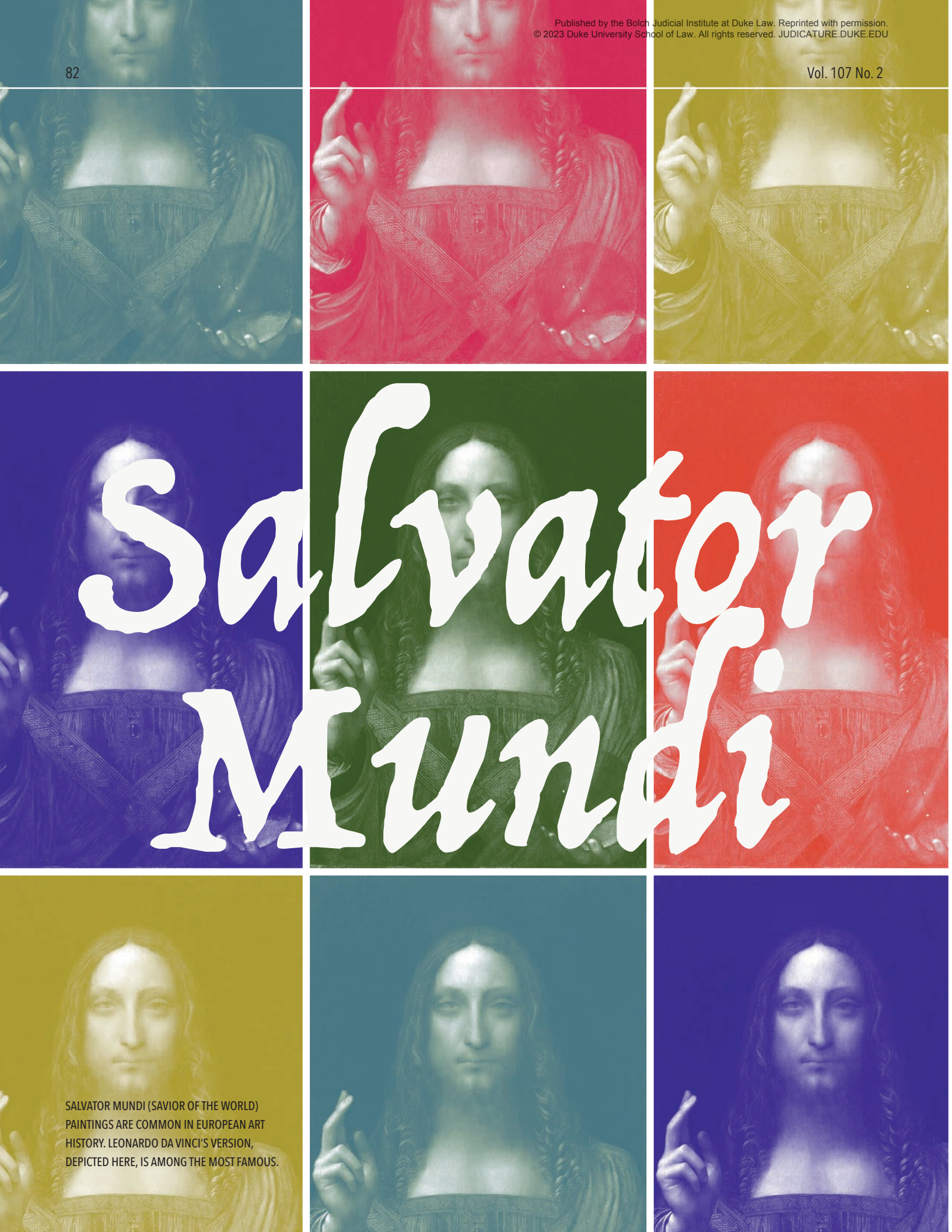
Salvator Mundi



SALVATOR MUNDI (SAVIOR OF THE WORLD) PAINTINGS ARE COMMON IN EUROPEAN ART HISTORY. LEONARDO DA VINCI'S VERSION, DEPICTED HERE, IS AMONG THE MOST FAMOUS.

Neutrality can be maddening to the public. And to judges, too.

BY CURTIS E.A. KARNOW

Those drawn to careers in law often want to save the world.

When we decided on law school, we hoped to wield the armor and lance of the law to ensure civil rights, make people whole, and do justice. Some of us became judges, many accepting a reduction in salary to do public service. Now, we were free of the obligations to find business, deal with partners or clients, free of the obligation to argue faintly foolish positions because they favored a client's views, free of billable hours requirements threatening to inflate our fees. We were free to do justice, pure and simple.

