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The Many Dimensions of Private Law

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Professor Stephen Waddams' new book emphasizes the many dimensions of private law and seeks to prove the inadequacy of simple explanations or categorizations of this law.[1] Waddams distrusts the divisions between public and private law, between property and obligations, and, within obligations, between the concepts of contract, unjust enrichment and wrongdoing.[2] He believes, for example, that within the law of obligations, judges often apply concepts "concurrently and cumulatively" to resolve issues, and that no single concept dominates.[3] As a result, it is a mistake and often misleading to label one case contract and another tort, for example, as if the former case solely concerns enforcing agreements and the latter only wrongdoing. Consistent with this thesis, Waddams also explains that legal principles and policy perspectives generally complement each other, and that neither alone usually serves as the paramount reason for a decision.[4]

Waddams sets forth many reasons for what he refers to as the failure of "mapping" of private law.[5] For example, he points out that, as circumstances change, judges must make decisions outside

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1. "[I]t has not been possible to explain Anglo-American private law in terms of any single concept, nor has any map, scheme, or diagram proved satisfactory in which the concepts are separated from each other, as on a two-dimensional plane." Waddams, *Dimensions*, *ibid.*, at p. 226. See also p. vi.
2. *Ibid.*
3. *Ibid.*, at p. 225; see also p. 2.
4. *Ibid.*, at pp. 191 and 205.
5. "[T]here is no consensus on what is to be mapped (facts, cases, issues, rules, reasons, categories or concepts), on what is to be located on the map when drawn, or on whether the map is governed by the shape of the terrain, or vice versa." *Ibid.*, at p. 3.

of existing frameworks.[6] Further, Waddams explains that the historical division of courts of law and equity, with equitable concepts "cut[ing] across legal categories",[7] contributes to the law's conceptual disunity. In addition, he sees that courts exercise judgment in selecting relevant facts, that "[n]o map or scheme could possibly classify all imaginable facts", and that facts influence the formulation of rules.[8] In light of these and other reasons, Waddams believes efforts to simplify and clarify private law by categorizing or mapping the law generally backfire, only "distort[ing] an understanding" of the law.[9]

Dimensions of Private Law is an excellent book. Waddams selects interesting and important examples from a wide array of legal decisions, helpfully collects them under chapter headings such as economic harms, physical harms, reliance and so on, usefully points out the panoply of legal concepts and principles constituting the solutions to these issues, and generally convinces the reader of the many dimensions of private law. I confess that I am not a disinterested observer of Waddams' thesis, having weighed in myself on the combination of legal principles and theories that constitute contract law. I concluded that "The various norms of contract law reflect the major social, economic and institutional forces of a pluralistic society. Not only do these norms often clash, but they are themselves frequently internally inconsistent."[10] It is no wonder that I am sympathetic to Waddams' thesis and see the deep value in a realistic description of the terrain of private law.

One of the many impressive things about *Dimensions* is its scope and its variety of insights. In the various chapters, not only does Waddams illustrate how various concepts figure in decisions involving the diverse issues of private law, but he offers many other illuminating observations as well. For example, the book includes thoughtful discussions of how the factual background of cases helps clarify the perceptions and reasons of judges,[11] the disparate legal

6. *Ibid.*, at p. 13.
7. *Ibid.*
8. *Ibid.*, at p. 14.
9. *Ibid.*, at p. 226.
10. Robert A. Hillman, *The Richness of Contract Law* (Dordrecht, Kluwer, 1997), p. 268 (hereafter *Richness*).
11. *Dimensions*, at p. 38.

responses to contract and other wrongs,[12] the difference between wrongdoing that is blameworthy and wrongdoing that entitles the victim to compensation,[13] and how equity blurs the distinction between obligation and property through vehicles such as trusts.[14]

