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## **SOCIAL TRUTHS IN THE WORKPLACE: HOW ADVERSARIALISM UNDERMINES DISCRIMINATION LITIGATION**

CATHERINE ROSS DUNHAM\*

### INTRODUCTION

This Article explores the effectiveness of dispute resolution for gender discrimination claims in the American system of civil litigation. Adversarialism is a defining feature of the American system of civil justice, beginning with reduced trust in the quasi-inquisitorial system of Chancery in the nineteenth century and escalating with the increased importance of lawyers and public trials in the twentieth and twenty-first centuries.<sup>1</sup> Although adversarialism remains of great importance in some aspects of the American system, this Article questions whether the adversarial system is the best system to address workplace-based discrimination claims, as those claims are intimately connected to changes in social and cultural understandings within the workplace and American society overall.

The tenets of our system over-rely on the assumption of a shared social context to define social truth.<sup>2</sup> But that assumption is flawed in workplace discrimination litigation as workplace context varies by profession, and the worker experience varies based on the individual's position in the hierarchy.<sup>3</sup> For example, a male supervisor may see the workplace culture as fair and merit-based, whereas his female contemporary may view the workplace culture as competitive and closed, seeing her position as that of an outsider who had to navigate her career path carefully.<sup>4</sup> These varying perspectives create different

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<sup>1</sup> See AMALIA D. KESSLER, *INVENTING AMERICAN EXCEPTIONALISM: THE ORIGINS OF AMERICAN ADVERSARIAL LEGAL CULTURE, 1800-1877*, at 4-14 (2017).

<sup>2</sup> See MATS ALVESSON & KAJ SKÖLDBERG, *REFLEXIVE METHODOLOGY* 23 (3d ed. 2018) (discussing the philosophy of social constructionism).

<sup>3</sup> See, e.g., *Price Waterhouse v. Hopkins*, 490 U.S. 228, 231 (1989).

<sup>4</sup> See, e.g., *id.* at 233 (involving a claim where of the of the eighty-eight persons proposed for partnership at Price Waterhouse, only one was a woman).

social truths in the workplace, which are challenged by litigation.<sup>5</sup> When the female employee claims that she was discriminated against in an unfair workplace, her social truth is thrust against the social truth of other supervisors and managers who view the workplace as fair. Litigation places those two conflicting understandings of workplace culture into direct controversy.<sup>6</sup> It positions the relevant parties as adversaries not only on the legal issues but also on the issue of what is true about the workplace culture, reducing the opportunity for meaningful cultural change within and without the workplace.<sup>7</sup>

This Article asks what type of dispute resolution system can create a more reliable assessment of workplace social truth. By exploring options such as the quasi-inquisitorial systems of American Chancery and European conciliation,<sup>8</sup> as well as the role of the Arbitrator and Magistrate in American civil litigation,<sup>9</sup> the Article suggests that a non-adversarial approach allows for a more holistic resolution of workplace controversies. If a judicial officer who can approach the conflict from a place of conciliation oversees the conflict cognizant of the relevant community and social context, resolution options can offer relief to the plaintiff within the subject workplace and protect the relevant economic and cultural interests of the defendant. Conflict resolution, which attempts to understand the competing social truths of the workplace, can offer an opportunity for voluntary change in the workplace without placing parties fully at risk as they are in the “winner-take-all” litigation scenario.<sup>10</sup> Furthermore, as our social truths evolve and change, our dispute resolution system, which de facto manages those truths through adversarial litigation, should be reconsidered for its role in creating new truths about whether the workplace is fair to all.<sup>11</sup>

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<sup>5</sup> See *infra* Part I; see also Kenneth R. Berman, *Is an Adversarial Legal System Well Suited for Delivering Justice?*, 47 LITIGATION 1, 1-3 (2020).

<sup>6</sup> Berman, *supra* note 5, at 1 (“In an adversarial system, the search for truth is a battle of narratives.”).

<sup>7</sup> *Id.*

<sup>8</sup> See KESSLER, *Inventing American Exceptionalism*, *supra* note 1, at 6, 14; see also *infra* Part III.

<sup>9</sup> See *infra* Part III.

<sup>10</sup> Majorie A. Silver, *Fairness and Finality: Third-Party Challenges to Employment Discrimination Consent Decrees After the 1991 Civil Rights Act*, 62 FORDHAM L. REV. 321, 327, 327 n.52 (1993).

<sup>11</sup> See Natasha J. Silber, *Unscrambling the Egg: Social Constructionism and the Antireification Principle in Constitutional Law*, 88 N.Y.U. L. REV. 1873, 1881-82 (2013) (discussing how gender is socially constructed and subject to change).

This Article proceeds as follows: Part I of this Article explores the concept of social truths and the importance of social truths in the workplace itself and litigation surrounding the workplace through the lens of gender discrimination litigation.<sup>12</sup> Part II of this Article explores the history and roots of American adversarialism, examining why adversarialism became the hallmark of the American system of civil dispute resolution, and asking whether the reasons which prompted the ascension of American adversarialism apply today in litigation.<sup>13</sup> Finally, Part III of this Article explores other systems of dispute resolution. It suggests that a quasi-inquisitorial approach to workplace discrimination litigation allows for more meaningful outcomes in individual litigation and also allows for overall social change in the workplace.<sup>14</sup>

## I. SOCIAL TRUTHS AND GENDER DISCRIMINATION LITIGATION

In gender discrimination cases, the plaintiff contends that an employer acted in a way that discriminated against persons based on their sex.<sup>15</sup> The crux of the contention is that the workplace is not fair—some employees are not treated the same as others, thus not afforded the same safe work environment and/or opportunities for advancement.<sup>16</sup> Although most gender discrimination lawsuits target entities as employers, the nature of a discrimination lawsuit is personal. Gender discrimination lawsuits assert that the defendant, through its people and practices, broke social and legal norms by allowing a workplace to operate unfairly.<sup>17</sup> If this allegation is postured through a lawsuit, the assertion of unfairness must be addressed in the language of adversity.<sup>18</sup> Allegations are made and answered, law is argued, economic ground is protected, and reputations are at risk.<sup>19</sup> The defendant worries about the impact of the lawsuit on big picture issues like consumer response,

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<sup>12</sup> See *infra* Part I.

<sup>13</sup> Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq.; see *infra* Part III.

<sup>14</sup> See *infra* Part III.

<sup>15</sup> See 42 U.S.C. §§ 2000e-2; see also *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (“The plaintiff must show that the employer actually relied on her gender in making its decision.”); *Johnson v. Transp. Agency*, 480 U.S. 616, 626 (1987) (discussing the plaintiff’s ultimate burden in a Title VII case).

<sup>16</sup> See *Price Waterhouse*, 490 U.S. 228; *Johnson*, 480 U.S. 616; *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011).

<sup>17</sup> See generally *Price Waterhouse*, 490 U.S. 228; *Johnson*, 480 U.S. 616; *Dukes*, 564 U.S. 338.

<sup>18</sup> See generally FED. R. CIV. P. 26-37 (prescribing the rules for discovery in civil litigation and exemplifying the adversarial nature of the system).

<sup>19</sup> See, e.g., FED. R. CIV. P. 8

revenues, and share prices.<sup>20</sup> Plaintiffs worry about possessing the necessary resources to pursue their claim, as well as the personal and professional costs attendant to gender discrimination litigation.<sup>21</sup> In terms of risk, everyone is “all in” after the lawsuit is filed.<sup>22</sup>

However, discrimination plaintiffs seek more than monetary relief.<sup>23</sup> Plaintiffs seek validation of their own experience and a change of culture in the workplace.<sup>24</sup> The non-monetary remedial theory is that if the employer can accept that certain actions and policies lead to discriminatory results, the workplace changes across the board and many benefit.<sup>25</sup> However, in the adversarial system of civil justice, the defendant has too much at stake to pursue options that address this remedial theory.<sup>26</sup> The defendant also has no incentive to operate outside of a legal action as it relies on the court system to discern which claims are valid and which are frivolous.<sup>27</sup> When the parties are forced into the vortex of the adversarial system, they miss the opportunity to confront their own social truths about which behaviors beget better workplace culture and productivity.<sup>28</sup> There is simply too much at stake to address the issues with a growth mindset. The defendant employer must then occupy the position of denying the plaintiff’s allegations or risk excess exposure.<sup>29</sup> Thus, the social truth of the workplace, that all is fair, must be protected to benefit all.

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<sup>20</sup> See generally *Dukes*, 564 U.S. 338.

<sup>21</sup> *Id.*

<sup>22</sup> See Berman, *supra* note 5, at 1 (“When the legal system delivers the wrong result, money, property, liberty and life can be lost and society will suffer.”).

<sup>23</sup> See *e.g.*, *id.*; *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Johnson v. Transp. Agency*, 480 U.S. 616 (1987) (demonstrating that the female plaintiff sought a change to workplace policy which would benefit other female employees, *e.g.*, Anne Hopkins sought recognition of the impact gender had on partner evaluations).

<sup>24</sup> See, *e.g.*, *Price Waterhouse*, 490 U.S. 228; *Johnson*, 480 U.S. 616; *Dukes*, 564 U.S. 338.

<sup>25</sup> See Robert Charles Johnson, Comment, *Partnership and Title VII Remedies: Price Waterhouse Cracks the Glass Ceiling*, 1991 WIS. L. REV. 787, 787 (1991) (discussing the equitable remedies available in Title VII litigation).

<sup>26</sup> See FED. R. CIV. P. 8. Civil litigation has become more “front-loaded,” focused on the early pleading stages of litigation, in part because defendants have become more attuned to the litigation risks which, in employment discrimination cases, involve financial risks and risks to the defendant’s public reputation. *Id.*

<sup>27</sup> See FED. R. CIV. P. 8(a); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

<sup>28</sup> See Berman, *supra* note 5, at 1 (“In an adversarial system, the search for truth is a battle of narratives . . . Generally our adversary system favors the better story, not necessarily the truer one . . . Fact finders believe the story they want to believe, the one that’s easier to imagine. That becomes their truth. If they don’t feel good about some other story, they won’t believe it, even if it’s the actual truth.”).

<sup>29</sup> See FED. R. CIV. P. 8(b)(6) (“An allegation—other than one relating to the amount of damages—is admitted if a responsive pleading is required and the allegation is not denied.”).

*A. Creating Workplace Social Truths*

This Article asks whether the civil system of justice, which relies on adversarialism, is effective when a workplace “social truth” is at issue. To explore that question further, we must consider what is meant by the term “social truth,” a term developed in this Article. The term is based in the theory of social constructionism, which has been used to explain how individual and institutional traits are developed through a social context.<sup>30</sup>

Courts have used social constructionist arguments to explore meanings of race and sexuality.<sup>31</sup> Generally, an argument that relies on social constructionism argues that society, not biology, creates the categories that cause us to differentiate between different types of people.<sup>32</sup> Social constructionism is juxtaposed with essentialism, which argues that human identity categories are fixed and exist “transhistorically and transculturally.”<sup>33</sup>

The pioneers of social constructionist theory were Peter Berger and Thomas Luckmann.<sup>34</sup> Berger and Luckmann argued that we socially construct our realities through a process which begins with typification, wherein we “typify” others in various ways; for example, as white, male, and young, based principally on face-to-face interactions.<sup>35</sup> These typifications give rise to “objectivations,” wherein the content gained from face-to-face interactions is given a more material expression primarily through language.<sup>36</sup> This process builds the “social stock of

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<sup>30</sup> ALVESSON & SKÖLDBERG, *supra* note 2, at 15 (“*Social constructionism* has increasingly emerged as an important perspective within social science and has even become predominant in some areas. Generally it can be said that for social constructionism, in contrast to positivism, reality is precisely *socially constructed* . . . The important thing for research therefore becomes to explore how these social constructions happen. This approach is not particularly theory-oriented; the focus is rather on the ‘disclosure’ of how social phenomena are socially constructed. As we shall see, social constructionism is very rich and multi-faceted, so what has been said thus far is only a first indication of direction.”).

