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**DELINEATING BETWEEN CONCILIATION AND ADJUDICATION:
A COMMENT ON RESNIK AND CURTIS'S
*REPRESENTING JUSTICE***

AMALIA D. KESSLER*

INTRODUCTION

Judith Resnik and Dennis Curtis's *Representing Justice: Invention, Controversy, and Rights in City-States and Democratic Courtrooms* is a masterful undertaking that defies easy categorization.¹ Based on painstaking years of research, the book crosses conventional disciplinary boundaries, drawing on legal history, art history, cultural history, political and social theory, and empirical social science data to reflect on the evolution of practices and representations of adjudication (primarily in the West) from the ancient world to the present. The authors shed light on the complex interrelationship between adjudicatory practice, state power, and political (and visual) culture. They ultimately conclude that modern public adjudication in its recent, twentieth- and twenty-first-century form is a powerful discursive sphere that is vital for sustaining robust democratic self-governance, but is in danger of collapse.²

The remarkable scope of *Representing Justice*—chronological, thematic, and methodological—is such that it will undoubtedly serve to provoke discussion across a broad array of subjects and disciplines for many years to come. This breadth does, however, pose a significant challenge for the commentator in that there is no way within the scope of these few pages to engage meaningfully with all of the many fascinating issues that the authors raise. After briefly describing the book's core themes and approaches, I therefore focus the remainder of my remarks on one particular topic that is a longstanding interest of mine, but also central to the historical and normative

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1. JUDITH RESNIK & DENNIS CURTIS, *REPRESENTING JUSTICE: INVENTION, CONTROVERSY, AND RIGHTS IN CITY-STATES AND DEMOCRATIC COURTROOMS* (2011).

2. *See id.* at 14–17, 306–10.

ambitions of Resnik and Curtis's book—namely, the practice of conciliation (or mediation) and its complex relationship to adjudication.³

I. THE BOOK

The book is framed, in part, as a puzzle. Pointing to a broad range of images, the authors demonstrate that people across cultures today recognize as a representation of Justice the figure of a woman in Grecian robes, standing with scales in one hand and sword in the other, and usually (though not always) blindfolded.⁴ This image of Justice, they show, has an astoundingly long history, dating back at least as far as ancient Rome,⁵ but with evident precursors in Babylonia, Egypt, and Greece.⁶ But as they are quite careful to note, such continuities in the representation of Justice are matched by a striking array of discontinuities. Unlike today, Justice was once commonly depicted alongside an ostrich,⁷ as well as the three other Cardinal Virtues with whom she was long associated (namely, Prudence, Temperance, and Fortitude).⁸ And until the eighteenth century, Justice typically appeared without a blindfold.⁹ Moreover, in earlier centuries, the visual imagery adorning the halls of state power was quite broad-ranging, extending beyond Justice to include representations of various biblical and classical allegories, designed to serve such didactic purposes as reminding judges to be dutiful servants of the ruling

3. Proponents of alternative dispute resolution, or ADR, often use the terms mediation and conciliation interchangeably to refer to the practice whereby a third party attempts to persuade disputants to agree to some kind of compromise. Jean R. Sternlight, *In Search of the Best Procedure for Enforcing Employment Discrimination Laws: A Comparative Analysis*, 78 TUL. L. REV. 1401, 1406 n.7 (2004). To the extent that scholars distinguish between these terms, they usually assert that mediation is (1) more formal and structured than conciliation, and (2) more concerned with protecting the disputants' autonomy. See, e.g., KATHERINE V.W. STONE, *PRIVATE JUSTICE: THE LAW OF ALTERNATIVE DISPUTE RESOLUTION* 6–7 (2000); Sternlight, *supra*, at 1406 n.7. For the sake of communicative ease, I use the term “conciliation” throughout much of this Essay to refer to any form of dispute resolution in which a third party promotes a negotiated compromise. I opt for “conciliation” rather than “mediation” for two reasons. The first is because, as discussed below, this was the term employed in a set of nineteenth-century writings, debates, and institutions that proved very important in shaping modern conceptions of adjudication. The second is that there is good reason to suspect that conciliation of the early-modern variety was not particularly attentive to the parties' wishes and thus lacked the focus on disputant autonomy viewed as essential to mediation today.

4. RESNIK & CURTIS, *supra* note 1, at 1–17.

5. *Id.* at 22.

6. *Id.*

7. *Id.* at 77.

8. *Id.* at 8.

