Lady Justice is traditionally represented with three symbols: a sword symbolizing the law's coercive power; a scale weighing competing claims; and a blindfold. The blindfold is often interpreted as impartiality, but how does blindness contribute to impartiality any more than is already expressed through the scale? And blind impartiality tends to equal randomness, which can hardly be the ideal. The idea must be that justice should only be blind to those elements that are not legally relevant. But what are those?

An examination of the idea of blind justice — and the idea of blindness in other contexts — shows that the allegory has never been unproblematic. While blindness has generally been a negative attribute, there is also a very long history of positive connotations going back at least as far as Ancient Egypt and Greece. These positive aspects ranged from simple impartiality to the pre-Socratic idea that we can perceive the real nature of things better when not blinded by our senses. And modern science confirms that the objectivity of vision is limited by biological, cultural, and psychological factors. All this suggests that we see much more what we have learned to see and what we expect to see than what our eyes neutrally perceive.

In recognizing the limitations with our vision, the idea of blind justice can be interpreted in a new light: as a challenge to be less influenced by cultural and individual factors than we generally are. This also helps to understand why the idea of blindness has surfaced in a few related contexts, such as Justice Harlan's claim of the Constitution's “color-blindness” and the proposed “veil of ignorance” in John Rawls' original position. If the idea of blind justice cautions us to be more mindful of factors that influence our vision subconsciously, we can aim to embrace a more critical and inclusive view of the world in our legal interpretation. This is especially true when we are challenged to interpret laws that protect points of view outside of the cultural mainstream and in contexts where the law specifically aims to right past wrongs.
We see the world the way we do
not because that is the way it is,
but because we have these
ways of seeing.

— Ludwig Wittgenstein

INTRODUCTION

This Article takes a fresh look at the old ideal of “blind justice” and asks what it represents – or should represent. In addition to tracing the roots of the allegory in history and examining the different suggestions that have been offered for its interpretation, it also proposes a new solution that might allow us to take the idea a little more seriously. This proposal, principally based on the work by John Rawls and Ronald Dworkin, would require us to take a step back from our typical view of the world – especially in cases in which the law aims to bring about significant change to the status quo – and examine the law in a more critical, inclusive and holistic way.

The first chapter introduces the various historical contexts in which blindness has stood for something other than merely the absence of eyesight. This ranges from blindness as the inability of the disbeliever to see the truth of a religious message and the loss of emotional control by mythological heroes to the blindness in the context of philosophy. It is shown that this final context, in particular, presented some early suggestions that blindness has a positive aspect. Philosophy questioned the reliability of our senses from the very start and asked of what value eyesight is for a true understanding of the world. Blindness could thus stand for the ability to gain true insights by placing reason over our misleading senses.

The second chapter examines more specifically under what circumstances the idea of blindness has been used as an epithet or characteristic of gods and goddesses. It shows that the ancient goddesses of justice were not depicted as blind, but only those gods whose very nature embodied randomness and unfairness, such as the god of wealth and goddess of fortune. The image of the goddess of justice with a blindfold can only be traced back to the late 15th century. And then it was born as an illustration of a satirical work that made fun of the contemporary system of justice. Only in the 16th century do the first images of blindfolded justice suddenly convey positive connotations. And just as the origin of the tradition is a little confusing, a survey of modern explanations suggests that there is still no real consensus on what the blindfold means today – or, indeed, whether it is a positive or negative attribute.

The third chapter lays the foundation for a fresh look at the concept of blind justice by examining more closely how reliable or unreliable our senses really are. It distinguishes

1 Ludwig Wittgenstein, Philosophical Investigations (1953).
between three different types of limitations in the objectivity of our vision. First, it looks at limitations with human vision as a matter of purely biological and psychological issues across different cultures. Second, it studies limitations with vision that are culturally determined and expressed fairly uniformly across all members of a particular cultural group. Finally, it examines those limitations that are related to specific cultural groups but nevertheless significantly differ from individual to individual within each culture. Through this fairly broad review of scientific insights into the limitations of vision, it becomes clear how subjective rather than objective the process of seeing the world is in many regards. In particular, what we see and not see is far more culturally determined than we generally believe. We commonly see what we have learned to see.

The final chapter asks the crucial question of what these visual limitations have to do with justice. If vision is largely culturally determined, then it stands to reason that the blindness of justice represents a challenge to take a critical distance from our own culture in the analysis of legal issues. By building on John Rawls’ famous idea of the veil of ignorance and Ronald Dworkin’s idea of the chain novel, this chapter suggests that it can help to envision the law as a community artwork project. In particular, it uses the image of the law as a stained-glass window through which we perceive reality and which, in turn, appears differently to us depending on the movement of reality’s lights and shadows behind it. Just as there are some instances in which we want to examine a work of art close-up and some instances in which we want to take a step back to get a better idea of the overall composition of the work, this might be true for the law as well. Given the link between culture and vision, this chapter argues that there is generally a greater benefit to focus on details of a law if the law has been defined slowly over time within that culture. When a law is the result of radical changes within a culture, however, our traditional cultural view of the world might not help as much to interpret the law in a way that fully reflects the desired changes. In this case, legal interpretation and justice might be better served if we take a step back and try to look at the bigger picture with minimized cultural bias. While this idea of justice as blind to traditional mainstream cultural perspectives can only be sketched in some broad strokes here, this Article uses the arguments regarding a color-blind Constitution and the controversy over affirmative action as a case study to illustrate the basic principles.

I. **THE ALLEGORICAL ORIGINS OF BLINDNESS**

A blindfolded female figure with a set of scales in one hand and a sword in the other hand as a depiction of Justice is one of the most recognizable allegories in the world today. The scales and sword, as symbols of the impartial weighing of competing claims and law’s coercive power, are easily understandable attributes. But when did we begin to think that it might be a good idea to take away her eyesight? The common explanation is that the blindfold stands for impartiality, but it is not entirely clear within the allegorical
image how that works or how this impartiality is different from the impartiality already expressed by the set of scales. As Robert Cover put it: “There is a critical ambiguity to the blindfold of Justice – which no end of explanation in terms of ‘impartiality’ can illuminate.”

Not only is the exact meaning of the blindfold unclear, there has even been controversy historically whether it represents a positive attribute in the first place. For example, while ministers in Prussia ordered in 1907 that Justice should be shown clear-eyed in all new courthouses, New Yorkers complained in the 1950s that the Justice in a Manhattan criminal court mural from the 1890s was not blindfolded. Interestingly, this kind of controversy regarding the positive or negative nature of blindness is not a phenomenon of the 20th Century, but goes far back in history.

When looking at the allegory of blind Justice in the larger context of images of blindness throughout history and across different cultures, it is surprising how often we come across someone who is blind in completely different contexts. Not only is justice blind, but so is love. Even faith, fear, anger, ambition, envy and passion can make us blind and so does authority when we become its blind tool, following it in blind obedience. There are also blind spots, blind alleys, blind dates, blind passengers, and blindworms — though none of them are typically blind. Even if we can see, we might only see what we want to see. Or we may not be able to see further than the end of our noses, to see straight, to see the bigger picture, to see the writing on the wall, or to see the forest for the trees. We might see something in a new light without any light, stars without stars and red without red. Some people see the glass half full and others see it half empty. And “I see” can mean a lot more than that the speaker’s vision is unimpaired.

A. Blindness in Religion

Blindness intuitively strikes us as something negative. And not just that. For most people, the idea of going blind probably ranks very high on the list of horrible catastrophes that could befall them. It is consequently not surprising that the default usage of the image of blindness throughout history has also been a negative one. But somewhat surprisingly, there have always been some positive connotations to blindness as well.

There are three contexts in which blindness appears within religious texts most prominently. The most common meaning refers to disbelievers’ inability to see the

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righteousness or the truth of the religious message. In this context, the believers are those who see and the disbelievers those who are blind. A related, but nevertheless distinct, second meaning is blindness as inability to tell good from evil. Someone faithful to a religion might still do the wrong thing in some contexts and even a disbeliever might get it right occasionally. Finally, a third sphere concerns man’s limited ability to see the world and inability to see the divine.

1. Inability to See the Truth of the Religious Message

The default allegorical meaning of blindness in a religious context is someone’s inability to see the religious truth. The faithful and wise are those who see the light whereas all others stumble blindly along the dark path of disbelief or, worse, are led by blind guides towards false religions.4 As the Koran puts it: “Not alike are the blind [disbelievers in Islam] and the seeing [believers in Islam]. Nor are the darkness and the light.”5 The Dhammapada in Buddhism teaches: “The best of ways is the eightfold; the best of truths the four words; the best of virtues passionlessness; the best of men he who has eyes to see.”6

Some religious texts build on the simple dualism between light and darkness, explaining the quality of our vision as one of increasing “enlightenment.” For example, John describes the birth of Jesus as the light that came into the darkness.7 The famous passage in 1 Corinthian that is usually attributed to Paul, uses the same imagery to convey that we are now in a state of semi-darkness, but will be able to see properly one day:8

As for prophecies, they will pass away; as for tongues, they will cease; as for knowledge, it will pass away. For we know in part and we prophesy in part, but when the perfect comes, the partial will pass away. […] For now we see in a mirror darkly (βλέπομεν γὰρ ἀρτι δι' ἐσόπτρου ἐν αἰνίγματι), but then face to face. Now I know in part; then I shall know fully, even as I have been fully

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4 See, e.g., MATTHEW 23, 16-17 (“Woe to you, blind guides, who say, ‘If anyone swears by the temple, it is nothing, but if anyone swears by the gold of the temple, he is bound by his oath.’ You blind fools! For which is greater, the gold or the temple that has made the gold sacred?”). See also JOHN 9, 39 (“Jesus said, ‘For judgment I came into this world, that those who do not see may see, and those who see may become blind.’”); DHAMMAPADA 11, 146 (“How is there laughter, how is there joy, as this world is always burning? Why do you not seek a light, ye who are surrounded by darkness?”); DHAMMAPADA 13, 174 (“This world is dark, few only can see here; a few only go to heaven, like birds escaped from the net.”).
5 KORAN 35, 19-20. See also KORAN 27,81 and 30,52 (“And you cannot guide the blind from their straying; you can make to hear only those who believe in Our Ayaat, and have submitted to Allah in Islam.”).
6 DHAMMAPADA, 20, 273. See also DHAMMAPADA 8, 115 (“And he who lives a hundred years, not seeing the highest law, a life of one day is better if a man sees the highest law.”) and 1, 11 (“They who imagine truth in untruth, and see untruth in truth, never arrive at truth, but follow vain desires”).
7 JOHN 1, 5-9: (“The light shines in the darkness, and the darkness has not overcome it. […] The true light, which enlightens everyone, was coming into the world.”).
8 1 CORINTHIANS 13, 8-12
known.
When Thomas refused to believe in Jesus’ resurrection without proof, Jesus makes another point about the particular nature of religious enlightenment: “Have you believed because you have seen me? Blessed are those who have not seen and yet have believed.” Similarly, we are reminded that merely religious knowledge is “ineffective or unfruitful” and that it requires the addition of virtue and love to see properly: “For whoever lacks these qualities is so nearsighted that he is blind, having forgotten that he was cleansed from his former sins.”

The reference to blindness as the disbelievers’ inability to see the religious truth is rather intuitive. But there is a more problematic aspect to this. If God made man and man is then unable to see God’s message, is this really the fault of man or of God? There are numerous passages in which religious texts unapologetically acknowledge the ultimate responsibility of God. The Koran states “whomsoever Allah sends astray, none can guide him; and He lets them wander blindly in their transgressions.” And the Bible follows the same thought: “[T]he god of this world has blinded the minds of the unbelievers, to keep them from seeing the light of the gospel of the glory of Christ, who is the image of God.”

2. Inability to Tell Good from Evil
This contribution of divine forces in men’s ability or disability to see, involves the question of men’s free will. If we cannot tell good from evil because God made us blind, how can we be blamed for making wrong choices? This ultimately goes back to the greatest mystery at the very beginning of the Torah. The serpent tempts Eve to eat from the forbidden tree of the knowledge of good and evil: “You will not surely die. For God knows that when you eat of it your eyes will be opened, and you will be like God, knowing good and evil.” This causes Eve to see that the tree was good for food, that is a delight to the eyes, and that the tree was known. When Thomas refused to believe in Jesus’ resurrection without proof, Jesus makes another point about the particular nature of religious enlightenment: “Have you believed because you have seen me? Blessed are those who have not seen and yet have believed.” Similarly, we are reminded that merely religious knowledge is “ineffective or unfruitful” and that it requires the addition of virtue and love to see properly: “For whoever lacks these qualities is so nearsighted that he is blind, having forgotten that he was cleansed from his former sins.”

10 2 PETER 1, 9 (“Φ γάρ μη πάρεστιν ταῦτα, τυφλός ἐστιν μισοπάζων, λήθην λαβών τοῦ καθαρισμοῦ τῶν πάλαι αὐτοῦ ἀμαρτών.”).
11 KORAN 7,186 ("بَعْضُهُمُ طَغَّايكُمْ فِي وَيْدُرُهُمْ ۖ لَهُمُ الْهَيَاتُ فَلاَ أُنْهِيَمُهُمْ مِنْ أَخْطَأْتِهِمْ") Compare KORAN 20, 124 ("أَعَزَّ وَجَلَّ") See also KORAN, 7, 186 ("أَنْتُمُ الْكَافِرُونَ مَعَ أَنفُسَكُمْ مَعَ أَنفُسَ يَوْمَ الْقِيَامَةِ مَا رَأَيْتُونَ إِلَّا ذَلِكَ رَبُّكُمْ") “But whosoever turns away from my reminder, verily, for him is a life of hardship, and we shall raise him up blind on the Day of Resurrection.”
12 2 CORINTHIANS 4, 4 (“ἐν οἷς ὁ θεὸς τοῦ αἰῶνος τοῦτον ἐπώφλισεν τὰ νοήματα τῶν ἰστισσων εἰς τὸ μή αὐξάσας τῶν φωτισμὸν τοῦ εὐαγγέλιον τῆς δόξης τοῦ Χριστοῦ, ὑς ἐστὶν εἰκόνα τοῦ θεοῦ.”).
13 See, e.g., EXODUS 14, 15-18 (stating that God “hardened the hearts of the Egyptians” so that the pursued the Israelites into the divided sea and perished).
14 GENESIS 3, 5 (“וַתַּעֲלֶה הָאֲדָמָה, אֵלָי וִלְךָ, אֵרַע אָכָלָה אֲכָלָה, וַיִּבְיֵשֶׁר בָּהּ, וַיִּכְרֶם אֵלָי כָּלִים כִּי, אֲכָלָה אֲכָלָה וָאָלָה כִּי, אֵלָי וִלְךָ”).

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give one sight” (לְהַשְׂכִּיל). Once Adam and Eve have eaten the fruit, “the eyes of both were opened” (פָּקַחְנָה עֵינֵי שְׁנֵיהֶם) “and they knew that they were naked.” Upon discovering them, God states that man has become “like one of us in knowing good and evil” and expels man from the Garden of Eden before man can reach out and eat from the tree of life as well and live forever.

The theological questions raised by these passages are obviously far too complex to be examined in this context. But the important point here is that even in the core religious messages, blindness is neither entirely good nor entirely bad. While blindness to the religion’s basic truths is bad, men’s desire to see also led to the expulsion from Eden and represents the original sin and the fall of man in Christian doctrine.

There is another warning of men’s limitation in seeing the world in the New Testament when Jesus advises us to not to judge others:

Judge not, that you not be judged. For with the judgment you pronounce you

15 GENESIS 3, 6.
16 GENESIS 3, 22-23.
17 MATTHEW 7, 1-3 (“Μή κρίνετε, ἵνα μή κριθήτε. [...] τί δὲ βλέπεις τὸ κάρφος τὸ ἐν τῷ ὀφθαλμῷ τοῦ ἁδελφοῦ σου, τὴν δὲ ἐν τῷ σῷ ὀφθαλμῷ δοκὸν οὐ κατανοεῖς.”). See also LUKE 6, 39-41 (“He also told them a parable: “Can a blind man lead a blind man? (Μήτι δύναται τυφλὸς τυφλὸν ὀδηγεῖν) Will they not both fall into a pit? A disciple is not above his teacher, but everyone when he is fully trained will be like his teacher. Why do you see the speck that is in your brother’s eye, but do not notice the log that is in your own eye (Τί δὲ βλέπεις τὸ κάρφος τὸ ἐν τῷ ὀφθαλμῷ τοῦ ἁδελφοῦ σου, τὴν δὲ δοκὸν τὴν ἐν τῷ ἰδίῳ ὀφθαλμῷ οὐ κατανοεῖς?”).

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will be judged, and with the measure you use it will be measured to you. Why do you see the speck that is in your brother's eye, but do not notice the log that is in your own eye?"

This clearly anticipates Kant’s categorical imperative: “Act only according to that maxim whereby you can at the same time will that it should become a universal law without contradiction.” How can we judge fairly if our vision is skewed based on our own experiences and faults rather than an objective assessment of reality?

3. Inability to See the Divine

A final element across different religious traditions is men’s inability to see the divine. Even if there is nothing wrong with our worldly vision, the divine is too magnificent, powerful, or in some other way overwhelming, for man to perceive it. The Torah expresses this in the context of Moses receiving the Ten Commandments. When Moses asks God to show him his glory, God explains that Moses might be able to see God’s passing, but that he can’t see God’s face for “man shall not see me and live.”

In asking the question why the righteous suffers, the Book of Job is also focused on men’s inability to see God. Having been subjected to horrible suffering for no discernable reason (a wager between God and the Satan), Job struggles with his faith: “[God] multiplies my wounds without cause; he will not let me get my breath, but fills me with bitterness […] though I am blameless, he would prove me perverse. [T]herefore I say, he destroys both the blameless and the wicked.” God finally answers Job out of a “whirlwind,” displaying the wonders of creation such as Behemoth and Leviathan and putting Job firmly back in his place: “Where were you when I laid the foundation of the earth? Tell me if you have understanding. […] Will you even put me in the wrong? Will you condemn me that you may be in the right? Have you an arm like God, and can you

19 Plutarch expresses a similar concern, see PLUTARCH MORALS (“And now, as they say of Lamia that she is blind when she sleeps at home, for she puts her eyes on her dressing-table, but when she goes out she puts her eyes on again, and has good sight, so each of us turns, like an eye, our malicious curiosity out of doors and on others, while we are frequently blind and ignorant about our own faults and vices, not applying to them our eyes and light.”).
20 EXODUS 33, 17-23 (“And the Lord said to Moses, ‘This very thing that you have spoken I will do, for you have found favor in my sight, and I know you by name.’ Moses said, ‘Please show me your glory.’ And he said, ‘I will make all my goodness pass before you and will proclaim before you my name ‘The Lord.’ […] But,’ he said, ‘you cannot see my face, for man shall not see me and live (יִרְאַנִי הָאָדָם, וָחָי - לֹא פָּנָי: כי - וַיֹּאמֶר, לֹא תּוּכַל לִרְאֹת אֶתְו).’ And the Lord said, ‘Behold, there is a place by me where you shall stand on the rock, and while my glory passes by I will put you in a cleft of the rock, and I will cover you with my hand until I have passed by. Then I will take away my hand, and you shall see my back, but my face shall not be seen.’”).
21 JOB 9, 17-22.
thunder with a voice like his?" God’s clouding himself in his own divinity causes Job to acknowledge his mistake: “I had heard of you by the hearing of the ear, but now my eye sees you (ונתן זה, אני רואהך); therefore I despise myself, and repent in dust and ashes.”

The Bhagavad-gîtâ, a discourse between Arjuna, prince of India, and the Supreme Being Vishnu in the form of Krishna within the great epic of the Mahâbhârata, contains another passage about a vision of the divine. Arjuna begs Vishnu to show himself in his omnipotent majestic form: “Oh Master, if You consider that I am able to see that form, then please show Your imperishable Ultimate Self to me; O Krishna.” But before Vishnu can reveal his true form, Arjuna has to be given divine eyes:

Lord Krishna said: “O Arjuna, behold My divine, transcendental forms with hundreds and thousands of variegated types of variegated colors and forms. […] But with the present eyes of yours you will not be able to see Me; so I grant you divine sight (न तु यो अस्त्य दुर्भंतामयवस्तुमयु); behold the omnipotent majesty of My Ultimate transcendental power. […] If the effulgence of a thousand suns simultaneously were to blaze forth in the firmament; then that might be comparable with the effulgence of the Ultimate Personalities universal form.” In response Arjuna exclaims: “Yes! I have seen! I see! Lord! All is wrapped in Thee!” When Arjuna asks further what this fearsome form is, Krishna answers: “I am terrible time the destroyer of all beings in all worlds” or, in the translation of J.R. Oppenheimer, “I am become Death, the destroyer of worlds.”

In addition to the impossibility to see God with human eyes, even the exposure to divine intervention can have disastrous consequences. Thus, Lot is told to flee from Sodom and Gomorrah and not to look back or stop anywhere before he has escaped to the hills. When God destroys the cities by raining sulfur and fire on them, “Lot’s wife, behind him, looks back, and becomes a pillar of salt.”

22 JOB 38, 2-4 and 40, 6-9.
23 JOB 42, 5-6.
24 BHAGAVAD-GÎTÂ 11.
25 BHAGAVAD-GÎTÂ 11, 4.
26 BHAGAVAD-GÎTÂ 11, 5, 8 and 12. See also DANTE, DIVINA COMMEDIA - PARADISO, Canto XXIII ("Apri li occhi e riguarda qual son io: tu hai vedute cose, che possente se’ fatto a sostener lo riso mio’ … O benigna vertù che si li ’mprenti, su t’essaltasti, per largirmi loco alli occhi li che non t’eran possenti.").
27 BHAGAVAD-GÎTÂ 11, 32. Oppenheimer referred to this passage when he described his reaction to the first nuclear explosion in 1945: “We knew the world would not be the same. A few people laughed, a few people cried. Most people were silent. I remembered the line from the Hindu scripture, the Bhagavad Gita; Vishnu is trying to persuade the Prince that he should do his duty and, to impress him, takes on his multi-armed form and says, 'Now I am become Death, the destroyer of worlds.' I suppose we all thought that, one way or another.” Television broadcast in 1965, available at http://www.atomicarchive.com/Movies/Movie8.shtml.
28 GENESIS 19, 17.
29 GENESIS 19, 26.
Another facet of man’s inability to see the divine is the prohibition to create an image of God. The Ten Commandments state that man “shall not make for yourself a carved image, or any likeness of anything that is in heaven above, or that is in the earth beneath, or that is in the water under the earth.”

