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AUTONOMY, PLURALISM, AND
CONTRACT LAW THEORY

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Abstract

Autonomy-based theories of contracts tend to ascribe a rather modest role to the law and to conceptualize contract law as a unified body of doctrine governed by one regulative principle. But if autonomy stands for the commitment that people should, to some degree, be the authors of their own lives, both of these typical features are wrong or at least exaggerated. An autonomy-based contract law should be attentive to the *pluralist* prescription of offering people a sufficiently diverse set of robust frameworks to organize their various endeavors and interpersonal relationships. And it should *actively* empower people's attempts to form collaborative contractual arrangements—both discrete and impersonal, as well as long-term and relational—by providing the necessary background regime for such risky undertakings.

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I. INTRODUCTION

The proposition that the commitment to individual autonomy is one of the most important foundations of contract is a truism; almost a cliché.¹ Contract, in this common account, is the legal cousin of the social practice of promise or voluntary obligation, and the significance of that practice to autonomy implies that contract law should be guided by the will of the parties or by their mutual consent. Accordingly, contract law, in this view, is both passive and structurally monist: it should be relatively passive due to the injunction to merely piggyback on people's expressions of their will; it should be structurally monist—it is a unified body of doctrine guided by one regulative principle—because its normative underpinnings are the same irrespective of the type of contract at hand.²

But the seemingly necessary association of autonomy-based justifications of contract with contract law passivity and structural monism is mistaken.³ It underrates the significance of the shift from the social (and moral) to the legal both in terms of the value of the pertinent practice and in terms of the potential of securing this value in the real

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¹ To be sure, while some contract theorists find autonomy to be the sole basis of contract, many invoke other values—notably efficiency—as well.

² See CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* (1981); Randy E Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269 (1986).

³ This mistake is also unfortunate. As the following text argues, it tends to misdirect contract lawyers who are committed to autonomy. Furthermore, it may also imply that lawyers who believe that contracts law can, and should, serve other values besides autonomy should resist, or at least minimize, the significance of autonomy to contracts.

world. Contract law facilitates—at times even enables—many more forms of voluntary obligations than its social counterpart can, notably obligations between strangers which may be too risky without legal facilitation. In fact, insofar as the ideal of autonomy as self-authorship is concerned,⁴ expanding these possibilities of interpersonal interactions may well be contract law's most important mission. This potential role of contract law in offering people a diverse set of robust frameworks to organize their life, thus contributing to their ability to be the authors of their own lives, implies that an autonomy-based justification of contract should be neither passive nor structurally monist.⁵ Quite the contrary: it requires a structurally pluralist theory of contract, in which contract law is an umbrella of a diverse set of contract institutions, where each institution responds to a different regulative principle, namely: vindicates a distinct balance of values in accordance to its characteristic subject-matter and the ideal type of the parties' relationships it anticipates.⁶

Revisiting Joseph Raz's account of the relationship between contract law and voluntary obligations is particularly helpful for establishing these claims and pointing out the ways in which these mistakes can be corrected. Although rather brief and scattered, Raz's remarks on contracts—which, like other autonomy-based theories, offer a rather passive and structurally monist account of contract law—“continue to resonate in the literature”⁷ and are likely to be further influential given his prominence as a legal philosopher. But Raz is also one of our most distinguished political philosophers, and as such he is closely identified with the notion that a commitment to autonomy as self-authorship imposes on the state important responsibilities in supporting pluralism. Thus, Raz's own theory of autonomy and its implications on the role of the state and its law

⁴ This ideal of personal autonomy is clearly distinguished from Kant's conception of personal independence, which is exhausted by the requirement that no one gets to tell anyone else what purposes to pursue, and is thus not a good to be promoted but a constraint on the conduct of others. See ARTHUR RIPSTEIN, *FORCE AND FREEDOM: KANT'S LEGAL AND POLITICAL PHILOSOPHY* 14, 34, 45 (2009).

⁵ Arguably, efficiency may also serve as the normative foundation of structural pluralism, but for this it is not enough to show that efficiency considerations underlie many rules of various contract institutions. Rather, one must demonstrate that like autonomy efficiency also entails a robust commitment to pluralism. Furthermore, even if such a claim can be substantiated, there are likely to be differences between autonomy-based pluralism and efficiency-based pluralism. See *infra* text accompanying note 57.

⁶ This revised autonomy-based justification of contract law may also support the view that autonomy is irrelevant for commercial contracts between large businesses. See, e.g., Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 *YALE L.J.* 541, 556 (2003). As Schwartz and Scott suggest, such contracts are mostly about efficiency. Indeed, adding efficiency, and possibly other values, to the normative foundations of contract law reinforces the significance of its structural pluralism.

⁷ Gregory Klass, *Three Pictures of Contract: Duty, Power, and Compound Rule*, 83 *N.Y.U.L. REV.* 1726, 1774 (2008).

provides the best foundation for correcting the blemishes in his (and others') autonomy-based account of contract.⁸

II. RAZ ON CONTRACT LAW

Raz makes two explicit claims regarding contracts, and his discussion includes or implies two further propositions. Separating out these four propositions is important for the purposes of this Essay, which builds on the first two in order to criticize the others.

Raz's core explicit claim, and the starting point of his analysis of contracts, relates to the purpose of contract law. Raz argues that "[t]he purpose of contract law *should* be not to enforce promises, but to protect both the practice of undertaking voluntary obligations and the individuals who rely on that practice." The shift from enforcing promises to protecting the practice of undertaking voluntary obligations is consequential to the way we should shape the law. As he explains, "[o]ne enforces a promise by making the promisor perform it, or failing that, by putting the promisee in a position as similar as possible to that he would have occupied had the promisor respected the promise. One protects the practice of undertaking voluntary obligations by preventing its erosion—by making good any harm caused by its use or abuse."⁹

But why should the law protect the practice of undertaking voluntary obligations? Raz realizes of course the significance of this question. By protecting this practice the law sanctions the "special bond" between the parties which requires "the promisor to be, in the matter of the promise, partial to the promisee."¹⁰ Although promises are not absolutely binding—they do not exclude all other considerations¹¹—they nonetheless exclude at least some reasons for nonperformance.¹² Promises thus privilege one special relationship, "oblig[ing] the promisor to regard the claim of the promisee as not just one of the many claims that every person has for his respect and help." Therefore, law would be justified protecting the practice of promising if and only if "the creation of such special relationships between people is held to be valuable."¹³

⁸ This Essay brackets the question of the institutional source—legislatures or courts—of the various contract institutions. For a related discussion, regarding property institutions, which seems applicable *mutatis mutandis* to contract institutions as well, see Hanoch Dagan, *Judges and Property*, in *INTELLECTUAL PROPERTY AND THE COMMON LAW* * (Shyam Balganesh ed. 2012).

