

Columbia Law School

Scholarship Archive

Faculty Scholarship

Faculty Publications

1985

Legal Informality and Redistributive Politics

William H. Simon

Columbia Law School, wsimon@law.columbia.edu

Follow this and additional works at: https://scholarship.law.columbia.edu/faculty_scholarship



Part of the [Legal Ethics and Professional Responsibility Commons](#), and the [Legal Profession Commons](#)

Recommended Citation

William H. Simon, *Legal Informality and Redistributive Politics*, 19 CLEARINGHOUSE REV. 384 (1985).

Available at: https://scholarship.law.columbia.edu/faculty_scholarship/726

This Response/Comment is brought to you for free and open access by the Faculty Publications at Scholarship Archive. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Scholarship Archive. For more information, please contact scholarshiparchive@law.columbia.edu.

Legal Informality and Redistributive Politics

by William H. Simon

I. Introduction

Until recently, one of the most consistent themes in both right and left critiques of the legal system has been the repudiation of procedural formality, that is, of specialized, rule-bound procedures. The left critique portrayed formality as facilitating the manipulation of the legal system by the privileged to the disadvantage of others. Both right and left critiques portrayed formality as expressing and fostering alienation and antagonism.¹

In recent years, however, attitudes toward formality on the left have become increasingly complex and ambivalent. This development may be partly a reaction to the rising prominence of a conservative rhetoric that links proposals for informalization with conservative substantive goals, such as reduction in civil rights or welfare rights enforcement.² It may be partly an expression of disappointment over the results of the Neighborhood Justice experiments.³ And it may be partly a reflection of the studies in the two volumes of *The Politics of Informal Justice*, edited by Richard Abel.⁴ No one is likely to come away from these remarkable volumes with the idea that informalization per se invariably or even presumptively serves the interests of the disadvantaged. The Abel studies illustrate again and again how broader social inequalities can be reproduced and exacerbated in informal dispute resolution procedures ostensibly designed to enhance access of the disadvantaged.

The author is William H. Simon, an Associate Professor of Law at Stanford University, Stanford, CA 94305, (415) 497-4605. Professor Simon was formerly a staff attorney at Greater Boston Legal Services.

1. For a historical survey of informalism, see J. AUERBACH, *JUSTICE WITHOUT LAWYERS?* (1981).

2. See, e.g., Burger, *Agenda for 2,000 A.D.—A Need for Systematic Anticipation*, 70 F.R.D. 83 (1976).

3. See Merry, *Defining "Success" in the Neighborhood Justice Movement*, in *NEIGHBORHOOD JUSTICE: ASSESSMENT OF AN EMERGING IDEA* 172-202 (Tomasic & Feeley ed. 1982).

4. *THE POLITICS OF INFORMAL JUSTICE* (R. Abel ed. 1982).

In these circumstances, a few critics, including Abel and some of his collaborators,⁵ appear to be attracted to a notion diametrically opposed to the traditional presumption that informality benefits the disadvantaged. This is the notion that, at least in the general conditions of contemporary America (or contemporary advanced capitalism), informalism tends to worsen the situation of the disadvantaged. The argument is not merely that most particular instances of informalization have harmed the disadvantaged—since no one has attempted a broad enough survey to advance such a claim—it is that structural features of the legal system and society make them more susceptible to advocacy on behalf of the disadvantaged in formal rather than informal contexts.

In this comment I suggest that it is unlikely that such an argument could be sustained. I begin by examining the anti-informalist argument in the context of a striking case study from the Abel collection and by arguing that the significance of the study is far more limited than the anti-informalist argument suggests. I then suggest that there are theoretical problems with terms and concepts such as "state power" and "social control" upon that the argument against informalism depends on. And finally, I sketch an alternative account of the significance of informalism in contemporary redistributive politics.

II. The Anti-Informalist Argument

The anti-informalists raise two general concerns. First, they fear that informalization will deprive the poor of strategic

5. See Abel, *The Contradictions of Informal Justice*, in *1 POLITICS OF INFORMAL JUSTICE: THE AMERICAN EXPERIENCE* 267-320 (R. Abel ed. 1982); Hofrichter, *Neighborhood Justice and the Social Control Problems of American Capitalism: A Perspective*, *id.* at 207-48; Lazerson, *In the Halls of Justice, the Only Justice Is in the Halls*, *id.* at 119-62.

advantages that arise from formal procedural rules.⁶ Anti-informalists recognize that formal rules can be designed to serve the interests of the privileged; indeed they insist that most rules are so designed. But they emphasize that the inflexibility of formal rules means that these rules serve their purposes imperfectly. The over- and under-inclusiveness of formal rules with regard to their purposes means that such rules, even when designed to serve the privileged, create pockets of leverage that are potentially available to the disadvantaged. Informalization can eliminate this leverage and turn procedure into a more flexible and precise instrument of the goals of the privileged.

