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# Constructing Courts: Architecture, the Ideology of Judging, and the Public Sphere

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# Chapter 23

## Constructing Courts: Architecture, the Ideology of Judging, and the Public Sphere

Judith Resnik, Dennis Curtis, and Allison Tait

**Abstract** In several countries, governments have embarked on major building expansion programs for their judiciaries. The new buildings posit the courtroom as their center and the judge as that room's pivot. These contemporary projects follow the didactic path laid out in Medieval and Renaissance town halls, which repeatedly deployed symbolism in efforts to shape norms. Dramatic depictions then reminded judges to be loyal subjects of the state. In contrast, modern buildings narrate not only the independence of judges but also the dominion of judges, insulated from the state. The significant allocation of public funds reflects the prestige accorded to courts by governments that dispatch world-renowned architects to design these icons of the state.

The investment in spectacular structures represents a tribute to the judiciary but should also serve as a reminder of courts' *dependency* on other branches of government, which authorize budgets and shape jurisdictional authority. A double narrative comes as well from the design choices. The frequent reliance on glass facades is explained as denoting the accessibility and transparency of the law. But courthouse interiors tell another story, in which segregated passageways ("les trois flux") have become the norm, devoting substantial space and cost to isolating participants from each other. Further, administrative offices consume the largest percentage of the

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All rights reserved, 2013. Our discussion and the reproduction of the images relate to the book, *Representing Justice: Invention, Controversy, and Rights in City-States and Democratic Courtrooms* (Yale Press, 2011) by Judith Resnik and Dennis E. Curtis, on which Allison Tait worked. We have benefitted from exchanges with and the provision of materials and images by participants in the building programs in many countries, including Marie Bels, Michael Black, Antoine Garapon, Susan Harrison, Robert Jacob, Andrea Leers, Jane Loeffler, Christine Mengin, Jean-Paul Miroglio, Christine Mengin, Linda Mulcahy, Simon Roberts, Douglas Woodlock, and Elizabeth Zoller.

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square footage, illuminating a shift away from public adjudication toward alternative dispute resolution and problematizing the emphasis on courtrooms.

The new monumentality reflects but does not frankly acknowledge the challenges to courts from democratic precepts that grant “everyone” entitlements to public hearings before independent jurists. The buildings are reminders of courts’ contributions to the public sphere, while new rules reconfiguring adjudication privilege private conciliation.

### 23.1 Reconceptualizing Judges and Reconfiguring Courthouses

During the last decades of the twentieth century, many countries authorized new courthouse building to signify the centrality of adjudication to their identities. Like the burgomasters of Amsterdam who, in the seventeenth century, built a monumental town hall as a testament to their own prosperity and authority, contemporary governments offer law, embodied in courthouses, as “the new fulcrum around which the mechanism of self-representation in the various modern states” pivots (Muratore, 45).

Despite regional and local variation, the architecture and interiors display a good deal of commonality across borders. That homogenization is driven in part by architects, artists, judges, and expert consultants, who move from jurisdiction to jurisdiction in a globalizing market for “justice architecture.”<sup>1</sup> They rely on transnational engineering standards and legislative mandates for energy efficiency an access for persons with disabilities. Transborder anxieties about safety and security are other powerful influences, as are the practices of courts. Attitudes about the roles of judges, litigants, lawyers, and the public audience—sometimes transmitted through cooperation and transnational conventions and other times by way of conquest and colonialism—organize courthouse space.

Many jurisdictions mandate that a small percentage of construction budgets be set aside for specially commissioned art. The resulting artistic motifs are often derived from iconographical emblems that cross borders as well. The “scales of Justice”—traceable to ancient Babylonia and Egypt and brought forward in time through the iconography of the Christian St. Michael—can be found in various locales, along with recycled Medieval and Renaissance allegories such as the personification of the Virtue Justice and the Tree of Justice (Curtis and Resnik 1987; Resnik and Curtis 2007, 2011). But modernist architecture is regularly complemented by diverse adornments, as artists employ metals, paint, clay, and fiber often shaped in abstract form.

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<sup>1</sup> See, for example, American Institute of Architects (AIA), Academy of Architecture for Justices (AAJ), Goals, at <http://network.aia.org/academyofarchitectureforjustice/home/>. AAJ is one of several “knowledge communities” of the American Institute for Architects and “promotes and fosters the exchange of information and knowledge between members, professional organizations, and the public for high-quality planning, design, and delivery of justice architecture.”

In short, a dazzling array of buildings and images present themselves. What then are the narratives inscribed therein? What representations are chosen, which norms revealed, and what practices lack reference? Following in the footsteps of Jeremy Bentham and Michel Foucault and therefore appreciating the centrality of architecture to power, this chapter relies on inter-jurisdictional comparisons to understand the relationship between the monumentality of recent court construction and the shifting norms of adjudication, reconfigured through democratic commitments that “all persons” have access to the public venues provided by courts.

Adjudication is an ancient form, yet it has changed significantly in the last three centuries. What were once “rites,” in which spectators watched judges pronounce judgments and rulers impose punishments, are now “rights,” requiring that all courts be “open and public.”<sup>2</sup> While judges once served as loyal servants to the state, judges are now situated as independent and empowered to rule against the state and protected from executive and legislative wrath when doing so. Further, while once the individuals eligible to participate—as litigants, witnesses, staff, and judges (both professional and lay)—were limited by various markers of status (such as gender, race, and class), today “everyone” is entitled to be heard in democratic orders.

The buildings in which courts work have, therefore, changed in many ways. Courtrooms were once tucked into multipurpose town halls as various public officials shared quarters. For example, in the United States during the nineteenth century, state courthouses were commonplace, but the federal government owned very few buildings, and, until the 1850s, none were denominated “courthouses.” By the end of the twentieth century, the federal government had provided its judges with “purpose-built” structures—more than 550 courthouses.

With new buildings came new instruction on the role of the judge. In multipurpose Renaissance town halls, texts and allegorical paintings warned judges to be dutiful servants of the state. Scenes of the Last Judgment invoked a higher authority, reiterated with admonitions such as “For that judgment you judge, shall redound on you” (Zapalac, 32–33). One of the oft-depicted *exemplum iustitiae* was *The Judgment of Cambyses*, referencing an account by Herodotus from around 440 BCE (Herodotus, 95,170,171). A king, Cambyses, learned that a judge, Sisamnes, was corrupt and ordered him flayed alive. Thereafter, Cambyses appointed Otanes, the judge’s son, to serve as a jurist, required to sit on a seat made from his father’s skin.

That narrative was prominently displayed in many venues, here exemplified by the 1498 installations in the Town Hall of Bruges. The remarkable diptych by the Flemish artist Gerard David (Figs. 23.1 and 23.2) consists of painted panels, each almost 6 ft high and 5 ft wide, one focused on the arrest of Sisamnes and the other offering excruciating details of the flaying. While classical authors identified Cambyses as a king

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<sup>2</sup>Examples include the Convention for the Protection of Human Rights and Fundamental Freedoms art. 6(1), Nov. 4, 1950, 213 U.N.T.S. 221, 228; and the International Covenant on Civil and Political Rights G.A. Res. 2200A (XXI), art. 14, U.N. Doc. 1/6316 (Dec. 16, 1966).



