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Cover: The Great Hall of the John Adams Courthouse. Photo by Hon. David S. Ross.

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Reflections After (Nearly) 25 Years on the Superior Court

By Chief Justice Judith Fabricant, Superior Court

For almost 25 years, Superior Court Chief Justice Judith Fabricant has been one of the more eminent and influential jurists in the commonwealth. The salutary imprint she has left on our law, as a profession and an avocation, will be long-lasting. Her absence in retirement will be felt, but her influence will long remain. A former member of the Board of Editors here at the Massachusetts Law Review*, Judge Fabricant was a valued contributor for many years, and it would not be what it is today without her contributions, guidance and friendship. With that, we provide here some brief reflections by Judge Fabricant on her experience as a jurist in the commonwealth. She'll be missed and, regardless of some aphorisms to the contrary, can't be replaced. On behalf of the Board of Editors, thank you, Judge Fabricant.*

— Dean Andrew Mazzone, Editor-In-Chief

I joined the Superior Court on Sept. 24, 1996, and will retire as its chief on July 6, 2021. My imminent retirement gives me an occasion to reflect on the changes I have seen over those years, as well as on what has stayed the same. Adaptation to changing needs and methods has characterized the Superior Court since its founding in 1859. So has continuity in our commitment to fundamental principles. These go together.

When I joined the court nearly 25 years ago, I found a group of colleagues much as we have now: They were highly intelligent, dedicated, scholarly, generous and collegial. They welcomed me and each new judge with notes and calls, just as we do now. Then, just as now, colleagues called each other to consult about challenging questions of law and practice, and to offer support when one of us faced a crisis. And just as now, judges of the Superior Court were committed to the rule of law, and to both the reality and the appearance of fairness in each case. None of that has changed, and I hope and believe that it never will.

A lot has changed, for the better. I see the changes in two categories: first, how judges view our role, and second, the infrastructure that the Trial Court provides to support our work.

Our judges were as wonderful then as they are now, but there was a difference in mindset, reflecting a different conception of judicial independence. The prevailing view was that each judge was in charge of his or her own domain, as if each were operating a separate court, without regard to how any other judge did things, or the overall caseload, or the functioning of the court as a whole. Indeed, it was considered awkward, if not rude, for a judge to enter another's courtroom.

That mindset meant wide variation in practices, especially regarding case management. Some judges worked closely with clerks and lawyers to manage the caseload in their session; others saw case management as entirely up to the clerk or the lawyers, with the judge responsible only for adjudicating the particular matter presented on each occasion.

Hon. Judith Fabricant

Independence in adjudication is central to the protection of liberty, and judges cherish our independence as we make decisions in each matter. But we have come to understand that teamwork is as valuable in judicial work as in other endeavors; that we need to collaborate with our colleagues as well as with clerks and staff; that we serve the public best when we follow consistent practices; and that we are responsible for bringing each case to timely conclusion. And we have learned that public trust and confidence in the judiciary depends on our collective performance, so we must work together to achieve a consistent standard of excellence.

That shift in mindset has occurred over decades, and in many jurisdictions; it certainly did not begin when I became chief of the Superior Court in 2014. But I like to think I have encouraged it and perhaps accelerated it, with the assistance of our regional administrative justices, judicial mentors, and committees, clerks, and administrative staff, by encouraging and supporting collaboration and mutual assistance, consistent practices and continuous professional development.

The mindset among judges has developed in another way that warrants recognition: We have deepened our understanding of the widely varied life experiences and cultural backgrounds of the people who come before us, and of the disparities in how our legal system treats people.

We have thought and talked about this topic more in the last few years than before, but it is hardly new. The Supreme Judicial Court (SJC) appointed a committee to study racial and ethnic bias in the courts in 1990. That committee issued a report in 1994, and that report followed a 1989 report of an SJC committee on gender bias.

We did not ignore those reports. To the contrary, when I reread both of them recently, I was struck by how many of the recommendations have been implemented, and how much progress we have made, particularly in the areas of language access, representation in jury pools and standards for cases alleging domestic violence. I was also struck by what has not changed: both reports describe incidents of judges and court personnel acting based on stereotypes, in ways that painfully resemble the incidents recently described to the SJC Committee on Lawyer Well-Being by members of affinity bar associations.

Still, I see development in our thinking in this area. In recent years, we have undertaken thoughtful and sustained examination of how stereotypes affect our own decision-making and that of other participants in the legal system. The more we learn, the more we are able to provide genuine fairness in our decisions, and to recognize and address unfairness in the conduct of others. This should be a permanent effort, and I am confident it will be.

I referred earlier to changes in the infrastructure that the Trial Court provides to support our work. When I became involved in the Trial Court's strategic planning process in 2012, I remember saying at a meeting that I felt I had been working with one hand tied behind my back. I saw strategic planning as a way to try to release our full strength. The effort is still a work in progress, but there can be no question that the Trial Court has made dramatic strides over these years, and that the changes have genuinely improved our ability to serve the public.

Technology is particularly key. Much as we still have frustrations, it is worth noting how far we have come. When I started, Superior Court judges received laptop computers that we could use to write decisions in WordPerfect. In a few courthouses, we could connect our laptops to dial-up data lines for online research, but most courthouses lacked that access. Only a few courtrooms had telephone lines that could manage conference calls, and videoconferencing was years off. Most clerks had no computers at all, no access to the Superior Court's fledgling electronic case management system, and no alternative to handwritten or typed dockets, schedules and notices to send to counsel by mail. We had no court email; all court communication, both internal and external, was on paper. And without a modern electronic case management system, we had only rudimentary data about our caseloads and how we handled them.

I shudder to think how we could have responded to a pandemic under the conditions we worked in then. But we have responded to the pandemic; we have kept on serving the public, and have kept in touch with each other, all through the use of technology. We have conducted proceedings of all types, including one jury trial, by videoconference. We have electronic filing for civil cases in all counties, and all clerks use a consistent electronic case management system, which provides public access, as well as the capacity for sophisticated data analysis. And with a highly qualified new chief information officer now leading the effort, I feel confident that the Trial Court is on the way to providing the technology necessary to operate a modern court system.

Dramatic improvements in other areas of court infrastructure also warrant recognition. The Trial Court Human Resources, Facilities and Security departments all have well-qualified new leadership, bringing high standards of professionalism. The Judicial Institute provides educational programs for judges and other court personnel with depth, variety and quality that we could not have imagined in my early years, as well as a judicial mentor program that is a national model. Those of us with long memories have seen nothing less than transformation in the professionalism, consistency and client focus that now characterizes the Probation Service. We now have a court administrator, John Bello, who brings depth of experience in professional public sector management, and commitment to our mission. And Trial Court Chief Justice Paula Carey stands behind these efforts to ensure that all departments of the Trial Court have what we need to serve the public.

Serving as a judge of the Superior Court has always been hard work, and the most rewarding work I can think of. We have the opportunity to do justice under the rule of law, while seeing each person who comes before us as a full human being and member of the community. We have the best colleagues anyone could ever hope for, and a caseload with enough variety and intellectual depth to maintain interest longer than any judge could ever serve. And we are moving in the direction of having the supports we need to achieve the consistent excellence we aspire to. The Superior Court will maintain its strength long past any judge's career — certainly long past mine — because of the collective dedication and commitment of the judges, clerks and staff who devote themselves to its critical mission.

Virtues in the Great Hall: Understanding the Allegorical Statues in the John Adams Courthouse

By Kenneth Bresler

Introduction

The 16 allegorical statues in the Great Hall of the John Adams Courthouse are part of a continuing tradition that started in antiquity. The statues, labeled with virtues and concepts, some of which may initially seem unrelated to each other and to law, are very much interrelated — to each other and to artwork outside the courthouse. While the statues may appear to be in random order, some are purposefully configured within the Hall.

The statues are *Law, Temperance, Prudence, Justice, Fortitude, Punishment, Guilt, Equity, Right, Innocence, Reward, Wisdom, Religion, Virtue, Reason* and *Legislation.*

When the courthouse opened in the late 19th century, the statues were discussed in print briefly, incompletely and not entirely accurately. Since then, they have not been discussed in more depth. They have provoked wonder, in both senses of the word (a sense of marvel and of puzzlement), in thousands of observers, including the author. It is time, at long last, to examine them, eliminate the puzzlement and retain the marvel.

The John Adams Courthouse

Before we can discuss the statues, we must discuss their setting. Construction began on the courthouse where the statues are located in 1886.[1] When it opened, sometime in the end of 1893,[2] it was called the Suffolk County Courthouse. It was completed in 1894.[3] When another courthouse was built next to and connected to it in the 1930s, the earlier one became known as the Old Suffolk County Courthouse, the later one as the New Suffolk County Courthouse.[4] In 2002, during extensive renovations, the Old Suffolk County Courthouse was renamed the John Adams Courthouse.[5] The New Suffolk County Courthouse became simply the Suffolk County Courthouse.

The centerpiece of the John Adams Courthouse is a soaring space called the Great Hall.[6] When the courthouse opened, the Great Hall became, and was possibly designed to be, a pedestrian thoroughfare, an interior street, between Pemberton Square and the top of Beacon Hill.

> Boarders on the hill on Ashburton pl [sic], Somerset, Bowdoin, Allston,[7] Derne, and sundry other streets, swarm down through the grand hall in the morning when they go to business. Then back again at noon to lunch and to work again. If they got off at 5 o'clock they can traverse the beautiful place again for dinner,[8]

wrote *The Boston Globe.* Initially, the Great Hall was even open on Saturday from 8:20 a.m. to 2:30 p.m.[9]

Kenneth Bresler, a lawyer, authored Poetry Made Visible: Boston Sites for Poetry Lovers, Art Lovers & Lovers; H. H. Richardson: Three Architectural Tours; *and the forthcoming second edition of* The Witch Trial Trail and The Harvard Witch Walk: The People and Places of Boston and Harvard Connected With the Salem Witch Trials. *He edited* Mark Twain vs. Lawyers, Lawmakers, and Lawbreakers: Humorous Observations.

**All statue photos in this article were taken by Hon. David S. Ross.*

1. Nomination Form, Nat'l Reg. of Historic Places Inventor (Feb. 1974), https://catalog.archives.gov/OpaAPI/media/63797036/content/electronic-records/rg-079/NPS_MA/74000391.pdf.

2. "No Opening Ceremony for the Old Suffolk County Court House," The Hist. Renovation of the John Adams Courthouse, https://www.socialaw.com/about/history/courthouse-renovation/history-of-the-courthouse/no-opening-ceremony-for-the-old-suffolk-county-court-house (last visited Nov. 8, 2020); "Supreme Court House. Elegant Rooms Provided in Pemberton Sq.," Bos. Globe, July 22, 1893, at 4 (Supreme Judicial Court will hold fall session in new courthouse).

3. Nomination Form, *supra* note 1.

4. *Id.* (New Suffolk County Courthouse constructed 1937); Building Information Form, Mass. Cultural Resource Info. Sys., http://mhc-macris.net/Details.aspx?MhcId=BOS.1945 (New Suffolk County Courthouse constructed 1936 to 1939); "No Opening Ceremony for the Old Suffolk County Court House," The Hist. Renovation of the John Adams Courthouse, https://www.socialaw.com/about/history/courthouse-renovation/history-of-the-courthouse/no-opening-ceremony-for-the-old-suffolk-county-court-house (last visited Nov. 8, 2020).

5. Michael O'Connor, "Courthouse Renamed to Honor Adams," Bos. Herald, June 13, 2002.

6. *The Boston Globe* called it "the Grand Central Hall" before it opened. "Sculptors' Art: Elegant Statuary for the New Court House," Bos. Globe, Feb. 20, 1893, at 3. *The Boston Globe* called it "the Grand Hall" after it opened. "Grand Hall of the New Court House," Bos. Daily Globe, Aug. 12, 1894, at 32. The form to nominate the courthouse for the National Register of Historic Places called it "the Great Cross Hall." Nomination Form, *supra* note 1.

7. Allston Street no longer exists. It ran between Somerset and Bowdoin streets, north of and roughly parallel to Ashburton Place. "Plan of site for new court house on Pemberton Sq. and Somerset St. for the County of Suffolk: taken by authority of Chapter 377," Norman B. Leventhal Map & Educ. Ctr. at Bos. Pub. Libr., https://collections.leventhalmap.org/search/commonwealth:js956k53b (last visited Nov. 8, 2020).

8. "Grand Hall of the New Court House," *supra* note 6.

9. *Id.*

In the 20th century, the Great Hall housed, on one side of the stairs leading to the second floor, a food canteen run by the Massachusetts Commission for the Blind, and on the other side, a bank of telephone booths.[10] The canteen, telephone booths, trash receptacles and the throngs of lawyers and parties flocking to the various courts made it hard to notice the grandeur of the Great Hall. The massive renovation of the John Adams Courthouse from 2001 to 2005 restored the grandeur and reduced the number of entities in and people flocking through the courthouse.

The Statues: A Preview

The Great Hall is lined with 16 life-sized statues, eight on each side, each personifying a virtue or concept.[11] They are stone, probably granite, although possibly limestone.[12] The statues were carved in place. An article in *The Boston Globe* on Feb. 20, 1893, reported: "On each side of the walls are eight huge granite blocks, on which are to be carved life-size allegorical figures....Of the 16 designs, seven have already arrived, and the work of their reproduction will begin today."[13]

The word "designs" presumably referred to models, also called maquettes. Between the date of the *Boston Globe* article and completion of the statues, several aspects changed. The statue of *Law* changed from a woman to a man. So did *Guilt*.

Temperance, who was reported to be holding a trowel in 1893, came to hold a mirror. (The trowel was significant, as will be discussed.) *Reward*, who was reported to hold a laurel, came to hold two. *Fortitude* was reported to be wearing a tunic on his head and a leopard's skin. *Fortitude* now wears four braids, not a tunic. Leopard spots do not appear on the animal skin that he wears now; it is the skin of a lion, which is associated with the personification of Fortitude.[14]

The 1893 article referred to some of the statues by alternative names, including some of the personifications' Latin names, although they are all now labeled in English.[15] It is unknown when or why the designs were changed, and who decided to change them. The statues were completed sometime before August 1894, when another article described them.[16]

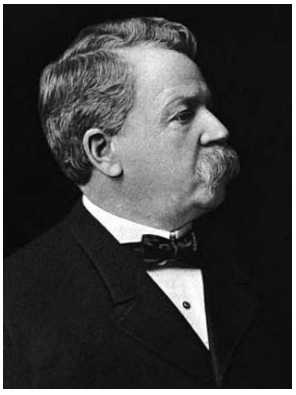
Under each statue is a bronze marker with its title. The installation as a whole has no known title.

(The 16 allegorical statues, which are elevated, are unrelated to the bronze statue of Rufus Choate, standing on a marble pedestal, by Daniel Chester French, which was placed in the Great Hall in 1898.[17])

The Two and Possibly Three Men Instrumental in Executing the Statues

Two and possibly three men were instrumental in conceiving and executing the allegorical statues, although their exact roles are unclear. It is tempting to start with the sculptor. However, in that era, "[a]rchitects, not sculptors, ultimately decided the subject matter, sizes, poses, and drapery of architectural sculpture and any modifications," Michele H. Bogart has written.[18] So we start with the architect.

George A. Clough: Architect



George Clough, architect of the John Adams Courthouse, 1911.

The courthouse was designed by George A. Clough, who had been Boston's first city architect from 1874 to 1883, shortly before construction began.[19] He was in private practice when he won the commission. Clough (pronounced "Cluff"[20]) was born in 1843 in Blue Hill, Maine, and attended Blue Hill Academy. The son of a shipbuilder, Clough worked for four years drafting shipyard drawings for his father. In 1863, he came to Boston and studied architecture with George Snell. In 1869, he established his own architectural firm. Among other buildings and schools, he designed the Prince School on Newbury Street, Boston,[21] which has been converted to condominiums.[22] He is not known to have designed a courthouse other than the John Adams Courthouse. Clough was "a competent but not very inspired practitioner," wrote author and historian Walter Muir Whitehill.[23]

10. Nomination Form, *supra* note 1.

11. Because the statues are attached to corbels, bracket-like devices, rather than extending from floor to ceiling or otherwise acting as pillars or supports, the author does not consider the statues to be caryatids and atlantes. *See* "Oswald Speir, Domingo Mora — A Sculptor in Clay: An Appreciation," 21 No. 2 The Brickbuilder: An Architectural Monthly 28, 29-30, Feb. 1912 (discussing caryatids by Mora — and not including the Great Hall statues); *but see, e.g.,* G. Albert Lansburgh, "Architect's Tribute to Domingo Mora," 26 No. 2 The Architect and Engineer of Cal., 51, 52, Sept. 1911 (referring to the Great Hall statues as caryatids).

12. The statues are limestone, according to a report of the Art Commission of the City of Boston. I Documents for the City of Boston for the Year 1915 in Four Volumes 30 (1916). The author was unable to locate anyone who may have cleaned the statues during the courthouse's renovation and who may have been able to identify the stone. Email from Jeff Greene, Chairman, Evergreene, to the author (Aug. 19, 2019) (on file with author); email from Ivan Myjer, Ivan Myjer Building & Monument Conservation, to the author (Aug. 21, 2019) (on file with the author); email from John Coles to Ivan Myjer (Aug. 22, 2019) (on file with author).

13. "Sculptors' Art: Elegant Statuary for the New Court House," *supra* note 6.

14. "Grand Hall of the New Court House," *supra* note 6.

15. *Id.*

16. *Id.* (mentioning completed statues).

17. "Unveiling of Rufus Choate Statue," Bos. Globe, Oct. 15, 1898.

18. Michele H. Bogart, "In Search of a United Front: American Sculptural Architecture at the Turn of the Century," 19 Winterthur Portfolio 151, 175 (1984).

19. Nomination Form, *supra* note 1.

20. Telephone Conversation with Lorna Condon, Senior Curator of Library and Archives, Historic New England (July 15, 2019).

21. "City's First Architect: George A. Clough, Who Planned Many Notable Buildings, Dies at Age of 67," Bos. Globe, Jan. 1, 1911, at 18.

22. "The Prince on Newbury," CL Properties, https://www.clproperties.com/condo/the-prince-on-newbury/ (last visited Nov. 8, 2020).

23. Walter Muir Whitehill, "The Making of an Architectural Masterpiece — The Boston Public Library," 2 No. 2 American Art J. 13, 14 (Autumn 1970).

Domingo Mora: Sculptor

The statues were carved by Domingo Mora, a sculptor and architectural sculptor who lived in Boston for a decade. He was born in Barcelona, Spain, in 1840 and educated in the Academy of Barcelona. He also studied in Paris and Rome.[24] He was an apprentice to Domènec Talarn, a carver of saints.[25] After living in Montevideo, Uruguay, and returning to Barcelona, Mora and his family moved to America in 1880; they lived in Manhattan and New Jersey. Mora became the design director of the Perth Amboy Terra Cotta Company in New Jersey.[26] He began working with the leading American architects, initially concentrating on the medium of architectural terra cotta.[27] In 1887, Mora and his family moved to the Allston neighborhood of Boston.[28] They later lived in the Roxbury neighborhood of Boston.[29] Mora maintained his ties to Perth Amboy and designed the Great Hall's statues there.[30] Mora left Roxbury for California in 1907 or 1908.[31]

Mora's other known courthouse commission was for the New York Criminal Courts Building at Center and White streets in New York City.[32] The courthouse was completed in 1894,[33] the same year as the John Adams Courthouse. Mora designed the pedimental sculptures (a pediment is the triangular area of a gable). That courthouse was demolished in 1946.[34] A surviving photograph of the courthouse shows that it had two and probably four pediments.[35] Close-up photographs and descriptions of the pedimental sculptures are not known to exist.[36] Thus, it is unknown what Mora portrayed on the New York Criminal Courts Building and whether he used any elements for both courthouses, even a figure's gesture or Lady Justice's belt.

Mora executed another commission roughly comparable to that in the Great Hall — he carved three sides of multiple related stone figures in a religious composition — in the Parish of All Saints, Ashmont, in the Dorchester neighborhood of Boston. Mora designed the reredos, the towering decoration at the rear of the altar, in 1897.[37] It contains three large figures — Jesus, St. Michael and St. Gabriel — and 12 smaller figures, mostly saints and two biblical figures.[38] The statues, which almost look as if they are tucked into niches, are far shorter than those in the Great Hall.

Mora's Great Hall's statues were "[o]ne of his most serious commissions," wrote an architect, G. Albert Lansburgh, who worked with Mora.[39] In terms of the statues' height, number and three-dimensional quality (14 of the statues can be viewed from three sides, in contrast with Mora's bas-relief work on pediments and panels), this was almost certainly Mora's most extensive commission. A photograph exists of Mora showing full-sized maquettes of the Great Hall's statues to his family, the only known photo of Mora's highlighting particular artwork, indicating that he considered this installation especially important. (The courthouse may also have been Clough's most important commission. The apex of both Mora's and Clough's creativity may have coincided in the courthouse.)[40]

Godfrey Morse: Courthouse Commissioner

Godfrey Morse was a member of the three-member body that oversaw the construction of the courthouse.[41] He was born in Bavaria in 1846 and immigrated to America in 1854. He attended public schools, and graduated from Harvard College and Harvard

24. "A New Sculptor at Work on Mr. Cairns Friezes on Trinity Church: The Great Scheme of Decoration Approaching Completion," Bos. Daily Advertiser, Sept. 13, 1897, at 5. F. Luis Mora, Domingo's son, reported simply that his father had traveled to France and Italy. Interviews by DeWitt McClellan Lockman with F. Luis Mora (June 9, 1926, at 1; Jan. 31, 1927, at 4), microformed on Roll 503 (Smithsonian Archives of American Art). Mora's two sons, F. Luis and Joseph Jacinto (Jo), were both noted artists. Lynne Pauls Baron, F. Luis Mora: America's First Hispanic Master 14, at 31 and passim (2008).

25. Interviews with F. Luis Mora, *supra* note 24 (June 9, 1926, at 1; Jan. 31, 1927, at 4).

26. Baron, *supra* note 24, at 23-24, 26. According to the 1900 census, Mora immigrated in 1881.

27. Speir, *supra* note 11, at 28.

28. Baron, *supra* note 24, at 34. More details, from Boston Directories and maps, are available from the author.

29. Details, from Boston Directories and maps, are available from the author.

30. Three indications exist that Mora designed the statues in Perth Amboy. His son F. Luis Mora gave a series of three interviews in the 1920s and reported that the statues had been designed in Perth Amboy. Interview by DeWitt McClellan Lockman with F. Luis Mora, supra note 24 (Jan. 31, 1927). Two photographs exist of Mora in his studio. Baron, *supra* note 24, at 22, 37, 39. (The ceiling reveals that it is the same studio.) One photograph depicts Mora with life-size maquettes of the Great Hall's statues, one with smaller-scale maquettes. The latter photograph includes a bag on the floor that is labeled "[Perth] Amboy [Ter]ra Cotta C[ompany]." *Id.* at 22, 39. Finally, an 1893 article in *The Boston Globe* credited the statues to "the celebrated sculptor Domingo Mora of Perth Amboy, N.J.," even though Mora had lived in Boston since 1887. "Sculptors' Art: Elegant Statuary for the New Court House," *supra* note 6.

31. Boston Directory 1229 (1908).

32. Speir, *supra* note 11, at 29.

33. "New York County," Hist. Soc'y of the N.Y. Cts., http://www.nycourts.gov/history/legal-history-new-york/courthouses-counties/new-york.html (last visited Nov. 8, 2020).

34. *Id.*

35. *Id.*

36. N.Y. Hist. Soc'y Museum & Libr., http://bobcat.library.nyu.edu/primo-explore/search?vid=NYHS&lang=en_US&fromRedirectFilter=true&sortby=rank (last visited Nov. 8, 2020), Archival & Digital Collections, NYU Libr., https://specialcollections.library.nyu.edu/search/?f%5Brepository_sim%5D%5B%5D=nyhs (last visited Nov. 8, 2020); telephone conversation with Daniel Sierra, Marketing Director, Historical Society of New York Courts (reporting on research by Allison Morey, Administrative Director) (Aug. 14, 2019).

37. Douglass Shand Tucci, *All Saints' Ashmont Dorchester, Boston: A Centennial History of the Parish 32 (*1975).

38. *Id.* at 36.

39. Lansburgh, *supra* note 11, at 30.

40. Baron, *supra* note 24, at 37.

41. It was called by various names, including the Board of Commissioners for the Erection of a New Courthouse for Suffolk County, and the Court-House Commissioners. Reports of Proceedings of the City Council of Boston for the Year Commencing Monday Jan. 4, 1892, and Ending Saturday, Dec. 31, 1892 282 (1893); II Documents of the City of Boston for the Year 1886 Doc. No. 72.

