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Regulating International Arbitrators: A Functional Approach to Developing Standards of Conduct

Catherine A. Rogers

It has been suggested that "barbers and taxidermists are subject to far greater regulation than [arbitrators]." The irony of this apparent incongruence is punctuated by some striking international cases. Take for instance the Saudi Arabian arbitrator who was unabashedly collaborating with his appointing party, helping plan its case strategy and rehearse witness testimony. Or consider the enforcement of an award notwithstanding the fact that an Indian

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1 Richard C. Cadwallader Associate Professor of Law, Paul M. Hebert Law Center, Louisiana State University, Baton Rouge, Louisiana; Long-Term Visiting Associate Professor of Law, Università Commerciale Luigi Bocconi, Milan, Italy. For their helpful comments, suggestions, support, and encouragement, I thank Ed Brunet, Guido Calabresi, Jules Coleman, Bill Dodge, John Devlin, Monroe Freedman, Keith Hylton, Mary Kay Kane, Jason Kilborn, Michael Malinowski, Carrie Menkel-Meadow, Ken Murchison, Michael Reisman, Ted Schneyer, John White, Michael Van Alstine and Marco Ventoruzzo. This Article benefited from the generous research support of Chancellor John Costonis and the LSU Law Center, and from the excellent research assistance of students Bill Bordelon, Teri Ellision and Reyna Mejia, and research librarians Randall Thompson, Kevin Gray and George Jacobsen. Special thanks are also due to Chris Drahozal for his uniquely detailed and precise comments. This Article was presented at faculty workshops at Hofstra University Law School and at Università Bocconi, where it received helpful comments from Robin Charlow, Mark Movsesian and Giorgio Sacerditi. Finally, in presenting this Article at the 2004 Stanford-Yale Junior Faculty Forum, I benefited greatly from the comments and questions of Jose Alvarez, Robert Gordon, Harold Koh, and Alan Schwartz. Remaining errors are, of course, my own.


3 What some might consider the "socially trivial" activity of cutting hair requires formal training and government licensure. In California, for example, it is a criminal misdemeanor for unlicensed persons to perform such services for money, and the California Board of Barbering and Cosmetology disciplines persons who violate the Act. See Cal. Bus. & Prof. Code § 7301 et seq (1990). Meanwhile, the venerable task of serving as an arbitrator can be performed by anyone, regardless of qualifications or training, and there is no regulatory oversight body. Only in relatively unusual venues such as Argentina is there even the minimal qualification that an arbitrator must be qualified as an attorney. See Christina L. Whittinghill, The Role and Regulation of International Commercial Arbitration in Argentina, 38 Tex. Int’l L.J. 795, 801 (2003) (noting that this unusual requirement "remains a point of contention in the legislature"). I stress at the outset that the issue of arbitrator misconduct is important because the consequences can be dire, both for individual parties and the system, but by all accounts the overall incidence of arbitrator misconduct is quite low.

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arbitrator withheld during the appointment process his numerous prior representations of his nominating party. And ponder how an English court could characterize as simply a “most unfortunate secretarial error” the failure by a Canadian arbitrator to disclose his directorship in a company that bid on the very contract in dispute. None of these arbitrators were sanctioned, removed, or even reprimanded. But what is ultimately problematic about these cases is not that these arbitrators were subject to less exacting regulation than their hair-cutting counterparts, but that no one agrees about how they should have been regulated.

Even as the need for clarity has increased, standards regarding arbitrator conduct remain obscure. Courts routinely express confusion over the vague and conflicting standards that purport to govern arbitrator misconduct, and commentators cannot agree about how the mess should be cleaned up. Meanwhile, some experts have been valiantly struggling to

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4 Fertilizer Corp. of India v. IDI Mgmt., Inc., 517 F. Supp. 948, 953–54 (S.D. Ohio 1981). One of the more interesting, and apparently persuasive, arguments raised was that the Indian arbitrator’s prior representation of the party was not as an advocate for the party, but as an Indian Senior Advocate (similar to a barrister in England). In that capacity, the arbitrator was insulated from his ultimate client, having been retained by the party’s advocate and not directly by the party. In this capacity, he operated as an officer to the court who was expected to maintain independence from clients. For a discussion of analogies between barristers and party-appointed arbitrators, see infra note 351 and accompanying text.

5 AT&T Corp. v. Saudi Cable Co., [2000] 1 Lloyd’s Rep. 22 (Q.B. 1999). Although the arbitrator claimed that the omission had been an accident, that explanation is particularly troubling in light of the fact that he had circulated another CV that included the relevant information at the same time.

6 In the two of these three cases that made it to award enforcement, the standards for evaluating the arbitrators’ conduct was, and remains, subject to considerable controversy. In Fertilizer Corp. of India, IDI submitted an expert affidavit swearing that it was permissible under Indian law to appoint a former legal representative and not disclose the former representation, while Fertilizer Corp. submitted an affidavit by another expert on Indian law which stated precisely the opposite. Fertilizer Corp. of India, 517 F. Supp. at 954. The court itself conceded the confusion in acknowledging one party’s argument that “[e]ven today it is not clear whether an ‘independent’ arbitrator need be neutral.” Id. Likewise, the court’s decision in AT&T is regarded as seminal for its attempt to bring some stability to the otherwise murky precedents, but the decision has been vigorously criticized as resting on faulty ground. See Lawrence Shore, Disclosure and Impartiality: An Arbitrator’s Responsibility vis-à-vis Legal Standards, 57 Disp. Resol. J. 32, 36 (2002) (describing as far beyond what was reasonable and a troubling perspective the AT&T court’s deference to the arbitrator’s discretion simply because of his experience and status as “a man of considerable distinction”).

7 “The rights and obligations of arbitrators are called into question increasingly often, and while national laws remain highly elliptical on these issues, they have become a matter of some concern to the courts and practitioners.” FOUCHEARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 558 (Emmanuel Gaillard & John Savage, eds., 1999); Shore, supra note 6, at 35 (noting that U.S. and English standards “do not provide clear guidelines”).

8 Burlington N. R.R. Co. v. Tuco, Inc. 960 S.W.2d 629, 632–36 (Tex. 1997) (surveying the various splits among both state and federal courts).

9 Compare James H. Carter, Rights & Obligations of the Arbitrator, 52 Disp. Resol. J. 56 (1997) (arguing that arbitrator obligations should be construed in light of “arbitrator’s rights” and thus not be too constritive); M. Scott Donahey, The Independence and Neutrality of Arbitrators, 9 J. Int’l Arb. 31 (1992) (proposing that party-appointed arbitrators adhere to a more “neutral” model that better suits the needs of the parties); William O’Malley Forbes, Rules of Ethics for Arbitrators and Their Application, 9 J. Int’l Arb. 5 (1992) (calling for heightened ethical standards); David Hacking, Ethics, Elitism, Eligibility: A Response: What Happens if the Icelandic Arbitrator Falls Through the Ice?, 15 J. Int’l Arb. 73, 78 (1998) (proposing a regular training process for international arbitrators as necessary to ensure quality); Chiara Giovannucci Orlandi, Ethics for International Arbitrators, 67 UMKC L. Rev. 93, 94 (1998) (noting the “large debate among scholars concerning the meaning of [the] term” “impartiality”); Jan Paulsson, Ethics, Elitism, Eligibility, 14 J. Int’l Arb. 13, 17 (1997) (warning against “over-emphasis on mechanical disclosure tests” that will “tend to exclude the honest and do very little to combat truly pernicious machinations”); Shore, supra note 6, at 35; Huang
promulgate new, clearer standards. To date, however, courts are still baffled, scholarly debate remains stalled, and the development of new standards is still in experimental phases. The primary reason for this methodological mayhem, I contend, is that there is no coherent conceptual theory to undergird new standards or to make sense of the confusion generated by the old standards. The purpose of this Article is to provide the necessary theoretical framework to develop and justify standards of conduct.

I contend that the confusion over standards for arbitrator conduct is rooted in the misleading judicial referent. In the only, now-antiquated U.S. Supreme Court decision addressing arbitrator impartiality, the purported majority opinion and the concurrence were deeply split over whether the


11 For example, the new IBA CONFLICT GUIDELINES were formally approved in May 2004, but in the introduction the drafters, led by Otto L.O. de Witt Wijnen, describe the guidelines “as a beginning, rather than an end, of the process” of defining standards of conduct. Still their completion represents a major accomplishment, particularly in light of admonitions from some detractors during the process that their project should be abandoned. Email from Otto L.O. de Witt Wijnen to the author (Feb. 13, 2003) (on file with author).

12 The category labeled “arbitrator misconduct” encompasses a range of behaviors, but the area that causes the most consternation, and the one that I focus on in this Article, is arbitrator bias or partiality. The U.S. Senator from State Elihu Root captured the concern well at the Second Hague Conference when he stated, “[The great obstacle to universal adoption of arbitration is not the unwillingness of civilized nations to submit their disputes to the decision of an impartial tribunal, it is rather the apprehension that the tribunal selected will not be impartial.” *Quoted in* Edward Gordon et al., *The Independence and Impartiality of International Judges*, 83 AM. SOC’Y INT’L L. PROC. 508, 508 (1989).

13 In this Article, I do not undertake to draft the specific rules for a code of ethics for arbitrators, in large part because much of the search for standards has found expression in newly minted AAA and IBA Codes. Instead, I seek to provide a conceptual analysis of the problem of arbitrator impartiality, a theoretical framework that will support and justify current and future efforts to develop ethical codes and a basis for interpreting and applying the standards that have been newly articulated in the revised codes. While I ultimately seek to tease apart conduct standards from enforcement standards because they have been routinely conflated by courts and commentators, some of my analysis of conduct standards in this Article necessarily implicates enforcement standards.

14 Many judicial decisions contemplating the question of arbitrator impartiality reason simply that judges are required to be “impartial,” arbitrators substitute for judges, and therefore that arbitrators are required to be “impartial.” Such decisions often go on to identify particular similarities and differences between judges and arbitrators, but because they begin with the more particularized referent, “judges,” as opposed to the more general category of “adjudicators,” their entire comparison is skewed. See discussion infra Subpart I.B.

15 Although I engage in comparative analysis of various national standards, I focus on international arbitration as applied by the U.S. legal system. This emphasis is a product both of the growing influence of U.S. standards in the international arbitration system and the limitations of my own professional expertise. Ultimately, the development of standards to govern international arbitrators must engage worldwide debate and more in-depth comparative analysis than is possible in the space of this Article.
standard for arbitrator impartiality should be the same or "lower" than that of judges. 16 While their divergent perspectives have been extensively debated, 17 no one has ever questioned their reliance on the judicial model.

"Impartiality" is said to be the defining feature of the judge, 18 but the mirage of absolute judicial impartiality becomes more distorted when it is superimposed onto the arbitrator. All the guarantees that ensure judicial impartiality, or at least protect the myth of impartiality, are either missing or openly flouted in the arbitral process. For example, attorneys can only be eligible for appointment or election as judges if they possess certain professional qualifications, 19 while arbitrators are not formally required to have any minimum qualifications, and in most cases they are not even required to possess any legal training. 20 Judges are sequestered from the professional community by rules that prohibit professional affiliations, 21 whereas arbitrators are often drawn from the ranks of active professionals. 22 Judges are randomly assigned to individual cases 23 and litigants are discouraged from forum shopping, but parties deliberately and individually select arbitrators who are presumably predisposed toward their case. 24 Judges are expressly precluded

16 Compare Commonwealth Coatings Corp. v. Cont'l Cas. Co., 393 U.S. 145, 148-49 (1968) (reasoning that "we should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges"); with id. at 150 (White, J., concurring) (arguing that arbitrators cannot be held to as high as standard as judges). For a full discussion of the Commonwealth Coatings case, see infra notes 141-150, and accompanying text.

17 Courts cannot even agree about whether Justice Black's opinion in Commonwealth Coatings was a plurality or a majority opinion. Compare Schmitz v. Zilveti, 20 F.3d 1043, 1045 (9th Cir. 1994) ("Commonwealth Coatings is not a plurality opinion."); Beebe Med. Ctr., Inc. v. InSight Health Serv. Corp., 751 A.2d 426, 434 (Del. Ch. 1999) ("Federal courts have struggled over the meaning and application of Commonwealth Coatings, principally because of the unusual nature of Justice White's concurrence in which he purported to join the majority opinion while delimiting its application."); with Morelite Constr. Corp. v. N.Y. City Dist. Council Carpenters Benefit Funds, 748 F.2d 79, 82 (2d. Cir. 1984) ("Four justices... [who joined Justice Black's opinion] do not constitute a majority of the Supreme Court."). As a result, one commentator has noted, "[a]lthough Commonwealth Coatings was the Supreme Court's first and only word on the matter," it has provided little true guidance." Eric M. Sommers, Gianelli Money Purchase Plan & Trust v. ADM Investor Services, Inc., 14 OHIO ST. J. ON DISP. RESOL. 687, 692 (1999) (internal citations omitted).

18 As Professor John Leubsdorf has put it, "To decide when a judge may not sit is to define what a judge is." John Leubsdorf, Theories of Judging and Judge Disqualification, 62 N.Y.U. L. REV. 237, 237 (1987).

19 This observation is true with regard to judicial selection in the United States. See, e.g., Susanne Di Pietro et al., Judicial Qualifications and Judicial Performance: Is There a Relationship?, 83 JUDICATURE 196, 196 (2000) (describing a study in Alaska to determine which "objectively identifiable qualities" are associated with nomination, appointment, and professional performance of judges).

20 Requirements that arbitrators have some legal training or qualifications are controversial in the few countries where they exist. See Whittinghill, supra note 2, at 801.

21 "Usually, by virtue of a statutory provision or a rule of court, a judge of a court of record is prohibited from practicing law." 46 AM. JUR. 2D Judges § 48 (2004).

22 See discussion infra Subparts I.A.1-2.


24 [T]he law struggles mightily, and generally successfully, to prevent judicial forum shopping. . . . In arbitration, by contrast, something akin to forum shopping—the search for a panel with the array of experience and skills sought by the parties—is not only permitted but encouraged." Francis O. Spalding, Selecting the Arbitrator: What Counsel Can Do, in WHAT THE BUSINESS LAWYER NEEDS TO KNOW ABOUT ADR 351, 353 (PLI Commercial Law & Practice Course,
from receiving even nominal or indirect compensation from cases they preside over, but arbitrators typically earn lavish fees. As an ultimate affront to notions of judicial impartiality, the availability of arbitrators' fees can depend in part on the substantive outcome of arbitrators' own decisions and the amount of fees is often determined by, or at least influenced by, the arbitrators themselves. In sum, when arbitrators step into judges' shoes, they seem to be wearing them on the wrong feet.

Reconciling the underlying contradictions requires a new understanding of the term "impartiality," defined specifically for the international arbitration context and independent from national judicial standards. This Article undertakes that effort in three Parts. I begin in Part I by describing the current state of affairs, starting with the practical pressures that compel a coherent theory of arbitrator impartiality. In the past, informal social pressures and a personal sense of duty provided sufficient constraints on arbitrator conduct. Today, the pool of arbitrators has vastly expanded and the occupation is seen less as a noble duty than as an entrepreneurial opportunity. Notwithstanding these dramatic changes, professional standards and procedures for regulating arbitrators represent only partial and imperfect modifications on the earlier regime based on self-regulation.

To make


In the United States, the principle has been held to preclude an old practice of calculating judges' incomes based on the number of convictions they presided over. See Tumey v. Ohio, 273 U.S. 510, 523 (1927) (concluding that under this arrangement, the judge would have a "direct, personal, substantial pecuniary interest" in the outcome of the case).

For example, decisions that find no arbitral jurisdiction will likely result in nominal or no arbitrator fees. See William W. Park, Bridging the Gap in Forum Selection: Harmonizing Arbitration and Court Selection, 8 TRANSNAT'L L. & CONTEMP. PROBS. 19, 50 (1999) ("Presumably arbitrators will be more likely than courts to find jurisdiction, since arbitrators get paid if they hear a dispute."). Relatedly, in some aberrant cases, arbitrators have made overtures about their future availability to the parties in an apparent attempt to solicit future appointments while the current case was still pending. See, e.g., Babcock & Wilcox Co. v. PMAC, Ltd., 863 S.W.2d 225, 233-34 (Tex. App. 1993). Notably, the court in Babcock found that the arbitrator's impartiality was not necessarily compromised.

See John Yukio Gotanda, Awarding Costs and Attorneys' Fees in International Commercial arbitrations, 21 MICH. J. INT'L L. 1, 1-3 (1999) (noting that an overwhelming number of countries permit arbitrators to award costs and fees, which often run into the millions of dollars). Additionally, one detractor of arbitration under the rules of the International Chamber of Commerce ("ICC") argues that since arbitrators' fees under the ICC rules are set based on "the complexity of the case, as reflected in the award," arbitrators have "an incentive to write unnecessarily elaborate opinions." Julia A. Martin, Arbitrating in the Alps Rather Than Litigating in Los Angeles: The Advantages of International Intellectual Property-Specific Alternative Dispute Resolution, 49 STAN. L. REV. 917, 967 (1997).

Although I refer collectively to "national judicial standards," they are not entirely uniform. "Virtually all jurisdictions apply the same standard of bias for judges and arbitrators[,] but here are some differentiations. Draft Joint Report of the Working Group on Guidelines Regarding the Standard of Bias and Disclosure in International Commercial Arbitration § 2.3, at.12 (October 7 & 15, 2003) (draft on file with author). Some systems (such as Sweden) define arbitrator standards as stricter than that of judges, while other systems (such as Germany) permit more contact between arbitrators and parties than would be allowed with judges. See id. at 12-13. A comprehensive comparative analysis of the meaning of judicial impartiality in various nations is beyond the scope of this Article, but a brief analysis of the meaning of impartiality as applied to a civil law judge is provided infra Subpart II.B.

See infra notes 49-63 and accompanying text.


As Otto L.O. de Witt Wijnen, one of the architects of the IBA's GUIDELINES ON CONFLICTS IN INTERNATIONAL COMMERCIAL ARBITRATION, explains:
matters worse, the primary contrivance used to effect the few cosmetic changes has been analogy to judicial ethics. In focusing on the judicial analogy, courts and commentators have failed to take account of how arbitrator impartiality fits with the central tenants of the international arbitration system.

Another cause of the underlying confusion is the conflation of conduct standards with enforcement standards. In this Article, I argue that conduct standards, meaning those norms or rules that guide arbitrators' professional conduct, must be more detailed and quantitative than the vague and qualitative standards that currently prevail. I also argue that these conduct standards should be enacted in the form of codes of ethics that should be enforced by arbitral institutions. The relationship of these conduct standards to enforcement standards, meaning those tenets that determine whether particular misconduct is so problematic that the resulting award should not be enforced, I take up in a forthcoming companion article. Teasing apart conduct and enforcement standards is a critical corollary to my overall thesis because one of the primary objections to efforts to increase specificity and transparency in the standards for arbitrator conduct is a concern that such efforts will increase the frequency of award non-enforcement. This objection fails, however, if the former can be independently augmented without disrupting application of the latter.

Before applying my theory, in Part II I undertake a conceptual analysis of the general problem of decisionmaker impartiality. The model I employ for understanding standards of decisionmaker conduct is what I have elsewhere dubbed a functional approach to ethics. This theoretical approach is grounded in the relationship between morality and role, and posits that professional ethical norms are designed to correspond with the functional role assigned to an actor within a particular legal system. To explicate the

The question of independence and impartiality of the arbitrator is an old one. But... it has become more and more complex over the last years—and, more important, it seems more and more difficult to find answers to this question and to the many forms in which it appears and the many situations that occur.


The functional approach is a method of conceptual analysis that I first developed in an earlier article regarding attorney ethics in international arbitration. See Rogers, supra note 30, at 380.

See id. at 380–81. In many ways, my functional approach echoes Lon Fuller's theory on legal ethics. As David Luban summarizes, Fuller envisioned the following procedure for deriving professional ethics:

First, ascertain the nature of professionals' work ("the purposes they serve in society"). Second, devise an appropriate method for morally assessing its purposes and their necessities. Third, following that method, "reason out what restraints must be observed if those purposes are to be achieved." Fuller has illuminating ideas on all of these topics.

David Luban, Rediscovering Fuller's Legal Ethics, 11 GEO. J. LEGAL ETHICS 801, 807 (1998) (citing Lon L. Fuller, The Philosophy of Codes of Ethics, 1995 ELEC. ENG. 916, 917) (footnotes omitted). It also appears that John Leubsdorf's principles of judicial qualifications are similarly traceable to a vision of the functional role of judges, which he refers to as the "constrained dialogue" model. Leubsdorf, supra note 18, at 282-89 (arguing that disqualification should be based on principles of "excluding personal considerations," "willingness to listen," and "clean slate," which are
functional role of the arbitrator, I develop an archetypal model of adjudication, from which I outline the functional features that define the role of the universal adjudicator, and the fundamental ethical obligations that are inherent in that role. Based on this archetypal model, I explore variations on the adjudicator's role that exist within adjudicatory forms present in the United States and in other national legal systems. Tracing how shifts in the adjudicator's role reshape and recalibrate ethical obligations provides a demonstration of the functional approach's explanatory powers.

Finally, in Part III, I take the conceptual analysis of the first two Parts and apply the functional approach prescriptively to the international arbitration system. The problem in this context is that the primary harbingers of an adjudicator's role—the appointment process, their decisional methodology and the procedural arrangements used for gathering proof and argumentation—are all subject to constant, ad hoc change through individually crafted arbitration agreements. This feature requires that the ethical codes for arbitrators be appended to the arbitral rules adopted by parties, as a few arbitral institutions have already done.

While it is beyond the scope of this Article to prescribe specific rules, I apply the functional approach to the two aspects of arbitrator impartiality obligations that have been the central focus of concern by commentators and courts—the impartiality obligations of the party-appointed arbitrator and the duty to disclose potential conflicts during the selection process. Through this analysis, I help reconfigure the underlying debate by clarifying its terms and identifying the source from which the specific ethical rules should be crafted.

What becomes clear from this analysis is that the impartiality required of arbitrators is tied to specific features of their functional role, rather than being simply a watered-down version of the mythical "impartial" judge. This insight avoids the unflattering and inaccurate comparison that recasts arbitrators as "caricatures of their judicial siblings" and, by extension, relegates arbitration to its former status as a "bastard remedy." By elaborating
independent justifications for the standards that govern arbitrator impartiality, the functional approach not only provides guidance at a prescriptive level for the development and justification of ethical norms, but it reinforces the normative legitimacy of the international arbitration system. This legitimacy is what encourages nation-states to permit resolution of certain important mandatory laws by arbitrators instead of judges and what persuades parties to forsake substantive appeal. In addition, the legitimacy of international arbitrators is also largely responsible for selection of arbitration as the system of choice for new areas of international governance, such as dispute resolution at the World Trade Organization and the North American Free Trade Agreement. Improved standards and increased transparency are required to maintain this legitimacy and, by extension, the continued prominence of international arbitration.

I. THE CURRENT CONCEPTUAL CONFUSION

"[P]rivate dispute resolution amongst commercial men is as old as commerce itself." Since the inception of this ancient institution, arbitrator regulation has scarcely improved, while concern over its inadequacies and confusion over its application have escalated dramatically. To understand this discrepancy, I provide, in Subpart A, an historical prologue to the current situation. In Subpart B I observe the incoherence of applying traditional static notions of judicial impartiality to arbitration, which is aggravated, as I explain in Subpart C, by certain features of the international arbitration system that defy traditional notions of judicial impartiality.

A. Prelude to an Abyss

Although the absence of arbitrator regulation seems astonishing today, until recently, formal regulation was presumed to be unnecessary. The ultimate testament to this historic belief is that the document that establishes the modern international arbitration system, the 1958 Convention on the Recognition and Enforcement of International Arbitral Awards, does not mention any minimum qualifications for arbitrators or any consequences for arbitrator bias. This omission seems like a significant oversight, but the

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39 Because international arbitration is "the preferred means of transnational dispute resolution, it is the arbitrator rather than a national judge who will decide most international commercial disputes. And, while arbitral institutions are there to assist and provide support, it is the arbitrator upon whom the success of any arbitration ultimately depends." Michael F. Hoellering, The Role of International Arbitrators, 51 Disp. Resol. J. 100, 100 (1996).

40 Failure to carefully define the role of adjudicators in other contexts has undermined the legitimacy and efficacy of those systems. See, e.g., Susan H. Shin, Comparison of the Dispute Settlement Procedures of the World Trade Organization for Trade Disputes and the Inter-American System for Human Rights Violations, 16 N.Y. Int'l L. Rev. 43, 95 (2003) (arguing that the "loose" and dual functions of both the WTO Commission and the Inter-American Court of Human Rights undermines the legitimacy and efficacy of those systems and their rule-based function).

41 W. Laurence Craig, Some Trends and Developments in the Laws and Practice of International Commercial Arbitration, 30 Tex. Int'l L.J. 1, 5 (1995). Shore, supra note 6, at 34 ("Independence and impartiality underpin the entire arbitral process. Without their assured vitality, arbitration as the favored dispute resolution method in international commercial contracts will have a troubled future.").


43 Id. The enumerated grounds for refusing to enforce an arbitral award under the New York Convention are the exclusive grounds for which signatory nations can review awards rendered in other jurisdictions. See, e.g., W. Michael Reisman et al., International Commercial Arbitration:
drafting of the New York Convention was itself a dramatic shift away from the prevailing view that informal social controls were sufficient to regulate the international arbitration system. During the period prior to the drafting of the New York Convention it was widely believed that there was no real need for judicial enforcement of arbitral awards because a businessperson’s sense of honor was sufficient to ensure voluntary compliance. While the drafters of the New York Convention recognized that losing parties may falter in their commitment to behave honorably, it must have been unimaginable that one of the “grand old men” who formed the closed circle of potential arbitrators (and who were themselves drafting the New York Convention) could stray from their noble duties. Several trends make this early altruism untenable in the

CATEGORIES, MATERIALS AND NOTES ON THE RESOLUTION OF INTERNATIONAL BUSINESS DISPUTES 1093 (1997). Parties often argue that arbitrator partiality or nondisclosure has meant that the tribunal was not constituted in accordance with the parties’ agreement or violates the public policy of the enforcement jurisdiction. See New York Convention, supra note 42, art. V(1)(d) and V(2)(b). These and related enforcement issues are taken up in my forthcoming companion article.


In any nascent legal system, when there is a relatively small and intimate group, informal social controls can operate as sufficient control mechanisms. Detlev F. Vagts, The International Legal Profession: A Need for More Governance?, 90 AM. J. INT’L L. 250, 250 (1996) (noting that in the early American legal profession “[t]here were only a few persons in the profession and they knew what they [were] supposed to do. In the rare case that somebody [was] tempted to lapse from grace, the prospect of disapproval by one’s peers [was] deterrence enough.”); see also Lisa Bernstein, Merchant Law in a Merchant Court: Rethinking the Code’s Search for Immanent Business Norms, 144 U. PA. L. REV. 1765, 1771 (1996).

