

## Transactions Benefits

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*At least since Ronald Coase, law and economics has been deeply engaged with transactions costs. These frictions can prevent resources from being efficiently deployed in production and goods from reaching their highest-valuing users. The systematic study of how to reduce or minimize transactions costs has yielded explanations, for example, of the boundary between the firm and the market, the allocation of initial entitlements, and the choice between deploying property rule or liability rule remedies when entitlements are breached.*

*However, the inevitable frictions that attend to human affairs can produce gains as well as losses, and law and economics has almost entirely neglected the study of these transactions benefits. At least three varieties of transactions benefits appear immediately once one starts to look for them. Publicity benefits arise when features of one transaction become known and are valuable to other circumstances and perhaps to the legal system at large. One reason to oppose settlement and arbitration, for example, is that even if these forms of dispute resolution involve lower transactions costs than adjudication, they also fail to generate adjudication's valuable transactions benefits. Legitimacy benefits arise when the frictions involved in legal arrangements transform the beliefs and desires of those who experience them in ways that sustain the authority that the arrangements have over the parties within them. Accounts from social psychology of the authority of adjudication and, more broadly, the role that procedure plays in producing legitimacy emphasize this variety of transaction benefit. Finally, solidarity benefits arise when legal frictions constitute intrinsically valuable relationships among the parties who produce them. Adjudication's transformative powers and contractual collaboration illustrate this variety of transactions benefit.*

*The three species of transactions benefit pose both opportunities and challenges for law and economics. Publicity benefits and perhaps also legitimacy benefits are well captured by traditional economic models, which might treat them as positive externalities. Law and economics can therefore recognize publicity benefits without changing any of its deep substantive or methodological commitments; and recognizing these transactions*

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*benefits opens up new avenues for law and economics scholarship. Solidarity benefits pose a much deeper challenge for law and economics, as they move towards the view that value inheres not in states of affairs but rather in relations among persons. This view is difficult to compass from within the functionalist approach to law that law and economics embraces.*

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## Introduction

Law and economics has had a long, intense, and sophisticated encounter with transactions costs. The Coase Theorem, perhaps the central result in the general theory of law and economics, deploys transactions costs to explain when legal rules will and will not affect economic efficiency.<sup>1</sup> Special topics in law and economics also invoke transactions costs, to any number of purposes. Transactions costs determine the boundary between the firm and the market and explain why there are many medium-sized firms rather than either no firms or just one universal firm.<sup>2</sup> Transactions costs determine whether entitlements should be protected by property rules or liability rules.<sup>3</sup> Transactions costs explain when courts should deploy textualist or contextualist approaches to contract interpretation.<sup>4</sup> In addition, transactions costs explain the *numerus clausus* principle in property.<sup>5</sup> These examples, drawn from the most famous law and economics articles ever written, sit atop a vast mountain of more prosaic work deploying transactions costs to explain or justify one thing or another. They might be

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1. See R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON 1 (1960).  
 2. See R.H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386 (1937).  
 3. See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).  
 4. See, e.g., Alan Schwartz & Robert E. Scott, *Contract Interpretation Redux*, 119 YALE L.J. 926 (2010).  
 5. See Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1 (2000).

multiplied almost without end. A Westlaw search for “transactions costs” and its cognates turns up over 10,000 law review articles.<sup>6</sup>

All these treatments of transactions costs share a basic view of what transactions costs are and how they figure in economic and legal affairs. Oliver Williamson captured this view crisply early on in his development of transactions costs economics, writing in *The Economic Institutions of Capitalism*:

In mechanical systems we look for frictions: Do the gears mesh, are the parts lubricated, is there needless slippage or other loss of energy? The economic counterpart of friction is transaction cost: Do the parties to the exchange operate harmoniously, or are there frequent misunderstandings and conflicts that lead to delays, breakdowns, and other malfunctions?<sup>7</sup>

Like mechanical frictions, moreover, transactions costs are inevitable—and just as physics and engineering should look past the fantasy of frictionless, perpetual motion, so law and economics should look past the fantasy of a zero-transactions-cost world. As Williamson says, in *Markets and Hierarchies*:

Although failures can be and often are assessed with respect to a frictionless ideal, my concern throughout the book is with comparative institutional choices. Only to the extent that frictions associated with one mode of organization are prospectively attenuated by shifting the transaction . . . to an alternative mode can a failure be said to exist.<sup>8</sup>

Finally, once viewed in this light, transactions costs become central to economic analysis of legal regimes. As Williamson proposes, “Transaction costs analysis supplants the usual preoccupations with technology and steady state production (or distribution) expenses with an examination of the *comparative costs of planning, adapting, and monitoring task completion under alternative governance structures*.”<sup>9</sup> Hence the 10,000 law review articles.

All these analyses adopt the same basic account of what transactions costs, fundamentally, are—namely that they are bads, in the sense of impediments to human flourishing, understood by analogy to the ways in which friction is an impediment in physical systems. Friction slows the progress of moving objects, dissipates energy as heat, and causes mechanisms to degrade. Similarly, transactions costs block resources from reaching their highest and best uses, confuse the formulation and implementation

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6. The search sought the terms “transactions costs”, “transaction costs”, or “transaction cost” on August 4, 2020.

7. OLIVER E. WILLIAMSON, *THE ECONOMIC INSTITUTIONS OF CAPITALISM* 1-2 (1985).

8. OLIVER E. WILLIAMSON, *MARKETS AND HIERARCHIES: ANALYSIS AND ANTITRUST IMPLICATIONS* 20 (1975).

9. WILLIAMSON, *supra* note 7, at 1-2.

of plans, and undermine coordination. This attitude runs deep in law and economics, reaching even into the conception of the good that lawyer-economists seek to promote. Although law and economics speaks in terms of “social welfare,” this phrase deploys a collective adjective to aggregate a fundamentally individual noun. No person’s welfare is in any way constituted through her relations with others, and certainly not by the transactions that constitute her engagement with others (which bear a merely instrumental relation to her private well-being). This conception of value makes it natural to suppose that the frictions associated with transactions must register as costs, so that it is always better if coordination can be achieved with less friction, by less transactions-intensive means. In all of these ways, and myriad others besides, transactions costs cause private as well as social losses. This is why they produce *costs*.

Nevertheless, an alternative face of transactions also exists. Friction may impede motion, and idealized physical models may imagine a frictionless world. However, in our world, friction is essential to many of the machines that we build. Friction may make the car’s engine less efficient, but friction (the grip of the tires) also enables the car to drive itself forward along the road. Similarly, while the transactions costs that figure so centrally in law and economics are real, transactions also produce private and social benefits. This, as it turns out, is especially true in our pedestrian rather than utopian world, peopled by imperfectly rational and precariously free agents. Just as cars need friction to fulfill their purpose, so (it turns out) people need the entanglements of life to achieve some of their most basic aims. In some respects, the entanglements themselves constitute human flourishing. In spite of this, law and economics does not model or otherwise study the good of transactions. A Westlaw search for the phrase “transactions benefits” turns up no—literally zero—uses that pick out transactions costs’ opposite.<sup>10</sup>

These pages propose how a law and economics analysis of transactions benefits might proceed. They identify and characterize three very different types of transactions benefits—of goods that accompany transactions in respect of the frictions that they generate, or, as might be said, in respect of their *intensity*<sup>11</sup>—and illustrate all three types in two domains of

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10. The search sought the terms “transactions benefits”, “transaction benefits”, or “transaction benefit” on August 4, 2020.

