Market Solidarity

Price as Commensuration, Contract as Integration

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1 Introduction

Market orderings establish an important and free-standing site of social cohesion. *Market solidarity* exerts a powerful centripetal force that sustains order against the centrifugal forces that constantly threaten to tear cosmopolitan societies apart. The theory of market solidarity elaborates a philosophical and legal sociology of market orders. Along the way, the theory will place a special emphasis on the legal regime—contract—in and through which economic markets are, quite literally, made.

Instead of emphasizing solidarity, lawyers, economists, and even philosophers conventionally understand markets as an *allocative* technology. Allocative theories approach markets as a mechanism for distributing goods across persons in the service of efficient investment, production, and (ultimately) consumption. The allocative view of markets has been perhaps the single most conspicuous achievement of the social sciences over the last century.

Familiarity and success can disguise. In order to see the familiar in a new way, as the theory of market solidarity proposes, one must be motivated to look. To acquire the necessary motivation, consider the tenuous and fragile character of social solidarity *tout court*. If social cohesion exists more widely than conventional arguments warrant, this

generates an explanatory demand to identify a new form of social solidarity. Market solidarity meets the demand.

Conflict is endemic in social systems, much as entropy is endemic in physical ones. Interest competition obviously causes conflict. Moreover, moral disagreement causes conflict also. Indeed, far from being a force for peace, morality fact *drives* conflict, inclining a person, as Learned Hand once said, to "press a partisan advantage to its bitter end." The same pattern of disagreement and conflict arises with respect to all regulative principles, at every level of abstraction. Interest, morality, justice, and legitimacy all generate centrifugal forces, which exert a steady tendency against social cohesion. This is no accident. Rather, it is an essential, if unhappy, feature of collective practical life among imperfectly rational agents, who experience an imperative to respond to right-reason, but reason privately. Finally, as there are no innate masters or servants among persons, practical conflict does not settle stably into a native hierarchy. Every practical engagement thus invites aggression. And even where the invitation is rebuffed, and persons are, for a moment, not engaged in active strife, they nevertheless live, as Hobbes put it, "in the procincts of battaile continually." Persons thus tend naturally towards what Hobbes called a "warre, as is of every man against every other man."

This recognition triggers a fundamental re-orientation towards observed social orders, akin to a reversal of figure and ground. The common view takes for granted background cohesion and treats strife—crime, rebellion, war—as the figure that invites sober examination. In fact, discord forms the unremarkable background of the human condition. Cohesion becomes the figure, the *explanandum*, in social systems, no less than order is the *explanandum* in physical ones.

Social cohesion depends on centripetal forces to counteract the centrifugal forces associated with private right-reason. These centripetal forces might act along two dimensions. *Vertical* forms of social cohesion involve asymmetric relations of authority and deference. *Horizontal* forms of social cohesion involve symmetric because reciprocal authority relations.

The most familiar accounts of social cohesion emphasize the vertical political solidarity associated with states. Allocative theories of markets belong to this tradition. While conventional accounts distinguish between vertical and horizontal mechanisms of allocation—most notably in the Coasean distinction between administration within the firm and contract across the firm boundary—they acknowledge only vertical forms of solidarity. Coasean considerations give system-designers a reason to include markets among the allocative tools of the systems that they design. But they do not give system-participants a reason for *respecting* market allocations. The allocative view cannot characterize markets as anything but a tool of the state. Markets may allocate, but only states can integrate.

There are good reasons to doubt that vertical solidarity taken alone can explain the observed absence of Hobbesian conditions. Political solidarity, at least in its modern instantiation, is tied to substantive justice. Vertical solidarity is therefore vulnerable wherever there is significant injustice, or indeed just a reasonable perception of injustice, which is to say everywhere.

These considerations create an intuitive demand for additional explanations for social cohesion that emphasize horizontal solidarity. The theory of market solidarity answers the invitation. Most importantly, market solidarity possesses the power to launder injustice. Markets thus sustain social cohesion even after the forms of solidarity associated with politics and the state have run out.

2 Historical Antecedents

The theory of market solidarity has historical antecedents. Montesquieu, for example, famously remarked that "[c]ommerce . . . polishes and softens barbaric ways." This *doux-commerce* thesis reappeared in David Hume and Adam Smith and others in the Scottish Enlightenment. More recently, it figured prominently in Emile Durkheim and

Georg Simmel and other founders of modern sociology. Classical statements of the thesis proceed impressionistically rather than systematically. Nevertheless, two main mechanisms may be discerned from the classical texts.

Commercial other-regard lays a foundation for market solidarity. Market success requires a distinctive engagement with others—an effort to apprehend and to penetrate other minds. Something like this thought appears in Smith's observation that each trader in a market "will be more likely to prevail [in pursuing his own ends] if he can interest [other traders'] self-love in his favor." Simmel perhaps observed commercial other-regard most closely and characterized it most vividly. Economic competition, he wrote,

> Compels the wooer . . . to go out to the wooed, come close to him, establish ties with him, find his strengths and weaknesses and adjust to them . . . . Innumerable times [competition] achieves what usually only love can do: the divination of the innermost wishes of the other, even before he becomes aware of them.

