1988

ADR and the Dispossessed: Recent Books about the Deformalization Movement Symposium on Informal Dispute Resolution

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RICHARD HOFRICHTER, *Neighborhood Justice in Capitalist Society: The Expansion of the Informal State*. New York: Greenwood Press, 1987. Pp. 192. $35.00.

CHRISTINE B. HARRINGTON, *Shadow Justice: The Ideology and Institutionalization of Alternatives to Court*. New York: Greenwood Press, 1985. Pp. x+216. $29.95.

STEPHEN B. GOLDBERG, ERIC D. GREEN, AND FRANK E. A. SANDER, *Dispute Resolution*. Boston: Little, Brown & Co., 1985. Pp. 594. $28.00

INTRODUCTION

Early writing on Alternative Dispute Resolution (ADR)—that loose collection of decentralized, deformalized procedures, including mediation, arbitration, ombudsmen, consumer complaint panels, and neighborhood justice centers—was almost uniformly congratulatory.[1] The movement appealed

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The author is indebted to his colleague, Mari Matsuda, for inspiration and criticism, and to Kathleen Bliss and Craig Reffner, his research asssistants.

1. E.g., Burger, Our Vicious Legal Spiral, 16 Judges J. 23 (Fall 1977); *id.*, Isn't There a Better Way? 68 A.B.A. J. 274, 275 (1982); Sander, Varieties of Dispute Processing, 70 F.R.D. 111 (1976); Bok, Law and Its Discontents: A Critical Look at Our Legal System, Bar Leader, Mar.-Apr. 1983, at 21. Recently, a revision of a Civil Procedure casebook was promoted in the following terms:

> Within the past decade the winds of change in American civil procedure have been blowing with extraordinary force. The most portentous draft is the one that has alerted the country to the need for non-court alternatives to resolve legal disputes. Judges, scholars, legislators and bar leaders are searching energetically for new mechanisms. A major "alternatives" movement has developed in the law and the law schools. Courses in civil procedure already feel the effects of this movement. . . . Casebooks clearly must reflect this development.

both to the technocratic-managerial instincts of the right and moderate center, as well as to the desire of many on the political left to avoid the polarization, contentiousness, and all-or-nothing character of formal, in-court justice. Drawing support from across the spectrum, the ADR movement grew rapidly.

The first wave of writing praising ADR emphasized both quantitative and qualitative virtues. Backers urged that informal justice could help clear congested court calendars and save governments, as well as disputants, time and money.[2] Many maintained that ADR could provide not only speedy and inexpensive justice but higher quality justice as well. ADR was nonintimidating. It could attract disputants who were put off by the formality and jargon of the judicial system.[3] Moreover, ADR promised solutions that were more flexible and humane than those that could be obtained in court. Alternative procedures could frame a "creative" solution to the disputants' problems, one that avoided the all-or-nothing, win-lose feature of judicial resolution. ADR could thus protect the feelings and possibility of a continuing relationship among the parties, both substantial goods.[4] Scholarship and speeches in this vein—promoting ADR for its purported quantitative and qualitative benefits—proliferated. A recent bibliography of writings on ADR contains over 65 pages of titles, almost all in a positive vein.[5]

More recent writings about ADR have been more nuanced. Several respected writers have criticized the politics of ADR or questioned its ability to deliver the promised benefits.[6] At the same time, the proponents' claims have become more modest and less global. Many have retreated from the early optimistic quantitative claims—according to which ADR would ease court congestion and clear dockets, for example—to the less easily attacked position that irrespective of quantitative virtues, alternative justice was qualitatively better than the standard kind.[7]

Three recent books illustrate this trend. Richard Hofrichter's *Neighborhood Justice in Capitalist Society: The Expansion of the Informal State*, is a powerful

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Foundation Press, Announcing a Major Revision of a Renowned Casebook 1 (Jan. 1985) (promotional release on file with author).

