The Enclosure of Justice: Courthouse Architecture, Due Process, and the Dead Metaphor of Trial

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We shape our buildings, and afterwards, our buildings shape us.
— Winston Churchill[1]

INTRODUCTION

Theories of justice have not had much to say about the space in which it is administered. Renderings of justice are almost entirely conceptual. In political theory, abstractions about the state of nature (an imagined condition in imaginary time) are followed by abstractions about consent, sovereignty, and just distribution that reduce agreement to implication, authority to inference, and equality to deferred expectation.[2] In moral philosophy, exhortations about right action are offered in concededly metaphysical (which is to say, atemporal, disembodied) terms.[3] And beyond the question of jurisdiction, which sovereignty implies, and the right of exclusion, which private property entails, precious little is said in legal theory about the relationship between justice and the space in which it operates.[4]

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1. Winston Churchill, speaking before the British House of Commons in 1943 on the question of how the House building should be rebuilt after its destruction in German air attacks on London. Quoted in AMERICAN BAR ASS'N, TWENTY YEARS OF COURTHOUSE DESIGN REVISITED iv (National Center for State Courts 1993).

2. *See* JOHN RAWLS, A THEORY OF JUSTICE (1971); ROBERT NOZICK, ANARCHY, STATE AND UTOPIA (1974); *see also* JOHN LOCKE, SECOND TREATISE OF GOVERNMENT (C.B. Macpherson ed., 1980) (1690); THOMAS HOBBES, LEVIATHAN (Edwin Curley ed., 1994) (1660).

3. *See* IMMANUEL KANT, GROUNDWORK OF THE METAPHYSIC OF MORALS (H.J. Patton trans., 1964) (1785). The dominant alternative relies on abstractions about utility. *See* JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (J.H. Burns & H.L.A. Hart eds., 1996) (1789).

4. For examples from contemporary legal theory, see JEREMY WALDRON, LAW AND

Even with respect to jurisdiction and sovereignty, borders have been rendered increasingly conceptual as national identity has become as much a question of memory and desire as of control over specific terrain.[5] And physical boundaries remain as porous and contested as ever. Adjudicative jurisdiction now turns less on physical boundaries than a set of speculations about the consequences of action and omission. The metaphors are still spatial (lawyers speak of minimum "contacts" and "long arm" jurisdiction), but the analysis is relational and bespeaks the irrelevance of physical borders to modern social and economic intercourse.[6] Property rights have become similarly abstract.[7]

Indifference to the space in which justice is administered also may derive from skepticism, persistent in the theoretical literature and doubtless shared by the public, about whether justice actually occurs in the places where it is administered. The long and now stale debate between positivists and natural law theorists confirms nothing if not a kind of irreducible ambivalence about whether law and justice occupy the same space.[8]

DISAGREEMENT (2001); NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE (1995); H.L.A. HART, THE CONCEPT OF LAW (Penelope A. Bulloch & Joseph Raz eds., 2d ed. 1994); RICHARD POSNER, THE PROBLEMS OF JURISPRUDENCE (1990); and RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1978). *Cf.* Lior Barshack, *The Constituent Power of Architecture*, 7 L. CULT. & HUM. 217 (2010). Even Michel Foucault, who was profoundly concerned with the effects of the organization of space on relations of power, insisted for most of his career on studying the organization of non-juridical space. *See, e.g.*, MICHEL FOUCAULT, DISCIPLINE & PUNISH: THE BIRTH OF THE PRISON (Alan Sheridan trans., 1977); *cf.* Socrates's claim that the experience of trial is what binds citizens to follow the law. Plato, *Crito*, *in* DIALOGUES OF PLATO (Benjamin Jowett trans., P.F. Collier & Son 1900) ("He who has experience of the manner in which we order justice and administer the State, and still remains, has entered into an implied contract that he will do as we command him."). On the abstractions of modern social contract theory, see Jeremy Waldron, *Superseding Historical Injustice*, 103 ETHICS 4, 13 (1992) ("Modern contractarian theories consist almost entirely of asking what the people of a society would have agreed to in the way of institutions governing the distribution of resources, had they been consulted . . . . It is characteristic of such approaches that they are holistic, systematic, and structural, rather than local and specific in their conclusions and recommendations."). On the abstractions of utilitarianism and deontological moral philosophy, see BERNARD WILLIAMS, ETHICS AND THE LIMITS OF PHILOSOPHY (1985); and SAMUEL SHEFFLER, CONSEQUENTIALISM AND ITS CRITICS (1988).

5. BENEDICT ANDERSON, IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM (1991); *see also* MICHAEL IGNATIEFF, BLOOD AND BELONGING: JOURNEYS INTO THE NEW NATIONALISM (1994).

6. *See* Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945); Zippo Mfg. Co. v. Zippo Dot Com, 952 F. Supp. 1119 (W.D. Pa. 1997); *cf.* Goodyear Luxembourg Tires v. Brown, 131 S. Ct. 63 (No. 10-76) **(**2010**)**; J. McIntyre Machinery Ltd. v. Nicastro, 131 S. Ct. 62 (No. 09-1343) **(**2010**)**. *But see* Burnham v. Superior Court, 495 U.S. 604 (1990).

7. Thomas C. Grey, *The Disintegration of Property*, 22 NOMOS 69 (1980).

8. JOSEPH RAZ, THE AUTHORITY OF LAW (1979); H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958); Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958); *see also* GORDON WOOD, THE CREATION OF THE AMERICAN REPUBLIC 295 (1969) (describing debate between positivism and natural law as "a basic ambiguity in the American mind about the nature of law that was carried into the Revolution").

Figure 1. Lincoln Memorial, East Facade, Washington, D.C. Reproduced courtesy of Library of Congress, Prints and Photographs Division, Historic American Buildings Survey.

That ambivalence is strikingly reflected in the use and arrangement of physical space for the administration of justice. "The Contemplation of Justice," James Earle Fraser's statue including a miniature Justicia, sits well outside the United States Supreme Court building on a marble pedestal at the north side of the staircase leading to the main entrance. And she is flanked by "The Authority of Law," a man seated holding the tablet "Lex," backed by a sword.[9] So one *passes* justice, already divided from the authority of law, at what used to be the public entrance to the building. And of course the building itself, designed in the style of Corinthian neoclassical revival to evoke religious reverence, is juxtaposed, albeit at a considerable remove, by an even more imposing and popular Doric temple of justice at the west end of the Mall. There, a towering statue of Abraham Lincoln sits alone, surrounded by columns and texts of his orations. His massive, deep chair is strikingly similar to elevated chief magistrates' benches "of imposing proportions," common in English as well as pre- and post-Revolutionary American courtrooms.[10] No public remonstration or petition at the steps of the Supreme Court Building has ever equaled those organized before this seat of justice.[11]

9. Unlike traditional representations of Justicia, the figure in the Contemplation of Justice is seated, is not blindfolded, and holds in her right hand a miniature statue of Justicia whose scales are held against her body rather than extended. *See* Office of the Curator, *Statues of Contemplation of Justice and Authority of Law*, SUPREME COURT OF THE UNITED STATES (May 25, 2010), http://www.supremecourt.gov/about/FraserStatuesInfoSheet.pdf. On the general history of western images of justice, see IMAGES ET RÉPRESENTATION DE LA JUSTICE DU XVIE AU XIXE SIÈCLE (G. Lamoine ed., 1983); and JUDITH RESNIK & DENNIS CURTIS, REPRESENTING JUSTICE: INVENTION, CONTROVERSY, AND RIGHTS IN CITY-STATES AND DEMOCRATIC COURTROOMS (2011).

10. CARL R. LOUNSBURY, THE EARLY COURTHOUSES OF VIRGINIA: AN ARCHITECTURAL HISTORY 73, 147 (2005). S*ee generally id*. at 146-53. On the architecture of the Lincoln Memorial, see CHRISTOPHER A. THOMAS, THE LINCOLN MEMORIAL AND AMERICAN LIFE (2002); Christopher A. Thomas, *The Marble of the Lincoln Memorial*, 5 WASH. HIST. 42 (1993-94).

11. Scott A. Sandage, *A Marble House Divided: The Lincoln Memorial, the Civil Rights*

Figure 2. Lincoln Memorial Interior, Washington, D.C. Reproduced courtesy of Library of Congress, Prints and Photographs Division, Historic American Buildings Survey.

But the meaning of any relationship between justice and the space in which it is administered probably should not be sought on the National Mall. After all, the Supreme Court had no purpose-built structure until the current building was completed in 1935. Prior to that, the Court sat in the Royal Exchange Building in New York, Independence Hall and City Hall in Philadelphia, various Chambers of the Capitol building in Washington, D.C., and even in a private home during the War of 1812.[12] Indeed, the Court's peripatetic existence for a century and a half suggests that the location, design, and use of courthouses have not been significant to the administration of justice or any other public ends.

Nothing could be farther from the truth. As recently published histories of the architecture of American courthouses have shown, state and county courthouses served not only as public spaces for the conduct of civil and criminal trials, but for countless other essential judicial and administrative functions directly affecting the lives of residents, travelers, and people doing business in the jurisdiction (taxation, licensure, weights and

Movement, and the Politics of Memory, 1939-1963, 80 J. AM. HIST. 135 (1993). *See also* Adam Fairclough, *Civil Rights and the Lincoln Memorial: The Censored Speeches of Robert R. Moton (1922) and John Lewis (1963)*, 82 J. NEGRO HIST. 408 (1997); Sara A. Butler, *The Art of Negotiation: Federal Arts, Civil Rights and the Legacy of the Marian Anderson Concert, 1939-43*, 40 WINTERTHUR PORTFOLIO 175 (2005).

12. *See* Robert P. Reeder, *The First Homes of the Supreme Court of the United States*, 76 PROC. AM. PHIL. SOC'Y 543 (1936); *Home of the Court*, THE SUPREME COURT HISTORICAL SOCIETY, http://www.supremecourthistory.org/history-of-the-court/home-of-the-court/ (last visited Nov. 16, 2011).

measures, probate, deed recording, to name but a few).[13] Court days drew all levels of society and all manner of social engagement for much of the nation's first three centuries.[14] Architectural histories further reveal the relationship of courthouse design and construction to the authority of law and the legal profession during the colonial period and the first century of the Republic, and to architects' parallel quest for professional authority.[15]

There are, however, even deeper and as yet unexplored connections between justice and the structure of the space in which it has been administered. As I argue in this Essay, the American concept of due process of law is itself intimately bound up with the location, design, and use of law's administrative space. Doctrinally, the dominant, indeed controlling, metaphor for the constitutional guarantee of procedural due process is a courtroom trial. That metaphor, with all that it conjures up about the organization of adjudicative space, emerged as *viva voce* confrontation in jury trials came to define the local practice of justice. Early Americans thus modified English common law and adversary procedure to suit their distinctive needs in the same period that they began to design, construct, and use purpose-built courthouses and constitutions.