Law School.[42] When he was elected to the Boston School Committee in 1875, he was among Boston's first Jewish elected officials.[43] He also served on the Boston Common Council, including as president, and was active in Democratic politics.[44]

In 1890, he mused with a writer for *The Boston Globe* about decorating the courthouse under construction in two ways. One idea concerned "the stairways leading to the main corridor,"[45] by which *The Globe* probably meant the stairway (in the singular) leading to the Great Hall. The stairway was apparently designed to have "six newell [sic] posts of marble," a feature that was not executed. Morse proposed placing on the posts "live-sized [sic] bronze figures of noted jurists," including Joseph Story, Rufus Choate and Daniel Webster.[46]

*Godfrey Morse, one of the three commissioners who oversaw construction of the John Adams Courthouse. His ideas for sculpture in and on the courthouse may have morphed into designs for the Great Hall's statues. (*Municipal Register, *1883)*

The other idea was for "a group of statuary surmounting the building" to commemorate a historic judicial proceeding, *The Globe* reported.[47] "How much such embellishments interest people is shown by the number of people who go to the post office to view the groups that adorn that structure," it wrote.[48]

The Globe was referring to two sets of statues by Daniel Chester French, *Labor Supporting the Arts and Domestic Life* and *The Forces of Steam and Electricity Subdued and Controlled by Science.* As Richard Heath described them in 2010: "Each is composed of three interlocking figures in a triangular shape with one tall, seated central person and two subordinate forms modeled as a single work of art."[49]

The central figures are about 15 feet tall. They were on the front of the United States Post Office and Sub-Treasury Building, whose construction was completed in 1885. The statues were about 100 feet above Congress Street. (The Post Office was in Post Office Square, on the site of the current John W. McCormack Post Office and Courthouse. When the previous Post Office was demolished in 1929, French's statues were moved to Franklin Park.[50])

French's statues were striking for two reasons. Heath has written, "They were among the largest sculptures in the city," and it was unusual in Boston for statues to decorate a building's façade.[51] Morse's vision, publicized by *The Boston Globe*, may have morphed into designs for the statues in the Great Hall.

Morse's suggestions in 1890 demonstrate that statues were not envisioned for the Great Hall from the beginning. Construction had started approximately four years earlier. Other evidence is that two undated drawings by Clough of the north wall of the Great Hall show it decorated with flora, probably acanthus — but not statues.[52] More evidence is that City of Boston records began mentioning the statues only in 1892, six years after the courthouse's construction began, and two years before its completion.[53]

42. Cyrus Adler, "Morse, Godfrey," Jewish Encyclopedia (1906), http://www.jewishencyclopedia.com/articles/11025-morse-godfrey (last visited Nov. 8, 2020).

43. Kurt F. Stone, *The Jews of Capitol Hill: A Compendium of Jewish Congressional Members* 34 (2011).

44. Jewish Encyclopedia, *supra* note 42.

45. William Taylor Jr., "Answering Mr. Clough: Commissioner Morse," Bos. Globe, Sept. 27, 1890, at 4. Taylor Jr. was probably not a member of the Taylor family that owned the *Boston Globe.* Telephone conversation with Jeremiah Manion, Researcher, *Boston Globe* (Sept. 19, 2019).

46. Taylor Jr., *supra* note 45.

47. *Id.*

48. *Id.*

49. Richard Heath, "The Statues of D.C. French from the Old Boston Post Office at Franklin Park," Jamaica Plain Hist. Soc'y, (2010) https://www.jphs.org/people/2005/3/14/the-statues-of-dc-french-from-the-old-boston-post-office-at.html (last visited Nov. 8, 2020).

50. *Id.*

51. *Id.*

52. Drawings on file with Historic New England. Folder: Suffolk County Courthouse, 1886-1892, Courthouse Sketches, George Clough Collection, BOS suf.

53. On July 20, 1892, the Boston City Council's Committee on New Court-House held a hearing, which revealed that the courthouse's liabilities included $4,000 owed to "D. Mora." IV Documents of the City of Boston for the Year 1892 Doc. No. 157 (July 20, 1892) at 5. The hearing also revealed future estimated expenditures of $4,740 for limestone and $5,000 for carving, which may have been related to the Great Hall's statues. *Id.* at 6. On Sept. 3, 1892, $4,000 was still due to D. Mora, the courthouse commissioners reported. IV Documents of the City of Boston for the Year 1892 Doc. No. 165 (Sept. 3, 1892) at 4. Their estimate of the future expenditure for limestone had risen to $5,000. *Id.*

On Oct. 19, 1892, the Art Commission of the City of Boston, which oversaw the city's public art, met and considered a "communication" that it had "received from the Court House Commissioners relative to some sculptured details in the New Court House," namely, the Great Hall's statues. It is unknown what the courthouse commissioners' communication was about, but it might have been a request for money. The Art Commission voted to refer the matter to a committee of three members. Proceedings of the Art Commission of the City of Boston 1890-1909 (handwritten notebook in Boston City Archives, 0272.100).

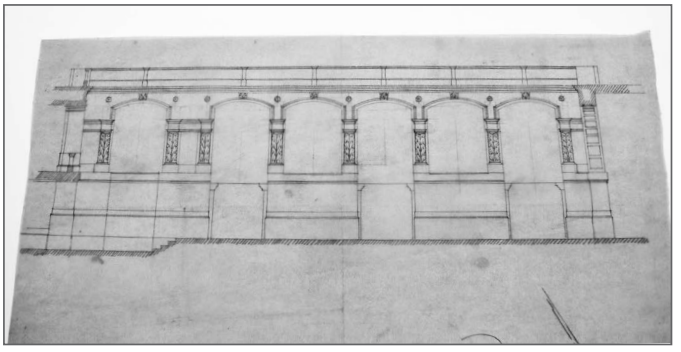
On Nov. 9, 1892, the Art Commission met and received a report from its three-member committee. According to the proceedings' minutes: "Inasmuch as the sculptures...are a structural part of the building, being figures in high relief on brackets, the special committee think that they do not come within the jurisdiction of the [Art] Commission" under the enactment that created it. The city solicitor agreed and "[t]his opinion...was communicated to the Court House Commissioners" in a letter. *Id.*

In 1893 or so, the City of Boston, Suffolk County, or the two entities jointly paid Mora $4,000 for "[m]odels for allegorical figures." Report of the City Auditor of the Receipts and Expenditures of the City of Boston and the County of Suffolk, State of Massachusetts, for the Financial Year, 1893-94. Feb. 1, 1893, to Jan. 31, 1894. (Both included.) 143 (1894). One hundred dollars was expended for "[i]nspection of carving," but it is unknown who inspected the carving. *Id.* It is unclear whether Mora was paid additional money and, if so, when and how much.

A contract for Mora does not appear in the contracts for the courthouse. Boston Auditing Department, New Suffolk County Courthouse contracts (1886-1893) (Boston City Archives, 2200.17).

The fact that records do not mention the Great Hall statuary until 1892 throws into doubt the notion that Mora moved to Allston in 1887 because he had received the commission for the statues. Interview of F. Luis Mora (Jan. 31, 1927, at 4), *supra* note 24 (stating his belief about why Domingo Mora moved to Boston 40 years earlier); Baron, *supra* note 24, at 34 (drawing on interview of F. Luis Mora); Philip Cronin, *The John Adams Courthouse: An Architectural Honor for an Architect of American History* 15 (2010) (using date of 1888).

It is unknown who decided (and when) that the Great Hall would be decorated with the twin rows of statues, that the statues would be allegorical, which virtues and concepts to depict and how to depict them. If Clough and Mora ever had notes or documents that shed light on the decisions that went into the statues, their papers almost certainly no longer exist. Some of Clough's architectural drawings, plans and blueprints for the courthouse do exist, but no explanatory papers are known to exist.[54] If Morse and the other two courthouse commissioners were involved in these decisions, records of their involvement apparently do not exist.[55]



An undated drawing by George Clough of the north wall of the Great Hall shows that statues were not always envisioned there. The pilasters (flattened pillars) are decorated with flora, possibly acanthus leaves. (George A. Clough architectural collection. Courtesy of Historic New England.)

Contemporary Explanations of the Statues

In the absence of documents providing contemporary insights into the statues, we are left with two unauthoritative articles from *The Boston Globe,* with brief descriptions of the statues. One article, discussed above, published on Feb. 20, 1893, is especially unauthoritative because it describes the statues before their designs were finalized and before they were carved. The other article, also discussed above, was published on Aug. 12, 1894.[56] Neither article is "sourced": neither unnamed writer indicates having communicated with Clough, Mora, Morse or anyone about the meaning of the statues. And the articles' descriptions are so lacking as to undermine the articles' authoritativeness.

Because the writer of the 1894 article described *Temperance* simply as, and nothing more than, "[t]he figure of a beautiful maiden," should we or can we trust the writer's report that *Wisdom* holds "the torch of thought and research"? If the 1894 writer was unaware that "the skins of wild beasts" that *Fortitude* wears are a lion's, should we trust the writer that *Reason* wears "the star of truth on her forehead"? However, the 1894 writer did report correctly that *Right* holds the Twelve Tables of Roman law. That obscure reference is not obvious to a viewer, possibly indicating that the writer did consult with a source, live or written.

Without contemporary documents, we are left on our own to understand the allegorical statutes. Understanding them requires understanding the cardinal virtues.

The Cardinal Virtues

The Great Hall's statues hinge on the cardinal virtues. Because almost everything about the statues turns on the virtues, a discussion of the virtues is necessary.

Millennia and centuries ago, various writers, including Plato (who lived from 428/427 or 424/423 to 348/347 B.C.E.), Cicero (106 to 43 B.C.E.) and Thomas Aquinas (1225 to 1274),[57] identified and wrote about four cardinal virtues. "Cardinal" here means "paramount." "Cardinal" is derived from "cardo," Latin for "hinge," because things pivot on something that is cardinal. The cardinal virtues are Temperance, Prudence, Justice and Fortitude. Temperance refers to restraint and forbearance in general, not abstinence from alcohol.

The four cardinal virtues were and are sometimes grouped with, or overlap with, theological virtues and other sets of virtues.[38] Possibly the most common set of virtues grouped with the cardinal virtues were and are the three theological virtues: Charity, Faith and Hope. When Giotto in 1305 painted frescoes of seven virtues in the Cappella Scrovegni, also known as the Scrovegni Chapel or Arena Chapel, in Padua, they were the cardinal and theological virtues.[59]

The source of the theological virtues is the Christian Bible, I Corinthians 13:13. Although translations vary, one is: "And now abides faith, hope, charity, these three; but the greatest of these is charity."[60] These three virtues are depicted in the Great Hall, although not labeled.

54. A list of the libraries, archives and other entities that the author contacted is available from him.

55. The courthouse commissioners' 22 reports to the Boston City Council and Board of Aldermen are not collected in a single place. Email from Caitlin Jones, Head of Reference, Massachusetts Archives, to the author (Aug. 16, 2019) (on file with author); telephone call with Elizabeth Bouvier, Director, Massachusetts Supreme Judicial Court Division of Archives and Records Preservation (Aug. 22, 2019). Of the 22 reports by the courthouse commissioners, 15 became official City of Boston documents. I Documents of the City of Boston for the Year 1886 Doc. No. 39 (Feb. 1, 1886), Doc. No. 46 (Feb. 11, 1886); II Documents of the City of Boston for the Year 1886 Doc. No. 66 (March 8, 1886), Doc. No. 70 (March 15, 1886), Doc. No. 155 (April 26, 1886), Doc. No. 165 (Aug. 3, 1886); III Documents of the City of Boston for the Year 1889 Doc. No. 173 (Nov. 16, 1889); I Documents of the City of Boston for the Year 1891 Doc. No. 58 (April 8, 1891); III Documents of the City of Boston for the Year 1891 Doc. No. 145 (Oct. 5, 1891); III Documents of the City of Boston for the Year 1892 Doc. No. 53 (Jan. 28, 1892), Doc. No. 76 (March 19, 1892); IV Documents of the City of Boston for the Year 1892 Doc. No. 124 (June 2, 1892), Doc. No. 165 (Sept. 3, 1892); III Documents of the City of Boston for the Year 1894 Doc. No. 69 (March 5, 1894); IV Documents of the City of Boston for the Year 1894 Doc. No. 175 (Oct. 22, 1894) (22nd and final report). The commissioners' reports were generally about land acquisition, expenses, and construction progress and delays. The 15 published reports were not detailed, barely discussed decoration of the courthouse, and did not refer to the allegorical statues.

56. "Grand Hall of the New Court House," *supra* note 6.

57. Judith Resnik & Dennis Curtis, "Representing Justice: Invention, Controversy, and Rights in City-States and Democratic Courtrooms," 8 (2011). This article relies on Resnik & Curtis even more than the numerous citations to that book indicate. The author cites many sources that he learned about in Representing Justice's endnotes.

58. *Id.*

59. "Seven Vices and Seven Virtues," Web Gallery of Art, https://www.wga.hu/html_m/g/giotto/padova/7vicevir/ (last visited Nov. 9, 2020).

60. Resnik & Curtis, *supra* note 57, at 384 n.27.

Even virtues that were not originally theological, including the cardinal virtues, were eventually viewed in a Christian context and Christianized.[61]

The cardinal, theological and other virtues came to be personified in literature, paintings, sculpture and other art.[62] Various examples from the visual arts date to the second half of the 9th century, the early 11th century and circa 1130.[63]

In addition to literature and art, Massachusetts law enshrines at least one set of virtues: "piety, justice, moderation, temperance, industry, and frugality." Those are the virtues that Massachusetts citizens should seek in their government officials and insist that the officials adhere to, according to the Declaration of Rights in the Massachusetts Constitution.[64] As with other sets of virtues over the ages, this set overlaps with the cardinal virtues, which include justice and temperance.

In art, personifications of the virtues are sometimes labeled, and sometimes identified by the attributes, the props, that they hold (for example, Prudence typically holds a mirror), or the animals that they associate with. (Innocence is typically with a lamb.) Sometimes, a viewer may identify the personifications of the virtues by both labels and attributes,[65] as in the Great Hall. The attributes are not uniform. Judith Resnik and Dennis Curtis have written:

> [T]he imagery varied by period, place, and artistic impulse, such that any particular Virtue can be found with an odd lot of attributes. Images of Justice are shown, for example, holding cornucopias, lictor rods, orbs, books and tablets; nearby are a mix of animals and birds including dogs, snakes, ostriches, and cranes.[66]

Sometimes the depiction of one virtue held an attribute usually associated with another virtue.[67]

In the 12th century, the stock of items identifying virtues loosened and increased. Justice, who has held scales "from very early times,"[68] was sometimes portrayed with measuring instruments — a set-square, plumb-level or measuring rod — to emphasize that justice must be measured precisely.[69]

Justice, whom we think of now as Lady Justice, did not have a blindfold for centuries.[70] Even today, she does not always have one. (Next door to the John Adams Courthouse, the central figure over the entrance to the Suffolk County Courthouse is Justice, who is not blindfolded.)

So well known were the four cardinal virtues as a group that at one time, the absence of one would have been noticeable to the common observer.[71] The cardinal virtues adorned religious and government buildings, including courthouses.[72] Eventually, Temperance, Prudence and Fortitude receded and became less prominent,[73] leaving Justice alone to decorate courthouses around the world.[74] Now, the common observer viewing Temperance, Prudence, Justice and Fortitude grouped together, as in the Great Hall, does not recognize them as the cardinal virtues.

Virtues have parts, subdivisions[75] — they can be considered sub-virtues[76] — or manifestations of virtues. For example, Justice comprises, among other virtues, Religion, according to Cicero, Macrobius, Guillaume de Conches, Alanis de Insulis and others.[77] Prudence comprises Reason and other virtues, wrote Macrobius and de Insulis.[78] *Religion* and *Reason* both appear in the Great Hall. So does *Innocence*, another part of Justice.[79]

Not only do Temperance, Prudence, Justice and Fortitude have parts, the cardinal virtues are sometimes considered to be parts of a larger single Virtue.[80] This concept, too, is depicted in the Great Hall.

Virtues, whether cardinal, theological, or on an extended list of virtues, are typically depicted as women. One reason is that they have roots in Egyptian, Greek and Roman goddesses. Another is that the Latin for Temperance, Prudence, Justice and most other virtues takes the feminine gender (Temperantia, Prudentia, Justitia and so on).[81]

The cardinal and other virtues had no set list of opposing vices.[82] Certain vices were male.[83] Sometimes in literature and art, the cardinal and other virtues were paired against vices in combat, fighting against and triumphing over them.[84] A prominent example is *Psychomachia*, a Christian allegorical poem from the 5th century.[85] Alternatively, virtues were pictured on a tree, with vices on a second tree.[86] Continuing this tradition of pairing virtues and vices, the Great Hall has two pairs of opposites.

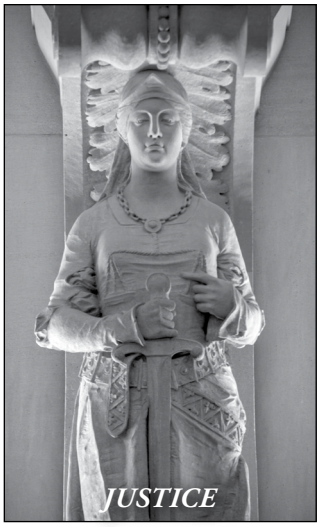
61. *E.g.*, Rosemond Tuve, *Allegorical Imagery: Some Mediaeval Books and Their Posterity* 62, 76 (1966); Resnik & Curtis, *supra* note 57, at 344.
62. *E.g.,* Resnik & Curtis, *supra* note 57, at 10-12.
63. Adolf Katzenellenbogen, *Allegories of the Virtues and Vices in Mediaeval Art: From Early Christian Times to the Thirteenth Century,* plates XVII, XVIII, XIX (1939).
64. Mass. Const. pt. 1, art. XVIII.
65. Resnik & Curtis, *supra* note 57, at 9.
66. *Id.* at 9. *See id.* at 22, 347.
67. *Id.* at 347.
68. Katzenellenbogen, *supra* note 63, at 55 (footnote omitted).
69. *Id.*
70. Resnik & Curtis, *supra* note 57, at 67.
71. *Id.* at 8.
72. *Id.* at 10.
73. *Id.* at 12, 347.
74. *Id.* at 1.
75. *E.g.*, Tuve, *supra* note 61, at 59-60, 63-70, 443 (1966).
76. *Id.* at 65.
77. *Id.* at 65, 443.
78. *Id.*
79. *Id.* at 443.
80. Resnik & Curtis, *supra* note 57, at 346; Marcus Wilson, *The Virtues at Home, in Under the Aegis: The Virtues* (Peter Shand ed., 1997).
81. Resnik & Curtis, *supra* note 57, at 9.
82. Helen F. North, *From Myth to Icon: Reflections of Greek Ethical Doctrine in Literature and Art 188 n.27, 192* (1979).
83. Resnik & Curtis, *supra* note 57, at 9.
84. Tuve, *supra* note 61, at 116; Resnik & Curtis, *supra* note 57, at 8-9, 347.
85. Resnik & Curtis, *supra* note 57, at 384-85 n.30, 32.
86. North, *supra* note 82, at 206-207; Resnik & Curtis, *supra* note 57, at 9, 347.

The Statues: An Overview

The series of statues starts at the Pemberton Square side of the Great Hall on the right. (That's the north wall; see the bronze-colored letters reading "North Elevator.") We know that from three things. Pemberton Square is the courthouse's main entrance. Both statues closest to the other entrance, on Somerset Street, *Equity* and *Right*, are demi-figures, incomplete. And the cardinal virtues are the second through fifth statues on the right.

Of the 16 statues, 13 are firmly in the tradition of the cardinal virtues, their parts, other classical and theological virtues, and their opposites. Three statues personify concepts that are not part of the virtue tradition. One of those three statues is *Law*, the first statue on the right.

We will return to it later.



The Great Hall's First Configuration: Cardinal Virtues

Personifications of the cardinal virtues stand, from right to left on the north wall: *Temperance, Prudence, Justice* and *Fortitude*.

Temperance

Temperance holds a bridle, which, because it restrains a horse, became a symbol of restraint.[87] The bridle became a widely used attribute of Temperance in the 15th and 16th centuries.[88] Among the numerous depictions of Temperance holding a bridle is Giovanni Batista Caccini's marble statue by that name. Completed in 1584, it is in the Metropolitan Museum of Art in New York.

Mora's *Temperance* wears her hair in curls and braids.

Prudence

Mora's *Prudence* holds a mirror with her right hand and looks into it. She holds a snake with her left hand. The mirror symbolizes not vanity, but apparently self-knowledge.[89] The snake symbolizes wisdom.[90]

The virtue of Prudence is classically, although not always, portrayed with these items. In Sebastiano Ricci's fresco of Prudence, she looks into a hand-mirror, and holds a snake and staff. Ricci painted the fresco from 1706 to 1707 in the Palazzo Marucelli-Fenzi in Florence.[91]

This virtue has a special place in American history and democracy. The Declaration of Independence proclaims, "Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes."[92]

Mora's *Prudence* wears earrings, a robe with bangles at her shoulders and some sort of turban-cum-headdress.

Justice

Mora's *Justice* holds a sword and scales of justice, as she commonly does in other depictions, but these scales are hard to spot. She points to scales at her neckline, which are incorporated into her robe or hang on a necklace. The scales, of course, represent impartiality and measuring what is due to people; the sword represents punishment and enforcement.

Mora's *Justice* wears a wide and elaborately patterned crossed belt, pointed shoes with slightly upturned toes, and a cap reminiscent of the modern equivalent of a goddess, Wonder Woman.

Fortitude

The virtue of Fortitude is identified with the lion (which appears in the Great Hall) and a broken column (which does not appear in the Great Hall). An engraving of Fortitude by the school of the artist Marcantonio Raimondi, who lived c. 1480 to c. 1534, "wears a helmet with a small lion perched on top and holds a broken column — all intended as references to power, endurance, and strength."[93]

Fortitude was often depicted wearing a lion skin as a trophy, especially in Italy.[94] Giotto did so in his fresco of Fortitude in the Scrovegni Chapel, painted in 1305.[95]

Mora's *Fortitude* is a man with muscled arms, a bare muscled chest, bare feet, four braids and a beard. He holds a club in his right hand. He wears a patterned fabric skirt decorated with animal skins with claws still attached. Because it is *Fortitude*, it is almost certainly a lion skin.

While Fortitude does not commonly carry a club, as Mora's *Fortitude* does, Ricci did paint her with a club in the early 1700s (along with a lion on her shield).

Whoever decided to depict Fortitude as a man broke a major tradition. Fortitude is a woman, an exceedingly strong one. In the Middle Ages, she was portrayed trampling lions or tearing their jaws open, as Hercules did.[96] When she wears a lion's skin as a trophy, it means that she killed it, not that it was a gift to her.

87. Cesare Ripa, *Baroque and Rococo Pictorial Imagery: The 1758-60 Hertel Edition of Ripa's 'Iconologia' with 200 Engraved Illustrations 149* (Edward A. Maser ed., 1971).

88. North, *supra* note 832, at 200.

89. Resnik & Curtis, *supra* note 57, at 347.

90. *Id.*

91. World Gallery of Art, https://www.wga.hu/art/r/ricci/sebastia/3/maruce08.jpg (last visited Nov. 9, 2020).

92. The Declaration of Independence, para. 2 (U.S. 1776).

93. Resnik & Curtis, *supra* note 57, at 10-11.

94. Jennifer O'Reilly, *Studies in the Iconography of the Virtues and Vices in the Middle Ages* 198 (1988); Resnik & Curtis, *supra* note 57, at 347, 590 n.137.

95. Resnik & Curtis, *supra* note 57, at 590 n.137; Web Gallery of Art, *supra* note 91.

96. O'Reilly, *supra* note 94, at 198.

An observer might be tempted to credit Clough, Mora or whoever made decisions about this installation for equalizing the number of female and male statues in the Great Hall.[97] However, the Great Hall has eight female and eight male statues because *Fortitude* and *Wisdom*, traditionally depicted as women, were changed into men. (*Law*, which was a woman as a maquette in 1893, became a man as a statue in 1894.) The Great Hall equalizes the number of female and male statues not by elevating the importance of female depictions, but by slighting them. This equalization derogated from the artistic tradition and ultimately from edification of the living women and men who have passed the statues.

Some of the cardinal virtues' attributes — *Temperance's* bridle, *Prudence's* snake, *Justice's* sword and scales, and *Fortitude's* lion — appear later in the Great Hall. (Because the installation has sequences, "later" is the appropriate word, not "again.")

The Great Hall's Second Configuration: Paired Opposites

When Giotto painted frescoes of the cardinal and theological virtues in the Scrovegni Chapel, he painted seven vices opposite them.[98] The Great Hall does something similar, although in a more limited fashion.

Continuing from right to left on the north wall after the cardinal virtues are *Punishment* and *Guilt*. Directly across the Great Hall from them, on the south wall, are *Reward* and *Innocence*. These four statues thus have four connections: *Guilt* and *Punishment* are next to each other, indicating that one leads to the other. *Innocence* and *Reward* are also next to each other, also indicating that one leads to the other. *Guilt* and *Innocence* are across the Great Hall from each other, signaling that they are opposites. *Punishment* and *Reward*, opposites, are also across from each other.

To emphasize that the two paired opposites are a set, the pairs are closer to each other than the other statues are. *Punishment* and *Guilt* are about three feet from each other on the north wall; so are *Reward* and *Innocence* on the south wall. Other statues in the Great Hall are about nine feet apart.

Punishment

Punishment is the second bare-chested figure in the Great Hall. He holds leg shackles or manacles in his right hand, and in his left, an intimidatingly large axe. As Edward A. Maser has written: "The axe is, of course, an old symbol for punishment: the lictors' rods in ancient Rome were bound around an axe to indicate the power of the state to chastise and kill as punishment for crimes."[99]

Such a bundle of an axe and lictors' rods appears on the Suffolk County Courthouse over the entrance. Designed by John Paramino, the figure on the left holds the bundle, called a fasces.[100]

Punishment is a part, a sub-virtue, of Justice, wrote Cicero and de Insulis.