**Fig. 23.1** *Arrest of the Corrupt Judge*, left panel of the diptych *The Justice (Judgment) of Cambyses*, Gerard David, 1498, Musea Brugge, Belgium. Copyright: Musea Brugge, Groeningemuseum. Image reproduced with the permission of the copyright holder



**Fig. 23.2** *Flaying of the Corrupt Judge*, right panel of the diptych *The Justice (Judgment) of Cambyses*, Gerard David, 1498, Musea Brugge, Belgium. Copyright: Musea Brugge, Groeningemuseum. Image reproduced with the permission of the copyright holder



**Fig. 23.3** (Detail) *Les Juges aux mains coupées*, Cesar Giglio, circa 1604, Town Hall of Geneva, Switzerland. Photograph reproduced courtesy of the Centre d'iconographie genevoise. Painting of the chamber of the Conseil d'Etat in the Baudet Tower

gone mad (Seneca labeled him “bloodthirsty” ([Seneca](#), 289–297)), Renaissance literature repositioned Cambyses as wise to sanction an unjust judge.

In 1604, the Town Hall of Geneva inscribed a parallel impression of Judicial vulnerability in a long panel covering the upper third of the wall in its room reserved for the Conseil d'Etat. Called *Les Juges aux mains coupées* (*Judges with their hands cut off*) (Fig. 23.3), the depiction includes a scroll whose text, taken from *Exodus* 23:8, warns: “Thou shall not accept gifts, for a present blinds the prudent and distorts the words of the just.” While that injunction is today familiar, in the sixteenth century, “gifts were everywhere” as presents were regularly given to honor officeholders ([Davis](#), 85). The line between a “good” gift and a “bad” one (today called a bribe) was not clear then (nor always, now). Public displays of *Cambyses* and *Les Juges aux mains coupées* aimed not only to instill norms about gifts but also about fear, teaching judges to avoid incurring a ruler's wrath.

The political iconography of the Renaissance serves as a reminder of the distance between courts then and now. Historically, autocratic and patriarchal messages insisted on state power over its judges. But by the 1800s, Jeremy Bentham offered a competing ideology—that while presiding on trial, the judge was also “on trial,” subject to the judgment of the populace.<sup>3</sup> To borrow a distinction drawn by Jonathan

<sup>3</sup> Jeremy Bentham, Rationale of Judicial Evidence, in 6 *The Works of Jeremy Bentham* 351.

Crary, members of the audience ceased to be passive “spectators” and assumed a role as participatory “observers” (Crary, 5–6). Bentham termed them “auditors,” as he advocated that individuals be permitted in court to take notes (“minutes”) to be disseminated so as to inform the “Public Opinion Tribunal” (Rosen, 26–27). Bentham sought to reshape the architecture of courts (as well as of legislatures and, infamously, of prisons through his proposed Panopticon) to be vehicles for “publicity” (Bentham, 351). Bentham’s commitment to public processes was fierce. “Without publicity all other checks are insufficient: in comparison with publicity, all other checks are of small account” (Bentham, 355).

Bentham’s vision was materialized in the centuries thereafter in constitutions and international conventions enshrining “open and public courts” in which “everyone” was entitled to be heard. Courts became a site contributing to the public sphere, or as Nancy Fraser reminds us, spheres (Fraser, 109)—as many venues are required for diverse and differently resourced “publics” to engage in the discursive exchanges envisioned by theorists of democracy like Jürgen Habermas. Because judges are obliged to function in public, to treat persons with dignity, and to enforce exchanges between radically disparate parties (private and public), they literally enact democratic precepts of equality and offer opportunities for dialogic exchanges in which popular responses affect norm creation and application (Zapalac, 32–33, 196).

Between the eighteenth and twentieth centuries, judges in many countries escaped servitude, obtaining independence guaranteed by mechanisms such as tenure in office and fixed salaries. By the late twentieth century, courts in turn had become a staple of development programs; transnational organizations (such as the UN and the World Bank) posited that independent judges were requisite to stable, successful market economies and to politically responsible states.

Courthouse design reflects these shifts. Aside from portraiture (often opaque to viewers who are unlikely to recognize individual judges amidst the thousands now occupying that role), the relationship between rulers and judges is rarely referenced directly. Courtrooms may be equipped with state emblems, fasces, coats of arms, and flags, but the state as overseer of the judge is no longer personified. Commonly, set-asides for public art have produced a variety of flora, fauna, text, and an occasional image of humans. The array takes representational or abstract shape in metal, ceramics, bronze, LCD displays, photographs, paintings, and weaving.

The absence of a didacticism explicating state authority *over* judges should be read as recognition of the new authority *of* judges, rendered impersonal. The judge is embodied by location in the place of honor, an elevated bench, in the space of honor—the courtroom. Although (as discussed below), courtrooms are a small part of the square footage in courthouses, now filled with offices and complex circulation patterns, the courtroom is (in the words of a leading US jurist) the “pearl” within (Woodlock, 158). What specifies a room as a courtroom is a layout that dedicates an isolated, esteemed space for the judge. And rather than art, the major emblematic gesture is the enclosing structure, providing visual evidence of what interactions among judges, lawyers, architects, politicians, and citizens seek to inscribe.

## 23.2 Parallel Projects of Political Iconography in the United States and France

Even as courthouses celebrate the independence of the judge, they also demonstrate the *dependence* of jurists, reliant on other branches of governments to support the elaboration of the “administration of justice.” Below we sketch parallels between the United States and France, as both launched major building programs during the last decades of the twentieth century to renew the housing stock of their courts.

The two countries vary on several dimensions. The United States is a federation, while France operates under a centralized system. Further, the United States relies on a common law tradition and France on the civil law, producing different juridical institutions (the presence or absence of a jury) that result in somewhat different layouts for courtrooms.<sup>4</sup> Nevertheless, the planning, aspirations, and outcomes were similar. In both countries, court administrators, architects, and judges held conferences, drafted building guides, laid out ambitious construction plans, and garnered funds for new structures, designed by world-renowned architects and adorned with artwork specially designed for these new public spaces.

### 23.2.1 Monumental US Federal Courthouses: William Rehnquist Innovates to Renovate

Grand buildings suggest a history that may mislead. In the United States, the federal courthouse building program regained momentum in the late 1980s after William Rehnquist became the Chief Justice of the United States. Responsive to concerns of judges in many locales, his senior staff set out not only to expand the number of facilities but also to make statements about the centrality of the lower federal courts to the country.

A few words on the relevant government entities are in order. Because each state has an independent court system, two judiciaries operate side-by-side. Counting all the judges and cases across the 50 states, more than 30,000 judges respond to more than 40 million civil and criminal case filings a year (LaFountain, 21). Tens of thousands more proceedings occur in administrative agencies, functioning as tribunals. In contrast, the federal courts have a limited jurisdiction and deal with a tiny fraction of the filings. On average, about 360,000 criminal and civil cases are filed yearly, along with more than one million bankruptcy petitions. The number of federal judges located in courthouses runs around 2,000. And, as in the states, a great deal of adjudication takes place in administrative agencies; for example, the Social Security Administration

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<sup>4</sup> For example, French guidelines detailed somewhat different seating arrangements for civil and criminal proceedings, while common law countries generally use the same room for both kinds of cases. See, for example, *Palais de Justice de Grenoble*, 24–26 (Ministère de la Justice, 2003).



takes evidence in some 500,000 cases a year.<sup>5</sup> Yet the federal courts are the dominant symbol of “courts”—better known and represented in the popular national media than are their state counterparts. That prominence comes in part from resources, as well as from the work of the United States Supreme Court, sitting in its iconic (if relatively new) temple-like building. When that building opened in 1935, the court issues many more judgments than its current average of about 80 opinions annually.

