusion of fair treatment. We want to expose to the full glare of reality the inequities superimposed on that great but unrealized objective. We want to see its errors, to identify its prejudices and to expose those who would pervert just laws with unjust penalties.[229]

Rampersad ed., 1994). The poem, Copyright 1994 by the Estate of Langston Hughes, is used in *Representing Justice* with the permission of Alfred A. Knopf, a division of Random House Inc., and Harold Ober Associates (as required by Random House under grant 271977 (Feb. 2010)).

223. *See* JOSEPH MCLAREN, LANGSTON HUGHES: FOLK DRAMATIST IN THE PROTEST TRADITION, 1921-1943, at 33-40 (1997); HANS OSTROM, A LANGSTON HUGHES ENCYCLOPEDIA 195 (2002). Hughes republished *Justice* in 1938 in *A New Song*. There, the phrase "we black" in the second line of the poem became "we poor." *See* LANGSTON HUGHES, THE COLLECTED WORKS OF LANGSTON HUGHES, VOL. 1: THE POEMS, 1921-1940, at 133 (Arnold Rampersad ed., 2001).

224. *See* DAN T. CARTER, SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH 3-48, 166 (1979); Hugh T. Murray, Jr., *Changing America and the Changing Image of Scottsboro*, 38 PHYLON 82 (1977).

225. In 1948, one of those still incarcerated escaped from prison. Captured in 1950 in Michigan, that state's governor refused to return him to the South. Murray, *supra* note 224, at 85-86.

226. MCLAREN, *supra* note 223, at 34.

227. Gilbert Ware, *Proceedings: Founding Convention of the Judicial Council of the National Bar Association*, 20 J. PUB. L. 371, 371 (1971). By the late 1990s, more than 18,000 black lawyers, judges, legal scholars, and students were members of the National Bar Association.

228. The facsimile by Yale Press in Figure 22 is of the logo of the Judicial Council and is reproduced with the permission of the Honorable Michael Bagneris, 2006 Chair of the Judicial Council of the National Bar Association, and with the assistance of Maurice Foster of that organization. Our thanks to the Honorable Ulysses Gene Thibodeaux, Chief Judge, Court of Appeal, Third Circuit, State of Louisiana, for bringing this image to our attention and for his tireless efforts in making it available to us.

229. George W. Crockett, Jr., *Racism in the Courts*, 20 J. PUB. L. 375, 389 (1971).

From Ripa through this emblem, from Locke through Harlan, Frankfurter, and Roberts, the puzzles of sight's relationship to judgment remain. More than two centuries after the Molyneux Problem was first posed, theorists continue to probe the relationship of sight to conceptual thinking and to judgment.[230] Psychologists and behaviorists ponder concepts such as framing, heuristics, schema, and implicit biases[231] that shape what we purport to "know" and to "see."[232] Lawyers argue what evidence should be admitted into court, constitutional theorists debate what histories and practices are relevant to interpretation, and artists depict Justice sometimes as clear-eyed, sometimes with eyes shaded, sometimes with diaphanous blindfolds, and sometimes with eyes occluded.[233]

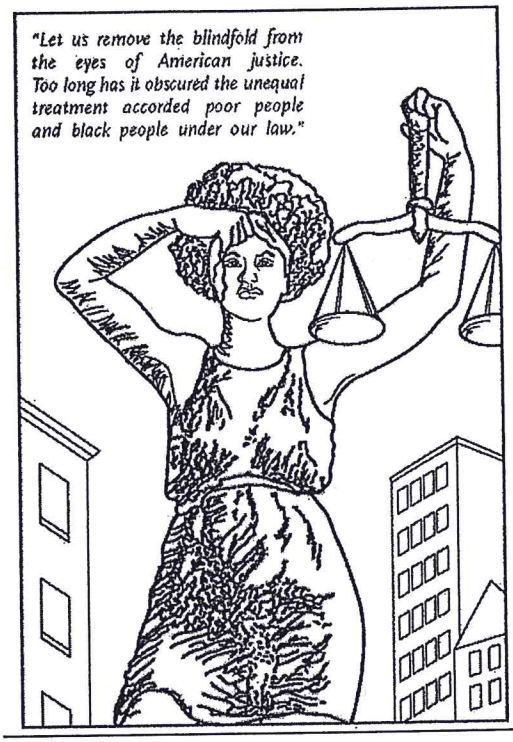


Figure 22.
Logo, Judicial Council of the National Bar Association, 1971.

Reproduced courtesy of the Judicial Council of the National Bar Association.

230. *See, e.g.*, Richard Held et al., *The Newly Sighted Fail To Match Seen with Felt*, 14 NATURE 551-53 (2011); Nicholas Bakalar, *Study of Vision Tackles a Philosophy Riddle*, N.Y. TIMES, Apr. 25, 2011, at D6. Contemporary studies make plain that "perception is not necessarily to be equated with the input from particular sense organs." MORGAN, *supra* note 199, at 207.

231. *See, e.g.*, HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT (Thomas Gilovich, Dale Griffin & Daniel Kahneman eds., 2002); Kristin A. Lane, Jason P. Mitchell & Mahzarin R. Banaji, *Me and My Group: Cultural Status Can Disrupt Cognitive Consistency*, 23 SOC. COGNITION 353 (2005).

232. Dan M. Kahan, David A. Hoffman & Donald Braman, *Whose Eyes Are You Going To Believe?* Scott v. Harris *and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837 (2009).

233. Examples, including a Justice with eyes shaded, by Joshua Reynolds, and a contemporary statue of a Justice tying or untying her own blindfold, by Diana Moore, are in RESNIK & CURTIS, *supra* note 2, at 99-101 & fig.71-75.

VI. IDENTITY, RIGHTS, AND REPRESENTATION

The logo of the Judicial Council provides a pivot for our discussion, as it is one of many examples of new Justice imagery shaped to take into account the meaning of democracy for courts. Kristin Collins maps how, during the late nineteenth and early twentieth centuries, Justice became an icon for feminists, insisting on legal rights to equality.[234] William Simon puzzles about what visual translations of the work of contemporary courts ought to be promoted, as he offers examples from manufacturing of collaborative product production.[235] And John Leubsdorf calls on us to consider representations and practices of justice outside of courtrooms.

Here we focus on what versions of Justice were seen, in the twentieth century, as appropriately iconic for courtroom use. As long as rulers ran the world, gaining authority from God, monarchy or oligarchy, they deployed images of their choice—be they Last Judgments, esteemed male jurists, classical narratives, or abstract Virtues shown as women. But as popular government shifted the procedure for selection of public commissions to committees of citizens, and as women and men of all colors gained juridical capacity as litigants, witnesses, staff and, eventually, as jurors, lawyers, and judges, decisions about what images ought to adorn courthouses became problematic.

A woman presented as Justice had to look like someone. No longer only a disembodied goddess serving as a vessel to legitimate authority, portrayals of Justice occasioned real debates about what kind of woman could serve as the embodiment of iconic Virtue and which were excluded. In the United States and elsewhere, conflicts have erupted about what has been displayed, with some depictions controversial at their inception and others becoming sources of distress decades later, when new rights holders looked at the walls and saw demeaning portrayals of persons they resembled.

Examples of the political pressures on Justice's visage come by way of four images discussed, briefly, below.[236] Two commissions were made by the United States Department of the Treasury, which, in the 1930s, was in charge of federal buildings and used funds from the Works Project Administration (WPA) to support art as well as architecture.[237] We turn next to two contemporary installations, produced through the United States General Services Administration (GSA), the entity now tasked with federal

234. Kristin A. Collins, *Representing Injustice: Justice as an Icon of Woman Suffrage*, 24 YALE J.L. & HUMAN. 191 (2012).

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

236. For fuller discussions and sources, see RESNIK & CURTIS, *supra* note 2, at 106-28.

237. *See* JONATHAN HARRIS, FEDERAL ART AND NATIONAL CULTURE: THE POLITICS OF IDENTITY IN NEW DEAL AMERICA (1995); MARLENE PARK & GERALD E. MARKOWITZ, DEMOCRATIC VISTAS: POST OFFICES AND PUBLIC ART IN THE NEW DEAL 5 (1984).

government buildings. Its Art-in-Architecture program authorizes set-asides of about one-half of one percent of the estimated construction costs of new federal buildings for public art,[238] awarded through a competitive process.[239]

A. A "Mulatto" Justice in South Carolina and an "Indian" Lynched in Idaho

In the 1930s, the federal government built a new courthouse and post office in Aiken, South Carolina, a town that had garnered national attention in the 1920s when a mob killed black teenagers after their convictions had been overturned by the South Carolina Supreme Court.[240] The government commission went to Stefan Hirsch, a successful artist based in the Northeast.[241]

Hirsch's mural, *Justice as Protector and Avenger* (Figure 23 and Color Plate 1), more than twelve by twelve feet, was installed in 1938 behind the judge's bench in a courtroom.[242] At the center is Justice, presented as an imposing figure, open-eyed, wearing a blue skirt and bright red shirt, hair drawn back in a bun, barefoot, and tanned. Some critics called the style cubist, while others saw social realism and the influence of the Mexican muralists with whom Hirsch had studied.[243] Hirsch explained that he created "a symbolic figure of 'Justice' with gestures indicating the meting out of justice to the deserving and the undeserving,"[244] and that his "gigantic

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238. *See generally* RESNIK & CURTIS, *supra* note 2, at 181-84; DONALD THALACKER, THE PLACE OF ART IN THE WORLD OF ARCHITECTURE (1980); John Wetenhall, *Camelot's Legacy to Public Art: Aesthetic Ideology in the New Frontier*, 48 ART J. 303, 304 (1989).