For example, the 1923 version of the International Chamber of Commerce Arbitration Rules provided only that the parties were “honor bound” to comply with the award. Craig, supra note 40, at 7. “It was expected that moral norms and ‘the force that businessmen of a country can bring to bear upon a recalcitrant neighbor’ would be sufficient to ensure respect for arbitral awards.” Id. The assumption that it was unnecessary to mandate appropriate conduct also extended to arbitrator conduct. See W. LAWRENCE CRAIG ET AL., INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION § 13.03, at 210 (3d ed. 2000) (describing how the former Secretary General of the Court of Arbitration submitted an affidavit to a court explaining that later rules made explicit the longstanding ICC practice of requiring independent arbitrators).

See YVES DEZALAY & BRYANT GARTH, DEALING IN VIRTUE: INTERNATIONAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER 34–36 (1996) (describing the “grand old men” who “played a central role in the emergence and the recognition of arbitration”). The use of masculine pronouns in the international arbitration context is an accurate reflection of unfortunate realities. For most of international arbitration’s history, there were no women arbitrators, and still there are very few. See Louise Barrington, Arbitral Women: A Study of Women in International Commercial Arbitration, in THE COMMERCIAL WAY TO JUSTICE: THE 1996 INTERNATIONAL CONFERENCE OF THE CHARTERED INSTITUTE OF ARBITRATORS 229–41 (Geoffrey M. Beresford Hartwell ed., 1996) (surveying the limited participation of, systematic discrimination against, and recent progress for women in international arbitration); Dr. K.V.S.K. Nathan, Well, Why Did You Not Get the Right Arbitrator?, 15-7 MEALEY’S INT’L ARB. REP. 10 (2000) (noting that “[t]he majority in a multimember international arbitral tribunal is always white” and interpreting a British arbitrator’s commentary as improperly suggesting that, “arbitrators from the developing countries and women simply do not or cannot satisfy the selection criteria” for arbitrators).

See DEZALAY & GARTH, supra note 47, at 36–38 (describing how the early arbitrators regarded their occupation more as a duty than a career). So complete was the sense of being above the fray that prominent international lawyers close to or part of the inner circle of international arbitrators maintained that party-appointed arbitrators were generally immune from the pulls of party loyalty. For my prescriptions for drafting rules for party-appointed arbitrators, see discussion infra Subpart III.C.
modern international arbitration context.

1. Expansion in the Number and Diversity of Arbitrators

In recent years, the intimacy and limited size that are prerequisites for informal social controls in the international arbitration community gave way to a host of pressures brought by its growth and expansion. Increased activity among traditional trading partners, as well as the entry of new nations onto the stage of world trade, inevitably resulted in more disputes and more arbitration. As part of this trend, some developing countries that agreed to submit disputes to arbitration in order to attract foreign investment became disenchanted with arbitrators from predominantly Western European backgrounds, whom they believed were biased against them. Unable to reject international arbitration altogether, parties from these countries began to insist on alternative arbitral candidates who were nationals of their own or other developing countries, and who had been trained in local legal systems. The resulting increase in the number of international arbitrations led to a dramatic expansion in the pool of arbitral candidates, and a commensurate diversification of the cultural and legal traditions among arbitrators. These new arbitrators brought new assumptions about what constitutes proper

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49 Institutions such as China International Commercial Dispute Resolution ("CIETAC"), the International Chamber of Commerce, and the American Arbitration Association ("AAA") have seen a great increase in the annual number of international cases filed with them. *Towards a Science of International Arbitration: Collected Empirical Research* I (Christopher R. Drahazol ed., 2004).

50 Sir Michael J. Mustill, *Arbitration: History and Background*, 6 J. Int'l Arb. 43, 53-54 (1989) ("[O]ne must take note of the efforts made by individual nations to make their arbitration laws . . . more attractive."). This trend extends to developing countries, such as Mauritius, Estonia, Latvia, Lithuania, and many Latin American countries, which in recent years have made legal commitments to support international arbitration as part of an effort to facilitate trade with foreign investors and business interests. Donald Francis Donovan, *International Commercial Arbitration and Public Policy*, 27 N.Y.U. J. Int'l L. & Pol. 645, 650-51 (1995); see also 10 World Arb. & Med. Report 209 (1999) ("The Turkish parliament's decision to approve a constitutional amendment allowing for international arbitration in investment disputes should attract foreign investors to the multibillion dollar projects currently awaiting funding.").

51 Leading arbitration practitioner and scholar Jan Paulsson concedes that "in the beginning of this century, and until the 1950s, arbitrations conducted by various 'international' tribunals or commissions evidenced bias against developing countries," but he claims that that the "dice are loaded no longer." Jan Paulsson, *Third World Participation in International Investment Arbitration*, 2 For. Inv. L.J. 19, 21 (1987). While there is significant consensus about the existence of bias conceded in the first part of Mr. Paulsson's analysis, many in the developing world have some remaining doubts about the more optimistic second part of his analysis. See, e.g., M. Somarajah, *The Climate of International Arbitration*, 8 J. Int'l Arb. 47, 47-48 (June 1991) (arguing from historical evidence that international arbitration manipulates vague notions of international law and systematically favors capital exporting States); see also Amir A. Shalakany, *Arbitration and the Third World: A Plea for Reassessing Bias under the Specet of Neoliberalism*, 41 Harv. Int'l L.J. 419, 420-424, 427-431 (2000); Ahmed Sadek El-Kosheri, *Is There a Growing International Arbitration Culture in the Arab-Islamic Juridical Culture?*, in *International Dispute Resolution: Towards an International Arbitration Culture* 47-48 (1998) (noting that, despite the long history and current popularity of arbitration in Arab nations, the Arab legal community remains hostile toward transnational arbitration because of perceptions of biased treatment by Western arbitrators); John Beechey, *International Commercial Arbitration: A Process Under Review and Change*, AUG/OCT DIS. RES. J. 32, 33 (2000) (explaining that there "remains a huge task" to convince developing nations that they can expect a fair hearing before international arbitration tribunals).

52 See Dezalay & Garth, supra note 47, at 47.

conduct and created new pressures on historically informal social controls.

Interestingly enough, even more disruptive than the influence of these non-Western and culturally-distinct newcomers, such as Zimbabweans, Yemenis, or Malaysians, was the advent of American lawyers and law firms. American attorneys brought not only their uniquely adversarial litigation style, the effects of which I discuss elsewhere, but also practices that profoundly affect arbitrator conduct, such as a compulsively persnickety approach to conflicts-of-interest. As characterized by one leading European scholar on the matter, some individual U.S. states require disqualification of an arbitrator simply because she "has the same hairdresser as the counsel of one of the parties." While this example may be more of an apocryphal parable than a case study, the reality and perception of U.S. conflict-of-interest standards contrast sharply with European standards and practices, which permit the same and other close relationships to be legitimately withheld.

In an unexpected counterpunch, American arbitrators and attorneys also brought their uniquely partisan view of the role of the party-appointed arbitrator to international arbitration. Domestic U.S. arbitration procedure allows parties and their counsel to communicate throughout arbitral proceedings with their party-appointed arbitrators, even about crucial issues involving strategy. Such communication is considered unacceptable in most...
other systems. This fundamental clash over the role of party-appointed arbitrators became a pet topic, if not a litmus test, for those contemplating regulation of arbitrator conduct.

2. Commercialization of International Arbitrators

As it has expanded in numbers and cultural vicissitudes, the pool of international arbitrators has also become more entrepreneurial. Arbitration results not only in large awards for prevailing parties, but also large fees for those rendering arbitral services. Arbitrators can earn hundreds of thousands to sometimes over a million dollars from a single arbitration, giving candidates a strong incentive to compete for selection as arbitrators. Not surprisingly, a consequence of these developments is that the new breed of

Controversies: Some Reflections, 30 TEX. INT'L L.J. 59, 65 (1995) (noting international norms that seek to neutralize perceived partisanship in the party-appointed arbitrator). Recently, in response to this problem, some institutions have clarified in their arbitral rules that all arbitrators are expected to act as "neutrals." See, e.g., LONDON COURT OF INTERNATIONAL ARBITRATION ARBITRAL RULES, art. 5.2 ("All arbitrators conducting an arbitration under these Rules shall be and remain at all times impartial and independent of the parties; and none shall act in the arbitration as advocates for any party.").

The starkness of this distinction has lost some force with recent efforts to revise the pertinent rules, but a survey of the preceding rules and practices, even if now partially displaced, is still illuminating. See, e.g., CRAIG ET AL., supra note 46, § 13.07; Donahay, supra note 9, at 41-42. Compare ALAN REDFERN & MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 225-26 (1991) (noting that "it is not unusual for there to be discussions between one of the parties in respect of procedural matters such as availability for future hearings"), and Former AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes (1997), Canon III(B)(5) (permitting ex parte communications with any member of the arbitral tribunal "concerning such matters as setting the time and place of hearings or making other arrangements for the conduct of the proceedings") and III(C) (permitting ex parte communications by party-appointed arbitrators as long as general disclosure is made).

63 See Detlev Vagts, International Legal Ethics and Professional Responsibility, 92 AM. SOC'Y INT'L L. PROC. 378, 379 (1998) (discussing a hypothetical case involving contrasting approaches to ex parte communication with arbitrators as basis for panel discussion); see also Hans Smi, The Practicalities of Cross-Cultural Arbitration, in CONFLICTING LEGAL CULTURES IN COMMERCIAL ARBITRATION: OLD ISSUES AND NEW TRENDS 86 (Stefan N. Frommel & Barry A.K. Rider eds., 1999) (describing differing approaches to ex parte communication as a problem in international arbitration that must be overcome); see also Hans Smi, Managing an International Arbitration: An Arbitrator's View, 5 AM. REV. INT'L ARB. 129, 131 (1994) (taking the view that communications between party and party-appointed arbitrator concerning the appointment of the presiding arbitrator are generally accepted where the party-appointed arbitrator takes part in the selection process, even if the rules are silent); Lowenfeld, supra note 61, at 59. But see Hans Smi, The Future of International Commercial Arbitration: A Single Transnational Institution?, 25 COLUM. J. TRANSNAT'L L. 9, 17 n.40 (1986) (noting that an award rendered by an arbitrator who communicates ex parte with an appointing party "may not be recognized in foreign countries").


65 See Gotanda, supra note 27, at 1 (noting that fees can run into the millions of dollars). As the Special Committee on Professionalism of National Academy of Arbitrators summarized:

There are those among us who view arbitration primarily as a business. They are likely to concentrate more on self-interest than the interest of the profession. . . . We recognize that arbitrators are no less ambitious than other professionals; we recognize that many of us are dependent on arbitration fees for a livelihood.

arbitrator regards participation in arbitration as an entrepreneurial venture.\textsuperscript{66} These newcomers are less constrained by the established traditions, senses of obligation, and informal social controls that served as constraints when the community was still comprised of an elite in-group.\textsuperscript{67}

While the number of arbitrators has expanded, it remains doubtful that arbitration has developed into a fully functioning and open market. Even with expansion, arbitral services are still dominated by those in the highest echelons of legal talent.\textsuperscript{68} To surmount entry barriers new arrivals must acquire professional credentials that make them attractive as arbitrators, and must be acknowledged by participants, particularly those who are already part of the controlling cartel.\textsuperscript{69} The arbitration market may also create incentives for those in the controlling cartel to affirm the strength of the international arbitration system, as opposed to outing deviant arbitrators and decrying their decisional products as invalid.\textsuperscript{70} The fact that most arbitration is confidential, most awards are not published, and most institutional decisions regarding arbitrators’ challenges are rendered without reasoned explanations creates significant information asymmetries that also belie the development of an effective and efficient market.\textsuperscript{71} The result is an increasingly entrepreneurial group that has not been formally organized into a profession, but nevertheless is able to claim the mantle of professionalism.\textsuperscript{72}

\textsuperscript{66} See DEZALAY & GARTH, supra note 47, at 34–36.
\textsuperscript{67} See id.
\textsuperscript{68} See Jan Paulsson, \textit{Ethics, Elitism, Eligibility}, 14 J. INT’L ARB. 13 (1997); David Hacking, \textit{Ethics, Elitism, Eligibility: A Response: What Happens if the Icelandic Arbitrator Falls through the Ice?}, 15 J. INT’L ARB. 73 (1998); and see David A. Hoffman, \textit{Certifying ADR Providers}, 40 APR BOST. B.J. 9 (1996) (arguing for certification, but acknowledging arguments that it can promote monopolization). There is an obvious tension between the claim in the preceding paragraphs that the pool of arbitrators is expanding enough to diminish the effect of informal social norms, and the claim in this paragraph that significant entry barriers remain.
\textsuperscript{69} The existence and influence of the controlling cartel is a product of the sources and processes used to select arbitrators. For example, one popular resource for arbitrator selection is the “Guide to International Arbitration and Arbitrators,” which has been described as a “Who’s Who in International Arbitration.” For examples of arbitrators influencing selection as authors, see William W. Park, \textit{Book Review}, 85 AM. J. INT’L L. 586 (1991) (famous international arbitrator reviewing new book compiled by The Parker School of Foreign and Comparative Law); Francis O. Spalding, \textit{Selecting the Arbitrator, What Counsel Can Do}, 2 ADR CURRENTS Fall 1997, at 8 (1998) (well-known arbitrator providing advice on how to use recommendations to select arbitrators). In addition, there are a few internet-based electronic directories for identifying potential arbitrators which were founded by well-known arbitrators. See, e.g., www.iaiparis.com (last visited Jan. 31, 2005) and www.hgexperts.com (last visited Jan. 31, 2005). For a discussion of the market to become an arbitrator, see DEZALAY & GARTH, supra note 47, at 34–36. While parties and their counsel use these in-group sources to identify would-be arbitrators, many arbitral institutions themselves appoint arbitral chairpersons. For example, at the ICC, the Court of Arbitration appoints chairpersons. See Robert H. Smit, \textit{An Inside View of the ICC Court}, 10 INT’L ARB. 53 (1994). The Court of Arbitration is comprised of accomplished arbitrators and practitioners, and this group decides on appointments of, and challenges to, arbitrators. \textit{Id.}
\textsuperscript{72} As Richard Abel has explained in his seminal work on lawyers and the legal profession, “[c]ontrol of the supply of services is one of the elements that defines a profession.” Richard L. Abel, \textit{Comparative Sociology of Legal Professions} in \textit{Lawyers in Society, Volume Three: Comparative Theories} 84 (Richard L. Abel and Philip S.C. Lewis eds. 1989). There are those who
3. Development of an Arbitral Rule of Law

The final trend that has focused attention on regulation of arbitrator conduct is the increasingly legalistic and rule-bound nature of international arbitration. Until the last few decades, arbitration was regarded as an ad hoc compromise-oriented process characterized by its informality and emphasis on fairness over legality. Formerly, arbitrators were most often experts chosen from the same industry as the dispute and were expected to render a just and equitable result, even if that meant disregarding the express terms of the contract or the provisions of the chosen law. In this aim, the arbitrator was aided by the doctrine of amiable compositeurs, the ability to rule ex aequo et bono, and the principles of lex mercatoria, all of which authorized arbitrators to disregard the strictures of legal rules in search of more equitable resolutions to disputes.

The increasing competitiveness of international business has challenged this earlier version of arbitration as an informal and largely equitable means of resolving disputes. International agreements are now drafted with greater precision and parties are intentionally choosing what law they want to govern interpretation and enforcement of their agreement. challenge the accuracy and efficacy of the term "profession," but they do not deny that the term has a value in conferring legitimacy on those who claim it. See Austin Sarat, Enactments of Professionalism: A Study of Judges' and Lawyers' Accounts of Ethics and Civility in Litigation, 67 FORDHAM L. REV. 809, 814 (1998) (arguing that the term professionalism is "far too vague, complex, and contradictory" but that it still confers legitimacy and operates as "symbolic capital" on those who can claim it).

The term "rule of law" is useful shorthand, but its meaning as well as its normative value has been questioned. See, e.g., Richard H. Fallon, Jr., "The Rule of Law" as a Concept in Constitutional Discourse, 97 COLUM. L. REV. 1, 1 (1997) ("The Rule of Law is a much celebrated, historic ideal, the precise meaning of which may be less clear today than ever before."). Notwithstanding the significant room for debate, there is broad consensus at the core. Randall Peerenboom, Let One Hundred Flowers Bloom, One Hundred Schools Contend: Debating the Rule of Law in China, 23 MICH. J. INT'L L. 471, 472 (2002). Applying Peerenboom's core definition to the international arbitration context means that formal and articulated legal rules impose meaningful constraints that are equally binding on all parties. 

\footnote{The term "rule of law" is useful shorthand, but its meaning as well as its normative value has been questioned. See, e.g., Richard H. Fallon, Jr., "The Rule of Law" as a Concept in Constitutional Discourse, 97 COLUM. L. REV. 1, 1 (1997) ("The Rule of Law is a much celebrated, historic ideal, the precise meaning of which may be less clear today than ever before."). Notwithstanding the significant room for debate, there is broad consensus at the core. Randall Peerenboom, Let One Hundred Flowers Bloom, One Hundred Schools Contend: Debating the Rule of Law in China, 23 MICH. J. INT'L L. 471, 472 (2002). Applying Peerenboom's core definition to the international arbitration context means that formal and articulated legal rules impose meaningful constraints that are equally binding on all parties.}  

\footnote{Yves Dezalay & Bryant Garth, Fussing About the Forum: Categories and Definitions as Stakes in Professional Competition, 21 LAW & SOC. INQUIRY 285, 295 (1996).}

\footnote{Rogers, supra note 30, at 350–51.}

\footnote{Id. at 352–53.}

\footnote{S.I. Strong, Intervention and Joinder as of Right in International Arbitration: Infringement of Individual Contract Rights or a Proper Equitable Measure?, 31 VAND. J. TRANSNAT'L L. 915, 932 (1998) ("The doctrine of amiable composition is a doctrine that allows arbitrators to make an equity-based, instead of a law-based, decision, even if they remain bound by national mandatory law."). The doctrine of ex aequo et bono is very similar to amiable compositeurs, except that the powers of arbitrators are slightly broader, enabling them "to disregard even mandatory provisions of substantive law in order to reach an equitable outcome." Id. at 933.}

\footnote{Dezalay & Garth, supra note 74, at 295; Christopher R. Drahazol, Commercial Norms, Commercial Codes, and International Commercial Arbitration, 33 VAND. J. TRANSNAT'L L. 79, 128–130 (2000).}

\footnote{Rogers, supra note 30, at 351–52.}

\footnote{This trend is also likely attributable to competition among the lawyers who participate in arbitration. DEZALAY & GARTH, supra note 74, at 297–98.}

response to these changing needs, international commercial arbitration has undergone a fundamental shift to become a more formalized legal process, which has been both celebrated and decried as the judicialization of arbitration.82

This trend is marked by a number of changes that make the arbitration process more transparent and more accountable, primarily by making arbitral procedure more definite in content and express in form.83 Back when the arbitrator's task was to reach a compromise outcome, by definition, winners and losers were less clear. Consequently, it was less likely that one party would emerge from the arbitral process truly disgruntled. As arbitrators are called on to use clearer legal rules to declare the victor and the vanquished, their ability and impartiality in applying those rules naturally comes under greater scrutiny. While a losing party might have previously regarded unfavorable awards as simply erroneous, they are now a signal for possible bias.84

In sum, consensus about what constitutes proper arbitrator conduct has disintegrated, just as corresponding pressures brought on by increased competition in, and formalization of, the international arbitration process have created a need for clearer rules to guide, and effective mechanisms to regulate, arbitrator conduct.85 The mechanisms that exist today, meanwhile, represent only minor and imperfect modifications of those created in the heyday of presumed arbitrator nobility and at the height of equitable informality. Even more problematically, efforts to modernize arbitrator ethics have taken as their starting point an artificial judicial model of impartiality.

B. Consequences of the Misleading Judicial Referent

The human addiction to antithetical analysis, meaning the defining or


82 See generally INTERNATIONAL ARBITRATION IN THE 21ST CENTURY: TOWARDS "JUDICIALIZATION" AND UNIFORMITY (Richard B. Lillich & Charles N. Brower, eds. 1993) (containing commentaries on the pros and cons of judicialization of arbitration). The word "judicialization" as used to describe the formalization of the arbitration process seems at odds with my rejection of the judicial model as a basis for defining arbitrator ethics. Because the term "judicialization" has gained significant currency as a shorthand for the formalization of international arbitration, I leave it in with simply a disclaimer to the reader.

83 Procedural rules have emerged in modern arbitral practice that shift control over factual investigation and presentation of evidence in the proceedings to the parties. For an investigation of these trends see Rogers, supra note 30, at 353–54. In addition, formal rules of evidence and the requirement of reasoned awards act as a constraint on arbitrator decisionmaking. Id. at 353.

84 As Randy Barnett explains, the rule of law can be a “warning sensor” so that substantive rules provide a source of constraint on adjudicators, and deviations from established rules may signal partiality. Randy Barnett, Coping with Partiality: Justice, the Rule of Law, and the Role of Lawyers, 3 ROGER WILLIAMS U. L. REV. 1, 11 (1997). As Owen M. Fiss explains, the rule of law is

a network of so-called ‘disciplining rules’ which, like a grammar, define and constitute the practice of judging and are rendered authoritative by the interpretive community of which the justices are part. These disciplining rules provide the standards for determining whether some decision is right (or wrong) and for justifying it (or for contesting it). They constrain, not determine, judgment.


85 In this respect, arbitrator regulation is just one example of a larger trend in international arbitration to replace informal controls with more predictable and effective ones. See Rogers, supra note 30, at 350–53.
evaluation of one thing by its opposite, infects most public discussions of ethics. Ethical discourse often frames important quandaries as a choice between diametrically opposed values—between truth and deception, loyalty and betrayal, right and wrong.\(^{86}\) With adjudicators, be they judges or arbitrators, the dichotomy is between the absolute moral virtue of "impartiality" and its supposed opposite, the deplorable sin of "bias."\(^{87}\) Notwithstanding continuous resort to such platitudes, absolute impartiality is impossible as a matter of cognitive psychology\(^ {88}\) and undesirable as a matter of social policy. Methods of absolutely impartial decisionmaking—such as flipping a coin or rolling the dice—have been thoroughly rejected as inconsistent with the concept of adjudication.\(^ {89}\) Even hypothesized alternatives cannot provide absolute impartiality.\(^ {90}\)

\(^{86}\) The use of reductionist dichotomies is a familiar rhetorical trope. See L.H. LaRue, What Is the Text in Constitutional Law: Does It Include Thoreau?, 20 GA. L. REV. 1137, 1151–52 (1986) (critiquing Thoreau's use of dichotomies in Civil Disobedience as rhetorically powerful, but deceptively simplistic and thus unable to provide a solid logical foundation for complex arguments).

\(^{87}\) As Judith Resnik has explained, the "buzzwords" in discussions of judicial ethics are simplistic: "[i]mpartiality' is required; 'bias' is forbidden." Judith Resnik, On the Bias: Feminist Reconsideration of the Aspiration for Our Judges, 61 S. CAL. L. REV. 1877, 1882 (1988); see RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES § 1.7, at 14–15 (1996) ("[I]t is generally agreed, at least in principle, that [the parties] are entitled to nothing less than a calm and dispassionate decisionmaker who operates in an atmosphere of absolute neutrality."). quoted in Debra Lyn Bassett, Judicial Disqualification in the Federal Appellate Courts, 87 IOWA L. REV. 1213, 1233 n.94 (2002) (emphasis added); see also Jeffrey M. Shaman, The Impartial Judge: Detachment or Passion?, 45 DEPAUL L. REV. 605, 606 (1996) ("W[e demand that [judges] adhere to the highest degree of impartiality that is mortally possible.").

\(^{88}\) As Gadamer explains, "it is our prejudices that constitute our being." HANS-GEORG GADAMER, PHILOSOPHICAL HERMENEUTICS 9 (1976) (quoted in RICHARD J. BERNSTEIN, BEYOND OBJECTIVISM AND RELATIVISM: SCIENCE, HERMENEUTICS, AND PRAXIS 129 (1983)). Therefore, "it literally makes no sense to think that a human being can ever be devoid of prejudices." RICHARD J. BERNSTEIN, BEYOND OBJECTIVISM AND RELATIVISM: SCIENCE, HERMENEUTICS, AND PRAXIS 129 (1983). Judges have concurred in these hypotheses. Justice Cardozo recognized the relationship between experience and judges' decisionmaking process: "All their lives, forces which [judges] adhere to the highest degree of impartiality that is mortally possible."

\(^{89}\) Judith Resnik tells of a judge who was censured for deciding a criminal defendant's prison term with the flip of a coin. Judith Resnik, Tiers, 57 S. CAL. L. REV. 839, 841 (1984) (arguing that despite its efficiency and even in the absence of claims that the result was incorrect, "[t]he coin flip offended this society's commitment to rationality"). Francois Rabelais's fictitious Judge Bridlegoose resolved cases by casting dice in his chamber, one on behalf of each party, and deciding in favor of the party whose die had the higher number. He was eventually prosecuted for this misconduct, but ultimately absolved since all his accusers had upheld his decisions. See David A. Harris, The Appearance of Justice: Court TV, Conventional Television, and Public Understanding of the Criminal Justice System, 35 ARIZ. L. REV. 785, 793–94 (1993) (citing FRANCOIS RABELAIS, THE COMPLETE WORKS OF FRANCOIS RABELAIS (Donald M. Frame trans., 1992)); THE PORTABLE RABELAIS (Samuel Putnam trans. and ed., 1974). Evidently, Judge Bridlegoose rolled dice primarily as a form of exercise, and not because of its assurance of absolute impartiality. See id. Other unconventional but apparently objective methods have been similarly rejected by judges. Cf. LaPine Tech. Corp. v. Kyocera Corp., 130 F.3d 884, 891 (9th Cir. 1997) (Kozinski, J., concurring) (commenting that "reading the entrails of a dead fowl" would not be a decisional strategy that parties could contractually agree to have employed by courts), reversed on other grounds on rehearing en banc, Kyocera Corp. v. Prudential-Bache Trade Services, Inc., 341 F.3d 987 (9th Cir. 2003).

\(^{90}\) John Rawls' veil of ignorance was designed to ensure superhuman impartiality by insulating decisionmakers from their own selfish personal interests, but even this idealized hypothetical would necessarily permit certain common human emotions and attitudes to operate behind the veil. JOHN RAWLS, A THEORY OF JUSTICE 118 (rev. ed. 1999); see also DAVID MILLER, PRINCIPLES OF SOCIAL
It is impossible to “strip” adjudicators of everything that influences or “biases” their decisionmaking. It is also undesirable: Stripping them of any such influence or bias would remove all the qualities that make them competent and good decisionmakers. Setting standards for adjudicator impartiality, therefore, is not about removing all forms of bias, but selecting what types of bias are appropriate to the particular system.

