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## Choice Theory: A Restatement

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## CHOICE THEORY: A RESTATEMENT

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# CHOICE THEORY: A RESTATEMENT

*Hanoch Dagan & Michael Heller*

## ABSTRACT

*This chapter restates choice theory, which advances a liberal approach to contract law. First, we refine the concept of autonomy for contract. Then we address range, limit, and floor, three principles that together justify contract law in a liberal society. The first concerns the state's obligation to be proactive in facilitating the availability of a multiplicity of contract types. The second refers to the respect contract law owes to the autonomy of a party's future self, that is, to the ability to re-write the story of one's life. The final principle concerns relational justice, the baseline for any legitimate use of the contract power. We conclude this restatement of choice theory by highlighting its most important jurisprudential payoff—how our account relates to and improves on the economic analysis of contract. Choice theory is the modest price that economic analysis must pay to account for individual freedom.*

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# CHOICE THEORY: A RESTATEMENT

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

## I. INTRODUCTION

In *The Choice Theory of Contracts*,<sup>1</sup> we advance a liberal approach to justify contractual freedom. In this account, contract is best interpreted as essentially a power-conferring institution, with autonomy as its grounding principle, its *telos*. Choice theory brings jurisprudential coherence to contract as a whole, explains many otherwise puzzling doctrines, and offers a normatively attractive program for law reform.

This chapter offers an up-to-date restatement of choice theory, which has benefitted from rigorous scholarly scrutiny in the time since the *Choice Theory* book first appeared.<sup>2</sup> Restated, choice theory contends that three principles—addressing *range*, *limit*, and *floor*—guide contract law in a liberal society:

- (1) *Range*. The state is obligated *proactively to facilitate* the availability and viability of multiple contract types in each sphere of human endeavor.
- (2) *Limit*. Contract law must respect the *autonomy of a party's future self*, that is, it must take seriously the ability to *re-write* the story of one's life.

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<sup>1</sup> See HANOCH DAGAN & MICHAEL HELLER, *THE CHOICE THEORY OF CONTRACT* (2017).

<sup>2</sup> See in particular Volume 20 of *THEORETICAL INQUIRIES IN LAW* (2019) (challenges from leading contracts scholars), Volume 38 of *LAW & PHILOSOPHY* (2020) (liberal philosophy), and Volume 20 of *JERUSALEM REV. LEGAL STUD.* (2019) (law and economics). Responding to these challenges, we refine choice theory in three articles. See Hanoch Dagan & Michael Heller, *Freedom, Choice, and Contracts*, 20 *THEOR. INQ. L.* 595 (2019) [hereinafter Dagan & Heller, *Freedom & Choice*]; Hanoch Dagan & Michael Heller, *Autonomy for Contract, Refined*, 38 *L. & PHIL. \** (2020); Hanoch Dagan & Michael Heller, *Why Autonomy Must Be Contract's Ultimate Value*, 20 *JERUSALEM REV. LEGAL STUD.* 148 (2019).

(3) *Floor*. To justify coercive enforcement by the state, all contracts must comply with the demands of *relational justice*.

Our original account was structured primarily around *range*. As we showed in *Choice Theory*, states largely comply with this injunction in the commercial sphere; there, we highlighted the theory's reformist agenda for the spheres of work, home, and intimacy. Here, we read *range*, *limit*, and *floor* together, an approach that grounds the core claim of choice theory more forcefully: contract's ultimate value must be autonomy, defined as the right of free and equal individuals to *self-determination* (or self-authorship, a term we use interchangeably).

Choice theory contests the conventional wisdom that associates the liberal commitment to freedom of contract with *negative liberty* or *personal independence*, that is, with the idea that law should enforce whatever private deals individuals agree to and otherwise get out of the way.<sup>3</sup> Self-determination, rather than independence, we argue, both grounds contractual liability and accounts for the main features that typify modern contract law.

Choice theory is an interpretive theory of contract law in liberal societies. It builds on existing practices and thus reaffirms much of existing law. But an interpretive theory is not a descriptive exercise. Rather, it provides an account of our legal practices that suggests a new perspective on the law. Although interpretive legal theories are falsifiable, their falsifiability is typically not an easy task. Thus, one could perhaps imagine a liberal society in which one (or more) of the three principles of liberal contract—proactive facilitation, regard for the future self, and relational justice—is missing. But choice theory, like other interpretive legal theories, is not *easily* falsifiable, because interpretation implies reconstruction, which necessarily involves marginalization and demarginalization of various features of the system.

The fact that the theory's falsifiability is not easy is, however, a virtue, because it allows the theory to serve as a normative ideal. It's the compass that provides internal resources of critique for lawyers who are loyal to their duty to push the law to comply better with its duties of justice. Choice theory indeed

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<sup>3</sup> See STEPHEN A. SMITH, *CONTRACT THEORY* 59, 139 (2004). For an early incarnation of this view, see Samuel Williston, *Freedom of Contract*, 6 CORNELL L.Q. 365, 368–69, 373 (1921).

suggests possible improvements in the law, and at times it even points to urgent reforms needed to ensure law's continued legitimacy. Finally, choice theory also highlights new questions that offer a research agenda for future reformers and scholars.

Part II refines the concept of autonomy we develop in *Choice Theory* and explains why it should ground liberal contract law. Parts III, IV, and V address range, limit, and floor, respectively. Part VI concludes by highlighting choice theory's most consequential jurisprudential payoff—how our account improves on the economic analysis of contract. We show the hidden normative price of adhering to welfare foundationalism, the approach that has dominated contract theory in recent decades. Economic analysis can lead to justified reforms, but only if integrated into a teleological scheme that takes autonomy, rather than welfare, as its ultimate value. Choice theory is the (modest) price that economic analysis must pay to account for individual freedom.

