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THE NEW LEGAL PROCESS: GAMES PEOPLE PLAY AND THE QUEST FOR LEGITIMATE JUDICIAL DECISION MAKING

RONALD J. KROTOSZYNSKI, JR.*

Once upon a time, many in the American legal academy subscribed to a theory of judicial decision making called "Legal Process Theory." Scholarly giants like Professor Henry Hart and Professor Herbert Wechsler argued (quite famously) that the particular result in a given case was far less important than the analytical tools used to justify the result.¹ This argument was a response to the problem of radical indeterminacy associated with the Legal Realist position set forth by leading academics in the 1920s and 1930s.² In essence, Hart and Wechsler argued that it was much more important to focus on how judges reasoned to a result—the forms of authority cited, the rank order of authority, the "neutral" application of formal rules regarding the rank and order of authority across cases with disparate facts, and so forth—than to determine whether the judge had an

* Visiting Professor of Law, Washington and Lee University School of Law; Paul Beam Fellow and Associate Professor of Law, Indiana University School of Law—Indianapolis. I am indebted to Professor Ron Wright for suggesting that I undertake this project. I also am grateful for the helpful comments and suggestions provided by Professors Gary Spitko, Michael Heise, Dan Cole, Alan Rau, S. Elizabeth Wilborn-Malloy, Florence Roisman, Lars Noah, Gerry Moohr, Bob Brookins, Jeff Cooper, John Weistart, Jerry Bepko, Lash LaRue, and Stephen Ware. As always, any errors or omissions are mine alone.

1. See, e.g., HENRY M. HART & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 2-6, 152-58, 642-47 (1994); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 15-20 (1959). Professor Wechsler's article is one of the most heavily cited law review articles of all time. See Fred R. Shapiro, *The Most-Cited Law Review Articles Revisited*, 71 CHI-KENT L. REV. 751, 767 (1995) (reporting that *Toward Neutral Principles* is the second most-cited law review article of all time, with at least 968 citations from 1956 to 1995).

2. See LAURA KALMAN, *LEGAL REALISM AT YALE, 1927-1960* (1986); see also Joseph William Singer, *Legal Realism Now*, 76 CAL. L. REV. 465 (1988); Gary Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1151 (1985).

Oedipal complex or belonged to the John Birch Society as a youth.³

At the risk of seeming terminally naive, I would like to argue for a return to Legal Process Theory as a baseline assumption for legitimate judicial decision making. Contemporary jurisprudence is both hopelessly subjective and hopelessly substantive. To a tremendous degree, legal academics are talking past each other in increasingly specialized jargon known only to the members of particular scholastic sects.⁴

It is highly unlikely that academics, the bench, and the practicing bar will ever reach broad agreement on a particular substantive end that would perforce legitimate the work of courts of law. For example, some have suggested that legitimate judicial decision making should consistently maximize efficiency⁵ or consistently give voice to the disempowered.⁶ Realistically, it is also unlikely that we will ever agree on a process that produces legitimate or acceptable results in particular cases on a routine basis. Nevertheless, a project dedicated to defining *how* judges should go about their task has a better chance of securing broad-based consensus than a project dedicated to delimiting precisely *what* the ultimate substantive ends

3. See Wechsler, *supra* note 1, at 15, 19-20.

4. See Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 42-57 (1992); Richard A. Posner, *The Decline of Law As An Autonomous Discipline: 1962-1987*, 100 HARV. L. REV. 761 (1987); see also Paralyzed Veterans of Am. v. D.C. Arena, L.P., 117 F.3d 579, 584 n.2 (D.C. Cir. 1997) (expressing appreciation of "serious discussions of legal doctrine, increasingly rare in the leading law journals"); Dennis W. Arrow, *Pomobabble: Postmodern Newspeak and Constitutional "Meaning" for the Uninitiated*, 96 MICH. L. REV. 461 (1997) (parodying current trends in legal scholarship).

5. ROBERT H. BORK, *THE ANTITRUST PARADOX* (2d ed. 1993); RICHARD A. POSNER, *AN ECONOMIC ANALYSIS OF LAW* (5th ed. 1998); Frank H. Easterbrook, *The Supreme Court 1983 Term—Foreword: The Court and the Economic System*, 98 HARV. L. REV. 1 (1984); Richard A. Posner, *Social Norms and the Law: An Economic Approach*, 87 AM. ECON. REV. 365 (1997); cf. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972) (applying, but also criticizing, the use of economic modeling techniques to predict human behavior because models can bring order to disparate cases but also "generate boxes into which one then feels compelled to force situations which do not truly fit"); Guido Calabresi, *The Decision for Accidents: An Approach to Nonsuall Allocation of Costs*, 78 HARV. L. REV. 713 (1965) (developing a theoretical framework for assigning the cost of accidents using economic analysis of law but also endorsing the importance of "collective political judgments," judgments that strongly implicate a community's moral values about particular activities, to assigning the costs of accidents); Jerome Culp, *Judex Economicus*, 50 LAW & CONTEMP. PROBS. 95 (Autumn 1987) (criticizing Judge Posner's use of economic analysis in traditionally non-economic areas of the law such as affirmative action, and for paying insufficient attention to values other than wealth maximization, such as fairness or equity).

6. See, e.g., RICHARD E. DELGADO, *THE RODRIGO CHRONICLES: CONVERSATIONS ABOUT AMERICA AND RACE* (1995); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980); PATRICIA WILLIAMS, *THE ALCHEMY OF RACE* (1987); Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365; Jerome Culp, *Toward a Black Legal Scholarship: Race and Original Understanding*, 1991 DUKE L.J. 39; Kimberlé Williams Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Legal Theory, and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139.

of judicial activity are or should be.

In this respect, legal academics could learn a valuable lesson from the athletic arena, a place where competitors routinely taste the "thrill of victory" and the "agony of defeat." The analogy, in my view, provides a compelling argument in favor of a new process-based jurisprudence.⁷

Each sport, whether football or figure skating, requires rules and judges to enforce those rules. As in law, both the substantive content of those rules and their application is subject to debate (and often this debate can be quite heated).⁸ Remarkably, however, the legitimacy of the results of sporting contests are seldom seriously contested.⁹ A "bum call" does not lead the general public to reject a particular team's claim to national preeminence, even if the "bum call" undoubtedly had a significant impact on the ultimate result.¹⁰ Arguably, the process legitimizes the result, even when those

7. I acknowledge that some scholars have objected to the use of "sports metaphors" as hopelessly "masculinist" and as reinforcing bad professional habits. See, e.g., Jeanne L. Schroeder, *Subject: Object*, 47 U. MIAMI L. REV. 1, 59 n.154 (1992); Elizabeth G. Thornburg, *Metaphors Matter: How Images of Battle, Sports, and Sex Shape the Adversary System*, 10 WIS. WOMEN'S L.J. 225 (1995); Catherine Weiss & Louise Melling, *The Legal Education of Twenty Women*, 40 STAN. L. REV. 1299, 1337 (1988).

This Article does not seek to equate the litigation process with sport, or to encourage the use of sports metaphors in either law school classrooms or courtrooms. Rather, it examines how process values contribute to the general public's interest in competitive athletics and how these process values differ from those associated with litigation in the public courts. Moreover, in the era of Mia Hamm and Rebecca Lobo, I am not at all certain that an interest in competitive athletics should carry with it gendered connotations—such an assumption is itself highly essentialist.

8. See Schroeder, *supra* note 7, at 63-64. Controversy surrounding a call at the final game of the 1999 Stanley Cup series resulted in an immediate change in the enforcement of the "skate-in-crease" rule, with the NHL's owners deciding to prohibit the use of instant replay to determine crease violations on goals. See Joe Lapointe, *Beware of Overtime Rule Changes*, N.Y. TIMES, June 23, 1999, § D, at 2; Richard Sandomir, *After Another Look, NHL Ends Crease Replays*, N.Y. TIMES, June 22, 1999, § D, at 1. Ironically, the NFL, responding to public controversy, seems likely to increase the use of video replays in the coming season to assist referees in making proper calls. See generally Brendon Koerner, *New Week in the NFL: Back to the Videotape?*, U.S. NEWS & WORLD REP., Mar. 15, 1999, at 56. In the 1998-99 NFL playoffs, the Green Bay Packers lost possession of the ball on an incorrectly called fumble and recovery by the San Francisco 49ers. Instant replay review made clear that the ball was dead before it became dislodged. The referees, without the benefit of a second look, simply got the call wrong. Other recent examples of questionable calls include a phantom touchdown and a blown coin toss during the 1998-99 NFL regular season. See Gerald Eskenazi, *Questionable Calls III: Officials Smile on the Jets*, N.Y. TIMES, Dec. 7, 1998, § D, at 1. Jets Coach Bill Parcells attributed the phantom touchdown to Divine Inspiration: "God's playing in some of these games, and He was on our side today." *Id.*

9. Olympic figure skating serves as a possible counterexample. Not only is the process of evaluation hopelessly subjective, it also seems to be blatantly nationalistic. See *Skating Judges Receive Typical Marks*, N.Y. TIMES, Feb. 20, 1992, § B, at 8 ("complaining about judging in figure skating is as old as the sport, because of the subjective nature of the system").

10. This is not to say that partisans of a particular team might decline to forgive and forget. To this day, fans of the University of Kentucky basketball team have not reconciled themselves to the Wildcats' loss to Duke in the 1992 NCAA Tournament Midwestern Regional in which Christian Laettner stomped on a fallen Kentucky player. The CBS cameras clearly caught Laettner's rather large foot coming down with some force on the chest of the downed Kentucky player. For whatever reasons, the referees failed to call a technical foul or to eject Laettner from the game. Laettner then proceeded to make a miracle half-court shot

charged with enforcing the rules of the game fail to apply the rules properly.¹¹

It is certainly true that the stakes in litigation can be much higher than in any sporting event. That said, from the perspective of the citizenry, the outcome of the Superbowl is a good deal more important than the outcome of the average Supreme Court case. The citizenry is likely to demand as much rationality (if not more) from the referees of the National Football League (the "NFL") than from the Justices of the Supreme Court of the United States.¹²

One should also note that the process elements animating the legitimacy of sport share an uncanny resemblance to the elements of the "Rule of Law," as explicated by academics from diverse points of the ideological compass. Both E.P. Thompson, a noted Marxist historian and social philosopher, and Friedrich Hayek, a celebrated classical liberal thinker, embrace the concept of the "Rule of Law" as an essential attribute of a just society. One could characterize the "Rule of Law" as a commitment to observe certain basic process values incident to the adjudication of legal claims.

Undoubtedly Thompson and Hayek would disagree on some necessary

at the buzzer, sinking the winning basket. Had a proper foul been called, Laettner would not have been available to take the last shot and the game might well have ended quite differently. All that said (and rest assured that breathless Kentucky fans say it regularly), Duke's 1992 National Championship is not seriously tainted or disputed. Janet Graham, *Rally Cats*, in 1999 NCAA DIVISION I MEN'S BASKETBALL CHAMPIONSHIP PROGRAM 53, 58 (1999).

11. See TOM R. TYLER, WHY PEOPLE OBEY THE LAW 104-12, 135-57, 170-78 (1990); see also DARYL J. BEM, BELIEFS, ATTITUDES, AND HUMAN AFFAIRS 27-39, 54-69 (1970) (explaining basic cognitive theory and how people rationalize their beliefs to avoid "cognitive dissonance" when reality and their beliefs fail to correspond adequately).

12. As much as judges, lawyers, and legal academics would like to think otherwise, the general public is generally quite indifferent to the business of the courts. Unless they have a personal interest in the outcome of a particular case, they are unlikely to pay much attention to its disposition. There are, of course, counterexamples, such as the O.J. Simpson trials and the Scopes trial. These exceptions simply prove the rule. Most Americans are hard pressed to name a single justice of the United States Supreme Court. See Nat Hentoff, *The Mysterious Supreme Court*, VILLAGE VOICE, May 20, 1997, at 22 (describing the general public's "continuing widespread ignorance about the Supreme Court"); Jeff Jacoby, *Turn Off the Tube and Watch Kids Get Smarter*, TAMPA TRIB., Apr. 21, 1997, § A, at 7 (reporting that although a majority of Americans can correctly name the "Three Stooges . . . only 17% can name three Supreme Court Justices"); Judith Kaye, *School Programs Acquaint Students With Role of Law*, N.Y.L.J., May 1, 1998, § S, at 1 (reporting that "close to two-thirds of adults cannot name a single Justice of the United States Supreme Court").

I suspect that far more Americans know which team won the 1998 NBA Championship and/or the Most Valuable Player in the 1998 NBA National Championship Series. See Erik Lacitis, *In An Age of No Heroes, Accent Is On the Dour*, SEATTLE TIMES, Apr. 26, 1998, § L, at 1 ("kids these days most admire Michael Jordan, who's won the poll for the past five years"); *People-Moss Keeps His Cool: Takes out the Trash*, COMM. APPEAL, Dec. 28, 1998, § D, at 2 ("Michael Jordan is still America's favorite sports star, according to an annual Harris poll."); Barbara Hoover, *What's New*, DETROIT NEWS, Dec. 18, 1998, § E, at 1 (reporting that 81% of Americans polled in a recent survey reported that they would remember Michael Jordan well into the future).

elements of the Rule of Law; however, they would just as surely agree on others.¹³ The important point is that a commitment to process values enjoys support from prominent jurisprudential thinkers on opposite sides of the ideological divide, constituting a kind of common ground. I believe that this common ground must serve as the starting point for a conversation about the construction and maintenance of a just legal order; a legal order that enjoys broad support from diverse constituencies within the community.

In this Article, I will argue in favor of a new legal process jurisprudence, analogizing the legitimacy of such an approach to the process theory that undergirds the legitimacy of contemporary athletics. In Part I, the Article describes the balkanization of contemporary jurisprudence into increasingly specialized sects. Part II examines the importance of process to contemporary athletic contests and explores the relationship of process to the legitimacy of the outcomes in those contests. In Part III, the Article completes the circle by arguing that the legitimizing effect of process plainly manifested in the context of athletics, whether at the little league, collegiate, or professional levels of competition, also manifests itself in the context of judicial contests. Finally, Part IV of the Article argues for the creation of a new, process-based theory of judicial legitimacy.

The very presence of rules and customs that judges observe more often than not provides legitimacy to the judicial process.¹⁴ In light of this

13. See FRIEDRICH A. HAYEK, *THE ROAD TO SERFDOM* 72-73 (1944); E. P. THOMPSON, *WHIGS AND HUNTERS: THE ORIGIN OF THE BLOCK ACT* 259-68 (1975).

14. See Harry T. Edwards, *The Judicial Function and the Elusive Goal of Principled Decisionmaking*, 1991 WIS. L. REV. 837, 838, 854-63 [hereinafter *The Judicial Function*]; Harry T. Edwards, *The Role of a Judge in Modern Society: Some Reflections on Current Practice in Federal Appellate Jurisdiction*, 32 CLEV. ST. L. REV. 385, 389-95 (1984); Ruth Bader Ginsburg, *Speaking In a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1190-98 (1992); Ruth Bader Ginsburg, *The Obligation to Reason Why*, 37 FLA. L. REV. 205, 214-18 (1985); cf. Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 793-97, 804-15, 819-22 (1983) (arguing that both the interpretive tools of judging and the legal rules themselves create tremendous discretion on the part of judges to decide cases in accordance with their own subjective preferences).

Whether judges observe these rules in order to seem fair or impartial rather than because they actually are fair and impartial is less important than the fact that they feel obliged to appear to comply with the modus operandi expected of a judge. See Bem, *supra* note 11, at 24-39, 54-61. Contrary to Immanuel Kant's position that motive is everything, see IMMANUEL KANT, *FOUNDATIONS OF THE METAPHYSICS OF MORALS* 13-20, 30-60 (Lewis Beck trans., Bobbs-Merrill 1959), the desire of judges to be perceived as complying with the rules of judicial behavior is a powerful constraint on judicial behavior. In an important sense then, legitimate judicial behavior is more a function of what judges actually do than why they choose to do it. In this sense, judicial virtue is more consistent with Aristotle's notion of attaining virtue through careful (even if unpleasant) repetition and practice. See ARISTOTLE, *THE NICHOMACHEAN ETHICS* 1103a25-1105a30, 1110a5-1114a12, 34-40, 53-68 (Terence Irwin trans., 1985). Thus, a judge who simply observes the rules of the game in order to play the role which he is assigned will, over time, come to play that role by force of habit. See Bem, *supra* note 11, at 54-61; see also Edwards, *The Judicial Function*, *supra*, at 856 ("For the most part, however, the judges on the court are, and feel themselves to be, meaningfully constrained in their decision

phenomenon, it is really not necessary (or even desirable) to redirect judicial efforts toward the achievement of a specific policy objective, whether maximizing efficiency or slaying patriarchy, in order to legitimize the act of judging. Instead, critics of the judicial process (like critics of the rules of particular sports) should tinker with the procedural rules of the game.¹⁵ Of course, process-based critiques might well have substantive objectives, just as such changes in the rules of a particular sport might have similar substantive aims. The important point is that judicial legitimacy cannot be attained solely through an unyielding focus on particular substantive results.¹⁶ Instead, the legitimacy of the judicial process is and will remain a function of the perceived fairness of the rules of the game.

I. THE POST-BABEL, POST-POSTMODERN WORLD

A. *An Introduction to Legal Process Theory*

In the late 1950s and early 1960s, prominent legal academics, including Herbert Wechsler and Henry Hart, advanced a "process theory" to legitimize judicial decision making. The theory was a response to the continued problem of counter-majoritarian decision making by judges, particularly judges applying constitutional constraints to legislation passed by popularly elected legislative bodies. Wechsler and Hart argued that certain "neutral principles" should govern the process of deciding legal cases and controversies.¹⁷ By this, they meant that judges should fashion "neutral" rules through a process of unbiased rational exposition and then apply those "neutral" rules to all cases presenting facts coming within the rule.¹⁸

making."); *id.* at 858 (explaining that in the largest subgroup of appellate decisions, "easy" decisions, "judges deciding these cases feel themselves to be and are tightly bound by legal principles; little or no room remains for the insertion of ideological concerns").

15. By this, I do not simply mean formal rules of evidence and rules of procedure, but rather the sources and rank order of authority that judges invoke to support their conclusions. *See generally* Tyler, *supra* note 11, at 170-78.

16. *See generally* Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 54-70 (1985) (discussing the problem of judicial legitimacy in the context of constitutional adjudication and discussing possible ways of addressing legitimacy problems through interpretational techniques). One should also note that judicial legitimacy is an essential component of any system of law in a pluralistic society. No substantive rule of law is meaningful if the means of enforcing the rule do not exist or, worse yet, are hopelessly unreliable or corrupt.

17. *See* HART & SACKS, *supra* note 1, at 4-6, 642-47.

18. Professor Wechsler stated the objective as follows:

I put it to you that the main constituent of the judicial process is precisely that it must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reason quite transcending the immediate result that is achieved. To be sure, the courts decide, or should decide, only the case they have before them. But must they not decide on grounds of

Consider, for example, the state action doctrine. From a Legal Process perspective, decisions as to whether a particular entity is a state actor, and therefore subject to constitutional constraints, should flow naturally and inexorably from the application of settled legal rules.¹⁹ Whatever rules the federal judiciary establishes, those rules should govern all cases, regardless of the social costs or the seeming unfairness of applying the rules in a particular case.²⁰

Accordingly, if the owner of real property wished to make a racially restrictive covenant with other owners of private real property, such a covenant should be legally enforceable, assuming that other sorts of covenants that transgress constitutional rights would be enforceable (e.g., a prohibition on the placement of political signs on properties within a residential subdivision²¹). The fact that private parties might deploy property law to enforce invidious forms of discrimination should not alter the application of the "neutral" principle that covenants associated with privately held real property do not constitute a form of state action.²²

Wechsler's insistence on applying his "neutral principles" in the face of the growing civil rights movement led to a general rejection of his Legal Process Theory.²³ Indeed, an unsympathetic observer would surely have pointed out that cultural and political reactionaries were deploying Legal Process Theory to attack judicial decisions that struck at laws, customs, and behaviors that were both legally and morally indefensible. The crowning moment came when Wechsler presented a lecture at the Harvard Law School

adequate neutrality and generality, tested not only by the instant application but by others that the principles imply? Is it not the very essence of judicial method to insist upon attending to such other cases, preferably those involving an opposing interest, in evaluating any principle avowed?

Wechsler, *supra* note 1, at 15; see also RICHARD A. POSNER, *OVERCOMING LAW* 60-61, 75-78 (1995) (arguing that Wechsler and others in the Legal Process school could advance their theory without serious contemporary objections from within the legal academy only because of the unyielding homogeneity of the legal academy in the 1950s and 1960s); Paul Brest, *Plus Ça Change*, 91 MICH. L. REV. 1945, 1945-46 (1993) (describing the Legal Process Movement as "hegemonic" in the 1950s and 1960s and noting the subsequent emergence of "newer genres" of legal scholarship that reject some of the basic premises of Legal Process Theory).

19. See Wechsler, *supra* note 1, at 29-31.

20. See *id.* at 33-35.

21. See, e.g., *City of Ladue v. Gilleo*, 512 U.S. 43 (1994) (holding the First Amendment's free speech clause, as applied against the states via the Fourteenth Amendment, precludes a municipality from prohibiting the placement of political signs in the yards of private residences).

22. See Wechsler, *supra* note 1, at 29-31, 33-35; but see Ronald J. Krotoszynski, Jr., *Back to the Briarpatch: An Argument For Constitutional Meta-Analysis in State Action Determinations*, 94 MICH. L. REV. 302, 315-17 (1995) (arguing that *Shelley* can be conceptualized as involving a common law of property rule that facilitated racial discrimination rather than as a general finding that the use of state courts to enforce an agreement makes the enforcement of the agreement state action).