239. *See* U.S General Services Administration, Art-in-Architecture Program, 41 CFR Pt. 120, § 102.5, *available at* http://www.gsa.gov/portal/content/104456; *see also* Salik K. Ghandhi, *The Pendulum of Art Procurement Policy: The Art-in-Architecture Program's Struggle to Balance Artistic Freedom and Public Acceptance*, 31 PUB. CONT. L.J. 535, 552 (2002).

240. Meier & Bracey, *supra* note 217, at 9-10.

241. Hirsch, who was born in 1899 and died in 1964, taught at Bennington and Bard Colleges. Our discussion draws on GSA Archives, Public Building Services, Fine Arts Collection, 477, Stefan Hirsch [hereinafter GSA Archives/FA 477, Hirsch description], and on Stefan Hirsch & Elsa Rogo Papers, 1926-1985 (Boxes 1-3, 11) in the Archives of American Art, Smithsonian Institution, http://siris-archives.si.edu/ipac20/ipac.jsp?&profile=all&source=~!siarchives&uri=full=3100001~!216012~!0#focus (which we have corrected for obvious typographical and spelling errors), as well as from SUE BRIDWELL BECKHAM, DEPRESSION POST OFFICE MURALS AND SOUTHERN CULTURE: A GENTLE RECONSTRUCTION 15, 44-45 (1989); HAYES, *supra* note 15; KARAL ANN MARLING, WALL TO WALL AMERICA: A CULTURAL HISTORY OF POST OFFICE MURALS IN THE GREAT DEPRESSION 29, 50 (1982); and PARK & MARKOWITZ, *supra* note 237, at 61.

242. Our thanks to Susan Harrison, formerly of the Art-in-Architecture Program and to Kathryn Erickson and Erin Clay of the Collection of Fine Arts of the GSA for their generous help in obtaining historical materials and the photograph reproduced in Figure 23, courtesy of the Fine Arts Collection, United States General Services Administration. The Aiken building was subsequently named the Charles E. Simons Jr. Federal Courthouse after Judge Simons, who had served as the Chief Judge for the District of South Carolina from 1980 to 1986.

243. BECKHAM, *supra* note 241, at 45; *A Huge Cover-Up*, THE POST & COURIER, Apr. 12, 1996, at B4.

244. *Aiken: The Trial of "Justice,"* an information booklet related to the symposium New Deal Art Patronage in South Carolina, Sept. 20-21, 1990, South Carolina Humanities Council, in GSA Archives, FA

female figure" was "without any of the customary or traditional appurtenances of such symbolic representations (scale, sword, book . . .)"[245] Further, she was a "healthy, young person . . . clad in a simple garment . . . neither modish nor classical . . . . [T]he only allegory I permitted myself was to use the red, white and blue [of the United States flag] for her garments."[246]



Figure 23. *Justice as Protector and Avenger*, Stefan Hirsch, 1938, Charles E. Simons, Jr. Federal Courthouse, Aiken, South Carolina. *See also* Color Plate 1.

Reproduced courtesy of the Fine Arts Collection, United States General Services Administration.

477.

245. The correspondence between Hirsch and Forbes Watson, Advisor to the Section of Painting & Sculpture of the Treasury Department (and this letter of May 18, 1938) comes from the archival materials cited *supra* note 241.

246. *Id.* Hirsch added that he hoped his use of the colors of the flag was not "too obvious." *Id.*

That was not how others saw it. A local newspaper objected to the "barefooted mulatto woman wearing bright-hued clothing," while the sitting federal judge termed it a "monstrosity"[247]—a "profanation of the otherwise perfection" of the courthouse.[248] Within the month, the judge had "ordered that the mural be hidden with a cloth until it could be removed."[249]

As the GSA subsequently described, federal officials attributed the criticisms to "ignorance" but offered a "compromise"—that the artist would "lighten Justice's skin color and cover the mural while court was in session."[250] The mural was not, however, repainted. Although the judge, aided by South Carolina's Governor, sought removal, the denouement was a tan velvet curtain covering the imagery.[251]

This 1930s conflict about depiction is one of several making plain that certain figures could not pass, uncontested, into the deserving ranks of those who qualified to represent Justice.[252] Nor, in that era, could people labeled "mulattos" gain much protection from the courts as a matter of law. But fifty years later, long after the Supreme Court had decided *Brown v. Board of Education*, members of the Aiken community raised money to make the mural visible by relocating it to the Aiken County Judicial Center. Senator Strom Thurmond (who represented South Carolina in Congress from 1954 to 2003 and was once famous for his racist views) wrote to the GSA to support the move.[253] Conservators, however, deemed the mural too fragile to relocate, and it remains behind curtains. According to a local newspaper reporter writing in 2001, the mural was not displayed during court sessions because the "flamboyant green background and the vibrant clothes on Lady Justice" made the "power of the gavel pale." Instead, the curtains are parted and the mural shown only "by request."[254]

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247. PARK & MARKOWITZ, *supra* note 237, at 61. MARLING, *supra* note 241, at 64-65, quoted a newspaper as reporting that spectators objected that Justice "resembled a 'mulatto.'"

248. Matthew Boedy, *Controversy Shadows Mural*, AUGUSTA CHRONICLE, Aug. 26, 2001, at C2; *see also A Judicious Answer*, 10 ART DIG. 10 (1938).

249. GSA Archives, Public Building Services, Fine Arts Collection, FA 477 Stefan Hirsch [hereinafter GSA Archives].

250. *Id.*

251. MARLING, *supra* note 241, at 71.

252. Other examples—such as a Justice perceived to look like the "ruthless spirit of confiscation" and relegated to a corner in a courthouse in Newark, New Jersey—are provided in RESNIK & CURTIS, *supra* note 2, at 108-10.

253. GSA Archives, *supra* note 249.

254. Boedy, *supra* note 248, at C2.

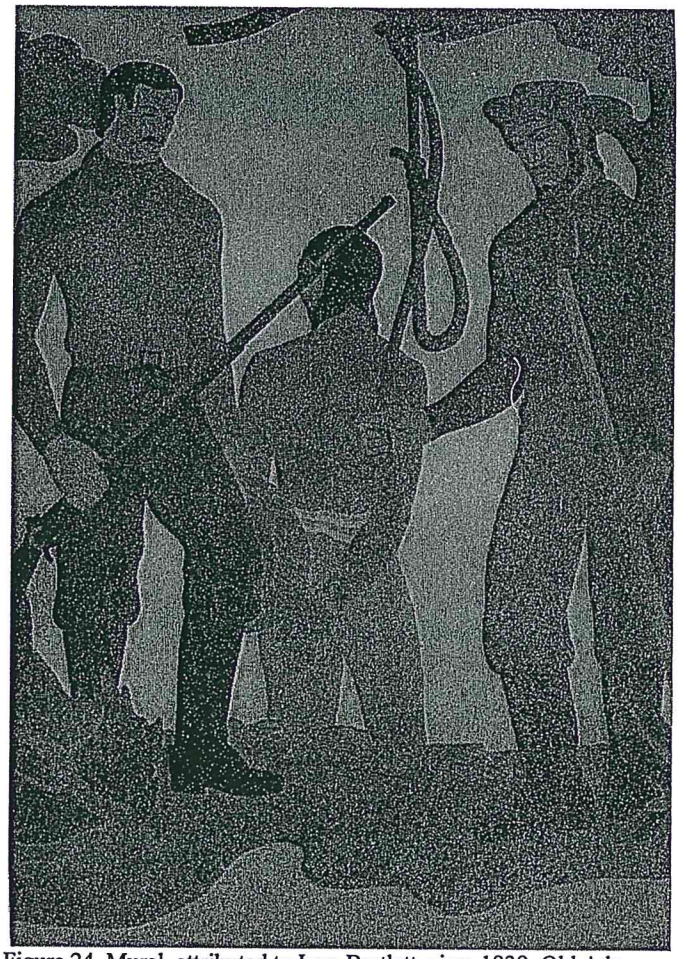


Figure 24. Mural, attributed to Ivan Bartlett, circa 1939, Old Ada Courthouse, Ada, Idaho. Photographer: Paul Hosefros, 2007. *See also* Color Plate 2.

Copyright: Paul Hosefros for Lemley International. Reproduced with the permission of the photographer.

Yet, at the same time that the "mulatto" Justice was covered as unsightly, another WPA mural, "depicting an Indian being lynched" (Figure 24 and Color Plate 2) was placed on the walls of the Ada County Courthouse in Boise, Idaho.[255] This image, showing an "Indian in buckskin breeches, on his knees with his hands bound behind his back . . . flanked by a man holding a rifle and another armed man holding the end of a noose dangling

255. Our thanks to Paul Hosefros and to Lemley International for providing us with the photograph for Figure 24 and permission to reproduce it. The design of the Ada Courthouse mural likely came from Ivan Bartlett, building on sketches from Fletcher Martin, and the murals were executed by various individuals. Diana Cammarota, *Courthouse Murals*, BOISE CITY REVUE, 2011, http://boisecityrevue.com/posts/courthouse-murals.

from a tree,"[256] was one of two dozen murals installed.

