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# ADVERSARY ADVOCACY AND THE AUTHORITY OF ADJUDICATION

*Daniel Markovits\**

## INTRODUCTION

Should lawyers detach their professional activities from their personal factual, legal, and moral views and promote even clients' causes that they would oppose as citizens and reject as judges or jurors, or should lawyers constrain the professional services that they provide to suit their personal views? Should lawyers serve particular clients as partisans, or should they serve justice writ large? To employ the terms that have brought us together, should lawyers assist clients in acting like Holmesian bad men, promoting their private interests as aggressively as the law allows, or should they encourage clients to honor the law's internal purposes, and indeed impose these purposes on clients, so that they help clients to secure not as much as they can get, but only what the law recommends?

The lore of the bar—think of Lord Brougham's remark that a lawyer should serve his client "by all expedient means" and "reckless of the consequences," and even though he should "involve his country in confusion for his client's protection"<sup>1</sup>—tends towards the first alternative in each pair. Moreover, the positive law governing lawyers also elaborates a partisan conception of lawyers' professional role. Broad and organic principles of lawyer loyalty<sup>2</sup> and client control<sup>3</sup> require lawyers zealously to pursue ends that their clients have wide discretion in setting. In addition, a broad and organic principle of professional detachment,<sup>4</sup> although usually understood as an effort to shield lawyers from legal or even moral

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1. 1 Speeches of Henry Lord Brougham 105 (1838), *quoted in* Lord MacMillan, *Law and Other Things* 195 (1937). MacMillan, it should be noted, did not approve of this extreme position. Nor, incidentally, is it clear that Lord Brougham himself believed what he said. On the one hand, Brougham intended his extravagant remark as a threat, made during a dispute, and designed to induce settlement. And he later characterized his statement as "anything rather than a deliberate and well-considered opinion." *See* William Forsyth, *Hortensius: An Historical Essay on the Office and Duties of an Advocate* 389 n.1 (2d. ed. 1874); *see also* David J.A. Cairns, *Advocacy and the Making of the Adversarial Criminal Trial, 1800-1865*, at 139 (1998). On the other hand, that Brougham made the threat suggests that whatever he thought in the abstract, he was in fact prepared to throw his country into confusion for his client's sake.

2. *See* Model Rules of Prof'l Conduct R. 1.3 (2003).

3. *See id.* R. 1.2.

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

responsibility for their clients' concerns,<sup>5</sup> also acts as a sword to forbid lawyers from imposing their personal doubts about the merits of claims that clients nevertheless wish to pursue.<sup>6</sup> 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<sup>7</sup> or assisting fraud,<sup>8</sup> and bringing frivolous or malicious claims.<sup>9</sup> And lawyers are permitted, and indeed in some measure encouraged, to counsel clients on the broader legal and moral implications of the positions that the clients take.<sup>10</sup> 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. The lawyer's counseling role must give way to the duties of lawyer loyalty and client control when confronted with recalcitrant clients.<sup>11</sup> Although I do not argue the point in detail here, the genetic structure of the positive law of lawyering tends towards partisanship.

Moreover, the adversary system defense, which has traditionally dominated theoretical work in legal ethics,<sup>12</sup> roughly supports this account

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5. *See id.*

6. The specific connection to professional detachment here is unconventional. Cases that draw the connection and criticize lawyers for seeking to impose their private assessments of clients' cases include: *United States v. Swanson*, 943 F.2d 1070, 1071 (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" and added "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 sought aggressively to impose her view of a client's case over the client's conflicting views); *Johns v. Smyth*, 176 F. Supp 949 (E.D. Va. 1959) (involving a lawyer who refused to ask a jury to acquit his client); *In re Harshey*, 740 N.E.2d 851 (Ind. 2001) (involving a lawyer who pressured a client to accept a settlement that he regarded as reasonable); *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). The cases do not always mention Rule 1.2 by name.

7. *See* Model Rules of Prof'l Conduct R. 3.3, 3.4 (2003).

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

9. *See id.* R. 3.1.

10. *See id.* R. 2.1.

11. For example, a lawyer may not force a resistant client to accept a settlement that she regards as reasonable. *See, e.g., In re Harshey*, 740 N.E.2d 851. Moreover, the rule that a lawyer may not impose her private judgment of a client's claim on settlements applies even outside the immediate shadow of a tribunal. For example, "a lawyer may not ethically break off negotiations with an opposing party simply because she has doubts about the viability of her client's case." *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 387 (1994).

12. The adversary system defense is announced by the Model Rules, which observe that "when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done." Model Rules of Prof'l Conduct pmbl. para. 8 (2003). The adversary system defense also appears in other prominent statements of the law governing lawyers, for example in the leading treatise on legal ethics, which claims that "lawyers administer justice in the broadest sense when they make available to all citizens whatever the law allows, without subjecting the law or their

of the lawyer's professional role. It proposes that lawyers' partisanship plays an essential part in an impartially justified moral division of labor—that competition among partisan advocates concerned exclusively (or at least primarily) for their clients produces, on balance, the best justice for all. The adversary system defense proposes, in this way, ingeniously to avoid the choices from which I began rather than to choose directly between the alternatives that they describe. Insofar as the defense succeeds, lawyers best serve the internal purposes of the law by assisting clients in approaching the law as bad men.

But this argument has repeatedly been shown to be not just mistaken but simply implausible. To begin with, its factual predicates do not generally obtain. Even in an ideal legal system, in which the underlying substantive laws are just and access to legal services is fairly distributed, it remains uncertain how much partisanship in fact best serves the law's underlying purposes. Certainly, a lawyer whose aggressive manipulations were on the verge of *successfully* subverting these purposes would better serve justice by stepping back in ways that neither the bar's self-conception nor its current rules contemplate.<sup>13</sup> And the adversary system defense stands on shakier ground still in nonideal legal systems (and therefore in every actual legal system), in which substantive laws are not perfectly just and legal services are 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 best serve justice for all, even only on balance.<sup>14</sup>

Moreover, the adversary system defense's theoretical predicates also stand on shaky ground. The aggregative conception of fairness on which the adversary system defense relies faces challenges from competitor conceptions, associated with rights-based moral theories, that apply the demands of fairness separately to every relation between persons. These theories suggest that a lawyer's preference for her client that violates a third-party's rights cannot, as the adversary system defense would have it, be simply offset by benefits that arise elsewhere in the adversary administration of justice.<sup>15</sup> And accordingly, notwithstanding the commonplaces of legal ethics, the partisan conception of lawyering remains in need of a defense.

I shall seek in these pages to offer a new justification for a partisan conception of legal practice—if not for lawyers' unreservedly adopting the

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client's objectives to any kind of 'moral filter' of their own design." 1 Geoffrey C. Hazard, Jr. & William Hodes, *The Law of Lawyering* § 1.2:301, at 36 (2d ed. 1990 Supp. 1996).

13. This point is powerfully developed in William H. Simon, *The Practice of Justice: A Theory of Lawyers' Ethics* (1998).

14. 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 pmb1. para. 8 (2003).

15. See generally Arthur Isak Applbaum, *Ethics for Adversaries: The Morality of Roles in Public and Personal Life* (1999); David Luban, *Lawyers and Justice: An Ethical Study* (1988).

bad man view of the law, then at least for their remaining substantially professionally detached from their private views of their clients' claims and certainly forbidden from imposing their private views (including of the law's internal purposes) over the objections or even reluctance of clients. Whereas the traditional adversary system defense is fundamentally an exercise in *moral* theory, this new argument will proceed in a self-consciously *political* mode and will turn on a freestanding idea of political legitimacy, which is qualitatively distinct from moral ideals, including even justice and its cognates.

I shall argue that partisan client-centered rather than impartial justice-centered lawyers are necessary for the legitimacy of adjudication (and indeed for the broader practices of applying general laws to particular cases). And although I shall not seek to establish the precise metes and bounds of the partisanship that legitimacy requires lawyers to display—or to ask how the positive law of lawyering stands with respect to the argument that I develop—it will be apparent that the required partisanship is substantial. Certainly, and for present purposes most importantly, it will be clear that although there are many things that lawyers may *not* do (including perhaps many things that they currently *do* do), legitimacy demands that lawyers whose clients pursue contrary aims sometimes restrain their own sense of what the law, sympathetically interpreted, requires.<sup>16</sup>

The defense of partisanship that I propose will not extend to all characteristically lawyerly activities—judges, after all, are lawyers too, as are many arbitrators and other third party neutrals.<sup>17</sup> And the case for partisanship will be stronger as lawyers' activities move nearer to addressing externally imposed resolutions of their clients' claims—because this is when the legitimacy of such resolutions is most insistently in need of a defense. Litigation, of course, represents the central example of such a case, but other activities, even those at some distance from litigation, also implicate the authority of the state's mechanisms for applying law to resolve disputes. Settlement negotiations most obviously proceed in the shadow of litigated outcomes, as do many regulatory matters. And even when lawyers are engaged as counselors, before any specific dispute has been joined, clients arrange their affairs against the backdrop of what they believe the law will allow, so that even here the law's legitimacy is

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16. Moreover, although the specific rules that I mention here 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 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.

