Communities and the Courthouses They Deserve. And Vice Versa.

Douglas P. Woodlock

I conceive my role at this gathering to be that of a talking fish. Let me explain. The great twentieth-century appellate lawyer, John W. Davis, was once asked to give a speech about oral advocacy. He did so, while observing that it was a bit like asking a fisherman to describe how to reel in a fish; wouldn’t it be more pertinent, Davis inquired, to ask the fish for his reflections? That is, “if the fish himself could be induced to give his views on the most effective methods of approach.”¹ Davis’s literary conceit can be extended a bit to think of this Symposium as a meeting of marine biologists discussing aquariums, their decoration, their placement, their contents, and their future, if any. As an inhabitant of such a venue, I am easily induced to offer views even while my species is dissected and my habitat is explored.

There is, it bears emphasizing, a broader ecosystem beyond the courthouse/aquarium—the larger political community that those in the aquarium purport to serve while those in the academy engage in observation—which provides the relevant context. The confluence of court and community may usefully be approached through what I consider the iconic image of the American courthouse in the formative period of our legal and political history: it is the painting of Patrick Henry in the Hanover County Courthouse arguing the Parson’s Cause, which raised in 1763 the question whether and how the citizens of Virginia should compensate the Anglican clergy.² The entire political community is on hand to observe and to participate. Of course, that political community was constricted; you will search in vain for the face of either a woman or an African American in the painting. Nevertheless, with those fundamental limitations to the polity of the American Eden acknowledged, it is evident that the observant and participatory community fills the courtroom and extends outside the courthouse door

¹ United States District Judge for the District of Massachusetts.
² Figure 1.
toward the tavern beyond, where, as Justice Robert H. Jackson once observed, lawyers and their clients traditionally retire to celebrate the "last rites" for court proceedings. There is historical symmetry in the fact that slightly more than two centuries later, this little courtroom also played a supporting role in the development of the constitutional doctrine—as opposed to the customary practice—of judicial transparency. A conviction imposed after a closed murder trial conducted in that courtroom became the vehicle by which the Supreme Court, in 1980, established a First Amendment right of press and public to attend criminal trials.

The centrality of the open and accessible courthouse to America's narrative finds expression through the Lafayette County Courthouse in Oxford, Mississippi, constructed about one century after Henry's argument in Hanover County had concluded. Lafayette County was the model for William Faulkner's fictional Yoknapatawpha County. As the architectural historian Thomas S. Hines observes, "the most significant building in all of Faulkner's work was the county courthouse, the symbol, [Faulkner] argued[,] not only of law and justice, but spiritually, psychologically, architecturally, the center around which life revolves." The Lafayette County Courthouse now bears on its walls a plaque quoting

5. Figure 2.
from one of Faulkner’s works, describing the courthouse as “the focus, the hub; sitting looming in the center of the county’s circumference like a single cloud in its ring of horizon, laying its vast shadow to the uttermost rim of horizon.” Faulkner records that when the citizens of Yoknapatawpha County completed their own courthouse, they realized, “or were for a moment capable of believing, that men, all men, including themselves, were a little better, purer maybe even, than they had thought, expected, or even needed to be.”

By yet another century later, a darkening on the “ring of horizon” appeared, obscuring this central focus of the community’s concerns. Those gathering clouds can be illustrated by the 1974 United States Courthouse for the Northern District of Mississippi in Oxford, several blocks from the Lafayette County Courthouse. That federal courthouse, I cannot resist saying in response to Professor William Simon’s comments, reminds me of a Toyota plant. More fundamentally, it is but

---

8. Id. at 501.
9. Figure 3.
one exhibit that may be offered to support the case stated by Daniel Patrick Moynihan: "[T]wentieth-century America," Moynihan argued, "has seen a steady, persistent decline in the visual and emotional power of its public buildings, and this has been accompanied by a not less persistent decline in the authority of the public order." Moynihan credits architecture critic Ada Louise Huxtable with "capturing the process in the precise moment of transformation"; it was "[a]t the moment the judges left the marble colonnaded chambers of the turn-of-the-century Hudson County Courthouse for new, functional efficient modern quarters next door."

Other exhibits refine the point. Perhaps the saddest image in twentieth-century architecture shows the new Chicago federal courthouse of 1965 rising above the razed remnants of the old Chicago federal courthouse. This image provides a larger insight into the problem. The new Chicago federal courthouse is a major work by a master, Mies van der Rohe, as part of his modernist architectural project. It is utterly unconcerned with the obligation to secure a connection between the work of the courthouse and the community it serves. As I have previously noted, it stands as a

Figure 3. United States Courthouse, Oxford, Mississippi.
Reproduced with the permission of the United States General Services Administration.

