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Facades of Justice

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REPRESENTING JUSTICE: INVENTION, CONTROVERSY, AND RIGHTS IN CITY-STATES AND DEMOCRATIC COURTROOMS. By *Judith Resnik* and *Dennis Curtis*. New Haven and London: Yale University Press. 2011. Pp. xvii, 668. $75.

I. THE BLINDFOLDING OF JUSTICE AND JUDICIAL CORRUPTION

Representing Justice is a book of encyclopedic proportions on the iconography of justice and the organization of space in which adjudication occurs. Professors Judith Resnik[1] and Dennis Curtis[2] have gathered a provocative array of images, ranging from the scales of the Babylonian god Shamash—"judge of heaven and earth"—on a 4,200-year-old seal (pp. 18–19 & fig. 23), and a 600-year-old painting of Saint Michael weighing the souls at the Last Judgment with sword and scales in hand (p. 23 fig. 25) to the tiny Cook County Courthouse in Grand Marais, Minnesota, 110 miles north of Duluth (p. 372 fig. 226), and the millennial opening of a spectacular new courthouse for the International Tribunal for the Law of the Sea in Hamburg, Germany (p. 266 fig. 176). A more richly conceived catalogue of the development of specialized courthouses from multipurpose buildings and the art that adorns adjudicative space is hard to imagine.

Part history, part art history, part architectural theory, and part meditation on the relationship between adjudication and political legitimacy in the spirit of Jeremy Bentham, the book poses fundamental questions about the trajectory of liberal justice in the twenty-first century: is adjudication in public space essential to the rule of law in democratic societies? Can the resolution of civil and criminal disputes be privatized without compromising democratic values? Is justice primarily procedural, linked to courts and adjudication; primarily substantive, tied to substantive rights and the popularly accountable branches of government; or primarily normative, a set of ideals or theories against which the actions of any people and their government may be assessed? Most significantly, what is the relationship between justice, representations of justice, and the material forms the practice of justice takes?

Representing Justice is preoccupied with these and other questions. Readers may be surprised to learn that Justicia—the classic image of a

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blindfolded woman holding scales and a sword adorning the entrance to countless modern courthouses—was not traditionally depicted with a blindfold, nor was she alone. The cardinal moral virtues—Justice, Prudence, Fortitude, and Temperance—appeared for centuries in public spaces as a quartet of female figures "grouped together so often that commentators sometimes referred to one as 'missing' when only three were presented" (p. 8). In representations of Justice, moreover, "[*s*]*ight was the desired state*, connected to insight, light, and the rays of God's sun" (p. 62; emphasis added). Impartiality or evenhandedness was already represented, after all, in "the balanced pans on Justice's scales" (p. 63). Indeed, in the "dominant pre-humanist tradition . . . the blindfold signified a disability" (p. 63). "[C]lassical and biblical texts . . . repeatedly cast light as representing truth and darkness as misguidedness" (p. 64). Thus, before the sixteenth century, Justicia was invariably depicted in public spaces where disputes were adjudicated with open eyes (p. 74).

Among "the earliest images known to show a Justice with covered eyes" is *The Fool Blindfolding Justice*, a woodcut for a 1494 book written by Sebastian Brant, "a noted lawyer and law professor" from Alsace.[3] Justicia is shown seated, holding scales in her left hand and a sword in her right while a jester stands behind her and fastens a blindfold over her eyes (p. 68 fig. 51). The image, included in a chapter entitled "Quarreling and Going to Court," is plainly intended to be "derisive" (p. 67). Brant "repeatedly equate[s] blindness with sin, ignorance, and mistakes" in his book (p. 67). Other images from the period also use a blindfold to reveal concern with "judicial error" (p. 67) and "the ease with which . . . judges could be deceived" (p. 69). In *The Tribunal of Fools*, for instance, an illustration in a 1508 volume on local law for the City of Bamberg, the presiding judge and his colleagues on the bench are depicted blindfolded and wearing jesters' caps (p. 67, 69 & fig. 52). The legend on a scroll "above their heads reads: 'Out of bad habit these blind fools spend their lives passing judgments contrary to what is right'" (p. 67). As late as the mid-seventeenth century, Resnik and Curtis contend, positive depictions of Justicia blindfolded remained "uncommon" (p. 75).

Readers may be equally surprised to learn that the didactic attributes of adjudicative space (statues, inscriptions, murals, frescoes, etc.) were once directed not only at the public but at presiding judges. Courthouses and multipurpose buildings in which trials were held frequently included images intended to impress upon judges their subservience to the sovereign, the importance of placing fidelity to law over other duties and interests, and the consequences that could follow deviation from perfect integrity (Chapter Three). In the Medieval and Renaissance periods, Herodotus's account of the judgment of Cambyses—a king who ordered a judge flayed for accepting bribes—was frequently depicted in paintings "in town halls, on commemorative medals, and in tapestries" to "warn[] all judges about how

3. P. 67; *see* SEBASTIAN BRANT, THE SHIP OF FOOLS 18 (Edwin H. Zeydel trans., 1944).

to behave appropriately" (pp. 38–39). The flaying of the corrupt judge was often shown in gruesome detail, as in the Flemish artist Gerard David's *The Justice (Judgment) of Cambyses*, commissioned for the Town Hall of Bruges in the late fifteenth century (pp. 40–41 figs. 31–32). The judge is stripped naked and tied prostrate on a table as three men open long incisions on his arms and chest (p. 41 fig. 32).