Second, the anti-informalists fear that informal procedures will induce resignation to or contentment with oppressive relationships. They argue that the alienation of which the traditional left critique complains can sometimes be a good (or at least second best) thing. The tendency of procedural formality to distance the parties from each other and to legitimate antagonistic behavior may encourage the disadvantaged to challenge oppressive relationships. Conversely, informal procedures may undercut alienation only to promote a false sense of integration with hierarchy.

Anti-informalists also fear that informal procedures will induce resignation to or contentment with oppressive relationships.

Both of these points are simply variations on the classical liberal defense of the rule of law.⁷ The classical liberals and the left anti-informalists both see procedural formality as an essential safeguard of the freedom and well-being of the disadvantaged. But while the classical liberals see the rule of law as an ultimate utopian goal, the left anti-informalists see the rule of law as a temporary strategic concession.

A. Strategic Advantages

These concerns are illustrated in an essay by Mark Lazerson in the Abel volumes.⁸ Lazerson describes how a "strategy of legal formalism" employed with initial success by lawyers on behalf of poor tenants in the South Bronx was ultimately defeated by informalizing reform. The strategy was initially formulated in response to several circumstances. The condition of most of the housing occupied by poor tenants in the area was substantially below the requirements of the housing code. Although state law gave tenants the right to have the premises repaired to code and to receive an abatement of rent for the time when the premises were substandard, this right was

largely unenforced. Municipal court judges and clerks were unsympathetic to tenants, and tenants could not navigate the court's complex procedures on their own. Landlords, benefiting from both greater expertise and the sympathy of the court personnel, got what they wanted quickly, usually in the form of default judgments. Lawyers in the federally funded legal services program adopted a strategy designed to exploit the procedural formality of the eviction process. The lawyers sought to defend with aggressive formalism the largest possible number of evictions. They generated evictions by encouraging tenants with habitability complaints to withhold rent in accordance with state law. They then used procedural tactics to maximize the expense and delay to the landlord. They attacked technical defects in the service, the summons, or the pleadings, frequently winning dismissals. They put landlords to proof on issues, such as ownership, that were undisputed and conventionally waived. They prolonged trials by unnecessarily detailed examinations and by pointless but technically permissible evidentiary objections that would ordinarily have been waived. The goal of this strategy was not merely to benefit clients in the cases being litigated, but to create a backlog in the court that would increase the leverage of tenants generally in negotiations with landlords. The courts had been heavily dependent on high default rates to clear their dockets. Even a small decrease in the default rate—say, from 90 to 86 percent—could enormously increase the trial rate—say, from 4 to 8 percent—and create a massive backlog. Since the principal burden of delay was on the landlord, who was unlikely to receive any rent for the period of the litigation, tenants gained a great deal of leverage. The legal services lawyers were able to settle the cases on more favorable terms because of the threat of expensive procedural jousting and delay.

This strategy succeeded to the extent of generating a sense of crisis among court officials and landlords. The response was legislative reform designed to informalize the eviction procedure. Spokespeople for both landlords and tenants supported informalization both as a means of reducing delay and expense *and* as a means of improving habitability enforcement.⁹ Informalization involved the elimination of technical procedural requirements, the replacement of judges with a larger number of lower status hearing examiners unsympathetic to procedural objections, and commitment to a norm of flexible and expeditious claim determination. According to Lazerson, these informalizing reforms thwarted the legal services strategy by undermining the bargaining positions of tenants in eviction cases without any corresponding increase in the efficacy of housing code enforcement.

Those who believe that the market swiftly translates tenant gains against landlords into either higher rents or abandonment would question whether the South Bronx legal services strategy could have in fact accomplished significant redistribution even prior to the informalizing reforms. Others would question the ethical propriety or the political viability of the strategy. However, I find the strategy is plausible as a

6. I focus on procedural rules because they are the main concern of the recent anti-informalist literature. However, much of the same analysis applies to the issues of formality in substantive law. See Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976).

7. See F. HAYEK, *THE ROAD TO SERFDOM* 72-87 (1944).

8. Lazerson, *supra* note 5.

9. The streamlined procedures were supposed to facilitate prosecution of landlords by tenants and housing officials as well as evictions.

matter of redistributive politics and ethically defensible.¹⁰ My doubts concern Lazerson's interpretation of his story as evidence for the general principle that, at least when the disadvantaged are demobilized and quiescent, "procedural fairness and blind, mechanical application of the rules are the best defense of the subordinate classes."¹¹ In fact, the initial success of the South Bronx litigation strategy seems to have depended on a series of fairly specialized circumstances. The tenants had substantial access to legal services. The burden of initiative was on the landlords. The landlord-tenant relationship was such that the costs of formality were not ultimately reimposed on the tenants.

