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Specters of Law: Why the History of the Legal Spectacle Has Not Been Written

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*Beware of the puddle of mens traditions: it infects often, seldom it refreshes.*¹

It all begins with the apparition of a specter. In 2006 the English Court of Chancery handed down a written judgment with certain typographical peculiarities.² The case, which has generally gone unremarked, concerned a claim against the author of *The Da Vinci Code* for copyright infringement.³ The dispute was in substantive terms quite ordinary, but the typographical oddities of the judgment did eventually gain some slight acknowledgement and then dismissal by the Court of Appeal. The idiosyncrasy in question concerned the format of single and seemingly random letters in the text in bold italics. The opening line of the first numbered paragraph, after the judge's name, the heading and subheading, contained the word "claimants," in which the last letter was thus altered in font and format. In the second paragraph, the "m" of "claimant" in the third line was again changed to bold italics. In the third paragraph the "i" of "is" gained comparable and surprising significance and the immediately subsequent word, "that," was also emboldened and printed slant. Excised from the judgment as a separate encryption, the first ten letters formed the nomination "Smithy Code"

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1. JAMES CALFHILL, AN ANSWER TO THE TREATISE OF THE CROSS 20 (London, Cambridge Univ. Press 1846) (1565) (spelling modernized).

2. *Baigent and Leigh v. The Random House Group Ltd.*, [2006] EWHC (Ch) 719 (Eng.).

3. For commentary on the legal historical significance of the judicial encryption, see Peter Goodrich, *Legal Enigmas: Antonio de Nebrija, The Da Vinci Code, and the Emendation of Law*, 22 O.J.L.S. 71 (2010). For an example of an extended academic commentary that makes brief mention of the encryption, suggesting that its inclusion was expressive of poor judgment, see Mary Wyburn, *Giving Credit Where It Is Due: The Da Vinci Code Litigation: Parts 1 & 2*, 18 ENT. L. REV. 96, 131–33 (2007).

followed, once disencrypted by means of the cipher actually used in the novel whose authorship was under dispute, by question and answer: “Jackie Fisher, who are you? Dreadnought.”

Interestingly the Court of Appeal neither reproduced nor analyzed the encryption in the judgment: “nothing turns on it” we are informed.⁴ This denial of relevance, however, is immediately followed in the next sentence—one space of separation—by the observation that “The judgment is not easy to read or to understand.” Properly speaking the coded statement is a legal enigma—a judicial hieroglyph, meaning an esoteric and forgotten reference inserted into the legal text. The obscurity of the enigmatic is not intrinsic but a matter of the mixing of genres, the reference being to a text, figure, or narrative that is unfamiliar to lawyers. It is important, however, in an era when legal enigmas are denigrated and denied relevance, to start with the obvious yet generally overlooked features of these emboldened italic, which is to say foreign, letters. The typography of common law judgments can also provide a surprisingly apposite introduction to the general question to which this article will be addressed, namely that of why the history of the legal spectacle, of the juristic use of images and performances, has not been written.

The typography of legal texts used to be in black letter, the reference being to the gothic typescript in which early treatises were printed. These included much use of bold font—Freud calls it “heavy type”—and different typefaces for different languages, with Latin quotations often reproduced in italic. Of the plethora of other peculiarities, at least to modern eyes, note should be taken of the marginal annotations to the side of the text, and lengthy explanatory headings. The other oddity was the frequent use of printer’s symbols for abbreviations of Latin declensions and of common English words, the shortening being generally a reflection of the cost of paper. That said, by the time of the judgment in our case, 2006, abbreviation has all but vanished, the marginalia have been removed, and rationalism has promoted plain text (Century Schoolbook for the U.S. Supreme Court and many U.S. jurisdictions, otherwise usually Ionic) and a minimum of symbols. The Chancery judgment in *Baigent v. Random House* has few typographical flourishes, although we can note that it boasts a table of contents—a lengthy list of headings and subheadings—with frequent underlining, some variation in font size, and boldfaced headers. Italicization and bold are also frequent in the text of the judgment, not simply for case names and book titles, as has long been the convention for these enigmas of reference, for things half-said, but also for points of emphasis and stress.⁵ Heavy type carries additional meaning, a greater weight, a

4. *Baigent and Leigh v. The Random House Group Ltd.*, [2007] EWCA (Civ) 247, [3] (Eng.).

5. Lacan makes the point best in arguing that every citation to a name is enigmatic. It invokes the work, everything not said but authorized through the citation. *See* JACQUES LACAN, *THE OTHER SIDE OF PSYCHOANALYSIS* bk. XVII, at 36–37 (Russell Grigg trans., W.W. Norton & Co. 2007) (1991).

point which Freud emphasized by using that typographic metaphor as his figure for the process of condensation, of latent energy and charge, in dreams.⁶

The investigation of the visual within the legal tradition can begin by noting that even in as profane and prosaic an expression of law in the manner of a deliberated judgment, even in this bastion of written reason, in this modern and rational realm of the application of legislation and precedent, there are plenty of important and indeed necessary images, visible clues as to meaning, spectacles of law. That this is to some degree surprising, that we think of the legal text as a transparent vehicle of meaning, free of any figures of truth, let alone emblems or images of rule, is tribute to the often forgotten Reformation context in which the common law tradition was first formulated and in which the Reformers' critique of images in favor of writing, their maxims of *sola scriptura* and *sola fide* had significant effects upon the development of legal method. Trial by the word was what even the Anglicans promoted, *sit liber index*—let the book decide—being an epigram, a figure of legitimate authority and weight of judgment, familiar to the Churchmen and to the sages of common law alike.⁷ When, however, we take the invocation of the book, of a purely scriptural law, seriously and examine the artifacts of the text—the various and miscellaneous collections in the chambers, libraries and courthouses, the breviaries, treatises, precedents and statutes, with all their visual implications of accumulation and authority—then there transpire to be numerous oddities, manifold ocular clues, and imagistic intimations in the very form of the written reports. From the linear Ramist list of headings through to the emblematically encrypted statement in the judgment, the text is never simply a text but rather falls within the general doctrinal definition of the manifest world itself as being “a certayne spectacle of thinges invisible, for that the order and frame of it, is a glasse to beholde the secrete working and hidden grace” of the author of nature, secular norm, or positive law, as the case and epoch dictate.⁸

Again it is in the context of the early modern theological debates as to the valence and use of scripture that the status of the legal text and the role of its prophets and interpreters has to be staged. The common law, because of its insistence upon custom and use, what the Catholics called tradition, as a primary source of legal rules, had always been conscious of the secondary and mediated quality of the text. The books of law recorded the unwritten tradition: “For indeed

6. SIGMUND FREUD, *THE INTERPRETATION OF DREAMS* 354 (8th ed. 1965).

7. WILLIAM FULKE, *A REJOINDER TO JOHN MARTIAL'S REPLY AGAINST THE ANSWERS OF MASTER CALFHILL* (1580), reprinted in *FULKE'S ANSWERS TO STAPLETON, MARTIAL, AND SANDERS* 135 (Rev. Richard Gibbins ed., Cambridge, The University Press 1848) (the argument being that “the spirit by his own substance incomprehensible, is by his effect in the holy scriptures visible, revealed, known, and able to be gone unto, therefore a sufficient judge, taking witness of the scriptures and bearing witness unto them . . . The Law of God is judge, not priests.”).

8. CALFHILL, *supra* note 1, at 169 (continuing to postulate “[t]he heavenly creatures and spheres above, have a greater mark of his divinity, more evident to the world's eye, than either can be unknown or dissembled”).

[the] reports are but comments or interpretations upon the text of common law: which Text was never originally written, but has ever been preserved in memory of man, though no man's memory can keep the original thereof."⁹ So dictated Sir John Davies, lawyer, poet, and one time, if only briefly, the attorney general of England under the virgin Queen Elizabeth. Sir Edward Coke wrote to very much the same effect, indicating that the law was only law if it could be found in the books, but at the same time pointing out that the books were but signs, meaning references to nature and truth, the antique and absolute sources of common law. Thus he stipulates that it is not the words but the truth that is to be loved—*in lectione non verba sed veritas est amanda*—and as this verity is more than the text, and outside or only invisibly present in the glass and frame of the book, the interpretation of scripture and norm is always more than is immediately or prosaically apparent.¹⁰ The visible words call up images of the unwritten, specular patterns of custom and use, the paths of an itinerant justice and a moveable law.

For the early modern tradition, and common law differs little in its doctrine of meaning and interpretation from the civilian method of the same period, the text was a sign, an envelope or image of unseen causes, a glass through which, as Saint Paul put it, we see darkly.¹¹ The italicized bold letters that formed the encrypted message in *Baigent* were not exceptional but rather emblematic of the written lexicon and bookish form of “modern” common law. Borrowing again from the Anglican contemporaries of Coke and Davies, amongst others, the tradition of the word, of the *logos* that founds being in the Gospel of Saint John 1.1, finds its exemplary expression in the rite of the sacrament—the holy word made visible. The sacraments were indeed the manifestation of the scriptural message: they were *verba visibilia*, moments of law giving that an Anglican contemporary of Coke's describes as follows: “When God gave the ten commandments to the children of Israel, his words were not only heard, but even visibly seen . . . the whole people saw the words (*videbat voces*).”¹² Sander follows through with the figure of fire as the mode of speech which allowed the onlookers to see the oration with their eyes and this leads to the conclusion that “the flame was an outward image, a deed as well as a word . . . a more worthy and honourable kind of reporting, than that which is done by bare words.” The image, for Sander,

9. SIR JOHN DAVIES, *LE PRIMER REPORT DES CASES ET MATTERS EN LEY RESOLVES & ADJUDGES IN LES COURTS DEL ROY EN IRELAND* (n.p., John Franckton 1615) (my translation). For a published translation of part of this work, see Sir John Davies, *Le Primer Report des Cases et Matters en Ley Resolves & Adjudges in les Courts del Roy en Ireland* (1615), reprinted in *DIVINE RIGHT AND DEMOCRACY: AN ANTHOLOGY OF POLITICAL WRITING IN STUART ENGLAND 131–42* (David Wootton ed., Hackett Publishing Company, Inc. 2003) (1986).

10. SIR EDWARD COKE, 2 *COKE'S REPORTS*, pt. 3 (1777), reprinted in *THE SELECTED WRITINGS OF SIR EDWARD COKE* 77 (Steve Sheppard ed., 2002).

11. 2 *Corinthians* 12, 13; see also PIERRE LEGENDRE, *NOMENCLATOR: SUR LA QUESTION DOGMATIQUE EN OCCIDENT*, II 89–90 (2006).

12. NICOLAS SANDER, *A TREATISE OF THE IMAGES OF CHRIST AND OF HIS SAINTS* 162 (EEBO Editions 2010) (1624).

is closer to the spiritual cause, to the thing itself, than is the word and so is connected more directly to passion and to the honor and glory of that which it represents. The image is “a most wise and speedy instrument and is to be commended for its nighness to truth.”¹³ For Calphill too the image is closest to the spirit, to the angels: “*quid est imago Dei invisibilis?* The image of God is Christ, which is the image of the invisible.”¹⁴

The image by extension reminds us that it is Christ who speaks, that words are not mere air with no general subsistence but rather have a cause and meaning, the intent and illocution of the face that pronounced or the hand that inscribed them. By the same token, the common lawyers equally viewed the books of law, the text, the print, the black letters as figures—manifestations, signs, images—of what one could term *ius absconditus*, the absent and invisible source of law. For canon and common lawyers, word and image, truth and its visible representations, are conjoint. If speech has an author then image and word are necessarily connected, the person of the speaker, single or several, natural or mystic, being the figure that gives substance to the word, in Sander’s depiction, and finds its theological root in Christ as the image of the father, the face through whom the law speaks—in *nominis Patris* or, for Lacan, *au nom du père*. For the secular lawyers we find again precisely this elision of image and word in the precept that it is the living spirit of law, the voice, tongue, or altered typeface of the judge that gives the dead letter of the lawbook its living expression and its “nighness to truth.” For the Italian humanist Alciatus “it is neither the words written on parchment nor those engraved in bronze that constitute the law, but rather it is that which justice dictates, and which equity directs that bears the true name of the law (*verum legem nomen habet*).”¹⁵ The judge, for Francis Bacon, is expressly *anima legis*, ambulant and articulated law if you will, and thus the tongue that revives the dead letter—*lex loquens*—the spirit that makes the majesty and authority of law speak.¹⁶

If another example is permissible, because I am not always believable, the Toulousian humanist lawyer Jean de Coras offers an exemplary explanation in a

13. *Id.* at 166; ROBERT PARKER, A SCHOLASTICALL DISCOURSE AGAINST SYMBOLIZING WITH ANTICHRIST IN CEREMONIES 48 (n.p., Richard Schilders 1607) (making the point that the sign of the cross made in the air, or in water—*aere fluido*—was the most dangerous as it led the most rapidly *ab imagine ad rem significatam*).