## II. AUTONOMY AS CONTRACT'S *TELOS*

Negative rights alone cannot guarantee people's autonomy.<sup>4</sup> In a liberal polity, people are entitled to more, that is, to a system of law *supportive* of their autonomy, rather than merely one that respects their capacity for uncoerced choice. In turn, people's right to self-determination—to have some control over their destiny—depends on both material conditions and a sufficiently heterogeneous inventory of alternatives.<sup>5</sup>

States employ many means to carry out their obligation to facilitate people's self-determination. Contract is just one such means, a power-conferring state-provided institution. Like other means for self-determination, the institution of contract, if it is to be legitimate, must be situated within a robust background regime that guarantees everyone the material, social, and intellectual preconditions needed for self-authorship. In other words, it is implausible to expect that contract law's legitimacy is freestanding. At the same time, contract's autonomy-enhancing

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<sup>4</sup> See H.L.A. Hart, *Between Utility and Rights*, 79 COLUM. L. REV. 828, 836 (1979).

<sup>5</sup> See JOSEPH RAZ, *THE MORALITY OF FREEDOM* 372, 398 (1986).

role is non-optional and irreducible. A liberal state is obligated to provide contract law.

### *A. Contract for Autonomy*

To appreciate contract's irreducible function, it is helpful to begin by considering *why* contract is a convention that any polity committed to autonomy must adopt.<sup>6</sup> The answer is that the normative powers contract makes available are essential to people's ability to plan over time.

1. *Time, Plans, and Expectations.* And why does the ability to plan matter for self-determination? As one observer notes, "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." This means that a successful exercise of self-determination is "an intertemporal achievement," which thus typically requires "a temporal horizon of action."<sup>7</sup>

Contract law's signature role is that it vindicates promisees' *expectations*, a core condition of autonomy. How? By ensuring the reliability of contractual promises for future performance, and not merely the protection of promisees' *actual* reliance, contract law enables people to extend their ability to plan into the future.

Contract is the means through which 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. 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>8</sup>

Choice theory is so named because the core of contract's autonomy-enhancing function is to expand the range of choices people can make to be the authors of their own lives over time. Contract law, enforced through state coercion,

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<sup>6</sup> See Seana Valentine Shiffrin, *Promising, Intimate Relationships, and Conventionalism*, 117 PHIL. REV. 481, 520 (2008).

<sup>7</sup> Charles R. Beitz, *Property and Time*, 26 J. POL. PHIL. 419, 427 (2018).

<sup>8</sup> JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 19 (2001).

expands the available repertoire of secure interpersonal engagements beyond the realm of gift-based and similarly close-knit interactions.

2. *Instrumental and Constitutive Choices.* While all additional choices are potentially valuable, an autonomy-enhancing account must distinguish choices based on how they actually contribute to self-determination. As an initial matter, we note that some contracts facilitate instrumental choices, while others address constitutive ones.

Some choices contract affords are instrumentally important: they satisfy preferences which reflect and serve people's life-plans. Or they may contribute to people's general welfare which in turn serves as a means for advancing their self-determination. This category of choice naturally lends itself to the familiar cost benefit analysis that renders commensurate all contract rules and terms.

But other choices go beyond preference satisfaction: they relate to people's "ground projects" – the projects that make us who we are and give meaning to our lives.<sup>9</sup> This is a significant category because it reminds us that contract is not only important for commerce, but also is potentially empowering in the other spheres that *Choice Theory* highlights: home, work, and intimacy. And, unlike instrumental choices, constitutive ones are not easily analyzed in cost benefit terms.

### *B. Justifying Enforcement*

As we just noted, for contract to enhance autonomy, contractual promises must be reliable. In turn, reliability depends on a background rule: people who invoke the contract convention must be deemed to submit themselves to the jurisdiction of contract law, which goes, as noted, beyond the harm principle. This is a demanding rule that applies even to promisors who have not deliberately intended to be so bound. How can it be defended in a liberal regime that enforces only people's duties of right while it avoids forcing people to be virtuous?

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<sup>9</sup> See Hanoch Dagan & Avihay Dorfman, *Just Relationships*, 116 COLUM. L. REV. 1395, 1419 (2016).



1. *Independence and Self-Determination.* This question reformulates contract's long-standing justificatory challenge, most powerfully posed by Lon Fuller and William Perdue:<sup>10</sup> Why does contract law go beyond promisors' reliance interest, vindicating their expectation interest? Why is it willing to coercively enforce promises even when nonperformance generates no detrimental harm?

In *Choice Theory*, we showed why earlier attempts to face this challenge predictably failed. These accounts assumed that contractual duties—like other interpersonal duties in private law—must be founded on people's reciprocal respect for *independence*. But if our interpersonal obligations are indeed exhausted by reciprocal respect for each other's independence, then the enforcement of wholly-executory contracts cannot plausibly be justified. Why? Because contract's background rule, which goes, as noted, beyond the harm principle, implies that promisors owe some *affirmative* duties to intended promisees.

This difficulty dissolves, however, as soon as we recognize that, in a liberal polity, people are justifiably expected to pay some modest price to benefit others. This price is entailed by our duty to respect each other's right of *self-determination* in our interpersonal relationships. The facts of interdependence and personal difference—and thus the vulnerability and the valuable options to which these social conditions give rise—require that the liberal commitment to individual self-determination cannot be excluded from the law governing relationships between people.<sup>11</sup> It should be no surprise, therefore, that modest affirmative interpersonal duties do indeed typify private law.<sup>12</sup>

2. *Modest Affirmative Duties.* The key here is *modest* duties. Private law resists, as it should, excessive interference with people's autonomy that many affirmative interpersonal duties to aid others entail. For example, duties of friendship and of benevolence are rightly beyond law's reach. But private law is

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<sup>10</sup> See L. L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages*, 46 YALE L.J. 52 (1936).

