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Richard Delgado

University of Alabama - School of Law, rdelgado@law.ua.edu

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**The Unbearable Lightness of Alternative Dispute  
Resolution: Critical Thoughts on Fairness and  
Formality**

Richard Delgado

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# THE UNBEARABLE LIGHTNESS OF ALTERNATIVE DISPUTE RESOLUTION: CRITICAL THOUGHTS ON FAIRNESS AND FORMALITY

Richard Delgado\*

## ABSTRACT

*Years ago, I published Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution in Wisconsin Law Review.*

*Arriving in the early years of the deformalization movement, Fairness and Formality sounded a warning about the risks this conflict resolution approach poses for disempowered disputants. Coming on the heels of an article in the same vein by Owen Fiss, Fairness & Formality attracted attention in part because its message ran counter to the prevailing ideology, according to which alternative dispute resolution is superior in many respects to the in-court variety—cheaper, faster, and friendlier, particularly for the uninitiated.*

*Soon, however, large controlled studies showed that minorities, women, and the poor achieved better results when they took their cases to court rather than to a mediator, arbitrator, or other informal intermediary, even allowing for the higher costs of a formal proceeding.*

*These considerations did little to slow the rush to ADR, especially mandatory arbitration, which spread rapidly via small-print clauses inserted in contracts setting up a host of relationships, including college loans, medical services, and information technology. I show how this happened, how it disadvantaged ordinary people, and why a new generation of scholarship needs to examine the risks associated with disputing mechanisms that limit one's access to court.*

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\* John J. Sparkman Chair of Law, University of Alabama School of Law. Thanks to Jean Stefancic, Lee Gilmer, and Miriam Garza for careful critique and suggestions.

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## INTRODUCTION

**Y**EARS ago, an article in the *Wisconsin Law Review*<sup>1</sup> sounded a cautionary note about the growing resort to alternative dispute resolution (ADR), including mediation, arbitration, neighborhood justice centers, and restorative justice.<sup>2</sup> Co-authored by a junior faculty member<sup>3</sup> and four students,<sup>4</sup> the article posited that with dispu-

1. Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1359-62 (1985) [hereinafter *Fairness and Formality*].

2. For other work in this vein, see Lindsay Goldbrum, Note, *Suspended Sentence Contingent upon Participation in Victim Offender Mediation for Juveniles Who Commit Violent Crimes*, 18 CARDOZO J. CONFLICT RESOL. 391, 392-94 (2017); Lisa G. Lerman, *Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women*, 7 HARV. WOMEN'S L.J. 57, 111-13 (1984). See also Richard Delgado, *ADR and the Dispossessed: Recent Books About the Deformalization Movement*, 13 L. & SOC. INQUIRY 145, 145-46 (1988) [hereinafter *Recent Books*] (listing these types of ADR and a few others). For a study of the restorative justice movement, see Richard Delgado, *Prosecuting Violence: A Colloquy on Race, Community, and Justice. Goodbye to Hammurabi, Analyzing the Atavistic Appeal of Restorative Justice*, 52 STAN. L. REV. 751, 751-55 (2000) [hereinafter *Goodbye to Hammurabi*] (noting that the movement, "which sprang up in the mid-1970s as a reaction to the perceived excesses of harsh retribution, features an active role for the victims of crime, required community service or some other form of restitution for offenders, and face-to-face mediation in which victims and offenders confront each other in an effort to understand each other's common humanity").

3. Namely this author. For a different 30-year retrospective offering a much more upbeat assessment of the ADR movement, see generally Lela Love & Ellen Waldman, *The Hopes and Fears of All the Years: 30 Years Behind and the Road Ahead for the Widespread Use of Mediation*, 31 OHIO ST. J. ON DISP. RESOL. 123 (2016) [hereinafter *Hopes and Fears*].

4. Namely Chris Dunn, Pamela Brown, Helena Lee, and David Hubbert.

tants of unequal status, alternative dispute resolution was likely to lead to worse outcomes for the weaker parties than the ones they were apt to secure in formal, in-court proceedings.<sup>5</sup>

In particular, when a disputant of minority race confronted an adversary such as a corporation, a white person, or an authority figure of some kind, the danger of a result tinged by bias would be greater in ADR than when such a plaintiff took his or her case to a court.<sup>6</sup> And the same would hold true, we posited, for women divorcing a high-status male such as a business executive,<sup>7</sup> or, indeed, for anyone of a lower social status than his or her adversary.<sup>8</sup>

Employing social science evidence, the article explained why results like these were to be expected.<sup>9</sup> Subsequently, large-scale empirical studies confirmed the article's prediction.<sup>10</sup> Divorcing women, for example, tended to secure more favorable support payments and child custody orders when they litigated rather than mediated their divorces.<sup>11</sup> The same was true for small-court claimants,<sup>12</sup> as well as for those engaged in settlement conferences.<sup>13</sup>

5. Even allowing for the additional expense of adjudication. See *Fairness and Formality*, *supra* note 1, at 1359–61, 1402.

6. *Id.* at 1359–60, 1387–91, 1398–1404.

7. See Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991) [hereinafter *Process Dangers*]. See also LINDA BABCOCK & SARA LASCHEVER, *WOMEN DON'T ASK: NEGOTIATION AND THE GENDER DIVIDE* (2003).

8. Grillo, *supra* note 7, at 1549–51 (giving reasons why mediation and other nonformal dispute resolution forums expose women to the risk of unfair treatment). A prime example would be a consumer seeking recourse from a large marketer, or manufacturer, or an employee pursuing a workplace claim against a large corporation. See also Lisa Bernstein, *Understanding the Limits of Court-Connected ADR: A Critique of Federal Court-Annexed Arbitration Programs*, 141 U. PA. L. REV. 2169, 2172–77 (1993) (noting that alternative dispute resolution may operate to the detriment of the poor).

9. See *infra* text and notes 47–57, explaining the thesis. See also Richard Delgado, *Conflict as Pathology: An Essay for Trina Grillo*, 81 MINN. L. REV. 1391, 1405 (1997) [hereinafter *Conflict as Pathology*] (applying the author's fairness-and-formality thesis to explain ADR's focus on creating peace).

10. Gary LaFree & Christine Rack, *The Effects of Participants' Ethnicity and Gender on Monetary Outcomes in Mediated and Adjudicated Civil Cases*, 30 L. & SOC. REV. 767, 776–89 (1996) (noting that small-stakes litigants who opted for mediation by trained mediators often received lower awards—especially if they were minorities or women—than ones who opted for a conventional trial); Christine Rack, *Negotiated Justice: Gender & Ethnic Minority Bargaining Patterns in the Metrocourt Study*, 20 HAMLINE J. PUB. L. & POL'Y 211, 222, 248–90 (1999) [hereinafter *Negotiated Justice*] (noting that white disputants made higher initial demands than minority disputants did when the opposing party was of minority race). See also Oren Gazal-Ayal & Ronen Perry, *Imbalances of Power in ADR: The Impact of Representation and Dispute Resolution Method on Case Outcomes*, 39 L. & SOC. INQUIRY 791 (2014). See also *infra* Part II (discussing these studies).

11. See LaFree & Rack, *supra* note 10, at 769–70, 776–81. See also Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 BUFF. L. REV. 441 (1992) [hereinafter *Killing Softly*] (analyzing how divorce mediation poses process problems for women). The above holds true even allowing for the slightly higher costs of in-court adjudication, since the outcomes in the two types of proceedings differ so markedly. See *id.*

12. Oren Gazal-Ayal, *supra* note 10, at 791 (based on a large field study of such courts in Israel).

13. See Michael Z. Green, *Negotiating While Black*, in *THE NEGOTIATOR'S DESK REFERENCE* ch. 41 (Christopher Honeyman & Andrea Kupfer Schneider, eds., DRI Press

Coming on the heels of a prominent article in the same vein by Owen Fiss,<sup>14</sup> the article earned a favorable response, especially among the academic left.<sup>15</sup> Shortly afterward, however, something interesting happened. One might think that alternative resolution for disputes presenting imbalances like the ones just described would drop in popularity, at least among disempowered people. After all, why would anyone choose the less promising of two competing alternatives? In fact, the reverse happened. Alternative dispute resolution, particularly arbitration and mediation, grew steadily in popularity to the point where they now dominate their respective fields.<sup>16</sup> Using a prize-winning movie, *The Unbearable Lightness of Being*,<sup>17</sup> as a point of departure, I show how this

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2017). See generally Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984) (arguing against the practice of coercive settlement as contrary to our fundamental values).

14. See Fiss, *supra* note 13.

15. Cited over 425 times in the Westlaw database for law reviews and journals, downloaded on SSRN almost as often, and noted in all the major casebooks, *Fairness and Formality* is probably among the most widely discussed civil procedure articles of its time. See *Fairness and Formality*, *supra* note 1.

16. See *infra* Part II. On how the practice of inserting mandatory arbitration clauses in commercial agreements of many kinds originated, see Jessica Silver-Greenberg & Michael Corkery, *Sued Over Old Debt, and Blocked From Suing Back*, N.Y. TIMES (Dec. 22, 2015), <https://www.nytimes.com/2015/12/23/business/dealbook/sued-over-old-debt-and-blocked-from-suing-back.html?mcubz=3> [<https://perma.cc/B7SD-YQNY>] (describing how the “strategy traces to a pair of Supreme Court decisions in 2011 and 2013 that enshrined the use of class-action bans in arbitration clauses,” and describing how “debt collectors have pushed the parameters of that legal strategy into audacious new territory”). Other industries have followed suit with nearly the same alacrity, including auto sales and financing of all types, including consumer credit. *Id.* See also *infra* text and note 146 (describing how this practice originated in a series of high-level meetings among defense lawyers representing mega-corporate clients). On the growth and expansion of Alternative Dispute Resolution, see generally CARRIE MENKEL-MEADOW, *DISPUTE RESOLUTION: BEYOND THE ADVERSARIAL MODEL* (2d ed. 2011) [hereinafter *ADVERSARIAL MODEL*]. See also Jacqueline Nolan-Haley, *Mediation and Access to Justice in Africa: Perspectives from Ghana*, 21 HARV. NEGOT. L. REV. 59, 61 (2016) (noting that mediation can spread corporate capitalism to new realms). See also Carrie Menkel-Meadow, *Variations in the Uptake of and Resistance to Mediation Outside of the United States*, in *CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS 2014* 189, 189–221 (Arthur W. Rovine ed., 2015) (noting that some countries, particularly ones in Africa, resist the introduction of mediation into their culture and dispute resolution systems). *But see Hopes and Fears*, *supra* note 3, at 134 (noting that it is spreading globally with little resistance). Mediation has even caught on in educational disputes over appropriate programs for the disabled in public schools. See Katherine McMurtrey, *The IDEA and the Use of Mediation and Collaborative Dispute Resolution in Due Process Disputes*, 2016 J. DISP. RESOL. 187, 191 (2016), but noting that it has been only partly successful. *Id.* at 198. On the relative lack of criticism of the ADR movement, see, e.g., Eric K. Yamamoto, *ADR: Where Have the Critics Gone?*, 36 SANTA CLARA L. REV. 1055, 1056–57 (1996) [hereinafter *Critics Gone?*] (noting the declining quality and quantity of serious scholarship critiquing deformed justice and attributing this to “a larger mosaic of efficiency reform measures implemented to restrict court access and expedite case dispositions,” including: plausibility pleading standards, “Rocket Dockets”, Rule 11 sanctions, lower summary judgment thresholds, [and] reduced discovery”). On the unsuitability of ADR for the resolution of civil rights disputes, see Marjorie A. Silver, *The Uses and Abuses of Informal Procedures in Federal Civil Rights Enforcement*, 55 GEO. WASH. L. REV. 482 (1987); in the realm of family law, see Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443 (1992).

