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Pluralism in Contract Law

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INTRODUCTION

Theoretical debate over the formation of contracts is legendary.[1] Is the foundation of contracts tied to the subjective wills of parties who make promises to each other, or is it about reasonable inferences arising from promise-bearing conduct that courts impute to the parties? Are promises giving rise to contracts grounded in morality? Is the formation of contacts about regulating contractual

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1. On this theoretical debate, see, for example, STEVEN J. BURTON, ELEMENTS OF CONTRACT INTERPRETATION, chs. 2-3 (2009); F.H. BUCKLEY, JUST EXCHANGE: A THEORY OF CONTRACT (2005) [hereinafter BUCKLEY, JUST EXCHANGE]; M. P. ELLINGHAUS ET AL., MODELS OF CONTRACT LAW: AN EMPIRICAL EVALUATION OF THEIR UTILITY (2005); JAMES GORDLEY, THE PHILOSOPHICAL ORIGINS OF MODERN CONTRACT DOCTRINE (1991); ROBERT A. HILLMAN, THE RICHNESS OF CONTRACT LAW: AN ANALYSIS OF CRITIQUE OF CONTEMPORARY THEORIES OF CONTRACT LAW (1997); ILLUSION OF CONSENT: ENGAGING WITH CAROLE PATEMAN (Daniel I. O'Neill et al. eds., 2008); STEPHEN A. SMITH, CONTRACT THEORY (2004); THE FALL AND RISE OF FREEDOM OF CONTRACT (F.H. Buckley, ed., 1999); MICHAEL J. TREBILCOCK, THE LIMITS OF FREEDOM OF CONTRACT (1993); Nathan B. Oman, *A Pragmatic Defense of Contract Law*, 98 GEO. L.J. 77 (2009); Leon E. Trakman, Contracts: Legal, *in* 3(8) INT'L ENCYC. SOC. & BEHAV. SCIS. 102 (Neil J. Smelser & Paul B. Baltes eds., 2001). On the international dimensions of this debate, see Paul Schiff Berman, *The New Legal Pluralism,* 5 ANN. REV. L. & SOC. SCI. 225 (2009); Paul Schiff Berman, *Global Legal Pluralism* 80 S. CAL. L. REV. 1155 (2007).

rights and duties, or is it about enforcing contracts that are economically efficient?[2]

Most theories of contract formation respond to one or another of these questions, not to all of them. Most of these theories are also expressed through monism. Monism subjects all "rights" and "goods" to a single determinative measure, conceived as a "super" or prime value, such as the liberty of the parties to contract.[3] That value is articulated through the wills, consent, or promises of the parties, or more comprehensively through the utility or efficiency of the contract.[4]

Preference monists prefer different "super" values, so long as their preferred values transcend all "lesser" values.[5]

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2. On the wills theory of contracting, see *infra* Section II. On consent theories of contracting, see *infra* Section III. On moral theories of contracting, see *infra* Section VI. On efficiency theories of contracting, see *infra* Section IX. On the proposition that the moral basis of a contract is based on the consent of the parties to exercise rights and assume duties, see Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269 (1986). On public policy rationale behind legally binding promises, see R.A. BUCKLEY, ILLEGALITY AND PUBLIC POLICY (2002); M.P. FURMSTON, CHESHIRE, FIFOOT AND FURMSTON'S LAW OF CONTRACT 449 (14th ed. 2001); Leon E. Trakman, *The Effect of Illegality in the Law of Contract: Suggestions for Reform*, 55 CAN. BAR REV. 625 (1977). *See generally* CHARLES L. KNAPP, NATHAN M. CRYSTAL & HARRY G. PRINCE, RULES OF CONTRACT LAW (2009-2010 STATUTORY SUPPLEMENT), chs. 1-2 (2009); RICHARD STONE, THE MODERN LAW OF CONTRACT ch.1 (8th ed. 2009). For a useful index and digest of writings on contract law, see ADAM KRAMER, CONTRACT LAW: AN INDEX AND DIGEST OF PUBLISHED WRITINGS (2010).

3. Monism has a lengthy history. For example, the first issue of the philosophical journal, "The Monist," was published in 1890. For more information, see The Monist: An International Journal of General Philosophical Inquiry, http://themonist.org (last visited Sept. 25, 2010).

4. Most monist conceptions, to a lesser or greater extent, are rights based theories of contracting in that they focus on the rights and duties of the contracting parties, as distinct from community values or responsibilities beyond those rights. *See* LEON E. TRAKMAN & SEAN GATIEN, RIGHTS AND RESPONSIBILITIES (1999). On a "rights based" theory of contracting based on private property, see Andrew S. Gold, *A Property Theory of Contract*, 103 NW. U. L. REV. 1 (2009).

5. Preference monism entails a preference for values that are commensurable and able to be integrated harmoniously. On preference monism in utilitarian philosophy, see, for example, JOHN STUART MILL, *Utilitarianism*, *in* THE BASIC WRITINGS OF JOHN STUART MILL 241 (J.B. Schneewind & Dale E. Miller eds., 2002). On the hierarchical ordering of values in monism as distinct from pluralism, see, for example, WILLIAM A. GALSTON, LIBERAL PLURALISM: THE

They also subscribe to a hierarchy of values, such as to a hierarchy of liberty, equality, or efficiency values in contracting, subject to one "super" value such as the liberty to contract standing at the apex of that hierarchy.[6]

What preference monist conceptions of contracting lack is a sustainable basis for differentiating among "super" values that conflict and collide, such as between liberty to contract and equality in contracting.[7] If judges are concerned primarily with the liberty of the parties to contract, they cannot as readily focus on other values like equality in contracting, other than through the subordination of those values to liberty. If they are engrossed with preserving one "super" value that determines the binding force of contractual promises, they cannot concentrate as readily on moral, political, cultural, or legal values that otherwise might circumscribe that "super" value.[8]

Pluralist theories of contracting do not endorse a "super" value, but instead acknowledge a plurality of values that are commensurable or incommensurable with one

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IMPLICATIONS OF VALUE PLURALISM FOR POLITICAL THEORY AND PRACTICE 6 (2002).

6. On an all-encompassing monist philosophy of justice, see, for example, JOHN RAWLS, A THEORY OF JUSTICE (1971). On monist wills, consent, and promise theories of contracting, see *infra* Sections II, III, and VI respectively. On monist utility and efficiency theories, see *infra* Section IX. *But cf.* RONALD DWORKIN, SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY 4-5 (2000).

7. For a classical treatment of this conflict between liberty and equality, see ISAIAH BERLIN, FOUR ESSAYS ON LIBERTY (1969). For a critique of monism generally, see GALSTON, *supra* note 5, at 8.

8. On this preoccupation with why a promise is legally enforceable, Mel Eisenberg once proclaimed: "A promise, as such, is not legally enforceable. The first great question of contract law, therefore, is what kinds of promises should be enforced." Melvin A. Eisenberg, *The Principles of Consideration,* 67 CORNELL L. REV. 640, 640 (1982); *see also* Omri Ben-Shahar & Lisa Bernstein, *The Secrecy Interest in Contract Law,* 109 YALE L.J. 1885 (2000). Most theories of judging are grounded either in legal positivism or in legal realism, not legal pluralism. On a blend between legal formalism and legal realism, referred to as "realistic formalism", see Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 3 (2007). *But see* David Dyzenhaus, *The Very Idea of a Judge*, 60 U. TORONTO L.J. 61 (2010); Neil Duxbury, *Lord Wright and Innovative Traditionalism*, 59 U. TORONTO L.J. 265 (2009). *See also infra* Section XIV.

another according to the contractual context.[9] Decision agents—typically courts—use that pluralism to identify and rank the intensity of plural preferences and apply them through a process of practical reason in order to reach prudential decisions about the formation of contracts.[10] For example, judges rank values like liberty to contract and equality in contracting on a ranking scale in which they pay due cognizance to continuing and discontinuing moral, political and cultural values.[11] They analyze those values through a process of practical reason through which they assimilate competing and supporting propositions in arriving at preferred determinations about the formation of a contract.[12]

As illustrations of different kinds of pluralism at work, judges employ political pluralism to synthesize competing governmental policies over anti-competitive agreements,

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9. On such commensurable and incommensurable values, see, for example, MICHAEL STOCKER, PLURAL AND CONFLICTING VALUES (1990); BERNARD WILLIAMS, MORAL LUCK: PHILOSOPHICAL PAPERS 1973-1980 (1981); David Wiggins, *Incommensurability: Four Proposals*, *in* INCOMMENSURABILITY, INCOMPARABILITY AND PRACTICAL REASON 52 (Ruth Chang ed., 1997).

10. This combination of deliberative practical reason and prudential wisdom is expressed here through the conception of "preference pluralism." *See infra* notes 12, 17. On measuring the intensity of plural preferences, see Daphna Lewinsohn-Zamir, *Identifying Intense Preferences*, 94 CORNELL L. REV. 1391 (2009).

11. For the view that liberty and equality are fundamentally in conflict, see BERLIN, *supra* note 7. On moral pluralism, see, for example, JOHN KEKES, THE MORALITY OF PLURALISM (1993); CHARLES E. LARMORE, PATTERNS OF MORAL COMPLEXITY (1987); Ruth Chang, *Putting Together Morality and Well-Being*, *in* PRACTICAL CONFLICTS: NEW PHILOSOPHICAL ESSAYS 118 (Peter Baumann & Monika Betzler eds., 2004). On political pluralism particularly in relation to "public" cultures, see MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY (1983). On cultural pluralism including the treatment of emerging and receding cultural values, see *infra* Section XIV.

12. Such preference pluralism is distinguished from foundational pluralism in not accepting that one value prevails over all others, for example, that liberty to contract prevails over equality or efficiency in contracting. It is arguable that a normative pluralist may also be a foundational monist in expressing a preference for both different kinds of values such as liberty and equality (normative or preference pluralism) but also for a super value among those values (foundational monism). For classical commentary on normative and preference pluralism, see GEORGE EDWARD MOORE, PRINCIPIA ETHICA (1903). On foundational pluralism, see, for example, Judith Jarvis Thomson, *The Right and the Good*, 94 J. PHIL. 273, 275-76 (1997).

such as assessing the source and social impact of "judgment sharing agreements."[13] They use cultural pluralism to analyze emerging and receding cultural attitudes towards duties of cooperation in the formation and performance of contracts, such as in imposing duties to keep records, share information about performance, permit audits, and not hide breaches of contract.[14] Judges invoke moral pluralism in establishing the boundaries between the duties of mass market suppliers to contract in "good faith" with repeat-order customers and their resort to boilerplate contracting with one-off end users.[15] In reaching prudential determinations, judges invoke "decision procedures" to identify the "adjudicative facts" and to differentiate them from "social fact."[16] They employ "practical reason" to reach prudential determinations in which they determine the rights and responsibilities of the contracting parties within disparate political, cultural, and economic contexts.[17]

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13. "Judgment sharing agreements" are instruments firms use to agree to contribute to antitrust penalties if one party is subsequently held liable,—in effect constituting a co-insurance contributory scheme. *See* Christopher R. Leslie, *Judgment-Sharing Agreements*, 58 DUKE L.J. 747, 749 (2009). On the extent to which such agreements undermine antitrust regulatory policy, see *id.* at 768-84. On a response to the illegality of "lockout agreements" by which a party agrees not to deal with a third party, see Barak D. Richman, *The Antitrust of Reputation Mechanisms: Institutional Economics and Concerted Refusals to Deal,* 95 VA. L. REV. 325 (2009).

14. *See, e.g.*, Gregory Klass, *Contracting for Cooperation in Recovery,* 117 YALE L.J. 2, 2 (2007). On arguments for using liquidated damages clauses to discourage uncooperative behavior, see Tess Wilkinson-Ryan, *Do Liquidated Damages Encourage Breach? A Psychological Inquiry*, 108 MICH. L. REV. 633, 664-65 (2010). For an argument in favor of resort to negative damages, see Barry E. Adler, *Efficient Breach Theory Through the Looking Glass*, 83 N.Y.U. L. REV. 1679, 1694-95 (2008).

15. On the complexity of moral pluralism, not limited to judicial analysis, see, for example, T.D.J. CHAPPELL, UNDERSTANDING HUMAN GOODS: A THEORY OF ETHICS 1-13 (1998); LARMORE, *supra* note 11, at 96-97; MORAL DILEMMAS (Christopher W. Gowans ed., 1987); MORAL UNIVERSALISM AND PLURALISM (Henry S. Richardson & Melissa S. Williams eds., 2009); Lawrence C. Becker, *Places for Pluralism*, 102 ETHICS 707, 707-19 (1992); Chang, *supra* note 11.

16. On "decision procedure" pluralism, see *infra* text accompanying note 38. On "social fact" evidence, see *infra* note 206. On the application of decision procedures to cultural pluralism, see *infra* Section XIV.

17. On "practical reason" in making normative choices among incommensurable values, see Joseph Raz, *Incommensurability Agency*, *in* INCOMMENSURABILITY, INCOMPARABILITY AND PRACTICAL REASON, *supra* note 9, at

The article has the following aims in arguing for judicial pluralism in the formation of contracts. Firstly, it evaluates how courts can apply value pluralism to different theories of contract formation that complement and sometimes contradict one another, such as by applying autonomy- and community-based theories to contract formation. Secondly, it illustrates how judges can reconcile competing theories of contract formation by moving along a spectrum from the subjective to the objective theory of contracting.[18] Thirdly, it analyzes how courts can horizontally integrate rights-based theories of contracting pertaining to comparatively equal bargaining parties. Fourthly, it considers how judges can vertically integrate equality-based theories of contract formation based on structural inequalities in bargaining between the parties. Finally, it proposes how courts can invoke "decision procedures" to assess the nature, manner of operation, and sufficiency of horizontally and vertically integrated contract theories.[19]

In exploring these issues, the article canvasses the extent to which judges already apply plural approaches to contract formation. However, it argues for decision agents not limited to courts applying plural values more explicitly and contextually to contracting. The overriding rationale is that a theory of legal pluralism can significantly inform the

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110; *see also* JOSEPH RAZ, ENGAGING REASON: ON THE THEORY OF VALUE AND ACTION 48 (1999) ("If of the options available to agents in typical situations of choice and decision, several are incommensurate, then reason can neither determine nor completely explain their choices or actions."). It is arguable that Raz's imputation of "practical reason" to rational choice is reductionist. A more accurate descriptor of the normative choice among incommensurable values is practical reason grounded in preference pluralism. Exercising preferences among plural alternatives *are* practical reasons for those choices. For a plural account of "duty" and "power" expressed through a "compound rule" in contract law, see Gregory Klass, *Three Pictures of Contract: Duty, Power, and Compound Rule,* 83 N.Y.U. L. REV. 1726, 1758-60 (2008). On a plural theory of rights and responsibilities, see TRAKMAN & GATIEN, *supra* note 4, at chs. 1-2.

18. *See infra* Section II.

19. On a different conception of vertical and horizontal integration, see Nathan Oman, *Unity and Pluralism in Contract Law*, 103 MICH. L. REV. 1483, 1498-506 (2005) (reviewing STEPHEN A SMITH, CONTRACT THEORY (2004)). On structural disparities in bargaining, see *infra* note 37.

formation of contracts, without regressing into unbridled relativism, or auguring the "death" of contracts.[20]

Each section addresses one or more of these propositions. Connecting the various sections is the recognition of an ongoing tension between rights-based and goods-based theories of contract formation and the need for neither to be subjugated by the other.

The article treats judges as actual or simulated decision agents in regulating contracts, subject to two exceptions. Legislatures are the primary decision agents under theories of contract regulation. Contracting parties are decision agents under theories of contract self-regulation, and to a degree, in relational contracting.

I. FROM MONISM TO PLURALISM

Monist wills theories of contract formation trace back to, among other sources, natural law conceptions of "right reason"[21] embodied in modern deontological liberalism.[22] That liberty consists of the right of autonomous individuals to engage in intentional or "expressive" actions as free and voluntary agents, insulated from the invasive intervention of third parties including public authorities. Courts as decision agents, in turn, are expected to respect the "expressive liberty" of autonomous contracting parties.[23]

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20. This plural conception is distinguishable from the late Grant Gilmore's conception of the "death" of contract arising, *inter alia*, from the alleged erosion of consent in contracting and the growth of tort-based "fault" as a substitute value determinant. *See* GRANT GILMORE, THE DEATH OF CONTRACT 87-103 (1974). Contestation around plural values in contracting is a challenge for contract law which is quite different from its conceptual or normative death. *See infra* Sections VII-X.

21. On the (natural law) liberal roots of deontological liberalism in the formation of contracts, *see generally* P.S. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT (1979); JOHN RAWLS, THE LAW OF PEOPLES (1999); CHRISTOPHER WOLFE, NATURAL LAW LIBERALISM (2006).

22. Deontological liberalism relies on rights that inhere in individuals, rather than in "goods" that are shared. Such a conception is monist in subscribing to unitary values that are identified with the liberal or "autonomy" rights of individuals, such as their rights to contract. *See* TRAKMAN & GATIEN, *supra* note 4, at ch. 2.

23. On "expressive liberty" as a balance between outward existence and inner conceptions of value, see WILLIAM A. GALSTON, LIBERAL PURPOSES: GOODS,

A court that endorses legal monism enshrines a "super" or prime value, such as the liberty to contract by placing it at the apex in ranking contract values. For example, it treats the subjective wills of the parties in contracting as its prime value;[24] or it adopts other "super" value, such as efficient contracting as the prime value.[25] It then applies that chosen "super" value in determining whether to enforce a contract according to its assessment of the subjective wills of the parties or the efficiency of their transaction.[26]

A monist court sometimes takes account of such social values as welfare, harmony, solidarity, and community; but it subordinates those values to a "super" value based on the wills, consent, or promises of the parties, as explicated through their liberty to contract.[27] For example, a monist court is likely to nullify an unconscionable contract, not primarily because it is unfair in a moral or cultural sense, but because it is an affront to the "super" value which that court identifies with the subjective wills or manifest consent of the parties. That transaction is unconscionable, on principled monist grounds, because it conflicts with the primacy of the will to, or consent in, contracting.[28]

VIRTUES, AND DIVERSITY IN THE LIBERAL STATE 140-62 (1991). On the normative relationship between love and liberalism in Judeo-Christian value systems, see PAUL W. KAHN, PUTTING LIBERALISM IN ITS PLACE 220-27 (2005); *see also infra* Section VII.