9. See RESNIK & CURTIS, *supra* note 1, at 95–96 (discussing evolving opinions regarding “what Justice ought to ‘see’”).

elite and to recall the suffering (and often violence) entailed in the exercise of judicial power.¹⁰

Why has a certain iconography of Justice remained largely fixed and stable, the authors inquire, even while important aspects of its representation have changed so dramatically? This art-historical puzzle, they suggest, bears directly on practices of justice in that there is an important linkage between visual representations of Justice and the actual exercise of state power.¹¹ Just as images of Justice have retained certain continuities across time, even while transforming in fundamental ways, so too practices of adjudication have remained to a degree constant, even while the nature and purposes of adjudication have morphed, in many ways, beyond recognition.¹²

A core argument of the book is that adjudication is a pre-democratic practice with important proto-democratic elements that contributed to the eventual rise of democracy.¹³ Dating back at least as far as the city-states of the Renaissance and early-modern West (and perhaps farther), jurists were long admonished to hear both sides before reaching judgment, “to treat the poor as one would the rich, and to refuse bribes.”¹⁴ Moreover, there is a long tradition (by no means exclusive or unbroken) of holding certain judicial proceedings in public fora.¹⁵ According to Resnik and Curtis, judges who were compelled to listen to both sides, to attempt to treat rich and poor alike, and to do so in public view, found themselves over time unwittingly breaking down status hierarchies and searching for justifications for the exercise of state power that would be widely accepted as legitimate.¹⁶ As a result, adjudication came to serve as a “paradigm for responsible, popularly responsive, and hence democratic governance.”¹⁷ In this way, pre-modern practices of adjudication whose initial purposes were in no way democratic—including, for example, the common practice of publicizing certain proceedings with an eye towards inspiring awe and subservience among a passive populace—ended up (ironically) contributing to the rise of democratic government.¹⁸

Tying together these accounts of continuity and discontinuity in the visual representation of Justice and in practices of adjudication is a third narrative concerning the evolution of the physical space in which justice is represented

10. *Id.* at 25–29 (exploring and contrasting *The Allegory of Good Government* and *The Allegory of Bad Government*, two frescoes painted in Siena’s Palazzo Pubblico in the fourteenth century).

11. *See id.* at 375–76.

12. *Id.* at 375.

13. *Id.* at 95.

14. RESNIK & CURTIS, *supra* note 1, at 289.

15. *See id.* at 26.

16. *See id.* at 289.

17. *Id.*

18. *Id.* at 295, 301–02.

and adjudication occurs. As Resnik and Curtis discuss, the Renaissance and early-modern period witnessed a growing trend towards rulers bringing adjudicatory proceedings, once often held outside, into specially constructed, multi-purpose municipal buildings or town halls—in no small part with the goal of containing unruly crowds.¹⁹ But from the eighteenth century onward (and with increasing rapidity in the nineteenth), these multi-purpose civic structures gave way to single-purpose buildings, including most importantly, courthouses.²⁰ Like the older town halls from which they derived, modern courthouses are grandiose structures located at the center of town, where they were built to symbolize and bolster state power—and (not unrelatedly) attract commercial activity.²¹ But unlike their predecessors, their very name (as well as internal design) revealed a new focus on a single governmental activity—namely, court proceedings or adjudication.²² This surge in “justice architecture” throughout the world was in part the result of the coordinated, global efforts and interests of three professional groups: lawyers, judges, and architects.²³ But according to the authors, it also followed from (and contributed to) a new tendency to view adjudication as a defining feature of modern, democratic governance, such that the physical structure of the courthouse served as an embodiment of the community’s political ideals.²⁴ Accordingly, by the twentieth century, the courthouse had to some extent replaced the centuries-old image of Justice as the dominant symbol of state power.²⁵

Resnik and Curtis close the book by arguing that adjudicatory practice not only helped give rise to democracy as a historical matter, but also is crucial for sustaining it today.²⁶ Drawing on the work of legal, political, and social theorists ranging from Jeremy Bentham²⁷ to Jürgen Habermas,²⁸ they suggest that public adjudication constitutes a vital public sphere in which members of society (including not only litigants, lawyers, and judges, but also audience members) can discuss and debate the kind of community in which they hope to live, thus engaging in democratic self-governance.²⁹ But while the authors view public adjudication as key for enabling the successful functioning of

19. RESNIK & CURTIS, *supra* note 1, at 134.

20. *Id.* at 136, 141.

21. *Id.* at 136, 139, 141.

22. *Id.* at 136.

23. *Id.* at 136, 194.

24. RESNIK & CURTIS, *supra* note 1, at 141–42.

25. *Id.* at 338 (describing courthouses as the “indisputable focus” of local government).

26. *See id.* at 301.

27. *See id.* at 295–99.

28. *See id.* at 300.

29. RESNIK & CURTIS, *supra* note 1, at 301.

democratic government, they also suggest that its long-term survival is far from secure.³⁰

In line with the egalitarian impulses of modern democratic society, adjudication was reconfigured in the latter half of the twentieth century to respond to growing demands for access, leading to the emergence of new procedural rules and institutional mechanisms designed to open up the justice system to those who were once systematically excluded—including historically disfavored minorities, women, and the poor.³¹ Although these rules and mechanisms have proven far from sufficient to meet demand, and a great many people continue to find themselves unable to obtain basic legal services, litigation rates nonetheless exploded over this time period, putting tremendous pressure on court dockets worldwide.³² For this reason (among others), the late twentieth and early twenty-first centuries have witnessed a retreat from public adjudication, such that the magnificent courtrooms, recently built to embody the ideals of the democratic state, often remain empty for lengthy periods of time.³³ As various groups decry public adjudication as wasteful and unnecessary, disputants are encouraged, or required, to bring their conflicts before administrative agencies or private dispute-resolution providers, both of which tend to operate outside the public view.³⁴ And to the extent that disputants continue to find themselves before traditional judges, the latter focus increasingly on promoting settlement through mediation³⁵—a practice that occurs behind closed doors and thus does not result in the public discussion and development of the law.³⁶