1. Legal Services

Formal systems tend to be more difficult for people without special training or experience to participate in. Nothing in the South Bronx story casts doubt on the traditional assumption that lay people without professional assistance will do more poorly in a formal proceeding than in an informal one. It appears that most tenants facing eviction do not have representation and that most unrepresented tenant defendants default.¹² It is plausible that many of these tenants might benefit from a variety of informalizing reforms. For example, one study of the introduction of simplified summonses and notices in a court noted for its hostility to tenants found that even in such an inauspicious setting the reform produced modest but significant benefits for tenants.¹³ More importantly, there are a variety of more sympathetic forums in which disadvantaged claimants routinely have significant success.¹⁴ During recent periods, more than a quarter of unemployment insurance claimants and more than a third of Aid to Families with Dependent Children (AFDC) claimants, most of whom were unrepresented, succeeded

at adjudicatory hearings in those programs, and about half of the unrepresented social security disability claimants succeeded at hearings.¹⁵ Most people believe that an important measure of informality is essential to the accessibility of such proceedings to claimants.¹⁶ For many years the welfare program that was widely regarded as the most responsive to claimants—the veterans' pension program—was also regarded as one of the most informally administered.¹⁷

The welfare hearing systems are far from perfect, but their informal procedures facilitate a far more meaningful degree of participation by unrepresented claimants than any other formal system I can think of, and sympathetic and competent official performances are not uncommon. The most serious problems with welfare administration concern, not the hearings procedures, but the frontline bureaucracy and most problems arise from the tendency of increasing *formality* in administration to encumber claimant access to the system.¹⁸

Of course, informality does not invariably benefit the disadvantaged. If officials are hostile, informality will not protect the disadvantaged from their hostility, but neither will formality if the claimants lack representation.

14. (cont.)

Note, *Small Claims Courts as Collection Agencies*, 4 STAN. L. REV. 237 (1951). But: (1) If the appropriate baseline is formal proceedings in which defendants are unrepresented, it does not seem implausible that the disadvantaged do somewhat better in informal small claims proceedings. Cf. Sarat, *Alternatives in Dispute Processing: Litigation in a Small Claims Court*, 10 LAW & SOC'Y REV. 339, 367 (1976) (unrepresented defendants, but not plaintiffs, appear to do better against represented adversaries in informal rather than formal small claims proceedings). (2) The high success rates could mean that creditors, because of their greater expertise, are better at selecting out relatively unmeritorious cases before going to court. See Priest, *The Selection of Disputes for Litigation*, 13 J. LEG. STUD. 1 (1984). (3) Savings in collection costs may benefit nondefaulting debtors in the form of lower prices.

15. U.S. DEP'T OF HEALTH, EDUC. & WELFARE, QUARTERLY PUBLIC ASSISTANCE STATISTICS, JAN.-MAR. 1981 22, 25 (1981) (among FY 1980 AFDC appeals, 42 percent, excluding those settled or abandoned, were decided for claimant; 88.5 percent of appeals, including those settled or abandoned, were unrepresented); Rubin, *The Appeals System*, in 3 NATIONAL COMMISSION ON UNEMPLOYMENT COMPENSATION, UNEMPLOYMENT COMPENSATION STUDIES AND RESEARCH 625, 628 (1980) (in a sample of 1979 cases, claimant success rate was 30.8 percent; representation rate was 7.23 percent). Popkin, *The Effect of Representation in Non-Adversary Proceedings—A Study of Three Disability Programs*, 62 CORNELL L. REV. 989, 1024 (1977) (in a sample of 1974 cases, 20 percent of the represented and 23 percent of the unrepresented claimants succeeded at the reconsideration stage; 71 percent of the represented and 48 percent of the unrepresented claimants succeeded at hearing stage).

To the extent that represented claimants succeed more often, it is unclear whether they do so because advocacy strengthens their cases or because the representatives select out relatively unmeritorious cases.

16. When the Social Security Administration proposed to experiment with an adversary format in which both the claimant and the government would be represented, the proposal was perceived by advocacy and old age groups as a disaster for claimants, in part because of the heightened degree of formality it would entail. See *Review of Poverty Law 1979-1980: Welfare*, 14 CLEARINGHOUSE REV. 934, 939 (Jan. 1981).

17. See G. STEINER, *THE STATE OF WELFARE* 237-79 (1971).

18. See Simon, *Legality, Bureaucracy, and Class in the Welfare System*, 92 YALE L.J. 1198 (1983).

10. For a critique of the economic argument, see Ackerman, *Regulating Slum Housing Markets on Behalf of the Poor*, 80 YALE L.J. 1093 (1971). One premise of the economic argument that is probably inapplicable to the South Bronx strategy is that of uniform enforcement. The South Bronx strategy seems compatible with a selective enforcement practice that would be relatively tough on low-cost, inframarginal landlords and relatively lenient on high-cost, marginal landlords in order to avoid driving the latter from the market. See *id.* at 1112.