Section II offers a brief sketch of the history of colonial courthouse architecture, relying for the most part on architectural histories of early Massachusetts and Virginia courthouses to identify the major design stages. I argue that as common law adversarial procedure matured and, in particular, as the right of confrontation developed to ensure full adversarial engagement in jury trials during the Revolutionary period, courthouses also became more enclosed. This development centralized

13. The two most comprehensive histories treating colonial courthouse architecture are MARTHA J. MCNAMARA, FROM TAVERN TO COURTHOUSE: ARCHITECTURE AND RITUAL IN AMERICAN LAW 1658-1860 (2004); and LOUNSBURY, *supra* note 10. For other significant but less comprehensive studies of courthouse architectural history, see CARL R. LOUNSBURY, FROM STATEHOUSE TO COURTHOUSE: AN ARCHITECTURAL HISTORY OF SOUTH CAROLINA'S COLONIAL CAPITOL AND CHARLESTON COUNTY COURTHOUSE (2001); SUSAN W. THRANE, COUNTY COURTHOUSES OF OHIO (2000); HERBERT ALAN JOHNSON & RALPH K. ANDRIST, HISTORIC COURTHOUSES OF NEW YORK STATE (1977); THE NATIONAL TRUST FOR HISTORIC PRESERVATION, A COURTHOUSE CONSERVATION HANDBOOK 9 (1976); EVELYN TAYLOR ADAMS, THE COURTHOUSE IN VIRGINIA COUNTIES: 1634-1776 (1966); BOYD CRUMRINE, THE COURTS OF JUSTICE BENCH AND BAR OF WASHINGTON COUNTY, PENNSYLVANIA (1902); and Paul Goeldner, Temples of Justice: Nineteenth Century Courthouses in the Midwest and Texas (1970) (unpublished Ph.D. dissertation, Columbia University) (on file with author).

14. *See* LOUNSBURY, *supra* note 10, at 3-8; MCNAMARA, *supra* note 13, at 58-63; LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW (3d ed. 2001); William M. Offutt, Jr., *The Limits of Authority: Courts, Ethnicity, and Gender in the Middle Colonies, 1670-1710*, *in* THE MANY LEGALITIES OF EARLY AMERICA 359 (Christopher L. Tomlins & Bruce H. Mann eds., 2001) ("Courts were critical social institutions in all colonies, established on arrival or soon thereafter by the first English settlers to transmit a colonial elite's values throughout the settlements . . . . Courts were an arena (in many times and places, the primary arena) for presentation and resolution of social conflicts, within which members of different social groups could contend.").

15. *See* MCNAMARA, *supra* note 13, at 11, 65.

primary adjudicative and administrative functions into a single, distinctive, and increasingly impregnable building. Enclosure not only symbolized the independence of law from political, commercial, and social space; it served to restrict access, limit vandalism, minimize the disruption of trial, and, perhaps above all, encourage deference to the administration of justice in a democratic society perpetually anxious about the authority of law and lawyers. Section III describes how courtroom interiors were increasingly partitioned and hierarchically segmented to specialize and control the structure of confrontation within adversarial space.[16] Procedural enclosure arising from increasingly formal rules for pleading and practice developed apace, rendering law less accessible to lay persons, making the expertise of lawyers more and more important, and provoking popular resentment and reform movements.

Having established the significance of spatial and procedural enclosure to the administration of justice and the guarantee of due process of law, I consider in Part IV why trial has remained the governing metaphor for due process notwithstanding the fact that actual courtroom trials are "vanishing."[17] A welter of scholarship and case law confirms the decline in public adjudication: courtroom trials have been eclipsed by alternative dispute resolution in private settings;[18] many litigated cases are rendered private by unpublished dispositions and the sealing of settlements and other court records;[19] and procedural rules designed to ensure meaningful

16. I rely heavily on McNamara's, *supra* note 13, and Lounsbury's, *supra* note 10, monographs on architectural history in Massachusetts and Virginia in these sections. These two British colonies were, of course, unique, and further differences can be found in the histories of courthouse architecture in other colonies. *See* JACK P. GREENE, PURSUITS OF HAPPINESS: THE SOCIAL DEVELOPMENT OF EARLY MODERN BRITISH COLONIES AND THE FORMATION OF AMERICAN CULTURE (1988); GEORGE LEE HASKINS, LAW AND AUTHORITY IN EARLY MASSACHUSETTS: A STUDY IN TRADITION AND DESIGN viii (1960). Nevertheless, the two principal developments on which my argument about enclosure turns—the revival of classical temple design features in courthouse architecture in the post-Revolutionary period, and the segmentation of adversarial space within courtrooms—appear to have been relatively widespread. See, e.g., CRUMRINE, *supra* note 13, at 67; JOHNSON & ANDRIST, *supra* note 13, at 29; LOUNSBURY, *supra* note 13; Goeldner, *supra* note 13; *see also infra* Part II.C.

17. Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004). It is common knowledge that more than 90% of civil and 95% of criminal cases are now resolved without trial. For civil figures, see LEONIDAS RALPH MECHAM, JUDICIAL BUSINESS OF THE FEDERAL COURTS: 2001 ANNUAL REPORT OF THE DIRECTOR 154 (2001); NATIONAL CENTER FOR STATE COURTS, EXAMINING THE WORK OF THE STATE COURTS 22 (2003). For criminal figures, see GEORGE FISHER, PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA 22-84 (2003); Jennifer Mnookin, *Uncertain Bargains: The Rise of Plea Bargaining in America*, 57 STAN. L. REV. 1721, 1722 n.3 (2005).

18. Cameron L. Sabin, *The Adjudicatory Boat Without A Keel: Private Arbitration and the Need for Public Oversight of Arbitrators*, 87 IOWA L. REV. 1337, 1339-40 (2002).

19. Judith Resnik, *Courts: In and Out of Sight, Site, and Cite*, 53 VILL. L. REV. 771 (2008); Hillel Y. Levin, *Making the Law: Unpublication in the District Courts*, 53 VILL. L. REV. 973 (2008); Lance A. Wade, Honda *Meets* Anastasoff*: The Procedural Due Process Argument Against Rules Prohibiting Citation to Unpublished Judicial Decisions*, 42 B.C. L. REV. 695 (2001).

participation and accuracy in administrative decisions have been strained to the breaking point in order to accommodate the imperatives of mass processing as well as demands for swift justice in the interests of national security.[20] Due process is increasingly honored in the breach.

Although the degree of deviation from the procedures of courtroom trial is now alarmingly sharp, the use of alternative fora for dispute resolution is hardly novel. From vigilantism and shaming to settlement and plea bargaining, private dispute resolution has always been an important feature of American civil and criminal justice.[21] The rise of so-called "contract procedure"[22] merely reflects redoubled efforts to formalize and expand upon a long history of private dispute resolution. Even so, the metaphor of courtroom trial persists in both popular and legal imagination. Why is this? What is the relationship between the proliferation of images of courtroom trial in popular media and its absence in actual adjudication? Why are we constantly imagining trials that almost never occur? What are the consequences of disaggregating the sites in which justice is actually administered from the space that gives shape to our constitutional standards and popular expectations regarding the proper administration of justice? And what are the defining features of the new spaces for the administration of justice?

To begin to answer these questions we must pierce the indifference theorists have shown toward the relationship between due process of law and the public space in which justice traditionally has been administered.[23] The Essay concludes in Section V by suggesting that what

20. Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1268 (1975) (discussing expansion of due process requirements for administrative hearings following Goldberg v. Kelly, 397 U.S. 254 (1975)). *See also infra* text accompanying note 93 (discussing due process concerns implicated in mass administrative claims processing). For cases involving the use of trial by military commission for enemy combatants detained in the war on terror, see Hamdi v. Rumsfeld, 542 U.S. 507 (2004); Rasul v. Bush, 542 U.S. 466 (2004); Hamdan v. Rumsfeld, 548 U.S. 557 (2006); Boumediene v. Bush, 553 U.S. 723 (2008). For appellate cases applying *Boumediene* to evaluate the sufficiency of procedural substitutes for habeas review, see Al Maqaleh v. Gates, 605 F.3d 84 (D.C. Cir. 2010); Al-Bihani v. Obama, 590 F.3d 866 (D.C. Cir. 2010).

21. *See, e.g.*, NICHOLAS PARRILLO, AGAINST THE PROFIT MOTIVE: THE TRANSFORMATION OF AMERICAN GOVERNMENT, 1780-1940 (forthcoming 2012); ELIZABETH DALE, CRIMINAL JUSTICE IN THE UNITED STATES, 1789-1939 (2011); SHERRYLIN A. IFILL, ON THE COURTHOUSE LAWN (2008); MICHAEL J. PFEIFER, ROUGH JUSTICE: LYNCHING AND AMERICAN SOCIETY, 1874-1947 (2004); PAUL GILJE, RIOTING IN AMERICA (1996); LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY (1993); RICHARD MAXWELL BROWN, STRAIN OF VIOLENCE: HISTORICAL STUDIES OF AMERICAN VIOLENCE AND VIGILANTISM (1975); W. EUGENE HOLLON, FRONTIER VIOLENCE: ANOTHER LOOK (1978); David Johnson, *Vigilance and the Law*, 33 AM. Q. 558 (1981). The capacity for complete publication is also a very recent phenomenon. *See* FREDERICK C. HICKS, MATERIALS AND METHODS OF LEGAL RESEARCH (3d ed. 1942).

22. *See, e.g.*, David Horton, *The Shadow Terms: Contract Procedure and Unilateral Amendments*, 57 UCLA L. REV. 605 (2010); David Marcus, *The Perils of Contract Procedure: A Revised History of Forum Selection Clauses in the Federal Courts*, 83 TUL. L. REV. 973 (2008); Judith Resnik, *Procedure as Contract*, 80 NOTRE DAME L. REV. 593 (2005).

23. Legal scholars have not been totally indifferent. Several important recent works have

is obscured in standard attempts to theorize justice is a desire for the complete enclosure of justice – desire for space in which the passionate, messy, and indeterminate elements of public trial may not only be contained, but eliminated in favor of dispassionate, rational, and efficient decision. Recovering the distinctive moment of Revolutionary American history in which the early formalization of adversary procedure, the development and specialization of courthouse design, and popular hostility to the adversary system all converged helps draw this desire for enclosure into relief. The conflicting aspirations and anxieties that animated the Revolutionary period (desire for a dispute resolution process that is orderly, rational, and controlled by experts, on the one hand, and yet decentralized, accessible, and popularly accountable, on the other) remain with us. Indeed, as the actual administration of justice approaches complete enclosure, and as we continue to imagine trials that almost never occur, the conflict has become simultaneously more acute and more elaborately displaced.

I. PURPOSE-BUILT CONSTITUTIONS AND COURTHOUSES

Before Revolution and Independence, before democratic consent, before what we call the Founding, Americans built courthouses across the colonies to secure the "rights of Englishmen" they would later assert against the crown by force. Common law reception and the adversary system in which it functioned were contested, all the more so after the Revolution. (It was never obvious, after all, why newly liberated citizens of a democratic society should import standards of justice from their former colonial sovereign.) But the ubiquity of courthouses and their central place in the life of the communities they served suggests that resistance to common law reception and the adversary system were grounded in the kind of ambivalence that springs from both dependence and desire.[24] There was of course widespread frustration with the rights

attended to visual representations of justice—including the history of courthouse design—and to changes in American procedural law. *See* RESNIK & CURTIS, *supra* note 9; Resnik, *supra* note 19; Judith Resnik & Dennis E. Curtis, *Representing Justice: From Renaissance Iconography to Twenty-First-Century Courthouses*, 151 PROC. AM. PHIL. SOC'Y 139 (2007). Linda Mulcahy offers a parallel account of enclosure in the design of English courts of Criminal Assizes in her recent book, LEGAL ARCHITECTURE: JUSTICE, DUE PROCESS AND THE PLACE OF LAW (2011). Mulcahy's focus is on criminal trials and the distinctive English practices of sequestering defendants in the courtroom. Mulcahy's work and the organization of adversarial space in American courtrooms (which I discuss in Part III) show how important local studies of courthouse design are to understanding the actual administration of justice.

