

# OPTING IN OR OPTING OUT: THE NEW LEGAL PROCESS OR ARBITRATION

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Professor Krotoszynski suggests that judicial legitimacy has fallen victim to the expectations of multiple constituencies, who evaluate judicial competency on the basis of particular substantive results.<sup>1</sup> These “outsider” constituencies—feminists, critical race scholars, queer theorists, critical legal studies scholars, and law and economics advocates—have effectively demonstrated the deficiencies in the judicial system.<sup>2</sup> While applauding their contribution to a fairer and more just society,<sup>3</sup> Professor Krotoszynski laments the damage to judicial credibility and the absence of common ground that makes dialogue across constituencies increasingly difficult. Taking a page from sporting events,<sup>4</sup> he sees a newly defined legal process as our “best hope” for devising a legal system that multiple constituencies will find fair, thus restoring confidence in judicial determinations.<sup>5</sup> Reflecting this preference, he expresses “grave doubts” about recommendations that cultural

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1. See Ronald J. Krotoszynski, Jr., *The New Legal Process: Games People Play and the Quest for Legitimate Judicial Decision Making*, 77 WASH. U. L.Q. 993, 998 nn.15-16 (2000).

2. See *id.* at 1003-08 (tracing scholarship that developed from Critical Legal Studies movement).

3. See *id.* at 1008.

4. Professor Krotoszynski’s confidence in process is bolstered by the model of sporting events, in which losers accept decisions because the process is perceived as fair. See *id.* at 1010-27.

As he notes, women have complained about the use of sports analogies in law. See *id.* at n.7. Many people, myself included, do not find such analogies persuasive, but view them as rather mystifying allusions that obscure the issue. Those who do not follow or participate in sports are excluded from a dialogue that rests on such analogies; they are without the experience that allows them to grasp the point and thus to participate. There is thus a certain irony in using a sports analogy in a discussion that addresses the concerns of outsiders.

Interestingly, a brief discussion with students disclosed their perception that sports and law were similar in their negative, rather than positive characteristics, such as the significant role that money plays in fielding a team, be it of players or lawyers, and the use of vague standards in determining outcomes. Cf. *id.* at 1019-20 (noting vague standards used to evaluate performance of figure skaters); Allen St. John, *Dumb Boxing Decisions: Fight Scoring Looks at a Ticket to Palookaville*, N.Y. TIMES, Sept. 26, 1999 § 4 at 5 (noting vagueness of scoring criteria in boxing matches).

The sports analogy used here generalizes across sports, although Professor Krotoszynski concedes that wrestling is an exception that “proves the general rule.” Krotoszynski, *supra* note 1, at 1013 n.76. Recent headlines suggest, however, that at least one other sport fails to provide a model of fair process. See Ronald Smothers, *Prosecutor Seeks Takeover of Boxing Group*, N.Y. TIMES, Nov. 23, 1999 at A1 (stating that members of International Boxing Federation were recently indicted on racketeering, bribery, and extortion charges for accepting bribes for moving boxers up in the rankings). As a result, federal prosecutors in New Jersey are asking a district court to place the organization under judicial oversight. *Id.*

Fortunately, the analogy is not fundamental to Professor Krotoszynski’s argument.

5. See Krotoszynski, *supra* note 1, at 1002.

minorities and commercial entities embrace arbitration.<sup>6</sup> My response comments on the new legal process and on the possible exodus to arbitration.

### I. OPTING INTO THE NEW LEGAL PROCESS

Professor Krotoszynski loosely defines process as the way judges go about their task of deciding cases,<sup>7</sup> a set of principles that define the method judges use to generate legitimate decisions.<sup>8</sup> Process is an inclusive concept: an “aggregation of all elements of the litigation process, including the judges, the parties, the procedural rules, and the substantive rules.”<sup>9</sup> Despite these elaborations, the parameters of the new legal process—and the topic to be discussed—remain unclear. Moreover, it may be unwise to expect too much from process.<sup>10</sup> Even Professor Hart, the principal founder of the Legal Process school, recognized the limitations of process. As he famously remarked: “What sense does it make to insist upon procedural safeguards in criminal prosecutions if anything whatever can be made a crime in the first place?”<sup>11</sup> A legal proceeding can be exquisitely fair and still result in an illegitimate decision because of a failure in substantive law. Although recent scholarship has effectively demonstrated the absence of bright-line distinctions between substance and process, a broad conception of process might include the points at which process and substance merge.

