



REPRESENTING JUSTICE

Invention, Controversy,
and Rights in City-States
and Democratic Courtrooms

Judith Resnik and Dennis Curtis



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JUDITH RESNIK *and* DENNIS CURTIS



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PREFACE

The relationship between courts and democracy is at the center of this book, and the principal claims can be set forth simply. First, adjudication is proto-democratic in that courts were an early site of constraint on government. Even when judges were required to be loyal servants of the state, they were instructed to “hear the other side” and told not to favor either the rich or the poor. When resolving disputes and sanctioning violations of their laws, rulers acknowledged through public rituals of adjudication that something other than pure power legitimated their authority.

Second, democracy changed adjudication. “Rites” turned into “rights,” imposing requirements that governments provide “open and public” hearings and respect the independence of judges. Courts developed alongside the press and the post as mechanisms for the dissemination of knowledge about government. Yet adjudication made a special contribution, offering a space in which ordinary persons gained, momentarily, the ability to call even the government to account. The circle of those eligible to come to court enlarged radically, and the kinds of harms recognized as wrongful multiplied.

Not only did all persons gain rights to equal treatment and dignity; they were also recognized as entitled to occupy all the roles—litigant, witness, lawyer, judge, juror—in courts. The nature of rights changed as well, as whole new bodies of law emerged, restructuring family life, reshaping employee and consumer protections, and recognizing indigenous, civil, and environmental rights. Courts rescaled in local and national contexts to cope with rising filings. Crossing borders, governments came together to create multi-national adjudicatory bodies, from the “Mixed Courts of Egypt” and the Slave Trade Commissions of the nineteenth century to the contemporary regional and international courts, such as the International Court of Justice and the International Criminal Court. The evolving norms reorganizing the role of the judge and imposing new obligations for courts moved from local to national to regional and trans-national institutions.

Third, both the longevity and the transformation of courts can be seen through tracing the shared political

icons of the female Virtue Justice and of buildings called courthouses. Looking at the evolution and changing configurations of places designated courts enables one to map dramatic shifts in the scope and ambitions of governments. Over time Justice became a symbol of government and courts an obligation of governance. Further, as everyone became entitled to use courts, conflicts emerged about how to personify Justice, what “she” should look like, and what symbols deserved places of honor.

Fourth, democracy has not only changed courts but also challenges them profoundly. Most governments do not adequately fund their justice systems to make good on promises of equal justice before the law. Contemporary responses depend on various modes of privatization, including reconfiguration of court-based processes to manage and settle disputes outside the public purview, devolution of factfinding to agencies and tribunals where judges are less visible and independent and the processes less public, and diversion of decisionmaking to private arbitration and mediation. These incursions are masked by a spate of courthouse building projects creating architecturally important structures that are, in some respects, distant from the needs for adjudication and the daily activities of judges. Most of the new courthouses, often clad in glass to mark justice’s transparency, celebrate courts without reflecting on the problems of access, injustice, opacity, and the complexity of rendering judgments.

Fifth, the movement away from public adjudication is a problem *for* democracies because adjudication has important contributions to make *to* democracy. Adjudication is itself a democratic process, which reconfigures power as it obliges disputants and judges to treat each other as equals, to provide information to each other, and to offer public justifications for decisions based on the interaction of fact and norm. Thus Jeremy Bentham’s insistence on “publicity,” Jürgen Habermas’s interest in the “public sphere,” and Michel Foucault’s understanding of the power of surveillance inform our thesis of the distinct place for courts in producing, redistributing, and curbing power.

Sixth, courts as we know them today are recent inventions. The possibility offered—of what Nancy Fraser has called “participatory parity”—is an outgrowth of social movements pressing governments to treat all persons with dignity and accord them equal status under law. Yet, while monumental in ambition and often in physical girth, the durability of courts as active sites of public exchange before independent judges ought not be taken for granted. Like other venerable institutions of the eighteenth century—the postal service and the press—courts face serious challenges in the twenty-first.

