GERARD DAVID'S "THE JUSTICE OF CAMBYSES"

THE AESTHETIC, RELIGIOUS, MYTHOLOGICAL, MUSICAL, AND LEGAL SIGNIFICANCE OF THE FLAYING OF SISAMNES

Barbara Jaffe

I. INTRODUCTION

THIS ARTICLE EVOLVED from a presentation I gave on November 22, 2005 at Syracuse University's Lubin House in Manhattan, part of a series of programs on "The Art of Execution." Produced by the New York City Bar Association's Special Committee on Capital Punishment, and with a decidedly abolitionist bent,[1] the series examines the death penalty within historical, religious, aesthetic, political, and legal contexts. The chair of the Committee, attorney Norman L. Greene, conceived of the series and sought to "capitalize" on my background in art history.

Barbara Jaffe is a Justice (Retired) of the Supreme Court of the State of New York. *Copyright 2023 Barbara Jaffe.*

[1] Among the eminent members of the Committee on Capital Punishment was the late Norman Redlich, counsel to Wachtell Lipton Rosen & Katz. Before serving as Dean of New York University Law School and as the New York City Corporation Counsel, Dean Redlich was a staff member of the Warren Commission and was often credited with the so-called "single bullet" theory of the assassination of President John F. Kennedy. He also represented, *pro bono publico*, death row inmates, and was a dedicated abolitionist whose leadership inspired many committee endeavors.

The first installment of "The Art of Execution" was presented in March 2000 at the New York City Bar Association. We called it "Pictures and Punishment in Western Culture: The Aesthetic Image of Public Execution and Its Impact on Criminal Justice," as it was inspired by Samuel Y. Edgerton, Jr., Amos Lawrence Professor, Emeritus, of Williams College, author of *Pictures and Punishment: Art and Criminal Prosecution During the Florentine Renaissance*.[2] For our panel, Professor Edgerton examined depictions of capital punishment from the fall of the Roman Empire through the 17th and 18th centuries. In my presentation, "William Hogarth and the Law Relating to Capital Punishment in Eighteenth Century England," I analyzed Hogarth's series of engravings, *The Four Stages of Cruelty*, as a statement against capital punishment. Craig Brandon, author of *The Electric Chair: An Unnatural American History*,[3] presented on "The Electric Chair as 20th Century Icon," and Norman Greene discussed Oscar Wilde's "Reading Gaol." The program was published by Cardozo Law School as "A Symposium on the Art of Execution."[4]

For our second program, "Crucifixion and Flaying in Italian Medieval and Northern Renaissance Art: Their Aesthetic, Religious, Mythological, and Legal Significance," we explained in our program note that, "[i]n contrast to today's allegedly painless execution method of lethal injection, executions had been carried out by excruciating means, such as crucifixion and flaying," and that depictions of such methods employed by Italian medieval and Northern Renaissance artists shed light on the aesthetic, religious, mythological, and legal significance of those methods.

For this program, stage and screen actor and art historian Professor Peter Weller presented his paper, "Death by Crucifixion: Passion and Compassion in the Carved Wood Crucifix of Early Trecento Pisa," in which he described and explained Roman crucifixion practices as reflected in a collection of 14th-century Pisan crucifixion scenes. Kenneth Pennington, Professor of Ecclesiastical and Legal History at Catholic University, discussed medieval law relating to capital punishment, and Norman Greene analyzed the role of the executioner. The topic of my presentation (and of this article) was a particularly gruesome depiction of a flaying in the second

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[2] Cornell University Press (1985).

[3] McFarland & Company (1999).