17. *THE UNBEARABLE LIGHTNESS OF BEING* (The Saul Zaentz Company 1988) [hereinafter *UNBEARABLE LIGHTNESS*] (starring Daniel-Day Lewis and Juliette Binoche).

may have happened. After describing the film,<sup>18</sup> I summarize the *Wisconsin* article and its critique of ADR.<sup>19</sup> Then, I review empirical studies of alternative dispute resolution that examined outcomes for disparities when one of the disputants is a person of lesser standing than his or her adversary.<sup>20</sup>

I next examine how ADR grew rapidly in two settings, divorce mediation and commercial arbitration, and how the two may have been connected.<sup>21</sup> I then examine recent feminist scholarship on *vulnerability* and show how our response to it in a setting such as dispute resolution can lead to two outcomes, only one of which is socially desirable.<sup>22</sup> A final section offers cautions for reformers who might be inclined to treat the critique of ADR lightly—requiring, at most, a minor correction—failing to notice that the United States is in the early stages of a broad trend toward inequality of which deformalization is just one part.<sup>23</sup>

## I. THE UNBEARABLE LIGHTNESS OF BEING

In *The Unbearable Lightness of Being*,<sup>24</sup> Tomas, a doctor played by Daniel Day-Lewis, and Tereza, a sweet-faced barmaid played by Juliette Binoche, meet, fall in love, go through turbulent times, find peace in a rustic idyll, and die in a tragic accident. Set in 1960's revolutionary-era Prague and based on a novel by Milan Kundera,<sup>25</sup> the film traces the lives of the above-mentioned pair and a second woman, Sabina. Sabina, played by Lena Olin, is a successful and highly libidinous artist who wears a bowler hat when she is in the mood, which she often is when in the presence of Tomas and other good-looking men. Tomas is a successful brain surgeon, charismatic, and an unrepentant lothario who beds a succession of women, including the primary two. Sabina holds his main affections during the opening scenes, along with a succession of nurses, secretaries, apartment-dwelling society women, and others with whom he has brief flings.

Tereza, however, with her youthful innocence and fresh-faced looks, soon wins his main attention, which at times approaches ninety percent.<sup>26</sup>

18. See *infra* Part I.

19. See *infra* Part II.

20. See *infra* Part III.

21. See *infra* Part IV. See also Richard Delgado, *Foreword: Alternative Dispute Resolution: A Critical Reconsideration*, 70 SMU L. REV. 595 (2017) [hereinafter *Critical Reconsideration*] (introducing a symposium on this subject).

22. See *infra* Part V.

23. See *infra* Part VI.

24. See *supra* note 17.

25. MILAN KUNDERA, *THE UNBEARABLE LIGHTNESS OF BEING* (Heim trans., Perennial Classics ed. 1999) (1984).

26. He is constantly finding excuses to step out from their apartment and not always to perform brain surgery. The soulful beauty, Tereza, would much have preferred that he devoted one hundred percent of his affection toward her, and suffers untold agonies when she comes across unmistakable evidence that he does not. Unfortunately, Tomas, at least at this stage of his development, prefers “lightness” and is incapable of playing doctor with

They move in together, she takes up photography,<sup>27</sup> and he performs operations on a succession of patients, including a farmer who owns an engaging little pig that follows him around as he heals from his operation and who turns out to play an important part in the couple's subsequent lives.<sup>28</sup>

Tereza and Tomas's big-city idyll comes to an end when, during one of Tomas's frequent, unexplained absences from their love nest, Tereza notices that the furniture is vibrating slightly and that a distant humming sound is increasing in volume.<sup>29</sup> Dashing to the street, she finds herself in the middle of a harrowing scene. A Russian tank, bearing a large red star and a protruding cannon, is slowly rumbling down the narrow alleyway in front of the charmingly dilapidated apartment where she and Tomas live. Many of their neighbors soon follow, and the gathering crowd quickly realize that they are witnessing the early stages of a military overthrow of their government.<sup>30</sup> Pandemonium ensues. Several of the bystanders throw rocks at the invading force, others hold up signs telling the Russians to go home, and the tanks begin pointing their weapons this way and that.<sup>31</sup> A few shots ring out and, luckily for Tereza, Tomas returns just in time to guide her to shelter in an empty doorway. When the tanks have passed, they proceed to the city's main square, where a massive demonstration is taking place.

Having had the presence of mind to bring her camera, Tereza takes picture after picture of the action, and, after the demonstration ends, the couple find their way home safely. Over the next few days, bound by connubial solidarity, as well as loyalty to their country, the two lovers carry out separate actions that depart from their characteristic "lightness." Realizing that she cannot publish her photographs in Czechoslovakia—the Russians now control everything, including the newspapers—Tereza entrusts the negatives to one of many refugees fleeing for the safety of Switzerland.

For his part, Tomas, whose previous life has demonstrated even more "lightness"—a metaphor for a carefree, happy spirit—than Tereza's,

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just one woman at a time. Does he love Tereza? Yes, but he is irresistibly drawn to other women as well, and has trouble resisting the lure of a pretty face.

27. At the suggestion of Sabina, whom she meets when Tomas introduces the two women to each other.

28. The farmer offers them jobs on his farm after the two are expelled from their jobs in Prague.

29. The camera and the film take on a dark character at this point, which the film editor accomplishes by introducing black-and-white or sepia-toned footage of the actual revolutionary scenes from archives of this period.

30. This is the actual setting of Kundera's novel, which opens in pre-1968 revolutionary times, when Czech liberty, freedom, and the arts had reached their apogee. Kundera, *supra* note 25.

31. See UNBEARABLE LIGHTNESS, *supra* note 17. Some of the photography in the ensuing scenes is from newsreels from the times, most of it in black-and-white.



turns to essay-writing. Intrigued by the story of *Oedipus Rex*,<sup>32</sup> which he has learned from the more literarily-minded Tereza, he composes a scorching essay and gets it past the editor of a local newspaper, which publishes it for all to see. In it, Tomas ridicules his countrymen, who have made their peace with the new ham-fisted rulers. Accustomed to living lightly and indulging his every whim, Tomas does not take kindly to the boorish Russians. His clever letter castigates his fellow Czechs, who collaborate with the new regime in hopes of leading near-normal lives.<sup>33</sup> But his letter is indirect and allegorical so that the editor lets it through or, perhaps, misses its point. The Russians do not, however, so that when it appears in print, the two of them are marked targets. Tomas is called in for interrogation, loses his medical license, and decides to join the long line of refugees leaving Czechoslovakia, accompanied by the loyal Tereza.

For her part, Tereza has received an even greater shock. Accompanying Tomas to his interrogation, she finds herself in a large hall with dozens of her countrymen waiting to face questioning from unsmiling Russian apparatchiks seated at a front table.<sup>34</sup> She is astonished to find large blow-ups of her photographs, published in foreign newspapers, taped to the walls behind the inquisitors. The Russians have circled the protesters who have recognizable faces and printed their names just below them. These are her very friends and neighbors who are lined up next to her, facing an inquisition for their participation in the demonstration that fateful day.<sup>35</sup>

It appears that her journalistic instincts have backfired. She had snapped her pictures and given the prints to a fleeing countryman in hopes of bringing an outrageous event to light. But the authorities put them to an unintended use, namely to identify the brave protesters who stood up to the tanks in the central square. Realizing that their casual approach to life is coming to an end, Tomas and Tereza pack their possessions into his small Czech-made car and head for the Swiss border.

In Geneva, Tomas and Tereza make the best of their situation. He gets a job as a window washer, while she applies to a local newspaper for a job as a photojournalist, specializing in wars, revolutions, and other dramatic events. The editor tells her that they have no needs in that area—Geneva being famously peaceful—but hires her to photograph small plants for the garden section of the paper. Her first assignment is to take pictures of

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32. By Athenian playwright Sophocles (ca. 429 B.C.), the play describes a tortured king who unwittingly sleeps with his mother, murders his father, and upon learning what he has done, tears out his eyes.

33. Specifically, he compares these collaborators to Oedipus. See *UNBEARABLE LIGHTNESS*, *supra* note 17. But instead of tearing out their eyes, they live as comfortably as possible in the new order. See Peter Fritzsche, *Jackboot Germany: A New History of the Gestapo*, N.Y. TIMES (March 10, 2017), <https://www.nytimes.com/2017/03/10/books/review/gestapo-by-frank-mcdonough.html?mcubz=3> [Perma link unavailable] (noting that “if you are not a designated enemy, you can live comfortably in a police state”).

34. They are interrogators, who question Czechs suspected of resisting the new regime.

35. See *supra* text and note 31.

miniature cactuses, which, being of a compliant nature, she carries out willingly but with little enthusiasm.

Their jobs make them feel weak, and finding working-class life in Geneva cheerless, they return to Prague. Tomas receives a cold reception from his former medical colleagues, and Tereza suffers agonies when he returns to his former faithless ways with a succession of women, including the obliging Sabina, who welcomes him back into her studio to rekindle their relationship and stoke her artistic fervor.

Realizing that their lives are in a downward spiral, Tomas and Tereza seize an opportunity when one of Tomas's former patients, the farmer with the adorable pig, looks him up to see how he is doing. On learning of the couple's plight, he offers them jobs on his farm. They eagerly join him in the country, where Tereza learns to tend crops in the field, and Tomas, despite his slight physique, makes himself useful, repairing dislocated shoulders and curing other ailments for the hired help.