Our task is to document these six claims. In this book, we trace the imagery that became the political iconography of town halls as well as the elaboration of purpose-built structures that came to be called courthouses. We move across oceans and ideas to map the emergence of rights that shifted the paradigm of legitimacy for governments. From the eighteenth through the twentieth-first centuries, interactions among lawyers, architects, judges, and government administrators captured political commitments and economic support for courthouses. We illustrate these phenomena through sketches of the development of courts in the United States, of major building projects in France, Israel, Finland, and a few other countries, and of the regional and international courts of the Americas, Europe, and the United Nations. After examining transnational efforts to develop alternatives to adjudication, we turn to the future of courts, which occupies the final segment of the book. Drawing on examples from South Africa, Mexico, Australia, and Minnesota, we provide images of what a democratic iconography of justice—struggling to deal with failures and challenges as well as authority—could entail.

* * *

This work emerged from our teaching, focused on courts and the function of judges and lawyers in criminal, civil, and administrative cases in both domestic and transnational justice systems. We have also worked as lawyers in courts, testified to legislative and judicial committees about court and sentencing reform, and been involved in projects for courts. Throughout, we have been the grateful recipients of knowledge from many people who have been generous with their time. While we cannot name them all, we would be remiss in not identifying several who have contributed to this project.

Aspects of these materials have been presented at seminars and workshops at our home base, Yale Law School, as well as at our prior home, the University of Southern California (USC). The deans at both institutions—Dorothy Nelson and Scott Bice of USC, Anthony Kronman, Harold Koh, and Robert Post of Yale—provided sustaining support, as did the librarians, specifically Camilla Tubbs, Mike Widener, Gene Coakley, and Blair Kauffman of Yale and Albert Brecht, Fannie Fishlyn, and Pauline Aranas of USC, all of whom enabled access to diverse, eclectic, and hard-to-

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Many scholars, judges, lawyers, court administrators, government officials, architects, artists, art experts, editors, photographers, librarians, archivists, colleagues, students, and friends have given advice, provided access to materials, taken pictures, or read chapters related to their expertise. The Note on Sources identifies various of the venues, libraries, and collections that contributed to this project, and we are grateful for their welcome and support. In addition, thanks are due to Rosalie Silberman Abella, Leslie Alden, Joseph Anderson, Michael Asimow, Caleb Bach, Emily Bakemeier, Aharon and Erika Barak, Emily Bazelon, Seyla Benhabib, Myriam Besnard, Michael Black, Laurence Blairon, Celeste Bremer, Stephen Breyer, Lea Brilmayer, Thomas Buerghenthal, Guido Calabresi, Paul Carrington, Rafael Cauduro, Oscar Chase, William Clift, Morris Cohen, Moishe Cohen-Eliya, Judith Colton, Olga María del Carmen Sánchez Cordero de García Villegas, Paola Pineda Cordova, John Darcy, José Ramón Cossío Díaz, Alexander Dyck, Steven Croley, Stephanie Curtis, Jonathan Curtis-Resnik, Geoffrey Davies, Joseph A. DiClerico Jr., Olivier Dutheillet de Lamothe, Ross Eisenman, Kathryn Erickson, Arthur Eyffinger, Dana Fabe, Michael Fein, Ruth and Rashi Fein, Eugene Fidell, Owen Fiss, Steven Flanders, Steven Fraade, Nancy Fraser, Christopher Fretwell, Marc Galanter, Antoine Garapon, Lech Garlicki, Hazel Genn, Nancy Gertner, Charles Geyh, Richard Gilyard, Ruth Bader Ginsburg, Eymert-Jan Goossens, Linda Greenhouse, Dieter Grimm, Thomas Grooms, Douglas Guilfoyle, Monica Hakimi, Piyel Haldar, Brenda Hale, Gábor Hamza, Susan Harrison,

