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The Jayne Lecture

Representing Justice:
From Renaissance Iconography to
Twenty-First-Century Courthouses¹

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I. SURVEYING THE DEPLOYMENT

IN THE SUMMER OF 2003, *The Economist* ran a column criticizing the use by the United States of military commissions to deal with individuals detained in the wake of 9/11. As the text of the headline (“Unjust, unwise, unAmerican”) on the cover of the magazine made plain, the authors objected to employing an ad hoc process instead

¹Judith Resnik and Dennis E. Curtis, Copyright 2007. This paper, the Henry LaBarre Jayne Lecture, was read at the meeting of the American Philosophical Society on 12 November 2005. We present some of the thesis of our forthcoming book to be published by Yale University Press in 2007 or shortly thereafter.

Thanks are due to more people than can be acknowledged here. The deans of Yale Law School (where we now teach) and of the University of Southern California (where we taught before) have been warmly supportive of our interests. We have benefited from the help of many judges, justices, and architects who assisted us in venues around the world and from staff, librarians, and curators who provided resources and information at diverse locations. Our understanding of the architectural questions has been informed by Diane Jones, who shaped a transnational conference on courthouse architecture, and by Jane Loeffler, Richard Gilyard, and Celeste Bremer, all of whom provided us with insights on the American side. Joel Cohen guided our chartmaking so as to clarify the graphics. Kathryn Slanski, expert on Yale’s Babylonian Collection, shared her expertise with us.

Special help came from a group of current and former students from Yale College and Yale Law School, including Laurie Ball, Elizabeth Brundige, Maria Burnett, Naima Farrell, Laura Heiman, Hannah Hubler, Chavi Keeney Nana, Phu Nguyen, Natalie Ram, Bertrall Ross, and Alana Tucker. Their research has enabled us to make accessible the images and graphics reproduced for this lecture. Additionally, we thank Yale staff, including the director



FIGURE 1. *Justicia [IUSTITIA]*.
Walter S. Allward, 1946, Supreme
Court of Canada, Ottawa, Canada.
Photographer: Philippe Landreville.
Copyright: Supreme Court of Canada.

of a regular court system to try alleged terrorists.² But the editors hoped that readers would quickly understand that critique by looking at the visual accusation—a blindfolded woman draped in Grecian robes and holding scales and sword—viewed through the sights of a rifle. The artist turned Justice into the target rather than the goal.

Our first question is why the publishers of *The Economist* had the confidence to market their product internationally by relying on such a picture for the cover. They were not, after all, selling their magazine only to people familiar with this remnant of Renaissance iconography. Why did the editors assume that viewers would connect the image to justice, gone awry, rather than to warrior princesses, the Roman Empire, or operas?

Our project is (in part) to answer that question. And the response (in part) is that *The Economist* is not alone in appropriating the icon of Justice. One can find her everywhere, marking both places and objects as law-related. One such example (fig. 1)

comes from the front of the Canadian Supreme Court in Ottawa. Travel thousands of miles to Australia to see Justices at many court buildings, including those in a Queensland court complex in Brisbane, and in Melbourne where a large metal sculpture on the side of the Victoria County Court (fig. 2) is readily seen from a busy street. Justices also sit outside in front of courts in Lusaka, Zambia, and in Brasilia,

of technical services, Susan Mosen, law librarians Gene Coakley and Camilla Tubbs, and Marilyn Cassella.

We began this project many years ago at the Photographic Collection of the University of London's Warburg Institute. We are deeply appreciative of the intellectual generosity of Jennifer Montagu and Elizabeth McGrath, of the Warburg Institute, who welcomed us and responded to our many questions. A first iteration can be found in Dennis E. Curtis and Judith Resnik, "Images of Justice," 96 *Yale Law Journal* 1727 (1987).

² *The Economist*, 12 July 2003, at 9.



FIGURE 2. *Lady of Justice*. William Eicholtz, 2002, Victoria County Court, Melbourne, Australia. Photographer: Ken Irwin. Reproduced by permission of the sculptor and of the Liberty Group, owner and manager of the Victoria County Court Facility.

Brazil, and other Justices sit inside, at the Supreme Court of Japan and the Supreme Court building in Azerbaijan. In addition, a photograph that ran in April of 2003 in the *New York Times* with the caption “Saddam Hussein with the Scales of Justice” made another point: leaders from around the world drape themselves in Justice’s accoutrements.³

In short, from Europe to Iraq, from North and South America to Africa, Australia, and Asia, producers of images rely on our capacity to recognize Justice. Further, and illustrated by magazine covers such as that of *The Economist*, Justice has other functions. In addition to adorning government buildings, she is also a stock figure in commerce, appearing on catalogues to sell books to lawyers and as jewelry. Further attesting to her ready recognizability is her incarnation in cartoons,

³The accompanying article, “U.S. Seeks Solid Core to Fix Iraq’s Broken Legal System,” by Bernard Weinraub, ran on 27 April 2003 at A24.

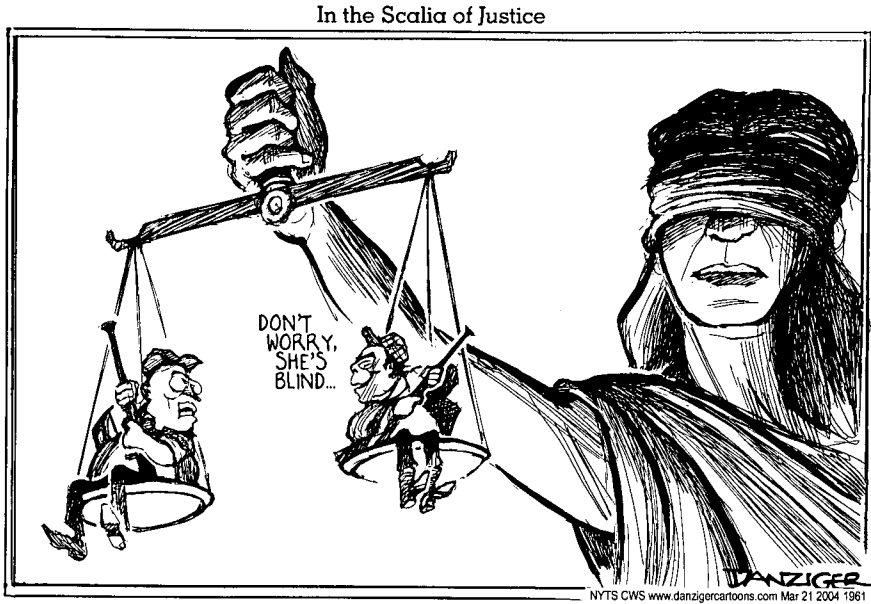


FIGURE 3. *Don't Worry, She's Blind.* Jeff Danziger, 2003. Copyright: Jeff Danziger, NY Times Syndicate. Reproduced courtesy of the artist.

as can be seen from a 2004 cartoon (fig. 3)⁴ criticizing a decision by one Supreme Court Justice to vote in a case involving a party with whom he had spent time duck-hunting.

These images have, we hope, sufficed to anchor a first point. Throughout the twentieth century and into the twenty-first, we can see Justice

⁴This cartoon ran in March of 2004 in the *New York Times*. At the time, Justice Antonin Scalia had declined a request that he recuse himself from a case pending before the Court. The underlying lawsuit, *Cheney v. United States District Court for the District of Columbia*, related to the decision by Vice President Cheney and other government officials to convene a National Energy Policy Development Group but not to comply with the Federal Advisory Committee Act, requiring open meetings and disclosure of information. The lower court had directed that the defendant government officials, including Vice President Cheney, provide information about the task force and its recommendations.

The government defendants asked the appellate court to prevent the district court's order from having effect. Losing that appeal, the government defendants won at the Supreme Court, which sent the case back to the appellate court to reconsider whether separation-of-powers doctrine protected the defendant officials from disclosing information about the meetings. Justice Scalia joined that majority. See *Cheney v. United States District Court for the District of Columbia*, 542 U.S. 367 (2004).

While the case was ongoing, Vice President Cheney and Justice Scalia continued their practice of duck-hunting together. The Sierra Club requested that the Justice recuse himself because his connection to one party raised an appearance of a lack of impartiality. The Justice, responding to that motion, declined to withdraw. See *Cheney v. United States District Court for the District of Columbia*, 541 U.S. 913 (18 March 2004) (Scalia, J.).

imagery used on government buildings, in advertisements, and in jest. All of these deployments rely on the fact that we can “read” the oddly dressed woman with a set of attributes (scales, sword, and sometimes a blindfold) as representing or referring to Justice.

2. THE VISUAL TRADITION

A. *Extricating Justice from Her Companion Virtues*

As those steeped in European history know, the Justice easily identified today dates from the medieval and Renaissance periods. This sixteenth-century engraving by Cornelis Matsys (fig. 4) shows one such Justice, and thousands of comparable classical images line museum and building walls.

Turn then to another engraving (fig. 5), also by Matsys, with two figures. One is, again, Justice. The other woman is looking in a mirror. Some will recognize her as Prudence, but most of the people walking into courthouses and most of the consumers buying magazines would not know who she is. Yet, in medieval and Renaissance imagery, Justice was not a solo actor but one of four Cardinal Virtues—Prudence, Fortitude,



FIGURE 4. *IUSTICIA*.
Cornelis Matsys, circa 1543–44.
Copyright: Warburg Institute.



FIGURE 5. *Justice and Prudence*. Cornelis Matsys, circa 1538.
Copyright: Warburg Institute.

Temperance, and Justice. That foursome was often joined in paintings by the three theological Virtues of Faith, Hope, and Charity.

Where does the iconography of Justice come from? The particular attributes that became associated with Justice harken back to the Babylonian iconography of the god Shamash and to the Egyptian goddess Maat. Along with other Egyptian deities including Thoth and Osiris, Maat (in a female form) has been found on papyri illustrating what is commonly called the Book of the Dead. In these scenes, the heart of an individual sits on one side of a balance. On the other side is a feather, itself another symbol of Maat, whose cosmological importance was to denote a state of order, stability, truth, justice, or well-being. Perhaps influenced by subsequent developments of theological beliefs in other religions, many interpreters of the balance scene assume that it marks the judgment of a person at death.

From there, one can trace Justice's roots through goddesses both Greek and Roman, from Themis and Dike to Iustitia. The iconographical trail continues through the portrayal of the archangel St. Michael, often shown weighing souls or brandishing a sword to ward off the

dragon of Satan. By the Middle Ages, Justice (holding sword and scales, à la St. Michael) became one of several Virtues identified in presentations of the *Psychomachia*, the epic battle of Virtues and Vices for a person's soul.

Each Virtue has its own substantial literature and theory, as well as signature attributes⁵ (greatly simplified in this brief overview) to distinguish one draped female form from another.⁶ In addition to Prudence, shown in figure 5 with a mirror described as denoting self-awareness, consider a Temperance (fig. 6) of the early sixteenth century, modeled by Agostino Veneziano after a Raphael fresco in the Vatican.⁷ Her bridle symbolizes self-restraint, whereas the Fortitude (fig. 7) by Marcan-tonio Raimondi has armor and a lion, evoking endurance and strength.

These reproductions anchor our second point: that the remarkable longevity of Justice is not shared by her sibling virtues. The visual *accessibility* of Justice stands in contrast to the relative inscrutability of other Renaissance images. The obvious question is why, and its answer brings us to a third proposition: that we know the image of Justice because it has been deployed, politically, by governments seeking to link their rules and judgments to her legitimacy. Sovereigns—be they emperors, kings, queens, dukes, burghers, presidents, prime ministers, or dictators—have wrapped themselves, deliberately and visibly, in Justice. She has had a remarkable run as political propaganda.

B. Tracing Justice's Political Roots

We skip the earliest periods and pick up with the late Middle Ages, when European town leaders constructed new public civic spaces—town

⁵ See, e.g., Helen North, *From Myth to Icon: Reflections on Greek Ethical Doctrine in Literature and Art* (Ithaca, N.Y.: Cornell University Press, 1979).

⁶ That Virtues are shown as females stems from their roots in Egyptian, Greek, and Roman goddesses and from the linguistic feminine case of abstract nouns in Romance languages. See Marina Warner, *Monuments and Maidens: The Allegory of the Female Form*, 63–87 (New York: Atheneum, 1985). In the 405 CE epic poem, the *Psychomachia* by Prudentius, which served as a source for portrayals of scenes of combat between good and evil, both the Virtues and Vices were described as female. By the twelfth century, however, certain Vices such as Avarice were given a male form, whereas Unchastity was portrayed as female. See Henry Kraus, "Eve and Mary: Conflicting Images of Medieval Woman," in *Feminism and Art History: Questioning the Litany*, 77–99 (Norma Broude and Mary D. Garrard, eds., New York: Harper & Row, 1982).