⁹ Joseph Raz, *Promises in Morality and Law*, 95 HARV. L. REV. 916, 933 (1982) (reviewing P.S. ATIYAH, *PROMISES, MORALS, AND LAW* (1981)).

¹⁰ Joseph Raz, *Promises and Obligations*, in *LAW, MORALITY, AND SOCIETY: ESSAYS IN HONOUR OF H.L.A. HART* 210, 227-28 (P.M.S. Hacker & J. Raz eds., 1977).

¹¹ *But cf.* STEPHEN A. SMITH, *CONTRACT THEORY* 54, 74-77, 163 (2004).

¹² Raz, *supra* note 9, at 222-23.

¹³ *Id.*, at 228.

Raz claims that it is indeed “desirable . . . to have a method of giving [others] grounds for reasonable reliance . . . by intending to bind oneself.”¹⁴ While he does not elaborate on the value which justifies the purpose of contract law, it seems that he finds the practice of promising valuable—and this is the second proposition of Raz’s account of contract law—due to both its autonomy-enhancing function and the type of relationships it creates. The practice of undertaking voluntary obligations “enable[s] individuals to make their own arrangements”; and these “special relations,” or “special bonds between people,” which “are voluntarily shaped and developed by the choice of participants,” are morally desirable.¹⁵

Raz’s third proposition relates to the nature of contract law, which in his view “is primarily supportive.” The practice of promising—“unlike the limited liability company”—“is not a creation of the law. Rather, it is like ownership and the family, which are [all] rooted in moral precepts and in social conventions.” Therefore, the main task of contract law for Raz is “recognizing and reinforcing . . . the social practice of undertaking voluntary obligations.” This does not mean that the role of contract law is “merely passive.” Contract law does influence the social practices it supports. It “reinforce[s] confidence in the reliability of existing practices . . . hindering influences that tend to undermine the practices it reinforces.” Furthermore, contract law also “serves to extend such practices,” making “contracts outside the framework of ongoing relations much more common by making them more reliable.” But “[t]he fact that the law of contracts operates predominantly in a supportive . . . role” means that by and large contract law should not be understood as “an initiating system, as a means of creating and changing social arrangements.”¹⁶

The proposition that “the predominant purpose of contract law is to support existing moral practices” has again important doctrinal implications. It explains why by and large “the conditions of the validity of contracts will reflect common moral conceptions concerning the validity of voluntary undertakings,” so that “[d]octrines such as the formation of contract, frustration, mistake, fraud, duress, unconscionability, and others based on public policy considerations might be expected to mirror common moral views.” Raz mentions only two exceptions to this rule, that law follows conventional “moral practices”: law “can and should assume some initiatory functions” insofar as they “reflect moral conceptions held valid by lawmakers, though not yet common in the community” (in matters such as invalidating racist contracts); and it “can protect the practice of undertaking voluntary obligations” by preventing “people from taking advantage of the practice by making it appear that they have agreed to obligations when

¹⁴ Joseph Raz, *Voluntary Obligations and Normative Powers* (pt. 2), 46 PROC. ARISTOTELIAN SOC’Y 79, 101 (Supp. 1972).

¹⁵ Raz, *supra* note 9, at 928, 936.

¹⁶ Raz, *supra* note 9, at 916, 933-34.

they have not,” which explains why “people who do not make a promise but who knowingly, carelessly, or negligently behave in a way that creates the impression that they have done so should be made to compensate those who innocently rely on the supposed promise.”¹⁷

Finally, Raz’s theory of contract law is a structurally monist theory. Like other structurally monist theorists of private law or its branches, Raz argues—and this would be the fourth (and last) proposition of his account of contracts—that contract law in its entirety should be guided by one regulative principle: the underlying purpose he identifies in contract law to protect the practice of undertaking voluntary obligations.¹⁸ This (by and large implicit) proposition is again consequential, as it guides us that in developing contract law we need to consult this one underlying principle irrespective of the type of contract at hand (although the implications of implementing this one principle may of course vary in different contractual settings).¹⁹

Raz’s first two propositions regarding the value of the practice of undertaking voluntary obligations and the role of contract law in protecting this practice are appealing. While it may be disputed if these are, respectively, the only virtues and the sole role of contract law, we can set this question aside, because the main point of this Essay is that even if we stipulate that reinforcing the practice of voluntary obligations is the sole purpose of contract law, Raz’s third and fourth propositions about contract law must be qualified. In order to serve the very purpose and values that Raz ascribes to contract law, it needs to be both more active and more fragmented than Raz acknowledges.

To make good on this critique one needs to further elucidate the moral significance of the practice of undertaking voluntary obligations and to explore the ways in which the law can actively empower this practice. This is the main task of Parts IV and V, which—on both fronts—heavily rely on Raz’s own account of autonomy and its

¹⁷ *Id.*, at 934-35.

¹⁸ To clarify: Raz’s regulative principle is not *substantively* monist: its virtue, for Raz, “rests . . . on its ability to reconcile” law’s facilitative function and the harm principle. Also, Raz is careful not to make an overly ambitious descriptive claim: while arguing that “much of the law is consistent with this view and many of its doctrines are actually motivated by it,” he adds that “it is not the sole underlying theory of the common law,” realizing that “[t]he law reflects too many competing strands of thought.” *Id.*, at 933-34.