Images of handless judges also proliferated during the period. In the Geneva Town Hall, there is a particularly "startling" fresco dated 1604 and attributed to the painter Cesar Giglio, entitled *Les Juges aux Mains Coupées* (p. 44). Resnik and Curtis describe the painting as follows:

> The imagery starts right above a door-height balustrade, reaches the ceiling, and fills the top third of the room's walls. The presiding judge is centered on one of the walls and seated on a high-backed bench. He is shown . . . with open eyes, an upright scepter in one hand, and the other hand cut off. On each side of that judge sit three others, also depicted handless, so that thirteen stumps of arms are visible. (p. 44)

Numerous biblical references condemning bribery are inscribed on a scroll that unfolds "near a figure of Moses" (p. 44). Among them is a passage from *Exodus* 23:8, which "can be translated as 'Thou shalt not accept gifts, for a present blinds the prudent and distorts the words of the just' " (p. 44). Paintings of the Last Judgment common in town halls further "remind[ed] judges that they too would be judged" (p. 42). In Maastricht, for example:

> a 1499 *Last Judgment* showed local aldermen presiding at trial[] with a demon and an angel nearby. The inscriptions have the demon tempting them to accept bribes, while the angel warns: "You who are counselors, . . . Do not allow, for favor or hate, with bribes to hire, Else you go . . . to hellish fire." (p. 42)

Other common images included depictions of Solomon (pp. 56–57 & fig. 44), Brutus's decision to sentence his sons to death for plotting treason (pp. 57–58 & fig. 44), and Zaleucus's decision to blind himself in one eye in an attempt to meet both his duty as a father and as a lawgiver (pp. 57–58; p. 60, fig. 45). Zaleucus's story is of particular moment. After Zaleucus issued an edict "that anyone found to have committed adultery was to be blinded," his own son was found to be an adulterer (p. 58). Instead of blinding his son, Zaleucus "ordered his son to lose only one eye and gouged out one of his own as well" (p. 58). Through an "admirable balance of equity dividing himself between compassionate father and just lawgiver," Zaleucus was said to have "rendered to the law a due measure of retribution" (p. 58; internal quotation marks omitted).

In contrast, modern adjudicative space is, Resnik and Curtis emphasize, almost entirely bereft of imagery directed at judges or addressing even the possibility of failure in the administration of justice.[4] We all "recognize a statuesque woman with scales and [a] sword as Justice[,] but [we] have not been

4. P. 61 ("Modern-day rulers . . . rarely offer scenes reflecting on the burdens of judgment."); *cf. infra* Section III, discussing examples from chapter 15.

schooled in Cambyses, Zaleucus, and Brutus or provided with comparable sagas about the harshness of law and the weight of imposing judgment" (p. 61). Whether we should read the earlier images as enjoining judges to take personal responsibility because no earthly power could adequately supervise and punish corruption (a confession of weakness by the state) or as communicating a promise that punishment would surely follow wrongdoing (an expression of robust supervisory power) is a question I take up below. But in light of *Caperton v. A.T. Massey Coal Co.*[5] and other scandals involving bribery and the corruption of judicial election campaigns, Resnik and Curtis's lament that modern courthouses include no such imagery is well taken.

In this Review, I concentrate on a relationship that the book seems both to recognize and to take for granted. If it is true that the organization and decoration of the space in which justice is done matters—if it is true that our understandings of justice are affected by the space in which it is administered—a working hypothesis of the relationship of the iconography of justice and the architecture of adjudicative space to the rule of law is necessary. I begin with what I take to be Resnik and Curtis's theory that the organization of adjudicative space fosters democratic engagement. I then turn to some complications their argument does not fully address, particularly the contested control of adjudication by elite professionals and the increasingly enclosed and exclusive organization of adjudicative space in modern democratic states. A complete theory of the relationship of the rule of law to the organization and decoration of the space in which justice is done would have to account not only for these developments, but for the multiple and sometimes conflicting meanings that representations of justice have come to possess.

II. THE ARCHITECTURE OF DEMOCRATIC ENGAGEMENT

Resnik and Curtis contend that the relationship between the imagery and practice of justice is defined by legitimation. The authority of law, they argue, depends on "anchors beyond sheer power" (p. 12), and the design and ornamentation of adjudicative space provides one such anchor in the form of "didactic scenes" (p. 26) and "mnemonic aids aimed at instilling beliefs."[6] Although some late Medieval and Renaissance cities and states were surely keen on using the design of public space to display their wealth and prosperity, both ostentatious and modest design choices about imagery and architecture tended to follow the tradition of "*exempla virtutis* (examples of virtue) that identified acts 'worthy of imitation' and therefore

5. 556 U.S. 868 (2009) (finding an appearance of a conflict of interest and risk of bias so "extreme" as to constitute a violation of due process, and reversing a state court judgment where a state supreme court justice refused to recuse himself and voted to overturn a judgment against the defendant, despite receiving a large campaign contribution from the defendant during the pendency of the appeal); *see also* Chris Kirkham, *St. Bernard Judge Gets Five Years in Prison; He Was Part of Scheme to Release Inmates Without Bond*, THE TIMES-PICAYUNE (New Orleans), Sept. 10, 2010, at A1.