⁷ Many commentators have identified the Raphael frescoes, painted between 1508 and 1511 in the Stanza della Segnatura, as including the Cardinal Virtues, three of whom are seen in one sequence with a lunette of Justice above. See, e.g., Edgar Wind, "Platonic Justice, Designed by Raphael," *J. Warburg Institute* 68 (1937). In contrast, Christiane L. Joost-Gaugier believes them to be the Three Graces. See Christiane L. Joost-Gaugier, *Raphael's Stanza della Segnatura: Meaning and Invention*, 132–46 (Cambridge: Cambridge University Press, 2002).



FIGURE 6. *Temperance*. Agostino Veneziano, 1517. Copyright: Warburg Institute.



FIGURE 7. *Fortitude*. Marcantonio Raimondi, circa 1520. Copyright: Warburg Institute.

halls, which were multi-function buildings that augmented churches and market squares as places of assembly and of commerce. From the buildings that remain,⁸ one can see that town leaders sought to enshrine their own authority by using scenes of the Last Judgment and of various Virtues and allegories on the walls about them. Over time, however, the image of Justice comes to the fore.

One spectacular and much discussed example of such art is in Siena, in the Palazzo Pubblico, its town hall. The fresco (fig. 8), sometimes called *The Allegory of Good Government*, dates from about 1340 and is by Ambrogio Lorenzetti. The scene, awash with figures and inscriptions, has at its center an older, bearded male figure, who holds a scepter and a shield and who resembles a mixture of Jesus and an emperor. Sitting on a throne, he is said either to represent the "Common Good" or to be an incarnation of "the Nine," the number of citizens serving for revolving short terms on the ruling council of the Republic of Siena, which endured for about seventy years until 1355.

In the Lorenzetti fresco, various figures, all labeled in Latin, surround the central figure. Included are Fortitude, Prudence, Temperance, and Justice. But in contrast to the other figures, only Justice appears twice and is named seven times in the inscribed texts.⁹ One of these Justices is on the bench with the other Virtues; she is shown both at their level and of their size. Looking forward and crowned, she might be a "Vindictive Justice." She displays a sword, pointing upward; a severed head lies on her knee. Below her are soldiers on horses and a group of scruffy-looking people, sometimes described as prisoners.

The second Justice is at the other end of the scene. Unlike all the other named Virtues, she is significantly larger and sits, like the central male figure, on a throne of her own. Above her head is a figure labeled (in Latin) Wisdom and below her is Concord. Cords thread from the pans of this Justice's scales to Concord, then on to a group of twenty-four well-dressed people (representing either the former governing council of Siena, upright citizens, or the Elders sitting on Judgment Day). From their hands, the cords run to the hand of the enthroned Common Good/Nine figure.

The virtuous court in *The Allegory of Good Government* inhabits a light-filled scene of a thriving locality, with builders, dancers, cobblers,

⁸ Given the range of cities, the various economic capacities, and the deterioration, recycling, and renovations of such structures, we generalize only with the caveat that much that existed no longer can be seen.

⁹ Randolph Starn and Loren Partridge, *Arts of Power: Three Halls of State in Italy, 1300–1600*, at 48–54 (Berkeley: University of California Press, 1992); Randolph Starn, "The Republican Regime of the 'Room of Peace' in Siena, 1338–1340," 18 *Representations* 1, 17–23 (1987).

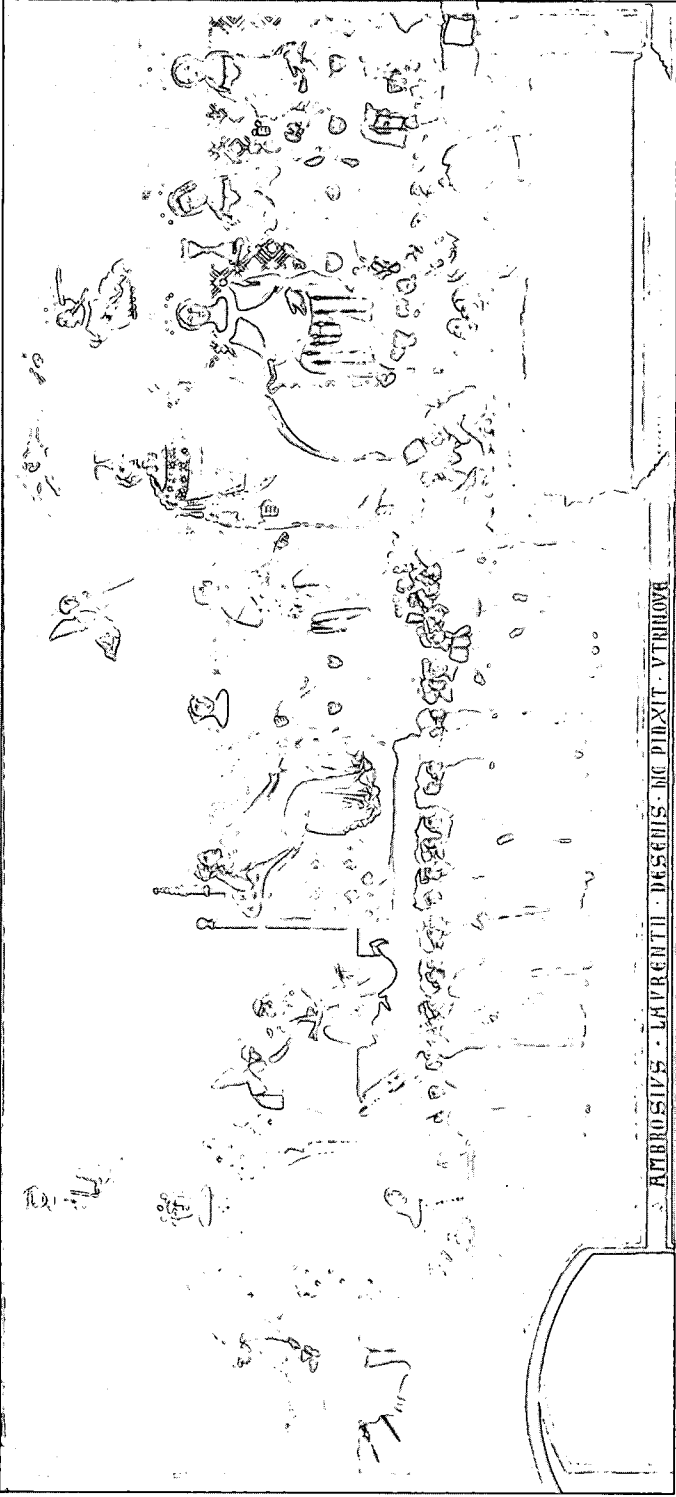


FIGURE 8. *Allegory of Good Government*. Ambrogio Lorenzetti, 1338–40. Copyright: Scala/Art Resource, New York.

and a rolling landscape. In visual opposition is another fresco, often called *The Allegory of Bad Government*, in which a horned, fanged central figure labeled “Tyranny” sits in a bleak landscape. Surrounded by various Vices, he subjugates yet another Justice, who is disheveled, tied up, and bound at his feet. Nearby lie two pans severed from a scale.

Political philosophers and art historians have debated the multiple messages of the Lorenzetti frescoes; some argue that they demonstrate an embrace of Aristotle (via St. Thomas Aquinas), and are thereby attentive to distributive and commutative justice, while others trace their sources to Cicero, committed to the wise use of power by leaders.¹⁰ Although disagreeing about what political theory was there embodied, these commentators share the view that the secular leaders who commissioned these frescoes wanted to impress upon viewers that the prosperity and security they enabled stemmed from Justice, with divine Wisdom’s blessing from above.

The contemporary currency of these frescoes, preaching the centrality of Justice to governance, can be seen by jumping hundreds of years ahead, to the United States in the twentieth century. Two artists, Caleb Ives Bach and Dorothea Rockburne, commissioned during the 1980s and 1990s to provide art for federal courthouses in Seattle, Washington, and in Portland, Maine, drew upon Lorenzetti. Bach named his densely painted large flat canvases *Allegories of Good and Bad Government* (fig. 9), and Rockburne’s abstraction bears the title *The Virtues of Good Government* (fig. 10).

Returning to the Europe of centuries ago, another central Renaissance building, the Vatican, also offered a deliberate didactic program of frescoes—this one understood as insisting that Greek and Roman philosophical traditions could be unified under the pope, the rightful representative on earth of the divinity of the Christian God in heaven. In the Stanza della Segnatura, Raphael put a Justice, along with Poetry, Theology, and Philosophy, on the ceiling above the grouping discussed earlier of Prudence, Temperance, and Fortitude.

Justices can be found in other Vatican rooms, including one painting by Giulio Romano, who portrayed a large woman looking at a scale and with her hand on a large ostrich, almost her size. The ostrich, one of several Justice attributes that have not been passed down to contemporary viewers, was—according to the famous Renaissance iconographical

¹⁰ Compare Quentin Skinner’s two essays (“Ambrogio Lorenzetti’s Buon Governo Frescoes: Two Old Questions, Two New Answers,” 62 *J. Warburg and Courtauld Institutes* 1 [1999], and “Ambrogio Lorenzetti: The Artist as Political Philosopher,” 72 *Proceedings of the British Academy* 1 [1986]) with that of Nicolai Rubinstein, “Political Ideas in Sieneese Art: The Frescoes by Ambrogio Lorenzetti and Taddeo di Bartolo in the Palazzo Pubblico,” 21 *J. Warburg and Courtauld Institutes* 179 (1958).

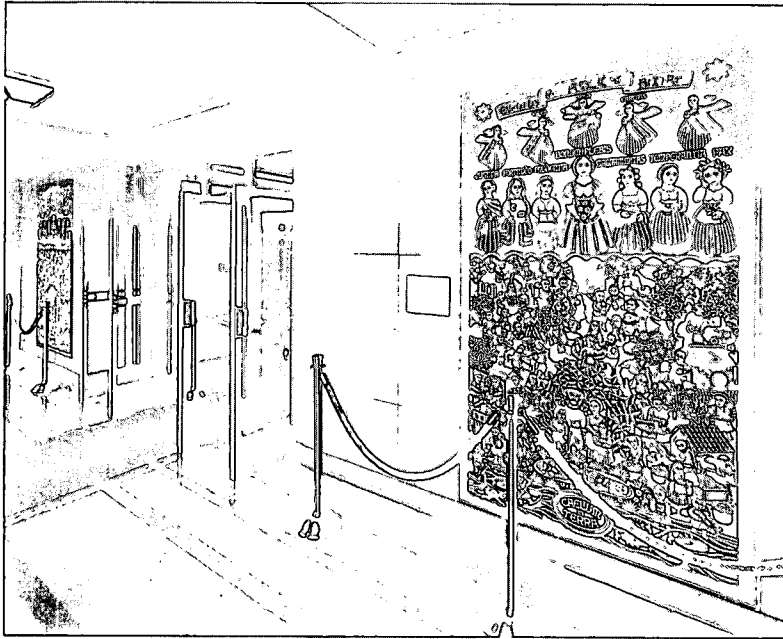


FIGURE 9. *Allegories of Good and Bad Government*. Caleb Ives Bach, 1985, in the interior of the William Kenzo Nakamura Federal Courthouse, Seattle, Washington. Photograph courtesy of the General Services Administration of the United States and reproduced with the permission of the artist.

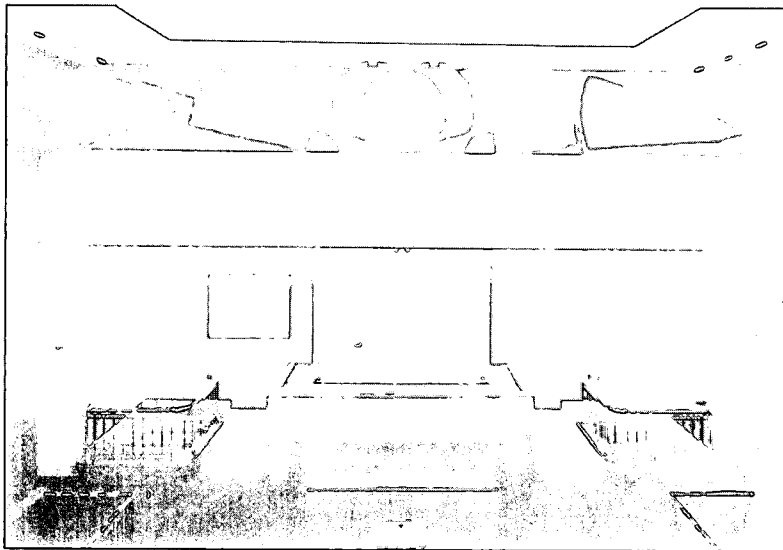


FIGURE 10. *The Virtues of Good Government*. Dorothea Rockburne, 1996, in the renovation of the Edward T. Gignoux United States Courthouse, Portland, Maine, completed by Leers Winsapfel Associates in 1996. Photographer: Don Johnson. Copyright: Dorothea Rockburne/Artists Rights Society (ARS), New York, 2006; Donald E. Johnson, donjohnsonphoto.com, 2006. Reproduced with the assistance and permission of the artist, the photographer, and the General Services Administration.