While many scholars have acknowledged the incoherence of treating impartiality as a static ideal, “[l]awyers and lawmakers have neither debated these problems openly nor renounced the ideal of impartiality.” They have

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**Justice 55** (1999). As feminist theorists have pointed out, “gender neutral” representatives cannot be impartial, but instead would necessarily be biased in favor of a masculine moral psychology. Linda R. Hirshman, *Is the Original Position Inherently Male-Superior?*, 94 Colum. L. Rev. 1860, 1866–75 (1994) (concluding that “given the real differences in physical strength between the sexes, no theory of the disembodied self can adequately generate political justice for the weaker group”); see also Susan Moller Okin, *Justice, Gender, and the Family* 107 (1989) (suggesting that it may be possible to modify Rawls’s theory to take into account “the standpoint of women”); Carol Pateman, *The Sexual Contract* (1988) (exposing male-centric origins of classical social contract theory and arguing that modern versions of the theory have not avoided the problem).


As one scholar described in the context of judicial qualifications and bias:

> Every judge brings to the bench a range of professional and life experiences which will influence his judicial decision-making. A judge may be deemed “qualified” to serve based on his experience as a trial lawyer, as a partner in a prestigious firm engaged in commercial law practice, as a government lawyer, or as an esteemed legal academic. These experiences, and a judge’s “thinking” about law, are part of the bundle of qualifications a judge brings to the bench.


Some types of bias, in their strongest forms, are intolerable in any system. Most odious of all possible motivations is racist or sexist animus against one party or their counsel. While these are the most invidious forms of bias, other objectionable forms present more subtle problems, such as indirect loyalties or empathy with parties, or when a decisionmaker has prior intellectual commitments to specific legal questions raised in a dispute or actual beliefs formed by prior knowledge of facts to be adjudicated in the dispute. Common sense and cognitive psychology tell us that those commitments and beliefs are unlikely to be set aside in the context of the parties' dispute. See Charles G. Lord et al., *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. Personality & Soc. Psychol. 2098 (1979) ("There is considerable evidence that people tend to interpret subsequent evidence so as to maintain their initial beliefs."); Lee Ross & Craig A. Anderson, *Shortcomings in the Attribution Process: On the Origins and Maintenance of Errorneous Social Assessments*, in *Judgment Under Uncertainty: Heuristics and Biases* 129, 145 (Daniel Kahneman et al. eds., 1982) (citing studies that confirm that trained scientists exhibit bias in favor of evidence corroborating their prior belief). These and several other sources documenting empirical findings on bias based on prior factual and legal beliefs are found in John R. Allison, *Ideology, Prejudgment, and Process Values*, 28 New Eng. L. Rev. 657, 663 (1994).


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neither delimited the true meaning of the term “impartiality,’’ nor wrestled with
the question of what kinds of bias are acceptable in a particular system of
adjudication.” In the context of judicial disqualification, legislators and judges
rely on procedural devices to avoid actually insisting on absolute impartiality,
and on rhetorical flourishes to mask their infidelity to the unachievable ideal.
Similarly, in reviewing arbitration decisions, courts have refused to give any
precise meaning to the term “impartiality,” other than to note obliquely that, as
applied to arbitrators, the term is something “lesser,” “lower” or “more
relaxed” than when it is applied to judges.
Apart from being doctrinally shoddy, this approach demeans arbitral
justice. In the absence of traditional sources of legitimacy found in national
court systems, arbitrator integrity is one of the cornerstones of legitimacy on
(1987) (observing the same tendency in the context of discussions of judicial ethics).
Professor Leubsdorf artfully illustrates the “cloudy distinctions” that have been drawn in the
judicial context:

A federal judge, for instance, must withdraw for ‘personal bias’
against a party, but not for an equally powerful bias against that
party’s case or counsel. A judge may hear a case although she
previously expressed strong views on its crucial legal issues, but she
must withdraw if she commented on the application of
uncontroversial law to the facts of that case. A judge who owns a
single share of stock in a large corporation may not hear a suit for a
few hundred dollars against it, but a judge may retry a suit even
though her first decision was vacated for numerous errors favoring
one party. A judge may construe a statute she helped write, but not
instruct a jury considering a traffic accident she saw . . . . There may
be justifications for these distinctions, but at first thought they seem
better suited to creating an appearance of scruple than to removing a
rationally bounded class of undesirable judges.
John Leubsdorf, supra note 95, at 238–39. According to Debra Bassett, at least part of the
reason for the distorted line-drawing is that “law tends to be highly resistant to non-objective concepts
or factors, and instead seeks logic, rationality, and predictability, shunning that which is subjective or
non-quantifiable.” Debra Lyn Bassett, Judicial Disqualification in the Federal Courts, 87 IOWA L.
REV. 1213, 1240 (2002). Consequently, financial interests, which can be objectively identified, are
subject to clear prohibitions, whereas other types of bias that might be even more disruptive, remain
mired down in confused standards and procedures. See id. at 1241–43.

See Leubsdorf, supra note 95, at 268 (“Judges and commentators find it all too easy to rely on
procedural arguments to gloss over disqualification issues.”).

See, e.g., Sphere Drake Ins. Ltd. v. All Am. Life Ins. Co., 307 F.3d 617, 621 (7th Cir.2002)
(“Evident partiality’ under § 10(a)(2) [of the Federal Arbitration Act] is a subset of the conditions that
disqualify a federal judge under 28 U.S.C. § 455(b);”); Delta Mine Holding Co. v. AFC Coal
Properties, Inc., 280 F.3d 815, 821 (8th Cir. 2001) (reasoning that unlike judicial contexts, it is well
known that arbitration is premised on “the selection of partial arbitrators-persons with substantial
financial interests in and duties of loyalty to one party”); Lozano v. Maryland Casualty Co., 850 F.2d
1470, 1472 (arbitrators are not required to be impartial); Toyota of Berkeley v. Auto. Salesman’s
Union, 834 F.2d 751 (9th Cir. 1987) (holding that arbitrators are not held to the same “high standards
as judges); Morello Constr. Corp. v. New York City Dist. Council Carpenters Benefit Funds, 748
F.2d 79, 83 (2d Cir. 1984) (stating that “[f]amiliarity with a discipline often comes at the expense of
(interpreting the Second Circuit as “[having adopted less stringent standards for disqualification of
arbitrators than for federal judges”); Reeves Bros. v. Capital-Mercury Shirt Corp., 962 F. Supp. 408,
413 (S.D.N.Y. 1997) (“Arbitrators are, therefore, held to a lower standard of impartiality than Article
III judges.”); First Interregional Equity Corp. v. Haughton, 842 F. Supp. 105, 109 (S.D.N.Y. 1994)
(“Arbitrators are . . . held to a lower standard of impartiality than Article III judges.”); see also
687 (S.D. Fla. 2001). Some courts have rejected this view and instead insist on “high” standards for
arbitrators are expected to maintain high standards of impartiality).

99 National systems maintain their legitimacy through transparent procedures and
through external displays of ritual and formality. Resnik, supra note 89, at 854 (“Ritual and formality
which the international arbitration system was built. In no small part due to the personal force of its founders, international arbitration has emerged as the way to resolve international disputes. The shift to increased party control, transparency in proceedings and rule-based decisionmaking may provide new sources of institutional legitimacy, but it cannot obviate the need for real and perceived decisionmaker legitimacy. Any theory of arbitrator impartiality must work not only to provide meaningful guidance at a practical level, but also to strengthen the system by reinforcing the authority and legitimacy of its decisionmakers.

C. The International Arbitration System and Arbitrator Conduct

The notion that arbitrators are "less" impartial than judges is attributable to several features inherent in the arbitration system. These features must be incorporated into any understanding of what "impartiality" means in the context of arbitration if it is to be defined as anything other than a "lesser" form of real (translated "judicial") impartiality.

1. A Conflict Within a Conflict

One of the most dramatic, if systematically obscured, ironies about arbitrators is that when they are required to self-diagnose a conflict problem, they are necessarily required to act against their own financial interest. A also give decisionmaking an appearance of 'correctness,' and thus legitimate the decisions rendered.") International systems, by contrast, rely on party confidence to elicit voluntary compliance from parties. Thomas M. Franck, Legitimacy in the International System, 82 AM. J. INT'L L. 705, 708 (1988). Institutional legitimacy holds consequences not only for the political vitality of institutions, see id. at 725, but also for the level of voluntary compliance with the institution's decisions. See Tom R. Tyler, The Role of Perceived Injustice in Defendants' Evaluation of Their Courtroom Experience, 18 LAW & SOC'Y REV. 51, 52-54 (1984) (reporting on social scientific research into the effects of perceived injustice); JANICE NADLER, FLOUTING THE LAW: DOES PERCEIVED INJUSTICE PROVOKE GENERAL NON-COMPLIANCE? (Northwestern Sch. of L., Northwestern Law & Economics Research Paper No. 02-9 (2002) (reporting on the results of an experiment that empirically tested the "Flouting Thesis." Participants who were exposed to laws and legal outcomes "that they perceived as unjust were more willing, as a general matter, to flout unrelated laws"), available at http://papers.ssm.com/paper.taf?abstract_id=353745 (last visited Jan. 31, 2005). The international arbitration system in particular has historically relied heavily on voluntary compliance with awards. For example, as of 1984, the ICC boasted a ninety percent voluntary compliance rate. See Thomas E. Carboneau, Rendering Arbitral Awards with Reasons: The Elaboration of a Common Law of International Transactions, 23 COLUM. J. TRANSNAT'L L. 579, 606 (1985). The statistic basis for this ninety percent figure is unclear, and presumably is somewhat lower today, but a high degree of voluntary compliance is undoubtedly an essential element of international arbitration's success.

Menkel-Meadow, supra note 61, at 949, 950-51, 970 (stressing that in the absence of mechanisms for enforcement, "transparency, disclosure, rules, sanctions and consequences [are] necessary for arbitration to maintain any semblance of legal legitimacy and justice"). Cf. Resnik, supra note 89, at 849 (noting that impartiality helps legitimate the outcomes of adjudicatory processes).


Menkel-Meadow, supra note 61, at 950-51, 970.

See discussion infra Subpart C.2.
decision to disclose a conflict or withdraw based on a challenge can result in the arbitrator having to forego or relinquish hundreds of thousands of dollars in potential fees. The process of evaluating a potential conflict of interest, in other words, is itself infected with palpable self-interest.

Notwithstanding the inherently self-interested nature of these decisions, most governing disclosure standards effectively vest tremendous discretion in arbitrators, both because of how they are phrased and because of how they are enforced. For example, the ICC Rules require that arbitrator-candidates disclose "any facts or circumstances which might be of such a nature as to call into question the arbitrator's independence in the eyes of the parties." This requirement is a vast improvement over the predecessor rule, which provided only that an arbitrator disclose information that the arbitrator subjectively believed called her independence into question. Even if phrased as an objective standard, however, the new rule still affords arbitrators tremendous discretion. This vague, qualitative standard provides no guidance for arbitrator-candidates about whether to disclose certain information, such as whether she has a former law partner who had rendered services for the opposing party the year before, or whether she has acted as counsel in another case in which current counsel acts as arbitrator. An arbitrator-candidate could, in perfectly good faith, decide that such contacts are not implicated by the ICC's standard and therefore need not be disclosed, even if the parties (particularly the losing party) would later vehemently disagree. Regardless of whether this decision is made in good faith or bad faith, subsequent challenge to the decision is unlikely to result in vacation of the resulting award. The decision about whether to disclose information receives significant deference because, in the context of award enforcement, only the most egregious instances of non-disclosure have been considered grounds for setting aside or refusing to enforce an award.

Even in the relatively unusual situations when parties voluntarily incorporate into their agreement a code of ethics for arbitrators or choose one

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105 See supra note 26 and accompanying text. The conflict may be amplified when arbitrators charge for their services by the hour. See John Yukio Gotanda, Setting Arbitrators' Fees: An International Survey, 33 VAND. J. TRANSNAT'L L. 779, 786-88 (2000) (describing when the hourly rate method is used to calculate arbitrator fees).

106 Even before the development of more subtle rules regarding bias, judges could be disqualified if they had a direct financial interest in the dispute. See Bassett, supra note 96, at 1240-45. Interestingly enough, with regard to arbitrators this aspect of bias is not discussed or even mentioned in any of the articles that have addressed the subject of arbitrator conduct, perhaps because many of those authors are themselves active arbitrators.

107 I explore in greater detail both at infra Subpart II.B.3. and in my forthcoming companion article the problems with conflating conduct and enforcement standards.


110 See Reed & Sutcliffe, supra note 56, at 37 & n.44 (describing how under American standards relationships between an arbitrator and a party's counsel should be disclosed, while under European standards the same relationship can legitimately be withheld).

111 The two most complete codes are the AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes and the International Bar Association Code of Ethics for International Arbitrators, both of which were updated in 2004. These codes improve on arbitral rules by describing
of the few institutions whose rules incorporate such a code, arbitrators' disclosure decisions during the selection process are only disturbed in extraordinary circumstances. As a result, even erroneous failures to disclose information are most often left undisturbed—a reality that arbitrator candidates are undoubtedly aware of when they make their decisions. One of the most compelling reasons to develop clearer standards is to reduce the need for arbitrators or candidates to rely on their own discretion at a time when their own interests are at stake.

2. Cognitive Dissonance and the Arbitrator Selection Process

Another polemic inherent in regulating arbitrator conduct is parties' simultaneously self-interested manipulation of, and unrealistic expectations about, the arbitrator selection process. The ability to select arbitrators is viewed by many as the benefit given in exchange for the agreement to forsake appeal. Substantive decisionmaking accuracy is assured through the selection of expert decisionmakers instead of multiple levels of substantively specific categories of relationships and activities, instead of relying on qualitative terms such as "independence." Useful as they may be, however, these codes are not formally binding on arbitrators or in arbitral proceedings, except in those rare instances when the parties expressly incorporate them into their contract by reference. See Hans Smit, \textit{A-National Arbitration}, 63 TUL. L. REV. 629, 631 (1989) (proposing language by which ethical codes can be incorporated into the arbitration agreement via reference to some national body of law); Dr. Iur. Oliver Dillenz, \textit{Drafting International Commercial Arbitration Clauses}, 21 SUFFOLK TRANSNAT'L L. REV. 221, 250 n.71 (proposing contract language for parties to incorporate the International Bar Association, Ethics for International Arbitrators in their agreements). The problem is that parties rarely adopt these freelance codes and, absent formal adoption, courts generally treat them as irrelevant. See ANR Coal Co., Inc. v. Cogentrix of North Carolina, Inc., 173 F.3d 493 (4th Cir. 1999) (concluding that there was no basis for setting aside awards based on nondisclosure because there were no applicable rules requiring disclosure); Al-Harbi v. Citibank, N.A, 85 F.3d 680, 682 (D.C. Cir. 1996) (concluding that there is no source for any such generalized duty in the absence of expressly applicable codes).

Only a handful of arbitral institutions have implemented a formal code of ethics, most notably the AAA and the Chamber of National and International Arbitration of Milan. See supra note 10 and accompanying text (discussing the AAA Code of Ethics, which has recently been redrafted); Code of Ethics for the International Arbitration Rules of the Chamber of National and International Arbitration of Milan (CNIAM), available at http://www.jus.uio.no/lm/milan.chamber.of.commerce.international.arbitration.rules.2004/a1 (last visited Oct. 29, 2004). The Milan Chamber's code conditions an arbitrator's appointment on acceptance of the code and sets dismissal of the arbitrator as a penalty for noncompliance with the code. See id. arts. 1, 7.

Freelance ethical codes, which parties can incorporate by reference into their agreements, provide some relief from the ambiguous standards of arbitral rules by going beyond qualitative descriptions of the nature of information that should be disclosed to delineate specific categories of information, such as personal and business relationships with counsel or witnesses.

While no comprehensive empirical research has been conducted, claims of bias rarely result in refusal to enforce an award. For a discussion of challenges to arbitrators during arbitration procedures, see infra note 134 and accompanying text.

More specific conduct standards would not necessarily translate into a commensurate broadening of the enforcement standards. As noted above, I take up the relationship between conduct and enforcement standards in a forthcoming companion article.

V.S. MANI, \textit{INTERNATIONAL ADJUDICATION: PROCEDURAL ASPECTS} 16-17 (1980) (describing control over the composition of the tribunal as the "royal road" that has lured sovereign nations into international adjudication); Rau, supra note 65, at 506, 527 (noting the "widely shared conviction that the ability participate in the selection of arbitrators is critical to fairness" and that "to many, . . . the right to choose one member of the panel is the very 'essence of arbitration'") (quoting Sir Michael Mustill, \textit{Multiparty Arbitrations: An Agenda for Law-Makers}, 7 ARB. INT'L 393, 399 (1991); see also W. MICHAEL REISMAN ET AL., supra note 43, at 541–72.
The ability to select decisionmakers makes it possible, for example, to appoint trained computer engineers to preside over a software dispute, or English-law trained barristers to preside over an insurance dispute governed by English law.

Quite apart from assuring professional aptitude, however, parties also use the selection process to ensure that their individual interests will be represented on the tribunal. The result is the practice of the tripartite panel, in which each party selects a party-appointed arbitrator, who together then select the chairperson. Instead of seeking out “impartial” arbitrators based solely on professional qualifications, parties predictably seek to “load” the tribunal in their own favor by selecting arbitrators who may be more sympathetic to, if not predisposed in favor of, their case. For example, although usually irrelevant as a qualification to decide the dispute, parties often focus on a candidate’s nationality or use specific professional experiences as a proxy for a candidate’s predilection in favor of their legal position.

Parties also engage in pre-selection inquiries and occasionally interview directly with candidates to determine more precisely the candidate’s predisposition. There is little agreement about the substantive limits on pre-appointment inquiries and interviews, and it is easy to imagine how parties

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117 See Resnik, supra note 89, at 859.

118 As Alan Scott Rau explains:

Nowhere perhaps is the tension between traditional ideals of adjudicatory justice and the contractual nature of arbitration felt more keenly than in the case of the so-called “tripartite” panel, where each disputant is permitted to select “his” arbitrator and the two arbitrators named in this way are then to name the chairman of the panel. Party-appointed arbitrators on “tripartite” panels occupy an uncomfortable and ambiguous position—not quite “advocates,” perhaps, but not exactly “judges” either.

Rau, supra note 65, at 497–98; see also Lowenfeld, supra note 61, at 65 (“There is a perceived need . . . for party-appointed arbitrators in international arbitration, and the predominant practice, as reflected in the most widely used rules, is to presume, or even to require, that if three arbitrators are to be appointed, each party shall appoint or nominate one of the three.”).

119 See Martin Hunter, Ethics of the International Arbitrator, 53 ARB. 219, 223 (1987) (explaining from his perspective, as an international arbitration practitioner, the optimal party-nominated arbitrator “is someone with the maximum predisposition towards my client, but with the minimum appearance of bias”).


121 For example, in an intellectual property dispute, a party who is defending its license rights might assume that a former in-house counsel for a technology-producing firm will be more sympathetic to licensors than licensees. Courts have held that such industry-based sympathies do not constitute disqualifying bias in arbitrators. See Carteret County v. United Contractors, 462 S.E.2d 816 (N.C. App. 1995) (holding that arbitrators are not considered biased simply because they are members of the same profession as one of the parties). Chris Drahazol has undertaken the important work of empirically documenting this, and other important trends affecting the practice of international arbitration. TOWARDS A SCIENCE OF INTERNATIONAL ARBITRATION: COLLECTED EMPIRICAL RESEARCH, supra note 49, Appendix A.

122 As the leading treatise of ICC arbitration describes, “it is perfectly proper for a party to discuss the case with the potential arbitrator” and “it would be irresponsible for the arbitrator to accept nomination without some knowledge of the scope and nature of the dispute.” See CRAIG ET AL., supra note 46, § 13.03, at 213. In addition to threshold inquiries about arbitrator-candidates’ availability, parties may also attempt to use the initial interview process as an opportunity to gauge the extent to
and arbitrators from different legal systems could have substantially different notions about what is proper in this process.\textsuperscript{123} At a minimum, given the fundamentally different European and American conceptions about the role of the party-appointed arbitrator, it follows that American and European parties will have radically different notions about the range of appropriate questions in interviewing candidates.\textsuperscript{124} The irony of this pick-the-most-partial arbitrator contest is that it collides sharply with parties' increased sensitivity to signs of bias that may undermine the accuracy of the final decision.\textsuperscript{125}

Possible solutions that have been offered to these problems are partial and incomplete. For example, in response to the narrow question of pre-appointment interviews, some commentators have suggested that the parties conduct joint interviews.\textsuperscript{126} Another possible solution to the more endemic problem of loyalty to appointing parties has been proposed by the CPR Institute for Dispute Resolution. CPR has developed a relatively novel, optional "screened" appointment procedure for its domestic arbitration rules, which is intended "to offer the benefits, while avoiding some of the drawbacks, of party-appointed arbitrators."\textsuperscript{127} Under this procedure, two of three arbitrators which the arbitrator might be predisposed in their favor at a more substantive level. See Klaus Peter Berger, International Economic Arbitration 252 n.357 (1993). Although opinions on the propriety of these particular questions might vary, parties often inquire about candidates' prior rulings in arbitrations, their substantive views on particular legal issues, and their responses to hypotheticals that could bear some resemblance to the facts underlying the case at hand. For example, the Swiss Arbitration Association (SAA) hesitantly affirmed that a potential arbitrator could travel, at the nominating party's expense, to meet with the party, and the SAA opined that although the case could not be discussed in concrete terms, the candidate could still answer questions regarding his opinions with respect to particular legal issues. See 1997 Bulletin of the Association Suisse de L'Arbitrage 2, 188, cited in Rau, supra note 65, at 130 & n.81.\textsuperscript{128} Although not binding, the International Bar Association's Code of Ethics for International Arbitrators, art. 5.1 (1987) sets forth some guidelines for communications during the nomination process, which would preclude most of these types of questions. See IBA Code of Ethics, reprinted in Law Without Frontiers: A Comparative Survey of the Rules of Professional Ethics Applicable to the Cross-Border Practice of Law 361–62 (Edwin Godfrey, ed. 1995). See generally Bishop & Reed, supra note 120 (providing additional discussion of strategy in and limitations on arbitrator interviews.)

In fact, I first became aware of and interested in questions of arbitrator conduct when I was a junior associate charged with scheduling in-person appointments to interview candidates for an international arbitration. At one point, my efforts were met with a vigorous reproof from a candidate. Notwithstanding his derision, however, he could not point me to any source that either justified his position or provided guidance about the extent or limits of pre-appointment communications. Needless to say, at that point we crossed him off our list of desirable candidates, if for no other reason than that he had apparently decided were engaged in illicit practices.\textsuperscript{125} See discussion supra Subpart I.A.1. There are clearly strategic disadvantages to selecting an arbitrator who is overtly partisan, since clear partisanship can result in a loss of credibility and effectiveness on the tribunal.\textsuperscript{126} See Charles H. Resnick, To Arbitrate or Not to Arbitrate, Bus. L. Today, May/June 2002, at 37, 38 (advocating interviews of arbitrator candidates, but cautioning that parties "should do so only jointly with opposing counsel"); Spalding, supra note 24, at 356 (stating summarily that interviews "can be undertaken appropriately only if done jointly by counsel for all parties"). Notably, both of these authors are arbitrators and their rather emphatic conclusions appear to be based more on opinion and experience than published rules or established practices.\textsuperscript{127} Robert H. Smit & Kathleen M. Scanlon, How New Nonadministered Rules Improve Arbitration Processes, 18 Alternatives to High Cost Litig. 172 (2000) (describing CPR Arbitration Rule 5.4). As Smit and Scanlon explain:

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On the one hand, parties are able to designate arbitrators whom they consider to be well-qualified to sit on the tribunal. On the other hand, any tendency (subtle or otherwise) of a party-appointed arbitrator to favor or advocate the position of the appointing party is avoided
\end{flushleft}
can be designated by the parties without the arbitrators knowing which party designated them. Notably, however, CPR did not add this option to its international rules because in the international context the screen would be harder to maintain since parties tend to select arbitrators of their own nationality. Notably, even within a culturally uniform domestic context, as one treatise warns, "[B]oth sides frequently have different expectations concerning the degree of partisanship or the types of activities in which the 'party arbitrators' may engage." JUDGE H. WARREN KNIGHT (RET.) ET AL., CALIFORNIA PRACTICE GUIDE, ALTERNATIVE DISPUTE RESOLUTION, Ch. 8-E, ¶ 8:124 (1995).

While many international experts would agree that partisan party-arbitrators are less prevalent, U.S. parties new to international arbitration often unwittingly (and unbeknownst to their opponents) import their assumptions based on domestic experiences into the international context. Resulting problems involve not only bias produced by engineered appointments, but also bias and unfairness produced by unperceived asymmetry between the appointment procedures used by each party. Rising expectations about the transparency and precision of arbitral decisionmaking combine with entrenched practices of manipulating the selection process to increase the prospect of challenges to arbitrators and to create opportunities to abuse the challenge procedures.

3. The Conflation of Conduct Standards with Enforcement Standards

Another problem is that the timing of challenges to arbitrator conduct contorts the meaning of arbitrator impartiality. Most alleged arbitrator

because those arbitrators are approached and appointed by CPR rather than the parties and are not told which party designated each of them.

Id. Similarly, the Liverpool London Cotton Association has a process called "Anonymous Arbitration," pursuant to which a dispute can be resolved without the arbitrators being told the names of the parties or the parties being told the names of the arbitrators. The Liverpool Cotton Association Ltd. Bylaws and Rules 344 (1997) (amended 2004), available at http://www.lca.org.uk/pdf_files/rules.PDF (last visited Jan. 31, 2005) [hereinafter LCA Bylaws].

See Smit & Scanlon, supra note 127, at 172.

See id.

See Vagts, supra note 45, at 260.

Notably, even within a culturally uniform domestic context, as one treatise warns, "[B]oth sides frequently have different expectations concerning the degree of partisanship or the types of activities in which the 'party arbitrators' may engage." JUDGE H. WARREN KNIGHT (RET.) ET AL., CALIFORNIA PRACTICE GUIDE, ALTERNATIVE DISPUTE RESOLUTION, Ch. 8-E, ¶ 8:124 (1995).