¹⁹ Thus, in discussing remedies, Raz claims that although “enforcing voluntary obligations is not itself a proper goal for contract law,” there may be cases in which enforcement is nonetheless “justified as a means to that end,” as it may be necessary in order to “prevent[] harm to the contracting parties and protect[] the practice of undertaking voluntary obligations from erosion.” Hence, he concludes that “[a]n ultimate judgment on the conditions under which enforcement remedies are appropriate requires a detailed consideration of various classes of contracts.” Raz, *supra* note 9, at 937-38.

implications on the role of the state and its laws. But before embarking on this mission, a brief summary of two prior friendly critiques of Raz's account of contract law—Gregory Klass's refinement of "Raz's picture of contract law as both duty imposing and power conferring"²⁰ and Richard Craswell's claim that philosophical theories about promising, such as Raz's, are largely irrelevant to contract law²¹—is in place.

III. TWO PRIOR COMPLAINTS

Klass reads Raz to argue that contract law justifiably facilitates the norms governing certain voluntary obligations "not only because of their morally obligatory character,"²² but also because "both undertaking and performing those obligations are socially valuable." As he explains, if the former "were the only reason for legal enforcement, contract law would have a strictly duty-imposing function," and would thus limit itself to enforcing voluntary obligations without "giving persons the ability to purposively undertake new ones." But in fact contract law as we know it does more than that, as Raz indeed indicates: because of the latter reason—the social desirability of contracts—contract law also serves "to permit and encourage normative innovation, such as transactions between strangers where there is no pre-existing relationship of trust." In this capacity, "contract law anticipates and enables" individual actors who "expect and want" to effect these normative changes, and in this sense "contract is also a legal power."²³

In acknowledging these two faces of contract Raz's theory is, for Klass, an example for a pluralist theory of contract, "according to which contract law imposes a type of duty that also generates a legal power." This is an important achievement because "[c]ontract law is unusual" exactly in that "it is structured to do both at once." It is also significant because it "allows us to see how a single form of legal liability can serve two such very different functions," thus offering "a nonordered pluralist theory" of contract law while resisting recommendations to "divid[e] the law of contracts into different regions, each governed by a single principle."²⁴

Klass claims, however, that Raz goes wrong in underrating the significance of the second function of contract law, which diverges from the extralegal, and therefore in mischaracterizing the relationship between extralegal and legal voluntary obligations.

²⁰ Klass, *supra* note 7, at 1782-83.

²¹ Richard Craswell, *Contract Law, Default Rules, and the Philosophy of Promising*, 88 MICH. L. REV. 489 (1989).

²² Raz, in fact, believes that state enforcement of moral obligations per se is not justified.

²³ Klass, *supra* note 7, at 1778-79.

²⁴ *Id.*, at 1734, 1770, 1773, 1773, 1783.

Thus, a person who is willing to undertake a moral obligation does not necessarily want also “to be legally obliged to comply with it” (especially given the legal remedies for breach of contract). Furthermore, “it is far from obvious that . . . the legal consequences of entering into an agreement for consideration approximate the extralegal ones” (for example, “[n]onmajoritarian or untailed interpretive defaults are [] likely to produce a gap between the parties’ legal duties and their untutored expectations about their obligations to one another”). Klass insists that this gap between legal and extralegal obligation is important because it implies that “the voluntary obligations that contract law supports are not limited to promissory ones and need not result from the exercise of a normative power *per se*,” which falsifies the assumption of many promise theorists that “the promisor will anticipate the legal consequences of her act.”²⁵

On its face, Craswell’s critique of the use of theories about promising in contract law is unrelated to Klass’s discussion. As Craswell explains, the moral obligation of promise-keeping dictates that the promisor fulfill the obligations prescribed by the combination of the express language she used and the legal background rules that “fill out the details of what it is [she] has to remain faithful to, or what [her] prior commitment is deemed to be.” Thus, the value of promise-keeping “cannot guide the legal system in deciding which background rules to adopt in the first place.” Unless the scope of the promisor’s obligation or the consequences of non-performance are explicitly defined by the promise itself, the law must resolve these issues. With the exception of a background rule that would render performance totally optional, the value of promise-keeping is neutral in relation to any possible set of background rules. Promise-keeping requires that the promised course of conduct is made “non-optional to some degree”; it does not dictate any particular degree of non-optionality. Thus, for example, while promise-keeping requires that some sort of sanction be imposed in cases of non-performance, it does not entail any preference of one remedy over another.²⁶

Craswell concludes, more generally, that theories which found the binding force of promises on individual autonomy “have little or no relevance” to “those [vast] parts of contract law that govern the proper remedies for breach, the conditions under which the promisor is excused from her duty to perform, or the additional obligations (such as implied warranties) imputed to the promisor as an implicit part of her promise.”²⁷ In this vein, Craswell exempts Raz’s account of the charge of irrelevance: in his reading, for Raz

²⁵ *Id.*, at 1779-82.

²⁶ Craswell, *supra* note 21, at 490, 504, 515-16, 518. There are some attempts to show that the value of promise-keeping is informative, notwithstanding Craswell’s claim of irrelevance, but they are by and large unconvincing. See HANOCH DAGAN, *THE LAW AND ETHICS OF RESTITUTION* 269-72 (2004). *But see* EYAL ZAMIR & BARAK MEDINA, *LAW, ECONOMICS, AND MORALITY* 306 (2010).

²⁷ Craswell, *supra* note 21, at 489.

the binding force of promises rests on “the value of the special relationships which promises create,” and may thus nonetheless inform contract law by pointing out to “which of all possible relationships [are] the most valuable,” recommending “to adopt the background rules that best facilitated those relationships.”²⁸

Both contributions are important in considering Raz’s theory of contract law. Klass is probably too critical of Raz in (correctly) insisting that the voluntary obligations which contract law supports are not only promissory: recall that Raz’s account implies that protecting the practice of undertaking voluntary obligations may indeed require non-promissory-based liability.²⁹ But Klass is correct in arguing that contract law is much more significant for the legal practice of contracts than the idiom of “primarily supportive” suggests. As Part IV demonstrates, however, Klass’s critique on this front is only the tip of the iceberg; appreciating the demands of Raz’s account of autonomy requires an even more significant qualification of Raz’s third proposition.

Likewise, Craswell’s complaint of irrelevance is important because it should affect Raz who in fact finds much of the value of promising in autonomy.³⁰ The remedy for this complaint is not, however, to focus on a particular type of relationship contract law should nourish, as Craswell implies, but rather to qualify the idea of a monist contract law theory. As Part V shows, Raz’s account of autonomy demands a *structurally* pluralistic theory of contract (exactly the kind of theory Klass believes that Raz helps avoiding); and this type of theory provides quite robust prescriptive recommendations throughout the contractual domain.

