Introduction: The Invention of Courts

Linda Greenhouse

This volume is both prequel and sequel. In 2008, *Dædalus* published an issue entitled "On Judicial Independence," exploring from a variety of perspectives the definition of that term, as well as age-old and newly emergent threats to the ability of judges to do their work without undue constraint.

Six years later, we both carry that story forward and shift the analytical frame to consider courts themselves: their past and ongoing evolution, and the work that a democracy can reasonably expect them to do. To write about courts is to write about political theory, about lawyering, about fiscal priorities, and about social welfare, as well as about courts' dependence on and independence from the body politic. The subject evokes a great variety of conversations, from the highly theoretical to the nitty gritty of service delivery for human needs in all their manifestations. Discussions of courts, at least in the United States, bring lawyers rapidly into view, along with criminal defendants, civil litigants, administrative agencies, budgets, public financing, and popular opinion.

Courts exist in our imagination and in bricks and mortar, in the stories we tell ourselves about the society we hope to be and in our acknowledgment that in our aspiration for "justice for all," we too often fall short. Our egalitarian ambitions for courts have grown over the years, perhaps outstripping our will to provide the means to fulfill our promises. Across a shifting landscape, we assign courts an astonishing range of tasks while lacking consensus on whether

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alternative mechanisms could do some jobs more efficiently, less expensively, and better than adjudication. What "better" means in this context is the subject of debate and a current source of tension, as co–guest editor Judith Resnik's essay demonstrates.

To explore these themes, Judith Resnik and I invited a cross-disciplinary group of scholars and judges to contribute the essays in this volume. The issue's title, "The Invention of Courts," is perhaps mystifying. Haven't courts always existed? Modern society surely did not invent courts; they appear in the ancient world, in classical texts including the Bible. Yet as Resnik explains in her essay, courts as we know them today are very much a social and political construct of the modern age. Embodying a progressive vision of the relationship between citizen and state, courts themselves became a site of democracy: a *re*invention. The volume opens with her exploration of the roots of that transformation and the current pressures that threaten to transform courts yet again, now from public forums to private agents.

Threaded throughout the essays that follow are concerns that the current system is not responsive to the needs of those it aims to serve. These issues are at the center of the commentary by two distinguished judges, Chief Judge Jonathan Lippman of New York State and Chief Judge Robert Katzmann of the United States Court of Appeals for the Second Circuit. From the perspectives of the state and federal judiciaries, Lippman and Katzmann describe the steps they have taken to address disturbing gaps in access to the legal system for criminal and civil litigants, as well as for immigrants facing deportation. Both judges aim to expand the resources for the provision of lawyers, essential to enabling claimants to receive a fair hearing.

A half century ago, the Supreme Court's landmark decision in *Gideon v. Wainwright* (1963) established that an indigent person charged with a serious crime was entitled to a court-appointed lawyer. Carol Steiker, noting *Gideon*'s long-ago triumph, analyzes the reasons for *Gideon*'s contemporary failure: specifically, the extent to which, in an era of large numbers of criminal prosecutions and mass incarceration, reality has fallen far short of the guarantee of legal representation. Steiker identifies the key factors – the lack of independence of and resources for public defender offices, the unwillingness of the Supreme Court to invalidate convictions of defendants who had patently inadequate counsel, and the plea-bargaining mill – that must be addressed if a way forward can be found.

Jonathan Simon looks at the challenges posed to the criminal justice system by the interrelationship of procedure, court processes, and substantive rules of law. His focus is the distinctive turn that American criminal procedure has taken from its English roots, and how legislatively made criminal law has enhanced the power of prosecutors. Simon joins Steiker in describing how the failure of adequate funding for defense lawyers undermines the adversary system.

We turn next to the civil side of the justice system – to the question of how to equip multiple litigants with legal services through group-based litigation. Deborah R. Hensler addresses this topic, examining the challenges that widespread injuries – mass torts – pose to the civil justice system. What are the tradeoffs to be made between an individual's "day in court" and group-based lawsuits? Can new rules and practices be shaped to achieve both efficiency and fairness, and how are either of these concepts defined?

Resources – of litigants and of courts – are also the subject of the two essays that follow. Lawyers are too expensive for most Americans, meaning that more than 95 percent of the people in domestic disputes,

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in landlord-tenant conflicts, and in consumer-credit cases go unrepresented. Can costs be lowered? What alternatives can be found? Gillian K. Hadfield offers a transnational look at English innovations in the structure of legal services, new arrangements that challenge the basic American assumption that lawyers provide the only means of representation in court. Hadfield argues that by requiring lawyer-only representation, courts themselves have become the sources of barriers to legal counsel; and her aim is to lower those barriers so that professionally trained non-lawyers, along with new technologies, can help address the access needs that now go unfilled.

Of course, courts themselves need resources. Given recent budget reductions in many arenas, state and federal judiciaries have had to cut back on services. Michael J. Graetz details the impact of the funding crisis that besets state courts and that threatens not only their functions but also their independence. To ensure adequate and stable financing, he offers an innovative strategy: establishing trust funds for courts.

But courts not only need funding, they also need judges in a position to grasp the full dimension of the claims they are being asked to resolve. As Frederick Schauer explains in his essay "Our Informationally Disabled Courts," courts generally rely on information (or "inputs") from the parties in cases. Schauer examines the structural deficits in the adversarial system, in the U.S. rules of evidence, and in the limits of appellate records that prevent judges from acquiring the knowledge they need to do their work well.

How much do we know about what courts themselves do? Trials ("a day in court") are the focus of the essay by Marc Galanter and Angela Frozena. Galanter and Frozena pull together detailed data that will surprise many readers, documenting the disappearance of the trial from federal courts, though trials remain anachronistically vivid in the public's imagination and the media's portrayals of judging.

Data are less plentiful about the state systems that account for more than 90 percent of the country's judicial business and that, in practice, have a broader impact than do federal courts on the lives of most Americans. In his essay, Stephen C. Yeazell provides a history of the development of funding, at state and federal levels, for research on courts, while also explaining the sources of data gaps. Given that methods of collection vary state by state (what he calls "data federalism"), comparisons across jurisdictions and knowledge of trends over time are extremely limited. Yeazell details the dimensions and consequences of our collective ignorance about the state courts and shows why refocusing attention on those venues is critical to our understanding of the whole of the U.S. justice system.

Despite the information gaps, courts loom large in American public culture. Susan Silbey provides a detailed analysis of public opinion about courts. Noting that Americans see courts as at once "godlike" and "game-like," Silbey argues (using recent social science research) that this ability to hold both images simultaneously – one aspirational and the other pragmatic – is what sustains public support for the judicial enterprise.

In his provocative essay, Jamal Greene offers a different angle on courts in the public imagination. He analyzes what he terms the "anti-canon" – certain cases that are consistently dismissed in public discourse as aberrational – including the notorious Supreme Court decisions of *Dred Scott* (1857) and *Plessy v. Ferguson* (1896). Greene argues that this categorization of an anti-canon of bad cases has blinded us to the inconvenient fact that these decisions were the product of the dominant

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political culture of their time. Their implications need to be faced, rather than written off as rogue actions divorced from their context.

Finally, we asked Kate O'Regan, who served a fifteen-year term (1994 – 2009) as one of the first judges on South Africa's post-apartheid Constitutional Court, to offer her reflections. Here was a court that was indeed invented, in the full view of an astonished world. O'Regan writes powerfully of an institution born not only as a court but as a symbol of the hopes we hold for all courts.

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