

1999

## Judge Not: In Defense of Minority-Culture Arbitration

E. Gary Spitko

Follow this and additional works at: [http://openscholarship.wustl.edu/law\\_lawreview](http://openscholarship.wustl.edu/law_lawreview)



Part of the [Dispute Resolution and Arbitration Commons](#)

---

### Recommended Citation

E. Gary Spitko, *Judge Not: In Defense of Minority-Culture Arbitration*, 77 WASH. U. L. Q. 1065 (1999).

Available at: [http://openscholarship.wustl.edu/law\\_lawreview/vol77/iss4/3](http://openscholarship.wustl.edu/law_lawreview/vol77/iss4/3)

This Reply is brought to you for free and open access by the Law School at Washington University Open Scholarship. It has been accepted for inclusion in Washington University Law Review by an authorized administrator of Washington University Open Scholarship. For more information, please contact [digital@wumail.wustl.edu](mailto:digital@wumail.wustl.edu).

# JUDGE NOT: IN DEFENSE OF MINORITY-CULTURE ARBITRATION

E. GARY SPITKO\*

Elsewhere, I have argued that cultural minorities<sup>1</sup> might use arbitration to escape from cultural biases of the majoritarian legal system.<sup>2</sup> In his article, *The New Legal Process: Games People Play and the Quest for Legitimate Judicial Decision-Making*,<sup>3</sup> Professor Ron Krotoszynski warns that such minority-culture arbitration will further undermine the legitimacy of the federal and state court systems.<sup>4</sup> Professor Krotoszynski fears that a “mass exodus” strategy for avoiding cultural bias in the public courts will sufficiently reduce the opportunities for inter-cultural interaction, such that the potential for harms from misunderstanding and prejudice will be exacerbated for those cultural minority members who have no choice but to litigate in the public court systems.<sup>5</sup> In Professor Krotoszynski’s view, this “will only further cripple the ability of the public courts to earn the trust and confidence of particular cultural subgroups within the community.”<sup>6</sup> Thus, Professor Krotoszynski fears a vicious cycle.

In this essay, I defend the merits of minority-culture arbitration. Minority-culture arbitration not only has great utility as a needed safe harbor from majoritarian bias, it also holds great promise as an instrument of systemic change.

I do agree with Professor Krotoszynski that cultural minorities and their allies must remain engaged in “efforts to promote the legitimacy of dispute resolution within the general public courts.”<sup>7</sup> But where Professor Krotoszynski sees minority-culture arbitration as an impediment to such reform of litigation in the public courts, I view it as a potential instrument of

---

\* Assistant Professor of Law, Indiana University School of Law—Indianapolis. A.B., 1987, Cornell University; J.D., 1991, Duke University.

1. I have defined a “cultural minority” member as “an individual whose core religious, political, or social values and beliefs differ meaningfully and substantially from majoritarian norms.” See E. Gary Spitko, *Gone But Not Conforming: Protecting the Abhorrent Testator From Majoritarian Cultural Norms Through Minority-Culture Arbitration*, 49 CASE W. RES. L. REV. 275, 275 n.1 (1999).

2. See generally *id.* (positing that minority-culture litigants might overcome cultural bias in the majoritarian legal system by arbitrating their dispute before an arbitration panel whose membership is selected so that it is more likely to be sensitive to the minority-culture litigants’ values and beliefs).

3. Ronald J. Krotoszynski, Jr., *The New Legal Process: Games People Play and the Quest for Legitimate Judicial Decision-Making*, 77 WASH. U. L.Q. 993 (1999).

4. See *id.* at 1036.

5. See *id.* at 1037.

6. *Id.* at 1041.

7. *Id.*

such reform. I believe that minority-culture arbitration can serve as both a laboratory for developing procedural and substantive reforms, free from the limitations of the majoritarian mindset and will, and as a means to habituate the majority to the realities of the lives of cultural minorities. Such experimentation and habituation, in my view, will tend to make “process”<sup>8</sup> reform in the majoritarian court systems more certain and more swift.

#### I. THE “NEW LEGAL PROCESS”: IF YOU REBUILD IT, THEY WILL COME

In *The New Legal Process*, Professor Krotoszynski argues for “the utility of process as a means of legitimating judicial decision-making.”<sup>9</sup> He notes “that cultural minorities are often . . . skeptical about the basic fairness of judicial decision making.”<sup>10</sup> Professor Krotoszynski’s article is a call for dialogue on the means that might overcome this unfortunate but very real distrust.

Professor Krotoszynski helpfully proposes several “first steps toward generating dialogue about process values” that will promote confidence in the judicial process among women and racial, ethnic, religious, and sexual-orientation minorities.<sup>11</sup> These steps include achieving increased diversity among those who create the procedural rules that operate in the public court systems and among the judiciary who staff those court systems.<sup>12</sup>

I join Professor Krotoszynski’s call for inclusion, dialogue, and reform. I urge that we add as our next step in generating this important dialogue that, once cultural minorities have accepted the invitation to join in the dialogue, we listen to what it is they have to say. It will not be sufficient to build confidence in the public court systems that cultural minorities come to the table and take their seats; they must be heard as well as seen, and their points of view must be appreciated and fully considered. I fear that Professor Krotoszynski’s project is doomed to failure if those in the majority too quickly and easily dismiss the concerns about the public adjudicatory processes raised by those who traditionally have been disadvantaged by those processes.

I think it unfortunate, therefore, that Professor Krotoszynski downplays

---

8. I use the term “process” in this essay expansively, as Professor Krotoszynski defines the term. He defines “process” and “process values” to mean “the aggregation of all elements of the litigation process, including the judges, the parties, the procedural rules, and the substantive rules.” *Id.* at 1010 n.68.

9. Krotoszynski, *supra* note 3, at 1051.

10. *Id.* at 1002.

11. *Id.* at 1050.

12. *See id.* at 1050-51.

minority concerns of judicial bias before the dialogue that he calls for has even begun.<sup>13</sup> Professor Krotoszynski opines that “[i]f the judicial system were as biased and political as some in the [Critical Legal Studies] movement suggest, the general public would surely give it a great deal more day-to-day attention.”<sup>14</sup> I do not share Professor Krotoszynski’s confidence in this majoritarian check on judicial bias given that the very bias at issue is one in favor of the general public. To meet Professor Krotoszynski on his field of sports metaphors, the fact that the Roman citizenry adored the Circus is not compelling evidence that the “process” at issue was fair to Christians.

Moreover, as the problem that the proposed “New Legal Process” seeks to overcome is one of not only *actual* bias but also of *perceived* and of *feared potential* bias, it is not nearly a complete answer to state that the extent of actual bias is less than cultural minorities believe.<sup>15</sup> It is important, therefore, that we listen to the life experiences of those who raise fears of bias so that we can understand the source of those fears and begin to address them.<sup>16</sup>

By way of illustration, consider how a gay defendant in a same-sex sexual harassment lawsuit might perceive the litigation process. I have argued elsewhere that under current sexual harassment law, “the trier of fact in a same-sex sexual harassment lawsuit is likely to judge the alleged behavior of a gay sexual harassment defendant more harshly than it would judge the identical behavior in a context where the defendant was not of the same sex as the plaintiff.”<sup>17</sup> I also have urged that, to lessen the likelihood of this potential bias, the trier of fact in a same-sex sexual harassment lawsuit should be instructed to “evaluate the actions of the gay same-sex sexual harassment defendant in the hypothetical context of a mixed-sex interaction”<sup>18</sup> and that it must not find the gay defendant’s conduct actionable unless it also would find actionable the identical behavior in a mixed-sex interaction.<sup>19</sup>

---

13. See Patricia A. Cain, *Stories from the Gender Garden: Transsexuals and Anti-Discrimination Law*, 75 DENV. U.L. REV. 1321, 1325 (1998) (positing that an important component of constructing feminist legal theories is “listening to and believing women’s stories” and “holding back the critiques and the judgments until the story has been heard in full—with empathy and understanding”).