FIGURE 11. *Justice*.
John van Nost the Younger,
1753, in the Great Courtyard,
Dublin Castle, Ireland.
Photographers: Dennis Curtis
and Judith Resnik. Reproduced
with their permission.



compendium by Cesare Ripa—appropriate.¹¹ The ostrich supposedly had feathers of equal length and, hence, provided a reference to law's obligation of equal treatment of all disputants. Further, ostriches were reputed to be able to digest everything. One translation of Ripa's *Iconologia* made this connection: "The ostrich ruminates its food as Justice should testimony put before her."¹² Moreover, the feather representing the Egyptian concept of Maat was said to have come from an ostrich. Romano's painting may well be referencing that tradition.

Moving north from Rome to Venice, today's visitors can see that the Doges of Venice embraced the iconography of Justice. Statues of her are in prominent display in many sites. Moreover, as is documented by Canaletto paintings of the mid-eighteenth century (such as the 1750 *Regatta on the Grand Canal*), Venice had a yearly ceremony featuring the Doges' official barge, the Bucintoro. At its bow sat a large gilded Justice.

Further north, the coats of arms for various Swiss and German burghers featured Justice. Across the channel in England, a 1704 Verrio painting, now hanging in Hampton Court Palace, showed Queen Anne as Justice. Later in that century, Ireland's rulers put Justice on top of Dublin's courts, originally completed in the second half of the eighteenth century and restored during the twentieth century. The photograph (fig. 11) shows her visage from the inner courtyard, but she is

¹¹ First published (without images) in 1593, and then in 1603 with images, Cesare Ripa's *Iconologia* was republished many times in many languages and with various illustrations.

¹² See Beryl Rowland, *Birds with Human Souls: A Guide to Bird Symbolism*, 111–15 (Knoxville, Tenn.: University of Tennessee Press, 1978) (citing an English translation of Ripa by George Richardson).



FIGURE 12. *Themis, Goddess of Justice*. Jack Harman, 1982, Vancouver Law Courts, British Columbia, Canada. Copyright: Harman Sculpture Foundry Ltd., Alberta, Canada, and the Law Courts Education Society of British Columbia. Reproduced courtesy of the copyright holders.

placed with her back to the city's streets, a gesture some explain as a protest against English rule.

The English Parliament, in turn, also deployed a Justice, who is dated from 1907, and is placed atop Old Bailey (now London's central criminal court). To complete this fast, chronological roots tour by landing in the present, figure 12 is called *Themis, Goddess of Justice* and sits inside the Vancouver Law Courts, a 1979 building in Western Canada.¹³

In sum, even in eras such as ours, so influenced by semiotic interpretations and postmodern skepticism, this remnant of Renaissance iconography continues to be placed in courthouses. Moreover, contem-

¹³ According to the City of Vancouver's Public Art Registry, the sculptor relied in part on images of the goddess Diana, who is often seen holding a sword but here has a scroll instead. Because "the artist . . . was against capital punishment, [he] replaced the sword with a scroll." City of Vancouver, Public Art Registry, *Themis, Goddess of Justice*, http://www.city.vancouver.bc.ca/publicart_wac/publicart.exe/indiv_artwork?pnRegistry_No=137.

porary viewers understand the message. We, like generations before us, have been taught it, repeatedly, by our governments, which have linked themselves to Justice. Yet government leaders did not insist that we also intuit their connections to Justice's Renaissance siblings, Fortitude, Prudence, and Temperance.

C. The Risks and Difficulties of Doing Justice

Today's governments have not only failed to teach about a wider array of virtues; they have also generally avoided reproducing the many historical paintings and sculptures that told less upbeat justice stories. To help recover them, consider first the myth of Cambyses, a story that was translated with regularity in medieval texts and then depicted visually in the Renaissance.

According to Herodotus, some 525 years before the Common Era King Cambyses ruled Persia and ordered a corrupt judge, Sisamnes, flayed alive. Cambyses then appointed Otanes, who was the son of the corrupt judge, to replace his father and forced the new judge, the son, to sit on a seat made from the skin of his father. Dozens of prints of this scene exist but the point is made vividly in an important painting of this story by the Flemish artist Gerard David, who undertook the commission in the late 1400s for the city hall of Bruges, in what is now Belgium. The visual translation of this story begins in the left-hand panel of the diptych (fig. 13). In the back, behind the arches, one can see a judge (in a red robe) accepting a bag of money. In the center, Cambyses (dressed like a German king) is accusing the judge, who is arrested. In the right-hand panel (fig. 14), the corrupt judge is being flayed alive. In a smaller scene at the back is the denouement. The new judge—the son—is seated on his father's skin, which has been turned into a judge's bench.

Competing interpretations exist about the import of the Cambyses story. One version of the legend posits that Cambyses was insane, a person left in a perpetual state of rage and drunkenness who committed many atrocious acts, such as killing his siblings and ordering the flaying of the judge. The dominant medieval/Renaissance interpretation, however, was that the Cambyses story exemplified a king who wisely (if vividly) sanctioned an unjust judge. The picture thus serves as a warning to all judges to behave appropriately.¹⁴

¹⁴ Supporting this approach are the texts appearing under medals depicting the story, such as one that states, "Cambyses the King maintained law and administered it justly, as one can perceive here from the punishment." See Edward Gans and Guido Kisch, "The Cambyses Justice Medal," 29 *The Art Bulletin* 121 (June 1947).

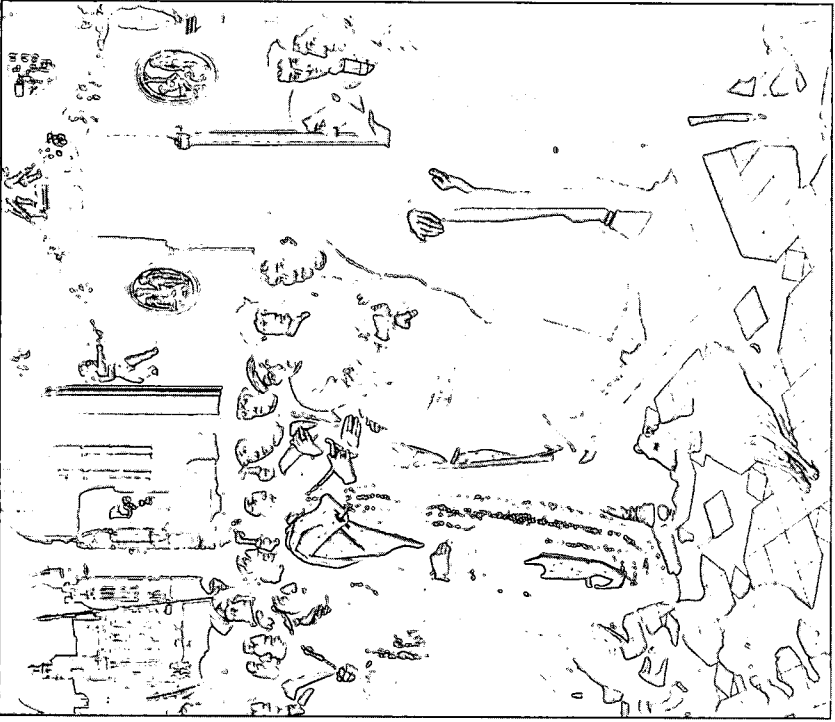


FIGURE 13 (left) and FIGURE 14 (right). *Arrest of the Corrupt Judge and Playing of the Corrupt Judge*. Left and right panels of the diptych *The Judgment of Cambyses*, Gerard David, 1498, Musea Brugge, Belgium. Copyright: Musea Brugge, Groeningemuseum, and reprinted with its permission.

Efforts to inspire fear in judges can also be found elsewhere, such as a fresco, called *Les Juges aux Mains Coupées* (Judges with their Hands Cut Off), dating from 1604 and hung in the Town Hall of Geneva, then a republic. One possible source is Plutarch's reference to judges in Thebes who, without hands, could not take bribes.¹⁵ On the fresco itself sits another text, displayed on a scroll, from Exodus 23:8, which can be translated as "Thou shall not accept gifts, for a present blinds the prudent and distorts the words of the just."¹⁶

But, according to Natalie Zemon Davis, writing *The Gift in Sixteenth-Century France*, "gifts were everywhere" because it was customary to honor holders of offices by giving presents.¹⁷ The line between a "good gift" and a "bad one"¹⁸—that is, what today we call a bribe—was not clear then (nor always so today). Further, as Davis argues, the French prohibition that banned gifts to judges was "as much related to the king's efforts to control his judicial officers and win their loyalty as it was to popular complaint."¹⁹ Thus, Cambyses and *Les Juges aux Mains Coupées* can be seen as warnings against corruption. Alternatively, these images could be understood to have been efforts to instill the concept that certain kinds of gifts were in fact a form of corruption and they can be read as efforts to control those who held the power of judgment by instilling the fear of a ruling power's wrath.

Important narratives come from other allegorical depictions found in many European town halls. The Amsterdam Town Hall, inaugurated in 1655 and now called the Royal Palace,²⁰ is a source that, like the Siena Town Hall, was famous in its day and remains available to contemporary spectators. From the rich literature about this edifice, we know that the city governors wanted their building and its interiors to tell of Amsterdam's prosperity and power. And like those who commissioned the works in Siena, the governing body linked its rule to Justice.

¹⁵ "In Thebes there were set up statues of judges without hands, and the statue of the chief justice had its eyes closed, to indicate that justice is not influenced by gifts or by intercession." See *Plutarch's Moralia, Isis and Osiris* v. 5, 27 (E. H. Warmington, ed., Frank Cole Babbitt, trans.; London: William Heinemann Ltd., 1969).

¹⁶ Some translate this text slightly differently, as "And thou shall take no gift; for the gift blindeth the wise, and perverteth the words of the righteous."

¹⁷ Natalie Davis, *The Gift in Sixteenth-Century France*, 85 (Madison: University of Wisconsin Press, 2000).

¹⁸ *Id.* at 85.

¹⁹ *Id.* at 87.

²⁰ The building became a palace in 1808 under King Louis Napoleon, the brother of Emperor Napoleon. See generally Katharine Fremantle, *The Baroque Town Hall of Amsterdam* (Utrecht: Hanetjens Kekker & Gumbert, 1959); Eymert-Jan Goossens, *Treasure Wrought by Chisel and Brush: The Town Hall of Amsterdam in the Golden Age* (Zolle, Netherlands: Waanders Publishers and the Royal Palace Foundation, 1996).

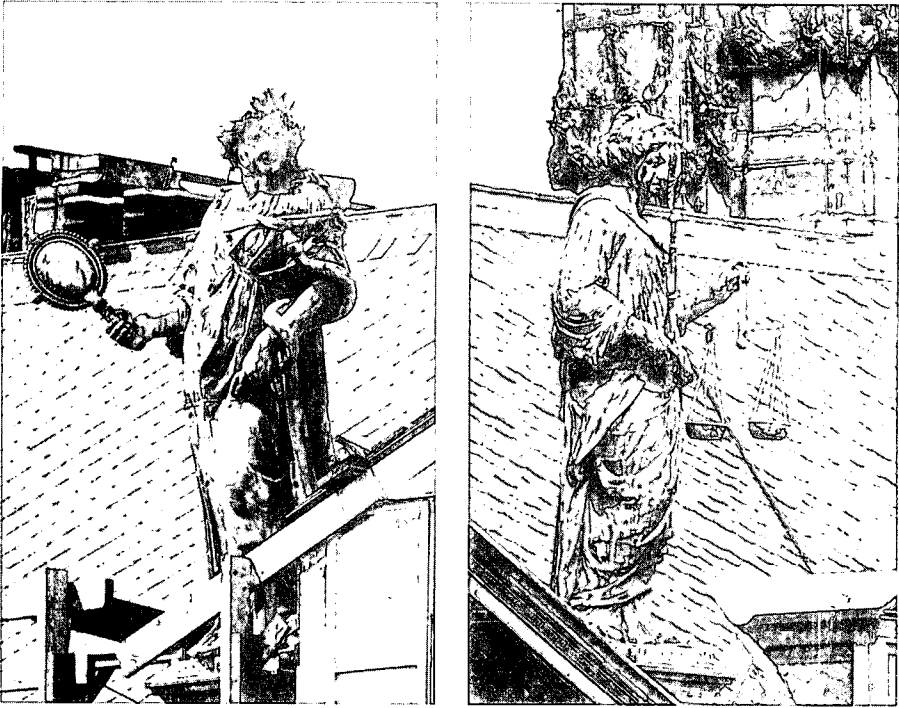


FIGURE 15. *Prudence and Justice*. Attributed to Artus Quellinus, front pediment (looking toward Dam Square) of the Town Hall (Royal Palace) of Amsterdam, the Netherlands. Photographs courtesy of and reproduced with permission of the Amsterdam City Archives.

The Town Hall's facade makes that announcement first. On the side facing Dam Square, three large statues adorn the roof. Figure 15 offers a close-up of Justice on one side of Peace, who sits at the center, while Prudence can be found at the other side of the roof. Once inside, Justice appears several times, including in a large sculpture with attendants that marks the entrance to the Magistrates' Chambers. Inside that room, she appears again in a 1662 painting, called *Prudence, Justice, and Peace*, by Jurgens Ovens.