12. Id.
13. Figure 4.
tangible testament to the relentless mid-twentieth-century tendency in courthouse architecture “to demolish the past and denature the present in exchange for a series of boxes—some of them quite elegant, most of them not—that are indistinguishable from other boxes encasing other activities that lack the drama, the liturgy, or the civic purpose of a courthouse.”\(^{14}\)

The cost efficiencies of modernist architecture, when practiced by someone other than a master, descend into a parody of the aspirations of those who seek to maintain the centrality of the courts and their business to the larger community. As Ada Louise Huxtable wrote, when describing the new Jersey City courthouse, “Mies Van der Rohe once said of building, ‘God is in the details’”; but, she added, “[n]ot in Jersey City.”\(^{15}\)

---


15. Ada Louise Huxtable, *Hudson County Courthouse: Whatever Happened to the Majesty of the*
And not in other places either. In this connection, let me offer as an exhibit the Middlesex County Courthouse in Cambridge, Massachusetts.\(^\text{16}\) That was the last major courthouse built in Massachusetts before the new federal courthouse in Boston was completed in 1998; it embodies everything to be rejected in courthouse design. Aesthetically, its detailing expresses the courtrooms found inside through melanoma-like excrescences projecting from its unlovely skin. The mean, low, and grim entry—not visible from the perspective shown in Figure Five—calls to mind the inscription Dante reported as cut in the Gates of Hell: “Abandon all hope ye who enter here.”\(^\text{17}\) The Middlesex County Courthouse fundamentally repels the approach of any larger community seeking to focus on the judicial process.

What was—and is—going on? A good part of the problem is the rise of the autonomous professions and their tenacious control over their slice of the community’s life. Architects are engaged by narrowly cost-conscious patrons to design in the styles of the moment, with greater or lesser degrees of skill, what architects conceive as interchangeable spaces for disparate programs that buildings can contain. For its part, the legal profession has enjoyed the sense of mystery created by inscrutable structures in which its arts are practiced. Hazel Genn specifies the indictment further when she identifies

an internal threat to civil justice emanating from sections of the judiciary, legal practice and the emerging alternative dispute resolution profession . . . . In the process of seeking necessary and laudable improvements to the administration of civil justice, voluble reformers have attacked its principles and purpose in a ‘postmodernist’ rhetoric which undermines the value of legal determination, suggests that adjudication is always unpleasant and unnecessary, and finally promotes the conviction that there are no rights that cannot be compromised and that every conflict represents merely a clash of morally equivalent interests.\(^\text{18}\)

---

\(^{16}\) Law?, in WILL THEY EVER FINISH BRUCKNER BOULEVARD?, supra note 7, at 148, 152.

\(^{17}\) Figure 5.

\(^{18}\) Dante reports that the full inscription read:

| I am the way into the city of woe. |
| I am the way to a forsaken people. |
| I am the way into eternal sorrow. |
| Sacred justice moved my architect. |
| I was raised here by divine omnipotence, primordial love and ultimate intellect. |
| Only those elements time cannot wear |
| were made before me, and before time I stand. |
| Abandon all hope ye who enter here. |


\(^{18}\) HAZEL GENN, JUDGING CIVIL JUSTICE 25 (2010).
But perhaps more fundamental than the conspiracy of the professions against the laity is the disposition of the laity itself. The problem was framed well for this country at the end of the last century by the British political philosopher John Gray, who wrote that “[t]he ruling American culture of liberal individualism treats communal attachments and civic engagement as optional extras on a fixed menu of individual choice and market exchange. It has generated extraordinary technological and economic vitality against a background of vast social dislocation.” Gray argued that “[t]he displacement of the public realms by an uncompromisingly individualist conception of rights has led to . . . a further weakening of civic ties. With this hollowing out of civic life goes the ‘end of conversation,’ the death of public discourse.”

Figure 5. Middlesex County Courthouse, Cambridge, Massachusetts, Keller & Post Associates. Reproduction courtesy of the photographer.

20. Id.
Alexis de Tocqueville, of course, long ago identified the jury trial system as the proper antidote for the malaise Gray described afflicting a nation that prefers to bowl alone. The jury, de Tocqueville observed, vests each citizen with a sort of magistracy; it makes all feel that they have duties toward society to fulfill and that they enter into its government. In forcing men to occupy themselves with something other than their own affairs, it combats individual selfishness, which is like the blight of societies.