11. It is worth pausing briefly, in the margin, to consider the relationship between transactions benefits and transactions costs. Some causal connections between the two undoubtedly exist. On the one hand, transactions costs may block transactions benefits: if transactions costs are too high—prohibitively high, one might say—they prevent transactions entirely and therefore also prevent any transactions benefits from being brought into being. On the other hand, transactions costs may promote transactions benefits: transactions costs might send a credible signal of high quality (which cannot effectively be sent in any other way), and thereby enable beneficial trades that would not otherwise occur. See, e.g., Gary S. Becker, *A Note on Restaurant Pricing and Other Examples of Social Influences on Price*, 99 J. POL. ECON. 1109 (1991). Lee Fennel pointed out the first possibility to me and Ed Morrison pointed out the second. The transactions benefits contemplated in the main text stand in a different relationship to transactions costs,

legal life: adjudication (doctrinally, procedure) and exchange (doctrinally, contract). The transactions benefits that this exercise reveals are not secret, obscure, or otherwise occult. Indeed, they have all been recognized in legal scholarship, although mostly in recessive rather than dominant traditions, and never as species of the genus “transactions benefits.” Certainly, the economically informed study of law has never sought to understand these goods in this way, as tied to transactions intensity and associated frictions. All the same, the raw materials for a systematic, economically informed study of transactions benefits are to hand, at least for the first two types of transactions benefits. The third type poses a greater challenge, as it emphasizes the formal qualities of transactions and therefore threatens to confound the functionalism that lies at the core of law and economics’s methodology.

All three varieties of transactions benefits appear immediately once one starts to look for them. *Publicity benefits* arise when features of one transaction become known and are valuable to other circumstances and perhaps to the legal system at large. When transactions generate heat, they also generate light, and the light is useful to other (imperfectly rational) legal actors as they seek to plan and coordinate their affairs. *Legitimacy benefits* arise when the frictions involved in legal arrangements influence the beliefs and desires of those who experience them in ways that sustain the authority that these arrangements have over the parties within them. The frictions that legal transactions produce tend to rub down the roughest and sharpest edges of the parties subject to these transactions, rendering people more cooperative and better governable. Finally, *solidarity benefits* arise when legal transactions—including in respect of the frictions associated with transactions intensity—establish intrinsically valuable relationships among the parties who produce them. Because human beings are sociable creatures, they value legal relationships with one another not just as means to promote their several ends, but also for the relationships’ own sakes. These relations are, literally, constituted by the frictions that legal transactions produce.

These three species of transactions benefit present law and economics with substantial opportunities for producing new insights. Publicity benefits and legitimacy benefits may both be interpreted, and modelled, as positive externalities produced by legal transactions. Law and economics is therefore well suited to studying their production functions and determining how much production is socially optimal. Solidarity benefits pose a deeper challenge for law and economics, as they move towards the view that value inheres not in states of affairs but rather in relations among persons, a view that is difficult to compass from within the functionalist approach to law that law and economics embraces.

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however. The benefits are not causally related to the costs (either blocked or promoted) but rather are consequences of transactions intensity, which is also a cause of transactions costs.

The best way to render these abstract ideas concrete is through examples of particular transactions and the specific benefits they produce. The following sections illustrate all three classes of transactions benefits by repeatedly considering two example transactions—adjudication and exchange. Each transaction, in its ideal type, centers around a particular department of law. Adjudication is governed by the law of procedure, and exchange is governed by the law of contract. This makes it possible to use specific examples to identify the doctrinal origins of transactions benefits, which also helps to connect the theory of transactions benefits to a wide array of prior legal scholarship.

These connections, and any suggestions that grow out of them, remain rough-and-ready. They are preliminary suggestions for further work rather than consummated pieces of legal analysis. The purpose of drawing them thus aligns with the theme that has brought us together, to reflect on *New Challenges for Law and Economics*. These pages aspire to identify challenges that also present opportunities—that open up new avenues of thought for lawyers and economists to pursue. They issue an invitation to begin a research agenda rather than consummating the contemplated research. Their success or failure turns, therefore, not simply on their internal merits but also, inevitably, on whether others take up these challenges.

### I. Publicity Benefits

Although no two transactions are identical, most transactions resemble at least some other transactions, often quite closely, involving similar parties in similar situations, or concerning a similar subject. One boundary dispute between neighbors is much like another, for example, and sales of construction lumber follow a pattern with only slight variations and might even share basic elements with sales quite generally. It follows from this that transactions can inform one another—that parties to later transactions can learn from earlier similar transactions, often very valuable lessons. They can learn what pattern of duties best serves their joint interests and most efficiently and fairly balances their private interests; they can learn which risks are material and who is best placed to bear them; and they can learn how accurately to price the benefits and burdens that transactions involve.

Publicity promotes—indeed, it is often essential for—all these types of learning. Past transactions can inform and improve future ones only if future parties know what their predecessors did. They must know something about the context and the facts of past exchanges and also about the norms that the legal system applies to govern the transactions. Often, it will also help to know something about the interests that prior parties pursued through their transactions and the values that inform the legal system's governance. Neighbors will benefit from knowing whether the metes and bounds of a parcel are established by deeds, physical boundary markers,

or patterns of actual occupation and use. Similarly, traders will benefit from knowing how others value and trade off the quality, quantity, and convenient delivery of the goods that they exchange.

These forms of publicity arise through the frictions that law and economics traditionally associates with transactions costs: as disputants and their lawyers discover and describe facts and courts articulate reasoned opinions; and as traders dicker over and draft contract terms. Without friction, in other words, there can be no publicity. Publicity is therefore a type of transactions benefit. A brief study of two legal contexts—adjudication and exchange—illustrates this benefit more concretely and in greater detail. This study also invites a law and economics research agenda that inquires into the optimal production of publicity benefits.

### *A. Adjudication*

A study of dispute resolution that focuses on transactions costs emphasizes the expense required to supply the elaborate procedures that characterize adjudication properly so called. Disputants must satisfy the demanding doctrinal complexities that govern formulating everyday complaints in terms of legal wrongs; they must marshal facts in ways that satisfy the technical requirements that the law of evidence imposes on legal proofs; and they must present their arguments in the unnatural, proceduralized, and indeed ritualized style associated with courts and trials. Courts, for their parts, must administer their intricate procedures and draft closely reasoned opinions to explain their judgements. Insofar as all these activities are expensive, a focus on transactions costs recommends replacing adjudication, at least some of the time, with less intensive, less demanding processes for dispute resolution. The focus on transactions costs thus leads, naturally, to valorizing alternative dispute resolution mechanisms such as settlement and arbitration.