This has occasionally been taken very seriously such as in the period of the Byzantine Iconoclasm. And even though the Koran does not contain an explicit ban on images of Allah or Mohammed, the publication of 12 cartoon images in September 2005 by Danish newspaper *Jyllands Posten* led to international protests, riots, and reportedly to over 200 deaths. The fear of violence in response to such religious images is in fact so great in the United States that Yale University Press decided to suppress all images of Mohammed from an academic publication on the Danish controversy in 2009, followed by a decision of the Metropolitan Museum of Art to remove all historic paintings with depictions of Muhammad from public exhibition in January 2010.

Even the U.S. Supreme Court had its own public relations issue: sculptor Adolph A. Weinman (1870-1952) designed the marble friezes in the courtroom with a procession of “great lawgivers of history,” including Menes, Hammurabi, Moses, Solomon, Lycurgus, Solon, Draco, Confucius, Octavian, Justinian, Charlemagne, King John, Louis IX, Hugo Grotius, Sir William Blackstone, John Marshall, Napoleon, and Mohammed. The official information sheet by the Supreme Court curator from 2003 tries to alleviate fears of potential embarrassment and violence by stating that the figure of Mohammed does not look like Mohammed at all (even though that was probably true of the satiric Danish cartoons as well). Although publications in Muslim countries did not get into trouble for reprinting the controversial Danish cartoon images in their news coverage, almost all American

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30 EXODUS 20, 1-17, DEUTERONOMY 5, 4-21
31 *See*, e.g., JOHN HALDON AND LESLIE BRUBAKER, BYZANTIUM IN THE ICONOCLAST ERA C. 680-850 (2011).
36 *Id.* (“The figure above is a well-intentioned attempt by the sculptor, Adolph Weinman, to honor Muhammad and it bears no resemblance to Muhammad.”).
37 *See*, e.g., the cover page of Egyptian newspaper El Fagr (Oct. 17, 2005) with one of the most aggressive images showing Mohammed with a black bar over his eyes and a dagger in his hand, available at http://en.wikipedia.org/wiki/File:Page-1-of-El-Fagr.org-egyptian-newspaper-Oct-17-2005.jpg. See also *No Danish Treatment for an Egyptian Newspaper*, FREEDOM FOR EGYPTIANS (Feb. 8, 2006), http://freedomforegyptians.blogspot.com/2006/02/egyptian-newspaper-pictures-that.html.
newspapers refused to reprint them.\footnote{Interestingly, the Chicago Tribune explained that it decided not to reprint the images not out of fear of reprisals, but because the “editors decided the images inaccurately depicted Islam as a violent religion, and that it was not necessary to print the cartoons in order to explain them to readers.” See Explaining the Outrage, CHICAGO TRIBUNE (Feb. 8, 2006), available at http://articles.chicagotribune.com/2006-02-08/news/0602080383_1_prophet-muhammad-cartoons-muslims. Explaining images rather than reprinting them is, of course, not a strategy generally followed by major newspapers in other contexts.} Interestingly, those who consider images as forbidden in Islam base this prohibition – like the Ten Commandments – on fears by Mohammed that images could result in cults of those who were pictured, \textit{i.e.}, deification. From that point of view, we should be least worried about critical and satirical depictions.

The previous passages illustrate the ambiguity of human vision across the major world religions. As important as it is to see and follow the true religion, as dependent are we on the divine in our ability to do that. And while it is important to be focused on the divine, too much exposure can be fatal as well.

There is also an interesting question about God’s vision. Arguably an all-knowing, all-powerful and all-merciful God – as envisioned by the monotheistic religions – would not need to see things as their occurrence would already have been known to him in advance. But the Torah shows again and again, that God’s vision was important as well. We are already confronted with this in the lines of Genesis: “God saw all that he had made, and it was very good.”\footnote{Gandhi expressed a similar thought: “There is an orderliness in the universe, there is an unalterable law governing everything and every being that exists or lives. It is not a blind law; for no blind law can govern the conduct of living beings. […] The Law which governs all life is God. Law and the lawgiver are one. I may not deny the Law or the Law-Giver because I know so little about It or Him.” See HOMER A. JACK (ED.), THE WIT AND WISDOM OF GANDHI 29 (1951). In contrast, Richard Dawkins argues that we can find “no design, no purpose, no evil, and no good” and “nothing but blind, pitiless indifference” in the universe. See RICHARD DAWKINS, RIVER OUT OF EDEN: A DARWINIAN VIEW 133 (1995).} God continues to observe man. For example, God tells Abraham to sacrifice his son Isaac and only calls it off after God was able to see that Abraham was willing to go through with it.\footnote{Genesis 22, 11-12 (“But the angel of the LORD called to him from heaven and said, […] ‘Do not lay your hand on the boy or do anything to him, for now I know that you fear God, seeing you have not withheld your son, your only son, from me.’”)}

\section{B. Blindness in Mythology}

No clear lines can be drawn between religion, mythology, and history. Parallel to men’s inability to see the truth as the standard meaning for blindness in a religious setting, the standard meaning in mythological and historic texts is men’s inability to see the wise course of action. And just as the story of mankind in the Torah begins with a fruit and a
bad judgment, Paris’s judgment over which goddess deserved the golden apple triggered the events of the greatest epic cycle of Western mythology, the Trojan War.

Marcantonio Raimondi, Judgment of Paris (ca. 1515)

While details of the Judgment of Paris differ based on which of the many ancient sources is consulted, the basic story is that Zeus held a banquet celebrating the marriage of Achilles’ parents, Peleus and Thetis. Eris, the goddess of discord, was not invited (for rather obvious reasons), but snuck in anyway and dropped a golden apple from the Garden of the Hesperides with the inscription “for the fairest one” (καλλίστῃ). Three goddesses claimed the apple: Hera, Athena, and Aphrodite. Zeus wisely refused to judge who should receive the apple (possibly the first incident of a judicial recusal since his wife and extramarital daughter were among the disputants) and declared that Paris, the prince of Troy, who was known for his fair judgment, should adjudicate the claim instead. The three contestants approached Paris on Mount Ida. While he was inspecting their beauty, each tried to bribe him with different gifts: Hera offered to make him King of Europe and Asia, Athena offered wisdom and skill in war, and Aphrodite offered him the world’s most beautiful woman. Paris awarded the prize to Aphrodite. The only problem, as it turned out, was that the world’s most beautiful woman, Helen of Sparta, was already married to the Greek king Menelaus. Her kidnapping from Greece then resulted in the Trojan War. Man’s desire to see, to judge between good and evil or to adjudicate between different degrees of beauty, keeps getting him into trouble.

41 See, e.g., Homer, Iliad 24, 25-30; Ovid, Heroides, 16, 71-152; Lucian, Dialogues of the Gods 20; Hyginus, Fabulae, 92; Pausanias, Description of Greece 5, 19, 5. For synthesized versions, see, e.g., Kerenyi, Karl, The Heroes of the Greeks 308-314 (1959).
42 The bribery element appears in later accounts of the story and the original account may have been a more unbiased judgment by Paris.
1. Inability to Control Emotions and Discover Deceit

Once the Trojan War had started, the fate of both armies and individual fighters was again subject to various types of blindness. The fight between Agamemnon and Achilles and their “blind madness” and “blind rage” triggered the events retold by Homer in the *Iliad*, as the first lines already indicate:43

Rage – Goddess, sing the rage of Peleus’ son Achilles, murderer, doomed, that cost the Achaeans countless losses, hurling down to the House of Death so many sturdy souls, […]
and the will of Zeus was moving toward its end.

Begin, Muse, when the two first broke and clashed,
Agamemnon lord of men and brilliant Achilles.

As this opening also suggest, the heroes don’t find the source for this blindness in themselves; it is Zeus whom Agamemnon blames for his blindness: “I was blinded and Zeus stole my wits.”44 And Zeus in turn, at the death of Hector, complains that these events only came about because his wife Hera had seduced him blind.45

The events in the *Odyssey* are even more triggered by blindness and failure of men’s senses than those in the *Iliad*. Odysseus is only subjected to those “twists and turns, driven time and again off course,”46 because he had enraged the god of the Sea, by blinding Poseidon’s son the Cyclops Polyphemus, “a savage deaf to justice, blind to law.”47 And before Odysseus can carry on his journey from Circe to Ithaca, he has to visit Tiresias, “the great blind prophet whose mind remains unshaken,”48 in the dark and comfortless world of the dead. Then Odysseus manages to make it past the Sirens only by being bound to the mast with his men unable to hear them: necessary deafness instead of positive blindness. And all of Odysseus’ crew are ultimately doomed when

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43 Homer, Iliad 1, 1-8. See also, e.g., Homer, Iliad 9, 136-145 (“And Agamemnon the lord of men consented quickly: / “That’s no lie, old man – a full account you give / of all my acts of madness. Mad, blind I was! […] But since I was blinded, lost in my own inhuman rage, / now, at last, I am bent on setting things to rights: / I’ll give a priceless ransom paid for friendship.”) In lamenting their fate to Hector, Helen describes Paris as blind as well. See Homer, Iliad 6: “You are the one hit hardest by the fighting, Hector, / you more than all – and all for me, whore that I am, / and this blind mad Paris. Oh the two of us!” Please note that the citations to the Iliad and Odyssey follow the verse-translation by Robert Fagles. In many of the cited passages, the Greek original is not as explicit in its usage of “blindness.” These passages are cited to convey the overall sense of blindness in Homer’s work rather than specific instances of the term.

44 Homer, Iliad 19, 161-164 (“[H]ow could I once forget that madness, that frenzy, that Ruin that blinded me from that first day? But since I was blinded and Zeus stole my wits, I am intent on setting things to rights, at once.”).

45 Homer, Iliad 15, 43-44 (“Down from the gods you came to waylay me – you seduced me blind.”).

46 Homer, Odyssey 1, 1-2.

47 Homer, Odyssey 9, 215 (“deaf” and “blind” appear in the translation by Robert Fagles. A more literal translation would be simply “knew not of justice or of law”).

48 Homer, Odyssey 10, 542.
they ignore the warning of blind Tiresias to shun the island of the Sun; instead the “blind fools […] devoured the cattle of the Sun, and the Sungod wiped from sight the day of their return.”\textsuperscript{49} Even when Odysseus eventually makes it to Ithaca all alone, he cannot recognize his own country, for Athena has cloaked the shore in a mist,\textsuperscript{50} and needs to disguise himself as a ragged beggar in order to survive in his own home. At the same time, Odysseus' wife Penelope, under increasing pressure from her suitors over the years to remarry, promised to marry one of them as soon as she was done weaving a burial shroud for Odysseus's elderly father Laertes, but undid her daily progress on the loom every night for three years and thus “deceived them blind.”\textsuperscript{51} Similarly, Mentor points out that the suitors laid “their lives on the line when they consume[d] Odysseus’ worldly goods, blind in their violence.”\textsuperscript{52} And after Odysseus has slain the first of them, Antinous, the others at first remained “poor fools, blind to the fact that all their necks were in the noose, their doom sealed.”\textsuperscript{53}

In addition to Odysseus’ and Penelope’s story, we also hear in the course of the Odyssey how the other companions from the Trojan War were either doomed by their blindness or saved by others’ blindness. Menelaus tells Telemachus that “a stranger killed” his brother Agamemnon, who was “blind to the danger, duped blind.”\textsuperscript{54} The great hero Ajax, “would have escaped his doom […] if he hadn’t flung that brazen boast, the mad blind fool.”\textsuperscript{55} And in helping Menelaus, Eidothea, the daughter of the sea deity Proteus, managed “to deceive her father blind.”\textsuperscript{56}

Whereas lies and deceit were abhorrent to Achilles in the Iliad,\textsuperscript{57} they are Odysseus’ second nature. Deceit allowed Odysseus to end the Trojan War with the wooden horse and it saves him numerous additional times on his journey home. Whereas the blindness in the Iliad is primarily the blindness caused by overcharged raw emotions, the blindness in the Odyssey is one of magic, trickery, and deceit.

These two elements combine in many myths. There is a clear notion that some things are too overpowering to be seen directly. Just like men’s inability to see God and the death of Lot’s wife when she looked back at the destruction of Sodom and Gomorrah, the Gorgon Medusa was so horrible to behold that her sight turned onlookers into stone and Perseus only managed to slay her by looking at her reflection in a mirrored shield.\textsuperscript{58}

\begin{flushleft}
\textsuperscript{49} Homer, Odyssey, 1, 8-10. \\
\textsuperscript{50} Homer, Odyssey 13, 200. \\
\textsuperscript{51} Homer, Odyssey 19, 170. See also Homer, Odyssey, 2, 117-118 and 24, 156. \\
\textsuperscript{52} Homer, Odyssey 2, 265-266. See also Homer, Odyssey, 24, 504. \\
\textsuperscript{53} Homer, Odyssey 22, 33-34. \\
\textsuperscript{54} Homer, Odyssey 4, 100-101. \\
\textsuperscript{55} Homer, Odyssey 4, 563-564. \\
\textsuperscript{56} Homer, Odyssey 4, 491. \\
\textsuperscript{57} See, e.g., Homer, Iliad 9, 378-379 (“I hate that man like the very Gates of Death / who says one thing but hides another.”) \\
\textsuperscript{58} Ovid, Metamorphoses 4, 770.
\end{flushleft}
When Orpheus follows his deceased wife Eurydice into the underworld, his music softened the hearts of Hades and Persephone, who agreed to allow Eurydice to return with him to earth on one condition: Orpheus was to walk in front of her and was not allowed to look back until they had reached the upper world.\(^\text{59}\) At “the very threshold of the day” a “sudden mad desire surprised and seized” Orpheus, he turns around too early and loses Eurydice forever.\(^\text{60}\)

There are some parallels to this idea in other cultural traditions, such as the Japanese myth of Izanagi and Izanami, the divine creators of Japan and its gods.\(^\text{61}\) When Izanami dies, Izanagi follows her to Yomi, the underworld, in order to bring her back. She greets him from the shadows as he approaches and warns him not to look at her until she has arranged for her release from the gods of Yomi. But full of desire for his wife, Izanagi lights up a torch and, seeing Izanami as a rotting corpse, flees. Angry that he did not respect her wishes, she sends hideous spirits to chase him and all he can do is block the pass between Yomi and the land of the living permanently with a huge boulder.

These passages illustrate that there are situations in which we either cannot see or in which we must see despite our better knowledge because they are too overwhelming for human beings. Sometimes our longing is too great not to follow it. And sometimes the horror of some reality is too great to walk away from it alive (or at least without serious scars). Again, seeing is not just some neutral matter of sensual perception, but something closely tied to who we are.

2. Inability to See Reality and Ability to See Beyond Reality

The idea that our vision can sometimes be a hindrance rather than an aid in the discovery of what is truly essential is expressed in a few more familiar mythological images. Often blindness is both punishment and gift.

Blindness is not an uncommon punishment by the Gods.\(^\text{62}\) There are two typical reasons for this punishment. The first reason is that a mortal has seen something that they

\(^{59}\) Virgil, \textit{Georgic} 4

\(^{60}\) As an alternative to this story, Plato presents a version in which Hades deceived Orpheus and only presented him with an apparition of Eurydice in the first place. See \textit{Plato, Symposium} 179.

\(^{61}\) For a summary of the myth, see, e.g., Izanagi and Izanami, \textit{Myth Encyclopedia}, \url{http://www.mythencyclopedia.com/Iz-Le/Izanagi-and-Izanami.html}.

\(^{62}\) There are also many stories of blindness inflicted as a punishment by mortals. The mythological King Echetus, famed for his cruelty, blinded his daughter, Metope, by piercing her eyes with bronze needles after he discovered that she had a lover. He then incarcerated her in a tower and gave her grains of bronze, promising that she would regain her sight when she had ground these grains into flour. See \textit{Homer, Odyssey} 18, 83 and 116; 21, 307; \textit{Apollonius of Rhodes, Argonautica} 4, 1093; \textit{Eustathius of Thessalonica, Commentaries on Homer} 1839. Hyllus, one of the sons of Herakles, killed King Eurytheus, cut off his head and gave it to Heracles’ mother Alcmene, who gouged out the eyes with weaving pins postmortem. \textit{Apollodorus, Library} 2, 8, 1. Hecuba revenges her son by having the
should not have seen. For example, Aphrodite blinded Erymanthos, a son of Apollo, for witnessing (and perhaps spreading gossip of) her union with Adonis. The other reason is some kind of failure to see reality; often the belief that a mere mortal can challenge the immortal gods. This is the case with Lycurgus, who was “struck … blind” by Zeus for trying “fight the deathless gods,” and also with Thamyris, a Thracian poet who was punished with blindness for boasting that he could outsing the Muses. It is also the case for Bellerophon, who was punished for his hubris after the taming of Pegasus when Zeus sent a fly to sting the winged horse. Bellerophon fell down to earth and lived out his life in misery as a blinded and crippled hermit grieving and shunning the haunts of men until he died. (This fate gives “blind justice” yet another meaning when Columbia Law School placed a huge sculpture of Bellerophon taming Pegasus over its entrance in 1977.)

But in all its horror, blindness can also open something new. Thus, blindness can bring with it the gift of immortal poetry. Such is the description of the poet Demodocus in the Odyssey, who was loved by the Muse above all other, even “though she had mingled good and evil in her gifts, robbing him of his eyes but granting him the gift of sweet song.” Of course, Homer has traditionally been seen as a blind poet and John Milton was certainly completely blind by the time he wrote Paradise Lost. An even closer connection than between blindness and poetry, has always been perceived between blindness and prophecy. Oracles usually involved a state of trance, as

Trojan women kill Polymestor's sons, and blinding Polymestor by scratching his eyes out. And Euenius, who fell asleep when he was guarding a flock of sheep that were sacred to the sun and lost several of them to wolves, was sentenced by a court to lose his eyesight. But as soon as he was blinded, their sheep and goats stopped giving birth and the land became barren. The oracles in Dodona and Delphi told them that he had been wrongfully blinded since the wolves had been sent by the gods. His fellow citizens had to compensate him and the gods awarded him the natural gift of divination. Herodotus, Histories 9, 93-94.

63 Homer, Iliad 6.
64 Homer, Iliad 2, 594–600.
65 Pindar, Olympian Odes 13, 87–90, and Isthmian Odes 7, 44; Bibliothèque 2, 3, 2; Homer, Iliad 6, 155–203 and 16, 328; Ovid, Metamorphoses 9, 646.
66 Columbia Law School commissioned a sculpture from Jacques Lipchitz in 1966 and the 5-story, 23-ton bronze sculpture “Bellerophon” (often said to be the second largest bronze in New York City after the Statue of Liberty) was installed in 1977. Lipchitz had warned the law school not to “expect a blinded lady with scales and all those things.” According to Lipchitz, Bellerophon’s taming of Pegasus represented the dominance of man over nature: “You observe nature, make conclusions, and from these you make rules […] and law is born from that.” This corresponds to the common explanation today, i.e., that the taming of Pegasus reflects law students’ increasing mastery of the law in the course of their legal education. It seems that either Lipchitz ignored the ignoble end of Bellerophon or played a practical joke on Columbia. For more information on the sculpture and its history, see http://www.law.columbia.edu/media_inquiries/news_events/2007/august07/sculptures.
67 Homer, Odyssey 8, 65-67.
in the case of the Pythia in Delphi, who sat on a tripod over an opening in the earth from which intoxicating vapors put her in a trance in which Apollo was able to possess her spirit. And the use of various psychedelics is linked to many of the world’s traditional religious rites. There is a very common cultural belief that a certain distance from our normal perception of reality is helpful in order to discover deeper truths.

Greek mythology knows of many blind seers. The blind fisherman Phormion possessed the ability to have prophetic dreams. There are different mythological explanations for why King Phineus was blinded, including as punishment for revealing the future to mankind. And Tiresias, who was either blinded for revealing secrets of the gods or for seeing Athena bathing, received the gift from Athena that she cleaned his ears, giving him the ability to understand birdsong, thus the gift of augury.

The greatest literary passage in this context is the confrontation between Tiresias and Oedipus in Sophocles’ drama Oedipus the King. Oedipus starts looking for the cause of the plague that has befallen his city and is told by the Oracle of Delphi that the plague is caused by the unsolved murder of the former king. Oedipus summons Tiresias for further aid. The blind seer, who knows that the reason for the plague is Oedipus himself, who unwittingly killed his father and slept with his mother, refuses to talk and tells Oedipus to abandon his search. But accused of complicity in the murder, Tiresias finally reveals that Oedipus himself is the murderer. A vehement argument ensues. When Oedipus finally finds out the truth, he blinds himself.

Literal and metaphorical references appear throughout the drama. The clear-eyed Oedipus is blind to the truth of his origins and inadvertent crimes while the blind Tiresias sees the truth. As Tiresias puts it: “So, you mock my blindness? Let me tell you this. You [Oedipus] with your precious eyes, you're blind to the corruption of your life.” It is only after Oedipus has physically blinded himself that he gains a clearer vision of life himself and some prophetic ability. In the more philosophical Oedipus at Colonus, the former king becomes “someone sacred” and a citizen of Athens. And as Theseus, the king of Athens, states to Creon who comes to force Oedipus back into the power struggle that has engulfed Thebes: “You have come to a city that practices justice, that sanctions nothing without law.” Oedipus has found justice in his blindness and when he dies shortly afterwards in the company of king Theseus, the messenger reports his death thus: “[W]e couldn't see the man – he was gone – nowhere! And the king,

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69 PAUSANIAS 7, 5, 7.
70 APOLLONIUS, ARGONAUTICA 2, 178–86.
71 BIBLIOTHEKE 3, 6, 7.
72 SOPHOCLES, OEDIPUS THE KING.
73 Id. For a similar statement, see SCHILLER, WALLENSTEINS TOD 2, 3 (“Oh, you are blind with your seeing eyes”).
74 SOPHOCLES, OEDIPUS AT COLONUS 312.
75 SOPHOCLES, OEDIPUS AT COLONUS 1010.
alone, shielding his eyes, both hands spread out against his face as if – some terrible wonder flashed before his eyes and he, he could not bear to look.”

There are many other instances in which blindness (often beginning as a punishment) becomes the key to perceiving reality, or at least a particular aspect of reality, that was hidden before. One other (somewhat more outlandish) example is the story of King Pheros told by Herodotus. When a flood strikes his land, King Pheros commits the sacrilege of hurling a spear into the river. Immediately afterwards he becomes affected with an eye disease that causes him to go blind. After ten years of blindness, an oracle tells him that his punishment had come to an end and that he will regain his sight again if he washes his eyes in the urine of a woman who has slept only with her husband. He tests this out with his wife, but nothing happens. He then collects urine samples from a large number of women in his kingdom. When he finally recovers his sight, he marries the woman whose urine cured him, assembles all other women in a single town and then burns the town down.

