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Autonomy for Contract, Refined

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AUTONOMY FOR CONTRACT, REFINED

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ABSTRACT

In The Choice Theory of Contracts, we advance a claim about the centrality of autonomy to contract. This Issue offers thoughtful and penetrating critiques. Here, we reply.

Autonomy is the grounding principle of contract. In Choice Theory, we stressed the (1) proactive facilitation component of autonomy, in particular, the state's obligation regarding contract types. Here, we highlight two additional, necessary implications of autonomy for contract: (2) regard for future selves and (3) relational justice. These three aspects of autonomy shape the range, limit, and floor, respectively, for the legitimate use of contract. They provide a principled and constrained path for law reform.

I. Robert Stevens argues that autonomy as self-authorship should not serve as contract law's normative foundation. Drawing on H.L.A. Hart, we reply that the core of Stevens' critique – rejecting modest affirmative duties in private law – is misplaced. Next, Stevens argues autonomy fails descriptively to account for existing law. In reply, we show choice theory does closely fit the law, including duress and non-disclosure, formation, privity, and remedies. Both of Stevens' challenges rely on transfer theory, a view we reject.

II. Arthur Ripstein argues that our analysis of transfer theory fails, in part, because it is not a "single thing," with a shared set of commitments. We reply that his version, "the bilateral modification theory," fares no better than other transfer theories. Second, Ripstein contends that we subscribe to a confused form of pluralism, that "is malleable enough to provide no real guidance." We reply that autonomy generates powerful guidelines for shaping contract law. Choice theory is not foundationally value pluralist.

III. Brian Bix offers a useful case study of choice in family law. He argues that state support for many types of family agreements is not grounded in autonomy and choice. We counter that family law highlights the floor of legitimate contractual interactions and the limit of contract when it adjusts for possible external effects, in particular, effects regarding children. Choice theory sharply cabins the indeterminacy inherent in "public policy" analysis, by comparison with the accounts of Stevens, Ripstein, and Bix.

Each paper in this Issue advances the field; each prompts us to refine choice theory – all steps we hope toward a more just and justified law of contract.

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AUTONOMY FOR CONTRACT, REFINED

Hanoch Dagan^{*} & *Michael Heller*^{**}

INTRODUCTION

In *The Choice Theory of Contracts*,¹ we advance a liberal approach to contract that celebrates contract types and justifies contractual freedom. Here, we reply to critics.²

Autonomy is the *telos* of contract and its grounding principle. In *Choice Theory*, we stressed the (1) *proactive facilitation* component of autonomy, that is, the scope of state's obligation regarding provision of contract types and the reform implications stemming from this obligation. Here, we highlight (2) *regard for future selves* and (3) *relational justice*, two additional, necessary implications of autonomy for contract. While we noted these elements in *Choice Theory*, we did not sufficiently stress their centrality for contractual freedom. These three aspects of autonomy shape the *range*, *limit*, and *floor*, respectively, for the legitimate use of contract. Together, they provide a principled path for law reform, driven by the contract's internal logic. Autonomy for contract offers far more constraint than the vagaries of competing regulatory or public policy approaches.

Robert Stevens argues that autonomy as self-authorship should not serve as contract law's *normative* foundation, in part because of the affirmative duties it imposes. Choice theory fails *descriptively* for "large areas of the positive law as it is found" (22, 5). To combat these flaws, he counsels adherence to transfer theory (1, 17), a view we reject.

Arthur Ripstein argues that our critique of transfer theory fails as to his version and in general. He contends that we hold to a confused form of pluralism that obscures the distinctiveness of contract (4, 24). We "conceive of freedom and autonomy in so many different ways," that choice theory "is malleable enough to provide no real guidance" (23).

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¹ HANOCH DAGAN & MICHAEL HELLER, *THE CHOICE THEORY OF CONTRACTS* (2017). Subsequent references appear parenthetically in the text.

² See Brian Bix, *Book Review*, LAW & PHIL. (forthcoming 2018); Arthur Ripstein, *The Contracting Theory of Choices*, LAW & PHIL. (forthcoming 2018); Robert Stevens, *Contract, Rights and the Morality of Promising*, LAW & PHIL. (forthcoming 2018). Subsequent references appear parenthetically in the text.

Finally, Brian Bix evaluates choice in family law (1-2). He argues, its “central objective” is “to respond to the various needs and interests of a large population,” not “increased choice” (25-26). Family agreements are so limited by external, public policy considerations that choice theory has little to add.

Each of these generous and thoughtful papers advances the field; each helps refine choice theory, a step we hope toward a more just and justified law of contract.

I. ROBERT STEVENS: JUSTIFICATION AND FIT

Robert Stevens makes two criticisms of *Choice Theory*. The first concerns *justification*. He rejects our reliance on “the moral permissibility of enforcing duties of virtue” (5). Even if we could show that private law does require affirmative duties of reciprocal respect for self-determination, Stevens contends that such “positive duties of assistance” have no legitimate role in private law (2-5). His second critique concerns *fit*. For Stevens, autonomy cannot plausibly serve as more than an add-on to contract’s core doctrines. Choice theory, as he reads it, faces severe difficulties accounting for contract law’s most basic rules (6-17). Thus, for choice theory to be an interpretive one, as we claim (CTC, 12-13), we “must provide more explanation as to how [these doctrines] can be justified than [we] have yet produced” (5).

a. Justifying Affirmative Duties. *Choice Theory* begins with a perennial challenge: what legitimates contract enforcement?³ Peter Benson powerfully argued – and we agree – that reciprocal respect for *independence* cannot plausibly justify use of the state’s coercive power to enforce wholly-executory contracts. Nevertheless, coercion is justified, we argue, thanks to contract’s important contribution to people’s *self-authorship*.

Contract’s autonomy-enhancement service depends on the reliability of contractual promises. Reliability depends in turn on a background rule: people who invoke the contract convention are deemed to submit themselves to the jurisdiction of contract law. Such a background rule admittedly implies that putative promisors owe *some* affirmative duties to putative promisees. We argue that in a liberal polity, properly understood, people are justifiably expected to pay this (modest) price for the benefit of others. Why? Because it is entailed by our reciprocal duty to respect each other’s right of self-determination (or self-authorship) in our interpersonal relationships.

(1) *Positive and Normative Challenge.* Stevens has a twofold objection to this foundational proposition. First, as a matter of *positive* law, he criticizes our claim that modest affirmative duties typify private law. In particular, he rejects the example we offer

³ Stevens helpfully refines this point. Recourse, as he correctly argues, is not strictly a *sine qua non* of contract (11-13). Rather, like other contract theorists (we think), our discussion of contract’s enforceability refers to law’s recognition of contract’s normative power.

– the duty of a mistaken payee to make restitution to the payor. Stevens agrees that this duty is indeed uncontroversial, but argues that we are wrong to present it as an *affirmative* duty. The payee, he maintains, is not wholly passive because what triggers restitutionary liability is the payee’s “role in the injustice (the payment for no reason) that has occurred” (4-5). The payee acted by accepting the payment “either thinking there was a good reason for it, indifferent as to whether there was such a reason, or knowing that there was not” (4-5).

Stevens also challenges our claim on *normative* grounds. He argues private law “should not be in the business of forcing us to be virtuous,” but rather focus on our “duties of right.” Why? To ensure that people are not used as mere means to an end. This means that “[i]f duties of right are based upon our entitlement to independence from the choices of others,” any “positive duties of assistance on the wholly passive” must be “expunged from private law” (2-3). So, even if our mistaken payee example (or any other example) of modest affirmative duties were shown to exist in the positive law, it would be normatively unjustified.

(2) *Mistaken Payments*. We reply first to Stevens’ positive claim, then to his normative objection.

To start, Stevens’ acceptance account of the law of mistaken payments is congruent with the one advanced by Ernest Weinrib; both are susceptible to a recent critique by Frederick Wilmot-Smith.⁴ We endorse Wilmot-Smith’s view on this point.

Wilmot-Smith explains that acceptance of the mistaken payment may render retention unjust only if acceptance implies some wrongdoing. This implication applies if the law allows that mistaken payments can be recovered. But this premise “merely begs the question at hand.” It remains mysterious why a regime of relational independence can attach responsibility to the payee for the unfortunate consequences to the payor of a mistaken payment based on her sheer acceptance.

