ARBITRATION'S ARBITRAGE: SOCIAL SOLIDARITY AT THE NEXUS OF ADJUDICATION AND CONTRACT

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INTRODUCTION

It is a common assumption about arbitration, shared among enthusiasts and detractors alike, that arbitration is a contractually created *substitute* for adjudication. According to this view, an agreement to arbitrate *transfers* disputes whose natural venue is a court to an arbitral tribunal, which *does the work of courts*. Arbitration, on this view, is a case of *displacing* adjudication with an alternative, party-chosen procedure that nevertheless retains adjudication's *judgment-rendering* function.[1]

This is an old line of thought. It is associated, for example, with the concern raised by Chief Justice Lemuel Shaw of the Supreme Judicial Court of Massachusetts in *Nute v. Hamilton Mutual Insurance Co.* that enforcing even forum selection clauses would allow "the rules [that] determine in what courts and counties actions may be brought," which are "fixed, upon considerations of general convenience and expediency, by general law," to be "changed by the agreement of the par-

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1. Examples of this line of thought include Judith Resnik's suggestion that arbitration constitutes an example of "contract procedure" and that this form of procedure cannot properly avoid the demands of what she calls "due process procedure." Judith Resnik, *Procedure As Contract*, 80 NOTRE DAME L. REV. 593, 594 (2005). For other examples, see Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331, 344–45; Rex R. Perschbacher & Debra Lyn Bassett, *The End of Law*, 84 B.U. L. REV. 1, 2 (2004) (suggesting that arbitration might privatize "law itself"); Peter B. Rutledge, *Arbitration and Article III*, 61 VAND. L. REV. 1189, 1195–1204 (2008); David H. Taylor & Sarah M. Cliffe, *Civil Procedure by Contract: A Convoluted Confluence of Private Contract and Public Procedure in Need of Congressional Control*, 35 U. RICH. L. REV. 1085, 1089 (2002) (suggesting that the key issue raised by arbitration is whether or not the "procedural rules and statutes of the public system of dispute resolution may be privately altered by contract"); Paul R. Verkuil, *Privatizing Due Process*, 57 ADMIN. L. REV. 963, 983 (2005) (suggesting that arbitration is "an alternative to judicial decisionmaking").

ties."[2] The same concern applies, *a fortiori*, to arbitration agreements, which select a non-judicial forum. Shaw's concerns, moreover, invoked not just prudential considerations but conceptual and even formal ideas about the distinction between resolving disputes by contract and by law. Thus, Shaw categorically distinguished between establishing contractual rights on the one hand, and asserting established rights on the other. He wrote that "the remedy," which stands, in Shaw's argument, for the entire apparatus of assessing and enforcing previously established contractual rights, "does not depend on [the] contract, but upon law, generally the *lex fori*, regardless of the *lex loci contractus*, which regulates the construction and legal effect of the contract."[3] Shaw observed, in effect, that the grounds of adjudicatory authority are distinct from the grounds of contractual authority, and he concluded from this that the parties could not, by contract, displace adjudication.

Similar formal distinctions survive in the current doctrinal order, although they tend to be employed to the opposite effect. For example, a 1995 Supreme Court decision held that even if an arbitration clause in a bill of lading selects a foreign arbitral tribunal and increases the transactions costs faced by a U.S. shipper who is seeking to enforce contractual rights against a foreign carrier, this does not constitute a "lessening" of the carrier's liability of the sort that is prohibited by the Carriage of Goods at Sea Act.[4] In reaching this conclusion, the Court insisted that the "duties and obligations" that are established by the Act are "*separate and apart* from the mechanisms for their enforcement,"[5] and that arbitration affects only the latter. This is, of course, precisely Shaw's formal distinction between creating rights and enforcing them, although the distinction is now employed in support of a substantive pro-arbitration agenda that is directly opposed to Shaw's.

This common assumption about arbitration is connected to second common assumption, namely, that there exists a *generic* difference between adjudication proper and the contracts that establish arbitral dispute resolution. Thus, it is commonly supposed that adjudication pursues the true and just resolution of disputes, whereas contract merely reflects the balance of advantage that is revealed through bargaining among competitors. This second assumption explains the first, that is, it explains why arbitrators must do the work of (so that they

2. Nute v. Hamilton Mut. Ins. Co., 72 Mass. (6 Gray) 174, 184 (1856).
3. *Id.* at 181.
4. *See* Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528, 551 (1995).
5. *Id.* at 535.

stand in for and indeed displace) judges and courts. What else might they do, since, after all, they plainly resolve disputes, and the contracts that create them are forms of competition rather than dispute resolution? The legal space occupied by arbitration is spanned, as it were, by contract and adjudication. And if one begins from the thought that contract is not a principled mechanism for resolving disputes but rather merely a form of competition, then the fact that arbitration is established by contract clearly cannot, by assimilating the arbitral process to the contracting process, render arbitration *of* contract. In order to function as a legitimate mechanism for dispute resolution, arbitration must perform the same function that adjudication would perform in its absence. Hence the displacement thesis.

I am dubious of both positions. The displacement thesis, which frames the current debate about arbitration, seems to commit a category error. Arbitration is not intelligible only as a stand-in for adjudication. Instead, the truth about arbitration is much more subtle and more variegated. In some cases, arbitration does indeed stand in for court-provided processes of dispute resolution, including adjudication. I shall call such arbitration "third-party arbitration" or "arbitration as judging." But in other cases, arbitration replaces party-provided processes of dispute resolution, which possess their own immanent legitimacy, and in particular supplants the bargaining that precedes contracting. For reasons that will become apparent, I shall call this arbitration "first-party arbitration" or "arbitration as gap-filling." These two types are fundamentally different in both their immanent structures and the grounds and limits of their proper use. Each must be analyzed separately in order properly to be understood.

Nevertheless, both enthusiasts and detractors of arbitration—perhaps because they remain in the grip of the two common thoughts just described—at least elide and perhaps even conflate these two fundamentally distinct arbitral practices in their arguments. This general, conceptual confusion, in turn, generates more specific, practical confusions concerning the proper attitude that courts and indeed our legal system more generally should take towards arbitration agreements.

When arbitration enthusiasts, including the federal courts, at least in their more recent decisions, consider the scope of arbitral authority,[6] they approach arbitration on the third-party model as an instance

6. *See, e.g.*, 14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456, 1469, 1471 (2009).

> We recognize that . . . the *Gardner-Denver* line of cases included broad dicta that was highly critical of the use of arbitration for the vindication of statutory antidiscrimination rights. That skepticism, however, rested on a misconceived view of arbitration that this Court has since abandoned. . . . These misconceptions have been corrected. For

of judging. This enables arbitration enthusiasts to exploit the analogy to adjudication in order to construct an expansive account of arbitral authority—so that an arbitrator's authority might extend well beyond the range of freedom of contract, for example, to deciding statutory claims and even (when courts affirm the arbitrability of arbitrability) to determining its own scope. But enthusiasts treat arbitration on the first-party model when they ask on what procedural safeguards the authority of arbitration depends. This enables them to exploit background ideals concerning freedom of contract in order to construct a relaxed account of the procedural standards that govern arbitration, even though such relaxed procedures could not possibly sustain arbitration's authority on the third-party model. In this Article, I argue that arbitration's most enthusiastic defenders, including the Supreme Court, are thus trying to have it both ways: they model arbitration on adjudication in order to expand its scope, and they then emphasize arbitration's contractual roots in order to relax the law's scrutiny of the actual arbitral process.

Arbitration's critics, I claim, engage in a parallel but opposite conflation. Thus, they exploit the analogy to contract, treating arbitration on the first-party model, when they consider the scope of arbitral authority. This enables them to restrict an arbitrator's authority according to the narrow limits of contractual authority, so that, for example, it cannot extend to claims involving statutory rights in which the state has an interest that stands apart from the parties. But they treat arbitration on the third-party model, as an instance of judging, when they ask what procedural safeguards arbitration must adopt in order to sustain its authority even within the relatively narrow scope in which it is permitted to act. This enables them to insist that arbitration must mimic adjudication's intensive truth-and-justice-tracking procedures, even when it involves only contractual claims. Arbitration's critics are therefore also trying to have it both ways: they model arbitration on contract in order to restrict its scope, and they then emphasize arbitra-

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example, the Court has recognized that arbitral tribunals are readily capable of handling the factual and legal complexities of antitrust claims, notwithstanding the absence of judicial instruction and supervision and that there is no reason to assume at the outset that arbitrators will not follow the law. We decline to indulge the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious, and impartial arbitrators. . . . Moreover, the recognition that arbitration procedures are more streamlined than federal litigation is not a basis for finding the forum somehow inadequate; the relative informality of arbitration is one of the chief reasons that parties select arbitration. . . . At bottom, objections centered on the nature of arbitration do not offer a credible basis for discrediting the choice of that forum to resolve statutory antidiscrimination claims.

Id. (internal quotation marks omitted) (internal citations omitted).

tion's roots in adjudication in order to increase the law's scrutiny of the arbitral process even within this scope.

Each side of the debate about arbitration thus engages in a kind of arbitrage—an effort to bootstrap one legal order into another. Neither arbitrage can succeed, however, because arbitration is not one thing, but two. A better approach disaggregates arbitration into its third-party, judging type, which can then be assimilated to adjudication, and its first-party, gap-filling type, which can then be assimilated to contract. It will then be possible to elaborate regulatory principles for each type of arbitration with respect to its proper scope and methods by reference to the pure legal type to which it has been assimilated.

To follow this path, one must first identify the distinctive ways in which adjudication and contract resolve social conflict, and specifically the distinctive forms of adjudicatory and contractual solidarity as well as the grounds of the legitimacy of each style of legal ordering. This is necessary in order to render plausible that, against the displacement thesis, arbitration might resolve disputes on *either* the adjudicatory *or* the contractual model. This is not so strange an agenda as it might sound. After all, part of its seeming strangeness is a product of the view, which I have said is mistaken,[7] that adjudication and contract play very different structural roles in our legal order: that the former aims at truth and justice and thus might underwrite the legitimate resolution of dispute, whereas the latter only implements an exogenous balance of advantage, so that the legitimacy of the allocations that contracts produce depends not on contracts but rather entirely on the legitimacy of the balance of advantage from which contractual bargaining begins. In fact, however, adjudication and contract share much more in common than is usually supposed. They both elaborate forms of legal and social solidarity that might each (within its proper sphere) achieve legitimacy on its own bottom. It is therefore natural for a legal order to employ them both, side-by-side, and in particular to allocate certain of its dispute-resolution functions to contract. To see this intuitively, one need only look to settlement, which literally uses contract to close a rift whose repair was initially assigned to adjudication. Nor is this the only case in which adjudication and contract perform similar dispute-resolving functions within our legal order. Indeed, it is one of the core features of our economic order, with its emphasis on freedom of contract, that disputes—for example, those concerning the relative shares of wealth to be received by capital and

7. *See supra* pp. 433–44.

labor—that might otherwise be resolved through adjudication (most likely carried out within an administrative agency) are instead legitimately resolved by contract.

Seeing things this way recasts the question whether arbitration agreements are salutary or damaging to our legal order. Arbitration's enthusiasts are wrong to arbitrage the intuitive appeal of arbitration as gap-filling into a justification of arbitration as adjudication, and arbitration's critics are wrong to arbitrage intuitive skepticism of arbitration as adjudication into a criticism of arbitration as gap-filling. Rather, each of the two styles of arbitration must be assessed on its own terms by reference to the form of solidarity to which it properly belongs. Arbitration as judging must be treated as a form of adjudication whose legitimacy depends on the procedural intensity that adjudication proper involves, but which enjoys a scope commensurate to the legitimating power that such procedural intensity confers. Here, it is particularly striking that when the arbitration process has an appropriate form, arbitral authority does not depend on any ordinary political connection between the disputants and the arbitral institution before which they bring their dispute. Arbitration as gap-filling must be treated as a form of contract, which constructs legitimacy out of the comparatively casual materials associated with bargain and exchange, but whose scope is commensurately narrower than the scope of arbitration as judging. Here, it is particularly important that many arbitration agreements appear in contracts of adhesion, something that is no accident but rather reflects the fact that arbitration just *is* a variety of adhesive contracting, whose legitimacy is identical to the legitimacy of contracts of adhesion quite generally. This is a case in which painting with a finer brush reveals both virtues and flaws that less discerning accounts of arbitration, whether friendly or hostile, all similarly disguise.

I shall try in these pages to sketch the legal worldview behind these claims, in the service of defending them or at least rendering them plausible. The argument will move quickly and at a high level of conceptual abstraction. This is consistent with my aim of changing how people think about arbitration in general, rather than approving or condemning particular arbitral arrangements or legal doctrines. This Article should be read as a theoretical exercise whose secondary aim is to demonstrate the relevance of theory to doctrine, rather than as a directly doctrinal engagement with the positive law.

Finally, I will at many points depend on assertion as much as on argument in developing my view. My aim is not to defend the approach that I am recommending against every possible counterargu-

ment, but rather to show that my argument generates valuable insights that alternative accounts of arbitration obscure, and the approach that I propose should therefore be taken seriously.

II. THE CHALLENGE OF SOCIAL SOLIDARITY

I have claimed that adjudication and contract should both be understood as solidaristic practices, which aspire legitimately to resolve disputes among those who engage them, and that arbitration should be understood as sometimes associated with one form of solidarity and sometimes with the other. To better understand this account of arbitration, and in particular to appreciate the motivation behind it, one must briefly consider the general problem of sustaining social solidarity. Understanding the challenge of solidarity will help to understand the several solutions through which our legal system aspires to address this challenge and the way in which arbitration agreements allow the law flexibly to deploy them.

To understand the problem of social conflict, one must begin from human reason's natural inclination towards what may be called "self-sufficiency." This is the idea that a rational person will always do what, *in her own judgment*, she has most reason to do—as Hobbes put it, the natural "Liberty each man hath, to use his own power, as he will himselfe . . . and consequently of doing any thing, which in his own Judgement, and Reason, hee shall conceive to be the aptest means thereunto."[8] This feature of rationality generates what might be called the Hobbesian problem, namely, that endemic and mutually destructive conflict is a natural and perhaps inexorable expression of practical reason applied to the conditions in which persons live together. Persons' interests conflict, to be sure, at least under the conditions of moderate scarcity that everywhere exist. Moreover, and perhaps more surprisingly, conflict arises equally naturally among persons who accept moral obligations, including even the obligation impartially to promote one another's interests—among persons who accept obligations of justice, as it were. The moralist looks insistently to persons' true interests and to the true demands of impartiality, as she sees them, and gives no *independent* weight to other persons' mistaken beliefs about their interests or about impartiality.[9] And accord-

8. THOMAS HOBBES, LEVIATHAN 189 (C.B. Machperson ed., Penguin Books 1968) (1651).

9. Of course, some moral theories—most notably those that value individual freedom and responsibility—hold that persons' interests are sometimes best promoted by allowing them to make their own mistakes and that, in light of this, the demands of impartial concern must be adjusted to include a healthy dose of anti-interventionism, including in particular antipaternalism. But even these theories will look exclusively to their own sense of the balance between

ingly, insofar as persons hold competing views about what morality requires—a state of affairs that, as Rawls has observed, is an inevitable outgrowth of the application of free human reason to the human condition[10]—morality also exerts a steady pressure towards conflict.[11]

This tendency towards conflict is mutually destructive and extremely difficult to contain. Because neither interests nor moral ideals can ever be completely satisfied, the inclination towards conflict associated with both self-interest and impartiality is insatiable. Moreover, persons' insatiable appetites are paired with a rough equality of powers, so that that there is no natural hegemon or inevitable division between the rulers and the ruled. Accordingly, even when persons beat a retreat from the mutual costs of their quarrels and coordination becomes locally possible, the coordination will be what Rawls has called a "mere *modus vivendi*,"[12] subjected to constant reevaluation by all sides who continue to pursue exclusively their own judgments and who continue to aspire to hegemony. Turning Clausewitz's famous phrase on its head, one may say that such coordination is not true solidarity but rather a mere continuation of conflict, by other means.

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freedom and other values in setting the limits of their anti-interventionism. And the theories will therefore necessarily reject the accommodations that democracy, adjudication, and contract make to the independent points of view of those who participate in them. Indeed, this has already been vividly illustrated, at least for the case of democracy, through the earlier observation that the scope of democracy's authority far exceeds what liberal political principles—which reflect the high-water-mark of respect for individual autonomy and choice—could possibly accommodate.

10. JOHN RAWLS, POLITICAL LIBERALISM 36 (1993). This is what John Rawls famously called "the fact of reasonable pluralism." *Id.* at xvii. By this, Rawls means that moral disagreements—about the character of the good and the proper balance among persons' competing claims to the good—are both deep and enduring. These disagreements cannot be papered over by appeals to broader or more significant areas of agreement, and they cannot be eliminated outright by arguments that induce one side to appreciate its errors and revise its views. Instead, reasonable moral disagreement is an inevitable and fundamental feature of practical life. *Id.* at xvi.

11. This thought belongs to the banalities of modern political philosophy. For a similar observation, see, for example, Thomas Nagel, *Moral Conflict and Political Legitimacy*, 16 PHIL. & PUB. AFF. 215 (1987). Other disciplines have also noticed that impartiality, and hence morality, drive rather than resolve social conflict. A particularly vivid example in the sociological tradition is Georg Simmel's observation that in moral conflict

> the parties' consciousness of being mere representatives of supra-individual claims, of fighting not for themselves gut only for a cause, can give the conflict a radicalism and mercilessness which find there analogy in the general behavior of certain very selfless and very idealistically inclined persons. Because they have no consideration for themselves, they have none for others either; they are convinced that they are entitled to make anybody a victim of the idea for which they sacrifice themselves.