14. Krotoszynski, *supra* note 3, at 1002.

15. See Clark Freshman, *Privatizing Same-Sex “Marriage” Through Alternative Dispute Resolution: Community-Enhancing Versus Community-Enabling Mediation*, 44 UCLA L. REV. 1687, 1742 (1997) (positing that “[e]ven apart from whether [gay and lesbian] couples will face less bias in gay and lesbian mediation, couples may feel more comfortable and reach better solutions merely because they feel more comfortable”).

16. See generally Cain, *supra* note 13 (recounting stories of female to male transsexuals and suggesting reforms of anti-discrimination laws in light of these stories).

17. E. 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, 56 (1997).

18. *Id.* at 95.

19. See *id.* at 96.

One response to this proposed process reform of sexual harassment law might be to downplay the need for any reform. One might argue that I have overestimated the probability and extent of heterosexist reactions by triers of fact to same-sex sexual interactions.<sup>20</sup> Such a response alone, however, seems unlikely to build the confidence in the public court systems that Professor Krotoszynski seeks to establish among sexual-orientation minorities.

Posit, for the sake of discussion, a gay man who has experienced social difficulty in response to his public display of same-sex affection—for example, holding hands with his boyfriend as the two men walk down a public street.<sup>21</sup> Such social difficulty might range from the awkward stares of passers-by to a violent assault. Posit further that this gay man suspects that he would not have suffered this social difficulty had he been walking down the street holding the hand of a woman. Finally, assume that some time after he has experienced this social difficulty, this gay man finds himself the accused harasser in a same-sex sexual harassment lawsuit arising from his alleged interactions with a male subordinate.

It seems to me likely that the gay man's personal life experiences with cultural bias will cause him to fear a heterosexist bias in the public court system in the context of a same-sex sexual harassment lawsuit. In the absence of some compelling evidence that the presumably heterosexual trier of fact will evaluate the gay man's alleged interactions with his male subordinate in a neutral fashion—that is to say, that the trier of fact will not sanction any same-sex interaction that it would not also sanction in a mixed-sex context—the gay alleged harasser is likely to wish that he had an alternative to adjudication of his case in the public court system. Moreover, I think it reasonable to hypothesize that the gay alleged harasser would be little comforted by assurances that gay people have overestimated the extent and probability of heterosexist reactions to same-sex interactions, or that if the public courts were really as biased against gay people as the gay alleged harasser believed, “the general public would surely give it a great deal more day-to-day attention.”<sup>22</sup>

---

20. See Richard F. Storrow, *Same-Sex Sexual Harassment Claims after Oncale: Defining the Boundaries of Actionable Conduct*, 47 AM. U. L. REV. 677, 719-21, 726-33 (1998) (dismissing as “speculative” my hypothesis that judges and juries will tend to treat acts of alleged same-sex sexual harassment more harshly than they will tend to treat similar acts of alleged mixed-sex sexual harassment).

21. See DAN SAVAGE, *THE KID: WHAT HAPPENED AFTER MY BOYFRIEND AND I DECIDED TO GET PREGNANT* 36 (1999) (describing how same-sex couples are almost never free to hold hands “unself-conscious[ly]”).

22. Krotoszynski, *supra* note 3, at 1002.

In fact, some gay men and lesbians who find themselves accused of same-sex sexual harassment might have an alternative to adjudication in a public court system that has failed to adopt even the modest proposed reform that would allow the trier of fact to “find a lesbian kiss, a gay caress, or a homosexual expression of attraction to be actionable under Title VII only if their mixed-sex counterparts also would ‘create an objectively hostile or abusive work environment.’”<sup>23</sup> Arbitration might offer the gay alleged harasser an opportunity to opt out of a legal forum that potentially is culturally biased against him.

For example, the sexual harassment litigation might be within the scope of an arbitration agreement between the plaintiff and the employer-defendant that calls for resolution of the claim before a tripartite arbitration panel. Under such a tripartite arbitration scheme, the plaintiff and the defendant both enjoy the right to select one of the three arbitrators who, together as a panel, will hear and decide the case. The two-party selected arbitrators then jointly select the third arbitrator.

Such a scheme allows the same-sex sexual harassment defendant to select an arbitrator who is familiar with and accepting of gay sexuality. At a minimum, this selection and the defendant-appointed arbitrator’s input into the selection of the third arbitrator lessen the likelihood that the outcome of the sexual harassment litigation will be influenced by hostility to gay sexuality. More generally, the tripartite scheme seems structurally well-suited to bridging gaps between cultures. Litigants have the opportunity to appoint decision makers from different cultures who will work together to arrive at a decision that reflects an informed social understanding. Absent meaningful process reforms in the public court systems that address minority-culture litigants’ concerns of real, potential, and perceived biases in those courts, public adjudication will be unable to compete with private adjudication as a forum that is sought out for its potential for socially informed decision-making.

## II. LITIGATION AS AN OPPORTUNITY TO INFORM SOCIAL UNDERSTANDINGS

In a very different context, Professor Stephen Ware has written of the potential that arbitration holds for producing “better” law for commercial disputants who fear that the triers of fact in the public courts might not fully appreciate the nuances of their dispute.<sup>24</sup> He points out that arbitration

---

23. Spitko, *supra* note 17, at 96 (citing *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993)).

24. See generally Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law*

affords the opportunity for creation of “sophisticated, comprehensive legal system[s]” tailored to specific industries.<sup>25</sup> He further argues that the private competitive market for law that arbitration can bring might result in the creation of legal norms superior to those produced under a government monopoly over lawmaking. This would be so precisely for the same reasons that competition in other commercial contexts results in better services (from the point of view of the consumer) than does monopolization.<sup>26</sup>

Professor Krotoszynski has reacted with caution to the emerging dialogue on private adjudication’s potential for overcoming majoritarian ignorance and biases in the public court systems. He questions whether the immediate gratification that minority-culture litigants might reap from exiting the majoritarian court systems today might not compound the problems of those minority-culture litigants who are forced into the majoritarian court systems tomorrow.<sup>27</sup> Given our “pluralistic society in which members of myriad ethnic, religious, racial, and ideological groups must, of necessity, interact on a daily basis,” Professor Krotoszynski harbors “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.”<sup>28</sup> He concludes that “[s]uch an approach would tend to exacerbate, rather than reduce, the legitimacy problems that the federal and state courts currently face.”<sup>29</sup>

Specifically, Professor Krotoszynski fears that, to the extent that cultural minorities routinely choose to exit the majority court systems in favor of minority-community-based arbitration, the majority community will lose valuable opportunities to interact with cultural minorities, and “the potential for misunderstanding and prejudice would be increased.”<sup>30</sup> Professor Krotoszynski further argues that this increased misunderstanding and prejudice itself will then further reduce the legitimacy of the public court systems in the views of cultural minorities.<sup>31</sup> For these reasons, Professor Krotoszynski concludes that “[r]ather than attempting to flee the court

---

*Through Arbitration*, 83 MINN. L. REV. 703 (1999).

