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Freedom of Contracts

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FREEDOM OF CONTRACTS

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ABSTRACT

“Freedom of contracts” has two components: (1) the familiar freedom to bargain for terms *within* a contract and (2) the long-neglected freedom to choose from *among* contract types. Theories built on the first freedom have reached an impasse; attention to the second points toward a long-elusive goal, a liberal and general theory of contract law. This theory is *liberal* because it develops an appealing conception of contractual autonomy grounded in the actual diversity of contract types. It is *general* because it explains how contract values – utility, community, and autonomy – properly relate to each other across contract types. Finally, it is a theory of *contract law* because it covers the field as a whole, including for example marriage, employment, and consumer contracts, not just arm’s length widget sales.

“Freedom of contracts” illuminates numerous puzzles in contract doctrines from liquidated damages to promissory estoppel and across the ABCs of contract types – agency, bailment, consumer transactions, etc. Our approach also generates a range of novel theoretical propositions. For example, it explains how sticky defaults and even mandatory terms within a contract type can actually increase freedom, so long as law offers sufficient choice among types. Finally, it offers law-and-economics contract scholars a way to situate efficiency analysis within a normatively appealing liberal framework. In sum, “freedom of contracts” suggests a refocus of how contract theory should be pursued – and how contract law should be designed and taught.

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FREEDOM OF CONTRACTS

Hanoch Dagan* & Michael Heller**

INTRODUCTION

Contract theory has lost touch with contract law. Existing theories all fall short. Some fit poorly with doctrine; others are conceptually muddled; the rest, normatively disappointing. Surveying the field, one observer notes, “[T]oday there is no generally recognized theory of contract,” and concludes, “The effort to develop a coherent explanation of contract seems to have reached an impasse.”¹

There is no impasse. A doctrinally well-fit, conceptually coherent, and normatively attractive account of contract is in view. This Article points the way through an approach we call “freedom of contracts.” Freedom of contracts is the sum of two components, which together constitute contractual autonomy: (1) the familiar freedom to bargain for terms *within* a contract, and (2) the long-neglected freedom to choose from *among* contract types.² As we will show, attention to choice among types can repair the broken link between contract theory and law.

We would like to claim the phrase “freedom of contract” – without the “s” – but we leave the familiar term aside because of its troublesome connotations. Outside the legal academy, “freedom of contract” largely serves as a slogan for laissez-faire capitalism. Even within contract theory, the term retains a particular libertarian flavor. It is most often associated with freedom as negative liberty, that is, with 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.”³

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¹ Peter Benson, *Contract*, in *A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY* 29, 29 (Dennis Patterson ed., 2nd ed., 2010).

² These two components encompass a third, an overarching voluntariness principle that is sometimes labeled “freedom *from* contract.” We discuss the role of voluntariness in our theory in Part III.B.2, *infra*.

³ STEPHEN A. SMITH, *CONTRACT THEORY* 59, 139 (2004). For an early

In this view, contractual freedom “has very little to do” with contract law and is thus perceived as “largely irrelevant” to its design.⁴ The law should just enforce private deals and otherwise get out of the way. Freedom of this negative sort is a non-trivial aspect of contracting. At times, people really do want to bargain for terms *within* their own idiosyncratic deal and they need the law to do no more than enforce their joint agreement.

But bargaining for terms is not the dominant mode of contracting, and it should not determine, as it long has, the central meaning of contractual freedom. Usually, when people enter contracts, they are not designing their deal from scratch. For most of us, most of the time – if we get married, start a new job, buy insurance, or click “I accept” – contractual freedom means the ability to choose from among a normatively-attractive range of already-existing contract types and then, perhaps, make a few contextual adjustments. The mainstay of present-day contracting is the choice among types, with each type using distinctive doctrinal features to embody its particular normative concerns. For example, we have waiting periods to dissolve marriage contracts, limitations on employee noncompete agreements, “reasonable expectations” doctrine in insurance contracts, and generous return rules in consumer transactions. These doctrinal rules are not oddities to be explained away. Rather, they are clues to and reflections of the divergent normative concerns of each contract type.

Over the past century, contract theory has progressively lost touch with the role of contract types. If you ask theorists about diverse marriage contract types, many answer: that’s family law, not contracts. How about employment contracts? That’s labor law. Consumer transactions? Part of the regulatory state. Rather than embracing diverse types, contract theory has shrunk its focus to a single universal, trans-substantive image – the arm’s length commercial widget sale. Unfortunately, contract law teaching has followed this scholarly lead and contracts casebooks have

incarnation of this view, see Samuel Williston, *Freedom of Contract*, 6 CORNELL L.Q. 365, 368-69, 373 (1921).

⁴ Richard Craswell, *Freedom of Contract*, in CHICAGO LECTURES IN LAW AND ECONOMICS 81 (Eric A. Posner ed., 2000). *But cf.* Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 VA. L. REV. 821 (1992).

marginalized most real-world contracting practices from their explanatory field.⁵ But contract law is not the shapeless, “general” law taught to generations of first-year students. Diverse family, work, home, and consumer contract types are at least as central to our shared contracting experience as are widget sales. So, we reject the idea that the core of contracting is dickering over terms in an arm’s length deal. While such transactions are surely important, they are not the platonic type of any contracting sphere, not even in commerce.

Attention to choice among types opens the door to a liberal and general theory of contract law. To qualify as *liberal*, contract theory must be grounded in an appealing conception of contractual autonomy.⁶ But contractual autonomy is not self-defining. Just the opposite. Pinning it down is tough, much tougher than the concept’s easy intuitive appeal suggests.⁷ Existing liberal contract theories – primarily libertarian in the United States and neo-Kantian in Canada and Europe – may fit well with aspects of arm’s length contracting, but each fails when expanded to cover contract law as a whole. Descriptively, they miss the texture of why we contract with one another; conceptually, they overlook key features of contractual autonomy; normatively, they slight the diverse goods of contracting. These failures help explain why many law-and-economics and communitarian contract scholars disclaim a liberal foundation to their work. But the turn away from liberal principles is detrimental and premature.

The first theoretical contribution of our approach is to offer a liberal conception of contractual autonomy grounded in, and well-adapted

⁵ See LAWRENCE J. FRIEDMAN, *CONTRACT LAW IN AMERICA* 25 (1965) (modern contract law courses are like “a zoology course which confined its study to dodos and unicorns”); *but see* MACAULAY ET AL., *CONTRACTS: LAW IN ACTION* (3rd ed. 2011) (a rare contracts casebook still organized around types).

⁶ Liberalism as such need not be grounded in autonomy. But for contract law in particular, we doubt that foundational alternatives such as political liberalism can prove adequate, a point we discuss in Part IV.A, *infra*.

⁷ Cf. Mark Pettit Jr., *Freedom, Freedom of Contract, and the “Rise and Fall”*, 79 B.U. L. REV. 263 (1999). See also Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 641-42 (1943) (“freedom of contract must mean different things for different types of contract”).

to, the actual diversity of contract types. We start with the familiar proposition that autonomy stands for the commitment that people should, to some degree, be the authors of their own lives. One element of this autonomy – reflecting the usual meaning of freedom of contract – involves enforcing idiosyncratic deals. But contract law must do more if it is to expand meaningful choices in service of our self-authorship. It must also support freedom to choose from among normatively-attractive contract types. The implications of this claim are stark. As a start, it means that a state committed to human freedom must be proactive in shaping contract law, including a robust body of diverse types. Sometimes, contract law must support missing types (say to promote minoritarian or utopian values), and sometimes it must limit choice so as to stabilize and channel cultural expectations regarding a particular contract type. This insight implies that, at times, sticky defaults and even mandatory terms *within* a contract type can actually increase freedom, so long as – and this is crucial – law offers sufficient choice *among* types.

The second conceptual contribution of this Article is to show how a liberal contract theory can also be a general one. To qualify as *general*, a theory must address the varied goods and diverse spheres of contracting. Accordingly, we reject the notion that any single value – utility, community, or even autonomy – suffices for a coherent general theory. Instead, we relocate most of the normative discussion to a more correct and productive level – relating to the diverse values that animate each type and the recurring dilemmas common to each sphere. (By “sphere,” we mean a core realm of life in which contract law can enrich how we legitimately enlist others to our projects). It should be no surprise that the values plausibly animating marriage, employment, and consumer transactions differ from each other and from those driving commercial sales, and further that, the contract types within a single sphere offer individuals choices among divergent values. Indeed, it is the availability of distinct, normatively-attractive types within each sphere – what we call *intra-sphere* multiplicity – that is the core requirement of freedom of contracts.

One collateral benefit of this approach, and a major impetus for this Article, is to offer law-and-economics contract scholars a more secure and defensible normative grounding for their work. Much of contract law is, and should be, driven by efficiency concerns, but a thorough-going efficiency theory of contract has never been persuasive: autonomy and

community concerns cannot be banished altogether if, for example, you oppose slavery and endorse marriage. But how do these normative commitments interrelate? Solving this puzzle constitutes the third conceptual building block of this Article. While our liberal commitments place autonomy as contract law's ultimate value, we recognize that people do not enter into specific contracts to become more free. Rather, they contract mostly to achieve other values: utility and community. We show how contract law can enhance individual autonomy while, at the same time, providing economic and social benefits from robust contracting. For law and economics theorists of contracts, we offer a path back from the uncomfortable collectivist position implied by an exclusive focus on wealth maximization, and give them a normatively appealing way to situate efficiency analysis within a liberal framework.⁸

Finally, to qualify as a liberal and general theory of *law*, we take seriously the generative and normative role of legal institutions. Prior autonomy-based theories conflate ideal contract law with legal passivity, that is, with the commitment that law aim just to enforce the parties' wills and maybe cure discrete market failures. By contrast, we show that it must actively empower people's relationships by shaping distinct contract types. This approach provides a solid normative standpoint for reforming existing contract law (considering the law in its best light possible, rather than through its historical evolution). Doctrinal interpretation and evaluation should look to the "local" animating principles of existing contract types, rather than any "core" principle of contract law. While the market for contractual innovation is vibrant, there is no reason to believe that existing types either exhaust the variety of goods that people may seek by contracting or are best configured to support their apparent goals.

This Article shows that robust contract law matters even more to human freedom than has previously been understood. Part I examines the contributions and limits of prior autonomy-based contract theories. Part II explores the main goods people seek from contracting – utility and

⁸ Our approach does generate four substantial theoretical distinctions from efficiency analysis, summarized at Part III.B.3, *infra*, and numerous novel doctrinal reforms, collected at Part IV.C.1, *infra*, which should all be viewed as friendly amendments for efficiency theorists willing to adopt a liberal foundation.

community – and shows why neither works alone as the ultimate contract value. Part III sets out our freedom of contracts theory and shows how contract law plays a positive, active, and previously underappreciated autonomy-enhancing role. Part IV addresses the main challenges our approach faces and the opportunities it presents for law reform. Throughout, we illustrate how our approach illuminates long-standing puzzles in doctrines ranging from liquidated damages to promissory estoppel and in the ABCs of contract types – agency, bailment, consumer transactions, etc.

The “freedom of contracts” approach has several virtues: it offers a normatively attractive view of freedom through law, a conceptually coherent account of core contract values and their interrelationships, a persuasive link between contract theory and contract law, and finally, a path for contract law reform that brings it closer to our shared ideals.

I. CAN AUTONOMY BE THE CORE OF CONTRACT?

A note to readers: this Part attempt a delicate balance – we aim for brevity and transparency so as not to exhaust the general reader’s patience, while recognizing that no account of deontological autonomy is too intricate for the neo-Kantian contract specialist. For those inclined to press on to our positive theory, the takeaway can be briefly stated:

(1) Any modern liberal account of contract must start with Charles Fried’s *Contract as Promise*.⁹ This work revived debate on the relation of autonomy to contract, but failed to resolve the core normative concern, that is, how to justify state coercion of promises. (2) Later liberal critics tried to refine Fried’s account and develop a rights-based foundation for contract law that does not rely on its contribution to enhancing individual autonomy. (3) After thirty years, we can now say this deontological detour has failed. But, (4) a liberal theory is still possible if we embrace as its (teleological) foundation a well-tempered conception of autonomy as self-authorship.

⁹ CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* (1981). See generally Symposium, *Contract as Promise at 30: The Future of Contract Theory*, 45 SUFFOLK L. REV. 601 (2012).

A. Fried's Reset

The first and most enduring contribution of *Contract as Promise* was to push back against generations of theorists – from Fuller and Perdue in the 1930s through Gilmore and Atiyah in the 1970s¹⁰ – who sought to fold contract into the fields of tort and restitution. At a moment when critics had already announced *The Death of Contract*, Fried offered a powerful moral justification, grounded in Kantian notions of individual autonomy, for continuing to take contract seriously.¹¹ Contract, as he explained, increases individual autonomy by empowering people to enlist others to their projects.¹² This intuition is robust.¹³

Fried's specific theory, however, has not held up as well. The challenge for his Kantian "conception of the will binding itself," which he puts "at the heart of the promise principle," is to justify the coercive practices of contract law.¹⁴ For Fried, the commitment to keeping promises is premised on the trust that a promise invokes regarding the future actions of the promisor.¹⁵ This trust, in turn, can only be justified by reference to the social convention of promising. Fried explains that this convention increases our autonomy by expanding our options in the long run. Promising enables us to achieve objectives that we can succeed in accomplishing only with the cooperation of others.¹⁶

¹⁰ See generally L. L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages*, 46 YALE L.J. 52 (1936); GRANT GILMORE, *THE DEATH OF CONTRACT* (1974); P. S. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* (1979).

¹¹ See FRIED, *supra* note 9, at 17 (justifying obligation to keep promises in "basic Kantian principles of trust and respect").

¹² *Id.* at 8.

¹³ Thomas Gutmann, *Some Preliminary Remarks on a Liberal Theory of Contract*, 76 LAW & CONTEMP. PROBS. (forthcoming 2013) (arguing "the notion of contract is inherently founded on the idea of two or more persons realizing individual self-determination by means of voluntarily entering legally binding agreements").

¹⁴ FRIED, *supra* note 9, at 3.

¹⁵ *Id.* at 9.

¹⁶ *Id.* at 13-14.

But why should the state coerce performance of the promise absent detrimental reliance by the promisee? Why should free individuals not be able to change their minds without liability? Fried recognizes the difficulty in closing the gap between the moral value of promise and a state's use of coercion: the social value engendered by trusting promises does not "show why I should not take advantage of it in a particular case and yet fail to keep my promise."¹⁷ Nonetheless, Fried continues, the individual obligation of promise-keeping is grounded "in respect for individual autonomy and in trust."¹⁸ The promisor intentionally invokes a convention whose function is "to give grounds – moral grounds – for another to expect the promised performance."¹⁹ To renege on a promise is, therefore, to abuse the trust and thus the vulnerability of the promisee, both of which the promisor freely invited; it amounts to wrongful exploitation of another individual. In short, contracts – which are a genus of promises – must be kept because promises must be kept; and promises must be kept because promising is "a device that free, moral individuals have fashioned on the premise of mutual trust, and which gathers its moral force from that premise."²⁰

Here's the problem: from the Kantian perspective Fried occupies, his formulation does not close the justificatory gap, but just relocates it. An ethical duty not to abuse someone's trust does not necessarily justify a legal duty for the same.²¹ Thus, Fried's rights-based commitment sits uncomfortably atop a consequentialist foundation concerned with maintaining trust. By mixing together these incompatible moral foundations,²² Fried opened the door for the deontological detour to come.

¹⁷ *Id.* at 14.

¹⁸ *Id.* at 16.

¹⁹ *Id.*

²⁰ *Id.* at 17.

²¹ Benson, *supra* note 1, at 43-44.

²² We do not imply that there is no way to accommodate consequentialism with deontology. For an interesting attempt, see EYAL ZAMIR & BARAK MEDINA, LAW, ECONOMICS, AND MORALITY (2010). However, their approach to contract, *id.* at ch.9, is quite different from ours.

B. The Deontological Detour

1. *Transfer theory.* Following Fried, the core question has remained: what justifies legal coercion of the promisor? While there have been many answers, the key element they share is the notion that a contract transfers something, some “thing.” Peter Benson offers one version of the argument: first, he argues (contra Fried) that abusing a promisee’s trust may be ethically blameworthy, but that blameworthiness should not give rise to legal liability, absent detrimental reliance.²³ As he puts it, if “there is no basis for holding that nonperformance injures anything that belongs to the promisee,” then there is “no basis for concluding that the promisor should be made to hand over the equivalent of the promised performance as a matter of compensation.”²⁴

This view suggests Benson’s second point: that contract law – which notably does enforce wholly executory contracts – can be justified only if the contract itself already transfers from the promisor to the promisee “a legally protected interest,”²⁵ so that “performance respects those rights whereas breach injures them,”²⁶ and thus the transfer justifies the state’s intervention to correct this wrong.²⁷ If the theory works, it’s the transfer, not the promise, that justifies state coercion on rights-based grounds, wholly apart from consequentialist concerns like preserving trust or enhancing autonomy.²⁸ This is the core move not just of Benson, but

²³ Peter Benson, *Contract as Transfer of Ownership*, 48 WM. & MARY L. REV. 1673, 1682 (2007).

²⁴ *Id.* at 1683. Jody Kraus, in defense of Fried, argues that the role of the *ex ante* perspective in his account is limited to the background conventions that inform the parties’ expectations and is thus compatible with the deontic commitment simply to “vindicate the parties’ pre-existing rights.” Jody S. Kraus, *Philosophy of Contract Law*, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 687, 728-29 (Jules Coleman & Scott Shapiro eds., 2002). But this still does not explain why these expectations need to be forcibly enforced.