GEORG SIMMEL, *Conflict, in* CONFLICT AND THE WEB OF GROUP AFFILIATIONS 39 (Kurt Wolff trans., The Free Press 1955) (1908).

12. RAWLS, *supra* note 10, at 147.

Every legal order must find a way to contain these natural human hostilities in order to survive, but different orders have adopted very different approaches to containment. Indeed, the history of political thought contains almost the full logical range of responses to the Hobbesian problem.

Hobbes himself occupies one extreme of this range. He concluded that the minimal solution to his problem is the maximal solution:[13] that only the *absolute* state—in which the ruler's power to compel his subjects' obedience is free from every external constraint—can sustain stable coordination at all. Hobbes famously believed that every alternative to the absolute state will inevitably decay into a "warre, as is of every man against every man,"[14] in which life, as he said, is "solitary, poore, nasty, brutish, and short."[15] He supported absolutism not out of any select sympathy for the sovereign but rather out of a vivid sense of the destructiveness of conflict and the fragility of peace.[16]

The liberal—that is, open and cosmopolitan—legal order under which we live, by contrast, is based on a deep skepticism of every effort to enforce solidarity. It thus represents the opposite extreme from Hobbesian absolutism, proceeding from the hope that if conflict—both interest conflict and moral conflict—is embraced by a legal order, then it might be domesticated, and solidarity might survive it. A capitalist economy encourages citizens aggressively to pursue their monetary interests and indeed to do so in overt competition with one another; an adversary system of adjudication encourages citizens aggressively to pursue their legal interests, again in overt competition;[17]

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13. I owe this form of words to Bernard Williams.

14. HOBBES, *supra* note 8, at 185.

15. *Id.* at 186.

16. These sentiments were likely personal for Hobbes, who had recently lived through England's destructive civil war. This comes through most clearly near the end of *Leviathan*, where Hobbes, writing about the brother of the man to whom he dedicated this book, says,

> I have known cleernesse of Judgment, and largenesse of Fancy; strength of Reason, and gracefull Elocution; a Courage for the Warre, and a Fear for the Laws, and all eminently in one man; and that was my most noble and honoured friend Mr. Sidney Godolphin; who hating no man, nor hated of any, was unfortunately slain in the beginning of the late Civill warre, in the Publique quarrel, by an undiscerned, and an undiscerning hand.

Id. at 718.

17. As I have argued extensively elsewhere, the class of adversary legal systems is much broader than the peculiarly American elaboration of adversary lawyering typically recognizes, and it certainly includes legal systems whose adjudicative procedures are commonly called inquisitorial. The hallmark of an adversary legal system is just the structural separation between advocate and tribunal, rather than any more specific set of rules that govern, for example, whether the parties or the court are in control of the evidence presented at trial. For more on this idea, see generally DANIEL MARKOVITS, A MODERN LEGAL ETHICS: ADVERSARY ADVOCACY IN A DEMOCRATIC AGE (2008).

a democratic political system establishes a political competition in which all citizens seek to bend the structures of collective decision to their peculiar interests and ideologies; and a commitment to human rights—specifically in virtue of the foundational place that toleration (and thus freedom of conscience and freedom of expression) occupies among these rights—gives these three forms of competition a maximal domain. Even this brief and highly schematic characterization makes clear that contemporary liberalism makes an immense departure from previous legal orders. Given the immediately compelling character of the Hobbesian problem, this departure is not just substantial but audacious. Nevertheless, it seems to be succeeding: at least under the conditions of modernity, liberal legalism is proving to be tolerably stable, and it may even be the most stable form of social solidarity yet devised.

It is therefore natural to ask how a legal order that embraces conflict might nevertheless contain conflict more successfully than alternatives that seek directly to suppress it. The dominant traditions within liberalism propose answers that proceed in the mode of *judgment.* That is, they argue that in spite of the self-sufficiency of human reason and the associated human tendency towards conflict, a principled agreement sufficient for political solidarity *can* be achieved. Philosophers in this tradition propose, for example, to identify an abstract value or class of values that is capacious enough so that all citizens, whatever more particular ideals they pursue in mutual conflict, might collectively accept and indeed embrace it as a foundation for their solidarity.[18] Alternatively, they seek to identify principles of self-restraint that can engender universal agreement in the special circumstances of politics.[19]

Neither approach can succeed. Although I do not of course argue the point here, persons will characteristically revert to deep yet reasonable disagreement concerning value at every level of abstraction and in connection with every human endeavor, liberal political philosophy of course included.[20] And when they do, the self-sufficiency of their reason will cause their disagreements once again to generate conflict. Traditional forms of liberalism, whatever their intramural disputes, all try to insulate the basis of political solidarity from the

18. Well-being plays this role in the broadly utilitarian version of liberalism, freedom plays it in liberalism's libertarian variety, and fairness plays it in egalitarian liberalism.

19. This approach has been most prominently pursued, in recent years, by John Rawls and Thomas Nagel. *See* RAWLS, *supra* note 10; John Rawls, *Justice As Fairness: Political Not Metaphysical*, 14 PHIL. & PUB. AFF. 223 (1985); Nagel, *supra* note 11.

20. *Cf.* JEREMY WALDRON, LAW AND DISAGREEMENT (1999).

Hobbesian problem. But Hobbes's logic of conflict inexorably reasserts itself.

A successful account of liberal solidarity must therefore adopt a very different approach. These brief recapitulations of canonical accounts illuminate (by way of providing a contrast) the alternative approach to liberal solidarity that I prefer and that organizes adjudication and contract in a manner that I eventually deploy in order better to understand the nature of arbitration. The difficulties encountered by traditional liberal approaches to solidarity illustrate, first, that solidarity cannot be sustained without achieving a shared perspective on the social order, and second, that such a shared perspective cannot be achieved on the model of discovery, that is, by independently persuading persons who come to it separately. These two failures, moreover, together point in a new and more promising direction: they suggest that liberal solidarity might be sustained by achieving a shared perspective (correcting the second failure) that is not *found* so much as *created* by the persons who share it, and thus arises on the model not of discovery but rather invention (thereby correcting the first failure). Liberal solidarity, it turns out, does not arise out of citizens' beliefs but rather out of their intentions; it is a matter not of theoretical but of practical reason. Liberal solidarity is an expression of *will*.

This account of liberal solidarity sets out from the familiar and intuitive thought that in spite of the deliberative self-sufficiency of human reason, persons nevertheless need others in order to flourish. Moreover, persons naturally value the company of others not just instrumentally—as when two people must combine forces to remove an obstacle that blocks both their paths, and which is too heavy for either to lift alone—but also intrinsically. This is important because solidarity that is based on an instrumental interest in coordination will never be more than a mere *modus vivendi*, which cannot, as I have said,[21] be sustained stably over time against the inexorable encroachments of self-sufficient reason. Persons are naturally sociable, and their sociability may be leveraged to overcome, or at least to contain, the conflictual impulses that threaten solidarity. The liberal approach to solidarity is best understood as a systematic effort to leverage human sociability by configuring society's basic legal, economic, and political practices into pro-social forms, which draw citizens into solidaristic engagements across sectarian difference and, in this way, sustain a sta-

21. *See supra* note 12 and accompanying text.

ble social order against the centrifugal forces that inevitably threaten all societies.

The power of human sociability is familiar from ordinary experience, and in particular, from the experience of what might be called (abusing ordinary language only a little) the *charisma* of persons, which is just the colloquial name for persons' moral capacity to draw others into their points of view by sheer force of personality. Charisma is possessed exclusively by persons and, moreover, is possessed by all persons and for all persons, although the extent and effectiveness of charisma will of course vary across pairs of persons. One might say (with another nod to colloquial usage) that although some persons have better personalities than others, nobody has literally no personality.

When charisma is effective, a person acknowledges the charismatic other simply in virtue of her constituting a point of view, and this emphasizes the categorical nature of the value of sociability understood in this way. A person who responds makes the charismatic's personality itself into his object, rather than conditioning his response on contingent facts about her, including whether she affirms ends that he deems appealing, from his own point of view. This feature of charisma—its power to cause people to break out of their own ideas and preconceptions—explains why it is such a potent persuasive tool. This entails that the good of society depends, in each instance in which it arises among any particular persons, on the fact that the persons act from motives and with intentions that could apply among all persons.

Moreover, the good of society can be achieved only insofar as a person recognizes that not just the interests but also the personalities of others—in the form of the intentions that other persons possess, from their free-standing points of view—command *deference* in her own intentions and conduct. She must, in other words, treat the intentions of the other participants as in some measure *authoritative* over her, in the sense (following Joseph Raz), that these intentions give her "a reason [for performing an action] which is not to be added to all other relevant reasons when assessing what to do, but should exclude and take the place of some of them."[22] These excluded reasons include, in particular, reasons that she identifies by applying her own sense of the interests and moral values at stake in the engagement in question. Indeed, the participants in social relations characteristically display the deference that these relations involve for its own sake, and

22. JOSEPH RAZ, THE MORALITY OF FREEDOM 46 (1986).

not just as a means of achieving some end that may be characterized without reference to social relations.[23]

The society of others therefore requires a willingness to engage others not just in the service of one's own judgments but at least partly on *their* terms. Human sociability cannot be realized in a purely self-sufficient mode. Instead of being justified because it increases an agent's conformity with other reasons that apply *independently* of any operation of authority, the authority associated with social relations is justified on grounds of its own *intrinsic* value, which is connected to the intrinsic value of social relations. Only in this case will it happen that her ends and their ends do not just coincide but are instead *shared*, and moreover, shared subject to a regime of public reasons that constitutes a genuine social relation. To realize the good of society, a person must not only act solicitously towards others while all the while remaining fully within herself but must rather fall genuinely under the sway of their charisma. Even if persons who accept the authority of their partners in joint activities do less well at conforming to the reasons that in their judgments independently apply to them, they better serve their own sociability. This phenomenon is readily illustrated by examples drawn from everyday life. Even if a singer who acknowledges the authority of her singing partner sings less well than she would have done by attending exclusively to her own judgment of how best to sing, she creates a social relation that could not have arisen but for this loss, and whose value can justify the loss.

Society therefore draws persons out of the self-sufficiency of their reason. Society cannot be encompassed from purely within an agent's own point of view, no matter how expansive. Instead, society is a genuinely *relational* good, which may be achieved only by genuine intersubjectivity—that is, by establishing public reasons that constitute reciprocal engagements among agents who each take the others' points of view as, within limits, authoritative over themselves. A social relation literally cannot be captured from the point of view of one of the participants, but instead must be lived in an ongoing adjustment to the

23. The authority that is involved in social relations thus departs dramatically from the instrumentally justified examples of authority that Raz emphasizes when he proposes that the normal justification for an authority is that the person subject to it "is likely better to comply with the reasons which apply to him (other than the alleged authoritative directives) if he accepts the directives of the alleged authority as authoritatively binding and tries to follow them, rather than by trying to follow the reasons which apply to him directly." *Id.* at 53. This approach to authority proposes that deference to authority arises only at a shallow level, so that although a person who obeys a legitimate authority initially retreats from her own judgments, she does so in the service not only of reasons that are hers but also of more fundamental *judgments* that she makes *from her own point of view.*

other participant's perspective. So in spite of the force of the Hobbesian view, we cannot, insofar as we are sociable, flourish self-sufficiently, and the need to escape our self-sufficiency arises, in various guises, throughout our practical lives. Indeed, our lives would be quite unrecognizable if we retained our concern for other persons' interests and even a pragmatic need for coordination, but were insensitive to them as personalities and could therefore proceed self-sufficiently, free of every felt need to engage others as free-standing points of view.

Human sociability therefore provides just the right kind of resources for sustaining social solidarity against the Hobbesian conflicts that constantly threaten to unleash themselves. And a social order might remain stable, even in the face of these conflicts, by leveraging sociability through its legal and economic institutions. Liberalism employs precisely this strategy: even as the open and cosmopolitan character of liberal institutions permits and indeed encourages widespread and diverse pursuits, these institutions also draw citizens into a broad and dense web of social relations, and hence encourage citizens to recognize the forms of authority that these relations inherently involve. Four practices—toleration, democracy, adjudication, and contract—are especially important to liberal solidarity in this respect. Arbitration of course represents a convergence of the last two of these practices. To understand arbitration, one must therefore understand adjudicatory and contractual solidarity, that is, how adjudication and contract each establish relations of reciprocal recognition and respect among the persons who engage them. Only then will it be possible to say whether and under what circumstances arbitration supports or undermines these forms of solidarity.

III. Adjudication and Contract As Solidaristic Practices

I began by observing that conventional accounts suppose that adjudication and contract are qualitatively different legal practices, that the former aims at justice whereas the latter merely implements the balance of advantage. I am now in a position to argue that both parts of the conventional view are mistaken. In fact, both adjudication and contract are, at their cores, solidaristic practices. They each engage human sociability in the service of dispute resolution. I have elaborated detailed accounts of the solidaristic character of each practice

elsewhere.[24] Here, I present only a rough and schematic outline of these accounts.

A. Adjudication

Begin by considering the practice by which a society resolves its members' disputes concerning not the general principles that should govern collective life, but rather how general principles whose authority is acknowledged should be applied to particular cases.[25] Whereas these general principles are, at least in liberal societies, left largely to the democratic process, questions of application are characteristically allocated to *adjudication*, which thus serves as the retail analog to the function that democracy performs at wholesale.

Adjudication therefore confronts the Hobbesian problem: disputants are inexorably inclined to insist on their own perspectives (concerning not just interest but also right), and conflicts among disputants' self-sufficient reasonings will reappear at every level of abstraction. At least in hard cases, therefore, adjudication raises at retail *all* the difficulties for political legitimacy that are more commonly associated with wholesale politics under conditions of ideological pluralism. And our adversary practice of adjudication proposes to resolve these problems along the general lines just described, by making retail dispute resolution into a site for human sociability.

More specifically, adversary adjudication resolves legal disputes by staging a contest between partisan disputants who are supported by advocates who promote their clients' causes even when they would oppose them as citizens and reject them as judges or jurors. The core of adversary adjudication is a structural separation between the disputant and the advocate on the one hand, and the tribunal on the other. This structure is enforced by a system of legal rules that allow disputants to press colorable but losing claims and that allow their lawyers to assist in doing so. These rules appear throughout the American legal system.[26] First, they are reflected in the often unnoticed but im-

24. See MARKOVITS, *supra* note 17 (2008) (discussing adjudication); Daniel Markovits, *Contract and Collaboration*, 113 YALE L.J. 1417 (2004) (discussing contract).

25. The treatment of adversary advocacy that follows borrows heavily from DANIEL MARKOVITS, *supra* note 17, at 4–5 (2008), and Daniel Markovits, *Adversary Advocacy and the Authority of Adjudication*, 75 FORDHAM L. REV. 1367 (2006).

26. As I have said previously,

> Moreover, although the specific rules that I mention . . . are distinctively American, the basic idea of adversary adjudication is not, and receives a wide range of developments outside the United States. Indeed, it is important to note that adversary adjudication, as I am construing it here, does not necessarily stand in contrast to systems of dispute resolution commonly called *inquisitorial*. Although a contrast is commonly drawn between adversary and inquisitorial procedure, that contrast principally refers to the legal

portant fact that tort law declines to apply its ordinary regimes of liability, including most notably the law of negligence, to harms caused when one person asserts legal claims, including losing legal claims, against another.[27] Thus, although there do exist torts of malicious prosecution and abuse of process, they are subject to narrow limits and certainly do not apply to impose liability in connection with lawsuits or legal arguments that impose costs on others, even when the lawsuits would have been predicted to fail by reasonable people.[28] And although fee shifting arrangements that require losing parties to pay winning parties' fees and costs sometimes impose partial liability on those who assert losing but nonfrivolous legal positions,[29] liability even in these systems is limited to the direct costs of adjudication. It

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system's allocation of control over evidence (whether evidence is developed by disputants or by tribunals) and not to the division of labor that I am emphasizing between parties and advocates on the one hand and tribunals on the other.

Markovits, *supra* note 25, at 1370 n.16.

27. In this respect, adversary adjudication is like a competitive market, which also makes certain harms—for example the harms suffered by a business that is simply underbid—not cognizable at law. Just as freedom of contract and economic competition encourage economic assertiveness, so too the adversary system encourages legal assertiveness by sanctioning conduct by the client and an agency role for the lawyer that the law would not otherwise allow. The protection from liability that losing clients and their lawyers enjoy supports an unfamiliar but important gloss on the common idea that a person ought not be judge in her own case. This idea is ordinarily understood to mean that judges ought not be permitted to act as partisans. But the argument in the main text reveals that it has a second meaning also, namely that disputants may be partisan and should not be required to bear the responsibility of judging.