On the ethical and political arguments, see Bellow & Kettleon, *From Ethics to Politics: Confronting Scarcity and Fairness in Public Interest Practice*, 58 B.U.L. REV. 337 (1978); S. SCHEINGOLD, *THE POLITICS OF RIGHTS* (1974).

11. Lazerson, *supra* note 5, at 159.

12. See Cunningham, *The New Implied Warranty of Habitability in Residential Leases: From Contract to Status*, 16 URBAN L. ANN. 145, 145-48 (1979) (summarizing studies).

13. Rose & Scott, "Street Talk" *Summonses in Detroit's Landlord-Tenant Court: A Small Step Forward for Urban Tenants*, 52 J. URB. L. 967, 992-95 (1975) (decreases in default rates of between 2 and 16 percent depending on case and form types).

14. Judgments about whether informal procedures benefit the disadvantaged are speculative since they depend on controversial assumptions about (1) the appropriate procedural baseline for comparison (what formal procedure would govern in the absence of the informal one)? (2) the appropriate substantive baseline for comparison (how should the cases come out given the applicable substantive law)? and (3) the ultimate incidence of the costs and benefits of formality. For example, some interpret the high success rates of creditor-plaintiffs in small claims courts to suggest that this type of informalization primarily services the interests of creditors. See

2. Burden of Initiative

The strategic significance of procedural formality is to encumber the intervention of state officials. The party most harmed by the delay, expense and rigidity of formality is usually the party with the burden of initiative to invoke the aid of the state, the party disfavored by the short-term legal status quo.¹⁹

The anti-informalists seem to assume that the privileged occupy this position more often than the poor. Yet, it seems at least as plausible to suggest—as Marc Galanter has—that the opposite is the case, that the privileged will usually be able to maneuver the disadvantaged into situations in which the disadvantaged will have the burden of initiative.²⁰ Perhaps the safest generalization is that the poor frequently find themselves both in the position of appealing for intervention by state officials and the position of resisting it. Procedural formality may benefit tenants facing eviction, but it hurts tenants trying to get the housing code enforcement agency to induce their landlords to repair. The failure of affirmative housing code enforcement often is attributed in substantial part to the delay and expense of formal procedures for landlord prosecution.²¹ Formality benefits

... the poor frequently find themselves both in the position of appealing for intervention by state officials and resisting it.

unionized workers resisting dismissal under a regime entitling them to remain at work until the employer has established good cause, but it is a disaster for workers fired or denied employment on account of union activities under a regime permitting the employer to discharge until the worker establishes an unfair labor practice. Thus, critics argue that the delay and expense resulting from the strategic use of procedural formality by employers in unfair labor practice cases under the National Labor Relations Act has substantially weakened the protection of the Act.²² And while procedural formality may benefit disadvantaged people resisting criminal prosecution by the state, it harms disadvantaged people who invoke the aid of the state to secure protection against criminal activity.

What determines which party has the burden of initiative? To some extent, the answer involves the unreflective perpetuation of traditional legal practices. To some extent, it involves half-conscious cultural paradigms that portray certain types of conduct (*e.g.*, occupying property) as passive or

natural, and other types (*e.g.*, disturbing possession) as active or intervening. The paradigms put the burden on the "active" party to seek the intervention of the state. To some extent, the answer must refer to the interests of the people who most influenced the formulation of the rules in question. From the point of view of the informalism debate, however, the critical point is that legal norms only minimally constrain the placing of the burden of initiative. The legal culture permits most enforcement regimes to be designed so that the burden of initiative can be placed on either party. This means that there are a variety of ways of undercutting the strategic use of formality by the disadvantaged without repudiating formality.

In Lazerson's account, the strategy of formality was undercut by informalization, but it could also have been subverted simply by shifting the burden of initiative. The most dramatic way to do this would be to authorize landlord self-help: permit the landlord to physically dispossess the tenant and give the tenant the burden of initiating an action to regain possession. During much of the heyday of the nineteenth-century commitment to the classical liberal rule of law, such self-help was widely allowed.²³ In the 1978 case of *Flagg Brothers, Inc. v. Brooks*, the Supreme Court upheld against a due process challenge a self-help procedure allowing a warehouseman to foreclose his lien on a tenant's goods, stored by the landlord on eviction, by selling them without judicial approval, leaving the tenant with the burden of initiating a damages action to challenge the detention and sale.²⁴ States have abolished self-help eviction by statute, and it may be that were they to reinstate it, the Court would distinguish *Flagg Brothers* and hold the practice unconstitutional.²⁵ However, in this event, a legislature trying to reverse the gains of the Lazerson strategy would have available another approach that the Supreme Court has specifically held constitutional. In *Lindsey v. Normet*,²⁶ the Court approved an Oregon statute that permitted the landlord to seek possession in an expedited, but impeccably formal, procedure in which the tenant was precluded from raising habitability as a defense. The tenant was required to initiate her own damage action, which would be heard after the landlord's action for possession, in order to raise the habitability claim.