23. See POSNER, *supra* note 18, at 70-80; Gary Peller, *Neutral Principles in the 1950s*, 21 U. MICH. J.L. REFORM 561, 620-22 (1988).

in which he attacked the legitimacy of *Brown v. Board of Education*.²⁴ This easily represented the moral nadir of the Legal Process movement.

Wechsler and his allies might have been attempting to hold the intellectual high ground, but they would have done well to better appreciate Justice Holmes's oft-invoked admonition that the "life of the law has not been logic, but experience."²⁵ Attacking the legitimacy of the Supreme Court's use of the equal protection and due process clauses to eradicate de jure forms of racial segregation was at best politically unwise and at worst reflected a kind of moral blindness.²⁶ As Professor David Strauss has noted, "[a] few swift strokes of principle were not enough to dispatch *Brown v. Board of Education*; today the self-confidence of the 1950s critics of the Warren Court seems utterly unwarranted."²⁷

The legal academy has long since moved on,²⁸ and if one attempted to defend Wechsler's version of Legal Process Theory at a contemporary scholarly meeting, the best reception that one could hope to receive would be polite chuckles from the audience.²⁹ The reasons for this are now well-rehearsed and widely-known: the notion of "neutral rules" is non-sensical because all legal rules reflect normative judgments about the way the world works or should work. That is to say, no legal rule is truly "neutral" because it incorporates, of necessity, a slew of political, ideological, economic, and philosophical assumptions.³⁰ Thus, postmodern critics would, quite rightly, tag Wechsler as being hopelessly naive about the nature and source of legal

24. 347 U.S. 483 (1954); see David A. Strauss, *Principle and Its Perils*, 64 U. CHI. L. REV. 373, 373-74 (1997) ("Wechsler's lecture became to some degree notorious for disapproving, as unprincipled, *Brown v. Board of Education*, the school segregation decision that has since achieved nearly universal acceptance as an appropriate exercise of judicial power."); Wechsler, *supra* note 1, at 1 n.† ("This paper was delivered on April 7, 1959 as the Oliver Wendell Holmes Lecture at the Harvard Law School.")

25. OLIVER WENDELL HOLMES, *THE COMMON LAW* 1 (1881); see also Strauss, *supra* note 24, at 376-79 (noting that the dynamic complexities of modern society make reliance on entirely theoretical and relatively static theories of law quite impossible).

26. See MORTON HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* 267-68 (1992).

27. Strauss, *supra* note 24, at 386.

28. See Brest, *supra* note 18, at 1945-46.

29. See MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* 186-212 (1987) (rejecting process-based theories of judicial legitimacy because such theories are hopelessly utopian and fail to account for the difficulties that pluralism presents for establishing and enforcing mutually agreed-upon procedures that will legitimize particular results in discrete cases).

30. For example, the notion that one who breaches an otherwise valid contract should be liable for consequential damages reflects a bias in favor of enforcing promises through a formal legal process. There is no necessary reason to create a legal system in which the breach of a contract gives rise to an action for damages. It is true that in the absence of a such a system, commercial enterprises would have to devise extra-legal means of ensuring that promises made are promises kept (e.g., the Yakuza's or Mafia's use of extra-legal sanctions to enforce promises). The presence of effective alternatives to an action for damages does not, however, make an action for damages an essential component of a just community.

rules.

A postmodern critique would go further, however, and contest the ability of judges to be neutral in enforcing rules. As critics like Mark Tushnet,³¹ Richard Delgado,³² and Roberto Unger³³ have pointed out, even the most tightly drafted legal rules can be avoided, if not through a substantive exception to the rule, then through a procedural ruse. Moreover, even the seemingly "neutral" application of a rule by a judge might nevertheless reflect forms of social or cultural bias.³⁴

Thus, the insistence with which traditional adherents of Legal Process Theory demand both "neutral" rules and judges able (and willing) to apply such rules on a "neutral" basis virtually requires sophisticated legal commentators to reject Legal Process Theory out of hand. One could attempt to defend Legal Process Theory by positing that judges must act as if they apply neutral rules in neutral ways, even if this assumption can be empirically disproved. Such a defense does not really do much to rehabilitate Legal Process Theory, for it represents a cynical kind of formalism.³⁵ If law is, as some in the Critical Legal Studies ("CLS") movement insist, little more than an exercise in interest group politics,³⁶ then better we should contest each individual application of every legal principle.

31. See Tushnet, *supra* note 14.

32. See DELGADO, *supra* note 6.

33. ROBERTO UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* (1986).

34. See Harold McDougall, *Social Movements, Law, and Implementation: A Clinical Dimension for the New Legal Process*, 75 CORNELL L. REV. 83, 94-95 (1989); Gary Spitko, *He Said, He Said: Same Sex Sexual Harassment Under Title VII and the "Reasonable Heterosexual" Standard*, 18 BERKELEY J. EMP. & LAB. L. 56, 80-89 (1997).

Consider, for example, a state statute that requires motor vehicle operators to stop at red signals and drive on green ones. Suppose that an African-American person fails to observe this rule and a police officer cites the driver for failing to stop at a red light. So far, so good. From a traditional legal process perspective, it would not be appropriate to treat the defendant any differently than any other defendant on the basis of his race. Accordingly, the presiding judge should not excuse the motorist from liability for the citation because of his race. Suppose, however, that this particular police officer never cites white drivers as a matter of enforcement policy. See generally Angie Cannon, *Driving While Black*, U.S. NEWS & WORLD REP., Mar. 15, 1999, at 72 (describing the use of "race profiling" in police law enforcement efforts); David Kocieniewski, *Racial Profiling Is the Subject of U.S. Investigation in New Jersey*, N.Y. TIMES, Feb. 18, 1999, § B, at 1 (describing federal DOJ concerns over alleged use of racial profiling by New Jersey state police to select drivers for random stops). On these facts, the application of the "neutral" rule in a "neutral" fashion does not ring true. That is to say, one must know the background and context of the observance of a particular legal rule to determine whether a particular application of the rule is truly "neutral." Given that no defendant will have perfect knowledge of a judge's prior application of the rule, it is really not possible to determine whether any given application of a rule is truly neutral.

35. See Peller, *supra* note 23, at 606-17; cf. BEM, *supra* note 11, at 27-29, 54-61 (arguing that people do try to act in ways that they perceive to be consistent with their beliefs and values).

36. See KELMAN, *supra* note 29, at 242-68; Peter Gabel & Duncan Kennedy, *Roll Over Beethoven*, 36 STAN. L. REV. 1, 33-41 (1984).

This does not mean, however, that a focus on *process* as the key to legitimizing legal decision making must be rejected. Even if the Wechsler/Hart iteration of Legal Process Theory rests on an untenable worldview, perhaps the task of legitimizing judicial decision making could be grounded on the process that judges use to decide cases rather than on critiques of the discrete results that judges reach in particular cases.

One could posit a new process theory that does not rest on insupportable claims to neutral rules or neutral arbiters. Even if legal rules reflect political or cultural sensibilities and even if judges incorporate their political or cultural sensibilities when applying legal rules to individual cases,³⁷ a focus on process might present the best hope for devising a legal system that multiple constituencies believe to be fair.³⁸ The fact of the matter is that most people live in the average everyday as if legal rules are determinate and judges apply those determinate rules in predictable ways.³⁹ If the judicial system were as biased and political as some in the CLS movement suggest, the general public would surely give it a great deal more day-to-day attention.⁴⁰ Even conceding these points, one cannot gainsay that crises of confidence in the judicial system arise from time to time, and that cultural minorities are often the most skeptical about the basic fairness of judicial decision making. This Article will seek to demonstrate that a renewed focus on process, rather than commitments to achieve particular substantive ends, presents a better opportunity to secure widespread confidence in judicial decision making.

37. This is plainly the case. See Ronald J. Krotoszynski, Jr., *Building Bridges and Overcoming Barricades: Exploring the Limits of Law As An Agent of Transformational Social Change*, 47 CASE W. RES. L. REV. 423 (1997).

38. See TYLER, *supra* note 11, at 140-57, 170-78; JOHN THIBAUT & LAUREN S. WALKER, *PROCEDURAL JUSTICE AS FAIRNESS: A PSYCHOLOGICAL ANALYSIS* (1975); see generally Henry Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267 (1975).

39. See Edwards, *The Judicial Function*, *supra* note 14, at 855-63; Kent Greenawalt, *How Law Can Be Determinate*, 38 UCLA L. REV. 1, 65-85 (1990).

40. This is not to say that the public is completely indifferent to the operation of the courts. The O.J. Simpson trial transfixed the community and raised troubling questions about whether blacks and whites view the judicial system as fundamentally fair. See RANDELL KENNEDY, *RACE, CRIME, AND THE LAW* 284-310 (1997); see also Paula Johnson, *At the Intersection of Justice: Experiences of African American Women in Crime and Sentencing*, 4 AM. U. J. GENDER & L. 1 (1995). The same could be said of the trial of the police officers who attacked Rodney King. See, e.g., KENNEDY, *supra*, at 113-25. On the other hand, if the general public perceived the legal system to be utterly arbitrary, then there would surely be broad-based political agitation for reform. Of course, from the perspective of a cultural minority, the existing system might appear to be highly arbitrary. See E. Gary Spitko, *Judge Not: In Defense of Minority Culture Arbitration*, 77 WASH. U. L.Q. 1065 (2000). It is entirely possible for the general community to perceive the public courts as essentially fair while particular minority communities perceive (or even experience) them to be unfair or arbitrary. To the extent that some in the CLS movement suggest that the legal system is utterly arbitrary on a routine basis to all members of the community, the general lack of dissatisfaction within the general, majority culture suggests that they have overstated their case.

B. *The Varied Terrain of Post-Postmodern Theories of Judicial Legitimacy*

As noted above, advocates of Legal Process Theory lost both moral legitimacy and political viability when confronted with the reality of the civil rights movement.⁴¹ Too many state and federal judges failed to implement the guarantees of the Bill of Rights and the Thirteenth, Fourteenth, and Fifteenth Amendments in a fashion that was legally, morally, or politically acceptable.⁴² The fact that Professor Wechsler decried a number of important civil rights decisions did not help matters.

As the political and moral force of Legal Process Theory went into decline,⁴³ new comprehensive movements arose that offered up holistic visions of the law.⁴⁴ These new visions, however, were not only normative

41. See *supra* notes 17-27 and accompanying text.

42. See JACK BASS, *UNLIKELY HEROES* 84-96, 164-67, 231-47 (1981) (describing the efforts of two reactionary federal judges from Mississippi who used their offices to thwart the advance of the civil rights movement); cf. *id.* at 23-83, 97-135 (describing the courageous and unflagging efforts of federal appellate judges John R. Brown, Richard T. Rives, Elbert P. Tuttle, and John Minor Wisdom and federal district court judges Frank M. Johnson, Jr. and J. Skelly Wright to implement the rule of law under incredibly adverse conditions).

43. One author recently cited Wechsler's article to support the proposition that some people once believed that considerations of race were "not relevant to an individual's free participation in the life of the community." See Peter Rubin, *Equal Rights, Special Rights, and the Nature of Antidiscrimination Law*, 97 MICH. L. REV. 564, 595 & 595 n.77 (1998). Essentially, Professor Rubin is citing Wechsler for the proposition that mainstream society once condoned de jure social forms of racial discrimination. See *id.* Passages in Wechsler's article do lend some support to Rubin's assertion:

For me, assuming equal facilities, the question posed by state enforced segregation is not one of discrimination at all. Its human and constitutional dimensions lie entirely elsewhere, in the denial by the state of freedom to associate, a denial that impinges in the same way on any groups or races that may be involved.

...

But if the freedom of association is denied by segregation, integration forces an association upon those for whom it is unpleasant or repugnant. Is this not the heart of the issue involved, a conflict in human claims of high dimension, not unlike many other that involve the highest freedoms—conflicts that Professor Sutherland has recently described.

Wechsler, *supra* note 1, at 34. Wechsler goes on to confess doubts that a "neutral principle" can be found that prohibits the state from segregating students in the public schools or that requires the state to maintain racially integrated schools. See *id.* at 34-35. Given this aspect of Wechsler's article and the fact that his theory supports a result so completely at odds with contemporary constitutional jurisprudence, it is somewhat surprising that it continues to enjoy such prominence in the nation's law reviews.

44. In the late 1980s and early 1990s, a "New Legal Process" movement arose, offering up portions of the Wechsler/Hart/Sacks program with various new bells and whistles. See William Eskridge & Gary Peller, *The New Public Law Movement: Moderation as a Postmodern Cultural Form*, 89 MICH. L. REV. 707 (1991); McDougall, *supra* note 34, at 83-84, 98-101; Daniel Rodriguez, *The Substance of the New Legal Process*, 77 CAL. L. REV. 919 (1989); Edward Rubin, *The Concept of Law and the New Public Law Scholarship*, 89 MICH. L. REV. 792, 820-31 (1991). Although it is dangerous to generalize, many of these scholarly efforts focus more on the problem of comparative institutional competence (*i.e.*, identifying the most appropriate branch of government to address a given social problem) or methods of statutory

(that is to say that they assumed a particular set of contestable values as assumed premises undergirding the entire enterprise), but they were also substantive (that is to say they assign controlling value to securing outcomes advancing particular considerations, such as "representation reinforcement" or "maximizing efficiency," rather than on the procedures associated with judicial decision making).

Indeed, these substantive "big theory" visions of the law have multiplied and divided, so that the contemporary legal academy is now offering up a cacophony of all-encompassing visions of the law, each complete unto itself, each offering other academics, lawyers, judges, and legislators a handy-dandy "how to" manual with a predetermined set of values (if not a predetermined set of results).⁴⁵ The legal academy has become a kind of post-Tower of Babel community, with many tongues speaking but with little understanding or engagement across the various sects.

Contemporary "big theory" scholarship tends to be both ends-oriented and highly specialized. Consider, for example, the fate of the CLS movement. In the early 1980s, a group of disenchanted academics began to offer an alternative account of the law that emphasized the relationship of law to power. Arguing (like the Legal Realists) that law was really about what judges do, the CLS movement went further than the Legal Realists and argued that judges routinely deployed the indeterminacy inevitably associated with judicial decision making in the service of politics and ideology.⁴⁶ Politics, in turn, redounded to the advantage of wealthy elites.

construction rather than on the problem of judicial legitimacy (which I take to be Wechsler's principal concern in *Toward Neutral Principles*). See Michael Froomkin, *Climbing the Most Dangerous Branch: Legisprudence and the New Legal Process*, 66 TEX. L. REV. 1071, 1081-84, 1088-94 (1988); Edward Rubin, *Institutional Analysis and the New Legal Process*, 1995 WIS. L. REV. 463; Nicholas Zeppos, *Justice Scalia's New Textualism: The "New" New Legal Process*, 12 CARDOZO L. REV. 1597 (1991); see also NEIL KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* (1994).

This Article's focus differs significantly from these earlier efforts in that its project is limited to the problem of judicial legitimacy and, more specifically, the relationship of process values to the confidence of the citizenry in the basic fairness of the litigation process. In this sense, it fits more comfortably into the Wechsler branch of the Legal Process family tree, whereas much of the extant "New Legal Process" scholarship takes up concepts and ideas more often associated with Henry Hart and Albert Sacks. For an excellent history of the Legal Process Movement and its principal exponents, see Neil Duxbury, *Faith in Reason: The Process Tradition in American Jurisprudence*, 15 CARDOZO L. REV. 601 (1993).

45. See POSNER, *supra* note 18, at 86-87 ("The legal doctrinalists are being crowded out by economic analysts of law, by other social scientists of law, by Bayesians, by philosophers of law, by political theorists, by critical legal scholars, by feminist and gay legal scholars, by the law and literature people, and by critical race theorists, all deploying the tools of non-legal disciplines.").

46. See MARK TUSHNET, *RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW* 42-69 (1988); UNGER, *supra* note 33, at 5-14, 91-108; cf. Edwards, *The Judicial Function*, *supra* note 14, at 854-63 (arguing that in most cases, a judge follows relatively determinate rules rather than political or

Completing the syllogism, law became the tool of the wealthy elites who oversaw the process of selecting judges. Rights and rights discourse were simply an empty shell for ratifying and maintaining existing power relationships within society and making secure existing property rights.⁴⁷

The CLS movement offered up a powerful and coherent trashing of the entire legal system. From a CLS perspective, the Legal Process tradition represented by Hart and Wechsler is laughable: given the corrupt players staffing the system and their unbounded discretion to do as they please, the idea that Marquis de Queensberry rules will meaningfully cabin their discretion is, at best, a bad joke. In the 1990s, the CLS movement splintered into several discrete camps, each offering a particular spin on the basic theme of law as power.

The Feminist Legal Theory movement has argued that gender issues should be paramount in deconstructing not only the hierarchy, but also the patriarchy, associated with the existing legal order. Many have undertaken efforts to "de-masculinize" particular areas of law, such as tort or contracts.⁴⁸ Others have attempted to redirect the deployment of Title VII to take into account the importance of systemic gender subordination as an aspect of employment discrimination.⁴⁹ More recent scholarly efforts have emphasized the project of women's agency—the idea that women should be empowered to make important self-defining choices free of the coercion associated with either traditional gender roles or those feminist critiques that denigrate and reject traditional care-giving roles.⁵⁰ The Feminist Legal Theory movement

ideological leanings to decide cases and that only a small subset of "hard" cases reflect a given judge's ideology). A recent study by Professors Sisk, Heise, and Morriss tends to bear out Judge Edwards's assertions, at least insofar as a particular separation of powers issue is concerned. See Gregory Sisk et al., *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Decisionmaking*, 73 N.Y.U. L. REV. 1377 (1998).

47. This aspect of CLS draws heavily on the writings of Karl Marx. See Mark Tushnet, *Critical Legal Studies: A Political History*, 100 YALE L.J. 1515 (1991).

48. See, e.g., Leslie Bender, *Feminist (Re)Torts: Thoughts on the Liability Crisis, Mass Torts, Power, and Responsibilities*, 1990 DUKE L.J. 848 (arguing that mass torts jurisprudence reflects an obsessive fixation with law and economics paradigms and would benefit from incorporation of feminist understandings of power relations and responsibility); Mary Frug, *Rescuing Impossibility Doctrine: A Postmodern Feminist Analysis of Contract Law*, 140 U. PA. L. REV. 1029 (1992) (arguing for the use of feminist theory "as a means of contesting and restructuring conventional and stalemated understandings" of contract law and noting that even seemingly arid formal legal discourses in contract law are often fraught with highly gendered subtexts).

49. See CATHARINE A. MACKINNON, *THE SEXUAL HARASSMENT OF WORKING WOMEN* (1979); Kathryn Abrams, *The New Jurisprudence of Sexual Harassment*, 83 CORNELL L. REV. 1169 (1998); Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183 (1989); Anita Bernstein, *Treating Sexual Harassment With Respect*, 111 HARV. L. REV. 446 (1997).

50. See, e.g., Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304 (1995) [hereinafter *Sex Wars*]; see also MARY FRUG, *POSTMODERN LEGAL FEMINISM* 3-11 (1992); cf. ANDREA DWORKIN, *INTERCOURSE* (1987); ANDREA DWORKIN, *RIGHT WING WOMEN*

has made an important contribution to legal scholarship (and society as a whole) by forcing the consideration of gender issues, making explicit long-held (and often misogynistic), but previously implicit, understandings of the social, legal, and political status of women.⁵¹

Critical Race Scholars pioneered yet another important offshoot of the CLS movement. These academics argue that race is at least as important (if not more so) as class in deconstructing the existing legal order, and that the existing legal order exists to maintain and protect white racial and cultural hegemony as much as to maintain and protect the existing economic status quo.⁵²

Significantly, Critical Race Scholars generally have disassociated themselves from the CLS movement's complete rejection of rights-discourse. Many in the Critical Race Theory ("CRT") movement instead argue that existing rights discourse, however flawed and biased toward majority-culture sensibilities, nevertheless creates necessary breathing room for disempowered cultural minorities.⁵³ "Indeed, Critical Race Theory evolved at least in part because Critical Race scholars believed that Critical Legal Studies' general emphasis on theoretical critique, and use of deconstructionist methods in particular, served to undercut the possibility for

(1983); ANDREA DWORKIN, *WOMAN HATING* (1974); CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* (1987); Andrea Dworkin, *Against the Male Flood: Censorship, Pornography, and Equality*, 8 HARV. WOMEN'S L.J. 1 (1985). Indeed, Professor Abrams (among others) has questioned whether Dworkin's and MacKinnon's tendency to essentialize women denies women the freedom to be self-defining in matters that go to the heart of personhood (i.e., meaningful agency). See Abrams, *The New Jurisprudence of Sexual Harrassment*, *supra* note 49, at 1201 n.180; Abrams, *Sex Wars*, *supra*, at 324-32, 350-56.

51. See POSNER, *supra* note 18, at 85 ("Feminism has influenced academic legal thinking not only about women's legal rights but also about the nature of legal reasoning, and bids fair to push Critical Legal Studies out of the academic limelight."); see also Derrick Bell & Erin Edwards, *Students As Teachers, Teachers As Learners*, 91 MICH. L. REV. 2025, 2034-36 (1993) (describing some of the important legal, political, and social contributions of Feminist Legal Theory); Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988) (same).

52. See Cheryl Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993); Alex Johnson, *Defending the Use of Narrative and Giving Context to the Voice of Color: Rejecting the Imposition of Process Theory in Legal Scholarship*, 79 IOWA L. REV. 803, 803-06 (1994); see also Bell & Edmonds, *supra* note 51, at 2036-38; Jerome Culp, *The Michael Jackson Pill: Equality, Race, and Culture*, 92 MICH. L. REV. 2613 (1994); Mari Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987); Patricia Williams, *Columbus's Legacy: Law As An Instrument of Racial Discrimination Against Indigenous Peoples' Rights of Self-Determination*, 1991 ARIZ. J. INT'L & COMP. L. 51. For a history of the development of African-American Critical Race Theory, see generally Jerome Culp, *You Can Take Them to Water But You Can't Make Them Drink: Black Legal Scholarship and White Legal Scholarship*, 1992 U. ILL. L. REV. 1021.