But as lawyers, we had seen things that should not be: judges who let bad behavior slide, who failed to award sanctions, who split the baby when one side (our side, usually) was plainly right. Judges who didn't read the cases or the papers, who allowed cases to continue years past their shelf life. Who believed the lies — or, worse, didn't seem to care.

We swore we would never be that judge. *We would make it right.*

It is a noble urge, never to be ignored. But it can get us into ethical trouble. In the American system, judges are (with important exceptions) process managers, not guarantors of the "right" result. When I first joined the bench an older judge told me we applied the law; we weren't, he said, in the "justice business." This sounds terrible to the lay public, but one sees the point: Notions of "justice" are idiosyncratic. The public demands justice for a victim; it demands justice for the defendant. The plaintiff wants justice with a jury trial. The defendant with an arbitration agreement wants the justice that comes with enforcing contracts and avoiding court altogether.

But these invocations of "justice" are not useful. The judge, instead, concentrates on process, making sure that the jury is picked fairly, that each side has time to make its points, that evidence is admitted according to law, and so on. The conceit is that if the judge follows the correct process, the "right" result is likely. This is our neutrality.

But this neutrality can be maddening to the public. When I campaigned for office, people in town halls asked me about "justice" — how I would serve justice to tenants, landlords, animal owners, unions, small businesses, and how I would enforce the "just principles" of the Democratic Party (this was San Francisco). They found my answers inadequate because all I promised was fairness, not a result.

Neutrality can be maddening to us, too. Our robes say we're neutral, but beneath them we have a sense of how cases should come out. And because we want to *make it right*, we might step in to make it right. We're thinking of the closing argument that should be made, the crucial question that should be asked, the objection that cries out for voice. Incredibly, we see ourselves granting summary judgment based on hearsay that was never objected to, or a deadline slipping away for a new-trial motion that we obviously would have granted. We see incompetence in the courtroom, unconscionable delay, or, even worse, deception, and we want to extirpate it, to come down like thunder — like Zeus himself — to ensure it never happens again.

These noble motivations — and their dishonorable results — are found throughout the reports of California's Commission on Judicial Performance. A judge upset that a child was being damaged by the family's litigation said "what I fully intended was that someone is going to win, and someone is going to lose, and it will be big time. Judgment day is today."[1] He rhetorically asked the parents, "[H]ow bad do you want to ruin your child?"[2] He noted a witness's entirely improbable loss of memory, saying she'd perhaps "suffered a bout of amnesia."[3]

In another case, a judge realized he'd failed to impose important bail conditions, so he emailed the DA's office — a violation of ex parte communication rules — to get the defendant back into court.[4] Separately, he'd seen an apparently disastrous charging decision, done for all the wrong reasons — the district attorney was lazy and unprepared to litigate the complex issue — and said so.[5] (How else to fix the situation? he may have asked himself.)

Another judge aggressively questioned a witness, clearly conveying to the jury that he doubted her credibility.[6] (Well, how else to contain perjury?)

In a dependency hearing, a judge termed the father's alcohol use and lack of treatment as "pathetic," and, in another proceeding, he responded to a mother's statement that she was clean by saying, "You're clean? And you expect me to believe that?"[7] When a prospective juror who had lived in the country for 25 years said she could not speak or understand English, the judge chastised her and told her people try to lie to him all the time.[8] (Are we not here to ensure the truth?)

And have we not all thought, as one judge quipped, "the party who rep- ▸

resents himself has a fool for a client"?[9] (Why not say so, and offer the caution?)

But good intentions will not save us.

The underlying problem in most of these examples is the judge's inclination to follow his or her own personal notions of justice — to *make it right*. But our authority is tightly constrained; it is deep but not wide. The law is about rules; it doesn't mandate who wins. Witnesses may lie, but we are not guarantors of the truth. We aren't there to advise the jury, or beat up on witnesses until they confess to our liking. We see bad charging decisions, but our power is usually limited to determining the sufficiency of evidence. We weren't elected to decide how to allocate the resources of the DA's office any more than we are empowered to find someone guilty — who we "know" did the crime — after the jury has said otherwise. Perhaps most people who have been here for 25 years do speak English (though millions, in fact, do not[10]), but berating a juror serves only our anger. And while it may be true that a self-represented litigant puts himself at risk, that doesn't mean we can berate a party with the observation.

