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Alternative Dispute Resolution

Conflict as Pathology: An Essay for Trina Grillo

Richard Delgado*

INTRODUCTION: IN WHICH RODRIGO OUTLINES HIS THOUGHTS ON ADR AND THE WORK OF A SISTER

I was standing in my pajamas trying to figure how to fold up the little hide-a-bed on which I had spent a surprisingly comfortable night when a familiar voice from behind startled me.¹

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1. See Richard Delgado, *Rodrigo's Chronicle*, 101 YALE L.J. 1357 (1992) (book review) [hereinafter *First Chronicle*] (introducing "Rodrigo," my brilliant young friend and alter ego). Half-brother of celebrated American civil rights lawyer and activist Geneva Crenshaw, see generally DERRICK BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* (1987) (featuring Professor Bell's fictional interlocutor), Rodrigo was born in the United States but moved to Italy when his father, Lorenzo, an African American serviceman, was assigned to a U.S. outpost there. Rodrigo completed high school at the base school, then attended an Italian university on government scholarships, graduating close to the top of his law school class. See *First Chronicle*, *supra*, at 1359 (providing biographical data for Rodrigo). In *First Chronicle*, Rodrigo looks me up on a return trip to the states to investigate graduate law study. See *id.* (discussing Rodrigo's aspirations and concerns). After discussing various LL.M. programs, we engage in a spirited discussion of race, affirmative action, the decline of the West, and other issues. See *id.* at 1364-76.

Despite our generational difference, we become friends, discussing a variety of legal issues over the course of the next two years. See Richard Delgado, *Rodrigo's Second Chronicle: The Economics and Politics of Race*, 91 MICH. L. REV. 1183 (1993) [hereinafter *Second Chronicle*] (law and economics); Richard Delgado, *Rodrigo's Third Chronicle: Care, Competition, and the Redemptive Tragedy of Race*, 81 CAL. L. REV. 387 (1993) [hereinafter *Third Chronicle*] (love); Richard Delgado, *Rodrigo's Fourth Chronicle: Neutrality and Stasis in Antidiscrimination Law*, 45 STAN. L. REV. 1133 (1993) [hereinafter *Fourth Chronicle*] (legal rules); Richard Delgado, *Rodrigo's Fifth Chronicle: Civitas, Civil Wrongs, and the Politics of Denial*, 45 STAN. L. REV. 1581 (1993) (the

"Professor, you're up. Let me give you a hand. How did you sleep?"²

My young host deftly snapped the mattress back in place, replaced the couch's cushions, and scooped up the bedding which I had stacked on a nearby chair. "Like a log. I spent a few minutes getting ready for my hearing, then turned in around eleven. How about you and Giannina?"³

"Fine. We talked for a while about Judge Garza,⁴ then called it a night. Did you have any dreams?"

"Not that I can remember. How about you?"

critique of normativity); Richard Delgado, *Rodrigo's Sixth Chronicle: Intersections, Essences, and the Dilemma of Social Reform*, 68 N.Y.U. L. REV. 639 (1993) [hereinafter *Sixth Chronicle*] (relations between men and women); Richard Delgado, *Rodrigo's Seventh Chronicle: Race, Democracy, and the State*, 41 UCLA L. REV. 721 (1994) (enlightenment political theory); Richard Delgado, *Rodrigo's Eighth Chronicle: Black Crime, White Fears—On the Social Construction of Threat*, 80 VA. L. REV. 503 (1994) (black crime); Richard Delgado, *Rodrigo's Ninth Chronicle: Race, Legal Instrumentalism, and the Rule of Law*, 143 U. PA. L. REV. 379 (1994) (racial discrimination and the rule of law); Richard Delgado, *Rodrigo's Tenth Chronicle: Merit and Affirmative Action*, 83 GEO. L.J. 1711 (1995) [hereinafter *Tenth Chronicle*] (the meaning of merit); Richard Delgado, *Rodrigo's Eleventh Chronicle: Empathy and False Empathy*, 84 CAL. L. REV. 61 (1996) (clinical practice). During this time, Rodrigo progresses from the status of law student to professor at a public law school "in the Midwest." He and the Professor continue their relationship, seeing each other at meetings, conferences, and airports.

2. Like Rodrigo, the "Professor" is a fictional character and not to be identified with any person alive or dead. As I have created him, the Professor is a man of color teaching law at a major institution and is in the late stages of his career. As this Chronicle opens, the Professor is in town to testify at a hearing in a school desegregation case. He spent last night at the apartment of his protégé, where they discussed biracialism. See Richard Delgado, *Rodrigo's Fifteenth Chronicle: Racial Mixture, Latino-Critical Scholarship, and the Black-White Binary*, 75 TEX. L. REV. 1181 (1997) [hereinafter *Fifteenth Chronicle*] (reviewing LOUISE ANN FISCH, *ALL RISE: REYNALDO G. GARZA, THE FIRST MEXICAN AMERICAN FEDERAL JUDGE* (1996)).

3. For an introduction to "Giannina," Rodrigo's soulmate and life companion, see *Third Chronicle*, *supra* note 1, at 402 and *Fourth Chronicle*, *supra* note 1, at 1136-37. Giannina, who previously wrote poetry and plays for a living, has long held an interest in law, serving as an honorary member of the Women's Law Caucus at the school where Rodrigo earned his LL.M., see *Sixth Chronicle*, *supra* note 1, at 640 (providing a setting for a discussion of essentialism), and writing the lyrics for a counter-parody of a tasteless "Follies" presented at Rodrigo's school, see *Fourth Chronicle*, *supra* note 1, at 1137. Giannina's fans will be interested to hear that she has embarked on a career shift, metamorphosing as a first-year law student—but not abandoning her writing.

4. Reynaldo Garza is an early federal judge of color with an interesting personal history. Rodrigo, his wife Giannina, and the Professor discussed the judge's career in *Fifteenth Chronicle*, *supra* note 2.