2. See Burger, sources cited in note 1; Miranker, Silicon Valley Courts Alternatives to Lawsuits, S.F. Examiner, Dec. 1, 1985, at D-1, col. 1.

3. E.g., Bok, Bar Leader (cited in note 1).

4. E.g., Preface, Dispute Resolution, 88 Yale L.J. 905 (1979); Cattani, From Courthouses of Many Doors to Third Party Intervenors, Christian Sci. Monitor, Jan. 17, 1979, at 12–13; McKay, Civil Litigation and the Public Interest, 31 U. Kan. L. Rev. 355, 369 (1983).

5. American Bar Association Special Committee on Alternative Means of Dispute Resolution, A Selected Bibliography (1985).

6. E.g., Abel, The Contradictions of Informal Justice, *in* R. Abel, ed., 1 The Politics of Informal Justice 267 (1982) ("Abel, Politics"); Nader, Disputing Without the Force of Law, 88 Yale L. J. 998 (1979); Hofrichter, Justice Centers Raise Basic Questions, *in* Neighborhood Justice: Assessment of an Emerging Idea 193 (1982); Delgado et al., Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution, 1985 Wis. L. Rev. 1359.

7. See J. Marks, E. Johnson, & P. Szanton, Dispute Resolution in America: Processes in Evolution 51–56 (1984) (recognizing problems with ADR); see also the discussion that follows immediately here.

critique from the left. Focusing on NJCs, Hofrichter argues that these forums are not supported by nor responsive to the communities they serve. Rather, the typical center is "an alien institution inserting itself into the community, using the discourse, interactions and values of community culture against itself" (at xxiii). The centers do this by devoting more energy to "cooling out" disputants than to determining on whose side justice lies (at 151). Moreover, by atomizing disputes and focusing on the particular, they discourage political organizing, legitimate austerity, and extend state power into areas of life where it formerly did not reach (at xiv, xxv, 89-95, 110, 151). There is little indigenous clamor or support for NJCs in the communities they serve; they must rely on publicity and referrals from courts for clients (at 98-99). NJCs thus employ the rhetoric, but not the reality, of community—a force normally opposed to capitalism—in a kind of thinly veiled co-optation. The rhetoric of justice, rights, conflict recedes, replaced by that of compromise, feelings, and a version of community that looks suspiciously like the status quo (at 110, 142-58).

A second book about NJCs, Christine Harrington's *Shadow Justice: The Ideology and Institutionalization of Alternatives to Court*, echoes some of these same conclusions but incorporates a sociological-empirical dimension. Drawing on earlier work by Richard Abel and other critical writers, Harrington puts forward the postulate that deformalized justice is concerned more with order maintenance than social justice (at 2-5, 43-72). Although its backers rarely admit it, deformalized justice is a technique by which managerialism uses state power and persuasion to defuse confrontation (at 43-72, 170). ADR extends state power by co-opting potential sources of opposition and by injecting bureaucratic-managerial objectives and values into community life (at 15, 106, 170). Yet this transformation appears noncoercive, freely adopted by the disputants and the communities they represent. ADR works by appearing to give disputants benefits and incentives in return for their agreement to mediate; the carrot is used more often than the stick (at 96, 105-37, 170-73). Yet, her study of the Kansas NJC found a large proportion of court-referred cases, where coercion plainly played an important part in bringing parties to the center (at 108-21).

