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Courthouse Iconography and Chayesian Judicial Practice

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# Courthouse Iconography and Chayesian Judicial Practice

**William H. Simon\***

Judith Resnik and Dennis Curtis emphasize in *Representing Justice* that the traditional iconography of courthouses is incongruent with the current practices of the institutions that inhabit them.<sup>1</sup> The key elements of traditional iconography—the blind-folded, scale-balancing Justitia and the courtroom configured for the trial—connote adjudication. Yet, the fraction of judicial work that involves deciding cases on the merits or conducting trials has decreased dramatically. Most judicial work today is basically managerial.

We could reduce this incongruity, on the one hand, by reviving the practical adjudicatory focus of the past or, on the other, by revising the iconography to take account of the new practices. Resnik and Curtis encourage both efforts, but they have more enthusiasm for the former. I want to suggest some ways in which imagery and design might be revised to express the importance and value of managerial judging. In particular, I suggest the relevance of what many will consider an unlikely source of inspiration for a new judicial iconography—modern manufacturing and factory design. The technological innovations associated with the Toyota Production System have produced an esthetic that might contribute both functionally and expressively to the democratic accountability that Resnik and Curtis see as threatened by managerial judging.

## I. THE MANAGERIAL PERSPECTIVE

Abram Chayes showed in his influential 1976 article that judges in “public law litigation” were departing from the “traditional conception” of their role. His definition of the traditional conception maps on closely to

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\* Arthur Levitt Professor of Law, Everett B. Birch Professor in Professional Responsibility, Columbia Law School. This essay is based on a presentation at the “Representing Justice” Symposium in January of 2011, at Yale Law School. Thanks to the organizers, participants, and Judith Resnik and Denny Curtis for help and encouragement.

1. JUDITH RESNIK & DENNIS E. CURTIS, *REPRESENTING JUSTICE: INVENTION, CONTROVERSY, AND RIGHTS IN CITY-STATES AND DEMOCRATIC COURTROOMS* (2010).

the centuries-old iconography documented by Resnik and Curtis.<sup>2</sup> Among its defining features are these:

1. “The lawsuit is bipolar.” So there are two pans on the scale that Justitia holds and two symmetrically placed counsel tables in the courtroom.
2. “Litigation is retrospective.” The balance of the scales suggests the correction of past imbalance.
3. “The lawsuit is a self-contained episode.” Self-containment is expressed by the railing or “bar” that separates judge, parties, and counsel from the spectators and in the general theme of “enclosure” in courthouse design that Norman Spaulding explores in his paper in this symposium.<sup>3</sup>

Chayes showed that there was a newer type of judicial practice that did not share these qualities. Rather, it involved “sprawling party structure,” “ongoing relief” with “continuing involvement” by the judge, and “widespread effects on persons not before the court.”<sup>4</sup> Chayes’s principal examples of this new, more administrative form of judicial practice came from civil rights actions seeking injunctive relief to restructure public institutions—schools, prisons, police departments, and mental health facilities.

Others soon pointed out that the category of managerial judging was much broader. Resnik emphasized that, with the expansion of discovery and the increasing trend toward settlement, judges’ work even in two-party private cases was concerned more with process management than decision-making on the merits.<sup>5</sup> Theodore Eisenberg and Stephen Yeazel pointed out that judges had long commanded administrative corps of sheriffs or marshals to enforce their routine judgments for money damages.<sup>6</sup> The “traditional model” could be viewed as “retrospective” only by ignoring what happened after the court made its judgment.

Just at the time Chayes identified public law litigation, tort law was transformed by the development of aggregate litigation processes for “mass torts.” Judges orchestrate hundreds or thousands of claims in both class and non-class formats. Resolution is typically through settlement, and as in public law litigation, the remedies often require complex and long-term administration.

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2. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1283-84 (1976).

3. Norman W. Spaulding, *The Enclosure of Justice: Courthouse Architecture, Due Process, and the Dead Metaphor of Trial*, 21 YALE J.L. & HUMAN. <page>, <pin cite> (2012).