<sup>11</sup> See Hanoch Dagan & Avihay Dorfman, *Justice in Private: Beyond the Rawlsian Framework*, 37 L. & PHIL. 171 (2018).

<sup>12</sup> See Hanoch Dagan, *Autonomy and Property* (in this volume); Avihay Dorfman, *Relational Justice and Torts* (in this volume).

not, need not, and should not be a stronghold of interpersonal independence, with a blanket rejection of affirmative duties. That view results from a particular Kantian understanding of the distinction between duties of right and duties of virtue. Liberalism need not, and should not, prescribe that duties of right are *only* duties of abstention.

A liberal state should be concerned with excessive interpersonal impositions, but that worry does not imply a blanket rejection of affirmative duties in private law. As H.L.A. Hart argued, not every infringement of independence ignores “the moral importance of the division of humanity into separate individuals and threatens the proper inviolability of persons.” We agree here with Hart and accept the significance of distinguishing “between the gravity of the different restrictions on different specific liberties and their importance for the conduct of a meaningful life.”<sup>13</sup>

Indeed, private law’s *grundnorm* of reciprocal respect for self-determination—governing interpersonal relationships in a liberal polity—implies that there is no way, and no reason, to bypass the modest interpersonal burden that law imposes on promisors who voluntarily invoke the contract convention while engaging with promisees. Because contract’s empowerment potential depends on people’s ability to count on the representations of others, an autonomy-enhancing view of contract implies that individuals may be required to satisfy promisees’ expectations even if they only inadvertently invoked the convention of contract with no subjective intention to be legally obligated and even before promisees have actually been harmed. The burden such a regime imposes on promisors—the precautions it requires—is the modest price each party pays so the other can benefit from contract law’s potential to advance our self-determination.

This lesson animates the principles that guide liberal contract law—range, limit, and floor. But before delving into these principles, we respond to two challenges. First, we show that celebrating autonomy as contract’s *telos* does not offend liberal neutrality. Second, we argue that placing autonomy as contract’s ultimate value does not conflict with contract’s other instrumental and intrinsic values.

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<sup>13</sup> Hart, *supra* note 4, at 834–35.

### C. On Neutrality and Pluralism

1. *Neutrality.* Not everyone is committed to the foundational status of individual self-determination. Religious believers, at least some, reject self-determination. They may view morality not as the affirmation of the self, but rather in its forgetfulness. Many religious believers may happily endorse contract's service to commerce, and, at the same time, may be offended if choice theory's more ambitious autonomy-enhancing approach were embraced. This concern, if valid, suggests that choice theory violates liberal toleration. Fortunately, it does not.

Even if religious believers indeed find the ideal of self-determination offensive,<sup>14</sup> this objection would be indefensible. Remember that contract is a power-conferring device, which people can, but need not, use in the service of their self-determination. Bolstering the autonomy-enhancing capacity of contract in the fields of work, home, and intimacy would empower people. But it would not force them to deviate from their already existing (more circumscribed) ways of conducting themselves in these spheres.

While adding choice among contract types may be controversial, objectors cannot rely on a claim grounded in liberal neutrality among conceptions of the good. Quite the contrary. This objection to choice is, after all, an argument against allowing *others*—not the objectors themselves—to benefit fully from contract's empowering potential. Religious believers can continue as before to practice in accord with their beliefs. Rejecting choice theory requires law to comply with the objectors' "external preferences," that is, with their views regarding the proper "assignment of goods and opportunities to others." But as Ronald Dworkin argued, taking *this type* of preference seriously violates, rather than vindicates, "the right of everyone to be treated with equal concern and respect."<sup>15</sup>

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<sup>14</sup> As the text implies, for us, self-determination still seems indispensable: even if people should not *author* their life story, they need to at least *discover* it. See Leslie Green, *What is Freedom For?*, Oxford Legal Studies Research Paper No. 77/201 (2012), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2193674](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2193674).

<sup>15</sup> RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 275 (1977).

2. *Pluralism*. To further ease neutralist worries of unequal treatment of different conceptions of the good, it may be helpful to clarify the subtle, but important, distinction in the meaning of autonomy in choice theory and in certain versions of perfectionist liberalism.

Self-determination, for us, is contract's ultimate value. It is not a means for securing a rich and satisfying life in terms of human perfections and excellences. As such, autonomy is not implicated in any form of (potentially disrespectful) paternalism. For choice theory, an autonomy-based contract law is committed to empowering individuals in forming and pursuing *their own* conception of life so long as they do not denigrate others'.

This is exactly why choice theory requires law to offer, for each sphere of human interaction, a sufficiently diverse range of contract types. Choice theory prescribes that these types must be *partial functional substitutes*, so that law's inventory offers people real alternatives from which *they* can choose. Additionally, one of the ways meaningful choice can be enhanced is by enriching this repertoire through support for minoritarian or utopian contract types. This requirement implies that law must not invest in contract types based solely on demand. At the same time, this demand-insensitivity of choice theory involves neither censorship nor worth-ranking.

Choice theory's pluralism, however, is *not* foundational. This point is crucial. Foundational value pluralism is normatively unacceptable because it may end up undermining the right of each person to equal concern and respect. It also fails to impose order on pre-theoretical practices and thus fails to provide contract law either guidance or constraint. Choice theory, by contrast, is not pluralist all the way up; it does not perceive autonomy as merely one value among many.