Given contemporary conditions, can courthouse form and iconography make a difference? I think and hope so, but it must be an approach that reinforces the engagement of the community in the resolution of its controversies. I see little in the assembly line, even the enlightened modern assembly line that Professor Simon finds potentially relevant, as leading a way to secure greater civic engagement. And I am unconvinced that the trend he notes in which proceedings in trial courtrooms are a diminishingly small part of what courts do, renders concern with courthouse architecture irrelevant to that project. For myself, I am skeptical concerning what I think are the premature reports of a revolution resulting in the disappearance of the American jury trial. In approaching caseload statistics, even those over a half century, I tend to share the sentiments perhaps apocryphally ascribed to Zhou Enlai. When asked about the impact of the French Revolution on western civilization, he is reported to have responded sagely, "It is too soon to tell." This much, however, is clear: the covenanted modes of proceeding in courtroom trials remain the benchmark against which due process is measured in other settings. Moreover, courtroom trials, as Professor Simon's colleague Professor Robert Ferguson reminds us, "are central ceremonies in the American republic of laws, even though over 90 percent of all legal actions never reach that stage."

24. Id.
25. See Symposium, The Vanishing Trial, 1 J. Empirical Legal Stud., no. 3, Nov. 2004. The literature has more recently turned to eulogies for the departed. See, e.g., Robert P. Burns, The Death of the American Trial (2009). Despite the title of his book, however, Professor Burns provides what he describes as "an appeal, not an explanation." Id. at 1. His appeal is a powerfully argued discussion of what would be lost were the trial, particularly the jury trial, to disappear. Id. at 112-35.
the current environment, Professor Ferguson teaches, remain “the face of the law, the place where outside observation operates as a check on authority.” And the disappearance of trials, Professor Robert P. Burns warns, “would mean the end of an irreplaceable public forum and would mean that more of the legal order would proceed behind closed doors.”

This, in turn, “would deprive us, American citizens, of an important source of knowledge about ourselves and key issues of public concern.”

Let me briefly explain the scheme of the Boston federal courthouse courtrooms to illustrate a way of designing the courtroom to reinvigorate the conversation and discourse necessary to give content to civic life.

Figure 6. Courtroom 1, John Joseph Moakley United States Courthouse, Boston, Massachusetts. Photographer: Steve Rosenthal. Reproduction courtesy of the photographer.

The well of the courtroom—the central space where the lawyers and the parties engage with each other, the judge, the jury, and the witnesses—is large enough to accommodate the quasi-New England Town Meetings that are convened in institutional and other aggregate or systemic litigation. But the courtroom well is sufficiently intimate to host, without overwhelming, the more modest array of combatants assembled for the single plaintiff-single defendant disputes, which continue to occupy the vast amount of the trial judge’s time in the space. The most prominent

28. Id.
29. BURNS, supra note 25, at 135.
30. Id.
31. Figure 6.
geometric feature of the room is the repetition of encompassing circles, not merely through the circular stencil inscribing the shallow dome delineating the well of the court, but, for example, also in the millwork of the spectator bar and the judge’s bench.

The sense of shared community undertaking is embodied in the arches—not fully completed circles in themselves, but needing other arches to complete an encompassing circle—that are inscribed on the four walls. The arch above the jury box is the same size as the arch above the witness box, which is located directly across the well. The vantage point of the image I am using to illustrate this proposition is from the spectator entrance, which is under an identically sized arch. But perhaps most significant is that the arch above the bench is the same size as well. Each of the participants—juror, witness, spectator, and judge—is equally ennobled. They each have different job descriptions, of course, but they are engaged in a collective community undertaking reflected in a design that requires each to contribute to the process and reflects how they do so.

This process is not the production of widgets on an assembly line, or the timely and relentless accumulation of statistics regarding dispute resolutions. The drama, liturgy, and civic purpose of the space are not captured in the signaling of the Andon display Professor Simon finds promising. The courtroom is rather a place for the working out of community life at the ground level, case by case, through engaged participants left to their own devices within broadly defined directives.