14. CALPHILL, *supra* note 1, at 172.

15. ANDREA ALCIATUS, ORATIO IN LAUDEM JURIS CIVILIS, IN OPERA OMNIA (n.p., n. pub. 1582) (my translation); *see also* IAN MACLEAN, INTERPRETATION AND MEANING IN THE RENAISSANCE (1990).

16. FRANCIS BACON, A COLLECTION OF SOME PRINCIPAL RULES AND MAXIMES OF THE COMMON LAWS OF ENGLAND 453 (Basil Montagu ed., Philadelphia, Carey & Hart 1842) (1630) (commenting that the laws are but *litera mortua* and “your sacred majesty, who is *anima legis*, doth not give unto your lawes force and vigour, but hath bin carefull of their amendment and reforming”); *id.* at 547 (“The rules themselves I have put in Latine . . . which language I chose as the briefest to contrive the rules compendiously, the aptest for memory, and of the greatest Authoritie and Maiesty to be avouched and alleged in argument.”).

dialogue between law and philosophy. The first question, after the obligatory praise of both emperor and jurists, is: what is a letter—*quid est epistola*?¹⁷ The opening question, the *exemplum*, is concerned with letters, with the *logos* or word that is at the beginning of law, something written and sent. The letter, however, is peculiarly juridical in the sense that it is the mode of formulation of law as scripture, as inscription, as sign. The answer to the question is that the letter is *tacitus nuncius*, a silent messenger. The silence of transmission has multiple connotations. First, expressly, according to Coras, but we can find the same thesis in the English lawyers, the letter has its origin in the characters, notes, and figures, in the hieroglyphs which the Egyptians “used to signify their conceptions.”¹⁸ Thus a fly on honey figures the king, time passed takes the form of the head of a wolf, a lion’s head indicates the present, and a stork manifests justice. The lexicon of images exemplified, we can note that the first facet of writing, in this theory, is its origin in plastic figures, in a pictorial code which later modes of signification will imitate.

The second facet of letters attaches to their nomination as hieroglyphs. The letter is enigmatic; in St Paul’s sense it is a glass through which we see darkly—*nunc videmus per speculum in aenigmate, tunc autem faciem ad faciem*—or for Calhill, as cited in the epigraph, it is a brackish puddle which we could elaborate here as one which poorly reflects the image of the viewer, an opaque mirror. The letter as hieroglyph of course has further connotations. The earliest form of writing was esoteric, its medium being dark and holy letters, its art the practice of “hierographie.”¹⁹ Whether the reference is Pythagorean or Pauline, Aegyptian or Roman, the origin of the letter is theological and like all holy mysteries it requires specialized knowledge for its proper decryption. And to this we can add that the hieroglyph and later letters were inscribed on stone, and then on clay, wooden tablets, animal skins, and other durable surfaces. This reflected in part the value of the inscription, the fact that it was holy, but it also aligned writing with death and passing on. Letters, to medieval theology, are signs that bring the speech of one absent to our ears without voice. No need for breath or speech and so of course the artifice of writing, not requiring insufflatory being, lives on. It endures. Letters inscribed or printed are *litera mortua* according to Francis Bacon, dead signs, or as Coke puts it, we call them testaments, the vestiges of antiquity and truth—*vocamus vetustatis et veritatis vestigia*.²⁰ There is a hint there of *V for Vendetta*, but the source is in fact Cicero and the point is that these letters, these signs are but images,

17. JEAN DE CORAS, ALTERCACION EN FORME DE DIALOGUE 20 (n.p., n. pub. 1558).

18. *Id.* at 20–21 (my translation); see also VINCENT CARTARI, LES IMAGES DES DIEUX (Lyon, Frelon 1610); ABRAHAM FRAUNCE, INSIGNIUM ARMORUM, EMBLEMATUM, HIEROGLYPHICORUM, ET SYMBOLORUM (London, Thomas Orwinus 1588) (defining a symbol as a representation by which something is concealed (*occultatur*)) (all quotations from this work are my translation).

19. The term is used in HENRI ESTIENNE, THE ART OF MAKING DEVISES 9 (Thomas Blount trans., n.p., J. Holden 1650).

20. COKE, *supra* note 10, at 245.

vestiges, impresses, or synecdoches of an invisible and eternal tradition that forms the source and authority of nature and law. The book, within this lineage, is the surviving image, the visual line, and *imago* of the dead author, the means by which the humanist's soul lives on.

I. LAW'S VEILS

It is not entirely accurate to say that the history of the legal spectacle has not been written. I am not afraid to be wrong. There are many partial and occasional accounts of diverse aspects of law's visible authority, presence, image, and performance.²¹ The trial has been a focus of studies of the theatricality of law, usually framed within a literary argot and method.²² There has been a limited interest in a social anthropology of legal rituals as ceremonial performances that undergird legal rules, and legal vestments, court architecture, judicial portraiture, and the language of law gain episodic and uneven examination.²³ More recently, law in film has become a significant focus of interdisciplinary legal study, but again the subject is usually law as acted out in entertainment dramas, in fictive film and television shows, as watched in the off-hours.²⁴ The legal use of images, the spectacle of law as relayed through the monumental, written, embodied, and enacted performances of lawyers themselves, gains little express recognition or examination. Modern historians and humanists address certain features and moments of the legal spectacle with a wealth of erudition, specialism, and insight,

21. See generally LAW AND ART (Oren Ben-Dor ed., 2011); LAW AND THE IMAGE (Costas Douzinas & Lynda Neade eds., 1999) (contains some important essays); NEAL FEIGENSON & CHRISTINA SPEISEL, LAW ON DISPLAY (2010) (offering a conspectus of new media used in law); RICHARD SHERWIN, VISUALIZING LAW (2011); RICHARD SHERWIN, WHEN LAW GOES POP (2002); Julie Stone Peters, *Legal Performance Good and Bad*, 4 LAW CULTURE & HUMAN. 179 (2008) (providing a useful conspectus and critical account of a rather sparse body of contemporary work on the performative dimensions of legality).

22. SIR EDWARD PARRY, THE DRAMA OF THE LAW (1924) provides an exemplar of the classical view. See JODY ENDERS, RHETORIC AND THE ORIGINS OF MEDIEVAL DRAMA (1992) and JODY ENDERS, MURDER BY ACCIDENT (2009) (important studies of the early historical interface of rhetoric, drama and law); see also LINDSAY FARMER, *Trials*, in LAW AND THE HUMANITIES: AN INTRODUCTION 455 (Austin Sarat et al. eds., 2010); STEPHANIE LYSYK, MAKING A FARCE OUT OF JUSTICE (1995) (unpublished Ph.D. dissertation, Stanford University) (on file with Stanford University Library) (a remarkable Rabelaisian study of the Basoche).

23. On the important topic of emblem and law, the symbolic valence of legal images, there is the incomparable work of VALÉRIE HAYAERT, MENS EMBLEMATICA ET HUMANISME JURIDIQUE (2008); and in a more theoretical vein, ANTOINE GARAPON, L'ÂNE PORTANT LES RELIQUES: ESSAI SUR LE RITUEL JUDICIAIRE (1985); ALAN HUNT, SUMPTUARY LAWS (1998); PIERRE LEGENDRE, LA 901^e CONCLUSION: ÉTUDE SUR LE THÉÂTRE DE LA RAISON (1998).

24. Peter Goodrich, *In Flagante Depicto*, 31 CARDOZO L. REV. 971 (2010) (introducing a symposium on film and trial); see also PAUL BERGMAN & MICHAEL ASIMOW, REEL JUSTICE (2006) (similar topoi and subject matter); MICHAEL ASIMOW, LAWYERS IN YOUR LIVING ROOM! LAW ON TELEVISION (2009) (largely to the same effect). For recent examples, see LAW AND POPULAR CULTURE (David Papke et al. eds., 2007); WILLIAM P. MACNEIL, LEX POPULI (2008) (indulging in the benefits and pitfalls of the law in popular movies approach); BARBARA VILLEZ, TELEVISION AND THE LEGAL SYSTEM (2010). Other examples, though there are many, would in my opinion be otiose.

but their focus is generally the spectacle and not the law. The history of the filming of war crimes trials, for instance, has been analyzed in detail recently by the filmmaker and historian Christian Delage, but again it is the features of the show trial, as historical act and filmic genre, rather than the legal *mise en scène*, the juristic import and expression, that are addressed.²⁵ Put it like this, just lightly and as a starting point, there is no history of juridical hieroglyphs, of legal emblems and other visual enigmas, of the *ius imaginum* or law honor, and hence my starting point, the surprise and nonrecognition that met the use of a cipher in the judgment in *Baigent v. Random House*.

No harm in a pun. There is no history of the legal spectacle because lawyers need spectacles—require glasses, have trouble seeing. It is in fact statistically true that as a professional group lawyers rank highest in the count of those born with congenital eye defects (archetypically myopia) and so at an early age, before optical correction, construct a world around rules that take the place of seeing. *Ex nugis seria*, however, as they used to say. We can take the impaired eyesight of lawyers further. However durable and permanent, death defying, and resistant to decay the records of law may be, doctrinally they are still simply transient material signs, visible figures of invisible causes. An extraverbal, spiritual truth supposedly hides behind even the written text of law. *Ratio scripta* is in the end but one form of scripture, an enigmatic reference to another scene and its hidden sources. All of which is well evidenced in a Renaissance text on jurisprudence written by a French humanist lawyer, Barthélemy Aneau, and first published in 1554. His topic, which was not unusual in his day, was the majesty, glory, and honor of great lawyers, their lineage, their works, their achievements *ad alta* as the frontispiece announces.²⁶ It would have been familiar to the ennobled Sir Edward Coke, whose laudatory testament to Sir Thomas Littleton, “not the name of a lawyer only but of the law itself,” signals the embodiment of a profession in the singularity of a unique *propositus* and face.²⁷ I will return to the theme of glory, the hymnological, angelological, and other acclamatory apparatuses of law, but will initially just make a point about the relation of lawyers to law.

In the descriptions provided by Sir Edward Coke and his contemporary Sir John Davies, though we could cite the Elizabethan reporter Plowden to equal effect, writing was not so much memory as mnemonic. Letters were images of

25. See CHRISTIAN DELAGE, *LA VÉRITÉ PAR L'IMAGE. DE NUREMBERG AU PROCÈS DE MILOSEVIC* (2006).

26. BARTHÉLEMY ANEAU, *IURISPRUDENTIA. A PRIMO ET DIVINO SUI ORGU, AD NOBILEM BITURIGUM ACADEMIAM DEDUCTA* (Lyon, Marque du Sagittaire 1554).

27. SIR EDWARD COKE, *THE FIRST PART OF THE INSTITUTES OF THE LAWES OF ENGLAND, OR, A COMMENTARIE UPON LITTLETON, NOT THE NAME OF A LAWYER ONELY, BUT OF THE LAW ITSELFE* 18–19 (London, Assigns of Richard Atkins & Edward Atkins 1628). For analysis of this and other images in *THE INSTITUTES*, see Peter Goodrich, *The Visual Line: On the Prehistory of Law and Film*, 14 *PARALLAX* 55 (2008).

words and words were images of thoughts.²⁸ Letters, whether plastic, scriptural, or oral, were the trigger of both reference and memory. In the system of case law, the early gleaming of precedent, the memory generated by reports and books was that of an immemorial pattern, of a time and practice beyond memory, an antique, venerable, and venerated unwritten law. Thus Coke, cited earlier, uses the term *vestigia* in his depiction of the sanctity of “our” legal reports. Written law is here the mark, the physical imprint (impress) and sign of its prior cause, its link to the unseen order of God, nature, and truth from which juristic norms derive. Writing, in other words, falls within the iconomy of holy signs and shares their enigmatic and ineffable reference. It is just that lawyers, for reasons of self-effacement and incapacity, choose not to recollect the iconic or simply specular quality of their instruments and, in the older argot, their “deeds,” their verbal performances of actions in law.

Since the Renaissance we are familiar enough with the image of a blindfolded justice, even if there is no very adequate interpretation of what this mutilation of the face of the divinity is meant to convey. Lawyers are not that well equipped with the techniques of visual conusance. That aside, Aneau offers a rather different image of justice which I will here reproduce as best I can from a digital edition of the text provided courtesy of the French national library website *gallica*.