24. "According to the classical view, the law of contract gives expression to and protects the will of the parties, for the will is something inherently worthy of respect." Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 575 (1933). On the genesis of this classical view, see SIR FREDERICK POLLOCK, PRINCIPLES OF CONTRACT (4th ed., Blackstone Publ'g Co. 1888) (1876); *see also infra* Sections II.

25. *See infra* Section IX.

26. Parties who freely conclude contracts are legally "bound by their pacts": *pacta sunt servanda.* On the ancient origins of this concept, see Paradine v. Jane (1647) 82 Eng. Rep. 897 (K.B.).

27. On the predominance of the parties' liberty to contract, see, for example, BUCKLEY, *supra* note 1, at 27-33; *see also* EXPLORING CONTRACT LAW (Jason W. Neyers et al. eds., 2009).

28. On the primacy of consent in contracting, see *infra* Section III. For classical commentary on "contracts of adhesion," see Friedrich Kessler, *Contracts of Adhesion—Some Thoughts about Freedom of Contract*, 43 COLUM. L. REV. 629 (1943) [hereinafter Kessler, *Contracts of Adhesion*]; Friedrich Kessler, *The Protection of the Consumer Under Modern Sales Law, Part 1: A*

Pluralist decision agents question the primacy of monist values such as the will, promises, or consent of the parties, as well as its dominance over a hierarchy of subordinated values. They decide, as courts, whether or not to enforce the wills, manifest consent or promises, of the parties, not on grounds that one value is inevitably prior to all others, but by identifying, ranking, and applying a plurality of competing values that may, but need not, be commensurate with one another.[29]

As a result, judges who subscribe to pluralism decline to treat any one value as inherently or naturally superior to all others in the formation of contracts.[30] They construe values like the wills of the parties or the efficiency of their contracts, not as a priori more fundamental than all other values, but according to how those values relate to one another and to other competing values.[31] As an illustration, pluralist courts attribute different qualities to "rightness" and "fairness" values in regulating the formation of e-consumer transactions.[32] For example, they weigh the "autonomy" value of e-sellers competing over price in e-markets against the "care" value in regulating the sale of unsafe products to e-consumers.[33] They assess the social cost

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Comparative Study, 74 YALE L.J. 262, 281-82 (1964); Edwin W. Patterson, *The Delivery of a Life-Insurance Policy*, 33 HARV. L. REV. 198, 222 (1919).

29. On such a pluralist approach, see *infra* Sections XII and XIV. On "the good," see, for example, FRED FELDMAN, PLEASURE AND THE GOOD LIFE Ch. 1 (2004); CHRISTINE SWANTON, VIRTUE ETHICS: A PLURALISTIC VIEW 56-60 (2003); *see also* BERLIN, *supra* note 7.

30. On these values, see, for example, TRAKMAN & GATIEN, *supra* note 4, at Chs. 1-2; Thomson, *supra* note 12, at 275-76.

31. *See supra* note 30.

32. Preference pluralists—like preference monists—treat "fairness" or "goodness" as a value with different qualities. However, unlike preferential monists, preferential pluralists do not treat one conception of "goodness" as inherently superior to all others. On preference monists, see *supra* text accompanying note 4. On a preference pluralist perspective in law, see, for example, RAZ, *supra* note 17, at ch. 3. On the ranking of "goodness values" in relation to cultural pluralism, see *infra* Section XIV.

33. On the plural intersection between contracts and torts in products liability cases, see *infra* note 94. On an allegedly plural conception of contract-as-product, as distinct from a monist conception of contract-as-consent, see, for example, Margaret Jane Radin, *Humans, Computers, and Binding Commitment*, 75 IND. L.J. 1125, 1125-26 (2000).

of e-distributors using warranty exclusion clauses in "click-wrap" and "browse-wrap" contracts against the discounted prices that e-consumers may gain in such e-markets.[34] They devise decision procedures by which they balance the "surprise" value to e-consumers who are prohibited by contract from returning defective products against the "clarifying" value of fine print clauses in e-contracts that explain such prohibitions.[35]

Plural decision-makers, not limited to judges, may well disagree over the prudential application of plural values in seemingly comparable cases.[36] For example, uniform law commissioners diverge over how to regulate product disclosure statements by mass e-sellers according to different perceptions of the disempowerment those statements have upon discrete classes of e-consumers.[37] The issue is not that such differences in the processes and results of plural decision making give rise to unbridled relativism, but that value pluralism extends the base of knowledge by which decision agents reach informed decisions that include differences of opinion.[38]

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34. On "click-wrap" and "browse-wrap" contracts, see *infra* note 126. On "consent" to standard form contracts, see Randy E. Barnett, *Consenting to Form Contracts*, 71 FORDHAM L. REV. 627, 637 (2002).

35. On such decision procedures, see *infra* Section XI.

36. On the bases for theoretical disagreement in legal analysis, see Brian Leiter, *Explaining Theoretical Disagreement*, 76 U. CHI. L. REV. 1215 (2010); Scott J. Shapiro, *The "Hart-Dworkin" Debate: A Short Guide for the Perplexed*, *in* RONALD DWORKIN 22, 49 (Arthur Ripstein ed., 2007).

37. The case for courts injecting plural standards of fairness into contracts is reinforced in transactions involving structural bargaining disparities between parties. *See, e.g.*, Michael I. Meyerson, *The Reunification of Contract Law: The Objective Theory of Consumer Form Contracts*, 47 U. MIAMI L. REV. 1263, 1270 (1993); Andrew Phang, *Doctrine and Fairness in the Law of Contracts*, 29 LEGAL STUD. 534 (2009). Such judicial construction is most evident, historically, in the law regulating insurance contracts. *See, e.g.*, 2 ALLAN D. WINDT, INSURANCE CLAIMS & DISPUTES: REPRESENTATION OF INSURANCE COMPANIES AND INSUREDS § 9 (5th ed. 2007); Kenneth S. Abraham, *Judge-Made Law and Judge-Made Insurance: Honoring the Reasonable Expectations of the Insured*, 67 VA. L. REV. 1151, 1152-56 (1981); Roger C. Henderson, *The Doctrine of Reasonable Expectations in Insurance Law After Two Decades*, 51 OHIO ST. L.J. 823 (1990); Robert E. Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 HARV. L. REV. 961 (1970).

38. Courts may also employ "covering values" as the framework in which they weigh and sort plural values. *See* Chang, *supra* note 11, at 118.. On variations

Plural decision making also does not necessarily lead to results that are distinct from monist decision making in the formation of contracts. Monist and pluralist decision agents may actually lead to the same result. A monist judge interpreting the Restatement (Second) may adopt the parties' unusual meaning, that all sales contracts exceeding $1,000 be oral and not reduced to writing, in accordance with the subjective wills of the parties. A pluralist court may reach the same determination, but only after considering such relational factors as the trust and confidence placed by the contracting parties in each other and such socio-cultural factors as their respective reputations and goodwill in the trade.[39]

What distinguishes pluralist from monist decision making is the unwillingness of pluralist decision agents to accord primacy to a single value before assessing its commensurability with other values in resolving disputes over the formation of contracts.[40] What further differentiates "decision procedure" pluralism from monism is the readiness of pluralist judges to identify a range of "rightness" and "goodness" values, to consider plural reasons in ranking them, and to construe the formation of contracts in light of those values and reasons.[41]

II. PLURALISM: BEYOND A WILLS THEORY

In applying monism to a wills theory of contracting, the alternative is between judges upholding or nullifying an

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in "decision procedure" pluralism, see, for example, R. Eugene Bales, *Act-Utilitarianism: Account of Right-Making Characteristics or Decision-Making Procedure?* 8 AM. PHIL. Q. 257 (1971); *see also infra* Section XI.

39. On trust building as an instrument in interpreting the intention of parties to contract, see Gregory Klass, *Intent to Contract*, 95 VA. L. REV. 1437 (2009).

40. For arguments in favor of implying "fairness" values into contracts in cases of commercial impracticability, see Leon E. Trakman, *Winner Take Some: Loss Sharing and Commercial Impracticability*, 69 MINN. L. REV. 471 (1985). For arguments in favor of imputing efficiency values to such contracts, see Sheldon W. Halpern, *Application of the Doctrine of Commercial Impracticability: Searching for "The Wisdom of Solomon"*, 135 U. PA. L. REV. 1123, 1133 (1987). On implied-in-fact and implied-by-law values in the consent to contract, see *infra* Section III.

41. *See supra* note 40.

agreement in accordance with the subjective wills of the parties.[42] A judge who considers the dignity, knowledge, desire, welfare, and happiness of the parties subordinates those values to their subjective wills.[43] For example, a monist court evaluates the reasonable reliance and unfair surprise as evidence of a "vice" or "defect" in the subjective wills of the parties, not as part of a further plural inquiry beyond those wills.[44] It concludes that, due to the "defect" in the subjective wills of the parties, there is no contract.[45]

A pluralist court goes further by considering plural values beyond the subjective wills of the parties. It conceivably starts by observing that the parties did not manifest subjective wills; that their subjective wills were incompletely expressed;[46] or that they had different subjective wills. In reaching a decision, it affirms or discounts their subjective wills in light of the plural alternatives.[47]

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42. On the wills theory in contracts, see, for example, BUCKLEY, JUST EXCHANGE, *supra* note 1, at 27-28. On the evolution of the wills theory of contracts in Continental European philosophical and legal thought, see GORDLEY, *supra* note 1, ch. 7.

43. A plural assessment of values helps to extend both the parameters and application of monist values. *Cf.* RAZ, *supra* note 17, at 48 ("The will is the ability to choose and perform intentional actions.").

44. Such a "vice" or "defect" negates the wills of the parties and therefore does not conflict with a subjective wills theory. *See* Stephen A. Smith, *Contracting Under Pressure: A Theory of Duress,* 56 CAMBRIDGE L J. 343 (1997); *see also infra* Section V.

45. Contradictory subjective wills of the parties is illustrated in the classic English case, *Raffles v Wichelhaus*, 159 Eng. Rep. 375 (1864) (This is primarily a "mistake" case, in which the parties agreed upon shipment *ex peerless*, but each had a different "Peerless" ship in mind, and they were at cross purposes lacking *consensus ad idem*).

46. In *Transatlantic Financing Corp. v. United States*, a case on commercial impracticability arising from the 1966 Suez Canal closure, Judge Skelly Wright stated: "Parties to a contract are not always able to provide for all the possibilities of which they are aware, sometimes because they cannot agree, often simply because they are too busy.". 363 F.2d 312, 318–19 (D.C. Cir. 1966).

47. The civil law may be more responsive to plural theory than the common law in being less preoccupied with rights based theories of contracting grounded in the liberty to contract. *See generally* JAMES GORDLEY, THE ENFORCEABILITY OF PROMISES IN EUROPEAN CONTRACT LAW (2001); *see also* LARRY A. DIMATTEO, CONTRACT THEORY: THE EVOLUTION OF CONTRACTUAL INTENT 22 (1998). *But see* THE THEORY OF CONTRACT LAW: NEW ESSAYS (Peter Benson ed., 2001).

A court that adheres to an objective theory of contracting is sometimes monist and other times pluralist.[48] It is monist in according objective meaning to the unclearly or incompletely expressed wills of the parties, while continuing to defer to the wills or intention of the parties. It is pluralist in valuing "rightness" and "goodness" values beyond those wills, such as in light of the dignity, knowledge, welfare, or safety of third parties who are affected by those contracts. Monist and pluralist judges that adhere to an objective theory of contracting could both determine that the subjective wills of the parties are ill-expressed or are at cross purposes. However, a monist judge would conclude on these bases that there is no binding contract. A pluralist court would decide only after identifying, ranking, and applying plural options of which the subjective wills of the parties is but one.[49]

A court can adopt a spectrum approach to reconcile monist and pluralist approaches toward the objective theory of contracting. On one end of the spectrum, it locates the subjective wills of the parties. On the other end, it reaches a plural determination which transcends their wills. Depending on the nature and extent of that continuum, its determination affirms, elaborates upon, discounts, or substitutes for the wills of the parties. For example, it initially gauges the subjective wills of the parties. It then augments their wills by determining the reasonable intentions of the parties based on their past practices. It concludes by imputing to them an implied covenant to negotiate in good faith that transcends the past practices of one or both parties.[50]

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48. *See, e.g.*, Joseph M. Perillo, *The Origins of the Objective Theory of Contract Formation and Interpretation*, 69 FORDHAM L. REV. 427 (2000).

49. The absence of the perfected wills of the parties is central to an objective theory of contracting, whether or not it is grounded in monism or pluralism. *See* BURTON, *supra* note 1, at chs. 2-3; *see also* Janet O'Sullivan, Book Review, 56 CAMBRIDGE L.J. 231 (1997) (reviewing CONSENSUS *AD IDEM*: ESSAYS ON THE LAW OF CONTRACT IN HONOUR OF GUENTER TREITEL (F.D. Rose, ed., 1996)).

50. In progressing along this continuum, a wills theory of contracting can be recast into an implied consent theory. *See infra* Section III. On Barnett's "default rules" in the formation of contracts, see Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 VA. L. REV. 821 (1992). On an implied covenant of good faith, see *infra* note 206.

The practical difficulty with adopting a spectrum approach toward the subjective and objective theories of contracting is in determining when a court employs an objective theory only to augment the wills of the parties and when it uses it to transcend those wills.[51] A further difficulty is to acknowledge that the purpose of value pluralism is not to replicate the wills of the parties. Nor is it to transform an objective theory of contracting into a "super" value that trumps all other values. The purpose is to rank plural values in relation to one another, not locate them on an unbroken spectrum from subjective to objective theories of contracting.[52]

III. RECONSTITUTING CONSENT

An alternative to the wills theory of contract formation is for courts to enforce contracts to which the parties have expressly or impliedly consented.[53] Courts conceivably opt for monist or plural conceptions of consent that may be, but are not necessarily, mutually exclusive.[54] They adopt monist to the exclusion of pluralist conceptions of contracting in subscribing to the express or implied consent of the parties that trump countervailing community values.[55] They resort to pluralist conceptions of consent by implying mandatory terms into contracts based on interrelated liberty and community values. For example, they rank the liberty and efficiency of liability limitation clauses in mass market sales

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51. For classical commentary on the extent to which an objective theory of contracting supplements or contradicts a subjective theory of contracting, see RESTATEMENT (SECOND) OF CONTRACTS, § 2 cmt. b (1979); E. ALLEN FARNSWORTH, CONTRACTS § 3.6 (1982); Ian R. Macneil, *Restatement (Second) of Contracts and Presentiation*, 60 VA. L. REV. 589 (1974).

52. The plural nature of the objective theory of contracting is best illustrated through moral pluralism. *See infra* Part VI.

53. Randy Barnett espouses a general consent theory of contract. *See* Barnett, *supra* note 2, at 309-10.

54. *See id.* at 305.

55. In subscribing to an objective measure of consent, Randy Barnett emphasizes the difficulty in ascertaining the subjective state of mind of the parties, but he does not see anything contradictory between his conception of objective consent and consent as a subjective measure of agreement. *See id.* at 305-09.

in light of the "confusion," "surprise," and "hardship" they cause to first-time purchasers in those markets.[56]

The difference between a monist and a pluralist theory of consent is illustrated by three default rules proposed by Randy Barnett.[57] Under the first default rule, courts implement the parties' "direct consent," which includes their "express" or "implied-in-fact" consent.[58] Under the second default rule, courts enforce the parties' "indirect consent" or "implied-in-law" consent.[59] Under the third default rule, courts apply "implied-in-law immutable terms" that supersede the consent of the parties.[60]

The first two default rules, "direct" and "indirect" consent to contract, are ordinarily monist insofar as they expect judges to implement the express consent of the parties, or the consent which derives reasonably from that direct consent. The third default rule, "implied-in-law immutable terms," is ordinarily pluralist insofar as a judge adopts an amalgam of efficiency, fairness, or other "goodness" values that transcend the consent of the parties.[61] For example, a court invokes immutable implied-in-law values of "fair dealings" to trump terms to which the parties directly agreed on grounds that those terms are unduly harsh, oppressive, or unusual in the context.[62] Pluralist judges also adopt immutable terms to determine

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56. On clarifying "confusion" values, see, for example, *id.* at 318. On reconciling confusion, surprise, and hardship values with free choice and efficiency values in standardized consumer contracts that exclude or limit liability, see *infra* notes 100-04 and the accompanying text. On "irrelevant confusion" in contracting, see Mark A. Lemley & Mark McKenna, *Irrelevant Confusion*, 62 STAN. L. REV. 413 (2010).

57. *See* Barnett, *supra* note 2, at 310-14. On monist theories of contracting grounded in default rules, see Russell Korobkin, *The Status Quo Bias and Contract Default Rules*, 83 CORNELL L. REV. 608, 611–12 (1998). *But see* W. DAVID SLAWSON, BINDING PROMISES: THE LATE 20TH-CENTURY REFORMATION OF CONTRACT LAW 21 (1996).

58. *See* Barnett, *supra* note 50, at 827.

59. *Id.*

60. *Id.* at 827-28.

61. *Id.* It is arguable that all three default rules in consent theory, including immutable implied-in-law consent, are monist in that they each subscribe to unitary values. Even immutable implied-in-law values may draw upon a single unitary conception of public value that trumps all other values.

62. *See* Barnett, *supra* note 34, at 637.

the contract price according to community standards of fair dealings,[63] in the absence of, or substitution for, the direct or indirect consent of the parties.[64]

Treating immutable implied-in-law terms pluralistically is not without risk. One risk is in paying lip service to immutable implied-in-law terms only to discount those terms in deference to a monist conception of consent.[65] A converse risk is in adopting immutable implied-in-law terms in order to effectuate a pre-selected and nuanced conception of "fairness."[66] These risks are attributable not to preference pluralism, but to its simulation.

Plural decision making has particular value by extending the scope of direct and indirect consent without being marginalized by it.