<sup>31</sup> See, e.g., *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003); cf. *Lawrence v. Texas*, 539 U.S. 558 (2003) (discussing theories which posit that gender and race can be evaluated as social constructs rather than as identities relegated to biology alone).

<sup>32</sup> See Suzanne B. Goldberg, *Social Justice Movements and LatCrit Community: On Making Anti-Essentialist and Social Constructionist Arguments in Court*, 81 OR. L. REV. 629, 633 (2002) (“[C]ourts have, in some instances, explicitly accepted the concept that society, not biology or nature, creates the categories that lead us to distinguish between ‘types’ of people.”).

<sup>33</sup> *Id.* at 634.

<sup>34</sup> ALVESSON & SKÖLDBERG, *supra* note 2, at 24; see also PETER L. BERGER & THOMAS LUCKMANN, *THE SOCIAL CONSTRUCTION OF REALITY: A TREATISE IN THE SOCIOLOGY OF KNOWLEDGE* (1966).

<sup>35</sup> ALVESSON & SKÖLDBERG, *supra* note 2, at 25.

<sup>36</sup> *Id.* at 26 (“Signs, symbols and language are examples of such objectivations.”).

knowledge” that humans use to achieve social order, as is needed for stability.<sup>37</sup> Social constructionist theory further argues that the social order of human life is ongoing and changing and does not possess some inherent nature.<sup>38</sup> “People alienate, or externalize, themselves by necessity in their actions and the social order is an expression of this.”<sup>39</sup>

Notably, the process of developing a social order creates institutions.<sup>40</sup> Socially constructed institutions are built on human habituations:

We create within our social relations all the time new habits and routines in our actions, as well as new categories in our observing of others and their actions. Or in Berger and Luckmann’s terminology, we habitualize and typify; these habituations and typifications – these habits, routines, and categorizations – spread between actors, and as they do this, institutions, that is fixed patterns of thought and action, emerge: institutionalization occurs, for instance in the shape of family, religion, legal systems, sports, school systems, health care, hunting, etc.<sup>41</sup>

These institutions then become something understood as external to the creators themselves, and an “institutional logic” is created to explain the core values and structures of the institution and serve as the basis for the institution’s legitimacy.<sup>42</sup> Berger and Luckman noted that “bod[ies] of knowledge as a whole” are developed through this process of institutionalization and legitimacy, and that knowledge

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<sup>37</sup> *Id.* (quoting BERGER & LUCKMANN, *supra* note 34, at 56).

<sup>38</sup> *Id.* (quoting BERGER & LUCKMANN, *supra* note 34, at 69-70) (“The social order is thus a human product, or more specifically ‘an ongoing human product’; it is not something inherent in the ‘nature of things’, nor does it express any ‘natural law.’”).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* (quoting BERGER & LUCKMANN, *supra* note 34, at 78) (“In every institution, actions of a certain type are supposed to be carried out by a certain type of actor. For example, our legal system as an institution stipulates certain penalties for individuals above a certain age who are aware of the consequences of their actions and commit certain crimes. Academic institutions stipulate certain rules of admittance for certain types of actors (students) and conditions of employment for others (researchers, teachers, administrators). And so forth.”).

<sup>42</sup> *Id.* at 27 (quoting BERGER & LUCKMANN, *supra* note 34, at 83-84). Berger and Luckmann discuss this process as creating an institutional biography—a narrative understanding of what constitutes the story of the institution. *Id.* This biography then allows the institution to define its membership. *Id.*

is then used to define the institution itself and all those within.<sup>43</sup> The knowledge is then transmitted not only by the persons within the institution but also between generations, thus forming a defining “truth” of the institution.<sup>44</sup> This truth becomes “sedimented” when institutional knowledge is transferred between people, especially when passed between people with special typifications, such as student to teacher or employer to employee.<sup>45</sup> Under social constructionism, “there is no Truth, only local truths.”<sup>46</sup> Therefore, the institution’s idea about what constitutes a truth within its membership is not based on some overriding law or social order.<sup>47</sup> The truth of each institution was created within itself and serves as the basis for institutional legitimacy for all those within the institution.<sup>48</sup>

Social constructionism, as it relates to gender, focuses its attention to “how the identity category itself is formed.”<sup>49</sup> Constructionists argue that identity categories are “social creations” that “result from social belief and practice, are themselves complex social practices, and may be evaluated in terms of whose interests they serve.”<sup>50</sup> Social constructionists take the position that the category “woman” is given meaning by societies rather than by an external “natural” force.<sup>51</sup> In contrast, essentialist theories deny society’s role in defining a trait and discount the variations between individual’s bearing that trait.<sup>52</sup> Essentialist thinking is, in some ways, easier for courts to embrace as the theory relies on fixed realities.<sup>53</sup> In the context of gender,

<sup>43</sup> See BERGER & LUCKMANN, *supra* note 34, at 83-84. The authors use the term “sedimented” to describe the way experience and knowledge is stored in memory layers within and between individuals and the role of knowledge in allowing for the transfer of institutional knowledge and collective sedimentation. *Id.* at 85.

<sup>44</sup> See ALVESSON & SKÖLDBERG, *supra* note 2, at 30 (describing Gergen’s position that institutional knowledge is “never abstract, objective and absolute but always concrete, situated and tied to human practice”); see also KENNETH J. GERGEN, AN INVITATION TO SOCIAL CONSTRUCTION (Luke Block ed., 3d ed. 2015).

<sup>45</sup> See ALVESSON & SKÖLDBERG, *supra* note 2, at 27.

<sup>46</sup> *Id.* at 30.

<sup>47</sup> See *id.* at 28.

<sup>48</sup> *Id.* (“Legitimization constitutes another layer in the objectivation of meaning. It integrates disparate meanings to a connected whole. This takes place both at the level of the single individual’s biography and at the level of institutions. Legitimization becomes necessary when meaning is to be mediated to new generations for which it is no longer self-evident. Explanations and justifications therefore become possible, and this is the process of legitimization.”).

<sup>49</sup> Goldberg, *supra* note 32, at 634.

<sup>50</sup> Daniel R. Ortiz, *Creating Controversy: Essentialism and Constructivism and the Politics of Gay Identity*, 79 VA. L. REV. 1833, 1836 (1993); see Silber, *supra* note 11, at 1891 (noting that the Supreme Court recognizes ways in which gender is socially constructed).

<sup>51</sup> Goldberg, *supra* note 32, at 633-34.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 635-36 n.22-23.



men are defined by male reproductive systems, and women are defined by female reproductive systems.<sup>54</sup> In gender discrimination cases, the determination of whether the plaintiff possesses the trait, or traits, the law requires to substantiate the claim does not involve a complex evaluation of social context as might be involved with determinations of ethnicity or race.<sup>55</sup>

How a court views its role in determining a discrimination claim is crucial to its ability to evaluate the claim and allow a remedy.<sup>56</sup> To prevail in a discrimination claim, a plaintiff must demonstrate that he or she has the protected trait, such that he or she is a member of a protected class, and that he or she suffered discriminated based on that trait.<sup>57</sup> The determination of whether the plaintiff possesses the protected trait is more complex when the theory behind that determination relies on a social construction of what it means to be of a certain race or gender.<sup>58</sup> Courts have allowed for social construction theory in cases evaluating discrimination based on race or ethnicity, generally accepting the argument that race, and what it means to be part of a given race, is socially constructed.<sup>59</sup> However, courts have been reluctant to apply social constructionism to determinations regarding gender.<sup>60</sup> Rather, courts have defaulted to the physical differences between men and women when determining if the plaintiff belongs to a protected class.<sup>61</sup> This approach to gender belies the complexity of gender and the role of society in creating the operative truths around gender and, more

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<sup>54</sup> See Silber, *supra* note 11, at 1896-97 (“Not only does the Court acknowledge ‘real’ difference, thereby ensuring that gender will continue as a meaningful social category, it also imbues attributes to women and men that go beyond the biological differences that are used to justify this set of legal classifications.”); see also Robin Dembroff, Issa Kohler-Hausmann & Elise Sugarman, *What Taylor Swift and Beyoncé Teach Us About Sex and Causes*, 169 U. PA. L. REV. ONLINE 1, 6 (2020).

<sup>55</sup> See Silber, *supra* note 11, at 1891 (“In contrast to its jurisprudence on race, the Court has steadfastly maintained that gender difference is real, enduring, and even worthy of celebration.”).

<sup>56</sup> See Goldberg, *supra* note 32, at 636, 659 (“To the extent that legal arguments disturb a court’s sense that a fixed group shares the particular trait at issue, however, the plaintiff may leave court with an intact identity but no court-ordered remedy.”).

<sup>57</sup> See *id.* at 636-37.

<sup>58</sup> See *id.* at 642.

<sup>59</sup> See ALVESSON & SKÖLDBERG, *supra* note 2, at 15.

<sup>60</sup> See Tracy A. Thomas, *Leveling Down Gender Equality*, 42 HARV. J.L. & GENDER 177, 185-86 (2019); Dembroff et al., *supra* note 54, at 5-6, 6 n.21.

<sup>61</sup> See generally Dembroff et al., *supra* note 54, at 3 (discussing sex discrimination in terms of “sex features” that refer exclusively to physical features that are associated with male and female reproductive roles).

specifically, the effect of gender in a given institutional context—a workplace.<sup>62</sup>

*Price Waterhouse v. Hopkins*<sup>63</sup> supplies a notable example of how gender discrimination involves a more nuanced trait analysis that one based solely on physical difference, and how institutionalization impacts the nature of the discrimination based on gender traits. In *Price Waterhouse*, the plaintiff, Ann Hopkins, asserted a claim for Title VII gender discrimination, arguing that she was not selected for partnership due to her female gender.<sup>64</sup> More specifically, Hopkins argued that the partners' expectations of female behavior, when combined with the firm's institutional culture, placed her in a double-bind wherein she was expected to exhibit feminine traits, yet also expected to work in a manner consistent with the male partners who valued masculinity.<sup>65</sup> However, when Hopkins cursed, she was not feminine enough.<sup>66</sup> Hopkins was refused a partnership for a lack of "interpersonal skills"<sup>67</sup> after nineteen of the thirty-two partners who submitted comments on Hopkins failed to support her bid for partnership.<sup>68</sup> Hopkins' successful lawsuit relied on evidence of sex-stereotyping in her Title VII case, arguing that the Price Waterhouse male-dominated culture caused the partners to evaluate Hopkins, and other women, in gender-based terms flowing from "an impermissibly cabined view of the proper behavior of women . . . ."<sup>69</sup>

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<sup>62</sup> See *id.* at 4 ("An allegation of discrimination under Title VII demands a social explanation.").

<sup>63</sup> 490 U.S. 228 (1989).

<sup>64</sup> *Id.* at 231-32. Supervising partners advised that "Hopkins should 'walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.'" *Id.* at 235.

<sup>65</sup> *Hopkins v. Price Waterhouse*, 618 F. Supp. 1109, 1116 (1985); *Price Waterhouse*, 490 U.S. at 235 ("There were clear signs, though, that some of the partners reacted negatively to Hopkins' personality because she was a woman. One partner described her as "macho" . . . ; another suggested that she 'overcompensated for being a woman' . . . ; a third advised her to take 'a course at charm school . . .").

<sup>66</sup> *Price Waterhouse*, 490 U.S. at 235 ("Several partners criticized her use of profanity; in response, one partner suggested that those partners objected to her swearing only 'because it's a lady using foul language.'").

<sup>67</sup> *Id.* at 234-35.

<sup>68</sup> *Id.* at 233. At the time of Hopkins' partnership application, Price Waterhouse consisted of 662 partners, including only 7 women firm-wide. *Id.* Hopkins was the only woman, of the 88 total persons, proposed for partnership that year. *Id.* Forty-seven candidates were admitted for partnership; 21 candidates were denied; and 20 candidates were held for reconsideration, including Hopkins. *Id.*

<sup>69</sup> *Id.* at 236-37; see also *Hopkins v. Price Waterhouse*, 618 F. Supp. 1109, 1116-17, 1120 (1985).