28. EDMUND PLOWDEN, *THE COMMENTARIES OR REPORTS OF EDMUND PLOWDEN* (Dublin, H. Watts 1792) (1578), cited in ABRAHAM FRAUNCE, *THE LAWIERS LOGIKE* 46 (EEBO Editions 2010) (1588) (“Car parols, que ne sont auter, que le verberation del ayer, ne sont l’estatute, mes solemente le image del statute, et levie del statute rest en les ments del expositors del parols . . .”); THOMAS EGERTON, *A DISCOURSE UPON THE EXPOSICION & UNDERSTANDINGE OF STATUTES* 140 (Samuel E. Thorne ed., Huntington Library 1942) (1567) (“For the words are the image of the law.”).



*Illustration 1: Aneau's Image of Justice*²⁹

29. ANEAU, *supra* note 26, at 11.

Iustitia is on a pedestal, book of law in her left hand, eyes open, and surveying a group of blindfolded politicians and lawyers, if their vestments can be trusted, and a child (Cupid with his bow). Justice can see. She looks upon, reads, and declaims the law. Men, who are children to the Gods, are blind or at least blindfolded. The verse explanation of the emblem that follows is didactic, as was usually the case. The blindfold is there to protect *homo juridicus* from the perils and the passion of sight. One cannot look upon the Gods immediately or directly. Veils are needed to protect the eyes from the bright light of truth. The next point is that the process of learning law is slow and arduous. Those below the pedestal of *Iustitia* are to have their eyes opened but slowly. First they are to listen to the law with their hearts. It is an auditory beginning, an internal picture that forms (*sit imagine formam*) and only subsequently, little by little, will the eyes be opened. The beauty of the internal conception is to be prepared, before the wonder of the spectacle inflames the passions and overwhelms the subject. The light of justice, we are warned, can kill both honor and all other flourishing.

The first reason then that the history of the legal spectacle has not been written is historical rather than theoretical, a preliminary point, which is that lawyers do not look, are not trained to see, but rather myopically inscribe and file amidst the smoke and dust of archives and the serried and gloomy ambience of storerooms, anterooms, corridors, pigeon holes, bookshelves, chambers, and libraries. Lawyers did not like to look beyond their instruments, their warrants and proofs, pleadings, tables, and rolls. They judge, as Chief Justice Fortescue put it, with downcast eyes, with reverence, because they are not gods but simply, at least for said Fortescue, holy men passing on sacred messages.³⁰ It was for *Iustitia* to declare the law and for the judge to pass it on. I am blind but she can see. Put differently, one does not become a God overnight. Takes time and tuition. The question then is: why was sight denigrated or more precisely how did it come to be placed in suspension, for how long, to what end, with which eventual reinstatement?

II. THE FLOWERS THAT MAKE THE CROWN

If my first reason simply restates the problem, viz. the history of the legal spectacle has not been written because lawyers are incapable of writing it, cannot see (sic) any reason for doing so, indeed are adamant that it should not be written, that the eyes remain closed, then the second reason will expand upon the context for that incapacity and heuristic defect. The history has not been written because

30. SIR JOHN FORTESCUE, *DE NATURA LEGIS NATURAE* 321 (1466), reprinted in *THE WORKS OF SIR JOHN FORTESCUE* 321 (Thomas Clermont ed., London, n. pub. 1869) (“Vultu ad yma dismisso”). As to the sacerdotal and filial character of lawyers, see SIR JOHN FORTESCUE, *DE LAUDIBUS LEGUM ANGLIAE* (Francis Grigor ed. & trans., Sweet & Maxwell 1917) (1460).

the image is mistakenly conceived to be a theological and not a legal topic, and by extension the practice of using images relates not to the external forum of law but to the internal forum of conscience. This is initially a question of jurisdiction and precedence. As Aneau's image of *Iustitia* indicates, the Gods speak the law, as *nomos* or Justice, and the vicarious and mundane legislators, Sovereign or Sotomayor, Caesar or Chemerinsky, let it speak through them. That much is evident and can be read in all the early reports and disquisitions upon the common law as it also can be seen in the emblem books that lawyers were for two centuries very fond of disseminating.

The emblems that depict the divine provenance of law, the images of the glory and the terror of providential rule are innumerable and can be found at the start of most early legal treatises. Coke on Littleton reproduces at the very beginning of the text an image of the Holy Book of law with the subscription "*Deo, Patriae, Tibi,*" translating as: "For God, For Fatherland, For You." Even or especially for Coke, culinary artist, phonetically and actually the chef of much of early common law, it was appropriate to offer a visual reminder, an emblem composed of book and sword, Latin motto and Latin subscription, because God back then spoke exclusively in Latin, because that was the right thing to do. The visual message of the emblem is simple enough. The book of law is on a pedestal cushion, open and raised with a sword and a rod of office forming a cross (as opposed to a crucifix) over it. Officials and arms will enforce these words. Do as they say and say as they do. It would be best if the image could be reproduced—the art of the emblem in the legal text has been too long defunct, but assuming that space is limited I will use another and even more explicit instance, an emblem from a Dutch Latin collection that gets reproduced by the English barrister George Wither in his 1632 collection of "emblemes" both ancient and modern.³¹ I use the source for the majesty of it, as Bacon used to say, and for the greater propriety and effect of the Latin.

31. GEORGE WITHER, A COLLECTION OF EMBLEMES, ANCIENT AND MODERNE 3 (London, A.M. 1635).



*Illustration 2: Rollenhagen's Image of the Emergence of Law*³²

The image is taken fairly directly from the story of the first law, the story of the Ten Commandments. In the foreground, fully frontal, held aloft by an arm appearing out of a cloud, is a sword, which, if the motto is to be believed, threatens execution and death—*arma tuentur*. Behind the sword is a tablet, a book of stone on which is inscribed, carefully placed around the arm and sword, so as to be fully visible, *Deus proximus*, God is at hand. The tablet, table, or tombstone of the law is placed on a pedestal of earth, while in the background, amidst claps of thunder, missiles of fire, and blinding light the people watch the moment of Moses returning with the law: “When God *Almighty* first engrav’d in stone / His holy Law; He did not give the same / As if some common Act had then beene done; / For, arm’d with *Fires* and *Thunders*, forth it came.”³³ And much more to

32. GABRIEL ROLLENHAGEN, *NUCLEUS EMBLEMATUM SELECTISSIMORUM, QUAE ITALI VULGO IMPRESAS VOCANT* 3 (Georg Olms Verlag 1985) (1611).

33. WITHER, *supra* note 31, at 3.

that effect and affray in Wither's interpretation of the emblem.

It is apparent from the image of God's proximity, and also from the various early modern constitutional treatises, that the spiritual realm and law formed an integral part of the dual polity of Church and State. The Spanish philologist and lawyer Antonio Nebrija, in his *Dictionary of the Two Laws*, defines *iconomus*, the study of images (*icones*), as the discipline depicting the rules of governance of ecclesiastical matters.³⁴ Nebrija goes on to acknowledge that the Emperor and Doctors of law also use images and hence are in their turn "iconomists" or, in an antique sense, artists, but this offers more of a clue as to the subsequent split between the two orders than an explanation of the subordination of one order and law to another. When Henry VIII, to stick to the example of common law, posed to the two universities the question "Does the Roman pontiff have any greater authority in England than any other external Bishop?" he paved the way for the annexation of the spirituality into the temporality, the law of conscience into the common law.³⁵ The answer the universities gave was that the Roman pontiff did not have any special status in England and so the Crown became explicitly the hieroglyph and emblem of both laws, of the spiritual and temporal, internal and external. The common law absorbed the jurisdiction of conscience.³⁶ It is to that annexation of title and jurisdiction that the judge John Godolphin later refers when he says that without knowledge of that Supremacy of the Crown "tenderly touched at in the first Chapter," then all that follows "would be but insignificant and disfigured Cyphers."³⁷ And what followed was precisely the annexation of the spiritual jurisdiction into the Royal, which is paradoxically to say the common law.

Part of what the Crown was given, "as it were," Livery and Seisin of, part of what the Convocation of 1532 transferred *in verbo Sacerdotii*, was the jurisdiction over the image, the *iconomus* or governance of the visible which Mondzain has recently termed "iconocracy."³⁸ The Christian regime of the visible was transferred into the hands of the lawyers, along with the jurisdiction of conscience—and this with only the minor problem that the lawyers had neither training nor, in all probability, aptitude for the passion of the image or the emotional and spiritual questions that it engenders. What does it mean for the common lawyers to take over the jurisdiction of the Church? It perhaps bears repetition, as the Ordinary Godolphin noted, that jurisdiction over the image means in the first instance the

34. ANTONIO DE NEBRIJA, VOCABULARIUM UTRISQUE IURIS 15 (n.p., Apud Haeredes Iacobi Iuntae 1561).

35. JOHN GODOLPHIN, REPERTORIUM CANONICUM; OR AN ABRIDGMENT OF THE ECCLESIASTICAL LAWS OF THIS REALM, CONSISTENT WITH THE TEMPORAL 1 (London, C. Wilkinson 1678) ("An aliquid Authoritatis in hoc Regno Angliae Pontifici Romano de jure competat, plusquam alii cuicumque Episcopo Extero?") (all quotations from this work are my translation).

36. For discussion of this theme, see Peter Goodrich, *The New Casuistry*, 33 CRITICAL INQUIRY 673 (2007).

37. GODOLPHIN, *supra* note 35, at 1.

38. Marie-José Mondzain, *Can Images Kill?*, 36 CRITICAL INQUIRY 20 (2009).

promulgation of an image of jurisdiction. The image obtained or annexed is nominally and figuratively that of supremacy and, more precisely still, “Of His Majesties Supremacy.” The concept of supremacy is familiar enough, but the substance and its visual accoutrements are less well recognized.

Following briefly the path mapped by Godolphin, whose sources prominently include Sir Edward Coke and supporting precedents, the model for Henry VIII’s assertion of supremacy over the Church is the imperial model established by none other than the Emperor Justinian: “By this word [Supremacy] is here understood, that undoubted Right and ancient Jurisdiction over the State Ecclesiastical within these his Majesties Realms and Dominions (with the abolishing of all Forein and Usurped Power repugnant to the same).”³⁹ Various Acts of Parliament and learned commentaries are then cited to instance the trinitarian quality of the Crown’s majesty. As Father, the sovereign, expressly citing Bracton, is *Dei vicarius*, God’s proxy, the delegate of divinity, and the statutes stipulate time and again that “annexed to the Imperial Crown of this Realm, as well the Title and style thereof, as all Honours, Dignities, Preheminence, Jurisdictions, & c. to the said dignity of Supream Head belonging.”⁴⁰ The Commendam Case, as *Colt and Glover v. The Bishop of Coventry* was known, stated explicitly that Sovereign Governorship of the Church, *authoritate Regia suprema ecclesiastica*, was one of the flowers that make the crown—*flores quae faciunt coronam*.⁴¹ The King was patron of all patronage. Hobbes, to use another and more famous example, places an emblem and motto on the title page of *Leviathan*, the latter being a Latin maxim to the succinct if less jurisdictionally orientated effect that there is none with greater power on earth.⁴² This means, most immediately, according to Coke, that all “Spiritual Power or Authority . . . that may be exercised or used for the visitation of the Ecclesiastical State and Persons, and for Reformation, Order, and Correction of the same, and of all manner of Errors, Heresies, Schisms, Abuses, Offences, Contempts and Enormities” now belong to the Crown.⁴³ The King, as a contemporary of Godolphin’s put it, is “nursing father” to the Realm.⁴⁴

The sources are, ironically enough, mainly civilian, conveyed it goes without

39. GODOLPHIN, *supra* note 35, at 15.

40. *Id.* at 13.

41. *John Colt & Glover v. The Bishop of Coventry & Litchfield*, (1616) 80 Eng. Rep. 290 (K.B.); Mich. 10 Jac. Rot. 2642.

42. “Non est potestas Super Terram comparetur,” from the emblematic frontispiece of THOMAS HOBBS, *LEVIATHAN OR THE MATTER, FORM, & POWER OF A COMMON-WEALTH ECCLESIASTICAL AND CIVIL* (A.P. Martinich & Brian Battiste eds., Broadview Editions 2011) (1651).

