

On the New Pluralism in Contract Theory

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INTRODUCTION

Pluralism is on the agenda of contract theory. Maybe pluralism is a budding movement, the next big thing; maybe it is just a rehashing of pragmatic muddling through that either shuns or doesn't deserve the name "theory." But whatever our predilections or eventual evaluations, it is worth noting that pluralism has become a *question* for theorists interested in contracts. Some of the scholars articulating what I will call pluralism have adopted this moniker themselves; others have developed pluralist insights without calling on the label. This paper has two goals. The first is to draw together a number of works that develop a pluralistic view in contract theory and to map out some of the different approaches they offer. The second goal is to take some combination of those pluralistic insights further (some will say, aside) in developing a relatively encompassing (though woefully preliminary) pluralistic conceptualization of contract.

Let me admit at the outset that the label pluralism is hardly well-defined, and that the contestation over its meaning threatens to make any account of pluralist theories of contract somewhat slippery. But what I have in mind when using the term pluralism is a fairly basic intuition, captured by the idea that there is a multiplicity of justificatory principles applicable to a particular set of institutions or problems. Michael Walzer's classic defense of pluralism in the context of thinking about distributive justice is a good place to start:

There is . . . no single point of access to [the] world of distributive arrangements and ideologies. . . .

Similarly, there has never been either a single decision point from which all distributions are controlled or a single set of agents making all decisions. . . .

And finally, there has never been a single criterion, or a single set of interconnected criteria, for all distributions. . . .

In the matter of distributive justice, history displays a great variety of

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arrangements and ideologies. But the first impulse of the philosopher is to resist the displays of history, the world of appearances, and to search for some underlying unity: a short list of basic goods, quickly abstracted to a single good; a single distributive criterion or an interconnected set; and the philosopher himself standing, symbolically at least, at a single decision point. I shall argue that to search for unity is to misunderstand the subject matter of distributive justice. Nevertheless, in some sense the philosophical impulse is unavoidable. Even if we choose pluralism, as I shall do, that choice still requires a coherent defense.¹

Walzer's characterization of the philosophical impulse is clearly applicable to contract theory. Indeed, not so long ago it seemed that unification theories of contract were in vogue and that it was worthwhile to consider them as a group. And perhaps unification theories and pluralist theories were always out there vying for dominance, with changing fashion in the legal academy representing a pendulum swing of theory. At any rate, over the past three decades—one might say since Charles Fried's *Contract as Promise*—most of the leading theories of contracts are unification theories, in the sense that each presents a single justificatory principle as the core around which the entire law of contract should be understood. Fried's book famously posits *the promise principle* as the moral basis from which contract law as a whole draws its justification.² Randy Barnett argues that consent is the central feature around which contract can be understood within a wider theory of protecting entitlements that precede the contract, and Peter Benson argues in a similar vein that contract as a whole can be understood through the logic of transfer of proprietary rights.³ Recently, Daniel Markovits has argued that collaboration, in the sense of joint planning through which contracting parties confer respectful recognition upon one another, is the core of contract.⁴ Finally, much of the work of economic analysis of contract law is based on a unified principle of efficiency with the aim of deriving all doctrinal results through the application of this single metric.⁵

1. MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 4-5 (1983).

2. CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION (1981).

3. Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 277 (1986); Peter Benson, *The Unity of Contract Law*, in THE THEORY OF CONTRACT LAW: NEW ESSAYS 118 (Peter Benson ed., 2001).

4. Daniel Markovits, *Contract and Collaboration*, 113 YALE L.J. 1417, 1448 (2004).

5. A caveat is in order at this point. Almost any of the theories mentioned in this paragraph could be construed as pluralistic, for a number of reasons. Just to cite the most extreme example, even Fried's theory could be called pluralistic, because he concedes that certain doctrines, for instance regarding gap-filling (in genuine gaps) or frustration of purpose, should be governed by principles that do not flow from promise (but rather from other commitments like those that find expression in the sharing principle). And Fried doesn't presume that the entire law of contracts need exclude these other principles. However, his theory does attempt to mark out a core from which most of the important doctrines of contract do or should flow. Thus, the characterization of the theories listed here is meant to accord with the overall thrust or ethos of the theories, even if an alternative interpretation of them would be possible. The case regarding the economic analysis of

Whether or not it comes as a response to these influential unification theories, a movement toward a pluralistic conception seems to be coming into its own.⁶ Or at least, that will be my claim. The paper proceeds as follows: Part I is an exercise in mapping the new pluralism, and distinguishing among its various strands. Since there is no organized pluralist movement in contract theory and no recognized division of labor, theorists have been developing independent lines of thought. Part I restates some of those variant lines. Part II is a reflection on the meaning of pluralism for contract theory. It begins by asking the abstract question of whether pluralism can be a theoretical model, or whether pluralism is inherently anti-theoretical and inevitably drawn to breaking apart the possibility of justification itself. It continues with an attempt to reformulate, still at a relatively high level of abstraction, the pluralist message. Its central claim is that pluralism is an attempt to conceptualize *contract without a core*. Part III is a preliminary but concrete attempt at the pluralist exercise of conceptualizing contract without a core.

I. MAPPING THE NEW PLURALISM IN CONTRACT

One might be tempted to believe that pluralism in contract theory already received its definitive statement over a decade ago with the publication of Robert Hillman's *The Richness of Contract Law*.⁷ That book, itself based on an article Hillman published a decade earlier,⁸ argued that contract law was characterized by a plurality of theories, most of which claimed to offer a unified perspective in understanding all of contract. The very plurality of the theories, claimed Hillman, and the fact that all of them offered genuine insights into particular aspects of the world of contract, militated against their comprehensive pretensions. Each of the theories was interesting; none was capable of explaining all of contract. But *The Richness of Contract* did not take the next step of trying to theorize plurality; it rested, instead, with the observation that there were many valuable theories. Recent attempts at pluralist theory try to do more, in the sense that they try to offer some

law is most problematic, because there are varying levels of attachment to efficiency as a justificatory principle across questions. I will return to economic analyses later in the discussion.