53. See Richard Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 HARV. C.R.-C.L. L. REV. 301 (1987); Angela P. Harris, *Foreward: A Jurisprudence of Reconstruction*, 82 CAL. L. REV. 741 (1992); Patricia J. Williams, *Alchemical Notes: Reconstructed Ideals From Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401 (1987).

practical transformation."⁵⁴ Like the CLS movement before it, the CRT movement has itself divided, with African-Americans, Latinos, and Asians each developing separate discourses about the changes necessary to legitimate the legal system from the perspective of their particular ethnic community.⁵⁵ Gays and lesbians have also developed a new specialized jurisprudence, denominated by some as "Law and Sexuality" and by others as "Queer Theory."⁵⁶

More traditional legal scholars also tend to offer up substantive prescriptions for legitimating the judicial process in general and judicial review in particular. For example, John Hart Ely has given us "representation reinforcement,"⁵⁷ whereas Bruce Ackerman would have us look to "constitutional moments."⁵⁸ The trend line is clear: contemporary legal scholarship reflects an alarming acceleration of specialization within the academy. Increasingly, non-adherents of a particular movement have great difficulty even understanding the works of its devotees.⁵⁹ As Judge Harry

54. Daria Roithmayr, *Deconstructing the Distinction Between Bias and Merit*, 85 CAL. L. REV. 1449, 1506 (1997); see also Kimberlé Williams-Crenshaw, *Race, Reform, & Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988).

55. See, e.g., Robert S. Chang, *Toward an Asian-American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CAL. L. REV. 1241 (1993); Symposium, *Latinas/os and the Law*, 85 CAL. L. REV. 1087 (1997); Symposium, *Symposium In Honor of Neil Gotanda*, 4 ASIAN L.J. 1 (1997).

56. See Katherine M. Franke, *Homosexuals, Torts, and Dangerous Things*, 106 YALE L.J. 2661, 2665-71 (1997) (providing a brief history of the emergence of Law and Sexuality as a discrete discipline within the U.S. legal academy); Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL. L. REV. 3, 346-67 (1995) (discussing the development and importance of nomenclature for gay/lesbian studies); see also Steven Seidman, *Identity and Politics in "Postmodern" Gay Culture: Some Historical and Conceptual Notes*, in FEAR OF A QUEER PLANET 105, 120-22 (Michael Warner ed., 1993).

57. Ely, *supra* note 6.

58. BRUCE A. ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991); see also Bruce A. Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453, 457-61, 510-15 (1989); Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1022 (1984).

59. This complaint could be leveled against some of the "New Legal Process" scholarship of the late 1980s and early 1990s, which did not do a particularly good job of engaging the process-based critiques offered up by scholars of the Left. See Eskridge & Peller, *supra* note 44, at 734. Professor Edward Rubin has noted the disjunction between legal scholarship of the Left and Legal Process Theory, observing that "[n]o one has explicitly claimed an interest in integrating critical legal studies with legal process." Edward Rubin, *The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions*, 109 HARV. L. REV. 1393, 1407 (1996).

This Article suggests that such an integration is essential to countering proposals for the creation of culturally-identifiable alternatives to the public courts through the creative use of ADR. See *infra* notes 159-215 and accompanying text. Professor Rubin proposes institutional analysis as a focus for a new and revitalized scholarly project. See Rubin, *supra*, at 1424-33. To the extent that Professor Rubin's call for "institutional analysis" encompasses close scrutiny of the operation of the public courts in the litigation process in an effort to create procedures deemed just across broad segments of the community, we share a common agenda. That said, I am less concerned with the operation of the legislative and executive branches of government, in large part because in a democratic society such

Edwards has suggested in this regard, perhaps hyperbolically, non-traditional legal scholars "often scorn each other, with the adherents of the various interdisciplinary approaches taking the view that all other approaches are deluded."⁶⁰ Even if Judge Edwards overstates the scope of the problem, it seems reasonably clear that the absence of common ground makes dialogue across these disciplines increasingly difficult. Common ground is needed, if only to ensure that legal academics engage each other in meaningful ways—methodological or ideological differences notwithstanding.

C. *E Pluribus Unum*

The creation of new and different conceptions of the scholarly project is a salutary development for the legal academy and the general public. For too long, racial minorities, women, and gays and lesbians did not enjoy a seat at the table.⁶¹ Moreover, other specialized "Law and" movements within the

institutions will, by definition, incorporate and reflect majoritarian biases and prejudices. Cultural minorities have a right to expect that the courts of law will not also serve as engines of the majority's will: the ability to enforce legal rights should not be a function of one's race, gender, or sexual orientation.

To the extent that some cultural minorities deeply distrust the ability of majoritarian courts to enforce fairly their legal rights, a crisis of legitimacy arises. A return to process values offers up a potential means of ameliorating the skepticism of cultural minorities. In this regard, one should note that 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. Although Professor Rubin's proposal is tentative, it does not seem to place sufficient importance on including and addressing the voice of the other, instead focusing on theories associated with pragmatism, public choice theory, and law and economics. *See id.* at 1424-37. Professor Rubin plainly wants cultural minorities to join the process party, *see id.* at 1434-37, but he does not offer them any particularly compelling reason for doing so. Moreover, his suggestion that "microanalysis of institutions is neutral," *id.* at 1437, reveals a deep misunderstanding of scholarship of the Left. Attempting to define the project of minority culture scholars is emphatically *not* neutral. Indeed, attempting to salvage the legitimacy of existing social and political institutions is a highly ideological, value-laden project. Although I share Professor Rubin's enthusiasm for attempting to reform existing arrangements, I do not consider this commitment on my part "neutral" in any meaningful sense. Moreover, I recognize that minority culture scholars have no obligation to commit themselves to a project aimed at salvaging the status quo. Accordingly, the substance of a scholarly project focused on process values would have to be carefully negotiated from the outset.

60. Edwards, *supra* note 4, at 37; *see also* Johnson, *supra* note 52, at 805 (describing the lack of meaningful scholarly interaction between CRT scholars and non-CRT scholars). Others have complained that "CLS literature is impossible to understand without familiarity with CLS works." Jeffrey L. Harrison & Amy R. Mashburn, *Jean-Luc Godard and Critical Legal Studies (Because We Need the Eggs)*, 87 MICH. L. REV. 1924, 1938 (1989); *see also* Wendy J. Gordon, *Counter Manifesto: Student-Edited Reviews and the Intellectual Properties of Scholarship*, 61 U. CHI. L. REV. 541, 546 (1994) (arguing that specialized scholarship is often best understood by the devotees of a particular school of thought); Richard A. Posner, *Reforming the American Law Review*, 47 STAN. L. REV. 1131, 1133 (noting that the balkanization of the American legal academy has "beached not only a number of doctrinal scholars but also most law review editors.").

61. *See* Richard Delgado, *The Imperial Scholar Revisited: How to Marginalize Outsider Writing*, 140 U. PA. L. REV. 1349 (1992). Even Chief Judge Edwards, a persistent and harsh critic of new

legal academy have made significant, positive contributions to the development of the law. I would not, indeed could not, argue that a single catholic project must animate the scholarly project of legal academicians.⁶²

With respect to critiques of particular substantive areas of law, this diversity of approach ensures that implicit premises are made explicit. It challenges hierarchy and patriarchy. It undoubtedly redounds to a fairer, more just society. I am less certain, however, that it does much to advance the legitimacy of the judicial act.

It is simply not possible to secure broad-based agreement that, day in and day out, judges should always act to maximize efficiency, or empower a particular cultural minority, or advance the project of democracy. In defining the judicial task, we should be seeking to create a set of principles that define the method that judges should use to generate legitimate decisions.⁶³ This is not a plea for "neutral principles," for such principles do not exist.⁶⁴ Any rules of the game would, of necessity, be both contestable and contested.

All that said, it seems reasonably clear that the prospects of resolving the "countermajoritarian difficulty"⁶⁵ would be greatly improved if commentators ceased telling the judges what to decide and instead paid some greater attention to how they should go about deciding particular cases. In my view, this is the central insight of the Legal Process movement. The legitimacy of judicial behavior should be a function of how judges go about performing the judicial role rather than the results judges reach in particular cases.⁶⁶ If the process that judges use to decide cases is acceptable to diverse

interdisciplinary and postmodern legal scholarship, has acknowledged that such scholarship has value: "I do not deny that 'impractical' scholarship also can serve our legal system." Edwards, *supra* note 4, at 56. Judge Edwards also provides a litany of ways in which "impractical" scholarship has made valuable contributions to the state of legal knowledge. See *id.* at 49-50; see also Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession: A Postscript*, 91 MICH. L. REV. 2191, 2195-96 (1993).

62. See Ronald J. Krotoszynski, Jr., *Legal Scholarship at the Crossroads: On Farce, Tragedy, and Redemption*, 77 TEX. L. REV. 321, 321-24, 327-28 (1998); cf. Rubin, *supra* note 59, at 1436-37 (positing a unified "neutral" scholarly agenda focused on "the microanalysis of institutions").

63. By "legitimate," I mean judicial decisions that enjoy a high degree of acceptability across racial, religious, political, gender, and class lines.

64. See Johnson, *supra* note 52, at 830 (explaining that the problem with Legal Process Theory "is that the so-called neutral principle or process is not neutral. Nor is it capable of incorporating to the fullest extent the messages that those employing Narrative and speaking in the Feminist Voice or the Voice of Color seek to communicate."); but see ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 78 (1990) (demonstrating that Professor Wechsler enjoys the complete support of at least one die-hard fan); Frank H. Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 CORNELL L. REV. 422, 432-33 (1988) (arguing that "the role of precedent should be similar for all decisions interpreting texts, with any difference in the direction of making it harder to revise constitutional interpretation"—a very Wechsler-eque proposition, to say the least).

65. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962).

66. In a variety of contexts, I have argued that, when deciding whether to vest discretion with judges,

constituencies, it is more likely that the results of the process will also be acceptable (even if particular communities disagree with a given disposition).⁶⁷ Conversely, if the process⁶⁸ used to reach a given decision reeks of bias, it is highly unlikely that the substantive result of the process will enjoy broad-based support.

II. PLAY BALL!

The resolution of a sporting contest presents many of the same problems associated with the resolution of litigation. Indeed, in the not too distant past, the notion of trying legal causes by ordeal or contest enjoyed relatively broad

the most important consideration may be the way in which the judges would go about performing the particular task if they possessed the discretion to act. *See, e.g.*, Krotoszynski, *supra* note 22, at 333-35, 342-46 (arguing that federal courts should abjure easy shorthands when making state action determinations in favor of more open-ended inquiries coupled with a duty to explain their ultimate decision); Ronald J. Krotoszynski, Jr., *Celebrating Selma: The Importance of Context in State Action Determinations*, 104 YALE L.J. 1411, 1437-39 (1995) [hereinafter *Celebrating Selma*] (arguing that judicial discretion can be cabined through a duty of explanation); Ronald J. Krotoszynski, Jr., *On the Danger of Wearing Two Hats: Morrison and Mistretta Revisited*, 38 WM. & MARY L. REV. 417, 445-47, 455-56, 475-84 (1997) [hereinafter *On the Dangers of Wearing Two Hats*] (arguing that additional procedures are necessary to preserve the perception of judicial independence if judges are to continue serving on the U.S. Sentencing Commission and/or the Special Division).

67. *See* TYLER, *supra* note 11, at 104-12. Some commentators have implicitly endorsed this proposition by advocating the creation of closed, private law systems for particular cultural subgroups within the community. *See* 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 (1999); Stephen Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703 (1998).

Professors Ware and Spitko do not argue that cultural minorities reject the dominant majority's substantive legal rules in toto, but rather that they severely distrust the process through which the majority enforces its rules. *See* Ware, *supra*, at 744-47; Spitko, *supra*, at 286-90, 294-97. Rather than fix the majoritarian courts' process failures, Professors Ware and Spitko endorse the creation of exit options for disgruntled cultural minorities. This is an intriguing proposal and might be the most realistic means of addressing the problem of cultural bias in the application of nominally "neutral" legal rules. That said, this proposition, even if true, is profoundly depressing and brings with it pronounced, negative consequences for the general community. *See infra* notes 191-216 and accompanying text.

68. By "process" and "process values," I mean the aggregation of all elements of the litigation process, including the judges, the parties, the procedural rules, and the substantive rules. Procedural Due Process ("PDP") concerns and values would be encompassed within the scope of "process values," but "process values" are not limited to the concerns of constitutional PDP.

First, and perhaps most importantly, constitutional PDP applies only against state actors, and then only when a judicially cognizable "liberty" or "property" interest is at stake. *See* Jackson v. Consolidated Edison Co., 419 U.S. 345 (1974); Perry v. Sindermann, 408 U.S. 593 (1972). Second, even when a would-be plaintiff satisfies these conditions, a rough balancing test determines the amount of process due and the timing of such process. *See* Mathews v. Eldridge, 424 U.S. 319 (1976). By way of contrast, the "process values" to which I refer should not be cabined by these limitations and should be present in all public litigation. Due process doctrine obviously bears an important relationship to process values, but it does not define or delimit them; they are not co-extensive concepts.

based acceptance.⁶⁹ Although the days of "trials by ordeal," walking across fires, being thrown into ponds while lashed to large stones, defenestration, and so forth, are long gone, dueling on the field of honor remained a feature of American dispute resolution well into the nineteenth century.⁷⁰

As the twentieth century gives way to the twenty-first, the use of such barbaric devices to resolve social conflict has given way to more formal dispute resolution techniques, ranging from traditional bench or jury trials in the public courts to the new Alternative Dispute Resolution ("ADR") proceedings.⁷¹ At the same time, however, trials by ordeal remain the way of settling claims to athletic excellence. The Denver Broncos and the Atlanta Falcons did not submit trial briefs or meet with a mediator to determine which team was the best in the land. Instead, they clashed on the gridiron in the 1999 Superbowl in an effort to vindicate through brute force their competing and mutually exclusive claims to the national football championship.

By drawing an analogy between the legitimacy of the judging of sporting events and the legitimacy of the judging of litigation, I am *not* recommending a return to the practice of trial by ordeal. I am, however, intrigued by the broad-based perceived legitimacy associated with the oversight of sporting contests at all levels of our society. Whether little league or Major League Baseball, the conduct of team sports requires the presence of judges who enforce rules, some of which are highly discretionary in their application. If one could isolate the factors that lead to the legitimacy of the judging of athletic events, one might be able to better understand the process challenge facing those who must resolve legal disputes.⁷² The analogy may not be

69. See Paul Hyams, *Trial By Ordeal: The Key to Proof in the Early Common Law*, in *ON THE LAW AND CUSTOMS OF ENGLAND: ESSAYS IN HONOR OF SAMUEL E. THORNE* 90 (Moriss Arnold et al. eds. 1981); R.C. VAN CAENEGEN, *THE BIRTH OF ENGLISH COMMON LAW* 62-84 (1973); see also Barbara J. Shapiro, *To a Moral Certainty: Theories of Knowledge and Anglo-American Juries*, 38 *HASTINGS L.J.* 153, 154-55 (1986).

70. Indeed, this practice claimed the life of Alexander Hamilton. Vice President Aaron Burr called Hamilton out to the dueling grounds and shot him dead. See BROADUS MITCHELL, *ALEXANDER HAMILTON* 536 (1962); JACK KENNY WILLIAMS, *DUELING IN THE OLD SOUTH: VIGNETTES OF SOCIAL HISTORY* (1980). Dueling essentially represented a kind of trial by ordeal: the person (or persons) walking away from the contest could claim vindication of their position. See WILLIAMS, *supra*; cf. KY. CONST. §§ 228, 239, 240 (requiring all persons holding offices under the Commonwealth of Kentucky to take an oath promising to refrain from dueling); KY. REV. STAT. ANN. § 61.100 (Michie 1996) (providing that dueling disqualifies a person from holding public office). Obviously dueling was a sufficiently serious problem in Kentucky that the framers of Kentucky's constitution thought it necessary to address the topic directly.

71. See Ware, *supra* note 67; Stephen Ware, *Punitive Damages in Arbitration: Contracting Out Government's Role in Punishment and Federal Preemption of State Law*, 63 *FORDHAM L. REV.* 529 (1994).

72. Of course, legal disputes often involve more complicated rules and fact patterns than most athletic events, so the analogy is an imperfect one. See Schroeder, *supra* note 7, at 65-66 n.171. On the other hand,

perfect, but it is sufficiently apt to make consideration of the question potentially helpful.

A. Sports Contests as a Proxy for Legitimate Judging

Americans have maintained a longstanding love affair with sports. Whether football, basketball, baseball, hockey, or another of countless athletic diversions, Americans of all ages participate in and root for myriad athletes and teams. A great many of our most popular cultural icons come from the world of sports. Although most Americans have no idea how David Souter earns his paycheck, they could instantly answer the inquiry if you were to ask them to identify Michael Jordan, Muhammad Ali, or Babe Ruth. Indeed, they would do so correctly and with alacrity.

Given the importance of sport to the American people, one might consider the process through which sports contests are judged as a means of exploring the relationship of process to the legitimacy of particular outcomes.⁷³ Every sport has its own set of rules, just as it has its own referees, umpires, or judges.

Fans of particular teams are often highly critical of the results in specific contests ("I can't believe the bums lost."). In some instances, they may even be highly critical of particular decisions by referees or umpires ("But he was out, dammit!"). It is also safe to say that people are invested personally in the result of particular contests; indeed, national championship games hold the attention of communities like nothing else.⁷⁴

Both professional and amateur athletic contests require rules and judges; if the process of enforcing the rules of the game were utterly arbitrary or indeterminate, fans would quickly lose interest.⁷⁵ After all, if the result of

even those skeptical of the utility of sports metaphors have deployed this analytical technique to good effect. See *id.* at 63-70 (demolishing a sports analogy by Professor Kent Greenawalt in favor of legal determinacy and using a baseball metaphor along the way).

73. See, e.g., JOYCE CAROL OATES, *ON BOXING* (1995) (using boxing as a prism to yield important insights into a variety of gender issues).

74. Witness the mass celebrations associated with winning a Superbowl, a World Series, or an NBA Championship. See Chris Broussard, *Off Parade Floats, the Players Themselves Become the Fans*, N.Y. TIMES, Oct. 24, 1998, § D, at 3 (describing crowd of several million Yankees fans and the players' ebullient reaction to the fans' adulation of the team); Stephen J. Gould, *At Last, I Love a Parade*, N.Y. TIMES, Oct. 24, 1998, § A, at 17 (describing the overwhelming importance of the Yankees' success to one diehard fan); Liz Leyden, *Yankees Are the Latest Hit on Broadway*, N.Y. TIMES, Oct. 24, 1998, § B, at 8 (noting that 3.5 million people attended the Yankees' victory parade in New York City).

75. See Editorial, *A Dubious Verdict At the Garden*, N.Y. TIMES, Mar. 16, 1999, § A, at 26 (criticizing the judges' decision to declare the Holyfield/Lewis bout a "draw"); Allen St. John, *Fight Scoring Looks at a Ticket to Palookaville*, N.Y. TIMES, Sept. 26, 1999, § 4, at 5 ("Fight judging is a big reason (though not the only one) why boxing has about as much credibility these days as the World Wrestling Federation. It is probably the most arbitrary undertaking in sports."); Timothy W. Smith, *Weird*

games depended entirely on the good will (or favor) of the referee or umpire, much of the excitement would be lost. Even though fans might disagree with particular calls, and even though referees and umpires sometimes make bad calls, the sports fan continues to believe in the basic fairness of the contest.

Theorists of judicial legitimacy could take a lesson from the legitimacy of team sports using referees, umpires, and judges. That is to say, the characteristics of sports judging that lead fans to deem the process legitimate might have some salience in the context of judicial decision making associated with the resolution of litigation. This is not to say that the stakes involved in professional or collegiate team athletics are materially equivalent to the stakes involved in litigation. Nor is it meant to elevate athletics to the exalted status of constitutional review. Rather, the willingness of fans to invest substantial time, money, and emotion in particular athletic contests demonstrates quite concretely that the fans view the process of enforcing the rules of the game as sufficiently fair to make the game, quite literally, worth the candle.⁷⁶

B. The Elements of Legitimacy

Fans accept the results of athletic contests for variety of reasons. None of these reasons, standing alone, sustains the interest and confidence of fans. Working in conjunction, however, these characteristics inspire the fan to

Science Gets Weirder As A Rematch for Holyfield-Lewis is Ordered, N.Y. TIMES, Mar. 15, 1999, § D, at 1 (describing the uproar after two judges failed to vote Lennox Lewis the winner of a championship heavyweight bout and reporting that the judge declaring Holyfield the winner "really didn't care" what other observers saw); see generally JOHN C. WEISTART & CYM LOWELL, THE LAW OF SPORTS § 2.15, at 154-56 (1979) (discussing the problems associated with game officials making controversial calls and the availability of formal and informal review of such calls).

76. I suppose one could posit professional wrestling as a counterexample to this general proposition. Professional wrestling is not truly competitive, insofar as the results in particular matches are predetermined and carefully choreographed. See SHARON MAZER, PROFESSIONAL WRESTLING: SPORT AND SPECTACLE (1998); Kirk Johnson, *Professional Wrestling Cuts Good Guys From the Script*, N.Y. TIMES, Mar. 30, 1998, § A, at 1; Camille Powell, *In This Ring, A Good Cause*, WASH. POST, Apr. 30, 1998, § V, at 1; see also JESSE VENTURA, I AIN'T GOT TIME TO BLEED (1999).

