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RESEARCH ARTICLE

The prospects for pluralism in contract theory

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Abstract

This paper explores the promise of pluralism in the realm of contract law. I begin by identifying and rejecting conceptual strategies adopted by monistic and dualistic approaches. Turning towards pluralism, I evaluate three versions in contemporary literature: pluralism across contracting spheres and types, pluralism through consensus and convergence, and pluralism through localised values-balancing and practical reasoning. I suggest embracing some pluralism about contract pluralism, by using these models to construct a framework of 'meta-pluralism', where at the macro-level, we are concerned with plural spheres of contracting activity; at the meso-level, a variety of trans-substantive interpretive concepts that receive some measure of juristic consensus; and at the micro-level, practical reasoning through particularistic analysis of case-specific considerations. I illustrate the meta-pluralistic framework through a case study on the varieties of specific performance, and explain how the proposed pluralistic framework enriches our understanding of the nature of contract.

Keywords: contract law; legal theory; pluralism

Introduction

In *Justice for Hedgehogs*, Ronald Dworkin wrote of the quest for the unity of value:[1]

> Poseidon had a son, Procrustes, who had a bed; he suited his guests to his bed by stretching or lopping them until they fit. You might well think me Procrustes, stretching and lopping conceptions of the great political virtues so that they neatly fit one another. I would then be achieving unity on the cheap… But…I hope to develop integrated conceptions that all seem right in themselves…We do not secure finally persuasive conceptions of our several political values unless our conceptions *do* mesh.

For the private law theorist, however, the unity of value appears to be an elusive ideal. The theories which have set the agenda for private law have tended to be monistic, giving pride of place to a particular foundational value that allegedly constitutes the 'immanent rationality' of the domain under interrogation:[2] promissory morality,[3] Kantian right and corrective justice,[4] the welfare economic conception of well-being,[5] and so on.

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[1]R Dworkin *Justice for Hedgehogs* (Cambridge, MA: Belknap Press, 2011) pp 5–6.

[2]See P Saprai *Contract Law Without Foundations: Toward a Republican Theory of Contract Law* (Oxford: Oxford University Press, 2019) ch 1.

[3]C Fried *Contract as Promise: A Theory of Contractual Obligation* (Oxford: Oxford University Press, 2nd edn, 2015); SV Shiffrin 'The divergence of contract and promise' (2007) 120 Harvard Law Review 708.

[4]EJ Weinrib *The Idea of Private Law* (Oxford: Oxford University Press, rev edn, 2012).

[5]S Shavell and L Kaplow *Fairness versus Welfare* (Cambridge, MA: Harvard University Press, 2002).

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Pluralism, in contrast, rejects the dominance of 'one super value (or metaprinciple) over all others'.[6] In the realm of contract, one definition of the pluralist enterprise is that

> there is no one idea that encapsulates the *sine qua non* of contract, no nodal point from which all the instantiations of the institutions 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….[7]

Consequently, there is a perceptible concern that the pluralist enterprise is more 'nightmare' than 'noble dream':[8]

> 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.

Notwithstanding these strong sentiments, the possibility of pluralism should not be written off so quickly. At present, there exists a sufficient groundswell of interest in a form of 'principled pluralism'[9] to warrant an examination of its viability. Advocates of pluralistic theories urge that:[10]

> It is concerned that courts not rigidly pit contractual consent against no-consent, promise against no-promise, and will against no-will… It focuses on how to reach determinations in light of the background and life experience of contracting parties, not by vaporizing those experiences within a monist theory of contracting.

My purpose in this paper, accordingly, is to explore the promise of pluralism in the realm of contract law. In order to understand the appeal of pluralism, I critique the conceptual strategies adopted by pluralism's alternatives, viz, monistic and dualistic approaches, taking as my reference points a number of well-known works in the contracts canon. Turning towards pluralism, I evaluate three versions in contemporary literature: pluralism across contracting spheres and types, pluralism through consensus and convergence, and pluralism through localised values-balancing and practical reasoning. I suggest that we might embrace some pluralism about contract pluralism, by using these models to construct a framework of 'meta-pluralism'. I argue that the shaping of contractual norms takes place at macro, meso and micro levels. At the macro-level, we are concerned with plural spheres of contracting activity; at the meso-level, a variety of trans-substantive interpretive concepts that receive some measure of juristic consensus and which anchor normative argument; and at the micro-level, practical reasoning through particularistic analysis of case-specific considerations. Other commentators have applied various pluralistic models to the values underpinning contract formation,[11] the construction of contracts,[12] or particular examples of commercial contracts.[13] For our purposes, I illustrate the suggested meta-pluralistic framework through a case study on the varieties of specific performance, focusing on the macro-level spheres of land, employment and consumer transactions, the meso-level interpretive concepts of 'legitimate interests' and 'joint cost-minimisation', and micro-level

[6]MR Miller 'Party sophistication value pluralism in contract' (2013) 29 Touro Law Review 659 at 662.
[7]R Kreitner 'On the new pluralism in contract theory' (2012) 45 Suffolk University Law Review 915 at 923.
[8]Ibid, at 922.
[9]N Oman 'Unity and pluralism in contract law' (2005) 103 Michigan Law Review 1483 at 1498.
[10]L Trakman 'Pluralism in contract law' (2010) 58 Buffalo Law Review 1031 at 1093.
[11]M Chen-Wishart 'The nature of vitiating factors in contract law' in G Klass et al (eds) *Philosophical Foundations of Contract Law* (Oxford: Oxford University Press, 2014).
[12]SJ Burton 'Normative legal theories: the case for pluralism and balancing' (2013) 98 Iowa Law Review 535.
[13]Kreitner, above n 7, at 927–932.

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applications in specific scenarios. The choice of specific performance is apt because it is a distinctively contractual remedy, one that is not only doctrinally complex but theoretically of continual interest to those within different camps of private law theory. My analysis explains how the proposed pluralistic framework enriches our understanding of contract, in comparison with monolithic perspectives on the nature of the contractual obligation espoused by hyper-moralistic accounts on the one hand, and the hypo-moralistic position of efficient breach theorists on the other. Whether or not one is of a pluralistic persuasion, the analysis will aim to demonstrate the dividends of reasoning through such approaches.

1. Clearing the ground

While eschewing an exercise in analytical jurisprudence, it will be valuable to clarify certain foundational ideas.[14] What is the basic unit of deliberation when one considers monism, dualism, and pluralism? It is submitted that the relevant coin of the realm involves *considerations of value* or *normative reasons*, which bear upon 'choice and action, to determining what one ought to do'.[15] Of course, there are all sorts of metaphysical, epistemological and motivational questions that emerge with a commitment to objectivism as to value,[16] which are beyond the scope of our discussion. Yet at a phenomenological level, it is undeniable that '[p]eople experience the world as infused with many different values'.[17] In contract adjudication, considerations of rights, community, and welfare in their normative sense 'all enter a person's practical deliberations as a reason to act in one way or another,'[18] and are 'weighed on the common dimension of their normative force'.[19]

Of course, translating values into law is not straightforward, regardless of whether some values are prioritised over others. Collins observes that the 'transition from normative standard to a particular legal rule does not permit a simple transposition'.[20] Values may be reflected in a variety of conceptual devices within the law's toolkit, from rules, to factors and guidelines, and more discretionary standards.[21] Just as importantly, we might ask whether particular values are associated with certain institutions or actors within the legal system. One well-known view takes it that judge-made common law reflects promissory morality or the will theory, while legislative interventions are grounded on consequentialist or instrumental considerations.[22] Such generalisations are too hasty, since a range of reasons are often utilised by both courts and legislative or regulatory bodies. As Varuhas notes, 'there is a misplaced tendency in much scholarship to present judge-made law as a domain of pure principle and legislative interventions as foreign, policy-driven impositions'.[23]

Relatedly, we might observe that the contest over the values animating contract often takes place against the backdrop of a state-centric conception of law. This assumption has been fruitfully challenged by contract scholars drawing from the wellsprings of *legal* pluralism, which conceives law from a global perspective as including a panoply of institutionalised practices oriented to ordering relations at different (supra, sub, non-state as well as statist) levels with a wide range of constitutive, facilitative, and regulative functions.[24] For instance, Mak's recent work on pluralism in European

[14]I am indebted to one anonymous reviewer for raising the issues discussed in this section.

[15]C Webb 'Contract as fact and as reason' in Klass, above n 11, p 135.

[16]See TM Scanlon *Being Realistic about Reasons* (Oxford: Oxford University Press, 2014).

[17]E Anderson *Value in Ethics and Economics* (Cambridge, MA: Harvard University Press, 1993) p 1.

[18]Burton, above 12, at 554.

[19]Ibid, at 551.

