

# Plural Values in Contract Law: Theory and Implementation

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*Private law theory must confront the plurality of values that inform the problems that private law addresses in practice. We consider Hanoch Dagan's and Michael Heller's *The Choice Theory of Contracts* as a case-study in the promise and perils that embracing plural values poses for private law theory.*

*We begin by arguing that private law theory cannot ignore value pluralism and identify three approaches that theory might take to pluralism. We call these approaches capitulating to, leveraging, and embracing value pluralism. We illustrate each approach and assess its strengths and weaknesses.*

*Theories that capitulate to pluralism simultaneously limit their scope and hamper their persuasiveness even within their restricted domains. Theories that leverage pluralism limit their domains more dramatically still. And theories that embrace pluralism are difficult to operationalize in practice without abandoning their pluralist roots.*

*We briefly illustrate the drawbacks of capitulating to and leveraging pluralism with examples from recent contract theory. We then take up theories that embrace pluralism in greater detail, by studying Dagan and Heller's approach. We argue that Dagan and Heller do not solve the deep problems that operationalizing their embrace of pluralism inevitably engenders.*

## INTRODUCTION

Private law theorists commonly view private law as a single legal field with three major subfields: contract, tort and property. The subfields play complementary roles. When private agents cannot bargain, property law creates, and defines

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the scope of, the rights it is legally possible for an agent to have in tangible (and more recently intangible) things. Also when agents cannot bargain, tort law determines when an agent has wrongfully invaded a right that property law requires be respected. When agents can bargain, however, contract law permits agents to alter property rights — e.g., to give a mortgage — and to create new rights — to allow a buyer to force the transfer of a seller's goods.

These bodies of doctrine regulate the creation, protection and transfer of rights. Moreover, courts historically created all three subfields; and courts still play a major creative role in each today. The commonalities among the subfields imply that the legal rules that constitute each subfield can be analyzed with similar philosophic, economic, and institutional tools. This similarity in modes of analysis suggests that courts and commentators can speak and think about private law, writ large, as a distinctive subject, or legal “field.”

There is a significant difference between property and torts on the one hand and contract on the other, however. Because agents do not bargain with each other in the contexts in which property and torts govern, a state organ must harmonize the several values — autonomy, efficiency, community, distributional fairness — that should determine just which property and tort legal rules to create. By contrast, agents do bargain in contract contexts and have preferences regarding the rules — i.e., implied contract terms — that they create. That agents have such power raises difficult questions: (i) Should the state just defer to whatever preferences private agents can jointly implement? (ii) Should the state also supply agents with terms that contracting agents can accept or reject? (iii) Should the state sometimes overrule private preferences and require agents to include some terms in contracts or prohibit agents from including other terms? A positive answer to question (i) implies that the state's role is exhausted in enforcing (and interpreting) what agents have done, except that the state — answering question (ii) — sometimes can help agents along by supplying rules that private agents would choose had they the time and resources.

Most commentators believe that courts defer, but do not and should not just defer, to agents' preferences regarding contract terms.<sup>1</sup> This common view implies a different answer to question (ii): the rules/terms that the state should supply to agents should reflect values in addition to (or in lieu of) those that the agents themselves pursue. The majoritarian belief thus answers question

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1 An exception is Jody Krause and Robert Scott's *The Joint Maximization Theory of American Contract Law*, which argue that courts in business contexts attempt only to implement agent welfare, which implies rules that maximize expected contracting surplus. See Jody P. Kraus & Robert E. Scott, *The Joint Maximization Theory of American Contract Law* (working paper).

(iii) in a way that places contract into conversation with property and tort: in contract contexts, how should the state apply the values that determine property and tort rules to contracting agents who want to maximize their own welfare and who have at least formal power to resist the state's solutions?

This is the question that Hanoch Dagan and Michael Heller address in their richly illustrated new book, *The Choice Theory of Contracts*.<sup>2</sup> Parties are formally free, in the Dagan and Heller view, to choose their contracts, but the state should greatly expand its facilitative role. In particular, the state should supply persons with many “contract types,” or default-setting frames, within which persons might elaborate their contracts. The more frames that parties can choose among, the greater the likelihood that each contracting dyad will find the frame that best realizes that dyad's preferences. Dagan and Heller also believe that choosing is intrinsically valuable. On their view, a person's autonomy increases with the number of options that are available to her. But crucially, the Dagan and Heller frames *also* should reflect not only what the agents would want; the frames should reflect one or more of the values that influence the state's choice of property and tort rules.

This approach to contract law possesses the considerable virtue of placing the state's choice among values — and its ways of justifying the menu of contract forms that it offers — front and center. Furthermore, Dagan and Heller are admirably explicit about insisting that the state's choices must simultaneously answer to many values at once. Their book thus serves as a useful jumping-off point for a broader reflection on the proper role for value pluralism — and more particularly the many values that might underwrite legal forms — to play in private law and legal theory more generally. Put another way, Dagan and Heller's strong rejection of an unqualified “yes” to question (i) pointedly tests whether a multi-valued contract law is desirable or even possible.

Dagan and Heller, both property scholars, analyze contracts in the same way that private law scholars analyze tort or property rules. As one of many examples,

Within a particular sphere of contracting, contract law should offer a sufficiently diverse range of contract types, each representing *a distinct balance of values*. The majority may prefer one contract type, but choice theory requires that within each contracting sphere, free individuals should be enabled to contract based on *a different value balance*.<sup>3</sup>

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2 HANOCH DAGAN & MICHAEL HELLER, *THE CHOICE THEORY OF CONTRACTS* (2017).

3 *Id.* at 103. Dagan and Heller do not define a “contracting sphere”; show how spheres are delimited; show how (or if) the boundaries of a sphere restrict the range of permissible contract types within it; or illustrate the relation between

Contract types/rules, for Dagan and Heller, thus are similar to, say, tort rules, which pursue both distributional and efficiency objectives. In each context, the state's goal is to choose the applicable values and the weight each value should have in the particular context at issue.