Downstairs, on the ground floor, is the Tribunal, the Vierschaar (fig. 16), which is a relatively small marble room in which judgments were pronounced. The interior is visible from above, apparently so that the burgomasters could "give their sanction to the sentencing of the prisoner."²¹ Further, the room is open through windows to the street;

²¹ Fremantle, *supra* note 20, at 40, 83.



FIGURE 16. *Interior of the Tribunal (or Vierschaar)*. Ground floor of the Town Hall (Royal Palace) of Amsterdam, the Netherlands. Photograph courtesy of and reproduced with permission of the Amsterdam City Archives.

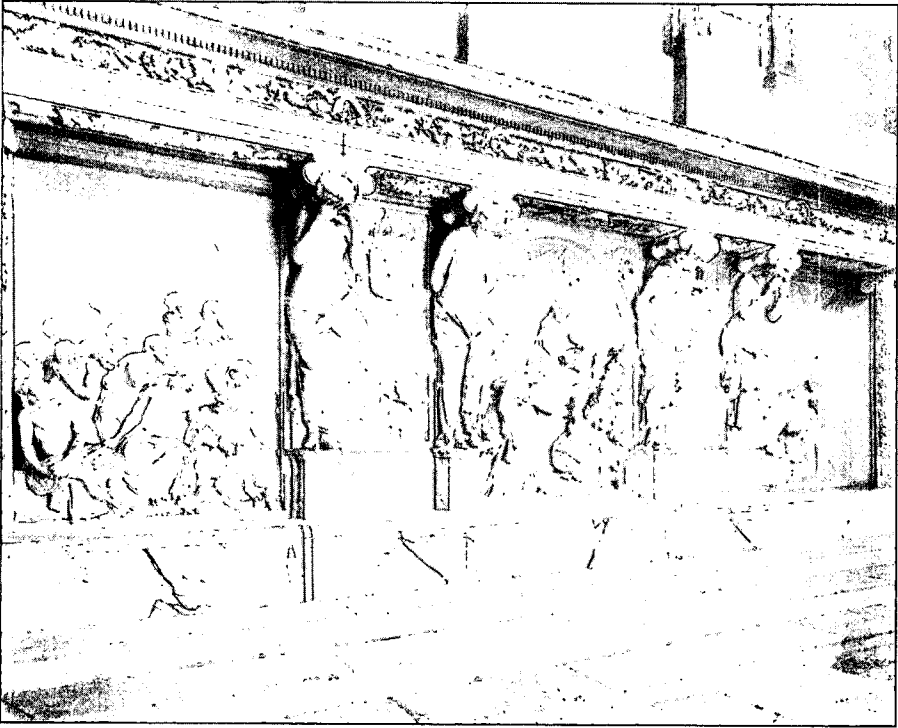


FIGURE 17. *West wall of the Tribunal (Vierschaar)*. Town Hall (Royal Palace) of Amsterdam, the Netherlands. Wall sculpture attributed to Artus Quellinus, circa 1655. Copyright: Royal Palace Foundation of Amsterdam.

passersby could look in to watch. When they did so, they would see the wall (fig. 17)²² behind the judges—and thus its three sculpted panels, the Blinding of King Zaleucus, the Judgment of Solomon, and the Judgment of Brutus.

The Judgment of Solomon is familiar. Depictions of this scene were featured in town halls across Europe. The story is a reminder that divining the truth is hard when competing claims of right are presented and requires knowledge of daily practices and of human emotions. More challenging for those with the burden of judgment are the lessons to be learned from the stories of Zaleucus and Brutus. Like the Solomon story, they center around parent-child relationships, but with a very different punch line. The Judgment of Solomon relies on the idea that a

²² Our thanks to Professor Eymert-Jan Goossens for helping us to obtain this image and permission for its reproduction.

mother would not permit harm to befall her child, whereas both of the fathers—Zaleucus and Brutus—do harm to their children as proof of their commitment to law.

Zaleucus was supposed to have been a “law-giver” in a Greek colony in Southern Italy in the seventh century before the Common Era. He issued an edict that anyone found to have committed adultery was to be blinded. After his son was found guilty of that crime, Zaleucus, unyielding, insisted that the prescribed punishment be applied. Some versions of this story describe protests from colleagues who urged mercy, prompting Zaleucus to order that his son lose only one of his eyes, and that he, Zaleucus, lose one of his as well. The Zaleucus image was commonplace, found not only in the grandeur of Amsterdam but in other town halls and elsewhere, reproduced in paintings, in stained glass windows, and in prints.

The theme that rendering judgment inflicts pain on judges is repeated in the Judgment of Brutus. Lucius Junius Brutus was, upon the overthrow of the monarchy in Rome, the first consul of the Roman Republic. According to the Roman historian Livy, Brutus’s two sons joined a conspiracy to return the monarchists to Rome. Upon learning of his sons’ treachery, Brutus sentenced them—along with their co-conspirators—to death.

Thus, a variety of messages about the challenges of doing justice were proffered. Some served as warnings to judges—threatened with the risk of life, limb, and skin—if they failed to be honest, or loyal and subservient to the power of the state. Other scenes demonstrated that to be the loyal servants of the state, applying its laws, required judges to inflict pain on themselves. Implicitly, as judges were required to kill their children, so kings would, at times, have to impose sanctions on their subjects—but also with pain at having to do so.

A recap of the analyses offered thus far is in order. First, Justice imagery is a regular feature of today’s legal and popular culture in many parts of the world. Second, we have learned to “read” Justice because ruling powers (both in pre-democratic states and in democratic governments) have taught us to do so in an effort to legitimate their judgment, once sourced in divine right and more recently in popular sovereignty. Third, rulers wrap themselves more in Justice than in the other virtues because governments need the power to judge as a means of imposing control.

Fourth, as we have seen from the last two centuries of Justice images, they do not (at least on the surface) reflect the weightiness of doing justice. Rather, the commonplace attributes of today’s Justice are taken to invoke positive utilitarian aspects of what doing justice entails: scales

to dispense justice evenly; the sword to mark the power to enforce the verdicts rendered, and, sometimes, a blindfold, suggesting judgment uncorrupted. Historically, however, far less cheerful images of Justice were regularly displayed in government buildings, as rulers instructed both the judges and the judged that the activity was neither painless for, nor costless to, any of its participants. Yet very little of this lively and freighted visual tradition has been handed down to us.

Rather (and now on to our fifth point), the complexity has been mostly washed out. In fact, however, the history of the contemporary attributes—sword, scales, and blindfold—reveals many meanings, not all necessarily celebratory as is now assumed. Here, we use the blindfold as our example and to do so we return to the Vierschaar of the Town Hall of Amsterdam.

Across from the painful scenes of Brutus, Zaleucus, and Solomon is one of the many statues of Justice in the building. But unlike the rest of the Town Hall's Justices, who are clear-eyed, this Justice is blindfolded. That blindfold is not, we believe, intended to be interpreted as a celebratory signature, denoting through covered eyes a useful distance. Rather, we think her eyes are bandaged to keep her from having to see the pain caused by the sanctions imposed in the name of the law.

Our reading is supported by a brief excursion into the history of art and of metaphors, which teaches that blindfolding—preventing a person from seeing—was once intended to signify the profound limitations of any person so encumbered. For example, blindfolds are regularly found on depictions of Synagoga, a figure who represents the Old Testament, and who was (from the Christian vantage point) “blind” to the light of Christianity. Through figures 18 and 19, taken of the south transept portal of the Strasbourg Cathedral in France, one can compare a 1230 rendition of Synagoga (fig. 19), shown blindfolded and crooked and holding a bent lance, with the female figure of the clear-eyed Ecclesia (fig. 18), who represents the New Testament; she is shown ramrod straight and holding an upright long staff.

The negative connotations of the blindfold were brought to bear on Justice in one of the many woodcuts that illustrated a book, *The Ship of Fools*,²³ written by Sebastian Brant and dating from the late 1400s. This once immensely popular volume, with some images attributed to Albrecht Dürer, is full of moral instruction. The illustration of *The Fool Blindfolding Justice* (fig. 20) accompanied a chapter entitled

²³ For our reading, we have relied on Edwin H. Zeydel, *The Ship of Fools by Sebastian Brant, Translated into Rhyming Couplets with Introduction and Commentary (with Reproduction of the Original Woodcuts)* (New York: Dover Publications, Inc., 1944).

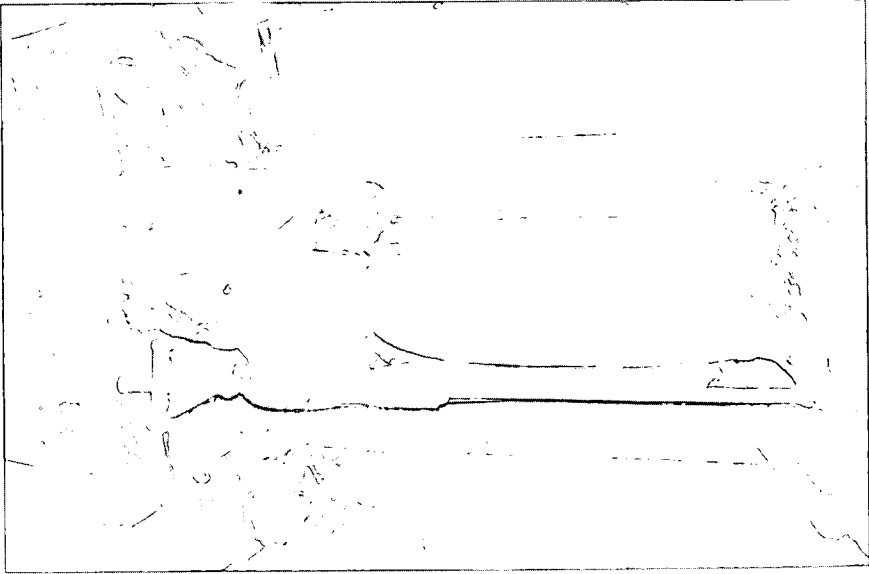
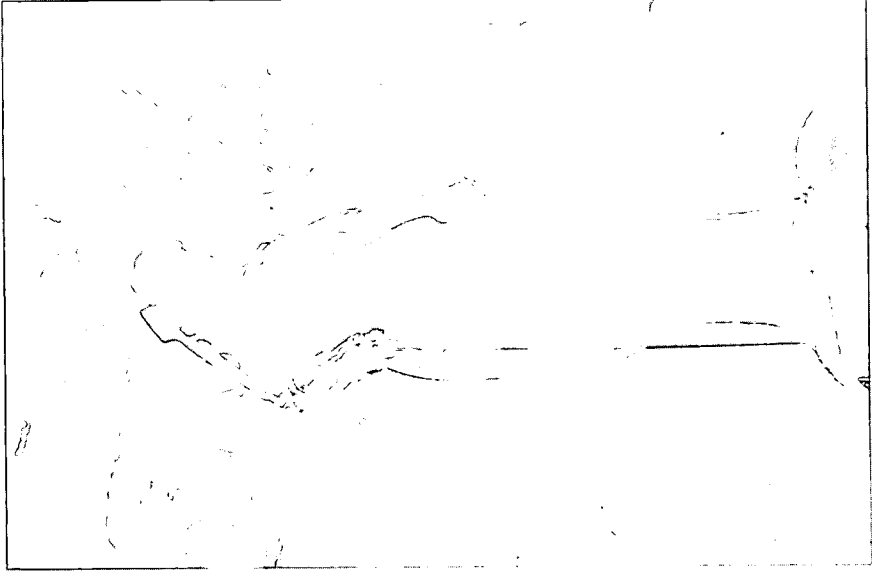


FIGURE 18 (*left*) and FIGURE 19 (*right*). *Ecclesia and Synagoga*. Circa 1230, Strasbourg Cathedral, France. Photographers: Dennis Curtis and Judith Resnik. Reproduced with their permission.



FIGURE 20. Woodcut illustrating Sebastian Brant's *Ship of Fools*.

Attributed sometimes to Albrecht Dürer, 1494, printed in Basel, Switzerland. Image courtesy of Beinecke Rare Book and Manuscript Library, Yale University.

“Quarreling and Going to Court.”²⁴ A reader of *The Ship of Fools* could have had no doubt of the negativity of blindness for the author, who repeatedly warned against the “folly, blindness, error, and stupidity of all stations and kinds of men.”²⁵

²⁴ See chapter 71, in Zeydel's translation, at 236–37. The three lines above the woodcut are:

He'll get much raillery uncouth,
Who fights like children tooth for tooth,
And thinks that he can blind the truth.

Below the print, the chapter begins:

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, . . .

The chapter ends with these words:

The man who'd rather sue than eat
Should have some nettles on his seat.