17. The positive law recognizes this role for lawyers. See Model Rules of Prof'l Conduct R. 2.4 (2003).

implicated. The defense of lawyerly partisanship that I propose obviously does not extend to the case in which a client asks her lawyer for advice concerning the law's internal purposes (rather than for assistance in pursuing her private interests), and so the argument obviously will not rule out a justice-centered approach to some of lawyers' professional activities. But although I again do not seek to identify the argument's precise scope here, it will again be plain that the defense of adversary partisanship (if it succeeds) extends far beyond the bounds of litigation proper. Certainly, it will be de-legitimizing for a lawyer to counsel her personal views when doing so causes clients to doubt her loyalties and approach her as an arm of the state.

One final point is worth noting, which I include because, although I will not revisit the matter in the larger argument, it is important (especially nowadays). The defense of partisanship that I develop here does not apply in any natural way, and probably does not apply at all, to lawyers for the government. The government, after all, is not an ordinary disputant who confronts the authority of the state (through litigation or in some other way) but is, rather, itself *in authority*. Accordingly, an argument that bases the case for partisanship on the contribution loyal advocates make to legitimating the law in application does not extend to cases in which the law is applied to the government. Government lawyers, it seems to me, should more or less always pursue justice rather than seeking the most that the government can get away with.<sup>18</sup>

## I. TWO APPROACHES TO POLITICAL LEGITIMACY

The fundamental problem of politics is that people come into conflict about how their collective affairs should be arranged. People have incompatible interests, and insofar as they each pursue these narrow self-interests this leads to conflict. Moreover, although it is often thought that morality—and in particular the impartial idea that all people's interests are in some sense equally important—will eliminate or at least dampen political conflict, this is a mistake. Even people who display an impartial regard for one another will continue to disagree about their collective affairs, and will come into conflict with one another, insofar as they have inconsistent beliefs about what their several interests consist in or about what balance among these competing interests is just.<sup>19</sup> Secular humanists and religious

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18. This is recognized by the positive law in the narrow context of criminal prosecutions, *see, e.g.*, Standards Relating to the Admin. of Criminal Justice §§ 3-5.7(b), 3-3.9, 3-3.11(a), (c), on the ground, roughly, that the prosecution function is a special case of lawyering, made so in virtue of the special rights of criminal defendants. But if the argument that I propose is correct, then almost every form of lawyering on behalf of the government is a special case, and restrictions on the partisanship of government lawyers much more broadly are in order.

19. As Thomas Nagel observes, persons may all be "motivated by an impartial regard for one another [but] be led into conflict by that very motive if they disagree about what the good life consists in, hence what they should want impartially for everyone." Thomas Nagel, *Equality and Partiality* 154 (1991).

fundamentalists, for example, may both care deeply about promoting the good life for everyone on equal terms. But they will disagree about the most basic features of the good life (including even about whether it may be found in this world or in the next<sup>20</sup>) and about the most basic structure of equality (including even about whether impartiality requires concern for all or only for all the faithful<sup>21</sup>). In this and myriad other analogous cases, morality, and in particular the impartial concern for others that thinking morally involves, does not promote harmony but in fact itself presents an independent source of conflict, which is an *expression* of persons' moral commitments and not a *retreat* from them.

These conflicts are, moreover, ineliminable. They are inevitable products of the competition for scarce resources and the fact that the diversity of human experience and the complexity of human reason make pluralism the natural state of ethical life.<sup>22</sup> Collective life (and indeed peaceful coexistence) therefore requires people who are naturally free and independent, and capable of objecting and resisting against collective decisions, to accept and obey collective decisions even when they remain unpersuaded of the decisions' merits. And politics takes as its central task elaborating and marshalling reasons to obey.

Government naturally (indeed almost universally) addresses this problem by aspiring not just to acquire the power to enforce collective decisions but also to generate voluntary compliance by sustaining an agreement about which decisions to obey, even in the face of disagreement about which decisions to adopt. Government aspires, that is, to achieve *political legitimacy*, which is to say to attain a distinctively political kind of authority over the governed. Moreover, although some—philosophical anarchists<sup>23</sup>—have insisted that in spite of this natural aspiration, political legitimacy is impossible, so that government can never rise above brute coercion, the dominant traditions in political philosophy have resisted this despairing counsel and proposed routes by which government might achieve legitimacy.

These proposals fall into two camps. The first approach, exemplified in the work of John Rawls,<sup>24</sup> articulates a freestanding conception of political (as opposed to moral) equality that claims to underwrite political legitimacy. According to this approach, political power is “proper and hence justifiable only when it is exercised in accordance with a constitution the essentials of which all citizens may reasonably be expected to

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20. They will also disagree, therefore, about whether collective arrangements should serve the needs of this world or of the next.

21. This assumes that faith is available to all.

22. John Rawls has famously called this the “fact of reasonable pluralism.” John Rawls, *Political Liberalism*, at xvii (1993).

23. The clearest contemporary statement of this position appears in Robert Paul Wolff, *In Defense of Anarchism* (2d ed. 1998).

24. See John Rawls, *A Theory of Justice* (1971), and especially Rawls, *supra* note 22.

endorse,"<sup>25</sup> specifically because it is "consistent with their freedom and equality."<sup>26</sup> Insofar as a government abides by this "liberal principle of legitimacy,"<sup>27</sup> which establishes the ground rules for political life, it may be justified to each citizen, from that citizen's own point of view, even in the face of intractable first-order disagreement about what political policies are best and even when the government pursues (within these ground rules) particular policies that some citizens find unappealing. This approach to legitimacy places the *understanding* at the center of politics, proposing to achieve legitimacy by generating an agreement on abstract propositions about political essentials that may be sustained based on reason alone and entirely apart from any affective engagement with the actual political process.<sup>28</sup>

This theoretical approach to political legitimacy has been given powerful developments, including of course by Rawls himself. But these several theoretical elaborations of political legitimacy, indeed through their very appeal, emphasize a structural (and therefore ineliminable) shortcoming of theoretical approaches to legitimacy.<sup>29</sup> Even as each theory of legitimacy purports (credibly) to regulate political power in ways that fairly resolve disagreements among citizens about what first-order ends power should serve, and therefore to justify power to every citizen from her own point of view, the theories of legitimacy themselves remain inconsistent with one another. Indeed, as the enduring liveliness of the field of political philosophy directly illustrates, the inevitable disagreement among theories of political legitimacy is not disagreement *simpliciter* but rather *reasonable* disagreement, which, like moral disagreement, arises organically out of the diversity of perspectives and experiences of free and equal participants in any shared political life.<sup>30</sup> Such reasonable disagreement undermines the

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25. Rawls, *supra* note 22, at 217.

26. *Id.* at 218.

27. *Id.* at 217.

28. Process plays a role in Rawls's theory, to be sure. In particular, the original position through which Rawls's theory of justice arises presents a case of what he calls pure procedural justice: The original position provides a "correct or fair procedure" for reasoning about political justice in the sense that principles of justice adopted in the original position are "correct or fair, whatever [they are], provided that the procedure has been properly followed." Rawls, *supra* note 24, at 86. But although the original position invokes proceduralist ideas, it remains, as Rawls stresses, a "purely hypothetical situation," *id.*, and the appeal of the principles of justice that arise out of the original position depends on the theoretical appeal of the original position as a device for representing the problem of justice and not on any affective engagements that result from actually inhabiting it.

29. My emphasis on the need for political philosophy to take into account disagreement not just about the first-order uses of political power that a theory of legitimacy seeks to justify but also about legitimacy itself (disagreement, in other words, at every level of the theory) resembles Jeremy Waldron's emphasis on the importance of taking into account disagreement about justice. See Jeremy Waldron, *Law and Disagreement* 1 (1999).

30. This formulation of course tracks Rawls's account of reasonable *moral* pluralism. Rawls characterizes reasonable moral pluralism as "the inevitable long-run result of the powers of human reason at work within the background of enduring free institutions." Rawls, *supra* note 22, at 4. He therefore insists that it is "not an unfortunate condition of human life." *Id.* at 144. By applying the same logic to reasonable pluralism about political



theoretical approach to political legitimacy, because it reveals that the problem of legitimacy applies, recursively, even to the several theories that purport to resolve it.

Perhaps for this reason, governments do not restrict their exertions towards legitimacy to the theoretical model (although almost all governments do assert their legitimacy in theoretical terms) but instead apply a second, practical approach to sustaining their legitimacy, which at least complements the theoretical account of legitimacy and might even harbor aspirations to substitute for the theoretical account. This approach is practical because it replaces the theoretical approach's emphasis on abstract propositions about justified political power with an effort to elaborate a set of political institutions and practices through which the participants in politics might come to take authorship of political outcomes, including even outcomes that they find substantively unappealing and that their political participation sought to oppose.<sup>31</sup> Whereas the theoretical approach seeks substantive principles of legitimacy that may be appreciated apart from any participation in political practice, this practical approach emphasizes the affective consequences of actual engagement with political practice—that is, the influence that political participation aspires to have on the political attitudes of the participants. One might say, as a shorthand, that the practical approach to legitimacy replaces the theoretical approach's emphasis on the understanding with an emphasis on the *will*.

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legitimacy, I am turning the method of pluralist political philosophy in on itself. (The relation to Waldron's work, see *supra* note 29, is particularly close here.)

