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L. S. Zacharias*

Abstract

During his first years on the Court, Louis Brandeis self-consciously used his opinions to reframe the Constitution and thereby refocus his colleagues’ perspective on judicial review. This article elaborates on his tactical use of opening sentences to frame the Constitution’s deliberative processes in their factual settings.

The reputation of Justice Louis Brandeis rests in significant part on revitalizing American legal positivism through his factual inquiry. Ironically, “Brandeis’s facts,” in particular their persuasive power, are still widely misunderstood. The commonplace is that Brandeis won judicial restraint simply by mustering an imposing array of facts to support rules, in particular social legislation, threatened by the Court’s disapproval. Yet, as I argue here, Brandeis was more concerned with moving the Court away from a role in which it sought to replicate or second-guess the factual inquiries underlying legislative deliberations. To do so he had to divert his fellow justices’ attention from “legislative facts” by using another set of facts that refocused their attention on constitutional processes. For the Constitution’s structure implies requirements for the integrity and complementarity of the various deliberative processes – federal as well as state, local and administrative as well as legislative. So as the nation moved through industrialization and the nationalization of commerce, Brandeis used facts characterizing the transition to help appraise the quality of deliberation underlying the nation’s laws. As I will show, these facts often appeared in the opening sentences of his opinions for the Court.

* During his first years on the Court, Louis Brandeis self-consciously used his opinions to reframe the Constitution and thereby refocus his colleagues’ perspective on judicial review. My recent article on the “Narrative Impulse in Judicial Opinions” elaborates on one literary aspect of judicial advocacy that Brandeis refined.1 Here I shall elaborate on

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another aspect of his style, namely his tactical use of opening sentences to frame the Constitution’s deliberative processes in their factual settings.

The reputation of Justice Louis Brandeis is prominently tied to two achievements. First, he—along with Justice Holmes—impelled the Supreme Court toward judicial liberalism.\(^2\) Second, he revitalized American legal positivism through his factual inquiry. The irony is that “Brandeis’s facts,” in particular their persuasive power, are still widely misunderstood. Even writers who diverged in their appraisal of Brandeis’s contribution seem to proceed from the same misimpression: namely, that Brandeis won judicial restraint simply by mustering an imposing array of facts to support rules—in particular, social legislation—threatened by the Court’s disapproval.\(^3\) Indeed, among all the writing about Brandeis only one author has sought to link Brandeis’s facts to the advent of judicial liberalism.\(^4\)

Just how did Brandeis use facts to impel the Court toward judicial liberalism— that is, toward a role in which justices sought to safeguard and develop the nation’s deliberative processes consistently with the Constitution’s structure, and away from a role in which they sought to replicate or second-guess legislative deliberations?\(^5\) In general, Brandeis succeeded in diverting his fellow justices’ attention from the facts underlying social legislation by using another set of facts to refocus their attention on constitutional processes. For the Constitution’s structure implies requirements for the integrity and complementarity of the various deliberative processes—federal as well as state, local and administrative as well as legislative. So as the nation moved through industrialization and the nationalization of commerce, Brandeis used facts characterizing the transition to help appraise the quality of deliberation underlying the nation’s laws. So much of the story is simple; the telling requires more.

During the Progressive Era state legislatures and Congress increasingly adapted rules to the uncertainties of American social order. It had “become popular,” Justice Holmes


wrote of his generation, “to believe that society advantageously may take its destiny into its own hands—may give a conscious direction to much that heretofore has rested on the assumption that the familiar is best, or that has been left to the mechanically determined outcome of the co-operation and clash of private effort.”

One of the problems state legislatures encountered was the increasing nationalization of industry and a corresponding robustness of interstate commerce. Thorstein Veblen, writing in 1904 on the “theory of business enterprise,” described the new social conditions confronting state legislatures as emanating from the “concatenation of industries,” by virtue of which “the modern industrial system at large bears the character of a comprehensive, balanced mechanical process.” Whether individual states were competent to regulate this process was a matter for dispute, insofar as a “disturbance of the balance at any point,” in Veblen’s estimation, “means a differential advantage (or disadvantage) to one or more of the owners of the sub-processes between which the disturbance falls; and it may also frequently mean gain or loss to many remoter members in the concatenation of processes, for the balance throughout the sequence is a delicate one, and the transmission of a disturbance often goes far.”

Just how the Supreme Court should respond to the new social legislation became a central dilemma for the justices. Indeed, some of the justices fell into the camp that Veblen facetiously labeled “metaphysics.” In Veblen’s characterization:

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7 THORSTEIN VEBLEN, THE THEORY OF BUSINESS ENTERPRISE (1904), at 15: “[E]ach industrial unit, represented by a given industrial ‘plant,’ stands in close relations of interdependence with other industrial processes going forward elsewhere, near or far away, from which it receives supplies – materials, apparatus, and the like – and to which it turns over its output of products and waste, or on which it depends for auxiliary work, such as transportation. The resulting concatenation of industries has been noticed by most modern writers.”

8 Id.

9 Id., 25.

10 See, e.g., MORTON KELLER, AMERICA’S THREE REGIMES: A NEW POLITICAL HISTORY (2007), at 158-159:

The judicial system was the only branch of government that integrated federal, state, and local layers of authority and thus could respond to issues in a relatively coherent way . . .

The most notable constitutional issue of the late nineteenth century was the degree to which the states and the federal government could tax and regulate corporations. That issue was defined primarily through thrust and parry between the legislative and the judicial branches. Most historians conclude that the result of this matchup was courts 1, legislatures 0.

Judges defined acceptable regulation and taxation through an ongoing interpretation of two doctrines: the police power of the states to protect the public’s health, safety, morals, and welfare,
Higher courts speak more unequivocally for the metaphysical principles and apply them with a surer and firmer touch. In the view of these higher adepts of the law, free contract is so inalienable a natural right of man that not even a statutory enactment will enable a workman to forego its exercise and its responsibility. By metaphysical necessity its exercise attaches to the individual so indefeasibly that it cannot constitutionally be delegated to collective action, whether legislative or corporate.

Other justices, however, decided the cases less ideologically, focusing more on the reasonableness of the social legislation itself. In their opinions, broadly speaking, they critiqued the regulations on their own terms – whether the statutory language was likely to serve as an effective means to the legislature’s designated ends. This replication of the legislative process, as it were, led to more balanced outcomes in the cases, but it hardly provided the Court’s constituents with the kind of certainty law promises.\(^{13}\)

This dilemma, as we now know, played itself out in the transition to modern judicial liberalism. Justices Holmes and Brandeis led the Court to a new understanding of the Constitution. In the words of the late Robert Cover, they opposed “constitutionalization of any particular social or economic philosophy—that is, [they were] against substantive due process; [they were] for judicial restraint, but also for enforcement of civil liberties and civil rights as checks against the tyranny of majorities.”\(^{14}\) G. Edward White offers the following conventional account of how they led the way: \(^{15}\)

American society after World War I was marked by a simultaneous collapse of allegedly timeless values and norms and a pervasive need for governmental policies that responded to the newly perceived facts of modern industrial life. To an extent, Holmes helped make palatable a world without consensual norms, while Brandeis sought to show how governmental institutions could intervene to make that world more livable. Each contributed to the belief of modern liberalism that an activist state could provide both security and progress.

and the check to that power implicit in the due process requirement of the Fourteenth Amendment. Hundreds of court decisions balanced these rules against each other. The result was massive judicial oversight of the states’ ability to tax and regulate an industrial economy.

\(^{11}\) VELEN, supra note 7, at 278. There is some ambiguity in Veblen’s use of the term, since he seemed to be characterizing the formalistic theorizing of those justices whose practices Roscoe Pound termed “mechanical jurisprudence” – see Pound’s analysis in Mechanical Jurisprudence, 8 COLUM. L. REV. 605 (1908). Veblen probably did not mean Justice Holmes, who opposed rigid formulations such as “liberty of contract”; yet, it was Holmes, among others, who formed the “Metaphysical Club” – see, LOUIS MENAND, THE METAPHYSICAL CLUB: A STORY OF IDEAS IN AMERICA (2001).

\(^{12}\) VELEN, supra note 7, at 278-279.

\(^{13}\) See discussion of Holden v. Hardy and Lochner vs. New York, infra text at notes 65-94.

\(^{14}\) Cover, supra note 4, at 352.

\(^{15}\) WHITE, supra note 2, at 175.
Indeed, as White describes, Brandeis did use “facts” to project his visions of a better world, to support governmental conclusions about the causes and effects embedded in rulemaking.

Nevertheless, Brandeis also used facts to do more than explain causation in the social world. Judicial “liberalism” typically succeeds by defusing moral conflict, often by diverting attention from substantive debates to ones about process.\(^\text{16}\) Still, process is an empty vessel, offering a world without vision or teleology. What Brandeis did was to characterize the deliberative processes underlying laws and orders subject to judicial review by showing how they complemented the realities of American life in transition – the expanding, yet increasingly concatenated range of Veblen’s new economy.\(^\text{17}\) In describing the factual settings for those processes, he reframed the Constitution structurally, identifying when it was appropriate or not for particular bodies, including the Court itself, to be making judgments about how to define and address the specific problems of social life. He built new bridges between the activities of the citizens and the political discourses they engaged in.

The Constitution structures the political sphere into deliberative processes without regard to their economic, social or geographic – that is, “factual” – context. Brandeis used his opinions to set those constitutional structures in their factual context. Yet, the oracular quality of his writing tends to conceal this aim from his critics and admirers. Willard Hurst observed that Brandeis’s Court served to “dramatiz[e] fundamental principles . . . [as] a kind of Holy Synod, to be kept untouchable and unsullied.”\(^\text{18}\) The drama, I take it, derived from Brandeis’s factual contexts, his penchant for a sort of stark realism that other justices eschewed. But the oddly mystical quality of his writing stems in many opinions from Brandeis’s strange positioning of “the facts.” As I shall explain below, the facts he used to reframe the Court’s understanding of the Constitution often appeared in his opening sentences, sometimes in ways that were confounding, yet readily intuited – Delphic, as it were.

An understanding of Brandeis’s approach to the Supreme Court’s dilemma deserves our attention.

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\(^{17}\) David Riesman, Brandeis’s one-time Supreme Court law clerk, noted that, “It was Brandeis who, in *OTHER PEOPLE’S MONEY*, popularised [sic] some of the conceptions set forth in Veblen’s *THEORY OF BUSINESS ENTERPRISE . . . ” – *see*, DAVID RIESMAN, THORSTEIN VEBLEN, *A CRITICAL INTERPRETATION* (1953), at 94.

REVISITING THE BRANDEIS BRIEF’S “FACT” LEGACY

To which facts did Brandeis assign priority? Was it the facts underlying social legislation? Or was there another set of facts toward which he directed his fellow justices’ attention?

Let’s begin with the “facts” in the prototype for what came to be known as “the Brandeis brief.” Several authors have sought to re-evaluate the legacy of the brief Brandeis submitted to the U.S. Supreme Court in Muller v. Oregon. David Bryden, for instance, questioned Brandeis’s reputation for, almost singlehandedly, bringing the “facts” of modern industrialization and the plight of the worker to the Supreme Court’s attention. That issue is of course straw, but the article itself is interesting, and perhaps warranted in its criticism of Brandeis’s admirers. A second author, Melvin Urofsky, concluded that the influence of the Muller case on the drift of Supreme Court decisions has been exaggerated (by, among others, the author himself). And the authors of a third article suggest that, while the labor legislation in question and its constitutional defense were well-motivated, the pattern set by gender based classification in labor law led to serious problems down the road.

The facts surrounding Brandeis’s involvement in the Muller case are well-known. Brandeis was asked to defend the constitutionality of Oregon’s maximum hours law before the U.S. Supreme Court after Joseph H. Choate had turned down the case. The law prohibited employers from working women more than ten hours a day at mechanical labor, primarily in factories or laundries, and Choate had seen “no reason why a great husky Irish woman should not work in a laundry more than ten hours in one day, if her employer wished her to do so.” The Supreme Court’s decision in Lochner v. New York had recently held a similar law without gender qualification unconstitutional. So Brandeis

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20 Bryden, supra note 3, at 283.
21 Among the more recent biographers, PHILIPPA STRUM, supra note 3, is the most ardent of such admirers.
24 See, e.g., ALPHEUS T. MASON, BRANDEIS: A FREE MAN’S LIFE (1946), at 245-252.
25 Id., 248.
sought to distinguish the Oregon law, to demonstrate scientifically “what,” as Brandeis would later put it, “any fool knows,”27 namely that Oregon women could still invite statutory protection under the Constitution in ways a class of New York workers no longer could. Brandeis’s aim was not to press a point about gender differences nor to divide the women’s movement,28 but simply to improve the lot of workers incrementally.29 Muller v. Oregon was the wedge to pry open, once again, the constitutional jaws Lochner had shut.30

The brief itself, law students sooner or later learn, contained only two pages of legal argument and almost one hundred of “scientific” opinion assembled to thwart Muller’s assault on Oregon’s law.31 In David Bryden’s description:32

Brandeis’s brief began with a short statement of legal principles, amounting to the proposition that the law is to be upheld unless the complainant establishes that it lacks any reasonable police power rationale. The next section summarized American and foreign hours legislation. Then, in the heart of the brief, he presented his evidence, an assortment of excerpts from the plethora of books, reports, and testimony about hours of labor and women at work.

28 Indeed, Brandeis had changed his views about, among other women's issues, universal suffrage: As a young man he had spoken out against, but by the turn of the century he supported women's suffrage. Thus, even those who raise questions about the beneficial impact of maximum hours legislation for women, have not sought to question Brandeis's motives or suggest that he meant to isolate women workers. For a useful delineation of the various positions on women's suffrage that suggests the underlying logic of Brandeis's evolution on the issue, see Ellen C. DuBois, Outgrowing the Compact of the Fathers: Equal Rights, Woman Suffrage, and the United States Constitution, 1820-1878, 74 J. AM. HIST. 836 (1987).
29 JOHN R. COMMONS & JOHN B. ANDREWS, PRINCIPLES OF LABOR LEGISLATION (rev. ed. 1920 [orig. 1916]), at 221 et seq., gives a short account of the constitutional litigation surrounding maximum hours laws. Certainly, by the time Felix Frankfurter took over the cases from Brandeis, the litigation was being managed strategically, much in the way, for instance, of subsequent civil rights litigation -- see, e.g., RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY (1975). On the cases following Muller v. Oregon, see also, Bryden, supra note 3, at 303-321. Whether, at the time of Muller v. Oregon, Brandeis had conceived of a larger strategy that would link the constitutionality of maximum hours laws for women with broad protective legislation for all workers is not apparent from his correspondence.
30 It is in this respect that Urofsky's reassessment of Brandeis's contribution understates the case – see supra, text at note 22.
31 16 LANDMARK BRIEFS, supra note 19, at 83-177. Bryden, supra note 3, observes that one or the other of Felix Frankfurter's briefs, when he took over Brandeis's labor litigation, exceeded 1000 pages.
32 Bryden, supra note 3, at 293.
Yet, this description is misleading. For Professor Bryden passes over the first eight pages of the brief that precede the “legal principles”—to wit, Brandeis’s admonition on page one that:

The decision in this case will, in effect, determine the constitutionality of nearly all the statutes in force in the United States, limiting the hours of adult women—namely:

MASSACHUSETTS . . . RHODE ISLAND . . . LOUISIANA . . . CONNECTICUT . . . MAINE . . . NEW HAMPSHIRE . . . MARYLAND . . . VIRGINIA . . . PENNSYLVANIA . . . NEW YORK . . . NEBRASKA . . . WAHSINGTON . . . WISCONSIN . . . NORTH DAKOTA . . . SOUTH DAKOTA . . . OKLAHOMA . . . NEW JERSEY . . . COLORADO . . . SOUTH CAROLINA . . . [eight pages, citing the laws and quoting their statutory language]

This compilation, which spells out over 30 years of enactments, was not lost on the Supreme Court; and it was this compilation, certainly as much as Josephine Goldmark’s awful melange of scientific opinion, that drew Justice Brewer’s attention in the Court’s opinion.

It may not be amiss, in the present case, before examining the constitutional question, to notice the course of legislation as well as expressions of opinion from other judicial sources. In the brief filed by Mr. Louis D. Brandeis, for the defendant in error, is a very copious collection of all these matters, an epitome of which is found in the margin.

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33 Bryden’s revision, incidentally, seems valuable in criticizing past commentary on the Brandeis brief, in questioning whether discriminatory wage and hour legislation or its constitutional defense improved women’s lot and working conditions in general, as Brandeis and his allies had expected. Moreover, Bryden presents Brandeis’s motivations fairly: that is, he does not doubt that Brandeis hoped to achieve what even now we might take to be progressive ends. Still, the article treats Brandeis’s acceptance of contemporary fact-finding too readily; Brandeis’s response to the “fact explosion,” as Robert Cover describes in an article on Brandeis and the First Amendment, supra note 4, was considerably more discerning. Just as the “essential” fact of Brandeis’s brief, for example, was the very first one submitted, so too — as I will show below — flowed much "reason" in his later decisions. Cf. PAUL L. ROSEN, THE SUPREME COURT AND SOCIAL SCIENCE 75-82 (1972). See also, infra, note 45.
34 16 LANDMARK BRIEFS, supra note 19, at 66.
35 208 U.S. 412, 419.
36 The brief was subsequently published with Josephine Goldmark’s name in the byline — WOMEN IN INDUSTRY (1908). See also, Goldmark’s later elaborations in FATIGUE AND EFFICIENCY: A STUDY IN INDUSTRY (1912). Bryden’s ironic review of the brief is descriptive.
37 208 U.S. 412, 419.
What Bryden labels “Brandeis’s facts”—opinions about the consequences of long working hours on women—is of secondary import. What matters is the perspective Brandeis drew in his opening lines. In Muller the Supreme Court was asking whether the legislation was “reasonable.” Questions about the fact of “woman’s difference” were simply secondary to the knowledge that 19 state legislatures had deliberated and reached much the same conclusion as Oregon over maximum hours laws—a rule that had in some instances proved viable for over 30 years. What could seem more reasonable than this degree of deliberation and emerging consensus? The “secondary facts,” one hundred pages of them, merely rendered each individual legislature’s deliberations plausible. The power of Brandeis’s strategy is reflected not just in Justice Brewer’s marginalia summarizing the contents of the brief, but in the body of the opinion itself:

The legislation and opinions referred to in the margin may not be, technically speaking, authorities, and in them is little or no discussion of the constitutional question presented to us for determination, yet they are significant of a widespread belief that woman’s physical structure, and the functions she

38 Indeed, the “facts” about women workers serve much as an appendix -- impressive in bulk, but secondary in view of the legal questions raised. Bryden’s thrust is well aimed, if Brandeis’s admirers are the object; at the same time, in my opinion, he misses the point about Brandeis’s own perspective. Supra, text at note 34.

39 208 U.S. 412, 419. See also, 16 LANDMARK BRIEFS, supra note 19, at 81-82.

40 The observation of social conditions, the perception that certain conditions require change, and the expectation of what rules will do are the end-products of legislative deliberation. To reach consensus requires that legislators share a perspective on social conditions -- a perspective made up of common experience on which to base observation, common values on which to base judgments about the need for change, and common logic on which to base predictions about rule changes. During Brandeis’s lifetime these commonalities were in disarray. As William E. Nelson described it in his THE ROOTS OF AMERICAN BUREACRACY, 1830-1900 (1982), at 160-161:

The perspective of the upper class was no more self-interested than that of the lower class; in both cases what might be called self-interest arose more from the bitter confrontations with the problems of daily life than from any truly selfish lack of concern about the problems of other people.

Brandeis, while he could shape perspectives to win the case at hand, understood as well that American society’s salvation rested in institutionalizing the discovery of shared perspectives. Consider the words of Brandeis’s contemporary, Frank Parsons, whose turn-of-the-century lectures on LEGAL DOCTRINE AND SOCIAL PROGRESS (1911), describe that tendency, at 218:

[Law] is adjusting the framework of society more and more so as to permit liberty of individual action and yet exerts its force to draw up individuals to lofty ideals of common and social action. . . . In thus holding up social ideals . . . law will continue to develop in the minds of men a social consciousness that each is a living and vital part of the social whole with duties as well as rights. . . . There is much for the law to do for the masses in the further development of that consciousness.

42 208 U.S. 412, 419-420 note. See, supra text at note 37.

43 Id., 420-421.
performs in consequence thereof, justify special legislation restricting or qualifying the conditions under which she should be permitted to toil. Constitutional questions, it is true, are not settled by even a consensus of present public opinion . . . At the same time, when a question of fact is debated and debatable, and the extent to which a special constitutional limitation goes is affected by the truth in respect to that fact, a widespread and long continued belief concerning it is worthy of consideration.

The point is that Bryden misconstrues Brandeis by assigning primary significance to the brief’s rendering of social scientific evidence. He leads us to the conclusion that Brandeis’s facts were not objective because he depended on the observations of “social workers, club women, journalists, bureaucrats, and of course academics.”

In doing so, however, Bryden misperceives not just the extent to which Brandeis and his contemporaries understood “fact” to be illusory—that is, a matter of public opinion as much as scientific discovery—but also ignores the very battleground on which Brandeis was fighting, namely, judicial review as a general proposition. As I shall explain below, it was the factual setting of judicial review that drew Brandeis’s principal attention—that is, the interplay between, on the one hand, deliberation in state legislatures across the country and, on the other, the Supreme Court’s perspective on the case or cases before it.

**Positivism, Facts and Judicial Review: The Progressive Dilemma**

The battleground was judicial review. James Bradley Thayer writing in 1893 suggested that the Supreme Court had begun “taking a part . . . in the political conduct of government.”

Fifteen years later Edward Corwin could add that the Court had changed the meaning of “due process” and so transformed the clause into an instrument of broad judicial review.

Certainly by the time Brandeis came to the Court the constitutional

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44 Bryden, supra note 3, at 325-326.

45 *Cf.*, e.g., Robert Cover's interesting article on Brandeis and First Amendment doctrine, "The Left, The Right," *supra* note 4, relying on Walter Lippmann, *Public Opinion* (1922) as a point of departure. For an attempt to sketch the Court's reliance on factual inquiry historically, see Rosen, *supra* note 33.

46 Urofsky's article, "Myth and Reality," *supra* note 22, seeks to describe the Supreme Court's attitudes toward protective legislation during the progressive era by analyzing the Court's decisions. By and large, however, Urofsky's analysis is more quantitative than qualitative, so that he misses the developments and swings in doctrine that gave particular cases their currency. *Cf.* A. Paul, *Conservative Crisis and the Rule of Law: Attitudes of Bar and Bench, 1887-1895* (1960) and Cover, *op. cit.* *supra* note 4.


48 E. S. Corwin, *The Supreme Court and the 14th Amendment*, 7 Mich. L. Rev. 643 (1909). Where once justices had confined their scrutiny merely to the "enforcement" of law, the new meaning unleashed them to apply their interests to the law's "making." Roscoe Pound, William Draper Lewis and others seemed to understand the same; but Corwin's essay, using history to defeat the notion of conceptual consistency, was the earliest to put the transformation in these terms. Not a few Supreme Court scholars have since
transformation was history.\textsuperscript{49} Like Holmes, Brandeis did not doubt the logic of judicial review, nor the right of the Court to exercise it.\textsuperscript{50} The question Brandeis set out to address then was not whether, but when.\textsuperscript{51}

There are a number of possible ways in which a court can review legislation. Activist justices arrogate more power to the court itself whereas more restrained justices tend to defer to the department or branch from which the rule under review has emanated. But this distinction is not sufficient to distinguish the variety of ways in which courts uphold or overturn rules enacted by other departments or the ways in which “facts” may enter into the decision.