[4] 15 Law and Literature 2 (Summer 2003).

of two painted wood panels entitled *The Justice of Cambyses*, or *The Judgment of Cambyses*, by the late-15th-century Netherlandish artist Gerard David.[5]

David, born in Holland in or around 1455, joined the Bruges artists guild in 1484[6] and produced artwork for the municipality of Bruges. With the death of the great Netherlandish artist Hans Memling in 1494, David gained prominence[7] and in 1498 the municipality commissioned him to paint the two panels, intending that they hang in the aldermen's chambers in Bruges's town hall. Apart from the extraordinary grisliness, the panels typify the justice themes frequently used to decorate municipal buildings during the Middle Ages.[8]

II. "THE JUSTICE OF CAMBYSES"

A. Justice scenes

Pursuant to the medieval European tradition, artists generally represented justice themes in a religious context, often depicting the celestially enthroned Jesus judging sinners, with the intention of impressing upon citizens the rule of law.[9] Secular justice scenes, such as Ambrogio Lorenzetti's 1338 three-part fresco in Siena's Town Hall, *The Allegory of Good and Bad Government*,[10] were also commissioned, and a century or so later, as demand for such scenes increased, they began to replace their divine counterparts, depicting kings judging convicted criminals.

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[5] *See* https://upload.wikimedia.org/wikipedia/commons/9/98/David_Diptych_The_Judgment_of_Cambyses.jpg. To flay is to strip off the skin of a live or dead being. I had not anticipated the timeliness of the topic, as there was then on display at New York City's South Street Seaport Exhibition Center the controversial "Bodies: The Exhibition," composed of a collection of preserved corpses. The exhibition traveled the world until a group of lawyers, academics, and human rights advocates called for it to be shut down as the bodies may have been those of executed Chinese political prisoners.

[6] Maryan W. Ainsworth, *Gerard David, Purity of Vision in an Age of Transition* 59 (1998).

[7] Otto Pacht, *Early Netherlandish Painting, From Rogier Van Der Weyden to Gerard David* 245 (1997).

[8] Ainsworth, *Gerard David* at 60, 61 (observing that David likely relied on the medieval tradition of "just judgment" in creating the panels).

[9] *Id.* at 62.

[10] Lorenzetti's frescoes were "designed to remind the Nine [magistrates] of just how much was at stake as they made their decisions." Niall Ferguson, *The Square and the Tower: Networks and Power, From the Freemasons to Facebook* 425-31(2017).

The Bruges commission, David's first major civic work,[11] was to depict Herodotus's recounting of the story of the Persian king, Cambyses, who had appointed one Sisamnes as a royal judge.[12]

During Sisamnes's judicial term, King Cambyses accused him of accepting money in exchange for imposing "an unrighteous sentence" on a litigant before him. Herodotus reports that as a result of this judicial misconduct, "Cambyses slew and flayed Sisamnes, and cutting his skin into strips, stretched them across the seat of the throne whereon he had been wont to sit when he heard causes."[13] According to Herodotus, Cambyses thereafter appointed Sisamnes's son, Otanes, to the vacant judgeship. Sisamnes's flayed and bloody skin was draped over the judge's bench, serving as a daily reminder to Otanes of the penalty imposed on his father for judicial corruption.

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[11] Ainsworth, *Gerard David*, at 57.

[12] Cambyses, conqueror of Egypt, was the son of Cyrus the Great. He governed Persia from 530 to 522 BCE. *Sidebar*: Sisamnes was an appointed, not elected, judge, a topical distinction given the 2008 decision of the Supreme Court of the United States in *New York State Bd. of Elections v Lopez Torres, et al.*, 552 U.S. 196 (2008). There, judicial candidates, voters, and non-profit organizations brought an action against the New York State Board of Elections alleging that New York's statutory scheme for electing judges to the state Supreme Court violated their political association rights under the First Amendment. Although the lower courts upheld the complaint, the U.S. Supreme Court reversed and held that the alleged existence of entrenched "one-party rule" within individual New York judicial districts did not constitute an infringement of the First Amendment associational rights of judicial candidates and did not justify mandating that New York adopt a different system for nominating judicial candidates. Of particular interest is Justice John Paul Stevens's concurring opinion, in which Justice David Souter joined:

> I think it appropriate to emphasize the distinction between constitutionality and wise policy. Our holding with respect to the former should not be misread as an endorsement of the electoral system under review, or disagreement with the findings of the District Court that describe glaring deficiencies in that system and even lend support to the broader proposition that the very practice of electing judges is unwise. But as I recall my esteemed former colleague, Thurgood Marshall, remarking on numerous occasions: "The Constitution does not prohibit legislatures from enacting stupid laws."