The growth of federal court administration has been key to court construction. In 1939, Congress moved support for the federal courts away from the Department of Justice and into the judiciary’s own Administrative Office (AO). That office reports to the Judicial Conference of the United States, whose roots go back to the 1920s when William Howard Taft was the Chief Justice. The Judicial Conference, chaired by the Chief Justice, has become the corporate policy voice for the federal judiciary. A different government entity, the General Services Administration (GSA), was chartered by Congress in 1949 to run all the federal buildings—prompting one commentator to name the GSA the “largest landlord in the world” (Dean, 62). Yet a third federal agency, the National Endowment for the Arts (NEA), created in the 1960s to foster American artistry, has been an advocate for improving federal architecture. The leadership in Washington, DC is but one part of the fabric of political interactions among judges and members of Congress representing specific localities that have generated projects and funding.

Before the 1960s, the relatively few federal judges had modest needs. Federal judges often shared “court quarters” (their term<sup>6</sup>) with post offices, another of the national functions. But from the 1960s through the 1990s, Congress authorized hundreds of new causes of action—about consumer, environmental, labor, and civil rights—empowering an array of litigants to file cases in federal court. Congress also increased the number and kinds of judges working in federal courthouses. Housing became an issue.

By the late 1980s, the judiciary thought its facilities insufficient. To garner support, the AO proffered the term “Judicial Space Emergency” for its “housing crisis” in an effort to obtain attention from its landlord, the GSA (JCUS 1989, 82). The press responded with reports that courtrooms were inadequate, that staff had no place to work (Cannell, W18), and that old courthouses were “nightmares for the federal marshals in charge of security, mainly because existing circulation forced the public, judges, and defendants to traverse the same corridors and use the same restrooms” (Dean, 62).

Another prong of the building plan was to detail what needed to be built. In the late 1970s, the GSA, working with the judiciary, developed a “Design Guide” for courts. After Chief Justice Rehnquist took office in 1987, he chartered a standing subcommittee, devoted to “space and facilities” and charged with oversight of long-term planning, construction priorities, and design standards (JCUS 1987, 59). Within a few years, the federal courts had drafted its own design guide. First published

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<sup>5</sup> *Plan to Eliminate the Hearing Backlog and Prevent its Recurrence*, 4.

<sup>6</sup> Annual Report of the Judicial Conference of the United States (hereinafter JCUS), Sept 24–25, 1953 at 28.

in 1991 and revised several times thereafter,<sup>7</sup> the *US Courts Design Guide* outlined “state-of-the-art design criteria for courthouses” (*US Courts Design Guide* 1997, Intro, 2). As the 2007 version explained:

The architecture of federal courthouses must promote respect for the tradition and purpose of the American judicial process. To this end, a courthouse facility must express solemnity, integrity, rigor, and fairness. . . .

Courthouses must be planned and designed to frame, facilitate, and mediate the encounter between the citizen and the justice system. All architectural elements must be proportional and arranged hierarchically to signify orderliness. The materials employed must be consistently applied, natural and regional in origin, be durable, and invoke a sense of permanence. (*US Courts Design Guide* 2007, 3–11)

The guide also detailed specified courtroom requirements and layouts. When Chief Justice Rehnquist’s predecessor, Warren Burger, chaired the judiciary, the presumptions were that courtrooms were to be made “available on a case assignment basis to any judge”; no judge on multi-judge courts had “the exclusive use of any particular courtroom” (JCUS 1971, 64). In contrast, the *2007 US Court Design Guide* required that all “active judges” have a courtroom dedicated to their individual use. Constant availability was explained as

Essential . . . to the fulfillment of the judge’s responsibility to serve the public by disposing of criminal trials, sentencing, and civil cases in a fair and expeditious manner and presiding over the wide range of activities that take place in courtrooms requiring the presence of a judicial officer (*2007 US Courts Design Guide*, 2–8).

By 2008, when Congress reduced funding, the Judicial Conference opened up consideration of courtroom sharing for senior and magistrate judges.<sup>8</sup>

In the 1980s, working with the GSA, the Judicial Conference had settled on courtrooms ranging from 1,120 to 2,400 square feet (*GSA Courts Design Guide* 1979, 1984, 1–5), with ceilings generally set at 12 ft (*GSA Courts Design Guide* 1984, 1–10). In contrast, the judiciary’s 2007 Guide made 2,400 square feet the standard size and raised the ceilings to 16 ft to “contribute to the order and decorum of the proceedings” (*US Courts Design Guide* 2007, 4–3). Most furnishings were to be fixed to the floor, and finishes were to “reflect the seriousness and promote the dignity of court proceedings” (*US Courts Design Guide* 2007, 12–5). As for the public space, observers were set far back in the room, with seating ranging from 40 to 80 depending on whether the room was for trial or appellate court. The cost of each courtroom and its adjacent offices spaces was estimated, on average, to be about \$1.5 million.

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<sup>7</sup> Administrative Office of the US Courts, Space and Facilities Committee, *US Courts Design Guide* (1991, 1997, 2007).

<sup>8</sup> Judicial Conference Adopts Courtroom Sharing Policy as Latest Cost-Saver, 40 *Third Branch* 1 (Sept., 2008).

Translating that figure (and many others for the rest of the space) into real buildings, 45 projects planned between 2002 and 2006 were budgeted to require \$2.6 billion.<sup>9</sup>

By a variety of metrics, the judiciary's efforts were remarkably successful. By 1991, the judiciary had secured \$868 million in new construction funds (*History of the Administrative Office of the United States: Sixty Years of Service to the Federal Judiciary*, 195). In the decade that followed, plans were made for 160 courthouse constructions or renovations, to be supported by \$8 billion.<sup>10</sup> Federal courthouse projects represented the federal government's largest customer for buildings constructions from 1995 to 2005.<sup>11</sup> As a result, the federal judiciary tripled the amount of space it occupied. The photograph (Fig. 23.4) of nine courthouses built or renovated between 1998 and 2008 by world-renowned architects (such as Henry Cobb, Richard Meier, Thom Mayne, Michael Graves, and Robert Stern) captures some of the exuberance.

The judiciary's success stemmed in part from GSA efforts to improve the quality of federal buildings. Distress about federal architecture dated back to the 1960s, when President Kennedy chartered an "Ad Hoc Committee on Government Office Space." The lead staffer (and later Senator), Daniel Moynihan, is given credit for the 1962 report and its one-page set of "guiding principles."<sup>12</sup> The Ad Hoc Committee, like leaders of European city states and the early American republic, sought to have public architecture serve as exemplary of national identity. Drafted in the shadow of the Cold War, the 1962 goals called for federal buildings to "provide visual testimony to the dignity, enterprise, vigor, and stability of the American Government" (Id., 4).

The implicit comparison to the Soviet Union, coupled with distaste for "faceless modern style buildings" and for repetition (whether Beaux-Arts or modern), produced another premise: that no "official style" be adopted (*I Vision + Voice*, 5). Further, reflecting both a commitment to entrepreneurship and the well-orchestrated efforts of the Association of Architects (AIA), the Ad Hoc Committee embraced the private sector. "Design must flow from the architectural profession to the Government and not vice versa" (Id.).

Yet few government structures built before the 1990s met the Ad Hoc Committee's goals because (as GSA publications later described) the chief "concerns" remained

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<sup>9</sup> General Accounting Office, GAO-02-341, *Courthouse Construction: Information on Courtroom Sharing* at 3 (2002).

<sup>10</sup> *Status of Courthouse Construction, Review of New Construction Request for the US Mission to the United Nations, and Comments on H.R. 2751, To Amend the Public Buildings Act of 1959 to Improve the Management and Operations of the US General Services Administration: Hearing Before the Subcomm. on Public Buildings and Economic Development of the H. Comm. on Transportation and Infrastructure*, 105th Cong. 22 (July 16, 1998) (testimony of Robert A. Peck, Commissioner, Public Buildings Service, GSA).