[20]H Collins *Regulating Contracts* (Oxford: Oxford University Press, 1999) p 32.

[21]CR Sunstein 'Problems with rules' (1995) 83 California Law Review 956.

[22]See eg J Gava 'Can contract law be justified on economics grounds?' (2006) The University of Queensland Law Journal 253.

[23]J Varuhas 'The socialisation of private law: balancing private right and public good' 137 (2021) Law Quarterly Review 141 at 142.

[24]For a representative definition, see W Twining *General Jurisprudence: Understanding Law from a Global Perspective* (Cambridge: Cambridge University Press, 2009) pp 116–119.

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contract law makes the case for a shift in perspective from state-centric law-making to co-authorship through a range of public and private sources of norms, without reliance on any formal hierarchy, but instead operating on the basis of mutual recognition, toleration and collective deliberation.[25] Such analyses are important in capturing a cosmopolitan dimension of contract which has not been the traditional focus of contract theorists, but I will have to bracket a more in-depth discussion on this score for a number of reasons. First, the legal pluralist literature uses the terms 'monism' and 'pluralism' in a different way, referring not to evaluative considerations but to sources of law: monism refers to state-based systems while pluralism refers to law-making beyond the state. A defence of pluralism thus requires the integration of public regulation, codes of conduct and soft law, reputational feedback systems, and so on,[26] which are not my main focus. Secondly, the legal pluralist literature does raise significant normative issues, but again these are of a different slant. One key fault line is between instrumentalist rationality of European private law with its focus on the integration of the internal market, in contrast with juridical rationality of national contractual regimes embodying their own balance of rights and social justice values.[27] Discussion of such issues would take us too far afield.

Lastly, on a methodological note, I take it that the task of contract theory is interpretive, in the sense that it aims at revealing an intelligible order in the law, beyond doctrinal descriptions or restatements, historical narratives, or prescriptive law reform endeavours.[28] We look at the relevant legal materials – 'decisions in fact made, concepts in fact employed, rules in fact endorsed and applied'[29] – with a view to distilling the deep structure, underlying concepts, and key values that hold these together. More comprehensively, a theory or conceptual framework aims to organise these foundational ideas into a meaningful account of the practice as a whole. For example, Adams and Brownsword suggest a more pluralistic framework comprising two anchoring ideologies, market-individualism and consumer-welfarism, both of which are associated with sub-principles (security of transactions, certainty, freedom of contract with regard to the former; proportionality, bad faith, exploitation and so on in relation to the latter), which can then be paired with formalist or realist adjudicatory techniques to classify judicial decisions.[30] The overall aim of an interpretive theory or framework is thus both explanatory and justificatory: for as Gardner observes, '[t]o justify something is to explain it rationally', viz, 'set[ting] out some or all of the reasons why it is as it is'.[31] Having made these conceptual clarifications, we are now in a position to evaluate monist, dualist and pluralistic approaches.

2. Beyond monism and dualism

(a) Monism

The fundamental problem with monism is that it makes either of two unsatisfactory moves.[32] First, it excludes principles it cannot accommodate by re-defining these as non-contractual. Conversely, it may 'co-opt' such principles and bring them within the promissory empire in a way that renders the idea bloated or indeterminate.

With reference to the former move, consider Fried's well-known argument that there 'exists a convention that defines the practice of promising and its entailments', one that 'provides a way that a person may create expectations in others', and that by reference to 'basic Kantian principles of trust and respect, it is wrong to invoke that convention to make a promise, and then to break it'.[33] This promise principle is said to be the life of contract. However, Fried's association of promise with contract leads

[25]V Mak *Legal Pluralism in European Contract Law* (Oxford: Oxford University Press, 2020).
[26]Ibid, chs 6–9.
[27]Ibid, ch 5.
[28]See SA Smith *Contract Theory* (Oxford: Oxford University Press, 2004) pp 3–6.
[29]Webb, above n 15, pp 137–138.
[30]JN Adams and R Brownsword 'The ideologies of contract' (1987) 7 LS 205.
[31]J Gardner *Torts and Other Wrongs* (Oxford: Oxford University Press, 2019) p 28.
[32]See Saprai, above n 2, ch 3.
[33]Fried, above n 3, p 17.

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to the conclusion that the doctrines of pre-contractual liability, incapacity, mistake, good faith (as honesty in fact) and the consequences of breach are 'not part of contract law', and consequently 'the field of contract law is shrunk to very few doctrines and rules, that is, the ones that… can be explained by the promise principle alone'.[34] This 'purification' strategy raises a number of concerns. First, it may not be descriptively correct, insofar as scholars, practitioners and lawmakers do see the above doctrines as 'contractual', and view the terrain of contract law as more 'normatively pluralistic'.[35] Secondly, this re-classification exercise may have negative ramifications: '[i]f we classified areas of law on the basis of isolated principles then we would know very little about how existing doctrines weigh them up within the various conventional categories', such as how 'will' aspects of contract are overridden, qualified or supplemented by competing considerations.[36] More subtly, it may result in a misrepresentation of the force of the promise principle vis-à-vis such competing considerations. For example, Fried sees the mitigation principle as non-contractual insofar as it rests on an independent 'Good Samaritan'-type affirmative moral obligation 'to save another from serious loss when the actor can do so with little trouble, risk of loss, or harm to himself'.[37] The 'externalisation' of the mitigation doctrine, and more broadly, associated loss avoidance concerns, may lead to a misunderstanding of how such ideas are embedded *within* remedial contract rules. For instance, mitigation is present not only in the basic avoidable loss rule that a claimant must take all reasonable steps to minimise its loss and must not take unreasonable steps to increase the loss,[38] but is also 'smuggled' into other rules, such as those limiting the availability of an action for the agreed sum,[39] based on the case law developing Lord Reid's well-known dictum in *White and Carter (Councils) Ltd v McGregor*[40] that if it can be shown that a person has no legitimate interest, financial or otherwise, in performing the contract, rather than claiming damages, he ought not to be allowed to saddle the other party with an additional burden with no benefit to himself.[41]

Moving from 'excision' to 'imperialism', viz, an exercise in 'inflating' the reach of the promise principle,[42] we find ourselves with further problems. Under this 'will theory' model, 'if voluntary consent gets you into a contract then some defect in the voluntariness of the consent should get you out'.[43] One notorious difficulty is that the very idea of a voluntarily assumed obligation appears to rest on 'external' standards of fairness, a challenge that many have mounted against will theories.[44] As Chen-Wishart points out in her analysis of vitiating factors, a 'pluralist defeasibility approach' better accords with the case law than a 'vague, bloated, and, at times, denatured concept of consent'.[45] Thus, in the context of the unconscionability doctrine, courts look to mental and circumstantial weaknesses (such as inexperience, poverty and ignorance, infirmity by reason of age, or emotional strain), coupled with exploitative or bad faith behaviour in taking advantage of the weakness to procure a transaction on terms clearly disadvantageous to the claimant.[46] The totality of considerations cannot simply be lumped together under 'defective consent'. Of course, the will theorist might respond by also positing some independent normative criteria in line with her non-interventionist liberal ideals, such as a basic 'force or fraud' baseline, for defining full, free and informed consent, and excluding notions such as

[34]Saprai, above n 2, p 36.
[35]Ibid, p 37.
[36]Ibid.
[37]C Fried 'The convergence of contract and promise' (2007) 120 Harvard Law Review Forum 1 at 8–9.
[38]See A Burrows *A Restatement of the English Law of Contract* (Oxford: Oxford University Press, 2016) p 131, summarising the case law.
[39]See J Morgan 'Smuggling mitigation into *White & Carter v McGregor*: time to come clean?' [2015] LMCLQ 575.
[40][1962] AC 413.
[41]Ibid, at 431.
[42]Saprai, above n 2, pp 27, 33.
[43]Chen-Wishart, above n 11, p 297.
[44]See discussion of the literature in A Robertson 'The limits of voluntariness in contract' (2005) 29 Melbourne University Law Review 179.
[45]Chen-Wishart, above n 11, p 317.
[46]Burrows, above n 38, pp 209–211, summarising the case law.

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economic and lawful act duress as well as unconscionability.[47] By this point, however, the monist might have to concede that 'promise' alone is doing little work; rather, the scope of voluntaristic obligation depends on other considerations, including normative and empirical argument as to the ability of courts to regulate markets and prices, and more broadly, the division of labour between social and contractual justice.[48]

Having argued against a monistic approach, it is worth pointing out that a monist might arguably limit the scope of her claims to avoid either of the above vices. Instead of subsuming all of contract under voluntaristic notions, or denying the label 'contract' to non-'will' aspects of doctrine, one might recognise that contract law at an institutional level falls on the side of what Hart called 'power-conferring' as opposed to 'duty-imposing' law,[49] in that it in the main confers upon persons legal facilities for committing themselves to joint projects that reflect and enhance their self-determination.[50] As we will see, Dagan and Heller suggest that autonomy as choice among contract types is the foundation of contract, but their theory should not be classified as monist because it leaves space open for other values to feature in the configuration of contract types, and the attendant rules on contractual formation, content, and remedies across types. In this sense, the monist's focus on contractual autonomy is not so much wrong as incomplete, and compatible with the pluralistic frameworks discussed below.