4. Chayes, *supra* note 2, at 1284.

5. Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

6. Theodore Eisenberg & Stephen Yeazell, *The Ordinary and the Extraordinary in Institutional Reform Litigation*, 93 HARV. L. REV. 465, 512-13 (1980).

A complete list of areas of managerial judging would have several more entries. Chayes himself had pointed to insolvency law as an area of long-standing judicial practice that departed from the criteria of the traditional model.<sup>7</sup> Here again, courts coordinate large numbers of claims and parties and superintend long-term remedial schemes. In criminal law, courts regulate the practice of investigation through the issuance of search warrants, and they supervise large bureaucracies responsible for diversion, sentencing, and probation. Judges spend significant amounts of time reviewing decisions of administrative tribunals who make decisions about welfare and (in the federal system) immigration. Although these cases usually nominally involve individual claims, they raise issues that can only be resolved through systemic assessment and intervention.<sup>8</sup> Specialized courts in areas such as family law (child custody, domestic violence), housing (habitability enforcement), and outside the United States, labor law (wage and hour enforcement or union organizing) are better described by the newer model.

Judicial practice in these areas may take the form of broad relief that creates or restructures institutions. Even when intervention focuses on individual claims, the judge's decisions are often understood in terms of larger processes with aggregate goals. This is so for one or more of three reasons:

(1) Individual fairness depends on like treatment of comparable cases. A fair criminal sentence, a fair immigration asylum decision, or a fair damage award for an injury from a defective product means in part a result comparable to those received by similarly situated claimants.

(2) Individual fairness depends on practical issues, for which comparable cases can provide useful information. Does a particular set of circumstances indicate sufficient probability that a search will produce evidence of criminal activity? How likely is it that a repeat offender with a particular profile who agrees to a particular drug-treatment program as a condition of diversion will re-offend? Should the poor achievement of students with a particular disability be understood as a failure to reasonably accommodate them? The best way a court can answer such questions is to look at its own experiences, those of other courts, or those of other institutions comparable to the ones before the court.

(3) Individual cases raise issues about the aggregate performance of institutions. In structural relief cases, the court is typically asked to draw inferences from individual claims about systemic performance. Even

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7. Chayes, *supra* note 2, at 1303.

8. Jerry L. Mashaw, *The Management Side of Due Process: Some Theoretical Notes on Accuracy, Fairness, and Timeliness in the Adjudication of Social Welfare Claims*, 59 CORNELL L. REV. 772, 804 (1974).

when claims do not explicitly assert aggregate conduct, they may do so indirectly. The degree of deference that a judge gives to an administrative law judge on a disability or immigration decision, to a probation officer on an incarceration decision, or to a police officer on a warrant application often depends on the judge's assessment of the quality of the institutions in which they work.

## II. ICONOGRAPHY AND JUDICIAL PRACTICE

For Resnik and Curtis, imagery and design have two functions—as an expression of ideals and as a mechanism of transparency. They value *Justitia* as an expression of the virtues of disinterested individual justice, and they value the traditional courtroom design for its contribution to the transparency of the trial. Their main regrets are that *Justitia* has become misleading in a world where judges rarely make judgments on the merits and that the courtroom has become irrelevant to processes where most important matters are resolved outside it.

Perhaps because of their ambivalence toward managerial judging, Resnik and Curtis do not have much to say about what kind of iconography would be appropriate to it. Anyone who sees positive value in Chayesian practice would want their analysis extended. The virtues associated with judgment in the managerial realm are different from those associated with judgment in the traditional model. Judgment in the managerial realm does not paradigmatically take the form of culminating disposition. Rather, it takes the form of small adjustments or periodic re-assessments. Individual claims are less likely to be seen as self-contained disputes and more likely to be seen as symptoms of systemic malfunction. While the judge remains ideally disinterested (blind-folded), she often delegates and defers key decisions to interested stakeholders. The central goal of the process is not the vindication of some pre-existing norm but the generation of new learning and understanding.

