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PARTY SOPHISTICATION AND VALUE PLURALISM IN CONTRACT

Meredith R. Miller*

I. INTRODUCTION

In a previous article, *Contract Law, Party Sophistication and the New Formalism*,¹ I documented a trend in United States case law and scholarship that fashions a “dichotomy between sophisticated and unsophisticated parties.”² That article set out to explain the trend as a theoretical compromise between formalism and realism in the face of a resurgence of formalism (the “new formalism”).³ For sophisticated parties, “freedom of contract”⁴ and literalism have come to trump all normative concerns.⁵ For unsophisticated parties, fairness concerns outweigh the principle of autonomy.⁶

However, as I noted in the previous article, the “new formalism” may not be formalism at all because it retains normative concerns.⁷ Indeed, the shift in legal thought may be more appropriately and simply characterized as embracing pluralism. This piece will place observations about party sophistication within recent scholarship discussing pluralist conceptions of contract doctrine and suggest

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¹ Meredith R. Miller, *Contract Law, Party Sophistication and the New Formalism*, 75 Mo. L. REV. 493, 493 (2010).

² *Id.*

³ *Id.* at 495.

⁴ See STEPHEN A. SMITH, CONTRACT THEORY 59 (2004) (defining freedom of contract as “the idea, fundamental in the orthodox understanding of contract law, that the *content* of a contractual obligation is a matter for the parties, not the law”).

⁵ Miller, *supra* note 1, at 503.

⁶ *Id.* at 508.

⁷ *Id.* at 495.

that the focus on sophistication is a means to order contract law's competing values.

The values of contract law are autonomy,⁸ efficiency,⁹ fairness and equality,¹⁰ certainty, and predictability.¹¹ These values often implicate a fundamental and difficult choice between individualism and greater societal norms and expectations; therefore, the values have the potential to conflict. For example, the principle that the law should be predictable and rules-driven so that parties can plan their obligations may find itself in conflict with fairness concerns. For this reason, contract law permits excuse of an express and unambiguous condition precedent to avoid forfeiture.¹² This abandonment of literalism may bend to fairness concerns, but it does not serve autonomy, certainty, and predictability. By way of another example, economic theories assert that a party should breach a contract if doing so would be efficient.¹³ Even though a breach is efficient, however, it may not be fair to the other party and it may not be the moral action.¹⁴

⁸ Larry A. DiMatteo, *The Norms of Contract: The Fairness Inquiry and the "Law of Satisfaction"—A Nonunified Theory*, 24 HOFSTRA L. REV. 349, 441 (1995) ("Contracts should be enforced because they 'foster[] individual autonomy, promot[e] fair allocation of social benefits, and minimiz[e] the costs of transacting.' " (alterations in original) (quoting David Charny, *Hypothetical Bargains: The Normative Structure of Contract Interpretation*, 89 MICH. L. REV. 1815, 1817-18 (1991))). "Autonomy" is a word that is often used without definition. I use the term "autonomy" to broadly describe the value of individual choice in private ordering, free from government interference. I use the term "freedom of contract" interchangeably with "autonomy," though I recognize that there may be room to argue that the two concepts overlap but are distinguishable. See SMITH, *supra* note 4, at 139 (discussing the differences between "autonomy" and "freedom of contract").

⁹ DiMatteo, *supra* note 8, at 376 n.150 ("Efficiency has long been an underlying norm of many of contracts' foundational premises."). "Efficiency" is intended to describe the economic principle of maximizing individual gains, which, in turn, should increase societal wealth. ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 12 (4th ed. 2003); see also SMITH, *supra* note 4, at 108-09 (discussing the theory of efficiency in contract law).

¹⁰ Amy J. Schmitz, *Embracing Unconscionability's Safety Net Function*, 58 ALA. L. REV. 73, 77 (2006) (stating "fairness and equity. . . lies at the core of contract law").

¹¹ Larry A. DiMatteo, *The History of Natural Law Theory: Transforming Embedded Influences into a Fuller Understanding of Modern Contract Law*, 60 U. PITT. L. REV. 839, 874 (1999) ("Contracts are born of the need for certainty." (quoting Martin E. Segal, *Foreseeability in a Fog: Uncertainty Over Pre-existing Duties Can Undermine Contracts*, 82 A.B.A. J. 86 (1996)) (internal quotation marks omitted)).

¹² RESTATEMENT (SECOND) OF CONTRACTS § 229 (1981).

¹³ JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS 537-39 (6th ed. 2009).

¹⁴ SMITH, *supra* note 4, at 130; Brian H. Bix, *Contract Rights and Remedies, and the Divergence Between Law and Morality*, 21 RATIO JURIS. 194, 198 (2008); Jeffrey M. Lipshaw, *Objectivity and Subjectivity in Contract Law: A Copernican Response to Professor Shiffrin*, 21 CAN. J.L. & JURISPRUDENCE 399, 408 (2008) (noting that efficiency and morality will never be harmonized); Seana Valentine Shiffrin, *The Divergence of Contract and Promise*,

Given the potential for these values to compete, Professor Roy Kreitner recently observed that “[p]luralism is on the agenda of contract theory.”¹⁵ Indeed, scholars have proffered serious arguments for a pluralist approach to contract formation,¹⁶ interpretation,¹⁷ and remedies.¹⁸ Other scholars have recognized contract doctrine as pluralistic.¹⁹ Still others, while not necessarily arguing expressly for pluralism, have rejected the possibility of a single, unifying theory of contract law in favor of “pragmatism.”²⁰ Further still, recent arguments have been made for a pluralist conception of not only contract doctrine, but all of private law.²¹

“Pluralism” is not readily defined. The term here is intended to refer to “value pluralism.”²² Broadly, in the words of Isaiah Berlin, this is recognition of “the fact that human goals are many, not all of them commensurable, and in perpetual rivalry with one another.”²³

120 HARV. L. REV. 708, 710-11 (2007).

¹⁵ Roy Kreitner, *On the New Pluralism in Contract Theory*, 45 SUFFOLK U.L. REV. 915, 915 (2012).

¹⁶ Leon Trakman, *Pluralism in Contract Law*, 58 BUFF. L. REV. 1031, 1036 (2010).

¹⁷ Kent Greenawalt, *A Pluralist Approach to Interpretation: Wills and Contracts*, 42 SAN DIEGO L. REV. 533, 534 (2005).

¹⁸ C. Scott Pryor, *Principled Pluralism and Contract Remedies*, 40 MCGEORGE L. REV. 723 (2009).