Markets also sponsor *commercial prudence*. Commerce, Thomas Paine wrote, operates to "cordialise mankind, by rendering [persons] useful to each other." Samuel Ricard similarly observed that commerce "makes him who was once proud and haughty suddenly turn supple, bending, and serviceable. Through commerce, man learns to deliberate, to be honest, to acquire manners . . . ." Paine and Ricard meant that markets reward those who make themselves useful to others, so that prudence encourages persons in commercial societies to develop a reputation for probity and reliability. Commerce does not make persons into altruists or saints; but it does dampen traders' immediate impulses to take for themselves and it encourages self-serving sacrifice. Commerce establishes a broad sphere of opportunity for delayed gratification, for doing good in order to do well.

The *doux-commerce* tradition emphasizes that the immanent logic of market-relations is in these two ways centripetal and integrative: markets encourage traders to

know and to serve one another. Although he did not write quite so starkly or crassly, thoughts like these led Smith to conclude that, when channeled through markets, interest achieves what virtue cannot. Virtue, like all principle, generates conflict; but markets tend towards peace.

The historical ideas failed, however, to set out a persuasive account of market solidarity. The failure concerned each of the two elements of the classical *doux-commerce* thesis. The main lines of failure are worth reporting, although details may be set aside.

The classical theorists proved unable to solve the epistemic and moral problems that confront commercial other-regard in the context of the conflicts of value (and not just interest) that pervade cosmopolitan societies. In short, they could not bridge the gap between sympathy (in which an observer assesses another's circumstances from her perspective) and empathy (in which the observer considers not the other's circumstances but his perspective on them). The classical *doux-commerce* theorists retreated to hierarchy to fix the content of commercial other-regard in the face of these problems. Smith, for example, insisted that "[i]t is from our disposition to admire, and consequently to imitate, the rich and the great, that they are enabled to set, or to lead what is called the fashion." And Hume thought the *Pomp and Grandeur* associated with caste essential to sustaining solidarity in market orders. This aristocratic atavism brought the classical thesis into conflict with the egalitarian forms of vertical solidarity championed by modern, cosmopolitan states, so that the classical *doux-commerce* thesis became weakest where markets most flourish. The recourse to hierarchy also betrayed the *doux-commerce* thesis's generic commitment to horizontal rather than vertical solidary, and it thus abandoned a principal source of the theory's attraction.

The classical *doux-commerce* theorists' treatment of commercial prudence similarly failed to underwrite a persuasive account of market solidarity. Classical commercial prudence remained too shallow reliably to overcome the centrifugal forces, of interest and morals, that give market traders powerful private incentives to defect.

Certainly classical commercial prudence is no flag to fly in answering egalitarian criticisms of market maldistribution. Once again, the classical theorists recognized the shortcomings of their own theories. Durkheim perhaps appreciated the difficulty most clearly, writing that

> if interest relates men, it is never for more than some few moments. It can create only an external link between them. . . . Consciences are only superficially in contact; they [do not] penetrate each other . . . . [T]his total harmony of interests conceals a latent or deferred conflict. . . . There is nothing less constant than interest.

These shortcomings kept the classical *doux-commerce* thesis from sustaining its own ambitions. Certainly, the historical accounts of market solidarity never attained anything like the refinement, organization, or power achieved by the theory of political solidarity associated with the modern state. But the experience of market solidarity survives the failures of the classical theory. And lived market solidarity continues to outstrip any plausible reductive reconstruction in terms of interest, morals, or even the vertical solidarity of the state.

A phenomenon exists in the world. The failure is one of explanation.

3 Market Solidarity in Outline

The theory of market solidarity aspires to provide the required explanation. It will be useful to state the theory in outline before explaining it in greater detail. Market solidarity arises, most fundamentally, through two mechanisms. Each answers one shortcoming of the classical approach. First, the economic structure of market exchange establishes prices as a commensurating frame capable of managing the value disagreements that undermined classical commercial other-regard. And second, the

normative structure of contract establishes integrating obligations capable of sustaining the authority of market orders as classical commercial prudence could not.

Price-commensuration and contract-integration reciprocally support each other. Contract-integration sustains the authority of market prices over those whose conflicting values the prices commensurate. And price-commensuration makes contract-integration possible, by enabling contract partners to reach a shared understanding of the terms of their trades, including of the size and distribution of the contractual surplus. Taken together, price-commensuration and contract-integration suppress the conflicts of private reason that inevitably arise among market participants. In this way, they sustain market solidarity.

4 Price as Commensuration

A more careful elaboration of the theory of market solidarity begins by explaining price-commensuration—the modern theory's version of classical commercial other-regard. Unlike the classical virtue, price-commensuration spans sympathy and empathy successfully to manage value disagreement. Market prices establish an inter-subjective, commensurating value frame in which all market-participants, whatever their private preferences and beliefs, enroll. In this way, prices give commercial other-regard a stable, convergent content. Price commensuration is so powerful that it colonizes ordinary language: the question "what's that worth," in a market society, is almost invariably answered by naming a market price. Finally, price-commensuration fixes value in a formally egalitarian fashion. Price commensuration thus both establishes the epistemic basis of market solidarity and constitutes a moral achievement in its own right.