²⁵ Benson, *supra* note 23, at 1683.

²⁶ *Id.* at 1674.

²⁷ *Id.* at 1707.

²⁸ See Peter Benson, *Abstract Right and the Possibility of a Nondistributive Conception of Contract: Hegel and Contemporary Contract Theory*, 10 CARDOZO L. REV. 1077, 1111-12 (1989).

also of all the “transfer theorists” following Fried.²⁹ Their challenge has been to explain what exactly contracts transfer and how they do so.

While transfer theorists vary in nuance,³⁰ Arthur Ripstein, the group’s most rigorous neo-Kantian, aptly captures their general orientation. Contract, for Ripstein, is “the legal means through which persons are entitled to make arrangements for themselves, and so to change their respective rights and duties.”³¹ The starting point of his analysis of contract – like the premise of his general theory of law – is an individual’s right to personal independence. Unlike more robust conceptions of autonomy as self-authorship, Kantian independence is not a good to be promoted but a constraint on the conduct of others, which is exhausted by the requirement that no one gets to tell anyone else what purposes to pursue.³² Against this background, contract gets its significance by enabling free people to “set and pursue their own purposes interdependently.”³³ Here, consent is conceptualized as “two persons uniting their wills to create new rights and duties between them.”³⁴ A united will can justify transfer of a preexisting right; it can also “create new rights, including rights to things that need not exist as fully determinate antecedent to the transfer.”³⁵ Ripstein’s reasoning is complex, but his bottom-line is simple: through a transaction based on a united will, the promisee receives title to compel the promisor’s future performance.³⁶

2. *Three shared features.* This brief summary suffices to highlight three characteristic features of transfer theories. (a) As just mentioned, transfer theorists are committed to the *conceptual* view that the act of

²⁹ This term was coined by Stephen Smith, *see* SMITH, *supra* note 3, at 97-99, but transfer theory relies on a rich natural law pedigree. *See, e.g.,* Helge Dedek, *A Particle of Freedom: Natural Law Thought and the Kantian Theory of Transfer by Contract*, 25 CAN. J.L. & JURISP. 313 (2012).

³⁰ *See, e.g.,* Benson, *supra* note 23, at 1719-31.

³¹ ARTHUR RIPSTEIN, *FORCE AND FREEDOM: KANT’S LEGAL AND POLITICAL PHILOSOPHY* 107 (2009).

³² *Id.* at 14, 34, 45.

³³ *Id.* at 107.

³⁴ *Id.* at 109. *See also id.* at 122-23.

³⁵ *Id.* at 116.

³⁶ *Id.* at 127. For a similar interpretation of Kant’s position, *see* ERNEST J. WEINRIB, *CORRECTIVE JUSTICE* 153-54 (2012).

contracting transfers an entitlement to the promisee (either an entitlement that pre-exists the contract,³⁷ or one that the contract itself creates). This point is the basis of their claim that breach must be understood as “an interference with the promisee’s ownership interest acquired at contract formation,” and thus an injury which the law corrects based on strict adherence to the parties’ Kantian independence.³⁸

(b) Next, transfer theorists converge also on at least one important *doctrinal* point. While implicit in Ripstein’s account,³⁹ the doctrinal point explicitly engages Randy Barnett.⁴⁰ He criticizes Fried for relying on “an inquiry as to the promisor’s actual state of mind at the time of agreement” – in contrast to the objective theory that dominates contract law.⁴¹ Barnett uses this problem of doctrinal fit to assert a deeper deficiency in Fried’s account: its inadequate attention to “the interrelational function of contract law,” which both explains and justifies law’s use of “a manifested intention to be legally bound” as the “criterion of enforceability.”⁴² There are many steps between Barnett’s doctrinal observation and his positive account.⁴³ We omit them here and raise his work only to note that transfer theorists in general endorse contract doctrine’s objective approach.

(c) The final, and most significant, commonality relates to shared *normative* focus on negative liberty. Thus, for Barnett, the function of contract doctrine is to set clearly “the boundaries of protected domains,”⁴⁴ which means that it should “identify the rights of individuals engaged in transferring entitlements, and thereby indicate when physical or legal force may legitimately be used.”⁴⁵ The significance for Barnett of clear

³⁷ Some transfer theorists engage in acrobatic exercises to establish that, prior to contracting, the transferred entitlement belonged to the promisee. See, e.g., Benson, *supra* note 23, at 1693-1719; Andrew S. Gold, *A Property Theory of Contract*, 103 NW. U.L. REV. 1, 31-42, 50-53 (2009).

³⁸ Benson, *supra* note 23, at 1707.

³⁹ See RIPSTEIN, *supra* note 31, at 124, 126.

⁴⁰ Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269 (1986).

⁴¹ *Id.* at 272.

⁴² *Id.* at 320.

⁴³ See *id.* at 303, 306.

⁴⁴ *Id.* at 302.

⁴⁵ *Id.* at 295.

boundaries emerges from his commitment to Nozickian individual independence, in which individual rights require that “the boundaries within which individuals may live, act, and pursue happiness [are] free of the forcible interference of others.”⁴⁶ Barnett’s libertarian account finds a nice echo in Ripstein’s Kantian commitment to an individual’s right to independence. Though the paths differ, their normative views largely converge.⁴⁷ Both call for a sharply limited, passive role for the state in providing contract law – the law is morally justified in doing no more than enforcing the deal to which the parties have mutually consented.

C. Why the Deontological Turn Fails

This concerted effort over the past thirty years to craft a rights-based account of contractual autonomy, purged of Fried’s covert teleological moves, has reached a dead end. The failure is unsurprising because transfer theory is question-begging; and without transfer as a premise, deontological contract theories collapse into a freestanding and normatively-dubious version of libertarianism. Our critique focuses here on transfer theorists’ conceptual and normative claims. (Their doctrinal point regarding the objective basis of contract law is widely accepted,⁴⁸ and we also endorse it for reasons that become clear below.)

1. *The conceptual muddle.* The conceptual claim of transfer theory fails in two ways. (a) The first has to do with the non-self-defining nature of ownership. All transfer accounts ground contract in ownership, either ownership of one’s future actions or of the right the contracting parties create. They assume our “sole and despotic dominion”⁴⁹ over these entitlements, such that we can wholly transfer them, and such that law should back up that commitment. But why?

⁴⁶ *Id.* at 291.

⁴⁷ Ripstein is eager, however, to distinguish himself from Nozick by, for example, defending anti-discrimination rules. *See* RIPSTEIN, *supra* note 31, at 292.

⁴⁸ *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 2 cmt. b; E. ALLAN FARNSWORTH, CONTRACTS § 3.6, at 115 (4th ed. 2004).

⁴⁹ WILLIAM BLACKSTONE, 2 COMMENTARIES ON THE LAWS OF ENGLAND *2 (University of Chicago ed., 1979) (1765-69).

Neither the range of transferability, nor even its inclusion within the scope of an owner's entitlement, is self-defining.⁵⁰ Ownership (and property) is open to competing interpretations and permutations. There is no inevitable content to the concept – even Blackstone never had a simple Blackstonian vision of ownership⁵¹ – and no arbitration among the different available conceptions is possible without pre-commitment to some normative apparatus.⁵² Viewing contract as a transfer of ownership just buries contract's moral underpinnings in a naïve view of property.⁵³ Reducing contract to property is no more promising than the pre-Fried reliance theorists' turn to tort and restitution.

(b) The second conceptual problem with the deontological turn, even more crucial for our current purposes, is its problematic understanding of contract law. In line with Fried's notion that contracts must be kept because promises must be kept, transfer theorists' accounts suggest that contract is *duty-imposing*.⁵⁴ While analyzing *tort* law doctrines dealing with our bodily integrity in these terms may make sense – assuming people have such pre-legal and pre-conventional rights, *tort* law affirms the correlative duties against their violation – *contract* law

⁵⁰ For a provocative argument along these lines, see J.E. PENNER, *THE IDEA OF PROPERTY IN LAW* 88-90 (1997) (arguing that the right to sell is not conceptually inherent in ownership, but the right to give is).

⁵¹ See Carol M. Rose, *Canons of Property Talk, or, Blackstone's Anxieties*, 108 YALE L.J. 601 (1998); David B. Schorr, *How Blackstone Became a Blackstonian*, 10 THEO. INQ. L. 103 (2009).

⁵² Nothing here should be interpreted as supporting the view that property is just a "laundry list" of substantive rights with a limitless number of possible permutations. See generally HANOCH DAGAN, *PROPERTY: VALUES AND INSTITUTIONS* pt. I (2011).

⁵³ Neo-Kantians have attempted to develop a conception of property that is securely detached from any consequentialist concerns. See RIPSTEIN, *supra* note 31, at chs. 4 & 9; WEINRIB, *supra* note 36, at ch. 8. But such accounts prove implausible. See DAGAN, *supra* note 52, at 63-66.

⁵⁴ See Gregory Klass, *Three Pictures of Contract: Duty, Power, and Compound Rule*, 83 N.Y.U. L. REV. 1726, 1726-27 (2008). This feature is conspicuous in the understanding of contracts Seana Shiffrin has advanced in recent years. See, e.g., Seana Valentine Shiffrin, *The Divergence of Contract and Promise*, 120 HARV. L. REV. 708 (2007).

works differently.⁵⁵ Rather than vindicating existing rights, contract law is first and foremost *power-conferring*.

We agree that duties not to interfere with people's rights are relevant to contract law, but they are secondary. Rules concerning duress, fraud and the like, which aim at ensuring that people not be forced into contracts, do impose duties. However, these duty-imposing areas of contract doctrine rely on the same normative commitments that explain and justify law's support for allowing people to self-impose obligations in the first place.⁵⁶ Even more fundamentally, these piggy-backing (duty-imposing) rules – which safeguard contracts' voluntariness – would be meaningless in the absence of (power-conferring) contracts: their role is to protect our ability to apply the powers enabled by contract, and they would be pointless in a world that does not recognize the power to contract.

As a power-conferring body of law, contract law “attaches legal consequences to certain acts” in order “to enable people to affect norms and their application in such a way if they desire to do so for this purpose.”⁵⁷ This feature captures the empowering role of contract that Fried identified and Jody Kraus later highlights. As Kraus explains, contract is “a particularly valuable means for pursuing ends,” because by recognizing people's power to undertake obligations, it allows individuals to provide credible assurances “to induce promisees to assist them in realizing their ends.”⁵⁸

Does the objective theory of contract undermine this conceptual point? We think not. Here's the potential difficulty, per Gregory Klass: a

⁵⁵ See Jody S. Kraus, *The Correspondence of Contract and Promise*, 109 COLUM. L. REV. 1603, 1608-09, 1614-15 (2009). See also Daniel Markovits, *Making and Keeping Promises*, 92 VA. L. REV. 1325, 1352-66 (2006) (launching an analogous critique of T.M. Scanlon's harm-based theory of promises and contracts which neglects the reasons for making contracts). But cf. Curtis Bridgeman & John C.P. Goldberg, *Do Promises Distinguish Contract from Tort?*, 45 SUFF. U. L. REV. 885, 888 (2012) (arguing that contract is power-conferring and is still “organized around the moral duty to keep promises.”).

⁵⁶ See Klass, *supra* note 54, at 1765; Kraus, *supra* note 55, at 1619.

⁵⁷ Klass, *supra* note 54, at 1739 (citing JOSEPH RAZ, PRACTICAL REASON AND NORMS 102 (1975)).

⁵⁸ Kraus, *supra* note 55, at 1608-09.

purely power-conferring doctrine should be designed to “ensure that a person’s acts result in legal change only when it is her purpose to achieve such a change,” whereas contract law merely “ensures that a significant proportion of actors . . . are likely to have such a purpose.”⁵⁹ The objective theory of contract fails to “include mechanisms to prevent inadvertent exercises of the power.”⁶⁰ Nevertheless, it does not undermine our claim. As Kraus argues, “making subjective intent a necessary condition for making a promise” would have frustrated “the point of promising” or at least severely limited its role only to “individuals who make promises to people who already trust them.”⁶¹ Therefore, promisors “would choose to make their promises *objectively binding*.”⁶²

Kraus does acknowledge the downside of objective theory to personal autonomy: it undermines “the negative right of individuals (merely objective promisors) to be free from subjectively unintended obligations.”⁶³ But as Kraus asserts, the law justifiably follows the prescriptions of “personal sovereignty” – the conception of individual autonomy on which promissory morality relies⁶⁴ – to “give priority to respect for the positive liberty of faultless individuals” who “choose to undertake objectively binding promises,” over the “negative liberty of blameworthy individuals.”⁶⁵ Contract law cannot be neutral in such a zero-sum contest, and given the inter-subjective context in which it operates, it correctly opts for the objective theory.⁶⁶

2. *The normative link.* This conclusion not only explains the secure status of objective theory, but also reveals why deontologists’ resistance to considering consequences – even consequences to people’s autonomy – cannot work. Contract is irreducibly concerned with power-conferring

⁵⁹ Klass, *supra* note 54, at 1730.

⁶⁰ *Id.* at 1754.

⁶¹ Kraus, *supra* note 55, at 1620-21.

⁶² *Id.* at 1623-24.

⁶³ *Id.* at 1624.

⁶⁴ *Id.* at 1609.

⁶⁵ *Id.* at 1624-25.

⁶⁶ By contrast, in unilateral contexts – think about mistaken payments cases with no detrimental reliance – private law (here, restitution) traditionally does vindicate the transferor’s subjective intent. *See generally* HANOCH DAGAN, THE LAW AND ETHICS OF RESTITUTION 40-45 (2004).

rules; even Ripstein begins his account by stating that contract is the “means” that entitles persons “to make arrangements for themselves, and so to change their respective rights and duties.”⁶⁷ In certain contexts – especially in close-knit groups – these rules may be conventional (social norms enforced notably via the parties’ reputational concerns).⁶⁸ In many others, contracting heavily relies on the law, so that by subjecting themselves to the potential deployment of “the powerful institutionalized mechanisms” of contract law, people who have no preexisting reason to trust one another can cooperate, and each can rely on the other’s rationality as the sole necessary safeguard.⁶⁹ Moreover, even for parties guided by their own social norms, contract law often provides background safeguards, a safety net for a rainy day that can help catalyze trust in their routine, happier interactions.⁷⁰ Thus, law (or a law-like social convention) shapes, and does not merely reflect, the interpersonal practice of contracting, and in designing contract law, we necessarily make choices that affect the contours of the parties’ bilateral relationship.

The relevant question for an autonomy-based contract law is not what *constraints* to people’s autonomy are legitimate (as it is for many aspects of tort law); rather, it is how should contract law *enhance* people’s autonomy.⁷¹ That is necessarily an *ex ante* discussion dealing with the ways law can facilitate forms of bilateral voluntary obligations that are

⁶⁷ See RIPSTEIN, *supra* note 31, at 107; see also Benson, *supra* note 1, at 37 (“Autonomy theories view contract law as a legal institution that recognizes and respects the power of private individuals to effect changes in their legal relations *inter se*, within limits.”).

⁶⁸ See, e.g., Stewart Macaulay, *Non-Contractual Relations and Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963); Anthony T. Kronman, *Contract Law and the State of Nature*, 1 J. L. ECON. & ORG. 5 (1985).

⁶⁹ DORI KIMEL, FROM PROMISE TO CONTRACT: TOWARDS A LIBERAL THEORY OF CONTRACT 55, 58, 60, 65 (2003). See also, e.g., Michael G. Pratt, *Promises, Contracts and Voluntary Obligations*, 56 L. & PHIL. 531, 572 (2007).

⁷⁰ Cf. Hanoch Dagan & Michael A. Heller, *The Liberal Commons*, 110 YALE L.J. 549, 578-79 (2001).

⁷¹ Cf. JAMES GORDLEY, THE PHILOSOPHICAL ORIGINS OF MODERN CONTRACT DOCTRINE 234 (1991). See also Richard Craswell, *Contract Law, Default Rules, and the Philosophy of Promising*, 88 MICH. L. REV. 489, 489 (1989) (arguing theories which found the binding force of promises on individual autonomy “have little or no relevance” to most parts of contract law).

conducive to contract's autonomy-enhancing *telos*. This inquiry is qualitative, rather than quantitative (it is not about maximizing the amount of autonomy in the world). But it is teleological nonetheless: we are looking for the system that generates the most autonomy-friendly implications.⁷²

Libertarian contract theorists, like Barnett, may admit that law matters and still endorse a minimalist role for contract law – along the lines of the boundary-crossing principle suitable for Robert Nozick's night-watchman state.⁷³ But there is nothing particular to contract law that justifies this view. If a minimalist libertarian view of the state appeals to you, then Barnett's view could plausibly inform your approach to contract law.⁷⁴

Notice the tectonic shift in the nature of this last argument: we are now seeking a normatively-attractive view of individual autonomy to guide the state in shaping its contract law. Because contract law confers the power to create new rights, this power cannot be defended from an autonomy perspective without engaging with its implications on people's autonomy. That's indeed quite a different path from the one taken during the deontological detour, but it's the right way for contract theory to go. More strongly, it's the only way to go for a liberal theory of contract, and it's where we turn next.