Autonomy is contract's ultimate value. Below autonomy, and cabined at the intermediate level of contract types, choice theory is functionally pluralist regarding the *goods* of contracts—roughly rendered as utility and community. Why? Because a range of contract types serving plural values gives people real choices, and that is most conducive to the ultimate goal of enhancing autonomy.

To restate, choice theory is *adamantly committed* to the parties' autonomy. There is no pluralism regarding this ultimate value and its robust consequences for

law's justification and design. At the same time, choice theory is *insistently agnostic* regarding the various combinations of "dosages" of community and utility that a society chooses in its contract types—so long as there are enough partial functional substitutes (to ensure choice and enhance autonomy), and so long as they all comply with the future-self *limit* and the relational-justice *floor* (for reasons we clarify below).

The combination of *foundational* autonomy with *pluralist* contract types is an important jurisprudential feature of choice theory. This architecture generates important guidelines that constrain the design of contract law, and thus offers reasonably-specific, contract-based criteria for evaluating the law. These guidelines, to which we now turn, flow from choice theory's distinctive commitment to contract's autonomy-enhancing *telos* and from its claim that private law's foundational maxim of reciprocal respect for self-determination grounds the legitimacy of contract law.

### III. PROACTIVE FACILITATION

The three guiding principles of liberal contract law—proactive facilitation, regard for future self, and relational justice—justify and explain a surprisingly broad set of contract rules, from inception to breakdown. These principles regulate the bargaining process and formation of contracts; determine the parties' obligations by identifying and interpreting their agreement, fill gaps and set norms for performance and excuse; and finally define the consequences of breach by prescribing the type and scope of available remedies. We begin with the first principle: the state's obligation proactively to facilitate contract types.

#### A. *The Role of Law*

To serve its autonomy-enhancing *telos* properly, contract requires proactive legal facilitation. The contract convention cannot leave people entirely to their own devices, as required by the *laissez faire* notion of "freedom of contract." Contract types must be prevalent and robust. *Prevalence* is the precondition for people's ability to cross the lines from their rather limited preexisting communities. *Robustness* helps people overcome the various transaction costs that otherwise

impede voluntary transactions, while it also ensures that contract law can do its essential cultural work.

1. *Contract as Language.* As it becomes more prevalent and robust, an autonomy-enhancing law must avoid the illiberal paternalism implied by active preference-shaping. And yet contract must do more than mere enforcement of privately-dickered deals—if it is to empower people to be authors of their lives.

In his review of our book, Charles Fried nicely captures the subtle cultural role choice theory ascribes to 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.”<sup>16</sup>

Taking this function of law seriously implies that old-fashioned “freedom of contract,” though significant, cannot possibly replace active legal facilitation. Lack of legal support is often tantamount to undermining—maybe even obliterating—a wide “menu” of cooperative types of interpersonal relationships. People seeking their own conception of the good need a “language” of viable choices, not a blank slate on which to write. This is why contract’s autonomy-enhancing promise requires a robust legal edifice.

2. *The Risk of Involuntariness.* But contract law’s proactive obligations are not risk-free from the standpoint of autonomy. As contract law becomes more elaborate, the risk increases that it will apply to obligations that are not fully voluntary. Ensuring the promisor’s full voluntariness—not only regarding the interaction with the promisee, but also with respect to its legal consequences—is a challenge that an autonomy-enhancing contract law must take seriously. Why? Because involuntariness infringes the promisor’s independence, which is intrinsically valuable (even if not of ultimate value).

To some extent, this risk can be reduced by making the conventions of contract explicit and thus more socially transparent. But an autonomy-enhancing

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<sup>16</sup> Charles Fried, *Contract as Promise: Lessons Learned*, 20 THEOR. INQ. L. 367, 377–78 (2019).

contract law cannot be contented solely with this partial safeguard against the risk of involuntariness. Two sets of contract doctrines respond to this risk.

*a. Duress and Misrepresentation.* The first is straightforward: core rules of contract formation—notably duress and misrepresentation—exclude from enforcement promises that are the product of the promisee’s manipulation of the promisor’s free will.

*b. Writing Requirement and Other Formalities.* The second set of doctrines deals with contract law’s “entry rules” and was highlighted by Lon Fuller’s account of the functions performed by legal formalities. As Fuller noted, the significance of form in law goes beyond its evidentiary function. Formalities, such as the requirement of writing, also perform cautionary (or deterrent) functions by offering “channels for the legally effective expression of intention” and by “acting as a check against inconsiderate action.”<sup>17</sup>

### *B. Facilitative Contract Doctrines*

*1. Objective Theory.* The objective theory of contract is a good example of the principle of proactive facilitation. While many theories of contract converge in support of the objective approach, choice theory provides a particularly secure justification for its role in modern contract law. The contemporary status of the objective theory is best explained by the qualitative difference between its impressive autonomy-enhancing potential and the much more limited potential of any subjective theory of contract.

This explanation also re-frames and clarifies some of the most contentious issues of contract doctrine dealing with the parol evidence rule and with contract interpretation. The autonomy perspective highlights the empowering potential of the predictability generated by delimiting the range of admissible evidence and by focusing on the literal meaning of the parties’ agreement.

