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Shadow Justice: The Ideology and Institutionalization of Alternatives to Court

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SHADOW JUSTICE: THE IDEOLOGY AND INSTITUTIONALIZATION OF ALTERNATIVES TO COURT. By *Christine B. Harrington.* Westport, Conn.: Greenwood Press. 1985. Pp. x, 216. $29.95.

In 1973, Professor Richard Danzig proposed the adoption in this country of the community moot, a forum for dispute resolution adapted from the Kpelle tribal moot of Liberia.[1] Danzig's indictment of the judicial system reflected widespread sentiments:

> The present system does not, after all, perform the job of adjudication in most of these [minor civil and criminal] cases. Civil proceedings are generally avoided because the parties are too ignorant, fearful, or impoverished to turn to small claims courts, legal aid, or similar institutions. Many matters which may technically be criminal violations will not be prosecuted because they are viewed by the prosecuting authorities as private and trivial matters. . . . [W]e know that due to institutional overcrowding and established patterns of sentencing the vast majority of misdemeanants and some felons are not likely to be imprisoned. For these defendants, the judicial process is not a screen filtering those who are innocent from those who will be directed to the corrective parts of

1. Danzig, *Toward the Creation of a Complementary, Decentralized System of Criminal Justice,* 26 STAN. L. REV. 1, 47-48 (1973).

> the process. Rather, it is the corrective process; as such it fails to be more than a "Bleak House," profoundly alienating, rather than integrating.[2]

In the less than fifteen years following Danzig's recommendation, some two hundred Neighborhood Justice Centers[3] have been established to more effectively resolve family, neighborhood, and other disputes between people who know each other. Part of the broad alternative dispute resolution "movement," Neighborhood Justice Centers adopt informal mechanisms, primarily mediation and arbitration, to involve the parties in reaching a maximum solution at a minimum cost of time, money, and emotional damage.

Christine Harrington[4] views the Neighborhood Justice Center as an example of judicial reform which has its roots in turn-of-the-century movements to abolish the rural justice of the peace courts in favor of specialized municipal courts such as small claims and family court. Her book, *Shadow Justice: The Ideology and Institutionalization of Alternatives to Court,* is part political history, part sociological analysis, part review of the literature of Alternative Dispute Resolution ("ADR"), and part case study. Alternating between thick theoretical jargon and succinct historical prose, the book reads more like a collection of loosely connected essays than a unified work. Nevertheless, the material is interesting in several respects to those concerned with the policy and implementation of ADR.

Shadow Justice can be divided into two parts. In one part (primarily Chapter One, "Courts and the Ideology of Informalism") the author develops a structural critique of "informalism," dispute resolution outside the formal court system. This critique is based on a sociological analysis of the forces and effects of judicial reform. The other part comprises the author's review of historical precedents and the politics of ADR. To reverse the book's order of presentation, which may unfortunately discourage the fainthearted reader from ever reaching the book's more accessible portions, this Notice will discuss the historical aspect first.

The book contains the author's original research in two areas: a history of judicial reform in the "Progressive period,"[5] and a case study of the operations of the Kansas City Neighborhood Justice Center. The author also reviews federal efforts to expand availability of ADR which culminated in the Dispute Resolution Act of 1980.[6]

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2. *Id.* at 44 (footnotes omitted) (quoting Shrag, *Bleak House 1968: A Report on Consumer Test Litigation,* 44 N.Y.U. L. REV. 115 (1969)).

3. *See* S. GOLDBERG, E. GREEN & F. SANDER, DISPUTE RESOLUTION 347 (1985).

4. Assistant Professor in the Department of Politics at New York University.

5. The author never defines the Progressive period (perhaps indicating an assumption about her audience's familiarity with political history) but discusses judicial reform efforts from circa 1880 to the late 1920s.

6. 28 U.S.C. app. §§ 1-10 (1982) (appropriations for the Act expired in 1985).

The findings in these areas demonstrate the needs, goals, and political tensions surrounding the ADR movement.

For the student of ADR, the discussion of the judicial reform movement of the early 1900s and the politics surrounding the Dispute Resolution Act is informative. Harrington points out that earlier reforms sought to decrease the considerable discretion wielded by the justice of the peace courts in order to stem arbitrary disposition of disputes and to assure justice through emphasis on procedural due process. In contrast, ADR often moves in the opposite direction. Mediators, especially those with authority to arbitrate a disposition if disputants cannot resolve their differences through a pure mediation process, exercise considerable discretion. The prosecutors, police, and judicial officials who refer the bulk of cases to Neighborhood Justice Centers likewise exercise considerable discretion, often under vague guidelines (*e.g.,* "where mediation is likely to accomplish a more satisfactory result"). While litigation involves substantial discretion as well, procedural due process absent in ADR protects the litigant.