²⁵ Id. at 57, which includes the prologue, translated as follows: “For profit and salutary instruction, admonition and pursuit of wisdom, reason and good manners: also for contempt and punishment of folly, blindness, error, and stupidity of all stations and kinds of men: with special zeal, earnestness, and labor compiled at Basel by Sebastian Brant, doctor in both laws.”

Another well-known blindfolded Justice comes from a series of Virtues done in the 1550s by Peter Bruegel. In different parts of the picture, various kinds of punishment (hanging, burning, scourging) are imposed. Justice, accompanied by a retinue of armed men, holds a raised sword, carries scales, and is blindfolded. Some commentators argue that the entire scene offers up a naturalistic and unproblematic portrayal of the then-ordinary administration of criminal justice. Given that blindfolded justices were not commonplace in that era, we believe that, at the least, Bruegel wanted us to focus on the pain of judgment rather than to celebrate uncritically its application.

In short, the blindfold on these Renaissance Justices is the forerunner of a trope regularly relied upon by contemporary cartoonists and muckrakers. The cartoon critical of a current Supreme Court Justice (fig. 3) used a blindfold in this manner. As far as we (and others)²⁶ have been able to find, only relatively recently has a blindfold become a more regular part of Justice iconography and, moreover, a valorized attribute. That re-reading of this symbol depends on the reconfiguration of the theory of judging.

That a blindfold could denote judicial impartiality and fair treatment depends on new (e.g., Enlightenment) understandings of judges' relationship to state authority. As the discussion of Cambyses made plain, kings once celebrated their power over judges. The ideas of subjecting kingly power *to* justice and of protecting judges *from* executive and legislative incursions are modern ones. In Commonwealth legal cultures, that principle was established in the 1701 Act of Settlement, which provided that judges no longer automatically lost their commissions as jurists when the monarch who had appointed them left office.

The positive evaluation of the blindfold on Justice is one of many examples of symbols whose meanings vary over time and place. Today, the blindfold is taken to refer to the desirability of deliberately circumscribing the knowledge of decision makers. Moreover, because of literary traditions that link blindness with heightened knowledge derived from reliance on other senses, artistic plays on Justice's sight can both denote special powers of Justice and, inferentially, raise the issue of the complexity of the relationship between knowledge and doing justice.

²⁶ See, e.g., Erwin Panofsky, *Studies in Iconology: Humanistic Themes in the Art of the Renaissance*, 109–10 (New York: Harper & Row, 1972; first published in 1939); Otto Rudolf Kissel, *Die Justitia: Reflexionen über ein Symbol, und seine Darstellung in der bildenden Kunst* (Justitia: Reflections on a Symbol and its Representation in Sculpture) (Munich: Beck, 1984); Theodore Ziolkowski, *The Mirror of Justice: Literary Reflections of Legal Crises*, 18 and 106 (Princeton, N.J.: Princeton University Press, 1997).

As a consequence, and in addition to the mocking deployment of the blindfold that stretches from the 1494 woodcut *The Fool Blindfolding Justice* to contemporary cartoons, one can find artistic inventions around Justice's eyes. A 1778 Joshua Reynolds *Justice* (for a series of Virtues in the New College at Oxford, England) has her hand shading her eyes. A sculpture from the 1990s (fig. 21) by Diana Moore that was created for a federal courthouse in New Hampshire puts Justice in the position of blindfolding herself.

To summarize, during the pre-democratic era, the challenges of rendering judgment were visually denoted in major public spaces with regularity. However, through self-conscious choices of governments over the last three centuries or so, handless and skinless judges were not made to adorn our courthouses. Nor can one find many scenes of the personal pain that judgment imposes on judges. And whatever irony the blindfold once had—of Justice led astray—has mostly been relegated to the cartoon pages.

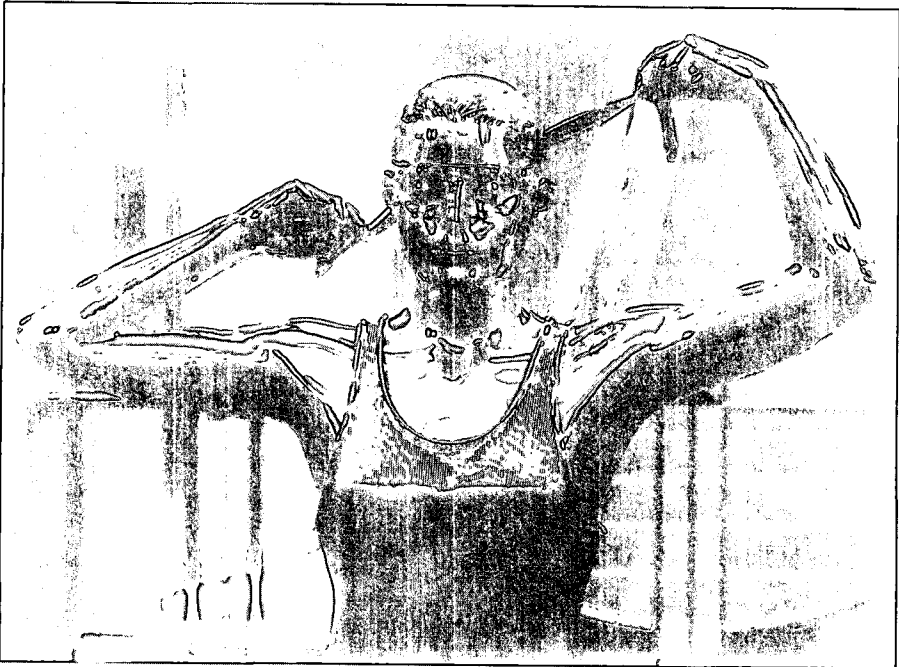


FIGURE 21. *Lady Justice*. Diana Moore, 1996, Warren B. Rudman, Jr. Federal Courthouse, Concord, New Hampshire. Photographer: Nick Wheeler. Photograph provided by the architectural firm of Shepley Bulfinch Richardson & Abbott and by the artist and reproduced with their permission.

3. THE TRIUMPH AND THE DEATH OF ADJUDICATION

To bring this discussion forward and to focus on the century just past, we will advert to but skip a logical next point—about the transition from the multi-function town halls of the medieval and Renaissance periods to what are today discrete buildings called courthouses. That saga entails analyses of the expansion of government functions, the growth of the professions of judges, lawyers, and architects, and the ability, during cycles of prosperity, to secure funding for major public buildings.

But we do want to spend a moment exploring how and why the demand side for justice has risen—resulting in the tens of thousands of courthouses around the world. As we have thus far made plain, public displays (spectacles, in some instances) of the fact of judgment and of adjudication long predate democracy. But the advent of democracy reshaped adjudication in important ways. During the twentieth century, the prospect of seeking justice became plausible for wholly new sets of claimants.

We highlight here just two of several factors central to the revised expectations for adjudication.²⁷ First, democratic theory entrenched the precepts that governments ought to be subject to and bound by their own rules and that they ought to treat persons with dignity and respect. To implement that constraint on government, individuals gained rights to use litigation to call state officials to account. The result has been an avalanche of claims, ranging from veterans seeking benefits within administrative tribunals to victims of crimes against humanity seeking acknowledgment in domestic as well as in international courts for wrongdoing of horrific dimensions.

Another factor, one that has been under-appreciated in the literature of courts, is women's rights. We have shown many images of Justice as a woman, but women only gained full juridical voice in the last century. The radical reconception of women as rights holders—both in and outside of their families—has driven up the volume of disputes.

Judicial institutions have proliferated and diversified. The changes in the United States can quickly be seen through a bar graph and a few pictures. This simple graph, "Article III Authorized Judgeships" (fig. 22), maps the growth in the life-tenured federal trial judges in the United States over one hundred years, from 1901 to 2001. As can be seen, in 1901, about one hundred life-tenured judgeships were commissioned for all three levels of the federal courts; by 2001, the current number of authorized slots exceeded 850.

²⁷ Additional discussion can be found in Judith Resnik, "Civil Processes," in *The Oxford Handbook of Legal Studies*, 748–72 (Peter Cane and Mark Tushnet, eds.; Oxford: Oxford University Press, 2003).

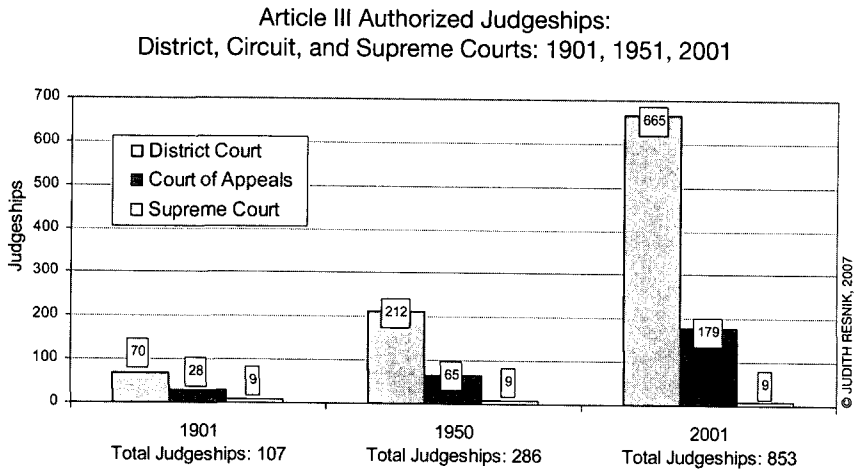


FIGURE 22

In days of fewer federal filings and fewer federal rights, United States courthouses were often buildings that included a post office, a few courtrooms, and sometimes customs offices. Others were dedicated courthouse spaces of three or four floors. The federal courthouse (fig. 23),²⁸ built in 1906 in Grand Forks, North Dakota, is one such solid embodiment. Compare it to a federal courthouse built in 2000, a twenty-nine-story-tall skyscraper in St. Louis, Missouri (fig. 24),²⁹ as well as to another, the new federal courthouse in Boston (fig. 25),³⁰ opened in 1998.

These visual embodiments of the importance of adjudication support a conclusion that, during the twentieth century, adjudication “triumphed”; it became a form of decision making identified as key to successful market-based economies and as a requirement of politically legitimate democracies. Further, as nations joined together in regional federations and in international organizations, they also spawned new transnational courts.

Inside that Boston courthouse, one finds lovely courtrooms such as the one depicted in figure 26. Twenty-five trial courts have a similar appearance, with four equal arches suggesting the equality of all before

²⁸ Our thanks to the Honorable Celeste Bremer, United States Magistrate Judge for the Southern District of Iowa, and to Janice Dinkel, Judiciary Regional Account Manager, Public Buildings Service, General Services Administration, Rocky Mountain Region, for helping us to locate and use figure 23.

²⁹ Our thanks to the Honorable David D. Noce, United States Magistrate Judge for the Eastern District of Missouri, for his assistance in taking and providing us with figure 24.

³⁰ Our thanks to the Honorable Douglas P. Woodlock, United States District Court Judge for the District of Massachusetts, for his assistance in helping us to obtain and reproduce the photographs in figures 25 and 26.

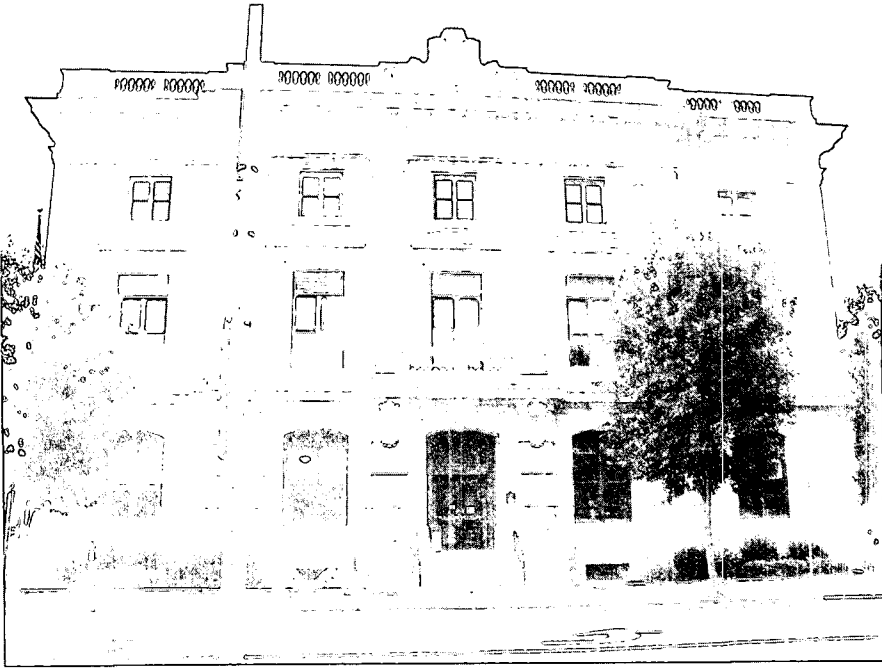


FIGURE 23. *The Grand Forks Federal and Court Building*. Renamed in 2002 the Ronald N. Davies Federal Building and U.S. Courthouse. Grand Forks, North Dakota. Architect: James Knox Taylor, 1906. Photographer: Steve Silverman. Copyright: Steve Silverman, www.stevesilvermanimaging.com. Reproduced with the permission of the photographer and of the building's Property Manager, Bryan Saylor.

the law. But there is a disjuncture between this new building, its courtrooms, and the rules and practices that now surround federal processes.