Balance or equilibrium is not an appropriate image for such processes. There is an analogy between the role of equilibrium in judicial iconography and its role in micro-economics. In neoclassical economics, equilibrium is the normative touchstone, and a well-constituted economy has a strong tendency toward it. A standard criticism of this view is that it fails to take account of learning, and particularly the way learning is both produced by and productive of dis-equilibrium.<sup>9</sup> The role of the entrepreneur is sometimes to disrupt equilibrium by creating pressures to adopt new practices. The same criticism might be made of the balance expressed by *Justitia*. The problems of abusive public institutions or

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9. *E.g.*, Friedrich Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519 (1945).

domestic violence or small-scale consumer fraud can arise in conditions of equilibrium, and the role of the courts may involve disrupting such equilibria.<sup>10</sup>

The efficacy of judicial judgment, connoted by Justitia's sword, also has different connotations in the managerial realm. In the traditional view, the narrow meaning of efficacy is simply the end of the dispute—the parties' acceptance of the court's judgment by ceasing to fight. A more ambitious interpretation equates efficacy with conformity to the terms of the judge's order, typically the defendant paying a sum of money or taking or refraining from taking a specific action. Yet, in the managerial realm, commands are more complex; and their underlying goals are more amorphous. In order to appraise their success, we need to know whether the school system provided better education to its minority students, whether the drug-dependent defendant relapsed, or what happened to the disappointed asylum seeker after she was deported. It is rarely possible to make such assessments by comparing the result to a specific judicial mandate. In addition, the threat of violence connoted by the sword seems cruder in the managerial realm than in the traditional one. Threats of violence still play an important role, but it is a more complex one in which threats are accompanied by material benefits and appeals to shame and honor.

A pertinent image in *Representing Justice* is the outdoor judicial session in 2005 that approved the settlement arrangements associated with the Australian Native Title Act.<sup>11</sup> It is one of the few pictures in the book that comes from Chayesian practice, and one of the few points where Resnik and Curtis try to take account of its positive virtues.<sup>12</sup> They admire the iconographic innovation of the session.<sup>13</sup> It moves from indoors to outdoors. Instead of elevating and focusing the judges, it puts them on the same level and in the same plane as the parties. The session appears to involve many parties, and there are no symmetrically arrayed counsel tables. Yet, from a Chayesian perspective, there are still limitations. The settlement created a complex body of stakeholder institutions to determine and manage native land claims over a long period. The significance of these arrangements cannot be adequately summarized—or even symbolized—by an image of a single moment of judgment. We need to know what happened next: How did the tribunals provided for in the Act resolve claims and allocate property? How did the “Bodies Corporate”

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10. See Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1016, 1096-97 (2004).

11. RESNIK & CURTIS, *supra* note 1, at 367 fig.224.

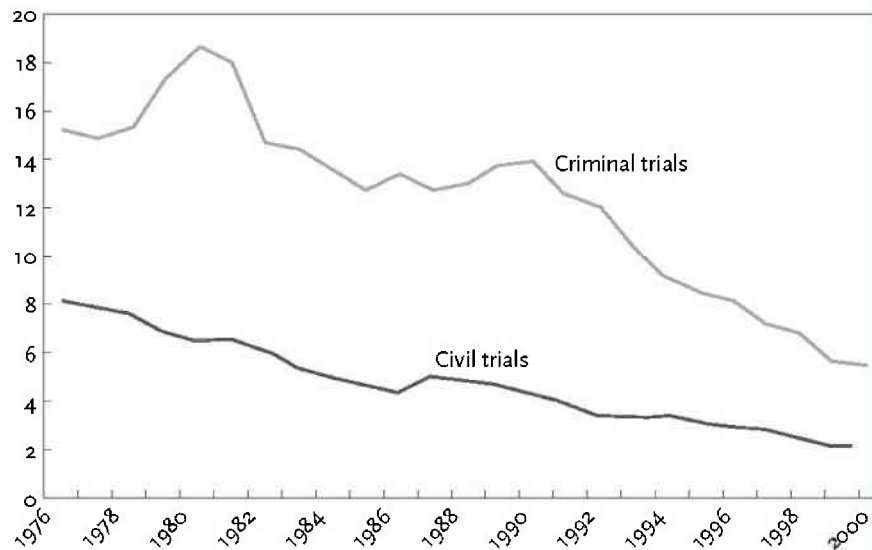
12. *Id.* at 367.