The two enjoy their bucolic idyll, working in the sun-dappled fields and dancing the polka on Sunday with the nearby farm folk, who seem undaunted by the times. Fate intervenes a second time, however, when on the way back in a rattletrap truck from a village dance, they die in a tragic accident on the rain-slicked country road. The movie ends when Sabina, who has by now moved to Big Sur and resumed her artistic career, receives a letter with the news. A wealthy patron who has been in her studio watching her work mutters, "damn shame," gives her a consoling squeeze, and invites her to join him and his wife for dinner that evening. Sabina is apparently entering her own period of lightness, enjoying the life of a successful artist in a seaside town in California. The moviegoer is left to ponder whether her future holds a fate similar to that of her former friends.<sup>36</sup>

## II. FAIRNESS AND FORMALITY

### A. ALTERNATIVE DISPUTE RESOLUTION—THE EARLY YEARS

My co-authors and I wrote our cautionary tale<sup>37</sup> during the early years of the alternative dispute resolution movement,<sup>38</sup> as it was just beginning to gain momentum and receive favorable reviews.<sup>39</sup> ADR struck many observers as a welcome antidote to costly, anxiety-inducing, and time-consuming adjudication that often left even the winner with mixed feelings about the event.<sup>40</sup> Mediation and arbitration, in particular, appeared to offer more humane ways of resolving disputes in which the parties

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36. American society soon began turning a jaded eye on immigrants such as Sabrina. *See, e.g.*, 1994 CAL. LEGIS. SERV. PROP. 187 (West) (repealed Jan. 1, 2015) (discouraging immigration by denying newcomers access to non-emergency health care, public education, and other services in the state).

37. *See Fairness and Formality*, *supra* note 1, at 1360–62.

38. Specifically, 1985.

39. *See, e.g.*, ADVERSARIAL MODEL, *supra* note 16.

40. *See id.*

could sit around a table in a small room, talking in an informal, friendly fashion.<sup>41</sup> No judge sat on high, scowling and issuing incomprehensible rulings from time to time, with few if any accompanying explanations.<sup>42</sup>

The parties could tell their stories in a manner that seemed natural to them.<sup>43</sup> A friendly intermediary would bring the parties closer together and help them arrive at a solution that both could accept.<sup>44</sup> Everyone would leave satisfied that justice was done—or that at least they managed to tell their story and have the others listen.<sup>45</sup> ADR was not only friendlier, cheaper, and faster than formal, in-court litigation,<sup>46</sup> it was also likely to leave the disputants on better terms than the ones they would have enjoyed following a high-stakes, in-court judgment.<sup>47</sup>

Unfortunately, this is not what the results showed, especially when the parties began on unequal footings.<sup>48</sup> Today, it would be fashionable to explain differential outcomes<sup>49</sup> in the two systems, with the minorities doing worse in ADR than in the formal, in-court variety, by resort to implicit bias,<sup>50</sup> stereotype threat,<sup>51</sup> and unconscious<sup>52</sup> and cognitive ra-

41. *Id.* But see *infra* text and notes 82–94 (noting that mediation presents process dangers for women and other disempowered disputants).

42. See Richard Delgado, *Law's Violence: Derrick Bell's Next Article*, 75 U. PITT. L. REV. 435, 448 (2014) (discussing “narricide”).

43. See *id.*

44. See ADVERSARIAL MODEL, *supra* note 16; ROGER FISHER & WILLIAM L. URY, GETTING TO YES, NEGOTIATING AGREEMENT WITHOUT GIVING IN (Bruce Patton ed., 2d ed. 1991) (1981); *Recent Books*, *supra* note 2, at 146; *Hopes and Fears*, *supra* note 3, at 135–36 (touting its ability “to bridge differences, and to build unique solutions”). Lisa A. Rickard, *The Virtues of Arbitration*, N.Y. TIMES (Nov. 14, 2015), <https://www.nytimes.com/2015/11/14/opinion/the-virtues-of-arbitration.html?mcubz=3> [Perma link unavailable] (positing that arbitration is cheaper than a court proceeding and often fairer, simpler, and faster). But see *Hopes and Fears*, *supra* note 3, at 139–40 (citing a Rand Report that found that mediation was not significantly speedier than ordinary litigation).

45. E.g., FISHER & URY, *supra* note 44. For authors sympathetic to this position, see, e.g., ADVERSARIAL MODEL, *supra* note 16; William H. Simon, *Legality, Bureaucracy, and Class in the Welfare System*, 92 YALE L.J. 1198, 1268–69 n.178 (1983) (touting the advantages of multiple approaches to dispute resolution); Lucie E. White, *Goldberg v. Kelly on the Paradox of Lawyering for the Poor*, 56 BROOK. L. REV. 861, 864–65, 871–873 (1990).

46. E.g., *Hopes and Fears*, *supra* note 3, at 125 (noting that it is also less stressful and produces less “relational havoc”).

47. See Lerman, *supra* note 2, at 84; *Killing Softly*, *supra* note 11, at 445; *Hopes and Fears*, *supra* note 3, at 127.

48. *Fairness and Formality*, *supra* note 1, at 1402–04.

49. See *supra* text and note 10. See also *infra* Part II (discussing empirical studies showing that minority disputants, holding other factors constant, do better in formal, in-court adjudication than they do in the informal kind (ADR)).

50. See Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1490–94 (2005) (explaining implicit bias).

51. See Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Intellectual Test Performance of African Americans*, 69 J. PERSONALITY & SOC. PSYCHOL. 797, 798–99 (1995) (explaining “stereotype threat,” which is the tendency of test subjects to perform worse than predicted when the test conditions remind them of a social stereotype that includes poor performance on intellectual tasks like the ones the test will require).

52. See Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 387–88 (1987) (noting how a great deal of racist behavior stems from unconscious attitudes).

cism,<sup>53</sup>—both on the part of the mediator and the parties themselves. These defects might be countered by conscientious “power balancing,”<sup>54</sup> more rigorous training for the mediators, and firm instructions to the parties not to treat each other disrespectfully.<sup>55</sup>

The political left would attribute outcome disparities to the manner in which deformalized justice increases the role of the state or rewards repeat players.<sup>56</sup> But my co-authors and I suspected that something structural—inherent in informality itself—was at work and likely to come to the fore in deformalized settings. If we were right, alternative dispute resolution carried risks for disempowered disputants that would not disappear even with careful training for mediators and constant reminders to the parties to behave.<sup>57</sup> As when Tereza noticed the furniture trembling slightly, we had a feeling that something was up.

We began by harkening back to the teachings of prominent social scientists like Gunnar Myrdal who, following a visit to the United States, published a landmark book on American society.<sup>58</sup> Americans, Myrdal wrote, behave as though they are ambivalent—of two minds—about race.<sup>59</sup> Their national ideals and founding documents hold that all persons are equal moral agents under prevailing ethical codes and the Constitution.<sup>60</sup> But, because of our history, most Americans also hold, if only implicitly, a second, lower set of values that emerge during moments of intimacy, such as with friends or mates at a pub.<sup>61</sup> In settings like these, many Americans are much more likely to tell a racist story or act in a way inimical to the prospects of a person of minority race or a woman.<sup>62</sup>

For example, on the Fourth of July, with the bands playing and American flags flying, most of our fellow citizens will act according to their

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53. See Linda H. Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 *STAN. L. REV.* 1161, 1197–98 (1995) (showing how cognitive schema predispose many to see events in accord with pre-existing dispositions).

54. By the mediator, that is. See, e.g., *Killing Softly*, *supra* note 11, at 446, 498–502, 509 (arguing that “mediator intervention does not protect the lesser powered wife from disadvantageous outcomes”).

55. On power balancing, see *id.* at 446, 498–502.

56. See *Recent Books*, *supra* note 2, at 146–48 (attributing this critique to Richard Hofrichter, Christine Harrington, and Goldberg, Green, and Sanders). See also *Hopes and Fears*, *supra* note 3, at 136 (discussing the advantage that repeat players enjoy in the system); Marc Galanter, *Why the “Haves” Come out Ahead: Speculations on the Limits of Legal Change*, 9 *L. & SOC. REV.* 95, 98–101 (1974) (explaining the advantage that accrues to repeat players).

57. See *Hopes and Fears*, *supra* note 3, at 137–38 (warning of the risks of heavy-handed training that encourages mediators to exercise an undue amount of direction, such as by adopting a pre-formed evaluative matrix or grid). See Leonard L. Riskin, *Understanding Mediators’ Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 *HARV. NEGOT. L. REV.* 7, 9–13 (1996).

58. E.g., GUNNAR MYRDAL, *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY* (1944).

59. See *Fairness and Formality*, *supra* note 1, at 1382–84.

60. See *id.* at 1375–85, 1388; MYRDAL, *supra* note 58, at 3–5.

61. *Fairness and Formality*, *supra* note 1, at 1382–86.

62. *Id.* at 1385, 1387–89.

higher set of values.<sup>63</sup> If they find themselves standing next to a person of color or one whom they know to be gay, they may smile, put an arm around the person's shoulder, and say, "Isn't the parade grand?" Afterward, they may invite the person to a barbecue in their back yard with a group of their friends.<sup>64</sup>

By the same token, jurors, witnesses, and other participants in a judicial proceeding are apt to behave with scrupulous fairness, following the judge's instructions to the letter. The physical setting of the courtroom, with the black-robed judge sitting on high, the state or national flag in full display, the blindfolded lady of justice emblazoned on the front wall, and the uniformed bailiff standing by, remind everyone that this is an occasion during which they are expected to behave according to the precepts of the American Creed.<sup>65</sup> Studies of jury behavior tend to find that this actually happens; even prejudiced jurors often find it within themselves to hold their biases in abeyance during the proceedings.<sup>66</sup>

Alternative dispute resolution offers relatively few such cues. Indeed, the comfortable setting and informal atmosphere instead provide an ideal situation for the stronger actor to behave in his usual confident fashion and expect the mediator to enact his wishes, as well.<sup>67</sup> He is apt to speak forthrightly, as though his account of things is the only possible one.<sup>68</sup> His body language and manner will signal to onlookers that he expects to secure a favorable outcome. The woman or minority group member may well sense the prevailing atmosphere with its familiar expectations and not put his or her case forward as forcefully as it might merit.<sup>69</sup>

For social scientists, this "confrontation" (fairness-and-formality) theory explains why desegregation came about so readily and with so little resistance in the military following President Truman's executive order.<sup>70</sup> It also explains why minorities flock to government jobs and sports, where civil service rules and athletic conventions set out what is to be

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63. That is to say, all men and women are equal, precious children of the Creator, and entitled to be treated with due respect. *Id.* (noting that situational features such as flags and emblems remind everyone present that they are expected to hold prejudicial attitudes in abeyance).

64. *Id.*

65. *Id.*

66. See HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 497-98 (Little, Brown & Co. 1966).

67. *Fairness and Formality*, *supra* note 1, at 1385-88, 1394-95, 1402.

68. *Id.* at 1371-73, 1383-85, 1390-91.

69. *Id.* See also Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 *HARV. L. REV.* 817, 818-19 (1991) (noting that automobile salespersons offered women worse deals than men because they believed the women expected no better and no standard price governed each transaction). See also Amanda Lee Myers, *Honda Settles Discrimination Claims with Justice Department*, *BOSTON GLOBE* (July 14, 2015), <https://www.bostonglobe.com/business/2015/07/14/honda-settles-discrimination-claims-with-justice-department/VICEJAiAUlBy6aRwkXvKEL/story.html> [Perma link unavailable].