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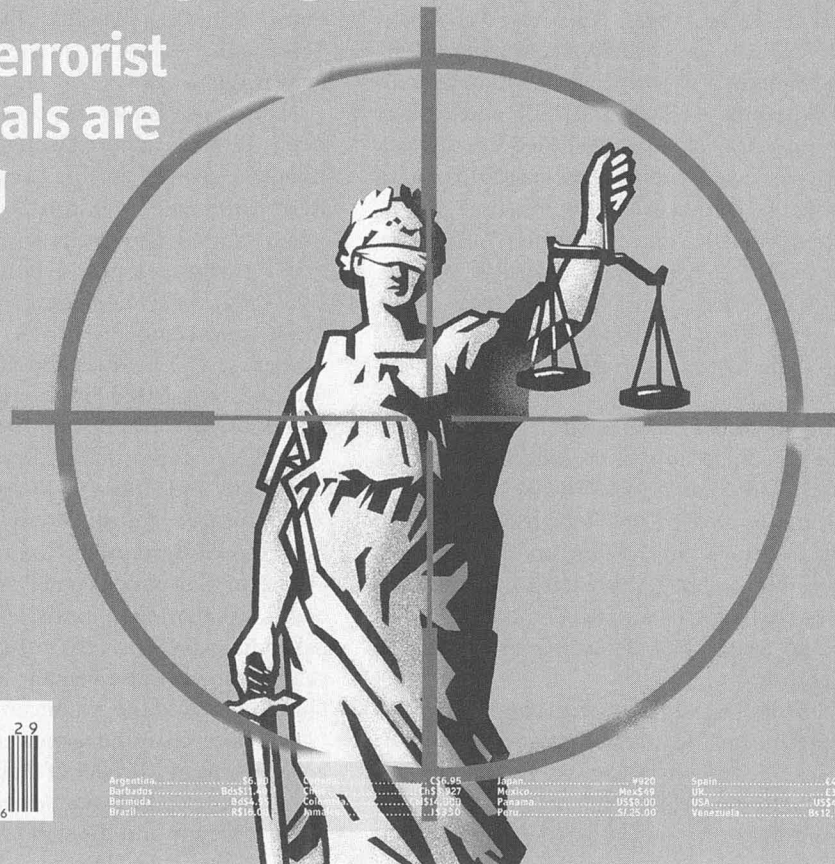
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A Remnant of the Renaissance: The Transnational Iconography of Justice



A PICTORIAL PUZZLE

The image shown in figure 1 ran during the summer of 2003 on the cover of the English magazine *The Economist*. As the headline, “Unjust, Unwise, Un-American,” makes plain, the cover story criticized the government of the United States for using an ad hoc “terrorist tribunal” instead of its regular courts to try individuals accused of being terrorists.¹ The editors assumed that readers would understand the visual accusation—the picture of a blindfolded woman, draped in Grecian robes and holding scales and a sword, seen through the crosshairs of a rifle’s scope aimed at her heart.

One purpose of this book is to explain why the publishers of *The Economist* had the confidence to rely on this image to sell their magazine internationally. They were not, after all, marketing only to people familiar with this remnant of Renaissance iconography. The editors knew that viewers would connect the picture to justice gone awry rather than to warrior princesses or Roman deities. The confidence that consumers would be neither bewildered nor confused came from the fact that this publication was not alone in appropriating the image of Justice. One can find her everywhere—in courts and in commerce, as a serious emblem or a foil.

A rapid world tour shows her ubiquity. Another example, the statue *Iustitia* (Justicia, or Justice) (fig. 2), is from North America. Along with a figure called *Veritas* (Truth), she is one of two large stone statues chosen to bracket the entrance to the 1946 building of the Canadian Supreme Court in Ottawa.² By traveling thousands of miles to Brisbane, Australia, one can see another such statue, labeled *Themis* after a Greek goddess of Justice (fig. 3) and placed in front of a court complex in 1987. Her photo also graces the cover of the holiday card of the Supreme Court of Queensland, which explains that, in order to “emphasise that the statue is an emblem of Justice in this State, the seal of the Supreme Court is embossed on the buckle of the belt worn by the Goddess.”³

