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## Why Autonomy Must Be Contract's Ultimate Value

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# WHY AUTONOMY MUST BE CONTRACT'S ULTIMATE VALUE

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## ABSTRACT

*In The Choice Theory of Contracts, we develop a liberal theory of contract law. One core task of the book was to persuade advocates of economic analysis that they must situate their enterprise within our liberal framework. Autonomy, rightly understood, is the telos of contract.*

*Oren Bar-Gill pushes back strongly in Choice Theory and the Economic Analysis of Contracts. He offers a penetrating – perhaps devastating – critique of our approach. Bar-Gill notes the substantial convergence between choice theory and a welfarist view. If he is right, then what does choice theory add?*

*Our task in Part I of this Essay is to demonstrate that welfare economics cannot simply absorb contractual autonomy. We show that choice theory has irreducible normative and reformist value along the four dimensions that are core to Bar-Gill's critique: (a) contract's regard for the future self, (b) the special role it ascribes to relational justice, (c) its distinction between utility and community, and (d) its prescription of intra-sphere multiplicity. We go further: welfare economics is indefensible without autonomy as its foundation.*

*Parts II and III respond to sharp critiques of Choice Theory by Yotam Kaplan, Prince Saprai, Ronit Levine-Schnur, Sharon Shakargy, and Ohad Somech. We discuss the proper place of contract values besides autonomy in a liberal contract law; explore the distinctive role contract plays in a liberal polity; and show how intra-sphere contract type multiplicity limits, rather than augments, state power.*

*Since publishing Choice Theory, we have engaged dozens of critiques, including the six in this Volume. All this rigorous debate confirms for us one core point: contract's ultimate value must be autonomy, properly refined. It cannot be welfare. Nor can foundational value pluralism possibly suffice. Autonomy justifies contract.*

# WHY AUTONOMY MUST BE CONTRACT'S ULTIMATE VALUE

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# WHY AUTONOMY MUST BE CONTRACT'S ULTIMATE VALUE

*Hanoch Dagan*\* & *Michael Heller*\*\*

## INTRODUCTION

In *The Choice Theory of Contracts*,<sup>1</sup> we develop a liberal theory of contract law. One core task of the book was to persuade advocates of economic analysis that they must situate their enterprise within our liberal framework. Autonomy, rightly understood, is the telos of contract.

Oren Bar-Gill pushes back strongly in his essay, *Choice Theory and the Economic Analysis of Contracts*.<sup>2</sup> He offers a penetrating – perhaps devastating – critique of our liberal approach. Bar-Gill notes the substantial convergence between choice theory and a welfarist view. If he is right, then what does choice theory add?

The burden is on us to demonstrate that welfare economics cannot simply absorb contractual autonomy. This is our task in Part I of this Essay. We show that choice theory has irreducible normative and reformist value along the four dimensions that are core to Bar-Gill's critique: (a) contract's regard for the future self, (b) the special role it ascribes to relational justice, (c) its distinction between utility and community, and (d) its prescription of intra-sphere multiplicity. We go further: welfare economics is indefensible without autonomy as its foundation.

Parts II and III pivot to sharp critiques internal to *Choice Theory*, including essays by Yotam Kaplan, Prince Saprai, Ronit Levine-Schnur, Sharon Shakargy, and Ohad Somech.<sup>3</sup> In reply, we discuss the proper place of contract values besides

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<sup>1</sup> HANOCH DAGAN & MICHAEL HELLER, *THE CHOICE THEORY OF CONTRACTS* (2017) (Intro and Chapter 1 available on SSRN). Subsequent references appear parenthetically in the text.

<sup>2</sup> Oren Bar-Gill, *Choice Theory and the Economic Analysis of Contracts*, \* JERUSALEM REV. LEGAL STUD. \* (2019).

<sup>3</sup> Yotam Kaplan, *A Normative Inquiry into The Choice Theory of Contracts*, \* JERUSALEM REV. LEGAL STUD. \* (2019); Prince Saprai, *Moving Beyond Promise*, \* JERUSALEM REV. LEGAL STUD. \* (2019); Ronit Levine-Schnur, *Contracts, States, and Obstacles of the*

autonomy in a liberal contract law; the distinctive role contract plays in a liberal polity; and the significance of intra-sphere contract type multiplicity, including how it limits, rather than augments, state power.

Since publishing *Choice Theory*, we have engaged dozens of reviews and responses,<sup>4</sup> including the six in this Volume. All this rigorous debate confirms for us one core point: contract's ultimate value must be autonomy, properly understood and refined. It cannot be welfare. Nor can foundational value pluralism possibly suffice. Autonomy justifies contract.

## I. AUTONOMY, NOT WELFARE, JUSTIFIES CONTRACT – A REPLY TO BAR-GILL

Oren Bar-Gill takes issue with our criticism of welfare economics as a normative theory of contracts. He also doubts choice theory's "ability to generate distinct policy implications." The core of his review is dedicated to showing that choice theory and economic theory are "largely compatible." Indeed, he argues the conflicts between these approaches are so "minimal" that they are "barely perceptible" (1, 7, 9). If he is right, then why does contract need an autonomy foundation? Welfarist analysis does the job. We respond in the reverse order, beginning with irreducible differences and then turning to the normative foundations.

### 1. Four Irreducible Differences

Bar-Gill identifies and rejects four areas where choice theory might offer a distinctive path from the one welfare economics proposes – (a) its regard to the future self, (b) the special role it ascribes to relational justice, (c) its distinction between utility and community, and (d) its prescription of intra-sphere multiplicity. Bar-Gill is unconvinced that concern for autonomy is worth the bother.

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*Imagination*, \* JERUSALEM REV. LEGAL STUD. \*, [5] (2019); Sharon Shakargy, *Family, Contracts, Autonomy and Choice*, \* JERUSALEM REV. LEGAL STUD. \* (2019); Ohad Somech, *The Uneasy Move from Autonomy to Alternatives: Self-Determination, Regret, and The Process of Autonomous Choice*, \* JERUSALEM REV. LEGAL STUD. \* (2019).

<sup>4</sup> For a sampling, see Volume 38 of LAW & PHILOSOPHY (forthcoming 2019) (special issue on CHOICE THEORY) and Volume 20 of THEORETICAL INQUIRIES IN LAW (forthcoming 2019) (collecting reviews and essays on CHOICE THEORY). We refine choice theory in response to these volumes, respectively, in Hanoch Dagan & Michael Heller, *Autonomy for Contract, Refined*, X LAW & PHILOSOPHY (forthcoming 2018) and Hanoch Dagan & Michael Heller, *Freedom, Choice, and Contracts*, 20 THEORETICAL INQUIRIES L. (forthcoming 2019). The papers in both volumes are mostly available on SSRN.com.

Perhaps *Choice Theory* did explore these four areas too briefly. So, let's revisit them. In doing so, we will show that choice theory does offer distinctive implications from those of welfare economics. Despite Bar-Gill's skepticism, those differences are likely to be both "significant" and "prevalent" (7).

But first, some concessions. Bar-Gill points out that, in *Choice Theory*, we use some economic terms in confusing ways (2-3). We agree. This is a simple fix, maybe in a second edition of the book. But Bar-Gill's (explicit) terminological point incorporates, perhaps, an (implicit) normative one: the claim that all valuable goods can be easily incorporated under a social welfare function which can, in turn, be maximized. If Bar-Gill is indeed making this latter claim, then it is, as we argue below, indefensible.

We also concede welfare economics does have *tools* to explain the four areas of potential divergence that Bar-Gill notes. But the *questions* a welfarist analysis asks are different from those choice theory poses, and the resulting answers differ too. Pinning down these distinctions goes far beyond what we can do in this short Essay. Our mission here is more modest. We want to persuade you that, at a minimum, the difference in practical implications between our approach and Bar-Gill's is more than "barely perceptible." Maybe a lot more.