70. See Exec. Order No. 9981, 13 Fed. Reg. 4313 (1948) (desegregating the armed forces). The military, of course, is an authoritarian, top-down institution where everyone knows that they are expected to obey the rules.

done and what will count as success.<sup>71</sup> And, as we shall see, it explains why minorities do comparatively poorly in alternative dispute settings.<sup>72</sup>

### III. EMPIRICAL STUDIES OF OUTCOMES

Real-world support for our thesis was not long in arriving. Minorities or women trying cases in court did, indeed, secure better outcomes than ones who agreed to resolve their dispute by mediation or arbitration.<sup>73</sup> A large study in Bernalillo County, New Mexico is typical. In Bernalillo, which includes Albuquerque, two investigators examined outcomes in mediated and non-mediated disputes in a metropolitan court system. They found substantial disparities, varying by race and gender, with minority disputants generally receiving lower settlements.<sup>74</sup> One of the two investigators carried out a second study using the same data as the first and found that when a disputant of the majority race confronted an opponent who was a member of a minority group, the white party asked for, and expected, a larger initial amount than when the opponent was white.<sup>75</sup> A second large study, of small claims courts in Israel (whose legal system resembles our own), found much the same,<sup>76</sup> as did others, differing only in the size of the disparity found.<sup>77</sup>

Formal, in-court disputing emerges, then, as superior to the informal kind for disempowered litigants. The reader who is predisposed to favor ADR, thinking of it as a humane, cost-saving innovation, will find these words, to some extent, counterintuitive. They may feel, instinctively, that ADR should be better than the furious clash of high-priced lawyers that prevails in in-court adjudication. But it is not—it is simply easier on the nerves and a little cheaper.<sup>78</sup> The results are counterintuitive for a second reason: many disputants, even those who fared poorly in an alternative

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71. *Fairness and Formality*, *supra* note 1, at 1386–89 (explaining the confrontation theory).

72. *See infra* Part III.

73. *E.g.*, Richard Delgado, *Rodrigo's Seventh Chronicle: Race, Democracy, and the State*, 41 *UCLA L. REV.* 721, 727–28 (1994).

74. LaFree & Rack, *supra* note 10, at 771–72, 783. *See also* ADVERSARIAL MODEL, *supra* note 16, at 643 (“In my view, one of the few rigorously successful studies of comparability of process is the Metro Court study of outcomes and satisfaction rates among adjudication and mediation users in New Mexico state courts.”). *See also* *Negotiated Justice*, *supra* note 10, at 294–97.

75. *See* *Negotiated Justice*, *supra* note 10, at 250–51.

76. *See generally* Gazal-Ayal, *supra* note 10. *See also* Roselle L. Wissler, *The Effects of Mandatory Mediation: Empirical Research on the Experience of Small Claims and Common Pleas Courts*, 33 *WILLAMETTE L. REV.* 565, 565–66 (1997) (noting that in cases featuring an imbalance of power, the weaker party is vulnerable to pressures to accede to the wishes of the stronger party and to follow the mediator's lead).

77. *E.g.*, *Killing Softly*, *supra* note 10, at 482–98. *See also* Pat K. Chew, *Arbitral and Judicial Proceedings: Indistinguishable Justice or Justice Denied?*, 46 *WAKE FOREST L. REV.* 185, 189–93 (2011).

78. Most courtroom scenes are full of tension, with rulings coming fast and furiously. Alternative dispute resolution appears, on the surface, to be a friendly, collaborative venture. *See* *Fairness and Formality*, *supra* note 1, at 1366–67.

proceeding, *liked it*.<sup>79</sup> They would recommend it to their friends.<sup>80</sup> The mediator struck them as friendly and humane. They may have secured a poor outcome, but at least “they listened to my story.”<sup>81</sup> Never mind that as soon as these disputants finished telling that story—perhaps to knowing looks, rolling eyes, and surreptitious glances at the clock—the mediator or arbitrator handed down a decision largely favoring the opponent.<sup>82</sup>

#### IV. UNEXPECTED CONSEQUENCES: POPULARITY SOARS, PARTICULARLY FOR MEDIATED DIVORCE AND COMMERCIAL ARBITRATION

As with Tereza and her photographs, my co-authors and I found our discovery being put to an unexpected use.

##### A. MEDIATED DIVORCE

When early commentators pointed out process dangers for women in mediated divorce,<sup>83</sup> it promptly became even more popular with men seeking lower alimony awards and child support orders.<sup>84</sup> It also retained favor with mediators, many of whom had convinced themselves that they were engaged in repairing relationships, reducing acrimony, and making everyone happy—while, of course, making a little money on the side.<sup>85</sup> Judges were pleased to get rid of the many divorce cases that were filling

79. See *Conflict as Pathology*, *supra* note 9, at 1396; *ADVERSARIAL MODEL*, *supra* note 16, at 1548–49 (discussing studies showing satisfaction with divorce mediation); Joshua D. Rosenberg & H. Jay Folberg, *Alternative Dispute Resolution: An Empirical Analysis*, 46 *STAN. L. REV.* 1487, 1488–89 (1994).

80. See Rosenberg et al., *supra* note 79.

81. See *id.*

82. See *supra* text and notes 7–9; *supra* Part III. See also Roy F. Baumeister et al., *The Glucose Model of Mediation: Physiological Bases of Willpower as Important Explanations for Common Mediation Behavior*, 15 *PEPP. DISP. RESOL. L.J.* 377, 377–78 (2015) (noting that many mediators realize that an inexperienced or poorly nourished party is apt to flag as the end of an afternoon of negotiating nears and accept an unfavorable award).

83. E.g., *Process Dangers*, *supra* note 7, at 1549–50, 1585–86 (noting that “people vary greatly in the extent to which their sense of self is ‘relational’—that is, defined in terms of connection to others”—and that many women exhibit this trait and, as a result, find high-stakes mediation or arbitration stressful); *Killing Softly*, *supra* note 11, at 444 (noting that the informality of mediation reinforces patriarchy “by returning men to their former dominant position”).

84. See *supra* text and notes 14–15 (describing the increase in popularity of this avenue of dispute resolution).

85. See Douglas N. Frenkel & James H. Stark, *Improving Lawyers’ Judgment: Is Mediation Training De-Biasing?*, 21 *HARV. NEGOT. L. REV.* 1 (2015) (positing that training in the techniques of mediation enables one to consider all sides of an issue). The typical mediator is a part-time litigator, or retired lawyer, law professor, or judge, with the makeup and helpful inclinations of a social worker and, sometimes, in need of the income. See *Hopes and Fears*, *supra* note 3, at 140 (noting that some mediators are “recovering lawyers”). Mediators and arbitrators are somewhat stratified by sex and gender, with the men handling the large cases. See Gina V. Brown & Andrea K. Schneider, *Gender Differences in Dispute Resolution Practice: Report on the ABA Section of Dispute Resolution Practice Snapshot Survey*, 47 *AKRON L. REV.* 975, 988–90 (2015).



their courtrooms with somber children, angry men, and crying women.<sup>86</sup> At the same time, many women embraced mediated divorce, believing that it enabled them to tell the tale of how badly their soon-to-be-ex had behaved during their marriage.<sup>87</sup> If mediated divorce would not help them get the award they deserved, it would at least be cathartic.<sup>88</sup>

A new generation of mediators loved it, too. Many were disenchanting (or retired) lawyers or judges who relished the prospect of making a little money while taking on, essentially, the role of a social worker, trying to bring peace to two sides at loggerheads.<sup>89</sup> Of course, these hopes proved largely vain.<sup>90</sup> Frequently, the weaker party does get to tell her story, but haltingly and with little confidence,<sup>91</sup> lacking the financial and social-capital resources that her adversary commands and with less practice in public speaking.<sup>92</sup> Mediators tend to think that they are experts at “power-balancing”<sup>93</sup>—compensating for the more powerful disputant’s confident demeanor and assertive behavior. But they rarely succeed at this task, since one’s own biases are, in most cases, invisible to oneself.<sup>94</sup>

#### B. COMMERCIAL ARBITRATION: “THE GUY DIDN’T REALLY LISTEN”

But the star performer for the ADR crowd was and is commercial arbitration. Not only a hit with the financial industry, commercial arbitration is also popular with marketers of dangerous products, HMOs and other providers of medical services, the electronics industry,<sup>95</sup> and even harried

86. See *Fairness and Formality*, *supra* note 1, at 1366–67; *Recent Books*, *supra* note 2, at 146 (noting the docket-clearing advantages of ADR); *Killing Softly*, *supra* note 11, at 446 (noting that many divorcing women are at an emotional and financial disadvantage during divorce proceedings); *infra* text and note 92.

87. *Process Dangers*, *supra* note 7, at 1610 (noting that this advantage is not decisive, because mediation introduces a host of process dangers).

88. See *id.* at 1550 (noting that some women are more “relational” in their identities and make-up than men, and thus are more prone to favor compromise over combat in resolving differences).

89. See Elizabeth L. MacDowell, *Reimagining Access to Justice in the Poor People’s Courts*, 3 GEO. J. POVERTY L. & POL’Y 473, 512–18 (2015) (describing how a social-worker attitude and approach can prove helpful). See Frenkel et al., *supra* note 85, at 34–35; *infra* note 124. See also *Hopes and Fears*, *supra* note 3, at 140 (noting that some mediators are burned-out lawyers looking for new means of support).

90. See *supra* Part III.

91. See *Killing Softly*, *supra* note 11, at 444–82.

92. *Id.* at 482–83 (noting that women are quite capable of dominance behavior, yet many do not practice it during mediations because of guilt, anxiety, social pressures, lack of financial resources, and sex-role ideology).

93. See *supra* text and note 55.

94. *Killing Softly*, *supra* note 11, at 490–514 (noting that the reasons include poor training, overconfidence, and role conflicts). See also James Coben, *Mediation’s Dirty Little Secret: Straight Talk About Mediator Manipulation and Deception*, 2 J. ALTERNATIVE DISP. RESOL. EMP. 4, 4 (2000) (pointing out that many mediators pressure and manipulate parties to produce a settlement); *Hopes and Fears*, *supra* note 3, at 140, 142–43.