Ann Hopkins' double-bind<sup>70</sup> illustrates two aspects of this discussion. First, the determination of whether she was in a protected class for purposes of her Title VII claim was not an issue—she was physically female, so her membership in a protected class was not in question.<sup>71</sup> However, her female traits, or lack thereof, were the center of her discrimination claim.<sup>72</sup> The male partners' reaction to her seemingly masculine presentation constituted pretextual discrimination based on sex.<sup>73</sup> The issue for Hopkins, in many ways, was not her actual physical gender, but how the Price Waterhouse institution socially constructed her gender.<sup>74</sup> Furthermore, the defendant institution had functioned as an institution in creating its own institutional logic, or "biography," of what it meant to be a partner in the firm.<sup>75</sup> Hopkins disrupted this biography and thus disrupted the social truth of the defendant's firm leading to a determination that she did not fit.<sup>76</sup> Hopkins' discriminatory treatment evolved not specifically from her physical gender, but from the social truth of the Price Waterhouse workplace. Further, Hopkins' gender discrimination lawsuit challenged the Price Waterhouse institutional logic that the workplace was fair.<sup>77</sup> In reality, the workplace was only fair to those who fit the institution's, the firm's, logic.

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<sup>70</sup> See *Price Waterhouse*, 490 U.S. at 234-35; see also GILLIAN THOMAS, *BECAUSE OF SEX: ONE LAW, TEN CASES AND FIFTY YEARS THAT CHANGED AMERICAN WOMEN'S LIVES AT WORK* 201 (2016) (citing Deborah L. Brake, *When Equality Leaves Everyone Worse Off: The Problem of Leveling Down in Equality Law*, 46 WM. & MARY L. REV. 513, 516, 516 n.6 (2004)).

<sup>71</sup> See Silber, *supra* note 11, at 1896, 1896 n.138 (citing *United States v. Virginia*, 518 U.S. 515, 533 (1996) (explaining that the "[p]hysical differences between men and women . . . are enduring . . .").

<sup>72</sup> *Price Waterhouse*, 490 U.S. at 235.

<sup>73</sup> See *id.* Note that the Court's decision that sex-stereotyping can constitute Title VII gender discrimination allows, on its face, for a similar discrimination claim brought by a similarly situated employee who was male in terms of physical gender assignment but possessed female behavioral traits or a lack of male behavioral traits. For example, if a male employee was stereotyped as less masculine because he exhibited some stereotypically feminine behavior and that stereotyping led to an adverse employment action, the male employee's claim would be supported by the Court's reasoning in *Price Waterhouse*. *Id.* at 248.

<sup>74</sup> See *id.* at 235. Price Waterhouse was a male-dominated institution, which allowed stereotyped thinking to inform its opinion as to professional skill and success based on gender. *Id.* at 233. The negative partner reviews of Hopkins were not reporting on her gender. *Id.* at 235. Rather, partners who made negative comments about Hopkins based on gendered expectations of her interpersonal skills telegraphed to others within the firm that Hopkins did not meet the institution's culture. *Id.* at 234-35.

<sup>75</sup> See *id.* at 235.

<sup>76</sup> See *id.*

<sup>77</sup> See *Hopkins v. Price Waterhouse*, 618 F. Supp 1109, 1111-13 (D.D.C. 1985) (noting the court's background discussion of Price Waterhouse's extensive partnership application process with a focus on neutrality).

*B. Evaluating the Role of Litigation in Disrupting Workplace Social Truths*

Although Ann Hopkins ultimately prevailed in her lawsuit and was awarded a partnership after appellate success on her claim, she remained an outsider.<sup>78</sup> Her success, such as it was, was not comprehensive, perhaps because her legal remedy did not address the workplace culture, and she would have to remain in that culture to fully achieve her legal remedy.<sup>79</sup> But the Court was not in a position to assess why Price Waterhouse had discriminated against Hopkins, only that it had and that the discrimination was unlawful under Title VII.<sup>80</sup> Indeed, it would be outside the role of the trial or appellate courts to examine the social truth of this defendant's, or any defendant's, organization.<sup>81</sup> Discrimination litigation is not designed to engage in the type of "reflexive dialogue" needed to manage the "hardened taken-for-granted assumptions" of social institutions—their social truths.<sup>82</sup>

When discrimination plaintiffs seek a legal remedy for an unfair workplace, they are moving from one institution, with its social truths, to another.<sup>83</sup> Women in employment discrimination cases are transferring control of their cases from one set of authority figures, employers, to another, judges.<sup>84</sup> Given that supervisors and judges are predominantly male, women plaintiffs struggle to convince a new, but

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<sup>78</sup> See THOMAS, BECAUSE OF SEX, *supra* note 70, at 146-47.

<sup>79</sup> See generally Hopkins v. Price Waterhouse, 737 F. Supp. 1202 (D.D.C. 1990) (finding, on remand, that Hopkins was entitled to back pay, with reductions for failure to mitigate, and that Hopkins was entitled to be made a partner); see also THOMAS, BECAUSE OF SEX, *supra* note 70, at 146-47 (discussing Hopkins' return to Price Waterhouse after her successful lawsuit and her exit from the firm thereafter).

<sup>80</sup> Goldberg, *supra* note 32, at 636-37 (noting that in evaluating a gender discrimination claim, the court must determine whether the plaintiff has demonstrated she possesses the trait protected by legislation and that she has been targeted for discrimination based on that trait).

<sup>81</sup> See *id.* at 642-43 (stating that social constructionist analysis "marks the beginning of uncomfortable territory for most courts. An anti-discrimination claim based on a trait acknowledged to be socially constructed calls not only for a judge to weigh the evidence of discrimination, which resonates as a judge-like activity, but also to engage in the sociological/anthropological enterprise of determining the indicia, or even the very existence, of a particular identity trait.").

<sup>82</sup> See ALVESSON & SKÖLDBERG, *supra* note 2, at 31; see also Goldberg, *supra* note 32, at 659 ("To the extent that legal arguments disturb a court's sense that a fixed group shares the particular trait at issue, however, the plaintiff may leave court with an intact identity but no court-ordered remedy.").

<sup>83</sup> DEBORAH L. RHODE, THE BEAUTY BIAS: THE INJUSTICE OF APPEARANCE IN LIFE AND LAW 111 (2010) (citation omitted).

<sup>84</sup> *Id.*

perhaps very similar, demographic of their discriminatory experience, which is often based on the social truth of the employing institution.<sup>85</sup>

The paradox for a discrimination plaintiff lies at the intersection of our legal system of dispute resolution, which is housed in our civil courts, and the complex social explanation of what happened to that plaintiff in that workplace.<sup>86</sup> Title VII litigation is jurisdictionally relegated to the federal courts, so it relies on the adversarial constructs of the Federal Rules of Civil Procedure and Evidence. Furthermore, discrimination litigation is designed to tell the parties whether wrongful discrimination occurred.<sup>87</sup> Courts reviewing discrimination litigation are not equipped to offer a social explanation for what occurred, yet a plaintiff's claims cannot be fully resolved without a social explanation.<sup>88</sup>

Turning back to social constructionism, courts have engaged social constructionist theories in evaluating discrimination cases based on race and ethnicity,<sup>89</sup> but have been reluctant to apply those theories to gender.<sup>90</sup> In fact, courts have embraced the inherent gender differences between men and women, treating gender differences as real rather than socially constructed.<sup>91</sup> By approaching gender as an essential trait based on physical reproductive traits, the courts have simultaneously improved women's workplace equity while diminishing gender as an important social category.<sup>92</sup>

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<sup>85</sup> See *id.* at 140; see also *Biographical Directory of Article III Federal Judges, 1789-present: Advanced Search Criteria*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/search/advanced-search> (last visited Feb. 2022).

<sup>86</sup> See Dembroff et al., *supra* note 54, at 4.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 8-9 (“For example, when the Supreme Court recognized in *Price Waterhouse v. Hopkins* that firing a woman for being ‘overly aggressive’ could be an instance of sex discrimination, it is precisely because they recognized that the explanation for the firing was *not* merely due to that individual’s sex features, much less merely due to her being ‘overly aggressive.’ What makes the act discriminatory is the relevance of acting on the basis of her being ‘overly aggressive’ *in light of the social meanings of female sex*—particularly, the norm that females ought not to be aggressive.”).

<sup>89</sup> See Silber, *supra* note 11, at 1891 (describing the use of social constructionism on cases based on race like *Brown v. Board of Education*).

<sup>90</sup> *Id.* (“In contrast to its jurisprudence on race, the Court has steadfastly maintained that gender difference is real, enduring, and even worthy of celebration. While the Court does recognize ways in which gender is socially constructed, it has never attempted to eliminate gender from popular consciousness as the antireification principle would require. Instead, it has sought only to eradicate certain constructs—or ‘stereotypes’—that it regards as false or archaic.”).

<sup>91</sup> *Id.* at 1897-98.

<sup>92</sup> *Id.*; see generally THOMAS, *Leveling Down Gender Equality*, *supra* note 60.

## II. AMERICAN ADVERSARIALISM AND WORKPLACE DISCRIMINATION LITIGATION

It is shortsighted to view the courts' response to gender as a refusal to accept the social nature of gender. Often courts are faced with the difficult decision of how to resolve the case.<sup>93</sup> They could resolve the case in a way that affects structural change, even at the expense of the individual's remedy, or to address the individual plaintiff's remedy exclusively, even at the expense of creating precedent that further advances discrimination law for other plaintiffs.<sup>94</sup> This complexity flows from the nature of our adversarial system for resolving workplace issues through litigation rather than through a system of conciliation.<sup>95</sup> Discrimination plaintiffs, and their lawyers, face a complex dynamic wherein they must vigorously seek the individual plaintiff's remedy while also attempting to shift judicial thinking about the law or the plaintiff's particular social group.<sup>96</sup> Defendants must attack the plaintiff's claims based on both the definitional elements and the required causal relationship between the plaintiff and the alleged discriminatory practice.<sup>97</sup> The courts, by design, occupy the role of the contest's referee.<sup>98</sup> However, in discrimination cases, the court must also evaluate the social explanations for the complained-of actions, and thus understand the social truth of the defendant institution and evaluate the plaintiff's experience in that institution.<sup>99</sup> Managing the litigation contest and assessing the workplace's social climate impose incompatible roles on the court, leaving the court to default to its

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<sup>93</sup> See Thomas, *Leveling Down Gender Equality*, note 60, at 190-96 (noting the difficulty that Justice Ginsburg had in deciding *Sessions v. Morales-Santana*).

<sup>94</sup> See *id.* at 191 (noting that given Justice Ginsburg's decision in *Sessions v. Morales-Santana*, "[h]er focus was on establishing policy and restraining the government, both systemic effects, rather than on alleviating the individual respondent's harm.").

<sup>95</sup> See Tom Spiggle, *The EEOC's Proposed Changes to the Conciliation Process*, FORBES (Dec. 15, 2020, 10:32 AM), <https://www.forbes.com/sites/tomspiggle/2020/12/15/the-eeocs-proposed-changes-to-the-conciliation-process/?sh=3fc56efb5dd6> (noting why most plaintiffs cannot fully access EEOC conciliation).

<sup>96</sup> Goldberg, *supra* note 32, at 660-61.

<sup>97</sup> See Dembroff et al., *supra* note 54, at 3; see also *City of L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978).

<sup>98</sup> See *How Courts Work: The Role and Structure of Courts*, ABA (Sept. 9, 2019), [https://www.americanbar.org/groups/public\\_education/resources/law\\_related\\_education\\_network/how\\_courts\\_work/court\\_role/](https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/court_role/).

<sup>99</sup> See Goldberg, *supra* note 32, at 642-43 ("Because this determination requires more than mere application of law to a set of findable facts, it appears to fall far outside the traditional zone of judicial expertise and, consequently, may pose a threat to the judicial reputation for the exercise of fair-mindedness.").

adversarial norms in cases, like gender discrimination cases, which require a more nuanced analysis.