Dagan and Heller's theory is fundamental and wide ranging, so the analyst can evaluate it along many dimensions. Here we raise two basic questions — both variations on the broader theme that *The Choice Theory of Contracts* instantiates. The first, familiar to private law theorists, is just how pluralist private law rules should be. Specifically, should *each* rule — here, contract type — attempt to implement a single value, or should a rule attempt to implement several values? This is a very important question for Dagan and Heller because they advocate the creation of many rules in diverse contexts. The second basic question is whether it is possible for the state to have a *contract law* of the kind that Dagan and Heller espouse: a law that supplies private agents with many rules, each of which reflects diverse values, and which the private agents would accept. Here we accept that a multi-valued contract law is normatively attractive, but we worry that such a law is not implementable. The state, that is, may be unable to create multi-valued contract terms that solve private agents' contracting problems in ways that are attractive to the private agents.

In Part I, we argue that some version of pluralism probably is inevitable, as a theoretical matter, in contract law and summarize the various positions it is possible to take regarding value pluralism. In Part II, we identify three coping strategies and illustrate each with an example. We also comment on the strengths and especially the weaknesses of each strategy. By identifying and distinguishing stylized approaches to coping with value pluralism, and by examining concrete instances of each approach, we hope to reveal the depth of the problem that value pluralism poses for legal theory in general and for contract theory in particular.

*The Choice Theory of Contracts* pursues one of these stylized approaches, which we call embracing pluralism. We therefore conclude our analysis of value pluralism by noting two challenges that Dagan and Heller face: developing a coherent pluralist theory of contract, and elaborating its operational consequences. Part III of this Article then argues, briefly, that a multi-valued account of contract, like the one Dagan and Heller strive for, may not be as

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a contract "type" and a default contract term. A "sphere" seems similar to a context, such as the employment context, and a "type" seems similar to a term (or set of somehow related terms). This Article therefore uses the phrases sphere and context and the words type and term interchangeably.

operational as one may think. The Conclusion asks whether a legal theory is helpful if it cannot be operationalized.

## I. VALUE PLURALISM AND CONTRACT DOCTRINE

Agents use contracts as tools to promote interests — including most commonly their narrow financial interests — that may be fully articulated without any reference to contract as the means for their promotion. Many legal doctrines recognize such interests. Obvious examples include rules concerning mitigation and rules that allow parties to under-liquidate damages.<sup>4</sup> Among other purposes, both rules serve to discourage inefficient over-reliance by promisees.

Agents also understand the power to enter binding agreements as a concomitant of freedom and understand contractual capacity as a sign of respect. Again, legal doctrines recognize these values. On the one hand, the law affirmatively promotes freedom of contract. Contracting parties are (within very broad boundaries) permitted to choose their contractual partners and to fix the terms of their agreements as they see fit. The pervasive doctrinal preference for default rules over mandatory rules promotes party choice. On the other hand, defenses such as misrepresentation, fraud, and duress protect freedom of contract against private encroachments.<sup>5</sup>

Furthermore, contracts can be sites of exploitation — of both commutative and distributive injustice. The common law's commitments to contractual fairness are, to be sure, less demanding and less pervasive than in other legal traditions: the law, for example, rejects the doctrine of a just price. But doctrine nevertheless recognizes values associated with fairness — for example in the law of unconscionability, in the U.C.C.'s weak but broad preference for consumers over merchants, and in the doctrines that protect weaker and less sophisticated agents against stronger and more sophisticated ones in specific

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4 On mitigation, see, for example, *Rockingham County v. Luten Bridge Co.*, 35 F.2d 301 (4th Cir. 1929). An economic explanation appears in Charles J. Goetz & Robert E. Scott, *The Mitigation Principle: Toward a General Theory of Contractual Obligation*, 69 VA. L. REV. 967 (1983). On liquidated damages, see, for example, U.C.C. §§ 2-718, 2-719 (AM. LAW INST. & UNIF. LAW COMM'N 2003).

5 On misrepresentation and fraud, see, for example, RESTATEMENT (SECOND) OF CONTRACTS §§ 162-164 (AM. LAW INST. 1981). On duress, see, for example, RESTATEMENT (SECOND) OF CONTRACTS §§ 174-177 (AM. LAW INST. 1981).

contexts (insurance, for example, or the delivery of legal or medical services) in which the threat of exploitation is unusually severe.<sup>6</sup>

And finally, agents recognize that contracts establish relationships, and these relationships might possess a value of their own, which cannot be reduced to the service that contracts provide the agents' several interests. Once again, although now more elliptically, the law recognizes the value of these relationships. The various doctrines that collectively govern relational contracts — including doctrines that incorporate commercial custom and usage into contractual arrangements among merchants — recognize that law should promote the integrity of the extralegal relationships within which contractual obligations sometimes arise.<sup>7</sup> And more thinly, the consideration doctrine (especially on the bargain theory that dominates the law today), insists that contracts must include reciprocal obligations — and in this way constitute formally symmetric relations — in order to be enforceable at law.<sup>8</sup>

These values — which one might loosely and imprecisely call efficiency, autonomy, equality, and community — assert claims on practical life that cannot easily be ranked or balanced against one another. This pluralism about value necessarily suffuses the agents' lived experience of contract. Moreover, the range and diversity of values at play in contract makes it doubly difficult to develop a coherent and unified account of this branch of law. Finally, each value is too important to be excluded from contract theory just because the theory would be more theoretically elegant or better cohere without it. The many values that are openly and notoriously at play in contract practice therefore create great difficulty for contract theory: taking all of the values into account may render the life of the law too unruly to be confined within any single logic.

Philosophers might reasonably resist suggestions that the values at play in contract are incommensurable in the technical sense; and they might even reasonably insist that the values in the end all cohere in a single framework or arise from a single basic source. Some theorists have, moreover, pursued this

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6 On unconscionability, see, for example, U.C.C. §§ 2-302 (AM. LAW INST. & UNIF. LAW COMM'N 2003). On preferences for consumers over merchants, see, for example, U.C.C. §§ 2-313 (AM. LAW INST. & UNIF. LAW COMM'N 2003) (making express warranties easy to create), U.C.C. §§ 2-314 (AM. LAW INST. & UNIF. LAW COMM'N 2003) (creating an implied warranty of merchantability for goods sold by merchant-sellers), U.C.C. §§ 2-316 (AM. LAW INST. & UNIF. LAW COMM'N 2003) (requiring disclaimers of warranties to be conspicuous), U.C.C. §§ 2-207 (AM. LAW INST. & UNIF. LAW COMM'N 2003) (creating a different battle-of-the-forms regime for merchants and non-merchants).