43. GODOLPHIN, *supra* note 35, at 2–3 (citing Coke).

44. SIR ROGER COKE, *JUSTICE VINDICATED FROM THE FALSE FUCUS PUT UPON IT*, BY THOMAS WHITE GENT., MR. THOMAS HOBBS, AND HUGO GROTIUS 21, 98 (London, Thomas Newcomb 1660) (discussing the sovereign as nursing father). The image is taken from the Psalms and can be pursued via HYACINTHE SERRONI, *ENTRETIENS AFFECTIFS DE L’ÂME AVEC DIEU* 7 (Paris, Chez Antoine Dezallier 1686).

saying in the Latin, from Justinian through the Reception, and establish the jurisdiction of law as a matter of things both spiritual and absolute, as well as temporal, “oeconomic,” and administrative. The King speaks the law, because that is what being Supreme means—*Principes jus dixerint*.⁴⁵ The various and contested depictions of the pleasure of the sovereign constituting law are reasonably familiar, but the jurisdiction that accompanies this supremacy deserves careful enunciation. The nursing father, head of the realm, King and ruler, has expressly the power of dispensation. It is present in the principle that “All Acts of Justice and grace flow from him,” meaning that what he gives he can also take away.⁴⁶ The Crown, as Head of the Church, can grant Dispensations, abrogate statutes, and overturn his own pronouncements and promulgations, because *qui potest jus condere, potest illud tollere*, and more to that effect and affray.⁴⁷ If one looks to the source of these rules in the law of conscience, this power to dispense with the law, a variant upon the right to declare *iusstitium* in Roman law as Agamben has recuperated and delineated it, resides in the “grace and favour” of the sovereign resulting in the abrogation of a specific law.⁴⁸ Dispensation is not equity but exception, its cause being external to the law rather than its extension or revision through interpretation. As Dr. Taylor puts it, “Dispensation is a voluntary act of the Princes grace and favor, releasing to any single person or community of men the obligation of the law.”⁴⁹ The relevant passage is in italics and there, typographically, doctrinally, and substantively the figure of the father of law, the image of the impossible conjunction of spirit and flesh, conscience and law, finds its spectral place in the spectacle of legality.

The second aspect of the trinity is precisely the son as the manifestation of the divine father, as the embodiment of the source, as speaking law—*lex loquens*. Godolphin cites the Spanish divine Suarez as authority for the maxim *Princeps est Lex viva*, the King is living law, and also borrows the Roman concept of the sovereign embodying all of the written law in his breast. Made flesh, as the living image of a spiritual rule, the sovereign as *vicarius Dei* has also the task of care and “cure of Souls.”⁵⁰ It is as the representative of the spiritual order and as

45. GODOLPHIN, *supra* note 35, at 2. The King is styled “*Vicarius summi Regis, & Reges regunt Ecclesiam Dei*.” See HENRY DE BRACON, *DE LEGIBUS ET CONSUEUDINIBUS ANGLIAE*, (London, Richard Tottel 1569) for a similar view in styling the King as being without equal in his realm, and continuing to define him as *vicarius dei* and so: *Ipse autem rex non debet esse sub homine sed sub deo et sub lege, quia lex facit regem*—meaning that divinity makes both law and sovereign and hence the King is subject to divine law.

46. GODOLPHIN, *supra* note 35, at 5. Regal authority is expressly pontifical, being “*ex justa plenitudine Potestatis suae*.”

47. *Id.* at 7.

48. GIORGIO AGAMBEN, *STATE OF EXCEPTION* 33 (Kevin Attell trans., 2005).

49. DR. JEREMY TAYLOR, *3 DUCTOR DUBITANTUM, OR THE RULE OF CONSCIENCE IN ALL HER GENERAL MEASURES; SERVING AS A GREAT INSTRUMENT FOR THE DETERMINATION OF CASES OF CONSCIENCE* 423 (London, R. Norton 1660).

50. GODOLPHIN, *supra* note 35, at 2.

legitimated by the proximity of the divinity that the sovereign gives effect to the providential order through the interpretation and application of laws. It is as *anima legis* that the sovereign awakes the sleeping rules, the images that rest unseen, the hidden figures of the immemorial and unwritten law. It is here, in this instant of the sovereign figure, in the living emblem of the body that incorporates the law, that the crucial theological function of the image is most visible.

It is the fate of the human to walk amongst images, to reside transiently in a carapace, to move amongst apparitions, phantasms, specters. The body is but a representation of another scene, the celestial realm, the heavenly city, the clouds, and this is nowhere more evident than in the person of Christ, *haec imago*, this face, who in particular bears the marks of a greater force and law that can only be glimpsed in the visage of the vicarious and living being. As Agamben has recently and usefully elaborated, this image is at the very heart of the Pauline conception of order, rule, and thought. It is the face that the encounter with the spirit illuminates, and it is as light that God emanates and manifests his glory. The theory of glory—of visible power—is presented indeed “by means of a meticulous crescendo of optic images” in which the drama of law-giving is depicted precisely in terms of veils and glimpses, the hidden and the epiphanic together forming the spectacle of the event of commandment and the portent of rule.⁵¹ Here then is a world of “aereall” or vanishing signs, marks in water or air that transiently and partially convey presence in the various forms of incorporation and manifestation that express spiritual force, the nonbeing of the invisible, in temporal and momentary reference. Just as Christ was the son, the representative, the delegate, the vicarious, and just as his face reflected part of the light of the father of light, so too the sovereign, the judge, the lawyer are delegates of the speech of the father. Lacan, of course, said as much, deeply imbued as he was with the spirit of Roman Catholicism, but the theoretical point deserves juristic specification.⁵² The judge was explicitly defined as *delegatus maiestatis*, which is to say as someone dispatched or sent by the crown, an itinerant messenger, an assignee, an agent of the glory and light, the illumination and emanation, the paradox of blinding light to which *maiestas* expressly refers.

The missive status of the law’s representatives, single and several, gives expression neatly to the third facet of the Trinity, the Holy Ghost or angelological principle of transmission. Here we encounter head-on the paradox of the legal spectacle in the ambivalent charge that imbues the question of the image as the evanescent sighting of light in flight, the angel or spirit passing through and communicating the variable disposition and manifest authority of those who represent the invisible cause of law. As Hobbes, and what better guide, depicts it,

51. GIORGIO AGAMBEN, *LE RÈGNE ET LA GLOIRE: POUR UNE GÉNÉALOGIE THÉOLOGIQUE DE L'ÉCONOMIE ET DU GOUVERNEMENT* 307–09 (Seuil ed., Joël Gayraud & Martin Rueff trans., 2008) (all English language quotations from this work are my translation).

52. This point is well elaborated by MICHEL TORT, *FIN DU DOGME PATERNEL* 123 (2005).

the divine is angelic and the angelic is divine.⁵³ Put this in a maxim and we can say that God is an image and the image is God. That is surely the one overriding message of the theology of vision, of the iconocratic regime. God—and truth and law—cannot be seen but only manifested in his emanations and delegations. God appears—in burning bushes, in bolts of thunder, in flashes of lightning, in smoke, in enigmas, in glass darkly, or as a back, a body turned the other way. As for the delegations of divinity, of the supreme light of life, it is his son, the impossible unity of spirit and body, light and form, that represents the principle of temporal hierarchy, and imbues the surrogate places and secondary personnel of the legal order with their dignity, their office, their proper role.

Lawyers have not been hesitant to invoke the paternity and authority of the spirit world. Take even the language of private law and we do not have to look far to learn that contracts are sacred, covenants solemn, that conscience legislates judicial decision, that morality dictates rule application, that courts be revered, judges respected, dignity recognized, and that justice be seen to prevail. *Gloriae mundi*, as early lawyers coined it, subtends and supports the solemnity of law.⁵⁴ That glory, to which I will turn shortly, is the embodiment and expression of the principle of the invisibility of causes, the nonfabrication or simple discovery of law as something more than just words or merely human devises. Thus, finally, the second reason for the failure to inscribe the history of the legal spectacle lies in a paradox. Lawyers need the trappings of sovereignty, the machinations of spiritual causes, and the efficacy of majesty—and these arrive as the spectacles, vestments, architecture, and argot of power. Images give law its power and glory, its aura and effect. Images, however, reference what cannot be heard or seen directly and it is precisely this vanishing quality to legal images that gives them their effect, their quality as phantasms, apparitions, manifestations of power. The image also, however, absconds. Its efficacy resides in its roots in the imaginary and this takes it outside of the ambit and competence of lawyers. Religion, and here the pursuit of that to which sacral and legal images refer, and I will borrow here from the Anglican theologian Perkins, is “perswasion, whereby we beleeve things that are not.”⁵⁵ The articles of faith, the creed or belief in law, cannot afford or simply does not dare to undo the images. The Anglican lawyers never took off the paint of Rome. They said they had, but they never did. How could they? No image and there would be no imagination, no spectral order or iconic and greater whole with which to identify and to which the subject could belong. No image, no law. No

53. HOBBS, *supra* note 42, at 208. See also RICHARD HOOKER, OF THE LAWES OF ECCLESIASTICALL POLITIE 53–57 (Da Capo Press 1971) (1617), which provides a most illuminating discussion of angels.

54. BARTHÉLEMY CHASSENEUZ, CATOLOGUS GLORIAE MUNDI (Venice, n. pub. 1576) is the source of this epigrammatic title for legal order.

55. WILLIAM PERKINS, A DISCOURSE OF CONSCIENCE 6 (Cambridge, Univ. of Cambridge 1596).

persons, no bonds, no lawyers as those little majesties that bring the immemorial, the unseen, the inheritance, and continuance of administrative practices that always already exist, to life.

It is an axiom of common law, formulated most effectively by the Renaissance barrister George Puttenham, that someone who does not know how to dissimulate does not know how to rule—*qui nescit dissimulare, nescit regnare*.⁵⁶ The maxim remains in the Latin, in the argot of a foreign religion and law, and this linguistic peculiarity is taken directly from the era of the political ascendancy of the vernacular, from the epoch of translation into English, and already tells much of the story. To retain their power, to continue in their ascendancy, the lawyers of the late sixteenth century needed their instruments, their arcane rolls and books, their filing systems and records of auditory hearings, their images of custom and use. They needed, in short, their majesty, power, and glory as signalled, and self-consciously so, by the authority of Latin and the self-evident legitimacy of their maxims. *Lex regnat*, one can usefully reiterate, *sed non gubernat*, law rules but it does not govern. The paradox of the national law being proclaimed and promulgated in a foreign language, in Latin maxims and French arguments, mirrors the paradox of the image. Indeed the Latin is an image, a hieroglyph, but also a spectacular mode of presence of majesty and invocation of truth.⁵⁷ The common lawyers preached the book, the text without figure or image, but their practice relied upon a heavy panoply of figurative devises and spectral machinations. Just think of the dress code of judges, the portraiture of lawyers, the architecture of courts, the solemnity of law libraries, the disposition of the courtroom, the silence amongst the files, and the intoning of Latin. In using Latin, in other words, the common lawyers dissimulated. They pretended not to have the civilian virus, the continental juridical influenza, but that was precisely what they were spreading. So best to keep quiet about it. Unwise indeed to comment upon the use of blazon, the *symbola heroica*, and other images manifest in the public presence of law.⁵⁸ The spectacle should overlook and be overlooked. Best all around to do it that way.

Finally, on this point, when the judge in *Baigent v. Random House* inserted a code, the italicized letters, the Court of Appeal expressed a significant disapproval.

56. GEORGE PUTTENHAM, *THE ART OF ENGLISH POESIE* 155 (London, Richard Field 1589).

57. The authoritative work on this point is FRANÇOISE WAQUET, *LATIN OR THE EMPIRE OF A SIGN* (John Howe trans., 2001). For a rendition of those arguments in relation to law, see Peter Goodrich, *Distrust Quotations in Latin*, 29 *CRITICAL INQUIRY* 193 (2003).

58. The starting point is BARTOLO DA SASSOFERRATO, *DE INSIGNIIS ET ARMIS* (1358), reprinted in *A GRAMMAR OF SIGNS* (Osvaldo Cavallar et al. eds. & trans., 1994). For the English reception, see CLAUDIUS PARADIN, *HEROICALL DEVISES* (London, William Kearney 1591), which offers the best illustration of this tradition, though JOHN FERNE, *THE BLAZON OF GENTRIE* (London, John Windett 1586) is also precise in its depiction of blazon as a species of *symbola heroica*. On the intricacies of this history, pellucidly unraveled, see Peter Goodrich, *A Note on Icnunculæ*, 13 *PÓLEMOS* 3 (2009), and Peter Goodrich, *Devising Law*, in *A TREATISE ON VISUAL SEMIOTICS* (R. Sherwin & A. Wagner eds., forthcoming 2012).