IV. OBLIGATION AS CHECKLIST OR PLURALITY?

A monist basis for upholding a contract is that the parties are bound by a checklist of legal requirements that relate to their wills, promises, or consent, notably: an offer and acceptance; a serious intention to contract; valid consideration; and the presence of complete, certain and non-illusory terms.[67] As an illustration, a court uses a

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63. For example, a court may construe an unreasonable price term in a contract restrictively on grounds that the values of commercial expediency and fairness transcend the express or inferred consent of the parties. U.C.C. § 2–305 (2005) empowers courts to imply terms in contracts of sale, including by establishing a reasonable market price that encompasses plural values beyond the consent of the parties. *See* Koch Hydrocarbon Co. v. MDU Res. Group, 988 F.2d 1529, 1534 (8th Cir. 1993); Lickley v. Max Herbold, Inc., 984 P.2d 697 (Idaho 1999); *see also* Radin, *supra* note 33, at 1125. Radin identifies the "contract-as-consent" model, with "the meeting of the minds between two humans." Her "contract-as-product" model encompasses standards prescribed by legislatures, industry-agreed standardizations, and standards set by technical bodies such as the Institute of Electrical and Electronic Engineers, that conceivably embody plural values beyond the parties' consent. *Id.*

64. Radin, *supra* note 33.

65. On such "expressive liberty," see GALSTON, *supra* note 23.

66. On the tendency of modern common law judges to objectify consent, see, for example, SLAWSON, *supra* note 57, at 20-21.

67. The Restatement Second of Contracts adopts a refined checklist in determining the "mutual assent" of the parties to contract. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS §§ 17, 20, 24, 25 (1979). For Williston's

checklist of requirements to substantiate a single prime value such as in determining whether there is a vice or defect in the parties' consent. Once that checklist is satisfied, it declares that the contract is legally binding and enforceable.[68]

A problem with courts applying such a checklist of requirements to the formation of a contract is that they are likely to exclude plural values which they construe as operating external to that checklist. For example, they may decline to enforce agreements to negotiate in good faith on grounds that such agreements do not promise any determinative result.[69] In contrast, courts that adopt a plural theory of contracting can stipulate that a party's reasonable reliance on such negotiations are among the "good faith" values that decision agents ought to consider in determining the nature and scope of a contract.

Such a plural analysis enables decision agents to ascribe normative properties to a checklist of contract requirements without having to accord primacy to any one item on that checklist. For example, a pluralist court determines whether an "agreement" entered into during the course of an employment relationship is illusory because it accords undue discretion over work conditions to a supervisor after taking account of the relationship between the supervisor and supervisee—including differences in their cultural, social, and educational backgrounds.[70]

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comments on such a checklist in the law of sales, see Samuel Williston, *The Law of Sales in the Proposed Uniform Commercial Code*, 63 HARV. L. REV. 561 (1950).

68. On values that are ranked below a single "super" value under legal monism, see *supra* Section II.

69. On such good faith duties in contract see, for example, Alan Berg, *Promises to Negotiate in Good Faith*, 119 L. Q. REV. 357, 363 (2003). *See generally* STEPHEN J. BURTON & ERIC G. ANDERSEN, CONTRACTUAL GOOD FAITH: FORMATION, PERFORMANCE, BREACH, ENFORCEMENT (1995); GOOD FAITH IN EUROPEAN CONTRACT LAW (Reinhard Zimmermann & Simon Whittaker eds., 2000); Roger Brownsword, Norma J. Hird, & Geraint Howells, *Good Faith in Contract: Concept and Context*, *in* GOOD FAITH IN CONTRACT: CONCEPT AND CONTEXT (Roger Brownsword, Norma J. Hird, & Geraint Howells eds., 1995).

70. Such an employment agreement is not self-evidently illusory, as when the weight of plural analysis leads to the determination that the employee "accepts" the employer's exercise of discretion as a hazard associated with employment. However, that determination does not arise a priori, but depends on the nature

Judges can also invoke value pluralism to identify, weigh, and rank checklist requirements, such as the intention to enter into a marriage agreement against the fairness value of not enforcing onerous terms in those agreements to the disadvantage of a dependant spouse.[71] They invoke "decision procedures" to isolate arbitrary distinctions, such as between the "trivial" and "non-trivial" affairs of a marriage in determining whether the spouses seriously intended to enter into a maintenance agreement while living apart.[72]

Pluralism does not seek explicitly to dissuade decision agents from ranking checklist requirements selectively, or even from concealing their underlying value preferences. It acknowledges that some courts will decline to enforce agreements between "common law" spouses on grounds of the absence of an intention to enter into legal relations that conceal their moral-religious disdain for such unions. What value pluralism provides is an explanatory context in which to identify and critique value preferences, including the failure of decision agents to articulate them adequately.

V. REFRAMING THE BARGAIN

Decision agents who adhere to a monist bargain theory affirm the free choice of the parties in concluding a bargain as the determinative measure of their "expressive liberty."[73] As an illustration, courts require evidence of a bargained-for-exchange, including a benefit to the promisee or a detriment to the promisor as willed or consented to by the

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and significance of that hazard in the plural context under review. *Cf.* HILLMAN, *supra* note 1, at 40.

71. On "decision procedure" pluralism, see *supra* note 38; *see also infra* Section XI.

72. *See, e.g.*, Balfour v. Balfour, (1919) 2 L. Rep. 571, 574-75 (K.B.) (construing a maintenance agreement between spouses as a trivial affair of marriage and not a contract). On gender stereotyping in employment and family contracts and conflicts, see Julie C. Suk, *Are Gender Stereotypes Bad for Women? Rethinking Antidiscrimination Law and Work-Family Conflict*, 110 COLUM. L. REV. 1 (2010).

73. On free choice as a measure of "expressive liberty," see GALSTON, *supra* note 5, at 10-11.

parties.[74] Related monist rationales include: that enforcing the right of the parties to determine their bargain is more certain, predictable, or efficient than a court "making" or "unmaking" a bargain.[75]

A court that subscribes to a nominal conception of consideration in contracting—that a mere peppercorn has value—may be monist or pluralist.[76] If it grounds a gratuitous promise in the a priori primacy of the parties' will or consent, it is likely to subscribe to a monist conception of nominal consideration. If it decides based on a plurality of values varying from the parties' wills or consent to the values of business efficiency and fairness, it adheres at least to a dualist or possibly a pluralist conception of consideration that includes nominal consideration.[77] A court that subscribes to a pluralist bargain theory establishes a decisional framework within which it identifies and ranks plural values relating to the bargain, such as values that relate to bargaining unfairness. It applies these values, in turn, in deciding whether to enforce a past debt in the absence of new consideration,[78] in contrast to a monist judge who holds that a past debt gives rise to a moral obligation only and has no legal effect.[79]

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74. For historical reflection on the "value" of consideration as a bargained-for-exchange, see Edwin W. Patterson, *An Apology for Consideration,* 58 COLUM. L. REV. 929, 929-41 (1958).

75. *See* Robert A. Pollak, *Bargaining Around the Hearth*, 116 YALE L. J. POCKET PART 414 (2007), http://yalelawjournal.org/index2.php?option=com_content&do_pdf=1&id=542.

76. On nominal consideration, see 1 CHITTY ON CONTRACTS § 3 (H.G. Beale ed., 30th ed. 2008); Robert A. Prentice, "*Law &" Gratuitous Promises*, 2007 ILL. L. REV. 881.

77. Such dualism derives from decision agents electing between right-based and fairness-based values in relation to gratuitous or "unbargained" contracts. On such dualism, see, for example, BERLIN, *supra* note 7; *see also* Pollak, *supra* note 75. For a challenge to *consensus ad idem* in so-called "unbargained contracts," see Joshua A.T. Fairfield, *The Search Interest in Contract*, 92 IOWA L. REV. 1237 (2007).

78. For a classical English case holding that past consideration is not "good" consideration, see *Eastwood v. Kenyon* (1840), 11 Eng. Rep. 438 (K.B).

79. On categories in which judges allegedly uphold contracts in the absence of a bargained for exchange, see CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION 28 (1981). Fried identifies four such categories:

Such a pluralist bargain theory provides courts with a framework in which to systemically analyze the nature of bargaining in contracts, to assess structural inequalities between parties in the process of bargaining, and to develop functional ways in which to regulate "bargaining unfairness."[80] It also assists them in deciding how to circumscribe bargaining inequities, such as in light of community values that are applied through standards of detrimental reliance.[81]

Plural bargaining theory poses the risk that decision agents will pick and choose the values by which they assess the bargain of the parties, leading to bargaining indeterminacy. If a plural bargain theory is to avoid such bargaining indeterminacy —leading to a "non-theory" of the bargain—it needs to delineate the plural parameters of the bargain in light of competing rights-based and goods-based values. If plural decision makers are to redress "confusion" or "unfair surprise" in bargaining, they need also take into account the disparate impact of those values upon both the bargaining process and the result reached.

VI. THE MORAL DIMENSIONS OF A PROMISE

Moral monism arises in contract theory when decision agents adopt a prime moral value that trumps all other values in the formation of contracts.[82] For example, moral

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including, *inter alia*, promises to keep an offer open, promises to release a debt, promises to modify a duty, and promises to pay for past benefits or favors. *Id.*

80. On the relationship between the bargain and the normative structure of a contract, see David Charny, *Hypothetical Bargains: The Normative Structure of Contract Interpretation,* 89 MICH. L. REV. 1815 (1991). *But cf.* Melvin Aron Eisenberg, *The Bargain Principle and Its Limits*, 95 HARV. L. REV. 741, 785, n.121 (1982). On how the normative framework is different in e-consumer transactions, see *infra* notes 239-41 and accompanying text.

81. *See, e.g.*, Randy E. Barnett & Mary Becker, *Beyond Reliance: Promissory Estoppel, Contract Formalities, and Misrepresentation,* 15 HOFSTRA L. REV. 443 (1987); *see also* Kevin M. Teeven, *Origins of Promissory Estoppel: Justifiable Reliance and Commercial Uncertainty Before Williston's Restatement*, 34 U. MEM. L. REV. 499 (2004). For arguments that there remain instances of injury and reliance which are unenforceable, see Cohen, *supra* note 24, at 579.

82. Arguably, a promise that is grounded in morality supersedes the traditional separation between law and morality by which analytical positivists hold that only legal promises are enforceable. On the Hart-Fuller debate over the permanent separation between law and morality, compare H.L.A. Hart,

monists ground promises in the "rightness" of respecting one's promises under a classical liberal theory of contracting,[83] as re-popularized by Charles Fried.[84] They couch the "rightness" of promises though such values as the liberty, freedom, dignity, and mutual respect of the parties, as explicated through their "liberty to contract."[85]

A communitarian "moral good" frames promises in light of such values as compliance, cooperation, or comity that are expected of, or imposed upon, the parties and are based on community standards.[86] These standards are most readily identified with the requirement that promises not infract upon public policy.[87] Most importantly, under a monist moral theory, either liberal rights or communitarian conceptions of the moral good prevail. They cannot both triumph.[88]

Pluralist courts invoke at least four moral bases in different combinations in determining whether a promise ought to be legally binding. First, they hold that promises to which the parties have morally bound themselves ought to be enforced. In effect, the parties ought to be bound by promises they freely and voluntarily assumed.[89] Second,

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Positivism and the Separation of Law and Morals, 71 HARV. L. REV. 593 (1958) (favoring the separation), with Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958) [hereinafter Fuller, *Positivism and Fidelity*] (challenging the separation). For additional commentary, see Leslie Green, *Positivism and the Inseparability of Law and Morals*, 83 N.Y.U. L. REV. 1035 (2008); Brian Leiter, *Legal Realism and Legal Positivism Reconsidered*, 111 ETHICS 278 (2001); Jeremy Waldron, *Positivism and Legality: Hart's Equivocal Response to Fuller,* 83 N.Y.U. L. REV. 1135 (2008).

83. On neo-liberal theories of contracting, see *infra* Section VIII.

84. On Fried's moral theory as it applies to promises, see FRIED, *supra* note 79.

85. On such liberty to contract, see ATIYAH, *supra* note 21.

86. On communitarian conceptions of contracting, see *infra* Section XIV.

87. On public policy, see BUCKLEY, *supra* note 2.

88. On the moral foundation of promises, see SMITH, *supra* note 1. On the moral foundations of freedom of contract in moral philosophy, see ATIYAH, s*upra* note 21, at 1-8; DAVID HUME, AN INQUIRY CONCERNING THE PRINCIPLES OF MORALS 30 (Charles W. Hendel ed., 1957); HENRY MATHER, CONTRACT LAW AND MORALITY (1999).

89. This moral foundation is closely identified with a wills theory of contracting. *See, e.g.*, Anthony Kronman, *A New Champion for the Wills Theory*,

they enforce promises to protect the reasonable reliance of one party whose interests are detrimentally impacted by the failure of another party to keep a promise.[90] These two bases bind the promising party for having "intentionally invoked a convention whose function is to give grounds—moral grounds—for another to expect the promised performance."[91]

Third, courts force parties to keep their promises, not only as a measure of honor, respect, and deference to their promises, but also to maintain moral order in—and respect for—civil society. The purpose in enforcing such promises is to avoid affronting public policy or inducing civil disorder.[92]

Fourth, courts rank and weigh promises according to theories of justice which they invoke to redress the failure of parties to keep their promises.[93] These theories include: compensating parties who suffer loss arising from default, extracting retribution from promising parties, deterring future default, or seeking some other moral-legal end such as restorative justice.[94]

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91 YALE L.J. 404, 404-05 (1981) (reviewing CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION (1981)). On the theoretical underpinnings of binding promises in contract law, see SLAWSON, *supra* note 57, at 21; *see also* Richard Craswell, *Contract Law, Default Rules, and the Philosophy of Promising*, 88 MICH. L. REV. 489 (1989). For a classical treatment of moral pluralism, see MOORE, *supra* note 12; *see also* KEKES, *supra* note 11; LARMORE, *supra* note 11.

90. See *supra* note 81 and accompanying text.

91. FRIED, *supra* note 79, at 16; *cf.* Seana Shiffrin, Could *Breach of Contract Be Immoral?*, 107 MICH. L. REV. 1551 (2009). *But see* Craswell, *supra* note 89; Frederick Green, *Is an Offer Always a Promise; Is Not Consideration Always an Act of Forbearance?*, 23 ILL. L. REV. 95, 95-97 (1928).

92. *See generally* FRANK HEARN, MORAL ORDER AND SOCIAL DISORDER: THE AMERICAN SEARCH FOR CIVIL SOCIETY (1997); DAVID SELBOURNE, THE PRINCIPLE OF DUTY: AN ESSAY ON THE FOUNDATIONS OF THE CIVIC ORDER (1994).

93. *See, e.g.*, Stephen A. Smith, *Performance, Punishment and the Nature of Contractual Obligation*, 60 MOD. L. REV. 360 (1997) (exploring the moral consequences of not punishing efficient breach and the limitations on remedies in a breach of contract dispute in terms of public policy). *See generally* GOOD FAITH AND FAULT IN CONTRACT LAW (Jack Beatson & Daniel Friedmann eds., 1997).

94. While one normally thinks of tort law as compensating parties who suffer losses, extracting retribution from wrong-doers, and deterring future undesirable behavior, conceptions of fault in tort law that impact on contract law. *See, e.g.*, PETER W. HUBER, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES ch. 2 (1990); Jay M. Feinman, *Critical Approaches to Contract*

Under a theory of moral monism, any one of these moral values can serve as the "super" value that determines whether a promise ought to be legally binding. That moral value then trumps other values, not limited to values grounded in morality.[95] As an illustration, a judge who subscribes to a classical liberal theory of morality in a society of free and voluntary moral agents would insist that honoring one's promises resides at the apex of the legal order, to which other moral values are subordinated. A court entertaining community values would maintain that honoring one's promises is contingent on such values as maintaining social order.[96]

A problem with moral monism is that it invites decision agents to establish a moral hierarchy, such as the moral superiority of "keeping one's word", to which they subject other moral values. A difficulty with this approach is that the choice of one prime moral value among competing alternatives—not limited to moral options—fosters intractable disputes over those options in the formation of contracts. For example, one decision agent holds that binding a minor to pay for the services of a guardian if the minor so consents to becoming an adult is morally questionable. Another insists that the assurance by minors of *ex post* payment for those services is in the public interest

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Law, 30 UCLA L. REV. 829, 834 (1983) ("contract law is like tort law and . . . judicial action is like legislative action: all necessarily involve public policy judgments in imposing legal liability."); Daniel Schwarcz, *A Products Liability Theory for the Judicial Regulation of Insurance Policies*, 48 WM. & MARY L. REV. 1389 (2007). For a discussion of restorative justice, see sources cited *infra* note 236.

95. The bases for promises in moral theory are many and varied. *See* P.S. ATIYAH, PROMISES, MORALS, AND LAW 177 (1981); BUCKLEY, JUST EXCHANGE, *supra* note 1, at 51-60; THE LAW OF OBLIGATIONS: CONNECTIONS AND BOUNDARIES (Andrew Robertson ed., 2004). Moral rights and economic efficiency theories, however, are not mutually exclusive. *See* Oman, *supra* note 19, at 1484 (espousing a "reconciliation of competing approaches").

96. For a libertarian rationale for the morally binding nature of promises, see ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 503 (1974); Cass R. Sunstein & Richard H. Thaler, *Preferences, Paternalism, and Liberty*, 81 ROYAL INST. PHIL. SUPP. 233 (2006) http://journals.cambridge.org/action/displayAbstract?fromPage=online&aid=457780. For the argument that a lack of clarity in legal standards may enrich moral deliberations, see Seana Valentine Shiffrin, *Inducing Moral Deliberation: On the Occasional Virtues of Fog*, 123 HARV. L. REV. 1214 (2010).

including the welfare interests of minors. The problem is not that theories of moral "righteousness" and moral "goodness" ought to coincide in the formation of contracts. The problem is in treating one moral conception as a super or prime value that transcends the other.[97]

A related concern is that moral monism simplifies moral-legal deliberations. For example, a "contract as promise" theory of morality regresses into a proxy for a monist wills or consent theory of contracting. In effect, the wills or consent of the parties determines when their agreement is binding on moral grounds.[98] A further risk is of moral monism marginalizing "fairness" values. A court that declares a promise binding to protect the reasonable reliance of the promisee may do little more than reframe promissory estoppel on moral grounds.[99]

Under a theory of moral pluralism, moral decision making derives not from the supremacy of one prime moral value over all others, but from identifying, ranking, and weighing a plurality of moral values in order to reach a morally defensible determination that is inclusive, not exclusive. Such a plural assessment includes recognizing the "rightness" of keeping one's promises, along with the "goodness" value of not enforcing promises that "unfairly surprise," or cause "undue hardship" to one party. For example, a court that declines to enforce a complex liquidated damage clause in a contract does so not simply because it "looks like" a penalty, but only after it has assessed the "confusion," "surprise," and "hardship" on the party subject to that clause.[100]

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97. On these moral dilemma, see generally SLAWSON, *supra* note 57; TREBILCOCK, *supra* note 1. *But cf.* DAVID FELLMAN, THE LIMITS OF FREEDOM (Greenwood Press, Publishers 1979) (1959).

