

61 No. 1 Judges' J. 31

Judges' Journal

Winter, 2022

Feature

Waymaker

John G. Browning^{al}

Copyright © 2022 by American Bar Association; John G. Browning

MESSAGING MATTERS IN THE COURTROOM

Justice Oliver Wendell Holmes once famously said of our legal system, “We live by symbols.” From the flags displayed in a courtroom to the judicial portraits that adorn its walls, the symbolism in a courtroom can convey a powerful message. Even the courthouses where these symbols reside are, themselves, symbolic. Novelist William Faulkner reminded us of this when he described the courthouse and its place in the community: “solid as a rock, dominating all; protector of the weak; judicate and curb of passions and lusts, repository and guardian of the aspirations and the hopes”¹

The ABA Model Code of Judicial Conduct calls for judges to act in a manner that “promotes public confidence in the independence, integrity, and impartiality of the judiciary.” The legitimacy of the judiciary is directly tied to this trust and to the degree of fairness of process that is provided. As other articles in this issue demonstrate, public confidence in the integrity and impartiality of the judiciary is particularly critical for immigration judges. In their courtrooms, messaging matters more than ever, as aspiring U.S. citizens have what is likely to be their first meaningful experience with American courts. In our nation's immigration courts, the judges who preside are, as former U.S. Attorney General Alberto R. Gonzales once reminded them, “the face of American justice,” requiring them to treat “the aliens who stand before you ... with courtesy and respect.”²

Unfortunately, that has not always been the case. In 2003, Boston immigration judge Thomas M. Ragno was placed on administrative leave after he joked, “Me Tarzan,” to a Ugandan asylum seeker named Jane, a rape victim. Two years earlier, the same judge was rebuked for demanding that a Sudanese refugee, who fled his country after losing his wife and son in civil war, “prove” his Christianity by reciting the Ten Commandments. An appellate court ultimately granted the man asylum, criticizing Judge Ragno's “confrontational attitude” and calling him “an embarrassment to the court.”³

The flags displayed in a courtroom also convey a message. In 2017, Clarksdale, Mississippi, Municipal Judge Carlos Moore drew national attention (and death threats) when he ordered the 124-year-old state flag (which then included the Confederate battle emblem) removed from his courtroom. Moore said, “I don't believe the confederate emblem stands for justice, and I took an oath to administer justice.” For over a year, the U.S. flag was the only one displayed in his courtroom. After the state legislature voted to discontinue use of the flag bearing the “Stars and Bars” of the Confederacy, Judge Moore displayed the “Stennis flag,” a flag designed by Jackson artist Lauren Stennis (granddaughter of the late U.S. Senator from Mississippi, John C. Stennis) that omitted any Confederate emblem or reference. In November 2020, Mississippi voters approved the state's “New Magnolia” flag, featuring a magnolia blossom encircled by stars.

And while a flag containing an emblem associated with racial injustice and white supremacy conveys the wrong message, what about a rainbow “pride flag”? In 2019, San Antonio, Texas, Judge Rosie Speedlin Gonzalez, who is openly lesbian, was disciplined by the Texas Commission on Judicial Conduct for displaying the flag associated with the LGBTQ community. The ruling encompassed not only the rainbow flag but other “pride” items in Gonzalez's courtroom, including a mouse-pad and robe she used featuring a colorful pattern. The decision followed a complaint by a local attorney who called hanging the flag in a courtroom “extremely repugnant” and compared it to other “flags expressing personal bias such as white supremacy (swastikas) or black slavery (confederacy) that are divisive and inappropriate symbols in our courtrooms.”⁴ Judge Gonzalez claims that while she is bound by oath to display a Texas flag behind her bench, she feels that the Texas flag does not send a message

of safety in a state where she feels members of the LGBTQ community are not protected against housing and employment discrimination. She wants the pride flag to show LGBTQ people they are welcome to seek justice in her court and has appealed the Commission's ruling.