(b) Dualism

In contrast to monism, dualism depicts contract law as riven by competing tensions.[51] Dualism might be highly optimistic, as with Brudner's Hegelian reconciliation of formal right with equitable considerations,[52] or it might be radically sceptical, as with Kennedy's (in)famous 'fundamental contradiction' between individualism and altruism.[53] From a pluralistic perspective, both views appear to be overstated.

Brudner identifies two competing paradigms in contract law. The first, formal right, is a more libertarian notion of freedom of contract, relying on a thin notion of personhood as capacity for detachment from the ends of life, abstracting away from subjective preferences and natural appetites, need, material goals, concrete intentions for transacting, and human welfare.[54] This is supplemented by a more egalitarian conception of contract, manifested in various equitable doctrines, that takes a more 'inclusive' idea of substantive freedom 'so as to harmonize the formal capacity for free choice with its concrete expression in particular goals', and is concerned with freedom as self-determination.[55] The formal right paradigm taken alone 'contradicts the very end it purports to realize and points to equity for its own fulfilment',[56] but applying the equitable paradigm without restraint leads to the reinstatement of domination.[57] The unity between the paradigms is realised through the existence of the 'dialogic community': the relationship of mutual recognition between the individual agent and the collective, wherein the common good recognises the individual's moral independence in order to be validated as such, and the individual in turn recognises the common good's authority for the sake of its own confirmation as a separate end.

[47]Fried, above n 3, ch 7.

[48]See discussion of the literature in S Scheffler 'Distributive justice, the basic structure and the place of private law' (2015) 35 Oxford Journal of Legal Studies 213.

[49]HLA Hart *The Concept of Law* (Oxford: Clarendon Press, 2nd edn, 1994) p 81.

[50]See H Dagan and M Heller 'Why autonomy must be contract's ultimate value' (2019) 20 Jerusalem Review of Legal Studies 148.

[51]A Brudner *The Unity of the Common Law* (Oxford: Oxford University Press, 2nd edn, 2013) p 162.

[52]Ibid, p 4.

[53]D Kennedy 'Form and substance in private law adjudication' (1976) 89 Harvard Law Review 1685.

[54]Brudner, above n 51, pp 170–172.

[55]Ibid, pp 172–173.

[56]Ibid, p 174.

[57]Ibid, p 228.

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Brudner's insistence on a universal dualism leads him to overload the characterisation of competing polarities. As Gardner has pointed out, Brudner lumps together various dichotomies that do not necessarily travel together under one dialectical process, assuming that agency and welfare, form and substance, common law and legislation, private and public, law and equity, non-instrumentalism and instrumentalism, individual and community, corrective and distributive justice, all reduce to 'one grand, overarching conflict', despite the fact that some contrasts may have little to do with others.[58] Moreover, Brudner's purported contradictions are sometimes awkwardly forced upon the structure of doctrinal debates. For example, Brudner insists that the expectation measure of damages is associated with formal right because formal right 'sees attachment to things as bondage', hence under an executory contract each party acquires at most a present property in exchange value promised, rather than any material thing, and the court aims to enforce a 'fictional agreement between owners of exchange value'.[59] At times, however, the equitable remedy of specific performance is available where the competing paradigm comes into play and the law sees the parties as free and deliberative agents with special interests, intentions and circumstances.[60] This characterisation appears foreign to practice, as it is rather difficult to find any cases in which the choice between specific performance and damages is expressed as a competition between detached as opposed to self-determining agency. Additionally, even if we accept some Brudnerian characterisation of grand conflict, it is not clear that the purported resolution through 'dialogic community' is anything more than an article of faith.[61]

Consider next the sceptical brand of dualism, associated with the theme of the 'fundamental contradiction' in contract law, which Kennedy has formulated, refined, and (on at least one occasion) repudiated.[62] Kennedy develops a 'dichotomy of individualism and altruism', which reflects 'a deeper level of contradiction…among ourselves and also within ourselves, between irreconcilable visions of humanity and society'.[63] The individualistic ideal is self-reliance and self-interest as a moral good, while the altruistic counter-ethic is sharing and self-sacrifice, based on reciprocity, moral fault or virtue, and need.[64] This is said to map onto further conflicts as between 'community versus autonomy', 'regulation versus facilitation', and 'paternalism versus self-determination' in contract law.[65] These 'substantive' debates are also connected with the 'formal' dimension of rules versus standards, as the individualistic rhetoric with its focus on self-reliance is aligned with the strict interpretation of formally realisable general rules, while the altruistic mode of mercy and sacrifice is associated with the application of flexible multi-factorial standards.[66] At the level of political discourse, the individualist social order is generally associated with liberalism, while the altruistic programme is collectivist in orientation.[67] Ultimately, the recognition of moral and practical conflict at different levels means that no reference to a 'metasystem' can be had for reconciliation.[68]

Despite Kennedy being at the opposite end to Brudner in terms of optimism about rational resolution, their strategies for subsuming dichotomies within a grander conflict are in a sense remarkably similar, and are subject to comparable complications. Take the alleged alignment between individualism/altruism and rules/standards. While this may work in some situations, attempting to see the latter debate in primarily political terms can be distortionary. To give one contemporary illustration, the illegality defence in contract and private law has moved from a rules-based approach to a discretionary

[58]J Gardner 'The purity and priority of private law' (1996) 46 University of Toronto Law Journal 459 at 481.
[59]Brudner, above n 51, p 227.
[60]Ibid, p 193.
[61]W Lucy 'The common law according to Hegel' (1997) 4 Oxford Journal of Legal Studies 685 at 692–694.
[62]P Gabel and D Kennedy 'Roll over Beethoven' (1984) 36 Stanford Law Review 1.
[63]Kennedy, above n 53, at 1685.
[64]Ibid, at 1713–1722.
[65]Ibid, at 1731–1737.
[66]Ibid, at 1740.
[67]Ibid, at 1767.
[68]Ibid, at 1774–1778.

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standards-based 'range of factors' approach since *Patel v Mirza*,[69] involving considerations as to the underlying purpose of the prohibition which has been transgressed, countervailing public policies which may be rendered ineffective or less effective by denial of the claim, and considerations of proportionality.[70] The transition is made from a chaotic mass of rules to a clearer universal standard for reasons of coherence and consistency, and to avoid situations where ossified rules have become so detached from underlying reasons as to generate arbitrary outcomes,[71] and it is hard to detect any conscious or unconscious leaning in favour of 'altruism' in the work of scholars and reformers who have advocated for the standards-based approach.[72]

Indeed, Kennedy has at one point renounced the 'fundamental contradiction' in a recorded dialogue.[73] Part of the recantation has to do with the fear that it has the 'terrible quality of reified abstractions'[74] and may be seized upon by liberal theorists to rationalise status quo incrementalism or quietism;[75] another is that Kennedy is appropriately cautious of depicting universal dichotomies: '[Y]ou can't plausibly describe "being" except in the vaguest and most general way. You *can* plausibly describe relatively contextualized, nonabstract, rich, human situations…'[76] While Kennedy does not directly apply any sort of contextualist method to contract doctrine, this concession to contextualisation is arguably important, for, as I explain below, it counsels against a dualistic characterisation of conflict in favour of a pluralistic one. Moreover, as much as Brudner's reconciliation appears unduly roseate, Kennedy's radical scepticism seems misplaced. It has been observed that Kennedy's contradictions are perhaps 'rhetorically overblown contrasts, distinctions, or simply alternatives'[77] and that '[a]ssessing the relative strength of the competing moral principles can…be a way to solve moral conflicts'.[78] As we will see, intractable 'grander' conflict is arguably susceptible to rational resolution through pluralistic strategies.