Resnik and Curtis therefore conclude that the triumphant nineteenth- and twentieth-century rise of public adjudication should not lull us into a false sense of confidence about its ultimate longevity.³⁷ And because adjudication plays a critical role in sustaining democratic self-governance, the threats that it faces today, they argue, have grave implications not only for fairness in dispute resolution, but for the entirety of the modern democratic political project.³⁸ That said, the authors do not end on a note of despair. While the pressures leading to the retreat from public adjudication may be too significant to overcome (at least in their entirety), there may be ways, they suggest, to

30. *Id.* at 306–07.

31. *Id.* at 307.

32. *See id.* at 307–08.

33. *Id.* at 339.

34. RESNIK & CURTIS, *supra* note 1, at 16.

35. *Id.* at 16.

36. *Id.*

37. *Id.* at 16.

38. *See id.* at 337 (arguing that as processes of “public participation, accountability, transparency, and equality” decline, “[t]he audience becomes voyeuristic rather than participatory, and power flows back to the spectacle’s producers”).

reconfigure some of the administrative-agency and alternative-dispute-resolution mechanisms that have emerged so as to ensure that they are more compatible with the democratic imperative of public discourse.³⁹ Along similar lines, they opine, courthouses (and the art adorning them) ought to be reimagined to engage more openly with the present-day disconnect between a grandiose narrative of public adjudication and the painful reality of our multiple failures to live up to our ideals.⁴⁰ In this respect, the authors suggest, artists and architects might benefit by recalling some of the earlier visual traditions that the book recounts and that have long since been largely abandoned—such as depictions of the pain and violence often entailed in judgment.⁴¹

II. THE PROBLEM OF CONCILIATION

Seeking to construct a genealogy of public adjudication as a defining feature of modern democratic government, Resnik and Curtis structure their account to focus on those elements of court practice that through time ended up contributing to the emergence of this particular form of dispute resolution.⁴² Conciliation enters their narrative primarily insofar as it is part and parcel of the recent movement towards alternative dispute resolution (“ADR”)⁴³—a movement that, according to the authors, poses a significant challenge to the continued survival of public adjudication as a core democratic practice.⁴⁴ But the history of conciliation dates back, of course, much longer than this movement⁴⁵—and a closer look at this history suggests that the birth of public adjudication as a defining feature of modern democracy was intimately linked to the question of what to do with private conciliation.

This linkage can be seen most clearly in the writings of Jeremy Bentham—a figure who, not uncoincidentally, is also central to Resnik and Curtis’s account of the rise of public adjudication as a bulwark of modern democratic society.⁴⁶ As the authors argue, Bentham played a key role in developing a model of public adjudication as conducive to good, democratic governance.⁴⁷ But what exactly did this effort entail? As Resnik and Curtis demonstrate, there were some very significant features of court proceedings (as these had developed across the centuries) that facilitated the construction of Bentham’s

39. RESNIK & CURTIS, *supra* note 1, at 337.

40. *See id.* at 344.

41. *Id.* at 344–49.

42. *See id.* at 134–224.

43. *See id.* at 308–10.

44. *See* RESNIK & CURTIS, *supra* note 1, at 306–07.

45. *See infra* note 51 and accompanying text (discussing the early identification of conciliation as a distinct form of dispute resolution).

46. *See* RESNIK & CURTIS, *supra* note 1, at 295–99.

47. *See id.* at 297–98.

model.⁴⁸ But it is important to note that there were also longstanding features of court proceedings that ran afoul of this model. Perhaps most problematic was the tradition of medieval and early-modern European judges serving as conciliators, aiming not to adjudicate the case by applying the fixed rule of law, but instead to help the disputants reconcile by persuading them to embrace some kind of compromise.⁴⁹ Indeed, for a great many centuries, judges across Europe (and its colonies) failed clearly to distinguish between their roles as conciliator and adjudicator.⁵⁰

This is not to suggest that there was no understanding of the theoretical differences between adjudication and conciliation. Jurists dating back at least as far as ancient Rome distinguished between dispute resolution processes that hinged on the application of a fixed rule of law and those that instead aimed at compromise and settlement (without regard to the letter of the law).⁵¹ In practice, however, medieval and early modern European courts regularly blurred this distinction. As revealed by studies of, *inter alia*, seigneurial courts in France, municipal, *alcalde* courts in Spain, and justices of the peace in England, judges frequently sought to promote informal, equitable conciliation, rather than (or prior to attempting) formal, legal adjudication—and this was considered in no way unusual or objectionable.⁵²

How should we make sense of the ubiquity of conciliation in the medieval and early-modern world? The answer here has much to do with Resnik and Curtis's rightful insistence that we recall the important (and frequently neglected) linkages between practices of dispute resolution and modes of governance.⁵³ The fact that conciliation was such a common judicial practice in the medieval and early-modern world⁵⁴ followed from the way in which justice was then conceived. Because the polity was understood to be ordered in accordance with God's law, the object of justice was to preserve the divinely ordained, hierarchical social order. As argued by the historian Michel Antoine, the medieval and early-modern ruler was understood to be a “dispenser of

48. *See id.* at 296–98.

