Viserbal laws: On an arbitral modality recently adopted in judgments

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Introduction

In a long running litigation over home appraisals, mortgages, lending and trade secrets, the parties’ representatives irked the judge. The pleadings were a litany of “dirty lawyer tricks”, the record replete with complaints about stalling, non-disclosure, failure to attend meetings, abusive language, “Rambo tactics” and vexatious filings. The inability to observe norms of civility, and the disturbing length and expense of the proceedings, which showed no signs of moving towards a close, led the District Judge to insert four images into a short decision. The pictures are didactic, exhortative, comic, popularising and potentially reorientating. They are also revealing, I will argue, of an emergent novel form of judicial rhetoric, a new symbolaeography or mode of writing that incorporates images and so proffers a sea change in the form of transmission of law.

The use of imagery in the decision in Housecanary v. Quicken Loans takes an intriguing and indicative form. Rhetorical figures, verbal icons and vivid descriptions are gauged to bend and persuade, to enliven and influence. Technology now expands the range of options and judges increasingly have recourse to screen captures and photographs, emojis and simulations that augment the text and can now render a seemingly more real version of what the text merely describes. The imagery variously expresses moments of emotion, fissures in the linear logic of judgment, disturbances of the text at a formal level as well as an opening up and disclosing of the judge’s drive and the site of arbitral invention. The image, in other words, is a symptom, a break in the text that signals not only a change of medium but an affective drive, a desire to express in a disjunctive form, an appeal to visible figures as somehow effectuating more than words alone.

In brief description, only one image appears in the signed text of the decision in Housecanary and this is significantly not a picture, but the more conventional and juristically acceptable diagrammatic form of a map. The cartograph or charter shows the borders of the state of Texas, North and West, and portrays forces intruding into the state from Mexico – “foreign” – and adjoining states – “migration”. It is lawyers from out of state, Northerners, non-Texans, who are lowering the Bar in San Antonio (Figure 1). For the moment, however, the key is that the map is the only image that makes it into the text, as opposed to into the appendices where the other images, an evolutionary clock of world history, the Judge’s own set of rules of conduct for litigating attorneys, and a picture of Abraham Lincoln are lodged.

The use of the map as the first depiction, as part of the text, reflects its diagrammatic character and putatively schematic role as a rational representation that charts a real geography and so escapes the aesthetic and sensory qualities of images.

2 On the atlas as a blend of epistemic purity and sensual aesthetic representation, as mixing word and image, and as thus constituting a licit form of visual representation, see Georges Didi-Huberman, Atlas, or the Anxious Gay Science, (Chicago: University of Chicago Press, 2018).
It is legally a preferred use and acceptable mode of depiction even though it distorts and invents quite as much as photographs and other pictorial presentations do. The history of the earth in a 24 hour clock and the cliché image of Lincoln discouraging wasteful litigation do not have the same privilege of access to, and concurrence with, the legal text and so are cautiously secreted at the end of the judgment. Be it noted, however, that they are there, extant and visible in the order handed down. They are inserted into the literary pickle jar of precedent and comprise part of a rapidly increasing corpus of visual reasons for decisions that require excision, classification, exposure and analysis. There is a growing population of precedential pictures being used to convince, persuade, legitimate and authorise judgments, while also performing a more phatic role of expression of emotion – comedy, anger, fear – and foray of the court into the world, interior and exterior, as it knows it.

Figure 1

Vividae Rationes
We exist as subjects of both words and images. While the distinction historically aligned law with strict literalism, an art of inscription, recording and archiving judgments, legislative and judicial, the image dominated the realm of politics and ceremony. Judges were to manipulate laws, indicatively enough more geometrico, according to a linear scriptural logic and an epistemic of purity and autonomy of form and language. Images, the whole social panoply of statuary, monuments, architecture, engraving, ritual and portraiture, costume and rite belonged in the dominion of the political, to populism and persuasion. It is precisely that schismatic distinction, the juridical caesura of word and image that the rhetorical or perhaps better the

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4 For a recent excursion on this point, see Pierre Legendre, Le Visage de la main, (Paris: Belles Lettres, 2019) and the corresponding site, www.arsdogmatica.com, which provides a translation.
semionautical digital conflations of internet transmission disrupt and disorder. The image is out of joint with the text because it evidences more than it shows. The depiction makes the figure visible, the emotion – technically enargeia – visceral and extant and so introduces through portrayal a distinct order of association of ideas and archive of imagery that is distinct and plural. Pictures are rhizomatically connected to other pictures, to lineages and morphologies of affect and drive that reason knows not and that texts cannot contain. It is this distinctive sign function that the viserbal seeks to explore.