Harrington lays out the contradictions not only of ADR's rhetoric and publicity but also of the means it uses to measure its own success. Many of ADR's claims rest on user satisfaction surveys. Yet, Harrington observes, satisfaction is a measure of the discrepancy between what a disputant expects and what he or she gets. Since ADR frequently draws only on those who want informality, it is not surprising that they are satisfied when they receive it (at 141-44). The many grievants who do not opt for an ADR forum are never canvassed; their feelings about ADR are never reflected in the survey results. When, due to subtle or not-so-subtle pressures, unwilling disputants are brought before a deformalized forum, the forum typically cools out their ex-

pectations long before a result is reached (at 89-90, disputes redefined; see also Hofrichter at 151). This reduction of expectations also contributes to higher reported satisfaction. Harrington's book concludes by deeming ADR a movement of "anxious professionals and unwilling participants."[8]

A third book, Goldberg, Green, and Sander's *Dispute Resolution*, a casebook intended for use in law school courses, presents a mixed message. Many of the articles reprinted or excerpted have an uncritical, "booster" tone or else assume the validity of ADR's premises and goals[9] (something that Harrington does not do); yet, other selections—and especially the authors' introductory and connecting passages—are reflective and circumscribed in their claims. For example, the Goldberg et al. materials raise the question whether ADR may injure women in the course of divorce or domestic mediation;[10] whether mediation and settlement compromise broad lawmaking functions and reaffirmation of principle, for the sake of peace (at 14, 490); whether ADR's qualitative and quantitative superiority over adjudication can be verified empirically (at 5–6, 14); and whether deformalized justice is possible when the disputants have differing levels of prestige and power (at 11, 113, 490). Thus, while the book is vulnerable to criticism,[11] it at least has the virtue of being more even-handed than most previous collections about ADR.

A basic presupposition of the Goldberg et al. book, as well as of much other work in the pro-ADR vein, is that the limitations and dangers of ADR can be avoided by vigilance—by being aware of and making allowances for them (at 10–11, 150, 162–63). If we wish to retain the benefits of ADR and avoid the detriments, it is only necessary to perform functional analysis, so that cases are referred to the "correct" forum (*id.*).

The remainder of my essay questions the feasibility of this general approach, putting forward two lines of criticism of ADR's goals and means. Part I proposes that ADR is in many cases not a method of addressing disputes or social problems but rather of avoiding them. Part II suggests that when an alternative forum considers claims pressed by certain classes of grievants, the forum's structure exposes them to an increased risk of an outcome colored by prejudice. If either criticism has merit—if ADR either denies problems or makes them worse—no amount of tailoring-to-forum will bring redemption.

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8. Harrington at 172–73, *quoting* U.S., Dep't of Justice & Nat'l Inst. for Dispute Resolution, Ad Hoc Panel on Dispute Resolution and Public Policy, Paths to Justice 2–3 (1983).

9. Passages that appear to treat nonformalism as an unqualified good appear throughout the Goldberg et al. volume, e.g., 33–49 (how to negotiate effectively); 102-4 (how to get people to mediate); 196–201 (how to be an ethical arbitrator); 271–288 (how to save time and money with mini-trials); 347–69 (ch. 7, "Neighborhood Justice Centers") (enthusiastic treatment of NJCs, contrasting markedly with those of Hofrichter and Harrington); 503–16 (how to get funding for nonformal programs); 539–54 (planning to integrate ADR into legal process).

10. *Id.* at 11, 502. See also Rifkin, Mediation from a Feminist Perspective: Promise and Problems, 2 Law & Inequality J. 21 (1984) (cited elsewhere in volume); Lefcourt, Women, Mediation, and Family Law, 18 Clearinghouse Rev. 266 (1984) (warning of ADR's ineffectuality in spousal abuse cases).

11. See in this issue Barbara Yngvesson, Disputing Alternatives: Settlement as Science and as Politics; 13 Law & Soc. Inquiry 000 (1988) (reviewing the Goldberg et al. volume).

HOW TO SOLVE INTRACTABLE SOCIAL PROBLEMS—ADR AND THE POLITICS OF DEFORMALIZATION

There are only a handful of basic ways in which our society responds to insoluble social problems—ones that, like blacks' demands for justice, women's claims for comparable worth, consumers' demands for well-made, reasonably priced goods, workers' demands for a larger share of the industrial pie, and everyone's desire for a safe, nonpolluted environment, cannot be solved at an acceptable cost.[12]

If those agitating for reform are aroused and united, we cannot dismiss their problem as a nonproblem or the claimants as nonpersons (as we once did with slaves or do today with children and the insane). That would simply inflame them further. The only solution is to seem to be addressing the problem, but without doing anything that threatens the status quo too drastically.