7 See, e.g., U.C.C. §§ 1-205 (AM. LAW INST. & UNIF. LAW COMM'N 2003).

8 See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 71 (AM. LAW INST. 1981).

path, arguing that contract law in general should privilege a master value, most prominently some version of efficiency or some version of autonomy.<sup>9</sup> But the arguments required to make such imperial claims persuasive necessarily proceed in a distinctively abstract register — they are philosophical arguments, properly so called. Even if these arguments succeed on their own terms, they will rightly be resisted by lawyers and judges, who must reason and speak more concretely and in ways that connect more immediately to the concerns of contracting parties, and who must stand prepared to decide particular cases. Unlike philosophers, lawyers (including academic lawyers) must answer to experience.

The need for legal theory to maintain contact with legal practice closes the most natural and powerful philosophical avenues for dissolving pluralism. Most legal theorists therefore accept that value pluralism will pose endemic problems for their enterprise and seek to cope with rather than cure pluralism. That coping is necessary does not make it easy or comfortable, however. On the one hand, once a value is acknowledged, dismissing or ignoring that value becomes untenable. On the other hand, the disorder associated with accommodating too many values undermines the point of a theory, which is to explain something by organizing otherwise unruly considerations into patterns that are simpler and more general than the pre-theoretical practice to be explained. Coping with value pluralism therefore inevitably involves sacrificing explanatory power. The sacrifices remain necessary, however. Since the costs of not coping are still greater, theorists will do better by accepting that they must manage value pluralism and focusing on how to cope.

We identify three coping strategies and devote Part II of this Article to illustrating each with an example. We also comment on the strengths and especially the weaknesses of each strategy. Our categories are not exclusive; and they are certainly not exhaustive. Instead, they are illustrative. By identifying and distinguishing the three strategies for coping with pluralism, and by examining concrete instances of each approach, we hope to reveal the depth of the problem that value pluralism poses for legal theory in general and for contract theory in particular.

The first strategy is to *capitulate* to value pluralism. Theorists who adopt this strategy constrain their theoretical ambitions to suit the value-landscape produced by contractual practice. Most commonly, the theorists artificially limit the scope of their theories to domains in which one or another value dominates or, ideally, holds exclusive sway. To separate contract law into

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9 For efficiency, see, for example, LOUIS KAPLOW & STEVEN SHAVELL, *FAIRNESS VERSUS WELFARE* (2009). For autonomy, see, for example, CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* (2d ed. 2015).

domains is, however, implicitly to reject the doctrinal category of “contract” as identifying a theoretically cohesive body of doctrine. Second, legal theorists sometimes *leverage* value pluralism. Leveraging theorists argue that, though values may conflict elsewhere, they align in support of the particular doctrine or doctrines that the theorists seek to explain. These theorists also limit the scope of their ambitions, although in a different way — to areas of value overlap rather than value exclusivity. And third, and in a very different vein, legal theorists sometimes *embrace* value pluralism. These theorists do not so much adapt their theories to value pluralism as change their expectations for theory in value pluralism’s shadow. Most commonly, theorists who embrace value pluralism abandon, or at least retreat from, theory’s conventional simplifying ambitions in favor of interpreting and displaying the complexity that practice unavoidably presents.

In Part II, we deploy examples of each strategy to illustrate its strengths and especially weaknesses. As it happens, we turn to some of our own prior work to illustrate the first two approaches: to identify domains in which only one value is implementable or domains in which all values imply the same rule. We deploy our own work in this way — as a punching bag — because doing so frees us up to punch, without worrying about whether or not we are throwing low blows. The issue, in the present context, is not whether the objections that we raise in the end defeat our views — we believe that they do not — but rather that the ways in which we engage value pluralism naturally invite objections of this sort to begin with. The objections therefore illuminate problems inherent in a genus of responses to value pluralism, quite apart from anything that they say (or do not say) regarding our particular species of argument. Finally, we illustrate the third approach to value pluralism — the possibility of embracing pluralism — by taking up Dagan and Heller’s *The Choice Theory of Contracts* — the most recent book that pursues the third strategy.

We do not argue in favor of or against any of the approaches that we identify, but rather hope better to understand the tradeoffs involved in adopting each of them. To return to our opening theme, we seek to show just how deeply the problem of value pluralism cuts into contract law and theory. No theorist can ignore value pluralism; and even those who seek to avoid it in the end succumb to its influence, in one way or another. Part III then takes up Dagan and Heller’s embrace of pluralism in greater detail. There we ask whether the state could create a contract law of the kind Dagan and Heller imagine.



## II. VALUE PLURALISM APPLIED

### A. Capitulating to Value Pluralism

The simplest way for a contract theorist to cope with value pluralism is to capitulate to it — by limiting the scope of theoretical ambition to a subclass, or domain, of contract practice within which one value so plainly dominates that others may be discounted. Each of us has, in other work, taken this approach, although within different domains and deploying different values. That these two otherwise very different efforts face a shared objection reveals that capitulating to value pluralism comes with an unavoidable drawback.

Schwartz, together with Robert Scott, has developed a contract theory tailored to the domain of contracts in which both parties are commercial firms.<sup>10</sup> This narrow focus on contracts among firms allows Schwartz and Scott to dispense with all values other than efficiency. Firms are constructed, by corporate law, to make efficiency their only goal. Moreover, because firms are artificial rather than natural persons, neither their individual freedom nor communal relations among them has any value, apart from being tools towards promoting efficient production.<sup>11</sup> Finally, because the firms in Schwartz and Scott's model are owned by shareholders as part of fully diversified portfolios, equality has nothing to say concerning the contracts that they make. The natural persons who ultimately own the firms will, at least in expectation, have interests on both sides of every contract that the firms make. This ensures that these contracts, by construction, will implicate neither corrective nor distributive justice. In these ways, Schwartz and Scott have constructed the domain of their contract theory effectively to track the part of contract practice in which efficiency is unchallenged. This enables them to pursue their goal — of elaborating the rules that an efficient law of contracts would embrace — without worrying about other values. By capitulating with respect to their theory's scope, Schwartz and Scott protect its clarity and integrity.