Rather than demonstrating that rigged contests are acceptable in professional athletics, professional wrestling is the exception that proves the general rule. Consider, in this regard, the 1919 World Series, which was rigged. See GEORGE WILL, BUNTS 113-15 (1998); see also *Fans Seeking Fame, Not Infamy for Shoeless Joe Jackson*, N.Y. TIMES, Nov. 27, 1998, § A, at 37 (describing the infamy visited upon Jackson and his teammates on the Chicago White Sox for allegedly throwing the 1919 World Series with the Cincinnati Reds); Shirley Povich, *Is It Time for Hall to Open for Shoeless Joe?*, WASH. POST, Feb. 11, 1998, § C1, at 2 (describing the allegations against the Chicago White Sox and Jackson's potential role in a plan to "throw" the 1919 World Series against the Cincinnati Reds incident to a gambling scheme). Although the Cincinnati Reds officially won the 1919 World Series and the Reds' victory remains in the record books, the outcome of the contest has been hopelessly tainted and fans of the game view the Reds' title as illegitimate. See WILL, *supra*, at 113-15; DAN GUTMAN, BASEBALL BABYLON 172-95 (1992); Povich, *supra*.

place faith in the reality and fairness of the contest; having done so, the fan deems the result—win, lose, or draw—legitimate.

1. The Same Rules Apply to Both Sides

Participants in athletic contests are bound by the same set of rules. For example, in basketball, one team is not free to give fouls without penalty; in football, running the ball into the opponent's end zone results in the addition of six points to the team's total.⁷⁷ As a formal matter, rules are rules and they are formally binding on both sides.

This is not to say that the rules of a particular game are constant across all times and places. Whether or not to permit designated hitters in baseball is a matter over which reasonable minds could differ; a shot clock of forty-five seconds might be more appropriate than a thirty-five second shot clock.⁷⁸ Even if the rules of a particular game vary in a particular league or locale, the same rules apply to both sides. A game in which one team labored under less favorable rules of play would not be particularly interesting and the result would be deemed illegitimate.⁷⁹

2. The Rules Are Determinate

Another aspect of sporting contests is that the rules—whatever they might be—do not change during the game. The rules are static with respect to a particular contest, even though the rules of a particular game (e.g., baseball) might vary somewhat from place to place or league to league.

Because the referee or umpire cannot modify the rules when applying them during a game, the rules enjoy a very high degree of formality.⁸⁰ Referees and umpires do not possess common law power over the rules that

77. See NFL, *THE OFFICIAL RULES OF THE NFL*, Rule 11, § 2, at 114 (1997).

78. In NCAA play, the rules of basketball have provided for no shot clock, a 45 second shot clock, and (the current) 35 second shot clock. See NCAA, *NCAA BASKETBALL THE OFFICIAL MEN'S COLLEGE BASKETBALL RECORD BOOK 203-04* (1997); see also NCAA, *1998 OFFICIAL RULES OF BASKETBALL*, Rule 9, § 10, at 129-31 (1997).

79. If a touchdown scored six points for the Blue Team but only four points for the Red Team, a victory by the Blue Team would be suspect if the margin of victory did not exceed the disparity associated with the disproportionate scoring of touchdowns. Cf. NFL, *supra* note 77, at Rule 11, § 1 (reporting that all touchdowns score six points). Indeed, even if the Blue Team's victory exceeded the margin associated with the bogus scoring, the presumed net effect of the bogus scoring might be deemed to delegitimize a victory by the Blue Team.

80. See P.S. ATIYAH & ROBERT S. SUMMERS, *FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW* 5-21 (1987) (describing and discussing the concept of rule formality). Basically, those who judge most sporting events act as if they are bound by the pre-existing rules and cannot modify them while the event is in progress. Cf. St. John, *supra* note 75 (describing the largely indeterminate nature of the rules governing the judging of boxing matches, including the concept of "ring generalship").

they enforce. Conduct that mandates a five-yard penalty under the rules of the game cannot be held to justify a ten-yard penalty;⁸¹ a thirty-five second shot clock cannot be reset to a forty-second shot clock.

A critic might observe that although the substantive content of the rules is mandatory, the application of those rules is not so. This observation is certainly true: a referee or umpire might choose not to make a call even on facts that justify such a call. The application of the particular rule requires good faith on the part of the referee or umpire.⁸² For reasons that I will explain later on, I think it highly likely that most referees and umpires will attempt to apply most rules in an evenhanded fashion.⁸³ This is not because they are "neutral" adjudicators in the sense suggested by Wechsler and others in the Legal Process movement, but rather because they feel constrained to appear and act in a fashion that is not obviously biased.⁸⁴

For the moment, it suffices to note that the referee or umpire lacks the power to alter the formal rules of the game. The rules bind the referee or umpire and constrain discretion, at least insofar as the referee or umpire would prefer a different rule of play.

3. *The Rules Are Known*

Even if the same rules apply to both teams and the referee lacks the ability to alter the rules during the pendency of the game, teams would be unable to enforce their rights if the rules were secret. In point of fact, the rules of a particular game are not secret: they are widely distributed and well known.⁸⁵ The teams conduct their drills and practices fully cognizant of the rules of the game. Hence, a soccer team will not practice a style of play that involves using the hands to move the ball; because the rules of soccer prohibit intentional touching of the ball by any player other than the goalie, players on a team practicing their skills will refrain from breaching this rule, for fear of making a violation of the rules a habit.

In this sense, the rules constrain behavior both within formal contests and outside such contests. Coaches, players, and fans internalize the rules and can

81. See generally NFL, *supra* note 77, Rule 8, at 87-100 (providing a number of penalties associated with plays involving passes); *id.* Rule 14, at 149-62 (setting out rather detailed rules on the enforcement of penalties involving the loss of yardage).

82. See, e.g., Eric Talmadge, *Controversial Call Keeps U.S. From Pole Vault Title*, INDIANAPOLIS STAR, Mar. 7, 1999, § C, at 9 (describing a controversial call that effectively decided the men's pole vault competition at the 1999 World Indoor Track and Field Championships in favor of a French athlete who touched the bar while vaulting).

83. See *infra* notes 89-100 and accompanying text.

84. See *infra* notes 89-100 and accompanying text.

85. See, e.g., NCAA, NCAA ILLUSTRATED MEN'S & WOMEN'S BASKETBALL RULES (1995).

cite chapter and verse on command: this conduct constitutes travelling, whereas that conduct constitutes the act of shooting. Coaches, players, and fans might genuinely dislike particular rules and believe them to be inimical to the proper conduct of the game. Even so, they will treat disfavored rules as formally binding and will, for the most part, agree to observe the disfavored rule.

It could be said that ignorance of the rules is no defense to a violation of the rules. This maxim is not often used in the context of athletic contests because the participants have near-perfect knowledge of the law. There are virtually no surprises regarding the substantive content of the rules on the basketball court, the baseball diamond, or the football field.⁸⁶ There may be dismay or incredulity associated with a particular application of the rules on facts that make a given call seem dubious. Even in these circumstances, however, the complaint is not with the substantive rule itself, but rather with its invocation on facts that do not seem (at least to one side) to constitute a violation of the cited rule.

4. The Teams Have Equal Status Under the Rules and Equal Access to Talent

In athletic competitions, both teams enjoy the same formal rights and obligations under the rules. Moreover, both amateur and professional leagues are organized according to the talents and abilities of the teams. A law firm amateur softball team will not usually play the Atlanta Braves in formal competition.

Most leagues maintain rules that establish formal parity between the teams within the league or that at least cabin the potential range of difference among teams. Thus, a New York football team is not allowed to retain a larger roster of players than a team in a smaller market (for example, Green Bay, Wisconsin). Salary caps, formal drafts for new players, and limits on free agency work in tandem to ensure that teams enjoy roughly equal access to player talent, even if the teams do not enjoy identical revenue streams.⁸⁷

86. In this sense, the rules of a particular sport might enjoy a higher level of legitimacy because they are simpler to understand—as rules become more complex and, hence, more difficult to obey, their legitimacy suffers. The Internal Revenue Code illustrates the nature of the inverse relationship between complexity and popular legitimacy. On the other hand, a simpler tax code, (e.g., a flat tax), would be easier to obey but arguably less fair, depending on its precise construction. See generally RICHARD EPSTEIN, *SIMPLE RULES FOR A COMPLEX WORLD* (1995).

87. Cf. Kurt Vonnegut, *Harrison Bergeron*, in *WELCOME TO THE MONKEY HOUSE* 7, 7-13 (1970) (describing a fictional future world in which all persons are made equal through the use of devices that destroy natural differences in both physical and mental talents and abilities by bringing everyone up or down as needed in order to ensure universal mediocrity).

These devices ensure that all the teams within a given league retain the ability to be competitive notwithstanding significant differences in financial resources.⁸⁸ Owners implement such rules in order to permit league expansion into smaller markets without jeopardizing the competitiveness of games between league teams. In the absence of such rules, differences in financial condition would lead to permanent imbalances in team ability; teams from major media markets would consistently win in games against teams from small media markets. Rules aimed at diffusing talent throughout the league ensure that league games remain competitive, and hence, of interest to fans.

5. *The Referee/Umpire/Judge Must Appear Unbiased*

The existence of constant rules that apply equally to both sides and which the coaches, players, and fans know by heart would not predictably secure acceptable results if those charged with enforcing the rules were thought to be partisan. Indeed, coaches, players, and fans would deem illegitimate a sporting contest in which the referee or umpire demonstrates clear partiality for one team or the other.⁸⁹ Even the team benefitting from the partiality would probably prefer not to have the "help" of the referee for fear that such help would taint an ultimate victory, a circumstance that might have adverse consequences for the winning team.⁹⁰ What is more, a referee or umpire who routinely engages in blatantly partisan calls will not remain a referee or umpire very long.⁹¹ Fans will protest and eventually teams would refuse to compete with the suspect referee or umpire officiating.

88. But see Richard Justice, *There's a Price to Pay, If You Can*, WASH. POST, Apr. 2, 1999, § H, at 6 (noting that discrepancies in financial resources have negatively affected the competitiveness of Major League Baseball and reporting that "[l]ast season, no team with a payroll of less than \$48 million had a winning record" whereas "[o]nly one team with a payroll in excess of \$48 million—Baltimore—had a losing record"); Sam Walker, *The Price of Victory*, WALL ST. J., June 11, 1999, § B, at 1 (describing the Arizona Diamondbacks' plan to lift a page from the Florida Marlins' playbook and spend their way into the World Series).

89. See Sam Goldaper, *Henry Iba, 88, A Top Coach in Basketball*, N.Y. TIMES, Jan. 16, 1993, § 1, at 10 (describing the circumstances of the United States National Basketball Team's 51-50 loss to the Soviet National Team at the 1972 Olympics, at which Robert Jones, an Olympic official, ordered time added to the game clock in order to allow the Soviets a new chance to beat the U.S. team).

90. For example, if a referee successfully "threw" a bowl game by consistently applying the rules in a biased fashion, those voting to establish national collegiate football rankings might elect to discount the result in evaluating the merit of the team. A victory in a cleanly-called game has more utility than a victory in a corruptly-called game.

91. See, e.g., *Skating Judges Receive Typical Marks*, supra note 9 ("when a [figure skating] judge's marks are beyond a reasonable range in scores, the judge must provide a rationale in writing. If the explanation is insufficient, the judge can risk varying degrees of response from the skating union, including an advisory, a warning, a demotion, or a suspension.").

Note that referees and umpires must only *seem* to be impartial.⁹² As an empirical matter, they are no doubt highly partial. A referee from the Southeastern Conference ("SEC") would probably prefer to see an SEC team win in a contest between an SEC affiliated team and an Atlantic Coast Conference ("ACC") affiliated team. No matter how strong the referee's preference for the SEC team, however, the referee cannot consistently engage in partisan judging.

Even if an official is, as an empirical matter, partial to a particular team, the official will feel constrained to appear impartial. Thus, if a certain level of physical contact in a basketball game constitutes a foul on the part of a player on the visiting team, the same level of physical contact must also constitute a foul when deployed by a player for the home team against a member of the visiting team. The failure of a referee in a basketball game to call fouls consistently within the same game would invite criticism from the fans, the players, the coaches, and the sports media covering the game.

It is, of course, possible for a referee in a basketball game to decline to make a call or two when a call should be made or, conversely, to call a foul for behavior on which he had previously cast a blind eye. Because calling fouls involves an element of discretion, an unscrupulous referee can deploy this discretion in order to assist (or harm) one team or the other. Although such behavior might affect the outcome of a single game, or perhaps even a group of games, the referee's ability to engage in such behavior over time is limited by the willingness of the fans, players, coaches, and sports media to accept the referee's continued service in the role of referee.

Assuming that the referee wishes to remain a referee, and to perhaps be retained for tournaments or professional games, he will attempt to call the game in good faith. The incentive structure certainly pushes a referee toward neutrality, even if the referee cannot ever truly be neutral with respect to the teams playing the game. The inability of the referee to be neutral is not essential to the legitimacy of the outcome of the game, provided that the referee's behavior does not manifest gross and obvious forms of bias.

6. Referees/Umpires/Judges Must Give Reasons in Support of Their Calls

The duty to give reasons in support of particular calls helps to cabin the discretion of game officials. Simply put, referees and umpires have an

92. See RAYMOND BOUDON, *THE ART OF SELF-PERSUASION: THE SOCIAL EXPLANATION FOR FALSE BELIEFS* (1994); MILTON ROKEACH, *BELIEFS, ATTITUDES, AND VALUES: A THEORY OF ORGANIZATION AND CHANGE* 82-108 (1986).

obligation to explain their calls—they are almost never excused from the obligation to give reasons. For example, a referee cannot simply impose a ten yard penalty in a football game without giving a reason.⁹³ When a referee gives reasons, those reasons are either accepted or rejected by the fans, the coaches, and the contestants. A referee who consistently gives bad reasons in support of his calls is likely to face adverse professional consequences.

A referee knows that his calls are going to be the subject of a certain amount of carping and disquietude. A rational referee would seek to avoid criticism of his rulings by attempting to enforce the rules in an evenhanded fashion, even if his conception of the facts necessary to invoke a rule might be at a variance from another referee's conception of the factual predicate necessary to invoke the same rule. Thus, the level of physical contact required for Referee Smith to call a foul in a basketball game might reflect a higher or lower threshold of violence than would be required by Referee Jones. Smith and Jones both call fouls and both give reasons for such calls; nevertheless, Smith and Jones might disagree as to whether a foul has been committed.

Fans do not reject the outcome of particular games because Smith calls more fouls (or fewer fouls) than Jones. So long as the rules as understood by Smith and Jones are applied evenly to both teams in a particular game, the fact that Smith and Jones conceptualize a foul in slightly different ways does not affect the willingness of the public to credit the results of games overseen by either Smith or Jones.

Imagine a system in which referees did not have to appear neutral and/or did not have to give reasons. The legitimacy of their decisions would come under sharp attack.⁹⁴ Players, coaches, and fans all expect the referee to act as

93. See NFL, *supra* note 77, Rule 15, § 2, art. 5, at 168.

After a foul, the referee (in the presence of both captains) must announce the penalty and explain to the offended captain the decision and choice (if any) as well as number of next down and distance (usually approximate) to necessary line for any possible positions of ball. See 7-1-2. The referee is to designate the offending player, when known. After an enforcement (7-3-2) he shall signal to spectators the nature of penalty by means of the visual signals specifically provided for herein.

Id. See also Friendly, *supra* note 38, at 1292 (explaining the significant benefits of requiring decision-makers to give reasons); *but cf.* St. John, *supra* note 75 ("boxing scoring is done by secret ballot, more like the Academy Awards than the Superbowl").

94. Consider the example of the infamous men's final basketball game at the 1972 Olympic games in Munich, Germany. An olympic official overruled the referees officiating the gold medal round game between the United States and Soviet national teams, adding time to the clock after the game was over in order to allow the Soviet team a second chance to beat the U.S. team—which the Soviet team did by a margin of 51-50. See Goldaper, *supra* note 89. After the Soviet team won the game in the de facto overtime, the members of the U.S. team refused to accept the silver medals, believing that they had been cheated out of the gold medals. See *id.* (noting that the U.S. team's coach "never really recognized the defeat, and the

if he is neutral as to the outcome of the game and to give persuasive reasons for his calls. If the referee were freed from these obligations, the outcome of the game would rest not with the skills of the players, but rather with the whim of the referee.

Figure skating presents perhaps the best example of a state of affairs in which judges wield largely unbounded discretion and are not required to offer reasons for their decisions. At the Olympic level, this extreme discretion has almost destroyed the credibility of the sport, as judges seem to evaluate skaters not on the excellence of their routines, but rather on the consanguinity of the skater's nationality.⁹⁵ Athletes, coaches, and fans have decried the utterly subjective nature of judging in figure skating competitions; the legitimacy of judging has come into question because the judges appear both partisan and high-handed.⁹⁶ This appearance is not corrected by a detailed explanation of why each judge evaluates a particular routine as an "4.1" rather than a "6.0."

If this sort of judging were imported into other sports, the legitimacy of the results of those games would likewise come into doubt. Imagine a football game in which the referee awarded possession of the ball on a whim, added or subtracted yardage as he thought appropriate, or scored touchdowns

United States team refused the silver medal."); see also *Medal on His Mind*, N.Y. TIMES, Aug. 17, 1984, § A, at 21 (reporting that a dozen years after the 1972 Olympics, the U.S. national basketball team had consistently refused to accept the silver medal); Ibragim Samodov, *Medalist's Ban Is a Tangled Tale*, N.Y. TIMES, Aug. 3, 1992, § C, at 2 ("The American basketball team refused to show up to accept their silver medals at the Munich Olympics in 1972, but continue to receive invitations every four years from the I.O.C. to accept their awards.").

95. See CHRISTINE BRENNAN, *EDGE OF GLORY: THE INSIDE STORY OF THE QUEST FOR FIGURE SKATING'S OLYMPIC GOLD MEDALS* 42-43, 88-89, 108, 120-24, 141 (1998); CHRISTINE BRENNAN, *INSIDE EDGE: A REVEALING JOURNEY INTO THE SECRET WORLD OF FIGURE SKATING* 68-91, 274-75 (1996) [hereinafter *INSIDE EDGE*]; *Skating Judges Receive Typical Marks*, *supra* note 9; Lisa Luciano, *Ice Theatre of the Absurd Turns Into Russian Fairy Tale*, N.Y. TIMES, Feb. 27, 1994, § 8, at 1 (noting that Western skaters were not outperformed at the Lillehammer, Norway Olympic Games but instead were "outmanned where it counts—on the judges' panel."); Liesl Schillinger, *A Not-So-Nice World on Ice*, WASH. POST, Feb. 5, 1996, § C, at 2 ("Whether at the Olympics or in local competitions . . . judging is often capricious and even arbitrary."); Amy Shipley, *New Reforms Tighten Judges' Point System*, WASH. POST, Feb. 16, 1998, § C, at 8 ("The call for judging reform in ice dancing has reached new heights during these Olympic games. Not only have skaters and coaches been uncharacteristically outspoken in their criticism of their sports' judges, but figure skating's international governing body also has announced more stringent guidelines for point deduction for falls.").

Other sports featuring relatively subjective forms of judging, such as diving and gymnastics, seem to have avoided the intractable problems plaguing figure skating. It is not obvious why this state of affairs exists. On the one hand, it seems unlikely that the elements of diving or gymnastics are any more "objective" than the elements of figure skating. It might be that the financial consequences of a gold medal in figure skating are more substantial than for a gold medal in diving or gymnastics. If this were so, then the difficulty associated with relatively subjective judging would simply be a form of rent seeking by a given set of nationals.

96. See BRENNAN, *INSIDE EDGE*, *supra* note 95, at 71-91.

and fieldgoals on a sliding scale. The viability of the game requires reasonably determinate rules and cabined discretion on the part of the officials; a requirement that officials give reasons in support of their calls is essential to cabining the discretion of the judges.⁹⁷

7. *The Games Are Open to the Public*

It is sometimes said that "sunshine is the best antiseptic." Athletic contests are open to the public, so that referees and umpires are subject to observation and criticism not only by the players and the coaches, but also by the public. To be sure, the public's ability to sanction a bad referee or umpire is quite limited. Beyond the shaming function of a round of boos and hisses, the audience at a sporting event possesses no direct authority to reverse a bad call by an official.⁹⁸

On the other hand, one cannot help but think that consistent negative responses from the audience would have an effect on the referee. Although

97. See Friendly, *supra* note 38, at 1292; cf. BRENNAN, *INSIDE EDGE*, *supra* note 95, at 71-89. On the other hand, one scholarly commentator has seriously questioned the relationship of reasoned analysis to the legitimacy of quasi-judicial decisions. See Alan Scott Rau, *Integrity in Private Judging*, 38 S. TEX. L. REV. 485, 529-39 (1997). As Professor Rau puts the matter:

Surely an arbitrator obligated to make a reasoned award may be expected to deploy his rhetorical ability, ingenuity, creativity, and imagination in articulating the narrowest, the most plausible, or the most conventional rationale for his decision—all in the interest of commanding the acquiescence of the disputing parties or a reviewing court.

Id. at 531. He essentially argues that a requirement for reasoned explanation may be little more than an invitation to rhetorical manipulation, empty verbiage largely devoid of meaningful "explanatory power." See *id.* at 531-32. Moreover, Rau suggests that removing a duty of explanation might lead to substantively more just results. See *id.* at 533-35. Perhaps this might be so, at least in the context of an arbitration, a proceeding to which both parties must freely give their consent and in which the arbitrator (or arbitral panel) is presumed to enjoy more than passing familiarity with the particular line of business at issue and its customs and practices. In the public courts, however, where the parties have not selected a particular judge (or panel of judges), the duty of reasoned explanation is essential to maintaining the integrity of the process. A judge has as much obligation to explain to the community why the prevailing party has achieved that status as she does to explain to the losing party why the decision is adverse. See generally Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633 (1995) (examining the relationship between reasons and the acceptability of judicial decisions); Girardeau A. Spann, *Expository Justice*, 131 U. PA. L. REV. 585 (1983) (exploring the role of courts as arbiters of community values and the relationship of reasons to the legitimacy of judicial work product).