In his essays on Image Science, Tom Mitchell usefully fuses imagetext as constitutive of a third site of signification, a fractal space of convergence of sight, sound and the senses, of eyes, ears and, I would add, the two horns of the nose. His key point is that the images are nested inside discourse, an alien assemblage within, but also breaking out of a discursive frame and sensibility. Viewing is not reading, just as in psychoanalytic terms the associations generated in dream and reverie are not those of the conscious and secondary processes of waking thought – or to borrow from Freud, the dream work does not think. The image belongs through not belonging in the sense that the apparent novelty of form condenses and displaces the linear dominion and putative control of the text over meaning; there is something more, plus ultra in the old language, wherein mind and eye wander, divagate, sense and feel something else, a viserbal and sensuous apprehension of something real but absent. Words are always present; the image nests or intrudes upon the pure reason of the text and exists in relation to the discursive contours and progressions of the syntagma but also exceeds and displaces it.

The image covers over a void, a gap in reason and text that necessitates a novel form and alternative expression. Most obviously the map that Justice Biery inserts introduces a series of affects and signals a distinct set of reasons for the decision and order. The map is in this context, as a facet of the precedent, on its surface, a jointure of irony, comedy and remonstration. It used to be, the judge opines, that lawyers in San Antonio all knew each other and resolved disputes with handshakes but now counsel “immigrate into Texas, as shown in this illustration”. To this he adds “Texans you are guarding the wrong river”. The reference mixes nostalgia, melancholy and humour, with frustration and an element of satire, the discursive divagation beginning with a rather self-conscious quotation from the movie Star Wars. The reference to the extra-terrestrial is also a signal of the alien and the theme of the movie, which is of opposed warring forces, darkness encroaching upon and threatening the existence of the good. This can provide a point of entry to the image as revealing much more than has been verbally and consciously formulated.

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7 Housecanary, p. 4.

8 Ibid: “A long time ago in a galaxy far, far away.” A footnote is appended to reference the source.
Rhetorically an enigma, a reference to external and unacknowledged sources, the diagram, like all maps, creates a subject and stakes a claim. The depiction is in the shape of Texas and evidences a jurisdiction, possession in a somewhat retro form of actual as distinct from virtual geography. It makes, however, the jealous point that this is, as stated, ours. Foreign and emigrant forces press upon “our” sovereignty and intrude into “our” state, threatening the standing of Texas and the proprieties of the bench and bar. The image delineates an imaginary jurisdiction, a space of disparate identity, and an isolation is inserted that wills itself pure and free of external threat, resistant to incursion. The diagram shows more. The foreign and the immigrant are imminent, pressing against the borders, about to invade. The nine pointers, the foreigners being a greater threat or at least more numerous than the immigrant attorneys, represent war, the arrows are the mode of belligerent communication, the messengers of the enemy that pierce the skin and kill, or break through the border and overrun. That was the fate of King Harold at the Battle of Hastings, 1066 and all that, and such seems to be the judge’s fear for the fate of Texas, not the Normans but the Normativos.

The image expresses a sensibility and shows an apprehension of siege and invasion which recalls directly the separation of the South from the North, the American civil war being referenced as well by the figure of Abraham Lincoln that is also reproduced in the appendix (Figure 2). It is significant, however, that it is the diagram of Texas, a jurisdictional portrayal, a linear graphic representation of a place that inaugurates the other text, the visual depictions that differentiate and diversify the rhetorical force of the judgment. There is the appearance of reason, the schematic modality of the diagram is transitional in being linear but figural, verbal and visual, containing the rational instruments of names of places and a compass if not a coda or key. Reason is mixed with the aesthetic of a picture, juvenile though it may seem, the visual with the verbal, and so a third epistemic space and rhetorical figure of possibility is created, and an interruption – a metastasis – of the textual relay necessarily occurs.