<sup>11</sup> *The Future of Federal Courthouse Construction Program: Results of a GAO Study on the Judiciary's Rental Obligations: Hearing Before the Subcomm. on Economic Development, Public Buildings, and Emergency Management of the H. Comm. on Transportation and Infrastructure*, 109th Cong. 269 (June 22, 2006) (statement of David L. Winstead, Commissioner, Public Buildings Service, GSA).

<sup>12</sup> "Guiding Principles for Federal Architecture" are reproduced in *I Vision + Voice* at 4–5.



**Fig. 23.4** United States Courthouses built or renovated 1998-2008; US General Services Administration (2009). Provided courtesy of the US General Services Administration, Office of the Chief Architect. Photographs taken by Taylor Lednum, Thomas Grooms, and Frank Ooms.

*Left to Right:* Top: John Joseph Moakley US Courthouse (Boston, MA); Alfonse D’Amato US Courthouse (Central Islip, NY); US Courthouse (Tallahassee, FL);

*Middle:* Wayne Lyman Morse US Courthouse (Eugene, OR); William B. Bryant US Courthouse Annex (Washington, D.C.); Wilkie D. Ferguson US Courthouse (Miami, FL);

*Bottom:* Corpus Christi Federal Courthouse (Corpus Christi, TX); Roman L. Hruska US Courthouse (Omaha, NE); Spottswood W. Robinson III and Robert R. Merhige, Jr., Federal Courthouse (Richmond, VA)

“efficiency and economy,”<sup>13</sup> and architectural choices favored “safe” and “noncontroversial designs” (Id., 93). But pressed by criticism from the NEA’s “Task Force on Federal Architecture” (Craig 1978) that worried about the lack of a distinctive “federal presence” and by congressional inquiries,<sup>14</sup> GSA retooled its processes. One model was the success of federal jurists Stephen Breyer and Douglas Woodlock, who had enlisted sophisticated consultants for planning the federal courthouse in Boston, designed by Harry Cobb and adorned with monumental monochrome panels by Ellsworth Kelly (Figs. 23.5 and 23.6).

By 1994, the GSA had developed its “Design Excellence Program” to attract prize-winning architects to federal projects. The federal courts were a major beneficiary of the new procedures. The courts’ monthly newsletter described the results as a “Renaissance” for federal courthouses that had, before then, been “box-like structures” (*The Renaissance of the Federal Courthouse*, 1). The GSA reported that it had succeeded in providing “the American public with government office buildings and courthouses that are not only pleasing and functional, but that also enrich the cultural, social, and commercial resources of the communities where they are located. Such public statements of American culture are meaningful contributors to the vibrancy of our democracy.”<sup>15</sup>

### 23.2.2 A New French Judicial Architecture

During the late 1980s, the French Ministry of Justice was similarly reviewing its 723 operating sites as it began a series of projects, defined by “a certain architectural ambition” to rationalize the services provided by courts through administrative reform and new construction.<sup>16</sup> The goals of modernizing justice and affirming the commitment to law and “the values of democracy” (*New French Judicial Architecture*, 3) entailed providing more space for judges,<sup>17</sup> improving conditions for decision making, reorganizing first-tier tribunals and courts (sometimes through consolidation into a single facility), creating efficient buildings,<sup>18</sup> reducing delay, coping

<sup>13</sup> *Growth, Efficiency and Modernism: GSA Buildings of the 1950's, 60's, and 70's* at 45.

<sup>14</sup> See, for example, *The Need for Architectural Improvement in the Design of Federal Buildings, Hearing Before the Subcomm. on Buildings and Grounds of the S. Comm. on Public Works*, 95th Cong. (1977).

<sup>15</sup> *Design Excellence: Policies and Procedures* 169 (Washington D.C.: US General Services Administration, 2008) (hereinafter 2008 *GSA Design Excellence Policies and Procedures*).

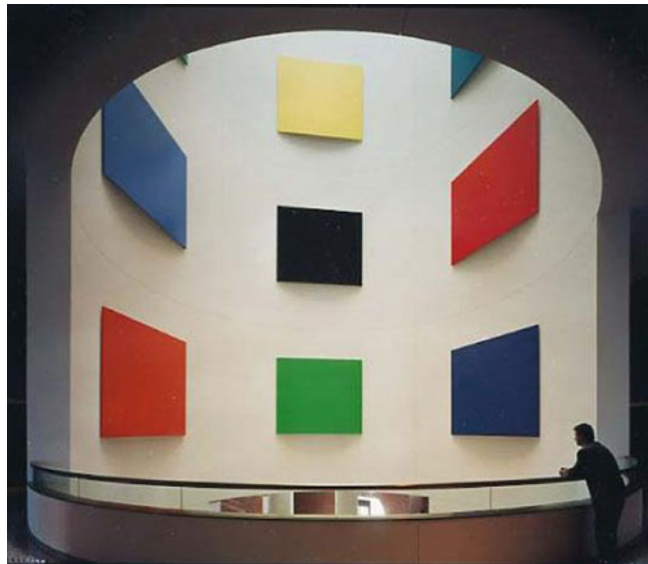
<sup>16</sup> *La nouvelle architecture judiciaire: Des palais de justice modernes pour une nouvelle image de la Justice* 3, 103 (*New judicial architecture: Modern Courthouses for a new image of Justice*) (hereinafter *New French Judicial Architecture*). This volume was produced in relationship to a colloquium held in Nanterre, France, in May, 2000.

<sup>17</sup> Between 1975 and 1995, caseloads tripled; during the 1990s, the number of magistrates increased 40%. Mengin, *Deux siècles d'architecture judiciaire aux Etats-Unis et en France (Two Centuries of Judicial Architecture in the United States and France)*, 11.

<sup>18</sup> L'Agence de Maîtrise d'Ouvrage des Travaux du Ministère de la Justice, 2004 *Rapport d'activité*, 29.



**Fig. 23.5** John Joseph Moakley United States Courthouse, Boston, Massachusetts. Architect: Harry Cobb, 1998. Photograph Copyright: Steve Rosenthal, 1998. Photograph reproduced with the permission of the photographer



**Fig. 23.6** *The Boston Panels*, Ellsworth Kelly, 1998, in the John Joseph Moakley United States Courthouse, Boston, Massachusetts. Architect: Harry Cobb, 1998. Photographer: Steve Rosenthal. Photograph Copyright: Steve Rosenthal, 1998, reproduced with the permission of the photographer and the artist

with rising filings, and providing more functional, secure, and welcoming facilities that would be readily legible to users (*Id.*, 3, 97).

Historians, jurists, art critics, and administrators came together to ponder the shape needed to express an array of commitments—to the evolving nature of justice with its multiplication of laws and tasks, the diversifying culture, and transnational obligations of fairness.<sup>19</sup> As in the United States, concerns were raised that French public architecture had, during the twentieth century, become banal, producing undistinguished structures conflating justice with bureaucratic administration (*Gouttes*, 9–11). As one of the leading commentators, Antoine Garapon, put it: courthouses were often “indistinguishable from other public buildings”; this “architectural silence” was “dangerous” as the “erosion of legal symbolism . . . threaten[ed] the very foundations of the legal system” (*Garapon*, 142).

When undertaking the future planning (“imagining courts for the twenty-first century,” as Garapon explained), commentators analyzed the output of earlier eras (*Garapon*, 1). Robert Jacob saw Medieval and Renaissance judicial architecture reflective of a fluid exchange between commerce and law (*Jacob*, 46–52), while, under Louis XII, courthouse space became more luxurious to denote the centralizing authority of regal power (*Id.*, 48–51). Monumental entryways and dedicated doorways, “framed by columns” and long stairways, put law on an elevated plane that was both distant from the ordinary person and underscored the “extraordinary act” of “going to law” (*Id.*, 39).