The achievement comes, however, at a cost — and one that goes beyond narrowing the theory's domain and instead applies even within the theory's domain. The nominal parties to the contracts that Schwartz and Scott address are reduced, by the structure of the theory, to mere instrumentalities of the diversified shareholder-owners who stand behind them. This allows Schwartz and Scott to set aside values other than efficiency; but it entails that the contracts

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10 See Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 *YALE L.J.* 541, 556 (2003). The discussion that follows adapts and elaborates on ideas first developed in Daniel Markovits, *Making and Keeping Contracts*, 92 *VA. L. REV.* 1325 (2006).

11 Schwartz & Scott, *supra* note 10, at 556.

that they contemplate have, at root, only a single party in interest. Schwartz and Scott's narrowing of their theory therefore does not just exclude classes of contract from the theory's scope, but also transforms the fundamental model of contract that their theory develops within its domain. Schwartz and Scott abandon the idea that contract establishes a legal regime by which fundamentally independent agents, with distinct interests and perspectives, might coordinate their activities. It is implicit in Schwartz and Scott's model that while there are many agents making contracts, there is only one principal.

Markovits, for his part, has also capitulated to pluralism by narrowing the domain of his theory of contracts, only now reversing figure and ground. Where Schwartz and Scott take efficiency as their theory's lodestar, Markovits builds his theory around a version of community, or as he calls it collaboration.<sup>12</sup> On Markovits' view, the parties to contracts reciprocally subject themselves to each other's legal authority and, in so doing, recognize each other as persons capable of exercising this authority and accord each other the respect that such recognition entails. And where Schwartz and Scott develop a theory of contract for commercial firms, and expressly exclude natural persons, Markovits develops a theory for natural persons, and expressly excludes commercial firms and indeed organizations generally, as only natural persons deserve and can give recognition and respect. Narrowing the theory's domain again allows Markovits to set aside values other than those that animate his theory — and in particular efficiency and substantive equality. The form of community that his theory invokes requires the law to take contracting parties' intentions at face value and therefore leaves no room for questioning whether their contracts maximize joint surplus or divide surplus fairly.

Once again, however, this approach to theory-building has drawbacks, not just for the scope of the theory but also for the theory's persuasiveness even within its domain. Markovits' theory excludes not just the contracts-between-firms that Schwartz and Scott take as central, but also all contracts that have organizations on one side, even if they have natural persons on the other. Markovits' theory therefore sets aside not just commercial law, but also consumer law and employment law. In fact, the real-world contracts that Markovits' theory most naturally addresses involve agreements concerning professional services — between doctors and patients, for example, or lawyers and clients — and agreements within the family — such as ante-nuptial agreements. And once again, this narrowing does not just exclude many contracts from the theory's scope; it also transforms the fundamental model of contract that the theory develops within its domain. Markovits is drawn, when he adopts a theory that requires both parties to contracts to be natural persons,

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

into practice areas that narrowly cabin or even largely abandon the freedom of contract that governs commercial life.<sup>13</sup> Insofar as freedom of contract is central to contract as a legal form, this makes it natural to ask whether Markovits has elaborated an account of contract, properly understood, at all.

We do not present these truncated observations either as fully faithful accounts of our theories or as final refutations of them. In fact, we each believe that our particular views can answer or accommodate the objections to them that we have just described. We raise the objections not to refute or abandon earlier work, but rather to illustrate a cost of the generic style of work to which our earlier arguments refer. The fact that we see this cost even in our own efforts highlights the costs rather than undermines the efforts.

Theories that narrow the domains of their application also — precisely on account of the narrowing — distort the accounts that they develop within the domains that they address. This is itself a natural consequence of the pluralism of contractual practice, because focusing on a narrow homogenous part of a broad and diverse regime will inevitably inflate the importance of the features of that part that are special to it and downplay the importance of the features that the part shares with the whole.

The problem recalls the old parable of blind men who, never having seen a whole elephant, each happen upon a part and then mistakenly ascribe the properties of the part that they have touched to the whole. Insofar as contract law in fact possesses an integrated structure, all of whose parts fit together and inform each of its domains, any theory that capitulates to pluralism by narrowing its scope will also distort even the parts of contract that it does address.

## **B. Leveraging Value Pluralism**

A second approach to value pluralism avoids one drawback of the first by addressing the several values at play in contract practice all together and in concert. Values that compete in some settings converge in others. Moreover, theory can reveal value convergence where naïve observation sees competition. When multiple values converge to favor a single contract doctrine or pattern of contract practice, then legal theory can leverage pluralism to make an integrated case for its preferred conclusions.

Our earlier work elaborating the myth of efficient breach and defending expectation damages against supra-compensatory remedies adopts this

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13 On contracts for professional services, see, for example, MODEL RULES OF PROF'L CONDUCT r. 1.5 (AM. BAR ASS'N 1983). On ante-nuptial agreements, see, for example, UNIF. PREMARITAL AGREEMENT ACT, 9C U.L.A. 35 (2001).

approach.<sup>14</sup> We have sought, in that work, to revive the old idea that the typical contract contains not a simple promise but rather a promise in the alternative, so that a promisor typically agrees either to trade goods or services for a specified price or to transfer a sum of money equal to the gain that the promisee would have enjoyed had the goods or services been supplied. We argue, further, that contracting parties in fact typically (under plausible and common, but not universal, assumptions about traders and markets) do make promises of this sort, and that even where the transfer promise is not express, it is implied in fact in a contract's price term. Finally, we argue that a promisor breaches such a contract only if she refuses both to trade and to transfer, and that a court that awards the expectation remedy provides direct rather than compensatory relief, specifically enforcing the contractual promise's transfer prong. This analysis dissolves the conventional distinction between the expectation remedy and specific performance, and it reveals that the theory of efficient breach promulgates a myth.