D. A New Autonomy?

Back when Fried was introducing his promise theory, Joseph Raz was developing a conception of autonomy as self-authorship, a view which has gained prominence because it provides both a compelling account of our most fundamental right and a coherent justification for an

⁷² We believe that justification for the moral obligation of promise-keeping is similar, but our intervention in the vibrant philosophical industry on this question must await another day.

⁷³ See generally ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (1974).

⁷⁴ Note that you would not be following Nozick who backed away from his early views. See ROBERT NOZICK, THE EXAMINED LIFE: PHILOSOPHICAL MEDIATIONS 286 (1989) (*"The Zigzags of Politics"*).

active, modern, liberal state.⁷⁵ However, when Raz applied his view to contract law, the result was problematic, suffering from some of the same difficulties as his deontological counterparts. Nevertheless, Raz provides useful building blocks for liberal contract theory, even though he did not adequately link them to his own robust conception of autonomy. Here we evaluate three threads in Raz's scattered and brief remarks on contract.

1. *Three Threads.* Raz's first claim is that the purpose of contract law is not to enforce promises, but rather "to protect both the practice of undertaking voluntary obligations and the individuals who rely on that practice."⁷⁶ The shift implies that law should prevent the erosion of this practice by protecting the "special bond" between the parties that requires "the promisor to be, in the matter of the promise, partial to the promisee."⁷⁷ Law's role in "making good any harm caused by [the] use or abuse"⁷⁸ of the practice of undertaking voluntary obligations is justified if and only if "the creation of such special relationships between people is held to be valuable."⁷⁹

While Raz does not elaborate on the justification for invoking law to protect and facilitate this practice, we can nevertheless tease out a second proposition: it "enable[s] individuals to make their own arrangements"; and these "special bonds between people," which "are voluntarily shaped and developed by the choice of participants," are morally desirable.⁸⁰ Why? It seems he finds the practice of promising valuable due to both its autonomy-enhancing function and the type of relationships it creates.⁸¹ So far, we agree.

⁷⁵ See JOSEPH RAZ, *THE MORALITY OF FREEDOM* (1986).

⁷⁶ Joseph Raz, *Promises in Morality and Law*, 95 HARV. L. REV. 916, 933 (1982) (reviewing P.S. ATIYAH, *PROMISES, MORALS, AND LAW* (1981)).

⁷⁷ Joseph Raz, *Promises and Obligations*, in *LAW, MORALITY, AND SOCIETY: ESSAYS IN HONOUR OF H.L.A. HART* 210, 227-28 (P.M.S. Hacker & J. Raz eds., 1977).

⁷⁸ Raz, *supra* note 76, at 933.

⁷⁹ Raz, *supra* note 77, at 228.

⁸⁰ Raz, *supra* note 76, at 928, 936; see also Joseph Raz, *Voluntary Obligations and Normative Powers* (pt. 2), 46 PROC. ARISTOTELIAN SOC'Y 79, 101 (Supp. 1972).

⁸¹ Raz's recent work on promise shares some of the premises of the transfer theorists – analogizing promise to a property conception of gift – and thus shares

Raz's third proposition – the point where we part ways – relates to the role of contract law. For Raz, such law “is primarily supportive,” an unfortunate echo of the deontological approach. The practice of promising, he claims, “is like ownership and the family, which are [all] rooted in moral precepts and in social conventions.” Therefore, the main task of contract law for Raz is “recognizing and reinforcing . . . the social practice of undertaking voluntary obligations.” While he acknowledges that contract law is not “merely passive” – it can influence the social practices it supports, reinforce and extend such practices, and make them more reliable – for Raz, by and large, contract law should not be understood as “an initiating system, as a means of creating and changing social arrangements.”⁸²

This final proposition must be rejected for the same reasons we have rejected its deontological counterparts. Contract law is already far more active than Raz recognizes. He states as “fact that the law of contracts operates predominantly in a supportive . . . role.”⁸³ But this is no fact, as we argue below, and it is a good thing too. To serve the very purpose and values that Raz ascribes to contract law – promoting autonomy as self-authorship – the law needs to be, as it already is, more active than Raz acknowledges.

2. *What's next?* It is time to admit the failure of the ambitious deontological effort. If the proper meaning of autonomy is merely as a constraint, contract may well be impossible, or rather unjustified. But it is neither. Raz's account points toward an appealing alternative, even though his efforts to link it to contract law faltered.

Our way forward is to develop a theory of contracts building on this conception of autonomy as self-authorship. Such a theory answers the classical question of contract theory – on what grounds does the obligation of agreement-keeping arise? The answer, simply, is that “making agreements is instrumentally valuable.”⁸⁴ The value that contract serves is

similar limitations. See Joseph Raz, *Is There a Reason to Keep a Promise?*, in PHILOSOPHICAL FOUNDATIONS OF CONTRACT (Gregory Klass et. al eds., forthcoming 2014).

⁸² Raz, *supra* note 76, at 916.

⁸³ *Id.* at 934.

⁸⁴ Cf. Markovits, *supra* note 55, at 1368.

autonomy: law (or any pre-legal convention we should respect) empowers individuals, as Fried argued, to make agreements that facilitate their ability legitimately to enlist one another in pursuing private goals and purposes – and thus contract law enhances our ability to be the authors of our own lives. This seemingly simple statement encapsulates one of the most difficult challenges of contract theory: just as self-authorship requires the ability to write and *rewrite* our life-story, contract law enables us to make credible commitments while safeguarding our ability to start afresh.⁸⁵

Being teleological in this sense implies that individuals do incur some burden for the common good. But in the context of contracts, this burden is minimal; as we have seen, it simply requires that people not invoke the power conferred on them by contract law if they do not intend to comply with its rules.⁸⁶ Further, unlike other teleological accounts of contracts, our focus on contracts' unique, autonomy-enhancing function easily explains why a contract creates a duty in the promisor and to the promisee: after all, only in this way can contract enable each one of us in particular to enlist specific others for our goals.⁸⁷

Contract serves autonomy by enabling people legitimately to enlist others in advancing their own projects and thus it expands the range of meaningful choices people can make to shape their own lives. That's an important claim, but a preliminary one. To round out a general, liberal theory of contract, we need to know *why* people want to enlist others in their projects.

II. THE GOODS OF CONTRACT

What are the main goods we seek when we exercise the power to contract? Contract theory must identify these goods, explain how they

⁸⁵ See *infra* text accompanying note 188.

⁸⁶ See *supra* text accompanying notes 63-65.

⁸⁷ Cf. Markovits, *supra* note 55, at 1328, 1348 (Markovits claims that this means the essence of all contracts is relational, a claim we criticize in Part II.B, *infra*). Neo-Kantians (and maybe other corrective justice scholars) are still likely to object, insisting that our theory violates private law's correlativity (or bipolarity). In reply, see HANOCH DAGAN, RECONSTRUCTING AMERICAN LEGAL REALISM & RETHINKING PRIVATE LAW THEORY ch.5 (2013).

relate to each other, and link them to the ultimate value of autonomy. Only then can we talk about tailoring contract law to meet its normative potential. In this Part, we show how utility- and community-based theories are best understood as essential building blocks in a robust autonomy-enhancing conception of contract.⁸⁸ This argument is not a comprehensive survey of the pertinent scholarship, nor does it dive deep into the subtle nuances of the accounts we cover. Our mission is more limited and focused: to show how utilitarian and communitarian theories of contract can be reread as accounts of the goods of contract an autonomy-based theory must recognize and facilitate.

By focusing on utility and community, we do not deny that other values may be justified in affecting contract doctrines. But autonomy, utility, and community (as we render them) are different from other values: they participate in law's vision of the ideal interpersonal relationships of contracting parties and thus are qualitatively distinct from "external values," that is, values arising from outside the contractual relationship. Although "internal values" need not enjoy a strict monopoly in shaping contract law as some private law purists claim, they are, and should be, privileged, such that external values should affect the contours of contract law only if they pass a heightened justificatory bar.⁸⁹

A. Utility

1. *The relationship between utility and autonomy.* Some economic analyses of contract law conceptualize the field – explicitly or implicitly – as a complex set of incentives. In this view, these incentives should aim at inducing potential transactors to behave so as to maximize

⁸⁸ While the concept of utility is surely not exhausted by material, economic welfare, and can encompass social and relational goods, our nomenclature follows the conventional focus on contract's material benefits. This is also why we use the terms utility and efficiency interchangeably.

⁸⁹ See DAGAN, *supra* note 87, at ch.5. It is beyond the scope of this Article to detail how values external to contracting may affect or have affected contract law. For an important discussion of one such value – distributive justice – see Richard Craswell, *Passing on the Costs of Legal Rules: Efficiency and Distribution in Buyer-Seller Relationships*, 43 STAN. L. REV. 361 (1991).

aggregate social welfare, where welfare is conventionally defined as preference satisfaction.⁹⁰ This understanding has much pragmatic strength, but always brings with it an uneasiness regarding the moral status of aggregate utility in contract theory. The moral concerns are familiar: some challenge framing the public good in terms of aggregate preference satisfaction; others question the legitimacy of using private law for such collectivist purposes.⁹¹

We need not resolve this controversy. Within the domain of contract law, many of the lessons of economic analysis are consistent with a commitment to autonomy as contract law's ultimate value. The reason is straightforward, at least from the point of view of our account of contractual autonomy. Often, maximizing the joint surplus is the good, or at least a good, of the contracting parties themselves. For such contracts, respect for autonomy entails embrace of economic analysis. Insofar as the efficient reallocation of their respective entitlements is what the parties want, and if (but only if) this good does not undermine the ultimate normative commitment to autonomy, then these theories converge: to respect autonomy, look to efficiency as the measure of ideal law in that type of contracting. (We reserve discussion of values in conflict and of how our account differs from economic analysis to Part III, below).

2. *An application to business contracts.* To demonstrate the potential usefulness and limits of the economic analysis of contract law to an autonomy-based theory, consider Alan Schwartz and Robert Scott's work on business contracts, that is, contracts between firms.⁹² Their central organizing question is, "What contract law would commercial parties want the state to provide?"⁹³ Their answer is that such law "should

⁹⁰ See ROBERT COOTER & THOMAS ULEN, LAW & ECONOMICS 307 (6th ed. 2011) (the economic theory of contracts begins with the proposition that "[c]ooperation is productive," and thus "creates value" and concludes that law ideally should "induce[] optimal performance and reliance at low transaction costs."). See also, e.g., RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 123 (8th ed. 2011). Critics of this scholarship also characterize the work this way. See, e.g., SMITH, *supra* note 3, at 108; Benson, *supra* note 1, at 54-60.

⁹¹ See, e.g., WEINRIB, *supra* note 36, at 297-333.

⁹² Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 545 (2003) (defining the firm).

⁹³ *Id.* at 549.

restrict itself to the pursuit of efficiency alone.”⁹⁴ They assume there are no relevant externalities (or rather that such externalities should be specifically targeted by, for example, environmental and antitrust laws) and set aside concerns of systematic cognitive error.⁹⁵ For this (externality-free, bias-free, sophisticated-commercial) subset of the contractual universe, Schwartz and Scott sensibly identify the good of contracting as maximizing the parties’ joint gains, or the contractual surplus.⁹⁶ Given this good, they argue provocatively that much of current business contract law is misguided and should be modified so parties can more easily generate a larger contractual surplus.⁹⁷

Does this approach fully displace autonomy as contract’s ultimate value, even within their sharply constrained sphere of business contracts?⁹⁸ It does not, as a close reading of Schwartz and Scott shows. They do assert that business firms are “artificial persons whose autonomy the state need not respect.”⁹⁹ And they do claim that welfare maximization should solely guide this contracting sphere.¹⁰⁰ But why privilege utility? For them, it’s out of deference to the contracting parties – because of concern for “party sovereignty,” a term they emphasize and repeatedly use.¹⁰¹

⁹⁴ *Id.* at 545.

⁹⁵ *Id.* at 545-46.

⁹⁶ *See id.* at 544.

⁹⁷ Schwartz and Scott thus recommend: (1) reversing some mandatory rules, *id.* at 619; (2) adopting the disfavored textualist approach as the default theory of interpretation, *see id.* at 568-94; *see also* Alan Schwartz & Robert E. Scott, *Contract Interpretation Redux*, 119 YALE L.J. 926 (2010); and, (3) significantly limiting the domain of state-supplied defaults, *see* Schwartz & Scott, *supra* note 92, at 594-609. They note, however, two business contract settings where legal facilitation is crucial. *Id.* at 544; *see also infra* text accompanying note 157 (discussing these settings).

⁹⁸ We admit that there may be other possible readings of their framing of the role of efficiency in business settings. Thus, in their response to critics, they emphasize other reasons to adopt efficiency above all. *See* Schwartz & Scott, *supra* note 97, at 934-35. Deference to “the parties’ objective ex ante intentions,” though, is mentioned as the premise of “The Case for Party Control.” *Id.* at 939.

⁹⁹ Schwartz & Scott, *supra* note 92, at 556.

¹⁰⁰ *See id.* at 544.

¹⁰¹ “Party sovereignty” is mentioned twice, for example, in the short conclusion of their piece. *See id.* at 618-19.

Their account (along with many other similar ones¹⁰²) seems to stand for the following proposition: given the welfare-maximizing goals typical of the anticipated parties in business contracts, “party sovereignty” requires that the law governing such transactions follow suit.¹⁰³ But behind the “artificial persons” making business contracts stand real people, and it is the choices those real people are seeking to make that the law ultimately serves. Framed this way, “party sovereignty” devolves to contractual autonomy as we define it – it’s a concern best understood as autonomy-regarding, not utility-maximizing.

We acknowledge that the significance of party sovereignty can also be grounded in epistemological reasons – in which parties are perceived as carriers of the best information regarding their preferences – so that respecting their choices is just a means for reaching the ultimate goal of aggregate welfare. But we believe that our interpretation of party sovereignty is more productive for economic analysis of contract law, because it allows legal economists to accommodate their collectivist welfare-maximizing methodology within an individualist, autonomy-regarding normative framework to which they are typically (if implicitly) committed. This interpretation is, in any case, the reason why its findings should matter to autonomy-minded contract theorists.

In our theory, autonomy and utility sit easily beside each other. When people choose to come together in their commercial lives, and to the extent they are then seeking wealth maximization, contract law should facilitate that choice. Thus, autonomy requires that contract law offer various structures for business arrangements – a rich array of corporate, partnership, trust, and commercial contract forms. With the autonomy imperative satisfied, the inner life of these contract types should facilitate people’s welfare goals, to the extent that is what people are seeking. Contract law between such firms, then, should maximize joint surplus, per Schwartz and Scott. This is not because autonomy is irrelevant, but because the concept has already done its work at an earlier stage.

¹⁰² See, e.g., VICTOR GOLDBERG, FRAMING CONTRACT LAW: AN ECONOMIC PERSPECTIVE 2 (2006). Interestingly, this may also be the (or a) way to read STEVEN M. SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 296-99 (2004).

¹⁰³ See Schwartz & Scott, *supra* note 92, at 556.

3. *The limits of the business contracts example.* There is another lesson we can take from Schwartz and Scott's careful delimitation of their study. Their sharp focus on business contracts helps "set[] out the theoretical foundations of a law merchant for our time."¹⁰⁴ This is an important task. But it cannot be the basis for a general theory of contract law. Even Schwartz and Scott acknowledge that rules applicable to externality-free, bias-free, and sophisticated-commercial parties may not be suitable for other types of contracts, particularly those involving individuals.¹⁰⁵ As we move away from their corner case, efficiency analysis remains pertinent – because people so often seek material benefits when they contract – but "party sovereignty" no longer straightforwardly points to maximizing joint economic surplus. Efficiency analysis does not become irrelevant, but its role is necessarily diminished as competing values play a larger role.

Legal economic theorists of contract typically struggle when faced with such incommensurable values.¹⁰⁶ They respond usually through one of two flawed strategies. The first, and least convincing approach, is to deny the conflict and instead assert that efficiency analysis can ground normative analysis of contract law as a whole. When such theorists try to explain areas of contracting that are widely understood to be animated by quite different values – such as family contracts – the results are disappointing.

The second, inverse approach re-defines and shrinks what constitutes the field of contract law. Thus, for Schwartz and Scott contracts between firms are "the main subject of what is commonly called contract law," because other types of contract are governed by other rules, outside of "Article 2 of the Uniform Commercial Code (UCC) and the provisions of the Restatement (Second) of Contracts." As they put it, contracts "between individuals are primarily regulated by family law (antenuptial agreements and divorce settlements) and real property law (home sales and some leases)"; contracts "between a firm as seller and an

¹⁰⁴ *Id.* at 550.

¹⁰⁵ *Id.*

¹⁰⁶ See generally Alon Harel & Ariel Porat, *Commensurability and Agency: Two Yet-to-Be-Met Challenges for Law and Economics*, 96 CORNELL L. REV. 749, 751-67 (2011).

individual as buyer are primarily regulated by consumer protection law, real property law (most leases), and the securities laws”; and contracts “between an individual as seller and a firm as buyer, commonly involve the sale of a person’s labor, are regulated by laws governing the employment relation.”¹⁰⁷

Radically shrinking the scope of contract law is no more appealing than over-extending economic analysis. Schwartz and Scott’s observations may reflect the canonical division of labor of contemporary contract laws and of the focus of most first-year courses in contract law. But labels and syllabi do not define the field of state enforcement of voluntary obligations. Calling business contracts the core does not make it so. We do not get closer to a general theory of contract by excluding the vast bulk of contracting which occurs in the spheres of family, home, consumer transactions, and employment. Focusing on business contracts has advantages we’ve already noted, but the focus is misleading for the rest of contract theory. Schwartz and Scott may have identified the one sphere of contracting in which utility and autonomy concerns seem to converge. Everywhere else, they don’t. Their example both ignores the other goods of contracting and obscures at least part of potential of contract as a – maybe *the* – legal means for enhancing our autonomy.