28. The traditional common law tort of malicious prosecution applies only to legal proceedings that, in addition to being wrongful have a "quasi-criminal" character, substantially interfere with a person's liberty, damage her reputation, or interfere with property interests (such as in attachment or involuntary bankruptcy proceedings). *See* WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 851–52 (4th ed. 1971). Although a growing majority of jurisdictions, and also the Restatement (Second) of Torts, recognize malicious prosecution without the requirement of special injury, a substantial minority of jurisdictions continue to follow the "English rule," which denies actions for malicious prosecution based on groundless civil suits in the absence of special harms of the type just described. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 674 (1977); PROSSER, *supra*, § 120; Bickel v. Mackie, 447 F. Supp. 1376, 1380 (N.D. Iowa 1978); Garcia v. Wall & Ochs, Inc., 389 A.2d 607, 608, 610 (Pa. 1978). Most American jurisdictions also recognize the tort of abuse of process. *See* RESTATEMENT (SECOND) OF TORTS, *supra*, § 682; PROSSER, *supra*, § 121. Note that no jurisdiction recognizes the tort of malicious defense. *See* Jonathan K. Van Patten & Robert E. Willar, *The Limits of Advocacy: A Proposal for the Tort of Malicious Defense*, 35 HASTINGS L.J. 891, 893 (1984).

29. Fee shifting has been widely adopted in Great Britain and selectively in the United States. For the rule in Britain, see CIV. PROC. R. 44.3(2)(a) (Eng.); Michael Zander, *Will the Revolution in the Funding of Civil Litigation in England Eventually Lead to Contingency Fees?*, 52 DEPAUL L. REV. 259, 292 n.192 (2002) ("The general rule is that the unsuccessful party will be ordered to pay the costs of the successful party.") (quoting CIV. PROC. R. 44.3(2)(a) (Eng.)). For the rule in the United States, see 42 U.S.C. § 1988 (2006), which entitles certain successful civil rights plaintiffs to recover their fees and costs. Additionally, Rules 11 and 37 of the Federal Rules of Civil Procedure require payment of the court costs that are associated with suits that are unreasonable or without substantial justification. *See* FED. R. CIV. P. 11, 37.

does not include the often much larger and potentially enormous indirect costs, such as those involving lost opportunities or lost reputations, that are imposed by the mistaken claims. Moreover lawyers enjoy a further privilege—expressly inscribed in legal doctrine—with respect to certain conduct that would otherwise be tortious when the conduct is engaged in for purposes of litigation: they are in most jurisdictions absolutely immune from tort liability for defamatory statements that they make in court;[30] they may encourage clients to breach a contract without becoming liable for tortious interference with contract,[31] and indeed they generally cannot be held liable as accessories to tortious actions taken by clients on the basis of their good faith legal advice;[32] and they are protected from various forms of statutory liability (for example, liability for trademark infringement and conspiracy) for their clients' acts.[33]

Second, the commitment to adversary adjudication is reflected in rules of procedure that allow litigants to present claims and arguments to courts only as long as their filings are not made for an improper purpose, are nonfrivolous, and the claims have or are likely to have evidentiary support.[34] The precise limits on the adversary assertiveness that these rules allow disputants to display are of course a subject

30. *See* RESTATEMENT (SECOND) OF TORTS § 586 (1977); *see also* 1 GEOFFREY C. HAZARD, JR. & WILLIAM HODES, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT § 1.1:205 (2d ed. Supp. 1998). Note that because the immunity is absolute, it applies even to statements made in bad faith, as long as the statements display the required connection to litigation. For a collection of cases, see 1 RONALD MALLEN & JEFFREY SMITH, LEGAL MALPRACTICE § 6.28, at 871–74 (2009). For a critical discussion, see generally Paul T. Hayden, *Reconsidering the Litigator's Absolute Privilege to Defame*, 54 OHIO ST. L.J. 985 (1993).

31. *See, e.g.*, Salaymeh v. Interqual, Inc., 508 N.E.2d 1155, 1159–60 (Ill. 1987); *see also* MALLEN & SMITH, *supra* note 30, § 6.25, at 856–58 (2009).

32. *See* HAZARD & HODES, *supra* note 30, § 1.1:205. Note that this immunity depends on the lawyer's good faith. Lawyers who proceed in bad faith may be liable as accessories to their clients' torts.

33. For trademark liability, see, for example, Elec. Lab. Supply Co. v. Cullen, 977 F.2d 798 (3d Cir. 1992) (holding that lawyers who filed an application on behalf of a client who sought to seize goods on the basis of trademark violations were not "applicants" under the Lanham Act and thus not liable when the seizure turned out to be unwarranted). For conspiracy liability, see, for example, Azrielli v. Cohen Law Offices, 21 F.3d 512, 521–22 (2d Cir. 1994) (holding that a law firm that advises a business but does not participate in its management does not "conduct or participate" in the enterprise and cannot therefore be liable for racketeering under the federal Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961–68 (2006). *See also* Bailey v. Trenam Simmons, Kemker, Scharf, Barkin, Frye & O'Neill, P.A., 938 F. Supp. 825, 827 (S.D. Fla. 1996).

34. *See* FED. R. CIV. P. 11. See also FED. R. CIV. P. 26(g), which extends Rule 11 concepts to the discovery process. *Cf.* 28 U.S.C. § 1927 (2006) (making lawyers personally liable for costs and attorneys' fees that result when they "multiply the proceedings in any case unreasonably and vexatiously" in federal court).

of substantial dispute. However, it is unquestioned that, like the tort rules mentioned a moment ago, they do not require disputants to pursue their legal claims only insofar as doing so minimizes the total costs (error costs of inaccurate dispute resolution and transactions costs of litigation) that they, their opponents, and third parties will jointly bear.

Third, the legal system's commitments to adversary adjudication include rules of professional conduct that obligate lawyers to assist their clients' adversary assertiveness. Broad and organic principles of lawyer loyalty[35] and client control[36] require lawyers zealously to pursue ends that their clients have wide discretion in setting. And a broad and organic principle of professional detachment,[37] although usually understood as an effort to shield lawyers from legal or even moral responsibility for their clients' concerns,[38] also acts as a sword to forbid lawyers from imposing their personal doubts about the merits of clients' claims on clients who nevertheless wish to pursue them.[39] To be sure, these duties are ringed round by constraints on any number of forms of partisan excess—including, for example, rules that forbid lying to tribunals[40] or assisting fraud,[41] and bringing frivolous or malicious claims.[42] But the constraints that the positive law places on adversary excess are technical and mechanical and therefore *only* constrain, and cannot possibly eliminate, the organic duties towards partisanship that the law articulates. And so the law governing lawyers forms a third pillar of the system of adversary adjudication.

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35. *See* MODEL RULES OF PROF'L CONDUCT R. 1.3 (2009).

36. *See id.* R. 1.2.

37. *See id.* R. 1.2(b).

38. *See id.*

39. The specific connection here to professional detachment is unconventional. For cases that draw the connection and criticize lawyers for seeking to impose their private assessments of clients' causes, see, for example, United States v. Swanson, 943 F.2d 1070 (9th Cir. 1991) (involving a lawyer who "stated that the evidence against [his client] was overwhelming and that he was not going to insult the jurors' intelligence" by asking them to acquit and adding "that if they found [the client] guilty they should not 'ever look back' and agonize regarding whether they had done the right thing"); Singleton v. Foreman, 435 F.2d 962, 970 (5th Cir. 1970) (finding a conflict of interest when a lawyer too abusively imposed his own view of his client's case despite the client's conflicting views); People v. Lang, 520 P.2d 393, 395–96 (Cal. 1974) (involving a lawyer who told an appellate court that although his client claimed that the evidence at trial was insufficient to support a conviction, he did not agree); *In re* Harshey, 740 N.E.2d 851 (Ind. 2001) (involving a lawyer who accepted a settlement despite knowing that his client did not want to accept any settlement); Johns v. Smyth, 176 F. Supp. 949 (D. Va. 1959) (involving a lawyer who refused to ask a jury to acquit his client). The cases do not always mention Model Rule of Professional Conduct 1.2 by name.

40. *See* MODEL RULES OF PROF'L CONDUCT R. 3.3, 3.4 (2009).

41. *See id.* R. 1.2(d).

42. *See id.* R. 3.1.

These features of adversary adjudication are all counterintuitive, indeed mysterious. Certainly they all depart dramatically from the broad legal norms that generally govern the treatment of others. The basic commitments of adversary adjudication therefore stand in need of a justification. Traditionally, the most prominent justification follows the assumptions about adjudication from which I began, namely, that adjudication tracks truth and justice. This account, which is commonly called the adversary system defense,[43] proposes that the procedures by which courts manage adjudication precisely calibrate a competition among disputants (assisted by partisan advocates who are primarily concerned with their clients' interests) who are entitled aggressively to assert their legal claims in whatever manner produces, on balance, the most accurate justice for all.[44]

In spite of having become conventional wisdom, this truth-and-justice-tracking account of adjudication has repeatedly been shown to be not just mistaken but simply implausible.

First, its factual predicates do not generally obtain. Even in an ideal legal system, where the underlying substantive laws are just and access to adjudication (including access to the services of lawyers) is fairly distributed, it remains uncertain how much adversary assertiveness in disputants and their lawyers in fact best serves the law's underlying purposes. Certainly, clients and lawyers whose aggressive manipulations are on the verge of successfully subverting these purposes will better serve accurate justice by stepping back in ways that the legal regimes governing adjudication do not require and in some cases (in particular, when stepping back would betray the partisan obligations of adversary lawyers) do not permit.[45] Moreover, the adversary system defense stands on even shakier ground in non-ideal legal systems—and therefore in every actual legal system—in which substantive laws are not perfectly just and access to adjudication is not perfectly fairly distributed. When adversary lawyers are more available to some persons than to others, for example, it becomes quite incredible that lawyers' adversary loyalty will most accurately serve

43. The adversary system defense is often presented as a narrow argument that defends certain rules of the law of lawyering. But it is in fact a defense of the complex of principles of adversary adjudication that I have just identified.

44. Here note what the adversary system defense is *not*, namely, an argument that certain adversary procedures are *constitutive* of the justice of the outcomes that they produce. The adversary system is not a case of what Rawls called "pure procedural justice." JOHN RAWLS, A THEORY OF JUSTICE 85 (1971). Rather, it is an ordinary procedure that seeks to discern which outcomes are just on independent grounds.

45. This point is powerfully developed in WILLIAM H. SIMON, THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS (1998).

justice for all, even if only on balance.[46] The idea that process serves substantive justice simply cannot account for our continued commitment to process even when it is applied against a background of substantively unjust law.

Second, the adversary system defense's theoretical predicates are also dubious. The aggregative conception of fairness, on which the adversary system defense relies, faces challenges from competitor conceptions. These challenges are associated with rights-based moral theories that apply the demands of fairness separately to every relation between persons. These theories suggest that when a disputant's adversary assertiveness, or her lawyer's preference for him as a client, violates a third-party's rights, this cannot, as the adversary system defense would have it, be simply offset by benefits that arise elsewhere in the adversary administration of justice.[47]

Indeed, the intuitive appeal of truth-and-justice tracking accounts of adjudication reflects a confusion. It is a synecdoche in which a part of the system of adjudication—the decision maker, whether the judge or the jury—is conflated with the system itself—the broader structure within which the decision maker decides. Thus, neither the fact that the *decision maker* directly pursues truth and justice nor that the legitimacy of adjudication requires decision makers to have this aim entails that the *system* either does or must aim at truth and justice, any more than the fact that advocates pursue partisan advantage entails that the system aims at such advantage. The system of adjudication encompasses *all* its parts—including tribunal and advocate—and the structural separation between the two entails that neither the advocate's perspective nor the tribunal's perspective, let alone the decision maker's perspective, is the perspective of the system. This is obviously true with respect to advocates, whom no one would take as standing in for adjudication, *tout court*; it is no less true, only less obvious, with respect to decision makers.

For all these reasons, a system of adjudication that truly promoted truth and justice in dispute resolution would permit far less adversary assertiveness than the current system allows. To be sure, it is always possible to recast arguments that connect adjudication to truth and justice in terms that abandon the effort to describe what is in favor of

46. Even the recitation of the adversary system defense in the Model Rules stipulates that the opposing party be "well represented." MODEL RULES OF PROF'L CONDUCT pmbl. para. 8 (2009).

47. *See generally* ARTHUR APPLBAUM, ETHICS FOR ADVERSARIES: THE MORALITY OF ROLES IN PUBLIC AND PERSONAL LIFE 177 (1999) ("If, however, moral justification is not at bottom about weighing benefits and burdens across persons, but about giving reasons to each person burdened that she, if reasonable, would accept, an appeal to good consequences alone is not likely to succeed."); DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY (1988).

a more critical project, which announces a broad agenda for reform. But the gap between our existing structures of adjudication and the pursuit of truth and justice invites another, much less radical, response. Perhaps our existing structures may be justified, but not in terms of truth and justice.

An alternative account of adjudication understands our current practice as one that pursues not truth and justice but rather legitimacy, which is to say convergence about which resolutions of disputes to obey in the face of entrenched disagreement (in the style of the Hobbesian problem) about which resolutions to adopt. According to this approach, adjudication constitutes an intrinsically valuable form of reciprocal recognition—a way of resolving disputes not just accurately but *together*. This approach thus connects the basic structure of the adjudicatory process, and in particular its invitation to partisan engagement, to adjudication's pro-social character. Adversary adjudication, on this account, is designed to promote affective engagements among disputants about how general laws should be applied in particular cases, and in this way, it is designed to transform disputants' claims and sustain a sense of authorship even of decisions that the disputants initially opposed. The legal regimes that govern adversary adjudication must establish conditions that support the transformative engagements on which the legitimacy of adjudication depends. And a characteristically adversarial approach to adjudication is therefore justified insofar as this approach contributes to converting these disputes into forms of engagement and reciprocal recognition among the disputants. More specifically, adversary adjudication enlists disputants' joint participation in the resolution of their claims, even against their initial intentions in pressing these claims. The adversary process causes each disputant to be responsive to the arguments adduced by the other; it establishes the authority of each over the other and therefore constitutes a social relation between them. The process of adjudication has this effect, moreover, even when it does not (in the case at hand or perhaps even generally) produce justice.

To understand how adversary license contributes to making adjudication into a form of engagement, it is necessary to reconsider the understanding of the legal process associated with traditional truth-and-justice-tracking explanations of adversary adjudication. The traditional, instrumental defense of adversary adjudication treats adjudication as what legal sociologists have called a *transparent* process, in the sense that it has "no effect on the values, goals, and desires of those

who use the system."[48] According to this approach, one can look backwards through a legal process, from its end to its beginning, and see the same claims asserted throughout, in undistorted form. But as legal sociologists have long contended, the transparent view of adjudication is in fact mistaken, a vestige of a formalist jurisprudence that is now discredited. Instead, "[T]he relationship between objectives [in a dispute] and mechanisms [of dispute resolution] is reciprocal; not only do objectives influence the choice of mechanisms, but mechanisms chosen may alter objectives."[49] And this fact about the legal process opens up the way to a reconstruction of adversary adjudication that explains adversary adjudication as a form of legal engagement and reciprocal recognition.

As the sociology of law observes, the legal process and the activities of the lawyers who administer it penetrate the attitudes of disputants at several depths and therefore transform their attitudes in several different ways. Most shallowly, the legal process "translates [disputants' private complaints], and reconstitutes the issues in terms of a legal discourse which has trans-situational applicability."[50] Lawyers, in particular, "objectify their [client's] arguments and . . . set them apart from the particular interests they represent,"[51] so that the client's positions come to be seen as participating in broader principles "in terms of which a binding solution can be found."[52] The lawyers who administer the legal process serve as "culture broker[s]" for their clients,[53] organizing and transforming their clients' claims in terms of this discourse in order to render them more persuasive,[54] and also, and more fundamentally, in order to enable the disputants actually to engage one another's claims so that the claims join issue through a mode of expression that the disputants all share.

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48. David M. Trubek, *The Handmaiden's Revenge: On Reading and Using the Newer Sociology of Civil Procedure*, 51 LAW & CONTEMP. PROBS., Autumn 1988, at 111, 115. "Transparent procedure," as Trubek says, "takes the litigants as they come to the court." *Id.* at 115. Procedure "does not add or subtract anything" to their dispute, so the procedure "should not make a difference in the [right] outcome of a dispute." *Id.* at 114.

49. *See* William L.F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW & SOC'Y REV. 631, 642–43 (1980).

50. Lynn Mather & Barbara Yngvesson, *Language, Audience, and the Transformation of Disputes*, 15 LAW & SOC'Y REV. 775, 791 (1980).

51. RONEN SHAMIR, MANAGING LEGAL UNCERTAINTY: ELITE LAWYERS IN THE NEW DEAL 38 (1995).

52. Maureen Cain, *The General Practice Lawyer and the Client: Towards a Radical Conception*, 7 INT'L J. SOC. L. 331, 343 (1979).

53. Mather & Yngvesson, *supra* note 50, at 792.

54. *See* Stewart Macaulay, *Lawyers and Consumer Protection Laws*, 14 LAW & SOC'Y REV. 115, 125 (1979).

Moreover, at an intermediate depth, lawyers and the legal process offer a forum for "testing the reality of the client's perspective,"[55] piercing unreasonable hopes and inaccurate perceptions,[56] and by contrast, legitimating the other elements of their clients' positions that are not pierced.[57] Once again, this allows disputants to engage one another by removing from each disputant's position beliefs and claims that, because they are unreasonable, obstruct the path of engagements that might otherwise develop.

Finally, at the deepest level, participation in the legal process does not just translate or test disputants' claims but fundamentally reconstitutes them. It does so by transforming brute demands into assertions of right, which depend on reasons and therefore by their nature implicitly recognize the conditions of their own failure (namely, that the reasons do not support the claims in the case at hand) and of the other side's success.[58] Indeed, the legal process can sometimes even induce disputants to recognize a still deeper contingency in their demands, as when they come to see a "problem as an adjustment between competing claims and interests, rather than as one warranting a fight for principle."[59] The legal process, in other words, can cause disputants to see their disputes specifically as sites for engagement.