The problem that prices must solve bears repeating. Traders do not just compete to acquire scarce goods, they also disagree about which goods are more and less worth acquiring. Indeed, traders value different things for different reasons. This means that it will not be clear, to any trader, what goods the others want, what they will give up to get

what they want, or what terms of exchange will maximize the surplus from trade. In all these ways, the variety in valuation makes it difficult for traders to deploy the other-regard that market conduct requires. Simmel's wooer pursues a mysterious target.

Achieving a commensuration that can publicly settle the terms of trade is an epistemically complex matter. It is made more difficult by the additional requirements that commensuration must be stable and cannot turn to deliberation to resolve value conflict on the merits. No such resolution is available to imperfectly rational creatures; and markets are anyway aggregative rather than discursive mechanisms, which operate not through *judgment* so much as *will*. Finally traders will resist sacrificing their values for naked self-interested; to do so, they will think, is to sell-out. Market solidarity must eventually sustain reasons for cohesion that can answer this concern, most promisingly by giving market orderings an intrinsic value. Price-commensuration must therefore not only solve epistemic problems but also support a moral case for the value of the market. This requirement re-emphasizes that price-commensuration must be achieved without hierarchy.

The difficulties involved in price-commensuration may seem exaggerated. After all, market participants uniformly value money. The money metric, it may be thought, provides the commensuration on which market-solidarity depends. Nothing more need be said.

This glib assertion of money's commensurating capacity disguises more than it reveals, latching on to market relations only *after* price-commensuration has already been achieved. Money is meaningless save against the backdrop of the price system. Money in fact just *is* the completed achievement, the consummation, of price-commensuration. That is made clear in economic theory, which treats money not as a separate good but rather as the vector of ratios at which all pairs of goods are traded, in equilibrium. The money sum is merely a simple way of announcing the set of bundles of resources (in all their myriad combinations) that the person who holds that particular sum may own at prevailing prices. Once again, to understand money, one must first understand prices.

Prices indeed do represent a non-discursive commensuration among traders' competing values that proceeds on public, shared, and formally equal terms. Equilibrium prices have the property that each trader prefers her holdings over any other bundle of goods that she could afford, at these prices. Indeed, the competitive equilibrium lies within the core of the exchange economy. That is, no coalition of traders can improve on their equilibrium allocations (as assessed by their own values) by taking their joint endowment out of the market and allocating that endowment among themselves according to some principle other than individually optimizing subject to the price structure. Markets settle, so to speak, so that prices and allocations reciprocally support each other. And the prices around which markets settle establish a shared, public frame of value, such that each trader will best promote her private values and preferences by adopting the price structure to organize the terms of her economic exchanges. Equilibrium prices thus establish a public framework of relative value, which is precisely what commensuration involves. Moreover, competitive prices arise among traders acting as price-takers. None chooses prices—they just happen, and in the same way, to all traders.

Prices possess a public, common-knowledge character, so that all traders join the price structure's commensurating frame. (The contrast to barter is revealing here, as barter produces terms of trade that apply only to the direct parties to each exchange and in this sense remain private.) Joining the price structure is no small matter, moreover. To see this, compare market-traders' natural inclination to value things at their prices with attitudes towards money (and thus also price) that were widely held before market-solidarity achieved its current power: aristocrats, professionals, and even guild-artisans all took it as a sign of their social status that they valued any number of goods, including most importantly their own labor, based on insular moral and social values, and thus apart from price.

Market equilibria, moreover, posses further properties that make price-commensuration a *moral* achievement.

The most familiar of these concern the relationships between markets and external frameworks of value. They are captured by the two fundamental theorems of welfare economics. The first fundamental theorem states that the allocations associated with every competitive equilibrium are Pareto efficient. This entails that price commensuration and market solidarity are compatible with the efficiency concerns that dominate allocative approaches to markets. For its part, the second fundamental theorem of welfare economics states that every Pareto efficient allocation may be achieved through a competitive equilibrium. This is commonly understood to announce the compatibility of efficiency and justice. The arguments developed here reveal another interpretation of the second fundamental theorem, namely that price commensuration and horizontal market solidarity are compatible with the vertical solidarity associated with the liberal state (including in particular the state's commitment to distributive justice).

A less familiar but equally important moral property of market equilibria concerns the internal normative structure of price commensuration and hence also market solidarity. Price commensuration implements an important conception of the formal equality of persons, a conception of equality of status, really. Markets possess an internal logic that fixes prices according to the interaction of the preferences of all market participants. Moreover, *no* participant in a competitive market possesses any market-power; all are, equally, price-takers. The prices that they take arise in a way that reflects an egalitarian balance among all persons' values. The price of something literally equals what others must give up, as measured from their several equally considered points of view, for its owner to possess it. The price mechanism thus enables money to bridge sympathy and empathy and to give commercial other-regard the fixed, public content that the classical *doux-commerce* theorists could not achieve. Each person values money for what it can buy her at prevailing prices; and prices are set from everyone's perspective. Money and prices thus underwrite a shared, public perspective on commercial exchange. The contrast to monopoly is revealing: Monopolists can manipulate prices, which is why we accurately speak not only of monopoly rents but also of monopoly *power*. This

renders monopoly prices like a private language, so that monopoly does not just cause misallocation; it also undermines commensuration.