My guess is that his judicial career is over. He is cancelled in Chancery and will never progress. Not, of course, that their Lordships said any such thing. It was tacit but audible, unwritten but visible. The first instance judgment, recollect, was in their superior appellate view difficult to read and hard to understand. Nothing, if you please, turned on the encryption. And then, reading between the lines, Smith had shown too much, revealed trade secrets, let slip that judges make things up, invent decisions, create the law. To a point. And inserting a code, being playful in a judgment, revealing the authorial hand through these rather minor typographic changes, these little images, *imagunculae* as they were once called, suggests a degree of exposure that exceeds the usual and accepted pattern of judgment writing. It displayed too much. The judge had failed to dissimulate and so betrayed the tradition of law.

III. THE POWER AND GLORY OF PRECEDENCE

The second reason for the failure to address the history of the legal spectacle, as elaborated, is jurisdictional and doctrinal. Doctrine in its strongest sense, as the unwritten tradition of the word, as inheritance, as time honored truth passed on through the artifacts and rites of religion and commandment gained only a secondary representation in the legal tradition and its black letter texts. The images and impresses, the symbols and synecdoches that made up the spectacle, the ritual performances and plastic presences of legality had been inherited from another jurisdiction and a longer established tradition than the mixed patterns and polyglot practices of common law. The early modern lawyers, the sages and founders of the scriptural tradition of common law, the authors of the black letter missives, were not unaware of the theological roots of majesty and dominion, of judicial offices and legal archives. The common lawyers wrote extensively of the divine provenance of common law, its roots in nature, and the indefinite time of antiquity. Sir John Davies wrote a book-length poem on the immortality of the soul and its “double fashioning,” like law being made once and then made again.⁵⁹ The generic acknowledgement of the source of law in a higher law, however, remained indefinite and lacking in theological specifics. These were the purview of another jurisdiction, annexed and assumed by the common lawyers but not their focus of attention. Indeed, as suggested, it would be most dangerous to address in law what precedes and instantiates legality. The *mise en scène*, the apparatus of appearance and machinery of visibility, was precisely to be precluded from view. This was expressed doctrinally as a question of the enigma of images, of the inexplicable aura and gradations of hierarchy, of the ineffable modes of appearance, and the untold affections occasioned by law.

59. SIR JOHN DAVIES, *THE ORIGINAL, NATURE, AND IMMORTALITY OF THE SOUL* (London, W. Rogers 1697). On the double fashioning of all law, its making, breaking, and making again, see Arthur Jacobson, *The Idolatry of Rules: Writing Law According to Moses, with Reference to Other Jurisprudences*, 11 CARDOZO L. REV. 1079 (1990).

The last point, the third reason why the history of the legal spectacle has not been written resides in this latter point and in a further dissimulation. Once stated it will seem peculiarly obvious but that of course is its brilliance. It is not the indefiniteness of the image, nor is it the non-knowledge of lawyers, the lack of training in “visial lines” or iconocratic regimes, that stalls the study of spectacles. It is their affective effect that is preserved in silence, in the power of silence, in the passage of meaning to the eyes without voice, in the “contentment of sight.” The common law is a system of precedent, a tradition of precedence, of honoring what came first, the oldest, the repeated. I will take this up in detail but the initial, and to modern eyes surprising, correlate is the simple yet profound observation that precedence is a system of hierarchy, a reflection of celestial order and heavenly community, a chart of honor and its descent from above to below. *Deus proximus est* as the earlier discussed emblem manifests, and we see clearly enough behind the commandments entombed in stone, another and more spectacular scene on the mount, an image of the event of law and of lawgiving, the site of human attachment to legality, and the order that stems from it. Behind the law, supporting the law, delivering the law to the social as a generalized norm and legitimacy, as opposed to a particular and demographically irrelevant case law decision, is the image of law’s appearance, the emblem of legal provenance and prophesy. The image, in other words, harbors another scene and another law, the support of legality and the legitimacy of the order are alike contained in the image of “hieros,” of sanctity, that founds both hierarchy and precedence.

The first, the origin, Selden states at the beginning of his work on the *ius imaginum*, the law of images, is *instar omnium*, the symbol and the worth of all.⁶⁰ The system of precedent is a system of images of honor, of an apparatus titled *notitia dignitatum* in the Roman argot, and it is this order of precedence, spiritual and temporal, from first to last, from highest to lowest, from the oldest to the youngest in the escutcheons of dignity that law presupposes but neither develops nor critically apprehends. The signs, the images of honor and glory, of power and precedence, have only the slightest dimension of conscious presence in legal doctrine. Their history is not yet written, their workings less than properly understood. It is to this, to the honor of law and the law of honor, majesty, and dignity, that I will turn. But before doing so, a brief word on theology and on the hymnological and acclamatory apparatuses of power. Here the work of the contemporary civilian lawyer and melancholic philological virtuoso Giorgio Agamben can serve as a guide to the doctrinal context. Common law turns out to be a rather surprising exemplar of the apparatuses of power and glory that Agamben traces within the continental tradition.

Agamben’s thesis develops from the seventeenth-century maxim *rex regnat sed*

60. JOHN SELDEN, TITLES OF HONOR 2 (The Lawbook Exch. 2006) (1614) (all quotations from this work converted to modern English).

non gubernat, the sovereign rules but does not govern.⁶¹ The maxim refers to a distinction taken from theology between two modes of divinity and two orders of being, one perfect and inactive, a pure being that theologians discussed in terms of an idle God (*Deus otiosus*), and a useless King (*rex inutilis*) as opposed to an active God (*Deus actuosus*) and a realm of administrative practices, also termed economic management, meaning household governance or *oikonomic* disposition. The realms of divinity and of sovereignty, of absolute rule, belong to an order of providential being, of substance without relationship, grace without action. The order of fate (destiny), by contrast, is that of disposition and “oeconomy,” of temporal and impermanent things.⁶² It is this double form that modern law inherits from theology in the distinction between legislative power and executive action, substance and relation, norm and decision. Sovereign power rules as a transcendent form, as a universal expression and carrier of the image of the absolute, but it is the executive and the administration that govern, that execute the details and determine right and wrong in action. There are two orders, two divinities and then, and here is the key doctrinal shift, the polytheism in the monotheistic tradition, there is the principal of the third, the modes of communication between the two, the role of the Holy Spirit, of choirs and angels as the media of transmission, the go-betweens that carry the authority of the Father to the mouth of the son. Legitimacy is a matter of provenance, of *oikonomic*—family—membership and descent. The son, in theology and early common law, has the authority of him from whence he came. This, as it was sometimes termed, is the authority of *ius communion*.

Granted the prohibition on images within the Judaic and, to a lesser extent, the reformed Christian traditions, the visibility of authority, the representation of the enigma of the source and cause is indirect, tacit, and somewhat moot. This transmission of authority and legitimacy, of the (subordinate) sovereignty and power of the judge, is not a matter of words, of dark robes and black letter texts, but is rather a more spectral and background dimension of such hierarchy and position. The general principle, that of delegation and the vicarious exercise of sovereign power, is coherent enough. Officials do what they do, occupy the positions they inhabit, take up their appointments, but that observation neither greatly helps in explaining how they rise to these offices nor why they continue undisturbed, approved, and acclaimed in their roles. There is a structure, Agamben argues, a deeply embedded and profoundly overlooked tradition—a brackish puddle in Calphill’s epigram—in which we can see darkly the light of divinity and the insignia of honor in the reflections of men. Law means hierarchy and this is a matter of the relation of the two orders of being and substance, ontology and relation, the leisured and useless regnancy, the empty throne, that is acclaimed and

61. AGAMBEN, *supra* note 51, at 121–22.

62. *Id.* at 198.

legitimated in the practices of governance and the domestic economics of administration.

In patristic theology the question of the duality—*duplex modus*—of power gets resolved in the relation between the Church and the celestial city with its order of angels, its choirs, and hymns. There is a law of double meaning—*duplicem sententiam*⁶³—and commonplace though this may seem in theology, within which the order of earthly being is but an imitation and aspiration towards the celestial hierarchy, it is less evident that this angelological model of governance is a political and juridical model of terrestrial administration. It may be very evident in entering a church in Venice that an aviary of angels has been unleashed before the visitors' eyes, but it is somewhat less apparent, and this is Agamben's point, that earthly order and honor are in doctrinal terms the reflection and shadow, the mimics of the celestial hierarchy.⁶⁴ Citing Saint Ambrose, "men are created 'in the image' (of God), the angels are created 'ad ministerium,'" to govern the world.⁶⁵ The angel is the medium through which the divine—spirit, light, law, all of Hooker's variable forms of "intellectual being"—rules from a distance, through intermediaries.⁶⁶ The principle, however, of such governance from a distance is familiar enough to lawyers. It is the principle of hierarchy, raised to the level of "a universal law," inclusive thereby of both divine and civil orders, of absolute glory and of its shadow in temporal being and its lesser ministrations. And then, last point, most counterintuitive and surprising of all to materialist beings, "hierarchy is a hymnology" and, as Saint Thomas explicates, this means it is linked directly to the sacred and that it is to be found just as much among men as amongst angels.⁶⁷

While hymnology, angelology, and acclamation may seem a far remove from the frozen and sparsely theorized offerings of contemporary jurisprudence, it is neither a long march nor an extensive doctrinal trail from the concept of precedent to that of hierarchy, from the robes of the judge to the vestments of the Church, from bench and throne to glory and honor, or indeed from podium to pulpit, from examination to last judgment. Hooker can provide an apt entrance, observing casually in Book 8: "Neither are the Angels themselves, so far severed from us in their kind and manner of working, but that, between the law of their heavenly operations and the actions of men in this our state of mortality, such correspondence there is, as maketh it expedient to know in some sort the one, for

63. This key expression is taken from the cleric ANDREAS CAPELLANUS, *ANDREAS CAPELLANUS ON LOVE* (P.G. Walsh ed. & trans., Duckworth 1982) (1176).

64. For a brief history of angelology, see AGAMBEN, *supra* note 51, at 227–30; RÉGIS DEBRAY, *CROIRE, VOIR, FAIRE. TRAVERSES* 11–39 (1999); RÉGIS DEBRAY, *TRANSMITTING CULTURE* 31–45 (Eric Rauth ed., 2000).

65. AGAMBEN, *supra* note 51, at 230. For a discussion of some early sources on acclamation and their significance, see ERNST KANTOROWICZ, *LAUDES REGIAE* (1946).

66. HOOKER, *supra* note 53, at 73–75 (converted to modern English).

67. AGAMBEN, *supra* note 51, at 210.

the other's more perfect direction."⁶⁸ Elsewhere, Hooker directs attention to the acclamation, the glory and the reverence, the pure light that angels chorally and illuminatingly emit in the divine presence. Such images, such genealogies, are not so popular in a contemporary environment in which juristic history and legal doctrine are largely abandoned in favor of politics and empiricism, the power of decisionism, and the greed for presence. So a little reconstruction of the passage and contours of dignity and honor, hierarchy and presence, will guide my analysis. First, necessarily so, is hierarchy and the temporal legal order's reflection of the angelic choir.

If there is one unquestioned feature of law, from Hammurabi to Hobbes, Langdell to Sexton, it is that law is a hierarchical order. Whether Roman or common, canon or customary, written or unwritten, the legal order descends in a diminishing declension of dignities and honors that reign down from above. Recollect that *Rex dat dignitates*, and that *dignitas non moritur*, and we begin to get the sense that what is apparent is less than what is there. Hobbes too, interestingly, is clear enough that this is an order modeled upon and reflective of the celestial distribution of angels and we can find the same spectacular observations in all of the early modern authors. I have mentioned as much already in terms of the judges' filial fear of God, their duty of reverence and of downcast eyes, which we find in Fortescue, in Davies and Coke, in Hooker, but also and more to the point here, this ordering and reverence is based upon the angelic and choral quality of institutional being.