"I actually did," Rodrigo replied. "I don't know if I told you, but Ray and Esmeralda, some friends of ours, are getting divorced. In my dream, Trina Grillo was warning Esmeralda not to choose mediation. It was one of those mixed-up dreams I sometimes have, with everything out of sequence. I don't think Trina even knew Esmeralda, but she was speaking to her warmly as though to a friend."

"Oh, what a loss! Trina was a loving, caring person, and, as you know, a leading critic of alternative dispute resolution, particularly for divorcing women. I found her work inspirational."

"Me too," Rodrigo echoed. "I woke up early, reread her Yale article,⁵ and have been thinking about it ever since. Would you like some coffee?"

"Oh, you're up. Here, let me take those bedclothes." The tall, smiling young woman who had just stepped into the room gave me a quick kiss on the cheek, then indicated the espresso machine that was starting to make inviting noises in the next room. "Like some coffee?"

"You know my weakness," I replied, accepting the mug Giannina handed me and pouring myself a steaming cupful. "Rodrigo tells me he's been dreaming of Trina Grillo."

"Another woman?" Giannina replied, smiling at her husband to show she wasn't serious. "He's been worried about our friends Ray and Esmeralda, who seem to be breaking up after nearly seven years together. I gather Trina was giving Esmeralda some sort of lecture on the pitfalls of mediated divorce."

Rodrigo poured himself a mugful of brew, added cream and his trademark four spoonfuls of sugar, and invited me to follow him to their kitchen table. "Have a seat, Professor. This area catches the morning sun, which should come streaming in any minute. Would you like some breakfast?"

"Coffee is fine for now. What were you thinking about ADR?"

"Oh—ADR," broke in Giannina. "We're just about to read up on that in my study group." Closing the door of the refrigerator into which she had been peering, she added: "We have several pieces on our list, including Professor Grillo's. Our civil procedure professor is a great booster. She never misses a

5. Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991).

chance to plug alternative dispute resolution, which she says saves money and time while reducing the risk and acrimony of a trial. Some of my fellow students and I have our doubts. So I'd love to hear what my husband is going to say."

"So, Rodrigo," I said. "Why do you think your friend is about to make a big mistake?"

I. IN WHICH RODRIGO REVIEWS TRINA GRILLO'S CRITIQUE OF ADR AND SHOWS THAT INFORMAL DISPUTING IS NOT A GODSEND FOR THE IMPECUNIOUS OR SMALL-STAKES DISPUTANT

After Giannina joined us at the comfortable kitchen table arrangement, a cup of steaming tea in hand, Rodrigo began:

"Professor Grillo wrote a few years ago, just as alternative dispute resolution—mediation, arbitration, neighborhood justice centers, consumer complaint panels, and so on—was taking off.⁶ Her warning was prophetic—as relevant today as it was then."

"She focused mainly on divorce mediation, as I recall," said Giannina.

"Correct," Rodrigo replied. "Although much of what she said applies equally to other methods of deformed justice, like consumer complaint boards.⁷ Her basic point was that despite its promise of a cheaper, faster, less intimidating means of disputing, deformed justice poses special risks for women and other disempowered disputants."⁸

6. See *id.* at 1547-51 (discussing the rise of mediation in family law). On the movement and its development, see Lisa Bernstein, *Understanding the Limits of Court-Connected ADR*, 141 U. PA. L. REV. 2169, 2172-77 (1993) (arguing that ADR programs may work to the detriment of poor litigants); Eric Q. Yamamoto, *Efficiency's Threat to the Value of Accessible Courts for Minorities*, 25 HARV. C.R.-C.L. L. REV. 341, 349-54 (1990) [hereinafter *Efficiency's Threat to Accessible Courts*] (providing historical context for the growth of ADR); Eric Q. Yamamoto, *ADR: Where Have All the Critics Gone?* (1996) (unpublished manuscript, on file with author). See generally Joshua Rosenberg & H. Jay Folberg, *Alternative Dispute Resolution: An Empirical Analysis*, 46 STAN. L. REV. 1487 (1994) (presenting findings from a commissioned study of ADR in the Northern District of California).

7. On the various settings in which ADR is used, see, e.g., Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1363-66 (providing an overview of the mechanics, claims, and contexts of ADR).

8. See Grillo, *supra* note 5, at 1549-50 (arguing that ADR suppresses the authentic voices of some participants, especially women).

"My professor discussed the supposed advantages in class recently," Giannina interjected. "Informal disputing with the aid of a friendly, trained third party promises a cooperative rather than adversarial means of resolving disputes that otherwise could drag on for months or years and leave the disputants angry and unhappy. It can frame solutions that take context into account—the particulars of an individual case—rather than being limited to fixed categories and rules, as is true in court. Each side gets to tell its story. Displays of emotion are not ruled out. And of course, it's speedier and less expensive than the in-court version."⁹

"All powerful advantages," I acknowledged. "What did Trina say in response?"

"She showed, with the aid of empirical studies and narratives from practice, that many of the touted advantages were illusory.¹⁰ She also supplied reasons, drawn from social science or psychoanalytical theory, why this is so.¹¹ Alternative dispute resolution may be speedy and cheap, but if you are a woman or member of a racial minority group, ADR is apt to compound the disadvantages you bring to the bargaining table.¹² Drawing on recent work in communication theory and radical feminist writing on the social construction of sex roles, she argued that mediated divorce poses special problems for women."¹³

"Some people who opt for ADR report that they like it," Giannina added. "My professor mentioned the other day that

9. See Delgado et al., *supra* note 7, at 1360 (summarizing claims of ADR proponents).

10. See Grillo, *supra* note 5, at 1555-64 (suggesting that ADR destroys narrative context).

11. See *id.* at 1572-81 (arguing that ADR's delegitimization of women's anger mirrors a more general suppression of female anger in Western culture).

12. See *id.* at 1550 (noting that women's relational sense of self undermines bargaining power); see *id.* at 1564 (noting that past behavior, and responses to past behavior such as blame or anger, are often unilaterally deemed irrelevant or counterproductive to ADR process); see *id.* at 1570-71 (noting that women are encouraged to think of familial commitments as primary, and wage labor commitments as secondary); see *id.* at 1594 (arguing that mediation imposes norms that fail to resonate with valid interpretations of the facts).