B. Community

1. *The value of community.* People contract not just for economic benefits, but also for the social gains that come from working together, from taking part in a successful collective enterprise.¹⁰⁸ Cooperation, in other words, is at times a good of contracting, in and of itself, in addition to its importance in facilitating economic success. People value interpersonal relationships – not only for instrumental reasons, as a means to some independently specified end.¹⁰⁹ Contract may help in furthering these intrinsically valuable relationships, and thus provide people an

¹⁰⁷ *Id.* at 544.

¹⁰⁸ Raz addresses this good of contract in mentioning the special bonds or relations that contract creates. *See supra* text accompanying note 80.

¹⁰⁹ *See* Samuel Scheffler, *Relationships and Responsibilities*, 26 PHIL. & PUB. AFF. 189, 200 (1997).

opportunity to enrich and solidify the interpersonal capital that grows from cooperation, support, trust, and mutual responsibility.

Community-based (or relational) theories of contract bring these interpersonal goods to the fore. These theories begin with a complaint against traditional theories that, for them, are excessively individualistic and miss the essence of contract. Instead, they premise contract on the interpersonal relations it creates.¹¹⁰ At times, these theories become as over-extended as the theories they criticize. To say that all contracts are necessarily relational, and that community is the core of contracting, requires marginalizing large swaths of contracting from analysis – it gives results as implausible as those from over-expanding efficiency analysis.

While the extreme version of community-based theory is not useful, a more nuanced reading can enrich our autonomy-based theory. Contract law should support individual freedom to form various types of communities, just as it should further efficient allocation, when that is what the contracting parties seek. Community-based values, like their economic counterparts, are necessary building blocks of a general liberal theory of contract.

2. *Community, thick and thin.* Community-based theories can be divided roughly into two groups, what we call thick and thin accounts. Ian Macneil best represents the former camp and is the scholar most associated with the relational understanding of contract. He has argued that much, if not most, contract practice does not comply with the model of a simple exchange of goods.¹¹¹ Varied contract types – in marriage, labor and employment, franchising, and other long-term transactions involving asset-specific investments – differ fundamentally from such discrete contracting. Since these long-term contracts are “characterized by complex (ex ante unspecifiable) obligations and asset specific (ex post noncompensable)

¹¹⁰ See Daniel Markovits, *Contract and Collaboration*, 113 YALE L.J. 1417, 1419-21 (2004). See also David Campbell, *Ian Macneil and the Relational Theory of Contract*, in *THE RELATIONAL THEORY OF CONTRACT: SELECTED WORKS OF IAN MACNEIL* 3, 5, 9-10, 14 (David Campbell ed., 2001).

¹¹¹ See, e.g., Ian Macneil, *Relational Contracts: What We Do and Do Not Know*, in *RELATIONAL THEORY*, *supra* note 110, at 257, 261.

investments,” they require the parties to “adopt a consciously co-operative attitude.”¹¹²

Another typical feature of relational contracts is the significance of what may be called “contract governance.” Although planning the substance of the exchange is still important, “many specific substantive courses of action cannot be planned in advance.”¹¹³ Thus, Macneil points out, more emphasis must be placed on the “operating relations” of the parties and on “structures and processes.”¹¹⁴ While, at times, much of this governance structure is formal and even hierarchical, these contracts necessarily rely also on some measure of trust and solidarity.¹¹⁵ And in some types of such contracts, the parties “engage in social exchange [and not only in] economic exchange,” or at least become highly interdependent, so that their “relations tend to include *both* sharp divisions of benefits and burdens *and* a sharing of them.”¹¹⁶

Compare this thick account of contractual communities to Daniel Markovits’ theory of contract as the epitome of “respectful communities” premised on “the collaborative ideal.”¹¹⁷ This “thin” notion of community is sharply limited: it aims to explain the morality of promise among self-interested strangers.¹¹⁸ Contracts, like other types of promises, establish for Markovits “a relation of recognition and respect – and indeed a kind of community – among those who participate in them,” and it is “the value of this relation” that explains and justifies the morality of promise and the legitimacy of contract law.¹¹⁹ This “collaborative” model of contract does

¹¹² Campbell, *supra* note 110, at 16, 22. See also, e.g., Ian Macneil, *Exchange Revisited: Individual Utility and Social Solidarity*, 96 ETHICS 567, 578-79 (1986).

¹¹³ Ian Macneil, *The New Social Contract: An Inquiry into Modern Contractual Relations*, in RELATIONAL THEORY, *supra* note 110, at 144.

¹¹⁴ *Id.*

¹¹⁵ See *id.* at 143, 151.

¹¹⁶ *Id.* at 136, 146, 148. See also Ian Macneil, *Restatement (Second) of Contracts and Presentation*, 60 VA. L. REV. 589, 595 (1974) (claiming that “[t]he entangling strings of friendship, reputation, interdependence, morality and altruistic desires are integral parts of the relation”).

¹¹⁷ Markovits, *supra* note 110.

¹¹⁸ *Id.* at 1420.

¹¹⁹ *Id.*

not imply any “concern for other persons’ interests,” but rather “a concern for other persons’ intentions and, ultimately, for their points of view.”¹²⁰ Thus, it applies precisely to arm’s length contracts between individuals¹²¹; not to the thicker, more contextual relations that concern Macneil,¹²² nor to contracts involving organizations.¹²³

Markovits claims that, “as a descriptive matter, contracts among individual persons – governed by the doctrines of traditional contract law – play a fairly prominent role in many individual persons’ moral and legal lives.”¹²⁴ More strongly, Markovits asserts that contracts between strangers “represent the core of contract,”¹²⁵ and that excluding Macneil’s relational contracts and Schwartz and Scott’s business contracts does not “undermine the collaborative view’s claim to capture the essence of contract.”¹²⁶ What is that essence? For Markovits, “[c]ontract law’s *primary purpose*” is “to sustain collaborative agreements among individual persons.”¹²⁷

3. *The limits of community-based theories.* We disagree with Markovits’ and Macneil’s claims to capture the conceptual core of contract, just as we disagreed above with Schwartz and Scott. There is no more justification for elevating contracts between individuals than there is to privileging contracts between businesses. (And, as an aside, both these approaches have a blind spot for contracts between individuals and organizations, in particular consumer transactions, which play such a large role in modern life). All these approaches try to craft a general theory of contract from too-limited examples. And yet, notwithstanding the excesses of community-based theory, we find value in these accounts. For example, the decision whether to use a franchise or commercial agency

¹²⁰ *Id.* at 1450-51.

¹²¹ *Id.* at 1462.

¹²² *Id.* at 1450, 1462.

¹²³ *Id.* at 1464-66.

¹²⁴ *Id.* at 1471-72.

¹²⁵ *Id.* at 1421; *see also id.* at 1450, 1465 (reiterating this point); Daniel Markovits, *Promise as an Arm’s-length Relation*, in *PROMISES AND AGREEMENTS: PHILOSOPHICAL ESSAYS* 295 (Hanoeh Sheinman ed., 2011).

¹²⁶ Markovits, *supra* note 110, at 1467.

¹²⁷ *Id.* at 1472.

contract can be understood, in part, as a choice between creating thin and thick contractual communities.¹²⁸

Markovits' collaborative ideal is indeed a good descriptive fit for the contract types on which he focuses, and it captures one normatively attractive vision of the relationship that contract law can help establish. In some "contracts involving the purchase and sale of personal property," and even more so "of services in many forms, including childcare and elder care, day labor, and services associated with any number of trades and professions,"¹²⁹ contract can serve as a "means by which people can "overcom[e] isolation through an intentional pursuit of shared ends," enabling them "to cease to be strangers," by "enter[ing] into respectful relations with each other."¹³⁰ But this is not the only interpersonal ideal autonomous people can legitimately pursue.¹³¹ Sometimes people seek, and contract law can help provide, the thick communitarian ideal of contractual community envisioned by Macneil. And sometimes people want what we call the "no community" ideal on which many other contracts rely.¹³²

An autonomy-based contract law should facilitate all three alternatives (thick, thin, and no-community) and allow people to choose from among these ideals as they shape different spheres of their lives. Accordingly, contract theory should both embrace autonomy as contract's ultimate value and respect the diverse, sometimes conflicting, substantive goods, material and interpersonal, that people seek from contracting.

¹²⁸ A franchise is thinner than a comparable commercial agency contract, because of the fiduciary duties that typify the latter, the agent's capacity to bind the principal, and the potential for respondeat superior liability. See RESTATEMENT (THIRD) OF AGENCY (2006), §§ 1.01 (fiduciary relationship), 2.01–2.02 (scope of agent's authority), and 2.04, 7.08 (scope of respondeat superior liability).

¹²⁹ *Id.*

¹³⁰ *Id.* at 1434–35, 1440–41.

¹³¹ We do not deny Markovits' claim that the contract *form* implies *recognition* of the other party's intention and point of view; but because this is a very thin requirement, which entails neither *respect* nor *community*, such recognition may be purely instrumental.

¹³² See our discussion of consumer contracts, *infra* text accompanying notes 154–156 and 175–177.

III. A LIBERAL AND GENERAL THEORY OF FREEDOM OF CONTRACTS

With these building blocks identified, we can now set out a liberal and general theory of contract law. There are four ways that our approach diverges from prior theories, keyed to the four sections in this Part: (a) We offer a *liberal* view of contractual autonomy focusing on freedom of contracts, that is, parties' ability to choose from among attractive contract types. This robust contract law can increase human freedom, a claim that may seem paradoxical, but is not. (b) We offer a *general* theory with a conceptually-coherent account of the goods of contracting and their interrelationships. There is no single animating principle that captures the quintessence of all contracting practice. (c) On the *descriptive* level, we develop a taxonomy that identifies the distinctive subject matter and recurring dilemmas of each contractual sphere and bridges between contract law and theory. (d) Finally, at the *normative* level, we argue that, to enhance freedom in each sphere, contract law must offer a rich menu of types with distinct value balances. Just piggybacking on the will of the parties does not reflect contract law as it is, nor as it should be.

A. How Contract Law Increases Human Freedom

1. *The centrality of choice and multiplicity.* The key to understanding contractual autonomy is to see it, as we concluded in Part I above, as a good that needs to be fostered. Here, we make the view explicit and more precise by adapting Raz's conception of personal autonomy as self-authorship. While his work resonates in political philosophy, it can also help ground an attractively-liberal view of freedom in contract law. In particular, we can take two useful points from Raz:¹³³

¹³³ A thorough exegesis of Raz's "perfectionist liberalism" is beyond the scope of this Article. However, it may still be worthwhile to flag that our interpretation of his work is different from Martha Nussbaum's and similar to Alan Brudner's. See respectively Martha C. Nussbaum, *Perfectionist Liberalism and Political Liberalism*, 39 PHIL. & PUB. AFF. 3 (2011); ALAN BRUDNER, CONSTITUTIONAL GOODS 25 (2004).

(1) to be free, individuals need meaningful choice, and (2) states have a necessary role in supporting valuable options.¹³⁴

On the first point, freedom requires that individuals be able to choose from among options they deem valuable. The idea of autonomy – that people should, to some degree, be the authors of their own lives – requires not only appropriate mental abilities and independence, but also “an adequate range of options.”¹³⁵ For choice to be effective, for autonomy to be meaningful, there must be (other things being equal) “more valuable options than can be chosen, and they must be significantly different,” so that choices involve “tradeoffs, which require relinquishing one good for the sake of another.”¹³⁶

Thus, autonomy emphasizes “the value of a large number of greatly differing pursuits among which individuals are free to choose.”¹³⁷ In turn, a society that pursues this autonomy ideal must ensure that there exists a wide range of social forms that “leave enough room for individual choice.”¹³⁸ Autonomy contract theorists, including Raz,¹³⁹ missed the significance of this obligation to a liberal account of contracting, maybe because they constricted their view of contract down to the symmetrical and discrete arm’s length exchange. While that form is one important type of voluntary obligation, it is not an adequate stand-in for contract as a whole. If one takes autonomy seriously, then contract theory must celebrate the multiple spheres of contract law rather than suppress them (as variations on a common theme) or marginalize them (as peripheral exceptions to a robust core).

No less significant to choice, and thus to autonomy, is contract law’s *intra-sphere* multiplicity. Within each sphere, a liberal contract law

¹³⁴ Doubts as to the necessity of state action in promoting autonomy-enhancing conditions give rise to the most significant critique of perfectionist liberalism: as a form of paternalism. See JONATHAN QUONG, *LIBERALISM WITHOUT PERFECTION* 85-96 (2011). Our discussion in Part III.A.2-3 below demonstrates that whatever the power of this critique may be regarding other implications of Raz’s account of autonomy, it is inapplicable to ours.

¹³⁵ See RAZ, *supra* note 75, at 372.

¹³⁶ *Id.* at 398.

¹³⁷ *Id.* at 381, 399.

¹³⁸ *Id.* at 395.

¹³⁹ See *supra* Section I.D.2.

must include sufficiently distinct contract types for the diverse social settings and economic functions in which law helps people undertake voluntary obligations. Only such a rich repertoire can enable people to freely choose their own ends, principles, forms of life, and associations. Consider a few examples where our theory counsels for more choice than the law currently offers:

(a) *Employment types*. First, people should be able to choose whether to work as independent contractors or as employees (or to use other contract types). We recognize that classifying the parties' relationships as employer/employee or employer/independent contractor is now considered a question of law, so the parties' characterization of the relationship is not controlling.¹⁴⁰ Formally, the law refers to a long list of non-exhaustive criteria, which seems to imply significant ad hoc discretion ex post, and thus to preclude, or at least impede, the parties' ex ante planning.¹⁴¹ But it turns out that the law in action is sufficiently predictable that careful parties can fashion their arrangement so that it will likely be classified per their mutually desired type.¹⁴² In our view, that freedom to choose should be simplified and formalized, so that it becomes meaningfully available and not just to well-counseled parties.

(b) *Purchases of Consumer Goods*. As a second example, our approach suggests that people should, in some circumstances, be able to choose between purchasing a good with the protections of consumer transaction law or in an arm's length traditional sale. We recognize that

¹⁴⁰ See RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 1.01 cmt. b (T.D. No. 2 Rev., 2009).

¹⁴¹ See RESTATEMENT (SECOND) OF AGENCY § 220(2) (1958); see also Richard R. Carlson, *Why the Law Still Can't Tell an Employee When It Sees One and How It Ought to Stop Trying*, 22 BERKELEY J. EMP. & LAB. L. 295 (2001).

¹⁴² See Teresa J. Webb et al., *An Empirical Assist in Resolving the Classification Dilemma of Workers as Either Employees or Independent Contractors*, 24 J. APPLIED BUS. RES. 45 (2008) (deducing three dominant criteria: employer control, integration or services, and payment of assistants); see, e.g., Robert W. Wood, *Do's and Don'ts When Using Independent Contractors*, BUSINESS LAW TODAY (June 16, 2011) available at <http://apps.americanbar.org/buslaw/blt/content/2011/06/article-wood.shtml>; U.S. Chamber of Commerce, *Tips for Using Independent Contractors*, available at http://www.uschambersmallbusinessnation.com/toolkits/guide/P05_0092.

consumer protection doctrine applies at least to merchant/consumer transactions,¹⁴³ while sales law applies only to non-merchant sellers (i.e., amateurs) and to commercial transactions (i.e. those between businesses). Insofar as this division derives from public policy concerns – involving possible collective action problems that waivability may trigger¹⁴⁴ – we have no objection.¹⁴⁵ But wherever no such external effects apply, sellers and buyers of consumer goods should have an alternative route, so that the availability of the consumer contract type would indeed add options, rather than just reconfigure an existing one. We thus support the allowance made by Texas for written and signed waivers by well-counseled individuals who are “not in a significantly disparate bargaining position.”¹⁴⁶ Similarly, we support the Massachusetts rule that business purchasers, which come within the protection of that state’s consumer law, may waive their rights even though an individual purchaser could not.¹⁴⁷

We could multiply the examples – consider cohabitation, civil unions, and covenant marriage as alternative types to conventional marriage¹⁴⁸ – but we have made the point: diversity of contract types is a necessary, although by no means sufficient, condition for contractual autonomy. In addition, we must be alert to opportunities for expanding choice, such as the Texas and Massachusetts provisions noted above.

¹⁴³ That is, it applies where a seller who “regularly solicits, engages in, or enforces consumer transactions” deals with a buyer purchasing for “personal, family, or household” purposes. UNIFORM CONSUMER SALES PRACTICES ACT § 2(1), (5), 7A U.L.A. 69 (2002). Consumers, typically, cannot opt out of these protections. See CAROLYN L. CARTER & JONATHAN SHELDON, UNFAIR AND DECEPTIVE ACTS AND PRACTICES § 4.2.19.4, at 257-61 (8th ed. 2012); DEE PRIDGEN & RICHARD M. ALDERMAN, CONSUMER PROTECTION AND THE LAW § 5:21 (2012 ed.).

¹⁴⁴ See Gisela Rühl, *Consumer Protection in Choice of Law*, 44 CORNELL INT’L L.J. 569, 571-75 (2011).

¹⁴⁵ Recall our recognition of possible normative concerns external to the bilateral parties, *supra* text accompanying note 89.