3. Paradigms of pluralism

(a) Pluralism across contracting spheres and types

If monism and dualism fall short, can we find a form of pluralism that avoids the charge of being little more than the proverbial 'dog's breakfast'? One strategy that a pluralist might invoke is to look to types and spheres of contracting, such as emphasising the position and sophistication of parties (say, hiving off firm to firm dealings from firm to individual dealings, and individual to individual dealings)[79] or transaction or situation types (employment, sale of goods, tenancy, and so on).[80]

The 'spectrum/sphere' characterisation has received a recent boost through the highly stimulating work of Dagan and Heller, who put forward a 'choice theory' of contract types that seeks to order the values of autonomy, utility and community within and across spheres.[81] Dagan and Heller argue that the key value of autonomy is best preserved through the state proactively making available a diverse body of normatively attractive contracting types. Within a sphere, that is, a core area of human interaction such as the family, home, employment or commerce, different types of contractual transactions

[69][2016] 3 WLR 399.
[70]Ibid, at [101].
[71]For instance the notorious 'reliance' principle in *Tinsley v Milligan* [1994] 1 AC 340, see discussion in *Patel*, above n 69, at [237].
[72]See A Burrows 'Illegality after *Patel v Mirza*' (2017) 70 Current Legal Problems 55.
[73]Gabel and Kennedy, above n 62, at 15–16.
[74]Ibid, at 16.
[75]Ibid, at 15.
[76]Ibid, at 48.
[77]M Krygier 'Critical legal studies and social theory – a response to Alan Hunt' (1987) 7 Oxford Journal of Legal Studies 26 at 29.
[78]D Meyerson 'Fundamental contradictions in critical legal studies' (1991) 11 Oxford Journal of Legal Studies 439 at 444–445.
[79]See A Schwartz and RE Scott 'Contract theory and the limits of contract law' (2003) 113 Yale Law Journal 541.
[80]Kreitner, above n 7, at 920.
[81]H Dagan and M Heller *The Choice Theory of Contracts* (Cambridge: Cambridge University Press, 2017).

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can take place. Choice theory proposes intra-sphere multiplicity of contracting types that are partial functional substitutes for each other, and which present a range of valuable options open to us.[82] Importantly, they emphasise that 'values in contract law are *local* to contract types, not *global* to contract law', such that each type 'represent[s] a distinct balance of values'.[83] For Dagan and Heller, autonomy (as choice among a meaningful menu of contract types) can be seen as contract's ultimate value, with utility and community as instrumental values, or the goods of contract.[84] In some arenas, such as commercial transactions, the balance of values favours types which focus on 'maximizing joint surplus by securing efficiencies of specialization and risk allocation – with social benefits being merely a side effect'; on the other hand, the family sphere emphasises 'the intrinsic good of being part of a plural subject, where the raison d'être of the contract refers more to one's identity and interpersonal relationships, while the attendant economic benefits are perceived as helpful byproducts rather than the sole…motive for cooperation'.[85] By taking a wider view of autonomy, Dagan and Heller further argue that choice within types may permissibly be restricted through sticky defaults and mandatory terms, especially where the interaction involves externalities, information asymmetry, cognitive biases, strategic behaviour or other forms of relational imbalance.[86] It is said that this version of pluralism has the advantage of re-calibrating contract law away from the Willistonian model of a purely general body of rules and principles towards the actual diversity of contracting practices.[87]

Of course, this form of pluralism also has its own challenges. From a political economy perspective, Markovits and Schwartz argue that as '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'.[88] State institutions might be incapable or find it unfeasible to intervene on this scale, since 'no rule generating institution could possibly have the resources or knowledge to supply *every* potential commercial contract dyad with pre-specified project descriptions or sets of goals'.[89] In response, one might attempt to preserve the core insight of 'spheres of contract' while addressing how such concerns can be managed. It might be noted that given information cost constraints and imperfect rationality, as well as the need for legal regimes to reflect inter alia comprehensibility, adequate publicity, and constancy over time,[90] there is no necessity to tailor the optimal number of available contract types to each contracting dyad's specific preferences. Take an illustration well-known to commercial lawyers: international sales contracts incorporating the International Chamber of Commerce's INCOTERMS 2020 governing typical export transactions, which provide a set of eleven commonly used trade terms reflecting business practice in cross-border transactions.[91] This functions as a small-scale *numerus clausus* from which parties can select terms relating to responsibility for carriage, insurance, shipping documents, risks, and various costs, the most well-known being cif or fob contracts in sea carriage. For instance, the cif contract 'is more widely and more frequently in use than any other contract used for purposes of seaborne commerce' and an 'enormous number of transactions, in value amounting to untold sums, are carried out every year under c.i.f. contracts'.[92] Yet 'a true fob or a true cif contract is a comparative commercial rarity' since contracts 'vary infinitely according to the wishes of the parties', and 'it may well be that other terms of the contract clearly show that the use of those letters is intended to do no more than show where the incidence of liability for freight or insurance will lie…but

[82]Ibid, p 76.
[83]Ibid, p 103 (emphasis in original).
[84]Ibid, chs 5–6.
[85]Ibid, p 103.
[86]Ibid, pp 109–110.
[87]Ibid, p 11.
[88]D Markovits and A Schwartz 'Plural values in contract law: theory and implementation' (2019) 20 Theoretical Inquiries in Law 571 at 576.
[89]Ibid, at 588 (emphasis in original).
[90]LL Fuller *The Morality of Law* (New Haven, CT: Yale University Press, 1964).
[91]This being the most recent version, the previous of which was the INCOTERMS 2010 rules.
[92]*Ross T Smyth & Co Ltd v TD Bailey, Sons & Co* [1940] 3 All ER 60.

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is not to denote the mode of performance' as between parties.[93] Accordingly, commercial parties have freedom to tailor terms while building off standardised templates reflecting a range of trade practices, with contractual design involving the interplay between individual actors, the commercial community, and the courts, which is at once collaborative, competitive and iterative.

(b) Pluralism through consensus and convergence

Another pluralistic strategy is to identify where different value systems might nonetheless converge on the legal norms of the contractual regime. As Sunstein explains in relation to what he calls 'incompletely theorized agreements':[94]

> [W]hen people diverge on some (relatively) high-level proposition, they might be able to agree if they lower the level of abstraction. People are sometimes able to converge on a point of less generality than the point at which agreement is difficult or impossible… What is critical is that they agree on how a case must come out and on a low-level justification.

Sunstein refers to different levels of abstraction – high-level theories, mid-level principles, low-level principles, judgments in concrete cases – and makes the plausible observation that at certain levels, it is possible that consensus may be found across ideological divides, as when we agree on the viability of a clear and present danger test for encroaching upon a constitutional guarantee of free speech, strict liability in tort, the protection of labour unions from employer coercion, and so on, for a number of overlapping reasons.[95]

Moreover, it has been argued that this is normatively desirable: '[p]luralist balancing would contribute more than monism to the legal system's legitimacy: simply put, relying on several converging values provides a *stronger* justification than relying on only one', and that 'pluralist justifications can enable all factions to see their values at work in the process'.[96] Likewise, convergence on lower-level principles and outcomes arguably 'serve[s] the crucial function of reducing the political cost of enduring disagreements', since one's larger worldview is not directly at stake in a legal dispute, and for practical reasons 'may be the best approach available for people with limited time and capacities'.[97] A focus on workable points of convergence in the interests of stability and inclusiveness is, of course, a theme articulated most thoroughly in Rawls' *Political Liberalism*,[98] which grounds a political conception of justice in 'an overlapping consensus comprised of all the reasonable comprehensive doctrines in society…in an enduring majority with respect to those rejecting that conception'.[99] Instead of constructing justice on the basis of a single comprehensive view such as a Kantian notion of autonomy, reasonable persons understand the burdens of judgment and the challenges of persistent disagreement, and look instead to a freestanding political view that incorporates a shared subset of common values across comprehensive doctrines. Applying Rawlsian thought to contract law, Bridgeman argues that it should eschew normative theories based upon 'thicker' versions of Kantian morality, Judeo-Christian morality, or utilitarian theory, and instead seek justifications 'that are acceptable from all reasonable comprehensive viewpoints'.[100] Accordingly, adjudicators and academic lawyers should be in the business of identifying and facilitating convergence among different perspectives.

The 'overlapping consensus' strategy might be helpful, with important qualifications. For instance, it might be useful in pointing to the fact that most leading theories do accept the notion, stated at a rather

[93]*Albacruz (Cargo Owners) v Albazero*, *The Albazero* [1977] AC 774 at 809.
[94]CR Sunstein 'Incompletely theorized agreements' (1995) 108 Harvard Law Review 1733 at 1740–1741.
[95]Ibid, at 1736–1740.
[96]Burton, above n 12, at 555.
[97]Sunstein, above n 94, at 1748–1749.
[98]J Rawls *Political Liberalism: Expanded Edition* (New York: Columbia University Press, 2005).
[99]Ibid, p 391.
[100]C Bridgeman 'Liberalism and freedom from the promise theory of contract' (2004) 67 MLR 684 at 698.

