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FAIRNESS AND FORMALITY: MINIMIZING THE RISK OF PREJUDICE IN ALTERNATIVE DISPUTE RESOLUTION

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Legal commentators have recently begun to focus a great deal of attention on methods of Alternative Dispute Resolution (ADR), such as arbitration, mediation and a host of other informal procedures. Most commentators have argued that these informal alternatives to the courtroom will lead to a more efficient and accessible justice system. The few detractors, primarily members of the Critical Legal Studies movement, have focused on the political shortcomings of ADR. In this Article, Professor Richard Delgado and his co-authors examine another potential liability of ADR: the possibility that it may foster racial and ethnic prejudice. The authors rely on several social scientific studies showing that people who hold prejudicial attitudes are more prone to act on those attitudes in informal, rather than formal, settings. Thus, when the formalities of traditional adjudication are abandoned in favor of more informal methods of dispute resolution, minority disputants may be placed at an even greater disadvantage than that which they usually suffer. If correct, the conclusions of this Article seriously undermine the assertion by ADR's proponents that ADR is especially beneficial to the poor and disadvantaged, many of whom are members of various minority groups. The authors suggest that, to protect minorities, ADR should be reserved for disputes in which parties of comparable status and power confront each other. When confronting opponents of higher status or power, minorities would be well advised to opt for formal adjudication and should not be forced by the courts into informal proceedings.

INTRODUCTION

Alternative Dispute Resolution (ADR) has been heralded as one

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of the most vital and far-reaching procedural reforms of our time.¹ Writers have praised this loose collection of deformed, decentralized procedures, including negotiation, mediation, arbitration, neighborhood justice centers, and consumer complaint panels²—as offering speedy, non-intimidating, flexible justice for the common person, the litigant of modest means or one whose claim is so small that it cannot be processed economically in court.³ Alternative Dispute Resolution has its own acronym, ABA Special Committee,⁴ and specialized journals.⁵ Its ideas shape law school courses, clinical teaching, and recently published casebooks.⁶

Except for a small group of leftist critics,⁷ the movement has few detractors. This Article raises a concern that has seemingly been overlooked in the rush to deformatize—the concern that deformatization may increase the risk of class-based prejudice.⁸ ADR has been pro-

1. For example, a recent revision of a well-known Civil Procedure casebook was promoted in the following language:

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

Foundation Press, Announcing a Major Revision of a Renowned Casebook 1 (Jan. 1985) (Promotional Release on file with authors). See also J. MARKS, E. JOHNSON & P. SZANTON, *DISPUTE RESOLUTION IN AMERICA: PROCESSES IN EVOLUTION* 7-19 (1984); *ACCESS TO JUSTICE: A WORLD SURVEY* (M. Capeletti & B. Garth eds. 1978); Sanders, *Varieties of Dispute Processing*, 70 F.R.D. 111 (1976).

The literature on ADR is vast. See, e.g., AMERICAN BAR ASS'N, SPECIAL COMM. ON ALTERNATIVE MEANS OF DISPUTE RESOLUTION, A SELECTED BIBLIOGRAPHY (1982) (65 pages of titles of articles and books on alternative dispute resolution).

2. See Sanders, *supra* note 1; *infra* text accompanying notes 11-64 (Part I, history and types of ADR).

3. See *infra* text accompanying notes 11-52.

4. Special Committee on Dispute Resolution. See American Bar Association 1985/86 Directory at D-2 (1985).

5. The quarterly journal, *Dispute Resolution*, publishes news and articles about alternative dispute resolution and techniques. See also Sanders, *Alternative Dispute Resolution in the Law School Curriculum: Opportunities and Obstacles*, 34 J. LEGAL EDUC. 229 (1984); *Private Alternatives to the Judicial Process*, 8 J. LEGAL STUD. 231 (1979); *Dispute Resolution*, 88 YALE L.J. 905 (1979).

6. See *supra* note 1; Harper, *Rising Number of Lawsuits Makes U.S. Legal System A Victim of its Own Success*, L.A. Times, April 17, 1983, § I-B, at 1, col. 3 (60 law schools offer courses in mediation). See also Miranker, *Silicon Valley Courts Alternatives to Lawsuits*, S.F. Examiner, Dec. 1, 1985, at D-1, col. 1 (Stanford Law School raising \$750,000 to add to its two courses on alternative dispute resolution).

7. See *infra* text accompanying notes 247-307.

8. Prejudice (a term we use interchangeably with "bias") is "an aversive or hostile attitude toward a person who belongs to a group, simply because he belongs to that group, and is therefore presumed to have the objectionable qualities ascribed to the group." G. ALLPORT, *THE NATURE OF PREJUDICE* 7 (25th Anniv. Ed. 1979). This Article will be mainly concerned with the

moted, in large part, with the rhetoric of egalitarianism.⁹ Moreover, it is aimed at serving many groups whose members are particularly vulnerable to prejudice.¹⁰ Thus, if our criticism is correct—if the rhetoric is untrue or if ADR injures some of those it is designed to help—society should proceed cautiously in channeling disputes to alternative mechanisms.

Part I of this Article gives a brief overview of ADR. Part II surveys ADR's counterpart—formal, in-court justice—to see what mechanisms it includes that check and contain prejudice. ADR, to date, has few protections. This lack, in itself, would not be especially worrisome if the settings in which ADR is conducted discouraged prejudice. Part III reviews social science writings to see how they bear on this question. It concludes that, based on what is known about human and contextual factors that contribute toward prejudiced behavior, ADR is indeed likely to increase the risk of that behavior. Part IV summarizes left-wing political criticisms of ADR. Part V reviews the role of the ideal of procedural fairness in our system of justice to see what significance should be attached to an increased risk of prejudice. It then balances the benefits and costs of ADR and suggests ways of lessening the danger of prejudice without sacrificing the advantages ADR offers.

I. AN OVERVIEW OF ADR

Recourse to formal judicial institutions has been increasing rapidly in the United States.¹¹ In the last forty years the number of annual federal district court civil filings has jumped from approximately 35,000

possibility that ADR increases the likelihood of prejudice against ethnic minorities of color. See Part III *infra* text accompanying notes 115-246. But the concerns raised, and evidence reviewed, suggest that ADR may facilitate prejudice against members of other out-groups as well, including women, religious minorities, foreigners, and the poor. These possibilities are not pursued in detail, for reasons of space. See *infra* notes 247-307 and accompanying text ("left" critique of ADR).

9. See J. MARKS, E. JOHNSON & P. SZANTON, *supra* note 1, at 9, 17-19: *Preface to Dispute Resolution*, *supra* note 5, at 906-07 (benefits the poor, "distinctly populist cast"). See also Abel, *Conservative Conflict and the Reproduction of Capitalism: The Role of Informal Justice*, 9 INT'L J. FOR SOC. L. 245, 247-48 (1981) (more humane and caring).

10. See *infra* notes 269-83 and accompanying text (ADR serves the poor, workers, the young, divorcing women, and persons confined in total institutions. These groups will often contain a high proportion of persons of minority race). An exception to this generalization is the rent-a-judge/mini-trial development (see *infra* note 27) in which corporations agree to use ADR-like procedures to settle business disputes cheaply and swiftly.

11. See generally Manning, *Hyperlexis: Our National Disease*, 7 NW. U.L. REV. 767 (1977); Burger, *Agenda for 2,000 A.D.—A Need for Systematic Anticipation*, 70 F.R.D. 83 (1976); Miranker, *supra* note 6; Barton, *Behind the Legal Explosion*, 27 STAN. L. REV. 567 (1975); Ehrlich, *Legal Pollution*, N.Y. TIMES MAG., Feb. 8, 1976, at 17. But see Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4 (1983) (rise in litigation is only modest, and not a sign of increased contentiousness in American society).

to 180,000;¹² there was a 14.3% increase in filings from June, 1981 to June, 1982 alone.¹³ At the appellate level filings rose from 2,800 in 1950 to over 26,000 in 1981.¹⁴ If that growth continues, federal appellate courts, with more than 5,000 active judges, will hear more than one million appeals each year by the twenty-first century.¹⁵

A similar pattern exists in state courts. For example, from 1967 to 1976 state appellate filings increased eight times as fast as the population; trial court filings increased twice as fast as the population.¹⁶

Increased resort to formal dispute resolution mechanisms might be tolerable if those mechanisms resolved disputes effectively. Commentators have said that some disputes are handled more effectively outside the courts, without "the delay and expense and psychological strain, the hostility or lack of empathy engendered by differences of class, or race, or verbal style"¹⁷ that accompany formal adjudication. The burgeoning ADR movement¹⁸ represents an attempt to develop dispute resolution processes that are free of these problems.¹⁹

Although Americans have sought alternatives to formal legal institutions since colonial times,²⁰ the earliest major push for informal forums came in the early 1900's when criticism of the legal system's inefficiency and expense intensified.²¹ This criticism spawned small claims, juvenile, and domestic courts as well as public defender services and legal aid societies.²² But by the 1950's, critics, believing that the earlier changes were not providing equal access to justice, were again demand-

12. Burger, *Isn't There A Better Way?*, 68 A.B.A.J. 274, 275 (1982).

13. Johnson, *Seeking a Better Way*, 46 TEX. B.J. 404 (1983).

14. Burger, *supra* note 12, at 275.

15. Barton, *supra* note 11.

16. Burger, *supra* note 12, at 275.

17. Cahn & Cahn, *Power to the People or the Profession?—The Public Interest in Public Interest Law*, 79 YALE L.J. 1005, 1017 (1970). See J. MARKS, E. JOHNSON & P. SZANTON, *supra* note 1, at 7-15; Burger, *Our Vicious Legal Spiral*, 16 JUDGES J., at 23, (Fall, 1977). See also Thibaut & Walker, *A Theory of Procedure*, 66 CALIF. L. REV. 541 (1978). But see Trubek, Sarat, Felstiner, Kritzer & Grossman, *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72 (1983) (costs of court-administered litigation less than many ADR proponents claim).

18. The number of civil cases disposed of through ADR probably exceeds those processed by the courts. Cf. Abel, *The Contradiction of Informal Justice*, in 1 THE POLITICS OF INFORMAL JUSTICE 267, 269, 273, 295 (R. Abel ed. 1982); Green, *A Comprehensive Approach to the Theory and Practice of Dispute Resolution*, 34 J. LEGAL EDUC. 245, 246 (1984).

19. But see Felstiner, *Influences of Social Organization on Dispute Processing*, 9 L. & SOC. REV. 63 (1974) (advantages of ADR may prove a curse; disputes do not always have to be resolved—"lumping it" may sometimes be preferable).

20. J. AUERBACH, *JUSTICE WITHOUT LAW?* (1983) (comprehensive account of development of ADR from colonial beginnings).

21. *Id.* at 95. See also J. MARKS, E. JOHNSON & P. SZANTON, *supra* note 1, at 15 (origins in late eighteenth century); R. POUND, *THE CAUSES OF POPULAR DISSATISFACTION WITH THE ADMINISTRATION OF JUSTICE* (1906), reprinted in 20 J. AM. JUD. SOC'Y 178 (1936).

22. J. AUERBACH, *supra* note 20, at 95.

ing reform.²³ Further efforts were made, but they too failed to produce their intended goals.²⁴ The dissatisfaction attending this failure led to the current effort to establish effective alternatives to formal dispute resolution mechanisms.

“Alternative Dispute Resolution” encompasses many mechanisms. Among the principal ones are arbitration, mediation, small claims courts, community justice centers, media complaint boards, and internal institutional grievance mechanisms. In addition, a number of formal, in-court adjudication devices that share certain features of ADR are sometimes included under that rubric. These devices include the use of masters and magistrates, settlement conferences, and offers of judgment.

Arbitration is a process disputants have used for years in an effort to circumvent the court system’s costly delays²⁵ and congested dockets.²⁶ In arbitration, disputants submit their disagreement to an impartial third party and agree to be bound by the arbitrator’s decision, a decision that a court may enforce.²⁷

In mediation, a neutral, noncoercive, nonadversarial third party coordinates and facilitates negotiations between disputants.²⁸ The mediator only encourages settlement; the parties retain ultimate decision-making authority.²⁹ Mediation is widely used in resolving domestic dis-

23. *Id.* at 115. See also Nader & Singer, *Dispute Resolution*, 51 CAL. ST. B.J. 281, 283 (1976).

24. J. AUERBACH, *supra* note 20, at 95-97.

25. Burger, *supra* note 12, at 276. See also Erickson, *The Panel Conference Recommendations: A Blueprint for the Justice System in the Twenty-First Century*, 76 F.R.D. 277, 283 (1977); Fuller, *Collective Bargaining and the Arbitrator*, 1963 WIS. L. REV. 3; Hall, *Negotiation*, 6 AM. J. TRIAL ADVOC. 481 (1983); Getman, *Labor Arbitration and Dispute Resolution*, 88 YALE L. J. 916 (1979); Comment, *Private Means to Public Ends: Implications of a Private Judging Phenomenon in California*, 17 U.C.D. L. REV. 611, 612 (1984); Comment, *Recent Medical Malpractice Legislation—A First Checkup*, 50 TUL. L. REV. 655 (1976).

26. Reilly, *President’s message*, N.Y. ST. B.J., at 5, 7, (April 1983) (23,600 cases disposed of by arbitration in New York in 1981). See Hiltzik, *Cures for Caseload Crisis Prove Elusive*, L.A. Times, Feb. 20, 1984, § 1, at 1, col. 4 (70,000 arbitrators handle 39,000 U.S. cases per year). See also *Winning through Arbitration*, CONSUMERS REPORTS, Nov. 1983, at 607.

27. One recent variant of arbitration used by corporations and businesses is rent-a-judge mini-trials. In these, the parties take their dispute to a private judge or panel of judges for speedy resolution. The format of the trial is set by the parties; ordinarily the procedures are streamlined; often there are limits on discovery and the amount of evidence permitted. Note, *The California Rent-A-Judge Experiment: Constitutional and Policy Considerations*, 94 HARV. L. REV. 1592, 1611 (1981). See also Hiltzik, *supra* note 26.

28. Cf. Note, “Mastering” Intervention in Prisons, 88 YALE L.J. 1062, 1066 (1979).

29. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 34-35 (1982). See also Phillips & Piazza, *The Role of Mediation in Public Interest Disputes*, 34 HAST. L.J. 1231, 1235 (1983).

putes³⁰ and consumer grievances.³¹

Small claims courts are adjuncts to the municipal courts that adjudicate claims for small dollar amounts³² using simplified trial procedure. Formal evidentiary rules are relaxed, the judge is the factfinder, and parties usually represent themselves. Controlling substantive law and streamlined procedural rules³³ constitute the primary formal restraints on decisionmakers.³⁴

The creation of community justice centers, in the form of community-based justice, community mediation, and citizen dispute centers, marks a return to grass roots, decentralized forums of dispute resolution.³⁵ Their principal task is to settle minor disputes among relatives,³⁶ friends, neighbors,³⁷ landlords and tenants,³⁸ and merchants and consumers.³⁹ In 1979, the Department of Justice opened three neighborhood justice centers—one each in Atlanta, Kansas City, and Los Angeles—to handle criminal and civil disputes.⁴⁰ The centers offered mediation and arbitration services as well as referrals to social service agencies and lawyers. Since then, the number of community justice centers has been growing rapidly; as of 1983 more than 170 such centers were operating in 40 states.⁴¹

30. Riskin, *supra* note 29, at 29. See J. SHAPIRO & M. CAPLAN, PARTING SENSE (1984) (mediation much less expensive than contested divorce; parties can devise "creative" solutions). See also Felstiner, *supra* note 19; Fuller, *Mediation: Its Forms and Functions*, 44 S. CAL. L. REV. 305 (1971).

31. See Steele, *Two Approaches to Contemporary Dispute Behavior and Consumer Problems*, 11 L. & SOC'Y REV. 667 (1977); Jones, *Wanted: A New System for Solving Consumer Grievances*, 25 ARB. J. 234 (1970); *Winning through Arbitration*, *supra* note 26.

32. Comment, *The California Small Claims Court*, 52 CALIF. L. REV. 876 (1974). See also Nader & Singer, *supra* note 23, at 281; Comment, *The Persecution and Intimidation of the Low Income Litigant as Performed by the Small Claims Court in California*, 21 STAN. L. REV. 1657 (1969).

33. Comment, *supra* note 32, at 881-82. See generally Hiltzik, *supra* note 26.

34. Other restraints, however, limit decisionmakers' discretion. See WFRA notes 67-72 (judges' role and training, stare decisis, and professional rules).

Because housing, family, and juvenile courts resemble small claims courts in the abovementioned respects (see *supra* text accompanying notes 32-33), some writers include them within ADR as well. See Abel, *supra* note 18, at 267-68. See also Dyson & Dyson, *Family Courts in the United States*, 8 J. FAM. L. 505 (1968); Comment, *The New York City Housing Court: New Remedy for an Old Dilemma*, 3 FORDHAM URB. L. J. 267 (1975).