31. This characterization of the practical approach to political legitimacy may make it seem unfair of me to place Rawls—at least in his later work and in particular in Political Liberalism—in the theoretical camp. The idea that citizens who disagree about which policies are good or just may nevertheless unite around a set of institutions and practices that command allegiance based on freestanding political considerations may seem to bear a close resemblance to Rawls's idea of an overlapping political consensus among reasonable moral views. See generally Rawls, *supra* note 22. And Rawls, in essays leading up to *Political Liberalism*, does say that his conception of political legitimacy “is practical” and “presents itself not as a conception of justice that is true, but one that can serve as a basis of informed and willing political agreement.” John Rawls, *Justice as Fairness: Political Not Metaphysical*, 14 *Phil. & Pub. Aff.* 223, 230 (1985). But in spite of these superficial similarities, the practical approach to legitimacy as I understand it departs dramatically from even the later Rawls's views. First, it understands political disagreement to be both broader and deeper than Rawls supposes, so that the overlapping consensus among reasonable moral conceptions simply cannot be had. (This criticism is powerfully developed, although not in connection with the practical approach to legitimacy, in Joseph Raz, *Facing Diversity: The Case for Epistemic Abstinence*, 19 *Phil. & Pub. Aff.* 3, 32 (1990).) And, second, it proposes, against the backdrop of this broad and deep agreement, that politics must be practical in a much more intensive sense than Rawls supposes. Even in his later work, Rawls retains his conviction that legitimacy can be achieved by finding abstract principles upon which all citizens can agree apart from any actual political engagements with one another. Rawls's views remain theoretical in this sense—that they take philosophical theorizing about politics to be fundamental to political legitimacy. The view that I am proposing is practical in the strong sense that it rejects the centrality of philosophy. Political legitimacy depends, instead, on actual and affective participation in political life.

Unlike theoretical principles of legitimacy, which attempt (and promise) principled resolutions to political disagreements that establish settled limits on the exercise of political power, the practical approach to legitimacy seeks to stave off rather than to resolve political disagreements. The practical approach aspires to establish a provisional, although hopefully renewable, holding pattern, in which disputants must actually go through the political process in order to accept the authority of the political outcomes that the process generates. Elaborating the practical account of legitimacy therefore requires identifying the political practices and institutions that sustain this holding pattern and the individual authorship of political outcomes that it sustains in turn.

I shall argue that the legal process, including in particular through the contributions of adversary advocates, contributes significantly to the practical legitimation of political power. But before taking up this claim, it will be useful to take a brief detour through democratic theory, both because democratic politics presents a more familiar illustration of the practical approach to legitimacy and because the example of democracy will serve as a template for identifying the contribution to legitimacy made by the adversary legal process.

## II. THE EXAMPLE OF DEMOCRACY

Lived experience suggests that democracy is a substantial legitimating force in political life. Indeed, the connection between democracy and legitimacy is one of the fixed points of modern politics—it is, one might say, a phenomenon in search of an explanation. Both main traditions of philosophical thought about political legitimacy have sought to provide one. A brief discussion of the drawbacks of theoretical accounts of democracy's contribution to political legitimacy and the advantages of practical accounts will lay the groundwork for a more intensive investigation of the contributions to political legitimacy made by the adversary legal process.<sup>32</sup>

Theoretical accounts explain democracy's legitimating character by reference to a special application of the broader ideals out of which they construct the general principles of political legitimacy that they champion, for example by casting democracy as the political branch of a more general ideal of equality.<sup>33</sup> This idea appears in Rawls's early work, as in the

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32. This discussion reprises a longer argument that appears in Daniel Markovits, *Democratic Disobedience*, 114 *Yale L.J.* 1897, 1905-21 (2005).

33. An alternative approach connects democracy directly to legitimacy's concern for universal justification of political power, under the headings neutral or nonsectarian politics and public reason. This approach appears in Rawls's later work, which casts universally acceptable public reason as "characteristic of a democratic people," Rawls, *supra* note 22, at 213, and is developed by Bruce Ackerman, who expressly seeks to "reconcile majoritarianism with the principles of liberal dialogue," Bruce A. Ackerman, *Social Justice in the Liberal State* 277 (1980), that is, with the liberal demand for political legitimation on mutually acceptable terms, specifically by demonstrating that these principles require a decision procedure that is formally equivalent to majority rule. I do not address this alternative separately here, except to say that it also places democratic decision making, in

observation that “[p]erhaps the most obvious political inequality is the violation of the precept one person one vote.”<sup>34</sup> But it is most fully developed by Ronald Dworkin, who elaborates an account of democracy expressly in response to the question, “How would a community based on equal concern [for all its members] choose its representative officials?”<sup>35</sup> Dworkin observes that answers to this question naturally lead to a broadly substantive conception that identifies democracy as the form of government “most likely to produce the substantive decisions and results that treat all members of the community with equal concern,”<sup>36</sup> or, put slightly differently, to “improve the accuracy” of political decisions, by making them more consistent with the demands of equality.<sup>37</sup> This account of democracy therefore places democratic decision making, in the intuitive sense associated with elections and majority rule, at the mercy of the substantive equality principle from which democracy derives, so that voting must give way to equality’s demands whenever the two conflict. And Dworkin would indeed limit majoritarian decisions to the narrow class of what he calls choice-sensitive issues, that is, issues “whose correct solution, as a matter of justice, depends essentially on the character and distribution of preferences within the political community.”<sup>38</sup> Not many issues (and certainly not many politically vital issues) are choice sensitive, so that this approach to democracy is far removed from the majoritarian and procedural elements that dominate everyday democratic understandings—so far removed that the idea that democracy arises when equality is applied to politics turns out not to generate a practice of democracy, in the ordinary sense, at all. Certainly this approach cannot explain the wide range of disagreements to which the authority of democracy—the legitimacy of democratic decision—in practice extends.

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the intuitive sense associated with elections and majority rule, at the mercy of the ideals of liberal dialogue from which it begins, so that democracy is again not a freestanding ground of political legitimacy but rather a way of choosing among alternatives whose legitimacy has been established by other means. For a more detailed discussion of these ideas, see Markovits, *supra* note 32, at 1908-10.

34. Rawls, *supra* note 24, at 231. Rawls’s views were of course more subtle than this simple remark reveals. He acknowledged, for example, that the difference principle applies in this area to justify inequalities that benefit the worst off, so that political inequality is justified as long as it is “to the benefit of those with the lesser liberty.” *Id.* at 232.

35. Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* 184 (2000).

36. *Id.* at 186. Dworkin calls the formal conception of democracy “detached” and the substantive conception that he adopts “dependent.” *Id.* (emphasis omitted).

37. *Id.* at 204.

38. *Id.* Dworkin reveals how narrow this class is when he observes that “[t]hough it might seem odd,” he believes that it is “sensible” even “to speak of a decision . . . to give aid to the [Nicaraguan] Contras as either accurate or inaccurate,” so that his liberal conception of democracy requires that this decision be made accurately, regardless of citizens’ actual preferences or the outcomes of a majoritarian process. *Id.* As an example of a choice-sensitive issue, Dworkin imagines the decision “whether to use available public funds to build a new sports center or a new road system,” although even here he suggests that choice-insensitive issues like distributive justice may “merge in that decision.” *Id.*

The theoretical approach to democratic legitimacy denies that democracy in its common procedural sense can legitimately resolve deep disagreements about morality or justice and instead converts the democratic process into a residual category, to be employed only in the narrow range of cases in which liberal principles of justice produce indeterminate results. As Rawls admits, we “submit our conduct to democratic authority only to the extent necessary to share equitably in the inevitable imperfections of a constitutional system.”<sup>39</sup> Democracy’s broad contribution to legitimacy in actual political life must therefore be explained by other means, and the practical traditions of political legitimacy that I introduced earlier naturally suggest themselves. These traditions explain democracy’s contribution to political legitimacy in terms of the affective consequences of engagement with the democratic political process—that is, in terms of the influence that democratic politics aspires to have on the political attitudes of the persons who participate in it. Democracy functions, as Alexander Bickel said in elaborating a version of the practical view, “not merely as a sharer of power, but as a generator of consent.”<sup>40</sup> This account of democracy is naturally suited to explaining the breadth of democracy’s legitimating capacities in ordinary political experience. Because it accords the democratic process a freestanding political authority that does not depend on democracy’s convergence on antecedent ideals such as equality, the practical approach to democracy promises an expansive account of legitimate democratic decision, which may reach even cases in which democratic choices conflict with such ideals.<sup>41</sup>

The practical account of democracy proposes that the democratic process, properly constructed and managed, transforms citizens from isolated individuals into members of a democratic *sovereign*, with which they identify and whose will they take as their own even when they have been outvoted. It proposes that a well-functioning democratic process induces those who participate in it to take *authorship* of the collective choices that the process generates.<sup>42</sup> This proposal underwrites a practical theory of

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39. Rawls, *supra* note 24, at 355. Thus Rawls’s theory of justice restricts the democratic process by imposing substantive requirements on policy concerning not just basic liberties but the distributions of all primary goods, including income and wealth, powers and opportunities, and even the social bases of self-respect. *See id.* at 62.