6. Again, some will say that it is not a question of pluralism coming into its own, but rather a question of reasserting itself, or coming *back* into style, or something of the sort. Such students of contract are likely to say that mainstream contract theory has actually been pluralist for a long time, and that pluralist contract theory pre-dates unification theory by at least half a century. These students of contract, holding the long view, would be right (indeed—some will look at what I propose for pluralism and see nothing but old style legal realism). But for now, my concern is not with questions of priority or intellectual history, but rather with the characterization of a particular moment in contract thinking, and in asking what we can learn from pluralism in its current forms. Thus, the question will not be one of pedigree (a theory being Kantian, or Hegelian, or Aristotelian, or Llewellyn-esque, or Holmesian), but rather simply whether we can get explanatory and normative purchase from the theory now.

7. ROBERT A. HILLMAN, *THE RICHNESS OF CONTRACT LAW* (1997).

8. Robert A. Hillman, *The Crisis in Modern Contract Theory*, 67 TEX. L. REV. 103 (1988).

indication of when aspects of particular theories are relevant, and when they should be set aside. Leon Trakman has recently articulated the idea at some length, concentrating on contract formation:

The article disputes the presupposition that pluralism in contracts leads to a non-theory in which all theoretical postulations are treated as incommensurable with one another, leading to contract nihilism. The purpose of pluralism is not to dismiss all, or even any, contract theory out of hand. Its purpose is to encourage exploration into the manner in and extent to which different substantive theories of contract formation are conceived as being exclusive of, or complementary to, one another.⁹

What maintains these theories as plural is the fact that they see *some* role for a number of principles that are, on the face of things, in tension with one another. In this sense, it may be the case that contract theory has responded to Randy Barnett's claim that there was a generational divide between scholars satisfied with an array of principles, and those who sought theoretical order among them.¹⁰

At the borders of pluralism, we might locate two opposing theoretical positions that define the outer boundaries of a pluralist position. On the one hand, we would find work that recognizes the importance of seemingly distinct values or principles of central importance to contract law and then attempts to reconcile them without eviscerating either one. Eyal Zamir's take on efficiency and paternalism is indicative: efficiency and paternalism are typically thought to be principles in tension; some scholars try to eliminate paternalism from the realm of contract; Zamir shows that paternalism is too deeply rooted in contract to be ignored, but that it can actually be understood as coherent with efficiency, provided our working theory of efficiency is not overly narrow.¹¹ In some sense, at this border of pluralism, we might find all those theories that attempt to integrate, in some orderly and predictable fashion, theories typically thought to be at odds, whether through convergence or vertical integration.¹² These

9. Leon Trakman, *Pluralism in Contract Law*, 58 *BUFF. L. REV.* 1031, 1092-93 (2010).

10. Randy E. Barnett, *The Richness of Contract Theory*, 97 *MICH. L. REV.* 1413, 1416-17 (1999) (reviewing ROBERT A. HILLMAN, *THE RICHNESS OF CONTRACT LAW* (1997)).

11. Eyal Zamir, *The Efficiency of Paternalism*, 84 *VA. L. REV.* 229, 233-37, 254-56 (1998).

12. See generally, e.g., BARAK MEDINA & EYAL ZAMIR, *LAW, ECONOMICS, AND MORALITY* (2010); Jody S. Kraus, *Reconciling Autonomy and Efficiency in Contract Law: The Vertical Integration Strategy*, 11 *PHIL. ISSUES* 420 (2001); Barak Medina & Eyal Zamir, *Law, Morality and Economics: Integrating Moral Constraints with Economic Analysis of Law*, 96 *CALIF. L. REV.* 323 (2008); Nathan B. Oman, *A Pragmatic Defense of Contract Law*, 98 *GEO. L.J.* 77 (2009); Nathan B. Oman, *Unity and Pluralism in Contract Law*, 103 *MICH. L. REV.* 1483 (2005) [hereinafter Oman, *Unity and Pluralism*] (reviewing STEPHEN A. SMITH, *CONTRACT THEORY* (2004)). Recall that these types of theories are at the border of pluralism—what is less clear is which side of the border they are on. Kraus's vertical integration seems to be set up to offer a unified theory—Does that mean that in the end it is not plural, or pluralistic? Oman's theory gives liberty “trump”

theories are at the border of pluralism because while they recognize a plurality of values at the outset, they seem to imply that theory allows for the type of ordering that will do away with conflict or competition among the values. At the other border we would find work critical of the very possibility of theory, but without giving up on some method of gaining theoretical knowledge. I take this to be Peter Alces's position in *Unintelligent Design in Contract*, which claims that while existing theoretical models are doomed to fail, there is still good reason to rethink contract theory in a way that incorporates the idea of a normative continuum.¹³ This theory is at the border of pluralist theory because it suggests that principled theory in the face of pluralism might be impossible; paradoxically, it may be the case that the most pessimistic view of contract theory is also the most ambitious.¹⁴

Between those two border positions (convergence/integration on the one hand; hope for a new theory without using existing theories on the other), at least three variants of pluralism in contract theory have made recent appearances. One variant of pluralist contract theory rests on the idea that the world of contract usefully divides into *types*, and that the work of theory is to account for a typology that will allow for varied application of the range of principles that animate various existing theories. A second variant calls for a theorization of what seems to be not simply a tension, but an antinomy between law and morality. A third variant draws pluralistic considerations, not from empirical observation of contracting behavior, but rather from a jurisprudential account of the nature of contract rules.