Think of it in terms of the orchestration of a choral and acclamatory mode of collective being. Consider the insignia and ensigns that still mark and protect the administrative order, the visible representations of order and dignity that overlook all of that which looks to the public sphere. Even the New York City sanitation department, especially the sanitation department, has an ensign, a symbol which, on buildings though not on uniforms, still carries a Latin motto. It was the office of heralds and the doctrine of heraldry that first recorded the order of social being and the dictates and other promulgations of sovereigns and judges. They announced the law by making it visible and audible and if we then look to the early common law treatises on heraldry, with titles such as Bosewell's *The Armorie of Honour*; Wryley's sadly neglected *True Use of Armorie*; Ferne's *Blazon of Gentry*, or indeed Selden's *Titles of Honor*; let alone the contemporary continental works such as Panciroli's *De notitia dignitatum*; or the wonderfully named civilian lawyer Barthélemy Chasseneuz, author of *Catalogus Gloriarum Mundi*, it is fairly immediately apparent that the problematic of representing law—the offices, dignities, jurisdictions, and competencies of the various lawmaking bodies—is very close to the theological debates of their day in which the relation of temporal sovereign to the Church and by extension to divine law, as also the question of

68. HOOKER, *supra* note 53, at 101.

representation itself, was in profound and schismatic dispute.⁶⁹ The general principles of juristic honor, the glory of judging, the spectacular quality of the lawyer or the learned in law, the *iuris periti* to whom Coke so fervently belonged, has a tripartite qualification. First, honor exists in external signs—it is *maximum bonorum exteriorum*, as Logan puts it.⁷⁰ Honor is the subject matter of the visible as such. Second, the relay of that honor and glory, of the degrees and callings of title and laudation, come from above. The herald is *nuncius Regis*, a bearer of the *arcana imperii heraldorum*, the mysteries of sovereign rule, which “must be kept secret as the ceremonies of the Eleusinian Goddess, or cabala of the jews.”⁷¹ We may also have given William Bird the bird rather unjustly in that he too did not neglect to address the genealogy of “the ensignes of honour” whose proper composition and display was subject to “the lawes of God, the general conclusions of the lawes of Nature, and the law of Nations, together with the customes, and usages of the statutes and ordinances of our country in like case heretofore, either observed or provided, or which all the primary grounds, and chiefe principles of the lawes of this Realme dictate.”⁷² Such a plethora of sources and gradation of sites of power and glory invokes then and finally the solemnized and sacred quality of the signs that subtend and submit to law. And then, last point, exit velocity all attributable to the neglected Wryley, “And in this sort as Princes, Great Lords, Judges, Magistrates and Governors, do use to wear sacred Robes of gold, purple and scarlet and other ornaments and apparel, not to take pride in, or for any vain ostentation or show, but onely that they may be distinguished from the inferior people to the end that a reverent regard may be had of them in respect of the high Office which under God here on earth they bear.”⁷³ Thus, Wryley goes on, and maybe he is a little verbose and florid, not as memorable as I thought, to say that

69. WILLIAM WYRLEY, *THE TRUE USE OF ARMORIE* (London, Gabriell 1592) (all quotations from this work converted to modern English). One could also add the later work of JOHN LOGAN, *ANALOGIA HONORUM OR A TREATISE OF HONOUR AND NOBILITY ACCORDING TO THE LAWS AND CUSTOMS OF ENGLAND* (London, Tho. Roycroft 1677); GUIDO PANCIROLUS, *NOTITIA UTRAQUE DIGNITATUM CUM ORIENTIS, TUM OCCIDENTIS* (Venice, Apud Ioan Antonium & Iacobum de Francifcis 1602).

70. LOGAN, *supra* note 69, at 11.

71. Francis Thynne, *A Discourse of the Dutye and Office of An Heralde of Armes, written by Francis Thynne Lancaster Heralde the third daye of Marche anno 1605*, in *A COLLECTION OF CURIOUS DISCOURSES WRITTEN BY EMINENT ANTIQUARIES UPON SEVERAL HEADS IN OUR ENGLISH ANTIQUITIES* 230, 233 (London, T. Evans 1773) (converted to modern English).

72. WILLIAM BIRD, *A TREATISE OF THE NOBILITIE OF THE REALME. COLLECTED OUT OF THE BODY OF COMMON LAW, WITH MENTION OF SUCH STATUTES AS ARE INCIDENT HEREUNTO, UPON A DEBATE OF THE BARONY OF ABURGAVENNY. WITH A TABLE OF THE HEADS CONTAINED IN THIS TREATLIFE* 8–9 (London, A.N. 1642) (quotation converted to modern English). A similar account of the precedence of common law in the deciding of questions of honor is also to be found in Sir John Dodridge, *A Consideration of the Office and Duty of the Heraldes in Englande, Drawne Out of Sundrye Observations. By John Dodridge the King's Solicitor Generall, at the instance of Hen. E. of Northampton, in Aug. 1600*, in *A COLLECTION OF CURIOUS DISCOURSES WRITTEN BY EMINENT ANTIQUARIES UPON SEVERAL HEADS IN OUR ENGLISH ANTIQUITIES* 269 (London, T. Evans 1773).

73. WYRLEY, *supra* note 69, at 24.

obsequies, and monuments, and all the other ceremonial indicia of “high estimation” are justified and to be encouraged.

That said, and however great the law itself might be in the escalating scheme of things, lawyers—the jurist *sacerdotes*—were self-effacing, cautious, and reverent, so as not to appear to have succumbed to the mystery that they convey. They may sit on high in the temporality, but like the rest of us they are naught as yet in the court celestial. Here is the Inns of Court herald Gerard Legh concluding his treatise on the insignia and arms of common law and the honor of the Inns of Court: “wherefore, as David saith, al people may clap their hands and rejoyce, that they have such good Judges, Magistrates and Justices, sprung out of these houses of honor whereby they are the more bound to pray God for your continuance,” and then, conclusion, peroration, honorific envoi: “herein I might compare your state (but that you are men) unto the heavenly hierarches, for that you have the three things that hierarches have, that is, Order, cunning, and working. In your order is office, in your cunning readiness, and in your work is service.”⁷⁴

Legh is poetic—hymnal—in his description of the celestial order reflected in the offices of lawyers, while his contemporaries at the Inns of Court were often more direct. Boswell, immediately after discussing the “preceptes iusticiarie” and the “rejoicings of arms,” because honor is a reward from the sovereign, goes on to depict the origins of arms derived from God’s honoring of nobility. Even in the heavens, God “made a discrepance of his heavenly Spirits, giving them severall names, as Ensignes of honour” and then going on to note “that the Law of Armes was by the ancient heralds grounded upon these orders of Angels in heaven, encrowned with the precious stones, of colors, and virtues diverse . . . so here in earth men are also distinct, in degrees, offices, governance, and power, every one serving their head in vocation, and calling.”⁷⁵ We could add indefinitely to this sketching of the signs of honor and the dictates of hierarchy, of the need for honor, glory, and the choruses of acclamation and laudation that both legitimate and keep them in their place. Selden, common lawyer par excellence, in his *Titles of Honor* provides a monumental listing of the proper forms of acclamation, the very wording of modes of address that honor sovereigns universally and dignitaries, pontiffs, and judges locally. The notes of dignity, the *Notitia utraque dignitatum* collected by Pancirolus in his work of that title, are images of honor, visible manifestations of superiority and inferiority expressed in sign and song, in ritual formulae and incantation. And almost always, of course, in Latin.

Take the last notice. Latin again. Distrust it. But that of course means apprehend and appreciate it critically. Don’t repeat it through nonrecognition, but recognize its function through reading it. That was indeed the humanist message

74. GERARD LEGH, *THE ACCEDENS OF ARMORIE* 135 (London, Henric Ballard 1562) (quotation to modern English).

75. JOHN BOSWELL, *WORKES OF ARMORIE* 9–10 (London, Richardi Totelli 1572).

that has long been forgotten. I will take some Latin examples for exactly that reason. As Bacon puts it, this is the language of majesty, the argot of self-evidently true maxims, the medium of the records that heralds and lawyers inscribe. First the early treatise on *Jurisprudence* by the lawyer Barthélemy Aneau earlier mentioned. Taking his queue from Bartolus's treatise on signs, the first and incomplete postclassical work on the law of ensigns and images, Aneau treats jurisprudence expressly as the expression of the order of honor of jurists. The emblem on the frontispiece of a work that is stuffed with images shows *nomos* as a divine justice floating, surrounded by angels, in the celestial clouds. Below, illuminated by stars, are the scintilla of divine wisdom according to the text, and underneath that is an emblem of prudence and the motto *tendit ad alta*, stretch, seek the heavens. The stars will lead the way through the shadows, and the angel of justice will guide the Prince in the path of virtue.

After establishing in varied and visible form the angelic path mapped for human rule, with numerous invocations of the divine spirit that is the fire of justice, the light of judgment, the visible spectacle of eloquence, Aneau moves on to present the order of honor that makes up the history of law. We are taken from the mouths of the Caesars to the judicious and excellent man Tribonian, second to none, and to his compilation, the *Digest*, a work of revelation, descended from the angels, and such like and more. We are taken then through the great Roman lawyers, Scaevola, Cicero, and on through to the post-glossators Bartolus and Baldus, "the lights of civil law," then to Alciatus and on to the flowers and honors of the modern profession, to Duarenus, Baldinus, Donello, and Bugarius. These are *viva Doctoris voce, et Ratione sedentis*, the living voice of the Doctors of law, and the seats of juridical reason, described earlier by Aneau as the lofty residences of Jurisprudence, the assiduous sources of law, the expositors of mystery and legality together.⁷⁶

Chasseneuz, whose *Catalogue of the Glories of the World* is to be compared to and indeed exceeds Pancirolo's *De notitia dignitatum* in scope and ambition, can expand the point usefully. In his preface, opening for content—*praefatio*, prologue, *prooimium*, preamble for the image of the work, as the incomparable Cornelia Vismann has taught us⁷⁷—Chasseneuz describes a treatise that will collate the absolute order of precedence and the vestiges of the father (*patrum vestigia*) that instruct and guide us in the path of virtue, truth, and honor. His guiding maxim, worth repeating, is *honor omnes tangit*—honor, like law, touches all.⁷⁸ Note that God is the author of the order of precedence, "of prerogative, pre-eminence, excellence, to which are offered honor, praise, glory, dignity, commendation both

76. ANEAU, *supra* note 26, at 46.

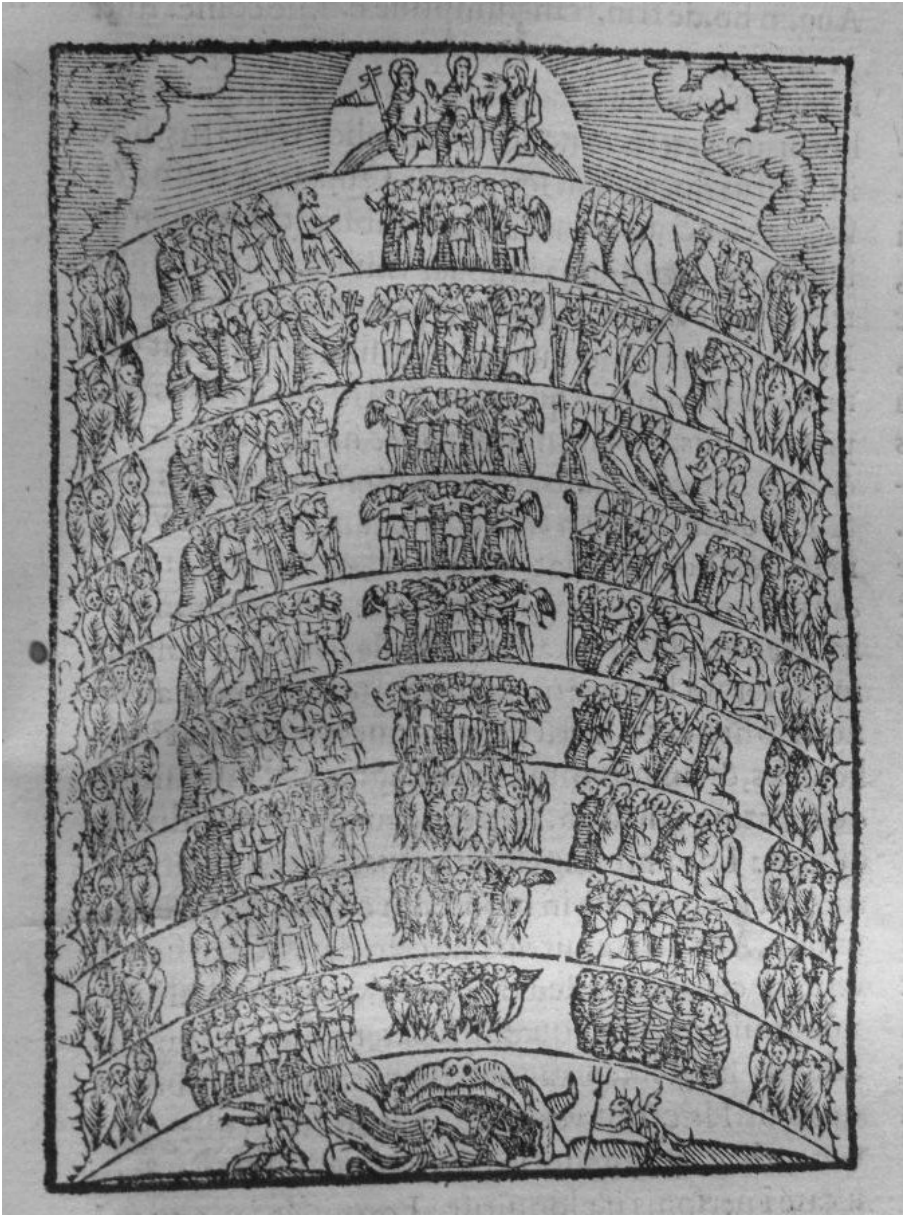
77. CORNELIA VISMANN, FILES 21–25 (Geoffrey Winthrop-Young trans., Stanford Univ. Press 2008) (2000).