Of course, in a book of the breadth of *Dimensions* it would be unusual if a reader agreed with all of Waddams' assertions. For example, he appears to lump promissory estoppel with other forms of estoppel in his claim that estoppel is dependent on other concepts because it "prevents a party from making certain assertions".[15] The inference is that promissory estoppel means only that a defaulting promisor cannot claim the absence of consideration to support the promise. However, at least in the United States, promissory estoppel now constitutes a separate and relatively distinct cause of action for detrimental reliance induced by a promise, and I think properly so. After all, positioning promissory estoppel as a separate theory allows courts to avoid distorting the doctrine of consideration by finding an enforceable bargain when the real reason for the decision is detrimental reliance on a promise. Apparently for the sake of consistency, Waddams seems to resist this characterization of promissory estoppel.[16]

In fact, Waddams himself occasionally strays from his theme of the interrelatedness of concepts and the difficulties of categorization. For example, in his discussion of strict tort liability, Waddams describes compensation for harm as the principal justification for the theory and downplays public safety as an important factor.[17] Waddams' main explanation is that other law creates incentives for manufacturers to produce safe products, as if laws cannot share policy goals.[18] Even if Waddams' explanation is true, it contradicts his overall thesis.

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12. For example, breaching parties generally cannot be enjoined or forced to return their ill-gotten gains. See *ibid.*, at p. 143.
13. *Ibid.*, at p. 106.
14. *Ibid.*, at p. 186.
15. *Ibid.*, at p. 69.
16. "The establishment of a fourth category of obligations, or consignment of the reliance cases to a separate 'miscellaneous' category, would scarcely resolve the difficulties because reliance has not been so much *separate* from the concepts of property, contract, tort, and unjust enrichment, as intimately linked with all of them." *Ibid.*, at p. 79.
17. "The purpose of imposing liability on the manufacturer . . . has plainly been not primarily to deter or modify the manufacturer's behavior, but to require it to compensate the injured plaintiff." *Ibid.*, at p. 100.
18. *Ibid.*

But I do not want to dwell on such minor quarrels, because, as I have already made clear, I agree with Waddams' central theme, namely, the complexity of private law and the general failure of categorization. In the rest of this article, I first set forth and expand upon but one of Waddams' many examples to illustrate his thesis. Then I briefly discuss some questions that *Dimensions* inspires: (1) In light of its inadequacies, what accounts for the popularity of conceptualizing private law? (2) What are the ramifications of the reality that private law is complex and multidimensional? (3) What new approaches to the study of decision-making may shed light on the judicial process when judges confront multidimensional problems?

I. AN EXAMPLE OF PRIVATE LAW'S MANY DIMENSIONS

Waddams is careful never to claim that every case is complex.[19] Rather, his strategy is to demonstrate that courts utilize a combination of concepts, principles and policies to resolve so many cases in so many different contexts that the reader cannot help but distrust any map of private law.[20] In this section, I shall look at one example to illustrate what Waddams shows over and over again. Because of the breadth of *Dimensions*, Waddams does not spend much time on the problem of judicial policing of contracts for unfairness.[21] Nevertheless, it is an excellent example of the complexity and many dimensions of private law.

Waddams sees a combination of wrongdoing, consent, unjust enrichment and policy at work in policing cases.[22] I agree. Take for example judicial application of the unconscionability doctrine. As analysts have long pointed out, courts applying this principle examine the bargaining process to determine whether there has been any "procedural unconscionability", and they

19. Categories have "failed to account for many actual judicial decisions . . . ." *Ibid.*, at p. vi.

20. "[C]ourts, in attempting to accommodate 'life in all its untidy complexity,' have in many cases not derived their conclusions from pre-existing conceptual schemes or maps." *Ibid.*, at p. 3. "The preceding chapters have drawn attention to a number of issues the resolution of which has not conformed to simple accounts of private law. . . . [S]uch cases have been neither infrequent, nor, from the point of view of the parties or of the public, insignificant." *Ibid.*, at p. 223.