Judge Biery is certainly not alone and the trend of using maps is a growing one, granted the ease of reproduction and the familiar and comforting character of these emblematically viserbal insertions. In other instances, the map will be coloured in, shaded, and provided with a key. Increasingly frequently, the judge will supply a Google Earth image of the site and occasion that is under review. These satellite depictions enhance the reality effect of the depiction although they are seldom of the site at the time of the event that is to be judged. The immediate point is that the map in the text of the judgment gives the chart a precedential status and weight of legal reason as an acceptable image, a permissible figure, rhetorically an icon, that is licit, more than anything else by virtue of the limitation of its aesthetic and its linear sensibility. It is an image that is not an image or at least it is one that is only part portrayal, and so marginally transgressive of the litera mortua of strict law.

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9 An instance from Hong Kong, for example, has the judge requiring the litigant to shade in the portion of the map which they claimed by virtue of adverse possession: Chan Chuen v. Forestside Limited High Court of Hong Kong HCA 2055/2011 (2016). Further discussion can be found in Goodrich, “Retinal Justice: Rats, Maps and Masks”.

10 See, for a relatively early and inelegant example, Gilles v. Blanchard 477 F.3d 466 (2007).
Sensibilities
The second image in the decision comes not in the text, but in a footnote to the judge’s peroration. The parties, he exhorts, should get on with each other. The litigation represents a nanosecond, a blink of the eye, in the 14-billion-year history of the planet. For what it is worth, that is a considerable exaggeration, an inaccurate representation, on any count, of the importance and longevity of the lawsuit, but it prompts the judge to reproduce an image, adapted he states from Carl Sagan’s Cosmic Clock, in the footnote (Figure 3). The History of the Earth in a 24 hour clock, perhaps bravely in South Texas, takes the scientific, evolutionary view of the development of life and depicts the cycle of life forms ending with the human at 11:58:43. Such an appearance, at the eleventh hour as the colloquialism goes, is insignificant and should be kept in perspective, a reasonable conclusion to the dispute should be possible, communication rather than antagonism and uncivil belligerence should be the order of the day. And to this is appended the signature, Fred Biery, District Court Judge.
The jurist’s footnote, on which much has been written, historical and critical, has an ambivalent status as discourse extant below yet incorporated into the text. An image in a footnote has an even greater ambiguity of status and instantiates what Emanuel Coccia describes as the medial multiplication of forms and truth. Entry into, which simply means recognition and acknowledgement of the imaginal quality of all representations, is made more explicit by the use of the graphic depiction of the clock: “Becoming an image is both an exercise in relocation and dislocation, but moreover in multiplication of self.” For our purposes the inhabitation of images, made explicit now in a picture reproduced in the footnote, multiplies the medial presence of the judge and judgment while also relocating and promulgating in an expressly imaginal form. The multiplier is the image or, as Pierre Legendre has lengthily traversed, we inhabit the text as image and here the text expressly becomes image, thus underpinning and legitimating the thesis that the text in its multiplying forms is no longer text but a diversity and plurality of medial distributions.

There is not only an ambiguity of status, a diffidence towards the image, in the placement in the footnote, but there is also an element of indirection, a partially unconscious and subtextual force, a differentiation fostered by the hesitancy to use

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satirical depiction in a judgement. That said, the image is now a constant presence, a frequently encountered manifestation of judicial opinion expressed in visible form and representing everything from re-enactment of the scene, to evidence, to subject-matter, to an increasing incursion, as with Judge Biery, of judicial expression, phatic opinations in cut and pasted visuals leading to a parallel strain of judgment and of precedent as a relay of imagery. This constitutes what has been coined as the imago decidendi or the image that subtends and drives judgment. Force will out, judicial drives are not hid long, the picture propels not only a multiplication of rhizomes and relays of decision but also a view – glimpse, conspectus, visage – of that indefinable moment, without rule or calculus, that is in Derrida’s coinage justice being done.