25. *Id.* at 746-47.

26. *See id.* at 747.

27. *See Krotoszynski, supra* note 3, at 1036-37, 1041.

28. *Id.* at 1036.

29. *Id.*

30. *Id.* at 1037. *Cf.* Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 679 (1986) (expressing the concern that “by diverting particular types of cases away from adjudication, we may stifle the development of law in certain disfavored areas of law”).

31. *See Krotoszynski, supra* note 3, at 1036-37. *Cf.* David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2625-26 (1995) (arguing that arbitration undermines the authority of courts as “an authoritative resolver of controversies”).

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.”<sup>32</sup> Moreover, Professor Krotoszynski challenges those of us who advocate the “‘right of exit’ from the public courts” to consider “the adverse consequences that the larger community might suffer as a result of a generalized” exodus.<sup>33</sup>

Professor Krotoszynski’s challenge is useful and timely. In evaluating the merits of private adjudication of minority-culture concerns, one should consider the potential of public adjudication to inform social understandings. That potential is enormous.

Professor Jane Schacter has written most eloquently of public adjudication’s power “to shape social knowledge and ideas.”<sup>34</sup> She illustrates the point with the case of *In re Adoption of Evan*,<sup>35</sup> in which the court approved the petition of a lesbian couple to jointly adopt a six-year old boy who the couple had raised together since his birth. The court’s opinion, which was among the first in the nation to approve such a lesbian co-parent adoption,<sup>36</sup> spoke of how truly blessed the boy was to have “two adults dedicated to his welfare, secure in their loving partnership, and determined to raise him to the very best of their considerable abilities.”<sup>37</sup> The court concluded that “[t]here is no reason in law, logic or social philosophy to obstruct such a favorable situation.”<sup>38</sup>

Professor Schacter relates how the mainstream press and the gay press widely disseminated the *Adoption of Evan* court’s opinion, sending an “affirming representation of this lesbian family into the larger public processes in which social meanings are made.”<sup>39</sup> Professor Schacter concludes that in this way, public adjudication “can mediate rather than simply mirror the image of a lesbian family because that image can be changed and enhanced by the authoritative recognition and respect of the law.”<sup>40</sup>

In short, public adjudication holds enormous potential for advancing

---

32. Krotoszynski, *supra* note 3, at 1036.

33. *Id.* at 1046.

34. Jane S. Schacter, “Counted Among the Blessed”: *One Court and the Constitution of Family*, 74 TEX. L. REV. 1267, 1268 (1996).

35. 583 N.Y.S.2d 997 (Surr. Ct. N.Y. County 1992).

36. *See* Schacter, *supra* note 34, at 1267.

37. 583 N.Y.S.2d at 1002.

38. *Id.*

39. Schacter, *supra* note 34, at 1269.

40. *Id.* Cf. Geraldine Szott Moohr, *Arbitration and the Goals of Employment Discrimination Law*, 56 WASH. & LEE L. REV. 395, 437-39 (1999) (arguing that public resolution of employment discrimination claims by the courts forms public values that govern future conduct).



progressive agendas, both directly in equalizing cultural minorities under the law, and indirectly, in humanizing cultural minorities beyond the courtroom.<sup>41</sup> For this reason, among others, I would not endorse “a policy of disengagement and withdrawal”<sup>42</sup> from the public court systems, even if such a mass exodus were practical, which of course it is not.

Rather, cultural minorities and their allies must remain engaged in efforts to remove cultural bias from the majoritarian legal system even as they seek to develop alternatives to that system.<sup>43</sup> The goal must be to make private adjudication of claims affecting cultural minorities unnecessary as a means for overcoming cultural bias. A left-handed litigant may well prefer private adjudication as a means for reducing cost and delay, but she need not resort to such private adjudication to overcome systemic bias in the public courts against left-handed people. (Indeed, a complete absence of bias in the legal system against left-handed people does much to explain the absence of a “Law & Left-Handedness” movement within the legal academy.)

But until cultural differences are as irrelevant in the majoritarian legal system as is left-handedness, resort by cultural minorities to private adjudication of minority-culture concerns should be considered and evaluated as to whether it might be instrumental in protecting the private litigants from majoritarian bias, a safe-harbor function, and as to whether such arbitration might retard systemic change or might itself serve as a means for affecting systemic change. A helpful focus for debate is the question: under what circumstances is minority-culture arbitration more helpful than harmful, both with respect to the immediate litigants and with respect to the larger society?<sup>44</sup>

---

41. See Schacter, *supra* note 34, at 1268. Of course, public adjudication has the power to diminish as well as to enhance the social standing of cultural minorities. Compare *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986) (commenting that “[n]o connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated”) with *Hardwick v. Bowers*, 760 F.2d 1202, 1212 (11th Cir. 1985), *rev’d*, 478 U.S. 186 (1986) (holding that Georgia’s prohibition of sodomy “implicates a [gay man’s] fundamental right” of privacy and commenting that, for such persons, such sexual intimacy “serves the same purpose as the intimacy of marriage”). See also Ronald J. Krotoszynski, Jr., *Equal Justice Under Law: The Jurisprudential Legacy of Judge Frank M. Johnson, Jr.*, 109 YALE L.J. (forthcoming April 2000) (noting that Judge Johnson’s opinion in *Hardwick v. Bowers* teaches “a basic recognition of the equal dignity of all persons”).

42. Krotoszynski, *supra* note 3, at 1037, 1034-35 (misrepresenting my position as one “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”).

43. On this broad point, Professor Krotoszynski and I would seem to be in agreement. Professor Krotoszynski does not “categorically reject” minority-culture arbitration of disputes in absolute terms provided “that such efforts must be in addition to, and not in lieu of, efforts to promote the legitimacy of dispute resolution with the general public courts.” *Id.* at 1041.

44. See Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic*

I believe that Professor Krotoszynski largely overstates the extent to which arbitration of minority-culture concerns will retard systemic change. He seems insensitive to the extent to which minority-culture arbitration may be necessary and useful to the minority-culture litigant in avoiding systemic bias. And he wholly overlooks the extent to which minority-culture arbitration can be used instrumentally to affect positive systemic change. This essay next takes each of these points in order.

### III. ARBITRATION AS A (SOMETIMES HARMLESS) SAFE HARBOR PENDING PROCESS REFORMS

Professor Krotoszynski compares my proposal for minority-culture arbitration to “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.”<sup>45</sup> He argues that “[j]ust as sports heroes like Jackie Robinson, Hank Aaron, and Willie Mays helped average Americans confront and overcome their irrational racial prejudices, 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.”<sup>46</sup> Professor Krotoszynski cautions, therefore, against “the potential loss of the public adjudication of certain categories of legal claims involving particular cultural minorities” that would flow from minority-culture arbitration.<sup>47</sup>

In evaluating this and other potential harms of minority-culture

---

*Defense of Settlement (In Some Cases)*, 83 GEO. L.J. 2663, 2663-65 (1995) (arguing that the academic debate “for and against” settlement has at times been overly simplistic and adversarial and positing that the more helpful “question is not ‘for or against’ settlement . . . but *when, how, and under what circumstances* should cases be settled?”).