13. See *id.* at 1570-72 (arguing that, despite professedly inclusive aspirations, ADR perpetuates assumptions and stereotypes regarding the superiority of males as ideal workers and proper female emotional comportment).

surveys of consumer satisfaction show that many who go through deformatized dispute resolution feel good afterward."¹⁴

"Grillo concedes that this may be true in some cases," Rodrigo replied. "Since ADR magnifies power differentials, naturally the more empowered party, who has probably prevailed, is happy. Sometimes weaker parties are happy as well because they feel they got to tell their story.¹⁵ Even though they may have gotten a worse disposition than the one they would have gotten had they gone to court, they may not know this. ADR *feels* comfortable. The parties get to speak, rather than have their position put forward by a lawyer according to prescribed rules of evidence and a definite time and place for speaking.¹⁶ Everything is conducted in ordinary English. The parties meet around a small table, with comfortable chairs, in a back room somewhere."¹⁷

"You mentioned that ADR is especially bad for women," Giannina said. "Why is that? And do you think Esmeralda is at risk?"

"Esmeralda's pretty strong-willed," Rodrigo said. "You can decide whether she needs the warning or not. Grillo's point is that in our society many women are conditioned into an ethic of caring or connection.¹⁸ In addition, they are taught that their principal role is that of homemaker and mother.¹⁹ In a face-to-face mediation, they can easily accept too much responsibility for what went wrong. Feeling guilty that the other side is unhappy, they may give in when, had they been represented by a lawyer and gone to court, they might have won."²⁰

"Are you two ready for some breakfast?" Giannina asked. "We have eggs, muffins, and more coffee."

14. See *id.* at 1548-49 (discussing studies of divorce showing higher satisfaction rates with mediation than with adversary proceedings); Rosenberg & Folberg, *supra* note 6, at 1488-89 (citing a survey finding a two-thirds satisfaction rate among participants in mandatory ADR programs).

15. See Grillo, *supra* note 5, at 1545-49, 1581.

16. *Id.*

17. See Delgado et al., *supra* note 7, at 1366 (discussing the informality of process, and by extension, accessibility, as one argument proffered in support of ADR).

18. See Grillo, *supra* note 5, at 1601-03 (discussing scholarship positing an essential female "ethic of care").

19. See *id.* at 1602 (discussing arguments that any female "ethic of care" is a manifestation of systemic gender dominance).

20. See *id.* at 1570-71 (positing that women are conditioned to prioritize child care over wage labor, and that mediation may encourage or reinforce this self-conception).

I looked at Rodrigo. "I am. You know how airplane food is. I had a tiny snack on the flight out, all bread and only a tiny scrap of lettuce. I hope we're not prevailing on you because of your ethic of caring."

"Not at all," Giannina said with a laugh. "Usually Rodrigo is up ahead of me and makes coffee and breakfast. I did the honors this morning because the two of you were talking and I hate making up that hide-a-bed."

Giannina served up our steaming omelets and offered re-fills of coffee. As we dove in, Giannina said, "You were going to tell us about your dream."

II. HAD SHE LIVED: IN WHICH RODRIGO OUTLINES WHAT PROFESSOR GRILLO MIGHT HAVE ADDED TO THE CRITIQUE OF ADR HAD HER CAREER NOT BEEN CUT SHORT

"Oh, yes," Rodrigo said. "Trina was warning Esmeralda about mediation, especially in light of her young child. As you recall, Trina wrote that divorcing women with children are particularly vulnerable to the power imbalances of ADR.²¹ But then she went on to discuss ADR in general."

"What did she say?"

"She said she was planning to explore some of the broader dimensions of deformalization, in particular the way in which changing social conditions may be eroding the fairness-and-formality critique. She also said she hoped to demonstrate that an even more basic premise of ADR—namely, that conflict is pathology, an aberration from a peaceful norm or baseline—is false. Instead, things are the other way around, and conflict is normal. She likened it to the liberal view of race and racism, which holds that racism is an anomaly in an otherwise fair system, when the critics believe it's just the opposite.²² Then a noise woke me up."

"Rats," I said. "It must have been me trying to fold up the hide-a-bed."

21. See Grillo, *supra* note 5, at 1550 (suggesting that the tendency of women to think relationally makes them more vulnerable to making unwarranted concessions).

22. See, e.g., Richard Delgado, *Recasting the American Race Problem*, 79 CAL. L. REV. 1389, 1394 (1991) (arguing that racial subordination is an ingrained feature of our cultural and social landscape).

"Don't worry. I think I caught her meaning. I'd like to run it past the two of you if you have the time and patience."

"I'd love to hear," I said. When Giannina nodded, Rodrigo continued.

A. FAIRNESS AND FORMALITY: WHY THE CRITIQUE MAY BE LOSING GROUND

"The first critique is something the three of us have discussed before," Rodrigo began.

"In connection with lawyering, I believe."²³

"Exactly," Rodrigo replied. "But it began in connection with alternative dispute resolution."²⁴ The basic idea is that the formal values of American society are aspirational and egalitarian.²⁵ We have some of the best public values in the world—all men are brothers, every person is an equal moral agent, and so on. The average American knows this and, when reminded, will often act in truly egalitarian fashion, treating a black or a woman, say, with equal dignity and respect."²⁶

"But that's not always true in informal interactions," Giannina chimed in.

"No," Rodrigo replied. "In informal situations, with friends, in a bar or a private club, the same person who would behave in a genuinely fair-minded fashion at a Fourth of July picnic, with all the flags flying, feels much freer to tell an ethnic joke or act in a way that will hurt the job chances of a Chicano or African American."²⁷

"Women know this by a kind of instinct," Giannina added. "Certain men can be trusted to behave decently in front of others, or on an official occasion. That same man at a party, with others like him, may feel freer to hassle one of us or come on stronger than we want. Is this an aspect of what you mean?"

"It is," Rodrigo replied. "And Professor Grillo's critique of ADR captures just this idea. In-court adjudication of the for-

23. See *Tenth Chronicle*, *supra* note 1, at 1723-24 (noting, in a discussion of affirmative action, that the criteria of merit mask both stark disparities resulting from long-term formal racism and ongoing unconscious racism).