For present purposes, the general form of our argument matters much more than its substantive particulars. We purport to show that although the several values that are credibly at play in contract law generally often (perhaps even usually) conflict, in the special case of contract remedies, these values converge to support the common law's traditional preference for expectation damages. That is, we argue that: (1) the efficient contract contains a promise in the alternative; (2) contracting parties in fact choose the efficient contract, even when they do not expressly include the transfer promise; (3) the expectation remedy fully respects the moral obligation to keep promises and fairly distributes the contractual surplus, including by giving the "disappointed" promisee a share of the gains produced by so-called "efficient" breaches; and (4) the regime that we identify sustains the thin form of contractual community that the law should favor in open, cosmopolitan societies. Hence, regardless of their tendencies to conflict in other areas of contract law and practice, efficiency, autonomy, equality, and community all

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14 See, e.g., Daniel Markovits & Alan Schwartz, *(In)efficient Breach of Contract*, in 2 THE OXFORD HANDBOOK OF LAW AND ECONOMICS: PRIVATE AND COMMERCIAL LAW 20 (Francesco Parisi ed., 2017); Daniel Markovits, *Sharing Ex Ante and Sharing Ex Post: The Non-contractual Basis of Fiduciary Relations*, in THE PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW 209 (Andrew S. Gold & Paul B. Miller eds., 2014); Daniel Markovits & Alan Schwartz, *The Expectation Remedy Revisited*, 98 VA. L. REV. 1093 (2012); Daniel Markovits & Alan Schwartz, *The Expectation Remedy and the Promissory Basis of Contract*, 45 SUFFOLK L. REV. 799 (2011) (symposium in honor of the 30<sup>th</sup> anniversary of the publication of *Contract as Promise*); Daniel Markovits & Alan Schwartz, *The Myth of Efficient Breach: New Defenses of the Expectation Interest*, 97 VA. L. REV. 1939 (2011).

unite in support of the expectation remedy. In this way, we leverage value pluralism in support of a single theoretical argument.

This approach appealingly avoids some of the pitfalls that necessarily accompany capitulations to pluralism on the model described earlier. Precisely because the several plural values all align in favor of a single theoretical and doctrinal vision, that single vision will capture, or at least be compatible with, all the structures that these values insert into contract law more broadly. To reverse the earlier parable, this is a case in which multiple descriptions of a single part of the elephant together capture, rather than distort, an essence of the whole.

Leveraging pluralism is more promising than capitulating to it: where multiple values converge on a single pattern of doctrine and practice, a theoretical account of law is more likely to be persuasive on its own terms than one that achieves coherence only by stipulatively excluding other applicable and perhaps also compelling values. But in another way, the leveraging approach to plural values succumbs to a weakness that also troubles approaches that capitulate to pluralism. Because the values informing contract practice are irreducibly plural, the leveraging approach has a narrow scope of application. After all, if the several values at play in contract law always, or even just regularly, favored *the same* rules and practices, pluralism would not be a problem to begin with. Lawyers and judges might disagree about the whys, but they would agree about the wherefores. And that is all the agreement that any legal system requires or might reasonably seek. The related problem with capitulation is that, according to many analysts, there are few contexts in which the pursuit of only one value is normatively attractive. Thus, at bottom, the leveraging and capitulation strategies share the same flaw: each is persuasively followed in only a few of the many areas in which contract law is at play.

### **C. Embracing Value Pluralism**

Theorists who capitulate to and leverage value pluralism both avoid pluralism, although they flee in opposite directions. Capitulation involves seeking domains that are insulated from pluralism, because only one value governs them; while leveraging involves seeking domains to which pluralism applies but only to create redundancies, because all values recommend the same result. A third approach to value pluralism does not flee from but rather embraces the diversity of values at play in contract practice and also the varieties of practice that arise in the shadow of these values. This is the approach taken by Dagan and Heller in *The Choice Theory of Contracts*, or at least in that book's most successful and ambitious second half.

Dagan and Heller embrace pluralism by rejecting the idea that contract has a center. Instead they elaborate a “taxonomy of contract types”; for them, contract law is composed of a few mandatory rules and the full set of contract types.<sup>15</sup> Each type may reflect one or more of the values that a contract law should pursue. On this approach, identifying, classifying and interpreting the spheres of contractual practice comprise one of contract theory’s two central tasks. The other task is to create new types when the need arises. Moreover, their choice theory’s central commitment is to understanding each actual or potential type on its own terms, to avoid at all costs the imperial instinct to impose values or even rules from some core or general contract law on types viewed as marginal or recalcitrant. As Dagan and Heller say with respect to bailments,

Rather than decide to treat bailments “as contractual in nature,” and therefore import all of the “general” contract law, reformers should focus on the recurring dilemmas of bailment contracts. The specific rules of bailment are not oddities to be explained away, but rather clues to the normative challenges people seek to solve when they use this contract type.<sup>16</sup>

The example is important precisely on account of its relative obscurity. Other theories of contract, including both theories that capitulate to and that leverage pluralism, ignore doctrinal backwaters such as the bailment. Obscure corners of the law raise all of the challenges and complications that value pluralism involves but provide little payoff for the larger theoretical enterprise. Dagan and Heller, by contrast, are content to highlight backwaters because these illustrate how fine-grained the taxonomy of contracts might become. Backwaters also illustrate that even narrow or obscure spheres possess sufficient doctrinal and practical depth so that the tasks that comprise the approach to contract that Dagan and Heller favor might be deployed on them.

A taxonomic approach can successfully embrace value pluralism only if it manages to make the categories in its taxonomy charismatic for lawyers and judges. The categories, that is, must track lived experience and construct spheres with sufficient doctrinal and practical integrity so that they might organize and underwrite their own interpretations. Only in this way, by grounding its taxonomy in the full complexity of lived experience, can the taxonomic approach truly embrace value pluralism.

It will in particular not do, in constructing categories, simply to replicate and generalize the domains proposed by theorists who capitulate to value

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15 DAGAN & HELLER, *supra* note 2, at 93.

16 *Id.* at 94 (citations omitted).

pluralism. The reason why not is simple. Theories that capitulate (including the theories of Schwartz, Scott and Markovits discussed earlier) proceed top-down; these scholars begin with a single value and then identify domains of contract that are credibly theorized with that value. But domains that are defined inductively, as sites of contested values, will inevitably be contested. The problems that these theories face follow directly from this method of their construction: the image of contract that they construct for their domain becomes misshapen on account of the stipulative dominance that a single value is accorded within that domain.

Instead, a taxonomy of contract that embraces value pluralism must be constructed out of the intuitive, pre-theoretical categories of lived contractual experience — out of the materials that parties, lawyers, and judges first look to when considering drafting, litigating, or adjudicating contracts. Dagan and Heller proceed in precisely this way, creating four categories of contract based on two distinctions: concerning subject matter, between people and things; and concerning the locus between private and public. These are precisely the sorts of categories that can provide grist for the interpretive mill that Dagan and Heller seek to build.