These mechanisms, however, save on adjudication's transactions costs only by sacrificing adjudication's publicity-related transactions benefits. Others have noticed these reasons for resisting settlement and arbitration, although not as part of a general (or even partial) theory of transactions benefits. Owen Fiss's arguments against settlement and Judith Resnik's arguments against arbitration in particular provide useful grist for the transactions benefits mill. Two publicity benefits of litigation's transactions-intensiveness stand out in particular in these arguments.

First, the friction inherent in litigation—its openness, procedural intensity, and insistence on a reasoned judgment—makes the outcome of litigation into a public reckoning of the dispute applying known and generally applicable standards. By contrast, less transactions-intensive methods of dispute resolution merely reflect the balance of private power. Settlement, as Fiss says, “is a truce more than a true reconciliation,” adopted as

“a capitulation to the conditions of mass society.”<sup>12</sup> This entails, as Fiss also observes, that settlement, being “based on bargaining,” inevitably “accepts inequalities of wealth as an integral and legitimate component of the process.”<sup>13</sup> The same goes, more or less, for arbitration—at least where arbitration is understood (on what I have elsewhere called the first-party as opposed to the third-party model<sup>14</sup>) as authorized by the disputants’ prior contractual agreement to arbitrate. Like settlement, arbitration’s contractual foundations give private power an open role in determining outcomes. This is why, as Resnik observes, disputants’ “‘unequal bargaining power’ or ‘excessive’ and ‘overwhelming economic power’” once (although regrettably no longer) led courts broadly to refuse to enforce arbitration agreements.<sup>15</sup> By contrast, adjudication, as Fiss insists, “knowingly struggles against th[ese] inequalities,” so that it “aspires to an autonomy from distributional inequalities,” and “gathers much of its appeal from this aspiration.”<sup>16</sup> Judges, Resnik observes, “are agents of the state, charged with implementing its law through public decision making.”<sup>17</sup> They honor their charge through adjudication’s transactions-intensity—specifically, through “a disciplined procedural structure, predicated on evidentiary standards, discovery, fact-finding, law application, and appellate review.”<sup>18</sup> These frictions redress (even if they cannot eliminate) power-inequalities that the parties bring to their disputes. They frame public justice as a transactions benefit of adjudication.

Second, litigation’s transactions-intensity allows it not only to put particular disputes between particular parties to bed, but also to announce rules that will govern others. Promulgating rules that can govern future conduct among persons distant from the case at hand requires connecting the present case to the web of prior precedents and expressly elaborating these connections and the norms that they traffic in. It also requires opening the present case—as it is argued and after it is decided—to scrutiny and potentially even participation from those who will be governed by its outcome.

The law governing adjudication makes these demands for transactions intensity express in various ways. Some state constitutions direct “Supreme Court Justices to write or publish opinions, to make rulings freely available, to let others publish them, or to explain reasons for dissent.”<sup>19</sup> Federal constitutional law similarly emphasizes rights of public access to judicial

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12. Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984).

13. *Id.* at 1078.

14. See Daniel Markovits, *Arbitration’s Arbitrage: Social Solidarity at the Nexus of Adjudication and Contract*, 59 DEPAUL L. REV. 431, 433 (2010).

15. Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2838 (2015) (citations omitted).

16. Fiss, *supra* note 12, at 1078.

17. Resnik, *supra* note 15, at 2986.

18. *Id.* at 2838.

19. *Id.* at 2818 (citations omitted).

proceedings and connects “informed public participation” to democratic values.<sup>20</sup> In addition, juries—which “put members of the public into courts as decision makers”—convert private citizens into public officials and “thereby further anchor[] the practice of open proceedings.”<sup>21</sup>

Settlement and arbitration, in stark contrast, do not include and indeed reject these open and participatory practices. They conceive of disputes “in essentially private terms”<sup>22</sup> and conclude disputes by aiding disputants “in the achievement of their private ends or to secure the peace.”<sup>23</sup> Along the way, settlement and arbitration “strip the public of its rights of audience to observe state-empowered decision makers imposing legally binding decisions, and strip the courts of their obligation to respond to alleged injuries.”<sup>24</sup> This entails that such efforts to shut down disputes privately cannot establish or announce public norms and standards that reach beyond the narrow immediacy of their settings, to govern similar disputes, and the conduct that surrounds them, going forward.

This purely private nature haunts settlement and arbitration: unlike judgments entered following adjudications, settlements are rarely enforced through the contempt power and rarely bind parties not directly involved in the settled disputes.<sup>25</sup> More important still, the explosion of settlement and arbitration, as Resnik observes, “has garnered a good deal of criticism for cutting off the production of law.”<sup>26</sup> Settlement and arbitration may save transactions costs, but society, Fiss observes, “gets less than what appears, and for a price it does not know it is paying.”<sup>27</sup> Once again, this loss is inextricably tied to the cost-savings that settlement and arbitration achieve by retreating from adjudication’s transactions intensity. Litigation’s transactions intensity enables its rules to develop and evolve in a principled and open way going forward—as in the system of common law precedent or more broadly the rule of law itself. Norm-production, and the governance that this enables, are further transactions benefits of adjudication.

Early work in law and economics acknowledged some of adjudication’s publicity-related transactions benefits, although only as asides generated by arguments that deployed transactions costs in the service of developing other insights. Most notably, a series of prominent articles investigating how common law doctrine develops—towards efficiency, but also towards other ideals—elaborated mechanisms of legal evolution that

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20. See *id.* at 2823-24 (citing *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488, 2499-2500 (2011) and *Press-Enter. Co. v. Superior Court (Press-Enterprise II)*, 478 U.S. 1, 8 (1986)).

21. *Id.* at 2820.

22. Fiss, *supra* note 12, at 1089.

23. *Id.* at 1085.

24. Resnik, *supra* note 15, at 2811.

25. See Fiss, *supra* note 12, at 1080-81, 1084.

26. Resnik, *supra* note 15, at 2804, 2809.

27. Fiss, *supra* note 12, at 1085-86.

turn on transactions costs in ways that implicitly recognize publicity benefits associated with litigation's transactions intensity.<sup>28</sup>

These articles modeled disputants' choices to settle or litigate and the effects of these choices on the development of doctrine. They set out from the premise that litigation is more transactions costly than settlement, so that private parties will litigate only when their expected outcome from litigation exceeds their expected outcome from settlement by more than litigation's greater transactions costs. Early work proposed that this "selective relitigation effect" would lead inefficient legal rules to be challenged more frequently than efficient ones, because their inefficiency increases the potential gains from litigation, thereby creating an evolutionary pressure towards efficiency in the common law.<sup>29</sup>