45. Krotoszynski, *supra* note 3, at 1044-45. Implicit throughout Professor Krotoszynski’s critique of my call for minority-culture arbitration is a rejection of the notion that “separate but equal” treatment of cultural minorities under the law should ever be the preferred alternative. *See id.* at 1035-37. Separate but equal treatment, however, need not imprint a stamp of inferiority on the cultural minorities who are the subject of the discriminating law. *See* PEGGY COOPER DAVIS, *NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES* 64 (1997) (“The phrase ‘equal protection of the laws’ can plausibly be read either to permit or to condemn the principle of separate but equal. The difference in interpretation turns largely upon whether one regards the separation as natural or benign or as unfairly presumptive of racial hierarchy and predictably subordinating.”).

Indeed, separate but equal treatment under the law in response to relevant fundamental differences may be necessary to avoid sending a message that the minority group does not merit positive attention. *See* E. Gary Spitko, *The Expressive Function of Succession Law and the Merits of Non-Marital Inclusion*, 41 ARIZ. L. REV. 1063 (1999) (arguing that the Uniform Probate Code’s failure to distinguish between the intestate inheritance rights of gay people and non-gay people ignores a fundamental distinction in the lives of gay people as contrasted with the lives of non-gay people and sends a message that gay and lesbian relationships are insignificant or unsuitable for recognition).

46. Krotoszynski, *supra* note 3, at 1045.

47. *Id.*

arbitration, it is important to distinguish, as Professor Krotoszynski fails to do, among various types of litigation with varying potentials for informing social understandings and, more generally, for impacting the public interest.<sup>48</sup> Many categories of litigation, for example, are less comparable to watching Jackie Robinson play baseball than they are to watching the grass grow at the neighborhood softball field.<sup>49</sup> The public interest in such claims is likely to be minimal and adjudication of such claims in the public courts is likely to be little noticed. There would seem to be little lost, therefore, in the way of “general social benefits flowing from the exercise of facing and deciding the questions embedded in the claim”<sup>50</sup> by the removal of such claims from the majoritarian court system.<sup>51</sup> For the minority-culture litigant, however, there might be much to be gained by such removal.

The typical probate dispute is illustrative of this point. Ordinarily, probate proceedings are little noticed by those without an immediate interest in the estate at issue.<sup>52</sup> Moreover, modern probate law generally is statutorily

---

48. See Edwards, *supra* note 30, at 671-76 (suggesting that ADR mechanisms that are divorced from the courts are “wholly inappropriate” for resolving litigation involving “significant public rights and duties,” but may be appropriate for solely “private” disputes that do not implicate important public values); Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1087 (1984) (pointing out that in evaluating the effects of settlement on the judicial system and the quest for justice, one must appreciate that “[a]ll cases are not equal”); Menkel-Meadow, *supra* note 44, at 2666 (arguing that an evaluation of the merits of settlement versus adjudication should consider the multiple variables particular to each dispute); Moohr, *supra* note 40, at 400-01 (concluding that arbitration is less effective than litigation at promoting the goal of ending workplace discrimination but conceding that “arbitration is the only viable forum for certain employees because it generally offers affordable and expeditious resolution of claims”); *id.* at 457 (rejecting the view that no statutory claim should be arbitrable, and calling for a “particularized inquiry to determine whether arbitration furthers the policy objective of the statute at issue”).

49. See Edwards, *supra* note 30, at 680 (suggesting that “highly fact-bound” employment discrimination cases that do not present novel questions of law may properly be resolved by an arbitrator but employment discrimination cases that “present novel questions . . . should be resolved by a court”). *But see* Moohr, *supra* note 40, at 455 n.304 (positing that “the development of discrimination law [evidences that] discrimination cases depend upon the application of a developing, rather than a fixed, law to a wide range of factual situations”).

50. Krotoszynski, *supra* note 3, at 1045.

51. To the extent that the “general social benefits” of which Professor Krotoszynski writes include the opportunity to educate the public trier of fact about minority-culture concerns, removal of litigation to a private minority-culture forum indeed would result in a lost opportunity to provide the public trier of fact with a transforming experience.

52. Occasionally, a probate dispute does capture wide public interest. A decedent’s fame or great wealth generally is prerequisite to such interest. See, e.g., DAVID MARGOLICK, *UNDUE INFLUENCE: THE EPIC BATTLE FOR THE JOHNSON & JOHNSON FORTUNE* (1993) (chronicling the litigation concerning the estate of J. Seward Johnson); Mark Miller, *Battling for a Billion: Anna Nicole Smith’s Big Inheritance Showdown*, NEWSWEEK, Nov. 8, 1999, at 41 (reporting on the fight over the late J. Howard Marshall’s \$1.6 billion fortune being waged between the decedent’s 31-year old widow, the 1993 Playboy Playmate of the year, and the decedent’s 60-year old son).

defined in great detail and is largely well-settled.<sup>53</sup> Most probate disputes, therefore, would not seem to present an opportunity to “make new law” or grab headlines in a way that will transform social understandings.<sup>54</sup>

Probate law is structured, however, so that some probate disputes can serve as vehicles for the imposition of majoritarian cultural norms on the decedent who has left an estate plan that deviates from the cultural norm favoring dispositions to the legal spouse and close blood relations over dispositions to “non-family.”<sup>55</sup> The doctrines of testamentary capacity, undue influence, and testamentary fraud are sufficiently nebulous that they give wide berth to a trier of fact who is intent on disregarding the estate plan that offends the majoritarian norm favoring family and close blood relations.<sup>56</sup> Once the trier of fact has declared the testator’s estate plan invalid, the estate might be subject to distribution in accordance with the jurisdiction’s intestacy scheme<sup>57</sup> that itself is likely to reflect the same majoritarian norm that prefers the legal spouse and close blood relations over “non-family.”<sup>58</sup>

Process reform, as Professor Krotoszynski defines that term,<sup>59</sup> could go a long way toward alleviating the concerns of majoritarian bias of at least some minority-culture testators. For example, reform of intestacy statutes to provide a significant share of the decedent’s intestate estate to her same-sex

---

53. See generally UNIF. PROBATE CODE Article II (1997) (providing the substantive law of intestate succession as well as substantive rules covering the execution and revocation of wills and certain other non-probate instruments).

54. One can cite counterexamples. See e.g., *Evans v. May*, 923 S.W.2d 712, 715 (Tex. App. 1996) (declining to hold that the will beneficiary’s “30-year relationship as the decedent’s [same-sex] ‘lifemate’ constitute[d] undue influence as a matter of law”); *In re Cooper*, 592 N.Y.S.2d 797 (N.Y. App. Div. 1993) (rejecting a surviving same-sex partner’s claim for a spouse’s elective share in the decedent’s estate).

55. See generally Melanie B. Leslie, *The Myth of Testamentary Freedom*, 38 ARIZ. L. REV. 235, 257-58 (1996) (reporting the results of Professor Leslie’s empirical study of will contests and concluding that “regardless of what courts declare, the presumption in favor of family members generally can be overcome only where the court views the testator’s reason for disinheriting relatives as morally acceptable”).