It is indeed time now to shift gears to the main task of this Essay: using Raz’s rich conception of personal autonomy in order to critique the view that contract law has (and should have) only a limited “initiative” role and that it is a rather unified body of law, which should be guided by one regulative principle. As we will see, a commitment to personal autonomy à-la Raz requires a different understanding of contract law: a conception of contract law which is, with Klass, much more appreciative of the active role of this body of law; and one that takes the heterogeneity of our existing contract doctrines seriously and thus endorses a structurally pluralist understanding of contract law as an umbrella of contract institutions, where each institution responds to a different regulative principle, namely: vindicates a distinct balance of values and a distinct set of purposes suitable for its particular subject matter. This “truly Razian” conception of contracts includes much more refined instructions than the injunction to protect the

²⁸ *Id.*, at 510.

²⁹ See *supra* text accompanying note 17. See also Hanoch Sheinman, *Contractual Liability and Voluntary Undertakings*, 20 OXFORD J. LEGAL STUD. 205, 216-19 (2000).

³⁰ See *supra* text accompanying note 15. To be sure, there are other readings of Raz, which emphasize the element of “special relationships.” See Daniel Markovits, *Contract and Collaboration*, 113 YALE L.J. 1417, 1440-41 (2004).

practice of undertaking voluntary obligations does, demonstrating that, at least in its Razian rendition, a commitment to personal autonomy can be, *pace* Craswell, quite informative to contract law.

IV. RAZIAN AUTONOMY AND ENABLING LAW

The starting point of our analysis on both fronts is Raz's conception of the ideal of personal autonomy as self-authorship. For Raz, the prescription of autonomy—that people should, to some degree, be the authors of their own lives—requires not only appropriate mental abilities and independence, but also “an adequate range of options.” While a wide range of valuable sets of social forms is available to societies pursuing the ideal of autonomy, autonomy “cannot be obtained within societies which support social forms which do not leave enough room for individual choice.” For choice to be effective, for autonomy to be meaningful, there must be (other things being equal) “more valuable options than can be chosen, and they must be significantly different,” so that choices involve “tradeoffs, which require relinquishing one good for the sake of another.” Thus, because autonomy admits and indeed emphasizes “the value of a large number of greatly differing pursuits among which individuals are free to choose,” valuing autonomy inevitably “leads to the endorsement of moral pluralism.”³¹

Indeed, given the diversity of acceptable human goods from which autonomous people should be able to choose and their distinct constitutive values, the state must recognize a sufficiently diverse set of robust frameworks for people to organize their life. At least if read strictly, to imply that subject to the two limited exceptions noted above³² contract law is, and should be, merely supportive of our extralegal conventions, Raz's third proposition might undermine this important prescription. The reason for this is that, as Raz insists, the state mission of fostering diversity and multiplicity cannot be properly accomplished by a hands-off attitude of the law, because such an attitude “would undermine the chances of survival of many cherished aspects of our culture.” A commitment to personal autonomy thus requires the liberal state, through its laws, to more actively “enable individuals to pursue valid conceptions of the good” by providing “a multiplicity of valuable options.”³³

Contract law indeed plays a crucial role in the practice of undertaking voluntary obligations and thus in the Razian ideal of personal autonomy as self-authorship.³⁴

³¹ See JOSEPH RAZ, *THE MORALITY OF FREEDOM* 372, 381, 395, 395, 398-99 (1986). Cf. ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 309-12 (1974).

³² See *supra* text accompanying note 17.

³³ RAZ, *supra* note 31, at 133, 161, 265.

³⁴ As the text implies, the discussion which follows brackets the question whether the difference of contract from other forms of voluntary obligations entails significant normative implications. It is enough to

Contract law expands “the range of options available to individuals,” thus increasing “the possibility of autonomous action.” And while it is difficult to define “what constitutes an ‘adequate range of options,’” it seems plausible to note that “the range of options that exist in a society without contract law will sometimes be inadequate” and that “contract law makes available options that would otherwise be unavailable.”³⁵

An important reason for this proposition begins with the claim, already raised by Klass, that contract law plays an important role in enabling us to engage in the practice of undertaking voluntary obligations with strangers. While moral commitments, social norms, and reputational concerns often provide some assurances, the *legal* protection of contractual reliance and expectations seems indispensable for a broad social practice of agreements between strangers. By subjecting themselves to the potential deployment of “the powerful institutionalised mechanisms” of contract law, people who have no preexisting reason to trust one another can cooperate with each other and rely on one another counting on each other’s rationality as the sole necessary reassurance.³⁶

Dori Kimel pushes this point even further, arguing that the intrinsic value of contracts is in fact “diametrically opposed” to the value of promises—their social counterparts—which promote personal relationships. By relying on the law, contracts tend to obscure the attitudes and motives of the parties, thus rendering “contractual conduct largely devoid of expressive content” and therefore “singularly inadequate . . . to create and enhance personal relationships.” The value of contracts, Kimel argues, is thus “the value of personal detachment,” that is: of “doing certain things with others not only outside the context of already-existing relationships, but also without a commitment to the future prospect of such relationships.” As he explains, detachment is valuable “as an alternative to dependence on (pre-existing, future) personal relations. And contracts are valuable as a practice that, with regard to a certain range of activities, facilitates this very option.” In this way, “the legal practice of contract is a source of . . . the freedom from dependence upon the very institution—personal relationship—in the enhancement of which lies the intrinsic value of the practice’s non-legal equivalent.”³⁷

While overstated, as I shortly argue, Kimel’s focus on detachment is helpful in demonstrating the requirement of active legal support of contracts. Consider consumer

acknowledge, that if there are such implications, they can refine—or maybe even qualify—my conclusions.

³⁵ SMITH, *supra* note 11, at 139-40.