6. P. 34; *see also* pp. 61, 89, 95, 295 (discussing the authority of law generally).

appropriate to display" in adjudicative space (p. 38). This "allegorical didacticism" (p. 49) helped to reinforce not only the rule of law, Resnik and Curtis argue, but the authority of the sovereign responsible for the violence, disruption, and intervention that enforcement of legal judgments requires. "Law was used to justify authority, and that authority was produced and reinforced through public representations of law as an explanation for [state-sanctioned] violence."[7]

Resnik and Curtis add that the imagery of justice and the architecture of adjudicative space can contribute to social and legal change, not just the entrenchment of existing power. Indeed, a substantial part of the book is dedicated to documenting the gradual evolution of what the authors call "proto-democratic" classical and medieval design elements saturated with religious meaning into secular icons of justice in modern democratic states around the world (pp. xv, 14, 48, 288–94). The overall narrative arc is one of democratic perfectionism in which the actual practice of justice begins, albeit gradually and haltingly, to fulfill the promises of impartiality, rationality, inclusion, and transparency made in the imagery of justice and the design of adjudicative space.

Drawing on Jeremy Bentham's theory that "publicity" and government accountability are related and Jurgen Habermas's concept of deliberative democracy, Resnik and Curtis argue that adjudication consistent with these core promises of the rule of law is, in fact, "a condition of democracy" (p. 301):

> The normative obligations of judges in both criminal and civil proceedings to hear the other side, to be impartial, and to provide public processes enable two forms of democratic discourse. A first comes from the authority of the audience, empowered to watch the direct participants—litigants and judge—in an adjudicatory exchange; the second stems from rules that structure the discourse among the disputants and jurists.[8]

Public awareness of law, Resnik and Curtis argue, may be fostered by organizing adjudicative space to include the public as audience in the manner of traditional courtrooms and town halls, and by adorning that space with *exempla virtutis* instructing people how that space is to be occupied. Such awareness "can fuel debate not only about . . . particular cases but . . . about what the underlying norms ought to be" (p. 301). It "can generate new rights . . . as well as new limitations" (p. 301). Internally, adjudication empowers individual litigants to "oblige others to treat them as equals as they argue in public about their disagreements, misbehavior, wrongdoing, and obligations" (p. 303). Unlike the legislative process, where citizens may or may not be heard by representatives, "[l]itigation forces dialogue on the unwilling

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7. P. 61; *see also* pp. 89, 95, 295 (discussing examples of how law reinforced state authority).

8. P. 301. Although Bentham and Habermas figure prominently in *Representing Justice*, the theory of democratic legitimacy in adjudication resonates deeply with John Hart Ely's theory of judicial review. *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

(including the government) and momentarily alters configurations of authority" (p. 303). Courts also "institutionalize democracy's claim to impose constraints on state power" by holding the state to answer (p. 303). In short, for Resnik and Curtis, major structural components of democratic legitimacy flow from the practice of adjudication in spaces that owe many of their principal design features to the Medieval and Renaissance periods.

If this trajectory of democratic perfectionism in the use of courts is reassuring, it is also jeopardized by the displacement of public adjudication by privately-controlled and secret forms of dispute resolution. Arbitration, mediation, private settlement, and administrative disposition in domestic and international civil law; plea bargaining in criminal law; and efforts to circumvent law altogether in response to terrorism take place almost entirely outside the traditional adjudicative spaces designed, on Resnik and Curtis's account, to foster democratic dialogue (Chapter Fourteen). Adjudication in court thus "take[s] on an increasingly symbolic character [and] judges now appear as exemplary, ceremonial figures, legitimating other peoples' decisionmaking," rather than as protagonists in the practice of justice (p. 336; internal quotation marks omitted). And although each alternative practice offers relative advantages, Resnik and Curtis worry that it has become more difficult for "discipline to be imposed on decisionmakers[,] . . . [that] [t]he audience becomes voyeuristic rather than participatory" (p. 336), and, as a consequence, that "power flows back to the spectacle's producers" (p. 337).

III. The Architecture of Democratic Control

Adjudication as a condition of democracy is one facade of justice, one way to conceptualize the relationship between the imagery, architecture, and practice of justice. I am moved by this approach and have argued in defense of the adversary system as well as for theories of justice that work up from local practices rather than down from abstract principles.[9] The American Bar Association also enthusiastically supports the construction of courthouses and the growth of the legal profession in other countries under the aegis of promoting (concurrently) economic development and the rule of law.[10] But there is no gainsaying that the association between courts and democracy is contested. Indeed, any country-specific study of the practice of justice in adjudicative space reveals complexity and contradiction. How these complexities and contradictions are represented in synthetic theories of the

9. Norman W. Spaulding, *The Enclosure of Justice: Courthouse Architecture, Due Process, and the Dead Metaphor of Trial*, 24 Yale J. Law & Human. (forthcoming Mar. 2012) [hereinafter Spaulding, *Enclosure of Justice*]; Norman W. Spaulding, *The Rule of Law in Action: A Defense of Adversary System Values*, 93 Cornell L. Rev. 1377 (2008) [hereinafter Spaulding, *Rule of Law in Action*].