*2. Incomplete Contracts and Gap-Filling.* Taking seriously contract’s autonomy-enhancing *telos* not only justifies the widespread endorsement of the objective theory, but also justifies and explains further doctrinal features of contract

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<sup>17</sup> Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 800–01 (1941).

law. First, consider incomplete agreements. While traditional common law judges hesitated to enforce incomplete agreements, modern law takes a diametrically-opposed attitude.<sup>18</sup> Contemporary contract law is no longer satisfied with providing enforcement services only to parties who fully specify the terms of their engagement. Certainly, where the parties “intentionally and deliberately” do not “incorporate in their agreements readily available, verifiable measures of performance,” courts correctly infer that they do not intend legal enforcement.<sup>19</sup> But beyond this limited category, current law—both the Uniform Commercial Code and the Restatement (Second) of Contracts<sup>20</sup>—goes out of its way to facilitate transactions by offering defaults that can fill gaps, even regarding crucial aspects of a transaction, such as price.<sup>21</sup> A significant subset of the modern contract law canon belongs to this category.

Liberal contract theories that adhere to an independence-based view of private law face severe difficulties in accounting for this robust apparatus. Randy Barnett, for example, argues that law’s default rules do not defy his consent theory so long as these defaults mirror “the commonsense expectations of persons in the relevant community of discourse,” because there are good reasons to assume that “such terms can be and often are indirectly consented to by parties who could have contracted around them—but did not.”<sup>22</sup> This account, however, cannot explain the breadth and depth of contract law’s gap-filling apparatus.

If contract rules were indeed guided by principles of independence—that is, if the paramount concern were safeguarding interpersonal boundaries by ensuring party consent—then the law would have adhered to the traditional common law approach, rather than adopted the one that typifies contemporary

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<sup>18</sup> See E. ALLAN FARNSWORTH, *CONTRACTS* 120–21 (4th ed., 2004).

<sup>19</sup> Robert E. Scott, *A Theory of Self-Enforcing Indefinite Agreements*, 103 *COLUM. L. REV.* 1641, 1657, 1659 (2003).

<sup>20</sup> See U.C.C. § 2-204(3) (AM. LAW INST. & UNIF. LAW COMM’N 2014); *RESTATEMENT (SECOND) OF CONTRACTS* § 33 (AM. LAW INST. 1981).

<sup>21</sup> See U.C.C. § 2-305.

<sup>22</sup> Randy E. Barnett, *The Sounds of Silence: Default Rules and Contractual Consent*, 78 *VA. L. REV.* 821, 821, 826, 875, 906 (1986).



law. The old, rejected approach induced parties to spell out the main terms of their interaction and thus reduced the divergence between their actual intent and the rules that governed their agreements.

By contrast, current law's capacious gap-filling apparatus directly follows from and supports choice theory's prescription. It *expands* the scope of people's voluntary obligations to empower their self-determination.<sup>23</sup> Like the objective theory, this robust apparatus is not risk-free. As noted, facilitating people's autonomy through contract requires law to refine its "anti-involuntariness" tools. It also leaves some precautionary burden on parties, which is yet another aspect of liberal contract law's dependence on modest affirmative interpersonal duties in line with its reliance on private law's *grundnorm* of reciprocal respect for self-determination.<sup>24</sup>

3. *Doctrinal Variation Among Types*. When gap-filling emerges as a core function of modern contract law, many other doctrines must adapt as well. In particular, for gap-filling to do its autonomy-enhancing job, there must be significant variation in how a single doctrine applies across contract types.

To put the point more sharply, the rise of gap-filling—expanding the facilitative ambition of contract—poses a fundamental challenge to trans-substantive contract theories. It requires law to adjust the means through which it identifies mutually-beneficial interactions worthy of support and the rules that best enable them. Accordingly, modern contract law does not hesitate to "deviate" from what conventional theory posits as "core" doctrines. But this is not deviation. In embracing variation in doctrine among contract types, law is responding precisely how choice theory requires.

This devotion to contract's autonomy-enhancement *telos* explains and justifies the development of promissory estoppel and of the material benefit rule as additional gatekeeping doctrines, alongside traditional consideration doctrine. It likewise accounts for the gradual recognition that the mirror-image rule for offer

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<sup>23</sup> See Hanoch Dagan, *Types of Contracts and Law's Autonomy-Enhancing Role*, 5 EUR. CONT. L. & THEORY (forthcoming 2020).

<sup>24</sup> Note, however, that even independence theories cannot escape the risk of involuntariness as long as they subscribe (as they do) to the objective theory.

and acceptance, the standard of performance of perfect tender, and the promisor's strict liability—rules often presented as part of contract law's signature core—are not universal, and indeed do not apply in certain contract types.

### *C. Intra-Sphere Multiplicity*

The last feature in law's toolkit of proactively facilitating contracts is the one we emphasized most in *Choice Theory*: the state's obligation to ensure sufficient contract types and secure intra-sphere multiplicity. A liberal contract law should support choice within each familiar category of human activity, so that law provides enough, and sufficiently distinctive, contract types within each sphere. More, not fewer, contract types are necessary to make individual choice genuine. More types are also necessary to dilute state coercion.

1. *More Law, Less Coercion.* Law always implicates power. But choice theory's multiplicity prescription tends to *curb* law's coercive effects vis-à-vis its monistic counterpart (one type per sphere). Admittedly, at pathological moments of contract, when litigation follows breakup, pluralist and monist regimes may assign decision-makers the same coercive power. But the endgame drama of contract breakup should not obscure the significance of the *ex ante* choices available to people when they enter, and then shape, their interpersonal relationships. From this perspective, a pluralist approach to contract types opens up options for autonomy-enhancing choice—rather than channeling everyone to a single type privileged by law.

When contract law complies with choice theory prescription of intra-sphere multiplicity, then individuals are freer to navigate their own course, bypassing certain legal prescriptions and avoiding their implications—thereby reducing the coercive power of those who issued them. Moreover, choice theory directs the architects of contract law to take a more embracing stance toward contract types emerging from minority views and utopian theories (such as “nonconjugal aspiring families” in the sphere of intimacy, or “shared equity” homeownership in the sphere of home). Multiplicity thus facilitates people's ability to opt out of the choices of the majority, reducing law's normalizing effects.