35. Erickson, *supra* note 25, at 281; Nejelski, "Neighborhood Justice Centers: Traditional Questions and New Issues," address delivered at Conference on Lay Judges, NYU Law School, Apr. 28, 1978.

36. *Report of the Pound Conference Follow-up Task Force*, 74 F.R.D. 159, 176 (1976).

37. Reilly, *supra* note 26, at 7; *Current Developments in Judicial Administration*, 80 F.R.D. 147, 172 (1977) [hereinafter cited as *Current Developments*].

38. Hall, *supra* note 25, at 480.

39. Nejelski, *The 1980 Dispute Resolution Act*, 19 JUDGES J. 33 (1980).

40. See generally Comment, *Community Concepts: An Alternative to Conventional Criminal and Civil Adjudication*, 24 AM. U.L. REV. 1253 (1975).

41. Harper, *supra* note 6, at 2, col. 1.

Newspapers and radio and television stations have set up hundreds of "action line" complaint centers⁴² that provide information, process disputes, and assist in resolving grievances.⁴³ Action lines inform individuals of their rights, elicit and give voice to community disapproval of offensive actions, and support permissible behavior.⁴⁴ They seek to identify who is right and suggest remedies.

Many public and private institutions have developed internal mechanisms, such as ombudsmen, prisoner complaint boards, and employee grievance committees, to assist individuals in resolving disputes with the institution.⁴⁵ These mechanisms attempt to ascertain underlying facts, determine whether the grievant has a legitimate complaint, and recommend appropriate changes in the institutions.⁴⁶

Finally, some ADR-like procedures have been incorporated, either permanently or experimentally, into formal adjudication.⁴⁷ Magistrates and masters may deal with minor matters or administer remedies requiring direct or ongoing supervision.⁴⁸ Some courts may require parties to attend settlement conferences, aimed at encouraging them to compromise and settle their dispute without a trial,⁴⁹ or to submit their dispute to binding arbitration.⁵⁰ A number of jurisdictions are experimenting with "offer of judgment" provisions, under which a party may coerce another into settling a case, on penalty of sanctions if the final judgment is less favorable than the amount refused.⁵¹ Recently, Chief Justice Burger suggested that complex cases be heard by judges rather than juries of lay persons, that mass-disaster cases be assigned to special tribunals, and that many personal injury cases be referred to arbitrators, mediators, or neighborhood courts.⁵²

42. Nader, *Disputing Without the Force of Law*, 88 YALE L.J. 998, 1009 (1979).

43. J. MARKS, E. JOHNSON & P. SZANTON, *supra* note 1; Nader & Singer, *supra* note 23, at 312.

44. See Nader, *supra* note 42, at 1009, 1017.

45. Gettman, *Labor Arbitration and Dispute Resolution*, 88 YALE L.J. 916 (1979); Comment, *Dispute Resolution in Prisons*, 36 RUTGERS L. REV. 145, 149 (1983).

46. See Cramton, *A Federal Ombudsman*, 1972 DUKE L.J. 1; Verkuil, *The Ombudsman and the Limits of the Adversary System*, 75 COLUM. L. REV. 845 (1975).

47. See J. MARKS, E. JOHNSON & P. SZANTON, *supra* note 1, at 33-35; Hiltzik, *supra* note 26 (describing Los Angeles bar association's Economic Litigation Pilot Project).

48. See FED. R. CIV. P. 53; Brazil, *Special Masters in the Pretrial Development of Big Cases: Potential and Problems*, 1982 A.B. FOUND. RESEARCH J. 287; Miranker, *supra* note 6. See also United States Magistrates Act, 28 U.S.C. § 631(e) and 1971 amendments; Note, "Mastering" *Intervention in Prisons*, 88 YALE L.J. 1062 (1979).

49. See FED. R. CIV. P. 16(c)(7).

50. See Lieberman, Book Review, N.Y. Times, June 5, 1983, § 7, at 13, col. 1 (reviewing J. AUERBACH, *supra* note 20) (some states experimenting with requirement that commercial suits below certain amount first go to arbitration; few are appealed).

51. FED. R. CIV. P. 68 (offer of judgment).

52. Chief Justice Burger *Seeks Better Ways to Settle Disputes*, S.F. Chron., May 15, 1985, at 10, col. 4.

The current ADR movement enjoys broad support; its proponents include Chief Justice Burger,⁵³ the American Bar Association, legal educators, legal journals, corporate counsel, federal and state legislators, and the media.⁵⁴ Some ADR proponents feel that informal dispute resolution mechanisms are more efficient than formal ones, saving both time and money.⁵⁵ ADR is less time-consuming than full-fledged adjudication because it eliminates many formalities of judicial proof (rules of evidence, for example), because decisionmakers often are familiar with the subject matter of the dispute, and because jurors need not be selected and educated.⁵⁶ Proponents of ADR also argue that it reduces the state's costs because informal forums require fewer decisionmakers and those decisionmakers are generally paid less than their formal counterparts.⁵⁷ Further, informal forums do not require the many support personnel associated with formal proceedings such as clerks, bailiffs and court reporters.⁵⁸ The disputants' costs are lowered as well, because ADR's informality often obviates the need for attorneys; in some cases attorneys are barred.⁵⁹ Even if attorneys are permitted, the brevity and simplicity of informal proceedings greatly reduce the costs of representation.

These time and money savings are, in part, responsible for the second advantage ascribed to ADR: it makes informal dispute resolution mechanisms more accessible than formal ones. Individuals who cannot afford the expense or delay of traditional litigation may be able to bring a dispute to an ADR forum. Some commentators also believe that ADR promotes access because of its informality. Those who feel threatened or intimidated by formal courts may be willing to bring a problem to an informal forum.⁶⁰

53. Burger, *supra* note 17; Burger, *supra* note 12; *Chief Justice Burger Seeks Better Ways to Settle Disputes*, *supra* note 52 (reporting address at American Law Institute annual meeting).

54. Cattani, *From Courthouses of Many Doors to Third Party Intervention*, *Chris. Sci. Monitor*, Jan 17, 1979, at 12, 13; J. MARKS, E. JOHNSON & P. SZANTON, *supra* note 1, at 69-74; Miranker, *supra* note 6 (ADR popular in Silicon Valley; Hewlett Foundation awarding money for study, practice, or teaching of ADR).

55. See Miranker, *supra* note 6 (retired judge, now employed trying ADR cases, believes "a couple of decisions I made saved each side several hundred thousand dollars in attorney's fees"). For the view that ordinary litigation costs less than ADR proponents allege, see Trubek, Sarat, Feltstiner, Kaitzer & Grossman, *supra* note 17.

56. E. JOHNSON, V. KANTOR & E. SCHWARTZ, *OUTSIDE THE COURTS* 86 (1977); Miranker, *supra* note 6 (ADR arbiters often chosen for their expertise in subject matter of dispute).

57. E. JOHNSON, V. KANTOR & E. SCHWARTZ, *supra* note 56.

58. *Id.*

59. *Id.* at 88. See also Miranker, *supra* note 6 (ADR judge's decisions allegedly saved parties hundreds of thousands of dollars in attorneys' fees).

60. See generally Bok, *Law & Its Discontents: A Critical Look at our Legal System*, *BAR LEADER*, MAR. - APR. 1983, AT 21; BURGER, *supra* note 17; Miranker, *supra* note 6 (parties in commercial suits may believe ADR offers greater protection of trade secrets than ordinary litigation). The assertion that informality encourages minorities and other stigmatized groups is ques-

A third argument in support of ADR is that the traditional adversarial process is ill-suited to resolve certain kinds of disputes. For example, the adversarial process is said to be least effective when there is a long-standing relationship between the parties, for it focuses only on the symptoms of a problem and makes little effort to delve into its source.⁶¹ Consequently, the problem remains after the disputants leave the courtroom. Proponents of ADR argue that informal processes, which address a dispute's causes and which emphasize community values, compromise, and individual discretion, are more appropriate than formal processes for disputes among family members, neighbors, tenants and landlords, or small business partners⁶² — individuals who must continue to deal with each other after the current dispute ends.

Another benefit attributed to ADR is that it avoids the "all or nothing" outcome typical of trial judgments. ADR's flexibility and lack of rigid rules enable the parties to work toward a creative resolution of their dispute, one that neither party will perceive as a defeat.⁶³ A final plus is that it promotes local empowerment. "Some community theorists have seen community-based dispute resolution as a means of revitalizing urban neighborhoods. Their aim is to restore to neighborhood institutions the mediative function once performed by the minister, precinct captain or community leader."⁶⁴

II. PROCEDURAL SAFEGUARDS IN FORMAL ADJUDICATION

Virtually absent from previous discussions of ADR is consideration of the possibility that ADR might foster racial or ethnic bias in dispute resolution. Before turning, in Part III, to that question, this Part surveys the main elements of formal adjudication that operate to reduce prejudice in trials.⁶⁵

tioned, *infra* text accompanying notes 233-46 (arguing that informality threatens minorities and discourages them from pressing claims vigorously).

61. Examples of such relationships are marriage, next-door neighbors, and partners in a small business. Preface to *Dispute Resolution*, *supra* note 5. See also Cattani, *supra* note 54, at 12-13.

62. See *supra* note 60.

63. McKay, *Civil Litigation and the Public Interest*, 31 U. KAN. L. REV. 355, 369 (1983).

64. J. MARKS, E. JOHNSON & P. SZANTON, *supra* note 1, at 26.

65. No claim is made that these mechanisms operate perfectly. Indeed, many writers believe that they have negligible effect or, worse, lull us into thinking our judicial system operates fairly when it does not. See generally *Critical Legal Studies*, 36 STAN. L. REV. 1 (1984). Our claim is a more modest, comparative one: formal adjudication contains mechanisms that are designed to and that may, at times, actually reduce prejudice whereas informal adjudication lacks such mechanisms. The radical critic may assert that all such distinctions are meaningless because the legal system is incapable of rendering fair, non-class-based decisions. Responding to such "global" objections is beyond the scope of this Article. Moreover, this section will consider only the safeguards afforded parties when their dispute actually goes to trial. Most cases do not go to trial, but are settled. Settlement is generally considered to fall within ADR, rather than within formal adjudica-

The survey examines constraints on judge and jury. It then considers the effect of rules of procedure and evidence on inhibiting the expression of prejudice in trials.

A. Judge and Jury Constraints

The American legal system strives to provide litigants a fair trial: to this end, it has developed an array of rules.⁶⁶ To secure their intended purpose, however, the rules must be applied even-handedly.⁶⁷ That task falls, in the first instance, to the trial judge.

Both internal and external constraints are designed to keep a judge from exhibiting bias or prejudice. Internal constraints stem from a judge's professional position. Many judges are appointed for lengthy terms, in some cases for life, and are to that extent freed from having to be politically responsive in their decisions.⁶⁸ Moreover, when a judge is appointed he or she agrees to apply an existing system of rules. The simple act of applying rules reduces bias.⁶⁹ Furthermore, the repetitive nature of their caseloads disposes judges to perceive a case not in terms of the parties in dispute, but of the legal and factual issues presented—for example, as a pedestrian-intersection accident case, rather than one of a black victim suing a white driver.⁷⁰ The doctrine of *stare decisis* is intended to produce consistent results in similar cases, and anomalous results can be subjected to appellate review.

External constraints also operate to control bias. The Code of Judicial Conduct requires judges to disqualify themselves from cases in which their impartiality is in question; it specifically requires disqualifi-

tion. See *infra* notes 294-43 and accompanying text (criticism of settlement, as relatively unguided and incapable of promoting public goals of the law).

66. Cf. Thibaut & Walker, *A Theory of Procedure*, *supra* note 17, at 550 (1978) ("A legal setting where a normative standard directs the decisionmaker in how to evaluate behavior will institutionally curb the observer's bias toward attributing behavior to the actor's disposition or character").

67. No matter how effective rules are and how fairly they are applied errors will still occur. See Brook, *Inevitable Errors: The Preponderance of the Evidence Standard in Civil Litigation*, 18 TULSA L.J. 79, 79 (1982). See also J. BORKIN, *THE CORRUPT JUDGE* 9 (1962) (judges are at the center of a trial and have tremendous discretionary power); *Offut v. United States*, 348 U.S. 11, 14 (1954) (Frankfurter, J.) ("justice must satisfy the appearance of justice").

68. See Fiss, *Foreword: The Forms of Justice, The Supreme Court 1978 Term*, 93 HARV. L. REV. 1, 14 (1979) (federal judiciary independent because of life tenure). But see D. STEIN, *JUDGING THE JUDGES*, 3-4, 35-36 (1974) (appointment system requires judge to become political in order to obtain appointment).

69. See Thibaut & Walker, *supra* note 17, at 550. Cf. K. DAVIS, *DISCRETIONARY JUSTICE* (1969).

70. See W. KITCHIN, *FEDERAL DISTRICT JUDGES 72-73, 94-96* (1978). See also H. KALVEN & H. ZEISEL, *THE AMERICAN JURY 497-98* (1966) (judges perceive sentimental factors, but ignore them); Fiss, *supra* note 68, at 13-14.

cation if a judge feels any animus or prejudice towards a party.⁷¹ If a judge should disqualify himself or herself, but does not do so, recusal statutes enable parties to request a new judge.⁷² Although invoked sparingly, disqualification and recusal procedures are at least present in formal adjudication to check the more extreme instances of judicial bias.

Similar rules are designed to control prejudice on the part of the jury.⁷³ Voir dire allows the judge and parties to discover and remove biased jurors for cause,⁷⁴ without limitations on the number of such challenges a party may make.⁷⁵ The Supreme Court has held that where racial issues are bound up in the case, if counsel requests, the trial judge must determine that jurors are not racially biased.⁷⁶

A party may also use peremptory challenges to remove a limited number of jurors without showing cause.⁷⁷ Peremptory challenges can be made for any reason, enabling a party to remove jurors he or she suspects are biased but not so blatantly as to be removed for cause.

71. CODE OF JUDICIAL CONDUCT Canon 3(c)(1)(a) (1972) ("A judge should disqualify himself . . . where . . . he has a personal bias or prejudice concerning a party . . .").

72. 28 U.S.C. §§ 144, 455 (1982). For cases interpreting the rule, see *United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966); *United States v. Hollis*, 718 F.2d 277, 280 (8th Cir. 1983), *cert. denied*, -U.S.-, 104 S. Ct. 1309 (1984) (party must file affidavit that shows personal bias or prejudice that stems from an extrajudicial source and resulted in decision on a basis other than what was presented at trial); *Davis v. Board of School Commissioners*, 517 F.2d 1044, 1050-51 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976); *United States v. Haldeman*, 559 F.2d 31, 131 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 933 (1977). See also 13A C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3551 (1975 and Cum. Supp. 1980); Note, *Judicial Disqualification in the Federal Courts: Maintaining the Appearance of Justice Under 28 U.S.C. § 455*, 1978 U. ILL. L.F. 863, 872. See also *Roberts v. Bailar*, 625 F.2d 125, 128 (6th Cir. 1980); *United States v. Norton*, 700 F.2d 1072, 1076 (6th Cir. 1983), *cert. denied*, -U.S.-, 103 S. Ct. 1885 (1984) (standard is whether reasonable person knowing all of the circumstances would consider the judge to be impartial; judge's statement that all knowing people have a bias against the Klu Klux Klan and the Nazi Party does not require recusal).

73. See generally A. GINGER, 1 JURY SELECTION IN CIVIL & CRIMINAL TRIALS § 1.51, at 45 (1985) ("It may be that the broadest boast of our society is its jury system . . ."); Ligda, *Viva La Jury*, 49 CAL. ST. B.J. 453, 455-56 (1974) (juries act to restrain government abuses and infuse public confidence in the legal system). Despite these benefits, the jury deliberates in secret, without stating the reasons for its conclusions—a combination that permits abuse. See M. GLEISSER, JURIES AND JUSTICE 297-98 (1968) (juries can reach a decision in any way they wish, with little review).

74. See A. GINGER, *supra* note 73, § 2.8, at 69. Cf. *Ristaino v. Ross*, 424 U.S. 589, 597 (1976) (voir dire used to insure an impartial jury is impaneled).

75. 28 U.S.C. § 1870 (1982); *United States v. Apodaca*, 666 F.2d 89, 94 (5th Cir. 1982), *cert. denied*, 459 U.S. 823 (1982) (a juror should be removed if he or she has an institutional bias that cannot be overcome).

76. *Ristaino v. Ross*, 424 U.S. 589, at 597 (1975); *Rosales-Lopez v. United States*, 451 U.S. 182, 192 (1981) (in trial for violent crime, if the defendant requests, the judge must determine that there is no racial bias in the jury). The right to have jurors examined for bias extends at least to prejudice based on race and religion. Cf. *United States v. Dickens*, 695 F.2d 765, 774 (3d Cir. 1983) (as amended), *cert. denied*, 460 U.S. 1093 (1983) and 461 U.S. 909 (1983) (prospective jurors may be questioned about racial and religious prejudices).