Stevens resists this conclusion by invoking his own example of a *true* “purely passive beneficiary”: Assume A and B own the only two copies of a rare stamp; B destroys her copy; A is “the ‘‘lucky owner of [the] undestroyed stamp,’’ which doubles in value. If the payee’s restitutionary duty in the mistaken payment case is independent of her involvement in the injustice, Stevens argues, then a parallel duty should attach to A, a “purely passive beneficiary” (4-5). But A does not, and should not, owe a restitutionary duty to B. Stevens uses this reasoning to argue that a liberal private law does not allow affirmative obligations in general.

⁴ See Frederick Wilmot-Smith, *Should the Payee Pay?*, 37 OXFORD J. LEGAL STUD. 844, 855–61 (2017).

But Stevens' example does not vindicate his conclusion. Quite the contrary. The stamp owner and mistaken payment cases are not equivalent. The differences between them show why private law's modest affirmative obligations in the mistaken payments case do not illegitimately instrumentalize people. For this step, we turn to H.L.A. Hart.

(3) *Hart, Judgment and Contract*. Hart argued that not every infringement of independence ignores "the moral importance of the division of humanity into separate individuals and threatens the proper inviolability of persons." Therefore, with Hart, we accept the significance of the "unexciting but indispensable chore" of distinguishing "between the gravity of the different restrictions on different specific liberties and their importance for the conduct of a meaningful life."⁵

Translating Hart's view into private law requires an intermediate step: developing and applying guidelines derived from the nature of legal prescriptions, the liberal ideal of reciprocal respect for self-determination, and rule-of-law concerns.⁶ In co-authored work with Avihay Dorfman, Dagan pins down these guidelines:

- (a) Certain practices (such as love or friendship) are rightfully shielded from legal treatment, because legal enforcement might destroy their inherent moral value or legal intervention might backfire by crowding out internal motivations.
- (b) The burden of the duty of reciprocal respect of self-determination cannot be excessive because it must neither undermine the autonomy of the involved parties nor create inappropriate interpersonal subordination between them.
- (c) To provide effective guidance to its addressees and constrain officials' ability to exercise power, law's rules need to be relatively clear, thus minimizing resort to individualized knowledge and radically ad hoc judgments.

So, how does Hart's insight apply to Stamp Owner A? A restitution order against the lucky owner of the undestroyed stamp is unlikely because that case cannot easily fall into a recognized legal category – as the third guideline requires. Also, and more

⁵ H.L.A. Hart, *Between Utility and Rights*, 79 COLUM. L. REV. 828, 834-35 (1979).

⁶ See Hanoch Dagan & Avihay Dorfman, *Just Relationships*, 116 COLUM. L. REV. 1395, 1421–24 (2016). The text that follows also suggests why Arthur Ripstein is wrong in arguing that recognizing the norm of reciprocal respect for self-determination implies that "everyone has a standing duty to see to it the particular other persons with who they are interacting lead autonomous and successful lives." Arthur Ripstein, *Private Authority and the Role of Rights: A Reply*, 14 JERUSALEM REV. LEGAL STUD. 64, 80 (2017).

fundamentally, restitution requires liquidating this or other assets and it thus excessively burdens autonomy – in violation of the second guideline.⁷

By contrast, the canonical restitutionary duty of the payee in the mistaken payment case (absent change of position) is rightly considered an easy case because it vindicates private law's maxim of reciprocal respect for self-determination without violating any of these Hart-derived guidelines.⁸

This analysis (which also applies to other aspects of private law⁹) helps clarify our disagreement with Stevens. Like Stevens, we believe that private law should not enact duties of virtue. But we deny what he simply assumes, namely: that “duties of right are based upon our entitlement to independence from the choices of others” (3). As Dagan and Dorfman explain, the facts of interdependence and personal difference – and thus the vulnerability and the valuable options to which the human condition as we know it gives rise – imply that the liberal commitment to individual self-determination cannot be excluded from the law governing horizontal relationships.

Yes, private law should resist *excessive* interference with people's autonomy that affirmative interpersonal duties to aid others typically entail. But private law need not – indeed does not and should not – subscribe to a blanket rejection of affirmative duties in private law.¹⁰ To bring this “modest affirmative duties” argument back to contract law, and in sum, private law's *grundnorm* of reciprocal respect for self-determination implies that there is neither a way nor a reason to bypass the modest *interpersonal* burden that law imposes on a promisor who voluntarily invokes the contract convention while engaging with the promisee.¹¹

* * *

b. Contract Doctrine's Fit. Stevens' second argument concerns fit. He contends that whatever its justificatory power may be, autonomy cannot account for core doctrines of contract law as we know it (see also Bix, FN2, who argues that we overstate the

⁷ Limiting the remedy of Stamp Owner A to an equitable lien to be realized at the moment of realization does not significantly ameliorate the affront to B's autonomy. It also creates numerous implementation difficulties that exacerbate the rule-of-law concerns of the third guideline.

⁸ For an extended refinement and defense, see Hanoch Dagan, *Autonomy, Relational Justice, and the Law of Restitution*, in RESEARCH HANDBOOK ON UNJUST ENRICHMENT AND RESTITUTION (Elise Bant et al. eds., forthcoming 2019).

⁹ See Dagan & Dorfman, *supra* note 6, at 1445–59.

¹⁰ See Dagan & Avihay Dorfman, *supra* note 6, at 1413–20, 1451–59; see also Hanoch Dagan & Avihay Dorfman, *Justice in Private: Beyond the Rawlsian Framework*, 37 L. & PHIL. 171 (2018).

¹¹ Stevens concedes that “a principle of independence *alone* cannot justify contract rights,” but still argues that transfer theory explains how such rights “can be created in a way that is compatible with the principle of equal [independence]” (22). We attend to transfer theory in Part II.a.

descriptive fidelity of choice theory). Much of Stevens' critique on this front aims not at choice theory, however, but rather at promise theory (or, as it is otherwise known, will theory).

Admittedly, at least some of the fault here is ours. We intended, in *Choice Theory*, to highlight the underappreciated contribution of contract types to our autonomy; we hoped to motivate reformers to consider expanding the inventory of contract types for work, home, and intimacy. But in focusing on these goals, we paid too little attention to showing how choice theory *already* fits and accurately explains the rules, doctrines, and cases that dominate existing contract law and scholarship.

In ongoing work, we are remedying this omission, restating the existing contract canon through the prism of choice theory.¹² Here, perhaps, it suffices to show, *pace* Stevens' critique, how choice theory explains doctrines that may seem puzzling. (We return to this task in Part II.b. on choice theory's prescriptive power.)

(1) *Objective Theory and Factors that Invalidate Contract*. As Stevens reminds us, first, will theory implies "the existence and content of a promise ought to be determined by the subjective intention(s) of the parties making them," and, second, neither evidentiary difficulties nor the promisee's putative reliance satisfactorily account for law's adherence to the objective theory (6-7). The failure of these explanations is manifest, for example, in the way law treats certain "defects in the subjective intentions of one or both parties [such as] misrepresentation, duress, or undue influence." These defects do not render the putative contract void, as the will theory requires, but rather empower the victim to avoid the contract (16). Stevens makes a powerful critique against will theory, which seeks to disclaim any teleological element in contract theory. Fair enough.

But will theory is *not* our position, not at all. Choice theory repudiates will theory's reactive and minimalist understanding of contract law, a view that holds law should simply follow the parties' subjective intentions and otherwise adopt a hands-off stance. Instead, we argue that contract law should *empower* people by *proactively facilitating* their autonomy.¹³

Understanding contract as an autonomy-enhancing institution *requires* law to adopt the objective approach. At most, promise/will theory goes halfway on this point: it may

¹² Hanoah Dagan & Michael Heller, *Choice Theory and the Canon of Contract Law* (unpublished work in progress).

¹³ Indeed, Stevens mischaracterizes our view by arguing that we ground contract "upon the (*actual, subjective*) autonomy of the individual" (10). We do not. His further complaint – that choice theory ends up with the disappointing outcome of sacrificing the autonomy interest of some contracting parties (those who do not subjectively intend to be bound by what they have objectively said) (10) – relies on his general critique of affirmative duties in private law, discussed in Section I.a.

grudgingly accept *external* moral reasons for subscribing to the objective standard.¹⁴ In sharp contrast, the objective standard *inheres* in choice theory's justification of contract law. For contract law to comply with its *telos*, it must opt for objective theory, rather than subjective theory. Why? Because of the qualitative difference between the limited autonomy-enhancing potential of a subjective theory of contract and the far more impressive potential of its objective counterpart.