At the same time, Dagan & Heller rightly recognize that their categories should not be dogmatically applied and certainly should not be taken as either exhaustive or exclusive. In the very next breath after identifying their taxonomy, Dagan and Heller identify “admittedly rough and ragged” sub-spheres of the contractual sphere that they call commerce, which involves public contracts concerning things. (These are consumer contracts, lending contracts, sales/business contracts, and contracts governing finance/risk.<sup>17</sup>) Finally, if the legal life-world throws up a new sphere of contractual experience, then a contract theory that embraces pluralism can add that sphere to the taxonomy, and take up interpreting its inner logics. Dagan and Heller do not just acknowledge but welcome this possibility.

Dagan and Heller insist that “[t]his multiplicity of contract types can be disorienting, but it is neither chaotic nor unprincipled.”<sup>18</sup> This claim is essential to their view, because it entitles them to claim that their approach, notwithstanding its embrace of value pluralism, develops a theory properly so called. Dagan and Heller sometimes propose to bring order to the seemingly dissimilar multiplicity of types by applying their principle of autonomy,<sup>19</sup> but this proposal risks self-defeat. The proposal must be read in the shadow of their exceedingly broad and itself pluralist account of autonomy as “self-

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17 *Id.* at 98.

18 *Id.* at 102.

19 *Id.* at 113.

determination or self-authorship.”<sup>20</sup> Indeed, insofar as it is not read in this vague way, their effort to organize their taxonomy by reference to autonomy reflects a mistaken retreat from the embrace of value pluralism that gives their broader view its power and appeal. If autonomy is indeed one value among many, then giving it master status in a contract theory inevitably narrows that theory’s domain and also opens the theory to precisely the same objections that we earlier observed confront our own views.

The key to all of this is to allow interpretation of the legal life-world, performed by applying the full range of legal methods — concerning not just economics, morality, and doctrine but also, as Dagan and Heller say, “cognitive, behavioral, structural, and political economy factors”<sup>21</sup> — to engage the materials provided by each several contract sphere, conceived as a coherent whole. This approach holds out the hope that a theory that embraces pluralism might achieve what Dagan and Heller call “principled multiplicity.”<sup>22</sup> Feedback loops between theory and practice — in which each is interpretively accountable to the other — provide the principle. The vast variety of practice provides the multiplicity.

We conclude this analysis of value pluralism by noting two challenges that Dagan and Heller faced: to develop a coherent pluralist theory of contract and to develop its operational consequences. Dagan and Heller, as Part II just showed, devote much of their effort to meeting the first challenge but devote little effort to meeting the second. As a concrete example of the second challenge, what would a multi-valued contract excuse rule look like? Dagan and Heller do not address questions this close to the contract ground. Part III next argues briefly that the questions are unanswerable. But while this may excuse Dagan and Heller’s neglect, it calls their enterprise into question. Is a legal theory helpful if it cannot be operationalized?

### III. THE POSSIBILITY OF A CONTRACT LAW COMPOSED OF MULTI-VALUED RULES

Contract law functions in a different way from tort or property law because contract law is largely optional for agents while tort and property law are largely mandatory. In torts, the rules either are mandatory or agents cannot change them because the first interaction between agents usually is the accident. In property, the state specifies the forms that agents must use in order to hold

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20 *Id.* at 41.

21 *Id.* at 136.

22 *Id.*



property.<sup>23</sup> In contrast, contract law has rules, but these function as implied terms in agents' contracts *only if* the agents accept them. These are familiar distinctions, but the role of voluntary choice in constraining the kind of contract law it is possible for a state to have can be insufficiently appreciated.

To explicate contract law's basic features, we begin with a simple case. An agent,  $A_1$ , has a project,  $P_1$ , which she wants to pursue.<sup>24</sup> The project has two relevant features: (i)  $A_1$  cannot pursue  $P_1$  alone; (ii)  $P_1$  cannot be implemented at once. The first feature implies that  $A_1$  must coordinate her efforts with that of a second agent,  $A_2$ . The second feature implies that the agents must develop a plan. The plan will describe the project, or as much of it as is necessary to get going, state the agents' objectives in pursuing the project, and specify the actions each agent is to take (or not take). The actions are costly.

Let  $A_2$  initially agree to play his part. Will he follow through? He may cooperate out of obligation: he is a family member, friend or fiduciary.  $A_2$  may want to deal with  $A_1$  in the future, a desire that is inconsistent with his renegeing on the current project.  $A_2$  also may comply just because he promised. In many cases, however, these incentives will not suffice, so  $A_1$  has to buy  $A_2$ 's cooperation.  $A_1$  will believe that  $A_2$  will cooperate in order to be paid but, because the problem is reciprocal,  $A_2$  must believe that  $A_1$  will pay him. When both beliefs are plausibly held, the two agents will agree to pursue the project.

Agents obviously can contract to pursue projects without the state's help, which raises the question what role the state can constructively play. The most important role is to enforce  $A_1$ 's promise to pay and  $A_2$ 's promise to cooperate. To see why, assume that contracts are not enforceable and consider two cases. First, a third agent bids more for  $A_2$ 's performance than  $A_1$  bid. If  $A_2$  accepts the third party's bid,  $A_1$ 's costly actions in pursuit of the project may be wasted. But if  $A_1$  anticipates the possibility of renegeing and the costs would be large, she may not pursue the project. In the second case,  $A_2$  incurs costs in pursuit of the project that would be lost if  $A_1$  renegeed. Understanding this,  $A_1$  insists on a price reduction after  $A_2$  invests. But  $A_2$ , anticipating this move, will not pursue the project. Legal enforcement thus increases the probability that agents will pursue projects that the agents believe will be valuable for them by ensuring that, when the agents make a contract, they only bear the risk of project failure; they *do not* also bear the risk of opportunistic behavior by their contract partner.

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23 See Thomas W. Merrill & Henry Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J 1 (2000).

24 In this Article, a "project" can be creating a machine or a process but it also includes trading goods or services. A project, that is, is what agents contract to realize.