10. *See* Robert W. Gordon, *The Role of Lawyers in Producing the Rule of Law: Some Critical Reflections*, 11 Theoretical Inquiries L. 441, 441 (2010); *Promoting the Rule of Law*, Am. Bar Ass'n, http://apps.americanbar.org/rol/publications/judicial_reform_index_factors.shtml (last visited Oct. 20, 2011).

relationship among the imagery, architecture, and practice of justice is as important as the features of any iconic images that inform the theory.

To begin with, at least in the American context, adjudicative space has quite frequently operated in ways that allow elites to check, regulate, or stifle populist, egalitarian political projects. This charge dates as far back as our national history runs. During and after the Founding, for instance, Federalists and Whigs attempted to counter populist hostility toward courts (seen as all-too-willing instruments of colonial oppression before the revolution, and as all-too-willing instruments of creditors afterwards), the common law (seen as an unwelcome inheritance from the former colonial oppressor), and lawyers (seen as morally corrupt profiteers who thrived on the misery of others). Populists sought to eliminate barriers to legal practice, to render judges democratically accountable by election and recall, to replace the common law with legislatively codified rules, and to simplify procedure to reduce costs and delays. Whig-Federalists responded by mounting a sustained campaign to defend common law adjudication as essential both to the rule of law and to the development of a national economic system. In speeches, pamphlets, and other commentary, they also lionized the bench and bar as "public sentinels" uniquely positioned to protect social order because of the moral faculties, perspective, and good judgment cultivated by the study and practice of law.[11]

Alexis de Tocqueville, who spent much of his time among lawyers in America with Whig-Federalists, canonized this view of adjudication and the profession in his argument that American lawyers are uniquely situated, structurally and by disposition, to check majoritarian democratic excess:

> The more we reflect upon all that occurs in the United States the more we shall be persuaded that the lawyers, as a body, form the most powerful, if not the only, counterpoise to the democratic element. In that country we easily perceive how the legal profession is qualified by its attributes, and even by its faults, to neutralize the vices inherent in popular government. When the American people are intoxicated by passion or carried away by the impetuosity of their ideas, they are checked and stopped by the almost invisible influence of their legal counselors. These secretly oppose their aristocratic propensities to the nation's democratic instincts, their superstitious attachment to what is old to its love of novelty, their narrow views to its

11. Norman W. Spaulding, *The Discourse of Law in Time of War: Politics and Professionalism During the Civil War and Reconstruction*, 46 WM. & MARY L. REV. 2001, 2001–02 (2005); *see also* MAXWELL BLOOMFIELD, AMERICAN LAWYERS IN A CHANGING SOCIETY, 1776–1876, at 164–68 (Stanley N. Katz ed., 1976) (discussing Hugh Henry Brackenridge's view that lawyers protect an ordered society); CHARLES M. COOK, THE AMERICAN CODIFICATION MOVEMENT: A STUDY OF ANTEBELLUM LEGAL REFORM 39–41 (1981) (discussing Federalist Joseph Hopkinson's response to the American codification movement and the role the common law plays in preserving order); DANIEL WALKER HOWE, THE POLITICAL CULTURE OF THE AMERICAN WHIGS 229 (1984) (discussing Rufus Choate's views regarding the legal profession and social order); Rufus Choate, The Position and Functions of the American Bar (1845), *reprinted in* THE LEGAL MIND IN AMERICA: FROM INDEPENDENCE TO THE CIVIL WAR 258, 258–60, 268 (Perry Miller ed., 1962) (arguing that lawyers safeguard American free government).

> immense designs, and their habitual procrastination to its ardent impatience. The courts of justice are the visible organs by which the legal profession is enabled to control the democracy.[12]

This too is an appealing facade of justice—one Whig-Federalists had been laboring for decades to construct. But it relies on a very different concept of democratic perfectionism than the one to which Resnik and Curtis seem attached. Dialogue and deliberation may be compelled in adjudication, but this occurs in space carefully structured to privilege elite experts and those who can afford immediate access to them. Indeed, the most basic complaint of Jacksonian democratic populists about adjudication was that it demanded this expertise as a condition of meaningful access to law.[13] The rules of pleading and practice as well as the substantive rights to be asserted were spread out across inscrutable precedents that only lawyers and judges—trained in Latin and possessed of case reporters—could hope to understand.[14] Moreover, admission to the bar *by the courts* was a prerequisite to entering the adversarial space of a courtroom with the authority to speak as an officer of the court.[15]

While there were important populist countercurrents of varying strength and duration over the course of the nineteenth and twentieth centuries, the Whig-Federalist project has largely succeeded. Access to adjudication in court remains almost entirely regulated by and available to elites.[16]

How then should we interpret the turn in many states toward visually imposing, nearly impregnable neoclassical courthouses on the model of ancient temples in the postrevolutionary period?[17] Did it express the authority of law, a consensus that law had become our civic religion, or anxiety to

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12. 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 278 (Henry Reeve trans., Alfred A. Knopf 12th ed. 1945) (1835). On the influence of Whig lawyers and Whig ideology on de Tocqueville's work, as well as the influence of de Tocqueville's thesis about lawyers in American democracy, see GEORGE WILLIAM PIERSON, TOCQUEVILLE IN AMERICA (1939); DANIEL WALKER HOWE, THE POLITICAL CULTURE OF AMERICAN WHIGS 157 (1979); and William LaPiana, Review Essay, 15 L. & HIST. REV. 419 (1997).