3. **Inability to See Past Social Conventions**

A final meaning of blindness is the captivity in social conventions and resulting absence of freethinking. Thucydides reports one such example in the famous Melian Dialogue, in which the Athenians confront the people of Melos, a small island in the southern Aegean Sea just east of Sparta. Athens, in an attempt to strengthen its empire again Sparta in 416 BC, demands Melos’ annexation and the dialogue turns on the practical and moral issues inherent in a peaceful submission versus an organized resistance (and eventual destruction) as a free community. The Melians argue that it would be shameful and cowardly of them to submit without a fight and the Athenians counter that it is about self-preservation and not honor:

You will therefore show great blindness of judgment, unless, after allowing us to retire, you can find some counsel more prudent than this. You will surely not be caught by that idea of disgrace, which [...] proves so fatal to mankind; since in too many cases the very men that have their eyes perfectly open to what they are rushing into, let the thing called disgrace, by the mere influence of a seductive name, lead them on to a point at which they become so enslaved by the phrase as in fact to fall willfully into hopeless disaster, and incur disgrace more disgraceful as the companion of error, than when it comes as the result of misfortune. This, if you are well advised, you will guard against; and you will not think it dishonorable to submit to the greatest city in Hellas [...] nor when you have the

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76 Sophocles, Oedipus at Colonus 1871-1875.
77 Herodotus, Histories 2, 111.
78 Thucydides, History of the Peloponnesian War 17.
79 Id.
choice given you between war and security, will you be so blinded as to choose the worse. 

The point made by the Athenians is that there are no rules that can be universally applied; that each situation needs to be assessed on its own merits. While disgraceful and dishonorable actions ought to be avoided, there are situations in which such actions may either be justified or which negate disgrace and dishonor in the first place. The only natural law that the Athenians acknowledge is that of force: “Of the gods we believe, and of men we know, that by a necessary law of their nature they rule wherever they can. And it is not as if we were the first to make this law, or to act upon it.” So the art is to see what are and what are not universal laws. According to the Athenians it is the error of the Melians that they feel bound by a rule that should give way in light of a more fundamental rule.

C. Blindness in Philosophy

What is expressed indirectly by mythology is tackled head on in philosophy: What does it actually mean to be blind? Or, more importantly, what does it mean to see? And how do we move from blindness into a state of seeing – or from one state of seeing into a different state of seeing.

Somewhere between mythology and philosophy stands Parmenides of Elea, the first – and generally considered most important – Pre-Socratic philosopher of whose work we have substantial fragments. He is also the founder of the Eleatic school in the early 5th Century B.C., which rejected the epistemological validity of sense experience, and instead took logical standards of clarity and necessity to be the criteria of truth. Parmenides and the Eleatics maintained that the true explanation of things lies in the conception of a universal unity of being and that the senses cannot recognize this unity, because their reports are inconsistent; it is by thought alone that we can pass beyond the false appearances of sense and arrive at the knowledge of being, at the fundamental truth that all is one: “[A]ll those things which mortal men, trusting in their true reality, have proposed, are no more than names – both birth and perishing, both being and not being, change of place, and alteration of bright coloring.” The Way of Appearance it pitted against the Way of Truth. As Aristotle described it: Parmenides arrived at the singularity, the one “Truth,” by viewing the world with reason rather than the senses.

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80 Id.
Parmenides’ idea of the senses as useless was extreme, but the skepticism of the validity and value of our sensual perceptions was a common phenomenon of early Greek philosophy. Xenophanes of Colophon believed that we can never attain infallible knowledge because the information that we receive through our senses is incapable of taking us there. And Heraclitus of Ephesus cast doubt on the senses in his own cryptic way: “Eyes and ears are bad witnesses for men if they have souls which cannot understand their language,” and the “true nature of a thing tends to hide itself.”

The distinction between two worlds – or between a right and a wrong way of viewing the one world – was very influential on Plato. In Plato’s famous Allegory of the Cave, Socrates reflects on “our nature in its education” through the image of people who experience reality only through shadows. People are imprisoned in a cave since childhood and can only face the wall in the back of the cave. Behind them is an enormous fire and between the fire and the prisoners, people walk carrying things on their heads, including figures of men and animals made of wood, stone, and other materials. If the prisoners have never seen anything other than the shadows cast by the men behind them, then they would clearly take the illusion to be real and not just reflections of reality. All of their knowledge and the whole of their society would depend on the shadows on the wall.

Jan Saenredam, Plato’s Allegory of the Cave (1604)

Socrates then supposes that a prisoner, who is freed and permitted to face the things that had cast the shadows, would not recognize them for what they are and could not name

85 HERAKLITUS, FRAGMENTS F25 and F27, see, e.g., ROBIN WATERFIELD, THE FIRST PHILOSOPHERS: THE PRESOCRATICS AND SOPHISTS 40 (2000). See also, Plutarch, Morals (“But indeed nature has given us sight and hearing and taste and smell, and all other parts of the body and their functions, as ministers of wisdom and prudence. For ‘it is the mind that sees, and the mind that hears, everything else is deaf and blind.’”).
86 PLATO, THE REPUBLIC 7, 514–520.
them. He would believe the shadows on the wall to be more real than what he sees. But once the freed prisoner has gotten used to the light of the sun and has come to understand the true nature of things, he would no longer be able to communicate with the other prisoners if he returned to the cave. He would now seem blind to the other prisoners with his eyes no longer accustomed to the darkness: “Wouldn’t it be said of him that he went up and came back with his eyes corrupted, and that it’s not even worth trying to go up? And if they were somehow able to get their hands on and kill the man who attempts to release and lead them up, wouldn’t they kill him?” Would not such a man be “compelled in courtrooms or elsewhere to contend about the shadows of justice or the representations of which they are the shadows, and to dispute about the way these things are understood by men who have never seen justice itself?”

The Allegory of the Cave is part of Plato’s belief in universal forms that are not part of particular things (uninstantiated universals). For example, he thought it possible that there is no particular good in existence, but “good” is still a proper universal form. In the language of Bertrand Russell, unlike things that exist in time, universals have being or “subsist.” Aristotle disagreed with this concept, arguing that all universals are instantiated and that they exist within each thing on which the universal is predicated (rather than in Plato’s world of the forms). But in evaluating our process of sense perception, Aristotle provided the first description of indirect realism. He describes how the eye must be affected by changes in an intervening medium rather than by objects themselves and speculates on how sense impressions can form our experience of seeing, reasoning that an endless regress would occur unless the sense itself were self-aware.

He concludes by proposing that the mind is the things it thinks and calls the images in the mind “ideas.”

We can think of this reasoning from Parmenides and Plato to Aristotle as a spectrum from the uselessness of the senses with the belief in one “Truth” and the independently existing forms to the forms that exist within the visual world. But these differences do not change the common philosophical idea that it is our mind that makes us see what things really are and that our senses, on their own, leave us blind.

II. THE AMBIVALENT NATURE OF BLIND JUSTICE

The modern image of Justice as a woman with sword, scales and blindfold, goes back to ancient goddesses, such as Ma’at in Egypt, Themis and Dike in Greece and Justitia in

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87 PLATO, THE REPUBLIC 7, 517a.
88 PLATO, THE REPUBLIC 7, 517c.
90 ARISTOTLE, ON THE SOUL.
Rome. The Greek Goddess Themis, who represented divine law and moral order, was the daughter of the titans Heaven (Uranus) and Earth (Gaea). As a consort to Zeus, she conceived several children, who represented distinct aspects of order, including the Horai (Eirene, Eunomia and Dike), who represented Peace, Lawful Order and Just Retribution, as well as the Moirai or Fates (Clotho, Lachesis and Atropos), whose power to determine fate by spinning, measuring and cutting the thread of life was even beyond the power of the gods. The earliest attribute of Themis and her daughter Dike was a set of scales. A sword was a later addition since Themis, as the voice of moral order, originally symbolized the power of common consent rather than coercion. Themis represented the customs and conventions that formed the social order while her daughter Dike stood for the enactment of justice between individuals. What is important in this context is that we are not told of any ophthalmologic problem in their family. Similarly, the Goddess Justitia appears on Imperial Roman coins with a variety of different attributes of power and religious piety, such as scepter, spear (hasta), rudder and libation dish (patera). But there is never anything wrong with her vision either.

A. Blind Justice in Antiquity

Not all ancient gods had normal vision. Some mythological creatures are famed for their terrific eyesight, like the giant Argus Panoptes (the “all-seeing”), who was Hera’s guard and could only be slain after Hermes caused each of his many eyes to fall asleep. The Titan of the Sun, Helios, and Zeus himself also appear with the epithet “Panoptes.” On the other hand, Plutus, the Greek god of wealth, was considered blind. He was the son of Demeter, the goddess of agriculture, and represented a good harvest in earliest times. Zeus himself is said to have blinded him so that he would distribute wealth indiscriminately and without favor towards the good and virtuous.

1. Blindness as Randomness

Aristophanes’ eponymous comedy starts with the god of wealth, Plutus, (somewhat surprisingly) as a blind beggar whose eyesight gets restored by an Athenian citizen, Chremylos, so that he may distribute wealth only to those who deserve it in one way or

93 Id.
94 Id. at 81-82.
95 See, e.g., HESIOD THEOGONY 969-974.
96 See, e.g., ARISTOPHANES PLUTUS 90 (“Zeus inflicted it on me, because of his jealousy of mankind. When I was young, I threatened him that I would only go to the just, the wise, the men of ordered life; to prevent my distinguishing these, he struck me with blindness’ so much does he envy the good’”); SCHOL. AD THEOCRIT. 10, 19.
another.97 Chremylos is convinced that a fairer distribution will make the world a better place. But the goddess Poverty appears and argues that it is better if not everyone is rich: only with poverty can there be slaves (since they would otherwise buy their freedom) and luxury goods (since no one would work if everyone were rich). Either way, the suddenly fair distribution of wealth leads to havoc and the Olympian gods are unhappy that men begin to direct all their religious attention to Plutus and no longer pay homage to them. In the end, Hermes, as messenger of the gods, offers to become Chremylus’ servant in order to see the status quo restored.

Similarly, the goddess of fortune and luck, Tyche in Greece and Fortuna in Rome, was often considered blind. As Apuleius explained in the second century, both these conventions were based on the inexplicable randomness of the favoritism of these gods:98

Learned men of old had good grounds for envisaging and describing Fortuna as blind and utterly sightless. That goddess ever bestows her riches on the wicked and the unworthy, never favoring anyone by discerning choice, but on the contrary preferring to lodge with precisely the people to whom she should have given wide berth, if she had eyes to see. Worst of all, she foists on us reputations at odds with and contrary to the truth, so that the evil man boasts in the glory of being honest, while by contrast the transparently innocent man is afflicted with a damaging reputation.

Blindness is intuitively understandable as a symbol for randomness in the distribution of wealth and fortune. In the same sense, Plutarch also calls Ares, the God of War, blind.99 Regarding Fortuna, Plutarch explains, that we abuse her “as blind because we ourselves are blind in our dealings with her […] seeing that we repudiate wisdom, which is like plucking out our eyes, and take a blind guide of our lives.”100 This image has survived in literature over the centuries. The German poet Friedrich Schiller attributed blindness to Fortuna and the “false god of battle.”101 Shakespeare refers predominantly to Cupid and

98 APULEIAS, THE GOLDEN ASS 7, 2.
99 PLUTARCH, MORALS (“Ares is blind, ye women, has no eyes, and with his pig’s snout roots up all good things”).
100 PLUTARCH, MORALS.
101 See FRIEDRICH SCHILLER, ELEGIE AUF DEN TOD EINES JÜNGLINGS (“Über dir mag auch Fortuna gaukeln, / Blind herum nach ihren Buhlen spähn, / Menschen bald auf schwanken Thronen schaukeln, / Bald herum in wüsten Pfützen drehn.”); FRIEDRICH SCHILLER, SHAKESPEARES SCHATTEN. EINE PARODIE (“Das Geschick, das ist blind, und der Poet ist gerecht.”); and FRIEDRICH SCHILLER, DIE JUNGFRAU VON ORLÉANS 2, 4 (“Versuche nicht den falschen Gott der Schlachten, / Denn blind und ohne Schonung waltet er.”). Another image in literature includes blind time. See OSCAR WILDE, THE PICTURE OF DORIAN GRAY (“Then, suddenly, time stopped for him. Yes: that blind, slow-breathing thing crawled no more.”).
Fortuna as blind. There is also a reference to blind death, but none to blind justice. Francis Bacon joked that “if a man looks sharply and attentively, he shall see Fortune; for though she be blind, yet she is not invisible.” From all of this, blindness as an attribute of a false goddess of justice would be understandable. But how do we get from there to the image of blind justice as an ideal? Surely the administration of justice aims to move away from randomness rather than idealize it.

2. Blindness as Focus on Truth

The only two ancient sources for blindness in the administration of justice are passages by the Greek historians Diodorus Siculus in the first century BC and Plutarch in the first century AD. Plutarch reports that statues of judges in the Egyptian city of Thebes had no hands and that the chief of them was shown with closed eyes:

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 (ὡς ἄδωρον ἣμα τὴν δικαιοσύνην καὶ ἀνέντευκτον οὖσαν).

Diodorus Siculus refers to the same group when he summarizes a description of the Tomb of Osymandyas in Thebes from Hecataeus of Abdera’s *Aigyptiaka* (written in the early third century BC):

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102 For references to blind Cupid, see SHAKESPEARE, *AS YOU LIKE IT* 4, 1 (referring to Cupid as the “blind rascally boy, that abuses every one’s eyes, because his own are out”); *A MIDSUMMER NIGHT’S DREAM* (“Love looks not with the eyes, but with the mind; and therefore is wing’d Cupid painted blind.”); *MUCH ADO ABOUT NOTHING* 1, 1 (“blind Cupid.”); *THE TEMPEST* 4, 1 (“Venus [...] and her blind boy’s scandal’d company I have forsworn.”); *THE TWO GENTLEMEN OF VERONA* 4, 4 (“If this fond Love were not a blinded god?”); *HENRY V* 5, 2 (“Love [...] his true likeness, he must appear naked and blind.”); *KING LEAR* 4, 6 (“No, do thy worst, blind Cupid; I’ll not love.”); *ROMEO AND JULIET* 2, 1 (“Speak to my gossip Venus one fair word, One nickname for her purblind son and heir, Young auburn Cupid.”); *ROMEO AND JULIET* 2, 4 (“[Romeo’s] heart cleft with the blind bow-boy’s butt-shaft.”). For references to blind Fortuna, see SHAKESPEARE, *AS YOU LIKE IT* 1, 2 (referring to Fortuna as “the bountiful blind woman”); *THE MERCHANT OF VENICE*, 2,1 (“blind Fortune”); *HENRY V*, 3, 6 (“Fortune's furious fickle wheel, that goddess blind, that stands upon the rolling restless stone”).

103 SHAKESPEARE, *RICHARD II* 1, 3 (“My inch of taper will be burnt and done, and blindfold death not let me see my son.”).

104 Shakespeare’s only reference to blindness in connection with “judgments” is in *CYMBELINE* 4, 2 (“Our very eyes are sometimes, like our judgments, blind.”)


107 The *Ramesseum* of Ramses II from the 13th Century B.C.

108 DIODORUS SICULUS, *LIBRARY OF HISTORY* 1, 48, 6. The translation is from DIODORUS SICULUS: *LIBRARY OF HISTORY*, BOOKS 1-2.34 (C.H. Oldfather, transl.) (1933) available at
In this hall there are many wooden statues representing parties in litigation, whose eyes are fixed upon the judges who decide their cases; and these, in turn, are shown in relief on one of the walls, to the number of thirty and without any hands, and in their midst the chief justice, with a figure of Truth hanging from his neck and holding his eyes closed (καὶ τοὺς ὀφθαλμοὺς ἐπιμύοντα), and at his side a great number of books. And these figures show by their attitude that the judges shall receive no gift and that the chief justice shall have his eyes upon the truth alone (τὸν ἀρχιδικαστὴν δὲ πρὸς μόνην βλέπειν τὴν ἀλήθειαν).

Thus Plutarch and Diodorus (or their source) interpret the absence of hands as standing for the ideal that justice should not be influenced by gifts and the closed eyes of the chief justice as standing for a focus on truth alone. Even though it is impossible to tell whether this Greek interpretation coincided with the original meaning implied by the Egyptian creators of these figures, the images certainly appear to depict blindness as a positive attribute. But here it is a judge who is blind rather than the goddess of justice. As far as the goddess of justice is concerned, we have to wait another 1,500 years before she is shown with a blindfold. And then it had a very different satirical meaning.

3. Blindness as Ability to See Past Sensory Illusions

The only ancient context in which it makes sense to think of a blind or blindfolded goddess of justice are the philosophical ideas in the tradition that goes back to Parmenides of Elea. As discussed above, Parmenides and the Eleatics rejected the false appearances of the senses (the Way of Appearance or Opinion, “δόξα”) in favor of the universal unity of being (the Way of Truth, “ἀλήθεια”). Parmenides expressed these thoughts in a poem, On Nature, of which only about 160 lines (or probably about 5 percent) survive. In it, the revelations about the Way of Truth are framed narratively by a proem, which describes the journey of a young man from darkness to light. The daughters of the Sun bring the man on a chariot to the temple of a goddess. Though the name of the goddess is never mentioned, she is generally thought to be the goddess of justice, Themis or Dike, whose speech constitutes the rest of the poem:

http://penelope.uchicago.edu/Thayer/F/Roman/Texts/Diodorus_Siculus/home.html. For a description of the operation of this Supreme Court, see Diodorus Siculus, Library of History 1, 75.


The maidens spoke soft and beguiling words to Lady Justice […].
The goddess received me kindly. Taking in her hand my right hand
She spoke and addressed me with these words: ‘Young man, […]
It was no ill fate that prompted you to travel this way,
Which is indeed far from mortal men, beyond their beaten paths;
No, it was Right and Justice (θεµίς τε δίκη). You must learn everything -
Both the steady heart of well-rounded truth,
And the beliefs of mortals, in which there is no true trust.
Still, you shall learn them too, and come to see how beliefs
Must exist in an acceptable form, all-pervasive as they altogether are.
The traveller must learn all things, the truth, which is certain, and the human opinions,
which are not certain but still represent an aspect of the whole truth.

Karl Popper developed an interesting theory about Parmenides.\textsuperscript{111} He hypothesized that Parmenides was brought up by a blind sister, who was a goddess and source of wisdom to him and taught him “quite unconsciously that light is not fully real.”\textsuperscript{112} Popper read the journey of the proem not as a journey to the illuminating light of truth. For Popper, it is this journey, which teaches Parmenides that movement is impossible and light is not truth but an illusion:\textsuperscript{113}

The blinding light of the revelation that taught Parmenides the awful truth did therefore really blind him; destroyed his eyesight (and his hearing, and even his tongue, his sense of taste – but not his tactile sense!), all epistemic power. The very journey towards the blinding light of truth turned out to be an illusion – a pre-revelational illusion – like all our ambitious desires and loves. […] So the proem is compatible with the revelation of the Goddess of Justice. And the Goddess of Justice is not identical with the Goddess of Truth; rather it is the goddess who judges the reliability of the witnesses and with this, she also declares the just distribution between the two worlds, the world of objective truth and the world of our illusions.

Read in this philosophical light, the blindness of Justice could stand for something quite different from the focus on truth alone that it represents in Plutarch’s and Diodorus’ blind chief justice. As an attribute of Justice herself, blindness is rather a definition of what truth is: the departure from the trust in the experience of our senses for the revelation of a deeper insight into the nature of things. While this is an appealing interpretation, it does not seem to have carried over into a depiction of blind or blindfolded justice in the ancient world.\textsuperscript{114}

\textsuperscript{112} Id. at 328.
\textsuperscript{113} Id. at 330.
\textsuperscript{114} Popper states that “the goddess Δίκη was blindfolded at least in some representations,” but does not cite any support for this proposition. See id. at 326.
B. **Blind Justice in the Renaissance**

Following these fragile roots for the idea of blind justice in the ancient world, our modern tradition can be traced back more directly to the end of the 15th century. At that time, however, justice’s blindfold started out as a negative attribute and it was only in the first half of the 16th century that the positive connotation was rediscovered and developed further.

1. **Blindness as Satire**

The earliest known depiction of blindfolded Justice is a woodcut, possibly by Albrecht Dürer, in which a fool covers the eyes of the allegorical figure with sword and scales.115 This is an illustration in Sebastian Brant’s satirical book *Das Narrenschiff* (The Ship of Fools), which criticized the weaknesses and vices of its time.116 This particular woodcut illustrated the foolishness of quarrelling and going to court (*Zanckē vnd zu gericht gō*) in chapter 71 and described as fools those who quarrel like a child and believe that they are able to blind the truth in this way (*Gar dikk der haechlen er entpfyndt / Wer stætes zancket wie eyn kyndt / Vnd meynt die worheyt machen blyndt*).117

Brant’s satirical work was published in Basel in 1494 and immediately became extremely popular. Six authorized and seven pirated editions were published before 1521 and it was translated into Latin by Jacob Locher, into French by Paul Riviere in 1497 and into English by Alexander Barclay and by Henry Watson in 1509. Given that Gutenberg had invented the printing press only about 50 years earlier, such popularity makes it “one of the most successful books recorded in the whole history of literature.”118 In a time not yet flooded with visual information, many of its illustration became likely very recognizable.

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117 Similarly, in Alexander Barclay’s English version of The Ship of Fools, it illustrated the notion that “He is a fole, whether it be man or wyfe / Whiche hym delythe in iugement and lawe / And euer contendyth in discorde and in stryfe / In small tryfyls, and scantily worth a strawe / Suche, theyr owne flesshe vnto the bonys gnawe / And labour by theyr sotelty and gyle / To blynde iustyce, and the laws to defile.” SEBASTIAN BRANT, THE SHIP OF FOOLS 48 (Alexander Barclay, transl., vol. 2, 1874) available at http://www.archive.org/details/shipfools00unkngoog. On the derisive nature of the image generally, see OTTO R. KISSEL, DIE JUSTITIA: REFLEXIONEN ÜBER EIN SYMBOL UND SEINE DARSTELLUNG IN DER BILDENDEN KUNST 39, plate 27 (1984).

A year after the publication of Brant’s book, Emperor Maximilian formally adopted Roman law and the Bamberg Code was instituted in 1507 in another effort to guide judges. The *Bambergensis* included a depiction of blindfolded and dunce-capped judges that was entitled *Mockery of Unjust Judges* (*Verspottung der ungerechten Richter*) and was clearly inspired by the Brant illustration.

2. **Blindness as Impartiality and Reason**

Despite the scathing criticism expressed by these early German depictions in 1494 and 1507, the image of blindfolded Justice also developed positive connotations in the early sixteenth century. And this development appears to have been influenced by the ancient idea of the blind chief Justice.

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120 See, e.g., REPRESENTING JUSTICE, supra note 3 at 68.

