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INTRODUCTION

Procul ab oculis, procul à corde[1]

A recent study carried out at New York University School of Law looked at how the milieu of judicial proceedings can affect their perceived legitimacy. During the first year of law school, in addition to the substantive curriculum of Contracts, Property, Civil Procedure, Criminal Law, and Administrative Law, the program includes a compulsory course on the elements of lawyering. It covers legal research and writing, case analysis, advocacy, negotiation, and trial, and at the end of the first year the students must argue a case. The researchers divided the students randomly into two groups.[2] The first argued in an informal setting, a classroom or lecture theatre that had been temporarily rearranged into a courtroom, with a judge in regular clothes presiding. The second group made their case in a formal courtroom replete with columns, panels, Latin inscriptions, murals, portraiture, bench, bar, and thrones, before judges in robes.

The survey questioned the students as to the authority, legitimacy, and justice of their first case. Students studying for a doctorate in law, a second and sometimes a third higher degree, at the end of a year devoted to studying legal reason; the art of juridical analysis; the line, square, and compass of doctrine, precedent and rule, responded that justice was more likely to be done in the second setting. The group that appeared in the formal court with the robes and regalia, the Latin and other insignia of *maiestas*, were significantly more likely to view the procedure as having greater legitimacy, the judgment as being more authoritative, and the judge as more learned in law than those who appeared in the makeshift informal auditoriums. For all the didactic effort, disciplinary skill, and Socratic dexterity expended on training these elite law students in the substantive principles and core rules, the precedents

[1] Johann Kreihing, *Emblemata ethico-politicorum* [1659] (Turnhout, Belgium: Brepols, 1999) emblem 130. (Far from the eye, far from the heart).

[2] Oscar Chase and Jonathan Thong, "Judging Judges: The Effect of Courtroom Ceremony on Participant Evaluation of Process Fairness-Related Factors," 33 Yale Journal of Law & Humanities 101 (2012).

and other sources of the juridical order, despite the maxim *quoad non ultra*, in its various forms, meaning that there is nothing beyond law, that legal reason dictates decision, the students responded positively and affectively to the classical visual emblems, the ceremonial and architectural aspects of the grandeur and gravitas of legality. The young students eager for law apprehended, though with minimal training in visual advocacy and therefore likely little tutored in critical appreciation, that there was more to the theatre of justice and truth than can be captured by reason and reduced to the page.

What is surprising is how unsurprising this is. Justice has always been a theatrical presence, and lawyers have depended on and clung to the accoutrements and other visible aspects of legal decorum and of the rituals of power. We do not have the wigs and gowns, silver buckles, codpieces, fur trimmings, or mandatory dinners at the Inns of Court that subsist pretty much to the present day in the higher echelons of English common law, but even in the United States, the courthouses are frequently columned, ornately decorated, replete with Latin inscriptions, and contain numerous murals, portraits, statues, and insignia of decorum present alongside the elevation of the bench, the barrier of the bar, and the formality of the judicial robe.[3] It makes it safer, creates a distance, and so offers the comfort of a certain degree of impersonality. These aspects of justice seem psychologically, anthropologically, and symbolically self-evident. At the same time, however, the visible qualities of law are not much studied or commented. We inhabit an exponentially expanding videosphere, a Planet Hollywood, a YouTube universe, a gamer zone of augmented life in which the public world of digital transmission penetrates almost every crevice of what was formerly the private sphere. The modes of the visible, what were classically the domain of spiritual governance, of the *regimen animarum*, and specifically of the *speculae pastoralis*, the spectral watchtowers of the episcopacy, the domain of what are now the visual incursions of a pervasively public intimate realm, intrude (or extrude) into all aspects of civil society. For all the abstract recognition of the reorientation and redistribution of media, relay, and transmission of law, there are few courses, little research, and a dearth of scholarship on visual advocacy and on critical interpretations of the visibilities of power, even on basic legal visual literacy.[4] The students in the New York University School of Law

[3] Judith Resnik and Denis Curtis, *Representing Justice: Invention, Controversy, and Rights in City-States and Democratic Courtrooms* (New Haven, CT: Yale University Press, 2011) provides an exhaustive account of the iconography and settings of justice.