¹⁹ See Hanoch Dagan, *Autonomy, Pluralism, and Contract Law Theory* 8 (Tel Aviv Univ. Law Faculty Papers, Working Paper No. 138, 2012), available at <http://ssrn.com/abstract=2104987>; Ethan J. Leib, *On Collaboration, Organizations, and Conciliation in the General Theory of Contract*, 24 QUINNIPIAC L. REV. 1, 4 (2005); Nathan Oman, *Unity and Pluralism in Contract Law*, 103 MICH. L. REV. 1483, 1485, 1498 (2005).

²⁰ See, e.g., LARRY A. DiMATTEO, ROBERT A. PRENTICE, BLAKE D. MORANT & DANIEL D. BARNHIZER, *VISIONS OF CONTRACT THEORY: RATIONALITY, BARGAINING, AND INTERPRETATION* 4-5 (2007) (“Ultimately, contract theory should reflect the pragmatism of contract law. Contract law is a reflection of a continuing framework of compromises between competing values, interests, and norms. The authors hope that a richer and more worthwhile dialogue will be possible once the idea of a unified theory of contract law or the idea of a contract metaprinciple is rejected.” (citation omitted)); ROBERT A. HILLMAN, *THE RICHNESS OF CONTRACT LAW: AN ANALYSIS OF CRITIQUE OF CONTEMPORARY THEORIES OF CONTRACT LAW* 2 (2d ed. 1998) (“Although I will insist that no unitary theory adequately captures the entire contract-law field, my message is not an ‘anti-theoretical counter-attack,’ but rather a pragmatic synthesis of the conceptual and the concrete.” (quoting Jay M. Feinman, *The Significance of Contract Theory*, 58 U. CIN. L. REV. 1283, 1284 (1990))). Although I do not tackle it here, it is worth exploring whether, in this context, pluralism and pragmatism are different concepts and, if so, how they are different.

²¹ Hanoch Dagan, *Pluralism and Perfectionism in Private Law* 2 (Tel Aviv Univ. Law Faculty Papers, Working Paper No. 128, 2011), available at <http://law.bepress.com/taulwps/fp/art128>.

²² See Christopher J. Robinette, *Torts Rationales, Pluralism, and Isaiah Berlin*, 14 GEO. MASON L. REV. 329, 333-34 (2007) (describing “value pluralism”).

²³ *Id.* at 334 (quoting Isaiah Berlin, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY*

As applied to contract law, pluralist theories “advert to autonomy, efficiency, morality, social norms, policy, experience, and other values to explain and justify contract doctrines.”²⁴

Pluralism is contrasted with “monist” (or “unification”) theories, those that strive to unify the entire body of contract law based on one “‘super’ value”²⁵ (or “metaprinciple”)²⁶ over all others. The prevailing unifying theories of contract law are well rehearsed—will theory, consent theory, promissory principle, the collaborative view, and economic theories of efficiency.²⁷ This Article will not undertake to rehash these theories. Each of them prioritizes a certain value.²⁸ For example, the promise principle argues that the moral obligation of making a promise forms the central basis of contract law.²⁹ Similarly, more recently, the collaborative view is a communitarian one that explains the morality of promise in contract law as deriving from recognition and respect among contracting parties.³⁰ Economic theories look to efficiency as the unifying principle.³¹ The will and consent theories look to autonomy as the guiding principle.³²

These unifying theories are admirable attempts at coherence, but they all fall short by failing to reconcile competing values. In this connection, pluralism recognizes that, necessarily, these values may find themselves in conflict and, therefore, no one value is an apt descriptive or normative fit for contract law.

171 (1969)) (internal quotation mark omitted), *available at* http://www.wiso.uni-hamburg.de/fileadmin/wiso_vwl/johannes/Ankuendigungen/Berlin_twoconceptsofliberty.pdf.

²⁴ Jody S. Kraus, *Philosophy of Contract Law*, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 688 n.1 (Jules Coleman & Scott Shapiro eds., 2002). “[P]luralism is a fairly basic intuition, captured by the idea that there is a multiplicity of justificatory principles applicable to a particular set of institutions or problems.” Kreitner, *supra* note 15, at 915.

²⁵ Trakman, *supra* note 16, at 1064; Kraus, *supra* note 24 (describing how monist theories “purport to explain and justify contract law by rendering it coherent under a single explanatory/justificatory principle”).

²⁶ Cf. DiMATTEO ET AL., *supra* note 20.

²⁷ See generally Kreitner, *supra* note 15 (discussing different theories of contract law).

²⁸ Admittedly, this is an overstatement because many of the theories, in recognizing their own limitations, admit that some of contract doctrine may not be explained by a certain value. Kreitner, *supra* note 15, at 916 n.5.

²⁹ CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION 17 (1981); Shiffrin, *supra* note 14, at 749-53.

³⁰ Daniel Markovits, *Contract and Collaboration*, 113 YALE L.J. 1417, 1420 (2004).

³¹ See DiMatteo, *supra* note 8 (illustrating that economic theory is based on the principles of efficiency).

³² Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 319 (1986).

With reference to my previous writing on the subject,³³ Section I of this Article addresses the increasing significance of labeling a party “sophisticated.” The next section summarizes the argument that party sophistication preserves fairness norms in the face of a resurgence of formalism. Section III provides a brief overview of Professor Kreitner’s typology of the existing pluralist contracts scholarship. Then the Article presents its central claim: the attention to the sophistication of contracting parties fits neatly within a theoretical shift toward pluralism and provides a way to strive for coherence and yet still order the competing values of contract law. After addressing some case examples in Section IV, this Article concludes that, once the status-based label of “sophistication” is applied, the law can prioritize one value (autonomy) over others (fairness). This allows for a general and comprehensive body of contract law, which would otherwise be impossible given the wide variety of parties and contexts that contract law serves.

II. THE INCREASING SIGNIFICANCE OF PARTY SOPHISTICATION

As I began to document in *Contract Law, Party Sophistication and the New Formalism*, “[a]n ever growing body of case law and scholarship has fashioned a rigid dichotomy between sophisticated and unsophisticated parties in a wide array of contract inquiries.”³⁴ Scholars, often from an economic perspective, state that their arguments apply only to “sophisticated parties” in an effort to quell any arguments about the fairness of their theories to a situation of imbalanced bargaining power.³⁵ Courts mention party sophistication in determining whether the parties intended to form a contract,³⁶ and what they meant by the terms they used.³⁷ They determine the enforceability of reliance disclaimers,³⁸ exculpatory clauses,³⁹ and liquidated

³³ Miller, *supra* note 1.

³⁴ *Id.* at 493-94 (citations omitted). I will set aside for now the argument made in that article that the concept of “sophistication” needs to be thoughtfully defined and deliberately applied.

³⁵ *Id.* at 493 n.2.

³⁶ *Id.* at 516-18 (discussing relevance of party sophistication to contract formation).

³⁷ *Id.* at 502-04 (discussing relevance of party sophistication to contract interpretation).