77. 28 U.S.C. § 1870 (1982) ("In civil cases, each party is entitled to three peremptory challenges.").

Unfortunately, attorneys occasionally abuse peremptory challenges to achieve an unrepresentative jury, one likely to find against the opposing party.⁷⁸ Some courts have moved to prohibit this abuse of the system.⁷⁹

Mechanisms also exist to protect juries from prejudicial influence.⁸⁰ Judges may admonish the jury not to discuss the case with outsiders or read news accounts of the trial. In extreme cases the judge may sequester the jury for the duration of the trial.⁸¹ In addition, severe criminal sanctions are imposed on those who attempt to influence a jury.⁸² If tampering or attempted tampering affects any juror, he or she must be removed.⁸³

The seriousness of becoming a part of the judicial system has a positive effect on juries,⁸⁴ as it does on judges. Studies indicate that most jurors genuinely strive to render a decision based on the evidence rather than on sympathy for or animosity toward the parties.⁸⁵

B. Rules of Civil Procedure

In addition to rules that limit prejudice by circumscribing the role of judge or jury, modern procedural systems contain rules that limit

78. M. GLEISSER, *supra* note 73, at 235, 298-99 (lawyers try to mold juries to suit lawyers' needs). See also A. GINGER, *supra* note 73, § 1.23, at 23-24 (plaintiffs' attorneys in Detroit prefer juries composed of persons with certain ethnic and economic backgrounds because they believe them likely to find liability and award higher damages).

79. *People v. Wheeler*, 22 Cal. 3d 258, 276-77, 583 P.2d 748, 761-62, 148 Cal. Rptr. 890, 902-03 (1978) (use of peremptory challenges to exclude members of a group violates right to a jury drawn from a cross-section of the community). Cf. *Hovey v. Superior Court*, 28 Cal.3d 1 n.45, 616 P.2d 1301, 1310 n.45, 168 Cal. Rptr. 128, 137 n.45 (1980) ("if persons are excluded from jury service, analysis of the propriety of the exclusion will depend upon whether the persons left out comprise a constitutionally cognizable class . . .").

80. "Prejudicial" in this context is used in its root sense, meaning calculated to cause one to prejudge. This type of prejudice is, of course, broader than class or ethnic prejudice. Still, rules aimed at minimizing prejudice in the broad sense can help minimize prejudice in the narrow sense. For example, the jury control rules would, in a civil rights case, prevent the jury from reading racially inflammatory letters to the editor concerning the case.

81. A. GINGER, *supra* note 73, § 1.56 at 59. See also *United States v. Johnson*, 584 F.2d 148, 155 (6th Cir. 1978), *cert. denied*, 440 U.S. 918 (1979); *United States v. Boffa*, 513 F. Supp. 444, 493 (D. Del. 1980).

82. 18 U.S.C. § 1503 (1982) (\$5,000 fine and/or not more than five years imprisonment for tampering with a jury); 42 U.S.C. § 1985 (1982) (injured parties may recover damages caused by jury influence).

83. See, e.g., *United States v. Smith*, 550 F.2d 277, 286 (5th Cir.), *cert. denied*, 434 U.S. 841 (1977) (jurors were properly removed when court was informed that a party had attempted to tamper with the jury and judge discovered a jury list with the removed jurors' names circled in red). See generally A. GINGER, *supra* note 73, § 1.56, at 59.

84. E.g., M. ZERMAN, *CALL THE FINAL WITNESS* 163 (1977) (a juror will "strive with all his capability to be wise and just and compassionate, to stretch himself beyond his foibles and his prejudices.").

85. H. KALVEN & H. ZEISEL, *supra* note 70, at 494 (juries generally decide according to evidence of the case and are not heavily swayed by sentiment).

prejudice by prescribing the events that occur in the course of litigation. Some of these rules promote fairness and discourage prejudice more or less directly.⁸⁶ Others promote fairness indirectly by equalizing the parties' knowledge or by requiring public trials. The Federal Rules of Civil Procedure illustrate the workings of these controls.

Permeating the federal rules is the basic requirement of Rule 1—that the rules “shall be construed to secure the just, speedy, and inexpensive determination of every trial.”⁸⁷ The rule makes clear that trials should be aimed at reaching decisions on the merits rather than on the basis of technical error or a party's social or economic advantage.⁸⁸

One group of rules lessens the scope for bias in adjudication by requiring notice of the suit to all parties and timely filing of pleadings, motions, and responses.⁸⁹ Early notice enables defendants to move to eliminate duplicative lawsuits, possibly filed to harass, or suits that have no foundation in fact.⁹⁰ The rules requiring pleadings and motions to be filed with the court and opposing counsel enable parties to learn about and respond promptly to significant events in the action. Such filings also inform the court. Awareness that the judge will see certain discovery requests, for example, may deter parties from making them out of spite or prejudice.

Other rules specify that pleadings need only give a brief, plain statement indicating the basis of a claim or defense and provide for

86. See Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 364, 369 (1978). Federal Rules of Civil Procedure 3, 4, 5, 6, and 8 provide notice to all parties, ensuring knowledge of proceedings and their course. Rule 11 requires attorney attest that papers are not filed to harass or achieve another improper purpose. Rule 16 mandates pretrial conference and order that serve to define litigable issues. Rule 52 requires court to issue an opinion, assuring that the decision will be exposed to public scrutiny. Finally, Rules 59 and 61 provide for a new trial if error impairs substantial right of a party.

87. FED. R. CIV. P. 1.

88. *E.g.*, *Foman v. Davis*, 371 U.S. 178, 181 (1962) (“It is too late in the day and entirely contrary to the Federal Rules of Civil Procedure for decisions on the merits to be avoided . . .”); *Conley v. Gibson*, 355 U.S. 41, 48 (1957) (“The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive . . . the purpose of pleading is to facilitate a proper decision on the merits.”).

89. FED. R. CIV. P. 3, 4, 5, 6 & 8. Rule 3 requires that a complaint be filed to begin the action. The suit thus becomes a matter of public record and the time of its commencement fixed. See generally 4 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 72, § 1051, at 165. If the claim is stale and dredged up out of spite or class-based animosity, the defendant can use a statute of limitations defense to have it dismissed. The rules also require service of process within a short period. FED. R. CIV. P. 4(a) & 4(j). If service is not received, the court must dismiss. *Id.*

90. FED. R. CIV. P. 4(A) & 4(j); Federal Rule of Civil Procedure 5 requires service on opposing counsel and the court of all pleadings and written motions. Rule 6 limits the time in which a party may file papers. Trial courts may enlarge the period only if doing so will aid in the “just, speedy and inexpensive” resolution of the case. FED. R. CIV. P. 6, Advisory Committee Note. Rule 6 thus confines legal maneuvering to a known period. During that time, a party can represent his or her interest; after that period he or she can be sure that the decision is final. See 2 J. MOORE & J. LUCAS, *MOORE'S FEDERAL PRACTICE* § 6.08 (2d ed. 1984). The few exceptions to the rule concern motions made after verdict. See FED. R. CIV. P. 6(b).

liberal amendment.⁹¹ These rules encourage resolution of lawsuits on their merits, rather than on the basis of the traditional complex pleading rules that benefited wealthy or experienced parties.⁹² The rules require that the complaint state the basis of the claim.⁹³ That disclosure may warn a party and the court that the claim is groundless and motivated by prejudice, enabling appropriate action to be taken.

Another rule requires counsel to sign all papers filed in a case.⁹⁴ The signature certifies that the attorney, after reasonable inquiry, believes that the paper is grounded in fact and either warranted by existing law or by a good faith argument for modification of current law.⁹⁵ The attorney's signature also certifies that the paper is not filed for an improper purpose such as bias or prejudice.⁹⁶ A recent amendment encourages sanctions to deter violations of this rule.⁹⁷

If scandalous or indecent matter, a possible indication of prejudice, appears in any paper filed, the rules provide for sanctions against the attorney who filed it,⁹⁸ and that portion of the paper may be stricken.⁹⁹ These provisions confine pleadings and other papers to material issues and punish those who inject matter for the purpose of embarrassing or harassing the adversary.

The use of pretrial orders also serves to reduce prejudice. A federal rule requires the parties to consider and define the issues for trial.¹⁰⁰ Once agreement is reached, a pretrial order is entered which guides the course of trial.¹⁰¹ This order may only be modified to prevent manifest injustice.¹⁰² This means that issues are enumerated under the supervision of a judge interested in trying only the relevant issues. If an extra-

91. FED. R. CIV. P. 8, 15. See *Conley v. Gibson*, 355 U.S. at 48. See also 2A J. MOORE & J. LUCAS, *supra* note 90, at § 8.03 (Rule 8 intended to simplify pleading requirements, while still providing notice to parties of nature of claim).

92. *Foman v. Davis*, 371 U.S. at 181; *Conley v. Gibson*, 355 U.S. at 48.

93. FED. R. CIV. P. 8.

94. FED. R. CIV. P. 11.

95. *Id.*

96. *Id.*

97. FED. R. CIV. P. 11, Advisory Committee Note.

98. FED. R. CIV. P. 11.

99. FED. R. CIV. P. 12(f). See *Bartelson v. Dean Witter & Co.*, 86 F.R.D. 657, 675 (E.D. Pa. 1980) (few attorneys will risk incurring Rule 11's sanctions to bring a case in bad faith). *But see* *Risinger, Honesty in Pleading and its Enforcement: Some "Striking" Problems with Federal Rule of Civil Procedure 11*, 61 MINN. L. REV. 1, 34-35 (1976) (from 1938 to 1976 only twenty-three cases were brought under Rule 11 to strike a pleading as sham. (Rule 11 was amended in 1983, however, to strengthen enforcement)).

100. See FED. R. CIV. P. 16 (c)(1), Advisory Committee Note. See also *Seneca Nursing Home v. Secretary of Social and Rehabilitation Services*, 604 F.2d 1309, 1314 (10th Cir. 1979) (purpose of pretrial order is to simplify litigation).

101. FED. R. CIV. P. 16.

102. *E.g.*, *Brook Village North Associates v. General Electric Co.*, 686 F.2d 66, 71 (1st Cir. 1982). See also 3 J. MOORE & J. LUCAS, *supra* note 90, at § 16.19.

neous issue, motivated by bias or prejudice, arises later it may be excluded based on the pretrial order.¹⁰³

The requirement that the court state its findings and opinions further limits bias.¹⁰⁴ It puts judges' reasoning into the public record, allows for appellate review,¹⁰⁵ and encourages judges to find the facts in an unbiased manner.¹⁰⁶ Finally, the rules provide for a new trial if it can be shown that the proceedings were affected by prejudice, bias or improper influence of the jury.¹⁰⁷

Rules of evidence also serve to reduce prejudice. These rules are intended to facilitate introduction of all relevant evidence.¹⁰⁸ Article IV of the Federal Rules of Evidence, dealing with relevancy, reduces prejudice by confining testimony to the legal issues presented in the case. Evidence which is not relevant but rather is offered to induce

103. Cf. 686 F.2d at 71. See generally 3 J. MOORE & J. LUCAS, *supra* note 90, at § 16.20.

104. FED. R. CIV. P. 52. See K. DAVIS, *supra* note 69, at 98 ("Openness is the natural enemy of arbitrariness and the natural ally in the fight against injustice"); Dawson, *The Functions of the Judge*, in TALKS ON AMERICAN LAW 19, 24-25 (H. Berman ed. 1971).

105. See FED. R. CIV. P. 52(a), Advisory Committee Note. See also 5A J. MOORE & J. LUCAS, *supra* note 90, at § 52.06[1].

106. The rule is satisfied only if the opinion contains enough facts to show all material issues were properly considered and resolved. See *supra* note 104. See also *Snyder v. United States*, 674 F.2d 1359, 1362-63 (10th Cir. 1982); *Rucker v. Higher Educational Aids Board*, 669 F.2d 1179, 1183-84 (7th Cir. 1982) (oral opinion issued at conclusion of hotly contested trial did not satisfy Rule 52); *Tidewater Equipment Co. v. Reliance Insurance Co.*, 650 F.2d 503, 508 (4th Cir. 1981).

107. See FED. R. CIV. P. 59, 61; 11 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 72, at §§ 2805, 2885.

Generally, a new trial should be granted whenever necessary to prevent miscarriage of justice. *Juneau Square Corp. v. First Wisconsin National Bank*, 624 F.2d 798, 806-07, 806 n.11 (7th Cir.), *cert. denied*, 449 U.S. 1013 (1980). Conduct by a judge that appears to be biased against a party may require a new trial. *Newman v. A.E. Staley Manufacturing Co.*, 648 F.2d 330, 336 (5th Cir. 1981); *Lutz v. Commissioner*, 593 F.2d 45, 46 (6th Cir. 1979) (comments by judge in chambers that witness was terrible and that party should concede required a new trial). *But see Sanden v. Mayo Clinic*, 495 F.2d 221, 227 (8th Cir. 1974) (despite judge's comment that the case had no merit, party received full and fair trial). See also *Gorsalitz v. Olin Mathieson Chemical Corp.*, 429 F.2d 1033, 1043 (5th Cir. 1970), *cert. denied*, 407 U.S. 921 (1972) (new trial required when facts aroused undue sympathy in the jury).

108.

The adversary system presupposes that the most effective means of determining truth is to place upon a skilled advocate for each side the responsibility for investigating and presenting the facts from a partisan perspective. Thus, the likelihood is maximized that all relevant facts will be ferreted out and placed before the ultimate fact finder in as persuasive a manner as possible.

Freedman, *Professional Responsibility of the Civil Practitioner*, in EDUCATION IN THE PROFESSIONAL RESPONSIBILITIES OF THE LAWYER 152 (D. Weckstein ed. 1970). See also 1 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE § 402[01], at 402-8 (1985) ("The fundamental condition for enhancing fact finding is that as much relevant information as possible be placed before the trier.").

prejudice¹⁰⁹ should be excluded.¹¹⁰ Even when relevant, evidence may be excluded if its probative value is outweighed by the danger of prejudice, confusion of the issues, or misleading the jury.¹¹¹

At times, evidence will be both prejudicial and highly relevant. The doctrine of limited admissibility attempts to strike a balance between full consideration of evidence and avoidance of prejudice by allowing parties to present evidence for limited purposes.¹¹² When a judge allows a jury to hear evidence subject to a limiting instruction, it is assumed that the jury will be able to use the evidence properly and ignore its prejudicial effect.¹¹³ When the risk of bias is high and the evidence is not crucial to the case, a court should recognize the inefficacy of a limiting instruction and exclude the evidence.¹¹⁴

As has been seen, modern rules of procedure and evidence contain numerous provisions that are intended to reduce prejudice in the trial system by defining the scope of the action, formalizing the presentation of evidence, and reducing strategic options for litigants and counsel. ADR, to date, has very few such safeguards; indeed, the absence of formal rules of procedure and evidence is often touted as an advantage — it enables ADR to be speedy, inexpensive, and flexible. ADR decisionmakers or other third parties are rarely professional, and there is rarely a decisionmaking body similar to a jury. Rules of evidence are absent or open-ended; the inquiry is wide-ranging, probing, “therapeutic.” The proceedings are often conducted out of the view of the public, in an intimate setting, and with little, if any, provision for review.

Although judicial proceedings by no means perfectly exclude prejudice, a fair-minded comparison shows that ADR opens the door wider for that behavior than does formal, in-court adjudication. This only indicates that prejudiced outcomes are possible in ADR, not that

109. FED. R. EVID. 403. The meaning of “prejudice” in evidence law is different from its meaning in everyday language. See *supra* note 80 (two meanings of “prejudice;” broader, technical meaning includes everyday meaning as a special case).

110. FED. R. EVID. 403.

111. J. WEINSTEIN & M. BERGER, *supra* note 108, § 105[02], at 105-11 (“Admittedly a compromise, limited admissibility offers an acceptable, if not completely satisfactory means of allowing the trier to consider the maximum amount of evidence with the minimum risk that it will use the evidence improperly.”). See Dolan, *Rule 403: The Prejudice Rule in Evidence*, 49 S. CAL. L. REV. 220, 249-50 (1976). See Fed. R. Evid. 103 (error occurs when evidence is erroneously admitted that injures a substantial right of a party). Evidence motivated by bias causes such an injury. Cf. J. WEINSTEIN & M. BERGER, *supra* note 108, § 103[06], at 103-67. See also FED. R. EVID. 103(d) (“plain error” rule).

112. FED. R. EVID. 105.

113. But, the Supreme Court has stated: “The naive assumption that prejudicial effect can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction . . .” *Bruton v. United States*, 391 U.S. 123, 129 (1968) [quoting *Krulwitsch v. United States*, 336 U.S. 440, 453 (1949) (Jackson, J., concurring)]. See also Note, *The Limiting Instruction—Its Effectiveness and Effect*, 51 MINN. L. REV. 264, 265-66 (1966).