While some objections were raised at the time, largely on aesthetic grounds, it was not until late in the twentieth century when a judge in Idaho concluded that the imagery "would be offensive, and rightfully offensive, to some people" and ordered the mural draped with flags of the state and of the United States.[257] In 2006, when the Idaho State Legislature was using the building as its temporary residence, the question debated was whether the mural ought to be painted over, preserved as it was, or displayed with new educational explanations of past prejudices. In 2007, the state legislative committee, reportedly guided by the views of local Indian tribes, decided that the murals were to remain on view, framed by "official interpretive signs."[258] One state official explained: "They reflect our values at the time."[259]

Thus, unlike Aiken, where the government literally rendered the depiction invisible, officials in Idaho raised the possibility of conversation. Although the minutes of the Idaho legislature do not cite Michel Foucault, the

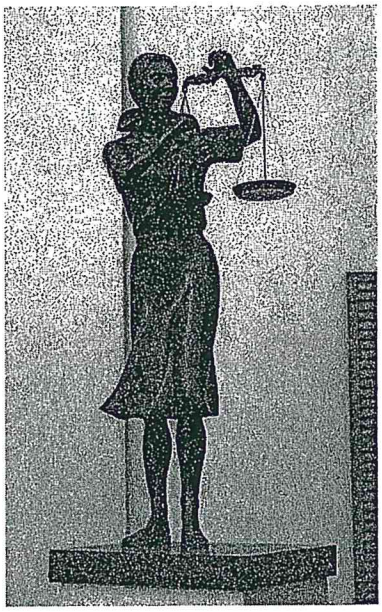


Figure 25. *Lady of Justice*, Jan R. Mitchell, 1993, Almeric L. Christian Federal Building, St. Croix, United States Virgin Islands. Photographer: Steffen Larsen. *See also* Color Plate 3.

Reproduced with the permission of the artist and the photographer and courtesy of the United States General Services Administration.

256. *See* John Miller, *Idaho Murals of Lynching Cause Debate*, N.Y. TIMES, Apr. 16, 2006 [hereinafter Miller, *Idaho Murals*]; *see also* John Miller, *Murals of Lynching Divide Officials*, DENVER POST, Apr. 13, 2006 [hereinafter Miller, *Murals of Lynching*]. Idaho papers reported criticism of the quality of the design and execution. *See Idaho Artist Believes Apathy Toward New Murals Justified*, IDAHO STATESMAN, July 4, 1940, at 10.

257. *See* John Miller, *Criticized Murals Hang in Courthouse*, CASPER STAR-TRIBUNE, May 15, 2005 (quoting then Chief Justice Gerald Schroeder, who had ordered the draping when a district judge).

258. Miller, *Idaho Murals*, *supra* note 256.

259. John Miller, *Indian Leaders View Murals of Lynching*, CASPER-STAR TRIBUNE, Jan. 19, 2007. As of 2011, the building, closed, was under consideration for renovation as a library. Cammarota, *supra* note 255.

outcome—displaying murals of lynching—opens up a way to glimpse gaps between law's claims to authority and its practices through seeing what the state once thought appropriate for courthouse display.[260]

B. Skin Color and Abstraction

During the second half of the twentieth century, the GSA took over the building projects of the United States and, as noted, developed the Art-in-Architecture program. GSA archives of decisions permit us to learn that, as of 2009, federal commissions had produced one artistic rendering of a nonwhite Justice, *Lady of Justice* (Figure 25 and Color Plate 3).[261] The statue, by Jan Mitchell, an artist resident of St. Croix, was installed in 1993 at the door of the federal courthouse in the Virgin Islands,[262] a territorial possession of the United States, bought in 1917.[263] Of the 110,000 people who live in the U.S. Virgin Islands, about three quarters are black, and many



Figure 26. *Moco Jumbie*, Jan R. Mitchell, 1993. Photographer: Steffan Larsen.

Reproduced with the permission of the artist and the photographer.

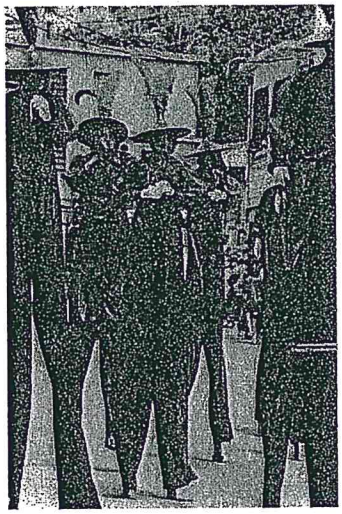


Figure 27. *Mystical Mocko Jumbies*, United States Virgin Islands Carnival, 1997. Photographer: Robert W. Nicholls, University of the Virgin Islands.

Reproduced with the permission of the photographer.

260. FOUCAULT, *supra* note 3, at 8.

261. Our thanks to artist Jan Mitchell, to photographer Steffen Larsen, and to the Mitchell-Larsen Studio for information obtained through an interview on Feb. 24, 2007, for providing us with the photographs of *Moco Jumbie* (Figure 26), *Reaching Man* (Figure 28), and *Lady of Justice* (Figure 25), and for permission to use them; to Susan Harrison for suggesting this avenue of research; to the U.S. General Services Administration for reproduction permissions; and to the Honorable Anne E. Thompson of the U.S. District Court of New Jersey for additional pictures of the courthouse, its imagery, and the artist.

262. The courthouse is named after Almeric L. Christian, who served as Chief Judge of that court.

263. Robert W. Nicholls, *The Mocko Jumbie of the U.S. Virgin Islands: History and Antecedents*, 32 AFRICAN ARTS 48, 94, n.1 (1999).

are descendants of slaves brought from Africa and emancipated in 1848.[264]

While Mitchell's *Lady of Justice* is innovative in bringing a dark-skinned Justice into view in a federal courthouse, Mitchell's completed work is wholly different from what she had originally proposed.[265] The figure was selected in lieu of two gritty alternatives proffered by the artist to evoke the Virgin Islands' ties to African history and the struggles for freedom by enslaved Africans.

Mitchell had first suggested a nine-foot-tall bronze statue (Figure 26) based on an island legend of "Moco Jumbie," an African folklore figure that had a special connection to the Virgin Islands.[266] Moco Jumbies are "thought to bring good luck and bestow beneficence,"[267] descending from trees to assist distressed islanders. Figure 27, an evocative photograph by Robert Nicholls, was taken in 1997 during the Virgin Islands Carnival,[268] where such figures had been portrayed since the eighteenth century. Like the Renaissance Prudence (seen in Figure 13) shown with a mirror and sometimes a second face looking backward, Moco Jumbies can "metaphorically . . . see what is happening both in the present and in the future."[269]

But, according to GSA records, the "District Court family" thought that putting a statue of a Moco Jumbie outside of its court would be "unsuitable as a symbol of justice." While "definitely Caribbean," the "jester of sort" had a name associated with mockery and the courthouse was a place for the community to "look for fair play and justice, tempered with

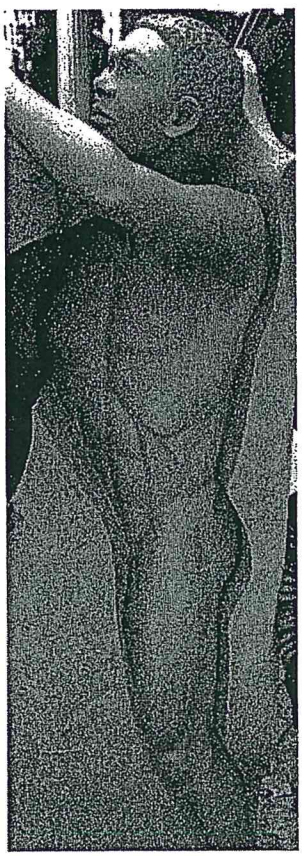


Figure 28. *Reaching Man*, Jan R. Mitchell, 1991. Photographer: Steffen Larsen.

Reproduced with the permission of the artist and the photographer.

264. *Id.* at 48.

265. This discussion is drawn from GSA Archives, Public Building Services, Fine Arts Collection, AA 208 Mitchell, and materials provided to us by Jan Mitchell [hereinafter GSA Archives, AA 208].

266. The term is variously spelled, as Mocko Jumbie or Moko Jumbie.

267. Nicholls, *supra* note 263, at 54.

268. The 1997 photograph in Figure 27, taken by Robert Nicholls at the Virgin Islands Carnival, is used with his permission and is also found in his article on the subject.

269. Nicholls, *supra* note 263, at 54.

mercy—hardly a place for clowning or jesting."[270] The proposal was rejected despite local protests ("Moko Jumbie: No Mockery of Justice"[271]) and discussions of how use of the figure would be a "reclamation by the oppressed of a measure of justice"[272] because plantation owners had prevented slaves from observing their religions and relegated the figure to carnivals.