In re Arbitration Between Andros Compania Maritima, S.A. & Marc Rich & Co. A.G., 579 F.2d 691, 700 (2d Cir. 1978) (observing the tendency of losing parties to seize upon an "undisclosed relationship between a party and an arbitrator "as a pretext for invalidating [an] award"); de Witt Wijnen, supra note 59, at 2 ("The number of challenges to arbitrators seem to be increasing. Not only before or at the time when arbitrators are appointed but also after their appointment, during the proceedings and, later, in setting aside proceedings.") (footnote omitted) (on file with author). Perhaps the most blatant example of purely strategic claims of bias is in two consolidated cases, Himpurna California Energy Ltd. v. Republic of Indonesia and Patuha Power Ltd. v. Republic of Indonesia, which are reported respectively in 15 MEALEY'S INT'L ARB. REP. 1, A-I (2000), and 15 MEALEY'S INT'L ARB. REP. 1, B-1 (2000). Accusations of bias on the part of the chairperson followed failed attempts to enjoin the arbitral proceedings in Indonesian courts and threats to prosecute and imprison opposing counsel, and were followed by a kidnapping of Indonesia's party-appointed arbitrator. In a testament to the resilience of international arbitration as an institution and the fortitude of the remaining two arbitrators, the tribunal reconvened the arbitration outside of Indonesia, determined based on various international precedents that they had jurisdiction to proceed, and rendered a $180 million award against Indonesia.
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misconduct occurs before the substantive proceedings begin, but most challenges to arbitrator conduct occur after the proceedings have concluded, as challenges to award enforcement. As a result, the most in-depth consideration of arbitrators' conduct is undertaken by courts, whose function when faced with an award is to implement the strong pro-enforcement bias of the New York Convention. The problem is that this pro-enforcement bias has resulted in a reluctance to identify arbitrator conduct as improper. When enforcement courts peer back through the other end of the kaleidoscope, they reason backwards (even if only implicitly) that if the award is enforceable, then there must not have been any arbitrator misconduct. In this respect, courts move back and forth seamlessly, in their rhetoric and analysis, between the language of ethics and the language of arbitration award enforcement, conflating substantive standards with remedial consequences for transgression of those standards. Even if interrelated, conduct standards must be separated from enforcement standards.

Although there are currently no real alternatives for regulating conduct standards, enforcement standards are an inadequate substitute for standards of conduct for a number of reasons. First, enforcement standards are designed to ensure the hyperenforceability of arbitral awards. The purpose of this vigorously pro-enforcement bias is to insulate arbitral decisionmaking from intrusive national court oversight. Enforcement standards provide final recourse against the most egregious violations of the arbitral process, and are therefore unable to provide detailed and meaningful guidance for arbitrator

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133 I use the term "proceedings" to refer to the events in an arbitral case that involve the parties' substantive claims, and to exclude the process of selecting arbitrators and enforcement of the award in national courts. See Rau, supra note 65, at 490 ("Allegations that a particular arbitrator lacks the requisite 'impartiality' almost always arise out of his supposed failure—at the time he was first appointed—to reveal past contacts or relationships with one of the parties."). I use the term "procedures" or "procedural rules" to refer to those rules, not included in arbitral rules, that govern the substantive proceedings, meaning those proceedings after arbitrator selection.

134 There are several possible explanations for this fact. First, parties become more acutely concerned about potential bias in an arbitrator's history and background when they receive an unfavorable award. Post-award research can be inspired either because of legitimate concern over an apparently unwarranted result, or as a last ditch effort to avoid a legitimate outcome since challenging the arbitrator is one of the few possible means for avoiding enforcement of an award.

135 See, e.g., Consol. Coal Co. v. Local 1643, United Mine Workers of America, 48 F.3d 125, 129 (4th Cir. 1995) (finding that award should be enforced despite arbitrator's failure to disclose that his brother was employed by the union that was a party to the matter). In exercising their role in regulating arbitrator conduct, arbitral institutions seem to adopt a comparable susceptibility to temporal factors as demonstrated by the radically different rates of responsiveness to challenges to arbitrator conflicts of interest depending on whether they are raised early or later in the proceedings. For example, a study of challenges in ICC arbitrations between 1986 and 1988 found that the Court of Arbitration refused appointment in seventy-two percent of the cases when challenges were raised prior to confirmation, as compared to a mere nine percent of challenges raised during or after arbitral proceedings. See CRAIG ET AL., supra note 46, § 13.01, at 204. These statistics do not suggest any clear conclusions since they cannot control for several potential variables, such as arbitrators' increased willingness to voluntarily withdraw at the confirmation stage. See id.

136 In judicial contexts, there are separate codes of conduct, which are related to, but drafted separately from standards for disqualification, even if the articulated standard governing each is that the judge must avoid even the "appearance of impropriety." Compare CANONS OF JUDICIAL ETHICS (1924), reprinted in LISA L. MILORD, THE DEVELOPMENT OF THE ABA JUDICIAL CODE, App. D, at 131, 140–41 (1992) (containing ethical obligations that apply to judges), with 28 U.S.C. § 455 (delineating standards for disqualification of judges).
The limitations of the enforcement process are most aptly demonstrated by the fact that Article V of the New York Convention, which provides the exclusive grounds upon which a foreign arbitral award can be refused enforcement, says nothing about arbitrator bias or misconduct. To fill the gap, courts often look either to arbitral institutions’ rules, which are notoriously vague, or national arbitration laws. In the United States, the Federal Arbitration Act (FAA) provides that an award can be vacated “[w]here there was evident partiality or corruption in the arbitrators, or either of them [sic].” In practice, however, the meaning of “evident partiality” has eluded courts. When the Supreme Court tried to define the term over thirty-five years ago, three dissenting justices concluded that it meant awards should only be set aside on a finding of actual bias, which was absent on the facts of that case. The other justices all agreed that impartiality standards were violated by the ongoing, undisclosed substantial business relationship between the arbitrator and one of the parties, but they could not agree about what standard should be applied.

Writing for the purported majority, Justice Black argued that “we should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges.” Based on this reasoning, and invoking the language of judicial standards, he concluded that arbitrators must “disclose to the parties any dealings that might create an impression of possible bias” and must not only “be unbiased but also must avoid even the appearance of bias.” In his concurrence, Justice White agreed with the result, but—withstanding a
rhetorical flourish and the parroting of the majority’s phraseology—he made some “additional remarks” that have called into question how much he actually assented to the majority’s reasoning. He stated that “[t]he Court does not decide today that arbitrators are to be held to the standards of judicial decorum of Article III judges, or indeed of any judges.” His reasoning for holding arbitrators to a different standard than judges is “men of affairs, not apart from but of the marketplace[].”

Judicial fallout from this supreme confusion has been, predictably, even more confused. Many courts have rejected the language of Black’s opinion, preferring instead the “clarification” offered by White’s concurrence. Closer examination reveals, however, that there is no real contradiction. Instead, a distinction is being drawn between conduct/disclosure standards in Justice Black’s opinion, versus disqualification/enforcement standards described in Justice White’s concurrence. Justice Black reasons that arbitrators must “disclose to the parties any dealings that might create an impression of possible bias” and they must not only “be unbiased but also must avoid even the appearance of bias.” Justice White, meanwhile, was addressing enforcement standards when he reasoned that “arbitrators are not automatically disqualified by a business relationship with the parties before them if both parties are informed of the relationship in advance, or if they are unaware of the facts but the relationship is trivial.” Putting the two pieces together, Justice Black’s position is that we should expect rigorously ethical conduct by arbitrators, but Justice White’s position is that, even if those conduct standards are sometimes transgressed, not every transgression should result in disqualification or, by implication, award non-enforcement.

The failure to recognize that Justices Black and White were distinguishing between conduct standards and enforcement standards has resulted in innumerable splits among courts. In addition to disorientation

146 Id. (White, J., concurring).
147 Id. Likewise, the English court in the AT&T case described in the introduction relied on a judicial referent and distinguished arbitrators as “men of the world” whose experience contrasts with “the cloistered calm of judicial life.” AT&T Corp. v. Saudi Cable Co., [2000] 1 Lloyd’s Rep. 22, 29 (Q.B. 1999).
148 As noted above, there is lower court disagreement about whether Justice Black’s opinion is a majority or plurality opinion. See supra note 17 and accompanying text. See, e.g., Merit Ins. Co. v. Leatherby Ins. Co., 714 F.2d 673, 682 (7th Cir. 1983) (interpreting Justice White’s clarification as part of the majority decision).
149 See Commonwealth Coatings Corp., 393 U.S. at 149–50 (emphasis added).
150 Id. at 150 (White, J., concurring) (emphasis added).
151 Compare Morelite Constr. Corp. v. New York City Dist. Council Carpenters Benefits Funds, 748 F.2d 79, 83–84 (2d Cir. 1984) (concluding that arbitrators are often chosen because of their expertise and experience in a particular field, they cannot be held to the same standard as judges) and Reeves Bros., Inc. v. Capital-Mercury Shirt Corp., 962 F. Supp. 408, 413 (S.D.N.Y 1997); with Kern v. 303 East 57th Street Corp., 204 A.D.2d 152, 153 (N.Y. App. Div. 1994) (relying on fact that arbitration awards are subject to judicial deference to find that the mere appearance of impropriety or partiality is sufficient to warrant vacatur); Schmitz v. Zilveti, 20 F.3d 1043, 1046 (9th Cir. 1994) (establishing the standard as whenever undisclosed information would create a reasonable impression of bias); Gianelli Money Purchase Plan & Trust v. ADM Investor Servs., Inc., 146 F.3d 1309, 1312 (11th Cir. 1998) (expressly rejecting Ninth Circuit’s test in Schmitz and defining “evident partiality” instead to require a showing that arbitrator had actual knowledge of, but failed to disclose, information that would lead a reasonable person to believe a conflict exists); Morelilte, 748 F.2d at 83–84 (staking out a middle ground between the “appearance of bias” standard and “proof of actual bias” and defining the standard as where “a reasonable person would have to conclude that an arbitrator was
over the definitional fundamentals of "evident partiality," courts are also confused about several implicit sub-questions. For example, there is indecision about whether it is misconduct for an arbitrator to fail to investigate and discover an unknown conflict, or whether the lack of specific knowledge vindicates an arbitrator of any wrongdoing. Courts are similarly split about whether the same standards should apply to party-appointed arbitrators and to so-called "neutral arbitrators" or arbitral chairpersons. To complicate matters further, there have been some suggestions that parties themselves do or should have a duty to investigate conflicts by arbitrators. In the United States, the confusion is in some ways more explicit than in other countries, in large part because U.S. courts have had more cases in which to ponder the issue and in part because the doctrine of stare decisis amplifies divisions and inconsistencies.

If courts are confused, commentators seem only slightly more focused. Commentators consistently refer to the need for augmented disclosure obligations, as if disclosure operates as a sort of confession and absolution of arbitration's sins against the moral ideal of impartiality. Not surprisingly, however, when it comes to demarcating the precise extent and limits of that obligation, consensus quickly disappears. Part of the breakdown in consensus reflects the tension between the need for broad disclosure and the

152 Compare Betz v. Pankow, 31 Cal. App. 4th 1503 (1995) (relying on arbitrator's lack of knowledge of former firm's conflict to find no impression of possible bias); Lifecare Int'l Inc. v. CD Medical, Inc., 68 F.3d 429, 432 (11th Cir. 1995) (rejecting the notion that arbitrators have a duty to investigate past contacts and defining "evident partiality" to mean that arbitrator had actual knowledge and that information was not disclosed) and Al-Harbi v. Citibank, N.A., 85 F.3d 680, 682 (D.C. Cir. 1996) (finding "no source for any such generalized duty" to investigate) with Wheeler v. St. Joseph's Hospital, 63 Cal. App. 3d 345 (1976) (requiring vacatur of award notwithstanding fact that arbitrator from reputable firm did not know of conflict).

153 Compare Barcon Assocs., Inc. v. Tri-County Asphalt Corp., 430 A.2d 214 (1981) (emphasizing that high standards for arbitrators apply equally to neutral and party-designated arbitrators because they are acting in a quasi-judicial capacity); with Lozano v. Maryland Cas. Co., 850 F.2d 1470, 1472 (11th Cir. 1988) ("An arbitrator appointed by a party is a partisan only one step removed from the controversy and need not be impartial.").

154 Most sources agree that a party who proceeds with an arbitration notwithstanding actual knowledge of a conflict is deemed to have waived (or is estopped from raising) any objection. A few courts have gone further, however, to suggest that parties themselves may have an affirmative duty to investigate potential conflicts, and may be charged with actual knowledge if information of the conflict was readily discoverable. See, e.g., Middlesex Mutual Ins. Co. v. Levine, 675 F.2d 1197 (11th Cir. 1982) (considering and ultimately rejecting claim that company should have knowledge of conflict imputed to it because it possessed, but did not know about, the conflicts at issue); DeBaker, 194 Wis. 2d 104 (holding no "evident partiality" where arbitrator received political campaign contributions from members of the law firm representing the opposing party because contributions were publicly recorded and could have been accessed by the complaining party).

155 See, e.g., Orlandi, supra note 9 (arguing that enhanced disclosure requirements protect the arbitration system); Forbes, supra note 9 (recognizing "disclosure ... can in the end only benefit the parties"). But see Carter, supra note 9, at 59 (expressing concern that expansive disclosure requirements will result in undue burdens on arbitral candidates and preclude most qualified candidates).

156 See FOCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION ¶ 1060, at 580 (Emmanuel Gaillard & John Savage, eds., 1999) ("The real problem is not the existence of a duty of disclosure but determining which facts prospective arbitrators should disclose.").
perceived burden that broad disclosure requirements would place on arbitrators. The more exacting the duties to investigate and disclose, the greater the burden in record-keeping and investigation that will be imposed on arbitrators. Too great a burden, the argument goes, will render the occupation of arbitrator undesirable to the most qualified candidates. Many also lament that extensive investigation and disclosure obligations can increase the grounds for refusing to enforce awards, destabilizing the entire system. As I have explained above, however, when conduct and enforcement standards are not conflated, this latter concern is quickly deflated.

D. Conclusion

This examination of the standards and mechanisms that regulate arbitrator conduct reveals a multitude of overlapping problems. To begin with, the existing standards for arbitrator conduct are described in value-laden, yet indeterminate terms such as "impartial" or "independent." In developing workable standards, such platitudes are ineffective. Before a workable framework can be developed, the underlying symptoms must be accurately diagnosed.

Accurate diagnosis requires engagement with the true meaning of the term "impartiality" in the specific context in which it is being applied. This is the essential lesson of Jonathan Swift's Digression into Madness, where he effectively illustrates how ethical judgment lies not in simply choosing between contrasting values, but in conceptualizing the nature of the contrast and the inter-relationships that exist between the seeming opposites. Instead of engaging in this process, courts and legislatures have generally fallen back on incomplete and unconvincing analogy to the judicial ideal, and ill-defined enforcement standards have become a substitute for a clear definition of what arbitrator impartiality means. To be fully satisfactory, a theory of arbitrator impartiality must explain the relationship between arbitrator standards of conduct and those of their judicial counterparts, but it cannot use judicial standards as a substitute for defining the critical terms.

157 As one commentator laments:

A potential arbitrator may be forced to undertake significant research to look for potential "conflicts" of which he or she is not even aware. In an age of large, multi-office law firms and attorneys who make career changes with some frequency from one firm to another, this has become a problem.

James H. Carter, Rights & Obligations of the Arbitrator, 52 DISP. RESOL. J. 56, 59-60 (1997) (objecting that "when legislators and courts begin to prescribe specific matters that must be disclosed" the risk is that "a good principle" or broad disclosure may be taken "too far and infringe an important right" of arbitrators).

158 See id.; see also Ruth V. Glick, Should California's Ethics Rules Be Adopted Nationwide? No! They Are Overbroad and Likely To Discourage Use of Arbitration, DISP. RESOL. MAG., Fall 2002, at 13; Judicial Council of California Adopts Ethics Standards for Private Arbitrators, 13 WORLD ARB. & MEDIATION REP. 176 (2002) (noting that members of the council suspect that the volume of information that must be disclosed under California's new standards "may be too burdensome" and could "be used too readily" to disqualify arbitrators).

159 See, e.g., Glick, supra note 158, at 15. This lament is based on a false assumption that conduct standards and enforcement standards are interchangeable.

160 This and other provocative and enlightened insights about A Tale of a Tub can be found in JAMES BOYD WHITE, WHEN WORDS LOSE THEIR MEANING: CONSTITUTIONS AND RECONSTITUTIONS OF LANGUAGE, CHARACTER AND COMMUNITY 114–117 (1984).
II. THE FUNCTIONAL APPROACH AND DECISIONMAKERS’ ETHICS

The key to defining “impartiality” independent from the judicial model is what I have elsewhere called a “functional approach” to professional ethics. The functional approach posits that professional ethics derive from the functional role of actors in an adjudicatory system. I have shown that the fit between ethics and function not only illuminates at a descriptive level the reasons why different legal systems adopt different ethical regimes for advocates, but also guides at a prescriptive level the development of new ethical norms for international arbitration. These norms of conduct must be integrated into the international arbitration system, which I take up in the following Part III, and coordinated with enforcement standards, which I take up in a forthcoming companion article.

In Subpart A, I critique as unworkable other methods that fail to adequately define the role of the arbitrator. To provide the appropriate role definition, I begin in Subpart B with an elemental definition of adjudication and from there trace first the fundamental features of the non-specific adjudicator and the broad perimeters of ethical obligations that that role suggests. I then examine in Subpart C variations on the role of adjudicator that exist in the United States and link debates over judicial conduct to these larger underlying debates about role. Subpart C ends with a similar analysis in a cross-cultural comparative context.

B. Role Definition as Predicate to Ethical Prescription

As Alasdair MacIntyre has explained, “moral agency is embodied in roles” assigned to actors, who are “mutually interdefined in terms of types of relationship.” What this means in the context of professional ethics is that “[e]thical codes do not establish the role of a professional. They guide and facilitate performance of an already-established professional role.” Because situation-specific obligations cannot be analyzed outside the context of a specific role, the starting point for delineating professional ethical obligations is defining the role of the relevant moral agent, which in this situation is the arbitrator. Much of the current confusion over standards for regulating arbitrators stems from a failure to address this necessary first step.

As depicted in the introduction, instead of beginning with a clearly defined conception of their role, analysis of arbitrator ethics often relies on

161 My focus in earlier works was on the distinct but related problem of how to develop international ethical standards for advocates from different countries who abide by different national ethical standards. Rogers, supra note 30, at 361 & n.92.
162 See id. at 380–87.
163 See id. at 387–94.
164 See id. at 406–22.
166 Rogers, supra note 30, at 383.
167 “On the other hand, role cannot, in most instances, distill complex ethical quandaries down to a single undeniable and controlling rule or algorithm, such that compliance with the rule would obviate the need for any personal ethical reflection. The functions performed by a moral agent establish a particular range of choices that would further fulfillment of that person’s role and help identify the factors to be taken into account in making ethical decisions.” Id. at 382.
analogy to judicial ethics. The reasoning behind reliance on a judicial referent is that arbitral decisionmaking substitutes for judicial decisionmaking, so arbitral impartiality should be measured against the base model of judicial impartiality. One problem with this approach is that it renders arbitrator ethics nothing but a poor imitation of judicial standards, because most often arbitrator impartiality is articulated as "lesser" or "less rigorous." This complaint is not merely aesthetic. As noted above, the international arbitration system is inspired by, and relies on, arbitrator integrity as one if its primary sources of legitimacy.

Besides denigrating arbitral justice, the current approach is also conceptually muddled. The notion of impartiality is not readily transferable between these two adjudicatory contexts: While adjudicators in both contexts seem to be performing the same task (i.e., resolving disputes), they have, as will be explained in this Part, been assigned different roles in performing that task. Even without further explication, this point seems almost intuitive after considering not only the multitude of ethical incommensurabilities illustrated in the Introduction, but also the many ethical obligations that are clearly not translatable from one role to the other. For example, arbitrators are generally regarded as having an obligation to maintain the privacy, if not the confidentiality, of the proceedings. Judicial adjudication, meanwhile, is an inherently public activity, as demonstrated by the fact that U.S. judges are constitutionally compelled to open courtroom proceedings to the public. U.S. judges are ethically restricted regarding the nature and type of political activities in which they can engage, but such restrictions make no sense for arbitrators. These examples illustrate why ethical obligations cannot simply be transplanted. They must be derived instead from the nature of these decisionmakers' distinct roles.

168 As Carrie Menkel-Meadow has explained, Many think that the Judicial Code of Conduct can be used as a benchmark for ethical standards and professionalism in situations where lawyers play adjudicative roles. I do not agree, since the judge has a permanent role, which allows him to be at arms length from parties on a regular basis. Arbitrators who may depend on parties choosing and paying them may be closer to lawyers seeking clients in some respects, while resembling judges in others.


169 See supra note 98 and accompanying text.

170 See supra notes 99–100 and accompanying text.

171 See supra notes 18–27 and accompanying text.

172 While the scope of judicial obligations to open their courtrooms in civil cases remains unclear, in criminal cases, the obligation is well established. See generally Michael Collins, Privacy and Confidentiality in Arbitration Proceedings, 30 Tex. Int'l L.J. 121 (1995) (highlighting that institutional rules normally require arbitration proceedings to be private).

173 See Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 581 n.18 (1980) (concluding that the public has a qualified First Amendment right to access criminal trials).

174 Shirley S. Abrahamson & Robert L. Hughes, Shall We Dance? Steps for Legislators and Judges in Statutory Interpretation, 75 Minn. L. Rev. 1045, 1088 (1991) (noting that judges are ethically prohibited from engaging in political activities because "[t]he public expects the courts to work above the tangle of partisan politics").
There have been similarly befuddled suggestions that the role of the advocate-lawyer could be a basis for extrapolating arbitrator ethics.\textsuperscript{175} The primary rationale for using attorney ethics is that although the attorney and the arbitrator perform different tasks, the same actor is performing both tasks and should therefore be bound by the same ethical obligations. The obligations imposed on both also seem also to resemble each other. Attorneys must be free from conflicts of interest, just as arbitrators must be free from bias. Attorneys must conduct "conflict checks" before accepting representation, just as arbitrators have a "duty to investigate" before accepting an appointment.\textsuperscript{176} As Carrie Menkel-Meadow points out, however, "[o]ur conventional rules of ethics are particularly inapposite when lawyers serve in quasi-judicial roles as arbitrators . . . ."\textsuperscript{177} Attorney ethics were developed for those acting in the role of advocate, where the hallmark is loyalty to, not independence from, a client.\textsuperscript{178} The role of lawyer is fundamentally different than the role of adjudicator, even if both tasks can be undertaken by the same person.\textsuperscript{179} Development of arbitrator ethics requires, as a starting point, a clear definition of the role of the arbitrator.

\section*{B. Defining the Role of the Adjudicator}

Arbitrators and judges are both subsets of the larger category of adjudicators; arguments relying on judicial standards instead implicitly assume arbitrators are a subset of the category of judges.\textsuperscript{180} It is the failure to recognize this relationship that leads to the misleading judicial referent. The process of defining the role of the arbitrator must begin, therefore, by defining more generally the role of the adjudicator and, with that definition in hand, explaining the nature and effects of variations within that general category.

\subsection*{1. Universal Features of Adjudication and Adjudicators}

All adjudicators share certain core features, which derive from the nature of adjudication itself. Although the ultimate aspirations and limits of adjudication have been subject to heated debate,\textsuperscript{181} Lon Fuller's classical

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\item[\textsuperscript{175}] See, e.g., Schmitz v. Zilveti, 20 F.3d 1043, 1048 (9th Cir.1994) (tying arbitrator's obligation to investigate possible conflicts of interest to his status and ethical obligations as a lawyer). For reasonable presentations of this argument by esteemed scholars in ethics and arbitration, see Geoffrey C. Hazard, Jr., \textit{When ADR Is Ancillary to a Legal Practice, Law Firms Must Confront Conflicts Issues, in 12 ALTERNATIVES TO THE HIGH COST OF LITIGATION} 147, 147 (1994) ("Applying this rule [regarding conflicts of interest] to [mediation], a law firm engaging in ADR practice must observe the rules of ethics—particularly the rules concerning conflict of interest—in the ADR work and the other practice, considering them as a single practice."); Gotanda, \textit{supra} note 105, at 801–06 (arguing that Model Rules 2.2 and 5.7 might apply to attorneys acting in the capacity of arbitrator).
\item[\textsuperscript{176}] Menkel-Meadow, \textit{supra} note 168, at 183–84.
\item[\textsuperscript{177}] \textit{Id.} at 162; see also Carrie Menkel-Meadow, \textit{The Lawyer as Consensus Builder: Ethics for a New Practice, 70 TENN. L. REV.} 63, 63–84 (2002) (providing an elaborated analysis of how the functional role of advocates differ from various dispute resolvers).
\item[\textsuperscript{178}] Lawyers' duty of loyalty and tolerance for lawyers' independence are not universal. For a comparative analysis of the attorney's duty of loyalty, see Rogers \textit{supra} note 30, at 368–70.
\item[\textsuperscript{179}] It is perfectly reasonable that one attorney might be bound by two different sets of obligations—one when she is acting in the role of advocate and another when she is acting as a decisionmaker. The multiplicity of ethical obligations is a product of the fact that "no one is ever an abstract moral agent." Rogers, \textit{supra} note 30, at 381.
\item[\textsuperscript{180}] See \textit{supra} notes 86–103 and accompanying text.
\item[\textsuperscript{181}] See, e.g., Abram Chayes, \textit{The Supreme Court, 1981 Term—Foreword: Public Law Litigation and the Burger Court, 96 HARV. L. REV.} 4 (1982); Abram Chayes, \textit{The Role of the Judge in Public Law Litigation, 89 HARV. L. REV.} 1281 (1976); Owen Fiss, \textit{The Social and Political Foundations of}
definition of adjudication provides the core for a universal definition. Fuller defined adjudication as "a process of decision that grants to the affected party a form of participation that consists in the opportunity to present proofs and reasoned arguments." The three constitutive elements or "ordering principles" of adjudication under this definition are reason, adversarialism and separateness, although the terms themselves are the subject of significant debate. Fuller uses these features to distinguish adjudication from other forms of social ordering, such as contract and democratic popular decisionmaking.

While Fuller provides a critical core, to distinguish adjudication from other forms of dispute resolution and political decisionmaking, some other features must be added. Adjudication is "authoritative," meaning that the

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See Lon L. Fuller, The Forms and Limits of Adjudication, 92 HARV. L. REV. 353, 369 (1978). As Jonathan Molot has pointed out, “[A]ny victory Chayes enjoyed over Fuller, and any defeat suffered by Fuller, was only partial. Chayes may have succeeded in discrediting Fuller’s arguments regarding the types of disputes courts could handle (which Fuller dubbed adjudication’s ‘limits’), but he did not discredit Fuller’s observations regarding the adjudicative process (which Fuller dubbed adjudication’s ‘forms’)”. Jonathan Molot, An Old Judicial Role for a New Litigation Era, 113 YALE L.J. 27, 36 (2003).

Fuller, supra note 182, at 369.