### A. *History of American Adversarialism*

As is true with essentially all aspects of the American legal system, its roots lie in the principally common law system of England, which was brought to America as part of the overall colonization of the “New World.”<sup>100</sup> The English system at the time of colonialism was a principally common law system,<sup>101</sup> thus the common law as we know it evolved through importation of ideas and doctrines. The American system followed England in developing a colonial equity court following the English Courts of Chancery, which were essentially devices of the monarchy to settle local claims through equitable rather than legal process.<sup>102</sup> The English Chancery system was widely criticized as being a device for graft and favoritism, and those criticisms followed the system to the colonies when English representatives served as chancellors presiding over colonial disputes.<sup>103</sup> The Chancery system was reviled in colonial America as a colonial extension of the disliked Crown.<sup>104</sup> However, Chancery survived the American Revolution when its leadership changed to colonists rather than the Crown’s appointees.<sup>105</sup>

In the early days of the American legal system, controversies were heard either in the courts of common law or the courts of Chancery, paralleling the English system.<sup>106</sup> Chancery courts were essentially equity courts, which dealt with primarily local disputes between individuals and commercial entities.<sup>107</sup> If you were an

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<sup>100</sup> KESSLER, *Inventing American Exceptionalism*, *supra* note 1, at 4; *see id.* at 7 (“To tell the story of the rise of adversarialism in the United States is thus not only to describe the origins of particular procedural devices . . . but also to explain how adversarial procedure as such came to be viewed as a distinguishing feature of American national identity . . . ”); *see also* STEPHAN LANDSMAN, *READINGS ON ADVERSARIAL JUSTICE: THE AMERICAN APPROACH TO ADJUDICATION* (1988).

<sup>101</sup> *See* KESSLER, *Inventing American Exceptionalism*, *supra* note 1, at 7.

<sup>102</sup> *Id.* at 23-33.

<sup>103</sup> *Id.* at 19.

<sup>104</sup> *See id.* at 19-20; *see also* LANDSMAN, *supra* note 100.

<sup>105</sup> *See* KESSLER, *Inventing American Exceptionalism*, *supra* note 1, at 19.

<sup>106</sup> *Id.*; *see also* Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 *CORNELL L. REV.* 1181, 1199-1210 (2005) (describing the judicial system prior to the nineteenth century in England and in the United States).

<sup>107</sup> *See* P. Tucker, *The Early History of the Court of Chancery: A Comparative Study*, 115 *ENG. HIST. REV.* 791, 793-95 (2000).

innkeeper in upstate New York who sought payment from a customer, your local Chancellor most likely heard your matter.<sup>108</sup> The Chancellor, or judge of your local Chancery, was likely appointed because they had roots in the community and had reached a position of trust in the community through education, travel, or other means.<sup>109</sup>

Although many Chancery courts had some modicum of procedural rules,<sup>110</sup> the process of Chancery was similar to a public airing of complaints that led to an immediate, practical decision. The Chancery model was focused on the parties and the decision makers, with lawyers playing a small, almost non-existent role in the late eighteenth and early nineteenth centuries.<sup>111</sup> The core of the Chancery model was the wise judge, the Chancellor, who was empowered to offer any practical remedy and was invulnerable to appeal as the appellate process was either non-existent or out of reach for most citizens.<sup>112</sup> In this way, Chancery, and its English predecessor, followed the model of European equity courts, which employed a “quasi-inquisitorial” approach to decision-making in essentially all controversies.<sup>113</sup>

The European systems of the eighteenth and nineteenth centuries did not follow the common law model but rather focused on codes and equitable administration through judicial process.<sup>114</sup> English Chancery resulted from the importation of the inquisitorial ideal from continental Europe at a time when monarchial power was the prevalent source of government.<sup>115</sup>

In New York, the Chancery court gained outsized importance largely due to the influences of several important Chancellors, most notably Chancellor Kent, who wrote extensively of the Court’s work.<sup>116</sup> Chancellor Kent became the self-created model of a Chancery Judge—one who is superior in intellect and wisdom thus in a singular position to resolve the disputes of the common man.<sup>117</sup> This expansive view of Chancery’s role led to a growth of Chancery in New York and other

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<sup>108</sup> See KESSLER, *Inventing American Exceptionalism*, *supra* note 1, at 20, 22 (noting that Chancery courts were available throughout the colonies).

<sup>109</sup> *Id.* at 33-48.

<sup>110</sup> See Kessler, *Our Inquisitorial Tradition*, *supra* note 106, at 1205 n.123 (citing the FED. EQUITY RULES OF 1822).

<sup>111</sup> KESSLER, *Inventing American Exceptionalism*, *supra* note 1, at 32-33.

<sup>112</sup> *Id.* at 19, 39-40.

<sup>113</sup> *Id.* at 5-6. American equity courts adopted adversarial practices but also departed from adversarialism in important aspects, such as employing lay judges, and, in that respect, closely resembled European inquisitorial systems. *Id.*

<sup>114</sup> *See id.* at 5.

<sup>115</sup> *Id.* at 4.

<sup>116</sup> *Id.* at 17, 22-23, 33-48.

<sup>117</sup> *Id.* at 39-40.



states, arguably increasing the expanse of Chancery to a size beyond its functional capabilities.<sup>118</sup>

Kent and others were critical of the courts of law as being bastions of arcane procedure and attorney intervention,<sup>119</sup> which resulted in overly legalistic results. Evidence in Chancery court was taken by court officers in private, upon the parties written questions.<sup>120</sup> This system of private inquiry was a cornerstone of Chancery, and Kent argued this system, which minimized the role of lawyers, was essential to a just outcome as parties and witnesses could not respond to other testimony and craft their own testimony to meet the allegations and expectations of other evidence.<sup>121</sup> This system of private, judicially-driven inquiry allowed for a fuller rendering of testimony, which Kent maintained was essential to the just resolution of disputes.<sup>122</sup>

The expansive role of Chancery in colonial jurisdictions like New York created procedural, legal, and practical issues for citizens seeking prompt or predictable resolution. First, the Court of Chancery took great pride in not following a detailed code of procedure.<sup>123</sup> Procedure was tied to the courts of law, which required parties to secure a lawyer to navigate the arcane process of writs and other pleading and practice devices imported from the English courts of law.<sup>124</sup>

Under the writ-based pleading system, parties could not gain access to the court for purposes of resolving a dispute if the nature of the dispute did not fit into an existing category of writ.<sup>125</sup> This narrow writ procedure limited possibilities for new claims or legal arguments and cabined court of law judges to procedural administrators rather than wise decision makers.<sup>126</sup> If the claim pursued did fit into a known writ category, the pleading process of writ and demurrer led to a paper-driven back and forth between attorneys that could endure for long periods of time and result in a technical holding regarding successful

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<sup>118</sup> *Id.* at 75.

<sup>119</sup> *See id.* at 48-55.

<sup>120</sup> *Id.* at 27.

<sup>121</sup> *See id.* at 56 (citing *Hamersley v. Lambert*, 2 Johns Ch. 495, 432-33 (N.Y. Ch. 1817)).

<sup>122</sup> *Id.* at 58-59.

<sup>123</sup> *See id.* at 62-63 (explaining New York Chancery's tension between Chancery's quasi-inquisitorial logic requiring a large staff and its choice instead to rely on a small staff on a case-by-case basis).

<sup>124</sup> *Id.* at 11.

<sup>125</sup> *Id.* at 53.

<sup>126</sup> *See id.*

procedure rather than a resolution on the facts.<sup>127</sup> However, the courts of law were the first to publish law and,<sup>128</sup> in that regard, allowed for a precedent that was instructive to lawyers and their clients.

In Chancery, any given case could yield a different result based on the evidence given and the whims of the Chancery judge.<sup>129</sup> The best predictors of outcome in Chancery were the disposition of the judge and equitable position of the parties.<sup>130</sup> In the courts of law, the common law set a course for parties to follow with the recorded precedent of England and America available to refine understanding.<sup>131</sup>

Finally, the expansive version of Chancery required a considerable amount of infrastructure as court officers were needed to take testimony and evidence both in writing and *viva voce*.<sup>132</sup> Those officers, deemed masters and/or examiners, were needed in many small towns for Chancery to do its work as travel from one town to another created difficulties for parties seeking court resolution of predominantly local claims.<sup>133</sup> Using the New York Chancery example, this system could only function if well-funded and well supported. When New York failed to properly fund Kent's construct of an expansive Chancery, the

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<sup>127</sup> *Id.* (explaining that “[t]he common law and its writ-based system of pleading allowed plaintiffs to file suit only to the extent that their particular complaint happened to fall within one of the established writs (or formulas) allowing for litigation[,]” thereby resulting in some unjust holdings).

<sup>128</sup> Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3, 40 (Amy Gutmann ed., 1997) (explaining the history of precedent); see also LANDSMAN, *supra* note 100, at 19.

<sup>129</sup> See Tucker, *supra* note 107, at 795; see also Shruti Rajagopalan, *Adversarial Versus Inquisitorial Systems: Error and Valuation*, 12 J. BUS. VALUATION & ECON. LOSS ANALYSIS 311, 312 (2017).

<sup>130</sup> See Tucker, *supra* note 107, at 795.

<sup>131</sup> See Charles R. Eloschway, *Say It Ain't So: Non-Precedential Opinions Exceed the Limits of Article III Powers*, 70 GEO. WASH. L. REV. 632, 638 (2002) (“English common law was judge-made; the courts created it, ‘bit by bit, as cases successively arose and were determined.’ Although reliance by the English courts on prior decisions, or precedents, had, to some extent, been the norm for many years in early English history, systematic use of precedents in the development of common law did not begin until the publication of reports became commonplace, sometime in the fourteenth century. These recorded judgments not only became evidence of the law, but also sources of it, and constrained succeeding judges. Case reporting and reliance on precedents are, therefore, historically related in English common law.”).

<sup>132</sup> KESSLER, *Inventing American Exceptionalism*, *supra* note 1, at 68-72, 86. *Viva voce* refers to evidence taken by oral examination rather than written. See *id.* at 329.

<sup>133</sup> *Id.* at 13; see also Kessler, *Our Inquisitorial Tradition*, *supra* note 106, at 1207, 1207 n.138 (explaining that “examiners” took testimony locally while the court appointed private individuals known as “commissioners” to take testimony from out-of-town witnesses).

time and cost involved in equitable resolution became a practical impediment to the effectiveness of the system.<sup>134</sup>

To wit, the ideal of Chancery as originally set forth by Kent and others began to flounder in the early and middle parts of the nineteenth century.<sup>135</sup> Several factors initiated the decline of Chancery and the ultimate merging of the courts of law and equity, most notably documented in the Field Code.<sup>136</sup> First, Chancery itself allowed lawyers to participate in the collection of evidence *viva voce* through the Master's or Examiner's inquiry.<sup>137</sup> As such, people were able to see the effect of lawyers first-hand without traveling to the state capital or other location of a court of law.<sup>138</sup>

Secondly, lawyers themselves began to take on more important roles in local society.<sup>139</sup> Lawyers became civic orators, examples of the popular notion of Republican civic virtue, who spoke publicly as elected leaders and as lawyers on behalf of citizens in public fora such as legislative arenas and the courts themselves, including Chancery.<sup>140</sup> The lawyers strove to be the best orators and used their client's matters to perform eloquent statements and arguments before the courts.<sup>141</sup> Civic social clubs filled with lawyers debating social and political issues creating forums for the oratorical skills of the lawyer.<sup>142</sup> Important lawyers of the time began to extol the virtue of cross examination, a

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<sup>134</sup> See KESSLER, *Inventing American Exceptionalism*, *supra* note 1, 86-89 (discussing the Kent's opinion in *Remson v. Remson* which allowed for evidence to be taken by masters and opened the door to more adversarial process and a more costly dual (inquisitorial and adversarial) model of dispute resolution).

<sup>135</sup> *Id.* at 62.