Mitchel then proposed *Reaching Man* (Figure 28), a bare-chested man shown struggling to free himself from the block in which he was sculpted, to symbolize the Islanders' "struggle for freedom."[273] But the local committee preferred what was then called *Market Woman* and is now *Lady of Justice*. This Justice stands, in bronze, six feet tall and on a pedestal outside the courthouse doors. Her shirt is open-collared, and on her feet are sandals. She has no sword, and her hair is mostly covered in a bandana-like scarf, with a few curls visible. Comments from selection committee members noted that she reflects the role of women in the family and served as a representative of "the culture."[274] Those descriptions suggest that the mix of classic Justice iconography and darker skin was made comfortable through associations with roles, such as service providers and caretakers, once assigned specially to black women.[275]

Our other example of contemporary courthouse commissions comes from Boston where, in the early 1990s, the architect Henry Cobb was selected to design a new courthouse for the federal appellate and trial courts that sit in Boston, Massachusetts. His enthusiasm for creating a special building was shared by Douglas Woodlock, a judge on the district court, deeply engaged—as his essay *Communities and the Courthouses They Deserve. And Vice Versa.* illustrates[276]—with public architecture. Woodlock was joined by Stephen Breyer (then on the Court of Appeals for the First Circuit before his appointment to the United States Supreme Court) and likewise

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270. Memorandum from the Clerk of the District Court of the Virgin Islands (around May 1991), GSA Archive, AA 208, *supra* note 265.

271. *Letter from Shirryl Hughes*, ST. CROIX AVIS, July 11, 1991, at 6, 27, *in* GSA Archives, AA 208, *supra* note 265.

272. *STX Courthouse Sculpture is Cultural Link*, VIRGIN ISLANDS BUS. J., Aug. 12-25, 1991, *in* GSA Archives, AA 208, *supra* note 265.

273. GSA Archives, AA 208, *supra* note 265.

274. Artist Proposal Meeting, *in id.*

275. *See, e.g.*, Regina Austin, *Sapphire Bound!*, 1989 WIS. L. REV. 539.

276. *See* Douglas P. Woodlock, *Communities and the Courthouses They Deserve. And Vice Versa.*, 24 YALE J.L. & HUMAN. 271 (2012) [hereinafter Woodlock, *Communities*]; *see also* Douglas P. Woodlock, *Drawing Meaning from the Heart of the Courthouse*, *in* CELEBRATING THE COURTHOUSE: A GUIDE FOR ARCHITECTS, THEIR CLIENTS, AND THE PUBLIC 155-67 (Steven Flanders ed., 2006) [hereinafter CELEBRATING THE COURTHOUSE]; Douglas P. Woodlock, *The "Peculiar Embarrassment": An Architectural History of the Federal Courts in Massachusetts*, 74 MASS. L. REV. 268, 268-278 (1989).

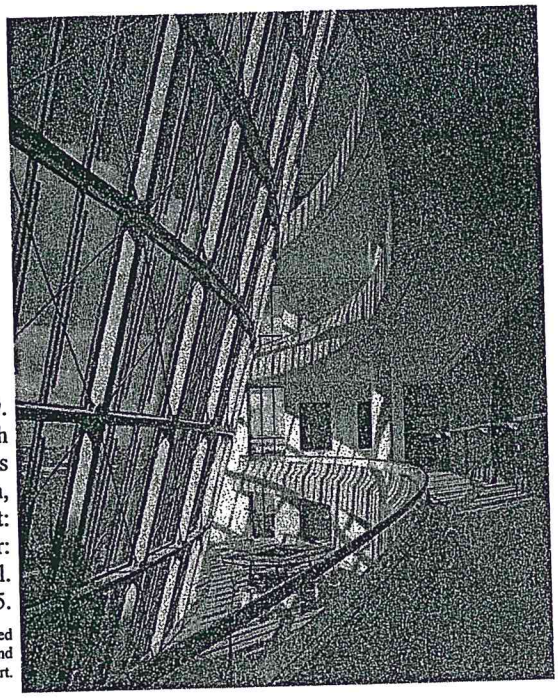


Figure 29. The Great Hall, John Joseph Moakley United States Courthouse, Boston, Massachusetts, 1998. Architect: Henry N. Cobb. Photographer: Steve Rosenthal. *See also* Color Plate 5.

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focused on the project of public architecture and courtroom access.[277]

Cobb, Woodlock, and Breyer took as their model a one-room courthouse in Virginia that, in 1735, had been "the center of its community."[278] The result, opened in 1998, is a ten-story building with twenty-seven courtrooms supported by "three quarters of a million square feet of bureaucratic support space."[279] A huge conoidal section of glass forms one wall of the courthouse, emblematic (in the architect's words) of the building as "open and accessible to all," yet also distinct and separate from "everyday life of the street."[280] The glass wall (in Figure 29 and Color Plate 5) dominates the public space by sheltering an atrium that permits views of seven stories.[281]

The art commission went to Ellsworth Kelly, who created *The Boston Panels*, twenty-one aluminum and enamel panels of varying colors (Figure

277. *See, e.g.*, Stephen G. Breyer, *Foreword* to CELEBRATING THE COURTHOUSE, *supra* note 276, at 9-12. Our thanks to Stephen Breyer, Douglas Woodlock, Henry Cobb, Steve Rosenthal, William Young, Nancy Gertner, Ellsworth Kelly, and Robert Campbell, all of whom helped us to understand the form and function of this courthouse.

278. *See* Henry N. Cobb, Third Lecture in the N.Y. Court of Appeals Lecture Series, The Shape of Justice: Law and Architecture (Nov. 16, 2006), *in* an unpaginated monograph published by the Historical Society of the Courts of New York and the Court of Appeals of the State of New York (2007).

279. *Id.*

280. *Id.*

281. Thanks to Steve Rosenthal for permission to reproduce his photographs (Figures 29, 30 & 31) of the court's interior and to Ellsworth Kelly for his permission, as well as to the Boston Courthouse, the GSA, and Judge Woodlock for facilitating the use of these images.

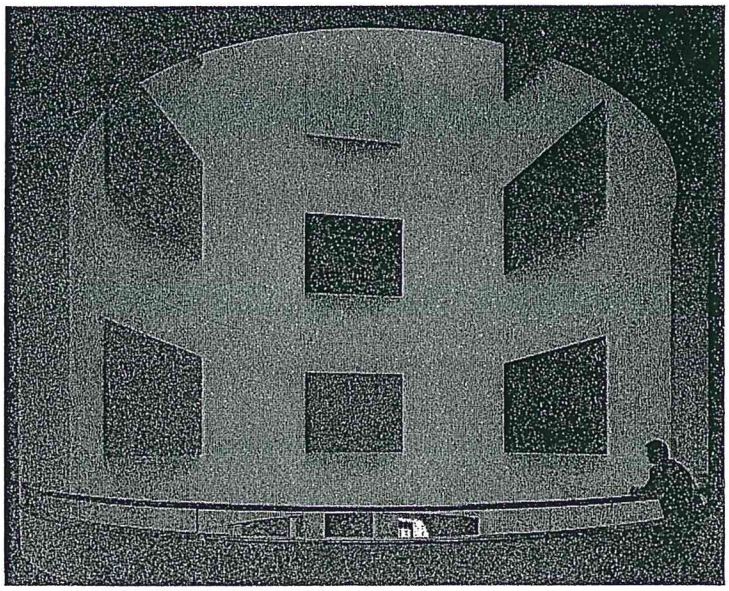


Figure 30. *The Boston Panels*, Ellsworth Kelly, 1998, John Joseph Moakley United States Courthouse, Boston, Massachusetts. Photographer: Steve Rosenthal. *See also* Color Plate 4.

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30 and Color Plate 4) intended to function as a single work of art.[282] The nine horizontal panels in the central rotunda are about eleven feet by thirteen and a half feet. The verticals, about the same height and seven and a half feet wide, hang in pairs at the ends of the hallways on several floors.

Kelly explained that *The Boston Panels* were themselves governed "by measure and balance."[283] In this Issue, Judge Woodlock sees *The Boston Panels* as an "invitation to future litigants, lawyers, jurors, and judges to inscribe their own meanings on the walls of the courthouse."[284] In his commentary here, Brian Soucek rejects such a privatizing reading by arguing that the *Panels*' beauty provides the "rapture of seeing" that valorizes the authority of the observer.[285] Soucek argues that Kelly's insistent visuality is a counterpoint to judge-centric imagery and is, therefore, particularly apt for courthouses, constitutionally mandated to be

282. *See* GSA, *The Boston Panels, Ellsworth Kelly, U.S. Courthouse* and General Services Administration, U.S. Courthouse, Boston, MA, The Artwork, *in* GSA Archives, Public Building Services, Fine Arts Collection, AA 283 Kelly.

283. *See* Christine Temin, *Court of Many Colors: Ellsworth Kelly Installs a Major Commission in the City Where He Got His Art Start*, BOSTON GLOBE, Sept. 16, 1998, at C1, C8.

284. Woodlock, *Communities*, supra note 276, at 283-84.

285. Brian Soucek, *Not Representing Justice: Ellsworth Kelly's Abstraction in the Boston Courthouse*, 24 YALE J.L. & HUMAN. 287 (2012).

open and committed to public "viewing" as a "civic virtue."[286] David Rosand reads the "chromatic neutrality of black" at the center of the nine panels to symbolize "the legal neutrality of judgment," and proffers that Kelly's abstraction of values provides an "eloquent model for the moral vision of the twenty-first century."[287]

Ellsworth Kelly's monochromes also avoid the questions of what Justice might, could, or does look like.[288] In the 1930s, federally funded arts programs had avoided abstraction,[289] preferring "representational" to "nonrepresentational" art.[290] What the WPA formerly considered avant-garde (read "foreign" and "Russian") is, ironically, now a conservative response to the complexity of Justice iconography in democracies.