24. See generally Delgado et al., *supra* note 7, at 1367-90 (contrasting procedural safeguards in formal and informal adjudication).

25. See *id.* at 1383 (discussing American equality norms).

26. See *id.* at 1387-88 (arguing that expectations conveyed in formal adjudication discourage displays of prejudice).

27. See *id.* at 1385-86 (citing psychological research demonstrating that whites tend to exhibit increased prejudice in intimate situations).

mal variety is less apt to be infected with prejudice than the informal variety.²⁸ In court, you have all those reminders—the flags, the pomp, the judge sitting on high—that this is an occasion when the formal American values of equality, fairness, and so on, are to rule.²⁹ In nonformal settings, fewer such reminders confront the participants. If one is a woman, a gay man, a black, or any other outsider, one should opt for as much formality as one can afford.³⁰ All this ties in to a leading theory of prejudice,³¹ Rodrigo concluded.

"And you believe this situation may be changing?" Gianina asked.

"Professor Grillo implied that it might be so," Rodrigo replied. "I've been puzzling over what she might have meant."

"Perhaps it has something to do with the right-wing surge this country has been experiencing over the last few years," I ventured.

"She might well have been referring to that surge, with conservatives attacking affirmative action and multicultural programs on campuses,³² rolling back voting rights and redistricting for minority candidates,³³ and pressing for immigration reforms,³⁴ English-only laws and other measures offensive to Hispanics,"³⁵ Rodrigo replied. "They've cut out most forms of welfare for the poor.³⁶ If so, the situation may be flipping."

28. See Grillo, *supra* note 5, at 1586-92 (providing anecdotal and social-psychological evidence of partiality and prejudice in mediation).

29. See Delgado et al., *supra* note 7, at 1387-88, 1401 (noting that the American system of justice incorporates formalities designed to elicit respect and subvert prejudice); cf. Grillo, *supra* note 5, at 1589-90 (noting that the informal nature of mediation may encourage prejudice).

30. See Delgado et al., *supra* note 7, at 1387-89 (relying on social-psychology theory to conclude that procedural safeguards in formal adjudication counteract bias).

31. See *id.* at 1386-87 (discussing the "confrontation" theory, devised by social scientists, of how to curb racism).

32. See JEAN STEFANCIC & RICHARD DELGADO, NO MERCY 45-82, 109-36 (1996) (identifying court cases and federal and state legislation aimed at narrowing affirmative action, and discussing various organizations and their efforts on college campuses opposing multiculturalism).

33. See, e.g., *Miller v. Johnson*, 115 S. Ct. 2475, 2488 (1995) (holding Georgia's congressional redistricting plan unconstitutional).

34. See STEFANCIC & DELGADO, *supra* note 32, at 20-32 (addressing California's Proposition 187, federal immigration reform measures, and groups advocating reform).

35. See *id.* at 9-19 (referring to state laws designating English as the official language and federal bills proposing English-only citizenship ceremonies,

We were silent for a moment. Then I continued: "I think I see what you mean. The equation of 'higher' values with the public sphere is only contingently, not necessarily, true. In some societies, for example South Africa under the old regime, the official values were racist, namely apartheid. In that country, if one were a black, one would be better off looking to private sources for relief. Say you were a stranded motorist. An individual South African motorist might stop and help you when the police would drive straight by. The government was racist, but an occasional private citizen might be kind."

"And so you are saying that the United States is in the process of becoming more like the former South Africa, with informality being better than formality?" I asked.

"It might be," replied Rodrigo. "Many conservative judges and mean-spirited laws have been put in place. The situation bears watching. Professor Grillo's other observation is even more fundamental. Would you like to hear it?"

I looked at Giannina, who nodded. "I certainly would," I said. "Let me get these plates first."

B. CONFLICT AS PATHOLOGY: WHY THE MAIN NORMATIVE PREMISE OF ADR STANDS ON A DUBIOUS FOOTING

As I helped Giannina carry the plates to the kitchen sink just a few steps away, Rodrigo began:

"In my dream, Professor Grillo also told me that, had she had the opportunity, she would have questioned the most basic premise of the ADR movement, the idea that conflict is pathology. All the rhetoric and ideology of the deformalization movement highlight how mediation and its relatives can avoid the all-or-nothing, win-lose quality of adjudication.³⁷ ADR is not adversarial, but cooperative.³⁸ The parties look for a way to

election ballots, and education, and identifying the groups supporting these measures).

36. See *id.* at 82-95 (discussing congressional welfare reform).

37. See Grillo, *supra* note 5, at 1548-50 (enumerating the reasons advanced for using mediation); Robert B. McKay, *Civil Litigation and the Public Interest*, 31 U. KAN. L. REV. 355, 372 (1983) ("A case that is fairly settled not only avoids the increasingly expensive burden of a trial, but also avoids the all or nothing result typical of cases litigated to verdict."); Frank E. Sander, *Varieties of Dispute Processing*, 70 F.R.D. 111, 115 (1976) (contrasting the win-lose nature of adjudication with ADR's focus on the relationship between the parties).

38. See Delgado et al., *supra* note 7, at 1360-67 (providing an overview of ADR); Sander, *supra* note 37, at 111-18 (examining the characteristics of vari-

solve their problem. Issues of blame, anger, and revenge, if raised at all, are ruled out of bounds.³⁹ The idea is to go forward together in a search for the best solution to the problem, whether it's custody of the children, a barking-dog problem, or a car that won't run right."⁴⁰

"The whole thing has a sort of therapeutic quality," Giannina observed.⁴¹

"It does. That's why it appeals so much to social workers and others with similar training," Rodrigo said. "And that's the fundamental problem that Professor Grillo told me she would have addressed had she had the chance."

"Conflict as pathology," I mused aloud. "I think she had a point. In a society like ours, conflict is normal, the ordinary state of affairs. Our society is made up of competing classes in endless struggle: consumers and manufacturers; whites and the descendants of former slaves; workers and factory owners.⁴² This conflict is normal, maybe even healthy. Smoothing it over ignores something important. And structuring a dispute resolution system so as to treat its every manifestation as a sign of unhealth is a very big mistake."