Finally, prices establish value equivalences without any underlying foundation in a base value that the others are equivalent in virtue of sharing. Price-commensuration thus constitutes a free-standing value frame. Marx who called prices the "wooing glances cast at money by commodities," was mistaken to think an antecedent base value is required to make sense of prices. Once again, this is connected to price-commensuration's moral achievement: it is because price-commensuration can proceed without foundations—purely symbolically, as Simmel might say—that it can establish a formally egalitarian resolution to value disagreement.

Of course, the formal equalities of price-taking and the fact that each trader equally optimizes her holdings subject to her budget constraint do not secure substantive equality, either of the value of overall holdings or of surplus shares in particular exchanges. The failure of substantive equality does not undo the price-commensuration's formal equality, however, or undermine its moral value. The monopolist stands in a *qualitatively* distinctive relation to the price system. But the difference between the relations to prices of the rich and the poor is not qualitative but merely *quantitative* and hence does not undermine price-commensuration or market-solidarity. Prices continue equally to reflect all traders' values and thus continue to commensurate—to establish a shared perspective on market exchanges. Indeed, price-commensuration succeeds not just in spite but *because* of its purely formal character—because of markets' openness to substantive inequality. In order to secure substantive equality by means of the rules of market exchange (rather than through tax and transfer concerning initial endowments), a market order would have to impose prices (and in particular wages), perhaps under the doctrine of the just price. Doing so abandons using price to commensurate among values in favor of using price as a technique of allocation to serve some antecedently fixed, vertically imposed value. These observations just reprise, in terms of the theory of market solidarity, the familiar idea that regulating contracts in the service of substantive justice comes at a cost to freedom of contract. The point is worth making nevertheless,

because it answers radical critiques of markets—for example, Evgeny Pashukanis's claim that contracts exemplify the evil of all bourgeois law, precisely because they elevate formal commensuration over the material equality of man—by emphasizing the necessary service that merely formal equality performs for solidarity in the face of value disagreement.

Finally, price-commensuration's moral achievement expands and contracts with the scope of the goods subject to market pricing. A social order might limit market exchange to goods that possess value only insofar as they are wanted. In such a society, price commensuration would extend only to balancing brute preferences; and price would remain a residual metric of value. But the societies in which markets flourish take a very different approach. Markets in these societies trade and price any number of goods—housing, medical care, education, even art—that are desired for being valuable. Where markets tread, price-commensuration follows; and so prices, in such societies, commensurate among not just brute preferences but values, including values that those who hold them regard as deeply reasoned and important. This is no accident but rather a self-conscious commitment, commonly expressed through the familiar ideal of freedom of contract. That ideal affirms the broad scope of markets as a matter of principle, often grounded in anti-paternalist ideas about individual sovereignty that are close cousins to the conception of formal equality of status at the root of price-commensuration. The scope of freedom of contract thus fixes the importance of market solidarity.

Legal doctrine supports price-commensuration by shoring up the price-structure's egalitarian bona fides and thus also its moral character. Two bodies of doctrine matter especially: offer & acceptance on the one hand, and consideration on the other.

Contract law, through offer & acceptance, makes interlocking *specific* intentions to establish a particular obligation necessary for that obligation to arise. The law refuses to impute to potential traders a general intent to make efficient, or fair, or otherwise optimal contracts and then to imply contracts based on that intent. Even so called "objective" theories of offer and acceptance thus do not ask whether a reasonable person

would have contracted but instead filter their reasonableness inquiry through the question whether the parties possessed the specific intent to be bound. In striking contrast, once a contract is established by specific intent, the law is willing, through any number of doctrines, to impute to the parties a general intent that their contracts contain optimal terms.

Conventional accounts of this difference emphasize allocative considerations. Given the myriad and diverse values and preferences of potential contract partners, they say, an efficient contract law will recognize those and only those contracts founded in the specific intent of both parties.

The conventional answer is conclusory, however. It does not explain *why* parties enjoy an allocative advantage at contract formation that they *do not* enjoy within their contracts. The theory of price-commensuration answers this question in a striking way. The source of any distinctive allocative advantage that the parties enjoy at contract formation is the price structure, whose commensurations enable the parties optimally to balance their private preferences and values against an amalgamated measure that accurately reflects everyone else's preferences and values. Prices achieve this, moreover, distinctively at the point of contract formation: there is no analog to perfect competition, and hence no analog to price-commensuration, within a consummated contract relation.