Contract law has already taken substantial steps towards meeting its obligation for intra-sphere multiplicity, particularly in the commercial sphere. Think, for example, of contract-type innovations—exclusive dealings, outputs, and requirement contracts – that are now part of the contract canon.<sup>25</sup> But outside the commercial sphere, with its many examples, law’s repertoire of contract types is quite limited. The reformist work of choice theory’s multiplicity maxim is thus most urgent in the spheres of work, home, and intimacy.

2. *Mechanics of Choice.* Implementing this prescription is not a straightforward matter, for at least three reasons.<sup>26</sup> The first implementation challenge concerns *autonomy-reducing choice*. Although multiplicity of types is conducive to autonomy all else equal, all else is not always equal. Indeed, at times, increasing choice may reduce autonomy. This means that an unqualified call for multiplicity should be rejected. Multiplicity must be limited if cognitive, behavioral, structural, or political economy analyses suggest that it would, in practice, be autonomy-reducing. While intra-sphere multiplicity is an important means, it is not the only means to the enhancing autonomy. This concern requires refining choice theory’s broad multiplicity injunction, but it does not overwhelm its normative significance.

The second implementation challenge for multiplicity concerns the *problem of legal forms*. Contract types, as we understand them, are legal forms, and are thus subject to the familiar difficulties of resorting to forms. To secure the empowering potential of multiplicity and minimize the risk of involuntariness, law needs to stabilize a set of contract types, each with its own animating principle—its balance of utility and community, to use our terms. This means that contract types must be well-defined and properly advertised, and that courts must be cautious when analogizing rules from one type to another. It also requires lawmakers to prescribe tailored criteria for entry to each type and to ensure that rules are suited to people’s

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<sup>25</sup> See U.C.C. § 2-306.

<sup>26</sup> A fourth important reason relates to the institutional allocation of labor. See DAGAN & HELLER, *supra* note 2, at 130–34; Dagan & Heller, *Freedom & Choice*, *supra* note 4, at 615–19.

choice capacities.<sup>27</sup> None of this is easy for imperfect courts and legislatures to accomplish, but neither does it excuse the obligation to try.

Third, and finally, implementing choice theory requires determining what constitutes an “adequate range of options” within any given contracting sphere. What is the right number of types and what should be the degree of variance among them? This is admittedly a complex task, one that must respond to an uncertain empirical environment. But difficulty does not excuse the obligation because the core guideline is normative. For contract types to be autonomy-enhancing, they must be, as noted, partial functional substitutes for each other. On the one hand, types must be substitutes because alternatives that are orthogonal to each other do not enhance choice (insurance does not substitute for franchise, and neither substitutes for marriage). On the other hand, substitutability cannot be too complete because overly-similar types also do not offer meaningful choice.

3. *The Urgency of Multiplicity.* Though challenging to implement, the obligation of intra-sphere multiplicity is normatively significant, indeed, urgent. A telling example comes from the sphere of work. Today, law offers people a binary choice between employee and independent contractor status. This century-old limitation on contract types for work no longer tracks the diversity of work relations that people seek.

Emerging workplace practices may also suggest room for additional employment types. For example, law could be instrumental in facilitating new job-sharing arrangements. Or law can ratify contract types from cases in which individuals are creating specifically designated worker co-ops.<sup>28</sup> More generally, choice theory suggests moving beyond the current approach to employment

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<sup>27</sup> See Gregory Klass, *Parol Evidence Rules and the Mechanics of Choice*, 20 THEOR. INQ. L. 457 (2019); Tal Kastner & Ethan J. Leib, *Contract Creep*, 107 GEO. L.J. 1277 (2019).

<sup>28</sup> Other new forms of work, notably in the platform economy, raise more complicated challenges. They require law to adapt the means by which it secures relational justice (think, for example, about occupational health and safety, anti-discrimination, or fair pay and working time regulations). See OECD, *OECD EMPLOYMENT OUTLOOK 2019: THE FUTURE OF WORK* ch. 4 (2019), <https://doi.org/10.1787/9ee00155-en>. Though these adjustments are far from trivial, if they can be put in place, then additional forms may open up new opportunities, most notably in emerging economies. See *id.* at 56.

contracts in which lawmakers choose between “at will” and “for cause” regimes as the state-level default. Why not make both choices available at the time of employment? If employers must transparently choose among regimes, perhaps employees would be more likely to know the rules governing their work contract.

#### IV. FUTURE SELF

Choice theory’s second principle—regard for the party’s future self—becomes ever more significant as contract types multiply. But the normative basis of our concern for future selves does not derive from multiplicity. Instead, it is grounded directly on contract’s autonomy-enhancing *telos*. Law that offers people the normative power to commit themselves through contracts cannot ignore the impact of such contracts on their future selves. The reason for this is that self-authorship requires a right to both write and *re-write* the story of our lives, to be able to start afresh.<sup>29</sup>

As Michael Bratman explains, people are planning agents, which implies “*diachronic* rationality constraints.” And that, in turn, means people’s “prior intentions provide a rational default for present deliberation.”<sup>30</sup> Liberal contract law follows suit. It offers people the normative power to make contractual commitments, and properly assumes that insofar that these commitments are indeed part of the current self’s plan, the future self is presumed to adhere to them.

But self-determination also requires that people have the right to re-write the story of their lives. New “ordinary desires and preferences” may not suffice. Nonetheless, planning agency implies only “defeasible constancy: constancy in the absence of supposed conclusive reason for an alternative.” In other words, the

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<sup>29</sup> The significance of the ability to start afresh may be what ultimately grounds the moral significance of agents’ independence from theirs, and others’, standpoints. Cf. PETER BENSON, *JUSTICE IN TRANSACTIONS: A THEORY OF CONTRACT LAW* 370 (2019).