Subsequent models, however, recognized that the selection of disputes for litigation operates in a subtler fashion, to focus litigation on those cases in which the application of existing precedents—efficient as well as inefficient ones—is "most problematic."<sup>30</sup> For this reason, George Priest observed, "[O]ver a series of litigated cases, the probability that any subsequent decision will actually be efficient or inefficient will approach equality. The selective effect of the parties' decision to litigate will neutralize the systematic influence of the efficiency standard on the composite set of common law decisions."<sup>31</sup> This result, moreover, generalizes. It applies to any theory—economic, moral, or sociological—that attempts "to explain common law decisions from assumptions about the basis of decision making."<sup>32</sup> As long as the transactions costs of settlement fall below the transactions costs of litigation, "the parties' decision to litigate or settle will subvert the systematic influence on common law decisions of every substantive legal standard."<sup>33</sup> The research agenda therefore yielded a sort of impossibility theorem: "(1) No theory of common law *decision making* will be able to explain all litigated decisions. (2) The substantive basis of the common law system of rules will appear indeterminate from observations of litigated decisions to an extent defined by the litigation variables."<sup>34</sup>

This impossibility theorem naturally dampened enthusiasm for the line of research that produced it. However, the models remain interesting,

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28. Articles in this movement of thought include John P. Gould, *The Economics of Legal Conflicts*, 2 J. LEGAL STUD. 279 (1973); Paul H. Rubin, *Why Is the Common Law Efficient?*, 6 J. LEGAL STUD. 51 (1977); William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235 (1979); George L. Priest, *Selective Characteristics of Litigation*, 9 J. LEGAL STUD. 399 (1980); and George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984).

29. This formulation and phrasing follow Robert C. Clark, *The Interdisciplinary Study of Legal Evolution*, 90 YALE L.J. 1238, 1267 (1981). Clark is summarizing the literature rather than developing it.

30. Priest, *supra* note 28, at 410.

31. *Id.* at 416.

32. *Id.* at 410.

33. *Id.*

34. *Id.*

from the point of view of transactions benefits, on account of insights peripheral to their main themes, whose entailments the impossibility theorem does not block. As Landes and Posner observed, adjudication serves two functions: “One is dispute resolution—determining whether a rule has been violated. The other is rule formulation—creating rules of law as a by-product of the dispute-settlement process.”<sup>35</sup> Settlement and arbitration, by contrast, serve just one: dispute resolution. Disputants, for their parts, choose between settlement/arbitration and adjudication, in the manner described above, so that as the transactions costs of settlement/arbitration decline, parties embrace settlement/arbitration and reject adjudication. In the limit case, as transactions costs fall to zero, and settlement/arbitration becomes frictionless while adjudication’s outcome becomes perfectly predictable, parties will always settle and never adjudicate—this is just an application of the Coase Theorem. In the limit case, therefore, dispute resolution is achieved perfectly, while rule-creation is abandoned entirely.

The frictions associated with settlement’s transactions intensity therefore have two faces. From the point of view of the parties—whose purely private interests lie only in dispute resolution—they are purely transactions costs. But from the point of view of the legal system—which includes a public interest in rule-creation—they produce transactions benefits. These benefits, being public goods, will be underproduced by disputants who consult only their private interests. “The difference between litigation and settlement costs is,” as Priest says, “the price of reducing uncertainty in law.”<sup>36</sup> Accordingly, advances in settlement and arbitration, which “reduce settlement costs relative to litigation costs,” will “increase the apparent indeterminacy of the set of [legal] decisions.”<sup>37</sup> Alternatively, “where litigation costs, as opposed to settlement costs, are subsidized . . . the indeterminacy of decisions is likely to diminish.”<sup>38</sup> Such subsidies, moreover, might take the form of supplements to the judgments that litigation can achieve, which increase parties’ incentives to litigate rather than to settle (by decreasing the difference between disputants’ estimates of winning required to make choosing litigation over settlement privately rational). Priest gives pre-judgment interest as an example.<sup>39</sup>

This analysis invites asking how the law might optimally produce the publicity benefits associated with litigation—benefits which arise, importantly, regardless of whether the rules that litigation creates are efficient or moral or just and therefore even in the teeth of the impossibility theorem that has so far demoralized the economic modelling of adjudication. What pattern of subsidies for litigation (and perhaps taxes on settlement/arbitration) will optimally produce the publicity benefits associated

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35. Landes & Posner, *supra* note 28, at 236.

36. Priest, *supra* note 28, at 418.

37. *Id.* at 419.

38. *Id.*

39. *Id.* at 420.

with litigation? What rules of procedure are optimal in this respect? What style of judicial reasoning and opinion-writing is optimal? (Priest, for example, observes in passing that his arguments favor the liberal use of dicta.<sup>40</sup>) A focus on transactions benefits promises to reinvigorate the economic study of processes of dispute resolution.

### *B. Exchange*

People value different things for different reasons. Accordingly, they do not just compete to acquire scarce goods, but they also disagree about which goods are more and less desirable to acquire. This makes it difficult to know which goods and services should be produced, and who should get what: disagreement about value renders both the collective interest and the fair balance of private interests obscure.<sup>41</sup> Moreover, since such disagreements are both reasonable and ineliminable—because of what Rawls called the “fact of reasonable pluralism”<sup>42</sup>—discursive efforts to organize production and distribution by reasoning everyone to general agreement are bound to fail. Hayek warned that such efforts at rational planning inevitably falter over the hurdle that intractable disagreement about value erects, with the result that plans must be imposed by force, opening a path that ends at authoritarianism.<sup>43</sup>

Markets resolve value disagreement in a very different way: they replace discursive efforts to bring people’s judgments into alignment with a mechanism for aggregating people’s wills, as reflected in their choices. A pure exchange economy illustrates the resolution that markets promise: prices, in such an economy, represent a non-discursive commensuration among traders’ competing values that proceeds on public, shared, and formally equal terms. Equilibrium prices have the property that each trader prefers her holdings over any other bundle of goods that she could afford, at these prices. Moreover, prices stick. The competitive equilibrium lies within the core of the exchange economy,<sup>44</sup> so that no coalition of traders can improve on their equilibrium allocations (as assessed by their own values) by taking their joint endowment out of the market and allocating that endowment among themselves according to some principle other than individually optimizing subject to the price structure. In addition, traders acknowledge the authority of the price structure when they make contracts

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40. *Id.*

41. The difficulty concerning fairness calls to mind an evening out in which I, an academic, and two friends, one an investment banker and the other a monk suddenly realized that each of us thought the other two proper objects of moral sympathy. The banker thought the monk and I poor, the monk thought the banker and I bereft of faith, and I thought the monk and the banker bereft of reason. We valued different things for different reasons and so could not agree who had more all-things-considered and who had less.

42. See generally JOHN RAWLS, *POLITICAL LIBERALISM* (1993).

43. See generally F.A. HAYEK, *THE ROAD TO SERFDOM* (1944).

44. See Gerard Debreu & Herbert Scarf, *A Limit Theorem on the Core of an Economy*, 4 INT’L ECON. REV. 235 (1963).

at prevailing prices and thereby embed prices in the relations of recognition and respect that contractual collaboration involves.<sup>45</sup> Markets therefore settle, so that prices and allocations reciprocally support each other.

The prices around which markets settle establish a shared, public frame of value, such that each trader will best promote her private values and preferences by adopting the price structure to organize her economic exchanges. Marx was mistaken when, calling prices the “wooing glances cast at money by commodities,”<sup>46</sup> he suggested that antecedent agreement about value is required to make sense of prices. The truth is rather the reverse. Prices (which define money<sup>47</sup>) constitute a free-standing commensuration of value—a provisional but stable, non-discursive resolution to the ineliminable reasonable disagreements about value that plague open, cosmopolitan societies.