<sup>136</sup> *Id.* at 9, 17, 142 (describing Field Code as "creati[ng] of a unified body of procedure bridging the divide between law and equity"); Kessler, *Our Inquisitorial Tradition*, *supra* note 106 at 1234-35, 1235 n.291.

<sup>137</sup> See KESSLER, *Inventing American Exceptionalism*, *supra* note 1, at 86 ("Kent held that 'the requisite proofs ought to be taken on written interrogatories, prepared by the parties, and approved by the master, or by *viva voce* examination, as the parties shall deem most expedient, or the master shall think proper to direct, in the given case.'").

<sup>138</sup> See *id.* at 86, 117.

<sup>139</sup> *Id.* at 152; see also Robert W. Gordon, *Lawyers as the American Aristocracy*, 20 STAN. LAW. 2, 2 (1985); Russell G. Pearce, *Lawyers as America's Governing Class: The Formation and Dissolution of the Original Understanding of the American Lawyer's Role*, 8 U. CHI. L. SCH. ROUNDTABLE 381, 383 (2001).

<sup>140</sup> KESSLER, *Inventing American Exceptionalism*, *supra* note 1, at 156-57; see also Gordon, *supra* note 139, at 2-3.

<sup>141</sup> See KESSLER, *Inventing American Exceptionalism*, *supra* note 1, at 13-14.

<sup>142</sup> See also Gordon, *supra* note 139, at 4 (discussing Justice Joseph Story's use of various public forums in addition to his position on the United States Supreme Court, including writing public commentaries on the law for use by lawyers and schoolchildren and conducting practice-oriented clinics within his circuit sessions).

technique not traditionally present in Chancery Court as evidence was taken in private.<sup>143</sup> Newspapers reported on lawyer craft and skill in cross examination leading to dramatic and public trial moments of confession or revelation.<sup>144</sup> However, the Courts of Chancery did not allow for this level of lawyer participation.<sup>145</sup> The growth of lawyers' importance meant that citizens began to seek resolution in the courts of law where the lawyers had greater influence, and matters were heard publicly before a judge or, most desirably, before a jury.<sup>146</sup>

### B. *Adversarialism's Impact on Employment Litigation*

The shift away from Chancery was a shift away from the quasi-inquisitorial system of dispute resolution. Chancery courts most closely followed the models of European conciliation courts which served as the principal courts for commercial and labor disputes.<sup>147</sup> Conciliation courts were described as “a lawyer-free realm in which a respected local authority figure relied on his stature within the community to persuade the parties to agree to a compromise, derived from his own sense of justice rather than the formal rule of law.”<sup>148</sup> In American Chancery, the Chancellor served as the “respected local authority figure,” leading the parties to a just resolution.<sup>149</sup>

In Europe, various models of conciliation courts persisted.<sup>150</sup> Notably, the French created a set of labor courts known as the *conseils de prud'hommes*, which were designed to manage labor strife as France became more market-oriented following the Napoleonic Wars.<sup>151</sup> The

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<sup>143</sup> *Id.* at 104-05, 164-65 (“Numerous legal biographies, novels and newspaper articles [in the early nineteenth century] celebrated the art of cross-examination and the lawyers who had mastered it.”).

<sup>144</sup> *Id.* at 165, 170.

<sup>145</sup> See Rajagopalan, *supra* note 129.

<sup>146</sup> See KESSLER, *Inventing American Exceptionalism*, *supra* note 1, at 98-100, 158 (explaining that the “jury-reliant common-law” was considered “uniquely liberty-promoting.”).

<sup>147</sup> KESSLER, *Inventing American Exceptionalism*, *supra* note 1, at 5, 14, 203 (defining quasi-inquisitorial system as “adopt[ing] many components of the inquisitorial type, including, most importantly, significant elements of judicial control . . . . Indeed, the only ways in which equity procedure unmistakably followed the adversarial model was that it authorized the parties to initiate the litigation and to determine its scope and content. Given these limited but important respects in which equity embraced the adversarial model, I refer to its procedure as ‘quasi-inquisitorial,’ rather than inquisitorial.”).

<sup>148</sup> *Id.* at 201.

<sup>149</sup> See *id.*

<sup>150</sup> *Id.* at 202.

<sup>151</sup> *Id.* at 202-03; see also B.W. Napier, *The French Labour Courts—An Institution in Transition*, 42 MOD. L. REV. 270, 270 (1979) (explaining that “*conseils de prud'hommes* has

French conciliation courts, the *bureau de conciliation*, were instituted by the French revolutionaries in 1790 to hear disputes between citizens on a wide range of civil matters.<sup>152</sup> Parties could proceed to actual litigation only after process within the *bureau de conciliation*.<sup>153</sup> The labor courts were an offshoot of the main conciliation court.<sup>154</sup>

Despite the advantages of conciliation courts,<sup>155</sup> the emergence of an American identity interfered with similar growth in American law and procedure. The middle part of the nineteenth century saw a universal turn towards free enterprise and the growth of free market economies.<sup>156</sup> Americans became even more entrenched in the commitment to political liberty and free enterprise, thus rejecting ideas emerging from English monarchical tradition or European models of government.<sup>157</sup> American idealism valued the individual and his liberty interests and did not permit the establishment of institutions that encouraged deference to a learned judge rather than compliance with the formal rule of law.<sup>158</sup> The emerging American ideal valued self-interest, not community.<sup>159</sup> As the free market economy grew, the individual and his own path to wealth and power became a more important narrative,<sup>160</sup> superseding the ideal of the wise authority figure, which was the backbone of Chancery and equity.

This value system created an ideal atmosphere for the lawyer-ordinator to emerge as the main character in legal dispute and reform. The private lawyer became the device used by people of power to access justice in the courts of law.<sup>161</sup> The lawyer was educated on the relevant process and procedure and knew how to access relief for his client.<sup>162</sup>

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been the cause of friction between trade unions, employers' associations and governments in France.”).

<sup>152</sup> See Amalia D. Kessler, *Marginalization and Myth: The Corporatist Roots France's Forgotten Elective Judiciary*, 58 AM. J. COMP. L., 679, 688-95 (2010); see also Napier, *supra* note 151, at 276.

<sup>153</sup> KESSLER, *Inventing American Exceptionalism*, *supra* note 1, at 202.

<sup>154</sup> *Id.* at 203.

<sup>155</sup> *Id.* at 203-205 (referencing Bentham's writings of the “virtues and vices of conciliation”).

<sup>156</sup> See *Capitalism*, INVESTOPEDIA, <https://www.investopedia.com/terms/c/capitalism.asp> (last visited Mar. 20, 2022).

<sup>157</sup> See KESSLER, *Inventing American Exceptionalism*, *supra* note 1, at 7, 12.

<sup>158</sup> *Id.* at 7.

<sup>159</sup> See Robert E. Lane, *Individualism and the Market Society*, 25 LIBERAL DEMOCRACY: NOMOS 374, 376 (1983).

<sup>160</sup> *Id.* at 374-75.

<sup>161</sup> See Gordon, *supra* note 139, at 5.

<sup>162</sup> See *id.* at 79; see also ROBERT BOCKING STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S* 52 (Lawbook Exchange Ltd. 2001) (1983).

He was the embodiment of the Republican civic virtue of debate,<sup>163</sup> thus a living example of core American values. Also, in the mid-nineteenth century legal education changed, becoming more formalized and “scientific” through Langdell’s introduction of the case method at Harvard Law School.<sup>164</sup> In sum, the legal profession began to develop into a profession like medicine, that was revered and respected for breadth and depth of knowledge as well as extraordinary skill.<sup>165</sup>

In law, this extraordinary skill was demonstrated by public communication, either writing or, more notably, oration in the courts of law.<sup>166</sup> Without a dual system of solicitor and barrister,<sup>167</sup> every American lawyer held the potential for great oration and had access to the court forum. To best illustrate his special importance in the American system, a lawyer needed a court forum where his skills were on display. As such, the structure of Chancery with its private inquiry and judge-driven process failed to allow lawyers to perform as desired.<sup>168</sup> After all, Chancery was quasi-inquisitorial, much like the conciliation courts abroad, and relied on informal adjudication with less emphasis on formal legal rules.<sup>169</sup> On the other hand, the courts of law were legalistic,<sup>170</sup> so the trained lawyer provided the only entre into the procedure and substance of American law.

Seizing on this opportunity, lawyers began to advocate for a more adversarial procedure in the law courts.<sup>171</sup> The role of cross examination and argument expanded, and procedure itself, which created many opportunities for litigation, worked towards a more formal construct.<sup>172</sup> This focus on adversarial justice created a zero sum mentality for civil litigation wherein one party must win and another

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<sup>163</sup> See Gordon, *supra* note 139, at 7 (“Even in the course of adversary proceedings, the republican lawyer was advised to remember that his primary role was the collegial one of helping the judge reach a correct decision.”).

<sup>164</sup> STEVENS, *supra* note 162, at 36-37, 52.

<sup>165</sup> *Id.* at 5-6; see also Gordon, *supra* note 139, at 6 (“Law, with its many opportunities for public careers in politics and public letters, was naturally attractive to talent of a certain bent, namely, talent with an ambition for public fame and glory rather than business success.”).

<sup>166</sup> See KESSLER, *Inventing American Exceptionalism*, *supra* note 1, at 158-63; see also Gordon, *supra* note 139, at 6 (discussing the importance of forensic argument before juries).

<sup>167</sup> Harry Cohen, *The Divided Legal Profession in England and Wales – Can Barristers and Solicitors Ever Be Fused?*, 12 J. LEGAL PROF. 7, 7 (1987) (discussing that “[B]arristers are advocates and specialists in various fields of law, and solicitors are lawyers who deal with clients directly . . .”).

<sup>168</sup> See Kessler, *Our Inquisitorial Tradition*, *supra* note 106, at 1210.

<sup>169</sup> See *id.*, at 1153, 1193.

<sup>170</sup> See KESSLER, *Inventing American Exceptionalism*, *supra* note 1, at 39 (referring to courts of law as “rule-bound.”).

<sup>171</sup> *Id.* at 62, 151.

<sup>172</sup> *Id.* at 151, 164-65,

must lose.<sup>173</sup> Adversarial litigation stood in sharp contrast to equity which allowed parties to privately give evidence to a neutral official, then await the compromise decision of a learned judge.<sup>174</sup> In the Chancery system, as in other quasi-inquisitorial systems, the parties to the dispute could resolve matters with reputations and relationships intact.<sup>175</sup> In adversarial litigation, the dispute rendered a winner and loser.<sup>176</sup> The winner then held the position of power over past and future adversaries, whereas the loser worked to retain its position and regain its credibility. This dynamic encouraged greater adversarialism as each contest put a great deal at risk such that parties were best advised to fight with all means available to protect their future interests.

Although heightened adversarialism served valid goals in some litigation, it did little to protect the socially less advantaged. The French created conciliation courts like the *conseils de prud'hommes* to ameliorate the potentially harsh effects of the market driven economy by protecting the most vulnerable members of society, such as the workers.<sup>177</sup> Conciliation courts allowed parties to mediate before litigating; thus, creating an early point of entry for workers who were suffering from harsh or unfair labor conditions.<sup>178</sup> In the French system, a worker could bring a matter regarding unsafe working conditions to the *conseils* and have this matter resolved with his employer without need of an attorney and without the expense of court process.<sup>179</sup>

Absent a similar mechanism in the late nineteenth century and early twentieth century American legal system, workers were required to access the courts of law to seek justice for harm caused by working

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<sup>173</sup> See Monroe H. Freedman, *Our Constitutionalized Adversary System*, 1 CHAP. L. REV. 57, 57 (1998); see generally ROBERT KAGAN, *ADVERSARIAL LEGALISM*, IV (2001).

<sup>174</sup> Freedman, *supra* note 173, at 74; Kessler, *Our Inquisitorial Tradition*, *supra* note 106, at 1217, 1225.