As described in more detail later, see infra notes 265-272 and accompanying text, I challenge Fuller’s definition of “adversarialism” in terms of the uniquely U.S.-style “partisan advocate.” While a dispute is, by definition, founded on adverse positions that must be advocated and advanced by the parties and their counsel, it is not necessarily true that that function must take the form of U.S.-style “partisan advocacy.” It is this accentuation of a culturally defined adversarialism that prevents Fuller’s definition from having cross-cultural, universal potency. One possible explanation for Fuller’s cultural blinders is that although he averred to be defining adjudication in “the very broadest sense,” he was really only attempting to define the meaning of adjudication within the framework of the U.S. Constitution. See Fuller, supra note 182, at 353.

Fuller and many other scholars of procedure use the term “impartiality,” but in an imprecise way that conflates what I contend are two distinct concepts: the moral agent’s role and the ethical requirements that derive from that role. The term “separateness” connotes the status or role of a decisionmaker in relation to the parties, whereas “impartiality” connotes the resulting mental state or conduct that should flow from that status.

For example, like the term “impartiality,” the term “adversarialism” has multiple connotations. Fuller and other more contemporary scholars of U.S. procedure ascribe an intracultural meaning to the term, while comparativist scholars use the term to designate intercultural differences, particularly to contrast “inquisitorial” systems on the Continent. The former uses “adversarial” to designate the dialectic ideal underlying litigation as a form, whereas the latter uses the term to emphasize the fact that the parties, not the judge, controls the gathering of evidence and presentation of proofs. Compare Fuller, supra note 182, at 383 (“It is only through the advocate’s [partisan] participation that the hearing may remain in fact what it purports to be in theory: a public trial of the facts and issues.”) with Francesco Parisi, Rent-Seeking Through Litigation: Adversarial and Inquisitorial Systems Compared, 22 INT’L REV. L. & ECON. 193, 193 (2002) (“Scholars of comparative civil procedure often contrast American and continental European legal systems by reference to the distinctive functions fulfilled by judges and lawyers in the two legal traditions. A distinction is often drawn between ‘adversarial’ and ‘inquisitorial’ procedural systems.”). In elaborating a theory of adjudication, I use the term as neither an ideal nor a culturally defined preference, but as a descriptive heuristic of one of the “valued features” of any adjudication, which can be amplified or muted in relation to other competing features as demanded by a particular adjudicatory system.

Fuller, supra note 182, at 366-69.

As described in more detail below, many of these “additions” actually derive from or can be found in Fuller’s writings on the subject. While I find Fuller’s descriptive formulations useful, I reject his conception of these formations as deriving from or inextricably linking to natural law theories. For a discussion of the natural law foundations of Fuller’s theories, see generally Robert G. Bone, Lon Fuller’s Theory of Adjudication and the False Dichotomy Between Dispute Resolution and Public
ultimate decision is final and binding on the parties. This is the feature that is usually relied on to distinguish adjudication from other forms of dispute resolution. Moreover, the concept of adjudication cannot be considered apart from the concept of jurisdiction, which refers both to the power of bodies to subject persons or things to adjudicative processes, as well as implicit limitations on those bodies’ decisionmaking power. These notions of authoritative and jurisdictionally bounded decisionmaking imply the closely related requirement that adjudication exist within a system, meaning within a series of interrelated units that work together to effectuate its outcomes. A fully operational definition of adjudication, therefore, is a process to facilitate final, binding, and jurisdictionally bounded decisions that operate within a system and are based on the opportunity of participants to present proofs and

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Law Models of Litigation, 75 B.U. L. REV. 1273, 1290 (1995) (arguing that Fuller “assumed there were natural principles that guided the ordering process”).

This feature is implicit in Fuller’s description of the products of adjudication, judicial decisions, as “authoritative determinations,” see Fuller, supra note 182, at 368, as well as some of his other writings. See Lon L. Fuller, Collective Bargaining and the Arbitrator, in COLLECTIVE BARGAINING AND THE ARBITRATOR’S ROLE: PROCEEDINGS OF THE FIFTEENTH ANNUAL MEETING NATIONAL ACADEMY OF ARBITRATORS 29–33 (Mark L. Kahn ed., 1962). See also Geoffrey C. Hazard, Jr., From Whom No Secrets Are Had, 76 TEX. L. REV. 1665, 1670 (1998) (“[A]n adjudicative system by definition requires a principle of finality.”).

David B. Lipsky & Ronald L. Seeber, In Search of Control: The Corporate Embrace of ADR, 1 U. PA. J. LAB. & EMP. L. 133, 133 n.2 (1998) (suggesting that the basis for distinguishing mediation from arbitration is whether the process is nonbinding or binding); David A. Newton, Alternative Dispute Resolution in Australia, in A HANDBOOK OF DISPUTE RESOLUTION: ADR IN ACTION 231 (Karl J. Mackie ed., 1991) (noting the use of the term “non-binding ADR” to distinguish between adjudicative and nonadjudicative forms of ADR, arbitration belonging to the former category).

See Fuller, supra note 182, at 355 (noting that “certain problems by their intrinsic nature fall beyond the proper limits of adjudication, though how these problems are to be defined remains even today a subject for debate”).

Jurisdictional limitations are necessarily part of the definition of adjudication because true adjudicators do not enforce their own decisions but rely on other political forces for enforcement. This feature is important to distinguish adjudicatory decisionmaking from deliberative and reasoned political decisionmaking in which the decisionmaker and the enforcer are identical or at least closely linked. Cf. David Luban, The Adversary System Excuse, in THE GOOD LAWYER: LAWYERS’ ROLES AND LAWYERS’ ETHICS 90 (David Luban ed., 1983) (defining the “adversary system” as “a method of adjudication characterized by three things: an impartial tribunal of defined jurisdiction, formal procedural rules, and ... assignment to the parties of the responsibility to present their own cases and challenge their opponents”) (footnote omitted).

Adjudication must necessarily operate within a larger system because the other units are necessary to ensure enforcement of adjudicatory decisionmaking, and to ensure that adjudicatory decisionmaking operates within its prescribed jurisdictional limitations. See THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“The judiciary ... has no influence over either the sword or the purse ... and can take no active resolution whatever. It may truly be said to have neither force nor will but merely judgment ... .”)..

See generally Lynn M. LoPucki, The Systems Approach to Law, 82 CORNELL L. REV. 479 (1997) (offering various definitions of systems). The requirement that adjudication operate within a system distinguishes it from, for example, a mother’s decision, upon hearing competing arguments from her two children, about which one is entitled to possession of a favorite toy. In his essay, Fuller seeks to include even this mode of decisionmaking in his definition of adjudication. See Fuller, supra note 182, at 353. While parental discipline between siblings is clearly a form of dispute resolution, I reject its inclusion within even the broadest definition of adjudication because parental decisionmaking lacks many other features of true adjudication, such as jurisdictional boundaries or the requirement of reasoned decisionmaking, as demonstrated by the most famous parental rejoinder “because I said so.” Still, I do not claim that every system that houses an adjudicatory process must necessarily be a legal system, even if nonlegal systems of adjudication almost inevitably rest on underlying legal regimes for ultimate enforcement. See David Charny, Illusions of a Spontaneous Order: “Norms” in Contractual Relationships, 144 U. PA. L. REV. 1841, 1841 (1996).
reasoned arguments to third parties. This basic definition is subject to innumerable particularized interpretations within various systems, which may choose to invigorate one feature while muting another. Any process that completely lacks one of these features, however, cannot be considered adjudication.

This core definition of adjudication, in turn, delineates the role of the archetypal adjudicator as a third party who is granted jurisdiction to render authoritative and reason-based decisions after considering arguments from both sides. These fundamental features inherent in the role of an adjudicator provide a starting point for discerning the core essence of an adjudicator's ethical obligations, including impartiality. When decisionmaking is infected with bias, outcomes are not based on reasoned application of applicable legal rules or premised on parties' proofs, but rather on the personal interests and inclinations of the decisionmaker. Bringing reasoned analysis to bear on legal problems necessarily requires being detached enough to engage in rational analysis of the problem. Relatedly, a requirement that adjudicators consider arguments from both sides implies an obligation of fairness.

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195 See infra notes 208-214 and accompanying text.
196 The definition of an adjudicator that emerges from my definition of adjudication illustrates even more precisely why parental resolution of a sibling squabble is not adjudication. The parent is not required to consider arguments from both sides or to render a reason-based decision. Surely a good parent would listen to both children, and would decide based on reasons, but parental decisionmaking is not founded on or defined by these requirements, whereas an adjudicator's decisionmaking is. See supra note 165 and accompanying text. Those people who serve as adjudicators may perform other functions corollary to their adjudicatory functions, and those functions may carry their own ethical obligations. See generally, Murray L. Schwartz, *The Other Things That Courts Do*, 28 UCLA L. REV. 438 (examining the nonadjudicatory activities of courts, including promulgating rules, appointing officers, and administering probate estates).
197 The functional approach provides a conceptual analysis of the consequences of assigning particular weights to various procedural values. While it does not attempt to defend a particular normative vision of adjudication, it claims that certain procedural choices compel or preclude related ethical obligations. See discussion supra Subparts II.B-C. The value of the functional approach to normative undertakings in the context of procedural reform, therefore, is that it provides a means of examining and testing the coherence (or incoherence) of various normative theories.
198 John Leubsdorf argues that the aim of judicial disqualification standards should be to ensure that judges are able to put aside personal considerations, are willing to listen, and are able to act as a clean slate. See John Leubsdorf, supra note 18, at 280-90.
199 In this context, I use the word "fairness" in a procedural sense, to refer to an affirmative obligation to treat the parties equally as well as a negative obligation to avoid bias that would interfere with an adjudicator's equal consideration of both sides. "Procedural fairness" has many different connotations. See id. at 487. The sense in which I am referring to "procedural equality" and its relationship to fairness is perhaps the most fundamental, what Professor Bill Rubenstein refers to as "equipage equality," or equal opportunities for litigants to produce evidence and arguments. See William B. Rubenstein, *The Concept of Equality in Civil Procedure*, 23 CARDozo L. REV. 1865, 1874 (2002). As Jerry Mashaw observes, even in the narrower sense of equality of procedural opportunity, "equality is a notoriously slippery concept, and its procedural implications are puzzling." Jerry L. Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 B.U. L. REV. 885, 899 (1981). Notably, many of the conditions in traditional litigation settings that can systematically disrupt this fundamental requirement are absent in the international arbitration setting, where all parties can be presumed to have the financial resources to afford proficient counsel. Even if the correlation between an attorney's cost and competence is not always a direct one, as David Wilkins points out in his path-breaking article, corroboration are less likely to be victimized by poor lawyering, in part because they can employ their own sanctions in terms of reduced future employment. See David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARY. L. REV. 801, 824-28 (1992); but see Gillian K. Hadfield, *The Price of Law: How the Market for Lawyers Distorts the Justice System*, 98 MICH. L. REV. 953, 970 (2000) (arguing that "[outside experts such as in-house counsel or market-provided 'watchdog' services can only identify obvious abuses of the use of time or resources"").
The requirement that adjudicators are jurisdictionally bounded implies an obligation to respect the limits of their jurisdiction. The ethical nature of this obligation explains why errors regarding jurisdiction are often described in terms that imply moral or ethical judgment, whereas incorrect substantive results are described simply as errors. Finally, the authoritative nature of adjudicatory outcomes, as well as their existence within a larger system, imposes on adjudicators an obligation to preserve the integrity and legitimacy of the adjudicatory system in which they operate. These responsibilities to the system might translate into obligations in connection with performance of certain administrative functions, into obligations to avoid certain external activities that are inconsistent with their judicial function, and into obligations to avoid the “appearance of impropriety.” The functional approach reveals that, quite apart from any moral issues, fundamental ethical


In an extreme example, a traffic judge had a coffee vendor, who the judge had concluded was selling “putrid” coffee, brought to his chambers in handcuffs. Zarcone v. Perry, 572 F.2d 52, 53 (2d Cir. 1978). The judge was charged with ethical violations for abusing his office and exceeding his jurisdiction. In re Perry, 53 A.D.2d 882, 882, 385 N.Y.S.2d 589, 589 (2d Dept.), appeal dismissed, 40 N.Y.2d 1078, 392 N.Y.S.2d 1029, 360 N.E.2d 964 (1976). The judge was ultimately removed from office and held civilly liable for violating the vendor’s constitutional rights.

“Conduct in excess of clearly defined limits of a judge’s authority may amount to misconduct requiring the disciplinary action be taken[.]” 48A C.J.S. Judges §109 (2004).

See Christopher J. Peters, Participation, Representation, and Principled Adjudication, 8 LEGAL THEORY 185, 185 (2002). Christopher Peters’ work links participatory features of adjudication with its legitimacy. Although he seeks to defend the law-making function of U.S. judges, his arguments also help explicate the link between adjudicatory functions and obligations to preserve the system in which those decisions are made.

See generally Murray L. Schwartz supra note 196 (examining the nonadjudicatory activities of courts, including promulgating rules, appointing officers, and administering probate estates).

Under 28 U.S.C. § 455(a), recusal is mandatory “in any proceeding in which [the judge’s] impartiality might reasonably be questioned.” The “appearance of impropriety” standard originated as a means of protecting the legitimacy or perceived legitimacy of judicial institutions. In an interesting article, Professor Peter Morgan traces the modern rise of the appearance-of-impropriety doctrine to the Black Sox scandal of 1919, the writings of lawyer/novelist Henry Fielding, and the turmoil following Watergate. See Peter W. Morgan, The Appearance of Propriety: Ethics Reform and the Blifil Paradoxes, 44 STAN. L. REV. 593, 594–95 (1992). Although subject to some criticism, the standard has some objective benefits in encouraging voluntary compliance with judicial outcomes. See Nadler, supra note 99 (reporting on the results of an experiment that empirically tested the “Flouting Thesis” in which participants who were exposed to laws and legal outcomes that they perceived as unjust were more willing, as a general matter, to flout unrelated laws). In the United States, the “appearance of impropriety standard” also serves an evidentiary function by permitting complainants to produce objective evidence of possible bias, as opposed to the all-but-impossible to obtain actual evidence of subjective bias. “[B]ecause not all improprieties are discernible, such [an appearance of impropriety] rule lowers what could otherwise be prohibitively high evidentiary hurdles facing a petitioner.” Timothy R. Terry, Lawyers, Guns and Money: What Price Justice?, 88 J. CRIM. L. & CRIMINOLOGY 1087, 1113 (1998); see also Merit Ins. Co. v. Leatherby Ins. Co., 714 F.2d 673, 682 (7th Cir. 1983) (arguing that appearance of bias “just means that it is unnecessary to demonstrate—what is almost impossible to demonstrate—that the arbitrator had an actual bias”). Notwithstanding its importance, it is a standard without independent content. What creates an “appearance of impropriety” for a government-appointed judge who wields law-making power in a political system is necessarily different than what creates an “appearance of impropriety” for an arbitrator appointed because of her professional expertise and experience by parties to resolve a single dispute. By focusing on the relationship between the term “appearance of impropriety” used in the judicial context and the term “evident partiality” used in the Federal Arbitration Act, the debate in the United States avoids giving any real meaning to either of these terms.
values cannot be compromised because, without them, the person could not perform the role of adjudicator.

These core features of the adjudicator's role and their attendant ethical obligations are universal, but only when discussed, as above, in the most abstract generalities. Outside the fundamental definition of adjudication, there are an infinite number of potential dispute resolution models that can be designed to serve different goals and communities. In crafting these different adjudicatory models, architects of various systems calibrate differently the roles assigned to adjudicators, and as a consequence, adjudicators' professional ethical obligations in these systems differ.

To design a system, procedural architects answer a host of questions to determine the salient features of the system: How are decisionmakers selected to serve in the position of adjudicator? How are adjudicators selected for individual cases? What are they being asked to decide? On what information should their decisions be based? What is the role of parties and their counsel in the process? How will the decisionmaker evaluate the information presented? What is the decisionmakers' constituency? And, relatedly, what forces constrain decisionmaking? How does the decisionmaker relate to underlying political and governmental structures? What recourse is available against decisionmaker error or abuse? What are the normative

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206 See discussion infra Subpart II.B.1. Fuller engages in a similar reasoning of the relationship between judicial functions and the obligation of impartiality. Fuller reasoned that from the office of judge "certain requirements might be deduced, for example, that of impartiality, since a judge to be 'truly' such must be impartial. Then, as the next step, if he is to be impartial he must be willing to hear both sides." Fuller, supra note 182, at 365. While Fuller identifies the link, this analysis reverses the causal connection, namely that the obligation of impartiality results from the functional necessity that a judge be willing and able to hear both sides.

207 As noted earlier, Professor Leubsdorf has recognized the link between ethical standards and role, albeit in the judicial context. See Leubsdorf, supra note 18, at 239. Cf. Rogers, supra note 30, at 385 (explaining how "[o]utside of the fundamental features inherent in the definition of an advocate, and contrary to popular belief, the professional advocates of the world perform very different functions ... in their respective adjudicatory systems"); M.D.A. Freeman, Standards of Adjudication, Judicial Law-Making and Prospective Overruling, 26 CURRENT LEGAL PROBS. 166, 181 (1973) ("Every institution embodies some degree of consensus about how it is to operate. To understand the judicial role and apprise the legitimacy of judicial creativity one must explore the shared expectations which define the role of judge.").

208 Brown & Lee, supra note 23, at 1044.

209 As Leubsdorf has noted, "[t]o define what a judge is is to decide what a system of adjudication is all about." Leubsdorf, supra note 18, at 237.

210 As I have explained elsewhere, the role of parties and their counsel in proceedings is a complementary counterpart to the judicial role. If the judge is assigned the role of questioning witnesses, as in inquisitorial systems, attorneys' role with regard to witness testimony is circumscribed to suggesting questions or adding minor clarifications. See Rogers, supra note 30, at 413–14.

211 For a discussion of how judicial roles are affected by different procedural arrangements and legal methodologies, see discussion infra Subparts II.B–C.

212 For example, most democratic systems depend on a judiciary that is independent of other branches of government. In the international and ADR contexts, the question is more how decisions relate to the public government or governments. The UDRP, for example, was expressly designed as a soft-law system that supplements but does not supplant national court adjudication of domain name disputes. Laurence R. Helfer & Graeme B. Dinwoodie, Designing Non-National Systems: The Case Of The Uniform Domain Name Dispute Resolution Policy, 43 WM. & MARY L. REV. 141, 203 (2001).

213 This question inquires not only about the availability of appeal, but the standards under which review of an adjudicator's decision will be evaluated.
objectives of adjudication?214 And how will the legitimacy and correctness of the outcomes be measured? In answering all of these and related questions to create different models of adjudication, systems also fashion different roles for adjudicators. Although the responses to all of these questions can affect the role of adjudicators, the primary determinants are: the manner in which they are selected and appointed to their positions as decisionmakers, the nature of the decisions they are asked to render, and the procedural arrangements through which they make their decisions. The next subparts examine the variations that exist within the United States and in other national settings.

2. Competing Models of Adjudicators Within the U.S. System

Within the United States, a host of models demonstrate how flexible the definition of “adjudication” is. Even within the prototypical adjudicatory model (i.e., the trial court or district court),215 the role of the U.S. federal judge has undergone several transformations in the past fifty years. The historical and current debates in U.S. civil procedure illustrate the essential insight of the functional approach—that ethical obligations derive from functional roles. Following is a comparative “proof” of the functional approach using several variations of adjudication that have been subject to what appear to be criticisms about the ethical comportment of the decisionmakers. Analyzing these various forms reveals how the criticisms, although sounding in ethics, are really about role.

a. Administrative Tribunals

At the extreme end of the continuum of adjudicatory models, and some say even hanging over the edge, are administrative tribunals.216 Notwithstanding the Administrative Procedure Act’s use of the terms “adjudication”217 and “judges,”218 many scholars doubt that administrative “judges” actually “adjudicate.” The labels are blankly mouthed, but they are words that in this context have lost their meaning.219 Because they lack institutional independence, administrative law judges (“ALJs”) can impose administrative policy on individual parties, but that is a different thing than

214 For a discussion of the different normative goals of the U.S. and Continental adjudicatory systems, and the link between those goals and countries’ cultural values, see Oscar G. Chase, Legal Processes and National Character, 5 CARDozo J. INT’L & COMP. L. 1, 17-18 (1997) (citing GEERT HOFSTEDE, CULTURE’S CONSEQUENCES 25 (1980)).

215 Even at the trial level, there are a range of other adjudicatory models outside of this paradigmatic example, such as small claims courts, James C. Turner & Joyce A. McGee, Small Claims Reform: A Means Of Expanding Access To The American Civil Justice System, 5 UDC/DCSL L. REV. 177, 177-80 (2000), the federal Court of Claims, Note, The Constitutional Status Of The Court Of Claims, 68 HARV. L. REV 527, 527-31 (1955), and the Court of International Trade.


219 See supra note 159 and accompanying text.
true adjudication.\footnote{220}

The debate over whether they are properly called "judges," however, illustrates the link between role and ethics. Administrative law judges' allegiance to their agencies and its substantive positions would clearly be an impermissible transgression of traditional judicial ethics.\footnote{221} The extensive criticism leveled against them, however, is not that they behave unethically. Instead, criticism is aimed at the designation of a role that would not only permit, but actually require, this kind of partiality in someone even nominally called a "judge." Calls for reform seek to change this underlying role to allow ALJs to undertake impartiality obligations, making this role more consistent with that of a true adjudicator. \footnote{222}

b. The Public Law Structural Remedies Model

The emblematic model of adjudication, as Lon Fuller's definition is usually cast, is based on a somewhat simplified notion of legal decisionmaking. After modern psychology revealed the complexities of the human psyche and Legal Realists refuted the notion that there exists one objectively correct answer to any legal problem, the standard role of the judge as impartial (and even agnostic) evaluator was no longer fully sustainable.\footnote{223} Armed with these insights and a rising awareness of the role of policy in adjudication, and in response to intractable sociopolitical problems, Abram Chayes and Owen Fiss heralded in the late 1970s a new role for judges as vindicators of important public rights.\footnote{224} In this role, judges are not only to afford remedies for past harms, but to enact and oversee broad injunctive relief aimed at effecting structural social change.\footnote{225}

In their reconception of the judicial role, Fiss and Chayes also

\footnote{220} As Jerry Mashaw explains in his thoughtful critique of the issue, "[r]ather than viewing each case as a unique opportunity to dispense individualized justice, as a job to be done well in and for itself, administrators are likely to see adjudication merely as the means for implementing rules." See Mashaw, supra note 218, at 1056. For a more disapproving critique of this problem, see William D. Araiza, Agency Adjudication, the Importance of Facts and the Limitations of Labels, 57 WASH. & LEE L. REV. 351, 354 (2001) (noting that the existence of policy-making power under the rubric of "adjudication" has caused concern among courts).

\footnote{221} Notwithstanding the chorus of criticism, internally ALJs may perceive themselves differently than their critics contend. See Ronnie A. Yoder, The Role of the Administrative Law Judge, 22 J. NAT'L ASS'N ADMIN. L. JUDGES 321, 342 (2002) (arguing that "the role of the ALJ is defined by the Model Code. Moreover, it is impossible to separate that role from the dictates and definitions of the Code of Judicial Conduct—to be an independent decisionmaker and an example of good conduct in public and private life. You may not be surprised to find that the two ABA resolutions address some of these same concerns").

\footnote{222} See Mashaw, supra note 218, at 1056 (expressing a concern to "protect[] adjudicatory impartiality by upgrading the status of administrative judges, by separating them as much as possible from their agencies, and by protecting them from those forms of importuning that lawyers devoted to the sanctity of adjudicatory records call ex parte contacts").

\footnote{223} In making this point, Professor Leubsdorf eloquently describes modern psychology's provocation of a shift in the perception of judicial bias "from the eighteenth century's economic man, susceptible only to the tug of financial interest, to today's Freudian person, awash in a sea of conscious and unconscious motives." See Leubsdorf, supra note 18, at 247.

\footnote{224} Chayes, The Role of the Judge in Public Law Litigation, supra note 181, at 1284 (defining the role of the trial judge as "the creator and manager of complex forms of ongoing relief").

\footnote{225} Although described as a direct challenge to the Fuller's model of adjudication, Fiss and Chayes' model applies specifically to a subset of litigation, which is termed "public law litigation" and aims at such projects as desegregating schools and reforming prisons and other institutions. See Jonathan Molot, supra note 182, at 36.
challenged the traditional notion (already destabilized by the Legal Realists) of judicial impartiality as encompassing political neutrality.226 Under their theory, instead of being ideal, judicial acts reflecting political neutrality are an objectionable abdication of the proper judicial function. Fiss and Chayes championed not only a new role for judges, but they defended the necessary reformulation of judicial impartiality that must necessarily accompany the new role.227

c. The Managerial Judge Model

In the past twenty years, Judith Resnik has identified another judicial role: the “Managerial Judge.”228 Departing from the traditional model of detached umpire, modern judges are “meeting with parties in chambers to encourage settlement of disputes and to supervise case preparation” and as a result “are playing a critical role in shaping litigation and influencing results.”229 Resnik is concerned, however, that Managerial Judging creates new powers for judges because these activities are insulated from appellate oversight and public visibility, and are free from institutional constraints.230 This increase in judges’ discretionary power marks a shift in the functional role of the judge in relation to the parties.231 In her managerial capacity, the judge is not acting in response to party arguments or requests, but on her own initiative; not issuing opinions that explain or justify her decision, but orders that must be complied with, or informal pressure to compel party compliance.232 The change in role when judges are transformed from “adjudicators” to “managers”233 signals an attendant shift in the applicable ethical norms.

This shift occurs because the newly defined role elevates the values of speed, and perhaps fairness, over deliberation and “separateness.”234 As the functions of the Managerial Judge change, applicable ethical norms must change to accommodate. Impartiality obligations in the traditional litigation setting, which demand that judges scrupulously avoid ex parte contact and

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226 Fiss and Chayes were essentially arguing that the correctness of judicial decisionmaking should be evaluated by whether the results correspond with political ideals that are enmeshed in the dispute, but also exist apart from the individual dispute. See Colin S. Diver, *The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions*, 65 VA. L. REV. 43, 46 (1979) (defining the role of the judge under the Fiss/Chayes model as a “political powerbroker”).

227 Note, *Implementation Problems in Institutional Reform Litigation*, 91 HARV. L. REV. 428, 428 (1977) (arguing that in institutional reform litigation “judges are placed in a new role: they become responsible for implementing broad reforms in complex administrative systems, without ordinarily having expertise in either public administration or the particular institutional field in question”).


229 See id. at 377.

230 See id. at 392–93.

231 See id. at 414.

232 See id. at 404.

233 I do not contend, nor does Resnik, that when acting in their roles as managers judges are no longer adjudicators. One purpose of my analysis of the role of the adjudicator is to demonstrate that it is a flexible one that can be adjusted to fit within various systems.