13. *See* Norman W. Spaulding, *The Luxury of the Law: The Codification Movement and the Right to Counsel*, 73 FORDHAM L. REV. 983, 980–90 (2004) [hereinafter Spaulding, *Luxury*]; *see also* COOK, *supra* note 11, at 15–16 (identifying access to justice as a basic complaint).

14. *See* Spaulding, *Luxury*, *supra* note 13, at 985.

15. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 236 (3d ed. 2005); JAMES WILLARD HURST, THE GROWTH OF AMERICAN LAW: THE LAW MAKERS 250 (1950).

16. *See* DEBORAH RHODE, ACCESS TO JUSTICE (2004) (noting that less than 1 percent of total U.S. expenditures on legal services are dedicated to serving low-income Americans); David Luban, *Taking out the Adversary: The Assault on Progressive Public-Interest Lawyers*, 91 CALIF. L. REV. 209, 211–13 (2003).

17. *See Enclosure of Justice*, *supra* note 9; NEIL LEVINE, MODERN ARCHITECTURE: REPRESENTATION AND REALITY 76 (2009); CARL R. LOUNSBURY, THE COURTHOUSES OF EARLY VIRGINIA: AN ARCHITECTURAL HISTORY 128 (Cary Carson ed., 2005); ERIC SLAUTER, THE STATE AS A WORK OF ART: THE CULTURAL ORIGINS OF THE CONSTITUTION 41, 67–69, 79 (2009) (examining the Founders' association of constitutions with architectural construction and sacred temples).

affirm an understanding of legal authority that was hotly contested? Were the design choices primarily an expression of shared understandings of justice or part of the Whig-Federalist project? My own view is that the organization and decoration of adjudicative space operated in and through enclosure—a carefully orchestrated series of inclusions of experts and laypersons that relied on procedural and spatial exclusions and hierarchical differentiation to elicit deference to the expertise of bench and bar. Everything from procedural rules to the internal structure of a courtroom and the increasingly impenetrable design of courthouses reflected this logic of selective, controlled inclusion and exclusion. Enclosure promised rationality, concealment of irrationality where necessary, expert control, and efficiency even as it helped to influence popular and professional commitments to procedural due process and permitted certain forms of resistance to law to occur in court proceedings. In many respects, the modern displacement of public adjudication into private spaces can be understood as the effect of a convergence between the desire for enclosure and other practices of justice to which Americans have long been attached (especially private ordering and vigilante justice).[18]

It is no accident then that the association between democratic values and adjudication in court remains controversial. Popular constitutionalists have sought to tear down the Whig-Federalist facade of justice precisely because it relocates the primary work of rights-definition from the democratic practices of "the people themselves" to enclosed, countermajoritarian spaces controlled by the bench and bar.[19] Law, on this view, may be our civic religion, but lawyers and judges are false prophets, constantly disabling genuine democratic engagement. Further to the left, neo-Marxists have developed elaborate theoretical and historical arguments tending to show that rights-definition by courts vindicates the interests of capitalism more than the values of democracy.[20] Even conservatives, dismayed by the most extended countercurrent against the Whig-Federalist project caused by the Warren Court and the liberalization of procedure following the New Deal, have mounted a wide-ranging assault on adjudication in court. Not only have they promoted private ordering,[21] they have also argued that the true purpose of

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18. Spaulding, *Enclosure of Justice*, *supra* note 9 (discussing American reliance on self-help, private ordering, and vigilante justice as alternatives to the adversary system). *Cf.* chapter 7 (discussing the history of American courthouse design and its displacement by alternative means of dispute resolution).

19. Several scholars have addressed popular constitutionalism and the role of a countermajoritarian judiciary. *See generally* LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999); Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CALIF. L. REV. 1027 (2004).

20. *See generally* MORTON HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780–1860 (Stanley N. Katz ed., 1977) (arguing that the legal transformation served capitalist interests); DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION 264–96 (1997) (arguing that judge-made law supports capitalism).

21. *See, e.g.*, AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011) (finding a state law prohibition on arbitration clauses that preclude class claims preempted by the

common law adjudication is the promotion of allocative economic efficiency, not corrective justice,[22] and they have sought to constrain constitutional judicial review using justiciability doctrines, originalism, and theories of strict construction.[23]

Presumably, design choices in the architecture and decoration of courthouses would be interpreted differently depending on which of these theories of adjudication one took to be the most convincing. But the point for present purposes is not to endorse or refute any one theory. It is rather to draw into question any interpretive stance that takes at face value the proposition that the imagery and architecture of adjudicative space has reflected or can serve any general didactic purpose or normative theory of adjudication—democratic or otherwise—in a society with plural visions of justice. Indeed, ambiguity and, one suspects, anxiety about the authority of law surround not only the neoclassical style of courthouse design that dominated the postrevolutionary period in America, but also the supposedly "proto-democratic" images and architectural design choices for adjudicative space highlighted by Resnik and Curtis. The breadth of this ambiguity is one of the most fascinating, important, and underdeveloped aspects of *Representing Justice*.