56. See Spitko, *supra* note 1, at 278-85.

57. If the decedent executed an estate plan prior to her execution of the estate plan that has been adjudicated invalid, the prior estate plan, rather than the intestacy scheme, might control the disposition of the decedent’s estate under some circumstances. See JESSE DUKEMINIER & STANLEY M. JOHANSON, *WILLS, TRUSTS, AND ESTATES* 276 (6th ed. 2000) (“If a duly executed will is not revoked in a manner permitted by statute, the will is admitted to probate”) (emphasis omitted).

58. See Spitko, *supra* note 1, at 280-81. Presently, California, Hawaii, and New Hampshire are the only American jurisdictions that provide an intestate share to others than a legal spouse or blood or adopted relations. See CAL. PROB. CODE § 6454 (West Supp. 2000) (providing intestate inheritance rights to certain step-children and foster children); HAW. REV. STAT. ANN. §§ 572C-1 to -7 (Michie Supp. 1998) (providing intestate inheritance rights to a decedent’s “reciprocal beneficiary” who can be a decedent’s registered same-sex partner); N.H. REV. STAT. ANN. § 457:39 (1992) (providing intestate inheritance rights to certain mixed-sex non-marital cohabitants).

59. See *supra* note 8.

partner<sup>60</sup> or her functional but non-legal child<sup>61</sup> would reduce, under certain circumstances, the incentive, and perhaps the ability, of blood relations to challenge the decedent's estate plan in favor of such non-traditional legatees.<sup>62</sup> Such reform might also reduce the ability of the trier of fact to reorder the estate plan in accordance with majoritarian norms.<sup>63</sup>

With such process reform, the minority-culture testator who favored in her will her same-sex partner or non-legal child might have less cause to fear majoritarian bias in the majoritarian legal system with respect to the probate of her will and, thus, might have much less of an incentive to flee the majoritarian court system in this instance.<sup>64</sup> Absent such process reforms, however, a minority-culture testator could gain some peace of mind through a provision in her will mandating that any challenge to her will shall be adjudicated by an arbitrator named by the testator in her will.<sup>65</sup> Through arbitration, the testator may increase the likelihood that the decision maker in any will contest understands and respects the testator's values and may decrease the likelihood that the trier of fact will invalidate the will because of an animus to the testator's dispositive choices.<sup>66</sup>

Thus, arbitration can serve as a safe harbor from majoritarian bias until process reform makes such a safe harbor unnecessary. Moreover, for many classes of litigation, this safe harbor function can be achieved with very little trade-off in lost social understanding resulting from the avoidance of the

---

60. See generally Spitzko, *supra* note 45 (arguing that reform of Article II of the Uniform Probate Code to provide intestate inheritance rights to surviving same-sex committed partners would be consistent with the values upon which the drafters based Article II).

61. See generally Susan N. Gary, *Adapting Intestacy Laws to Changing Families*, 18 LAW & INEQ. J. (forthcoming Jan. 2000) (proposing that the definitions of parent and child in intestacy statutes be expanded to include those persons who can establish a functional parent-child relationship).

62. To the extent that intestacy reform removes the blood relatives' status as heirs, the blood relatives would lack standing to bring such a challenge to the decedent's estate plan unless the decedent had previously denominated such persons as legatees. If a prior estate plan left more property to the blood relations than the decedent's final estate plan, the blood relations would have both standing and the incentive to challenge the final estate plan regardless of the intestacy scheme.

63. Such intestacy reform might not impair the trier of fact's ability to reorder the decedent's estate plan in accordance with majoritarian cultural norms in situations where the decedent had executed an estate plan that conformed to such norms prior to her execution of her final estate plan.

64. Reform of other default rules relating to family relations to recognize the realities of gay and lesbian lives also would likely do much to build the confidence that gay and lesbian people have in the public court systems. See Thomas P. Gallanis, *Default Rules, Mandatory Rules, and the Movement for Same-Sex Equality*, 60 OHIO ST. L.J. (forthcoming Nov. 1999) (arguing for reform of default rules in the areas of intestacy, healthcare decision-making, and guardianship to recognize the realities of the lives of gay and lesbian people).

65. For an analysis of whether such an arbitration clause should be enforceable, see Spitzko, *supra* note 1, at 297-314.

66. See *id.* at 294-97.

majoritarian court systems.<sup>67</sup>

#### IV. ARBITRATION AS A LABORATORY FOR THE DEVELOPMENT OF PROCESS REFORMS

In addition to its potential for serving as a safe harbor from a biased trier of fact, arbitration holds great promise as a means for avoidance of biased substantive law. As Professor Ware has written, “arbitration agreements permit a menu [of substantive law] limited only by the parties’ imaginations.”<sup>68</sup> Thus, cultural minorities might use arbitration to opt out of substantive law that was developed without regard to their special circumstances and to opt into substantive law custom made for them. Moreover, in serving as a safe harbor for cultural minorities from biased substantive law, arbitration simultaneously can serve as a vehicle for facilitating diversity in substantive law to match the diversity in the general population.

The precarious legal situation faced by many gay or lesbian co-parented families provides a compelling example of the urgent need for such an ability to opt out of substantive law drafted with majoritarian norms in mind and without any regard for the special needs of cultural minorities. According to some estimates, millions of children in the United States today live in families headed by a gay or lesbian parent or parents.<sup>69</sup> Many of these children were born or adopted into a heterosexual marriage with a husband or wife who later came out as gay.<sup>70</sup> Indeed, prior to 1980, it was quite rare for a

---

67. Even for classes of litigation that do have the potential to transform social understandings, arbitration may be the more useful approach in some circumstances. Arbitration of selected cases would allow for the resolution of those particular disputes while preventing courts that are likely to be hostile to the minority culture or the proposed legal reform at issue from acting on their bias or setting a negative precedent on the relevant question. Thus, for example, those who attempt to manage the movement for gay and lesbian legal equality might consider litigating novel issues of law in the courts of more progressive states, while submitting to arbitration the very same issues when they arise in jurisdictions that have proven hostile to gay and lesbian equality.

68. Ware, *supra* note 24, at 727.

69. See, e.g., Craig W. Christensen, *If Not Marriage? On Securing Gay and Lesbian Family Values by a “Simulacrum of Marriage,”* 66 *FORDHAM L. REV.* 1699, 1730 n.187 (1998) (citing sources that estimate the number of gay or lesbian parents in the United States at between 1.5 million and 5 million and sources that estimate the number of children in the United States being raised by a gay or lesbian parent at between 1.5 million and 10 million); Joan Lowy, *Movement to Halt Gay Adoptions Gathers Steam; Homosexuals More Outspoken About Desire to Create Families*, *CHATTANOOGA TIMES*, Feb. 28, 1999, at A8 (reporting that the National Adoption Information Clearinghouse, a federal agency, estimates that between 2.5 million and 8 million gay parents are raising between 6 million and 14 million children and reporting that the Family Pride Coalition, a support group for gay and lesbian families, estimates that approximately 2 million gay parents are raising between 3 million and 5 million children).