¹⁴⁶ TEX. BUS. & COM. CODE ANN. § 17.42(a) (West 2011).

¹⁴⁷ *Canal Elec. Co. v. Westinghouse Elec. Corp.*, 548 N.E.2d 182, 187 (Mass. 1990).

¹⁴⁸ For a conceptualization of cohabitation along these lines, see Shahar Lifshitz, *Married Against Their Will? Toward a Pluralist Regulation of Spousal Relationship*, 66 WASH. & LEE L. REV. 1565, 1569 (2009).

Whereas previous theories correctly focused on freedom *within* a particular contract, they have missed the role of freedom *across* contract types.

2. *The liberal obligation to provide diverse contract law.* Raz's account of contract, like the account of other autonomy-based contract theorists, also missed the generative role of law in offering choices.¹⁴⁹ But a new take on his rightly celebrated *Morality of Freedom* can help remedy this flaw and highlight the crucial role of law for contract. As Raz argues, given the diversity of human goods from which autonomous people should be able to choose and their distinct constitutive values, the state must recognize a sufficiently diverse set of robust frameworks for people to organize their lives.¹⁵⁰ But the state's obligation to foster diversity and multiplicity cannot be properly accomplished through a hands-off attitude by the law because such an attitude "would undermine the chances of survival of many cherished aspects of our culture."¹⁵¹ A commitment to personal autonomy thus requires a liberal state, through its laws, more actively to "enable individuals to pursue valid conceptions of the good" by providing a multiplicity of options.¹⁵²

This important obligation is relevant to contract law. As Stephen Smith notes, contract law plays a crucial role in the practice of undertaking voluntary obligations by expanding "the range of options available to individuals" and thus increasing "the possibility of autonomous action." And while it is difficult to define "what constitutes an 'adequate range of options,'" it seems plausible that "the range of options that exist in a society without contract law will sometimes be inadequate" and that "contract law makes available options that would otherwise be unavailable."¹⁵³

To be more concrete, deals with strangers – what we call no-community contracts¹⁵⁴ – are an important category of options that contract law makes available. Dori Kimel even puts such deals at the core

¹⁴⁹ See *supra* Section I.D.2.

¹⁵⁰ See RAZ, *supra* note 75, at 265.

¹⁵¹ *Id.* at 162.

¹⁵² *Id.* at 133, 265.

¹⁵³ SMITH, *supra* note 3, at 139-40.

¹⁵⁴ See *supra* text accompanying note 132.

of contract law. While we reject his (and any other) essentializing strategy, we agree these deals are a big category worthy of attention. Kimel argues that the intrinsic value of contracts lies in “the value of personal detachment,” that is, of “doing certain things with others” both “outside the context of already-existing relationships” and “without a commitment to the future prospect of such relationships.”¹⁵⁵ Though overstated, Kimel’s focus on detachment helpfully demonstrates the requirement of active legal support of contracts. Law is crucial for the very possibility of consumer transactions – the paradigmatic contract type which responds, in our view, to Kimel’s account of detachment-based, autonomy-enhancing contracts.¹⁵⁶

Beyond enabling consumer transactions (a significant subset of the anonymous side of contracting), law is crucial in supporting contracts even in the business contracts context. As Schwartz and Scott observe, legal facilitation is indispensable for commercial contracts in two non-trivial types of cases: “in volatile markets, when a party’s failure to perform could threaten its contract partner’s survival; and when contractual surplus would be maximized if one or both parties made relation-specific investments.”¹⁵⁷ Active contract law is no less significant in relational contracts as well where it helps facilitate trust-based interpersonal relationships. Though moral commitment, social norms, and reputational concerns drive much party behavior, a hands-off policy and a minimalist (libertarian) attitude to freedom of contract can hardly suffice to overcome endemic difficulties to long-term cooperation.

Various impediments to contract are pervasive in all these settings – information costs (symmetric and asymmetric), cognitive biases, bilateral monopolies, heightened risks of opportunistic behavior, and other transactions costs (in the broad sense).¹⁵⁸ Merely enforcing the parties’

¹⁵⁵ KIMEL, *supra* note 69, at 78, *see also id.* at 79.

¹⁵⁶ Our reference to “law” in general is not coincidental. While we argue that contract law can play a significant role in making consumer transactions a viable autonomy-enhancing alternative, we acknowledge that other bodies of law, which are regulatory in nature, are also important for this task.

¹⁵⁷ Schwartz & Scott, *supra* note 97, at 544.

¹⁵⁸ *See, e.g.,* Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989);

expressed intentions would not be sufficient to overcome the inherent risks of such endeavors. Contract laws provide the background reassurances that help catalyze the trust so crucial for success.¹⁵⁹ Even where law is rarely invoked, its active engagement is likely to be the *sine qua non* that makes viable these challenging types of interpersonal relationships.

In sum, across a range of contracting spheres law must actively engage the liberal commitment to contractual autonomy. The impediments to secure contracting often depend on the specific features of the contract type at hand and therefore each type requires its own legal facilitation. People can, by and large, further customize their contracts to their particular needs and circumstances. But in most cases these refinements build on an off-the-shelf, legal edifice that already addresses many of the difficulties they might otherwise have to face. Thus, many valuable forms of interpersonal interaction only become available thanks to the active support of law. Before applying their freedom *within* a particular contract, people need to rely on law's support for freedom *across* contract types.

3. *Contract and culture.* Thus far we have discussed how the diverse contract types that law facilitates help to overcome various bargaining obstacles. But alongside this material effect, law's inventory of contract types affects our contracting practices in an even more profound, albeit more subtle, fashion. To appreciate this effect, consider the difficulties facing parties who seek to shape their contract as, say, one of bailment, suretyship, or fiduciary in an environment in which these notions have not been coined. Setting up terms that would duplicate our conventional design of these contract types is surely complex, so transaction costs along the lines discussed earlier would inhibit such contracts in many cases. But this material aspect does not fully capture the difficulty such parties face. For us, the concepts of bailee, surety, or fiduciary have core conventional meanings that make them culturally available as possible modes of contracting. Without such salient

Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051 (2000).

¹⁵⁹ See *supra* Section I.C.2.

meanings, which are by and large legally constructed, these parties may not even reach the stage of confronting bargaining obstacles, because they may face a preliminary impediment, an obstacle of the imagination.

By contrast, once the “character” of a contract type or its *raison d’être* gains broad social and cultural recognition, most people (roughly) know what they are getting into when they, for example, engage a surety, buy insurance, enter consumer transaction, lease an apartment, or start a new job.¹⁶⁰ In this way, the salient categories contract law employs also affect people’s preferences respecting constitutive categories of relationships.¹⁶¹ Old-fashioned “freedom of contract” does not fulfill these roles. Freedom to tailor-make terms, while important, does not consolidate expectations or express shared normative ideals regarding our basic categories of interpersonal relationships. Consider two examples.

(a) *Suretyship*. Suretyship is a complex contract type, the subject matter of a full-blown Restatement,¹⁶² an obvious product of legal construction distinct from, say, a fiduciary or bailee.¹⁶³ But the concept of a surety, who undertakes an obligation to substitute another’s duty to pay (or perform) if that other person fails to do so,¹⁶⁴ is widely recognized. Many people (vaguely, to be sure) know what it means; at times they even know some of its basic rules, such as the right of a surety who was

¹⁶⁰ See Michael Klausner, *Corporations, Corporate Law, and Networks of Contracts*, 81 VA. L. REV. 757, 766, 788 (1995) (discussing the accumulated outcome of the social learning effect and the network externalities phenomenon). The correspondence between contract law and its popular understanding is far from being perfect. Oftentimes, gaps relate to details and thus do not pose a real challenge to our claim; but there are admittedly cases where these gaps go to some core features of a contract type. See *infra* note 269.

¹⁶¹ Cf. Eyal Zamir, *The Inverted Hierarchy of Contract Interpretation and Supplementation*, 97 COLUM. L. REV. 1710, 1758-59 (1997).

¹⁶² RESTATEMENT (THIRD) OF SURETYSHIP & GUARANTY (1996).

¹⁶³ Suretyships are tripartite agreements where a secondary contract is conditional on a benefit for and a failure in the principal contract and in which the surety obtains no direct benefit from the arrangement. See 72 C.J.S. PRINCIPAL AND SURETY § 12 (Mar. 2013).

¹⁶⁴ See, e.g., Frank S. H. Bae & Marian E. McGrath, *The Rights of a Surety (Or Secondary Obligor) Under the Restatement of the Law, Third, Suretyship and Guaranty*, 122 BANKING L.J. 783, 787-89 (2005).

required to pay or perform to recover from the primary obligor.¹⁶⁵ They can thus invoke this contract type as a means for facilitating transactions that would have been too risky otherwise because the primary obligor's ability to perform is in doubt.¹⁶⁶ Indeed, exactly because contract types – like our private law categories more generally – tend to blend into our natural environment, they help structure our daily interactions.¹⁶⁷

(b) *Insurance*. As with surety contracts, insurance contracts comprise a thick layer of rules that correspond (perhaps imperfectly) to the ideal party relationships they anticipate. They thus participate in the ongoing social production of stable categories of human interaction by consolidating people's expectations of themselves and others. Consider some of the distinctive features of insurance contract law: the frequent, traditional use of the *contra proferentem* rule against insurers,¹⁶⁸ the “reasonable expectations” doctrine (in some jurisdictions),¹⁶⁹ and the emerging doctrine of insurer bad faith.¹⁷⁰ These rules are not defects in the “general” law, but are instead tools that reflect, and help further inculcate, widely-shared understandings of ideal insurance relationships.

We concede contract law cannot possibly serve this expressive and cultural role as to every idiosyncratic arrangement that parties may pursue. But it can, should, and to some extent does perform this function respecting a limited number of core categories of such arrangements. “Freedom of contracts” stands for contract law's participation in the cultural production of diverse contract types among which people may

¹⁶⁵ See RESTATEMENT (THIRD) OF SURETYSHIP AND GUARANTY § 22(1)(A) (1996).

¹⁶⁶ See THE LAW OF SURETYSHIP AND GUARANTY § 3:4 (June 2012).

¹⁶⁷ See, e.g., Robert W. Gordon, *Unfreezing Legal Reality: Critical Approaches to Law*, 15 FLA. ST. U.L. REV. 195, 212-14 (1987).

¹⁶⁸ See, e.g., ROBERT E. KEETON & ALAN I. WIDISS, INSURANCE LAW 628 (1988).

¹⁶⁹ Eugene R. Anderson & James J. Fournier, *Why Courts Enforce Insurance Policyholders' Objectively Reasonable Expectations of Insurance Coverage*, 5 CONN. INSUR. L.J. 455 (1998).

¹⁷⁰ See James M. Fischer, *Should Advice of Counsel Constitute a Defense for Insurer Bad Faith?*, 72 TEX. L. REV. 1447, 1451 (1994) (noting that doctrine covers misconduct which results in the delayed receipt of policy proceeds by the insured).

choose. This inventory offers people choices they might not bargain for if they were defaulted into the prototypical arm's length commercial contract.¹⁷¹ (Consider, by contrast to the saliency of suretyship, the "cultural invisibility" of the possibility of job-sharing, which is exactly why we will invoke this category as one possible "missing contract type" that we recommend adding.¹⁷²) Ensuring sufficient diversity of valuable contract types is a core feature, benefit, and indeed *obligation* of a contract law regime committed to human freedom.

B. How Contract Values Relate

A legal theory that relies on multiple values must address how they interrelate. Because the values we invoke – autonomy, efficiency, and community – are oftentimes treated as rivals, our theory carries a heavy burden in this arena. The task of this Section is to show that our freedom of contracts approach dissipates some of these apparent conflicts and provides important guidelines to the resolution of the others.

The key to this challenge is to assign each value its proper role. Autonomy, we argue, is contract's ultimate value and the source of the state's obligation to provide meaningful diversity of contract types. But because autonomy is never the reason for making a contract, it cannot be its sole value. Utility and community are contract's instrumental values. Community may even be intrinsically valuable to the extent it is constitutive of the autonomy-enhancing potential of certain contract types.¹⁷³

1. *Horizontal coexistence.* Sometimes contract's potential goods are in conflict. What then? Contract law cannot always help people obtain all these competing goods. While utility and community are often mutually-reinforcing,¹⁷⁴ at times they push in different directions. But it is

¹⁷¹ See Ian Ayres, *Menus Matter*, 73 U. CHI. L. REV. 3, 8 (2006) (arguing that even "statutory menus that merely reiterate what the private parties could have done contractually by other means can have a big effect").

¹⁷² See *infra* text accompanying note 268.

¹⁷³ On this distinction between ultimate, intrinsic, and instrumental values, see RAZ, *supra* note 75, at 177-78.

¹⁷⁴ See Philip Pettit, *The Cunning of Trust*, 24 PHIL. & PUB. AFF. 202, 209-

not the job of autonomy-friendly contract law to decide which of these values trumps or how they should be balanced. Rather, contract law should support multiple contract types, each of which offers a distinct balance of goods, so that parties can choose their own favorite balance.

Situating utility and community under autonomy's rule helps explain where previous totalizing contract theories have gone astray. At times, people may prefer not to obtain certain goods that other times seem fundamental. Consider the good of community. Macneil is right to highlight the prevalence and significance of diverse relational contracts in which interpersonal cooperation is of the essence. But there are equally important contracting spheres for which the communitarian goods he celebrates are beside the point, at least for most parties. Consider the thin communities Markovits discusses or the inter-organizational contracts Schwartz and Scott address.

More pointedly, consider a consumer transaction for a relatively inexpensive good or service primarily intended for personal use. In that significant sphere of contracting, the consumer is (typically) uninterested in personal relations with the merchant. Indeed, autonomy is enhanced insofar as law helps people make such transactions quickly, anonymously, and securely so they can focus their time and attention instead on more valuable projects.¹⁷⁵ This no-community commitment can explain and justify some of the most conspicuous features of consumer contract law,¹⁷⁶

10 (1995).

¹⁷⁵ This reconceptualization of consumer transactions, which emerges from our discussion of Kimel's account of contracts, *supra* text accompanying notes 155-156, was to some extent anticipated by Karl Llewellyn. See Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 455 (2002).

¹⁷⁶ Our account of consumer contracts is admittedly ahistorical: this type largely resulted from paternalistic regulation that limited classical freedom of contract. See Fred H. Miller, *Consumers and the Code: The Search for the Proper Formula*, 75 WASH. U. L.Q. 187, 187-99 (1997); see generally Anthony T. Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763 (1983). Nonetheless, this contract type enhances freedom of contracts because it likely expands buyer autonomy more than it reduces autonomy for sellers (which are typically organizations with no claim to autonomy, see *infra* text accompanying note 189). But because of its autonomy-reducing effect, we argue that law should also make available alternative types in settings where consumer

such as imposing on businesses heightened duties of disclosure and affording consumers certain rights to cancellation and warranty, which all go far beyond the protective measures anticipated by “classical” contract law.¹⁷⁷

Relational contracts, business contracts, consumer contracts – all support equally fundamental types of human activity; yet each responds to different values autonomous people may seek. This means that the proper place for utility and community is not at the level of animating contract law as a whole. Rather, they are components of distinct contract types that support people’s diverse pursuits and interests, whether interpersonal relationships, the maximization of their joint material surplus, or the many permutations between these poles. Only a sufficiently rich repertoire of contract types properly facilitates people’s ability to choose and revise their various endeavors and interpersonal interactions.

2. *Vertical implications.* If contract law is to live up to its promise of enhancing autonomy, it must facilitate people’s ability to pursue the utilitarian and communitarian goods that contracts can bring about. So our division of labor does *not* imply that utility and community are unimportant to contract. If much of the value of contract comes from freedom to choose among types, and if the most important values that should shape these types are utility and community, then these values are nothing short of crucial to contract law.

And yet we argued that the value of utility and community in contract is neither fundamental nor freestanding, but rather derives from the way that they serve the parties’ autonomous pursuit of their goals. Here we identify two implications of our claim that autonomy is contract’s

transactions do not impose costly external effects. *See supra* text accompanying notes 143-147. Making an alternative available means that consumer contracts add an option, rather than just limiting an existing one.

¹⁷⁷ *See respectively* OREN BAR-GILL, *SEDUCTION BY CONTRACT: LAW, ECONOMICS, AND PSYCHOLOGY IN CONSUMER MARKETS* (2012); Omri Ben-Shahar & Eric A. Posner, *The Right to Withdraw in Contract Law*, 40 J. LEGAL STUD. 115 (2011); Alan Schwartz & Louis L. Wilde, *Imperfect Information in Markets for Contract Terms: The Examples of Warranties and Security Interests*, 69 VA. L. REV. 1387 (1983).

ultimate value, while utility and community are the goods an autonomy-based contract law can help secure.

(a) *Voluntariness as common denominator.* Freedom of contracts' ultimate commitment to self-authorship implies that law should be responsible for "creating the conditions for autonomous life, primarily by guaranteeing that an adequate range of diverse and valuable options shall be available to all."¹⁷⁸ But because autonomy is emphatically "incompatible with any vision of morality being thrust down people's throats," it must stop there and "leave individuals free to make their lives what they will."¹⁷⁹ This premise implies that contract is – and should remain – a voluntary obligation. People may not be forcibly pushed to seek contract's potential efficiency or community goods.