49. *Id.* at 296–97.

50. *See id.* at 296–97.

51. *See* REINHARD ZIMMERMANN, THE LAW OF OBLIGATIONS: ROMAN FOUNDATIONS OF THE CIVILIAN TRADITION 528–29 (1996) (discussing the Roman distinction between two different kinds of arbiters—one required to apply the law and another that was free to seek an equitable compromise).

52. *See, e.g.*, TAMAR HERZOG, UPHOLDING JUSTICE: SOCIETY, STATE, AND THE PENAL SYSTEM IN QUITO (1650–1750) 243–45 (2004); NORMA LANDAU, THE JUSTICES OF THE PEACE, 1679–1760, at 173–75 (1984); STEVEN G. REINHARDT, JUSTICE IN THE SARLADAIS 1770–1790, at 150–52 (1991); Antoine Follain, *De la justice seigneuriale à la justice de paix*, in UNE JUSTICE DE PROXIMITÉ: LA JUSTICE DE PAIX (1790–1958) 19, 25–26 (Jacques-Guy Petit ed., 2003).

53. *See, e.g., supra* notes 42–48 and accompanying text.

54. *See infra* notes 60–78 and accompanying text.

justice,” whose role it was to arbitrate between groups, thereby restoring harmony and preserving the status quo.⁵⁵ This essentially static conception of justice proved particularly hospitable to the practice of conciliation because the latter was focused first and foremost on resolving conflict, and thus on peacemaking.⁵⁶ At the same time, because medieval and early-modern European judges frequently promoted conciliation by relying on their high standing in the community to persuade disputants to defer to their wisdom and authority, the very act of encouraging conciliation served to reinforce traditions of hierarchy and deference.⁵⁷

Given these historic linkages between practices of conciliation and political and social traditions of hierarchy and deference, conciliation posed a problem for would-be democrats like Bentham (and, indeed, for the late eighteenth-century age of revolution as a whole). While conciliation appeared to be antithetical to democratic self-governance, it constituted a sizeable component of what courts actually did (and what people expected them to do), and thus could not simply be wished away.⁵⁸ Looking to contemporary European (and especially French) practice, Bentham thought he might have discovered a solution to this dilemma in the establishment of what he called “conciliation courts” (or sometimes “reconciliation courts”).⁵⁹ Such courts, he hoped, would institutionalize the practice of court-based conciliation in ways that clearly set it apart from—and thus protected the sanctity of—adjudication proper.

The French created the first conciliation courts in 1790, shortly after they embarked on their revolutionary experiment in government.⁶⁰ Known as *bureaux de conciliation*, or conciliation offices, these institutions were required to attempt to reconcile disputants in a wide range of civil matters.⁶¹ Only if such efforts failed was litigation to proceed.⁶² The conciliation proceedings themselves were to be an informal, lawyer-free affair, relying largely on oral pleadings and taking place in secret, outside the public’s view—namely, in the

55. Michel Antoine, *La monarchie française de François I^{er} à Louis XVI*, in LES MONARCHIES 185, 187–89 (Emmanuel Le Roy Ladurie ed., 1986).

56. See *supra* note 52 and accompanying text; *infra* notes 60–78 and accompanying text.

57. See *infra* notes 65–70, 82–84 and accompanying text.

58. See *supra* note 54 and accompanying text; *infra* notes 82–85 and accompanying text.

59. See Amalia D. Kessler, *Deciding Against Conciliation: The Nineteenth-Century Rejection of a European Transplant and the Rise of a Distinctively American Ideal of Adversarial Adjudication*, 10 THEORETICAL INQUIRIES L. 423, 429, 436–38 (2009) [hereinafter Kessler, *Deciding Against Conciliation*].

60. Amalia D. Kessler, *Marginalization and Myth: The Corporatist Roots of France’s Forgotten Elective Judiciary*, 58 AM. J. COMP. L. 679, 698 (2010) [hereinafter Kessler, *Marginalization and Myth*].

61. See *id.*

62. *Id.*

presence only of the parties and court personnel.⁶³ These courts were, in turn, to be staffed by a newly created group of officers known as justices of the peace, each of whom was to be assisted by two *assesseurs prud'hommes* (literally, assistant wise men).⁶⁴ As initially contemplated, both the justices of the peace and the *assesseurs prud'hommes* were to be mere amateurs, lacking any legal training,⁶⁵ and elected by eligible voters in the district⁶⁶ because of their reputation for wisdom and virtue.⁶⁷ Remarkably, even after Napoleon reconfigured these courts to eliminate the *assesseurs prud'hommes* and to ensure that judicial selection would henceforth reside in his hands alone,⁶⁸ nineteenth-century French justices of the peace continued generally to be locals, born in the region where they served and described by one historian as “small-scale notable[s] close to the peasantry.”⁶⁹ Such local bigwigs were expected to rely on their standing within the community, rather than any legal knowledge per se, to conciliate intra-community disputes.⁷⁰