[4] Anglophone exceptions, in addition to the expansive Resnik and Curtis, *Representing Justice*, supra n. 3, include C. Douzinas and L. Neade (eds.), *Law and the Image: The Authority of Art and the Aesthetics of Law* (Chicago: University Chicago Press, 1999); Richard Sherwin, *When Law Goes Pop: The Vanishing Line between Law and Popular Culture*

study simply absorbed the visual context, the apparent comfort of decorum and contentment of sight, without any great degree of critical mediation. Structures, it seems, go untutored and unseen.

An initial hypothesis can be proffered as to the significance of décor and decorum to the law students in this study. These youths eager for law – *juventus cupida legum* in the old argot – recognized in the formal setting and venerable dress of the courtroom a symbolic dimension of legality that was missing from the makeshift hearing in the classroom. More strongly, in the image archive that Freud calls the unconscious, there was a prior picture of a judge and court that corresponded more closely to the courtroom than the classroom setting. The imagery already housed the law in a visual setting, derived in part no doubt from film and television, from the architecture and statuary of the city, and from the busts, bronzes, statuary, paintings, and other plastic imagery in law school. These prior images, these imaginary representations of legality, are modern day and subsisting emblems directing vision and establishing sites of recognition that correspond remarkably closely to the legal tradition of figures of justice and specifically to that gallery of juristic images that will be the principal object of this study, the legal emblem tradition. These, it is argued, form not only a visual archive but also a structure of vision, gesture, and look that has remained remarkably invariant over time. The theatrical settings, performative rites, and figurative expressions of law remain now largely the same as they were at the beginning of the modern tradition.

Within the popular perception and public imaginary of legality, a judge is supposed to hand down the law and so evidently needs to be placed above those to whom the rules are addressed. She also needs to have a surrounding that will provide the symbolic means of rendering justice as distinct from some merely administrative act. This is not just any missive from any scrivener's boy in his master's shop, as Sir Thomas More somewhere puts it, but rather trial is entry into the portals of law; it requires that a threshold be

(Chicago: University of Chicago Press, 2000); and Sherwin, *Visualizing Law in the Age of the Digital Baroque: Arabesques and Entanglements* (London: Routledge, 2011). Mention should also be made of William MacNeil, *Lex Populi: The Jurisprudence of Popular Culture* (Palo Alto, CA: Stanford University Press, 2007); and of Neal Feigenson and Christina Speisel, *Law on Display: The Digital Transformation of Legal Persuasion and Judgment* (New York: New York University Press, 2009); Alison Young, *The Scene of Violence: Cinema, Crime, Affect* (London: Routledge, 2010); C. Delage and P. Goodrich (eds.), *The Scene of the Mass Crime: History, Film, and International Tribunals* (London: Routledge, 2013). For surveys of current literature, good and bad, see the essays in A. Sarat et al. (eds.), *Law and the Humanities* (New York: Cambridge University Press, 2010); and Peter Robson & Jessica Silbey, *Law and Justice on the Small Screen* (Oxford: Hart, 2012); as well as the compendious Papke et al. (eds.), *Law and Popular Culture* (LexisNexis, 2012).

crossed and invokes a professional knowledge, a rhetoric and lexicon, gesture, and dress that are many years in the making. Law is an antique tradition, a classical practice, and entails rites and ceremonies that are distinctly solemn and out of the ordinary. Many of those features are established by and evident in the early modern law books. Although the prototypes are generally presented and expounded in books of emblems, we can pause momentarily on a common law example from a famous substantive work of doctrine. Coke's *Institutes* provides an intriguing image of Sir Thomas Littleton close to the start of the first volume, with his commentary on said Littleton that he is, as the subtitle elaborates, "not the name of a lawyer onely, but of the law itself."[5]

The *propositus*, our venerable and venerated judge and author, is placed in the very center of the image, on a pedestal of six gradations of descendants (Figure 1.1). He stands above the present and the future, the descending line, while he himself has over his head, designated in the Latin, *recta linea* or proper line, the unbroken chain of his lineage, the representation of his legitimacy, both literal and figurative.