24. *See* WILLIAM E. NELSON, AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830 (1975); WOOD, *supra* note 8, at 300-05; GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION (1992); *see also* CHARLES M. COOK, THE AMERICAN CODIFICATION MOVEMENT: A STUDY OF ANTEBELLUM LEGAL REFORM (1981); RICHARD E. ELLIS, THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC

and remedies of creditors enforced in local courts, and with the lawyers who profited from such work, but there is no gainsaying the significance of common law reception and the adversary system, not only to rights definition in the new colonies, but to the public rituals and legal procedures that attended court days.[25]

At least in the American context then, the long practice of justice in local courthouses belies the abstractions of political, legal, and moral philosophy. There was no state of nature, no time behind the veil. The local practice of justice via common law reception well preceded insistence upon popular sovereignty. Indeed, insofar as the local practice of justice relied upon the active participation of community members not only to assess and meet their own needs but to make effective and, as the case may be, avoid imperial mandates, it cultivated the very knowledge, dispositions, and discourses from which democratic constitutionalism would emerge.[26]

A. Taverns, Townhouses, and Purpose-Built Courthouses

In what kinds of space did the local practice of justice occur? We know from recent architectural histories that multi-purpose public spaces (taverns, townhouses, state houses, and public squares) were initially used for trials and other legal proceedings.[27] Massachusetts town houses

(1971); SCOTT DOUGLAS GERBER: A DISTINCT JUDICIAL POWER: THE ORIGINS OF AN INDEPENDENT JUDICIARY, 1606-1787 (2011); Norman W. Spaulding, *The Discourse of Law in Time of War: Politics and Professionalism During the Civil War and Reconstruction*, 46 WM. & MARY L. REV. 2001 (2005); David Thomas Konig, *Legal Fictions and the Rule(s) of Law: The Jeffersonian Critique of Common Law Adjudication*, *in* THE MANY LEGALITIES OF EARLY AMERICA, *supra* note 14, at 97 (2001). On the importance of resisting accounts of colonial legality that suggest a "'linear, coherent, coercive process' between clearly defined protagonists," see Christopher Tomlins's introductory essay in THE MANY LEGALITIES OF EARLY AMERICA, *supra* note 14, at 5. Drawing on the work of Jean and John Comaroff, Tomlins notes that while "legality entered centrally 'into the making of modern history,' . . . one must allow that it did so 'imaginatively' and 'in inherently ambivalent, contradictory ways.'" *Id.* (quoting Jean Comaroff & John L. Comaroff, *The Dialectics of Modernity on a South African Frontier*, *in* 2 OF REVELATION AND REVOLUTION 365-67; John L. Comaroff, *Foreword* to CONTESTED STATES: LAW, HEGEMONY, AND RESISTANCE ix-xiii (Mindie Lazarus-Black & Susan Hirsch eds., 1994)). This essay attempts to expose the ambivalent and contradictory ways that early Americans sought to enclose the local practice of justice.

25. *See* FRIEDMAN, *supra* note 14; BRUCE H. MANN, REPUBLIC OF DEBTORS: BANKRUPTCY IN THE AGE OF AMERICAN INDEPENDENCE (2002); NELSON, *supra* note 24; Mary Sarah Bilder, *Salamanders and Sons of God: The Culture of Appeal in Early New England*, *in* THE MANY LEGALITIES OF EARLY AMERICA, *supra* note 14, at 47, 49.

26. *See* BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 74-79 (1967) (describing the conjunction of natural rights, separation of powers, jury trial, and English common law in American Revolutionary political consciousness); LOUNSBURY, *supra* note 10, at 27-28, 87; WOOD, *supra* note 8, at 298-99; *see also* J.G.A. POCOCK, THE ANCIENT CONSTITUTION AND THE FEUDAL LAW: A STUDY OF ENGLISH HISTORICAL THOUGHT IN THE SEVENTEENTH CENTURY (1957) (describing the significance of common law practice and ideology, which located legal authority in "time immemorial" to seventeenth-century English revolutionary political consciousness).

27. MCNAMARA, *supra* note 13, at 20, 22. The same was true in European countries for centuries. *See* JUDITH RESNIK & DENNIS CURTIS, REPRESENTING JUSTICE: INVENTION,

generally were located at the heart of commercial centers and were built on the English model: a rectangular building featuring a first-floor open arcade and a second story divided into multi-purpose "assembly rooms."[28] Typically the ground floor served as a marketplace and financial exchange, while the second floor was dedicated to legislative, executive, and judicial business.[29] Town houses not only "represented the authority of the king,"[30] they were important sites for the dissemination of official and unofficial information,[31] and they "facilitated the maintenance of order in their use as militia training spaces."[32] Government and commerce were thus combined in centralized, hierarchically ordered public space.[33]

In mid-seventeenth-century Virginia, after the Virginia Company replaced martial law with the common law, county courts "became the central mechanism for maintaining the peace, administering the county's business, and adjudicating civil and criminal disputes."[34] But as in seventeenth-century Massachusetts, "it must have seemed extravagant to build a structure solely for public purposes. The notion that minor courts should be housed in a specialized place, much less a separate building, held little currency in English or colonial society."[35] So, early on, court sessions were held in rented houses, magistrates' private houses, and taverns.[36] Many counties "made it a policy to alternate between established sites in widely scattered locations," much as quarter session courts in English counties had done to make "attendance accessible to all regions."[37]

But this changed in the late seventeenth and early eighteenth centuries.[38] As greater resources became available, as legal practice formalized with the steady increase in the population of lawyers, and as lawyers and judges sought means beyond their personal authority and specialized knowledge to induce deference in both the communities they served and their provincial government superiors,[39] municipalities turned to purpose-built structures. Studies reveal wide variation in many aspects

CONTROVERSY, AND RIGHTS IN CITY-STATES AND DEMOCRATIC COURTROOMS 26 (2011) (describing reliance on town halls for adjudication).

28. MCNAMARA, *supra* note 13, at 14-16, figs.1.1-1.3.

29. *Id*. at 15.

30. *Id*. at 17.

31. *Id*. at 17-18.

32. *Id*. at 19. On taverns and meetinghouses, see *id*. at 20-21.

33. *Id*. at 30, 35.

34. LOUNSBURY, *supra* note 10, at 17-18.

35. *Id*. at 60. The choices were surely also influenced by developing ideas about judicial independence. *See* ELLIS, *supra* note 24; GERBER, *supra* note 24.

36. LOUNSBURY, *supra* note 10, at 58.

37. *Id*. at 58-59.

38. *Id.* at 62; MCNAMARA, *supra* note 13, at 46.

39. LOUNSBURY, *supra* note 10, at 61; MCNAMARA, *supra* note 13, at 11, 25.

of early American courthouse location and design. In Massachusetts, for instance, legal professionals were apparently keen to dissociate courtroom space from commercial centers, so courthouses were built at a remove from town houses and adjacent to jails.[40] In Virginia, by contrast, which had fewer urban centers and a population dispersed across wide stretches of land on plantations, "colonists gradually came to build their public structures on land in or near the geographic middle of the area encompassed by the county. This method of selection often meant constructing civic structures in the middle of nowhere, at a place that was equidistant from all corners of the county."[41]

Notwithstanding this variation, common patterns developed in the early colonial period and were repeated later on the frontier.[42] More sophisticated design forms emerged on the eastern seaboard in two subsequent waves between the mid-eighteenth and mid-nineteenth centuries. The first purpose-built colonial courthouses were quite humble. Early Virginia courthouses were "simply fashioned frame buildings whose structure, size, and configuration differed little from neighboring farmhouses."[43] Colonists "used inferior materials and methods of construction," producing "structures that would seldom survive more than one or two decades without substantial repairs."[44] Courthouses were generally single-story, single-room "earthfast" rectangular buildings.[45] Various techniques were used to distinguish the judges' end of the courtroom, including different flooring, an elevated platform for a table or bench, wall framing, paneling, molding, clapboards, and a simple railing or "bar" to restrict physical access.[46]

Doors located on the sides or at the end facing the bench and bar opened directly into a single room. There were rarely ancillary rooms for clerks' offices, judges' chambers, records, or jury deliberation. Judges, jurors, lawyers, and clients huddled in open court or conferred outside. The clerks kept records at their home, in jury rooms, courthouse lofts, or on the courthouse floor "in chests, trunks, boxes, and loose volumes."[47] Equally rare was any space for lawyers to sit or meet with clients.[48] Most floor plans show no space for lawyers separate from the area for the

40. LOUNSBURY, *supra* note 10, at 72; MCNAMARA, *supra* note 13, at 53.

41. LOUNSBURY, *supra* note 10, at 54.

42. Goeldner, *supra* note 13, at 111-14; THRANE, *supra* note 13; NATIONAL TRUST, *supra* note 13; Crumrine, *supra* note 13 (describing courthouse development in a western Pennsylvania county).

43. LOUNSBURY, *supra* note 10, at 62; MCNAMARA, *supra* note 13, at 22, 53, fig.2.8.

44. LOUNSBURY, *supra* note 10, at 67.

45. *Id*. at 84.

46. *Id*. at 78-79.

47. *Id*. at 297.

48. *Id*. at 82-83.

general public. Taverns intentionally built in close proximity to courthouses filled the gap:

> Whether a private dwelling with a public license or a 'purpose-built' structure, the courthouse tavern provided rooms to accommodate travelers, served meals and spirituous beverages to guests, acted as a business exchange, and was a venue for polite and raucous public entertainments such as assemblies, theatricals, lectures, gambling, and sporting activities.[49]

Taverns offered private dining rooms for a fee, but private meetings regularly took place in the unenclosed, socially level space of the main open rooms.[50]

In sum, the early courthouse *was* the courtroom. It provided public space for adjudication with minimal enclosure. Significant court business was conducted outside the courthouse in taverns and other public and private spaces. The court was physically unprotected from exterior noise and disruption since doors and ground-floor windows necessary for light and ventilation provided immediate access; the internal structure was relatively undifferentiated; and low-quality building materials left it subject to the elements and to destruction as an expression of protest. As Lounsbury notes, "[t]he disgruntled had the disturbing tendency to torch buildings when the scales of justice tipped in the wrong direction."[51]

B. Specialization in Courthouse Design

Larger, more imposing buildings, more permanent building materials, more function-specific use of space, and more direct borrowing of English courthouse and ecclesiastic architectural themes characterized the second wave of purpose-built courthouses in the mid-eighteenth century. Single-room courthouses were replaced by buildings with ancillary rooms for jury deliberation, record-keeping, and other administrative functions. Raised perimeter foundations replaced earthfast construction. Brick and stonework replaced wood. Most significantly, builders began to pay more attention to the symbolic and functional significance of exterior and interior features.

In wealthy Virginia counties, porches, multi-bay arcaded piazzas, and pedimented porticos adorned entrances.[52] Cupolas, hipped roofs,

49. *Id*. at 6, 265.

50. *Id*. at 38.