Similarly, Garapon saw the changing configuration of French courthouses as denoting the political shift from a sovereignty centered on the nation (and earlier, the king) to one committed to representative democracy. As Garapon schematized French traditions, under the *ancien régime*, courthouses were basilica-like, with courtrooms akin to chapels. Judges, priestlike, sat on high to superintend the confrontation between man and law. Thereafter, more democratic visions shaped courthouses to resemble parliaments, with judges like a chairperson overseeing exchanges that, through procedural commitments, acknowledged and valorized the autonomy of individuals in horizontal relationship to each other. One might then map successive eras of courthouse styles—those evocative of “le palais royal, le temple de Thémis et l’hôtel des droits de l’homme” (*Lamanda*, 69).

But what should a “Hall of the Rights of Man” look like? Jacob argued that traditions marking the isolation and grandeur of justice no longer fit contemporary commitments of the shared ownership of law’s promulgation and application. Marc Moinard, secrétaire general of the Ministry of Justice, wanted viewers “to be able to identify the building as a place where justice is meted out” (*Moinard*, 142), a goal that Jacob ascribed to the “universal need . . . for a clearly marked place where good can be distinguished from evil” (*Jacob*, 43). Garapon called for architects and lawyers to “unite to find new ways to express a democratic legal process” that reflected that courts were “simultaneously a theatre, a temple and a forum” (*Garapon*, 142).

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<sup>19</sup> One event, “Palais de Justice: héritage et projets” (“Courthouses: legacy and projects”), was convened in Paris in 1994. See Robert Jacob, *The Historical Development of Courthouse Architecture*, 14 *Zodiac* 31, 43, n. 2 (hereinafter Jacob, *Historical Development*). Papers from that conference can be found in 265 *Archicr e* (1995).

**Fig. 23.7** Exterior, Palais de Justice, Bordeaux, France. Architect: Richard Rogers, 1992–1998. Copyright: APIJ. Photographer: Jean-Marie Monthiers. Photograph reproduced with the permission of the APIJ and the photographer. Reproduction without written permission of the copyright holders is forbidden



In response to this *mélange* of goals, the Justice Ministry acquired more sites and sought accomplished architects.<sup>20</sup> With the goal of extending French justice properties from a footprint of about 1.7 million meters (approx. 5.8 million square feet) by another 500 million meters (approx. 1640.5 million square feet), the Ministry's administrative building arm developed detailed dossiers for each function within a courthouse, specifications on room sizes, and left general discretion to architects for the designs of entry areas and the exterior aesthetics (Bels 1995, 3). Like the leadership in the United States, French officials obtained significant funds. A budget of about 1.5 billion dollars (6 billion francs) supported the projects from 1995 to 1999 (*New French Judicial Architecture*, 103). Twenty-seven regions in France were flagged in the early 1990s for improvements to run through 2015. By the end of 2004, eighty-nine buildings (forty-seven related to prisons and forty-two for courts) were under construction or had been completed in both France and its territories abroad (Guadeloupe, Martinique, La Réunion, Mayotte, and French Polynesia) at a cost of more than 2 billion euros (about \$3 billion).<sup>21</sup> As in the United States, the result is an impressive array of structures whose exterior shapes varied dramatically.

Commissions through competitions (the customary mode for public building in France) went to well-known architects, including Henri Ciriani for le Palais de Justice de Pontoise, Bernard Kohn for Montpellier's facility, Richard Rogers for Bordeaux's courthouse (Fig. 23.7), Henri Gaudin for the Besançon facility, Françoise Jourda and Gilles Parraudin for Melun's Palais de Justice (Fig. 23.8), and Jean Nouvel for the courthouse (Fig. 23.9) in Nantes. They produced monumental buildings, as a few details from Nantes make plain. Sited on a small Loire island accessible by a footbridge, the building is a square rectangle of almost 100,000 square feet, whose

<sup>20</sup> Interview with René Eladari, Director of the Ministry of Justice Long Term Planning Program, 265 *Archicrée* 79.

<sup>21</sup> L'Agence de Maîtrise d'Ouvrage des Travaux du Ministère de la Justice. 2004 *Rapport d'activité* at 7, 28.





**Fig. 23.8** Exterior, Palais de Justice, Melun, France, circa 1998. Copyright: APIJ. Photographer: Jean-Marie Monthiers. Photograph reproduced with the permission of the APIJ and the photographer. Reproduction without written permission of the copyright holders is forbidden



**Fig. 23.9** Palace of Justice, Exterior View, Nantes, France. Architect: Jean Nouvel, 2000. Photographer: Olivier Wogenscky. Copyright: APIJ, April 2000, reproduced with the permission of the AMOTMJ/ Ministry of Justice, the photographer, and APIJ

dimensions (113.4 m or 372 ft by 81 m or 265.75 ft) befit the word “palais.”<sup>22</sup> Paved in stone and clad in glass, the waiting room is said to express “the solemnity of justice through its transparent, clear, and balanced character” (Nouvel, *Commentary*, 28). The stone, the metal framing of the glass walls, and the interior walls of the open areas are all charcoal black, and the geometry relentless. The “immense lobby running the width of the building” (about 370 ft) permits entry into three boxlike contained areas, in which sit seven blood-red courtrooms as well as auxiliary offices (Gore, 71, 74).

Other facilities ranged from an “audacious” (Zulberty, 67) and novel conception in Bordeaux by Richard Rogers of cone-like modular units (Fig. 23.7)—described as looking like “wine casks, eggshells, or beehives” (Leers, 129) to a recycled parliament building in Rennes (Hanoteau, 28–34) and a renovated courthouse in Nice.<sup>23</sup> The courthouse in Melun (Fig. 23.8) is an imposing parallelepiped, 236 by 177 ft (78 by 54 m) with a two-story, glass-cloaked entry fronted by six treelike pillars supporting an overhang, some 80 ft or 24 m from the ground. The façade, sheltering pedestrians, references the role of trees in French justice iconography (Palais de Justice de Melun, 8–11). Inside, various tribunals are consolidated in an effort to make them visible and accessible.

Commentators found some buildings successful, “overturning customs and symbols . . . [and] helping to bring about another kind of justice, one that is more open, more democratic” (Simon, 88), while other structures were criticized for failing to take those very concerns into account (Saboya, 75–77). As for the diversity, some thought it praiseworthy, and others argued undue fragmentation (Depambour-Tarride, 36–40), a concern also heard in the United States where the array of styles meant that none ensconced a “federal presence”.

### 23.3 Access, Usage, and Isolation

We have argued that courthouse architecture narrates the political capital of adjudication as well as the symbiosis of the independence of the judge and the dependence of the judicial apparatus on the state for its financial wherewithal and materialization. Builders of courthouses claim that new structures make other statements—reflecting democratic courts’ commitments to their citizens.

The Nantes Palais de Justice is but one of many buildings clad in glass. The German Constitutional Court, for example, has an “extensive transparent glass skin,” admired for providing an “open face to the public” for courts (Bürklin, 15–42). In the United States, glass is also said to signify the “new openness and accountability of the court to its community (Greene, 63, 65),” as well as the justice system’s “principles of *transparency*, *accessibility*, and *civic engagement*” (Id., 63). In the spring of 2008 when a new courthouse in Manchester, England, opened

<sup>22</sup> Commentary, Jean Nouvel, *Courthouse in Nantes* (hereinafter Nouvel, *Commentary*), 28.