40. Alexander M. Bickel, *The Morality of Consent* 15 (1975). Bickel was commenting approvingly on Edmund Burke, who famously championed the right of elected representatives to vote their consciences and connected this practice to the authority of representative government. *See* Edmund Burke, *Speech on Fox’s India Bill* (Dec. 1, 1783), in 5 *The Writings and Speeches of Edmund Burke: India: Madras and Bengal, 1774-1785*, at 378 (Paul Langford et al. eds., 1981).

41. *See, e.g.*, Robert Post, *Equality and Autonomy in First Amendment Jurisprudence*, 95 *Mich. L. Rev.* 1517, 1538 (1997) (reviewing Owen Fiss, *Liberalism Divided: Freedom of Speech and the Many Uses of State Power* (1996)) (“Approaches that attempt to maximize other kinds of equality of ideas or of persons are either implausible or inconsistent with the principle of collective self-governance [that is, democracy].”).

42. I borrow use of *authorship* in this connection from Robert Post. *See* Robert C. Post, *Democracy and Equality*, 1 *Law Culture & Human.* 142, 144 (2005); *see also* Robert C.

democratic political *legitimacy* because the sense of individual authorship of collective decisions that the democratic process sustains gives these decisions the *authority* over individual citizens that political legitimacy requires. The practical view of democracy proceeds, one might say, in the spirit of Rousseau, defusing the problem of political legitimacy by proposing that democracy presents a political mechanism through which each person “uniting with all, nevertheless obeys only himself and remains as free as before.”<sup>43</sup>

The great question for the practical approach to democratic legitimacy is just how an affective engagement with the democratic process sustains this sense of authorship even of outcomes that a person opposed. Rousseau’s own view seems to have been that in properly functioning democratic systems, the democratic process simply *subsumes* citizens’ political agency. Thus, Rousseau claims that “[t]he citizen consents to all the laws, even to those passed against his will, and even to those that punish him when he dares to violate one of them.”<sup>44</sup> And he adds, imagining a conflict between his private will and the democratic (general) will, that “[i]f [the] private will had prevailed, I would have done something other than what I wanted. It is then that I would not have been free.”<sup>45</sup> This is at once implausible and sinister—it carries the deference to the collective that political legitimacy necessarily involves over into a denial of the individual self that cannot be had and should not be sought. But the idea behind the practical approach should not be tarnished by Rousseau’s excesses in developing it. Joint action has intrinsic and not just instrumental appeal for people, who can be lonely and generally dislike it, and whose natural state is therefore not solitariness but rather engagement with others. Although political life is not the only way in which people can engage one another,<sup>46</sup> it is a properly

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Post, *Between Democracy and Community: The Legal Constitution of Social Form*, in NOMOS XXXV: Democratic Community 163, 170 (John W. Chapman & Ian Shapiro eds., 1993) (arguing that democracy makes collective self-government possible by “social processes anterior to majoritarian decision making that somehow connect the democratic system as a whole to the autonomous will of the entire citizenry”). In both essays, Post is following Hans Kelsen, who observed that “[a] subject is politically free insofar as his individual will is in harmony with the ‘collective’ (or ‘general’) will expressed in the social order. Such harmony of the ‘collective’ and the individual will is guaranteed only if the social order is created by the individuals whose behavior it regulates.” Hans Kelsen, *General Theory of Law and State* 285 (Anders Wedberg trans., 1945). The idea of authorship also appears in Habermas, who observes that “legal persons can be autonomous only insofar as they can understand themselves, in the exercise of their civic rights, as authors of just those rights which they are supposed to obey as addressees.” Jürgen Habermas, *On the Internal Relation Between the Rule of Law and Democracy*, 3 *Eur. J. of Phil.* 12, 15 (1995).

43. Jean-Jacques Rousseau, *On the Social Contract* 53 (Roger D. Masters ed., Judith R. Masters trans., St. Martin’s Press 1978) (1762).

44. *Id.* at 110.

45. *Id.* at 111.

46. Friendships and family relations constitute the most familiar forms of nonpolitical communal engagement. And other forms also exist, including forms that do not require the intimacy that friendships and families necessarily involve. I cast promise and contract as examples of communal engagement even among strangers in Daniel Markovits, *Contract and Collaboration*, 113 *Yale L.J.* 1417 (2004).

prominent expression of the human instinct in favor of community. People therefore join in politics not merely to coordinate their conduct better to serve pre-political ends, but also (and perhaps even principally) to associate themselves with one another through collective action (to belong to a group), so that politics is an inner need, and not just a technological necessity.<sup>47</sup> This expresses itself most immediately through what Jeremy Waldron has called a “felt need . . . for a common framework or decision or course of action on some matter, even in the face of disagreement about what that framework, decision or action should be.”<sup>48</sup> And democracy appears, at least in the shadow of the Enlightenment’s rejection of caste and class, as a natural way of satisfying this need.

The democratic politics that answers the need for community, and that generates a democratic sovereign whose decisions command the allegiance even of dissenters, must involve more than the aggregation of antecedently held preferences associated with simple majoritarianism.<sup>49</sup> Instead, the democratic political process must generate engagements that break through, that penetrate into, the preferences to be aggregated. Most familiarly, democratic deliberation and the institutions that support it—in particular venues for public debate such as a free press<sup>50</sup>—encourage political engagements among citizens once political debate has been joined and underwrite forms of respect and loyalty that support the political legitimacy of outcomes even vis-à-vis those who have lost the debate.<sup>51</sup> And, more subtly but no less importantly, the formal structure of elections integrates ordinary citizens into the apparatus of government in legitimacy-sustaining ways. “Voter,” after all, is a public office, and a citizen can be a voter, as opposed to a revolutionary who participates in an election because it suits her, only if she acknowledges the legitimacy of the election’s outcome, so that democracies that encourage their citizens to conceive of themselves as voters therefore already sow the seeds of their own practical legitimacy. Moreover, the mass political parties that accompany democracy similarly implicate their members in the legitimacy of the political processes they seek to influence. Political parties naturally evolve to pursue not raw power

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47. I owe this way of putting the point to Bernard Williams.

48. Waldron, *supra* note 29, at 102.

49. Mere aggregation, even when it is fair, cannot sustain the authorship of its results on which democratic political legitimacy depends. Certainly the most familiar forms of aggregation—lotteries, for example, or markets—do not do so. And voting separated from the thicker forms of democratic engagement—public deliberation, political parties, a free press—would fare no better.

50. Democracies also encourage deliberation through political mechanisms—for example, the separation of powers in the United States and proportional representation on the European Continent—that force coalition-building at various stages in the political process and therefore demand the forms of political debate and engagement that are necessary for sustaining coalitions. For a slightly more detailed, although still brief, account of these matters, see Markovits, *supra* note 32, at 1918-21.

51. This is the theme that unifies the several approaches to deliberative democracy. See, e.g., Benjamin Barber, *Strong Democracy: Participatory Politics for a New Age* (1984); 1-2 Jürgen Habermas, *The Theory of Communicative Action* (Thomas McCarthy trans., 1984).

(that is, the direct capacity to implement policy) but rather the intermediate end of political office, narrowly understood. And political offices, being creatures of the wider political system in which they appear, can be obtained only against the backdrop of the legitimacy of the procedures that this system employs for allocating them. (Revolutionaries may implement policy when they overthrow a government, but they cannot become senators.)<sup>52</sup> This once again encourages party members to recast their political ambitions in forms that implicitly accept the authority of the wider political system, including even the authority of competing parties when they win elections. These features of democratic elections penetrate individual citizens' political preferences in legitimacy-reinforcing ways even before what is ordinarily thought of as politics—that is, competition over whose preferences will dictate policy—has begun. They contribute to shaping the preferences of democratic citizens in ways that encourage the citizens to take authorship of democratic outcomes and acknowledge their legitimacy.

Much more would have to be said, of course, to convert these rough reflections into a mature account of the practical legitimacy of democratic politics. The ways in which democratic institutions and political engagement penetrate citizens' preferences would have to be explained in greater detail. And it would be necessary to demonstrate that the feelings of authorship that democratic politics produces are justified (or at least that they can withstand rational reflection) and not mere ideology. (Here there is room for reintroducing some of the concerns that generated the theoretical treatment of legitimacy, although not in the expansive form that the theoretical treatment gives them.) But although these are important topics, they can be set aside for now. What has been said so far is enough to establish a template for the account of the adversary system's contributions to political legitimacy that follows.