VII. CAMP JUSTICE AT GUANTÁNAMO BAY AND PRIVATE COURTS

The move to abstraction is not unique to courthouses avoiding positing any one visage as the embodiment of Justice. During the twentieth century, representational and allegorical imagery lost its prominence, and technology multiplied the visuals competing for attention. Justice iconography was eclipsed by designer buildings, the product—as Norman Spaulding also maps[291]—of the professional authority of architects, lawyers, and judges, as well as the need to meet expanding rights to court services and legal commitments to certain forms of process. Kim Scheppele's contribution—*Judges as Architects*—explores the "deeply symbolic—and homologous—relationship between law and architecture,"[292] while we focus on how courthouses came to replace Justice personifications to serve not only as icons for justice but as markers of government more generally.[293]

Eighteenth- and nineteenth-century constitutions created substantive

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286. *Id.* at 304.

287. David Rosand, *The Color of Justice and Other Observations: A Response*, 24 YALE J.L. & HUMAN. 305, 307 (2012).

288. Minutes from the committee's considerations of other artists included comments by committee members that some were "too partisan" or would highlight "one culture." Draft Artist Selection Meeting Minutes, Oct. 21, 1993, at 2, *in* GSA Archives, AA 283, *supra* note 282. According to one participant, our essay, Dennis E. Curtis & Judith Resnik, *Images of Justice*, 96 YALE L.J. 1727 (1987), had affected their view that the symbolism associated with justice had become popularized to a degree that diluted its meaning. *See* Honorable Douglas Woodlock, Comments at the Symposium on the Art and Architecture of Civic Buildings, U.S. Courthouse, District of Massachusetts 5-6 (Sept. 24, 1998).

289. HARRIS, *supra* note 237, at 169 n.51.

290. *Id.* at 25.

291. *See* Norman W. Spaulding, *The Enclosure of Justice: Courthouse Architecture, Due Process, and the Dead Metaphor of Trial*, 24 YALE J.L. & HUMAN. 311 (2012); *see also* LINDA MULCAHY, LEGAL ARCHITECTURE: JUSTICE, DUE PROCESS AND THE PLACE OF LAW (2010).

292. Kim Lane Scheppele, *Judges as Architects*, 24 YALE J.L. & HUMAN. 345, 349 (2012) (emphasis omitted).

293. *See* RESNIK & CURTIS, *supra* note 2, at 134-82.

entitlements to courts.[294] Twentieth-century equality movements made all persons entitled to claim those rights, producing new demands for adjudication. Just as egalitarian norms make Justice representation problematic, they likewise pose difficulties for the delivery of court services. Aspirations for what courts ought to provide are encapsulated in a description, provided by Justice Breyer, about why good public buildings for courts are so important.

> A court, unlike a government agency, deals not with the public en masse but with the individual citizen who appears before it. It devotes as much time and attention to that individual's specific problem as the problem requires. In this modern age, when people fear government's dehumanizing tendencies, it is particularly important to emphasize that the judicial branch of government treats each citizen before it not as a member of a group but as a separate human being with a right to call upon the court's considerable resources to resolve his or her specific dispute with whatever effort that may take.[295]

That right is not only challenged by the volume of claimants but also by arguments that the public, labor-intensive, processes of adjudication are expensive, overly adversarial, and insufficiently generative. At the outset, we flagged the number of filings (fifty million) in state courts, now facing acute financial problems. Millions of litigants cannot afford lawyers; in 2009, 4.3 million civil litigants were in California courts without lawyers, and 2.3 million were in the same position in New York.[296] Hazel Genn's discussion (focused on what civil justice is "for") details cutbacks in funding in England, where the government proposed the closing of 142 courthouses as it—and judges—counseled against the use of courts.[297]

Kim Scheppele argues that, during the twentieth century, architecture moved "from a modernist program of general social improvement through design, to a postmodernist program of professional eclecticism in which multiple messages are encoded in buildings."[298] Legal dispute resolution processes have followed a similar trajectory, shifting from a courtroom-centered, public display to a diverse set of activities, many of which are increasingly private. Fiscal crises have joined social and political critiques in prompting changes dismantling the signature features—independent

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294. Judith Resnik, *The Childress Lecture: Constitutional Entitlements to and in Courts: Remedial Rights in an Age of Egalitarianism*, 56 ST. LOUIS U. L.J. (forthcoming 2012); Resnik, *Fairness in Numbers*, *supra* note 5, at 82.

295. Breyer, *supra* note 277, at 11.

296. *See* Resnik, *Fairness in Numbers*, *supra* note 5, at 92-93.

297. Genn, *supra* note 18, at 413; *see* Owen Bowcott, *Cuts Threaten To Close 142 Courts*, THE GUARDIAN, Apr. 1, 2011.

298. Scheppele, *supra* note 292, at 377-78.

and protected judges welcoming all persons in dignified and equal treatment in a public forum—that have come in the twentieth century to mark institutions as courts.

That shift can be glimpsed with a few, final graphics. In new federal courthouses, courtrooms remain the centerpiece. Illustrative are the carefully designed rooms in the Boston Courthouse (Figure 31),[299] where, as Judge Woodlock explains, the "most prominent geometric feature . . . is repetition of encompassing circles" that underscore that courtroom activities are a "shared community undertaking;" each side of the courtroom is marked by arches of equal size behind the judge, the jury, and the public to make plain that all are "equally ennobled."[300]

In 1998, when that courthouse opened, a total of 142 civil and 48 criminal trials took place in the federal trial courts in Massachusetts.[301] The result was that about seven or eight trials were held per courtroom during the new courthouse's inaugural year.[302] Of course, trials are not the only proceeding for which courtrooms are used. Defendants who plead



Figure 31. Courtroom 1, John Joseph Moakley United States Courthouse, Boston, Massachusetts. Architect: Henry N. Cobb. Photographer: Steve Rosenthal.

Copyright: Steve Rosenthal, 1998. Reproduced with the permission of the photographer and courtesy of the court.

299. The photograph of the Boston Courthouse courtroom in Figure 31 is reproduced courtesy of the photographer Steve Rosenthal and with the permission of the court.

300. Woodlock, *Communities*, *supra* note 276, at 279-80.

301. *See* ADMINISTRATIVE OFFICE OF THE U.S. COURTS, 1998 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS 178 tbl.C-7 (1999), *available at* http://www.uscourts.gov/dirrpt98/c07sep98.pdf.

302. That estimate focused on federal district court trials in Boston, and not on cases heard in Springfield, Massachusetts, where trials could have taken place. *See infra* note 338, on the 2010 data that likewise includes both sites.

guilty must do so in open court; judges must sentence in public, and oral arguments and other hearings in civil cases take place in courtrooms. Yet, one study in the late 1990s found that federal courtrooms have their "lights on"—defined as in use for part of a day—about half of the time.[303]

The statistics on trial rates in Boston are illustrative of national trends. In 1962, on average, federal judges presided at thirty-nine trials a year; by 2002, "the average federal district judge presided over only about nine trials."[304] State courts have much higher levels of filing and of public proceedings; yet data from the states show a comparable pattern of declining numbers of trials,[305] and funding challenges have resulted in cutbacks in times when courts are open and staff available.

This occasion is not the one to map all the modes of change, their rationales, or their import.[306] Rather, we offer three representations of this transformation. Contrast the thoughtful and value-infused design of the Boston courtroom above with the alternative set of values displayed in our own cell phone contract (Figure 32), mailed to us several years ago. Provided are requirements that we waive our rights to court and to class actions (whether in court or in arbitration) and instead may only bring claims against the service provider individually and exclusively through a private arbitration process designated by the provider.[307] In 2011, a bare majority of the United State Supreme Court held that federal arbitration law makes such provisions enforceable, despite state court conclusions that such one-sided provisions were unconscionable.[308]

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303. *See* U.S. GENERAL ACCOUNTING OFFICE, COURTHOUSE CONSTRUCTION: BETTER COURTROOM USE DATA COULD ENHANCE FACILITY PLANNING AND DECISIONMAKING, GAO/GGD-97-39, at 2-3 (1997). The 1997 GAO study defined courtroom usage as "any activity" (including but not limited to trials) for any portion of the day and looked at sixty-five courtrooms in seven locations before concluding that courtrooms were in use about 54 percent of the days when courthouses were open. *Id.* at 10. The judiciary has since developed a different measure of use—"latent use"—to capture proceedings scheduled but cancelled. FEDERAL JUDICIAL CENTER, THE USE OF COURTROOMS IN U.S. DISTRICT COURTS: A REPORT TO THE JUDICIAL CONFERENCE COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT (2008).

304. Mark R. Kravitz, *The Vanishing Trial: A Problem in Need of a Solution?*, 79 CONN. BAR J. 1, 5 (2005). As Judge Kravitz noted, while the number of trials per judge had decreased, the length of trials had increased. *Id.* at 5-6.

305. Galanter, *supra* note 21, at 506-513; *see also* Brian J. Ostrom, Shauna M. Strickland & Paula L. Hannaford-Agor, *Examining Trial Trends in State Courts: 1976–2002*, 1 J. EMPIRICAL LEGAL STUD. 755 (2004).