This is a substantial practical achievement. Economic and social coordination depend on a shared metric of value, so that people converge on a single measure of what things are worth. Price commensuration provides a shared measure that is adequate for achieving coordination even among people who disagree—reasonably and ineliminably—about ultimate values. People may disagree in any number of ways—about whether the best life is one of contemplation or action or one of austere self-restraint or sybarite self-indulgence—and yet they agree on how much a painting, or a book, or a car, or a meal out is worth. That is what makes it possible for them to anticipate one another’s preferences and actions in the manner that trade, investment, and other forms of coordination require.

Price commensuration represents a moral achievement as well. Economics has typically focused on the allocative facets of this achievement. The two fundamental theorems of welfare economics assert, first, that the allocations associated with every competitive equilibrium are Pareto efficient and, second, that every Pareto efficient allocation may be achieved through a competitive equilibrium. Together, these theorems assert that price commensuration is compatible with efficiency (the first theorem) and also with distributive justice (the second). But price commensuration represents a moral achievement in another, unappreciated way. No participant in a competitive market possesses any market power; all participants are, equally, price-takers. Prices therefore arise in a way that reflects an egalitarian balance among all persons’ values. The price of something literally equals what others must give up, as measured from their several equally considered points of view, for its owner to possess it. The rich have

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45. See generally, Daniel Markovits, *Contract and Collaboration*, 113 YALE L.J. 1417 (2004). This article suggests that replacing market-prices with “prices” produced by algorithmic central planning would involve forgoing important transactions benefits. See generally, Przemysław Pałka, *Algorithmic Central Planning: Between Efficiency and Freedom*, 82 L. & CONTEMP. PROBS. 125 (2020).

46. 1 KARL MARX, CAPITAL 120 (Lawrence & Wishart 1996) (1867).

47. Neo-classical economics treats money not as a separate good but rather as the vector of ratios at which all pairs of goods are traded, in equilibrium.

more stuff than the poor (in the sense that their holdings are worth a higher total price), but the rich do not exert any greater control over prices than the poor. Although markets do not guarantee all people access to equally valuable holdings, markets—at least, perfectly competitive markets—do treat all people equally *as valuers*.

This moral reconstruction of prices also has an edge. Most familiarly, it casts the political (rather than purely technocratic) foundations of actual money and prices into sharp relief.<sup>48</sup> Central banks, through monetary policy, influence employment and wages, which is to say the price of labor; and the contrast between this mechanism and price commensuration highlights the legitimation burden that monetary policy must carry.

A second contrast—now between perfect competition and monopoly—is less familiar, but also illustrates price commensuration’s critical power. A monopolist can influence prices—this is why we speak not just of monopoly rents but also of monopoly power. Moreover, whereas competitive prices are public, monopoly prices are private. Most immediately, whereas traders in competitive markets all approach prices from the same perspective, monopolists (on account of having power over prices that others lack) take a distinctive attitude towards prices: they are price-makers, not price-takers. Moreover, monopoly prices are often private in a second sense. Monopolists often price discriminate, so that different buyers face different prices (and information technology makes such price discrimination increasingly possible and profitable). Monopoly pricing therefore does not merely generate inefficiently few sales or shift surplus from consumers to producers; it also undermines price commensuration, by fragmenting market valuations which competitive markets make public into several—distinct and often competing—private perspectives. Monopoly makes it literally impossible to sustain agreement about what something is worth.

The threat that monopoly poses to price-commensuration has profound and practical costs, which conventional economic analysis does not recognize. To appreciate the costs, consider the case in which monopoly produces no inefficiency, because perfect price discrimination enables the monopolist to serve all and precisely the consumers who would buy in a competitive market, while capturing for herself all the consumer surplus that perfect competition generates. It is commonly objected that even in this case, monopoly produces maldistribution, on account of the shift of surplus from consumers to the monopoly-producer. However, another objection is different and deeper. Monopoly pricing (especially when it becomes pervasive) makes it impossible to say whether or not maldistribution arises because it undermines the public commensuration that competitive prices achieve. Distributive judgments depend on determining who has how much, but where people value different things for different reasons,

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48. See generally CHRISTINE DESAN, MAKING MONEY: COIN, CURRENCY, AND THE COMING OF CAPITALISM (2014); Roy Kreitner, *Legal History of Money*, 8 ANN. REV. L. & SOC. SCI. 415 (2012).

they will also disagree about how to measure their holdings. Competitive markets, through price commensuration, make it possible to sustain a public answer to this question. Monopoly prices, being private, merely reprise the disagreement. Monopoly's essential evil, therefore, is not that it produces inefficiency or injustice but rather that it makes judgements regarding these matters impossible. Again, monopoly makes it impossible to say what things are worth.

Perfectly competitive markets automatically sustain price commensuration as a benefit of the transactions that constitute them. One might even say, loosely, that where transactions costs are zero, the transactions benefit of price-commensuration arises automatically. But in imperfect markets, where transactions costs create monopoly power, the transactions benefits of price commensuration must be protected and nurtured, and private power over prices must be contained.

Economic approaches to competition law should thus worry about protecting price commensuration alongside promoting efficiency and consumer welfare. This new concern parallels recent trends in antitrust scholarship—associated with what is sometimes called the neo-Brandeisian school<sup>49</sup>—concerning the political distortions that accompany democracy. Those trends worry about the distortions that monopoly power imposes on democratic politics. The account of price commensuration just rehearsed inaugurates a parallel line of argument concerning a democratic culture of valuation. Law and economics should study this facet of economic democracy.

## II. Legitimacy Benefits

The reasonable disagreement that is endemic in open, pluralist societies does not end at the question what things are worth but rather extends also to questions about what justice and even fidelity to law require. Legal systems, facing ineliminable reasonable disagreement, therefore necessarily aspire not simply to achieve efficiency, or justice, or some other comprehensive value but also to achieve legitimacy—to sustain agreement about which legal rules to obey that can survive disagreement about comprehensive values and therefore also which legal rules to adopt. Successful legal systems sustain legitimacy in two interlocking senses: as a social fact, concerning which rules legal actors in fact obey; and as a norm, concerning which rules they have reason to obey. (The two facets of legitimacy interact insofar as legal actors, deploying their critical faculties, tend in fact to act on the reasons that apply to them.) The frictions that accompany various legal regimes on account of their transactions-intensity turn out to contribute substantially to achieving legitimacy, as another type of transactions

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49. An account of this school appears in Lina Khan, *The New Brandeis Movement: America's Antimonopoly Debate*, 9 J. EUR. COMPETITION L. & PRAC. 131 (2018).

benefit. Once again, both adjudication and exchange illustrate how transactions produce legitimacy benefits.

### *A. Adjudication*

The social psychology of dispute resolution instructs, as one of its core teachings, that procedure influences disputants' attitudes towards adjudication and its outcomes. Transactions intensity and the procedural frictions that intensity brings matter especially.