98. On the view that Charles Fried's theory of "contract as promise" is a wills theory, see Kronman, *supra* note 89, at 404.

99. On the detrimental reliance arising from a promissory estoppel, see *supra* note 73. *But cf.* HILLMAN, *supra* note 1, at 52-55.

100. For Charles Fried's recognition that courts may construe contracts expansively on grounds of fairness in the absence of contract as promise, see FRIED, *supra* note 79, at 25. *See also* Brian Langille and Arthur Ripstein, "*Strictly Speaking—It Went Without Saying*," 2 J. LEGAL STUD. 63 (1996); Andrew J. Morris, *Practical Reasoning and Contract as Promise: Extending Contract-Based Criteria to Decide Excuse Cases*, 56 CAMBRIDGE L.J. 147 (1997).

A concern about courts applying moral pluralism to the formation of contracts is the risk of decisions regressing into endless discourse over the relative weight of contractual "righteousness" or "virtue." If a promise becomes captive to the vagaries of judicial belief, faith, decency, honor, courage, or some other conception of the "right" or the "good," moral abstractions triumph, leading to formless decisions.[101] Courts will declare promises binding based on an assortment of incongruous judicial conceptions of distributive, punitive, corrective, and restorative justice.[102] They will encapsulate an infinite variety of moral determinations beyond deterring the unconscionable treatment of consumers, or the systemic denial of corrective justice to minorities in the workforce.[103] The concern is that morality will run amuck and contract formation along with it.[104]

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101. For a view promoting the "priority" of the right over the good, see TRAKMAN & GATIEN, *supra* note 4, at chs. 1-2. For a view promoting the "priority" of the good over the right, see MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 113-23 (1982). For additional commentary, see W.D. ROSS, THE RIGHT AND THE GOOD (1930); J.J. Thomson, *The Right and the Good*, 94 J. PHIL. 273 (1997).

102. On moral determinism in relation to law, see, for example, Fuller, *Positivism and Fidelity*, *supra* note 82, at 630-38. For a critique of morally open-ended judicial activism by "new legal formalists," see, for example, Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765 (1996). For a critique of moral pluralism in liberal thought, see, for example, JOSEPH H. CARENS, CULTURE, CITIZENSHIP, AND COMMUNITY: A CONTEXTUAL EXPLORATION OF JUSTICE AS EVENHANDEDNESS (2000); DAVID LEWIS SCHAEFER, ILLIBERAL JUSTICE: JOHN RAWLS VS. THE AMERICAN POLITICAL TRADITION 28-33 (2007).

103. The basis for such corrective justice lies in the assertion that systemic discrimination is best redressed through systemic remediation. The problem is in determining the nature and extent of that remediation contextually, without regressing into an unqualified assertion that corrective justice is determined quantitatively only. For an example, by hiring and paying more to minorities, without addressing underlying qualitative concerns such as work conditions that systemically disadvantage minorities. For reflection on such issues in civil justice, see, for example, Daniel N. Lipson, *Where's the Justice? Affirmative Action's Severed Civil Rights Roots in the Age of Diversity*, 6 PERSP. ON POL. 691 (2008).

104. For the proposition that, before a contract and promise can correspond, it is necessary first to provide a theory of self-imposed moral responsibility, see Jody S. Kraus, *The Correspondence of Contract and Promise*, 109 COLUM. L. REV. 1603 (2009).

What moral pluralism can offer is a conceptual framework within which to consider the moral alternatives, as well as their perceived moral implications. For example, if the issue is about the enforceability of a sale of body parts for research, moral pluralism cannot provide a pre-packaged answer to whether it is per se "immoral" to sell body parts. However, it can help to identify, weigh, and rank moral values such as circumspection over profiteering in body parts, compared to encouraging the donation of body parts to maintain life-enhancing research. A decision agent may conclude that however objectionable the sale of body parts is in principle, such sales are morally defensible in discrete contexts such as by taking account of the terms of the sale including the parties, the price, and the public benefit.

Far from embroiling itself in moral indeterminacy, value pluralism accommodates morally defensible determinations not on their own terms, but in response to the moral values that are identified, ranked, and applied. Consider the provision in the Restatement (Second) of Contracts stating that reliance upon a promise should be "reasonabl[e] . . . as justice requires."[105] In the absence of a sustained plural analysis, the moral dimension of reasonableness "as justice requires" invites an infinite array of ways in which to recast the objective moral person into a legally determinate person.[106] Examining these different moral dimensions is precisely what moral pluralism seeks to do. In particular, moral pluralism recognizes that the objectively "moral" person, far from being irreversibly fixed, may include someone who, through the act and consequence of promising, is bound by the dictates of conscience to act justly, build relations of trust with others, and contribute to a defensible moral "good." Moral pluralism entails identifying, weighing, and ranking these moral attributes in

105. RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (1979).

106. For criticisms of reliance on open-ended conceptions of fairness in arriving at contract remedies, see IAN R. MACNEIL, THE NEW SOCIAL CONTRACT: AN INQUIRY INTO MODERN CONTRACTUAL RELATIONS 62 (1980). *But see* HILLMAN, *supra* note 1, at 129-31 (identifying distinct norms of fairness by which courts decide cases, such as in allocating performance losses). *See generally* Robert A. Hillman, *Court Adjustment of Long-Term Contracts: An Analysis Under Modern Contract Law*, 1987 DUKE L. J. 1.

order to determine whether enforcing a promises is "reasonable . . . as justice requires."[107]

Moral pluralism cannot provide an a priori account that a unified moral conception ought to apply in all cases any more than any rights-based and goods-based theories can pretend to do so. However, moral pluralism can explore the moral alternatives without holding that one moral good is invariably superior to all others in the formation of contracts.

VII. SELF- OR PUBLIC REGULATION?

A theory of contract regulation entails self-regulation by the parties, regulation by public authorities, or some blend of the two.[108] At issue is why, when, and how self and public regulation apply to contract formation, how they interact, who decides, and according to what criteria.[109]

A theory of self-regulation in contracting is usually monist. For example, the assumption in a liberal society is that contracting parties ought to be free to regulate their own affairs by their own means, such as according to their wills, consent, or promises.[110] However, the nature of their self-regulation may conceivably be contingent on a plurality of values including their knowledge, desire, dignity, character, solidarity, reputation and sense of community, beyond their unitary wills, consent, or promises.[111]

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107. *Cf.* Melvin Aron Eisenberg, *The Role of Fault in Contract Law: Unconscionability, Unexpected Circumstances, Interpretation, Mistake, and Nonperformance*, 107 MICH. L. REV. 1413, 1415 (2009).

108. *See, e.g.*, HUGH COLLINS, REGULATING CONTRACTS 5-7 (1999); Jean Braucher, *Contract Versus Contractarianism: The Regulatory Role of Contract Law*, 47 WASH. & LEE L. REV. 697, 712 (1990).

109. *See* Braucher, *supra* note 108. For a thoughtful analysis on the interaction between self- and public regulation in a democracy, see generally CHRISTINE PARKER, THE OPEN CORPORATION: EFFECTIVE SELF-REGULATION AND DEMOCRACY (2002).

110. On how contracts can be invoked in governing social interaction, see COLLINS, *supra* note 108, at 70 (citing Laura Nader, *Disputing Without the Force of Law,* 88 YALE L.J. 998, 1021 (1979)). On free choice, see *supra* Section II.

111. The risk in a plural theory of self-regulation is in determining the plural qualifications for such self-regulation. For example, if knowledge and reputation are preferred values, a potentially insidious inference is that only

Public regulation of contracts requires that contracts are regulated by decision agents beyond the parties, varying from legislators and administrative agencies to courts of law and arbitrators. Public regulation can be based on monist or pluralist values. As an illustration of monism in public regulation: consider the legislature that declares illegal the sale of flick-blade or switchblade knives to minors on grounds of public interest in deterring their access to and use of dangerous weapons. That regulation is monist, ascribing primacy to deterrence as the determinative value in regulating such sales.[112]

Courts, in turn, apply regulatory schemes both in accordance with legislative or other guidelines and through common law instruments. For example, judges employ traditional principles of economic duress,[113] applicable standards of procedural and substantive unconscionability,[114] and rules of construction like the *contra proferentem* rule selectively in determining whether to enforce a contract.[115] If the legislative guidelines so direct, or the adjudicative and social facts so demonstrate, judges impute immutable implied-in-law terms into contracts

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knowledgeable people and people with a public reputation ought to regulate their own affairs.

112. From a legal perspective, see *infra* Section XIV; *see also* BUCKLEY, *supra* note 2.

113. *See, e.g.*, John P. Dawson, *Economic Duress—An Essay in Perspective*, 45 MICH. L. REV. 253 (1947); Robert L. Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603 (1943).

114. On the rationale for such judicial scrutiny on grounds of procedural unconscionability, see, for example, *Gatton v. T-Mobile USA, Inc.*, 61 Cal. Rptr. 3d 344, 352 (Ct. App. 2007) ("Oppression [for purposes of rendering a contract provision procedurally unconscionable] arises from an inequality of bargaining power that results in no real negotiation and an absence of meaningful choice."), quoting *A & M Produce Co. v. FMC Corp.*, 135 Cal.App.3d 473, 486 (Ct. App. 1982). *But see* Robert A. Hillman, *Debunking Some Myths About Unconscionability: A New Framework for U.C.C. Section 2-302*, 67 CORNELL L. REV. 1 (1981).

115. On the *contra proferentem* rule, see RESTATEMENT (SECOND) OF CONTRACTS § 206 (1981); 17A AM. JUR. 2D *Contracts* § 342 (2004); 11 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS, § 32:12 (4th ed. 1999 & Supp. 2005).

based on values of fairness, even-handedness, or other variants of social justice.[116]

A plural theory of public regulation does not propose that regulators such as legislatures and courts engage in extraordinary inquiry beyond their regulatory mandate. What it does envisage is that decision makers transparently assess the malady that is subject to regulation, the purposes sought through regulation, and the competing plural means that are invoked to redress that malady and attain the regulatory purposes. As an illustration, uniform law commissioners already explore different regulatory policies governing end-user consumer transactions. They design regulatory schemes that balance competing values such as preserving free market e-commerce and measures designed to redress inefficient or unfair contract practices.[117] They take account of the systemic use of confusing or incomplete product description clauses in determining whether and how to regulate them.[118] In doing so, decision agents focus on such party-specific factors as the significance of e-sellers having deeper pockets, more bargaining leverage, and greater legal sophistication than e-buyers.[119] They consider price and non-price competition, such as the alleged market dysfunctions arising from the online sale of complex products like computers, the recurrence of product defects,

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116. On such immutable implied-in-law terms, see *supra* Section III.

117. On the regulatory framework behind contract law, see, for example, Jean Braucher, *Cowboy Contracts: The Arizona Supreme Court's Grand Tradition of Transactional Fairness*, 50 ARIZ. L. REV. 191 (2008); Jean Braucher, *New Basics: Twelve Principles for Fair Commerce in Mass-Market Software and Other Digital Products*, *in* CONSUMER PROTECTION IN THE AGE OF THE "INFORMATION ECONOMY" 177 (Jane K. Winn ed., 2006).

118. *See generally* Joshua A.T. Fairfield, *Anti-social Contracts: The Contractual Governance of Virtual Worlds*, 53 MCGILL L.J. 427 (2008). For reflections on plural conceptions of contract regulation in a complex socio-legal order, see GRANT GILMORE, THE AGES OF AMERICAN LAW (1977).

119. It is easier to determine the percentage of consumers who bring suit in response to complex exclusion and limitation of liability clauses than those consumers who understand them. *See, e.g.*, Steven P. Croley & Jon D. Hanson, *Rescuing the Revolution: The Revived Case for Enterprise Liability*, 91 MICH. L. REV. 683, 687 (1993).

and the implementation of risk avoidance measures to contracts under scrutiny.[120]

In engaging in such plural analysis, public regulators assess competing legislative measures in otherwise similar contexts. For example, they consider value contestations over the public regulation of "straight-jacket" clauses prohibiting class actions against e-sellers, and contract clauses mandating arbitration in the e-seller's home state.[121] They evaluate such countervailing factors as the extent to which e-buyers have access to consumer protection agencies, public advocacy measures, and fast-track arbitration.[122] They appreciate that the more complex the malady, purpose, and response to formation of contract issues under examination, the more complex is likely to be the inquiry into public regulation.

Plural inquiry into public regulation is not without pitfalls. Public regulators are likely to diverge over the suitability of particular regulatory measures, "decision procedures" by which to implement them,[123] and over the

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120. For a legal realist critique of fine print clauses in adhesion contracts, see KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 370 (1960) ("The fine print which has not been read has no business to cut under the reasonable meaning of those dickered terms which constitute the dominant and only real expression of agreement . . . .").

121. For a critique of forum selection clauses in e-commerce, see , for example, *Brower v. Gateway, 2000, Inc.*, 676 N.Y.S.2d 569, 574-75 (App. Div. 1998) (finding a forum selection clause unconscionable). On concerns over choice of arbitration clauses in contracts, see Jonnette Watson Hamilton, *Pre-Dispute Consumer Arbitration Clauses: Denying Access to Justice?*, 51 MCGILL L.J. 693, 695-96 (2006); Sajida A. Mahdi, *Gateway to Arbitration: Issues of Contract Formation Under the U.C.C. and the Enforceability of Arbitration Clauses Included in Standard Form Contracts Shipped with Goods*, 96 NW. U. L. REV. 403, 418 (2001); Stephen J. Ware, *Arbitration Clauses, Jury-Waiver Clauses, and Other Contractual Waivers of Constitutional Rights*, 67 LAW & CONTEMP. PROBS. 167 (2004); *see also* Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 430 (2002).

122. A converse indicator is "herd behavior" among consumers. *Cf.* Marcel Kahan & Michael Klausner, *Path Dependence in Corporate Contracting: Increasing Returns, Herd Behavior and Cognitive Biases*, 74 WASH. U. L. Q. 347, 353–57 (1996); David S. Scharfstein & Jeremy C. Stein, *Herd Behavior and Investment*, 80 AM. ECON. REV. 465, 466 (1990).

123. On such cultural influences over plural decision making, see *infra* Section XIV.

nature, timing and extent of regulatory reform.[124] Illustrating such divergences among regulators was the failure of the Uniform Computer Information Transactions Act ("UCITA"), devised by the Commissioners on Uniform State Law, to secure state endorsement beyond Maryland and Virginia.[125] In contention, among other factors, were differences among state authorities over the manner in which to regulate such e-contracts as "click-wrap" and "browse-wrap" e-contracts,[126] and how to scrutinize clauses within them such as those that limit the product liability of e-suppliers.[127]

Courts also likely differ over the nature and limits of public regulation over the formation of contracts. Take the case of the choices available to courts in determining whether to enforce limitation of warranty liability clauses in discount consumer contracts. One determination is to hold that unbargained "take-it-or-leave-it" clause should be enforced on evidence that sellers discount prices to mass consumers, consumers expressly or tacitly agree to such clauses, and their use reduces transaction costs. A contrary determination is that the evidence is stronger that take-it-

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124. *See, e.g.*, COLLINS, *supra* note 108, at 28.

125. The UCITA was initially framed as Draft Article 2B-207 and 208 of the UCC. In 2003, after various efforts to have states adopt it, the National Conference of Commissioners on Uniform State Law suspended efforts to obtain further state adoptions beyond Maryland and Virginia that had already adopted it. On the UCITA, see Nat'l Conf. of Comm'rs on Unif. State Laws, Uniform Computer Information Act (Feb. 9, 2000), http://www.law.upenn.edu/bll/archives/ulc/ucita/ucita200.pdf [hereinafter *UCITA*].

126. Click-wrap contracts include conditions of sale at the end of the agreement where the e-purchaser is asked to tick an "I agree" box consenting to the purchase. Browse-wrap contracts provide e-purchasers with a hyperlink to another screen containing those terms. *See* Dale Clapperton & Stephen Corones, *Unfair Terms in "Clickwrap" and other Electronic Contracts*, 35 AUSTL. BUS. L. REV. 152 (2007); Kaustuv M. Das, *Forum-Selection Clauses in Consumer Clickwrap and Browsewrap Agreements and the "Reasonably Communicated" Test*, 77 WASH. L. REV. 481, 500 (2002); Hillman & Rachlinski, *supra* note 121, at 493; *see also* Leon E. Trakman, *The Boundaries of Contract Law in Cyberspace*, INT'L BUS. L.J. 161 (2009).

127. *See UCITA*, *supra* note 125. Notwithstanding dissension among regulators, new mandatory rules have evolved that govern the use of new technologies in e-commerce. *See, e.g.*, Robert A. Hillman, *Online Boilerplate: Would Mandatory Website Disclosure of E-Standard Terms Backfire?*, 104 MICH. L. REV. 837 (2006).

or-leave-it clauses are unduly onerous, that they unfairly surprise consumers, that sellers do not discount prices adequately in fact, and that such clauses increase transaction costs for consumers who receive defective products with limited warranty protection.