Judges are now multi-taskers, sometimes managers of lawyers and of cases, sometimes mediators, sometimes referral sources, sending people outside of courts to alternative fora. In the United States and elsewhere, we have seen a failing faith in adjudicatory procedure, a growth in anti-adjudicatory rhetoric, and the promotion—by judges and lawyers—of alternative dispute resolution. Local rules of the Boston federal courts are illustrative—instructing judges to bring up the topic of settlement every time that judges meet with lawyers and litigants.³¹

One should contemplate the image of the Boston courtroom with the knowledge that, in the District of Massachusetts in 1998 when this federal courthouse opened, 142 civil and 48 criminal trials were completed.

³¹ For further details, see Judith Resnik, "Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III," 113 *Harvard Law Review* 924 (2000), and Judith Resnik, "Managerial Judges," 96 *Harvard Law Review* 376 (1982).



FIGURE 24. *Thomas F. Eagleton Federal Courthouse*. St. Louis, Missouri. Architects: Hellmuth, Obata + Kassabaum, Inc., 2000. Photographer: The Honorable David D. Noce, Magistrate Judge of the Eastern District of Missouri. Photograph courtesy of and reproduced with permission of the photographer.

With twenty-five courtrooms available, the average that year was about seven to eight trials per courtroom. Of course, trials are not the only proceeding for which courtrooms are used. But we know from congressionally chartered analyses of courtroom usage that, at least in the locations studied, federal courtrooms had their “lights on”—meaning lit for at least two hours in a given day—only about half the time.³²

Yet, as can be seen from the Boston courtroom interior in figure 26, new courtrooms are not designed as multi-tasking spaces, with easily

³² See U.S. General Accounting Office, “Courthouse Construction: Better Courtroom Use Data Could Enhance Facility Planning and Decisionmaking,” 8–11 (GAO/GGD-97-39, May 1997). Additional criticism of the use of space by the federal judiciary can be found in U.S. Government Accountability Office, “Federal Courthouses: Rent Increases Due to New Space and Growing Energy and Security Costs Require Better Tracking and Management” (GAO-06-613, June 2006).

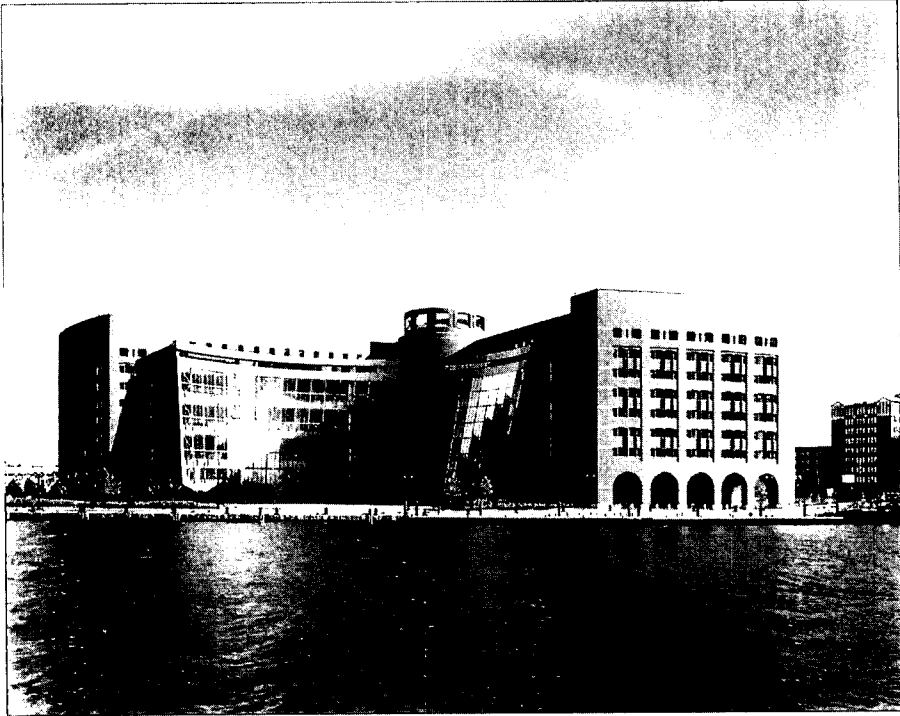


FIGURE 25. *John Joseph Moakley United States Courthouse*. Boston, Massachusetts. Architect: Harry Cobb, 1998. Photographer: Steve Rosenthal. Copyright: Steve Rosenthal, 1998. Reproduced with permission.

movable pieces permitting reconfiguration into conference and mediation rooms. Instead, twenty-five courtrooms (estimated to cost approximately \$1.5 million each) are being built as though trials were still the centerpiece of the justice system.

The data on trial rates in Boston are not anomalous. In 2004, of one hundred civil cases filed, a trial was commenced in two. Moreover, as the chart “Civil and Criminal Trial Rates in U.S. Federal Courts, 1976–2000” (fig. 27, which was prepared at the behest of a federal appellate judge concerned about the decline in trials)³³ makes plain, trial rates, both civil and criminal, have been dropping for decades. The shorthand for this phenomenon in the legal profession is “the vanishing trial.”³⁴

³³That jurist, the Honorable Patrick E. Higginbotham, of the United States Court of Appeals for the Fifth Circuit, explained his concerns in his essay “So Why Call Them Trial Judges?” 55 *Southern Methodist Law Review* 1405 (2002).

³⁴The American Bar Association funded an initiative that brought a group of scholars together to work on gathering and analyzing the data. See Mark Galanter, “The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts,” 1 *J. Empirical Legal Studies* 459 (2004).

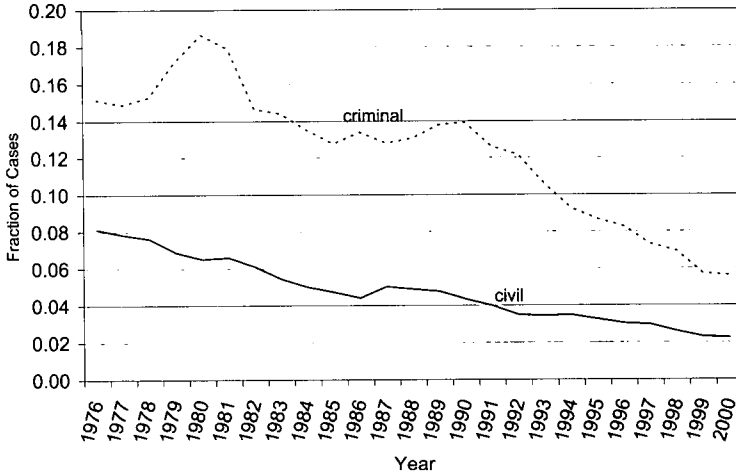


FIGURE 26. *Interior of a courtroom, John Joseph Moakley United States Courthouse.* Boston, Massachusetts. Architect: Harry Cobb, 1998. Photographer: Steve Rosenthal. Copyright: Steve Rosenthal, 1998. Reproduced with permission.

Thus, concurrent with the narrative of one hundred years of the triumphant expansion of adjudication is another story—one that describes adjudication in decline or, more dramatically, as dying. In both public and private sectors, leaders in many countries argue that private outcomes predicated on the parties' consent are better than those imposed by judges through public processes applying state-generated regulatory norms. This worldwide movement is propelled by political and social forces trumpeting deregulation and privatization and is staffed by lawyers and other professionals seeking and shaping new markets.

Given the pressure to move outside of public adjudication, the courtrooms in the Boston and other federal courthouses become themselves symbolic. They stand large and empty, turning into visual relics of a system now in disuse. Indeed, a few years ago, when speaking with a group of judges from several midwestern states, we raised questions about the continued building of such courtrooms. Several judges were defensive—insisting that courtrooms, and especially imposing ones, were very useful. Those judges explained that they brought litigants into courtrooms as

Civil and Criminal Trial Rates
in U.S. Federal Courts, 1976–2000



SOURCE: This chart was created by and is reproduced with the permission of the Honorable Patrick E. Higginbotham, United States Court of Appeals, Fifth Circuit. Copyright: Honorable Patrick E. Higginbotham, 2002.

FIGURE 27

part of their effort to convince litigants to settle their cases. The courtroom was praised for its *in terrorem* effect: the embodiment of what disputants are told to fear and to avoid. Courtrooms could thus be understood as the modern-day version of the Cambyses story. But no longer is the corrupt judge flayed alive. Rather, it is the litigants, punished if daring to insist on trial instead of agreeing to settle.

Another problem with major courthouse building can be seen by looking at figure 28, which compares two sets of judges. The shorter column shows the total number of authorized federal judgeships who sit inside federal courthouses like those in Boston and St. Louis. Included are those judges with life tenure appointed through the constitutionally prescribed processes of Article III and those judges, called magistrate and bankruptcy judges, who, by virtue of congressional statutes, are selected by life-tenured judges and chartered for fixed and renewable terms.³⁵ That total number, roughly 1,650, can be contrasted with the higher column representing the administrative law judges and hearing officers who number about 4,750, work in agencies, and hold their positions by virtue of statutes that create administrative adjudication.

³⁵ See 28 U.S.C. §§ 151, 152 (bankruptcy judges), and §§ 631–636 (magistrate judges).

Number of Authorized Judgeships in Article III Federal Courts and in Federal Agencies (as of 2002)

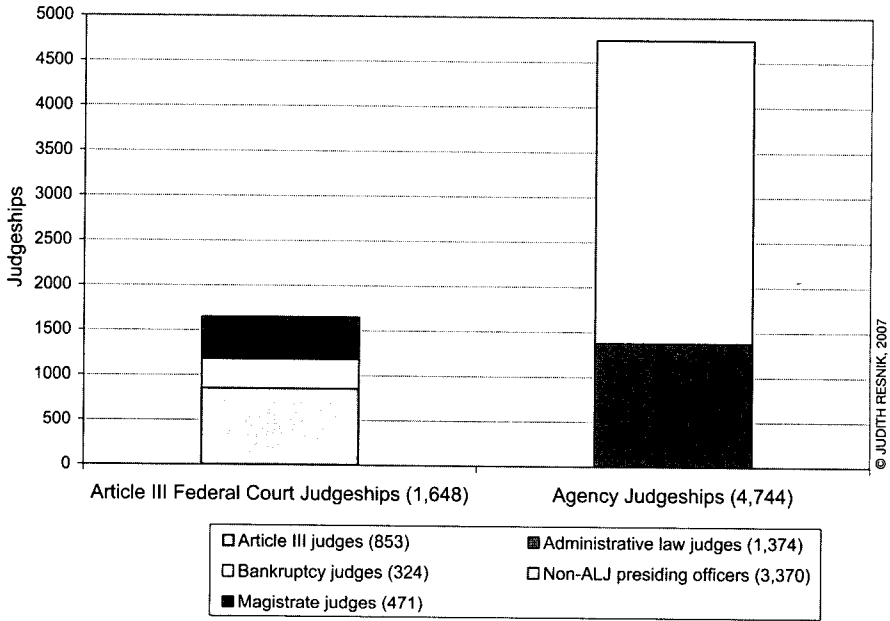


FIGURE 28

Estimate of Evidentiary Proceedings in Article III Courts and in Four Federal Agencies (2001)

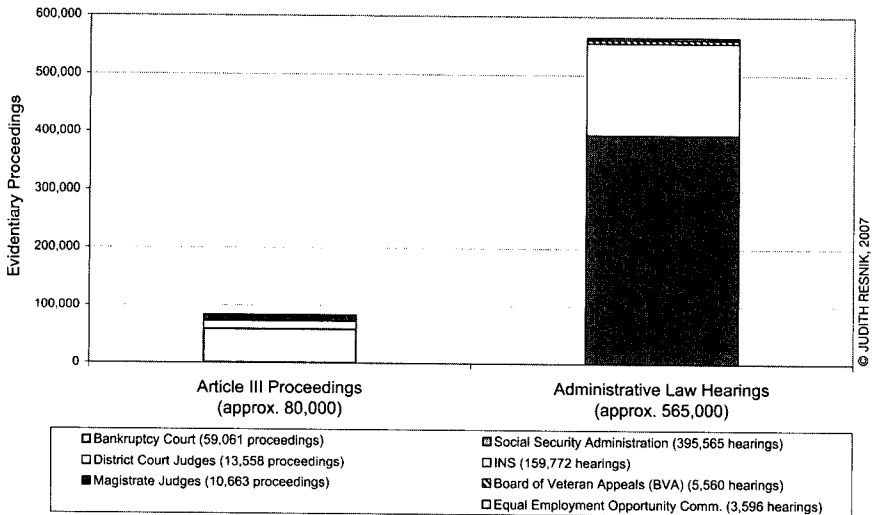


FIGURE 29

As the next graph, providing an “Estimate of Evidentiary Proceedings in Article III Courts and in Four Federal Agencies” (fig. 29) makes plain, the number of evidentiary hearings in federal agencies is more than fivefold the number of evidentiary hearings in federal courthouses such as those depicted in St. Louis and Boston. Looking at data from 2001 and considering four federal agencies (the Social Security Administration, the Equal Employment Opportunities Commission, the Immigration Service, and the Veterans Administration), the volume of events in which witnesses testify is greater outside the federal courts than inside. The point here is that while trials are vanishing in the federal courts, they are also migrating into agencies that have become, functionally, another set of courts. Moreover, adjudication has been “outsourced” not only to agencies but also to the private sector. We cannot depict the volume or shape of such proceedings because no good data are available about their dimensions.³⁶

4. ADJUDICATION AND DEMOCRACY

We move now toward our conclusions, and to do so we delineate the different critiques and questions that emerge from the discussion of contemporary courthouse building. A first set of issues can be clustered under the question, why are we building major new courthouses at all? Despite the cutting-edge construction techniques and abstract paintings, many new courthouses, centered on their courtrooms, are both old fashioned and dysfunctional.