78. CHASSENEUZ, *supra* note 54, at 2.

celestial and terrestrial,” and more to that affray.⁷⁹ In delineating and inscribing the various and descending orders of honor and reverence, power and glory, Chasseneuz is very clear that what is at issue is precisely the gradations and distinctions between diverse ranks, to which the relevant and proper degrees of reverence and deference are collated. Following on from this desideratum we learn that the universe could not subsist nor governance exist without the exemplar and instruction in all matters of differentiation and order that is provided by the celestial degrees of the angels and archangels upon whose model nature is formed and justice made. Greater and lesser, superior and inferior, major and minor, head and member are the terms of differentiation most fond to Chasseneuz and the basis for the description of the proper modes of expression and exhibition of reverence, honor and exaltation, the modes of sending on high.

Divided into eight parts, after a discussion of the proper modes of acclamation and honoring, the third part presents the celestial hierarchy of angels and the proper places of the spirits in an order that proceeds from heaven to hell.

79. *Id.* at 3.



*Illustration 3: Chasseneuz's Hierarchy of Angels*⁸⁰

80. *Id.* at 62.

The image that prefaces, opens, acts as preamble to the fifty considerations on the angelic order is interesting for its visual simplicity and its frequent repetition in varied forms in later books of emblems. The frontispiece to the English lawyer George Wither's book of emblems is a version of a similar representation but without the same degree of accessibility and poignancy. There are nine orders or ranks of angels, descending from the Holy Trinity aloft, the Father, the Saints, and the Archangel Gabriel. Meanwhile, below are the lower orders, closer to hell, less distinct, becoming faceless, and bound in the lowest order, in chains. Compare this to the seventh book or catalogue comprised of the order of offices of justices and jurisdictions, superior and inferior, also divided into fifty considerations. Examine here the tripartite image of justice and jurisdiction ascending from a pontiff or sovereign, without books, who holds the law in his breast. .



*Illustration 4: Chasseneuz's Order of Offices*⁸¹

81. *Id.* at 143.

Around him are arrayed ecclesiastical counselors. In the second order, the judge is before a bar and bench, with books of laws, rods of office, and doctors of law. Then finally, an itinerant or rural justice appearing amongst the populace, distributing law, the *ius honorarium* as it used to be called, to old and young.

Here then, and repeated in Selden, are images of the order of honor and of the necessity of reverence as the mode of recognition and obedience to hierarchy, as well as glory being the proper response, the exhibition of laudation and acclamation as the means by which the order is both propitiated and propelled. And here begins the order of precedence and the panoply of rites and ministrations through which law manifests itself as law and through which it appears, continues to appear, and will appear again. This is the regnancy of order, the sanctity of hierarchy, the choral and acclamatory norm of jurisdiction that lives on in all the architectural, vestimentary, artistic, and auditory modes of law's glorious and glorified presence on earth. While this may seem strange to a legal culture that professes to distinguish Church and State, spiritual and temporal, it is simply a matter of honor being indirectly visible and circuitously spoken, a tacit assumption, a state of affairs or structural form that constitutes the placing on stage, the apparatus of appearances, the spectacle but not the immediate substance, the behind the scenes—the red mass before the Supreme Court session begins, the robes, the oaths of office sworn, the preambles and presumptions. Is there any law that is not promulgated at some point *Dei gratia*, at the behest of the divine or some other majesty, appointed, as even the U.S. Constitution in a specific and specified “year of our Lord.”

Pass then to this domain of images that so vividly and extensively catalogues and exhibits. Moving to the common law we can make two distinctions. The first concerns the relation of image to honor, and the second is more directly a matter of precedence as precedent. With respect to the former, the invocation of the image, the war over images, the proclamations for and against the visible word and the “aereall” sign all relate to the proper honor that is due the reference of the sign. It is not obvious, but time and again the issue raised by the image is that of the distinction between *latria* and *doulia*, between the honor due “to God's owne divine substance and incomprehensible nature,” which cannot be represented in any image, and another honor that is due God, “but is not properly belonging to his substance, but to his government and Lordship,” and which can be honored through signs and images which refer to him. Thus “a certain honour is due to holy images by the way of passing by.”⁸² The outward image reflects the inward image, according to our Anglican author Sander, and he further reflects that we honor the person, *haec imago*, in direct mimicry of the prophet who everywhere

82. SANDER, *supra* note 12, at 92. Elsewhere he notes the principle *veneranda imago*: the image is worthy of reverence, so long as it is iconic and not idolatrous.

cries out *sit nomen domini benedictum*, let the name of the Lord be blessed. The image of Christ bears Christ's name "and partakes of his honour," and so too the name of dignities *quem honoris causa nominis*, is given to honor him who bears it. Mindful again that *Rex dat dignitates*, that the King bestows dignities, we can see an elision between image and word that has as its mediating principle the honor that is invested in both.

Sander was a defender of the use of images because they relayed an honor that was properly referred to, and due to the invisible principle that the sign represented. We can also, however, note that the issue is the same, if inverted, for the reformers. Perkins, for example, warns against images and idolatry precisely because they threaten the proper order of honor and glorification. Thus "so soon as God is presented in an image, he is deprived of his glory, and changed into a bodily, visible, circumscribed, and finite majesty."⁸³ Perkins then follows his denunciation of Roman worship, of honor given to images themselves, with the listing of those forms of honor that are properly due to the various signs of presence. Christ and the Holy Ghost are not images but rather are manifestations or "sensible signs" of a temporary presence, appearances that vanish with their apparent bearers. They are impresses of an eternal but absent presence. By the same token, Perkins is fully prepared to allow honor to the temporal order and "civil or political worship, that we may homage and signify our loyalty and subjection to our lawful prince."⁸⁴ And so, point made, whether images are helpful or obstructive, their function is universally that of the transfer of honor and glory, such as will legitimate and propagate divinity or filial manifestation, icon or idol as the case may be.

Turning next and penultimately to common law again, the text that most directly encapsulates the theory of precedence is Selden's *Titles of Honor* and the *notitia dignitatum* of the common law that he there elaborates. If common law expresses a common realm, a kingdom and its indigenous practices, here is the best inscription of the order of rankings, the hierarchy of nobility, the unwritten system of precedence and obeisance, reverence, and acclamation that subtends and transmits the culture and its laws. We are familiar enough with the obsessive ranking of U.S. law schools and that is in truth but a pale reflection of Selden's *longo ordine spectarentur*, the antique order of visibility of honor and legitimacy that the titles, names, and insignia of virtue and reverence portray. Nobility, variously defined as descending from knowledge and family, deeds, and ancestors, is meticulously adumbrated, starting from the principle that "Oeconomique rule (representing what is now a Commonwealth) had, in its state, the Husband, Father and Master, *as king*."⁸⁵ It is "oeconomique" rule, according to Selden, the face of

83. PERKINS, *supra* note 55, at 24.

84. *Id.* at 96–97.

85. SELDEN, *supra* note 60, at 2.

the father in the immediate family, that establishes the necessity of a unitary ruler and singular order, and it is this domestic model that gets repeated in the commonwealth, as the civil and political variation upon and social representation of the function of an “immutable law.”

It is upon the analogy to oeconomic rule that Selden elaborates an extensive theory of social place, role, and distinction within a genealogical tree of honors. Coke prints the family tree of Littleton some way into the first volume of the *Institutes*,⁸⁶ a whole page devoted to a visual schema of the great lawyer’s ascending and descending lines, and we can see too in Selden a similar concern with lines of honor and the historical establishment of legitimacy and virtue. Nobility, the preface to *Titles* announces, “being rightly the Virtue of his Fathers, from which he derived what he rightly means to propagate.” More than that, “he that is so descended from truly Noble Parentage and withall following their steps, or adding to their Name, in the Gentleman that may lawfully glorie in his Title.” The Name, capitalized by Selden, is the archetype of the image and subject to an original law of reference. It is the sign of an origin, the mark of a dignity, the source of glory, and the object of praise, a principle well captured in the maxim *Nobilitas, cuius laus est in Origine sola*.⁸⁷ Names are the images of origin and virtue, the marks of ancestry and inheritance, the inscriptions literally of an unwritten law, an internal norm imprinted in the heart.

The image propels the subject into the imaginary, into a spectral realm of unwritten law, custom, and use that is only ever partially present, always in the majority a sign of an immemorial pattern, a virtuous lineage, an inheritance. The name, like the crown, is a hieroglyph, a visible representation of a concealed meaning or at least of a greater substance and mystery. Abraham Fraunce, just to add the support of another early authority on common law jurisprudence, was of the view that the name is a synecdoche, an imprint of its lineal origin, a temporary mark of a permanent ancestral and long dead line.⁸⁸ The foundation of that inheritance, as Selden promotes it, is glory, which is most visibly supported by the attributes attached to the name: “I mean those additions of *Clarissimus*, *Spectabilis*, *Illustris*, *Superillustris*, and much more. To these, as Corollaries, at the end of each part we join something of *Place and Precedence*.”⁸⁹ Nobility, honor, virtue, and glory are correlates of place and precedence and belong within the unwritten law, the *ius imaginum*, that silently dictates the eminence of persons and their titles of nobility, their superiority and inferiority, along with the reverence and praise that is their due. The *ius imaginum*, as Selden points out, belonged in Rome to those whose ancestors had held greater offices by virtue of which their descendants could keep their image—their death mask—in their home. Thus to be honorable, to be due

86. COKE, *supra* note 27, at 18–20.

87. SELDEN, *supra* note 60, at 3 (Nobility, whose praise is in the Origin alone).

88. FRAUNCE, *supra* note 18.

89. SELDEN, *supra* note 60, at 3.

acclamation and laudation, one had to belong to the social imaginary, one had to be attached to the realm of images, to the undying domain of dignities and nobility, glory and law, nothing could be more beautiful—*Pulchrius multo parari, quam creari Nobilem*.⁹⁰

It is this beauty of nobility that allows the creation classically of images, and in the early modern period of devises and symbols, *icunculae* or little icons that represent the spectacular publicly and visibly. “This matter of place,” Selden later opines, “is civilly very considerable.”⁹¹ And to this, finally, should be added the relation between the principle of precedence, of the beauty of civil place, and the honor of the name, of the Doctor of Law, the judge, the sovereign, all of whom have their honorific modes of address well established, as the support of precedent and law. Precedence is age, inheritance, the virtue of antiquity as honored by time and propagated by use. Its roots, for Selden, are in the Old Testament, the *ager vetus* of commandment and law. “The ancientest cause of Precedence was, it seems, taken from the elder Age or Priority of birth among men that were otherwise of equal dignity.” Early laws developed to clarify disputes about precedence, “eminence and honor of one kind of dignity, officinary or honorary, or both, before another, with the Reasons for the most part that induced them”⁹² To this is added the Roman law of dignities, the “*Lists, Commestaries and Decisions*” that established and promulgated precedence “as may best conduce to the direction of them that would have more distinct knowledge of it.”⁹³ Here it is set out that custom establishes law and, in an argument that Coke was to make as well, that legislation and those decisions become part of custom where, over time, it “hath that force only according to the strength of Reasons and Circumstance joined with it, or as it shows the opinion and judgment of them that made it”⁹⁴

It is no simple thing, within the common law world, to find the law from amongst the myriad and indefinite reports and other records and relics of inherited practices. Amongst the files, embedded in the stacks, lost and forgotten in the cases, the auditory and scriptural recollections, and now floating, virtual, scrambled on the web, are the signs of an order and law, a beauty and proclaimed virtue, that established precedence and along with it both jurisdiction and judgment. To enter the past, to engage with precedent is to have an affair with texts, scriptural records, or now printable forms, but it is also to set foot in the domain of images and so to engage in an imaginary relation to the social. Inheritance, custom and use, patterns of practice, names and cases, *rationes* and *dicta* alike come from and continue a world of images and honors, dignities and

90. *Id.* at 706.