121 See id. at 69, fig. 52.
Illustration in Andreas Alciatus’s *Emblemata* (1531)

Andreas Alciatus, a law professor in Bourges and Pavia, who published an anthology of diverse moralizing short poems and epigrams in 1531, picked up on the depiction of the court in Thebes as described by Plutarch and Diodorus.\(^{122}\) His work includes an emblem called *The good Prince and his Council*, which shows an assembly of men without hands and a seated central figure which, depending on the edition, has no eyeballs, has only one eye, or a patch or some kind of bandage over one or both eyes.\(^{123}\) In line with the explanation by Plutarch and Diodorus, the accompanying epigram elaborates that the absence of hands and eyes stands for unresponsiveness to bribery and to the identity of those who appear before them.\(^{124}\)

These men without hands who are seated are those by whom justice is administered. They should have well-balanced sense; nothing is received from them in response to a bribe. Their prince, deprived of his sight, cannot see anybody, and he judges by due sentence according to what is said in his ear.

Within just a few years, the blindfold had thus become a symbol for the foolishness and ignorance of the justice system as well as for the independence and impartiality of ideal justice. From these early book illustrations, the image of blindfolded Justice then made its way into other forms of art. For example, in 1543 Hans Gieng placed a figure of Justice with a blindfold on the *Justice Fountain* (*Gerechtigkeitsbrunnen*) in Bern above


\(^{123}\) See REPRESENTING JUSTICE, supra note 3 at 43-44, fig. 33.

\(^{124}\) See id. at 43. The excerpted quote is based on *ALCIATUS, DALY EDITION*, vol. 2, emblem 145 and motto (from a French edition of 1536). An online version of the work is available at [http://www.mun.ca/alciato/order.html](http://www.mun.ca/alciato/order.html).
representations of the Pope, a Sultan, the Emperor and a Lord Mayor. It is generally read as representing the power of justice over the rulers of the political systems of the day: theocracy, monarchy, autocracy and the republic.\textsuperscript{125} In this tradition, subsequent sculptural depictions of Justice generally used the blindfold as a positive attribute.

\begin{center}
Justice Fountains in Bern (1543) \textsuperscript{126}
\end{center}

Another 50 years later, Cesare Ripa published the \textit{Iconologia}, another hugely successful book, with descriptions of allegorical figures including the type and color of their clothing and the varied symbolic paraphernalia, as well as reasons (mostly based on classical literature) for why these were chosen.\textsuperscript{127} He recognized Fortuna’s blindfold as evidence of arbitrariness and caprice, provided a blindfold for Eros to represent the foolishness of emotions, and also used it as a symbol for the indiscriminate force of Ambition, for Error and Ignorance, for Furor’s loss of control from rage, and other negative traits.\textsuperscript{128} When it came to Justice, Ripa described only one way to depict divine

\begin{footnotesize}
\textsuperscript{125} For more art historical information on the fountain and images of the figure of Justitia, see, e.g., Gerechtigkeitsbrunnen (Bern), \textsc{Wikipedia} \url{http://en.wikipedia.org/wiki/Gerechtigkeitsbrunnen_(Bern)}.

\textsuperscript{126} \url{http://en.wikipedia.org/wiki/File:Berner_Justitia.jpg}.

\textsuperscript{127} \textsc{Cesare Ripa}, \textit{Iconologia ovvero Descrittione Dell’Imagini Universali Cavate dall’Antichità et da Altri Luoghi} (1593). The first publication was without illustrations, but the more than forty subsequent versions in different languages came with drawings.

\textsuperscript{128} \textit{See Cesare Ripa, Iconologia} at 14 (Ambition); 146-147 and 240-241 (Error and Ignorance); and 189-190 (Furor) (Padua 1611; New York and London 1976). \textit{See also Representing Justice, supra note 3 at 70 and notes 103-112.}
\end{footnotesize}
justice, but six different ways to depict worldly Justice depending on which tradition was followed or which aspect of her nature was emphasized. The worldly Justice in the tradition of Aulus Gellius is described as having “eyes of the most acute vision and a necklace around her throat that is decorated with an eye.” The reason provided is Plato’s view that Justice sees all and that from ancient times priests were called seers of all things. Ripa also acknowledged that ministers of Justice must have these qualities in order to discover truth and, “in the manner of virgins,” be exempt from passion and not corrupted by flattery, gifts, or anything else. But Ripa also presented one of the six worldly Justices – the one simply called Giustitia – as blindfolded so that “she cannot see anything that might cause her to judge in a matter that is against reason.”

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

This allows us to understand the switch from a blindfolded judge to blindfolded justice. It is not the abstract idea, not divine justice, that is blindfolded, but the allegory for worldly justice or for the justice of human beings. This distinction is an important first step in interpreting the blindfold. It is easily understandable that open eyes can lead us astray from the path of justice, but it is less clear how closed eyes can assure that we stay on the path. Put differently, what exactly should we be blind about in order to bring worldly justice close to the ideal of divine justice?

129 See CESARE RIPA, ICONOLOGIA at 202-203 (Divine Justice); 201-202 (Justice according to Aulus Gellius); 202 (Justice of Pausanias); 203 (Justice) 203-204 (Principled Justice); 204 (Rigorous Justice); and 204 (Justice on the medals of Hadrian, Antoninus Pius and Alexander) (Padua 1611; New York and London 1976). See also REPRESENTING JUSTICE, supra note 3 at 70 and n. 114.


131 Id.

This problem can be illustrated by looking at another depiction of self-imposed blindness that originated in Asia around the time of Ripa’s *Iconologia*, roughly 400 years ago. Japan has since exported the three wise monkeys as an internationally recognized pictorial maxim: together Mizaru, covering his eyes, Kikazaru, covering his ears, and Iwazaru, covering his mouth, symbolize the ancient Chinese proverbial principle to “see no evil, hear no evil, speak no evil.”\(^{133}\) But if our sight is impaired in one way or another, are we not blind to good and evil alike? And what good is impartiality in justice if the legal system is specifically called upon to adjudicate disputes and not to be an impartial observer? Every legal system must distinguish between facts that are relevant to its decisions and those that are not. Looking only at the legally relevant facts and ignoring everything else makes the system impartial. But impartiality only speaks to internal self-consistency and not to a broader concept of justice. Mizaru might see no evil, but the idea of justice’s impartiality makes her see exactly what the law tells her to see no matter whether it is good or evil.

C. Blind Justice Today

This conflict between an idealized Justice with particularly clear vision and one with obscured vision has persisted through the last few centuries. An information sheet by the U.S. Supreme Court on the depictions of justice outside of the court building recognizes the complicated history and problems of interpretation. It admits that the origins of the blindfold are unclear and that “it seems to have been added to indicate the tolerance of, or ignorance to, abuse of the law by the judicial system,” but also points out that the blindfold “is generally accepted as a symbol of impartiality” today.\(^{134}\) Similarly, information brochures in London explained that the Justice figure on top of the Old Bailey was not blindfolded in defiance of convention since this corresponded to the original depiction and since her “maidenly form” was already supposed to guarantee impartiality.\(^{135}\) Even if a critical modern observer might be skeptical about the maidenly form guaranteeing impartiality, it is not clear why the set of scales does not already convey the impartial weighing of claims.

1. Blindness as Dispassionate Procedure

The origin of the “positive” blindfold in connection with a judge rather than the goddess of justice and the subsequent use for worldly rather than divine justice suggests that the

\(^{133}\) See, e.g., Michio Iida, Mizaru Kikazaru Iwazaru: Sekai sanen genryu ko (Sanseido sensho) (1983).


positive meaning related specifically to human beings administering justice. In this sense, it seems to stand more for an independence from human desires and emotions than for impartiality generally.

As seen in the case of Homer, the idea that passion can make us blind is a very old one. Plutarch puts it more analytically when he cites Chrysippus’s treatise on Anomaly as saying: “The encroachment of the passions blots out reason, and makes things look different to what they should look, violently forcing people on unreasonable acts.” So in order to ensure justice, we should blind ourselves with reason before our passions blind us – similar to Odysseus who ordered his men to tie him to the mast of his ship in order to hear the song of the sirens and yet be unable to follow his own resulting passionate madness? This seems to be the lesson. In the same vein, Robert Cover imagined a goddess, who used the blindfold to eliminate her own emotions and gain immunity from the allure of sexual attraction on the one hand and from the fear of powerful enemies on the other hand.

If the blindfold represents the power of judges to speak truth to power and to establish a government “of laws, and not of men,” one should try to gain a better understanding of how exactly it does that. This question has been asked in different ways. Cover saw Justice’s blindfold, an act of self-constraint, represented in legal procedure. That’s a nice idea, but it is not entirely clear why procedure should be inherently more self-constrained. For example, when officials were required to arrest alleged runaway slaves under the Fugitive Slave Act of 1850, the procedural rules provided that the suspected slave was not eligible to defend himself against the accusation in a trial so that many free blacks were effectively being conscripted into slavery. While not necessarily more just or self-constrained, procedural rules might have the advantage that they are less ambiguous, on average, than substantive legal rules. But then the blindfold could just stand for any kind of judicial self-constraint or for the consistency of rulings.

2. Blindness as Judicial Independence

Dennis Curtis and Judith Resnik saw the blindfold as creating “distance or independence” and asked, “from what is Justice distant?” Dennis E. Curtis & Judith Resnik, Images of Justice, 96 Yale L.J. 1727, 1727-28 (1987). Frame like this, the blindfold may stand for judicial independence from the sovereign employer and for the separation of powers. But there are many different reasons why our humanity might cause us to use the scales of justice incorrectly. Fear and favoritism are two reasons to

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136 PLUTARCH, MORALS.
138 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).
140 See, e.g., MILTON MELTZER, SLAVERY: A WORLD HISTORY 225 (1971).
actively temper with the scales. When this happens, the culprit is typically fairly aware of it at the time. In allegorical imagery, this kind of independence and impartiality is arguably already conveyed, as the Old Bailey brochure suggested, by her maidenly form, or by her white robe.

There is another way of interpreting the blindfold that relates more to a subconscious and involuntary manipulation of the law. As the image of the judges from Thebes and Alciatus’s emblem of the Prince’s council from 1531 showed, the original image was an assembly in which only the leader was blindfolded. Legal systems have tried to determine the best way to discover facts and align the complexity of reality with the abstraction of legal rules. The Torah already provided that the charge of a crime cannot be sustained with one witness alone. The jury system in the common law tradition can be seen as a link to the idea of the blind judge from Thebes. It is not the judge who examines reality and determines what facts occurred but the jury and the judge is supposed to accept this self-imposed blindfold by applying the law to those determined facts rather than to his own vision of what occurred. Even the jury is, of course, blind in the sense that the judge will decide when evidence may be presented and when the danger of unfair prejudice outweighs its probative value. There is great value to this system of self-imposed blindness, but it also involves many dilemmas. For example, while the U.S. Constitution requires that criminal defendants are tried by jurors from the locality, we no longer think that juror’s “extrajudicial knowledge” is beneficial to the administration of justice and persons who have such knowledge may now be disqualified as impermissibly tainted.

What underlies all of this is the awareness that the act of seeing is not an impartial collection of objective facts, but a process by which external stimuli are filtered through a largely subconscious set of thoughts and emotions. When the Supreme Court decided in 1976 that it was fundamentally unfair – and thus a violation of the Due Process Clause – to try a person dressed in a prison uniform since that clothing was suggestive of guilt rather than protective of the presumption of innocence, it followed a tradition already expressed in the Code of Maimonides from the 12th century, which provided that the parties to a suit should be equally well (or badly) dressed during trial. The visual information might not add to our knowledge. Everyone knows that defendants are often in prison during trial and there is no objective reason why the dress should influence the decision of the court, but it can also be shown that such objectively irrelevant elements matter at least on a subconscious level.

The blindfold in this sense acts like a filter. Rather than observing reality personally, the judge prefers his advisors or the jury to examine reality and provide him with a

142 Deuteronomy 19:15.
143 See Representing Justice, supra note 3 at 104.
processed version of it. This expresses the view that a group of observers are more likely to paint an accurate picture of reality collectively than a single individual. While each individual over- and underemphasizes elements that correspond to his own background and cultural upbringing, a group of individuals is more likely to eliminate such individual elements when they compile their composite picture (and the same principle applies to appeal decisions by more than one judge). At the same time, there is the competing view that the judge as an individual trained in the law, is in a better position to filter what the jury should and should not consider. In certain contexts, we believe that the common sense of the community is better in “seeing” reality than any individual, and in other contexts, we fear that the “seeing” of average members of the community will be tainted by some kind of prejudice. The question is then: Is there something that we can learn from the image of a blindfold to draw a principled line between situations in which we should go with the view of a community instead of the view of an individual and vice versa?

III. **The Characteristics of Human Vision**

In taking a closer look at our visual capacity, a preliminary question poses itself: of what value is seeing something in the first place? Our intuitive answer today is that seeing is extremely important, but it is important to keep in mind that other times attributed different importance to it. This has already been discussed with regards to pre-Socratic philosophy. And academic thinking in Europe throughout the Middle Ages relied on ancient authorities, especially the Bible, Aristotle and the Fathers of the Church rather than on scientific observation. The clash between the Catholic Church and Galileo in the early 17th Century can only be understood as the question of the relative importance of established authority versus visual and scientific observation. The “Enlightenment” has since taught us to trust the power of scientific observation so fully that this kind of controversy seems very distant (even though it is arguably still at the core of the debate between certain creationists and evolutionists who would consider each other blind with regards to true knowledge).

But what do we “see” when we “see” the world? Joseph Jastrow called vision “the most intellectual of all senses,” “the one in which mere acuteness of the sense organ counts least and the training in observation counts most.”145 The eagle’s eyes see farther, but our eyes tell us vastly more of what is seen: “The retina may be exposed a thousand times and take but few pictures; or perhaps it is better to say that the pictures […] remain undeveloped and evanescent.”146 Kant expressed this in his *Critique of Pure Reason*.

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145 JOSEPH JASTROW, FACT AND FABLE IN PSYCHOLOGY 275 (1900).
146 *Id.* at 276.
“Thoughts without content are empty, perception without concepts is blind.”\textsuperscript{147} Similarly, Goethe coined an expression that has remained famous primarily amongst archaeologists and art historians: we see only what we know (\textit{Wir sehen nur was wir wissen}). This can easily be illustrated when we confront art with which we are not familiar, when we watch sport without knowing the rules, or when we see unfamiliar musical notation or letters of an unknown language. Reading a sentence in a known language only takes a second and one is still able to reproduce it hours and days later. But reading a sentence in an unknown language for a second, our memory will probably be limited to a few letters and the sound of some words. This is clearly even worse when we look at a sentence in a language that uses letters with which we are not familiar.

In 1973, Chase and Simon published a pioneering study on the expert memory of chess players.\textsuperscript{148} Chess players from beginners to masters were shown board positions from actual chess games for a few seconds and then asked to recall the location of the pieces. The ability to recall increased as a function of the chess skill. While beginners could only recall a few pieces, international-level players recalled virtually all of them. In contrast, when the players were shown boards with random pieces, beginners and experts alike could only recall very few pieces.

The allegory of blindfolded Justice is another illustration of this. For someone not familiar with the iconology, it is just a figure of a woman with a blindfold. We only see Justice, and perceive particular aspects of her character that the artist might have wanted to underline, if we are familiar with the cultural tradition of which this image forms a part. Without knowledge, our eyes might still receive all the visual stimuli, but our brain has not learned to filter out what is important and we consequently cannot appreciate properly what appears in front of our eyes.

Before asking what this might mean for the ideal vision of worldly justice, these individual and collective limitations of vision should be understood a little better. This will lay the foundation for the question of whether there is something that justice might be very focused on and should be blind to or vice versa and how we might be able to distinguish between these categories.

The traditional view of the process of seeing is that the eyes provide neutral stimuli, which are then interpreted through instinctual and intellectual activity. In the formulation of Schiller: “The senses must always be blind postmen, unknowing of what fantasy and nature will haggle out with each other.”\textsuperscript{149} We know today, however, that the

\textsuperscript{147} IMMANUEL KANT, KRITIK DER REINEN VERNUNFT (1781) ("Gedanken ohne Inhalt sind leer, Anschauungen ohne Begriffe sind blind.")


\textsuperscript{149} SCHILLER, \textit{DIE VERSCHWÖRUNG DES FIESCO ZU GENUA} 3, 10 ("Die Sinne müssen immer nur blinde Briefträger sein und nicht wissen, was Phantasie und Natur mit einander abzukarten haben.").
neutrality of vision is subject to a broader range of biological, cultural and psychological factors (or, in the classic formulation, to the limitations set by nature and by nurture).\textsuperscript{150}

\textbf{A. The Sight of Homo Sapiens}

Seeing in the biological sense is “the sense by which objects in the external environment are perceived by means of the light they give off or reflect.”\textsuperscript{151} More specifically, it is the process by which light rays enter the eye through the iris, are focused by the lens onto the retina, and converted by the retina into nerve impulses, which are then relayed to the visual center and interpreted as images by the brain.\textsuperscript{152} Since the lens – like a camera lens – projects an upside-down image on the retina, the images are “flipped over” by the visual center of the brain. There are two different types of nerve cells on the retina, the cones, which are sensitive in bright light, and the rods, which work in dim light. The switching from cones to rods (and vice versa) accounts for the momentary blindness we experience when the light level changes very quickly. Also, since the cones are concentrated in the center of the retina while the rods for dim light are spread toward the edge of the retina, our peripheral vision tends to be better in very dim light than our focal vision.\textsuperscript{153}

\textbf{1. Visual Adaptation to Standard Situations}

The alignment of cones and rods makes sense from an evolutionary point of view. While our attention to detail might be more important during bright daylight, perceiving possible dangers from the corner of our eyes tended to be more important during the night. This also points to the main deficiency with our eyes. They have evolved to deal very effectively with the vast majority of standard situations, but they can be thrown off when we see something that defies the way things normally are. This can be illustrated quickly with some famous optical illusions.

\textsuperscript{150} This formula was first used by Francis Galton in 1874. See \textit{NOTICES OF THE PROCEEDINGS AT THE MEETINGS OF THE MEMBERS OF THE ROYAL INSTITUTION OF GREAT BRITAIN}, vol. 7: 1873-1875, 227 (1875). This chapter divides limitations on objective vision into those related to our nature as \textit{homo sapiens}, \textit{homo sociologicus}, and \textit{homo ludens}. This is roughly correlated with the terms biological, cultural and psychological limitations based on practical considerations as they relate to different legal issues. It does not attempt to follow the traditional scientific categories.

\textsuperscript{151} \textsc{Dorland’s Medical Dictionary for Health Consumers} (2007) available at \url{http://medical-dictionary.thefreedictionary.com/vision}.

\textsuperscript{152} \textsc{Miller-Keane Encyclopedia and Dictionary of Medicine, Nursing, and Allied Health} (7th ed. 2003) available at \url{http://medical-dictionary.thefreedictionary.com/vision}.

\textsuperscript{153} \textit{Id.}
Optical Illusion 1: Scintillating Grid Illusion

The first illusion plays with the difference between focal and peripheral vision. When we focus on a given intersection of the grey lines, this intersection is (and a few others close to it are) clearly white. Our peripheral vision, however, tricks us into perceiving all other intersections as black.

Optical Illusion 2: Café Wall Illusion

The second illusion presents horizontal grey lines between cut up broader vertical lines of black and white. Because of these black and white segments, the thin grey lines appear crooked when they are, in fact, perfectly straight and parallel to each other.

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154 This illusion, a variation of the Hermann grid illusion from 1870, was discovered by E. Lingelbach in 1994. Despite several explanations for the illusion, it is still not entirely understood. See, e.g., Grid Illusion, WIKIPEDIA, http://en.wikipedia.org/wiki/Grid_illusion.

Optical Illusion 3a: Moving Surface

When our eyes wander over a third kind of optical illusion, the image seems to be moving. The effect is not as strong in a small black and white print, but many websites have large images with bright, saturated colors and there the (non-existent) movement can make a viewer easily dizzy.  

Optical Illusion 3b: Rotating Snakes

A recent study in Japan showed that these kinds of illusions don’t just trick the eyes, but really convince the brain that the image is moving. Scientists previously believed

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156 See, e.g., National Institute of Environmental Health Sciences - Kid’s Pages, at http://kids.niehs.nih.gov/games/illusions/lots_of_illusions.htm. There are many other optical tricks that involve movement and thus cannot be reprinted here. One of them, the “Lilac Chaser,” is a ring of pink dots with one dot at a time disappearing and reappearing in quick succession. By focusing on the center of the ring, we see dots in the complementary color (green) wherever a pink dot disappears even though there is nothing. See Lilac Chaser, WIKIPEDIA, http://en.wikipedia.org/wiki/File:Lilac-Chaser.gif.

157 See Ichiro Kuriki et al., Functional brain imaging of the Rotating Snakes illusion by fMRI, 8(10) JOURNAL OF VISION 16 (Dec. 30, 2008) available at http://www.journalofvision.org/content/8/10/16.full.pdf+html?sid=d9e361ee-436a-4f94-9933-
illusions that simulated movement involved higher-level brain activity – the imagination. But by using functional magnetic resonance imaging (fMRI) while exposing subjects to the optical illusions, this study found the illusion sparked brain activity generated by a bottom-up process in the visual cortex, which processes real physical movement.\textsuperscript{158} We don’t just imagine movement, the image is really moving for us. And because we do not just “imagine” something, it is also impossible to turn it off. No matter how much we tell ourselves that nothing can possibly move in those images, we will see the movement again every time we look at them.

This can also be observed with another category of optical illusion that focuses on our perception of color and light levels. Edward Adelson, Professor of Vision Science at MIT, used the image of a checkerboard to illustrate how our visual system can get tricked when it falsely compensates for apparent illumination.\textsuperscript{159}

We regularly need to determine the color of objects in our environment. Just measuring the light from a surface (the luminance) is not enough since a white surface in a shadow might reflect less light than a black surface in full sunlight. The visual system uses some tricks to compensate for shadows. The first trick is based on local contrast. The visual system assumes that a square that is lighter than the squares next to it is probably lighter than average and vice versa. A second trick is based on the fact that shadows often have soft edges. The visual system tends to ignore gradual changes in light level, so that it can determine the color of surfaces without being misled by shadows. While the A square looks considerably darker than the B square, both squares are exactly the same shade of grey.

The checkerboard illusion is similar to the simultaneous contrast illusion where a monochrome bar in the center appears as different shades of grey because of its surroundings. Here, the fact that the center is a single shade of grey can be verified more easily by covering up the top and the bottom part of the image.

These illusions illustrate that the visual system is good at breaking down information into meaningful components and thus perceiving the nature of objects quickly, but not so good at objectively measuring the amount of light of a given surface. We see what we expect to see; what we have learned to see. When confronted with a highly unusual setup, we see what we usually see rather than what these unusual circumstances present us with.