(a) *Future Selves, Regret and Technology*. The first dilemma Bar-Gill discusses involves rules that prescribe the outer limits of people's power to commit themselves into the future. These include restrictions on the enforceability of employee non-compete agreements, limits on the advance sale of future wages, and the semi-inalienability of the unilateral right of termination of long-term contracts. For us, these examples point to a distinctive autonomy concern in contract law.

Bar-Gill does not find our reliance on these examples persuasive because all three doctrines "can be explained within the standard economic framework" (6). We agree with Bar-Gill that there are welfarist reasons – notably imperfect information, strategic barriers, cognitive failures, or externalities – for restricting alienability. But these welfarist rationales are both tentative and contingent. For example, they are subject to the emergence (at least theoretically) of technologies or legal techniques that would ameliorate rationality-impeding deficiencies and overcome other pertinent market failures. On a welfarist account, technology could render the doctrines protecting future selves obsolete.

As an autonomy-based account, choice theory offers a different understanding of regret, one that is not solvable by technological change. Inalienability rules are premised, under this view, not only on a response to contingent (and surely important) welfarist reasons. Rather, they are based also, and perhaps even primarily, on the

commitment to self-determination. The possibility of regret is an inherent entailment of people's right to (re)invent themselves.<sup>5</sup>

A law that confers upon people the normative power to commit themselves through contracts in the name of enhancing their self-determination cannot ignore the impact of such contracts on their future selves. Self-authorship, after all, stands for our right to write and *re*-write the story of our life. This tension is inherent in contract's *raison d'être* – *any* act of self-authorship constrains the future self. In turn, this implies that contract law needs to be particularly careful in defining the scope of the obligations it enforces and in circumscribing their implications.

The implications of this principle are not limited to examples we mentioned in *Choice Theory*. Consider two further doctrinal manifestations of this autonomy-based principle of regard to the future self. The first concerns mutual mistake, impossibility, impracticability and frustration; the second deals with limits on remedies for breach of contract.

(1) The first set of doctrines delimit the parties' obligations by reference to their shared basic assumptions with regard to facts or the occurrence of a future contingency material to their agreement.<sup>6</sup> Risks that fall outside this domain, and not allocated to the adversely affected party, should not encumber his or her future self. Applying this rule is difficult in practice – and its details vary across contract types – but its autonomy-enhancing rationale is straightforward: there is no “autonomy gain” in enforcing contracts that go beyond the parties' own basic assumptions.

(2) Remedies law is likewise guided by an effort to minimize the future autonomy-constraining effects of a present autonomy-enhancing commitment. Many limitations on remedies for breach of contract nicely belong to this category. The most salient rule here deals with the severe limitations on specific performance (and its cognates) in the common law tradition. This traditionally strong preference for monetary recovery is not, as mistakenly presented by some critics, an *embarrassment* to contract law,<sup>7</sup> but rather a salutary *testament* to contract law's underlying liberal commitments.

Further, situating the parties' self-determination at the core of contract's normative infrastructure nicely accounts for the subtle, yet at times significant, difference between rules in contract types involving people's self-identity and those concerning only material welfare. The prime example here again comes from the law

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<sup>5</sup> Cf. JOSEPH RAZ, *THE MORALITY OF FREEDOM* 384 (1986).

<sup>6</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 152-52 (1981); U.C.C. § 2-615.

<sup>7</sup> See, e.g., Seana Valentine Shiffrin, *The Divergence of Contract and Promise*, 120 HARV. L. REV. 708, 722-24 (2007).

of specific performance, typified by a rigid resistance to awarding such a remedy in service contracts.<sup>8</sup> The same sensitivity to the difference between “me” and “mine” explains and indeed justifies the inapplicability of any reasonableness inquiry regarding refusals to accept a different or inferior position in mitigation of breach of a personal service contract.<sup>9</sup>

Addressing regret is a powerful and meaningful element of our self-determination. It better explains and justifies a wide range of contract doctrines than the contingent welfare economics approach does, not just in the examples advanced in *Choice Theory*, but even more intuitively in the additional doctrinal areas we note here. While technological advances could plausibly address the welfarist concerns regarding constraint of future selves, they cannot eliminate the autonomy-related reasons.

(b) *Relational Justice is Not Distributional Justice.* The most fundamental claim we make in *Choice Theory* is that the legitimacy of enforcing contracts necessarily relies on people’s right to reciprocal respect for self-determination. This right to reciprocal respect is the basis for relational justice. Once we appreciate how self-determination grounds contract’s legitimacy, then it follows that any attempt to recruit the law to advance an agreement that defies this premise must be treated as *ultra vires*: an abuse of the idea of contract, that is, use of contract law for a purpose that contravenes its *telos*.

Many doctrinal rules are best understood as guaranteeing contract law’s compliance with relational justice. Some of these rules are products of adjudication; others were enacted by legislatures and regulatory agencies, oftentimes after the common law has set a vague standard that legislators and regulators then pin down. In *Choice Theory* we mentioned only a small subset of these rules. Here, it may be helpful to identify briefly the four sets of doctrines that robustly vindicate contract law’s requirement of relational justice as the “admission criterion” for recruiting its support. (The following discussion of relational justice in contract relies on Dagan’s co-authored work with Avihay Dorfman.<sup>10</sup>)

(1) Affirmative Obligations. Consider first rules that regulate the parties’ bargaining process in a way that goes beyond the traditional *laissez faire* mode of proscribing the *active* interference of one party with the other’s free will. These rules

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<sup>8</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 367(1) (1981).

<sup>9</sup> See *Parker v. Twentieth Century-Fox Film Corp.*, 474 P.2d 689 (1970).

<sup>10</sup> For more, see Hanoch Dagan & Avihay Dorfman, Justice for Contract (work in progress). The concept of relational justice, on which we rely, is developed in Hanoch Dagan & Avihay Dorfman, *Just Relationships*, 116 COLUM. L. REV. 1395 (2016); Hanoch Dagan & Avihay Dorfman, *Justice in Private: Beyond the Rawlsian Framework*, 36 L. & PHIL. 171 (2018).

expand the set of “vitiating factors” by prescribing *affirmative* interpersonal obligations. This category accounts for the expansion of the law of fraud beyond the traditional categories of misrepresentation and concealment to include also – notably in real estate and securities transactions – disclosure duties. This conceptual expansion also underlies the doctrine of unilateral mistake. Similar analysis may help explain duress cases of wrongful threats that do not violate others’ rights as well as anti-price-gouging laws and admiralty rules of salvage. Finally, a charitable reading of unconscionability doctrine and some of its regulatory cognates nicely fits an autonomy-enhancing model, one that is careful to ensure that contract is used only in settings that comply with the minimal requirements of reciprocal respect to self-determination.

(2) Cooperation Obligations. A parallel group of diverse rules includes moderate duties to assist in promoting each other’s self-determination, rules that, viewed together, solidify a cooperative conception of contract performance. An important member of this group is the duty of good faith and fair dealing which sets up the contractual rules of the game. But it is not the only one. The substantial performance doctrine in service contracts, the role of the principle against forfeiture in applying the condition/promises distinction, the modern tendency to expand the excuses for nonperformance and to validate contract modifications due to changed circumstances. Consider also the long-standing burden to mitigate and the choice of the expectation interest as the default measure of recovery. All these doctrines can be interpreted as belonging to this cooperative framework, explained by (modest) affirmative obligations rooted in reciprocal respect and relational justice.

The last two sub-categories of doctrines that vindicate contract law’s compliance with relational justice are not part of the conventional canon of contract law, but are increasingly part of the actual life of contract. Highlighting the continuity between these doctrines and the more canonical manifestations of relational justice in contract law noted above also helps demonstrate the prevalence of relational justice in already-existing doctrine.