Even more troubling, one might read the buildings as gestures seeking to instill a sense of legitimacy to state-based processes by making it seem as if trials were a major modality and thereby rendering the predominance of the alternatives to trial less visible. From a more positive vantage point (if you are, as we are, skeptical of some forms of alternative dispute resolution), one could interpret the ongoing building as evidence of the deep ambivalence that government leaders have about their own promotion of settlement and privatization in lieu of public processes.

A related question focuses on the maldistribution of public funds. We have provided no pictures of the office buildings or small rooms in which agency decision making takes place, but such facilities are quite often cramped and tucked away. Amsterdam’s Town Hall and the courthouses

³⁶ For further details, see Judith Resnik, “Migrating, Morphing, and Vanishing: The Empirical and Normative Puzzles of Declining Trial Rates in Courts,” 1 *J. Empirical Legal Studies* 783 (2004), and Judith Resnik, “Whither and Whether Adjudication?” 86 *Boston University Law Review* 1101 (2006).

in Boston and St. Louis invite passersby to enter. In contrast, no one walking down a street could easily happen upon a hearing held in an agency and decide, spontaneously, to attend. Through regulations, practices, and custom, what occurs in agency adjudication is generally not readily accessible to either the public or the media. Better spaces are needed to enable access to adjudication based in agencies, where tens of thousands of ordinary disputants go to resolve their disputes.

The relative impoverishment and inaccessibility of agency adjudication and the utter invisibility of dispute resolution processes in the private sector enable us to answer the question we raised earlier, about whether to build courthouses at all. The tradition of public observances of judgments (such as those rendered in Amsterdam) did not come from modern conceptions of accountable and transparent government. Rather, historically, many practices of public judgment were ritualized displays of power that were “rites” for members of the public, situated as observers with no ability to make demands on the state. In contrast, in common-law systems with juries, eligible members of the public did have participatory obligations to serve as decision makers.

But because the processes were public, rulers could not always contain their effects. The consequences ranged from uncontrollable crowds (as Foucault famously recounted)³⁷ to the generation of new information that brought knowledge to the public domain. Over time, as commitments to democracy grew, the public gained “rights” of audience and the ability to demand access, information, and accountability. Today’s constitutions and transnational conventions ensure “open” and “public” courts as these attributes have themselves become representations of the meaning of adjudication *in* democracies, and adjudication in turn has become a signature feature of democracy.

Open courts are one of many venues that today create the public sphere, enabling exchanges among various segments of a polity and thereby creating participatory opportunities for norms to be constituted, affirmed, or reconfigured. The public processes of courts permit education, a point made centuries ago by Jeremy Bentham, who called courts “school[s] of the highest order.”³⁸

But in the interval since Bentham wrote, courts have come to do a good deal more. Given twentieth-century developments of equal treatment of humans, courts are one place in which power can be redistrib-

³⁷ Michel Foucault, *Discipline and Punish: The Birth of the Prison* (Alan Sheridan, trans.; New York: Vintage Books, 1977; 2nd ed., 1995).

³⁸ Jeremy Bentham, *The Works of Jeremy Bentham* 355 (Edinburgh: William Tait, 1843, vol. 6) (reprinting Bentham, *Rationale of Judicial Evidence*, 1827, vol. 1).

uted. Individuals have entitlements to call governments to account, publicly, for wrongdoing. However powerful they may be when outside courts, when private-sector and public-sector actors come into court, they become subject to rules that oblige them to exchange information and to treat their opponents fairly. In many respects, they must operate as equals of their adversaries. (The importance of such obligations can be seen in efforts to avoid them, as in the United States today, where the Executive branch has tried repeatedly to “strip” jurisdiction from the federal courts over claims of wrongdoing brought by detainees in Guantanamo and elsewhere.)³⁹

In short, and as argued at more length elsewhere,⁴⁰ courts are one place in which to insist on equal treatment or to witness the failure to accord it. Courts undermine the state’s monopoly on power and forge community ownership of norms. Moreover, courts make good on another democratic promise: that rules can change because of popular input. Through the democratic iterations of a multitude of cases, witnessed by a motley crew of spectators, conflict about or convergence on law can emerge. That is an argument for continuing to construct separate and discrete buildings—courthouses.

This response, in turn, prompts consideration of another set of questions, about whether courthouses “ought” to be identifiable in form so as not to be confused with other major buildings. Further, should they be distinctive reflections of the particularities of a given country? These questions have an immediacy, as the spurt in courthouse construction is by no means limited to the United States. Many countries are involved in courthouse building, with architects competing for design commissions. Moreover, some buildings are explained as representing a particular nation’s identity. For example, the architects who designed the 1992 Supreme Court in Jerusalem for the State of Israel described their goal as seeking to reflect the “special nature of justice and traditions in Israel.”⁴¹ France has undertaken an ambitious project of construction in more than twenty sites,⁴² and other important buildings span the globe, from Melbourne, Australia, to Helsinki, Finland.

³⁹ See, e.g., The Military Commission Act of 2006, Public L. No. 109–366, 120 Stat. 2600 (codified at various sections of 10 U.S.C. § 948 et seq., and at 28 U.S.C. § 2241).

⁴⁰ Judith Resnik and Dennis E. Curtis, “From ‘Rites’ to ‘Rights’ of Audience: The Utilities and Contingencies of the Public’s Role in Court-Based Processes,” in *Representations of Justice* (Antoine Masson and Kevin O’Connor, eds.; Brussels: P.I.E.–Peter Lang, forthcoming, 2007).

⁴¹ See Yosef Sharon, *The Supreme Court Building, Jerusalem at 25* (Alexandra Mahler, trans.; Israel: Yad Hanadiv, 1993, 2nd ed. 1997).

⁴² See *La Nouvelle Architecture Judiciaire: Des Palais de Justice Modernes Pour Une Nouvelle Image de la Justice* (France: La Documentation Française, 2000). Such work is centered in the offices of the Agence de Maîtrise d’Ouvrage des Travaux du Ministère de la Justice.

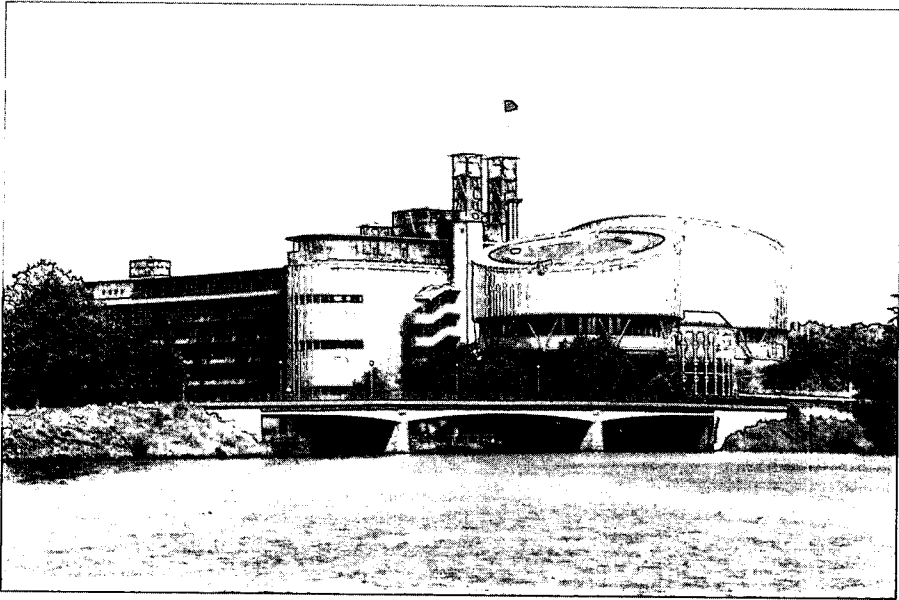


FIGURE 30. *European Court of Human Rights*. Strasbourg, France. Architect: Richard Rogers, 1984. Photographer: Sandro Weltin. Image provided and reproduced with the assistance of the photographer and with the permission of the Council of Europe.

In contrast to these nation-specific courts is the 1984 building (fig. 30)⁴³ of the European Court of Human Rights, whose jurisdiction crosses the boundaries of nation-states as it develops aspects of the law of a federated Europe. That court joins some old transnational courts (such as the International Court of Justice, convening on the site of the “Peace Palace,” which opened in The Hague in 1913 after a major competition among architects) and others, now housed in new buildings, such as that of the International Tribunal for the Law of the Sea, opened in 2000 in Hamburg, Germany. (The International Criminal Court [ICC] is currently in temporary quarters as state parties consider whether to proceed with a building.)

Many of the new buildings, like the federal courthouse in Boston (depicted above, in fig. 24) are clad in glass. Looking at the exterior and interior glass, one might be tempted to conclude that glass—and the transparency it permits—is the new symbol of justice. But a vocabulary of transparency, with the expanse and expense of glass that it supports, is not unique to contemporary courthouses. Rather, it is an artifact of technological advances of the last century and can be found in many

⁴³ Our thanks to the Honorable Lucius Wildhaber, former President of this Court, and to John Darcy, a lawyer staff member of that Court, for helping us to obtain this image.

kinds of buildings.⁴⁴ Indeed, proponents of a new baseball stadium in Washington, D.C., have also insisted that glass will be essential, for (as they were quoted in newspapers as explaining) baseball too must convey “the transparency of democracy.”⁴⁵

One issue is whether to aspire to a particular aesthetic, insistent upon the notion that courts have a distinctive look. Should we be troubled if a viewer sees a court but does not know it, mistaking the building for a museum, a factory, or a mall? A new court in Helsinki is in fact a recycled liquor factory. In Sydney, another is a renovated old department store, with faded words like “corsets” and “gloves” still legible on its facade. Another question is whether courts should aspire to have a national identity, looking different from one another because one is in Australia, another in Israel, a third in France.

Our position is that the sine qua non of courthouse buildings should be their accessibility to the public. Those with the power to commission new court buildings ought to select sites easily reached by public transportation and proximate to other services and to use buildings housing other government functions. In the United States, for example, the federal courts in many cities were in the same building as the post office. While both courts and post offices now need more space, multipurpose venues welcome a wider range of users than does a space dedicated to only one use. Responsive to this very concern, the Federal Courthouse in Boston now convenes educational events for children and adults as it seeks to continue to serve, as county courthouses around the United States once did, as a community center.

As for whether these structures ought to be marked to reflect distinctive national identities, answers come in part from the functions of courthouses. The unique service provided—adjudication—is not particular to place. Rather, adjudication’s norms of equal treatment, fair hearings, and public transparency are either transnational or a-national. Further, many countries have determined that their jurists ought to be in dialogue with judges elsewhere. An example comes from Article 39 of the Constitution of South Africa. That provision requires that, when interpreting that nation’s bill of rights, the Constitutional Court of South Africa “must consider international law” and may consider foreign law. As the 1996 Constitution’s preamble explained, South Africa was establishing “a society predicated on democratic values, social justice

⁴⁴ See Annette Fierro, *The Glass State: The Technology of the Spectacle: Paris, 1981–1998* (Cambridge, Mass.: The MIT Press, 2003).

⁴⁵ David Nakamura, “Architects Promise Visionary D.C. Ballpark: HOK Sport Considers Such Encompassing Themes as ‘Transparency in Democracy’ for Design,” *Washington Post*, 1 April 2005, at B1.

and fundamental human rights” so as to take “its rightful place as a sovereign state in the family of nations.”⁴⁶

Atop the exchange of views about the shape of human rights, another idea—that of universal jurisdiction transcending geography—is increasingly asserted by some countries as well as by bodies like the International Criminal Court as a legitimate response to certain kinds of harms. Under that theory, courts have the power to indict individuals outside the nations in which a particular court sits. If national boundaries decreasingly define a court’s jurisdiction and if transnational documents (including several United Nations covenants) express shared commitments to public processes, fair treatment, and judicial independence, the buildings that are courts will share features reflective of the transnationalization of both law and adjudication.