Any rule has three elements. The first is some statement, often implicit, about the larger purposes of the rule – e.g., the orderly transfer of property, peace in the community. The second is a more specific statement, generally explicit, about the behavior the rule seeks to influence or modify directly (i.e., the “antecedent condition”) – e.g., writing a will, assaulting one’s neighbor. Finally, the third is a statement, always explicit, about the means the state will bring to bear on the behavior (i.e., the “consequence”) – e.g., benefits or rewards to encourage certain behaviors, penalties or “costs” to discourage others. When a court subjects a rule to constitutional review, it may judge it based on any of these three elements: is the larger purpose legitimate under the constitution? Is the behavior in question within the particular authority’s (e.g., state legislature’s) constitutional jurisdiction? Is the consequence or means the state relies on likely to achieve or at least capable of achieving the desired result?

Facts do have a place in each of the foregoing inquiries. Although discussions about legitimate purposes tend to be grounded in constitutional and political theory, the “facts” surrounding a particular constitutional provision’s history and drafting are generally of considerable import.\textsuperscript{52} The second form of inquiry above – the jurisdictional question, counted the rapidly increasing frequency with which Justices invoked the Constitution to overrule the end products of political deliberation. \textit{See e.g.,} ROBERT H. JACKSON, THE SUPREME COURT AND THE STRUGGLE FOR JUDICIAL SUPREMACY: A STUDY OF CRISIS IN AMERICAN POWER POLITICS 38 et seq. (1941); and Nelson, \textit{supra} note 41, at 148-155. Cf., Charles Warren, Earliest Cases of Judicial Review of State Legislation by Federal Courts, 32 YALE L. J. 15 (1922).


\textsuperscript{50} \textit{See e.g.,} KONEFSKY, \textit{supra} note 18, at 39 et seq.

\textsuperscript{51} Constitutional questions are raised characteristically in two forms, the one political, the other adjudicative. The constitutional judge's success depends on mediating these forms. However, as 14th Amendment practice moved from its original concerns with slavery to the problems of industrialization and "class legislation," the task of mediating the two forms changed. Two problems in particular vexed the Justices -- namely the changing character of national interest and the beginnings of the "fact explosion" toward the end of the century.

\textsuperscript{52} \textit{See, e.g.,} both sides in D.C. v. Heller and in Citizens United v. F.E.C., discussed \textit{infra}, text at notes 204-205, 208-211.
including the competence of the various departments, including the judiciary, to address particular kinds of social conditions or behaviors – is generally couched in interpretation of the constitution’s structure and language. At the same time, these discussions may also resort to factual characterizations of the departments called upon to create or refine particular kinds of rules.\textsuperscript{53} As we shall see below, these were the facts of “political deliberation” that Brandeis highlighted in order to move the Court toward a more restrained, though still nuanced approach to judicial review. Finally, the third set of questions grows out of the social science of behavior modification – whether a rule’s consequence or enforcement mechanism is likely to achieve the intended outcomes. These were also factual questions, relying on expertise in adapting theories about social causes and effects to empirical observations.\textsuperscript{54}

The competing positions over judicial review during the Progressive Era evolved from a shared heritage—the Supreme Court’s \textit{Dred Scott} decision and the debacle that had ensued.\textsuperscript{55} We cannot overestimate the influence of either upon Brandeis’s generation; yet, the “lesson” of \textit{Dred Scott} was ambiguous. Two interpretations of what the case may have meant for Brandeis’s generation help sort out the different judicial approaches to specific cases around the turn of the century.

One interpretation focused on “class legislation,” the sort that condemned the slaves in southern states.\textsuperscript{56} Simply put, class legislation was bad, for it tended to divide citizens permanently from one another in their loyalty to the state. The Fourteenth Amendment empowered the Supreme Court to guard against legislation that reinforced class distinctions—classifications, in other words, that favored the electoral majority over

\textsuperscript{53} See, e.g., Chief Justice Roberts’s notions about Congressional competence in the health care field in Federation of Independent Businesses v. Sebelius, \textit{infra}, text at note 206-207.


political minorities by redistributing wealth without apparent, much less compelling, social purpose.\footnote{See, e.g., Nelson, supra note 41, at 160 et seq.; Hyman & Wieck, Equal Justice Under Law, supra note 55, at 335 et seq.}

Through this lens of history the justices fixed upon elected officials and their allegiance to particular classes of constituents. They sought to weigh the claims of political rule against the individual freedoms and the formal requirements of justice that political rule impinged. These freedoms and formal requirements were what Veblen termed the metaphysics of law. In reaching their conclusions, the justices fixed upon “facts” that allowed them to decide whether “progress” was better served by autonomous social forces and individual freedom or by governmental interventions, in particular legislative adjustments.

Yet, there was another interpretation of the history surrounding \textit{Dred Scott}. To progressives like Brandeis the problem was not simply winning approval for legislation, but the very fact that justices were ready to disapprove legislation by second-guessing political deliberations and by empathizing with the individual’s intolerance when faced with constraint. That interpretation, one Brandeis himself hardly needed elaborate, was that the Supreme Court’s intervention in \textit{Dred Scott}, much as state slave laws themselves, had brought on civil war.\footnote{See note 55, supra.} For Chief Justice Taney had in short order disrupted the existing compromise, short-circuited political deliberation at the federal level, and, in retrospect, denied the constitutional potential for a more peaceful transition from slavery.\footnote{Yet, even progressive scholars who partook in the latter interpretation treated the Taney Court gently and the subject somewhat elliptically, suggesting that the justices had been not so much irresponsible as the victims of legislative abdication of responsibility under the "departmental" theory of constitutional review. We have previously noted Thayer's and Corwin's writing to this effect – see, supra notes 47 and 48. Consider, now, the writing of Frank Parsons, a "progressive" friend of Holmes who was almost certainly in attendance when Holmes came to Boston University Law School to deliver his “Path of the Law” address. Shortly after Holmes's address Parsons began lecturing on “Legal Doctrine and Social Progress” at Boston University Law School – see, supra note 41. Parsons asserted, id., 214, that, “Progress must always be secured at some cost ... [either] the striving of the radicals under the impulse of ideals to carry new laws or to educate society to the point where it will enact new laws [or] the cramping of society by outworn laws before it generates the energy to slough them off and create new forms.” In balancing those costs, Parsons conceded, the law tends properly toward caution, favoring slow progress over the “whims and passing passion of a great radical uprooting.” Thus, he noted: \[I\]t would have been an immense financial saving to say nothing of the still more enormous savings of life, energy and love, if the nation could have paid the South the full market price of the negro slaves before the breaking out of Civil War, but owing to the passions aroused, war was a greatly to be regretted necessity. Parsons went on to suggest, however, that law was changing from the era when civil war could not be averted, “abandoning the negative ideal, and [taking] up the positive ideal [of civic usefulness and greater}
This perspective on the cases raised questions not just about legislative and administrative action, but also about the role of the justices themselves as part of the political “deliberation” process. Here the constitutional significance of comparing the role of government with autonomous social forces in achieving progress dimmed. Only the “fact” of deliberation and prospects for consensus seemed to matter. The justices had to look beyond the legislative process and, in effect, ask themselves what their own intervention might contribute to the system of rules and the achievement of political consensus. Had Freud written about the superego before 1920, one might say that these justices had adapted the concept to their own role in constitutional review.60

By and large, progressive historiography has tended to distort the outcome of judicial review before 1920. Melvin Urofsky, in his evaluation of the Court’s protective legislation decisions, points out that progressive historians have exaggerated the frequency of judicial disapproval around the turn-of-the-century.61 For while the justices did scrutinize laws for class bias, they also tended to favor the lawmakers’ conclusions about social progress notwithstanding the constraints regulation imposed on individual freedom.62 Perhaps Urofsky’s conclusion ought not surprise us. Others before him have observed much the same,63 and it is unlikely that the widespread preference for social legislation—a preference Justice Holmes among others noted—would not have touched the Court at all.64

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Consider, for instance, the Lochner65 case that had set the stage for Brandeis’s brief in Muller v. Oregon. The circumstances behind Lochner reflected a long-standing battle between labor and capital for the worker’s welfare. Labor sought regulations to mandate shorter workdays and workweeks. This change has taken place not only in the law as applied to individuals, but as to society and social conditions, until our legislative halls resound with talk about the effect of law upon society,” id., 217.


61 Urofsky, Myth and Reality, supra note 22, at 53-55.

62 Id., 69-70. Cf., Wiecek, supra note 55, at 55 et seq. and Hall, supra note 49, at 29-34. See also, note 48, supra.


64 Holmes, Jr., Introduction, supra text at note 6.

to be paid a subsistence wage regardless of the number of hours he or she worked.\textsuperscript{66} To allow employers to compel workers to work more than 60-hour weeks to earn their living was patently exploitative and would quickly exhaust the individual worker’s capacity for labor, much like a prematurely burnt-out baseball pitcher or football halfback.\textsuperscript{67} Shorter hours, moreover, spread work among a larger number of workers. In the absence of a maximum hours law, employers were not only free to extract the maximum possible margin (“surplus”) from each worker, but were virtually compelled to do so within a competitive industrial system.\textsuperscript{68} Furthermore, in the context of the increasing immigration of unskilled as well as skilled workers from Europe, employers with ready access to those immigrants were relatively unmoved by the prospect of exhausting their current labor forces.\textsuperscript{69} So in the grand scheme of things legislation enacting a shorter workday or workweek served to normalize standards for rates of exploitation – that is, the extent to which one man could benefit at another’s expense – and for preserving workers’ labor capacity for the longer duration.\textsuperscript{70}

In 1895 the New York legislature enacted the Bakeshop Act restricting bakery workers’ hours; at the time much of organized labor was mobilizing for an 8-hour day, whereas the bakery workers had for ten years been pressing for legislation to limit their workdays and workweeks to 10 hours and 60 hours, respectively.\textsuperscript{71} Three years later the Supreme Court in \textit{Holden v. Hardy} upheld a Utah law limiting the hours of miners and smelters to eight hours per day, but noted in passing that a generally applicable maximum hours law of eight hours per day was not likely to be reviewed favorably.\textsuperscript{72} Accordingly, as the New

\textsuperscript{66} See, e.g., COMMONS & ANDREWS, \textit{ supra} note 29, at 182-187. Note that “minimum wage laws” were an alternative solution to some of the same problems “maximum hours laws” addressed, but with less restrictiveness.

\textsuperscript{67} Id., 221-226.

\textsuperscript{68} Id., 247-248; on employer behavior, see e.g., id., 249, describing government contractors’ and subcontractors’ justifications (“emergency” loopholes) for forcing workers to work in excess of the protective maximum hours provisions in federal contracts.

\textsuperscript{69} Id., 69-78.

\textsuperscript{70} Id., 221-222: In 1909, the U.S. Census of Manufactures found, 7.9% of wage earners “were employed in establishments where the eight-hour day prevailed”; \textit{circa} 75% worked 54-60 hour weeks; and \textit{circa} 5.2% worked 60-72 hour weeks, like the bakers covered by New York’s maximum hours law. In other words, the norm for wage earners was a 60-hour maximum workweek. COMMONS & ANDREWS go on to report that, “beginning in the spring of 1915 an active movement for the eight-hour workday swept the country” that led to roughly 58% of the workforce working a maximum of an eight-hour day by the end of the World War One – id., 222-223.


\textsuperscript{72} “While the general experience of mankind may justify us in believing that men may engage in ordinary employment more than eight hours per day without injury to their health, it does not follow that labor for the same length of time is innocuous when carried on beneath the surface of the earth, where the operative is deprived of fresh air and sunlight and is frequently subjected to foul atmosphere and a very
York act passed through the courts, its supporters claimed not only that the state had the power to restrict hours of work in general, but also that long hours exposed bakery workers as well as the industry’s consumers to specific health risks. The law won approval from 3 of the 5 judges in the New York Appellate Division and 4 of the 7 judges in the New York Court of Appeals.\textsuperscript{73} Lochner, the bakery owner convicted under the act, then took his case to the Supreme Court for review.

In the Supreme Court the camps were split.\textsuperscript{74} Justice Peckham, writing for the five-justice majority, was a conservative, but activist justice from upstate New York who nine years before had opposed the limitation on mine workers’ hours in \textit{Holden v. Hardy}.\textsuperscript{75} In \textit{Lochner}, he questioned not the process that had led to the New York legislation, but the substantive authority and factual conclusions of the legislature: “The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate ...”\textsuperscript{76}

With respect to the purpose of the act, Peckham agreed that under the U.S. Constitution the state legislature could rely on its “police powers” to protect the public’s health from significant dangers, but that the state was not authorized to regulate the hours of labor without more: “The question whether this act is valid as a labor law, pure and simple, may be dismissed in a few words. There is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker.”\textsuperscript{77} Furthermore, with regard to the issues of health, Peckham noted that a substantial minority at each level of judicial review had rejected the legislature’s unanimous conclusion that long hours of bakery work posed significant health risks; and so he concluded that “there can be no fair doubt that the trade of a baker, in and of itself, is not an unhealthy one to that degree which would authorize the legislature to interfere with the right to labor, and with the right of free contract on the high temperature or to the influence of noxious gases generated by the processes of refining or smelting.”


\textsuperscript{73} People v. Lochner, 76 N.Y.S. 396 (App. Div., 4\textsuperscript{th} Dept., 1902); People v. Lochner, 69 N.E. 373 (NY Ct. of App., 1904).

\textsuperscript{74} \textit{Lochner v. New York}, 198 U.S. 45, 52 (Peckham, J., opinion of the Court); \textit{id.}, 65 (Harlan, J., dissenting).

\textsuperscript{75} \textit{Holden v. Hardy}, 169 U.S. 366, 398 (Peckham, J., and Brewer, J., dissenting). Note that Justice Brewer, who wrote the majority decision in \textit{Muller v. Oregon} -- see, \textit{supra}, text at notes 35-43 -- had lodged the other dissenting vote in \textit{Holden v. Hardy}.

\textsuperscript{76} \textit{Lochner v. New York}, 198 U.S. 45, at 57.

\textsuperscript{77} \textit{Id.}, 57. Later on in the opinion, Peckham reiterates as follows, \textit{id.}, 61: “Statutes ... limiting the hours in which grown and intelligent men may labor to earn their living, are mere meddlesome interferences with the rights of the individual, and they are not saved from condemnation by the claim that they are passed in the exercise of the police power and upon the subject of the health of the individual whose rights are interfered with, unless there be some fair ground, reasonable in and of itself, to say that there is material danger to the public health or to the health of the employes [sic], if the hours of labor are not curtailed.”

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part of the individual, either as employer or employe [sic]. To clarify his point, he added the following, peculiarly ambivalent factual argument:

In looking through statistics regarding all trades and occupations, it may be true that the trade of a baker does not appear to be as healthy as some other trades, and is also vastly more healthy than still others. To the common understanding the trade of a baker has never been regarded as an unhealthy one. Very likely physicians would not recommend the exercise of that or of any other trade as a remedy for ill health. Some occupations are more healthy than others, but we think there are none which might not come under the power of the legislature to supervise and control the hours of working therein, if the mere fact that the occupation is not absolutely and perfectly healthy is to confer that right upon the legislative department of the Government. It might be safely affirmed that almost all occupations more or less affect the health. There must be more than the mere fact of the possible existence of some small amount of unhealthiness to warrant legislative interference with liberty.

Brandeis’s brief in Muller, with its 100-plus pages of “facts” to show “what any fool knows,” was designed as little more than a mockery of Peckham’s arrogantly casual analysis. As Roscoe Pound observed, by no means the least offense in the Court’s “liberty of contract” decisions was the justices’ resort to artificial criteria of general application – e.g., liberty of contract – to address issues of constitutionality as legal questions; as a result those justices eschewed “effective judicial investigation or consideration of the situations of fact behind or bearing upon the statutes.”

In the other camp, Justice Harlan wrote the opinion for the minority. He was a famously liberal justice who had sided with the seven-justice majority that had upheld the eight-hour mining law in Holden v. Hardy. His approach in Lochner was decidedly more restrained than Peckham’s. For one, he was inclined to give the legislature a wider berth in deciding what sorts of purposes fell under the police powers, even when its measures – as in the case of a maximum hours law -- tended to compromise the liberty of contract. Moreover, he was also inclined to defer to the legislature’s factual conclusions about the significance of particular social conditions, such as health risks in work, and the effectiveness of particular measures to secure improvements. In these respects Harlan’s description of his approach was very much reflective of Thayer’s departmental theory of constitutional review, an approach virtually opposite Peckham’s: “... a large discretion

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78 Id., 58-59.
79 Id., 59.
81 Id., 458 (1909).
‘is necessarily vested in the legislature to determine not only what the interests of the public require, but what measures are necessary for the protection of such interests.’”

Harlan accepted that two sets of values, individual freedom and collective welfare, necessarily collided in the Constitution’s structure. Thus he took “it to be firmly established that what is called the liberty of contract may, within certain limits, be subjected to regulations designed and calculated to promote the general welfare or to guard the public health, the public morals or the public safety.” To the extent that the legislature may have entered a grey area in effecting the police powers, Harlan asked where the line should be drawn. He answered in no uncertain terms: “Upon this point there is no room for dispute, for the rule is universal that a legislative enactment, Federal or state, is never to be disregarded or held invalid unless it be, beyond question, plainly and palpably in excess of legislative power.”

Further, Harlan deferred to the legislature’s expertise on the effectiveness of a rule in achieving its purpose, so long as the legislative process itself had not been tainted by bad faith. Accordingly, on the issue of labor laws generally and those which attended to health issues specifically, Harlan took an expansive and “progressive” view:

While [the police] power is inherent in all governments, it has doubtless been greatly expanded in its application during the past century, owing to an enormous increase in the number of occupations which are dangerous, or so far detrimental to the health of the employes [sic] as to demand special precautions for their well-being and protection, or the safety of adjacent property.

The most noteworthy aspect of Harlan’s dissent, however, one that Holmes echoed as well, was his portrayal of the Court’s role in such cases: “If there be doubt as to the validity of the statute, that doubt must therefore be resolved in favor of its validity, and the courts must keep their hands off, leaving the legislature to meet the responsibility for unwise legislation.” It is commonplace that unwise rulings are more amenable to correction by the legislatures than by the Court; for in the former membership is

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83 Id., 67 (Harlan, J., dissenting).
84 Id., 68 (Harlan, J., dissenting).
85 Id., 66 (Harlan, J., dissenting).
86 Id. 66 (Harlan, J., dissenting). In making the case for deference to legislative expertise on the facts surrounding the rule, Harlan quoted the opinion of the Court in Holden v. Hardy, 169 U.S. 366 (1898), at 396, as follows:

These employments [i.e. working in underground mines or in the smelting, reduction or refining of ores or metals], when too long pursued, the legislature has judged to be detrimental to the health of the employes [sic], and, so long as there are reasonable grounds for believing this is so, its decision upon this subject cannot be reviewed by the Federal courts.

88 Id., 68 (Harlan, J., dissenting).
determined by regular elections, whereas in the latter membership changes only with death and retirement.

In seeking to define a viable constitutional role for the Supreme Court at the turn of the 20th Century, the justices were essentially grappling with the problem of consistency. Consistency gave the process of making judgments about competing visions of society integrity. Conservative-activists sought consistency in the time-worn values that they ascribed to the Constitution – liberty, property, and so forth. Justice Peckham no doubt believed that resorting to substantive values like “liberty of contract” to trump legislative modifications of social conditions would enable the Court to guide the nation with reliable consistency. But while basic values may not change, their adaptation to new social circumstances inevitably does -- that is, their realistic definition in one era may well become incommensurate with their definition in the next.

On the other extreme Justice Holmes believed that values were simply a manifestation of larger political struggles. To achieve consistency the Court should avoid imposing its own values, and certainly not use them to trump legislation, unless specifically called for in the language of the Constitution. Although his view, one formulation of the “process strategy,” led perhaps to a sort of consistency, it was hardly a palliative for conservatives who were skeptical about the directions of the larger political struggles. The pitfall of legislation was its focus on discrete aspects of the social condition; legislative fact inquiries were limited in scope, and the resulting rules achieved some certainty only with respect to severely limited spheres of human endeavor. The rule system that grew out of politics had the capacity to fragment the social order beyond repair. This at least was one form of anxiety that prompted conservative restraints on politics.

In contrast to Holmes, Harlan’s version of the “process” strategy was to mediate between the political and timeworn values. Although he leaned largely in favor of legislation and promoted judicial restraint, there was little in his approach to assure the

89 See, e.g., Pound, supra note 11: Pound, at 605, observes that judges seek to be “scientific” in order to maintain at least the appearance of consistency in their decisions: “the marks of a scientific law are, conformity to reason, uniformity, and certainty.”

90 Id., 608, Pound distinguishes what he calls “mechanical jurisprudence” from truly scientific inquiry: “I have referred to mechanical jurisprudence as scientific because those who administer it believe it such. But in truth it is not science at all. We no longer hold anything scientific merely because it exhibits a rigid scheme of deductions from a priori conceptions.”

91 See, e.g., Zacharias, supra note 2, at 596-599, 641-645.


93 This was, for instance, the basis for Justice Holmes’s opposition to the codification of substantive law around the time he published THE COMMON LAW (1881). For an interpretation, see MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY 117-142 (1992). Compare the quaint, unified systemic visions of society and its laws that unfold in BLACKSTONE’S COMMENTARIES or its earliest American counterpart, ZEPHANIAH SWIFT, SYSTEM OF THE LAW OF THE STATE OF CONNECTICUT (1795).
Court’s constituents that a society left in the hands of elected officials would remain in tact. The justice who was willing to acknowledge uncertainty about the outcome of any rule still wanted to develop a check on the fragmentation of the social world that self-interested legislation threatened. And this is where Brandeis, with his construction of a perspective on the “facts of deliberation” entered the discussion. What Brandeis spelled out was that consistency required some guarantee of deliberative process in the legislature, one that convinced the justices that the legislature could satisfy the positive “requirements” of rulemaking as well as any court. This strategy required not only insights into the factual inquiries that guided legislative rulemaking, but also a set of facts that persuaded the Court’s constituents that the justices were serving as diligent overseers of the nation’s political or “deliberative” processes as a whole.94

**BRANDEIS’S CRITIQUE OF SUPREME COURT INTERVENTION**

By the time Brandeis acceded to the Court he could work this insight into his opinions as no one else; yet, as we suggested earlier, he did so with a subtlety that writers have largely ignored.95 To begin, in confronting judicial attempts to replicate the rule makers’ inquiries, to ask about the “facts” surrounding social progress and “natural rules” that guided individual tolerance when faced with constraints, Brandeis adopted a strategy that evoked discomfort among his colleagues.96 He introduced facts less to demonstrate how much legislatures or administrative agencies actually did know than to convince the justices how little they themselves understood.97

The justices in replicating legislative judgments were, generally speaking, bound to consider the social conditions the lawmakers had observed, the values they had sought to safeguard, and the predictions they had ventured about conforming “is” to “ought” through particular rules. Brandeis recognized that when the justices looked at legislation

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94 The Court had to ask whether the three circumstances for legislative enactments—the capacity to articulate conditions, to envision norms, and to imagine dynamic causal relationships between conditions and norms—had been met and the objections to enactment addressed.

95 The key distinction is between facts as social events and facts as markers of social deliberation and perspective. Samuel Konefsky, *supra* note 18, at 306, comes as close to bridging the distinction as any Brandeis scholar in concluding that “Brandeis [was] far more successful than Holmes in adapting law and its techniques to the stark realities of life in the 20th century. The fusion of richly informed judgment and high social purpose is his legacy to the judicial process . . . It is Brandeis’ extraordinary gifts as a student of American society as well as the strength of his attachment to the imperatives of the democratic creed which made him the authentic leader of modern constitutional jurisprudence.” See also, K. Llewellyn, *Book Review [Felix Frankfurter, Mr. Justice Holmes]*, 31 *COLUM. L. REV.* 902, 905 (1931). Cover, *supra* note 4, amplifies the distinction. Meanwhile, Alexander Bickel, *The Unpublished Opinions of Mr. Justice Brandeis: The Supreme Court at Work* (1957), remains the only in depth treatment of Brandeis’s judicial writing strategies.