70. Caryle Murphy, *Gay Parents Find More Acceptance*, *WASH. POST*, June 14, 1999, at A1

gay man or lesbian to have a child outside of a heterosexual relationship.<sup>71</sup>

Since the early 1980s, however, the United States has experienced a “gay baby boom.”<sup>72</sup> Gay men and lesbians continue to have children within the context of a heterosexual relationship such as a traditional marriage.<sup>73</sup> In ever-increasing numbers, however, gay men and lesbians have been having and raising children who have never lived in a household headed by a heterosexual couple or a non-gay person.<sup>74</sup>

Some of these children were born to or were adopted by a gay or lesbian parent who alone chose to create a family with only one functional parent who is also the sole legal parent.<sup>75</sup> Many other children were brought into a family, through birth or adoption, in which two gay or lesbian parents planned to raise the child jointly as equal functional co-parents.<sup>76</sup> Gay couples may create such co-parented families through surrogacy or adoption.<sup>77</sup> Lesbian couples may create such co-parented families though

---

(reporting that, according to the executive director of the Family Pride Coalition, “the overwhelming majority of about 2 million parents who are gay are raising children from earlier heterosexual marriages”).

71. See Nancy D. Polikoff, *Brief: The Social Construction of Parenthood in One Planned Lesbian Family*, 22 N.Y.U. REV. L. & SOC. CHANGE 213, 219 & n.2 (1996) (documenting the first appearance in the early 1980s of media reports, scholarly articles, and litigation concerning children planned and raised in lesbian co-parented families).

72. See *id.* at 221-27 (documenting the increased prevalence of planned lesbian and gay families since the early 1980s and the modern boom in media resources, conferences, support groups, and media coverage targeted to or reporting on such families).

73. Upon dissolution of the heterosexual marriage, the gay or lesbian parent may find that his or her minority sexual orientation or new same-sex relationship places him or her at a disadvantage in any custody dispute with the non-gay parent in the majoritarian legal system. See *e.g.*, *Ex parte J.M.F.*, 730 So. 2d 1190, 1195-96 (Ala. 1998) (holding that the trial court acted within its discretion in changing custody of a divorced couple’s child from the mother to the father where the mother had “established an open lesbian relationship, which [the mother and her partner] explained to the child and which they demonstrate with affection in the presence of the child on a regular basis” and where the father had “established a happy marriage with a woman”); *Pulliam v. Smith*, 501 S.E.2d 898, 904 (N.C. 1998) (holding that the evidence supported the trial court’s decision to change the custody of a divorced couple’s two children from the father to the mother where the father “was regularly engaging in sexual acts with [another man] in the home”).

74. See, *e.g.*, *Murphy*, *supra* note 70 (relating the stories of the creation of several such planned gay and lesbian families through surrogacy and artificial insemination).

75. See Ronald Smothers, *Accord Lets Gay Couples Adopt Jointly*, N.Y. TIMES, Dec. 18, 1997, at B4 (reporting the comments of an adoption researcher with the Child Welfare League of America that gay and lesbian single-parent adoptions have become more prevalent in recent years).

76. See, *e.g.*, *Adrienne Drell, Panel Rebukes Adoption Judge*, CHICAGO SUN-TIMES, June 2, 1999, at NWS8 (reporting that hundreds of adoptions by same-sex couples have been granted in Illinois since 1995); Smothers, *supra* note 75 (describing the agreement between gay advocacy groups and New Jersey child welfare officials that will let gay and lesbian couples in New Jersey adopt children jointly, and reporting the comments of an attorney with the American Civil Liberties Union’s Lesbian and Gay Rights Project who represented more than 200 gay and lesbian couples in a class action challenging New Jersey’s former policy opposing such adoptions).

77. See *e.g.*, *SAVAGE*, *supra* note 21 (relating a gay couple’s experiences with the open adoption

alternative insemination or adoption.<sup>78</sup>

As *In re Adoption of Evan* illustrates,<sup>79</sup> the law in some jurisdictions has evolved to recognize these new family structures. Indeed, the trend subsequent to *Adoption of Evan* has been for courts to approve gay and lesbian co-parent adoptions.<sup>80</sup> Where, through a co-parent adoption, both gay or lesbian co-parents have become recognized as the legal parents of the child, both co-parents generally will retain parental rights with respect to their child even if the co-parents terminate their partnership. Thus, both co-parents can invest in their relationship with the child and with the family unit secure in the knowledge that their parent-child relationships will not be subject to unilateral termination by the other parent.

Gay or lesbian co-parent adoptions are not an option, however, in many jurisdictions.<sup>81</sup> The law in many states simply does not allow for a child to have two legal mothers or two legal fathers. This legal non-recognition endures despite the fact that such dual motherhood or dual fatherhood is a reality for many children.

In such states, the termination of the gay or lesbian partnership would find the co-parents on unequal legal ground with respect to rights relating to their child.<sup>82</sup> The biological or adoptive parent—that is, the sole legal parent—

---

process); Ted Gideonse, *Baby by Proxy: Growing Generations Helps Gay Couples Through the Maze of Surrogate Pregnancy*, THE ADVOCATE, June 22, 1999, at 83 (discussing “Growing Generations,” a company that assists gay individuals and couples with the surrogacy process); Susan Swartz, *Santa Rosa Woman Carrying Baby for Gay Couple*, PRESS DEMOCRAT (Santa Rosa, CA), June 28, 1998, at B1 (reporting on the surrogacy process from the perspective of a woman who chose to be a surrogate for a gay couple).

78. See e.g., Daniela Altimari and Matthew Daly, *Same-Sex Family Adoption Derailed: Homosexual Marriage Ban Stalls Legislation*, HARTFORD COURANT, June 4, 1999, at A6 (relating the story of two lesbians who have been together as a couple for 25 years, one of whom recently adopted two girls from Vietnam; under Connecticut law, the couple was not able legally to adopt the girls jointly); Drell, *supra* note 76 (reporting on the cases of three lesbian couples in which one partner conceived a child through artificial insemination and the other partner sought to become the second mother through adoption).

79. See *supra* notes 35-38 and accompanying text.

80. See *In re M.M.D. & B.H.M.*, 662 A.2d 837 (D.C. 1995); *In re K.M.*, 653 N.E.2d 888 (Ill. App. Ct. 1995); Adoption of Tammy, 619 N.E.2d 315 (Mass. 1993); Adoption of Two Children by H.N.R., 666 A.2d 535 (N.J. Super. Ct. App. Div. 1995); *In re Jacob*, 660 N.E.2d 397 (N.Y. 1995); Adoption of B.L.V.B., 628 A.2d 1271 (Vt. 1993). See also Adoption of Galen, 680 N.E.2d 70 (Mass. 1997) (trial judge may not order a home study simply because the adoption petitioners are of the same sex).

81. See *In re Adoption of Baby Z.*, 724 A.2d 1035 (Conn. 1999) (holding that Connecticut’s adoption statute does not allow a biological mother’s lesbian partner to adopt the mother’s child unless the biological mother first relinquishes her legal rights); *In the Interest of Angel Lace M.*, 516 N.W.2d 678 (Wis. 1994) (holding that a lesbian co-parent cannot adopt her partner’s child unless the parental rights of her partner are first terminated).