Guilt

Mora's *Guilt* is male, hooded, scowling, downcast and barefooted. In his left hand, he holds a dagger, concealed by his right.

The right-to-left sequence on the north wall, of *Temperance, Prudence, Justice, Fortitude, Punishment* and *Guilt*, creates two minor sequences, whether intentional or not: the only two bare-chested statues are next to each other, *Fortitude* and *Punishment*. And the only four statues who hold weapons stand in a row: *Justice* holds a sword; *Fortitude*, a club; *Punishment*, an axe; and *Guilt*, a dagger.

Innocence

On the south wall of the Great Hall (see the sign in bronze-colored letters, "South Elevator"), Mora's *Innocence* is a maiden holding her hands over a font. It resembles a baptismal font. The fingers of one hand might be dipping into the water. She wears a headband of flowers. Her feet are bare. Behind her is a lamb, the traditional symbol for innocence. For example, Jean-Baptiste Greuze's painting *Innocence* portrays a young woman holding a lamb. The painting, circa 1790, is in London's Wallace Collection.

Innocence, a trait associated with legal systems, is a part, a sub-virtue, of the virtue of Justice.[101]

When Cesare Ripa, an Italian, catalogued and attempted to standardize the attributes of a long list of virtues in his book *Iconologia*, he included Innocence.[102] Maser, summarizing Ripa's 1603 edition, wrote:

> The personification of Innocence is a sweet small young girl, robed in virginal white, and with flowers in her hair, who stands washing her hands in a basin....At her feet sits a large lamb.
>
> Youth is the age of innocence. Her ablutions indicate freedom from blemish of any kind, physical or spiritual.... The lamb, a symbol of Christ, is also that of innocence and purity.[103]

That is an apt description of Mora's *Innocence*.

97. Cronin, *supra* note 53, at 15-16.

98. Andrew Ladis, *Giotto's O: Narrative, Figuration, and Pictorial Ingenuity in the Arena Chapel* 17, 19 (2008).

99. Ripa, *supra* note 87, at 60.

100. John F. Paramino, "Renowned Sculptor, 67, Dies in Wellesley," Bos. Globe, Oct. 6, 1956, at 14.

101. Tuve, *supra* note 61, at 443.

102. *Id.* at vii-xi.

103. Ripa, *supra* note 87, at 163.

To portray a virtue with a font is somewhat self-referential and circular because personifications of the virtues often decorate baptismal fonts.[104]

Reward

To the left of *Innocence* is *Reward*. He holds two laurels, an ancient symbol for victory.[105] One is in his left hand; the other is around his right forearm. With his right hand, he holds a lowered herald trumpet with a banner attached to it. He wears a patterned tunic, a necklace with a cross, and some sort of cap. He is a medieval herald, according to the *Boston Globe* article of Aug. 12, 1894.[106] The writer in 1894 seems to have been unaware that the statue represented a virtue.

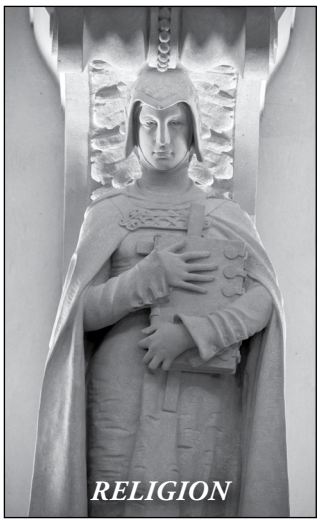
In his *Iconologia*, Ripa wrote about Reward as a man. Whoever decided that Mora should sculpt Reward as a man followed this tradition. When Gottfried Eichler the Younger, a German, illustrated an edition of Ripa's book,[107] he portrayed Reward with two laurel wreaths, as Mora did, but not a herald trumpet.[108]

Equity

To return to the north wall, the last statue, Mora's *Equity* holds a long thin cornucopia in her left hand, out of which fruit spills. With her right hand, *Equity* clutches over her heart a small set of scales, which, like Mora's *Justice*, she wears. A cornucopia of course symbolizes abundance. The connection with law is that abundance is a result of commerce, and commerce thrives under equity and the rule of law.[109]

The virtues of Equity and Justice are interrelated and their attributes sometimes overlap.[110] Justice sometimes holds a cornucopia.[111] Equity sometimes holds a plumb-line, a line with a weight at the end, used to measure depth, and representing taking the measure of people and their cases.[112] Thus, Equity is sometimes given a measuring device, as is Justice.[113] In the Great Hall, both *Equity* and *Justice* wear the measuring device of scales.

A depiction of Equity appears in the U.S. Supreme Court's courtroom, a winged woman holding scales (but no cornucopia). She and other allegorical figures are on the North Wall Frieze, a carved band, designed by Adolph A. Weinman.[114] The building was completed in 1935.[115]



Another *Equity* holds a stout cornucopia (but no scales) on the courthouse in Manhattan where the Supreme Court for New York County sits. (When it opened in 1927, it was the New York County Courthouse.) *Equity* is one of three statues by Frederick Warren Allen, standing on the typanum, the triangle over the entrance.[116]

Among the personified virtues, Equity seems to be minor. For example, Ripa, in his attempt to standardize portrayals of the virtues in the late 16th and early 17th centuries, did not catalogue Equity.[117] Equity is not a part of any of the cardinal virtues, according to Cicero, Macrobius, Guillaume de Conches and Alanis de Insulis,[118] although it has been "linked to Cicero's conceptions of Temperance."[119]

It is unclear why Mora carved *Equity* as a demi-figure.[120] One can see only two sides of her, front and left, although her face is not split. Her gaze is less penetrating and her face is less expressive than other statues, except for the statue of *Right*, who is across the Great Hall from her and is the other demi-figure in the installation.

Other Virtues: Wisdom, Religion and Reason[121]

Opposite *Equity* on the south wall is *Right*, which we will discuss later. Continuing counter-clockwise, we have already discussed *Innocence* and *Reward*. Next is *Wisdom*.

Wisdom

Mora's *Wisdom* is bald, thus equating wisdom and age. With his left hand, he strokes his long beard. With his right, he holds the torch of thought and research, according to the 1894 article in *The*

104. North, *supra* note 82, at 188 n.27, 192.

105. Ripa, *supra* note 87, at 140.

106. "Grand Hall of the New Court House," *supra* note 6.

107. Ripa, *supra* note 87, at xi.

108. *Id.* at 140.

109. Resnik & Curtis, *supra* note 57, at 347.

110. *Id.* at 62, 384, n.28.

111. *Id.* at 9, 22, 347.

112. Tuve, *supra* note 61, at 69.

113. Resnik & Curtis, *supra* note 57, at 384, n.28.

114. "Courtroom Friezes: South and North Walls," U.S. Sup. Ct., https://www.supremecourt.gov/about/northandsouthwalls.pdf (last visited Nov. 9, 2020).

115. "The Supreme Court Building," U.S. Sup. Ct., https://www.supremecourt.gov/about/courtbuilding.aspx (last visited Nov. 9, 2020).

116. New York County, *supra* note 33; "New York County Supreme Courthouse, Manhattan, Acroteria Statues, abt 1924," Frederick Warren Allen, https://fwallen.com/portfolio/new-york-county-supreme-courthous/ (last visited Nov. 9, 2020).

117. Ripa, *supra* note 87.

118. Tuve, *supra* note 61, at 443.

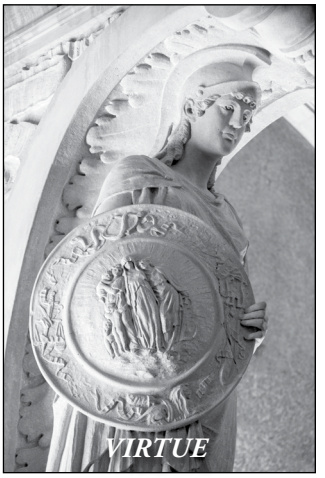
119. Resnik & Curtis, *supra* note 57, at 384 n.28.

120. The reason possibly has to do with the courthouse's infrastructure. Recall that the Great Hall was designed without statues. See text accompanying note 53. An early drawing of the Great Hall shows two pairs of corbels, without statues, closer to each other than other corbels. *See* text accompanying note 99. These two pairs of corbels were later used to create the configuration of paired opposites; the distances between corbels were not shortened to create the paired opposites. The reason for the different distances was possibly to accommodate infrastructure. So, too, the demi-corbels on which the demi-figures were later carved possibly reflected a decision about infrastructure.

121. If a configuration exists for *Wisdom, Religion* and *Reason*, or a configuration exists for those three virtues combined with *Innocence* and *Reward*, all on the south wall, the author has been unable to discern it.

Boston Globe. He is so lost in thought that he is oblivious that the lit torch is next to his robe. Thirty other torches, in bas-relief, appear in the Great Hall on the sides of the corbels that the statues are attached to.[122]

The personification of *Wisdom* has been feminine since antiquity. The Great Hall breaks that tradition by depicting *Wisdom* as a man. Wisdom is not a part of any of the four cardinal virtues, according to four leading cataloguers of virtues' parts, Cicero, Macrobius, de Conches and de Insulis.



Religion

Mora's *Religion*, a woman, holds a large Bible and, behind and almost hidden by the Bible, a large cross. She wears the coif of a nun, according to the 1894 *Boston Globe* article — which would make her a nun. A coif is a cap; it was a traditional part of a nun's habit. The message is unmistakable: Religion equals Christianity.

The virtue Religion is a part of the virtue Justice.[123]

Reason

Mora's *Reason* is a woman wearing a star on her head; it is the star of truth, according to the 1894 *Globe* article. She holds a triangle and, behind that, a square, "demonstrating a geometrical problem," wrote *The Boston Globe.*

Reason is a part of Prudence, according to some authorities, Macrobius and de Insulis.[124] Ripa did not catalogue Reason.[125] The author has been unable to determine if Reason is typically personified as a woman.

Of the non-cardinal virtues personified in the Great Hall, three are parts of Justice (Punishment, Innocence and Religion), one is part of Prudence (Reason), and three are not parts of any cardinal virtue (Equity, Reward and Wisdom).

Virtue Herself and the Three Theological Virtues

Mora's *Virtue* represents the overarching virtue, an amalgamation of the most important virtues. *Virtue*, a woman, wears a helmet with a crest. She holds a shield, as if protecting virtue itself. It is possible that *Virtue* is pregnant (view her from her left) and that she shields her belly.

The shield is a piece of art on its own, an allegorical world in miniature, and just might be the most fascinating part of Mora's installation. The edges of the shield are decorated with what appear to be ribbons or banners. If the shield were a clock face, at "9:00," a set of scales and a sword are carved. They represent Justice. At "6:00," a recumbent lion faces right. Although the bottom half of its body seems to be a lizard, this lion is a short-hand representation, a symbol, of Fortitude. At "12:00," entwined with the ribbons or banners, a snake faces left — a symbol of Prudence. It is unclear, at least to the author, what is carved at "3:00." But the process of elimination reveals it to be a bridle, the leading attribute of the remaining cardinal virtue, Temperance.

A similar, but apparently rare, use of visual synecdoche — a part standing for the whole, an attribute representing a personified virtue, rather than helping identify her — appears in the Amsterdam Town Hall. Carved under the archway leading to the Magistrates' Chambers are a sword, a bridle and a lion's pelt[126] representing Justice, Temperance and Fortitude.

Thus, the statue *Virtue* represents an amalgamation of the four cardinal virtues — and is rare, if not singular. The author is unaware of any other portrayal of Virtue. However, *Virtue* represents more than an amalgamation of the four cardinal virtues. She also presents the three theological virtues.

The Theological Virtues

In the center of the shield are three women, one of them a mother with three children. The mother holds a child. A second child hugs her with bare buttocks facing the viewer. A naked boy on the edge of the group faces out. The face of the woman in the center is draped with a hood. The woman on the right holds an anchor.

Hope

The anchor identifies the woman as Hope, the personification of one of the three theological virtues. In the Collégiale Sainte-Waudru in Mons, Belgium, Jacques du Broeucq's *Hope* is an alabaster statue of a woman with an anchor at her feet.[127] Du Broeucq, who lived in the 16th century, carved a series comprising the four cardinal virtues and the three theological virtues. The anchor as a symbol of hope derives from the Christian Bible, Hebrews 6:19, one translation of which is, "We have this hope as an anchor for the soul, firm and secure...."[128]

Charity

The three children identify the woman on the left of *Virtue's* shield as *Charity*, who is portrayed with children, often three. For example, *Charity*, a mid-16th-century alabaster statue by the circle of Jacques du Broeucq, has three children, two of whom she holds. The work is in the Metropolitan Museum of Art in New York.[129] Du Broeucq's *Charity* in the Collégiale Sainte-Waudru holds two children.[130]

122. Each of the 16 statues is attached to a corbel. However, *Equity's* and *Right's* corbels display only one side, reducing the total number of torches to 30.

123. Tuve, *supra* note 61, at 443.

124. *Id.*

125. Ripa, *supra* note 87.

126. Eymert-Jan Goossens, *Treasure Wrought by Chisel and Brush: The Town Hall of Amsterdam in the Golden Age 66* (1996).

127. Web Gallery of Art, https://www.wga.hu/ (last visited Nov. 9, 2020).

128. "Hebrews 6:19" (New International Version).

129. Web Gallery of Art, https://www.wga.hu/ (last visited Nov. 9, 2020).

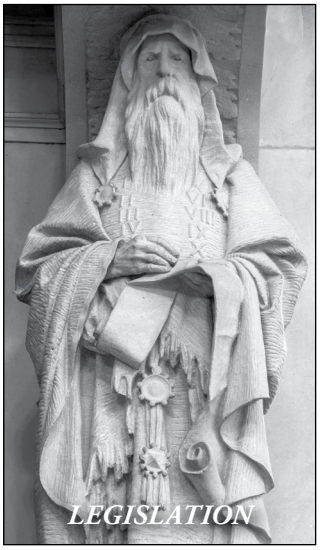
130. *Id.*

Faith

That leaves *Faith* in the center. While du Broeucq's 16th-century *Faith* holds a goblet and stands over a recumbent dog,[131] Mora's *Faith* holds no attribute and is not with an animal to identify her. However, the process of elimination reveals that this figure is Faith. Faith is not typically depicted with draped eyes. Mora's depiction might indicate that her faith is blind.

Beams of light radiate from behind the personifications of the three theological virtues. Whoever decided to make the Great Hall's installation hinge on the four cardinal virtues decided to work the three theological virtues, unlabeled, into the Great Hall, recreating a common set of seven virtues.

Were the three theological virtues unlabeled and miniaturized to hide them in plain view? It is unknown. However, little reason existed to have hidden the theological virtues. A very public 16-foot *Charity* presided over City Hall Annex, now called alternatively the Old City Hall Annex and the Boston School Committee Building, at 26 Court Street. It is so close to the John Adams Courthouse that when one stands across the street from the building, one can see the courthouse. The Annex's *Charity*, who held one baby, was named and described (although not as a theological virtue) around the time of its installation in publications that included *The Boston Globe* and a City of Boston document.[132] *Charity*, along with *Law and Order, Education* and *Industry*, were designed by Roger Noble Burnham and installed over the building's four columns around 1914. They were removed in the 1950s because of fears that they would not remain safely in place.[133]



The Great Hall's Third Configuration: Scroll Holders in the Corners

The three remaining statues are not part of the tradition of personifying virtues.

Law

The first statue in the installation (the first one on the right [north wall] upon entering the Great Hall from Pemberton Square) is *Law*, a male figure. According to the 1894 *Boston Globe* article, he is a Roman senator, who wears a toga and holds a scroll of the law. He wears sandals and some sort of cap. He also holds a staff. On his left is a low wall-like slab, the only structural element carved next to a statue in the Great Hall.

Right

Diagonally across from *Law* is *Right*, a male demi-figure who holds a long scroll. It is captioned "Si Quis," Latin for "If anyone," as in "If anyone does ___." Under the caption is a list of Roman numerals from I to XII, which represent the Twelve Tables of Roman law, a codification.

According to the Roman historian Livy, the Twelve Tables of Roman law were bronze. Modern sources think that they were wood.[134] They stood in the Forum in Rome. The surviving textual fragments relate largely to civil law and procedure.[135]

Legislation/Moses

On the same (south) wall as *Right* is *Legislation,* in the opposite corner, the last statue in the installation. *Legislation* is Moses, and Moses is *Legislation*. Moses transmitted from God an early codification of legislation included in the Hebrew Bible, according to an important narrative in Western civilization. Mora's *Legislation* is bearded — as Moses is invariably portrayed — and wears what may be a prayer shawl over his head and shoulders. In any case, his garment is heavily fringed and has the Roman numerals I through X on it, representing the Ten Commandments. With one hand, *Legislation*/Moses holds an unrolled scroll. He touches the scroll with his other hand.

As with *Justice* and *Equity,* who wear their attributes (scales of justice), *Legislation* wears Moses' Roman numerals I through X, an allusion to Moses' typical attribute in the visual arts, the tablets of the law.

Courthouses across the country — and across the Atlantic Ocean — depict Moses, alone or with other statues of lawgivers or virtues. On the Four Courts Building in Dublin, dating from the late 18th century, Moses is one of the statues on the roofline. (The other surviving statues sculpted by Edward Smyth are *Justice, Mercy, Authority* and *Wisdom*.[136])

Moses is the central figure in the pediment of the U.S. Supreme Court building's east façade. Moses balances a tablet of the law on each side of him. (To the left is Confucius, the political philosopher who influenced Chinese law. To the right is Solon, the Athenian legislator and lawgiver.) They were carved by Hermon A. MacNeil in 1935.[137]

Inside the U.S. Supreme Court's courtroom, Moses is also depicted in friezes by Weinman, along with other lawgivers and legal notables. (They are Menes, Solomon, Lycurgus, Solon, Draco,

131. Web Gallery of Art, https://www.wga.hu/ (last visited Nov. 9, 2020).

132. "Art Commission Approves Models for Figures for the Court-St Facade of the City Hall Annex," The Bos. Globe, Jan. 6, 1913, at 5; D. B. Adams, "The Production in Concrete of Statues for Boston's New City Hall Annex," 4 Concrete-Cement Age 222 (May 1914); I Documents for the City of Boston for the Year 1915 In Four Volumes 28 (1916).

133. Anthony Mitchell Sammarco, *Boston: A Historic Walking Tour 64* (2013).

134. Olga Tellegen-Couperus, *A Short History of Roman Law* 20 (1990); Hans Julius Wolff, *Roman Law: An Historical Introduction 55* (1951).

135. Tellegen-Couperus, *supra* note 134, at 21.

136. "The Four Courts," Cts. Serv., https://web.archive.org/web/20061013011612/http://www.courts.ie/courts.ie/Library3.nsf/pagecurrent/C405A2905C07523880256DA900495EE2#Exploring_the_Four_Courts (last visited Nov. 10, 2020).

137. "The East Pediment, Information Sheet," U.S. Sup. Ct., https://www.supremecourt.gov/about/East_Pediment_11132013.pdf (last visited Nov. 10, 2020).

Confucius, Octavian, Justinian, Muhammad, Charlemagne, King John, Louis IX, Hugo Grotius, William Blackstone, John Marshall and Napoleon.[138])

To give two last examples of many, in 1902, roofline statues of lawgivers, including Moses, were installed on the New York State Supreme Court, Appellate Division, First Judicial Department, in New York. (The other lawgivers: Lycurgus, Solon, Justinian, Manu, Alfred the Great, Louis IX, Moses, Zoroaster and Muhammad.) They were carved by various artists.[139] Next door to the John Adams Courthouse, Moses appears (without other lawgivers) over the entrance to the Suffolk County Courthouse. He is the right figure in the trio.

Although the Hebrew Bible describes the original Ten Commandments as written on stone tablets, a small but significant artistic tradition depicts Moses holding not tablets, but a parchment scroll — as Mora's *Legislation* does. The tradition of depicting Moses with a parchment scroll, rather than the tablets of the law, apparently originated in Byzantine; it eventually reached Europe and Rome. The tradition comprises examples from the fifth through 14th centuries.[140] In depicting Moses with a scroll, Mora did not break the tradition of depicting him with tablets so much as invoke a less prominent tradition involving a scroll.

In the John Adams Courthouse, the three personifications of non-virtue concepts, *Law, Right* and *Legislation*, all hold scrolls — the only statues in the Great Hall to do so — and are in the corners. Two of them have Roman numerals that represent legal codifications — *Right* and *Legislation* — and are at opposite ends of the south wall. Creating this configuration — scroll-holders in the corners — required some effort. A scroll was forced into *Right's* hand, even though the Twelve Tables of Roman law are remembered as tablets. Similarly, a scroll was forced into the hands of Moses, whose typical props are also tablets.

The Tradition of the Virtues Continues

The Great Hall's statues are fairly late depictions of the virtues, centuries after most of their predecessors.[141] The statues, however, are certainly not the last depictions. The cardinal virtues appear in bas-relief on the exterior of the Palace of Justice, a courthouse in Porto, Portugal,[142] which was erected in 1961.[143]

In 1985, muralist Caleb Ives Bach created a pair of paintings, one personifying virtues, one, vices, called *The Effects of Good and Bad Government.* The virtues include the four cardinal virtues, the three theological virtues, and two others, labeled in Latin. The theological virtues are portrayed with angels' wings. The opposing vices have devils' bat-like wings. The paintings hang — in a courthouse, the William Kenzo Nakamura Federal Courthouse in Seattle, Washington.[144]

In 1997, Megan Jenkinson, a photographer from New Zealand,[145] portrayed the cardinal, theological and other virtues in an exhibit and book, *Under the Aegis: The Virtues.* Jenkinson portrays Innocence, for example, as two hands holding a bar of soap above an old-fashioned sink with separate faucets with ceramic medallions, marked "Hot" and "Cold." A metal stopper lies between the faucets, chained to the sink — whose brand name is "Perfection." A black-strapped garment rests to the left of the hands. The heading for Innocence, using the Latin, is "Innocentia, Fallen on Hard Times, Washes Her Hands of the Corruption of the Body."[146]

The Three Most Important Statues

Whoever decided the configuration of the Great Hall told us the three most important statues in the Great Hall. The first is *Virtue*, whose shield practically summarizes the rest of the statues, and by adding the theological virtues, puts the cardinal virtues and their parts in a larger composition.

The second is *Justice*, which is not surprising for a courthouse. A few things signal her importance. *Justice* stands toward the center of the north wall.[147] The Great Hall presents three parts of Justice — Punishment, Innocence and Religion — whereas the Great Hall presents only one part of one other cardinal virtue: Reason, which is a part of Prudence. Thus, while the Great Hall honors the original tradition of presenting all four cardinal virtues, it also continues the later tradition of favoring Justice.

The Palace of Justice in Porto did something comparable in that it presents all four cardinal virtues while emphasizing Justice. Euclides Vaz carved personifications of the four cardinal virtues in bas-relief on the courthouse's exterior in 1961. In front of the panels that depict the cardinal virtues is a freestanding statue of Justice, probably in bronze, by Leopoldo de Almeida. Thus, Justice is represented twice.[148]

138. U.S. Supreme Court website, *supra* note 115.

139. Resnik & Curtis, *supra* note 57, at 117.

140. Gad B. Sarfatti, *The Tablets of the Law as a Symbol of Judaism, in The Ten Commandments in History and Tradition,* 383, 390-91 (Ben-Zion Segal & Gershon Levi eds., 1990).

141. Elizabeth Eastmond, *Megan Jenkinson's Library of Uncertainties: The Virtues at Sea, in Under the Aegis: The Virtues* (Peter Shand ed., 1997), at 105, 107 ("The Virtues were especially prominent within the visual arts of the west in the twelfth and thirteenth centuries.").

142. "Palácio da Justiçia — Porto," The City Tailors, http://thecitytailors.com/en/palacio-da-justica-porto/ (last visited Nov. 10, 2020).

143. "Tribunal da Relação do Porto," https://www.trp.pt/historia-da-relacao-do-porto (last visited Nov. 10, 2020).

144. Resnik & Curtis, *supra* note 57, at 30-31.

145. Wilson, *supra* note 80, at 155.

146. *Id*. at XVIII.

147. *Justice*, like *Religion*, is approximately 32 feet, nine inches from the east end (Pemberton Sq.) of the Great Hall and approximately 36 feet, eight inches from the west end (Somerset St.). It was possible to roughly center the two statues on their respective walls, even though the total number of statues on each side is an even number, because the spacing between the corbels is not equal. *See* text accompanying note 99.

148. The City Tailors, *supra* note 142.

The third of the most important statues in the Great Hall is *Religion*. She stands toward the center of the south wall. And *Religion* is triumphant. She is at the center of a network of virtues. Writers have long considered the virtues to be interrelated and interactive.[149] *Religion* interacts with *Justice*, of which she is part and across from whom she stands; they even wear similar shoes. The cross she holds relates to the cross that *Reward* wears around his neck. The Bible (including the New Testament) that she holds relates to the Ten Commandments (Old Testament) that *Legislation* wears.[150] *Religion* interacts with the unmarked theological virtues on *Virtue's* shield next to *Religion*, and the religious symbolism of *Innocence's* font and sheep. *Innocence, Reward, Virtue* and *Legislation* are all on the south wall with *Religion*.

Various writers, philosophers and theologians have selected the most important virtue. Nominees have included Temperance, Prudence, Justice, Wisdom and Peace.[151] Whoever decided which virtues to depict in the Great Hall and how and where to depict them nominated Justice and Religion as the most important ones.