234 See Resnik, *Managerial Judges*, supra note 228, at 424–25 (“Judicial management has its own techniques, goals and values, which appear to elevate speed over deliberation, impartiality and fairness”). Defenders of Managerial Judging contest suggestions that it is less fair. See, e.g., Jon O. Newman, *Rethinking Fairness: Perspectives on the Litigation Process*, 94 YALE L.J. 1643, 1644 (1985) (arguing that “fairness” in designing procedural systems requires consideration not only of fairness to individual litigants, but also to other current and potential litigants).
maintain intellectual and personal detachment from the litigants, are tied to the 
traditional judicial role as neutral umpire. As judges assume a role that injects 
them into party negotiations and requires them to mediate, they can no longer 
be held to the same impartiality standards.235

Resnik implicitly acknowledges this point. But she does not argue that 
Managerial Judges are acting unethically when they engage in *ex parte* contact 
and develop personal intimacies with the litigants, even though this conduct 
could be considered improper under the traditional model of the judicial role and 
its impartiality requirements.236 She argues instead that this new form of 
"judicial activism" is problematic and should be rejected because it would 
*necessarily require* a shift in traditional conceptions of judicial impartiality.237 
After this new role has been implemented, in other words, criticism is more 
fairly aimed at the legitimacy of the new role in light of the ethical obligations 
attendant on it than at "violations" by those performing the new role based on 
standards assigned to the antecedent role.238

Those who support Managerial Judging similarly acknowledge that the 
role they envision has consequences for the conceptions of ethical obligations 
of impartiality. The difference is that, unlike Resnik, they willingly accept the 
shift in ethical standards that would accompany the change in role.239 In other 
words, while both sides acknowledge that a necessary correlative shift in 
ethical standards occurs when judges become managers, they disagree about

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236 Judges are generally prohibited from engaging in *ex parte* communications. See Model Code 
of Judicial Conduct, Canon 3(B)(7) (1990). But see id. at 307 (claiming consensus has developed that 
such contacts are permissible if parties consent). Although application of this Canon is relatively 
straightforward, Resnik refers to the techniques that characterize Managerial Judging as creating risks 
or "threats" to impartiality, rather than characterizing them as clearly outside the boundaries of 
acceptable judicial conduct. See Resnik, supra note 228, at 426-28 (describing Managerial Judging's 
reliance on *ex parte* and informal processes as creating a "fertile field for the growth of personal bias" 
and a "threat to impartiality"). But it is clear from her proposals that although framed as possible, not 
actual, consequences, she clearly regards them as intolerable risks. See id. at 435-40 (discussing 
possible reforms that would wholly separate managerial and judicial roles). This intolerance for 
partiality that is possible but has not been demonstrated is consistent with insistence that the 
legitimacy of the system requires not only the provision of justice but also the appearance that justice 
has been done. For a discussion of the appearance of impropriety standard, see supra note 205 and 
accompanying text.

237 See Resnik, supra note 228, at 380 ("[M]anagerial judging may be redefining sub silentio our 
standards of what constitutes rational, fair, and impartial adjudication.").

238 Arguably, there is still room to criticize Managerial Judging techniques as ethically improper. 
Even if attenuated impartiality is essential to the newly assigned role, at least part of the responsibility 
for reconceptualizing the judicial role is attributable to judges themselves. See id. at 391–97 
(describing the sources of changes to the judicial role as caused by "procedural innovations and the 
articulation of new rights and remedies" as well as "changes initiated by judges themselves in 
response to work load pressures").

239 See Elliott, supra note 235, at 327 (conceding that one cost of Managerial Judging may be a 
real or perceived loss of fairness, but arguing that the cost is outweighed by increased substantive 
justice when techniques are applied properly); see also Robert F. Peckham, *A Judicial Response to the 
Cost of Litigation: Case Management, Two-Stage Discovery Planning and Alternative Dispute 
a more particularized example, advocates for the unrepresented poor argue that when unrepresented 
poor are parties to an action, a judge's role should include vigorous assistance for those parties. 
Russel Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles Of the 
argument, advocates recognize that the role they are urging would entail certain shifts in the nature of 
a judge's impartiality. Id.
the desirability of that shift.

d. The Transactional Model of Adjudication

More recently, William Rubenstein examines a genre of adjudication, known as the "Transactional Model," that has emerged in "large, sprawling class action lawsuits."240 Under Rubenstein's description, modern class actions have "more in common with business deals than they do with traditional adversarial litigation, legislative activity, or executive management."241 In class actions, party control is hyper-accentuated and consequently the judicial role is reduced to "one of presiding at a fairness hearing to bless the transaction."242 This scenario represents a shift away from either the traditional adjudicatory model or the Managerial model because it combines what Rubinstein characterizes as settled adjudication and representative litigation.243 In other words, "representative plaintiffs settle huge numbers of cases belonging to absent parties."244 The resulting process, according to Rubenstein, is barely distinguishable as adjudication and resembles more a private transaction, in which effectively "defendants purchase a commodity—finality."245

Like the Managerial model, the role shift implied in the Transactional Model has consequences for judicial ethics. In the Transactional Model judges may act "more as self-interested deal-brokers than as impartial dispute resolvers."246 According to Rubenstein, the judge's impartiality is replaced with an obligation "to serve the interests of the judicial institution that sent him."247 This obligation to serve an institution is distinguishable from a professional obligation because, as Rubenstein argues,248 the judicial branch has a "vested interest" in transactions that create finality because they are thereby absolved of additional work.249 It is this presumed self-interest in reducing their own workload that Rubenstein argues encourages judges to act more as self-interested deal-brokers than as impartial dispute resolvers in the transactional model.250

241 Id. at 372.
242 Id. at 373.
243 Id. at 412.
244 Id. at 413.
245 Id. at 372–73.
246 Id. at 373.
247 Id. at 372.
248 Id. at 427.
249 Rubenstein's argument that Transactional Model judges serve an institutional interest of conserving resources is not altogether persuasive. While it seems reasonable to assume, even in the absence of empirical evidence, that judges will feel pressure to control their dockets and move cases along, Rubenstein's arguments about the judicial branch suggest that judges personalize this urge into a self-interested desire for a lighter caseload. See id. at 373. The institutional pressure is a professional urge to administer justice swiftly and efficiently, while the personal pressure seems more akin to professional shirking. To the extent that Rubenstein is referring only to the former, he may be referring instead to "systemic bias," which is a related but distinct concept.
249 Id. at 373.
250 Id. To the extent that Rubenstein argues that the Transactional Model unduly emphasizes finality and efficiency over other valued features of litigation, such as accuracy or party autonomy, it may well be properly called a disrupting influence on the litigation process. It remains somewhat questionable, however, whether the disruption is different than what other scholars have suggested is a personal investment a judge may have in structured remedies. See Carolyn Hoecker Luedtke,
Rubenstein, like Resnik, criticizes a judicial model that shifts the judicial role in an undesirable direction, as opposed to critiquing conduct in that role as improper. At a normative level, Rubenstein is troubled by the ethical implications of the Transactional model he identifies. He does not, however, condemn judges for trespassing against static principles of impartiality, but instead he questions a role that would enable and permit them to abide by different standards of impartiality. Like Resnik, he is not arguing that judges act unethically in the model he identifies. Rather, he argues that the Transactional Model is perilous because it shifts the judicial role in a manner that would permit what he conceives of as an illegitimate disruption of impartiality. Even if one does not accept Rubenstein’s argument that judges might so easily be seduced by the lure of lower caseloads, the Transactional Model portends another shift in the judicial role that implicates judicial ethics. Rubenstein notes that courts enforce “transacted judgments” from other jurisdictions “even if the dealmaking judicial system would have had no jurisdiction to litigate the transacted case,” pointing out that the Manual on Complex Litigation urges judges to coordinate with one another not only within a state or the federal system, but also across states and between states and the federal system. At least some of these practices have been questioned as an improper shift in the judge’s role as independent adjudicator. Others who have directly considered the shift in ethical obligations on judges in mass tort litigation have expressly acknowledged that the ethical shift is a product of the shift in roles.

Innovation or Illegitimacy: Remedial Receivership in Tinsley v. Kemp Public Housing Litigation, 65 MO. L. REV. 655, 701 (2000) (arguing that a particular judge “has an interest in the outcome of the litigation, both because of his principled commitment to helping the residents of public housing, as well as his professional interest in vindicating his choice of remedy”). Rubenstein may be using the terms “impartial” and “vested interest” not as technical indicia of judicial professional ethics, but instead to express more generally the idea that pressures are influencing judges to behave in ways they may not otherwise and that the effect of those pressures is normatively undesirable.

“Should lawyers and judges engage in activities that are best characterized as transactional, not adjudicative, in nature?” he asks. Rubenstein, supra note 240, at 431. Rubenstein candidly admits that the Transactional Model does not “purport to provide final answers” to normative questions about the proper judicial role in class action litigation. Id. at 375, 431. Instead, he seeks to “reorient our thinking toward the reality of class action litigation, a reality that our current doctrinal discussions and theoretical conceptions tend to mask.” Id. at 375.

As Martha Minow queries:

Has the court strayed into the domain of the executive to enforce the law or taken over the task of the legislature to devise prospective rules and establish governmental agencies? Have appointed judges stepped into the fray reserved for elected officials? Are the judges making political judgments that require accommodation, bargaining, and the accountability of the electoral sanction for democratic legitimacy and efficacy?

Martha Minow, Judge for the Situation: Judge Jack Weinstein, Creator of Temporary Administrative Agencies, 97 COLUM. L. REV. 2010, 2022 (1997). Even if invoking the terms that may suggest ethical judgment, Minow’s critique focuses on the constitutional and institutional appropriateness of this shift in roles, as opposed to challenging the new role under traditional judicial ethics. For example, Minow frames the larger debate as over the “proper relation between justice and law” and implicitly the judicial role in that relationship. See id. at 2025.

Geoffrey Hazard notes that “[I]f we are to understand the ethical problems posed in mass tort cases, whether involving personal injury or discrimination-poverty, we should address the web of interests, power, authority, and responsibility in which the operatives in these new institutions
d. Final Observations

The differences between the Public Law Litigation, Managerial Judging, and Transactional Litigation models demonstrate that, although created and constrained through relatively fixed traditions, precedents and rules, the role of judges evolves in response to new social and political pressures. The model proposed by Fiss and Chayes altered the judicial role by redefining the proper scope and nature of judicial products to include structural remedies administered over time. Resnik's Managerial Judging altered the traditional judicial role by moving from more formal to less formal procedures, and by shifting the end product from full adjudication on the merits to lesser included decisions that would encourage settlement. Rubenstein's Transactional Adjudication reduces the role of the judge to ratifying an already negotiated result. In each case, these changes in role suggest a corollary shift in the notion of impartiality incumbent on the adjudicator.

Donald Elliott argues that these procedural changes represent creative evolutionary adaptations, which allow new functions that are needed but unaccommodated by a system's traditional structure, in the same way the panda's thumb allows an otherwise clumsy paw to efficiently strip shoots off bamboo. Unlike biological organisms, however, legal systems are not only concerned with changes that offer more efficient alternatives. Efficiency, or that aspect of it called "economy," is one valued feature of the adjudicatory process, but it stands in competition with several others. The crux of civil procedure debate in the United States today is focused not so much on whether a given procedure is more or less efficient, but rather on what weight efficiency should be given in relation to other adjudicatory goals.


As Resnik points out, the shift to the Managerial model was in part caused by changes to the Federal Rules of Civil Procedure. See Resnik, supra note 228, at 425–27.


The analogy of a panda's mock "thumb" to civil procedure innovations was introduced by Elliot. Elliot, supra note 235, at 307 (citing STEPHEN JAY GOULD, THE PANDA'S THUMB: MORE REFLECTIONS IN NATURAL HISTORY 21–24 (1980) for the metaphor).

Elliot, supra note 235, 334–35.

Resnik uses the term "economy," which she defines to mean "that part of efficiency that relates to resource conservation and to the view that a functional system must produce results speedily and with minimal cost." Resnik, supra note 89, at 854. Her article identifies litigants' autonomy, litigants' persuasion opportunities, decisionmakers' power, the diffusion and reallocation of that power, decisionmakers' impartiality and visibility, rationality and norm enforcement, ritual and formality, finality, revisionism, economy, consistency and differentiation as valued features of United States procedure. See id. at 837.

Judith Resnik questions the "efficiency" of Managerial Judging at the trial court level. See Resnik, supra note 228, at 417–24 (arguing that without data on the amount of "judge-hours that management consumes and saves, as well as information regarding the effect of management on parties' costs," it is not possible to evaluate the efficiency of Managerial Judging).

Several strands of the debate have been discussed above, but there are still others. See, e.g., Robert G. Bone, Agreeing to Fair Process: The Problem with Contractarian Theories of Procedural Fairness, 83 B.U. L. Rev. 485, 487 (2003) (arguing that "[a]ll fairness arguments operate in the same way: they provide reasons to trump or constrain the pursuit of aggregate social goals such as economic efficiency").
this question, the magnitude of efficiency gains must be evaluated on a
normative scale in light of other adjudicative values.

The functional approach cannot provide normative valuation. It can,
however, clarify an unacknowledged blurring of role definition and ethical
obligations by illustrating both the separateness of and interconnectedness
between the two. Any normative redesign meant to address problems such as
mass tort class actions and adversarial excesses must define a judicial role that
either coheres with the ethical obligations expected of judges by their
constituency or justifies departure from those expectations. Functional roles
are sensitive to evolutionary pressures because they are inherently utilitarian.
Ethical expectations, however, are more constant over time, even as the
original role to which those obligations were tethered has slipped from its
moorings. While new roles may portend new ethical obligations, it is not
always certain that those new obligations will be readily accepted as
legitimate.

C. Adjudicatory Models in Comparative Perspective

For as many different judicial models as exist and are debated in the
United States, the number and functions of tribunals vary even more across
cultures. The study of foreign systems can provide meaningful insight into the
efficacy of home-grown legal theories, particularly by revealing to us our own
unacknowledged and hidden assumptions. Fuller, for example, doubts that a
judge in an inquisitorial system could be impartial. Fuller and his co-author
John Randall note:

Any arbiter who attempts to decide a dispute
without the aid of partisan advocacy . . . must
undertake not only the role of judge, but that
of representative for both of the litigants.
Each of these roles must be played to the full

263 The functional approach also offers another response to Professor Molot’s lament that
“scholars are reluctant to rely on an old judicial role to tackle new litigation problems.” Molot, supra
note 182, at 31. Without a normative justification, the traditional judicial role is simply a utilitarian
choice made at an earlier time. Molot attempts to provide the needed normative justification by
reference to the judiciary’s institutional competence and constitutional authority in performance of its
traditional role. The comparative analysis that follows offers other visions of judicial competences,
which raise legitimate questions about whether the traditional U.S. judicial role is the only one to
which judicial officers are institutionally adept. On the other hand, the functional approach adds to
Molot’s constitutional justifications the observation that the traditional judicial role is consistent with
the ethical obligations that confer legitimacy on the judicial function.

264 See Catherine A. Rogers, Gulliver’s Troubled Travels, or The Conundrum of Comparative

265 While it remains a useful heuristic device, it has long been acknowledged that systems
described as “civil law,” “civilian,” and “inquisitorial” are a range of distinct traditions. For this
reason, in my comparative analysis, I use these terms in the tradition of Max Weber and Mirjan
Damaška—to represent an ideal type, as opposed to a specific tradition, except to the extent I identify
specific national traditions. See MIRJAN R. DAMAŠKA, THE FACES OF JUSTICE AND STATE
AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS 9 (1986). While this focus
undoubtedly poses some inherent limitations, the use of “ideal types” is helpful to demonstrate the
functional approach’s ability to explicate the reasons behind different ethical regimes. The limited
focus of my comparative analysis reflects primarily limitations of my own knowledge, not a judgment
that norms for international arbitration need only consider European and American perspectives. To
the contrary, especially given the expanding role of arbitration in developing nations, it is particularly
important that legal systems outside of Europe and the United States be incorporated into the
discussion.
without being muted by qualifications derived from the others. When he is developing for each side the most effective statement of his case, the arbiter must put aside his neutrality and permit himself to be moved by a sympathetic identification sufficiently intense to draw from his mind all that it is capable of giving . . . . When he resumes his neutral position, he must be able to view with distrust the fruits of this identification and be ready to reject the products of his own best mental efforts . . . .

Defining the judicial role as contingent on U.S.-style partisan advocacy biases Fuller's critique of judicial impartiality. By holding this definition as a necessary constant, Fuller critiques the inquisitorial model for not properly accommodating the judicial role. As David Luban explains, Fuller "is presupposing that the inquiry proceeds best by unmuted adversary presentation, in which case, of course, an inquisitorial investigation becomes by definition a mere copy of the real thing." Here, Fuller succumbs to one of the most common hazards of comparative analysis: Fuller's erroneous conclusion about the implausibility of judicial impartiality in the absence of "partisan advocacy" rests on a failure to recognize that abstracting particular characteristics from their systemic context portends the results of their comparison to other features of the system. To borrow Professor Andrew Huxley's poignant illustration of this classical problem, the comparison of chalk with cheese necessarily will highlight the question of edibility, while a comparison of chalk with pens will focus on legibility. By taking partisan advocacy as his starting point, Fuller


267 As David Luban has explained in his more elaborated exposition on Fuller's theories, "we can agree with [Fuller] that an adjudication should include all points of view without conceding that each point of view should be spin-doctored by an advocate to advance a party's interest." See id. at 826; see also Bone, supra note 102, at 1307 n.126 (1995) (describing Fuller's conception of how the "process of partisan advocacy is likely to push lawyers in the direction of viewing their role, not in terms of persuasion or manipulation of doctrine, but instead in terms of 'conveying to the court that full understanding of the case which will enable it to reach a wise and informed decision'") (citing Lon L. Fuller, Philosophy for the Practicing Lawyer, in Kenneth I. Winston, Introduction to the Principles of Social Order 282, 289-90 (Kenneth I. Winston ed., 1981)). On the other hand, Fuller's hypothesis finds some support in social scientific research that indicates that an "opponent of an adversarial lawyer transmits more facts that are unfavorable to her own client," apparently induced to candor by the presence of an adversary. Monroe H. Freedman, Our Constitutionalized Adversary System, 1 Chap. L. Rev. 57, 79 (1998) (citing E. Allan Lind et al., Discovery and Presentation of Evidence in Adversary and Nonadversary Proceedings, 71 Mich. L. Rev. 1129, 1136 (1973)).

268 See Luban, supra note 33, at 821 ("What Fuller claims is psychologically impossible turns out to be daily practice in civil law systems.").

269 See id. at 822.

270 For an extended discussion of the methodological problems raised in comparative law, see Rogers, supra note 264, at 162.

271 Andrew Huxley, Golden Yoke, Silken Text, 106 Yale L.J. 1885, 1924-25 (1997). The problems illustrated by Huxley's example are exacerbated in comparing principles, rules, procedures, and doctrines instead of tangible and relatively simple objects, such as chalk and cheese. Legal rules,
fails to adequately define the role of the civil law judge prior to delineating her ethical role. Paradoxically, this omission is contrary to Fuller’s own prescription for how ethical norms should be developed.\textsuperscript{272}

When the definition of the civil law judge’s role in relation to the other actors in her legal system is properly illuminated—as opposed to being left in the shadow of partisan advocates—the distinctive features of the civilian judge’s impartiality obligations are revealed. That is not to say that the role of advocates is irrelevant to the question of the adjudicator’s role, because roles are inherently inter-relational. For this reason, I take Fuller’s misstep (his assumption about the indispensability of strong partisan advocates) as my point of departure from which to demarcate the inter-relational role of advocates and judges in an inquisitorial system.\textsuperscript{273}

As I have argued elsewhere, instead of acting as a partisan advocate or “champion” of his clients, the civil law attorney is cast in a semi-collaborative role as “guide” to the court:

Sometimes, this semi-official status is made explicit, such as in Germany where attorneys are considered part of a concept called \emph{öffentliche Rechtspflege} (administration of law) and in Greece the “Lawyers’ Code” characterizes lawyers as “unsalaried Public Servants.” Advocates’ collaborative role is also recognized and reinforced through a range of traditions, such as a host of “rights and privileges” enjoyed by Greek attorneys, including special access to public service or administrative offices at times closed to the lay public. . . . Even the requirement that [some] civilian lawyers appear in court wearing a robe can be understood as a symbolic reflection of their quasi-official role.\textsuperscript{274}

Consistent with this semi-official role, civilian attorneys are assigned an obligation to be “independent” from their clients.\textsuperscript{275} In this role, civilian principles, and procedures exist in the larger context of a legal system’s framework. See Rogers, \emph{supra} note 264, at 161–62 & n.62.\textsuperscript{276}

\textsuperscript{272} See \emph{supra} note 33 and accompanying text (citing Luban, \emph{supra} note 33, at 807 and Lon L. Fuller, \emph{The Philosophy of Codes of Ethics}, 1995 \textsc{Elec. Eng.} 916, 917 (1955)).

\textsuperscript{273} The contrasting role of the judge in civil and common law systems has been called the “grand discriminant” between the two systems, John H. Langbein, \emph{The German Advantage in Civil Procedure}, 52 U. \textsc{Chi. L. Rev.} 823, 862 (1985), and is consequently the primary determinant for other actors’ roles. Rogers, \emph{supra} note 30, at 387.

\textsuperscript{274} Rogers, \emph{supra} note 30, at 389 (footnotes omitted).

\textsuperscript{275} The texts of both the U.S. and European code of professional responsibility (the CCBE) appear to be similarly committed to the principle of attorney “independence,” but the linguistic similarity masks deeply divergent views about what this duty requires. See id. at 365–67. American attorneys also have an obligation of “independence,” but the term denotes independence from the state, whereas on the continent “independence” refers primarily to attorneys’ relationships with their clients and other attorneys. Laurel S. Terry, \emph{An Introduction to the European Community’s Legal Ethics Part 1: An Analysis of the CCBE Code of Conduct}, 7 \textsc{Geo. J. Legal Ethics} 1, 46–48 (1993).
attorneys do not present their clients’ positions in their strongest, most uncompromising form, as Fuller’s partisan advocates would. Instead, they mediate their strongest position, presenting a pre-screened and more restrained view of their clients’ cases to the inquisitorial judge.

This role of the civil law attorney is prefigured by the role of the civil law judge. At least according to the “official portrait,” the civil law judge “mechanically applies legislative provisions to given fact situations.” According to the “official portrait,” statutory law, and in particular the Civil Code, are not interpreted, but are rather simply applied by judges to determine the outcome of cases. Mitchel Lasser and others have effectively demonstrated that indiscriminant adherence to this “official portrait” can mask the sometimes expressly policy-oriented decisionmaking by continental judges. Nevertheless, the “official portrait” suggests the intellectual heritage of the role of the civil law judge that inevitably continues to affect at least at some level perceptions of legitimacy for a civil law judge.

The role of the civil law judge derives from the process of judicial education and selection in civil law countries. As one scholar explains about the education and selection of civil law judges,

Civil law judges are part of the civil service. Judges enter a career of judging and advance through the judicial hierarchy. They are educated and trained to be judges. In

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276 See Rogers, supra note 30, at 361–62 (explaining that creativity in legal argument is not tolerated in civil law systems and can be regarded as professionally irresponsible).

277 See Luban, supra note 33, at 822 (citing Lon L. Fuller, The Adversary System, in TALKS ON AMERICAN LAW 30 (Harold J. Berman ed., 1961)).

278 For a contrary view about the advantages of partisan advocacy over civilian-style lawyering, see Freedman, supra note 267 at 78–79 (citing E. Allan Lind et al., Discovery and Presentation of Evidence in Adversary and Nonadversary Proceedings, 71 MICH. L. REV. 1129 (1973), for the proposition that “an adversarial lawyer transmits more facts that are unfavorable to her own client... [apparently [induced] to candor by the presence of an adversary”).


280 See id.


282 Lasser affirms the vitality of the official portrait of the civil law judge by pointing to explicit provisions of the French Civil Code that prohibit judges from “making” law, see Lasser, supra note 279, at 1335. Lasser just denies that it is the only vision of the judicial function that operates in the French system.

283 See generally John Bell, Principles and Methods of Judicial Selection in France, 61 S. CAL. L. REV. 1757. 1757 (1998) (using the French system to examine “different types of problems encountered during judicial selection in which the political or policy orientation of the individual judge may not always be a dominant feature”); David S. Clark, The Selection and Accountability of Judges in West Germany: Implementation of a Rechtsstaat, 61 S. CAL. L. REV. 1795, 1818 (1998) (noting that France’s selection of judges is based upon the “needs of a particular type of judicial function” and that Germany’s law schools focus on preparing students to become judges and that selection “contemplates... emphasizing democratic legitimation and neutral administration of justice”).
particular, their education and training equips them to work with language and to engage in the rational and scientific finding of the law. They then gain experience as judges. The judicial hierarchy allows judicial authorities considerable control over lower level judges. Their training and experience creates an elite, if anonymous, corps of adjudicators.

As a result of this education and appointment process, judicial selection is regarded less as a political act than as a technical selection of the most qualified personnel to perform the judicial function. This assumption is reinforced in the process for promoting civil law judges. The early stages of judicial decisionmaking are guided by senior judges and career advancement is determined by senior judges' evaluations.

At a more realistic level, outside the stiff confines of the "official portrait," when called on to fill gaps, civil law judges employ a range of methodologies, including a resort to policy. Even when civil law judges act more creatively outside their "official portrait" and venture into law-making activities, their function still varies significantly from that of their common law counterparts. As a matter of methodology, civil law judges may pronounce new rules based on policy, but their primary task is to find the legal solution that is consistent with the Code and contributes to the "manifestation of the 'organic whole.'" In this endeavour, their primary source is scholarly doctrine, which they use in search of an interpretation that coheres with the larger framework of the Code. Methodologically, civil law judges may look to prior judicial decisions for guidance, but even if done regularly, this reliance on prior judicial decisions does not confer on judicial decisionmaking the express force of law that it has in common law systems through the doctrine of *stare decisis*.

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285 As one scholar explains, civil law judges advance in their careers from an apprenticeship supervised by senior judges, up through increasingly important courts based on their performance, which is evaluated and controlled by other judges in the form of a council. See Charles H. Koch, Jr., *The Advantages of the Civil Law Judicial Design as the Model for Emerging Legal Systems*, 11 IND. J. GLOBAL LEGAL STUD. 139, 143 (2004).


287 See Lasser, supra note 279, at 1351.

288 Curran, supra note 286, at 76-77.

289 In what has been aptly heralded as a "unique collection of outstanding insights into judicial structures and legitimacy, legal theory and reasoning, and comparative law," editors Neil MacCormick and Robert Summers have brought together a series of commentators who describe the reliance on precedent in European judicial decisionmaking notwithstanding the absence of formal obligation or authorization to do so. See also Thomas Lundmark, *Interpreting Precedents: A Comparative Study*, 46 AM. J. COMP. L. 211, 224 (1998) (book review); see generally INTERPRETING PRECEDENTS: A COMPARATIVE STUDY (Neil MacCormick & Robert S. Summers, eds., 1997).
At a procedural level, as is all the fashion to point out in the current academic literature, civil law judges are much more active managers than their American counterparts, even under the modern U.S. trend toward Managerial Judging. Any one of these hearings may dispose of the entire case. See Langbein, supra note 273, at 831. One demonstration of the extent of judicial power is that in France, it is often said there are no formal evidentiary rules. See THE FRENCH CODE OF CRIMINAL PROCEDURE 199 (GERALD KOCK & RICHARD FRASE, trans., 1988) (describing and translating provisions regarding the introduction of evidence from the French Code of Criminal Procedure). While the absence of evidentiary rules may initially seem strange to an American lawyer, it is only because they are accustomed to the presentation of information to a lay jury. Even in the U.S., when parties agree to a bench trial, often the formal rules of evidence are relaxed. See Damaška, supra note 265, at 130 & n.60.