(3) Interpersonal Decency. One subcategory mandates the minimal level of interpersonal decency that contract law is willing to accept regarding contract types that significantly affect the personhood of one of the parties – regarding for example, minimum wages, safety in the workplace, and the habitability of homes. Relational justice is the most plausible foundation for this group of immutable contract rules, which are by now well-entrenched, but whose grounding is nonetheless still tormented as a matter of contract theory.

(4) People as They Actually Are. The other subcategory concerns duties to respect the contractual party as the person she actually is, and thus, up to a point, accommodate her constitutive features such as race, gender, nationality, religion, disability, familial status, and sexual orientation. At times, these duties are relevant to

the content of the parties' obligations. More often, however, they serve as "gatekeepers" to ensure that parties who make systemic use of contract – by becoming employers, landlords, or owners of public accommodations that offer services to the public – do not apply discriminatory practices in their choice of contractual counterparts and thus contravene the requirement of reciprocal respect to self-determination on which contract is founded.

Bar-Gill is not impressed by the weight of this contract doctrine and practice. For him, economic tools break apart our relational justice category. At least some of these doctrines, he argues, "might exacerbate, not ameliorate, concerns about relational justice," given that they may incentivize "the stronger party [to] adjust the contract price or altogether refuse to deal with the weaker party." And absent such *ex ante* adjustments, autonomy and welfare are likely to converge, since "welfare economics allows for distributional considerations." Bar-Gill adds that he recognizes "the difference between relational justice and distributional justice," but that his argument here is that, "as a practical matter in the contexts that [we] emphasize, the two often lead to similar policy prescriptions" (6).

We disagree. Practices may be *relationally* unjust even if they do not violate *distributive* justice or *efficiency* – indeed, they may be relationally unjust even if they promote both.

Bar-Gill is correct that most paradigmatic examples of contractual terms purporting to promote distributive justice likely prove futile or even counter-productive. Why? Because the rich, as Richard Craswell claims, are typically "willing to pay more for protection against [many risks] simply because they have more money with which to pay." So, the inter-consumer distributional effects of many "pro-consumer rights" are likely to "favor the rich at the expense of the poor." This means that "the identity of the winners and losers may be correlated with wealth in a way that makes the resulting redistribution regressive."<sup>11</sup> Craswell's analysis applies quite broadly – it explains (for example) the conventional economic wisdom that distributive justice recommends using an earned income tax credit, rather than a minimum wage,<sup>12</sup> and it justifies substituting rules like the implied warranty of habitability with direct measures (such as subsidies) to improve people's housing.<sup>13</sup> All this means, to us at

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<sup>11</sup> Richard Craswell, *Passing on the Costs of Legal Rules: Efficiency and Distribution in Buyer-Seller Relationships*, 43 STAN. L. REV. 361, 376-77 (1991).

<sup>12</sup> Daniel Shaviro, *The Minimum Wage, the Earned Income Tax Credit, and Optimal Subsidy Policy*, 64 U. CHI. L. REV. 405 (1997).

<sup>13</sup> David A. Super, *The Rise and Fall of the Implied Warranty of Habitability*, 99 CAL. L. REV. 389, 461 (2011).

least, is that the architects of contract rules must attend to the final incidents of each potential measure if they are truly committed to distributive justice.

Thus, *distributive* analysis is important. Nothing of what follows belittles its significance. But this is not what *relational* justice is about. Indeed, collapsing relational justice into distributive justice is exactly what happens if we shift from an autonomy-based theory of contract, which focuses on the *parties' interpersonal interactions*, to a welfarist one, which focuses on the *social order as a whole*.

We accept that the demands of distributive justice may at times supersede those of relational justice. But this agreement does not diminish the freestanding significance of relational justice. Distributive justice *can* be addressed elsewhere (e.g., tax and redistribution). By contrast, *only* private law – the law of our interpersonal interactions – can address instances of relational wrongdoing. Yes, sometimes, sufficiently pressing distributive concerns may legitimately override the demands of private law's relational commitments. But simply collapsing relational commitments into distributive justice does not even allow such (complex, to be sure) judgments. Such a strategy must be unacceptable given the freestanding significance of our interpersonal relationships; in our capacity as workers or consumers, as opposed to citizens, for example, in a given polity.

Indeed, like private law more generally, contract law is not just another instrument for achieving *public* goals, such as the goal of distributive justice. Having a body of law that specifically governs our interpersonal relationships as persons is independently, normatively significant. Recognizing both the value and the potential threat of our horizontal interactions in the array of social spheres governed by contract law – such as family, work, home, and commerce – implies that a core responsibility of justice lies in delineating the floor (the minimally acceptable ways) in which people treat each other in and around contracts. People are entitled to be treated in a way that respects their status as self-determining and substantively equal persons – not only vertically (with the state), but also horizontally (with each other).<sup>14</sup>

Because reciprocal respect to self-determination is the premise of contract law's own legitimacy, the floor of relational justice is *not* constrained by a welfarist analysis, even when its focus is distributional.

(c) *Community is Not Utility*. Our discussion of the last two sources for gaps between a welfarist analysis of contract and one guided by choice theory can be briefer. Unlike the first two (future selves and relational justice), the latter two are discussed at

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<sup>14</sup> See Dagan & Dorfman, *Just Relationships*, *supra* note 10, at 1406-09.

some length in *Choice Theory* (at Chapter 6 and Part III, respectively). A few clarifications are nonetheless in order.

Bar-Gill questions the prevalence of conflicts between utility and community. He maintains that we rely on an overly narrow definition of utility when we insist that community dominates in some contract types. He does seem to concede our claim that process (contract governance) and not just the outcome is crucial for contract types in which the thick (or maybe even thin) community value predominates. Think here of the sphere of intimacy or, to a lesser extent, work. But Bar-Gill nonetheless insists that “if people value the process, then this value will be counted in the welfarist calculus” (7).

We briefly addressed this point in *Choice Theory*: while process values can be optimized, they do not lend themselves “to the maximization formula that economic analysis employs” (91). Maybe we can go a bit further here.

The main objection to the familiar move of reducing all values – say, community – to welfare is, as Bar-Gill himself elsewhere acknowledges, that it “forces commensurability on incommensurable values” (5; see also CTC, 54, 65). Community, as we used that term in Chapter 6 of *Choice Theory*, is intended to capture “a set of values that are incommensurable with the material benefits that comprise [our] notion of utility” (5). It refers to intrinsically relational goods, such mutual trust, interpersonal commitment, support, caring, self-identification, and the confident reliance on specific other individuals which these relations tend to bring about.

At root, it seems Bar-Gill must be skeptical about the incommensurability of these relational goods and the material benefits of contract – to which we refer in *Choice Theory* as utility. He does raise the (intriguing, but somewhat puzzling) possibility that the economic analysis can accommodate incommensurability “using lexical ordering.” We are not sure how that would work.

Maybe a better characterization of Bar-Gill’s skepticism is this: perhaps, he believes community values and material benefits are indeed incommensurable goods, but the differences are not meaningful in practice (5). If so, we can safely leave aside the autonomy approach in favor of the welfarist one. If this last point captures his view, we must confess that we are skeptical about this skepticism.

We acknowledge that relational goods tend to be conducive to the parties’ cooperation, and that in this “capacity” they can, and indeed have been, successfully integrated into the economic analysis of contracts (CTC, 59-60). Where community is a *means* to utility – such as in analyzing business contracts, consumer contracts, and the like – insisting on the incommensurability of relational goods and material benefits may be pedantic and even redundant.

But this is hardly the case where the community value is neither residual nor instrumental, that is, in much of contracting outside the business and consumer contexts. Designing a regime of contract governance that takes the facilitation of relational goods as its main task – so as to shape contract as a “special bond between people”<sup>15</sup> – seems quite different from designing one that aims at maximizing material benefits. Therefore, for us, the prediction that they are likely to converge – or that the differences are trivial in practice – seems counterintuitive.

(d) *Minoritarian and Utopian Contract Types*. Finally, Bar-Gill claims that even the prescription we most emphasized in *Choice Theory* – facilitating minoritarian and utopian contract types – may not distinguish choice theory from a welfarist analysis. Why? “The economic analysis of contract law has long recognized the importance of minoritarian default rules” (7).