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I am often reminded of a truism when conducting settlement conferences: If the parties agree, it's done, and my views of what's fair don't matter. It's not my money. It's not my case. And I don't know all the factors that went into the deal. Imposing my views of a "just" result would be hubris.

"Hubris" (hybris, in ancient Athens) originally meant "the intentional use of violence to humiliate or degrade," though over time it came to mean an "overweening presumption that leads a person to disregard the divinely fixed limits on human action in an ordered cosmos."[11] Change "divinely fixed limits" to the "judicial canons," and we see what might drive judges to trouble.

A constrained view of a judge's role doesn't always sit well. We want to speak out about injustice; that seems to be our calling. Sometimes it seems the justice system is at the narrow end of a funnel: When the rest of society fails — agencies, family, neighbors, institutions — cases end up in the courts, especially family, criminal, and juvenile courts. So getting the right result seems essential. Judges don't want to be the last, final missed opportunity. The trick in these cases is threading the needle of our actual authority. We can do the "right" thing in sentencing, in placing children, in resolving family disputes — within the bounds of the law. We can do the "right" thing on motions for new trial, in setting aside orders and judgments based on mistake, by reversing miscarriages of justice. Sometimes we can do what's right — within limits.

For the rest: We mourn the lost opportunities seen in court every day — the bad results from poor lawyering; reckless deals made in settlement (and the stunningly good offers rejected); parties taking the most expensive, time-consuming approach; defendants representing themselves; and all the other blood of self-inflicted wounds.

We can make sure the parties had the chance to get it right. We can't get it right for them. We can't save them.

1 In the Matter Concerning Judge Matthew J. Gary, 11 (Comm'n on Jud. Performance May 14, 2020) (decision and order imposing public admonishment), https://cjp.ca.gov/wp-content/uploads/sites/40/2020/05/Gary_DO_Public_Adm_5-14-20.pdf. The admonishments cited in these notes were all based on many actions, not just those mentioned here.

2 *Id.* at 3.

3 *Id.* at 8.

4 In the Matter Concerning Judge Robert L. Tamietti, 3–4 (Comm'n on Jud. Performance Oct. 14, 2020) (decision and order imposing public admonishment), https://cjp.ca.gov/wp-content/uploads/sites/40/2020/10/Tamietti_Pub_Adm_10-14-20.pdf.

5 *Id.* at 4.

6 In the Matter Concerning Judge Frank Roesch, 10 (Comm'n on Jud. Performance Oct. 15, 2020) (decision and order imposing public admonishment), https://cjp.ca.gov/wp-content/uploads/sites/40/2020/10/Roesch_DO_Pub_Adm_10-15-2020.pdf.

7 Public Admonishment of Judge Barbara L. Roberts, 19 (Comm'n on Jud. Performance Feb. 18, 2021) (decision and order imposing public admonishment), https://cjp.ca.gov/wp-content/uploads/sites/40/2021/02/Roberts_Pub_Adm_2-18-21.pdf. Separately, discipline was imposed for, among other things, a judge's questioning a party in a civil jury trial in a manner that reflected disbelief in the plaintiff's testimony. In the Matter Concerning Ariadne J. Symons, 9 (Comm'n on Jud. Performance May 20, 2019) (decision and order imposing severe public censure), https://cjp.ca.gov/wp-content/uploads/sites/40/2019/05/Symons_DO_Censure_05-20-19.pdf.

8 Inquiry Concerning Judge Edmund W. Clarke, Jr., 23 (Comm'n on Jud. Performance Sept. 29, 2016) (decision and order imposing public admonishment), https://cjp.ca.gov/wp-content/uploads/sites/40/2018/12/Clarke_1_Cal.5th_CJP_Supp._1.pdf.

9 This was directed at the plaintiff, an attorney who represented herself. In the Matter Concerning Ariadne J. Symons, *supra* note 7, at 11.

10 Of about 291 million speakers in the U.S. over 5 years old, 60 million — about one in five — do not speak English at home. *Detailed Languages Spoken at Home and Ability to Speak English for the Population 5 Years and Over: 2009-2013*, U.S. Census Bureau (Oct. 2015), https://www.census.gov/data/tables/2013/demo/2009-2013-lang-tables.html. The situation is actually routine.

11 Britannica, Hubris, https://www.britannica.com/topic/hubris (May 12, 2023).

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