People in glass houses . . .


Abstract: This article examines the arguments made around the historical and contemporary value of courthouses as democratic spaces in Curtis and Resnik’s *Representing Justice*: briefly, that the new paradigm of “transparent” glass-clad courtrooms paradoxically masks the antidemocratic devolution of justice into back-office proceduralism. While accepting the main thrust of this argument, the article also enters a couple of caveats relating to arguably novel forms of democratization that characterize the current representation of justice. Is there, for example, room to read at least some of the proceduralization described as itself democratic in its deflation of intimidatory ritual? And has “screen culture” now largely replaced the courtroom space as the contemporary icon of justice?

Keywords: representation / democracy / icon / rites / transparency / Lady Justice

Over the course of 600-odd double-column pages (including the notes) in a book that amply justifies the adjective “tome,” the authors just about manage to wrestle the octopus of “Representing Justice” to the ground—although a few pesky tentacles still wave free. The book’s awkward qualifying subtitle gives some clue to the undoubted difficulties of trying to tie down, and tie together, such multiply significant terms as “justice” and “representation,” and doesn’t really (forgive me) do justice to the multiple themes and materials that fill out the fifteen chapters into which the book is divided. Above all, and oddly, the subtitle diverts attention away from images of justice and focuses it on ideas about justice, whereas the book
overall is concerned with the complex mesh-like intertwining of both. This examination of the historical and contemporary interplay of justice imagery and ideas through the book covers the meaning of “representing” as “standing in for,” but “representing” as “standing up for” is also part of the book’s remit, in that it seeks to advance a normative argument about positive and negative developments in legal process against a standard of “justice” that roughly equates it to broad-based active participation, or as the authors have it, “democracy.” Courts are democratic environments insofar as there is real participation by the public at large, and insofar as justice processes are progressively privatized (whether in economic or spatial terms), then democracy loses ground and, in circular fashion, justice as a concept is enfeebled from a broad-based relational matter into simply an outcome of bureaucratic processes. The closing question for the authors is, then, one of how courts might be constituted to reestablish and develop the link between an active public, a judiciary self-aware and responsible with its power, the process of adjudication, and the eventual decision(s). The answer for the authors will necessarily include careful management of the inescapable features of justice provision constituted by architecture (or, more simply, the space of adjudication) and image (more grandly, the icons of adjudication). In the face of an identified contemporary tendency to build courthouses as palaces of glass in the name of transparency and accessibility, a kind of representation through nonrepresentation, the authors are representing representing justice.

The summary version of the book’s core themes above is laid out more accurately and in more detail by the authors in the book’s preface. Indeed, through the book, the authors take a great deal of care to spell out the direction of travel for the reader and to record the steps taken on the road thus far. Practically every chapter is topped and tailed by an explanatory section on how the themes are developing and how this particular chapter fits in with the overall scheme. It is perhaps this clarity of exposition that prompted one commentator, when the book was launched at the LCH conference in Fort Worth in March 2012, to remark that there was something of the textbook about the volume, and although this may be true, it is a textbook for a course that certainly falls outside the standard curriculum. The same commentator further remarked that the book also had something of the coffee table about it, and although again there is some truth here simply in terms of the size of the book, the wealth of images (including
many gorgeous color plates), and the overall superior production values, any idea that the book is intellectually insubstantial or lacking in provocation is misguided. However, on the theme of the book as a species of hybrid, best to point out the further resemblance to a reference book or encyclopedia, which to some degree mitigates an obvious potential criticism that the book might well have been split into two or three separate volumes (on icons of justice, on courtroom architectural development, on changes in judicial process). Gains on the swings of focus would certainly have lost on the roundabout of comprehensiveness and connection. The multiple nature of the book does present some problems for the reviewer in that the book’s imagery and the balance between text and image, which constitutes a large part of its suggestive power, is lost. Further, the scale of the book means that the effort to boil down its achievement into the compass of a few pages is always liable to produce a somewhat unfaithful jus.

In the preface the authors list six principal claims that, through the book, they aim to substantiate in order to establish an overall argument about the relationship between courts and democracy. First, that “adjudication is proto-democratic in that courts were an early site of constraint on government” where “rulers acknowledged through public rituals of adjudication that something other than pure power legitimated their authority.” Secondly, that “democracy changed adjudication” as adjudication “offered a space in which ordinary persons gained, momentarily, the ability to call even the government to account” and in which “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.” In short, legal “rites” were succeeded by, and to some extent spawned, legal “rights,” which rights in turn proliferated in multiple directions as an expression of and a result of democracy. Thirdly, that “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” since “over time Justice became a symbol of government and courts an obligation of government.”