552 U.S. at 209.

[13] *The History of Herodotus* (George Rawlinson, trans.), classics.mit.edu/Herodotus/history.5.v.html.

The power struggle between the German- and French-allied factions in the Netherlands may have inspired the commission of *The Justice of Cambyses*. In 1491, German-allied Maximilian I, with the aid of his father, German King and Holy Roman Emperor Frederick III, won back Bruges, which had been allied with France. At around the same time, a French-allied Bruges alderman was convicted of official corruption and condemned to death. It is reported that the alderman who had replaced him commissioned David's panels to advertise his impartiality and integrity in contrast to the corruption of his French predecessor.[14]

B. The panels

The Justice of Cambyses contains two scenes. (Visit Wikipedia to view the two panels, presented chronologically.[15]) In the background of the first panel, the judge Sisamnes is seen accepting money from the corrupt litigant. In the foreground, King Cambyses pronounces the gory sentence imposed on Sisamnes. Urgency is conveyed by the forward movement of a helmeted henchman accompanying Cambyses and the firmness with which the arresting officer holds onto Sisamnes.

In the foreground of the second panel, the execution of the sentence of flaying is depicted in all of its terrifying detail. Sisamnes's grimace reflects the horror of the scene and yet not one of the onlookers appears horrified. Rather, they are at one with the flayers who perform their bloody task with the clinical focus of surgeons. The eyes of one of the onlookers are closed, as if he were unable to stomach the scene, or perhaps because David sought to enhance the immediacy of the scene by showing the onlooker blinking at the precise moment that his countenance had been captured. The individuality of the onlookers' faces adds to the immediacy, with their heads placed on the same plane as that of the King, who studiously looks away from the execution of his sentence. Otto Pacht characterized David's straight line of portrait heads as a way of "imposing democratic coordination in place of the subordination that was standard in Italian painting."[16] David may also have been expressing the banality of evil.

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[14] Ainsworth, *Gerard David*, at 62.

[15] *See* https://upload.wikimedia.org/wikipedia/commons/9/98/David_Diptych_The_Judgment_of_Cambyses.jpg.

[16] Pacht, *Early Netherlandish Painting*, at 248.

Herodotus's account ends, as shown in the background of the second panel, where Otanes is shown seated on what had been Sisamnes's bench, which is now draped with his father's flayed skin. The scenes proceed from background to foreground in the first panel, and from foreground to background in the second panel, forming a narratively coherent semi-circle.

David's first panel recalls the composition of the second of two panels painted a generation before by the Flemish artist Dieric Bouts.[17] Nonetheless, the style of Bouts's *The Judgment of Otto III* differs significantly from David's. While each artist presents traditional medieval justice scenes with two episodes and contemporary portraiture, in contrast to Bouts's judgment scene, David incorporated into his painting elements of classical architecture which were all the rage in Renaissance Italy and beyond, such as decorative cherubs, corinthian columns, carved reliefs, dogs, and festoons. These elements were adopted by artists from the ancient Roman art that had frequently been unearthed in Italy during the preceding centuries. Bouts, however, adhered to the older Gothic stylistic elements of elongated figures and spindly architectural elements. Apparently, however, dogs are always in style.

Of particular interest is David's first panel. Above the seated Sisamnes and to the viewer's right is a bas relief of the Greek myth of Apollo and Marsyas. An understanding of David's panels requires an analysis of this myth. While myths were superseded by the Roman church long before the 15th century, they remained useful, as they do today, in understanding human behavior.

III. The Myth of Apollo and Marsyas

Myths, or fables, "were believed to be endowed with hidden meanings that disclosed themselves only to the thoughtful beholder . . . [they were] invented to veil purposefully their mystical teachings from the vulgar who might defile and distort them." The ancient Greek mythologist Ovid tells the story, summarized by Edith Wyss,[18] and now by me: While

[17] *See* https://upload.wikimedia.org/wikipedia/commons/1/1d/Dirk_Bouts_-_Justice_of_Emperor_Otto_III-_Beheading_of_the_Innocent_Count_and_Ordeal_by_Fire_-_Google_Art_Project.jpg.