82. See John DeWitt Gregory, *Blood Ties: A Rationale for Child Visitation by Legal Strangers*, 55 WASH. & LEE L. REV. 351, 351-52 (1998) (reviewing case law and noting that “[m]ore often than



would be in a superior position relative to her co-parent to gain custody of their child. Indeed, in some jurisdictions, the functional but non-legal parent would find herself without standing to seek custody or even visitation rights in relation to the child she has co-parented since the child's birth.<sup>83</sup> Even if the jurisdiction allows the non-legal parent to petition for custody or visitation, that parent may be at the same legal disadvantage as a third party challenging a legal parent for custody.<sup>84</sup>

A system in which primary custody and visitation rights derive solely from a biological relationship to the child or marriage to the mother of the child might work well for the majority of non-gay people. But such rules are presumptively dysfunctional for gay and lesbian families whose co-parents are denied the privilege of legal marriage and for whom co-biological parentage of the child is a physical impossibility.<sup>85</sup> Indeed, if one were to set out to design rules to promote the destruction of gay and lesbian families upon fracture, one could hardly seek to do better than to adopt the present rules basing primary custody and visitation rights on biology or marriage.

For this reason, I agree with Professor Krotoszynski's broad thesis that

---

not, natural parents successfully resist assertions of child visitation rights by legal strangers such as stepparents and so-called lesbian "co-parents").

83. See *Guardianship of Z.C.W.*, 84 Cal. Rptr. 2d 48 (Cal. Ct. App. 1999) (rejecting a lesbian former partner's attempt to gain visitation rights through a guardianship proceeding and under a "de facto parent" theory); *Curiale v. Reagan*, 272 Cal. Rptr. 520 (Cal. Ct. App. 1990) (holding that a mother's lesbian former partner and co-parent, who had previously supported both the child and the mother, lacked standing to petition for visitation or custody of the child who was conceived during the relationship by artificial insemination); *Kazmierczak v. Query*, 736 So. 2d 106 (Fla. Dist. Ct. App. 1999) (denying a biological mother's lesbian former partner custody or visitation rights with respect to the child they had jointly raised since the child's birth on the grounds that the non-biological mother lacked standing to petition for such rights). *But see E.N.O. v. L.M.M.*, 711 N.E.2d 886 (Mass. 1999) (holding that a trial court possesses equity jurisdiction to grant visitation between a child and a lesbian former partner of the child's legal mother where the former partner was the child's "de facto" parent); *Holtzman v. Knott*, 533 N.W.2d 419 (Wis. 1995) (holding that a court may exercise its equitable powers to grant visitation to a lesbian former partner who enjoys a parent-like relationship with the child, even where the visitation statute does not provide for such a right).

84. See *J.A.L. v. E.P.H.*, 682 A.2d 1314, 1319 (Pa. Super. Ct. 1996) (holding that legal mother's lesbian former life partner has standing to petition for partial custody of the child born during their relationship but faces an "increased burden of proof required of third parties seeking custody rights").

85. See Paula L. Ettelbrick, *Who Is A Parent?: The Need to Develop A Lesbian Conscious Family Law*, 10 N.Y.L. SCH. J. HUM. RTS. 513, 515-17 (1993) ("Any rule of law that presumes marriage to be a determining factor for legal recognition as a parent inherently discriminates against lesbian families for the simple reason that lesbian couples are not allowed to marry. Rules that presume that the biological connection between parent and child outweighs all other claims to parenting likewise eliminate the possibility that the relationship between a non-biological lesbian mother and the child she is raising with her partner will ever be recognized."). See also Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459, 463 (1990) (pointing out that upon the dissolution of a lesbian co-parenting couple, the "family will find itself in a court system ill-prepared to recognize its existence and to formulate rules to resolve its disputes").

encourages advocates for gay and lesbian families to continue to litigate in the public courts where appropriate and to petition state legislatures for “process” reforms that recognize the realities of the lives of gay and lesbian families.<sup>86</sup> “Process” reforms such as those providing for gay and lesbian co-parent adoptions not only better serve gay and lesbian families, but also have great potential for legitimating the public court systems in the eyes of gay men and lesbians.

For gay and lesbian couples who live in jurisdictions that have not yet adopted such reforms, however, reform may come too late. Such reforms already are too late for gay and lesbian couples that presently are co-parenting or wish to co-parent in an environment in which neither parent is forced to serve as a parent-at-will. Process reforms that come tomorrow will not allow these couples to structure their lives today in a way that promotes their family goals.

Arbitration, however, offers gay and lesbian co-parents the potential to develop and adopt today their own law of child custody and visitation apart from the heterosexual experiences and assumptions that dominate the majoritarian legal dialogue. Pursuant to a pre-dissolution arbitration agreement, a gay or lesbian couple can agree to be bound, in the event that their partnership dissolves, by gay- and lesbian-friendly rules of standing and custody decision-making. For example, a same-sex couple might agree to a rule of standing for child custody and visitation claims along the lines of Professor Nancy Polikoff’s proposal for expanding the definition of parenthood.<sup>87</sup> They might also reject the “best interests of the child” standard as hopelessly heterosexist<sup>88</sup> and instead agree to a substantive rule for child custody and visitation decision-making along the lines of, for example, Professor Elizabeth Scott’s “approximation” principle.<sup>89</sup> Indeed, the co-

---

86. See Krotoszynski, *supra* note 3, at 1041-42. See also Ettelbrick, *supra* note 85, at 514-15 (urging that the law “be developed according to the perspectives and experiences of lesbians, in much the same way that some advocate that it be developed to fit the experiences of women and people of color”).

87. See Polikoff, *supra* note 85, at 464 (proposing “expanding the definition of parenthood to include anyone who maintains a functional parental relationship with a child when a legally recognized parent created that relationship with the intent that the relationship be parental in nature”).

88. Academic criticisms of the prevailing “best interests” standard are legion. See Mary Becker, *Maternal Feelings: Myth, Taboo, and Child Custody*, 1 REV. L. & WOMEN’S STUD. 133, 175 (1992) (detailing biases in the application of the “best interests” standard against, for example, gay and lesbian people and sexually active women); Carl E. Schneider, *Discretion, Rules, and Law: Child Custody and the UMDA’s Best Interest Standard*, 89 MICH. L. REV. 2215, 2219-25 (1991) (summarizing criticisms of the “best interests” standard).

89. See Elizabeth S. Scott, *Pluralism, Parental Preference, and Child Custody*, 80 CAL. L. REV. 615, 630 (1992) (proposing that courts use past parental roles to guide their custody decisions “and seek[] to approximate as closely as possible the predivorce patterns of parental responsibility in the

parents could even attempt to persuade Professors Polikoff and Scott to serve as the arbitrators who would implement their custody and visitation principles.

In this way, arbitration can allow cultural minorities to structure their lives under rules that were crafted with the realities of their lives in mind. By replacing child custody and visitation rules that depend upon heterosexual marriage or biology with rules that depend upon the functional parenting roles that gay and lesbian co-parents fill, gay and lesbian co-parents can build stronger families. The co-parents of an intact co-parenting relationship can invest in their family relationships secure in the knowledge that the law will respect their emotional investment.<sup>90</sup>

More generally, those minority-culture litigants who choose arbitration in an attempt to circumvent law that they find dysfunctional for their particular circumstances inadvertently might also further law reform by providing a model for comparison. The private standards developed in arbitration might expose how the laws that the majority has crafted for the general population fail to serve the needs of cultural minorities.<sup>91</sup> Therefore, the substantive law that cultural minorities develop and implement in private arbitration to fit their peculiar needs also can serve as the focus of reform efforts in the public

---

custody arrangement”).