The Statues' Contexts and Possible Contexts

Religious Context

The Great Hall's allegorical statues constitute an installation of religious art. Religion infuses the installation. Religion is both latent and blatant.

Portraying the four cardinal virtues by themselves would arguably constitute religious art, so long have they been Christianized — since the 4th century.[152] However, they are not portrayed by themselves. They are grouped with the theological virtues, confirming their religiosity. A separate virtue, Religion, is depicted. And *Religion* holds a Bible and a Christian cross, and is probably a nun. *Innocence* stands with what is probably a baptismal font and a lamb, a symbol of Jesus.

While Moses is sometimes depicted in and on other courthouses as part of a tradition of lawgivers, other lawgivers do not appear in the John Adams Courthouse. And the law Moses is depicted with is the Ten Commandments, almost all of which are religious laws.

If Morse, the courthouse commissioner who was Jewish, objected to the installation's Christian imagery, the author has been unable to find a record of it.

How should we put into perspective a religious installation in not merely a public building, but in a courthouse, where attention to impartiality is especially acute, a courthouse whose Great Hall has not one, but two personifications with sets of scales in balance?

Domingo Mora, left, sculptor of the Great Hall's statues, in his studio, Perth Amboy, N.J., circa 1892. On the right is his son, F. Luis Mora. Starting behind and to the left of Luis' head is a row of seven small maquettes (models) of Great Hall statues. From left to right: Equity*; unknown;* Reward*; probably* Guilt; Religion; Virtue; *and* Reason. *Four more maquettes hang in the same row, obscured behind other sculptures. To the right of Luis' legs is a bag marked, "[Perth] Amboy [Ter]ra Cotta C[ompany]." The open door and F. Luis's tank top indicate that this is summer. (Domingo and F. Luis Mora in Domingo's studio. F. Luis Mora papers, 1891–1986. Archives of American Art, Smithsonian Institution.)*

What should we think? What, if anything, should we do? The author leaves that to other commentators and actors for now. That is beyond the scope of this article.

Cathedral Context?

With the advent of modern security, the renovation of the courthouse and the departure of trial courts from the courthouse, which reduced the internal bustle, the Great Hall is no longer an interior street. Now its resemblance to the nave (the long aisle) of a cathedral, whether Clough intended it or not, is more apparent. The lavishly decorated ceiling is reminiscent of a cathedral's. The stairs to the second floor evoke the approach to an altar. The lamps, each with three branches and orbs, flanking the bottom of the stairs, evoke candelabras.

Various factors give the statues the appearance of a row of penitents, especially to an observer on the stairs leading up from the Great Hall. The statues on their corbels are tipped slightly forward. The scrolls above their heads nudge their heads slightly downward. Some statues look downward, including *Wisdom*, who is lost in

149. Resnik & Curtis, *supra* note 57, at 346.

150. That *Religion* is centrally located on the south wall, while *Moses* is in the corner, may symbolize the triumph of the New Testament over the Old Testament. John Singer Sargent's murals in the Boston Public Library, *The Triumph of Religion*, installed between 1895 and 1919, portray the triumph of Christianity over Judaism. *See* Sally M. Promey, "Painting Religion in Public: John Singer Sargent's *Triumph of Religion* at the Boston Public Library" (1999).

151. Resnik & Curtis, *supra* note 57, at 12.

152. *Id*. at 383 n.26.

thought, and *Temperance*, who looks into her mirror.

Cathedrals whose naves are lined with statues include the Palermo Cathedral[153] and, in the Vatican, the Basilica di San Giovanni in Laterano.[154] Also in the Vatican, the nave and transept of St. Peter's Basilica are decorated with not simply statues, but statues of the four cardinal virtues, the three theological virtues and 21 other virtues.[155] The transept is the shorter aisle, at a right angle to the nave, creating a cross. The personifications of the virtues in St. Peter's are elevated, as in the John Adams Courthouse, but they are not upright; they recline in the spandrels. The spandrels are the roughly triangular spaces on either side of the arches lining the nave and transept. *Faith* holds a cross and book,[156] as does Mora's *Religion*. *Innocence* appears with a lamb,[157] as does Mora's *Innocence*. *Charity* has three naked children,[158] as does *Charity* on the shield of Mora's *Virtue*. Sixteen allegorical statues appear in St. Peter's nave until it meets the transept, the same number as in the John Adams Courthouse.

Both Clough and Mora may have been familiar with St. Peter's and other cathedrals. Mora studied in Rome.[159] In August 1881, Clough took a two-month leave of absence from his position as city architect to sail from New York "to visit the leading schools of architecture and various buildings of note in European capitals in the interest of his professional experience," as a newspaper reported.[160]

Racial Context?

All the statues in the Great Hall appear to represent Caucasians, with one possible exception. Yet they may have an undiscovered racial context. The statues "represent the development of the races through the ages,"[161] wrote Oswald Speir, shortly after Mora died. Speir did not elaborate on the subject in a five-page appreciation and review of Mora's life. Speir was an architect who, like Mora, worked at the Perth Amboy Terra Cotta Company.[162] His appreciation indicates that he knew Mora personally and had visited his studio, so this enigmatic and passing assertion may have some lost truth. Another racial undertone to the statues is the report in *The Boston Globe* in 1894 that *Prudence* is "oriental"[163] — even though she appears Caucasian.

If the Great Hall's statuary has a racial context, that would have been consistent with the zeitgeist. Racial depictions played a role in two major showcases of architectural sculpture in that era. One was the Library of Congress. In 1891, William Boyd and Henry J. Ellicott carved *The Ethnological Heads*, 33 human heads on keystones of the library, to represent the major races of the world, as identified by an ethnologist, Otis T. Mason.[164] The other showcase was the World's Columbian Exposition in Chicago in 1893. A sculpture, *The Four Races Supporting the Horoscope, The Seasons, and Abundance*, by Philip Martiny, topped the Agricultural Building.[165] It is unknown when Mora received the commission for the statues and therefore when he designed them, but it was roughly in the early 1890s.

Domingo Mora in his Perth Amboy Studio, circa 1893, shows a full-size and detailed maquette of Reward to his family. It was later carved in place in the Great Hall. From left to right: Domingo Mora; Facundo Bacardi, Domingo Mora's brother-in-law and member of the Bacardi Rum family; Jo Mora, Domingo's son; F. Luis Mora, his son; and Laura Mora, his wife. (Bacardi married Laura's sister.) Behind the family are less detailed maquettes. From left to right: Probably Guilt, Prudence, Temperance *and* Law. Prudence, Temperance *and* Law *stand in the Great Hall in that sequence. The model to the left of* Reward *is probably not of a statue in the Great Hall. Over the model's shoulder can be seen the corbel (bracket) of a maquette for a Great Hall statue.* Reward *is taller than Mora. In front of* Reward *is a low bench with clay on it. (Photograph appears in* F. Luis Mora: America's First Hispanic Master *by Lynne Pauls Baron (2008).)*

153. https://www.google.com/search?hl=en&tbm=isch&q=palermo+cathedral&chips=q:palermo+cathedral,g_1:inside:A9N2vOd-wv0%3D&usg=AI4_-kTY8zt4mJkkSbOCaC2-IGihsYBP7g&sa=X&ved=0ahUKEwivppfN2IjkAhWGc98KHTc-Bd0Q4lYIKygB&biw=812&bih=599&dpr=1#imgrc=G9MLbRXIvFq4LM:&spf=1566003230222.

154. "Archbasilica of Saint John Lateran," Wikipedia, https://en.wikipedia.org/wiki/Archbasilica_of_Saint_John_Lateran#/media/File:Lazio_Roma_SGiovanni1_tango7174.jpg (last visited Nov. 10, 2020).

155. "The Allegory Statues," St. Peters Basilica. Info, http://stpetersbasilica.info/Interior/Virtues/VirtuesMap.htm (last visited Nov. 10, 2020).

156. http://stpetersbasilica.info/Interior/Virtues/Faith-22.jpg (last visited Nov. 10, 2020).

157. http://stpetersbasilica.info/Interior/Virtues/Innocence-23.jpg (last visited Nov. 10, 2020).

158. http://stpetersbasilica.info/Interior/Virtues/Charity-21.jpg (last visited Nov. 10, 2020).

159. "A New Sculptor at Work on Mr. Cairns Friezes on Trinity Church: The Great Scheme of Decoration Approaching Completion," *supra* note 24.

160. "City and Suburbs: About Town," Bos. Daily Advertiser, Aug. 2, 1881, at 8.

161. Speir, *supra* note 11, at 30. This assertion was repeated without more details in a book published in Uruguay in 1939. Ernesto Laroche, *Algunos: Pintores y Esculotes [Some Painters and Sculptors]* 156 (1939).

162. 75 No. 2 The Clay-Worker 153 (Feb. 1921).

163. "Grand Hall of the New Court House," *supra* note 6.

164. James M. Goode, *The Outdoor Sculpture of Washington, D.C.: A Comprehensive Historical Guide* 74 (1974).

165. Michele H. Bogart, *Public Sculpture and the Civic Ideal in New York City 1890-1930,* 43 (1989) (citing Letter from Franklin W. Hooper to McKim, and White (April 8, 1907), in McKim, Mead and White letter books, 6-2A, N.Y. Historical Society.

Freemasonry Context

The cardinal virtues, the theological virtues[166] and other virtues are significant to not only Christians, but Freemasons as well. A leading dictionary of Freemasonry has entries for the "cardinal virtues," and separately for Charity, Faith, Fortitude, Hope, Justice, Prudence and Temperance.[167] Life-sized allegorical statues of the theological virtues, Charity, Faith and Hope, appear in three of the four corners of Corinthian Hall on the third floor of the Grand Lodge of Masons in Massachusetts, located at Tremont and Boylston streets in Boston; the statue in the fourth corner is Minerva, the Roman goddess of wisdom. The sculptor or sculptors are unknown. The statues stood in the previous Grand Lodge, before the current one was completed in 1899, according to the best available information.[168]

Clough, the courthouse's architect, was a Mason, although he left the Masons on Dec. 13, 1894,[169] shortly after the courthouse was completed.

As a Mason, he was familiar with the cardinal and theological virtues. He certainly saw the theological virtues in the Grand Lodge and may have seen the virtues depicted in Europe. Mora, too, may have seen them in Europe. Mora sculpted an allegorical frieze in a Masonic Temple in Trenton, New Jersey[170] — but it was about the development of the arts and sciences, not the virtues.[171]

At least one of the three courthouse commissioners, Godfrey Morse, was a Mason.[172] A second commissioner, Thomas J. Whidden, may have been a Mason at one time. One Thomas Whidden joined the Masons in 1853 and left in 1867.[173] The third commissioner, Solomon B. Stebbins, was not a Mason.[174]

Morse was Worshipful Master, that is the governing officer, of St. John's Lodge, a Masonic Lodge, in 1888, while the courthouse was being built. St. John's Lodge met in the previous Grand Lodge building in Boston. Thus, Morse, like Clough, was familiar with the virtues and saw the statues of the three theological virtues in the Grand Lodge.[175] Morse, who was Jewish, may not have objected to the depiction of Christian virtues in the Great Hall because they are also Masonic virtues.

Small hints exist of the Masonic influence on the Great Hall's statues. In 1893, a maquette of Mora's *Temperance* held a trowel, which is not a known attribute of the personified virtue. It is, however, a symbol of Freemasonry.[176] As carved in the Great Hall, *Temperance* holds her usual mirror.

Both *Temperance* and *Reason*, which are directly across from each other, have pendants hanging on the left side of their robes, which may or may not be plumb-lines. *Temperance* has a second pendant on her right. A plumb-line, a weight on a cord, not only measures depth, but it is also used in building construction and masonry to establish verticality — and is a symbol in Freemasonry.[177] *Reason* holds a square and triangle, which might be related to building construction, a theme of Freemasonry.

Clough's and Morse's membership in the Freemasons may have influenced the decision to depict the virtues in the Great Hall and the decisions about how to depict them.

Edification Context

In the era when the John Adams Courthouse was built, architects "took special care to place works" — the statues they oversaw — "in strategic positions that would require a sequential 'reading' of the components," Bogart wrote. An example is the Brooklyn Institute of Arts and Sciences, designed by McKim, Mead and White, and built between 1895 and 1915. The Institute's director "brought in a committee of leading scholars to decide on a suitable program for and placement of thirty monolithic statues atop the museum's four facades. Their decision took into account both the 'historical sequence and the relation between' various peoples 'whose genius' had contributed to Western civilization."[178]

The phrases "sequential 'reading'" and "monolithic statues" evoke the Great Hall, whose monolithic statues have configurations and sequences to read. The Great Hall's statues were certainly placed in "strategic positions" — not atop the building, but in an interior street that brought streams of people past the statues, not only people with business in the courthouse, but also those passing through.

166. W. Kirk MacNulty, *Freemasonry: A Journey Through Ritual and Symbol,* 19, 46 (1991).

167. Albert G. Mackey, *A Lexicon of Freemasonry; Containing A Definition of All Its Communicable Terms, Notices of Its History, Traditions, and Antiquities,* 49, 53-54, 101-102, 106, 140, 162-163, 274-275, 339 (1867).

168. Telephone Conversation with Walter H. Hunt, Librarian, Grand Lodge of Masons in Massachusetts (Sept. 6, 2019).

169. "George Albert Clough," Find A Grave, https://www.findagrave.com/memorial/121988983/george-albert-clough/photo (last visited Nov. 10, 2020). *The Boston Herald* mistakenly reported that he had been the Worshipful Master of the Washington Lodge of Roxbury. "City's First Architect: George A. Clough, Who Planned Many Notable Buildings, Dies at Age of 67," *supra* note 21. However, that was a different George A. Clough. *See* George Albert Clough, *supra* note 169 (showing death date in 1938).

170. Lansburgh, *supra* note 11, at 52.

171. Speir, *supra* note 11, at 29.

172. XX Harvard Graduates' Magazine 151 (1911-1912) ("News from the Classes," reporting Morse's death).

173. Telephone conversation with Hunt, *supra* note 168 (Sept. 13, 2019).

174. *Id.*

175. *Id. See* text accompanying note 169.

176. Mackey, *supra* note 167, at 360; Daniel Béresnia*k, Symbols of Freemasonry,* 54 (2000).

177. Mackey, *supra* note 167, at 258. A plumb-line can also establish horizontality in combination with a triangle, such as the one that Reason holds. A plumb-line suspended from the triangle's apex will divide the base exactly in half if the base is horizontal. Béresniak, *supra* note 176, at 54.

178. Bogart, *supra* note 18, at 164. *See also id.* ("In designing their buildings, especially the facades, architects worked out detailed thematic programs for sculpture, sometimes in consultation with sculptors, but more often with eminent scholars.") No record or hint exists that any scholars consulted with Clough or Mora. Clough and Morse possibly drew on their knowledge, as Freemasons, of the virtues.

The statues of the era were not merely installations. Bogart calls them "architectural sculpture programs" with "audiences."[179] Recall that in 1890, *The Boston Globe* reported that people went to view the allegorical statues atop the Post Office building.[180] "Edifying as they were intended to be," it is hard to know how much "the general public understood the messages."[181] It is hard to know if judges and lawyers understood the imagery in the Great Hall better than the general public and boarders on Beacon Hill who swarmed through the Great Hall on their way to and from work. "[N]ineteenth-century middle-class audiences...apparently needed assistance to interpret both the more complex and elaborate turn-of-the-century allegories and the abstract nuances of meaning conveyed architectonically. Pamphlets, newspapers, popular magazines, and professional journals" explained the imagery.[182] Such an explanatory tradition reached back to Cesare Ripa's *Iconologia*, first published in 1593, "where personifications were accompanied by short explanatory texts."[183] The explanatory tradition includes *The Boston Globe* articles published in 1893 and 1894 — and this article.

Conclusion

After a century-and-a-quarter, the allegorical statues in the Great Hall of the John Adams Courthouse have yielded their hidden meanings, which have always been public too, waiting to be discovered. Discerning the meanings did not lie in locating the sculptor's papers, as the author once thought. Rather, it lay in repeated observation; realizing that the statues had counterparts around the world, as depicted on the Web Gallery of Art; serendipity and epiphanies. The author visited the statues and studied them countless times. While researching another project, the author revisited Judith Resnik and Dennis Curtis's book *Representing Justice: Invention, Controversy, and Rights in City-States and Democratic Courtrooms,* which became a gold mine for this article. One epiphany came to the author one morning in the moments before fully awakening, while in the hypnopompic state: the symbols on the rim of *Virtue's* shield represented the cardinal virtues. The other epiphany came beneath *Virtue* during a conversation in which the author told another person that the three women and three children in the center of *Virtue's* shield were the last major mystery of the statues. The conversation suddenly shifted as the author realized that the three women are the theological virtues.

Mysteries remain. Among them: Why are two statues demi-figures, *Equity* and *Right*? Do the statues have a racial context? How strong is their Masonic context? The statues stand silently and penitently in the Great Hall, still keeping their last secrets.

Photograph of the Great Hall in 1972 in its inelegance with a canteen run by the Mass. Commission for the Blind, telephone booths and bullet-shaped trash receptacles. Photograph by Richard Cheek. Courtesy of Historic New England.

179. *Id.* at 169.
180. Taylor Jr., *supra* note 45.
181. Bogart, *supra* note 18, at 168.
182. *Id.*
183. *Id.* (footnote omitted).

Case Comment

U.S. Supreme Court Interprets Title VII to Include Discrimination Based on Sexual Orientation and Gender Identity Despite Discord with HHS Ruling

Bostock v. Clayton County, 140 S. Ct. 1731 (2020)

Introduction

Massachusetts has long been at the forefront of lesbian, gay, bisexual and transgender (LGBT) civil rights. It was a leader in prohibiting discrimination on the basis of sexual orientation in housing, employment, credit, public accommodations and union practices.[1] Laws in Massachusetts forbidding same-sex sexual activity were removed in 1974.[2] Massachusetts, in 2003, was the first state to solemnize gay marriage[3] — eventually recognized by the U.S. Supreme Court.[4] In 2014, then-Governor Deval L. Patrick's administration announced reforms[5] and the Division of Insurance (DOI) issued a bulletin,[6] both prohibiting private health insurers and MassHealth from excluding medically necessary gender-affirming care. And in 2016, a transgender public accommodations bill also became Massachusetts law, adding the phrase "gender identity" to Massachusetts' public accommodations law, and prohibiting discrimination on the basis of gender identity in restaurants, libraries, hotels, malls and public transportation.[7]

In fact, over the past 10 years, Massachusetts has extended a number of protections against discrimination on the basis of gender identity and expression. In 2011, Gov. Patrick signed an executive order prohibiting discrimination based on gender identity and expression in state employment.[8] In 2012, Massachusetts anti-discrimination laws were amended to prohibit discrimination on the basis of gender identity in public and private employment, housing, credit, education and services,[9] followed by the transgender public accommodations law in 2016.[10] Finally, in 2019, these amendments supported the transition of a 54-year-old inmate, who was receiving hormone therapy, from a men's prison to a women's prison.[11]

In 2020, in the consolidated cases of *Bostock v. Clayton County, Altitude Express, Inc. v. Zarda,* and *R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission* (*Bostock*), 140 S. Ct. 1731 (2020),[12] the U.S. Supreme Court finally concluded what Massachusetts has recognized for years: LGBT rights are civil rights, and equal protection of the laws requires that civil rights for all individuals be honored.[13]

In *Bostock*, the Court considered whether Title VII of the Civil Rights Act of 1964 protects individuals against discrimination on the basis of sexual orientation and gender identity. In a 6-3 ruling, the Court held that Title VII protections on the basis of sex extend to cover employees allegedly discriminated against on the basis of their sexual orientation.[14] The Court also held that Title VII protections "on the basis of … sex" include employees allegedly discriminated against on the basis of their gender identity.[15]

The Court's decision in *Bostock* contrasts with the U.S. Department of Health and Human Services' (HHS') finalization of a rule under Section 1557 of the Affordable Care Act (ACA),[16] made three days before the Bostock decision, that interprets sex discrimination by looking to the plain meaning of the word "sex" as determined

1. *See* Mass. Gen. Laws c. 151B, § 4 (2019).
2. *See* Commonwealth v. Balthazar, 366 Mass. 298 (1974).
3. *See* Goodridge v. Dep't of Pub. Health, 440 Mass. 309 (2003).
4. *See* Obergefell v. Hodges, 576 U.S. 644 (2015).
5. P. M. Molloy, "Trans residents celebrate monumental health care ruling in Mass.," Advocate (June 23, 2014), https://www.advocate.com/politics/transgender/2014/06/23/trans-residents-celebrate-monumental-health-care-ruling-mass.
6. Joseph G. Murphy, "Bulletin 2014-03," Commonwealth of Massachusetts, Office of Consumer Affairs and Business Regulation, Division of Insurance (June 20, 2014), https://www.mass.gov/doc/bulletin-2014-03-guidance-regarding-prohibited-discrimination-on-the-basis-of-gender-identity/.
7. Mass. Gen. Laws c. 272, §§ 92A, 98 (2019).
8. Mass. Exec. Order. No. 526, 1177 Mass. Reg. 3 (Mar. 4, 2011).
9. Mass. Gen. Laws c. 151B (2019).
10. An Act Relative to Transgender Anti-Discrimination, St. 2016, c. 134.
11. "Massachusetts Moves Transgender Inmate to Women's Prison," Providence Journal, Jan. 25, 2019, https://www.providencejournal.com/news/20190125/massachusetts-moves-transgender-inmate-to-womens-prison.
12. *Bostock* was consolidated with Altitude Express, Inc. v. Zarda and R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission for purposes of U.S. Supreme Court review.
13. *See* Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020).
14. *Bostock*, 140 S. Ct. at 1754.
15. *Id*.
16. *See* Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1557, 124 Stat. 119, 260 (2010) (codified as amended at 42 U.S.C. § 18116 (2012)).

by biology and not recognizing gender identity.[17] In doing so, the administration's "Final Rule" on Section 1557 purports to specifically remove important health care protections from discrimination for transgender patients.[18] How that Final Rule will be interpreted in light of the Court's decision now becomes an open, and likely contentious, question. Once again, while equal protection for the LGBT community is secure in Massachusetts, there remains yet another hurdle in the national forum.

On its face, the Supreme Court's opinion in these three cases protects transgender employees from discrimination based on their gender identity. In striking contrast, the Final Rule on Section 1557 declines to protect transgender individuals from discrimination based on their gender identity when accessing health care.

Title VII and LGBT Individuals

Title VII of the Civil Rights Act of 1964 protects employees from discrimination "because of such individual's race, color, religion, sex, or national origin."[19] This federal law applies to employers with 15 or more employees and is enforced by the Equal Employment Opportunity Commission (EEOC).[20]

Over the last 30 years, Title VII discrimination "on the basis of … sex" has been interpreted by lower courts and agencies either to include or not to include protections for LGBT employees allegedly facing discrimination on the basis of sexual orientation or gender identity. In the landmark case *Price Waterhouse v. Hopkins,*[21] the U.S. Supreme Court held that Price Waterhouse had unlawfully discriminated against Hopkins by consciously giving credence and effect to partners' sex stereotyping comments about her.[22] In the employer's decision to place Hopkins' partnership candidacy on hold, the trial court found that the employer had solicited evaluations from the partners and relied heavily on evaluations in making the decision about partnership, and that several of the partners' comments were the product of stereotyping.[23] Further, the employer told Hopkins that in order to improve her chances for partnership, she should "'walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.'"[24] The U.S. Supreme Court held that Title VII forbids an employer from taking gender into account in making an employment decision unless it is a bona fide occupational qualification.[25]

Nine years later, in *Oncale v. Sundowner Offshore Services, Inc.,*[26] the U.S. Supreme Court held in a unanimous opinion that sex discrimination under Title VII applies to sexual harassment perpetrated by same-sex individuals. The Court held that Title VII bars all forms of discrimination "because of sex" in the workplace, and claims of sexual harassment are actionable regardless of the victim's gender.[27]

In recent years, the EEOC has taken the position that Title VII prohibits discrimination based on gender identity[28] and on sexual orientation.[29] Several district and appellate courts have also determined that Title VII protects employees from discrimination on the basis of sexual orientation[30] and on the basis of gender identity.[31] However, in 2017, the *Eleventh Circuit in Evans v. Georgia Regional Hospital*,[32] along with *Bostock*, appellant herein, declined to recognize sexual orientation claims under Title VII, creating a split authority between the federal circuits.

17. News Release, U.S. Department of Health & Human Services, "HHS Finalizes Rule on Section 1557 Protecting Civil Rights in Healthcare, Restoring the Rule of Law, and Relieving Americans of Billions in Excessive Costs" (June 12, 2020), https://www.hhs.gov/about/news/2020/06/12/hhs-finalizes-rule-section-1557-protecting-civil-rights-healthcare.html.

18. *Id*.

19. Civil Rights Act of 1964, Pub. L. No. 88-352, title VII, § 703, 78 Stat. 255 (1964) (codified as amended at 42 U.S.C. § 2000e-2 (2012)).

20. "What Laws Does EEOC Enforce?," EEOC.GOV, https://www.eeoc.gov/youth/what-laws-does-eeoc-enforce (last visited Jan. 13, 2021).

21. Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (plurality opinion), superseded in part on other grounds by statute, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074, as recognized in Burrage v. United States, 571 U.S. 201, 214 n.4 (2014).

22. *Price Waterhouse*, 490 U.S. at 256-58.

23. *Id*. at 256.