Fourthly, that “the practice of adjudication helped shape democratic norms,” and in circular fashion, “democracy has not only changed courts but also challenges them profoundly,” in that “most governments do not adequately fund their justice systems to make good on promises of equal
justice before the law” while responding to increasing demand for adjudication through “various modes of privatization, including reconfiguration of court-based processes to manage and settle disputes outside the public purview.” Such developments are masked by “a spate of courthouse building projects creating architecturally important buildings that are, in some respects, distant from the needs for adjudication and the daily activities of judges,” in effect celebrating courts “without reflecting on the problems of access, injustice, opacity and the complexity of rendering judgments.” Fithly, that “the movement away from public adjudication is a problem for democracies because adjudication has important contributions to make to democracy,” in that “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.” Sixthly, and finally, that “the durability of courts as active sites of public exchange before independent judges ought not to be taken for granted”—that courts, although venerable, are also currently vulnerable both to a bureaucratic consciousness that ignores the historical function of courts as not simply the site of judgment but also the site of democratic participation, and to a security consciousness that is unreflectively concerned with making sure participants are kept physically separate from each other.

The book, however, is not formally structured around these six claims, or at least not strictly so, comprising as it does fifteen chapters that, given the noted general tendency to signpost the overall themes in each chapter, can usually be read as stand-alone pieces. To list all fifteen would be redundant since some titles are fairly opaque and therefore unhelpful for the potential dip-in-and-out or single-issue reader; the clearly elucidating titles are “Civic Space, the Public-Square, and Good Governance” (chapter 2), “Why Eyes? Color, Blindness, and Impartiality” (chapter 5), “Representations and Abstractions: Identity, Politics and Rights” (chapter 6), “From Seventeenth-Century Town Halls to Twentieth-Century Courts” (chapter 7), “Late Twentieth-Century United States Courts: Monumentality, Security, and Eclectic Imagery” (chapter 9), “Constructing Regional Rights” (chapter 11), “From ‘Rites’ to ‘Rights’” (chapter 13), and “An Iconography for Democratic Adjudication” (chapter 15). Even this shortened list should be enough to suggest that there is a lot going on that speaks to the authors’ enthusiasm for sketching out the actual
and potential pathways and connections (the scholarship is vast with some chapters having up to five hundred and fifty notes) rather than a concern with economy and efficiency of argument.¹ In some cases this might be accounted as amounting to chapter-long excursions that are not strictly necessary; for example, chapter 12, “Multi-Jurisdictional Premises: From Peace to Crimes,” manages to smuggle in a brief history of international legal process together with a primer on the role and function of international courts as a supplement to discussions on art and architecture. If that sounds like a complaint, it is not—merely an observation that the book sets out a lot of claims, yet always outdoes itself in what it delivers and what it opens up, a tendency that leaves it open to charges of “too much, and not enough” but on the other hand greatly contributes to the richness of the overall project. Perhaps as a legacy of the book’s long-term genesis in intermediate chapters, presentations, teaching materials, and the like, over the course of many years, the claims being advanced gradually accrete in substance through the book, with one or another taking precedence at a particular time, but there is always the sense that the overall theme of the relationship between democracy and open participatory adjudication is being thickened rather than discovered. To this end the first chapter acts as a yet more substantial guide to the connections between the claims being made or a sufficiently detailed summary, and thereby obviates the need to read on if it is simply the argument that interests the reader. In this chapter, entitled “A Remnant of the Renaissance: The Transnational Iconography of Justice,” the restating of the linked claims listed above draws in the ancillary points that Justice iconography developed as a Renaissance gesture that marked out (for a largely illiterate public) spaces of proto-democratic governance as guided by humanistic Virtues, amongst which was Justice. These Virtues, being a development of certain Greek, Roman, and medieval Christian ideas, through the Renaissance were ever more readily to be found in pictured form as an illustration of governance itself as attentive to virtue rather than simply to power. This theme continues into the second chapter, which is organized around a detailed discussion of Ambrogio Lorenzetti’s magnificent fresco “Allegories of Good and Bad Government” from the Palazzo Publico in Siena, and their significance in the early Renaissance governmental structure of the Republic of Siena, which lasted for about seventy years until overthrown in 1355. In the “Allegory of Good
Government,” arguably foreshadowing the emergence of Justice as a principal Virtue, Justice appears twice: once as a figure overseeing the panoply of social relations from her position alongside the other Virtues, and once as a figure linked into the pattern of social and spiritual relations but with the distinct role, as indicated by her scales, of weighing out a form of justice.