Recta linea, the proper line, the right lineage, is not only a question of genealogy and inheritance, of the symbols of legitimacy, but also a matter of law, of compact and contract between origin and emanation, source of law and current distribution. Each place on the ascendant line is marked by an image of hands clasped together, the sign of faith, amity, and contract, from Cicero to contemporary doctrine. This is the visual representation of *bona fides* and shows us visually a law of fidelity, a contractual succession, place, and belonging evidenced through the image of an insuperable concord, an unbroken bond that binds antiquity to novelty, past to present, and law to the subject. This is in a law book on the institutes of the laws of England, itself a commentary on a treatise on tenures that are held from one generation to the next according to the rules of succession and primogeniture. And if this is not enough, the judge himself is in a garb sufficiently ornate and opulent – robe, furs, and judicial hat – to satisfy even the most demanding of the eager law students.

There are other images in Coke's *Institutes*, including an introductory one of the book itself on a cushion with a sword and rod of office placed over it. Angels watch and guard. The Latin subscript (*Deo*, *Patriae*, *Tibi*) reads, in translation: 'For God, for fatherland and for you'. There is no doubt then either as to the image of the origin of law and book or as to its

[5] Sir Edward Coke, *The First Part of the Institutes of the Lawes of England. Or, A Commentarie upon Littleton, not the name of a Lawyer onely, but of the Law itselfe* (London: Stationers, 1628).