24. *Id.* at 272 (quoting Hopkins v. Price Waterhouse, 618 F. Supp. 1109, 1117 (D.D.C. 1985), *aff'd in part and rev'd in part,* 825 F.2d 458 (D.C. Cir. 1987), *aff'd in part and rev'd and remanded in part,* 490 U.S. 228 (1989))).

25. *Id.* at 240-45. The Court also held that that the trial court judge's factual conclusion that gender stereotyping "was permitted to play a part" in the evaluation of the plaintiff as a candidate was not clearly erroneous. *Id.* at 254.

26. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79-80 (1998).

27. *Id.*

28. Macy v. Dep't of Justice, EEOC Appeal No. 0120120821, 2012 WL 1435995 (Apr. 20, 2012) (Wilson, Acting Executive Officer).

29. Baldwin v. Dep't of Transportation, EEOC Appeal No. 0120133080, 2015 WL 4397641 (July 15, 2015) (Wilson, Acting Executive Officer).

30. *See, e.g.,* Hively v. Ivy Tech Cmty. Coll., 853 F.3d 339, 341 (7th Cir. 2017); Latta v. Otter, 771 F.3d 456 (9th Cir. 2014); Boutillier v. Hartford Pub. Schs., No. 3:13-cv-01303, 2016 WL 6818348 (D. Conn. Nov. 17, 2016); Videckis v. Pepperdine Univ., 150 F. Supp. 3d 1551 (C.D. Cal. 2015); Heller v. Columbia Edgewater Country Club, 195 F. Supp. 2d 1212, 1224 (D. Or. 2002).

31. *See, e.g.,* Tudor v. Se. Okla. State Univ., No. CIV-15-324-C, 2017 WL 4849118 (W.D. Okla. Oct. 26, 2017) (Cauthron, J.); Glenn v. Brumby, 663 F.3d 1312 (11th Cir. 2011); Barnes v. City of Cincinnati, 401 F.3d 729 (6th Cir. 2005); Smith v. City of Salem, 378 F.3d 566 (6th Cir. 2004).

32. Evans v. Ga. Reg'l Hosp., 850 F.3d 1248 (11th Cir. 2017). In Bostock v. Clayton County Board of Commissioners, 723 F. App'x 964 (11th Cir. 2018) (per curiam), the Eleventh Circuit declined to recognize sexual orientation under Title VII, whereas the Second Circuit, in Zarda v. Altitude Express, Inc., 883 F.3d 100 (2d Cir. 2018), and the Sixth Circuit, in EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560 (6th Cir. 2018), did.

The Court's Opinion in *Bostock*

In *Bostock*, the plaintiff alleged that he was fired because of his sexual orientation.[33] After 10 years of employment with the Clayton County Juvenile Court, where he earned consistently good performance reviews, Bostock publicized his decision to join a gay softball league.[34] He was subsequently accused of misspending county funds (which he denied)[35] and was fired for "conduct 'unbecoming' a county employee."[36] Bostock alleged the "funds" accusation was a pretext for his firing, which was actually the result of his being (openly) gay.[37]

In *Altitude Express, Inc. v. Zarda,* the estate of Donald Zarda alleged that Zarda was fired from his position as a skydiving instructor after telling a customer (who was strapped together with him on a skydive) that he was gay.[38] His employer accused him of inappropriate behavior in the workplace, citing the customer's claim that he touched her inappropriately.[39] Zarda denied the claim, alleging that the customer was homophobic, and that his firing was a pretext for discrimination on the basis of his sexual orientation.[40]

Both of the plaintiffs in *Bostock* and *Zarda* alleged that their employers' discrimination was thus "on the basis of … sex," and prohibited by Title VII.[41] The defendants in both cases argued that the plain meaning of "because of . . . sex" should be limited to the understanding of that language at the time that Congress enacted the Civil Rights Act in 1964.[42] The plain meaning of "because of . . . sex," the defendants argued, was commonly understood to refer to male vs. female, and interpretation of the language would be limited to those gender-based traits or distinctions (and not applicable to LGBT individuals).[43]

In *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC,* the plaintiff alleged that she was fired on the basis of her transgender identity.[44] Aimee Stephens was employed for six years at R.G. & G.R. Harris Funeral Homes, Inc.[45] After disclosing to the funeral home that she intended to undergo gender reassignment surgery and present herself as a woman, the funeral home terminated Stephens, admitting that she was not fired for any performance-related issues.[46] In bringing suit, Stephens similarly claimed that discrimination on the basis of gender identity constitutes discrimination "on the basis of … sex" and is prohibited by Title VII.[47] During the October 2019 oral arguments, the plaintiff cited *Price Waterhouse v. Hopkins*,[48] urging that she had been denied employment opportunity for being insufficiently masculine, just as Hopkins had been denied employment opportunity for being insufficiently feminine.[49] R.G. & G.R. Harris Funeral Homes, Inc., argued that treating men and women equally does not mean that employers need to treat men as women.[50]

The Court's Decisions in the Context of Employment

The Court's decisions in *Bostock* appear to resolve the reach of Title VII as it affects the employment of those claiming discrimination on the basis of sexual orientation and transgender identity. In reaching its decisions, the Court's majority held that "[a]n employer violates Title VII when it intentionally fires an individual employee based in part on sex. It doesn't matter if other factors besides the plaintiff's sex contributed to the decision. . . . Title VII's message is 'simple but momentous': An individual employee's sex is 'not relevant to the selection, evaluation, or compensation of employees.'"[51]

The majority further explained, "[a]n individual's homosexuality or transgender status is not relevant to employment decisions. That's because it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."[52] Stated differently, the Court clarified that "to discriminate on these grounds requires an employer to intentionally treat individual employees differently because of their sex. . . . Nor does it matter that, when an employer treats one employee worse because of that individual's sex, other factors may contribute to the decision."[53]

Justice Samuel Alito, in a vigorous dissent, admonished, "[w]hat the Court has done today — interpreting discrimination because of 'sex' to encompass discrimination because of sexual orientation or gender identity — is virtually certain to have far-reaching consequences."[54] In his cursory, but perhaps prophetic, mention of health

33. *Bostock*, 140 S. Ct. at 1737-38.

34. Bostock v. Clayton Cnty., No. 1:16-CV-1460-ODE, 2017 U.S. Dist. LEXIS 217815, at *1-2 (N.D. Ga. July 21, 2017) (Evans, J.).

35. *Id.* at *2.

36. *Bostock*, 140 S. Ct. at 1738.

37. *Bostock*, 2017 U.S. Dist. LEXIS 217815, at *2.

38. *Zarda*, 883 F.3d at 108.

39. *Id.*

40. *Id.* at 109, 111.

41. *Bostock*, 140 S. Ct. at 1738.

42. Amy Howe, "Argument Analysis: Justices Divided on Federal Protections for LGBT Employees," SCOTUSblog (Oct. 28, 2019, 2:14 PM), https://www.scotusblog.com/2019/10/argument-analysis-justices-divided-on-federal-protections-for-lgbt-employees/.

43. *Bostock*, 140 S. Ct. at 1739.

44. *Harris Funeral Homes*, 884 F.3d at 566-67.

45. *Id.* at 567.

46. *Id.* at 566, 568-569, 572.

47. *Bostock*, 140 S. Ct. at 1738.

48. *Price Waterhouse*, 490 U.S. 228.

49. Howe, *supra* note 43.

50. *Id.*

51. *Bostock*, 140 S. Ct. at 1741 (quoting *Price Waterhouse*, 490 U.S. at 239).

52. *Id.*

53. *Id.* at 1742.

54. *Id.* at 1778 (Alito, J., dissenting); Justice Brett Kavanaugh, who dissented from the majority opinion, wrote that he "fully agree[d] . . . that gay and lesbian Americans 'cannot be treated as social outcasts or as inferior in dignity and worth.'" *Id.* at 1823 (Kavanaugh, J., dissenting) (quoting Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n, 138 S. Ct. 1719, 1727 (2018)). Noting that Congress had unsuccessfully attempted several times since 2007 to pass employment legislation prohibiting discrimination on the basis of sexual orientation, Kavanaugh believes (based on separation of powers) that only Congress can amend the Civil Rights Act: "although Congress has come close, it has not yet shouldered a bill over the legislative finish line. In the face of unsuccessful legislative efforts (so far) to prohibit sexual orientation discrimination, judges may not rewrite the law simply because of their own policy views." *Id.* at 1824. Kavanaugh opined that "it is appropriate to acknowledge the important victory achieved today by gay and lesbian Americans. Millions of gay and lesbian Americans have worked hard for many decades to achieve equal treatment in fact and in law. They have exhibited extraordinary vision, tenacity, and grit — battling often steep odds in the legislative and judicial arenas, not to mention in their daily lives. They have advanced powerful policy arguments and can take pride in today's result." *Id.* at 1837.

care, Alito notes, "[h]ealthcare benefits may emerge as an intense battleground under the Court's holding. Transgender employees have brought suit under Title VII to challenge employer-provided health insurance plans that do not cover costly sex reassignment surgery. Similar claims have been brought under the ACA, which broadly prohibits sex discrimination in the provision of healthcare."[55]

The Court's ruling is, indeed, likely to have far-reaching consequences for the 7.1 million LGBT workers over the age of 16 in the United States, and the estimated 3.4 million LGBT workers who live in the 28 states and territories that had no explicit protections against discrimination in employment based on sexual orientation.[56] It will also benefit the 1 million workers over the age of 16 who identify as transgender in the United States, including an estimated 536,000 who live in states that had no explicit protections for gender identity in employment.[57]

In Massachusetts, despite broad protections already in place, there remained employers exempt from the anti-discrimination laws: employers with fewer than six employees,[58] employers arguing discriminatory selection as a "bona fide occupational qualification" (which is rarely successful)[59] and religious employers who explicitly limit employment to members of their religion.[60] *Bostock* now removes these remaining discriminatory practices absent a compelling state interest in maintaining them.

The Court's Decision in Context of Section 1557 Final Rule

The Court's ruling that Title VII protections extend to transgender and minority sexual orientation employees stands in stark contrast to HHS' issuance of a Final Rule on Section 1557, finalized only three days prior to release of the Court's opinion.[61] Section 1557 prohibits health programs or activities that receive funding from HHS from discriminating against patients on the basis of sex.[62] Under the Obama administration, Section 1557 had been interpreted to define sex discrimination to include gender identity, which it defined as "an individual's internal sense of gender, which may be male, female, neither, or a combination of male and female, and which may be different from an individual's sex assigned at birth."[63] The impact of the Final Rule is that Section 1557 specifically removes protections from discrimination for transgender patients, not only in health services, but likely also in employer-sponsored health insurance policies. HHS, thereafter, published its modified rules, raising the issue of whether the ACA protections for LGBT patients are now illegal. The HHS regulation was set to go into effect 60 days after it was formally published in the Federal Register, but the U.S. District Court for the District of New York temporarily enjoined the regulation from taking effect.[64] Several other cases are currently pending around the country.[65]

The Final Rule continues to enforce civil rights laws to the extent of discrimination on the basis of race, color, national origin, age, disability and sex, but refuses to define sex discrimination beyond the "plain meaning of the word 'sex' as male or female."[66] Thus, while the Court now protects transgender employees from discrimination based on their gender identity, Section 1557 on its face purports to deny those protections with respect to access to health care. However, with employer-sponsored health insurance as a term and condition of employment and thereby protected under Title VII,[67] Section 1557 directly impacts employment, and is subject to Final Rule interpretation, thus doubtless setting the stage for the next round of challenges to interpret the effect of the Court's opinion, if any, on application of the Final Rule — at least as to those receiving health benefits through employment.

Indeed, the Justice Department undercut the enforcement of the Supreme Court's opinion by refusing to withdraw or amend prior guidance[68] that was in conflict with the decision, and by neglecting to release new guidance on the law. One month after the Supreme

55. *Id.* at 1781 (Alito, J., dissenting); in reaching its decisions, the Court acknowledged that its opinion will likely reach well beyond the workplace. During oral arguments, Justice Neil Gorsuch, who authored the majority opinion, specifically asked whether the Court should consider the "massive social upheaval" that would follow a ruling in favor of Stephens in *Harris Funeral Homes.* Howe, *supra* note 43. In so doing, he acknowledged the central argument of his colleague on the Court, Justice Kavanaugh, and reignited the underlying ideological question of so-called "textualism": the extent to which the Court should rely upon the meaning of the Constitution and its interpretation of federal laws (such as the Civil Rights Act of 1964) as they were understood when passed, or whether the Court should accommodate social and political change — a so-called "living Constitution" approach (albeit applied in this context to a statute) — to be interpreted as issues present at the time of the decision. *Bostock*, 140 S. Ct. at 1767; 1771-1774. Justice Alito, in his sharp dissent, believes that the Court's decision constitutes rewriting history and argues that so doing oversteps into Congressional authority. *Id.* at 1755-1756 (Alito, J., dissenting). This decision, issued by a divided Court, illustrates the differing approaches to statutory interpretation, with the majority viewing the issue as it exists today, albeit only today, only on this issue and only in this context.

56. Press Release, "US Supreme Court Decision in Employment Discrimination Cases Will Impact Millions of LGBT Workers" (April 29, 2020), UCLA School of Law — Williams Institute, https://williamsinstitute.law.ucla.edu/press/scotus-title-vii-media-alert/; "NondiscriminationLaws," Movement Advancement Project, https://www.lgbtmap.org/equality-maps/non_discrimination_laws (last visited Jan. 15, 2021).

57. UCLA School of Law — Williams Institute, *supra* note 59.

58. *See* "Discrimination, Employment, Massachusetts," GLBTQ Legal Advocates & Defenders, https://www.glad.org/overview/employment-discrimination/massachusetts/ (last visited Jan. 15, 2021).

59. *See* Sarni Original Dry Cleaners, Inc. v. Cooke, 388 Mass. 611 (1983).

60. *See* Barrett v. Fontbonne Acad., No. NOCV2014-751, 2015 WL 9682042 (Mass. Super. Ct. Dec. 16, 2015) (Wilkins, J.).

61. U.S. Department of Health & Human Services, *supra* note 17.

62. *Id.*

63. "Nondiscrimination in Health Programs and Activities," 81 Fed. Reg. 31376, 31384 (May 18, 2016) (to be codified at 42 C.F.R. pt. 92).

64. Walker v. Azar, No. 1:20-cv-02834, 2020 WL 4749859 (E.D.N.Y. Aug. 17, 2020) (Block, J.).

65. Boston Alliance of Gay, Lesbian, Bisexual and Transgender Youth v. DHHS, No. 1:20-cv-11297, 2020 WL 3891426 (D. Mass., filed July 9, 2020); New York v. DHHS, No. 1:20-cv-5583, 2020 WL 4059929 (S.D.N.Y., filed July 20, 2020); Washington v. DHHS, No. 2:20-cv-01105-JLR, 2020 WL 4788019 (W.D. Wash., filed Aug. 18, 2020).

66. U.S. Department of Health & Human Services, *supra* note 17.

67. Civil Rights Act of 1964, Pub. L. No. 88-352, title VII, § 703, 78 Stat. 255 (1964) (codified as amended at 42 U.S.C. § 2000e-2 (2012)).

68. "Revised Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964," (2017), Office of the United States Attorney General.

Court's decision, over 100 members of Congress issued a letter calling on President Donald Trump to direct federal agencies to "review and revoke or revise all federal agency regulations, federal agency policies, and executive orders permitting discrimination against LGBTQ people … and conduct a complete review to address all potentially discriminatory regulations, policies, or actions that require revocation or revision because they are now in direct conflict with the law."[69] The Subcommittee on Civil Rights and Civil Liberties followed suit, requesting written plans to identify discriminatory policies and steps to re-evaluate the policies in letters to the Department of Labor,[70] Department of Education,[71] HHS,[72] and the Department of Housing and Urban Development.[73]

The Trump administration did not issue guidance on implementation of the Supreme Court's opinion, and in the last days of its administration, the Department of Justice issued a memo stating that "the Supreme Court has never held that a religious employer's decision not to hire homosexual or transgender persons 'violates deeply and widely accepted views of elementary justice' or that the government has a 'compelling' interest in the eradication of such conduct."[74]

In one of his first actions in office, President Joe Biden issued an executive order stating his administration's policy to "fully enforce Title VII and other laws that prohibit discrimination on the basis of gender identity or sexual orientation."[75] President Biden further detailed guidance for each U.S. agency to "review all existing orders, regulations, guidance documents, policies, programs, or other agency actions that were promulgated or are administered by the agency under Title VII … and are or may be inconsistent with the policy set forth in section 1 of this order." Of course, executive orders are neither statutes nor Supreme Court precedent, and could be rescinded by executive orders issued by this or a subsequent administration. However, for the moment, it appears to be a priority of the current presidential administration to broadly construe Title VII and other laws governing antidiscrimination policy and to develop agency guidance through the Administrative Procedures Act for enforcing them.

The Impact of *Bostock* and HHS Rule 1557 in Massachusetts

Massachusetts laws protecting transgender residents in matters of health care, hospitals and public accommodations remain in effect independent of the HHS Final Rule, at least as to most patients when they receive health care in Massachusetts.[76] In fact, following the announcement of the HHS Final Rule on June 12, MassHealth issued a statement explicitly stating that federal changes would not change MassHealth's commitment to providing care to LGBT individuals, including transgender members.[77] For example, MassHealth (on behalf of Medicaid recipients, and funded in part by Massachusetts tax revenues)[78] and the Massachusetts DOI[79] (on behalf of most private health insurance plan enrollees) prohibit discrimination on the basis of gender identity and have specific provisions for health services, including gender-affirming care.

69. Letter from Dianne Feinstein, Jerrold Nadler, Ron Wyden, Patty Murray, Chris Pappas, Edward J. Markey, Sheldon Whitehouse, Bernard Sanders, Tammy Duckworth, Cory A. Booker, Patrick Leahy, Debbie Stabenow, Margaret Wood Hassan, Mazie K. Hirono, Richard Blumenthal, Tammy Baldwin, Kamala D. Harris, Jeffrey A. Merkley, Catherine Cortez Masto, Kirsten Gillibrand, Robert P. Casey Jr., Sherrod Brown, Richard J. Durbin, Brian Schatz, Amy Klobuchar, Robert Menendez, Jack Reed, Maria Cantwell, Chris Van Hollen, Christopher A. Coons, Tina Smith, Elizabeth Warren, Jacky Rosen, Thomas R. Carper, Christopher S. Murphy, Zoe Lofgren, Jamie Raskin, Madeleine Dean, Jennifer Wexton, Andy Levin, Gilbert R. Cisneros Jr., Peter Welch, Eleanor Holmes Norton, TJ Cox, Sean Patrick Maloney, Eliot L. Engel, Stephen F. Lynch, Alan Lowenthal, Nydia M. Velázquez, Eric Swalwell, Jackie Speier, Lauren Underwood, Judy Chu, Danny Davis, Grace Meng, Derek Kilmer, Betty McCollum, Gwen S. Moore, Scott H. Peters, Diana DeGette, Earl Blumenauer, Kathleen Rice, Deb Haaland, Seth Moulton, David Trone, Katie Porter, Joseph P. Kennedy III, Jared Huffman, Debbie Wasserman Schultz, Suzanne Bonamici, Susan A. Davis, Mark Takano, Sylvia R. Garcia, Adam Schiff, Mike Quigley, Jan Schakowsky, Grace Napolitano, Brendan F. Boyle, John B. Larson, Gregory W. Meeks, Pramila Jayapal, Veronica Escobar, Alcee L. Hastings, Mark DeSaulnier, José E. Serrano, Ro Khanna, Carolyn B. Maloney, Katherine M. Clark, Susan Wild, Frank Pallone Jr., Karen Bass, Darren Soto, Bonnie Watson Coleman, Ayanna Pressley, Sharice L. Davids, Albio Sires, Mary Gay Scanlon, John Yarmuth, Julia Brownley, Lori Trahan, Joseph D. Morelle, Linda T. Sánchez, Bill Foster, Salud Carbajal, Alexandria Ocasio-Cortez, Tim Ryan, Jason Crow, Angie Craig, David N. Cicilline, Elissa Slotkin, Ted Lieu, Peter A. DeFazio, Ami Bera, M.D., Tom Suozzi, Ilhan Omar, Mark Pocan, Kim Schrier, M.D., Jimmy Panetta, Amy Kirkpatrick and Kathy Castor to President Donald Trump (July 9, 2020), https://www.feinstein.senate.gov/public/_cache/files/8/8/889b6019-39ee-4f22-a9aa-b233bb422ac9/05CB0E33C4E97EE84B4D255F40D6DC47.2020.07.09-letter-to-white-house-on-lgbtq-regulations.pdf.

70. Letter from Jamie Raskin to Eugene Scalia (Aug. 19, 2020), https://oversight.house.gov/sites/democrats.oversight.house.gov/files/2020-08-19.JR%20to%20Scalia%20-DOL%20re%20LGBTQ%20Protections.pdf.

71. Letter from Jamie Raskin to Betsy DeVos (Aug. 19, 2020), https://oversight.house.gov/sites/democrats.oversight.house.gov/files/2020-08-19.%20JR%20to%20DeVos-Ed%20re%20LGBTQ%20Protections.pdf.

72. Letter from Jamie Raskin to Alex M. Azar II (Aug. 19, 2020), https://oversight.house.gov/sites/democrats.oversight.house.gov/files/2020-08-19.JR%20to%20Azar%20II-HHS%20re%20LGBTQ%20Protections.pdf.

73. Letter from Jamie Raskin to Ben Carson (Aug. 19, 2020), https://oversight.house.gov/sites/democrats.oversight.house.gov/files/2020-08-%2019.JR%20to%20Carson-HUD%20re%20LGBTQ%20Protections.pdf; House Committee on Oversight and Reform, "Subcommittee Requests Trump Administration Reverse LGBTQ+ Discrimination Policies in Light of Bostock V. Clayton County, Aug. 19, 2020," https://oversight.house.gov/news/press-releases/subcommittee-requests-trump-administration-reverse-lgbtq-discrimination-policies.

74. Sadie Gurman and Jess Bravin, "Justice Department Seeks to Limit Scope of Landmark LGBT Rights Decision," Wall Street Journal, Jan. 20, 2021, https://www.wsj.com/articles/justice-department-seeks-to-curtail-workplace-protections-for-gay-transgender-people-11611091426.

75. Executive Order 13988: "Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation" (Jan. 20, 2021).

76. Mass. Gen. Laws c. 272, §§ 92A, 98.

77. MassHealth Statement, Masshealth, https://bostoncil.org/wp-content/uploads/2020/06/MassHealth-Statement.pdf (last visited Jan. 15, 2021).

78. 130 Mass. Code Reg. 450.202.

79. Murphy, *supra* note 6.

With Medicare funded by the federal government, however, some of those recipients may be more vulnerable. Medicare eligibility includes not only those over age 65, but some disabled persons, as well as those with end-stage kidney disease.[80] Those who elect Medicare Part C (Advantage) and some Part D (prescription drugs) coverage plans that receive funding from the federal government may be subject to Section 1557 interpretation. Prior to the Final Rule, the Centers for Medicare & Medicaid Services did not exclude LGBT services for Medicare recipients,[81] but it is not clear if new restrictions will be issued as a result. Similarly, federal health care facilities in Massachusetts — such as Veterans' Administration hospitals — may interpret Section 1557 restrictively, consistent with the HHS Final Rule.

Further, while the Massachusetts DOI requires all Massachusetts health care plans to provide coverage for gender-affirming surgery, self-funded insurance plans (often used by large, national employers to apply uniform insurance provisions across all states) are not subject to DOI regulation.[82] It is unclear whether they will adhere to local standards in interpreting coverage provisions. Moreover, when Massachusetts residents seek health care in another state, available care would follow the health plan's provisions for out-of-state coverage.[83]

It is also important to note that Massachusetts offers protections to transgender residents through a patchwork of laws, executive orders, and DOI and MassHealth interpretations.[84] It has not, however, enacted a full gender-affirming law, such as one that was passed in Oregon in 2015. The Oregon Equality Act of 2008 protects all residents from discrimination in housing and employment,[85] while the 2015 Medicaid expansion in Oregon provides coverage for gender-affirming care.[86] This is important because executive orders and agency interpretations can be rescinded or amended much more easily than laws can be overturned.

Perhaps most impactful, a strong policy against discrimination in health care — such as the one in Massachusetts — benefits patients in more important ways. Legal protections, such as mandated insurance coverage, are inadequate when social determinants of health serve as a barrier to participation in services.[87] Insurance coverage is not enough when individuals do not have the financial resources or the ability to navigate the complexity of the insurance provisions, or the wherewithal to advocate for themselves.[88] For example, transgender patients are often disparaged by medical personnel who refuse to acknowledge their preferred gender or gender expression.[89] In rural areas, it can be difficult to find providers who offer health services, such as gender-affirming surgery.[90] Finally, participation in health care as a transgender person requires the patient to satisfy specific mental health criteria in order to qualify for the benefits mandated by law.[91] The difference between medical personnel who support the needs of a transgender patient and those who do not can be the difference between a patient's ability to access services and a situation in which patients cannot navigate the complex process.

The policy enunciated by HHS Section 1557 thus codifies transphobic stigma and creates systemic barriers to accessing gender-affirming treatment, even for those who qualify for care. Insurers are now poised to impose greater deniability of benefits and require affected individuals to seek legal remedies through complex administrative channels or the courts. Despite the law in Massachusetts — and the findings of an increasing number of courts around the country that follow its lead in determining that such claims constitute unlawful gender discrimination — the need for legal recourse is always a powerful barrier to enforcement of civil rights.