<sup>23</sup> See *Palais de Justice de Nice* (Ministère de Justice, 2004).

(“the biggest court building to be constructed in Britain since the Royal Courts of Justice in London opened in 1882”), Europe got its “largest hung glass wall.”<sup>24</sup>

But equating glass with access to justice is simplistic, for courthouses are not the only structures for which glass is claimed to be especially appropriate. During the nineteenth century, glass was celebrated for its use in train stations, commercial arcades, and exposition sites, including the Grand Palais in Paris and the Crystal Palace in London (McKean). Technology is foundational to the “crystal metaphor” (Bletter 1981, 20–43); during the nineteenth century, steel and glass manufacturing changed. In the twentieth century, when environmental concerns became acute, coatings were developed to reduce “the cost of interior climatological systems” (Fierro, 27). Similarly, when questions of security and terrorism rendered vulnerable the glass walls of courts, embassies, libraries, and other government buildings (Loeffler 1999, 1998), “ballistic-resistant level” glass was developed, as were “gradations of clear, transparent, and opaque” glass (Greene, 66)—producing real what art critics have termed “opaque transparency” (Bletter, 115–120).

Political explanations of glass’s import vary depending on a building’s use. Great nineteenth-century greenhouses displayed the “nurturing” qualities of glass, providing a habitat that brought plants to life (Ersoy, 38–39). During the Cold War, glass in US embassies was equated with democracy’s openness, an explanation also proffered for the “*Grand Projets* of François Mitterand” in the 1980s and 1990s (Fierro, viii–ix). In 2008, the glass in a baseball stadium in Washington, DC was attributed to baseball’s special relationship to the “transparency of democracy” (Nakamura, B1). In courts, glass is evidence of law’s accessibility and transparency, although one architect also noted that glass renders courts “open to public scrutiny, inclusive of public participation, and dependent on the support and protection of its community” (Greene, 66).

Yet art theorists remind us that glass can function as a “blockage” distancing the observer (Riley, 26; Vidler, 4); a viewer may look at a mirrored reflection rather than see what lies through or beyond the glass. Moreover, glass is a mechanism for transferring voyeuristic control to a distant viewer. Indeed, complaints were leveled against the Bibliothèque Nationale de France for “putting scholarly readers on display, as if ‘animals in a zoo,’ exposed to scrutiny from a general public who were too distant . . . to engage reciprocally and meaningfully” (Fierro, 29). That point is reiterated in “high-security” courtrooms in which defendants sit in a glass box.

### 23.4 Zones of Authority

Whatever transparency may be provided by glass skins often ends at the courthouse door. Once inside, the aim is—to borrow from commentary on recent Italian courts—“to keep the various users of the building (magistrates, judges, lawyers,

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<sup>24</sup>Rozenberg, *Civil Justice Centre Shines in Court Gloom*, Telegraph, (Apr. 19, 2008), <http://www.telegraph.co.uk/news/uknews/1584453/Civil-Justice-Centre-shines-in-court-gloom.html>. Rozenberg noted that the glossy new court, with six “specialist commercial judges,” was hoping to “drum up more work.”

public, prisoners) as separate as possible” (Aymonino, 128). Would-be entrants are screened, and those admitted sent off on separate paths. While efforts are made to convey a sense of “free movement,” boundaries are everywhere (*1997 US Courts Design Guide*, 3–10, *2007 US Courts Design Guide*, 3–10).

Segregation of space inside a courtroom has a long history. While seventeenth-century buildings once permitted intermingling, courtroom layouts evolved into divided space, represented in some jurisdictions by a literal “bar” between the area reserved for the professional jurists and the public (Mulcahy, 384–385). A deeper segregation throughout the building is a twentieth-century artifact, produced as tragic shootings of judges and bombings of courthouses brought security to the forefront. The result is that three “circulation patterns” have become a common feature of courtroom construction in the United States, France (“les trois flux”<sup>25</sup>), and elsewhere.

Denominated “public, restricted, [and] secure” zones, the distinctions entail separate entries, elevators, and corridors for the public (including civil litigants), for judges, and for criminal defendants (*US Courts Design Guide 2007*, 3–10). Hierarchies—or stacking—are commonplace; the public enters and remains on the bottom floors, and judges and administrators occupy higher levels. Passage in and out of courthouses may also be secured so that judges enter through “a restricted parking structure within the confines of the building . . . to a restricted elevator system that transports them to their chambers and courtrooms” (*GSA Design Excellence Policies and Procedures 2008*, 168). Prisoners are likewise walled off, entering a secured sally port and held in cellblocks.

Security is predicated on perceived needs both physical and visceral, warding off what one critic called the “contamination” emanating from criminal defendants and potentially disruptive spectators (Hanson, 58). Patterns of segregation are argued as politically apt—that judges ought not have to confront those whom they must judge, and that ordinary persons ought not have to see “defendants walked, in shackles, through public corridors in the presence of other citizens who may be there merely to pay a traffic ticket” (Phillips, 204).

Because the three circulatory patterns buffer against the possibility of contact, “circulation space often accounts for 30–50% of the usable space in a building” (*2007 US Courts Design Guide*, 3–5). The multiple paths add significant expense. In 1993, estimates of cost in US courthouses were about \$160 per gross square foot, “at least \$44 per gross square foot more” than the costs of building “a comparably sized federal office building.”<sup>26</sup> In short, remarkable amounts of space and funds are devoted to people not meeting each other inside courthouses.

Other problems emerge when the focus turns to hallways. One courthouse architect explained: “It is remarkable how many existing court facilities have no adequate waiting space outside the courtrooms” (Phillips, 221). While the buildings were to express that “you, your liberty and property, are important,” they were not

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<sup>25</sup> An overview of several projects is provided in *Les Nouveaux Visages de La Justice*, 1–5.

<sup>26</sup> *More Disciplined Approach Would Reduce Cost and Provide for Better Decision making, Testimony Before the Subcommittee on Oversight of Government Management and the District of Columbia*, GAO/T-GGD-96-19 at 3 (Testimony of William J. Gadsby).

accompanied by “clear and generous lobbies, corridors, counters, and waiting areas,” nor do they denote anything of the “bond between the individual and the justice system upon which all depend” (Id., 223, 224). Below, we detail the emptying of courtrooms, but, in many jurisdictions, hallways can be crowded with people. Yet for those with resources to do so, new technologies provide “virtual” alternatives, as litigants file documents electronically, download record data, and “meet” via video or telephone (Lederer, 190, 196).

### 23.5 The Signification of the Courtroom

Although modern design specifications separate populations, the courtroom is offered as the “interface” among the differently routed individuals. Like the glass metaphor, however, the idealized courtroom is problematic in practice. Not only is that space internally segregated (as users enter through different doors and sit in designated areas<sup>27</sup>), it is often underutilized.

During the 1980s and 1990s, the practices of judging were shifting. Enthusiasm for mediation, arbitration, and other modes of dispute resolution grew into the “alternative dispute resolution” (ADR) movement. In the United States, new rules and statutes produced “managerial judges,” some of whom saw trial as a “failure” of the system (Resnik 1982, 2000). In England and Wales, Lord Harry Woolf spearheaded similar reform efforts. His 1996 report, *Access to Justice*, insisted on prefiling exchanges to avoid courts entirely and then judicial case management if that route was pursued (Woolf 1996). As Professor Simon Roberts explains, “In England, this ‘culture of settlement’ has been advocated by the higher judiciary, adopted as government policy, enshrined in a new regime of civil procedure and increasingly realized in court practice,” resulting in the replacement of rule-based adjudication with “negotiated agreement” (Roberts, 1). At the transnational level, the 2008 European Directive on Mediation calls for EU members to promote mediation and permits member states to make mediation “compulsory or subject to incentives or sanctions.”<sup>28</sup>

Many factors contribute to these changes, as well as to the results, which is the decline of courts as venues for public dispute resolution. On both sides of the Atlantic, trial rates are down. In federal courts in the United States, fewer than two in 100 civil cases start a trial—prompting debate about whether the “vanishing trial” is a problem (Galanter 2004, 259). While the *US Court Design Guide* insisted that each judge needed a courtroom of his/her own, congressionally chartered studies investigated usage rates in several courthouses and found, in 1997, courtroom lights

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<sup>27</sup> See 1997 *US Courts Design Guide*, 4–39.