96 See, *supra*, text at note 27, where Brandeis verges on mocking the Court by suggesting that some justices needed 100 pages in a brief to recognize what “any fool knows” – namely, the “fact” that women differ from men in ways that may have relevance for the workplace. See also, *infra*, notes 103-104.

in terms of its relation to particular classes of grievants, they tended to focus on facts
germane only to those classes and predict effects based on normative theory developed
around the interests of the affected classes. 98

Accordingly, Brandeis sought to render the issues more complex. 99 Where a Joseph
Choate might have thought the issue of social conditions in Muller was confined largely
to a woman’s capacity to work more than ten hours a day, “Brandeis’s facts” suggested
that it was also a case about moral standards, family life, population growth and infant
health. 100 Where Choate thought the case involved simply value choices that women
made based on self-interest, “Brandeis’s facts” suggested that these were social choices
quite out of the ordinary woman’s control, part of Veblen’s “concatenation” of industrial
effects. Once he had expanded and intertwined the factual circumstances and moral aims
of social legislation, he could question the norms upon which prediction had to be based
as well. In Brandeis’s writing economic theory with its markets and sharply defined class
interests gave way to groping institutional analyses. 101 Thus, Brandeis rendered the
appearance of class bias in legislation more obscure.

We see this aspect of Brandeis’s “fact strategy” taking shape largely in his well-known
dissents. 102 Even when Brandeis acceded to majority conclusions about overturning state
action, he sought to elaborate on the factual complexity and breadth of values legislative
judgments entailed. Thus, his attack on the “rule of Smyth v. Ames,” 103 delivered in an
ironic concurring opinion in Southwestern Bell Telephone v. Public Service Commission of
Missouri, 104 succeeded above all in giving fellow justices pause about the facts, values and

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98 See, e.g., Burdick, supra note 56. For contrasting, but "progressive" historical interpretations of the Court's
perspective near the turn of century, see e.g., JOHN R. COMMONS, LEGAL FOUNDATIONS OF CAPITALISM
1-64 (1923), and ARNOLD PAUL, THE CONSERVATIVE CRISIS AND THE RULE OF LAW (1960).
99 See, e.g., supra text at note 96 et seq.
100 See, supra text at notes 24-31. The headings for the brief's parts on women workers, 16 LANDMARK
BRIEFS, supra note 19, at 83 et seq., read as follows: "The Dangers of Long Hours," "Causes," "Bad Effect
of Long Hours on Health," "Bad Effect of Long Hours on Safety," "Bad Effect of Long Hours on
Morals," "Bad Effect of Long Hours on General Welfare."
101 Cf., James F. Smurl, "Allocating Public Burdens: The Social Ethics Implied in Brandeis of Boston, 1 J. L.
& RELIG. 59 (1983), with Bryden, supra note 3.
102 Konefsky, supra note 18, is one of several writers who focus exclusively on Brandeis's dissenting
opinion: for instance, at 141, he writes, “Brandeis was looking to the future to vindicate the positions he
was voicing in dissent; hence the highly didactic nature of his utterances.”
104 262 U.S. 276, 289 (1923). The reporter styles the opinion as "dissenting," but Brandeis begins with the
words, "I concur in the judgment of reversal. But . . ." The opinion is ironic in a number of ways. Most
importantly, Brandeis, in reaching the outcome favored by his colleagues, exposes every conceivable flaw
in the Court's approach to that outcome. Indeed, the very need to overturn the state's order in this case
stemmed from the Court's creation of a rule that had made it virtually impossible for the state to reach a
"fair" result.

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theoretical models of prediction their “rule” imposed on state agencies. “To decide whether a proposed rate is confiscatory,” Brandeis wrote, “the [ratemaking] tribunal must determine both what sum would be earned under it and whether that sum would be a fair return.”

He continued:

The decision involves ordinarily the making of four subsidiary ones:

1. What the gross earnings from operating the utility under the rate in controversy would be. (A prediction.)
2. What the operating expenses and charges, while so operating, would be. (A prediction.)
3. The rate base: that is, what the amount is on which a return should be earned. (Under *Smyth v. Ames*, an opinion, largely.)
4. What rate of return should be deemed fair. (An opinion, largely.)

A decision that a rate is confiscatory (or compensatory) is thus the resultant of four determinations. Each of the four involves forming a judgment, as distinguished from ascertaining facts; and as to each factor there is usually room for difference in judgment.

“The doubts and uncertainties incident to the last two factors,” Brandeis argued, “can be eliminated, or lessened, only by redefining the rate base, called value, and the measure of fairness in return, now applied under the rule of *Smyth v. Ames*. Just to prove the point, Brandeis continued for twenty pages to expound on the intricacies of ratemaking and to demonstrate beyond doubt that the Supreme Court by imposing its “rule of *Smyth v. Ames*” had confounded those proceedings to the point of grave uncertainty and the detriment of all.

In addition, Brandeis's opinion happens to serve as counterpoint to Justice McReynolds' opinion for the Court. Commentators and historians have not apparently addressed Brandeis's gibes at the latter in the give and take of court opinions; but there are at least several opinions in which Brandeis seems to be rewriting, with considerable refinement, McReynolds's opinions. While the slights and perhaps outrages McReynolds launched against Brandeis are well known, Brandeis has generally been depicted as the silent and unresponsive sufferer. One suspects, however, that, from the time Brandeis advised McReynolds, who was Wilson's Attorney General, on Wilson's “position” with respect to antitrust and other economic legislation, the ill-will on McReynolds's part was as much personal as the product of his reputed anti-Semitism. In Brandeis's opinions one may find some evidence.

105 *Id.*, 291.
106 *Id.*
107 *Id.*, 291-292.
108 *Id.*, 292-312.
Brandeis led the way in complicating facts and adapting contemporary institutional analyses of society to resist judicial intervention. Yet, to dwell on this “fact” strategy alone, as Bryden among others does, diminishes Brandeis’s contribution. For Brandeis was above all a mediator, an advocate who in “adapting the law and its techniques to the stark realities of life in the twentieth century” sought consensus. Nevertheless, as I indicated earlier, Brandeis’s “other” fact strategy is more elusive, and even his more discerning contemporaries failed to grasp it entirely.

Henry Wolff Biklé, for instance, came as close as anyone to describing the thrust of Brandeis’s strategy. Biklé, writing for the Harvard Law Review in 1924 shortly after Brandeis’s Southwestern Bell concurrence, began by acknowledging, though somewhat vaguely, that the Supreme Court had legitimate bases for reviewing “factual” determinations. At the same time, Biklé doubted the Supreme Court’s expertise on many of the “facts” on which it was moved to pass judgment. He proposed then to have Congress, or state legislatures, preempt the Supreme Court’s factual inquiries by creating and explicitly instructing more “expert” federal and state agencies (including courts) to devote themselves to that work. The Supreme Court would then be obliged to defer.

Yet, even so astute a commentator as Biklé failed to penetrate Brandeis’s core strategy. As we observed earlier, from Brandeis’s historical perspective the facts surrounding social progress and individual will were secondary to constitutional questions about deliberation. Thus, while Brandeis articulated “secondary facts” to win support for

109 Justice Holmes, in contrast, suffered an aversion to Brandeis's brand of factual inquiry; at the same time, Holmes seems to have been quite acquiescent in acknowledging his own ignorance about such legislative matters — see, e.g., HOLMES-LASKI LETTERS 204-205 (M. DeW. Howe, ed., 1953); and 2 HOLMES-POLLOCK LETTERS 13-14 (M. DeW. Howe, ed., 1946). Holmes projects a more philosophical perspective on factual inquiry in HOLMES-LASKI LETTERS, supra, at 810.

110 Bryden, supra note 3. See supra text at notes 31 et seq.

111 KONEFSKY, supra note 18, at 306.

112 Biklé was a long-time Brandeis admirer, his position as General Counsel of the Pennsylvania Railroad Company, notwithstanding. He argued cases before Brandeis frequently and contributed to Felix Frankfurter’s collection of essays, Mr. Justice Brandeis (F. Frankfurter ed. 1932), published also as Henry Wolff Biklé, Mr. Justice Brandeis and the Regulation of Railroads, 45 HARV. L. REV. 4 (1931). Biklé also taught at the University of Pennsylvania Law School.


114 See, supra, text at notes 103 et seq.


The Commission is a fact-finding body. The question whether it must give to confessedly relevant facts evidential effect is solely one of adjective law. . . . But no instance has been found where under our law a fact-finding body has been required to give to evidence an effect which it does not inherently possess. Proof implies persuasion. To compel the human mind to infer in any respect that which observation and logic tells us is not true interferes with the process of reasoning of the fact-finding body.
legislation in individual cases, his ultimate aim was to move the Court toward an altogether different perspective on judicial review. Biklé’s haphazard taxonomy of factual inquiry and vague acquiescence in the Supreme Court’s role prevented him from seeing the alternative premises underlying Brandeis’s fact strategy.

**BRANDEIS’S FOCUS ON THE FACTS OF DELIBERATIVE PROCESS**

Generally speaking, Brandeis sought to make the Court more thoughtful about political deliberation, to reformulate the “departmental theory” of constitutional review that Thayer in 1893 had hoped to revitalize. The theory itself was plain. Each branch of government ought to look out for the constitutionality of its own acts. Judicial review of legislative judgments should be confined to egregious cases, to patently unreasonable or arbitrary regulation. The term “due process,” for instance, would simply not admit of more.

Brandeis took this thinking a step further. He saw in political deliberation not just the “people’s voice,” but a positive process like the market that led to ends transcending class interest. In his career as “people’s counsel” he had taken particular pride in working out compromise. (His renowned feistiness came into play largely in confronting the intractability of his counterparts.) He was, in practice, a student both of the legislative and administrative processes. And as many have sought to describe, perhaps most recently, Clyde Spillenger, Brandeis developed his own peculiar style of advocacy and deliberation. So long as compromise was possible and deliberation persisted—that is, a reasoned, mutual give and take—the Court, except in rare instances, had no business interfering. The principal exceptions occurred when deliberation at the local level threatened to corrupt the larger national interest or to provoke the sort of divisions that rent the Union before civil war.

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116. See, supra text at notes 58-60.
117. Biklé might have organized his factual inquiry more categorically. That is, the Supreme Court was the last in a series of legal decision-making institutions to concern itself with facts; as such, the Court had its eyes on several other perspectives, including that of the society-at-large on social conditions, the legislature on popular perceptions as well as the legislators' more directly on society at large, and finally the petitioners' and respondents' view of the facts in the context of the contested legislation (or administrative order). Each of these sets of facts made for distinct lines of inquiry. For a theoretical approach to the judicial perspective on facts and a discussion of the underpinnings for Biklé's "acquiescence," see discussion supra, text at note 46 et seq.
118. Thayer, supra note 47. See, HALL, supra note 49, at 32-33.
121. See, e.g., Smurl, supra note 101.
122. See e.g., infra text at notes 153 et seq. Cf. also Parsons, supra note 41. Roe v. Wade – infra text at notes 199-203 – presents these issues as well. 

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Much has been written over the years about Brandeis’s procedural creativity, even the ways he formalized procedural techniques to restrain judicial activism of various kinds. Yet, Robert Cover’s article on Brandeis’s free speech opinions seems the first to come to grips with Brandeis’s larger “deliberative theory” and his attempts to reframe the Constitution accordingly. In short, the Court had not only to guard the deliberative process, but to ensure its adequacy at the national as well as the local level. Brandeis introduced political deliberation into the cases, though not formally, to give the justices a deeper perspective on the intricate relation of free speech, interstate commerce, due process and equal protection concerns then pending before the Court.

Indeed, Brandeis did not generally engage in direct debate over his constitutional theory, but relied largely on technique to move the Court. We observed earlier that Brandeis framed the Muller case in its “deliberative perspective” through his opening sentences in other words, that the Oregon legislation, as the most recent product of political deliberation that had progressed over thirty years in twenty states across the nation, withstood constitutional scrutiny. That same opening technique resurfaced when Brandeis spoke for a majority of the Court. However, before we ask how Brandeis

123 Felix Frankfurter’s article on Brandeis’s constitutionalism, Mr. Justice Brandeis and the Constitution, 45 HARV. L. REV. 33 (1931), points out many of Brandeis’s procedural contributions. Several of Brandeis’s law clerks also wrote on Brandeis’s significance in reforming constitutional procedure -- see e.g., L. Jaffe, Judicial Review: Constitutional and Jurisdictional Fact, 70 HARV. L. REV. 953 (1957) and Was Brandeis an Activist? The Search for Intermediate Premises, 80 HARV. L. REV. 986 (1967); H. Shulman, The Demise of Swift v. Tyson, 47 YALE L. J. 1336 (1938); H. Hart, The Relations Between Federal and State Law, 54 COLUM. L. REV. 489 (1954). One need only reflect on Brandeis’s majority opinion in Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938), and his concurring opinion in Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 341 (1936), to recognize the powerful syntheses that Brandeis worked upon procedural law: see, e.g., TONY FREYER, HARMONY AND DISSONANCE, THE SWIFT AND ERIE CASES IN AMERICAN FEDERALISM 101-164 (1981), and Bickel, supra 95, at 1-20.

124 Cover, supra note 4. Cover’s discussion of Brandeis’s First Amendment theory, though not about the formalizing of procedural techniques to shape judicial review, does reflect Brandeis’s vision of and approach to problems of federalism embedded in the First Amendment. Similarly, the discussion below seeks to elaborate on Brandeis’s approach to judicial review of state action caught between constitutional Commerce Clause and Due Process Clause limitations.

125 On the informal character of Brandeis’s approach, see infra text at notes 134 et seq.

126 See also, E. E. Steiner’s piece on Brandeis’s New State Ice opinion and his attempt to reconcile local experimentation with pluralism on a national scale – E. E. Steiner, A Progressive Creed: The Experimental Federalism of Justice Brandeis, 2 YALE L. & POL’Y REV. 1 (1983). Incidentally, both Steiner and Cover, supra note 4, advance our understanding by reexamining Brandeis’s legal theory in the light of history: Cover sets Brandeis’s opinions against progressive writing on public opinion and political movements; Steiner explores the writing on local authority and pluralism.

127 The discussion here focuses on Brandeis’s majority opinions, not dissenting or concurring opinions, and his ability to frame an alternative perspective on constitutional adjudication for the majority.

128 See supra text at note 34 et seq.

129 The opening technique we focus on here was most apparent during the first 10 years of Brandeis’s career on the bench. By the 1930s many things had changed, including the Court’s perspective on cases inviting judicial review, Brandeis’s relationships with fellow justices, and, of course, the political climate.
adapted the technique to “constitutionalize” deliberation in reviewing state action, we may begin by convincing ourselves briefly that Brandeis’s openings are in themselves significant.\(^\text{130}\)

Contrast Brandeis’s opening style with judicial convention, both then and now. Supreme Court opinions routinely proceed from such phrases as: “This case is before us on certiorari . . . “;\(^\text{131}\) or, “The question presented today is whether . . . “;\(^\text{132}\) or, “Plaintiff brought this suit in the district court to recover for damages suffered when . . . “.

Nevertheless, I am convinced, after reading through Brandeis's openings -- see, 2 SUPREME COURT OF THE UNITED STATES, 1789-1980: AN INDEX TO OPINIONS ARRANGED BY JUSTICE 629-645 (L. Blandford & P. Evans, eds. 1983), for a comprehensive alphabetical listing of the cases, and Frankfurter, supra note 123, for a classification of Brandeis cases through the 1931 term -- that Brandeis followed relatively consistent, but among judges unique, stylistic patterns. Indeed, even Brandeis’s protegé, Frankfurter, rarely began opinions with striking openings -- but, cf. Railroad Commission of Tex. v. Pullman Co., 312 U.S. 496 (1941), at 497 (Frankfurter, J., Opinion of the Court). The cases selected below constitute no more than a selection; other striking sets of Brandeis openings are found in his FELA decisions and in opinions that concern geographical entities -- e.g., cities and navigable waters.

When I first noticed the pattern -- I was then still in law school -- I was not quite certain what to make of it, whether from a semantic, stylistic or legal standpoint. Originally, I had hoped to write more broadly on the "meaning" of judicial openings. Yet, when I sought to discuss the pattern(s) with my law professors, they dismissed my observations without interest (I might add, with prejudice). At the time, only my classmate, Tom Hazen, now Professor of Law at the University of North Carolina, thought the Brandeis patterns sufficiently provocative to warrant elaboration.

\(^{131}\) In McDonald v. Chicago, Justice Alito begins his opinion for the Court with an explanation of how the case arose: “Two years ago, in District of Columbia v. Heller, 554 U.S. 570, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008), we held that the Second Amendment protects the right to keep and bear arms for the purpose of self-defense, and we struck down a District of Columbia law that banned the possession of handguns in the home.” 130 S. Ct. 3027. Justice Stevens begins his dissent similarly, id. 3089.

\(^{132}\) Justice Scalia, writing for the Court in D.C. v. Heller, begins as follows: “We consider whether a District of Columbia prohibition on the possession of usable handguns in the home violates the Second Amendment to the Constitution,” 554 U.S. 573. Similarly, Justice Breyer begins his dissent in the same case with the “question” – to wit: “We must decide whether a District of Columbia law that prohibits the possession of handguns in the home violates the Second Amendment,” id., at 681. Justice Stevens begins his dissent similarly, but with a twist – to wit, what the question is “not”: “The question presented by this case is not whether the Second Amendment protects a ‘collective right’ or an ‘individual right.’ . . .” id., at 636.

\(^{133}\) Justice Roberts, for instance, begins his concurring opinion in Citizens United v. F.E.C. as follows: “The Government urges us in this case to uphold a direct prohibition on political speech.” 130 S. Ct. 876, 917 (2010).
Indeed, Brandeis proceeded with much the same logic—the facts of the case, the procedural history of the case, the rule in question or the constitutional issue presented—but modified the style in ways that went beyond what Walton Hamilton might have thought “charm.”  

To begin, what I have in mind illustrates itself simply in two very different kinds of cases:

On August 4, 1914, Great Britain declared war against Germany and on August 12, 1914, against Austria-Hungary.

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The armistice with Germany was signed November 11, 1918.

The first case involved contract rights in private international law, the second the validity of federal prohibition legislation. Yet, despite their differences, both cases turn on the significance of war itself, the extent to which the prospect and conditions of war call for different rules of social life. Here in the openings, then, we see Brandeis framing “deliberative” perspectives on the cases.

A second example is even more striking, for it illustrates Brandeis’s keen instinct for building on popular preferences, preferences he did not always share. In *Chicago Board of Trade v. United States* Brandeis begins as follows:

> Chicago is the leading grain market in the world. Its Board of Trade is the commercial center through which most of the trading in grain is done.

The case involved a cooperative “price-fixing” or clearing rule among the Board’s “1,600 members including brokers, commission merchants, dealers, millers, maltsters, manufacturers of corn products and proprietors of elevators.” The rule sought to preserve the integrity of the Board as a market. At issue was the Sherman Act’s prohibition against agreements in restraint of trade, along with the “rule of reason” the

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134 Walton Hamilton, *The Jurist's Art*, 31 COLUM. L. REV. 1073, 1077 (1931). Hamilton was not referring to Brandeis’s openings; rather, he was alluding to aspects of Brandeis’s style that seemed out of phase with judicial taste at the time -- cf. e.g., Holmes’s comments on Brandeis’s advocacy and excessive footnoting, in *Holmes-Laski Letters*, supra note 109, at 128.


136 The two cases drew or extended exceptions to a general rule. See also, Cover’s discussion in supra note 4, on war and peace with respect to Brandeis’s interpretation of the free speech clause.

137 I.e., "bigness" — see Zacharias, op. cit. supra note 2, at 599 et seq.

138 Chicago Board of Trade v. United States, 246 U.S. 231 (1918).

139 Id., 235.

140 Id., 235-236.
Court’s earlier decisions had imputed to the Act.\textsuperscript{141} Brandeis, for the majority, wrote that the intent and design of the Board’s restraining rule was reasonable; and after the first sentence no reader would doubt that there, in Chicago, in the heartland of America, was an institution worth preserving (although we may note with some irony one that was plenty Big as well!).

Note that Brandeis’s perspective on the cases presupposes a duality. In the \textit{Chicago Board of Trade} case, for instance, the underlying question opposes two means to social ends—the restrictive rule of cooperation on the one side, on the other untrammeled competition. By alluding so enthusiastically in his opening sentences to the end-product of cooperation, Brandeis all but answers the underlying question. We will find a similar strategy when we turn to Brandeis’s opinions for the Court in constitutional cases.

Let’s consider, then, some cases that touched on political process. There were, essentially, two kinds. In the one Brandeis asked the Court to abstain, in the other to intervene.\textsuperscript{142} To build consensus on abstention, Brandeis drew perspectives on the cases that initially turned the Court’s attention away from the substantive issues and at the same time rendered the justices sanguine about deferring to the political process—for instance, that deliberation had run its proper course, was proceeding apace, or probably would.

Take, for example, \textit{Omaechevarria v. State of Idaho}.\textsuperscript{143} The Court is asked to review, on Fourteenth Amendment grounds among others, an Idaho statute penalizing shepherds for allowing their sheep to graze on ranges previously occupied by cattle. Brandeis opens his opinion with this sentence:\textsuperscript{144}

\begin{quote}
For more than forty years the raising of cattle and sheep have been important industries in Idaho.
\end{quote}

He next lays out the practical constraints facing lawmakers and traces the law’s history from its inception by Idaho’s then still territorial legislature through several modifications.\textsuperscript{145} In conclusion, Brandeis found the statute reasonable—just as one would expect from his opening which makes clear that Idaho’s legislature, more than any other political agency, had both the stake and experience to work out a proper compromise.

\textsuperscript{141} Standard Oil Co. v. United States, 221 U.S. 1 (1911).
\textsuperscript{142} See supra, text at notes 47-64.
\textsuperscript{143} Omaechevarria v. State of Idaho, 246 U.S. 343 (1918).
\textsuperscript{144} Id., 344.
\textsuperscript{145} Id., 344-346.
We can find a similarly striking example of deference to local wisdom in *Galveston Electric Co. v. City of Galveston.*\(^{146}\) The narrow question was whether the ratemaking board had imposed a confiscatory rate on the utility. More broadly, the issue was whether fourteenth and fifth amendment judgments about “fair value,” or the investment basis to be assigned for ratemaking purposes, are best left to the determination of local interests. Brandeis, arguing for deference, begins the Court’s opinion as follows:\(^{147}\)

The street railway system of Galveston was started as a horse car line in 1881. Simply stated, it is in Galveston’s interests—and the community polity has managed responsibly thus far, to judge by the city’s forty-year oversight of the railway\(^{148}\) -- to work out a reasonable rate with its utilities. Larger interests such as national integrity or the Fourteenth Amendment simply had nothing to say about this case.\(^{149}\)

By creating a perspective that contrasted the Idaho and Galveston deliberations against national integrity, Brandeis succeeded in winning the Court’s abstention quite readily. Nevertheless, since both *Omaechevarria* and *Galveston Electric* centered on issues of primarily local concern, we should ask how Brandeis might have used the same technique to secure state action even though the issue transcended local boundaries. This was, if you will recall, the case in *Muller.*\(^{150}\) There Brandeis referred to other states’ legislation to show that Oregon’s law reflected a national deliberative process even though it did not enjoy any official federal approval. He made much the same point even more strikingly in the *Swift v. Hocking Valley Railway* case.\(^{151}\) There petitioners challenged state laws establishing railroad demurrage charges by suggesting that those charges threatened to disrupt the federal transportation system. Brandeis answered by referring to the national deliberative process that had actually given rise to the state law. Thus, he opens the Court’s opinion as follows:\(^{152}\)

The National Convention of Railway Commissioners, an association comprising the commissioners of the several states, adopted in November, 1909, a Uniform Demurrage Code. Its action was based upon extensive investigations and thorough discussion, participated in by the railroad commissioners, commercial organizations, representatives of railroads, and individual shippers from all parts of the country.

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147 Id., 389.
148 Id., 389-390.
149 Cf., e.g., another vivid geographic opening in Sears v. City of Akron, 246 U.S. 242 (1918).
150 See supra text at notes 19 et seq.
152 Id., 283.
BRANDEIS’S PERSPECTIVE AND THE POLITICS OF ECONOMICS

Perspective—that is, Brandeis’s implicit contrast of different levels of political deliberation to grant or, as we shall see, deny constitutional validity—had important implications for “fact-finding.” We can begin to see this more clearly in the dilemma that Brandeis confronted in reviewing state action. For the states were vulnerable to two very different and potentially contradictory constitutional challenges—namely, Commerce Clause claims on the one hand, and Fourteenth Amendment claims on the other. These challenges ultimately rested on the competing normative standards built into the Constitution—individual liberty and national unity.