In addition to the *bureaux de conciliation*, the French established a number of other judicial institutions in this period that relied heavily on community leaders to promote informal conciliation and were therefore often lumped together with the former. In particular, the Napoleonic regime created a set of labor courts, known as *conseils de prud'hommes*, that paralleled the *bureaux de conciliation* in certain key respects.⁷¹ Designed to help quell the extensive

63. ANTHONY CRUBAUGH, *BALANCING THE SCALES OF JUSTICE: LOCAL COURTS AND RURAL SOCIETY IN SOUTHWEST FRANCE, 1750–1800*, at 132, 141 (2001); Jean Léonnet, *Une création de l'Assemblée constituante, la conciliation judiciaire*, in *UNE AUTRE JUSTICE: CONTRIBUTIONS À L'HISTOIRE DE LA JUSTICE SOUS LA RÉVOLUTION FRANÇAISE* 267, 273 (Robert Badinter ed., 1989).

64. CRUBAUGH, *supra* note 63, at 133, 141. The position of *assesseur* was abolished in 1801. *Id.* at 146.

65. *Id.* at 135–36, 146; ISSER WOLOCH, *THE NEW REGIME: TRANSFORMATIONS OF THE FRENCH CIVIC ORDER, 1789–1820S*, at 307–08 (1994); *see also* Richard M. Andrews, *The Justices of the Peace of Revolutionary Paris, September 1792–November 1794 (Frimaire Year III)*, *PAST & PRESENT*, Aug. 1971, at 56, 58–60 (1971).

66. GEORGE MARTIN, *LES JUSTICES DE PAIX EN FRANCE: MANUEL PRATIQUE DES JUGES DE PAIX* 2 (1880); WOLOCH, *supra* note 65, at 307–08.

67. 11 D. DALLOZ, *JURISPRUDENCE GÉNÉRALE: RÉPERTOIRE MÉTHODIQUE ET ALPHABÉTIQUE DE LÉGISLATION DE DOCTRINE ET DE JURISPRUDENCE* 88–89 (1849); *see also* HENRION DE PANSEY, *DE LA COMPÉTENCE DES JUGES DE PAIX* 3 (4th ed. 1816).

68. MARTIN, *supra* note 66, at 405–06; WOLOCH, *supra* note 65, at 319.

69. Jean-Claude Farcy, *Les juges de paix et la politique au XIX^e siècle*, in *UNE JUSTICE DE PROXIMITÉ: LA JUSTICE DE PAIX (1790–1958)*, *supra* note 52, at 143, 161; *see also* Serge Defois & Vincent Bernaudeau, *Les juges de paix de Loire-Atlantique (1895–1958): une magistrature de proximité?*, in *UNE JUSTICE DE PROXIMITÉ: LA JUSTICE DE PAIX (1790–1958)*, *supra* note 52, at 195, 200–01.

70. *See supra* notes 64–69 and accompanying text.

71. *See* WILLIAM H. MCPHERSON & FREDERIC MEYERS, *THE FRENCH LABOR COURTS: JUDGMENT BY PEERS* 15–16 (1966).

labor strife that emerged in the wake of the Napoleonic Wars,⁷² these courts were staffed by lay judges (usually the leading manufacturers in the community, elected by their peers)⁷³ and were required to prioritize informal conciliation over formal adjudication.⁷⁴ Along similar lines, the revolutionaries and Napoleonic regime opted to retain a set of merchant-run courts (*juridictions consulaires*) that dated back to the sixteenth century.⁷⁵ Renamed *tribunaux de commerce*, or commercial courts, these institutions also relied on elected lay judges—in particular, leading local merchants—and tended to place a heavy emphasis on informal conciliation.⁷⁶

As of the late eighteenth and early nineteenth centuries, the French had thus established a number of different institutions that could be described as conciliation courts. And in these waning days of French influence, a variety of European countries (including, Spain, Denmark, and Rhenish Prussia) opted—either on their own initiative or under military compulsion—to adopt some form of conciliation court within their borders.⁷⁷ While conceptualized as radically new, all of these institutions drew in practice on longstanding traditions of judicial conciliation. For example, the French *bureaux de conciliation* were themselves in many ways the direct descendents of the abolished seigneurial courts of the Old Regime, such that the personnel and files of the latter were often transferred directly to the new *bureaux*.⁷⁸

72. *See id.*

73. *Décret contentant règlement sur les conseils de prud'hommes (11 juin 1809)*, in COLLECTION COMPLÈTE DES LOIS, DÉCRETS, ORDONNANCES, RÉGLEMENS, AVIS DU CONSEIL-D'ÉTAT 386, 387–88 (J. B. Duvergier ed., 1836).

74. MCPHERSON & MEYERS, *supra* note 71, at 16; Alain Cottureau, *Justice et injustice ordinaire sur les lieux de travail d'après les audiences prud'homales (1806–1866)*, LE MOUVEMENT SOCIAL, Oct.–Dec. 1987, at 25, 35; Monique Kieffer, *La législation prud'homale de 1806 à 1907*, LE MOUVEMENT SOCIAL, Oct.–Dec. 1987, at 9, 12.