In February 1885, Justice Oliver Wendell Holmes—then a Justice sitting on the Supreme Judicial Court of Massachusetts, at that time both an appellate and a trial court—offered a haunting literary image of the Law in this setting. “When I think of the Law as we know her in the courthouse,” Holmes said, “she seems to me a woman sitting by the wayside, beneath whose overshadowing hood every man shall see the countenance of his deserts or needs.” That written image eerily anticipated the memorial sculpture by Augustus Saint-Gaudens for Holmes’s friend Henry Adams, commissioned some ten months later, after Adams’s wife, Clover, committed suicide. The sculpture was not completed until 1890. Whether Adams or Saint-Gaudens had Holmes’s image in mind when designing the memorial I cannot say, but the image is perfectly descriptive of the statue and the statue is a perfect embodiment of the image.

33. OLIVER WENDELL HOLMES, The Law, in SPEECHES 16, 18 (Boston, Little, Brown 1913) (1885).
34. Figure 7.
Discerning the countenance of desires or needs case by case is not the stuff of metrics. It is the accommodation of diverse community sentiments. Judge Learned Hand captured this process of fact-finding by a jury in his classic statement regarding the assessment of negligence:

The degree of care demanded of a person by an occasion is the resultant of three factors: the likelihood that his conduct will injure others, taken with the seriousness of the injury if it happens, and balanced against the interest which he must sacrifice to avoid the risk. All these are practically not susceptible of any quantitative estimate, and the second two are generally not so, even theoretically. For this reason, a solution always involves some preference, or choice between incommensurables, and it is consigned to a jury because their decision is thought most likely to accord with commonly accepted standards, real or fancied.\textsuperscript{35}

\textsuperscript{35} Conway v. O'Brien, 111 F.2d 611, 612 (2d Cir. 1940), rev'd on other grounds, 312 U.S. 492 (1941).
The resistance of the fundamental standards at play in a trial to statement with mathematical precision—even by professional courtroom decision-makers—is evident in criminal cases as well. The evaluation of evidence to determine whether the government has proven its case beyond a reasonable doubt illustrates the point. Judge Jack B. Weinstein once gave a test to his colleagues sitting on the United States District Court for the Eastern District of New York in which he asked them to assess, as percentages, the degree of probability necessary to demonstrate that reasonable doubt had been overcome. The ten judges surveyed offered assessments ranging from seventy-six to ninety-five percent. Similar efforts by others to quantify reasonable doubt have yielded similar results. "Reasonable doubt defies exact definition," Professor Charles Nesson rightly contends, "precisely because it is a concept meant to encompass many different, individual views of how probable guilt must be (or how unlikely innocence must be) to warrant conviction." I share Professor Nesson's view that efforts to quantify reasonable doubt should be avoided because the result would be to invade the role of the jury as the community's collective body for producing "authoritative finality" in fact finding.

At the core of any effort to recover the centrality of the courthouse to its community is a project to invite and encourage the community to construct its own narrative and calibration of "deserts and needs." In this, strategies such as the deployment of exhausted representational imagery

36. To be sure, Hand later rendered his recitation of the three "factors" in Conway as an equation, suggesting some quantifiability to the otherwise indeterminate judgment process of assessing negligence. "Possibly it serves to bring this notion into relief," Hand wrote, "to state it in algebraic terms: if the probability be called P; the injury L; and the burden B; liability depends upon whether B is less than L multiplied by P: i.e. whether B < PL." United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947). This algebraic formula, in which the values attached to the variables are, of course, themselves uncertain and dependent upon a fact finder’s evaluation of the evidence, may present to the inattentive the illusion of mathematical verifiability to a process that is inherently imprecise and contingent.

38. See generally Charles Nesson, Reasonable Doubt and Permissive Inferences: The Value of Complexity, 92 HARV. L. REV. 1187, 1192-99 (1979) (demonstrating that pure mathematical probability of guilt—for instance, a twenty-four in twenty-five chance that a prisoner participated in the jail yard murder of a prison guard—is insufficient to overcome reasonable doubt, while unquantifiable, subjective evidence—such as testimony from another prisoner—may be used to validate conviction).
39. Id. at 1197.
41. I must confess to using references to such imagery with a small statue of blindfolded Justice I have placed in the bookcase behind my chair on the bench (as seen in Figure 6). In cases where there is some possibility that bias, predisposition, undue sympathy, or reliance on extrajudicial matters may enter into jury decision-making, I often invoke her. For example, in a recent case involving immigration law enforcement, I instructed the jurors:

I think it is important for me to emphasize something that the lawyers talked about as well, and that is your duty to be impartial and disinterested. One way of thinking about this is to
or the cultivation of the sensibility of a well-run factory are at best collateral. Rather, there must be a clear-eyed recognition that diverse and incommensurable individual views will be engaged, accommodated, and honored in the collective work of resolving disputes.