This shift from passive response to proactive facilitation necessarily raises concerns of involuntariness. Law in a liberal polity must take this concern seriously. It is thus neither surprising nor unprincipled that choice theory adopts the objective theory of formation, and *at the same time*, endorses contract law's "tests for avoidance [that remain] largely subjective."¹⁵ These subjective tests for avoidance are not an exogenous imposition on contract's inner logic, as Stevens presents them (23). Instead, factors that affect a contract's validity (vitiating factors in UK parlance, like undue influence or incapacity) are founded on the same internal logic that justifies contracts from the get-go.

Because it relies on reciprocal respect for self-determination, contract law cannot be legitimate *in its own terms* without these rules, which proscribe violations of this maxim. Our account also vindicates modern law's broad understanding of this category of *relational injustices* by endorsing certain affirmative interpersonal obligations – such as duress law's anti-price-gouging and anti-profiteering rules or the disclosure duties that dominate the contemporary law of fraud. Finally, our account better explains why factors that invalidate contracts can – but need not – be invoked by the infringed party.

(2) *Formation and Privity*. Stevens implies that choice theory also fails to account for the "mutuality of contracting" (6). An autonomy-enhancing theory, in this view, is ill-equipped to explain law's understanding of contract as "the creation of both parties, through an offer and acceptance communicated by both." This mutuality is dramatically illustrated by the notion that "[t]he promisor's loss of liberty with respect to the promise takes place at the same moment as the acquisition by the promisee of the right against the promisor" (6, 18).

Following the same reasoning, Stevens claims that privity of contract makes little sense for choice theory, being "an unwarranted restriction on parties being able to do what they choose" (10; see also Ripstein at 15-16). "Third parties are not parties to the agreement, and they do not therefore acquire any contractual rights," Stevens claims; so "Nothing more needs to be, or can be, said" (11). For him, choice theory's failure to account for the promisee's unique standing vis-à-vis the promisor is yet more evidence of its distance from positive law.

¹⁴ See CHARLES FRIED, *CONTRACT AS PROMISE* 63 (1981).

¹⁵ Joseph M. Perillo, *The Origins of the Objective Theory of Contract Formation and Interpretation*, 69 *FORDHAM L. REV.* 427, 471 (2000).

Our answer to this charge is implicit in Part I.a, and we make it explicit here. If we justify contract enforceability based on the *interpersonal* right to reciprocal respect for self-determination, then the unique standing of the right-holder – the promisee – becomes straightforward. Only by conferring this standing on the promisee “can contract enable each one of us to enlist *specific* others for our goals” (CTC, 46). Contract, after all, is not the only autonomy-enhancing legal device; rather, its distinctive contribution to our self-determination is that it allows “specific people [to] recruit other specific people who can help them in pursuing their goals.” To do so, contract needs to empower the former “with the authority to invoke enforcement proceedings in the case of breach” (CTC, 47).

This means that, *pace* Stevens’ critique, the promisee’s unique standing does follow from choice theory. It also implies that choice theory easily accounts for the traditional rules of offer and acceptance, epitomized in the mirror-image rule, a rule Stevens implicitly invokes. Stevens, however, seems to argue that, to pass muster, choice theory must require *strict* adherence to privity and to the traditional tests of contract formation. Choice theory admittedly does not. But this raises no worry of fit, because contract law does not strictly adhere to these requirements either.

Choice theory nicely accounts for law’s deviations from both the mirror image rule and the privity requirement.¹⁶ As an autonomy-enhancing account of contract, choice theory comfortably lives with modern law’s alternative formation technologies, especially where they outperform the traditional approach to empowering both parties in a mutually beneficial way. (For example, this is the laudable ambition of §2-207 of the Uniform Commercial Code.¹⁷) By the same token, as Stevens notes, choice theory happily embraces the relaxation of the privity rule and the additional standing contract law confers on certain third parties (“intended beneficiaries”) to claim rights to contract performance.¹⁸ These adjustments to privity are congenial to choice theory insofar as they indeed expand contract law’s empowerment potential.¹⁹

(3) *Damages vs. Specific Performance.* Finally, Stevens offers the “primary duty of performance” as an example of a core common law feature that resists choice theory. Stevens criticizes the “frustratingly frequent mistake of contract theorists” who claim that

¹⁶ As the text implies, we do not subscribe to Stevens’ presentation of privity as a conceptual necessity of contract. Rather, choice theory accounts for privity as a *typical feature* of contract. Modern contract law helpfully demonstrates the distinction between these positions.

¹⁷ The cautionary language of the text derives from the less-than-ideal performance of this task. For a lucid explanation of this rule, see ROBERT E. SCOTT & JODY S. KRAUS, *CONTRACT LAW AND THEORY* 255-56 (5th ed., 2013).

¹⁸ See RESTATEMENT (SECOND) OF CONTRACTS § 302 (1981). See also, e.g., Contracts (Rights of Third Parties) Act 1999 (England).

¹⁹ Cf. Alan Schwartz & Robert E. Scott, *Third-Party Beneficiaries and Contractual Networks*, 7 J. LEGAL ANAL. 325 (2015).

“expectation damages is the law’s default contract remedy,” and speculates that the reason for this “error” is that “academics are generally not practitioners.” Because “the most common action in private law is a claim to enforce a promise to pay a sum of money owed,” he argues, contract’s “usual remedy” is – as transfer theory suggests – an order “that the promise must be performed.” Damages is, in this view, merely a “secondary” remedy, whose frequent application should not imply that the right of performance disappears. Even courts’ refusal to “specifically enforce contracts for the provision of services” does not prove otherwise, but merely shows that “[t]he contractual right conflicts with another right that has priority over it” (13-15).

There exists a fierce debate over the normative propriety of referring to expectation damages as contract law’s default remedy and to specific performance as an exceptional recovery. Nevertheless – and despite Stevens’ claim to the contrary – this ordering does reflect the common law’s canonical self-understanding, at least on the American side, as enshrined, for example, in both the Restatement (Second) of Contracts and the Uniform Commercial Code.²⁰ Stevens may be correct that the most *frequent* remedy is a performance order, but contract theorists are right (implicitly) to reject frequency as the sole test for *primacy*.

Choice theory helps us see that the common law’s traditional strong preference for monetary recovery is not, as mistakenly presented, an embarrassment for contract law, but instead a salutary testament to its underlying liberal commitments. To see why, we need to introduce another implication of our autonomy-enhancing theory that *Choice Theory* did not highlight sufficiently – *concern for the parties’ future selves*.

Taking seriously contract’s role in facilitating autonomy necessarily requires law always to be alert to the possible detrimental implications of its operations for the autonomy of the parties’ future selves. In other words, the same law that confers on people the normative power to commit themselves through contracts in the name of enhancing their self-determination cannot ignore the impact of the resulting contracts on their future selves. Self-authorship, after all, stands for our right to write and *re-write* the story of our life. Because this tension is inherent in contract’s *raison d’être* – *any* act of self-authorship constrains the future self – contract law must be particularly careful in defining the scope of the obligations it enforces and in circumscribing their implications (for more on regard for future selves, see Part II.b).

In *Choice Theory* we considered this point by reference to rules that define the outer limits of people’s power to commit their future selves, such as 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

²⁰ See RESTATEMENT (SECOND) OF CONTRACTS §§ 359-60; U.C.C. § 2-716.

contracts (CTC, 85). The common law's position – captured in the rule that specific performance “will not be ordered if damages would be adequate to protect the expectation interest of the injured party”²¹ – follows the same logic. Other things equal (for the promisee), contract in the common law tradition rightly opts for not compelling the promisor to act in accordance with the contractual script, allowing her to choose between doing so and covering the promisee's expectation.

This principled position also accounts for the particular rigidity of existing law in its resistance to awarding specific performance against service providers.²² This is a deeply entrenched rule, one that also applies in civilian jurisdictions where specific performance is widely available.²³ Because Stevens follows transfer theory, he needs to present this widespread rule as an *external* imposition to the logic of contract. By contrast, choice theory provides a principled explanation, in which contract's *internal* logic of self-empowerment proscribes such excessive impositions on the future self.

In short, choice theory fits and explains existing contract law far more closely than Stevens would allow.