<sup>30</sup> See Michael E. Bratman, *Time, Rationality, And Self-Governance*, 22 *PHIL. ISSUES* 73, 74 (2012).

inter-temporal constancy required by planning agency must be “sensitive to the fact that sometimes an agent supposes there are conclusive reasons for change.”<sup>31</sup>

Free individuals make plans and undertake commitments, but they do not always enact the role they set themselves in the script they once authored. Autonomous life is neither a set of unrelated episodes nor a script fully written in advance. Rather, autonomous people characteristically make decisions in a piecemeal fashion, choosing both long-term and short-term pursuits. Self-determination allows—to some extent even requires—opportunities for people to alter their plans and even, sometimes, to replace them completely.<sup>32</sup>

### A. *The Present and Future Challenge*

On the one side, contract must attend to the both parties’ capacities as *promisees* because that empowers self-determination of their *current* selves—taking seriously their right to write their life stories. To respect their role as promisees, contract must ensure both parties—*pace* the Fuller/Perdue claim—a right to expect, rather than to merely rely, on the others’ performance. At the same time, and, on the flip side, contract must respect the parties’ self-determination in their capacities as *promisors*. This means that it should safeguard the self-determination of their *future* selves—thus vindicating their right to *rewrite* their life stories. The challenge is to limit the range, and at times the types, of enforceable commitments people can undertake consistent with the state’s obligation to respect both our present and future selves.

Indeed, a robust autonomy-based theory of contract must appreciate not only the significance of enabling people to make credible commitments, but also the impediment these commitments pose to their ability to rewrite their life-story. Contract theory must be alert to potential harmful implications of its operations for the autonomy of promisors’ future selves. This seemingly simple statement encapsulates one of the most difficult challenges to an autonomy-enhancing

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<sup>31</sup> *Id.* at 82.

<sup>32</sup> See JAMES GRIFFIN, ON HUMAN RIGHTS 149, 151 (2008); Raz, *supra* note 5, at 384; Leslie Green, *Rights of Exit*, 4 LEGAL THEORY 165, 171, 176 (1998).

contract law. Since *any* act of self-authorship constrains the future self, the state's obligation to enhance autonomy implies that contract law must both bolster and limit people's ability to commit.

This is a subtle task, and there is no easy formula for resolving this difficulty. But resolution need not—and in an autonomy-based contract law must not—be done on an *ad hoc* basis. *Ad hocery* surely undermines autonomy. Instead, liberal contract law must resort to “Hartian strategies” that apply qualitative judgments. This familiar approach tries to find the system that is as conducive as practicable to enhancing people's autonomy, that is, it seeks a contract law that generates the most autonomy-friendly implications. The usual strategy—and the correct one from the standpoint of the rule of law—is to identify *categories* of limitations on parties' exit—that is, on promisors' freedom to change their minds—that should not be enforceable because they undermine party autonomy too much.

### *B. Outer Limits of the Power to Commit*

The power to revise or even discard one's plans is an entailment of, not a threat to, the normative underpinnings of contract. In turn, this entailment provides a strong, principled justification for many otherwise-puzzling contract doctrines.

1. *Non-Competes and Advance Sales*. Consider, for example, 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 to terminate long-term contracts (such as agency contracts). In many of these cases, the parties' initial intention to commit is unequivocal. A particularly interesting subset of this category involves cases that are not interpersonally abusive.

Even in cases where the current self commits to a plan that is genuinely empowering—the employee earns more and gains upgraded skills that open new professional horizons—liberal contract law must acknowledge the possibility of *revision*, which these doctrines, in practice, enshrine. Where the *quid pro quo* is a significant encumbrance of the future self, even genuinely empowering agreements may be subject to critical scrutiny: liberal contract cannot remain agnostic toward severe limitations on the ability of an employee's future self to rewrite the story of her life.

True, one can advance familiar efficiency-based reasons for these limitations, such as responses to rationality deficiencies, externalities, or other market failures. But these reasons are tentative and contingent, subject to elimination by emergent technologies or legal techniques that ameliorate rationality deficiencies or overcome pertinent market failures. On the other hand, the autonomy-based rationale for these doctrines is different in nature, independent of momentary technological and legal structures. Respect for the ability to change one's mind is an inherent entailment of contract's most fundamental commitment to people's right to (re)invent themselves.

2. *Damages and Specific Performance.* Choice theory's concern for our future selves also helps explain the traditional common law's strong preference for monetary recovery. This preference is not, as often mistakenly asserted, an embarrassment for contract law.<sup>33</sup> Instead, it is a salutary testament to contract law's fidelity to its underlying liberal commitments.

In the common law tradition, specific performance will not be ordered "if damages would be adequate to protect the expectation interest of the injured party."<sup>34</sup> Other things equal (or close to equal) for the promisee, liberal contract law rightly opts for this remedial approach. It does not compel the promisor to act in accord with the contractual script, instead allowing the choice between doing so and covering the promisee's expectation.

This principled position accounts for the rigidity of existing law in resisting awards of specific performance against service providers.<sup>35</sup> This is a deeply entrenched rule, one that also applies in civil law jurisdictions where specific performance is otherwise widely available.<sup>36</sup> Even those jurisdictions take the value

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<sup>33</sup> See Seana Valentine Shiffrin, *The Divergence of Contract and Promise*, 120 HARV. L. REV. 708 (2007).

<sup>34</sup> RESTATEMENT (SECOND) OF CONTRACTS § 359(1).