Of course, there may be political reasons that preclude these approaches; landlords may lack the power to get them enacted. But it is politics, and not the legal culture or norms of formality, that prevent the landlords from doing so. On the other hand, when landlords are in a position to impose their will, a legal order committed to formality remains flexible enough to accommodate them.

3. Relationship

Who bears the costs of procedural formality also depends on the nature of the relationship of the parties. Even

19. The party with the burden of initiative need not be plaintiff. For example, when action by defendant is stayed or enjoined *pendente lite*, much of the burden will be on defendant.

20. Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 *LAW & SOC'Y REV.* 95, 122 (1974) ("repeat players" will typically maneuver themselves into the "possessor position" to avoid burdens of delay).

21. *E.g.*, Howe, *Code Enforcement in San Francisco*, 60 *J. URB. L.* 373 (1983).

22. See Weiler, *Promises to Keep: Securing Worker's Rights to Self-Organization Under the NLRA*, 96 *HARV. L. REV.* 1769 (1983).

23. J. DUKEMINIER & J. KRIER, *PROPERTY* 227, 229 (1980).

24. *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978).

25. Perhaps on the ground that the importance of the interest at stake or the potential for violence makes dispossession of a residential tenant an inherently "state function" requiring a prior hearing. Such arguments, however, have not been favored recently. See G. GUNTHER, *CONSTITUTIONAL LAW* 987-97 (10th ed. 1980).

26. *Lindsey v. Normet*, 405 U.S. 56 (1972).

when an adversary bears them initially, he may be able to reimpose them on the disadvantaged litigant or on other disadvantaged people. Crude economic analysis sometimes suggests that this is always the case when the parties are in contractual relationships. Although this claim goes much too far, it is surely sometimes the case that the adversary can recover the costs of procedural formality by charging tenants more or paying workers less or engaging in lawful or unlawful discrimination against litigious tenants or workers. Moreover, when the strategic use of procedural formality has large nonmonetary costs, these costs are rarely borne solely by the adversary. This kind of strategy often engenders alienation and antagonism that may damage relationships that are valuable to the disadvantaged claimant. This possibility seems most palpable when the disadvantaged person and the antagonist are participants in a long-term relation of some intimacy, such as husband and wife, neighbors, landlord and tenant in an owner-occupied building, employee and employer in a small business. The anti-informalists remind us that most such relations are hierarchical and caution us not to overvalue them. The material gains of adversarial contest may well be worth the exacerbation of personal relations. Moreover, adversarial contest may lead to a long-run improvement in personal relations, a kind of Hegelian "reintegration at a higher level" in which struggle makes it possible for the parties to reconcile with a sense of dignity and mutual respect that would formerly have been impossible. For example, it seems quite plausible that, in areas of the South where civil rights conflict was most intense in the sixties, the personal aspects of relations between the races are better than they were before the conflict. But again, there is no reason to presume that this usually will be the case. In some circumstances, the antagonistic conflict fostered by formal procedures is simply destructive. It subverts the kind of personal openness and direct engagement that can lead to reconciliation and solidarity, even in hierarchical relationships.

B. False Consciousness

So far, I have been concerned mainly with the first theme of the new anti-informalism: the claim that informality deprives the disadvantaged of strategic advantage and material gain. Lazerson does not suggest that his experience supports the second claim that informality subverts progressive conflict by inducing a sense of false integration or resignation. It should be apparent that, like the first one, this claim is plausible in some circumstances but implausible as a general rule or presumption. Formal procedures can also subvert conflict and induce acquiescence. They can do so by convincing the disadvantaged that their losses are the result of a fair contest that gives everyone her day in court. They can do so by making disadvantaged litigants feel incompetent and powerless to conduct their affairs. They can do so by making litigants feel dependent on professional helpers, who themselves vouch for the fairness of the system.

Lazerson's case study not only fails to support the second claim, it is a counterexample to it. The strategy of procedural formality followed in the South Bronx was possible because of one critical informal element in the system: the provision of state-subsidized professional legal services to the claimants. The lawyer-client relation is, of course, a paradigmatically

informal relation. The anti-informalist thesis suggests that this type of relation should lead to the "cooling out" of poor clients, that lawyers would use their discretion to reconcile clients with landlords in return for merely token gains. Some legal services have in fact been described as behaving that way.²⁷ But the lawyers Lazerson describes behaved in the opposite way.