II. ARTHUR RIPSTEIN: THEORY AND GUIDANCE

The last sentence of Arthur Ripstein's review nicely captures the crux of his critique. “The transfer theory,” he writes, “provides an explanation of [contract's] distinctiveness in a way that an account built on shifting meanings of autonomy and choice cannot” (24). Hence, our agenda in this Part: (a) discussing transfer theory/ies and critiques, and (b) considering how our account performs, given Ripstein's critique of our understanding of autonomy, pluralism, and contract theory.

a. Transfer Theory/ies. Ripstein has many disagreements with our presentation of transfer theory.²⁴ Some of these arise from our framing in *Choice Theory*. Therefore, we use this opportunity to restate our criticism more precisely. Additionally, Ripstein cautions against viewing transfer theory as “a single thing” (11), with a core set of commitments.

²¹ RESTATEMENT (SECOND) OF CONTRACTS § 359(1).

²² See RESTATEMENT (SECOND) OF CONTRACTS § 367(1).

²³ See, e.g., Charles Szladits, *The Concept of Specific Performance in Civil Law*, 4. AM. J. COMP. L. 208, 226 (1955).

²⁴ In the text, we focus on Ripstein's main objections. It is perhaps worth adding one small, additional clarification here. *Choice Theory*'s use of the term “private law libertarians” does accept the difference between libertarianism and liberal egalitarian theories that adhere to moral and institutional division of labor between private and public law. Our point, perhaps inelegant, is that these positions – though different in many crucial respects – converge in their view that private law is properly guided by an ideal of relational independence.

We did not originate that view, but in deference to Ripstein's concern, we will examine, and indeed refine, our critique here by reference to his specific formulation.

(1) *Our Critiques.* Before we examine Ripstein's objections, recall what he is objecting to. *Choice Theory* elaborated two conceptual challenges to transfer theory: the ownership and power-conferring critiques.

First, transfer theory assumes that a contract “*necessarily* needs to take the form of a *complete* assignment to the promisee of the right to the promisor's future actions” (CTC, 36). This binary view – promisor or promisee owns a right of performance – may explain why, as Stevens notes, transfer theorists “have given the impression that contract law is in some way dependent upon a [Blackstonian] theory of property law” (Stevens, 21).²⁵ In any event, the proper target of our first critique is not the idea that contract is property, nor the notion that it transfers pre-existing property (15). Rather, our “ownership critique” objects to a particular view of the nature of contract. To illustrate that view, we can point, for example, to Benson, who recently wrote that “because contract formation regulates what the parties must do by way of performance, [it] conceptually presupposes that a transfer has taken place,” so that “the promisor's duty to perform rests on the fact that she has already vested in the promisee's rightful and exclusive control what she promised her.”²⁶

Second, transfer theory misses the point that contract, unlike tort, is at core a *power-conferring* body of law. Contract attaches legal consequences to certain acts to enable people to affect their entitlements, if they so desire. This means, we argue, that the relevant question for contract theory “is not ‘what constraints to people's autonomy are legitimate?’”, but rather “how should contract law enhance people's autonomy?” (CTC, 39). In *Choice Theory*, we argued that transfer theory fails to address this question because it mistakenly views contract as essentially duty-imposing.

On this second point, Ripstein counters that transfer theorists do view contract law's power-conferring core as “non-contentious” (14). We are happy to stand corrected. The clarification, however, does not affect the content of our objection. It only revises slightly the form. Even if transfer theory accepts that contract is power-conferring at core, it does not engage the teleological question that this position necessitates. Transfer theory refuses to consider “the ways in which law can facilitate forms of bilateral voluntary obligations

²⁵ See, e.g., Peter Benson, *The Unity of Contract Law*, in *THE THEORY OF CONTRACT LAW: NEW ESSAYS* 118, 134-35 (Peter Benson ed., 2001) (arguing that “the right acquired at contract formation is a right *in performance*,” and insisting that while “it exists only as against a definite individual” it is “nevertheless proprietary and therefore fully compatible with the idea of transfer of ownership,” so that “it consists just in a right to have exclusive physical possession of the thing promised.”)

²⁶ Peter Benson, *Unity and Multiplicity in Contract Law: From General Principles to Transaction-Types*, 20 *THEORETICAL INQUIRIES L.* *, * (2019) [29, 18].

that are conducive to contract's autonomy-enhancing *telos*," and thus fails to look for the system "that generates the most autonomy-friendly implications" (CTC, 39-40).

(2) *Thin and Thick Transfer Theory*. We turn now to Ripstein's concerns regarding these two critiques of transfer theory. The best approach is perhaps to examine his position in particular, the "bilateral modification theory" of contract (hereinafter BMT), not "transfer theory" writ large. Ripstein resists the idea that one can talk about "the" transfer theory because, in his view, BMT does not subscribe to certain, crucial features of other transfer theories. As Ripstein explains, BMT is "thinner" than other transfer theories, because in his reading of Kant, juridical concepts "require institution through legal doctrine" (8).

It is not apparent, however, just how thin Ripstein's concept of contract is. As a first proposition, he writes that it stands only for "the simple idea that contract is the means through which people vary the normative relations between them" (23). But he quickly adds a second requirement, that contracts "are enforceable because they create new rights as between the parties in a way that is consistent with the freedom of both" (23), which for a Kantian (certainly for Ripstein, given his important contributions to Kantian legal theory) surely means independence and *not* autonomy.

The gap between these two propositions – between the thin and the thick understandings of BMT – seems subtle, but it is crucial. The former avoids our critiques, but says little about contract law, and it lacks the resources to provide an account "of how two people can change their respective legal relations" (23) in the typical ways afforded by contract. (We return to these difficulties in Part II.b). The latter understanding, which integrates the Kantian *grundnorm* of relational independence into its understanding of the concept of contract, seems more loyal to Ripstein's private law theory. This thick version of BMT, however, cannot escape our critiques.

(3) *Thick BMT and Ownership*. Consider first the ownership critique. Ripstein claims that BMT does not, and certainly need not, subscribe to the idea that specific performance should be the standard remedy for breach of contract, a view that we associate with transfer theory (8). This proposition may well fit the thin version of BMT. But it does not easily cohere with Ripstein's further claim, that contract necessarily entitles one person "to compel" another person to do something that she was not compelled to do but for the contract (12). This additional claim goes beyond the careful (and indeed uncontroversial) proposition of the thin version of BMT. It implies that a contract right, as Ripstein recently argued, "gives one person the entitlement to have another person's action available for the

first person's purposes . . . it is one person's entitlement to determine (that is demand or compel) a particular action from another."²⁷

This last proposition follows the logic of the thick version of BMT. Indeed, if, but only if, the promisee has an unqualified right to the promisor's performance along these lines, then breach of contract is analogous to conversion (CTC, 26, 31), or more precisely replevin. This analogy is important for an independence-based view of contract, what we are calling the thick version of BMT. The analogy allows legitimacy – that is, the justification for enforcing wholly executory contracts absent any reliance by the promisee – to rely on relational independence. Put differently, if, but only if, the analogy holds, the promisor's duty to perform can represent “a purely negative requirement not to withhold or treat as one's own what one has already vested with the other as a matter of rights.”²⁸ So, the thick version of BMT holds only if a promise *necessarily* makes the promisee the sole and despotic owner of the jointly created right (however qualified it is) vis-à-vis the promisor – as our ownership critique implies.

But then, *pace* Ripstein and as we previously noted, Stevens seems correct in endorsing the association of transfer theories with the view that, properly understood, breach of contract should entail specific performance as a matter of course, absent conflicting *external* considerations (and the mitigation doctrine appears to be, at best, an anomaly).

This view is not incoherent. The problem lies elsewhere: it (mis)represents one possible (and quite contentious) understanding of contract, which is built on notions of relational independence, as contract's conceptual core. Loyal to its Kantian commitments, this thick version of BMT implies that “parties to a transaction are not, strictly speaking, partners: there is no ‘ours’ here, but only a ‘mine’ and a ‘thine.’”²⁹ As our critique of Stevens' discussion suggested, and as our ownership critique implies, such a robust independence-based view of contract is quite alien to the law of contract as we know it, and certainly cannot present itself as the obvious, or at least innocuous, way to understand “*the* relational, transactional idea of contract” (18).