The relay of images brings legal judgment both closer to the real, defined as the sensibility of being which is necessarily a spectral affair, an abstraction from bodies and things as experienced by the subject. This theatre of visibilities gains its highest expression to date in the virtual domain and through internet relay, the multiplication of screens and optimised sites of viewing. The court is led into the world and into the dominion of the visible by images which, whether or not they gain direct expression or space and relay in the judgment, are nonetheless the interior presence and intimate theatre of decision. To judge it is necessary to imagine, to put into image, and a simple example from a South African case can help describe. A murder scene is re-enacted using mannequins in situ to give a sense of the scene of the crime as well as to indicate with red dots the entry points of bullets (Figure 4). There is nothing dispositive about the depiction, nor does it either confirm or further the analysis of the warrant officer who details the trajectory of the bullets. What then is the purpose of the juxtaposition of word and image? The answer is that it visualises the scene, the external imagery facilitates and aids the internal imagination of the event, changing, dislocating the site of thought from text to image, words to pictures, generating another reason, another form. The simulation using mannequins neither imagines the scene and curiously humanises the crime by means of these dummies. It is a juridical “as if” or scilicet, that is neither what it shows – mere simulation in frozen time – nor tracks the path of the bullets, but it appeals to the sensibility of being there, of seeing the situation, of experiencing the sparseness, the scrimshaw free environment, the squalid circumstances, the cramped and lavatorial occasion of death.

The mannequins, differentiating the two participants by the use of different colours, and depicting gender by the use of slim mannequins and bra and knickers, specifically aim to lend an air of reality and precision to a crude and largely non-probative depiction of the scene. The depiction plays the role of all images as false truths, alternate relays that are both real and fantastical, representations whose epistemic status in the judgment is that of legitimating the effect, trajectory and outcome of decision. The judge, Justice Mandela Makaula, introduces this image, a single picture from a photo album that the police had presented in evidence, so as to justify the police testimony and to support his conforming deliberation, his reasoning and conclusion. There is a weight to the depiction, a power of the image that accords with Ovid’s observation that it is always more than it shows – *plus quam videatur imago*. It is sensory, cathartic, a mode of mourning and release, of seeing and evacuating an event, an anterograde portrayal that allows judge, court and reason to move on.

It is the aesthetic of the image, the effect of the figuration that our two disparate instances of viserbality betray. It is tradition that is betrayed, not simply etymologically but equally in the interruption, the collision of forms, the movement of the judgment as a system of signs from linear text to these Pentecostal and persuasive modalities of portrayal. What I want to argue here, as justification for the path from the seemingly irreverent and playful cautels of Judge Biery to the melancholegalistic imagery of Justice Mandela Makaula’s mannequins is that the hermeneutic or, better, apprehensive principle is the same. In each instance it is effect that instigates the irruption, the rending of text – *déchirure* – that the advenience of the image fosters and displays. In both cases the image is law by other means, the sudden

16 Henry Bond, *Lacan at the Scene*, (Cambridge: MIT Press, 2009) might argue that the simulation is the *studium* of the murder scene and represents the dream content of the real event. This reconstruction would appear to be a psychotic crime scene, in which familiar and ubiquitous objects “have been radically recategorized”, unbonded from their symbolic signifying grid.

apparition of judicial determination in which the depiction, the staging, is of image as evidence and evidence as image. In each case the picture is treated as subject to the text, subordinate to the sovereignty of the word, the mechanics of reason being linear logic, and so whether evidencing the idiocy of the litigants or the scene of the crime, the purpose of the image is to be the vehicle of the text. The picture produces more words, it is the *via regia* back to the text, to the augmented text, and to the judicial order or verdict as the application of rule, to be sure, but as an affective and sensible distribution as well, as feeling just, rather than just feeling.

The same point can be pursued again in Judge Biery’s decision which in its appendices introduces an intriguing twist to the above observations because the images, now deep in the textual unconscious, coalesce in an image of words, a crescendo picture of commandments. After the historical clock of the world, resident visually just under the Judge’s chirographic ownership of the order announced, comes Appendix A. This takes the form of an image of a text, a tabulation, no less, of Biery’s own nine commandments: The Rule for the Practice of Law, inclusive of instructions for implementation and penalties for non-observance (Figure 5). Echoing Robert Burton’s *Anatomie of Melancholy* and its raillery at lawyers as the cause of most of the unhappiness in the polity: “where a population be generally contentious, where there be many discords, many laws, many law suits, many lawyers … it is a manifest sign of a distempered, melancholy state.” Whatever the status or originality of these rules – the Texas Lawyer’s creed – presenting them comedically as a table, as an image, a Diet of Worms, in an appendix, both dislocates them, distances the table from the case, but also authorises and legitimates the rules by rendering them as a tabulation, a flyer or posting that is theatrical, simultaneously parodic and pompous. All of this, recollect, is in a judgment issuing an order and is followed by the image of Abraham Lincoln, the President who saved the Union, who brought peace, who sits now, dour, unsmilng, waistcoat and fob watch chain as if a judge, as if holding a hearing, about to pronounce judgment on the lawyers today.