21. See *ibid.*, at p. 164.

22. *Ibid.*

evaluate the adequacy of the exchange to determine whether it is "substantively unconscionable".[23]

Procedural unconscionability constitutes wrongdoing by a party in many possible forms. For example, a party's conduct may resemble (or satisfy the elements of) duress, fraud or undue influence. In addition, a party's wrongdoing may involve hiding terms or drafting terms that it knows the other party cannot understand.[24] But wrongdoing is not all that is going on in procedural unconscionability cases. They also involve the quality of a party's consent. Courts have little difficulty concluding that a party has not consented to a hidden or unclear term or to one that is the product of fraud or duress, or even conduct approaching these wrongs.[25] Courts also consider the age, intelligence, business acumen and bargaining power of the party asserting unconscionability in determining whether that party has consented to a term.[26]

A clause is substantively unconscionable when it is too favorable to one party, so that the other party does not receive the fruits of the bargain.[27] Courts investigating substantive unconscionability consider whether a contract or clause serves a reasonable purpose in the context or simply takes unfair advantage of a party.[28] One classic example involves a clause in a contract that authorized a seller to reclaim all of the goods it sold to a purchaser if the purchaser defaulted on any single item.[29] In the absence of the seller showing a need for the clause, such as because of unusual default risks, many courts would find the clause unfair and unenforceable.[30]

Enforcement of a substantively unconscionable term would unjustly enrich the favored party. For example, if a party pays $100 for a watch worth $5, I suspect most courts would find the seller's profit an unjust windfall, not the product of entrepreneurial skill.

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23. See, *e.g.*, *American Stone Diamond, Inc. v. Lloyds of London*, 934 F. Supp. 839 at p. 844 (S.D. Tex. 1996) ("[T]he party asserting unconscionability of contract bears the burden of proving both the substantive unconscionability and the procedural unconscionability of the contract at issue."); Arthur Allen Leff, "Unconscionability and the Code — The Emperor's New Clause" (1967), 115 U. Pa. L. Rev. 485 at pp. 487-88.
24. See, *e.g.*, Hillman, *Richness*, *supra*, footnote 10, at p. 138.
25. *Ibid.*, at p. 141.
26. See Robert A. Hillman, "Debunking Some Myths About Unconscionability: A New Framework for U.C.C. Section 2-302" (1981), 67 Cor. L. Rev. 1 at p. 19.
27. *Ibid.*
28. *Ibid.*
29. *Williams v. Walker-Thomas Furniture Co.*, 350 F. 2d 445 (D.C. Cir. 1965).
30. *Ibid.*

Policy also plays an important role in both procedural and substantive unconscionability decisions. For example, courts consider whether a decision finding unconscionability over-regulates and impinges on freedom of contract. Further, they ask whether the decision will deter wrongful behavior or only drive transactors out of a market at the expense of those who want to contract.

In sum, wrongdoing, consent, unjust enrichment and policy are all at work in unconscionability decisions. Waddams' principal point is that this characteristic of judicial decision-making repeats itself across the various domains of private law. After reading all of the examples, the reader cannot help but come away from *Dimensions* suspicious of any classificatory system of private law. But, assuming Waddams is correct, what are the implications of the general failure of private law categorizations?

II. QUESTIONS TO PURSUE

1. What Accounts for the Popularity of Categorizing Private Law?

Undoubtedly, for many reasons, analysts believe in the process of categorizing law. For example, Waddams himself does not deny that at least *some* cases fit nicely within one category or another and that mapping can sometimes contribute to our understanding. Categorizing also sometimes helps guide courts and usefully restricts judicial prerogatives and imagination. I return to these subjects in the next subsection.[31] Here, I would like to focus on another important reason, one that theorists often overlook.

Law is supposed to be clear, definite and hence predictable, so that people can plan their business and personal lives.[32] Further, law should be objective and resistant to manipulation that favors one group or another or that creates avenues for judges to usurp the legislature's prerogative to make new law.[33] Conceding law's complexity is therefore problematic for those who believe in the rule of law. In my view, then, people believe in the efficacy of creating categories and conceptual frameworks in part because they believe law *should be* susceptible to such an analysis.

31. See *infra*, footnotes 42-53 and accompanying text.
32. Hillman, *Richness*, *supra*, footnote 10, at p. 161.
33. *Ibid.*, at pp. 160-64.