³⁶ DORI KIMEL, FROM PROMISE TO CONTRACT: TOWARDS A LIBERAL THEORY OF CONTRACT 55, 58, 60, 65 (2003). See also Michael G. Pratt, *Promises, Contracts and Voluntary Obligations*, 56 L. & PHIP. 531, 572 (2007); Menachem Mautner, *Contract, Culture, Compulsion, or: What Is So Problematic in the Application of Objective Standards in Contract Law?*, 3 THEORETICAL INQ. L. 545, 553-59 (2002).

³⁷ KIMEL, *supra* note 36, at 72, 74, 77-80.

transactions, which probably stand for—alongside the symmetric discrete arm’s length exchange transactions anticipated by the so-called classical theory of contract and their service counterparts—the paradigmatic contract category which responds to Kimel’s account of detachment-based autonomy-enhancing contracts. When an individual interacts with a merchant for a relatively inexpensive good or service primarily intended for personal, family, or household use, both parties are indeed typically uninterested in personal relations, and law seems crucial for opening up the option of their transaction in terms of detachment. This option is particularly conducive to consumers’ autonomy (the merchant—typically a corporation—is in the business of making money), because our ability to make such transactions quickly and anonymously allows us to focus our time and attention on our valuable projects. But to allow these important benefits, contract law must be—as it gradually (at times grudgingly) becomes—quite proactive.³⁸ Consumer protection, as the body of law governing these transactions is now called, is accordingly a robust contract institution, typically imposing on businesses heightened duties of product safety and of disclosure and affording consumers wide powers of cancellation, which all go way beyond the protective measures anticipated by “classical” contract law.³⁹

The virtue of contract is not limited, however, to enabling cooperation-in-personal-detachment.⁴⁰ Numerous types of contracts (contract institutions in my terminology) support long-term interpersonal relationships of cooperation. Employment contracts, agency contracts, partnership contracts, landlord-tenant contracts, as well as other categories of “relational” contracts,⁴¹ which (again) form a substantial part of the contractual domain,⁴² are much more complex than the one-shot arm’s length exchange transactions (such as the purchase of a used car from its private owner) which most

³⁸ See Joseph William Singer, *Subprime: Why a Free and Democratic Society Needs Law*, 47 HARV. C.R.-C.L. L. REV. 141, 156-58 (2012).

³⁹ See respectively Howard Latin, “Good” Warnings, *Bad Products, and Cognitive Limitations*, 41 UCLA L. REV. 1193 (1994); Oren Bar Gill, *Behavioral Economics of Consumer Contracts*, 92 MINN. L. REV. 749 (2008); Jan M. Smits, *Rethinking the Usefulness of Mandatory Rights of Withdrawal in Consumer Contract Law: The Right to Change Your Mind?*, 29 PENN ST. INT’L REV. 671 (2011).

⁴⁰ See also Anthony J. Bella, Jr., *Promises, Trust, and Contract Law*, 47 AM. J. JURIS. 25 (2002).

⁴¹ Such as distributorships, franchises, and joint ventures.

⁴² Kimel argues that relational contracts are the “clearest illustration” of the tendency of “personal detachment and personal relations . . . to be mutually reinforcing”: the background reassurance of contract law “is often indispensable in enabling the parties to develop, possibly over time, a relationship that far transcends that set of legally binding rights and duties which the contract constituted or recorded in the first place.” KIMEL, *supra* note 36, at 83. This argument is correct, but it hardly captures the breadth of background legal rules needed for the sustainability of the foreground social norms.

autonomy theorists of contracts (usually implicitly) consider as paradigm.⁴³ Various forms of impediments to contract—information costs (symmetric and asymmetric), cognitive biases, bilateral monopolies, heightened risks of opportunistic behavior, and other types of transactions costs (in the broad sense)—are pervasive in these contractual settings.⁴⁴ To be sure, in certain contexts and for some parties social norms and other extralegal reasons for action or the possibility of *ex ante* explicit contracting may be sufficient. But in a host of other contexts a hands-off policy and a hospitable attitude to freedom of contract can hardly suffice to overcome these endemic difficulties to long-term cooperation.⁴⁵ Even where the parties are guided by their own social norms—as is often the case with relational contracts⁴⁶—contract law is nonetheless significant in providing the parties background reassurances, a safety net for a rainy day that can help catalyze trust in their routine, happier interactions.⁴⁷ Therefore, even where law is rarely invoked, contract law’s active empowerment is likely to be the *sine qua non* of the viability of these challenging though still significant types of interpersonal relationships. (Another important reason for the necessity of legal support is the need to accommodate the interests of third parties with whom the parties to these long-term contractual

⁴³ Cf. P.S. Atiyah, *Book Review*, 95 HARV. L. REV. 509, 516-19 (1981) (reviewing FRIED, *supra* note 2). The text implicitly responds to a possible attempt to resist the argument of Part V by presenting contract rules that apply only to specific transaction types as peripheral to contract law, and generic contract rules—which indeed largely anticipate one-shot arm’s length exchange transactions—as its core. Cf. Daniel Markovits, *Promise as an Arm’s-length Relation*, in PROMISES AND AGREEMENTS: PHILOSOPHICAL ESSAYS 295 (Hanoch Sheinman ed., 2011). Marginalizing the former and essentializing the latter is unjustified because contract rules that target specific transaction types are no less important for realizing the values we attribute to contract law and are no less prevalent in our lives. For a similar claim in the context of property theory, see Hanoch Dagan, *Pluralism and Perfectionism in Private Law* 112 COLUM. L. REV. *, * (2012). For a particularly provocative critique of treating symmetric discrete arm’s length exchange transactions as the core of contract law, see Clyde W. Summers, *Collective Agreements and the Law of Contracts*, 78 YALE L.J. 525 (1969).

⁴⁴ See, e.g., Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989); Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051 (2000).

⁴⁵ For a similar claim regarding property law, see Hanoch Dagan, *Inside Property*, 63 U. TORONTO L. J. *, * (2013).

⁴⁶ See generally IAN R. MACNEIL, THE RELATIONAL THEORY OF CONTRACT: SELECTED WORKS OF IAN MACNEIL (David Campbell ed., 2001); Stewart Macaulay, *Non-Contractual Relations and Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963).