IV. POLYSEMIC ADVERSARIAL SPACE

We know, for instance, that when Justicia was first depicted with a blindfold, it was not intended to represent the promise of impartiality but rather to serve as a critique of the competence of judges—especially the ease with which they could be deceived. Notably, the images of fools blindfolding justice and of judges blindfolded and dressed as jesters reflected specific concerns about the arbitrariness of decisions by *lay* judges who were looking to local, customary law. Brant and his fellow critics sought not merely to highlight a general risk of judicial deception; they sought "to professionalize law, to dispossess lay jurists of their authority, and to promote law's codification" according to Roman statutes (p. 69). The imagery thus arose from basic disagreements over access to law, what constituted authoritative sources of law, and who should be recognized as authoritative interpreters.

Even early proponents of a blindfolded Justicia had "somewhat different rationales for the blindfold" (p. 75). Some made the familiar modern argument that "[d]eprivation of sight resulted in even-handedness," while others associated it, "like Homer's blindness," with perfect reason and "clarified

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Federal Arbitration Act); Rent-A-Center, West Inc. v. Jackson, 130 S. Ct. 2772 (2010) (precluding judicial review of a claim that an arbitration agreement was unconscionable).

22. *See, e.g.*, WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW (1987); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (8th ed. 2011).

23. *See generally* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION (2004); ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 163 (1990); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989); Cass R. Sunstein, *What's Standing After* Luhan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 180 (1992).

knowledge" (p. 75). The "allegorical didacticism" of paintings, frescoes, and other art adorning adjudicative space was equally "polysemic" (p. 49, 75). Depictions of the Last Judgment, for instance, were ambiguous about the division between secular and sacred legal authority (pp. 35–36, 42), and it is not clear whether representations of the judgment of Cambyses were included in adjudicative spaces to "document[] the prohibition of paying money to judges and the power of rulers to control local magistrates" or "to instill these ideas" (p. 39).

At least some of this ambiguity was linked, as in Brant's critique of lay judges relying on customary law, to contested legal authority and the emergence of secular professional expertise. The famous fourteenth-century frescoes allegorizing good and bad government in the Palazzo Pubblico in Sienna, Italy, are not only "drenched in Justice iconography," they also made "statements about a relatively new form of leadership—a republic claiming some distance from both the Emperor and the Pope" (p. 27). "The amalgam of picture and script," Resnik and Curtis describe, "served as a shrine to the power of the Nine [civic leaders who used the space to meet, and] who relied on the 'prerogatives of a literate elite of clerics, academics, and officials' to rule" (p. 27). Disagreement among art historians about how to "decode the frescoes" (p. 29) and their "didactic scenes" (p. 26) is, to this day, notoriously sharp.

Resnik and Curtis are perfectly frank about this interpretive ambiguity, but they do not theorize it in relation to the fact that political, legal, and professional authority were contested in the periods in which some of the most significant images and designs for adjudicative space were produced. Perhaps what explains the salience and durability of these images and design choices is not their expression (whether anticipatory or celebratory) of democratic commitments of any specific kind, but rather their polysemic qualities—particularly the fact that they draw together, without necessarily resolving, radically different expectations and didactic objectives for the rule of law. This account has the appeal of drawing the iconography of justice and the architecture of adjudicative space into a more coherent relationship with aesthetic theory, for which the conjunction of unifying and discordant elements is a major concern.[24] It also draws the design of adjudicative space into a more coherent relationship with theories of adjudication that stress the theatrical attributes of adversarial exchange, the indeterminacies of rights-definition, resistance to remedies over the closure of judgment, and the legitimation of state authority taken to flow from that closure.[25] On this view, adjudicative space is inherently polysemic.

To validate this account, the differences and tensions that animate the imagery and design of adjudicative space would have to be scrutinized as

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24. For discussion of the development of modern aesthetic theory, see PETER KIVY, THE SEVENTH SENSE: FRANCIS HUTCHESON AND EIGHTEENTH-CENTURY BRITISH AESTHETICS (2d ed. 2003) (1976).

25. *See* Spaulding, *Enclosure of Justice*, *supra* note 9, at sec. V); Spaulding, *Rule of Law in Action*, *supra* note 9, at 1380 (discussing the role of passion and play in adjudication).

they are embedded in the local practice of justice in specific jurisdictions. Different understandings and expectations of adjudication (most significantly those between common law and civil law countries and those held by different groups within individual jurisdictions), different cultural understandings of what it means for the administration of justice to occur in public,[26] and differences in the degree of faith in and reliance upon legal experts would all be relevant to defining a hermeneutics of representations of justice.