### III. AN ANALOGY TO ADJUDICATION

The example of democracy illustrates, in familiar circumstances, both the shortcomings of theoretical approaches to political legitimacy and the appeal of an alternative practical approach. Moreover, the account of democratic legitimacy may be reprised in the less familiar case of the legal process. The legal process presents a problem of political legitimacy that

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52. Thus, although it might be thought that political parties are important primarily because they connect parliamentarians to the masses (serving to keep ruling elites informed of the wishes of the people), political parties' greater contribution to politics may actually be to connect the masses to the parliament, in the sense of channeling political ambitions into forms that implicitly recognize government authority. This is probably especially true in democracies, because although parties can exist under many political regimes, they are most broadly appealing in democracies. The best historical account of the role of political parties in sustaining democratic legitimacy appears in Richard Hofstadter, *The Idea of a Party System: The Rise of Legitimate Opposition in the United States, 1780-1840* (1969). An underappreciated early account is Martin Van Buren, *Inquiry into the Origin and Course of Political Parties in the United States* (Smith T. Van Buren et al. eds., 1867).

runs parallel to the problem of the legitimacy of the political process, although at a different point in a society's overall structure of government. And the adversary system sustains the legitimacy of the legal process in much the same way as democracy sustains the legitimacy of the political process. The analogy to democracy therefore promises to generate a reconstruction of the adversary system defense that can underwrite a rich and appealing political account of the distinctively lawyerly virtues. This argument must proceed slowly, however, first elaborating a general approach to the legitimacy of the legal process and only then turning to the role that this general approach to legitimacy establishes for adversary advocacy in particular.

Citizens may naturally object to their government's authority at two places: first, when the government, most characteristically through legislation, adopts general rules concerning how it will exercise its power; and, second, when the government, through executive enforcement or adjudication, applies these general rules to particular facts in particular cases. Moreover, although collective decisions must be legitimated at each of these places, the democratic process engages only the first of them, so that although democracy is a powerful legitimating force in politics, it does not exhaust the opportunities for legitimation or complete the legitimation of political power by itself. Nor does democracy in fact stand alone in the theories of political legitimacy in which it figures so prominently. Instead, political philosophy typically pairs the arguments about democratic legitimacy through which it explains the general authority of governments with arguments about the legitimacy of adjudication (typically proceeding under the heading "the rule of law") that support the authority of a government in connection with specific applications of its powers to particular cases. It is, as Karl Llewellyn said, one of the "law-jobs" to sustain authoritative resolutions of "trouble cases"—cases in which general principles do not straightforwardly resolve themselves into consensus outcomes.<sup>53</sup> And the process of adjudication establishes the context in which lawyers go to work.

One might say, then, that what democracy is to political legitimacy at wholesale, adjudication is to political legitimacy at retail.<sup>54</sup> And a

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53. See K.N. Llewellyn & E. Adamson Hoebel, *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence* (1941).

54. This idea, that even laws that have been adopted by legitimate political processes face a separate and independent challenge to their legitimacy when they are actually applied, is essential to the argument to come. It is also far from universally accepted. W. Bradley Wendel, for example, has recently argued that "lawyer[s] must respect the achievement represented by law: the final settlement of contested issues (both factual and normative) with a view toward enabling coordinated action in our highly complex, pluralistic society," and that this requires them to constrain their partisanship according to (their views of) the law's underlying purposes. W. Bradley Wendel, *Professionalism as Interpretation*, 99 *Nw. U. L. Rev.* 1167, 1168-69 (2005); see also Robert W. Gordon, *Why Lawyers Can't Just Be Hired Guns*, in *Ethics in Practice: Lawyers' Roles, Responsibilities, and Regulation* 42, 47 (Deborah L. Rhode ed., 2000) (arguing that the ethics of advocacy must be approached against the backdrop of a rebuttable "presumption that the law very imperfectly sets forth an



characteristically adversary approach to adjudication is therefore justified insofar as lawyers' adversariness contributes to the retail legitimation of political power that the legal process is called on to provide. This connection to political legitimacy makes it natural for justifications of adversary advocacy to proceed in parallel to justifications of democracy. And indeed they do.

On the one hand, the traditional elaboration of the adversary system defense closely resembles the familiar theoretical claim that the democratic process is justified because it best serves antecedent ideals of equality and neutrality. In particular, it proposes that the balance between partisan lawyers established by the adversary system legitimates the retail application of political power because it best serves antecedent ideals of truth and justice—indeed, that the adversary process is the most accurate engine of truth and justice that legal science can design and implement. Moreover, the familiar shortcomings of this development of the adversary system defense, which are directly connected to its theoretical structure, are analogs of the familiar shortcomings of the theoretical account of democracy. Thus, it is natural to wonder how much adversariness in lawyers *really* best serves truth and justice overall—for example, whether a broad duty to preserve client confidences really does more to vindicate than to disguise the facts. Such worries inexorably press towards abandoning the adversary system as we know it in favor of a system in which, as William Simon proposes, lawyers abandon the deference to clients that adversary partisanship involves and instead, “take those actions that, considering the relevant circumstances of the particular case, seem likely to promote justice,”<sup>55</sup> meaning a resolution on the “legal merits,” to be established by reference to the broader purposes and principles of the substantive law.<sup>56</sup> Certainly the theoretical approach to adversary advocacy cannot justify a lawyer's using her adversary expertise successfully to manipulate the law against its clear purpose.

Just as the theoretical suggestion that democratic legitimacy turns on democracy's promotion of equality naturally leads to constraining the ordinary processes of democracy (such as voting) to secure substantively equal outcomes, so also the theoretical suggestion that the legitimacy of

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approximately agreed-upon minimal framework of common purposes, a social contract”). Note that Wendel draws a distinction, in this respect, between legal and extralegal values, and argues in particular that lawyers may not “use . . . moral reasons that are not embodied in governing legal texts to block [a] client's attempt to exercise a legal right.” W. Bradley Wendel, *Civil Obedience*, 104 Colum. L. Rev. 363, 385 (2004). Whereas lawyers who impose the law's purposes on their clients support the political resolutions that the democratic process has achieved, lawyers who impose moral (or other) values that have not been incorporated in the law undermine this resolution. This approach, it seems to me, ignores the difference between cases in which a law is comfortably (even unthinkingly) obeyed and in which it meets with greater resistance. In the second type of case, the authority of law rests as much in its application as in its adoption. And legitimacy in application requires client-centered rather than justice-centered advocates.

55. Simon, *supra* note 13, at 138 (internal quotation marks omitted).

56. *Id.*

adversary advocacy turns on its service to truth and justice leads naturally to constraining the ordinary adversary process (including lawyers' partisanship) to secure true and just outcomes. Indeed, just as the theoretical approach to democracy reaches its apogee in Dworkin's view that the ordinary democratic process should be confined to deciding questions in which majority rule is *constitutive* of equality, so too the theoretical approach to adversary advocacy reaches its highest expression in the view that lawyers should "think like judges in determining what the relevant law is,"<sup>57</sup> and may avoid behaving like judges only in cases in which there exist real judges who are capable of effectively imposing this judicial sensibility.<sup>58</sup> The analogy between the theoretical approaches to democracy and adversary advocacy is therefore complete: In each case, the theoretical approach exerts an almost irresistible pressure towards restricting the procedural elements, such as voting and partisan advocacy, that lie at the cores of these practices as they are commonly understood; and in each case, the goal of legitimating the folk practices in question escapes the theoretical approach.

On the other hand, a practical reconstruction of the adversary system defense, which closely parallels the practical reconstruction of democracy, naturally presents itself. The theoretical approach fails to take advantage of the legitimating powers of affective engagement with the legal process (just as the theoretical account of democracy fails to exploit the legitimating powers of affective engagement with the democratic process). In particular, the theoretical version of the adversary system defense approaches the legal process as a technology for satisfying process-independent claims (just as the theoretical approach to democracy treats the democratic process as a technology for producing process-independent equality). The theoretical approach treats process, to borrow a word from legal sociology, as *transparent*, in the sense that it has "no effect on the values, goals, and desires of those who use the system,"<sup>59</sup> so that one can look backwards through a legal proceeding, from its end to its beginning, and see the same claims asserted throughout, in undistorted form.

But this is, as the sociologists point out, a mistaken account of legal process, associated with the formalism of classical jurisprudence, and now discredited. (This is an independent ground for rejecting the traditional adversary system defense.) Instead, "the relationship between objectives [in a dispute] and mechanisms [of dispute resolution] is reciprocal: not only do objectives influence the choice of mechanisms, but mechanisms

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57. Robert W. Gordon, *The Radical Conservatism of The Practice of Justice*, 51 Stan. L. Rev. 919, 922 (1999) (reviewing Simon, *supra* note 13).

58. *Id.*

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

chosen may alter objectives.”<sup>60</sup> This fact about the legal process opens up the way to a practical reconstruction of the adversary system defense, which (again analogizing to the practical account of democracy) places the affective consequences of engagement with the legal process—the transformations wrought by the process—at the center of its legitimacy.

#### IV. THE TRANSFORMATIVE LEGAL PROCESS

Like democracy, the legal process legitimates the application of political power through the affective engagements it requires of the parties to legal disputes, in particular by penetrating the ideals and preferences of these parties. In this way, the legal process legitimates disputes not by reaching settlements that the participants would have accepted before going through the process, but by transforming the participants (through engaging them) so that they come to take authorship of the resolutions that the process produces.

As the sociology of law observes, the legal process and the activities of the lawyers who administer it penetrate the attitudes of the 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.”<sup>61</sup> Lawyers “objectify” their client’s arguments and “set them apart from the particular interests they represent,”<sup>62</sup> so that the client’s positions come to be seen as participating in broader principles “in terms of which . . . binding solution[s] [to disputes] can be found.”<sup>63</sup> The lawyers who administer the legal process serve as “culture broker[s]” for their clients,<sup>64</sup> organizing and transforming their clients’ claims in terms of this discourse to render them more persuasive.<sup>65</sup> At an intermediate depth, lawyers and the legal process “test[] the reality of the[ir] client[s]’ perspective[s],”<sup>66</sup> piercing unreasonable hopes and inaccurate perceptions<sup>67</sup> and, by contrast, legitimating the other elements of their clients’ positions that are not

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60. 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 (1980-81).