75. AMALIA D. KESSLER, A REVOLUTION IN COMMERCE: THE PARISIAN MERCHANT COURT AND THE RISE OF COMMERCIAL SOCIETY IN EIGHTEENTH-CENTURY FRANCE 2 (2007). For a discussion of the Old Regime *juridictions consulaires*, see generally *id.*

76. *See id.* at 70–74; Claire Lemerrier, *The Judge, the Expert and the Arbitrator: The Strange Case of the Paris Court of Commerce (ca. 1800–ca. 1880)*, in FIELDS OF EXPERTISE: A COMPARATIVE HISTORY OF EXPERT PROCEDURES IN PARIS AND LONDON, 1600 TO PRESENT 115, 130–35 (Christelle Rabier ed., 2007).

77. JOSE SANCHEZ-ARCILLA BERNAL, HISTORIA DE LAS INSTITUCIONES POLITICO-ADMINISTRATIVAS CONTEMPORANEAS (1808–1975) 405 (1994); DON JOSÉ DE VICENTE Y CARAVANTES, TRATADO HISTÓRICO, CRÍTICO FILOSÓFICO DE LOS PROCEDIMIENTOS JUDICIALES EN MATERIA CIVIL, SEGUN LA NUEVA LEY DE ENJUICIAMIENTO; CON SUS CORRESPONDIENTES FORMULARIOS 448 (1856); COMPANION TO THE ALMANAC 42 (1857); Annemarie Højer Pedersen, “Skranker for Lovtrækkeriets Krumveie”: De Danske Forligskommissioner Deres Nedlægelse Og Genopstaen? §§ 1.2, 2.1 (Mar. 2005) (unpublished M.A. thesis, Copehagen University) (on file with author).

78. Kessler, *Marginalization and Myth*, *supra* note 60, at 699.

Observing these developments, Bentham devoted a great deal of energy to trying to make sense of them, and his writings on this topic played a decisive role in creating the notion of a “conciliation court” as a kind of ideal type—one with which jurists and policy-makers thereafter grappled well into the latter half of the nineteenth century.⁷⁹ But why precisely were Bentham and the many he influenced so interested in these institutions? Part of the answer is that Bentham viewed conciliation courts as an embodiment (or at least near approximation) of his ideal of “natural procedure”—by which he meant that universal set of common-sense methods that a father would use to resolve disputes among the various dependents within the patriarchal home.⁸⁰ As such, natural procedure, he hoped, would make it possible to avoid the great costs and delays associated with the “technical procedure” employed in ordinary courts of law.⁸¹ But while admiring conciliation courts and their natural procedure as a possible antidote (or at least an alternative) to the woes of technical procedure, he also recognized that there was little place for them in the democratic polity for which he longed.⁸² In his view, it was perfectly acceptable for the father of the household to draw on his patriarchal authority as a means of encouraging dependents to reconcile, but citizens of a democratic society ought not to be placed in such a position of submission vis-à-vis the judicial officers of the state.⁸³ Because “[i]n the system of conciliation, the equality [that reigns at law] is destroyed,”⁸⁴ Bentham ultimately concluded that conciliation courts ought to be used only for the resolution of intra-familial disputes.⁸⁵

But while Bentham assigned conciliation courts a very limited role within the democratic polity, they were nonetheless essential to his thinking, reappearing throughout his writings on procedure and evidence.⁸⁶ And his reflections on these institutions were deeply compelling to many of his nineteenth-century readers.⁸⁷ Resnik and Curtis’s book helps us to understand why this was so. Conceptualizing the nature and limits of conciliation courts was a means of going about the difficult task of defining the contours of

79. Kessler, *Deciding Against Conciliation*, *supra* note 59, at 431–32, 434–36.

80. *See id.* at 436–37.

81. *Id.* at 434–35.

82. *See id.* at 437.

83. *Id.*

84. Kessler, *Deciding Against Conciliation*, *supra* note 59, at 441 (quoting JEREMY BENTHAM, *De l’organisation judiciaire, et de la codification*, in 3 ŒUVRES DE J. BENTHAM, JURISCONSULTE ANGLAIS 51 (Étienne Dumont ed., 1829–30)).

85. *Id.* at 441–42.

86. *See, e.g.*, 6 JEREMY BENTHAM, *Rationale of Judicial Evidence, Specially Applied to English Practice*, in THE WORKS OF JEREMY BENTHAM 366 (John Bowring ed., 1843).

87. Kessler, *Deciding Against Conciliation*, *supra* note 59, at 442.

adjudication proper.⁸⁸ Put differently, it was in precisely those public, non-familial realms in which conciliation had no place that Bentham hoped to develop a robust, democracy-promoting practice of adjudication. And given the centuries-old tradition of European judges engaging in both adjudication and conciliation (and failing clearly to differentiate between the two),⁸⁹ the effort thus to distinguish between conciliation and adjudication was not simply a matter of theoretical line drawing, but also an attempt to solve a concrete, real-world problem.