The psychological phenomenon known as cognitive dissonance may best describe what is going on here.[34] People seek consistency in their beliefs, which leads them to ignore conflicting information. Further, when information conflicts with people's "core values", they especially seek to dismiss contradictory information.[35] In short, we continue to categorize private law in part to mask the disconcerting truth of law's overall complexity.

Others have recognized the urge of legal analysts to suppress disturbing inconsistencies through legal fictions. For example, Lon Fuller saw that the criminal-law fiction that "everyone knows the law" hides the troubling reality that the law often punishes people who do not believe they are breaking a law.[36] Fuller's inspiration for this conclusion was Pierre De Tourtoulon:

> It is an essentially human tendency to refuse to believe sad events and to invent happy ones. What the lawmaker sometimes tries to do is precisely this — to efface unfortunate realities as far as possible and to evoke the shades of fortunate realities which have not been achieved . . . . While the fiction is a subtle instrument of juridical technique, it is also clearly the expression of a desire inherent in human nature, the desire to efface unpleasant realities and evoke imaginary good fortune.[37]

So, at least in part, we want to believe that the law is clear and predictable, and we categorize the law to prove it and to bury the uncomfortable reality that the law is neither of those things. To take a specific example, we say (and try to believe) that, in order to facilitate private arrangements, contract law enforces people's actual bargains, grants expectancy damages and ignores the reasons for breach.[38] The reality, however, is quite different. These precepts of contract law are heavily modified by exceptions, qualifications and contradictions. Contract law enforces a reasonable person's interpretation of the parties' bargain, rarely if ever puts the injured party in as good a position as if there had been no breach, and is heavily influenced by the reasons for breach.[39] Our

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34. See Robert A. Hillman, "Contract Lore" (2002), 27 J. Corp. L. 507 at p. 515 (hereafter "Contract Lore").
35. Steven Hartwell, "Legal Processes and Hierarchical Tangles" (2002), 8 Clinical L. Rev. 315 at p. 371, note 117.
36. Lon L. Fuller, *Legal Fictions* (Stanford, Cal., Stanford U.P., 1967), p. 84.
37. *Ibid.* (quoting Pierre De Tourtoulon, *Philosophy in the Development of Law*, Martha Mc. Read trans. (New York, Macmillan, 1922), p. 386).
38. Hillman, "Contract Lore", *supra*, footnote 34 , at pp. 506-12.
39. *Ibid.*

resistance to contract law's complexity nurtures our vision that contract law succeeds at its goals better than it really does.

2. Ramifications of Legal Complexity

What are the ramifications of recognizing our dissonance about the nature of law, and facing up to the conclusion that the law is complex, multidimensional and difficult to categorize? Of course, legal realists and critical legal studies adherents have spilled lots of ink over these observations. The legal realists asserted the bankruptcy of formalism and the reality of judicial pragmatism. Facts and equities decide cases, they thought, and not necessarily in a neutral manner.[40] Critical legal studies theorists followed the realists, but distinguished themselves by their more dogged insistence that the law is indeterminate and biased. Rules have little effect in cases, they reasoned, because for each rule the judge can find a counter rule. Further, the law offers precious little guidance on whether the rule or counter rule should apply in a given case.[41] Judges must use their discretion to decide a case.

Notwithstanding private law's complexity, Waddams has more faith in the relative predictability of legal decisions.[42] He explains that courts use their "overall judgment",[43] after examining the various "complementary strands" in the reasoning.[44] Even if each concept alone is insufficient to reach a decision, "cumulatively the various concepts [tend] to support each other, and [form] a persuasive reason for the result".[45] Thus, concepts such as wrongdoing, unjust enrichment, contract and property used in conjunction more often than not locate a problem on one side of the line or another, so that courts can reach an objective decision.