Pluralism Through Contract Types

The *type* variant of pluralism might be further subdivided, because there is, at this point, no widely accepted theory on the basis of which to carry out the necessary typology. Ethan Leib has developed one strand of such a theory, arguing that contracts ought to be divided by contracting parties.¹⁵ There would then be three types of contracts—human being with human being; human being with organization/firm; and organization/firm with organization/firm—each of which would presumably have a distinctive set of

status—Again, does that mean that it is not in the final instance pluralistic? I don't believe these questions actually need answering, because at the end of the day the point of the mapping exercise is not classificatory. We are out to understand the field, not to give pluralism points.

13. Peter A. Alces, *Unintelligent Design in Contract*, 2008 U. ILL. L. REV. 505, 506-11 (2008).

14. In other work, Alces seems to lean precisely toward a rejection of theory because of its impossibility. Peter A. Alces, *The Moral Impossibility of Contract*, 48 WM. & MARY L. REV. 1647, 1648-49 (2007). Beyond Alces we could locate critical analyses, whose focus tends to be on what contract theory is actually doing when it thinks it is solving problems in contract. Those theories are probably right as sociological descriptions of the legal academy, but that is a story for another day.

15. Ethan J. Leib, *On Collaboration, Organizations, and Conciliation in the General Theory of Contract*, 24 QUINNIPIAC L. REV. 1, 20-23 (2005).

applications of contract principles. Most obviously, firm-to-firm contracts would have little or no need for autonomy principles (since firms have no autonomy interest to protect or bolster) and would be governed by efficiency; and conversely, human-to-human contracts would apparently have a large role for autonomy, with efficiency playing a subservient role. This would leave a great deal of room for theorizing about what autonomy actually requires of contract, even when only human beings are involved. Thus, at the preliminary level formulated by Leib, there is some indication that collaboration theory as proposed by Markovits seems attractive, but little indication of whether or why it is preferable to other theories that claim to be based on autonomy.

A second strand of the *type* variant would divide contracts not by the parties to the contract, but rather by transaction or situation types. The historical inspiration for such division is the common law, which until late in the nineteenth century conceptualized contract around relational pairs: landlord-tenant, vendor-purchaser, bailor-bailee, factor-principal, master-servant, husband-wife, and so on and so on. Current theorists suggesting a theorization of contract by type no longer hew to the common-law categories, but the idea of distinct categories of transactions governed by different principles (or a different internal weighing of principles) sensitive to context takes its model, at least in part, from preclassical contract law.¹⁶

Somewhere in between a categorization by transaction type and party, there are accounts that partake of both, looking to existing law's categorization as a good indication of different fields of contract, especially consumer law and employment law.¹⁷ And while it is not clear that it has emerged as yet, we could imagine an additional strand of contract type theory inspired by Ian Macneil that divided contract by relational intensity.¹⁸ Intuitively we might believe that the leaner the relation, the more it would be governed by norms relevant for *ex ante* structuring; the greater the relational intensity, the more *ex post* type considerations would govern the contract. Recent work by Robert Scott, Charles Sabel, and Ronald Gilson on collaborative contracting goes far beyond this primitive intuition, and is suggestive of a more complex pattern in which parties braid formal and informal enforcement mechanisms that grow with the relationship.¹⁹ This work suggests that translating intense relational

16. See Todd D. Rakoff, *Implied Terms of Contract: Of 'Default Rules' and 'Situation Sense,'* in GOOD FAITH AND FAULT IN CONTRACT LAW 191 (Jack Beatson & Daniel Friedmann eds., 1995); Todd D. Rakoff, *Social Structure, Legal Structure, and Default Rules: A Comment*, 3 S. CAL. INTERDISC. L.J. 19, 22-24 (1993); Oman, *Unity and Pluralism*, *supra* note 12, at 1483-85.

17. See Brian H. Bix, *Contract Rights and Remedies, and the Divergence Between Law and Morality*, 21 RATIO JURIS 194, 195 (2008).

18. See generally Ian R. Macneil, *Relational Contract Theory: Challenges and Queries*, 94 NW. U. L. REV. 877 (2000).

19. Ronald J. Gilson, Charles F. Sabel & Robert E. Scott, *Braiding: The Interaction of Formal and Informal Contracting in Theory, Practice, and Doctrine*, 110 COLUM. L. REV. 1377, 1402-10 (2010); Ronald J. Gilson, Charles F. Sabel & Robert E. Scott, *Contracting for Innovation: Vertical Disintegration and Interfirm*

ties into the enforceability of informal obligations could be a mistake. But for our purposes here, the important point to note is that what appears to be a major theoretical innovation rests on separating out a class of contracts for special consideration.

Pluralism Through Independent Principles, or Metaphysical Pluralism

A different variant of contract pluralism that does not rely at all on dividing the field by contract types holds that distinct and potentially conflicting principles hold sway within the contract relationship simultaneously. This idea, which is hard to pin down, appears fleetingly in a host of works on contract, at precisely those moments when intuition quietly (one might say surreptitiously) does the work that theory can't muster. But it is an idea that has been thematized and treated at length in several articles by Jeffrey Lipshaw.²⁰ Lipshaw argues that contracting parties often understand that the requirements of contract law (in the sense of enforceable obligation, recognizable by courts in routine instances) and the requirements of morality do not always merge. While the relationship proceeds without a problem, there is no divergence of law and morality. But when unexpected contingencies arise, the parties to a contract may face a situation in which morality poses one requirement, while law poses a less stringent requirement (or possibly, the other way around). But Lipshaw is not satisfied to leave this divide with a simple sense of positivist resignation. Instead, he points to the fact that contract theory should actually take this duality into account, and *theorize* it. The claim is subtle: Lipshaw does not suggest that contract should incorporate the moral obligation and transform it into a legal duty. Indeed, at certain points he is willing to say that legal obligation should be formalistically constrained. On the other hand, he is not willing to ignore the existence of the moral obligation as if it had no relevance to contract theory. Instead, Lipshaw posits a genuine metaphysical problem (possibly an *aporia*) as one that contract theory should grapple with: there is no simple way for incompatible norms to be binding at the same time, and yet this dual binding-ness is a central and even routine feature of the life of contract for both sophisticated and unsophisticated contracting parties. Contract theory that ignores this normative plurality is missing something central about the contracting experience, and more generally about the experience of being bound by law.