Let me illustrate the point by offering a plausible reading of the vivid but austere Ellsworth Kelly panels that adorn the Boston federal courthouse walls. I emphasize that this is not the artist’s explanation. In fact, knowing, after we chose Kelly to provide the original art for the courthouse, I would be expected to explain the “meaning” of the panels to my more traditionalist colleagues, I asked Kelly to do so for me. He made a game effort, but it was clear that the exercise had no interest or significance for him. I concluded the effort by telling him my question and his efforts to answer reminded me of the story of the provincial music lover who attended a special performance of a visiting maestro. At the reception that followed, the music lover approached the great man and said, “Maestro, what was the violin saying to me?” “Madame,” he replied, “it was saying, ‘I am a violin.’”

Yet over the years, my colleagues and others have continued to ask me repeatedly when Kelly is going to come back and paint recognizable pictures on the blank, colorful panels he left us. Those lame exercises in aesthetic humor and faux appreciation of contemporary art obliquely support the larger narrative of my comments. The Kelly panels can fairly be read, I think, as an invitation to future litigants, lawyers, jurors, and

think about the statue that sometimes is on the top of a courthouse. It is not on the top of this one but on some. It is a woman. She has got a sword in one hand, she has got scales in the other, and she has got a blindfold on. As a matter of fact, a version of her is up there on the bookshelf (indicating).

It is pretty easy to see why she has got a sword in her hand. She is there to enforce the law. It is pretty easy to see why she has got scales. She is there to weigh the evidence. But why does she have a blindfold on? I suggest to you that she has a blindfold on because she is disciplining herself to consider only that which is material. She is not going to be swayed by public opinion about immigration reform or lack of reform. She is not going to be exercised by some undue sympathy or bias or prejudice. She is going to decide the case solely on the basis of the evidence that is presented and the law that I give you. . . . [T]hat is another and, perhaps, overarching background instruction with respect to your duties as jurors.


42. Nor is the question of teasing out representational meaning for the abstract panels likely to be one of significance as a matter of contemporary aesthetic theory. But installation of the Kelly panels in a courthouse inevitably raises for those engaged there the question what the panels are trying to tell us. As Professors Amsterdam and Bruner have argued, in a book whose cover promises to explain “How Courts rely on storytelling, and how their stories change the ways we understand the law—and ourselves,” “[l]aw lives on narrative, for reasons both banal and deep.” ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW 110 (2000). “[Narrative] is how law’s actors comprehend whatever series of events they make the subject of their legal actions. It is how they try to make their actions comprehensible again within some larger series of events they take to constitute the legal system and the culture that sustains it.” Id.
judges to inscribe their own meanings on the walls of the courthouse.43

Adopting Professor Simon’s terminology, which in turn deploys Professor Chayes’s taxonomy,44 the relatively few cases and controversies that present themselves in the courthouse for resolution as multifaceted systemic litigation find representation in the nine-panel array in the Boston courthouse’s central drum.45 There, a central black panel (the robed judge?) absorbs (in color theory and the physics of light, as well as in resolving disputes) the limited spectrums of the surrounding eight multicolored partisans. With those inputs, the court is positioned to administer accommodations. The much more frequent “bipolar” disputes are represented by the pairs of opposing panels on the end walls of the three courtroom floors.46 There, two adversaries in tension seek to have courtroom proceedings establish a balance between them.

The courtrooms of the building, together with the art in the public spaces leading to the courtrooms, are structures and forms designed “to teach members of polities to make claims on justice as well as to seek justice.”47 In doing so themselves, members of the polity create the experience of justice through a democratic undertaking in a meaningful setting.

43. Brian Soucek, in his subtly argued essay published in this Issue, Not Representing Justice: Ellsworth Kelly’s Abstraction in the Boston Courthouse, 24 YALE J.L. & HUMAN. 287 (2012), contends that the “[v]iewers’ quest for meaning should not lead them to project meaning onto the artwork outside the courtrooms. It should open them to observing the meaningful activities taking place inside.” Id. at 303. The argument that the significance of the Kelly panels is to allow viewers to experience “the rapture of seeing” carries the narrative to a level of high abstraction. Id. It may also, however, be underinclusive in that it emphasizes the significance of the experience of observing meaningful court activities without also privileging the significance of direct engagement in those activities.

44. Simon, supra note 10, at 420.

45. Figure 8.

46. Figure 9.


Reproduced with permission of the artist.