However, Bar-Gill elides a crucial distinction between minoritarian contract *rules* and minoritarian contract *types*. This is important because, for choice theory, what is special about types is that some must be *partial functional substitutes* for each other. Indeed, “[t]hey need to be substitutes because choice is not enhanced with alternatives that are orthogonal to each other; and their substitutability should not be too complete because types that are too similar also do not offer meaningful choice” (CTC, 106-107).

The difference between rules and types reflects a more profound distinction. The economic analysis of contract law looks for minoritarian default terms to serve social welfare; more precisely, they may be penalty defaults that have an efficient information-forcing function. In choice theory, by contrast, minoritarian types are summoned in the service of people’s autonomy.

As we argued in *Choice Theory*, to enable the rich diversity of interpersonal relationships needed for adequate self-determination, a liberal contract law must ensure the availability of a sufficiently diverse repertoire of contract types in each major category of human action and interaction. In turn, to qualify as sufficiently diverse, these types must be governed by distinct animating principles, meaning different values or different value balances. A state committed to human freedom, we claimed, must be proactive in shaping contract law, including ensuring a sufficient number of such partial functional substitutes, so that it offers meaningful alternatives.

This commitment, we further claimed, means the state is sometimes obligated to support establishment of emerging types that serve minoritarian or utopian values – even when market demand for the new types is low. This obligation has a rather critical

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<sup>15</sup> Joseph Raz, *Promises in Morality and Law*, 95 HARV. L. REV. 916, 928 (1982).

edge in the non-commercial spheres of contracting – work, home, and intimacy – where the market predictably undersupplies contract types (CTC, chapter 11).

As we tried to explain in *Choice Theory* (e.g., at 125), market failures do not exhaust the rationale for this affirmative state obligation. For choice theory, the prescription of intra-sphere multiplicity is, as just noted, autonomy-based. “Autonomy requires that people have the ability to choose from among meaningful, distinct options.” It is for this reason that choice theory requires that, even if these minoritarian or utopian contract types “might appeal to only a small subset of potential contracting parties, contract law should ensure availability of some such types” (125).

Thus, the obligation of liberal contract law to ensure intra-sphere multiplicity has a decidedly non-welfarist foundation. In turn, it implies that people’s preferences regarding the number of choices they want to have in any given sphere must not be determinative, even if they are not insignificant. After all, as we argue below, our autonomy is not important because we have a taste or a preference for self-determination. It’s the other way around: our preferences are important to the extent they reflect our self-determination.

This reversal does not imply that we shape contract law willy-nilly. Rather, it accepts that valid empirical data and good economic analysis regarding people’s preferences and perceptions is crucial (8). But that is not enough. Choice theory adds further empirical questions to the usual data that welfarist analysis would generate – some of these new questions we addressed in our book (106-07, 128-30) and others we discuss in Part III.2 below. The bottom line is we must look beyond sheer preferences to fine-tune contract law’s intra-sphere multiplicity so it can optimally serve people’s autonomy.<sup>16</sup>

## 2. Normative Foundations

Bar-Gill insists that welfare economics – which “prescribes policies that maximize the social welfare function” – provides a satisfactory normative theory for contract.

In particular, he resists our characterization of welfare foundationalism as collectivist, writing that “economists’ collectivist commitment loses much of its power

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<sup>16</sup> We defer Bar-Gill’s forceful analysis on the dangers for choice theory of state domination via preference-shaping until Part III.3.(a) below. In addition, there are (at least) two further, potentially important wrinkles, that require further analysis. First, as we claim in the following section, there may be existing objects of choice-through-contract whose elimination would not necessarily undermine people’s self-determination. Second, choice theory might require addressing a heterogeneity problem, assuming some people need fewer choices to optimize their autonomy than others. (We are grateful to Bar-Gill for highlighting this point.)

in the domain of contracts.” The reason for this is twofold. First, “freedom, in the sense of a ‘free market’ has been a basic tenet of economic theory.” Economic theory supports free markets and freedom of contract due to “the epistemic assumption that individuals generally have more information than the government about how to maximize their own preferences.” Second, so long as contracts do not impose significant externalities on third parties, “the legal rule that maximizes social welfare also makes the two contracting parties better off or maximizes the joint contracting surplus” (4-5, 9).<sup>17</sup>

Put differently, Bar-Gill argues that, in *contract* law, normative concerns regarding welfare foundationalism should be treated as a “false alarm.” Welfare economics is bound to respect individual freedom, because (1) free contracting is the best way to ensure allocative efficiency; and (2) except for cases of significant externalities, social welfare and joint maximization of the parties’ preference satisfaction will converge.

We appreciate both the epistemic role of freedom of contract and the close, albeit not full, alliance of a “local welfarist” accounting with full-blown social welfare (CTC, 53-54). Each of these points may ameliorate the collectivist concerns, but neither one can set them aside. Why? Because neither addresses the real difficulty of welfare foundationalism. The former’s commitment to freedom of contract is only contingent; the latter presupposes an intolerably reductionist understanding of freedom. Read together, both these reasons require that a liberal polity must renounce welfare foundationalism.

(a) *Can Technology Replace Freedom of Contract?* Consider first the role of freedom of contract in welfare economics. Welfare economics celebrates free markets as a means “to achieve the greatest good for the greatest number.” The invisible hand of the market – in this case, freedom of contract – offers, in this view, a comparative advantage vis-à-vis other forms of social design because it harnesses individuals’ self-interest to both obtain and process information about people’s tastes and preferences. As Eric Posner and Glen Weyl put it, the market is “programmed” to allocate resources

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<sup>17</sup> As an example, Bar-Gill claims that expectation damages and efficient breach “maximize[] social welfare by allowing for the optimal allocation of resources in society,” but are “also in the ex ante best interest of both contracting parties, including the breach victim.” Whereas this nice convergence applies regarding the rule governing promisors’ decision of whether to perform or to breach, expectation damages is probably not socially optimal insofar as it pertains to the parties’ decision of how much and when to rely. See, e.g., ROBERT E. SCOTT & JODY S. KRAUS, *CONTRACT LAW AND THEORY* 843 (5<sup>th</sup> ed., 2013). As we explain below, autonomy provides a much more secure foundation for protection of the parties’ expectations, a core feature of contract. See *infra* text accompanying note 30.

efficiently; it is similar to “a giant computer composed of these smaller but still very powerful computers.”<sup>18</sup>

But if freedom of contract is wholly subservient to an ultimate welfarist goal of optimizing allocative efficiency, we could (as Posner and Weyl do) envision replacing contract with a more efficient mode of economic organization. That is, once people’s *preferences* can be deduced, not from the choices they make, but rather from data such as their behavior or their physical and psychological attributes, then people’s *choices* may no longer be necessary.

Once the total capacity of digital computers surpasses that of human minds (circa, say, the 2050s) – the welfarist function of contract could, and maybe should (from a welfarist perspective), be replaced by machines. Digital computers will be able to learn “the statistical patterns in human behavior [and] use this information to distribute goods (and jobs) as well as, or possibly better than, people can choose goods (and jobs) themselves.”<sup>19</sup> Maybe a computer could assign you an optimal spouse.

Analyzing the human (or is it post-human?) predicament under the governance of “big data” is unnecessary for our purposes. What is important here is to appreciate that if the choices people reveal through contract are merely instruments for employing the market’s program of allocating entitlements so as to achieve the greatest good for the greatest number, then freedom of contract may well be unnecessary.<sup>20</sup> Indeed, freedom of contract may become, as a whole, welfare-reducing.

(b) *Preferences and Choice.* This implication may sound overly-futuristic (although we suspect it isn’t). But even if it is, it reveals a deeper difficulty with welfare foundationalism. The idea that the welfare economist’s (contingent) support for contract guarantees individual freedom depends, as Bar-Gill’s second point clarifies, on a view that equates respect for individual freedom with satisfying her preferences.