61. Lynn Mather & Barbara Yngvesson, *Language, Audience, and the Transformation of Disputes*, 15 *Law & Soc’y Rev.* 775, 791 (1980-81).

62. Ronen Shamir, *Managing Legal Uncertainty: Elite Lawyers in the New Deal* 38 (1995).

63. Maureen Cain, *The General Practice Lawyer and the Client: Towards a Radical Conception*, 7 *Int’l J. of the Soc. of L.* 331, 343 (1979) (emphasis omitted).

64. Mather & Yngvesson, *supra* note 61, at 792.

65. Stewart Macaulay, *Lawyers and Consumer Protection Laws*, 14 *Law & Soc’y Rev.* 115, 125 (1979).

66. Felstiner, Abel & Sarat, *supra* note 60, at 646.

67. See Jeffrey Fitzgerald & Richard Dickins, *Disputing in Legal and Nonlegal Contexts: Some Questions for Sociologists of Law*, 15 *Law & Soc’y Rev.* 681, 698 (1980-81).

pierced.<sup>68</sup> And at the deepest level, an engagement with the legal process does not just translate or test disputants' claims but fundamentally reconstitutes them, specifically 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).<sup>69</sup> Indeed, the legal process can sometimes even induce disputants to recognize a still deeper contingency in their demands, as they come to see a "problem as an adjustment between competing claims and interests, rather than as one warranting a fight for principle."<sup>70</sup>

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."<sup>71</sup> Indeed, the transformative effect on a dispute of the legal process is potentially so powerful that "the transformed dispute can actually become *the* dispute,"<sup>72</sup> so that the parties abandon any of their demands that cannot be accommodated within the transformation.

When this happens, the legitimacy of the legal process naturally follows, because the reconstructed disputes and the resolutions that the legal process proposes have been tailored to suit each other, so that parties who come (through their affective engagements with the legal process) to see their disputes as the legal process proposes also come to accept the resolutions that the legal process recommends. Indeed, someone who engages the legal process to resolve a dispute but denies its legitimacy when her claims fail on their legal merits commits bad faith against the legal process—she in fact retains unreconstructed and perhaps even unreasonable brute demands even as she purports to be asserting reconstructed, reasonable claims of

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68. This effect emphasizes "the 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." Talcott Parsons, *The Law and Social Control*, in *Law and Sociology: Exploratory Essays* 56, 70 (William M. Evan ed., 1962).

69. 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. See *id.*

70. Macaulay, *supra* note 65, at 128.

71. 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, so that 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 remains generally in sympathy with Fuller's broader emphasis on the legitimating character of adjudication. See, e.g., Fuller, *supra* note 69.

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

right. And she therefore escalates the dispute from a simple disagreement into a case of deception and manipulation—one might even say fraud—which is something that most disputants will naturally resist as inconsistent with their basic commitments to respect persons.

#### V. LEGITIMATION AS A POLITICAL IDEAL

This account follows in a long tradition that emphasizes the legal process's contribution to political cohesion and treats the lawyers who administer the process as peacemakers. It is as old, at least, as Tocqueville's impressed assessment of the lawyerliness of Americans, who, even in "their daily controversies," tend to "borrow . . . the ideas, and even the language, peculiar to judicial proceedings."<sup>73</sup> Indeed, even the legal profession's harshest critics acknowledge that lawyers serve as experts who mediate between citizens and the state,<sup>74</sup> so that the legal process complements democracy's efforts in support of political stability.

It is important to emphasize the *political* character of the legitimation that adversary adjudication sustains. To accept the legitimacy of the legal process is not to applaud or even to welcome its outcomes. In particular, accepting the legitimacy of adjudication does not require believing that the legal process has reached the just or accurate outcome. That would be too much to ask. Just as the democratic process cannot possibly eliminate political disagreement at wholesale, so adjudication cannot possibly eliminate disagreement at retail: In each case, losers will often continue to believe (reasonably) that they are in the right. Instead, adjudication, like democracy, aims only to persuade disputants that they are obligated to comply with its outcomes even when they remain unpersuaded on the merits. It aims, that is, to exclude disputants' independent judgments of the merits from their grounds for resisting, and in this sense to achieve authority. And indeed, although dissatisfaction with adjudication, especially among those who have just gone through it, is one of the banalities of contemporary legal culture, the acceptance of adjudication's legitimate authority in spite of this dissatisfaction is equally entrenched in the culture. Disputants commonly satisfy verdicts without the need for separate enforcement proceedings. And even when voluntary compliance with adjudication breaks down—as, for example, in connection with the collection of child support from absentee fathers<sup>75</sup>—the success of resistance against judgments only emphasizes the extent to which

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73. 1 Alexis de Tocqueville, *Democracy in America* 357 (Francis Bowen ed., Henry Reeve trans., 6th ed., Boston, John Allyn 1876) (1835).

74. See Richard L. Abel, *American Lawyers* 34-35 (1989).

75. See, e.g., Drew A. Swank, *The National Child Non-Support Epidemic*, 2003 Mich. St. DCL L. Rev. 357, 358-59. But note that even here there is some reason to believe that a significant portion of delinquency is caused by inability rather than unwillingness to make payments. See Ronald K. Henry, *Child Support at a Crossroads: When the Real World Intrudes Upon Academics and Advocates*, 33 Fam. L.Q. 235, 237 (1999).

compliance with the legal process more generally exceeds whatever compulsion legal institutions could plausibly assert.

But these observations do not yet justify the lawyer's conduct or the transformative effects of the legal process, because stability is not the only political value and even peace is not worth every price. And the dominant view among those who emphasize the transformative character of the legal process is critical of lawyers' contributions to dispute resolution. According to this view, the transformations that the legal process induces in disputants' attitudes, and therefore resolutions to disputes that depend on these transformations, cannot be justified in a principled way. The legal process, on this view, is merely a tool of ideology—a way of manipulating certain litigants to get them to accept being cheated. This happens most dramatically when lawyers persuade their clients simply to abandon claims or defenses that are justified, as when public defenders “cool[] out” criminal defendants and get them to accept punishments that they do not deserve,<sup>76</sup> or when lawyers “manipulate[] and fool[]”<sup>77</sup> consumer-clients about their rights under consumer protection laws and in this way “lead the client[s] to redefine the situation so that [they] can accept it.”<sup>78</sup> It also happens, although more subtly, when the transformations wrought by the legal process deprive even surviving claims of their principled content, for example when engagement with the legal process that administers worker's compensation in the face of industrial accidents “convince[s] workers to rely on employer paternalism to ensure their safety and relinquish claims to control the workplace.”<sup>79</sup> In these ways, and in myriad others, lawyers and the legal process support transformations in disputes that “create ends so that clients come to want—or at least accept—what the system is prepared to deliver.”<sup>80</sup> And the “social construction of the self through ideology and language”<sup>81</sup> that is imposed by the transformative legal process involves “depoliticization, apathy, anomie”<sup>82</sup> and so “suppresses the full potential of the self.”<sup>83</sup> The legal process, to put it bluntly, secures peace only by abandoning justice.

There is much in this view, to be sure, and the peaceful resolutions to disputes that the transformative legal process sustains certainly can come at the expense of some measure of justice. But criticisms of the legal process that focus exclusively on shortfalls in justice take aim at a conception of the legal process that is mistaken in two related ways. First, these criticisms treat procedure as transparent rather than transformative (a strange irony in

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76. Abraham S. Blumberg, *The Practice of Law as a Confidence Game: Organizational Cooptation of a Profession*, *Law & Soc'y Rev.*, June 1967, at 15, 28.

77. Macaulay, *supra* note 65, at 159.

78. *Id.* at 124.

79. Felstiner, Abel & Sarat, *supra* note 60, at 644 (citing James Weinstein, *Big Business and the Origin of Workman's Compensation*, 8 *Labor History* 1560 (1967)).

80. Trubek, *supra* note 59, at 122.

81. *Id.* at 125.

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

83. Trubek, *supra* note 59, at 125.

criticisms that belong to a tradition whose descriptive components emphasize that the legal process inevitably transforms disputes). Insofar as procedure is transformative, the outcomes that disputants are prepared to accept after having engaged the legal process will *necessarily* differ from the outcomes that they set out to pursue through this process or that they regarded as antecedently just, and disputants who have come through the legal process will prefer these outcomes to alternatives that they initially rated more highly. It is therefore unreasonable to evaluate post-process outcomes based exclusively on pre-process attitudes and standards. Unless one is prepared to cast the legal process's transformative powers as absolutely and irredeemably oppressive, one must approve some portion of the inevitable departures from antecedent notions of justice that the process generates. This is just the retail expression of a phenomenon that the experience of democracy makes familiar at wholesale, namely that citizens properly prefer to be governed by less just laws that enjoy a democratic pedigree over being governed by more just laws that do not.