The doctrinal divergence between the treatment of intentions at contract formation and within established contracts thus turns on price-commensuration. The converse is also true: market prices can commensurate traders' values and preferences *only* if contracts arise, as under the doctrines of offer & acceptance, through specific intentions to obligate. If one party could impose contractual obligation on a counterparty that lacked specific intent to be bound, based on the efficiency or fairness of the terms, then the contract price would cease to reflect the formally egalitarian balance of the parties' values and preferences. Instead, it would reflect the idiosyncratic view of what is efficient or fair under whose flag the contract was imposed. Command rather than price

would become the organizing principle of exchange, and the problem of conflict concerning the values behind command would at once re-arise.

Whereas allocative accounts justify offer & acceptance by reference to the efficiency of market allocations, this new argument reverses the direction of justification. Markets can allocate efficiently only where prices commensurate among traders' values, and price-commensuration succeeds only where contracts require specific intent. Offer & acceptance thus underwrite the price-commensuration that constitutes one of the central mechanisms of market solidarity.

Price commensuration, including in respect of its formal egalitarianism and connection to freedom of contract, is further elaborated by the consideration doctrine.

That doctrine requires contracts to take the form of bargains, in which the parties establish symmetrical intentions reciprocally to bind and be bound. At the same time, the consideration doctrine insists on only formal reciprocity and not substantive equality in exchange: as it is familiarly said, "the requirement of consideration is not a safeguard against imprudent and improvident contracts except in cases where it appears that there is no bargain in fact." This fact-but-not-quality approach to bargains has long puzzled lawyers. Why, they have asked, ignore substantive quality and restrict freedom of contract on account purely of form? Price-commensuration provides a reason.

To begin with, price-commensuration requires refusing to police bargains for their quality. Legal rules that imposed substantive quality standards on bargains would fix prices according to the necessarily controversial antecedent frame of value on which judgments of substantive quality are based. A contract law that adopted these rules would abandon price-commensuration in favor of private values and would cease to support market solidarity.

Insisting on the fact of bargains also supports market solidarity. Prices commensurate insofar as the price of a good equals what others must give up for a person

to own it, as measured according to an amalgam of everyone's preferences. This mechanism of price formation requires precisely that prices arise out of exchanges in which each party recognizes the other's authority to insist on its side of the deal. Such reciprocity of recognition—not of the fair value of the exchange, to be sure, but of the *status* associated with contributing to the construction of the inter-subjective value frame—is embedded in the formal structure of the bargain through the fact that each party is both promisor and promisee. Gratuitous promises, by contrast, may invoke purely private conceptions of value. Gift giving may thus constitute a form of self-indulgence, in the manner of Rousseau's observation that "when I give a gift, it is a pleasure I give myself," or even imposition, in the way that led Marcel Mauss to emphasize that every gift constitutes an exercise in social power.

Bargains, in sum, are distinctively outward-looking and egalitarian, requiring genuine *inter*-subjectivity, based directly on their form rather than through some functionalist or instrumental logic. The bargain is the formal opposite of the caste promise. The consideration doctrine and the bargain form thus at once ensure that the mechanism that fixes prices can sustain price-commensuration and underwrite price-commensuration's moral achievement.

5 Contract as Integration

For all these reasons, price-commensuration makes markets appealing to system-designers, who seek structures of horizontal solidarity that might be paired sympathetically with the principles of vertical political solidarity that figure prominently in cosmopolitan states. Price-commensuration also has a limited appeal to system-participants, who cannot, from their private value-perspectives, improve on the holdings that they receive in market equilibrium save by employing force, fraud or some other bad faith to increase the endowments that they bring to the market.

But why should traders avoid bad faith? The question recalls the second challenge that the classical *doux-commerce* thesis proved unable to answer: concerning the shallowness of commercial prudence and the consequent fragility of commercial orders. Connecting markets to a practical imperative in favor of solidarity by establishing the authority of market prices and associated allocations thus requires a new line of argument.

The argument is available. It invokes the normative structure of contract. Two distinctive features of contract obligation, both connected to contract's promissory character, allow contracts to sustain the authority of the markets that they make. These features may be read off the face of the law, visible to the naked eye, as it were.

First, contract law protects interests not just in recovering losses incurred in reliance on a contractual promise or avoiding disappointment based on promissory expectations, but in securing the value of contractual performance. Although most contracts do trigger reliance and engender expectations, neither is required for contract obligation to arise. This principle establishes a sharp contrast between contract and tort. Tort law, and in particular the law governing liability for misrepresentation, insists that a party asserting misrepresentation must have relied (reasonably, no less) *directly on the truth of the representation at issue*; and it expressly rejects that the prospect of subsequent legal enforcement through a tort claim might satisfy the reliance requirement. Once again, such bootstrapping is the essence of contract.

Second, contract law establishes strict liability rather than fault-based obligations. Contract obligation thus requires promisors to *ensure* performance, including even where performing requires taking *un*reasonable measures (which are *not* cost-justified). A promisor may take reasonable care in both the making and the breaking of her contract—so that she gives the interests of all others every consideration that tort law's principles against harming require, at every step of her way—and yet her breach wrongs her promisee.