98. Of course, fans do wield economic influence. If a particular rule of play were sufficiently noxious to fans and reduced live attendance and television viewership, one would expect team owners to take preemptive action to avoid a loss of revenue. See, e.g., Lapointe, *supra* note 8; Jim Taylor, *NHL Licking to Slice Hockey Into Quarters*, FINANCIAL POST, Jan. 20, 1998, § 3, at 59 (describing proposals to increase hockey attendance/viewership by abandoning three period game division and documenting a U.S. proposal to modify international soccer rules by going to four quarters, eliminating center line off-sides, and enlarging the size of the goals, all in hopes of generating a larger fan base in the United States for professional soccer). A rabid soccer fan informs me that such proposals to increase the commercial viability of professional soccer are anathema to current fans of the game.

the referee should be prepared to make hard calls in the face of a hostile crowd, all things being equal, the official would probably prefer the fans to ratify rather than reject his call. The presence of an audience—an often loud, vocal audience—undoubtedly encourages referees to attempt to be fair in applying the rules of the game (at least when the audience is roughly equally divided between fans of both teams).

Absent a duty of explanation, the presence of a live audience would probably not be sufficient, by itself, to cabin discretion effectively.⁹⁹ When coupled with an obligation to give reasons, however, it creates a kind of instant plebiscite on the legitimacy of the official's decision. Of course, if the audience is itself highly biased in favor of the home team, the presence of the public might well encourage the official to follow suit. Viewed from this perspective, the presence of a vocal, biased audience creates a pressure on referees to be partial, to be biased, to favor the home team. This pressure might be somewhat reduced if the event were televised to a wider regional or national audience that would, presumably, include a roughly equal number of fans of both teams. In such circumstances, the effect of the coverage might be to invite the referee to overcome the immediate local pressure in order to impress a wider audience with his ability to call the game properly.¹⁰⁰

C. One Changes the Game By Changing the Rules Governing Process and Not By Preordaining Particular Outcomes

Fans place faith in the results of particular matches because of the process-based considerations governing the officiation of sports contests described in Part II.B. Fans judge the legitimacy of a given match not by the outcome, but rather by the application of the rules by the referees during the game. Concerns about a particular game's ability to hold the interest of fans is not a function of which team wins¹⁰¹ but rather a function of the process

99. Olympic figure skating once again provides a useful example. Figure skating events are open to the public, but this circumstance does not seem to check unbridled partisanship on the part of some judges. See BRENNAN, *INSIDE EDGE*, *supra* note 95, at 71-91, 274-75; Luciano, *supra* note 95; Shipley, *supra* note 95; *Skating Judges Receive Typical Marks*, *supra* note 9.

100. Moreover, the financial interest of team owners is (or should be) a serious check on arbitrary officiation—if fan disgust at officiation begins to affect team revenues, the team owners are likely to take aggressive corrective action. See, e.g., St. John, *supra* note 75 (reporting on reform efforts in New York and New Jersey to improve the process values associated with the judging of professional boxing matches, efforts driven by the controversy surrounding the officiation of the recent De La Hoya/Trinidad and Holyfield/Lewis bouts and the risk of lost revenue).

101. Again, professional wrestling would arguably constitute an exception to this rule, if one were to deem it a legitimate sport. See Fred Ahrens, *Grappling With Good and Bad: Pro Wrestling Adapting Its Dramas To Our Morally Ambiguous Times*, WASH. POST, Nov. 27, 1998, § D, at 1 (describing a professional wrestler's obligation to go from being a "good" character to an "evil" or "bad" character in

associated with the conduct of the contest.

When Dean Smith's "four corner" offense slowed down the pace of collegiate basketball games,¹⁰² the NCAA introduced the shot clock to require teams either to shoot the ball or lose possession of it upon expiration of the shot clock, thereby forcing turnovers (whether from points scored, defenders rebounding successfully, or shot clock violations¹⁰³). In professional basketball, a concern about the pace of the game led to the adoption of a rule against "illegal defenses," which is essentially a prohibition against using a zone defense rather than a man-to-man defense.¹⁰⁴ In both instances, the governing bodies overseeing the sport did not seek to change the results in particular contests, but rather altered the procedures that govern all contests.¹⁰⁵ Whether the University of North Carolina ("UNC") won or lost after the adoption of the shot clock was a function of the excellence of UNC's teams, not a preordained list of wins and losses.¹⁰⁶

Grand theory legal scholarship, on the other hand, generally proceeds from a predetermined result; *e.g.*, only economically efficient results are legitimate. Viewed from the perspective of the sports metaphor, this is like saying that a basketball game is only a real basketball game if the Bulls win. If one is trying to assess the net cost or benefit of a given legal rule, judging the work product of courts from a particular set of lenses might make some sense. If a scholar's project is legitimating the judicial process itself, however, it leaves much to be desired. This is so because the desirability of a particular substantive rule has no necessary connection to the institutions and procedural rules associated with enforcing that substantive rule.

order to help maintain fan interest); Johnson, *supra* note 76 (describing contemporary professional wrestling's tendency to market its product through violence and bloodshed, abandoning somewhat tamer values in which "good guys mostly won" in a world of "bloodless aggression."). For an academic examination of professional wrestling and its various and sundry pathologies, see MAZER, *supra* note 76.

102. See DEAN SMITH, BASKETBALL, MULTIPLE OFFENSES AND DEFENSES 74-83 (1982) (describing how and when to execute the "four corners" offense); see also ART CHANSKY, THE DEAN'S LIST: A CELEBRATION OF TARHEEL BASKETBALL AND DEAN SMITH 93-101, 106-08, 116 (1996) (providing a history of Coach Smith's use of the four corners offense and suggesting that Coach Smith actually welcomed the adoption of the shot clock).

103. See NCAA, 1998 OFFICIAL RULES, *supra* note 78, Rule 9, § 10, at 129; NCAA, RECORDS BOOK, *supra* note 78, at 203.

104. See NBA OPERATIONS DEPARTMENT, OFFICIAL RULES OF THE NATIONAL BASKETBALL ASSOCIATION, 1997-98, Rule 12(a), §§ I & II, at 36-38 (1997).

105. See NCAA, RECORDS BOOK, *supra* note 78, at 202-04 (describing various changes in basketball's rules from 1891 to the present).

106. Sadly for Duke fans, the introduction of the shot clock did not seem to cripple UNC's winning ways under Coach Smith. See Chansky, *supra* note 102, at 123-52.

D. The Rules of the Game as the Rule of Law

In many respects, the elements that make a rooting interest in the outcome of an athletic contest possible (or plausible) bear a pronounced resemblance to the "Rule of Law," as explicated by jurisprudential thinkers of both the Right and the Left. Although one could write an entire book on various theories of the Rule of Law, Friedrich Hayek and E.P. Thompson's thoughts on the matter will suffice for present purposes.

Friedrich Hayek, a noted liberal thinker embraced by conservatives, broadly embraces the "Rule of Law" as an essential attribute of a just society. "Nothing distinguishes more clearly conditions in a free country from those in a country under arbitrary government than observance in the former of the great principles known as the Rule of Law."¹⁰⁷ According to Hayek:

Stripped of all technicalities, this means that government in all its actions is bound by rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge.¹⁰⁸

The discretion to make up the rules as one goes along "should be reduced as much as possible."¹⁰⁹

According to Hayek, indeterminacy in law impedes rational planning and upsets reasonable expectation interests.¹¹⁰

The Rule of Law thus implies limits to the scope of legislation: it restricts it to the kind of general rules known as formal law and excludes legislation either directly aimed at particular people or enabling anybody to use the coercive power of the state for the purpose of such discrimination.¹¹¹

For Hayek, the Rule of Law is not only one of the "greatest achievements" of the liberal age, but also "the legal embodiment of freedom."¹¹²

E.P. Thompson, the noted English historian and Marxist, also embraces the Rule of Law as "an unqualified human good."¹¹³ He explains that while individual laws may be unjust or invidious, "[t]he Rule of Law itself,

107. HAYEK, *supra* note 13, at 72.

108. *Id.*

109. *Id.* at 72-73.

110. *See id.* at 73-77.

111. *Id.* at 83.

112. *Id.* at 81-82.

113. THOMPSON, *supra* note 13, at 266.

imposing of effective inhibitions upon power and the defence of the citizen from power's all-intrusive claims, seems to me to be an unqualified human good."¹¹⁴ In language strikingly similar to Hayek's, Thompson explains that "if the law is evidently partial and unjust, then it will mask nothing, legitimize nothing, contribute nothing to any class's hegemony."¹¹⁵ For law to be effective as a means of social control and as an ideological bulwark for existing political arrangements, it must "display an independence from gross manipulation and shall seem to be just. It cannot seem to be so without upholding its own logic and criteria of equity; indeed, on occasion, by actually *being* just."¹¹⁶

Thompson's endorsement of the Rule of Law was not without controversy.¹¹⁷ As Professor Dan Cole has explained, traditional Marxists "had, of course, heard similar pronouncements, but from the likes of Hayek, Dicey, and others among their liberal 'enemies;' never from one of their own."¹¹⁸ One should not overstate Thompson's commitment to the Rule of Law—"Thompson appears to adopt a minimal conception of the Rule of Law, defining it as little (or nothing) more than a rule of equal application of legal rules, which limits ruling power."¹¹⁹ This, of course, corresponds rather nicely with Hayek's definition of the Rule of Law.

Other iterations of the Rule of Law include more specific requirements, such as the provision of particular legal processes (due process),¹²⁰ an independent judiciary,¹²¹ or respect for particular substantive goals or rights.¹²² Common to almost all variations of the concept of the Rule of Law is a commitment to limiting official discretion in meaningful ways and ensuring that adequate process accompanies the application of previously established, known rules.

The rules governing most major athletic contests incorporate these major elements of the Rule of Law: known rules cabin discretion, procedures define and restrict the application of rules, disputes over the substantive content of rules are settled independently of the application of the rules during a game, and so forth. Indeed, the public invests so much time, money, and energy in

114. *Id.*

115. *Id.* at 263.

116. *Id.*

117. See Dan Cole, "An Unqualified Human Good": E.P. Thompson and the Rule of Law (Mar. 7, 1999) (unpublished manuscript on file with the author).

118. *Id.* at 13.

119. *Id.* at 16.

120. See, e.g., JOHN RAWLS, A THEORY OF JUSTICE 399 (1971).

121. See Joseph Raz, *The Rule of Law and Its Virtue*, 93 L.Q. REV. 195, 201 (1977).

122. See RONALD DWORKIN, A MATTER OF PRINCIPLE 11-18 (1985); LON L. FULLER, THE MORALITY OF LAW 38-39 (Rev. ed. 1969).

following athletic contests precisely *because* the adjudication of such events reliably observes the "Rule of Law."

If the central animating force of the Rule of Law is a set of determinate rules (as Hayek and Thompson would have us think), then the existing system of formal civil and criminal adjudication is problematic. Judicial discretion, antithetical to both Hayek's and Thompson's vision of the Rule of Law, permeates the public courts in the contemporary United States.¹²³ Of course, the courts possess this discretion ostensibly in order to promote individual justice in discrete cases.¹²⁴

Paradoxically, the ability to rewrite rules incident to the adjudication of a case gives rise to a potential crisis in judicial legitimacy; for the power to bend or remake the rules necessarily engenders questions about a judge's motives for granting or withholding relief from particular litigants. In turn, this skepticism about the reasons animating a judge's decision to exercise discretion has led some commentators to question the basic fairness of the public courts of law and, in some instances, to advocate that cultural minorities abandon the public courts in favor of quasi-private, community-based systems of adjudication.¹²⁵

This concern is not ill-founded. At the beginning of this century, Justice Cardozo openly admitted that judges not only possess tremendous discretion in identifying and applying legal principles, but also exercise this discretion in a fashion consistent with their pre-existing beliefs and values.¹²⁶ As Cardozo so famously put it, "[t]he great tides and currents which engulf the rest of men, do not turn aside in their course, and pass the judges by."¹²⁷ According to Cardozo, the ideal of neutral judges applying "[t]he law, conceived of as a real existence, dwelling apart and alone" has "a lofty sound" but is little more than "partly true."¹²⁸

Precedent, traditions, and a felt sense of duty all limit a judge's discretion and "will help in some degree to emancipate him from the suggestive power of individual dislikes and prepossessions."¹²⁹ Nevertheless, subconscious loyalties will remain and "[n]ever will these loyalties be utterly extinguished while human nature is what it is."¹³⁰

123. See generally Henry Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 754-62 (1982) (discussing the concept of judicial discretion and its costs and benefits to the legal system).

124. See *id.* at 754-55.

125. See *infra* notes 159-215 and accompanying text.

126. See BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921).

127. *Id.* at 168.

128. *Id.* at 168-69.

129. *Id.* at 176.

130. *Id.* at 176.

Ultimately, Cardozo posits that “[t]he eccentricities of judges balance one another.”¹³¹ Judges from different backgrounds will bring different strengths and weaknesses to the bench; “out of the attrition of diverse minds there is beaten something which has a constancy and uniformity and average value greater than its component elements.”¹³² Ever the optimist, Cardozo suggests that “[t]he tide rises and falls, but the sands of error crumble.”¹³³ “In the endless process of testing and retesting, there is a constant rejection of the dross, and a constant retention of whatever is pure and sound and fine.”¹³⁴

It is quite understandable that some cultural minorities might not want to wait for the tide of history to carry the judicial “dross” out to sea, particularly if the “dross” impedes their ability to live happy, fulfilling lives. Indeed, rather than serve as (quite literally) grist for the judicial mill, some might prefer to find adjudicators with a better appreciation of their problems and the relation of their community to the lived experience of these problems.¹³⁵

III. JUDGES AS UMPIRES (OR, THE ULTIMATE SPORTS ANALOGY)

At the risk of sounding like George Will or Bob Costas, careful consideration of the matter demonstrates that team-based athletics present a near perfect system of law—a system of law that complies with most iterations of the Rule of Law. In this system, the law applies evenly to both sides (sides which enjoy roughly equal access to talent), does not change during a particular contest, is perfectly known to all parties and the public, is enforced by persons with a strong motive to appear fair and impartial and who, in any event, must give reasons, in public, to support their application of the rules. The mandatory nature of the rules and the effective scheme of enforcement leads to a high degree of voluntary compliance by those bound by the rules, not only when a referee is present to enforce the rules, but also when the players are not under the direct supervision of a formal judge.¹³⁶

131. *Id.* at 177.

132. *Id.*

133. *Id.*

134. *Id.* at 179.

135. See *infra* notes 159-215 and accompanying text.

136. For example, in a pick-up game of basketball, the players will agree to a voluntary system of rule compliance. Hence, punching another player will constitute a foul and if the punch is thrown while a player is in the act of shooting, the defender will acquiesce if the punched player demands free throw shots. The aggressive defender agrees to abide by the rules not only to make the game viable, but also because the aggressive defender wants the benefit of the rules for herself. See generally BRUCE BENSON, *THE ENTERPRISE OF LAW: JUSTICE WITHOUT THE STATE* 11-41 (1990) (arguing that the existence of formal governmental structures is not a prerequisite to the development and enforcement of systems of law).

A. Difficulties in Making the Analogy

A number of potential objections exist to the sports analogy. Principal among them are the problem of judicial discretion and the inequality of arms between litigants in both criminal and civil cases.

1. Judicial Discretion Undermines the Legitimacy of Judicial Decision Making

The judging of athletic contests enjoys a high degree of legitimacy because the referee's or umpire's discretion is tightly cabined by a system of high rule formality, the public enforcement of the rules, and the obligation to give reasons. The legitimacy problem associated with judging cases is directly linked to the absence of these characteristics in courts of law.

In any case involving a common law claim, the rules are subject to change incident to the proceeding before the court. A contract, tort, or property claim could fail if the presiding judge decides to create a new rule of the common law that precludes relief on the facts alleged. This sort of indeterminacy simply does not exist in the vast majority of athletic contests (with the possible exceptions of professional wrestling and figure skating). The ability of the judge to change the rules incident to a particular litigation precludes the parties from knowing the rules with certainty going into the trial and can lead to a great deal of dislocation if the lawyers for the plaintiff prepare and argue the case based on the common law that existed prior to the judge's decision to make a new rule.

In a real sense, the common law system of judging undermines the legitimacy of the judicial process by vesting judges with the power to rewrite the rules after the contest has been joined.¹³⁷ Of course, judges—unlike most referees and umpires—face cases raising novel legal problems born of technological or social change and—unlike most referees and umpires—must decide how to apply preexisting legal rules and doctrines to unforeseen factual circumstances. The inevitability of change in the common law does not, however, cabin or resolve the problem of judicial discretion.

Cases involving statutory law do not fare much better. Even when a claim rests on a statutory claim of right, the ability of judges to interpret statutory language creates a kind of wiggle-room that allows them substantial

137. Cf. GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 82-90, 141-66 (1982) (arguing that the common law function of judges is essential to maintaining an acceptable set of rules that adequately reflect contemporary circumstances).

discretion to accept or reject particular claims at bar.¹³⁸ By way of comparison, the rules of most athletic contests are relatively simple and enjoy common interpretations.¹³⁹

It is certainly true that the decision to apply a particular rule in given circumstances involves discretion on the part of a referee or umpire. In this respect, the discretion problem is common to both the judging of cases and the judging of athletic contests. To the extent that a difference exists, it is that a referee must give a reason at the time she makes the call, a reason that may or may not prove persuasive to the various interested parties. A judge may decline to apply a rule without giving a reason—a whole variety of summary decision techniques exist at both the trial and appellate levels of state and federal courts.¹⁴⁰ Even when a judge provides a reason, it is not subject to the kind of broad-based scrutiny that the average referee's call receives because the community is largely unaware of the day-to-day workings of state or federal courts.

Those charged with deciding legal questions enjoy less legitimacy because they have the power to change the rules and, even if they decline to alter the rules during a particular litigation, their ability to refuse to apply the rules in an evenhanded fashion is broader than a referee's or umpire's discretion. These factors alone would give rise to a problem in the legitimacy of the judicial process: if a judge can alter the rules or refuse to apply the preexisting rules, questions naturally arise as to why she would do so in a particular case. The decision maker does not appear unbiased and those appearing before the tribunal lose faith in the basic fairness of the process.

In this sense, then, the formality and mandatory nature of rules, coupled with a duty of explanation and a public oversight of the decisional process can legitimize a decisionmaking process; competitive sports reflect a system of high rule formality coupled with a duty of public explanation.

138. See ATIYAH & SUMMERS, *supra* note 80, at 100-14; Easterbrook, *supra* note 64, at 423-29.

139. This view may be somewhat optimistic; sometimes the enforcement of rules in sporting contests does seem to depend on the players in question. For example, an NBA referee might expect Dennis Rodman to give cheap fouls, whereas the same referee might be more likely to turn a blind eye on identical conduct on the part of a "nice guy" player, like Grant Hill. See generally DENNIS RODMAN, *BAD AS I WANNA BE* (1996). In this sense, some players "get the calls" whereas other players do not.

140. See, e.g., FED. R. APP. P. 36; FED. R. CIV. P. 12(b)(6); see generally Alexander M. Bickel, *The Supreme Court 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 47-58, 79 (1961) (arguing in favor of clever decision avoidance techniques that permit judges to avoid deciding hard cases without admitting that this is their real objective); Alexander M. Bickel & Harris H. Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1, 8-9, 19-20, 31-35 (1957) (same). For a discussion of the phenomenon of federal appellate judges refusing to give reasons for their rulings and the possible motivations for such behavior, see Mitu Gulati & C.M.A. McCauliff, *On Not Making Law*, 61 LAW & CONTEMP. PROBS. 157 (Summer 1998). For another perspective, see Ginsburg, *The Obligation to Reason Why*, *supra* note 14, at 218-23.

Notwithstanding the potential bias of referees or umpires, those charged with overseeing the rules and conduct of particular sports have, by and large, designed systems of officiating competitive sporting events that minimize the potential for bias and, moreover, that correct for bias if it should manifest itself. Conversely, the judicial process (at least in the United States), unlike sport, does not manifest the same high level of rule formality or include a similarly strong duty of explanation. Paradoxically, a concern for ensuring that courts have the ability to do substantive justice in individual cases has created an indeterminacy problem that erodes the legitimacy of judicial decision making.¹⁴¹

The judicial process includes elements of discretion that produce the opportunity for biased adjudicators (meaning all adjudicators) to predetermine outcomes. In theoretical terms, we have virtually come full circle. After considering the elements of competitive athletics that make the results of such contests legitimate, it became clear that rule formality (*i.e.*, the rules are clear, known, and mandatory), parity of arms, and the obligation to give reasons, in public, when applying the rules differentiates the officiation of athletic contests from the adjudication of legal claims. The discretion problem gives rise to a legitimacy problem—the very crux of the indeterminacy problem advanced by the Critical Legal Studies movement.¹⁴²

It would be possible, theoretically, to devise a system of adjudication that more closely resembles the sports analogy. We could imagine a world in which judges have less discretion to make and shape legal rules, a world in which judges “apply the law but do not make the law.”¹⁴³ Such a rule could not, of course, be absolute in application, even if absolute in theory. It is not possible completely to prevent judges from exercising discretion when adjudicating legal claims. A system of higher rule formality is, however, possible. Indeed, the United Kingdom presents a model of a system in which judges exercise substantially less discretion when applying specific legal rules to individual cases.¹⁴⁴ That said, the fact remains that in any common law system the discretion problem is going to loom quite large, for a judge in a common law jurisdiction cannot effectively disclaim responsibility for the content of the rules to be applied.¹⁴⁵

To overcome this objection, one would have to reject the common law

141. See ATIYAH & SUMMERS, *supra* note 80, at 43-53, 70-95, 120-28; *cf.* Edwards, *The Judicial Function*, *supra* note 14, at 855-63 (arguing that judicial discretion in the U.S. Courts of Appeals for the D.C. Circuit is to a large degree more apparent than real).