Waddams also asserts that conceding the law's complexity actually will help clarify legal decisions.[46] Instead of distorting concepts to fit them into a particular conceptual framework, analysts can examine the concepts at work outside of a formal structure. In this way, the law avoids "the formulation of legal rules far wider than

40. Hillman, *Richness*, *supra*, footnote 10, at pp. 176-77.
41. *Ibid.*, at p. 194; see also *Dimensions*, at p. 205.
42. *Ibid.*, at p. 233.
43. *Ibid.*, at p. 34.
44. *Ibid.*, at p. 191.
45. *Ibid.* at p. 34; see also *ibid.*, at pp. 61, 106, 135 and 142.
46. *Ibid.*, at p. 2.

necessary to explain the result in the particular cases".[47] Further, by relaxing conceptual boundaries, courts are less likely to engage in confusing and wasteful efforts to determine which concepts are "supplemental, subordinate, secondary or subsidiary to the other",[48] when the truth is that they share the spotlight.

Waddams does not seek to tear down existing edifices completely, however. For example, he criticizes "the tendency to make *too sharp* a separation of legal concepts from each other", suggesting that he approves of at least some separation.[49] Waddams also defends contract law as "legal rules found, over several centuries, to have answered the needs of justice".[50] Waddams is apparently content to describe more realistically the many dimensions of private law without ridding the system of its classifications, which, I take it, he believes ultimately contribute to the determinacy of the law.[51]

Some readers may not be satisfied with Waddams' account of judicial decision-making, or his conclusion that categorizing ultimately contributes to the law's order. These readers may want to know more than that private law concepts have a "complex interrelationship",[52] that courts reach persuasive conclusions by exercising their "overall judgment", and that mapping generally distorts understanding but also sometimes clarifies decisions.[53] I now turn to one possible avenue for increasing our knowledge about judicial decision-making.

3. Judicial Decision-Making under Complexity

Can we learn more about how judges make decisions when faced with many complex analytical tools? How does a court select relevant concepts, assign their appropriate weights, and reach what the court believes is a satisfactory solution? Psychological research about decision-making may enrich the analysis of judicial choices.

47. *Ibid.*, at p. 34.
48. *Ibid.*, at p. 165.
49. *Ibid.*, at p. 34 (emphasis added).
50. *Ibid.*, at p. 68.
51. "The idea of mapping cannot be entirely discarded, and it owes its attraction partly to the fact that it is understood in many different ways, some of which are essential to the organization of thought." *Ibid.*, at p. 226. "The result has not been perfect order. But it does not follow that it has been chaos." *Ibid.*, at p. 233.
52. *Ibid.*, at p. 171.
53. *Ibid.*, at p. 226.

Recently, legal analysts have begun to apply the learning of the social science discipline often called Behavioral Decision Theory (BDT) to the project of evaluating and improving legal rules.[54] BDT explains and predicts how people make decisions, taking into account both their propensity to create "mental shortcuts" or heuristics to process information and also their biases in reaching decisions.[55] Although heuristics usually serve people well, they can lead to "systematic errors in judgment".[56] Although critics correctly wonder whether BDT's clinical experiments realistically assess real-world decision-making, not to mention judicial decision-making,[57] the discipline raises some interesting questions that may shed light on how judges make decisions.[58]

I can only scratch the surface here of questions BDT raises. BDT suggests that people are not very good at digesting large quantities of information[59] or integrating information that comes from incomparable sources.[60] Further, BDT shows that people often adopt simple rules for making choices, and focus on only a few salient factors out of many.[61] Indeed, decisions may be less accurate when people attempt to utilize too many factors.[62] Do judges consider all of the relevant concepts or focus on only a few? If the former, do their decisions ironically suffer as a result? If the latter, can we predict which concepts judges actually employ? In fact, some experiments