114. FED. R. EVID. 403.

they are likely, much less certain. In order to assess how great that likelihood is, the next section reviews social science evidence about the origin and nature of prejudiced behavior.

III. THEORIES OF PREJUDICE AND ADR

This part examines theories of prejudice and their relation to ADR. Though based primarily on studies of prejudice among whites toward blacks, many of the findings are also applicable to prejudice against Hispanics, Indians, women, and other groups, as well as inter-ethnic group prejudice.¹¹⁵ After surveying the leading theories of how prejudice develops and is expressed, we examine prejudice in relation to the "American Creed." According to a leading school of thought, many persons suffer from a "moral dilemma" which arises from a conflict between socially espoused precepts of both equality and humanitarianism, and personal attitudes that are less egalitarian. The manner in which these conflicts are resolved depends largely on situational factors. Certain settings tend to foster prejudiced behavior, while others tend to discourage it. We apply these findings to the formalism/informalism dichotomy and find that formal dispute resolution is better at deterring prejudice than informal adjudication.

A. Theories of Prejudice

A number of theories seek to explain racial or ethnic prejudice. Because of the complexity of the behavior, it seems likely that no one theory can account for all forms of it. Several theories—psychodynamic, social-psychological, and economic—all play a part.

1. PSYCHODYNAMIC THEORIES

Psychodynamic theories of prejudice look to personality traits and tendencies to explain why some individuals react with hostility to certain groups. The dynamics of prejudice became a focus of study after World War II as researchers sought to explain the horror of the Holocaust.¹¹⁶ Since then, theorists have sought to identify cognitive or emotional processes common to prejudiced persons and to determine whether prejudice is part of a larger "syndrome."¹¹⁷

115. The section concentrates on prejudice against minority groups, for the obvious reason that they are the most frequent victims of prejudice in our society.

116. Fairchild & Gurin, *Traditions in the Social-Psychological Analysis of Race Relations*, 21 AM. BEHAV. SCI. 757, 760 (1978); See E. HARTLEY, *PROBLEMS IN PREJUDICE* (1948). See also B. BETTLEHEIM & M. JANOWITZ, *DYNAMICS OF PREJUDICE* (1950).

117. E.g., G. SIMPSON & J. YINGER, *RACIAL AND CULTURAL MINORITIES: AN ANALYSIS OF PREJUDICE AND DISCRIMINATION* 78 (4TH ED. 1972); Lawrence, *The Id, The Ego and Equal Protec-*

In a landmark study, Adorno, Frenkel-Brunswik, Levinson and Sanford identified a personality structure which they believed particularly susceptible to ethnic prejudice.¹¹⁸ According to the authors, highly prejudiced persons tend to have an "authoritarian personality," characterized by rigidity, conventionality, difficulty in accepting impulses they consider deviant (for example fear, weakness, aggression and sex) as part of the self, a tendency to externalize these impulses by projecting them on others, and a need for status and power in personal relationships.¹¹⁹

According to psychoanalytic theory, the authoritarian personality develops through a process of displaced hostility.¹²⁰ Hostility arises when frustrations or deprivations are imposed on an individual by harsh authority figures, such as parents, to whom the individual is closely tied by bonds of affection.¹²¹ The individual represses the hostility he or she feels, directing it not against the source of the frustration, but against a substitute target, or scapegoat—often an individual or group who cannot easily respond.¹²²

Experimental studies confirm Adorno's theory. Berkowitz found that highly anti-Semitic college students experienced increased hostility toward other persons when subjected to frustration.¹²³ Tolerant subjects, by contrast, became friendlier.¹²⁴ Prejudiced persons were also more susceptible to frustration than were tolerant persons.¹²⁵ For example, in a study of war soldiers Bettelheim and Janowitz found that prejudiced soldiers were more frustrated than tolerant servicemen, although they served under similar conditions.¹²⁶

tion: Reckoning with Unconscious Racism (forthcoming in *Stanford Law Review*) (summarizing psychoanalytic and cognitive theories of racism's origins) [hereinafter cited as *Reckoning*].

118. T. ADORNO, E. FRENKEL-BRUNSWIK, D. LEVINSON & R. SANFORD, *THE AUTHORITARIAN PERSONALITY* (1969) [hereinafter cited as *AUTHORITARIAN PERSONALITY*].

119. *See generally id.* The study is discussed by many authorities. *See, e.g.*, Harding, Proshansky, Kutner & Chein, *Prejudice and Ethnic Relations*, in 5 *HANDBOOK OF SOCIAL PSYCHOLOGY* 1, 38 (G. Linsey & E. Aronson ed. 1968) [hereinafter cited as *Harding & Proshansky*].

120. *E.g.*, Harding & Proshansky, *supra* note 119, at 38; Masling, *How Neurotic is the Authoritarian?*, 49 *J. ABNORMAL & SOC. PSYCHOLOGY* 316 (1954). *See also* M. GOODMAN, *RACE AWARENESS IN YOUNG CHILDREN* 250-51 (rev. ed. 1964) (discussing and citing studies).

121. Harding & Proshansky, *supra* note 119, at 38. *See also* M. JAHODA, *RACE RELATIONS AND MENTAL HEALTH* 15-28 (1960).

122. *Id.* at 38-39.

123. *Id.* at 34; L. BERKOWITZ, *AGGRESSION: A SOCIAL PSYCHOLOGICAL ANALYSIS* 142, 145-47 (1962).

124. Harding & Proshansky, *supra* note 119, at 38.

125. *Id.* at 34.

126. B. BETTELHEIM & M. JANOWITZ, *SOCIAL CHANGE AND PREJUDICE* (1964) *See also* G. ALLPORT, *supra* note 8, at 215-16.

Authoritarian personalities are dogmatic and dichotomous;¹²⁷ they are unable to differentiate flexibly or change their mental sets.¹²⁸ They want definiteness, finality and authority in human relationships and reject groups less familiar and safe than their own.¹²⁹ Because ethnic minorities possess characteristics that seem different from those of the dominant group, they become ready targets for rejection and displaced hostility.

Researchers posit two requirements for a group to become a target of displaced hostility—high visibility and little power to retaliate.¹³⁰ Many ethnic groups have both characteristics. In addition, groups may become objects of especially intense hostility if they are in competition with the authoritarian individual or symbolize traits (e.g., nonconformity, irresponsibility, urbanism) which he or she dislikes.¹³¹ Some theorists assert that the differences most disliked by the prejudiced person are those he unconsciously recognizes as potential characteristics of himself.¹³² This is particularly true of “sins of the flesh”—lechery, laziness, aggression and slovenliness, traits prejudiced individuals often ascribe to the Black. Similarly, the sins of pride, deceit, unsocialized egotism and grasping ambition are often ascribed to the Jew. The traits ascribed to blacks reflect our “id” impulses; the traits ascribed to Jews, violations of our “superego,” or conscience. Thus, “our accusations and feelings of revulsion against both groups symbolize our dissatisfaction with the evil in our own nature.”¹³³

Psychodynamic theory cannot provide a complete explanation for prejudicial attitudes—for example, it cannot explain selective prejudice against one ethnic group rather than another. Although personality attributes may determine susceptibility, a full understanding of prejudice also requires a historical and sociocultural analysis.

127. Harding & Proshansky, *supra* note 119, at 35; Fairchild & Gurin, *supra* note 116 at 760.

128. G. ALLPORT, *supra* note 8, at 400-03.

129. *Id.* at 216.

130. Harding & Proshansky, *supra* note 119, at 35.

131. *Id.* Berkowitz and Green showed that displaced hostility increases as these characteristics acquire meaning for the frustrated person and come to be associated with members of the stigmatized group. L. BERKOWITZ, *supra* note 123, at 33.

132. G. ALLPORT, *supra* note 8, at 199; L. BERKOWITZ, *supra* note 123; Harding & Proshansky, *supra* note 119, at 35.

133. G. ALLPORT, *supra* note 8, at 199. *See also* AUTHORITARIAN PERSONALITY, *supra* note 118; N. ACKERMAN & M. JAHODA, ANTISEMITISM AND EMOTIONAL DISORDER: A PSYCHOANALYTIC INTERPRETATION (1950).

2. HISTORICAL APPROACHES: SOCIOECONOMIC AND POLITICAL CAUSES OF PREJUDICE

Many historians insist that one must have in mind the experiences of oppressed groups in this country in order to understand the causes of prejudice in the United States.¹³⁴ As one historian put it:

[Psychological] studies are enlightening only within narrow limits. For personality is itself conditioned by social forces; in the last analysis, the search for understanding must reach into the broad social context within which personality is shaped.¹³⁵

Just as persons, with their particular desires and ambitions make history, so too history makes people.¹³⁶

Some writers in the sociohistorical school see racism as a means by which society purifies itself of rage, anxiety, and guilt resulting from rapid social change and economic disruption.¹³⁷ Like members of the psychodynamic school, these writers use the concept of a scapegoat to explain the operation of prejudice, although the scapegoat serves slightly different functions for each school. For members of the sociohistorical school, the driving force behind racism is social and economic dislocation, which generates widespread anxiety. This anxiety causes a search for victims on whom the anxiety can be discharged. These scapegoats—often members of minority groups—are assigned traits of personal inadequacy to defend the prevailing belief that the American system is fair and just.¹³⁸ Scapegoating also channels aggression into acceptable directions and insures social loyalty.¹³⁹

134. See G. ALLPORT, *supra* note 8, at 208-11. See generally A. HIGGINBOTHAM, *IN THE MATTER OF COLOR* (1978). See also D. BELL, *RACE, RACISM AND AMERICAN LAW* (1980); J. FRANKLIN, *FROM SLAVERY TO FREEDOM* (STU. ED. 1980).

135. Handlin, *Prejudice and Capitalist Exploitation*, 6 *COMMENTARY* 79 (1948).
136.

The psychology of a culture is to a great extent a symbolic precipitate of the kinds of experience forced upon a group of people by their history. Thus what we call personality is a historically evolving system, and personality and culture may be considered congruent.

J. KOVEL, *WHITE RACISM—A PSYCHOHISTORY* 44 (1984). See also *supra* note 134.

137. J. KOVEL, *supra* note 136, at 231; see G. ALLPORT, *supra* note 8, at 224-25. See also Geertz, *Ideology as a Cultural System*, in *THE INTERPRETATION OF CULTURES* 201-04 (C. Geertz ed. 1973); Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 *U. PA. L. REV.* 561, 570-71, 573 (anxiety as a source of damaging civil rights scholarship and ideology).

138. "If the victim is socially isolated and poor, it must be his or her fault." See I. KATZ, *STIGMA—A SOCIAL PSYCHOLOGICAL ANALYSIS* 121 (1981). See also G. ALLPORT, *supra* note 8, at 224.

139. G. ALLPORT, *supra* note 8, at 234-38. See C. KLUCKHOHN, *NAVAHO WITCHCRAFT* (1944). Prejudice thus holds society in a kind of equilibrium. It maintains the status quo—a situation favored by the dominant majority.

Scapegoating of racial minorities is especially easy because many of them are visibly poor.¹⁴⁰ Black Americans were originally owned as property and even after slavery disappeared, a caste system remained.¹⁴¹ Their oppressed status and resulting poverty, in turn, confirmed the beliefs of some whites that blacks are inferior.¹⁴² Class prejudice becomes a proxy for race prejudice: “[Some][w]hite people do not like blacks, not because of racial differences, but because they are poor.”¹⁴³

Some blacks manage to escape poverty, however, and many try. Upward mobility, an ideal enshrined in the American ethic, leads to economic competition. A group of scholars within the historical school considers this competition to be a key source of prejudice.¹⁴⁴ They point out that as blacks and other groups have demanded a larger share of the good life, the dominant majority has reacted with hostility.¹⁴⁵ For example, northern whites’ enthusiasm for civil rights decreased markedly when the movement moved north.¹⁴⁶ The threat of competition causes greatest alarm to members of society who live in fear of a downward slide.¹⁴⁷ Studies have shown that persons dissatisfied with their jobs (one indicator of downward mobility) were more prone to prejudice than those secure in their jobs.¹⁴⁸ In the United States, it is principally members of the most favored economic groups who can afford to fight vigorously for equality, since others are threatened by it.¹⁴⁹

140. G. MYRDAL, AN AMERICAN DILEMMA 207 (1962); Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 135 (1982). Many see anti-black prejudice in the United States as “having its roots in slavery, in carpetbagging, and in the failure of reconstruction in the South following the Civil War.” G. ALLPORT, *supra* note 8, at 208.

141. G. MYRDAL, *supra* note 140, at 207. See generally A. HIGGINBOTHAM, *supra* note 134; Delgado, *supra* note 140, at 135.

142. See sources cited *supra* note 141. Theories of Social Darwinism prevailed in the nineteenth century. These notions of white racial superiority were useful in justifying the subjugation of minorities. See Fairchild & Gurin, *supra* note 116, at 758; Delgado, Bradley, Burkenroad, Chavez, Doering, Lardiere, Reeves, Smith & Windhansen, *Can Science Be Inopportune? Constitutional Validity of Governmental Restrictions on Race-IQ Research*, 31 UCLA L. REV. 128, 132-34 (1983).

143. Fairchild & Gurin, *supra* note 116, at 767 (noting, however, that these findings have not been adequately demonstrated in real-life situations).

144. See G. MYRDAL, *supra* note 140, at 790.

145. Kinder & Sears, *Prejudice and Politics: Symbolic Racism Versus Racial Threats to The Good Life*, 40 J. PERSONALITY & SOC. PSYCHOLOGY 414 (1981).

146. *Id.* at 415.

147. Fairchild & Gurin, *supra* note 116, at 770; G. ALLPORT, *supra* note 8, at 223.

148. See Sources cited *supra* note 147.

149. *Id.* Other scholars, however, hold certain members of the favored class responsible for prejudice. An exploitation theory holds that prejudice is fostered by the ruling class to keep control over the proletariat. P. VAN DEN BERGHE, RACE AND RACISM 21 (2d ed. 1978); G. ALLPORT, *supra* note 8, at 233-34. See W. WILSON, POWER, RACISM AND PRIVILEGE (1973); Mekcel, *Race Relations*, 27 MENTAL HYGIENE 177 (1945), reprinted in ANATOMY OF RACIAL INTOLERANCE 81, 87, 89 (G. de Huszar ed. 1946). Prejudice is “a social attitude propagated among the public by an

3. SOCIAL-PSYCHOLOGICAL THEORIES OF PREJUDICE

A final approach to prejudice emphasizes social-psychological factors, especially the role of group influence and socialization.¹⁵⁰ This section discusses how such factors help explain the acquisition and retention of prejudiced attitudes.

For most social psychologists, "there are no innate antipathies toward the members of different social, national, religious, or other groups."¹⁵¹ Rather, we learn whom to dislike, just as we learn other group values.¹⁵² Prejudiced attitudes generally emerge in early childhood as the child develops an awareness of skin color and its social significance.¹⁵³ A study by Goodman of black and white nursery school children found well developed awareness of racial characteristics and the social implications of racial membership in children as young as three.¹⁵⁴ As they become older, "children shift from describing themselves . . . and the people around them by reference to their own names or names of specific individuals to the use of ethnic designations."¹⁵⁵ The level of prejudice stabilized when the children reached late adolescence and rarely changed after that.¹⁵⁶

Children acquired attitudes toward different groups by observing the behavior and attitudes of persons around them, particularly parents.¹⁵⁷ Some of the learning is coercive; it is made plain to the children that they were expected to adopt the attitudes and designations of

exploiting class for the purpose of stigmatizing some group as inferior so that the exploitation of either the group itself or its resources may both be justified." O. COX, *CASTE, CLASS & RACE* 393 (1970). Thus, anti-Semitism was used in the 1870's by railroad and industrial tycoons to divert attention from their own exploitive labor policies. G. ALLPORT, *supra* note 8, at 233. Jews were blamed for economic ills, moral lapses, and political chicanery. Exploitation of blacks throughout history provided economic, sexual, political, and status gains for white men.

150. G. ALLPORT, *supra* note 8, at 206; G. SIMPSON & J. YINGER, *supra* note 117, at 107. See also M. GOODMAN, *supra* note 120, at 250-51 (discussing and citing leading authorities).

151. G. SIMPSON & J. YINGER, *supra* note 117, at 107. See generally M. GOODMAN, *supra* note 120; Kinder & Sears, *supra* note 145, at 416. See also G. SAENGER, *THE SOCIAL PSYCHOLOGY OF PREJUDICE* (1953); Lawrence, *supra* note 117 (summarizing cognitive and learning theories).