Farther south in Melbourne, Australia, a huge aluminum *Lady of Justice* (fig. 4) can be seen from a busy street to mark the County Court of Victoria.⁴ Indicating no specific “age, race or religion,” she becomes, according to the sculptor, the image of “equality and fairness.”⁵ Moving to Zambia, Africa, one finds another *Lady Justice* (fig. 5), which was placed in front of one of its courts in 1988.⁶ The message, as described by one of the justices of Zambia’s Supreme Court, is that “the judiciary will dispense justice and fearlessly defend the rule of law without favour.”⁷ The Zambia Association of Women Judges then used the figure for its logo, transferring it as a repeated pattern to brightly colored orange and black cloth used for dresses (fig. 6, color plate 1).⁸

This travelogue continues with two European images from Azerbaijan, where a statue labeled *Themis* (fig. 7) sits in the Constitutional Court; another rendition, with scales, sword, and blindfold, is the centerpiece of a 2000 calendar (fig. 8) provided by the Ministry of Justice.⁹ Crossing land and oceans to South America, a *Justice* (fig. 9) outside Brazil’s Supreme Court identifies the courthouse building within the complex of government buildings in Brasilia.¹⁰ Moving west across the Pacific Ocean, one can see the entrance (fig. 10) to the 1974 building for the Supreme Court of Japan. There, another *Justice* (fig. 11)—with distinctive elements—sits inside the foyer.¹¹

Figure 12 returns us to the popular media. Taken in April of 2003 during the first phase of the war in Iraq, the photograph of a defaced Saddam Hussein mural accompanied a story titled “U.S. Seeks Solid Core to Fix Iraq’s Broken Legal System.”¹² The *New York Times* captioned the photo “Saddam Hussein with the Scales of Justice in a mural in Baghdad.” Like the large wall sculpture of *Lady Justice* in Melbourne, this imposing mural was to be seen from city streets. Its disfigurement captures a regime just toppling.¹³ The mural recorded Hussein’s intent to personify a modernized version of legal, cultural, and religious authority by joining Western garb with a shaykh’s robe while holding scales of justice. Hussein here repeated a gesture used over centuries by an array of political leaders, such as in a



FIGURE 2 *IUSTITIA*, Walter S. Allward, 1946, Supreme Court of Canada, Ottawa, Canada.

Photographer: Philippe Landreville. Copyright: Supreme Court of Canada. Photograph reproduced with the permission of the court.



FIGURE 3 *Themis*, Maria I. Papaconstantinou, 1987, Supreme Court of Queensland, Brisbane Courts Complex, Australia.

Copyright: Supreme Court Library, Queensland. Photograph reproduced courtesy of the Supreme Court of Queensland and of its Chief Justice Paul de Jersey.

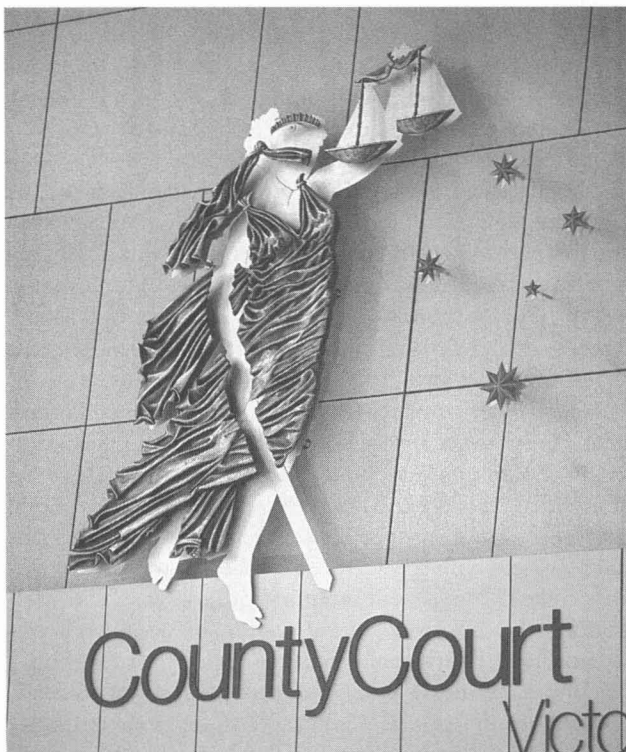


FIGURE 4 *Lady of Justice*, William Eicholtz, 2002, Victoria County Court, Melbourne, Australia.