306. *See* Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement Is Re-shaping Our Legal System*, 108 PENN ST. L. REV. 165 (2003); Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211 (1995).

307. This contract is typical of those provided. *See* Resnik, *Fairness in Numbers*, *supra* note 5, at 118-133.

308. *See* AT&T v. Concepcion, 131 S. Ct. 1740 (2011). Several other states had, like California, found this kind of provision unenforceable.

Your Cellular Service Agreement

Please read carefully
before filing in a safe place.

YOUR CELLULAR SERVICE AGREEMENT

This agreement for cellular service between you and [your] wireless [company] sets your and our legal rights concerning payments, credits, changes, starting and ending service, early termination fees, limitations of liability, settlement of disputes by neutral arbitration instead of jury trials and class actions, and other important topics. PLEASE READ THIS AGREEMENT AND YOUR PRICE PLAN. IF YOU DISAGREE WITH THEM, YOU DON'T HAVE TO ACCEPT THIS AGREEMENT.

IF YOU'RE A NEW CUSTOMER, THIS AGREEMENT STARTS WHEN YOU OPEN THE INSIDE PACKAGE OF ANY CELL PHONE YOU RECEIVED WITH THIS AGREEMENT .... IF YOU DON'T WANT TO ACCEPT AND BE BOUND BY THIS AGREEMENT, DON'T DO ANY OF THOSE THINGS. INSTEAD, RETURN ANY CELL PHONE YOU RECEIVED WITH THIS AGREEMENT (WITHOUT OPENING THE INSIDE PACKAGE) TO THE PLACE OF PURCHASE WITHIN 15 DAYS.

IF YOU'RE AN EXISTING CUSTOMER UNDER A PRIOR FORM OF AGREEMENT, YOUR ACCEPTING THIS AGREEMENT IS ONE OF THE CONDITIONS FOR OUR GRANTING YOU ANY OF THE FOLLOWING CHANGES IN SERVICE YOU MAY REQUEST: A NEW PRICE PLAN, A NEW PROMOTION, ADDITIONAL LINES IN SERVICE, OR ANY OTHER CHANGE WE MAY DESIGNATE WHEN YOU REQUEST IT (SUCH AS A WAIVER OF CHARGES YOU OWE). ... YOU CAN GO BACK TO YOUR OLD SERVICE UNDER YOUR PRIOR AGREEMENT AND PRICE PLAN BY CONTACTING US ANY TIME BEFORE PAYING YOUR FIRST BILL AFTER WE MAKE THE CHANGE YOU REQUESTED. OTHERWISE, IF YOU PAY YOUR BILL, YOU'RE CONFIRMING YOUR ACCEPTANCE OF THIS AGREEMENT. IF YOU DON'T WANT TO ACCEPT THIS AGREEMENT, THEN DON'T MAKE SUCH A CHANGE AND WE'LL CONTINUE TO HONOR YOUR OLD FORM OF AGREEMENT UNLESS OR UNTIL YOU MAKE SUCH A CHANGE. ...

Figure 32. Example of cellular phone contract, 2002.

INDEPENDENT ARBITRATION

INSTEAD OF SUING IN COURT, YOU'RE AGREEING TO ARBITRATE DISPUTES ARISING OUT OF OR RELATED TO THIS OR PRIOR AGREEMENTS. THIS AGREEMENT INVOLVES COMMERCE AND THE FEDERAL ARBITRATION ACT APPLIES TO IT. ARBITRATION ISN'T THE SAME AS COURT. THE RULES ARE DIFFERENT AND THERE'S NO JUDGE AND JURY. YOU AND WE ARE WAIVING RIGHTS TO PARTICIPATE IN CLASS ACTIONS, INCLUDING PUTATIVE CLASS ACTIONS BEGUN BY OTHERS PRIOR TO THIS AGREEMENT, SO READ THIS CAREFULLY. THIS AGREEMENT AFFECTS RIGHTS YOU MIGHT OTHERWISE HAVE IN SUCH ACTIONS THAT ARE CURRENTLY PENDING AGAINST US OR OUR PREDECESSORS IN WHICH YOU MIGHT BE A POTENTIAL CLASS MEMBER. (We retain our rights to complain to any regulatory agency or commission.) YOU AND WE EACH AGREE THAT, TO THE FULLEST EXTENT POSSIBLE PROVIDED BY LAW:

(1) ANY CONTROVERSY OR CLAIM ARISING OUT OF OR RELATING TO THIS AGREEMENT, OR TO ANY PRIOR AGREEMENT FOR CELLULAR SERVICE WITH US . . . WILL BE SETTLED BY INDEPENDENT ARBITRATION INVOLVING A NEUTRAL ARBITRATOR AND ADMINISTERED BY THE AMERICAN ARBITRATION ASSOCIATION ("AAA") UNDER WIRELESS INDUSTRY ARBITRATION ("WIA") RULES, AS MODIFIED BY THIS AGREEMENT. WIA RULES AND FEE INFORMATION ARE AVAILABLE FROM US OR THE AAA;

(2) EVEN IF APPLICABLE LAW PERMITS CLASS ACTIONS OR CLASS ARBITRATIONS, YOU WAIVE ANY RIGHT TO PURSUE ON A CLASS BASIS ANY SUCH CONTROVERSY OR CLAIM AGAINST US . . . AND WE WAIVE ANY RIGHT TO PURSUE ON A CLASS BASIS ANY SUCH CONTROVERSY OR CLAIM AGAINST YOU. . . .

(3) No arbitrator has authority to award relief in excess of what this agreement provides, or to order consolidation or class arbitration, except that an arbitrator deciding a claimarising out of or relating to a prior agreement may grant as much substantive relief on a non-class basis as such prior agreement would permit. **NO MATTER WHAT ELSE THIS AGREEMENT SAYS, IT DOESN'T AFFECT THE SUBSTANCE OR AMOUNT OF ANY CLAIM YOU MAY ALREADY HAVE AGAINST US OR ANY OF OUR AFFILIATES OR PREDECESSORS IN INTEREST PRIOR TO THIS AGREEMENT. THIS AGREEMENT JUST REQUIRES YOU TO ARBITRATE SUCH CLAIMS ON AN INDIVIDUAL BASIS.** In arbitrations, the arbitrator must give effect to applicable statutes of limitations and will decide whether an isue is arbitrable or not. In a Large/Complex Case arbitration, the arbitrators must also apply the Federal Rules of Evidence and the losing party may have the award reviewed by a panel of 3 arbitrators.

(4) IF FOR SOME REASON THESE ARBITRATION REQUIREMENTS DON'T APPLY, YOU AND WE EACH WAIVE, TO THE FULLEST EXTENT ALLOWED BY LAW, ANY TRIAL BY JURY. A JUDGE WILL DECIDE ANY DISPUTE INSTEAD;

(5) NO MATTER WHAT ELSE THIS AGREEMENT SAYS, IT DOESN'T APPLY TO OR AFFECT THE RIGHTS IN A CERTIFIED CLASS ACTION OF A MEMBER OF A CERTIFIED CLASS WHO FIRST RECEIVES THIS AGREEMENT AFTER HIS CLASS HAS BEEN CERTIFIED, OR THE RIGHTS IN AN ACTION OF A NAMED PLAINTIFF, ALTHOUGH IT DOES APPLY TO OTHER ACTIONS, CONTROVERSIES, OR CLAIMS INVOLVING SUCH PERSONS.

The poor visual quality of the document makes its own point. Just as readers of these pages are unlikely to delve into its provisions, those who find these clauses in packaging (or on job applications) are similarly unlikely to read the terms. The unreadability embodies their "unreadness," which is also economical. Reading is a waste of time because the provision is a "take it or leave it" clause, avoided only by not buying that phone service. Calling this document a "contract" is thus a misnomer, for it is neither bargained for nor subject to bargaining.[309] In this sense, the contract too is generally unseen, which is one of the reasons for its production here.

A second marker of contemporary dispute resolution shifts the focus from everyday consumer transaction to Guantánamo Bay, which, after the attacks on the United States on September 11, 2001, gained worldwide infamy as a prison for individuals detained by the United States. Initially, more than 750 persons were housed at Guantánamo; by the end of 2011, fewer than 175 remained.[310] Although President Barack Obama sought, in 2008, to close the detention facility,[311] members of Congress objected, and, as of the end of 2011, Congress has required that Guantánamo continue to house detainees and to serve as a site for decisions about their confinement.[312]

In an Executive Order issued in November of 2001, then President George W. Bush decreed that the status of Guantánamo detainees was to be determined by ad hoc processes organized under the Department of Defense.[313] In 2004, the United States Supreme Court ruled that the federal courts had jurisdiction to consider the legality of detention at Guantánamo[314] and that the constitutional guarantee of due process constrained the government's treatment of at least the detainees who were American citizens.[315] The executive branch has since set up various proceedings for detainees.

The procedures created bear some resemblance to administrative adjudication in the United States,[316] with methods to determine if detainees

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309. Arthur Allen Leff, *Contract as Thing*, 19 AM. U. L. REV. 131, 132 (1970); Resnik, *Fairness in Numbers*, *supra* note 5, at 127-133.

310. *Guantanamo: Ten Years On*, HUMAN RIGHTS WATCH, Jan. 6, 2012, http://www.hrw.org/news/2012/01/06/guantanamo-ten-years.