These transformations, taken collectively, can have real staying power. When it is successful, the legal process, to borrow Lon Fuller's form of words, has the "capacity to reorient the parties toward each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitudes and dispositions toward one another."[60]

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55. Felstiner et al., *supra* note 49, at 646.

56. *See* Jeffrey Fitzgerald & Richard Dickins, *Disputing in Legal and Nonlegal Contexts: Some Questions for Sociologists of Law*, 15 LAW & SOC'Y REV. 681, 698–99 (1980).

57. This effect emphasizes "the impact on the client of the lawyer's *attitude*, his expressed or implied approval of this as so legitimate that a lawyer is willing to help him get it, whereas other elements of the client's goals are disapproved and help in getting them is refused." Talcott Parsons, *The Law and Social Control*, *in* LAW AND SOCIOLOGY: EXPLORATORY ESSAYS 56, 70 (William M. Evan ed., 1962).

58. *See* Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 368 (1978). Fuller imagines a baseball player who transforms his brute claim to play catcher into a claim of right based on his being the best catcher available and therefore implicitly acknowledges that he must abandon his claim in case a more skilled catcher appears. *Id.*

59. Macaulay, *supra* note 54, at 128.

60. Lon L. Fuller, *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305, 325 (1971). Fuller wrote these words as part of a discussion of mediation, which he sought in certain respects to contrast with adjudication. *See id.* at 328. Thus, my appropriation of Fuller's characterization stands in some tension with his official position on adjudication. I quote Fuller nevertheless because I believe that my account is generally in sympathy with Fuller's broader emphasis on the legitimating character of adjudication. *See, e.g.*, Fuller, *supra* note 58.

Indeed, the transformative effect on a dispute of the legal process is potentially so powerful that "the transformed dispute can actually become *the* dispute,"[61] causing the parties to abandon any of their demands that cannot be accommodated within the transformation. When this happens, the engagement that the legal process facilitates comes to supplant the purely private demands that the disputants originally brought to the legal process because each party continues to press her claims not as brute demands but only insofar as they can be reconstructed in a way that can be assessed and answered from the other's point of view. This is therefore consistent with the structures of reciprocal recognition upon which the legal process insists. Moreover, these transformations occur involuntarily in disputants, and adversary adjudication can cause disputants to engage one another even against their initial intentions.

The ambition to engender engagement among disputants explains the adversary nature of adjudication, and in particular the otherwise mysterious partisan license that this process grants disputants.[62] First, it explains the entitlements of litigants to adversary assertiveness, which is an expression of the scope of adversary adjudication's ambition to deploy persons' sociability in the service of reconstituting disputes into more tractable forms. The natural scope of adversary adjudication comprehends all disputes that are amenable to being reconstructed in this way, excluding only those disputes that—because one or both disputants insists on proceeding in the modality of brute demand—cannot possibly be recast as forms of engagement and reciprocal recognition. The tort categories "malicious prosecution" and "abuse of process" and the procedural category "frivolous filings" pick out such disputants and deny them access to adversary adjudication in promoting their claims. These categories are narrowly cabined because to construe them any more broadly than the limits of reciprocal recognition require would be to exclude disputes that are amenable to the methods of engagement and therefore unnecessarily cabin adjudication. Certainly, persons may be open to engagement even as they make claims whose chances of winning cannot, viewed impartially, justify the costs of prosecuting them. Excluding such persons

61. Felstiner et al., *supra* note 49, at 650 (emphasis added).

62. Here it is important to remember that my argument is *not* designed to distinguish between what are commonly called adversary and inquisitorial procedures with respect to their connections to human sociability. Again, I am using the term adversary adjudication to emphasize the structural separation of disputant and advocate on the one hand from tribunal on the other, and not to identify any particular way of managing the production and assessment of evidence. Procedural systems that are commonly called inquisitorial can qualify as adversary in my usage.

from adversary adjudication would squander a portion of the blessings of human sociability.

Moreover, the connection between the adversarial nature of adjudication and its capacity to trigger engagement among disputants carries over into the administration of the legal process. In particular, it is natural to ask how lawyers who serve a mediating function must behave in order successfully to introduce clients to the forms of engagement that adjudication involves. The basic principles of adversary adjudication, and in particular lawyers' partisan professional obligations, may be justified against this backdrop insofar as they contribute to promoting the forms of engagement and reciprocal recognition that characterize adversary adjudication.

This they undoubtedly do. As even the legal profession's harshest critics acknowledge, lawyers serve as experts who shepherd clients through their interactions with the state's authoritative institutions.[63] "[T]he lawyer's job," as Robert Gordon says, "is selling legitimacy,"[64] not at wholesale but at retail, one client at a time. To do so, a lawyer must "mediate between the universal vision of legal order and the concrete desires of his clients."[65] Nor is it surprising that an approach to adjudication that champions its engagement-promoting properties should emphasize the lawyer-client relationship. As Talcott Parsons has observed, this relationship "is focused" on the "smoothing over" of "situations of actual or potential social conflict."[66] Indeed, the engagements among disputants that adjudication sustains are administered directly through the lawyer-client relationship.

Moreover, it is not surprising that the *adversarial* nature of lawyers should figure particularly prominently in this context, as a support for the transformative influence of the legal process. "[T]he lawyer, Gordon observes, "cannot deliver unless she can make plausible arguments rationalizing her client's conduct within the prevailing terms of legal discourse,"[67] and she can do this only insofar as she takes her client's part and endeavors "to understand the day-to-day world of the client's transactions and deals as somehow approximating, in however decayed or imperfect a form, the ideal or fantasy world of the legal order."[68] Although the precise extent of lawyers' adversary obliga-

63. *See* RICHARD L. ABEL, AMERICAN LAWYERS 34–35 (1989).

64. Robert W. Gordon, *"The Ideal and the Actual in the Law": Fantasies and Practices of New York City Lawyers, 1870–1910, in* THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA 51, 53 (Gerald Gawalt ed., 1984).

65. *Id.* at 53–54.

66. Parsons, *supra* note 57, at 63.

67. Gordon, *supra* note 64, at 53–54.

68. *Id.* at 54.

tions remains open and any particular regime of professional responsibility, including of course the current American regime, might tend towards partisan excess, adversary advocacy in its most basic form—including the foundational ideas of lawyer loyalty and client control and the structural separation between advocate and tribunal—is therefore a necessary condition for the engagement-generating power of the legal process, without which adjudication could not reliably penetrate disputants' attitudes in order to transform them as reciprocal recognition requires. Indeed, the connection between adversary lawyering and adjudication's capacity to promote engagements among disputants may be developed in greater detail by revisiting the ways in which adjudication promotes engagement. The adversarial nature of lawyers contributes to each of the three pro-social transformations that the legal process engenders—from the shallowest to the deepest.

First, even the most superficial transformations, associated with the mere translation of claims from the ordinary into the legal language in which issues can be joined and engagements sustained, will be stable only if clients place a high degree of trust in lawyers as translators. Specifically, clients must trust in both lawyers' capacity to *understand* their claims and lawyers' commitments to *fidelity* in translation, even when fidelity requires lawyers to ignore their own assessments of their clients' claims. Only loyal partisan lawyers can earn and sustain such trust because only loyal partisans have the empathy necessary for understanding their clients and the open-mindedness necessary to avoid judging them.

Second, lawyers' ability to dampen disputes by encouraging clients to abandon or modify their most unreasonable positions—the intermediate of the three transformations in client attitudes that sustain engagements among disputants—also depends on their commitment to adversary advocacy. This is, to begin with, a matter of psychology and even of emotion. Disputants' most unreasonable positions often reflect frustration and anger rather than considered judgments, so that they are open to being talked down and may even seek it out; but only a sympathetic and non-judgmental counsel will inspire the trust needed to cool passions in this way. In addition, the adversary lawyer's unique capacity to deflate her clients' most extreme claims has an ethical component that is associated with disputants' natural ethical inclinations in favor of resolving disputes through reasonable reciprocal concessions. Lawyers, who have experience and expertise that clients do not, can help to resolve inexperienced clients' natural uncertainty about which concessions are in fact reasonable. However, lawyers will be trusted to do so only when clients are confident that

their deflationary advice serves the clients' interests alone, rather than the interests of the legal system or the other disputants. This can occur only when lawyers accept a conception of their professional role that emphasizes partisan loyalty. In these ways, adversary advocates support both the psychological and ethical mechanisms through which disputants voluntarily abandon their most aggressive and unreasonable demands—the demands that separate them in ways that even their sociability cannot bridge.

Finally, lawyers' adversary commitments are especially important to the transformation of clients' claims from brute demands into assertions of right whose implicitly defeasible character connects adjudication to reciprocal recognition at the deepest level. Once again, "a high degree of trust and confidence are usually necessary [if lawyers are] to 'sell' [the] new definition of the situation" that the conversion of brute demands into claims of right involves,[69] and lawyers' adversary commitments justify their clients' trust. As before, this demand for partisan loyalty is not just psychological but also ethical. Lawyers who abandon partisan loyalty in favor of personal assessments of their clients' claims quite literally pre-judge these claims. When this happens, the legal process's capacity to sustain reciprocal recognition among disputants is cut off by the lawyers' private judgments. And these judgments, because they are private, arise before the engagement and reciprocal recognition that the legal process sustains has even begun. One might say that lawyers who abandon partisanship to pursue personal assessments of their clients' claims shift the site of dispute resolution from the legal process to their private evaluations, which necessarily, because they are private, cannot sustain engagement or reciprocal recognition among disputants.

Lawyers provide the principal connection between disputants and the legal process, and so the burdens both of inviting disputants to engage the legal process and also of sustaining disputants' participation fall principally on them. In order successfully to shoulder these burdens, lawyers must deny the potentially alienating features of adjudication (in particular, the legal process's divided sympathies) any foothold within the lawyer-client relationship itself; instead, they must structure the lawyer-client relationship so that they may use it to "bring[ ] the client's case in a nonjudgmental way to the authoritative institutions of the society."[70] Only lawyers whose approach to their profession is in some measure adversarial—only lawyers who fall on

69. Fitzgerald & Dickins, *supra* note 56, at 698.

70. Stuart A. Scheingold, *Taking Weber Seriously: Lawyers, Politics, and the Liberal State*, 24 LAW & SOC. INQUIRY 1061, 1063 (1999).

their clients' sides of the structural separation between disputant and tribunal—can achieve this, and the pro-social character of adjudication therefore requires a partisan conception of the lawyer's professional role. And partisan advocacy is therefore revealed to lie at the very center of the law's pro-social ambitions, as a retail analog to the democratic virtues that are so notoriously celebrated throughout the civilized world.

> Viewed in this light, the role of the lawyer as a partisan advocate appears not as a regrettable necessity, but as an indispensable part of a larger ordering of affairs. The institution of advocacy is not a concession to the frailties of human nature, but an expression of human insight in the design of a social framework within which man's capacity for impartial judgment can attain its fullest realization.[71]

The partisan conception of adjudication—the assertiveness that disputants are entitled to display under tort law and the law of procedure and the partisan support that they are untitled to receive under the law of lawyering—cannot be explained as long as adjudication is understood, in instrumental terms, as a technology for accurate dispute resolution. But these legal regimes can be explained if adjudication is understood, in the light of human sociability, as an intrinsically valuable form of engagement and reciprocal recognition. It is, as Karl Llewellyn said, one of the "law-jobs" to manage disputes in "trouble cases"—cases in which general principles do not straightforwardly resolve themselves into consensus outcomes.[72] And adjudication provides the framework within which the law can do its job. Finally, if, as Lon Fuller observed, "the distinguishing feature of adjudication lies in the mode of *participation* which it accords to the party affected by the decision,"[73] then "[w]hatever heightens the significance of this participation lifts adjudication toward its optimum expression."[74]

B. Contract

Next, consider contract, which I argue is also best understood as an expression of human sociability—a practice by which persons recognize one another as persons by constructing a public perspective in

71. Lon L. Fuller & John D. Randall, *Professional Responsibility: Report of the Joint Conference of Professional Responsibility of the American Bar Association and the Association of American Law Schools*, 44 A.B.A. J. 1159, 1161 (1958).

72. K.N. LLEWELLYN & E. ADAMSON HOEBEL, THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE 293–94 (William S. Hein Publishing 2002) (1941).

73. Fuller, *supra* note 58, at 364.

74. *Id.*

which they might share.[75] This account is, once again, unconventional. Contract is ordinarily understood as a mechanism for creating efficient incentives to invest or, alternatively, as a special case of the morality of harm and hence the law of torts, where tort law, in turn, might itself be understood as a mechanism for creating efficient incentives, this time to avoid accidents. But as I have argued extensively elsewhere,[76] the positive law of contract does not actually fit this explanation. In particular, it is committed to a formally forward-looking conception of contractual entitlements (reflected most prominently in the fact that contract remedies are designed to vindicate the expectation interest) and to a no-fault account of contractual wrongs (reflected in the fact that contract liability is strict liability). Both are, respectively, difficult to square with either economic efficiency or the morality of harm. This makes it natural to seek an alternative reconstruction of contract law.

The best such reconstruction, I believe, proceeds in terms of contract's solidaristic properties—the fact that contract may be understood as an expression of human sociability. Certainly promise, which is contract's moral cognate, involves a form of recognition: to make a promise to someone is to respect her as a person—to acknowledge her moral personality—in a particular way. Our ordinary practices of promising make clear that only persons can receive promises,[77] and the mechanics of promising give this intuition a practical expression. Promises must be accepted before promissory obligations arise, and only persons possess the power of acceptance. Indeed, this power is no less a mark of moral personality than the power to promise itself.[78]

75. The account of contract that follows borrows heavily from Daniel Markovits, *Contract and Collaboration*, 113 YALE L.J. 1417, 1450 (2004), and Daniel Markovits, *Promise As an Arm's Length Relation*, *in* UNDERSTANDING PROMISES AND AGREEMENTS: PHILOSOPHICAL ESSAYS (Hanoch Scheinman ed., forthcoming 2010).

76. *See generally* Daniel Markovits, *Making and Keeping Contracts*, 92 VA. L. REV. 1325 (2006).

77. Insofar as organizations (for example, corporations) can make and accept promises, then this is because they are endowed by law with artificial personality.

78. The connection between moral personality and promissory capacity has a long history in philosophy and indeed in law. In philosophy, it is perhaps most directly associated with Hegel, who wrote that "[c]ontract presupposes that the contracting parties *recognize* each other as persons and owners of property." G.W.F. HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT § 71 (Allen Wood ed., H.B. Nisbet trans., Cambridge Univ. Press 1991) (1821) (emphasis added). Other philosophers have taken a similar line. One particularly vivid example is Nietzsche's remark that "[t]o breed an animal *that is permitted to promise*—isn't this precisely the paradoxical task nature has set for itself with regard to man? isn't this the true problem *of* man?" FRIEDRICH NIETZSCHE, ON THE GENEALOGY OF MORALITY: A POLEMIC 35 (Maudemarie Clark & Alan J. Swensen trans., Hackett Publishing Co. 1998) (1887). Another example is Nietzsche's remark that a person who possesses promissory capacity "will hold his kick in readiness for the frail dogs who promise although they are not permitted to do so." *Id.* at 37. The connection between legal

This intuitive account of promissory recognition may be made precise. When a person makes a promise, she forms intentions in favor of certain ends—the ends associated with the promised performance—that are also available to her promisee. Moreover, the promisee, on whose acceptance the creation of the promissory obligation depends, is not merely drafted into the service of the promisor's pursuit of these ends.[79] Instead, he is engaged by the promise and, through his acceptance, takes up the promisor's engagement by also forming intentions in favor of the ends associated with the promised performance—specifically, the intention to vindicate his promissory rights and, correlatively, to not act in ways that would undermine these rights. The ends of a promisor therefore coincide with those of her promisee, at least with respect to the promised performance. Furthermore, the connection between the promisor's and promisee's ends is no mere coincidence, and the overlap in their ends is not just incidental. Instead, the promisor, through her promise, intends to entrench her pursuit of the ends that are announced by the promise and to refuse to defect from these ends unless the promisee releases her. She intends, in effect, to give the promisee authority over her ends—to pursue, within the sphere of the promise, only ends that the promisee also affirms. She intends, one might even say, to become obligated to the promisee to render the promised performance.[80] Finally, insofar as the promisor honors the promise—insofar as she refuses to deviate from the promised performance without obtaining a release from the promise—she carries out the intention not to defect, and she actually confers this

personality and promise was for a long time expressed in legal rules that deprived human beings whose personality the law did not recognize—slaves and women—of contractual capacity. Even today, the law acknowledges this connection when it denies certain classes of human beings contractual capacity. *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 12–16. Notice, moreover, that human beings—for example, minor children—may lack contractual capacity but nevertheless sue and be sued in tort. *See* PROSSER AND KEETON ON TORTS § 134 (Keeton et al. eds., 5th ed. 1984); E. ALLAN FARNSWORTH, CONTRACTS § 4.4 (1982). Thus, having contractual capacity indicates a higher legal status than merely enjoying the right not to be harmed.

79. If there were no acceptance requirement, so that a promisor could draft her promisee into the service of her ends, then promising would not necessarily involve respect or recognition, but could be a form of manipulation. This point has been noted by Charles Fried. *See* CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION 43 (1981).