Together, these commitments—in favor of *strict fidelity* to contractual promises—fix the normative structure of the contract relation. Rather than protecting antecedent interests and entitlements, every contract creates—through the mechanisms of offer, acceptance, and consideration and out of the intentions of the parties—a new joint project, shared between the parties. Contract obligation at once vindicates this project and is grounded in the intrinsic value of the relation that the parties establish in respect of the joint project.

Contracting parties each intend that their ends do not merely coincide, but rather, to use Hume's phrase, "have a reference to" each other. Moreover, each reciprocal promisor *entrenches* her deference to the other, giving him power over her normative situation. Her obligation to perform endures at his option. She thus adopts an intention *in his favor*, rather than merely an intention to perform contingently, or for the sake of her interest, or even of his interest (as she understands it) in the promised performance. The parties to contracts come, in this way, each to treat the other, and not just the joint activity associated with performance, as an end in himself.

Contracts thus establish a special normative relation between the parties to them. Each recognizes the other as a formally equal author of the joint performance. As Kant observed, a contract becomes "an act of the united choice of two persons" and contractual promises and acceptances are "represented not as following upon one another but . . . as proceeding from a single *common* will." A contract establishes a shared perspective—shared first-personally by promisors and promisees—over the contemplated performance. The two contracting parties even entrench this shared perspective, appointing a third—a court—as final arbiter of what their contractual obligations concretely require, as a bulwark against the possibility that disagreements about the terms of their contracts might cause their relations to decay back into the private. Contracts integrate the parties in respect of this shared project.

Contract is typically thought to belong to the part of morality and law that emphasizes *constraint*. But contracts are also valuable in respect of the aspects of

morality and law that do not constrain but rather *enable* persons who implement them. Among the enabling aspects of morality—the sense in which morality in itself serves the interests of persons who conform to it—is that we have reason to engage others as persons, whom we treat, as Kant's Formula of Humanity says, as ends in themselves. Contract thus arises, to borrow a form of words from Hannah Arendt, "directly out of the will to live together with others in the mode of acting and speaking." This aspect of right is most commonly associated with accounts of politics, such as Rousseau's, that emphasize the public practice of collective self-government by free and equal people through democratic law. But right shows an analogous face away from the hierarchy of political authority, in the horizontal, symmetric relations that constitute the private realm, including in contract. Reversing the direction of the common analogy, one might say that every private contract resembles the social contract. Finally, right's horizontal face, because it involves recognition based on formal equality of status—the capacity to owe and be owed obligations—can authorize arrangements that involve substantive inequality that right's vertical face must reject. Contracts obligate even where made against unjust backgrounds, including even when (because the party that can do better without the bargain does better within it) they allow one side to leverage undeserved bargaining advantages in a way that entrenches injustice. Contract obligation does not depend on setting the world right before contracts are made or require improving the world through contracting. Contract possesses the power to launder injustice, creating legitimate entitlements between parties where previously none existed.

The grounds of contract obligation are similarly familiar from ordinary experience. Persons, being sociable creatures, are susceptible to what might be called (abusing ordinary language only a little) the *charisma* of other persons, which is just the colloquial name for persons' capacity, by sheer force of personality, to draw others into their points of view, making others see things their way, so to speak. Persons have an interest in establishing and respecting recognition relations that make others charismatic. Recognition relations are good for persons, in the sense of promoting their flourishing.

Contracts engage this interest, as each party recognizes the other's personality, making him charismatic for her. These considerations straightforwardly sustain reasons for keeping contracts. A breach *defies* the promisee's authority and thus disrespects his personality. The breaching promisor adopts a perspective that is *inconsistent* with the promisee's. Breach introduces a hostility into the parties' relation, in which the breaching promisor closes herself off to the promisee's charisma. Breach thus imposes a distance between the parties, who do not just revert to the *status quo ante*, reassuming the relation—of being strangers—that they enjoyed before the contract was offered and accepted. Strangers do not engage each other as ends in themselves, but they remain open to coming to do so, receptive to one another's charisma. Breach of contract *estranges* the contracting parties.

Market orderings exploit human sociability, channeling traders' inclinations in favor of recognition through horizontal structures of reciprocal authority that support social cohesion. Price-commensuration already reflects human sociability. The extent to which commensurating prices penetrate the private values of traders is just a generalization of traders' sympathetic empathy, of their general inclination to defer in appropriately constructed engagements with the perspectives of others made charismatic. Contract obligation concentrates and channels sociability and its attendant deference in a way that further supports market solidarity. The forward-looking and strict-liability character of contract obligation expresses the authority of contractual promisees over their promisors. The intentional structure of the contract relation—the patterns of intentions through which contracts arise and operate—embeds this authority in a recognition-relation. And the interests at stake in sociability give contracting parties reasons to honor their contractual arrangements: to keep contracts that they have made, and even to make contracts in the first place. Contracts integrate.

Once again, doctrine tracks theory. The central doctrinal embodiment of contract-integration is the principle of good faith in performance, which the common law implies in every contract.