152. See sources cited *supra* note 151. See also K. CLARK, *PREJUDICE AND YOUR CHILD* 17 (2d ed. 1963); Pettigrew, *Regional Differences in Anti-Negro Prejudice*, 59 J. ABNORMAL & SOC. PSYCHOLOGY 28 (1959).

153. M. GOODMAN, *supra* note 120; Harding & Proshansky, *supra* note 119, at 17; Stevenson & Stevenson, *Social Interaction in an Interracial Nursery School*, 61 GENETIC PSYCHOLOGY MONOGRAPHS 37 (1960). See K. CLARK, *supra* note 152, at 19.

154. M. GOODMAN, *supra* note 120, at 36-60. See Stevenson & Stewart, *A Developmental Study of Racial Awareness in Young Children*, 29 CHILD DEV. 399 (1958); see sources cited *supra* note 152.

155. Harding & Proshansky, *supra* note 119, at 18. See also M. GOODMAN, *supra* note 120, at 254-55 (summarizing research on older children and adolescents).

156. Harding & Proshansky, *supra* note 119, at 22; M. GOODMAN, *supra* note 120, at 255 (summarizing studies).

157. M. GOODMAN, *supra* note 120, at 251; G. ALLPORT, *supra* note 8, at 297; Harding & Proshansky, *supra* note 119, at 27.

members of their group. The pressures toward conformity, although often subtle, are very real,¹⁵⁸ especially if the individual deviates from the established ethnic norms of his own group.¹⁵⁹ Once acquired, prejudiced attitudes tend to persist: "Realistic threats may come and go, but the solid core of prejudice remains, no matter how anachronistic it may become."¹⁶⁰

Many social-psychological theorists explain this persistence in terms of in-group/out-group categories.¹⁶¹ Humans have a natural propensity to categorize arising from the general need to organize and simplify experience.¹⁶² "A million events befall us every day. We cannot handle so many events. If we think of them at all, we type them . . . we cannot handle each event freshly in its own right."¹⁶³ Some of the categories are rational—they have a close and immediate tie to first-hand experience. But irrational categories may also be formed through error, the need to oversimplify experience, or social pressures.¹⁶⁴ Thereafter, these categorizations assume a life of their own: "[W]hat enables people to reject members of other races is the supportive (unconscious and automatic) bias elicited by categorization."¹⁶⁵

Ethnic categories not only simplify experience; they satisfy a basic psychological need by strengthening ties of group membership. At an early age children are capable of understanding that they are members of various groups,¹⁶⁶ including family, neighborhood, religion, and race. All such groups have "characteristic codes and beliefs, standards and 'enemies' to suit their own adaptive needs,"¹⁶⁷ and apply continual pressure to insure that their members adopt them.¹⁶⁸ Loyalties to the in-group are often accompanied by dislike of out-groups. Dislike is accommodated by barriers to communication and by oversimplified, undifferentiated categorizations according to which all members of the

158. Harding & Proshansky, *supra* note 119, at 27; M. GOODMAN, *supra* note 120, at 46-48, 73, 130-31, 251.

159. See *supra* sources cited notes 157-58. See also E. SUCHMAN, J. DEAN & R. WILLIAMS, *DESEGREGATION: SOME PROPOSITIONS AND RESEARCH SUGGESTIONS* 57-60 (1958).

160. Kinder & Sears, *supra* note 145, at 416. See also sources cited *supra* note 156.

161. "In-group" is defined as "any cluster of people who can use the term 'we' with the same significance." "Out-group" refers to all others. G. ALLPORT, *supra* note 8, at 37.

162. See G. ALLPORT, *supra* note 8, at 20; Taifel, *Cognitive Aspects of Prejudice*, 25 *J. Soc. Issues*, 79-97, (Autumn 1969).

163. G. ALLPORT, *supra* note 8, at 20.

164. *Id.* at 21, 35.

165. Larsen, *Social Categorization and Attitude Change*, 111 *J. Soc. Psychology* 113, 114 (1980). See C. WOODWARD, *THE STRANGE CAREER OF JIM CROW* xvi (3rd ed. 1974); F. WERTHAM, *A SIGN FOR CAIN* 89 (1966); J. KOVEL, *supra* note 136, at 132; Snyder, *On the Self Perpetuating Nature of Social Stereotypes in Cognitive Processes in Stereotyping and Intergroup Behavior* 183 (D. Hamilton ed. 1981).

166. G. ALLPORT, *supra* note 8, at 29.

167. *Id.* at 39.

168. *Id.* at 39-41.

out-group are the same.¹⁶⁹ Thus, factors that cause individuals to form prejudiced attitudes are functionally related to an individual's membership in a group—"to adopting the group and its values (norms) as the main anchorage in regulating experience and behavior."¹⁷⁰

Authorities disagree on what characteristics of racial minorities cause them to be seen as out-groups. Some believe it is skin color and other physical differences.¹⁷¹ Others assert that prejudice is based less on physical characteristics than on lack of belief congruence—by the view that the beliefs and values of members of other races are inconsistent with one's own.¹⁷² Members of this latter school assume that most people will accept minorities who hold beliefs similar to their own¹⁷³ and argue that prejudice can be reduced by simply showing, through contact, that most minorities do so.¹⁷⁴ The manner in which this "social contact" theory can be used to promote fairness in dispute resolution is discussed later.¹⁷⁵ At this point, however, it is worth noting that social contact theorists do not assert that all social contact reduces prejudice; the nature and quality of the contact are also important. For Allport, the type of contact that best dispels prejudice is "equal status contact . . . in the pursuit of common goals." Moreover, "the effect is greatly enhanced if this contact is sanctioned by institutional supports (i.e., by law, custom or local atmosphere), and if it is of a sort that leads to the perception of common interests and common humanity . . ."¹⁷⁶

As we have seen, many factors—personal dynamics, scapegoating, economic dislocation, power disparities, socialization, and in-group/out-group cognitive categories—contribute to the development of prejudice. Their effect is widely felt—many Americans harbor some degree of prejudiced attitudes, values, and behavior.¹⁷⁷ However, run-

169. I. KATZ, *supra* note 138, at 113; G. ALLPORT, *supra* note 8, at 9, 19, 51-52.

170. M. SHERIF & C. SHERIF, *GROUPS IN HARMONY AND TENSION* 218 (1966).

171. Fairchild & Gurin, *supra* note 116, at 766; Liebowitz & Lombardo, *Effects of Race, Belief and Level of Prejudice on Responses to Black and White Strangers*, 110 J. SOC. PSYCHOLOGY 293, 293 (1980).

172. Rokeach is a prime exponent of this view. See M. ROKEACH, *BELIEFS, ATTITUDES AND VALUES: A THEORY OF ORGANIZATION AND CHANGE* (1968); M. ROKEACH, *UNDERSTANDING HUMAN VALUES: INDIVIDUAL AND SOCIETAL* (1979); Breckheimer & Nelson, *Group Methods for Reducing Racial Prejudice and Discrimination*, 39 PSYCHOLOGY REP. 1259, 1260 (1976). See also Taylor & Guimond, *The Belief Theory of Prejudice In An Intergroup Context*, 105 J. SOC. PSYCHOLOGY 11 (1978).

173. Liebowitz & Lombardo, *supra* note 171, at 293.

174. See Breckheimer & Nelson, *supra* note 172, at 1259-60. A skeptic might question whether change of belief of a generalized sort ever occurs. The prejudiced individual may conclude only that the black whose belief system turns out to be like his or her own is an "exception to the rule."

175. See *infra* text accompanying notes 203-11.

176. G. ALLPORT, *supra* note 8, at 281.

177. G. ALLPORT, *supra* note 8, at 79-80, 197-202. See *Racism Flares on Campus*, TIME, Dec. 8, 1980, at 28 (change in national mood, racism now "acceptable" in some quarters); L.A.

ning parallel, but in stark contrast to these attitudes are the public values of equality and humanitarianism known as the "American Creed."¹⁷⁸

The inner conflicts generated by these opposing tendencies are resolved in various ways, depending upon the setting. Many individuals harbor some degree of prejudice, but the expression of that prejudice is called up and magnified by features in the environment. The next section discusses the American Creed, the cultural dissonance it generates, and the ways in which persons cope with that dissonance.

B. The American Creed—An Ideal Imperfectly Realized

American culture has been described as highly concerned with fair and ethical treatment of all human beings.¹⁷⁹ The American Creed emphasizes liberty, equality, and human worth—values that arise from the basic tenets of democratic and Judeo-Christian teachings.¹⁸⁰ The Creed represents a collective national conscience, commanding high respect; according to Myrdal, "no other norm could compete in authority over people's minds."¹⁸¹ The authority of the Creed is reinforced by the Constitution and maintained by institutional structures, such as churches, schools, and courts.¹⁸² Although these institutions also accommodate local interests and prejudices,¹⁸³ they direct individuals to show more fairness and justice than many would otherwise be inclined to display.¹⁸⁴

The contradiction between the principles of the American Creed and the reality of class and race-based prejudice exists on a societal level, where it affects the behavior of groups and institutions. This contradiction also exists in the consciences of particular individuals,¹⁸⁵ so that "[t]he average American . . . experiences moral uneasiness and . . .

Times, June 12, 1981, § V, at 2, col. 1 ("the veiled insult, contempt masquerading as a joke, the direct slur," underground in 1960's and early 1970's, now being "recycled as a protest against minority gains").

178. This term was coined by Gunnar Myrdal. See, e.g., G. MYRDAL, AN AMERICAN DILEMMA (1962). See *infra* text accompanying notes 179-90 for a description of the American Creed.

179. G. MYRDAL, *supra* note 178, at LXX; R. GABRIEL, THE COURSE OF AMERICAN DEMOCRATIC THOUGHT 418 (1940).

180. G. MYRDAL, *supra* note 178, at 80. Thus, it has been noted that "in this country political, social and economic conditions gravitate toward equality." K. MILLER, OUT OF THE HOUSE OF BONDAGE, 134-35 (1914). See also D. DEVINE, THE POLITICAL CULTURE OF THE UNITED STATES: THE INFLUENCE OF MEMBER VALUES ON REGIME MAINTENANCE (1972) (Americans value liberty, equality, property, religion in that order).

181. G. MYRDAL, *supra* note 178, at 23.

182. *Id.* at 80.

183. *Id.* at 80.

184. *Id.* at 1023.

185. Westie, *The American Dilemma: An Empirical Test*, 30 AM. SOC. REV. 527, 529 (1965).

individual and collective guilt."¹⁸⁶ Allport demonstrated this conflict in a well-known study in which college students were asked to write about their experiences with members of minority groups. Only about 10% of the students who admitted experiencing prejudice did so without expressing feelings of guilt or conflict.¹⁸⁷ Behavior became a series of difficult-to-predict moral and prudential compromises.¹⁸⁸ While some students rejected prejudice on an intellectual plane, it lingered on an emotional level and shaped behavior.¹⁸⁹ A typical response in Allport's college essay study was as follows: "Although prejudice is unethical, I know I shall always have prejudices. I believe in goodwill toward the Negro, but I shall never invite him to my house for dinner. Yes, I know I'm a hypocrite."¹⁹⁰

C. Resolution of the Conflict

Persons afflicted by prejudice resolve this inner conflict in different ways. According to a leading theorist the main methods are: (1) repression (denial); (2) defense (rationalization); (3) compromise (partial resolution); (4) integration (true resolution).¹⁹¹

Repression denies that a problem exists in order to avoid the turmoil of inner conflict.¹⁹² Most persons do not want to be at odds with their consciences.¹⁹³ Thus, they react by denying the existence of their prejudices or by citing nonracial explanations.¹⁹⁴ An employer, for example, might explain the failure to hire a black worker by saying the worker dressed peculiarly.

Another straightforward way of resolving one's prejudices is to disparage the victim; a form of rationalization.¹⁹⁵ Devaluing the target of prejudice decreases moral discomfort—¹⁹⁶ if the victim receives shoddy treatment, that is what he or she deserves. Prejudice may also be

186. G. ALLPORT, *supra* note 8, at 330.

187. *Id.* at 327.

188. *Id.* at 327-28. See G. MYRDAL, *supra* note 178, at LXXII: "There are no homogeneous 'attitudes' behind human behavior but a mesh of struggling inclinations, interests, and ideals, some held consciously and some suppressed for long intervals but all active in bending behavior in their direction."*Id.*

189. G. ALLPORT, *supra* note 8, at 328; Weitz, *Attitude Voice, and Behavior: A Repressed Affect Model of Intersocial Interaction*, 24 J. PERSONALITY & SOC. PSYCHOLOGY 14, 19-20 (1972).

190. See G. ALLPORT, *supra* note 8, at 327.

191. G. ALLPORT, *supra* note 8, at 334.

192. *Id.* at 317. See Wasserstrom, *Racism, Sexism and Preferential Treatment: An Approach to the Topics*, 24 UCLA L. REV. 581, 598-600 (1977).

193. See sources cited *supra* note 192.

194. J. KOVEL, *supra* note 158, at 54-55; Gaertner, Dovidio & Johnson, *Race of Victim, Nonresponsive Bystanders, and Helping Behavior*, 117 J. SOC. PSYCHOLOGY 69, 70 (1982).

195. G. ALLPORT, *supra* note 8, at 335. See Delgado, *supra* note 137, at 136-37 (and sources cited therein); M. JAHODA, *supra* note 121, at 14-15.

196. I. KATZ, *supra* note 138, at 121; M. JAHODA, *supra* note 121, at 14-15.

rationalized by selectively perceiving or interpreting reality. For example, whites may rationalize their opposition to integration by stating that black children would be frustrated in academic competition with whites.¹⁹⁷

A larger group of persons "attempt to conceal the conflict between their different valuations of what is desirable and undesirable, right or wrong, by keeping away some valuations from awareness and focusing attention on others."¹⁹⁸ This concealment results in ambivalence, a tendency to hold extremely positive (i.e., friendly, accepting, sympathetic) as well as extremely negative (i.e., rejecting, denigrating, hostile) attitudes toward certain ethnic groups.¹⁹⁹

In the U.S., where prejudicial attitudes conflict with a humane creed, many resolve this conflict by varying the expression of these beliefs to conform to particular circumstances,²⁰⁰ a response known as "situational specificity."²⁰¹ Ambivalence and situational specificity explain why many persons behave in egalitarian ways in some situations and in discriminatory ways in others. An example of a situationally determined reaction is when an individual uses racial slurs within his or her own home or other intimate setting, but avoids using that same language in a public forum.

Finally, a few individuals resolve their inner conflicts by effectively ridding themselves of prejudice. These persons "face the whole issue and get it settled so that their daily conduct will be under the dominance of a wholly consistent philosophy of human relationships."²⁰²

D. Strategies for Reducing Prejudice

With the etiology of prejudice in mind, we now turn to theories of how to reduce prejudice and we apply those theories to the problem of minimizing prejudice in dispute resolution.

Some social psychologists advocate increased social contact among ethnic groups as a means to reduce prejudice. This "social contact" hypothesis, put forward by Allport and others, underlies much of the movement toward institutional integration.²⁰³ However, not all

197. Westie, *supra* note 136, at 528.

198. G. MYRDAL, *supra* note 178, at LXXIII.

199. I. KATZ, *supra* note 138, at 23. See also J. KOVEL, *supra* note 136, at 54-55.

200. G. ALLPORT, *supra* note 8, at 337-38. See P. VAN DEN BERGHE, *supra* note 149, at 20-21.

201. Fairchild & Gurin, *supra* note 116, at 764.

202. G. ALLPORT, *supra* note 8, at 338. See also I. KATZ, *supra* note 138, at 97; MYRDAL, *supra* note 178, at 1023; Gaetner, Dovidio & Johnson, *supra* note 194, at 69.

203. G. ALLPORT, *supra* note 8, at 261-81; Fairchild & Gurin, *supra* note 116, at 762. See Simpson & Yinger, *The Reeducation of Prejudice and Discrimination: Changing the Prejudiced Person*, in *RACIAL AND CULTURAL MINORITIES: AN ANALYSIS OF PREJUDICE AND DISCRIMINATION* 673 (G. Eaton & J. Yinger eds., 4th ed. 1952).

contact among groups reduces prejudice. As noted previously, contact sometimes intensifies prejudice.

For contact to lessen prejudice, three conditions must be met. First, equal status between majority and minority groups must be present.²⁰⁴ Second, each group must see contact as rewarding, rather than threatening or antagonistic.²⁰⁵ Finally, contact must lead to individualization between participants;²⁰⁶ the contact must be intimate rather than casual or impersonal.

Unfortunately, whites tend to avoid close contact with minorities,²⁰⁷ and few such contacts occur between individuals of equal status. This reality has led social psychologists to propose a seemingly contrary theory of reducing prejudice—the social distance theory.