Collaboration, 109 COLUM. L. REV. 431, 472-75 (2009) [hereinafter Gilson, Sabel & Scott, *Contracting for Innovation*].

20. See generally Jeffrey M. Lipshaw, *Contract Formalism, Scientism, and the M-Word: A Comment on Professor Movsesian's Under-Theorization Thesis*, 35 HOFSTRA L. REV. 23 (2006); Jeffrey M. Lipshaw, *Freedom, Compulsion, Compliance and Mystery: Reflections on the Duty Not to Enforce a Promise*, 3 L. CULTURE & HUMAN. 82 (2007); Jeffrey M. Lipshaw, *Metaphors, Models, and Meaning in Contract Law*, 116 PENN ST. L. REV. 987 (2012); Jeffrey M. Lipshaw, *Objectivity and Subjectivity in Contract Law: A Copernican Response to Professor Shiffrin*, 21 CAN. J.L. & JURISPRUDENCE 399 (2008).

Jurisprudential Pluralism

One of the most intriguing appearances of pluralism in recent contract writing is Greg Klass's jurisprudential theory of the nature of contract rules.²¹ Klass argues that contract theory flounders when considering the jurisprudential classification of the nature of contract, dividing over the question of whether to understand contract as duty-imposing or as power-conferring. Those on the duty-imposing side of the aisle view the obligation of contract as analogous to the obligation that arises in tort, in the sense that one is under a duty not to harm another by breaching a promise or by failing to follow through on a commitment that induced reliance. Those on the power-conferring side view the obligation of contract as a power given to individuals in order to extend the range of their purposeful activity. One of the most intriguing (and I must say, refreshing) aspects of this theory is that it divides the contract theory world in new ways, putting (for example) Charles Fried and Patrick Atiyah in the same theoretical camp (not, I am sure, something they would have found congenial). Instead of foundering on this jurisprudential divide, Klass suggests that we recognize contract as (perhaps the paradigm example of) a new type of rule, which he calls (descriptively enough), a compound rule. Genuine power-conferring rules sort for purposeful use, but contract rules (which allow for assuming a legal obligation without actual intent to do so in some cases) do not, and thus, they should be considered compound rules. Klass goes on to argue that understanding contract as a compound rule is congenial to pluralist conceptions of contract, but extrapolates only briefly on what such pluralist theories would look like.²²

II. THE MEANING OF PLURALISM FOR CONTRACT THEORY

Theory, Anti-Theory, and Mediating Language

At the extreme, pluralism is not a version of theory, but a threat to theory. When many principles contend for the role of justification, and when there is no simple procedure for ordering their priority, the very existence of multiple principles threatens to undermine the possibility of justification. Ad hoc preferences for one principle over another according to unarticulated contextual notions seem to be *anti-theory*. So the question is whether pluralism can offer anything more than this kind of practical wisdom (at best) for making sense of

21. Gregory Klass, *Three Pictures of Contract: Duty, Power, and Compound Rule*, 83 N.Y.U. L. REV. 1726, 1728-29 (2008).

22. A counter-intuitive result of Klass's argument is that contract theorists who were unselfconscious about the jurisprudential status of contract rules may have been producing better contract theory than their more jurisprudentially sophisticated colleagues, who were led astray by Hart-ian inspired view of contract as power-conferring.

a multiplicity of possible justifications.²³ Otherwise, pluralism will have to be satisfied with the role of critique of theory.²⁴ Assuming that pluralists do not want to give up on “theory” as a project, it seems they have two available avenues. One option is to retain the idea that justification requires a singular principle (or a clear hierarchy), but then to claim that different aspects of contract require different theories. This is directly tied to the program of dividing contract by type, and then in effect suggesting a theoretical model tailored to each type.

The second option is to propose that theory (still worthy of the name) need not have a set hierarchy among components or principles, as long as there are practical (and relatively agreed-upon) procedures for determining “local priority” of the principles. This option is more radical, in that it suggests that the very nature of theoretical inquiry is actually at some level up for grabs. I will very briefly suggest why this is a productive way of looking at the problem. The basic assumption about theory is that general propositions decide concrete cases. But legal analysis time and again confounds this idea, not as a matter of necessity, every time, because of the very nature of deciding, but rather as a matter of empirical knowledge in a wide array of cases, and many (most, almost all?) of the interesting cases. It isn’t that general propositions *cannot* decide concrete cases, but in interesting legal cases, general propositions generally swing in many directions. But if theory will not provide the type of general propositions that decide concrete cases, what will it do? In a word, it will provide the language for mediating between normative commitments and the settings in which we try to realize those commitments.

The Pluralist Statement

Now that I’ve outlined a number of variants of pluralism, and gestured at the theoretical status of a pluralist enterprise, it still remains to distill the message. And of course, it may be that none of the scholars cited would agree with my formulation. My claim is that whether they have articulated it or not, pluralists are flirting with the idea that contract can be theorized or conceptualized *without a core*. In other words, there is no one idea that encapsulates the *sine qua non* of contract, no nodal point from which all the instantiations of the institution of contract flow: not autonomy; not consent; not promise; not a community of mutual respectful recognition; not efficiency; not the transfer of proprietary right; not reliance (tired yet? I could go on).²⁵ Instead, contract is

23. Trakman’s recent contribution is geared primarily to suggesting a form of complex balancing that could overcome this very problem. Trakman, *supra* note 9, at 1092-93.