142. See TUSHNET, *supra* note 14, at 822-27; *see also* TUSHNET, *supra* note 46, at 42-57.

143. See TUSHNET, *supra* note 14, at 781-82 & 781 n.1.

144. See ATIYAH & SUMMERS, *supra* note 80, at 75-95, 118-27.

145. See CALABRESI, *supra* note 137, at 38-43, 70-80, 92-114, 124-35.

method entirely. Nations embracing the civil law tradition have adopted such an approach and attempt, to the maximum extent possible, to constrain judicial discretion through positive statutory law; in civil law jurisdictions, "judge-made law" is supposed to constitute an empty set.¹⁴⁶ Once again, however, the effort to cabin discretion by prohibiting judge-made law is only a partial solution to the problem of discretion. Statutes are ambiguous, legislators fail to update statutes on a regular basis, and new circumstances arise that in turn lead to disputes unforeseen by the legislators who drafted a particular code provision.¹⁴⁷

In order to do substantive justice in individual cases, judges require the power to modify legal rules. This discretion to modify the rules governing a particular dispute in turn gives rise to a potential appearance of cultural bias: members of cultural minorities may fear that this discretion will consistently be deployed in a fashion adverse to their individual and collective interests.¹⁴⁸ Because the discretion to modify rules incident to the adjudication of legal claims is unlikely to be abolished anytime soon, a renewed focus on how judges exercise that discretion—on the procedures and rules that ostensibly cabin its use—presents the next best alternative for ensuring that all constituencies within the community deem judicial decision making legitimate.¹⁴⁹

2. *Litigants Are Not Sports Teams*

Another important difference between civil and criminal litigation and the resolution of professional and amateur sporting events has to do with the relative parity of talent that exists in both professional and amateur team sports. Simply put, in many instances imbalances in wealth lead to serious mismatches of legal talent. An average citizen suing a major corporation can expect to encounter significant difficulty in locating and retaining counsel

146. See JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA* 19-33, 39-55, 61-67, 80-84 (2d ed. 1985).

147. See CALABRESI, *supra* note 137, at 120-35, 141-45.

148. See Spitzko, *supra* note 34, at 81-89, 96-97.

149. From the perspective of some commentators, even belling the cat is not a sufficient safeguard against the ill-effects of cultural bias. See *infra* notes 159-216 and accompanying text. In the interests of full disclosure, I must confess that in a variety of contexts, I have embraced judicial discretion as preferable to a system of determinate, but arbitrary, rules. See Krotoszynski, *supra* note 22, at 342-46; Krotoszynski, *Celebrating Selma*, *supra* note 66, at 1432-39; Krotoszynski, *On the Danger of Wearing Two Hats*, *supra* note 66, at 472-84. Essentially, I believe that with sufficient procedures it is possible to mitigate the risks associated with judicial discretion arising from open-ended, context sensitive legal rules. Thus, if a novel proposal for a new judicial task comes with sufficient procedural checks and advances the project of good governance in material ways, the proposal deserves careful consideration. See, e.g., Ronald J. Krotoszynski, Jr., *Constitutional Flares: On Judges, Legislatures, and Dialogue*, 83 MINN. L. REV. 1 (1998).

with experience and ability equal to that of the defendant's counsel.

In both civil and criminal cases, those who lack the financial means to pay the fees of talented lawyers face the prospect of entering the contest at a serious disadvantage. For example, a criminal defendant relying upon court-appointed counsel will probably receive a less favorable plea arrangement and is less likely to prevail at trial than a defendant facing identical charges who is represented by a "dream team."¹⁵⁰ Prosecutors discount the probability of success when facing highly-talented defense counsel and act accordingly in plea negotiations.¹⁵¹ Thoughtful scholars and jurists also have raised hard questions about the relationship of race and class to prosecutors' behavior.¹⁵²

In many instances, the mismatch in access to legal talent and resources is both significant and outcome determinative. In keeping with the sports analogy, some litigations are the equivalent of the Peoria Knights of Columbus Men's Basketball team playing the Michael Jordan-era Chicago Bulls. The inability of many litigants to retain the best lawyers when facing opponents with an ability to retain top legal talent undoubtedly gives rise to a profound cynicism about the ultimate fairness of the entire process. There is more than a kernel of truth to the maxim that one set of laws governs the affairs of the poor and another set of laws governs the affairs of the wealthy.¹⁵³

150. See KENNEDY, *supra* note 40, at 292-95; LLOYD L. WEINREB, DENIAL OF JUSTICE 57-60 (1977); William Stuntz, *The Uneasy Relationship Between Criminal Procedures and Criminal Justice*, 107 YALE L.J. 1, 35-37 (1997); cf. H. RICHARD UVILLER, THE TILTED PLAYING FIELD: IS CRIMINAL JUSTICE UNFAIR? 163 (1999) ("Defendants favored or disfavored by the imbalance [in lawyering skills] cannot readily be distinguished in bankbook terms. Many of the ablest trial lawyers work for public defense agencies or are available for assignment. And the skill of prosecutors varies widely.").

151. See DAVID A. JONES, CRIME WITHOUT PUNISHMENT 98-101, 120-36, 209-10 (1979); NASHERI HEDJEH, BETRAYAL OF DUE PROCESS 26-34 (1998); Joyce S. Sterling, *Retained Counsel Versus the Public Defender: The Impact of Type of Counsel on Charge Bargaining*, in THE DEFENSE COUNSEL 151, 160-62 (William F. McDonald ed., 1983); Dean J. Champion, *Private Counsels and Public Defenders: A Look at Weak Cases, Prior Records, and Leniency in Plea Bargaining*, 17 J. CRIM. JUST. 253, 262 (1989); Stevens H. Clarke & Susan T. Kurtz, *The Importance of Interim Decisions to Felony Trial Dispositions*, 74 J. CRIM. L. & CRIMINOLOGY 476, 507 (1983); Michael McConville & Chester C. Mirsky, *Criminal Defense of the Poor in New York City*, 15 N.Y.U. REV. L. & SOC. CHANGE 581 (1986-87); Jon L. McGregor, *The Market Model of Plea Bargaining*, 6 PUB. AFF. Q. 385, 386 (1992); Raymond Patemoster, *Prosecutorial Discretion in Requesting the Death Penalty: A Case of Victim-based Discrimination*, 18 LAW & SOC. REV. 437 (1984); but cf. UVILLER, *supra* note 150, at 165-66 (questioning whether the ability to retain paid defense counsel affects either prosecutor behavior or final outcomes).

152. See *McClesky v. Kemp*, 481 U.S. 321-22, 325-35 (1987) (Brennan, J., dissenting); DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM (1999); CORAMAE MANN, UNEQUAL JUSTICE: A QUESTION OF COLOR (1993); KENNEDY, *supra* note 40.

153. See Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not For the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1835-41, 1878-82 (1994); Donald A. Dripps, *Ineffective Assistance of Counsel: The Case for an Ex Ante Standard*, 88 J. CRIM. L. & CRIMINOLOGY 242, 252-54 (1997).

Consistent mismatches in access to representation raise a serious problem with the perceived fairness of the entire legal system. Resolving this problem while continuing to allow a free market in legal services would be very difficult. At the same time, failing to address the problem creates a significant impediment to securing general acceptance of the legitimacy of the legal system itself.

In this regard, it bears noting that some academics have proposed rethinking the dimensions of the constitutional right to counsel under the Sixth Amendment. Several commentators have proposed reducing the scope of federal habeas review of both state and federal criminal convictions, but conditioning such limitations on an expansion of the right to counsel.¹⁵⁴ The basic argument posits that if the Supreme Court interpreted the right to counsel to impose a higher standard of professional excellence than the minimum competency required under *Strickland v. Washington*,¹⁵⁵ there would be significantly less reason to provide routine collateral review of most state court criminal convictions in the federal courts.¹⁵⁶ In my view, this approach has much to recommend it. Moreover, such an approach would have the ancillary benefit of engendering greater confidence in the overall fairness of the judicial process, at least insofar as criminal trials and appeals are concerned.

The imbalances in access to legal talent in the civil context also need to be addressed. This is not to say that everyone should be deemed to have a right to representation by Johnnie Cochran in a routine slip-and-fall case against the neighborhood supermarket. Obviously, there always will be differences in the abilities of counsel in a given case. My point is more limited: the bar should be concerned about the ability of persons of average means to secure

154. See, e.g., Paul M. Bator, *Finality In Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 451-62, 521-23 (1963); Vivian Berger, *Justice Delayed or Justice Denied?—A Comment on Recent Proposals To Reform Death Penalty Habeas Corpus*, 90 COLUM. L. REV. 1665, 1672-84 (1990); Dripps, *supra* note 153, at 245-51, 281-84; Daniel J. Meltzer, *Habeas Corpus Jurisdiction: The Limits of Models*, 66 SO. CAL. L. REV. 2507, 2525-27 (1993); Comment, *The Eighth Amendment and Ineffective Assistance of Counsel in Capital Trials*, 107 HARV. L. REV. 1923, 1923-30, 1938-40 (1994); Note, *Tinkering With the Machinery of Death: An Examination and Analysis of State Indigent Defense Systems and their Application to Death-Eligible Defendants*, 37 WM. & MARY L. REV. 1617, 1621-22, 1630-38 (1996).

The quality of representation indigent defendants receive in state court systems raises very serious questions about the reliability of convictions in these systems, not only for defendants facing capital crimes, but also for defendants facing other felony charges. See Bright, *supra* note 153, at 2525-27; see also NORMAN LEFSTEIN, *CRIMINAL DEFENSE SERVICES FOR THE POOR* 11-26 (1982) (describing the serious shortcomings of legal services for the indigent in most states); American Bar Association, Criminal Justice Section, *Report to the House of Delegates*, 40 AM. U.L. REV. 9, 14-27 (1990) (same).

155. 466 U.S. 668 (1984).

156. See Bator, *supra* note 154, at 521-23; Dripps, *supra* note 153, at 281-83.

competent legal representation without undue difficulty. The legitimacy of the legal process requires more than a mere theoretical possibility of an equality of arms; it requires that every litigant enjoy access to nominally competent counsel when significant legal rights are at issue.

If the bar proves unwilling to address the problem of an inequality of arms, then legislatures should step into the breach by funding access to legal services for those of modest means. By this, I do not mean only the most abjectly poor citizens. Working class families should also enjoy reasonable access to competent legal counsel. It is certainly true that the Constitution does not generally require the state to provide such legal services, even in civil cases implicating terribly important interests, such as parental custody rights and the receipt of basic subsistence payments from the state.¹⁵⁷ Nevertheless, the legitimacy of the legal process demands that greater attention be given to the problem of unequal access to legal talent.

Alternatively, state supreme courts and state legislatures should consider ending the bar's monopoly on the practice of law. If a would-be litigant cannot find a lawyer willing to take her case, surely it is better that she have the assistance of a para-professional than no assistance at all.¹⁵⁸

In sum, the bench and bar should take a lesson from the professional and amateur sports leagues: equality of arms is essential to a fair contest.

B. A League of Their Own

Given the process-based problems inherent in the contemporary system of judicial decision making, some scholars have advocated that cultural minorities simply withdraw, to the extent feasible, from the public judicial system. One of the principal advocates of such an approach is Professor Gary Spitko.

Professor Spitko has recently observed that "[i]n a variety of contexts, cultural minorities have cause to fear adjudication of their legal rights and responsibilities in a legal system dominated by majority-culture personnel (most notably including judges and jurors)."¹⁵⁹ Spitko argues that "[t]his is

157. See *Lassiter v. Department of Social Servs.*, 452 U.S. 18 (1981); *Goldberg v. Kelly*, 397 U.S. 254 (1970); cf. Norman Lefstein, *Keynote Address*, 14 N.Y.U. J. L. & SOC. CHANGE 5, 8-9 (1986) (advocating an expansion of access to competent legal counsel as a matter of basic fairness in both criminal and civil matters).

158. See GEORGE C. LEEF, *THE CASE FOR A FREE MARKET IN LEGAL SERVICES*, POLICY ANALYSIS NO. 322, at 18-39 (Cato Institute ed., Oct. 9, 1998); DAVID S. YOUNG, *THE RULE OF EXPERTS: OCCUPATIONAL LICENSING IN AMERICA* (Cato Institute ed., 1987); see also Walter Gellhorn, *The Abuse of Occupational Licensing*, 44 U. CHI. L. REV. 1, 6, 13-19 (1976).

159. Spitko, *supra* note 67, at 275.

particularly true when cultural minorities attempt to use formal legal processes to give effect to choices which are inconsistent with prevailing community norms."¹⁶⁰ Accordingly, cultural minorities "face a cruel dilemma" in either electing to "forego the formal enforcement of their legal rights or trusting enforcement of their rights to a culturally-biased forum."¹⁶¹

Essentially, Professor Spitko argues that the process values associated with the judicial process systematically fail to protect the legal rights of unpopular cultural minorities. Rather than addressing the process failures in an effort to correct the procedural shortcomings of the existing judicial system (which he deems considerable), he instead endorses a kind of mass exodus from the state and federal court systems.¹⁶²

I do not disagree with Spitko's assertion that "[c]ultural understanding, tolerance, and acceptance are as important as facially-neutral laws in securing equal rights for minorities."¹⁶³ I also agree with him that "[t]rue equality requires that neutral law be applied in a culturally neutral fashion."¹⁶⁴ Nevertheless, I question his conclusion that the only reliable means of securing the legal rights of cultural minorities is for them to resort to essentially private, community-based systems of adjudication (e.g., arbitration).¹⁶⁵

According to Professor Spitko, "arbitration can empower cultural minorities by providing a forum for adjudication in which the decision maker is selected because she understands and appreciates the minority culture at issue."¹⁶⁶ Although the arbitrator "need not be a member of the minority culture," she must be "empathetic to the values and beliefs of the parties

160. *Id.*; see also Clark Freshman, *Privatizing Same-Sex "Marriage" Through Alternative Dispute Resolution: Community-Enhancing Versus Community-Enabling Mediation*, 44 UCLA L. REV. 1687 (1997).

161. Spitko, *supra* note 67, at 276.

162. See *id.* at 286-290, 294-97; cf. TYLER, *supra* note 11, at 85-112 (discussing how an individual's experiences with the legal system affect perceptions of the legitimacy of the legal system). Tyler's empirical work suggests that if cultural minorities had favorable interactions with the legal system, they would deem the system legitimate. See *id.* It does not require a great leap of logic to suggest, then, that tinkering with the procedures governing the public courts represents a reasonable response to the perceived illegitimacy of these institutions. See *id.* at 135-57, 170-78; see also THIBAUT & WALKER, *supra* note 38; but see Paul Butler, *Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 705-22 (1995) (arguing that racially-biased structure of contemporary criminal justice system makes an organized, concerted, and broad-based effort at jury nullification by African-American jurors a reasonable means of counteracting the racial inequities of the criminal justice system).

163. Spitko, *supra* note 67, at 287.

164. *Id.*

165. See *id.* at 294-97 (proposing the use of arbitration and testator appointment of minority-culture arbitrators to ensure that the testamentary freedom of so-called "abhorrent" testators is honored).

166. *Id.* at 296.

whose dispute she is adjudicating.”¹⁶⁷ Implicit in his position is a complete rejection of existing judicial forums as at worst hopelessly biased against members of cultural minorities and at best ignorant and insensitive to the values of cultural minorities.¹⁶⁸

Undoubtedly persons from a particular cultural subgroup are more likely to understand that group's traditions and customs. Nevertheless, in a pluralistic society in which members of myriad ethnic, religious, racial, and ideological groups must, of necessity, interact on a daily basis, I have grave doubts about the wisdom of balkanizing the adjudication of basic legal rights in private courts defined by a common membership in a particular cultural group. Such an approach would tend to exacerbate, rather than reduce, the legitimacy problems that the federal and state courts currently face.¹⁶⁹

If a privatized legal system staffed solely by members of a particular minority group (or persons deemed sufficiently friendly to the group to enjoy the group's trust and friendship) routinely adjudicated the legal rights and

167. *Id.*

168. See LEWIS CARROLL, *ALICE IN WONDERLAND AND THROUGH THE LOOKING GLASS AND WHAT ALICE FOUND THERE* 158-65 (1994) (Alice observing that the King of Hearts, sitting as a judge, seems to be quite arbitrary, creates rules out of thin air, abolishes them just as quickly, and generally abuses the trial process to suit his whim).

Professor Spitko seems to share Carroll's cynicism about the ability of judicial personnel to recognize their personal biases and professional limitations and to correct for them when engaged in the adjudication of a case. That said, Professor Spitko's mass exodus strategy seems infinitely preferable to Professor Paul Butler's proposal for cultural minorities to subvert the existing legal structure through a concerted campaign of broad-based jury nullification. See Butler, *supra* note 162, at 714-25. Although Professor Butler's proposal makes a powerful point in a direct and inescapable way, it does not constitute a form of constructive engagement about process values and process-based shortcomings inherent in the current system of adjudication in the public courts. Indeed, his proposal would tend to further undermine, rather than enhance, public confidence in the administration of justice.

169. Cf. MARTIN LUTHER KING, JR., *Letter From a Birmingham Jail*, in *I HAVE A DREAM: WRITINGS AND SPEECHES THAT CHANGED THE WORLD* 83 (James M. Washington ed. 1992). It bears noting that Professor Spitko's call for cultural separatism is fully consistent with the works of several preeminent race theorists, including Malcolm X and Marcus Garvey. See MARCUS GARVEY, *AIM AND OBJECTIVES OF MOVEMENT FOR OF NEGRO PROBLEM OUTLINED* (1924); MARCUS GARVEY, *THE PHILOSOPHY AND OPINIONS OF MARCUS GARVEY, OR, AFRICA FOR THE AFRICANS* (1986); MALCOLM X, *THE AUTOBIOGRAPHY OF MALCOLM X* (1965); MALCOLM X, *BY ANY MEANS NECESSARY* (2nd ed. 1992). These less optimistic works on the possibility of a just pluralistic society largely reject integration and assimilation as principal objectives for cultural minorities in favor of programs of voluntary separation and group self-empowerment. Cf. KING, *supra*, at 102-06.

When we allow freedom to ring, when we let it ring from every village and hamlet, from every state and city, we will be able to speed up that day when all of God's children—black men and white men, Jews and Gentiles, Catholics and Protestants—will be able to join hands and sing in the words of the old Negro spiritual “Free at last, free at last; thank God Almighty, we are free at last.”

Id. Perhaps I am naive to believe in the possibility of achieving Dr. King's dream; nevertheless, it seems an eminently worthy objective.

responsibilities of members of minority groups, instances in which members of the group had to litigate claims in the public court system would produce even greater levels of anxiety and mistrust. Rather than attempting to flee the court system, cultural minorities should attempt to secure meaningful reforms that lead to a higher degree of confidence in the basic fairness and reliability of these institutions.¹⁷⁰ Undoubtedly Professor Spitko is correct to assert that "[a]rbitration provides a means for cultural minorities to opt out of a legal forum that is often biased against them."¹⁷¹ Even so, the best interests of the community would not be served by a policy of disengagement and withdrawal.

To the extent that members of the community have even less interaction with members of cultural minorities in the general courts, the potential for misunderstanding and prejudice would be increased, rather than reduced. A model premised on enhanced, rather than reduced, interaction and dialogue between cultural groups would make more sense and constitute a more constructive plan of attack. Even if an individual litigant might feel more comfortable having her claim adjudicated by a person familiar with the "values and beliefs" of the litigant's community,¹⁷² the society as a whole suffers when opportunities for constructive engagement are lost.

Indeed, Professor Spitko has gone so far as to reject the extension of Title VII to gays and lesbians because he deeply mistrusts the willingness of members of the dominant straight community to apply a rule against same-sex sexual harassment in an evenhanded fashion against both perpetrators and victims of same-sex sexual harassment.¹⁷³ In Spitko's view, gays and lesbians will not enjoy effective protection from job discrimination based on their sexual orientation because the viability of such claims will rest in the hands of jurors who are hopelessly heterosexist (if courts even deign to recognize such claims at all); concurrently, these same heterosexist jurors will harshly evaluate the workplace behavior of gays and lesbians when

170. See KING, *supra* note 169, at 85-86, 96-100 (explaining the critical importance of confronting and rejecting injustice, even at the cost of great personal sacrifice); MARTIN LUTHER KING, JR., "Our God Is Marching On!, in I HAVE A DREAM: WRITINGS AND SPEECHES THAT CHANGED THE WORLD 119, at 120-24 (James M. Washington ed., 1992) (arguing that good must confront evil if evil is to be defeated and urging people of good will to recognize that "[t]he battle is in our hands").

171. Spitko, *supra* note 67, at 314. In this regard, note Professor Peter Rubin's observation that "[f]actfinders are not omniscient and human experience is complex. The legal system requires lines to be drawn between lawful and unlawful activity, but it is limited in its ability to draw lines against which conduct can be measured accurately and efficiently." Rubin, *supra* note 43, at 583. If this is so—and there is good reason to believe that it is—then the use of persons familiar with a minority culture would undoubtedly do a better job of assessing facts accurately and applying law properly on those facts. This is really the basic point that Professors Spitko and Ware are attempting to make.