As many have pointed out, the average white American exhibits increased prejudice in intimate situations²⁰⁸—a prejudiced person is more likely to act in prejudiced fashion when on familiar ground or with friends than when participating in a public function.²⁰⁹ Wilson showed that although many whites avoid close social contact with blacks, they are not adverse to giving blacks equal rights unless doing so makes it harder to avoid them.²¹⁰ Thus, he concluded that “intermarriage, open housing, and school integration would be less desirable and that voting rights, legal rights, and employment opportunities would be relatively more acceptable.”²¹¹

A third theory that has been proposed for reducing prejudice is known as the confrontation theory. In face-to-face settings the prejudiced person’s attitudinal inconsistencies are brought to his or her attention.²¹² Confronting these inconsistencies causes unease and “self-dissatisfaction”;²¹³ some social psychologists believe that this dissatisfaction is central to attitudinal and behavioral change.²¹⁴ One classic study confronted white subjects with inconsistencies between their

204. G. ALLPORT, *supra* note 8, at 281; Robinson, *Physical Distance and Racial Attitudes: A Further Examination of the Contact Hypothesis*, 41 *PHYLON* 325 (1980); Fairchild & Gurin, *supra* note 116, at 762.

205. G. ALLPORT, *supra* note 8, at 281; Fairchild & Gurin, *supra* note 116, at 764.

206. Breckheimer & Nelson, *supra* note 172, at 1260.

207. Wilson, *Rank Order of Discrimination and its Relevance to Civil Rights Priorities*, in *RACIAL ATTITUDES IN AMERICA: ANALYSES AND FINDINGS OF SOCIAL PSYCHOLOGY* 216 (J. Brigham & T. Weissbach eds. 1972). In some cases, the reverse may also be true—some minorities shun contact with whites—because of fear of rejection, paranoia, or racism.

208. G. MYRDAL, *supra* note 178, at 384.

209. Leibowitz & Lombardo, *supra* note 171.

210. Wilson, *supra* note 207, at 220.

211. *Id.*

212. I. KATZ, *supra* note 138, at 16.

213. *Id.* at 109.

214. *Id.* at 28.

general values and their actual attitudes toward minority persons.²¹⁵ It found that those subjects reporting feelings of self-dissatisfaction demonstrated positive changes in attitudes and behavior. Thus, according to this theory, where conflict exists between custom and prejudice on one side and conscience and law on the other, face-to-face situations reduce discriminatory behavior.²¹⁶

E. The Optimal Setting for the Reduction of Prejudice: Formal vs. Informal Dispute Resolution

The selection of one mode or another of dispute resolution can do little, at least in the short run, to counter prejudice that stems from authoritarian personalities or historical currents.²¹⁷ Prejudice that results from social-psychological factors is, however, relatively controllable. Much prejudice is environmental—people express it because the setting encourages or tolerates it. In some settings people feel free to vent hostile or denigrating attitudes toward members of minority groups; in others they do not.

Our review of social-psychological theories of prejudice indicates that prejudiced persons are least likely to act on their beliefs if the immediate environment confronts them with the discrepancy between their professed ideals and their personal hostilities against out-groups. According to social psychologists, once most persons realize that their attitudes and behavior deviate from what is expected, they will change or suppress them.²¹⁸

Given this human tendency to conform, American institutions have structured and defined situations to encourage appropriate behavior.²¹⁹ Our judicial system, in particular, has incorporated societal norms of fairness and even-handedness into institutional expectations

215. G. ALLPORT, *supra* note 8, at 327-28.

216. *Id.*

217. These factors are relatively unchangeable. Their expression in the form of behavior can be inhibited, however. *See infra* notes 218-46.

218. Thus, in situations in which prejudicial feelings are likely to be aroused, prejudiced people are likely to constrain any expression of prejudice if they perceive that it will be noticed and invite negative consequences. Allport, *Prejudice: Is it Societal or Personal?* in *RACIAL ATTITUDES IN AMERICA: ANALYSES AND FINDINGS OF SOCIAL PSYCHOLOGY* 165,166 (J. Brigham & T. Weissbach eds. 1972); Katz & Gurin, *Race Relations and the Social Sciences: Overview and Further Discussion*, in *RACE AND THE SOCIAL SCIENCES* 342, 373 (I. Katz & P. Gurin eds. 1969). In other words, "[w]here the formal group structure defines a given action in clear-cut terms and where these definitions are acted out by most of the members, then an individual's valuations . . . tend to 'follow' even though initially he might have preferred a different state of affairs." Westie, *supra* note 185, at 533.

219. *See* G. ALLPORT, *supra* note 8, at 461-77.

and rules of procedure at many points.²²⁰ These norms create a “public conscience and a standard for expected behavior that check *overt* signs of prejudice.”²²¹ They do this in a variety of ways. First, the formalities of a court trial—the flag, the black robes, the ritual—remind those present that the occasion calls for the higher, “public” values, rather than the lesser values embraced during moments of informality and intimacy. In a courtroom trial the American Creed, with its emphasis on fairness, equality, and respect for personhood, governs. Equality of status, or something approaching it, is preserved—each party is represented by an attorney and has a prescribed time and manner for speaking, putting on evidence, and questioning the other side. Equally important, formal adjudication avoids the unstructured, intimate interactions²²² that, according to social scientists, foster prejudice. The rules of procedure maintain distance between the parties. Counsel for the parties do not address one another, but present the issue to the trier of fact. The rules preserve the formality of the setting by dictating in detail how this confrontation is to be conducted.

That the formality of adversarial adjudication deters prejudice is borne out by the few empirical studies that have investigated the question. An experiment conducted by Walker and his colleagues showed that subjects viewed adversarial procedures as “the most preferable and the fairest mode of dispute resolution,”²²³ a preference that may even extend to persons in countries that do not use an adversarial system of justice.²²⁴ Another experiment placed subjects in a laboratory setting behind a “veil of ignorance”²²⁵ and asked them to choose among a variety of procedural alternatives. Almost all the subjects chose the adversarial system. The authors concluded that the adversary system introduces a systematic evidentiary bias in favor of the weaker party.²²⁶

220. See *supra* text accompanying notes 65-114. See also Walker & Lind, *Psychological Studies of Procedural Models*, 2 PROGRESS IN APPL. SOC. PSYCHOLOGY 293 (1984). See also G. ALLPORT, *supra* note 8, at 461-77.

221. G. ALLPORT, *supra* note 8, at 470.

222. See *supra* text accompanying notes 204-07 (social contact permits understanding only when certain conditions are met); *supra* text accompanying notes 209-11 (certain types of contact can increase prejudice); *infra* text accompanying note 230 (closely structured, rule-governed settings inhibit tendency to prejudice).

223. Thibaut, Walker, LaTour & Houlden, *Procedural Justice as Fairness*, 26 STAN. L. REV. 1271, 1288 (1974) [hereinafter cited as Thibaut & Houlden].

224. Lind, Thibaut & Walker, *A Cross-Cultural Comparison of the Effect of Adversary and Inquisitorial Process on Bias in Legal Decisionmaking*, 62 VA. L. REV. 271 (1976).

225. Thibaut & Houlden, *supra* note 223, at 1272. The subjects were deliberately kept ignorant of the role they would play in the legal settings Walker described to them. Thus, they did not know whether they would be prosecutors, defendants, judges, lawyers, etc. The term “veil of ignorance” was coined by Rawls. J. RAWLS, *A THEORY OF JUSTICE* (1971); the purpose of the device is to cancel out self-interest in the analysis of hypothetical social arrangements.

226. Thibaut & Houlden, *supra* note 223, at 1289; Thibaut & Walker, *Discovery and Presentation of Evidence in Adversary and Non-Adversary Proceedings*, 71 MICH. L. REV. 1129, 1143

Another experiment showed that the “competitive presentation of evidence counteracts decisionmaker bias . . .”²²⁷ In one experiment, subjects were presented with a test case; they were given a list of both “lawful” and “unlawful” factors, but were told to consider only the “lawful” ones in making a decision.²²⁸ The results showed that in a simulated adversarial framework, even those subjects predetermined to be biased gave less weight to unlawful factors in their decision-making.²²⁹ The authors hypothesized that adversarial procedure counteracts decisionmaker bias because it combats the natural human tendency to “judge too swiftly in terms of the familiar that which is not yet fully known.”²³⁰ The human propensity to prejudge and make irrational categorizations is thus checked by procedural safeguards found in an adversarial system.²³¹

Formality and adversarial procedures thus counteract bias among legal decisionmakers and disputants.²³² But it seems likely that those factors increase fairness in yet a third way—by strengthening the resolve of minority disputants to pursue their legal rights.

(1973). *Cf.* Thibaut, Walker & Lind, *Adversary Presentation & Bias in Legal Decisionmaking*, 86 HARV. L. REV. 386, 388 (1972).

227. Thibaut, Walker & Lind, *supra* note 226, at 401.

228. *See id.* at 391.

229. *Id.* at 399.

230. *Id.* at 390, 401. Proponents of ADR argue that close, intimate contact will lead to better understanding and thus fairer results. On first examination, this position appears to be supported by the social contact theory of reducing prejudice. *See supra* notes 203-07 and accompanying text. Upon closer examination, however, ADR fails to provide the conditions necessary for the social contact theory to operate effectively. Although ADR is informal, the atmosphere is not intimate; the quality of contacts among parties in ADR tends to be superficial. For the most part, there is no process of individualization, and parties are rarely on equal footing. Moreover, the parties will often view the contact as threatening or antagonistic rather than rewarding. *See supra* notes 25-45, 204-06, 223-30 and accompanying text, *infra* notes 258-60, 286-89, 291-93, 298-300 and accompanying text.

231. In addition to Walker's studies, scattered anecdotal reports suggest that informal institutions offer less protection and worse outcomes for women, minorities, and other weaker parties than do formal institutions. *See* Abel, *supra* note 18, at 267, 298 (and sources cited therein); Mnookin & Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979) (little is known about bargaining outside of courts — society should be slow to embrace it). *See also* *Longer Sentences for Minorities, 3-State Study Says*, J. Petersilia, *Racial Disparities in the Criminal Justice System* (1983) (Rand Corp. study showed that at sentencing stage of criminal prosecutions—the stage at which discretion enters most easily—minorities received much harsher treatment than whites). *But cf.* Johnson, *Book Review*, 34 J. LEGAL ED. 334, 335-36 (1984) (asserting that individual plaintiffs do better against insurance companies in informal “court-adjunct” arbitration than they do in court).

232. *But see* Galanter, *Why the “Haves” Come Out Ahead: Speculations on the limits of Legal Change*, 9 L. & SOC'Y REV. 95 (1974) (this counteraction is, at best, weakly felt; legal deck is stacked against “have-nots” regardless of the setting).

F. Dispute Resolution and the Minority Disputant

Early in life, minority children become aware of themselves as different, especially with respect to skin color.²³³ This awareness is often not merely neutral, but associated with feelings of inferiority. Separate studies by psychologists Kenneth Clark and Mary Goodman in which minority children were presented with dolls of various colors illustrate this graphically. For example, when asked to make a choice between a white and black doll, "the doll that looks like you," most black children chose the white doll.²³⁴ A black child justified his choice of the white doll over the black doll as friend because "his feet, hands, ears, elbows, knees, and hair are clean."²³⁵ In another experiment, a black child hated her skin color so much that she "vigorously lathered her arms and face with soap in an effort to wash away the dirt."²³⁶ As minority children grow, they are "likely to experience a long series of events, from exclusion from play groups and cliques to violence and threats of violence, that are far less likely to be experienced by the average member of the majority group."²³⁷ Against a background of "slights, rebuffs, forbidden opportunities, restraints, and often violence . . . the minority group member shapes that fundamental aspect of personality—a sense of oneself and one's place in the total scheme of things."²³⁸

Discriminatory treatment can trigger a variety of responses. Writers identify three main reactions: avoidance, aggression, and acceptance.²³⁹ A minority group member may display one or more of these responses, depending on the setting.²⁴⁰ In some situations, victims of discrimination are likely to respond with apathy or defeatism; in others, the same individuals may forthrightly and effectively assert their interests.²⁴¹ In general, when a person feels "he is the master of his fate, that

233. M. GOODMAN, *supra* note 120; K. CLARK, PREJUDICE AND YOUR CHILD (1955); G. SIMPSON & J. YINGER, *supra* note 117, at 192. Cf. W. WARNER, B. JUNKER & W. ADAMS, COLOR AND HUMAN NATURE: NEGRO PERSONALITY DEVELOPMENT IN A NORTHERN CITY 26 (1941); Delgado, *supra* note 140, at 137.

234. Clark & Clark, *Racial Identification and Preference in Negro Children*, in READINGS IN SOCIAL PSYCHOLOGY 602, 608 (E. Maccoby, T. Newcomb & E. Hartley, eds. 1958).

235. *Id.* at 611.

236. M. GOODMAN, *supra* note 120, at 56.

237. See G. SIMPSON & J. YINGER, *supra* note 117, at 168.

238. *Id.* at 192. See O. COX, *supra* note 149, at 383; K. CLARK, *supra* note 233, at 23 (1955); K. CLARK, DARK GHETTO 63-64 (1965); J. KOVEL, *supra* note 136, at 195 (1970); M. DEUTSCH, MINORITY GROUP AND CLASS STATUS AS RELATED TO SOCIAL AND PERSONALITY FACTORS IN SCHOLASTIC ACHIEVEMENT (Monograph #2, Soc'y for Applied Anthropol. 1960); Stevenson & Stewart, *A Developmental Study of Racial Awareness in Young Children*, 29 CHILD DEV. 399, 408 (1958).

239. G. ALLPORT, *supra* note 8, at 142-161; G. SIMPSON & J. YINGER, *supra* note 117, at 205.

240. See G. SIMPSON & J. YINGER, *supra* note 117, at 205. Cf. Snyder, *supra* note 165.

241. *Id.* See also J. MARTIN & C. FRANKLIN, MINORITY GROUP RELATIONS 3 (1979); G. ALLPORT, *supra* note 8, at 142-61.

he can control to some extent his own destiny, that if he works hard things will go better for him, he is then likely to achieve more. . . ."²⁴² That is, minority group members are more apt to participate in processes which they believe will respond to reasonable efforts. They are understandably less likely to participate in proceedings where the results are random and unpredictable.²⁴³

Thus, it is not surprising that a favored forum for redress of race-based wrongs has been the traditional adjudicatory setting. Minorities recognize that public institutions, with their defined rules and formal structure, are more subject to rational control than private or informal structures.²⁴⁴ Informal settings allow wider scope for the participants' emotional and behavioral idiosyncrasies;²⁴⁵ in these settings majority group members are most likely to exhibit prejudicial behavior. Thus, a formal adjudicative forum increases the minority group member's sense of control and, therefore, may be seen as the fairer forum. This perception becomes self-fulfilling: minority persons are encouraged to pursue their legal rights as though prejudice were unlikely and thus the possibility of prejudice is in fact lessened.²⁴⁶

IV. THE LEFT CRITIQUE OF ADR

Many commentators who have criticized ADR have expressed concerns associated with the "left"—concerns for the unempowered, the poor and other disadvantaged groups.²⁴⁷ This section canvasses the thoughts of these commentators, in particular objections that informalism (i) solidifies control by capital and the state; (ii) disadvantages "weaker" parties; (iii) expands state control; (iv) deflects energy away from collective action; and (v) promotes law without justice. As we shall see, the political critique of ADR, although based on different premises and couched in different terms, comes to the same general conclusion as the psychological critique: ADR is no safe haven for the poor and powerless.

Some commentators have criticized informalism for reinforcing powerful or authoritarian forces in society—capital, the state, formal legal institutions, or the wealthy. The most representative of these writers is Richard Abel, a member of the Critical Legal Studies Conference.

242. Grambs, *Negro Self-Concept Reappraised*, in *BLACK SELF-CONCEPT: IMPLICATIONS FOR EDUCATION AND SOCIAL SCIENCE* 184 (J. Banks & J. Grambs, eds. 1972).

243. *See id.*

244. *See G. SIMPSON & J. YINGER, supra* note 117, at 730.

245. *See id.*

246. *Cf. Abel, supra* note 18, at 309 (the oppressed instinctively prefer formality and formal institutions for redressing grievances; distrust informality).

247. Some proponents of ADR have begun to take seriously the criticisms discussed in this section. *See, e.g., J. MARKS, E. JOHNSON & P. SZANTON supra* note 1, at 51-56.