The irony, of course, is that despite Bentham's efforts, a sharp delineation between conciliation and adjudication failed in practice to materialize. While the transnational history of conciliation courts has yet to be told, and there is therefore much about these institutions that we still do not know, the overarching narrative is one of decline. To the limited extent that such courts have survived, they now appear (for a complex variety of reasons) to engage at least as much in formal adjudication as in informal conciliation.⁹⁰ The original *bureaux de conciliation*, for example, were abolished in 1958.⁹¹ And while the French labor and commercial courts persist to this day, it is generally agreed that they have become much less effective at facilitating conciliation than was once the case and instead often apply the formal rule of law.⁹² Conversely, as described by Resnik and Curtis, over the last several decades, ordinary non-conciliation courts have become increasingly committed to promoting various kinds of alternative dispute resolution, including court-based mediation or conciliation.⁹³ Thus, just as conciliation courts have turned towards formal adjudication, so, too, ordinary courts have turned towards conciliation.⁹⁴ The end result is a conceptual and institutional blurring of these practices that is reminiscent in this respect of the medieval and early-modern European judicial experience.

III. SOME MUSINGS FROM HISTORY

What lessons should we draw from this history? While history is not particularly useful for developing detailed policy prescriptions, it can suggest

88. See *supra* notes 46–48 and accompanying text.

89. See *supra* notes 49–52 and accompanying text.

90. See, e.g., Kessler, *Deciding Against Conciliation*, *supra* note 59, at 469–70.

91. ANDREW WEST, YVON DESDEVISES, ALAIN FENET, DOMINIQUE GAURIER & MARIE-CLET HEUSSAFF, *THE FRENCH LEGAL SYSTEM: AN INTRODUCTION* 87–88 (1992) (“Since 1958, small civil claims have been dealt with by the *Tribunaux d’Instance*. These courts replaced the earlier system of civil justices of the peace (*juges de paix*).”).

92. Michel Armand-Prevost, *Fonctionnement et enjeux des tribunaux de commerce au cours des XIX^e et XX^e siècles*, in *LES TRIBUNAUX DE COMMERCE: GENÈSE ET ENJEUX D’UNE INSTITUTION* 129, 138 (2007); Cottereau, *supra* note 74, at 38; Kieffer, *supra* note 74, at 15.

93. RESNIK & CURTIS, *supra* note 1, at 308.

94. See *supra* notes 90–93 and accompanying text.

broad patterns or trends and, in so doing, help to identify, *inter alia*, risks to be avoided. In this respect, the history of conciliation retold here serves to reinforce points that Resnik and Curtis themselves make. Most importantly, the fact that conciliation was linked to a medieval and early-modern political commitment to the preservation of a hierarchical status quo⁹⁵—and that those (like Bentham) who lived at the dawn of democratic revolution viewed it as imperative to limit conciliation's reach⁹⁶—reminds us that there are potential dangers to the unrestrained flourishing of conciliation in (and out of) our courts. Similarly, the fact that it has proven so difficult to follow through on Bentham's goal of institutionalizing a sharp delineation between conciliation and adjudication underscores the authors' argument that we ought not to presume the indestructibility of adjudication as a democracy-promoting, discursive sphere.⁹⁷ Finally, the remarkable staying power of conciliation suggests that it is likely to be with us for the long run. This, in turn, lends support to Resnik and Curtis's conclusion that, moving forward, the answer is not to wish ADR away (as this is not likely to happen) but instead to find ways of making it more compatible with democratic governance, including most importantly, by opening it up to public view.⁹⁸

That it is important to identify ways of making ADR practices like conciliation more public does not, however, mean that this prescription is a cure-all. Setting aside the much debated (and never clearly resolved) question of whether conciliation does in fact require some degree of privacy to work (a view that Bentham himself expressed),⁹⁹ we are left with the even more difficult question of what precisely we gain by opening up conciliation to public view? To the extent that the conciliating judge is free to depart from the rule of law, the utility of conciliation as a sphere for meaningfully deciding matters of social policy is limited. If the aim is to preserve dispute resolution as a sphere of democratic self-governance, it may therefore ultimately be more important to find ways of making formal, public adjudication cheaper and, thus, more readily accessible to all.

How precisely to accomplish this goal is an enormously difficult question whose resolution lies well beyond the scope of these pages. An extensive literature exists on the costs of litigation, much of it bemoaning the difficulties of obtaining sound, reliable empirical evidence.¹⁰⁰ And while, despite such

95. See *supra* notes 54–57 and accompanying text.

96. Kessler, *Deciding Against Conciliation*, *supra* note 59, at 442.

97. See *supra* notes 2–3, 82–83, 94 and accompanying text.

98. RESNIK & CURTIS, *supra* note 1, at 321.

99. See BENTHAM, *supra* note 86, at 366 (“Publicity in these cases . . . can have no better effect than that of pouring poison into whatever wounds have already been sustained.”).