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high level of generality, that legitimate contractual interests should be given legal protection. To take an illustration from an adjacent field, the concept of property (as an *in rem* right of exclusion) can arguably be grounded upon moral rights and deontological theory, information cost and collective action reasons, human psychology, and habits of mutual forbearance or conventional norms, as 'a genuine example of the "overlapping consensus" one hears invoked so often in an era not exactly characterized by consensus'.[101] To some extent, the same can be said of contractual rights. In justifying inducing breach of contract under the *Lumley v Gye*[102] doctrine, one can look to arguments inspired by property theory to make the case, such as transfer theory (contract involves a transfer of exclusive authority to exercise control over the thing promised), positive autonomy (in that the stability of contracts, like the stability of ownership, allows persons to increase their options), as well as efficiency and wealth-maximisation (to provide requisite incentives to invest relation-specific effort and resources in transactions).[103]

Still, we should acknowledge that consensus is often provisional and unstable. As Craswell has pointed out, early economic analysis of efficient breach saw expectation damages as a way of achieving an efficient allocation of resources by making sure that the promisor fully internalises the cost of breach and breaches only if a third party values performance more than the promisee.[104] However, once the logic of efficiency is embraced, 'the optimal measure of damages from an economic standpoint is simply whatever measure of damages would create the best consequences – the best incentives to take precautions against accidents…to gather information before signing a contract…to do any of a hundred things', such that 'the quantum of damages that happens to be best at achieving these instrumental goals need not coincide with the quantum…that would be dictated by some moral theory of compensation'.[105] Whether or not these arguments are correct (and there is reason to doubt the ability of courts to process all the relevant variables in the economic calculus),[106] it shows that we should be hesitant to hope for convergence on key questions of contractual regime design.

Moreover, the value in trading off contractual justice for stability is rather contestable. Similar observations have been made as to the Rawlsian 'overlapping consensus' strategy by notable commentators: it appears to 'purchase the neutrality of [a] conception of justice at the cost of forsaking its cognitive validity claim',[107] and results in 'stability replac[ing] justice as the primary objective of the theory'.[108] Legitimacy is not necessarily secured through a procrustean solution of focusing on similarities and ignoring differences. Instead, some measure of legitimacy is secured through the negotiation of fit and justification, with the threshold of institutional data already constraining the trajectory of normative development, hence expressing some commitment to 'integrity' and the rule of law within a community's legal practice.[109] Accordingly, consensus and convergence may work up to a point, but it is not a complete answer.

(c) Pluralism and localised forms of balancing and practical reasoning

One final group of pluralistic theories involve, broadly speaking, a commitment to localised forms of values-balancing and practical reasoning. Approaches which emphasise close attention to how values play out in particular cases are by no means novel. For example, Collins' well-known work has stressed

[101]TW Merrill and HE Smith 'The morality of property' (2007) 48 William & Mary Law Review 1849 at 1856.

[102]*Lumley v Gye* (1853) 118 ER 749.

[103]See discussion in R Bagshaw 'Inducing breach of contract' in J Horder (ed) *Oxford Essays in Jurisprudence, 4th series* (Oxford: Oxford University Press, 2000).

[104]R Craswell 'Instrumental theories of compensation: a survey' (2003) 40 San Diego Law Review 1135 at 1139–1140.

[105]Ibid, at 1137.

[106]See EA Posner 'Economic analysis of contract law after three decades: success or failure?' (2003) 112 Yale Law Journal 829.

[107]J Habermas 'Reconciliation through the public use of reason: remarks on John Rawls's *Political Liberalism*' (1995) 92 Journal of Philosophy 109 at 110.

[108]E Wingenbach 'Unjust context: the priority of stability in Rawls's contextualized theory of justice' (1999) 43 American Journal of Political Science 213 at 214.

[109]R Dworkin *Law's Empire* (Cambridge, MA: Harvard University Press, 1986) pp 255–266.

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that the content of contract law depends not purely on promissory morality but 'upon a rich dialogue with a variety of normative standards drawn from politics, morality, economics, public policy, conventions, and values internal to the legal system'.[110] The 'normative complexity' of contract is revealed even in textbook cases such as *Gibson v Manchester City Council*[111] where an excessively narrow focus on the traditional mirror-image approach is said to miss out on other important considerations such as the protection of detrimental reliance, and the value of informal alternative conventions for identifying agreement.[112]

Similarly, though more with more explicit emphasis on pluralism's philosophical foundations, Saprai has recently put forward a non-foundationalist account of contract. Saprai's account rejects a 'platonic' vision of contract and proposes reference to values that 'are contingent to particular times and places, undetermined, that is, subject to a multiplicity of reasonable interpretations and specifications, and irreducibly plural', such that 'it is the responsibility of the courts to balance and rank these competing values to suit local conditions and circumstances'.[113] Saprai draws inspiration directly from Dworkin, not only for the familiar notion that adjudication aims at the best constructive interpretation of a community's legal practice, by identifying implicit moral propositions that fit and justify the institutional data of contract law, but also to observe how Dworkinian thought points toward 'local' priority or coherence within the particular departments of law. This is contrasted with the utopian dream of coherence across the law as a whole: 'While *global* coherence looks like an impossible dream for earthly judges, *local* coherence – coherence *within* particular departments of law…is achievable.'[114] Hence, the principle that one should not profit from one's own wrong might explain disgorgement damages, *Riggs v Palmer*,[115] and the length of time required to gain title by adverse possession. However, given that most contractual doctrines are composite, the local instantiation of a principle must be weighted as against other important moral and political principles in concrete circumstances.[116] In addition, local priority also promotes legitimacy by directing us towards popular views about the moral principles that particular areas of doctrine implicate, making for a more 'republican' outlook where the tension between conventional and critical morality is addressed contextually, and conduces towards wider understanding and discourse in matters of principle.[117]

This form of pluralism has many attractions, though there are familiar worries that this does not provide anything like an algorithm for achieving rational resolution, often associated with an 'incommensurability' critique. These have been discussed elsewhere,[118] but it suffices to emphasise that insofar as incommensurability is understood more precisely as concerning items that 'cannot be put on the same scale of units of value', without a 'cardinal unit of measure that can represent the value of both items',[119] it is clear that this is a common phenomenon in both law and life,[120] and that reasoned evaluation often proceeds without taking the alignment of all values along a single metric. Instead, what is relevant is the possibility of the comparability of values. While justice and mercy are said to be incommensurable, they are arguably comparable with respect to a specific criterion or covering consideration, such that we can say justice is preferable to mercy with respect to security of private law entitlements and crime control, and vice versa where the covering consideration is personal virtue.[121]

[110]Collins, above n 20, p 33.
[111][1979] 1 All ER 972.
[112]Collins, above n 20, pp 39–40.
[113]Saprai, above n 2, p 69.
[114]Ibid.
[115](1889) 115 NY 506.
[116]Saprai, above n 2, pp 49–50.
[117]Ibid, p 69.
[118]See CR Sunstein 'Incommensurability and valuation in law' (1994) 92 Michigan Law Review 779; R Chang 'Value incomparability and incommensurability' in I Hirose and J Olson (eds) *The Oxford Handbook of Value Theory* (Oxford: Oxford University Press, 2015).
[119]Chang, above n 118, p 205.
[120]Sunstein, above n 118, at 798.
[121]Chang, above n 118, p 207.

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Moreover, the value of a localised analysis should not be underestimated, for 'even if two abstract values are incomparable…some of their instantiations may be comparable'.[122] Take for instance the test for the enforceability of a restrictive covenant, which requires that it be reasonable in the interests of the parties and the public.[123] We might say that the test involves values that are difficult to compare purely at the conceptual level – freedom of contract on one hand, and on the other the value of the defendant's 'future freedom',[124] and the public interest in efficient and competitive functioning of the market economy. Yet in each specific case, these competing values take on particular weights, in relation to the types of proprietary interests secured by the covenant (goodwill, trade secrets, customer connections, investments in a workforce), the scope of protection asserted (contrast a bare non-compete with a confidentiality or non-solicitation clause), and the range of situations in which the test is applied (employment as opposed to sale of business).[125] Accordingly, while working through the pluralistic normative landscape is always challenging, it 'does not entail paralysis, indeterminacy, or arbitrariness'.[126]

4. Towards a model of meta-pluralism

(a) Macro, meso and micro-level analyses

Thus far, I have set out various models of contractual pluralism and defended features of which I find appealing. I propose that we can use aspects of the models explored above to construct a working framework for an integrated form of 'meta-pluralism'. To borrow the language of action frames in social theory,[127] we can shape the norms of contract law at the macro, meso, and micro levels.