24. While I will try to develop a pluralist theory here, I must admit that I am far from sure that the position of a critique from practical wisdom is less satisfying. In fact, in the end these may not be polar positions at all, and bringing “theory” closer to practical wisdom might actually be a worthy goal.

25. A critical reader might at this point say, “What about *voluntariness*?” Surely, where there is no

an encompassing and multi-faceted institution: in some contexts it is driven by—*choose any feature from the list above*—while in other contexts it is not. In some contexts certain features cohere while others conflict, and the mix changes as we move through contexts.

In order to figure out how to assign different principles relative importance, we will need some statement of the various benefits or values that contract can service. But before that, it pays to formulate in positive terms some conceptualization of contract without a core—a formulation that will have to be notoriously general. Here is one attempt: Contract is best understood as a framework for cooperation among societal agents. It serves as an infrastructure that provides a means to carry out a range of collaborative projects. The infrastructure, in turn, provides benefits even to those who are not using it at any given moment, because it structures in productive ways the interactions (actual and potential) among past, present, and future participants. If this view sounds familiar, it should, because it draws extensively from realist conceptions of contract.²⁶

Contractual Values and Benefits

Here is a partial and somewhat overlapping list of some contractual values, interests, or goals that we pursue (or can, or ought to) through contract. The list will be unwieldy, and the task of the next part will be to tone down its unruliness. (1) Contract supplies frameworks for planning and developing

voluntariness, there is no contract.” I’m not sure I agree, but it wouldn’t matter. Voluntariness is too capacious a concept to do any work in the contractual setting—and indeed, it is so capacious that it holds in tort and in criminal law just as well.

26. Here are two quotations from the realist literature that set out the same vision:

[T]he major importance of legal contract is to provide a frame-work for well-nigh every type of group organization and for well-nigh every type of passing or permanent relation between individuals and groups, up to and including states—a frame-work highly adjustable, a frame-work which almost never accurately indicates real working relations, but which affords a rough indication around which such relations vary, an occasional guide in cases of doubt, and a norm of ultimate appeal when the relations cease in fact to work.

Karl N. Llewellyn, *What Price Contract?—An Essay in Perspective*, 40 YALE L.J. 704, 736-37 (1931).

The task of the law of contract thus ceases to be the simple one of enforcing bargains and becomes the far more complex one of providing means for conducting a cooperative commonwealth on a voluntary basis, of reconciling group industry and economic justice with individual freedom and individual responsibility for results. To achieve this it is necessary to enforce promises to such an extent that promisees may reasonably entrust their fortunes to them, but not to an extent which will permit them to be made instruments of exploitation, multiply the chances of accidental gains and losses, or needlessly restrict the future economic initiative of promisors.

George K. Gardner, *An Inquiry into the Principles of the Law of Contracts*, 46 HARV. L. REV. 1, 21-22 (1932). For a modern view of contract interpretation that resonates with this vision of contract, see Eyal Zamir, *The Inverted Hierarchy of Contract Interpretation and Supplementation*, 97 COLUM. L. REV. 1710 (1997).

complex relations. Such contracts (and the contract law that supports them) set up a structure for a cooperative venture, replete with concrete goals and obligations on the one hand, but also with mechanisms or procedures for generating new obligations or resolving disputes, on the other.²⁷ These frameworks are actually like contractual *constitutions* that set up the procedures for generating additional norms. (2) Contract can function as a commitment device that allows parties without alternative sources of confidence in one another to indulge in investment-specific reliance, thus significantly increasing the gains from trade. (3) A related benefit is that contract can facilitate cooperation by policing opportunistic behavior once contract performance is underway. Sometimes parties can write anti-opportunism into the contract; at other times, because opportunism is often hard to predict with accuracy, they will rely on courts. Contract law might “keep the parties honest” even if it only occasionally polices opportunistic behavior. (4) Contract law supplies mechanisms of *ex post* governance when plans go sour. By *ex post* governance I refer to considerations that focus on conceptions of the parties’ rights and obligations, but also on conceptions of cooperative behavior whose relation to rights is less definitive. Such considerations may be highly sensitive to the context of the dispute, and may incorporate implicit norms under which the parties transacted into the calculus of decision-making after the fact. Such considerations may be phrased in terms of entitlements exchanged at formation, but might also find expression in phrases like reasonable expectations or good faith.²⁸ (5) Contract supplies a menu of standardized terms for typical relational arrangements (like basic property institutions, marriage, partnership, corporations, but also bank-customer relations, seller-consumer relations, etc.). These standardized terms can reduce transaction costs by obviating bargaining, but can also make actual bargaining easier by supplying salient baselines. (6) Contract generates information that facilitates trade, and in particular, the financing of trade. (7) Contract, to borrow Macneil’s famous formulation, projects exchange into the future, and when exchange is relatively pure, its projection into the future is primarily a method of allocating risks (with the key example being risks of price fluctuations).²⁹ (8) Contract can support

27. Think of a large-scale construction project, where the supervising contractor and the owner create (contractually) a structure of future dealings that touches on everything from procedures for hiring sub-contractors to materials to regulatory/zoning authorizations to interactions with the architects and engineers, and including dispute resolution mechanisms that assume that disputes will arise without threatening the overall venture. Or consider a collective bargaining agreement between a union and an employer at one plant, authorizing union control over certain aspects of the labor force, and setting up an ongoing negotiation function. Or consider a similar agreement, but applied to an entire industry. For empirically informed work on such agreements primarily in the context of innovation, see Gilson, Sabel & Scott, *Contracting for Innovation*, *supra* note 19.

28. Todd D. Rakoff, *Good Faith in Contract Performance: Market Street Associates Ltd. Partnership v. Frey*, 120 HARV. L. REV. 1187, 1189-92 (2007).