For the authors the answer to the question of the eventual representational dominance of Justice—who in early representations (as in Siena) figured as an aspect of the gamut of governing Virtues, standing with her scales and sword next to Prudence with her mirror, Temperance with her pitcher, Hope with her olive branch, and so on—lies in the gradual compartmentalization of governance into separate functions. As governance generally exercised by assemblies that merged legislative, judicial, and bureaucratic functions under the sign of the Virtues, was displaced by separate organs of government, then the need for an idea of Virtue governance waned as the majority of government functions aimed for paradigmatically Modern self-presentation as bureaucratic or objective: “Not all political theories of leadership require wise, restrained, and generous governance” (12). The function of adjudication, however, could never escape its obvious attachment to the enforcement of decisions and therefore to violence. Thus, for governments and the idea and practice of the State as it developed, there was continuing political utility in promoting adjudication as operating under the sign of the Virtue Justice as a means of separating out the violence of enforcement from a direct link to notions of arbitrary power. In productive circularity, as far as the democratic development of rites into rights goes, the recognition of the need for legitimacy beyond power and thus of the procedural separation of the courts and the other functions of government, developed into manifold rights protected by the courts against any such exercise of arbitrary power. Eventually, so the argument runs, the recognition of the specialization of the adjudicative function led to the physical separation of the organs and aspects of governance and thus to specialized courtrooms, marked by the ubiquitous transnational symbol of Lady Justice.

However, as courtrooms proliferated as a demonstration of state power, they themselves in their architecture and ornamentation took on the quality of the principal representation, the icon, of Justice. The Lady remained, but as the participative democratic function of the courts grew apace with
blossoming rights and exponentially increasing court filings (here the narrative is evidenced through a historical focus on the United States), she was ever more subject to interrogation as to her qualities as woman—as blind or clear-eyed, as everyday or abstract, as local or universal—and ever more relegated to a position as adjunct to the function of the court building, usually imposing, imperial, dreadful, in representing the quality of Justice. The most recent developments in courtroom idiom, in line with the acquired adjudicative attributes of “independent decision-makers, requirements of public processes, a new ideal of fairness and equal access and equal treatment of all” are fashioned in glass and natural light, as a nod to “transparency, accessibility and accountability” (15), and are in evidence from Boston to Strasburg, Melbourne to Melun. And so courtrooms and images of the Lady Justice are linked together in their representation of Justice, although latterly, reversing the original historical position laid out by the authors, it is the buildings and not the images that do most of the signifying work.

The irony here is that the new palaces of steel and glass arrive at the point where the courts actually empty out in favor of the devolution of adjudicative function to the bureaucratic back offices. The courtrooms have the transparency of the void, while the offices thrum and vibrate to the energies of privatized Justice—the antidemocracy of multiple forms of Alternative Dispute Resolution where only the protagonists engage while the public is shut out. In a parallel development, increasing concerns with security engender both barriers to participation in standard courts and special courts, such as in Guantanamo, that denigrate completely the notion of public participation and with it the safeguards to justice that such participation developed to ensure. Such courts are the particularly sharp edge of less visible but cognate domestic processes, both criminal and civil, which close off avenues to public participation (for example, commercial contracts that include terms requiring that disputes be resolved by private arbitration). Only in certain enlightened spaces is there sign of the successful blending of image and process, marked by the recognition of the violence of judgment, but also, in balance, the price paid in suffering for the possibility of this democratic form of violence to have been achieved and thus a constant reminder of the possibilities of injustice: witness the architecture of the Constitutional Court of South Africa, incorporating a former prison, the Supreme Court of Mexico with its startling murals of injustice in
the raw, and the open-air sitting of the Federal Court of Australia to adjudicate on certain aboriginal land claims. The danger is that such rare examples of “iconography for democratic adjudication” become lost in the welter of self-congratulatory edifices to transparency that provide a front operation to the back-housing of adjudication-as-administration.