The interpretation of Dred Scott that suggested self-restraint to the Court (the constitutional superego, as we put it earlier) allowed justices to reconcile the competing challenges. Simply stated, the legislature had to judge through its factual inquiries the extent to which either constitutional norm was threatened, and the Court could then defer to the legislature’s judgment. In contrast, the alternative interpretation of Dred Scott that suggested replication of the legislative inquiry held out little hope for reconciling the two challenges in a consistent manner, insofar as it gave the justices virtually a free-hand in deciding which legislation to overturn. For one might use social scientific projections, above all economic theory, to undercut any legislative judgment about the relationship between certain conditions and two competing norms. Brandeis, in moving the Court from one perspective on review to the other, sought to render the constitutional questions ones of political economy, not merely economic projection.

Brandeis’s facts—that is, the facts he used to introduce his cases—were designed to join economic issues with the problems of political deliberation. It was one thing, for instance, to assume that New York’s prosperity was tied to Chicago’s by some vague, half-understood “concatenation” of social events. It was quite another to note that trains transported beef from the one city to the other. Through the former perspective any authority that claimed to understand economic theory could see itself empowered to

153 See, e.g., BICKEL, supra note 95, at 164-201. Commerce Clause claims concerned themselves with the integrity of the national legal system and constrained or bounded "states' rights" from that perspective; Fourteenth Amendment claims concerned themselves with individual liberty and equality, and so bounded the states from another, in some sense, opposite perspective. Thus, the Supreme Court had considerable discretion to restrain or liberate state lawmaking powers. Much of that discretion was, at the same time, intertwined with elusive notions of the "public interest" -- for two influential accounts, see, Walton Hamilton, Affectation with a 'Public Interest,' 39 YALE L. J. 1089 (1930) and FELIX FRANKFURTER, THE COMMERCE CLAUSE UNDER MARSHALL, TANEY AND WAITE (1937).

154 See e.g., Urofsky, supra note 22, and supra text at note 55 et seq.

155 But cf. Arthur Shenfield, The Influence of Holmes and Brandeis on Labor Law, 3 Gov’t Union Rev. 30, 50 (1982), asserting that Brandeis’s blend of political and economic concerns was tantamount to balancing “truth [i.e., economics] against error [i.e., politics].”

156 “Concatenation” is Thorstein Veblen’s imagery in his THEORY OF BUSINESS ENTERPRISE (1904) – see, supra text at notes 7-12.
draw legal conclusions. In contrast, through the latter perspective the fact of political interest subjugated any pretense to authority that might accompany an understanding of economic theory.\textsuperscript{157} It was in drawing these connections and then elaborating on the adequacy of one forum or the advantages of another that the constructive nature of Brandeis’s activism in economic rulemaking comes across.

Consider, for example, the \textit{Western Transit} case.\textsuperscript{158} A shipper has won judgment in a New York state court for the full value of copper ingot that disappeared while sitting in defendant’s Buffalo warehouse. The defendant attacked the judgment on the ground that ICC regulations limited recovery to the Bill of Lading schedule of liability, in this case a sum roughly a third of the actual loss.\textsuperscript{159} The state court ruled for the shipper, but Brandeis speaking for the Court overturned the judgment. The opinion opens by emphasizing the geographical context of the state court’s decision:\textsuperscript{160}

The Western Transit Company, operating steamers between Buffalo and other points on the Great Lakes, formed, with the New York Central Railroad, a “lake and rail” line between Michigan and New York City.

Brandeis then goes on to characterize the joint venture in virtuous terms, as bestowing valuable new services on shippers over a wide region.\textsuperscript{161} The upshot is that local interest and law must give way. Local deliberation, no matter how well reasoned, is simply incapable of taking into account the larger interstate interests the “facts” encompass.\textsuperscript{162}

The \textit{Philippine Sugar Estates} case\textsuperscript{163} provides a similar example of local action falling to national interest. In that case the Philippine Islands Supreme Court had ruled on a matter of Philippine (i.e., local) contract law. The U. S. Supreme Court customarily deferred to rulings on local law by the highest court of a territory or possession.\textsuperscript{164} Yet, as in \textit{Western Transit}, Brandeis, for the majority, overturned the Philippine Supreme Court’s decision. The first sentence leaves little doubt that the U. S. government has a leading stake in the case.\textsuperscript{165}

\begin{footnotes}
\item \textsuperscript{157} \textit{Cf., supra} text at note 44 \textit{et seq.}
\item \textsuperscript{158} \textit{Western Transit Company v. A. C. Leslie & Co., Ltd.}, 242 U.S. 448 (1917).
\item \textsuperscript{159} \textit{Id.}, 450. Still, the sum at stake in the case was hardly large -- $94 under federal provisions versus $271 and change under the state court judgment.
\item \textsuperscript{160} \textit{Id.}, 449.
\item \textsuperscript{161} \textit{Id.}
\item \textsuperscript{162} This case, like many others, may surprise those who have read Brandeis casually; for by and large he is accused of favoring -- almost to the point of obsession -- local business and community interests along with local social control over national industrialization and the efficiencies of consolidation. Quite to the contrary, Brandeis sought a balance, and his constitutional adjudication reflected that balance.
\item \textsuperscript{163} \textit{Philippine Sugar Estates Development Co. v. Philippine Islands}, 247 U.S. 385 (1918).
\item \textsuperscript{164} \textit{Id.}, 390.
\item \textsuperscript{165} \textit{Id.}, 386.
\end{footnotes}
When Spain ceded the Philippine Islands to the United States large tracts of agricultural lands were owned by the great religious orders.

The point here is that Brandeis sought to justify the Court’s intervention in substantive matters by placing the cases in their deliberative perspective. That is, the U.S. Supreme Court, charged as it was with national integrity, had to guard questions of national interest against the corruption or preemption of local politics. The deliberative perspective, moreover, was not a matter of imposing normative theory, whether economic or political, but relied on the “essential facts” that tied economic to political activity. In *Western Transit* it was the fact of an interstate lake and rail system; in *Philippine Sugar Estates* the fact that the United States, as conqueror, had won the spoils.

Both of the preceding cases involved local court decrees, and for that reason we can understand Brandeis’s willingness to intervene as but slight deviations from his path toward judicial restraint in reviewing local economic policy. Yet, in *Thompson v. Consolidated Gas Utilities* Brandeis deviated much farther, striking down, on Fourteenth Amendment grounds, a Texas law regulating well-owners’ rights to produce natural gas. An administrative order allocating the production of gas had so restricted the production of certain well-owners with substantial pipeline capacity that they were forced, in effect, to purchase gas from competing well-owners (without pipeline capacity) to meet their contractual requirements. The pipelines, in several instances, served out-of-state communities; and nothing precluded the construction of pipelines to other communities by the second class of well-owners. Brandeis, speaking for the Court in 1937, begins the opinion by referring to the state legislature’s deliberations, upon which he subsequently elaborates extensively:

This case challenges the validity of a gas proration order issued by the Railroad Commission of Texas for the Panhandle fields on December 10, 1935, and

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166 While statements about "essentials" on the part of Brandeis are no less normative than anyone else's, the statements were not part of any broad based normative theory about deliberation, federalism or the like. Over the years many have referred to the fact explosion to which Brandeis's generation was the original witness. The progress of law is attributable to a learning curve: judges learning both to express themselves in new ways and to travel beyond the point of social impact, or hard facts, into the realm of explanation — see, e.g., BRUCE ACKERMAN THE RECONSTRUCTION OF AMERICAN LAW (1982). The problem for judges, in maintaining the legitimacy of their judgments, is in separating explanation from prediction, enforcement from policy. Toward this end judges are ever receptive to formalistic means — see, e.g., Morton Horwitz, *Law and Economics: Science or Politics*, 8 HOFSTRA L. REV. 905 (1979). Yet, Brandeis had to develop an individual style to reach beyond the formalism of his contemporaries. In the national deliberative process and the expertise of public servants he was able to discover meanings that persuaded.

167 In the two cases the Supreme Court was reviewing local court decisions, not legislative acts. Accordingly the review and overturning was not a direct intrusion into the deliberative process.


169 Id., 57-58.

170 Id.
carried forward in supplemental orders. The orders were entered under chapter 120 of the Texas Acts, 1935, Forty-Fourth Legislature, Regular Session, commonly known as House Bill 266.

In overturning the state’s order Brandeis concluded that the allocation was a naked redistribution, undertaken “to prorate not production [i.e., a local matter], but distant markets and the facilities for serving them.”\(^{171}\) Once again, in this frame, the matter was one for deliberation not in a state’s legislature, but on a national scale, whether by the states collectively, their representatives in Congress, or federal administrators.

Samuel Konefsky, in noting the opinion, did not characterize the *Thompson* case as an anomaly; rather he saw it as the vigorous expression of one who, no less than Holmes, recognized the ends of property.\(^{172}\) Konefsky is, I think, correct in his insight that Brandeis held fast to property doctrines.\(^{173}\) Yet, at the same time, in Brandeis’s presentation of the *Thompson* case we are confronted with more than merely “the taking of one man’s property and giving it to another.” The case was about deliberation; and Brandeis, I suspect, saw the Court’s procedural mission quite differently, for instance, than Justice Stone at the writing of footnote four in the *Carolene Products* case.\(^{174}\) There were times, in Brandeis’s estimation, when the national integrity with which the Court was charged would not tolerate the idiosyncrasies of state action. Within the Constitution one might label that intolerance a Commerce or Supremacy Clause intervention. Or, as in *Thompson*, one might envision a need to preserve the larger political process against its reckless parts and label the grounds of intervention “due process.”

So far we have pointed to the peculiar nature of Brandeis’s first sentences as well as to his overall body of work as evidence of Brandeis’s intentions. Admittedly, there is little in the record to confirm my inferences, neither Brandeis’s use of first sentences as a tactic, nor his larger “deliberative process” strategy in “reframing” the Constitution. Still, Harvard Law School’s special collections contain some of Brandeis’s opinions in draft, and the *Thompson* opinion records appear quite complete. Thanks to the late Professor Paul Freund, at the time the trustee of these records, I was granted permission to transcribe and include some of the earlier drafts here. A review of the *Thompson* opinion drafts provides insight into Brandeis’s intentions on first sentences.

In all, there are about 38 drafts of the opinion. Interestingly, the body of the opinion was completed relatively early on in the process. Writing and rewriting the first several paragraphs absorbed much of Brandeis’s attention. The very first draft, written in

\(^{171}\) Id., 68.
\(^{172}\) KONEFSKY, supra note 18, at 270-271.
\(^{173}\) Elsewhere I have explored how Brandeis did so even after property lost meaning in constitutional discourse – see, Zacharias, supra note 2.
Brandeis’s hand, focuses attention on the fact that the Texas legislature has delegated far-reaching power to the Texas Railroad Commission, not only to effect state policies on oil and gas conservation, but to regulate production in the United States’ largest natural gas field. In other words, he had in mind a collision between deliberative processes at the state level and the interests of the greater U.S. economy, which by then was in the throes of the Great Depression. The collision is reminiscent of Thorstein Veblen’s warnings, quoted earlier, 175 about the potential for widespread disruptions to America’s concatenated economy that attended a “disturbance of the balance at any point.”

Brandeis’s initial draft of the opening paragraph, along with his edits, reads as follows: 176

House Bill 26 Chapter 120 of the Acts of Texas (House Bill 266) is a comprehensive measure which declares the State’s policy with reference to the conservation of oil and natural gas and confers upon the Railroad Commission the broad powers of regulation. . . . this suit was brought [it?] in the federal court for the western district of that State, challenges the validity of to enjoin the enforcement of proration orders made by the Commission December 10-18, 1935. The orders limits [sic] the production of sweet gas in the Texas Panhandle, the largest natural gas field in the United States, -- an enormous reservoir of gas and oil extending through six counties for a distance of 126 miles with a width of from 10 to 40 miles, and [The?] plaintiffs who are producers in the Western Panhandle field, claim that the orders are invalid, both because they are in excess of the [?] conceived by the statute; -- and because as construed, of certain provisions of the statute, as construed, under which the orders purport to be made violate the Federal Constitution and [that of?]. The District Court, three judges sitting, held the orders void [granted a temporary injunction against Texas Pan Gas Co. & Thompson; and against their enforcement. 12 Fed. Supp. 462; and lat. also a permanent injunction made it permanent. 14 Fed. Supp. 318. The case is here on appeal.

After working on the body of the opinion in the following two drafts, Brandeis returned his attention to his opening paragraph. 177 In his fourth draft he adopted most of the changes he had inserted in the first draft, but refined his description of the Texas Panhandle oil field and its oversight in the third sentence of the opening paragraph. 178 In the fifth draft, however, he decided to revise his opening sentence as follows:

175 Supra, text at notes 7-9.
176 The Louis D. Brandeis Papers, Part 2, 1932-1939, Harvard Law School Library, Microfilm Reel 26, Frame 0794 [hereinafter, Brandeis Papers, Part 2]. The first draft is all handwritten with insertions (underlined words in the text above).
177 Id., Reel 26, Frames 796-804.
178 Id., Reel 26, Frame 805.
Chapter 120 of the Acts of Texas, 1935 (House Bill 266) is a comprehensive measure which declares the State’s policy with reference to the conservation of oil and natural gas and confers upon the Railroad Commission broad powers of regulation.

became:

The orders purport to be issued under Chapter 120 of the Acts of Texas, 1935. This statute commonly known as House Bill 266 is a comprehensive measure which declares the State’s policy with reference to the conservation of oil and natural gas and confers upon the Railroad Commission broad power of regulation.

The addition of the phrase “orders purport” shaded the deliberative processes in Texas that had given rise to the orders in question. It virtually imputes a degree of corruption among those – i.e., the Texas Railroad Commissioners – charged with effecting the state’s oil and gas conservation policies. This taint, however, persisted only until the following, sixth draft, where Brandeis settles on an opening sentence that he would carry through to the published opinion with only minor edits:

This case challenges the validity of gas a [sic] proration order issued [?] by the Railroad Commission of Texas for the Panhandle fields on December 10th, 1935, and carried forward in supplemental orders.

Here, instead of focusing attention immediately on the state’s deliberative processes as a whole – that is, “Chapter 120 of the Acts of Texas, 1935 – Brandeis shifts primary attention to the deliberations of the state railroad commission.

The remaining drafts switch their attention back and forth from adjustments to the body of the opinion to re-arranging the central elements in what I have called his argument: namely, the powers of the state legislature, the deliberative processes of the state railroad commission, the significance of the oil and gas fields for the U.S. economy as a whole, and the claims of the appellants, who were not only producers,
but also distributors throughout the United States via pipelines they owned. In the earlier drafts Brandeis follows his first sentence with a description of the procedure in the case at hand. Thus, for instance, in the seventh draft, the opening paragraph reads in full as follows:182

This case challenges the validity of a gas proration order issued on December 10th, 1935, and carried forward in supplemental orders by the Railroad Commission of Texas for the Panhandle fields. Two suits to enjoin their enforcement were brought in the federal court for western Texas. One was by Texas Panhandle Gas Utilities Company, for which Consolidated Gas Utilities Corporation was later substituted as plaintiff; the other by Texoma Natural Gas Company. In each suit the members of the Railroad Commission and the Attorney General of the State were made defendants. The plaintiffs claim that the orders are invalid, both because they are in excess of the statutory powers, and because provisions of Chapter 120 of the Texas Acts, 1935, as construed, under which the orders purport to be made, violate the Federal Constitution, and that of the State. The two cases were consolidated for hearing. That the District Court had jurisdiction was conceded. Three judges sitting, granted a temporary injunction, Tex Pan Gas Co. v. Thompson, 12 Fed. Supp. 462; and made it permanent, 14 Fed. Supp. 318. The consolidated case is here on appeal. The record is extensive; the findings of fact explicit.

This paragraph remained relatively unchanged while he fiddled with other parts of the opinion.183

Then, in his nineteenth draft, he returned his attention to the opening paragraph. There he inserted a second sentence to sharpen his concerns with the Texas railroad commissioners’ order. The first two sentences then read as follows:184

This case challenges the validity of a gas proration order issued by the Railroad Commission of Texas for the Panhandle fields on December 10th, 1935, and carried forward in supplemental orders. The orders limit the production of the

182 Id., Reel 26, Frame 830.
183 In the following 10 drafts he added more substance to the opinion, only occasionally refining the wording, but not the content of the sentences or the structure of the opening paragraph. See, Id., Reel 26, Frames 835 (making small corrections in the text of the first paragraph), 841, 844, 850 (adjusts some word ordering within sentences), 860, 865, 872, 883, 905, and 922. The body of the opinion, which had developed from a two-page handwritten introduction in the first draft into a 19-page type-script at the point Brandeis circulated the final version to his fellow justices, grows out of a series of memoranda from his clerk: two on the “Construction of the Statute,” three on “[Evidentiary] Findings” as well as “Conflicts in the Evidence,” one on “Texas Law on the Review of Administrative Findings,” and one on the “History of Oil Proration in Texas.” See, Id., Reel 26, Frames 890-959.
184 Id., Reel 26, Frame 960.
gas from the plaintiffs [sic] wells to an amount far below the market demand therefor under their existing contracts and likewise far below their production, their transportation and their marketing facilities.

In his twenty-first draft Brandeis inserts a new third sentence to sharpen even further his concerns with the motives of the railroad commissioners and whether they were really carrying out the intent of the Texas legislature’s conservation policies. In other words, he implies, there has been a breakdown in the deliberative processes of the state itself on a matter of great national significance. Meanwhile, he has decided in this draft to relegate the procedural history of the case to a second, separate paragraph. The resulting first paragraph reads in full as follows:185

This case challenges the validity of a gas proration order issued by the Railroad Commission of Texas for the Panhandle fields on December 10th, 1935, and carried forward in supplemental orders. The orders limit the production of the gas from the plaintiffs’ wells to an amount far below their market requirements under existing contracts and, likewise, far below their production and their transportation and marketing facilities. It is charged that the purpose of so limiting their production is not to prevent waste or to prevent invasion of the rights of co-owners in a common reservoir, but solely [sic] compel the plaintiffs to purchase gas from other well-owners who wholly lack a market and who must stop production unless such purchases are made by plaintiffs and others similarly situated.

Brandeis remained satisfied with these sentences while he played with the following paragraphs and developed the body of the opinion in the next thirteen drafts.186 Throughout these drafts he continued to feature the procedure of the case in the second paragraph and his description of the Panhandle gas field’s significance and oversight in the third. In several later drafts we find him making minor edits in the first paragraph, mainly moving phrases around in the second and third sentences. It is not till the thirty-third draft that he drops in a new second sentence to clarify the railroad commissioners’ relationship with the Texas legislature. That sentence reads as follows:187

The orders were entered under Chapter 120 of the Texas Acts, 1935, Forty-Fourth Legislature, Regular Session, commonly known as House Bill 266.

185 Id., Reel 26, Frame 989.
186 Id., Reel 26, Frames 1002, 1014, 1025, 1035 (some minor changes in wording in the first paragraph), 1047, 1057 (some more minor changes in the first paragraph), 1067; Id., Reel 27, Frames 2 [“0002”], 18, 0031 (in this draft, Brandeis struck out the day the decision had been scheduled to be “issued” in the title of the opinion; to that point, the draft had been dated “Jan. 4, 1937”), 49, 62, and 90.
187 Id., Reel 27, Frame 130. The new sentence was typed vertically in the margin.
Curiously, we find the sentence above omitted from the following draft. However, the omission may simply have been the result of his working on two separate printed versions of the preceding draft simultaneously, especially in light of the fact that the draft with the sentence in question omitted seems to be the first in which footnotes appear in the introductory paragraphs. In any case, this sentence re-appears in the penultimate (thirty-seventh) draft. This configuration of the opinion’s opening paragraph remained in the published version of the opinion.

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“Reason” has no single form. Rather, in the Brandeis “way,” reason accommodates situations. It serves to mediate, reconciling the diverse interests in attendance. Dred Scott presented the Court with a situation in which the “reasoning” of one set of legislatures seemed inalterably opposed to that of another. National integrity, moreover, could not survive that clash of reason. Brandeis, in reconceiving the Court’s role as constitutional interpreter, merged two styles of reason. First, he obliged the Court to envision the deliberative processes and institutions that could achieve a “reasonable” accommodation among particular clashes of interest. Second, he led the Court to facilitate deliberation by envisioning the viable solutions toward which an appropriate rulemaking institution might strive.

Brandeis could not project the “reasoning” that power-wielding institutions, both public and private, would bring to bear on controversial issues to win support for their rule. But his “facts,” both those that gave the cases their political economic perspective and those that compelled the Court to restrain itself, gave substance to the lens that mediated between national security and decentralized progress.

188 Id., Reel 27, Frame 153.
189 Id., Reel 27, Frame 171.
190 Id., Reel 27, Frame 188. A reprint of this 19-page draft was sent to the printer with a request for “18 copies” that were, presumably, circulated to the other justices. Some of the circulated copies came back to Brandeis with minor corrections (on pages 5 and 13 of the draft). In the accompanying “Memorandum” slips, each justice signaled his approval. Justice Cardozo, for instance, wrote: “Yes, sir. A fine opinion. BNC” – Id., Reel 27, Frame 263. “CJ” (the Chief Justice at the time was Charles Evans Hughes) wrote back: “A very able and important opinion – I agree” – Id., Reel 27, Frame 363. Justice Sutherland wrote: “I agree. A very well considered and unusually well drawn opinion” – Id., Reel 27, Frame 383. Justices Roberts (Frame 283), McReynolds (Frame 303), Butler (343) all also signaled their agreement, and Justice Van Devanter (Frame 323) “Agree[s] to all but the last paragraph and am hoping you will eliminate it.” Brandeis kept a tally of votes – see Id., Reel 27, Frame 243 – and indicated Van Devanter’s objection as well as the fact that Justice Stone was “not participating.” The decision was finally issued on Feb. 1, 1937 – see, Thompson v. Consolidated Gas Utilities Corp., 300 U.S. 55, 57-58 (1937).
191 See, PARSONS, supra notes 41 & 59. See also, HYMAN & WIECEK and FEHRENBACKER, both supra note 55.

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REFRAMING VS. REWRITING: CONTEMPORARY IMPLICATIONS

Elsewhere I have written about Brandeis’s reputation and its relationship to the rise and fall of liberal constitutional theory. The point worth reiterating here is that Brandeis was a transitional figure. That is, he moved the Court to a different perspective on its role, even though his own substantive vision of social order was out of phase with the social order that his successors (including many protegés) elaborated during the “Second New Deal.” Nevertheless, Brandeis has been consistently identified not just with judicial liberalism, but – somewhat incorrectly -- with the broader liberal vision of social order the Court has been monitoring since the Great Depression. As a result, the writers have missed some of Brandeis’s more useful contributions to the Court’s practice during the transitional period.

Just what are the implications then?

Brandeis’s career placed him squarely in the midst of the drastically changing social order brought on by American industrialization. The American polity, much as today, was irreconcilably divided. Competing assessments of what was going on and where society was headed abounded at the time. There are countless examples of reformers and social theorists who changed their outlook during that era on what the state should do.