29. *Restatement (Second) of Contracts and Presentation*, 60 VA. L. REV. 589, 589-92 (1974); Ian R.

autonomy by authorizing self-created obligation.³⁰ (9) Contract law may be able to prevent oppression in problematic markets, and more generally may help generate trust in markets (or at least, many globalization advocates would have us believe so). (10) Contract is one of the institutions that facilitate transitions from distinction or independence to loyalty or joint responsibility. Such transitions may be instrumentally desirable, and may even be considered an end in themselves.

This list, while far from random, is clearly unsystematic.³¹ It ranges from something bordering on sociological description to normative speculation. But the point is that almost any of the contractual benefits or goals outlined above could be seen as the basic trait of some particular contract, or some particular group of contracts. None of them could be taken for the basis of every contract. The next part of this paper will consider what it would take to try to operationalize the list (or your favorite alternative list, as long as it is sufficiently encompassing—I'm sure one could reasonably add list members; subtracting members would be trickier).

III. CONCEPTUALIZING CONTRACT WITHOUT A CORE

Making Theory Operational

There are two quite-distinct ways to operationalize a pluralistic vision of the benefits or goals of contract. One would be to set out the spectrum of contractual goals and match points (or ranges) on the spectrum with ranges on a different spectrum, one of concrete contractual situations. For example, my contract with a nanny to take care of my children weekday afternoons would implicate primarily list members (4) (*ex post* governance considerations), (8) (autonomy), and (10) (transitions to loyalty). A contract between AIG and Deutsche Bank for the sale of corporate bonds would implicate (5) (standardized relations), (6) (information), and (7) (risk allocation). We could then work out the different doctrinal variations that best represent each of these goals in their particular mix for the contract type at stake in the analysis, comfortable with the fact that we would reach significantly different doctrinal structures for these two radically different settings. The hope would be that we could rationally cut up the world of contract into a set of contract types that was not so large that it descended into nominalism (ten types would be fine; perhaps forty would be okay as well; 400 would make the endeavor untenable).³²

Macneil, *The Many Futures of Contracts*, 47 S.C. L. REV. 691, 720-25 (1974).

30. Hanoch Dagan, *Autonomy, Pluralism, and Contract Law Theory* 75 LAW & CONTEMP. PROBS. (forthcoming 2012); FRIED, *supra* note 2.

31. For a slightly more systematic but still unwieldy list of twelve principles of contracts, see George Gardner's early formulation. Gardner, *supra* note 26.

32. Some would balk at the number forty, but I think this is a result of a bit of blindness that doing "contract theory" generates. We may already have a large number of these categories at work in our contract

Pluralist theory would have relinquished a vision of an underlying core of contract, but would still function as theory in the sense of generating (relatively) general propositions to decide concrete cases, and one where midlevel principles of justification could be delicately matched with doctrinal functioning.³³

A second way of making my list of contract goals operational, and the one I will pursue here, would be more complicated (and less satisfying from the traditional perspective of what theory ought to do). It would proceed on the assumption that any and possibly all of the contract goals discussed above could be relevant *at once*, and that only particularistic argumentation could establish that any individual goal should take precedence for a given contract problem. In addition, ideally it would proceed at a high level of self-consciousness or reflexivity, taking into account that when discussion of one contractual goal reveals certain aspects of what is at stake in the contracting situation, it is likely at the same time to obscure other aspects. So, where I might say that the contract between AIG and Deutsche Bank ought to be governed by principles appropriate to risk allocation, someone else might make the claim that such an analysis obscured the ways that such a contract implicates autonomy concerns. Our faith in reasoned deliberation tells us that not all such arguments are fated to endless indeterminacy, though some of them probably are. Contract theory becomes then, the locus for a discussion of the values at stake in contractual ordering—but not at the level of high abstraction where the parties are *A* and *B* with assumed qualities (or lack thereof) imputed to them, but rather at a midrange level of pragmatic inquiry that generalizes (a bit, but not too much) from empirically observed contracting relations. Theory becomes the language that mediates between normative commitments and the complexity of their application. Much more could be said about this view of theory, but for now I will offer a limited example of such analysis.

*An Example—Corporate Merger Contracts*³⁴

Corporate acquisitions are complex transactions with high stakes and many opportunities for breakdown. The players in the market for corporate control are well aware that an agreement of sale is only the first step toward consummation of the deal. In order to mitigate agency problems between the

law, with specialized principles tailored to the specific setting: consumer (protection) law; insurance; financing (think of the special contractual laws involved in negotiable instruments or in the law of secured interests); labor; employment; regulatory contracting (with its own idiosyncratic remedial regime); information licensing, bailment, agency, and almost certainly a slew of others that don't have catchy labels but still warrant lawyers' specialization.

33. This would be fairly close to the realist theory of property institutions advanced in HANOCH DAGAN, *PROPERTY: VALUES AND INSTITUTIONS* (2011).

34. The following draws on Roy Kreitner, *Frameworks of Cooperation: Competing, Conflicting, and Joined Interests in Contract and Its Surroundings*, 6 *THEORETICAL INQUIRIES L.* 59 (2005).

target's management and its shareholders, management will have to bring the proposal before the shareholders for approval. The problem arises because management may have sought out this particular deal because the acquirer promised post-transaction benefits (e.g., retaining current management, or replacing it on favorable terms). In many cases, the transaction also requires approval by regulatory agencies. Finally, while the various forms of review of the transaction are taking place, there is a significant likelihood that competing offers will be tendered. Any of these eventualities may signal the breakdown of the original transaction. Thus, the acquirer's costs in identifying the target company, and its legal, accounting, and financing expenses are in jeopardy, often for significant periods of time.³⁵

In order to protect its investments, the acquirer typically bargains for and obtains deal-protective measures in merger agreements. These protective measures come in many forms, ranging from no-shop provisions (whereby target management agrees not to solicit competitive bids), to stock or asset lock-ups, to simple termination fees or combinations of these and other measures.³⁶ The various measures are designed to raise the likelihood of consummating the deal, and as a second-best option, to ensure that the acquirer receive compensation if the deal falls through. Deal-protective measures always impose a cost on the target if it does not carry out the original transaction. As the target (or its successful late bidder) must absorb this cost, the protective measure can make the target that much less attractive to other would-be bidders. Because of the importance of such provisions for shareholders, their potential to distort the market for corporate control, and because of the potential for managerial self-interest, courts have applied enhanced scrutiny in passing on the validity of such provisions.