80. The last two ways of characterizing promissory intentions, which build the idea of obligation, or its cognates, into these intentions, raise the specter that the theory is circular—that the account of recognition out of which the theory derives its defense of promissory obligation builds the very obligation that it is meant to generate into the promissory intentions from which it begins. This is a false worry, however, because the account of recognition can be fully elaborated without any reference specifically to obligation, using simply a promisor's intentions not to defect from her promise unless released by her promisee. Once recognition has been explained in this way, using the language of obligation going forward becomes a harmless concession to expository ease.

authority over her ends to the promisee. A promisor therefore intends, within the sphere of the promise, to defer to her promisee and indeed to subordinate her ends to her promisee's will. Through this subordination—through placing her ends in his hands—the promisor comes to take the promisee's ends as her own and, moreover, to treat him—his will—as an end.[81] In this way, the promise underwrites a form of respectful recognition by the promisor of her promisee.

A promisor who breaks her promise abandons these shared ends in favor of other ends that cannot be shared with the promisee because they are inconsistent with the ends that the promisee has in fact adopted in conjunction with the promise. Promise breaking therefore does more than merely return the promisor and promisee to the *status quo ante*, the time when they were strangers. Strangers do not share ends and do not treat each other as ends in themselves, but they may at any moment come to do so. Promise breaking, by contrast, entails that, at least with respect to the promised performance, the two adopt *inconsistent* ends. Promise breaking does not just unmake but instead actively *betrays* the recognition established by the promise; and the promise breaker pursues ends, through her breach, that do not just depart from but instead *contradict* her promisee's ends. Her breach therefore forecloses possibilities for sharing ends that previously existed and imposes conflict in their place. The breaching promisor denies, at least in respect of the promise, the personality of the promisee, closing herself off to him so that the parties to the promise become incapable of recognizing each other. The parties to a broken promise become actively *estranged* from each other.[82]

One might summarize this by saying that promises render persons practically open to one another. Without promises, their wills would remain separated, just as their minds would remain separated without truth telling. Moreover, when promises are broken, persons' wills become isolated, just as their minds become isolated when they lie, including even when the lie fails. But when a person makes and keeps promises, she may overcome her separation from her promisees and

81. It is worth pointing out, in light of the complication mentioned *supra* note 80, that this account of the promissory relation does not depend upon characterizing the promisor's intentions in terms of obligation or any of its cognates. All the elements of the promissory relation appear even if promising is characterized simply in terms of a promisor's intentions not to defect from the promised performance unless she is released from the promise.

82. Here it is instructive to notice the difference between the moral character of nonperformance that constitutes a breach of promise on the one hand, and nonperformance that is connected to a promisee's waiver of her promissory rights on the other. In this alternative case—in which the promisee releases the promisor from any duties that arose under the promise—the relation that was invited by the promise is not so much betrayed as abandoned, and the status quo ante in which the promisor and promisee were strangers is simply restored.

respectfully recognize them by submitting to their authority, within the scope of the promise, and taking their ends as her own.[83] Promises, Seana Shiffrin recently observed, "involve[ ] the transfer of a party's power to change one's mind to another party, and so a consolidation of the power to determine what the two parties will do," and in this way "enable[ ] a fully first-personal perspective on joint activity."[84] As Hannah Arendt once said, promise making and promise keeping arise "directly out of the will to live together with others in the mode of acting and speaking."[85]

Contract, which is the legal order that has grown up around promise, also follows this solidaristic line. Certainly contract law follows promise insofar as recognizing a creature's legal personality is a transcendental condition of contracting with it: contract requires both offer and *acceptance* before a legal obligation arises, and only persons possess the capacity to accept.[86] Moreover, contract adopts promise's internal structures of authority and shared ends.

This may seem surprising. The parties to contracts, after all, are unlike the parties involved in many personal promises in that the former generally enter into their relations with purely self-interested motivations. Indeed, the parties to contracts generally face strategic circumstances in which these motives lead them to compete, as each tries to get the best deal that she can: buyers press for low prices, for example, and sellers for high ones. Moreover, the law permits the parties to contracts to carry these self-interested motivations with them into the interstices of their contractual relations. But although contracting parties are motivated by opposed interests and retain these interests even within the contractual relationship, they nevertheless pursue their interests, insofar as they pursue them through contract, in a way that involves recognizing each other's personalities as authoritative in just the manner that I have described.

Contracts are characteristically established by an exchange of promises in which each party intends to join in the performance of the exchange; each party intends her participation in the performance to support the other's. And because even the simplest contract cannot

83. Promising, by uniting the wills of the parties in pursuit of shared ends, may even be said to serve as a private analog to the public practice of lawmaking—as a private act of collective self-governance. The analysis that I am conducting of the respectful private community of promising may be said, therefore, to parallel the republican analysis of the respectful community of citizenship.

84. Seana Shiffrin, *Promising, Intimate Relationships, and Conventionalism*, 117 PHIL. REV. 481, 516 (2008).

85. HANNAH ARENDT, THE HUMAN CONDITION 245–46 (1958).

86. *See* RESTATEMENT (SECOND) OF CONTRACTS § 22 (1981).

be administered as pre-packaged coordination but instead requires constant adjustment in the face of unanticipated contingencies, the parties adjust their performance to be mutually responsive. Borrowing Michael Bratman's formulation, to which this account of the morphology of contract obviously owes a substantial debt, one can say that contracts involve a pattern of intentions among contracting parties in which their intentions are self-consciously *interlocking*: "each agent must have intentions in favor of the efficacy of the intentions of the other. In this way, each agent must treat the relevant intentions of the other as *end-providing* for herself; for each intends that the relevant intentions of the other be successfully executed."[87] Finally, and crucially, contract, just like promise, adds to this interlocking pattern of intentions the additional feature that each party adopts an intention not to defect from the performance that the contract describes—not to abandon the promised performance unless released. In this way, the parties to contracts form intentions not just in favor of the activity that constitutes contractual performance but also in favor of each other. These are the promissory intentions not to defect—not to abandon the promised performance unless released. Rather than intending just that the intentions of her promisee succeed, a contractual promisor intends, in effect, to give the promisee authority—not just moral but also legal authority—to require the promisor to promote the success of the promisee's intentions. The promisor intends, within the sphere of the contract, to subordinate her will to her promisee's, and she comes, in this way, to treat her promisee, and not just the joint activity of the contract, as an end in himself. When she does so, she recognizes the personality of her contract partner, taking his intentions (within the sphere of the contract) as authoritative.

Contract establishes a form of social solidarity not just *in spite of* but *because of* the self-interested motives that contracting parties bring to their engagements. Contract is not a degenerate or even only marginal form of promise. Instead, it represents the highest form of promise: the form that most completely realizes the recognition in which the morality of promise is grounded. This is so for three reasons.

First, the self-interestedness of the parties to contract—their arm's length interaction—makes it natural for each contractual party to recognize the pure and free-standing personality of the other: the parties to contracts recognize one another exclusively in virtue of their wills, the fact that they each constitute an independent perspective and are

87. MICHAEL BRATMAN, FACES OF INTENTION 102 (1999).

capable of forming and acting on intentions. The self-interest that motivates contractual parties prevents one party's sympathetic concern for the other from interfering with the authority that her promissory engagements accord to his intentions. Thus paternalism, which presents a constant threat to promissory recognition among intimates, is quite alien to contract. That is what freedom of contract means.[88] Freedom of contract thus accords promisees authority that is based simply on their possessing personality and is in particular not cabined by their promisors' perceptions of their interests or indeed of any peculiar features of their personalities.

Second, contract, unlike promise simpliciter, requires not just offer and acceptance but bargained-for exchange, that is, contracts add reciprocity to promise *simpliciter*. Anglo-American contract law achieves this result through the consideration doctrine.[89] This introduces an egalitarian element into contract, which is absent from promise. The egalitarianism is not substantive, of course, and a contract might allocate virtually all of the contractual surplus to one party or the other and still be supported by adequate consideration.[90] But the formal equality of the contract relation survives such substantive inequality. The consideration doctrine requires each party to the contract to obligate itself to the other, so contracts necessarily involve authority on both sides. Moreover, by requiring not just an exchange of promises but also an exchange in which each promise induced the other, the consideration doctrine selects for promises in which reciprocal authority is not just *granted* but also, because it was sought on each side, actually *exercised*. Through this formal reciprocity requirement, contract secures a crucial condition for recognizing the personality of

88. The law does, of course, include doctrines that review, and sometimes even override, contracting parties' apparent intentions. Many of these rules—for example, rules concerning duress, fraud, misrepresentation, and even unconscionability (especially insofar as unconscionability is understood, as it increasingly is, to require procedural defects in contract formation)—are designed to ensure that contracting parties' intentions are free rather than the product of manipulation. Other rules—for example those concerning illegality—are designed to prevent persons from using contract as a tool for harming others in ways that the law deems impermissible. Neither set of rules seeks to override a party's intentions in the service of the parties' own interests, and so neither is paternalistic. Indeed, insofar as contract law does embrace paternalism—for example, in the rule that contracts for the provision of personal services will not be specifically enforced—it does so in the service not of promoting contracting parties' interests but rather of safeguarding their freedom over time. Even here, therefore, contract law supports the patterns of respectful recognition that I am describing.

89. *See* RESTATEMENT (SECOND) OF CONTRACTS § 71 (1981).

90. *Id.* cmt. c. The prototypical such case involves contracts of sale in perfectly competitive markets, in which the equilibrium price is competed down until all of the surplus goes to the buyers.

others that may be absent from one-sided promises.[91] In order for recognition to be a good, it must be not only an appreciation of the personality of the other, but also an expression of the personality of the agent herself. This is immanent in the very idea of recognition—of seeing oneself in the other—an attitude that involves not just an appreciation for the other but an assertion of self for the other to reflect. Formally one-sided promises, for this reason, fail to achieve the good of recognition. Indeed, they may affirmatively undermine recognition and therefore suppress the appreciation of humanity, as when they are predicated on the thought that while the promisor might obligate herself to the promisee, she lacks the capacity to *receive* promises from him because she is incapable of the authority over him that receiving such promises would require. This occurs, for example, in the promise of unconditional obedience made by the slave to his master in Hegel's dialectic.[92] Promises such as these involve not recognition, and its combination of appreciation for the personality of the other and assertion of the personality of the self, but rather self-denial—the promisor does not express her personality, so much as she retreats from it or even represses it. They therefore cannot establish truly solidaristic relations. By insisting, through the consideration doctrine, on promissory reciprocity and the formal equality of status that such reciprocity engenders, contract denies the law's imprimatur to arrangements that constitute promises only in this degenerate sense.

And third, contract adds to the purely internal and abstract recognition associated with personal promises the fact that contractual recognition is rendered external and concrete in positive law. Insofar as the parties to promises, and especially to reciprocal promises, come to share ends and to recognize each other as authoritative with respect to the promised performance, their promise establishes a set of common reasons—a kind of public reason—between them. But for promises that have moral force only, this public reason remains intangible or purely abstract. It has no independent constituency, no concrete expression in the world, but rather depends for its practical efficacy on the continued engagement of the parties and, critically, on their continued agreement concerning what conforming to the public reasons

91. This feature of recognition is rendered vivid in Kant's Formula of Humanity, for example, which takes a broad view of the injunction always to treat humanity as an end in itself. This requirement applies, as Kant takes pains to point out, to every expression of humanity, "whether in *your own person* or in the person of any other." IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS 96 (H.J. Paton trans., Harper Torchbooks 1964) (1785) (emphasis added).

92. GEORG WILHELM FRIEDRICH HEGEL, PHENOMENOLOGY OF SPIRIT 111–19 (A.V. Miller trans., Oxford Univ. Press 1977) (1807).

established by the promise requires. The parties must agree not only *that* they are bound by the promises, but also to *what* the promises bind them. The legal recognition associated with contract changes this, and it gives the public reason associated with contractual promises a concrete, tangible existence, a positive law. In particular, the law establishes an agent—the court—who reasons not from the point of view of the promisor or of the promisee, but rather from the point of view of the contract, which the court embodies.[93] And the parties to contracts agree to give the court the authority not just to declare what their contractual obligations are but also to enforce them. In both of these respects, contract perfects the recognition associated with promise: it protects the publicity of promissory recognition against the inevitable encroachment of the parties' peculiar and contradictory views concerning what authority they have given each other, and it relatedly supports promissory recognition by creating third-party enforcement, which proceeds from this public point of view. Contract law does for private promises what the social contract—constitutional law—does for public principles of justice.[94]

This solidaristic account of contract amounts, in effect, to a contemporary, philosophical renovation of an older, sociological idea: the *doux commerce* thesis. That thesis praised the socially integrative power of market relations, which is the tendency, as Thomas Paine wrote in *The Rights of Man*, for commerce to "cordialise mankind, by rendering Nations, as well as individuals, useful to each other."[95] Market relations, according to this idea, induce those who participate in them to become prudent, reliable, and honorable, and indeed to attend and adapt to one another's interests and beliefs in much the same manner associated with overcoming egocentrism. As Georg Simmel memorably wrote,

> [Economic] [c]ompetition compels the wooer . . . to go out to the wooed, come close to him, establish ties with him, find his strengths and weaknesses and adjust to them . . . . Innumerable times [competition] achieves what usually only love can do: the divination of

93. Shiffrin is right that promise involves "a consolidation of the power to determine what the two parties will do" and therefore "enables a fully first-personal perspective on joint activity." Shiffrin, *supra* note 84, at 516 (2008). But whereas in promise this perspective exists at the pleasure of the parties, as merely a creature of their intentions, in contract it exists even apart from them.

94. This thought about the importance of positive law for recognition borrows from Jeremy Waldron. *See* Jeremy Waldron, *Kant's Legal Positivism*, 109 HARV. L. REV. 1535, 1539–40 (1996).

95. THOMAS PAINE, THE RIGHTS OF MAN 215 (E.P. Dutton 1951) (1792).

> the innermost wishes of the other, even before he becomes aware of them.[96]

Moreover, as the law of comparative advantage makes plain, markets give self-interested persons reasons to confer such attentions on all others, including across the boundaries marked by traditional animosities of caste, creed, or class. And once they have done so, markets tend to undermine these animosities. As Durkheim observed, markets draw persons into "unintended ties."[97] "We cooperate because we wish to, but our voluntary cooperation creates duties for us that we did not desire."[98] Accordingly, simply "[b]ecause we fill some certain domestic and social function, we are involved in a complex of obligations from which we have no right to free ourselves."[99] Markets, in short, give each person an incentive to develop empathy for, at least potentially all others. This web of reciprocal self-serving other-regard, proponents of the *doux commerce* thesis have proposed, sustains social solidarity against the forces of conflict.

There is much in this traditional account of the *doux-commerce* thesis, to be sure. But it fairly obviously leaves much to be said. The instrumental flavor of the argument neither meets the social need for integration that markets must serve nor exhausts the normative resources that markets present for addressing this need. To begin with, even accepting that the participants in market relations have many incentives to cooperate, they also (and obviously) have many incentives to defect. Cheating, of various sorts, can be privately profitable in markets, especially when cheaters can cultivate false reputations as cooperators, which, although perhaps imperfectly, they are surely able to do. Moreover, insofar as markets operate against a backdrop of unjustly unequal initial endowments, cheating may seem, at least until more is said, justified to those who come to the market with less than their fair shares. Considerations such as these led Durkheim, for example, to see the social integration produced by market relations as relatively shallow and impotent. Thus, even as he recognized the ways in which markets integrate, Durkheim ultimately concluded that

> if interest relates men, it is never for more than some few moments. It can create only an external link between them. . . . Consciences are only superficially in contact; they [do not] penetrate each other

96. SIMMEL, *supra* note 11, at 61–63.

97. I borrow this phrase from Albert Hirschman's gloss on Durkheim. *See* Albert O. Hirschman, *Rival Interpretations of Market Society: Civilizing, Destructive, or Feeble?*, 20 J. ECON. LITERATURE 1463, 1471 (1982).

98. EMILE DURKHEIM, THE DIVISION OF LABOR IN SOCIETY 214 (George Simpson trans., The Free Press 1964) (1893).

99. *Id.* at 227.

> . . . . [T]his total harmony of interests conceals a latent or deferred conflict. . . . There is nothing less constant than interest.[100]

These doubts about market-based social solidarity arise because the conventional statement of the *doux commerce* thesis neglects that *contract* is the peculiar medium through which markets operate and through which they support social integration.[101] Contracts, although they may be made for instrumental reasons, establish legal and moral obligations among those who make them that are not purely instrumental. As I have argued, the basic structure of contractual *obligation* (a structure that it shares with promissory obligation more generally) requires promisors to respect their promisees' persons quite generally, and not just their usefulness. Moreover, the structure requires promisors to acknowledge that they may not disappoint their promisees simply because it suits them, or indeed because doing so would be best overall.[102] Contrary to Durkheim's belief, the consciences of contracting parties precisely do "penetrate one another," including in ways that can overcome any "latent or delayed conflict[s]" that remain.

The intrinsic normativity of contract in this way supports the integrative powers of markets in a way that simple self-interest cannot. Indeed, the structure of contractual obligation establishes markets as free-standing sources of social integration in just the same way that the *doux commerce* thesis requires. Contracts purport to bind the contracting parties to honor their terms—to vindicate each other's contractual expectations—independent of any full inquiry into the moral and political legitimacy of their making. Contracts purport to obligate even parties who contract against a background of unjust entitlements. Indeed, contracts purport to obligate even when they allow one side to leverage undeserved bargaining advantages in a way

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100. *Id.* at 203–04.