This can be done in either of two ways: As with civil rights law, we can redefine the problem so that it becomes very small and circumscribed.[13] Then, we can use rhetoric and repetition in an effort to get everyone to accept that this is what the problem really is. Thus, we can adopt rules requiring narrow chains of causation, an intent requirement, and elevate formal neutrality above nonsubordination principles—and say, "If you (Third World plaintiff) satisfy all these requirements, then and only then has there been redressable racism."[14] Outside this area, complaints are nonracial, mere generalized lamentations that the world is not perfect. Indeed, continued agitation can be used against the grievants. With all our carefully designed remedial law in place, minorities' failure to succeed only proves their lack of ability or unwillingness to work hard; their continuing demands, their lack of reasonableness and desire for something more than fairness—for handouts and coddling.[15]

This first route has been highly successful. It has kept down the number of racial-justice claims, delegitimized others, and forced minority claimants to negotiate a labyrinth of technical obstacles. A small liability with this approach is that a few plaintiffs will successfully negotiate the maze and prevail in court.[16] But this may turn out to be an advantage. The rare perpetrator found guilty of intentional, narrowly defined racism can be seized and made the object of a public degradation ceremony.[17] The rarity of such events con-

12. See, e.g., Bell, Minority Admissions, and the Usual Price of Racial Remedies, 67 Calif. L. Rev. 1 (1979); D. Bell, Race, Racism, and American Law 1–51 (1980) (cost of racial justice for blacks too high; whites refuse to pay it, instead shift cost to blacks and lower-class whites).

13. See Freeman, Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine, 62 Minn. L. Rev. 1049 (1978).

14. See *id.*

15. See Delgado, The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want? 22 Harv. C.R.-C.L. L. Rev. 302, 303-10 (1987).

16. Cf. Delgado et al., 1985 Wis. L. Rev. (cited in note 6) (suggesting that, for minorities, formal in-court adjudication is preferable to its alternatives).

17. See Freeman, 62 Minn. L. Rev. (cited in note 13) (discussing "perpetrator" perspective,

vinces us that racism is indeed aberrant and outside the norm—an anomaly in an otherwise healthy, nonracist social system.[18]

This tack—narrow definition of the problem—will work well with populations that have great respect for the law and will accept its redefinition of their problem uncomplainingly, or who believe they can somehow turn the concrete formality of race reform law to their advantage.[19]

A second approach is to enlarge the problem—to concede its existence but insist that it is much broader than most realize, that its solution entails expanding the context and taking account of a multitude of factors not ordinarily considered part of the problem.[20] This magnified version of the dispute must then be given to a decisionmaker of great wisdom and discretion, one capable of taking into account many things at once—the background of the dispute, the setting against which it occurs, the nature of the disputants, their past, present, and likely future relationship, and so on.[21] When "the problem" is transformed into something so complex and multifaceted that no simple legal formula can encompass it, it is also likely that no single remedy—such as an injunction or damages—can solve it. Instead, we must strive to avoid simplistic win-lose thinking and look for creative solutions that maximize many variables at once.[22] Equally important, the approach must be contextualized, because no two cases, no two sets of litigants, will ever display exactly the same set of relevant characteristics. Since dozens, perhaps hundreds, of details are relevant to a case's resolution, the likelihood that identical cases will recur is remote. Therefore, we can dispense with stare decisis, the rule of law, written opinions, and judicial review.[23]

If we can get complaining groups—say, mistreated women, disgruntled workers, or residents complaining of environmental nuisances—to agree to this view of their problem, considerable gains will accrue. Their agreement will postpone the day they coalesce to combat their common grievance. Moreover, the long list of relevant items will help diffuse indignation; we may even be able to get them to admit that their problem is partly their own fault.