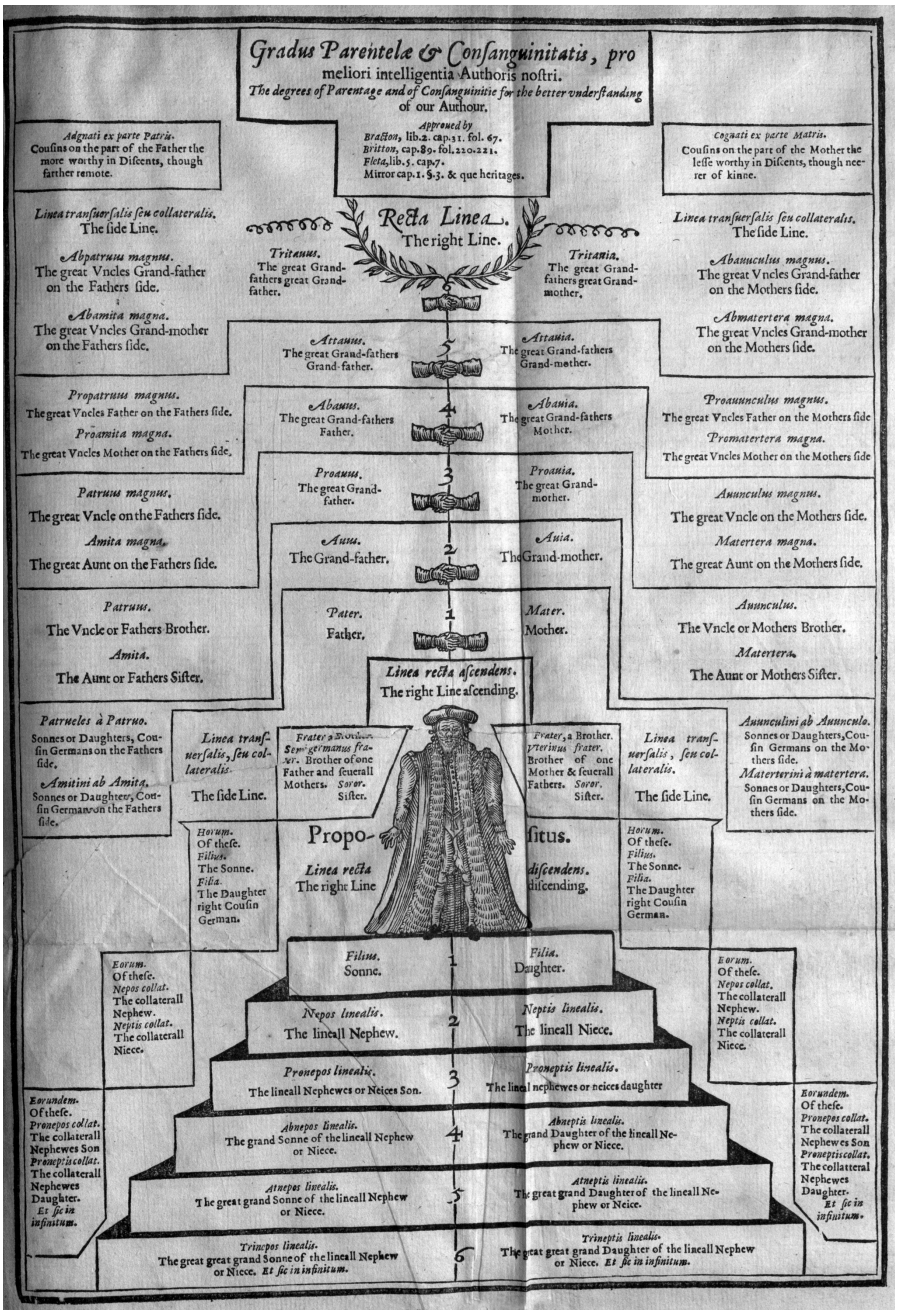

Figure 1.1 The lineage of the *propositus* Sir Thomas Littleton, from Sir Edward Coke, *The First Part of the Institutes of the Lawes of England* (London: Stationers, 1628). (Reproduced courtesy of the Rare Book Collection, Lillian Goldman Law Library, Yale Law School.)

likely features, embedded in an emblem at the beginning of the treatise that in many respects founds the modern common law tradition. I offer one more preliminary instance of the prior history of legal decorum and courtroom hierarchy, again to bolster the record of the students' perceptions. It is taken from a Latin edition of the *Corpus juris civilis*, the great compilation of Roman law, published in the mid-sixth century, over a millenium before Coke's *Institutes*.[6] Here we see a slightly earlier emblematic representation of lawgiving, the handing down of law, which can add both detail and visual structure to Coke's schematic tree. The image is inserted into the text of the universal law and proffers a picture of the lawgiver, Justinian himself (Figure 1.2).

The Emperor, the most Holy Lord Justinian – *Domini Iustiniani sacratissimi* – is raised on a platform and sits on a throne with a screen behind and a canopy around. This portrait, in its minimalist emblematic way, represents the majesty and authority of law as staged, dressed, and performed. The Emperor wears a crown and robes of office. In his right hand is a sword, and his left hand is raised, with the palm, held in a fist, index finger raised. The sword, of course visualizes the power and force of law, the rigor of strict application, while the fist and raised finger dictate silence and indeed the terror of law (*terrorem incutio*). The Emperor is looking to the right and addressing himself to a lawyer and a priest, the two relays of law, while in the background, on the ledge of an open window, is a stack of law books. The window marks a transition from interior to exterior and also from terrestrial to universal, earth to sky. The law books mediate, in other words, between the heavens, the law of God, and the justice of the Emperor. He does not judge in his own name but rather applies the higher law to which he has a unique access and greater proximity. His head is raised above the others and so is closer to the sky and hence the divinity, while the lawyers are closer to the books.

This is a fairly standard representation of "justice and law," of "constant and perpetual will," and is repeated in numerous variants within the Senneton edition of the *Corpus*. More surprisingly, I suggest that it still provides the basic visual archive for the imagination and so visualization of justice as a theatre of law and truth. We know these images but we also know them as images, and so tend in the modern curriculum to view them as ornaments, mere figures on the way to law, rather than recognizing them as mnemonics, as triggers that engage us with the ceremony and theatre of

[6] *Corpus juris civilis* (Lyon: Senneton, 1547–1551) at I. 8. The authoritative commentary on the Senneton edition is Valéry Hayaert, Mens emblematica *et humanisme juridique* (Geneva, Switzerland: Droz, 2009) chapter 5. Her edition of the Senneton imagery is due out next year.


Domini Iuſtiniani ſa
cratiſsimi Auguſti Inſtitu-
tionum, ſeu elementorum
LIBER PRIMVS.
TITVLVS PRIMVS.
De iuſtitia[s] & iure[t].
¶ Iuſtinianus, veluti optim⁹ præceptor, imi
tatus rectum ordinem procedendi (qui debet
eſſe definitiuus, diuiſiuus, &
exēplorū poſitiuus) primò po
nit definitionem iuſtitiæ.
Vſtitia[v] eſt conſtans &
perpetua volūtas, ius ſuum

Figure 1.2 Justice and law, from *Corpus juris civilis* (Lyon: Senneton, 1547–1551) at I. 8: *Domini Iustiniani sacratissimi* – Bibliothèque Municipale de Lyon, 21511. (Crédit photographique Bibliothèque Municipale de Lyon, Didier.)