In short, both informal and formal procedures can work for and against the interests of the disadvantaged. How each works in any given situation is likely to depend on far too many particular circumstances to permit the kind of generalizations to which the anti-informalists are drawn.

III. "State Power"

The anti-informalists seem to value procedural formality for the same reason that classical liberals do: it constrains the activities of the state. The anti-informalists describe informalizing reforms as increasing "state power" or "social control,"²⁸ terms they use more or less interchangeably and that for them have unmistakably menacing connotations. While the classical liberals feared the state as a threat to capitalism, some neo-Marxists fear it as a servant of capitalism.²⁹

One problem with this approach is that terms like "state power" have no clear reference. A central trait of contemporary legal and political culture is its tendency to collapse the distinctions between public and private and coercion and choice. Both the lawyers' debate over the scope of "state action" in constitutional law and the political theorists' debate about the meaning of "power" reflect this phenomenon. The most penetrating works in both debates have concluded that neither term can be defined apart from controversial ethical and political judgments and choices.³⁰ In order to identify a situation as involving "state power," one needs an image of a non-state, uncoerced situation with which to compare it. One needs an image of prepolitical freedom.

For example, consider whether state power is extended or restrained when a court enjoins racial discrimination on the part of an employer. Does the court represent the state or does the employer? The court is surely the state in the sense that judges are officials. But many lawyers will tell you that the employer is also the state because she is intensely regulated or subsidized, or because she exercises an inherently public function, or simply because she makes use of the state-defined and enforced regime of contract, property and torts. Is it power to enjoin or not to enjoin? People who think that in a "natural" condition of prepolitical freedom there would be no race discrimination will consider that when the court enjoins it has merely prevented disruption by the employer and restored the status quo ante. But people who think that in the condition of

27. Bellow, *Turning Solutions Into Problems: The Legal Aid Experience*, 34 NLADA BRIEFCASE 119 (1977).

28. Abel, *supra* note 5, at 270-79; Hofrichter, *supra* note 5, at 222-30.

29. See, e.g., J. O'CONNOR, *THE FISCAL CRISIS OF THE STATE* (1973), which is dedicated to "the workers, the unemployed, the poor, the students, and others whose struggles against the state have made this work possible."

30. See Brest, *State Action and Liberal Theory*, 130 U. PA. L. REV. 1296 (1982); S. LUKES, *POWER—A RADICAL VIEW* (1974).

prepolitical freedom employers would be free to choose with whom to contract will think that when the court enjoins it is coercively intervening.

Terms like "state power" and "social control" usually play a question-begging role in American political rhetoric. Conservatives tend to speak of the state's activities in enforcing traditional norms of contract and property as the vindication of customary ground rules rather than as an assertion of power, but the left often portrays this activity as coercive intervention. Similarly, conservatives tend to speak of the federal government's activity in enforcing public law norms against state and local governments as coercive intervention, while the left often portrays this activity as vindicating customary ground rules. In such instances, the difference between state power and prepolitical freedom seems to depend simply on whether the person characterizing the practice approves of the practice in question.

Often the neo-Marxists seem to speak of the state in a narrow ordinary language sense that refers simply to the activities of officials and public employees. Sometimes, they suggest that such people act monolithically in advanced capitalism to serve the interests of the dominant class. At other times, they limit the suggestion to more specific circumstances. For example, Frances Fox Piven and Richard Cloward argued that the state acts in the interests of the poor only in response to unorganized, disruptive protest by the poor; it acts in the interest of the privileged as long as the poor are not disruptive.³¹ It follows that in times of lower class passivity one cannot expect initiatives of the state to benefit the poor, especially initiatives such as informal dispute resolution mechanisms that reduce the likelihood of disruptive protest. Lazerson appears to have some similar thesis in mind when he writes:

If the social structure is not seriously threatened and the ruling classes are firmly in control, the procedural fairness and blind, mechanical application of the rules are the best defenses of the subordinate classes, even if these rules were the instruments by which the dominant classes came to power. . . . At other times, when the forces of reaction are on the defensive and a new social movement is contending for power, procedural formalism tends to inhibit change.³²

Some anti-informalists may feel that their views cannot be characterized as holding that public officials monolithically serve the interests of the privileged classes. But this is the only theory of the state in which their explanation of informalization as an extension of state power would be interesting. If the officials did not monolithically serve the interests of a single group, then characterizing their activity as state power would be trivial or question-begging; the important issue would be, which constituency within the state is responsible for the activity and in whose interest is the activity undertaken?