95. See, e.g., Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES (Oct. 31, 2015), <https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html?mcubz=3> [Perma link unavailable] [hereinafter *Arbitration Everywhere*] (noting that “[o]ver the last few years, it has become increasingly difficult to apply for a credit card, use a cellphone, get cable or Internet service, or shop online without agreeing to private arbitration,” and



lawyers worried that their clients might sue them.<sup>96</sup> Loan collectors, for the trillion dollars of unpaid student loans, found it very helpful, too.<sup>97</sup> Each of these behemoths of the modern economy discovered that a suitably drafted arbitration clause brings substantial benefits.<sup>98</sup> It can bar class suits.<sup>99</sup> And it can land the dispute in front of a friendly arbitrator with ties to the defendant or its industry, a repeat player who the arbitrator depends on for continuing assignments.<sup>100</sup>

Commercial actors soon learned that arbitration can save them a great deal of time and money.<sup>101</sup> Many consumers, on learning that their com-

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observing that “[b]y inserting individual arbitration clauses into a soaring number of consumer and employment contracts, companies . . . devised a way to circumvent the courts and bar people from joining together in class-action lawsuits, realistically the only tool citizens have to fight illegal or deceitful business practices”) (noting the spread to new areas practically every month, such as funeral homes and car loans. Even small companies are beginning to adopt the practice). See Jessica Silver-Greenberg & Michael Corkery, *Start-Ups Embrace Arbitration to Settle Workplace Disputes*, N.Y. TIMES (May 14, 2016), <https://www.nytimes.com/2016/05/15/business/dealbook/start-ups-embrace-arbitration-to-settle-workplace-disputes.html?mcubz> [Perma link unavailable]. See also *supra* note 15 (describing the spread of ADR).

96. See Terese M. Schireson, Comment, *The Ethical Lawyer-Client Arbitration Clause*, 87 TEMP. L. REV. 547, 564–65 (2015).

97. See Gretchen Morganson, *Student Victims Seek to Become Creditors in ITT Bankruptcy*, N.Y. TIMES (Jan. 6, 2017), <https://www.nytimes.com/2017/01/06/business/student-victims-seek-to-become-creditors-in-itt-bankruptcy.html?mcubz> [Perma link unavailable]. See also Schireson, *supra* note 96, at 548 (noting that “Arbitration clauses have become a standard feature in form contracts including ‘credit card agreements, . . . cell phone bills, home mortgages, and . . . other service and sales agreements’”). See also Editorial, *Don't Force Students to Sign Away Their Rights*, N.Y. TIMES (June 10, 2016), <https://www.nytimes.com/2016/06/10/opinion/dont-force-students-to-sign-away-their-rights.html?mcubz> [Perma link unavailable (noting the common practice of including arbitration clauses in documents setting up student loans)].

98. See *Arbitration Everywhere*, *supra* note 95. See also Jessica Silver-Greenberg & Michael Corkery, *Efforts to Rein in Arbitration Come Under Well-Financed Attack*, N.Y. TIMES (Nov. 15, 2015), <https://www.nytimes.com/2015/11/16/business/dealbook/efforts-to-rein-in-arbitration-come-under-well-financed-attack.html> [https://perma.cc/ZPV6-LW2W] (noting that the home mortgage and finance industry strongly embraces the tactic). Even legislators and employers looking for inexpensive foreign guest workers find the idea attractive. But see Annie Smith, *Imposing Injustice: The Prospect of Mandatory Arbitration for Guestworkers*, 40 N.Y.U. REV. L. & SOC. CHANGE 375 (2016) (deploring the idea). See also Theresa M. Beiner, *The Many Lanes out of Court: Against Privatization of Employment Discrimination Disputes*, 73 MD. L. REV. 837, 838–40 (2014) (noting the rise of ADR in employment discrimination disputes).

99. *Arbitration Everywhere*, *supra* note 95 (noting that following two business-friendly Supreme Court decisions endorsing arbitration “judges upheld class-action bans in 134 out of 162 cases,” and that many other consumers were deterred from even filing a lawsuit). See *AT&T Mobility v. Concepcion*, 563 U.S. 333, 346–48 (2011) (upholding a fine-print contract that obliged consumers to arbitrate their cases one by one); *Am. Express v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310–12 (2013).

100. *Arbitration Everywhere*, *supra* note 95 (calling arbitrators generally “friendly” to business interests); Silver-Greenberg, *supra* note 98 (noting that arbitrators are often business-friendly). See also Galanter, *supra* note 56, at 97–101 (explaining the advantage of being a repeat player).

101. *Arbitration Everywhere*, *supra* note 95. See also Sam Hananel, *Justices Will Weigh Limits on Worker Rights to Sue Employers*, ASSOCIATED PRESS (Jan. 13, 2017), <https://apnews.com/5205b448f26f4996985d367b6a155798/justices-will-weigh-limits-worker-rights-sue-employers> [https://perma.cc/3B4H-QJHF] (noting that the National Labor Relations Board takes the position that arbitration agreements that prevent workers from filing class

plaint can only be heard in front of an arbitrator, will decline to proceed.<sup>102</sup> Torts, contract breaches, and medical malpractice will go unredressed.<sup>103</sup> Manufacturers of dangerous products and merchants who market shoddy goods online can escape liability for corner-cutting practices<sup>104</sup> by merely taking the precaution of inserting an agreement to arbitrate into the document setting up their relationship with the consumer.<sup>105</sup> The world becomes safer for the more empowered party, but much more dangerous for everyone else.

As in *The Unbearable Lightness of Being*, merchants enter a world of lightness, joy, and irresponsibility in which they can get away with almost anything because of the small-print arbitration clause they have placed in their form contracts. Like Tomas, they can do what they want with little fear that others will call them to account. As for the public, just as happened in the world of war-torn Prague, which turned gray or sepia-toned once the Russian boors took over, citizens entered into a new era in which they have to get used to life with no representation and little opportunity for redress.<sup>106</sup>

### C. BUYER'S REMORSE

Tomas came to regret his *Oedipus Rex* essay.<sup>107</sup> But his chagrin was only that of the pleasure-seeker who realizes that something he has done will interfere with his next bacchanal. Tereza's remorse was deeper and more shocking. After she photographed the scenes of righteous revolut-

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actions for job-related grievances violate labor laws that give workers the right to conduct joint action for redress of their grievances).

102. *Arbitration Everywhere*, *supra* note 95. See also Hiro N. Aragaki, *Does Rigorously Enforcing Arbitration Agreements Promote "Autonomy"?*, 91 IND. L.J. 1143 (2016) (answering no).

103. *Arbitration Everywhere*, *supra* note 95. See Editorial, *Nursing Home Residents Still Vulnerable to Abuse*, N.Y. TIMES (July 25, 2016), <https://www.nytimes.com/2016/07/25/opinion/nursing-home-residents-still-vulnerable-to-abuse.html?mcubz=3> [Perma link unavailable] (noting that "[p]rospective patients do not have the necessary information to make a decision about signing the clauses"). See also Rickard, *supra* note 44 (observing that the Kaiser Health Plan requires that members agree to arbitration and believes that this is in their best interest); Michael Corkery & Jessica Silver-Greenberg, *A Nursing Home Murder and a Family's Arbitration Fight*, N.Y. TIMES (Feb. 22, 2016), <https://www.nytimes.com/2016/02/22/business/dealbook/pivotal-nursing-home-suit-raises-a-simple-question-who-signed-the-contract.html?mcubz=3> [Perma link unavailable] (noting the use of arbitration clauses in nursing home contracts).

104. *Arbitration Everywhere*, *supra* note 95.

105. See *supra* notes 100–104.

106. But see Jessica Silver-Greenberg & Michael Corkery, *Rule on Arbitration Would Restore Right to Sue Banks*, N.Y. TIMES (May 5, 2016), <https://www.nytimes.com/2016/05/05/business/dealbook/consumer-agency-moves-to-assert-bank-customers-right-to-sue.html> [<https://perma.cc/PQ7C-SAKR>] (noting that "[t]he nation's consumer watchdog is unveiling a proposed rule" to curb some of the abovementioned abuses and "restore a consumer's rights to bring class-action lawsuits against financial firms"). The pioneer of the strategy of mandatory arbitration clauses, Alan S. Kaplinsky, gloomily predicted that "[i]t's going to spell the end of arbitration." *Id.* The agency's rule "would be the first significant check on arbitration since a pair of Supreme Court decisions in 2011 and 2013 blessed its widespread use." *Id.* The U.S. Chamber of Commerce was expected to mount strong opposition to the new rule. *Id.*

107. See *supra* text and notes 32–33.

ionaries defending their country's honor in the face of advancing Soviet tanks, she believed that the negatives that she entrusted to her fleeing countryman would help bring justice.<sup>108</sup> Surely, readers everywhere, seeing the Soviet barbarians and the popular uprising they sparked, would clamor for justice.<sup>109</sup> They would demand that their own governments, or perhaps the United Nations, do something about it.

Tereza was mortified that nothing like this happened. The world was silent. The Russians quickly installed themselves in power with little effective resistance. Their henchmen used her photographs to identify and punish her friends and wipe out the last vestiges of resistance.<sup>110</sup>

As with the authors of *Fairness and Formality*, she sought to bring an injustice to light. Instead, she ended up enabling the invaders to crush the opposition.<sup>111</sup> In similar fashion, legions of divorcing women, students burdened by intolerable debt, workers saddled with unfair working conditions, medical patients, and consumers injured by careless manufacturers are worse off for our having drawn attention to a weakness that their adversaries can, with a little advance planning, exploit.<sup>112</sup> We imagined ourselves as sounding an alarm, coming to their aid, helping them avoid an untenable situation—all classic tasks for lawyers and legal scholars working for social justice.<sup>113</sup> Surely, courts, legislators, and the organized bar would respond appropriately.

## V. VULNERABILITY: A CAUTIONARY TALE FOR PROCEDURAL CRITICS

Or so we thought. In recent years, scholars like Martha Fineman have been calling attention to *vulnerability* as a new approach to protecting women, children, minorities, the disabled, and others from harm at the hands of caregivers and others.<sup>114</sup> Focusing on that feature, scholars contend, can circumvent the limitations of traditional review—under equal protection, for example, with its many tiers of review and incongruous limits, such as the requirement of state action, intent, and straight-line causation.<sup>115</sup>

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108. See *supra* text and notes 31–35.

109. *Id.*

110. See *supra* text and notes 34–35.

111. See UNBEARABLE LIGHTNESS, *supra* note 17.

112. See *supra* Part IV(A).

113. See MARK V. TUSHNET, *THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION 1925–1950* (1987).

114. E.g., Martha A. Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 *YALE J. L. & FEMINISM* 1 (2008) [hereinafter *Anchoring*]; Martha A. Fineman, *The Vulnerable Subject and the Responsive State*, 60 *EMORY L.J.* 251 (2010) [hereinafter *Responsive State*]. See also EMORY UNIVERSITY, *The Vulnerability and the Human Condition Initiative*, <http://web.gs.emory.edu/vulnerability/> [https://perma.cc/CRS5-ZP9E] (last visited Sep. 10, 2017) (describing a university project to publicize Professor Fineman's work and ideas). See also Martha A. Fineman, *Fineman on Vulnerability and Law*, *NEW LEGAL REALISM CONVERSATIONS* (Nov. 30, 2015), <https://newlegalrealism.wordpress.com/2015/11/30/fineman-on-vulnerability-and-law/> [https://perma.cc/M2EQ-FPPF].