100. See, e.g., Thomas E. Willging, *Past and Potential Uses of Empirical Research in Civil Rulemaking*, 77 NOTRE DAME L. REV. 1121, 1127–38 (2002) (discussing, *inter alia*, limitations inherent in various kinds of empirical studies of procedural rules). See generally Judith A.

empirical difficulties, some have identified particular costs as excessive—including, perhaps most importantly, those associated with discovery and attorneys' fees—others are equally vocal in countering these assertions.¹⁰¹ Moreover, in reading this literature, it is hard to avoid the conclusion that each author's bottom line is shaped at least in part by normative assessments of the value of the procedural form in question that are reached independently of questions of cost.¹⁰²

That said, given the themes of this conference—and, in particular, the focus on aggregation—it is worth emphasizing that aggregation itself is one possible approach to generating cost-savings in adjudication. The class action, in particular, affords significant economies of scale. By reducing litigation costs for each individual, the class device makes it possible to litigate low-value claims that, but for group action, would likely be too costly to pursue.¹⁰³ The problem, of course, is that class actions do not *feel* economical, in that the cost-savings they afford are evident only when the costs that they entail are compared to the sum total of damages incurred and the cost of filing numerous individual actions. Since, but for the class action, most of these individuals would not file suit, the cost of their injuries—and the concomitant cost of vindicating their rights through a series of individual suits (even assuming that such a course of action were possible)—are not readily taken into account in the political process. The end result is that, as Resnik herself has documented

McKenna & Elizabeth C. Wiggins, *Empirical Research on Civil Discovery*, 39 B.C. L. REV. 785 (1998) (summarizing empirical studies on discovery and discussing the limitations of various approaches used).

101. See, for example, the debate over discovery outlined in McKenna & Wiggins, *supra* note 100, at 787–89. See also Charles Silver, *Does Civil Justice Cost Too Much?*, 80 TEX. L. REV. 2073, 2086–98 (2002) (discussing the debate over discovery and attorneys' fees).

102. For example, even if (as is unlikely) we were all to agree with the authors of a recent Federal Judicial Center (“FJC”) report that discovery accounted for approximately twenty to fifty percent of the total cost of an average, non-complex litigation, is that percentage too big, too small, or perfectly reasonable? See Emery G. Lee III & Thomas E. Willging, *Defining the Problem of Cost in Federal Civil Litigation*, 60 DUKE L.J. 765, 779–82 (2010) (discussing, *inter alia*, the FJC report that they authored). The authors of the FJC study use these numbers to dispute the claim that discovery costs are excessive, arguing that even fifty percent represents a much smaller percentage of total costs than the seventy percent that many critics of discovery had previously estimated. *Id.* at 781–82. But is twenty to fifty percent reasonable in and of itself? An answer to this question depends in no small part on the benefits that we think we gain from discovery, some of which (like the notion that the dispute will be resolved in accordance with the truth) may not be readily quantifiable. And to the extent that discovery is thought to benefit particular classes of plaintiffs, including most importantly, those (like civil rights claimants) whose claims rest on evidence likely to be in the defendants' possession, our view of the cost of discovery may turn on our normative assessment of the underlying substantive law and our political sympathies (or lack thereof) for these particular plaintiffs and defendants.

103. See Jon Romberg, *Half a Loaf is Predominant and Superior to None: Class Certification of Particular Issues Under Rule 23(c)(4)(A)*, 2002 Utah L. Rev. 249, 258–59, 264 (2002).

elsewhere, sustaining the political will necessary to maintain the class action as a robust procedural device has proven quite a challenge.¹⁰⁴

There may, however, be some hope in the rather ironic fact that, even as American courts have become increasingly skeptical of the class action, countries around the world have begun experimenting with the form.¹⁰⁵ As Deborah Hensler, John Coffee, and others have emphasized, these new, non-American devices are quite different from the American variant, often for example, providing only for opt-in (rather than opt-out) classes and relying on third-party financing, rather than the contingency fee.¹⁰⁶ Whether these new procedural devices will survive and prove efficacious remains to be seen. But it is possible that experimentation with forms of aggregation abroad might ultimately provide some inspiration for how to reinvent the class action here in the United States—perhaps in a fashion that eliminates, or at least cabins, some of its historically more controversial features.

But whatever the eventual outcome of the current experimentation with aggregation (and with the class action in particular), the broader point is that, in searching for cost-savings in public adjudication, we ought to take heed of another key historical lesson of *Representing Justice*—namely, the importance of the transnational.¹⁰⁷ As Resnik and Curtis emphasize, the rise of adjudication as a democracy-promoting practice that was itself fundamentally challenged and transformed by the post-WWII empowerment of new groups of rights-holders was—and remains—a fundamentally transnational phenomenon.¹⁰⁸ Thus, while the challenges that adjudication faces are global, so too perhaps are the solutions.

104. See Judith Resnik, *Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 78, 145–48, 162–69 (2011).

105. Richard A. Nagareda, *Aggregate Litigation Across the Atlantic and the Future of American Exceptionalism*, 62 VAND. L. REV. 1, 4 (2009).

106. John C. Coffee, Jr., *Litigation Governance: Taking Accountability Seriously*, 110 COLUM. L. REV. 288, 301, 339, 341 (2010); Deborah R. Hensler, *The Future of Mass Litigation: Global Class Actions and Third-Party Litigation Funding*, 79 GEO. WASH. L. REV. 306, 307–08, 322 (2011); see also Nagareda, *supra* note 105, at 21–25.

107. See RESNIK & CURTIS, *supra* note 1, at 14–15.

108. See *id.* at 14.