This proposition of voluntariness, which underlies the liberal commitment to "freedom *from* contract,"¹⁸⁰ constitutes the common denominator of the otherwise heterogeneous realm of contract law. There are, to be sure, diverse doctrinal means to ensure voluntariness: in addition to doctrines like offer and acceptance and duress, think about the familiar common law resort to formalities like consideration or writing¹⁸¹ or about the civil law requirement of intent-to-contract.¹⁸² So, different liberal legal systems may pick and choose among this inventory, or tailor-make other tools.

Oftentimes the choice among many of these tools would be better handled if conducted at the level of contract types, rather than at the wholesale level of contract law, a move that would allow the rule to be

¹⁷⁸ JOSEPH RAZ, *ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS* 105 (1994).

¹⁷⁹ *Id.*

¹⁸⁰ On some of the difficult questions this commitment raises, see Omri Ben-Shahar, *Forward: Freedom from Contract*, 2004 WISC. L. REV. 261.

¹⁸¹ See Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799 (1941).

¹⁸² See PRINCIPLES OF EUROPEAN CONTRACT LAW § 2:101 cmt. B (Comm. On European Contract Law, Ole Lando & Hugh Beale eds., 2000); PRINCIPLES, DEFINITIONS AND MODEL RULES OF EUROPEAN PRIVATE LAW: DRAFT COMMON FRAME OF REFERENCE (DCFR), OUTLINE EDITION § II: 401 (Christian von Bar et al. eds., 2009); EU COMMISSION, PROPOSAL FOR A COMMON EUROPEAN SALES LAW § 39(2) (2011).

informed by the type's animating principle.¹⁸³ Voluntariness may even take different meanings in different contract spheres. Along these lines, scholars have proposed that the parol evidence rule should be relaxed in more interpersonal contexts and imposed strictly in high-value corporate transactions, where the parties gain more from ex ante certainty and are more likely to ensure the contract is the full expression of their intentions.¹⁸⁴ Despite this value in tailoring at the level of types, a common overarching commitment to autonomy implies a trans-substantive concern for voluntariness,¹⁸⁵ especially given the challenge that the objective theory of contract poses for this value.¹⁸⁶

(b) *Autonomy as side constraint.* While autonomy often recruits community and utility to shape the multiple contract types that self-authorship requires, these values do not always dovetail. Within any particular type, autonomy's role as the ultimate commitment of contract implies that it should generally trump contract's other values when they conflict. Thus, in addition to the enabling role of autonomy in our theory, it also fulfills a protective role by functioning as a "side constraint."¹⁸⁷

Usually, promoting contract's other values – utility, community, or a blend of the two – does not clash with, and indeed enhances the ultimate value of autonomy. But there are cases when promoting the means might undermine the end. Communitarian demands of loyalty that pose

¹⁸³ This point applies equally to other general doctrines such as fraud and unconscionability whose application varies depending on the context. See, e.g., Steven M. Haas, *Contracting Around Fraud Under Delaware Law*, 10 DEL. L. REV. 49, 50-51 (2008); Melissa T. Lonegrass, *Finding Room for Fairness in Formalism – the Sliding Scale Approach to Unconscionability*, 44 LOY. U. CHI. L.J. 1, 1-6 (2012).

¹⁸⁴ See, e.g., Eric A. Posner, *The Parol Evidence Rule, The Plain Meaning Rule, and the Principles of Contractual Interpretation*, 146 U. PA. L. REV. 533, 534 (1998). Others have proposed varying default rules regarding parties' intent to be bound in different situations, such as preliminary contracting or spousal promises. See, e.g. Gregory Klass, *Intent to Contract*, 95 VA. L. REV. 1437, 1480-87, 1488-97 (2009).

¹⁸⁵ In this respect, our analysis converges with Ripstein's account of a "united will." See *supra* text accompanying notes 34-36.

¹⁸⁶ See *supra* text accompanying notes 56-65.

¹⁸⁷ See Stephen A. Smith, *Future Freedom and Freedom of Contract*, 59 MOD. L. REV. 167 (1995).

excessive limitations on contractual parties' exit (that is: on promisors' freedom to change their mind) might collide with party autonomy.¹⁸⁸ Efficient contracts between consumers and organizations may invoke similar concerns, given that, unlike consumers, organizations have no claim to autonomy.¹⁸⁹ In many such conflicts, contract's commitments to community and to utility should give way to rules that best promote contract's ultimate value. This may justify, for example, limits on enforceability of employee noncompete agreements,¹⁹⁰ and help explain the *unilateral* right of termination of long-term contracts, which is semi-inalienable at least regarding certain contract types.¹⁹¹

We do not imply that autonomy straightforwardly and necessarily trumps utility or community. Rather, our approach may require exploring (at least) two alternative responses. Thus, it may imply that we should try to resolve such conflicts by looking more closely at the meaning of the utility or community value for people's autonomy.¹⁹² Just as your garden-variety contract limits one's future options in the service of self-authorship, the vibrancy of certain utility- or community-oriented contract types may require curtailing certain future choices; and insofar as a (complicated, to be sure) analysis of the overall effects of such limitations on people's self-authorship shows that they are positive, the incommensurably higher status of autonomy poses no real difficulty.

¹⁸⁸ See generally Leslie Green, *Rights of Exit*, 4 LEG. THEORY 165 (1998); Dori Kimel, *Promise, Contract, Personal Autonomy, and the Freedom to Change One's Mind*, available at <http://ssrn.com/abstract=2237853>.

¹⁸⁹ See MEIR DAN-COHEN, *RIGHTS, PERSONS, AND ORGANIZATIONS: A LEGAL THEORY FOR BUREAUCRATIC SOCIETY* 77-78 (1986).

¹⁹⁰ See Ronald J. Gilson, *The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete*, 74 N.Y.U. L. REV. 575, 594-619 (1999) (attributing Silicon Valley's dynamism in part to limited enforcement of noncompete agreements); see also Ruth Simon & Angus Loten, *When A New Job Leads to a Lawsuit*, WALL ST. J., Aug. 15, 2013, at B1 (discussing national variation in enforceability).

¹⁹¹ See, e.g., Deborah A. DeMott, *The Fiduciary Character of Agency and the Interpretation of Instructions*, in PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW (Andrew Gold & Paul Miller eds., forthcoming 2014).

¹⁹² Cf. Richard H. Pildes, *Conceptions of Value in Legal Thought*, 90 MICH. L. REV. 1520, 1557 (1992).

Other conflicts, however, are real and fundamental and may even require a (seemingly impossible) tradeoff. In most of these cases, autonomy should take priority. But we recognize the possibility that (in rather rare cases, we assume) this presumption may be overridden if, and only if, its costs to the utility or the community goods of contract pass a sufficiently high threshold.¹⁹³ We cannot hope fully to address here the challenges of value incommensurability, so for now we just flag the concern, and note that its implications for our liberal contract theory seem no more intractable than for legal theory in general.¹⁹⁴

3. *How we differ from the economic analysis of contract.* Finally, because our freedom of contracts approach designates such a significant role to utility and thus to the economic analysis of contract law, it may be helpful to note briefly how our views differs from theirs. We see four significant distinctions:

(a) Most basically, whereas the economic canon seeks to facilitate preference satisfaction in order to maximize social welfare, we argue that such facilitation is important to the extent it is conducive to people's self-authorship. This fundamental difference implies further key distinctions: (b) As we have just noted, preferences that undermine self-authorship should, in our account, be generally overridden. (c) Because we claim that the goods of contracts sometimes are communitarian in nature, so that part of their point is the process (and not just the outcome), we argue that not all contract goods are amenable to the maximization formula economic analysis employs. In other words, once the contractual relationship has a significant intrinsic value, it can no longer be analyzed in strict instrumental terms.¹⁹⁵ And last but not least, (d) as we will further elaborate below, an autonomy-based account of contracts implies that facilitating minoritarian and utopian alternatives may be quite important even if it cannot be fully justified in terms of demand.

¹⁹³ Cf. ZAMIR & MEDINA, *supra* note 22, at 1-8, 79-104 (defending "threshold deontology").

¹⁹⁴ See generally Cass Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779 (1994).

¹⁹⁵ See SAMUEL SCHEFFLER, *EQUALITY AND TRADITION: QUESTIONS OF VALUE IN MORAL AND POLITICAL THEORY* 50 (2010).

C. The Taxonomy of Contract Spheres

We have talked about contract values and their interrelations. This is what makes our theory *liberal* and *general*. Now we provide the bridge between our theory and contract law *as a whole*. To do so, we reject the arm's length widget sale as contract's core and we offer, in its place, a taxonomy of contract spheres that groups contracting practices according to their distinctive subject matter and shared dilemmas.

1. *The flattening effect of the arm's length core.* Like other critics of the Willistonian strategy before us, we reject the arm's length core as a description of contract law.¹⁹⁶ Our opposition is, we hope, particularly pointed because it normatively relies on a commitment to autonomy, the ultimate value Willistonian contract law purports to serve.

Contract theory had a distinctive twentieth-century trajectory that elevated the arm's length deal image to the core of contract, and, as a byproduct, substantially obscured the generative role of diverse contract types. Starting with Samuel Williston, through the early Restatements, and now pervasive in law teaching, contract theory shifted from concern with distinctive types to contract's trans-substantive, stylized, and seemingly universal elements, an approach that makes much of actual contracting practice seem peripheral – or outside of contract law altogether.¹⁹⁷

But lawyers in practice cannot rely on “general” contract law to understand the key elements of employment, family, real estate or other real world contracts.¹⁹⁸ To do so would often constitute malpractice.¹⁹⁹ And yet, the paradigm of general contract law dominates contract theory. This paradigm not only mis-describes contract law and understates its

¹⁹⁶ See Roy Kreitner, *Multiplicity in Contract Remedies*, in *COMPARATIVE REMEDIES FOR BREACH OF CONTRACT* 19, 19–20, 38, 49 (Nili Cohen & Ewan McKendrick eds., 2005). See generally Roy Kreitner, *On the New Pluralism in Contract Theory*, 45 *SUFF. U. L. REV.* 915 (2012).

¹⁹⁷ See FRIEDMAN, *supra* note 5, at 20.

¹⁹⁸ Similarly, law students in upper-level contracts classes must leave aside much of what they learned their first-year. By contrast, other private law fields did not go through quite the same theoretical flattening.

¹⁹⁹ Cf. BRIAN H. BIX, *CONTRACT LAW: RULES, THEORY, AND CONTEXT* 159–60 (2012) (emphasizing the significance of the differences among contract types).

autonomy-enhancing potential; it also generates unnecessary confusion.²⁰⁰ Consider the following four concrete examples:

(a) *Bailment*. First, the flattening effect of general contract seems responsible for much of the doctrinal muddle now troubling bailment law. The dominant paradigm interprets the prevailing doctrine as repudiating the contractual nature of bailments. Why? Because the bailee's responsibility for loss or damage is usually based on a standard of ordinary care, in contrast to "general" contract's typical strict obligation to perform.²⁰¹ The possibility that strict liability exceptions threaten to swallow the negligence rule²⁰² is less troubling if both the "rule" and its "exceptions" are understood as majoritarian defaults of the bailment contract type. Rather than decide whether to treat bailments "as contractual in nature,"²⁰³ and thus import all of the "general" contract law, reformers should focus on the recurring dilemmas of bailment contracts.

(b) *Liquidated damages*. Another example of the detrimental effects of the arm's length paradigm comes from the standard debate over liquidated damages. From our perspective, this debate seems frustratingly futile. While most arguments in favor of the prevailing rule of *ex post* fairness review anticipate certain types of contracts (in which promisors are vulnerable to making suboptimal choices), most of the claims criticizing the rule assume a very different set of contract types (where sophisticated parties use liquidated damages in anticipation of possible unverifiable harms of breach).²⁰⁴ Each argument is right in its own sphere, and the rule should likely vary by sphere, rather than be held artificially constant to conform to a misplaced notion of "general" contract law.²⁰⁵

²⁰⁰ Our discussion below focuses on the effects of contract's conceptualization on adjudication. But it surely implies that contract's autonomy-enhancing functioning would be improved if the muddles we identify were removed.

²⁰¹ See R.M. Helmholz, *Bailment Theories and the Liabilities of Bailees: The Elusive Standard of Reasonable Care*, 41 U. KAN. L. REV. 97, 99 (1992).

²⁰² See *id.* at 109-29 (describing expansion of strict liability exceptions).

²⁰³ *Id.* at 99.

²⁰⁴ Compare, e.g., Alan Schwartz, *The Myth that Promisees Prefer Supracompensatory Remedies: An Analysis of Contracting for Damage Measures*, 100 YALE L.J. 369 (1990) with Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 225-36 (1995).

²⁰⁵ For indications that courts reduce scrutiny of liquidated damages in cases

(c) *Promissory estoppel*. Similar confusion and potential distortions were generated by the attempt to align intra-family contracts with contracts between strangers. Thus, the perception that once promissory estoppel was adopted for intra-familial contracts, it must apply to others has led to a morass of practical and doctrinal confusion. Businesses were forced to contend with the risk of unexpected obligations by the application of ex post judicial enforcement of clearly invalid promises on equity grounds in the employment and franchise contexts.²⁰⁶ Scholars noted the doctrinal confusion introduced by promissory estoppel into these contract contexts and some feared that the doctrine would consume traditional contract bright line rules aimed at the arm's length contract contexts, such as the doctrine of consideration.²⁰⁷

(d) *Efficient breach*. By the same token, the theory of efficient breach runs into its most serious criticism and doctrinal problems when it is applied to promises made in the context of a thick community, most particularly marriage.²⁰⁸ These problems could be avoided if this doctrine were applied selectively to contract types, rather than assuming that once introduced to contract law, it must be applied generally.²⁰⁹

These brief case studies do not simply reflect the obvious prescription that, for abstract principles to be properly applied, they need to be carefully adjusted to their context. Rather, the required differences they highlight are best explained by reference to the different animating

involving sophisticated parties, see Meredith R. Miller, *Contract Law, Party Sophistication and the New Formalism*, 75 MO. L. REV. 493, 512 (2010).

²⁰⁶ See HOWARD O. HUNTER, MODERN LAW OF CONTRACTS § 6:12 (2013); Gregory M. Duhl, *Red Owl's Legacy*, 87 MARQ. L. REV. 297, 307-11 (2003).

²⁰⁷ See, e.g., Charles L. Knapp, *Rescuing Reliance: The Perils of Promissory Estoppel*, 49 HASTINGS L.J. 1191, 1197-99 (1998). For other doctrines that are at risk, see Michael B. Metzger, *The Parol Evidence Rule: Promissory Estoppel's Next Conquest?*, 36 VAND. L. REV. 1383, 1383-85 (1983).

²⁰⁸ See Avery Katz, *Virtue Ethics and Efficient Breach*, 45 SUFFOLK U. L. REV. 777, 794-97 (2012); Margaret F. Brinig, "Money Can't Buy Me Love": A Contrast Between Damages in Family Law and Contract, 27 J. CORP. L. 567, 572-79, 589 (2002).

²⁰⁹ See also, e.g., Brett E. Lewis, *Secondary Obligors and the Restatement Third of Suretyship and Guaranty: For Love or Money*, 63 BROOK. L. REV. 861 (1997) (criticizing suretyship law for not distinguishing between compensated and uncompensated sureties).

principles of contract types that have been improperly lumped together. These more fundamental differences may derive from the typical normative commitments of a contract type (as in the intra-family vs. business contracts) or from its distinctive subject matter (as in bailment, or, for that matter, suretyship). Such examples, and numerous others, suggest that in dealing with discrete doctrinal questions, we should examine the normative desirability of competing rules vis-à-vis the animating principles of their specific contract types (an inquiry that requires us to present this principle in its best light possible).

But contract theory cannot return to the pre-Williston list of contract categories. That list was an atheoretical mishmash. What's needed is to replace the old abstractions of the orthodox "freedom of contract" model with a theory-driven and descriptively well-formed taxonomy for "freedom of contracts."

2. *The four spheres of contracting.* An autonomy-regarding theory requires a taxonomy that reflects the typical contexts in which people enter contracts and responds to the distinctive dilemmas that arise in those interactions. There are many ways such a taxonomy could be constructed. Here we offer one that collects contract types into spheres.

The subject matter of our contracts is bound to make a difference regarding the kind of ideals that law can plausibly embrace and hope to further. Thus, along one dimension we distinguish between contracts in which the subject matter primarily concerns "people" or "things." This distinction is neither exhaustive nor stable.²¹⁰ But the division has some appeal: it reflects real distinctions in how contract law operates, and it has the virtue (perhaps) of historical pedigree. Blackstone divided contract in part between "rights of persons" and "rights of things."²¹¹ Our second dimension concerns whether the locus of contracting is in some sense "private" or "public." This axis is even less stable than the former (and it has been subject to much criticism), but again reflects practices oriented toward the internal, domestic, or personal versus those that are relatively

²¹⁰ Our cautious language derives not only from the fact that this is a preliminary effort, but also from our commitment to a functional dynamic mode of taxonomic work. See generally DAGAN, *supra* note 87, at ch.6.

²¹¹ See ATIYAH, *supra* note 10, at 102-03; Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 205, 327-50 (1979).

more external. These two axes yield four salient spheres of contracting: family, home, employment, and commerce (fig. 1):

		<i>Subject Matter</i>	
		<i>People</i>	<i>Things</i>
<i>Locus</i>	<i>Private</i>	1. Family	2. Home
	<i>Public</i>	3. Employment	4. Commerce

FIGURE 1: *Four Spheres of Contracting*

While one can imagine other ways to divide the contractual universe (we have no commitment to these axes or labels), this taxonomy is helpful here because it is conducive to freedom of contracts' injunction of intra-sphere multiplicity. It highlights the obligation of liberal contract law to support choice within each familiar category of human activity, such that, within each sphere, we see contract types that often are substitutes for each other. So, (1) in the sphere of family, we might see pre-nuptial, civil union, and co-habitation contracts; (2) in the home: real estate purchase and lease contracts; (3) in employment: at-will, for cause, independent contractor, and union contracts; and (4) in commerce: sales, consumer, insurance, and derivative contracts.