This view, however, must be wrong. It ends up undermining the very reasons that justify caring about satisfying people’s preferences and promoting their welfare in the first place, namely, the role of these preferences in people’s life plans and the way social welfare can serve their self-determination.

Welfare foundationalism, in other words, ends up throwing out the baby with the bathwater: people are not data points of preferences or joint carriers of the aggregate

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<sup>18</sup> See ERIC A. POSNER & E. GLEN WEYL, *RADICAL MARKETS: UPROOTING CAPITALISM AND DEMOCRACY FOR A JUST SOCIETY* 278-83, 285-86 (2018).

<sup>19</sup> *Id.*, at 277, 286-87, 289-90, 292.

<sup>20</sup> This paragraph, and the following two, draw on Hanoeh Dagan, *Why Markets? Welfare, Autonomy, and The Just Society*, 117 MICH. L. REV. (forthcoming 2019).

social welfare. They are agents with projects who are entitled to govern their lives. Viewed this way, welfare foundationalism cannot plausibly justify contract. As is often the case, refining our *normative* foundation is *practically* significant, because it tends to “generate distinct policy recommendations” (9).

True believers in welfare foundationalism should not necessarily be alarmed by the idea of replacing contract by machine. The tenor of Bar-Gill’s response suggests that he is not a proponent of *that* idea. Ultimately, he seems still to share our view that puts autonomy first. He just does not believe a commitment to autonomy imposes much cost on him as a welfare economist. The sophisticated normative and empirical tools of welfare economics do a good enough job of incorporating autonomy concerns.

But autonomy is not free. It requires welfare economists to make adjustments, including along all four dimensions Bar-Gill raises and we discuss in Part I.A above. We count Bar-Gill as an advocate for freedom. But to be an advocate means agreeing contract’s ultimate value is autonomy, properly understood and refined. It cannot be welfare.

## II. OTHER CONTRACT VALUES ARE NOT FOUNDATIONAL EITHER

We are now ready to address the concerns of our other commentators, which share an important common denominator. Like Bar-Gill, they resist the way choice theory privileges autonomy over other contract values, but from a different direction.

There are two versions to this resistance. The *weak* version is concerned that choice theory’s autonomy foundationalism cannot account, and might thus unduly marginalize or maybe even efface, important contract values, that is, values that should and in fact do inform contract law. The *strong* version may concede that these values find a place in choice theory’s normative architecture, but nonetheless insist that they (or some of them) should be recognized as freestanding contract values, rather than derivative, constitutive, or instrumental to the ultimate value of autonomy.

We begin by clarifying why the weak version is unfounded – properly understood, an autonomy-based theory of contract does not leave out these important concerns. We then turn to the strong version, which is justified – choice theory indeed privileges autonomy as contract’s only ultimate value – but nonetheless must be rejected.

### 1. Where Choice Matters

Prince Saprai claims that because “it’s unclear that . . . choice theory provides an adequate explanation of the newly expanded domain,” we “need to take a few steps back.” More specifically, he argues that *Choice Theory’s* autonomy-monism is “reductive” and therefore “distorts the nature and purposes of the practice.” What seems to motivate Saprai’s critique is his understanding that our claim to autonomy’s supremacy implies that any other contract value is subordinate to autonomy “in at least two ways”: (1) “their importance is ultimately reducible to the role that their pursuit plays as a constitutive component of an autonomous life”; and (2) “these are values that the parties themselves have chosen to pursue” (2, 9).

We fully subscribe to the first sense in which all contract values are subservient to autonomy, but just as fully reject the second. *Choice Theory’s* emphasis on the *proactive facilitation* component of autonomy, that is, the scope of state’s obligation regarding provision of contract types, might have contributed to Saprai’s interpretation. We hope our discussion in Part I helps clarify that choice theory’s normative architecture emphatically rejects, rather than embraces, the reductive view of the value of choices (that is, the view typical in welfare economics).

We agree that a liberal contract theory offers various contract types for people to choose. People choose among both the utility and the community values of contract – the two main goods that contract types can help facilitate in various “dosages.” In *Choice Theory*, we clarified that whereas utility is an *instrumental* value, community – as we understand that term – is an *intrinsic* value that is constitutive of autonomy (CTC, 44 & ch.6). Yet, like utility-based contract types, community-based types are also valuable for those who choose them.

But this is *not* the way choice theory perceives the two additional, necessary implications of autonomy for contract – on which we elaborated earlier in this Essay. In our view, for contract law to be legitimate, neither contract law’s *regard for future selves* nor its adherence to *relational justice* is (or can plausibly be interpreted to be) a matter of choice. Why? The legitimacy of practice itself relies on its service to people’s self-determination and its compliance with the maxim of reciprocal respect to self-determination. We cannot choose to ignore these preconditions for legitimacy – and their necessary implications regarding our future selves and relational justice.

In other words, choice theory is *insistently agnostic* regarding people’s choices from amongst the various combinations of dosages of community and utility of the (properly diverse) inventory of contract types law offers. But because choice theory is *adamantly opinionated* in its commitment to the parties’ autonomy, it *unequivocally rejects* attempts to use contract for – let alone claims that contract law should actively facilitate – practices that are autonomy-reducing.

Because choice theory grounds contract in self-determination, it requires contract law always to be wary of how its operations could affect the autonomy of the parties' future selves. And because choice theory insists that reciprocal respect to self-determination is the foundation of contract law's legitimacy, its implications for contract law design are likewise not optional. In other words, since people's use of law's coercive power must be limited to interactions that comply with its ultimate justification of reciprocal respect to self-determination, relational justice must serve as the floor of legitimate interactions that law will support and enforce.

We believe these clarifications help dissipate the weak version of the reductionism critique. Saprai's own concern regarding contract law's commitment to address vulnerabilities can be our first exhibit. Thus, to take one of his examples, the claim that both undue influence and unconscionability cannot be accounted for by reference to impaired consent, but are rather premised on "the prevention of exploitation" (12) does not really challenge choice theory: the prevention of exploitation falls squarely under contract law's autonomy-based requirement of relational justice.

Our argument applies with equal force when we shift to Yotam Kaplan's interesting analysis of the limits of choice in the context of mandatory-arbitration vs. no-arbitration contracts. We agree the "market-for-lemons-view" (7-8) may partly explain why the recent trend of broad enforcement of mandatory arbitration and no-class-action clauses in consumer contracts is troubling. But that view need not, and indeed does not, exhaust our concerns.

In *Choice Theory* we focused on the implications of our "errands" conception of consumer contracts (CTC 81-83, 112). Our view implies that the inclusion of such clauses "should not be able to upset consumers' background expectation of relatively unimpeded access to courts or to reasonably equivalent procedures for dispute resolution" (CTC, 112). We hope that our renewed emphasis on the core role relational justice plays in choice theory may explain why we subscribe to a "fairness-based" analysis of this topic, and find no tension between choice theory and a robust commitment to "transactional fairness" (7).

Finally, Sharon Shakargy's discussion of spousal contracts engages our discussion of choice theory's maxims of regard to future self and relational justice in a particularly important context.<sup>21</sup> Shakargy raises the question of "the limits of autonomy in spousal contracts," but her discussion refers to both the issue of *limits*

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<sup>21</sup> Shakargy's discussion of parental contracts delves into the complicated status/market distinction, which we cannot properly address here. See Hanoch Dagan & Elizabeth S. Scott, *Reinterpreting the Status-Contract Divide: The Case of Fiduciaries*, in *CONTRACT, STATUS, AND FIDUCIARY LAW* 51, 52-60, 62-66 (Paul B. Miller & Andrew S. Gold, eds., 2016).

(governed in our scheme by regard to future self) and the issue of *floor* (shaped by obligations of relational justice). While our concern for future selves and relational justice does not provide “exact” and “clear” answers to her questions (6 & 12-13 and 8-9), these elements are informative.