— Allison Rhodes, Marcia Boumil, Gregory Curfman

80. "Disability Organizations & Coalitions," Centers for Medicare & Medicaid Services (Feb. 11, 2020) (last visited April 13, 2021).

81. Department of Health and Human Services, Departmental Appeals Board, Appellate Division. NCD 140.3, Transsexual Surgery, Docket No. A-13-87, Decision No. 2576, May 30, 2014; Medicare, National Center for Transgender Equality, https://transequality.org/know-your-rights/medicare (last visited April 13, 2021).

82. Self-Insurance Group Health Plans, Self-Insurance Institute of America, Inc., https://www.siia.org/i4a/pages/index.cfm?pageID=4546 (last visited Jan. 15, 2021).

83. *See* Covered Services, Mass.Gov, https://www.mass.gov/service-details/covered-services (last visited Jan. 15, 2021).

84. "Massachusetts Law About Gender Identity or Expression," Mass.Gov (Dec. 22, 2020), https://www.mass.gov/info-details/massachusetts-law-about-gender-identity-or-expression.

85. "The Oregon Equality Act: Protection for Lesbian, Gay, Bisexual and Transgender People," Lambda Legal (Sept. 19, 2007), https://www.lambdalegal.org/sites/default/files/publications/downloads/fs_oregon-equality-act_0.pdf.

86. Kristian Foden-Vencil, "In Oregon, Medicaid Now Covers Transgender Medical Care," NPR.ORG (Jan. 10, 2015), https://www.npr.org/sections/health-shots/2015/01/10/376154299/in-oregon-medicaid-now-covers-transgender-medical-care; "Oregon Health Plan Coverage of Gender Dysphoria: Frequently Asked Questions for Current or Future Clients," Basic Rights Oregon, http://www.basicrights.org/wp-content/uploads/2021/03/OHP_FAQ_For_Individuals_Mar_2021-revision-1.pdf (last visited Jan. 15, 2021).

87. *See* Scott Burris, "From Health Care Law to the Social Determinants of Health: A Public Health Law Research Perspective," 159 U. Pa. L. Rev. 1649 (2011); *See* Samantha Artiga & Elizabeth Hinton, "Beyond Health Care: The Role of Social Determinants in Promoting Health and Health Equity," Kaiser Family Foundation (May 10, 2018), https://www.kff.org/racial-equity-and-health-policy/issue-brief/beyond-health-care-the-role-of-social-determinants-in-promoting-health-and-health-equity/.

88. *See* Matthew Bakko & Shanna K. Kattari, "Transgender-Related Insurance Denials as Barriers to Transgender Healthcare: Differences in Experience by Insurance Type," 35 Journal of General Internal Medicine 1693 (June 2020).

89. *See* Sandy E. James, Jody L. Herman, Susan Rankin, Mara Keisling, Lisa Mottet, & Ma'ayan Anafi, *The Report of the 2015 U.S. Transgender Survey, National Center for Transgender Equality* (Dec. 2016), https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf.

90. *See* Douglas Knutson, Julie M. Koch, Tori Arthur, T. Andrew Mitchell, & Meredith A. Martyr, "Trans Broken Arm: Health Care Stories from Transgender People in Rural Areas," 7 Journal of Research on Women and Gender, 30 (2016).

91. "Standards of Care for the Health of Transsexual, Transgender, and Gender-Conforming People [7th Version]," World Professional Association for Transgender Health. (2012), https://www.wpath.org/publications/soc; J. Morrow-Gorton, "Guidelines for Medical Necessity Determination for Gender-Affirming Surgery," Mass.gov (July 31, 2019), https://www.mass.gov/doc/gender-affirming-surgery/download.

Case Comment

Validity and Effect of Policyholder Consent-to-Settlement Clauses in Professional Liability Insurance Policies

Rawan v. Continental Casualty Co., 483 Mass. 654 (2019)

Most common forms of insurance against lawsuits and legal liability ("liability insurance") vest control of decisions about whether to settle a claim or suit, and for what amount, in the insurer, as it is the insurer who generally must fund the settlement. In Massachusetts, the perceived potential for insurer abuse of this prerogative has given rise to legislation protecting both policyholders and third-party claimants from insurer "[u]nfair claim settlement practices," including "fail[ure] to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear." Mass. Gen. Laws c. 176D, § 3(9)(f) (2018). Commission of such an unfair claim settlement practice can subject the insurer to the remedies available to an injured party under M.G.L. c. 93A, including double or treble damages for a knowing or willful violation. *See* Mass. Gen. Laws c. 93A, § 9(3) (2018). It is a common practice for policyholders and claimants to remind insurers of the "duty to settle" imposed by these statutory provisions, and the risks the insurer faces if it fails to effect a fair settlement where liability is, indeed, reasonably clear.

In fact, however, not all forms of liability insurance allocate settlement discretion entirely to the insurer. Professional liability insurance, i.e., insurance against claims and liability arising from errors or omissions committed in providing professional services, often requires the consent of the insured professional before the insurer can settle the claim on their behalf. These professionals typically do not face obligations respecting settlement similar to those imposed on their insurers by M.G.L. c. 176D. In effect, they are free to decline to settle even where liability *is* reasonably clear and even if an opportunity to settle the claim fairly and equitably should arise. The question thus arises: Can a professional liability insurer be held liable for violating M.G.L. c. 176D, § 3(9)(f) where a failure to settle was attributable to the professional's refusal to consent to a settlement, rather than to any recalcitrance on the part of the insurer? Put another way, does M.G.L. c. 176D, § 3(9)(f) impliedly invalidate policyholder consent-to-settlement clauses in professional (or other) liability insurance policies? And, if it does not, does a professional insured's invocation of such a clause in refusing to settle effectively insulate an insurer from liability for a violation of M.G.L. c. 176D, § 3(9)(f)? These questions were recently addressed by the Supreme Judicial Court (SJC) in *Rawan v. Continental Casualty Co.,* 483 Mass. 654 (2019). In *Rawan*, the court held that, while policyholder consent-to-settlement clauses are not invalidated by M.G.L. c. 176D, § 3(9)(f), such clauses do not free insurers entirely from their statutory duties in respect of settlement.[1] This case comment canvasses the circumstances and rationale that gave rise to those holdings and discusses some of *Rawan's* implications for settlement of insured professional liability claims where a policyholder consent-to-settlement clause is present.

I. The *Rawan* Litigation

Rawan initially was a pure professional liability suit by homeowners Douglas and Kristen Rawan against Kanayo Lala, a professional engineer who had performed structural design engineering services in connection with the construction of the Rawans' new home.[2] Though the Rawans later amended their complaint to add Lala's professional liability insurer, Continental Casualty Company (Continental), based on allegations of bad faith claim settlement practices, that claim was stayed until the Rawans' case against Lala had concluded.[3] The *Rawan* suit thus proceeded in two stages, the first encompassing the Rawans' prosecution of their claims against Lala, the parties' (and Continental's) efforts to resolve those claims by settlement and, after those efforts failed, the trial of the Rawans' claims to a jury.[4] The second stage — the proceedings that gave rise to the order from which the Rawans took their appeal — addressed the insurance law questions flowing from Lala's refusal to authorize Continental to make a pre-trial settlement offer to the Rawans of sufficient magnitude to potentially resolve the case.[5]

A. The Insurance Relationship

Continental insured Lala for professional liability under a series of policies running from the time when he was performing engineering services for the Rawans through at least 2012.[6] The limits of liability of those policies varied, but the policy to which the Rawans' claim was ultimately assigned (the "policy") provided $500,000 in coverage per claim, inclusive of defense expenses; that is, defense expenses would erode limits, such that amounts expended on defense would reduce the amount remaining to fund a settlement or satisfy a judgment.[7]

1. *Id.* at 671-72.
2. *Id.* at 655.
3. *Id.* at 659.
4. *See id.* at 659-62.
5. *See id*. at 662.
6. Rawan v. Cont'l Cas. Co., 48 Mass. 654, 659-60 (2019).
7. *Id.* at 657, 659-60.

Although the policy provided Continental with "the right and duty to defend" any covered claim, and the right to appoint or approve defense counsel, it also provided that Continental would "not settle any claim without the informed consent" of Lala.[8] This provision did not include a so-called "hammer clause" found in many policyholder consent-to-settle provisions.[9] Such clauses potentially exact a price for the policyholder's discretion with respect to settlement; if an insurer offers to settle at an amount the claimant would accept, but the policyholder withholds consent, the insurer's offer serves to limit its exposure.[10] For example, the insurer's liability to fund the settlement may be capped at the amount of the offer, and its obligation to fund additional defense expenses may be terminated or limited.[11] While such clauses provide an insurer with a measure of influence over the policyholder's settlement decision-making, Continental did not reserve any such influence over Lala in the policy. Consequently, its ability to "effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear," per Mass. Gen. Laws c. 176D, § 3(9)(f), was, at best, limited to attempts at persuasion. The final say would rest with Lala.

B. The Professional Liability Claim

The Rawans' claim against Lala for errors in his structural engineering work was strong, at least as to liability. After construction on the Rawans' new home was completed in 2010, its beams and joists began to crack.[12] When Douglas Rawan raised this issue with Lala, Lala admitted that he had underestimated the building loads in his calculations for the design.[13] The problem apparently went unremedied, and the Rawans filed suit against Lala in August 2011, asserting claims for negligence, negligent supervision, breach of contract, breach of the covenant of good faith and fair dealing, breach of the implied warranty of fitness, and violations of M.G.L. c. 93A.[14] Lala initially elected to defend himself *pro se*, but notified Continental of the Rawans' claim and consulted with a Continental representative, Jack Donovan, in seeking an early resolution of their lawsuit.[15] Lala did not invoke the Continental coverage, however, until September of 2012, when counsel appointed by Continental entered an appearance in the suit on Lala's behalf.[16]

Nevertheless, in April 2012, while still merely consulting with Lala on the Rawans' claim, Donovan agreed to meet with the Rawans' consulting structural engineer, Neal Mitchell, who had reviewed Lala's work on the Rawans' home and concluded that Lala made serious computational errors based on erroneous engineering assumptions.[17] Mitchell went so far as to assert that Lala's work showed "a complete lack of understanding of structural design."[18] In the wake of his meeting with Mitchell, Donovan suggested that a third-party engineer be engaged to review Lala's engineering work and Mitchell's assessment to assist the parties in "reach[ing] an accord," perhaps with the assistance of a mediator.[19] The parties agreed that Thomas Heger would serve as the third-party engineering expert.[20] Heger performed the requested review and reported to Donovan that he had found a number of violations of building code requirements and agreed with Mitchell's conclusions regarding Lala's errors.[21] And while Continental initially declined to share Heger's report with the Rawans, claiming that Heger himself had served as a mediator, the Rawans' motion to compel production of Heger's report was granted and Heger was deposed, such that his unfavorable view of Lala's work came fully to light.[22] Even a third consultant, Lisa Davey, retained to review only selected structural elements of the Rawans' home, concluded that the building code had been violated and that certain structural members in the Rawans' home were overstressed.[23]

C. Damages Claims and Settlement Negotiations

The magnitude of the Rawans' damages flowing from Lala's engineering errors was somewhat less clear. The Rawans' initial embrace of a collaborative approach to resolution seemed to deteriorate in the face of the dispute over the Heger report.[24] In October 2012, the Rawans forwarded a M.G.L. c. 93A demand letter to Continental, asserting that Continental violated M.G.L. c. 176D, § 3(9)(f) by failing to promptly and equitably settle the Rawans' claim in light of Lala's clear liability.[25] The Rawans claimed damages in the amount of $272,890.[26] When Continental responded by again proposing mediation, the Rawans moved to amend their complaint to add Continental as a defendant on allegations that it had violated M.G.L. cc. 93A and 176D.[27] Although the court granted the motion, as noted, it also stayed proceedings against Continental until the case against Lala was resolved.[28]

8. *Id.* at 656-57.
9. *Id.*
10. *Id.*
11. In a footnote, the court quoted what it considered to be a "typical" hammer clause, providing that:

> The insurer shall not settle any claim without the consent of the insured. If, however, the insured shall refuse to consent to any settlement recommended by the insurer and shall elect to contest the claim or continue any legal proceedings in connection with such claim, then the insurer's liability for the claim shall not exceed the amount for which the claim could have been settled plus claims expenses incurred up to the date of such refusal.

Id. at 656 n.2 (quoting J. Kesselman, A. Fox & R. Sattler, "Professional Liability Insurance Issues," Massachusetts Liability Insurance Manual § 5.6.3 (Mass. Cont. Legal Educ. 3d ed. 2017)).

12. Rawan v. Cont'l Cas. Co., 483 Mass. 654, 656 (2019).
13. *Id.*
14. *Id.*
15. *Id.* at 657.
16. *Id.*
17. *Id.*
18. Rawan v. Cont'l Cas. Co., 483 Mass. 654,657 (2019).
19. *Id.* at 657-58 (alteration in original).
20. *Id.* at 658.
21. *Id.* at 658-59.
22. *Id.* at 659.
23. *Id.* at 660.
24. *See* Rawan v. Cont'l Cas. Co., 483 Mass. 654, 659 (2019).
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*

Shortly thereafter, in November 2012, Lala consented to a $100,000 offer to the Rawans to be paid from the policy, which Lala's counsel conveyed to the Rawans' counsel.[29] This proposal apparently was not well received, and in May 2013, the Rawans formally demanded $1,324,390 to settle the case, pointing to worsening adverse effects on their home from Lala's substandard work.[30] Lala advised his counsel that he "had no interest in making a settlement offer in response to that demand."[31]

In June 2013, Continental's claim consultant, Thomas Hedstrom, contacted Lala to explain how the policy would respond in light of settlement dynamics and the ongoing defense of the litigation.[32] He explained that the policy limit for each claim was $500,000, and that this limit applied to defense costs — not just indemnity payments — such that the policy limit was eroding as the lawsuit proceeded.[33] He warned that, to the extent any judgment or settlement exceeded the remaining limits of the policy after claim expenses had been deducted from the $500,000, the excess would fall to Lala himself to pay.[34] Lala nevertheless maintained his position that he would make no further offers.[35]

In November 2013, after Lala's own consultant (Davey) had delivered her report addressing only some of the structural problems at issue, but still finding $100,000 to $120,000 in damages, Hedstrom again approached Lala regarding settlement.[36] Lala agreed to reinstate his previous offer of $100,000.[37] The Rawans were unmoved and stood by their existing $1.3 million demand.[38] Negotiations had once again reached an impasse.

Lala also proved resistant to the exhortations of counsel. In March 2014, just a few months before trial, his appointed attorney explained to Lala in an email the full extent of the risks he would face if the case did not settle: the potential for a verdict of $1.3 million, possibly trebled under M.G.L. c. 93A to almost $4 million; possible liability for the Rawans' attorney's fees; and the likely addition of interest at 12% per annum from the date suit was filed in 2011, potentially adding 36% to the above amounts as the suit neared its third anniversary.[39] The attorney observed that these amounts would "dwarf" remaining limits in the policy and urged Lala to again consider settlement to avoid exposure of his personal assets.[40] Lala remained unmoved.[41]

Finally, in July 2014, with trial about 60 days away, Lala's counsel again raised the excessive verdict risk Lala faced and urged him to provide authorization for an approach to the Rawans' counsel to explore the possibility of settlement within the remaining limits of the policy.[42] Lala refused again, although on the eve of trial he authorized a reduced offer of $35,000, which garnered a responsive demand of $900,000.[43] Lala instructed his attorneys to try the case.[44]

D. Trial, Verdict and Satisfaction

After a trial in September 2014, the jury found Lala was negligent in his design of the Rawans' home and awarded them $400,000 in damages.[45] The court also requested that the jury render an advisory verdict on the M.G.L. c. 93A claim, on which they recommended an award of $20,000.[46] Finding that Lala's misrepresentations to the Rawans regarding building code compliance and available insurance were either knowing or reckless, the trial judge doubled the c. 93A award to $40,000.[47]

The ensuing judgment was, in fact, satisfied by a combination of remaining insurance proceeds and Lala's own funds.[48] At the time of payment, defense expenses had eroded the $500,000 limit of the policy down to $141,435.98, which Continental paid to the Rawans.[49] The remainder of the judgment, and the Rawans' attorney's fees, were paid by Lala.[50]

E. Unfair Settlement Practices Claim Against Continental

After the trial against Lala, the Rawans again amended their complaint, adding new allegations to their claim against Continental for failure to effectuate a prompt, fair and equitable settlement of the claim against Lala, and adding a claim against Continental for violation of its duty to conduct a reasonable investigation under M.G.L. c. 176D, §3(9)(d).[51] The Rawans also complained of Continental's "'pre-verdict litigation conduct' in withholding the Heger report and misrepresenting Lala's policy limits."[52]

29. *Id.*
30. Rawan v. Cont'l Cas. Co., 483 Mass. 654, 659 (2019).
31. *Id.* at 659.
32. *Id.* at 660.
33. *Id.*
34. *Id.*
35. *Id.*
36. Rawan v. Cont'l Cas. Co., 483 Mass. 654, 660 (2019).
37. *Id.*
38. *Id.*
39. *Id.* at 660-61.
40. *Id.* at 661.
41. *Id.*
42. Rawan v. Cont'l Cas. Co., 384 Mass. 654, 661 (2019).
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.* at 661-62. The misrepresentation as to insurance is not further described in the opinion, although it may have been related to Continental's misstatement of applicable limits by reference to the wrong policy period, discussed *infra*.
48. Rawan v. Cont'l Cas. Co., 384 Mass. 654, 662 (2019).
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.*

The Rawans moved for summary judgment on their claim against Continental under M.G.L. c. 176D, §3(9)(f), and Continental cross-moved for summary judgment on all counts.[53] A Superior Court judge granted Continental's motion for summary judgment and the Rawans appealed.[54] The SJC transferred the appeal from the Appeals Court on its own motion.[55]

II. The Supreme Judicial Court's Analysis

The SJC framed the central issue presented on appeal in *Rawan* to be "whether consent-to-settle clauses in professional liability policies violate an insurer's obligations under M.G.L. cc. 93A and 176D," and, more specifically, M.G.L. c. 176D, § 3(9)(f), "because the insurer has entered into a contract with its insured that provides the insured with a right to consent to, or reject, any settlement offer."[56] After careful analysis of whether consent-to-settlement clauses should be deemed prohibited by M.G.L. c. 176D, § 3(9)(f) or to otherwise offend public policy, the court concluded that such clauses are valid under Massachusetts law, and that an insurer can honor its insured's choice to decline to settle "even when liability has been clearly established."[57] It further held, however, that an insured's invocation of its right to withhold consent does not relieve the insurer of its duties under M.G.L. c. 176D, including its duty under § 3(9)(f) to make good faith efforts to effectuate settlement.[58] Concluding that the record evidence, even when viewed most favorably to the Rawans, revealed no disputed issue of material fact as to Continental's compliance with these duties, the court affirmed the Superior Court's grant of summary judgment in Continental's favor.[59]

A. Legality of Consent-to-Settle Clauses in Professional Liability Insurance

Before directly confronting the question of whether to find in M.G.L. c. 176D a legislative intent to prohibit consent-to-settlement clauses in professional liability insurance, the court first took note of three propositions that would inform its analysis: (i) that non-medical professional liability insurance is not among the types of insurance that are mandated by law or required to employ legislatively dictated provisions; (ii) that consent-to-settlement clauses serve important purposes in the unique context of professional liability insurance; and (iii) that Massachusetts common law favors freedom of contract and invalidates private bargains only where enforcement of the provision under scrutiny would be manifestly injurious to the public interest.[60] Each of these considerations ultimately was cited as undercutting any inference that the legislature intended to invalidate consent-to-settlement clauses when it adopted M.G.L. c. 176D, or when it later amended the standing requirements of M.G.L. c. 93A so as to permit third-party claimants to bring claims against insurers pursuant to M.G.L. cc. 93A and 176D.[61]

In setting the stage for the court's statutory construction and public interest discussion, it is necessary to afford additional attention only to the second of these propositions, i.e., the purposes served by consent-to-settlement clauses in professional liability insurance. The court observed that these clauses are attractive to professionals because of reputational concerns.[62] It approvingly quoted commentary asserting that "Insured professionals are often more likely than other insured entities to resist settlement of underlying claims [because] settlement of an underlying claim may adversely affect the professional's reputation or might actually encourage future lawsuits against the professional."[63] The SJC recognized that the perspectives of insurers and professionals may differ markedly on the question of settlement, where the insurer may favor "smaller dollar settlements," while the reputational impacts of any settlement, even one well within policy limits, may be paramount to the professional insured.[64] These considerations gave rise to what the SJC considered the most important purpose of consent-to-settlement clauses in professional liability insurance, i.e., "they encourage professionals to purchase such insurance, thereby providing coverage for the insured and deeper pockets to compensate those injured by the insured."[65]

Reaching the statutory interpretation and public interest questions, the SJC began by recognizing that consent-to-settle clauses are not directly addressed either in M.G.L. c. 176D or in its legislative history.[66] The court found this omission significant in light of indications that such clauses had been common for many years, and predated the passage of M.G.L. c. 176D, § 3(9).[67] The court noted, moreover, that the original enactment of § 3(9) was to address "the obligations of insurers towards insureds," as opposed to third-party claimants — who at that time lacked standing to bring suits under M.G.L. c. 93A — and focused particularly on "policies in which insurers retained control over settlement."[68] The concern was that

53. *Id.*
54. Rawan v. Cont'l Cas. Co., 483 Mass. 654, 662 (2019).
55. *Id.*
56. *Id.* at 663.
57. *Id.* at 671.
58. *Id.* at 672.
59. *Id.* at 672, 675.
60. Rawan v. Cont'l Cas. Co., 483 Mass. 654, 664-66 (2019).
61. *Id.* at 664-72.
62. *Id.* at 664-65.
63. *Id.* at 665 (alteration in original) (quoting J. Kesselman, A. Fox, & R. Sattler, "Professional Liability Insurance Issues," Massachusetts Liability Insurance Manual, *supra* note 11, at § 5.6.2).
64. *Id.*
65. *Id.* at 664. The court's opinion does not cite to empirical studies supporting the view that consent-to-settlement clauses *actually* cause more professionals to purchase liability insurance than would do so if such clauses were not available. However, at least one of the several *amici* to file briefs in *Rawan* described Florida's experience in first invalidating consent-to-settlement clauses in medical malpractice insurance by statute, and then, decades later, amending the statute to permit such clauses in light of media reports that physicians were eschewing coverage because of insurer settlements of matters in which their conduct was thought to be blameless. Brief of Amici Curiae American Property and Casualty Insurance Association, Medical Professional Liability Association, and Massachusetts Insurance Federation Supporting Affirmance of the Judgment in Favor of Continental Casualty Company, Rawan v. Cont'l Cas. Co., 483 Mass. 654 (2019) (No. 12691), at 18-20.
66. Rawan v. Cont'l Cas. Co., 483 Mass. 654, 666 (2019).
67. *Id.* at 666-67.
68. *Id.* at 667. The court noted that both homeowners and commercial general liability policies commonly provide that the insurer will have the "right and duty to defend any suit against the insured . . . and may make such investigation and settlement of any claim or suit as it deems expedient." *Id.* at 664-65 (alteration in original) (quoting Western Polymer Tech., Inc. v. Reliance Ins. Co., 32 Cal. App. 4th 14, 18 (1995)).

insurers not be free to abuse exclusive rights of control over settlement, particularly where doing so might expose their insureds to jury verdicts in excess of policy limits.[69] In the court's view, policyholder consent-to-settle clauses *help* in correcting the imbalance of power between insurer and insured, such that the original enactment of c. 176D did not imply that such clauses were invalid.[70]

The court recognized that this state of affairs changed with the 1979 amendments to M.G.L. c. 93A, which eliminated any requirement of contractual privity between plaintiff and defendant and conferred standing to sue on "[a]ny person . . . who has been injured by another person's use or employment of any method, act or practice declared to be unlawful" by M.G.L. c. 93A, §2.[71] More specifically, the SJC acknowledged that this amendment conferred standing upon third-party claimants to pursue claims against insurers for unfair claim settlement practices, such as those proscribed by M.G.L. c. 176D, § 3(9)(f).[72] Nevertheless, the court was not persuaded that recognition of insurer duties running to claimants implied an intent to regulate the content of insurance clauses addressing settlement authority or to subordinate the rights of insureds to the rights of claimants.[73]

The SJC emphasized that, by the time of the 1979 amendments to M.G.L. c. 93A, "there was no doubt that consent-to-settle clauses were in existence," citing one of its own decisions as illustrative.[74] Nevertheless, such clauses were neither prohibited nor limited by the amendments, nor were they even mentioned in the relevant legislative history.[75] In the absence of any such statutory wording or legislative guidance, the court held that "an insurer must respect its obligations to its insured."[76] The court conceded there would be circumstances in which a policyholder's withholding of consent will insulate an insurer from M.G.L. c. 176D liability where the insurer *would* have been obligated to settle if the policyholder had consented.[77] Returning to its observation about the optional nature of non-medical professional liability insurance, however, the SJC observed that, even if the claimant is thereby forced to trial, they will be "in no worse a position than he or she would have been if the professional had not purchased insurance."[78]

The court accordingly concluded that "consent-to-settle clauses are neither prohibited by M.G.L. c. 176D, § 3(9)(f), nor 'manifestly injurious to the public interest and welfare,' and therefore, nothing renders them unenforceable as a matter of public policy."[79] For the same reasons, the court rejected the Rawans' contention that only consent-to-settle provisions that are accompanied by hammer clauses are acceptable.[80] It remained only for the court to examine whether, in light of its conclusions, the record supported the Superior Court's grant of summary judgment in favor of Continental.