172. See Spitko, *supra* note 67, at 314.

173. See Spitko, *supra* note 34, at 81-89.

adjudicating claims by straight plaintiffs that allege same-sex sexual harassment by gay men or lesbians.¹⁷⁴ Once again, implicit in Spitko's position is a near-complete rejection of tinkering with the process of adjudicating such claims to eliminate or reduce the potentially pernicious effects of cultural bias.¹⁷⁵

In a similar vein, Professor Stephen Ware has argued for the use of arbitration to create new private law systems.¹⁷⁶ Ware posits that "vast areas of law are, contrary to the received wisdom, privatizable."¹⁷⁷ He argues that various constituencies might prefer private adjudicatory systems to the public courts because private adjudicatory systems could offer greater expertise with particular kinds of problems.¹⁷⁸

For example, a system of arbitration law developed by steel manufacturers could be tailored to reflect the particular needs, wants, and desires of steel manufacturers.¹⁷⁹ Trade practices and customs could be incorporated more easily and reliably into the adjudicatory process. The net result should be a more nuanced application of the rules to the facts: "parties may even expect that an arbitrator who works in the widget business will apply them better than a judge or jury. . . . [R]ules incorporated by reference into an arbitration agreement may, because of the adjudicator, produce different law than the same rules incorporated into a contract without an

174. See *id.* at 81-89, 96-97.

175. As a second-best alternative, Professor Spitko proposes instructing juries to pretend that the harassing behavior at issue took place on a mixed-sex, rather than same-sex, basis. See *id.* at 94-96. This is a clever example of how tinkering with process can give greater legitimacy to the judicial process from the perspective of a cultural minority. A program of constructive engagement that challenges jurors to overcome their prejudices makes a great deal more sense than rejecting the existence of an entire subset of employment discrimination claims. At a minimum, such an approach creates an effective opportunity for overcoming the kinds of irrational prejudice that afflict our society. Implicit in this position, of course, is an assumption that a member of a minority group should face legal jeopardy in order to educate members of the dominant majority. From the perspective of a gay defendant, avoiding legal liability might well be a higher priority than raising the social consciousness of the jury.

176. See Ware, *supra* note 67, at 750-54.

177. *Id.* at 707; see also Lisa Bernstein, *Merchant Law In a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765 (1996) (providing a case study and economic analysis of a privatized system of law maintained by the National Grain and Feed Association).

178. To return to the metaphor of the previous section, judges in the public courts are generalists; in litigation, the same judge must do the legal equivalent of scoring a gymnastics competition, umpiring a baseball game, refereeing a soccer game, not to mention overseeing many other discrete sets of legal rules. By way of contrast, officials of athletic contests tend to be highly specialized, if not sport-specific. Professor Ware's proposal in some sense is a suggestion for the creation of expert courts and would to some degree make the officiation of litigation more like the officiation of athletic competitions. See generally MERRYMAN, *supra* note 146, at 88-89, 134-35, 140-41 (describing the civil law system's use of highly-specialized administrative courts).

179. See Ware, *supra* note 67, at 745-46 (explaining that arbitration "rules can be very general, e.g., the unwritten 'norms and customs of the widget industry'" or "they can be very specific, e.g., the 'written rules and by-laws of the Widget Dealers Association'").

arbitration clause.”¹⁸⁰ Professor Ware extols the virtues of a such a system of privatized law, concluding that “arbitration can produce a sophisticated, comprehensive legal system.”¹⁸¹

Having established the general principle that arbitration can privatize law, Professor Ware argues that arbitration can create “many such” private law systems.¹⁸² “There is diversity because what is best for some is not best for others.”¹⁸³

Like Professor Spitko, Ware posits that the creation of private law systems via arbitration could also empower cultural minorities to exit the majoritarian courts. An agreement to arbitrate “contracts out of all the law that would have been applied by a court but for the agreement”¹⁸⁴ and “a market for law develops.”¹⁸⁵ Even when arbitrators materially depart from ostensibly mandatory laws, such as Title VII, current limitations on judicial review of arbitration decisions make it “likely” that such decisions will “be enforced anyhow.”¹⁸⁶

Ware and Spitko share an unbridled enthusiasm for the possibility of privatized law. Professor Ware explains that “[t]his privatized system produces better law than does a system in which government monopolizes lawmaking. The principles animating privatization around the world apply to lawmaking just as they apply to coal mining or mail delivery.”¹⁸⁷

Professor Ware’s assessment of the potential benefits of private law systems is undoubtedly accurate. Specialization naturally gives rise to greater expertise; in legal disputes, an adjudicator’s familiarity with the mores and traditions of the litigants breeds trust, not contempt. This intuition undergirds the proliferation and growth of administrative agencies over the course of the 20th Century. In many respects, an administrative agency represents a kind of specialized tribunal vested with responsibility for adjudicating

180. *Id.* at 746.

181. *Id.* at 747.

182. *See id.* at 746-47.

183. *Id.* at 747.

184. *Id.* at 711.

185. *Id.* at 747.

186. *Id.* at 711. As Ware explains, “even if a court discovers that an arbitration award does not apply the law, the court will likely confirm the award.” *Id.*; *see also id.* at 721; Ware, *supra* note 71, at 541-42.

187. Ware, *supra* note 67, at 747. In fairness to Professor Ware, it bears noting that he acknowledges that “[s]ome may feel that this vision goes too far.” *Id.* at 753. He is also very careful to distinguish “mandatory law” from “default rules” and to emphasize that private law systems should not be permitted to opt out of mandatory law. *See id.* at 729-30, 741-43. This is a critical concession: Ware is not suggesting that a private law system could, for example, authorize consensual human sacrifice or permit the maintenance of a segregated work force, even if either condition would be economically beneficial to a particular trade group. Indeed, Professor Ware’s proposal would correct a problem that presently exists in the current law of arbitration, which effectively *does* permit exactly these sorts of results. *See id.* at 729-31.

enforcement of a particular subset of laws.¹⁸⁸

Of course, Professor Ware's enthusiasm for privatizing law arguably represents an endorsement of a *fait accompli*. For many decades, accomplished legal scholars have advocated the creation of privatized legal systems or, alternatively, posited that such systems already exist in the form of commercial arbitration.¹⁸⁹ These earlier works in the ADR field, unlike the contemporary efforts of scholars like Spitko and Ware, embrace privatized systems of dispute settlement because such systems offer greater expertise with the problems of particular enterprises, usually with less delay than is typically associated with litigation in the public courts, and at a lower net cost.¹⁹⁰ Professor Spitko, and to a lesser degree, Professor Ware, are not positing arbitration as the solution to problems associated with the public courts' lack of special technical expertise or with the sometimes extensive time delays associated with litigation in the public courts (and the concomitant financial costs), but rather to blatant forms of prejudice on the part of judges and juries.

188. See JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 30-39, 46 (1938); see also *Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (holding that agency expertise requires federal courts reviewing agency action to defer to an agency's reasonable interpretation of an ambiguous statutory provision); CALABRESI, *supra* note 137, at 44-58; see generally MERRYMAN, *supra* note 146, at 134-35, 140-41 (discussing the civil law tradition of separate administrative courts based on a desire to take advantage of the expertise associated with such entities); Stefan Riesenfeld, *The French System of Administrative Justice: A Model for American Law?*, 18 B.U. L. REV. 48, 55-67 (1938) (describing the French system of administrative law).

189. See William C. Jones, *Three Centuries of Commercial Arbitration in New York: A Brief Survey*, 1956 WASH. U. L.Q. 193 (exploring the long history of commercial arbitration in New York state and its ability to secure "cheaper, quicker, and less acrimonious" resolutions of disputes than traditional litigation in the public courts); see also Soia Mentschikoff, *Commercial Arbitration*, 61 COLUM. L. REV. 846, 848-56 (1961) (noting that commercial arbitration has existed since the thirteenth century and tracing its historical development to the present); Sabra A. Jones, *Historical Development of Commercial Arbitration in the United States*, 12 MINN. L. REV. 240, 242-51 (1928) (tracing the history of commercial arbitration practices from ancient Rome and Greece to the United States in the twentieth century). For more recent critiques of adjudication in the public courts and the relative benefits of alternatives to traditional litigation (including commercial arbitration), see Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4 (1983); Marc Galanter & Mia Cahill, "Most Cases Settle": *Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339 (1994); Richard E. Miller & Austin Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture*, 15 L. & SOC'Y REV. 525 (1981); David M. Trubek et al., *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72 (1983).

190. See W. Jones, *supra* note 189, at 202, 218-19; see also S. Jones, *supra* note 189, at 240 ("A substitute for litigation has been developed in commercial arbitration, the purposes of which are to eliminate the expense of litigation, to save delays in legal proceedings, to improve business relations between men in an industry and between them and their customers, to help establish trade customs, and to substitute the decisions of practical business men for those of inexperienced juries."). For a comprehensive empirical exploration of the reasons potential litigants elect to avoid the public courts through settlement (as opposed to arbitration), see Galanter & Cahill, *supra* note 189, at 1353-78.

To say that those staffing the public courts lack technical expertise or are slow in reaching their decisions is one thing. To say that they are bigots (whether consciously or not) is quite another. The classic ADR rationales for embracing privatized law do not indict the good faith of the public courts—Professor Spitko's attack does. In this way, then, the multiculturalist argument for arbitration presents a much more aggressive challenge to the legitimacy of the public courts, for it does not merely question their speed or technical competence, but rather their basic ability to do equal justice.

Notwithstanding the potential benefits associated with the enhanced expertise that a private adjudicatory entity might offer, one must give careful consideration to the potential decrease in cultural expertise such a system would inflict on the general-jurisdiction public courts. Again, even if, from the perspective of an individual litigant, significant benefits attach to exiting the public courts in favor of a private dispute resolution system, one might still object that the overall social costs of such a development are too high to be acceptable. Assuming that conflicts involving members of different guilds or cultural groups will arise and that adjudication of such claims will take place in the public courts,¹⁹¹ the success of an exit strategy will only further cripple the ability of the public courts to earn the trust and confidence of particular cultural subgroups within the community. Although the creation of private law systems would enhance the satisfaction of those with the luxury of relying on the private law system with the fairness of adjudication of claims within the system, it would tend to further delegitimize the public courts and increase the dissatisfaction of those forced to litigate their claims within the public law system.

This is not to say that I categorically reject Spitko's and Ware's proposals for the creative use of arbitration to create dispute resolution systems that enjoy higher levels of confidence within particular communities than the public courts. My point is that such efforts must be in addition to, and not in lieu of, efforts to promote the legitimacy of dispute resolution within the general public courts. Creating a "league of their own" is not objectionable, provided that regularized interleague play takes place. The creation of new private law systems is not inherently inconsistent with attempts to establish a

191. Such an assumption seems reasonable, given that a litigant who is not a member of a particular guild or minority group would undoubtedly refuse to consent to the adjudication of a dispute before an adjudicator or panel identified completely with a particular guild or minority group. The non-member would justifiably fear undue bias in a system developed to incorporate the sensibilities of a particular guild or minority group. Cf. Spitko, *supra* note 67, at 307-14 (acknowledging the problem of an arbitrator's bias and arguing that existing federal rules to protect against arbitrator bias are sufficient to protect the interests of non-cultural minorities). Of course, the member of a guild or minority group might object that the public courts have a built in bias against them.

dialogue about the perceived shortcomings of the existing public courts.

As explicated by Professors Spitko and Ware, however, the emergence of these private law dispute resolution systems would tend to displace efforts to tinker with the public courts. Because complete exit from the public courts is simply not feasible, advocates of new private adjudication systems should take care to emphasize that the emergence of such dispute resolution mechanisms does not lessen the need for reform of existing public dispute resolution institutions.¹⁹²

Consider, for example, the recent phenomenon of the "gay advance" or "homosexual panic" defense to criminal charges in cases involving acts of violence against gay men and lesbians, including murder.¹⁹³ The "Jenny Jones" case is illustrative. Jonathan Schmitz murdered Scott Amedure after Amedure announced his affection for Schmitz on Jenny Jones's syndicated television talk show.¹⁹⁴ Rather than rejecting this defense out of hand, many commentators criticized Jones for unfairly provoking Schmitz. Indeed, a non-trivial number of criminal defendants have successfully deployed the "gay advance" defense to avoid criminal liability for murder.¹⁹⁵ Professor Spitko has correctly observed that "[i]t is inconceivable that a jury would excuse a man for murdering a woman because the woman offered to perform oral sex on the man and attempted to grab his penis."¹⁹⁶

192. Paradoxically, the emergence of new, quasi-private systems of adjudication via ADR techniques should serve as an impetus for the improvement or reform of the public courts, much as Martin Luther's challenge to the Roman Catholic Church spurred a counter-Reformation movement within the Church itself. See WILLIAM RAYMOND MANCHESTER, *A WORLD LIT ONLY BY FIRE: THE MEDIEVAL MIND AND THE RENAISSANCE* 117-206 (1992) (describing the causes and effects of the Protestant Reformation and the Roman Catholic Church's response to the challenges posed by Martin Luther's defiance of the hierarchy). The danger, of course, is that the public courts might not respond to the challenge with sufficient alacrity.

193. See Toni M. Massaro, *Gay Rights, Thick and Thin*, 49 STAN. L. REV. 45, 82 n.178 (1996); Robert B. Mison, *Homophobia as Manslaughter: The Homosexual Advance as Insufficient Provocation*, 80 CAL. L. REV. 133 (1992); Anthony Winer, *Hate Crimes, Homosexuals, and the Constitution*, 29 HARV. C.R.-C.L. L. REV. 387, 418 (1993); *Developments in the Law—Sexual Orientation and the Law*, 102 HARV. L. REV. 1508, 1542-48 (1989).

194. See Spitko, *supra* note 34, at 86-89; see also Megan Garvey, *The Aftershock of Shock TV: Two Ordinary Lives were Shattered in a Bizarre Tangle*, WASH. POST, Mar. 25, 1995, § D, at 1. Schmitz was twice convicted of murder and twice sentenced to 25 to 50 years in prison. See *Schmitz Gets 25-50 Years*, WASH. POST, Sept. 15, 1999, § C, at 8. In addition, a civil jury found the Jenny Jones show civilly liable for provoking Schmitz, thereby causing Amedure's death. See Joan Biskupic, *Jurors Vent Outrage at Industry; Verdicts Against Tobacco, Gun Firms, Stake Out New Legal Territory*, WASH. POST, Aug. 30, 1999, § A, at 1; Keith Bradsher, *Talk Show Ordered to Pay \$25 Million After Killing*, N.Y. TIMES, May 8, 1999, § A, at 10; Paul Farhi, *"Jenny Jones" Show Found Negligent in Murder Case*, WASH. POST, May 8, 1999, § A at 1.

195. See, e.g., *Schick v. State*, 570 N.E.2d 918 (Ind. Ct. App. 1991); see also *Mills v. Shepherd*, 445 F. Supp. 1231 (W.D.N.C. 1978); *State v. Flowers*, 574 So. 2d 448 (La. Ct. App. 1991), cert. denied, 580 So. 2d 666 (La. 1991); *Wills v. State*, 636 P.2d 372 (Okla. Crim. App. 1981); Mison, *supra* note 193.

196. Spitko, *supra* note 34, at 89; see also Rubin, *supra* note 43, at 582 (arguing that the existence of civil rights protections might lead a minority person to perceive being "treated differently than others" and

In my view, a mass exodus of gays and lesbians from the public courts would tend to make instances of misunderstanding and prejudice more, rather than less, commonplace. We live in a world where the Majority Leader of the United States Senate, Trent Lott, can compare gays and lesbians to kleptomaniacs and alcoholics with impunity.¹⁹⁷ Obviously, if one takes Mr. Lott's analogy seriously, it becomes plausible to impose all sorts of special legal liabilities on gays and lesbians, just as one might impose special rules on persons known to suffer from other psychiatric disorders that cause anti-social behavior.¹⁹⁸

When Wyoming legal authorities confronted Russell Arthur Henderson and Aaron James McKinney, the murderers of Matthew Shepard, the defendants' supporters initially responded with a "gay advance" defense.¹⁹⁹ Unlike the media's response to Jonathon Schmitz's claim, this attempted justification fell flat, not only with the general public, but also with local prosecutors.

A Wyoming prosecutor brought capital murder charges against both Henderson and McKinney.²⁰⁰ Henderson quickly pled guilty to kidnapping and murdering Shepard, in large part to avoid the death penalty; the trial

that this different treatment might also be perceived as "different and less than equal treatment").

197. See Michael Kelly, *Lott's Sodom and the Righteous*, WASH. POST, June 24, 1998, § A, at 17 (reporting that Senator Lott "said, or seemed to say, in response to an interviewer's question, that the condition of being homosexual is in itself a sin"); Alison Mitchell, *Controversy Over Lott's View of Homosexuals*, N.Y. TIMES, June 17, 1998, § A, at 24 ("Senator Trent Lott . . . likened homosexuality to alcoholism, kleptomania, and 'sex addiction' in a television interview").

198. See 42 U.S.C. § 14071 (1994); N.J. STAT. ANN. 2C: 7-1 to 7-11; E.B. v. Verniero, 119 F.3d 1077 (3d Cir. 1997), cert. denied, 118 S. Ct. 1039 (1998); see also Susan R. Paisner, *Exposed: Online Registries of Sex Offenders May Do More Harm Than Good*, WASH. POST, Feb. 21, 1999, § B, at 7; Dale Russakoff, *States Search for Fairness in Implementing Megan's Law*, WASH. POST, Mar. 7, 1998, § A, at 3.

199. See Ruben Castenada, *Hate Crime Laws Rely on Motives, Not Targets*, WASH. POST, Oct. 26, 1998, § D, at 1 ("McKinney's girlfriend, Kristen Price, 18, who is charged as an accessory in the case, told a reporter that the two men attacked Shepard because he flirted with McKinney at the bar and caused embarrassment."); *Suspect's Father Denies Attack Was Hate Crime; Victim Targeted for "Embarrassing" Act*, WASH. POST, Oct. 12, 1998, § A, at 2 ("Bill McKinney, father of suspect Aaron McKinney, and Kristen Price, Aaron McKinney's girlfriend, said the two men accused of the attack targeted Shepard because he flirted with Aaron McKinney at the bar and embarrassed him."); see also Jay Reeves, *2 Charged in Gay Man's Death*, INDIANAPOLIS STAR, Mar. 5, 1999, § A, at 24 (reporting that two men accused of killing an allegedly gay man with an ax handle in Sylacauga, Alabama have "claimed that Gaither [the victim] made a pass at them" after which they decided to murder him).

200. See James Brooke, *Men Held in Beating Lived on the Fringes*, N.Y. TIMES, Oct. 16, 1998, § A, at 16; Tom Kenworthy, *Gay Wyoming Student Succumbs to Injuries*, WASH. POST, Oct. 13, 1998, § A, at 7; *Death Penalty Asked in Gay Man's Murder*, WASH. POST, Dec. 29, 1998, § A, at 6. For an account of this brutal and senseless crime, see James Brooke, *Gay Man Beaten and Left for Dead; 2 Are Charged*, N.Y. TIMES, Oct. 10, 1998, § A, at 9. For a sadly similar story involving the recent lynching of James Byrd, Jr. in Jasper, Texas, see Joseph L. Galloway, *Into the Heart of Darkness*, U.S. NEWS & WORLD REP., Mar. 8, 1998, at 18.

court sentenced Henderson to two consecutive life terms in prison.²⁰¹ McKinney proceeded to trial, at which a Wyoming jury convicted him of second-degree murder, robbery, and kidnapping, thereby exposing McKinney to the death sentence for felony-murder.²⁰² After an emotional plea by Shepard's parents to spare McKinney's life, the court sentenced McKinney to two consecutive life sentences incident to a sentencing agreement.²⁰³ I would suggest that the difference in both the public's and the legal system's reaction to the Shepard case reflects a greater tolerance for gays and lesbians in contemporary American society; this tolerance, in turn, is a function of the greater visibility of gays and lesbians in positive community roles.

Make no mistake, capital murder charges will be adjudicated in the public courts. The Constitution mandates not only a fair and public trial, but also a jury verdict.²⁰⁴ Rejection of the "gay advance" defense to acts of violence against gays will occur, if at all, in individual trials, in the decisions of appellate courts, and through legislation passed by state legislatures.²⁰⁵ All of these institutions will reflect the kind of majoritarian cultural bias that Professor Spitko seems to fear, yet there is no plausible alternative to attempting to convince persons staffing these institutions that violence against gays and lesbians is immoral and should be deemed illegal.²⁰⁶

201. See James Brooke, *Gay Murder Trial Ends with Guilty Plea*, N.Y. TIMES, Apr. 6, 1999, § A, at 20; Tom Kenworthy, *Gay Student's Attacker Pleads Guilty, Gets Two Life Terms*, WASH. POST, Apr. 6, 1999, § A, at 2.

202. See Tom Kenworthy, *2nd Man Is Convicted of Killing Gay Student*, WASH. POST, Nov. 4, 1999, § A, at 1; Michael Janofsky, *Man Is Convicted in Killing of Gay Student*, N.Y. TIMES, Nov. 4, 1999, § A, at 14.

203. See Michael Janofsky, *Parents of Gay Student Obtain Mercy for His Killer*, N.Y. TIMES, Nov. 5, 1999, § A, at 1.

204. See U.S. CONST. amends. V, VI, XIV; *Duncan v. Louisiana*, 391 U.S. 145 (1968).

205. Predictably, lawyers for Aaron McKinney attempted to use a "gay panic" defense to excuse McKinney's brutal murder of Mathew Shepard. See Tom Kenworthy, *"Gay Panic" Defense Stirs Wyoming Trial*, WASH. POST, Oct. 26, 1999, § A at 2. The Wyoming trial judge, in a surprise move, ruled the "gay panic" defense inadmissible under Wyoming law. See *Wyoming Judge Bars "Gay Panic" Defense*, WASH. POST, Nov. 2, 1999, § A, at 7; Michael Janofsky, *Judge Rejects "Gay Panic" As Defense in Murder Case*, N.Y. TIMES, Nov. 2, 1999, at § A, at 14. Even Reverend Jerry Falwell, the conservative minister and social activist, has publicly denounced the "gay panic" defense: "I could never accept 'gay panic' or any other excuse as grounds for what he [Aaron McKinney] did." Frank Rich, *Has Jerry Falwell Seen the Light?*, N.Y. TIMES, Nov. 6, 1999, § A, at 17.