Yet perhaps no form of messaging in the courtroom has been as divisive and as nationally debated as judicial portraits. As a lawyer, I routinely practiced in courtrooms festooned with the portraits of judges who had presided over each given court in the past. While waiting for my case to be called, I hardly gave the portraits--overwhelmingly white and overwhelmingly male--much thought at all, except perhaps to marvel at how sartorial styles for facial hair had changed so much since the late 1800s. At appellate courts, I strolled past the gallery of portraits of appellate jurists past and present, a mental journey that would eventually culminate ^{*32} in seeing my own portrait join those (mostly) solemn-looking ranks. For over 31 years, I regarded the judicial portraits that adorn our courthouses the way most lawyers and judges probably do: as a way of honoring those judges, both living and dead, and as a means of expressing the legal system's connection of the past with the present.

However, recent developments and our country's ongoing dialogue about systemic racism compel us to reconsider judicial portraits and the messages they may convey. In September 2020, Judge Timothy K. Sanner of Virginia's 16th Judicial Circuit Court ordered that a near life-size portrait of Robert E. Lee be removed from the Louisa County Circuit courtroom where an African American man, Darcel Murphy, was due to stand trial for capital murder. The order came in response to a motion filed by Murphy's attorney, Doug Ramseur, and it was only issued after a nearly two-year effort by Ramseur to ensure that the trial not be held in a courtroom featuring "images that could be interpreted as glorifying, memorializing, or otherwise endorsing the efforts of those who fought on behalf of the Confederate cause or its principles." Ramseur's motion argued that the two most enduring symbols of the Confederacy, its flag and Lee, both "have been misappropriated for racist purposes and have been used to instill fear amongst African-American citizens." While Ramseur didn't feel the court itself harbored any racial bias, the messaging sent by the "presence of Confederate symbols and icons in the courtroom" could have "a powerful influence on other participants and observers, such as jurors, witnesses, family of loved ones involved in this case, and the citizens of Louisa."⁵

Judge Sanner agreed, concluding, because of the intense controversy over Robert E. Lee's image, as a figure of racial hatred and prejudice, it was "unwelcoming to many of the African Americans, and others, who are compelled to appear in our courtroom as litigants, witnesses, jurors, attorneys, and judges," and it might "impair the fair administration of justice." Sanner, however, declined to order the removal of the portraits of three judges--Andrew J. Richardson, Clayton G. Coleman, and Robert Lewis Dabney--all of whom had been Confederate officers. Noting that each of those three portraits was smaller, in black and white (rather than color), and less prominently displayed than the Lee portrait, Judge Sanner ruled there was nothing "iconic" about the three portraits. He further pointed out that Richardson's, Coleman's, and Dabney's peacetime pursuits justified their portraits' presence in the courtroom, and "only the most ardent student of Civil War history ... would have any idea who any of the three gentlemen were."⁶

Judge Sanner is not alone, as jurists throughout the South address this issue. In 2015, Patrick County (Virginia) Circuit Judge Martin F. Clark ordered the removal of a portrait of Confederate general J.E.B. Stuart from his courtroom. Judge Clark stated, "The courtroom should be a place every litigant and spectator finds fair and utterly neutral. In my estimation, the portrait of a uniformed Confederate general--and a slave owner himself--does not comport with that essential standard."⁷ On December 20, 2020, Fairfax County (Virginia) Circuit Court Judge David Bernhard ordered that the trial of an African American defendant, Terrance Shipp Jr., will take place in a courtroom devoid of judicial portraits. Judge Bernhard (who has not permitted portraits in his own courtroom since taking the bench in July 2017), pointed out that portraits of white judges comprise 45 of the 47 portraits in courtrooms of Fairfax County--which did not elect its first African American judge until 1990. Judge Bernhard also relied on the Fairfax County Circuit Court's own August 2020 "Initial Plan of Action to Address Systemic Racism and Enhance Civil Engagement with Our Community," one of whose key points was to "identify whether there are symbols in the courthouse and courthouse grounds that carry implications of racism, such as public displays of historical figures who have demonstrated racial hostility."⁸ That action plan--signed by all 15 of the circuit's judges--was itself a response to a June 16, 2020, letter to Virginia's judiciary and bar from the Supreme Court of Virginia, which reminded judges to take "all reasonable steps to ensure that in the courtrooms of the Commonwealth, all people are treated equally and fairly with dignity under the law."⁹