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192 *See*, Zacharias, supra note 2.
193 Many candidates can be named here – Adolf A. Berle, Jr., Donald R. Richberg, David E. Lilienthal, David Riesman, among others, come to mind. *See*, Zacharias, supra note 2, at 603-608.
194 In this regard, as the New Deal has gradually been eclipsed, Brandeis’s normative prescriptions for social order, though largely irrelevant, have increasingly come under attack.
195 In writing some thirty years ago about the changing landscape of state-federal jurisdiction in Brandeis’s day compared with our own, I concluded as follows: There are numerous explanations for the breakdown of the liberal social order, but in the end two aspects of current social life will have to be reconciled before another vision can emerge. The current constitutional dilemma stems from much the same dual allegiance that the citizenry confronted in Brandeis’s time. On the one hand, citizens are allied with communities of interest, on the other with the state and its power to secure ends that grow out of political consensus. The difference between today’s dilemma and that of the earlier era is that the activities carried on by the communities of interest—specifically transnational business enterprises—are not largely confined to the geographic boundaries of the nation. Indeed, we are now in an age when transnational businesses have the potential for integrating economic activities in disregard of national power and even monetary systems. The justices by mediating the individual citizen’s choice to ally him or herself either with national political policies or with international economic interests, must contribute to a vision of the kinds and configurations of political institutions that in turn will generate positive substantive visions of a social order.
196 Herbert Croly, Walter Lippmann and Walter Weyl are best known. But consider Ida M. Tarbell: in 1904 she published her *HISTORY OF THE STANDARD OIL COMPANY*, an account of John Rockefeller’s ruthless monopolizing practices; by 1916, however, she had come to notice the *NEW IDEALS IN BUSINESS, AN ACCOUNT OF THEIR PRACTICE AND THEIR EFFECTS UPON MEN AND PROFITS*, much as Walter Lippmann had moved from his *PREFACE TO POLITICS* in 1913, a sharp critique of the politics.
As the “legal realists” eventually made clear, decisions based on rules were inconsistent; reliable forms of inquiry into social order and the normative vision effective rules could ultimately depend upon were missing from judicial deliberations. Holmes’s “bad man” reigned supreme.

Brandeis—and he was not alone—understood that a political process for generating clear visions about social order and consensual norms had to complement an understanding of what the society could achieve. And in the Court he saw the constitutional mechanism for developing that process. His greatness is not attributable to the caliber of his personal vision or the “facts” that sustained it, but to his nurturing of a political process that gave credence to competing parts of the vision—the security of the whole as well as the decentralized progress that accompanied individual freedom. Brandeis’s greatness was in his capacity to describe a political process that was attempting to mediate rather than decide conflict. By articulating the facts of the deliberative process— for instance, that not just one state legislature stood behind the rule in question, but twenty or thirty legislatures, and that the history of that legislation portended a clear trend with respect to where all of the states, indeed the nation, would soon stand— he was able to engage his fellow justices in mediating, rather than deciding (and thereby exacerbating) the nation’s conflicts.

The changing facts surrounding the deliberative process today are an extension of those that were characteristic of Brandeis’s time. During the Progressive Era the nationalization of industry compromised the several states’ jurisdictions. The central question for the Court was whether a state’s law could be sufficient to address economic and other social issues, or whether something more was necessary to reinforce state law. As Brandeis so often pointed out reinforcement could take the form of collective action on the part of many states or the adoption of “uniform” laws developed through professional associations; but when the states’ powers or will to coordinate their laws failed, then often the time was ripe for interventions by some branch of federal government.

Thirty years ago when I wrote an earlier draft of this piece, I noted that contemporary industrial concatenation was increasingly tied to international commerce and transnational migration, and accordingly that new national-transnational conflicts were superseding the state-federal kinds of constitutional conflicts that had absorbed the Court in Brandeis’s day. During the years since it has become clearer just what those emerging conflicts entail. We are now a divided nation with divergent interests and divergent allegiances. One “America” comprises the cosmopolitan regions that are closely tied to the international community -- international banking and finance, intense migrations with all of their cultural effects, the influences of the “world wide web” of indifference and the statecraft of “drift” to his DRIFT AND MASTERY in 1914, a more sanguine appraisal of modern management (or managerial capitalism) and the role of business.
(Internet) on commerce and privacy, and so forth. The other “America” consists of the so-called “heartland” regions that have the capacity, at least in theory, to isolate themselves from transnational influences. To some, the notion of the heartland suggests a conservative political idyll, where Americans can live in smaller communities, parents can educate their children at home, property owners can defend themselves with their own arms, government institutions, including schools and police (and organized labor), are scarce, and good order is centrally coordinated by local churches or other religious institutions. Just how much of this idyll is realistic without government support and protection is not clear, but the idyll has generated a set of constitutional ideals and values that are the framework and rallying cries for a new brand of “conservatism” that has dispersed through the nation’s deliberative processes in recent years. Meanwhile, the debating points for these two Americas have become incommensurate, so that the reform of cosmopolitan America, which depends on government institutions for coordination and regulation, has been brought to a standstill. Americans in those regions don’t share “a church”; they need policing that is broadly accountable and transparent; they need schools that are both effective and contribute to the socializing of the region; and they need much more coordination than the pure workings of “the market.”

For the Court to have a positive influence on these troubled political relations, it would have to find ways to reconcile the divisions, whether by way of decentralizing the governing authorities or supporting compromises at the federal level that allow both Americas to move on. Just how it can resolve the political conflicts, let alone repair them, is not clear. Many commentators seeking to unravel the current tangle would begin with the aftermath of Roe v. Wade, but the lessons of that case are ambiguous.

On the one hand, there are those who view Roe v. Wade as divisive, insofar as it cut off debate on central questions still being deliberated at the time in state legislatures and courts. In 1973, when Justice Blackmun published the opinion of the Court, 20 state legislatures had already re-evaluated abortion restrictions and opened the way to reproductive reform. The revisions had occurred in roughly a three-year period leading up to the case. At the same time, 30 state legislatures were still holding fast to laws criminalizing abortions, laws that for the most part had been enacted during the 19th century. We will never know just what might have happened in these other 30 states had the political process been allowed to unfold without interruption, let alone how the

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198 See, e.g., Harold L. Wilensky, AMERICAN POLITICAL ECONOMY IN GLOBAL PERSPECTIVE (2012).

nation as a whole might have responded;\(^\text{200}\) yet, the Supreme Court’s decision unquestionably cut off the deliberative processes over these issues prematurely.\(^\text{201}\) Justice White, in his dissent in the companion case, *Doe v. Bolton*, pointed this out: \(^\text{202}\)

The upshot is that the people and the legislatures of the 50 States are constitutionally disentitled to weigh the relative importance of the continued existence and development of the fetus, on the one hand, against a spectrum of possible impacts on the mother, on the other hand. As an exercise of raw judicial power, the Court perhaps has authority to do what it does today; but in my view its judgment is an improvident and extravagant exercise of the power of judicial review that the Constitution extends to this Court.

At any rate, the upshot of cutting off the political deliberations around abortion in 1973 is thought to have entrenched the two sides in battle lines that have thwarted all possibilities for compromise, much less reconciliation, in the years since.

On the other hand, there is evidence that *Roe v. Wade* was not the cause of the divisive, no-holds barred kinds of politics that the nation has experienced in recent decades, but simply a side-plot that paralleled ongoing political machinations both before and following the case. In an alternative and insightful analysis of the events, Linda Greenhouse and Reva Siegel suggest that the dominant factor in the abortion debates both before and after 1973 was not the Court’s intervention as much as the strategies of the conservative wing of the Republican party to reshape party allegiances at the federal level by attracting Catholic voters and white voters in the South, many of whom had

\(^{200}\) Would women in restrictive states have taken note of the inequalities to which they were subjected? Would they have engaged more actively in their own states’ political processes to effect change (leading perhaps to decriminalization, but also to other forms of restraint on abortions)? Would women and medical systems and human rights workers in less restrictive states have reached out and developed new private systems to ensure the full range of reproductive services for women in more restrictive states, including subsidized travel to and from the differing states? Would Congress have intervened to preempt schism among the states? Would the political process have made birth control and sex education more available in states where abortion as a last resort was not an option?

\(^{201}\) Justice Blackmun was careful in his opinion for the Court in *Roe v. Wade*, not to assign unconstitutional religious motives to existing laws prohibiting abortions, much as the Court in *Griswold v. Connecticut* had avoided striking down laws banning contraception on religious grounds, even though those laws were at best thinly veiled edicts of “the church.”

In any case, the point, made by the dissenting justices in both *Roe v. Wade* and *Doe v. Bolton*, was that the Court could have at least waited for the case to ripen – that is, for some state prosecutor to bring felony charges against and actually convict a woman who had terminated her pregnancy, or to prosecute her doctor. At some point, there would have been more solid grounds for Supreme Court intervention – for instance, when women in some states were permitted to seek abortions freely, whereas in other states similarly situated women wound up in jail. If the Congress had not stepped in by this juncture to ameliorate the situation, then the Court could have sensibly entered the fray to preserve the Union.

\(^{202}\) *Doe v. Bolton*, at 410 U.S. 179, 222 (White, J., dissenting).
formerly been aligned with the Democratic party. In other words, the current intractability of our political divisions is a profound and ongoing political problem, not the outgrowth of misguided judicial meddling. The irony is that these political strategies have led Republican Presidents to appoint five justices who are part and parcel of the realignment – that is, conservative and apparently religious Catholics; in holding sway over the Court, these justices seem to look back on Roe v. Wade not as a warning against short-circuiting political deliberation, but as precedent for political opportunism.

Specifically, the Court in recent years has returned frequently to the business of creating substantive constitutional rights where they did not exist before, and in doing so disrupting the political process. Justices Scalia and Alito have rewritten the Second Amendment in order to disable Congress and all state legislatures in their attempts to regulate handguns and other firearms. Justice Kennedy has rewritten the First Amendment to disable Congress in its attempts to regulate corporate participation in election campaigns. And during the last term, Justice Roberts, in at least a gesture that resembled mediation (or compromise), nevertheless thwarted Congress’s effort to regulate health care markets under the Commerce Clause following over 100 years of congressional deliberation on national health care, not to mention multiple federal

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205 Citizens United v. Federal Election Commission, 558 U.S. 310 (2010). The First Amendment decrees that “Congress shall make no law . . . abridging the freedom of speech . . .,” not that Congress shall make no law regulating federal elections, or regulating corporations, or regulating corporate participation in federal elections. If we are going to be “originalists,” we should at least get our history straight. At the time of the framing, corporations were chartered by the states. The powers of these corporations were strictly circumscribed in their charters to specific purposes. No one would deny that the promoters and investors in these chartered entities had the right to make their views known in the political affairs of their times, to petition their governments, to assemble in public personally. But they were not permitted to divert corporate funds from the purposes specified in the corporate charters (granted or conceded by the state) to political engagements that were not specified. It was only much later in American history that states began to enact more general laws of incorporation so that, in the earlier versions, all citizens had access to the possibilities of incorporating and that, in later versions, the incorporators were no longer required to circumscribe the corporate purposes strictly. See, e.g., J.WILLARD HURST, THE LEGITIMACY OF THE BUSINESS CORPORATION (1970); Morton Horwitz, Santa Clara Revisited: The Development of Corporate Theory,” 88 W. VA. L. REV. 173 (1985); and Ruth H. Bloch & Naomi R. Lamoreaux, “Corporations and the Fourteenth Amendment” (2013), Working Paper at http://economics.yale.edu/sites/default/files/files/Faculty/Lamoreaux/Corps-14th-Amend-13.pdf (accessed 11/14/2013). For further insights into the Majority’s inconsistency and disingenuousness with respect to First Amendment rights, see, e.g., Linda Greenhouse, “Justice(s) at Work,” NEW YORK TIMES, Opinionator [Online Commentary], Feb. 6, 2013 -- http://opinionator.blogs.nytimes.com/2013/02/06/justices-at-work/?emc=eta1 (accessed 11/14/2013).
The style in all of the more recent decisions differs somewhat from the earlier cases. Unlike Justice Peckham, or for that matter Justice Blackmun, the opinion writers have not relied on the “liberty or property” provisions of the 14th Amendment – that is, “substantive due process” – to establish rights that had not existed before under the Constitution. Instead, they created new, ahistorical understandings of what the “framers” of the Constitution had in mind “originally” when they included particular provisions. Here is not the place to review the nonsense; the dissenting opinions in those cases among other writings have attempted to set the record straight. My point here is not that the “originalists” on the Court are poor historians; my point is that they are poor constitutionalists, unwilling to find ways to reinvest that great document with the means to foster democratically sustained deliberative processes that can over time forge consensus around divisive issues. They have failed, as Justice Stevens put it in D.C. v. Heller, to differentiate the cases requiring intervention from those in which the deliberative processes at the state and/or federal levels seem to be resolving the issues on their own or moving in consensus-building directions.

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207 Id., 2601-2608.
208 Although Justice Alito in McDonald v. Chicago does rely on that clause in the 14th Amendment to “incorporate” the right to carry around handguns in the city of Chicago.
211 “While our entry into that thicket was justified because the political process was manifestly unable to solve the problem of unequal districts, no one has suggested that the political process is not working exactly as it should in mediating the debate between the advocates and opponents of gun control.” D.C. v. Heller, Stevens J., dissenting, 554 US 570, at 680, fn 39. Justice Breyer's dissent in Heller reiterates this sentiment, to wit:

[T]he majority's decision threatens severely to limit the ability of more knowledgeable, democratically elected officials to deal with gun-related problems. The majority says that it leaves the District "a variety of tools for combating" such problems. Ante, at 636, 171 L. Ed. 2d, at 684. It fails to list even one seemingly adequate replacement for the law it strikes down.

In McDonald v. Chicago, Justice Breyer, again dissenting, elaborates on the deliberative processes of the 50 states:
More recently the justices had an opportunity to confront these issues in the same-sex marriage cases, *U.S. v. Windsor* and *Hollingsworth v. Perry*. Not surprisingly, a decisive issue in both cases revolved about the deliberative process and the Court’s own role. Curiously, but also not surprisingly, the conservative core of the Court – Justices Scalia, Roberts, Alito and Thomas – chose to defend some version of the deliberative process insofar as it vindicated those justices’ substantive views. Perhaps more hopeful was the fact that the fifth member of this core, Justice Kennedy, was willing to take a more open-minded and inclusive approach to the political process. Specifically, in writing for the majority in the *Windsor* case, he recognized that the federal law, The Defense of Marriage Act (DOMA), stood in the way of the deliberative processes that had been going on in the states for almost two decades. In striking down Section 3 of DOMA, the Court enabled the deliberative processes to unfold more robustly and with more nuance. Interestingly, the national-transnational correlation to the heartland-cosmopolitan divergence that I mentioned earlier is reflected in the case quite strikingly; while Justice Scalia goes on about the American Way in his dissent (contrasting it at one point with German procedure), Justice Kennedy begins his opinion as follows:

Two women then resident in New York were married in a lawful ceremony in Ontario, Canada, in 2007.

The fact that judges do not know the answers to the kinds of empirically based questions that will often determine the need for particular forms of gun regulation. Nor do they have readily available “tools” for finding and evaluating the technical materials submitted by others . . . We have thus repeatedly affirmed our preference for “legislative not judicial solutions” to this kind of problem, just as we have repeatedly affirmed the Constitution’s preference for democratic solutions legislated by those whom the people elect . . . There are 50 state legislatures. The fact that this Court may already have refused to take this wise advice with respect to Congress in *Heller* is no reason to make matters worse here.

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212 133 S.Ct. 2675 (2013).
213 133 S.Ct. 2652 (2013).
214 In the *Windsor* case dissents, the conservative four sought to retain a federal law that trumped state laws permitting same-sex couples the “marriage” designation on grounds that the Court ought not second guess Congress’s deliberative processes. Ideally, Congressional repeal of DOMA Section 3 would have vindicated the deliberative process more directly, so to some degree Justice Scalia and company have a point; but one doubts that this is the conclusion he sought to facilitate. See, infra text at note 211. In the *Perry* case majority, Justice Roberts in effect sustained a California referendum that revoked the marriage designation from previously married same-sex couples and denied it to same-sex couples who would be married by vacating two lower federal court decisions on the grounds of justiciability (standing).
215 In some states, the rights have been forged through referenda and legislation, in others by judicial decrees under state constitutions. The spread of these new laws has been fairly recent, and the trend suggests that the phenomenon will spread to other states. There is no reason that these states should not recognize each other’s domestic relations laws under the “Full Faith and Credit Clause” of the Constitution, just as they have recognized somewhat variant marriage and divorce laws under the same provision of the Constitution.
216 133 S.Ct. 2675, 2682 (Kennedy, J., Opinion of the Court).
So at least we know that Justice Kennedy is open to the cosmopolitan and international perspective.\(^{217}\)

As I have noted, there were two sets of facts that Brandeis found noteworthy. One set, those that are conventionally understood as “Brandeis’s facts,” support the legislation—much as Justice Breyer called the empirical evidence on gun crime and gun control to the Court’s attention in the two Second Amendment cases.\(^{218}\) The other set, those that, as we noted here, appeared in Brandeis’s opening sentences and paragraphs, framed the constitutional significance of the cases as issues of political or deliberative process. Unlike Brandeis, neither the majority nor the dissenters have used Brandeis’s approach to frame the new “substantive due process” cases: Brandeis might have opened his opinion in Heller with reference to the 40 years of deliberation that the D.C. City Council had devoted to local crime and the role of handguns; or in the case of McDonald he might have opened by noting the multiple approaches of the 50 states and thousands of localities in mediating the desires of hunters, the fears of homeowners, and the devastation of gun violence for over two centuries of American history. Similarly, in Citizens United, Brandeis might at some point in an opinion have enlisted the facts of corporate political behavior in support of federal election laws, but he might well have framed his opinion at the start by noting Congress’s ongoing bipartisan attempts to come to grips with the new realities of campaign finance.

Like Justices White and Stevens, Brandeis was no radical. He simply loved his country and wanted the text of the Constitution to serve as a guide to keeping the nation on course toward consensus or at least peaceful co-existence. Perhaps Justice Roberts’s slight departure from his cohorts in National Federation of Independent Business v. Sebelius signaled an intention on his part to stop using the Constitution to further narrow interests and ideological preferences, and instead to support consensus-building through the deliberative processes of democratic representatives. Or perhaps it was an aberration. Time will tell.


\(^{218}\) In D.C. v. Heller, 554 U.S. 570 (2008), see e.g., 693-705 (Breyer, J., dissenting). In McDonald v. Chicago, 561 U.S. 3025, 130 S. Ct. 3020 (2010), see e.g., 130 S. Ct. 3134-3136 (Breyer, J., dissenting).
Legal Theory and The Holocaust: Between The Purposive and The Reflective

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Legal academia faces a perennial identity crisis. Law is a practical activity with real world consequences. Academic reflection on Law has a capacity to be similarly purposive and practical. Appellate courts often use academic insights to solve practice specific problems. On the other hand, most academics would balk at the idea that our thoughts are to be seen as a repository of suggestions for practice as to how it might go about its business. There must be space within legal academia for reflection on the broader context of human experience and what is said to us about human nature in law beyond the technical issues of the courtroom. There is a danger that in our debates on technical legal issues, we miss the point that law deals with human beings and tells us some profound truths about human experience. The same might also be said of debates within jurisprudence on discipline specific topics like ‘inclusive’ versus ‘exclusive’ positivism, or any theoretical approach that seeks to look at law from an ‘internal perspective’ or from the point of view of ‘the legal man’.

This tension is clearly seen in our responses to great human catastrophes like The Holocaust. Law faced a moral imperative to act in light of this atrocity. Important, immediate, practical problems were raised which required a purposive and creative response. This included the need to bring all of those responsible to justice for their crimes at a time when this was not a straightforward matter in principle or in practice. Legal academia played a vital role in meeting this demand. Yet in this rush to address such problems, there is a danger that reflection on what is being said to us about humanity might be lost. The sheer horror of these crimes also raised a moral imperative for thinking human beings everywhere to reflect on what man is capable of doing to his fellow man. A particularly radical form of detached reflection on The Holocaust has recently been put forward in legal academic literature. In this essay I argue against this utterly detached, ‘silent’ response. Practical, day-to-day needs must be the starting point for our contemplation of the human condition as it reveals itself through law or through horrific events like The Holocaust. No other starting point is possible or desirable, no other starting point is “human”. Our demand as legal theorists is to reconcile the purposive and practical with broader contemplation, not to forsake the former in favour of some ivory tower version of the latter.

* I would like to thank Sean Coyle, Robert Cryer, Marie Fox, Anna Grear, Stephen Smith and Gordon Woodman for their helpful comments on earlier drafts.

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I Claus Roxin and ‘The Legal’ Response to The Holocaust

Claus Roxin provided a goal-oriented, practical academic reflection on The Holocaust. I introduce this practical response in order to contrast it with the radically detached and reflective response suggested by others. The argument for more detached reflection seems to have missed the important practical gains that abandonment of a more purposive approach entails.

The Frankfurt Auschwitz Trials (1963-1965) involved the prosecution of those that had participated in organized murder at the Auschwitz-Birkenau concentration camps. The trials were held in West German domestic courts. In seeking to prosecute middle to low level Nazi officials, German criminal law faced a problem. Culpability for a crime under German law at that time had been determined by the subjective ‘will’ of a perpetrator or co-perpetrators. There was a possibility of leniency in sentencing for accomplices to a criminal act; there was no such possibility for actual perpetrators. In practice this leniency was nearly always exercised.¹ In cases where two parties had been involved in committing the act, courts had generally considered one the perpetrator and the other an accomplice if their subjective intentions were different.² As a result it was difficult to attribute legal culpability both to those that physically carried out atrocities and to those that issued orders to do so in an organized system such as the Nazi regime.

German law’s highly subjective theory of culpability was the reason for this problem. Until that point there were two conceptions of individual culpability for criminal acts in German law.

The dolus theory sought to identify an individual that had willed a particular outcome. In cases where multiple individuals were involved in committing an act, this lead to a sharp distinction between the will to achieve a criminal outcome and the will to assist another in achieving that outcome. German courts had also recognised an interest theory of culpability. Under this theory, the individual with an interest in the criminal outcome is said to be the perpetrator. If an individual’s interest in carrying out an act was to obey the orders of a superior, they were likely to be considered an accomplice. Neither of these theories was satisfactory in relation to Nazi atrocities at Auschwitz; obedience to a superior was the likely will or interest of anyone other than the most senior Nazi party members.

Roxin advocated a more objective approach to criminal culpability based on ‘mastery over the act’. Under Roxin’s approach one looks to the act in question and asks whether

² The highpoint is Badenwannenfall RGSt, vol. 74 (1940). A woman, who wished her infant dead, convinced her sister to drown the child. It was held that the mother was perpetrator, her sister merely an accomplice.
external indicia suggest that the accused has exercised voluntary control over this criminal outcome. Whether the accused had chosen to behave in such a way as to achieve a given criminal outcome is the important question; why the accused had chosen to do so (their ‘will’ or ‘interest’) is less significant. This theory of culpability allowed for more than one ‘master’ over an act. Several individuals, motivated by different ends and interests, might intentionally commit a criminal act together in which case each is blameworthy.

With regard to criminal organizations Roxin devised a theory of ‘domination over an organizational apparatus’. On Roxin’s theory, it is possible to have not only a perpetrator, but a perpetrator behind that perpetrator. In reference to The Holocaust, Roxin claimed that ‘what happens in such events is, to speak graphically, that a person behind the scenes at the controls of the organized structure presses a button’. The ‘button pusher’ has exercised mastery over the criminal act as subordinates in the Nazi hierarchy have been used as mere ‘gear[s] in a giant machine’. Importantly those that carry out such orders have also exercised mastery over the act. This machine can only work if subordinates are willing to carry out orders. Had they not been willing, they would have been replaced or the organizational apparatus would have failed. Those issuing orders, together with their subordinates, could be criminally liable as perpetrators rather than accomplices. Roxin thus met the moral imperative for law, and legal academics, to do something practical. Yet he lost this argument. His ‘mastery over the act’ theory and the idea of an ‘organizational apparatus’ were not adopted by German courts in the Frankfurt Auschwitz trial. On the other hand, Roxin achieved a great deal in practical terms by simply participating in this debate. Roxin’s ‘organizational apparatus’ theory has had a huge influence in international criminal law. Article 25(3)(a) of the Rome Statute of the International Criminal Court is based on Roxin’s model, as recently acknowledged by Pre-Trial Chamber 1 of the International Criminal Court. Roxin’s theory has enabled domestic courts and the International Criminal Court to prosecute organizers of mass atrocity in addition to those that carry out their will. Even unsuccessful practically-oriented reflection can thus have profound practical importance.