Consider, for instance, Irus Braverman's work on legal geography and the respects in which trees have become a crucial and hotly contested part of the imagery of justice in Israel and Palestine. Over the course of the twentieth century, Braverman writes, "Israel has planted some 240 million trees, mostly pines, throughout Israel/Palestine so as to 'bloom the desert.' "[27] However, "Palestinian acts of arson, Hezbollah rockets, and illegal tree chopping for wood, along with fires and infectious diseases, have damaged many of these pines."[28] Palestinians have developed a correspondingly deep attachment to the olive tree. It is not only "a major source of livelihood . . . it has also become a symbol of the Palestinian steadfast resistance to Israeli occupation."[29] In order to build the Separation Barrier, "the State of Israel has been carrying out a massive project of olive uprooting . . . and radical Jewish-Israeli settlers have been vandalizing the olive as a way to assert their rights over land."[30] Because land rights in the 1858 Ottoman Land Code flow to those who can prove they are "long-time cultivator[s] of fruit trees,"[31] and because Israel claims as "state land those lands that have not been cultivated for a sufficient time period,"[32] litigation over contested land now turns heavily on expert testimony using aerial photographs of treescapes.[33]

Part of Braverman's argument is that pine and olive trees are now saturated with divergent legal and cultural meanings. He is particularly concerned with how the Israeli government has used aerial photographs in time-lapse sequences to establish, with the appearance of objectivity, the

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26. Consider, for example, the sharp disparities in French and American reactions to media coverage of the arrest of Dominique Strauss-Kahn. *See* Scott Sayare, Maïa de la Baume & Robert Mackey, *French Shocked by I.M.F. Chief's 'Perp Walk,'* N.Y. TIMES THE LEDE BLOG (May 16, 2011, 5:05 PM), http://thelede.blogs.nytimes.com/2011/05/16/french-shocked-by-i-m-f-chiefs-perp-walk (discussing divergent American and French views of media coverage showing a defendant in handcuffs).

27. Irus Braverman, *Hidden in Plain View: Legal Geography from a Visual Perspective*, 7 L. CULTURE & HUMAN. 173, 177 (2010) [hereinafter Braverman, *Hidden in Plain View*]. *See generally* IRUS BRAVERMAN, PLANTED FLAGS: TREES, LAND AND LAW IN ISRAEL/PALESTINE (2009).

28. Braverman, *Hidden in Plain View*, *supra* note 27, at 177.

29. *Id.*

30. *Id.*

31. *Id.* at 178.

32. *Id.*

33. *Id.*

status of disputed land and construct an unimpeachable "official view."[34] "Occupation, closures, settler harassment,"[35] other conditions that may "have prevented Palestinians from cultivating their lands,"[36] and alternative means of expressing ties to the land are thus "made illegible to the eyes of the state."[37] But he also insists that both sides in the land disputes have come to rely on "the manifest innocence of nature and the seemingly a-temporal properties of landscapes" as evidence.[38] "[L]egal enterprises embody themselves in space,"[39] he concludes, "thereby appearing neutral, fixed, and external. In effect, natural landscapes are convenient ways for making power dynamics seem inevitable and immutable."[40] The salience of landscape imagery to the iconography of justice in Israel and Palestine thus derives from a number of sources. It stems partly from the indeterminacies in the Ottoman Land Code about the necessary period of cultivation and the evidence sufficient to establish cultivation over that period, partly from the improvisational maneuvers of the Israeli government and Palestinian land claimants in adversarial contests, partly from deep cultural and economic associations with pine and olive trees, and partly from the structural features of resistance that shape border disputes in the broader conflict between these groups.

It is precisely the ability of landscapes to make contested arrangements of power seem "neutral, fixed, and external" that makes them objects of polysemic investment. The displacement of three-dimensional landscapes and their histories by the coded imagery of landscapes in time-lapse aerial photographs and the burning and uprooting of pine and olive trees chillingly confirm this fact. The same can be said of courthouse architecture, other images of justice, and of course the rule of law itself. Their ability to make contested arrangements of power seem neutral, fixed, and external in their allegorical didacticism is precisely what makes them objects of polysemic investment. Interpretation of the relationship between imagery, architecture, and the practice of justice should therefore concentrate on contested arrangements of power, not superficial didactics, if we are to avoid mistaking expressions of the fragility of justice for its potency.

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34. *Id.*
35. *Id.* at 181.
36. *Id.*
37. *Id.*
38. *Id.* at 177–78.
39. *Id.* at 178.
40. *Id.*

CONCLUSION

This raises the question of how one might go about designing adjudicative space to reveal rather than conceal the fragility of justice. What would a facade of justice that acknowledged contested authority and legal failure look like? The final chapter of *Representing Justice* contains a few intriguing clues in its discussion of the design of the South African Constitutional Court building and the murals adorning the interior of the Mexican Supreme Court building. Ultimately, both courthouses reveal how difficult it can be to acknowledge legal failure without simultaneously containing it in redemptive narratives—narratives that support the irreducible authority of the rule of law and elite professional power.

The South African Constitutional Court is not only built on the grounds of "the Old Fort Prison, where many Apartheid resisters—including Nelson Mandela and Mahatma Ghandi—were detained," remnants of the former prison, including an entire cell block, are attached to the new building and included in its interior spaces (p. 352). There is evidence that the architect sought a "complete intermingling of past and present" (p. 354; internal quotation marks omitted)—prison bars and "some of the bricks from what had been the 'Awaiting Trial Block' " of the prison were used in the courthouse (p. 354). Parts of the old prison are distinctly visible from the courthouse, and the interior court chamber includes a long, thin window through which "judges and others in the room can watch the feet of passersby . . . to 'keep judges and counsel down to earth' " (p. 354).