Note that in the commerce sphere, the types just mentioned are not substitutes for each other, but instead reflect distinctive contracting practices. The sub-spheres of commerce-related contract activity depend (roughly) on the sophistication of the parties and the tangibility of the contract's subject (as with figure 1 above, nothing turns in our theory on commitment to these particular labels). The distinctions suggest a second matrix with four sub-spheres within the sphere of commerce: (1) consumer: including ordinary consumer transactions and software licenses, (2) lending and insurance: mortgages, credit cards, health and life insurance, (3) sales/business: from commercial sales to partnerships and LLCs, and (4) finance/risk: derivatives, guarantees (fig. 2).

		<i>Type of thing</i>	
		<i>Tangible</i>	<i>Intangible</i>
<i>Relative Sophistication</i>	<i>Individual</i>	1. Consumer	2. Lending/Insurance
	<i>Corporation</i>	3. Sales/Business	4. Finance/Risk

FIGURE 2: *Sub-Spheres of Commerce*

Why are there so many more contract types within the sphere of commerce? In part, the answer must lie in the stronger incentives for individual parties to invest in creating new contract types within this sphere. Even relatively moderate demand can justify creation of a new type, so long as that type responds to the balance of contract goods that enough people seek.²¹² Note that the large number of contract types here, available even to individuals, suggests that people can handle new types without too much danger of confusion. In other words, communication costs – a concern emphasized recently by private law theorists – does not justify adherence to the conception of one “general” contract law.²¹³

By contrast, there are far fewer contract types in the non-commerce spheres. Why? Perhaps there are weaker individual incentives and more substantial collective action problems in demanding new types. But that does not mean that there should not be more types. The commerce sphere suggests that confusion among types is not a significant problem, and the autonomy perspective suggests that, where effective demand is weak, the state shoulders a concomitantly greater responsibility to supply valuable new types to ensure sufficient diversity and choice.

²¹² Consider, for example, the recent emergence of the “benefit corporation” – blending profit and social objectives – in about a dozen states. See generally J. William Callison, *Benefit Corporations, Innovation and Statutory Design*, REGENT L. REV. (forthcoming 2013).

²¹³ The reason for the current over-emphasis on communication costs is that they are too often mistakenly conflated with the interests of third parties (whose interest is best cast in terms of verification), rather than with the consolidation of expectations of the parties *inter se* and the expression of ideals on core categories of interpersonal interaction. See DAGAN, *supra* note 52, at 18-20, 31-35.

D. The Goods of Diverse Contract Types

The final step in creating a general and liberal theory of contract law is to specify the link between contract spheres, diverse types, and the values people seek. The multiplicity of contract types is neither chaotic nor unprincipled. Rather, it can be explained by reference to the recurring dilemmas of the underlying contract spheres and the obligation to provide real choice within each of these spheres, including a choice among the good of interpersonal relationships, the maximization of joint surplus, or a complex and shifting mix of these goals. In other words, other than the ultimate commitment to autonomy, values in contract law are local, not global.

1. *Value diversity in contract types.* We do not deny that certain contract spheres may be more amenable to particular values. Thus, some contract types, particularly in the sphere of commerce, are mostly about economic gains – maximizing joint surplus by securing efficiencies of specialization and risk-allocation – with social benefits being merely a side effect. Other contract types, say in the family sphere, are more about the intrinsic good of being part of a plural subject, where the *raison d'être* of the contract refers more to one's identity and interpersonal relationships, while the attendant economic benefits are perceived as helpful byproducts rather than the sole (or at least the primary) motive for cooperation.

But commitment to contractual autonomy requires attention not only to diversity among spheres, but also crucially to meaningful choice within spheres. Within a particular sphere of contracting, contract law should offer a sufficiently diverse range of contract types, each representing a distinct balance of animating values. The majority may prefer one contract type, but within each contracting sphere free individuals should be enabled to contract based on a different value balance. Having forms available to reject makes one's chosen contract type even more of an expression of individual autonomy.

This is, again, most clearly the case regarding long-term business arrangements, where contract law (in the appropriate, broad sense of the

word) offers more than one set of defaults, so as to facilitate more than one type of interpersonal interaction:²¹⁴ from agency contracts, through partnership contracts (notably LLCs and LLPs), to the various forms of corporate contracts (from close corporations to publicly-held corporations).²¹⁵ Each of these contract types is characterized by its own governance structure and set of solutions to the typical difficulties (notably agency costs) that would probably have inhibited such business activities but for their legal facilitation.²¹⁶

Whereas the prescription of multiplicity of contract types seems straightforward, its implementation is not always simple. As a first rule of thumb, for a contract type to do its autonomy-enhancing work, it should be guided by one robust animating value that can effectively consolidate expectations and clearly express normative ideals. This rule implies that each contract type should be rather narrow, but that many should be offered. Thus, a contract type should be split if it addresses too-divergent values, as has indeed happened with leaseholds, now largely bifurcated into residential and commercial types.²¹⁷ Opposing this view, we see four concerns that may require actively limiting multiplicity:²¹⁸

²¹⁴ See Terry A. O'Neill, *Toward a New Theory of the Closely-Held Firm*, 24 SETON HALL L. REV. 603, 605 (1993). See also Edward P. Welch & Robert S. Saunders, *Freedom and Its Limits in the Delaware General Corporation Law*, 33 DEL. J. CORP. L. 845, 846-47 (2008) (arguing that Delaware law increases freedom of contract by creating a “menu” of available options – with mandatory restrictions for corporations but not for partnerships or limited liability companies – so firms can easily “brand” themselves).

²¹⁵ See generally, e.g., WILLIAM T. ALLEN ET AL., COMMENTARIES AND CASES ON THE LAW OF BUSINESS ORGANIZATION (3rd ed., 2009); LARRY E. RIBSTEIN, THE RISE OF UNINCORPORATION (2010).

²¹⁶ See, e.g., FRANK H. EASTERBROOK & DANIEL R. FISCHER, THE ECONOMIC STRUCTURE OF CORPORATE LAW 34-35 (1991).

²¹⁷ Compare 1 FRIEDMAN ON LEASES § 1:2.1 (Patrick A. Randolph, Jr. ed., 5th ed., rel. 20, 2012) (describing modern approach to residential leases as regulatory and replete with “non-waivable rights and obligations [that] may have little to do with the history of lease concepts”), with *id.* § 1:2.2 (observing the lack of any such “wholesale substitution for traditional property notions in commercial leasing.”).

²¹⁸ Another possible concern is that disaggregating contract law to distinct types may hinder cross-fertilization and learning. But this risk is likely to materialize only if we lose sight of the common denominators of the various contract types.

(a) *Cognitive constraints.* If there are too many distinct types, then multiplicity itself may curtail people's effective choice – a paradox that cognitive psychologists have found.²¹⁹ Addressing such cognitive limits is a delicate challenge for contract law design.

(b) *Boundary disputes.* Multiplicity may also trigger boundary disputes arising from ex post opportunistic maneuvering.²²⁰ This difficulty does not negate the value of contract type diversity, partly because having in mind a salient model (or a few salient models) of the intended transaction likely reduces the probability of ex post misunderstandings – at least by comparison with the alternative of contracting through the necessarily vague “general” contract law. But boundary disputes nonetheless pose a challenge to legal architects. Their cost is probably reduced to the extent that law successfully conveys the animating principles of the various contract types. We hope our call to reinvigorate their significance in contract law scholarship and education makes a modest contribution in this direction. But this may not be enough. So we acknowledge that boundary arbitrage concerns may justify heightened formalities for entry – and such formalities should be refined with an eye to ensuring that both parties have the same contract type in mind.²²¹

(c) *Market structure.* In certain market structures, multiplicity might undermine the autonomy of weak parties rather than, as usual, augmenting it. Offering a few alternative, standardized types for the same activity typically opens options for weaker parties just as competition over prices increases consumers' choice. But in certain asymmetric scenarios – say, markets for unskilled workers in times of non-negligible unemployment – multiplicity may generate a race to the bottom that would curtail autonomy. To the extent contract law reformers subscribe to our

²¹⁹ See generally BARRY SCHWARTZ, *THE PARADOX OF CHOICE: WHY MORE IS LESS* (2004).

²²⁰ See Martijn W. Hesselink, *Non-Mandatory Rules in European Contract Law*, 1 EUR. REV. CONTRACT L. 43, 48-49 (2005).

²²¹ To preempt an objection, we think such “entry rules” should be shaped so that they could not be fairly treated as significant impediments to people's freedom of action. An alternative strategy to formalities on entry, which we disfavor, is one of ex post equitable inquiry.

approach, they need to be cautious *not* to provide multiple forms where doing so likely undermines autonomy.

(d) *Political economy*. Certain contract types may be particularly vulnerable to the risk of interest group rent seeking.²²² When the autonomy-reducing consequences of such rent seeking likely outweigh the autonomy benefits from an additional contract type, reformers should again not support the new type.

2. *Tailoring law to local animating values*. Freedom of contracts requires that contract law offer different, but equally valuable and obtainable, frameworks of interpersonal interaction. A mosaic of contract types within a single sphere of contracting activity is valuable – indeed, indispensable – for autonomy.

(a) *Business contracts*. To sustain such a mosaic, contract law needs to tailor its rules to the local animating values of each distinct type. This is implicitly the goal of the Schwartz and Scott model. By concentrating on sophisticated organizations seeking the maximization of joint surplus as their ideal-typical contracting parties, they insist that business contract law should be minimal, that is, it should focus on giving the parties wide latitude and enforcing their deal.²²³

By contrast, as contract types emphasize more relational goods, the contracting parties are increasingly understood, by themselves and others, as active participants in a joint endeavor, as members in a purposive community.²²⁴ Thus, as Macneil emphasizes, governance is of the essence regarding many thick relational contract types and law should aim at developing governance structures that sustain interdependence and are conducive to long term trust and solidarity.²²⁵

²²² See Nathan B. Oman, *A Pragmatic Defense of Contract Law*, 98 GEO. L. J. 77, 86–90 (2009).

²²³ See *supra* note 97 and accompanying text.

²²⁴ For an example of “general” contract law that supports contracting parties in their contractual community, consider the duty of good faith and fair dealing. Although frequently said to inhere in all contracts, in practice it is highly context-dependent, as it should be. See, e.g., IAN AYRES & RICHARD E. SPEIDEL, *STUDIES IN CONTRACT LAW* 719 (7th ed. 2008).

²²⁵ See *supra* notes 114–116 and accompanying text.

(b) *Agency*. Consider, for example, the agency contract type, which structures the agent-principal relationship. A principal is bound by (and may be liable for) her agent's acts.²²⁶ This authority to bind generates vulnerability. Some implications of this vulnerability are straightforward: where an agent binds her principal while acting only in the scope of her apparent authority, he has a cause of action for breach of fiduciary duty.²²⁷ Others are more subtle; they imply intricate governance rules,²²⁸ dealing with topics such as disclosure,²²⁹ consultation,²³⁰ and adjustments.²³¹ Because these governance rules are not easily amenable to any form of maximization function, agency and other relational contract types are qualitatively different from contracts for the pursuit of efficiency gains.²³²

(c) *Family contracts*. Finally, as we reach the social pole of contracting – say in the context of marriage contracts – the contractual community is also part of the actor's own self-understanding.²³³ As this plural identity becomes a more constitutive element of each individual's self-understanding, applying responses from the commercial sphere threatens to undermine, rather than advance, the goods these contract types aim to encourage. It is thus not surprising that premarital agreements and separation agreements are governed by a unique set of rules – think about the fairness review that typifies the former and the possible judicial modification for change of circumstances that characterizes the latter –

²²⁶ On the agent's authority to bind the principal, see RESTATEMENT (THIRD) OF AGENCY §§ 6.01–6.02, 2.01–2.02 (2006); on the principal's liability, see *id.* § 7.03–7.08.

²²⁷ See *id.* § 8.09 cmt. b.

²²⁸ Cf. DeMott, *supra* note 191 (forthcoming 2014) (“direction, supervision [and] authority . . . loom large in how agency relationship functions.”).

²²⁹ RESTATEMENT (THIRD) OF AGENCY §§ 8.11 (2006); see also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 20(1) (2000).

²³⁰ See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 20(1) (2000).

²³¹ Adjustments of relations between the principal and agent are governed in part by the doctrine of ratification. See RESTATEMENT (THIRD) OF AGENCY §§ 4.01–4.08 (2006).

²³² See *supra* note 195 and accompanying text.

²³³ See, e.g., MARGARET GILBERT, *LIVING TOGETHER: RATIONALITY, SOCIALITY, AND OBLIGATION* 2, 8 (1996).

which derive more from the typical characteristics of this contract type than from any general principle of contract as a whole.²³⁴

As these examples demonstrate, our distinction between utility and community is not about whether the contracting activity is economic in some absolute sense. After all, we are dealing with contracts that always have economic implications, especially at the “end-game” when the contractual community breaks down and people move from cooperation to breach. But colorful dramas at breach should not obscure the daily – and ultimately more germane – mid-game life of contract types.²³⁵ Hence, we focus on the role of contract types as forums for various sorts of interpersonal relationships – with thick, thin, or no community, and we argue that the predominant character of each contract type along this spectrum affects (or at least should affect) its doctrinal architecture.

Even rules about end-game breach can be analyzed from this perspective because they can, and often do, serve as background norms to channel and shape participants’ expectations in the varying contract types at stake.²³⁶ In other words, mid-game purposes dealing with the daily and the mundane should inform end-game rules dealing with failures and pathologies. These distinctions suggest a concrete area for contract law reform: in relational contracts, perhaps require the parties to share the efficiency gain secured by the promisor’s alternative transaction after breach, *contra* the general law, derived from wealth-maximizing contract types, that disallows such recovery.²³⁷

²³⁴ See Brian H. Bix, *Contract Rights and Remedies, and the Divergence Between Law and Morality*, 21 *RATIO JURIS* 194, 203 (2008). See generally Brian H. Bix, *Private Ordering and Family Law*, 23 *J. AM. ACAD. MATRIMONIAL LAW* 249 (2010).

²³⁵ See Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code’s Search for Immanent Business Norms*, 144 *U. PA. L. REV.* 1765, 1796-98 (1996).

²³⁶ See Dagan & Heller, *supra* note 70, at 597-98; Carolyn J. Frantz & Hanoch Dagan, *Properties of Marriage* 104 *COLUM. L. REV.* 75, 95-98 (2004).

²³⁷ See DAGAN, *supra* note 66, at 278-82.

IV. CHALLENGES AND OPPORTUNITIES

We have now set out a general and liberal theory of contract law. We cannot hope to explore in this (relatively) concise Article all the possible challenges our theory must face or the opportunities it may open up. But before we conclude, we need to address briefly one major normative concern, clarify our position on another set of more concrete issues, and outline a few reformist directions our approach recommends.

A. *Neutrality and Residual Contracting*

Some readers may worry that rather than serving our liberal commitments, a freedom of contracts regime actually betrays them. Our approach, according to this argument, violates “the precept of state neutrality” both in its endorsement of self-authorship as contract’s ultimate value and in privileging a limited (albeit not insignificant) number of contract types.²³⁸ Wouldn’t a more neutral regime that equally supports all possible arrangements that people might want to take up be superior for the task of facilitating people’s ability to choose and revise their various endeavors and relationships? And wouldn’t focusing on contract types obscure the significance of “a vibrant general contract law” not only for the sake of legislative (or reporting or teaching) economy, but also as a liberating device that allows individuals to reject the state’s favored forms of interaction and decide for themselves how to mold their interpersonal interactions?²³⁹

Let’s start with this last point. Because we believe that contract types share a commitment to voluntariness, we do not call for eradicating all general contract doctrines, and agree that some – although by no means all – doctrinal implications of this commitment take a trans-substantive

²³⁸ This critique blends reference to both “neutrality as a first-order principle of justice” and to “neutrality as a second-order principle of justification.” On this distinction and its significance to theoretical liberalism, see Peter De Marneffe, *Liberalism, Liberty, and Neutrality*, 19 PHIL. & PUB. AFF. 253 (1990).

²³⁹ See Martijn W. Hesselink, *Private Law Principles, Pluralism and Perfectionism*, in GENERAL PRINCIPLES OF EU LAW AND EUROPEAN PRIVATE LAW (forthcoming 2013).

form.²⁴⁰ But voluntariness does not require parties to contract explicitly about their relationship.

A forced contracting system would be quite burdensome, rendering certain types of interpersonal relationships too costly to enter into, at least for some. In many contexts it would also still miss the “authentic” substantively neutral position, because all contracting schemes ratify the parties’ contingent background expectations and power imbalances, so that what may seem an innocent equilibrium generated by neutral market processes is oftentimes a path dependent contingency that, as such, should not necessarily be privileged.²⁴¹ Further, even if, or to the extent that, the freedom of contracts paradigm may entail a crowding out effect, this effect seems to be offset by the greater choice of options provided by contract types that would cease to exist, or become available only in rather circumscribed settings, were it not for the support of the law, as well as by a greater choice-making capability within legally facilitated types.