The purpose of a plural analysis is to inform regulatory policies in light of values like security, reliability, and fairness between contracting parties, without subjecting different form contracts to a one-size-fits-all regulatory scheme that relies on static regulatory norms. The intention is for public regulators to periodically review measures to assess regulatory deficiencies such as the absence of market compliance or other evidence of ineffectiveness or unfairness; and to take account of changes in horizontal and vertical integration among buyers and sellers in the regulatory context. A related goal is to ameliorate regulatory measures in markets that are predominantly horizontally integrated, as when buyers expressly or tacitly agree not to dicker over warranty exclusion clauses in return for sustainable benefits. Regulators can also refine regulatory measures in vertically integrated markets in which warranty exclusion clauses unfairly surprise consumers or impose undue hardship upon them as a class or within sub-classes.[128]

VIII. FROM DISCRETE TRANSACTIONS TO RELATIONAL CONTRACTS

A distinction is sometimes drawn between discrete transactions and relational contracts.[129] Discrete transactions resemble "classical" agreements in which the parties engage in one-off transactions that are monist in nature. What you see is what you get, a hermetically sealed unitary theory of contracting grounded in the wills,

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128. On sub-categorization of consumers, such as distinguishing between one off, repeat order, and purchase-for-resale consumers, see Trakman, *supra* note 126. On the interface between plural regulatory policies in contracting and functionalism, see *infra* Section XI.

129. For a discussion by Ian Macneil, a key figure in developing the relational contracts perspective, see MACNEIL, *supra* note 106, at 10. *See also* James W. Fox Jr., *Relational Contract Theory and Democratic Citizenship*, 54 CASE W. RES. L. REV. 1, 5-7 (2003).

intention, or consent of the parties.[130] The discrete transaction includes all the applicable terms and conditions of the agreement between the parties. Such discrete transactions encompass traditional party-to-party transactions such as between traditional buyers and sellers.[131] They also include mass market consumer transactions in which a mass market seller uses a series of standardized transactions in dealing with a mass of consumers.[132]

Relational contracts involve ongoing dealings between parties including the impact of periodic changes in their contractual relationships, such as arise from modifications over time and space in the nature of the goods and the quantity, price, and terms of delivery. Such relational contracts typically include parties engaged in long-term supply agreements, such as an oil company and its distributors.[133]

It is arguable that discrete transactions and relational contracts are both monist. The supposition is that both are explained by a monist conception of consent, although relational consent is more widely conceived than discrete consent. The result is that the judiciary's role is merely to determine the nature of consent according to its place on a continuum from discrete transactions to relational

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130. *See* MACNEIL, *supra* note 106.

131. *Id.*; *see also* Fox, *supra* note 129, at 5.

132. The distinction between discrete transactions and relational contracts is not universally endorsed. *See, e.g.*, Melvin A. Eisenberg, *Why There is No Law of Relational Contracts*, 94 NW. U. L. REV. 805, 816-17 (2000). *But see* Donald J. Smythe, *Bounded Rationality, the Doctrine of Impracticability, and the Governance of Relational Contracts*, 13 S. CAL. INTERDISC. L.J. 227, 230-31 (2004); Richard E. Speidel, *The Characteristics and Challenges of Relational Contracts*, 94 NW. U. L. REV. 823 (2000).

133. *See generally*, Ian R. Macneil, *Contracting Worlds and Essential Contract Theory*, 9 SOC. & LEGAL STUD. 431 (2000) [hereinafter Macneil, *Contracting Worlds*] (discussing relational contract theory); Ian R. Macneil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law*, 72 NW. U. L. REV. 854 (1978) [hereinafter Macneil, *Contracts*] (discussing some of the traits of relational contracts); Ian R. Macneil, *Relational Contract Theory: Challenges and Queries*, 94 NW. U. L. REV. 877 (2000) [hereinafter Macneil, *Relational Contract Theory*] (defining relational contracts).

contracts.[134] According to this approach, a court is likely to treat consent to contract as the applicable "super" value, supported by a hierarchy of lesser values deriving from the cultural background, political affiliation, and socio-economic situation of the parties. The difference between such discrete transactions and relational contracts is merely one of degree, notably in the prospect of a court placing greater reliance on cooperative dealings between the parties at the relational than the discrete end of the spectrum.[135]

A contrary approach is that discrete transactions and relational contracts are fundamentally different in kind, beyond differences of degree. Discrete transactions are monist, whereas relational contracts are pluralist. A discrete transaction is formed at the precise moment at which the parties consent; namely, at the time of their accord and satisfaction.[136] A discrete transaction is unenforceable, in turn, when there is evidence of a vice or defect in the wills, promise, or consent of those parties.[137]

In contrast, a relational contract engages a range of plural values arising out of a continually evolving—progressing or regressing—relationship.[138] Those changes

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134. The continuum arguably treats relational contracts as monist, not pluralist. For example, consent may remain a "super" value. All that changes on entering the relational part of the continuum is that the "fairness" and "goodness" values are acknowledged without displacing the monist super-value of, say, the wills or promises of the parties. In some respects, laws that have evolved to govern adhesion contracts are grounded in monism in seeking to remedy the imperfect consent of consumers faced with "take it or leave it" standard form contracts. The justification for such laws is attributed, in part, to systemic market forces, involving inherent bargaining imbalances between the parties, such as between mass market producers and mass consumers. In part, the rationale for such laws responds to vices in the consent of consumers who do not fully understand—and are not meant to understand—onerous provisions in such contracts. For classical commentary on these two forces—the abuse of bargaining advantage on the one hand and defects in consent on the other—see Kessler, *Contracts of Adhesion*, *supra* note 28.

135. On the judicial construction of consent under a continuum or spectrum approach, see *supra* Section IV.

136. Such a discrete transaction is identified with the classical wills theory of contracting, as well as with traditional consent theories. *See supra* Sections II & III, respectively.

137. On the "single moment" theory of consent, see *infra* note 141; *see also* Fairfield, *supra* note 77, at 1260-63.

138. *See* Fairfield, *supra* note 77, at 1260-63.

are contingent on the plural context surrounding each relationship, such as arising from supply shortages that impact relations between suppliers and distributors.[139]

The argument that an analysis of relational contracts is pluralist includes evidence of judges identifying, weighing, and applying competing "rightness" and "goodness" values to contract relationships.[140] For example, they adopt "decision procedures" that transcend the wills or consent of the parties, that avoid relying on a "single moment" at which a contract is concluded, and that take account of variations in the wills and consent of the parties over the duration of their long-term relationship.[141] Typifying relational pluralism is the readiness of courts to value the cultural, economic, and political context surrounding contract relationships, such as the capacity of oil suppliers to anticipate disruptions in oil supplies during energy crises, to draw on oil reserves to redress shortages, and to re-negotiate oil prices with other sources of supply.[142]

Plural decision agents are also likely to limit the impact of monist values they consider ill-fitting to a changing long-term relationship.[143] In doing so, decision agents are likely to assess the mutual trust, confidence, goodwill, and reputations of the parties and the extent to which they collaborate in reaching "winner take some" rather than

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139. An inference arising from Ian Macneil's *The New Social Contract* is that the socialization of relational contracts renders them pluralist in nature. *See* MACNEIL, *supra* note 106, at 69-70.

140. On the implicit recognition of interacting plural values exemplifying "law in action," see, for example, Stewart Macaulay, *Elegant Models, Empirical Pictures, and the Complexities of Contract*, 11 LAW & SOC'Y REV. 507, 521-22 (1977); Stewart Macaulay, *The Real and the Paper Deal: Empirical Pictures of Relationships, Complexity and the Urge for Transparent Simple Rules*, 66 MOD. L. REV. 44 (2003) [hereinafter Macaulay, *The Real and the Paper Deal*].

141. On the parameters of a "single moment" theory of consent, see E. Allan Farnsworth, *Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations*, 87 COLUM. L. REV. 217, 220 (1987).

142. Engaging in plural value determinism is implicit in establishing when and how to "adjust" long-term relationships. *See, e.g.*, Macneil, *Contracts*, *supra* note 133, at 895-96, 898.

143. Courts may also be "activist" in policing discrete transactions, for example in responding to the perceived abuse of differences in bargaining power between the discrete parties, while still being monist in subscribing to consent or promise as a "super" value. *See supra* note 37.

"winner take all" resolutions of their differences. Such an analysis involves courts identifying an amalgam of values varying from the express promises of the parties to their behavioral attitudes and relational practices in determining whether to enforce a price escalation clause in a supply contract.[144]

Take Westinghouse's celebrated commercial impracticability case in 1981.[145] Westinghouse, a long-term supplier of uranium, sought an excuse from its uranium supply contracts with its relational buyers on grounds of unforeseen increases in prices arising beyond its control that were not expressly provided for by contract.[146] In issue was whether Westinghouse was entitled to relief from performance only as provided expressly by contract;[147] or whether it could claim an excuse from performance by operation of law due to "commercial impracticability" under section 2-615 of the Uniform Commercial Code ("UCC").[148] After protracted hearings, the court appointed a special master to try to broker a resolution between the parties which, in effect, it incorporated into its decision.[149]

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144. On give-and-take solutions to relational disputes, see generally Trakman, *supra* note 40 (providing various examples).

145. Fla. Power & Light Co. v. Westinghouse Elec. Corp. (*In re* Westinghouse Elec. Corp. Uranium Contracts Litig.) (*Westinghouse*), 517 F. Supp. 440 (E.D. Va. 1981), *aff'd in part and rev'd in part*, 826 F.2d 239 (4th Cir. 1987).

146. *Id.* at 452, 454. *Westinghouse*, again, illustrates the difficulties in determining the foresight of parties and the foresight that ought "reasonably" to be attributed to them. *See, e.g.*, Paul L. Joskow, *Commercial Impossibility, the Uranium Market and the Westinghouse Case*, 6 J. LEGAL STUD. 119, 157–58 (1977).

147. *See Westinghouse,* 517 F. Supp. at 458-59; *cf.* Eisenberg, *supra* note 132, at 817 (disputing the existence of a law governing relational contracts).

148. *Westinghouse*, 517 F. Supp. at 450.

149. The appointment of a special master to resolve complex issues of fact is far more common in tort litigation than in contracts. *See,* Symposium, *Judge Jack B. Weinstein, Tort Litigation, and the Public Good: A Roundtable Discussion to Honor One of America's Great Tiral Judges on the Occasion of His 80th Birthday*, 12 J.L. & POL'Y 149, 169 (2003). The criticism that such an appointment in contracts offends the consensual nature of agreements may be offset in part by the difficulty courts may have in resolving complex relational disputes. *See, e.g.*, Macaulay, *The Real and the Paper Deal*, *supra* note 140; Trakman, *supra* note 40.

An argument that the court adhered to a monist position is the proposition that it decided, in significant measure, according to the consent of the parties. That consent was expressed not only through any original contract between the parties, but through a special master who brokered mutually acceptable terms between them. The result was that the court supervised a post-dispute agreement between the parties.

A contrary argument is that the *Westinghouse* court decided on relational grounds that transcended any brokered "consent" between the parties. The court explored and reached a practical, efficient, and fair solution based on the ongoing relationship between them within a volatile macro-political and economic environment.[150] However much the remedy co-opted the parties' value preferences through the good offices of a special master, it transcended the wills, promises, and consent of the parties. In effect, the result took account of changes in the complex relationship between Westinghouse and its customers including intervening political and economic circumstances that destabilized the oil supply market.[151]

Both monist and pluralist approaches to relational contracting have limitations. A monist court is subject to challenge for undue temerity in declining to take account of plural factors, so as not to circumvent the express wills or consent of the parties.[152] A court that incorporates relational considerations into its decisions is prone to undue audacity in sublimating the formation of contracts to relational

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150. In issue, for example, is whether the long-term supplier could have averted or mitigated the risk that eventuated, such as through stockpiling supplies, earmarking alternative suppliers, continuing supplies in reduced quantities, etc. *See Westinghouse*, 517 F. Supp. 440.

151. *See* Richard E. Speidel, CONTRACTS IN CRISES: EXCUSE DOCTRINE AND RETROSPECTIVE GOVERNMENT ACTS 3 (2007); *see also* Mark B. Baker, "*A Hard Rain's A-Gonna Fall"—Terrorism and Excused Contractual Performance in a Post September 11th World*, 17 TRANSNAT'L LAW. 1, 20–21 (2004) (discussing the effect of the September 11th terrorist attacks on excused contractual performance).

152. Judges of this genre could be called "trimmers," by seeking to avoid political conflict over controversial issues. *See* Cass R. Sunstein, *Trimming,* 122 HARV. L. REV. 1049, 1053-54 (2009).

economics and politics.[153] The overriding issue relates to neither the temerity of judges in preserving the prime value of the wills or consent of the parties, nor to their audacity in superimposing relational considerations upon such contracts. In issue are the normative values judges attribute to complex commercial dealings, including inferences drawn about changes in trust, confidence, solidarity, and goodwill between the parties over the course of their relationship.

The result reached in the *Westinghouse* case is also one among a number of possible plural results. Key issues in reaching a plural determination is the need to identify the significance of a dysfunctional horizontal relationship, not to become a supplicant of one party to that relationship, and not peremptorily to transform a horizontal into a vertically integrated relationship.[154]

IX. THE LIMITS OF EFFICIENCY

Almost a legend in its own time is the idealized value of "efficiency" in the formation and performance of contracts.[155] Ascribed to "Law and Economics," a contract is efficient when it maximizes upon profits or produces benefits that outweigh its costs.[156] Expressed in contractual terms, parties benefit most by concluding efficient—optimal or profitable—

153. Co-opting party participation in relational decision making also presupposes that the court will endorse the remedy proposed by the parties. *See supra* Section VII.

154. On horizontal and vertically integrated relationships, see *supra* Oman, note 19.

155. On Law and Economics, see, for example, VERNON VALENTINE PALMER & MAURO BUSSANI, PURE ECONOMIC LOSS: NEW HORIZONS IN COMPARATIVE LAW (2009); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (Aspen Publishers 7th ed. 2007) (1972); William M. Landes & Richard A. Posner, *Legal Change, Judicial Behavior, and the Diversity Jurisdiction*, 9 J. LEGAL STUD. 367 (1980); Richard A. Posner, *The Law and Economics of Contract Interpretation*, 83 TEX. L. REV. 1581 (2005) [hereinafter Posner, *Contract Interpretation*]; *see also* Melvin A. Eisenberg, *The Disgorgement Interest in Contract Law*, 105 MICH. L. REV. 559 (2006); Adam J. Hirsch, *Evolutionary Theories of Common Law Efficiency: Reasons for (Cognitive) Skepticism*, 32 FLA. ST. U. L. REV. 425, 429–30 (2005); Todd J. Zywicki, *The Rise and Fall of Efficiency in the Common Law: A Supply-Side Analysis*, 97 NW. U. L. REV. 1551 (2003).

156. For a classical conception of the social cost of inefficient contracting, see R.H. Coase, *The Problem of Social Cost*, 31 J.L. & ECON. 1 (1960).

contracts.[157] Such "efficiency" is usually ascribed to neo-liberal principles grounded in free market economics and rooted in utilitarian philosophy.[158]

Law and Economics is founded on preference monism. A single but comprehensive value—efficiency—is conceived as determinative in the formation of contracts. The guiding assumption is that courts attribute different properties to efficiency, so long as efficiency serves as the determinative "super" value.[159]

A further Law and Economics assumption is that parties to a contract are presumed to make efficient choices within competitive markets in order to maximize benefits and minimize costs.[160] Richard Epstein proclaimed: "[s]urely all transactions made in organized markets at competitive prices must go unquestioned, for to hold one of these exchanges suspect would be to strike down all identical transactions."[161]

A less self-evident assumption is that, in markets that are not organized and in which prices are not competitively determined, courts are more likely to question the utility, costs, and benefits of the exchange between the parties. Their purpose, again, is to promote efficient transacting, but by taking into account that a party in an imperfect market

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157. Arguably, there are multiple measures of efficiency. For example, Coleman asserts that "Economists as well as proponents of the economic analysis of law employ at least four efficiency-related notions, including: (1) Productive efficiency, (2) Pareto optimality, (3) Pareto superiority, and (4) Kaldor-Hicks efficiency." Jules L. Coleman, *Efficiency, Utility, and Wealth Maximization*, 8 HOFSTRA L. REV. 509, 512 (1980).

158. On the neo-classical liberal—and libertarian—foundations of Law and Economics, see ANDREW GAMBLE, HAYEK: THE IRON CAGE OF LIBERTY (1996); Paul G. Mahoney, *The Common Law and Economic Growth: Hayek Might Be Right*, 30 J. LEGAL STUD. 503 (2001); *see also* JOHN GRAY, HAYEK ON LIBERTY 40 (1984).

159. Efficiency as a measure of "preference monism" is founded on "preference utilitarianism." On Stuart Mills' "preference utilitarianism," see, for example, MILL *supra* note 5, at 241; FREDERICK ROSEN, CLASSICAL UTILITARIANISM FROM HUME TO MILL (2003); Ronald J. Scalise Jr., *Why No "Efficient Breach" in the Civil Law?: A Comparative Assessment of the Doctrine of Efficient Breach of Contract*, 55 AM. J. COMP. L. 721 (2007).

160. *See* Posner, *Contract Interpretation*, *supra* note 155, at 1582-83.

161. Richard A. Epstein, *The Social Consequences of Common Law Rules*, 95 HARV. L. REV. 1717, 1748 (1982).

may be "misled as to . . . the true benefits and costs of the deal."[162]

Courts that subscribe to an efficiency analysis ordinarily presuppose that they are required to redress the costs of inefficient contracting.[163] They devise default rules that minimize on opportunistic behavior, that discourage one party from exerting improper pressure on another,[164] that cure market disruptions,[165] and that elaborate on contractual conditions which the parties failed to consider themselves in forming their contracts.[166] Evidence of courts addressing these party-to-party costs include, among other factors, judicial consideration of cost inefficiencies in contracting and the transaction and opportunity cost of one party exploiting a bargaining advantage at the expense of another.[167]

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162. Michael I. Myerson, *The Efficient Consumer Form Contract: Law and Economics Meets the Real World*, 24 GA. L. REV. 583, 589 (1990) ("A party misled as to the utility to be derived from a proposed transaction cannot properly evaluate the true benefits and costs of the deal.").

163. On whether efficiency costs should be measured subjectively or objectively, see JAMES M. BUCHANAN, COST AND CHOICE: AN INQUIRY IN ECONOMIC THEORY 1-26 (Markham Publ'g Co. 1969); G.F. Thirlby, *The Subjective Theory of Value and Accounting "Cost*," *in* L.S.E. ESSAYS ON COST 135 (J.M. Buchanan & G.F. Thirlby eds., 1981).

164. On these justifications for judicial intervention in contracts, see Richard A. Posner & Andrew M. Rosenfield, *Impossibility and Related Doctrines in Contract Law: An Economic Analysis*, 6 J. LEGAL STUD. 83, 88-97 (1977); Samuel A. Rea, Jr., *Nonpecuniary Loss and Breach of Contract*, 11 J. LEGAL STUD. 35, 36 (1982).