54. See, *e.g.*, Robert A. Hillman, "The Limits of Behavioral Decision Theory in Legal Analysis: The Case of Liquidated Damages" (2000), 85 Cor. L. Rev. 717.
55. *Ibid.*
56. Chris Guthrie, Jeffrey J. Rachlinski and Andrew J. Wistrich, "Inside the Judicial Mind" (2001), 86 Cor. L. Rev. 777 at p. 780.
57. Judges have more information and time to reach decisions. In addition, their motivation to do a good job is high. *Ibid.*, at p. 819.
58. In fact, one recent empirical study of judges' decision-making concluded that "Empirical evidence suggests that even highly qualified judges inevitably rely on cognitive decision-making processes that can produce systematic errors in judgment." *Ibid.*, at p. 779.; see also *ibid.*, at pp. 782-84.
59. Russell Korobkin, "The Efficiency of Managed Care 'Patient Protection' Laws: Incomplete Contracts, Bounded Rationality, and Market Failure" (1999), 85 Cor. L. Rev. 1 at p. 52.
60. Robyn M. Dawes, "The Robust Beauty of Improper Linear Models", in A. Khanemen, P. Slovic and A. Tversky, eds., *Judgment Under Uncertainty: Heuristics and Biases* (Cambridge, Cambridge U.P., 1982), p. 395.
61. See Gerd Gigerenzer and Peter Todd , *Simple Hueristics That Make Us Smart* (Oxford, OUP, 1999), pp. 358-59; Mandeep K. Dhami, "Psychological Models of Professional Decision Making", *Psychological Science*, 2003 WL 19077951.
62. *Ibid.*

using judges already suggest that they, just like everyone else, employ cognitive shortcuts instead of complex models in making decisions.[63]

People also may overstate the number of factors they utilize in reaching a decision.[64] Further, they often have a poor idea about why they make a particular choice and their explanations can be very misleading.[65] For example, people may believe they base their decisions on their experiences, when in reality they rely on "a priori causal theories about the effects of particular stimuli".[66] In light of these errors, can we rely on the reasons offered in judicial opinions? If not, how can we gather more accurate explanations of decisions?

For a concrete example of some of the questions BDT raises, consider the unconscionability doctrine discussed earlier. Recall that courts apply the concepts of wrongdoing, consent, unjust enrichment and policy in reaching decisions. Each concept, in turn, raises several factual issues, so that before a court decides a case it should consider at minimum the presentation of the terms, the reasons for them, alternative markets (if any), bargaining power, the parties' age, intelligence and sophistication, and the nature of the terms. If BDT observations are accurate and apply to judicial decisions, we should worry about whether courts actually and accurately consider all of these factors, how they assign weight to the factors they do consider, the accuracy of their decisions, and the validity of their explanations.

This brief discussion of BDT, inspired by *Dimensions*, raises difficult questions. I do not expect BDT to generate any revelations. I only suggest that the psychology of judging may be a fertile field for exploration.[67]

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63. Dhami, *supra*, footnote 61; see also Guthrie *et al.*, *supra*, footnote 56.
64. Ebbe B. Ebbeson and Vladimir J. Konecni, "Decision Making and Information Integration in the Courts: The Setting of Bail" (1973), 32 J. Personality & Social Psych. 805.
65. Timothy de Camp Wilson and Richard E. Nisbett, "The Accuracy of Verbal Reports about the Effects of Stimuli on Evaluations and Behavior" (1978), 41 Social Psych. 118 at p. 119. See also Guthrie *et al.*, *supra*, footnote 56, at p. 813 ("Egocentric biases could lead judges to believe that they are better decision makers than is really the case.").
66. Wilson and Nisbett, *ibid*, at p. 129.
67. Thus far, most psychological studies in the legal field have focused on the decisions of juries. Guthrie *et al.*, *supra*, footnote 56, at p. 781. For a collection of work on judicial decision-making, see *ibid.*, at p. 781, note 21.

III. CONCLUSION

Dimensions of Private Law is an excellent book. Rich with examples and insights, readers will gain a firmer understanding of the nature of private law and a greater appreciation of its complexity. In addition, the book should stimulate readers to delve more deeply into the nature of judicial decision-making.

To the extent that readers take up the challenge by drawing on BDT, some may find more solace in mapping than Waddams. They may conclude that people should not be sanguine about the ability of judges to handle complexity and that judges make systematic errors in that environment just like everyone else. If categorizing or mapping moves only a few prominent concepts to the forefront, perhaps it performs an important service.