[18] Edith Wyss, *The Myth of Apollo and Marsyas in the Art of the Italian Renaissance* 13, 19 (1996).

walking through the woods of Phrygia, now Turkey, Marsyas, a satyr often depicted as half-goat/half-human, found a flute, or *aulos*. Unbeknownst to Marsyas, the flute had been discarded by the goddess Athena, who had cursed it after Aphrodite and Hera had made fun of the way her face became distorted when she puffed up her cheeks to play it. Marsyas became proficient at playing Athena's flute and therein lies his tragic fate.

One day, Marsyas encountered Apollo and, feeling highly accomplished at playing his flute, he challenged him to a musical contest, Marsyas with his flute and Apollo with his lyre. The lyre, a small stringed instrument often depicted in the arms of cherubs, is said to have been invented by the Greek god Hermes, the Roman Mercury. Apollo, or Phoebus, the god of the sun and master musician among the gods, is often depicted playing the lyre, or *cithara*.

Following their respective performances, Apollo prevailed over Marsyas, for after all, he was a god while Marsyas was a lowly satyr. The punishment selected by Apollo was to have Marsyas flayed alive. Even for a myth, the punishment is inordinately harsh. Ovid reports that as Marsyas's skin was stripped from his body, he cried out, "Why do you tear me from myself?" Marsyas's flayed skin was then draped on a tree and the blood that flowed from it is said to have formed the river Marsyas.[19]

A. Interpretations of the myth of Apollo and Marsyas

1. "Hubris"

The myth of Apollo and Marsyas has been retold over the centuries, often as a warning against *hubris*, a Greek concept denoting immoderate pride, or the intentional use of violence to humiliate another. According to Aristotle, "[h]ubris consists in doing and saying things that cause shame to the victim . . . simply for the pleasure of it," and he observed that "[y]oung men and the rich are hubristic because they think they are better than other people."

Wyss's cogent analyses form the basis for my understanding of the myth. However, whereas Wyss confined herself to depictions of the myth executed between 1460 and 1575, with appropriate nods to their classical sources, I trace its depictions from antiquity through modern times, and given my specific topic of *The Justice of Cambyses*, I stray beyond Wyss's discussions of the myth's philosophical and musical underpinnings.

[19] *See generally id.* at 20-24, 26ff.

In time, *hubris* became defined as an excessive presumptuousness "that leads a person to disregard the divinely fixed limits on human action in an ordered cosmos."[20] This definition comports neatly with the myth of Apollo and Marsyas, although the myth is rich with other meanings.

2. Musical meanings

To the ancient Greeks, stringed instruments represented harmony, law, and order, attributes identified with Apollo, whereas wind instruments represented chaos, passion, and sensuality, attributes associated with Dionysus, or Bacchus, the god of wine and pleasure. The flute, a quintessential wind instrument, was central to the cult of Dionysus, who was closely connected with intoxication and ecstatic Greek mystery religions. As wind instruments were deemed antithetical to the love of order that was integral to the ancient and classical aesthetic, Plato banished them from his ideal republic although he appreciated the ecstatic states brought about by love and eros.[21] Apparently, the ancient Greeks had never heard an electric guitar.[22]

Building on Pythagoras's mathematical theories and Aristotle's philosophy, the ancient Greeks believed that music is cosmic, mathematical, and moral, and that it exerts a strong influence on emotions. According to Aristotle, music imitates emotions and states of the soul; certain kinds of music inspire nobility, whereas others inspire baser emotions.[23]

With the decline of Greek and Roman classicism and the rise of Christianity, all pagan music, whether sung or performed on wind or stringed instruments, was deplored and rejected. The early church fathers thus struggled with allowing music in churches at all, although a compromise was ultimately reached with Augustine who, like Aristotle, recognized the emotional power of music and understood that it was far more practical to integrate music into religious practices than attempt to bar it.[24] From unison singing, like Gregorian chants, there arose, with its pagan flavor,

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[20] *Britannica*, www.britannica.com/topic/hubris.