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3 Roxin’s work has never been translated into English, for this phrase see Mark Osiel, ‘The Banality of Good: Aligning Incentives Against Mass Atrocity’ (2005) 105 Columbia Law Review 1751, 1831.
4 Ibid.
5 See Pendas, above n 1, 296-99.
6 The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui ICC-01/04-01/07 [Katanga] [496-99], see generally Osiel, above n 3, 1831-33.
Merely entering these debates can assist in the achievement of moral and political goals far beyond the immediate legal problem under consideration.

II DETACHED REFLECTION: BEN-DOR AND HEIDEGGER

The general response to The Holocaust of academics like Roxin would appear to be beyond reproach ethically. Yet some have argued that any ‘legal’ response to an atrocity does more harm than good on a human level. In order to meet various practical demands, legal discourse obscures the human element, the sheer horror of what is being said to us about humankind when something like this happens. By participating in purposive reflection in response to The Holocaust, legal academics too have covered up what is said to us about Being as a unique and specifically human experience. They do not reflect on ‘Law’, but become part of ‘the legal’ by operating within a paradigm of rights, culpability and obligation. This is the central claim in Oren Ben-Dor’s recent monograph Thinking About Law: In Silence With Heidegger.

Ben-Dor’s position has enjoyed a very positive critical response. Yet his choice of philosophical guide for a more reflective approach toward Law and The Holocaust is extraordinary. Martin Heidegger was a member of the Nazi party and Rector at the University of Freiburg for a time during the Nazi regime. After the Second World War his Nazi involvement was deemed to be such that he was excluded from any university activities for a period of three years. Heidegger never publically distanced himself from The Holocaust or even addressed the issue after the Second World War. It is Heidegger’s very silence on this point that Ben-Dor finds so laudable. It is a response to atrocities and an attitude towards Law that Ben-Dor feels legal theorists ought to follow in order to ‘preserve Being in its essence’. The specific idea in Heidegger’s writing that Ben-Dor uses is the concept ‘Thinking’. Instead of becoming part of the legal in response to The Holocaust, the theorist should Think in silence with Heidegger about Law and The Holocaust.

Although Ben-Dor’s argument in favour of Heidegger’s Thinking response to The Holocaust is unique, there are several other scholars that have sought to Think about Law. There is nothing in contemporary scholarship arguing against this position. In what follows I expose a central flaw in this approach. Thinking is too radically detached from practical, day-to-day concerns to offer a tenable solution to the danger of obscuring the human element through our theoretical approaches to law. Ben-Dor’s suggestion that Heidegger ‘Thought in silence about the atrocities of his generation’ is demonstrably false. When Heidegger faced a choice between engaging in the legal and

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Thinking about Law he chose the former. While Heidegger never discussed gas chambers or the final solution, he most certainly engaged in a purposive way with the legal and state mechanisms that made The Holocaust possible. In Heidegger’s own terms he ignored the ‘call for Thinking’, time and again, before, during and after the Second World War. That Heidegger did so is not simply a matter of hypocrisy on his part, it points to much larger problems with Thinking as a viable theoretical approach toward law and toward atrocity. The flaws in this approach will be used to offer a blueprint for how we might engage with the big question of what it means to Be on a uniquely human level without sacrificing the important practical gains that the goal-oriented approaches of writers like Roxin have given us.

III THE CENTRAL PROBLEM: THINKING IN OPPOSITION TO PRACTICAL THEORY

Heidegger claims that Thinking can ‘preserve [Being] in its essence’. This is very different from any form of ‘essentialism’, the idea that man has an essential, immutable nature. Essentialism is precisely the sort of attitude that Heidegger wished to avoid; it reduces man to a mere object. Heidegger wished to get away from a philosophical attitude that talked of human beings as though they were matters of scientific investigation, like strange compounds in a laboratory. Heidegger and others within his tradition, such as Kierkegaard and Sartre, were trying to rescue questions about Being from this approach. The Being that Heidegger sought to harness by Thinking is an evolving and ongoing experience of existence itself. Thinking’s most salient feature is one of withdrawal from any goal or purpose. Heidegger contrasts Thinking with any ‘process of reflection in service to doing and making’. He draws this contrast so starkly that he goes so far as to claim on several occasions that Thinking is resistant to being written down. Once we write down a Thought, we leave the ‘draught of pure Thought’ and start reflecting towards some practical purpose. Thinking is something beyond day-to-day practical and theoretical encounters with the world. It is not something that we are generally engaged in. Yet the subject matter at stake is said to be the ‘nearness of the nearest’, human Being itself.

Thinking is thus not just an alternative within the broad scope of existing philosophy. Thinking is fundamentally different from any existing theoretical approach whatsoever. We simply cannot do both at the same time. Great harm is said to occur to Being itself because of the pervasive nature of what Heidegger termed ‘technological’ approaches. Technology is said to ‘harm’ Being by ‘forgetting’ this question and ‘covering’ it up.

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10 Ibid, 218.
12 Heidegger, above n 9, 254.
There can be no true Thinking within a technological paradigm. ‘Nothing but mischief’ is said to come from trying to use the results of Thinking within technology, which includes existing theoretical perspectives on law.13

Significantly for the discussion at hand, ‘what is Law?’ fits comfortably alongside Heidegger’s examples of questions that ‘call for Thinking’. ‘What is science?’ ‘what is technology?’ and ‘what is poetry?’ are said to be questions that call us to Think about Being.14

The natural consequence of these claims is that in order to Think about Law we need to abandon our existing ‘legal’ approaches as harmful to Being and Thinking. As Ben-Dor correctly notes, this would include abandonment of even the most radical, critical approaches to legal theory that currently exist.15 My main target in this essay is Ben-Dor’s Thinking About Law and some of the wrongheaded conclusions that he draws in praising Heidegger’s silence on the Holocaust. Yet Ben-Dor’s approach is representative of positions adopted by recent writers that encourage us to Think about Law. These ‘Thinkers about Law’ are best understood not as providing instances of Thinking about Law; Thinking’s hostility to being written down would make this impossible. Instead, their focus is to explain how existing forms of legal theory are not sufficiently ‘fundamental’ and ‘ontological’ on Heidegger’s terms. For Ben-Dor and his fellow Thinkers about Law a more fundamental philosophy is one that is not derived from existing practices and all of their assumptions. Heidegger’s Thinking is seen as the only way of achieving fundamental ontology in stark, irreconcilable contrast to technological approaches which cover up and harm Being. They do so, according to Heidegger, by ‘enframing’ Being. They chop up human experience, in all of its richness and complexity, and take out the small snippets that are useful for their practice.

Although Heidegger notes the practical achievements of technology, he thus presents the legal scholar with a choice between Heidegger’s vision of Thinking and existing jurisprudence. If one were to accept Being as an important concern and accept Heidegger’s claim that practical reflection is harmful to it, one must also condemn even the most successful goal-oriented theoretical responses.

In spite of multiple claims about how damaging and harmful the legal is to Being, Ben-Dor never gives any illustrative examples of this point. This is particularly remiss when we turn return to Ben-Dor’s defence of Heidegger’s silence on The Holocaust. Roxin’s reflection on the meaning of culpability was goal-oriented and practical. There was no silent Thinking about what it is to ‘Be culpable’. Instead participators in the various

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13 Heidegger, above, n 11, 7-8.
14 Ibid 32-33.
debates on this issue, including Roxin, sought a notion of culpability that might be put to practical use in order to achieve certain ends. By enframing the Being of those who have committed atrocities as various types of perpetrator, Roxin is part of the legal. The same can be said of those that argued against him, and of the German courts that considered this approach. All of these actors in the Frankfurt Auschwitz trials and the surrounding academic debates were treating the world as a “standing reserve” in which Being is enframed for the purpose of establishing guilt or innocence of those responsible for great evils. By even adding his voice to this technological enframing of concepts such as culpability, Thinkers about law must consider Roxin’s approach to harm Being. In trying to enframe ‘guilt’ for practical purposes, Roxin covered up the essential meaning of guilt on a human level.

Roxin writes in a post-Heidegger world, where Thinking has been introduced to philosophy. The practical uses discovered in Roxin’s work during the Frankfurt Auschwitz debates would have been lost to the global judicial community had Roxin (and others) chosen to follow Heidegger on the path towards silent Thinking about The Holocaust, in the manner that Ben-Dor and others encourage.\(^\text{16}\) This sort of sacrifice represents enormous real world harm. To take Thinking to its logical conclusion we would have to accept such harm for the sake of deep, detached contemplation of the evils of The Holocaust. If we must give up these practical benefits legal scholars would require a great deal of convincing that they should Think in silence instead.\(^\text{17}\) The great harm to detached contemplation of our Being that practical reflection is said to involve seems a price worth paying if it leads to saved lives, the prevention of persecution and the prosecution of those that commit mass atrocities.\(^\text{18}\)

It is particularly difficult to accept that the legal, academic community should remain silent \textit{while} atrocities are perpetrated in the hope that this will allow Thinking to flourish. Under Article 6(c) of The Nuremberg Charter, individuals can be prosecuted for the persecution, by a state, of its own citizens.\(^\text{19}\) This piece of international law came about


\(^{17}\) The legal response to Nazi war crimes was flawed, see David Luban, ‘The Legacies of Nuremberg’ in Guénaël Mettraux, ed, Perspectives on the Nuremberg Trial (Oxford and New York: Oxford University Press, 2008) 638. Criticism that the legal response failed to achieve some end is technological, it cannot be Thinking.

\(^{18}\) Van der Walt briefly notes this concern in an otherwise unequivocally positive review of Ben-Dor’s work, Johan Van der Walt, ‘The Murmur of Being and the Chatter of Law’ (2011) 20 Social and Legal Studies 389, 398.

\(^{19}\) Article 6(C), ‘Charter of the International Military Tribunal’, Trial of the Major War Criminals Before the International Military Tribunal, I.II
precisely because people lobbied for it as a direct response to reports about the sheer horror of The Holocaust. The debates that informed the creation of The Nuremberg Charter are technological responses to an atrocity. So too are efforts by Hannah Arendt to understand the possibilities of such an atrocity and suggest ways in which it might be avoided in future and Karl Jaspers’ attempt to come to terms with the question of ‘German guilt’. I do not wish to argue against the idea that The Holocaust says something terrifying and significant about Being; my argument is against utterly detached reflection as a response. The practical sacrifice required in order to Think in silence about these atrocities is clear. Thinkers about Law fail to address this problem at all.

Giving up these practical solutions in favour of silent reflection is supposed to bring us closer to Being itself, closer to humanity. This is highly counter-intuitive. To jettison such vital real world benefits would be inhuman. Far from bringing us closer to our humanity, it would require us to act in a way that is utterly unnatural. There is no better example of this than Heidegger’s own attitude toward law and toward The Holocaust in the aftermath of the Second World War.

IV HEIDEGGER DID NOT THINK ABOUT ‘THE ATROCITIES OF HIS GENERATION’

For Ben-Dor, Heidegger shows us a way towards Thinking through his silence on the issue of the Holocaust. His silence, therefore, is not only defensible but worthy of praise as Heidegger ‘refused to compromise [his] ethical position’. Ben-Dor’s suggestion that Heidegger Thought in silence about the ‘atrocities of his generation’ is simply incorrect.

There are examples of Heidegger engaging, practically, with ‘the legal’ in a way that relates directly to those atrocities. These examples come before, during and long after the rise of Nazism in Germany. In 1929 Heidegger wrote to a senior official in the Ministry of Public Education in Baden. In it he stated ‘either we restore genuine forces and educators emanating from the native soil to our German spiritual life, or we abandon it definitively to the growing Jewification’. This anti-Semitism presents a serious challenge to any Heidegger apologist. Furthermore, Heidegger voluntarily offers advice on a matter of public policy here. Yet Heidegger claims that Thinking cannot ‘give practical instructions’ or ‘offer advice’ in public policy matters. During the Nazi regime itself Heidegger was appointed Rector at the University of Freiburg shortly after

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21 Ben-Dor, above n 15, 376.
22 Ibid.
the ‘Law for the Reestablishment of the Professional Civil Service’ was enacted.\textsuperscript{25} Nineteen of his former colleagues had already been forcibly retired by this point. The Act was one of a number of pieces of legislation aimed at the systematic disenfranchisement of ‘non-Aryans’ and the removal of potential threats to Nazism from positions of authority. The process became known as ‘the bringing into line’.\textsuperscript{26} These laws called for Thinking, in Heidegger’s terms. Heidegger’s repeated response was technological. Heidegger apologists and Heidegger accusers disagree on the extent of Heidegger’s involvement, yet neither side could defensibly argue that he Thought in silence about these laws. On the contrary both sides point to Heidegger’s practical engagement with this legislation, whether to implement it wholeheartedly or circumvent it, in order to accuse or defend him.\textsuperscript{27} Heidegger practically engaged with ‘bringing into line’ legislation, the only question is whether he subtly protested against it or wilfully enforced it.

The debate on the extent of Heidegger’s Nazism is known as ‘The Heidegger Controversy’. It will not be entered into here. In this essay we are concerned with academic responses to ‘The Holocaust’. Heidegger did not ‘Think in silence’ at this point either. There are a number of rational, practical and humane reasons that we might give for his ‘failure’ to do so. None of these can be reconciled with Thinking. This shows how the sort of radically detached reflection Ben-Dor and Heidegger promote is irrational, impractical and ultimately inhumane.

\textsuperscript{25} 1933 Reichsgesetzblatt, 175, Art 1-18, 7 April 1933, available in Nazi Conspiracy and Aggression: Vol III (Office of United States Chief of Counsel For Prosecution of Axis Criminality, United States Government Printing Office; Washington, 1946) 981, 982.

\textsuperscript{26} Diemut Majer, “Non-Germans” under the Third Reich: The Nazi Judicial and Administrative System in Germany and Occupied Eastern Europe, with Special Regard to Occupied Poland, 1939-1945, translated by Peter Thomas Hill, Edward Vance Humphrey & Brian Levin (Baltimore & London: Johns Hopkins University Press, 2003) 79-185.

\textsuperscript{27} Although Heidegger’s Nazism will not be addressed here, Thinkers about Law need to respond to this claim. As more information comes to light, Heidegger looks increasingly indefensible, see his central involvement in the Herman Staudinger affair, Hugo Ott, Martin Heidegger: A Political Life, translated by Allan Blunden (London: Harper Collins, 1993) 210-23. This took place in 1934, a point at which Heidegger claims to have become disenchanted with Nazism. More generally see Ott, ibid, 113-260, Karl A Moehling, ‘Heidegger and the Nazis’ in Thomas Sheehan, ed, Heidegger: The Man and Thinker (Chicago: Precedent Publishing, 1981) 31, Richard Wolin, ed, The Heidegger Controversy: A Critical Reader (New York: Columbia University Press, 1991) and Faye, above n 23. It is little short of astonishing that Ben-Dor has not addressed mounting evidence of Heidegger’s Nazism while praising his silence on The Holocaust.
A Denazification

‘Denazification’ was an attempt by allied forces to remove the influence of Nazism from public life in post-war Germany. The legal basis is the Potsdam Conference, 1st August, 1945. Article II (A) paragraph 6 of the proceedings reads as follows:

All members of the Nazi Party who have been more than nominal participants in its activities and all other persons hostile to Allied purposes shall be removed from public and semi-public office, and from positions of responsibility in important private undertakings.28

Control Council Directives 24 and 38 implemented these proceedings;29 responsibility was devolved to occupying Allied forces in their respective zones. The University of Freiburg fell within the French zone. The French administration allowed universities to address matters internally first. As a result, the University of Freiburg set up its own denazification commission which had a quasi-judicial function. The commission investigated the level of involvement by former Nazi party members among academic staff. The goal was to categorize such participants as ‘nominal’ or as ‘more than nominal’. The commission then made recommendations to University senate.

In Heidegger’s case, issues included the manner of his appointment as Rector, the degree to which Heidegger had helped to implement the ‘Fuehrer principle’ and whether Heidegger had used his Rectorship as a means of promoting Nazism.

In Heidegger’s terms two things are apparent in these proceedings. First, they are a good example of ‘the legal’ as ‘technological’. The proceedings were goal-oriented, that goal was to ‘enframe’ the Being of those accused as ‘nominal participants’ or more committed party members. The quest was for correctness in this enframing process rather than any preservation of Being in its essence. Furthermore this use of the legal to enframe existence and cover up Being ‘called for Thinking’ under Heidegger’s criteria. Categorizing ‘persons’ in terms of their Nazi involvement in this way says much to us about our Being and the essential nature of how humans look at each other. Needless to say Nazism itself and its rise in 1930s Germany also tells profound and complex tales about the human condition, including the way in which Nazi ‘law’ was used to achieve the most heinous ends imaginable.

So Heidegger faced a clear choice. He could have responded with the Thoughtful silence that Ben-Dor and others laud in his response to The Holocaust. Attentiveness to the ‘murmur of Being’ uncovered by Law in this process would have required


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Heidegger to relegate himself to the role of passive onlooker at his own hearing. The alternative was to respond technologically with an active, traditional defence.

Heidegger chose the legal over silent Thinking. He wrote a letter to the new Rector, in which he portrayed himself as victim. This letter claims that his appointment to the Rectorship had been by democratic vote, not by the appointment of the Nazi party. It further claims that he joined the party to influence it for good from within. Heidegger went on to argue that he had done his best to oppose National Socialism, citing several instances including the claim that he prevented a book burning and the display of anti-Semitic signs.\(^\text{30}\) In addition, Heidegger enlisted Karl Jaspers to deliver expert testimony to the commission, a plan that backfired when Jaspers’ report was largely damning.\(^\text{31}\)

The credibility of Heidegger’s defence will not be debated here. The important point is that Heidegger engaged with ‘the legal’ when his own practical goals and interests were involved. He participated in the denazification process by attempting to ‘enframe’ his own Being as a lesser category of Nazi party member. He did so by pointing to the ‘correctness’ of certain facts. There is no more technological or ‘legal’ engagement that one can have with law than to defend one’s actions as reasonable in the circumstances, deny allegations that cannot be backed up by empirical proof, and introduce expert testimony in order to support the argument.

Heidegger’s case lasted from 1945 until 1949. Throughout this period Heidegger wrote and lectured on Thinking.\(^\text{32}\) If technology is harmful to fundamental ontology, then Heidegger is responsible for harming Being by fully and voluntarily participating in this process. He did so instead of trying to preserve Being by listening in silence.

Heidegger refers to Socrates as ‘the purest Thinker of the West’ and alludes to Socrates’ trial, claiming that the latter remained a Thinker ‘right up until his death’.\(^\text{33}\) Accounts of Socrates’ attitude at trial provide a useful contrast to Heidegger’s approach. According to Plato’s \textit{Apology}, Socrates expressly eschewed conventional legal defence of the time. He sought to remain true to his \textit{daimon}, acting as a ‘stranger to the language of the court

\(^{30}\) Martin Heidegger, ‘Letter to the Rector of Freiburg University, November 4, 1945’ in \textit{The Heidegger Controversy}, above n 27, 61. These claims are disputed, see Faye above n 23, 42-58 and Ott, above n 27, 140-48 and 187-209.

\(^{31}\) Karl Jaspers, ‘Letter to the Denazification Committee’ in \textit{The Heidegger Controversy}, above n 27, 147.

\(^{32}\) The concept first appears in \textit{Letter on Humanism}, written in 1946. In 1949 Heidegger delivered the first of the lectures that would become \textit{The Question Concerning Technology, and other essays}, ed by and translated by William Lovitt (London and New York: Harper & Row, 1977), lectures published as \textit{What is Called Thinking?} were delivered in 1951-2. “Excusing” Heidegger’s failure to Think about Law on these grounds is not open to Thinkers about Law; they do not distinguish Heidegger’s early and later positions. Ben-Dor interprets early Heidegger \textit{in light of} later writings, see Ben-Dor above n 15, 34-35.

\(^{33}\) Heidegger, above n 11, 17.
law.

Socrates did not ‘produce his children in court... together with a host of relations and friends’ as character witnesses, a practice so standard that Socrates felt it may be considered ‘offensive’ not to do so. Heidegger bowed to this convention through Jaspers and others. Standard accounts also suggest that Socrates used his trial as an opportunity to exercise the provocative questioning that he practiced outside the courtroom. He denounced the court as ‘a place not of instruction but of punishment’. Socrates did not introduce evidence against the charge of corrupting the young but argued against the very logic of such an accusation. Against the charge of atheism, Socrates attacked the inconsistency of the accusation. He also unapologetically reaffirmed his belief in the supernatural ‘voice’ which he sought to follow in all of his affairs.

The denazification process became unpopular among both academic commentators and the general populace. It was ultimately abandoned. The idea of rebelling against these trials was nothing like as controversial as Socrates’ stance. Yet Heidegger’s defence bears little similarity to Socrates’ attitude, at least according to interpretations of Plato’s and Xenophon’s accounts that were available at that time. There are conflicting descriptions of Socrates’ trial. One account suggests that Socrates literally said nothing throughout. This would appear to be precisely the sort of silence that Thinking requires, but the claim is largely discredited. The generally accepted interpretation in Heidegger’s time was that the Apology portrays Socrates as provocative and ‘tactless’. This interpretation would have us believe that Socrates stood outside traditional legal practice, as Plato’s Apology suggests. Heidegger embraced the legal, and all that it supposedly does to cover up and harm Being. If Heidegger was serious in his commitment to Thinking, and his desire to follow Socrates, his self-defence in the denazification process was a failure to do so.

V HUMAN REASONS FOR HEIDEGGER’S DEFENCE

Heidegger comes out of this episode badly. It appears that he was willing to encourage silent reflection when the most basic needs of others were involved, but failed to live up to this standard when his own practical needs and wants were threatened in a way that is

36 Ibid 350.
37 Ibid 349-50.
38 Ibid 350-53.
39 Ibid 356.
40 See John H Herz, ‘The Fiasco of Denazification in Germany’ (1948) 63 Political Science Quarterly 569 and Luban, above n 17.
42 Ibid 18.
minor by comparison. Quite aside from Heidegger’s failure to practice what he preached, the denazification episode is instructive for the discussion at hand. It illustrates an important flaw in Thinking about Law or any form of radically detached reflection. When the stakes are highest in practical terms Thinking about Law requires us to act in a way that seems inhuman. It simply asks too much of any person. This is a serious charge against a form of engagement that is supposed to bring us closer to our Being. There are a number of rational excuses that we might make for Heidegger’s failure to Think. Each is untenable on Heidegger’s own terms, in spite of some intuitive, logical, appeal.

A Expediency

One might argue that Heidegger’s hearing was simply not the time for philosophy or Thinking. Heidegger makes a point of commenting on the practical merits of technological reflection. We need this approach in our day-to-day lives. Thinking cannot replace practical achievement; it was never meant to.

There are several reasons why this excuse fails. While Heidegger preserves a hard distinction between practical engagement and Thinking, the two will inevitably conflict. To make a practical expediency argument about Heidegger’s attitude during the denazification hearings is to concede that practical concerns should trump Thinking in the event of a clash. This position undermines the very idea of Thinking about Law. The priority in Thinking is to preserve Being in its essence. That priority means little if it comes with the caveat that it no longer applies when there is something really important on a practical level at stake. The intellectual tradition that Heidegger seeks to dissociate from is based upon questions that we consider important, whether practically or theoretically. If we should not Think about Law where matters of the utmost practical importance are at stake, then almost anything that calls for Thinking seems likely to fall within this category. It is likely that there is a high degree of overlap between ‘pressing practical concerns’ and ‘things that call for Thinking’. This unquestionably includes legal (and other technological) responses to The Holocaust.