³⁸ Miller, *supra* note 1, at 505-08 (discussing relevance of party sophistication to reliance disclaimers).

³⁹ *Id.* at 508-10 (discussing relevance of party sophistication to exculpatory clauses).

damages provisions⁴⁰ based, at least in part, on party sophistication. Courts reference sophistication in determining whether a party can avoid a contract on the grounds of mistake or fraud.⁴¹ “While [average] consumers are commonly contrasted with sophisticated parties, the relevance of party sophistication is not limited to consumer transactions. Its relevance transcends any one area of substantive law—arising in commercial, business, employment, franchise, insurance, family and property disputes, among others.”⁴²

I have argued that the trend toward party sophistication is aptly understood as a theoretical compromise between formalism and realism, the contours of which are provided below.

III. SOPHISTICATION AND THE NEW FORMALISM

In *The Death of Contract*, Grant Gilmore eloquently described how literature and the arts have endured “alternating rhythms of classicism and romanticism.”⁴³ Gilmore contemplated “the possibility of such alternating rhythms in the process of the law.”⁴⁴ Contract law’s rhythms appear to alternate between the poles of formalism and realism (or “anti-formalism”).

Roughly, “formalism” is intended to refer to a theory of contract law that, above all else, elevates the content of the parties’ written contract (its form) over any concerns for normative values or so-

⁴⁰ *Id.* at 510-12 (discussing relevance of party sophistication to economic loss rule, limitations on damages, and liquidated damages).

⁴¹ *Id.* at 512-14 (discussing relevance of party sophistication to mistake); *id.* at 505-08 (discussing relevance of party sophistication to claim of fraud).

⁴² Miller, *supra* note 1, at 494 (citing *Green v. Select Portfolio Servicing, Inc.*, No. 5:08-cv-00198, 2008 WL 2622917, at *1 (S.D.W. Va. June 30, 2008)) (indicating that plaintiffs described themselves as “‘unsophisticated consumers’ who ‘did not understand the details of the transaction’ ”); *Warner v. Ford Motor Co.*, No. 06-cv-02443-JLK-MEH, 2008 WL 4452338, at *15 (D. Colo. Sept. 30, 2008) (noting that the purchasers of cars “were likely relatively unsophisticated consumers with little bargaining power”); *Leonard v. Terminix Int’l Co., L.P.*, 854 So. 2d 529, 538 (Ala. 2002) (discussing how the homeowners were “not sophisticated or wealthy consumers with equal bargaining power”).

⁴³ GRANT GILMORE, *THE DEATH OF CONTRACT* 111 (Ronald K. L. Collins, ed., 2d ed. 1995). Gilmore observed that “the classical aesthetic, once it has been formulated, regularly breaks down in a protracted romantic agony.” *Id.* But, “[t]hen, the romantic energy having spent itself, there is a new classical reformulation—and so the rhythms continue.” *Id.* at 112; see also Curtis Bridgeman, *Why Contracts Scholars Should Read Legal Philosophy: Positivism, Formalism, and the Specification of Rules in Contract Law*, 29 CARDOZO L. REV. 1443, 1483-84 (2008) (discussing Gilmore’s description of “alternating rhythms of classicism and romanticism” (quoting GILMORE, *supra* note 43) (internal quotation marks omitted)).

⁴⁴ *Id.*

cietal notions of fairness.⁴⁵ It is an a-contextual and rules-driven approach dedicated to literalism.⁴⁶ With these priorities, formalism is ideologically justified by freedom of contract.⁴⁷ It is committed to the ideal of voluntary, private actors creating their own legally binding obligations, free from judicial interference.⁴⁸ As a rules-based approach,⁴⁹ formalism permits certainty and predictability in the marketplace, but leaves little room for case-by-case inquiries that consider the context of the deal, the behavior of the parties, and their relative bargaining positions.⁵⁰

By the conventional account, formalism reigned in United States contract law until the mid-20th century.⁵¹ At this time, the realist movement in contract law began a shift away from formalism's "context insensitivity."⁵² Realism demonstrated concern for the particular circumstances of the parties; standards-based approaches emerged, with reasonableness and fairness as guiding principles.⁵³ The realist movement met with the criticism that adherence to fairness norms curtailed the certainty and predictability contract law allows in the marketplace.⁵⁴

In reaction to the concerns about preserving certainty and stability in the law, some scholars have noted generally, and in contract law more specifically, that the theoretical pendulum appears to be swinging back in the direction of formalism⁵⁵ (which has been termed

⁴⁵ Bridgeman, *supra* note 43, at 1443.

⁴⁶ *Id.* at 1461.

⁴⁷ See *id.* at 1449 (stating that "rules are . . . binding because they are rules," not because they are substantively justified).

⁴⁸ *Id.* at 1472.

⁴⁹ Lawrence Solum, *Legal Theory Lexicon 043: Formalism and Instrumentalism*, LEGAL THEORY LEXICON (May 22, 2005), <http://legaltheorylexicon.blogspot.com/2005/05/legal-theory-lexicon-043-formalism-and.html>.

⁵⁰ *Id.*

⁵¹ Mark L. Movsesian, *Formalism in American Contract Law: Classical and Contemporary*, 12 IUS GENTIUM 115, 116 (2006) (discussing that the realist era of contract began in mid-1900s).

⁵² See Bridgeman, *supra* note 43, at 1448 (explaining how the term "context insensitivity" may be used to describe "a case where the application of a rule leads to injustice for particular parties in their situation, . . . despite justification for the rule in most cases").

⁵³ *Id.*

⁵⁴ *Id.* at 1445.

⁵⁵ See Mark L. Movsesian, *Two Cheers for Freedom of Contract*, 23 CARDOZO L. REV. 1529, 1530 (2002) (reviewing THE FALL AND RISE OF FREEDOM OF CONTRACT (F.H. Buckley ed., 1999) (stating that "developments [in contract law] reflect a new formalism"); see also Thomas C. Grey, *The New Formalism* (Stanford Law Sch. Pub. Law & Legal Series, Working Paper No. 4, 1999), available at http://papers.ssrn.com/sol3/zpapers.cfm?abstract_id=200732

“neoformalism”⁵⁶ or “anti-antiformalism”⁵⁷). In contract law, the new formalism is evidenced by the resilience of the bargain principle, the courts’ reluctance to interfere with the substance of the parties’ contract, and the prominence of literalism.⁵⁸

However, this renewed tendency towards formalism has not developed without regard for the concerns addressed during the realist period. At least nominally, through the dichotomy based on party sophistication, the law has attempted to preserve concern about the context of a transaction.⁵⁹

(indicating that a formalistic approach is preferred); Jay M. Feinman, *Un-making Law: The Classical Revival in the Common Law*, 28 SEATTLE U. L. REV. 1, 1-2 (2004); David Charny, *The New Formalism in Contract*, 66 U. CHI. L. REV. 842, 842 (1999) (observing a return to formalism in contracts scholarship).