The argument over the success of Lady Justice down through the centuries (to the point where the image of Justice with sword and scales is so familiar cross-culturally that all manner of critiques of justice provision can be quickly sketched by some cartoon version of Justice with scales awry, Justice in cross-hairs, Justice with a bent sword, etc.) is perhaps historically plausible enough, but difficult to substantiate. In a book such as this, where there is continued focus on the circular and complex nature of the interplay between image and idea in the historical movement from sovereign rite to democratic right, it might be equally plausible to suggest that the popularity of the image rests with a public attachment to Justice as protector rather than a state attachment to the necessary legitimization of power through recourse to propagandistic image. This is not a trenchant criticism of the book—which in fact, despite the early laying down of this polemical political argument, seems more interested in the investigation of the controversies generated by versions of the image down through the years than in sticking to a line that images of Justice provide cover for political power. Such controversies are in particular catalogued as part of the United States story of representationally “dealing with” troubling histories of racism and exclusion, resulting in several cases in images that were once acceptable but now shrouded in drapes.

The controversies themselves demonstrate, arguably, a dynamics of the power of representation to which the authors are not blind given the historical sociological discussions in which they engage, and indeed their calling on Foucauldian theory throughout the book to highlight the interactive elements of State and public power might have been more fully developed in order to push the theoretical political analysis beyond the parameters of democratic/undemocratic. Foucault is teamed up with Bentham and Habermas (and to a lesser extent Jonathan Crary) to provide ballast to the notion that publicity or public access engenders participation of some or another kind that betimes serves state power interests and betimes rejects it, and while this is certainly an element of the argument in *Discipline and Punish* (1975), Foucault had other, perhaps more subtle,
things to say about both power and images through his work. It holds true generally in the book that this is not a text of delicate semiotic interpretations, but rather one animated by a political (democratic) concern that leans on theory to a limited extent to make its point. In terms specifically of images and icons, the political idea that relates to participation is that the contemporary trend of privatization and securitization converts the limited amount of public who are able to engage with trials as mere spectators, that is, passive rather than active participants.

The repetition and “thickening” of this argument about participation is convincing up to a point. However, whereas the detailing through the book of the processes that limit public participation while at the same time providing spectacular (architectural) masks of seeming transparency is very striking and effective, perhaps equally striking is the relative poverty of exploration of Justice as anything other than the actual process of adjudication. The emphasis on the connection of such adjudicative process to democracy, and the pointed cautioning against squandering the democratic opportunities afforded (and historically often hard won) by public participation, has the effect of creating a perhaps overly smooth conceptual relationship among participative process, justice, and democracy. What this overlooks is the role that Justice as a legal-philosophical abstraction and as constitutional fundamental can play and has played in holding participative democratic processes to account in relation to some other standard than simply the consensus that emerges from broad-based participation. If the book is appropriately skeptical to the vision of state and supra-state transparent Justice declared by the new glass-clad monuments such as the Boston Courthouse or the European Court of Justice, it is perhaps overly optimistic about the automatic social benefits in terms of democratic good government that increased participation would entail. The ancillary effect, at least potentially, is to divert attention away from Justice issues for which increased participation provides no obvious remedy. An interesting comparison here would be, as a single recent example, William J. Stuntz’s recent The Collapse of American Criminal Justice, which elaborates an argument that United States courts have failed Justice in not adequately promoting a constitutional “equal protection” jurisprudence attentive to remedying structural inequality. To an extent the wider arguments elaborated dovetail with those in this book, in the cognizance taken of “the vanishing trial” (in favor of plea bargains with prosecutors), but
there is a more developed story of relationship between (local) participative democracy and constitutional protection. In short, then, the equation of justice with adjudication and thence with democracy leaves this gap: there is no opportunity to maintain justice as a site for potential criticism of forms of democracy. One gets the sense that the real idea is that “if more people like us were involved, then it would all be better,” which might well be true, but there is no guarantee that this would be the case.

A second element of the book that might be regarded as a gap in provision if not in the argument as it is detailed, is the lack of attention to representations of justice in the era of “screen culture”—movies, television, and more latterly, the Internet. It hardly bears repeating that ever since the beginning of film as a genre, the themes of Justice generally and the courtroom drama in particular have been absolute stock fare. Likewise television since its inception has relied heavily on legal dramas, with a recent glut of “procedurals” such as CSI and Law and Order inviting the audience into the arcana of the behind-the-scenes of justice—the space that this book suggests has been radically closed. The super-reality of The Wire constituted a whole series of connected arguments about social justice involving reflections on the current state of United States democratic institutions including the legislature, the courts, the police, city governance, and the press. Meanwhile courtroom mock-ups like Judge Judy are deliberately blurring the boundaries ever more between the public and the private, playing on the notion that the distinction between “spectator” and “participant” can be treated as fertile territory for colonization rather than a simple line to be crossed. There is also the issue of the televising of certain court processes and what effects this has produced. Arguably, the quality of representation itself has altered given patterns of image manipulation in the “age of the digital baroque,” and this, mimicking or partaking of the kind of circular processes described in this book, has effects for the kind and quality of justice processes that can occur and the kind of decisions that result. All these elements provide potential avenues to a complicating of arguments about the relationships among participation, democracy, and the image, and although it is understandable that books only ever do what they do, the complete avoidance of any discussion on these issues in a book on the representation of justice is somewhat odd.