51. *Id*. at 164 (discussing other examples of physical damage short of burning courthouses). Even in colonies like Massachusetts, which relied on the second floor of town houses into the early eighteenth century, enclosure was minimal. The space was multipurpose, internally undifferentiated, disconnected from spaces in which other court business took place, and noise intruded from commercial activity below. MCNAMARA, *supra* note 13, at 23.

52. LOUNSBURY, *supra* note 10, at 108.

compass-headed windows, and large double-doors distinguished courthouse exteriors from domestic structures.[53] Inside, apses were introduced at the judges' end of the courtroom either by extending the exterior wall in a curve or by installing the magistrates' bench in a semicircle to round out the corners of the rear wall. Although magistrates' benches had already been set on raised platforms and chief magistrates given a high armchair, "[t]he enhanced status of the elevated bench curving outward from the center chair conveyed an image of corporate power and responsibility shared by an entire class of gentry officeholders."[54] Means of access to the platform became more restricted in the eighteenth century: simple "bars" gave way to balustraded railings designed to hold books and court records open to the magistrates; magistrates' benches received back paneling, cushions, and cloth-padded armrests; and chief magistrates' chairs received "the most elaborate ornamentation," including high canopies, wainscoting, pilasters, dentilated cornices, and greater depth and width than magistrates' benches.[55]

By the end of the eighteenth century, there was also an "intricate subdivision of the courtroom into specific places for the court participants."[56] Although there was considerable variation in many of the details, the main features approached the format of modern courtroom design and are immediately recognizable. Side entrances opening directly onto the courtroom floor were eliminated, clerks' desks were set proximate to the judges' bench, prisoners' docks were placed near seating for sheriffs and constables, counsels' seating was separated from the public and either below the judges' bench or facing it, the witness stand was set off to one side, jurors were situated in rows of elevated benches at right angles to the magistrates' bench and "enclosed by panels or a balustrade,"[57] and, finally, rows of benches facing the judges' bench for public seating and designated press seating were divided from the adjudicative space by a second bar.[58]

As with other civic buildings, both interior and exterior design features of second-wave colonial courthouses borrowed heavily from English courts, English town halls, and, above all, churches.[59] Inside, backless benches facing a curvilinear, elevated panel-backed bench with a central

53. MCNAMARA, *supra* note 13, at 65-67.

54. LOUNSBURY, *supra* note 10, at 139.

55. *Id*. at 140-42, 147-49.

56. *Id*. at 137.

57. *Id*. at 151.

58. *See id*. at 164; MCNAMARA, *supra* note 13, at 24, 66-67, figs.1.7, 3.11, 3.13, 4.8.

59. There was, of course, a broader aesthetic trend of borrowing. *See* RICHARD BUSHMAN, THE REFINEMENT OF AMERICA: PERSONS, HOUSES, CITIES (1993).

canopied armchair unmistakably recalled pulpit and pews; outside, "semicircular and segmentally arched openings" like the arcaded piazzas, pedimented porticos, and compass-headed windows common to eighteenth-century Virginia courthouses copied design features that "first appeared in late seventeenth-century Anglican parish churches."[60] The authority of the law might be contested by a litigant, advocate, or spectator, but by the mid- and late eighteenth century that contest took place in space formally organized and decorated to induce deference to the administration of justice.

C. Classical Revival Temples

The apotheosis of ecclesiastic influence, and the beginning of the third wave of early American courthouse design, was Thomas Jefferson's widely copied design for the Richmond capitol building, completed in 1789, a year after the Constitution was ratified. While in Paris in the late 1780s, Jefferson worked closely with Charles Louis Clérisseau to build a model for the capitol building based on the Maison Carrée in Nimes.[61] Jefferson adored the Maison Carrée, and Clérisseau was an ideal collaborator. He had spent decades in Rome teaching and drawing studies of classical buildings, and in 1788 he published detailed engravings of the Maison Carrée as part of a study of classical Roman buildings in France. Other capitol buildings, the United States Supreme Court building, the Lincoln Memorial, and, most importantly for present purposes, countless state and local courthouses share the areopagitic design features of the Richmond capitol building: "a massive hexastyle pedimented portico executed in the Ionic order" supported by "two-story columns rising above a plinth"; "a shallow roofline"; stone block walls; columns or pilasters running the length of the building; and double tier windows.[62] That neoclassical form became "standard for new courthouse design in the first quarter of the nineteenth century."[63]

60. LOUNSBURY, *supra* note 10, at 108; MCNAMARA, *supra* note 13, at 23-24 (describing incorporation of "design elements associated with Congregational meetinghouses").

61. *See* THOMAS MCCORMICK, CHARLES LOUIS CLÉRISSEAU AND THE GENESIS OF NEO-CLASSICISM (1990).

62. LOUNSBURY, *supra* note 10, at 126-27.

63. *Id*. at 128; NATIONAL TRUST, *supra* note 13, at 9; *see also* MCNAMARA, *supra* note 13, at 68-73 (describing Charles Bulfinch's design for the 1805 Newburyport, Massachusetts, courthouse); MCNAMARA, *supra* note 13, at 86-90 (describing the design for the 1810 Suffolk County courthouse); MCNAMARA, *supra* note 13, at fig.4.7 (describing the 1812 Hampshire County Courthouse); THRANE, *supra* note 13, at 27-30 (providing photographs and history of the 1850 Montgomery County, Ohio, revival temple courthouse). Given his reservations about common law adjudication, there is some irony that Jefferson's design for the Richmond capitol was so widely copied for courthouses. *See* Konig, *supra* note 24, at 116 (2001) ("[Jefferson] trusted the legislature more than the judges. Like Bentham, who had urged codification in 1776 so that 'the fictitious must be substantiated into real,' Jefferson that same year began an effort to codify Virginia's laws. The effort fell far short of his

Figure 3. Virginia State Capitol, Richmond Virginia, Southwest Facade. Reproduced courtesy of Library of Congress, Prints and Photographs Division, Historic American Buildings Survey.

Jefferson and the courthouse architects who standardized neoclassical design in America were in many respects merely following a trend that originated in mid-eighteenth-century France and influenced the design of public buildings across Europe for more than fifty years. As a historian of architecture summarizes,

> [mid-eighteenth-century French architects] underwrote the establishment of a strict form of neoclassicism that became the lingua franca of architectural production from the last quarter of the eighteenth century through the first third of the nineteenth. Whether in Berlin, Munich, St. Petersburg, Washington, D.C., London, or Paris, buildings of all types and sizes were designed with representational facades based on the post-and-lintel system of Greek and Roman columnar architecture. The ubiquity of this neoclassical ideal was matched only by the restricted palette of its characteristic forms and the academic rigor of their application.[64]

goals, but in 1812 he still hoped for the complete 'exclusion from the courts of the malign influence of all [English] authorities' after 1760 . . . .").

64. NEIL LEVINE, MODERN ARCHITECTURE: REPRESENTATION AND REALITY 76 (2009). *See also* EMIL KAUFMANN, ARCHITECTURE IN THE AGE OF REASON: BAROQUE AND POST-BAROQUE IN ENGLAND, ITALY, AND FRANCE 141 (1955).

Figure 4.
Revival Style Courthouse for Montgomery County, Dayton, Ohio, 1850. Architects: Howard Daniels & Davis Waymire. Reproduced courtesy of Library of Congress, Prints and Photographs Division, Historic American Buildings Survey.

But what made neoclassicism uniquely salient in American public spaces, and especially in American courthouses, was the use of ancient templar forms designed to inspire religious deference in a new nation founded on principles of popular sovereignty and republican government. The space in which law was to be administered and justice done expressed a durability and faith that could only have been proleptic with respect to the laws and constitutional structure of the nascent state and federal governments. These were truly "representational facades"—designed to address anxieties about how to mediate freedom and authority in a pluralistic, democratic society by embodying abstractions and distant promises in a concrete form.[65]

65. As Leonardo Benevolo has written of the emergence of neoclassicism in the late 1700s, "Modern architecture was born at the moment when constructional activity was drawn into the sphere of [the] attempt" to "integrate freedom and authority in a way that might transform them from abstract and contradictory notions into practical and complementary realities." BENEVOLO, THE HISTORY OF MODERN ARCHITECTURE xxxiv (1971). The association between political, legal, and architectural projects of the Founders should not be underestimated. For evidence of the many ways in which the Founders imagined the state "as a work of art," see Eric Slauter's fascinating book, THE STATE AS A WORK OF ART: THE CULTURAL ORIGINS OF THE CONSTITUTION 98 (2009) ("[I]n the eighteenth century, political thought and aesthetic theory were mutually constitutive."); *id*. at 79 ("Constitutional discourse in 1787 often figured the revision of the Articles of Confederation as architectural renovations."); *id*. at 73 (explaining that new state constitutions were described by proponents as "'sacred temple[s]'" and "the notion of a 'temple' for Liberty was widespread in period iconography"); *id*. at 41 ("In the verbal and visual culture of late eighteenth century America, depictions of government that reference the human body gave way to depictions of a depersonalized political apparatus identified most often in architectural constructions."). Neoclassical public buildings were believed by their proponents to display the "natural," "original," and "essential" principles of architecture, *see* LEVINE, *supra* note 64, ch.2, *passim*, much as the nation's laws and constitutional structure were believed by political theorists to express natural, original, and essential civil and political rights. *See* BENEVOLO, *supra* note 65, at xxxiii-xxxiv (exploring analogy between Rousseau's political theory and neoclassical architecture). *See also* WOOD, *supra* note 8; GORDON S.

Not only were these third-wave courthouses more imposing, frequently sitting on plinths higher than the human eye and accessible only via grand steps, their massive stone facades, multiple courtrooms, and ancillary rooms for other court functions provided more complete centralization and enclosure. No first- or second-wave courthouse could have been successfully "ringed with chains and protected by federal militia" in the way the 1832 Suffolk County revival-temple-style courthouse was in 1851 during the fugitive slave case involving Thomas Sims.[66] The security measures were taken because abolitionists had already rescued another detained fugitive whose petition for a writ of habeas corpus had been denied by Chief Justice Shaw earlier that year.[67] Fugitive slave trials were of course exceptional in the degree of dislocation between the

Figure 5. *The Boston Courthouse Is Guarded by Police and Hung with Chains*, Sims Trial at the Suffolk County Courthouse, Boston, Massachusetts. Reproduced courtesy of the Stanford Law School, Stanford, California.

WOOD, EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789-1815 (2009); BAILYN, *supra* note 26. Both political and architectural theories also relied on origin myths. *See* LEVINE, *supra* note 64, at 56-57 (discussing Marc Antoine Laugier's influential *Essai sur L'Architecture*, his "presumption of . . . natural origins" for classical design forms, and the similarity to Rousseau's description of the "noble savage" in his *Discourse on the Origins of Inequality*).

66. ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS (1984); MCNAMARA, *supra* note 13, at fig.5.2; Leonard W. Levy, *Sims's Case: The Fugitive Slave Law in Boston in 1851*, 35 J. NEGRO HIST. 39 (1950).

67. HAROLD HYMAN & WILLIAM WIECEK, EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT, 1835-1875, at 153 (1982).

authority of law, public claims for justice, and the space in which justice was administered—one could argue that abolitionists had succeeded in disrupting that space, or that Congress had done so at the bidding of southerners. But the defense of the Suffolk County courthouse draws into stark relief the openness, impermanence, and fragility of earlier courtroom designs, as well as the symbolic and real impregnability of the neoclassical style.