Professor Krotoszynski’s definitions of legal process become less elusive when considered in conjunction with the narrower problem presented by judicial discretion.<sup>12</sup> While conceding that adjudication is not quite analogous to refereeing in a sporting event,<sup>13</sup> he recommends that the new legal process take a lesson from those who referee games, whose discretion is “tightly

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6. *See id.* at 1036.

7. *See id.* at 1002.

8. *See id.* at 1009 n.63. These “rules of the game” include sources and rank order of authority invoked by judges as well as formal rules of evidence and procedure. *See id.* at 1010 n.68.

9. *Id.* at 1010 n.68.

10. The reasons for the demise of the legal process school speak volumes about the limitation of process. *See id.* at 999-1000 (marking on Weschler’s use of legal process theory to attack racial discrimination decisions in late 1950s); *id.* at 1003 (noting numbers of state and federal judges that failed to implement the Thirteenth, Fourteenth, and Fifteenth Amendments).

11. Henry M. Hart, Jr. *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 431 (Winter 1958). Professor Krotoszynski defines legal process as encompassing, but not limited to, procedure. *See Krotoszynski, supra* note 1, at 1010 n.68 (stating “process values” are not limited to procedural due process).

12. *See Krotoszynski, supra* note 1, at 1028-31; *see also id.* at 1025 (stating that judicial discretion is “antithetical to . . . the Rule of Law”).

13. *See id.* at 1028 (noting judges face new situations and problems that result from changes in technology and society); *see also id.* at 1030 (noting judicial duty to do substantive justice in individual cases).

cabined.”<sup>14</sup> Thus, the new legal process would appear to include rules that constrain judicial discretion.<sup>15</sup>

While more sanguine than Professor Krotoszynski about judicial discretion,<sup>16</sup> I agree that the new legal process should encompass measures designed to constrain the discretion of decisionmakers. A promising starting point is to consider a central complaint of outsiders: legal standards often fail to respond to the reality of non-majoritarian lives because judges and juries apply majority norms—variously called standards, pre-conceptions, or world views—when determining outcomes that involve and affect outsiders.

Two examples illustrate how legal standards can fail to acknowledge and thus account for the real lives of women and gays and lesbians. Both examples concern claims of sexual harassment, which is barred by Title VII of the Civil Rights Act of 1964.<sup>17</sup> The prohibition against sex discrimination includes severe or pervasive sexual harassment that creates an abusive or hostile work environment.<sup>18</sup> A two-part test determines whether the conduct at issue resulted in a hostile working environment. The first part of the test is subjective—the plaintiff must demonstrate that she perceived her workplace environment to be hostile or abusive.<sup>19</sup> The second prong is objective—the plaintiff must establish that a reasonable person would also find the environment hostile or abusive.<sup>20</sup> Thus, it is insufficient that a woman thinks she has been subjected to a hostile working environment; she must also establish that a reasonable person would think that the harassment created a hostile environment.

Feminists have argued that a more accurate determination would be obtained if the objective standard were that of a reasonable woman.<sup>21</sup> They

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14. *See id.* at 1027 (noting referees' discretion is constrained by formal rules, public enforcement, and an obligation to explain).

15. *See id.* at 1031.

16. *See infra* text accompanying notes 65-72 (discussing beneficial effects of judicial discretion in context of Title VII).

17. Title VII of the Civil Rights Act of 1964 prohibits employers from discrimination on the basis of race, religion, national origin, or sex. *See* 42 U.S.C. § 2000e-2(a)(1) (1994).

18. *See Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986) (establishing hostile environment sexual harassment as violation of Title VII because it is discrimination based on sex). For sexual harassment to be actionable, it must be “sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment.” *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (quoting *Meritor*, 477 U.S. at 67).

19. *See Harris*, 510 U.S. at 21-22.