Choice theory’s commitment of regard to future self – its insistence that as, a means for self-determination, contract cannot be used so as to undermine one’s ability to write one’s life story anew – implies that it finds “a marriage in which no divorce is permitted” unacceptable. Likewise, we would refuse to enforce, let alone offer as a legally-created type, arrangements in which “divorce necessitates fault, or . . . the party at fault has to pay a large sum of money to exit the relationship.”<sup>22</sup> This also means that, per choice theory, divorce is *not* – cannot be deemed – breach of contract, and that from autonomy’s perspective there is no symmetry between one spouse’s right to exit and the other’s expectation that she stays put. Not only must specific performance be out of the question in this context – as it is in any contract involving a party’s core personhood<sup>23</sup> – but even the conventional remedy of expectation damages is inapplicable upon divorce. Why? Because in an autonomy-based system, divorce is not breach of contract.

Relational justice, in turn, explains why choice theory is happily attuned to Shakargy’s concern that – in an environment that is still typified by pervasive gender subordination – many spousal contracts implicate bargaining-power disparities. This is why, in *Choice Theory*, we endorsed the practice – demanded by relational justice – in which “marital separation agreements are subject to possible judicial modification for change of circumstances, and premarital agreements are typified by a robust (both ex ante and ex post) fairness review” (61). No decent contract law – certainly not one grounded in choice theory’s commitment to self-determination – would allow itself to be used as a means for proactively facilitating patriarchal arrangements.

## 2. Against Freestanding Pluralism

We have addressed our commentators’ concerns regarding specific contract values that choice theory might, but does not, neglect. Some, however, may remain reluctant to subscribe to our refined understanding of autonomy as contract’s ultimate value.

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<sup>22</sup> See also, respectively, Hanoch Dagan & Carolyn J. Frantz, *Properties of Marriage*, 104 COLUM. L. REV. 75, 85-87 (2004); Hanoch Dagan & Michael A. Heller, *The Liberal Commons*, 110 YALE L.J. 549, 568-69 (2001).

<sup>23</sup> See *supra* note 8 and accompanying text.

Saprai suggests this point when he claims that “a successful theory of contract law has to be a pluralistic one,” in which there is “an *irreducible* plurality of values in play in justifying contract doctrine” (12-13). Levine-Schnur questions why we do not, to be consistent, extend the “pluralism of options – of values – . . . to the question of core contractual value(s)” (8). Finally, Shakargy pushes towards freestanding pluralism when she argues our conception of autonomy is “an overly liberal one”; that we impermissibly “ignore other preferences, disciplines, and worldviews,” unduly “preferring one liberal and individualistic type of life story over other more communitarian ones.” Shakargy thus encourages us to consider substituting self-determination with “content-neutral autonomy,” in which “there is no value or set of preferences that an autonomous person must endorse,” and “preferences for cultural and religious norms into which agents are born can be just as autonomous as preferences to repudiate these norms” (14).

We are well aware of the problems in pseudo-universalist claims that take culturally-specific choices and render them as essential. We vehemently resist, however, the innuendo that choice theory is a form of such disguised parochialism.<sup>24</sup>

We accept that a measure of suspicion is a necessary to counter the tendency to impose one’s contingent preferences as natural or necessary truths. But it is important not to substitute a sociological suspicion with skepticism about reason and normativity. We thus reject the way some critical legal scholars characterize reason itself as a disciplinary technology and normative analysis as arbitrary power.<sup>25</sup> These claims imply a dubious meta-ethical position that ends in relativism, skepticism, or nihilism. By equating normative reasoning with parochial interests and idiosyncratic perspectives, they also undermine any possibility of moral justification, and thus also of moral evaluation and moral criticism.<sup>26</sup>

Humanists can, and should, be suspicious, but they must resist the trap of helpless relativism, which paradoxically ends up reaffirming the status quo. The sheer fact that claims of universalism are not always true and are open to possible abuses should not undermine our responsibility or our commitment to work on behalf of what we believe to be universal rights.

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<sup>24</sup> What follows draws on Hanoch Dagan & Avihay Dorfman, *Justice, Politics, and Interpersonal Human Rights*, 51 CORNELL INT’L L.J. ONLINE 139, 146-49 (2018).

<sup>25</sup> See DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION 109-13, 147-48, 155 (1997); Gary Peller, *Reason and the Mob: The Politics of Representation*, 2 TIKKUN 28, 92 (1987); Gary Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1151, 1152, 1155 (1985).

<sup>26</sup> See, e.g., ALAN BRUDNER, THE UNITY OF THE COMMON LAW: STUDIES IN HEGELIAN JURISPRUDENCE 269-77 (1995).

Because the right of each and every individual to self-determination is the ultimate human right, we are unwilling to repudiate autonomy's status as contract's ultimate value or – what eventually amounts to the same thing – to embrace a view of autonomy in which self-determination is but an option. Arrangements that denigrate self-determination, by either undermining the future self or infringing the maxim of relational justice – patriarchal marriage is a prime example – must not benefit from law's proactive support.

Only a contract law that treats autonomy as its ultimate value can guarantee against such an unacceptable predicament.

### III. REFINEMENTS TO CHOICE THEORY

Now, we turn from debates on foundations to refinements within choice theory. We start by recapping the core of choice theory, which Saprai nicely highlights. He calls our approach “an unashamedly teleological theory of contract based on the value of personal autonomy.” Yes, autonomy is the *telos* of contract and is its grounding principle. Saprai also correctly identifies the core feature that distinguishes us from other liberal theorists of contract such as Charles Fried: we insist that contract is not, indeed cannot be, grounded “in the value of negative freedom or freedom from interference,” but is rather firmly grounded “in a vision of positive freedom based on the ideal of personal autonomy or self-determination.” By defending this position, choice theory “overcome[s] the moral problem of justifying the normative power of promise, and the legal problem of explaining the state's right to enforce such promises”<sup>27</sup> (1, 4, 5).

#### *1. The Necessity of Contract*

So far, so good. Saprai, however, believes we overemphasize the role of self-determination. He argues that it is “unclear whether personal autonomy even in a liberal society provides contract law with a stable enough foundation” (13). There are two

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<sup>27</sup> Note that Saprai's argument here, with which we agree, runs counter to Levine-Schnur's suggestion that this foundation of contract is widely accepted, so that “what is at stake here is [only] whether autonomy *through choice* is the purpose.” See Levine-Schnur, *supra* note 3, at \*. On some of the more conspicuous features of existing contract law – notably its objective approach and its extensive gap-filling apparatus – that are nicely explained by its commitment to self-determination, and cannot be accounted for by a thinner account of liberty, see Hanoch Dagan, *Types of Contracts and Law's Autonomy-Enhancing Role*, in 5 EUROPEAN CONTRACT LAW AND THEORY (forthcoming 2019). On others, see *supra* Section I.2.

aspects to Saprai's concern that "there is no necessary connection between contract law and the value of personal autonomy" (7) and they are both important.

One criticism, which he mentions in passing, is that contract law can, and indeed does, also exist "in a non-autonomy supporting culture," where it is used to pursue "other ends or goals, such as welfare maximization or communitarian ideals" (7). We responded to this challenge in Part I, where we argued that grounding contract on efficiency makes it unacceptably contingent. We believe we could persuasively extend our response to cover communitarian ends, but do not attempt the argument here.

The second prong of Saprai's critique is his main focus and ours as well. He notes "[t]here are lots of ways a state might promote the availability of autonomy-promoting options for citizens," and it is thus unclear in which sense – if at all – contract "plays a necessary or essential rather than merely contingent role" (7-8).