Contract law, however, is more than its enforcement function: the law also is a set of rules that supplement agents' contracts unless the agents reject them. Why would agents need state supplied rules? We begin to answer with an example involving profit-maximizing agents. As suggested above, their contract will contain (i) a description of the project; (ii) a specification of the agents' goals; (iii) a set of permitted (and possibly prohibited) actions. For example, the parties are agents one and two;  $A_1$  is located in Ohio and  $A_2$  is located in Minnesota; their project —  $P_1$  — is to build a chemical plant; their goals are timely completion, compliance with applicable regulations, and competitive cost; and their actions are engineering for  $A_1$  and legal compliance and marketing for  $A_2$ . The state could facilitate these agents' actions by reducing their contract writing costs: that is, the state could supply the agents with a project description, a set of goals and a set of actions. The agents could adopt these as their contract rather than create a contract from scratch.

Now let there exist a rule-generating institution. The institution can be a court, a private lawmaking group such as the American Law Institute, or a public group such as an administrative agency or a legislative committee. To be useful to agents such as  $A_1$  and  $A_2$ , the institution would have to reduce these agents' contract writing costs as just shown. But — and this is the point — no institution could do this. Thus, there also are agents  $A_3$  and  $A_4$  who live, respectively, in North and South Florida and need a contract to permit them to pursue project  $P_2$ : developing a shopping center. In a modern economy, the set of agents, which would include these four, is countably infinite and the set of potential projects the agents could pursue also is countably infinite. How could, say, a Congressional Committee or a private lawmaking group even know that these particular agents exist and that  $P_1$  and  $P_2$  are their preferred projects? As should be obvious, no rule-generating institution could possibly have the resources or the knowledge to supply *every* potential commercial contracting dyad with pre-specified project descriptions or sets of goals. And in fact, private agents create their own project descriptions and goal statements. This constricts the institution's role to supplying agents with pre-specified action sets, but it is the project descriptions and goal statements *that imply the actions* that the agents' contracts would require or prohibit. Hence, the rule-generating institution cannot be very helpful.

An objection to this analysis is that rule-generating institutions can specialize. One institution can create default terms for commodities traders, another for metal miners, and so forth. The rule-generating institutions that create today's contract law, however, do not specialize. Courts adjudicate every type of contract dispute and the "official" private lawmaking groups — the ALI and NCCUSL — attempt to make law for every contract type. It is these institutions that are subject to the objection we raise here.

The institutions — the courts and the private groups — are necessary, however, because contract law itself *is general*: it applies to every commercial transaction everywhere. Therefore, a rule-generating institution *whose domain is private contracts* necessarily has an impossible task: it is supposed to supply contracting agents — all of them — with default terms; but a general institution cannot supply all of the agents with such terms. On the other hand, if the institution specializes — providing, say, electric utilities and the pipelines to which they sell with default terms — it no longer is the institution it was created to be. For example, the ALI would no longer be the ALI; it would be the electricity industry's default term-creating institution. And what institution would help the ignored other industries? They too would need their own rule-generating institutions. But then the generality of contract law would be lost. Unsurprisingly, therefore, the institutions we have — courts and the official groups — abandon any attempt to supply agents with rules in favor of supplying them with standards, such as the duty to behave in good faith or reasonably, and with the few transcontextual rules (i.e., terms) that can be useful to agents almost everywhere.<sup>25</sup> *And that is all contract law as presently constituted does.*<sup>26</sup>

Now turn to Dagan and Heller's claim: some rule-generating institution should supply potential contracting agents with contract types the agents would accept in just about every context in which agents could contract: the labor market, the family, the consumer market, all of which are contractual "spheres." Because a type apparently is a contract, any such type which *commercial agents* could use<sup>27</sup> would have a project description, a set of goals and a set of actions. Dagan and Heller do not identify the rule-generating institution that is to supply such contract types for the many and varied commercial contexts that constitute a modern economy.

Agents in markets maximize profits, which are a relatively easy metric for a legal institution to access. Agents in the other spheres often maximize utility. Utility is harder because it is experienced partly subjectively and can

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25 An example is the damage rule that awards a disappointed promisee the difference between the contract and market prices. A court could apply this rule everywhere because it needs to know only the two prices, both of which it could easily access. And the rule induces parties to renegotiate to *ex post* efficient states everywhere. See Alan Schwartz & Robert E. Scott, *Market Damages, Efficient Contracting and the Economic Waste Fallacy*, 108 COLUM. L. REV. 1610 (2008).

26 A more extensive version of the argument here is in Alan Schwartz & Robert E. Scott, *The Common Law of Contract and the Default Rule Project*, 102 VA. L. REV. 1523 (2016).

27 Dagan and Heller have a "choice theory" so they do not want many mandatory types.

be a function of many things, including other-regarding preferences. If no rule-generating institution could supply agents with useful profit-maximizing contract types, then no institution could meet the more challenging task of supplying various utility-maximizing agents with useful contract types either.<sup>28</sup>

A state-supplied contract type is useful to an agent if it reduces the agent's cost of contracting to maximize whatever the agent wants to maximize. Dagan and Heller say that state-supplied types should respond to "the balance of contract goods that enough people seek."<sup>29</sup> This clarification suggests that the values that should animate the state in making type choices are the values — the "goods" — that agents pursue when making contracts. But this restates the difficulty: agents maximize profits or utility and no contract-generating institution can identify and then supply the project descriptions, goals, and actions that would influence the contracts that agents who maximize profits or utility would need.

Dagan and Heller set an even harder task than this for the rule-generating institution. As Part II showed, they are value pluralists, and much of their theory argues for contract types that reflect normatively appropriate value combinations. But then the rule-generating institution must create contract types that private agents would accept because the types facilitate the parties' ability to pursue some goal that is important to them, *and that also reflect* values whose justifications do not depend on their private-goal-maximizing properties.

To be concrete, suppose that the state could create two contract types, each of which contains a pre-specified action set. Type  $t_1$  is the pure value type; its action set would reduce a typical dyad's contracting cost by \$100. Type  $t_2$  is the mixed value type; its action set would reduce the contracting cost by only \$75 because the set *includes* hiring disadvantaged persons. Would typical agents in the relevant sphere choose  $t_2$  because their value for hiring the disadvantaged exceeds \$25? Would typical agents instead choose  $t_1$  because their value for hiring the disadvantaged is between 0 and \$24? How is the rule-generating institution to know? The institution perhaps could supply agents with both  $t_1$  and  $t_2$  because it is indifferent to which contract the agents choose. But supplying agents with  $t_2$  while permitting them to

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28 An institution could supply agents with a template or framework and let the agents fill in the blanks. Insurance contracts are an example, but it is an example that confirms our argument. It takes expertise and knowledge to develop a useful template for an industry, so insurance contracts are created by specialized bodies. To create templates for the myriad contexts in which they would be useful would require a myriad of rule-creating institutions.