165. On a quasi-efficiency analysis holding the ship owner liable for a performance loss because it was best placed to anticipate the closure of the Suez Canal and to insure against it, see *Transatlantic Fin. Corp. v. United States*, 363 F.2d 312, 319 (D.C. Cir. 1966).

166. For argument that one-sided consumer contracts may still be efficient if consumers have market choice, see Lucian A. Bebchuk and Richard A. Posner, *One-Sided Contracts in Competitive Consumer Markets*, 104 MICH. L. REV. 827 (2006).

167. For a traditional "Law and Economic" argument holding that judicial "gap filling" may be efficient including in relation to contracts, see RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 44 (1974). *But see* Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989); Omri Ben–Shahar, *"Agreeing to Disagree": Filling Gaps in Deliberately Incomplete Contracts*, 2004 WISC. L. REV. 389, 389.

A central problem with a monist theory of efficiency is the hazard that courts will construe efficiency in contracting as a 'super' value to which they will subordinate all incommensurable values.[168] The problem is not that courts should be discouraged from reaching efficient outcomes, but rather that they weigh efficiency against potentially countervailing values, such as unfair surprise to the promisee, that sometimes are not encompassed within an efficiency analysis. As an illustration, enforcing a no-warranty clause in a discounted computer sales contract is conceivably efficient if the buyer is able to purchase a separate warranty. However, such efficiency is potentially outweighed by "unfair surprise" to a buyer who receives a defective computer at the outset and has not chosen to buy a separate warranty. Making a choice between these incommensurable options includes decision agents considering, among other factors, the nature of the vertical relationship between the discount computer seller and buyer, including but not limited to reasonable notice given of that warranty exclusion.[169]

A Law and Economics decision agent may declare that an efficiency outcome incorporates the value of "unfair surprise" to the discount computer buyer. This approach is only plausible when normative values like "unfair surprise" are reasonably explicated through an efficiency analysis rather than subjugated by it. In contrast, a decision agent who adopts a plural analysis identifies "unfair surprise" as

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168. On whether efficiency in Law and Economics determines consent to contract, see James M. Buchanan, *Good Economics—Bad Law*, 60 VA. L. REV. 483, 489–90 (1974). On default rules that transcend the consent to contract, see also Omri Ben-Shahar & John A.E. Pottow, *On The Stickiness of Default Rules*, 33 FLA. ST. U. L. REV. 651 (2006).

169. Law and Economics may well address the "inequity" to the computer buyer as an unreasonable "transaction cost" that justifies setting the contract aside. But it reduces inequity to an inefficiency cost, such as a transaction cost, rather than as an independent value that may be incommensurable with efficiency. See, for example, Judge Posner's decision in *Carr v. CIGNA Sec., Inc.*, 95 F.3d 544, 548 (7th Cir. 1996) ("[I]t would be unreasonable to expect Carr to pore through 427 pages of legal and accounting mumbo-jumbo looking for nuggets of intelligible warnings."); *see also* Posner, *Contract Interpretation*, *supra* note 155. *But see* Alan Schwartz & Robert E. Scott, *Market Damages, Efficient Contracting, and the Economic Waste Fallacy*, 108 COLUM. L. REV. 1610 (2008).

a distinct value, not as a subset of efficiency.[170] It recognizes that an "efficient choice" is not coexistent with a "fair choice."[171] It does so by weighing a "rights" based efficiency analysis in light of a "goodness" based fairness analysis, without sublimating one to the other in determining whether to enforce a contract.[172]

Take the example of a party who opportunistically takes advantage of the liabilities of a debt-ridden patent holder by purchasing a patented drug for use as an exclusive life-saving drug at a bargain basement price. Assume that the buyer's aim is to corner the drug market and to double the retail price of the drug. Assume, too, that the purchase was efficient for the buyer acting as a "self-interested egoist who maximi[z]es utility";[173] that the original patent holder would have become bankrupt but for the sale of the patent; that the patent buyer was opportunistic in taking advantage of the seller's financial plight to secure the patent at half its market value; and that doubling the market price increased health hazards to patients who could no longer afford to buy the drug.[174]

Under a monist Law and Economics analysis, the value of efficiency is paramount; other values are subordinated to

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170. For example, a court may invoke plural values to arrive at an efficient or fair outcome at the expense of *ex ante* certainty in contracting. *See, e.g.*, Robert E. Scott, *The Case for Formalism in Relational Contract*, 94 NW. U. L. REV. 847, 858 (2000) ("If there are to be tradeoffs, why not trade off the chimera of ex ante certainty in favor of ex post efficiency (or fairness)."). On the tension between the "foresight" of risks by contracting parties and efficient outcomes, see Robert A. Hillman, *An Analysis of the Cessation of Contractual Relations*, 68 CORNELL L. REV. 617, 626 (1983).

171. The argument that efficient choices may also be fair choices may include an ancillary assessment as to whether paternalism is efficient. *See, e.g.*, Eyal Zamir, *The Efficiency of Paternalism*, 84 VA. L. REV. 229, 230 (1998); Anthony T. Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763, 778-84 (1983).

172. Such an analysis presupposes that the value of efficiency, however complex it may be, remains a monist value. However, if a decision agent chooses between such efficiency as a rights-based value and a competing fairness-based value, that choice gives rise to decisional dualism. *See supra* notes 80, 170.

173. C.G. Veljanovski, *The Economic Approach to Law: A Critical Introduction*, 7 BRIT. J. LAW & SOC'Y 158, 162 (1980).

174. Assume, too, that the drug is either not covered by public and private health insurance, and/or that a significant proportion of patents are uninsured.

it. If the purchase of the patent is efficient, other values based on equity between the parties and the public interest in an affordable drug are not determinative except as subsets of efficiency. Now assume that a monist court contends that its efficiency analysis actually encompasses such equitable and public interests. The risk is that, in reducing such values to costs and benefits or some other measure of efficiency, it will extend the efficiency analysis selectively to include some equity and fairness values while excluding others. For example, a monist court justifies the efficiency of the patent sale on grounds that, had the sale not occurred, the patent seller would have gone insolvent and the drug would have been withdrawn from the market. It invokes a further efficiency analysis to legitimate the buyer doubling the price of the drug on grounds that, had it not bought the patent, all drug users would have been denied access to a drug that was no longer available. In the monist scenario, an efficiency rationale trumps both the countervailing unfairness to the beleaguered seller of the patent and the social harm arising from doubling the drug price.[175]

Assume now that another court adopts a pluralistic view, taking account of incommensurable "rightness" and "goodness" values on their own terms, not by treating them as subsets of efficiency. So conceived, it considers that, however efficient the sale is for the patent purchaser, it is inequitable for the beleaguered patent seller; or it leads to an "impoverished, pre-social conception of human life" in being unaffordable for most drug users.[176] That pluralist court could conceivably reach the same determination as the monist court adhering to an efficiency analysis, but only when the plural analysis justifies that determination.

What pluralism adds is a framework for assessing the legitimacy of the patent sale that is wider than the framework provided by an efficiency analysis. Operating with that plural framework, decision agents, varying from

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175. An efficiency analysis would not necessarily produce this result. For example, it may be concluded that the sale of the patent is inefficient because the benefit to the drug purchaser is outweighed by the cost to the patent seller and/or to consumers who can no longer afford to buy the drug.

176. TREBILCOCK, *supra* note 1, at 18. On the prospect of "patterned differences" in efficient choices including fairness values, see, for example, NOZICK, *supra* note 96, at 156-57.

legislatures to courts, can explore a wider range of party-to-party rights and public interests than arise under a restrictive efficiency analysis. They can develop "winner-take-some" remedies that allow for incremental increases in drug prices within a monitoring regime that extends beyond "winner-take-all" results.

Law and Economics is not without a response to these plural challenges.[177] As the "second wave" of Law and Economics recognizes, a comprehensive cost-benefit analysis takes account of values like corrective and distributive justice without subjecting them to narrow conceptions of profit maximization.[178] In effect, the efficiency of the sale of the patent drug depends on how it is weighed in light of the equitable interests of the patent seller in the first instance[179] and the cost to drug users as a further inquiry.[180] The problem with this "second wave" is that, despite recognizing goodness based values such as relate to the public interest, it subjects those values to rights-based directives aimed at maximizing individuated free choice. Pluralism holds that decision agents ought to decide ex posteriori according to a plural assessment of competing values that are identified, ranked, and weighed according to measures that are not all reduced to efficiency values.[181]

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177. On the attempt to add a moral dimension to efficient choice, see Richard A. Posner, *The Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1637 (1998). *But see* Ellis Washington, *Reply to Judge Richard Posner on the Inseparability of Law and Morality*, RUTGERS J.L. & RELIGION 1 (2001).

178. *But see* Richard A. Posner, *Let Us Never Blame a Contract Breaker*, 107 MICH. L. REV. 1349 (2009); Omri Ben-Shahar & Ariel Porat, Foreward, *Fault in American Contract Law*, 107 MICH. L. REV. 1341 (2009).

179. A utilitarian may nevertheless resist pluralism by insisting that such equity values are encompassed within a monist value of utility. *See, e.g.*, Posner, *supra* note 177.

180. Courts adhering to preference monism may also decline to set the patent aside on public interest grounds because they lack "law-making" authority and in the absence of a legislated mandate. On "preference monism" in utilitarian thought, see *supra* note 159. Preference monism may also be explicated through rational determinism. *See generally* Richard Craswell, *In That Case, What Is the Question? Economics and the Demands of Contract Theory*, 112 YALE L.J. 903 (2003).

181. *See* Ralf Michaels, *The Second Wave of Comparative Law and Economics?* 59 U. TORONTO L.J. 197 (2009); Steve Thel & Peter Siegelman, *Willfulness Versus Expectation: A Promisor-Based Defense of Willful Breach Doctrine*, 107 MICH. L. REV. 1517 (2009). *But see* TREBILCOCK, *supra* note 1. Trebilock attempts

This is not to claim that an efficiency analysis can never be pluralist, but rather that the Law and Economics default position in the formation of contracts, more often than not, is monist in character. The alternative is to subscribe to preference pluralism in which no one "rightness" or "fairness" value is construed a priori as more valuable than all others. No particular value, like efficiency, need be stretched beyond its reasonable limits, and no other plural value need be discounted by reason of not being treated as efficient.[182]

X. UNITARY OR PLURAL RATIONALITY?

A monist conception of rationality holds that adherence to a prescribed process of rationality is itself a "super" value by which decision agents like courts identify, rank, and weigh other values in reaching contractual decisions. Most prominent among monist conceptions of rationality is utilitarianism, in which the purpose of the decision agent is to arrive at the greatest happiness of the greatest number through a rational process that maximizes upon utility, or in Law and Economics terms, that promotes efficiency in contracting.[183]

Unlike a monist conception of rationality, a court adhering to plural rationality does not treat a "super" rational process leading to a decision as inherently more

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to find answers with Law and Economics to questions such as whether it's permissible to buy and sell blood, *id.* at 27-28; bodily organs, *id.* at 34-36; surrogate babies, *id.* at 48-57; and sexual favors, *id.* at 38-42; Symposium, *Law, Economics and Public Policy: Essays in Honour of Michael Trebilcock*, 60 U. TORONTO L.J 155 (2010); Todd D. Rakoff, *Too Many Theories*, 94 MICH. L. REV. 1799 (1996) (reviewing MICHAEL TREBILOCK, THE LIMITS OF FREE OF CONTRACT (1993)).

182. On "preference pluralism," see *supra* notes 12 and 17. On the interface between plural values and efficient breach, see Ian R. Macneil, *Efficient Breach of Contract: Circles in the Sky*, 68 VA. L. REV. 947, 968 (1982).

183. On rationality in utilitarianism including law and economics, see *supra* Section IX. Rational choice may also marry behavioral efficiency with the "biology" of behavior. On rationality in relation to behavioral economics and behavior biology, see Owen D. Jones, *Time-Shifted Rationality and the Law of Law's Leverage: Behavioral Economics Meets Behavioral Biology*, 95 NW. U. L. REV. 1141, 1151 (2001).

rational than all other rational processes.[184] For example, it uses different processes of rational reasoning as well as disparate plural measures to determine when to enforce a promise in contract,[185] when to uphold a transaction as efficient, and when to construe a contract term as fair.[186] In so employing "preference rationality," it arrives at different value choices by adopting an amalgam of values.[187]

Courts that subscribe to preference rationality may ultimately accord higher worth to one value, such as efficiency, than to others in the formation of a contract. However, that preference stems not from the a priori primacy of one value, such as logical positivism as arises under preference monism, but from rationally assessing that value in light of other "rightness" and "fairness" values. For example, a judge who seeks to determine a "just price" in a discrete transaction may employ different rational processes to assess how that price was set,[188] how it compares to the price of comparable products, and how to regulate predatory prices in a particular market.[189] The court's preference for a particular model of pricing stems, not from the *per se* efficiency of that preference, but from a rational assessment of it in light of market conditions, cost-

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184. On "preference rationality," see STOCKER, *supra* note 9, at 190-92; WILLIAMS, *supra* note 9.

185. On the rationality of keeping one's promises, see Peter Vallentyne, *The Rationality of Keeping Agreements*, *in* CONTRACTARIANISM AND RATIONAL CHOICE: ESSAYS ON DAVID GAUTHIER'S *MORALS BY AGREEMENT* 177 (Peter Vallentyne ed., 1991).

186. On the relationship between "rightness" and "fairness" values, see *supra* text accompanying notes 30-32.

187. An issue in exercising "rational" choices is whether a pluralist is rational in regretting the consequence of a "correct"—or at least, preferred—moral choice. *See* STOKER, *supra* note 9, at 271-77; WILLIAMS, *supra* note 9, at 30-39.

188. On the history of the "just price," see LEON E. TRAKMAN, THE LAW MERCHANT: THE EVOLUTION OF COMMERCIAL LAW ch. 1 (1983) [hereinafter TRAKMAN, THE LAW MERCHANT]. On functional ways in which to arrive at a "just price," see Bernard W. Dempsey, *Just Price in a Functional Economy*, 25 AM. ECON. REV. 471, 471, 474-76, 480-86 (1935); Raymond de Roover, *The Concept of the Just Price: Theory and Economic Policy*, 18 J. ECON. HIST. 418, 420-34 (1959).

189. *See* Eric A. Posner, *Contract Law in the Welfare State: A Defense of the Unconscionability Doctrine, Usury Laws, and Related Limitations on the Freedom to Contract*, 24 J. LEG. STUD. 283, 312-14 (1995).

price correlations, competitor pricing, and perceptions of market abuse, among other factors.[190] In identifying the plural alternatives, the court is likely to consider prevailing monetary policies; regulations directed at redressing predatory prices; and policies aimed at compensating for and deterring aberrant pricing practices. In identifying and ranking these values, it is likely to consider positive economics to assess how prices are set; behavioral studies to evaluate the market impact on prices;[191] and compliance measures to determine the effectiveness of pricing regulations on a case-by-case or systemic basis.[192]

One criticism of preference rationality is that it is subject to manipulation. In effect, the enforcement or non-enforcement of a contract is rational only because the presiding decision agent so asserts.[193] A somewhat different criticism is that such rational assertions lead to indeterminacy in establishing whether a contract is

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190. *See, e.g.*, Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1278 (2003) (arguing that the efficient use of standard form contracts, including greater use of mandatory contract terms and judicial modification of the unconscionability doctrine, responds to the primary cause of contractual inefficiency); *see also* Ian Macneil, *Bureaucracy and Contracts of Adhesion*, 22 OSGOODE HALL L.J. 5 (1984) (arguing that adhesive conditions are often drafted to discourage consumers from reading them).

191. On classical commentary on the use of positive economics to measure behavioural practices, see, for example, Milton Friedman, *The Methodology of Positive Economics*, *in* THE METHODOLOGY OF POSITIVE ECONOMICS: REFLECTIONS ON THE MILTON FRIEDMAN LEGACY 3 (Uskali Mäki ed., 2009); George L. Priest, *Selective Characteristics of Litigation*, 9 J. LEGAL STUD. 399, 421 (1980); *see* Mario J. Rizzo, *Can There Be a Principle of Explanation in Common Law Decisions? A Comment on Priest*, 9 J. LEGAL STUD. 423 (1980); *see also* Korobkin, *supra* note 190. *Cf.* Gerald P. O'Driscoll, Jr., *Justice, Efficiency, and the Economic Analysis of Law: A Comment on Fried*, 9 J. LEGAL STUD. 355, 355-60 (1980).

192. On such regulatory measures, see *supra* Part VII. Compliance measures may include explicitly prohibiting customers from altering the terms of a contract. *See* Richard E. Speidel, *Contract Theory and Securities Arbitration: Whither Consent?*, 62 BROOK. L. REV. 1335 (1996).

193. Some commentators on the law of unconscionability find little "rational" place for law and economics in reaching determinations based on "conscience." *See, e.g.*, Arthur Allen Leff, *Unconscionability and the Code—Emperor's New Clause*, 115 U. PA. L. REV. 485, 547-58 (1967); *cf.* Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. & ECON. 293, 311-13 (1975).

enforceable.[194] Blaming preference rationality for indeterminacy fails to recognize its intrinsic value in comprehensively synthesizing plural values, more so than under preference monism.[195] Preference rationality helps decision agents assess the process and results of preferential bargaining in consumer contracting, to police boilerplate contracts, and to regulate transgressions from that regulatory regime.[196] Decision agents also have access to different mechanisms by which to exercise rational preferences about enforcing contracts, such as demographic and ethnographic studies that analyze "patterns" of consumer behavior as well as by considering the age, gender, education, and wealth of different kinds or classes of consumers.[197]

Preference rationality can aid decision agents in reaching rational, as distinct from rationalized results. In particular, they can use rational study to explain and respond to such issues as irregular price "spikes" in target markets, and to determine the "just" or "fair" price.[198]

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194. On such indeterminacy, see Joseph Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 11 (1984). A further concern is that reversals in policy are often difficult to achieve. *See* Yair Listokin, *Learning Through Policy Variation*, 118 YALE L.J. 480, 522-24 (2008).