First, at the macro level, the terrain is populated by various spheres of contractual justice, which reflect the great variety of socio-economic arrangements facilitated through contract law: commercial transactions, consumer sales, employment and personal services, family and more intimate relations, and so on, as emphasised by Dagan and Heller's choice theory. This form of mapping domains of human interaction, though to some extent conventionalist in its tracking of socio-legal categories, finds significant parallels in strands of political theory that underscore the pluralistic nature of social goods and their differentiation across different distributive spheres,[128] and moreover is defensible as an application of 'situation-sense', in its understanding of legal norms as clustering around intricate models of interaction which include paradigmatic type-situations and the relationships between type-characters.[129]

At the same time, as Dagan and Heller observe, '[c]hoice theory is *insistently agnostic* regarding the various combinations of "dosages" of community and utility that a society chooses in its contract types'.[130] This leads us to a second meso-level analysis of the regulative norms within and across contractual spheres. My contention is that at this level, there is a limited form of overlapping consensus, convergence or incompletely theorised agreement as to certain trans-substantive structural concepts, such as good faith, reasonableness, foreseeability, types of rights and their correlatives, and so on.[131]

[122]Ibid, p 210.

[123]*Thorsten Nordenfelt v The Maxim Nordenfelt Guns and Ammunition Company, Ltd* [1894] AC 535, 565; see further *Tillman v Egon Zehnder Ltd* [2019] UKSC 32.

[124]SA Smith 'Future freedom and freedom of contract' (1996) 59 MLR 167.

[125]SA Smith 'Reconstructing restraint of trade' (1995) 15 Oxford Journal of Legal Studies 565.

[126]Sunstein, above n 118, at 860.

[127]See D Rueschemeyer *Usable Theory: Analytical Tools for Social and Political Research* (Princeton, NJ: Princeton University Press, 2009) ch 2.

[128]See M Walzer *Spheres of Justice: A Defense of Pluralism and Equality* (New York: Basic Books, 1983).

[129]TD Rakoff 'The implied terms of contracts: of "default rules" and "situation-sense"' in J Beatson and D Friedmann (eds) *Good Faith and Fault in Contract Law* (Oxford: Oxford University Press, 1995) p 214.

[130]H Dagan and M Heller 'Freedom, choice, and contracts' (2019) 20 Theoretical Inquiries in Law 595 at 628 (emphasis in original).

[131]See S Balganesh and G Parchomovsky 'Structure and value in the common law' (2015) 5 University of Pennsylvania Law Review 1241.

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Such structural concepts could be said to have a fairly thin jural aspect that enables widespread use by participants in legal discourse, which 'leaves sufficient elbow room for normative value-driven/based constructions'.[132] One regulative structural concept in contract law, especially in the remedial sphere, is the notion of a 'legitimate interest': the 'availability of remedies for a breach of duty is not simply a question of providing a financial substitute for performance', but 'engages broader social and economic considerations, one of which is that the law will not generally make a remedy available to a party, the adverse impact of which on the defaulter significantly exceeds any *legitimate interest* of the innocent party'.[133] Of course, the concept of a 'legitimate interest' can be instantiated differently depending on the remedial measure in question.[134] A countervailing structural concept might be remedial 'joint cost-minimisation',[135] understood broadly as a 'guiding principle' that the expectation interest should be effected 'in the way that imposes the least cost on the promisor';[136] it is said that 'though the overriding goal remains protection of the plaintiff's expectation, this should be done as cheaply as possible, and alternatives to performance should be considered', taking into account bilateral considerations as well as that of the contracting system as a whole.[137] Joint cost-minimisation is a widely-recognised theme that animates the rule in *White and Carter*,[138] what has been called 'built-in' mitigation under the difference in value measure in sale of goods cases where there is an available market which the buyer or seller should turn to with all reasonable speed,[139] the proportionality requirement limiting recovery of damages in some property or services cases to amenity damages,[140] and so on.

As alluded to, while helping out to anchor argument, analysis at the meso-level does not yield answers at the level of case-specific application. This requires a third, micro-level analysis, involving localised practical reasoning where concepts like 'legitimate interest' are fleshed out and acquire particular normative weight. To anticipate the discussion below, one can assert a legitimate interest in physically unique goods by reference to the value of 'personhood' property.[141] Alternatively, some goods might be 'commercially unique' by appeal to the value of utility, as an integral factor of production, being 'unique to, ideally integrated into and an important part of, a plaintiff's wider business interests or asset mix',[142] or irreplaceable where acquiring substitutes 'would be so difficult or would cause such delay that the claimant's business would be seriously disrupted'.[143] The extent of the 'legitimacy' of an interest becomes a context-specific inquiry within various spheres and types of contracting.

The suggested framework of meta-pluralism thus sees analyses at the macro, meso, and micro levels coming together in a complementary and mutually-reinforcing structure.[144] Its theoretical virtues are as follows. First, as I will elaborate below, it seeks to make sense of complex areas of law like specific performance in a way that is more illuminating than either monism or dualism. In justifying specific performance, a promissory monist like Shiffrin might simply insist that a 'promisor is morally expected to keep her promise through performance', and that contract law falls short insofar as it

[132]Ibid, at 1247.

[133]*Cavendish Square Holding BV v Talal El Makdessi and ParkingEye Ltd v Beavis* [2016] AC 1172 at [29].

[134]See S Rowan 'The "legitimate interest in performance" in the law on penalties' (2019) 78 CLJ 148.

[135]CJ Goetz and RE Scott 'The mitigation principle: toward a general theory of contractual obligation' (1983) 69 Virginia Law Review 967.

[136]Morgan, above n 39, at 584.

[137]See D Campbell 'The relational constitution of remedy: co-operation as the implicit second principle of remedies for breach of contract' (2005) 11 Texas Wesleyan Law Review 455.

[138]See text to above n 41.

[139]For non-delivery, see Sale of Goods Act 1979, s 51(3), and for non-acceptance, s 50(3).

[140]*Ruxley Electronics and Construction v Forsyth* [1996] AC 344 at 361.

[141]M Radin 'Property and personhood' (1982) 34 Stanford Law Review 957.

[142]SR Gordon et al 'May you litigate in interesting times: specific performance, mitigation, and valuation issues in a rising (or falling) market' (2018) 56 Alberta Law Review 367 at 377.

[143]A Burrows *Remedies for Torts, Breach of Contract, and Equitable Wrongs* (Oxford: Oxford University Press, 4th edn, 2019) p 405.

[144]I am grateful to the reviewers for their comments on this part of the analysis.

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adopts an expectation damages default.[145] A dualist like Brudner might latch upon the distinction between detachment versus self-determination, which as we have seen is somewhat off the mark in terms of doctrinal fit. The pluralist will explain that the considerations underlying specific performance are best captured through macro, meso and micro-level analyses. Secondly, the framework advocated here builds on the signal advantages of existing models of pluralism, charitably conceived. It attempts to demonstrate that these models taken alone are insufficient in making sense of contract. At the same time, they are not flatly inconsistent, nor are they completely talking past each other. Rather, the key to harnessing their insights is by viewing the different levels of analysis in the suggested three-tiered framework, which helps us to rationalise the data of contract law by directing us first towards the macro-institutional frame of contracting spheres, next taking into account meso-level trans-substantive concepts anchoring debate and discussion, and thirdly, the micro-site of localised balancing and practical application of values. The reconciliation can be summarily depicted as follows.

Level of analysis	Description of domain	Illustration	Promotes a workable form of pluralism via:-
Macro-level	Spheres of contractual justice with menu of contracting types	Family, employment, corporate, commercial, consumer etc	Autonomy through choice across spheres and types
Meso-level	Trans-substantive concepts anchoring normative argument	Legitimate interest; joint cost-minimisation (in remedial sphere)	Thin juristic consensus over key regulative concepts
Micro-level	Localised balancing of values	Legitimate interest: value of binding commitments, value of personhood property, value of economic utility etc Joint-cost minimisation: Accounting for value of positive autonomy and freedom from severe hardship, value of 'change of mind', value of efficient enforcement and administration of contractual justice etc	Practical application and localised rationalisation of various normative considerations in adjudication

Thirdly, by tying structure, concepts, values and application together, the framework hopes to redeem the promissory note of a meaningful account of contract law. Take as a brief contrast the sort of theoretical reconciliations adopted in philosophy, such as Rawls' attempt to order political values in a lexical priority consisting of equal basic liberties, fair equality of opportunity, and socio-economic inequalities governed by the difference principle, as constraints over the pursuit of consequentialist objectives.[146] Despite any merit this account might have in depicting 'justice' at the abstract level of the basic structure of a political community, its method of reconciliation is not easily transposed to contract law, especially if we wish to avoid general ideas simply 'spinning frictionless in the void'.[147] Rather, our approach in contract requires close attention to considerations at various levels of concretisation, from the institutional to the conceptual and the practical.