⁵⁶ John E. Murray, Jr., *Contract Theories and the Rise of Neoformalism*, 71 FORDHAM L. REV. 869, 891 (2002) (describing trend of neoformalism in contracts scholarship). Professor Murray did note that “[i]t seems unnecessary to refer to this school as ‘neoformalism’ notwithstanding differences between their rationale and the underlying philosophy of classical formalism. The results are essentially identical.” *Id.* at 892 n.115.

⁵⁷ Charny, *supra* note 55.

⁵⁸ Movsesian, *supra* note 55.

⁵⁹ For example, courts have not abandoned the doctrine of unconscionability, with its focus on procedural and substantive fairness. The unconscionability doctrine allows courts to deny enforcement of a contract (or a term of a contract) when that contract (or a term thereof) is, on balance, procedurally and substantively unfair. RESTATEMENT (SECOND) CONTRACTS § 208 cmt. c. (1981); U.C.C. § 2-303 cmt. 1 (2011). This standards-based doctrine survives to preserve the realists’ normative concerns. *See, e.g.*, Schmitz, *supra* note 10, at 74 (stating that unconscionability serves to protect fairness). This is readily evidenced by the court’s frequent application of unconscionability to temper strict enforcement of adhesion contracts in the consumer context. *See, e.g.*, Jeffrey W. Stempel, *Arbitration, Unconscionability, and Equilibrium: The Return of Unconscionability Analysis as a Counterweight to Arbitration Formalism*, 19 OHIO ST. J. ON DISP. RESOL. 757, 800-01 (2004) (indicating courts’ refusal to enforce an adhesion contract if the agreement is unconscionable). Moreover, courts have not rejected reliance-based theories, and they continue to interpret contracts contextually by reference to trade usage, course of performance, and course of dealing. *See, e.g.*, Kiely v. Raytheon Co., 105 F.3d 734, 736 (1st Cir. 1997) (applying the doctrine of promissory estoppel); Adams v. Johns-Manville Corp., 876 F.2d 702, 704-05 (9th Cir. 1989) (referencing course of dealing); Caterpillar, Inc. v. Usinor Industeel, 393 F. Supp. 2d 659, 679-80 (N.D. Ill. 2005) (applying doctrine of promissory estoppel); Coca-Cola Bottling Co. v. Coca-Cola Co., 654 F. Supp. 1419, 1429 (D. Del. 1987) (looking to the course of performance to interpret parties’ agreement); Prenger v. Baumhoer, 939 S.W.2d 23, 24-27 (Mo. App. W.D. 1997) (applying the doctrine of promissory estoppel); Smith-Scharff Paper Co. v. P.N. Hirsch & Co. Stores, Inc., 754 S.W.2d 928, 930 (Mo. App. E.D. 1988) (referencing course of dealing). Practical Products Corp. v. Brightmire, 864 P.2d 330, 333 (Okla. 1992) (discussing how general trade usage supplemented the terms contract); Pennsylvania Eng’g Corp. v. McGraw-Edison Co., 459 A.2d 329, 332 (Pa. 1983) (looking to the course of performance to interpret parties’ agreement); Century Ready-Mix Co. v. Lower & Co., 770 P.2d 692, 696-97 (Wyo. 1989) (referencing trade usage).

IV. SOPHISTICATION AND VALUE PLURALISM

Much in line with Grant Gilmore's observation of the possibility of "alternating rhythms in the process of the law,"⁶⁰ Professor Roy Kreitner posits that perhaps the "changing fashion in the legal academy represent[s] a pendulum swing of theory" between monism and pluralism.⁶¹ Indeed, the "new formalism" may be more appropriately and simply characterized as embracing pluralism because, to the extent it retains normative concerns, it may not be formalism at all.

Writing about rationales of tort law, Professor Christopher Robinette looks to Isaiah Berlin to derive four basic elements of value pluralism: "First, human values and goals are irreducibly many. Second, these values and goals have the potential to conflict; they may be incompatible. Third, these values and goals may be incommensurable. Fourth, these values and goals are objective."⁶² Robinette explains that the first element describes the values as "irreducible" because "the multiple goals and values are truly distinct; they do not just appear that way to those of us not sophisticated enough to understand the commonalities."⁶³ Second, the observation that these values may conflict is recognition that individual liberty and social justice may not be compatible.⁶⁴ Third, the values may be "incommensurable" because there is no ready tool to choose among them.⁶⁵ Though not express in Robinette's analysis, this could also be taken to mean that the prioritization of the values is context-driven. Finally, values and goals are described as "objective" because they are essentially fundamental to being human.⁶⁶

These four elements also resonate as an account of contract law. Autonomy, efficiency, fairness and equality, certainty, and predictability are values that may conflict. Taken out of context, one

⁶⁰ GILMORE, *supra* note 43, at 112.

⁶¹ Kreitner, *supra* note 15, at 916.

⁶² Robinette, *supra* note 22, at 334.

⁶³ *Id.* at 335.

⁶⁴ *Id.* (quoting Isaiah Berlin, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* 167 (Oxford Univ. Press 1969)) ("It is a commonplace that neither political equality nor efficient organization nor social justice is compatible with more than a modicum of individual liberty, and certainly not unrestricted laissez-faire; that justice and generosity, public and private loyalties, the demands of genius and the claims of society, can conflict violently with each other.").

⁶⁵ *Id.* at 336.

⁶⁶ *Id.*

could easily mistake Berlin's observations as a fitting description of the difficult task for contract law: these values often conflict because of the precarious balance of freedom and individualism with greater societal norms and expectations.⁶⁷ Indeed, no more transparent is the difficulty of this task than in the public policy cases—the cases, for example, concerning whether to enforce surrogacy contracts, non-compete clauses, and exculpatory agreements. Even though it is not always as transparent as in the public policy cases, this tension persists throughout all areas of contract doctrine.

Although it might be tempting to resign to the acknowledgment that the values of contract law are incommensurable, that itself conflicts with the value contract law places on predictability and certainty. A failure to pursue some coherent explanation of the law gives up on making it certain and predictable so that parties can order their private affairs accordingly. This is where party sophistication comes into play. It is an intuitive tool, though a crude one, to decide which competing values to prioritize in any given contracting situation.⁶⁸ It reflects a compromise between the search for the cohesion of a unifying theory and the recognition that contract law serves fundamental values that often find themselves in conflict.

This section of the Article looks to Professor Kreitner's typology of the current, pluralist conceptions of contract theory and then demonstrates how party sophistication is placed neatly within it.