101. A second integrative feature of markets is their support for money as an all-purpose medium of exchange. Money serves as a means of commensuration among persons whose interests and values would otherwise be incommensurable. *See, e.g.*, GEORG SIMMEL, THE PHILOSOPHY OF MONEY 128 (David Frisby ed., Tom Bottomore & David Frisby trans., Routledge 2d ed. 1990) ("Money is that divisible object of exchange, the unit of which is commensurable with the value of every indivisible object; thus it facilitates, or even presupposes, the detachment of the abstract value from its particular concrete content.").

102. This process is familiar from everyday experience; it is reflected, for example, in the well-known fact that protections against employment discrimination (a practice at odds with the impersonal logic of market-based recognition) form a leading edge of popular support for gay rights quite generally. *See* Lydia Saad, *Tolerance for Gay Rights at a High-Water Mark*, GALLUP NEWS SERVICE, May 29, 2007, http://www.gallup.com/poll/27694/Tolerance-Gay-Rights-High-Water-Mark.aspx (noting that 89% of Americans believe that homosexuals should have "equal rights in terms of job opportunities" while 47% believe that "homosexual relations are morally acceptable" and 46% believe that same-sex marriages should be "legally valid").

that increases injustice. Not everything goes, of course, and doctrines concerning fraud, duress, and even unconscionability limit the injustice that contracts may create. But our contractual practice—through its clear commitment to a background norm of freedom of contract—insists that contractual obligation does not depend on setting the world right before contracts are made or improving the world through contracting, but can instead arise as equally in non-ideal as in ideal contracting. Contract, it seems, possesses the power to launder injustice, creating legitimate entitlements between parties where previously there were none and, moreover, inducing the parties to recognize these entitlements.[103] Accordingly, one important reason why markets support social integration is that contract—the substrate through which markets arise—is itself an integrative practice.

C. *Arbitration Between Adjudication and Contract*

Adjudication and contract each establish patterns of reciprocal recognition that express human sociability, and they thus constitute solidaristic practices. But there is a difference between the paths to recognition that the two practices set out and hence the mechanisms by which the two practices generate solidarity. Adjudicative solidarity employs an intensive, transformative process in order to draw disputants into reciprocal recognition and into the shared perspective that such recognition establishes, even when the disputants do not intend to engage one another in this way, and indeed to induce them to recognize each other against their initial intentions. Contractual solidarity, by contrast, must itself be directly intended by those who participate in the contract, even if they are motivated not by solidarity but rather by self-interest.

These accounts of adjudication and contract cast doubt over the two common assumptions concerning arbitration from which I began. The second assumption is simply mistaken: adjudication and contract are *not* generically different. Both legal orders belong to the genus of solidaristic social and legal practices through which open, complex societies sustain stable integration in the face of the myriad competing aims that they invite citizens to pursue. Adjudication and contract differ only in a narrower respect, that is, in the manner in which they engen-

103. Freedom of contract is an essential ingredient in contract's capacity to launder injustice. The current uproar over the bonuses paid to American International Group, Inc. (AIG) executives, pursuant to ordinarily binding contracts, reflects the fact that once AIG became in effect publicly owned, it lost the freedom of contract that private firms ordinarily enjoy, so that its contracts became subject to scrutiny based on political ideals, for example of fundamental fairness.

der respectful recognition and social solidarity. And once this is understood, the first assumption becomes unmotivated. Insofar as contract and adjudication share solidaristic properties that render them close cousins, there is no need to see arbitration as displacing adjudication or to see arbitral tribunals as doing the work of courts. Arbitral tribunals may do so, but they need not, because arbitration may resolve disputes through an application of contractual rather than adjudicatory solidarity.

The central task for a theory of arbitration is therefore to elaborate the forms of solidarity that arbitration establishes. It is possible that arbitration constitutes its own, free-standing solidaristic enterprise, whose characteristic features may be elaborated in much the same way in which I have described the characteristic features of adjudicatory and contractual solidarity. But it seems injudicious to embrace the theoretical agenda of producing such an elaboration too readily. Arbitration obviously does arise in the nexus between adjudication and contract. Accordingly, a shrewd theorist should begin by considering whether arbitral solidarity might be understood by reference to these two more familiar forms. This requires asking whether particular instances of arbitration might be assimilated to one or the other pure type, so that arbitration is theorized as not one but *two* things. If enough of actual arbitral practice can be accommodated by such a bifurcated, reductive account, then there will be no need for any more fundamental theoretical innovation. Once one sees that arbitration is not one thing but two, each style of arbitration may be less distinctive than initial appearances of the undifferentiated phenomenon suggest. At any rate, this is what I shall now argue.

I begin by considering instances of arbitration that serve as full functional equivalents of adjudication proper—instances of what I earlier called third-party arbitration or arbitration as judging. Arbitration that carries on in this style employs procedures that are equivalently intensive to those associated with adjudication, and it does so in the services of applying substantive law that, like the law applied in adjudication, is a creature of the tribunal rather than of the parties. Accordingly, the processes of third-party arbitration possess, at least in principle, all of the transformative powers associated with the adjudicatory process: they employ the several mechanisms described earlier to induce disputants to recast their claims in terms that allow the arbitral tribunal successfully to resolve them. In this way, third party arbitration sustains solidarity in the face of conflict by creating a public perspective that exists independent of the disputants and then, in just the same manner as adjudication, by drawing the disputants into

that perspective, apart from, and perhaps even against, their initial intentions.

Nothing in the theory of adjudication that I have developed rules out the possibility that third-party arbitration might possess such solidaristic powers, as these powers are not limited by the theory to the institutional forms that we call courts. That is, nothing in the account of adjudicative solidarity that I sketched out earlier invokes the thought that adjudication occurs in tribunals that are creatures of the wholesale political structures—as the federal courts, for example, are creatures of the political branches of the federal government—that otherwise govern the parties to a dispute. Moreover, especially in a common law system, history in this respect accords with theory. Thus, the judiciary's historical origins are at least partly independent of the executive and the legislature. This is reflected in the fact that even today it is familiar to hear courts, harkening back to these theoretical ideas and historical roots, refer to their "inherent authority."[104] Indeed, insofar as the best account of the authority of adjudication reflects and even valorizes this independence from the other branches of government, one might even say that courts are best understood as a special kind of arbitral tribunal.

One need not reach this extreme position, however, to defend the idea that, in principle, a non-court arbitral tribunal that manages to establish transformative procedures like those employed by courts might thereby establish solidarity on the model of adjudication. Certainly it is the case in many instances of arbitration that the disputants' connections to the arbitral tribunals are no less morally respectable than the connections that ordinary disputants have to the courts before which they appear: the combination of consent to arbitration and truly voluntary membership in a commercial community whose norms affirm the authority of arbitration that binds sophisticated firms to the arbitrators before whom they appear is at least as morally solid as the notoriously unsettled political obligations that connect parties to courts based on the happenstance that they, often involuntarily and by accident of birth, happen to find themselves within the courts' geographical jurisdictions.

104. *See, e.g.*, United States v. Nelson, 277 F.3d 164, 208 (2d Cir. 2002) (claiming an "inherent supervisory authority" over the jury selection practices of a federal district court judge); State v. Quitman County, 807 So. 2d 401, 409–10 (Miss. 2001) (claiming an inherent authority to require the appointment of counsel for indigent defendants). State courts sometimes rely on their inherent authority to demand increased funding from state and local governments. *See* ROBERT W. TOBIN, CREATING THE JUDICIAL BRANCH: THE UNFINISHED REFORM 16–17 (2004).

Nor is the possibility that third-party arbitration might achieve solidarity in just the fashion of adjudication merely a theorist's fancy. Forum selection clauses in effect transform one jurisdiction's courts into adjudication unbacked by the ordinary mechanisms of wholesale political authority—that is, into third-party arbitral tribunals—for the parties who invoke them.[105] Perhaps the best contemporary example of such court-based third-party arbitration is the willingness of the courts of the United Kingdom to accept jurisdiction over contract disputes based solely on a forum selection clause, including even where neither the disputants nor the contract being adjudicated bears any other connection to the United Kingdom.[106]

Moreover, tribunals that are purely arbitral—those that never convene as ordinary courts but rather always operate entirely outside of the ordinary structures of government, while owing their authority only to their own procedures—might also achieve solidarity on the adjudicatory model. Indeed, as the Supreme Court has recognized, an agreement to arbitrate, on this model, "is in effect, a specialized kind of forum selection clause that posits not only the situs of the suit but also the procedure to be used in resolving the dispute."[107] Something like this probably occurs in international arbitration that is convened under the model adopted by the International Chamber of Com-

105. American law has increasingly favored forum selection clauses. The National Conference of Commissioners on Uniform State Laws has approved a Model Act that gives some recognition to such clauses. *See* Willis L.M. Reese, *The Model Choice of Forum Act*, 17 AM. J. COMP. L. 292, 292 (1969). The American Law Institute has approved enforcing forum selection clauses as long as they are not "unfair or unreasonable." *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 80 (1969). And the U.S. Supreme Court has held that forum selection clauses may be enforceable in connection with cases that reach federal courts under their admiralty jurisdiction. *See* Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972). The Court has, over time and in conjunction with the lower federal courts, greatly expanded the class of cases in which forum selection clauses will be enforced. *See* Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 601 (1991) (Stevens, J., dissenting). Much of the law concerning the enforcement of forum selection clauses, including the law governing such clauses when they arise in federal courts under diversity jurisdiction, is of course state law. The doctrine here is mixed. *See* Carrington & Haagen, *supra* note 1, at 358–59.

106. *See, e.g.*, CIV. PROC. R. 1998, S.I. 1998/3231, Practice Direction 6B, r.6 (U.K.) (permitting English courts to assume jurisdiction over a contract dispute, even though the contracting parties do not trade or reside within the courts' ordinary jurisdiction and even though the contract was not made within the jurisdiction, as long as the contract "contains a term to the effect that the court shall have jurisdiction to determine any claim in respect of the contract"). Similarly, the 1968 Brussels Convention of the European Economic Community and the subsequent Commission Regulation No. 44/2001 provide that when one or more parties to a contract are domiciled in a state that belongs to the convention, then the parties may agree that the courts of *any* signatory state shall have exclusive jurisdiction to settle any dispute that might arise under the contract. *See, e.g.*, JOHN O'HARE & KEVIN BROWN, CIVIL LITIGATION 166, 169 (13th ed.).

107. Scherk v. Alberto-Culver Co., 417 U.S. 506, 519 (1974).

merce.[108] This form of third-party arbitration follows adjudication-like procedures involving the presentation of evidence, advocacy on both sides, a reasoned decision by a neutral arbitrator, and perhaps even the supervision of individual arbitrators' conduct and decisions by a higher body.[109] Insofar as it follows these procedures, such arbitration achieves a court-like legitimacy, entirely independent of the political structures in which ordinary courts are embedded.[110] Indeed, it may even happen that third-party arbitration, precisely because it arises independent of the ordinary political process, can achieve adjudicatory solidarity more successfully than courts. An example is religious arbitration, which occurs when members of a religious subculture seek to resolve disputes in tribunals that are more sympathetic to their basic world views than the courts of the dominant culture are prepared to be.[111] It may be that the subculture suspects the substantive aims of the dominant courts, or it may be that certain features of the process followed in those courts are alienating to members of the subculture. In some societies and for some bodies of law—for example for family law in Israel—such third-party arbitration has become the standard, and sometimes even the exclusive, form of dispute resolution.[112] In all these cases, the success of third-party arbitral solidarity

108. *See* INT'L CHAMBER OF COMMERCE, RULES OF ARBITRATION (1998), *available at* http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/rules_arb_english.pdf. It is sometimes suggested, with some support in the case law, that the U.S. Supreme Court is sensitive to the value of third-party commercial arbitration's employing processes that resemble adjudication and hence, I would add, are adequate to the problem of adjudicatory solidarity. *See, e.g.*, Carrington & Haagen, *supra* note 1, at 332 (commenting on Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528 (1995), and Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985)). Some domestic arbitral organizations are also internalizing due process norms. Thus, the Consumer Due Process Protocol, for example, calls for a "fundamentally fair" arbitral process, meaning a process that requires notice, opportunities to be heard, and an independent decision maker. *See* American Arbitration Association, National Consumer Disputes Advisory Committee, Consumer Due Process Protocol, http://www.adr.org/si.asap?id=1588.

109. Appellate review remains admittedly rare in even the most highly formalized arbitral proceedings.

110. This list does not include the publication of decisions in a forum accessible by third parties. This practice, which is prominent in adjudication, may be essential to integrating a practice of retail dispute resolution into the other forms of open government, including most notably legislation. Insofar as it is essential, that is a strike against arbitration's overall appeal. For an argument that develops related ideas, see Judith Resnik, *Courts: In and Out of Sight, Site, and Cite*, 53 VILLANOVA L. REV. 771 (2008). But the lack of publication of arbitral decisions does not undercut arbitration's authority with respect to the disputants whose conflicts it decides.

111. *See generally* Michael A. Helfand, Submitting Disputes for Religious Adjudication: The Enforceability of Religious Arbitral Awards (May 31, 2007) (unpublished manuscript), *available at* http://ssrn.com/so13/papers.cfm?abstract_id=990029.

112. *See, e.g.*, Marc Galanter & Jayanth Krishnan, *Personal Law and Human Rights in India and Israel*, 34 ISR. L. REV. 101, 127 (2000); Gabriela Shalley, *Israel*, *in* THE ELGAR ENCYCLOPEDIA OF COMPARATIVE LAW 348, 350 (Jan M. Smits ed., 2006).

may be identified by the fact that parties subject to such arbitration, even if they initially fought removal from the ordinary courts, accept the authority of the arbitral decisions.

The theory of adjudicatory solidarity sketched earlier makes clear that there is nothing dubious or even surprising in this result. Third-party arbitration just *is* adjudication, at least form the perspective of that theory. And it is therefore competent, from the perspective of its solidaristic powers, to reach all the questions that ordinary adjudication reaches, including, for example, to decide the scope of its own authority. If there is an objection to third-party arbitration, it must sound not in concerns about its procedural legitimacy but rather in concerns about substantive justice. The objection must argue, in other words, that the solidarity achieved by such instances of third-party arbitration involves false-consciousness or some analogous defect in the beliefs and sentiments of those who treat the arbitration as authoritative. That is a perfectly plausible style of argument; it proposes, for example, that the secular legal order should be skeptical of the attitudes of women who accept the decisions of religious family courts, or that a state's legal order should be skeptical when its citizens come to accept the decisions of arbitral tribunals (including of courts sitting as third-party arbitrators) outside their jurisdiction. Perhaps such skepticism can give a state sufficient ground to refuse to enforce the judgments of arbitral tribunals. But an argument of this sort has two features that may not be ignored: first, its invocation of ideology involves a paternalistic insult to the persons whose beliefs and sentiments it disrespects as ideological; and second, it may be applied equally, indeed, formally equivalently, to the core cases of perfectly ordinary court-based adjudication, because adjudication's solidaristic powers are no less divorced from justice than are third-party arbitration's solidaristic powers.

This is all just to say that third-party arbitration raises no special concerns about legitimacy (although it does of course raise all of the normal concerns). Third-party arbitration functions, in all relevant respects, just like adjudication proper.

Things are very different for the case of what I earlier called first-party arbitration, which establishes solidarity on the model not of adjudication but of contract. Because contract is a solidaristic practice in its own right, it should come as no surprise that arbitration might resolve disputes on the contractual model. At the same time, the proper function and scope of first-party arbitration must be understood with respect to the forms and limits of contractual solidarity.

To see how first-party arbitration might sustain solidarity in the manner of contract, notice that an agreement to submit to first-party arbitration is not in principle any different from a contract that leaves certain terms open but includes an account of the mechanism by which these gaps will be filled. Common mechanisms of this sort include formulas, references to market conditions, and commitments to bargain in good faith. First-party arbitration may be understood as simply another such mechanism, which is why I have also called it "arbitration as gap-filling." As this account makes plain, first-party arbitration does not so much contractualize procedure as replace procedure with contract *tout court*. First-party arbitration—the gap-filling conception reveals—is not a *process* for deciding the content of independent legal entitlements at all, but rather a part of the *substance* of the contracts that create it, a means of fixing the content of contractual rights.

This theory of first-party arbitration builds on familiar materials. It is a commonplace, at least since the Supreme Court decided the *Steelworkers' Trilogy*, that labor arbitrators possess gap-filling authority.[113] In fact, in these cases, the Court recognized that arbitration conceived of on this model involves gap-filling. As the Court observed in *Enterprise Wheel & Car Corp.*, "The question of the interpretation of [a] collective bargaining agreement is a question for the arbitrator: It is the arbitrator's construction which was bargained for."[114] Indeed, the Court, in adopting this approach, recharacterized labor arbitration along lines similar to those that I have been suggesting. As it said in *Warrior & Gulf Navigation Co.*, while "in the commercial case, arbitration is the substitute for litigation," in the context of labor relations, "arbitration is the substitute for industrial strife."[115] "Industrial strife," of course, is just another name for bargaining; the Court admitted this when, in the same paragraph, it accepted that "arbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself."[116] Here the Court expressly followed academic commentary, quoting at length from Archibald Cox's *Reflections upon Labor Arbitration*.[117] Following a discussion of Cox's work, the Court noted that although a resort to arbitration in commercial contexts, like a resort to adjudication, re-

113. *See* United Steelworkers of Am. v. Am. Mfg. Co., 363 U.S. 564 (1960); United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers of Am. v. Enter. Wheel & Car Corp., 363 U.S. 593 (1960).