Second, and relatedly, exclusively justice-based evaluations of the legal process attribute to that process the ambitions associated with the theoretical rather than the practical approach to politics. The appropriate way to approach the legal process, from a practical perspective, is to ask not whether it is just but rather whether it is *legitimate*—not whether its outcomes satisfy antecedent principles but rather whether the transformations occasioned by engagement with the legal process can sustain the disputants' sense of authorship of the outcomes that these engagements have produced.<sup>84</sup> As at the wholesale level, so also (if less familiarly) at retail, legitimacy is the most that can be hoped for in the shadow of the deep and intractable theoretical disagreements that disputes involve—including disagreements not just about the facts or the legal and moral values that are at play but also about how justly to resolve disagreements concerning these facts and values. Transparent procedures that answer to theoretical ideals of justice simply cannot sustain orderly dispute resolution in these circumstances, because they themselves inevitably become subjects of disputes. Only transformative procedures, which answer to practical conceptions of legitimacy, can hope to sustain a stable political life, and both democracy (at wholesale) and the legal process (at retail) must be approached keeping these basic features of politics in mind. It is therefore a piece of good fortune—and not a thing to be lamented—that our practical nature leaves us susceptible to the transformative effects of procedure, for if we were not so susceptible, collective life would not be possible for us.<sup>85</sup>

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84. Injustice that becomes too pronounced may of course threaten this sense of authorship and undermine legitimacy, but justice is not (nor indeed could it be) a necessary condition for legitimacy.

85. This idea is more emphasized in political literature than in political philosophy. A particularly forceful literary example is Robert Bolt's treatment of Thomas More, whose central theme is to celebrate the political possibilities brought on by human impurity. *See*

## VI. ADVERSARY ADVOCACY REDUX

In short, “the lawyer’s job,” as Robert Gordon says, “is selling legitimacy,”<sup>86</sup> not at wholesale but at retail, one client at a time. To do so, he must “mediate between the universal vision of legal order and the concrete desires of his clients.”<sup>87</sup> Of course, this practical account of retail political legitimation and the legal process depends on the effectiveness of the legal process at penetrating disputants’ attitudes and sustaining the transformations in disputants’ attitudes and the sense of authorship of outcomes to which it aspires. Moreover, even if the argument succeeds in demonstrating that justice is an inappropriate standard for judging the legal process (as it is an inappropriate standard for judging the democratic process), the practical approach to the legal process cannot rest on the bare fact that disputants accept authorship of the resolutions that the legal process proposes. A merely subjective experience of authorship of an outcome may be manufactured in ways that undermine its capacity to legitimate, even on the practical view. Thus, the sense of authorship may be secured by deception, for example about the relative benefits and burdens that a particular way of resolving a dispute imposes on the disputants, or by coercion, as when the accused at show trials come to believe their confessions. More broadly, such authorship may belong to larger patterns of ideological manipulation designed to cause disputants to accept burdens that they would be better off without, for example, when victims of sexual violence internalize norms of chastity that cause them to blame themselves. In all these cases, the experience of authorship that the legal process engenders is a kind of alien attitude, which overwhelms rather than expresses disputants’ native practical personalities, and it therefore cannot sustain the practical political legitimacy to which the legal process aspires.

In order for the legal process to legitimate the retail application of political power, the authorship of outcomes that follows engagements with the process must be more durable and more secure than in the examples just discussed: It must be assumed freely rather than through fraud or force, and it must be authentic rather than ideological. These requirements are, to be

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Robert Bolt, *A Man For All Seasons* (1962). Bolt’s More insists, for example, that even imperfect laws must be respected, because to do otherwise invites catastrophic conflict. “This country’s planted thick with laws,” More says, “man’s law, not God’s—and if you cut them down . . . d’you really think you could stand upright in the winds that would blow then?” *Id.* at 66. And he emphasizes how unsuited man is to standing on principle, observing that “God made the *angels* to show him splendor . . . . But Man he made to serve him wittily, in the tangle of his mind . . . [so that] [o]ur natural business lies in escaping.” *Id.* at 126. The historical More, incidentally, probably took quite the opposite line on these matters, and seems to have gone to his death convinced that martyrdom would bring him closer to God.

86. 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 W. Gawalt ed., 1984).

87. *Id.*



sure, weaker than the requirement, associated with the theoretical approach to the legitimacy of the legal process, that adjudication must secure substantive justice. But they nevertheless have real bite. Thus, the practical legitimacy of the legal process requires that the sense of authorship of outcomes that the process produces survives even when disputants learn whose interests it serves, for example, or how (that is, by what methods) the legal process established this sense of authorship in them (and how the transformations that followed their engagements with the legal process fit into their broader ethical and political attitudes). In short, the practical political legitimacy of the legal process requires that the experience of authorship that the legal process engenders remains stable in the face of the rational reflection of those who experience it, when they apply the critical faculties that they have or can develop.

These considerations naturally return the argument to adversary advocacy and generate a practical reconstruction of the adversary system defense. In place of the (failed) theoretical attempt to justify the adversary system on the ground that it promotes substantively accurate and just legal outcomes, this practical approach proposes to defend the adversary system by placing adversary advocacy at the center of the legal process's retail legitimation of political power. According to this argument, adversary advocacy is essential to the legal process's capacity to transform disputants' attitudes so that they take authorship of its outcomes, and, moreover, to ensuring that this sense of authorship remains stable in the face of rational reflection among those who experience it. Adversary advocacy is thus essential to the political *legitimacy* of the legal process.

It is not surprising that the practical approach to legitimating the legal process should emphasize the lawyer-client relation. This relation, as Talcott Parsons observes, "is focused" on the "smoothing over" of "situations of actual or potential social conflict."<sup>88</sup> Indeed, the transformative engagements with the legal process that generate the experience of authorship of outcomes on which practical legitimacy depends are administered directly through the lawyer-client relation. Moreover, it is not surprising that the *adversariness* of lawyers should figure particularly prominently in this context, as a support for the transformative influence of the legal process. The lawyer, Gordon observes, "cannot deliver unless she can make plausible arguments rationalizing her client's conduct within the prevailing terms of legal discourse,"<sup>89</sup> 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."<sup>90</sup> Adversary advocacy—including the basic ideals of lawyer loyalty and

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88. Parsons, *supra* note 68, at 63.

89. Gordon, *supra* note 86, at 53-54.

90. *Id.* at 54.

client control—is therefore a necessary condition for the transformative power of the legal process, without which the legal process could not reliably penetrate disputants' attitudes and certainly could not underwrite transformations that remain stable in the face of disputants' rational reflection.<sup>91</sup>

The adversariness of lawyers is necessary for sustaining all the transformations that the legal process engenders—from the shallowest to the deepest. Even the most superficial transformations, associated with the mere translation of claims from ordinary into legal language, will be stable only if clients place a high degree of trust in lawyer-translators. Specifically, clients must trust first in lawyers' capacity to *understand* their claims and, second, in lawyers' commitments to *fidelity* in translation (even when fidelity requires lawyers to ignore their own assessments of the clients' claims). Only loyally 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. If lawyers retreat from adversary ideals of lawyer loyalty and client control, their efforts at translation will no longer be trusted by clients but will instead be experienced as foreign and hostile, so that they disrupt rather than enhance the clients' engagements with the legal process. Insofar as lawyers reject adversary advocacy in favor of a more positively capable conception of their professional roles, lawyers' professional behavior "grows introverted, preoccupied with its own norms and activities,"<sup>92</sup> so that the "institution [of the legal profession] develops a carapace, impermeable to external information, prescription, or influence."<sup>93</sup> And when this happens, lawyers' efforts at translation inevitably fail, and "[t]he problems [the legal profession] handles are the problems defined by the institution, not the society; the solutions it

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91. It is worthwhile expressly to distinguish my approach from another, very different claim about the contributions that lawyers make to resolving disputes, which gives lawyers a role in dampening disputes while holding on to a *transparent* view of procedure. According to this claim, lawyers (unlike most clients) are repeat participants in the legal process and (unlike clients) can therefore establish reputations for cooperative dispute resolution that can help clients to avoid the prisoner's dilemma aspect of much litigation and can therefore improve the efficiency of outcomes. See Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict between Lawyers in Litigation*, 94 Colum. L. Rev. 509 (1994). Although I do not deny that cooperative lawyers can have this effect, the efficiency gains associated with cooperative lawyering will come at some cost to the legitimacy of the legal process, at least on the practical account of legitimacy that I am proposing. Lawyers can exploit reputations for cooperation only if they can resist when clients (who are not repeat players and have no reputations to protect) issue instructions to defect. As Gilson and Mnookin observe, "client-centered advocacy presents a serious problem for the lawyer seeking to establish or maintain a reputation for cooperation." *Id.* at 551. And insofar as such resistance undermines adversary lawyering, it may also undermine lawyers' capacity to connect clients to the *transformative* legal process in ways that can sustain that process's practical legitimacy.

92. Richard L. Abel, *A Comparative Theory of Dispute Institutions in Society*, 8 Law & Soc'y Rev. 217, 265 (1973).

93. *Id.*

generates are solutions for the institution, not the society.”<sup>94</sup> Rather than serving as intermediaries whose interpretive efforts connect clients to the legal process, non-adversary lawyers confront clients as an unmediated part of the process; and rather than bringing clients into the legal process in ways that support its practical legitimacy, non-adversary lawyers alienate clients in ways that undermine the legal process’s legitimacy.