<sup>28</sup> Directive 2008/52/EC of the European Parliament and of the Council (on certain aspects of mediation in civil and commercial matters)(21 May 2008) at Art. 1, sec. 1 and Art. 5, sec. 2.

**Fig. 23.10** Aerial view, International Tribunal for the Law of the Sea, Hamburg, Germany, 2005 photograph. Architects: Baron Alexander and Baroness Emanuela von Branca, 2000. Photograph copyright: YPScollection. Photograph reproduced courtesy of the International Tribunal for the Law of the Sea



were “on” about half the time.<sup>29</sup> Dame Hazel Genn provided data on declining trial rates in England, (Genn, 34–35) where Professor Roberts described how “often empty courtrooms” produced a growing “dislocation” between the “form” of the Gothic buildings and the “substance” of the exchanges transacted within (Robert, 23).

The unintended consequence of shifting from oral proceedings in courtrooms to an exchange of papers and discussions in chambers, as well as to outsourcing to private providers, is that some of the grandest courthouses are “lonely,” if secure (O’Mahony 2004). Consider the International Tribunal for the Law of the Seas (Fig. 23.10). As of 2008, this treaty court has 160 member states. Its new courthouse, designed by Baron Alexander and Baroness Emanuela von Branca, opened in 2000. From the tribunal’s inception in 1994–2008, however, 14 cases were filed. Even as courts lay claim to an architecture of openness made plain through glass, some are relatively infrequently used—seeming to be more like “fortresses,” replete with both perimeter and interior surveillance (Phillips, 207), than lively sites of activity.

Thus, as a US federal judge Brock Hornby put it, the public image of a judge on a bench is outdated. He suggested that, instead, “reality T.V.” ought to portray judges in “an office setting without the robe, using a computer and court administrative staff to monitor the entire caseload and individual case progress; conferring with lawyers (often by telephone or videoconference).” A judge on bench was, he said, an “endangered species, replaced by a person in business attire at an office desk surrounded by electronic assistants” (Hornby, 462). Antoine Garapon proffered a

<sup>29</sup> See General Accounting Office, *Courtroom Construction: Better Courtrooms Use Data Could Enhance Facility Planning and Decision making* GAO/GGD-97-39 at 42–43 (1997).

parallel description of the decentralization of judicial activities in France—research and discussions often take place in offices, and interventions veering toward the therapeutic are also held in private settings (Garapon, 56). For a brief time in the United States, ADR was built into federal courthouses, as *US Court Design Guides* called for “alternative dispute resolution suites”—with roundtable layouts and several areas for consultations (JCUS 1995, 98).<sup>30</sup> But as conflicts with Congress about building funds have emerged, the guidelines dropped the specifications for ADR suites.

## 23.6 Reading Political Spaces

Are there “alternative” building designs to capture these new functions? In France, discursive courthouse planning explored questions of signification. How does a building reference judicial roles ranging from educators, interpreters, experts, conciliators, and mediators to adjudicators? Could one materialize judicial obligations for conciliation while creating courthouses, “the only institution that bears the name of a virtue” (Lamanda, 74). What ought to be the shape of courthouses, given that (in the words of a World Bank consultant on Courthouse Development) “the greater percentage of the modern courthouse is composed of general-purpose office space – perhaps 80–85%”? (Thacker, 3).

A few pragmatic responses have been proffered. For example, Garapon worried that (à la Foucault) the diffusion of power risked it being everywhere and nowhere. He commended the elimination of standard offices and the creation of an intermediary space—something between a courtroom and an office—where bureaucracy was replaced with more public spaces that enable public discourse (“circulation de la parole”) (Garapon, 12–16). The South African Constitutional Court, opened in 2004, has aimed to do some of what Garapon recommended for France, by creating glass walkways that make the administrative aspects of the court visible to the public.

The building challenges reflect that the goals of instantiating national and transnational legal regimes through buildings unmistakably understood to be “courts” are burdened by the instability of the word “court,” now comprehending a range of practices both public and private. In some respects, new courthouses are fair representations of the mélange of authority, privatization, and public ideology currently promoted by law. The segregated passages, quiet courtrooms, and administrative square footage document these shifts. At the same time, the built grandeur also seeks to assimilate new rightsholders to great judicial traditions and visibly expresses the idea that courts, once protective of limited classes, are today significant spaces aiming to dignify an expansive community.

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<sup>30</sup> The 2007 *US Courts Design Guide* eliminated the dedicated ADR spaces, suggesting use of conference rooms and jury rooms instead. Id. at 1–2, 11–2.

Further, some of the grand courthouses demonstrate the movement of public and private sector actors across domains. For example, Jean Nouvel's Nantes Palais de Justice resembles his design for the Cartier Foundation in Paris, also a grid-based "ethereal glass and steel building" (Gibson, 6). In addition, the allocation of funds to a few grand buildings, while a great deal of the business of judging occurs in less well-appointed administrative facilities, is reflective of maldistributions of resources throughout state infrastructures and services.

Thus, while some read new courthouses as symbolically silent (Garapon, 7), they can also be understood as symbolically apt, as class stratifications are reflected in law, as courts are entwined in economies reliant on law's centrality, and as builders wish to speak to political aspirations for state protection of all persons. The loneliness and austerity materializes some of the struggle to develop actual practices instantiating rights through public hearings and accountings. Rather than see courthouses as masking the complex interaction by which "the law court institution really operates" (Bels, 145), one can find in them revelatory maps, commemorating affection for practices of open justice amidst a transformation of legal processes that devotes the vast bulk of usable space to offices. The stratification expresses, as Marie Bels put it, "the operation of an institution that superimposes the different and contradictory work methods represented by the ... 'business' side of the legal system and the technical aspects that allow the justice 'machine' to function" (Id.).

But the issue is not only whether construction expresses current trends but what law should do. Thus, deeper problems come by way of a return to Jeremy Bentham, who underscored the relationship between publicity and responsive government—entailing public access to the exchanges between jurists and disputants. As currently formatted, conciliation procedures take place in private. Even if (as Simon Roberts has argued) the trip to the massive buildings to confirm a negotiated settlement serves to legitimate parties' decisions, it offers no opportunities for third parties to engage as participatory observers.

If couched only in terms of a decline in public performance, the concern could be read as focused on theatricality and miss the democratic potential within practices of adjudication. When meeting its aspirations, courts insist on equality of disputants, oblige respect, and discipline the judge who, through the public surveillance, must render dignified treatment and fair procedures. Of course, courts may fail to do so, but, when practiced in public, the weaknesses are also revealed.<sup>31</sup> Moreover, public practices display the indeterminacy of fact and law. Revelations of applications of legal parameters can prompt political efforts for change. Using the United States as an example, public trials altered understandings of "domestic" violence, as well as prompted additional punishments for sexual offenders. Democratic input into adjudication can result in legal shifts styled progressive or conservative, but, whatever the direction, law's plasticity enacts the democratic promise of providing routes to alter governing norms.