Good faith places distinctive limits on advantage-taking within the contract relation. Thus it is commonly and rightly observed that "conduct that might not rise to the level of fraud may nonetheless violate the duty of good faith in dealing with one's contractual partners." At the same time, good faith requires less than fiduciary loyalty and devotion. The law does not seek, "in the name of good faith, to make every contract signatory his brother's keeper." Rather, the duty of good faith requires only, but significantly, that the parties to a completed contract avoid exploiting contingencies that arise over the course of performance in ways that deprive their counterparties of the benefits that the contractual bargains were designed to secure.

It is not easy to articulate a clear standard of good faith that falls in between these poles. The currently dominant approach to good faith, associated with the allocative view of markets, proposes that the duty "is a stab at approximating the terms the parties would have negotiated had they foreseen the circumstances that have given rise to their dispute." Good faith, on this *utopian* approach, is the doctrinal pathway for making the ideal actual.

The utopian vision of good faith cannot be the right one, however, for reasons both shallow and deep. As a shallow matter, the utopian conception of good faith simply does not fit the doctrine. According to the utopian view, good faith *adds* to the substantive content of every contract obligation. Doctrine, however, expressly denies this, insisting that good faith is *not a separate or additional undertaking* of the parties to a contract but an *attitude towards whatever undertakings the parties have adopted*. This feature of the doctrine is no accident, moreover, but rather reflects a deeper truth. By treating imperfectly rational parties as if they were perfectly rational, utopian good faith abandons their actual intentions in the service of an externally imposed ideal. A utopian standard of good faith thus betrays the deep structure of contract law, undermines the authority of the contract relation, and diminishes contract-integration.

An alternative account of good faith captures the internal structure of contract-integration and thus gives doctrinal expression to market solidarity. Good faith requires

respecting the parties' deal, not perfecting (and thus really supplanting) it. To display good faith in contract performance is simply to recognize the authority of the contract, and hence the authority of one's counterparty to insist on performance according to the contract's terms. Good faith is not a utopian but rather a *pedestrian* ideal.

This pedestrian view ties good faith to the parties' actual intentions and so connects good faith distinctively to contract. Good faith applies not among strangers and is not owed to everyone (like tort duties) nor does it apply only in the shadow of trust or intimacy (like fiduciary devotion). Rather, it applies among persons who have forged a distinctive relationship with each other, structured around a shared understanding of a voluntary obligation. This, finally, is why good faith makes no independent contribution to the content of the contract obligation. The measure of good faith is the shared project of the contract; indeed, to make a contract *just is* to accept the duty of good faith. Good faith is the attitude that imperfect planners must adopt towards their plans in order for the plans to be joint plans at all; the matrix in which a shared perspective is possible.

An association between pedestrian good faith and formal equality emphasizes the importance of good faith. It is commonly said that the degree of other-regard required by contract is *less* than that required of fiduciaries. If a beneficiary asks his trustee to walk a mile with him, she must, altruistically, walk with him twain; a contractual promisor, by contrast, may self-interestedly walk only the mile that she promised, and not an inch further. But good faith is not simply a lesser version of fiduciary other-regard. Rather, good faith involves a distinctive form of recognition of the other to whom it is owed, which fiduciary altruism would foreclose, or at least impede. Fiduciary devotion becomes a nonsense in the absence of a right, in the trustee, to promote the beneficiary's true interests rather than false ones, including even paternalistically. By contrast the fact that good faith permits a promisor, within the constraints of the contractual agreement, to remain as self-interested within the contract as she was without it carries with it an obligation to take a counterparties' intentions at face value in administering a contract's performance. This anti-paternalism is, in fact, just another facet of freedom of contract,

as a promisee subjected to the mercies of her promisor's paternalism would be deprived of promise as a reliable mechanism for pursuing her own purposes.

Fiduciaries, because of their altruism and the paternalism that this carries with it, recognize their beneficiaries in terms of their peculiar, idiosyncratic needs and interests—one might say, as the particular persons whom they are. Contractual promisors, by contrast, proceeding anti-paternalistically and in good faith, recognize their promisees for their general intentional capacities to pursue whatever interests and needs they have—for their generic moral personalities, one might say.

The chain of characterizations—from good faith, to bounded self-interest, to anti-paternalism, to freedom of contract, to recognition of generic personality—sustains a striking conclusion. When they adopt good faith and recognize each others' expressed intentions at face value, the parties to contracts recognize each other as sovereign wills, whose choices must be respected. Fiduciary relations lack this variety of respect, not in spite but rather because of the other-regard that they involve. Contractual recognition (the basis of contract-integration) is not lesser but rather different from more intimate forms of recognition. Indeed, the contract relation—precisely because good faith is thin and generic—opens up possibilities for solidarity at arm's length that intimates cannot achieve. The impersonality of contractual recognition and respect reflects one of market solidarity's great achievements; it renders market solidarity particularly well-suited to sustaining social cohesion in cosmopolitan societies, in which deep private differences of value render thicker, more intimate forms of recognition broadly unavailable.