Photographer: Ken Irwin. Photograph reproduced with the permission of the sculptor and of the Liberty Group, owner and manager of the Victoria County Court Facility.



FIGURE 5 *Lady Justice*, circa 1988, High Court of Zambia, Lusaka, Zambia.

Photographer: Elizabeth Brundige. Photograph reproduced courtesy of the photographer and of the court.

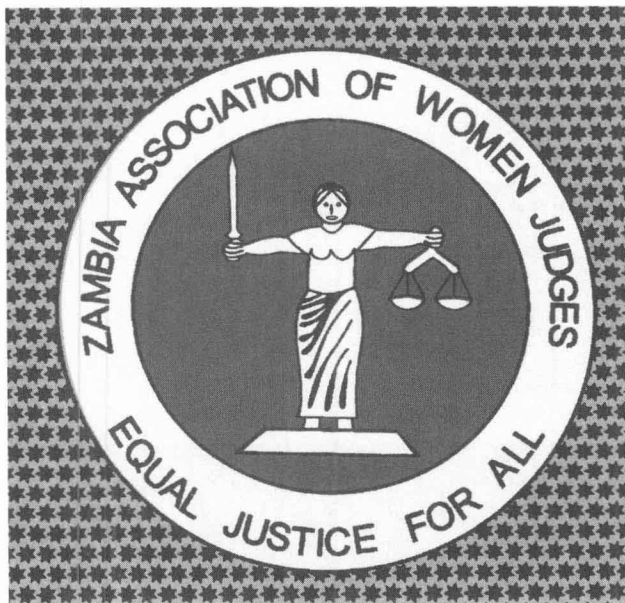


FIGURE 6 Decorative cloth with repeated pattern of the High Court's figure *Lady Justice*, made for the Zambia Association of Women Judges, circa 2004.

Cloth provided by Elizabeth Brundige and reproduced courtesy of the Zambia Association of Women Judges. Facsimile by Yale University Press. See color plate 1.

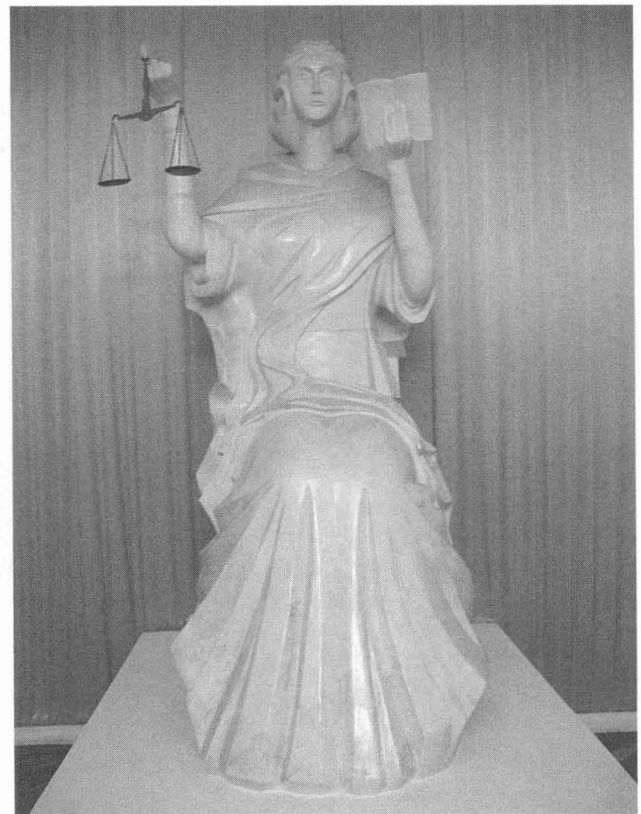


FIGURE 7 *Themis*, undated, Constitutional Court of the Azerbaijan Republic.

Photograph reproduced courtesy of Raouf Guliyev, Head of the International Relations Department, Constitutional Court of the Azerbaijan Republic.