A. The Variants of Value Pluralism in Contract

Professor Kreitner provides a thoughtful mapping of the current pluralist contract scholarship.⁶⁹ Kreitner first identifies the “borders of pluralism.”⁷⁰ One border represents the scholarship that attempts to reconcile central and competing principles. He describes these works as the outer edge of pluralism because “they seem to imply that theory allows for the type of ordering that will do away with conflict or competition among the values.”⁷¹ Kreitner next identifies the other border of pluralism, those scholars who are critical of theory and wonder whether a pragmatic and principled theory of contract is

⁶⁷ Robinette, *supra* note 22, at 335-36.

⁶⁸ *Id.*

⁶⁹ Kreitner, *supra* note 15, at 917.

⁷⁰ *Id.* at 918.

⁷¹ *Id.* at 919.

even possible.⁷²

Between these two positions, Kreitner discerns three variants of pluralist contract scholarship.⁷³ The first category represents the work of scholars who argue to prioritize competing values by subdividing the world of contract by party or transaction types.⁷⁴ In the second category, Kreitner summarizes the work of Professor Jeffrey Lipshaw and describes it as “metaphysical pluralism,” which, loosely, he explains as acknowledging the complexity of incompatible norms and yet recognizing that this duality is a “central and even routine feature” of contracting.⁷⁵ The third category looks to Professor Gregory Klass’s theory about the nature of contract rules as either “duty-imposing” or “power-conferring.”⁷⁶

B. Sophistication’s Fit Within Pluralist Conceptions that Look to Status and Transaction Type

This Article focuses on the first variant of pluralism—that which subcategorizes the world of contracts into types. Kreitner collects some of the prominent works in the group, which look to either the types of parties or types of contracts in an attempt to guide the doctrine.⁷⁷

On the subject of party types, Kreitner looks to the work of Professor Ethan Leib.⁷⁸ In response to the collaborative view of contract, Leib argues that “pluralism . . . requires more attention within contract theory.”⁷⁹ He describes the monism of the collaborative view as “frustrating precisely because contract’s heterogeneity likely demands a pluralistic theory.”⁸⁰ This discussion is a reaction to the collaborative theory’s application only to contracts between individuals, not those between organizations or an organization and a per-

⁷² *Id.*

⁷³ *Id.*

⁷⁴ Kreitner, *supra* note 15, at 919.

⁷⁵ *Id.* at 921; see generally Jeffrey M. Lipshaw, *Contract Formalism, Scientism, and the M-Word: A Comment on Professor Movsesian’s Under-Theorization Thesis*, 35 HOFSTRA L. REV. 23, 23 (2006).

⁷⁶ Kreitner, *supra* note 15, at 922; see Gregory Klass, *Three Pictures of Contract: Duty, Power, and Compound Rule*, 83 N.Y.U. L. REV. 1726, 1728-29 (2008).

⁷⁷ Kreitner, *supra* note 15, at 919-20.

⁷⁸ *Id.*

⁷⁹ Leib, *supra* note 19, at 22 (responding to Markovits, *supra* note 30).

⁸⁰ *Id.*

son.⁸¹ Leib is also responding to the efficiency theory of Professors Alan Schwartz and Robert Scott to the extent that it essentially limits its application only to contracts between organizations.⁸² Leib argues that theories that “box out” entire types of contracts fail to offer a general theory of contract.⁸³ Instead, these sub-categorizations could be used as a way to prioritize competing principles. For example, contracts between organizations would be governed by efficiency over autonomy concerns. Contracts between individuals would be governed by autonomy principles before efficiency concerns.⁸⁴

Further, Kreitner gathers the work of scholars who have argued that distinct types of contracts should be governed by principles that reflect the needs of that particular context, whether, for example, landlord-tenant or employer-employee.⁸⁵ This allows prioritizing of competing principles with sensitivity to the context in which the contracting occurs.⁸⁶

The recent scholarly attention to the sophistication of contracting parties fits neatly within this theoretical account of pluralism. It also falls squarely within the observation that contract law has been divided according to the status of the parties.⁸⁷ This status-based dichotomy allows the law to prioritize competing principles and attempts to bring coherence to otherwise incommensurable values. For sophisticated parties, autonomy and perhaps efficiency⁸⁸ principles govern. For those parties who are not sophisticated, normative con-

⁸¹ *Id.* at 21.

⁸² *See id.* at 3-4; Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 546-47 (2003) (discussing the theory of literal interpretation of contracts between organizations). Indeed, Schwartz and Scott limit their “efficiency theory” of contract to those deals where both parties are obviously sophisticated. *Id.* at 545. They then draw a boundary line for these obviously sophisticated parties by stating that the following firms fall into the first category: “(1) an entity that is organized in the corporate form and that has five or more employees, (2) a limited partnership, or (3) a professional partnership such as a law or accounting firm.” *Id.* They draw this categorical line on the reasoning that “[t]hese economic entities can be expected to understand how to make business contracts.” *Id.*

⁸³ Leib, *supra* note 19, at 22.

⁸⁴ Kreitner, *supra* note 15, at 919-20.

⁸⁵ *Id.*

⁸⁶ *Id.*; *see, e.g.*, Bix, *supra* note 14, at 199 (arguing that theories should be “localized to a particular jurisdiction and/or to particular sub-categories of Contract Law”); *see also* Oman, *supra* note 19, at 1484-85; Lipshaw, *supra* note 14, at 400.

⁸⁷ Robert C. Childres & Stephen J. Spitz, *Status in the Law of Contract*, 47 N.Y.U. L. REV. 1, 2 (1972).

⁸⁸ Jody Kraus, *Reconciling Autonomy and Efficiency in Contract Law: The Vertical Integration Strategy*, 11 PHIL. ISSUES 420, 420 (2001).

cerns about morality and fairness outweigh autonomy and efficiency.⁸⁹

While the entity type formulation that Leib describes in the collaborative and efficiency views has the allure of a bright-line, automatic categorization, it is an oversimplification that fails to account for the nuance of any given circumstance or context.⁹⁰ Fundamentally, the label of “sophisticated” recognizes (or, at least, should recognize) that imbalances of bargaining power must be factored into the law’s application, and the concept of bargaining power is complex and dynamic.⁹¹

Likewise, the scholars that look to transaction types to categorize the law of contract do so at the peril of deconstructing a general body of contract law into numerous, specific areas of law. Instead, categorization based on party sophistication makes a general body of contract law possible.⁹² And the courts are already using this formulation.⁹³ As I have argued elsewhere,⁹⁴ sophistication needs to be meaningfully defined and conceptualized, but its frame is available and already a burgeoning and significant part of all aspects of contract doctrine from formation to remedies.