114. *Enterprise Wheel & Car Corp.*, 363 U.S. at 599.

115. *Warrior & Gulf Navigation Co.*, 363 U.S. at 578.

116. *Id.*

117. Archibald Cox, *Reflections upon Labor Arbitration*, 72 HARV. L. REV. 1482 (1958).

flects "a breakdown in the working relationship of the parties," labor arbitration, by contrast, "is at the very heart of industrial self-government."[118] On this view, the Court observed, arbitration is "a part of the continuous collective bargaining process. It, rather than a strike, is the terminal point of disagreement."[119]

The insight that arbitration might be assimilated to contract has not, however, been properly generalized or indeed well-understood, even by its proponents. Thus, the *Steelworkers' Trilogy* Court embedded its analysis of arbitration as gap-filling in a model that departed from, and indeed expressly rejected, the contractual frame. First, the Court grounded its argument on the functionalist claim that arbitration can be "a stabilizing influence" on labor relations only if courts keep out of its way.[120] This led the Court to draw a sharp distinction between labor arbitration and the general "commercial" case, so that the "run of arbitration cases . . ." became "irrelevant" to the problem before it, and presumably *vice versa*.[121] Second, the Court's focus on the special character of labor relations caused it to reject the general conceptual point about arbitration and contract that its language otherwise invites. Thus, the Court said that a collective bargaining agreement "is more than a contract" and that "[i]t calls into being a new common law."[122] In both respects, the Court's model falls short of a general theory of arbitration as gap-filling.[123]

According to the general theory, the fact that a first-party arbitration takes a form that could not possibly achieve solidarity on the model of adjudication provides no ground whatsoever for skepticism about the legitimacy of the arbitration's conclusion. And therefore, first-party arbitral tribunals have no need to employ the procedures associated with adjudication: they need not hear and weigh evidence in a regular fashion, apply substantive rules of decision that are inde-

118. *Warrior & Gulf Navigation Co.*, 363 U.S. at 581.

119. Other commentators saw the same point. *See, e.g.*, Theodore J. St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel and Its Progeny*, 75 MICH. L. REV. 1137, 1140 (1977).

120. United Steelworkers of Am. v. Am. Mfg. Co., 363 U.S. 564, 567 (1960).

121. *Warrior & Gulf Navigation Co.*, at 578.

122. *Id.* at 578–79.

123. Something nearer to this general theory of arbitration as gap-filling appears in Paul F. Kirgis, *The Contractarian Model of Arbitration and Its Implications for Judicial Review of Arbitral Awards*, 85 OR. L. REV. 1 (2006). Kirgis also distinguishes between two accounts of arbitration, which he calls the adjudicatory and contractarian models. *Id.* at 27. He elaborates the contractarian model in terms much like mine and observes that "[u]nder this model, the arbitrator's award is understood to be equivalent to a contract term agreed upon by the parties ex ante." *Id.* at 38. Kirgis does not, however, see the systematic structural implications of this approach to arbitration because he comes to it without the theoretical framework concerning adjudication, contract, and social solidarity that I develop here.

pendent of the issue at hand and the positions of the disputants, or even employ a neutral arbiter. Again, first-party arbitration is simply not a case of procedural justice in the manner associated with adjudication.

This account of the structural role of first-party arbitration is obscured by the conventional conception that underlies the assumptions that I identified at the start of this Article, which mistakenly conceives of arbitration as necessarily a mechanism for adjudicating rights that are established elsewhere (either in the contract or perhaps by statute) rather than as itself constitutive of contractual rights. However, the proper model for first-party arbitral processes is not adjudication at all but rather *bargaining*. That is, first-party arbitration is authoritative as long as it reflects the bargain-based solidarity that has been established by the contracts to which it belongs.

The proper standard for assessing first-party arbitration is therefore not due process or some analog (the standard for evaluating third-party arbitration) but rather the procedural standards that govern contracts, namely, fraud, duress, and procedural unconscionability in contract negotiations and good faith in contract performance. These are not toothless requirements. An agreement to first-party arbitration may, after all, be procured by coercion or deception, and it may, under a slightly less demanding standard, be unconscionable. Alternatively, first-party arbitration may be structurally designed by one party to deprive the other of the very benefits that the contract establishing the tribunal was designed to secure. This may occur, for example, because the arbitrator is simply in the pocket of the designing party. In such cases, the agreement to arbitrate is not freely procured, or it renders the contract to which it belongs illusory, in the sense that it fails effectively to secure any gains for one side and fails effectively to bind the other. These possibilities, and perhaps others, provide the doctrinal (and indeed moral) materials that are needed to attack particular instances of first-party arbitration. But they neither underwrite blanket skepticism about contracts to arbitrate nor make arbitration in itself distinctively problematic. They therefore fundamentally recast the debate about arbitration.

This account of first-party arbitration also helps to illuminate the otherwise mysterious and indeed misleading fact that so many clauses that establish arbitration on the first-party model appear in contracts of adhesion. It is common to hear critics of arbitration lament this fact, which they treat as an additional ground for skepticism concern-

ing arbitration, including arbitration on the first-party model.[124] It is, these critics say, not just that arbitration is suspect in light of the gap between arbitral processes and adjudication proper; instead, arbitration is also suspect because agreements to arbitrate are not even proper agreements.[125]

This lament, however, reflects a conceptual confusion, which the model developed here lays bare. The adhesive character of the contracts in which agreements to first-party arbitration appear should not add to the general skepticism concerning arbitration as an *additional* ground for doubting the validity of these agreements. Rather, first-party, gap-filling arbitration just *is* a case of an adhesive contract term. A contract of adhesion fills in the gaps in the dickered terms with boilerplate that one or both parties (both, when the form is drafted by a third party) neither read nor understand. An agreement concerning first-party arbitration fills in the gaps in the dickered terms of the contract in which the agreement appears with the arbitrator's decisions, which, being rendered in the future, neither party knows. The outcome of the arbitration is therefore, from the perspective of the parties, just like another printed clause, save that it is post-printed rather than pre-printed. It is therefore natural rather than surprising or sinister that arbitration agreements appear in printed form contracts: the very same grounds that render the printed form appealing to the parties also render the first-party arbitration appealing. And there is thus no additional or recursive problem in the fact that agreements to arbitrate are themselves often adhesive. Finally, there are good grounds to believe that arguments concerning how the law should manage contracts of adhesion will generally cast a useful light on the question how the law should intervene to regulate first-party arbitration, which might now be treated as just a special case. I shall not elaborate here, but I have elsewhere argued that the proper approach to contracts of adhesion is to enforce good-faith bargaining should disputes about non-dickered terms arise *ex post*.[126] This approach obviously resonates with the suggestion that I just made concerning good faith in first-party arbitrators.

Finally, the gap-filling account of first-party arbitration also helps to explain the otherwise peculiar fact that when a party attempts to avoid

124. *See, e.g.*, Carrington & Haagen, *supra* note 1, at 334–35.

125. *See, e.g.*, Mark E. Budnitz, *Arbitration of Disputes Between Consumers and Financial Institutions: A Serious Threat to Consumer Protection*, 10 OHIO ST. J. ON DISP. RESOL. 267 (1995).

126. *See* Daniel Markovits, Contracts of Adhesion and Displaced Bargaining (Jan. 2010) (unpublished manuscript on file with author).

an agreement to arbitrate in order to press her claims in a court, courts typically decline even to hear the claims and instead insist that the party takes them to arbitration. Critics of arbitration have suggested that this approach to arbitration agreements amounts to ordering their specific performance, which mysteriously and unjustifiably departs from the law's general rule of vindicating contractual rights through the expectation remedy.[127] Indeed, traditional opposition in courts to compelling arbitration proceeded precisely on the ground that principles of federal equity precluded an arbitration agreement from being specifically enforced.[128] These critics of arbitration treat the arbitral agreement as addressing the question, "To what process are the parties entitled in pursuing disputes concerning their contractual rights?" When courts refuse to hear claims consigned to arbitration, critics say, they are concluding both that the answer to this question is "arbitration" and that the court should specifically enforce this answer.

The gap-filling account reveals that this criticism reflects a doctrinal confusion. In gap-filling cases, the agreement to arbitrate is not, in fact, an agreement concerning process at all. It is, rather, an agreement concerning substance—the arbitrator fills in a substantive gap in the contract. Therefore, when courts refuse to hear a claim consigned to arbitration, they are not specifically enforcing the arbitral agreement any more than they would be issuing specific performance were they directly to apply a price-formula in a contract rather than deciding the price themselves.

Of course, if a first-party arbitrator reaches a decision about how a contractual gap should be filled, and a contracting party refuses to proffer the performance that this gap-filling describes, then the question of specific performance does squarely arise. The standard law of contract remedies should apply in such a case: the court should, as a general matter, give the disappointed party a money award sufficient to vindicate the value that she accords to the gap-filling that the arbitrator has produced. Insofar as most arbitral awards contemplate money payments, there will often be no practical difference between the expectation remedy and specific performance.

The theory that first-party arbitration is just gap-filling renders it unproblematic. Indeed, the theory renders arbitration less problematic than settlement, which unlike arbitration actually does replace adjudication as a method of evaluating independent substantive legal

127. *See, e.g.*, Taylor & Cliffe, *supra* note 1, at 1132–34.

128. *See, e.g.*, U.S. Asphalt Refining Co. v. Trinidad Lake Petro. Co., 222 F. 1006, 1011 (S.D.N.Y. 1915).

claims. But the gap-filling account of first-party arbitration also immediately entails that there are natural limits to first-party arbitration's legitimacy. If arbitration achieves solidarity on the model of contract, then it must limit its scope to the sorts of disputes that contractual solidarity might successfully resolve. In particular, first-party arbitration, unlike third-party arbitration, cannot lay claim to *any* of the forms of authority associated with adjudication.

Proponents of arbitration, including in the federal courts, have not always seen this clearly. Rather, in order to generate the conclusion that arbitration should be regarded as broadly authoritative quite apart from its procedural properties, they have sought to arbitrage both the narrow but easy authority that first-party arbitration enjoys entirely apart from the procedures that it employs and also the broad authority that third-party arbitration might enjoy if it employs adjudication-like procedures.

This effort at arbitrage sometimes appears even on the face of arguments in favor of arbitration, and specifically in their immanent narrative structure. This is illustrated in the Supreme Court's opinion in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*,[129] which held that antitrust claims arising under the Sherman Act[130] are arbitrable, and indeed generally rejected a presumption against the arbitrability of statutory claims.[131] That opinion, which cites the *Steelworkers' Trilogy* and hence begins in the context of first-party arbitration, observes that in resolving questions of arbitrability, "as with any other contract, the parties' intentions control."[132] The opinion—seamlessly, without comment, and indeed in the very next sentence—applies the same observation to the arbitrability of statutory claims: "There is no reason," the Court says, "to depart from these guidelines when a party bound by an arbitration agreement raises claims founded on statutory rights."[133] But in explaining itself further, the Court, without recognizing what it has done, gives just such a reason. As the opinion goes on to say,

> By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. It trades the

129. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985).

130. 15 U.S.C. §§ 1–7 (2000).

131. *Mitsubishi Motors Corp.*, 473 U.S. at 625.

132. *Id.* at 626. The opinion adds that, in light of the Federal Arbitration Act, "those intentions are generously construed as to issues of arbitrability." *Id.*

133. *Id.*

> procedures and opportunities for review of the courtroom for the simplicity, informality, and expedition of arbitration.[134]

This, of course, is decidedly *not* the first-party model of arbitration that drove the result in the *Steelworkers' Trilogy* or that makes arbitration's authority easily established. It is the third-party model, and it immediately raises the question how intensive an arbitral procedure must be in order legitimately to reject a statutory claim raised by a party who did *not* intend to waive it. The Court never seriously addresses this question, let alone answers it.

The mistake of *Mitsubishi Motors* has, moreover, become a commonplace of the Supreme Court's approach to arbitration. *114 Penn Plaza, LLC v. Pyett*,[135] decided last term, illustrates how deeply the mistake has become entrenched. That case concerned the arbitrability of claims arising under the Age Discrimination in Employment Act of 1967 (ADEA),[136] where the claims were brought by union members whose collective bargaining agreement expressly contemplated submitting them to binding arbitration. The case therefore arose (like *Mitsubishi Motors*) in the context of first-party arbitration, and the majority opinion began by discussing the NLRA's structures for collective bargaining and citing the *Steelworkers' Trilogy*.[137]

The *Pyett* Court next acknowledged that the ADEA prohibits prospective waivers of substantive claims arising under it.[138] That is, the ADEA prohibits prospectively contracting out of such claims, including presumably where the contracting out consists in submitting the claims to first-party arbitration.[139] But the Court concluded that this prohibition does not prevent the enforcement of agreements to arbitrate such rights, on the ground that "the agreement to arbitrate ADEA claims is not the waiver of a 'substantive right' as that term is employed in the ADEA."[140] Instead, the Court (quoting *Mitsubishi Motors*) objected to "confus[ing] an agreement to arbitrate those stat-

134. *Id.* at 628.

135. 129 S. Ct. 1456 (2009).

136. 29 U.S.C. § 621

137. Pyett, 129 S. Ct. 1464.

138. *See id.* at 1465 ("[I]f the "right" referred to in §626(f)(1) [restricting prospective waivers of "substantive" rights under the ADEA] included the prospective waiver of the right to bring an ADEA claim in court, even a waiver signed by an individual employee would be invalid as the statute also prevents individuals from "waiv[ing] rights or claims that may arise after the date the waiver is executed. §626(f)(1)(C)."); *see also id.* at 1469 ("[F]ederal anti-discrimination rights may not be prospectively waived . . . .)

139. Any doubt about this might be resolved by imagining that the selected first-party arbitral process consists in the toss of a (weighted) coin. This would clearly constitute a prospective waiver of the sort prohibited by the ADEA. And *every* form of first-party arbitration is conceptually equivalent to the (weighted) coin toss.

140. *Id.*

utory claims with a prospective waiver of the substantive right."[141] Thus, the Court insisted, "The decision to resolve ADEA claims by way of arbitration instead of litigation does not waive the statutory right to be free from workplace age discrimination; it waives only the right to seek relief from a court in the first instance."[142] As in *Mitsubishi Motors*, these remarks decidedly reject the first-personal conception of arbitration for the third-personal one. But once again, in the *Pyett* opinion they are not accompanied by the kind of concern for the quality and intensity of the arbitral process on which the authority of third-party arbitration depends. In place of this concern about authority, the *Pyett* Court blithely observes that "the recognition that arbitration procedures are more streamlined than federal litigation is not a basis for finding the forum somehow inadequate; the relative informality of arbitration is one of the chief reasons that parties select arbitration."[143] This is, of course, fair enough on the first-party model; it is entirely inadequate, however, where arbitration is conceived, on the third-party model, as a genuine substitute for adjudication. If arbitration is to stand in for adjudication, then it must possess the legitimacy of adjudication. And an *ex ante* preference for informality cannot underwrite that kind of legitimacy.

The arbitrage between first- and third-party arbitration that these and similar opinions employ cannot replace an argument in favor of arbitral authority under one model or the other. The question addressed by *Mitsubishi Motors* and *Pyett*—concerning the arbitrability of statutory claims—displays why it cannot. A first-party arbitrator, in contrast to her third-party counterpart, simply cannot have general authority to decide statutory claims.[144]

Insofar as arbitration is understood as gap-filling, its outcomes just *are* contract terms. Accordingly, a clear-eyed appreciation of the structure of first-party arbitration makes plain that *every* such arbitration of statutory rights amounts, conceptually, to a contractual *waiver* of these rights. As long as the first-party arbitrator *might* rule against the party who is claiming a statutory right, that party has, by agreeing to the arbitration, waived the right in whatever circumstances the arbitrator would so decide. Thus, although a first-party arbitrator might in some circumstances decide questions concerning statutory rights,

141. *Id.* at 1469.

142. *Id.* at 1459.

143. *Id.* at 1471.

144. Similarly, a first-party arbitrator, again in contrast to third-party arbitrators, cannot legitimately determine the scope of her own competence, that is, an arbitrator cannot arbitrate arbitrability. The argument for this conclusion proceeds analogously to the argument in the main text.

she may not do so where the rights cannot be waived by contract. Again, the key question in such cases is whether the statutory right *itself* may be waived, and not, as the *Mitsubishi* and *Pyett* Courts supposed, whether "judicial remedies"[145] for the right may be waived. The observation made in *Mitsubishi Motors* and repeated in *Pyett* that the party has waived only the judicial process and not the substantive right is correct on the third-party model only, because it depends on the idea that the arbitrator possesses procedural authority apart from any party agreement to the substance of her decision. Hence, this observation invites (indeed demands) systematic investigation into the qualities of arbitral procedure on which the legitimacy of third-party arbitration depends. This investigation, however, is absent in the case law.

The ground of the incapacity of first-party arbitrators to decide nonwaivable statutory claims is not that, because arbitrators are less careful or sympathetic to plaintiffs than courts, arbitration involves the plaintiff's capitulation to the defendant. Rather, the ground is that arbitration in these cases involves plaintiff and defendant together thwarting the legislature.[146] The first-party arbitration of statutory claims therefore does not, as critics commonly suppose, reflect an encroachment of contract on adjudication; rather, it reflects an encroachment of contract on legislation, and in particular, on the authority of the democratic process that produces legislation. The general theory of arbitration that I have constructed therefore supports a criticism, specifically of the first-party arbitration of statutory claims, that is qualitatively different from the standard criticisms associated with alternative theories.