A further query might relate not to what the book does not deal with but to what seems implicit in the book’s central argument. This is that, even as
the book details a critique of the representation of justice, the political thrust of the book is that adjudication is being enfeebled as a site of democratic participation through bureaucratization and securitization. Yet the point could surely equally well be made of political processes where the doubled sense of representation holds even more true. We need more ways for our democracy to be more truly participative, and this point is recognized right at the end of the book in the statement that “because governments do not have an inexhaustible quantum of political or symbolic capital, they need to find points of contact to regenerate their relationships with the polities of which they are a part.” However, rather than being used as an opportunity to reflect more broadly on multiple potential points of contact, this statement is used as a route to the reiteration of the importance of the courts because “the performativity within open courts provides an antidote to the Foucauldian concerns about decentralized, polymorphous techniques that mask power” (377). Well, perhaps, but perhaps this idea of “antidote” overestimates the degree to which people, the public, are ever likely to be drawn to participate and “perform” within courts, no matter how open and inviting those courts endeavor to be. It is worth recalling that, for a lot of the advocates of the kind of alternative dispute resolution mechanisms criticized in this book for their lack of publicity, the value of precisely these mechanisms is that they open a less ritualized and therefore more truly participative (democratic) space of justice. The opening up of multiple “hybrid” legal and governance spaces might itself be regarded as an opportunity for justice. The opening up of multiple sites or spaces certainly is likely to produce clashes that will have the effect of rendering much more socially resonant the processes themselves and to emphasize the quality of juris-diction over legal auto-performativity.

The book closes, somewhat more modestly and with much greater resonance, on an image and an expression of hope. The image—somewhat paradoxically, one that is painted in words (a point that might open up an interrogation of the book’s premises on a whole other level on another day)—is of the closure of the front steps of the United States Supreme Court, so that “rather than being greeted by the words ‘Equal Justice Under Law,’” entrants are routed to the side to enter “a secure, reinforced area to screen for weapons, explosives and chemical and biological hazards” (377). The hope is that “this volume serves as a reminder that law’s institutional forms should be structured to teach members of polities
to make claims on justice as well as to seek justice—so as to have the
capacity to contest and to understand what law can and should do” (377).
It is a mark of the book’s success in this aim that I doubt any legal scholars
will come away without having turned their minds to the question of how
they, if given the chance, would build their own courts.

Eugene McNamee

1. The book uses endnotes situated after each chapter, rather than footnotes, which can be awkward
but is a choice made presumably to free up the standard pages from notes that might well have on
occasion swamped them.
David Garland’s review in the Times Literary Supplement (June 2012) 7.
3. The recent Law and Justice on the Small Screen, ed. Peter Robson & Jessica Silbey (New York: Hart
Publishing, 2012), is a comprehensive introductory series of essays.
4. If the televised trial of O.J. Simpson stands out as one “before and after” moment for representa-
tions of Justice in the United States, then perhaps the televised trial of domestic terrorist and
multiple murderer Andreas Brevik in Norway constitutes another; here the audience is invited to
consider, on the basis of the evidence, not guilt or innocence, but sanity or insanity. In each case the
wider issues of (respectively) race and terrorism bleed into the scene of judgment.
5. For an elaboration of the argument, see Richard Sherwin, Visualising Law in the Age of the Digital
6. The authors nod briefly in this direction with reference to the work of Gunther Teubner on
“hybridization” and Martha Minow on “partnerships,” but don’t dwell on the point; see 336.
7. On fascinating public clashes of hybrid/privatized legal or quasi-legal forms, witness the ongoing
(as of August 2012) saga of Lance Armstrong: whether he did or did not, who has the right to
pronounce, who has the right subsequently to act and to what degree. On jurisdiction generally, see
Bradin Cormack, A Power to do Justice: Jurisdiction, English Literature, and the Rise of Common Law