As John Langbein describes, in the German system,

The very concepts of "plaintiff's case" and "defendant's case" are unknown. In our system those concepts function as traffic rules for the partisan presentation of evidence to a passive and ignorant trier. By contrast, in German procedure the court ranges over the entire case, constantly looking for the jugular—for the issue of law or fact that might dispose of the case.

Langbein, supra note 273, at 830. Although the German judge is obviously much more active than the U.S. version, the "inquisitorial" role of the German judge in civil proceedings can be, and has been, dramatically overstated. See generally Ronald J. Allen, Idealization and Caricature in Comparative Legal Scholarship, 82 Nw. U. L. Rev. 785 (1988) (criticizing Langbein for overstating the role of the judge in German civil proceedings).

Conventional wisdom among German advocates is that a lawyer should be wary of putting more than three questions to a witness because to put more risks implying that the judge did not do a satisfactory job in initial questioning. See Oscar G. Chase, Legal Processes and National Character, 5 CARDOZO J. INT'L & COMP. L. 1, 4–5 (1997). While the conventional wisdom is not always followed, it demonstrates the gravitational force of the judge's power over fact gathering.

See Damaška, supra note 265, at 138 (noting that continental decisionmakers are expected to conduct pre-hearing review of the files and are not presumed to come to the case with a "virgin mind").

Langbein, supra note 273, at 832. To the extent that U.S. judges engage in some of these tasks, they do so informally, and partially. See Resnik, supra note 228, at 377. The divide between civil and common systems is not always so stark. In Canada, judges have an obligation to assist the jury in summarizing and characterizing the evidence for them, as well as suggesting conclusions that might be drawn from certain evidence and warning the jury of the inherent unreliability of certain types of evidence. Judges may also express an opinion about what would be a reasonable range of damages. John P. Wright, An American Visitor to a Canadian Court, 4 GREEN BAG 2d 281, 285 (2001).
witnesses is not a sign of bias, as it might be in the U.S. system.\footnote{296} Given the quasi-collaborative role between judges and lawyers in the civil law system, absolute prohibitions against \textit{ex parte} communication, which exist in the United States,\footnote{297} are not as necessary.\footnote{298} Judicial statements regarding the relative strengths of each party’s case during proceedings would not be considered an inappropriate violation of impartiality obligations, and prior knowledge of facts involved in a case are not necessarily grounds for disqualification.\footnote{299} Decisions, however, that veer away from doctrine toward politically motivated outcomes might more readily be regarded as more improper than they would be in the United States.

Conversely, the more staunchly partisan role of U.S. attorneys can be seen as linked to the nature of common law legal methodology and the judge’s decisional role in relation to that methodology. The common law judicial decision is predicated on the “mosaic of facts and circumstances presented in their unicity with each case.”\footnote{300} The task of a common law judge is to evaluate counsel’s competing arguments about hyper-factual analogies and subtle distinctions in prior decisional law.\footnote{301} The view of each case as presenting a unique scenario, combined with an inherent skepticism about the existence of any single right answer, amplifies the need for the common law judge to distance herself from the competing scenarios so that she can effectively

\footnote{296} See also Damaška, \textit{supra} note 265, at 120 (noting that when a judge “grills a witness testifying in favor of one disputant, the other may think that the official is assisting his adversary”).

\footnote{297} In the United States there are strict prohibitions against \textit{ex parte} communications, except in the most narrow, and extreme exceptions, such as special proceedings for extraordinary relief through temporary restraining orders, \textit{in camera} inspections, and similar unusual procedural settings. CHARLES F. WOLFRAM, MODERN LEGAL ETHICS 605-06 (1986).

\footnote{298} See Terry, \textit{supra} note 275 n.159 (noting that in many European countries “ex parte contact with the court on ‘non-fundamental’ issues is not prohibited”). For similar reasons, as I have argued elsewhere, European regulation of attorney conflicts of interest may be much less rigorous than regulation in the United States because of expectations that civilian attorneys, in performing their quasi-official role, would maintain professional independence from their own clients, thus reducing the threat of cross-client conflicts. See Rogers, \textit{supra} note 30, at 390–91.


\footnote{300} Curran, \textit{supra} note 286, at 100.

\footnote{301} As one comparative law scholar explains,

\begin{quote}
Common-law lawyers . . . fashion their arguments from a close study of prior cases. Their success as lawyers depends on persuading the judge in each case of the accuracy of the analogies they suggest between their client’s situation and that of the precedents they cite . . . . and the [distinctions] from situations that arose in the precedents they hope to distinguish. The common-law lawyer’s task also is to persuade the judge that the lawyer’s interpretation of existing case law accurately reflects prevailing contemporaneous legal standards, and that the accumulated body of relevant precedents obliges the judge to rule in favor of the lawyer’s client . . . . Thus, common-law lawyers engage in complex factual triages, distinguishing as factually different and distant those cases whose outcomes would militate against their client’s interests . . . .
\end{quote}

\textit{Id.} at 76–77.
evaluate them. Finally, the fact that U.S. judges have an express law-making function means that parties go to court not only to resolve disputes, but to achieve changes in the law. When judges have the power to make law, lawyers take on a lobbyist role in relation to them and the necessity of equality of access becomes paramount.

At a procedural level, as I and many others have explicated elsewhere: [T]he American system is built on a model of party contest before a "judicial tabula rasa." The American judge (or jury) is supposed to obtain only through the party dialectic all evidence that must be evaluated and legal arguments that must be analyzed, and they are expected to remain completely neutral until it is time to render the final judgment. As a consequence of the relatively passive role of decision-makers, the attorneys are given an active role in managing the proceedings. The attorney in U.S. litigation gathers evidence, shapes the issues for trial and presents evidence at trial, including examining and cross-examining witnesses. Because the judge only rules on pre-trial motions that are brought by the parties, attorneys act not as guides, but primarily as clients' strategists, evaluating and advising when and how various procedural tactics should be used.

This understanding of the judge's role in the trial process makes clear why a U.S judge's impartiality may be called into question for asking too many questions of a party's witness, or for expressing opinions during the

302 Historically, modern concerns about impartiality can be traced to the emergence in the seventeenth century of doubt about the ability or at least difficulty to reach "an objectively correct legal decision," which caused people to go "to greater lengths to prevent extraneous motives from inhibiting the delicate feat." Leubsdorf, supra note 18, at 249 (citing BARBARA SHAPIRO, PROBABILITY AND CERTAINTY IN SEVENTEENTH CENTURY ENGLAND 190–91 (1983)).

303 See ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16–23 (1962) (arguing that judges make law even though they are not elected or subject to the same constraints as legislatures).

304 See generally GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982) (arguing that courts are better suited than legislatures to resolve certain policy issues because of the structure of the courts and the nature of the common law); Thomas W. Merrill, Does Public Choice Theory Justify Judicial Activism After All?, 21 HARV. J.L. & PUB. POL’Y 219 (1997) (suggesting that courts provide less expensive access to government than direct lobbying of the legislature).

305 See Rogers, supra note 30, at 390.

306 See id. (footnotes omitted). Although I quote from my own previous work, the most profound and nuanced version of these explanations, and the one that has inspired my work in this area, is that of Mirjan Damaska. "Tabula rasa" is his poignant expression. See DAMASKA, supra note 265, at 138.

307 There are many cases in the United States in which arbitrators have been challenged on the grounds of bias or misconduct based on aggressive questioning of witnesses. Compare In Matter of Arbitration between Cole Publ’g Co., Inc. v. John Wiley & Sons, Inc., 1994 WL 532898, *2 (S.D.N.Y. Sept. 29, 1994) (rejecting challenge to arbitral award that alleged arbitrator bias was
proceedings about the relative merits of the parties’ cases. Such questions or comments would remove the judge from a position of total detachment and inject her into the attorney’s process of developing and presenting the client’s case. It also explains why U.S. prohibitions against ex parte communications are more absolute—because the decisionmaker is expected to be a blank slate on which the parties, in heated contest, draw their dispute, and any stray renderings by one party might unfairly alter the tableau.\(^\text{308}\)

On the other hand, because U.S. judges have express law-making and policy-creating functions, it is necessary to have their selection and appointment determined through a political process, namely appointment by the President with the advice and consent of the Senate.\(^\text{309}\) For this reason, American notions of judicial impartiality may be more tolerant of the effects of “Politics” with a capital “P” than “politics” with a lower case “p,”\(^\text{310}\) the latter of which may be more prevalent in civil law countries as a result of the institutional pressure from more senior judges.\(^\text{311}\) Unapologetically politicized decisions may injure perceptions of the legitimacy of U.S. judges,\(^\text{312}\) but the level of political neutrality embodied in conceptions of political impartiality of judges in the United States is less than that expected of ordinary civil law judges, whose selection and promotion processes confirm that the position of judge is regarded more as a technical vocation than a political activity.\(^\text{313}\)

evidenced by aggressive questioning of some witnesses and attempts to rehabilitate others, and that arbitrator acted more as an advocate than an impartial moderator), with Holodnak v. Avco Corp., 381 F. Supp. 191 (D. Conn. 1974), aff’d in part, rev’d in part on other grounds, 514 F.2d 285 (2d Cir. 1975) (finding bias and vacating arbitral award based on arbitrator’s “badgering” the complaining party at the time of the proceedings).

Rogers, supra note 30, at 392.

“[T]he Senate can serve as an important political check on the President’s power to appoint. Moreover, the political nature of the Senate’s role, like that of the President, helps ameliorate the ‘countermajoritarian difficulty.’” Henry Paul Monaghan, The Confirmation Process: Law or Politics?, 101 HARV. L. REV. 1202, 1203 (1988); see also Richard D. Manoloff, The Advice and Consent of the Congress: Toward a Supreme Court Appointment Process for Our Time, 54 OHIO ST. L.J. 1087, 1102 (1993) (arguing that aggressive Senate review of presidential nominees may provide a valuable political check on judicial appointments).

This preference is most clearly expressed in the Public Litigation Model. While Fiss argues that judicial independence is necessary to protect fundamental rights, he simultaneously demands certain political inclinations of judicial decisionmakers. See Fiss, The Supreme Court Forward, supra note 181, at 43–44.

Professor Koch reasons that the structure of the civil law judiciary, and particularly the vesting of both promotion and disciplinary decisionmaking in the hands of senior judges, may encourage junior judges to conform or “bias” their decisionmaking to conform to the perceived preferences of senior judges. See Koch. supra note 284, at 143–44, 147 & nn.16 & 28 (citing study by Mitu Gulati & C.M.A. McCauliff, On Not Making Law, 61 LAW & CONTEMP. PROBS. 157, 161 (1998), and various works critiquing the judicial bias implications).

As dissenting Justices Ginsburg, Breyer and Stevens commented in their dissent to the majority opinion in Bush v. Gore, “[a]lthough we may never know with complete certainty the identity of the winner of this year’s Presidential election, the identity of the loser is perfectly clear. It is the Nation’s confidence in the judge as an impartial guardian of the rule of law.” Bush v. Gore, 531 U.S. 98, 128–29 (2000) (Stevens, J., dissenting).

Notably, concern over political accountability does affect judicial selection in civil law countries for those judges whose functional role includes invalidating unconstitutional legislative decisionmaking. For example, Article 94(1) of the German Basic Law requires that half of the judges of the Federal Constitutional Court are elected by the Bundestag and half by the Bundesrat, and pursuant to Article 56 of the French Constitution, one-third of the French Cour di Cassassion are appointed by the President of the Republic, one-third by the President of the National Assembly, and one-third by the President of the Senate. These and other judicial selection processes are described in
C. Conclusion
While adjudicatory systems have many moving parts, this discussion of various systems demonstrates that the adjudicator’s role is determined primarily by the nature of her decisionmaking function, the procedures through which she assembles information on which to make such decisions, and the manner in which she was selected. As these features shift within various systems, the role of the adjudicator shifts, and consequently her attendant ethical obligations shift. Unlike courts in national systems, designed pursuant to and in furtherance of specific constitutional objectives and subject to relatively fixed procedural rules, arbitration is a flexible medium that draws inspiration and personnel from both common law and civil law systems. This distinction means that while national judicial roles may shift from system to system or within one system over time, the arbitrator’s role can shift from case to case, based on party procedural preferences or the identity of the arbitrators selected. This potential for ad hoc variation presents a new challenge for application of the functional approach.

III. APPLYING THE FUNCTIONAL APPROACH TO ARBITRATOR ETHICS
Having surveyed a range of adjudicatory models in Parts I and II, it is now possible to apply the functional approach to the international arbitration system. The problem in the arbitration context, which I discuss in Subpart A, is that parties are able to contractually alter the role of the arbitrator. This predicate, I argue in Subpart B, suggests that ethical rules for arbitrators must be default rules that are tied as closely as possible to the primary source of contractual manipulation of the arbitrator’s role: the arbitral rules and hybrid procedures adopted by the parties. After establishing the general outlines of the international arbitrator’s role, I address, in Subparts C and D, the two aspects of arbitrator impartiality obligations that have been the focus of concern by commentators and courts: the impartiality obligations of the party-appointed arbitrator and the duty to disclose potential conflicts during the selection process.

A. Deriving the Content of Ethical Codes
The difficulty in applying the functional approach to international arbitration is that the arbitrator is a chameleon. One of the strengths of the international arbitration system is the flexibility that allows the arbitrator’s role to be subject to change through individually crafted arbitration agreements. While an entire article could be written regarding the precise factors that determine the specific contours of an adjudicator’s role, for our purposes it is fair to concentrate on the most obvious and apparently most significant: the process by which they are appointed, the processes by which they obtain information from the parties, and their decisional methodology. I address these three variables in turn below.

The first of these variables, the appointment process, is determined by the institution the parties choose to administer the arbitration. Cross-institutional comparison reveals that the structure and appointment processes for tripartite arbitral tribunals are fairly uniform across institutions. As noted


See discussion supra Subpart II.B.
earlier, in this conventional structure, each party appoints its own party-appointed arbitrator, and they together select the chairperson. The most significant distinction between this process and processes for judicial appointment (regardless of the system) is that arbitrators are specifically chosen for particular cases, whereas judges are appointed under national procedures, but assigned cases randomly. Arbitrators are specialized decisionmakers, with attributes and experiences that are presumably well-suited to the particular case in which they are appointed.

With regard to the second critical variable, decisionmaking procedures, there is considerably more room for flexibility since institutional arbitral rules provide only skeletal procedures for commencing arbitration and selecting arbitrators. Those aspects of the arbitrator's role that are determined by the procedures by which information is gathered, synthesized and presented may still be subject to considerable variation, even within a single institution, because parties can agree to (or arbitrators can decide on) a range of possible allocations of power. Notwithstanding the shifting sands, some concrete foundations can be found. One of the most significant points to find equilibrium is in what might be called "hybridized" procedural rules for gathering evidence:

[H]ybridized procedures . . . are routinely adopted by parties[,] . . . under which oral hearings are routinely held. In these hearings, most often direct examination is submitted by the parties in the form of witness statements or declarations, which gives parties substantial control over what testimonial evidence will be presented in support of their case. Cross-examination of witnesses [in a more subdued form] . . . is generally accepted . . . [and] arbitrators routinely interject with questions of witnesses, but more for the purpose of clarifying and filling in gaps in testimony, than developing the initial content of testimony. Limited discovery is usually allowed, including depositions, and evidentiary objections are making an appearance in many arbitrations.

These hybridized procedures represent a mutual accommodation of civil and common law procedural traditions. While not always adopted, these

315 See Rau, supra note 65, at 497–98. Alternatively, under some institutional rules, the chairperson is appointed by the institution. See, e.g., ICC Rules, art. 8(4). Sole arbitrators are almost universally appointed by the institution or an appointing authority since parties rarely agree on this issue. See, e.g., id. art. 8(3).
316 See supra note 24 and accompanying text.
319 Although developed in a different context, the ALI's project in drafting transnational procedural rules has a similar purpose. See generally, Geoffrey C. Hazard, Jr. et al., Introduction to
The third variable—the arbitrators’ decisionmaking processes or methodologies—is the most subtle and supple. At first blush, this variable seems to be impossible to isolate since arbitrators and governing substantive law can be selected from either the common law or civil law tradition. The potential for variation at this level, however, is dwarfed by the more important methodological shift, described above, away from vast, flexible equitable powers, to a structure more subject to and constrained by established rules of law and procedure.

The methodological distinctions between civil and common law, and the effect of each system on the nature of judicial decisionmaking, do not translate clearly into the arbitral context. For example, in international arbitrations, arbitrators trained in the common law tradition are often required to apply civil law rules, and arbitrators trained in the civil law tradition are often required to apply common law rules. In these situations, an arbitrator’s methodology will be at best a hybrid, or more likely a covert mix, of methodologies. As a result, arbitrators often either intentionally or unintentionally add a “gloss” to their legal decisionmaking, either implicitly viewing the legal issue through the lens of their home system or even expressly incorporating into their decision international standards to supplement the parties’ choice of law. In this way, international arbitral decisionmaking may be gravitating toward substantive methodological hybridization in the same way it has on the procedural level. Top international arbitrators are chosen

the Principles and Rules of Transnational Civil Procedure, 33 N.Y.U. J. INT’L L. & POL. 769, 771 (2001) (noting the project’s use of “principles” as a general foundation that various systems can use, including international arbitration).


321 See supra notes 73–84 and accompanying text.


323 Overt and covert mixing of common law and civil law methodologies can be easily observed when national courts are required to apply the law from a foreign legal tradition. See, e.g., V. Susanne Cook, The U.N. Convention on Contracts for the International Sale of Goods: A Mandate to Abandon Legal Ethnocentrity, 16 J.L. & COM. 257 (1997) (pointing out a court’s failure to use “general principles,” as a civilian court would, in its interpretation of the Convention, and its neglect to rely on foreign case law when no U.S. jurisprudence was available).


325 Some even argue, citing statistical support, that the UNIDROIT principles represent a new era for choice of law in international arbitration. See Aline Grenon & Louis Perret, Globalization and Canadian Legal Education, 43 S. TEX. L. REV. 543, 546 (2002); see also Marrella, supra note 324, at 1167 (exploring the use of UNIDROIT to supplement parties’ choice of national law). Despite the enthusiasm of internationalists, it remains doubtful whether commercial law can ever be fully abstracted from national conceptions or methodologies of law, and particularly from the methodologies of national legal systems, if for no other reason than that those who must apply it are...
for their specialized ability to work with the intermingled procedures, substantive rules, and methodologies of multiple systems that come into play during a single arbitration. While this creative mixing of law and methodology may make arbitral decisionmaking less constrained than it would be in the domestic context, it nevertheless operates as a much greater constraint than the antecedent vagaries of the largely equity-based decisionmaking of former times.

Notwithstanding a blurring around the edges, some distinctions in methodology inevitably remain depending on whether the arbitrator is applying common law or civil law. The consequences of these distinctions, however, would seem to be less significant outside the judicial context. In national courts, the applicable methodology determines judges’ relationship to the legislative and law-making functions. In the arbitration context, where adjudicators do not have an expressly political role, the methodological distinctions become more a matter of what analytic processes and research techniques they will employ than what their relationship will be to other political bodies. As a consequence, while the distinction between common law and civil law methodologies will inevitably affect arbitrators’ decisionmaking, it is unlikely to affect their functional role in aspects that are most relevant to their ethical obligations.

This sketch of the universal core features of international arbitrators provides a basis for a definition of the arbitrator’s functional role, from which it is possible to outline broadly the structure of arbitrator ethics. Because arbitrators are individually appointed, specialized knowledge of both factual and technical matters, as well as industry-specific legal issues, is not only more tolerable than it would be for judges in national contexts, it is to be expected.

creatures of national systems. For the classic analysis of this problem, see R.J.C. Munday, The Uniform Interpretation of International Conventions, 27 INT’L & COMP. L.Q. 450, 450 (1978) (arguing that “even when outward uniformity is achieved following the adoption of a single authoritative text, uniform application of the agreed rules is by no means guaranteed”).

326 See JOSEPH M. LOOKOFFSKY, TRANSNATIONAL LITIGATION AND COMMERCIAL ARBITRATION: A COMPARATIVE ANALYSIS OF AMERICAN, EUROPEAN, AND INTERNATIONAL LAW 559 (1992) (noting that an important qualification of arbitrators is often that they possess legal expertise in several systems of national law).

327 See supra notes 73-84 and accompanying text (describing the shift from equitably-based to law-based arbitral decisionmaking).

328 For a comparison of civil law and common law judicial methodologies, and their relationship to the constitutional structures in which they exist, see supra notes 299-301 and accompanying text.

329 Arbitrators undoubtedly have a law-making role, but it is not in direct competition with national legislatures. See Thomas E. Carbonneau, The Ballad of Transborder Arbitration, 56 U. MIAMI L. REV. 773, 807 (2002). Apart from the fact that arbitrators are structurally apart from domestic governmental structures, competition is also limited because national legislatures have largely ceded to arbitration control over most aspects of private international commerce because they might otherwise be ceding it to other national legislators. See Hannah Buxbaum, The Private Attorney General in a Global Age: Public Interests in Private Antitrust Litigation, 26 YALE L.J. 219, 242 (2001).

330 I do not seek to provide a specific definition of arbitrator impartiality. My theory is, in part, that no single definition exists. Instead, my primary aim is to identify how and why certain hallmarks of impartiality shift from the judicial context to the arbitrator context.

331 One exception might be specialized courts that are organized specifically to develop and build an expertise regarding a specific type of dispute or particular industry, such as the Commercial Court of Lille, France. See Allendale Mut. Ins. Co. v. Bull Data Sys. Inc., 10 F.3d 425, 429 (7th Cir. 1993) (arguing that “[a]lthough called a ‘court,’ it is actually a panel of arbitrators, composed of businessmen who devote part time to arbitrating”).
Given the hybridized information-gathering procedures, active questioning of witnesses and expressions of opinion regarding the relative merits of parties' cases are more acceptable in an arbitration than they would be in a U.S. courtroom, but given the rise of party autonomy in arbitral procedure, this should be practiced with less consistency than in traditional civil law courtrooms.

On the other hand, the lack of appeal and absence of governmentally conferred legitimacy may suggest that arbitrators should have heightened obligations to support and enhance the legitimacy of the system. This augmented obligation to the system may translate into more specific duties, particularly with regard to disclosure, as I analyze in more detail below. These are very general outlines of the international arbitrator's role, which will have to be filled out through specific rules. It is at this juncture that the difficulty with arbitral flexibility comes in.

B. Appending Ethical Codes to Arbitral Rules

My purpose in this Article is not to delineate specific standards of conduct or elaborate the details of how they should be implemented and enforced, but instead to provide a methodology for how the rules should be drafted. Because the functional approach dictates that the ethical rules must be tied to functional roles, however, it raises some practical concerns about implementation and enforcement that I address briefly in this section.

In arbitration agreements parties can contractually alter the above sketch of the generic arbitrator's role, most fundamentally by selecting arbitral institutions with particular features. To accommodate this complexity,
ethical codes for arbitrators should be drafted in conjunction with, and should be tied closely to, the primary source of contractual manipulation of the arbitrator's role—the arbitral rules adopted by parties. In other words, instead of one universal ethical code of conduct for arbitrators, I am proposing that there be multiple codes that can be calibrated and appended to the specific rules, traditions and features of particular arbitral institutions.335 Moreover, these rules should be set not as static prohibitions, but as default rules that can be amended as necessary by the parties.

This approach holds several advantages. First, and most importantly, co-joining these ethical rules with arbitral rules will ensure that they become contractually binding on arbitrators.336 Currently, relatively few institutions have rules of ethics, and parties rarely incorporate the freestanding IBA ethical code into their contracts. As a result, parties often come to an arbitration with divergent expectations and arbitrators have little guidance about what constitutes appropriate conduct.337

Appending ethical codes to the arbitral rules will also necessarily conscribe for arbitral institutions a more active and transparent policing role, instead of leaving the matter to their shadowy discretion. It is not surprising that the only two institutions that have published a policy of refusing to appoint in future arbitrations those arbitrators found to have violated ethical obligations, the AAA and the Milan Chamber, are among the few institutions whose rules append a code of ethics for arbitrators.338 The benefits of increased oversight and transparency would inure not only to parties, but also to arbitrators. Even arbitrators who are honest and scrupulously attentive to their reputations for fairness and impartiality can be the victims of a frustrated award debtor who seeks to use accusations of misconduct to frustrate enforcement. An obscure absolution from an institution, and an inevitable decision to enforce by a deferential court, might not be sufficient to avoid

335 I have made similar arguments regarding proposed codes of ethics for attorneys in international arbitration. See Rogers, supra note 317, at 27.
336 A limited few arbitral institutions have already taken this step, most notably the detailed code provided by the AAA. See supra notes 10 & 112 and accompanying text.
337 There are several possible explanations for why parties do not incorporate the IBA CONFLICT GUIDELINES. The most plausible explanation is that, while there is evidence that some degree of attention is given to the process for selecting arbitrators, parties rarely address more general procedural issues, such as the methods for obtaining and presenting evidence. Legend has it that arbitration agreements are often tossed in the night before a deal closes. Anecdotal evidence suggests that at that time corporate counsel, with little or no dispute resolution experience, draft arbitration clauses. See Donald I. Baker & Mark R. Stabile, Arbitration of Antitrust Claims: Opportunities and Hazards for Corporate Counsel, 48 BUS. LAW. 395, 413 (1993) (noting that arbitration clauses even by companies as large as Union Carbide are often "included in agreements almost as afterthoughts"). From this perspective, the omission of procedural rules or reference to the IBA CONFLICT RULES is not reflective of party choice, but rather clumsiness in drafting clauses. This theory is consistent with the fact that although parties often modify model clauses (most significantly to denote arbitrator selection processes), those modifications often result in confusion and administrative difficulties since they are not drafted as amendments to specific rules.
tarnish to the arbitrator's reputation. On the other hand, having misconduct formally identified and regulated publicly through written opinions based on clearly articulated and published rules would provide notice and protection for arbitrators. Increased transparency would also contribute to perceptions of legitimacy by increasing the shared understanding among arbitrators and parties about when conduct transgresses into the inappropriate. The nuance of a term like “impartiality” cannot be captured in a single rule, but instead must be developed incrementally through decisions that apply and comment on its meaning in various factual contexts. Meanwhile, these applications to specific arbitrators will also improve the market-based forces that inevitably supplement formal regulation of arbitrator misconduct by providing a resource for parties seeking to evaluate an arbitrator’s record. Appending ethical rules to arbitral rules will also avoid problematic mismatches. To the extent that parties want to amend the baseline of an arbitrator’s role (for example, by shifting presentation of evidence to more complete party control), they are more likely to address corollary ethical obligations if they are part of the same body of rules. Ad hoc party drafting of ethical rules may seem like a tall order, particularly in light of the fact that parties rarely include any procedural provisions in their arbitration agreements. For this reason, the call for greater clarity, predictability and transparency in arbitrator ethics may ultimately mean that the flexibility afforded to parties in shaping arbitrators’ roles should translate into relatively stable menu formats, in which parties can choose, even at one particular institution, from multiple sets of governing rules, each of which comes with its own custom-tailored ethical rules.