(b) Pluralism in practice: a case study in the varieties of specific performance

(i) Contracts for the sale of land

It is said that specific performance is an equitable and discretionary remedy, which is not given as of right but subject to clearly established bars, such as adequacy of damages, the constant supervision

[145]Shiffrin, above n 3, at 722.

[146]See J Rawls and EI Kelly (eds) *Justice as Fairness: A Restatement* (Cambridge, MA: Harvard University Press, 2001) pp 42–43.

[147]To appropriate McDowell's felicitous phrase: see J McDowell, *Mind and World* (Cambridge, MA: Harvard University Press 1996) p 11.

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objection, the employment or personal services restriction, uncertainty, impossibility, severe hardship, and want of mutuality, to name a few.[148] Let us examine a few examples of how the meta-pluralistic framework unpacks the doctrine in a fruitful manner.

In the macro-sphere of real property transactions, the doctrinal starting point is that damages are presumptively inadequate because land is unique.[149] At the meso-level, one looks at the claimant's legitimate interest in seeking specific performance. A claimant may have a subjective valuation of a piece of land over the market price where residential purposes are concerned, or even as a long-term investor where comparable gains are difficult to assess. However, applying an appropriate micro-level inquiry, one might conclude that no such legitimate interest is present where the claimant's purpose in purchasing the land is purely for a quick resale profit.[150] As such, some Canadian courts have adopted a 'critical inquiry as to the nature and function of the property in relation to the prospective purchaser',[151] viz, a more tailored legitimate interest test, which involves the court examining whether a claimant might have a business rationale or longer-term development strategy for the property that renders it unique for the claimant's purposes.[152] On the other hand, when looking at countervailing concept of joint-cost minimisation, we might conclude that compelling the defendant to perform under conditions where the initial assumption of a mutually beneficial exchange does not presently obtain will result in unnecessary costs. Hence it would be preferable to protect the claimant's interest with damages while allowing the defendant to cut her losses as far as possible. This is quite clearly seen in the 'severe hardship' bar to specific performance, for instance in extreme situations where a claimant was not granted specific performance of a contract to purchase a house because the defendant-vendor's personal circumstances had changed drastically.[153] Specific performance may be refused 'where the cost of performance to the defendant is wholly out of proportion to the benefit which performance will confer on the claimant',[154] which is very much a contextual inquiry situated within this larger sphere of transactions.

(ii) Employment and services

Take as a contrast the macro-sphere of employment and personal services. The doctrinal starting point treats such contracts as coming under a bar on the availability of specific performance.[155] Applying our framework, we might say that within this sphere, the meso-level concepts of legitimate interests and countervailing need for cost-minimisation take on different contextual weights depending on the sub-categories within the sphere and their application at the micro-level of individual disputes. As against employees, this bar is well-established and statutorily enshrined in UK law.[156] The primarily financial interests of an employer in securing the employee's services, even where close substitutes are unavailable, runs up against the cost to the employee's autonomy. It is argued that contracts of service might become contracts of involuntary servitude;[157] or that there is a 'value of change of mind' which should permit autonomous persons to 'learn, mature and recreate ourselves'[158] and revise their ground projects. However, these considerations stack up differently when considering specific

[148]Burrows, above n 38, p 149.

[149]*Sudbrook v Eggleton* [1983] 1 AC 444 at 478; see further PS Davies 'Being specific about specific performance' (2018) 4 Conveyancer 324.

[150]*Paramadevan v Semelhago* [1996] 2 SCR 415 at [21].

[151]See *904060 Ontario Ltd v 529566 Ontario Ltd* (1999) 89 OTC 112 at [14]; *Raymond v Raymond Estate* 2011 SKCA 58 at [15].

[152]See *Covlin v Minhas* 2009 ABCA 404; *532782 BC Inc v Republic Financial Ltd* 2001 ABQB 581; *cf Harle v 101090442 Saskatchewan Ltd* 2014 SKCA 6.

[153]*Patel v Ali* [1984] Ch 283.

[154]H Beale (ed) *Chitty on Contracts* (London: Sweet & Maxwell, 32nd edn, 2015) para 27-048.

[155]Burrows, above n 38, p 23.

[156]Trade Union and Labour Relations (Consolidation) Act 1992, s 236.

[157]*De Francesco v Barnum* (1890) 45 Ch D 430 at 438.

[158]M Chen-Wishart 'Specific performance and change of mind' in G Virgo and S Worthington (eds) *Commercial Remedies: Resolving Controversies* (Cambridge: Cambridge University Press, 2017) pp 116, 121.

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performance against employers. It is said that 'in recent years the common law has shown much greater willingness to acknowledge that a worker has a variety of interests in the employment relationship'.[159] Conversely, there is an asymmetry of control, power and access to resources such that specific performance 'does not have the same element of subjugation that making an employee specifically perform does'.[160] This recalibration is exhibited in the wrongful dismissal jurisprudence, where courts have seen fit to specifically enforce contractually-agreed disciplinary procedures.[161] While one would be hard pressed to argue that an employee has a legitimate interest in lifetime employment, it would surely be reasonable to see employees as having legitimate personal and reputational interests in properly-executed disciplinary hearings, particularly where the procedural irregularities were serious,[162] and dismissal without due process would make it difficult to get an equivalent position.[163]

At times, the countervailing considerations involve disproportionate costs. Accordingly, in applying the notion of joint-cost minimisation, specific performance will not be ordered where constant supervision is required, since the court could not be constantly watching over a continuing contract, such as an obligation to provide a porter constantly in attendance[164] or an artiste's obligation to perform.[165] This would require courts to entertain repeated and costly litigation to execute orders that might demand 'an indefinite series of rulings'.[166] Again, the extent of these systemic costs are context-specific: unlike orders to carry on activities, orders to achieve a particular result may not involve continual litigation,[167] and costs of enforcement might be attenuated by having a sufficient definition of what is required to be done in the order, so that courts can verify compliance without having to incur the time and expense of interpreting or implying further terms.[168] A determination of specific performance thus requires an understanding of how sphere-specific normative considerations of employer or employee-legitimate interests are balanced against particular countervailing costs to parties or the contracting system in making the award.

(iii) Consumer contracts

Lastly, consider the macro-sphere of consumer transactions. The current regime in UK law under Part 1 of the Consumer Rights Act 2015 provides a number of special remedies for a consumer under a contract for the supply of goods or digital content, to the effect that various instances of non-conformity give the consumer a right to repair or replacement, within a reasonable time, unless repair or replacement is impossible or disproportionate (as between these two rights);[169] and in the case of a supply of services by a trader, a consumer has a parallel right to require repeat performance within a reasonable time in the case of non-conformity, unless this would be impossible.[170] Courts have the power to enforce these remedies by an order of specific performance pursuant to s 58(2) of the 2015 Act.[171]

From the perspective of meta-pluralism, we can better rationalise the law as follows. Within the sphere of consumer transactions, one has to examine the legitimate interests of consumers as against joint-cost minimisation considerations in deciding whether to make specific performance available.

[159]D Brodie 'Specific performance and employment contracts' (1998) 27 Industrial Law Journal 37 at 44.

[160]Saprai, above n 2, p 139.

[161]See eg *Chhabra v West London Mental Health NHS Trust* [2014] ICR 194; *Stevens v University of Birmingham* [2016] 4 All ER 258; *Edwards v Chesterfield Royal Hospital NHS Foundations Trust* [2012] 2 AC 22.

[162]*West London Mental Health NHS Trust v Chhabra* [2014] ICR 194.

[163]*Irani v Southampton and South West Hampshire Health Authority* [1985] ICR 590.

[164]*Ryan v Mutual Tontine Association* [1898] 1 Ch 116.

[165]*Giles & Co Ltd v Morris* [1972] 1 WLR 307 at 318.

[166]*Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] AC 1 at 12.

[167]Ibid, at 13.

[168]See *Rainbow Estates Ltd v Tokenhold Ltd* [1999] Ch 64 at 73.

[169]Consumer Rights Act 2015, s 19(3)(b) and s (4)(a) read with s 23 in the case of goods; s 42(2)(a) read with s 43 in the case of digital content.

[170]Consumer Rights Act 2015, s 54(3)(a) read with s 55.

[171]Consumer Rights Act 2015, s 58(2).