The case also demonstrates the tension underlying enclosure and partitioning in public adjudicative space—tension running well back into the colonial period and relieved only in part by the satyr play of commerce, drinking, games, gambling, and other legal and illegal public activities that regularly attended court days.[68] As one editorial on the Sims case lamented:

> Court Square and the Court House presented a most singular—I might say sickening and disgraceful appearance. A heavy chain, supported by iron posts, was drawn completely round the Court House, and one hundred police officers were employed to guard every avenue to the 'Temple of Justice.' It was a sad spectacle for a free State. Most odious must be the mandate that can be obeyed only under such guards and forces. . . . This is unusual, if not an unheard of measure. Our court rooms have ever been as open to inspection as our school rooms and our sanctuaries . . . .[69]

Others, of course, found more to lament in the "heated appeals to resistance" to the orderly process of law made by Wendell Philips and Reverend Theodore Parker in their vituperative public speeches on the square outside the courthouse on the day of the Sims trial. As a Whig paper editorialized:

> Increase the show of resistance and the supporting force of the law must be increased. . . . Where then, is the good sense in resisting this law? Is it not wiser and safer and better for every man to counsel obedience to the law instead of resistance, and to insist upon it that the remedy for any law is in its repeal or amendment, and not by making it a shuttlecock of popular feeling and an element of acquiring political and personal capital?[70]

68. LOUNSBURY, *supra* note 10, at 5; MCNAMARA, *supra* note 13, at 9. On the significance of satyr play in tragic theatre, see FRIEDRICH NIETZSCHE, THE BIRTH OF TRAGEDY, § 7 para. 6 (1872) ("I believe . . . the cultured Greek felt himself neutralized by the sight of the chorus of satyrs, and the next effect of Dionysian tragedy is that the state and society, in general the gap between man and man, give way to an invincible feeling of unity.").

69. *Another Slave Excitement*, N.Y. EVANGELIST, Apr. 10, 1851. Hyman and Wiecek report that the Sims trial turned into a "propaganda coup" for abolitionists who ridiculed Chief Justice Shaw for having to stoop under "'the southern chain on the neck of the Massachusetts court.'" HYMAN & WIECEK, *supra* note 67, at 153-54 (1982) (quoting Theodore Parker).

70. BANGOR DAILY WHIG & COURIER, Apr. 8, 1851.

As the contest over fugitive slave rendition and slavery made painfully clear, democratic legitimacy turns on the inclusion and participation of the community (all the more so in communities in which enforcement resources are limited).[71] But in third-wave courthouses, that participation is carefully structured by hierarchically segmented and "intricately subdivided" space in courtroom interiors,[72] incorporation of specialized functions in ancillary rooms within the building and navigable only by trained professionals,[73] exterior features delimiting the administrative space of adjudication as super-ordinate to domestic, commercial, and merely social or political space, and the proximity of a courthouse to the parties it serves. In other words, legitimacy and authority in the local practice of justice depend on a kind of inclusion that operates in and through carefully orchestrated exclusions.

Inclusion by exclusion is repeated in the incomplete accessibility of legal doctrine and terminology to non-experts, in rules of evidence defining whose speech and what forms of speech are legally salient, and in rules of procedure (i) providing for notice that one's rights are before the court, (ii) designating what matters shall be heard by a judge rather than a jury, and (iii) allocating power between judge and jury in jury trials by determining access to the right of trial and post-verdict review. The same structure can be seen in the "inherent powers" doctrine supporting a judge's use of contempt to control conduct in the courtroom and empowering judges to determine the fitness of attorneys to practice law.[74] Inclusion by exclusion is thus an irreducible feature of adversarial legalism. It is no accident that it defines both the spatial structure of the local practice of justice and the ambivalence (the desire and resentment) with which lay people approach the law and legal experts.[75]

71. *See* EDGAR J. MCMANUS, LAW AND LIBERTY IN EARLY NEW ENGLAND: CRIMINAL JUSTICE AND DUE PROCESS, 1620-1692, at 58-72 (1993); TOM TYLER, WHY PEOPLE OBEY THE LAW (1990); Offutt, *supra* note 14, at 359 ("[A] primary goal of the legal elite would be to achieve and maintain legitimacy through popular usage of courts and popular acceptance of legal decisions based on legal norms.").

72. On the night of Sims's arrest, his abolitionist attorney, Samuel E. Sewall, was himself arrested for demanding access to this space. Suspicious that a trial would be held at night in secret to avoid abolitionist resistance, Sewall accosted a deputy marshal and demanded immediate access to his client and information about when and where he would be tried. *The New Fugitive Slave Case at Boston*, DAILY NAT'L INTELLIGENCER (D.C.), Apr. 7, 1851.

73. The courthouse was not just ringed with chain and guards; Sims was held "in a room in the Court House, fitted up for such an emergency." *The Fugitive Slave Case at Boston, Several Arrests, Etc., Public Meeting Called*, ALBANY EVENING J., Apr. 4, 1851.

74. Lathrop v. Donohue, 367 U.S. 820 (1961); *Ex Parte* Robinson, 86 U.S. (1 Wall.) 505 (1874).

75. From Shays's Rebellion to the movement to replace common law with democratically enacted codes in the nineteenth century, the early history of the Republic is replete with examples of this ambivalence and the legal profession's attempt to rebut and, where necessary, commandeer popular reform movements. On Shays's Rebellion and attacks on the courts and legal profession in Massachusetts, see ROBERT A. GROSS, IN DEBT TO SHAYS: THE BICENTENNIAL OF AN AGRARIAN REBELLION (1993); LEONARD RICHARDS, SHAYS'S REBELLION: THE AMERICAN REVOLUTION'S

II. ADVERSARIAL SPACE, REAL AND IMAGINED

At the core of this structure of enclosure defining the terms of inclusion by exclusion in the administration of justice is the courtroom interior, and within that core is the space reserved to participants. The structure of this adversarial space has been remarkably consistent since the late colonial period when it first became "intricately subdivided." The exclusivity of the space increases as one moves from the public area at the back past seating for parties, lawyers, prisoners, sheriffs/bailiffs, jurors, the witness, the reporter, and the clerk to the judge's bench. On a symbolic level, elevation, ornamentation, and partitions (specialized boxes, benches, bars, and tables) serve to fix and hierarchically segment lay and expert role players. At the visual and aural level, however, the division of space accentuates accessibility. The standard organization of partitions ensures proximity, audibility, and clear sight lines to stage adversarial confrontation—sequences of *viva voce* testimony and argument directed by the judge and elicited by attorneys.

Recent research reveals that the right of confrontation and cross-examination of witnesses, though long a part of English common law procedure and having roots in both Roman and Hebrew law, did not formalize in England until the middle of the seventeenth century.[76] It was nevertheless rather quickly embraced and expanded in America during the Revolutionary period. The catalyst for formalization in England was a string of notorious treason trials in Tudor and Stuart England, including

FINAL BATTLE (2002); and DAVID SATZMARY, SHAYS'S REBELLION: THE MAKING OF AN AGRARIAN INSURRECTION (1980). There were precursors in the pre-Revolutionary period. *See* Richard Lyman Bushman, *Farmers in Court: Orange County, North Carolina, 1750-1776*, *in* THE MANY LEGALITIES OF EARLY AMERICA, *supra* note 14, at 388 (discussing the Regulator controversy in North Carolina). On public concerns about the authority of legal experts in antebellum American society, legal reform efforts, and the response of the legal profession, see BURTON BLEDSTEIN, THE CULTURE OF PROFESSIONALISM (1976); MAXWELL BLOOMFIELD, AMERICAN LAWYERS IN A CHANGING SOCIETY, 1776-1876 (1976); ANTON-HERMANN CHROUST, THE RISE OF THE LEGAL PROFESSION IN AMERICA (1965); COOK, *supra* note 24; ELLIS, *supra* note 24; FRIEDMAN, *supra* note 14, at 391-411; CHRISTIAN G. FRITZ, AMERICAN SOVEREIGNS: THE PEOPLE AND AMERICA'S CONSTITUTIONAL TRADITION BEFORE THE CIVIL WAR (2008); CHARLES SELLERS, THE MARKET REVOLUTION: JACKSONIAN AMERICA, 1815-1846 (1994); GERARD W. GAWALT, THE PROMISE OF POWER: THE EMERGENCE OF THE LEGAL PROFESSION IN MASSACHUSETTS, 1760-1840 (1979); MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1960 (1979); DANIEL WALKER HOWE, THE POLITICAL CULTURE OF AMERICAN WHIGS (1979); PERRY MILLER, THE LEGAL MIND IN AMERICA: FROM INDEPENDENCE TO THE CIVIL WAR (1962); NELSON, *supra* note 24; 1 SPEECHES, ARGUMENTS, AND MISCELLANEOUS PAPERS OF DAVID DUDLEY FIELD (A.P. Sprague ed., 1884); and Spaulding, *supra* note 24.

76. Richard D. Friedman & Bridget McCormack, *Dial-In Testimony*, 150 U. PA. L. REV. 1171, 1205 (2002); *see also* Brief for Petitioner, Crawford v. Washington, 541 U.S. 36 (2004) (No. 02-9410) **(**discussing history of confrontation right); JAMES WILLIAM MOORE, MOORE'S MANUAL: FEDERAL PRACTICE AND PROCEDURE (Matthew Bender ed., 3d ed. 1997) (same).

the trial of Sir Walter Raleigh, whose conviction was obtained by introducing the written, pre-trial confession of an alleged co-conspirator over Raleigh's demand that the author be produced as a witness at trial and subject to cross-examination. Subsequently, Acts of Parliament "repeatedly required that accusing witnesses be brought 'face to face' with the defendant," and in 1662, the King's bench unanimously reaffirmed the right of confrontation by excluding custodial confessions made by alleged accomplices.[77]

"The confrontation right naturally found its way to America," and by means that highlighted its procedural significance during precisely the period in which courtroom interiors were becoming more intricately subdivided.[78] As Friedman and McCormack write:

> American criminal procedure developed in a distinctive way. The right to counsel in felony trials developed far more quickly in America than in England, and with it rose an adversarial spirit that made the opportunity for confrontation of adverse witnesses especially crucial. . . . [T]he right became especially relevant to American concerns when in the 1760s Parliament began to regulate the colonists through inquisitorial means like the Stamp Act, which provided for the examination of witnesses upon interrogatories. In the Revolutionary period, the right to confrontation was frequently expressed, especially in the early state constitutions. Some used the time-honored "face to face" phrase; others, following Hale and Blackstone, adopted language strikingly similar to that later used in the Sixth Amendment's Confrontation Clause. It is clear that the Framers were aware not only of the American history of the confrontation right, but also of the abuses in the sixteenth and seventeenth-century treason trials and of the defendants' demands for meeting their accusers "face to face."[79]

Partitioning role players in fixed benches, boxes, stands, bars, and tables in mid- to late-eighteenth-century courtrooms structured the adversarial space in which this face-to-face confrontation occurred.

Although the confrontation right was thought to enhance the reliability of evidence presented at trial, the accused did not lose his right of confrontation on a showing that the evidence to be offered in lieu of live testimony was reliable, nor even on a showing that live testimony was impossible because the witness was deceased.[80] The accuracy of trials

77. Friedman & McCormack, *supra* note 76, at 1205-06.

78. *Id*. at 1207-08.