91. *Id.* at 740.

92. *Id.* at 741.

93. *Id.* at 742.

94. *Id.* at 743.

virtues that perhaps only the unconscious can recognize in the deference we exhibit toward them. We sing our praises quietly, we overlook the images that overlook us. At the same time, however, the order of precedence, the array of jurisdictions, the choruses and acclamations that legitimate and propitiate precedence, repeat and augment the age, the establishment and honor upon which precedent depends.

The third reason then that the history of the legal spectacle has not been written devolves from the theology of the image. The question of the image transpires to rapidly become a matter of honor and virtue, of the proper forms and observances, the ceremonies and rites of the legal and political world. If we don't believe in them, what then? It is not so much that being is dressed up in images, *esse vestitum imagine* as the Latinists put it, but rather that appearance and honor are unavoidably bound together and part of the very fabric of place and role, illocution and utterance, by means of which law is pronounced. Precedence is synonymous with honor, with the order of procession, with the appropriate veneration or adoration due and paid by the inferior to the superior, the unworthy to the worthies, the lower jurisdiction to the higher. The image is indicative of the order of honor, of nobility, and finally truth. The lawyers too inherited such a perception and the maxim *honor est in honorante* is not far from the method of law. Dignity dictates status, and status plays a pivotal role in controlling precedent. Why then conceal such an imaginary order? The answer, lengthily pursued, is that the honor harbored and relayed by the legal spectacle, the variable images of juridical reality, of lawful presence and precedent, depend upon a lexicon—an iconic law—of rites and performances, visual supports, and theatrical arrangements that precede appearance and audition.

Third thesis, last and wildest claim, Holy Ghost, is the argument that the legal spectacle, the minute gradations and distinctions of dignity and jurisdiction, give visible expression to an angelic order, to the epiphanies and annunciations through which a higher law—*Justitia*, Reason, custom, Nature, or God—finds expression in precedence and precedent. The support for this claim, as if the previous and exemplary erudition were not enough for you to take it on trust, can be elicited from Agamben's argument as to the centrality of hymnology and acclamation, power and glory, to the proper functioning of the *oeconomy* or dispositions of an administrative order that governs but does not rule. The image is the go-between, the angel, and is the one feature, relay, or operator that is shared by both orders, the ecclesiastical and the temporal, the inactive and the active, the otiose and the practical. Governance is what happens. Rule is what appears to happen. The image, which shuttles between the two, is a legal devise that hides the absence of law in the *oeconomic* order, in an administrative realm where it is not sovereign dictate but pragmatism, the quotidian of institutions that continues in its everyday order, its networks and decisions. The concept and theology of the *oeconomics* of administrative action of course also provides the

figure of the familial—of the Holy Trinity as the complex unity of a plurality—as the image of a law that is before law, an order that from time immemorial and out of mind has inscribed a pattern, assigned roles, distributed places that are their own law. The legal image, as discussed earlier, is necessary because it dissimulates, and as a dissimulation it hides the theocratic character, both history and practice, of governance. And to end with an image, take an instance, a case, because lawyers are fond of cases, because I am not averse to them.

A decision from the English Privy Council. The appeal was from a court in Edmonton, Canada. In an undefended divorce case involving a well-known public figure, a government Minister, the judge, Justice Tweedie, repaired to the courthouse library. The report indicates that the judge, without robes, was accompanied by a court clerk, an official shorthand writer, and the defendant. Access to the judges' law library was from a public corridor, but the swing doors to the library had a "brass plate with the word 'Private' in black letters."⁹⁵ These doors opened on to an "inner corridor" and a further and unmarked set of swing doors led into the library. The appellant moved for annulment of the decree *nisi* on the basis that the trial had been held "in secret." The obligation to sit in public, in open court, being fundamental to the constitution, is no mere rule of procedure but rather a primary obligation dictated by the highest authority. Justice had not been seen to be done and in the opinion of the appellant, a judge who "deliberately sits in a place where the public will not find him 'demit[s] his capacity as a judge and cease[s] to be a judge.'"⁹⁶

Lord Blanesburgh, for a unanimous and appropriately titled Privy Council, could not stress sufficiently that the hearing of trials in public, citing to earlier authority, "is so precious a characteristic of English law [as to be] the salt of the constitution." It could not be waived at the discretion of a judge. Open court meant open court, and Lord Blanesburgh continued "publicity is the hall-mark of judicial as distinct from administrative procedure," and indeed "Every court of justice is open to every subject of the King."⁹⁷ It was, in sum, deplorable in principle that the case had been heard in the library behind closed doors marked "Private" in black letters. It might be that the judge was blameless—"he would probably have been gratified by the presence of a small audience"⁹⁸ (judging is lonely)—and he may have been "unconscious" of the actual exclusion, and it was a very remote possibility that any public would in fact attend, but that remoteness "must never be reduced to the certainty that there will be none."

The image of this remote trial sequestered secretly in a private library behind closed doors and then further doors is suggestive of a certain Kafkaesque economy, the Janus of common law here having both faces turned away. Divorce

95. *McPherson v. McPherson*, [1936] A.C. 177, 197 (Can.).

96. *Id.* at 180.

97. *Id.* at 200 (quoting *Scott v. Scott*, [1913] A.C. 417, 420 (Can.)).

98. *Id.* at 200.

proceedings involve the community at large; “the entire social structure” is affected by marital break-up and the life of the community indelibly marked. This being so, in no case could visibility and audibility, publicity and notice, be more essential. Here his Lordship moves to emphasize the reasons for the requirement of visibility. Justice Tweedie “seems to regard too lightly the duty of hearing these suits in public and with all appropriate ceremony.” The “robe of ceremony” had been discarded and the “appropriate solemnity” thereby divested. Such insouciance to ceremony and solemnity could in no circumstances be deemed either “harmless or merciful.” These tendencies to informality and privacy of trial had to be “definitely checked,” it being the worst of examples, *pessimi exempli* no less, to abandon “the decorum of procedure,” the robes, the gowns of ceremony, the requisite and just degree of formality which “ideally” should characterize all proceedings.⁹⁹ The end result of these theoretical and honorific cerebations was that the Privy Council was adamant that the private hearing, without robes, with ceremony discarded, was unjustified and “must be condemned so that it shall not again be permitted.”¹⁰⁰

The image of justice and the places of precedence are preserved by the proper attention to solemnity, robes, and decorum. These references are all to the titles and accoutrements of honor, to the order of precedence, and by short extension to the proper acclamation, glorification, choral support, and veneration necessary to sovereign rule. Publicity, the due reverence for the order and hierarchy of law manifest in its proper rites, its special dress, and all other items and instances of *decorum*, the Latin term for honor, for the heraldic order of law, for the right to die—*dulce et decorum est pro patria mori*—at the insistence of the sovereign. This, although a silent and generally unremarked dimension of legal practice, remains intact and as transcendent and authoritative a principle as it ever was. *Honor* must remain *in honorante*, in the eye of the beholder. All of which duly said, recorded, inscribed in the reports, and promulgated in the books of highest authority, their Lordships went on to dispose of the instant case by stating that the decree *nisi* pronounced by Justice Tweedie, “after such an idle ceremonial,” from his private library, and in a state of indecorous undress, was valid and in full force and effect. The image, in short, is not a reality. The image is a mode of transmission of something other than and more than law. The transgression of the image, the veiling of proceedings, the invisibility of justice being done on this occasion, did not invalidate the order promulgated. *Rex regnat sed non gubernat*, as Agamben points out: the administrative act is separate from the sovereign order and rule. When all was said and done, the order should stand, and then, last line for honor and style: “their Lordships . . . will humbly advise His Majesty accordingly.”¹⁰¹

99. *Id.* at 202.

100. *Id.*

101. *Id.* at 206.

IV. CONCLUSION: ADIAPHORISM AND LEGAL DOCTRINE

All this, the above and footnotes, images and emblems, and I have proved, quite nicely I think, something that never happened: a history of the legal spectacle not written. *Mea maxima culpa*. I have fallen foul of the law of diminishing returns. All cost and no benefit. All image and no law. And that is the point. The rub. The law depends upon, is supported by, exists through an array of background techniques, apparatuses of appearance, a theatrical machinery of solemnization and approbation that is largely preconscious, an affection image. These spectacles relay the site and space of legality. They are the apparatuses that make the law appear but, for it to be law, the machinery or theater of its manifestation has to be seen through, which is to say overlooked, penetrated, passed unwittingly by. Law is a theater that denies its theatricality, an order of images that claims invisibility, a series of performances that desire to be taken as the dead letter of prose and so the dead hand of the law. The eloquence of forensic speech, the elegance of judicial writing, the elocution and gesture, the robes and mime, the *sotto voce* and exclamatory, were topics in rhetoric that hardly outlived the Reformist zeal of the early modern era. The image, attached as it is to all those aspects of performance, fared even less well. We can read in *McPherson* that it really didn't matter, wasn't real—was too valuable to be real—and in *Baigent*, with its beautiful encryption, its lettered image, the Chancery judge was severely reprimanded by the Appellate Court for doodling in his judgment and by implication for drawing attention to what should never be witnessed.

Here then, on the brink of an unwritten history, on the edge of the positive unconscious of law, similar in kind to the encryption, is a synecdoche, a mark of a hidden history of the juridical. We have literally to look behind the scenes, into the emptiness that is filled by images and imaginings, to apprehend the staging of law as a theatrical and present drama. A history of such an imaginary, of its spectacular persons and illustrious jurisdictions, would move of course beyond the borders of dogmatics, of second order law reporting as now fills the legal academic scene with would-be lawmakers and *soi-disant* judges of judicial virtue, to an older humanist doctrinal exercise. There are occasional pieces of legislation, rare court cases, but innumerable institutional and administrative—*oeconomic*—acts that reverberate in the public sphere. Sovereign rule is much less a sword than a shield—even the images of sovereignty dissemble—they are symbols that deflect attention, point away, keep out, like the black letters on a brass plate that spelled “Private” on the library door in *McPherson*. Kafka taught us this already and used the gate as the quintessential emblem of law. This in turn was a borrowing from an earlier imagery used in legal emblems, that of the portal with its two-faced Janus, the deity of common law. By the same token, the history of the legal spectacle, the apprehension of law as, and in and through its images, opens the vast terrain where dwell the dead and their unwritten law, a pattern of practice, of immemorial custom and use that is only image, a law that is not law but merely

oeconomics. It is in this domain that things happen, events are devised—in the proper etymological signification of devising, namely fashioning an image. So why no interest? Why the modern juridical “so what”?

My answer, long extrapolated, lengthily prefigured, painfully experienced is: the legal academy in the United States is subject to a pragmatic ethos that is distinctly adiaphoristic. The concept of adiaphorism is taken from the doctrinal debates of the early modern era, the same debates that produced the ban on images, the suppression of the plurality of visible orders, in favor of a singular and iconic sovereign manifestation through a hierarchy inscribed in letters by black-robed judges invested with generally overlooked, formal, ceremonial, and spectacular powers. The adiaphorist is someone who denies both the diversity of the tradition and the need for choice based on arguments from the best available sources. The adiaphorist is thus one who is indifferent to the ethics of history and the writing of scholarship, preferring certainty to indulgence, outcome to process, decision to diversity of dialogue and expansions of reason. It was the nonconformists who accused the Roman Catholics of adiaphorism, of making the ceremonies up to suit their own ends, of acting *contra sacras literas*, to be sure, but also blatantly ignoring the doctrines that did not suit their purpose, that of the pontiff's pontification. The more basic point was that Papism denied doctrine as reasoning in favor of the decisionism propelled by infallibility and the unwritten tradition that supported it.

Legal adiaphorism is simply indifference to the liberal trajectory and cultural purposes of law. It is an indifference to the diversity of scholarship and the potential of doctrine to write law. In our case, legal adiaphorism is expressed in the failure to write the history of the legal specter, in an ignorance, even blindness in the face of the spectacular qualities and image relays of the legal system as a whole, as a ceremonial and honorific dimension of governance that most usually takes place by other means, to the side of law, in the shadows cast by the symbols, the *impresa*, of legislators and judges of the highest authority. It is not simply a tendency to think with downcast eyes, reverently, as the early lawyers termed it, but also and rather that doctrine in its fuller sense, *doctrina* meaning the teachings of the tradition, the interplay of the schools, the art and artifice of variegated disciplines intervening in law, are all essential aspects of understanding, of properly apprehending the *oeconomy* of governance as it honors and invests the sovereignty of rule.