195. The claim is not that "preference rationality" is value neutral among the plural alternatives, only that it can facilitate choices among them in a manner that value monism precludes. *See* John O. Newman, *Between Legal Realism and Neutral Principles: The Legitimacy of Institutional Values*, 72 CALIF. L. REV. 200, 204 (1984); Alvin B. Rubin, *Doctrine in Decision-Making: A Rationale or Rationalization?*, 1987 UTAH L. REV. 357, 366-67.

196. On the legal significance of boilerplate contracting, see Robert B. Ahdieh, *The Strategy of Boilerplate*, 104 MICH. L. REV. 1033 (2006); Omri Ben-Shahar & James J. White, *Boilerplate and Economic Power in Auto Manufacturing Contracts*, 104 MICH. L. REV. 953 (2006); David Gilo & Ariel Porat, *The Hidden Roles of Boilerplate and Standard-Form Contracts: Strategic Imposition of Transaction Costs, Segmentation of Consumers, and Anticompetitive Effects*, 104 MICH. L. REV. 983 (2006). *But cf.* Margaret Jane Radin, Commentary, *Boilerplate Today: The Rise of Modularity and the Waning of Consent*, 104 MICH. L. REV. 1223 (2006).

197. On the reliability of statistical evidence, see Edward K. Cheng, *A Practical Solution to the Reference Class Problem*, 109 COLUM. L. REV. 2081, 2081-83 (2009). *Cf.* Daniel Shaviro, *Statistical-Probability Evidence and the Appearance of Justice*, 103 HARV. L. REV. 530, 530-31 (1989).

198. On the "just price," see *supra* note 188.

XI. FUNCTIONALISM AS DECISION PROCEDURE PLURALISM

Functionalism defines contracts, not in terms of its constituent elements, but according to its causes and effects, such as the causal relationship between the state of mind and behavior of the contracting parties in the formation of contracts.[199] For example, functionalists utilize both empiricism and logic to determine the causal relationship between the intention of the parties and their contractual or non-contractual behavior.[200] Functionalists have various tools at their disposal. They use psychological and sociological analysis to verify and reify normative suppositions about contractual and non-contractual behavior in particular kinds of family and employment relationships.[201] They use positive economics to measure patterns of behavior in those relationships.[202]

The benefit of functionalism is in assisting decision agents to better understand contractual behavior, such as when business relations are concluded informally; when the parties dispense with formal contracts crafted by lawyers; and the manner in which they settle their differences through third party facilitators such as collaborative mediators.[203] Empirical and analytical functionalism also

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199. Functionalism in law is closely identified with Roscoe Pound and the school of "sociological jurisprudence." *See* Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454 (1909).

200. For a classical theory of functionalism applied to contract law, see W. Friedman, *Changing Functions of Contract in the Common Law*, 9 U. TORONTO L.J. 15 (1951); *see also* ROGER COTTERELL, THE SOCIOLOGY OF LAW: AN INTRODUCTION 119-21 (Butterworths 2d ed. 1992) (1984); W. FRIEDMANN, LEGAL THEORY 218-19 (Stevens & Sons Ltd. 5th ed. 1967) (1944). *But see* Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 838-43 (1935).

201. On use of sociological study to assess attitudes towards contracting among select classes of business people, see, for example, Stewart Macaulay, *Freedom from Contract: Solutions in Search of a Problem?*, 2004 WIS. L. REV. 777, 779-80 [hereinafter Macaulay, *Freedom from Contract*]; Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55, 62-67 (1963) [hereinafter Macaulay, *Non-Contractual Relations in Business*].

202. On the history of social science research methodologies in law, see, for example, John Monahan & Laurens Walker, *Judicial Use of Social Science Research*, 15 L. & HUM. BEHAV. 571, 580-81 (1991).

203. On the use of functional verification to legitimate Law and Economics to its critics, see Guido Calabresi, *About Law and Economics: A Letter to Ronald*

helps explain how regulatory measures work, such as schemes to monitor and redress anti-competitive behavior in consumer industries.[204]

Decision agents also use functionalism as a tool in assessing the relationship between contractual and non-contractual behavior. For example, courts can admit "social fact" evidence to determine the causal connection between education, professional background and employment history, and particular kinds of contractual behavior.[205] They can resort to functional studies in assessing the parameters of non-contractual behavior, such as when informal "trust building" between negotiating parties operates outside the purview of contracts.[206]

Functional study is not invariably value neutral. Decision agents employ it as much to affirm as to test their value hypotheses about the causal relationship between the intention of the parties and patterns of contractual behavior. At its worst, functional analysis is dressed up to

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Dworkin, 8 HOFSTRA L. REV. 553, 558-61 (1980); Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1093-95 (1972).

204. On socio-legal theory as the coalescence between social theory and pragmatism, see BRIAN Z. TAMANAHA, REALISTIC SOCIO-LEGAL THEORY: PRAGMATISM AND A SOCIAL THEORY OF LAW 105-09 (1997). On the capacity of pragmatism to edify pluralism, see James Bohman, *Theories, Practices, and Pluralism: A Pragmatic Interpretation of Critical Social Science*, 29 PHIL. SOC. SCI. 459, 459-61 (1999). On the public regulation of contractual behavior, see *supra* notes 121-124.

205. *See supra* note 201. On "trust building," see RUSSELL HARDIN, TRUST AND TRUSTWORTHINESS 186-91 (2002); OLIVER E. WILLIAMSON, MARKETS AND HIERARCHIES: ANALYSIS AND ANTI TRUST IMPLICATIONS 106-09 (1975); Frank B. Cross, *Law and Trust*, 93 GEO. L.J. 1457, 1460, 1485-88 (2005); Tom Tyler & Steven L. Blader, *Justice and Negotiation*, *in* THE HANDBOOK OF NEGOTIATION AND CULTURE 301 (Michele J. Gelfand & Jeanne M. Brett eds., 2004).

206. On "social fact" evidence, see Kenneth Culp Davis, *Facts in Lawmaking*, 80 COLUM. L. REV. 931, 936-37 (1980); Laurens Walker & John Monahan, *Social Facts: Scientific Methodology as Legal Precedent*, 76 CALIF. L. REV. 877 (1988). On an implied covenant of good faith in contracting, see Teri J Dobbins, *Losing Faith: Extracting the Implied Covenant of Good Faith from (Some) Contracts*, 84 OR. L. REV. 227, 231-32 (2005); Harold Dubroff, *The Implied Covenant of Good Faith in Contract Interpretation and Gap-Filling: Reviling a Revered Relic*, 80 ST. JOHN'S L. REV. 559, 561-64 (2006); Emily M.S. Houh, *Critical Interventions: Toward an Expansive Equality Approach to the Doctrine of Good Faith in Contract Law*, 88 CORNELL L. REV. 1025, 1028-33 (2003).

validate pre-determined normative ideologies, and degenerates into "highly amorphous sociological inquiry" with dubious instrumental ends.[207] Its use raises doubt as to whether empiricists have asked the "right" questions; it is potentially expensive and self-justifying; and it can lead to inconclusive and unreliable results respecting the enforceability of contracts.[208]

At its best, functional analysis identifies values and test suppositions relating to contractual and non-contractual behavior without becoming captive to those values or suppositions. It assists in determining the reasons for the breakdown in trust building between parties to non-contractual dealings and the reasons for their resort to formalized contracts. It also helps decision agents to address party conflicts arising from shifting horizontally to vertically integrated relationships in changing market conditions.[209]

How well functional studies work in practice depends on such factors as the complexity of the behavior under analysis, the suppositions underlying the behavioral analysis, and the perceived reliability of the results reached such as in enforcing a contract. Functional analysis can assume that contracting parties in similar situations will

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207. *See* TREBILCOCK, *supra* note 1, at 141. For a critique of the use, *inter alia*, of functional study to support Law and Economics, see Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, With Special References to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 621 (1982). *But see* Thomas Brennan et al., *Economic Trends and Judicial Outcomes: A Macrotheory of the Court*, 58 DUKE L.J. 1191 (2009).

208. *See, e.g.*, Jack Knight, *Are Empiricists Asking the Right Questions about Judicial Decisionmaking?*, 58 DUKE L.J. 1531 (2009). Of further concern is whether the results of field investigation are worth the costs. *See, e.g.*, Monahan & Walker, *supra* note 202. Such inconclusiveness may stem from an ideological assumption that contracting parties value the free market and that deviations from such values are explicable by studying market imperfections and bargaining disparities in particular cases. So conceived, the empirical analysis concentrates on identifying such market and bargaining imperfections, failing to assess the extent to which study subjects may doubt the value of a free market on other grounds.

209. On functional study in predicting judicial behavior, see Lee Loevinger, *Jurimetrics: The Methodology of Legal Inquiry*, *in* JURIMETRICS 5 (Hans W. Baade ed., 1963); Lee Loevinger, *Jurimetrics: The Next Step Forward*, 33 MINN. L. REV. 455 (1949). On limitations in the use of functional study to regulate contracts under the UCITA, see *supra* text accompanying note 125.

conceivably act alike. It cannot account for contractual behavior that is not demonstrated through rational or empirical study.

XII. CONSTRUING COMMENSURABLE AND INCOMMENSURABLE VALUES

An interpretative theory of contracting holds that the formation of contracts is determined primarily through a process of interpretation, or more expansively, through contract construction.[210] The interpretation of contracts is grounded in monism when courts interpret contracts in accordance with "super" values, such as the "wills" or "consent" of the parties.[211] More comprehensively, they construe contracts according to their utility or efficiency.[212] Courts adopt monist "decision procedure" when they interpret the "plain word" of contracts so as to reflect the subjective wills of the parties through the literal words used in those contracts.[213]

A plural approach to contract interpretation considers both plural rightness and goodness values. These vary from the express rights of the parties to a contract to the "good faith" responsibilities imputed to them beyond monist conceptions of their wills or consent.[214] For example, judges engage in pluralism in construing "good faith" in negotiations according to the fairness of the negotiating

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210. A leading theorist on contract interpretation is Stephen A. Smith. *See* SMITH, *supra* note 1. For a critique of this book, see Oman, *supra* note 19. *But see* HILLMAN, *supra* note 1, at 125.

211. On monist methods of interpretation, see *supra* Section I; *see also* Leon E. Trakman, *Interpreting Contracts*: *A Common Law Dilemma*, 59 CAN. BAR. REV. 241 (1981). *But see* Colin Farrelly, *The Institutional Theory of Legal Interpretation*, 58 U. TORONTO L.J. 217 (2008).

212. *See* Karen Eggleston et al., *The Design and Interpretation of Contracts: Why Complexity Matters*, 95 NW. U. L. REV. 91 (2000); Steven Shavell, *On the Writing and the Interpretation of Contracts*, 22 J.L. ECON. & ORG. 289 (2006).

213. On the "plain meaning" of a contract, see Eric A. Posner, *The Parol Evidence Rule, the Plain Meaning Rule, and the Principles of Contractual Interpretation*, 146 U. PA. L. REV. 533, 570-71 (1998).

214. On the influence of plural values upon the "substantive" interpretation of contracts, see, for example, Charny, *supra* note 80; Avery Wiener Katz, *The Economics of Form and Substance in Contract Interpretation*, 104 COLUM. L. REV. 496 (2004); Trakman, *supra* note 211.

tactics employed, beyond express agreement between the parties as to the process of such negotiations.[215] They construe the "true meaning" of a contract expansively according to plural conceptions of dependability, responsibility and accountability, beyond the "plain words" meaning of a contract.[216]

In practice, decision agents often commence using monist methods of interpretation and conclude with plural constructions of contracts.[217] Judges start by interpreting "whole agreement clauses" in contracts as "fully integrated" in expressing the wills, consent or promises of the parties; and admit extrinsic evidence only to clarify ambiguities in those contracts.[218] They progress to "filling gaps" in those contracts by taking account of the course of dealings[219] and performance of the parties,[220] the "network effect" of the

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215. On the implied covenant to negotiate in "good faith," see Chris Williams, *The Search for Bases of Decision in Commercial Law: Llewellyn Redux*, 97 HARV. L. REV. 1495 (1984) (reviewing LEON E. TRAKMAN, THE LAW MERCHANT: THE EVOLUTION OF COMMERCIAL LAW (1983)). On the influence of culture on plural methods of interpretation, see *infra* Section XIV. *See generally* PRACTICAL CONFLICTS: NEW PHILOSOPHICAL ESSAYS (Peter Baumann & Monika Betzler eds., 2004).

216. The "true meaning" may be monist or pluralist, depending on whether "truth" in interpretation is identified with a "super" value that transcends all other values. On the "true meaning" of the contract, as distinct from its "plain" or "ordinary meaning," see Avery W. Katz, *Contractual Incompleteness: A Transactional Perspective*, 56 CASE W. RES. L. REV. 169 (2005); Posner, *supra* note 213, at 533.

217. On more structured steps in interpretation, see, for example, ANDREI MARMOR, INTERPRETATION AND LEGAL THEORY ch. 3 (2d ed. 2005); Ronald Dworkin, *Law as Interpretation*, 60 TEX. L. REV. 527 (1982). *But see* Stanley Fish, *Working on the Chain Gang: Interpretation in Law and Literature*, 60 TEX. L. REV. 551 (1982) (arguing that Dworkin falls prey to the same fallacies of "pure objectivity" and "pure subjectivity" that he has fought so vehemently to challenge).

218. On establishing the "true meaning" of the contract, see *supra* note 216. Courts can also use canons of interpretation, like the *contra proferentem* rule to support both unitary and pluralist theories of construction. *See, e.g.*, Michelle E. Boardman, Contra Proferentem*: The Allure of Ambiguous Boilerplate*, 104 MICH. L. REV. 1105 (2006).

219. *See* U.C.C. § 1-303(b) (2001) (course of dealings).

220. *Id.* § 1-303(a) (2001) (course of performance). For an argument that the parties should devise their own rules of contract interpretation, see Katz, *supra* note 214, at 496.

conduct of the parties,[221] and by imputing industry norms to them.[222] They conclude by constructing judicial boundaries between self-interest and altruism in imposing duties on parties to use best efforts in contracting.[223]

Similarly, courts commence with the monist assumption that contracts have *lacunae* or "gaps" which they need to "fill" to clarify or complete the intention of the parties.[224] They progress to "filling gaps" in contracts on grounds of fairness that go beyond clarifying ambiguities or completing inchoate terms in those contracts.[225]

There is nothing extraordinary about decision agents moving from monist to plural methods of filling gaps in contracts. The trepidation is over the justification for, and permissible extent of "gap filling" in particular contexts. Those who decline to "fill gaps" in contracts on principled grounds can contend that courts should not "make contracts" at variance with the wills or consent of the parties.[226] Those who identify gap filling with the intention of the parties can claim that they are merely clarifying or completing the intention of the parties, whereas their

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221. On this network effect, see Mark A. Lemley & David McGowan, *Legal Implications of Network Economic Effects*, 86 CALIF. L .REV. 479, 587 (1998); Larry E. Ribstein & Bruce H. Kobayashi, *Choice of Form and Network Externalities*, 43 WM. & MARY L. REV. 79, 110 (2001).

222. *See* U.C.C. § 1-303(c) (2001) (usage of trade); *see also* David V. Snyder, *Language and Formalities in Commercial Contracts: A Defense of Custom and Conduct*, 54 SMU L. REV. 617, 620 (2001).

223. On the requirement of "good faith" primarily in relation to performance, as distinct from "good faith" in contracting, see *Tymshare, Inc. v. Covell*, 727 F.2d 1145, 1152-53 (D.C. Cir. 1984); Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 HARV. L. REV. 369, 372-73 (1980); E. Allan Farnsworth, *On Trying to Keep One's Promises: The Duty of Best Efforts in Contract Law*, 46 U. PITT. L. REV. 1 (1984); Robert S. Summers, *The General Duty of Good Faith—Its Recognition and Conceptualization*, 67 CORNELL L. REV. 810 (1982).

224. Such "gap filling" is monist in subscribing to a monist wills or consent theory of contracting. *See supra* Sections II, III.

225. On normative influences including "gap filling" on contract interpretation, see Charny, *supra* note 80; Katz, *supra* note 214. *But see* George M. Cohen, *Implied Terms and Interpretation in Contract Law*, *in* 3 ENCYCLOPEDIA OF LAW AND ECONOMICS 78, 90 (Boudewijn Bouckaert & Gerrit De Geest eds., 2000).

226. The underlying assumption is that the wills, consent, or promise exhaust their intentions, leaving no scope for "gap filling." *See supra* Section II, III, VI.

decisions may reflect plural values which transcend those intentions.[227] Those that are reluctant to acknowledge their use of open-textured methods of contract construction can use legal fictions to hypothecate and objectify the unarticulated intentions of the parties, along judicially inventive lines.[228] The problem lies in the morass of methods of interpretation that decision agents conceive of inconsistently and apply unpredictably in determining when and how to enforce a contract. Those who defer to rights-based methods of interpretation are likely to limit gap filling to the express promises and consent of the parties. Those who adhere to communal methods of construction are likely to fill gaps in line with "fairness" values that are based on preconceived conceptions of the communal good, beyond the express promises or consent of the parties.[229]

What pluralism offers is an interpretative platform along which decision agents can identify and weigh the plural alternatives in construing contracts, without succumbing to a unidimensional conception of contracting. It encourages decision agents to explore open-textured methods of construing contract terms, such as by taking account of the changing boundaries between trust building in relational contracting and its failure. Pluralism also raises the specter of decision agents interpreting contracts, not only to identify the rights and duties of the parties, but to rebuild trust and confidence between them in their relational context.[230]

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227. Jurists have long recognized a difference between "interpreting" a contract and "constructing" its terms. *See, e.g.*, 3 ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS: A COMPREHENSIVE TREATISE ON THE RULES OF CONTRACT LAW § 534 (1960); *see also* Arthur L. Corbin, *Conditions in the Law of Contract*, 28 YALE L.J. 739, 740–41 (1919).

228. *See* Leon E. Trakman, *Frustrated Contracts and Legal Fictions*, 46 MOD. L. REV. 39 (1983). *But cf.* Cohen, *supra* note 225 (examining economic arguments for textualism and contextualism). For challenges directed by "new formalists" against judicial gap filling by realist courts, see Bernstein, *supra* note 102; Symposium, *Formalism Revisited,* 66 CHI. L. REV. 527 (1999).