Judge Bernhard's 11-page opinion noted that this measure was necessary in part because of COVID-19 precautions mandating that trials take place only in the largest courtrooms to enable social distancing; those largest courtrooms were among those featuring the overwhelmingly white judicial portraits. The opinion went on to discuss how portraits of a virtually all-white judiciary hanging on the walls of a trial courtroom can give the perception of unfairness in the judicial process to participants

and observers, especially in the context of a history of jury nullification in racial violence cases and “disfavor to persons of color.” While judicial portraits might honor past jurists, Bernhard said, they could at the same time “serve as unintended but implicit symbols that suggest the courtroom may be a place historically administered by whites for whites, and that others are thus of lesser standing in the dispensing of justice.”¹⁰ The good intention of celebrating the service of prior judges, Judge Bernhard concluded, was far outweighed by the defendant's constitutional right to a fair jury trial.

North Carolina is another state reckoning with its courtroom portraits. On June 29, 2020, the Northampton County Board of Commissioners voted unanimously to remove all the portraits adorning the walls of the Superior Courtroom in the county courthouse, acknowledging that while the portraits had historical significance, they did not “appropriately reflect and honor the current diversity of Northampton's citizens and judiciary.”¹¹ The subjects depicted in the portraits removed from the courtroom included several with ties to the Confederacy and slavery, such as Governor Thomas Bragg Jr. (who served as the Confederacy's Attorney General), Judge Thomas Mason (a former Confederate officer), and Senator Matt Rancom (a former Confederate general). But the county commissioners also removed portraits of James Crompton, Earl of Northampton (the seventeenth century English nobleman for whom the county was named), and *33 twentieth century former judges with no discernible racist ties, like Judges Ballard S. Gay, Raymond G. Parker, Garland Midyette, and W.H.S. Burgwyn Sr.

The North Carolina Supreme Court was much more specific when facing up to its past. After a 2018 op-ed called for the removal of a giant portrait of former Chief Justice Thomas Ruffin from its courtroom, the Supreme Court formed an Advisory Commission on Portraits to study the issue.¹² That Commission's final report and recommendations, submitted on December 14, 2020, shed light on one of the court's darkest chapters. Ruffin, who served on the court from 1829 to 1855 (and as chief justice from 1833 to 1852), was not merely one of many slaveholders in a slavery-based society. Ruffin was an active participant in a slave-trading business, and, according to the Commission's report, had “a documented record of cruelty that stood out as egregious even in its time.”¹³ He even received letters from neighbors and fellow slaveowners complaining of Ruffin's “evil and barbarous treatment” of his slaves. But equally damning are Ruffin's pro-slavery judicial opinions, particularly his opinion in the 1829 case of *State v. Mann*--¹⁴ a decision that some legal scholars have called “the coldest and starkest defense of the brutality of slavery ever to appear in an American judicial opinion.”¹⁵ Overturning an all-too-rare conviction of a white man for assault (he shot an enslaved woman from behind as she fled from him), Ruffin wrote that “the power of the master must be absolute, to render the submission of the slave perfect.”¹⁶ Excerpts from Ruffin's chilling opinion discussing a slaveowner's “absolute” power and “uncontrolled authority” over the human beings he held as chattel property were even quoted in slave owner instruction manuals.

On December 22, 2020, the North Carolina Supreme Court announced its decision to remove Ruffin's portrait from its courtroom and replace it with the seal of the Supreme Court. Chief Justice Cheri Beasley called the decision “a tremendous reflection of the progress that has been made since the time Chief Ruffin served on the Court,” adding, “It is important that our courtroom spaces convey the highest ideal of justice and that people who come before our Court feel comfortable knowing that they will be treated fairly.” Chief Justice Beasley, who literally once sat in the shadow of Ruffin's portrait, is herself a reflection of the North Carolina Supreme Court's progress--the first African American woman to serve as its chief justice.