[21] Wyss, *The Myth of Apollo*, at 26-27.

[22] Robert Kirby, *The LDS Church still regards guitars as the scepters of Satan*, Salt Lake Tribune, Aug. 22, 2008, archive.sltrib.com/story.php?ref=/faith/ci_10279368.

[23] Wyss, *The Myth of Apollo*, at 27.

[24] Saint Augustine of Hippo, *De Musica* 387-391, *The Core Curriculum*, columbia.edu.

harmonic singing and eventually, instrumentation. However, notwithstanding the periodic retelling over the centuries of the myth of Apollo and Marsyas, the ancient tension between the orderly apollonian stringed instruments and the chaotic dionysian wind instruments persisted.

3. Stylistic variations of depictions of the myth

Depictions of the myth dating from the classical period of Greek art focus on the contest between Apollo and Marsyas. A bas relief of the contest sculpted in the mid-fourth-century BCE by the renowned Greek sculptor Praxiteles shows the calm Apollo watching Marsyas passionately playing his pipes.[25] No value judgments there.

During the Florentine Renaissance, which flowered a century or so after the devastation wrought by the Bubonic Plague, and in light of the historical perspective gained over the intervening centuries, antique values and platonic ideals were reborn, freeing artists to reconsider the myth. In 1483, Pietro Perugino, teacher of the great High Renaissance artist Raffaello Sanzio, or Raphael, depicted Apollo and Marysas with their respective instruments.[26] Each performs in a placid apollonian manner. As with Praxiteles's sculpture, there is no inkling of the contest's grisly outcome. Rather, consistent with the Florentine Renaissance style, Perugino focused on the beauty of the figures and landscape. His nude Apollo plainly recalls ancient classical Roman statuary.

Raphael, along with Leonardo da Vinci and Michelangelo Buonarroti, represents the pinnacle of the late-16th-century high Renaissance style in Italy. Some 20 years after Perugino's *Apollo and Marsyas*, Raphael merged the crowning of Apollo as the winner of the contest with the commencement of the flaying, thereby simultaneously expressing Apollo's moral superiority, the dread of the executioner, and Marsyas's primordial fear, having just been strung up to a tree, about to be flayed. Raphael may have been inspired by this third-century BCE hellenistic sculpture of the hanging Marsyas.[27]

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[25] *See* https://commons.wikimedia.org/wiki/File:Apollon_%26_Marsyas.jpg.

[26] *See* en.wikipedia.org/wiki/File:Perugino,_apollo_e_dafni_(o_marsia).jpg.

[27] *Compare* https://d1inegp6v2yuxm.cloudfront.net/royal-academy/image/upload/c_limit,cs_tinysrgb,dn_72,f_auto,fl_progressive.keep_iptc,w_1200/pb8ut8soapthglueyyxc.jpeg *with* https://collections.louvre.fr/en/ark:/53355/cl010278846.

4. A return to the fundamental warning against hubris

Later depictions of the myth of Apollo and Marsyas hearken back to the ancient warning against *hubris* by focusing on the suffering endured by Marsyas, the message being that to challenge a god is to invite defeat and terrible punishment. The 1575 painting of the flaying in progress by Tiziano Vecelli, or Titian, is particularly horrifying especially compared with Raphael's. Bartolomeo Manfredi's startlingly modern rendition, painted between 1610 and 1620, presents Apollo as the flayer and brings the viewer up close to the psychological drama between the tortured mortal and the torturer god, whereas the Apollo depicted by Jusepe de Ribera in 1637 performs the task with cool detachment.[28] Myron's third-century BCE sculpture of the Scythian slave who, in some versions of the myth, performed the dreadful task, uniquely portrays the slave sharpening the knife with which he will flay Marsyas. His face reflects all of the horror of his task.[29]

Some artists present the contest being judged by the three muses,[30] others by King Midas[31] who, Ovid reports, had initially ruled in Marsyas's favor and received in recognition thereof the ears of a donkey. In other versions, Apollo, upon hearing Midas's verdict, asked for reconsideration, having demonstrated that he was not only able to play the lyre while holding it upside down, but could also sing along with it, whereas Marsyas could do neither. Midas thus ruled in Apollo's favor. In Ovid's opinion, the contest was inherently unfair, for after all, how can a mortal defeat a god?[32] Accordingly, a justice theme also emerges from the myth.