206. In this respect, Mr. Shepard's death has proven to be a powerful catalyst for positive change. See Tom Kenworthy, *Hundreds Gather to Remember Slain Man as "Light to the World"*, WASH. POST, Oct. 17, 1998, § A, at 3 ("Matthew Shepard, the University of Wyoming student whose murder has made him a national symbol for the campaign against hate crimes and anti-gay violence, was eulogized here today as a 'light of the world' in 'a world that is not always kind to gentle spirits.'"). The recent murder of Billy Jack Gaither, another gay man, in a small town in Alabama, also has provoked expressions of outrage. See Reeves, *supra* note 99 (reporting that "[t]he Feb. 19 slaying [of an allegedly gay man] outraged Gaither's friends in this central Alabama town, along with civic leaders and gay rights organizations"); see also

Prejudice is often a function of ignorance, which gives rise to an irrational fear of those who seem different in material respects.²⁰⁷ The creation of separate but equal systems of adjudication for cultural minorities would deprive the larger community of an important opportunity for interaction. Professor Spitko's proposal is not unlike a plea for the re-creation of segregated sporting leagues on the ground that racial prejudice precludes the fair treatment of minority athletes in integrated contests. One does not have to turn a blind eye on the continuing reality of racial prejudice to question the wisdom of self-segregation as a rational response to the fact of racial prejudice (or other forms of prejudice). Just as sports heroes like Jackie Robinson, Hank Aaron, and Willie Mays helped average Americans confront and overcome their irrational racial prejudices,²⁰⁸ so too the interaction of various cultural groups in our courts of law helps to sensitize the community to the fact of irrational prejudice against members of cultural minorities. Indeed, the triumph of prejudice in a given judicial proceeding can provide a powerful message to the larger community about the continuing need for vigilance in our efforts to overcome racism.²⁰⁹

One should also worry about the potential loss of the public adjudication of certain categories of legal claims involving particular cultural minorities. Whether or not a member of a cultural minority prevails in a given

Accomplice Convicted in Killing, N.Y. TIMES, Aug. 6, 1999, § A, at 15 (reporting on conviction of Charles M. Butler, Jr., for capital murder in death of Billy Jack Gaither and earlier guilty plea of his accomplice, Steven Mullins).

207. See BEM, *supra* note 11, at 21-22.

208. See RED BARBER, 1947, WHEN ALL HELL BROKE LOOSE IN BASEBALL (1982); JULES TYGIEL, BASEBALL'S GREAT EXPERIMENT: JACKIE ROBINSON AND HIS LEGACY (1997); WILL, *supra* note 76, at 87-90, 276-79; see also GUTMAN, *supra* note 76, at 332-38 (describing continuing racial problems in major league baseball, including Al Campanis's racist remarks on "Nightline" in 1987). Although much progress has been made in overcoming stereotypes about racial minorities, a great deal of work remains to be done. At the time Al Campanis observed that, in his opinion, "they [African Americans] may not have some of the necessities to be, let's say, a field manager, or perhaps a general manager," major league baseball lacked any "black managers or general managers." GUTMAN, *supra* note 76, at 332, 334. In that regard, Jimmy "the Greek" Snyder's observations about the various races' innate strengths and weaknesses also raised (and continues to raise) troublesome questions about how much progress our society has made on issues of race. See STEPHEN R. FOX, BIG LEAGUES: PROFESSIONAL BASEBALL, FOOTBALL AND BASKETBALL IN NATIONAL MEMORY 346 (1994); see also JACK BASS, TAMING THE STORM: THE LIFE AND TIMES OF JUDGE FRANK M. JOHNSON, JR. AND THE SOUTH'S FIGHT OVER CIVIL RIGHTS 470 (1993) (reporting Judge Johnson's contemporary view that "[s]ometimes I think we've come a long way on race, and sometimes I just don't know").

209. In this context, the acquittal of the police charged with beating Rodney King comes immediately to mind. The national revulsion at this verdict, not to mention the severe social dislocation associated with the verdict in some communities, put the issue of race on the collective agenda of the American people. See KENNEDY, *supra* note 40, at 113-25. This fact does not, of course, mitigate the injustice or unfairness of the verdict with respect to Mr. King. Rather, I am suggesting that an unjust verdict can have collateral social benefits and that these benefits in absolute utilitarian terms can outweigh the cost of injustice to a particular litigant.

proceeding may be significantly outweighed from a systemic perspective by the general social benefits flowing from the exercise of facing and deciding the questions embedded in the claim. As Professor Jill E. Fisch has noted, "the public may benefit at the expense of the losing litigant."²¹⁰ Indeed, several commentators have emphasized the social benefits associated with the process of litigation in the public courts.²¹¹ The Supreme Court also has endorsed this point of view.²¹²

As Professor Fisch explains, "civil litigation serves to correct unfair or corrupt practices, remedy tortious wrongs, and resolve quasi-public issues such as trademark and patent protection."²¹³ Consequently, "resolution of litigation may have external effects which extend beyond the parties to the lawsuit."²¹⁴

Professors Spitko and Ware have not seriously addressed the adverse consequences that the larger community might suffer as a result of a generalized "right of exit" from the public courts, whether via arbitration or some other means. This is not to say that individual minorities have an absolute obligation to sacrifice their own best interests to further a project of

210. Jill E. Fisch, *Rewriting History: The Propriety of Eradicating Prior Decisional Law Through Settlement and Vacatur*, 76 CORNELL L. REV. 589, 624 (1991).

211. See Judith Resnik, *Whose Judgement? Vacating Judgments, Preferences for Settlement, and the Role of Adjudication at the Close of the Twentieth Century*, 41 UCLA L. REV. 1471, 1491-1501, 1526-28 (1994) (arguing that third parties to litigation have legitimate interests in the law created incident to the adjudication of a case and describing the view that law creation in the public domain constitutes an important social good); see also Fisch, *supra* note 210, at 624-32 (arguing that litigation helps to resolve vexing and important community disputes and affects the content of the community's values in important ways); William M. Landes & Richard A. Posner, *Adjudication As a Private Good*, 8 J. LEGAL STUD. 235, 259-80 (1979) (describing and modelling in economic terms the costs and benefits of litigation in the public courts for both parties to the proceeding and the general public). Of course, the fact remains that most cases settle. See Trubek et al., *supra* note 189, at 89; Galanter, *Landscape of Disputes*, *supra* note 189, at 34-36. Moreover, in many cases, settlement undoubtedly well serves the private interests of the parties to the dispute. See Galanter & Cahill, *supra* note 189, at 1388-90.

212. See U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 513 U.S. 18, 26-27 (1994) (holding that "judicial precedents are presumptively correct and valuable to the legal community as a whole. They are not merely the property of private litigants and should stand unless a court concludes that the public interest would be served by a vacatur." (internal quotations and citations omitted)).

213. Fisch, *supra* note 210, at 624.

214. *Id.*; see Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 675-82 (1986) (arguing that resolution of legal disputes outside the public courts of law creates the risk of displacing the "rule of law" with "non-legal values" and noting that "the mere resolution of a dispute is not proof that the public interest has been served" and that ADR may become "a tool for diminishing the judicial development of legal rights for the disadvantaged"); Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1082-87 (1984) (describing the social benefits of litigation and explaining why settlement devices, including ADR techniques, that preclude judicial evaluation and resolution of the merits of a lawsuit impose serious costs on the general community); cf. JEROLD S. AUERBACH, *JUSTICE WITHOUT LAW?* 115-37 (1983) (arguing that community-based dispute resolution mechanisms often can produce better, more just results, at a lower social cost than adjudication of the same dispute in the public courts).

constructive engagement.²¹⁵ It is to say, however, that such considerations should be an important part of the overall calculus.

IV. THE NEW LEGAL PROCESS

The time has come for a new jurisprudential focus on process as the key to legitimating judicial decision making. Professors Wechsler and Hart were, in fact, correct to suppose that the process used to reach particular results might play a more important role in determining the general acceptability of the result across various constituencies than the outcome itself.²¹⁶ The quest for "neutral" rules and "neutral" judges should, of course, be abandoned as hopelessly naive and dangerously simplistic. That said, there is no reason to believe that process-oriented jurisprudence could not play a greater role in debates about the legitimacy of the judicial process generally and the act of judicial review in particular.

I do not suggest that it will be particularly easy to develop procedures that will generate broad acceptance. On the contrary, there is every reason to think that various constituencies within the legal academy, the bench, the bar, and the general public will have very different ideas about the procedures necessary to legitimate the judicial process. As a theoretical matter, it does seem possible that a consensus could be reached, just as the rules of most competitive team sports enjoy broad-based support across cultural groups. Of course, the mere theoretical possibility of success in achieving consensus about the proper rules of the judicial game hardly guarantees that the enterprise will actually succeed. The game is nevertheless well worth the candle.

Recent scholarship in the field of alternative dispute resolution suggests that a renewed focus on process would be useful. For example, to the extent that Professors Spitko and Ware emphasize that perceived shortcomings in the process of adjudicating claims lead to a crisis regarding the legitimacy of the public courts, their scholarly efforts support my larger thesis that the acceptability of judicial decision making is more a function of the process that judges use rather than the discrete results that judges reach in particular cases. Both Spitko and Ware offer proposals to create new processes for

215. Cf. KING, *supra* note 169, at 96-100. It bears noting that our contemporary legal system has already gone a long way toward making private party autonomy a co-equal value with the public explication of the community's values through adjudication of legal claims in the public courts. See Resnik, *supra* note 211, at 1528-32.

216. Cf. *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833 (1992) (joint opinion of Justices O'Connor, Kennedy, and Souter) (affirming *Roe*'s "central holding" and "central premises" while entirely abandoning the decision's principal analytical, jurisprudential, and factual predicates).

adjudicating disputes that would enjoy greater credibility with particular constituencies than existing arrangements. In this sense, their efforts demonstrate the need to refocus the project of legitimating judicial decision making on developing procedures that engender broad-based confidence in the basic fairness of the litigation process.

Similarly, Professors Gerald Torres and Kathryn Milun have argued that process has an inexorable relationship to the legitimacy of judicial decision making, particularly from the perspective of cultural minorities. In this regard, Torres has observed that procedural constraints can prevent indigenous peoples from effectively making a case for tribal recognition because traditional rules of evidence largely reject the probative value of tribal oral histories.²¹⁷ In particular, Torres cites the experience of the Mashpee tribe in attempting to gain official tribal recognition from the federal government. The federal courts refused to credit the Mashpee Indians' oral history as relevant evidence in determining whether the Mashpee tribe should enjoy formal tribal recognition by the United States government.²¹⁸

In a scathing critique of the federal courts' treatment of the Mashpee's claim, Torres observes that "[t]o require a particular way of telling a story not only strips away nuances of meaning, but also elevates a particular version of events to a non-contingent status."²¹⁹ Professor Torres explains that the formal rules of evidence "give preference to documentary evidence over 'mere' recollection of the Tribe's members."²²⁰ He concludes that "[t]he elevation of documentary evidence over oral recollection effectively debased the Mashpee's foundation of self-knowledge—their way of looking at, and knowing, themselves."²²¹

Ultimately, Professor Torres uses the tragedy of the Mashpees as an argument for a new kind of cultural pluralism, "one that within the context of a democratic polity, respects the cultural foundations for differently

217. See Gerald Torres & Kathryn Milun, *Translating "Yonnondio" By Precedent and Evidence: The Mashpee Indian Case*, 1990 DUKE L.J. 625; see also Robert W. Lannan, *Anthropology and Restless Spirits: The Native American Graves Protection and Repatriation Act, and the Unresolved Issues of Prehistoric Human Remains*, 22 HARV. ENVTL. L. REV. 369 (1998) (describing the dispute over custody of "Kennewick Man" and Native Americans' frustration with the formal process associated with resolving ownership of the remains, a process that tended to devalue oral history as relevant evidence in favor of scientific tests); Diedra Henderson, *Kennewick Man: A Closer Look*, SEATTLE TIMES, Dec. 16, 1997, § A, at 1; M.L. Lyke, *Pagans, Tribes, Scientists Battle Over Ancient Bones: Court to Decide Who Holds Claim to Kennewick Man*, WASH. POST, Sept. 10, 1997, § A, at 1.

218. See Torres & Milun, *supra* note 217, at 633-36, 642-49.

219. *Id.* at 629.

220. *Id.* at 654.

221. *Id.*

conceived notions of the 'good' and provides a social space for such conceptions to take on material form."²²² This Article's project is substantially more limited: in my view, the failure of the formal procedures associated with the adjudication of the Mashpee tribe's claim to official governmental recognition should generate a dialogue about the nature of the procedural rules of the game. If litigants cannot tell their side of the story because of procedural formalities, those litigants are highly unlikely to view the process as fair or reasonable.²²³ Indeed, "[i]ntuitively, one assumes that everything potentially helpful to telling the story behind a given legal claim ought to be allowed in as part of the explanation."²²⁴

In process terms, Professor Torres is not suggesting that formal rules of evidence be abolished, but rather that they be applied in a fashion fundamentally consistent with the truth-seeking inquiry of the court. "[L]egal requirements of relevance" should not be permitted to render "Indian storytellers mute and the culture they were portraying invisible."²²⁵

Professors Spitko and Ware would undoubtedly suggest that private (or community-based) dispute resolution mechanisms represent a viable means of empowering cultural minorities to construct procedures that pay adequate attention to culturally-specific practices that potentially impact the adjudicatory process (e.g., reliance on oral traditions rather than written documents to pass on the history of the community).²²⁶ Although the creation of community-based tribal courts reflects one means of implementing this observation, such courts would not be materially helpful to the Mashpees or other tribes similarly situated in disputes with the federal government over official tribal recognition: it is simply not sufficient to offer up viable exit strategies for minority-culture litigants lucky enough to have the option of

222. *Id.* at 657.

223. *See generally* *Goldberg v. Kelly*, 397 U.S. 254, 268-69 (1970) (holding that due process of law demands that procedures be tailored to the circumstances of participants in the proceeding at issue); *Gray Panthers v. Schweiker*, 716 F.2d 23, 34-38 (D.C. Cir. 1983) (approving a telephone appeal system for Medicare claims involving less than one hundred dollars in recognition "of the flexibility necessary when the procedural requirements of due process are being defined").

224. *Torres & Milun*, *supra* note 217, at 645.

225. *Id.* at 649. In this regard, the rules of certain sports can also be unyielding, even when an accommodation is necessary to level the playing field. *See Martin v. PGA Tour, Inc.*, 984 F. Supp. 1320 (D. Or. 1998) (rejecting PGA's motion for summary judgment in an ADA case brought by disabled golfer Casey Martin to use a golf cart in tournament play); *see also* Note, *Casey Martin v. PGA Tour, Inc.: A New Significance to a Golfer's Handicap*, 8 J. ART & ENT. LAW 303 (1998) (discussing the facts of the *Martin* case and its legal and social significance). Just as law and legal process should be sensitive to difference, so too the rules of sport should take into account the circumstances of differently-abled persons. Failing to account for difference can make both litigation and athletic competition fundamentally unfair.

226. *See* Spitko, *supra* note 67, at 275-77, 286-90, 314; Ware, *supra* note 67, at 745-47, 753-54.

removing their legal claims from the public courts.²²⁷

It would be highly presumptuous of me to attempt to define the process values that would enhance the perceived legitimacy of the public courts. No single commentator could succeed in such an effort, for no single commentator can claim to speak universally for all members of the community. Indeed, were I to embark on such a project, I would simply lend tacit support to Professor Spitko's objections about cultural insensitivity.

Nevertheless, one can identify several logical first steps toward generating the dialogue about process values that this Article endorses. First, membership on the committees charged with revising the federal procedural rules, including the rules of evidence, civil procedure, criminal procedure, appellate procedure, and bankruptcy, should reflect the cultural diversity of the contemporary United States.²²⁸ Women, persons of color, and gays and lesbians should enjoy seats at the table as a matter of course. Plainly, if the procedural rules lack the input of cultural minorities, they are less likely to engender faith in the public courts that apply them on a daily basis.

Second, executive and legislative branch officers should ensure that appointees to the bench reflect the diversity of the community in which they will sit in judgment. Just as the presence of woman and persons of color on a local police force can engender greater trust in the law enforcement community, the presence of greater numbers of cultural minorities on the

227. See Barbara Ann Atwood, *Fighting Over Indian Children: The Uses and Abuses of Jurisdictional Ambiguity*, 36 UCLA L. REV. 1051 (1989); see also *Tribal Banishment for Teens Annulled: Will Go to Prison for Robbery*, COMM. APPEAL, Oct. 4, 1995, § A, at 4; Editorial, *Banishment Experiment Should Be Discontinued*, SEATTLE TIMES, July 25, 1995, § B, at 4; Lynne K. Varner, *Judge Approves Tribal Banishment Sentence for 2 Alaskan Youths*, SEATTLE POST-INTELLIGENCER, Aug. 13, 1994, § A, at 1; cf. *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 885, 894-96 (2d Cir. 1996) (questioning suitability of a traditional tribal punishment and holding the imposition of such practices to be subject to federal court review via the writ of habeas corpus).

228. See Judith Resnick, "Naturally" Without Gender: Women, Jurisdiction, and the Federal Courts, 66 N.Y.U. L. REV. 1682, 1711-12 (1991) (describing the paucity of women on committees organized under the auspices of the Judicial Conference of the United States); Jeffrey W. Stempel, *New Paradigm, Normal Science, or Crumbling Construct?: Trends in Adjudicatory Procedure and Litigation Reform*, 59 BROOKLYN L. REV. 659, 712 n.190 (1993) (noting that "many observers question" the "benign assumption" that "Advisory Committee membership represents a cross-section of the federal bench and legal profession"); see also Peter G. McCabe, *Renewal of the Federal Rulemaking Process*, 44 AM. U.L. REV. 1655, 1664-66 (1995) (noting the historic lack of diversity on the federal rules advisory committees). That federal rules advisory committees are not broadly representative should not be surprising: "the Chief Justice substantially influences the rules-amending process by determining membership on the key Judicial Conference committees that are charged with rulemaking responsibility." Harold S. Lewis, Jr., *The Excessive History of Federal Rule 15(c) and Its Lessons for Civil Rules Revision*, 85 MICH. L. REV. 1507, 1510 (1987). The "passive role" of Congress in overseeing the committees' work product only enhances the Chief Justice's impact on the rule-writing process. See *id.* at 1510-11. For a history of the procedural rulemaking process within the federal court system, see Robert Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887 (1999).

bench would encourage cultural minorities to repose greater faith in the judiciary. Just as the systematic exclusion of racial minorities from juries delegitimized the deliberative process of juries, so too the relative absence of cultural minorities on the bench raises questions about the basic fairness of the public courts.

The Supreme Court has banned culturally-biased jury selection, thereby increasing the perceived legitimacy of the jury system.²²⁹ The same principle that precludes the use of peremptory jury strikes to exclude cultural minorities from jury service should be applied affirmatively to encourage the presence of cultural minorities on the bench. This is not because cultural minorities have a unitary worldview or a common ideology,²³⁰ but rather because the exclusion of cultural minorities from the bench gives rise to a crisis of legitimacy in the operation of the public courts.²³¹

V. CONCLUSION

By stipulation, this Article does not attempt to sketch a particular set of procedures that would ensure the broad social acceptability of particular judicial decisions. The Article's objective has been more limited: to establish the utility of process as a means of legitimating judicial decision making as a project for further discussion, debate, and engagement. The analogy to team sports makes clear that process plays an integral role in establishing the acceptability of particular outcomes. The sports analogy also helps to highlight the systemic difficulties that plague the contemporary legal process: virtually unchecked judicial discretion and an unlimited inequality of arms between the contesting parties.

Further study and examination may demonstrate that these problems are simply intractable. Perhaps no system of procedures could receive general acclamation by the entire community. Even if a set of such procedures could be developed in theory, conscientious judges and jurors might find it quite impossible to implement the procedures successfully. I would suggest that it is simply too early in the day to embrace either of these propositions. Just as one should not declare victory before the game has been played to completion, so too one should not accept defeat.

229. See *J.E.B. v. Alabama*, 511 U.S. 127 (1994); *Batson v. Kentucky*, 476 U.S. 79 (1986).

230. The empirical evidence supporting a connection between immutable characteristics and judicial behavior presents at best a mixed picture. See Sisk et al., *supra* note 46.

231. See generally *Wittmer v. Peters*, 87 F.3d 916 (7th Cir. 1996) (holding that presence of racial minorities at a reform camp for young offenders was essential to the success of the program and, therefore, hiring practices designed to ensure a strong minority presence on the staff were constitutional), *cert. denied*, 519 U.S. 1111 (1997).

The time has come for a new legal process theory, a legal process theory that is thoroughly postmodern in outlook and sensibility, a legal process theory that is inclusive and multicultural in both its aims and its means. Rather than balkanizing the process of dispute resolution through the creation of private and quasi-private judicial institutions, a sustained effort should be made to address the myriad problems that confront our public courts. "Equal justice under law" must be something more than a mere catch-phrase or solely a description of ADR.

Proposals for the privatization of dispute resolution offered up by commentators like Professors Spitko and Ware strongly suggest that the need for systemic attention to process values is acute. The task may be difficult, the challenges vast. Nevertheless, we have no choice but to make the attempt. "Equal justice under law" demands no less.