Consider for a moment the duty of good faith and fair dealing – along with cognates such as the substantial performance doctrine in service contracts, the principle against forfeiture in applying the condition/promises distinction, and the modern tendency to

²⁷ Arthur Ripstein, *Kantian Perspectives on Private Law*, in THE OXFORD HANDBOOK OF NEW PRIVATE LAW (Andrew Gold et al. eds., forthcoming 2020) [8]. See also, e.g., ERNEST J. WEINRIB, CORRECTIVE JUSTICE 153 (2012).

²⁸ Benson, *supra* note 26, at [29].

²⁹ Peter Benson, *The Idea of a Public Basis of Justification for Contract*, 33 OSGOODE HALL L.J. 273, 317 (1995).

expand excuses for nonperformance and to validate contract modifications due to changed circumstances. All these are ordinary features of contemporary contract law. And they seem much closer to a cooperative conception of contract performance than to a binary view, set at formation, of the parties' rights and responsibilities.³⁰

(4) *Power and Legitimacy*. This conclusion reappears when we consider Ripstein's response to our second line of critique of transfer theories, that is, their refusal to take to heart contract's autonomy-enhancing *telos*.³¹

Ripstein argues that we mistakenly assume that contract's power-conferring rules should be assessed by reference to their consequences without considering the view that they "might be justified by reference to their subject matter; for example, that the relevant powers to make binding agreements must be structured by the fact that contracting is something that two people do together" (14). But our claim regarding the need to consider the happy, autonomy-enhancing, consequences of these power-conferring rules is indeed appropriate. Otherwise, contract law's legitimacy must rely on the proposition that a breach of contractual right is *necessarily* tantamount to a conversion. But this proposition, as we have just argued, does not hold, and without it the requirement of reciprocal respect for independence does not offer a path to justify recruiting the state's coercive power to enforce wholly-executory contracts. Some such path is needed to validate contract's non-contentious, power-conferring core.

This is exactly why, in *Choice Theory* (22-23), we endorsed Benson's critique of the position often associated with Charles Fried. Fried tries to have it both ways, justifying enforcement of wholly-executory contracts and at the same time denying the legitimacy of affirmative interpersonal duties. Ripstein's challenge regarding the "arresting," "dialectic structure" of our treatment of Benson's critique of Fried (6) is therefore misplaced.

As explained in Part I.a, our claim is that a modest affirmative duty (premised on reciprocal respect for self-determination) both underlies mistaken payments law (and similar private law doctrines) and justifies recruiting the law to enforce wholly-executory contracts. So we indeed think that Benson was correct to highlight the "missing link" in Fried's original argument, one that tried to resist any reliance on teleological claims. And, at the same time, we argue – and are analytically entitled to argue – that Benson was wrong

³⁰ Can Ripstein respond that endorsing a cooperative conception of contract performance is tantamount to the *abolition* of contract law? We don't think so, for reasons we clarify in Part II.b.2.

³¹ Some readers may argue that *telos* is just white noise and insist that the disagreement is not about the nature of the argument (teleological, deontological, etc.), but rather about its substance. Ripstein's argument, in this view, is (notwithstanding his own dismissal of consequences) teleological about independence, in which case our claim is indeed that, unlike self-determination, independence (because of its negative focus on not being drafted by the choice of others) cannot get at the ground of contract-keeping.

to think transfer theory can fix this problem, and he was wrong to presuppose the only way to legitimize contract law is by bracketing its autonomy-enhancing *telos*.

Put differently, because the legitimacy of contract requires summoning our reciprocal respect for self-determination, it necessitates exactly the teleological assessment that Ripstein denies. People are justified in expecting specific others to submit themselves to the jurisdiction of contract law because this is the modest price each pays to allow us all to benefit from contract law's autonomy-enhancing potential. Therefore, *ceteris paribus*, the strength of the justification for recruiting the law for this purpose is a function of contract's performance of its autonomy-enhancing *telos*.

This view does not mean that *only* the consequences of contract's normative powers matter, or that the relational structure of these normative powers is insignificant. Rather, our reference in the previous section (and in *Choice Theory*, 86-88) to relational justice as an intrinsic contract value derives exactly from this relational structure. Because reciprocal respect for self-determination is the premise of contract's own legitimacy, attempts to recruit the law in the service of an agreement that defies this premise must be treated (at least *prima facie*) as *ultra vires*: an abuse, rather than use, of the institution of contract for a purpose that contravenes its *telos*.

* * *

b. Contract Theory, Pluralism and Autonomy. Choice theory also fails, Ripstein claims, because we misunderstand the point of contract theory and because our account of value pluralism and autonomy is confusing and confused.

(1) *Sequencing Analysis.* Ripstein argues that we erroneously “suppose [] that because people exercise autonomy by pursuing other ends, the point of any autonomy-focused institution must be to enable them to achieve those other ends” (18). It is a mistake, he claims, to “run[] together the question of what people do when they contract – and the bearing of that on the legal relationship that results – with the question of what they hope to achieve” (18; also 20). Choice theory cannot but fail, Ripstein implies, because it “conflates a question about how contracts could be binding at all with a different question about the regulatory and other powers of the state” (18).

Properly conceived, contract theory should explain what differentiates contract from “other equally legitimate doctrinal areas” (24). For Ripstein, focusing on this task invites a “sequenced approach” that first rigorously identifies the “the contract part.” This part should focus on “the nature of contractual obligation, which concerns the rights of private persons against each other.” This task must be distinguished from what properly “comes later in the analysis,” namely, the “different question about the powers the state may exercise” in regulating contracts, “restricting or shaping the arrangements that people can make,” “‘supplying’ a variety of contract types so as to make life more convenient or protect people from various forms of domination and exploitation,” or “imposing

mandatory terms on some contracting situations” (18, 23-24). Only such a sequenced model, Ripstein claims, sufficiently disciplines the theoretical inquiry by allowing a “pluralistic inquiry in which different values might be relevant by considering them at different stages, rather than in one larger all-things-considered judgment” (20).

Ripstein views *Choice Theory* as an invitation to engage in unprincipled, all-things-considered judgments. The source of this flaw, in his view, is twofold: our understanding of autonomy and the way we approach pluralism. Ripstein claims that we misapprehend “the kind of value that autonomy is” and that we confusingly treat “diverse values as a unified goal” (17, 23). He reads us as “holistic pluralists,” who insist that “the values relevant to a domain are all always in play” (4). But this position, he argues, entails grave difficulties because “within any specific domain, a plurality of incommensurable values can be engaged in multiple ways, and the pluralist has difficulty arguing that [there] is a uniquely best way of applying them to a particular problem” (2).

Choice Theory, Ripstein thus concludes, produces an apparatus that offers “no resources to defend independence” and is “so protean” that it provides no reliable guidance or constraint (17, 23). Specifically, while celebrating the importance of contract types, choice theory provides “little guidance in assessing [these] types” or in figuring out “which ones to offer” (22, 20). It furthermore generates two particularly embarrassing conclusions: (1) it implies that “contracts should only be enforceable after a comparative assessment of the effects of doing so on each party,” and, more particularly, it outright “prohibit[s] enforcement of wholly executory contracts” (16); and (2) it misrepresents non-voluntary contract practices that may be acceptable on welfarist grounds – notably mandatory terms within contract types and consumer contracts whose terms are nonnegotiable – as if they may plausibly be autonomy-enhancing (21-22).

These are tough critiques. In reply, we begin by considering Ripstein’s sequencing approach and his assertion regarding what qualifies as contract theory within this sequence. Then, we address his claims as to the indeterminacy and undesirability of choice theory.

(2) *What is the ‘Contract Part?’* To start, Ripstein classifies the rules constituting contract types – rules *Choice Theory* highlights – as being within the state regulatory apparatus rather than within the contract part of this sequence. He (along with Stevens) also excludes from the “contract part” contract’s mandatory rules and many of the rules that “restrict[] and shap[e] the arrangements people can make.”

The implication of these boundary-drawing propositions is dramatic because they exclude from the “contract part” much, indeed most, of contract law as it is conventionally discussed in the case law, the Restatement, and academic commentary in America, Canada, the United Kingdom, and everywhere else. Notably, it excludes the entire gap-filling apparatus. And, consistent with Ripstein’s insistence on BMT’s indifference to the debate over specific performance, this view excludes most of the rules on contract remedies.