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<sup>31</sup> For example, in the United States, state and federal courts in the 1980s and 1990s commissioned more than 50 reports on problems of gender, racial, and ethnic bias in the courts (Resnik 1996).



It is not only that the means of expressing universal values recognizing dignity remains elusive in courthouse configurations. Actually doing so—dignifying humans in their contestation with each other and the state, rendering fair hearings, and struggling to be just—is challenging. Despite legal and rhetorical commitments to access, despite the economic and political utilities of public activities for legitimating authority, and despite the invocation of transparency by the deployment of glass around the world, the rising numbers of persons entitled, as a right, to public hearings have been met by procedures routing them to private resolutions and administrative dispositions. Neither contemporary courthouses nor the rule regimes they shelter make accessible many of the processes and practices of judges.

Architectural critic Paul Spencer Byard understood these difficulties when describing new courthouse building as “intensely sad”—responding to the “huge weight of a system bent toward retribution” (Byard, 145, 147). He wrote of the “bind” for courthouse architecture—that the “political emphasis on criminalization, prohibition, and retribution as proper responses” puts the architect in a position of requiring “quantities of space for courtrooms and related functions—duplicated and even trebled by requirements for segregation and security—to accommodate all the required adjudication and punishment” (Id., 142). Byard objected that the “design exercise is reduced to an effort to bury very large volumes of space in symbols that will lend them some legitimacy” (Id.). Several of the new and monumental buildings had “nothing to say” other than attempting to lend authority through recognizably important architectural forms (Id., 142–143).<sup>32</sup> Rather, and “[I]ike our times, contemporary court architecture is about effect, not substance; . . . about how great we have been, not how great we might become” (Id., 151).

### 23.7 If Performed in Open Air

Our focus has been on the monumentality of new courthouses, as well as the fragility of public adjudication. We do not yet know whether the buildings will prove to be awesome monuments to the past or retrieved and inhabited as lively vectors of public spheres. What needs, however, to be underscored is that the shift toward settlement modalities need not inevitably end public engagement with law’s force. Just as courthouses can no longer be equated with public exchanges, alternatives to courts ought not to be assumed as necessarily entailing complete privatization.

Thus, in closing, we provide a glimpse of alternative semiotics by way of a trip made by the Australian Federal Court in 2005 to the Great Victoria Desert. Almost two centuries earlier, Jeremy Bentham had commented that “if performed in the *open air* . . . , the number of persons capable of taking cognizance of [judicial proceedings] would bear no fixed limits” (Bentham, 354). That proposition was put

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<sup>32</sup> Examples included a federal courthouse designed by Richard Meier in Islip, New York, that Byard called “striking and strictly beautiful” while “literally and figuratively a monumental white void.” Byard, 142–143.



**Fig. 23.11** Ngaanyatjarra Land Claims Open Court, Parntirri Bore Outstation in the Great Victoria Desert, Australia, 2005. Photographer: Bob Sheppard, Trial Logistics Manager, Federal Court of Australia. Photograph reproduced with the permission of the photographer and courtesy of the Federal Court of Australia

into practice at the Parntirri Outstation of the Great Victoria Desert when the Federal Court set up a makeshift tent (Fig. 23.11), some 725 arid miles northeast of Perth, the capital of Western Australia.

The photograph shows the ceremonial pronouncement of a settlement allocating land rights claimed by the Peoples of the Ngaanyatjarra Lands over a mass three times the size of Tasmania. Solicitous of the claimants' needs and resources, the Federal Court traveled thousands of miles to hold the session. (Bentham had recommended an equal justice fund that included paying the costs of travel to and of lodging near courts [Schofield, 310]). The event did not adjudicate but recorded the conclusion of a multiparty dispute among public and private entities. The agreement recognized the preexisting rights of indigenous peoples to a vast land area, as it also enabled uses by telecommunication and mining companies, as well as by state and national governments (Stanley et al. 2005). The court's opinion praised conciliation:

Agreement is especially desirable in native title cases due to the importance, complexity and sensitivity of the issues involved. Agreements between the parties minimises cost and distress and establishes good will between the parties for future dealings. (*Id.*, para 17)

Yet the proceedings depicted are also an antidote to the privatization, and the story of what produced the image provides an appropriate coda to this discussion

about the function and meaning of new courthouses. The court's ritual was an effort to legitimate the settlement not only by making it legally enforceable (through the court order) but by using traditions associated with courts to acknowledge the role played by law. Indeed, the event was law-drenched—the product of courts, legislatures and the executive, responding to twentieth-century human rights movements marking new recognitions of group and individual rights.

When approving the results of an alternative dispute resolution regime and turning it into an enforceable order, the court relied on rituals of law, complete with icons of the country's authority. We know from one of the participants—Chief Justice Michael Black—that the court took pains to specify the open-air tent as a court of law. The “symbols of justice” were, as Chief Justice Black wrote, “present just as they would be in one of our courtrooms in the capital cities.”<sup>33</sup> The Chief Justice sat in front of a canvas rendition of the Court's symbol—the Coat of Arms of the Commonwealth of Australia. The canvas, which traveled with the court for its “on-country hearings,” was “designed by an aboriginal artist following the Commonwealth's written protocol permitting replication of the coat of arms” (Id.). The Justice sat at the center, wearing a ceremonial robe of Australian merino wool, faced in red silk divided into “seven equal segments” to “symbolize the elements of our federation and also equality before the law” (Id.). Yet more didacticism was sewn in, for the black robe itself was made of seven segments deliberately “unequal in size, symbolizing the diversity of our nation and the circumstances that the elements of different size make for a unified whole” (Id.).

Riding circuit has been a practice of judges over many centuries and in various countries. While the Federal Court of Australia has a new major building in Sydney (Fig. 23.12), it occasionally decamps to temporary quarters. When doing so, the High Court shifts its locus to enable assemblies that are literally open rather than encased in glass. “[M]ore than 800 people made their way” to hear Chief Justice Michael Black read the court's discussion of “Australia's largest native title application,”<sup>34</sup> with the substance of the “reasons for the judgment” “translated simultaneously into the Language of the Peoples of the Ngaanyatjarra Lands.”<sup>35</sup> The reading was thus a moment of recognition of traditions that were lawful but different from the patterns of English common law. The exchange sought to encompass a “culturally diverse deliberation” (Mohr, 87–102) that (depending on the quality of the exchanges, of which we know only the court's summary) could be read to have commemorated “consensus through deliberation” (Benhabib, 142–146).

By relocating to the Great Victoria Desert, the Australian government underscored that the relevant audience constituted not only those who could travel to one of the court's home bases, in Sydney, but also those for whom such a trip would be arduous. The simultaneous languages reflected that the agreement was forged

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<sup>33</sup> Email from Chief Justice Michael Black to Judith Resnik, March 21, 2006.

<sup>34</sup> 2005 *Office of Native Title Newsletter*, Ngaanyatjarra Lands, 1.

<sup>35</sup> *Mervyn/Ngaanyatjarra Lands v. Western Australia* at para. 2.



**Fig. 23.12** Commonwealth Law Courts, Melbourne, Australia. Architects: Tim Shannon, Paul Katsieris of HASSELL, 1995–1998. Photographer: Martin Saunders Photography. Photograph reproduced with the permission of the photographer and courtesy of the court

between peoples coming from different political and legal systems. And, in addition to the ritual in the tent that was, momentarily, the “Federal Court of Australia,” the participants had shared another ritual. As the court’s opinion records:

The evening before, there had been a dance and song, performed last night at the place where the court sits today, about the emu and the turkey, who met up at a place called Yankal-Tjungku to the north of here, and continued on.<sup>36</sup>

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