V. CASE EXAMPLES

At this point it is worthwhile to provide some examples of how the courts employ party sophistication and how the framework of sophistication already exists as a tool to weigh competing contract values. Increasingly, courts hold sophisticated parties to a different

⁸⁹ *Id.*

⁹⁰ See Larry T. Garvin, *Small Business and the False Dichotomies of Contract Law*, 40 WAKE FOREST L. REV. 295, 296-97 (2005) (arguing that status-based dichotomies of “consumer versus non-consumer [and] merchant versus non-merchant . . . are false because small businesses do not fall cleanly into any of these categories”).

⁹¹ See generally Daniel D. Barnhizer, *Inequality of Bargaining Power*, 76 U. COLO. L. REV. 139 (2005).

⁹² Nathan B. Oman, *A Pragmatic Defense of Contract Law*, 98 GEO. L.J. 77, 78 (2009).

⁹³ See *infra* Part IV.

⁹⁴ See generally Miller, *supra* note 1 (arguing that the courts should establish a definition for “sophistication,” and develop a proper mode of analysis for deciding when application of the term is proper). Indeed, in a 1972 article, Childres and Spitz observed: “[S]tatus analysis clears the way to rational, just decision-making in all the categories. Once it is made explicit that no single rule can be expected to operate across all status lines, we can get about the business of trying to create new categories and rules.” Childres & Spitz, *supra* note 87, at 31.

set of rules, grounded in freedom of contract.⁹⁵ It is presumed *ex post* that a sophisticated party was aware of what to bargain for⁹⁶ and read (or should have read) and understood (or should have understood) the terms of a written agreement.⁹⁷ Sophisticated parties are expected to negotiate ably and order contract risks sensibly. Courts frequently state that it is not their role to interfere with or “rewrite” the terms of a deal for sophisticated parties.⁹⁸

Two relatively recent decisions of the New York Court of Appeals (the state’s highest court) serve as examples of sophisticated parties being held to autonomy principles over all else. The first example involves the requirement of strict compliance with an express condition precedent; the second example addresses the enforceability of a release of future claims among members of a business entity. The third example is an Ohio Supreme Court decision that deems a buyer of real estate unsophisticated and, with that, allows the buyer to rescind the contract based on mutual mistake.

⁹⁵ One treatise notes that “equity often deals a harsher hand to the more sophisticated party.” Richard A. Lord, 28 WILLISTON ON CONTRACTS § 70:153 (4th ed. 2009) (discussing *Farash v. Sykes Datatronics, Inc.*, 452 N.E.2d 1245, 1251 (N.Y. 1983)).

⁹⁶ See *Oppenheimer & Co., Inc. v. Oppenheim, Appel, Dixon & Co.*, 660 N.E.2d 415, 421 (N.Y. 1995) (requiring strict compliance with express condition precedent to formation of sub-lease of commercial real estate). The court explained that “[i]f [sophisticated parties] are dissatisfied with the consequences of their agreement, ‘the time to say so [was] at the bargaining table.’ ” *Id.* (second alteration in original) (quoting *Maxton Builders, Inc. v. Lo Galbo*, 502 N.E.2d 184, 189 (N.Y. 1986)).

⁹⁷ *Cara’s Notions, Inc. v. Hallmark Cards, Inc.*, 140 F.3d 566, 571 (4th Cir. 1998) (“The Gibsons are sophisticated business people and Cara’s Notions, Inc., dealt with Hallmark at arm’s length. Both parties to such a commercial contract have a duty to read the contract carefully and are presumed to understand it.”); see also 7 Joseph M. Perillo, CORBIN ON CONTRACTS: AVOIDANCE AND REFORMATION § 28.38 (2002) (“The more sophisticated the party, the greater the burden to read.”).

⁹⁸ *AccuSoft Corp. v. Palo*, 237 F.3d 31, 41-42 (1st Cir. 2001) (“[W]e do not consider it our place to ‘rewrite contracts freely entered into between sophisticated business entities.’ ” (quoting *Mathewson Corp. v. Allied Marine Indus., Inc.*, 827 F.2d 850, 856 (1st Cir. 1987))); *LaSociete Generale Immobiliere v. Minneapolis Cmty. Dev. Agency*, 44 F.3d 629, 637 (8th Cir. 1994) (“[W]here . . . two sophisticated parties negotiate[] a commercial contract which was executed in the absence of fraud, duress, or any other form of unconscionability, we will not rewrite the contract in order to save a contracting party from its own poor decisions.”); *Nelson v. Elway*, 908 P.2d 102, 107 (Colo. 1995) (en banc) (explaining when a contract is between two sophisticated parties involved in a complex transaction, the court will not rewrite the contract to circumvent the clear intent of the parties); *Oppenheimer*, 660 N.E.2d at 421.

A. Example 1: Strict Compliance with Express Conditions

In *Oppenheimer & Co., Inc. v. Oppenheim, Appel, Dixon & Co.*,⁹⁹ plaintiff (a national, full-service investment firm) had three years remaining on a lease of the 33rd floor of One New York Plaza in Manhattan.¹⁰⁰ Defendant (an accounting firm) was already a tenant on the 29th floor of the same building.¹⁰¹ Plaintiff was looking to vacate the premises and sublease the space on the 33rd floor; plaintiff and defendant “entered into a letter agreement setting forth certain conditions precedent to the formation and existence of a sublease between them.”¹⁰²

Defendant wanted to construct “a telephone communication linkage system between the 29th and 33rd floors.”¹⁰³ Thus, one express condition precedent to formation of the sublease was that plaintiff provide defendant with the prime landlord’s consent in writing on or before a date certain.¹⁰⁴ On that date certain, plaintiff’s attorney called defendant’s attorney to say that the prime landlord had consented to the work.¹⁰⁵ When defendant later refused to go forward with the sublease, plaintiff sued for breach of contract.¹⁰⁶

Defendant moved to dismiss the complaint in its entirety, claiming that the sublease was never formed because plaintiff failed to comply with the express condition precedent that plaintiff provide defendant with *written* notice of the prime landlord’s consent.¹⁰⁷ Plaintiff argued that its attorney notified defendant orally and, therefore, substantially complied with the condition.¹⁰⁸ The New York Court of Appeals held for defendant on the ground that the express condition precedent required *written* notice and, therefore, it had not been satisfied.¹⁰⁹

It is black letter law that an express condition requires strict

⁹⁹ 660 N.E.2d 415 (N.Y. 1995).

¹⁰⁰ *Id.* at 416.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Oppenheimer*, 660 N.E.2d at 416.

¹⁰⁵ *Id.* at 417.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 417-18.

¹⁰⁸ *Id.* at 419.