Ripstein seems untroubled by this vast excision. We, however, fail to see how an approach that renames the bulk of contract law “regulation” or “public law” can yield a satisfactory theory of *contract law*, as opposed to, at best, and at most, a theory of *contract formation*.³²

But the problems with Ripstein’s sequencing model are even deeper than these artificial limits to contract’s domain. Excluding any reference to people’s possible ends in making contracts from the “contract part” threatens to undermine the possibility of contract itself.³³ To explain why, we invoke Charles Fried’s articulation, in his recent review of *Choice Theory*, of the justification for expecting law *proactively* to enrich our repertoire of contract types. Contract types, he writes, “offer parties a menu of possible interactions,” that are crucial for “party autonomy and self-fulfillment . . . because human interactions and legal interventions are hardly imaginable without them.” Just like “language that enables thought[,] without types, our minds would be blank.” The result is that these types are “*enabling* our liberties.”³⁴

Fried nicely captures what we termed in *Choice Theory*, “law’s indispensable role,” deriving both from what we call obstacles of our imagination and from a familiar set of transaction costs (CTC, 72-76). We can distill a similar lesson regarding the significant facilitative role of modern contract law by analyzing its extensive apparatus of gap-filling rules – a role starkly opposed to the traditional common law approach, which was hesitant to enforce incomplete agreements.³⁵

In short, a sequenced approach that delimits “the contract part” in line with BMT’s thick version fails to justify contract enforcement (as we argued in Part II.a). And, by grounding contract on independence, rather than autonomy, the sequenced approach marginalizes – rather than elucidates – “the simple,” but indeed important, “idea that

³² For Daniel Markovits and Alan Schwartz, contract theorists use three paths to avoid the perils of pluralism. Ripstein’s analysis offers an extreme version of what they call the “capitulation” path, which involves “seeking domains that are insulated from pluralism, because only one value governs them.” See Daniel Markovits & Alan Schwartz, *Plural Values in Contract Law: Theory and Implementation*, 20 THEORETICAL INQUIRIES L. [9] (forthcoming 2019); see also Hanoch Dagan & Michael Heller, *Freedom, Choice, and Contracts*, 20 THEORETICAL INQUIRIES L. *, * (2019) (evaluating this framework) [21-23]. Ripstein’s version eliminates even more, much more, from the domain of contract than do Markovits and Schwartz, who also rely on the capitulation strategy.

³³ To be sure, *pace* Ripstein’s contrary implication, insisting that contract law should be analyzed in terms of its autonomy-enhancing *telos* does *not* require us to subscribe generally to “teleological approaches to morality” (21).

³⁴ Charles Fried, *Contract as Promise: Lessons Learned*, 20 THEORETICAL INQUIRIES L. *, * (2019) [20, 19, 17, 16].

³⁵ See Hanoch Dagan, *Types of Contracts and Law’s Autonomy-Enhancing Role*, in 5 EUROPEAN CONTRACT LAW AND THEORY (forthcoming 2019).

contract is the means through which people vary the normative relations between them” (23; circling us back to the thin version of BMT).

There is one final difficulty with Ripstein’s sequencing model. It implies that restrictions on the interpersonal arrangements law facilitates are a form of regulation – and regulation goes beyond contract principles, properly so-called. But then the sequencing model says nothing regarding the legitimate considerations for such regulation or its relationship to the considerations that arguably guide “the contract part.”

The open-ended discretion left for legal institutions – which Ripstein celebrates elsewhere³⁶ – is wide. Somehow, this latter part in the sequence needs to account for all the concerns excluded from “the contract part.” Contract theory, in Ripstein’s account, provides neither guidance nor constraint for contract law. Insofar as contract theory is concerned, then, most of modern contract law results from nothing more than a set of all-things-considered judgments by various regulatory actors. In other words, per Ripstein, contract law combines a tiny core where *telos* is irrelevant and a vast regulatory part where discretion is almost absolute. We demur.

(3) *Autonomy for Contract, Refined.* Now, we round the corner to Ripstein’s last big block of critique, regarding value pluralism and autonomy. To face his challenge, we need to clarify how choice theory is pluralist, and how not. Also we must explain how our reliance on “autonomy as self-determination” – defined by Rawls as each individual’s right “to have, to revise, and rationally to pursue a conception of the good”³⁷ – as contract’s ultimate value structures contract’s seemingly conflicting values. *Pace* Ripstein, choice theory fares better than BMT along the dimensions of guidance and constraint.

We agree that *foundationally* pluralist contract theories may well be subject to Ripstein’s indeterminacy critique. Choice theory, however, is not pluralist all the way up.³⁸ To repeat: we are not foundational value pluralists.

The normative pluralism in *Choice Theory* is cabined at an intermediate level, that is, to the *goods* of contracts – roughly rendered as utility and community. These values are subordinate to autonomy, contract’s ultimate value. Choice theory is *adamantly committed* to the parties’ autonomy. There is no pluralism regarding the ultimate value and its robust consequences for law’s justification and design. At the same time, choice theory is

³⁶ See Ripstein, *supra* note 27, at [1] (“Despite its centrality to both morality and law, the morality of this natural law is incomplete in the absence of legal institutions; indeed, on its own, natural law is inadequate to its own principles. It requires legal institutions to render it fully determinate in its application, and to do so in a way that is consistent with everyone’s independence.”).

³⁷ JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 19 (2001).

³⁸ For the distinction between foundational pluralism and autonomy-based pluralism, see HANOCH DAGAN, RECONSTRUCTING AMERICAN LEGAL REALISM & RETHINKING PRIVATE LAW THEORY 171-73 (2013).

insistently agnostic regarding the “dosages” of community and utility that a society chooses in its contract types. The only guidance choice theory offers here regards the *distribution* of types within each valuable sphere of human interaction (CTC, 97).

The combination of foundational autonomy with pluralist contract types generates important guidelines that constrain the architecture of contract law, and thus offer reasonably-specific, contract-based criteria for evaluating the law. These guidelines flow from choice theory’s distinctive celebration of contract’s autonomy-enhancing *telos* and from its claim that the legitimacy of contract law is grounded in private law’s foundational prescription of reciprocal respect for self-determination. These core features imply that contract law in a liberal society must follow three overarching principles:

- (1) Law should *proactively facilitate* contracts.
- (2) Law should take seriously *the autonomy of the parties’ future self*.
- (3) *Relational justice* must serve as the floor of legitimate contractual interactions eligible for law’s support.

We discussed these three principles individually in *Choice Theory*, but we did not stress how they work together. This was an oversight that future work will remedy. The three principles form a single, coherent account of *autonomy for contract*. This account constrains the *range*, *limit*, and *floor* of contract, respectively. It does not suffer the indeterminacy of foundational value pluralism.

Recently, we offered a preview of this endeavor, and we incorporate it here by reference.³⁹ We show how the core rules governing the life of contracts – from inception to breakdown – all partake of one autonomy-enhancing mission and follow our three guiding principles. In this brief essay, we could only touch on a few of these contract law rules and doctrines. On *proactive facilitation*: (1) contract’s objective approach, (2) acceptance and privity rules, (3) the gap-filling apparatus, and (4) commitment to intra-sphere multiplicity of types. On *regard for future selves*: (5) its severe limitations on the availability of specific performance and cognates and (6) the outer limits it sets of people’s power to commit. And on *relational justice*: (7) factors that invalidate contract and (8) the rules that fortify a cooperative conception of contract performance.

We intend that these scattered examples (and the ones we add in Part III below) at least illustrate the potential of this substantial undertaking. We also hope this brief discussion shows why Ripstein’s verdict that choice theory cannot adequately defend independence is unwarranted, or at least premature. We do not deny, of course, that understanding independence as an intrinsic value does not prevent aggregation (17). Rather, we rely on Hart’s sensible maxim that our qualitative judgments regarding the distinctions “between the gravity of the different restrictions on different specific liberties

³⁹ Dagan & Heller, *Freedom, Choice, and Contracts*, *supra* note 32, at *.

and their importance for the conduct of a meaningful life” enables a credible autonomy-based analysis of contract law (just as it does as in mistaken payments law).

(4) *Inter-Temporality, Enforcement and Mandatory Terms.* Finally, by understanding (1) the role of contract for our self-authorship and (2) the function of contract types in this scheme, we see why Ripstein’s two final critiques are misplaced.