"Maybe more than a mistake," added Giannina. "Adjusting divorcing women to their lot, or disappointed consumers to their mistreatment at the hands of General Motors, can take away indignation that might otherwise fuel reform."⁴³ Richard Abel and others point out that ADR atomizes disputes;⁴⁴ Owen

ous ADR mechanisms); see also *Efficiency's Threat to Accessible Courts*, *supra* note 6 (discussing growth of ADR).

39. See Grillo, *supra* note 5, at 1560 ("The informal law of the mediation setting requires that discussion of principles, blame, and rights, as these terms are used in the adversarial context, be deemphasized or avoided."); *id.* at 1572-81 (noting, specifically, the suppression of anger in mediation).

40. See *id.* at 1559-67 (asserting that mediation minimizes the role of principles and fault, resulting in a flawed basis for decisionmaking).

41. See *id.* at 1548-60, 1572 (explaining that mediation focuses on meeting the parties' mutual needs).

42. See THE FEDERALIST NO. 10 (James Madison) (discussing the role of "factions").

43. See Delgado et al., *supra* note 7, at 1391-98 (explaining the "left" critique of ADR).

44. See, e.g., Richard L. Abel, *The Contradictions of Informal Justice*, in 1 THE POLITICS OF INFORMAL JUSTICE 267, 272-74 (Richard L. Abel ed., 1982) (arguing that ADR magnifies state power at the expense of consumers and other small disputants); Delgado, *supra* note 7, at 1394-96 (citing concern that ADR splinters and disaggregates disputes); Laura Nader, *Disputing Without the Force of Law*, 88 YALE L.J. 998, 998, 1000, 1021 (1979) (noting ADR im-

Fiss notes that it deprives courts of the opportunity to articulate public values.⁴⁵ Maybe both observations are part of the insight that you, courtesy of Professor Grillo's apparition, are putting forward: namely, that conflict is not pathology but the ordinary and natural state of affairs in a radical free market-society like ours.⁴⁶

"You mentioned that the two critiques were connected in some way," I said, sensing that our conversation was about to come to a close. "Can you spell that out for us before we part company?"

Rodrigo looked at his own watch. "I can drop you off on my way, if you like, Professor. It's only a short drive. There's a bookstore on the way you might like to see."

"Thanks. I told the attorneys I'd be there a little early to go over my testimony. But I do have time to hear this last point, if you're ready."

III. IN WHICH THE FIRST TWO CRITIQUES CONVERGE AND RODRIGO OFFERS SOME THOUGHTS ON THE FUTURE OF ADR

"I am," Rodrigo replied, draining his cup and pouring himself a refill. "The connecting link is the idea of intersectionality⁴⁷ and multiracialism."⁴⁸

"Do you mean the way the U.S. population is rapidly diversifying?" asked Giannina. "With Hispanics expected to take over as the largest ethnic group of color sometime early in the next century, and whites ceasing to be a majority sometime around mid-century?"⁴⁹

pedes development of "an active and vital grassroots . . . consumer movement").

45. See Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984) (arguing that public officials involved in the adjudication process have an obligation to explicate public values).

46. On the relationship between caregiving and production in a free market society, see generally *Third Chronicle*, *supra* note 1.

47. On intersectionality—the problem of things or persons lying at the juncture of two or more legal categories—see *Sixth Chronicle*, *supra* note 1, and Trina Grillo, *Anti-Essentialism and Intersectionality: Tools To Dismantle the Master's House*, 10 BERKELEY WOMEN'S L.J. 16, 16-19 (1995).

48. On issues the United States will need to face as it moves to an increasingly diverse, multiracial society, see generally Deborah Ramirez, *Multicultural Empowerment: It's Not Just Black and White Anymore*, 47 STAN. L. REV. 957 (1995).

49. For these and other projected demographic changes, see *id.* at 958-69.

"That and more," Rodrigo replied. "Multiracial people, like myself, are increasing in number.⁵⁰ Some are even demanding their own census category.⁵¹ Black women are asserting their differences from white feminists, as well as from black, male-dominated civil rights movements.⁵² Gays and lesbians of color are asserting themselves.⁵³ Society is becoming more differentiated."

"And fractious," Giannina replied. "And that is why a dispute resolution system that treats conflict as pathological is less and less likely to serve us well. But you mentioned something about ADR being on a collision course with itself."

"Let's see if I can put it succinctly," Rodrigo replied. "Have the two of you heard the hope that ADR can offer a better form of justice to intersectional people, to black women or single mothers, for example?"

"I have," I replied. "At last year's American Association of Law Schools meeting, a speaker put forward just this view.⁵⁴ The idea is that nonformal justice, because it does not have to follow hard-and-fast, bright line rules designed with stable categories in mind, can do a better job of dispensing justice in nonrecurring, unusual situations or ones featuring nonstandard people, such as black women, gay Latinos, or lesbian single mothers."⁵⁵

"Professor Grillo wrote of this hope," Rodrigo replied, "without endorsing it.⁵⁶ But it seems to me that intersectional people who do not fit the cookie-cutter mold should not put

50. See Luther Wright, Jr., *Who's Black, Who's White, and Who Cares: Reconceptualizing the United States' Definition of Race and Racial Classifications*, 48 VAND. L. REV. 513, 557-58 (1995) (noting that the number of multi-racial individuals has increased dramatically in the last two decades).

51. See *id.* at 563-66 (proposing new race classifications, including a category for biracial Americans).

52. See e.g., Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 586-90 (1990).

53. See, e.g., Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL. L. REV. 1 (1995).

54. Susan Sturm, Opening Remarks at the Meeting of the Section on Remedies, Am. Ass'n of Law Schools, San Antonio, Tex. (Jan. 6, 1996).