79. *Id*.

80. *Id*. at 1208 ("[N]either in the statutes, caselaw, nor commentary was there a suggestion that, if the courts determined that a particular item or type of testimony was reliable, then the accused lost his right of confrontation."); Brief for the Petitioner, *supra* note 76, at 14.

therefore could not have been the only procedural value served by requiring confrontation *viva voce*. "On the contrary, the confrontation principle was a categorical rule, a basic matter of the procedures by which testimony was taken."[81] But why a categorical rule? What procedural and other values warrant the exclusion of reliable evidence? Why was adjudication so intimately bound up with live, public confrontation and cross-examination?

Friedman and McCormack suggest that the confrontation right was linked to expansion of the right to counsel in criminal cases. And expansion of the right to counsel is taken as evidence of a distinctive American enthusiasm for the adversary system.[82] The argument finds further support in the growth of the population of lawyers in America and the parallel increase in the formality of both civil and criminal procedure in the Revolutionary and post-Revolutionary periods.[83] Americans and their entrepreneurial lawyers took up and gradually extended traditional English common law ideologies about the interdependence of due process of law, trial (especially jury trial), personal liberty, and separation of powers through the local practice of justice.[84] Infringements upon life, property, and other incidents of personal liberty required, it was contended, an opportunity for litigants to be heard before an impartial adjudicator and an opportunity to hear and orally examine witnesses against them.

Whatever the effect on the reliability of adjudication, adversarial trial process ensured that litigants would experience and directly participate in the process in which their rights were defined. More than that, with juries, spectators from the community, and press all present, the scene of

81. Friedman & McCormack, *supra* note 76, at 1208.

82. *See* JOHN H. LANGBEIN, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL (2003); Randolph N. Jonakait, *The Origins of the Confrontation Clause: An Alternative History*, 27 RUTGERS L.J. 77 (1995); Randolph N. Jonakait, *The Rise of the American Adversary System: America Before England*, 14 WIDENER L. REV. 323 (2009).

83. *See* BLOOMFIELD, *supra* note 75; FRIEDMAN, *supra* note 14, at 94-102, 391-411, 633; NELSON, *supra* note 24.

84. Juries in early America decided not only questions of fact, but questions of law; appeals from an initial jury trial in some states were to another jury trial, not to a panel of appellate judges; trial and appellate judges had no real means to enter judgment against a jury verdict; and summary judgment did not exist. *See* Galloway v. United States, 319 U.S. 372 (1943) (Black, J., dissenting); FRIEDMAN, *supra* note 14, at 153-55; NELSON, *supra* note 24; SATZMARY, *supra* note 75 (describing multiple layers of jury trial in Massachusetts); Bilder, *supra* note 25, at 62-77. On the relationship between the Founders' experience of abusive judicial authority during the colonial period and their preference for jury trial to protect political and civil liberties, see generally ELLIS, *supra* note 24; THE FEDERALIST, NOS. 81, 82 (Alexander Hamilton); NELSON, *supra* note 24; JOSEPH STORY, 3 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, ch. 38 (Melville M. Bigelow ed., 1891); ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 302-18 (2004); and 3 WRITINGS OF THOMAS JEFFERSON 71 (H.A. Washington ed., 1854) (quoted in Black's dissent in *Galloway*: Jefferson considered "trial by jury as the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution").

confrontation became a public stage—a familiar, indeed immediately recognizable enclosure, in which the process of rights definition was made public in a way that invited substitutions in individual consciousness and popular culture. American trials have always been popular forms of public entertainment. Court days were widely attended well into the nineteenth century, and the trial scene has been, and is now, endlessly reproduced in popular culture.[85] Law, as Tocqueville put it, has become our "vulgar tongue," channeling all manner of social interests and disputes into adversarial space (both real and imagined) and into the discourse of rights.[86] A camera shot of the wood-paneled witness box adjacent to and below the judge's bench; the standard reverse shot from over the shoulder of a testifying witness to the litigants whose case her testimony helps or hurts and interested community members sitting behind the bar; the movement and sound of the judge's gavel; jurors seated in double rows at right angles to the judge's bench in a larger wood paneled box near the witness stand—each of these images not only operates as a common synecdoche for trial in popular consciousness, but for the local practice of justice as well.

Due process thus has a readily identifiable spatial structure with deep historical and cultural resonance. It is the trial courtroom. And notwithstanding perennial accusations that due process of law is a guarantee of "wide, varied, and indefinite content,"[87] courts and legal commentators have systematically relied upon the courtroom trial as an organizing metaphor. In one of the few U.S. Supreme Court cases dealing with the procedural incidents of the federal right before the Civil War, *Murray's Lessee v. Hoboken Land and Improvement Co.*,[88] the Court directly identified "due process of law" with the "by the law of the land" clause in Magna Carta.[89] It did so on the premise that "'due process of law' generally implies an actor, reus, judex, regular allegations, opportunity to answer, and a trial according to some settled course of

85. On trials as nineteenth-century public entertainment, see FRIEDMAN, *supra* note 14; and LOUNSBURY, *supra* note 10, at 5. On modern representations of trial and the homologous structure of film and trial, see CAROL J. CLOVER, *Law and the Order of Popular Culture*, *in* LAW IN THE DOMAINS OF CULTURE 97 (Austin Sarat & Thomas R. Kearns eds., 2000).

86. TOCQUEVILLE, *supra* note 84, at 280 ("Scarcely any political question arises that is not resolved, sooner or later, into a judicial question. Hence all parties are obliged to borrow, in their daily controversies, the ideas, even the language, peculiar to judicial proceedings. As most public men are or have been legal practitioners, they introduce the customs and technicalities of their profession into the management of public affairs. The jury extends this habit to all classes. The language of the law thus becomes, in some measure, a vulgar tongue. . . .").

87. RODNEY MOTT, DUE PROCESS OF LAW: A HISTORICAL AND ANALYTICAL TREATISE 123 (1926).

88. 59 U.S. 272 (1855).

89. *Id*. at 276.

judicial proceeding."[90] Moreover, the Court held that the proper method for testing novel procedures against the constitutional guarantee is "to look to those settled usages and modes of proceeding existing in the common law and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country."[91] We know what due process of law is by looking to traditions established in the local practice of justice.

As in many cases decided by antebellum state courts, this interpretive method canonized trial by jury as the touchstone.[92] Even the recognition of exceptions to trial by jury helped to define the rule as procedural innovations were measured for their degree of deviance from the incidents of jury trial. Modern caselaw is in accord. Indeed, modern courts are constantly imagining the adversarial space of the trial courtroom as they decide what procedures should govern pre-trial procedures, alternative forms of dispute resolution, and the operation of the modern administrative state.[93] Moreover, because due process is a constitutional guarantee, legislators, administrators, and others engaged in designing private alternatives to adversary adjudication are bound by the same metaphor. The adversarial space of the trial courtroom thus suffuses both popular and legal conceptions of what it means for justice to be done.

III. DEAD METAPHOR

What then are we to make of the fact that the actual use of space from which the metaphor derives is diminishing? Lawyers and laypeople speak the vernacular of courtroom trial, and we are constantly imagining adversarial space and displacing it onto other public, private, and fictional venues for decision making, but actual trials are rare indeed. What are the consequences of the touchstone of due process existing only as metaphor? Not all metaphors are conceits, of course, and dead metaphors are among

90. *Id*. at 280.

91. *Id*. at 278.

92. *See* JAMES KENT, 2 COMMENTARIES ON AMERICAN LAW 13-14 (Oliver W. Holmes, Jr., ed., 1873); STORY, 2 COMMENTARIES, *supra* note 84, at 692; Edward J. Eberle, *Procedural Due Process: The Original Understanding*, 4 CONST. COMMENT. 339, 360 (1987) ("In looking to 'those settled usages and modes of proceedings existing in the common and statute law of England' courts ruled almost without exception that a jury trial . . . was the procedure necessary to validate deprivation of life, liberty, or property."); *id*. at 349-60 (gathering and describing early state cases).

93. *See* Turner v. Rogers, 131 S. Ct. 2507 (2011); Hamdi v. Rumsfeld, 542 U.S. 507 (2004); United Mine Workers v. Bagwell, 512 U.S. 821 (1994); Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1984); Mathews v. Eldridge, 424 U.S. 319 (1976); Goldberg v. Kelly, 397 U.S. 254 (1970). *See also* JERRY MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE (1985); Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949 (2000).

the most powerful. Moreover, as long as other procedures provide reliable evidence, accurate decision making, and efficient resolution, it is not obvious that the practice of justice, local and otherwise, is threatened by the disappearance of courtroom trial.

But there are reasons to worry. To begin with, private systems of dispute resolution rely parasitically on courtroom trial. Existing systems are literally and figuratively "court-annexed." Even systems that operate independently of the courts rely heavily on the expertise of a now-diminishing class of the legal profession—lawyers with extensive jury trial experience. Civil lawyers without trial experience commonly retain an experienced trial lawyer to advise them about settlement or help induce the other side to settle by introducing an authoritative estimate of the likely jury verdict and by signaling intrepidity about going to trial.[94] Dispute resolution "neutrals," especially arbitrators, typically are drawn from the same pool of experienced judges and trial lawyers for the same reason.[95] Settlement is surely possible beyond the shadow of the courthouse, and without trial lawyers, but, for the most part, we have not constructed alternative dispute resolution systems on alternative expertise.[96]

Second, although trial is not cheap, the social costs associated with systems of dispute resolution that occupy no public space are considerable. Sealed settlements allow repeat offenders to persist in malfeasance for years without public scrutiny or accountability;[97] confidentiality rules in alternative dispute resolution promote open

94. CHARLES B. CRAVER, EFFECTIVE LEGAL NEGOTIATION AND SETTLEMENT § 16.11 (5th ed. 2005).

95. *See* JOHN W. COOLEY, THE ARBITRATOR'S HANDBOOK (2d ed. 2006).

96. Mediation and restorative justice present exceptions in civil and criminal practice, respectively. On mediation, see DWIGHT GOLANN & JAY FOLBERG, MEDIATION: THE ROLES OF ADVOCATE AND NEUTRAL (2011); and Lon Fuller, *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305, 327 (1971) (describing the essential quality of mediation in civil cases as the "capacity to reorient the parties toward each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship"). *But see* Craig McEwen et al., *Bring in the Lawyers*, 79 MINN. L. REV. 1317 (1995) (discussing mediator's obligation to disclose relevant law where necessary to correct power imbalances); Kirk Johnson, *Public Judges as Private Contractors, A Legal Frontier*, N.Y. TIMES, Dec. 10, 1994, at B11 (describing entry of judges into the industry of mediation services). On restorative justice, see JOHN DUSSICH & JILL SCHELLENBERG, THE PROMISE OF RESTORATIVE JUSTICE: NEW APPROACHES FOR CRIMINAL JUSTICE AND BEYOND (2010); RESTORATIVE JUSTICE AND CRIMINAL JUSTICE: COMPETING OR RECONCILABLE PARADIGMS (Andrew von Hirsch et al. eds., 2003); and Albert W. Dzur, *Restorative Justice and Civic Accountability for Punishment*, 36 POLITY 3 (2003).