20. *See id.*

21. *See Kathryn Abrams, Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1203-05 (1989); Susan Estrich, *Sex At Work*, 43 STAN. L. REV. 813, 845-46 (1991) (noting that the construct of reasonable person is “at best meaningless . . . [and] at worst, it implies that the reasonable person is male”); *see generally* CATHARINE A. MACKINNON, *THE SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* (1979).

have argued, and at least one circuit court has agreed, that a sex-blind reasonable person standard is inherently male-biased.<sup>22</sup> A woman's experience is different from that of a man; for one thing, it includes greater physical and social vulnerability to sexual coercion.<sup>23</sup> That experience also includes living in a society that is marked by a high incidence of rape and sex-related violence and the presence of a vast pornography industry that portrays women as sexual objects.<sup>24</sup> For these reasons, women are likely to think that references to sexuality in the workplace are improper and often find them an anguishing experience.<sup>25</sup>

The use of the reasonable person standard ignores factual predicates of women's lives and thus fails to acknowledge the reality of their experience.<sup>26</sup> Indeed, the reasonable person test expressly directs the factfinder not to consider the reality of a woman's experience.<sup>27</sup> Consequently, the resulting determination may be flawed because it is simply inaccurate.<sup>28</sup>

The second example, provided by Professor Spitko, also involves the reasonable person standard, but as applied to cases of harassment by a gay supervisor.<sup>29</sup> The reasonable person test makes it likely that the factfinder will judge sexual comments or behavior more harshly when same-sex harassment is alleged than when the alleged harasser is of a different sex from the victim.<sup>30</sup> Given the minority status of homosexuals, the reasonable person is, in theory and in practice, a straight person with a heterosexist

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22. See *Ellison v. Brady*, 924 F.2d 872, 878-79 (9th Cir. 1991) (noting conduct many men consider unobjectionable may offend many women). Men, who are rarely victims of sexual assault, may not fully appreciate the underlying threat of violence that a woman may perceive. See *id.*

23. See *Abrams*, *supra* note 21, at 1205.

24. See *Ellison*, 924 F.2d at 879 (noting also that women are disproportionately victims of rape and sexual assault).

25. See *id.* (noting also that as a result of their experience, women tend to hold restrictive views of when sexual conduct is appropriate).

26. The Supreme Court has cast the test in terms of reasonable person. See *Harris*, 510 U.S. at 21.

27. Another example of the way law ignores the reality of women's experience is found in the criminal offense of rape, whose essential elements, typically "sexual intercourse or contact, force, and non-consent, remain largely unchanged." Estrich, *supra* note 21, at n.2. Judicial interpretation of the force element imposes the male notion of a fight as an operative definition of force. See SUSAN ESTRICH, REAL RAPE 65 (1987) (concluding that the reasonable woman standard is that of "real man").

28. The practice of utilizing tests that expressly ignore the experience and reality of women's lives might be compared to the practice of testing airbags only on men. See generally Patrick J. Norton, Note, *What Happens When Air Bags Kill: Automobile Manufacturers' Liability for Injuries Caused by Air Bags*, 48 CASE W. RES. L. REV. 659 (1998); *The Family That . . .*, HOUSTON CHRONICLE, Nov. 7, 1999, Bus. at 1 (stating that National Highway Traffic Safety Administration has proposed testing airbags on "family" of dummies that includes children and women).

29. See E. Gary Spitko, *He Said, He Said: Same-Sex Sexual Harassment Under Title VII and the "Reasonable Heterosexist" Standard*, 18 BERKELEY J. EMP. & LAB. L. 56 (1997).

30. See *id.* at 84.

world view.<sup>31</sup> A jury is likely to be wholly composed of people who are not gay and who have little or no exposure to openly gay people.<sup>32</sup> In these circumstances, the reasonable person standard is likely to reflect the mores of the heterosexist community, allowing the factfinder to utilize prevailing preconceptions about gay men and women.<sup>33</sup>

The use of the reasonable person standard in sexual harassment law works to the detriment of women and of gays and lesbians. It makes it more difficult for women to establish a hostile environment claim and more difficult for a gay person to escape the accusation of sexual harassment. The common problem is that the combination of a malleable and imprecise standard, together with unchecked discretion, allows the factfinder to decide the issue by reference to the norm of the reasonable male heterosexist.<sup>34</sup>