In an early article,²⁴⁸ Abel writes that informalism inhibits social change by persuading disputants with legitimate grievances to sacrifice their grievances in the interests of peace and cooperation. Informalism “presupposes a high degree of normative consensus on the substantive norms that control behavior outside the legal system”²⁴⁹ and views dispute resolution as a process by which a third party works to get the opposing parties to acknowledge their shared values and resolve their dispute on the basis of those values. The flaw in this view, according to Abel, is that instead of consensus there is disagreement about social and political values; by concealing this dissensus, ADR curbs efforts by have-nots to improve their position.²⁵⁰

Abel's later views take on a decidedly more Marxist cast. In *Conservative Conflict and the Reproduction of Capitalism: The Role of Informal Justice*,²⁵¹ Abel argues that the rise of informalism indicates a shift of power to the more powerful elements in society—capital and the state—a shift whose source lies in the “backlash to the ‘rights explosion’ of the last few decades.”²⁵² Abel contrasts formalism, a product of classical liberal theory that has worked to protect the oppressed, with informalism, which

expresses positivist theories . . . which justify domination, authority, [and] the exercise of control from above . . . Classic liberalism is the ideology of the revolutionary phase of capitalism, whereas positivism is the ideology of capitalism triumphant. The movement from formalism to informalism thus reflects and carries forward a shift in power from the less privileged to the more.²⁵³

In a third article,²⁵⁴ Abel argues that “informal institutions neutralize conflict by responding to grievances in ways that inhibit their transformation into serious challenges to the domination of state and capital.”²⁵⁵ This neutralization occurs in a number of ways. First, informalism allows the state to extend its control to new areas of conflict.

248. Abel, *Delegalization*, in *ALTERNATIVE RECHTSFORMEN UND ALTERNATIVEN ZUM RECHT. JAHRBUCH FÜR RECHTSZOLOGIE UND RECHTSTHEORIE* 27 (H. Von Erhard, Blankenburg, E. Klause & H. Rottleuthner eds. 1980).

249. *Id.* at 40.

250. *Id.* at 42. On the other hand, Abel suggests that delegalization may foster change by withdrawing state approval from certain normative positions. In other words, because delegalization may remove the state from the process of identifying social values, those values may be more susceptible to change. *See id.*

251. Abel, *Conservative Conflict and the Reproduction of Capitalism: The Role of Informal Justice*, 9 *INT'L J. SOC. LAW* 245 (1981).

252. *Id.* at 256.

253. *Id.* at 256-57.

254. Abel, *supra* note 18, at 267.

255. *Id.* at 280.

It does this by attracting to formal institutions disputes that otherwise would have been settled outside the system had not informal mechanisms reduced the workload of formal institutions, and by attracting to informal forums disputes that would have been settled outside the system had those informal forums not been available.²⁵⁶ Further, by seeming to proffer solicitude, informalism fosters dependence, thereby strengthening the state's and capital's control over conflict in society.²⁵⁷

Thus, by directing conflict into safe channels, capital and the state are able to render conflict "conservative," i.e., safe, repetitive, and homeostatic.²⁵⁸ By creating an environment that emphasizes cooperation and imposing that on the disputants, ADR denies the existence of many conflicts and transforms others into simple misunderstandings.²⁵⁹

256. Abel, *supra* note 251, at 257-59.

257.

They do this by reproducing and extending the relationship between the helping professional and the needy consumer of services, a paradigmatic form of domination in advanced capitalism Informal conflict management is simply the latest service provided by constantly expanding welfare state bureaucracies and capitalist enterprises (the two increasingly indistinguishable) in the movement toward social democracy and corporate paternalism. *Id.* at 260.

258. Abel, *supra* note 251, at 250. Abel looks at seven traits of informal and formal processes that foster conservative conflict:

1. Disputant characteristics—In individual conflict, the parties retain the characteristics attributable to them in society at large; individual advantages and disadvantages are preserved by the process. *Id.* at 250-51.

2. Equality of adversaries—A related distinction is that in conservative conflict, opponents can be, and usually are, unequal because liberal legalism promotes the notion of equal justice for all, thereby inviting weaker parties to challenge stronger ones. In liberating conflict, where this notion does not exist, weaker parties are far less likely to challenge stronger ones. *Id.* at 251-52.

3. Normative order—In conservative conflict there is a normative order, attributable to some third-party authority (e.g. constitution, legislature, etc.) imposed upon and agreed to by the parties. No such consensus is part of liberating conflict. *Id.* at 252-53.

4. Role differentiation—Conservative conflict accentuates the different roles of the various parties: plaintiff, defendant, third-party authority. *Id.* at 253.

5. Conflict boundaries—Conservative conflict "is confined by clearly demarcated, relatively rigid boundaries. These are temporal, spatial, institutional, strategic, and linguistic." *Id.* at 253-54. It attempts to make the conflict discrete and definable, and then seeks to solve it. Liberating conflict has no such clear boundaries; there are no boundaries other than those drawn by the parties. *Id.*

6. Chronological focus—Conservative conflict focuses exclusively either on the past (formal) or on the future (informal). "Liberating conflict, by contrast, engages in a normative evaluation of the past in order to influence the future . . ." *Id.* at 254-55. It takes into account both periods.

7. Outcome—"First, in conservative conflict, the outcome is imposed by a third party, be it a judge (formal) or an arbitrator (informal). Second, conservative conflict tends to perpetuate the status quo, not only in terms of preservation of relative wealth, but also in terms of preserving the identity of the parties. (On the latter point, individuals attain things that reinforce their individuality.) Liberating conflict transforms parties, disaggregating those that were corporate . . . and organizing previously atomistic individuals . . ." *Id.* at 255.

259. Abel, *supra* note 18, at 283-84; Abel, *supra* note 251, at 259.

When informalism is unable to suppress conflict completely, it channels it so as to minimize its political and structural aspects.²⁶⁰ It does this by defining "who can claim and what they can claim,"²⁶¹ by defining "the locus of significant conflict—typically the neighborhood,"²⁶² and by defining "the adversaries against whom claims can be made."²⁶³ Informalism directs attention to interpersonal, intraneighborhood, and intraclass disagreements, ignoring the conflicts that are important to the oppressed (and likely to threaten the powerful)—conflicts between labor and capital, consumer and producer, polluter and inhabitants of polluted environments.²⁶⁴

Others have expressed similar concerns about informalism.²⁶⁵ For example, Auerbach, in *Justice Without Law?*, charges that informal alternatives were more or less consciously designed to siphon discontent from courts. Alternative processes reduce the danger of political confrontation and thus preserve the power of legal institutions and the stability of the social system.²⁶⁶

In addition to the macropolitical concerns just reviewed, critics have also expressed microinstrumental concerns for the individuals who use ADR. Abel who is also a principal spokesperson for this view, observes that formal legal institutions begin with a presumption of inequality between the parties and construct elaborate rules and mechanisms to protect weaker parties.²⁶⁷ Informal systems deemphasize these concerns—they presume "that the people or entities that interact outside formal legal institutions are roughly equal in political power, wealth, and social status."²⁶⁸ However, according to Abel, this is an erroneous presumption—there is no such equality—with the result that informal forums greatly disadvantage weaker parties.²⁶⁹ Mark Lazer-son comes to the same conclusion, based on studies of landlord-tenant

260. Abel, *supra* note 18, at 286-87; Abel, *supra* note 251, at 260-61.

261. Abel, *supra* note 251, at 261.

262. *Id.*

263. *Id.*

264. *Id.* at 260-61; Abel, *supra* note 18, at 286-87.

265. Commenting on the role of state agencies and corporate interests in the creation of neighborhood justice centers, Hofrichter argues that instead of furthering the interests of minorities, the poor, and the unemployed, "the interests served are those of corporate planners and public officials, fearful of excessive democracy and disruptions of the established order." Hofrichter, *Neighborhood Justice and the Social Control Problems of American Capitalism: A Perspective*, in 1 *THE POLITICS OF INFORMAL JUSTICE* 207, 236 (R. Abel ed. 1982).

266. J. AUERBACH, *supra* note 20, at 144.

267. See *supra* text accompanying notes 65-114 for a summary of those devices. Abel is convinced that these formal rights have aided disadvantaged groups: "Prisoners, mental patients, children, women, the elderly, ethnic minorities, and other disadvantaged categories have enhanced their social status and gained political power through formal legal rights." Abel, *supra* note 248, at 41.

268. *Id.* at 40.

269. *Id.* at 41.

relations.²⁷⁰ He argues that “procedural formality recognizes inequality and attempts to compensate for it by making both parties conform to the same standards.”²⁷¹ If the procedural formalities are withdrawn, the weaker party stands little or no chance of succeeding in litigation.²⁷² Hofrichter and Nader level similar criticism, the former based on his studies of neighborhood justice centers;²⁷³ the latter, on her examination of consumer complaint mechanisms.²⁷⁴

For some, the tension between informalism and justice²⁷⁵ is unresolvable: “Without legal power the imbalance between aggrieved in-

270. “A legal system that encourages conciliation between landlords and tenants—two parties with vastly unequal resources—by curtailing the procedural rights of the weaker can only succeed in amplifying that inequality.” Lazerson, *In the Halls of Justice the Only Justice is in the Halls*, in 1 *THE POLITICS OF INFORMAL INJUSTICE* 119, 159 (R. Abel 1982).

271. *Id.*

272. Lazerson bases his conclusion on his experience fighting slum landlords in the South Bronx. At that time the Bronx Tenant Court was the tribunal with jurisdiction over landlord-tenant disputes. According to Lazerson, his agency, the South Bronx Legal Services Corp. (SBLs), was “determined to use the technical defects in dispossess [eviction] petitions as a source of leverage to pressure landlords to satisfy tenant demands for better housing or else go bankrupt.” *Id.* at 129.

Once this was accomplished, because landlords could only evict tenants by court order, their “only reasonable solution was to settle in the hallways of the court building.” *Id.* at 133. As hoped, the Landlord-Tenant Court’s proceedings ground to a halt as attorneys vigorously pursued their clients’ procedural rights by contesting jurisdiction and service of process, forcing lengthy trials, and pressing landlords to prove every element of their cases. *Id.* at 128-33. Landlords began to act differently once they realized the court was not a “captive institution.” Lazerson reports that landlords agreed to flexible rent payment terms and forgiveness of past rent due in exchange for the tenant’s agreement to vacate the premises. *Id.* at 132.

In October, 1973, the Landlord-Tenant Court was replaced by the Housing Court. The court’s capacity was greatly expanded and the landlord-tenant judge was replaced by administrative hearing officers less well-versed in the procedural law and less responsive to efforts to exploit that law. *Id.* at 145. Although the SBLs renewed its defensive tactics, they were only partly successful. *See id.* at 151. Lazerson concludes that the new court, with its emphasis on conciliation and deemphasis of formal procedural rights, worked against the disadvantaged. He believes this is true of ADR generally.

273. Hofrichter, *Justice Centers Raise Basic Questions*, in *NEIGHBORHOOD JUSTICE: ASSESSMENT OF AN EMERGING IDEA* 193 (1982). Hofrichter argues that Neighborhood Justice Centers (NJs) “may indirectly weaken the rights of low and moderate income groups and their ability to use the regular courts as protection against the increasingly institutionalized and concentrated power of organizations with vast resources, e.g., landlords, creditors, and government bureaucracies.” *Id.* at 196. Because NJs operate informally, they are likely to limit the scope of demands and remedies of clients—clients generally drawn from disadvantaged groups. *Id.* Further, disputes that might otherwise have been aired in formal legal institutions, with their formal protections, will be diverted to NJs. And, finally, NJs may attract disputes that are better handled in the political arena; the atomization of grievances characteristic of informal judicial forums may undermine efforts towards collective action that would be of greater benefit to the disadvantaged than would a series of ADR-mediated compromises. *Id.* at 197.

274. Although purportedly aimed at redressing grievances, these mechanisms are rendered ineffective by the weak bargaining position of the individual who confronts a large corporation or government bureaucracy. Nader asserts that when a dispute occurs between persons of unequal power, mediation or arbitration is unlikely to resolve it fairly unless legal force is available as a last resort. Nader, *supra* note 42, at 1020.

275. J. AUERBACH, *supra* note 20, at 145.

dividuals and corporations, or government agencies cannot be redressed."²⁷⁶ One cannot have equity and informality at the same time.

A third criticism is that informalism extends the state's control over members of disadvantaged classes. This happens in two ways. First, "[b]ecause informal state institutions reduce or disguise coercion[,] they can . . . review behavior that presently escapes state control."²⁷⁷ In our society the reach of coercive institutions is limited by formal rights and individual resistance to coercion. Institutions that appear noncoercive circumvent formal rights and undermine resistance, and are thus able to bring new types of dispute within the ambit of state control.²⁷⁸

Second, the "creation of informal institutions increases the quantum of state resources devoted to social control."²⁷⁹ By relieving the courts of some of their burden, informal mechanisms free up resources which the courts can then use to process more cases.²⁸⁰ And, because informal forums attract disputes that would not otherwise have been handled by the state, they increase the areas of life subject to state coercion.²⁸¹

Informalism thus extends state control. While this is worrisome, it does not in itself imply bias against minorities, the poor, and the politically unempowered. However, this increased state control does implicate such bias because informal procedures, like formal ones, are often directed toward the economically, socially, and politically oppressed.²⁸² This is evidenced, for instance, by the location of NJCs in neighborhoods with disproportionate numbers of these groups' members.²⁸³ Moreover, the differing ways in which the poor and the privileged use legal institutions make the poor especially susceptible to state control. The poor use law "to settle disputes, enhance their authority, or demonstrate conformity to norms [and] do so in controversies with equals or inferiors, not against superiors."²⁸⁴ The privileged, by contrast, use law "to control inferiors but protect one another from state intervention."²⁸⁵

276. *Id.*

277. Abel, *supra* note 18, at 272.

278. *Id.* at 271-72.

279. *Id.* at 273.

280. *Id.*

281. *Id.* at 273-74.

282. *Id.* at 274. There are a few exceptions, e.g., the rent-a-judge summary trial movement favored by some large corporations as ways of cutting litigation costs. See Miranker, *supra* note 6 (rent-a-judge trials popular in Silicon Valley to settle corporate disputes).

283. See Abel, *supra* note 18, at 274.

284. *Id.* (Landlord-tenant disputes may be exceptions to Abel's generalization.)

285. *Id.* (Antitrust suits may be exceptions to Abel's generalization.)

Hofrichter echoes many of these criticisms,²⁸⁶ but adds a new twist. He argues that informal dispute resolution processes are more intrusive than those associated with formal adjudication. For example, he points to mediation and the freewheeling, "therapeutic" inquiry that characterizes it, an inquiry whose "openness magnifies the extent to which the state penetrates the lives of disputants: Their deepest emotions and most personal problems become part of the process of conflict resolution. This intervention itself is regulation, regardless of its effect on the outcome."²⁸⁷ Informal institutions can also expand state control by referring disputants to other state agencies for further, sometimes extended, monitoring,²⁸⁸ in the course of which detailed records are often kept.²⁸⁹

Commentators also criticize informalism for draining energy from collective action that would be of greater benefit to disadvantaged groups than would a series of individual decisions. First, informalism may attract disputes that otherwise would have led to collective action.²⁹⁰ Second, by handling problems on a case-by-case basis, informalism ignores the class basis of many kinds of conflict:²⁹¹ "[T]he content of conflict is divorced from collective interests, segregated from similar cases, and limited to the immediate relationship between the disputants. Consumers may 'win' cases as individuals . . . but lose as members of a wider social class . . ."²⁹² And Nader, examining consumer complaints, observes:

Disputing without law is not a very satisfactory experience for most consumers and citizens in this country, yet it is unlikely that the force of law can be marshalled to address 'little injustices' unless they are reconceptualized as collective harms. For official action in that direction to have any likelihood of yielding more than symbolic victories, an active and vital grass-roots citizen and consumer movement must be encouraged.²⁹³

286. "Because [NJs] handle cases concerned not only with violations of law but also with behavior identified as a social problem or a threat to community stability, the range of social control is greatly extended." Hofrichter, *supra* note 265, at 237. See also Hofrichter, *supra* note 273, at 198: "The accessibility of NJCs allows for an over-inclusion of cases and the institutionalization of conflicts that might never have entered the courts."

287. Hofrichter, *supra* note 265, at 239.

288. See Hofrichter *supra* note 265, at 238; Hofrichter, *supra* note 273, at 198.

289. Hofrichter, *supra* note 273, at 199.

290. Hofrichter, *supra* note 265, at 240.

291. *Id.* See also J. AUERBACH, *supra* note 20, at 144; Auerbach, *The Two-Track Justice System*, THE NATION, at 399, 400, (Apr. 5, 1980).

292. Hofrichter, *supra* note 265, at 240 (citation omitted).

293. Nader, *supra* note 42, at 998, 1000, 1021. See also J. AUERBACH, *supra* note 20, at 144; Auerbach, *supra* note 291, at 400.

A final criticism is that informalism serves private interests at the expense of public ones. This works to the detriment of minorities, the poor, women, and other disadvantaged groups to the extent that they benefit most from the public policies underlying formal legal processes.

The principal spokesperson for this view is Owen Fiss. Focusing on settlement and the problem he believes inherent in the process, Fiss argues that settlement is far from the cure-all its proponents suggest;²⁹⁴ judgments produced by traditional litigation are preferable for several reasons.