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[28] *Compare* https://upload.wikimedia.org/wikipedia/commons/thumb/4/4b/Titian_-_The_Flaying_of_Marsyas.jpg/1280px-Titian_-_The_Flaying_of_Marsyas.jpg *with* https://www.slam.org/collection/objects/43745/ *with* https://upload.wikimedia.org/wikipedia/commons/0/0c/Jos%C3%A9_de_Ribera_004.jpg.

[29] *See* https://images.uffizi.it/production/attachments/1600246085484707/arrotino-2.jpg?ixlib=rails2.1.3&w=1200&h=800 &fit=clip&crop=center&fm=pjpg&auto=compress.

[30] Hyginus, *Fabulae*, 165; Apollodorus, R.S. Smith, Stephen Trzaskoma, and C.J. Hyginus; *Apollodorus' Library and Higinus' Fabulae: Two Handbooks of Greek Mythology* (2007).

[31] *See* https://upload.wikimedia.org/wikipedia/commons/9/94/Palma_il_Giovane_-_Apollo_and_Marsyas_-_Herzog_Anton_Ulrich_-_Museum_Braunschweig.jpg.

[32] Ovid, *The Metamorphoses*.

In Titian's painting[33] Marsyas is not only flayed, but flayed upside-down, possibly a reference to Apollo's ability to play the lyre while holding it upside-down, or to the alleged martyrdom of the apostle Peter, who was said to have been crucified upside-down, or to the apostle Bartholomew, who was allegedly flayed upside-down. Bartholomew appears in Michelangelo's *Last Judgment* in the Sistine Chapel holding his own flayed skin, onto which Michelangelo reproduced his own self-portrait.[34] Seventeenth-century master Peter Paul Rubens also invokes the warning against *hubris* in his mid-17th-century workshop painting portraying Cambyses appointing Sisamnes's son Otanes to the bench, grotesquely draped with his father's flayed skin.[35] Herodotus reports that "[h]aving so done Cambyses appointed the son of Sisamnes to be judge in his father's room, and bade him never forget in what way his seat was cushioned."[36]

According to Ovid, following the flaying of Marsyas, the country folk, sylvan deities, fauns, brother satyrs, and nymphs all wept for him. The scene, painted by a 19th-century pre-Raphaelite artist, fittingly recalls the pastoral style of Raphael's teacher Perugino.[37] There is no mistaking Marsyas's resemblance to Jesus about to be baptized by John the Baptist in the river Jordan. Although a topic for another day, Marsyas apparently gained a measure of stature during the liberal and romantic 19th century.

In 2002, the myth was entirely abstracted by sculptor Anish Kapoor, whose installation, *Marsyas*, is at the Tate Modern in London.[38] It comprises three steel rings joined together by a span of red plastic membrane which, at one point along its almost 500-foot length, shifts from a vertical to a horizontal position and back again to the vertical. In an interview, Kapoor invoked the notion of *hubris*, referencing the myth as a warning that artists dare not create a work of art more beautiful than the gods could create,

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[33] *See* https://upload.wikimedia.org/wikipedia/commons/thumb/4/4b/Titian_-_The_Flaying_of_Marsyas.jpg/1280px-Titian_-_The_Flaying_of_Marsyas.jpg.

[34] *See* https://upload.wikimedia.org/wikipedia/commons/c/cf/Last_judgement.jpg.

[35] *See* https://collectionapi.metmuseum.org/api/collection/v1/iiif/437539/795145/main-image.