A legal process that purports to address the concerns of cultural minorities should include constraints on the natural tendency of judges and juries to impose their personal views and limited experience on factual issues. Once tests or standards that fail to account for an outsider's experience are identified, ameliorative measures to constrain the discretion of the factfinder may be devised. For example, in the case of female plaintiffs, the standard could be changed to that of a reasonable woman or expanded to include a reasonable person in the "same situation or similar circumstances," which would allow the factfinder to consider the sex of the alleged victim.<sup>35</sup> Professor Spitko suggests that when the alleged harasser is gay or lesbian, the factfinder should be instructed to view the situation as though the conduct were directed at a person of the opposite sex.<sup>36</sup> The devices suggested here, while far from providing a complete solution to the problem of unconscious cultural or gender bias, would remind factfinders of their obligation to think beyond their own experience.

Thus, a preliminary conception of new legal process should include those tests and standards against which the substantive law is measured. While Professor Krotoszynski refrains from defining process to this extent, including substantive tests and standards in a new conception of process

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31. *See id.* at 82.

32. *See id.* at 83 (noting social and cultural segregation of gay America from non-gay America, and that it exists because it is desired by non-gay America).

33. *See id.* at 84.

34. *See* I. Bennett Capers, Note, *Sex(ual Orientation) and Title VII*, 91 COLUM. L. REV. 1158, 1159 (1991) (defining heterosexism as "institutional valorization" of heterosexual activity).

35. This test was once favored by the Equal Employment Opportunity Commission (EEOC). *See* MICHAEL ZIMMER ET AL., CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 646 (4th ed. 1997) (commenting on the withdrawal of the controversial EEOC proposed guideline).

36. *See* Spitko, *supra* note 29, at 94-96.

appears consistent with the spirit of his proposal.<sup>37</sup>

## II. OPTING OUT OF JUDICIAL DISCRETION: OUT OF THE FRYING PAN AND INTO THE FIRE

Professors Spitko and Ware advise cultural minorities and commercial specialists to use private arbitration to resolve disputes rather than the public judicial system.<sup>38</sup> Both believe that their constituents will obtain more acceptable decisions in arbitration. Professor Krotoszynski argues, on the other hand, that resolving claims in arbitration increases the potential for misunderstanding and prejudice, from which society as a whole suffers.<sup>39</sup> I agree that choosing arbitration over litigation is unwise, at least as arbitration now operates, and I share Professor Krotoszynski's concern about the threat to community interests.

Professor Spitko views arbitration as an escape from the application of majoritarian norms to gay and lesbian claimants. He finds arbitration a welcome option because parties may choose decision makers who understand the minority culture; accordingly, arbitration could conceivably provide more acceptable results than litigation in the public courts.<sup>40</sup> Arbitration, however, may not produce decisions acceptable to cultural minorities. Procedural rules affect any method of adjudication, and in arbitration the rules have limitations that can make a significant difference in the outcome of a claim.<sup>41</sup> Even the informality of arbitration may work to the

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37. See Krotoszynski, *supra* note 1, at 1008 n.60 (noting "a new process theory of straight white men, for straight white men, and by straight white men will not be adequate to the task at hand").

38. See E. Gary Spitko, *Gone But Not Conforming: Protecting the Abhorrent Testator from Majoritarian Cultural Norms Through Minority-Culture Arbitration*, 49 CASE W. RES. L. REV. 275, 294-97 (1999); Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703, 745-57 (1999).

39. See Krotoszynski, *supra* note 1, at 1037 (noting best interests of community are not served by policy of disengagement and withdrawal). He also believes that deserting the judicial system would harm those who are forced to remain in litigation and exacerbate the legitimacy problems of the courts. See *id.* at 1041.

40. See Spitko, *supra* note 38, at 296. Professor Spitko considers the problem of a gay testator who wishes to leave his estate to his male partner. See *id.* Relatives who challenge the will use the "nebulous" legal doctrines of mental capacity and undue influence to invalidate the bequest. See *id.* at 283. Judges and juries, through a combination of "ignorance, fear, and loathing," are likely to view the bequest through a heterosexual mind's eye. See *id.* at 288-89 (noting "pre-understanding" that gay relationships are principally mere sexual encounters rather than permanent and familial).