This approach will work with groups who distrust law (the opposite of the first group),[24] who do not want to cause trouble, who are prone to think of problems as caused by lack of caring or failure to communicate.[25] The movement toward alternative dispute resolution illustrates the second approach. Relegating many problems to alternative forums is enormously beneficial to

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in which racial remediation law focuses on vicious-willed racists, punishes them, and deems racism cured).

18. *Id.*

19. Cf. Delgado et al., 1985 Wis. L. Rev. (cited in note 6).

20. Hofrichter at 82, 147; Goldberg et al. at 369–71; Delgado et al., 1985 Wis. L. Rev. at 1367, 1374.

21. Sources cited in note 20 *supra*.

22. See *supra* note 4 and accompanying text.

23. Delgado et al., 1985 Wis. L. Rev. at 1374; Hofrichter at 146.

24. See *supra* note 19 and accompanying text.

25. Cf. Hofrichter at 121–58; Goldberg et al. at 91.

those in power. It takes the sharp edge off claims, diffusing them into generalized grievances to be worked out, harmoniously if possible, on a case-by-case basis. It is an excellent way of seeming to be doing something about intractable social problems while actually doing relatively little. It enables us to "bury" claims in a mass of irrelevant detail. ADR, in short, is a powerful means of replicating current social arrangements and power distributions. Replication occurs because problems are not faced, responsibility is diffused, grievants are cooled out, while everyone leaves thinking something positive has been done.

WHEN GRIEVANCES REFUSE TO REMAIN BURIED: ADR AND THE SOCIAL SCIENCE OF PREJUDICE

Some grievances will not succumb to burial. They will retain their sharp edges despite being embedded in a mass of extraneous detail. The grievant will decline ADR's demand for peace, for compromise, and insist that his or her problem be dealt with in accord with justice. In disputes of this type—ones that retain their initial polarity—a second problem with ADR emerges: ADR may expose vulnerable disputants to a heightened risk of class- or race-based prejudice. ADR has been promoted, to a large extent, under the banner of egalitarianism. Moreover, it is aimed at groups—such as consumers, workers, the poor, or divorcing women—that are particularly vulnerable to stigma and bias. Thus, if ADR, rather than helping members of those groups obtain justice, affirmatively injures their chances, ADR will be at best a very mixed blessing.

The argument that this is so proceeds in three steps. The first is to observe that ADR, in contrast to formal, in-court adjudication, contains relatively few checks and rules to confine prejudice. The second is to understand, with the aid of social science analysis, how prejudice works. This will entail an examination of leading theories of prejudice and prejudice's expression to see how different settings encourage or discourage prejudiced behavior. The final step consists of applying social science knowledge to the formalism/nonformalism dichotomy in dispute resolution.

Formal Adjudication and Constraints on Prejudice

Formal adjudication contains a multitude of rules and practices the effect, and sometimes intent, of which is to constrain bias and prejudice. These range from rules dealing with disqualification of judges[26] and jurors for bias,[27]

26. See Code of Judicial Conduct Canon 3(c)(1)(a) (1972).

27. See A. Ginger, 1 Jury Selection in Civil and Criminal Trials 45 (1985); 28 U.S.C. 144, 455 (1982).

to rules that protect the jury from prejudicial influence.[28] Judges may admonish jurors not to discuss the case with outsiders or read news accounts of the trial.[29] Severe sanctions may be imposed on persons who attempt to bias or tamper with a jury.[30] Moreover, studies indicate that simply becoming a member of a jury has a fairness-inducing effect on jurors, causing them to display a greater degree of impartiality and fairness than they ordinarily do in daily life.[31]