<sup>175</sup> See KESSLER, *Inventing American Exceptionalism*, *supra* note 1, 27-28. Kessler describes the practice in English Chancery, the precursor to American Chancery, wherein testimonial evidence was offered to the court in writing, not *viva voce* as was done in courts of law, and taken privately, described as secretly, rather than in open court. This private, written process allowed litigants to edit or withdraw testimony if the testimony included falsehoods, thus avoiding the public exposure of cross-examination. The private inquiry process was premised on the logic that most witnesses were truthful and honorable and most likely to provide truthful testimony in a private setting. *Id.*

<sup>176</sup> See Freedman, *supra* note 173, at 57.

<sup>177</sup> See KESSLER, *Inventing American Exceptionalism*, *supra* note 1, at 203, 284.

<sup>178</sup> Chester P. Higby & Caroline B. Willis, *Industry and Labor Under Napoleon*, 54 AM. HIST. REV. 465, 465 (1948); see also Kessler, *Marginalization and Myth*, *supra* note 152, at 704.

<sup>179</sup> Higby & Willis, *supra* note 178.

conditions.<sup>180</sup> If workers did access courts of law with labor disputes, the dispute created both financial and reputational risk for the defendant employer.<sup>181</sup> Not only might the employer face the payment of damages or adjustment to more expensive practices, but the employer would also be called upon to answer to public allegations that it did not care for workers.<sup>182</sup> These allegations could disrupt the public reputation of the company and the private reputations of its principals. As wealth typically fell on the employers' side of the equation, defendant employers were incentivized to hire the best adversaries and fight the labor claims vigorously, leaving behind the possibility of a private, mutually agreeable resolution.<sup>183</sup>

*C. How Adversarialism Fails to Foster Social Change in the Workplace*

The Anglo-American model is adversarial, the opposite of inquisitorial in that the “search for truth” in an adversarial system is deemed to require the actions of attorneys as champions in a battle between the parties.<sup>184</sup> The law court system elevates the role of the parties and their lawyers, placing the judge in the role of legal referee.<sup>185</sup> In a quasi-inquisitorial system, the judge and court officers serve as the fact gatherers, gathering information through private inquiry, principally through court-directed discovery.<sup>186</sup> The inquisitorial process is slow and subject to the criticism of bureaucratic systems;

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<sup>180</sup> See Kathleen Thelen, *Employer Organization and the Law: American Exceptionalism in Comparative Perspective*, 83 L. & CONTEMP. PROBS. 23, 23-28 (2020) (discussing the economic legal context of labor organization in the United States).

<sup>181</sup> See *id.* at 37 (noting the role of litigation against labor unions in the nineteenth century).

<sup>182</sup> See *id.* at 38-39 (describing the coordination between labor and management to address public backlash against management; however, the cooperation “withered as organizations . . . encouraged them instead to mobilize the courts in battles that focused on the individual rights of firms and workers.” See also *Remedies for Employment Discrimination*, U.S. EEOC, <https://www.eeoc.gov/remedies-employment-discrimination> (last visited May 13, 2022) (describing available remedies for employment discrimination, including economic consequences).

<sup>183</sup> See, e.g., Thelen, *supra* note 180, at 36 (discussing how employers used court process to challenge labor organizations through organizations such as the American Anti-Boycott Association whose “express purpose was to shape authoritative interpretation of particular laws by seeking secure court decisions . . . that would establish that unions too were subject to antitrust provisions . . . and to establish that an individual’s right to work was to be protected just as vigorously as a business person’s right to run his own business.”).

<sup>184</sup> KESSLER, *Inventing American Exceptionalism*, *supra* note 1, at 4.

<sup>185</sup> *Id.* at 5.

<sup>186</sup> *Id.* at 85.



however, it may offer benefits in cases where the adversarialism of the parties may have interfered with the overall best outcome for the parties.

This Article argues that gender discrimination cases serve as an example of the type of controversy which would benefit from a quasi-inquisitorial approach. As discussed in Section I, gender discrimination cases necessarily involve an inquiry into the workplace's social context and raise social as well as legal issues.<sup>187</sup> Dispute resolution that focuses on the parties' experiences in the workplace and the "social truth" of the workplace would allow the litigating parties to use the controversy not just as a contest to determine who is right, but as a means of improving the overall workplace culture. In gender discrimination cases where litigation can prompt social change, the parties are not positioned to collaborate on a remedy which addresses the injury to the plaintiff and better positions the defendant to change practices and avoid future exposure.

### III. NON-ADVERSARIAL APPROACHES TO WORKPLACE DISCRIMINATION LITIGATION

Adversarial litigation positions the parties as enemies with both working to protect their own interests, whether that is maximizing economic recovery for the plaintiff or mitigating public relations impacts or financial risk to the defendant.<sup>188</sup> Although mediation and other alternative dispute resolution mechanisms are designed to allow parties to find common ground in the course of adversarial litigation, the postures in settlement discussions flow from the overall adversarial context, so parties must strategize their best position in mediation, e.g., what to share and when.<sup>189</sup>

The need for strategy in settlement negotiations interferes with open communication and positive resolution.<sup>190</sup> Most often, lawsuits settle after an evaluation of economic and reputational exposure for defendant balanced against a risk of loss and limited recovery for the

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<sup>187</sup> See *supra* Part I.

<sup>188</sup> See generally Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984); Stephen A. Saltzburg, *Lawyers, Clients and the Adversary System*, 37 MERCER L. REV. 647, 662 (1986) (describing that lawyers have a duty to represent their clients zealously).

<sup>189</sup> See Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Post-Modern, Multi-Cultural World*, 38 WM. & MARY L. REV. 5, 37 (1996) (arguing that many forms of alternative dispute resolution are "becoming corrupted by the persistence of adversarial values."). *But see* Saltzburg, *supra* note 188 (stating that an argument in an adversarial process assures competent representation).

<sup>190</sup> See Menkel-Meadow, *supra* note 189, at 37.

plaintiff. Ultimately, the process devolves to a cost/benefit analysis which requires parties to protect as much turf as possible while ceding ground only where risk analysis indicates concession is the best course. This process does not allow the parties to work together in problem solving.<sup>191</sup> This section explores possible alternatives to the adversarial approach which may, in part or in full, be informative models for American workplace discrimination cases.

#### A. *The Possible Solution: A Quasi-Inquisitorial Approach*

In resolving workplace discrimination cases, a more effective alternative to using traditional, adversarial tactics could be to apply a quasi-inquisitorial approach.

Although in 1938 the Rules of Civil Procedure merged law and equity, the Federal Courts continue to sit in equity when making certain determinations.<sup>192</sup> When the trial court occupies this role, the court theoretically moves into a quasi-inquisitorial role wherein the judge makes fairness-based determinations based on the evidence presented by the parties.<sup>193</sup> In equity, the judge, not the jury, serves as the fact-finder and applies the facts found to reach an “equitable” end premised on the roles and needs of both parties.<sup>194</sup> Equity functions well when remedies sought require action or inaction.<sup>195</sup> The court can determine that a party must reinstate or promote an employee based on the court’s factual findings.<sup>196</sup> When equitable remedies are sought, we accept the trial court’s function as a fairness agency.<sup>197</sup> Thus, why not accept the same function when the controversy seeks non-equitable relief such as money damages?

The American adversarial system has experimented with more inquisitorial approaches to private conflict, principally through Chancellor Kent’s New York Chancery courts.<sup>198</sup> Most attribute the

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<sup>191</sup> *Id.*

<sup>192</sup> See Thomas O. Main, *Traditional Equity and Contemporary Procedure*, 78 WASH. L. REV. 429, 431-32 (2003).

<sup>193</sup> *Id.* at 444.

<sup>194</sup> *Id.* at 451.

<sup>195</sup> *Id.* (“Whenever a court of law was competent to take cognizance of a right and had the power to proceed to a judgment that afforded plain, adequate, and complete relief, the plaintiff had to proceed at law . . .”).

<sup>196</sup> See *Duke v. Uniroyal, Inc.*, 928 F.2d 1413, 1424 (4th Cir. 1991) (discussing the interplay between equitable and legal remedies in regard to reinstatement and front pay under the Age Discrimination in Employment Act).

<sup>197</sup> See Main, *supra* note 192 at 478; see also KESSLER, *Inventing American Exceptionalism*, *supra* note 1, at 4.

<sup>198</sup> See KESSLER, *Inventing American Exceptionalism*, *supra* note 1, at 6.

decline of Chancery to the emerging influence of lawyers as orators and the outsized importance of Chancery judges who were accused of overreaching in their inquisitorial role.<sup>199</sup> However, there are other models of inquisitorial decision-making that are worth consideration when evaluating claims which impact not only legal remedies but ongoing cultural contexts, like workplace discrimination claims.

First, it should be noted that the proper term for Chancery and other models is quasi-inquisitorial as no relevant system is fully inquisitorial, meaning without the influence of attorneys in the process.<sup>200</sup> However, the hallmark of a quasi-inquisitorial system is its use of judges or other court officials as both inquirers and fact finders.<sup>201</sup> Quasi-inquisitorial systems often involve blind fact gathering processes that use conventional aspects of American civil discovery, such as the oral deposition, but structure the fact gathering through court process rather than through attorney-driven self-directed discovery.<sup>202</sup> In a quasi-inquisitorial system, a witness's testimony may be gathered through oral deposition in front of a judge or court officer without cross examination or even the presence of the adverse parties.<sup>203</sup>

The quasi-inquisitorial French *counsiels de prud'hommes* began as labor courts, thus supporting the argument that even in the early days of private dispute resolution there was an acknowledgement that labor disputes involved special circumstances.<sup>204</sup> In many private disputes, the parties have had limited interaction either before or after the actions generating the dispute, thus parties can walk away from the court resolution without a need for future interaction.<sup>205</sup> However, in cases involving the workplace, the parties often share the goal of remaining in their relationship.<sup>206</sup>

The French system allows those parties to meet face to face and discuss the relevant issues before a knowledgeable person, preserving

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<sup>199</sup> See Pearce, *supra* note 139 (discussing that the role of a lawyer is to be a public orator).

<sup>200</sup> See Kessler, *Our Inquisitorial Tradition*, *supra* note 106, at 1187.

<sup>201</sup> *Id.* at 1240.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> See Kessler, *Marginalization and Myth*, *supra* note 152, at 701 (“At least as important were the labor courts, or *conseils de prud'hommes*, established by the Napoleonic regime in the early nineteenth century in order to help quell the extensive labor strife that emerged in the wake of the Napoleonic Wars and the widespread economic disorder that these generated.”).

<sup>205</sup> See generally *id.*

<sup>206</sup> See *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (explaining that the plaintiff wanted to be promoted to partner at her accounting firm); see also *Duke v. Uniroyal, Inc.*, 928 F.2d 1413, 1422 (4th Cir. 1991) (explaining that the plaintiff wanted to continue to be employed by Uniroyal).

the possibility that the parties could resume their workplace relationship.<sup>207</sup> The French labor court system allows for the possibility that workers and employers can evaluate the social truth of the workplace from both points of view.<sup>208</sup> This is as opposed to the winner-take-all posture of the adversarial system which imposes no obligation on the employer to alter the workplace, or their actions, if they are the winner.<sup>209</sup>

Adjusting the adversarial system to a quasi-inquisitorial system similar to the French example of labor courts is not realistic and most likely not desirable. The French system is oriented towards conciliation and reflects an overall more corporatist attitude to employment.<sup>210</sup> The adjudication process is managed by elected bureaucrats who are often regarded as biased towards the labor organizations that support their candidacies.<sup>211</sup> A quasi-inquisitorial system in the French model values bureaucratized justice, whereas the American adversarial system values its distinctive commitment to “judicial creativity, common sense, and equity.”<sup>212</sup> This gap alone may be sufficient to defeat attempts to create an American version of conciliation devoted to employment disputes. However, as Kessler points out, understandings of legal systems are not only based on rules, practices, precedents, and institutional formats, but also on a set of myths that shape legal culture and professional identity.<sup>213</sup> These myths operate like social truths in that as they sediment, they become the truth of what we value in the system of private conflict resolution.<sup>214</sup> The question is whether the American system, which values contest as the mechanism of truth, could be altered to allow for a quasi-inquisitorial approach without disrupting the myth of victory as vindication.