97. On confidential settlements and sealed records in the Catholic priest sexual abuse scandals, see Walter V. Robinson et al., *Scores of Priests Involved in Sex Abuse Cases*, BOS. GLOBE, Jan. 31, 2002, at A1; *Catholic Church Mishandled Reports of Sex Abuse*, NAT'L PUB. RADIO (Aug. 11, 2010), http://www.npr.org/templates/story/story.php?storyId=126390884; *see also* Symposium, *Secrecy in Litigation*, 81 CHI.-KENT L. REV. 301 (2006).

internal deliberation but also conceal coercion and bias;[98] and even when courts do decide cases, unpublished dispositions and depublication of decisions already rendered challenge the most basic rule-of-law values. One noteworthy study has shown that the plaintiff win rate in employment discrimination cases at the federal district court level "is four times higher in published than in unpublished opinions."[99] There is thus an already massive and steadily expanding body of subterranean law.

Third, as courtroom trial becomes mere metaphor, the substantive rights trial used to define have become mere modes of declamation in well-funded, high-profile, fully litigated cases increasingly dissociated from the action of courts and dispute resolution practitioners in run-of-the-mill cases. This is not a tension between law on the books or the glittering generalities of rights talk, on the one hand, and law in action, on the other;[100] but a problem of law off the books altogether, law operating in fully enclosed spaces. With run-of-the-mill cases increasingly decided in private, confidential, and sealed spaces, the discursive habits, the legal and cultural practices, and, above all, the rules of decision governing their resolution, are rendered opaque—in some instances, unknowable. The displacement and private enclosure of adjudicative space thus alters the very epistemology of justice.

Finally, outside the courtroom, and increasingly within it, the right to a meaningful hearing is more honored in the breach. Constitutionally suspect rules permitting trial judges to take cases away from juries before and after trial have steadily expanded;[101] in collateral judicial review of criminal convictions, state and federal courts have taken to rubber-stamping denials of basic constitutional rights;[102] there is even less enthusiasm for exercising meaningful judicial review over erroneous

98. Timothy Hedeen, *Coercion and Self-Determination in Court-Connected Mediation*, 26 JUST. SYS. J. 1 (2005).

99. Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 99-100, 104, 105 (1999); *see also* Joseph L. Gerken, *A Librarian's Guide to Unpublished Judicial Opinions*, 96 L. LIBR. J. 475, 478 (2004); Levin, *supra* note 19. *See generally* RESNIK & CURTIS, *supra* note 27, ch. 14.

100. *See* Paul Carrington & Erika King, *Law and the Wisconsin Idea*, 47 J. LEGAL EDUC. 297 (1997).

101. *See* Ashcroft v. Iqbal, 556 U.S. 662 (2009); Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007); Celotex v. Catrett, 477 U.S. 317 (1986); *see also* Suja A. Thomas, *Why Summary Judgment Is Unconstitutional*, 93 VA. L. REV. 139 (2007). On increased judicial discretion after verdict, *see* Galloway v. United States, 319 U.S. 372 (1943).

102. *See* Terry Williams v. Taylor, 529 U.S. 362, 410 (2000) (emphasizing that federal courts may not grant habeas relief merely because they come to the conclusion that the state court has incorrectly applied federal law; "the most important point is that an unreasonable application of federal law is different from an incorrect application of federal law . . . a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly"). *See also* Doody v. Schriro, 596 F.3d 620 (9th Cir. 2010) (en banc), *vacated*, Ryan v. Doody, 131 S. Ct. 456 (2010); Lockyer v. Andrade, 538 U.S. 63 (2003).

arbitration awards;[103] the constitutional standard for the right to effective assistance of counsel in criminal cases is now so strict that a jurisprudence has developed to specify precisely how long an attorney must be asleep during trial to warrant reversal;[104] in civil cases, counsel is rarely provided by the state and beyond the means of most poor and middle-income litigants;[105] and in administrative settings, massive caseloads and inadequate judicial review have led to wide variation in outcomes and shockingly inadequate attention to the factual record in individual cases.[106] Not only the epistemology of justice but the basic practices that ensure decision on the merits are shifting.

IV. SEEING THAT JUSTICE IS DONE

A 1973 report prepared by the Joint Committee on the Design of Courtrooms and Court Facilities and sponsored by the American Bar Association and the American Institute of Architects describes ideal-typical courtroom partitioning derived from a survey of existing courthouses and their core functions.[107] The report includes a figure depicting "a total communication system for jury trials" composed of partially overlapping and intersecting triangles shaped by lines representing a composite of visual accessibility, audibility, movement, and document flow among courtroom principals. Bold lines shape triangles connecting judge-witness-attorneys, judge-witness-jurors, judge-attorneys-jurors, and judge-parties-attorneys. Secondary triangles with thinner lines represent points of access among subordinate participants and principals. Press and public areas are positioned just outside these

103. *See* E. Assoc. Coal Corp. v. United Mine Workers, 531 U.S. 57, 62 (2000) ("'[A]s long as an [honest] arbitrator is even arguably construing or applying the contract and acting within the scope of his authority,' the fact that 'a court is convinced he committed serious error does not suffice to overturn his decision.'") (quoting Paperworkers v. Misco, Inc., 484 U.S. 29, 38 (1987)). For an extreme case, see Moncharsh v. Heily & Blasé, 3 Cal. 4th 1 (1992). For commentary indicating that arbitration is biased in favor of repeat players, see Thomas E. Carboneau, *Arbitral Justice: The Demise of Due Process in American Law*, 70 TULSA L. REV. 1945 (1996); and Brian G. Garth, *Tilting the Justice System*, 18 GA. ST. U. L. REV. 927, 950-52 (2002).

104. *See* Burdine v. Johnson, 262 F.3d 336, 349 (5th Cir. 2001) (en banc) (reversing panel decision that upheld capital sentence where defense lawyer was asleep during trial but expressly "declin[ing] to adopt a per se rule that any dozing by defense counsel during trial merits a presumption of prejudice"); *see also* Tippins v. Walker, 77 F.3d 682, 685-90 (2d Cir. 1996); Javor v. United States, 724 F.2d 831, 832-35 (9th Cir. 1984).

105. DEBORAH RHODE, ACCESS TO JUSTICE 3-19 (2004); David Luban, *Taking Out the Adversary: The Assault on Progressive Public Interest Lawyers*, 91 CALIF. L. REV. 209 (2003); *see also* Lassiter v. Dept. of Social Services, 452 U.S. 18 (1981).

106. For a recent example drawn from asylum cases, see Iao v. Gonzales, 450 F.3d 530, 533-35 (7th Cir. 2005); *see also Immigration Judges*, TRAC IMMIGRATION (July 31, 2006), http://trac.syr.edu/immigration/reports/160/.

107. A. BENJAMIN HANDLER, THE AMERICAN COURTHOUSE: PLANNING AND DESIGN FOR THE JUDICIAL PROCESS 29, fig.3.9 (1973). The book was influential, prompting the drafters to return to the subject. *See* AMERICAN BAR ASS'N, *supra* note 1; Figure 6.

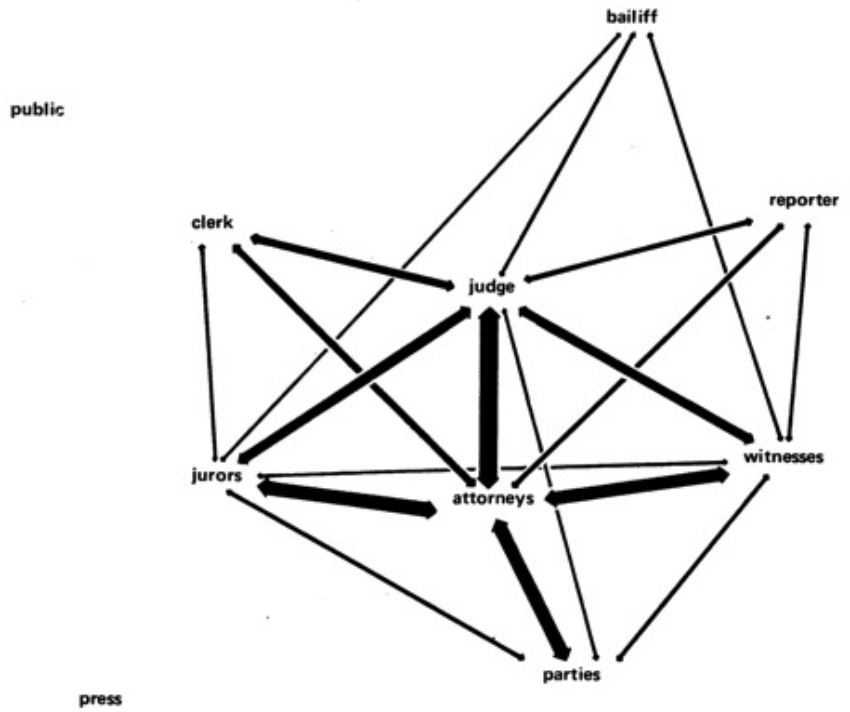

Figure 6. A. Benjamin Handler, *The American Courthouse: Planning and Design for the Judicial Process*. Copyright 1973 © by the American Bar Association. Reprinted with permission. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the Amereican Bar Association.

triangles of communication. The figure perfectly displays the structure of enclosure we have inherited from the local practice of justice in early American courts.

The report then considers a number of design "innovations," suggesting under the heading of "observation space problems" that in order to prevent disruption, a glass wall and sound system might be used to separate the adversarial space from the "public observation space."[108] To prevent even "visual distraction from the audience," the report suggests installing "one-way glass" and "revolutioniz[ing]" courtroom design by using closed-circuit television to centralize public observation space "on the lower floors of a multilevel building" and to separate "[p]ublic traffic . . . from the traffic of courtroom participants."[109] Quoting a judge who insists that courtrooms exist for participants, "'not to provide an

108. HANDLER, *supra* note 103, at 30.
109. *Id*. at 31.

amphitheatre for those interested in watching a particular procedure,'" the report concludes that "[m]ost courtrooms require only sufficient space to accommodate relatives and friends of the defendant or people directly related to the case," and sufficient space to accommodate seating for impaneling a jury in jurisdictions that conduct voir dire in the courtroom.[110] Finally, the report discusses means of making trial more efficient by replacing open trial with recorded testimony pre-screened by attorneys and the court to address evidentiary objections, and then re-screened in edited form on television monitors in jury rooms.[111]

Both the separation of the public from what the report calls the "action area" of the courtroom and the separation of jurors from witnesses and attorneys through edited video recording stand in no small degree of tension with the report's opening bromides that "[t]he doors of the temple of justice must always be open to the people," and that "[e]ach courthouse must be a symbol of the American dream of true justice" so that "citizens will be assured that justice is a functioning reality of the American way of life."[112]

The tension may perhaps be explained by the fact that the report was written in the midst of a dramatic expansion of procedural due process rights by the Supreme Court, a period of civil disobedience in which courthouses were regularly made sites of resistance to law, and just a few years before public debate about frivolous litigation, excessive jury verdicts, and overzealous advocacy would explode, provoking a new cycle of procedural reform and retrenchment.[113] In the intervening decades, trials have continued to rely upon *viva voce* testimony, but the perceived need for enclosure—a need present in even the earliest purpose-built structures for adjudication—has intensified. Metal detectors, permanent identification checkpoints supervised by armed sheriffs or federal marshals, diversion from traditional public entrances, glass walls and even closed-circuit television dividing public from the adversarial

110. *Id*. at 30.

111. *Id*. at 31.

112. *Id*. at 5.