Although I don't believe the anti-informalists cannot reject the monolithic understanding of the state without altering their interpretation of informalism, I don't believe they can defend it plausibly either. No sooner had Piven and Cloward articulated their version of the understanding, than events provided a striking counterexample. During the Nixon Administration, at a time when the disruptive protest of the sixties had

abated, welfare activities of the state expanded at a greater rate than at any time since the New Deal. Public assistance benefits, which had remained a constant fraction of the gross national product since the New Deal, doubled from one to more than two percent. During this time, there were also unusually large and in some respects unprecedented increases in most of the major social insurance, housing, and employment programs.³³ Some of this growth, particularly in the medical programs, simply represented the expansion of initiatives taken during the Democratic administrations of the sixties, but a large part of it was due to new initiatives, several by the Nixon Administration.³⁴ Indeed, at a time when the urban riots had abated and the popular mobilization dimensions of the civil rights and welfare rights movements were nearly extinct, the Nixon Administration proposed the most progressive welfare reform ever proposed by an American president—the Family Assistance Plan.³⁵

Once one acknowledges that the state, rather than being monolithic, is made up of a variety of constituencies and is responsive, although in varying degrees, to many interests, it is not hard to think of conditions other than disruptive protest that might prompt reforms beneficial to the poor. For example, welfare activities that benefit the poor may benefit important non-poor constituencies. As neo-conservatives point out, welfare expansion benefits elite professionals and the publicly employed working class as well as the poor. Alternatively, factions within the dominant class may find it in their interest to appeal to and mobilize the poor in the course of struggles with competing factions. This type of appeal is most readily associated with right-wing corporatist regimes, such as Peronist Argentina, but it is not confined to them. One can find more modest illustrations in the machine politics of turn-of-the-century America.³⁶ And some suggest that Nixon's progressive welfare initiatives were prompted by an ambition to establish the Republican party as the majority party on corporatist lines. Like Reagan, but with considerably more justice, Nixon analogized himself to Roosevelt.³⁷

Things do not improve when the social theorist tries to follow the lead of the constitutional lawyer and abandons ordinary language notions of the state to argue that nominally private parties, as well as officials, represent the state.³⁸ At this point, the claim that the state acts against the interests of the disadvantaged is likely to become tautological. The state ends up getting defined in terms of whatever activities the theorist thinks are against the interests of the disadvantaged. Thus, Abel assumes that federally subsidized poverty lawyers in the South

31. F. PIVEN & R. CLOWARD, *REGULATING THE POOR* (1971).

32. Lazerson, *supra* note 5, at 195.

33. See C. MURRAY, *LOSING GROUND: AMERICAN SOCIAL POLICY 1950-1980* 48-50 (1984).

34. Especially important were the transformation of the food stamp program and the dramatic increase in social security benefits. See D. MOYNIHAN, *THE POLITICS OF A GUARANTEED INCOME* 116-24 (1973); E. TUFTTE, *POLITICAL CONTROL OF THE ECONOMY* 29-44 (1978).

35. The proposal died under the fire of both conservatives and liberals who apparently could not believe that a progressive reform could emerge from the Nixon Administration. See generally D. MOYNIHAN, *supra* note 34.

36. See, e.g., C. ADAMS & H. ADAMS, *CHAPTERS OF ERIE* (1886).

37. D. MOYNIHAN, *supra* note 34, at 204-05, 359.

38. Abel, *supra* note 5, at 271-72.

Bronx are not agents of state power but argues that federally subsidized mediators in the Neighborhood Justice Program *are* agents of state power.³⁹

IV. The Political Significance of Formality

One way of interpreting the recent debate over informalization would see it as a turn in the dialectic of formality and equity or solidarity that runs throughout modern legal thought.⁴⁰ On the one hand, formality is valued as protection against the danger that collective activity will be oppressive. On the other hand, formality is resisted because it inhibits progressive as well as regressive collective activity. It precludes the tailoring of decisions to particular circumstances that is necessary to achieve important kinds of fairness, freedom, efficiency, and solidarity. From this perspective, the question of formality turns most basically on the degree of faith in collective activity, and trust in the people engaged in it. Of course, "collective activity" is no more self-defining or homogeneous a term than "state power." What people will perceive as collective activity will vary, and their degree of faith and trust will vary widely among activities so perceived. Since attitudes toward different collective activities will turn on the particular circumstances of specific activities, there can be no categorical resolution to the question of formality.

Putting the matter this way raises the question of what the particular circumstances are that account for the configuration of positions in the contemporary informalization debate. I think that an adequate understanding of the informalism debates has to look to some of the distinctive features of the liberal politics of the sixties and seventies.⁴¹ Although the new anti-informalism seems a departure from the traditional left critique of formality, it seems generally consistent with the liberal legal activism of the past two decades. If the left had generally attacked formality in the Progressive and New Deal eras, it discovered some of formality's virtues in the sixties and seventies. The civil rights, welfare rights, and criminal justice movements all focused on the dangers of the abuse of state power and appealed to formality as a way of checking them.

An adequate understanding of the informalism debates must look to some of the distinctive features of the liberal politics of the sixties and seventies.