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<sup>207</sup> See Napier, *supra* note 151 (discussing the jurisdiction, organization, personnel, and procedure of the *conseils de prud’hommes*). See generally Pete Burgess, Susan Corby & Paul L. Laurreille, *Lay Judges and Labor Courts: A Question of Legitimacy*, 35 COMP. LAB. L. & POL’Y J. 191 (2014) (discussing the role of lay judges in European labor courts).

<sup>208</sup> See generally Kessler, *Marginalization and Myth*, *supra* note 152.

<sup>209</sup> See Menkel-Meadow, *supra* note 189, at 66.

<sup>210</sup> See Kessler, *Marginalization and Myth*, *supra* note 152, at 712 (defining “corporatist attitude” as control of a country by large groups, especially businesses).

<sup>211</sup> *Id.* at 681 (“[J]udges lack formal judicial (and usually legal) training of any kind and are elected mid-career to serve temporary terms of office. Those thus elected to office belong to the particular profession (and social) groups whose disputes they will resolve and which, in turn, are responsible for electing them.”).

<sup>212</sup> See *id.* at 716.

<sup>213</sup> See *id.* at 720.

<sup>214</sup> See ALVESSON & SKÖLDBERG, *supra* note 2, at 27.

In the twentieth century, the role of the lawyer shifted from a public orator to a public interpreter of law.<sup>215</sup> Lawyers have become more subject-specific in their knowledge and have been disincentivized to develop as orators as the great ideal of the public trial nearly ceases to exist.<sup>216</sup> Thus, most lawyers will never argue a case before a jury in a public court, never donning the armor of the gladiator.<sup>217</sup> Also, the court as a public forum is a dwindling ideal.<sup>218</sup>

Many controversies, including many workplace controversies, are litigated in administrative courts or managed through extra-judicial settlement mechanisms.<sup>219</sup> Administrative courts may technically be open to the public but are often difficult to access since the business of agencies is not conducted in traditional courthouses, as some agencies occupy office space that appear outwardly to be private.<sup>220</sup> Many courthouse spaces limit access for security reasons or limit courtroom attendance based on party requests or space limitations.<sup>221</sup> To individuals who do not have experience appearing before them, federal courts do not present themselves as open fora in many jurisdictions.<sup>222</sup>

Furthermore, the federal judiciary currently includes a substantial number of non-Article III decisionmakers who preside over dispositive matters.<sup>223</sup> Federal magistrate judges have increased in number largely in response to concerns raised by the federal judiciary, and others, regarding full dockets and slow processes.<sup>224</sup> The creation of magistrate and other non-Article III judicial officers allows for

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<sup>215</sup> See Gordon, *supra* note 139.

<sup>216</sup> See Pearce, *supra* note 139, at 397 (discussing lawyers' evolving role in shaping corporate culture in the 1960s).

<sup>217</sup> See Jeffrey Q. Smith & Grant R. Macqueen, *Going, Going, But Not Quite Gone: Trials Continue to Decline in Federal and State Courts. Does it Matter?*, 101 JUDICATURE 26, 27 (2017).

<sup>218</sup> See Judith Resnik, *Whither or Whether Adjudication*, 86 B.U. L. REV. 1101, 1103 (2006) ("Given the proliferation of the sites of adjudication and the pressures to seek alternative forms of resolution, I am not confident that adjudication will be as available one hundred years hence as it is today, nor that its substitutes will permit easy public observation and public knowledge of the deployment of power, both public and private.").

<sup>219</sup> *Id.* at 1131.

<sup>220</sup> *Id.* at 1132 ("As a practical matter, however, even if one has a 'right' to attend these various [administrative] proceedings, it is difficult to find them.").

<sup>221</sup> *Id.* at 1126 (noting that the Boston federal courthouse housing the court for the Western District of Massachusetts was instructed to keep the lights on for two hours per day in each courtroom but only does so about one-half of the time the courthouse is open).

<sup>222</sup> See JUDITH RESNIK & DENNIS CURTIS, *REPRESENTING JUSTICE: INVENTION, CONTROVERSY AND RIGHTS IN CITY-STATES AND DEMOCRATIC COURTROOMS* (2011).

<sup>223</sup> Resnik, *Whither or Whether Adjudication*, *supra* note 218, at 1118.

<sup>224</sup> *Id.* at 1114-15 (discussing the rise of magistrate judgeships).

political expediency as magistrates and similar officers may be appointed by the District Court judges without a political confirmation process.<sup>225</sup> As civil court practice in federal court has moved away from a judge with lifetime tenure playing a singularly central role in civil litigation, one can argue that a further adjustment to the system that allows for a more inquisitorial process is hardly an existential threat to the American system. As of now, civil cases are handled in part, and sometimes in full, by bureaucratic judges who are deemed to have special expertise.<sup>226</sup> Arguably, the structure for a quasi-inquisitorial system attending to workplace discrimination cases is already in place.

*B. The Non-Solutions: System Approaches that Inhibit the Reconciliation of Social Truths*

It is appropriate to suggest that non-adversarial alternatives already exist. Alternative dispute resolution (ADR) devices allow parties to discuss the social truth of an organization and assess possible avenues for change to improve the employee experience and the employer's business position.<sup>227</sup> However, the options most often considered are those which flow from the adversarial model—options which involve the resolution of a disputed claim. As settlement itself presupposes a dispute, the context of settlement derives itself from the context of the dispute prompting questions regarding what evidence plaintiffs should reveal to support their demand and how much defendants should offer to take full advantage of the settlement posture.<sup>228</sup> The stage for settlement is set by the threat of a later contest, a staging which undermines any realistic goal of cultural change in the workplace.<sup>229</sup>

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<sup>225</sup> *Id.*

<sup>226</sup> *See id.* at 1123. “Judges are now multi-taskers, sometimes managers of lawyers and of cases, sometimes mediators, and sometimes referral sources, sending people outside courts to alternative fora.” *Id.*

<sup>227</sup> Todd B. Carver & Albert A. Vondra, *Alternative Dispute Resolution: Why it Doesn't Work and Why It Does*, HARVARD BUS. REV. (May-June 1994), <https://hbr.org/1994/05/alternative-dispute-resolution-why-it-doesnt-work-and-why-it-does>.

<sup>228</sup> *See* Menkel-Meadow, *supra* note 189, at 17-18. Menkel-Meadow explains that the adversarial system may no longer be the best method for our legal system to deal with all matters. She criticizes the binary nature of the adversarial system and notes that “the ‘false’ or ‘exaggerated’ representation of oppositional stories may oversimplify the facts and not permit adequate consideration of fact interpretations or conclusions that either fall somewhere in between, or totally outside of, the range of the lawyer’s presentations.” The binary presentation of evidence filters into alternative dispute resolution processes when those processes derive from the binary adversarial context. *Id.*

<sup>229</sup> *See generally id.*; Resnik, *Whither or Whether Adjudication*, *supra* note 218.

i. *Mediation, Settlement, and Other Adversarial-Based Alternative Dispute Resolution Mechanisms*

The parameters of mediation and settlement are carved out of civil litigation's basic structure.<sup>230</sup> Although private parties have always been able to seek an extra-judicial remedy for their conflicts, whether before or during litigation, the mechanisms which drive settlement evolved through a series of structural changes to the Federal Rules of Civil Procedure.<sup>231</sup> Further, the evolution of alternative dispute resolution has, like arbitration, become its own industry.<sup>232</sup> Trial courts certify mediators and mandate settlement conferences as a prerequisite to placing a case on the civil trial calendar.<sup>233</sup> Judges openly express to litigants their opinions on the viability or advisability of settlement, sometimes stating an assessment of the strength of the case and assessing the risks between the parties.<sup>234</sup> The court's open embrace of settlement is not an error—settlement does benefit the parties in many situations. What is important to note though is that settlement arrived at through mediation or court-ordered process is assessed as an alternative to adversarial litigation, thus the settlement is a substitute for the winner-take-all trial.<sup>235</sup> Building mediation and settlement models as dependencies on civil litigation's adversarial structure eliminates the opportunity to reimagine a different approach to be applied in certain types of civil cases.<sup>236</sup>

For example, consider a negligence case wherein the parties are an injured plaintiff and a defendant accused of a negligent action. Assume the parties had no association prior to the event creating the

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<sup>230</sup> See, e.g., FED. R. CIV. P. 16(a) ("In any action, the Court may order the attorneys and any unrepresented parties to appear for one or more pretrial conferences for such purposes as . . . (5) facilitating settlement.").

<sup>231</sup> Amy M. Pugh & Richard A. Bales, *The Inherent Power of the Federal Courts to Compel Participation in Nonbinding Forms of Alternative Dispute Resolution*, 42 DUQ. L. REV. 1, 3 (2003).

<sup>232</sup> See generally *id.* (discussing sources of judicial authority for compelling party to mediate and settle).

<sup>233</sup> See, e.g., N.C.R. 1.(c).(1) (promulgated under N.C.G.S.A. [S] 7A-38.1(e)) (providing that North Carolina Superior Court judges may require parties to attend mediated settlement conferences).

<sup>234</sup> See Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 385 n.52 (1982) ("[A] trial court ought not to force a settlement . . . but [may suggest] the advisability of settlement.").

<sup>235</sup> See Menkel-Meadow, *supra* note 189, at 37 (arguing that positive developments in alternative dispute resolution "are becoming corrupted by the persistence of adversarial values.").

<sup>236</sup> See *id.* at 36 (noting that, in cases which involve a "genuine search for truth," a quasi-inquisitorial process may provide a sensible alternative to adversarial process).

case and will most likely never interact with each other again outside of the current litigation. The decision of whether to settle such a case is largely based on the risk assessment around financial loss, risks which are calculated based on the likelihood of either party's success at trial. The parties in this hypothetical can litigate aggressively as a means of either winning at trial or achieving the better settlement position, and then walk away without concern for repairing a damaged relationship. In cases like this, the court is well advised to encourage settlement, formally or informally, as the parties positions can be evaluated in monetary terms.<sup>237</sup>

But the issues around settlement read differently when the underlying litigation centers on an ongoing relationship.<sup>238</sup> In litigation involving workplace discrimination, for example a claim of sexual harassment under Title VII, the plaintiff-employee may seek a remedy that involves a return to the workplace.<sup>239</sup> Also, the plaintiff's complaint may implicate greater concerns about the given work environment which need to be addressed by the defendant-employer even if the plaintiff ceases to be an employee.<sup>240</sup> Even if the plaintiff-employee does not return to the workplace after litigation, the workplace culture can expose the defendant-employer to future risk and expose other employees to potential harm.<sup>241</sup>

In the sexual harassment example, assume the plaintiff is alleging that her supervisor harassed her through inappropriate conduct and threatened to fire her if she did not engage in sexual activity.<sup>242</sup> The plaintiff-employee files a suit for sexual harassment. The defendant-employer mounts a vigorous defense which requires a certain degree of

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<sup>237</sup> See *id.* The typical negligence-based dispute does not involve a "search for truth" but rather seeks a practical, most likely monetary, remedy for the injured party. This type of case functions well as an adversarial challenge with attorneys (or parties) arguing the relevant factual/legal position without a reference to cultural issues operating contextually to the conflict. In Menkel-Meadow's language, the case does not raise a "public question" requiring resolution in open court. See *id.* at 32.

<sup>238</sup> See *id.* at 34-35 (citing Susan Sturm & Lani Guinier, *Reflections on Teaching About Race and Gender*, 53 J. LEGAL EDUC. 515 (2003)) (discussing the use of multi-layered procedure at the Center for Interracial/Inter-ethnic Conflict Resolution at the UCLA School of Law designed to avoid debate-like adversarial presentations in workshop on affirmative action).