115. See, e.g., *Responsive State*, *supra* note 114, at 251–53.

If a group, such as African Americans or aliens, requires heightened judicial scrutiny, these scholars ask, why not protect them using the very quality—their vulnerability—that calls for heightened solicitude?<sup>116</sup> This approach avoids line-drawing problems (who is a minority, anyway? how about mixed-race people? the transgendered?).<sup>117</sup> It also avoids the charges of reverse discrimination that frequently accompany a decision to distribute a coveted good, such as a seat at a prominent university, to a minority at the expense of an equally or more deserving white.<sup>118</sup> Courts and other institutions adopting vulnerability as a criterion would simply protect all those who, by reason of their circumstances, were found in need of special consideration.<sup>119</sup> Line-drawing problems would recede, since most types of vulnerability are readily recognizable.<sup>120</sup> One is either weak, ill, young, disabled, or of minority race and lacking in resilience right now, or not.<sup>121</sup> And few people are likely to envy the vulnerable, believe that they are getting away with something, and deem themselves righteous when they organize to deprive them of an undeserved handout.<sup>122</sup>

#### A. VULNERABILITY: TWO RESPONSES

As impressive as those advantages are, drawing attention to vulnerability can lead to unintended effects. As Tereza learned with her photographs, fragility can elicit two responses, not just one.<sup>123</sup> Pointing out that a fellow citizen is at risk can motivate sympathetic onlookers<sup>124</sup> to rush to his or her aid.<sup>125</sup> A child teeters on a cliff; everyone rushes to help guide it to safety.<sup>126</sup>

But not in every case. As with a barnyard chicken with a speck of blood that ends up pecked to death by its yard-mates, the sight of vulnerability can elicit an aggressive reaction.<sup>127</sup> (Naturalists and poultry farmers believe that this is an evolutionary response that enables the birds to thin

116. *Anchoring*, *supra* note 114, 1–2 (noting that vulnerability—the absence of resilience—does not reside in fixed groups, such as minorities or children. Instead it arises from an interaction between an individual and the social conditions in which she finds herself at a particular time or moment in her life cycle).

117. *E.g.*, *Responsive State*, *supra* note 114, at 253.

118. *Id.* at 275.

119. *Id.* at 253, 267–68.

120. *Id.* at 253.

121. *Id.* at 253–55.

122. *See Ricci v. DeStefano*, 557 U.S. 557, 562–63 (2009) (discussing a challenge to a fire department's test procedures that made special concessions to minorities).

123. *See supra* text and notes 34–35.

124. That is, ones endowed with compassionate instincts—in short, social worker types.

125. *See Wagner v. Int'l Ry. Co.*, 133 N.E. 437 (1921) (“Danger invites rescue. The cry of distress is the summons to relief.”). *See also* HENRY PROSSER, *PROSSER ON TORTS* § 51 (2d ed. 1955).

126. *See Prosser*, *supra* note 125.

127. *See* Richard Delgado & David H. Yun, *Pressure Valves and Bloodied Chickens: An Analysis of Paternalistic Objections to Hate Speech Regulation*, 82 CAL. L. REV. 871, 877–78 (1994).

the flock and eliminate the unfit).<sup>128</sup> We all know how schoolyard bullies can pick on a slightly built child, or one with crossed eyes, unfashionable clothing, or a funny name or accent.<sup>129</sup> Large nations can attack small weak ones, unless, like Switzerland, they are bristling with underground artillery emplacements and citizens who keep military rifles at home in case of a national call-up.<sup>130</sup> Corporate raiders look for slim pickings in order to plan their next hostile takeover.<sup>131</sup> And so on.

In *The Unbearable Lightness of Being*, the Czech citizens were at first lighthearted. Music, operas, literature, and spas were their favorite leisure time pursuits.<sup>132</sup> For Tomas, it was all of these things, plus lovemaking.<sup>133</sup> For the soulful Tereza, it was finding and fastening herself to a fascinating and debonair man.<sup>134</sup> For Sabina, it was creating large, impressive art works while entertaining Tomas whenever he tired of innocent Tereza.<sup>135</sup> Many Czechs enjoyed music and high culture while living in atmospheric apartments in beautiful old neighborhoods in cities like Prague.<sup>136</sup>

What better target than a country like that for an expansion-minded Russian regime? Sending the tanks in and overcoming the unarmed crowd in the city center must have seemed like shooting fish in a barrel.

And so it was with advancing ADR, beginning with divorce mediation and progressing to mandatory arbitration.<sup>137</sup>

### 1. Divorce Mediation

Family lawyers representing men were quick to pick up on its advantages, confident that their peace-loving adversaries would be easily seduced (a second time, perhaps). They were. As mentioned, many women readily agreed to divorce mediation, even after studies showed that it worked to their disadvantage.<sup>138</sup> It felt good. Even if my award ended up on the low side, some women reasoned, at least everyone heard me

128. See *id.* at 878–79 n.56.

129. See SOUTHERN POVERTY LAW CENTER, *SPLC Survey: Presidential Campaign Leading to Widespread Fear, Bullying in Schools* (April 13, 2016), at <https://www.splcenter.org/news/2016/04/13/splc-survey-presidential-campaign-leading-widespread-fear-bullying-schools> [<https://perma.cc/292A-5R8F>].

130. See Clare Nullis, *Long-Secret Forts Coming to Light in Switzerland*, WASH. POST (Oct. 20, 2002), [https://www.washingtonpost.com/archive/politics/2002/10/20/long-secret-forts-coming-to-light-in-switzerland/e43cc165-f485-4593-909b-cc84489c4471/?utm\\_term=.8ca048fa0459](https://www.washingtonpost.com/archive/politics/2002/10/20/long-secret-forts-coming-to-light-in-switzerland/e43cc165-f485-4593-909b-cc84489c4471/?utm_term=.8ca048fa0459) [<https://perma.cc/DE7V-CZD4>].

131. See *Carl C. Icahn*, BIO.COM, at <http://www.biography.com/people/carl-c-icahn-9348875> [<https://perma.cc/EF7R-RNQF>] (last updated Aug. 31, 2016) (describing the career of a prominent corporate raider).

132. See UNBEARABLE LIGHTNESS, *supra* note 17.

133. *Supra* text and notes 24–26, 32.

134. *Id.* at 25–26.

135. *Id.*

136. UNBEARABLE LIGHTNESS, *supra* note 17.

137. See *infra* Part V(A)(1)–(2) (explaining this two-step process, which culminated in a secret meeting of high-powered lawyers from major corporations).

138. That is, even allowing for the additional expense of the lawyer and filing costs, a court-ordered award is generally higher than the one a woman might expect from mediation. See *Killing Softly*, *supra* note 11, at 523 (describing the ideology of divorce mediation for women as seductive and insidious, even though the outcomes were often suboptimal);

out.<sup>139</sup> Like Tomas and Tereza, who returned from Switzerland to their home country, “the land of the weak,”<sup>140</sup> knowing full well the fate that awaited them there, many clients will opt for mediation because it seems familiar and easy to understand<sup>141</sup> compared to the rapid-paced, high-stakes atmosphere of a court, with lawyers and judges communicating in an unfamiliar language.<sup>142</sup>

Tomas and Tereza found life in Geneva alienating and arduous.<sup>143</sup> There the political regime was relatively free, but daily life was difficult. They could secure only menial and unrewarding work. Once back home, they found the situation little better.<sup>144</sup> But at least it offered the appearance of familiarity. Would they have done better had they stayed in their new locale? Sabina certainly did. At the movie’s end, we see her in a California seaside studio, apparently thriving. Studies of divorce mediation suggest that this holds true, as well, for disputants who pass up mediation, summon their courage, consult a lawyer, and take their dispute to a court.<sup>145</sup>

## 2. Commercial Arbitration

High-priced lawyers for retail marketers, automobile manufacturers, the electronics industry, bankers, and financial executives were not far behind. A recent series in *The New York Times* shows how this happened.<sup>146</sup> It shows how mandatory consent-to-arbitration clauses have begun appearing in form contracts in areas ranging from those mentioned above, to nursing home agreements, funeral parlor arrangements, student loan collection practices, and even employment contracts, where workers suing for racial or sexual discrimination on the job find, to their surprise, that the employment contract that they entered into years ago binds them to take their grievance to an arbitration proceeding, not a court.<sup>147</sup>

Might it be that the arbitration boom, following on the heels as it did of an early wave of mediation, came about precisely because gimlet-eyed corporate lawyers in executive suits saw in mediation an early example of what they could achieve for their corporate clients through mandatory

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*Process Dangers*, *supra* note 7, at 1548 (noting that many women felt satisfied with the experience of mediation and would recommend it to their friends).

139. See *supra* text and notes 79–81; *Process Dangers*, *supra* note 7, at 1563–69, 1585–96, 1610 (attributing this to the mediators’ skill and preference for compromise so that disempowered parties end up acquiescing “in their own oppression”).

140. See *supra* text and notes 34–35.

141. *Process Dangers*, *supra* note 7, at 1547–50 (concluding that mediation is not the “feminist alternative” that many think).

142. See *Recent Books*, *supra* note 2, at 146.

143. UNBEARABLE LIGHTNESS, *supra* note 17. See *supra* text and notes 34–35.

144. See *supra* text and notes 34–35.

145. See *supra* Part III (reviewing outcome studies).

146. See *supra* notes 95, 97–106.

147. *Arbitration Everywhere*, *supra* note 95 (discussing the growing use of such clauses in employment contracts). See generally *supra* note 16 (describing the spread of ADR generally).

arbitration?<sup>148</sup> Mediation, for some clients, is an enjoyable exercise, as it is for some mediators who imagine themselves benefactors of the poor and dispossessed, contributing to a more peaceful world.<sup>149</sup> In their mind's eye, they are engaged in making the lion and the lamb lie down together. What a wonderful role! Many of their clients even claimed to like it and thanked them afterward.<sup>150</sup>

For many mediators and clients alike, mediation is "light." It represents peace, love, and a restoration of solidarity. And in some cases, that might be true. Yet, might they not overlook the enterprise's risks, unwittingly introducing the current wave of mandatory arbitration with its even greater dangers for consumers, workers, and practically everyone else? A light, happy society like Czechoslovakia before the Russian invasion did not see the danger coming, so that their only defenses against the Russian tanks were rocks, and, in Tereza's case, photographs sent to a foreign newspaper.