legality prior to any actual enunciation of norm, rule, or judgment. The image puts us in the mood for law. And this image, surrounded by Latin text and commentary, puts us in the frame of mind for civil law. It comes, appropriately, as the emblem that accompanies the first title of the first book of Justinian's *Institutes*, and so sets the stage and brings the principal actor to presence. The stage it sets is that of reading, precisely because the image is internal to the text, a didactic and different relay set in among the three columns of the words of the law: text, gloss, commentary, and in this edition supplemented with marginal notes. The image in a strong sense

precedes and dominates, or at least overlooks the words, the mere letters of the law, and so may be taken as prior to law and above law, with all the connotations of hierarchy and precedence that such implies. As for the text, we do not, however, generally read Latin any longer. Nor, of course, did many of the populace at the time that the Senneton edition was first printed. That aside, my apologies for the intrusion, but the image at least is visible and comprehensible, indeed recognizable enough even if we neither any longer know its proper encoding nor have much critical skill in looking at such images.

It is, however, and enduringly, the text, the words, *ipsissima verba*, that lawyers are trained to address, as if these were not also, in their way, images, visible signs, figures of a prior source and learning, bringing the speech of one absent to our ears without voice, as John of Salisbury put it. This essential visibility, the presence of the text, the ideographic character of calligraphy and then print, gets lost. There is, of course, a history to the blindness of law, to the oblivion to the ceremonial and theatrical aspects of justice, to which this book is addressed, but before embarking on the recollection and elaboration of the *longue durée* of legal images I proffer one further and peculiarly striking, because both lexical and figurative, example of what goes unseen. The reason that lawyers are not trained in visual apprehension goes back to the early modern war on images, the Reformation critique of the figurative and imagistic in favor of the religion of the word, the reformist maxim of *sola scriptura*, the text alone, having had some impact upon the common lawyers. Trial was to be by the word and not the image: *Sit liber iudex*, let the book judge, was in this regard the relevant Reformist motto.[7] In this tradition it is the unadorned text, the black letter of the law book, the ironically ornate gothic typeface of the various institutes, that is supposedly to transport the subject of law, and not the glamour and falsity, the lure and lewdness of the fleshly and physical appearances of the various legal actors, let alone the illusion of the images that surround their costumed manifestations. So lawyers are trained to read and interpret but not to look, view, gesticulate, mimic, or act. Such being the case, ceremony deflected, histrionics ignored and thrust aside, the text should then be the object of the closest scrutiny, the most careful reading and almost Aristotelian cerebration. Consider then the following experiment.

[7] W. Fulke, *A Rejoinder to John Martials Reply Against the Answere of Maister Calfhill* (1580) 133. The argument being that "the spirit by his own substance incomprehensible, is by his effect in the holy scriptures visible, revealed, known, and able to be gone unto, therefore a sufficient judge, taking witness of the scriptures and bearing witness unto them … The Law of God is judge, not priests." For discussion of this theme, see Goodrich, "Specters of Law: Why the History of the Legal Spectacle has not been Written," 1 UCI Law Review 773 (2011).

In 2006 the English Court of Chancery, in the person of Peter Smith J., handed down a written judgment with certain typographical peculiarities (Figure 1.3).[8] The case, which has generally gone unremarked, concerned a claim against the author of a novel, *The Da Vinci Code*, for copyright infringement.[9] The dispute was in substantive terms quite ordinary but the typographical oddities of the judgment did eventually gain some slight acknowledgment and then dismissal by the Court of Appeal. The idiosyncrasy in question concerned the format of single and seemingly random letters in the text in bold italics. The opening line of the first numbered paragraph, after the judge's name, the heading, and subheading, contained the word "claimant***s***," in which the last letter was thus altered in font and format. In the second paragraph, the "m" of clai***m***ant in the third line was again changed to bold italics. In the third paragraph the "i"" of "***i***s" gained comparable and surprising significance and the immediately subsequent first letter of the next word, "***t***hat" was also emboldened and printed slant. Excised from the judgment as a separate encryption, the first ten letters formed the nomination "Smithy Code" followed, once disencrypted by means of the cipher actually used in the novel whose authorship was under dispute, by question and answer: "Jackie Fisher, who are you? Dreadnought."