Now in one respect this belated appeal to formality might seem paradoxical. The liberal turn to formality occurred at a time when the state had become, not only most responsive to the concerns of the working class, but its most important

39. *Id.* at 271, 279-93, 308.

40. See R.M. UNGER, *LAW IN MODERN SOCIETY* 203-16 (1976).

41. The argument of the remainder of this section is expanded and illustrated in Simon, *supra* note 18.

employer.⁴² But the paradox disappears when one recognizes that much of the legal activism of this period was concerned less with the interests of the securely employed working class than with the interests of elite professionals and the poor. Indeed, formality was typically invoked to increase the control of judges and upper level administrators over the lower tier public work force in order to make the latter more responsive to the poor. It is only a slight exaggeration to characterize the activism of this period as efforts by elite professionals to protect the poor from the working class. Of course, this feature of legal reform is an instance of the broader tendency of recent liberal politics to bypass, and ultimately alienate, the working class.

Formality in the liberal legal literature has meant control through rules, not of state officials or the powerful generally, but of the publicly employed working class. The type of collective action in which this literature expresses a loss of faith and distrust is the activity of the lower and, to some extent, middle-tier public officials. At the same time that the liberals were arguing that the rule of law required a regime of formality to protect against the abuse of power by police officers, welfare workers and school principals, they were arguing that the rule of law required a regime of informality to facilitate the responsible exercise of power by federal judges and, more grudgingly, state judges and upper tier administrators. Indeed, the purpose of subjecting lower tier officials to regimes of formality was usually to facilitate control of them by elite judges and officials.

Whatever plausibility the more extreme anti-informalist arguments have derives from the fact that they resonate with the rhetorical tradition of the activist successes of the sixties and seventies. The assumptions about class in this liberal rhetoric seem consistent, for example, with Lazerson's South Bronx case study. At the beginning of Lazerson's story, the officials portrayed as unworthy of trust and in need of the discipline of formality are the lowest status state judges. In the class vision of recent liberal jurisprudence, state judges occupy an intermediate position between the totally untrustworthy street-level officials and the totally trustworthy federal judges. But the most frequently expressed attitude toward state judges is distrust,⁴³ and one would surely expect this to be the case with municipal

42. By the late seventies, about 17 percent of the work force was in public employment. Freeman, *The Evolution of the American Labor Market 1948-1980*, in *THE AMERICAN ECONOMY IN TRANSITION* 349, 364 (M. Feldstein ed. 1980).

43. In a rare passage that makes explicit the premises of liberal jurisprudence regarding class, Burt Nebourne writes:

The federal bench is an elite, prestigious body, drawn primarily from a successful, homogeneous socioeducational class—a class strongly imbued with the philosophical values of Locke and Mill (which the Bill of Rights in large measure tracks). As such, when a plaintiff asserts a constitutional claim against a state official whose socioeducational background does not include obeisance to that libertarian tradition, a federal judge will generally protect the threatened constitutional value.

... And since a class disparity between federal trial judges and the individual targets of constitutional enforcement is more likely than one between state trial judges and constitutional defendants, this phenomenon will assist the constitutional plaintiff more often in the federal courts.

Nebourne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1126-27 (1977).

court trial judges. And the impression of disaster one gets from Lazerson's account of reform arises, not simply from the loss of opportunities for the strategic exploitation of formality, but from the fact that the judges have been replaced by even lower status and less trustworthy administrative officials. On the other hand, the professional class is represented in the account by legal services lawyers, who are portrayed as entirely trustworthy and exempt from concerns about formality.⁴⁴

Lazerson's political assumptions seem plausible in the case he describes, but as a general political strategy the liberal program has drawbacks that have recently become all too evident. Since formality is not self-enforcing, the liberal strategy of formality depends on liberal control of the judiciary or upper administrative offices. As liberal control over these of-

44. Many would regard municipal court judges as occupying a higher social status than legal services lawyers, but I think the opposite is the dominant view within the liberal professional class. In terms of family background, education and worldview, legal services lawyers are probably closer than lower tier judges to the elite professional ranks.

fices has weakened in the past decade, formality has increasingly been pressed into the service of goals hostile to the interest of the poor. Moreover, I think the liberal strategy has overestimated the extent to which formality could ever enable upper tier officials to control the practice of a lower tier work force alienated from the goals of those at the top. By portraying low status public workers as incarnations of a reified monolithic menace such as "state power" or "social control," liberal jurisprudence and its neo-Marxist variants have encouraged reforms that alienated these workers from claimants and discouraged reforms that might have promoted more responsible lower tier practice and made possible political alliances between workers and claimants.

V. Conclusion

The new anti-informalism plays a valuable role when it shows how much more complex conditions are than the proponents of many informalizing reforms suppose. It is less helpful when it turns naive informalism on its head to create a nightmare image that is just as fanciful and misleading.