13. *Id.*

charged with managing the property on behalf of the natives perform? I would not push this point too far. Most likely, the photo memorializes an occasion of genuine progress and hope. But especially in the context of iconographic tradition, there is the danger that the photo will connote resolution and equilibrium, rather than a stage in a continuing process of reconstruction.

The second iconographic function Resnik and Curtis emphasize is transparency.<sup>14</sup> By providing a public forum in which trials can be conducted openly, traditional design contributes to democratic accountability. From a Chayesian perspective, the limitation here goes beyond the diminishing incidence of trials. The key problem is that traditional design offers only case-by-case information. Each trial is transparent, but we see only one trial at a time. Yet, the most important information for transparency in the managerial realm is aggregate, not individual.

Here is an example from *Representing Justice* of what I mean by aggregate information:



Civil and Criminal Trial Rates in U.S. Federal Court (Percentage of Cases per Year), 1976-2000. RESNIK & CURTIS, *supra* note 1, at 311. This chart was created by and is reproduced with the permission of the Honorable Patrick E. Higginbotham, United States Court of Appeals, Fifth Circuit. Copyright: Honorable Patrick E. Higginbotham, 2002.

The graph has a dual relevance to the Resnik-Curtis project. First, it indicates that traditional courthouse iconography is misleading

14. *Id.* at 341-44.



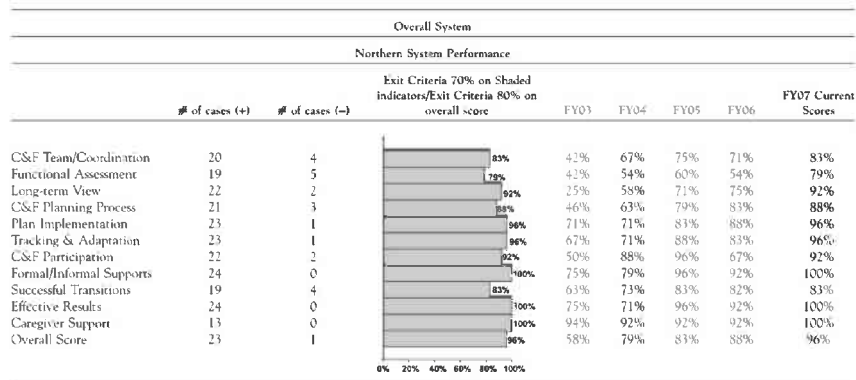
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(descriptively) to the extent it focuses attention on trials, when trial rates are, in fact, decreasing. In addition, it involves a different kind of imagery that proves highly useful in conveying information critical to the goal of transparency. It communicates an important fact about the federal courts that could not be learned by observing proceedings one-by-one.

Below is another illustration of the kind of aggregate information that enhances accountability. The graph below summarizes a quality assurance process in Utah's child protective services system. It aggregates judgments in audit reviews of individual child-welfare cases. It is a measure of the extent to which the applicable norms have been executed. A complementary graph (not shown here), meanwhile, aggregates judgments on the condition along various dimensions of the children. It measures the extent to which the underlying goals of the norms have been achieved. The two graphs, which compose what managers call a "balanced scorecard," are part of a process mandated by a consent decree in an institutional reform suit in federal court.<sup>15</sup> The graphs potentially contribute to transparency along two dimensions. They give information about the general nature and quality of practice in the state agency. They also give information about the efficacy of the court's intervention in the institutional reform case.<sup>16</sup>



Kathleen G. Noonan, Charles F. Sabel & William H. Simon, *Legal Accountability in the Service-Based Welfare State: Lessons from Child Welfare Reform*. 34 LAW & SOC. INQUIRY 523, 546 tbl. 2 (2009).