339 Artilral institutions can protect confidentiality concerns by expunging names from the opinions. For similar, more expanded examination of the benefits of reasoned decisions in the context of attorney conduct in international arbitration, see Rogers, supra note 317, at 36–37.

340 As noted above, there is reason to doubt that the conditions are present for a fully functioning market for arbitrator services. The most important limitation is that the confidentiality in arbitration and the lack of agreed-upon standards make it difficult to identify an arbitrator who may have committed misconduct. Moreover, even if the award enforcement phase can result in public opinions and proceedings, the extreme deference courts give to arbitrator decisions can serve to sanitize misconduct instead of exposing it. In the absence of clear market signals, the only ones likely to know about “bad apple” arbitrators are the arbitration insiders. Under this scenario, repeat players, who already enjoy certain strategic advantages over newcomers, will also be able to avoid suspect arbitrators, while newcomers may be less able to identify and avoid them.

341 For example, if arbitral ethical rules permit pre-appointment interviews, but the parties choose to have the entire tribunal appointed by the institution, interviews would be inappropriate.

342 Howard M. Holtzmann, Balancing the Need for Certainty and Flexibility in International Arbitration Procedures, in INTERNATIONAL ARBITRATION IN THE 21ST CENTURY: TOWARDS "JUDICIALIZATION" AND UNIFORMITY? 11 (Richard B. Lillich & Charles N. Brower, eds. 1993) (citing study by Stephen Bond, former ICC President, of over 450 arbitration clauses submitted to the ICC, in which only one referred to specific procedures).

343 While the proposal for multiple sets of rules to be administered by the same institution may seem foreboding, there exist some precedents that were created to respond to market forces. The CPR’s optional screening process, see discussion supra notes 127–129 and accompanying text, may represent a movement in this direction. In an analogous move, several arbitral institutions already offer separate “fast track” procedures that are available to parties who require particularly expeditious resolution of their disputes. See generally, Hans Smit, Fast Track Arbitration, 2 AM. REV. INT’L Arb. 138 (1991) (providing a general overview of fast-track arbitration); Arthur W. Rovine, Fast-Track Arbitration: A Step Away From Judicialization of International Arbitration, in INTERNATIONAL ARBITRATION IN THE 21ST CENTURY: TOWARDS "JUDICIALIZATION" AND UNIFORMITY? 45 (Richard B. Lillich & Charles N. Brower, eds. 1993). This approach would be an effective response to the complaint that providing specific content for terms such as “independence” and “impartiality” is
C. Party-Appointed Arbitrators

One context to which the functional approach can bring clarity is the meaning of “impartiality” as applied to party-appointed arbitrators. This topic has been a lightning rod for debate over arbitrator ethics, particularly as the entree of U.S. parties and attorneys has introduced what many regard as intolerable excesses. The focus on those perceived excesses, however, has obscured the even more important, but subtler problem of how party-appointed arbitrators are distinguishable from chairpersons. Debate over party-appointed arbitrators has presumed the existence of a stark dichotomy in models for party-appointed arbitrators between either strong-form partiality, meaning the traditional (if waning) American practice described above, or no partiality. But this dichotomy is false.

Apart from the strong-form party-appointed arbitrator, who communicates with the appointing party throughout the proceedings, there are a range of possible intermediary models, including several semi-strong variations. Under these latter models, the arbitrator may not continuously communicate with her appointing party, but her role still contrasts with the agnosticism presumed of the chairperson. As Thomas Carbonneau describes, the practice in international arbitrations has been generally to have “arbitrations within arbitrations,” in which the chairperson “resolved the disagreement between the two party-appointed arbitrators...[because]...each party wanted ‘their man or person’ on the tribunal.” Critiques of strong-form and semi-strong form party-appointed arbitrators are usually framed in ethical terms, but the functional approach reveals that what is really in dispute are questions of role.

Strong-form and semi-strong form party-appointed arbitrators are pragmatic responses to party demand for more responsive and express representation on the tribunal. Many participants in arbitration desire to have clearly defined representatives on the tribunal who act as a party’s agent on the

"impossible" to do without alienating certain segments of institutions’ clientele. See CRAIG ET AL., supra note 46, § 12.04, at 195.


345 See supra notes 61-63 and accompanying text.

346 Thomas E. Carbonneau, The Exercise Of Contract Freedom In The Making Of Arbitration Agreements, 36 VAND. J. TRANSNAT’L L. 1189, 1211–12 (2003) [hereinafter Exercise Of Contract Freedom]. In the words of one practitioner, a frequent, though he contends mistaken, strategy in international arbitration is to appoint arbitrators who “blatantly favor one side,” which ends up polarizing the tribunal and “leaving the chair to decide.” Lawrence W. Newman, A Practical Assessment of Arbitral Dispute Resolution, in LEX MERCATORIA AND ARBITRATION: A DISCUSSION OF THE NEW LAW MERCHANT 5-6 (Thomas E. Carbonneau, ed., rev. ed. 1998). Others contend that the mistake is not in choosing an arbitrator who will favor one side, but in choosing one who appears to favor one side. Martin Hunter, Ethics of the International Arbitrator, 53 ARB. 219, 223 (1987) (explaining that from his perspective, as an international arbitration practitioner, the optimal party-nominated arbitrator “is someone with the maximum predisposition towards my client, but with the minimum appearance of bias”).

347 Carbonneau, Exercise of Contract Freedom, supra note 346, at 1211–12 (noting that the usual response to claims of arbitrator partiality is a general reassurance that “international arbitrators are people of high integrity and accomplishment and rule in an independent manner”).
tribunal rather than as an umpire over the dispute.\(^3\) As a result, under the strong form model, the role of the party-appointed arbitrator is not one of separate adjudicator, but rather of “tribunal advocate” or “tribunal representative” for the party.

In the context of this role, \textit{ex parte} communication may be regarded as necessary to ensure that the party-appointed arbitrator fulfills her assigned role. Even if declining in popularity, there might be theories that support the use of strong form party arbitrators, which are evidently appealing to some parties. Just as the civil jury, so treasured in the American legal tradition, brings the promise of common sense and shared values being injected into the decisionmaking process, so too party-appointed arbitrators might be able to bring to the tribunal a perspective that, while not shared by both parties, nevertheless adds a representative dimension to the decisionmaking process.\(^4\) There may also be functional advantages to party-appointed arbitrators, such as an ability to create opportunities for more frank debate within the tribunal. Moreover, to the extent that the parties and the process establish a tribunal that has mediation-like competences, party-appointed arbitrators who communicate with parties may be able to act as “shuttle diplomats” in ways that are unique and impossible for a “neutral” member of the tribunal. Finally, because arbitral decisionmaking is immune from substantive scrutiny after an award is made, having a “representative” on the tribunal could be regarded as an efficient safety device against biased, corrupt, or otherwise wrongheaded decisions. In functional terms, this role is analogous to that performed by barristers in Anglo systems, who represent clients but retain some professional detachment.\(^5\)

The foregoing is not meant to be a sentimental requiem for an apparently dying breed of party-appointed arbitrators,\(^6\) but instead to reveal the real issue underlying the debate over the practice of \textit{ex parte} communications. Most scholars who have questioned the practice of

\(^3\) Craig \textit{et al.}, \textit{supra} note 46, § 12.04, at 195 (noting that it is rare, but possible, for parties to contractually agree to have party-appointed arbitrators who are not independent but rather are agents (i.e., lawyers or employees) of the nominating party).


\(^5\) See \textit{id.} ("They have the occasion to hear the umpire speak frankly about his or her initial views of the case and may then offer alternative outlooks in response.").

\(^6\) In fact, in the case described in the introduction, the court describes the role of barristers and relies on the professional detachment of the Indian equivalent of barristers to find that the prior representations by him were not unduly prejudicial, even though they had not been disclosed. See Fertilizer Corp. of India \textit{et al. v. IDI Memt. Inc.}, 517 F. Supp. 948, 954 (S.D. Ohio 1981) (describing how “Senior Advocates in India are hired by the client's advocate (similar to the retention of a barrister by a solicitor under the British system), are paid by the advocate (who is normally reimbursed by the client), and the Senior Advocate is thus insulated from the client”).

\(^3\) While these arguments may legitimize the role of strong-form party arbitrators, the more grave problem arises when one side is treating its party arbitrator as a representative on the tribunal, while the other is not. As I have posited elsewhere, “how can a proceeding be neutral if one party is meeting with its appointed arbitrator to strategize, while the other is not?” See Rogers, \textit{supra} note 30, at 374. Many normative questions about the efficacy and perceived legitimacy of a system that employs party-appointed arbitrators remain, but particularly in the absence of empirical research on that issue, I will leave those questions aside for now.
communication between arbitrators and their nominating parties have framed the problem as a transgression of appropriate (even if unwritten) ethical norms.\textsuperscript{353} Analysis under the functional approach reveals that the real problem with \textit{ex parte} communication is not that it contravenes ethical norms, but rather that the role assigned to strong-form partisan arbitrators expressly permits, if not necessitates, such conduct. Just as various shifts in U.S. civil procedure have conflated critiques of role with ethical-based objections, objections to \textit{ex parte} communications with party-appointed arbitrators are not inherently about ethics, but are instead objections to assigning a role that would permit or require such conduct to be accepted as ethical.\textsuperscript{354}

This analysis instead illustrates how the role of the party-appointed arbitrator is shaped by the functions they are expected to perform, which are presaged in large part by the manner in which they are appointed. The functional approach also reveals that what ultimately makes \textit{ex parte} communication objectionable is not that it violates some static ethical ideal, but that it presupposes a role for the arbitrator that is inconsistent with the essential functional attributes of an adjudicator.\textsuperscript{355} Like the individual who flips a coin or rolls the dice,\textsuperscript{356} party-appointed arbitrators who act as a party's agent on the tribunal are not making reasoned decisions based on argumentation presented by both parties. They are not, therefore, adjudicating, but are instead performing a different function for which they were specifically selected and retained—to cast a vote for their nominating party and attempt to persuade other panel members to do the same. Accordingly, the proper response for those who defend strong form party-appointed arbitrators might be to explicitly acknowledge their non-adjudicatory function, perhaps by redesignating them "party representatives."

Alternatively, for those who object to strong form party-appointed arbitrators, the appropriate response is not simply to decree that all arbitrators should be "neutral" and "independent,"\textsuperscript{357} or to merely prohibit \textit{ex parte} communication.\textsuperscript{358} Extracting out of this context the practice of \textit{ex parte} communication between arbitrators and their nominating parties have framed the problem as a transgression of appropriate (even if unwritten) ethical norms.\textsuperscript{353} Analysis under the functional approach reveals that the real problem with \textit{ex parte} communication is not that it contravenes ethical norms, but rather that the role assigned to strong-form partisan arbitrators expressly permits, if not necessitates, such conduct. Just as various shifts in U.S. civil procedure have conflated critiques of role with ethical-based objections, objections to \textit{ex parte} communications with party-appointed arbitrators are not inherently about ethics, but are instead objections to assigning a role that would permit or require such conduct to be accepted as ethical.\textsuperscript{354}

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communication ends a practice that is highly visible (at least as compared to internal psychological commitments), but it seems to implicitly deny the existence of semi-strong form party-arbitrators. Similarly, rules that declare that all arbitrators shall be “neutral” or “independent,” without imbuing those words with any meaningful content, do not alter parties’ expectations that the arbitrators they choose will be more sympathetic to their positions.\footnote{359}

Parties’ expectations are indulged and reinforced by international arbitration selection procedures, which allow parties to identify candidates based on their nationalities and supposed predispositions,\footnote{360} and in many cases allow a party interview to confirm these predispositions.\footnote{361} Although denied at a rhetorical level, the distinct role of the party-appointed arbitrator is implicitly acknowledged and reinforced by what are in essence, if not in name, ethical rules or ethical implications contained in arbitral rules. Arbitral rules generally permit party-appointed arbitrators to share the nationality of their appointing party, reifying the popular practice, while prohibiting chairpersons from sharing the nationality of either party.\footnote{362} These rules suggest that shared nationality is not violative of the scope of impartiality applied to party-appointed arbitrators, but generally would be for the chairperson. These selection procedures and criteria create an interrelational role for the party-appointed arbitrator that is necessarily different from that of the chairperson.\footnote{363} In this way, institutional rules and arbitral practices necessarily presume functional differences between party-appointed and chairperson arbitrators, even as they expressly deny any such distinction. These differences are created by procedural rules, but hold consequences for the ethical obligations that can reasonably be imposed on these actors.

If, true to the rhetoric, there were a desire to have panels comprised of three arbitrators with identical impartiality obligations, then the linguistic commitment must be honored by the procedures that portend the functions of party-appointed arbitrators. In this vein, the CPR’s new screening procedures.

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the entire course of the proceeding” what it refers to as “unilateral contacts” and requires that any such contacts be reported to the Chamber so that it can notify the parties and other arbitrators. CNIAM Arbitral Rules, Article 9, at http://www.jus.uio.no/lm/milan.chamber.of.commerce.international.arbitration.rules.2004/a9 (last visited Jan. 31, 2005). It is not clear from the rules whether this would also preclude unilateral pre-appointment interviews. See supra notes 120–122 and accompanying text.

\footnote{359} See Martin Hunter, Ethics of the International Arbitrator, 53 ARB. 219, 223 (1987); CRAIG ET AL., supra note 46, at 196 (“It is sometimes said that while a party-nominated arbitrator must be ‘independent,’ he or she need not be ‘neutral.’”).

\footnote{360} See Lowenfeld, supra note 61, at 60, 69; CRAIG ET AL., supra note 46, at 196 (describing how shared nationality, shared “economic, political and social milieu” and commitment to particular legal doctrines may create expectations that an arbitrator is particularly sympathetic to the nominating party’s case).

\footnote{361} See supra notes 120–122 and accompanying text. As noted above, there is little or no agreement about the nature and extent of questions that can be properly posed to an arbitrator candidate.

\footnote{362} For example, Article 9(5) of the ICC Arbitral Rules provides that “[t]he sole arbitrator or the chairman of an arbitral tribunal shall be chosen from a country other than those of which the parties are nationals.” It also provides an exception for “suitable circumstances” when neither party objects.

\footnote{363} The chairperson’s more executive and, it is sometimes contended, tie-breaker role on the tribunal is protected and reinforced through appointment procedures. Selection processes generally preclude parties from having direct contact with chairpersons, who are instead either chosen as a product of agreement between the party-appointed arbitrators or by an arbitral institution or appointing authority.
represent an inspired step toward clearer role definition because they synchronize appointment procedures with other functions expected to be performed by party-appointed arbitrators. Even if not under the CPR’s screened appointment procedures, rhetorical commitments to uniform arbitrator impartiality obligations must be accompanied by regulation of the arbitrator selection process, for example, to exclude shared nationality and to preclude pre-appointment interviews, or at least to ensure that such interviews are held jointly. On the other hand, as the CPR drafters concluded, international arbitration is unlikely to abandon the practice of having party-appointed arbitrators bring to the tribunal representation of a party’s national culture, legal or otherwise. In the absence of a willingness to unify appointment procedures for party-appointed and chair arbitrators, their distinctive roles and consequent ethical distinctions should be made more explicit and delimited more carefully in arbitral rules and attendant ethical standards.

D. The Duty to Disclose

The other area where the functional approach can help demystify ongoing debate is with regard to the duty to disclose. Proponents of broadened disclosure obligations emphasize the need for “impartiality” or “fairness,” while opponents emphasize the potential to undercut finality or diminish the pool of worthwhile arbitrators or the integrity of arbitral awards. Meanwhile, existing arbitral rules impose some disclosure obligations as part of their arbitral procedures, but most institutions frame obligations in vague generalities that provide little guidance. The vague standards leave arbitrator-candidates with considerable discretion, which is to be exercised precisely at a time when they face a competing interest in securing their own appointment. Moreover, this exercise of discretion is given significant deference when awards are later reviewed on very narrow grounds for refusing enforcement. The functional approach can clarify the terms of this debate, and help resolve the apparent conflicts by linking those issues to the role of arbitrators.

Although there remains considerable suppleness in the role of arbitrators, with regard to disclosure obligations, one of the important features of modern arbitrators’ role is represented in the observed transition from being ascertainment of informal equitable solutions to being appliers of legal rules through formal processes. The other important, and probably related, trend explored in the preceding section is the decline of strong-form predisposed party-appointed arbitrators whose primary role is to advocate the interests of their appointing parties. The notion of “tribunal representatives” has given

364 Resnick, supra note 126, at 37–38; Spalding, supra note 69, at 356.
365 For an overview of this debate, see supra notes 153–154 and accompanying text. Shore, supra note 6, at 82 (noting that “[s]ome international arbitrators have expressed unhappiness about what they see as an American-driven tendency to overburden arbitrations with excessive punctiliousness about impartiality”).
366 See arbitration rules cited supra note 139.
367 See supra notes 105-106 and accompanying text.
368 See supra notes 108–114 and accompanying text.
369 See supra notes 64–72 and accompanying text.
way to an expectation that all arbitrators are expected to make autonomous, law-bound decisions. These observed shifts in role help unravel the ongoing debate about how broad or detailed the duty of disclosure should be.

The necessary predicate to understanding the puzzle over disclosure standards is to clarify exactly what is and is not at stake with broader disclosure requirements. Those who link broader disclosure requirements to vague notions of impartiality miss the point. Broader disclosure requirements may have some benefits for arbitrator impartiality, but those benefits are only incidental and indirect. For example, because disclosure facilitates analysis of arbitrator impartiality, more expanded disclosure rules will likely aid arbitral institutions (or courts) in making more precise decisions about the parameters of impartiality. This process, in turn, will inevitably improve collective understanding of what the term "impartiality" means among arbitrators, parties, and their counsel. Apart from these indirect benefits, however, broader and more detailed disclosure obligations will not enhance or improve actual impartiality of arbitrators, unless accompanied by a commensurate broadening of the disqualification and enforcement standards. For example, a new requirement that arbitrators disclose past relationships with a party's counsel will not increase impartiality in any absolute sense unless that relationship is also a ground for disqualification or if nondisclosure of that relationship is a ground for refusing to enforce an award. In the absence of a corresponding expansion of disqualification and nonenforcement standards, the actual impartiality of the arbitrator remains unaffected by the expansion in disclosure requirements.

While broader disclosure requirements do not enhance actual impartiality of particular arbitrators, they do enhance perceptions of impartiality and more generally the legitimacy of the international arbitration system. With this understanding of the purpose of disclosure requirements, it appears expanded and clearer, more categorical disclosure standards are necessary. With the increased size and diversity in the pool of arbitrators, and the consequent breakdown in informal social controls, formal rules clarify the propriety of relationships about which there might otherwise be disagreement. Moreover, international arbitration, as resilient as it is, has had its legitimacy challenged, at least in the developing world. These relatively minor chinks in the international arbitration system's armor may increase pressure on arbitrator obligations to maintain the legitimacy of the system. Expanded and more categorical disclosure requirements will undoubtedly decrease misperceptions and misunderstandings.

Correspondingly, standards of disclosure that afforded arbitrators considerable discretionary latitude in disclosure decisions are no longer acceptable because they are inconsistent with this new constrained role. Instead, arbitrators' new role necessitates that disclosure obligations be defined

370 See discussion supra Subpart I.C.2.

371 Of course, as the IBA CONFLICT GUIDELINES acknowledge, a failure to disclose relevant information may be evidence of partiality, and even grounds for nonenforcement. In that instance, however, it is not the nature of the information that leads to disqualification or nonenforcement—it is the misconduct in not disclosing required information that may give rise to questions of partiality.

372 See supra notes 50–52 and accompanying text.
by categorical rules that limit arbitrator discretion. The two examples of the trend toward categorical rule-based disclosure requirements, instead of open-textured standard based requirements, are the new IBA Conflict Guidelines and the newly revised AAA Rules. The IBA Conflict Guidelines, and to a lesser extent the AAA Code of Ethics, describe specific categories of information subject to disclosure, such as prior service as an arbitrator for a party and specifically enumerated social relationships with counsel. These specific descriptions eliminate the need for arbitrators to rely on their own discretion in deciding whether to disclose particular information. They also make it easier to evaluate when disclosure obligations have been violated.

This conceptual analysis of disclosure obligations is also important in order to correct confusion about whether party-appointed arbitrators should have lower disclosure obligations than chairperson arbitrators. In the previous section, I explained how the functional approach justifies a more flexible impartiality standard for party-appointed arbitrators to correspond with the different role they have with respect to their appointing party. Many courts and commentators have inaccurately assumed that lower impartiality standards should translate into lower disclosure standards. I will concede that disqualification standards (or what I elsewhere refer to as "enforcement standards") may well be lower or more flexible for party-appointed arbitrators, but it does not follow that their conduct standards, at least with regard to disclosure, should be any different than those of other arbitrators. To the contrary, the importance of clearer and more expansive rules may be all the more important for party-appointed arbitrators to make their representative role explicit.

As the analysis of this section has revealed, disclosure obligations protect the legitimacy of the system, but do not ensure the actual impartiality of individual arbitrators. Once separated from impartiality standards, it logically follows that disclosure obligations for all arbitrators should be the same. The alternative to categorical disclosure standards are the vague, qualitative standards that currently prevail in most arbitral rules. As analyzed above, however, the effect of qualitative standards as opposed to categorical rules is to vest arbitrators with discretion right at the time when their discretion is most vulnerable to outside and even selfish interests. Meanwhile, party-appointed arbitrators are the ones whose discretion is most subject to question or doubt because of their presumed empathy toward their appointing party, even if only reflected in a shared nationality. Reduced standards for party-appointed arbitrators would vest discretion over disclosure in the hands of precisely those whose discretion is most suspect.

373 For a description of how even objective standards leave much leeway for arbitrators' subjective judgment, see supra notes 108–113 and accompanying text.
375 See id. nums. 16–22 (2004).
376 In other words, party-appointed arbitrators should be allowed to serve despite the existence of conflicts that would be impermissible for chairpersons or sole arbitrators. A discussion of disqualification and enforcement standards is beyond the scope of this Article, and instead the subject of my forthcoming piece, Regulating International Arbitrators: A Consent-Based Approach to Enforcement of Misconduct-Tainted Awards (draft on file with author).
At a more pragmatic level, as noted in the previous section, there has been considerable confusion and historical shifts over the role of party-appointed arbitrators. Among the sources of controversy are those cases in which opposing parties had conflicting and undisclosed assumptions about what constituted appropriate conduct for party-appointed arbitrators. This history heightens the need for the clarity and transparency with regard to party-appointed arbitrators to aid in the development of an agreed-upon role definition for party-appointed arbitrators.

E. Conclusion

Defining the role of the arbitrator is an essential predicate to framing the standards for regulating arbitrators.377 There are certain fundamental features that an arbitrator must have because all adjudicators must have them, but other features of an arbitrator’s role must be determined by examining the arbitrator in the context of the system in which she operates. Because the procedures and selection processes for arbitration, and hence arbitrators’ roles, can be affected by party decisions in individual cases, ultimately ethical rules may have to include prefabricated adjustments designed to correspond to the most popular modifications adopted by parties. Finally, the functional approach will avoid reference to the misleading judicial analogy, which renders arbitrators poor imitations of the real thing and unworthy knights in the elusive quest for “true impartiality.”378

IV. Conclusion

As a system constructed in the undefined spaces between state governments and conceived of as an alternative to the supposed bias of national courts, international arbitration relies on the actual and perceived impartiality of arbitrators as one of its primary sources of legitimacy. Confusion over the nature and extent of that requirement has hung like a dark cloud over the arbitration community. While some commendable efforts have been made to clarify standards, the practical project must be accompanied by theoretical models that explain why arbitrators are not simply inferior imitations of judicial decisionmakers and how the meaning of “impartiality” as applied to arbitrators is distinct from its definition in the judicial context. The functional approach provides an independent justification, and methodology for the development of, standards to govern arbitrator conduct.

Delineating clear and reasoned standards for arbitrator impartiality will help resolve existing confusion, but also exposes another problem. Detangling award enforcement from the substantive standards will emphasize that some awards will be enforceable even when there has been arbitrator misconduct. Recognizing this distinction emphasizes the need for other sources of regulation for international arbitrators.379

While I do not attempt to resolve these issues here, my thesis in this

377 See discussion supra Subpart I.A.
379 Clarifying the standards for arbitrator misconduct may actually accentuate this problem. A party victimized by misconduct, but still forced to abide by the final award, will find little consolation—and will likely feel even more aggrieved—knowing that the arbitrator’s conduct is formally labeled as unethical.
and my forthcoming companion article accentuates the need to reconsider some of the control mechanisms that have been advocated for regulating arbitrator conduct. There is ongoing debate about whether, why, and to what extent arbitrators should enjoy immunity. Mechanisms for disseminating and publicizing arbitrator misconduct must be enhanced to improve market controls. Arbitral institutions must engage in more active, rigorous, and transparent regulatory oversight of arbitrator conduct. It may well be that those few institutions that have led the way by adopting clearer ethical codes, and assumed an active role in enforcing those codes—the AAA, the Chamber of National and International Arbitration of Milan, and the Center for Public Resources—will end up being winners in the global race to attract international arbitration business. Finally, as some have already suggested for the domestic context, perhaps the time has come for licensing or certification procedures to regulate arbitrator conduct. These steps are inevitable as the pool of international arbitrators transforms from being an ad hoc collection of highly talented independent contractors into a fully formed profession.

380 See generally Franck, supra note 54 (providing an interesting and thorough discussion of arbitrator immunity and its relationship to the contractarian and judicial models of arbitration in various countries); Maureen A. Weston, Reexamining Arbitral Immunity in an Age of Mandatory and Professional Arbitration, 88 MINN. L. REV. 449, 517 (2004) (suggesting that "arbitral immunity should be qualified, not absolute" and should extend to provider institutions, "which by their own proclamation perform only administrative tasks, does not align with the purpose underlying the immunity doctrine").

381 Cf. Rau, supra note 65, at 495–96.

382 See supra notes 110 & 335 and accompanying text.