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Despite the fact that consumer goods, digital content, or services are not invariably unique goods, it is arguable that the consumer's legitimate amenity and other interests in performance are best served through a more protective remedy, given that sellers are likely to have better access to the market, knowledge of market conditions, and comparative advantage in evaluating quality of performance, hence leading to lower cover costs.[172] These point in favour of specific performance, as opposed to giving consumers cover damages to seek a market cure. Of course, cost considerations are bound to surface contextually in micro-level analysis. Hence, while the availability of specific remedies of repair or replacement cannot be discretionarily limited on the basis that they are costly compared with other remedies such as a price reduction or damages,[173] the statutory provisions are tailored to allow for a disproportionality comparison as *between* repair or replacement remedies in goods[174] and digital content contracts.[175] For example, if the costs to the trader of replacement would be half that of repair, the latter might be deemed disproportionate, but arguably not if replacements cannot be procured quickly enough, taking into account inter alia the significance of the defect both monetarily and practically, as well as the inconvenience caused to the consumer.[176] Again, within the distinct macro-sphere of consumer contracts, the meso-level concepts of legitimate interest and joint cost-minimisation play out quite differently in micro-level application.

(c) Pay-offs of a pluralistic approach

Adopting a pluralistic framework has the further benefit of dissolving certain persistent puzzles over the nature of contract. Recall that a strong promissory account, such as Shiffrin's, insists on the moral priority of specific performance, as the nature of the contractual obligation should allegedly reflect the moral commitments made through the practice of promising, in order for contract law to exhibit compatibility with the conditions for flourishing moral agency. Hence, once we pass over from specific performance to damages, '[t]he law…fails to use its distinctive powers and modes of expression to mark the judgment that breach is impermissible as opposed to merely subject to a price…reflect[ing] an underlying view that promissory breach is not a wrong, or at least not a serious one'.[177]

In diametric opposition to this view is the amoral Holmesian perspective that the 'duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it, and nothing else'.[178] One influential refinement of the Holmesian view is found in the work of Markovits and Schwartz, who argue that contracts between commercial parties should be understood through a 'dual-performance' hypothesis: the contractual obligation is in truth a 'perform or pay' set of options, rather than a straightforward obligation to perform.[179] This is allegedly grounded on the rationality of promisees standing to gain more from better price terms in exchange for an expectation damages regime, as opposed to a specific performance default which would lead a promisor to charge a higher price if she does not have the option to renege and accept better offers in standard cases of gain-based 'efficient' breaches.[180]

From a pluralistic perspective, both views fail to demonstrate a situation-sense of macro-level spheres of contracting, the various meso-level considerations of legitimate interests and joint-cost minimisation, and how these are tailored to micro-level applications. Consequently, they end up

[172]A Schwartz 'The case for specific performance' (1979) 89 Yale Law Journal 271 at 287.

[173]Joined cases C-65/09 and C-87/09, *Gebr Weber GmbH v Wittmer* and *Putz v Medianess Electronics GmbH* [2011] WLR (D) 210 at [68], [71].

[174]Consumer Rights Act 2015, s 23(3)(b) and s 23(4).

[175]Consumer Rights Act 2015, s 43(3)(b) and s 43(4).

[176]See G Woodroffe et al *Woodroffe & Lowe Consumer Law and Practice* (London: Sweet & Maxwell, 10th edn, 2016) p 143.

[177]Shiffrin, above n 3, at 724.

[178]OW Holmes 'The path of the law' (1897) 10 Harvard Law Review 991 at 995.

[179]D Markovits and A Schwartz 'The myth of efficient breach: new defences of the expectation interest' (2011) 97 Virginia Law Review 1939.

[180]Ibid, at 1950–1952.

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universalising in a hyper or hypo-moralist direction. Take Shiffrin's promissory account: Shiffrin tends to speak of contract (as opposed to contracts) in the abstract, suggesting a certain degree of homogeneity as a matter of institutional practice. Her argument ends up misconstruing the variegated contractual landscape, the need to recognise relevant legitimate interests as well as the normative pull of joint-cost minimisation considerations, and their instantiation in different scenarios. A pluralistic model views the morality of contract law as 'less the stern morality of promise keeping as a morality of adjustment, release and forgiveness in contractual relations'.[181] We have seen this exhibited in the above analysis, where the tension between keeping parties bound to give effect to legitimate contractual interests competes with notions of joint cost-minimisation in different contexts, such that severe hardship concerns in a sale of residential property, autonomy concerns in employment contracts, disproportionality concerns in consumer contracts, and wider systemic and administrative costs of enforcement may all play a role in providing countervailing reasons for departing from specifically enforcing a contractual obligation. Hyper-moralism is thus too undiscriminating, failing to appreciate that the morality of contract is informed by a plurality of considerations.

Likewise, from the perspective of pluralism, the economistic picture misses the point. It is not true that once a strong promissory account is rejected, the alternative is a general and un-contextualised privilege to 'perform or pay', unmediated by the considerations that lead to a more textured remedial regime. First, most 'efficient' breaches are loss-minimising, referring to situations where there is a subsequent rise in the cost of performance due to imperfect information about the future states of the world at the time of contracting, leading to a good faith defendant having to breach and pay damages rather than to incur the prohibitive costs of performance.[182] Here, contract law does not allege the moral equivalence of Holmesian options, recognising that a wrong has been done, but reasoning as follows: if there is severe hardship to the promisor in the form of extreme personal circumstances, and an order for specific performance of a residential property would exacerbate such hardship significantly, but an order for damages would not, while giving a promisee the means to be put in a position as if the contract were performed, the latter is to be preferred.

Secondly, where efficient breach refers to gain-based scenarios, neither is it the case that the law endorses the Markovits and Schwartz view that one can always infer from a putative lower price the conclusion that parties would have actually agreed upon a priced-adjusted compensatory damages regime and waived any preference for specific performance or supra-compensatory remedies, when they may not have contemplated such default remedial terms at all.[183] Rather, contract law awards the well-known remedy of negotiating damages on the basis of a legitimate remedial interest: 'the claimant has in substance been deprived of a valuable asset, and his loss can therefore be measured by determining the economic value of the right in question, considered as an asset'.[184] The precise nature of this valuable interest has been expressed in different ways[185] – as an opportunity to bargain for a licence fee; dominium or control; the power to insist on claim rights or stop an infringement by applying to court for *ex ante* injunctive relief – but again at the bottom-line the failure to perform remains a wrong requiring a remedy to vindicate the particular interest undergirding the contractual right. Of course, joint-cost minimisation considerations inform the award of negotiating damages, such that one guideline is for the court to be satisfied that orthodox compensatory measures and specific relief are unavailable, hence excluding situations of mere evidential difficulty, and confining the award to rarer situations of 'damages without loss' or exceptional cases where damages are practically impossible to quantify.[186] Accordingly, a

[181]JM Lipshaw 'Contract as meaning: an introduction to "contract as promise at 30"' (2012) 45 Suffolk University Law Review 601 at 615.

[182]D Campbell and D Harris 'In defence of breach: a critique of restitution and the performance interest' (2002) 22 Legal Studies 208 at 218.

[183]See G Klass 'To perform or pay damages' (2012) 98 Virginia Law Review 143 at 146–147.

[184]See *Morris-Garner and Another v One Step (Support) Ltd* [2019] AC 649 at [95].

[185]See the literature review in K Barker '"Damages without loss": can Hohfeld help?' (2014) 34 Oxford Journal of Legal Studies 631.

[186]*Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2018] 2 SLR 655 at [220]–[225].

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pluralistic account directs our attention to how various considerations of legitimate interests and joint-cost minimisation play out across different forms of breach, and makes more sense of the remedial landscape than the hypo-moralistic economic perspective. In short, both 'always keep your promises' and 'there is no wrong in efficient breach' are overly reductive from a pluralistic perspective.

Conclusion

I have hoped to make a number of contributions to the project of pluralism in contract theory: to identify where monism and dualism fall short, to discuss key forms of pluralism in contemporary discourse, and to suggest a working framework of 'meta-pluralism' integrating these forms at macro, meso and micro-levels, fleshed out through a case study on the varieties of specific performance, which leads us to an enriched understanding of the nature of contract. Still, I have made no pretension to a grand reconciliation of plural values (à la Dworkin in *Justice for Hedgehogs*) across the entire field of contract. One may possibly still think the pluralist like Mr Brooke in Eliot's *Middlemarch*, grappling haplessly over the form and limits of theory:[187]

> The fact is, human reason may carry you a little too far – over the hedge, in fact. It carried me a good way at one time; but I saw it would not do. I pulled up; I pulled up in time. But not too hard. I have always been in favour of a little theory: we must have Thought; else we shall be landed back in the dark ages.

Perhaps we ought to be more charitable. The contract law pluralist, in recognising the diverse terrain of the normative landscape, holds out for the possibility of rational resolution, hence embracing both anti-scepticism and fallibilism, yet coupled with the modest hope that what she is chiselling away at amounts to a little more than 'muddling through'.[188]

[187]G Eliot *Middlemarch* (London: Penguin, 2003) p 17.

[188]See PS Atiyah *Pragmatism and Theory in English Law (The Hamlyn Lectures)* (London: Stevens and Sons, 1987) p 6.

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