Perhaps it behooves a weaker party to ask why the stronger one prefers to proceed as it does. Perhaps it should set aside periods of sobriety, alternating with the lightness they prefer as a daily diet. If they had done so, Tomas and Tereza might have avoided a meaningless early death in a dilapidated truck on a rainy day in the forest. By the same token, the organized bar might have slowed the rush to alternative dispute resolution and preserved an age-old system of adjudication, with trials, high stakes, tense stomach muscles, and the trappings of an adversary system that, at times, worked just as theory suggested it should, rendering a fair result for a disempowered litigant and making the one who injured him pay full freight—not a compromised settlement that enables both parties to walk away semi-satisfied.<sup>151</sup>

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148. It would be hard for a hard-driving corporate lawyer not to have known how divorce mediation could benefit a better-resourced male going through a high-stakes divorce. At a minimum, such a lawyer would be likely to know about it from the old-boys grapevine or the experience of friends. Or, perhaps he went through divorce proceedings himself and saw the advantages of mediation close up. See *Critical Reconsideration*, *supra* note 21. Lawyers have good memories for this sort of thing. See *Arbitration Everywhere*, *supra* note 95 (noting that "[t]he effort was led by a lawyer at . . . a Philadelphia firm that represented big banks . . . [who] was searching for solutions when he remembered helping, as a young lawyer . . . draft[ing] an arbitration clause . . . because '[c]lients . . . were getting killed by frivolous lawsuits and asking what on earth could be done about it.'" The article goes on to describe how he convened a meeting of like-minded corporate defense lawyers, including ones from Bank of America, Chase, Citigroup, Discover, Sears, Toyota, and General Electric to promote his bright idea. *Id.* "At a subsequent teleconference, participants dialed in remotely using an easy-to-remember code: a-r-b-i-t-r-a-t-i-o-n." *Id.* Following that meeting and "more than a dozen others over the next three years," mandatory arbitration clauses became "a means to an end . . . [namely] to kill class actions and send plaintiffs' lawyers to the 'employment lines.'" *Id.* The Class Action Fairness Act of 2005 soon followed, succeeded by Supreme Court victories such as *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013). *Id.*

149. See *supra* text and notes 85, 89, 125.

150. See *supra* text and notes 80, 137; see *infra* 165. See also *Hopes and Fears*, *supra* note 3, at 141 (noting that mediation seemed to morph into arbitration around 2012).

151. The victor, perhaps wearing a secret smile and issuing a sigh of relief at getting off so easily.

## B. REASON FOR THE SECOND RESPONSE

What is it that calls up the second response—opportunism, seizing the advantage over a weaker opponent—rather than compassion and fellow feeling? With chickens and other barnyard animals, we know the answer.<sup>152</sup> With children who taunt and bully each other, too.<sup>153</sup> With some adults, sadism, schadenfreude, and sociopathy explain how some of our fellow citizens seem missing in the consideration that we have come to expect among normal people.<sup>154</sup>

But with corporations and other large institutions, this quality (consideration) is much more likely to be absent than it is with individuals.<sup>155</sup> Corporations generally act in their own best interest, with little consideration for the broader social good.<sup>156</sup> The bottom-line is profit. If the corporation injures some hapless consumer, or disappoints a long-term employee (for example by firing the employee just before a pension kicks in), that's the breaks.<sup>157</sup>

No one expects the corporation to experience remorse, feel sorry, or search its soul and resolve to act better next time. Human beings often do. A late-arriving movie-goer steps on the toes of a seated patron while sidling to his seat and says "sorry." He does this automatically; it is, for most of us, second nature. But large institutions are in most cases entirely devoid of this inclination. They rarely apologize or express any other emotion. They are "happy" only if the bottom-line—profit—is favorable this quarter. The CEO breaks out a bottle of champagne and invites a few of his staff into his office for a drink.<sup>158</sup> If they do something reprehensible—contribute to global warming, say—they are sorry only if it injures their image in the public eye or if a governmental regulator calls them to

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152. See *supra* text and notes 126–1277.

153. They are immature beings whose social consciences are not fully developed. See generally WILLIAM GOLDING, *LORD OF THE FLIES* (Coward-McCann, Inc., 1962); B.J. Casey et al., *The Adolescent Brain*, NCBI (July 21, 2008), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2475802/> [Perma link unavailable].

154. On these unlovely traits, see Anthony P. Farley, *The Black Body as Fetish Object*, 76 ORE. L. REV. 457 (1997); JOEL KOVEL, *WHITE RACISM: A PSYCHOHISTORY* (Colum. U. Press 1984) (1970).

155. On corporate capitalism, as devoid of an inherent moral impulse, see KARL MARX, *CAPITAL: A CRITICAL ANALYSIS OF CAPITALIST PRODUCTION* (Penguin Classics, paper ed. 1991); ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* (Bantam Classics, paper ed. 2002).

156. Marx, *supra* note 155; Smith, *supra* note 155. See also Nelson D. Schwartz & Alan Rappeport, *Call to Create Jobs, or Else, Tests Trump's Sway*, N.Y. TIMES (Jan. 23, 2017), [https://www.nytimes.com/2017/01/23/business/economy/trump-business-leaders-meetings-ceos.html?hp&action=click&pgtype=Homepage&clickSource=story-heading&module=b-lede-package-region&region=top-news&WT.nav=top-news&\\_r=0](https://www.nytimes.com/2017/01/23/business/economy/trump-business-leaders-meetings-ceos.html?hp&action=click&pgtype=Homepage&clickSource=story-heading&module=b-lede-package-region&region=top-news&WT.nav=top-news&_r=0) [Perma link unavailable] (quoting a Harvard Business professor that "[g]lobal capital doesn't have a social conscience").

157. On this common practice, see, e.g., Deborah L. Jacobs, *11 Sneaky Ways Companies Get Rid of Older Workers*, FORBES (Nov. 3, 2013, 12:30 PM), <http://www.forbes.com/sites/deborahljacobs/2013/11/03/11-sneaky-ways-companies-get-rid-of-older-workers/#43590ba6206a> [https://perma.cc/98P2-LRMH].

158. But probably not the secretary or foreman.



task for it.<sup>159</sup>

With individual, flesh-and-blood mediators, the mechanism is a little different from the one (lack of a conscience) that produces unfeeling corporate behavior. That mechanism is a combination of mediation training and group psychology, which enable many mediators to dismiss concerns like the ones that the *Fairness and Formality* raised. The argument, even reinforced by the empirical studies that followed, confronted old-fashioned confirmation bias.<sup>160</sup> If one's world consists, in large part, of other mediators trading tips and reading scholarly literature and CLE materials on how to conduct a successful mediation, one is apt to give little attention to an argument that casts doubt on the enterprise as a whole.<sup>161</sup>

Trying to raise systemic questions with a successful divorce mediator with a big caseload—or a large corporation that routinely inserts agreements-to-arbitrate clauses in contracts, invoices, receipts, download apps, and the like—can be a fruitless enterprise, what philosophers call a category mistake.<sup>162</sup> They—the corporation and the mediator—are not the kind of entity that can exhibit that quality (empathy). The skeptical reader is invited to pick up any casebook, symposium issue, or law review article on alternative dispute resolution and look for the—usually very short—section on critiques of the movement. There, buried in an obscure footnote, one is apt to find a brief reference to *Fairness and Formality*,<sup>163</sup> followed by a perfunctory question (how about this?) before going on to discuss, say, polycentric disputes, the sort of thing that really matters in that world.<sup>164</sup>

By the same token, ask a busy mediator if he has ever seen powerful males summoning up their authority and privilege in the course of a divorce mediation, causing the woman to fall silent, and looking up confidently at the mediator for the expected approval. One will find that the most common response is impatience and the insistence that his crowd is aware of this problem and tries to ward it off by encouraging the woman to speak up.<sup>165</sup> And if one asks about studies showing that, despite it all, women do worse in mediated divorce than in the litigated variety, holding all factors constant, the answer is apt to be that that's impossible—the

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159. E.g., Matt Egan, *5,300 Wells Fargo Employees Fired Over 2 Million Phony Accounts*, CNN MONEY (Sept. 9, 2016, 8:08 AM), <http://money.cnn.com/2016/09/08/investing/wells-fargo-created-phony-accounts-bank-fees/> [<https://perma.cc/EAC7-3WG6>].

160. See, e.g., Shabram Heshmat, *What Is Confirmation Bias?*, PSYCHOL. TODAY (Apr. 23, 2015), <https://www.psychologytoday.com/blog/science-choice/201504/what-is-confirmation-bias> [<https://perma.cc/WX9T-QB58>] (explaining that it consists of interpreting new evidence in line with one's pre-existing beliefs—in short, “wishful thinking”).

161. Particularly if one's livelihood depends on it.

162. See Definition of “category mistake,” OXFORD DICTIONARIES, [https://en.oxforddictionaries.com/definition/category\\_mistake](https://en.oxforddictionaries.com/definition/category_mistake) [<https://perma.cc/Q2HL-KSSU>] (last visited Sep. 10, 2017) (explaining that a “category mistake is the error of assigning to a thing or person an attribute that cannot belong to that type of thing or person”).

163. See generally *Fairness and Formality*, *supra* note 1.

164. See, e.g., *Critics Gone?*, *supra* note 16, at 1062–64 (noting the occasional brief, perfunctory cite); *Hopes and Fears*, *supra* note 3, at 125 n.5 (providing an example of one).

165. That is, “we power-balance all the time.” See *supra* text and notes 54–55.

investigators must have failed to take some important variable into account.<sup>166</sup> Still others will fall back on satisfaction: "But my women clients tell me afterward that they were happy with what I did."<sup>167</sup>

One can easily leave such conversations with a strange feeling of disconnection from the other person. In some ways, the feeling resembles Jean-François Lyotard's notion of *le differend*<sup>168</sup>—a state of affairs, similar to Emile Durkheim's *anomie*<sup>169</sup>—that comes into play when a person or group cannot see itself in the coercive language that another uses toward or about it. The disaffected group cannot address its complaint, or even pose it, in the language of the other. If it tries, the other will simply not recognize what it is saying. Scholars critiquing ADR can easily find themselves in this predicament.<sup>170</sup>

## VI. FAIRNESS AND FORMALITY IN 21ST CENTURY AMERICA

The reader will recall that the *Fairness and Formality* critique turned on (i) the connection between prejudice and informality; (ii) the observation, dating back to Gunnar Myrdal, that most Americans hold ambivalent beliefs about race; and (iii) that they tend to hold these beliefs in abeyance when in the presence of features (cues) in their surroundings that remind them of the American Creed. The critique, of course, argued for caution in relegating disempowered disputants to alternative forums. Since the article appeared, new developments have complicated some of our premises, while making critique even more urgent.

### A. AN ALTERNATIVE PARADIGM: SOUTH AFRICA UNDER APARTHEID

Changes in the political climate are starting to cast doubt not so much on the fairness-and-formality critique itself, but on its application to contemporary America. In particular, Gunnar Myrdal's observation about the American Creed and most white citizens' double value system (ambivalence) may have held true for liberal democracies like America in mid-century,<sup>171</sup> but does so less forcefully today. The basic value system

166. See *Killing Softly*, supra note 11, at 509–12 (noting the common belief that "power balancing" covers all sins).

167. See supra text and note 138.

168. See JEAN-FRANÇOIS LYOTARD, *THE DIFFEREND: PHRASES IN DISPUTE* 13 (Georges Van Den Abbeele trans. 1988) (1983); George A. Martinez, *Philosophical Considerations and the Use of Narrative in Law*, 30 RUTGERS L.J. 683, 684–85 (1999) (explaining this concept).