113. On the procedural due process revolution, see Goldberg v. Kelly, 397 U.S. 254 (1970). Although political and social movements animated the Second Reconstruction, structural reform litigation and hence trial court equity power were pivotal both to proponents and opponents of desegregation. *See, e.g.*, Swann v. Charlotte-Mecklenberg Bd. of Educ., 402 U.S. 1 (1971); Walker v. City of Birmingham, 388 U.S. 307 (1967). Concerns about frivolous litigation sharpened in the debate about tort reform that emerged in the mid-1970s. *See* John T. Nockleby & Shannon Curreri, *100 Years of Conflict: The Past and Future of Tort Retrenchment*, 38 LOY. L.A. L. REV. 1021 (2005); Robert L. Rabin, *The Politics of Tort Reform*, 26 VAL. U. L. REV. 709 (1992); *see also* FED. R. CIV. P. 11 advisory committee notes to 1983 amend. (discussing adoption of mandatory sanctions to deter frivolous litigation). On the new cycle of procedural reform, see A. Benjamin Spencer, *The Restrictive Ethos in Civil Procedure*, 78 GEO. WASH. L. REV. 353 (2010). On the associated critique of excessive adversarialism in lawyers, see ARTHUR APPLBAUM, ETHICS FOR ADVERSARIES (1999); and DEBORAH L. RHODE, ETHICS IN PRACTICE: LAWYERS' ROLES, RESPONSIBILITIES, AND REGULATION (2000).

space of courtrooms, are all regularly employed in the name of enhancing courthouse security, increasing efficiency, and preventing disruption.[114] Even for parties to litigation, security measures have become more elaborate. A line of cases now delimits the degree of state force that can be deployed to ensure courtroom security without undermining the presumption of innocence in criminal trials.[115] Finally, a gradual but steady shift of authority from juries to judges and from judges to dispute resolution "neutrals" has moved the site of adjudication from courtrooms to the more enclosed spaces of judges' chambers and private conference rooms.[116]

Enclosure offers control, efficiency, and rationality in the administration of justice. By specializing the use of space and restricting access, disruption and surprise can be avoided, deference can be enforced in participants and observers, extraneous or prejudicial information and events can be excluded from the perceptual range of decisionmakers, and the ungovernable passions social and legal conflict provoke can be minimized to promote rational deliberation. No system of dispute resolution can function without enclosure; all depend on it to prevent vigilance from descending into vigilantism.

But the enclosure of justice should not be conflated with justice itself; nor should the desire for enclosure be conflated with the desire that justice be done. To enclose justice is not, in the end, to do justice, or to ensure that it will be done. The disorder of open trial is due in no small measure to the fact that it is a system of representation which reproduces in its formal structure the very indeterminacy (factual and legal) it is designed to resolve. Inside the triangular lines of communication that shape the adversarial space of a courtroom, participants make and test representations about the dispute in each other's presence and in real time. The representations made can never be fully scripted even if they are scrupulously prepared. It is dynamic space—as dynamic as the memories that factual representations are designed to recall and as dynamic as the interpretive gap between general propositions of law and concrete cases.

Effective resolution arises not just from ensuring accurate outcomes, nor just by allowing direct participation in the process of rights definition, but by organizing enclosure in such a way that the anxiety of the participants and the public about the indeterminacy of justice is put in play. Resistance, disruption, surprise, adversarial excess, deception,

114. *See* RESNIK & CURTIS, *supra* note 9, at 167, 173.

115. Deck v. Missouri, 544 U.S. 622 (2005); Holbrook v. Flynn, 475 U.S. 560 (1986). None of this is to deny that the security threats are real.

116. *See* text accompanying notes in Section IV, *supra*; *see also* Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

nullification, and passion are neither endorsed nor invited, but they are always possible. There is room then for unexpected reversals—room for the embarrassment of reason to be displayed in the very space in which we expect and hope to see reasoned argument prevail. And there is public space in and about the courthouse for satyr play—space in which the local practice of justice can be mocked, satirized, defied, called to account, or ignored altogether while court is in session and the community is present. The organization of this space thus concedes, if it does not celebrate, that justice is not a set of fixed principles to be applied, but a set of relations to be mediated.

Fully enclosed adjudicative space, by contrast, expresses hostility to the indeterminacy of law and fact. Only polished opinions are to be published or cited; the idiosyncrasies of juries are to be strictly contained, indeed, superseded by the rational deliberation of judges; and, above all, the disorder and delay of open trial and litigation are to be replaced whenever possible by the private ordering of alternative dispute resolution systems. Reason is not to be embarrassed.

I have no naïve faith in, nor maudlin attachment to, the courtroom trial. Nor do I believe the mere endurance of a social practice over time is sufficient to command allegiance—though, as a doctrinal matter, history is constitutional pedigree in due process analysis.[117] And while participation and imaginary substitution may enhance democratic legitimacy, it would be a mistake to see any uncontroversial endorsement of adversarial legalism in the local practice of justice. As the post-Revolutionary period reveals, procedural complexity in litigation and an ideology that tied adversarial trial process to personal liberty may have served more to enhance the profit and power of lawyers than the liberty and harmony of the clients and communities they served. Indeed, the very trends that help explain Americans' distinct "adversarial spirit" also help explain widespread antipathy toward lawyers, common law reception, and the adversary system as exclusive and undemocratic. After all, it was elite Whig-Federalist lawyers, not democratic populists, who labored for decades to check this antipathy by touting the merits of adversarial legalism in print and public speech.[118] Tocqueville's quip about law

117. Burnham v. Superior Court, 495 U.S. 604 (1990); Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (1 How.) 272 (1855).

118. COOK, *supra* note 24; FRIEDMAN, *supra* note 14; MILLER, *supra* note 75; Spaulding, *The Luxury of the Law: The Codification Movement and the Right to Counsel*, 73 FORDHAM L. REV. 983 (2004); Spaulding, *supra* note 24. Whatever its merits, the early American enclosure of justice also generally entailed the exclusion of women and people of color. *See* Bradwell v. State of Illinois, 83 U.S. (1 Wall.) 130 (1873) (upholding exclusion of women from practice of law); Cherokee Nation v. Georgia, 30 U.S. (1 Pet.) 1 (1831); BARBARA ALLEN BABCOCK, WOMAN LAWYER: THE TRIALS OF CLARA FOLTZ 156-62 (2010); KATHLEEN BROWN, GOOD WIVES, NASTY WENCHES, AND ANXIOUS PATRIARCHS: GENDER, RACE, AND POWER IN COLONIAL VIRGINIA 185-86, 284 (1996); FRIEDMAN,

having become our "vulgar tongue" is made in a chapter about why lawyers are the only naturally "aristocratic" class in democratic society and how their habitual caution and adherence to precedent act to check popular democratic excess.[119] Our history thus reveals ambivalence regarding the adversary system rising to meet its prevalence, its increased procedural formality, the prominence of the legal profession, and the grandeur of third-wave courthouses.

Still, we have arrived at a kind of crossroads. The gradual process of enclosure in the design and operation of courthouses and alternative dispute resolution systems has accelerated. Popular reproductions of trial—reproductions whose dramatic content derives from exposing the stages of trial in intimate detail, particularly those stages ordinarily shielded from public view (jury deliberation, side-bar conferences, attorney-client communication, attorney investigation and negotiation, etc.)—have continued to proliferate. At the same time, cultural and political tolerance for other even more enclosed practices (preemptive warfare, indefinite detention, torture, and, most significantly, targeted killing) has increased dramatically.[120] Law is thus simultaneously rendered relatively invisible in its formal administration, vividly present in the substitutionary space of cultural representation, and, at least beyond our national borders, altogether absent or dissolving into techniques of summary execution.

These genuinely "alternative" techniques are predicated in part on sentiments not unlike those animating vigilante justice in the past—doubt that "ordinary" due process is adequate to the threat posed, a feeling that the local practice of justice is anachronistic, clumsy, easily manipulated by the guilty, and fraught with peril (personal, dignitary, and financial) for the innocent. But for the state to mobilize the sentiments of vigilantism

supra note 14, at 226 ("[A] slave who wanted his day in court faced formidable barriers. No slave could testify against his master. In some states, no black could testify against a white man at all."); *id*. at 227 (noting disqualification in 1803 in Indiana Territory of "negro[s]," "mulatto[s]" and "Indian[s]" except in cases where they were sued by the United States or in civil cases where only people of color were parties); *id*. at 639 (discussing general prohibitions on the practice of law by women and blacks); Barbara Allen Babcock, *A Place in the Palladium: Women's Rights and Jury Service*, 61 U. CINN. L. REV. 1139 (1993); Katherine Hermes, *"Justice Will Be Done Us": Algonquian Demands for Reciprocity in the Courts of European Settlers*, in THE MANY LEGALITIES OF EARLY AMERICA, *supra* note 14, at 123; Offutt, *supra* note 14, at 377-84; Linda L. Sturtz, *"As Though I My Self Was Pr[e]sent": Virginia Women with Power of Attorney*, *in* THE MANY LEGALITIES OF EARLY AMERICA, *supra* note 14, at 250.

119. TOCQUEVILLE, *supra* note 84, at 309-11.

120. *See* Helene Cooper & Mark Landler, *Targeted Killing Is New U.S. Focus in Afghanistan*, N.Y. TIMES, Aug. 1, 2010, at A1; Karen DeYoung & Joby Warrick, *Under Obama, More Targeted Killings than Captures in Counterterrorism Efforts*, WASH. POST, Feb. 14, 2010, at A01; Harold Hongju Koh, Legal Adviser, U.S. Dep't of State, The Obama Admin. and Int'l Law, Address at the Annual Meeting of the Am. Soc'y of Int'l Law (Mar. 25, 2010) (transcript available at http://www.state.gov/s/l/releases/remarks/139119.htm) (describing and defending the legality of current procedures for targeted killing).

itself rather than solemnly insist on ordinary legal process is most unusual. The almost complete enclosure of practices like targeted killing (keystrokes on a computer in a secure location sending a signal to a remotely controlled predator drone to release a "smart" bomb after classified intelligence has identified the target) is equally distinctive.[121] Secrecy, control, efficiency, and the coldest of bureaucratic rationalities reach their apotheosis. Athena turns not to trial at the Areopagus, but to bloodletting of her own in Argos, from on high.[122]

Enclosure is not yet an end in itself. And the persistence of the dead metaphor of courtroom trial in the popular and legal imagination may check the desire for full enclosure. But the history of the local practice of justice teaches nothing if not that the space in which justice is done shapes what we think it means.

121. *See* Christopher Drew, *Drones Are Weapons of Choice in Fighting Qaeda*, N.Y. TIMES, Mar. 3, 2009; *see also* John Markoff, *War Machines: Recruiting Robots for Combat*, N.Y. TIMES, Nov. 27, 2010.

122. THE ORESTEIA OF AESCHYLUS (Robert Fagles trans., 1977). In popular culture, the imagery of target shooting has already entered political discourse. *See* Brian Montopoli, *McCain: Sarah Palin Is Not Inciting Violence*, CBS NEWS POLITICAL HOTSHEET (Mar. 25, 2010) http://www.cbsnews.com/8301-503544_162-20001170-503544.html (describing controversy surrounding Sarah Palin's "target list" in the 2008 presidential campaign). Border shootings by border agents and private citizens have increased; video games and popular media also celebrate targeted killing.