The structure of market solidarity is further illuminated by analogizing the distinction between utopian and pedestrian good faith to the more familiar distinction between natural and positive law. Natural justice has long tempted political thinkers towards skepticism concerning the authority of merely positive law. Similarly, utopian good faith tempts lawyers to resist the positive terms of actual contracts—to make the actual ideal. In both contexts, however, obligations establish intrinsically valuable relations, and sustain solidarity among those subject to them, not in spite of but

specifically because they reference actual rather than ideal arrangements. Natural law—in both public and private settings—is a relation between persons and their maker; positive law is a relation among persons. That is why preventing political alienation in our imperfect world requires actual politics. Similarly, market solidarity requires actual contracts, which integrate through pedestrian rather than utopian good faith.

Contract-integration enables the theory of market-solidarity to overcome the shallowness of classical accounts of commercial prudence. The normative structure of contract, which receives summary expression in the duty of good faith, embeds integrative forces within the interstices of the consummated contract relation itself. Honoring contracts thus is not just useful or prudent, but becomes mandatory. Moreover, the interests, connected to human sociability, that underwrite contract-integration are substantial, indeed profound. Contrary to Durkheim's beliefs, the consciences of contracting parties precisely *do* "penetrate one another," including in ways that can overcome any "latent or delayed conflict[s]" that remain.

6 Conclusion

Market solidarity arises through price-commensuration, which solves the epistemic problem associated with value difference, and contract-integration, which solves the normative problem associated with the authority of the market. Market relations in this way introduce into a social and economic order a centripetal force to counteract the centrifugal forces of private right-reason. Market solidarity is not merely second-best. Rather, commerce achieves what virtue cannot.

The theory of market solidarity is novel twice over. First, by emphasizing solidarity rather than allocation, it departs from received wisdom about markets. Second, the theory of market solidarity also departs from the received wisdom about social cohesion. The theory articulates a horizontal form of solidarity rather than the more familiar vertical solidarity associated with politics and the state. And it casts market

solidarity as a hybrid between purely private and fully public social forms. Markets establish shared rather than merely coordinated intentions; but the sharing stops at intentions and does not reach cooperative motives. Market solidarity, one might say, involves neither mere coordination nor full cooperation, but rather, intermediately, collaboration.

Novelty bears a special persuasive burden. But there are good reasons to shoulder the burden. Both coordinative and cooperative solidarity suffer structural shortcomings, which make it implausible that they can account for observed social cohesion. The shortcomings may be rendered intuitive by returning to the analogy between conflict in social systems and entropy in physical ones. Coordination sustains social order by analogy to a machine, in which physical processes are marshaled into a stably recurring pattern. Just as a *perpetuum mobile* is impossible, so perfect social coordination is impossible. Cooperation sustains social order by analogy to physical freezing, in which matter is held in a pattern, and entropy eliminated, by taking all energy out of a system. Just as absolute zero is impossible, so perfect social cooperation is impossible. Collaboration helps to explain observed order in the face of coordination's and cooperation's limits.

The theory of market solidarity should begin its career by supporting conventional accounts of social cohesion where they stumble. Market solidarity explains aspects of observed social cohesion—in particular, cohesion's stubborn persistence in the face of obvious injustice—that strain familiar theories. Insofar as the theory of market solidarity succeeds in this supporting role, it reduces demand for conventional theories. Possibly some conventional accounts will come to appear artificial or forced—un-natural extensions of an idea invented to corral a recalcitrant observed reality, a little like the epicycles once increasingly required to explain celestial observations under the Ptolemaic cosmology. In this way, the explanatory power of conventional accounts of social cohesion will come to shrink. The vertical solidarities proposed by Coasean accounts of contract and liberal theories of the state are especially at risk.

The theory of market solidarity might eventually come, in some instances, not just to support but even to substitute for these more familiar theories. If the theory of market solidarity succeeds, that success might spark the development of additional theories of horizontal or collaborative solidarity that explain forms of social cohesion arising outside the market. (Two particular promising areas for innovation are: democracy, understood as a free-standing political practice independent of rights, natural law, and the social contract; and arbitration, understood as proceduralist third-party dispute resolution independent of the political authority of states.)

Neither the theory of market solidarity in particular, nor the broader classes of horizontal or collaborative accounts of social cohesion, can plausibly aspire fully to *displace* more conventional theories, say in the manner in which Copernican cosmology came eventually to displace the Ptolemaic system. But the theory of market solidarity might reasonably aspire, eventually, to stand not behind but beside more conventional theories—not as a gap-filler but as an independent pillar of social cohesion. And the broader class of horizontal and collaborative theories might reasonably aspire to take a leading role in the overall explanation of social cohesion.

These aspirations suit the age. As states lose practical capacity in the face of cosmopolitan social and economic forces, they also lose ideological prestige. Theory naturally lags behind practice, but it equally naturally aspires to catch up. The current age thus leads theories of social cohesion away from the vertical and towards the horizontal and away from cooperation and towards more modest forms of intersubjectivity. In both respects, the theory of market solidarity answers practical trends and anticipates theoretical ones. Where these trends will lead and how they will end remains anyone's guess.