169. See EMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* (W.D. Halls trans., Free Press 1997) (1892) (considering the alienation of the working class).

170. See Nathalie Martin, *Giving Credit Where Credit is Due: What We Can Learn from the Banking and Credit Habits of Undocumented Immigrants*, 2015 MICH. ST. L. REV. 989, 1003 (2015) (observing "that middle-class parents model a sense that they are entitled to have fair rules and procedures governing their experiences, to have the consequences of their actions explained, and to have situations customized to their unique needs. These habits are not equally present among the poor . . .").

171. See MYRDAL, supra note 58.

(American Creed) has undergone subtle erosion so that our official policies and practices do not incline toward equality and fairness quite so unequivocally as they once did.

Not all national creeds place racial fairness on a high pedestal. For example, in South Africa during apartheid, the official values were overtly racist.<sup>172</sup> The national regime oppressed blacks and treated them as second-class citizens. There, a black with a broken-down car could hope for kindly treatment from a passing motorist or pedestrian more readily than from a representative of the official regime.<sup>173</sup> The same was true in the American South during slavery and Jim Crow. An occasional white Southerner might extend blacks a helping hand in situations where the authorities were unlikely to do so.

The relationship between fairness and formality, in short, is contingent and varies from society to society and from era to era. Our society, which today embraces official neglect, deeming it virtuous “colorblindness,”<sup>174</sup> and worries at least as much about reverse racism and quotas as about relieving historical injustice,<sup>175</sup> may well be approaching a point where, as in South Africa, a disempowered minority citizen may hope for better treatment from an informal source than from an official enforcing brutally cool, uncaring laws and practices.<sup>176</sup>

If Myrdal’s observation no longer holds true as forcefully as it once did, incorporating rules and physical reminders into a dispute resolution forum may no longer yield the same results.<sup>177</sup> In short, official disputing

172. Ruling whites there, of course, did not see them that way. For them, their practices were merely what the situation demanded. See, e.g., F.W. DE KLERK, *THE LAST TREK: A NEW BEGINNING* (1998); Hirsh Goodman, *Losing the Propaganda War*, N.Y. TIMES (Jan. 31, 2014), <https://www.nytimes.com/2014/02/01/opinion/sunday/how-israel-is-losing-the-propaganda-war.html?mcubz=3> [Perma link unavailable] (noting how the country moved masses of people to arid Bantustans and instituted a “pass system” to split families and break down social structures “to provide cheap labor for the mines” and a plentiful supply of servants for white homes and families).

173. See *Goodbye to Hammurabi*, *supra* note 2, at 772.

174. See, e.g., Neil Gotanda, *A Critique of “Our Constitution Is Color-Blind,”* 44 STAN. L. REV. 1 (1991) (noting the growing popularity of the color-blind metaphor).

175. See *Ricci v. DeStefano*, 557 U.S. 557 (2009) (discussing a recent Supreme Court decision that evinced this concern).

176. *Goodbye to Hammurabi*, *supra* note 2, at 772; MICHAEL K. BROWN ET AL., *WHITE-WASHING RACE: THE MYTH OF A COLOR-BLIND SOCIETY* (2003) (noting that the myth of colorblindness enables the majority to justify unfair regimes).

177. See *supra* text and note 146–1488 (describing how a group of high-paid lawyers from various industries devised the tactic—mandatory arbitration clauses in form agreements setting up various transactions). See Jessica Silver-Greenhouse & Michael Corkery, *In Arbitration, a “Privatization of the Justice System,”* N.Y. TIMES (Nov. 1, 2015), <https://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html?mcubz=3> [Perma link unavailable] (noting that some predatory forms of ADR have now effectively substituted themselves for the justice system). See also Ian Lovett, *Builders Pierce California’s Environmental Shield with New Weapon: The Ballot*, N.Y. TIMES (June 7, 2016), <https://www.nytimes.com/2016/06/08/us/builders-pierce-california-as-environmental-shield-with-new-weapon-the-ballot.html?mcubz=3&mtref=www.google.com&gwh=3E7EFD3EAF277C633C034AB17E9202EA&gwt=pay> [Perma link unavailable] (noting how developers often evade the justice system entirely by proceeding through the initiative process) (“A Walmart spokeswoman . . . said the ballot initiative was ‘a way

may be a less promising avenue for the disempowered litigant than it was when we wrote *Fairness and Formality*.<sup>178</sup> Of course, ADR may be in the process of turning into a barren landscape for disempowered disputants as well,<sup>179</sup> so that both avenues are just as unpromising as, say, German society was toward the Jews in the Third Reich, when both the state and society at large were equally cold and hostile.<sup>180</sup> If a trend of this sort is, indeed, in process, merely channeling disputes among parties of different levels of power and status to a relatively formal setting may be less helpful than it once was. Proceduralists may need to explore new approaches entirely.

#### B. NORM THEORY: SECOND-CLASS TREATMENT FOR SECOND-CLASS DISPUTANTS

A new mode of social analysis points in the same direction. *Norm theory* holds, in essence, that our response to a person in need—in a predicament of some sort—is a function of how normal or abnormal that person's predicament seems to us.<sup>181</sup> We see starving villagers in a foreign country on TV, but do not allow this to bother us excessively because we reason that famines are common in that part of the world so that the villagers must be used to it by now. By contrast, if our neatly dressed next-door neighbor shows up at our doorstep saying that she and her children are starving because her husband walked out on them, and she lost her job and has not eaten in three days, we are immediately taken aback. This is not supposed to happen in a nice neighborhood like ours. We fix a sack of peanut butter sandwiches for her, and we give her some money for gas and the address of a social service agency that can help her.<sup>182</sup>

On another occasion, we might be driving through the country when we come across a family standing by a car on the side of the road with the hood up. It is getting dark, and they look worried. But we drive on. The family looked Mexican, and we reason that a lot of them live and work in this area. Surely, a carload of their countrymen will come along before long and stop to help. They all drive dilapidated cars like the roadside family's car and undoubtedly know how to fix them. They probably speak better Spanish than we do, so that communication between them will go more smoothly than it would if we were the ones stopping to help. So we drive on.

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to move the process forward,' but she would not address whether the company was using the process to avoid potential lawsuits.").

178. See *infra* text and notes 187–1933 (discussing a number of retrenchments suggesting that this is indeed the case today).

179. See *supra* Parts II–IV.

180. See *infra* text and notes 186–188.

181. See Richard Delgado, *Four Reservations on Civil Rights Reasoning by Analogy: The Case of Latinos and Other Nonblack Groups*, 112 COLUM. L. REV. 1883, 1896 (2012) (explaining norm theory); Daniel Kahneman & Dale T. Miller, *Norm Theory: Comparing Reality to Its Alternatives*, 93 PSYCHOL. REV. 136, 136 (1986).

182. See Delgado, *supra* note 181, at 1897.

Finally, consider the fortunes of special education in the public schools. To ease the burden for cognitively or developmentally disabled students struggling to keep up in regular classrooms, Congress years ago enacted the IDEA Act, which requires public schools to provide such students individualized help and opportunities tailored to their needs.<sup>183</sup> The Act requires an expert investigation of each such child's situation, a conference with the family, a formal hearing if both sides cannot agree to a joint plan, and a written program that will enable the child to perform at his or her highest possible level. Early assessment shows that programs of this type, which are in effect in most advanced countries, perform well, but only for white students.<sup>184</sup> Students of color rarely receive enriched instruction but are relegated to tracks for slow learners and ones with disruptive behavioral problems. Many drop out as soon as they can.<sup>185</sup> The IDEA Act ends up increasing racial disparities in school achievement and completion.<sup>186</sup>

Both considerations—norm theory and a general hardening of social attitudes—suggest a degree of caution today that may have been unwarranted when my co-authors and I wrote *Fairness and Formality*.<sup>187</sup> Form contracts, requiring that consumers, medical patients, and purchasers of electronic hardware or apps submit their claims to arbitration, are manifestly unfair, since the arbitrators are often company shills and the contracts bar class relief.<sup>188</sup> Divorce mediation is probably just as poor a choice for women as it was at the dawn of the ADR revolution. But the advent of tort caps,<sup>189</sup> stringent pleading rules,<sup>190</sup> new limits on class actions,<sup>191</sup> and legislative limits on recovery for medical malpractice and even voting<sup>192</sup> suggest that formal, in-court adjudication does not provide the same opportunity for redress that it once did.<sup>193</sup> For reasons that are

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183. See Individuals with Disabilities Education Act, Pub. L. No. 111-256, § 2, 124 Stat. 2643 (2010). See also generally McMurtrey, *supra* note 16.

184. See, e.g., David Gillborn, *Dis/ability as White Property: Race, Class and 'Special Education' as a Racist Technology*, in *WORLD YEARBOOK OF EDUCATION 2017, ASSESSMENT INEQUALITIES* 104, 105 (Julie Allan & Alfredo J. Artiles eds., 2017).

185. See *id.* at 113–16.

186. *Id.*

187. *Viz.*, 1985.

188. See *supra* text and notes 56, 100.

189. See Jeffrey A. Krawitz, *New Study Reveals Caps on Damages are Potentially Ruining the Healthcare Industry*, *NAT. L. REV.* (July 27, 2017), <http://www.natlawreview.com/article/new-study-reveals-caps-damages-are-potentially-ruining-healthcare-industry> [<https://perma.cc/8XDK-SV8W>]. See also George A. Martinez, *Further Thoughts on Race, American Law, and the State of Nature: Advancing the Multiracial Paradigm Shift and Seeking Patterns in the Area of Race and Law*, 85 *UMKC L. REV.* 105, 110–16 (2016) (noting this and other changes in procedural law that operate to the disadvantage of disempowered litigants).

190. See Brooke D. Coleman, *One Percent Procedure*, 91 *WASH. L. REV.* 1005, 1043–44 (2016).

191. *Id.* at 1037–38.

192. E.g., *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 440 (2010); *Shelby Cty., Ala. v. Holder*, 133 S. Ct. 2612, 2624 (2013).

193. On some of these measures, see *Critics Gone?*, *supra* note 16, at 1056–57; Martinez, *supra* note 189, at 110–16 (2016) (noting changes in procedural law that operate to the detriment of disempowered litigants).

not completely clear, we normalize the predicament of poor people seeking relief from corporate villainy. We reason that this sort of thing happens all the time. We arrange that they lose—in court, or anywhere else.

Courts and other means for adjudicating disputes originated centuries ago as measures by which the King could assure peace in his realm and discourage his subjects from seeking private revenge. If the two main avenues our society offers for such relief—formal, in-court adjudication, and ADR—are poor guarantors of a fair hearing, it may be time to begin pondering new means by which poor disputants, at least, may achieve official relief. Otherwise, we may find ourselves driving down a forest road on a rainy night, oblivious to the fate that awaits us in a deteriorating world.<sup>194</sup>

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194. *See supra* text and notes 35–36, explaining how the story of Tereza and Tomas comes to an end.