Evaluation of deal-protective measures may focus on corporate law, asking primarily whether the management of a target corporation has violated their fiduciary duties to shareholders by agreeing to asset or stock lock-ups. Early scholarly treatment expanded the inquiry by asking whether stock lock-ups were an obstacle to the functioning of a market for corporate control.³⁷ But the inquiry could also focus on the interplay between contract and corporate law in evaluating deal-protective measures.³⁸ The meeting of corporate law and contract law in this setting is especially interesting because the traditional

35. Note that the initial formulation of the issue with list member (2) dealing with relationship specific investment.

36. For a detailed description of available protective provisions, see John C. Coates IV & Guhan Subramanian, *A Buy-Side Model of M&A Lockups: Theory and Evidence*, 53 STAN. L. REV. 307 (2000).

37. See generally Ian Ayres, *Analyzing Stock Lock-Ups: Do Target Treasury Sales Foreclose or Facilitate Takeover Auctions?*, 90 COLUM. L. REV. 682 (1990).

38. Paul R. Regan, *Great Expectations? A Contract Law Analysis for Preclusive Corporate Lockups*, 21 CARDOZO L. REV. 1, 74-75 (1999); Judd F. Sneirson, *Merger Agreements, Termination Fees, and the Contract-Corporate Tension*, 2002 COLUM. BUS. L. REV. 573, 577-84 (2002).

concerns of corporate law, in particular the safeguarding of shareholders' interests in the face of managerial discretion, may be in tension with equally traditional goals of contract law, i.e., protecting party expectations. A closer look at the stages of the transaction and the conflicts it engenders should clarify.

The initial acquisition agreement raises the specter of a conflict of interests between the target's management and its shareholders. This is because the acquisition agreement may be based on promises to existing management that it will not be replaced. In return for such a promise, management may be willing to accept a bid for the company that does not exploit the corporation's true value. This conflict of interests is ostensibly solved by providing that any acquisition agreement must be approved by the shareholders. However, shareholder approval may be an ineffective mode of policing managerial discretion, especially if management can deter competitive bids by agreeing to deal-protective measures such as asset or stock lock-ups. The worry is that such measures may allow management to circumvent its fiduciary duties to the shareholders by agreeing to an acquisition that does not maximize shareholder profit.³⁹

However, the basic problem attended to by managers' fiduciary duties does not tell the complete story because it focuses narrowly on the relationship between the managers and the shareholders of the target. A more complete picture needs to offer, in addition, some account of the relationship between the acquirer and the target. That relationship is contractual, and the standard deal-protective measures involved are akin to complex liquidated-damage provisions.⁴⁰ Seen as a contracts problem, evaluation of a deal-protective provision asks whether the provision corresponds to a reasonable estimate of actual damages in case of breach, in which case the provision should be upheld. But in order to carry out such an estimate, we need to revisit the method for calculating damages in the merger context.

The question of appropriate damages for the breach of an acquisition agreement may be approached from either an *ex post* or *ex ante* angle of inquiry. *Ex post*, we are concerned with balancing the interests of shareholders of the target on the one hand, and the expectations of the acquirer on the other. Granting full expectation damages inflicts the same injury on the shareholders that a preclusive lock-up would have. If the managers' fiduciary duties are not to be circumvented, the obvious starting point for the inquiry is that some reduction of damages is necessary, if damages are to be assessed at all. The more difficult question is how to compensate the acquirer for her investments

39. By now, the discussion has shifted to list member (1) which deals with constitution-like frameworks for planning complex relations—relations that in essence allocate power among groups.

40. Sneider, *supra* note 38, and Regan, *supra* note 38, both develop the analogy between deal-protective termination and liquidated-damage clauses.

in the transaction if the deal falls through. Recall that the acquirer has often created a market for the target: it is on the basis of one acquisition offer, with its background in research, that the potential for an auction situation is created. When management is actually interested in becoming a target for acquisition, it may even lure a potential acquirer as a stalking horse in order to generate the highest bids possible. Intriguingly, reliance seems to be the best compensatory measure in the merger context.⁴¹

The merger agreement is in essence a preliminary agreement. Technically, it is a contract conditioned upon the approval of shareholders (and possibly regulators). Substantively, the possibility of better offers also limits the likelihood of consummation. When the parties to a contract realize in advance the preliminary and tentative nature of the agreement, reliance is the best standard from the compensation perspective because “it better approximates the real consequences of breach to an initial bidder than an expectation measure would.”⁴² The reason is that the expectation interest in this context should not be viewed as a full-fledged entitlement: I do not mean simply to rely on pre-existing moral intuitions about whether the interest is worthy. Instead, my claim is that the law ought to take a stand, defining this particular interest as unfit for protection typically accorded to full-fledged property rights, because a tentative agreement should not be translated into an insurance policy against nonoccurrence of the condition. This is precisely the type of case in which the law will create value, and the decision as to what value the entitlement will hold should reflect the degree of commitment involved. An agreement that is in itself conditional on approval of shareholders does not create a sufficient joint interest between the parties to the negotiation to warrant full expectation-based compensation. And the lack of a strong common interest is exacerbated by the fact that full expectation-based compensation would undermine the prior relationship, itself based on loyalty, between two distinct elements (management and shareholders) that comprise one of the contracting parties. The reduced-damage measure serves to highlight a partially existing perception, and more importantly to define the common interest as a limited one: leaders cannot always make communities.⁴³

The *ex ante* angle of inquiry leads us to similar results. Analysis of the incentives provided by rules governing damages for breach of contracts has led to a widespread acceptance of two propositions: first, the rule of expectation damages will normally give promisors optimal incentives in deciding whether to breach; and second, reliance damages are better suited to inducing the

41. David A. Skeel, Jr., *A Reliance Damages Approach to Corporate Lockups*, 90 NW. U. L. REV. 564, 566-67 (1996).

42. *Id.* at 596.