B. Impact of Consent-to-Settle Clause on Insurer Duties as to Settlement

The SJC began its analysis of Continental's performance in the Rawan-Lala settlement dynamic by cautioning that its conclusion that consent-to-settle clauses are valid does not mean that an insurer who honors such a clause "is otherwise exonerated from the duties imposed by M.G.L. c. 176D."[81] The insurer's performance instead is to be "measured in terms of the insurer's good faith efforts and transparency toward both its insured and a third-party claimant."[82] The court explained that such efforts "would include a thorough investigation of the facts, a careful attempt to determine the value of a claim, good faith efforts to convince the insured to settle for such an amount, and the absence of misleading, improper, or extortionate conduct towards the third-party claimant."[83] Applying this test to Continental's conduct, the court found that, even considering the facts in the light most favorable to the Rawans, no act or omission on Continental's part could be found to have given rise to the Rawans' claimed damages, such that the grant of summary judgment in favor of Continental was proper.[84]

Unsurprisingly, the court found that Continental's efforts to encourage Lala to settle were satisfactory.[85] It emphasized the insurer's thorough investigation and evaluation of the claim; its sharing of the results of its investigation with Lala; its encouragement of mediation with both Lala and the Rawans; and its efforts to persuade Lala to settle, which had succeeded in generating a Lala-endorsed settlement offer of $100,000 to the Rawans.[86] It found that Lala's "obstinacy" in refusing to authorize a more generous offer, even after being advised of his own exposure if the verdict exceeded the depleted limits of his insurance, rendered any further efforts on Continental's part "pointless."[87]

The court was more sympathetic toward the Rawans' complaints about Continental's attempts to "hide" the Heger report from them and Continental's inaccurate statements regarding the limits of liability applicable to the Rawans' claim.[88] The SJC found these acts

69. *Id.* at 667.
70. *Id.*
71. Mass. Gen. Laws c. 93A, § 9 (2018), as amended through St. 1979, c. 406, § 1.
72. *Rawan*, 483 Mass. at 669.
73. *Id.* at 669-70.
74. *Id.* at 669 (citing Van Dyke v. St. Paul Fire & Marine Ins. Co., 388 Mass. 671, 676 n.6 (1983)).
75. *Id.*
76. *Id.* at 670.
77. *Id.* at 670-71.
78. Rawan v. Cont'l Cas. Co., 483 Mass. 654, 671 (2019).
79. *Id.*
80. *Id.* at 671, n.7.
81. *Id.* at 672.
82. *Id.*
83. *Id.* at 672 (internal quotation marks omitted).
84. Rawan v. Cont'l Cas. Co., 483 Mass. 654, 673-75 (2019).
85. *Id.* at 673.
86. *Id.*
87. *Id.*
88. *Id.* at 673-74.

"questionable" and "problematic" when viewed in the light most favorable to the Rawans, but pointed out that, even if they had been found to violate M.G.L. c. 176D, it would have remained for the Rawans to prove that this conduct was the cause of any loss they had sustained.[89] This, in the court's view, was a hurdle the Rawans' could not clear.[90]

Regarding the Heger report, the court noted that Lala's position as to settlement became even more intransigent after the Rawans' motion to compel had been allowed and the report was in the Rawans' hands, such that the delay in production "made no difference."[91] As to the available limits of insurance, the court observed that Lala's posture toward settlement did not improve even after he knew his limits were actually twice the amount Continental had indicated, and that Continental ultimately paid the full amount of the remaining limits of the applicable policy in partial satisfaction of the judgment against Lala, with Lala making up the difference with his own funds.[92] The court could see no harm from Continental's misrepresentation with respect to policy limits, and thus concluded that summary judgment was appropriate on all claims advanced by the Rawans.[93]

III. Implications of *Rawan*

The *Rawan* opinion strikes a delicate balance among the rights of insurer, policyholder and claimant. The professional policyholder's bargained-for right to decline to settle an action attacking his or her competence as a service-provider is respected, as is the insurer's right to honor that decision, even if the declined settlement would have been fair and equitable. The claimant's right under M.G.L. c. 176D, § 3(9)(f) to insist that insurers endeavor in good faith to settle claims or suits in which liability has become reasonably clear is abridged only to the extent necessary to enforce the professional's veto power. Despite the undeniable tension between that veto power and the insurer's duty to settle, the court found it unnecessary to sacrifice entirely the rights of either insured professionals or claimants.

The decision also is quite consequential, surely in declaring consent-to-settle provisions to be valid, but perhaps equally in spelling out the insurer's obligations with respect to investigation and settlement where a consent-to-settle provision is involved — obligations that presumably will attach equally whether or not a "hammer clause" is included. The court's non-exhaustive list of these obligations bears repeating: The insurer must make a thorough (and, doubtless, timely) investigation of the facts; it must make a careful attempt to determine the value of the claim; it must make good faith efforts to persuade the professional to settle in accordance with that valuation; and it must not engage in misleading or otherwise unfair conduct toward the claimant in the course of the litigation or in settlement negotiations.[94] If the claimant can demonstrate an insurer's failure to discharge any of these obligations, *and* that such failure was the cause of any loss the claimant sustained, M.G.L. c. 93A liability may be imposed.[95]

Despite the soundness of the court's reasoning and conclusions, however, there is cause for concern that the legacy of *Rawan* will be complicated and challenging for insurers and claimants. At least two significant problems of proof are apparent. If a claimant attacks a failure to settle where an opportunity to do so was rejected by the professional contrary to advice provided by the insurer's appointed counsel, the insurer ordinarily will wish to prove in its defense both the professional's exercise of their veto power and the content of the advice as to settlement provided to the professional by appointed counsel. But the communications by which these points might be evidenced will often be subject to the attorney-client privilege, and that privilege will "belong," at least in part, to the professional, and presumably could not be waived absent the professional's consent. For reasons not evident from the opinion, no such invocation of privilege by Lala appears to have impeded Continental's defense of the Rawans' M.G.L. c. 93A claims. But if the professional is unwilling to waive the privilege, how does the insurer prove its good faith efforts to persuade the professional to settle? Will the Massachusetts courts find that entering into a contract of professional liability insurance that includes a consent-to-settle clause constitutes an implied waiver of privilege by the professional to the extent necessary to permit the insurer to prove its compliance with statutory duties regarding settlement?

From the claimant's perspective, proving not only that the insurer violated its duty-to-settle obligations, but also that this default caused the claimant to suffer loss, may be a difficult burden to sustain. In *Rawan* itself, the insurer's misrepresentations as to policy limits, as well as its shifting characterizations of the Heger report, were viewed as "problematic" and not to be condoned, at least when viewed in the light most favorable to the Rawans.[96] Nevertheless, these arguable breaches of duty by the insurer were deemed immaterial in light of Lala's intractable posture toward settlement. Where the claimant's case depends on proof of a refusal to settle on fair and equitable terms in the face of reasonably clear liability, it seems fair to wonder how often a claimant will be able to demonstrate that the professional who refused to settle in such circumstances would have acted reasonably and proceeded with a settlement if only their insurer had been better prepared or more persuasive.

— Martin C. Pentz

89. *Id.*
90. Rawan v. Cont'l Cas. Co., 483 Mass. 654, 675 (2019).
91. *Id.* at 674.
92. *Id.* at 675.
93. *Id.*
94. *Id.* at 672.
95. *See id.* at 672, 674.
96. Rawan v. Cont'l Cas. Co., 483 Mass. 654, 674-75 (2019).

Book Review

Separate: The Story of Plessy v. Ferguson and America's Journey from Slavery to Segregation

By Steve Luxenberg (W. W. Norton Company, Inc., 2019) 600 pages

On June 7, 1892, Homer Plessy bought a ticket on the East Louisiana Railroad for a trip from New Orleans to Covington, La. Plessy was a light-skinned shoemaker of mixed race[1] from an old New Orleans family that traced its roots back to the time of French and Spanish rule. His journey was a test to challenge the constitutionality of a new law. Two years earlier, Louisiana had enacted "An Act to promote the comfort of passengers on railways," also known as the Railway Accommodations Act or Separate Car Act.[2] The statute required railroad companies to "provide equal but separate accommodations for the white, and colored races."[3] Railroad companies had two choices: either partition a coach by race with dividers or run two or more segregated coaches for each train. Passengers could ride only in the section devoted to their race. The statute directed train employees to assign passengers to the applicable coach or compartment. If a passenger refused to go as assigned, the railroad company could deny passage and was absolved from damage claims. Passengers could be fined or imprisoned for refusing to travel in the designated coach or compartment, and train employees (both conductors as well as company officers and directors) were subject to criminal penalties for neglecting to comply with the law or assigning a passenger to the wrong coach.

A group of New Orleans residents led by Lewis Martinet, a newspaper editor and member of a prominent Creole family, formed a citizens' committee (Citizens' Committee), known by its French name "Comité des Citoyens," to figure out ways to defeat the law. Martinet, the son of a French-speaking European father and a mother who was a former slave, was active in Republican politics and had spearheaded a vigorous opposition to the statute before enactment. After securing local and national legal help, the Citizens' Committee devised a scheme to challenge the law in court with the connivance of the East Louisiana Railroad.[4] The Citizens' Committee planned a test case: a volunteer would be convicted of violating the statute and then seek a writ of habeas corpus in federal court alleging the law's unconstitutionality. Homer Plessy was the second such volunteer.[5]

By pre-arrangement with the railroad company, Plessy went to the car assigned for whites and was questioned by the conductor as to his race. On identifying himself as not white, a private detective who had been hired by the Citizens' Committee for this purpose arrested Plessy. After being removed from the train, Plessy was whisked off to the local police station where the Citizens' Committee posted his bail.

Plessy was charged with violating the statute. Judge John Ferguson, who was originally from Massachusetts, rejected Plessy's constitutional challenge. The judge's view was straightforward: a requirement of "separate but equal" was legal and supported by much precedent.[6] (The issue of whether the cars were, in fact, equal was not raised in the case.) Judge Ferguson's opinion teed up the constitutional arguments. However, a delay in setting a trial date blocked the plan to quickly seek habeas corpus relief in federal court since Plessy remained free on bail. Undaunted, Plessy's legal team filed writs of prohibition and certiorari with the Louisiana Supreme Court to review the constitutional question. As expected, the state court (which had previously limited the statute's reach to intra-state travel)[7] upheld the law, emphasizing that neither race could ride in the car designated for the other as long as all people were treated equally.[8] In so ruling, the court rejected the argument that the law was aimed at Blacks.[9] A contrary view, the justices maintained, would strike down many laws based on separation, such as separate schooling and bans on interracial marriage (which, it matter-of-factly assumed, were themselves valid). Nevertheless, the court held that the legislature could not curtail damage suits by passengers against railroad companies for improperly determining a person's race. With this decision, Plessy was able to file a writ of error with the U.S. Supreme Court to get a definitive determination.

Four years later, on May 18, 1896, a month after oral argument,

1. In the census of 1900 and 1910, Homer Plessy was identified as Black, but in the 1920 census, he was listed as white. Steve Luxenberg, *Separate: The Story of Plessy v. Ferguson and America's Journey from Slavery to Segregation* 490 (W. W. Norton Co., Inc. 2019).
2. La. Acts of 1890, chapter 111.
3. *Id.*
4. Railroad companies generally opposed the statute due to the added expense of adding more cars. *See* Luxenberg, *supra* note 1, at 416.
5. The *Plessy* case was the committee's second attempt to challenge the law. The first had been partially successful and used a similar approach. Daniel Desdunes, like Plessy a light-skinned young man of mixed race, boarded an Alabama-bound train (this time of the Louisville and Nashville Railroad). As with Plessy, the railroad company was cooperating with the committee. Desdunes refused to go to the car assigned to him and, as planned, was arrested. Luxenberg, *supra* note 1, at 425-26. However, before the case could advance, the Louisiana Supreme Court ruled in another case that the statute could not be enforced against interstate travelers such as Desdunes. State *ex rel.* Abbott v. Hicks, 44 La. Ann. 770 (1892).
6. Luxenberg, *supra* note 1, at 439.
7. State *ex rel.* Abbott v. Hicks, 44 La. Ann. 770 (1892).
8. *Ex parte* Plessy, 45 La. Ann. 80 (1892).
9. The record did not indicate Plessy's race.

Justice Henry Billings Brown issued the Court's opinion in *Plessy v. Ferguson*[10] upholding the constitutionality of the Louisiana statute, a decision that Justice John Marshall Harlan's dissent predicted would "in time, prove to be quite as pernicious as the decision made by this tribunal in the Dred Scott Case."[11] Despite its serious ramifications, the case attracted little attention at the time. The country had fought the Civil War to wipe out slavery and buttressed this outcome with the Reconstruction Amendments.[12] However, the promise of political, let alone social, equality failed. *Plessy* gave permission to lock in a racial caste system, and progress toward a colorblind nation collapsed.

Separate: The Story of Plessy v. Ferguson and America's Journey from Slavery to Segregation by Steve Luxenberg, recounts how this result came about by focusing, in alternating chapters, on the lives of three key individuals and one community caught up in the *Plessy* saga. The individuals are Justice Brown, who wrote the majority opinion; Justice Harlan, the sole dissenter;[13] and Albion Tourgée, lead attorney for the plaintiff in error. The City of New Orleans, with its vibrant, 19th-century mixed-race population and long history of free Black people, is the community.

Luxenberg, an editor at *The Washington Post* who has won two Pulitzer Prizes, uses the individuals as well as his overview of New Orleans society to show how little attitudes toward racial equality changed from the Antebellum period through the Civil War and Reconstruction era and into the Jim Crow era.[14] He starts his tale with the Northern origins of separation. As befits his subject, Luxenberg begins with an earlier controversy over separate rail cars, this one involving Massachusetts railroads in the 1830s and '40s. In those years, three of eight Massachusetts rail lines required that Blacks ride separately from whites in what became commonly known as the "Jim Crow" car. Nor was segregation in transportation limited to rail travel. For example, the operator of the ferry between New Bedford and the Islands restricted Blacks to the lower-priced seats below deck. Abolitionists fought vigorously against this discrimination with demonstrations, rallies and civil disobedience.[15] However, challenges to company policies were rebuffed in court, where judges deferred to the private railways as free to make whatever rules they wanted. Property rights trumped equal treatment. When the General Court took up a bill to outlaw segregated rail cars, the main objection leading to the bill's defeat was the impropriety of government interference with private corporations. Nevertheless, seeing the threat of legislative action, in 1843, the railroad companies voluntarily rescinded their segregationist policies.

Luxenberg spends little time on other aspects of separation in Massachusetts, but it was significant. Indeed, segregation presumably reflected widespread attitudes, or the rail lines would not have implemented their policies. Interracial marriage had been banned in Massachusetts since 1705, with the prohibition repealed in 1843 at the same time as the railroad controversy was raging. The 1840s also saw an unsuccessful effort to desegregate Boston schools,[16] to end a practice that had begun several decades earlier from requests of Black parents for separate schools.[17] In *Roberts v. City of Boston,*[18] the Supreme Judicial Court upheld Boston's segregated school policy in an opinion written by renowned Chief Justice Lemuel Shaw. The court declared that, in the absence of legislation, the Boston School Committee had the power to distribute and classify pupils in any way it saw fit. As long as the power was reasonably exercised, the school committee's decision was conclusive. The court noted that the school committee, after "great deliberation,"[19] had concluded it best to maintain separate primary schools for Black and white children and stated, "we can perceive no ground to doubt, that this is the honest result of their experience and judgment."[20] Responding to the plaintiff's argument that separate schools "perpetuate the odious distinction of caste, founded in a deep-rooted prejudice in public opinion,"[21] Shaw observed that "[t]his prejudice, if it exists, is not created by law, and probably cannot be changed by law."[22] This theme of the law's inability to alter societal attitudes would be repeated in many cases, including *Plessy*. In 1855, however, the Massachusetts Legislature outlawed separate schools, likely reflecting at least some change in public opinion.[23]

After setting the stage, Luxenberg turns to his four characters: Justice Harlan, Justice Brown, Albion Tourgée and the City of New Orleans. Of the three individuals, Harlan's attitudes evolved most dramatically over the course of his life. Coming from a prominent Kentucky family of slaveholders, Harlan followed in the political footsteps of his father, a leading Whig who served as Kentucky's attorney general.[24] The younger Harlan became a lawyer, fought for the Union, ran for political office (serving terms as attorney general both before and after the war) and gained respect for his oratorical skills. As the Whigs were breaking apart in the 1850s, Harlan sought a new political home opposed to the Democrats. For several years, he joined the anti-immigrant Know Nothing party. In 1860, he ran for Congress as a pro-slavery candidate of the Kentucky "Opposition" party, no longer able to support the Know Nothings but also unable to bring himself to join the Republicans with their abolitionist views. A staunch Unionist, Harlan nevertheless, remained pro-slavery and supported George McClellan in the 1864 election against Lincoln. After the Civil War, he rejected the Democratic party as replete with traitors.

10. 163 U.S. 537 (1896).

11. *Id.* at 559 (Harlan, J. dissenting).

12. The Reconstruction Amendments are the 13th, 14th and 15th amendments to the United States Constitution.

13. The Court's decision was 7-1. Justice David Brewer did not participate in the case.

14. Reconstruction ran from 1865 to 1877, followed by the Jim Crow era, which continued into the 1950s.

15. Abolitionist riders, both white and Black, and including the young Frederick Douglass, insisted on traveling in the "wrong" car and forcing railroads to oust them, thereby often disrupting service. Luxenberg, *supra* note 1, at 10-13.

16. Schools in Salem and Nantucket were also segregated. *See* "The History of Slavery and Institutional Racial Segregation in Massachusetts," Primary Research, https://primaryresearch.org/the-history-of-slavery-and-institutional-racial-segregation-in-massachusetts/.

17. Donald M. Jacobs, "The Nineteenth Century Struggle Over Segregated Education in the Boston Schools," 39 J. Negro Education 76, 76 (1970).

18. 59 Mass. 198 (1849).

19. *Id.* at 209.

20. *Id.*

21. *Id.*

22. *Id.*

23. Mass. Acts 1855, c. 256; *See* "The History of Slavery and Institutional Racial Segregation," *supra* note 16.

24. The elder Harlan also later served as the U.S. district attorney for his home state under Lincoln. Luxenberg, *supra* note 1, at 119.

Harlan did not voluntarily free his family's slaves. He opposed federal emancipation as well as the post-war constitutional amendments and the 1866 Civil Rights Act as disrupting the constitutional balance between state and federal powers. However, influenced in large measure by atrocities inflicted by the Ku Klux Klan and other terrorist groups on Blacks that he observed as a special federal prosecutor for civil rights cases, Harlan's views evolved. Eventually, in the late 1860s, he became a Republican, not a popular stance in heavily Democratic Kentucky. With his new party, Harlan ran twice for governor (losing both times). When confronted with his changed outlook by a Democratic opponent, Harlan declared, "let it rather be said of me that I am right than consistent."[25] When President Rutherford Hayes wanted a Southerner for the Supreme Court in 1877, he turned to Harlan, by then a loyal Republican who had sacrificed and worked hard for the party.

Unlike Harlan, Henry Brown's views did not evolve. Born in western Massachusetts, Brown moved to Michigan as a young man. He was ambitious though often filled with self-doubt. Settling in Detroit, Brown became active in Michigan politics, but his Northern roots did not make him sympathetic to the plight of slaves or former slaves. Although a Republican, he was attracted to the party's moderate wing; he liked neither the radicals nor abolition.

Brown developed an active law practice but did not like the stress of litigation and longed to be a judge. He got his wish when President Ulysses Grant appointed him to the U.S. District Court in 1875 after the sudden death of the incumbent judge. Later, Brown actively campaigned for a Supreme Court appointment and, after being passed over on one occasion, finally was selected by President Benjamin Harrison in 1890.

Luxenberg presents Brown as someone who would not rock the boat. Unlike both Harlan and Tourgée, he hired a substitute to serve for him in the Civil War. He liked entertaining and European travel along with luxuries and status. His wife's precarious health, however, often interfered with his ambition, political demands and love of social gatherings. Brown had a wealthy father-in-law and did well financially from his wife's inheritance, although his taste for fine living brought financial stress. Nonetheless, his wife's money allowed him to pursue political office and the judiciary with their lower pay.

Perhaps the most intriguing of Luxenberg's characters is Albion Tourgée. Tourgée was a tireless advocate for equality. Hailing from Ohio, he devoted much of his life to writing, lecturing and working for justice for former slaves. In his youth, Tourgée was a dreamer. He wanted to make a mark on the world, perhaps as a famous lawyer or noted author. A powerful debater, he had a brusque manner and freely spoke his mind. For a man who would eventually devote his life to the fight for racial justice, he showed little concern with abolition before the Civil War. Indeed, he would make fun of his future wife's interest in the subject. When the war came, however, Tourgée enlisted. Unlike Harlan, who fought to preserve the Union, Tourgée wanted to make the Union better by making it more just. His interactions with Black men in the South during the war left him deeply impressed. Tourgée was soon injured during the retreat from Bull Run, resulting in a back ailment that plagued him the rest of his life. Nevertheless, he struggled back to health and re-enlisted, only to become a prisoner of war. Four months spent captive in a Confederate prison led him to strong appreciation of what freedom meant.

Following the war, Tourgée moved to North Carolina, where he lived for 15 years as one of the hated Carpetbaggers, became active in Republican politics, crusaded for the rights of former slaves, helped rewrite the state constitution, was elected to one term as a superior court judge and vigorously opposed the Ku Klux Klan. Needless to say, he was not popular with many of his white neighbors. As Reconstruction ended and Democrats regained power, conditions became increasingly dangerous for him, so much so that, for much of his time in the South, he lived apart from his wife who had returned north for safety.

After leaving the South, Tourgée turned to writing and editing. He authored the highly popular novel about a Carpetbagger, *A Fool's Errand*, as well as other stories of Southern life, and was in high demand as a public speaker. Tourgée's long-running newspaper column, *A Bystander's Notes*, frequently attacked what he called "Southernism," the idea that Southern civilization is unique and needed "controlled labor" and the oppression of Black people to flourish. He also attacked Northern indifference to racial injustice and admonished Northerners that they did not understand the South. In particular, Tourgée vehemently criticized Northern acceptance of racial violence as simply part of the Southern way of life. Northern ignorance, he believed, led to the poor design and ultimate failure of Reconstruction. Still, he criticized the end of Reconstruction and federal oversight in 1876 as a misguided hope that the South would respond by becoming a fairer society.

In Tourgée's view, Reconstruction should have focused on helping former slaves acquire property, stability and education, but not immediately to push for rights. Such an approach, he believed, would have improved their lot without infuriating the South and hardening resistance. He viewed education as especially important. Thus, shortly after moving to North Carolina, Tourgée and his wife established a school for former slaves. Tourgée argued that direct federal aid to local public schools was the key to defeating the Southern way of life and supporting the freedmen. Funneling money through states instead would ensure that little of such aid would reach Black schools. In 1880, he nearly convinced President-elect James Garfield to back a national education fund to send money directly to towns and schools. The fund, he proposed, should be used to provide literacy and stop racial oppression. Although backing federal education aid, Garfield was urged caution by other advisers who questioned the constitutionality of bypassing state governments. In his inaugural address, Garfield emphasized the need to end illiteracy with the help of the states but did not explain how this would be done. Garfield was assassinated before he could flesh out his plans. Tourgée's prominence in the national dialogue concerning race relations brought him to the attention of people in New Orleans who sought to challenge the separate car legislation.

Luxenberg describes the personal tragedies and physical ailments that beset his main characters. The influence of wives, financial pressures, attitudes toward status and acceptance, family tragedies

25. *Id.* at 212.

and health concerns all shaped the lives of Harlan, Brown and Tourgée. Both Tourgée (who was blind in one eye) and Brown had poor eyesight, which afflicted them all their lives. Brown often was haunted by debilitating headaches. Tourgée suffered greatly from his injuries received in the Civil War. Harlan endured his daughter's death shortly after he was appointed to the Supreme Court. He also provided considerable aid to his older brother who suffered from alcoholism. To one degree or another, they all confronted financial pressures. Although generally well-off, Harlan's forays into politics brought stress by interfering with his law practice and ability to support his growing family. Until his wife received her inheritance, Brown felt financial demands competing with his desire for less remunerative judicial or other public positions. Tourgée was frequently in a precarious financial situation. He tried a few business ventures with limited reward. Even after the resounding success of *A Fool's Errand*, he squandered his earnings with poor investments. While interesting in providing an understanding of these men (and Tourgée's refusal to let his injuries slow him down is impressive), the book does not give a sense of how or whether these personal stories affected their view of racial equality.