Saprai is surely correct that an autonomy-enhancing state should ensure that "citizens develop the basic capacities they need to exercise meaningful choices" by "providing a basic level of education, healthcare, and material wellbeing," and that there are also many ways beyond contract through which "a state might promote the availability of autonomy-promoting options for citizens" (8). He is thus correct when he insists that we need to explain why we do not end up relegating "contract law into an 'optional extra' in a liberal state" by "uprooting contract law from its foundations in promissory morality," and instead claiming that contract is grounded on our fundamental right – towards both the state and each other – to self-determination (8).

We agree contract is not the only means that the state can, and should, employ in carrying out its obligation to facilitate our self-determination. But contract does have a distinctive – indeed, irreducible and non-optional – role. To see why, it is helpful to begin with Charles Beitz's observation that "self-determination consists in the carrying out of higher-order projects," each of which is "composed of a set of plans arranged in a temporal sequence."<sup>28</sup> This means that a successful exercise of self-determination is "an intertemporal achievement," which thus typically requires "a temporal horizon of action."<sup>29</sup>

Contract is important for self-determination because the normative powers it makes available facilitate the temporally extended horizon of action that is so conducive to people's ability to plan. Indeed, contract law's signature role in vindicating promisees' expectations responds to this core condition of autonomy.

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<sup>28</sup> Charles R. Beitz, *Property and Time*, 26 J. POL. PHIL. 419, 427 (2018).

<sup>29</sup> *Id.*; Lisa Austin, *The Power of the Rule of Law*, in PRIVATE LAW AND THE RULE OF LAW 270, 278-79 (Lisa Austin & Dennis Klimchuk eds., 2014).

How? By ensuring the reliability of contractual promises for future performance, rather than merely protecting against promisees' detrimental reliance,<sup>30</sup> contract law enables people to extend their ability to plan into the future. Through contract, we can legitimately enlist others to our own goals, purposes, and projects – both material and social. This intertemporal dimension is prominent in relational contracts, but is no less important in one-shot contracts, which are typically wholly-executory. In both cases, the predictability that expectations will be fulfilled is key for allowing people to plan and thus to act on their capacity “to have, to revise, and rationally to pursue a conception of the good.”<sup>31</sup>

Furthermore, contract law is not anticipating only one foundational pact in which people are bound for their lifetime; rather, it refuses to support such agreements. This feature is again not fortuitous. As an autonomy-enhancing institution, contract law is committed, as noted, to people's right to both write and *rewrite* our life story. It thus ensures their ability to withdraw or refuse to further engage; to dissociate, to cut themselves out of a relationship with other persons. By facilitating the liquidation of one's holdings, contract makes this *right to exit* meaningful. The right to exit serves a protective function, because leaving is a form of self-defense, and the mere possibility of one's exit plays a disciplinary function. But even if one is not worried about possible mistreatment, exit is essential to autonomy because it enables geographic, social, familial, professional, and political mobility, all of which are crucial to a self-directed life.<sup>32</sup>

Implicit in these observations is also contract's contribution to people's ability to choose. Contract law expands our range of meaningful choices by expanding our repertoire of secure interpersonal engagements beyond the (by definition limited) realm of gift-based interactions. It allows individuals to unbundle their estates and broadens the scope of choices among differing projects. It enables them to make their own judgments about what they value and how they value it, and thus what to own and how (and with whom) to own it, how hard to work, how much to save, and what to consume.<sup>33</sup>

It would be wrong to conclude that contract is strictly necessary for self-determination. But it does not seem far-fetched to conclude that contract makes a

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<sup>30</sup> Accounting for the robustness of the expectation interest in contract law is a core test of any interpretive contract theory. See Daniel Markovits, *Making and Keeping Promises*, 92 VA. L. REV. 1325, 1364-66 (2006).

<sup>31</sup> JOHN RAWLS, *JUSTICE AS FAIRNESS: A RESTATEMENT* 19 (2001).

<sup>32</sup> See Dagan & Heller, *supra* note 22, at 567-69.

<sup>33</sup> See Hanoah Dagan, *Markets for Self-Authorship*, 28 CORNELL J.L. & PUB. POL'Y 577, 587 (2018).

crucial, and in any case distinctive, contribution to people's ability to realize the right to self-authorship – at least in the world we know and experience. This conclusion reinforces our argument in Part I – and our response to Saprai's first critique – why the “machine-replaces-contract” trajectory of true commitment to welfare foundationalism is so intuitively alarming.

## 2. Contract Type Multiplicity

This foundational commitment of contract proactively to facilitate people's self-determination is the core of choice theory. It is the pre-condition for contract's legitimacy. It is also the *telos* of contract law, which both explains many specific features of existing law and justifies some pressing reforms. In *Choice Theory*, as well as in some of our later scholarship, we have discussed numerous aspects of contract law (broadly defined, as it should be) along these explanatory and reformist lines.<sup>34</sup> But with the aim of writing a short book, we emphasized in *Choice Theory* one practical takeaway: the hitherto marginalized significance of the intra-sphere multiplicity of contract types. It is thus not surprising that some of our commentators have focused on this aspect of choice theory.

“More choice among types,” we wrote in *Choice Theory*, “usually enhances freedom.” But, we also noted, this is not always the case. We identified some of the contexts in which “multiplicity cuts the other way” due to cognitive, behavioral, structural, and political economy concerns. Since intra-sphere multiplicity is but an (important) means to an end,<sup>35</sup> we acknowledged that in these other contexts – where multiplicity tends to be autonomy-reducing – we “may override choice theory's prescription of multiplicity” (68, 128-30).

(a) *Emotions and Choice*. Ohad Somech criticizes *Choice Theory* for focusing only on “the two end-poles of choice – the existence of valuable alternatives and the eventual choice – [while] skip[ping] over whatever occurs in between.” He insists that we must pay attention also to “the process of choice,” which is “at the heart of personal autonomy,” and is “what makes choice *self-determining*” (5). Somech suggests an “understanding of autonomous choice as founded on inner deliberation,” one which is distinguished from both free but not autonomous choices and meaningful but not

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<sup>34</sup> See DAGAN & HELLER, *supra* note 1, at 135 (summarizing takeaways); Dagan & Heller, *Freedom, Choice, and Contracts*, *supra* note 4.

<sup>35</sup> Levine-Schnur is thus correct that the prescription of a “variety of off-the-shelf alternatives” does not claim lexical priority over autonomy (2). Levine-Schnur, *supra* note 27, at 2. She appears to argue that we believe otherwise. We do not.

chosen actions. A theory that prizes autonomous choice, he thus claims, should engage with the psychology of decision-making, and in particular the role of emotions in this process (8-10).

Regret, or more precisely anticipated regret – that is, “the emotion arising from imagining the occurrence of a future regretful event” – plays a key role in this drama. Anticipated regret is “is what motivates the engagement with inner deliberation conducive to personal autonomy” because “it makes individuals comprehend choice as including forfeiture of unchosen alternatives,” forcing them to consider “the tradeoff between the alternatives’ prospective outcomes” (2). Somech uses this insight to explain why, by making choices generally irreversible, contract fosters this *process* of autonomous choice.

He thus concludes that (1) in general an extensive right to withdraw is “self-defeating in terms of self-determination”; and yet (2) easy withdrawal is nonetheless unobjectionable “when other mechanisms – such as robust social norms – ensure anticipated regret would arise,” as well as “when the contractual decision itself is not meant to increase autonomy” (15-19). Promises to marry serve as a nice example for the former category; consumer contracts – understood along the lines of what we called “the errands conception” – for the latter.

Somech’s discussion of regret and withdrawal is highly relevant for choice theory’s regard for future selves, which we discussed earlier. What is important here is that anticipated regret adds a fifth possible countervailing concern to the four categories of reasons we identified in *Choice Theory* that may justify limiting multiplicity (CTC 128-30). As Somech claims, anticipated regret is “especially valuable” to choice theory, because creating new contract types may inadvertently cause” a decoy effect. The *decoy effect*, he explains, “occurs when a choice includes two alternatives of similar value, and a third decoy alternative dominated by (only) one of them.” When an added alternative is a decoy, people tend to focus their attention on “the domination of one of the valuable alternatives over the decoy,” in order to “avoid the (unpleasant) realization that their choice involved relinquishing a desired alternative.” This means that when the added alternative is a decoy, it tends to distract people from “engaging in the inner deliberation needed to choose between two [really] valuable alternatives,” thus making their choice “far less self-determining” (12-13).