Because “self-determination consists in the carrying out of higher-order projects,” and because each such project “can be seen as composed of a set of plans arranged in a temporal sequence,” a successful exercise of self-determination is “an intertemporal achievement.”⁴⁰ In other words, only by securing “a temporal horizon of action” do we become “individuals with concrete identities” and our abstract choices transform into “individual life plans.”⁴¹ Because some temporally extended horizon is “indispensable for success in carrying out the vast majority of those plans,”⁴² contract’s autonomy-enhancement service depends on the *reliability* of contractual promises, and not merely on the protection of a promisee’s *actual* reliance – a point we noted early in this Response.

To restate, the right to expect, rather than the right to merely rely, is core to the idea of planning and thus to the ideal of self-determination. A consequence of the right to expect is that enforcement of wholly executory contracts is an essential feature of our autonomy-enhancing theory of contract – *pace* Ripstein’s claim to the contrary.

We agree with Ripstein that the autonomy of both parties needs to be taken into account. An autonomy-based theory need not, and indeed should not, subscribe to the position that this accounting should be done on an *ad hoc* basis. That would surely undermine autonomy.⁴³ Rather, an autonomy-enhancing approach would engage in a “Hartian” analysis, as in Part I.b.3 above which explained why the traditional common law is justified in treating specific performance as an exceptional remedy.

Ripstein’s last observation – that choice theory counterintuitively presents some mandatory terms and consumer contracts as potentially voluntary – is correct, but it is hardly embarrassing. As we explain in *Choice Theory*, our “errands” conception of consumer contracts implies that voluntariness can be secured in the context of consumer contracts if, but only if, law ensures that the non-bargained terms correspond to (or exceed) consumers’ typical expectations (CTC, 83). This is parallel to, and no more objectionable than, attributing voluntariness to a buyer of a car who lacks knowledge of its mechanical features.

⁴⁰ Charles R. Beitz, *Property and Time*, 27 J. Pol. PHIL. (2017) [p.9].

⁴¹ 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).

⁴² Beitz, *supra* note 40, at * [p.9].

⁴³ See DAGAN, *supra* note 38, at 201-11.

By the same token, mandatory terms that stabilize and channel cultural expectations regarding types do not necessarily undermine parties' voluntariness. If indeed these terms are salient, and if there exists a sufficient range among types in the relevant sphere of human activity, parties who resent the "specification" of one such type would simply opt for another (CTC, 4, 111-12).

III. BRIAN BIX: CHOICE THEORY IN FAMILY LAW

We now shift to a very different dialogue. Brian Bix's review provides a nice case study that illustrates the power of choice theory in the sphere of intimacy, an aspect of contracting marginalized by the Willistonian project – which aimed at unifying contract law around the model of commercial contracts. In Part III.a, we argue that Bix's discussion of variety in family law contract types – premarital agreements, marital agreements, separation agreements, cohabitation agreements, co-parenting agreements, open-adoption agreements, procedural agreements, surrogacy agreements, covenant marriage, and civil unions/domestic partnerships – reinforces our claim regarding contract's autonomy-enhancing role, albeit in varied ways.

Bix's analysis of the reasons in family law against providing such options and for limits to choice also helps us refine choice theory. As we show in Part III.b, contract's autonomy-enhancing *telos* explains the *floor* and the *limit* of legitimate contractual interactions eligible for law's support and accounts for the *constraint* of the power of contract when it adjusts, properly, for contract's possible external effects.

a. Autonomy and Choice. In a recent review of *Choice Theory*, Nathan Oman suggests that "Williston got it right" in presenting "the commercial contract [as] the core case of contract law,"⁴⁴ and warns against the expansion of contract beyond that sphere. Bix's review nicely shows that Oman's account is descriptively wrong and contract is very much present already in the intimacy sphere. Indeed, as Bix notes, family law in recent decades is typified by the increasing "role of party (contractual) choice" (1-2).

Despite acknowledging the plethora of contract types in family law and "the centrality of autonomy for living a good life," Bix takes this insight in a different direction, intended as a counterpoint to choice theory. He writes, "One can support a wide variety of contractual and status options, not primarily because of increased choice, per se, but because those range of options are needed to respond to the various needs and interests of a large population" (25-26).

Bix is correct to note that not all family agreements advance intra-sphere multiplicity. Premarital agreements, marital agreements, separation agreements, co-

⁴⁴ Nathan B. Oman, *Contract Law and the Liberalism of Fear*, 20 THEORETICAL INQUIRIES L. * (2019).

parenting agreements, open-adoption agreements, and surrogacy agreements (as opposed to the various types within this category) – are not really functional substitutes for each other or to the default legal regime.

That said, a variety of other family law contract types do comply with choice theory even in Bix's restricted reading: cohabitation agreements, covenant marriage, and civil unions/domestic partnerships fall squarely within this framework. These contract-types offer parties alternative ways to organize their intimate relationships that may be less, more, or simply different from conventional marriage (7, 11-12). To some extent, this is also the effect of procedural agreements, given that procedural choices of law or forum often "approximate choices among contract types" (11).

Furthermore, we see no friction between Bix's account of family agreements that do not advance intra-sphere multiplicity and those that do.⁴⁵ At root, choice theory stands for the idea that contract law should follow contract's autonomy-enhancing *telos*, and it must do so in compliance with all three guidelines discussed in Part II.b – proactive facilitation, regard for future selves, and relational justice.

Like contract's gap-filling apparatus, Bix's typology of family agreements illustrates that there are different *modes* of proactive facilitation. This include the aspect we emphasized in *Choice Theory* – ensuring intra-sphere multiplicity of types. But this mode does not exhaust the reach of this important guideline. Taken together, they demonstrate the prescriptive power of contract's autonomy-enhancing *telos* and the fit between our autonomy-enhancing theory of contract and contemporary law.

We agree with Bix's proposition that "what often seems most important about the offering of and support for" the former category of family contract types (those that are not functional substitutes) is "the way particular alternatives help certain individuals to live worthwhile lives, where living a worthwhile life means something above and beyond having chosen a particular path" (26). "Both marital and premarital agreements," Bix writes, add choices that enable "well-counseled parties who are married or about to marry" to "alter the financial terms of their marriage" (3-4). By the same token, although separation agreements are "usually not thought of as family 'options,'" they should be. They "offer couples about to divorce (or legally separate) choices among a broad range of different potential sets of rights and duties," regarding their capacities as co-parents as well as the "ongoing financial obligations, if any, each will have to the other (in terms of alimony, child support, or other future obligations) (5)."

⁴⁵ We also agree with Bix's observation that choice theory is orthogonal to the discussion of the legal recognition of same-sex marriage (15). *Choice Theory* does not address this matter, because the issue there is that a liberal state must make the (autonomy-enhancing) institution (or contract-type) of marriage equally available to everyone.

We also agree that contract is potentially conducive to intimacy, even without multiplicity. Allowing alteration of law's rules increases autonomy because "the ability to rely on a promise" enables "many important joint decisions" regarding the parties' life as partners or parents, and is crucial in "allowing one to plan for the future, and thus better to be in control of one's life" (14-15). Indeed, as Bix correctly notes – echoing our claim in Part II.b.4 – from the perspective of autonomy, choice without reliability confers no benefit (16).

The only aspect in which we slightly disagree with Bix here relates to his presentation of these points as separate from each other and as reasons favoring enforcement that are to some extent "distinctive to the family context" (14). They are neither separate nor distinctive. Instead, they illustrate the core workings of choice theory.

* * *

b. The Limits of Choice. Bix presents contract law's presumption in favor of enforcing agreements as premised on the contracting parties' belief that their exchange is "better than (or at least not worse than) the status quo;" refusals to enforce are, for him, grounded on concerns of public policy, that is, when enforcement undermines "the public good" (13, 16-17). In the previous Parts, we offered a more precise autonomy-based justification for the presumption in favor of enforcement, Bix's first point, and will not revisit it here.

(1) Internal and External Considerations. Instead, we focus on Bix's analysis of the "public policy" considerations that constrains choice in the agreements he surveys. We use this part of his discussion to illustrate choice theory's distinction between *internal* and *external* contract considerations.

Recall the three main elements that choice theory singles out as internal (albeit not exclusive) to contract: proactive facilitation, regard for future selves, and relational justice. Our observations in the previous section related to the first consideration; here we expand the analysis.