Luxenberg's fourth "character" is the free mixed-race community of New Orleans and several of its individual members. The city's three-tier society was unique in the South. Settled by the French and Spanish before being acquired by the United States in the Louisiana Purchase, New Orleans retained many European customs and traditions. In particular, the French and Spanish colonies were not divided on rigid lines of black or white. Both French and Spanish society recognized a number of racial categories, depending on the percentage of a person's African and European parentage, with different names for each gradation. Many of these mixed-race people were not enslaved. Some had gained freedom through militia service for the French or Spanish colony. Others had purchased their freedom either themselves[26] or with the help of friends or relatives. As a result, by the 19th century, much of this community had never been enslaved, and some owned slaves themselves. Thus, New Orleans had a large population of *les gens de couleur libre,* or free people of color. Indeed, Luxenberg tells us that by 1840, this population numbered about 19,000 (out of a total population of 102,000). Many of them were middle-class professionals, artisans, shop owners and the like. Some were wealthy. Many had fought at the Battle of New Orleans during the War of 1812 and were recognized as military heroes important in saving the city from the British. Plessy came from a long-established family in this mixed-race community.

Despite their accomplishments, the free people of color were confined to a middle rung of society. Although they had many rights compared to enslaved people, they did not have political rights. For example, they could own property, make wills and enter contracts, but could not vote or hold public office. They were allowed to sue and testify in court but were barred from jury service. Public theaters were open to them but only in sections separate from whites, and the public schools were off limits. Promises of citizenship made at the time of the Louisiana Purchase had, of course, been ignored.

Throughout the Antebellum period, efforts were made to expand the rights of this mixed-race population. A proposal at the state constitutional convention in 1845 sought (unsuccessfully) to give them citizenship. Their rights, however, also came under attack. Legislators increasingly tried to restrict or harass free Blacks and mixed-race people. In an 1855 decision, the Louisiana Supreme Court pushed back on some of these efforts by stressing the difference in legal status between *les gen de couleur libre* and slaves and essentially upheld the existing social structure.[27] The legislature quickly responded with new laws designed to encourage free Blacks to leave Louisiana. Statutes were enacted banning people of color from many occupations[28] and barring their immigration into the state.[29] Despite the reluctance of New Orleans officials to enforce the state legislation, the increasing hostility had its effect as the population of free people of color in the city dropped by 1,860 to about 11,000.

Tensions continued during and after the Civil War as Louisiana debated whether simply to end slavery or to advance equal rights irrespective of race. Throughout the post-war years, members of the mixed-race community chafed under the tendency of many whites to lump them in with former slaves, ignoring their long-established social status.

With the end of Reconstruction, conditions deteriorated throughout the South. The former white ruling class regained power. Gains made after the Civil War in legal and political rights for Black people were being eroded. The federal government lost interest, as did many in the North. Violence increased. Nor was racial injustice confined to the South. Northern prejudice continued after the Civil War as well. Luxenberg highlights numerous instances of ongoing racial antagonism and discrimination. For example, when a proposal in 1866 to amend the Michigan Constitution to allow universal male suffrage was soundly defeated, the Detroit Free Press declared, "Michigan Believes This Is a White Man's Government."[30] Many Northern communities featured white-only hotels[31] and segregated city streetcars. Schools in the District of Columbia and elsewhere were segregated. Moreover, that great celebration of American progress, the 1893 World Columbian Exposition in Chicago, ignored or trivialized Black contributions to the country and trumpeted white achievement. Despite the Reconstruction amendments promising citizenship and equality, society's biases remained unchanged. The increasingly harsh atmosphere was particularly felt by New Orleans' middle-class, mixed-race community, leading to Martinet's resolve to challenge the Separate Car Act.

Thus, *Plessy* played out amid increasing hostility, injustice and indifference among much of the white population toward African Americans. But it was not just societal attitudes that posed challenges. Plessy's position faced formidable obstacles due to case law that had developed since the Civil War. Supreme Court decisions had not been sympathetic to a broad interpretation of the three

26. The Spanish allowed slaves to take on extra work for pay. *Id.* at 96.

27. State v. Harrison, 11 La. Ann. 722 (1856). The dissent, however, protested that both slaves and free Black people were "distinguished from all others by nature, custom and law, and never confounded with citizens of the State." *Id.* at 725 (Spofford, J. dissenting).

28. La. Act No. 16 (1859).

29. La. Act No. 87 (1859).

30. Luxenberg, *supra* note 1, at 225.

31. Luxenberg describes the 1882 refusal of hotels in Washington, D.C., as well as elsewhere in the North, to welcome a popular Black choral group, which had performed to great acclaim at the White House. *Id.* at 342-44.

Reconstruction Amendments. The Reconstruction Amendments, and federal legislation that followed in their wake, seemingly placed prohibition of racial discrimination on a solid legal footing. The 13th Amendment had ended slavery.[32] The 14th Amendment established national and state citizenship. It also restricted state power by protecting the privileges and immunities of United States citizens from hostile state law, prohibiting states from denying equal protection, and guaranteeing due process of law.[33] The 15th Amendment guaranteed the right to vote notwithstanding race, color or previous condition of servitude.[34] All three amendments authorized enforcement through federal legislation, and Congress took the opportunity to act. In 1866, it adopted a Civil Rights Act[35] followed by a series of laws to protect voting and other civil rights and to outlaw the Ku Klux Klan. In 1875, Congress went further with a new Civil Rights Act directed at private businesses.[36] This statute mandated "full and equal enjoyment of the accommodations, advantages, facilities and privileges of inns, public conveyances . . . theaters, and other places of public amusement" to all persons regardless of race, color or previous condition of servitude.[37]

When interpreted by the courts, however, these laws often ran into trouble. In reviewing challenges to the statutes, the judiciary struggled to define the relationship between the federal and state governments as well as the authority of the federal government to regulate private enterprise. A recurring theme in the pre-*Plessy* cases was a reluctance by the Court to interfere with traditional property rights or to disrupt the traditional state-federal relationship. These concepts proved barriers difficult to overcome. Harlan himself grappled with this, particularly while a government official and politician in Kentucky before his appointment to the Court, but he ultimately recognized that the 13th and 14th amendments changed the rules of the game and that justice demanded equal treatment, which could not be accomplished through segregation. Other judges, however, did not agree. Although courts recognized the Reconstruction Amendments as providing Blacks with citizenship and certain concomitant legal or political rights,[38] there was a reluctance to go further. As case law developed, many courts began to distinguish between "social" and "legal" equality.

Luxenberg describes the major cases. The first warning came in a 5-4 decision concerning state economic regulation rather than racial discrimination. The *Slaughterhouse Cases*[39] involved a challenge to a state grant to a private corporation of an exclusive right to maintain a slaughterhouse in the vicinity of New Orleans. As a result, all butchers were forced to use the designated facility. The plaintiffs, a group of local butchers, alleged that this state-sanctioned monopoly deprived them of the right to exercise their trade, thereby imposing an involuntary servitude and abridging their privileges and immunities as citizens of the United States, as well as violating equal protection and due process. The Court's majority rejected the claims, emphasizing that the Reconstruction Amendments were designed to end slavery and were not meant as economic legislation.[40] The Court held that the Privileges and Immunities clause of the 14th Amendment applied only to certain rights of United States citizenship and did not protect a citizen against the legislative power of his own state.[41] The clause did not change the relationship between the federal and state governments or allow the federal government to regulate property rights. In contrast, the dissent argued that the 14th Amendment protected citizens of the United States against deprivation of their common rights by state legislation and also was sympathetic to a broad reading of "involuntary servitude" under the 13th Amendment. Therefore, although the decision recognized the purpose of the amendments as securing and perpetuating freedom for former slaves, it also determined that the separate roles of the state and federal governments as established in the pre-Civil War Constitution remained generally unaltered.

With *United States v. Cruikshank*,[42] the Court further restricted the reach of the 14th Amendment. *Cruikshank* involved a challenge to federal prosecution under the 1870 Enforcement Act of white terrorists who had murdered scores of Black freedmen in rural Louisiana during the infamous Colfax Massacre.[43] Holding that the 14th Amendment applied only to the states and not against individuals,

32. The 13th Amendment provides that "neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. Const. amend. XIII.

33. Section 1 of the 14th Amendment provides, "all persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

34. "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. Const. amend. XV, § 1.

35. 14 Stat. 27, Pub. L. 30-31. Among other things, the law provided that "all citizens regardless of race, color or previous condition of slavery or involuntary servitude" were entitled to certain specific legal rights of citizenship, including the right to make and enforce contracts, to sue, be parties and give evidence; to inherit, purchase, lease, sell, hold and convey real and personal property, and in every state to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment and to none other."

36. 18 Stat. 335.

37. 18 Stat. 335, § 1.

38. *See, e.g., Ex parte* Virginia, 100 U.S. 339 (1879) (indictment of county judge for excluding Black men from jury service); Strauder v. West Virginia, 100 U.S. 303 (1879) (state statute barring Black men from jury service is void).

39. 83 U.S. 36 (1872).

40. *See id.* at 71-72, 82.

41. *Id.* at 74.

42. 92 U.S. 542 (1875).

43. The Colfax Massacre occurred on Easter Sunday, 1873. It resulted from tensions over the outcome of the Louisiana elections and a struggle for control of the Colfax, Louisiana, courthouse. A group of 140 white Democrats attacked the courthouse, which was defended by mostly Black Republicans. After the defenders ran out of ammunition, they surrendered, and many were executed. *See* Richard White, *The Republic for Which it Stands: The United States during Reconstruction and the Gilded Age, 1865–1896* 279-80 (2017).

the Court threw out the indictments.[44]

Two years later, in *Hall v. Decuir,*[45] the Court struck down a state ban on racial discrimination, holding that Congressional authority over interstate commerce overrode Louisiana's ability to bar discrimination on interstate steamboats on the Mississippi River. It was irrelevant that the passenger was only traveling within Louisiana if the steamship served multiple states. Foreshadowing future developments, Justice Nathan Clifford's concurrence suggested that a policy of separate but equal ("as far as practicable") accommodations for white and Black passengers was reasonable to prevent "natural or well-known customary repugnancies."[46]

An 1883 challenge to the 1875 Civil Rights Act put additional restrictions on the Reconstruction Amendments. Lower courts had long questioned the constitutionality of the Civil Rights Act's regulation of private businesses. Shortly after its enactment, Judge Halmer Emmons, a respected circuit court judge, had held the act unconstitutional in a case brought against a private theater manager for discrimination. He declared that the internal regulations of theaters, hotel keepers and common carriers were all local concerns. Many other judges, but not all, agreed[47] Eight years after the statute's enactment, the issue finally reached the Supreme Court.

The Civil Rights Cases[48] were five consolidated cases attacking racial discrimination by hotels, theaters and railroad companies as in violation of the Civil Rights Act. Rejecting all the claims, the Court held that the 14th Amendment only applies to state action and does not authorize federal legislation affecting private persons. Otherwise, the Court feared, Congress would use the amendment to create a municipal code regulating private rights, a power reserved solely to the states. (The Court, however, reserved analysis under the Interstate Commerce clause.) Harlan, who was then the junior justice, was the sole dissenter. In an opinion lavishly praised by Frederick Douglass, Harlan accused the majority of taking a "too narrow and drastic" view of both the 13th and 14th amendments. Relying on the intent of the drafters, the context of the amendments and the pre-Civil War recognition of Congressional power to regulate individual conduct as demonstrated by the imposition of obligations under the Fugitive Slave Acts of 1793 and 1850,[49] Harlan found ample support for the federal legislation. While the majority was reluctant to impose responsibility on private persons, Harlan argued that railroad companies and inns were quasi-public, and under the statutes and permits that authorized them, were required to serve all the public. Similarly, he maintained that, because theaters were subject to state licensing, they had a responsibility to treat all members of the public the same.[50] He also urged a broad reading of the 13th Amendment to allow Congress to prohibit laws that use race to deprive persons of civil rights granted to other citizens of the state.[51] But his views did not prevail.

The Court moved closer to endorsing separation with its 1890 decision in *Louisville, New Orleans and Texas Railway v. Mississippi*.[52] While the *Civil Rights Cases* barred the federal government from banning discrimination by private entities, *Louisville Railway* upheld a Mississippi statute requiring all railroad companies carrying passengers in the state to discriminate by providing equal but separate accommodations for the white and Black races. The railroad company attacked its conviction under the statute, claiming violations of both the Privileges and Immunities clause of the 14th Amendment and the Interstate Commerce clause.[53] Despite the seemingly contrary decision in *Decuir*, the Court rejected the railroad company's position, ruling that, since the Mississippi Supreme Court deemed the law to apply only to intrastate travel, it did not affect interstate commerce.[54] Justice David Brewer's majority opinion took pains to try to distinguish *Decuir*, asserting unconvincingly that the Mississippi law did not burden the railroad company's interstate operations. Justice Harlan's dissent, joined by Justice Joseph Bradley, quoted extensively from the opinion in *Decuir* and pointed to the blatant inconsistency between the two decisions.

The Court emphasized that *Louisville Railway* was concerned only with a state mandate for railroads to provide separate accommodations within its borders. Whether the state could compel an individual to use a particular compartment was not at issue. Nevertheless, it seems clear where the Court was heading.

Thus, by the time Homer Plessy challenged the Louisiana Separate Car Act, the Supreme Court had signaled its sympathy for the separate but equal concept. Notwithstanding the differences in the two cases, both *Louisville Railway* and *Plessy* revolved around the constitutionality of the separate cars policy. Indeed, given the case law, Plessy's quest seems quixotic. Prior decisions had narrowed the reach of the Reconstruction Amendments and recognized the states' traditional control over police power. Frederick Douglass understood this and refused to support the effort. At some level, Tourgée

44. *Cruikshank*, 92 U.S. at 554-55. The Court found the indictments defective for several additional reasons, including that the alleged violations involved rights of state, rather than national citizenship; lack of specificity; and failure to allege that the victims were deprived of rights on account of race.

45. 95 U.S. 485 (1877). Ms. Decuir, a member of the New Orleans free people of color, booked passage for a trip within Louisiana on a steamboat traveling between that state and Mississippi. After being refused a room on the whites-only deck, she sued, alleging violation of the 1869 Louisiana Constitution and a related statute that prohibited discrimination on the basis of race. The Court held that, notwithstanding the intra-state nature of Decuir's trip, only the federal government could regulate accommodations on an interstate steamboat.

46. *Id.* at 503 (Clifford, J. concurring) (citing The West Chester & Philadelphia Railroad Co. v Miles, 55 Pa. St. 209).

47. Luxenberg, *supra* note 1, at 311-12, 344. State courts also were divided. For example, Coger v. The North West Union Packet Company, 37 Iowa 145 (1873), which predated the 1875 Civil Rights Act, held that Iowa constitutional provisions prohibiting discrimination on the basis of race were valid and supported by the federal constitutional amendments. In contrast, People ex Rel. King v. Gallagher, 93 N.Y. 438 (1883), a 4-2 decision of the New York Court of Appeal, upheld the authority of local school districts to segregate students by race notwithstanding the Reconstruction Amendments. Nor were the courts the only venues to consider separate accommodations. In a pair of decisions shortly after it was established in 1887, the Interstate Commerce Commission declared that separate rail cars were permissible as long as they were truly of equal quality. Luxenberg, *supra* note 1, at 364-71.

48. 109 U.S. 3 (1883).

49. 1 Stat. 302 (1793); 9 Stat. 462 (1850), Pub L. 31-60.

50. The Civil Right Cases, 109 U.S. at 37-41 (Harlan, J. dissenting).

51. *Id.* at 34-36 (Harlan, J. dissenting).

52. 133 U.S. 587 (1890)

53. Found in Article I, Section 8, clause 3 of the United States Constitution. U.S. Const. art. I, § 8, cl. 3.

54. *Mississippi*, 133 U.S. 587 at 592.

recognized the difficulty of Plessy's position but hoped to change the Court's outlook so that justice would win out. He would be disappointed.

Tourgée's arguments were wide-ranging. Luxenberg tells us that Plessy's brief (which also included the work of co-counsel James Walker)[55] advanced 23 issues. It emphasized both the 13th and 14th amendments and urged the Court to focus on their true purpose, which was to end the nation's caste system and create a new citizenship based on place of birth. Thus, the 13th Amendment outlawed all "badges of inferiority" and the 14th Amendment defined and protected the rights of citizenship irrespective of race. Moreover, he argued that under the 14th Amendment, whatever rights the state provides, must be the same for every United States citizen within the state's borders. Anticipating concerns about the division of federal and state power, Tourgée emphasized that the amendment altered the governmental relationship only as to matters of equality. Beyond that, the states retained their traditional authority.

Among other points, Tourgée scoffed at Louisiana's assertion that the Separate Car Act was merely a police regulation designed to protect the public health and the comfort of passengers. This was a subterfuge, he argued; the real purpose was to "humiliate and degrade" Blacks. He asked the justices to see themselves as African American to understand the impact of the statute and its perpetuation of inequality.

He also attacked the statute as arbitrary in its treatment of race and the responsibility it placed on train conductors. The statute legislated for two races, when in reality there are several. Furthermore, definitions of race varied greatly among the states. Surprisingly, Louisiana had no definition. In other states, different percentages of African versus European ancestry determined whether one was considered to be a person of color. This could result in an interstate traveler having to change coaches multiple times as the train crossed state lines. In addition, some states made race a question for the jury; in others, it was a question of law. Under these circumstances, it was nonsensical for a statute to force a train conductor to determine race.

Hoping to appeal to the Court's sympathy for property rights, Tourgée also proposed a novel argument, which further implicated the conductor's role. He asserted that an individual's reputation as a white person was a form of property. By leaving the determination of race to the conductor, Tourgée contended that the Louisiana statute deprived passengers of that property without due process.

The Court summarily rejected Plessy's 13th Amendment argument, holding that the provision was directed only against slavery, not discrimination. Justice Brown wrote, "a statute which implies merely a legal distinction . . . founded in the color of the two races and which must always so exist . . . has no tendency to destroy the legal equality of the two races, or reestablish a state of involuntary servitude."[56] As for the 14th Amendment, the Court distinguished legal from social equality. While agreeing that the amendment provided for "absolute equality of the two races before the law," the Court nevertheless declared that "in the nature of things, it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality or a comingling of the two races upon terms unsatisfactory to either."[57] Apparently unmoved by Tourgée's entreaty for the justices to put themselves in the place of persons of color, Justice Brown averred that laws requiring separation do not imply inferiority of one race or the other. In so doing, he ignored the historical context in which these laws were adopted and the long history of slavery and discrimination.[58]

The Court turned Tourgée's property rights argument around. Since, Justice Brown's opinion stated, the favorable reputation belonged to the dominant race, it could not be claimed by people of color. Therefore, the Court was unable to see how the statute deprived anyone of property.

Readily deferring to Louisiana's police power, the Court gave the state wide discretion as to what would be deemed reasonable, including reliance on established usage, customs and traditions with a view to promote comfort and preservation of the public peace and good order. Thus, Justice Brown, as had the Louisiana Supreme Court, cited laws requiring separate schooling and forbidding miscegenation as examples of valid regulation. Also like the Louisiana Court, the opinion accepted those other racial classifications as themselves constitutional. Similarly, the Court brushed away Tourgée's argument that allowing racial separation in rail accommodations would justify state-mandated separation based on other distinguishing characteristics in all sorts of contexts. Although broad, the police power, the Court said, must be reasonable and exercised in good faith rather than as a means of oppression. Citing *Yick Wo v. Hopkins*[59] as an example where an unreasonable city ordinance was struck down as unjustly discriminating against Chinese immigrants, the Court failed to understand that both the ordinance and the Louisiana statute arose from similar racial animosity.

The Court was unable or unwilling to see the true nature of the separate car legislation. Justice Brown asserted that the underlying fallacy of Plessy's case was an assumption that enforced separation was a badge of inferiority. "If this be so," the Court declared, it was "solely because the colored race chooses to put that construction upon it."[60] In an echo of Judge Shaw in *Roberts*, the Court held that social prejudices could not be overcome by legislation.

In contrast, Justice Harlan viewed the Louisiana statute as regulating use of a public highway solely based on race. This discrimination was unconstitutional. To his mind, for "civil rights common to all citizens, the Constitution of the United States does not . . . permit any public authority to know the race of those entitled to be

55. Walker was a prominent New Orleans criminal lawyer.

56. Plessy v. Ferguson, 163 U.S. 537, 543 (1896).

57. *Id.* at 544.

58. *Id.* at 549.

59. 118 U.S. 356 (1886). The case involved a challenge to a San Francisco ordinance that required a permit to operate a laundry business. Although on its face the ordinance was not discriminatory, the city denied permits to all Chinese applicants, numbering more than 200, while granting permits to 80 non-Chinese applicants. The Court unanimously declared, "the conclusion cannot be resisted that no reason for [the denial of permits to Chinese applicants] exists except hostility to the race and nationality to which the petitioners belong," and held that such discrimination violated the equal protection clause of the 14th Amendment. *Id.* at 374. As the court below had asked, "can a court be blind as to what must be necessarily known to every intelligent person in the state?" *In re: Wo Lee*, 26 Fed. Rep. 471 (1886).

60. *Plessy*, 163 U.S. at 551.

protected in the enjoyment of such rights."[61] Unlike the majority, Justice Harlan would have applied the 13th Amendment to prevent deprivation of any right inherent in freedom. Mandatory separation was a "badge of servitude" running afoul of the Constitution. Moreover, Justice Harlan believed the three Reconstruction Amendments shared a common purpose to secure to former slaves all civil rights that the dominant race enjoyed, including the right to be free from hostile legislation. Such legislation directed specifically at a race implied inferiority in civil society and hence was invalid.

Justice Harlan's view that all citizens are equal before the law encompassed a wider understanding of civil and political legal rights than the Court's distinction between social and legal rights. He recognized the reality, ignored entirely by the majority, that the Louisiana statute was not enacted to exclude white persons from coaches occupied by Blacks, but rather to exclude Blacks.[62] It was a ruse to give comfort to white prejudices. Enforced separation, he believed, was a clear interference with personal liberty of both Black and white citizens and hence unconstitutional. Agreeing with Tourgée, he foresaw that similar laws enacted throughout the states would constitute "sinister legislation" interfering with the full rights of freedom for all citizens and designate a large class of citizens as legally inferior based on race inconsistent with the guarantees of the Constitution. Unlike the majority, he realized the decision gave imprimatur to separation in all aspects of life and observed that "[t]he thin disguise of 'equal' accommodation. . . will not mislead anyone, nor atone for the wrong this day done."[63]

Other than Harlan, the justices were all Northerners. Luxenberg accuses them of having no personal experience of what African Americans went through on a daily basis. They felt legislation could not change social attitudes toward race and that to do so could make matters worse. "Legislation is powerless to eradicate racial instincts or abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation."[64] Harlan warned instead that the statute would stoke racial hatred and encourage people to think state law could circumvent the goals of the Reconstruction Amendments.[65] Luxenberg speculates that perhaps the majority thought separate but equal was what the country needed to heal racial animosities. But he notes as well that many in the North wanted to move on from a focus on racial justice.[66] The *Plessy* saga also shows the conservative nature of the courts, which were unwilling to upend long-established customs. Notwithstanding the purpose behind the Reconstruction Amendments, the judiciary remained receptive to narrow interpretations that did not challenge widely held societal attitudes, whether toward race or the proper roles of the state and federal governments.

Separate is a narrative history. Perhaps reflecting the author's media background, the book reads like a news article. Luxenberg provides many details about the lives of his characters and recounts their conversations and thoughts, supported by extensive endnotes. He had a trove of materials to work from. All three individuals kept journals and maintained an extensive correspondence. During absences from family, they exchanged frequent letters with their wives. Family members wrote memoirs, and all these materials have been preserved. Justice Brown, in particular, was an inveterate journal writer and would typically compose a year-end retrospective of his life. Unfortunately, much of the personal detail does not make for compelling reading, but it gives insight into each individual's personality. In contrast, the discussion of the New Orleans *les gens de couleur libre* allows for an appreciation of the pressures and frustrations felt by this community, resulting in the resolve of the Citizens' Committee to challenge the separate car legislation.

The reader interested in a full understanding of the post-Civil War struggle for racial justice will be disappointed by Luxenberg's approach. His focus on the individuals does not allow for a robust analysis of Southern violence or Northern attitudes, although these matters are certainly touched on. A discussion of how racial conflict fit in with other national issues and the overall political context would have been useful. Moreover, the reader does not get a good sense for how, if at all, the Court was affected by national events. Likewise, although *Separate* notes differences within the African American community as to the best approach to respond to racial injustice, one is left wanting to know more. In fairness, only so much can be covered in one volume. There is an extensive literature about the *Plessy* case and even more about racial issues during and after Reconstruction. Luxenberg's goal was to provide a new perspective on the evolution of racial attitudes and the history of separation through the lives of some of the principal players in the Plessy story, and in this task he succeeds. His lengthy bibliography, divided by topic, allows the interested reader to pursue specific issues in more depth.

In retrospect, the strategy to bring *Plessy* before the Supreme Court appears misguided.[67] Having a definitive decision from the Supreme Court was worse than none at all. Perhaps Justice Brown was right that a decision for Plessy would not have changed social attitudes. That has certainly been true of many more recent Court decisions in the social sphere. But at least the Court would not have enabled Jim Crow. As Justice Harlan foresaw, the Court's opinion gave permission to impose a separate but equal regime throughout all aspects of life.

— Victor N. Baltera

61. *Id.* at 554 (Harlan, J. dissenting).
62. Plessy v. Ferguson, 163 U.S. 537, 557 (1896) (Harlan, J. dissenting). ("No one would be so wanting in candor to assert the contrary.")
63. *Id.* at 562 (Harlan, J. dissenting).
64. *Id.* at 551.
65. *Id.* at 560 (Harlan, J. dissenting).
66. Luxenberg, *supra* note 1, at 482-83.
67. *Id.* at 435.