311. Exec. Order No. 13,492, 74 Fed. Reg. 4,897 (Jan. 22, 2009).

312. *See* National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, 125 Stat. 1298 (2011).

313. *See* Military Order of Nov. 13, 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 16, 2001).

314. Rasul v. Bush, 542 U.S. 466 (2004).

315. Hamdi v. Rumsfeld, 542 U.S. 507 (2004).

316. *See, e.g.*, Paul Wolfowitz, Deputy Secretary of Defense, Order Establishing Combatant Status Review Tribunal [CSRT], July 7, 2004. The Military Commissions Act of 2006 gave a statutory basis to the CSRT. *See* 10 U.S.C. §§ 801, 948 (2006); 32 C.F.R. § 10.3 (2003); *see also*

are "unprivileged enemy combatants"[317] and to provide military commissions to "try" a small subset. But even as improved under the Obama Administration,[318] the Department of Defense does not rely on independent judges, standing outside the chain of military command, nor has it conceded that constitutional rights accorded the public and criminal defendants apply.[319] Closed-circuit television may be available but only at the option of the Defense Department, which also controls permission to enter the base through travel by air or sea.[320]

Thus, when eschewing both the regular federal court system (in which other terrorists had been tried since the 1990s) and military courts that have existed for decades, the Executive and Congress created an ad hoc, sui generis set of procedures that seek, in many respects, to gain legitimacy through invoking the imagery of courts. In addition to offering website images of courtroom-like setups and graphics of how rights at Guantánamo compare with those in courts, flags fly over a sign designating the site as "Camp Justice" (Figure 33) with the logo of the Office of Military Commissions (Figure 34),[321] echoing back to *Ma'at*, albeit substituting an eagle for a female with an ostrich feather in her cap. The seal is a variation on that of the Department of Defense, which is, in turn, a variation on the Seal of the United States.[322] In the Camp Justice version, the Defense

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Military Commissions Act of 2009, 10 U.S.C. §§ 948a-950t (Supp. III 2010).

317. The term in 2004 had been "enemy combatant," and in 2011 became "unprivileged enemy combatant." National Defense Authorization Act for Fiscal Year 2012 §§ 1031-32, Pub. L. No. 112-81, 125 Stat. 1298 (2011).

318. *See, e.g.*, Military Commissions Act of 2009.

319. *See id.* §949b(b) (amended by National Defense Authorization Act for Fiscal Year 2012 §1034(b)).

320. The Obama Administration policies replace more restrictive provisions. *Media Ground Rules for Guantánamo Bay, Cuba*, DEP'T OF DEF. (Sept. 10, 2010), http://www.defense.gov/news/d20100910groundrules.pdf; *see* JTF-GTMO Media Policy, Guantánamo Bay NAS, Cuba, as of June 2006.

321. The photographs of Camp Justice in Figures 33 and 34, taken in the fall of 2009 by Travis Crum (Yale Law School, 2011), are provided and reproduced with his permission.

322. Official seals are, in contrast, designed by the Institute of Heraldry of the United States. The Defense Department's Seal, approved in 1947, include the eagles "as an emblem of strength . . . defending the United States, represented by the shield of thirteen pieces . . . joined together by a blue chief representing Congress." *See Department of Defense Seal*, THE INSTITUTE OF HERALDRY, http://www.tioh.hqda.pentagon.mil/default.aspx (last visited Feb. 13, 2012).

The Seal of the United States also includes an eagle at its center with thirteen stars over its head, thirteen arrows (resembling a lictor rod) in one talon, and an olive branch in another. The original proposal, by "Dr. Franklin, Mr. J. Adams and Mr. Jefferson," called for the "Goddess of Liberty" and the "Goddess of Justice bearing a sword in her right hand and in her left a Balance." GAILLARD HUNT, THE SEAL OF THE UNITED STATES: HOW IT WAS DEVELOPED 5-6 (1892). The final design, adopted in 1789, included neither but did preserve two of their suggestions, "the Eye of Providence in the triangle, . . . and the motto *E pluribus unum*." *Id.* at 7.

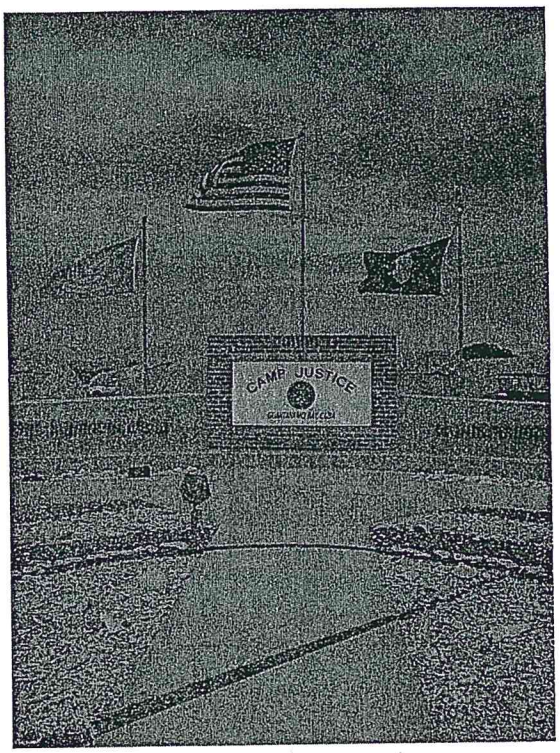


Figure 33. Camp Justice, Guantánamo Bay, 2009. Photographer: Travis Crum.

Reproduced with the permission of the photographer.



Figure 34. Logo, Department of Defense, Office of Military Commissions, 2009. Photographer: Travis Crum.

Reproduced with the permission of the photographer.

Department's eagle—with a shield of red, white, and blue, three arrows, and thirteen stars—is encircled at the top by the Department's name.

The imagery is (unwittingly or not) revelatory; the effort to dress Guantánamo Bay up as a court aims to bolster its legitimacy but placing a bird of prey with arrows at the center of the balance inside a pentagon reflects just how enclosed those at Guantánamo are. They are not accorded the same equal, public, and dignified treatment that became the rights of ordinary civil and criminal litigants in the twentieth century. And the words at the logo's bottom likewise underscore the distance; eschewed is the phrase ensconced at the top of the Supreme Court—Equal Justice for All—in favor of "Freedom through Justice."

One might well think of Guantánamo as isolated in both the literal and legal senses. But its procedures are not as foreign to contemporary decisionmaking as one might wish.[323] As Alexandra Lahav, Nancy Gertner, Norman Spaulding, and Hazel Genn's contributions detail,[324] reforms in U.S. courts and agencies, in England and elsewhere, similarly push away the public processes of adjudication and reduce the guarantees of independent jurists. The privacy renders both judges and disputants vulnerable. The public rituals that Oscar Chase and Jonathan Thong analyzed as sustaining understandings of fairness[325] are not built into the devolution of adjudication to administrative bodies and outsourcing to private providers, even as those procedures try to lay claim to the legitimacy of courts by miming, but yet not mooring to, some of its forms.

Our third marker of this century is a poly-vocal image permitting another glimpse of the shift from public to private courts while also recording the injustices that courts have spawned. The William Clift photograph, *Reflections, Old St. Louis County Courthouse, Missouri* (Figure 35), also graces the cover of this Issue. In the nineteenth century, the Old St. Louis Courthouse was the site of the trial of Dred and Harriet Scott, whose names became iconic for the horrors of slavery and the failures of law.[326] Although

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323. The forms of detention are also not as idiosyncratic. *See* Judith Resnik, *Detention, The War on Terror, and The Federal Courts*, 110 COLUM. L. REV. 579 (2010).

324. Nancy Gertner, *From "Rites" to "Rights": The Decline of the Criminal Jury Trial*, 24 YALE J.L. & HUMAN. 433 (2012); Alexandra D. Lahav, *Rites Without Rights: A Tale of Two Military Commissions*, 24 YALE J.L. & HUMAN. 439 (2012); *see also* Genn, *supra* note 18; Spaulding, *supra* note 291.

325. 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).