Moreover, 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 the practical legitimacy of the legal process—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 nonjudgmental counsel will inspire the trust needed to cool passions in this way. As Parsons says,

In order to be capable, psychologically, of ‘getting things off his chest’ a person must be assured that, within certain limits . . . sanctions will not operate. . . . The confidential character of the lawyers’ relation to his client [and, Parsons might have added, the lawyer’s loyalty and deference more generally] provides such a situation. The client can talk freely, to an understanding and knowledgeable ear, without fear of immediate repercussions.<sup>95</sup>

In addition, the adversary lawyer’s unique capacity to deflate her clients’ most extreme claims has an ethical component. Both ethical theory<sup>96</sup> and empirical research<sup>97</sup> suggest that disputants have a natural ethical inclination in favor of resolving disputes through reasonable reciprocal concessions. But most clients, being inexperienced in the disputes in which they are engaged, will be uncertain which concessions are in fact reasonable. Lawyers have experience and expertise that clients do not and can therefore help to resolve this uncertainty. But 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—only, that is, when lawyers accept the adversary obligations associated with lawyer loyalty and client control. In these ways, adversary advocates support both the psychological and ethical mechanisms through which engagements with the legal process persuade disputants

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94. *Id.* (citations omitted).

95. Parsons, *supra* note 68, at 67. These ideas are also emphasized in the client-counseling literature. *See, e.g.*, Anthony G. Amsterdam, 1 *Trial Manual 5 for the Defense of Criminal Cases* §§ 79-80 (1988); David A. Binder et al., *Lawyers as Counselors: A Client-Centered Approach* (2d ed. 1991).

96. The capacity to understand and abide by fair terms of social cooperation is, as Rawls says, one of the basic powers of human moral personality. *See, e.g.*, Rawls, *supra* note 22, at 19.

97. *See generally* Dan M. Kahan, *The Logic of Reciprocity: Trust, Collective Action, and Law*, 102 *Mich. L. Rev.* 71 (2003).

voluntarily to abandon their most aggressive and unreasonable demands. And adversary advocates therefore transform disputants' attitudes in legitimacy-enhancing ways, whereas lawyers who abandon their adversary obligations and judge their clients rather than serving them have an opposite, de-legitimizing effect.<sup>98</sup>

Finally, lawyers' adversary commitments are especially important for transforming clients' claims from brute demands into assertions of right whose implicitly defeasible character makes the deepest contribution to the legitimacy of the legal process. 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,<sup>99</sup> and lawyers' adversary commitments justify their clients' trust. Furthermore, the internal logic of the legal process (and not just the willingness of clients to go along) also emphasizes the importance for legitimacy of using adversary advocates to convert disputants' brute demands into assertions of right. The legal process insists that disputants frame their demands as assertions of right because of the commitment to reasoned dispute resolution on which it bases its legitimacy, a commitment that requires the legal process to address every assertion of right that can be made in support of a disputant's position. Accordingly, the lawyers who help disputants to transform their brute demands into assertions of right must leave no available right unasserted. (Unasserted rights cannot be addressed in adjudication and therefore threaten to undermine legitimacy by coming between disputants and the resolutions to disputes that the legal process proposes.) And lawyers can do this only if they function as adversary advocates, amplifying and refining all their clients' claims rather than evaluating and choosing among them. Lawyers who abandon their adversary role in favor of personal assessments of their clients' claims quite literally prejudge these claims. And when this happens, the legitimacy of the legal process becomes dependent on the legitimacy of the lawyers' judgments. But these judgments, being creatures of the lawyers' individual minds, are virtually impossible to legitimate, and certainly cannot be legitimated by reference to the transformative powers of a legal process that has not yet begun. Lawyers who abandon their adversary role to pursue the law's underlying purposes merely shift the burden of legitimation forward to their own assessments of these purposes, which necessarily address their clients' demands in an untransformed, and hence intractable, state.

The legal process legitimates its decisions by engaging disputants and penetrating their attitudes, in the ways described, to encourage them to recast their demands into forms that make disputes more tractable. A

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98. This is perhaps most evident in the criminal context, where "in the eyes of many defendants, their attorney is the most despicable member of the cast of characters who have conspired to deprive them of their liberty; of all the figures in the courtroom, only defense counsel *pretends* to be on their side." Jay Sterling Silver, *Truth, Justice, and the American Way: The Case Against the Client Perjury Rules*, 47 Vand. L. Rev. 339, 364 (1994).

99. Fitzgerald & Dickins, *supra* note 67, at 698.

disputant who accepts the legal process's invitation to proceed in these terms but then, reverting to her original attitudes, rejects the outcome that the process recommends acts manipulatively and violates the trust of her opponent, thereby escalating the dispute by introducing an element of bad faith. Most disputants naturally shrink back from such an escalation, and the legal process leverages this attitude—the natural good faith of disputants—in support of the legitimacy of its outcomes, including outcomes that disputants initially opposed. But in order to function in this way, the legal process must welcome rather than estrange the disputants who might engage it. If, as Lon Fuller observes, “the distinguishing characteristic of adjudication lies in the fact that it confers on the affected party a peculiar form of *participation* in the decision,”<sup>100</sup> then “[w]hatever heightens the significance of this participation lifts adjudication toward its optimum expression,” which is to say, increases the legal process's legitimacy.<sup>101</sup> And because lawyers provide the principal connection between disputants and the legal process, the burden of inviting disputants to engage the legal process, and of sustaining disputants' participation, falls principally on them. In order successfully to shoulder this burden, lawyers must deny the potentially alienating features of adjudication (in particular, the legal process's divided sympathies) any foothold within the lawyer-client relation itself; instead, they must structure the lawyer-client relation so that they are able, through it, to “bring[] the client's case in a nonjudgmental way to the authoritative institutions of the society.”<sup>102</sup> Only lawyers whose approach to their profession is in some measure adversarial can achieve this, and adversary advocates are therefore necessary for sustaining the transformations in disputants' attitudes on which the legitimacy of the legal process depends.<sup>103</sup>

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100. Fuller, *supra* note 69, at 364 (emphasis added).

101. *Id.*

102. Stuart A. Scheingold, *Taking Weber Seriously: Lawyers, Politics, and the Liberal State*, 24 *Law & Soc. Inquiry* 1061, 1063 (1999).

103. This movement of thought, incidentally, suggests a new reason for condemning the unequal distribution of legal services that the legal profession provides. Because disputants who are not led to the legal process by loyal counsel are unlikely to experience the transformations in their attitudes on which the legitimacy of the process depends, and are doubly unlikely to experience transformations that can survive rational reflection, an unequal distribution of lawyers threatens the legitimacy of the legal process.

But this approach to inequality in legal assistance differs in an important way from the criticisms that dominate the literature, specifically in that it replaces the conventional focus on the injustice that results when some disputants have more and better lawyers than others with a focus on legitimacy. This difference in emphasis, moreover, has policy implications. There is a tendency, in traditional criticisms, to respond to inequality in legal services by recommending a retreat from adversary advocacy, on the grounds that less aggressive lawyers will have fewer opportunities to exploit opponents who lack legal representation and will therefore be less able to secure unjust advantages for their clients. But the argument here reveals that this is a mistake: Insofar as the legal process's transformative powers are essential to its legitimacy and adversary lawyers are essential to the legal process's transformative powers, abandoning adversary advocacy will undermine the authority of adjudication. Justice is secondary to legitimacy in political life, and there can accordingly be no substitute for securing adversary representation for all disputants.

## CONCLUSION

“[T]he primary function of the legal system,” Parsons observes, “is integrative.”<sup>104</sup> The law “serves to mitigate potential elements of conflict and to oil the machinery of social intercourse.”<sup>105</sup> Moreover, this integrative function is essential to social coordination. “It is, indeed, only by adherence to a system of rules that systems of social interaction can function without breaking down into overt or chronic covert conflict.”<sup>106</sup>

The law integrates through the transformative powers of the legal process, which operates through the efforts of the lawyers who administer the legal process and invite disputants to engage it. And lawyers can successfully invite litigants to engage the legal process (and open themselves up to the transformations that the process engenders) only if they themselves resist judging their clients—only, that is, if they serve their clients loyally. Partisan advocacy is therefore revealed to lie at the very center of the law’s claim to legitimacy—as a retail analog to the democratic virtues that are so notoriously celebrated throughout the civilized world. Thus, it has even been said,

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.<sup>107</sup>

It is often said that lawyers, especially in a democratic society, should respect the legitimate authority of the law, by which is meant the wholesale authority of lawmaking, and that this requires lawyers, in their work, to attend to law’s broader purposes. But lawyers should also respect the freestanding authority of the law in its retail application, in and around adjudication, and if the argument presented here is correct, this requires that they restrain, in some meaningful measure, their personal views of the law’s internal purposes and, as partisans, assist clients who wish it in acting as bad men.

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104. Parsons, *supra* note 68, at 58.

105. *Id.*

106. *Id.*

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

*Notes & Observations*