Resnik and Curtis use the trial-frequency graph as an indication that the trial-focused connotations of traditional design are misleading. I want to consider whether this graph might have something more direct and

15. For further discussion and references, see Kathleen Noonan, Charles F. Sabel, & William H. Simon, *Legal Accountability in the Service-Based Welfare System*, 34 LAW & SOC. INQUIRY 523, 545-48 (2008).

16. *Id.*

positive to say about courthouse iconography. Could the visual principles that inform the graph and the kind of systemic information it communicates inspire efforts at symbolic expression and structural design?

### III. THE MANUFACTURING ANALOGY: TOYOTA AESTHETICS

I find a helpful reference point in the approach to manufacturing plant design associated with the Toyota Production System (TPS). The system bears the name of the Japanese auto firm that pioneered it, but it has influenced many industries. No doubt it will strike many as an unlikely analogy for courts, but TPS is relevant because it is preoccupied with the key characteristic of the new judicial practice—continuous adjustment and learning. TPS developers have produced important insights about what this kind of practice implies for imagery and design.

I am not ignoring the differences between courts and factories. However, there is a helpful analogy between the judicial transition from traditional to managerial practice and the transition that inspired TPS from traditional to Toyota-style manufacturing. An important dimension of both transitions is a changed understanding of the relation of particular problems/dysfunctions/cases and the larger system.<sup>17</sup>

In the pre-Toyota, or Fordist, manufacturing processes, when a worker on the assembly line spots a problem, she ignores it, performs her regular task, and leaves it to an end-of-the-line rework department to remedy. The rework department approaches defects unit by unit, just as a traditional judge approaches problems case by case. By contrast, in the Toyota system, the worker responds to a problem by stopping the line and initiating a collaborative discussion designed to trace the problem's systemic causes and remedy them before production resumes.

The key idea is that the signaling of deviance triggers neither a retrospective effort to assign responsibility nor a self-contained attempt to mitigate immediately perceived effects, but systemic inquiry and intervention. The way line workers trigger such inquiry is by pulling an "Andon" (lantern) cord. When the cord is pulled, the line stops, and lights signal the location and nature of the problem to the entire plant. Anyone who believes she has something to contribute to the solution assembles to consider appropriate solutions. This group takes a systemic perspective, looking not just to the immediate manifestation but also to its root cause.

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17. See William H. Simon, *Toyota Jurisprudence: Legal Theory and Rolling Rule Regimes*, in *LAW AND NEW GOVERNANCE IN THE EU AND THE US* (Grainne de Burca & Joanne Scott eds., 2006). I first encountered the idea that the Toyota system might be relevant to public institutions in Charles F. Sabel, *Learning by Monitoring: The Institutions of Economic Development*, in *HANDBOOK OF ECONOMIC SOCIOLOGY* (Neil J. Smelser & Richard Swedberg eds., 1994).

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A rule of thumb known as the “five whys” creates a presumption that any given problem should be traced through five stages.<sup>18</sup>

Here is an image of the practice of pulling the Andon cord:



Toyota Worker Pulling an Andon Cord, in Stephen Williams, *Toyota Quality Control Includes 'Greensleeves' and 'Popeye'*, N.Y. TIMES WHEELS (Nov. 4, 2011, 12:18 PM), <http://wheels.blogs.nytimes.com/2009/09/04/toyota-quality-control-includes-greensleeves-and-popeye/>.

Toyota iconography relies less on human figures than traditional courthouse iconography, but this picture makes a good icon for TPS. While the blind-folded, scale-balancing Justitia celebrates the end of a process, this figure emphasizes the interruption of one. It glamorizes a moment of disequilibrium—a provisional stopping point in a process of continuous improvement—rather than the achievement of balance or resolution.