⁴⁷ See Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code’s Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765, 1793 (1996); Carol M. Rose, *Trust in the Mirror of Betrayal*, 75 B.U. L. REV. 531, 535, 537-38, 540-41, 546, 550 (1995); Austin Sarat & Thomas R. Kearns, *Beyond the Great Divide: Forms of Legal Scholarship in Everyday Life*, in LAW IN EVERYDAY LIFE 21, 45, 47 (Austin Sarat & Thomas R. Kearns eds., 1993).

endeavors interact.⁴⁸) It is thus no wonder that again we find in each of the corresponding branches of contract law—employment law, agency law, partnership law, and landlord-tenant law—robust mechanisms that help overcoming these difficulties, thus significantly extending and indeed reshaping (rather than merely supporting) the extralegal practice of undertaking voluntary obligations.⁴⁹

As with consumer transactions (which are a significant subset of the anonymous side of the practice of contracts), in many (most?) categories of relational contracts (in which contract law participates in the creation and maintenance of trust-based interpersonal relationships) the thin common denominator of “general” (basically passive) contract law and remedies would not have been sufficient to overcome the inherent risks of such endeavors. In taking seriously its mission of fostering the practice of undertaking voluntary obligations due to its indispensable role for self-authorship, contract law appropriately takes a much more active approach. It facilitates and empowers—at times even enables—this practice by means that both appreciate the thorough heterogeneity of this practice (an injunction to which we turn shortly) and participate in the creation and reform of social arrangements.⁵⁰

The import of contract law’s enabling function may also extend to the broader cultural function of law. The thick layer of both defaults and mandatory rules which typifies the diverse branches of contract law, such as commercial transactions, real-estate transactions, consumer transactions, employment contracts, banking contracts, bailment contracts, suretyship contracts, family contracts and the like, offers a series of identifiable contract institutions, each of which with its own character, which corresponds (at least ideally) to its characteristic subject-matter and the ideal type of the parties’ relationships it anticipates. In this way, contract law participates in the on-going social production of stable categories of human interaction. More precisely, these contract institutions consolidate people’s expectations. This happens where the contracting parties are

⁴⁸ See, for example, in the context of agency law, MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* 39-51 (1992).

⁴⁹ See, respectively, Clyde Summers, *Effective Remedies for Employment Rights: Preliminary Guidelines and Proposals*, 141 U. Pa. L. Rev. 457 (1993); Eric Rasmusen, *Agency Law and Contract Formation*, 6 Am. L. & Eco. Rev. 369 (2004); Larry E. Ribstein, *Partnership Governance of Large Firms*, 76 U. Chi. L. Rev. 289 (2009); Edward H. Rabin, *The Revolution in Residential Landlord-Tenant Law: Causes and Consequences*, 69 CORNELL L. REV. 517 (1984).

⁵⁰ At times, allowing individuals to choose to engage in more different forms of interactions with one another requires the deployment of mandatory rules or of sticky defaults, which (respectively) curtail or encumber party choice within the relationship. See generally Ian Ayres, *Regulating Opt Outs: An Economic Analysis of Altering Rules*, 121 YALE L.J. * (2012). An autonomy-based perspective which appreciates the enabling role of contract law would not find mutability necessarily objectionable if its overall effects are choice-enhancing. This perspective is also, as the following text indicates, quite amenable to default rules which are not simply or necessarily majoritarian. See also *infra* note 55 and accompanying text.

sophisticated or where the active players are their lawyers. It also happens, albeit in a more attenuated way, once the “character” of these institutions gains broad social and cultural recognition, so that people roughly know what they are getting into when entering, for example, a consumer transaction, purchasing an apartment, or starting a new job.⁵¹ Furthermore, these contract institutions may also affect people’s ideals and therefore their preferences with respect to these categories of relationships.⁵² In this latter role, contract institutions perform a significant expressive and cultural function. Contractual freedom, significant as it is, cannot replace the law of contracts in the consolidation of expectations and the expression of normative ideals regarding these categories of interpersonal relationships.

Indeed, because many of the diverse forms of interpersonal interaction opened up thanks to the practice of undertaking voluntary obligations cannot be realistically actualized without active support of diverse viable and robust legal institutions, contract law should—and does—actively facilitate (within limits) the coexistence of these various social spheres, which brings to the fore the second major amendment that Raz’s political philosophy offers to autonomy-based theories of contract: the prescription of structural pluralism.

V. RAZIAN AUTONOMY AND CONTRACT LAW PLURALISM

On its face, the structural monism of autonomy-based theories of contracts is appealing. By conceptualizing the entire domain of contract law as revolving around one idea such as will, consent, or voluntary obligations, monist theories tend to be parsimonious and elegant, thus satisfying an important demand of the practice of theorizing. They also avoid the seemingly intractable difficulties of pluralist theories in addressing contextual conflicts of values or contextual applications of values. Finally, the broad coherence monist theories celebrate means that the law talks to the people with one voice and is thus deserving of their obedience. But the lure of monism can and should be resisted, at least if by autonomy contract theorists mean self-authorship. Contract theory should take seriously the existing structural pluralism of contract law and celebrate, rather than suppress (as variations on a common theme) or marginalize (as peripheral exceptions to a robust core) the multiple forms typifying contract law.

Indeed, appreciating the significant enabling role of contract law—and thus the need to qualify Raz’s third proposition—also implies similarly revisionist conclusions

⁵¹ See Michael Klausner, *Corporations, Corporate Law, and Networks of Contracts*, 81 VA. L. REV. 757, 766, 788 (1995) (discussing the accumulated outcome of the social learning effect and the network externalities phenomenon).