Finally, whatever detrimental effects law’s active facilitation may entail is likely to be remedied if contract law takes seriously our prescription of reinforcing minoritarian and utopian contract forms (discussed below) and properly structures the residual category of freestanding contracting. Indeed, it seems indispensable to freedom that people be able to “invent” their own private forms of contracting outside of any familiar contract type (a freedom that distinguishes contract from property). The law governing such residual contracting should be shaped with this purpose in mind, rather than piggyback on the arm’s length commercial contract that the Willistonian project imagined as the default.

Our approach also seems to score quite high on the neutrality test. To see why, realize that contract law cannot practically give equal support to all the possible arrangements people may want to make; further, it should not even try to offer such support because having too many options may curtail choice just as much as having too few.²⁴² Because law’s

²⁴⁰ See *supra* text accompanying notes 181-185.

²⁴¹ See generally Tom Ginsburg et al., *Libertarian Paternalism, Path Dependence, and Temporary Law*, 81 U. CHI. L. REV. Pt. I (forthcoming 2014); Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U. CHI. L. REV. 1159, 1161, 1171-83 (2003).

²⁴² See *supra* text accompanying note 219.

support makes a difference – very few contract types would have looked as they do, and would have worked as well as they do, without the active support of law – contract law necessarily prefers certain types of arrangements over others.

Furthermore, even respecting each contract type, law cannot be strictly neutral because every choice of a set of legal rules governing a particular contract type facilitates and entrenches one ideal vision of the good in that particular context. But the obligation to provide a diverse menu of contract types imposes less than its alternative, namely: the one-type-fits-all of traditional contract theories with their global, overarching principles. Finally, as a power-conferring body of law, which people can but need not invoke or use in pursuing their objectives, it is hard to think of any intelligible, let alone neutral, alternative to autonomy as self-authorship as contract's ultimate value.²⁴³

B. Mandatory Rules and Sticky Defaults

Our fundamental commitment to voluntariness²⁴⁴ implies that people should generally be able to choose not only among various contract types, but also terms within each one of them so as to ensure that they best serve their own conception of the good and the proper means for realizing it, given their particular needs and circumstances.

Mandatory rules are troublesome from this perspective because they do not accommodate heterogeneity, let alone idiosyncrasy. Thus, where no third-party negative externalities are at stake, contract law should not mandate its rules; rather, people should be able modify them at will, tailoring their arrangements in accordance with how they prefer to

²⁴³ See *supra* text accompanying note 64. Can democracy serve as such a value, so that contract law could safely and solely rely on whatever choices our elected representatives entrench in their legislated products? We do not think so. Not only does this suggestion seem to conflate the search for substantive moral truth with that of institutional legitimacy (which this Article brackets), but it also overstates the comparative advantage of legislatures vis-à-vis courts in private law matters. Cf. Hanoch Dagan, *Judges and Property*, in *INTELLECTUAL PROPERTY AND THE COMMON LAW* 17 (Shyam Balganeshe ed., 2013).

²⁴⁴ See *supra* text accompanying notes 178-186.

cast their interpersonal relationships. To be sure, in certain contexts, law may legitimately regulate and at times even strictly scrutinize such opt-outs to guarantee that they indeed reflect people's informed and rational choices. But, to the extent possible, contract laws should try overcoming problems of information asymmetry, cognitive biases, and strategic behavior as well as engage in the cultural production of stable expectations regarding contract types by prescribing sticky defaults, rather than curtailing choice by using mandatory rules.²⁴⁵

While the discussion so far does not diverge from that of a more traditional freedom of contract analysis, our perspective raises two additional explanations for at least some of the mandatory rules and sticky defaults that are so prevalent throughout contract's diverse domain.

One reason for refinement emerges from the heightened ambition of the classical freedom of contract paradigm. That model examines the impediments to informed cooperation through just one prototypical contract form. Working from the arm's length merchant transaction, the conventional wisdom of freedom of contract analysis struggles to justify the diverse settings in which regulation is warranted. By contrast, our freedom of contracts paradigm already anticipates a multiplicity of such regulations corresponding to the multiplicity of contract types. It is no stretch for us to claim that contract law must fine-tune its devices to address quite diverse challenges.²⁴⁶

While this first justification for regulating opt outs focuses on assuring that contract types are viable, notwithstanding the systemic difficulties they would otherwise encounter, the second turns to the concern that easy mutability may undermine their cultural function. To give an example from fiduciary law, the "general" contract law rhetoric of gap-filling and optionality may signal indifference towards fiduciaries' duty of loyalty, thus diluting the expressive function of fiduciary law.²⁴⁷

²⁴⁵ Hanoch Dagan, *Pluralism and Perfectionism in Private Law*, 112 COLUM. L. REV. 1436 (2012). Admittedly, at times, mandatory rules may be the only credible solution. See, e.g., SHAVELL, *supra* note 102, at 207-14.

²⁴⁶ See *supra* Sections III.D.2 & III.A.2.

²⁴⁷ See Melanie B. Leslie, *Trusting Trustees: Fiduciary Duties and the Limits of Default Rules*, 94 GEO. L.J. 67, 69-70, 91, 116 (2005). Cf. Dagan,

Insofar as these effects threaten the social norms that seem crucial to sustaining the fiduciary form, they may also pose a valid concern for liberal contract law.

On its face, acknowledging these concerns may seem to be in tension with the commitment to autonomy. But it is not. Properly applied, they only mean that opt out may be justifiably regulated if and only if three conditions obtain: (1) the regulation is indispensable to the viability of that contract type, so that without it people would have *fewer* options regarding a given activity; (2) people can freely invoke the regulated contract type, namely that they are also able to engage in that activity using an alternative, less regulated contract type; and finally (3) the regulation entails the minimal interference with people's choice necessary to overcome the relevant material or expressive concerns.

The first condition highlights the possible autonomy-enhancing role of mandatory rules and sticky defaults in facilitating, at times even enabling, contract types. Our analysis of consumer contracts as being aimed at allowing people to make quick, anonymous, and secure transactions²⁴⁸ may be a prime example for a contract type that would be meaningless without extensive regulation.

The second condition is more demanding. It requires that there would be sufficient intra-sphere multiplicity regarding the activity and that people indeed make informed choices when invoking the more regulated contract type. People who refuse to enter into what they perceive as an overly-regulated contract type should not be deprived of an area of self-authorship. (Think again about the possibility of becoming an independent contractor left open to someone who finds the immutable rules and sticky defaults that typify employment contracts objectionable, or the ability to engage in an arm's length purchase through sales law if one objects to the constraints that constitute consumer contracts.)

Finally, the third condition highlights the significance of sticky defaults of various kinds as a preferred alternative to mandatory rules. Ian Ayres has recently demonstrated that sticky defaults may be justified on

supra note 245, at 1436 (referring to a prenuptial agreement providing that a given marriage would last for a week or a month).

²⁴⁸ See *supra* text accompanying note 177.

efficiency grounds.²⁴⁹ Our account shows that at times they may serve an important role in enhancing autonomy. Thus, for example, fiduciary law can, and to some extent already does, address the expressive concerns noted above,²⁵⁰ while avoiding mandatory rules, by using “impeding altering rules”²⁵¹ which allow only limited, specific initial waivers of the duty of loyalty and incorporate further mechanisms to ensure the informed consent of the beneficiary (or of the benefactor) and maybe even their periodic reconfirmation.²⁵²

Interrogating the validity of mandatory rules and sticky defaults along these lines may not redeem them all. But this refined analysis of their relationship to autonomy suggests that at least some of these rules may be attractive features, rather than defects, of a liberal, autonomy-enhancing contract law regime.

C. Legal Reforms

We hope that by now we were able to convince you that freedom of contracts, rather than only freedom of contract, provides both a credible description of contract law’s heterogeneous terrain and a promising normative foundation that justifies many of its otherwise puzzling features.

1. *Concrete examples.* Our approach generates numerous theoretical and doctrinal propositions. To note a few, we: (1) reconceptualize consumer transactions as “no-community” interactions,²⁵³

²⁴⁹ See Ian Ayres, *Regulating Opt Outs: An Economic Analysis of Altering Rules*, 121 YALE L.J. 2032, 2097 (2012) (sticky defaults can minimize the costs of party error (or judicial error) as well as channel contractors efforts towards means that better control externalities).

²⁵⁰ See *supra* text accompanying note 247.

²⁵¹ Ayres, *supra* note 249, at 2086.

²⁵² See Hanoch Dagan & Sharon Hannes, *Managing Our Money: The Law of Financial Fiduciaries as a Private Law Institution*, in PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW, *supra* note 190, at § III.B.1.

²⁵³ See *supra* text accompanying notes 154-156 & 175-177. Consider also, along these lines, the way we analyzed the choice between contracts of franchise and commercial agency. See *supra* text accompanying note 128.

(2) reconcile a doctrinal puzzle in bailment law,²⁵⁴ (3) recast the liquidated damages debate,²⁵⁵ (4) address the confusion around promissory estoppel,²⁵⁶ (5) highlight the cultural significance of contract types such as suretyship and fiduciary law,²⁵⁷ (6) cabin Schwartz and Scott's work to settings where the parties seek solely to maximize the contractual surplus,²⁵⁸ (7) suggest that promisees in relational contracts get a share of the profits captured by their promisors through their efficient breach,²⁵⁹ (8) offer an autonomy rationale for semi-inalienable rights of termination in long-term contracts and limited enforcement of noncompete clauses in employment contracts,²⁶⁰ (9) (cautiously) conclude that wherever no external effects are applicable, sales law be an available alternative to consumer contract law,²⁶¹ and (10) refocus the debate over mandatory rules and sticky defaults, discussed just above.

In these and other cases, the key lesson of our freedom of contracts approach is to use the animating principle of the particular contract type, rather than any "global" principle of "general" contract law, as the benchmark for evaluating the law and prescribing guidelines for its proper evolution.²⁶²

2. *Market for new types.* Another direction for reform, the market for contract types, is implicit in our discussion of the taxonomy of contract types and the liberal obligation to provide *intra*-sphere diversity, but it requires some elaboration. For the most part, creation of new contract types has been demand-driven. We agree with efficiency-based contract theories that demand should be an important driver of legal innovation; demand for new contract types generally justifies their legal facilitation.²⁶³ In the commercial sphere, there are powerful economic forces catalyzing

²⁵⁴ See *supra* text accompanying notes 201-203.

²⁵⁵ See *supra* text accompanying note 204.

²⁵⁶ See *supra* text accompanying notes 206-209; see also *supra* note 184.

²⁵⁷ See *supra* text accompanying notes 162-166 & 247.

²⁵⁸ See *supra* note 97 and accompanying text.

²⁵⁹ See *supra* text accompanying note 237.

²⁶⁰ See *supra* text accompanying note 191.

²⁶¹ See *supra* text accompanying notes 143-147.

²⁶² Recall also, along these lines, our analysis of agency contracts and marriage contract. See *supra* text accompanying notes 226-234.

²⁶³ But not always. See *supra* notes 219-222 and accompanying text.

demand – legal entrepreneurs see value from one-off creation of new forms that are then standardized, replicated, and sometimes codified as discrete types – so the task of contract law can be mostly reactive.²⁶⁴ There is little reason here to think that long-standing market failures will prevent the introduction of valuable new forms, though path dependency and stickiness in legal norms may still suggest some role for active legal shaping of new forms.²⁶⁵

But an autonomy-enhancing view implies an obligation – distinct from efficiency theories – that contract law should respond favorably to people’s innovations even absent significant demand. As people’s ends move away from strict maximization of economic surplus – that is, for most contracting – there is less reason to believe that market-driven contract types offer us what we need as free individuals. In part, this is because the social benefits of such new contract types are hard for an individual legal entrepreneur to capture. Thus, an autonomy-enhancing contract law should prioritize settings where law’s enabling role can best support autonomy through new contracting practices.

While it is difficult to expect that legal systems would routinely invent new contract types, they should favorably respond to innovations even absent significant demand, including innovations based on minority views and utopian theories, insofar as these outliers have the potential to add valuable options for human flourishing that significantly broaden people’s choices.²⁶⁶

²⁶⁴ See Ronald J. Gilson et al., *Contract and Innovation: The Limited Role of Generalist Courts in the Evolution of Novel Contractual Forms*, 87 N.Y.U. L. REV. (forthcoming 2013).

²⁶⁵ This is (roughly) the reason why William Eskridge calls for a legislative study commission in his celebration of what he describes as the emergence of “a pluralistic family law which relies on ‘a utilitarian framework.’” William N. Eskridge Jr., *Family Law Pluralism: The Guided Choice Regime of Menus, Default Rules, and Override Rules*, 100 GEO. L.J. 1881, 1891 (2012). Similarly, long-standing market failures in design of mortgage derivative contracts catalyzed recent legislative interventions. See MICHAEL HELLER, *THE GRIDLOCK ECONOMY: HOW TOO MUCH OWNERSHIP WRECKS MARKETS, STOPS INNOVATION, AND COSTS LIVES* xvi (2008).

²⁶⁶ Indeed, rather than inhibiting experimentalism – as Oman, *supra* note 222, at 94–105, argues – a pluralist contract law, at least in our version, fosters experimentalism.

For example, our approach suggest reforming the sphere of employment, not just to allow more certain choice between employee and independent contractor status, as we proposed earlier,²⁶⁷ but also by developing innovative new contract types. One possibility would be to facilitate job-sharing arrangements that stabilize defaults regarding responsibility, attribution, decision making mechanisms, time division, sharing space and equipment, and availability on off days.²⁶⁸ Another type could require an employee to be terminated only “for cause” (the explicit choice between a for-cause default and the current dominant “at-will” default could help clarify the employer’s obligations to the employee in a way that formal law so far has not achieved²⁶⁹). Finally, employment contract law can add a viable category of phased retirement that may be autonomy-enhancing by reducing the financial and psychological burdens of suddenly ending employment, while delivering significant benefits to employers by keeping experienced labor in the workforce at a lower cost.²⁷⁰

²⁶⁷ See *supra* text accompanying notes 140-142.

²⁶⁸ The Federal government has often been proactive in facilitating creation of flexible workplaces. For an outline of the government’s job-sharing policies, see U.S. OFFICE OF PERSONAL MANAGEMENT, http://www.opm.gov/employment_and_benefits/worklife/officialdocuments/handbooksguides/pt_employ_jobsharing/pt08.asp. For a general overview of flexible work arrangements, discussion of pros and cons, and a rich selection of secondary sources, see CHRISTINE AVERY & DIANE ZABEL, *THE FLEXIBLE WORKPLACE: A SOURCEBOOK OF INFORMATION AND RESEARCH* 37–80 (2001).

²⁶⁹ Empirical studies have shown that most employees believe their employment can be terminated only for-cause, yet about 85% of non-union employees can be fired at-will. See Jesse Rudy, *What They Don't Know Won't Hurt Them: Defending Employment-at-Will in Light of Findings That Employees Believe They Possess Just Cause Protection*, 23 BERKELEY J. EMP. & LAB. L. 307, 309-10 (2002).

²⁷⁰ Gradual retirement programs can benefit all the relevant stakeholders. See Tunga Kantarci & Arthur van Soerst, *Gradual Retirement: Preferences and Limitations*, NIH Public Access, manuscript at 15–16 (2010), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2862495/pdf/nihms-193194.pdf>. But significant regulatory hurdles remain in the United States. *E.g.*, U.S. Dep’t of Labor, Employee Benefits Sec. Admin., *Report on Phased Retirement*, <http://www.dol.gov/ebsa/publications/2008ACreport2.html> (recommending tax and other legislative reforms).

Part of the value of these (and many other) minoritarian or utopian forms is precisely that most people would *not* choose them. Autonomy requires that people have the ability to choose from among meaningful, distinct options. We are freer people, we are more confident in being the authors of our lives, not just through the contract types we choose, but also through those we affirmatively reject. Therefore, even if there is no market demand (yet) for certain new contract types, even if they might appeal to only a small fragment of potential contracting parties, contract law should ensure availability of some such types.

While liberal contract law has an obligation to support new contract types, there are limits. At a certain point, the marginal value from adding another type is likely to be nominal in terms of autonomy gains.²⁷¹ When our autonomy obligations are satisfied, then contract law has offered enough types. For those who still want something more or different, they can custom craft their own contract – that is, they retain the classical freedom of contract.

CONCLUDING REMARKS

Once released from the straightjacket of classical contract theory – with its search for a unifying principle as its common core – contract law proves to be fertile ground for autonomy-enhancing legal creativity. In an increasingly interdependent world, self-authorship often requires people to undertake voluntary obligations that can be mutually beneficial. But we face numerous material and cultural impediments. Liberal contract law responds with diverse contract types, properly understood as a repertoire of viable options for legitimately enlisting others to our projects in the core spheres of life.

While at first sight an inventory of contract law doctrines embedded in an array of contract types may seem confusing, almost chaotic, the “freedom of contracts” lens opens a new perspective. Our approach brings focus to the doctrinal muddle and shows that the law’s varied solutions to recurring bargaining dilemmas are not random. They

²⁷¹ And it may paradoxically undermine choice and thus autonomy. See *supra* text accompanying note 219.

respond to the spheres of activity in which people contract, and to the different contractual values people are seeking – from utility to community. Putting contract law in context transforms seeming chaos into a coherent legal landscape. “Freedom of contracts” suggests a major refocus of how contract theory should be pursued – and how contract law should be designed and taught.