In addition, rules of procedure and evidence constrain the scope of irrelevant inquiries, possible sources of prejudice or bias. Pleadings that contain scandalous or irrlevant material may be stricken;[32] questioning of witnesses that is too wide-ranging or intrusive may be stopped.[33] The pleadings and pretrial order confine the matters tried to the relevant issues.[34] Rules of ethical responsibility exhort lawyers to treat each other, the opposite party, and the court with respect.[35]

Formal adjudication thus contains a panoply of rules and practices that limit discretion—discretion that could be wielded against a black, a female, or a member of some other outgroup. ADR, to date, has few such devices. Indeed, the lack of procedural complexity is touted as an advantage—it enables ADR to be speedy, flexible, and nonintimidating. This is, of course, only to say that ADR opens the door to prejudice somewhat wider than does formal, in-court adjudication. Whether any characteristic of ADR affirmatively encourages or brings out such behavior is the next question to be explored.

Theories of Prejudice and Nonformal Disputing

To say that prejudice is possible in ADR—that the absence of formal rules and structures permits prejudice—is not to say that prejudice is likely, much less certain, to manifest itself. Yet, a consideration of social science writing on prejudice suggests that this likelihood is very real.

There are a number of overlapping theories—psychodynamic theories,[36]

28. Ginger at 23–24; 18 U.S.C. 1503 (1982); 42 U.S.C. 1985 (1982).

29. Cf. Ginger at 59; United States v. Johnson, 584 F.2d 148, 155 (6th Cir. 1978); *cert. denied*, 440 U.S. 918 (1979).

30. See note 28 *supra*.

31. H. Kalven & H. Zeisel, The American Jury 494 (1966).

32. Fed. R. Civ. P. 12(f). See also *id.* R. 11 (permitting assessing costs against attorneys who plead in bad faith).

33. See Fed. R. Evid. 403; see *id.* R. 103, 105.

34. See Fed. R. Civ. P. 16; Brook Village North Assocs. v. General Elec. Co., 686 F.2d 66, 71 (1st Cir. 1982).

35. Model Rules of Professional Conduct, Rule 4.4 (1983).

36. See T. Adorno, E. Frenkel-Brunswick, D. Levinson, & R. Sanford, The Authoritarian Personality (1969); G. Simpson & J. Yinger, Racial and Cultural Minorities: An Analysis of Prejudice and Discrimination 78 (4th ed. 1972) ("Simpson & Yinger"); see generally Lawrence, The Id, the Ego and Equal Protection: Reckoning with Unconscious Racism, 39 Stan. L. Rev. 317 (1987).

socio-economic theories,[37] and social-psychological/learning theories[38]—that seek to explain how it is that individuals in our society come to harbor prejudice toward outgroups. For our purpose, it is not essential to single out one "best" theory; indeed, it seems likely that no one theory can explain the complex, multifaceted phenomena of racism.

Whatever its origin or etiology, prejudice is widespread in American society—surveys and polls indicate that most Americans harbor some degree of prejudice toward members of groups other than their own.[39] The *expression* of prejudice is far from simple, however, and certainly not automatic. Most Americans feel constrained by the provisions of the "American Creed," which emphasizes egalitarianism, fairness, and justice for all.[40] Prejudice's expression is therefore said to be context-bound, or environmentally conditioned.[41] Some settings remind us of the need to act according to our "public" values—the values of the American Creed. In other, more intimate settings, we feel more comfortable telling a racial joke, discriminating against a Jew or black, or treating a woman or child dismissively.[42]

Unlike with theories of prejudice's origins, there is relatively widespread agreement among social scientists on how prejudice is best contained. Much prejudice is environmentally induced—individuals express it because the environment encourages or tolerates it.[43] In some settings, persons feel free to act in prejudiced fashion; in others, they do not. The principal feature that suppresses prejudice is the certainty that prejudice, if displayed, will be remarked and punished—that it will not be tolerated but will result in active condemnation. This "confrontation" theory[44] is probably the majority view among American social scientists today on how best to contain and discourage prejudice.