As Tom Tyler has shown, people are more likely to comply with the law when they judge that the authorities who apply the law to them are legitimate.<sup>50</sup> Moreover, people judge the legitimacy of legal authorities, especially when the authorities apply the law in the shadow of disputes about what the law requires, based substantially on the procedures that the authorities deploy in resolving legal disputes.<sup>51</sup> Finally, procedural intensity is essential for legitimacy and therefore compliance. When disputants evaluate the legitimacy of the legal authorities who preside over their disputes, Tyler reports, "they focus more on their opportunities to state the case than they do on their influence" over outcomes.<sup>52</sup> Indeed, procedural intensity matters for legitimacy specifically on account of the frictions that intensive procedure involves. "[P]roviding structural opportunities to speak is not enough"<sup>53</sup> for sustaining legitimacy. Instead, disputants "must also infer that what they say is being considered by the decision-maker."<sup>54</sup> The precise features of adjudication that law and economics conventionally identifies as imposing transactions costs turn out to be essential to sustaining the transactions benefits associated with legitimacy.

The sociology of dispute resolution reinforces and elaborates on the legitimacy benefits produced by transactions intensity in adjudicative procedures. Sociological studies of adjudication emphasize that adjudicative procedures are transformative rather than transparent. When disputants, having gone through the process, look back at the disputes to consider their origins, they do not see things in the same way as they did before the process, when the disputes began. Instead, adjudication "translates"<sup>55</sup> private complaints into public terms, which are "objective[]"<sup>56</sup> and "set . . . apart from the [disputants'] particular interests."<sup>57</sup> By this means, adjudication "reconstitutes the issues in terms of a legal discourse which has trans-

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50. See TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 103 (1990).

51. See *id.* at 102.

52. See *id.* at 125.

53. See *id.* at 149.

54. See *id.*

55. Lynn Mather & Barbara Yngvesson, *Language, Audience, and the Transformation of Disputes*, 15 L. & SOC'Y REV. 775, 791 (1981).

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

57. *Id.*

situational applicability”<sup>58</sup> and which engages broader principles “in terms of which . . . binding solutions [to the disputes] can be found.”<sup>59</sup> In addition, adjudication’s procedural intensity, including in particular the role that lawyers play in training their clients to the discipline of the law’s categories, “test[s] the reality of the client[s]’ perspective[s],”<sup>60</sup> in order to deflate unreasonable expectations and demands and to elevate and reinforce claims that the law might reasonably address.<sup>61</sup> Critics worry that these mechanisms promote injustice, by training claimants to accept less than their due: criminal defense lawyers may “cool out” defendants to suffer punishments that they do not deserve;<sup>62</sup> and contract lawyers may “manipulate[] and fool[]”<sup>63</sup> consumers to under-assert their rights and “redefine [their] situation[s] to that [they] can accept” injustice.<sup>64</sup> But while these risks identify real costs,<sup>65</sup> the legitimacy benefits produced by adjudication’s transactions-intensity are also real. These benefits are, as I have argued elsewhere, essential to the authority of adjudication and the political legitimacy of the law, as applied (at retail) to the individual persons whom it governs.<sup>66</sup>

These mechanisms once again invite a systematic analysis—in the manner associated with law and economics—of the production of the legitimacy benefits associated with adjudication’s transactions intensity. To begin with, which features of the legal process contribute most to adjudication’s legitimacy? Do inquisitorial processes legitimate as effectively as adversary ones? How important are lawyers, and how should the law governing lawyers be structured to maximize their legitimating effects? Moreover, when is legitimacy most socially valuable and how should the legitimacy benefits of transactions-intensive procedures be traded off against

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58. Mather & Yngvesson, *supra* note 55, at 791.

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

60. See William L.F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, and Claiming*, 15 L. & SOC’Y REV. 631, 646 (1981).

61. See Jeffrey Fitzgerald & Richard Dickins, *Disputing in Legal and Nonlegal Contexts: Some Questions for Sociologists of Law*, 15 L. & SOC’Y REV. 681, 698 (1981); see also Talcott Parsons, *The Law and Social Control*, in LAW AND SOCIOLOGY: EXPLORATORY ESSAYS 56, 70 (William M. Evan ed., 1962) (“[T]he impact on the client of the lawyer’s *attitude*, his expression 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.”).

62. Abraham S. Blumberg, *The Practice of Law as a Confidence Game: Organizational Cooptation of a Profession*, 1 L. & SOC’Y REV. 15, 28 (1967).

63. Stewart Macaulay, *Lawyers and Consumer Protection Laws*, 14 L. & SOC’Y REV. 115, 159 (1979).

64. *Id.* at 124.

65. It is worth noting that adjudications transactions intensity can also transform disputants’ claims in ways that expand, generalize, and elevate them, as when sexual harassment claims once conceived of as involving private injuries are reframed, through adjudication, to compass a broader agenda of workplace sex equality. See, e.g., Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683 (1998); Kathryn Abrams, *The New Jurisprudence of Sexual Harassment*, 83 CORNELL L. REV. 1169 (1998).

66. See DANIEL MARKOVITS, *Lawyerly Fidelity and Political Legitimacy*, A MODERN LEGAL ETHICS: ADVERSARY ADVOCACY IN A DEMOCRATIC AGE 171 (2011); Daniel Markovits, *Adversary Advocacy and the Authority of Adjudication*, 75 FORDHAM L. REV. 1367 (2006).

the more familiar transactions costs that such procedures more familiarly involve? What public investments in legitimating procedures, made where, are optimal? Finally, how should procedure's legitimacy benefits be balanced against other values? Which mechanisms of legitimation most closely tie legitimacy to justice, and which are indifferent to justice and equally effectively legitimate unjust outcomes as just ones? When is it desirable to tie legitimacy to justice and when not? The methods of law and economics, both theoretical and empirical, can usefully address all these questions as well as myriad other related ones.

### *B. Exchange*

Contracts also—although less familiarly—constitute a mechanism for legitimately resolving disagreements. Most obviously, contracts resolve conflicts of interest: buyers want low prices; sellers want high ones; and their agreements settle the prices they each will get. In addition, and no less importantly, contracts resolve disagreements about how best to promote the common interest. When a homeowner and a builder contract to renovate a house, for example, much of their planning—the negotiation that leads up to the contract governing the renovation—concerns how best to match the owner's interests and tastes with the builder's capabilities, to produce a renovation plan that maximizes the contractual surplus that the owner and builder will share. Only a small part of the bargaining, which typically occurs towards the end of planning, concerns how to divide the surplus by fixing a price. Similar efforts at creative problem-solving in order to achieve joint gains dominate most negotiations. This is just a more theoretically articulate generalization of the negotiator's mantra that getting to “yes” requires solving the other side's problems. Negotiations, that is, resolve not just conflicts of interest but also disagreements about how best to promote the common interest. In order to succeed at either task, the bargains that negotiations conclude must acquire legitimacy in the eyes of the parties who strike them. The bargains must sustain agreement about which plans to implement in the face of enduring disagreement about which plans should be adopted.