The worker pulling the Andon cord resembles a plaintiff to the extent that he is calling attention to a problem. He also resembles the managerial judge to the extent that he induces deliberative efforts by others. He does not blind himself to any aspect of the situation. He looks directly at the problem through clear goggles. Of course, there are elements here that do not belong in an emblematic representation of judicial practice. Yet, the figure is suggestive of the qualities of inducing deliberation and continuous improvement that typify most ambitious forms of managerial judgment.

A second reason why TPS is pertinent is that its progenitors have developed interesting ideas about how buildings can be designed to promote the transparency of the activities within them. A provocative

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18. For example: (1) Why is Machine A broken? Because no preventive maintenance was performed. (2) Why is the maintenance crew derelict? Because it is always repairing Machine B. (3) Why is Machine B always broken? Because the part it machines always jams. (4) Why does the jam occur? Because the part is warped by heat stress. (5) Why does the part overheat? A design defect.

source is Michael Greif's *The Visual Factory*, which makes an interesting comparison with Resnik and Curtis's study of the Visual Court. Greif's concerns parallel Resnik and Curtis's. "Most plants are tedious to visit because the reality of production is not visible at the point where production occurs," he writes. "The work areas are like bodies without souls."<sup>19</sup> The basic goal of "visual communication" in manufacturing is make the plant's operations transparent to both the workers and outside observers. Transparency means that one can see how each element of the plant's operations relates to the others and how they all relate to the goals of the plant.

Graphical displays of information play an important role in this effort. The light that illuminates when the worker pulls the Andon cord is part of a larger display called the Andon board. There are boards for each major function, and each board has indicators that communicate a variety of activities. All or most of the boards can be seen from any point on the shop floor.

Here is an example:



Toyota Worker Pulling an Andon Cord, in Stephen Williams, *Toyota Quality Control Includes 'Greensleeves' and 'Popeye'*, N.Y. TIMES WHEELS (Nov. 4, 2011, 12:18 PM), <http://wheels.blogs.nytimes.com/2009/09/04/toyota-quality-control-includes-greensleeves-and-popeye/>.

These and other displays show what is occurring in each area, what problems have arisen, and how the plant is doing overall in relation to production, quality, and safety goals. When the lights indicating problems flash, they serve to summon workers with relevant knowledge to

19. MICHAEL GREIF, *THE VISUAL FACTORY: BUILDING PARTICIPATION THROUGH SHARED INFORMATION*, at xxii (1991).

assemble. The displays are also intended to promote broader understanding that facilitates flexible deployment of workers across multiple jobs. Moreover, the sense of individual connection to larger purposes may engender a sense of shared responsibility and achievement. At the same time, transparency makes operations accessible to outsiders, and the experience of outside observation may promote pride or shame on the part of insiders that motivates performance.

TPS transparency is part of a production technology, but it is also part of an ideology and an aesthetic. The ideology is a pragmatist one that denies the distinction between conception and execution (or enactment and enforcement) and insists that problems (or cases) be treated as opportunities for systemic re-assessment. The ideology is also democratic to the extent that it diffuses responsibility and participation. Greif writes, “By providing management tools [i.e., information] in the production location, management has in effect increased the number of managers.”<sup>20</sup>

The aesthetic is a functionalist one. It values leanness, rhythm, adaptability, and utility, or “quality,” (defined statically as conformity to specifications and dynamically as satisfying the customer). It disdains waste and clutter, and it has no sense of irony. Visually, it aspires to what Edward Tufte calls “beautiful evidence”—a combination of clarity and multi-dimensionality in the aggregate portrayal of core activity.<sup>21</sup>

On the other hand, this aesthetic differs from the functionalist architectural modernism of the mid-twentieth-century skyscraper or glass box house. It is not puritanically hostile to decoration, and it does not use design to symbolize some presumed essence of the structure (as the mid-century modernists did when they put steel girders on the outside of their skyscrapers).<sup>22</sup> Toyota design aspires to serve the work that is actually being conducted in all its complexity.