41. See Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 679-80 (1996) (noting arbitration procedures influence substantive rights); Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contracts of the 1990s*, 73 DENV. U. L. REV. 1017, 1036-43 (1996) (noting due process deficiencies of arbitration procedures).

disadvantage of members of minority cultures.<sup>42</sup>

A typical arbitration hearing is informal, and parties may not invoke rules of evidence or procedure.<sup>43</sup> Arbitrators generally prefer to hear all the evidence, even when it is prejudicial or irrelevant. Further, discovery is very limited, the arbitrator has only limited subpoena power, and there is virtually no motion practice.<sup>44</sup> Arbitrators generally do not award punitive damages,<sup>45</sup> and are known for a tendency to compromise on damages. Finally, arbitrators do not provide a reason for their decision, and the decision is virtually final. In fact, arbitration is even less like refereeing a game than is litigation; there are no formal rules and no obligation to explain the decision.

Admittedly, parties to arbitration may circumvent these procedural traditions. Arbitration is a creature of contract, and parties can stipulate to any procedures,<sup>46</sup> including the scope of judicial review.<sup>47</sup> But adding procedures that mimic those available in litigation adds expense and forfeits finality, the defining characteristics of arbitration. The expensive hybrid that results may be too costly for non-commercial litigants.<sup>48</sup>

I also agree with Professor Krotoszynski that long-term interests of the minority community and the larger community are better served by litigation. I have argued that arbitration is not an appropriate forum in which to decide employment discrimination issues, even when the forum serves the interests of the parties.<sup>49</sup> Even when statutory law is not involved, judicial

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42. See Richard Delgado, *et al.*, *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1388 (noting that informal procedures expose minorities to biases of decision-makers).

43. See Geraldine Szott Moohr, *Arbitration and the Goals of Employment Discrimination Law*, 56 WASH. & LEE L. REV. 395, 401-04 (1999) (discussing arbitration procedures).

44. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991) (conceding that arbitration procedures limit discovery).

45. See Thomas J. Stipanowich, *Punitive Damages and the Consumerization of Arbitration*, 92 Nw. U. L. Rev. 1, 15-22 (1997) (noting competing policy arguments for and against arbitral awards of punitive damages).

46. See *Baravati v. Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704, 709 (7th Cir. 1994) (noting parties may stipulate to whatever procedures they want, "short of authorizing trial by battle or ordeal or, more doubtful, by a panel of three monkeys").

47. See *LaPine Tech. Corp. v. Kyocera Corp.*, 130 F.3d 884, 888 (9th Cir. 1997) (holding court must honor arbitration agreement under which parties agreed to standard of judicial scrutiny exceeding that allowed by Federal Arbitration Act).

48. See Moohr, *supra* note 43, at 454-56 (evaluating prospect of judicial review of arbitration awards in employment discrimination cases).

Arbitrators, who are paid by the parties, also have a financial incentive to decide claims in a way that protects their future employment. The exchange of financially disinterested judges and juries for financially interested arbitrators may not be in the best interests of both parties. See *id.* at 460, n.9.

49. See generally Moohr, *supra* note 43. While that argument is directed to a statutory scheme in which the individual litigant serves as a private attorney general, some of the advantages of litigation apply also to common-law resolutions. Perhaps the most compelling example of judicial common-law development that changed public attitudes is the law of products liability. See generally G. EDWARD

adjudication develops substantive law, creates precedent, produces uniform law, educates the public, and forms public values.<sup>50</sup> Legal development in substantive law can clearly serve the interests of minority communities. In the long-run, development through litigation of a uniform precedent that educates and informs public values is more likely than arbitration to integrate the interests of cultural minorities into the legal system.