For Fiss, settlement is unconstrained by the party equality that underlies formal legal processes. An imbalance of power can distort the settlement process²⁹⁵ in a number of ways: (1) The poorer party will be less able than the wealthier party to predict the outcome of litigation and thus will be in an inferior bargaining position; (2) the poorer party may be in great need of damages and thus willing to settle for a smaller sum rather than wait for a larger recovery through litigation; and (3) the poorer party may be forced to settle simply because she cannot afford to hire counsel or finance litigation, regardless of the merit of her claim.²⁹⁶ Although Fiss acknowledges that imbalances in the parties' power may also distort judgments, he suggests this distortion can be and often is mitigated by judges.²⁹⁷ Moreover, there is a critical difference between a process like settlement, which is based on bargaining and accepts inequalities of wealth as an integral and legitimate component of the process, and a process like judgment, which knowingly struggles against those inequalities. Judgment aspires to an autonomy from distributional inequalities, and it gathers much of its appeal from this aspiration.²⁹⁸

Fiss also warns of the increased danger that disputants in settlement proceedings may suffer conflicts of interest with their representatives. In settlement negotiations, the negotiator shapes the settlement. Judgments, by contrast, are shaped by juries and judges, who take into account the information provided by representatives but come to independent conclusions.²⁹⁹ The latter process, according to Fiss, is less likely than settlement to subordinate the interest of the disputant to that of his or her representative.

294. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984). For another view of negotiation, see Eisenberg, *Private Ordering through Negotiation: Dispute-Settlement and Rulemaking*, 89 HARV. L. REV. 637 (1976).

295. Fiss, *supra* note 294, at 1076.

296. *Id.*

297. *Id.* at 1078.

298. *Id.*

299. *Id.* at 1080.

Fiss also points to problems that may arise after a settlement is negotiated.³⁰⁰ If one of the parties seeks modification of a consent decree because of a change in circumstances, a judge must reconstruct conditions as they existed at the time of the settlement and then evaluate the subsequent changes to see whether relief is warranted, a task many may be unwilling to perform.³⁰¹ Enforcement is his or her second concern: “[C]ourts hesitate to use that [enforcement] power to enforce decrees that rest solely on consent. . . .”³⁰² As a result, if the stronger party simply ignores the decree, the weaker party may be unable to do much about it.

Fiss’ final concern is that while settlement may produce peace between the parties, it fails to further the substantive public goals that shape adjudication. He asserts that the task of public officials who administer state dispute resolution systems “is not to maximize the ends of private parties, nor simply to secure the peace, but to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality into accord with them. This duty is not discharged when the parties settle.”³⁰³

Adjudication is a process that embodies public values; Fiss points to *Brown v. Board of Education*³⁰⁴ as an example of the public nature of adjudication, describing that case as an example “in which the judicial power [was] used to eradicate the caste structure.”³⁰⁵ For Fiss, “[c]ivil litigation is an institutional arrangement for using state power to bring a recalcitrant reality close to our chosen ideals.”³⁰⁶ Because the “chosen ideals” of a liberal democracy such as ours include equality and other values important to disadvantaged classes and because ADR does not advance those ideals as well as its formal counterpart, ADR may work against the best interests of the disadvantaged.³⁰⁷

300. “[J]udgment is not the end of the lawsuit but only the beginning. The involvement of the court may continue almost indefinitely. In these cases, settlement cannot provide an adequate basis for that necessary continuing involvement, and thus is no substitute for judgment.” *Id.* at 1082.

301. *Id.* at 1083-84.

302. *Id.* at 1084.

303. *Id.* at 1085.

304. 347 U.S. 483 (1954); 349 U.S. 294 (1955).

305. Fiss, *supra* note 294, at 1089.

306. *Id.*

307. Hofrichter and Landsman have expressed similar reservations about ADR. Hofrichter argues that informalism stresses resolution of disputes through accommodation at the expense of normative criteria, “a conception of justice that lacks social content or ideals.” Hofrichter, *supra* note 265, at 242. Informal dispute resolution is thus likely to reproduce the inequality existing between the parties, an inequality that could be mitigated in formal proceedings. *Id.* Nor do informal agreements afford much opportunity for structuring future behavior of the parties, or others like them. *Id.*

Stephen Landsman also finds formal adjudication preferable to ADR for the disadvantaged client. Adversarial presentation—absent in ADR—benefits such clients because their attorneys are

V. PREJUDICE IN ADR—ASSESSING AND BALANCING THE RISKS

ADR increases the risk of prejudice toward vulnerable disputants. Our review of social science writings on prejudice reveals that the rules and structures of formal justice tend to suppress bias, whereas informality tends to increase it. The social science findings are reinforced, on a sociopolitical level, by ADR's leftwing critics, who see ADR as increasing the power of authoritarian social institutions over individuals, extending state coercive power into new areas of citizens' lives, and discouraging collective action.

This Part assumes that the social-science and leftwing critiques are at least partly valid—that ADR does indeed increase the risk of unfair treatment for minority disputants, women and the poor. From this it proceeds to address two final questions: (i) How much weight should be assigned to such a risk? and (ii) Can the risk be minimized without forfeiting the benefits and advantages of ADR?

A. *The Ideal of Fairness in American Procedure*

If ADR increases the risk of prejudice or bias in adjudication, it does not follow immediately that ADR should be curtailed. Equity concerns are only one value among many; conceivably, the gains in flexibility, speed, and economy that ADR's proponents cite could override moderate losses in fairness. A survey of the role of the ideal of fairness in American procedural law suggests, however, that the balance should be struck on the side of fairness.

American procedural law's history evidences a strong and steady evolution toward fairness, an evolution that has at times overshadowed the impulse toward economy and efficiency.³⁰⁸ Over a century ago, the Field code simplified pleading rules, largely to eliminate traps for the unwary and to render legal paper work intelligible to ordinary per-

spurred by professional pride to gather evidence and argue the client's case forcefully. Landsman, *The Decline of the Adversary System: How the Rhetoric of Swift and Certain Justice Has Affected Adjudication in American Courts*, 29 BUFFALO L. REV. 487, 525-26 (1980). Formal rules also counter decisionmaker bias or consideration of extraneous issues. *Id.* at 526. The results of an adversarial process are also more likely to be accepted by the parties and by society. *Id.* Finally, adversarial systems facilitate actions against the state and other powerful entities, for judges and juries—unlike informal decisionmakers—are relatively insulated from outside influence. *Id.* at 526-28.

308. See *Griffin v. Illinois*, 351 U.S. 12, 16-19 (1965) (American goal of equal justice one of our most enduring values, rooted in ancient traditions and documents, including Magna Charta and Old Testament; equal justice affording of adequate and effective appellate review to indigent defendants). To be sure, society has at times seemed to emphasize efficiency values over fairness values in adjudication. See sources cited *infra* note 317 (indications that current period stresses efficiency). But when this has been so, the shift in emphasis has been small and incremental—it has never taken the form of a wholesale abrogation of procedural rights of entire populations of persons, as is arguably the case with ADR.

sons.³⁰⁹ The great procedural reforms of this century, civil discovery and long-arm jurisdiction, were likewise intended to equalize power and opportunity among litigants. Discovery enables litigants of modest means to learn facts about the dispute that might otherwise remain in the exclusive possession of the more powerful party.³¹⁰ Long-arm jurisdiction enables citizens injured by corporations and other powerful entities to bring them to account where the injury occurred, instead of being forced to sue where the defendant is found.³¹¹

Civil and criminal reforms have made access to court cheaper and more readily available to all. Public defenders and legal aid attorneys represent individuals who cannot afford the costs of a private lawyer.³¹² Transcripts on appeal in some cases have been held a defendant's constitutional right.³¹³ A panoply of rules and procedures, reviewed earlier, have developed to assure fairness, despite the added costs they impose.³¹⁴ Many of these are minor, such as the rule permitting modification of time rules for good cause.³¹⁵ Others are broader, cutting across areas and stages of litigation, such as the requirement of trial by jury.³¹⁶ Although efficiency and fairness are often in tension,³¹⁷ our jurisprudence regards fairness in litigation as an important ideal not to be discarded lightly—and certainly not in broadbased, systemic

309. See, e.g., J. COUND, J. FRIEDENTHAL & A. MILLER, *CIVIL PROCEDURE: CASES AND MATERIALS* 426-30 (4th ed. 1985).

310. Cf. *id.* at 643-44; *Hickman v. Taylor*, 329 U.S. 495 (1947). See *United States v. Procter & Gamble Co.*, 356 U.S. 677 (1958): "Modern instruments of discovery . . . make a trial less a game of blind man's bluff and more a fair contest . . ." *Id.* at 682.

311. J. COUND, J. FRIEDENTHAL & A. MILLER, *supra* note 309, at 70-106; *International Shoe v. Washington*, 326 U.S. 310 (1945).

312. *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to counsel at various stages of criminal process). See *Legal Services Corporation Act of 1974*, 42 U.S.C. § 2996. But see *infra* note 317 (recent counterpressure to reduce funds for public defenders and legal aid attorneys).

313. See *Griffin*, 351 U.S. at 16-20 (basic goal of "equal justice for poor and rich, weak and powerful alike" requires states provide means of affording adequate review to indigent defendants; American people have never ceased to aspire to that goal.)

314. See Text accompanying notes 65-114 (Part II, Procedural Safeguards in Formal Adjudication). See also the storm of criticism that arose over the disclosure that many default judgments were rendered against indigent defendants pursuant to "sewer service" of process. *Abuse of Process: Sewer Service*, 3 COLUM. J.L. & SOC. PROBS. 17, 18 (1967); *Velasquez v. Thompson*, 321 F. Supp. 34, 40 (E.D.N.Y. 1970); *Kovalesky v. AMC Associated Merchandising*, 551 F. Supp. 544 (S.D.N.Y. 1982).

315. *Supra* note 89 and accompanying text.

316. *Supra* notes 73-85 and accompanying text.

317. See *supra* text accompanying note 52 (Chief Justice Burger proposes assigning complex cases to judges, rather than lay juries, and that minor cases be sent to arbitration, mediation, or neighborhood justice centers). Recently, funds for public defenders and legal aid attorneys have been cut. For the view that the ideal of fairness is at risk throughout the civil justice system, see Burbank, *Sanctions in the Proposed Amendments to the Federal Rules of Civil Procedure: Some Questions About Power*, 11 HOFSTRA L. REV. 997 (1984) (discussing proposed amendments to Federal Rules of Civil Procedure).

fashion.³¹⁸ The next section addresses the question of how best to preserve that value in informal proceedings without sacrificing the benefits of informality.

B. Striking the Balance: Protecting against Prejudice without Sacrificing the Benefits of ADR

ADR offers a number of clear-cut benefits. It can shape a decree flexibly so as to protect a continuing relationship between the parties.³¹⁹ It is low-cost, speedy, and, for some at least, nonintimidating.³²⁰ Yet there is little benefit for a minority disputant in a quick, painless hearing that renders an adverse decision tainted by prejudice.

Part III showed that the risk of prejudice is greatest when a member of an in-group confronts a member of an out-group;³²¹ when that confrontation is direct, rather than through intermediaries;³²² when there are few rules to constrain conduct;³²³ when the setting is closed and does not make clear that "public" values are to preponderate,³²⁴ and when the controversy concerns an intimate, personal matter rather than some impersonal question.³²⁵ Our review also indicated that many minority participants will press their claims most vigorously when they believe that what they do and say will make a difference, that the structure will respond, and that the outcome is predictable and related to effort and merit.³²⁶

It follows that ADR is most apt to incorporate prejudice when a person of low status and power confronts a person or institution of high status and power.³²⁷ In such situations, the party of high status is more likely than in other situations to attempt to call up prejudiced responses;³²⁸ at the same time, the individual of low status is less likely to

318. Unlike modification of individual rules of procedure, *see* Burbank, *supra* note 317, or reduction in funding for public legal services, diversion of cases to ADR entails wholesale and serious loss of procedural protections. *See supra* text accompanying notes 65-114 affecting identifiable classes of persons. *See supra* text accompanying notes 247-307 (left critique of ADR).

319. *Supra* notes 61-63 and accompanying text.

320. *Supra* notes 55-60 and accompanying text.

321. *Supra* notes 115-29, 161-76 and accompanying text. Rent-a-judge and mini-trials, used increasingly by corporations interested in cutting litigation costs, would not present this problem; the parties are of roughly equal power, and they voluntarily choose the alternate forum. *See supra* notes 10, 27 (and sources cited therein).

322. *Supra* notes 222-24, 217-18, 233-34 and accompanying text.

323. *Supra* notes 181-84, 216-21, 233-34 and accompanying text.

324. *Supra* notes 180-90 and accompanying text.

325. *Supra* notes 208-11 and accompanying text.

326. *Supra* notes 233-46 and accompanying text.

327. *Supra* notes 137-43, 157-70 and accompanying text (scapegoating; in-group/out-group relations).

328. *Id.* *See also supra* notes 227-32 and accompanying text (checking decisionmaker bias).

press his or her claim energetically.³²⁹ The dangers increase when the mediator or other third party is a member of the superior group or class.³³⁰ Examples of ADR settings that may contain these characteristics are prison and other institutional review boards,³³¹ consumer complaint panels,³³² and certain types of cases referred to an ombudsman.³³³ In these situations, minorities and members of other out-groups should opt for formal in-court adjudication, and the justice system ought to avoid pressuring them to accept an alternate procedure. ADR should be reserved for cases in which parties of comparable power and status confront each other.

ADR also poses heightened risks of prejudice when the issue to be adjudicated touches a sensitive or intimate area of life,³³⁴ for example, housing or culture-based conduct. Thus, many landlord-tenant, interneighbor, and intrafamilial disputes are poor candidates for ADR. When the parties are of unequal status and the question litigated concerns a sensitive, intimate area, the risks of an outcome colored by prejudice are especially great. If, for reasons of economy or efficiency ADR must be resorted to in these situations, the likelihood of bias can be reduced by providing rules that clearly specify the scope of the proceedings and forbid irrelevant or intrusive inquiries, by requiring open proceedings, and by providing some form of higher review.³³⁵ The third-party facilitator or decisionmaker should be a professional and be acceptable to both parties.³³⁶ Any party desiring one should be provided with an advocate, ideally an attorney, experienced with representation before the forum in question.³³⁷ To avoid atomization and lost opportunities to aggregate claims and inject public values³³⁸ into dispute resolution, ADR mechanisms should not be used in cases that

329. *Supra* notes 242-46 and accompanying text (situational factors that encourage forceful presenting of claims).

330. *Id.* See also *supra* notes 221-22 and accompanying text.

331. *Supra* notes 45-46 and accompanying text.

332. *Supra* notes 42-43 and accompanying text; Steele, *Fraud, Dispute and the Consumer: Responding to Consumer Complaints*, 123 U. PA. L. REV. 1107 (1975).

333. See e.g., Silbert & Sussman, *The Rights of Juveniles Confined in Training Schools and the Experience of a Training School Ombudsman*, 40 BROOKLYN L. REV. 605 (1976); Verkuil, *The Ombudsman and the Limits of the Adversary System*, 75 COLUM. L. REV. 845 (1975).

334. *Supra* notes 208-11, 321 and accompanying text.

335. Consideration should be given to drafting Model Rules of ADR. Cf. Haber, *Speeding Justice Along: Model Rules of Summary Civil Procedure*, 21 HARV. J. LEGIS. 173 (1984) (proposing rules for small or simple cases tried in court).

336. See Vogel, *Squeezing the Consumer: Automobile Lemon Laws and a Proposal for Reform*, 1985 ARIZ. ST. L. J. 589 (1985) (panels hearing automobile warranty complaints often chosen, or influenced by, automobile industry).

337. See *supra* notes 221-22 and accompanying text.

338. See *supra* notes 303-06 and accompanying text.

have a broad societal dimension, but forward them to court for appropriate treatment.³³⁹

Would measures like these destroy the very advantages of economy, simplicity, speed, and flexibility that make ADR attractive? Would such measures render ADR proceedings as expensive, time-consuming, formalistic, and inflexible as trials? These measures do increase the costs, but, on balance, those costs seem worth incurring. The ideal of equality before the law is too insistent a value to be compromised in the name of more mundane advantages. Continued growth of ADR consistent with goals of basic fairness will require two essential adjustments: (1) It will be necessary to identify those areas and types of ADR in which the dangers of prejudice are greatest and to direct those grievances to formal court adjudication; (2) In those areas in which the risk of prejudice exists, but is not so great as to require an absolute ban, checks and formalities must be built into ADR to ameliorate these risks as much as possible. With both inquiries, the preliminary investigations and tentative identifications of troublesome areas made in this Article may prove useful starting points.

339. *Cf. Mitsubishi Motor Corp. v. Soler Chrysler-Plymouth, Inc.*, 723 F.2d 155, 163, 168 (1st Cir. 1983) (antitrust claims non-arbitrable; public policy demands adjudication, since plaintiff is in a sense acting as a private attorney general).