229. On the merits of a new criterion for default rules in incomplete contracts, namely, filling gaps in contracts with terms that are favorable to the party with the greater bargaining power, see Omri Ben-Shahar, *A Bargaining Power Theory of Default Rules*, 109 COLUM. L. REV. 396 (2009).

230. For evidence that sophisticated parties often may prefer a default rule that strictly enforces their contract rather than "delegate" authority to courts to

XIII. BEYOND CRITICAL ANALYSIS

Critical social, race, and feminist scholars attack neo-classical theories of contracting for relying on self-serving liberal values.[231] They challenge liberal courts for enshrining the right of the atomized individual to act as a free, efficient, rational, and functional agent;[232] for transforming "private" rights to contract into benefits for the moneyed elite;[233] for undermining the enterprise bargaining needs of the working poor in the corporate interest; for disempowering women and minorities in commercial relations; and for artificially differentiating between private rights to contract and the public good.[234]

Critical analysis also confronts the judiciary for raising legal form over legal substance;[235] for using paternalistic principles of contract law to mask substantive inequalities between the parties in the formation of contracts;[236] for invoking self-serving contract procedures to perpetuate systemic disadvantages;[237] for recasting a "reasonable white

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fill gaps on equitable or other grounds, see Jody S. Kraus & Robert E. Scott, *Contract Design and the Structure of Contractual Intent*, 84 N.Y.U. L. REV. 1023 (2009).

231. *See, e.g.*, Kennedy, *supra* note 207, at 621.

232. For a strident critique of liberal rights, see Peter Gabel, *The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, 62 TEX. L. REV. 1563 (1984).

233. *See, e.g*, Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349 (1982).

234. On the institutional disempowerment of minorities "without consent" tracing back to slavery, see ROBERT WILLIAM FOGEL, WITHOUT CONSENT OR CONTRACT: THE RISE AND FALL OF AMERICAN SLAVERY (1989). On the disempowerment of women, see, for example, FEMINIST PERSPECTIVES ON CONTRACT LAW (Linda Mulcahy & Sally Wheeler eds., 2005). On the use of "adhesion contracts" to disempower consumers, see *supra* notes 28, 120.

235. *See, e.g.*, Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976).

236. Critical legal theorists like Duncan Kennedy reflect on the somewhat paternalistic need for "the decision maker . . . to take the beneficiary under his wing and tell him what he can and cannot do." Kennedy, *supra* note 207, at 634.

237. On the critical deconstruction of liberal theory on grounds, *inter alia*, of disempowerment, see Jon Bruschke, *Deconstructive Arguments in the Legal Sphere: An Analysis of the Fischl/Massey Debate About Critical Legal Studies*, 32 ARGUMENTATION & ADVOC. 16 (1995).

male person" into a "reasonable person" standard;[238] and for falsely equating that standard with the fair treatment of those whom it disenfranchises.[239]

Critical scholars also confront the restrictive nature of plural preferences, including their relation to the formation of contracts.[240] For example, they question judicial pluralists for aligning private rights to contract with a "plural good," which they conceive as no greater than the sum of liberal privileges within it.[241] They challenge law reform proponents for invoking procedural rights selectively in order to perpetuate "private" rights to contract at the expense of communal values.[242] They confront post-legal realists for allowing themselves to be co-opted by mainstream liberal thought;[243] and they attribute indeterminacy, including in the formation of contracts, to pluralist courts that avoid transgressing beyond pre-set liberal boundaries.[244]

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238. Feminist critiques are among the most compelling challenges to consent based models of contracting, including the judicial application of a reasonable "man" standard. *See* FEMINIST PERSPECTIVES ON CONTRACT LAW, *supra* note 234; Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997, 1063-65 (1985); *see also* Cynthia Grant Bowman et al., *Race and Gender in the* Law Review, 100 NW. U. L. REV. 27 (2006); Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991). On critical race theory, see RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY (2001).

239. Some of this criticism revolves around the "language" and "culture" that is ascribed to legal liberalism, including the "reasonable person" standard. *See generally* Christine A. Desan Hussan, *Expanding Legal Vocabulary: The Challenge Posed by the Deconstruction and Defense of Law*, 95 YALE L.J. 969 (1986); Duncan Kennedy, *A Semiotics of Critique*, 22 CARDOZO L. REV. 1147 (2001); Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986).

240. The attack on pluralism is presented, in part, through liberalism's allegedly dubious reliance on the divide between public and private values. *See, e.g.*, Kennedy, *supra* note 233.

241. *See, e.g.*, Kennedy, *supra* note 239.

242. On the importance of utopian community values in the development of Critical Legal Studies, see Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561 (1983).

243. *See, e.g.*, Williams, *supra* note 215.

244. On such indeterminacy, see Singer, *supra* note 194, at 11. *But see* Robert W. Benson, *How Judges Fool Themselves: The Semiotics of the Easy Case*, *in* 2 LAW AND SEMIOTICS 31, 32-33 (Roberta Kevelson ed., 1988); Kenneth Kress, *Legal Indeterminacy*, 77 CALIF. L. REV. 283, 286 (1989).

Critical scholars have a legitimate quarrel with judicial reliance on monist and plural theories of contract formation that originate in legal liberalism. Judges who adopt monist theories based on the wills, consent, or promises of the contracting parties accord priority to individual rights at the expense of countervailing social, economic, and political values.[245] Courts that orient preference pluralism around "rightness" more than "goodness" values perpetuate the liberal *status quo*, ignoring the extent to which contracts ought to promote the values of community and solidarity.[246]

What critical scholars have not adequately acknowledged is the extent to which statutes and judicial precedents have enhanced plural conceptions of equality in the intersection of cultural differences. However marginal these achievements are, they have given at least some protection to select classes of employees and consumers, women, and visible minorities.[247]

Critical scholarship's nihilist critique has also failed to produce a viable alternative to the judicial application of pluralism in the formation of contracts, other than through utopian idealism.[248] The utopian conception of "the good," to which some critical theorists subscribe, may be virtuous, but it may also regress into the preferred idealism of some utopian theorists at the expense of others.[249]

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245. *See supra* Sections II-IV.

246. On this criticism, see, for example, Singer, *supra* note 194. On the relationship between the "self" and "community" in post-modernity, see, for example, WILL KYMLICKA, LIBERALISM, COMMUNITY, AND CULTURE 57-58 (1989); ALASDAIR MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY 204-05 (Univ. of Notre Dame Press 2d ed. 1984) (1981); PRIVATE ACTION AND THE PUBLIC GOOD (Walter W. Powell & Elisabeth S. Clemens eds., 1998); CHARLES TAYLOR, SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY (1989); WALZER, *supra* note 11, at 31-35.

247. Critical scholarship, arguably, has also failed to acknowledge the contributions made by Legal Realism to equality rights including through contracts. On the legal realist movement, see generally LLEWELLYN, *supra* note 120.

248. On such utopian idealism, see Unger, *supra* note 242, at 583. *But see* MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT (2005). For an existential exposition of utopia, see MARTIN BUBER, PATHS IN UTOPIA (Syracuse Univ. Press 1996) (1949).

249. *See* Unger, *supra* note 242. For a conservative attack on the radical agenda of Critical Theory, including for undermining its multi-cultural

XIV. CULTURAL PLURALISM

Cultural pluralism acknowledges the cultural background and life experiences that particular groups such as religious, cultural, political, and economic communities share.[250] It is about the impact that their different backgrounds and life experiences have upon their individual practices,[251] such as the impact that their religious affiliations have on marriage contracting, or on agreements between spiritual leaders and their congregants.[252] Cultural pluralism is also concerned with fostering cultural inclusivity, such as by using collaborative law to resolve contract disputes between family members who are willing to work together to resolve differences,[253] and by applying

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aspirations, see DANIEL A. FARBER & SUZANNA SHERRY, BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW 5, 19-21 (1997). *But cf.* HILLMAN, *supra* note 1, at 190-211.

250. Will Kymlicka defines a "societal culture" as "a culture which provides its members with meaningful ways of life across the full range of human activities, including social, educational, religious, recreational, and economic life, encompassing both public and private spheres." WILL KYMLICKA, MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS 76 (1995). He adds that cultures may be "territorially concentrated, and based on a shared language." *Id.*; *see also* THE CHALLENGE OF CULTURAL PLURALISM (Stephen Brooks ed., 2002); AMITAI ETZIONI, THE NEW GOLDEN RULE: COMMUNITY AND MORALITY IN A DEMOCRATIC SOCIETY 204 (1996); Monique Deveaux, *Cultural Pluralism from Liberal Perfectionist Premises*, 32 POLITY 473 (2000); Amy Gutmann, *Liberty and Pluralism in Pursuit of the Non-Ideal*, 66 SOC. RES. 1039 (1999); George Kateb, *Can Cultures Be Judged? Two Defenses of Cultural Pluralism in Isaiah Berlin's Work*, 66 SOC. RES. 1009 (1999).

251. A significant attribute of culture pluralism is the culture of tolerance, including tolerance of difference. *See generally* THE CULTURE OF TOLERATION IN DIVERSE SOCIETIES: REASONABLE TOLERANCE (Catriona McKinnon & Dario Castiglione eds., 2003).

252. On such cultural values, see, for example, Kenneth Baynes, *The Liberal/Communitarian Controversy and Communicative Ethics*, *in* UNIVERSALISM VS. COMMUNITARIANISM: CONTEMPORARY DEBATE IN ETHICS 61 (David Rasmussen ed., 1990); Allen E. Buchanan, *Assessing the Communitarian Critique of Liberalism*, 99 ETHICS 852 (1989).

253. On the *Westinghouse* case, see *supra* text accompanying notes 145-51. *But cf.* Daniel Markovits, *Contract and Collaboration*, 113 YALE L.J. 1417 (2004).

principles of restorative justice to heal cultural-ethnic differences.[254]

Cultural pluralism is not an all-purpose solvent for every ill in the formation of contracts. It helps to understand historical-cultural developments, such as the influence of nineteenth century liberal values on freedom of contract, and the impact of twentieth century consumer-welfare values upon "adhesion contracting."[255] Cultural pluralism also responds to the intersection of differences among cultures, such as through "connecting factors" that link individuals to voluntary associations with competing attitudes towards "trust building" in reaching informal and formal agreements.[256]

Cultural pluralism also provides a better grasp of the technological, linguistic, psychological, and sociological backgrounds of the contracting parties, such as in distinguishing between e-merchants and e-consumers[257] and between e-consumers and e-merchant consumers.[258] It

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254. On restorative justice, see, for example, JOHN BRAITHWAITE, RESTORATIVE JUSTICE & RESPONSIVE REGULATION (2002); JAMES DIGNAN, UNDERSTANDING VICTIMS AND RESTORATIVE JUSTICE (2005); Albert W. Dzur, *Restorative Justice and Civic Accountability for Punishment*, 36 POLITY 3 (2003); Paul Takagi & Gregory Shank, *Critique of Restorative Justice*, 31 SOC. JUST. 147 (2004).

255. For a libertarian rationale in support of both autonomy and welfare values, see Sunstein & Thaler, *supra* note 96; *cf.* Russell Korobkin, *Libertarian Welfarism*, 97 CALIF. L. REV. 1651, 1652-53 (2009) (expanding the paradigm established by Sunstein and Thaler). On recognition of the adhesion contract in the early and mid twentieth century, see *supra* note 28.

256. On "trust building," see *supra* note 205. *See generally* VICTOR GOLDBERG, FRAMING CONTRACT LAW: AN ECONOMIC PERSPECTIVE (2006); ERIC A. POSNER, LAW AND SOCIAL NORMS (2000); Lucian Arye Bebchuk & Omri Ben-Shahar, *Precontractual Reliance*, J. LEGAL STUD. 423 (2001).

257. On the allegedly artificial distinction between merchant and consumer cultures in contracting, see Larry T. Garvin, *Small Business and the False Dichotomies of Contract Law*, 40 WAKE FOREST L. REV. 295, 296-97 (2005); Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 544 (2003).

258. On whether an e-consumer who buys to resell ought to be treated as an end user "consumer" or a repeat order "merchant," see *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1454 (7th Cir. 1996). *But see* Appendix, ProCD v. Zeidenberg *in Context*, 2004 WIS. L. REV. 821. On whether suppliers can detect and cater to aggressive consumers while taking advantage of other consumers, see Clayton P. Gillette, *Rolling Contracts as an Agency Problem*, 2004 WIS. L. REV. 679, 692-93.

assists in assessing the "free," "fair," "efficient," and "rational" behavior of those parties within discrete cultural settings such as emerging e-markets.[259]

Cultural pluralism faces two particular challenges in relation to contracting. The first is in weighing, ranking, and applying cultural traits to distinctive kinds of contractual and non-contractual behavior.[260] The second is in recognizing the influence that the cultural-religious backgrounds and life experiences of decision agents have upon the decisions they reach.[261]

Cultural pluralism does not have glib solutions to these concerns, but it does have responses. Decision agents can use anthropological and interdisciplinary studies to confirm the nature and significance of cultural change in the formation of contracts. They can vigilantly redress cultural myopia, not least of all their own. But one should not blithely assume that historical-cultural study will invariably be illuminating, or that it will neutralize cultural bias in deciding contract disputes.[262]

What cultural pluralism does for contract law is help decision-makers identify the impact of emerging and receding cultural traits upon contractual behavior. For example, it assists them to assess the impact that "new" twenty-first century merchants have on pre-contractual

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259. On emerging e-commercial and consumer cultures including click-wrap and browse-wrap agreements, see Trakman, *supra* note 126.

260. *See, e.g.*, WERNER MENSKI, COMPARATIVE LAW IN A GLOBAL CONTEXT: THE LEGAL SYSTEMS OF ASIA AND AFRICA (Cambridge Univ. Press 2d ed. 2006) (2000); COMPARATIVE LEGAL CULTURE (Csaba Varga ed., 1992); David Nelken, *Culture, Legal*, *in* 1 ENCYCLOPEDIA OF LAW AND SOCIETY: AMERICAN AND GLOBAL PERSPECTIVES 369 (David S. Clark ed., 2007); David Nelken, *Using the Concept of Legal Culture*, 29 AUSTL. J. LEG. PHIL. 1 (2004).

261. On the propensity to believe that one's views are predominant, giving rise to "false consensus bias" in the interpretation of contracts, see Lawrence Solan et al., *False Consensus Bias in Contract Interpretation*, 108 COLUM. L. REV. 1268 (2008).

262. Cultural discourse may also accentuate extreme positions. *See* CASS R. SUNSTEIN, GOING TO EXTREMES: HOW LIKE MINDS UNITE AND DIVIDE (2009). On challenges to cultural pluralism within communitarian thought, see DANIEL BELL, COMMUNITARIANISM AND ITS CRITICS (1993); DEREK L. PHILLIPS, LOOKING BACKWARD: A CRITICAL APPRAISAL OF COMMUNITARIAN THOUGHT 156-59 (1993); Amitai Etzioni, *The Attack on Community: The Grooved Debate,* SOC'Y, July/August 1995, at 12.

representations and warranties in emerging areas of contract law.[263] It aids them in arriving at culturally sensitive responses to non-price competition within discount consumer markets.[264] It encourages decision agents to weigh cultural values in a palpable manner, including by acknowledging their own cultural predilections and perspectives.[265]

CONCLUSION

This article challenges the application of intractable conceptions of monism to the formation of contracts and argues for greater resort to judicial pluralism. If monism is about enforcing the free, efficient, or rational choices of individual contractors, pluralism is about courts being willing to value the cultural background and life experiences of those who make those choices. If contract formation is about judges preserving the reasonable expectations of the parties, cultural pluralism is about courts considering the socio-economic, political, and cultural context in which those expectations arise.[266]

The article disputes the presupposition that pluralism in contracts leads to a non-theory in which all theoretical

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263. A particular challenge is to measure emerging and receding cultural trends that evolve gradually and unevenly. For example, it remains unclear to what extent emerging consumer e-cultures are distinct from other consumer cultures. *See* Trakman, *supra* note 126; *see also* James Q. Whitman, *Consumerism Versus Producerism: A Study in Comparative Law*, 117 YALE L.J. 340 (2007).

264. *See* James R. Maxeiner, *Standard-Terms Contracting in the Global Electronic Age: European Alternatives*, 28 YALE J. INT'L L. 109 (2003); Leon E. Trakman, *From the Medieval Law Merchant to E-Merchant Law*, 53 U. TORONTO L.J. 265 (2003). For an early commentary on the cultural-legal development of cyber-commerce, see David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367 (1996). On the "just price," see *supra* note 188.

265. On judges choosing methods of interpretation that are more likely to generate preferred outcomes, see Alexander Volokh, *Choosing Interpretive Methods: A Positive Theory of Judges and Everyone Else*, 83 N.Y.U. L. REV. 769 (2008). On attempts through jurimetrics to predict judicial behavior based on the socio-cultural and political background of judges, see Knight, *supra* note 208, at 1534.

266. On plural conceptions of legal rights, see TRAKMAN & GATIEN, *supra* note 4.

postulations are treated as incommensurable with one another, leading to contract nihilism. The purpose of pluralism is not to dismiss all, or even any, contract theory out of hand. Its purpose is to encourage exploration into the manner in and extent to which different substantive theories of contract formation are conceived as being exclusive of, or complementary to, one another. Included in such an analysis is the prospect of pluralism endorsing, refining, and sometimes rejecting discrete conceptions of contract formation that fail to engage with pertinent plural values. Pluralism does not seek to accomplish these ends through the outright rejection of liberal theories of contracting, but to assess their operation within complex and contradictory real world contexts.

Judicial pluralism in particular is about resisting the polarization that arises from judicial monism in the formation of contracts. It is concerned that courts not rigidly pit contractual consent against no-consent, promise against no-promise, and will against no-will in the formation of contracts. It scrutinizes how to apply plural values to contracts through the exercise of prudential wisdom and practical reason. It focuses on how to reach determinations in light of the background and life experiences of the contracting parties, not by vaporizing those experiences within a monist theory of contracting.

The resilience of judges in applying pluralism to contract formation ultimately depends on two bulwark principles. The first is that no one set of plural values is a priori more fundamental than all others. The second is that choosing among plural values requires an informed judicial appraisal of their differences rather than an arbitrary election among them. Satisfying these two principles will determine the future of judicial pluralism in contract formation and in some ways, the future of the law of contract itself.