\textsuperscript{158} \textit{Id.}

Optical Illusion 5: Ebbinghaus Illusion

In contrast to our thoughts and emotions, we commonly assume that we see the world in a very similar way from person to person (as long as we have no reason to believe that there is something wrong with our eyes). But research by the Wellcome Trust and University College London using the Ebbinghaus Illusion (and the similar Ponzo Illusion) has shown that this is not entirely true either: the primary visual cortex is known to differ in size by up to three times from one individual to the next and the effect of the illusion depends on the size of the visual cortex. Using fMRI to measure the surface area of the primary visual cortex, the researchers could show that test subjects with a smaller visual cortex perceived the visual illusion more pronounced, thus showing that the size of a part of a person’s brain actually influences how the person perceives their visual environment.

Developmental research has further suggested that the illusion is dependent on context-sensitivity. When researchers tested children aged 10 and under and a sample of university students, the illusion was found more often to cause relative-size deception in adults, who have high context-sensitivity, than deception in young children, who possess low context-sensitivity. This confirms what we said earlier: the brain learns to deceive itself because such deception helps up take in our environment more quickly and, in most cases, with a sufficient degree of accuracy. But at the same time, it becomes easier to trick our perception as well.

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2. Seeing What We Believe

Whether these illusions make us see something that does not exist, make us see distortions, or make us see movement that is not there, they all point to biological and basic psychological limitations in the objectivity of our vision. Other studies have shown similar limitations with our other senses. For example, a joint study of the California Institute of Technology and Stanford Business School examined the impact perceived wine prices have on taste.\(^{163}\) In this study, 20 volunteers tasted five wine samples that were identified by different retail prices: $5, $10, $35, $45, and $90 per bottle. But in reality the wines with price tags of $10 and $90 as well as those with tags of $35 and $45 were identical. When people were not given any price information, they rated the cheapest wine as their most preferred. But when they were given the price information, they consistently reported that they liked the taste of the $90 bottle better than the $5 one, and the $45 bottle better than the identical $35 one. While the subjects tasted and evaluated the wines, their brains were scanned using fMRI, as in the Rotating Snakes study. These brain scans supported their subjective reports; the medial orbitofrontal cortex, a brain region involved in our experience of pleasure, showed higher activity when the subjects drank the wines they said were more pleasurable. Just as with the rotating snakes study, the test subjects did not just imagine something (there some non-existent movement and here a taste difference between two identical wines), but the pleasure region of their brains was actually more or less active (presumably affecting the amount of pleasure experienced).\(^{164}\)

Another interesting example of how the brain’s hardwiring affects perception comes from a famous experiment on seagulls. Nikolaas Tinbergen found in the 1950s that seagull chicks beg for food from their mother by pecking on a red spot near the tip of her beak and that this behavior can even be induced by a disembodied beak or by a strip of cardboard with a red spot.\(^{165}\) Most fascinating of all, he discovered that a long thin stick with three red stripes, which looks nothing like a beak to us, acts as some kind of super beak to the seagull chicks and they will get far more excited about it then they do about a real beak. The neurons in the chicks visual pathways may be coding “form” in a way that is not obvious to us so that the stick with three red stripes is somehow more “effective in driving the ‘beak percept’ neuron than a real beak.”\(^{166}\)

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\(^{164}\) Id.

\(^{165}\) N. TINBERGEN, CURIOUS NURALISTS (1954).

insight to art, V.S. Ramachandran suggested that “Long stick with three stripes” would be a million dollar piece of art in a seagull art gallery without knowing why it is so effective because it does not “realistically” resemble anything they know and that our own reaction to artistic expression might be influenced by similar forces. It is not just our relationship with art, however, but with all aspects of our environment that is influenced by such invisible forces.

3. Biological Jury Bias

As discussed above, justice systems at least from the Code of Maimonides in the 12th century have recognized that appearances can influence judicial results. This is certainly also the logic behind Estelle v. Williams’ holding that compelling a defendant to appear in court in prison uniform is unconstitutional and behind the Rules’ of Evidence weighing between probative and prejudicial value generally. We are used to seeing convicted individuals in prison uniform and presenting someone in prison uniform during trial can trick our brain into seeing a guilty person; turning the presumption of innocence into a presumption of guilt.

The scientific insights into the subjectivity of our senses suggest that we might want to take such subconscious perceptions even more seriously. After all, as the illusory-motion and the wine-price studies have shown, wrong sensual perception does not just trick the imagination, but the areas of the brain responsible for processing these stimuli themselves. If knowing about (or believing to know about) wine prices causes us not only to believe that the more expensive wine tastes better, but to actually receive a more pleasurable taste sensation from our brain, the lines between subjective and objective perception get blurred. What does that mean for prejudices with which the justice system is confronted regularly?

Just as there is a normal connection between price and quality across virtually all cultures, there is a similar link in our perception between beauty and innocence and ugliness and guilt. A beautiful villain is only a little less uncommon in film and television than an ugly hero. But if our brains get used to a correlation between attractiveness and innocence, would not more unattractive than attractive people get convicted of crimes? Studies have indeed shown that juries convict unattractive defendants in 22 percent more cases than attractive defendants. We can protect people from jury bias based on

their clothes, but there are limits to improving defendants’ attractiveness. Similarly, studies have shown that there is a gender bias in jury verdicts. These reflect stereotypes that can be specific to particular cultures or a common experience of mankind based on genetic differences.

4. The Genetic Defense

A study by H.G. Brunner in 1993 laid the foundation for what has come to be known as the Genetic Defense. Brunner hypothesized a rare genetic disorder caused by a mutation in the MAOA gene that is characterized by lower than average IQ and problematic impulsive behavior (such as arson, hypersexuality and violence), sleep disorders and mood swings (the Brunner syndrome). Proponents of the Genetic Defense suggest that individuals cannot be held accountable for their genes and resulting dispositions and actions. In the United States, some courts have recognized that “certain predispositions may reduce the blameworthiness of the offender” and have consequently reduced sentences for violent offenders based on genetics.

If it is true that our genes also influence our perception of the world, the genetic defense might go further than it already has. Rather than impacting only sentences where a violent act has an immediate link to a genetic predisposition for the loss of control, we could also consider someone less blameworthy whose genetically influenced sense perception pushed him into an inappropriate response to some stimulus. But what is different between a purely genetic reason and one built on the upbringing within a certain culture or subculture? Can we tell our brain not to be influenced by the (perceived) knowledge of wine prices in experiencing pleasure? If not, does it matter


170 M.L. McCoy & J.M. Gray, The impact of defendant gender and relationship to victim on juror decisions in a child sexual abuse case, 37 J. of Applied Social Psychology 1578–1593 (2007) (finding that jurors are significantly more likely to find male defendants (especially the father) guilty in cases of child sex abuse than female defendants); A. DeSantis and W.A. Kayson, Defendants’ characteristics of attractiveness, race, and sex and sentencing decisions, 81 Psychological Reports 679–683 (1997) (showing more lenient sentences when the defendants are attractive, white or female). See also Gloria J. Fisher, Gender effects on individual verdicts and on mock jury verdicts in a simulated acquaintance rape trial, 36 Sex Roles: A Journal of Research 491-501 (1997) (finding that a higher percentage of women in juries increases the likelihood of guilty verdicts in simulated acquaintance rape trials).


173 Id.
whether our body reacts to something through genetics alone or through cultural conditioning when we cannot choose either?

B. The Sight of Homo Sociologicus

In addition to basic biological limitations and the influence of the cultural development of our brains on our vision, there are also more direct and intellectual links between our vision and culture. The notion that culture shapes cognition and conduct has been described as enculturation (or socialization). And it is often impossible to fully understand one culture when one’s own point of view is firmly anchored in another culture.

1. Learning How to See

The difficulty to understand one culture from a completely different point of view was one of the observations of Wade Davis when he travelled to Haiti in 1982 as a graduate anthropology student at Harvard on a highly unusual research project: to investigate what was behind the occasional sighting of zombies. He developed the ethnobotanical hypothesis that tetrodotoxin poisoning combined with regular doses of the deliriant, datura stramonium, could explain the existence of Haitian zombies. But his important insight in this context was that the religious zombie phenomenon, as deeply anchored in the local voudoun beliefs, could not be fully analyzed scientifically. He realized that he was unprepared as a western scientist to fully understand certain phenomena in a society so different from our own. The different environments and belief systems do not just give us different tools to interpret identical perceptions, but our background actually influences the development of our senses themselves.

Anthropologists wonder how different peoples develop the latent capabilities of the human mind differently. These distinctions amount to unconscious cultural choices. Davis refers to seminomadic Indians in the northwest Amazon who use the most rudimentary technology, but possess knowledge of the tropical forest so refined that they can smell animal urine from forty paces and correctly identify the species that left it. Or how is it that our ancestors were (and that some Indians still are) able to navigate the oceans guided by Venus night and day, but that we have lost the ability to see her during the day? Such sensitivity is not an innate attribute of certain people any more than our technological prowess and ability to blend out the myriad of different strong stimuli in order to survive in big cities. Our different levels of sensitivity to something “are

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175 See id. at 174.
176 See id. at 174.
consequences of adaptive choices that resulted in the development of highly specialized but different mental skills at the obvious expense of others.”

Henri Breuil, the leading French pre-historian of the first half of the 20th century, reported a story involving a Turkish officer who was incapable of recognizing the drawing of a horse “because he could not move around it” and was, as a Muslim, entirely unfamiliar with depictive art. Anthropologist Anthony Forge made a similar observation when he was working with the Abelam in New Guinea, who had difficulty in “seeing” photographs based on their cultural tradition and needed him to outline figures before they could recognize them: “Their vision [had] been socialized in a way that makes photographs especially incomprehensible.”

It has been less than 200 years since people wondered in mainstream Western culture whether trains were devices of the devil and whether travelling at speeds of up to 60 miles per hour could cause concussions of the brain. A little over hundred years ago, in 1896, the Lumière brothers premiered their film of The Arrival of a Train at La Ciotat Station, which placed a camera on the platform very close to the arriving train. Though the story of the audience screaming and running away from the screen might be an urban legend, it undoubtedly astonished people who were still unaccustomed to the realistic illusions of moving pictures.

We observe the world and our languages develop around what matters to us. Children generally learn that the sky is blue and the grass is green, but what if they grow up in a place where all light is filtered by the canopy of a rain forest? Members of certain South American tribes reportedly could not distinguish between green and blue. Conversely, people who grow up in an icy landscape will be far more attuned to the different types of ice and be likely much more conscious of different shades of white than we are. We see and develop words for what matters to us and can learn to ignore everything else to the point where we no longer perceive something different at all. People who are blind from birth can talk about colors, but they won’t make any sense to them except as an

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177 See id.
180 See, e.g., Early Railroads, The 1830, AMERICANRAILS.COM, http://www.american-rails.com/early-railroads.html. (referring to assertions that “railroads were a ‘device of the devil’ and could cause a ‘concussion of the brain’”).
182 See WADE DAVIS, ONE RIVER 218 (1997).
acquired intellectual knowledge that certain objects have certain colors. It is an illusion to believe that the world appears in the same way to the rest of us.

2. Case Studies on Cultural Perception

There are many little games that illustrate the cultural dependency of our visual perception and some have become very popular through the Internet. A couple of them that focus on different aspects of cultural vision are presented here.

![Reading Test #1](image)

In this popular online “reading test,” we are confronted with 35 geometric shapes. A few of them resemble letters (such as “i” and “l”), but most of them don’t seem to make any “sense.” Part of our problem is just that we are “too close” in the same sense in which an old television picture (in the days prior to retina screens) just becomes a collection of random red, green and blue dots with different levels of luminosity when we are too close to it (or an old newspaper photograph a collection of black and white dots). Consequently, the reader is usually advised to look at this image from a distance to make sense of it. The larger the image, the more we intuitively tend to focus on the individual geographic shapes – looking for meaning where there is none. It is only when we look at the overall image of assembled geographic shapes from a greater distance (or squint at the image through half-closed eyes so that the shapes become blurry), that our initial intuition is overcome. Different from our usual everyday experience, the meaning here is not to be found in the positive geometric shapes themselves, but in the negative empty spaces between them. The geometric shapes are the space between letters and the spaces between them are the letters. By transforming the usually meaningless and

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unobserved empty spaces between letters into three-dimensional shapes, the illusion tricks us into focusing on these spaces instead of the letters. And since we are not used to “reading” the empty spaces between letters, the meaning disappears together with the letters. To some extent, this image illustrates the idea of not being able to see the forest because of all the trees (or rather because of the empty spaces between the trees).

Popular Vision Test Joke on the Internet – Blurred Vision

Another reading experiment illustrates the same point. The challenge is to read the text in the following box and count the number of times that the letter “F” appears.

FINISHED FILES ARE THE RESULT OF YEARS OF SCIENTIFIC STUDY COMBINED WITH THE EXPERIENCE OF YEARS.

Reading Test #2

Here, we have no problem identifying the letters. We can also easily count the total number of words (16) or the total number of letters (81). But in looking at the words more closely, it is no longer just a mathematical exercise and we subconsciously import our culturally determined adaptation acquired over many years of reading English texts. It’s a mere matter of survival that we are able to reduce the complexity of the world into things that do and do not matter. We learn to blend out sights and noises that harmlessly occur in our everyday environment and only pay attention to those that are unusual or that we have learned to associate with importance. We might only perceive the colorful
advertising on a large plasma screen subconsciously, but a red traffic light will attract our attention.

In the context of reading, this same phenomenon causes us to blend out unimportant words like “of.” We see the word, but our brains have learned to ignore it. As a result, when people are told to look for the letter “f” in the text passage, most people will only find three; some people see four. But it is very rare for anyone to find all six occurrences of the letter. We might notice the last “of” as it is placed more prominently, but our brain almost always suppresses the existence of the other two times that the word occurs. It is only after we know that “of” is important in this context (something that should have been fairly obvious from the start given the task of counting the occurrences of the letter “f”) that we can go back and have no problem finding the right number.

Imagine people who do not understand any English are presented with the previous task. Would they have a similar problem arriving at the right number of occurrences of the letter “f”? No. Until someone has learned to blend out the word “of” in order to increase the speed of reading comprehension, the “f” is as visible in “of” as in any other word. We become blind to this particular aspect of reality as a result of the enculturation involved in increasing English reading proficiency.

3. **Adaptability of Learned Perception**

Our brain adjusts how it processes the input from our senses when its previous processing no longer makes sense. If we wear glasses that turn our visual field by an angle of 180 degrees, we will temporarily see the world upside down. But the brain will eventually adjust and we will perceive the world as “normal” again within a few days. We don’t “see” the information our retinas receive (which are, of course, upside down images in the first place), but the information after our brains have processed and made sense of it. Such perceptual adaptation also allows us to filter out distractions. It allows a local resident to sleep at night in a noisy environment in which non-adapted visitors might be unable to sleep, whether that noise is the traffic noise of New York City or the animal sounds of a rain forest.

Neurologist Oliver Sacks collected many incidents in which people had to adapt to worlds that were new to them. In one of them, he describes the situation of Virgil, a man who had been virtually blind since early childhood and could suddenly see after an

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186 See, e.g., OLIVER SACKS, THE MAN WHO MISTOOK HIS WIFE FOR A HAT: AND OTHER CLINICAL TALES (1985); OLIVER SACKS, AN ANTHROPOLOGIST ON MARS: SEVEN PARADOXICAL TALES (1995) (describing the neurologist’s life, which, unlike the systematic life of a scientist, “provides him with novel and unexpected situations, which can become windows, peepholes, into the intricacy of nature.”) at 109.
operation at age 50.\textsuperscript{187} He confronts the commonsensical notion that someone in this position would suddenly see the world in the same way we do and realizes that experience is necessary in order to see. In 1690, John Locke had already reflected on this problem posed to him by his friend William Molyneux (which thus became known as the “Molyneux Problem”) and concluded in his \textit{Essay Concerning Human Understanding} that a formerly blind man who learned to distinguish between a cube and a sphere based on touch would not suddenly be able to distinguish them by sight alone without touching them.\textsuperscript{188} Indeed, Virgil found it impossible for a long time to fit squares, triangles, circles and rectangles into the corresponding holes on a child’s wooden formboard.\textsuperscript{189} And these were basic geometric shapes with which he was familiar; identifying unfamiliar objects presented a whole different challenge.

\begin{figure}
\centering
\includegraphics[width=0.5\textwidth]{invariance.jpg}
\caption{Demonstration of invariance in perception\textsuperscript{190}}
\end{figure}

We achieve perceptual constancy (invariance of perception), the ability to identify objects under different conditions, such as changing perspectives, distances and lighting, in the first months of life. Yet it is a learning achievement that even the largest supercomputers cannot match.\textsuperscript{191} And it is virtually impossible for people who have regained sight after

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{187} \textsc{Oliver Sacks}, \textsc{An Anthropologist on Mars: Seven Paradoxical Tales} 108-152 (1995).
\item \textsuperscript{188} \textsc{John Locke}, \textsc{An Essay Concerning Human Understanding} 146 (Peter H. Nidditch, ed., Oxford 1975). \textit{See also} \textsc{Oliver Sacks}, \textsc{An Anthropologist on Mars: Seven Paradoxical Tales} 110 (1995).
\item \textsuperscript{189} \textsc{Oliver Sacks}, \textsc{An Anthropologist on Mars: Seven Paradoxical Tales} 126-27 (1995).
\item \textsuperscript{190} \textsc{S. Lehar}, \textsc{The World In Your Head} 53, fig. 3.5 (2003). The image is available at \url{http://en.wikipedia.org/wiki/File:Invariance.jpg}.
\item \textsuperscript{191} \textsc{Oliver Sacks}, \textsc{An Anthropologist on Mars: Seven Paradoxical Tales} 128 (1995).
\end{enumerate}
\end{footnotesize}
long blindness to understand two-dimensional representations of reality such as photos and television pictures.\textsuperscript{192}

Wade Davis assigned our perhaps biggest cultural choice to the moment when we began to breed scientists roughly four centuries ago. It was the latest phase of our society’s fundamental quest for unity; its “struggle to create order out of perceived disorder, integrity in the face of diversity, consistency in the face of anomaly.”\textsuperscript{193} This vital urge underlies science as well as religion, philosophy and the law:\textsuperscript{194}

What distinguishes scientific thinking from that of traditional […] cultures is the tendency of the latter to seek the shortest possible means to achieve total understanding of their world. The vodoun society, for example, spins a web of belief that is all-inclusive, that generates an illusion of total comprehension. […] And what’s more, the belief system works; it gives meaning to the universe. Scientific thinking is quite the opposite. We explicitly deny such comprehensive visions, and instead deliberately divide our world, our perceptions, and our confusion into however many particles are necessary to achieve understanding according to the rules of our logic. […] Few laymen know or even care to know the principles that guide science; we accept the results on faith, and like the peasant we simply defer to the accredited experts of the tradition. Yet we scientists work under the constraints of our own illusions. We assume that somehow we shall be able to divide the universe into enough infinitesimally small pieces, that somehow even according to our own rules we shall be able to comprehend these, and critically we assume that these particles, though extracted from the whole, will render meaningful conclusions about the totality. Perhaps most dangerously, we assume that in doing this, in making this kind of choice, we sacrifice nothing. But we do. I can no longer see Venus.

We generally consider our brains to individually process the neutral reception from our senses, but that is not the case. As the foregoing examples have shown, our senses allow us to observe and interpret the world, but our choices, in turn, determine how the perception of our senses changes over time.

4. Cultural Jury Bias

As shown above, studies have documented that juries are influenced by defendants’ attractiveness and gender.\textsuperscript{195} The reason might be partly biological disposition and partly stereotypes shared between virtually all cultures (such as that between beauty and innocence). But there are many other contexts in which perception is much more clearly

\textsuperscript{192} Id. at 129-131.


\textsuperscript{194} Id. at 174-75.

\textsuperscript{195} See supra page 48.
tied to stereotypes within one particular culture. These cultural stereotypes might cause us not to see something even though it is legally relevant or, conversely, to see something even though it is not legally relevant. For example, Justin Levinson recently conducted empirical research on racially-biased memory functions. Study participants, who were asked to recall facts from stories they read minutes earlier, misremembered legally relevant facts in racially biased ways. Participants who read about an African-American story character were significantly more likely to remember aggressive facts from the story than participants who read about a Caucasian character even though these racial perception or memory biases were not related to explicit racial preferences. Again, while the law can protect a defendant from being forced to appear in court in prison uniform, it cannot make a black defendant appear in court white.

In addition to studies that examine the influence of defendants’ ethnicity, attractiveness, and gender, researchers have also shown that juries consider other extralegal factors in arriving at the question of guilt or innocence as well as sentence length and parole recommendations, including age, religion, and occupation.

5. The Cultural Defense

While studies have shown that members of a minority group are often disadvantaged in the perception of juries (with majority representation from the dominant cultural group), advocates of cultural diversity and minority rights have proposed that the fact that

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197 Several studies have shown that race affects the likelihood of conviction. See M.J. Sargent & A.L. Bradfield, Race and information processing in criminal trials: Does the defendant's race affect how the facts are evaluated? 30(8) PERSONALITY AND SOCIAL PSYCHOLOGY BULLETIN 995–1008 (2004); S.R. Sommers & P.C. Ellsworth, White juror bias: An investigation of prejudice against Black defendants in the American courtroom, 7 PSYCHOLOGY, PUBLIC POLICY, AND LAW 201–229 (2001).
200 S.D. Johnson, Religion as a defense in a mock-jury trial, 125 J. OF SOCIAL PSYCHOLOGY 213–220 (1985) (finding a general leniency effect; the more participants saw themselves as similar to the defendant, the less certain they were of guilt) available at http://gpi.sagepub.com/content/14/4/517.refs.
culture shapes our cognition and conduct should expressly be taken into account by the legal system in the form of a Cultural Defense. This defense, more theoretical today than established in court, would require judges to consider the cultural background of litigants in the disposition of cases. Most individuals intuitively reject the idea of a cultural defense in fear that it would lead to anarchy. The official policies of essentially all nation-states mirror these beliefs, favoring assimilation to the accommodation of cultural differences – and the notion that everyone should be held to a single monolithic standard (what Alison Renteln has termed the “presumption of assimilation”). This, as well as the common dismissal of cultural background as “irrelevant,” makes the raising of the cultural defense difficult. But Renteln makes a strong argument that enculturation and the need to protect minorities against majoritarian bias, requires legal systems in pluralistic societies to look at the cultural context of individuals’ actions. Given that all individuals are psychologically predisposed (and legally encouraged) to act in accordance with the norms and precepts of their culture, excluding all evidence that someone tried to do the right thing given their view of the world causes us to treat people unequally rather than equally: “The common aspect of all these cases is the desire of litigants to be treated equally under the law by being treated differently.”