The visual encryption, the judicially coded statement, is manifestly part of the judgment and so at the very least must be treated as being of persuasive authority. It is *obiter dictum*, in the argot of law, something said along the way to decision, part of the reasoning of the judgment but not *the* reason, not the *ratio decidendi* or ruling itself. So, in brief, this encryption is part of the legal text, an apparent facet of the precedent, visibly an element of the law. But it passed quite unseen. Nobody noticed these hieroglyphs, the little symbols and properly enigmas that bestrew the judgment. They were not expected, and they were not seen by the lawyers nor, perhaps even more surprisingly, did the public and the media, which had taken considerable interest in the copyright action because of the huge success of *The Da Vinci Code*, observe this typographical peculiarity. The judge had to e-mail a journalist to elicit any reaction to this highly significant although equally unconventional judicial invention. The code included in the judgment is extraordinary, without

[8] Baigent & Leigh v. The Random House Group Ltd. [2006] EWHC 719 (CH).

[9] For commentary on the legal historical significance of the judicial encryption, see Peter Goodrich, "Legal Enigmas: Antonio de Nebrija, The Da Vinci Code, and the Emendation of Law." 30 Oxford Journal of Legal Studies 71 (2010). For an example of an extended academic commentary that makes brief mention of the encryption, suggesting that its inclusion was expressive of poor judgment, see Mary Wyburn, "Giving Credit Where It Is Due: The Da Vinci Code litigation: Parts 1 and 2," Entertainment Law Review 96, and 131, at 133 (2007).

MR JUSTICE PETER SMITH
Approved Judgment

Baigent & Leigh v Random House

Peter Smith J :

A SETTING THE SCENE

1 ***Introduction***

1. The two Claimants Michael Baigent and Richard Leigh claim that the novel The Da Vinci Code ("DVC") is an infringement of their copyright in their book The Holy Blood and The Holy Grail ("HBHG").

2. The Claimants are two of the three authors of HBHG. The third author, Henry Lincoln is not a claimant and does not participate in the claim. No point is taken about his non participation. Nor is there any claim that the Claimants' title to sue in respect of their interests in that copyright by reason that they had been two of the three joint holders copyright.

3. DVC was written by Dan Brown who lives and works in America. The Claimants' case is that in writing DVC he produced a book which is an infringing copy of HBHG. The Defendant to the proceedings is The Random House Group Ltd ("Random") which is responsible for the publication of DVC in the United Kingdom. Dan Brown is not a Defendant, but Random relied upon his witness statements and his evidence in this action. In reality Mr Brown is on trial over the authorship of DVC.

4. By virtue of various mergers and acquisitions Random publishes both HBHG and DVC. Further a film production of DVC is apparently in the offing starring Tom Hanks with a scheduled release in May 2006. It is a testament to cynicism in our times that there have been suggestions that this action is nothing more than a collaborative exercise designed to maximise publicity for both books. It is true that the book sales of both books have soared during the course of the trial (in the case of HBHG it is said to be a tenfold increase).

5. I am not in a position to comment on whether this cynical view is correct but I would say that if it was such a collaborative exercise Mr Baigent and Mr Brown both went through an extensive ordeal in cross examination which they are likely to remember for some time.

2 ***The Claimants***

6. The Claimants together with Mr Lincoln spent 5 years researching HBHG between 1976 and 1981 leading to its publication in 1982. As will be seen later in this judgment HBHG was preceded by a number of television documentaries. Mr Baigent said that he had spent 75% of his waking hours during that period researching various points underpinning HBHG.

7. He was born in New Zealand and moved to England in 1976 and had an interest in religion "esoteric" thought. After completing studies at university culminating in a BA in psychology with comparative religion and philosophy he developed a private interest in the Knights Templar.

8. Mr Leigh was born in New Jersey and after secondary education completed a BA in English Literature at Tufts University Boston. He became interested in the Grail Romances whilst an undergraduate and also steeped himself in comparative religions. Thereafter he completed an MA at the University of Chicago in comparative literature

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Figure 1.3 Cyphers in the transcript of the judgment in *Baigent & Leigh v. The Random House Group Ltd.* [2006] EWHC 719 (CH). (Transcript; public record.)