What makes Bix's public policy discussion particularly helpful is that it conflates – as do many courts – internal considerations that constrain choice with external concerns that have nothing to do with the parties' interaction *inter se*, but rather with their potential effects on others (notably children).⁴⁶ The profound distinction between these two

⁴⁶ One could resist treating effects on children as externalities by arguing that the relevant family agreements must be analyzed as contract types, with parents or potential parents (as opposed to promisor and promisee) as parties. Then, effects on children are arguably internal to the parties' interpersonal interactions. The status of children in family law is complex, and we need not arbitrate it here. For our purposes, the conventional view invoked in the text above suffices. It illustrates well our distinction between internal and external contract concerns.

categories drives our response to both Stevens and Ripstein (in Parts I.b and II.b, respectively). Their accounts offer no resources for appreciating this distinction.

To give an example of how Bix conflates these factors, consider the following. In his discussion of party choice in premarital and marital agreements, Bix notes “there are limits to which terms can be altered (generally terms relating to children cannot be set by the parties in premarital or marital agreements) or by how much (at a minimum, there is the limit of unconscionability, which applies to all agreements)” (4).

The former constraint is, in our account, a real “public policy” concern. Why? It looks beyond the parties and their interpersonal interactions. The latter constraint, by contrast, arises from within contract. It exemplifies our claim that attempts to enforce contract for purposes or in ways that undermine reciprocal respect for self-determination are best treated as *ultra vires*: they abuse contract by invoking the institution in defiance of its own *telos*.

This distinction goes to the foundational role of *relational justice* in liberal contract law. It explains why, for example, choice theory adopts a rather expansive view of the law of duress, notwithstanding Bix’s hesitation. As we argued in Part I.b, duress must go beyond the traditional *laissez faire* mode of simply prohibiting *active* interference of one party with the other’s free will. By the same token, appreciating choice theory’s *regard to the future self* nicely accounts for the limited ability to contract away the right to divorce (even in covenant marriages) – a restriction so fundamental Bix does not even mention it.

These guidelines better explain – as concerns internal to contract’s autonomy-enhancing *telos* – Bix’s account of judicial review of premarital agreements and “the substantive constraints [they impose] on the terms to which the parties can (enforceably) agree.” As he notes, these constraints are typically imposed on agreements in which “the spouse-to-be who is already financially less well-off” waives “rights to alimony or [] claims to property upon divorce.” If enforceable, these waivers might exert pressure on “a poorer spouse to stay in a marriage even when it is harmful to that spouse, because the alternative is financially too daunting” (17).

(2) *Commodification*. Bix’s discussion also helps highlight commodification, another internal concern that justifies constraining contractual choice. Bix notes that *Choice Theory* does not address this concept, adding that those who worry about commodification “generally do not take as persuasive counter-arguments based on the autonomy of the contracting parties” (21). We agree with Bix that friends of autonomy *should* take commodification concerns seriously – if these concerns are properly formulated.

As an autonomy-based account of contract, choice theory implies that the material benefits that contracts generate must be understood as an *instrumental* value. The utility surplus is a means to the superior end of promoting the parties’ autonomy (CTC, 90-91).

In other words, facilitating the parties' preference satisfaction is important because, *and to the extent*, it is conducive to people's self-determination. Utilitarian considerations – even those relevant only to the contracting parties – are generally subordinate to autonomy, contract's ultimate value. Preferences that undermine self-determination should be generally overridden, for example if they give too little regard for the party's future self. The same conclusion applies to commodification. A liberal contract law cannot legitimately facilitate types of transactions in which the parties' welfare-enhancement threatens to efface their self-determination.⁴⁷

So relational justice, regard to the future self – and anti-commodification, properly understood – are all internal to contract. There is, of course, no linguistic or conceptual wrong in treating them as part of public policy. But it is informative nonetheless to see that none of these concerns requires invoking some external, “larger” public good. All three considerations for *constraining* contractual choice spring from the very same rationale – internal and autonomy-enhancing – that justifies *enforcing* contract in the first place.

(3) *Externalities*. The other important examples Bix discusses of constraints on choice are conceptually different. They arise where the parties' agreement might generate *negative externalities*. It is easy to see how externalities might justify constraints to parties' choice in family agreements. But this is a debate external to choice theory.

For example, it seems straightforward that parents' agreements should not detrimentally affect children. An open adoption agreement is enforceable (in the states that recognize this contract type) only if a court determines that “such an arrangement is in the best interests of the adopted child,” and it remains “subject to judicial supervision and possible revision, again under the standard of the best interests of the child” (9). More generally, as Bix correctly notes, “[i]n family law, there are often third parties potentially hurt by arrangements, and those third parties are usually children: *e.g.*, the children who are in the marriage with one-sided financial terms, the children who are in the open adoption, the children with whom a functional (but not legal) parent has ties (or has ties cut off), the children who are the product of surrogacy agreements, and so on” (18). Restrictions on party choice grounded on *such* externalities are not controversial.

This last point illustrates one of the benefits of contract theory that rejects the Willistonian paradigm and pays due attention to the contracting spheres of home, work, and intimacy. Family agreements demonstrate that third party losers need not “fall between the various cracks in contract theory.”⁴⁸ To be sure, it is implausible to expect that all possible negative externalities of contract will be internalized. For example, the price

⁴⁷ See Hanoch Dagan, *Markets for Self-Authorship*, 27 CORNELL J. L. & PUB. POL'Y *, * (2018).

⁴⁸ Aditi Bagchi, *Other People's Contracts*, 32 YALE L. REG. 211, 215 (2015).

mechanism of supply and demand implies that almost every contract entails *some* external effect. For private ordering to take place – while contract performs its autonomy-enhancing task – law should aim only to address contract’s *substantial* negative externalities.⁴⁹ Indeed, the core of certain specialized areas of law, such as antitrust or bankruptcy law, restrict freedom of contract along exactly these lines.

(4) *Public Policy and Indeterminacy.* What’s left is to elaborate contract law’s external public policy restrictions, a core task indeed, and a value-laden and indeterminate one. As Alan Farnsworth notes, such policies change over time and are of “great variety,” but are by and large “firmly rooted in precedents.”⁵⁰ Rule-of-law-respecting courts are understandably restrained in revising the existing categories.⁵¹ Unlike the *internal-to-contracts* considerations we detail, which are guided by “Hartian” qualitative judgements on autonomy, public policies do reflect the broad *all-things-considered* judgments that are necessary when contract is situated in its larger socio-economic context.

Two final points. The first builds on Bix. Even those who are skeptical about public policy analysis, often appreciate its legitimacy when children are involved. This perception of legitimacy may have positive spillovers to other contract spheres. For example, it may help encourage courts (cautiously and rarely, we hope), reasoning by analogy, to revisit entrenched borderlines between suspect and legitimate classes of contract, say in insurance contracts.⁵²

The second point returns to Ripstein. Like Ripstein, we do not think contract theory should encompass *all* the possible considerations contract implicates – there must exist an external zone of regulation and public policy. But choice theory sweeps a lot more into the “contract part” than Ripstein, as discussed in Part II.b. We exclude only “true” public policy concerns, those that involve certain substantial, negative, third party effects. The result is that choice theory sharply cabins the value indeterminacy inherent in public policy or regulatory analysis – by comparison with the accounts of Stevens, Ripstein and Bix.

⁴⁹ See *Id.*, at 217.

⁵⁰ E. ALLAN FARNSWORTH, *CONTRACTS* 326-27 (3rd ed. 1999).

⁵¹ See Bagchi, *supra* note 48, at 218.

⁵² Consider the putative negative externalities of insurance contracts, particularly in corporate settings. Compare FARNSWORTH, *supra* note 50, at 328 (the “policy against wrongs” does not generally “extend to a promise to indemnify another against the consequences of his committing a wrong”) to TOM BAKER & SEAN J. GRIFFITH, *ENSURING CORPORATE MISCONDUCT: HOW LIABILITY INSURERS UNDERMINES SHAREHOLDER LITIGATION* (2010) (demonstrating how corporations use insurance to avoid responsibility for corporate misconduct, dangerously undermining the impact of securities laws).

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 philosophers regarding our claim. This issue advances that debate. Reflecting on the thoughtful and generous essays by Stevens, Ripstein, and Bix refines autonomy for contract to require proactive facilitation, regard for future selves, and relational justice. Choice theory comes out stronger, but more remains to be done. Together, we continue on a mutual path toward a just and justified law of contract.