¹⁰⁹ *Oppenheimer*, 660 N.E.2d at 421.

compliance.¹¹⁰ The reasoning is that the court should not frustrate the clearly expressed intention of the parties.¹¹¹ In *Oppenheimer*, the oral notice of the prime landlord's consent did not satisfy the strict requirement of written notice.¹¹² For sure, the result seems harsh and overly technical. The parties' attorneys had a discussion, and through that discussion defendant was on actual notice of the prime landlord's consent to the work.¹¹³ Certainly, plaintiff had complied with the spirit of the condition.

Notably absent from the decision is any discussion of the parties' intent in requiring written notice. One can certainly imagine that defendant wanted tangible evidence of the prime landlord's consent before taking on any obligations. On the other hand, another very plausible view of the case is that defendant was not so concerned about having the notice in writing but was able to use the written notice condition as a pretext, as a way to walk away from the sublease based on a technicality. Recognizing the technical nature of the decision, the court wrote in its conclusion:

Freedom of contract prevails in an arm's length transaction between sophisticated parties such as these, and in the absence of countervailing public policy concerns there is no reason to relieve them of the consequences of their bargain. If they are dissatisfied with the consequences of their agreement, "the time to say so [was] at the bargaining table."¹¹⁴

The fact that the parties in *Oppenheimer* were sophisticated was not necessarily dispositive, but it served as a justification for what might otherwise be seen as an overly formalistic decision. The court certainly thought the parties' sophistication was important enough to mention in the conclusion of the decision.¹¹⁵

Oppenheimer presents a fundamental, underlying conflict that pits freedom and individualism (yielding here to a rules-driven literalism) against greater societal norms and expectations (acknowledg-

¹¹⁰ *Id.* at 418.

¹¹¹ *Id.*

¹¹² *Id.* at 421.

¹¹³ *Id.* at 417.

¹¹⁴ *Oppenheimer*, 660 N.E.2d at 421 (alteration in original) (quoting *Maxton Builders*, 502 N.E.2d at 189 (N.Y)).

¹¹⁵ *Id.*

ing plaintiff's substantial compliance with the notice provision).¹¹⁶ The court resolved this tension by stating that, for sophisticated parties, "[f]reedom of contract prevails."¹¹⁷ The implication is that had plaintiff been unsophisticated, the autonomy principle may have been outweighed by other values. This status-based method of ordering the world of contracts allows the court to adhere to "freedom of contract" for these parties, but recognizes that another situation with a different match of parties or a different type of contract might yield to other, countervailing principles. Indeed, if, rather than a commercial sublease between two large companies, we imagine this as a residential sublease between two individuals in a market with a glut of housing options, the prioritization of guiding values arguably shifts.

B. Example 2: A General Release of Claims

In *Oppenheimer*, the New York Court of Appeals would not rewrite the bargain for sophisticated parties.¹¹⁸ This is a familiar approach in cases involving a general release of claims, which the same court had the opportunity to address in *Arfa v. Zamir*.¹¹⁹

In *Arfa*, plaintiffs and defendant (all individuals) formed a business entity ("Company") to purchase a building in Manhattan.¹²⁰ Plaintiffs took ownership of 60% of the Company and defendant took 40%.¹²¹ Their "Governance Agreement" allocated management rights equally between plaintiffs (50%) and defendant (50%).¹²² It also included a general release of "any and all claims" whether "known [or] unknown, which they have ever had, have or may now have" arising from prior events.¹²³

Defendant arranged the purchase of the building on behalf of the Company.¹²⁴ In arranging the deal and negotiating the Company's "Governance Agreement," plaintiffs alleged that defendant understated the cost of renovating the building and failed to disclose

¹¹⁶ *Id.* at 418-19, 421.

¹¹⁷ *Id.* at 421.

¹¹⁸ *Id.*

¹¹⁹ 905 N.Y.S.2d 77 (App. Div. 2010), *aff'd*, 952 N.E.2d 1003 (N.Y. 2011).

¹²⁰ *Id.* at 77-78. The form of business entity is not specified in the court's decision.

¹²¹ *Id.* at 78.

¹²² *Id.* at 78 n.1.

¹²³ *Id.*

¹²⁴ *Arfa*, 905 N.Y.S.2d at 78.

structural defects and building code violations.¹²⁵ Plaintiffs sued for, among other things, breach of fiduciary duty and fraud.¹²⁶ Defendant argued that the release in the “Governance Agreement” barred plaintiffs’ claims.¹²⁷

The appellate division (New York’s intermediate appellate court) enforced the release and dismissed plaintiffs’ claims, reasoning that the governance agreement “was the result of rigorous, arm’s-length negotiations between highly sophisticated parties.”¹²⁸ The parties owed each other fiduciary obligations based on other, existing real estate businesses.¹²⁹ Nevertheless, the appellate division went so far as to hold that, “notwithstanding the fiduciary obligation owed by each side to the other[,] . . . [plaintiffs], as sophisticated businesspeople, had ‘an affirmative duty . . . to protect themselves from misrepresentations . . . by investigating the details of the transactions and the business’ affected by the Governance Agreement.”¹³⁰

The Court of Appeals affirmed in a terse memorandum, reasoning:

[Plaintiffs] have failed to allege that they justifiably relied on [defendant’s] fraudulent misstatements in executing the release. By their own admission, plaintiffs, who are sophisticated parties, had ample indication prior to [signing the release] that defendant was not trustworthy, yet they elected to release him from the very claims they now bring without investigating

¹²⁵ *Id.*

¹²⁶ *Id.* at 77-79.

¹²⁷ *Id.* at 78.

¹²⁸ *Id.* at 78-79. I have criticized courts for generally failing to provide the reasons why they label a party sophisticated. Coincidentally, in this case, the appellate division did a good job of explaining this conclusion. *Arfa*, 905 N.Y.S.2d at 78 n.2. The court wrote:

In their complaint, Arfa/Shpigel allege the facts establishing their sophistication. Arfa, an attorney, has practiced law with the Securities and Exchange Commission and as a partner in a large corporate law firm for more than 12 years. Shpigel, a 20-year veteran of the real estate business, is a principal in his own real estate brokerage firm and has served as a consultant on investing in the U.S. real estate market to Israel’s largest pension fund and to prominent Israeli individuals.

Id.

¹²⁹ *Id.* at 78-79.

¹³⁰ *Id.* (fourth and fifth alterations in original) (quoting *Global Mins. & Metals Corp. v. Holme*, 824 N.Y.S.2d 210, 215 (App. Div. 2006)).

the extent of his alleged misconduct.¹³¹

This is the prevailing view in cases addressing releases of prior or future claims, no-reliance clauses,¹³² and waivers of fiduciary duty.¹³³ Indeed, in enforcing a general release of future claims, the Missouri Supreme Court wrote that “[s]ophisticated parties have freedom of contract—even to make a bad bargain, or to relinquish fundamental rights.”¹³⁴

Courts state the sophisticated parties can and should be able to privately order their affairs, even if it leads to a “bad bargain.”¹³⁵ Sophisticated parties should read closely, investigate thoroughly, and write their bargains carefully. The countervailing contract value for sophisticated parties is autonomy and, with that, minimal judicial interference.