[36] The History of Herodotus by Herodotus, translated by George Rawlinson, *op cit*.

[37] *See* https://victorianweb.org/painting/strudwick/paintings/7.jpg.

[38] *See* https://arthur.io/img/art/jpg/000173448d3da63de/; anish-kapoor/marsyas/large-2x/anish-kapoor--marsyas.webp.

and described his sculpture as "in a sense a flayed object, made of skin stretched, revealing a complex network of interior and exterior."[39] Soon thereafter, perhaps in recognition of the musical analogy embedded in the myth, the Tate Modern commissioned composer Arvo Part to create *Lamentate, Homage to Anish Kapoor and his sculpture Marsyas*, first performed in 2003 by the London Sinfonietta.[40]

IV. FLAYING

"Skin is the parchment upon which identity is written."[41] Flaying was a subject of interest during the Renaissance, when anatomy was an emerging science. In 1543, flaying was the method used by Andreas Vesalius to produce his renderings of musculature, doubtlessly influenced by Leonardo's earlier investigations.[42]

Pacht's comparison of David's depiction of Sisamnes's flaying to an anatomy lecture is facile, and it is likewise easy to posit that Rembrandt had David's panels in mind when he painted *The Anatomy Lesson of Doctor Nicolaes Tulp* in 1632.[43] Like the corpse in Rembrandt's painting, Sisamnes's body is laid out as if on an operating table, surrounded by aldermen who go about their business with the detachment of modern medical professionals.[44] Only Sisamnes suffers, although to a far lesser extent so does Cambyses, which lends a hint of humanity to the otherwise inhumane scene.

A similar scene appears in *The Reward of Cruelty*, the fourth and final engraving of *The Four Stages of Cruelty* by William Hogarth, dated 1791.[45] This

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[39] *Interview of Anish Kapoor*, theguardian.com/arts/tateandegg/story/0,12775,875267,00.html.

[40] Kai Kitman, *Arvo Part/Lamentate* (2014), musicinmovement.eu/media-room/arvopart/music/Lamentate-711096747. Hear *Lamentate* at youtube.com/watch?v=4EYNS07qyFM.

[41] Larissa Tracy, ed., *Flaying in the Pre-Modern World: Practice and Representation* (2017), www.jstor.org/stable/10.7722/j.ctt1kgqt74.

[42] *See* https://collectionapi.metmuseum.org/api/collection/v1/iiif/358129/1515955/main-image.

[43] Pacht, *Early Netherlandish Painting*, at 246-247; https://www.mauritshuis.nl/media/dkxeasum/146_repro.jpg?center=0.35407241292323127,0.62758458646616544&mode=crop&width=3840&rnd=132902519746470000&quality=70.

[44] *See* https://upload.wikimedia.org/wikipedia/commons/9/98/David_Diptych_The_Judgment_of_Cambyses.jpg.

[45] *See* https://www.princeton.edu/~graphicarts/hogarth.jpg.

engraving depicts the vivisection of a convicted murderer who, like Sisamnes, is laid out on a table to receive his punishment. The execution is presided over by an authoritarian figure, a chief surgeon, along with several assistants who facilitate the torture. Around the table are witnesses, presumably surgeons and doctors, who take in the spectacle absent outrage or disgust, although the ambiance seems volatile and chaotic. On the floor below the table is the ever-popular canine representative.[46]

In my possibly unoriginal view, there are aspects of the punishment depicted by David that suggest that Sisamnes was as much a martyr as a criminal. Sisamnes endures his agony with a martyr's courage; the piece of cloth at his head may stand in for a crown of thorns or a halo. And this execution is not being conducted within some mythical sylvan renaissance landscape but smack dab in the middle of town, surrounded by Sisamnes's colleagues, friends, neighbors, litigants, and local politicians, among whom King Cambyses appears without fanfare. There is nothing mythic or remote in this immediate and terrifying punishment of a judge; its excessive ghastliness suggests that flaying may not be just punishment for judicial corruption.