Anthropologists have pointed out that enculturation is not a matter of personal choice: “Even the most deliberately unconventional person is unable to escape his culture to any significant degree. [...] Cultural influences are so deep that even the behavior of the insane reflects them strongly.” Enculturation does not, of course, generally predetermine individual behavior, but it provides individuals with their view of the world and thus strongly influences their actions. And those individuals who then move from one culture to another are subject to acculturation and – at least some degree of – assimilation. But despite a wealth of evidence as to how fundamentally culture informs our view of the world, legal systems around the world have taken very little notice of this phenomenon: “Researchers in the field of medicine and psychiatry have already recognized the important influence of culture on mental processes in their primary

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204 See id. at 5-6.
205 See id. at 6-7.
206 See id. at 6 (suggesting that a legal system is “more fair if it recognizes the existence of different notions of ‘reasonableness.’”)
207 Id. at 16.
reference works. It is striking that jurists have hardly acknowledged the manner in which cultural imperatives affect human behavior.  

Ignoring the truth of enculturation, Renteln points out, biases the result from the beginning: whenever we evaluate actions by the “objective reasonable person” standard (a legal fiction to start with), this means in effect that we evaluate actions by the majoritarian norms in the dominant culture. And whenever two cultures differ significantly in some regard, what appears reasonable to one culture will likely appear unreasonable to the other culture and vice versa.

C. The Sight of Homo Ludens

There is a third set of limitations to objective vision in addition to biological and cultural factors: those founded in individual psychology. Dutch historian Johan Huizinga coined the term *homo ludens* in 1938 to indicate that “unnecessary challenges” play a remarkable role in the advancement and development of human culture. Works of art, games, sports, festivals and carnivals are deeply rooted phenomena of humanity – even though they are not the results of straightforward need or necessity. But while play finds different expression in any culture, it is not just a cultural phenomenon: “Play is older than culture, for culture, however inadequately defined, always presupposes human society, and animals have not waited for man to teach them their playing.”

This idea of man as *homo ludens* is closely related to its perception as *homo creativus*. And creativity, defined as the ability “to produce something new through imaginative skill” clearly underlies much of human activity – not least the workings of the different legal systems.

The previous optical illusions made us see something that was not actually there. And even after verifying that the lines were straight, that two shades of grey were identical or that there was no movement, we still saw crooked lines, different shades of grey and moving images. The short preceding “reading tests” pointed to the dependency of sense perception on broader culturally acquired factors. Almost all English readers have the same problem at first, but can adapt fairly quickly once it is clear what to look out for. At that point, it is perplexing that it ever posed a problem in the first place. The images

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210 See id. at 18.
211 See id. at 15 and 32.
212 *Johan Huizinga, Homo Ludens: A Study of the Play-Element in Culture* (1955). See also, Friedrich Schiller, *On the Aesthetic Education of Man* 15 (“[D]er Mensch spielt nur, wo er in voller Bedeutung des Worts Mensch ist, und er ist nur da ganz Mensch, wo er spielt.” / “Man only plays when in the full meaning of the word he is a man, and he is only completely a man when he plays.”).
215 For example, Huizinga identifies three play-forms in a lawsuit: (1) the game of chance, (2) the contest, and (3) the verbal battle. See *Johan Huizinga, Homo Ludens: A Study of the Play-Element in Culture* 84 (1955).
most relevant in this last context are ambiguous (or reversible, or bistable) figures.\textsuperscript{216} With these images, what we see or not see depends entirely on our perspective and once we change our perspective we see something different. Our perception might be influenced by culture or by sexual orientation – or it might simply depend on what we had for breakfast.

1. Selecting Meaning

The reading test above with three-dimensional shapes representing the spaces between letters illustrated how our understanding disappears when we attach meaning to the wrong thing. But often there is parallel meaning without a clearly correct or superior reading.

![The Necker Cube (1832)](image)

The Necker cube is possibly the most famous of these ambiguous figures.\textsuperscript{217} We can either see a cube from an elevated position (left) or from a lower angle (right). The original image (center) does not give us any indication of which reading is correct – or whether the twelve-line two-dimensional drawing is meant to represent a three-dimensional figure at all. This is used in epistemology as a counter-attack on naïve realism. Naïve realism (also known as direct or common-sense realism) states that the way we perceive the world is the way the world actually is. By demonstrating that we see something that is not really there, the Necker cube can be seen as disproving this theory in favor of representational (also known as indirect or epistemological) realism. For representational realism, the world we see around us is not the real world itself, but


\textsuperscript{217} L.A. Necker, Observations on some remarkable optical phænomena seen in Switzerland; and on an optical phænomenon which occurs on viewing a figure of a crystal or geometrical solid, 1 LONDON AND EDINBURGH PHILOSOPHICAL MAGAZINE AND JOURNAL OF SCIENCE 329–337 (1832). See also Necker Cube, WIKIPEDIA, http://en.wikipedia.org/wiki/Necker_Cube.
merely an internal perceptual copy of that world generated by the neural processes of our brains. To the representational realist, our ideas of the world are interpretations of sensory input derived from an external world that is real. The alternative, that we have knowledge of the outside world that is unconstrained by our sense organs and does not require interpretation, would appear to be inconsistent with everyday observation – as Aristotle already pointed out.\(^\text{218}\)

The Necker cube also points to the dividing line between common cultural and individual perception. It is only because we are all familiar with regular geographic shapes in our everyday experience that we identify the Necker Cube as a cube in the first place (rather than just a bunch of lines). But seeing it as a cube does not yet resolve the question of perspective. It also does not answer whether it is a glass-cube, a wire-cube, or something else in an individual’s imagination.

The Necker cube is also often used in Gestalt Psychology, a theory of mind and brain of the Berlin School.\(^\text{219}\) Its operating principle is that the brain is holistic, parallel, and analog, with self-organizing tendencies, and that the human eye, thus, sees objects in their entirety before perceiving their individual parts (suggesting that “the whole is other than the sum of its parts”).\(^\text{220}\) In aiming to understand the laws of our ability to acquire and maintain stable percepts in a noisy world, Gestalt Psychology defined the “gestalt effect” as the form-generating capability of our senses, particularly with respect to the visual recognition of figures and whole forms instead of just a collection of simple lines.

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\(^{218}\) See supra page 23.

\(^{219}\) The concept of “Gestalt” was first introduced in the late 19th century. See Christian von Ehrenfels, Über Gestaltqualitäten, 14 VIERTELJAHRRSSCHRIFT FÜR WISSENSCHAFTLICHE PHILOSOPHIE 249-292 (1890) (defining “Gestalt” as not just the combination of elements, but something new and, to a certain extent, independent.”). See also G. Humphrey, The psychology of the gestalt, 15 JOURNAL OF EDUCATIONAL PSYCHOLOGY 401–412 (1924). See also Gestalt Psychology, WIKIPEDIA, http://en.wikipedia.org/wiki/Gestalt_psychology.

\(^{220}\) See, e.g., KURT KOFFKA, PERCEPTION: AN INTRODUCTION TO THE GESTALT THEORIE (1922); KURT KOFFKA, PRINCIPLES OF GESTALT PSYCHOLOGY (1935); DAVID HOTHERSALL: HISTORY OF PSYCHOLOGY (2004).
and curves. The same phenomenon has been illustrated with the Kanizsa Triangle.\textsuperscript{221} Due to the “gestalt effect,” we see two triangles on top of each other even though there is not a single triangle depicted.

![Laws of Prägnanz: Law of Closure, Law of Proximity, Law of Similarity](image)

Since Gestalt Psychology implies that the mind understands external stimuli as a whole rather than the sum of their parts, it has developed a significant number of grouping laws to describe aspects of this process.\textsuperscript{222} For example, the law of closure is what causes us to see a triangle in the Kanizsa Triangle or to see a rectangle even though its lines are interrupted. The law of proximity causes us to see objects that are close to each other as a group (e.g., three groups of 12 circles in picture 2). The law of similarity states that similar objects will be grouped together (e.g., causing dots to form lines in picture 3). In the legal arena, similar ideas are behind many of the common law canons of interpretation.\textsuperscript{223} For example, the plain meaning rule reflects the law of closure (seeing a form in its typical shape unless this presents an absurd result). Or the laws of proximity and similarity are reflected in the canon of \textit{noscitur a sociis}, the rule that interprets a term to be similar to more specific terms in a series.

\textsuperscript{221} Gaetano Kanizsa, \textit{Margini quasi-percettivi in campi con stimolazione omogenea}, 49 RIVISTA DI PSICOLOGIA 7–30 (1955). See also Kanizsa Triangle, WIKIPEDIA, \url{http://en.wikipedia.org/wiki/Kanizsa_triangle}.

\textsuperscript{222} See, \textit{e.g.}, Herb Stevenson, \textit{Emergence: The Gestalt Approach to Change}, available at \url{http://www.clevelandconsultinggroup.com/articles/emergence-gestalt-approach-to-change.php}

\textsuperscript{223} For an overview of the judicial canons, see, \textit{e.g.}, Jacob Scott, \textit{Codified Canons and the Common Law of Interpretation}, 98 GEO. L.J. 341 (2010).
While the image on the left presents us with a positive form that we will immediately identify as a vase, the image on the right presents the same vase as a negative form. And with our attention drawn to the contours, we can suddenly also see two faces in addition to a vase. Without any visual assistance to tell us what we are supposed to see, our selection of meaning becomes more arbitrary.

“Kaninchen oder Ente”-Figure (1892)

This image first appeared in a German humor magazine in 1892 with the question which two animals look most alike. It was first used scientifically by Joseph Jastrow to illustrate that perception is not just a product of a stimulus, but also of mental activity.

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Whether someone initially sees a duck or a rabbit in this image depends on the person and the situational context. For example, children tested on Easter were more likely to see the figure as a rabbit, whereas children tested on a Sunday in October tended to see a duck.\(^{227}\) The ease with which people can flip between perceiving the image as a duck and as a rabbit has been tied to creativity (and would seem quite relevant for legal enquiries in which we are asked to look at the world from different angles and, as it is sometimes casually expressed, “throw everything against the wall and see what sticks.”).\(^{228}\)

Ludwig Wittgenstein used the same image to explain two uses of the word “see.”\(^{229}\) One use is the immediate object, e.g., “to see two faces.” The other use is “noticing an aspect,” e.g., “to see a similarity between two faces.” Its causes are studied by psychology. As in the case of the Necker Cube, we only “see” twelve lines, but we might interpret it as a three dimensional box. The duck-rabbit illustrates in this context the difference between “continuous seeing” and the “dawning” of an aspect. The viewer might initially only see a rabbit and respond: “I see a rabbit.” The viewer would not say: “I am now seeing a rabbit” (just as no viewer looking at cutlery would say: “I am now seeing this as a fork.”)

Wittgenstein also considers someone seeing the image of the duck-rabbit twice: once surrounded by rabbits and once by ducks. In each case the viewer would likely see a rabbit and duck respectively and might not even notice that it is the same image. We might say that we have “seen” something different, but we really noticed a different aspect. When the aspect changes, we describe this alteration like a perception; quite as if the object had altered before our eyes: “The expression of a change of aspect is the expression of a new perception together with the expression of an unchanged perception.”\(^{230}\)

2. Inventing Meaning

A further step from the guided or unguided selection of meaning, is our ability to even see meaning in completely arbitrary forms. Swiss psychologist Hermann Rorschach invented a test in 1921 in which subjects interpret meaningless inkblots as a tool for the


diagnosis of schizophrenia.\textsuperscript{231} Over the next decades, the use of the Rorschach Test widened into a projective test of a person’s personality characteristics and emotional functioning. It became the most widely used projective test in the 1960s and continues to be used broadly, including in court-ordered evaluations.\textsuperscript{232}

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{Rorschach_Tests.png}
\caption{Rorschach Test, Card I \textsuperscript{233} Rorschach Test, Card VI}
\end{figure}

\textsuperscript{231} HERMANN RORSCHACH, PSYCHODIAGNOSTIK (1921). It should be noted that the interpretation of the Rorschach test is not based primarily on the contents of the subjects’ response (what they see in the blot), but on a broader cluster of variables, including the determinants of the response (i.e., which details make the inkblot look like what is said to resemble), the form quality of the response (to what extent a response is faithful to how the actual inkblot looks), the time taken to provide a response, and any comments made by the subjects. See, e.g., W. MONS, PRINCIPLES AND PRACTICE OF THE RORSCHACH PERSONALITY TEST (2nd ed. 1950); IRVING WEINER, PRINCIPLES OF RORSCHACH INTERPRETATION (2003). For information on the history and controversy surrounding the Rorschach test and images of all ten inkblots used in the test, see Rorschach Test, WIKIPEDIA, \url{http://en.wikipedia.org/wiki/Rorschach_test}.

\textsuperscript{232} The use of the test in court-ordered evaluations has added to its controversy. But a study showed that out of 8,000 cases in which forensic psychologists used Rorschach-based testimony, the appropriateness of the instrument was challenged only six times, and the testimony was ruled inadmissible in only one of those cases. IRVING B. WEINER AND R.L. GREENE, HANDBOOK OF PERSONALITY ASSESSMENT 402 (2007). Another study found that the use of the test in course has increased by three times between 1996 and 2005. CARL B. GACONO ET AL. (ED.), THE HANDBOOK OF FORENSIC RORSCHACH PSYCHOLOGY 80 (2007). But other research indicated that the usage by forensic psychologists has decreased. H.N. Garb et at., Roots of the Rorschach controversy, 25 CLIN. PSYCHOL. REV. 97–118 (2005). For cases in which the test was challenged, see, e.g., Jones v. Apfel, 997 F. Supp. 1085, 1089 (N.D. Ind. 1997) (finding that the Rorschach test, though the “most widely used objective personality test”, yields results that “do not meet the requirements of standardization, reliability, or validity of clinical diagnostic tests”, and that “interpretation thus is often controversial”); State of New Jersey ex rel. H.H., 754 A.2d 635 (N.J. Ch. Div. 1999); and United States v. Battle, 235 F. Supp. 2d 1301, 1308 (N.D. Ga. 2001) (finding that the Rorschach “does not have an objective scoring system.”); see also CARL B. GACONO AND F. BARTON EVANS, THE HANDBOOK OF FORENSIC RORSCHACH ASSESSMENT 83 (2007).

\textsuperscript{233} This card is often interpreted as a bat, badge and coat of arms.
In examining experiential-perceptual attitudes, the Rorschach test shows aspects of the way a subject perceives the world. By doing this, the test has shown how cultural differences impact our worldview. For example, European subjects have fewer “good form” responses, up to the point where schizophrenia may be suspected if the data were correlated to the North American norms.234 Also, color-form responses are comparatively frequent in opposition to form-color responses, which has been interpreted as possibly stemming from a higher value attributed to spontaneous expression of emotions (since form-color responses tend to be interpreted as indicators of a defensive attitude in processing affect).235

Differences in form quality are often attributable to purely cultural aspects. For example, while Card VI is most typically interpreted as an “animal hide” or a “skin rug” (with its likely sexual percepts being reported more frequently than in any other card as well), a popular response in Japan is “musical instrument.”236

In contrast to these cultural aspects, many other assumptions that were proposed at some point have been proven wrong. For example, in the 1960s, when homosexuality was seen as a psychopathology (and the Rorschach test was the most popular projective test for this), five signs were most often interpreted as diagnostic of homosexuality: 1) buttocks and anuses; 2) feminine clothing; 3) male or female sex organs; 4) human figures without male or female features; and 5) human figures with both male and female features.237 A study by Loren and Jean Chapman subsequently showed that these five signs match students’ assumptions about which imagery would be associated with homosexuality, but were just as likely to be identified by heterosexuals in reality.238 Further tests showed that the testers’ prejudices could result in them seeing non-existent relationships in the data; a phenomenon that the Chapmans called “illusory correlation” and which has since been demonstrated in many other contexts.239

235 Id. at 335.
238 See, e.g., DAVID HARDMAN, JUDGMENT AND DECISION MAKING: PSYCHOLOGICAL PERSPECTIVES 57 (2009).
239 See, e.g., SCOTT PLOUS, THE PSYCHOLOGY OF JUDGMENT AND DECISION MAKING 164-166 (1993); STUART SUTHERLAND, IRRATIONALITY 117-120 (2nd ed. 2007).
A related phenomenon, “invisible correlation,” applies when people fail to see a strong association between two events because it does not match their expectations. This was also found in the case of the Rorschach: Homosexual men were more likely to see a monster on Card IV or a part-animal, part-human figure in Card V, but almost all of the experienced clinicians in the Chapmans’ survey missed these valid signs. The Chapmans ran an experiment with fake Rorschach responses in which these valid signs were always associated with homosexuality. The subjects missed these perfect associations and instead reported that invalid signs, such as buttocks or feminine clothing, were better indicators.

3. Vision Distortions

Everything discussed so far has been an attempt to illustrate that our vision – and sensory perceptions generally (including the relevant parts of our brain) – differ more from individual to individual and are more prone to manipulation than we generally assume. This issue has been well documented in the context of eyewitness testimony and the extent to which juries rely on such testimony. Studies have shown that 52 out of 62 cases, in which convicted defendants were exonerated in the 1990s by DNA testing, involved eyewitness testimony. Similarly, the Innocence Project reported eyewitness testimony
misidentification in about 75 percent of overturned convictions.243 Further research has shown that “jurors’ verdicts are predicted by the confidence of the witness”, even though confidence is more a matter of personality and only shows a “weak relationship to eyewitness identification accuracy.”244 While jurors overestimate the importance of confidence, they ignore other variables that have a stronger relationship to eyewitness accuracy. For example, while mock jurors were able to identify when the instructions in connection with a lineup of suspects were suggestive, they erroneously did not consider this important when rendering their verdicts.245 Also, while it is well documented that people are better at identifying members of their own race than members of a different race, only half of participants in a study agreed that a White eyewitness would be worse than a Black eyewitness at identifying a Black culprit.246

The recognition that our perception can be conditioned – consciously and subconsciously – by extraneous information (like wine prices), has been most clearly reflected in recent reforms to police lineup procedures. Instead of traditional police lineups in which the witness sees the suspect and “fillers” simultaneously, this reform switched to a sequential model. This forces the witness to compare the person in front of them against their memory rather than against the other people in the lineup. Also, instead of being conducted by police officers who were involved in the case and could convey signals to the witness subconsciously in a variety of ways, the sequential lineups are conducted “double-blind” by police officers without knowledge of who the suspect is.247 New Jersey was the first state to adopt the more scientific sequential method in 2001 and a number of states have followed since. But a study in 2009, which showed that witnesses picked the suspect in fewer cases when shown sequential lineups, resulted in heavy criticism of this method (even though the elimination of weak and uncertain identifications were exactly the point of the switch).248 In whichever way police lineup mechanisms might be further refined, it should be a concern for the law generally that the legal process does not condition the brain in such a way that objective perception is subsequently no longer possible.

Another well-documented problem has been termed the misinformation effect: the impairment in memory of the past that arises after exposure to new misleading

243 The Innocence Project is a national public policy organization focused on exonerating wrongfully convicted individuals through DNA testing and reforming the criminal justice system. See http://www.innocenceproject.org.
245 Id.
This effect is a prime example of retroactive interference, i.e., the interference of (false) information with previously encoded information. New information works backward to distort the memory of the original event. The misinformation effect, in turn, reflects two of the cardinal sins of memory: suggestibility, the influence of others’ expectations on our memory, and misattribution, information attributed to an incorrect source. In the original misinformation effect study, participants were provided with visual information (a number of slides including one with a car in front of a yield sign) and were then given a description that contained misinformation (a car in front of a stop sign). The results revealed that those participants who were exposed to such misinformation were more likely to report seeing a stop sign then participants who were not misinformed.

Especially troubling in the context of eyewitness testimony is that this misinformation effect has been shown in particular in connection with facial recognition. In one study, the reference to a non-existing feature by another witness caused one third of subjects to include this into their own description; and the reporting of a misleading detail caused nearly 70 percent of subjects to later “recognize” an individual with that feature. And not only are misinformation effects observable in court, they are used for political purposes in the spreading of rumors about a candidate. For example, when Barack Obama was elected president in 2008, 12 percent of Americans believed that he was a Muslim (a number that actually increased to 18 percent by 2010).

254 Growing Number of Americans Say Obama is a Muslim. Religion, Politics and the President, THE PEW FORUM ON RELIGION & PUBLIC LIFE (Aug. 18, 2010), http://www.pewforum.org/Politics-and-Elections/Growing-Number-of-Americans-Say-Obama-is-a-Muslim.aspx. For the background regarding the smear campaigns that spread the misinformation, see, e.g., Smears 2.0, The Internet helps fuel the ugly insinuation that Obama is a stealth Muslim, reviving an ancient hate, LOS ANGELES TIMES (Dec. 03, 2007) available at http://articles.latimes.com/2007/dec/03/opinion/ed-obama3.
IV. SEEING LIKE A LAWYER

By introducing students to the concepts of the law, law schools not only teach us how to “think like a lawyer,” but also how to see the world like a lawyer. If Felix Cohen is right that we mostly acquire an ability to deal with transcendental nonsense in law school, then that could be seen as a form of acquired blindness. But that would hardly be blindness in a positive sense. George Bernard Shaw referred to self-interest as another aspect of acquired blindness that we can arguably also often encounter in legal practice:

It is on this point of intellectual conscientiousness that we all break down under pecuniary temptation. We cannot help it, because we are so constituted that we always believe finally what we wish to believe. The moment we want to believe something, we suddenly see all the arguments for it, and become blind to the arguments against it.

It is, of course, not just pecuniary interest that makes us blind, but the mere process of seeing a dispute for an extended period of time from one party’s point of view. In this sense, it is merely tied to the simple fact that we tend to see the world in the way we want to see it (“die beste aller möglichen Welten” or “le meilleur des mondes possibles” to follow Leibniz and Voltaire respectively). Few litigators have not had at least a few cases in which they had very low expectations of success initially only to strongly believe in the value of their argument as the trial date approaches.

Karl Llewellyn used the image of blindness more reverentially when he entitled his classic book on law and legal education “The Bramble Bush.” Just as the man in the nursery rhyme to which the title refers, Llewellyn envisioned the law students to scratch out their eyes in the thorns of the first year of law school while scratching them back in during their subsequent legal studies: “If law makes blind, more law will make you see.” But here blindness is again a means towards the end of seeing more clearly rather than an end in itself.

Joseph Jastrow described the learning process more generally as a path of increasing vision: recognition occurs “when the judgment decides that what the physical eye sees corresponds to the image in the mind’s eye.” Thus, if our mental image is indistinct, recognition becomes doubtful or faulty. A student who uses a microscope for the first time has difficulty in observing the appearances that the teacher describes because his

255 Felix Cohen, Transcendental Nonsense and the Functional Approach, 35 Colum. L. Rev. 809, 825 (1935) (pointing out that “the law student who refuses to answer senseless questions of law and merely points out their senselessness” is “entirely justified, although he must expect scant mercy from ignorant teachers and examiners”).