90. Such an arbitration agreement governing child custody and visitation matters is useful in structuring the lives of the co-parenting couple only if the couple can count on the public courts to specifically enforce such an agreement and to defer in most cases to a resulting arbitration award. The majority approach, however, is that an arbitration award relating to child custody or visitation is not binding on the court because of the state's *parens patrie* responsibilities with respect to the minor child. See e.g., *Masters v. Masters*, 513 A.2d 104, 111-12 (Conn. 1986); *Spencer v. Spencer*, 494 A.2d 1279, 1285 (D.C. 1985); *Glauber v. Glauber*, 600 N.Y.S.2d 740, 741 (N.Y. App. Div. 1993); *Miller v. Miller*, 620 A.2d 1161, 1164 (Pa. 1993). See also Joseph T. McLaughlin, *Arbitrability: Current Trends in the United States*, 59 ALB. L. REV. 905, 930 (1996) (noting that “most state courts hold that, while divorcing parents may arbitrate disputes involving the custody, care, and costs of their children, the arbitrator’s decision is subject to the court’s *de novo* review if the decision is not in the child’s best interests”). But see *Dick v. Dick*, 534 N.W.2d 185, 190-91 (Mich. Ct. App. 1995) (allowing for the use of binding arbitration in resolving child custody disputes); *Faherty v. Faherty*, 477 A.2d 1257, 1263 (N.J. 1984) (in dicta, stating that an arbitrator may be as capable of protecting a child’s best interests as is a judge). I believe that in deciding whether the state should enforce pre-dissolution arbitration agreements that purport to govern custody and visitation rights relating to a minor child, courts should be guided by the principles that govern state intervention in the parent-child relationship. For an analysis concluding that these principles support enforcement of such arbitration agreements and deference to resulting arbitration awards absent a showing of a likelihood of harm to the child, see E. Gary Spitko, *Reclaiming the “Creatures of the State”: Contracting for Child Custody Decision-Making in the Best Interests of the Family”* (Nov. 1, 1999) (unpublished manuscript, on file with the author).

91. See Menkel-Meadow, *supra* note 44, at 2676 (positing that a system of settlement of disputes “serves to criticize, avoid, or correct laws that some find unjust, inefficient, or just plain inapplicable”).

court systems.<sup>92</sup>

Thus, arbitration holds great promise for enriching and focusing the dialogue on reform that Professor Krotoszynski has called for. Those who seek to formulate process reforms that will tend to increase the confidence of cultural minorities in the public courts could look to the procedural and substantive rules that cultural minorities have developed for themselves for use in arbitration in response to their frustration with the “process” available in the general public courts.

#### V. THE HABITUATING FUNCTION OF ARBITRATION

I have attempted to demonstrate how arbitration can serve as a necessary safe harbor from procedural and substantive cultural bias in the general public courts. I also have attempted to demonstrate how arbitration can serve as a laboratory for process reforms as cultural minorities attempt to craft rules that better govern their lives than do the purportedly “one size fits all” rules that the majority has crafted. In so allowing cultural minorities to structure their lives and legal disputes in ways that reflect their particular needs, minority-culture arbitration also has great potential for habituating the general public to the realities of the lives of cultural minorities and to the notion that custom-made responses to these realities are both possible and appropriate. These two habituations would be likely to lead to easier acceptance of necessary process reforms that would better serve cultural minorities in the public courts.

Each time cultural minorities use arbitration to contract around a hostile or dysfunctional rule of general application and to replace this rule with a better-serving custom-made rule, they have an opportunity to demonstrate to the general public that the process shortcomings that drove the cultural minorities from the general public courts are not intractable. They also have the opportunity to demonstrate to the general public the utility of custom-made solutions to minority-culture concerns and that these solutions to process shortcomings can be implemented with little cost to the general public. If minority-culture arbitration were to become routine, it is possible that the general public would habituate to the idea that process-customization is both practical and useful. Such habituation would lessen resistance to adoption of process reforms tailored to cultural minorities.<sup>93</sup>

---

92. *See id.* (concluding that “[t]hrough individually adaptive solutions in settlement we may see the limits of law and explore avenues for law reform”).

93. *See* Martha M. Ertman, *Contractual Purgatory for Sexual Minorities: Not Heaven, But Not Hell Either*, 73 *DENV. U. L. REV.* 1107, 1140 (1996) (theorizing that the execution and

For example, when gay or lesbian co-parents arbitrate their custody dispute using substantive rules for custody decision-making that do not disadvantage the functional but non-legal co-parent relative to the legal parent, they help to break down the belief that parental rights should in all cases derive from marriage or biology. They help to habituate the general public to the idea that the law can accommodate the reality that some children do have two mothers or fathers. And they cause the public to consider the costs of the prevailing law that denies this reality.

Arbitration also can facilitate habituation in a larger social context. This second tier of habituation arises from the consequence that arbitration allows the minority culture to survive and even to flourish. Biased procedural and substantive law undermines the minority culture at the same time that it disadvantages the minority-culture litigant. Arbitration allows cultural minorities to protect themselves from these majoritarian procedural and substantive biases that deny the validity of their values and relationships and consequently undermine those values and relationships.

The end product of this protective maneuver is a larger public space for the minority culture. As the minority culture flourishes, the general public more frequently comes into contact with that culture and habituates to its realities.<sup>94</sup> Again, this habituation is likely to pave the way for process reforms in the majoritarian legal system.

Consider one last time our lesbian co-parenting couple. Upon dissolution of their partnership, the law in some jurisdictions would deny the non-legal parent standing to petition for custody and visitation rights relating to the child she has co-parented since birth with her former partner.<sup>95</sup> A consequence of such a restrictive rule of standing is that the child no longer would have two mothers. The lesbian family would be not only fractured but also legally extinct.

If the co-parents had been parties to a binding pre-dissolution arbitration agreement that granted standing and substantive equality to the non-legal co-parent, however, the lesbian family would be likely to survive, fractured but

---

enforcement of gay cohabitation contracts might habituate the general public to the notion of gay couplehood and that this habituation might lead to the recognition of gay marriage as a public right).

94. See E.J. Graff, *Equal Rights: When Heather's Mommies Share Custody*, BOSTON GLOBE, Sept. 12, 1999, at Focus (reporting the comment of the executive director of the National Center for Lesbian Rights that "[a]s more [gay men and lesbians] become parents, [gay men and lesbians] are showing up in places [they] have never been seen before: school board meetings, parent-teacher conferences, Little League games, the soccer field, [and] school potluck fund raisers" and arguing that the resulting familiarity of the non-gay majority with gay and lesbian parents will translate into greater acceptance of gay and lesbian parenting).

95. See *supra* notes 82-84 and accompanying text.

extant. Regardless of which co-parent was awarded primary custody of their child, both parents would have the legal right to continue to play an important active role in the child's life. This fractured but extant lesbian family would remain in public view, offering an ongoing opportunity for the general public to habituate to the reality that gay and lesbian people do form such families.