Contracts, moreover, must legitimate the bargains that they establish even without achieving general, substantive justice between the parties. It is a basic principle of contract law and practice in market economies that the party who would do better without the contract does better within it, including even when the advantages that she brings to her negotiations are not deserved and indeed unjust. Contract law does not require setting the world right before contracts may be struck. On the contrary, contract law launders injustice, by establishing legitimate legal obligations even against the backdrop of inequality and injustice. Contract law does this on account of the engagement that contracts establish between the parties to them, as they form interlocking intentions to achieve the joint performance of their

agreements and, moreover, not to defect from the agreements without being released. Through these intentions, the parties to contracts recognize each other's authority to insist on performance and thereby establish their contracts as legitimate.<sup>67</sup>

The legitimacy of contracts therefore arises directly out of their transactions intensity, as a transactions benefit of contracting. Contractual legitimacy is, moreover, undermined when contracts are formed in less transactions intensive ways. This is a concrete and practical rather than merely abstract and theoretical development. Contracts of adhesion seek to establish obligations without the frictions associated with bespoke bargaining or even specific consent to particular terms. Instead, form contracts include long lists of clauses (including clauses that cross-reference yet other forms or even claim the unilateral right to change other clauses in the future) that term-takers do not, and cannot reasonably be expected to, understand or even read. Consent to such contracts is only abstract and general—to “whatever is in the form”—rather than to any concrete, specific joint plan or exchange.

This has led any number of theorists to doubt whether the consent that contracts of adhesion involve is meaningful and able to sustain legitimate obligations. Relatedly, they question whether form contracts are, properly speaking, contracts at all. Todd Rakoff regards them as a variety of private lawmaking or administration;<sup>68</sup> and Margaret Jane Radin writes of the “normative” and “democratic” degradations that accompany this attenuated form of consent.<sup>69</sup> Sociologists, moreover, have documented that these threats to the normative legitimacy of contracts of adhesion have a positive counterpart—that parties in fact treat form contracts as less binding than contracts that arise through individual bargaining. For example, an experimental study conducted by Zev Eigen reports that as parties become less intensively engaged in bargaining over the terms of their contracts, they become less willing to incur performance costs to honor their agreements.<sup>70</sup>

Economically inflected legal thought has devoted substantial attention to the transactions costs of bargaining and bespoke contract drafting and also to how optimally to balance these costs against the inefficiencies that arise when term-makers exploit term-takers' costs to secure private gains.<sup>71</sup> But the legitimacy benefits of contractual transactions intensity

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67. The details of this normative structure may be filled out in various ways. My own account of them appears in Markovits, *supra* note 45.

68. See Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173 (1983).

69. See Margaret JANE RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW* 15 (2013).

70. See Zev J. Eigen, *When and Why Individuals Obey Contracts: Experimental Evidence of Consent, Compliance, Promise, and Performance*, 41 J. LEGAL STUD. 67 (2012).

71. See, e.g., Ian Ayres & Alan Schwartz, *The No-Reading Problem in Consumer Contract Law*, 66 STAN. L. REV. 545 (2014).

suggest a new research challenge for law and economics—specifically, to investigate how contractual legitimacy is produced and then best deployed to support efficient economic coordination. Both theoretical and empirical advances are needed to produce a general account that optimally balances the transactions costs and transactions benefits of the bargaining and drafting that accompany contractual exchange.

### III. Solidarity Benefits

A final class of benefits associated with transactions intensity concerns forms of solidarity that are constituted through transactions intensive relations. Human beings, on account of their limited rationality, view the world and one another in an ineliminably perspectival fashion. Each person necessarily judges and acts not from the shared Archimedean perspective of universal reason but rather from her own, peculiar, private point of view. This means that it takes effort, which involves friction, to get to know other persons—to engage other minds and to bridge the perspectival gap that each person’s limited reason imposes.

At the same time, as persons are by nature sociable, their flourishing depends on precisely the engagements that their limited rationality makes difficult for them. This has been familiar at least since Aristotle’s observation that we desire the esteem of others, and especially of those others whom we ourselves esteem.<sup>72</sup> Such observations from ordinary experience are, moreover, confirmed and generalized by social psychology, in laboratory experiments. Well-established phenomena such as social referencing and joint visual attention reveal that a person’s perspective commands attention from, and penetrates, the perspectives of those who observe her, including from the very beginning of life. For example, infants whose mothers turn to direct their gaze at an object tend also to turn towards and focus on the same object, literally coming to see the world from their mothers’ points of view.<sup>73</sup>

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72. ARISTOTLE, *NICHOMACHEAN ETHICS* 97-98 (Sarah Broadie ed., Christopher Rowe trans., Oxford University Press 2002) (c. 384 B.C.E.). Sociability need not only be harmonious but may also be oppositional, characteristically involving an inclination to dominate others, to impose one’s own perspective on them, typically by overcoming their wills. This complicates oppositional sociability, perhaps in a self-limiting way: as Hegel emphasized in his dialectic of lordship and bondage, total domination deprives the dominated other of the perspectival capacity that might make him a worthy object of domination. Hegel’s point, as Allen Wood observes, is “an instance of the general truth that if I want to acquire worth in my own eyes on the basis of another’s esteem, I can do it only to the extent that I esteem the other as a judge of my worth.” ALLEN WOOD, *HEGEL’S ETHICAL THOUGHT* 89 (1990). Achieving recognition requires esteeming the *independent judgment* of the other, and not just recognizing the other’s worth judged from one’s own point of view. The truth is in fact more general even than Wood’s formulation suggests. It applies not just where my motive is to acquire worth based on esteem, but with respect to *any* motive that references another’s independent judgment: I cannot vindicate such a motive through actions that destroy or deny the other’s capacity as an independent judge.

73. See, e.g., Ross A. Thompson, *Empathy and Emotional Understanding: The Early Development of Empathy*, in *EMPATHY AND ITS DEVELOPMENT* (Nancy Eisenberg & Janet Strayer eds., 1987).

These several phenomena differ in their particulars, but they are united by the fact that they are all instances of what might be called (abusing ordinary language only a little) the *charisma* of persons, which is just the colloquial name for persons' capacity, by sheer force of personality, to draw others into their points of view, making others see things their way, so to speak.<sup>74</sup> Being sociable creatures, persons possess an interest in treating one another not just as patients who possess interests (which each considers sympathetically, entirely from within her own point of view), but also as agents who possess intentions and beliefs that underwrite free-standing claims on the relations that arise among them.

The relationships that are constituted in the frictions involved in getting to know other minds therefore establish a third kind of transactions benefit. This benefit presents a greater challenge to economic thinking than the others, however, because it is not caused but rather constituted by transactions intensity. This makes it difficult to comprehend through the functionalist methods that dominate law and economics. The solidarity benefits produced by transactions are better explained by the formalism that some philosophical approaches to law embrace.<sup>75</sup> For this reason, transactions intensity's solidarity benefits receive only a briefer treatment here.