The Andon and other graphical displays in Toyota design suggest how iconography might serve Resnik and Curtis’s goal of transparency in the realm of Chayesian practice. A court could prominently display images that aggregate information about its own practices, such as the trial-frequency graph. Such displays could include information about the effect of judicial efforts outside the courtroom, for example, on the collection of judgments or recidivism in diversion programs. Where Chayesian practice seeks to reform independent institutions, graphs like the one from Utah’s child welfare program might be displayed. Accountability would be greatly aided were the courts and stakeholders to articulate goals and

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20. *Id.*, at 213.

21. EDWARD TUFTE, BEAUTIFUL EVIDENCE 1-11 (2006).

22. This is Tom Wolfe’s disparaging characterization of high architectural modernism. See TOM WOLFE, FROM BAUHAUS TO OUR HOUSE (1981).

metrics for measuring progress toward them for various key projects. If this were done, displays could indicate progress toward the goals. Which projects, variables, and metrics would be displayed might be decided by deliberation by the judges and stakeholders, under the joint supervision of appeals courts and legislative committees.

Such efforts should avoid two unfortunate tendencies. One is the overemphasis on production targets, especially narrowly defined ones. Such overemphasis is bad both because the narrow targets distort effort (as, for example, when teachers “teach to the test” and ignore unmeasured goals) and because it generates potentially exhausting and demoralizing stress. A lot depends on the governance arrangements that decide what information will be displayed. If local judges have unilateral control, they will be inclined to choose variables and measures that make them look good. If people with rigid and unsympathetic agendas have unimpeded control, they will choose variables and measures that create unproductive pressure (for example, to close cases without regard to the quality of resolution).<sup>23</sup> As Resnik and Curtis illustrate occasionally, an interesting feature of courthouse design is that it raises issues about governance of the judiciary that are rarely considered.<sup>24</sup> Toyota design would increase the salience of such issues.

Another unfortunate tendency in the design of professional workplaces is the use of displays that continually bombard the spectator with small titillating bits of undigested information. This is what television news does, and institutions (like the two law schools where I teach) that place televisions tuned to cable news channels prominently in their public areas are not acting in the spirit of Toyota design. Television news strives to maintain a constant level of unreflective excitement; Toyota design intends to encourage awareness and reflection. (Another negative example is the prominent display in the waiting rooms of financial institutions of real-time stock market data.)

Finally, my suggestion is that Toyota design might inspire some aspects of courthouse design, not that it be taken as a complete recipe. A courthouse has to be receptive to a much broader and more diverse population than a factory, including many who come infrequently and in situations of great stress. Toyota principles that clarify what the various functions of the court are and where they are located reduce stress, but they are not adequately responsive to emotional needs. My impression is that the most popular contemporary image in Resnik and Curtis’s book is

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23. See Simon Head, *The Grim Threat to British Universities*, N.Y. REV. BOOKS, Jan. 13, 2011, available at <http://www.nybooks.com/articles/archives/2011/jan/13/grim-threat-british-universities/> (arguing that this very problem has arisen in British higher education).

24. RESNIK & CURTIS, *supra* note 1, at 121-26.

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the print of Ellsworth Kelly's series of distinctly colored monochrome panels in the new Boston courthouse.<sup>25</sup> This image is sometimes explained as a representation of diversity, but I think it is much too abstract to be effective for that purpose. My guess is that what people like about it is that it radiates tranquility. If so, that is a valuable contribution that TPS is not well equipped to make. And while Greif insists that there is a spiritual dimension to Toyota design, its resources cannot portray the ineffable aspects of the ideals of justice expressed in traditional iconography.

Nevertheless, Toyota design is responsive to a major gap in traditional iconography. Traditional figural iconography is too abstract; traditional architectural iconography is pre-occupied with the display of information only case-by-case or trial-by-trial. But in the Chaysian era, much of the most important information is aggregate. For the purposes of transparency, courts need their Andon boards.

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25. *Id.* at 124-25 plate 26.