29 DAGAN & HELLER, *supra* note 2, at 95, 98.

choose  $t_1$ , which puts no weight on hiring the disadvantaged, is inconsistent with caring that agents should hire the disadvantaged. If the state were so indifferent, it would not create contract form  $t_2$ .

Dagan and Heller may attempt to meet this challenge by stressing the choice aspect of their theory. If the state supplies agents in a particular sphere with a variety of contract types, the agents will sort themselves out. This response, however, seems precluded by the size of some spheres — i.e., the labor market — and the likely heterogeneity in agents' value preferences.<sup>30</sup> To make this difficulty concrete, suppose that there are 150 agents in a contracting sphere and each agent believes that five values should bear on its contract choice. (In fact, there will be many more values and many, many more agents). The agents rank the values differently, but the state, we plausibly assume, does not know each agent's ranking. Agent five would like the "value balance" to attach the greatest weight to value b, and then c, e, d and a in that order, while agent nine wants the balance to attach greatest weight to value c, and then d, e, a and b in that order, and so forth. There are 150 agents and 120 five-value combinations. Hence, the state respects the agents' choice by creating at least 120 contract types, each reflecting a different value balance. Ideally, the state would maximize choice by creating more than 14,000 types, reflecting all the possible accommodations between every pairing of two value judgments. Nor could the state simplify its type creation task by limiting types to reasonable or appropriately balanced value judgments; for to do that would be to *impose* an evaluative frame antithetical to the pluralism that motivates Dagan and Heller's approach to begin with.<sup>31</sup>

Because many spheres, agents, and value combinations exist in modern society, the rule-generating institution therefore would have to create and supply a very large number of contract types in order to maximize majority and minority choice. This might be possible if the institution could supply types at zero cost. But institutions that operate costlessly do not exist.<sup>32</sup>

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30 Recall that Dagan and Heller insist that "ensuring sufficient diversity of contract types is a core feature, benefit, and indeed *obligation* of a contract law regime committed to human freedom." *Id.* at 78 (emphasis in the original).

31 To be sure, the state could enhance choice by supplying a subset of types: 87 for example. But then supplying a subset is inconsistent with Dagan & Heller's goal of *maximizing* agents' choices. And there would remain the unaddressed question how the rule generating institution should, or could, choose which subset of types to create.

32 Dagan & Heller may attempt to elide some of these difficulties by arguing that mixed value rules reflect public statements of the values the law maker believes that agents should pursue, *and will be brought to pursue* in part because of the public endorsement. But the extent to which rules can transform persons is

To summarize, Dagan and Heller create a theory that calls for the state to supply contract types for the various contract spheres in which agents function. The existence of many and various types maximizes the agents' contracting choices. And the rules themselves should reflect, and advance, all of the values that agents or the state find relevant to contractual choice. Dagan and Heller argue strongly for the desirability of a contract theory that rationalizes such a contract law. But they do not argue for the *feasibility* of the law that their theory implies. The latter argument is necessary because the closer the analyst comes to how the theory would function on the ground, the less implementable the theory appears to be.

### CONCLUSION

It has been almost a consensus for decades among commentators that contract law is irreducibly pluralist. No single value, the majority view holds, can explain the law's many rules, nor would a contract law that attempted to implement a single value be normatively attractive. There have been some recent dissenters, however. Efficiency theories argue that the contract law that applies to sophisticated business transactions permits agents to maximize expected surplus. Autonomy theories argue that contract law does, and should, enable individual agents to increase the fields in which they can pursue their life plans. Communitarian theories argue that contract law attempts to further community among contracting parties. Each of these monist theories achieves the coherence and depth that an orderly normative structure permits, but at the cost of accepting not just incompleteness — each theory leaves much of the law unexplained — but also accepting the distortions that arise from viewing a multifaceted practice through a single lens. To recognize this is not to reject monist theories; rather, it is to acknowledge the vices that accompany their virtues.

The vices have yet to defeat the monist theories conclusively because it is one thing to assert that contract law is pluralist, but quite another to develop a comprehensive pluralist theory. Dagan and Heller, in the book that has occasioned this Symposium, attempt to fill this gap by developing a wide-ranging pluralist theory of contract law. Theories of this sort attempt a complete and undistorted view of the law of contract, but at the cost of abandoning theoretical depth and coherence. The intellectual habits of the age sufficiently value depth and coherence that they impose pressure on

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unknown. See Alan Schwartz, *The Default Rule Paradigm and the Limits of Contract Law*, 3 S. CAL. INTERDIS. L.J. 390 (1994).

theorists who wish to sacrifice them in the service of embracing pluralism. Dagan and Heller sometimes capitulate to this pressure, as when they purport to subordinate their pluralism to autonomy, understood as contract's master value. But Dagan and Heller's pluralism runs deep enough to foil this effort at its own subordination, by inducing them to develop an account of autonomy that is sufficiently unstructured and capacious so that it does not threaten their broader pluralist enterprise.

On the level of theory, we do not argue here for either monism or pluralism. Rather, we raise a more practical challenge to pluralism. Monist contract theories have a particular appeal: they can rationalize and justify particular contract law rules. For example, the expectation remedy permits agents to achieve exchange efficiency while other proposed rules, such as disgorgement, do not. This is a reason, for welfare theorists, to argue for expectation damages. In this short Article, we claim that while pluralism at the theoretical level is hard to avoid, pluralism at the rule level is hard to achieve. In particular, Dagan and Heller are no more successful than prior pluralist theories at building a normatively sustainable bridge between the theory and the law. We thus conclude by asking two questions that an *implementable pluralist theory* should confront: (1) Are the default rules that actual contracting agents will accept few or many? Put otherwise, is contract law, however theoretically motivated, large or small? (2) Can the state create acceptable default rules that reflect a mix of public and private values? Or is the state practically restricted to creating rules that advance a single goal that actual agents pursue?

Practice, that is, may necessarily retreat from the broad pluralism that theory equally necessarily embraces, and the pluralist lawyer must confront constraints that a purer theorist might avoid.