55. See *id.*; Telephone Interview with Susan Sturm, Professor of Law, University of Pennsylvania (October 1995).

56. See Grillo, *supra* note 5, at 1548 (suggesting ADR avoids the objectivist approach, enabling "decisions . . . informed by context rather than by abstract principle"); *id.* at 1586-91 (noting the risk for minorities and other disempowered disputants).

their faith in normlessness. Instead, they should insist on new norms. Opting for the normless plasticity of ADR does indeed open the possibility that the mediator will craft a solution that better serves one's needs. But at the same time, it exposes one to the prejudices and unstated presumptions that are apt to come to the fore in exactly that sort of situation.⁵⁷ The more one strikes the other participants in the mediation as deviant and outside the norm, the more likely one is to find oneself cut off, foreclosed from expressing certain emotions or exploring the issues that are dearest to one's heart.⁵⁸ This is especially so if the aspect of one's make-up that is being litigated is the subject of social controversy, such as the right of gay parents to the custody of their children. To treat a case like that therapeutically, as though the only important result is finding a solution that serves the best interests of the children, is to guarantee a result tinged by bias. If you go to court, you may lose because doctrine is against you. But you may win. The judge may decide to change the doctrine.⁵⁹ The jury may decide to nullify the law.⁶⁰ At least you will get a hearing. If you opt for ADR you may get no hearing because the mediator and your adversary may marshal an entire constellation of attitudes and prejudices to shut you up and trivialize your pleas.⁶¹ At best, you will find yourself treated as an intriguing deviant in need of therapy—or as the one who is breaching the peace and needs to be persuaded to back off.⁶²

"And as society becomes more diverse, we will see more and more such claims,"⁶³ Giannina seconded.

57. See *supra* Part I (reviewing Grillo's critique of ADR).

58. See *supra* notes 10-13 and accompanying text (reviewing Grillo's critique of ADR).

59. See *Romer v. Evans*, 116 S. Ct. 1620, 1623 (1996) (upholding protection of gays in the face of a referendum that would have limited rights of political participation).

60. See Jeffrey Rosen, *The Bloods and the Crits*, NEW REPUBLIC, Dec. 9, 1996, at 27 (describing an increase in jury nullification in criminal trials in which the defendant is black and the jury is dominated by persons of the same color). For an argument that this is a valid response, see generally Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677 (1995).

61. See Delgado et al., *supra* note 7, at 1400 (asserting that ADR may increase the risk of class-based prejudice); Grillo, *supra* note 5, at 1560, 1563-64, 1585-86, 1588-96 (discussing problems of partiality and prejudice in ADR).

62. See Grillo, *supra* note 5, at 1586 (describing two mediation stories that illustrate the effects of prejudice).

63. On this demographic trend in the United States, see Ramirez, *supra* note 48, at 959-60 (noting the effects of increased diversity in American society).

"And more and more requests to treat them by alternative dispute mechanisms," Rodrigo added.

"Where they will be 'adjusted' in the direction of the normal—the straight white male way of seeing or doing things," I added.

"Which is why we must not succumb to the notion of conflict as pathology," Rodrigo concluded. "If so, we do ourselves a disservice. We atomize and render invisible those very claims that we should take seriously because they reflect a new, emerging social order. We ought to treat them directly and formally. Doing so confers on all of society a benefit—the opportunity to create new norms that will better serve a diversified people.⁶⁴ Invisible, back-room negotiation based on a therapeutic model and a false idea of conflict as pathology will hurt many individual disputants in the short term. In the long term, it will deprive society of opportunities to resolve a host of new issues, ranging from gay rights to sex roles in the family, and new norms respecting consumer safety and environmental protection."⁶⁵

"In that sense," I summarized, "conflict may not be pathology, but health. And, speaking of health, I need to stop taking advantage of your hospitality and think about getting to my hearing. At my age, running through court buildings in search of a hearing room is a bad prescription for longevity."

"We only need to allow"—Rodrigo looked at his watch—"less than ten minutes this time of day. When are you due?"

"Ten o'clock."

"We could have a second cup of coffee unless you need to get there early," Rodrigo offered.

"I'd much rather spend the time here than in some sterile waiting room. Especially if you have more thoughts on ADR."

64. See *supra* notes 58-62 and accompanying text (discussing how informal dispute resolution leads to singular decisions that fail to affect prevailing social norms).

65. See *supra* notes 58-62 and accompanying text (discussing the disadvantages of applying private dispute resolution to important social issues).

IV. THE IDEOLOGY AND TIMING OF THE ADR MOVEMENT: IN WHICH RODRIGO ADDRESSES THE QUESTION, WHY NOW?

"Speaking of timing," Rodrigo began, "have the two of you ever wondered why ADR is so popular—why it seems to be taking off right now?"

"I assume you have a theory of some sort," I said.

"I do," Rodrigo replied. "ADR is one of those ideas that appeals to both the left and the right. Republican business leaders love it because it fends off lawsuits that might bring bad publicity and high damages.⁶⁶ Moderate leftists like it because it enables them to think they are cutting down on acrimony and doing something useful for society."⁶⁷

"But in fact they are brushing conflict under the rug," Giannina interjected.

"More than that," Rodrigo replied. "They are not merely atomizing disputes but sidetracking them altogether. In adjusting the dissident to his or her situation, they take groups that are—or should be—spoiling for a fight, such as the poor, workers, consumers, and civil rights complainants, and offer them momentary peace. This smoothes things out for the corporate state, which naturally believes we have too many lawsuits because they are the ones getting sued."

"Doesn't the United States in fact have a high rate of litigiousness?"⁶⁸ Giannina asked. "My professor pointed out that in Japan, the percentage of lawyers is only a small fraction of what it is here. People solve their problems without going to court."⁶⁹

66. See, e.g., PETER HUBER, *LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES* (1988) (discussing high costs of the U.S. tort system). On capital's embrace of nonformalism, see Richard L. Abel, *Conservative Conflict and the Reproduction of Capitalism: The Role of Informal Justice*, 9 *INT'L J. SOC. L.* 245 (1981).

67. See, e.g., Rosenberg & Folberg, *supra* note 6, at 1510 (reporting that the ADR process used in the Northern District of California saved participants time and money, improved the efficiency of trial preparation, and increased prospects for early settlement).