A transnational idiom for courts is not, however, an approach that is specifically modern. The town halls of various city-states in Europe had a good deal in common with each other, as they displayed an iconography influenced by Ripa, whose work traveled from Italy through and beyond Northern Europe. Moreover, “European” emblems, such as the scales used so widely to evoke the act of judgment, are not specifically European, but rather can be traced to non-European cultures in Africa and the Middle East. A shared vocabulary and overlapping images about judgment have long spanned many cultures and derived from a host of crossings, some of them via colonizing powers that themselves moved both east and west, both north and south.

Finally, we return to the questions of symbolic representation with which we began. As governments dedicate spaces to justice and aspire to some didacticism along the way, what content ought to be conveyed? Our conclusion is that the contemporary glowing expressions of power, authority, privilege, and legitimacy rarely do justice to justice. We have documented the iconography surrounding justice but, to be clear, we have not done so in an effort to romanticize that history.

Our visual traditions of Justice have their political roots in states that were hierarchical, non-democratic, and tolerant of profound inequalities. Most people for most of the time were outside the circle of rights and of power. It is therefore not surprising that the icons of Justice that have come down to us signal little about *access* to justice or about rights-seeking. (A more complex question is why, with the rise of democracy, so much about the pain and conflict entailed in imposing justice was washed out.)

For us, the precepts of good democratic governance as encoded and iterated in the symbolism of Justice are far too narrow. Hence, we close with four suggestions. First, to the extent we harken back to Renais-

⁴⁶ Article 39(1)(b) and (c) and the preamble of the Constitution of the Republic of South Africa (1996).

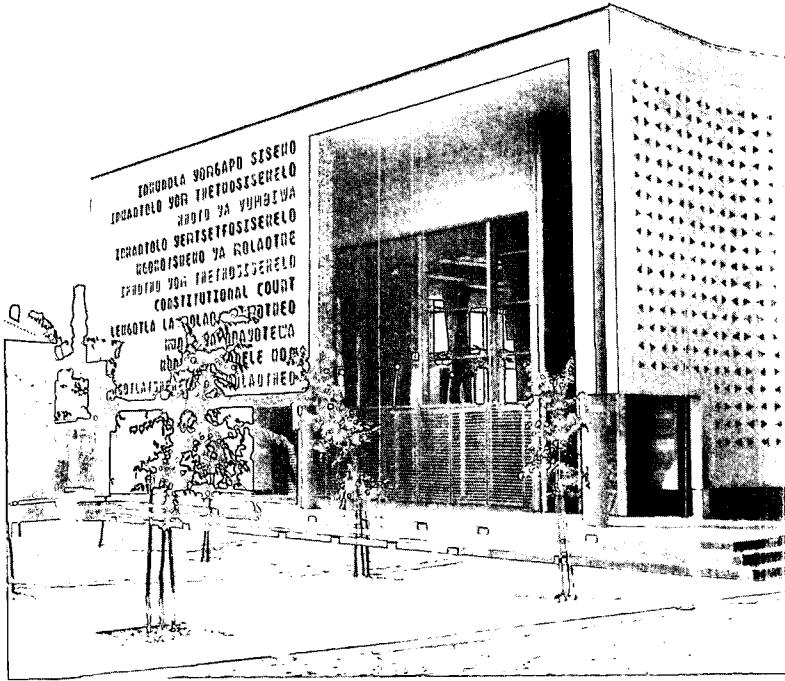


FIGURE 31. *Front facade of the Constitutional Court of South Africa.* Johannesburg, South Africa. Architects: Jamina Masojada, Andrew Makin, OMM Design Workshop, and Paul Wygers, Urban Solutions, 2004. Photographer: Angela Buckland. Copyright: Constitutional Court Trust, 2005. Reproduced courtesy of the Constitutional Court Trust and David Krut Publishing.

sance iconography, we need to enlarge the focus. Justice was once part of a foursome. We would be better served were our leadership to see itself in need of Prudence, Fortitude, and Temperance as much as in need of the power of Justice. Imagine courts adorned with bridles to symbolize restraint, mirrors to evoke the need for self-awareness, and broken columns to show strength and endurance. Moreover, one could retrieve Justice's cornucopia (an attribute that was lost in late medieval times) and drop the sword, borrowed from the iconography of Archangel Michael, portrayed as slaying a satanic dragon.

For the second suggestion, a visual visit to the Constitutional Court of South Africa, discussed above, is required. Figure 31 provides another court facade, by now somewhat familiar,⁴⁷ yet with an important

⁴⁷Our thanks to Justice Albie Sachs of the South African Constitutional Court and to former Yale Law students Elizabeth Brundige and Maria Burnett for assistance in obtaining the images shown in figures 31 and 32.

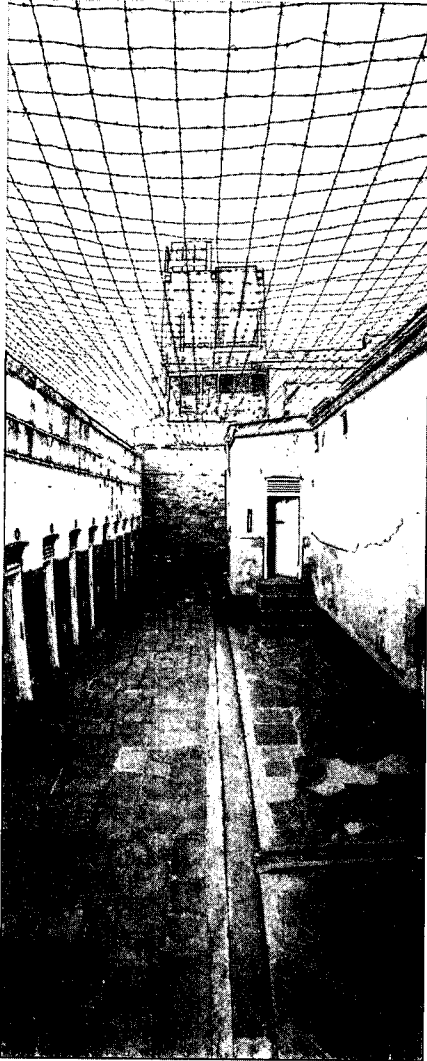


FIGURE 32. *Interior Courtyard, Old Fort Prison, within the Constitutional Complex of South Africa.* Johannesburg, South Africa. Photographer: Angela Buckland. Copyright: Constitutional Court Trust, 2005. Reproduced courtesy of the Constitutional Court Trust and David Krut Publishing.

variation in that many languages are used on the front to welcome speakers of different tongues. But, in addition to foyers and courtrooms, one can see barbed wire and empty jail cells (fig. 32). This Constitutional Complex was built on the Old Fort Jail, where Nelson Mandela was a prisoner. According to Mandela, President of South Africa when this design was selected, its purpose is to incorporate “horrid memories of torture and suffering,” in part to honor the struggle for freedom and in part with the confidence that these practices would not be resumed.⁴⁸

⁴⁸ Taryn Lamberti, “Mandela Names Winning Architects,” *Business Day* (South Africa), 9 April 1998, at 4.

In so far as we have ascertained, this is the rare contemporary court building insistent on expressing something about injustice going forth in the name of the state. (A predecessor can be found after another revolutionary moment when, in 1941, José Clemente Orozco painted murals in the then-new building for the Supreme Court of Mexico. There depicted is a Justice, lying far back in her throne, a sword dangling by her side, as injustice oppresses people below her feet.)⁴⁹

Third, something about the pain of giving judgment—retrieving the themes of Zaleucus (rather than Brutus)—is needed, as is illustrated by figure 33,⁵⁰ a wooden figure described sometimes as a Lord of Jurisprudence. According to some commentators, this wooden African figure is full of nails because of the pain and burdens of judging that he carries on his chest. Others say that community rituals require that nails be driven in when judgments are accepted. Yet others argue that this is not a justice figure at all.

We show it here to demonstrate that objects can be used to express something of the weight, the difficulty, and the pain of judgment—both in the making of judgments and in the acceptance of them. Yet few of the courthouses we have seen admit or display the burdens and obligations of judgment—for either judges or litigants.



FIGURE 33. *Nail figure.*
Kongo, artist unknown,
circa 1875–1900.
Copyright: The Detroit Institute
of Arts, Founders Society
Purchase, Eleanor Clay
Ford Fund for African Art.
Reproduced with permission.

⁴⁹ See *Nation's Supreme Court of Justice: Federal Judiciary: Integration and Operation of the Federal Judiciary, Retrospective: Mexico*, 66–67 (Mexico [published for the Court], 1997). The Court's monograph described the two sections related to Justice, with one section representing "metaphysical justice fulminating the evil, and on the other, men[s] justice punishing them." The imagery of a "blindfolded Justice in a compromising position" apparently distressed some government leaders sufficiently that another, more "constructive," set of murals (about the "fertility of peace" as contrasted with the "horror of war") by George Biddle of the United States was installed. See "Orozco v. Biddle," *Time Magazine*, 24 September 1945, at 46.

⁵⁰ This figure was identified by Robert Farris Thompson in *Perspectives: Angles on African Art*, 181 (1987) as a "standing image of what might be called a lord of jurisprudence."

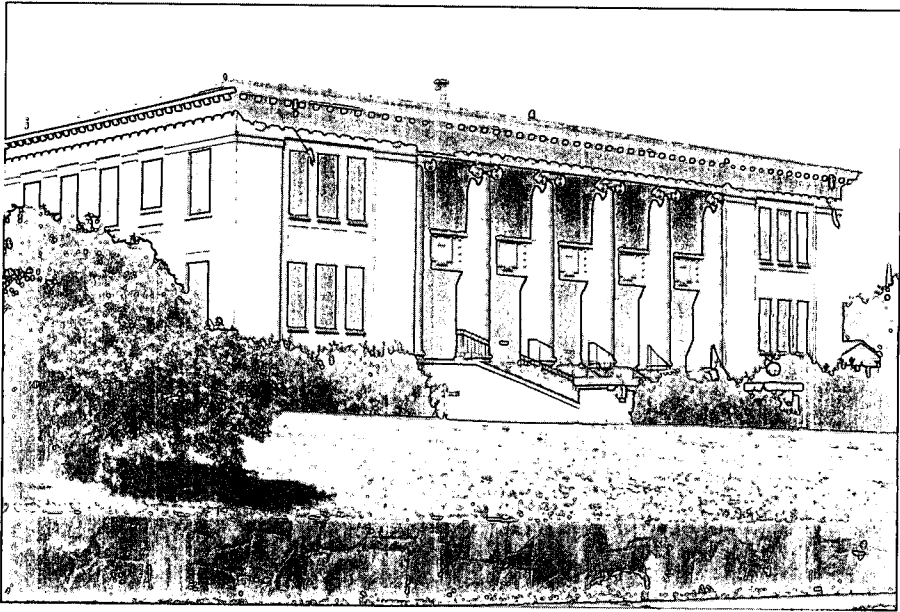


FIGURE 34. *Cook County Courthouse*. Grand Marais, Minnesota. Architects: Kelly and Lighell, circa 1900–24. Photographer: Doug Ohman, Pioneer Photography. Copyright: Doug Ohman. Reproduced with permission.

Our fourth suggestion takes us to two last images of what we found in a county court in Northern Minnesota, in a town called Grand Marais. Figure 34 offers a view of the facade of this multi-purpose courthouse, constructed at the beginning of the twentieth century. Today, it continues to serve many functions, as do government buildings in small towns around the United States. We arrived unannounced but found a probation officer who offered to give us a tour. When we inquired about what (if any) icons of justice were displayed, he did not hesitate to bring us to the courtroom in which a shabby corduroy jacket, shown in figure 35, had proudly been framed. Our guide explained that this was a memorial to a local lawyer who had provided free services to criminal defendants. The plaque celebrates a person committed to the “human dignity of others,” and specifically “the poor,” in need of but without the resources to seek justice.

These closing examples suggest but a few of the ways to invoke the challenges of democratic justice in the twenty-first century—in terms of making justice accessible to a host of claimants, of remembering and acknowledging the injustice that has gone forth in the name of legitimate state power, of the burden and the weight that giving judgment entails, and of understanding that Justice, if the only attribute of gov-



FIGURE 35. *James Sommerness Memorial*. Cook County Courthouse, Grand Marais, Minnesota. Photographer: Glenn Gilyard. Reproduced with the permission of Richard Gilyard, who served as the architect for the Court of Appeals for the Eighth Circuit and who arranged for the picture to be taken.

ernment, comes to be reduced to power rather than working as one facet of a set of programs and actions that would constitute good governance. Entailed herein are not only acts of memory—reclaiming the stories of justice and injustice from the past—but also a vision that democratic justice is not simply continuous with the practices of adjudication predating democracy but also entails substantial departures. To represent justice today requires devising ways to acknowledge what democracy brings to adjudication: new and genuinely radical commitments of trying to make more available the forms of earthly justice that we are continually reiterating and reconfiguring.



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