#### A. Adjudication

Earlier discussions elaborated the ways in which adjudication's transactions intensity produces publicity benefits (by redressing private power imbalances as between disputants and supporting the development of public, generally applicable legal norms) and legitimacy benefits (by transforming disputants' claims into forms that the law can successfully resolve). The frictions associated with adjudication perform a third function, transforming not just the claims an adjudication decides but also the relationship between the disputants themselves.

The procedural engagements that adjudication involves fundamentally transform disputants' claims, reframing brute demands—"I was hurt and want compensation or even vengeance"—into claims of right—"I have been wronged and am entitled to justice." A claim of right, by its nature, invokes reasons (and not just will). The reasons invoked in legal claims, moreover, are by their nature publicly accessible, so that they may be

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74. Charisma is revealed, most crassly, by the fact that it is literally impossible completely to *ignore* another person, to free oneself entirely of the frictions associated with human engagement—where to ignore is consciously to disregard him in the full awareness that he is a person. We can (and do) find ways of avoiding becoming aware of the personalities of others. But once made aware, we cannot help but recognize.

75. See generally Jody S. Kraus, *Philosophy of Contract Law*, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 692 (Jules L. Coleman, Kenneth Einar Himma & Scott J. Shapiro eds., 2004); Daniel Markovits & Alan Schwartz, *Function and Form in Contract Law*, in THE OXFORD HANDBOOK OF THE NEW PRIVATE LAW 243 (Andrew S. Gold et al. eds., 2020).

evaluated by all persons. Adjudication therefore transforms not just the claims that disputants assert but also the relationship between the disputants themselves. Adjudication, as Lon Fuller observed, possesses 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 disposition towards one another.”<sup>76</sup> When adjudication succeeds, it builds a deeper solidarity beneath the strife that it reveals to be increasingly superficial. When this happens, “the transformed dispute,” a prominent sociology of adjudication observes, “can actually become *the* dispute.”<sup>77</sup> Through adjudication’s transactions intensity, conflict is reframed in terms that, at bottom, express solidarity.

### *B. Exchange*

If parties were perfectly rational and able to deliberate and coordinate without any frictions, then particular, concrete agreements between them—positive contracts, as one might say—would be unnecessary. Ideal and costless deliberators would know their own and one another’s interests and intentions perfectly. They could plan optimal coordination collectively, up front, once and for all, without needing to resort to the private, bilateral, agreement- and indeed text-based form of coordination associated with contract law.<sup>78</sup> In a perfectly rational, frictionless world, persons would agree immediately on ideal arrangements and then live optimally by implementing them perfectly.

Contracts thus arise in the shadow of imperfect rationality, enabling coordination among persons who must incur costs to learn their own and one another’s interests and intentions. Concrete, particular contracts have a positive existence—an actual text, which will, on account of transactions costs, depart from whatever arrangements would ideally promote the parties’ ends. This closely resembles the character of the positive law, which also exists through concrete texts, whose rules inevitably depart from the ideal justice associated with natural law. The parties to contracts, moreover, recognize each other, and establish a thin form of solidarity, on account of acknowledging each other’s authority to insist on the terms of their positive contracts, displaying what I have elsewhere called pedestrian good faith towards their collaborative arrangements.<sup>79</sup>

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76. Lon L. Fuller, *Mediation: Its Forms and Functions*, 44 S. CAL. L. REV. 305, 325 (1971). Fuller’s account of mediation belongs to a broader agenda, which sought to display the ways in which adjudication and its cousins diffuse conflict and sustain social solidarity. *See generally* Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978).

77. *See* Felstiner, Abel & Sarat, *supra* note 60, at 650.

78. This observation might helpfully be thought of as an abstraction and generalization of the Coase Theorem.

79. *See* Daniel Markovits, *Good Faith as Contract’s Core Value*, in PHILOSOPHICAL FOUNDATIONS OF CONTRACT LAW 272 (Gregory Klass, George Letsas & Prince Saprai eds., 2014).

This conception of good faith, which I have claimed is contract law's core value,<sup>80</sup> arises directly out of the friction that contracts among imperfectly rational parties necessarily involve. It is tied to concrete terms of the positive contracts that the parties have in fact struck, rather than to abstract, ideal arrangements that they would have struck were they perfectly rational. Good faith, that is, captures the form of solidarity that imperfect planners achieve when they make joint plans. Finally, the positive contracts that take the measure of pedestrian good faith, the work-product (as it were) of the frictions associated with contracting, are, literally, the matrix within which a shared perspective between imperfectly rational parties is possible.

Empirical scholarship is beginning to document this theoretical effect in practice. Lisa Bernstein's work on what she calls "managerial contracting," for example, emphasizes that long negotiations and detailed contracts are sometimes self-consciously deployed by lawyers to "build trust-based social capital," including by deploying their transactions-intensive publicity benefits—as "parties . . . learn[] about one another's business culture"—and legitimacy benefits—as parties "work[] through a series of increasingly difficult issues involving both concrete problems and judgment calls"—to support "trust-based relationalism" and "reciprocity norms."<sup>81</sup> In practice as well as in theory, therefore, transactions intensity constitutes contracts as sites of solidarity.

### Conclusion

Transactions involve not just costs but also benefits, and these benefits arise specifically and directly on account of the frictions that, more familiarly, produce transactions costs. Transactions intensity thus yields publicity benefits, legitimacy benefits, and solidarity benefits. Moreover, at least among imperfectly rational persons, lowering a transaction's intensity typically reduces not only transactions costs but at the same time reduces transactions benefits as well. A frictionless world might well be better than our world in some ways, but it would be worse in others.

These general claims receive concrete illustrations in case studies of adjudication and exchange. Even the case studies remain preliminary, of course—they constitute no new learning but rather issue invitations for further thought. Along the way, they open up three lines of argument that economically inflected work on law might pursue.

First, what are the production functions for transactions benefits, especially concerning publicity and legitimacy? What are the inputs into these values, how are they converted into outputs? And how might economic thought model and measure these transactions benefits,

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80. *See id.*

81. Lisa Bernstein, *Beyond Relational Contracts: Social Capital and Network Governance in Procurement Contracts*, 7 J. LEGAL ANALYSIS 561, 589-90 n.98 (2015).

theoretically and empirically, in order to maximize them while at the same time minimizing the transactions costs that accompany the frictions that produce them?

Second, how do transactions benefits interact? Do the several types transactions benefits necessarily go together, or might they compete? Does publicity sometimes, generally, or even always promote legitimacy; and if only sometimes (or even generally), when does a tradeoff between these values arise? Alternatively, how do the mechanisms that sustain transactions benefits interact? Do they serve as substitutes or complements? For example, do arbitration and settlement establish contractual publicity, legitimacy, or solidarity that is capable of filling the gap that they open up by hollowing out adjudicatory publicity, legitimacy, and solidarity?<sup>82</sup>

Finally, is there a way to bring solidarity benefits within a law and economics framework? Or is solidarity's relationship to transactions intensity too formalist—insufficiently like the relationship between a consequence and its cause—for a fundamentally functionalist method like law and economics to compass?

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82. For a skeptical assessment of this possibility, which argues that current doctrine and practice surrounding arbitration fail to achieve either adjudicatory or contractual solidarity, see Markovits, *supra* note 14.