⁵² See Eyal Zamir, *The Inverted Hierarchy of Contract Interpretation and Supplementation*, 97 COLUM. L. REV. 1710, 1758-59 (1997).

regarding Raz's fourth proposition re contract law's structural monism. As just noted, an important part of the enabling role of contract law is to form effective frameworks of social interaction and cooperation by consolidating people's expectations regarding certain types of voluntary obligations and expressing our ideals with respect to these categories of relationships. Contract law cannot possibly consolidate expectations and express ideals regarding any idiosyncratic arrangement contractual parties may pursue. But it can—and thus should, and indeed does (at least to some extent)—perform this role respecting a limited number of core categories of such arrangements.⁵³ In other words, like other branches of private law, contract law should follow the prescriptions of structural pluralism.⁵⁴

A structurally pluralist contract law includes different and sufficiently diverse types of contracts (different contract institutions) for the diverse social settings and economic functions in which law facilitates the practice of undertaking voluntary obligations. Each such contract institution—consider again, for example, commercial transactions, consumer transactions, employment contracts, and family contracts—incorporates a distinct balance of values, and is thus governed by a distinct regulative principle suitable to its subject matter. This rich repertoire enables people to freely choose their own ends, principles, forms of life, and associations.⁵⁵ While at a certain point the marginal value from adding another distinct institution is likely to be nominal in terms of autonomy, pluralism implies that contract law's supply of these multiple institutions should be guided not only by demand. Demand for certain institutions generally justifies their legal facilitation. But a contract law regime that follows Raz's account of personal autonomy prioritizes settings, such as those discussed earlier,⁵⁶ in which law's enabling role is most acute for the practice of undertaking voluntary obligations to flourish. Furthermore, while it is difficult to expect that such a regime would invent new contract institutions, it should favorably respond to people's innovations even absent significant demand, including innovations based on minority views and utopian theories, insofar as they have the potential to add valuable options of human flourishing that significantly broaden people's choices.⁵⁷

⁵³ Cf. HANOCH DAGAN, *PROPERTY: VALUES AND INSTITUTIONS* 31-35 (2011).

⁵⁴ The following paragraphs draw on Dagan, *supra* note 43, at *. Cf. J.E. Penner, *Voluntary Obligations and the Scope of the Law of Contract*, 2 *Legal Theory* 325, 357 (1996) (acknowledging the challenge that relational contracts pose to a unified conception of contract as a voluntary obligation).

⁵⁵ The choice *among* contract institutions adds, of course, to the choice *within* each one of these institutions given the mutability of many (most?) contract law rules. *See also supra* note 50.

⁵⁶ *See supra* text accompanying notes 38-49.

⁵⁷ One example that may be particularly timely is job-sharing arrangements in which typically the job sharers are “individually responsible for certain aspects of the job and jointly responsible for others.” U.S. OFFICE OF PERSONAL MANAGEMENT,

Such a structurally pluralist contract law recognizes and promotes the individuality-enhancing role of multiplicity, so germane to a Razian commitment to self-authorship.⁵⁸ As Raz argues in criticizing Ronald Dworkin's espousal of coherence as an independent value, in a world of incommensurable human values, a monist legal voice is repressive, and normative coherence is justified if, but only if, it is local, rather than global, and it derives from the normative injunction to found a given area of the law on one certain value or on a given balance among pertinent values.⁵⁹ This means that despite the appeal of the global coherence of monist theories of contract, it is reasonable and even desirable for law to adopt more than one set of regulative principles and, therefore, more than one set of coherent contract institutions.⁶⁰ Indeed, the liberal commitment to autonomy neither necessitates the hegemony of the so-called classical model of contract, which is typically reflected in the monist conceptions of contract, nor does it undermine the value of other contract institutions, whose regulative principles focus on the intrinsic good of the parties' interpersonal relationships or on the maximization of their joint surplus. On the contrary, the availability of several different but equally valuable and obtainable frameworks of interpersonal interaction makes autonomy more meaningful by facilitating people's ability to choose and revise their various endeavors and interpersonal interactions. Thus, what from a monist viewpoint seeking to pigeonhole contract law in its entirety under the rule of one regulative principle (such as will or consent) looks like a random mess, turns out to be a rich mosaic once a perspective of structural pluralism is utilized. This mosaic is valuable—indeed, indispensable—for Razian autonomy. While the symmetrical and discrete arm's length exchange contract—the contract institution which is anticipated by will and consent theorists—is one important form of voluntary obligations, law's support for other contract institutions is just as crucial for autonomy.⁶¹

http://www.opm.gov/employment_and_benefits/worklife/officialdocuments/handbooksguides/pt_employ_jobsharing/pt08.asp (last visited Apr. 29, 2012). While there are numerous possible configurations, law can facilitate these innovative arrangements by stabilizing defaults regarding responsibility attribution, decision making mechanisms, time division, sharing space and equipment, and availability on off days. See ENTREPRENEUR, <http://www.entrepreneur.com/article/170244> (last visited Apr. 29, 2012).

⁵⁸ Cf. RAZ, *supra* note 31, at 417-18, 425.

⁵⁹ See JOSEPH RAZ, *The Relevance of Coherence*, in ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS 261, 281-282, 291-304 (1994).

⁶⁰ This is also one of the most important legacies of Karl Llewellyn. See KARL N. LLEWELLYN, *A Realistic Jurisprudence: The Next Step*, in JURISPRUDENCE: REALISM IN THEORY AND IN PRACTICE 3, 27-28, 32 (1962); *Id.*, *Some Realism about Realism*, in JURISPRUDENCE, *id.*, at 42, 59-60; *Id.*, *The Current Recapture of the Grand Tradition*, in JURISPRUDENCE, *id.*, at 215, 217, 219-20; *Id.*, *The First Struggle to Unhorse Sales*, 52 HARV. L. REV. 872, 880, 904 (1939).

⁶¹ But is this mosaic of contract institutions guided by different regulative principles that represent distinctive balances of values indeed entailed by the Razian commitment to ensure a broad range of valuable options? Wouldn't a more neutral regime, which equally supports all the possible

Understanding contracts along these structurally pluralist lines is not radical; quite the contrary. As Roy Kreitner argues, pre-classical contract law used to be arranged according to typical contractual relationships. And notwithstanding (or is it due to?) the great unifying force of the classical contract theory that followed, we have witnessed a constant development of specialized fields of contract. As Kreitner further claims, this “grouping . . . of fact situations by contract type” appropriately links contract theory “with the practices of contracting parties and the courts”: It supplies “some guidance regarding the relative weight of conflicting contract principles.” It also provides “an understanding of contract that respects the multiplicity of . . . purposes inherent in contract law” and the way in which different purposes “take on varying levels of importance with regard to the different types of contract.”⁶²