V. Questions Raised

Some scholars ignore the myth inserted into David's first panel and postulate that the topic of *The Justice of Cambyses* was selected by the municipality for the town hall because it reflects contemporary events. But why depict a judge being flayed for corruption when it was a politician who was executed for it? Did 15th-century Netherlandish society conflate politics and the judiciary? And why the reference to the myth of Apollo and Marsyas? Did the aldermen who commissioned David intend to express the classical preference for law and order over anarchy as embodied by the mythical musical analogy? Does it also reflect a recognition that judges are as easily influenced by the relative stature of litigants, such as a god, as by bribery? Would Apollo have won had he not been a god, all else being equal?

According to Judith Resnik, Arthur Liman Professor of Law, Yale Law School, paintings like *The Justice of Cambyses* demonstrate that "pre-

[46] Barbara Jaffe, *William Hogarth and the Law Relating to Capital Punishment in Eighteenth Century England*, 15 Law and Literature 2 (Summer 2003).

democratic" adjudications cannot be equated with those conducted pursuant to "democratic principles," as the former are based on judicial subservience as opposed to judicial independence. She optimistically observes that "[o]nly in later eras did a view develop that the judge was a specially-situated employee of the state, paid by the state yet insulated from its ordinary exercise of authority."[47]

One such "specially-situated employee," whose tragedy summons a remembrance of *The Justice of Cambyses*, was the father of Justice Benjamin N. Cardozo. Cardozo the younger, Judge of the New York State Court of Appeals and, later, a Justice of the Supreme Court of the United States, was known for his devotion to the rule of law, disciplined indifference to the status of litigants, and concern with the abstract legal theories underlying a case. Such virtues are said to have inspired his famous 1928 decision in *Palsgraf v Long Island Railroad Co.*,[48] rendered when he served as Chief Judge of the New York Court of Appeals. There, the unfortunate Mrs. Palsgraf lost her claim for damages following the Chief Judge's determination, in a nutshell, that she had failed to prove that the Long Island Railroad owed her a duty and that the breach of its duty to her proximately caused her injury. *Palsgraf* is a cornerstone of tort law and one of the many opinions that helped propel Cardozo to the judicial pantheon.

Cardozo's father Albert was also a judge, but one whose career ended far less illustriously than his son's. The elder Cardozo was forced to resign from the New York State Supreme Court to avoid facing charges of corruption. He had been recommended for impeachment by a legislative committee upon the accusation that he had been influenced in his rulings by robber baron Jay Gould in his attempt to wrest control of the Erie Railroad from Cornelius Vanderbilt. The late John T. Noonan, Jr., Judge of the U.S. Court of Appeals for the Ninth Circuit, observed that the younger Cardozo's jurisprudence reflects his status "as the son of Sisamnes," studiously blinding himself to the status of the litigant before him, in contrast to his disgraced father.[49]

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[47] Judith Resnik, *Courts: In and Out of Sight, Site, and Cite, The Norman Shachoy Lecture*, 53 Vill. L. Rev. 771, 781 (2008).

[48] 248 N.Y. 339 (1928) (Cardozo, C.J.).

[49] John T. Noonan, Jr., *Persons and Masks of the Law: Cardozo, Holmes, Jefferson and Wythe as Makers of the Masks*, www.law.berkeley.edu/files/Noonan_Ch4_UPB2.pdf.

VI. Conclusion

In closing, we return to Marsyas, the martyred mythical musician. Ovid wrote that upon his demise, the nymphs mourned him:

> the fruitful earth was soaked, and soaking caught those tears and drank them deep into her veins. Changing these then to water she sent them forth into the free air. Thence the stream within its sloping banks ran down quickly to the sea and had the name Marsyas, the clearest river in all Phrygia.[50]

Although some consider evolution a myth, we see here that myths evolve. And many of those who dismiss evolution as myth also fail to acknowledge that humans may be more merciful than the gods they worship. While it may be said that capital punishment has "evolved" from brutal practices like flaying to more humane methods, hopefully, it will further evolve into extinction.

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[50] Ovid, *The Metamorphoses*.