These social science insights shed light on the ability of different dispute resolution forums to minimize bias. The formalities of a court trial are calculated to check prejudice. The trappings of formality—the flags, black robes, the rituals—remind the participants that trials are occasions on which the higher values of the American Creed are to preponderate, rather than the less

37. E.g., J. Kovel, White Racism—A Psychohistory 44 (1984) ("Kovel, White Racism"); I. Katz, Stigma—A Social Psychological Analysis (1981) ("Katz, Stigma"); G. Myrdal, An American Dilemma (1962) ("Myrdal").

38. G. Allport, The Nature of Prejudice (25th Anniversary Ed. 1979) ("Allport"). See Simpson & Yinger at 107; M. Goodman, Race Awareness in Young Children (rev. ed. 1964).

39. Allport at 79–80, 197–202. See Racism Flares on Campus, Time, Dec. 89, 1980, at 28 (racism now acceptable in some quarters following change in national mood).

40. The term *American Creed* was coined by Myrdal (cited in note 37). It includes values that stem from the tenets of democratic and Judeo-Christian teachings, *id.* at 23.

41. See Allport at 337–38; P. Van den Berghe, Race and Racism 20–21 (2d ed. 1978).

42. See generally Myrdal; Katz, Stigma at 23; Kovel, White Racism at 54–55.

43. See *supra* notes 39–42 and accompanying text.

44. E.g., Katz at 16, 109; Allport at 327–28; Katz & Gurin, Race Relations and the Social Sciences: Overview and Further Discussion, *in* I. Katz & P. Gurin, eds., Race and the Social Sciences 342, 373 (1969); Westie, The American Dilemma: An Empirical Test, 30 Am. Soc. Rev. 527, 529 (1965).

noble values we embrace during times of intimacy. Equality of status is sought to be preserved—each party is represented by a lawyer and has a prescribed time and manner of speaking. Counsel direct their arguments not toward each other but toward a neutral judge or jury. Adjudication avoids the unstructured, unchecked, low-visibility types of interaction that, according to social scientists, foster prejudice. The rules confine litigants and counsel to relevant matters, coercing them to remain on point, thereby limiting their ability, at least overtly, to call up and evoke status- or class-based differences among the parties.

Recent writing on the psychology of the victims of racism suggest that formality deters unfairness in a third way. It not only encourages mediators and disputants of the majority race to behave more fairly than they otherwise might; it also encourages minority-race persons to press their claims more forthrightly. The assurance that an encounter is governed by ostensibly neutral rules and procedures counteracts defeatism and apathy born of sad experience.[45] The more assertive behavior of minority claimants becomes self-fulfilling; they act as though they will be treated fairly, and this causes others in fact to treat them more fairly than they otherwise might.[46]

CONCLUSION

Deformalized justice can defuse legitimate grievances by burying them in a mass of detail. Just as courts and legislatures can narrow legal rules so that entire categories of grievance become unrecognizable, shrunken versions of their former selves, ADR can, by expanding disputes beyond recognition, cause them to lose their urgency and sharp edges. When ADR cannot avoid dealing with sharply contested claims, its structureless setting and absence of formal rules increase the likelihood of an outcome colored by prejudice, with the result that the haves once again come out ahead. Deformalized justice is far from the panacea some of its proponents claim; recent writing is moving in the direction of identifying some of its liabilities. Books like Goldberg, Green, and Sander's, Harrington's, and Hofrichter's are a step in the right direction.

45. See Grambs, Negro Self-concept Reappraised, *in* J. Banks & J. Grambs, eds., Black Self-Concept: Implications for Education and Social Sciences 184 (1972); see Simpson & Yinger at 730.

46. Cf. Abel, Politics at 267, 309 (dispossessed instinctively prefer formal institutions, distrust informality).

Review Section

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REVIEW ESSAYS

BOOK REVIEW

BOOK NOTES

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