Two characteristics of judicial adjudication account for its effectiveness in developing law and changing public attitudes. First, public litigation is public,<sup>51</sup> in both senses of the word; it is not confidential and it operates with the authority of the state.<sup>52</sup> Second, trial courts are part of a unitary, hierarchical judicial system in which legal errors can be corrected.<sup>53</sup>

Judicial adjudication stimulates and produces legal development, largely because courts “speak” to one another. In a hierarchical legal system, reasoned and recorded decisions are available to other courts; indeed, their use by other courts is often required. The development of the same-sex harassment cause of action illustrates the process.<sup>54</sup> As noted above, the Supreme Court established a cause of action for hostile environment sexual harassment in 1986. Early decisions held summarily that Title VII did not provide a cause of action for same-sex harassment.<sup>55</sup> Eventually, a lively judicial dialogue emerged in which judges debated arguments and counter-arguments for the right to sue in cases of same-sex harassment.<sup>56</sup> The Supreme Court recently resolved the conflict between the circuits and held that same-sex harassment is a form of sexual discrimination when the harassment occurs because of the victim’s sex.<sup>57</sup>

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WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY (1990).

50. See Moohr, *supra* note 43, at 427.

51. See Geoffrey C. Hazard, Jr. & Paul D. Scott, *The Public Nature of Public Adjudication*, 6 YALE L. & POL’Y REV. 42, 75 (1988) (noting trial is public event in which publicly appointed judge renders judgment by virtue of state authority).

52. See Moohr, *supra* note 43, at 401-02.

53. See *id.* at 435 (noting judiciary is ultimately accountable, absent constitutional issues, to public and to legislators).

54. Professor Spitko opposed the recognition of same-sex harassment. See Spitko, *supra* note 29, at 81 (arguing that same-sex sexual harassment cause of action would provide an “additional means for non-gay people to regulate the sexual behavior of gay people”).

55. See *Goluszek v. Smith*, 697 F. Supp. 1452, 1456 (N.D. Ill. 1988) (holding Title VII does not cover same-sex harassment because statute was directed at power differentials between men and women).

56. See, e.g., *Quick v. Donaldson Co.*, 90 F.3d 1372, 1378 (8th Cir. 1996) (stating that key inquiry is “whether members of one sex are exposed to disadvantageous employment conditions to which members of opposite sex are not exposed”) (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 25 (1993)); *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138, 141 (4th Cir. 1996) (holding claim of same-sex harassment may lie when alleged harasser is homosexual); *Yeary v. Goodwill Indus.-Knoxville, Inc.*, 107 F.3d 443 (6th Cir. 1997) (rejecting Fourth Circuit standard and relying on whether harassment was because of sex).

57. See *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998).

Another way legal development occurs through litigation is that courts apply precedents from analogous cases to the issues before them. The example of sexual harassment is once again pertinent. The Supreme Court decision that created the hostile work environment cause of action was based, in part, on a lower court decision dealing with national origin discrimination.<sup>58</sup> If Mrs. Rogers, the Hispanic plaintiff, had arbitrated her case, the courts (or for that matter, the arbitrators) that were dealing with a sexual harassment claim could not have utilized the previous decision. They are unlikely to have known about a favorable or relevant ruling. Arbitration decisions are not public documents. Rather, the awards are proprietary and are seldom distributed to anyone but the parties. Even if they were generally distributed, the awards would not be especially helpful to other courts and litigants; they do not explain the reason for the decision, or even disclose which of the claims was successful.

Legal development is an inevitable by-product of judging—whether judges or arbitrators resolve the dispute.<sup>59</sup> The acts of evaluating and deciding oblige decisionmakers to articulate general principles and to formulate interpretive guidelines.<sup>60</sup> Nevertheless, arbitrators do not “create” law; that is, they do not explain the reasons for decisions, record that reasoning, and make decisions available to others. Private arbitrators have no incentive to create law because the rules and precedents that would result are public goods that are not appropriable by the arbitrator. Creating law through progressive, carefully reasoned decisions is time-consuming and costly, and in arbitration there is no viable mechanism by which the creator can recoup that investment, much less earn a profit.<sup>61</sup> Consequently, unlike courts, an arbitrator in the present system has no incentive to create the public good of

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The same-sex cause of action protects gays and lesbians from harassment by straight persons when that harassment is because of sex. It also protects all employees, including gays and lesbians, from harassment by gay or lesbian persons. Ironically, although a gay person may not be harassed, he may be fired. *See Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989), *cert. denied*, 493 U.S. 1089 (1990) (Title VII does not bar discrimination because of sexual orientation); *DeSantis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327 (9th Cir. 1979) (same).