The distinction between more familiar objections and the approach to first-party arbitration of statutory claims that was just elaborated makes a practical difference. Familiar objections to arbitrating statutory claims emphasize both the greater accuracy and fairness that courts provide when adjudicating such claims and also the third-party benefits associated with adjudication's public nature.[147] But such in-

145. *Id.* at 1465. It is, of course, in the very nature of anti-trust law (which deals with limits on freedom of contract in restraint of trade) that the rights it establishes may *not* be waived by contract.

146. The dissent in *Pyett* notes that the Congress intended that employees' rights to seek enforcement of anti-discrimination statutes in a judicial forum should survive arbitration clauses adopted as parts of collective bargaining agreements. *Id.* at 1475 (Souter, J., dissenting). But the dissent presents this observation almost as an afterthought and fails to connect it to any structural analysis of arbitral authority of the sort developed here.

147. Both themes appeared in the Supreme Court's early decisions that expressed skepticism about the arbitrability of statutory rights. *See, e.g.*, Wilko v. Swan, 346 U.S. 427 (1953).

strumental arguments are susceptible to the counterargument that the arbitration of statutory rights claims has instrumental benefits of its own, which often inure to the very same class of persons whom the demand that these claims be adjudicated is intended to protect. Skepticism concerning the arbitrability of statutory claims eventually gave way before such considerations.[148] One might say, observing an analogy, that the traditional arguments against arbitrability in this area, being an example of instrumental arguments for process, fell in the face of the same instrumental counter arguments that diminished the demands of constitutional due process from *Goldberg v. Kelly* through *Matthews v. Eldridge* and beyond.[149] The non-instrumental argument

148. Instrumental considerations in favor of arbitrability figure prominently in the Federal Arbitration Act, and also in judicial reasoning, performed in the shadow of the Act, that finds statutory claims arbitrable. *See* 9 U.S.C. § 1 (2006); *see also* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) (upholding arbitration of a claim arising under the Age Discrimination in Employment Act); Rodriguez de Quijas v. Shearson American Express, Inc., 490 U.S. 477 (1989) (enforcing an agreement to arbitrate claims arising under the Securities Act of 1933 and the Securities Exchange Act of 1934); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) (upholding arbitration of a claim brought under federal anti-trust law). Courts have even employed this style of reasoning to hold that Title VII claims are arbitrable. *See, e.g.*, Metz v. Merrill, Lynch, Pierce, Fenner & Smith, 39 F.3d 1482 (10th Cir. 1994); Alford v. Dean Witter Reynolds, Inc., 939 F.2d 229 (5th Cir. 1991). Insofar as they consider arbitration's authority to be unproblematic under the contractual model and they therefore make no serious inquiry into whether the arbitral *process* represents a free-standing fount of authority by analogy to the authority of adjudication, these cases involve a sleight of hand. The conflation between unproblematic but limited first-party arbitration and problematic but more expansive third-party arbitration is vividly illustrated by the Supreme Court's more recent decision in Vimar Seguros, 515 U.S. 528 (1995). There, the Court upheld the arbitrability of a shipper's claim against a carrier that related to damage sustained to cargo during transport on the carrier's vessel. The bill of lading that governed the contract of carriage provided that any disputes arising under it must be referred to arbitration in Tokyo by the Tokyo Maritime Arbitration Commission. *Id.* at 531. The shipper argued that the arbitration provision was invalidated by the Carriage of Goods by Sea Act (COGSA), and in particular § 1303(8) of the Act, which invalidates contract clauses that lessen carriers' liability. *Id.* at 528; *see also* 46 U.S.C. app. § 1303(8) (1994). The Supreme Court, employing a strict and formal distinction between substantive rights and procedures for enforcing such rights, held that the arbitration agreement—which the Court said addressed only process and not substance—did not violate the COGSA and was hence enforceable. *See Vimar Seguros*, 515 U.S. at 534–35. In employing this mode of argument, the Court implicitly adopted a third-party conception of arbitration. Under the first-party model, the distinction between process and substance breaks down, because the substantive entitlement *just is* whatever the arbitral process concludes. Accordingly, first-party arbitration of a claim like that at issue in *Vimar Seguros* is conceptually equivalent to a waiver of that claim, and hence forbidden by the COGSA. The Court's holding in *Vimar Seguros* employs a third-party model of arbitration and therefore turns on whether the arbitral tribunal at issue in that case—the Tokyo Maritime Arbitration Commission—employs procedures that can achieve free-standing authority under the adjudicatory model. The tribunal may do so, but the Court made no investigation of the question, and indeed never even considered it.

149. *See* Matthews v. Eldridge, 424 U.S. 319 (1976); Goldberg v. Kelly, 379 U.S. 254 (1970). This is of course an analogy only. The Due Process Clause does not, as a matter of doctrine, apply to arbitration because arbitration has been held to involve no state action. *See, e.g.*, De-

that I am making is immune to these considerations. Arbitration as contract is not solidaristic on the adjudicative model, and no external benefits can compensate or correct for this. At the very least, the non-instrumental objection to the arbitration of statutory claims shifts the analysis to the question whether or not the legislature intended to make the claims at issue waivable by contract.[150] This is an enormously consequential shift because legislatures are much better placed than courts to balance the instrumental consequences of waivers of this sort.[151]

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siderio v. Nat'l Ass'n of Sec. Dealers, Inc., 191 F.3d 198 (2d Cir. 1999). For an elaboration of the current state of the law, see generally Sarah Rudolph Cole, *Arbitration and State Action*, 2005 BYU L. REV. 1.

150. It is often suggested that in order for first-party arbitration to get off the ground at all, the right to a jury trial must be waivable by contract. *See, e.g.*, Elizabeth Thornburg, *Designer Trials*, 2006 J. DISP. RESOL. 181, 185. It is then observed that after some initial uncertainty in the Supreme Court, the lower federal courts have held that parties who choose arbitration may in fact waive this right in this manner. *See* Geldermann, Inc. v. Commodity Futures Trading Comm'n, 836 F.2d 310, 323–24 (7th Cir. 1987) (holding that the Seventh Amendment right to a jury trial does not apply in non-Article III fora, and indeed that it may be waived even by parties who remain committed to adjudicating their disputes in court). *Compare* Ins. Co. v. Morse, 87 U.S. 445, 451 (1874) (observing that a person may not "bind himself in advance by an agreement, which may be specifically enforced . . . to forfeit his rights [to a jury trial] at all times and on all occasions"), *with* Telum, Inc. v. E.F. Hutton Credit Corp., 859 F.2d 835, 837 (10th Cir. 1988); Leasing Serv. Corp. v. Crane, 804 F.2d 828, 832 (4th Cir. 1986), *and* Nat'l Equip. Rental, Ltd. v. Hendrix, 565 F.2d 255, 258 (2d Cir. 1977) (all holding that the right to a jury trial may be relinquished by prior contract as long as the waiver is knowing and intentional). Some critics of arbitration think that these lines of cases are mistaken. *See, e.g.*, Jean R. Sternlight, *Mandatory Binding Arbitration and the Demise of the Seventh Amendment Right to a Jury Trial*, 16 OHIO ST. J. ON DISP. RESOL. 669, 719–26 (2001). In fact, however, this suggestion betrays a conceptual confusion between third- and first-party arbitration, which is in fact illustrated by the focus on waiver of jury trials in courts. Because first-party arbitration is not a form of adjudication at all but rather an exercise in contractual gap-filling, an agreement to first-party arbitration does not waive any trial-related rights. This question of waiver arises only in connection with third-party arbitration. And, of course, a court-based adjudication in which the parties alter the process amounts, in effect, to a case of third-party arbitration with the court as arbitrator.

151. The general theory of contract, adjudication, and arbitration that I am proposing—and in particular the idea that first-party arbitration should be assimilated to contract rather than to adjudication—also helps to elaborate a standard for judicial review of arbitral decisions. Courts that review first-party arbitration are essentially engaged in an exercise in contract interpretation; they should therefore ask whether the arbitrator filled the gap she was appointed to address in a manner that is consistent with the parties' intentions in appointing her. This helps to make sense of the otherwise counterintuitive idea that courts should overturn arbitrators' innocent mistakes in deciding statutory rights but should not overturn arbitrators' intentional departures from the correct understanding of statutory rights. *See* Kleine v. Catara, 14 F. Cas. 732, 735 (C.C.D. Mass. 1831); WESLEY A. STURGES, A TREATISE ON COMMERCIAL ARBITRATIONS AND AWARDS 500–02 (1930); Michael A. Scodro, *Deterrence and Implied Limits on Arbitral Power*, 55 DUKE L.J. 547, 582 (2005) (citing authority for the idea that "a mistake of law visible on the face of an award suggested that the award did not represent the arbitrator's intended resolution of the dispute"). This approach makes no sense if arbitration is understood under the model of adjudication because it is difficult to see, under that model, how an arbitrator's intentional departures from the conclusions that courts would reach should insulate her decisions more surely

Similarly, the idea that first-party arbitration is just a case of contractual gap-filling immediately reveals that first-party arbitration cannot fix the scope of its own authority—that is, it cannot arbitrate arbitrability. The reason for this is that contractual solidarity, unlike adjudicatory solidarity, cannot expand its own reach to encompass unwilling parties. Adjudicatory solidarity, and hence also the solidarity associated with third-party arbitration, uses process to impose itself, drawing disputants into its scope even against their intentions. But contractual solidarity, and hence also the solidarity associated with first-party arbitration, depends on the parties' intentions to be bound, not just morally but by the law—these are the intentions, recall, that establish the recognition that a contract involves and the intentions constitute the public point of view of the contract. Accordingly, a party may always dispute that she had the intention to be bound in a particular manner, and this claim must always, ultimately, be heard by the law—that is, by a court or other third-party tribunal. To be sure, if the court or tribunal determines that the contracting party intended to have a first-party arbitrator fill in the gaps in her intentions, then that arbitrator may set to work. But the first-party arbitrator, being merely a creature of the contracting party's intentions, cannot possibly bootstrap herself into the third-party, legal obligation on which contractual solidarity depends. Contractual solidarity simply cannot get going without third-party supervision because the point of view of the contract cannot subsist save in a third-party medium. This highly abstract idea has been recognized by courts. As one has put the point,

> [T]he obligation of the contract does not inhere or subsist in the agreement itself *proprio vigore,* but in the law applicable to the agreement, that is, in the act of the law in binding the promisor to perform his promise. When it is said that one who enters upon an undertaking assumes the legal duties relating to it, what is really meant is that the law imposes the duties on him. A contract is not a law, nor does it make law. It is the agreement plus the law that makes the ordinary contract an enforceable obligation.[152]

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from judicial review than would be the case were her errors innocent. But the approach makes perfect sense if first-party arbitration is understood under the model of contract. An arbitrator's intentional derogation from adjudicatory interpretations of a statutory scheme is more likely to reflect the parties' intentions to waive statutory rights than a merely accidental derogation. While the parties might well intend to abandon or reject their statutory rights, it seems less likely that they have intended to subject themselves to the mistakes of an unreliable arbitrator.

152. Groves v. John Wunder Co., 286 N.W. 235, 239–40 (Minn. 1939) (Olson, J., dissenting) (quoting 12 AM. JUR. *Contracts* § 2 (1938)) (internal quotation marks omitted).

Here also, then, the general theory that I have developed yields a critical purchase on more particular questions.[153]

IV. CONCLUSION

These pages have presented an exercise in the theoretical reconstruction of a legal practice. They have prescinded from a highly abstract and general account of the problem of sustaining social solidarity that every legal order must confront, through a more particular but still abstract account of certain characteristic legal forms by which our own open, cosmopolitan legal order sustains solidarity through encouraging and channeling conflict rather than repressing it outright, to a concrete analysis of particular doctrinal problems that arise when two of our legal order's solidaristic forms—adjudication and contract—interact to create arbitration. The theory, moreover, has had a payoff on the ground. It has demonstrated that, contrary to more conventional accounts, arbitration is not one phenomenon but two and, moreover, that these two phenomena are structurally very different: third-party arbitration is, in its deep structure, an example of adjudicatory solidarity; while first-party arbitration is, in its structure, an example of contractual solidarity. Moreover, this is no purely intellectual exercise in categorization: the solidaristic forms to which each type of arbitration belongs have direct entailments concerning the internal structure of arbitral practice and the scope of arbitral authority, and these entailments have direct doctrinal consequences.

Finally, the account of arbitration developed here strikes me, at least, as satisfying in another, less theoretical respect. Arbitration—in both its third-party and first-party varieties—is here to stay. Third-party arbitration is here to stay because economic markets, and hence the contracts through which market exchanges proceed, are becoming increasingly untethered from the various political jurisdictions into which the earth has been carved up, and thus also from the various

153. Current law concerning the arbitrability of arbitrability is complicated. Thus, although the Supreme Court has recently held that parties may agree to submit arbitrability to an arbitral tribunal, whether or not they have done so must be decided by applying state law principles of contract interpretation. *See* First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 943 (1995) (holding that "a court must defer to an arbitrator's arbitrability decision when the parties submitted that matter to arbitration"). This amounts, in my view, to rejecting the arbitrability of arbitrability in general, even as it accepts that the particular questions that concern the scope of an arbitrator's authority may be determined by the arbitrator, as long as a court has found that the parties intended to give her this power. Relatedly, a first-party arbitrator cannot (Supreme Court and lower federal court decisions to the contrary notwithstanding) properly decide issues that concern the revocation of the arbitral agreement, such as fraud in the inducement. *See* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 402–04 (1967); Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F.2d 402, 411 (2d Cir. 1959).

court systems associated with these jurisdictions. First-party arbitration is here to stay because complete contracts cannot ever be written, and contractual gap-filling in a mass-market economy increasingly requires the mass-production of contract terms through form contracts and hence also through arbitration understood on the model of the contractual form. In both of these respects, the scale of contemporary economic activity is coming to exceed the scale of political authority, which raises the very real question whether the forces that this economic activity is unleashing may be contained or at least controlled—whether, that is, social solidarity can survive where an economic order outstrips its political counterpart.

The law—and in particular, courts—cannot, however, simply declare war on arbitration. Some accommodation must be and therefore of course has been made. But accommodation is not the same thing as capitulation. And courts have in recent years increasingly—and to my mind mistakenly—ceded their core competences to arbitrators. They have treated arbitrators as authoritative under the third-party model without insisting upon the intensive process values on which this model depends, and they have allowed arbitration understood on the first-party model to address questions beyond the scope of the authority that this model can sustain. The theory of arbitration that is developed here proposes a more subtle, but also more hopeful, accommodation. It grants arbitration a prominent place in the pantheon of solidaristic practices; it announces manageable principles by which courts might enforce the boundaries of arbitration's role; and—this is what makes the theory hopeful—it explains that rather than being a threat to the forms of liberal solidarity that have sustained our open, cosmopolitan social order against the conflictual tendencies that are immanent in it, arbitration, properly understood and properly regulated, reflects a natural evolution of these forms and so possesses the potential to help sustain our solidarity.

APOLOGIES AND REASONABLENESS: SOME IMPLICATIONS OF PSYCHOLOGY FOR TORTS

*Jennifer K. Robbennolt**

INTRODUCTION

One does not need to think long about the range of situations that are addressed by tort law to realize that tort law implicates any number of questions about human behavior and decision making. What motivates people to pursue tort claims? How do people determine whether particular conduct is reasonable? How do people reason about what factors caused which harms? How do such judgments inform determinations of blame and liability? How do cases get settled, and do less tangible things such as apologies matter? How do people think about compensation and punishment?[1]

Some of these questions focus on tort doctrine; others center on how tort lawsuits are brought, handled, and ultimately resolved. As a "hub science"[2] with a particular focus on human behavior, psychology has much to offer that is useful for understanding these questions. Some psychological findings—primarily the literature on heuristics and biases[3]—have already made their way into discussions of tort law and are taken into account with increasing frequency. Links between

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1. *See generally* E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE (1988) (addressing the question of how legal actors and observers experience the procedures used to resolve tort cases, and what effect these procedures have on them); Gary Blasi & John T. Jost, *System Justification Theory and Research: Implications for Law, Legal Advocacy, and Social Justice*, 94 CAL. L. REV. 1119 (2006) (examining what values people desire to incorporate in the system and how reform of the system occurs); Jennifer K. Robbennolt, John M. Darley & Robert J. MacCoun, *Symbolism and Incommensurability in Civil Sanctioning: Decision Makers As Goal Managers*, 68 BROOK. L. REV. 1121 (2003) (discussing how people view and address emotional harms, as well as how people seek to simultaneously achieve the multiple, potentially inconsistent goals of tort law (for example, appropriate compensation, deterrence, and punishment)).

2. Kevin W. Boyack et al., *Mapping the Backbone of Science*, 64 SCIENTOMETRICS 351 (2005) (identifying hub sciences based on relationships and patterns of influence among scientific disciplines); John T. Cacioppo, *Psychology Is a Hub Science*, OBSERVER, Sept. 2007, at 5, 42.

3. The literature on heuristics and biases examines the mental short-cuts that people take in making complex information manageable. Such short-cuts are often efficient ways to reach accurate decisions, but can sometimes result in systematic errors in judgment. *See generally* HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT (Thomas Gilovich et al. eds., 2002).