The question of flags, portraits, and other forms of messaging and their impact on presenting an atmosphere of impartial justice recently came to the fore in a Tennessee criminal case that garnered national attention in the *New York Times*, *Washington Post*, the *ABA Journal*, and other media outlets. On December 3, 2021, the Tennessee Court of Criminal Appeals reversed the aggravated assault conviction of a Black defendant, Tim Gilbert, due to the extraneous prejudicial effect of Confederate memorabilia in the jury room. Specifically, the all-white jury deliberated in a room named for the local chapter of the United Daughters of the Confederacy in which a large, framed Confederate flag and portraits of Confederate leaders Jefferson Davis and Gen. John C. Brown were prominently displayed. Noting the Confederate flag's representation of “at least in part, the attempt to perpetuate the subjugation of black people through chattel slavery” and the power of flags to convey messages, the court concluded that “permitting the jury to deliberate in a room filled with Confederate memorabilia exposed the jury to extraneous information or improper outside influence.”¹⁷

As noted earlier, as judges, we must act in a manner that promotes public confidence and trust in the judiciary's independence, integrity, and impartiality. But what message does it send to defendants, victims, witnesses, and jurors--all of whom are invested in this impartiality--when they gaze at the portraits gracing the walls of the courtroom and see nothing but white faces? Yes, for most of us, judicial portraits are perceived as little more than homage to the service of past jurists, most of whom had no record of racial animus. Yet at a time in our nation's history when public confidence in our system of justice has been eroded by the

politicization of the judiciary and accusations of systemic racism, any means of restoring that confidence and trust should be welcome. I'm proud of any judicial portrait, but if removing judicial portraits achieves a higher purpose for our justice system, then so be it.

Footnotes

- ^{a1} **John G. Browning** is a partner in the Plano, Texas, office of Spencer Fane, LLP, and a former justice on Texas's Fifth Court of Appeals in Dallas. He is the author of five books and numerous articles on social media and the law, and he serves as the chair of the Institute for Law and Technology at the Center for American and International Law.
- ¹ William Faulkner, *Requiem for a Nun* (1950).
- ² Memorandum from U.S. Atty. Gen. Alberto Gonzales to Immigration Judges (Jan. 9, 2006); available at <http://www.immigration.com/newsletter1/attgenimmjudge.pdf>.
- ³ Ann M. Simmons, *Some Immigrants Meet Harsh Face of Justice*, LOS ANGELES TIMES (February 12, 2006).
- ⁴ Elizabeth Kuhr, *Texas Judge Says She Was Forced to Remove Pride Flag From Courtroom*, NBCNEWS.COM (April 21, 2020).
- ⁵ Emily Davies, *Virginia Judge Orders Robert E. Lee Portrait Removed From Courtroom Ahead of Murder Trial*, THE WASHINGTON POST (September 11, 2020).
- ⁶ Peter Vieth, *Judge Orders Removal of Lee Portrait From Courtroom*, LEGALNEWS.COM (September 14, 2020).
- ⁷ Judge Martin Clark, *Full Statement From Judge Martin Clark*, MARTINSVILLE BULLETIN (September 2, 2015).
- ⁸ Derrick Bryson Taylor *Virginia Judge Won't Try Black Man in Courtroom Lined With White Portraits*, THE NEW YORK TIMES (January 1, 2021).
- ⁹ *Id.*
- ¹⁰ December 20, 2021, Letter Opinion, Commonwealth of Virginia v. Terrance Shipp, Jr.; <https://www.fairfaxcounty.gov/circuit/files/assets/documents/pdf/opinions/fe-2020-8-cw-v-terrance-shipp-jr>.
- ¹¹ Holly Taylor, *Courtroom Portraits Removed*, THE ROANOKE-CHOWAN NEWS-HERALDD (July 2, 2020).
- ¹² Press Release, Supreme Court to Remove Portrait of Chief Justice Thomas Ruffin From Its Courtroom, North Carolina Judicial Branch (December 22, 2020).
- ¹³ Advisory Commission on Portraits “Report and Recommendations to the Supreme Court of North Carolina,” (December 14, 2020); <https://www.ncourts.gov/assets/inline-files/Advisory-Commision-on-Portraits-Report-and-Recommendation-web.pdf>.

14 *State v. Mann*, 13 N.C. 263 (1829).

15 Sally Greene & Eric Muller, *State v. Mann and Thomas Ruffin in History and Memory*. 87 N.C.L. REV. 669 (2009).

16 13 N.C. 263, at 266 (1829).

17 *State of Tennessee v. Tim Gilbert*, No. M2020-01241-CCA-R3-CD (Opinion by Tennessee Court of Criminal Appeals, December 3, 2021).

61 No. 1 JUDGEJ 31

End of Document

© 2022 Thomson Reuters. No claim to original U.S. Government Works.