68. See Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 *UCLA L. REV.* 4, 36-61 (1983) (analyzing and disputing this contention by comparing levels of litigation in the United States over time and with other countries).

69. See *id.* at 57-61 (examining cultural and institutional explanations for the low rate of litigation in Japan).

She mentioned a recent high jury award as an example of the evils of the current system."⁷⁰

"Of course our system allows some abuse," Rodrigo conceded, "but look at it from another point of view. Capitalism, ruthlessly pursued, encourages businesses to skirt the line of illegality."⁷¹ Lawsuits are a means of policing that line and assuring that the number of dangerous products is kept down. Much illegal and harmful conduct goes undetected and unpunished. Businesses count on this—normalize it—in setting their profit margin.⁷² Naturally, an increase in the number of lawsuits is seen as a sign of social pathology, as something abnormal."

"I know the argument that tort law is efficient; that it encourages businesses to take measures to prevent accidents as the cheapest cost-avoider."⁷³ So I can see why you oppose ADR for consumers, but what about divorce law? That's a huge area for ADR. In fact it's the main area Professor Grillo was concerned with," Giannina pointed out.

"Divorce law is efficient, too," Rodrigo replied. "It encourages careful calculation of budgets and separate maintenance awards."⁷⁴ It encourages separate treatment of separate things, like alimony and child custody.⁷⁵ It encourages uniformity of treatment through the development of benchmarks and the possibility of written appellate opinions.⁷⁶ By the same token, it encourages parties to settle, because the range of possible outcomes is known in advance.⁷⁷ Have the two of you noticed

70. See, e.g., C.W. Gusewelle, *Hot Coffee Steams Our Legal System*, DALLAS MORNING NEWS, Sept. 1, 1994, at A27 (criticizing a \$2.86 million award to a woman burned when she spilled a cup of restaurant coffee on herself).

71. See *Third Chronicle*, *supra* note 1, at 391-400 (questioning the compatibility of certain "caregiving industries" with the profit motive).

72. See *id.* at 392 (admitting that the desire of a firm in the productive sector to reduce costs "is good and to be expected").

73. See RICHARD A. POSNER, *THE ECONOMIC ANALYSIS OF LAW* 230-31 (3d ed. 1986) (arguing that the tort system "prices behavior in such a way as to mimic the market").

74. See generally HARRY D. KRAUSE, *FAMILY LAW* 514-80 (3d ed. 1990) (examining how the legal system apportions the economic consequences of divorce).

75. See *id.* at 514-80, 774-881.

76. See *id.* at 563-80 (noting trend toward more uniform treatment of such matters).

77. See *id.* at 757-80.

how ADR seems to be taking hold most strongly in those areas of greatest power imbalance between the parties?"

"You mentioned divorce, consumer complaints, and medical malpractice," I replied.⁷⁸

"My professor said that ADR is beginning to be used in civil rights and environmental disputes,"⁷⁹ Giannina added.

"In all these areas, powerful parties are able to make lawsuits go away by diverting them to ADR. Recent empirical studies, including a large-scale one by Professor Hermann and her colleagues,⁸⁰ show that mediation produces outcomes that favor the stronger party, even more so than standard, in-court lawsuits," Rodrigo added.

"Well, Rodrigo," I conceded, "you've explained why ADR has caught on so powerfully. Any movement that taps both conservative and liberal impulses is apt to be unstoppable.⁸¹ And, you've marshaled a case that ADR, for all of its touted advantages, is apt to prove harmful to both disempowered litigants and law reform in general.⁸² But why is ADR catching on now rather than, say, twenty or thirty years ago?"

"Business is ascendant right now," Rodrigo replied.⁸³ "The gap between the wealthy and the poor stands at one of its widest margins ever.⁸⁴ At the same time, a lot of liberals have

78. See *supra* notes 5-6, 66-67 and accompanying text (identifying popular areas for ADR).

79. See Edward Brunet, *The Costs of Environmental Alternative Dispute Resolution*, 18 ENVTL. L. REP. (Envtl. L. Inst.) 10,515, 10,616 (1988) (cautioning against the overuse of ADR in environmental cases).

80. See MICHELE HERMANN, THE METROCOURT PROJECT FINAL REPORT (1993). See generally Symposium, *Gender, Empiricism and the Federal Courts*, 83 GEO. L.J. 461 (1994) (containing articles by various authors, including Vicki C. Jackson, on the impact of various forms of disputing on women); Lisa G. Lerman, *Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women*, 7 HARV. WOMEN'S L.J. 57 (1984) (arguing that mediation in abuse cases fails to protect women); Proceeding, *What Happens When Mediation Is Institutionalized?*, 9 OHIO ST. J. ON DISP. RESOL. 307 (1994) (including comments by Leonard Riskin and Michelle Hermann).

81. See *supra* notes 66-67 and accompanying text (identifying diverse sources of support for ADR).

82. See *supra* Parts I, II.B (arguing that ADR exacerbates power imbalances and inhibits the evolution of social norms).

83. See, e.g., STEFANCIC & DELGADO, *supra* note 32, at 96-108 (discussing motivations behind recent attempts at tort reform).

84. See *Eleventh Chronicle*, *supra* note 1, at 78-79 (noting this trend and citing Keith Bradsher, *Gap in Wealth in U.S. Called Widest in West*, N.Y. TIMES, Apr. 17, 1995, at A1 (citing new studies that describe the United States as "the most economically stratified of industrial nations"); Spencer

relatively little to do. The civil rights movement is almost non-existent, and even environmentalism seems to be at a stand-still.⁸⁵ Instead of standing around looking at their hands, many liberals are turning into mediators. That way, they can at least tell themselves they are doing something useful—mediating conflict, making it go away.”

“A fair number of people on the left are writing books about conciliation and racial healing,” Giannina interjected. “Just the other day I saw one by a black writer writing about her first white friend.⁸⁶ Until recently, she had been a racial activist. Now she advocates loving everybody, including the race that enslaved her forebears.”⁸⁷

“And a well known critical race theorist has written a book about ‘racial healing.’⁸⁸ While not quite as unfocused as the other one, this book nevertheless urges the two camps to stop their feuding and get down to the business of learning how to live together,” I added.