58. *See Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986) (citing *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972) (establishing importance of employee’s working environment)). The Supreme Court also noted that appellate courts had applied the *Rogers*’ principle to cases involving race and religion. *See id.*

59. *See William M. Landes & Richard A. Posner, Adjudication as a Private Good*, 8 J. LEGAL STUD. 235, 236 (1979).

60. *See id.*; David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2621 (1995).

61. *See Moohr, supra* note 43, at 436 (noting absence of private market in law that requires collective or government action to create rules and precedents).

law.<sup>62</sup>

Courts also “speak” to the public to educate the community and form public values. As courts develop new standards, they deliver them to the community. The judicial system operates in open hearings, creates public records, and provides reasoned decisions that explain the basis of judgment. These results are recounted in newspapers and found in libraries and on electronic databases. Publicity that accompanies a trial may educate the public.<sup>63</sup> Public litigation gives public values meaning and expression by providing concrete applications of those principles.<sup>64</sup> Finally, judges and juries are effective in setting community standards because they speak with the authority of the government.

In contrast, arbitration procedures are confidential, and arbitrators do not provide reasons for their decisions. There is no publicity, no public hearing, no record, and no explanation of the basis of the award. Not only would the plaintiff in the first sexual harassment case not have been able to use Mrs. Rogers’ case as an analogous precedent, the community would not have known about, and thereby learned from, the ruling that emphasized the significance of an employee’s working environment.

Experience indicates that litigation both develops substantive legal change and alters public attitudes. In 1964, conservative legislators amended the proposed Civil Rights Act to ban discrimination based on sex. Their purpose was not to protect women from discrimination, but to use sexual equality to highlight the absurdity of the legislation and thus to derail the bill.<sup>65</sup> Their effort reflected the public’s low valuation of sexual equality in the workplace. Thirty-five years later, most reasonable people would regard the rejection of sexual equality in the workplace as at best antiquated and at worst hopelessly misogynistic. To put the matter simply, the ideal of sexual equality in the workplace has won the support of the general public,<sup>66</sup> and

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62. Professor Ware claims that arbitration will eventually develop a private market in law. *See* Ware, *supra* note 38, at 747. He apparently assumes that the judicial system is static and will not evolve to respond to the concerns of cultural minorities or specific commercial industries as a private legal system would. While it is possible that a private market in law might develop, we have little evidence of its effect or responsiveness, whereas the history of common-law adjudication indicates that the judicial system will continue to develop a responsive procedural and substantive law.

63. *See* Moohr, *supra* note 43, at 437.

64. *See* Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984); Owen M. Fiss, *Out of Eden*, 94 YALE L.J. 1669, 1672-73 (1985) (stating adjudication uses state power to require reluctant public to talk and to listen).

65. *See* Burlington Indus. Inc. v. Ellerth, 524 U.S. 742, 767 n.1 (1998) (Thomas, J., dissenting) (referring to eleventh-hour effort to destroy the Civil Rights Act of 1964); 110 CONG. REC. H2577-84 (daily ed. Feb. 8, 1965) (remarks of Reps. Smith, Tuten, Andrews, and Rivers); Estrich, *supra* note 21, at 817.

66. This is not to suggest that development was entirely even or that it is complete. *See* General Elec.

women now compete in the workplace for jobs and wages that were once reserved for men.<sup>67</sup> Judicial decisions that interpreted the broad mandate of Title VII certainly deserve some credit for this change in public opinion.<sup>68</sup>

In these decisions, judges utilized their discretion to interpret statutes in meaningful ways that achieved the goal of the legislation. Courts devised procedures that enforced the rights conferred by substantive law.<sup>69</sup> They devised new theories of discrimination<sup>70</sup> and accepted new ways that plaintiffs might prove discrimination.<sup>71</sup> Although complaints about excessive judicial discretion and its contribution to legal indeterminacy are well-grounded, we must also recognize that judicial discretion has been used to protect and nurture minorities. Because judicial discretion can be used as a sword or a shield, Professor Krotoszynski's proposal for a more diverse judiciary is particularly important.<sup>72</sup>

### CONCLUSION

The debate over whether to opt in or out of the present judicial system reflects the immutable, endemic dilemma of whether the law should privilege