In any event, Heidegger suggests that the stakes should not have been particularly high for him during denazification. Socrates’ approach again provides an instructive contrast. According to Plato’s Crito and other sources, Socrates accepted punishment of death as the outcome of his trial, eschewing an opportunity to escape and flee Athens. He was prepared to die for the sake of his commitment to doing right. Heidegger’s trial was not a full legal one, his hemlock nothing like as lethal. The least favourable outcome

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44 Heidegger, above n 11, 7-8.
45 Plato ‘Crito’ in The Dialogues of Plato, above n 34, 371. As with the Apology this account is questionable.
possible was a recommendation that Heidegger be prevented from teaching at Freiburg and that he lose any association with the university. Exclusion from one institution ought not to have been a great punishment for someone who consistently denounced the liberal, western ‘Americanized’ version of ‘the university’ from 1929 and who insisted that fundamental ontology was not possible within this system.\(^{46}\) Heidegger had other options. His work was acclaimed outside Germany during the immediate post-war period. As the denazification process unfolded, the careers of influential Heidegger-inspired philosophers were taking off. Jean-Paul Sartre successfully championed Heidegger in France.\(^{47}\) Even if Heidegger could justify technological engagement with the legal in certain circumstances, the situation here was not utterly dire. There were willing fora for his work and he was guaranteed at least some income. This was a long way from Socrates’ choice between life and death. As such any practical exception that we might carve out for Heidegger would make prioritizing practical engagement over detached and silent reflection look more like a rule than an exception in law.

In addition, Heidegger revisited these events long after the committee had heard his case. Heidegger was invited to consider denazification and his involvement with Nazism twenty years later in an interview with \emph{Der Spiegel}. The interview was conducted on condition that it would be published after Heidegger’s death. During this interview Heidegger remained silent on the systematic murder of Jews and dissenters in Nazi concentration camps. Yet, when asked about his association with Nazism, Heidegger broke this silence again. In doing so he largely repeated the arguments that he had made during the committee hearings.\(^{48}\) Heidegger thus turned away from Thinking about Nazi law and denazification at a point when there was no practical concern that might have compelled him to do so.

**B The Holocaust as a Unique Event**

A second possible excuse for Heidegger’s engagement with ‘the legal’ is to distinguish The Holocaust from other ‘atrocities of [Heidegger’s] generation’. One might argue that there is no parallel between Heidegger’s involvement with various pieces of legislation enacted during the Nazi regime and The Holocaust itself because the latter is such a catastrophic, époque-defining event. As a result, the argument might continue, The

\(^{46}\) See generally Alan Milchmann & Alan Rosenberg, ‘Martin Heidegger and The University as a Site for the Transformation of Human Existence’ (1997) 1 \textit{The Review of Politics} 75. Heidegger justified his Nazi membership on the basis that he saw it as an opportunity to turn universities into ‘Thinking institutions, Heidegger, above n 24. This is consistent with his rectoral address in Wolin, ibid 29-39.

\(^{47}\) For Heidegger’s assimilation into post-war French philosophy see Rüdiger Safranski, \textit{Martin Heidegger: Between Good and Evil}, translated by Ewald Osers (Cambridge, MA: Harvard University Press, 1999) 342-52. Sartre’s endorsement coincides with the start of denazification. Heidegger was also a hired public speaker during this time, ibid 390-403.

\(^{48}\) Heidegger, above n 24, 91-104.
Holocaust calls for Thinking whereas ‘the bringing into line’ process and the denazification hearings do not.

This suggestion has appeal; we can sympathize with the general notion that there is a part of our reflection on events like The Holocaust that standard, practical and legal responses do not encapsulate. One might also feel that purposeful reflection is more important to us in our day-to-day affairs, and that only unique, special events, such as The Holocaust, cause us to reassess what we had thought about the human condition itself. On Heidegger’s terms, however, this suggestion must be rejected. By his own standards, Heidegger failed to engage on a fundamental ontological level with The Holocaust itself. Heidegger’s claims about our relationship with time form a crucial part of his philosophy. An ‘inauthentic’, technological attitude sees past, present and future as isolated events. This attitude leads us to ‘forget’ about Being. Fundamental ontology, on the other hand, has an authentic attitude towards time that sees past, present and future as part of the continuance of Being. To isolate the ‘now’ from what has happened before and what we can project in the future is the hallmark of inauthenticity – it is to ignore our Being as continuously unfolding. Given all of this, we simply cannot accept Heidegger’s silence on The Holocaust itself as Thinking when he engaged technologically in discussion of the legal mechanisms that enabled it. The Holocaust was only possible once those that might defend its victims had been eradicated from the power structure. To Think about what the Holocaust says to us about Being, one must Think about the past that lead to it. The Nazi rise to power, the bringing into line legislation and the establishment of the Fuehrer principle are part of what The Holocaust tells us about Being. To separate The Holocaust from these laws and the subsequent denazification of public bodies is to see the past of the bringing into line as an entity ‘side by side’ with The Holocaust as another entity. It is to see them as one off, isolated events, rather than pieces in the unfolding continuance of human existence. Heidegger’s participation in the legal before the Holocaust, during denazification and again in 1966 negates any claim that he had engaged with The Holocaust on his own ‘fundamental ontological’ level.

Ben-Dor notes how Levinas employs a ‘punctuated’, ‘inauthentic’ attitude towards time, by regarding past, present and future as isolated events; as such Levinas does not engage in the sort of detached reflection that Ben-Dor advocates as the only way to access Being. Yet Ben-Dor does not hold Heidegger to the same standard – he disregards the ‘punctuated’ attitude towards time that treating The Holocaust as a singular event would require. This is a good illustration of how Thinkers about Law do not reflect critically

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50 Ibid 373-75.

51 Ibid 81.

52 Ben-Dor, above n 15, 246-62.
on Heidegger’s work. Ben-Dor and other Thinkers about Law do not even judge Heidegger on his own terms. While Thinkers about Law may argue that their aim is to faithfully apply Heidegger rather than critique it, such an assertion cannot work here. Heidegger’s treatment of the Holocaust as a singular event utterly contradicts his claims about Being. One cannot faithfully apply Heidegger’s claims about ‘Being’ yet ignore ‘Time’. Consequently, one cannot faithfully apply Heidegger’s claims about time and accept his silence on The Holocaust as an example of Thinking.

Leaving aside this core, fatal, objection, Heidegger does not set the minimum requirement for what ‘calls for Thinking’ anything like as high as The Holocaust. Ben-Dor convincingly argues that a transformative event such as the Holocaust calls for Thinking. Nevertheless, much had happened prior to The Holocaust in Nazi Germany that was also transformative and also ‘calls for Thinking’. Heidegger uses the example of coal-mining to ‘Think’ about what our technological approaches tell us about Being. The practice of coal-mining itself is technological. Yet this practice calls us to Think about how we treat the earth as nothing more than a ‘standing reserve’ to be mined and used for our needs. If coal-mining calls us to Think about the harmful effects of the technological for Being, the disenfranchisement of certain citizens, state-sponsored anti-Semitic propaganda, and the trampling of civil liberties that took place from the moment the Nazi Party came to power must do so too. Ben-Dor asks us ‘to be with [Heidegger] in silence, listening to the evident that lurks in the language of legal materials, case law [and] theories of law’. The ‘bringing into line’ legislation contained much that was ‘evident’ about Being and ‘lurk[ing] in the language’. Had Heidegger truly Thought about the atrocities of his generation, he would have listened in silence to that which was ‘murmuring in the unsaid’ about Being in this systematic removal of non-Aryans and dissenters from political life. Heidegger, Ben-Dor, Ljungstrøm and Nonet write of law’s destructive power, which is revealed if we Think about Law. If ever one needed an example of Law’s deinon (‘terrible power’) to harm humanity, the bringing into line legislation is it.

C Expecting Heidegger to Think about Denazification expects too much

To expect Heidegger to Think about Law instead of defending himself is too much to expect of anyone in the circumstances. Faced with accusations of central Nazi involvement and the consequences that this would have for his career, reputation and

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53 Heidegger, above n 32, 12.
54 Ben-Dor, above n 15, 397.
56 Ben-Dor in particular focuses on this term, above n 15. The use of Greek words as a vehicle for Thinking is discussed below.
legacy, it seems perfectly reasonable, perfectly human, that Heidegger should try to defend himself.

I offer no counter-argument to the suggestion that nobody should be expected to reflect silently on Being to the detriment of their own legal defence. Yet to exonerate Heidegger on these grounds is to accept the fundamental inhumanity of the type of detached response to law that Ben-Dor and others advocate. To expect Heidegger to Think about Law during his denazification hearing is to expect a superhuman level of commitment and restraint. To expect the superhuman is to expect the inhuman. That Thinking should lead us to this conundrum is profoundly problematic. If we accept the excuse suggested here for Heidegger’s failure to Think about Law during his own trial, we accept that Thinking about Law would have made Heidegger less human.\(^{\text{57}}\) Thinking was supposed to preserve humanity, not suppress it.

It is difficult to believe that anyone has ever Thought about Law instead of defending themselves or pleading guilty in court. Heidegger’s example of Socrates as someone who Thought ‘right up until his death’ is dubious. The account of Socrates’ trial presented in Plato’s *Apology* may fit with the conception of Socrates as Thinker. As noted, the accuracy of this account is contested. ‘Fiction theory’ interpretations of Plato’s *Apology* hold that it is part of a genre of Socrates literature in which authors used ‘Socrates’ the character to put their own ideas forward. Even ‘accuracy theorists’ concede that Plato exaggerated somewhat.\(^{\text{58}}\) An alternative accuracy theory has recently emerged. Brickhouse and Smith suggest that the account in the *Apology* is largely correct, but that it is a mistake to view Socrates’ approach as radically outside the parameters of normal legal defence for the time.\(^{\text{59}}\) There is a compelling argument that the defiant ‘Thinking’ Heidegger found so laudable, yet failed to follow, was actually an engagement in the legal. Heidegger may have unwittingly followed Socrates after all in prioritizing practical concerns over detached reflection when his own interests were at stake.

There are several rational excuses that we might make for Heidegger’s failure to maintain silent contemplation during the denazification process. None is compatible with Thinking. It makes sense to us that a pressing practical concern should trump silent contemplation about what it means to Be, but Thinking cannot support this suggestion because practical engagement is said to damage Being. We might feel that the question of the meaning of human existence is a special one that only gets triggered in response


to specific, cataclysmic events but Thinking cannot support practical engagement with events that lead up to such a human catastrophe nor does Heidegger limit what calls for Thinking to these sorts of unique events. Heidegger explicitly rules each of these possibilities out. The only rational explanation left for Heidegger's failure to Think during denazification damn Thinking as an unrealistic and inhuman response to crises.

VI THE ARBITRARINESS OF THINKING

So far we have noted how the sort of radically detached reflection that Ben-Dor and Heidegger advocate takes us away from humanity instead of bringing us closer. A second negative consequence of this approach can be seen in the sweeping, arbitrary claims that Thinkers about Law make because their detached reflection refuses to accept any input from more purposive, fact-based reflection.

The arbitrariness of Thinking is particularly apparent in claims about Law that are based on word origins. Language is said to be the ‘house of Being’.60 Thinkers focus on the etymology of words for clues to help us uncover the essence of the concept in question and of what is ‘unsaid’ in language. This is done in order to ‘denote the primordial signification of essences’,61 when man attempted to capture some concept in a word he tried to represent the meaning of that concept for our Being.

Heidegger uses German and Greek. Legal Thinkers Nonet, Ljungstrøm and Ben-Dor follow Heidegger directly in this regard; Ben-Dor also uses Hebrew and French.

These legal Thinkers focus on two concepts. The Greek term dikē, roughly meaning ‘justice’, is subjected to sustained analysis. Much is made of its common root with the word deinon meaning ‘strange’, ‘terrible’ or ‘overpowering’.62 Significance is also attached to the role of the goddess Dike as ‘one who enforces the destined order’.63 In various ways, Thinkers claim that the Being of justice is a destined order. A second concept discussed at length is logos, which has no direct English translation. Its multiple meanings include ‘reason’ and ‘word’. Thinkers claim that there is an important point about the Being of Law in the fact that the word logos shares a root with the verb legein meaning ‘to say’.64 Within the ‘reason’ or ‘word’ of Law, there is the ‘saying’ of Being. To Think the Being of Law is to listen in silence to this saying.

60 Heidegger, above n 9, 193.
61 Ben-Dor, above n 15, 141.
63 Ibid. See also Ljungstrom, above n 8, 79.
Those unfamiliar with Heidegger’s work may wonder why these various Thinkers about Law stop at ancient Greek concepts. If the point is to get at our ‘most primordial signification’ of Law, the logical place to start is the earliest examples of codified law that we have available.

The Code of Hammurabi substantially predates any Greek codified law; it is among the most complete of the early codes available. *Kittum u mēšarum* (eternal truth and right) are referred to in the introductory part. The code explains how the king is charged with dispensation of both *kittum* (eternal laws) and *mēšarum* (justice). *Mēšarum* mitigates the harshness of eternal laws and custom, a role similar to that historically performed by equity in our jurisdiction. Law in early Babylonian cultures was seen as a combination of these two concepts. As Speiser and others have noted, these early Cuneiform laws substantially influenced the content and form of regulation in later Mediterranean civilizations, including Greece.\(^65\) If the purpose of word analysis and association with deities in Thinking is to get to the primordial ‘saying of Law’, this use in ancient Mesopotamian cultures is more ‘primordial’ than Greek usage. The term *kittu(m)* has multiple meanings in Akkadian. In addition to ‘universal truth’, ‘reality’ or ‘cosmic order’ it can also mean ‘steadiness’, ‘reliability’, ‘loyalty’ and ‘righteousness’. The singular *kittu* is also the word for a ‘stand’ or ‘support’. The custodian of universal law in Mesopotamian mythology is the god Shamash, who is also the sun-god, the god of light, justice and healing. If we were to take early Babylonian languages and deities as the ‘primordial signification of essences’ instead of Greek language and mythology the claims that we would make about the Being of Law might look quite different to those made by Thinkers about Law.

To understand why Thinkers about Law ignore pre-Greek terms one must appreciate the reasons behind Heidegger’s focus on ancient Greece. Heidegger felt that the Greeks represented the emergence of the ‘spirit’ of the west, the first step towards an identifiable occidental culture whose remnants are apparent in modern Being.\(^66\) The definition of ‘The West’ for these purposes is non-technological, that is to say non-scientific. The West is not to be thought of regionally,\(^67\) ‘anthropologically’\(^68\) or ‘biologically’.\(^69\)

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\(^66\) Heidegger, above n 55, 46-47.

\(^67\) Ibid.

\(^68\) Heidegger, above n 9, 212, 221, see also Heidegger, Question Concerning Technology, above n 32, 140, 153.

\(^69\) Heidegger’s most disdainful comments on “liberal biologism” remain untranslated see Faye, above n 23, 96-99. Nevertheless his “anti-biologism” is evident elsewhere. During denazification he claimed that this position represented resistance to Nazism, above n 24, 64-65. See also Heidegger’s analysis of Nietzsche, Martin Heidegger, Nietzsche: Volumes Three and Four, ed by and translated by David Farrell Krell (New York: Harper Collins, 1991) 39-47 and 103-22.
Heidegger dismisses each of these approaches as damaging to fundamental ontology. Instead ‘the West’ is defined by ‘the context of belongingness to a destiny’ and a common ‘spirit’. According to Heidegger, the split between technological philosophy and pure Thinking emerges in ancient Athens. As the Greeks compartmentalized academia into philosophy, arts and sciences, so the dominance of technology began. The Pre-Platonic Greeks ‘Thought’ generally, instead of having different areas of expertise. From then on, according to Heidegger, we turned away from the question of Being (which included all elements of academic life) and turned towards specialist approaches where different disciplines each sought their own ‘correctness’ rather than the Aletheia or ‘uncovering’ of Being itself. Thinking is an effort to return to an attitude towards Being that was lost post-Socrates and continually eroded in the history of Western philosophy.

Heidegger thus identifies a spirit in the pre-Socratic Greeks that can be used to help us Think. Thinkers about Law are not looking for factual evidence of the earliest law available and what this might tell us about the relationship between ‘man’ and ‘law’; they are looking for a culture that Thought about Being. As Heidegger bluntly and arbitrarily states ‘along with German the Greek language is (in regard to its possibilities for Thought) the most powerful and most spiritual of all languages’. Evidence of influences on western law in earlier cultures is, presumably, too technological to be considered. The historical, factual parallels that Speiser and others draw between western legal systems and ancient Mesopotamian law are ignored because the quest is for similarities in Being or spirit. Demonstrable, factual similarity in day-to-day practical affairs is thus divorced from the question of ontological essence. This allows Heidegger to make the claim that the Anaximander fragment is ‘the oldest fragment of Western Thinking’ and for his fellow Thinkers to make similarly sweeping statements about the Being of Law based on this claim. They do so in spite of evidence that Speiser, Westbrook and others can introduce relating to codes that predate this fragment by over one thousand years and had a direct influence on the substantive content of later Western law.

This sort of argument, based on ‘spirit’ but disregarding or contradicting biological, geographical, anthropological or historical fact was lampooned by the comedian Stephen Colbert in his address to the Washington Press Correspondents Dinner in 2006.

70 See Heidegger, above n 9, 71-75; Heidegger, above n 11, 7-18; Heidegger, above n 32, 21-28, 115-54, 176-82.
71 Heidegger, above n 9, 217-37; Heidegger, above n 55, 1-42.
72 Heidegger, above n 9, 232-33.
73 Heidegger, above n 55, 47
74 Heidegger, Early Greek Thinking, above n 62, 13; Ljungstøm, above n 8, 79; Nonet, ‘Antigone’s Law’, ibid, 314-55; Ben-Dor, above n 15, 141-67.
Guys like us, we're not some brainiacs on the nerd patrol. We're not members of the factinista. We go straight from the gut... That's where the truth lies, right down here in the gut. Do you know you have more nerve endings in your gut than you have in your head? You can look it up. Now, I know some of you are going to say, 'I did look it up, and that's not true'. That's 'cause you looked it up in a book. Next time, look it up in your gut. I did. My gut tells me that's how our nervous system works. Every night on my show, *The Colbert Report*, I speak straight from the gut... I give people the truth, unfiltered by rational argument. I call it the 'No Fact Zone'.

Colbert is joking. Heidegger and Thinkers about Law are serious. Yet the underlying rationale is the same, to Think we must follow spirit rather than fact. Unless our reflections on the human condition grant some sort of weight to practical human knowledge they have no basis and no criteria other than gut instinct or the sort of ‘blind’ faith that one might associate with the brainwashed members of a cult. Thinkers about Law demonstrate this blind faith in Heidegger himself. Nonet, Ljungstrøm and Ben-Dor treat Heidegger’s texts as sacred documents that lead us on a ‘way’ that is never held to account on its own terms or reconciled with fact. They thus return to the various sources for Thinking about Law that appealed to Heidegger’s spirit, pre-Socratic Greek philosophy and the poetry of Hölderlin and Celan. To do this is to elevate Heidegger above the rank of a philosopher, whom we can engage with and argue against. It is to treat him as a prophet who had privileged access to Being. Ben-Dor strays slightly from Heidegger’s path by supplementing discussion of Greek terms with Hebrew ones. This never becomes a critique of Heidegger. Nevertheless it seems certain that Heidegger would have disapproved. Heidegger never used Hebrew as a path to Thinking and did not regard it as a ‘spiritual language’. Ben-Dor does not contradict Heidegger’s claims, preferring to draw parallels in Hebrew to Greek-based analysis. Yet it is impossible to imagine how debate between Heidegger and Ben-Dor could even get started. For

75 Full transcript available online: http://politicalhumor.about.com/od/stephencolbert/a/colbertbush.htm
76 This “cult” of the later Heidegger is clearly distinct from theology which reconciles faith and practical reason. For an overview within Christian theology see Paul Helm, *Faith and Reason* (Oxford: Oxford University Press, 1999).
77 Ljungstrøm name-drops Wallace Stevens and Samuel Beckett as other literary figures that demonstrate “poetic Thinking”, again without argument or demonstration, above n 8, 90.
78 Evidence of Heidegger’s anti-Semitism also suggests likely disapproval. Jaspers testified that Heidegger became anti-Semitic in the 1930s, Jaspers, above n 31, 147-48. According to Jaspers, Heidegger expressed belief in “a dangerous international network of Jews” during private conversation in May 1933, Karl Jaspers, *Philosophische Autobiographie* (Munich: Piper Verlag, 1933) 101. For further accounts of anti-Semitic remarks by Heidegger, see Faye, above n 23, 32-38 and George Leaman, ‘Strategies of Deception: The Composition of Heidegger’s Silence’ in *Martin Heidegger and the Holocaust*, above n 16, 57. Heidegger remained married to confirmed anti-Semite, Elfride Heidegger (nee Petri), from 1917 until his death in 1976 and at no point appeared to have considered ending the relationship, even during his multiple extramarital affairs.
Heidegger, ‘German and Greek [just] are the most spiritual of languages’ and thus hold the key to Thinking. For Ben-Dor Hebrew, presumably, just is as spiritual. There is nothing that one side could say to the other in order to advance their position. Nothing counts as evidence for either claim. Even looking for evidence, or ‘correctness’, is seen as missing the point.

VII RESCUING ‘BEING’ IN LEGAL THEORY: A MODEST PROPOSAL

No effort to contemplate the human condition within Law is worthwhile if such contemplation is hostile to efforts by the legal to protect and preserve basic human necessities. This reality provides certain guidelines for a tenable ontology of Law.

We should not be required to sacrifice important practical gains, such as those of Roxin, in order to address what is said to us about Being in Law.

Food, clothing, shelter and the preservation of life simply are more important than the opportunity to question Being in Law. Fundamental ontological reflection is a luxury many cannot afford. No human being would, or should, prioritize detached reflection about our existence over the practical goals of survival for themselves and for others. To require such prioritizing is inhuman and destructive of Being.

Any fundamental ontology of Law needs to be informed by input from our purposive practices. Fundamental ontology that hovers above practical engagement instead of being led by it runs the risk of being too arbitrary and personal to have any meaning for others.

Thinking about Law falls short of these guidelines. Ben-Dor notes that the major figures in philosophy who have been influenced by Heidegger have not ‘Thought’ in Heidegger’s terms. Ben-Dor and others see this as a failure. It is not. Each of the major figures that departed from Heidegger’s later philosophy did so by deliberately re-establishing the priority of practical human interaction in claims about the human condition. Sartre does this by claiming (contrary to Heidegger) that ‘practical day-to-day] existence comes before essence’.79 Levinas does this by holding that ethics is more primordial than ontology.80 Arendt does it by placing the vita activa at the centre of her vision of reflective political community.81 The fundamental flaw that I have identified in


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Thinking about Law is broadly the same point of departure that we see in Sartre, Levinas and Arendt. We are not failing to live up to Heidegger's later project; we disagree with it.

Heidegger’s later work contains insights that might be applied fruitfully to legal theory. These become apparent when we look at Heidegger’s position critically, instead of blindly following him. In what follows, I make a modest proposal for an approach towards legal scholarship based on the concern that theory has ignored or turned away from the question of Being. My suggestion will re-unite existing scholarship with the question of Being in Law.

Heidegger distinguishes the ‘enframing’ quest for correctness in technological approaches from his quest for Aletheia, the ‘uncovering’ of Being itself. Yet Heidegger is clear that goal-oriented reflection achieves some Aletheia. The enframed part of essential Being is uncovered, while much is left uncovered, or is covered up by this process. Heidegger’s fundamental ontology has to do with ‘the nearness of the near’ rather than anything transcendental. For Heidegger, Being is always near to us; it constantly ‘murmurs’ in the background even though it may be ‘distorted’ by our enframing. Existing jurisprudence may operate on a technological level but Being is still present and engaged with albeit unknowingly. Something about our Being is ‘said’ to us, even as we enframe concepts for practical purposes. Roxin’s ‘mastery of the act’ theory has been put to important practical use within ‘the legal’. Yet the fact that we think of culpability in this way tells us something significant about the uniquely human feeling of guilt. How and why we feel responsibility for our actions and towards others is no small part of Being itself. This is precisely the sort of input that we need if we are to reflect on the meaning of humanity as it reveals itself to us in law.