C. Example 3: Mutual Mistake in a Residential Real Estate Contract

The previous two examples involved contracts in a business setting where the parties were deemed sophisticated. *Oppenheimer* involved a contract between two organizations¹³⁶ and *Arfa* involved a “Governance Agreement” between individual members of the Company.¹³⁷ In *Reilley v. Richards*,¹³⁸ the Supreme Court of Ohio addressed the rescission of a residential real estate contract between two individuals.¹³⁹ The court allowed an “unsophisticated” buyer to rescind the contract after closing on the ground of mutual mistake.¹⁴⁰

In *Reilley*, buyer and seller entered into a contract for the purchase of real property.¹⁴¹ The buyer planned to build a family residence on the property.¹⁴² The buyer also happened to be an attor-

¹³¹ *Arfa*, 952 N.E.2d at 1004.

¹³² Miller, *supra* note 1, at 505-08.

¹³³ See, e.g., *Centro Empresarial Cempresa S.A. v. América Móvil, S.A.B. de C.V.*, 952 N.E.2d 995, 1001-02 (N.Y. 2011)).

¹³⁴ *Purcell Tire & Rubber Co. v. Exec. Beechcraft, Inc.*, 59 S.W.3d 505, 508 (Mo. 2001) (en banc).

¹³⁵ *Id.*

¹³⁶ *Oppenheimer*, 660 N.E.2d at 687.

¹³⁷ *Arfa*, 905 N.Y.S.2d at 77-78.

¹³⁸ 632 N.E.2d 507 (Ohio 1994).

¹³⁹ *Id.* at 508.

¹⁴⁰ *Id.* at 509.

¹⁴¹ *Id.*

¹⁴² *Id.*

ney.¹⁴³ Subsequent to closing, the parties discovered that part of the property was in a flood hazard zone, which rendered the property untenable for the buyer's building plans.¹⁴⁴ Both buyer and seller were unaware of the government's flood hazard designation, and the buyer sought rescission on the ground of mutual mistake.¹⁴⁵ The Supreme Court of Ohio allowed rescission of the contract, holding that the mutual mistake was "material to the subject matter of the contract."¹⁴⁶

In reaching this conclusion, the *Reilley* court observed that the contract of sale contained an inspection provision, allowing the buyer sixty days from signing the contract to conduct soil, engineering, utility, and any other inspections.¹⁴⁷ The court held that this provision did not mean that the buyer assumed the risk of the mistake.¹⁴⁸ In that connection, the court commented that the inspection would not have revealed that the property was in a flood hazard zone.¹⁴⁹ The court also noted that the buyer "was a lawyer but . . . had no experience in real estate law and, thus, was an unsophisticated party at the time of the transaction."¹⁵⁰ Among other things, the dissent challenged the majority's determination that the buyer, an attorney (or any attorney), is unsophisticated in real estate matters.¹⁵¹

The majority of the court did not adhere to "freedom of con-

¹⁴³ *Reilley*, 632 N.E.2d at 509.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 508-09.

¹⁴⁶ *Id.* at 509.

¹⁴⁷ *Id.*

¹⁴⁸ *Reilley*, 632 N.E.2d at 509.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* The majority of the court did not mention that the mistake was "one of law, not fact"; although this point was raised by the dissent. *Id.* at 510 (Bryant, J., dissenting).

¹⁵¹ *Id.* at 510-11. The dissent wrote:

I am also troubled by the majority's holding that appellant, a lawyer, has no obligation to use all his knowledge if the matter at issue is not within his area of practice. This holding does nothing to enhance the professional reputation of lawyers. The appellant in this case was not unsophisticated simply because he has no experience in real estate law. This court has always considered licensed lawyers to be competent enough to know those things which lawyers are required to know. An applicant's knowledge of the law of real property is tested on the Ohio bar examination; accordingly, attorneys are presumed to know the law applicable to real estate. Ordinary citizens are not excused for their failure to know the law applicable to such matters and attorneys certainly should not be so excused.

Reilley, 632 N.E.2d at 510-11 (citations omitted).

tract” and, instead, re-wrote the parties’ bargain to achieve fairness.¹⁵² Certainly, it could be argued that the result is not fair to the seller, but setting that discussion aside, fairness norms are driving the outcome, not autonomy or predictability and certainty. At least in part, this is because the majority of the court believed the buyer was not knowledgeable of and experienced in real estate transactions.¹⁵³

VI. CONCLUSION

The attention of scholars and courts to party sophistication embraces value pluralism; it recognizes that contract law serves several competing values and there is no “perfect whole.”¹⁵⁴ But, even given this recognition, it attempts to bring cohesion to a body of law that applies to a diverse number of circumstances. As the cases show, the courts are guided by different values in different contexts.¹⁵⁵ They are inclined to hold an “unsophisticated” buyer of residential real estate to different guiding principles than a business owner with considerable experience.¹⁵⁶

Once the status-based label of “sophisticated” or “unsophisticated” is applied, the law can prioritize competing values. For sophisticated parties, the supervalues are autonomy and individual liberty, which lead to a rules-driven and a-contextual approach that lends itself to efficiency, predictability, and certainty.¹⁵⁷ For unsophisticated parties, the supvalue is a normative one of reasonableness and fairness; it is guided by a-contextual and standards-driven approach.¹⁵⁸

The label of “sophisticated” allows for a general body of contract law that is both principled and pragmatic, a difficult balance to achieve. The challenge now, however, is to appropriate the existing, basic structure of “party sophistication” and define and better conceptualize it for this purpose.

¹⁵² See *id.* at 509 (majority opinion).

¹⁵³ *Id.*

¹⁵⁴ Robinette, *supra* note 22, at 335 (quoting ISAIAH BERLIN, *THE CROOKED TIMBER OF HUMANITY: CHAPTERS IN THE HISTORY OF IDEAS* 13 (Henry Hardy ed., 1991)).

¹⁵⁵ See *Reilley*, 632 N.E.2d 507; *Oppenheimer*, 660 N.E.2d 415; *Arfa*, 905 N.Y.S.2d 77.

¹⁵⁶ Compare *Reilley*, 632 N.E.2d at 509 (allowing an unsophisticated buyer to rescind a contract for residential real estate), with *Arfa*, 905 N.Y.S.2d at 81 (preventing the sophisticated buyer to rescind contract).

¹⁵⁷ Kraus, *supra* note 88.

¹⁵⁸ *Id.*