Lincoln’s view, cited below the photo portrait, is an irenic one, urging compromise, communication, comity and community. Make peace not law. But why show the portrait, the all too solid, sedentary figure, *ex cathedra*? Granted that the image comes after the historical clock of the world and the rules of irenic legal practice, the answer has to be that this is firstly a history lesson, part of the blinking of the eye, a reminder of who Texas is and where it belongs. The civil war was lost, the Union persists, and keeping the peace means following the time honoured and genteel traditions of specifically Texan lawyers, so that the North does not come down again. More than that, however, the portrait, *haec imago*, is a sledgehammer image of authority and foundation used here to authorise “The Rule” and bring *gravitas* to the *levitas* of the nine tables of the law. It appears *in ludo veritas*, an instaning of the playfulness of truth.

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18 Robert Burton, *Anatomie of Melancholy* (Oxford: Cripps, 1628), p. 69, continuing: “a purse-milking nation, a clamorous company, gowned vultures … a company of irreligious Harpies, scraping, griping catchpoles (I mean our common hungry pettifoggers …) without art, without judgment, that do more harm … than sickness, wars, hunger, diseases.”

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The Rule
For the Practice of Law

Treat others (including lawyers, parties, witnesses and Court staff) as you would like to be treated.

The Implementation of The Rule

Our goal is the fair, peaceable and efficient resolution of disputes, and to seek the truth within the bounds of the rule of law.

There is a difference between advocacy for the sake of prolonging advocacy and serving the best interests of clients in bringing litigation to closure.

The law is only a part of life. It is easier to abide by The Rule if one occasionally breaks bread with one’s adversary.

Abide by the Texas Lawyer’s Creed.

The Penalties for not abiding by The Rule

The loss of respect and goodwill from one’s professional colleagues, thus making the practice of law much less enjoyable.

The writing of The Rule in multiples of fifty on a Big Chief tablet with a Number Two pencil.¹

The donation of numerous pictures of George Washington to deserving charitable organizations.

Others within the discretion of the Court.

Fred Biery
United States District Judge

Figure 5

Conclusion
Specular legal philosophy, retinal justice, and the dogmatic methodology that should follow the chirographer’s maxim, procedere ad apparentiam, is still but a minor jurisprudence, a micro-legal studies but unrecognised or if adverted to, deemed flippant, unserious, confusionist and chaotic. The lawyers’ desire for analogy, to proceed ad similia, according to the same, has always involved a degree of hostility
towards new forms, difference and change. Beware of novelty – *cave novum* – is easier, is more stable and hides law behind a structural status of unchanging norms, uses unsullied by reality or contact with the quotidian. The minor jurisprudence of the specular and spectral will, however, undoubtedly have its day and the jurist of the image, of virtuality, of sensible life extant in the rhizomatic relay of images, in the multiplicities of the viserbal, material and immaterial, intimate and estimate promise a new *ars iuris*, one in which the art of living, embodying, opening to images as media of law will draw the jurist into the world in differential and divergent forms.

Judge Biery’s peculiar and comedic use of images is not a good example but it is strangely probative and strikingly revealing. Judgment is an embodied sense, replete with images, visible and verbal expressions of judicial sentiments. The effect of deciding, the symptoms and triggers of decision, carries with it a dimension of the human comedy, the theatre of images amongst which we walk, judges, lawyers, pixelated commoners all alike. The minor jurisprudence of the specular, *ius imaginum* in the old tongue, is not mere scrimshaw or ornament, ever the castigation of rhetoric itself, but rather a domain and methodology of novel insights and indigitations of the truth. *Video et rideo*, I see and I laugh, meaning that the epistemic sense of the scopic drive sees into, sees through, perceives and apprehends differently, corporeally, viscerally, and virtually. Judge Biery may have hidden his images in footnotes and appendices, rendering them minoritarian, lessening their juristic significance and precedential value – these are simply *obiter depicta* – but for the scholar, the jurist of the future, the reader of the book of law yet to come, which is no book, the comedy signals both a caution and a radical divagation. The order contains another judgment, a viserbal relay, an alternative set of motivations and elaborations that link to a distinct and antique tradition of juristic imagery, emblematic relays, the visible devices and desires of lawyering, the *serio-ludere* of humanist thought as such.

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