“A kind of alternative dispute resolution writ large,” Giannina commented.

“It’s not just the left and liberals who are preaching accommodation and damning Balkanization,” Rodrigo added. “Dick Arney recently accused opponents of his flat-tax proposal, which would reward the rich and punish the poor, of practicing ‘class warfare.’⁹⁰ And of course we’ve seen how the Balkanization charge is leveled at proponents of ethnic studies

Rich, *Blacks Lose Ground with Jobs Despite Education Gains*, *Study Says*, WASH. POST, Apr. 30, 1995, at A8).

85. See Richard Delgado, *Stark Karst*, 93 MICH. L. REV. 1460, 1462 (1995) (reviewing KENNETH L. KARST, *LAW’S PROMISE, LAW’S EXPRESSION: VISIONS OF POWER IN THE POLITICS OF RACE, GENDER, AND RELIGION* (1993) and suggesting that liberalism has less appeal because “we are not currently in particularly hard times”).

86. See PATRICIA RAYBON, *MY FIRST WHITE FRIEND: CONFESSIONS ON RACE, LOVE, AND FORGIVENESS* 84-101 (1996) (offering an open letter to a white high school acquaintance).

87. See *id.* at 10 (describing her movement toward racial reconciliation as “rejecting a racial agenda and embracing forgiveness for people I have always identified as ‘the enemy’”).

88. See HARLAN L. DALTON, *RACIAL HEALING: CONFRONTING THE FEAR BETWEEN BLACKS & WHITES* (1995).

89. See, e.g., DINESH D’SOUZA, *ILLIBERAL EDUCATION* 236-42 (1991) (decrying fragmentation on campuses).

90. Dick Arney, *Ground Rules For Flat Tax Debate*, WASH. TIMES, Feb. 14, 1996, at A14; see also G.A. Pollin, *Class Warfare Stuff and Nonsense*, WASH. TIMES, Apr. 14, 1996, at B5.

curricula at universities, theme houses for minority students,⁹¹ and even at opponents of English-only measures that punish the foreign born for speaking their own languages in the workplace,⁹² I said.

"Curious in a country founded on the idea of popular rule. Thomas Jefferson even thought we should have a revolution every few years," Rodrigo chimed in.⁹³ "It's interesting how conservatives cite the founding fathers and original intent when it suits their purposes and not at other times."

"Speaking of time," Rodrigo said with a start after taking a quick look at his watch, "if we're going to get you to the courthouse on time, we'd better get going."

"I've got my bags right here," I said, standing up and giving Giannina a quick hug. "Thank you for your hospitality. It's ten times better than spending the night in some sterile hotel."

"You were going to tell us how you made it back from exile," Giannina reminded me.

"Maybe I'll tell Rodrigo in the car and let him share it with you later, if you don't mind," I replied. "It's not nearly so dramatic a story as you might think."⁹⁴

A few minutes later, Rodrigo and I were zooming along the freeway in the direction of the courthouse. I briefly buried myself in my notes, then, when I felt ready, told Rodrigo the story of my return.⁹⁵ The ride passed quickly. As we neared the

91. See D'SOUZA, *supra* note 89, at 20 (professing to document this charge through interviews and research conducted at a number of major universities).

92. See STEFANCIC & DELGADO, *supra* note 32, at 12 (citing comments by leaders of the official language movement).

93. On Jefferson's belief in the salutary effect of periodic revolutions, see Letter from Thomas Jefferson to James Madison (Jan. 30, 1787), in THE PORTABLE THOMAS JEFFERSON 415, 416-17 (Merrill D. Peterson ed., 1975).

94. On Rodrigo's dramatic return from exile, see *Second Chronicle*, *supra* note 1, at 1183-86. On the Professor's much tamer one, see note 95 *infra*.

95. In the concluding chapter of RICHARD DELGADO, *THE COMING RACE WAR? AND OTHER APOCALYPTIC TALES OF AMERICA AFTER AFFIRMATIVE ACTION AND WELFARE* 148-65 (1996), the Professor takes early retirement and departs for Mexico rather than face a "citizenship audit" sparked by the government's belated discovery that his father had been an illegal alien. After passage of a new measure withdrawing citizenship from children born in the United States of undocumented aliens, the Professor receives a form query, to which Rodrigo reacts with surprise and indignation, offering to defend his mentor and friend for free. See *id.* at 151-52. Instead, the Professor, whose family is grown, packs his office, grades his last set of bluebooks, purchases a Winnebago, and returns to the country of his birth. *Id.* at 148-52. The birth of a grandchild, however, causes him to make a series of return trips to the

court building, I spied the lawyer for the plaintiff group engaged in intense conversation with two others on the steps leading up to the court building.

"Oh, oh, Professor. They could be settling your case right now," Rodrigo alertly commented. "Do you want me to wait around and see if you'll be needing a ride to the airport? Settlement, a kind of ADR, might be on the verge of rendering your whole trip here moot."

Rodrigo pulled into the yellow zone while I stepped out and looked inquiringly at the lead attorney. "Come on," she mouthed and waved in my direction.

"Looks like I'm needed," I said to Rodrigo. "They're going ahead after all."

"Great," said Rodrigo. "Give 'em heck." As his little car disappeared from sight, I walked up the courthouse steps with the lead attorney. "I'm glad you're here," she said. "The district offered to settle, but on completely unsuitable terms. We've got our work cut out for us."

I took a deep breath, squared my shoulders, and got ready for yet another battle on behalf of the poor and oppressed.

States, see *Thirteenth Chronicle: Legal Formalism and Law's Discontents*, 95 MICH. L. REV. 1105 (1997), and he decides to explore the possibility of a permanent return. While carrying out genealogical research in the national archives, he discovers that his ancestors were Chichimec Indians, who ranged as far north as what is now Texas and Arizona. He writes a letter to the Immigration and Naturalization Service, calling their attention to this fact and the possibility that his own father may not have been an illegal alien, after all. The agency, after a long silence, writes him that he is no longer on their "active list" and is free to return at any time.