43. In this paragraph, the discussion centers on list member (10), where contract law defines the type of joint interest held by the parties (and thus decides, in essence, how tightly bound a community they become).

optimal level of reliance expenditures by the promisee.⁴⁴ A decision regarding whether to adopt the expectation or reliance measure is then sometimes framed as a question about which incentives are most important to the kind of transaction in question: incentives regarding the breach/perform decision; or incentives regarding the precaution/reliance expenditure decision. While incentives for these two decisions are often considered to be in tension, in the case of merger agreements both sides of the equation point to the efficiency of reliance damages.⁴⁵ The promisee (the acquirer) must make significant investments in identifying the target and in legal, accounting, and financial fees, all in the context of an agreement that holds a significant likelihood of falling through before consummation. Guaranteeing his profits as if the probability of consummation is one-hundred percent will give him an incentive to over-rely, and will give him a disincentive to continue to search out better opportunities. On the other hand, eliminating all possibility of compensation for reliance losses will discourage the acquirer from undertaking any expenses, and thus foreclose the possibility of efficient transactions. Moreover, if expectation damages are assessed according to the value of a foreclosing lock-up, they will actually have the effect of precluding a more efficient transaction.⁴⁶ The promisor's breach-or-perform decision is also best addressed by reliance damages. Generally, damages set below expectation are thought to allow for inefficient breach, because the promisor may elect to breach by engaging in an alternative contract when the promisee's valuation is higher than the price of the alternative. In the merger context, however, such a decision is always the opening parry to an auction situation, in which the original acquirer can change his offer, all the way up to his actual valuation. Thus, the "breach" will only take place if it is efficient, in the sense that the highest value user will win the auction.⁴⁷

There is an additional reason to support a limited damage measure for nonperformance of a merger agreement. As I argued above, the attempt by an acquirer to exploit expectation from an acquisition agreement entails the possibility of a conflict of interests between the acquirer and the shareholders of the target. Limiting the acquirer's damages to its reliance expenditures mitigates (or eliminates entirely) this particular conflict of interests. But in addition, the acquirer's attempt to cash in on his full expectancy from the

44. The discussion operates in short-hand. In fact, "reliance" here functions as a proxy for damages lower than expectation damages. For an extended discussion that puts order in the sometimes chaotic use of terms like reliance and expectation, see Richard Craswell, *Against Fuller and Perdue*, 67 U. CHI. L. REV. 99 (2000).

45. For the developed economic argument that preliminary agreements should utilize a reliance remedy, see Alan Schwartz & Robert E. Scott, *Precontractual Liability and Preliminary Agreements*, 120 HARV. L. REV. 661 (2007).

46. Sneirson, *supra* note 38, at 580-81.

47. Skeel, *supra* note 41, at 596-98.

agreement is a form of rent seeking on the public interest. This is because a well-functioning market for corporate control entails a positive externality in the form of disciplining corporate management generally. By watering down the threat represented by a takeover, the acquirer and target management team up to dilute the effectiveness of that discipline, undermining the public interest. Limiting damages to reliance expenditures minimizes this type of rent seeking and ensures that shareholders and the public enjoy the benefits of the market for control.⁴⁸

The analysis of merger agreements (or more specifically, the deal-protective measures typically found in merger agreements) has been very preliminary. And yet, it shows something of how analyzing contract without a core might work. Along the way, it has been possible to show two potentially important things for a pluralist enterprise: first, analyzing a specific context is likely to lead to the adoption of doctrines tailored to that context—here, the example is that while most people believe expectation damages should be the normal default,⁴⁹ for this context it appears that a different rule (reliance damages) better serves our contractual purposes; second, the analysis at least sketches out a way to use several principles at once, on the basis of their problem-solving capability for a particular context and without granting any of them core-status. Perhaps someone will come along and show that the analysis is incomplete because there is an important autonomy interest I ignored. At the very least, this seems like decent groundwork for that discussion to proceed. The analysis is far from exhaustive, but it should be at least suggestive of what a pluralist language could offer.

CONCLUSION

In the end, our views about what contract theory should look like are deeply tied to our inclinations about what legal scholarship can or should do more generally. Devising a theory that yields predictable and reliable methods of deduction from first principles is obviously useful, especially for courts and working lawyers. But maybe it is not the only thing theory can do. Perhaps by taking into account multiple goals of contract within a broadly social perspective, contract theory can be, in Oliver Williamson's phrase, more respectful of politics, and more attuned to the stakes of theorizing itself.⁵⁰ And

48. This paragraph has returned to (1) (constitutional features), but also implicates (6) (generation of information), and (9) (generating trust in markets).

49. Apologies to George Triantis, *Promissory Autonomy, Imperfect Courts, and the Immorality of the Expectation Damages Default*, 45 SUFFOLK U. L. REV. 827 (2012), and Robert E. Scott & George G. Triantis, *Embedded Options and the Case Against Compensation in Contract Law*, 104 COLUM. L. REV. 1428 (2004).

50. Oliver E. Williamson, *Revisiting Legal Realism: The Law, Economics, and Organization Perspective*, 5 INDUS. & CORP. CHANGE 383, 401 (1996).

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perhaps what I have outlined here is less a theory of contract and more a way of thinking about contract. Either way, positing this type of *thinking* about contract as a way-station between general normative commitments and the context of their application seems like a worthy challenge for a new pluralism.