In Chapter Three, "The Politics of Legal Resources," Harrington demonstrates that judicial reform, while seeking to advance neutral principles of justice, is often a weapon in the battle between opposing interest groups. For example, in the lobbying leading up to the Dispute Resolution Act, consumer groups struggled to broaden access to the courts by such means as publicly funded consumer legal representation and a consumer affairs agency. Business groups, however, fought to channel consumer disputes to ADR mechanisms instead. This shows an overriding concern about ADR: that reforms which seek to increase access to dispute resolution mechanisms may in practice inhibit access to the broad remedial power of the courts desired by certain underrepresented groups. The author reminds us of the development of small claims courts as mechanisms to increase public access to the courts, but which now serve primarily as collection agencies for businesses large and small.

This concern is reinforced by the author's finding in Chapter Four, "Institutionalizing Voluntarism," that the Kansas City Neighborhood Justice Center successfully processed few disputes involving an individual and an organization. Because of their greater resources (*i.e.,* lawyers), organizations were not subject to the same coerced participation as were individual complainants without the means to litigate. Individual respondents more often succumbed to empty threats that they would be prosecuted if they chose not to mediate. The author supplies detailed statistics to back up these findings. However, what is most impressive about her portrayal of the Kansas City program is not its empirical findings. It is rather the concrete sense that the Neighborhood Justice Center operated more to serve the convenience of public officials than the needs of aggrieved parties.

As for the author's sociological interpretation of contemporary judicial reform, one not schooled in sociopolitical methodology will find it difficult to pinpoint the principle themes running through the currents of "-isms" and "-zations" which traverse the book. Besides the jargon, the theoretical critique is diluted by an obvious shortcoming: the author fails to tell us a better way.

The first chapter, "Courts and the Ideology of Informalism," provides perhaps the best example of the frustration the reader uninitiated to sociological and political vocabulary faces on his or her way upstream:

> A sociological perspective on legal ideology informs this study of the relationship between the ideology and institutions of informalism. . . . In the process of identifying the underlying social relations constituting legal ideology, the instrumental tendency to reduce the ideology of informalism to a mere social control function (e.g., rationalization, legitimation) must be avoided. Those who have worked on the concept of legal ideology more directly point out that "we should abandon any *a priori* views about [law's] integrative or legitimating functions and treat them as open questions relating to understanding the specific effects or consequences of legal regulation and legal ideology."[7]

Harrington's basic thesis is quite general: the reform goal of "informalism" is problematic. Primary among the author's arguments is the theory that the politics and pragmatic requirements of setting up an out-of-court dispute resolution process contradict the goals of ADR. The author echoes a recurrent concern: rather than furthering the goals of social justice, the structure of such informal processes serves to legitimize the expansion of state control over dispute resolution.[8]

In the author's view, since ADR mechanisms such as Neighborhood Justice Centers rely heavily on referrals from judges, clerks, prosecutors, and the police for their caseloads, and on tentative funding resources, they allow too much discretion on the part of officials and compromise the legitimate needs of disputants. Referral is often by coercion of the parties, and is motivated at least in part by the desire of the officials to "dump" the minor civil and criminal cases involved.

This critique calls into question the legitimacy and desirability of ADR. Yet it ignores an important question: what alternative? The author does not dispute the failure, due to high cost, delay, ignorance, and overly combative process, of the formal court system to address mundane but important conflicts. And the discussion of the impor-

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7. Pp. 13-14 (quoting Hunt, *The Ideology of Law: Advances and Problems in Recent Applications of the Concept of Ideology to the Analysis of Law*, 19 LAW & SOCY. REV. 11, 17-18 (1985)).

8. *See, e.g.*, Shonholtz, *Neighborhood Justice Systems: Work, Structure, and Guiding Principles*, 5 MEDIATION Q. 3, 10-11, 13-16 (1984), *reprinted in* S. GOLDBERG, E. GREEN & F. SANDER, *supra* note 3, at 364-67.

tance of due process implicitly recognizes that at least to some extent these costs are a consequence of the strong value our system places on due process in the resolution of major disputes. Harrington does criticize the process of selecting which cases are directed away from court and into ADR. But she does so to draw attention to the exercise of official discretion; she does not challenge separating disputes by degree of severity per se.

In this context, the exposition of structural relationships between informalism and official discretion seems beside the point. If these disputes are festering for want of access to the courts, and if the quality of life in the community suffers significantly as a result, then pointing out that ADR in some instances expands the scope of state "control" seems a hollow observation. Harrington's analysis does little to guide the judicial reformer. Instead, its message seems to be: "don't bother."

In sum, *Shadow Justice* is largely a treatise in the political theory of judicial reform, with a heavy dose of sociological methodology and vocabulary. The highly specialized orientation of the theoretical analysis is of limited interest in the field beyond perhaps the handful of scholars and judicial reformers working on alternatives to litigation. Though at times impenetrable to one not conversant in "Weberism," the book is of value to those seeking to broaden their understanding of the politics of ADR.[9] The work is most enlightening in its exploration of the political tensions surrounding judicial reform, both historical and contemporary, and the empirical demonstration of the initial shortcomings of the Neighborhood Justice System in achieving the goals envisioned by Danzig and others.

— *Andrew J. McGuinness*

9. For an excellent introduction and overview of ADR, see S. GOLDBERG, E. GREEN & F. SANDER, *supra* note 3.