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Co. v. Gilbert, 429 U.S. 125 (1976) (holding that discrimination based on pregnancy was not sex discrimination). Congress responded to *Gilbert* by passing the Pregnancy Discrimination Act of 1978 (PDA), Pub. L. No. 95-555, 92 Stat. 2076 (October 31, 1978), codified at 41 U.S.C. § 2000e (k) (1994). Despite the PDA, courts have yet to devise an acceptable response to employers who dismiss or otherwise discriminate against pregnant employees. See *Troupe v. May Dep't Stores Co.*, 20 F.3d 734, 737-38 (7th Cir. 1994) (stating that termination of pregnant employee to avoid paying costs of maternity leave is not discrimination because of sex).

67. Again, the picture is not perfect and the process is not complete. See *supra* text accompanying notes 21-28 (discussing reasonable person standard in sexual harassment); *EEOC v. Sears, Roebuck & Co.*, 839 F.2d 302 (7th Cir. 1988) (accepting argument that women were not interested in highly paid commission sales jobs); Donna K. Ginther & Kathy J. Hayes, *Gender Differences in Salary and Promotion in the Humanities*, AM. ECON. REV., May 1999, at 397 (suggesting that gender differences in income are result of reduced probability of promotion among women).

68. I would not, however, press the analogy between women and homosexuals too far. Not only are women not a minority, but their presence in the community does not present as great a challenge to heterosexist notions about sexual identity.

69. See, e.g., *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981) (explaining employers' burden is to produce evidence of legitimate, nondiscriminatory reason for decision); *McDonnell Douglas v. Green*, 411 U.S. 125 (1976) (establishing elements of prima facie case of discrimination, which shifts burden of producing evidence to employer in Title VII cases that present circumstantial evidence). But see *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993) (limiting inferences that must be drawn from employee's prima facie case).

70. See, e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (establishing disparate impact theory of discrimination, which does not require intent to discriminate).

71. See, e.g., *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 307-08 (1977) (explaining that statistical evidence is persuasive); *Int'l Bd. of Teamsters v. United States*, 431 U.S. 324, 334-40 (1977) (approving use of statistical proof in systemic disparate treatment cases).

72. See Krotoszynski, *supra* note 1, at 1050 (urging executive and legislative branch to ensure that judicial appointees reflect diversity of community in which they will sit in judgment).

the individual or the community.<sup>73</sup> One may also view the dilemma as a choice between short-run solutions and long-term development. In the short-run, arbitration may solve an individual's problem but the ruling and its reasoning then do not apply to others. Conversely, long-term development through litigation may sacrifice the immediate interests of individuals but ultimately produce rules that apply to everyone in the community. Either way, the choice is painful.

Exit strategies are attractive for those whose reality is not recognized or fully appreciated by the majority culture or accounted for in the tests that enforce substantive law because they rescue the individual from the tyranny of majority norms. But not even Solomon could feel certain when forcing a beleaguered individual to litigate rather than arbitrate, thereby foregoing her interests for the good of long-term community interests.<sup>74</sup> And those who encourage opting out of the public system must feel disquiet in the realization that their recommendation sacrifices potential long-term change that would benefit members of both the cultural minority and the majority.

Professor Krotoszynski's proposal is directed to those on both sides of this debate—those who plan to work within the judicial system and those who would choose another forum. His proposal for a dialogue about the parameters of legal process is at once modest and ambitious. While modestly cast as a request for engagement and debate, he effectively asks critics and outsiders to accept process as the criterion for judicial credibility and to abandon result-oriented evaluations of judicial decisions. The responses printed here are a measure of his success in stimulating discussion of a subject that merits continued development.

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73. Utilitarian theories of punishment are perhaps the starkest example of the choice between individual and community. Under utilitarian theory, there is no limit to the punishment that may be imposed, if the community benefits through the reduction of crime. See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW, § 2.03 (1987). Retributionists consider it unjust to use a person solely as a means to an end. See *id.* at § 2.04 (citing IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE 100 (J. Ladd trans. 1965)).

74. See Krotoszynski, *supra* note 1, at 1027 (noting it understandable that minorities prefer to find decision-makers with better appreciation of their problems rather than serve as grist for judicial mill).