Indeed, in various realms of life contract law provides standardized forms of interpersonal interaction which serve to stabilize expectations and express ideals: the regulative principles which explain the doctrinal details of these contract institutions and can (and often do) guide their further development. Thus, family contracts, such as premarital agreements and separation agreements, are governed by a unique set of rules—think about the fairness review that typifies the former and the possible judicial modification for change of circumstances that characterizes the latter—which derive more from the typical characteristics of the parties and the character of their joint endeavor than from any general principle of contract as a whole.⁶³ Furthermore, regarding certain types of activities contract law devises, in compliance with the injunction of structural pluralism, more than one set of defaults, so as to facilitate more than one type of interpersonal interaction. This is most clearly the case regarding long-term business arrangements, where contract law (in the appropriate, broad sense of the word) offers multiple forms: from agency contracts, through partnership contracts

arrangements that people might want to take up, sufficient for the task? If my analysis thus far is convincing, it also implies that the answer to this challenge is that there is no such neutral law of contract: because contract law cannot equally support all these arrangements and since its support makes a difference—very few contract types would have looked as they do and would have worked as well as they do without the law—contract law needs to prefer certain types of arrangements over others, and its choices affect the set of options that are available, or at least more available, to people. (The modest perfectionism of contract law implied in this proposition is even more conspicuous in the rules governing unenforceable agreements dealing with not-unlawful activities, such as restrictive covenants.)

⁶² Roy Kreitner, *Multiplicity in Contract Remedies*, in *COMPARATIVE REMEDIES FOR BREACH OF CONTRACTS* 19, 19-20, 38, 49 (Nili Cohen & Ewan McKendrick eds., 2005).

⁶³ See Brian H. Bix, *Contract Rights and Remedies, and the Divergence Between Law and Morality*, 21 *RATIO JURIS* 194, 203 (2008). For the regulative principle of marital property law, see DAGAN, *supra* note 53, at ch.9. For a thorough discussion of the legal treatment of agreements in family matters, see Brian H. Bix, *Private Ordering and Family Law*, 23 *J. AM. ACAD. MATRIMONIAL LAW* 249 (2010).

(notably LLCs and LLPs), to the various forms of corporate contracts (from close corporations to publicly-held corporations).⁶⁴ Each of these contract institutions is typified by its own governance structure and its set of solutions to the typical difficulties (notably agency costs) that would probably have inhibited such business activities but for their legal facilitation.⁶⁵ To some extent, this variety also typifies the realm of work,⁶⁶ given the distinction between the ideal-types of different doctrines governing employment relations on the one hand and hiring of independent contractors on the other, which—at least ideally—follows the question whether the pertinent work arrangement is typified by significant and inherent vulnerabilities respecting constitutive features of the worker’s identity and membership in society, which justifies the employee-protective measures characteristic of employment contracts law.⁶⁷

A pluralist conception of contract does not eliminate contract law as a legal field. There are sufficient similarities among the various contract institutions to justify teaching them in one introductory class or having them as subject-matters of unified scholarly reflections. These similarities, however, often only mean that the various institutions of contract law raise similar questions (e.g., whether judges who interpret a contract should focus on its language or also analyze the circumstances surrounding its formation) and that there is some overlap in the pertinent values that affect the regulative principles of at least some of these diverse institutions (e.g., maximizing the joint surplus of the contracting parties). These similarities imply that the broad category of contract law offers a toolbox of normative commitments and sociological insights, which explains why reflecting on the variety of contract institutions is likely to helpfully yield some cross-fertilization. They do not imply, however, the type of normative coherence needed in order to justify making the classification as member of these wide areas of laws a reason for any concrete prescriptive consequence.⁶⁸

Recently, Kreitner offered a “pluralist statement” of the conception of contract that coheres, in my view, with the revised Razian account offered in this Essay (even if it

⁶⁴ See generally, e.g., WILLIAM T. ALLEN ET AL., COMMENTARIES AND CASES ON THE LAW OF BUSINESS ORGANIZATION (3rd ed., 2009); LARRY E. RIBSTEIN, THE RISE OF UNINCORPORATION (2010).

⁶⁵ See, e.g., FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 34-35 (1991).

⁶⁶ As the implies, analyzing the intervention of contract law in the realm of work from the perspective of structural pluralism may still challenge the sufficiency of the choice between working as an employee and working as an independent contractor. In this case—and possibly in other examples dealing with other activities—a structural pluralist account of contract law turns out to have important critical ramifications.

⁶⁷ See Guy Davidov, *The Three Axes of Employment Relationships: A Characterization of Workers in Need of Protection*, 52 U. TORONTO L.J. 357 (2002).

⁶⁸ Cf. Bix, *supra* note 63, at 202-03.

relies on different normative commitments). Contract, in this view, is “an encompassing and multi-faceted institution” that has no core: “there is no one idea that encapsulates the *sine qua non* of contract, no nodal point from which all the instantiations of the institution of contract flow.” Contract, in this view, is “a framework for cooperation among societal agents,” which “serves as an infrastructure that provides a means to carry out a range of collaborative projects.” This infrastructure “provides benefits even to those who are not using it at any given moment, because it structures in productive ways the interactions (actual and potential) among past, present, and future participants.”⁶⁹

VI. CONCLUDING REMARKS

Autonomy-based theories of contracts tend to ascribe a rather modest role to the law and to conceptualize contract law as a unified body of doctrine governed by one regulative principle. But if autonomy stands for the commitment that people should, to some degree, be the authors of their own lives, both of these typical features are wrong or at least exaggerated. An autonomy-based contract law should be attentive to the *pluralist* prescription of offering people a sufficiently diverse set of robust frameworks to organize their various endeavors and interpersonal relationships. And it should *actively* empower people’s attempts to form collaborative contractual arrangements—both discrete and impersonal, as well as long-term and relational—by providing the necessary background regime for such risky undertakings.

This approach to contract law as an umbrella for diverse contract institutions which stand for diverse ideals of the various types of social relationships and economic functions contracts serve may seem naïve, since regarding many contract institutions law often falls short of the ideals they represent. But these gaps only mean that, rather than searching for a unifying regulative principle of contract law in its entirety, the main task of an autonomy-based contract theory is to distill the distinct regulative principles of the various contract institutions, to elucidate the ways each of them contributes to human flourishing, and to offer reform, if needed, that would force these contract institutions to live up to their own implicit promises.

⁶⁹ Roy Kreitner, *On the New Pluralism in Contract Theory*, * SUFFOLK. L. REV. * (2012).