We are happy to accept Somech’s claim that a legal reform implementing choice theory’s prescription of intra-sphere multiplicity should consult the psychology of the emotions involved in making choices and should incorporate pertinent insights such as the decoy effect.

(b) *Creative Tools for Choice*. We likewise welcome Kaplan's claim that choice theorists should not be too quick to embrace mandatory rules. The appeal of mandatory claims may arise from our view of the errands conception of consumer contracts. In that contract type, people indeed "often wish to be free from the burden of making choices, which can be taxing." We agree that argument should not extend to choice avoidance more generally. Rather, we should acknowledge, and contract theorists should seek to find, "creative contractual tools" – midway immutable rules and plain-vanilla default rules – that facilitate choice "where different contract types do exist, but contracting parties are unable to choose effectively between them" (4-5).

Like Kaplan, we are unsure that a unilateral default rule is an appealing solution when it provides the consumer with a choice only between, say, the mandatory-arbitration and the no-arbitration contracts. (The adequacy of this choice seems to depend on whether the arbitration option can be sufficiently salient, and whether consumers properly value access to courts.) But if this particular idea – similar to the Texas rule we discuss in *Choice Theory* (71) – fails, Kaplan's broader point that the implementation of choice theory can potentially benefit from the development of "novel choice-enhancing mechanisms" (9) is both correct and important.<sup>36</sup>

### 3. State Power, Preferences, and Choice

When Ronit Levine-Schnur discusses contract spheres, she focuses on *Choice Theory*'s claim that ensuring multiplicity of types is, or at least should be, law's responsibility. Levine-Schnur finds this notion "quite alarming," because "giving the state the role of developing and offering contractual options paves the way for greater state domination." Read charitably,<sup>37</sup> this critique could plausibly be based on one of two premises (or both). The fear may be that (1) the power is one of preference formation, that is "the power to set the agenda for the people and to affect and even dominate their beliefs, values, and ideology" (2-3, 12-15) or (2) once "power is granted, it [tends to] be used beyond the intended mandate."

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<sup>36</sup> For more on this front, see Gregory Klass' essay, engaging *Choice Theory*, in which he discusses the "legal mechanisms for choosing," that is, the question of "how the law determines the choices they have made." Gregory Klass, *Parol Evidence Rules and the Mechanics of Choice*, 20 THEORETICAL INQUIRIES L. \* (forthcoming 2019). For our response, see Dagan & Heller, *supra* note 4, at \*.

<sup>37</sup> In some passages, Levine-Schnur attributes to us the view that the state should offer "yet-unimagined" contract types and that the state's capacity in this regard is unconstrained (9-10). *Choice Theory* does not make these arguments; we do not hold those views. We leave aside some other of her concerns about *Choice Theory* (say, at 10-11) because they too are not our views; rather, they are arguments by critics to whom we are responding.

(a) *Preference-Shaping*. Oren Bar-Gill frames the first version of the state domination concern in a subtle and challenging way. A theory, like choice theory – which insists that people’s autonomy is both the ultimate justification of contract and its most important design principle – must indeed resist assigning a preference-shaping role to the state.

Bar-Gill offers two interpretations of our claim regarding the role of contract types. Contract types, he claims, can either “serve an epistemic purpose – indicating a predefined set of rules that apply in a particular situation or to a particular relationship,” or they can “shape[] people’s preferences.” The former role adds nothing to welfare economics, while the latter, he correctly writes, “may pose a real problem” for choice theory (8-9).

Bar-Gill’s invocation of this possible interpretation of choice theory (which unfortunately has some textual basis in *Choice Theory*) pushes us to refine the role of contract types, as he indicates in the last footnote of his Comment. Contract types are indeed situated “between the epistemic and preference-shaping” (10). The (minoritarian and utopian) contract types that a legal regime committed to choice theory is expected to support do not merely serve an epistemic purpose. And yet their introduction is *not* an exercise of proactive preference formation. Rather, the way they affect preferences is by opening up possibilities for people that allow *them* then to *rethink* or *readjust* their preferences.

Pursuing intra-sphere multiplicity is admittedly shaping preferences in a trivial sense, but it is qualitatively different from the sense in which this term is used. There is a meaningful difference between channeling people to what the state deems right and adding options for people. Choice theory avoids the illiberal paternalism that active preference shaping implies, because it is based on a subtler idea in which “the menu of types may create an opportunity for people to construct new preferences” (10).

Shakargy gets our point just right when she writes that adding ready-made contract types as choice theory prescribes “supports actual choice by opening parties’ eyes to possibilities; it raises awareness of – and, when necessary, helps shake off – biases and default assumptions; and it prevents costly experimentalism by offering options that were considered, balanced, and . . . tested by other users” (8).

(b) *Dilution of State Power*. The second version of the state domination concern can be set aside quite easily, because it assumes that the shift from the “one size fits all” (Willistonian) understanding of contract to choice theory’s vision of intra-sphere multiplicity grants the state more power, that is, it increases the state’s “capacity to

influence people's actions and interests."<sup>38</sup> This assumption, however, is incorrect: intra-sphere multiplicity dilutes rather than augments state power.

Law always implicates power, but choice theory tends to *curb* law's coercive effects vis-à-vis its monistic (Willistonian) counterpart. Admittedly, at pathological moments of contract breakup followed by litigation, the coercive power over the litigants that a pluralist legal regime assigns decision-makers may be no different from that allocated by a monist system. But it is also no greater. In any case, the drama at the endgame of interpersonal relationships should not obscure the significance of the *ex ante* choices available to people entering and shaping these relationships. From this perspective, a pluralist contract law opens up options for choice rather than channeling everyone to the singular possibility privileged by law. When contract law complies with the intra-sphere multiplicity prescriptions of choice theory, individuals can navigate their own course, bypassing certain legal prescriptions and avoiding their implications as well as the power of those who have issued them.<sup>39</sup>

Moreover, in *Choice Theory*, we argued time and again that the carriers of contract law should *not* engage in innovative design, but rather "proactively look out for innovations" – notably "those based on minority views and utopian theories" – that "have the potential to add options for human flourishing that significantly broaden people's choices" (116). Requiring a polity to recruit the law to make these options more viable, so that people can *opt out* of the choices of the majority, can hardly be conceptualized as an exercise of *augmenting* the power of the state. The examples of the contract types we mentioned as candidates for de-marginalization – such as "for cause" and job-sharing in the sphere of work, cohabitation and "nonconjugal aspiring families" in the sphere of intimacy, or home equity insurance and shared equity homeownership in the sphere of home – also suggest that choice theory is likely to limit law's coercion, rather than facilitate domination by the state.

## CONCLUDING REMARKS

*Choice Theory* advances a claim about the centrality of autonomy to contract. The goal was, in part, to trigger debate among leading legal theorists regarding freedom of contract. Engaging with Bar-Gill's penetrating essay helps sharpen our conclusion that autonomy must be contract's ultimate value. Welfare cannot serve that function. The balance of the thoughtful and generous essays in this Issue helps refine our

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<sup>38</sup> Leslie Green, *The Forces of Law: Duty, Coercion, and Power*, 29 *RATIO JURIS* 164, 171 (2016).

<sup>39</sup> See HANOCH DAGAN, *RECONSTRUCTING AMERICAN LEGAL REALISM & RETHINKING PRIVATE LAW THEORY* 176 (2013).

understanding of autonomy foundational status, the role of multiplicity of contract types, and the limits of state power. Choice theory comes out stronger, but more remains to be done. Together, we continue on the path toward a just and justified law of contract.