<sup>239</sup> See, e.g., *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (explaining how Ann Hopkins steadfastly sought a return to her workplace at the partner level, refusing significant money offers in settlement in pursuit of a return-to-work remedy).

<sup>240</sup> See Catherine R. Dunham, *Third Generation Discrimination: The Ripple Effects of Gender Bias in the Workplace*, 51 AKRON L. REV. 56 (2017).

<sup>241</sup> See *id.* at 59-61 (discussing implicit bias and the effects of bias in the workplace).

<sup>242</sup> *Know Your Rights at Work: Sexual Harassment*, EQUAL RTS. ADVOCATES, <https://www.equalrights.org/issue/economic-workplace-equality/sexual-harassment/> (last visited May 6, 2022).



support for the supervisor who is the subject of the allegations. If the case moves forward to settlement, not only could the process quiet or discredit the plaintiff-employee's allegations, but it also overlooks the impact the alleged conduct may have had on others in the workplace.<sup>243</sup> Others in the workplace may have endured similar experiences. However, if the defendant-employer wins at trial or closes the case through an amenable settlement, it has no incentive to manage the supervisor or change the workplace other than an incentive that arises from practical business reasons.<sup>244</sup> The cultural issue remains unlitigated.

The changes in the Federal Rules of Civil Procedure which have enhanced the role of mediated settlement in civil cases have largely derived from concerns raised by judges and court personnel regarding crowded dockets.<sup>245</sup> Concerns about court efficiency are valid concerns as delays do affect parties.<sup>246</sup> However, docket efficiencies must be weighed against the access issues raised when litigants are disincentivized to litigate their controversies before a judge or jury.<sup>247</sup> The best solution for deficiencies in adversarial litigation should not be the coerced settlement of claims. In fact, the rise in settlements should be evaluated not as indicator of success in the system's docket management but as an indicator of failure in the system.

## ii. *Arbitration*

Arbitration presents itself as another viable option to full-blown adversarial litigation. Arbitration operates under its own rules which, although similar to Anglo-American rules of civil court practice, allow for some departures from adversarial process.<sup>248</sup> For example,

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<sup>243</sup> See Menkel-Meadow, *supra* note 189, at 32 (noting that some litigation involves "public questions.").

<sup>244</sup> See Joni Hersch, *Can the Media Solve the Problem of Sexual Harassment*, GEO. J. INT'L AFFS. (Mar. 1, 2018), <https://gjia.georgetown.edu/2018/03/01/can-media-solve-problem-of-sexual-harassment/> ("In the absence of information about the actual risk of sexual harassment, there is little incentive for firms to take on the expense of lowering the risk of sexual harassment.").

<sup>245</sup> See generally Paul D. Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542 (1969) (discussing the problems of crowded dockets in the courts of appeals).

<sup>246</sup> See Resnik, *Managerial Judges*, *supra* note 234, at 390 (discussing court delay and its impact on court proceedings).

<sup>247</sup> *Id.* at 441-42 (outlining economic disincentives to litigation).

<sup>248</sup> See, e.g., AAA *Court- and Time-tested Rules and Procedures*, AM. ARB. ASS'N, <https://www.adr.org/Rules> (last visited Mar. 1, 2022); *Download Current Rules, Procedures*

arbitration regimes eschew juries and do not occur in open court, which should reduce the need for attorneys to perform as public orators.<sup>249</sup> However, arbitration schemes conform in substance to the adversarial systems they are designed to replace.<sup>250</sup> The parties perform the basic aspects of a trial, resolving disputes regarding evidence, facts, and law before a panel of arbitrators.<sup>251</sup> In many cases the parties have agreed to abide by the arbitrators' decision, so the effect of the arbitration is a final and unappealable judgment.<sup>252</sup> As such, arbitration can create an even higher stakes contest than traditional civil litigation.<sup>253</sup>

Arbitrators are often chosen based on subject-specific expertise, a system more in line with an employment-focused conciliation court.<sup>254</sup> A panel of arbitrators with experience in the workplace environment in controversy may be more likely to understand the cultural dynamics of the workplace, and thus more likely to understand the lasting effects of the decision for the parties and other workers.<sup>255</sup> However, if the rules of the game remain the same, a different referee cannot change the game.

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*and Forms*, JUD. ARB. & MEDIATION SERVS., INC., <https://www.jamsadr.com/rules-download/> (last visited Mar. 1, 2022); *see also* AM. ASS'N FOR JUST., *WHERE WHITE MEN RULE: HOW THE SECRETIVE SYSTEM OF FORCED ARBITRATION HURTS WOMEN AND MINORITIES* (2021) (noting that AAA and JAMS are the two largest consumer and arbitration providers in the country).

<sup>249</sup> *See* Pamela K. Bookman, *The Arbitration-Litigation Paradox*, 72 VAND. L. REV. 1119, 1123 (2019) ("On one hand, arbitration could be understood simply as a private, contract-based dispute resolution system in which decisionmakers render binding adjudication of parties' claims. Litigation, on the other hand, refers to the process of resolving disputes in a public court system according to procedures and institutions established by the state."); *see also* Gordon, *supra* note 139, at 6; KESSLER, *Inventing American Exceptionalism*, *supra* note 1.

<sup>250</sup> *See* Resnik, *Whither or Whether Adjudication*, *supra* note 218, at 1124 ("One form is court-based ADR, which creates a 'new' civil procedure. Techniques such as mediation, *arbitration*, and settlement conferences, once termed 'extrajudicial,' have become regular features of civil process.") (emphasis added).

<sup>251</sup> *See* COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES (AM. ARB. ASS'N. 2013).

<sup>252</sup> A full discussion of the role of private contract in arbitration is beyond the scope of this Article. For a thoughtful discussion of the hostility and enthusiasm for private arbitration, *see* Bookman, *supra* note 249.

<sup>253</sup> *See id.* at 1165-73 (comparing the aspects and risks of arbitration and litigation).

<sup>254</sup> *See* AM. ASS'N FOR JUST., *supra* note 248, at 6-7 (discussing the overall lack of diversity in arbitrator selection); *see also* KESSLER, *Inventing American Exceptionalism*, *supra* note 1, at 203, 284.

<sup>255</sup> *See* AM. ASS'N FOR JUST., *supra* note 248 (discussing an employment discrimination case against Tesla by a Black employee who alleged he suffered "at least a dozen instances of racial slurs and threats, including video of co-workers threatening him while using the n-word."). Tesla took the case to arbitration and a white arbitrator ruled that the slurs were not racist, thus not evidence of discrimination, but "were consistent with lyrics and images commonly found in rap songs." The Article also notes the gender disparity in arbitrator availability and how that disparity is of particular concern in sexual harassment cases. *Id.*

However unlikely it may seem, Major League Baseball (MLB) is an example of how arbitration can be used effectively in a workplace dispute. First of all, despite all media indications to the contrary, professional sports teams are workplaces, and the people involved in those enterprises come to work, wear uniforms, and seek fair salaries and equitable working environments.<sup>256</sup> In baseball, the core employee issue is often compensation, and, to its credit, Major League Baseball devised its own system of arbitration to manage player compensation controversies.<sup>257</sup> Like most arbitrations, the matter in controversy is heard by a panel of three arbitrators, all of whom who possess the relevant expertise.<sup>258</sup>

The important difference is the process. Baseball salary arbitrations involve the panel selecting between two, and only two, options—the salary proposed by the player or the salary proposed by the team.<sup>259</sup> There is no third option and no hybrid options.<sup>260</sup> Both sides make their pitch for the proposed salary, and the arbitrators decide.<sup>261</sup> The process is time structured with one hour allotted to each side, then thirty minutes per side for rebuttal.<sup>262</sup> The player argues first, trying to convince the arbitrators to adopt their salary proposal based on the comparable data regarding salaries of other similar players.<sup>263</sup> The team follows with its argument, which is also based on comparable data evidence.<sup>264</sup> The entire process, including rebuttals, is typically concluded within one half day, and the panel renders its decision within twenty-four hours.<sup>265</sup> The arbitrators' decision is final, and the parties understand the process and the resolution.<sup>266</sup> When players hit the field

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<sup>256</sup> See Ross E. Davies, *Along Comes the Players Association: The Roots and Rise of Organized Labor in Major League Baseball*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 321, 322-46 (2013) (chronicling the history of major league baseball players as a labor force).

<sup>257</sup> See Bibek Das, *Salary Arbitration and the Effects on Major League Baseball and Baseball Players*, 1 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 55, 55-56 (2003); see also Andrew J. Wronski, *The Unique Game of Baseball Arbitration*, 48 LITIGATION 29, 29.

<sup>258</sup> See Wronski, *supra* note 257 at 29.

<sup>259</sup> *Id.*

<sup>260</sup> See Das, *supra* note 257, at 56-57 (“The arbitrator must chose [sic] either the amount given by the owner or the amount given by the player.”).

<sup>261</sup> See Wronski, *supra* note 257, at 29.

<sup>262</sup> *Id.*

<sup>263</sup> *Id.*

<sup>264</sup> *Id.*; see also Das, *supra* note 257, at 57 (noting criteria for salary arbitration).

<sup>265</sup> See Wronski, *supra* note 257, at 29.

<sup>266</sup> *Id.*

after a salary arbitration, the controversy is over for the affected player and for the others on the team.<sup>267</sup>

In order for arbitration to serve as an adequate substitute for adversarial litigation, the arbitration rules must allow for a different, not merely substituted, process.<sup>268</sup> There is no special magic in replacing judges and juries with arbitrators if the process remains adversarial at its core, leaving the parties to assume the roles of winners and losers.<sup>269</sup> The MLB salary arbitration system allows the controversy to be resolved with the team culturally intact in part because the system values the team over the individual player.<sup>270</sup> The suggestion here is that all workplace litigation should value the equitable function of the workplace over the individual worker, thus reducing the need for workplace litigation focused on individual harm and litigation success.

#### CONCLUSION

Imagine for a moment how workplace claims would be impacted if plaintiff-employees could work with the defendant-employer to create a better work environment such that the plaintiff-employee could accept a remedy that allowed them to return to a reformed workplace. This Article argues that a more progressive approach to resolving workplace controversies, one which allows the parties to work towards a better overall understanding of the actual workplace culture, would allow for the reconciliation of competing social truths in the workplace and the overall improvement of workplace culture to the benefit of all.

Compare a plaintiff-employee's successful outcome in non-adversarial dispute resolution to a plaintiff-employee's victory against a defendant-employer through adversarial litigation. If the employee can return to an improved workplace, the social outcome benefits all. Whereas in cases when the employee wins after an adversarial contest, the case outcome is often attributed to factors such as the better lawyer, the biased judge, the few "bad apples" at work, or the overall failure of

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<sup>267</sup> See *id.* at 31 (discussing how the salary arbitration format changes litigation strategy—there is no incentive for lawyers to argue alternative theories and “hedge their bets” as the arbitration panel has no discretion to find a middle ground).

<sup>268</sup> See Das, *supra* note 257, at 57-58. Das argues the “final offer format” has drawbacks that can affect the relationship between the player and the team. For example, if the owners degrade the player to justify a lower salary award, the player/team relationship can be adversely impacted. Das notes, however, that many owner representatives will hold back degrading information to avoid alienating a player who will return to the team. *Id.*

<sup>269</sup> See *id.*

<sup>270</sup> *Id.* (noting that the final offer format forces both sides to give a reasonable offer to avoid lingering controversies that can inhibit the player and the team).

the jury system. If workplace social truths are challenged in a case-by-case adversarial manner the underlying sources of those workplace truths are ignored, thus not improved. Furthermore, if the employer prevails, the workplace culture is validated by the litigation process, thus obviating any need for cultural change.

Civil litigation is, at its core, shortsighted. The system is not designed to accomplish more than the resolution of the matter at hand, and the parties, and their lawyers, are obligated to follow the rules of the game. However, understanding the limitations of the system creates opportunities for change. In times of increased cultural awareness, lawyers should be asking the important questions regarding litigation structures and who they benefit, understanding that litigation structures which allow for cultural understanding can motivate cultural change.