For Heidegger, the growth and pervasiveness of technology causes Being to be forgotten and is ultimately harmful to Aletheia. Thinkers about Law unquestioningly repeat this claim. Yet Heidegger’s concession that some Aletheia takes place in every technological practice rests uneasily with this position. There has been massive growth in legal theory since Heidegger first suggested Thinking. Much piece-by-piece Aletheia simply must have taken place through these different approaches. If at least some of Being in Law was uncovered by legal positivism, another part was captured by natural law and still more uncovered by legal realism in 1947. So much more must have been uncovered by the diversification and enrichment of these approaches. Critical legal theory, feminist jurisprudence and deconstruction are but three supposedly ‘technological’ approaches that have emerged since. On Heidegger’s own terms, each of these enframes another bit of the fundamental ontological truth of Law for a different technological purpose. All of these traditions will have achieved a great deal of incidental, unwitting Aletheia when taken together.

82 Heidegger, above n 32, 21.
This suggests an alternative to the untenable, radical detachment that Heidegger and Thinkers about Law advocate. Instead of turning away from our existing attitudes, openness towards diverse approaches and questions within the ever growing body of legal theory presents a way of coming to grips with the meaning of Law in our Being. We can do this without giving up our purposeful engagements. Each enframed piece tells us something more about Being. We can construct a picture of the ontological truth of law by combining different approaches. Ontology by slow construction in this way would still be an enframing, technological exercise. Yet the ‘frame’ used would expand as our existing approaches diversify. The more practically useful ways of looking at Law we come up with, the more glimpses of Law in our Being we get.

This alternative allows us to re-establish the importance of Being as a significant philosophical question within jurisprudence. It also re-engages with goal-oriented, practical reflection. Combining the enframed truth from different traditions avoids practical, real world loss. It allows us to act when we have a moral imperative to do so. Roxin’s work is useful to this modest ontological project; we do not have to condemn it as harmful to Being. This proposal also avoids the dilemma of requiring an individual to make enormous personal sacrifices. Heidegger’s self-defence in the denazification process enframes a bit more of the Being of Law and that bit is part of the project. ‘Correctness’, fit with our day-to-day practical reason, serves as a means of preventing the arbitrary claims and starting points we can see in Thinking about Law.

By critiquing Heidegger’s internal inconsistency, we can thus rescue the central insight; in all of our technical legal disputes we should not forget the question of what this tells us about humanity itself. It also goes to the heart of a more evident danger in the growth of technology for legal theory. Alongside the emergence of different types of legal philosophy, the practice as a whole has become fragmented. Increased diversity has led to increased specialisation, with different branches of legal philosophy operating within their own spheres. There is little dialogue between schools; critical jurisprudence and analytical jurisprudence barely engage with each other. We can see areas of specialization move in ever decreasing circles of debate within broad positions such as critical feminist theory or positivism. This specialization and stratification echoes the claims that Heidegger makes about the growth of technology. The important debates within our areas of specialization may well cause us to ‘forget’ the meaning of Law for human existence. The suggestion that I have made for a more tenable Aletheia of Law would require us to combine these different existing theoretical approaches. One does not need to accept any part of Heidegger’s philosophy to see what is at stake here for legal philosophy or to endorse this more holistic approach. The more specialized we become in our endeavour, the narrower its scope. This makes the potential audience for any legal theory smaller. Our areas of interest are becoming so specific that it is difficult to

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83 Heidegger, above n 9, 256.
imagine a ‘big idea’ in Jurisprudence that all schools of thought and traditions would deem worthy of discussion. If we wish to talk about the general at all in jurisprudence, my modest proposal for a more tenable Aletheia of Law must be pursue.
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 Wittgenstein¹

**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

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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 (βλέπουμεν γὰρ ἄρτι δι’ ἐσώπτρου 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 was a delight to the eyes, and that the tree was to be desired “to make one wise” or “to

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10 2 Peter 1, 9 (“Φῶς γὰρ μὴ πάρεστιν ταῦτα, τυφλὸς ἐστιν μοσπάζων, λήθην λαβόν τοῦ καθαρισμὸν τῶν πάλαι αὐτοῦ ἁμαρτιῶν.”).

11 Koran 7, 186 ("‘أَعْرَضْنَ وَمَنْ‘) See also Koran 20, 124 ("‘يَعْمِهِنَّ طَغَابَانِهِمْ فِي وَيْدُرْنَهُمْ لَهَا هَادِيْ فَلَا اللَّهُ يُضِلُّ الْمُتَّسَاطِينَ من‘") "‘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 τοῦτούτου ἐπώφλεψεν τὰ νοήματα τῶν ἀπίστων εἰς τὸ μὴ αὐχέσαι τοῦ φωτισμοῦ τοῦ εὐαγγελίου τῆς δόξης τοῦ Χριστοῦ, δέ ἐστιν εἰκόνα τοῦ θεοῦ.”).

13 See, e.g., Exodus 14, 15-18 (stating that God “hardened the hearts of the Egyptians” that they pursued the Israelites into the divided sea and perished).

14 Genesis 3, 5 (“‘Or added: ‘עָשָׂה בֵית אֱלֹהִים, הָאֱלֹהִים צִכּוּרָם וַעֲשַׂרְתָּם, וַיַּעֲשֵׂה אֱלֹהִים יֵעָלֶה נַחֲלוּת, וַּיַּעֲשֵׂה אֱלֹהִים בַּעֲלָה בֵּית אֱלֹהִים יָדָא בֵּית אֱלֹהִים בֵּית אֱלֹהִים בֵּית אֱלֹהִים הָאֱלֹהִים הָאֱלֹהִים הָאֱלֹהִים הָאֱלֹהִים הָאֱלֹהִים הָאֱלֹהִים הָאֱלֹהִים הָאֱלֹהִים הָאֱלֹהִים הָאֱלֹהִים הָאֱלֹהִים הָאֱלֹהִים הָאֱלֹהִים הָאֱלֹהִים הָאֱלֹהִים הָאֱלֹהִים הָאֱלֹהִים הָאֱלֹהִים הָאֱלֹהִים הָאֱלֹהִים הָאֱלֹהִים הָאֱלֹהִים הָאֱלֹהִים הָאֱלֹהִים הָаֱלֹהִים הָאֱלֹהִים הָאֱלֹהִים הָאֱלֹהִים הָאֱלֹהִים הָאֱלֹהִים הָאֱלֹהִים הָאֱלֹהִים הָאֱלֹהִים הָאֱלֹהִים הָאֱלֹהִים Horses of the Lord’”).
give one sight” (לְהַשְׂכִּיל). Once Adam and Eve have eaten the fruit, “the eyes of both were opened” (פָּקַחְנָה, עֵינֵי) “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.

Albrecht Dürer, Adam and Eve (1504)

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, ίνα μή κριθήτε. [...] τί δέ βλέπεις τὸ κάρφος τὸ ἐν τῷ ὀφθαλμῷ τοῦ ἀδελφοῦ σου, τὴν δέ ἐν τῷ σῷ ὀφθαλμῷ δοκῶν 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 ἀδελφοῦ σου, τὴν δὲ δοκῶν τὴν ἐν τῷ ἰδίῳ ὀφθαλμῷ οὐ κατανοεῖς?”).
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

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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).’ 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?" 22 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 (הָאָזֵן, וְעַתָּה עֵינִי רָאָתְךָ); therefore I despise myself, and repent in dust and ashes.” 23

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. 24 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.” 25 But before Vishnu can reveal his true form, Arjuna has to be given divine eyes: 26

> 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 मो अलङ्करित मुक्तमीत्वान्तः); 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.” 27

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. 28 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.” 29

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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 sì li’imprenti, 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](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.”\(^{30}\) This has occasionally been taken very seriously such as in the period of the Byzantine Iconoclasm.\(^ {31}\) 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.\(^ {32}\) 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,\(^ {33}\) 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.\(^ {34}\) 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.\(^ {35}\) 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).\(^ {36}\) Although publications in Muslim countries did not get into trouble for reprinting the controversial Danish cartoon images in their news coverage,\(^ {37}\) almost all American

\(^{30}\) *EXODUS* 20, 1-17, *DEUTERONOMY* 5, 4-21


\(^{36}\) Id. (“The figure above is a well-intentioned attempt by the sculptor, Adolph Weinman, to honor Muhammad and it bears no resemblance to Muhammad.”).

newspapers refused to reprint them.\textsuperscript{38} 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.”\textsuperscript{39} 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.\textsuperscript{40}

\textbf{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

\textsuperscript{38} 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 \textit{Explaining the Outrage}, CHICAGO TRIBUNE (Feb. 8, 2006), available at \url{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.

\textsuperscript{39} \textsc{Genesis} 1, 31. 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 \textsc{Homer A. Jack (ed.)}, \textsc{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 \textsc{Richard Dawkins}, \textsc{River Out of Eden: A Darwinian View} 133 (1995).

\textsuperscript{40} \textsc{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.’”).
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.

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41 See, e.g., Homeric 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., Kerényi, 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, murderous, 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

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 Fragles. 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.” 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, 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.” Similarly, Mentor points out that the suitors laid “their lives on the line when they consume[d] Odysseus’ worldly goods, blind in their violence.” 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.”

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.” The great hero Ajax, “would have escaped his doom [...] if he hadn’t flung that brazen boast, the mad blind fool.” And in helping Menelaus, Eidothea, the daughter of the sea deity Proteus, managed “to deceive her father blind.”

Whereas lies and deceit were abhorrent to Achilles in the Iliad, 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.

49 Homer, Odyssey, 1, 8-10.  
50 Homer, Odyssey 13, 200.  
51 Homer, Odyssey 19, 170. See also Homer, Odyssey, 2, 117-118 and 24, 156.  
52 Homer, Odyssey 2, 265-266. See also Homer, Odyssey, 24, 504.  
53 Homer, Odyssey 22, 33-34.  
54 Homer, Odyssey 4, 100-101.  
55 Homer, Odyssey 4, 563-564.  
56 Homer, Odyssey 4, 491.  
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.”)  
58 Ovid, Metamorphoses 4, 770.
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. At “the very threshold of the day” a “sudden mad desire surprised and seized” Orpheus, he turns around too early and loses Eurydice forever.

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. 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. There are two typical reasons for this punishment. The first reason is that a mortal has seen something that they

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59 Virgil, 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 Plato, Symposium 179.


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 Homer, Odyssey 18, 83 and 116; 21, 307. Apollonius of Rhodes, Argonautica 4, 1093; Eustathius of Thessalonica, Commentaries on Homer 1839. Hyllus, one of the sons of Heracles, killed King Eurytheus, cut off his head and gave it to Heracles’ mother Alemene, who gouged out the eyes with weaving pins postmortem. 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 Troyan 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; Bibliotheca 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. 69 There are different mythological explanations for why King Phineus was blinded, including as punishment for revealing the future to mankind. 70 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. 71

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. 72

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.” 73 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. 74 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.” 75 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,
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.\textsuperscript{76}

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.\textsuperscript{77} 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. \textbf{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.\textsuperscript{78} 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:\textsuperscript{79}

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

\textsuperscript{76} \textsc{Sophocles}, \textsc{Oedipus at Colonus} 1871-1875.
\textsuperscript{77} \textsc{Herodotus}, \textsc{Histories} 2, 111.
\textsuperscript{78} \textsc{Thucydides}, \textsc{History of the Peloponnesian War} 17.
\textsuperscript{79} \textsc{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.”80 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.81 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.”82 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.83

80 Id.
83 ARISTOTLE, METAPHysics 986– 987.
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?”87 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?”88

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.”89 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.90 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

87 PLATO, THE REPUBLIC 7, 517a.
88 PLATO, THE REPUBLIC 7, 517e.
90 ARISTOTLE, ON THE SOUL.
Rome.91 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.92 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.93 Themis represented the customs and conventions that formed the social order while her daughter Dike stood for the enactment of justice between individuals.94 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.95 Zeus himself is said to have blinded him so that he would distribute wealth indiscriminately and without favor towards the good and virtuous.96

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. Chremylus 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:

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. 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.” This image has survived in literature over the centuries. The German poet Friedrich Schiller attributed blindness to Fortuna and the “false god of battle.” Shakespeare refers predominantly to Cupid and

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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.
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 ἀδώρον ἁμα τὴν δικαιοσύνην καὶ ἀνέντευκτον οὐσαν).

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.”)

105 FRANCIS BACON, ESSAYS, MORAL, ECONOMICAL, AND POLITICAL 28 (1859).


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:

There stand the gates of the paths of night and day,
And a lintel and threshold of stone enclose them round about.
The gates are of aither and they fill the huge frame of the gate,
And vengeful Justice (Δίκη πολύπινις) controls the alternating locks

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 (θεῖας τε δίκαιος). 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{111} KARL POPPER, THE WORLD OF PARMENIDES: ESSAYS ON THE PRESOCRATIC ENLIGHTENMENT (2012).
\textsuperscript{112} Id. at 328.
\textsuperscript{113} Id. at 330.
\textsuperscript{114} Popper states that “the goddess Δική 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. 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. 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 dīck der bœchlen er entpfyndt / Wer stætes zancket wie eyn kyndt / Vnd meynt die worheyt machen blyndt).

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.”

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115 See, e.g., Dennis E. Curtis & Judith Resnik, Images of Justice, 96 YALE L.J. 1727, 1740 fig. 6 (1987).


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 delyteth in iugement and lawe / And euer contendyth in discorde and in stryfe / In small tryfyls, and scantly worth a strawe / Suche, theyr owne flesshe vnto the bonys gnawe / And labour by theryr sotelty and gyle / To blynde iustycye, 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. Blinding 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.\(^\text{122}\) 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.\(^\text{123}\) 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:\(^\text{124}\)

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.
representations of the Pope, a Sultan, the Emperor and a Lord Mayoral. 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{figure}[h]
\centering
\includegraphics[width=0.5\textwidth]{JusticeFountainsinBern.png}
\caption{Justice Fountains in Bern (1543)\textsuperscript{126}}
\end{figure}

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

\textsuperscript{125} For more art historical information on the fountain and images of the figure of Justitia, \textit{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 OVERO DESCRITTIONE DELL’IMAGINI UNIVERSALI CAVATE DALL’ANTICHTÀ 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.
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 manner 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.” 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. 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 “maidely form” was already supposed to guarantee impartiality. 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

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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.”\(^{136}\) 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.\(^{137}\)

If the blindfold represents the power of judges to speak truth to power and to establish a government “of laws, and not of men,”\(^{138}\) 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.\(^{139}\) 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.\(^{140}\) 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?”\(^{141}\) Framed 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).

\(^{139}\) See ROBERT M. COVER, OWEN M. FISS & JUDITH RESNIK, PROCEDURE 1231-32 (1988).

\(^{140}\) 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.\textsuperscript{142} 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.\textsuperscript{143}

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 \textit{Code of Maimonides} from the 12\textsuperscript{th} century, which provided that the parties to a suit should be equally well (or badly) dressed during trial.\textsuperscript{144} 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

\textsuperscript{142} \textit{Deuteronomy} 19:15.

\textsuperscript{143} See \textit{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.

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} \textsc{Immanuel Kant}, \textsc{Kritik der reinen Vernunft} (1781) (“Gedanken ohne Inhalt sind leer, Anschauungen ohne Begriffe sind blind.”)


\textsuperscript{149} \textsc{Schiller}, \textsc{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). \(^{150}\)

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.” \(^{151}\) 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. \(^{152}\) 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. \(^{153}\)

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.

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\(^{150}\) This formula was first used by Francis Galton in 1874. See 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 homo sapiens, homo sociologicus, and 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.


\(^{153}\) Id.
Optical Illusion 1: Scintillating Grid Illusion\textsuperscript{154}

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\textsuperscript{155}

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.

\textsuperscript{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.\footnote{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.}

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.\footnote{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-4f94-9933-989-7a588b3c-5158-5e59-92ed-41bd753bb77f.} Scientists previously believed...
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} Id.

\textsuperscript{159} For a more detailed explanation of these visual phenomena, see Edward H. Adelson, \textit{Lightness Perception and Lightness Illusions}, in: M. \textsc{Gazzaniga}, Ed., \textsc{The New Cognitive Neurosciences}, 339-351, (2nd ed. 2000) \textit{available at} \url{http://www.sciencedaily.com/releases/2009/02/090202175202.htm}.
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. 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 nonexistent 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).

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. 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.”

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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.\textsuperscript{167} 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 \textit{Code of Maimonides} in the 12\textsuperscript{th} century have recognized that appearances can influence judicial results. This is certainly also the logic behind \textit{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.\textsuperscript{168} 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.\textsuperscript{169} We can protect people from jury bias based on

\begin{itemize}
\item \textsuperscript{167} V.S. Ramachandran & W. Hirstein, \textit{Response from V.S. Ramachandran}, 7 J. OF CONSCIOUSNESS STUD. 17, 18 (2000).
\item \textsuperscript{168} \textit{Estelle v. Williams}, 425 U.S. 501, 505-06 (1976).
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.\(^\text{174}\) 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.\(^\text{175}\) 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.\(^\text{176}\) 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


\(^{175}\) See id. at 173-74 (1985).

\(^{176}\) 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

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

In this popular online “reading test,” we are confronted with 35 geometric shapes.\textsuperscript{184} A few of them resemble letters (such as “i” and “f”), 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

\textsuperscript{184} See, e.g., Treasury apologizes over e-mail, BBC News (Jan. 24, 2006), http://news.bbc.co.uk/2/hi/uk_news/politics/4644540.stm.
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. 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 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. 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. And these were basic geometric shapes with which he was familiar; identifying unfamiliar objects presented a whole different challenge.

![Demonstration of invariance in perception](http://en.wikipedia.org/wiki/File:Invariance.jpg)

**Demonstration of invariance in perception**

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. And it is virtually impossible for people who have regained sight after

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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} \textit{Id.} at 129-131.
\textsuperscript{194} \textit{Id.} at 174-75.
\textsuperscript{195} \textit{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


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)

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 phaenomena seen in Switzerland; and on an optical phaenomenon 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, \url{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.

\[
\text{The Kanizsa Triangle (1955)}
\]

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.

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

\(^\text{219}\) The concept of “Gestalt” was first introduced in the late 19th century. See Christian von Ehrenfels, Über Gestaltqualitäten, 14 VIERTELJAHRESCHRIFT 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.

\(^\text{220}\) 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.

\begin{center}
\includegraphics[width=0.6\textwidth]{kanizsa_triangle}
\end{center}


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.

\begin{footnotes}
\textsuperscript{221} Gaetano Kanizsa, \textit{Margini quasi-percettivi in campi con stimolazione omogenea}, 49 RIVISTA DI PSICOLOGIA 7–30 (1955). \textit{See also} Kanizsa Triangle, WIKIPEDIA, \url{http://en.wikipedia.org/wiki/Kanizsa_triangle}.
\textsuperscript{222} \textit{See}, \textit{e.g.}, Herb Stevenson, 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, \textit{see}, \textit{e.g.}, Jacob Scott, \textit{Codified Canons and the Common Law of Interpretation}, 98 GEO. L.J. 341 (2010).
\end{footnotes}
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.

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. 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.”).

Ludwig Wittgenstein used the same image to explain two uses of the word “see.” 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.”

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

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diagnosis of schizophrenia.\footnote{Hermann Rorschach, Psychodiagnostik (1921).} 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.\footnote{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).}

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

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

\footnotetext{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
misidentification in about 75 percent of overturned convictions. 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.” 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. 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.

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. 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).

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

(2013) J. JURIS. 461
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).

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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

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.\textsuperscript{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 \textit{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 \textit{Brave New World}?\textsuperscript{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?\textsuperscript{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

\textsuperscript{263} Id. at 302.

\textsuperscript{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.”).

\textsuperscript{265} ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 42-44 (1974).
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.” 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.” 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.

Judith Shelly commented on this debate between Dworkin and Fish in light of the discoveries of anthropologist Claude Lévi-Strauss. 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. 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.”

Lévi-Strauss illustrated the different attitudes of bricoleur and scientist with François Clouet’s painting of Elisabeth of Austria. 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. 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

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283 Id. at 179.
seem to be comparatively freer to decide cases based on their ideological preferences again. 285

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

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.”286 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.”287

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. Wade288 or the Massachusetts’ Supreme Court
decision in Goodridge v. Department of Public Health289 (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.
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 ideas 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

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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.

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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

\(^{299}\) Korematsu v. United States, 323 U.S. 214 (1944).
suppressed a key intelligence report that undermined the rationale behind the internment.\textsuperscript{300} 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.”\textsuperscript{301}

The lack of objectivity in \textit{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.\textsuperscript{302} 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).\textsuperscript{303}

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

\begin{flushright}
\textsuperscript{301} Id.
\textsuperscript{303} See also MALCOLM X, \textit{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”).
\end{flushright}
accomplished. I have laid out the faults with this line drawing in greater detail in a different Article.\textsuperscript{304} 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 \textit{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 \textit{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:\textsuperscript{305}

\begin{quote}
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.
\end{quote}

As exemplified by the House Committee on Un-American Activities from 1947 to 1975\textsuperscript{306} 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.

\textsuperscript{305} WILL HERBERG, PROTESTANT, CATHOLIC, JEW 79 (1955).
\textsuperscript{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 unconstitutional\(^{310}\) 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 \textit{Grutter v. Bollinger} in which the Supreme

\(^{307}\) See \textit{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.


\(^{311}\) \textit{San Antonio Independent School District v. Rodriguez}, 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. 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:

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.

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<td>4</td>
<td>2</td>
<td>1</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Black – Poor</td>
<td>1</td>
<td>2</td>
<td>4</td>
<td>8</td>
<td>4</td>
<td>2</td>
<td>1</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Overall Result</td>
<td>1</td>
<td>3</td>
<td>7</td>
<td>15</td>
<td>18</td>
<td>18</td>
<td>15</td>
<td>7</td>
<td>3</td>
<td>1</td>
</tr>
</tbody>
</table>

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.

<table>
<thead>
<tr>
<th></th>
<th>100</th>
<th>99</th>
<th>98</th>
<th>97</th>
<th>96</th>
<th>95</th>
<th>94</th>
<th>93</th>
<th>92</th>
<th>91</th>
</tr>
</thead>
<tbody>
<tr>
<td>White – Rich</td>
<td>1</td>
<td>2</td>
<td>4</td>
<td>8</td>
<td>4</td>
<td>2</td>
<td>1</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>White – Poor</td>
<td>1</td>
<td>2</td>
<td>4</td>
<td>8</td>
<td>4</td>
<td>2</td>
<td>1</td>
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</tr>
<tr>
<td>Black – Rich</td>
<td>1</td>
<td>2</td>
<td>4</td>
<td>8</td>
<td></td>
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<td>1</td>
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</tr>
<tr>
<td>Black – Poor</td>
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<td>2</td>
<td>4</td>
<td>8</td>
<td></td>
<td>2</td>
<td>1</td>
<td></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>
<td>18</td>
<td>3</td>
<td>1</td>
<td></td>
<td></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>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
</tbody>
</table>

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.

<table>
<thead>
<tr>
<th></th>
<th>100</th>
<th>99</th>
<th>98</th>
<th>97</th>
<th>96</th>
<th>95</th>
<th>94</th>
<th>93</th>
<th>92</th>
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<tbody>
<tr>
<td>White – Rich</td>
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<td>8</td>
<td>4</td>
<td>2</td>
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<td></td>
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<tr>
<td>White – Poor</td>
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<td>2</td>
<td>4</td>
<td>8</td>
<td>4</td>
<td>2</td>
<td>1</td>
<td></td>
<td></td>
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</tr>
<tr>
<td>Black – Rich</td>
<td>1</td>
<td>2</td>
<td>4</td>
<td>8</td>
<td>4</td>
<td>2</td>
<td>1</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Black – Poor</td>
<td>1</td>
<td>2</td>
<td>4</td>
<td>8</td>
<td>4</td>
<td>2</td>
<td>1</td>
<td></td>
<td></td>
<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>
<td>2</td>
<td></td>
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<tr>
<td>50% Enrolled</td>
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<td>6</td>
<td>12</td>
<td>24</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
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</tbody>
</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 20th century to exercise more control over the composition of their student bodies and designed tests specifically to limit admissions of poor immigrants: 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.

314 539 U.S. 306, 368-69 (Thomas, J., dissenting).

(2013) J. JURIS, 483
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...
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.\textsuperscript{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.\textsuperscript{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


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.