258 Id. at 119.

259 Joseph Jastrow, Fact and Fable in Psychology 278 (1900).
conception of the object is still lacking in precision. Art students will see the paintings, but the features that identify certain techniques, time periods, and painters do not yet stand out for them. It is not too different for law students and legal concepts. But what is different in the learning process at law school is that most legal concepts cannot be observed and checked against the real world in the same way that we can observe microbiological or art historical phenomena. Even basic legal concepts, such as equality, are open to vastly different points of view – up to the extent that even a slave society had no problem declaring its firm belief to the world that “all men are created equal.”

A. Of Veils and Chain-Novels

Before suggesting a way of looking at the legal process that takes our limitation of seeing the world objectively more strongly into account, two theories that have shaped much of the legal theoretical thinking over the last few decades need to be discussed. The first is John Rawls’ idea of the veil of ignorance behind which basic principles of fairness can be determined. The second is Ronald Dworkin’s idea of the judicial process as akin to the writing of a chain novel. Both of these approaches contain some valuable ideas, but also some serious limitations.

1. Blind Principles of Fairness

John Rawls’s *A Theory of Justice* developed the most interesting modern approach to intentional blindness in the law. Its starting point is the biblical notion, discussed above, that we will be judged with the judgment we pronounce on others and Kant’s related categorical imperative. In combining this with the social contract tradition, Rawls imagines an original position in which everyone decides principles of justice from behind a “veil of ignorance.” This veil blinds people essentially to all the facts about themselves that might cloud what their notion of justice is:

\[N\]o one knows his place in society, his class position or social status, nor does anyone know his fortune in the distribution of natural assets and abilities, his intelligence, strength, and the like. I shall even assume that the parties do not know their conceptions of the good or their special psychological propensities. The principles of justice are chosen behind a veil of ignorance.

Rawls argues that designing justice principles in a state of blindness about one’s future position in society will lead to fairness since the designer will have no incentive to privilege any particular class of people. In particular, Rawls assumes that such a design would maximize the prospects of the least well-off since, from behind the veil of

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261 See id. at 264.
262 Id. at 12.
ignorance, inequality would appear acceptable only if it is to the advantage of those who have lesser opportunity.263

The image of the veil of ignorance essentially represents an appealing combination between the social contract theory and those earliest images of judges without hands and eyes as those who are focused on truth alone rather than their own particular interests. Since people behind the veil do not know yet what their particular interests are going to be in society, they do not have any other incentive than to pursue an abstract benefit. But this leaves many questions open. If we get to divide a total benefit of 100 between 10 society members from behind a veil of ignorance, normal risk aversion would suggest an equal division of 10 for everyone since we could otherwise end up being the person with the least benefit. But what if some kind of unequal distribution pushes the overall benefit to 120? Maybe the maximum benefit under this solution would be 15 and the least benefit would only be 9 with an average of 12. Would we really want to give everyone an equal benefit of 10 since the risk of being the poorest person with 9 outweighs the opportunity to be the richest person with 15? What value do we place on equality – or on any particular benefit – if we are looking at it from behind a veil of ignorance and do not even have “conceptions of the good” yet?

If we take the idea of an original position and a veil of ignorance seriously, we will have no framework of reference from which to make those decisions about fairness and justice. For example, what if the society into which we are ultimately placed is so poor that a benefit of 10 is not enough to survive? Would we still prefer an equal distribution knowing that this will cause everyone to die or would we consider some evolutionary principles of survival more important under those circumstances? Arguably, we would want to enshrine some right to survival for the strongest in this case since we don’t have anything to lose if death for the weak is certain under any circumstances, but a lot to gain if we end up being the strongest.

Even if survival is not an issue, it is not clear how we would weigh different benefits from behind the veil of ignorance. Would a utopian world of panem et circenses in which drugs allow us a constant state of “happiness” be preferable to one in which happiness is validated and made valuable by its contrast to unhappiness or would we also claim a right to unhappiness like the savage in Aldous Huxley’s Brave New World?264 As Robert Nozick expressed it with the image of the Experience Machine, would we prefer perfect illusory experiences through neural-stimulation over engaging with the real world including all its limitations?265 How can we make decisions about justice behind a veil of ignorance that divorces us from the values and aspirations that define who we are as

263 Id. at 302.
264 ALDOUS HUXLEY, BRAVE NEW WORLD (1932) (“‘All right then,’ said the Savage defiantly, ‘I’m claiming the right to be unhappy.’”). See also JOHN STEINBECK, TRAVELS WITH CHARLEY: IN SEARCH OF AMERICA (1962) (“What good is the warmth of summer, without the cold of winter to give it sweetness.”).
persons and which allow us to determine what justice in in the first place. As Michael Sandel put it: “Justice cannot be primary in the deontological sense, because we cannot coherently regard ourselves as the kind of beings the deontological ethic – whether Kantian or Rawlsian – requires us to be.”

Blind justice might be good, but judging still requires a framework that is necessarily based on experience.

2. Hercules as a Novelist

Ronald Dworkin analogized judicial analysis in the common law to the writing of a chain novel, in which different authors contribute successive chapters. Each judge is “a partner in a complex chain enterprise” and each new chapter must realize the promise of the work’s beginnings by helping to make the novel the best work of art it can be. Like a chain novelist a judge must, according to Dworkin, not “strike out in some new direction of his own,” but instead extend the logic of what went before, focus, and clarify what has already evolved:

Each has the job of writing his chapter so as to make the novel being constructed the best it can be, and the complexity of this task models the complexity of deciding a hard case under law as integrity. [The novelists] aim jointly to create, so far as they can, a single unified novel that is the best it can be. The chain suggests both sequence and progress. As the string of cases grows, there will be fewer possible reasonable conclusions. Thus, arriving at the right answer to a legal issue becomes easier as precedents accumulate and this, in turn, safeguards the integrity of the law.

Early criticism to this “chain gang” theory was famously posed by Stanley Fish, who argued that neither legal nor novelistic interpretation can be conceived of as a chain-like enterprise. According to Fish, interpretive alternatives do not diminish as chain novels

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268 Dworkin, Law as Interpretation, supra note 267, at 263.

269 Id. at 263-264.

270 RONALD DWORKIN, LAW’S EMPIRE 229 (1986).


are passed from author to author or as legal doctrine develops over time: constraints “do not relax or tighten in relation to the position an author happens to occupy on the chain.”273 In terms of Dworkin’s metaphor, Fish saw the “chain” of interpretation forged anew with each interpretation: “To see a present-day case as similar to a chain of earlier ones is to reset that chain by finding in it an applicability that had not always been apparent.”274 But Fish’s denial of a continuous chain does not lead to arbitrariness. Instead of the chain of decisions, he envisions that the academic community, of which the judge is a part, will cause it to “see” the conclusion that he necessarily regards as “best” and the rightness of his answer can only be measured by its persuasiveness on this community.275

Judith Shelly commented on this debate between Dworkin and Fish in light of the discoveries of anthropologist Claude Lévi-Strauss.276 In her analysis, Dworkin’s point of view corresponds to Lévi-Strauss’s “bricoleur,” who aims at explaining new events within existing knowledge structures, whereas Fish’s position is that of a “scientist,” who adversarially challenges earlier structures.277 And while the scientific approach is closer to the Western view of the world today, Lévi-Strauss points out that “the bricoleur's achievement, the folding of new facts into received theories, requires just as much intellectual energy and subtlety as does the scientist's task, the generating of new theories.”278

Lévi-Strauss illustrated the different attitudes of bricoleur and scientist with François Clouet’s painting of Elisabeth of Austria.279 He argued for the sophistication of bricolage, which others would call a simplistic and primitive way of seeing the world, and appreciated, together with the pensée sauvage, the unity of design in the picture.280 But as a modern rationalist and scientist, Lévi-Strauss also saw the picture as a man-made object, saw technique and imagined the possibility of other techniques and other structuring of things. This “multiplicity of meaning may give rise to a better apprehension of truth”

273 Fish, Working on the Chain Gang, supra note 272, at 274.
274 Id. at 277.
275 Id. at 278.
278 Id. at 176.
280 See also Wade Davis’ description of the differences between traditional Haitian vudoun society and the common scientific view of the Western World, supra at page 56.
and represent “the social importance of a lawyer’s ability to take either side of an issue.”

François Clouet, Elisabeth of Austria (detail) (ca. 1571)  

As Schelly explains, each case at law presents both game and ritual and these are, in the view of Lévi-Strauss, two sides of the same coin:

Lawyers, the Fishian players of the game, have their sanctioned role, arguing whichever side of the issue they have been given. Judges, like Dworkin's referee, undertake to preserve the ritual by which the court will determine the right answer according to precedent. In this way, our legal system guarantees that the rights of individuals will be represented in the game by vigorous attorneys, while the cohesion of society will be preserved in the ritual dictates of the judge.

This points to an important aspect in the debate between Dworkin and Fish and recent empirical research has underlined the limitations of Dworkin’s theory. The chain novel hypothesis suggests that decisions become more constrained (and thus easier) as the number of prior decisions grows and precedent accumulates. But while empirical evidence confirmed that ideology of judges plays a greater role in cases of first impression, it does not seem to be true that there is an increasing constraint as precedent accumulates. Instead, more decisions lead to a decreased role of precedent and judges

283 Id. at 179.
There is also a more fundamental criticism that can be raised regarding the image of the chain novel itself. Judges write in some kind of chain (at least along the line of precedent), but they are clearly not writing novels (or, at least, are not supposed to). We could say that common law opinions end up forming some kind of chain law book, but there are aspects to a novel that are just not reflected in judicial opinions at all. These differences are important because elements that make a good novel are not just different but antithetical to legal opinions. For example, novels have a story arc and character development; they have plot twists and surprising endings. Innovation is important in novels or they become boring. If authors write a chain novel together, they need to agree on a basic framework, but with everything beyond that, innovating and advancing the story in interesting and unexpected ways are valuable. Also, single chapters in novels rarely come to a conclusion, but the rule of law has to be clear at the end of every single opinion. A lawsuit might have “to be continued” following the opinion, but that is not the aim of the judge. More criticism and defenses regarding the comparison between novels and opinions could be raised, but the important point in this context is only that the purpose of the authors is very different. And eliminating these differences makes for a very artificial construct.

B. A Community Art Project

In combining Rawls’ and Dworkin’s ideas, one can arrive at a less ambitious, but in some regards more realistic, image of the process of determining justice through judicial decision-making. This short proposal replaces the idea of the chain novel with a community artwork project and the veil of justice with the viewing of reality in light of this piece of art.

1. Art Instead of Literature

Comparing the process of issuing a judicial opinion to the authoring of a novel is somewhat intuitive given that they are both processes of reflecting reality in written form. But the written form is just about all that novels and judicial opinions have in common. Most importantly, judicial opinions are concerned with defining concepts rather than developing characters and stories. And these definitions can, ideally, be applied to any future characters and stories that relate to them. In this sense, the collaboration of different courts in the process of precedential lawmaking is far more similar to a collectively written lexicon than a novel. And the idea of “chain writing” is, not surprisingly, far less unusual in the context of lexica and other reference works than

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285 Id. at 1177-1206.
in the context of novels. The development of the common law is then more akin to the development of a community lexicon like Wikipedia. Just as attorneys can make any legal argument, users can contribute anything to the lexicon project, but there are editorial rules and some judges deciding which definitions persevere in case of conflicting views by different contributors.

Most of what Dworkin describes as characteristics of the chain novel, also applies to such a collaborative lexicon project. But the growth of a lexicon is intuitively understandable as a much closer parallel to the growth of the common law. Terms get defined and re-defined. And the definition of terms is enhanced through the definition of related terms, which, in turn, are defined and re-defined over time. Such a parallel to a collaborative lexicon can also explain why empirical evidence appears to suggest that the influence of ideology on rulings increases when the number of precedents increases. After all, the more closely a term is defined and the more related definition we can find, the easier it is to shift the interpretation between them. It is thus logical that definition is least constraint when there is not yet any definition at all and then again when the definition – and related definitions – have grown so specific and detailed that switches between them based on our perspective of reality become easier.

In the context of blindness and vision, one can push the comparison one step further away from the world of words and into the world of art. A collaborative lexicon is, after all, similar to a collective painting or mosaic. We start with a blank canvas and every decision adds one or more spots of paint. Some brush strokes will push the painting into a previously empty space. Other strokes will partly or completely obscure earlier strokes as precedents are more specifically defined or overturned and redefined. After some time, we might more commonly use finer brushes to add a little detail here and there instead of defining the overall composition and structure of the painting. And different contributors might use different paints, different brushes, and different techniques, making for a painting that is not always pretty, but a true reflection of a community instead of any individual. As Holmes pointed out, “law finds its philosophy not in self-consistency, which it must always fail in so long as it continues to grow, but in history and nature of human needs.” And Picasso expressed a similar sentiment about art: “Painting is a blind man’s profession. He paints not what he sees, but what he feels, what he tells himself about what he has seen.”

The image of a community painting also helps to visualize how radical changes in the law can cause admiration as well as outrage across different communities. A decision that radically changes the law, like Roe v. Wade or the Massachusetts’ Supreme Court decision in Goodridge v. Department of Public Health (holding that limiting marriage to

286 Oliver W. Holmes, Book Notices, 14 Am. L. Rev. 233, 234 (1880).
heterosexual couples is unconstitutional under the state constitution), are not just challenging to communities because they change the law. After all, many people get upset about these decisions even though they don’t generally care much about the law and are never going to be in a position of a possible abortion or of entering into a same-sex marriage themselves anyway. The opposition is based on the complete repainting by one court of what was previously a community artwork. For many people, religion and traditional morality continue to play a major role in how they see the world. And rulings that not only curtail the scope of validity of such traditional morality, but do not even find it to be a rational basis for legislation, change the community vision in a way that many people can no longer identify with it. Having no opportunity to protect unborn life in many circumstances (even for the father of the child) upsets people who believe in its sanctity. Similarly, being told that there can no longer be two different concepts regarding traditional marriage and same-sex unions, forces people to merge two pictures that cannot be merged in their view. The painting might be about a legal standard, but if people can no longer relate the painting to their particular view of reality, it can become meaningless and even a threat to them.

2. Stained-Glass Windows

A switch from chain novel to community painting eliminates some of the problems with Dworkin’s framework. But in order to also reflect Rawls’ veil of ignorance and the limitations on our ability to neutrally perceive reality, the image might work even better if we think of a stained-glass window. The production process remains the same. With every decision, some part of the window gets changed. Sometimes a single piece of glass might get broken into two. Sometimes two pieces might get combined into one; or a thicker strip of lead might be used to reinforce a division between two pieces.

The advantage of envisioning this process as a community creating and recreating a stained-glass window is that it reflects the different layers of perception: First, we have an image for the law as it is defined in any given moment in the stained-glass window. Second, we have an image for the differences in perceiving the law. The window will not present itself to everyone in exactly the same way. Everyone sees the window from a somewhat different perspective. Some people will focus more on color while others will be more focused on form. And our understanding of the window will depend on our knowledge about its historic growth and the figures depicted. Seeing a representation on the window without any knowledge of its historic meaning will cause us to perceive its images differently from someone who is intimately familiar with the tradition. Third, the image of the stained-glass window reflects the combination between law and reality. Reality behind the window influences how the window appears to us. On a clear day, the window might make perfect sense to everyone in the building. But on a cloudy day when part of the window is obscured while another part is hit by a ray of sunshine, some might begin to wonder whether the image still makes sense under these lighting
conditions. Fourth, our perception of reality is not only different from person to person per se, but it is also filtered for everyone by the legal standard (which appears different from person to person as well). Someone might agree that the window should be modified if a part of it is obscured by perpetual darkness, but disagree as to whether a particular shadow is really that constant or that dark. Finally, the window appears to each of us within our own cathedral. We can invite others in, but they can never truly share the space with us. For some people the window might be surrounded by others. For some it might be the only spot of light in an otherwise dark wall. And those arrangements also determine how it and the reality behind it appear to us.

Even if there is some consensus that the image in the window is no longer what the community wants it to be, we have more questions to answer. What kind of adjustments should be made to the window? What technique should be used? Is it only an internal change within the window or do the dimensions of the window change as well? Does the window in its modified form clash with neighboring windows?

Transported into this image, the basic argument between Dworkin and Fish also becomes more easily understandable. Should we be respectful to the integrity of the window as a traditional piece of collective art and try to minimize future changes? In this case, we might focus on individual pieces of glass and only get rid of those that no longer work at all. Or we can be more focused on the integrity of the overall image. In this case, we might be more willing to implement significant changes notwithstanding that they mean the removal of many individual pieces of glass that were possibly incorporated into the window over several generations.

3. Piercing Eyes and Peripheral Vision

Despite the fact that representatives of different traditions of legal interpretation sometimes suggest otherwise, there is no easy answer to the question of how we should look at the image of the law. To stay within the image of the stained-glass window, difficult questions depend on why an image might no longer make sense. Do we have difficulties with an image because the composition or the integrity of the window no longer makes sense, because of changing lights and shadows behind the window, or because we no longer understand an old image?

In this sense, the image of a stain-glass window cannot only help us think about the legal decision-making process in a different light, but can also give a new – and somewhat more practical – meaning to Rawls’ idea of the veil of ignorance. Seeing the law as an artwork that represents a community vision confronts us with our own cultural and individual perspective of seeing the world, more so than when we think about precedent merely as opinions of courts and judges. This, in turn, allows us to gain a more critical awareness of when we can follow our own – inevitably personal and faulty – view of the
world and when blind justice demands that we should be more critical of this default perspective.

Cesare Ripa already contrasted in 1593 the tradition in which Justice has “acute vision” and “piercing eyes” with the Justice whose eyes are “bandaged” so that “she cannot see anything that might cause her to judge in a manner that is against reason. Rather than seeing this as a conflict between two incompatible ideas of justice, legal interpretation might benefit from looking into which type of justice might be most appropriate for particular circumstances. What the image of law as a stained-glass window suggests is that there might be situations in which justice requires the focus on details and situations in which we might step back and take in the overall impression of the law and its relationship to reality as if through more diffused vision.

Imagine a law that has developed over many decades in broadly the same direction. Courts have differed on some minor issues and details are a little unclear with conflicting precedents, but the overall direction of the law is very clear. This is the common context in which Dworkin’s idea work fairly well. For a judge who arrives at a new (or revisited) legal issue from within this overall cultural framework, there is not much need for a blindfold or a veil of ignorance. In fact, being a part of the same culture will likely help the judge see the law in the same way that a majority of community members see it. All their views might be a little skewed and they might all differ regarding some details, but the broad lines are the same and they understand each other. The question of whether the community considers an outcome as just or not will depend mainly on how well the opinion follows this tradition. Individuals can disagree on what the outcome should be from their individual points of view, but even individuals who disagree with it will likely consider an opinion just if it makes sense within the tradition. But what if a law specifically challenges a legal tradition and the view of the world as it has developed over decades or centuries in that particular community? Under those circumstances, a judge has much more reason to be cautious about his intuitive understanding of the issue (and the general understanding of his fellow citizens). Considering that his view of the world in this context is part of what is challenged by the law would advice against overly confident reliance on what looks like justice at first sight.

In the first case, we already know the window and the reality behind it. Thus, we can go into the details right away and see whether individual pieces of glass should be adjusted or exchanged. But in the second case, we should take a step back, look at the window as a whole and see how its appearance changes as different aspects of reality pass behind it. We should remember that we only see what we know and that we need to proceed with caution. It might make sense to learn more about the window, discuss the image with others, even consult some people from a different cultural tradition in which the image might appear differently – and possibly less complicated.

The following examples might illustrate this: the question of what constitutes “cruel and unusual punishment” under the English Bill of Rights of 1689 or under the Eighth
Amendment of the American Bill of Rights of 1791 is clearly not fixed in time. When the Supreme Court decided in 2005 that executions of people who were under the age of 18 when the crime was committed, was unconstitutional, it followed a line of cases that expanded the principle in response to changes in reality, in the attitude of society, and in the perspective of the international community. The overall image stays the same, but its contours shift slowly and it might require piercing eyes to determine where the line should be drawn at any given time in the light of these changes. In contrast, while the concept of “equality” has also shifted over time, it has done so far less as a gradual process and much more with revolutionary bounces. While slavery was not seen as a problem for a long time, it suddenly posed a conflict. And even after slavery, equal rights for racial minorities remained to be defined through some hugely controversial landmark decisions. What is different in such a context of fundamental legal change is that we are not only confronted with a new image of the law, but also with the challenge to shift our vision accordingly. The danger is that we decide to change the law as an intellectual matter, but that our senses are still stuck in the status quo. And a situation in which the law says one thing while society still sees something else easily leads to injustice. It is arguably in this context, in which stepping back from the law will reveal reasons to distrust our own sense perception, that the idea of blind justice is most appropriate. Situations in which actual corruption leads judges to knowingly do the wrong thing in a legal system are rare compared to situations in which corrupted senses cause them to perceive something as just or unjust simply because a clear vision of the world would require a greater distance from the immediate perception of their senses.

American constitutional law already reflects some of this in the different tiers of judicial scrutiny. Instead of examining the gap between the law that is to be enforced and the traditional cultural view of society, the heightened levels of scrutiny relate to laws concerning “fundamental rights” and “discrete and insular minorities.” It is not a perfect correlation, but it is certainly with regards to fundamental rights and suspect classifications that legal developments tend to go out of sync with the development of society – and then occasionally are overtaken by the delayed development of a society that finally tries to catch up with its laws. It is in this context that we can expect our vision to be skewed most commonly by traditional cultural factors that the law specifically sets out to shift.


C. Case Study: Color-Blindness

The most famous judicial statement about the visual acuity of justice in the United States can be found in Justice Harlan’s opinion in *Plessy v. Ferguson*.  

Dissenting from the majority view that upheld the constitutionality of racial segregation in public facilities under the doctrine of “separate but equal,” Harlan demanded that the “Constitution is color-blind, and neither knows nor tolerates classes among citizens.” Even though these are some of the most famous lines in American law, it is not entirely clear what they stand for beyond a fierce opposition to the majority in *Plessy*. If the point is that the Constitution regards racial divisions with particular skepticism, wouldn’t this be a special acuity for color perception rather than color-blindness? If we don’t even know about something, how can we make sure that it is not tolerated? And how can we reconcile Justice Harlan’s claim of color-blindness with his separate reference in the same opinion to the Chinese as such an inferior race “that we do not permit those belonging to it to become citizens of the United States.”

Strictly speaking, even the worst case of color-blindness can still distinguish between “black” and “white,” but if Lady Justice can distinguish “white” and “black” from “yellow,” but not from each other, then there is something very peculiar going on with her vision.

Less than ten years after *Plessy*, another famous dissent in the Supreme Court made a similar argument about some visual impairment in the Constitution. In *Lochner v. New York*, the majority decided that a New York law, which protected the health of bakers by limiting the number of permissible working hours, violated the “liberty of contract” that was implicit in the due process clause of the Fourteenth Amendment. In his famous dissent, Justice Holmes pointed out that the Constitution is made for people of fundamentally differing views and should thus not be taken to “embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of *laissez-faire*.” Even though we might find a certain opinion shocking, he argued, this should not conclude our judgment on the constitutionality of a law. In other words, the Constitution should arguably be blind towards the economic principles that are embodied in the law.