326. *See* DONALD F. DOSCH, THE OLD COURTHOUSE (1979). The building, opening in 1828, was used as both a state and federal courthouse. Enlarged thereafter, it was remodeled in the 1850s. *Old Courthouse Architecture*, JEFFERSON NATIONAL EXPANSION MEMORIAL, http://www.nps.gov/jeff/planyourvisit/old-courthouse-architecture.htm (last visited Feb. 11, 2012). The Dred Scott proceedings, from trials through the Missouri Supreme Court hearing, were held there. *Id.* A rich history is provided in DOSCH, *supra*, at 100-10; and LEA VANDERVELDE, MRS. DRED SCOTT 232-319 (2009). The building included art (such as a Justice, installed inside in 1861, DOSCH, *supra*, at 43) and

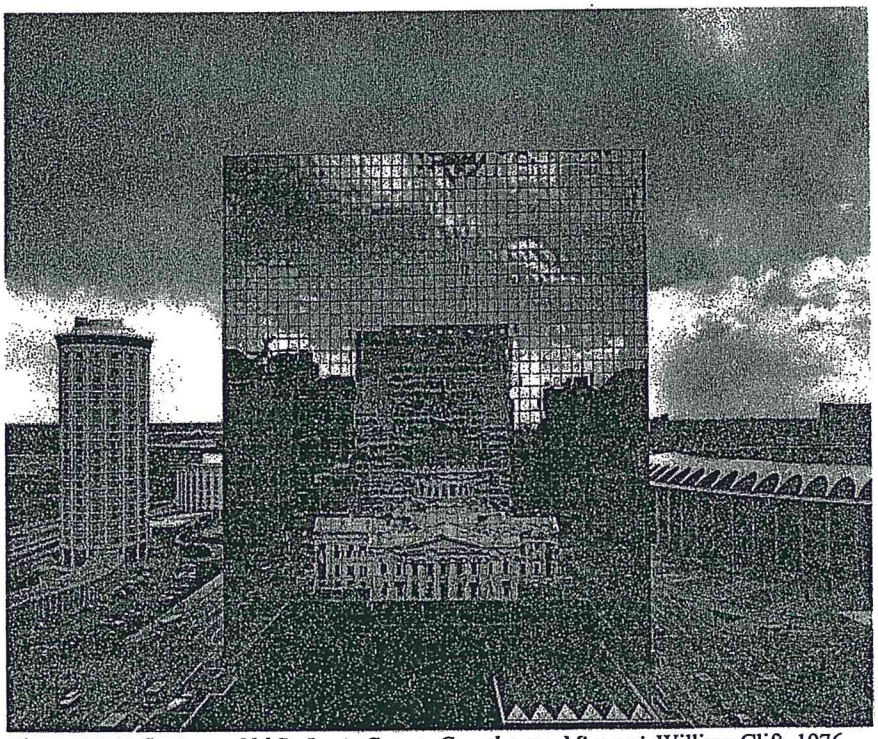


Figure 35. *Reflections, Old St. Louis County Courthouse, Missouri*, William Clift, 1976.
Provided and reproduced with the permission of the photographer.

a Missouri jury had, in the 1850s, ordered the Scotts free, the state supreme court and the United States Supreme Court concluded that they were legally slaves. Chief Justice Taney's opinion for the Supreme Court held that the Constitution put slaves ("beings of an inferior order") outside citizenship and hence, that they lacked juridical voice even to challenge the state holding.[327]

The Old St. Louis Courthouse was also the site of Virginia Minor's litigation seeking, in 1872, to vote as a citizen of the United States. In 1875, in *Minor v. Happersett*, Virginia Minor argued that the Privileges and Immunities Clause of the recently enacted Fourteenth Amendment endowed her, as a woman, with new rights. The United States Supreme Court denied her equality. Minor was (unlike the Scotts) recognized as a citizen of the United States but not guaranteed voting rights which, the Court held, depended on state law.[328]

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was used as a "public forum" as well as a court. DOSCH, *supra*, at 66-87.

327. Dred Scott v. Sandford, 60 U.S. 393, 407, 450-53 (1856) (striking provisions of the Missouri Compromise that declared it a free territory and holding that the Fifth Amendment protected the rights of slaveholders in the "property" that was their slaves).

328. Minor v. Happersett, 88 U.S. 162, 178 (1875); DOSCH, *supra* note 326, at 98-99.

The Old Courthouse stands as a testament to injustices promulgated in the name of the United States Constitution. This image makes plain that our project entails no romance of courts as intrinsically just. Rather, we appreciate their potential to redistribute power from government to individual, from one side of a case to another, and from disputants and decisionmakers to the audience. Through participatory parity, public processes can teach about practices of norm development and offer the opportunity for popular input to produce changes in legal rights. The redundancy of various claims of rights enables debate about the underlying legal rules. These facets are democratic responses to the disquieting fact that judicial power entails the use of violence in the name of the state.

When that issue is engaged in open court processes, we—those outside the immediate dispute—have a role in understanding, legitimating, delegitimating, and interpreting what law means, what justice entails, what the predicates of its practices are, and whether the resulting violence is acceptable or intolerable. Such "democratic iterations" provide dense sets of interactions that can, over time, function as a mechanism to limit the scope of rulers' powers and change normative precepts.[329] Thus, to create public spaces as active sites requires normative commitments to a political theory of courts in democracies as obliged to provide independent judges hearing both sides of disputes and according equal and dignified treatment of claimants before a public empowered to respond.

Illustrative are the contemporary repudiations of *Dred Scott* and of *Minor v. Happersett*, undone by the Civil War, constitutional amendments thereafter, and political and social movements (of which the litigations were a part) that embrace a profoundly different conception of personhood and of justice. And of course, democratic engagement does not inevitably yield results that could be termed progressive. Like other sites of democratic ordering, popular will can be propelled in a variety of directions. In the context of adjudication, public trials also help sustain commitments to the death penalty and to harsh sanctions for certain kinds of offenders.

The authority of the audience is what some seek to escape. As Michel Foucault famously mapped the move from public to private punishment (when the "great spectacle of punishment ran the risk of being rejected by the very people to whom it was addressed," the state developed prisons to assert coercion removed from public view),[330] so we map the privatization of litigation, putting at risk the modern phenomenon of "rights" of access to

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329. *See* Robert M. Cover, *The Supreme Court 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

330. FOUCAULT, *supra* note 3, at 63; *see also* John Rajchman, *Foucault's Art of Seeing*, 44 OCTOBER 88 (1988).

court for everyone, newly empowered to seek accountings from previously impervious actors. The procedures encoded in Guantánamo Bay and in the documents purchased with cell phones are threats to those entitlements. These public and private disciplinary powers increasingly rely on practices that do not admit of a need to show their processes in order to justify the exercise of authority.

Courthouses have become so familiar that one might assume that they always existed, just as the rights that adjudication has come to signify feel deeply entrenched. Inside the many purpose-built structures is the "pearl of the courtroom" (to borrow, again, from Judge Woodlock).[331] As building manuals dictate, the courtroom is the one designated space in which judges, otherwise "completely separated from the public," can interact with disputants before the public.[332] Yet, even though the exterior glass facades of many new courthouses are designed to convey openness,[333] not much remains to be seen, and as the discussion of the cell phone contract and Guantánamo Bay illustrates, more is moving offsite. And even in courthouses, one finds "too little publicity, with a consequent increase of secrecy, in areas hitherto considered public."[334] While remaining "public," the appellation denotes, as Habermas put it, that a structure "simply house[s] state institutions."[335]

William Clift's late twentieth-century photograph of the Old St. Louis Courthouse (Figure 35) records that trajectory.[336] In the 1930s, the courthouse was abandoned in favor of a new Civil Courts Building and then rescued for renovation as a national monument—formally confirmed in 1940 under President Franklin Roosevelt.[337] The building functions as a museum, which is what we fear may be the twenty-first century fate of other monumental courthouses.[338] Moreover, what Clift shows is the Old Courthouse reflected in a structure known, in the 1970s, as the Equitable

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331. Woodlock, *Drawing Meaning*, *supra* note 276.

332. Jordan Gruzen, Cathy Daskalakis & Peter Krasnow, *The Geometry of a Courthouse Design*, *in* CELEBRATING THE COURTHOUSE, *supra* note 276, at 83, 90.

333. *Id.* at 108.

334. *See* Maure L. Goldschmidt, *Publicity, Privacy and Secrecy*, 7 W. POL. Q. 401, 401 (1954).

335. HABERMAS, *supra* note 9, at 2.

336. Our thanks to William Clift for providing us with the image in Figure 35 and permission to use it. His photograph, taken in conjunction with the Seagram Court House Project, is also in the collection of the Yale University Art Gallery and can be found in the volume COURT HOUSE 31 (Richard Pare ed., 1978).

337. DOSCH, *supra* note 326, at 111-15.

338. Recall that when the Boston Courthouse opened in 1998, 190 trials had begun, or seven to eight per courtroom, *see supra* note 301; by 2010, the number was down to 115 civil and criminal trials, or five per courtroom (plus providing space for thirty civil and fifty-four criminal contested hearings on motions and twelve sentencing hearings entailing evidence). *See U.S. District Courts—Civil and Criminal Trials, by District, During the 12-Month Period Ending September 30, 2010*, UNITED STATES COURTS, http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2010/appendices/T01Sep10.pdf (last visited Feb. 13, 2012).

Life Building.[339] The building behind the reflected image of the courthouse is now the regional headquarters of the American Arbitration Association. The flat glass of the International Style skyscraper lends the appearance of a court subsumed by the corporate structure it now faces.

This picture provides a fitting closing for this analysis reflecting centuries of change that leaves us, inevitably, *in medias res*. The disquieting image of the Old St. Louis Courthouse is one vision of what the future could include. In *Representing Justice*, we provided examples of alternative imagery (new *exempla iustitiae*), just as several contributors to this Issue argue for our eyes to look beyond the repertoire of imagery and practices currently so commonplace that the degree to which they have been made—by acts of political and social will—sometimes passes, unseen.[340]

339. The building, designed by Hellmuth, Obata + Kassabaum and built in 1971, was renovated in the 1990s and purchased by the Hertz Investment Group in 2007 from the AXA Equitable Life Insurance Company. *See Equitable Building Under Contract*, ST. LOUIS BUS. J., Jan. 5, 2007.

340. *See, e.g.*, John Leubsdorf, *Justice Unrepresented*, 24 YALE J.L. & HUMAN. 247 (2012); Simon, *supra* note 235. On the other hand, Ruth Weisberg argues that we need to see the usefulness of the connections that Justice, *inter alia*, provides to the past. Weisberg, *supra* note 52.