But the design choices also reflect an acute desire for what Justice Albie Sachs called a " 'radical rupture' with the country's past" (p. 350)—a desire to "convert the 'intense negativity associated' with the prison into 'optimism' about the new commitments to a very different legal regime" (p. 353). The contrast between the openness and accessibility of the modern courthouse, bathed in natural light, and the foreboding enclosures of the prison remnants is sharp indeed—so sharp as to invite the reassuring, but false, conclusion that apartheid is an injustice that has been overcome when its remnants still pervade South African society and the administration of justice there (pp. 355–56). The Constitutional Court is, on this view, perhaps less a counterpoint to the lingering injustice in South Africa than an embodiment of the tension between desire for closure in relation to the nation's horrific past and the persistence of harms flowing from that past.

The murals by José Clemente Orozco and Rafael Cauduro for the Mexican Supreme Court also vividly depict the failure of justice (pp. 260–61, figs. 219–20). Orozco's mural *La Justicia* has two immediately recognizable figures of Justicia, one sleeping or dead in a chair on a pedestal with her sword drooping in her right hand, the other masked like the "throng of evildoers" in which she is swimming as her scales are distorted by the commotion (pp. 360–61). A third figure of Justicia, massive and abstract, is "shown attacking someone wearing a symbol of the liberty of the Republic and perhaps gathering up papers, either to protect them or steal them from her" (p. 359). Orozco's murals "are now on proud display," accompanied by

brochures describing "the images as a critique of monopolist corporate behaviors and the perpetuation of injustice" (p. 362). But his work on the murals was interrupted in 1941 when justices of the Supreme Court, expecting an "homage" to the "divine goddess" Justice, cancelled his commission in "disgust" (p. 361; internal quotation marks omitted). The government eventually replaced Orozco with an American painter, George Biddle, who rather decisively shifted focus to themes of war and peace in a mural which Resnik and Curtis describe as a "paean to religious salvation" on the wall over the court library door (pp. 362–63).

More recently, a contemporary Mexican artist, Rafael Cauduro, was commissioned to create a series of murals in honor of the hundredth anniversary of the Mexican Revolution in a stairwell through which the justices pass on the way from their chambers to the courtrooms (pp. 362–63). Titled *La Historia de la Justicia en México* (*The History of Justice in Mexico*) (pp. 364–65, figs. 221–23), the murals extend over 3,000 square feet from the basement of the building to the third floor and include eight panels depicting "Los [S]iete [C]rímenes [M]ayores" ("The Seven Major Crimes") (p. 363). Violence, bureaucratic corruption, rape, torture, murder, kidnapping, and repression are all shown in graphic, three-dimensional images that turn the stairwell into a vertiginously unstable space. From almost any position on the stairwell it is not clear where the walls are, because the murals extend the visual terrain directly into the imaginary space of the crimes depicted. "[B]oth victims and oppressors are plainly contemporary, not clad in historical costumes. Moreover, throughout the scenes, officialdom is regularly the source of the violence" (p. 363). In the 2009 ceremony honoring the completion of the final section, justices of the Mexican Supreme Court praised the murals and expressed the desire that Cauduro's "work would come to exemplify an era that had passed" (p. 365; internal quotation marks omitted). As Justice Ortiz Mayagoitia put it, Cauduro's work "challenges us to make these scenes disappear forever from our country, such that they last as images, but not as experiences" (p. 365; internal quotation marks omitted). The justices seemed clearly moved to complete the narrative arc suggested by the transition in Cauduro's *La Historia* from the two basement murals—*Tzompantli* ("[an] Aztec term for a rack . . . used in some Mesoamerican societies to display the skulls of those sacrificed" (p. 363)) and *Procesos Viciados* ("Corrupt Processes")—to the depiction of " 'celestial soldiers' coming to do battle with injustice" crowning the work on the third floor (p. 363).

Resnik and Curtis frame the imagery of the Mexican Supreme Court in the context of the judiciary's ongoing struggle for independence from the executive, and thus within the trajectory of democratic perfectionism. They contend that "the Cauduro murals bespeak a courageous judiciary" cognizant of the present failings in the administration of justice in Mexico (pp. 365–66). The didactic influence on justices passing these images on the way to court sessions is, of course, undeniable—the justices themselves confess it. But given the judiciary's struggle for independence in Mexico and the embarrassing deficiencies in (indeed, corruption of) other branches

of government, the murals and the justices' confessions may be read less as an open confession of *judicial* failure than as an indictment of *other* branches of government—an indictment which simultaneously ratifies the new judiciary's attempts to expand judicial review. The break from any past judicial corruption associated with former legal arrangements that made the judiciary more susceptible to control by the executive is as obviously appealing (and polysemic) as the "radical rupture" (p. 350) that the South African Constitutional Court building attempts to make with apartheid. Orozco's much earlier, unvarnished depiction of judicial failure fits comfortably within this narrative.

A full confrontation with the failure of justice would require representing error as an ineluctable feature of the administration of justice. That no court or country is prepared to press the imagery and design of adjudicative space into this service is perhaps understandable. But a nation confident enough in the rule of law to erect such a facade, and a legal profession secure enough in its contested authority to support it, would be a most welcome departure from precedent.