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293 *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). Lyndon B. Johnson picked up on this in 1963 as Chairman of the Committee on Equal Employment Opportunity in a speech commemorating the 100th anniversary of Lincoln’s Gettysburg address: “Until justice is blind to color, until education is unaware of race, until opportunity is unconcerned with the color of men's skins, emancipation will be a proclamation but not a fact.” See, e.g., *Johnson’s Gettysburg Address Surpasses Lincoln’s in Black Rap and Relevance*, JET 12-13 (Feb. 8, 1973).
1. The Different Tiers of Scrutiny

With Roosevelt’s New Deal in the 1930s, the pressure on the Supreme Court increased to find a new way to interpret the Constitution; one that allowed it to turn a blind eye to social and economic legislation that would previously have been held to exceed Congress’ Commerce Power. The simple albeit somewhat confusing solution that was ultimately offered in 1938 was that the Constitution’s (or the Court’s) visual acuity depended on the legal context. Justice Stone’s opinion in United States v. Carolene Products,297 explained why the Supreme Court was using a new rational-basis standard of review to find social and economic legislation constitutional. While such a presumption of constitutionality would henceforth apply in most contexts, he argued, a “narrower scope for operation of constitutionality” might be called for “when legislation appears on its face to be within a specific prohibition of the Constitution,” such as when laws express “prejudice against discrete and insular minorities.”298 Of course, such a more vigorous Constitutional examination under specific circumstances has often remained an elusive ideal. This was the case from the very start when “strict scrutiny” was first applied six years later only for the court to find that the concern over espionage expressed in the exclusion orders against Fred Korematsu and all other Americans of Japanese descent outweighed their individual rights. But then again this case dealt with that special kind of Asian color blindness of which Justice Harlan had already been a victim.

Korematsu v. United States was the first case to apply strict scrutiny in 1944, but nevertheless found that Executive Order 9066, which ordered 110,000 Japanese Americans into internment camps during World War II, was constitutional.299 The dissent by Justice Murphy complained that the government action fell “into the ugly abyss of racism” and resembled “the abhorrent and despicable treatment of minority groups by the dictatorial tyrannies” with which the United States were at war. He called such racial discrimination “utterly revolting among the free people who have embraced the principles set forth in the Constitution of the United States.” He also compared the treatment of Japanese Americans with the treatment of Americans of German and Italian ancestry to show that the exclusion order did indeed represent racial discrimination. Nevertheless, the majority opinion by Justice Black did not even acknowledge any kind of racial prejudice: “Korematsu was not excluded […] because of hostility to him or his race. He was excluded […] because the properly constituted military authorities […] decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily.” The full extent of Justice Black’s error regarding the absence of racial discrimination only became known decades later when it was revealed that the Solicitor General had

suppressed a key intelligence report that undermined the rationale behind the internment. Neither did he inform the Court that a key set of allegations used to justify the internment, that Japanese Americans were using radio transmitters to communicate with enemy submarines off the West Coast, had been discredited by the FBI and FCC and instead relied on gross generalizations that Japanese Americans were disloyal and motivated by “racial solidarity.”

The lack of objectivity in Korematsu illustrates a key justification behind the application of strict scrutiny in certain contexts such as racial discrimination: people’s beliefs, community expectations and consequently the stakes for individuals tend to be so skewed that there is a greater likelihood of the distortion of reality than in other contexts. Just as the internment of Japanese Americans in 1942 was justified after the attack on Pearl Harbor with suppressed information and discredited allegations, the U.S. invaded Iraq after the terrorist attack on the World Trade Center in 2001 primarily on the rationale that the country was developing weapons of mass destruction and was harboring Al Qaeda terrorists; two claims that were subsequently largely discredited. Surveys indicate that the war in Iraq might have resulted in over a million casualties between the U.S. invasion in 2003 and September 2007. Public opinion turned against the war eventually and yet with emotions running high at the outset, community pressures in the United States made it very difficult to speak out against the war for a long time. French fries were being renamed into freedom fries across the country (including the cafeteria of the House of Representatives) in protest of the French opposition of the war. So much for political controversy and cultural differences influencing the way we see the world (not to mention the blindness to the fact that French fries are originally from Belgium).

2. Seeing Race and Not Seeing Economics

If heightened scrutiny is based, at least in part, on the recognition that the invisible elements in society need particular protection, the natural question is whether this is really where the courts draw the line and whether this is really what is being suppressed.

301 Id.
303 See also MALCOLM X, MALCOLM X SPEAKS 12 (1965) (“You're not supposed to be so blind with patriotism that you can't face reality. Wrong is wrong, no matter who does it or who says it”).

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accomplished. I have laid out the faults with this line drawing in greater detail in a different Article. Here, a short summary must suffice.

American culture has a very peculiar attitude towards economics compared to the prevailing view around the world. While most cultural traditions primarily think of individuals as exposed to – and impacted in their lives by – economic forces, America tends to think of economics much more as an issue regarding society as a whole. Compare, for example, the prominence of Law & Economics as an academic discipline in America to the historic suppression of anything resembling communism. Law & Economics aims at increasing efficiency and economic prosperity across society without giving much thought to distribution aspects. That is close to traditional American thinking. In contrast, social and political economic theory that focuses more on the individual has never been popular. As far as society as a whole is concerned, Americans tend to see a lot of economics; as far as individuals are concerned, they are much more focused on gender and race.

The history of this attitude is fairly straightforward. During the Cold War, the media increasingly used the expression *The American Way of Life* to highlight the differences in living standards of the populations of the United States and the Soviet Union. It was also a notion closely tied in popular culture to the *American Dream*, the idea that anyone, regardless of background, could significantly increase his or her standard of living through determination, hard work, and natural ability. The same attitude propelled the common belief in a competitive market’s power to foster talent, innovation and economic success. An influential book by Will Herberg in 1955 identified the American Way of Life as the “common religion” of American society:

> The American Way of life … affirms the supreme value and dignity of the individual; it stresses incessant activity on his part, for he is never to rest but is always to be striving to “get ahead”; it defines an ethic of self-reliance, merit, and character, and judges by achievement: “deeds, not creeds” are what count. … The American believes in progress, in self-improvement, and quite fanatically in education.

As exemplified by the House Committee on Un-American Activities from 1947 to 1975 as an investigative committee of the House of Representatives and by Joseph McCarthy’s activities in the Government Operations Committee of the U.S. Senate, this belief in the positive character of a market that challenges people to “get ahead,” was counterbalanced by the suppression of communism as something entirely incompatible with the American Way of Life.

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306 In 1969, the name was changed into “House Committee on Internal Security.”
Already in the 1930s, the creation of a Justice figure for the new federal courthouse in Newark, New Jersey, had created tremendous controversy when the artist showed her with two raised arms representing scales, in a gesture reminiscent of Christ, but without sword and blindfold.307 The resident federal court judge, Guy L. Fake, asserted that the “horrible” figure smacked “blatantly of communism,” even though a New York Times author aptly observed that it was “hard to understand where any hint of communism comes in, unless it come[s] automatically with any and every departure from hide-bound custom.”308 This hostility towards any communist ideas, whether real or fictitious, is probably best documented by the Hollywood blacklist from 1947 to the 1960s, which was the basis for the denial of employment to U.S. entertainment professionals suspected of such political beliefs or association with communist organizations.

The fact that we still intuitively see race rather than socioeconomic status today can be easily illustrated. Most legal professionals will know immediately that two of the current Justices of the U.S. Supreme Court are members of racial minorities: Clarence Thomas is Black and Sonia Sotomayor is Hispanic. But who knows how many members of the Supreme Court come from economically disadvantaged families? More or less coincidentally, Thomas and Sotomayor are also the Justices with the most economically disadvantaged backgrounds.309 Countries with a less pronounced racial history and a more pronounced history of class struggle might see the current composition of the Supreme Court more in terms of socioeconomic composition, but our standard view is that of a court with seven white and two minority Justices (as well as with six men and three women). Individuals are perceived in terms of race and gender and not in terms of socioeconomics. In the same vein, the Supreme Court could hold that racial segregation in schools is unconstitutional310 while also holding that there is no fundamental right of education for poor communities.311

This focus on race at the expense of other factors came out very clearly in the oral argument of the 2003 affirmative action case of Grutter v. Bollinger in which the Supreme

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307 See REPRESENTING JUSTICE, supra note 3 at 108-110.
308 See id.
309 Thomas had the most disadvantaged background; Sotomayor’s father worked as a tool and die worker and her mother as telephone operator and practical nurse. In contrast, Roberts’ father was plant manager with Bethlehem Steel, Scalia’s father was professor of Romance languages, Alito’s father was Director of the New Jersey Office of Legislative Services, Kagan’s father was an attorney in New York, and Kennedy’s and Breyer’s fathers were both influential attorneys in California.
311 San Antonio Independent School District v Rodriquez, 411 U.S. 1 (1973) (upholding a Texas state financing scheme that left poor school districts with substantially less money to fund education than richer districts and finding education, however important it might be, not to be a “fundamental right” of the sort that triggers strict scrutiny).
Court upheld the affirmative action program of Michigan University’s law school.\(^{312}\) The argument was that race was only used as a “plus factor” among many in university admission, but no evidence had been presented that any other forms of diversity, mentioned in the Court, such as travel abroad, fluency in foreign languages, overcoming of hardship, records of community service, or previous successful careers in other fields, provided students with any kind of advantage even remotely resembling the bonus awarded for racial minority status.

The Court similarly, never inquired into the possibility of reducing the bonus necessary to achieve minority “critical mass” by giving credit to factors that are not racial, but correlated to race, such a socioeconomic backgrounds, first. This exact point was raised in oral argument, but discarded by Justice Souter with an astonishing sentiment that membership in a certain race and economic disadvantage are identical:\(^{313}\)

> Justice Scalia: [What] would happen if they did something else, such as making special provision for all people of economically disadvantaged background. We don’t know whether that would have produced the same number, either.

Kirk O. Kolbo: That’s correct, Your Honor. As the Court --

Justice Souter: Do you believe that that would be an adequate -- at least means of experimenting here -- take it as an alternative?

Kirk O. Kolbo: Taking race neutral alternatives into consideration?

Justice Souter: Well, taking for example economic disadvantage?

Kirk O. Kolbo: Yes, Your Honor.

Justice Souter: Do you seriously believe that that would be anything but a surrogate to race? It would take the word race out of the categorization of the label that we put on it, but do you believe it would function in a different way but as a surreptitious approach to race?

Kirk O. Kolbo: It certainly functions differently, Your Honor. Race controls --

Justice Souter: Do you think it would?

Kirk O. Kolbo: Certainly, yes --

Justice Souter: Is there any reason to believe that it would?


Kirk O. Kolbo: I do, Your Honor, because it’s not just minorities that are socioeconomically disadvantaged in this country. That happens with respect across racial lines.

Justice Souter’s point of view would not make sense to people in most countries. Even if there is a strong correlation between racial minority status and socioeconomic disadvantage, it is presumably the socioeconomic background that impacts more on test performance than race. And even if race and socioeconomics are strongly correlated, it is wrong to think that pursuing racial equality will automatically improve opportunities for the poor as a group.

This can be illustrated with a very simple hypothetical. The following table envisions a random test in which the top score is 100 points. There are 88 students taking the test (22 from each category of white rich, white poor, black rich, and black poor). The 22 students in each category show a normal distribution, but poor background lowers the average score by two points while other race-related factors cause black students to score on average one point lower than the comparable white students. Thus, white rich students show the best scores with a mean of 97 while black poor students show the worst scores with a mean of 94.

<table>
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<th>97</th>
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<td>White – Poor</td>
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<tr>
<td>Overall Result</td>
<td>1</td>
<td>3</td>
<td>7</td>
<td>15</td>
<td>18</td>
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<td>15</td>
<td>7</td>
<td>3</td>
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Let us assume further that the program can accept 44 students (half of the applicants). A system that does not take race or socioeconomic status into account would simply enroll the students with the highest score. In this case, the score cut-off point would be 96. And the composition of the program would be 19 white rich, 7 white poor, 15 black rich, and 3 black poor. From a race perspective, 26 white students got enrolled compared to only 18 black students. Differently put, almost 60 percent of white applicants were admitted and only a little over 40 percent of black applicants. Since there were 44 applicants from each race and their score differences were only due to wealth and other race correlated factors, the admission of an equal number of white and black students would have seemed fair. We can thus make a strong case for affirmative action.
As the following table shows, an affirmative action plan that gives a one-point bonus to all black students easily resolves the racial disproportionality issue. Now the average score rises to 96.5 points. Everyone with a score of 97 or higher (after race bonus adjustment) gets admitted and half of the applicants with a score of 96 get admitted as well. And the enrollment is now 22 white and 22 black students. Problem solved.

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<td>Overall Result</td>
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<td>7</td>
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<td>18</td>
<td>15</td>
<td>7</td>
<td>3</td>
<td>1</td>
</tr>
<tr>
<td>50% Enrolled</td>
<td>1</td>
<td>3</td>
<td>7</td>
<td>15</td>
<td>18</td>
<td>0</td>
<td>0</td>
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Through a simple point adjustment, proportional representation of both races was established. That is a satisfactory outcome for a society focused on race, but it would be a very different story for a society that is focused on socioeconomic disadvantage. This latter society would not have viewed the unadjusted enrollment figures as being 26 white versus 18 black students, but as being 34 rich students versus 10 poor students. And for this society, an affirmative action program based on race would not have made any difference. Even under the affirmative action problem, there are still 34 rich and 10 poor students admitted.

Instead of having focused on the different enrollment of white (60 percent) and black (40 percent) students in unadjusted admissions, a society that focuses more on socioeconomics would have paid more attention to the fact that 77 percent of rich students and only 23 percent of poor students made it into the program without affirmative action. Justice for this society would be represented by a score adjustment based on socioeconomics rather than race. If all the poor students received a two-point bonus in this society, its particular problem would also be solved. As the following table
shows, giving poor applicants such a bonus would also lead to the equal enrollment of 
22 rich students and 22 poor students.

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<td>Black – Poor</td>
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<td>1</td>
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<td></td>
</tr>
<tr>
<td>Overall Result</td>
<td>2</td>
<td>6</td>
<td>12</td>
<td>24</td>
<td>24</td>
<td>12</td>
<td>6</td>
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<tr>
<td>50% Enrolled</td>
<td>2</td>
<td>6</td>
<td>12</td>
<td>24</td>
<td>0</td>
<td>0</td>
<td>0</td>
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</table>

But in this society the adjustment for socioeconomic background would not have taken into account the additional point disadvantage based on other factors that are correlated to race. Thus, while the socioeconomic affirmative action program succeeds in enrolling 22 rich and 22 poor students, it enrolls 30 white and only 14 black students. Thus, in terms of race, the socioeconomic affirmative action program actually made the disparity worse.

This simple example shows that not seeing one aspect of reality can lead to terrible unfairness for the group that is not seen. The common debate in society generally discusses affirmative action as admissions privileging certain minorities. But that is hardly the case. After all, the bonuses awarded based on race generally only raise the number of minority candidates admitted to the level at which the minority is represented at the same level at which it is represented as percentage of the overall population. Instead of providing some kind of advantage, such affirmative action programs thus only eliminate a disadvantage that is inherent in the admissions process. As was pointed out by Justice Thomas’ dissent in Grutter, universities introduced selective admissions in the early 20\textsuperscript{th} century to exercise more control over the composition of their student bodies and designed tests specifically to limit admissions of poor immigrants:\textsuperscript{314}

Columbia, Harvard, and others infamously determined that they had “too many” Jews. … Columbia employed intelligence tests precisely because Jewish applicants, who were predominantly immigrants, scored worse on such tests. Thus, Columbia could claim (falsely) that “[w]e have not eliminated boys because they were Jews and do not propose to do so. We have honestly attempted to eliminate the lowest grade of applicant … and it turns out that a good many of the low grade men are New York City Jews.” Letter from Herbert E. Hawkes, dean of Columbia College, to E.B. Wilson, June 16, 1922. … In other words, the tests were adopted with full knowledge of their disparate impact.

\textsuperscript{314} 539 U.S. 306, 368-69 (Thomas, J., dissenting).

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An admissions test that heavily disfavored recent immigrants because of a heavy English language component helped keep the percentage of Jewish students down. The language component still makes it extremely difficult for foreigners and recent immigrants to compete with American students for admission to the top J.D. programs. And there is generally no bonus given by the admissions process for the diversity that they provide.

It is not as if the constitution is color-blind. By declaring racial discrimination unlawful, the constitution must be able to see racial dynamics in the world. But the prohibition of racial discrimination and resulting strict scrutiny should, at least, require that we be not overly focused on race at the expense of other (and more pertinent) factors.315 If it is possible to design an admissions system in which race features less prominently, then universities should not be allowed to avoid this out of administrative expediency.316 Giving members of a racial minority the sense that they require some bonus to make up for a racial disadvantage merely perpetuates the racial view of the world.317

3. Discrete and Insular Minorities

The example of affirmative action reveals a broader vision problem that has found its way into American jurisprudence. It is easy to be discriminated against when you are invisible because society refuses to see you, like Ralph Ellison’s Invisible Man.318 It makes perfect sense to say that courts should use a heightened level of scrutiny when reviewing situations in which an invisible group is being disadvantaged. What the courts use, however, to determine whether a case qualifies for heightened scrutiny is not invisibility, but the characterization of the group as a “discrete and insular minority.”

How exactly is society more likely to discriminate against minorities that are “discrete and insular”? Does not a minority of significant size likely have more influence and power when it is “discrete and insular” rather than unorganized and dispersed? Is there

315 Whether strict scrutiny really gets applied in all cases in which it is supposed to get applied is, of course, a different question. See, e.g., Grutter v. Bollinger, 539 U.S. 306, 387 (Kennedy, J., dissenting) (“The Court … does not apply strict scrutiny. By trying to say otherwise, it undermines both the test and its own controlling precedents.”).
316 See, e.g., Grutter v. Bollinger, 539 U.S. 306, 369-71 (Thomas, J., dissenting) (“The Law School’s continued adherence to measures it knows produce racially skewed results is not entitled to deference by this Court. … An infinite variety of admissions methods are available to the Law School. … The Court will not even deign to make the Law School try other methods, however, preferring instead to grant a 25-year license to violate the Constitution.”).
317 See, e.g., Grutter v. Bollinger, 539 U.S. 306, 353 (Thomas, J., dissenting) (“The Constitution abhors classifications based on race, not only because those classifications can harm favored races or are based on illegitimate motives, but also because every time the government places citizens on racial registers and makes race relevant to the provision of burdens and benefits, it demean us all.”). Id. at 373 (“The majority of blacks are admitted to the Law School because of discrimination, and because of this policy all are tarred as undeserving.”). See also T. Sowell, Race and Culture 176-77 (1994).
318 Ralph Ellison, Invisible Man (1952).
really a question as to whether the Black or Hispanic communities in America today are politically more or less powerful than the Poor? According to the U.S. Census Bureau, the nation’s poverty rate rose to about 15.9 percent (48.5 million) of the population in 2011, up from 15.3 percent (46.2 million) in 2010, 14.3 percent (43.6 million) in 2009, and 13.2 percent (39.8 million) in 2008.319 And children, the least influential (and consequently often most invisible) members of society, represented 24 percent of the overall population, but 36 percent of the poor population.320

<table>
<thead>
<tr>
<th>Children Under 18 Living in Poverty</th>
<th>Number</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>White only, non-Hispanic</td>
<td>5,002,000</td>
<td>12.4%</td>
</tr>
<tr>
<td>Black</td>
<td>4,817,000</td>
<td>38.2%</td>
</tr>
<tr>
<td>Hispanic</td>
<td>6,110,000</td>
<td>35.0%</td>
</tr>
<tr>
<td>Asian</td>
<td>547,000</td>
<td>13.6%</td>
</tr>
<tr>
<td>All</td>
<td>16,401,000</td>
<td>22.0%</td>
</tr>
</tbody>
</table>

Source: U.S. Bureau of the Census (2011)

More detailed statistics show clearly that race and poverty are correlated but not synonymous. When Justice Souter asked incredulously if switching “the label” from race to economic disadvantage would “function in a different way but as a surreptitious approach to race,” (and whether there is “any reason to believe that it would” function differently), he ignored five million white children who are growing up in poverty as well as over half a million Asian children. Justice requires that affirmative action levels the playing field by providing an advantage to make up for some unfair disadvantage. If affirmative action instead only responds to what we see on the surface, it is no longer a tool of fairness and instead allows us to cover up unfairness by making concessions to now highly visible and influential minorities at the expense of those minorities that are still invisible and voiceless.

The problem of focusing on the surface instead of the real issues is exacerbated by what could be called persistence of vision. If legal rules are created to protect a disadvantaged group, they determine our focus for the future. Since legislators, judges and other administrators of justice typically only get into positions of power a considerable amount of time after their formative years, there is a tendency for them to focus more on groups that were at the center of discrimination in the past rather than groups that are in its center now. This is the kind of culturally determined vision that the idea of blind justice warns us to avoid. The blindness of justice should be a warning not to create overly


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inflexible legal rules in a rapidly changing society or, if they are created, to use them as a tool to channel our vision on what matters rather than be blinded by them and prevented to see reality in its full complexity.

**CONCLUSION**

The idea that justice is blind has been with us for at least a few hundred, if not several thousand, years. The image of the blindfolded maiden has been used with positive and negative connotations, but there are not many instances in which this image has been questioned critically. And most of those cases looked at it from a particular point of view that anticipated their final interpretation.

This Article has shown that there are different roots for a positive meaning of blindness in religion, mythology, and philosophy. This includes prominently the belief that not relying on the perception of the senses can lead to a greater intellectual clarity; to recognition of reality on a higher level. This Article has also shown that there are numerous ways in which science documents that some criticism towards the objectivity of our sense perception is indeed well warranted. Instead of seeing the world as it is, we see it in the way in which we have learned to see it and in which we expect phenomena to present themselves to us again in the future. Such evolutionary adaptation serves us well in many regards, but it can also cause us to misjudge reality – especially when we are confronted with situations outside of our standard cultural traditions.

Based on the allegorical tradition of blindness and these scientific insights into the accuracy of our vision, this Article has proposed a reading of Justice’s blindfold as a reminder to remain critical about the perception of our environment. We observe law in the light of reality like a stained-glass window and an important ability in legal interpretation is to recognize when we should examine details and when we need to take a step back to get a better look at the overall design. The blindfold is a reminder that there are different ways of looking at reality and that our standard way is not always the best. This is especially true when justice requires that we interpret laws in an environment of rapid social and cultural changes. In those situations, avoiding stereotypes and gaining the most objective sense of reality possible, might be the only way to truly pursue justice.