<sup>35</sup> See RESTATEMENT (SECOND) OF CONTRACTS, at § 367(1).

<sup>36</sup> See, e.g., Charles Szladits, *The Concept of Specific Performance in Civil Law*, 4 AM. J. COMP. L. 208, 226 (1955).



of being able to switch plans seriously when it comes to awarding specific performance against service providers.

When the stakes may concern the promisor's "ground projects," rather than merely fungible resources, there is no difference between the common law and the civil law. Both rigidly resist specifically forcing a person to work. And choice theory explains why this entrenched and widespread rule is *not* an external imposition on the logic of contract. Instead, the rule follows contract's *internal* logic of self-authorship, one that proscribes such excessive impositions on the future self.<sup>37</sup>

By focusing on the parties' self-determination, choice theory also explains why remedies differ when contract types implicate people's self-identity from when they only raise material concerns. Thus, the law's sensitivity to the difference between "me" and "mine" justifies why there is no reasonableness inquiry regarding refusals to accept a different or inferior position in mitigation of breach of a personal service contract.<sup>38</sup>

3. *Normative Defaults*. Finally, law's regard for the parties' future selves need not always result in a categorical limit on their ability to use the contract convention. At times, this regard takes the form of *normative defaults*. These are rules the parties are free to adjust or even reject, but whose status need not depend on their responsiveness to majoritarian preferences. Normative defaults are chosen for their freestanding value, and the contracting parties can overrule them only if they use "apt and certain words."<sup>39</sup>

For example, rules dealing with mutual mistake and with impossibility, impracticability, and frustration can be understood as normative defaults. These doctrines delimit the parties' obligations by reference to their shared basic assumptions with regard to facts, or to the occurrence of a future contingency,

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<sup>37</sup> For an account explaining why the common law's justified preference for damages should be treated as a normative default (except when workers are in breach), see Hanoch Dagan & Michael Heller, *Specific Performance*, available at <https://ssrn.com/abstract=3647336>.

<sup>38</sup> See *Parker v. Twentieth Century-Fox Film Corp.*, 474 P.2d 689, 692-94 (Cal. 1970).

<sup>39</sup> *Jacob & Youngs, Inc. v. Kent*, 129 N.E 889, 891 (N.Y. 1921).

material to their agreement.<sup>40</sup> Risks that fall outside the domain of the shared plan of the parties' current selves, and are not allocated to the adversely-affected party, should not encumber their future self. Applying this rule is difficult, 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.<sup>41</sup>

## V. RELATIONAL JUSTICE

The third and final guiding principle of choice theory arises from the foundational right of *reciprocal* respect for self-determination, the same right that underlies the legitimacy of contract in the first instance. This right implies that, when one invokes the contract convention, that party is also necessarily undertaking the obligation to respect the other party's self-determination. As usual, this obligation of respect cannot be too onerous, but neither is it limited to a negative duty of non-interference.

### A. *The Challenge of the Floor*

Restated, if reciprocal respect for self-determination is the premise for contract's own legitimacy, then relational justice must be ingrained in contract's normative DNA. But relational justice is not self-defining. Part of the task for liberal contract law is to set a "floor" for agreements. Below that floor, parties cannot legitimately recruit the state's coercive powers because enforcement would lead to gross relational injustice. Attempts to enlist the law in the service of contracts that defy relational justice must be treated (at least *prima facie*) as *ultra vires*. They abuse the idea of contract, that is, they try to use law for a purpose that contravenes its *telos*.

1. *Internal and External Preconditions.* Contract's relational-justice *floor*, just like its concern for the future-self *limit*, are preconditions for the legitimate use of

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<sup>40</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 152–52 (1981); U.C.C. § 2-615.

<sup>41</sup> See Hanoch Dagan & Ohad Somech, When Contract's Basic Assumptions Fail: From Rose 2d to COVID-19, available at <https://ssrn.com/abstract=3605411>.

contract. But these are not the only preconditions, and not even the most familiar ones. For example, contract law's doctrine of public policy and related doctrines (including antitrust law) target categories of agreements that produce substantial systemic external effects on third parties. Contract's future-self limit and its relational justice floor, however, are importantly different. They do not rely on any consideration *external* to contract; rather, these constraints on contractual choice follow the very same rationale that justifies enforcing contracts in the first place, that is, they are *internal* to contract.<sup>42</sup>

This external/internal distinction is not only conceptually significant, but also has prescriptive implications because the two categories "invite" different normative analyses. In a liberal polity, policing contract's externalities must be performed with care because every contract has external effects, so achieving perfect internalization risks the outright elimination of private ordering. By contrast, the challenge regarding internal preconditions is different: a liberal polity must be vigilant in ensuring that contracts do not undermine their own autonomy-enhancing *telos*.

2. *Guidelines for Finding the Floor*. Determining contract's relational-justice floor, as with the future-self limit, requires lawmakers to apply Hartian qualitative judgments. The task is to ensure that the floor does not impede people's independence too much so that it undermines, rather than serves, self-determination. We offer no magic formula, but, with Hart, think this challenge gives no reason for alarm. In co-authored work with Avihay Dorfman, Dagan pins down three guidelines, derived from the liberal ideal of reciprocal respect for self-determination, from the nature of legal prescriptions, and from rule-of-law concerns, that translate Hart's dictum into contract law:<sup>43</sup>

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<sup>42</sup> This means that these constraints, just like the external ones, do not involve any form of paternalism. A more serious concern is that having a uniform floor might entail normalizing effects. One possible way to address this concern is to prescribe *multiple* floors, in line with choice theory's commitment to multiplicity. See Hanoch Dagan, *The Value of Choice and the Justice of Contract*, JURIS. 422, 431–33 (2019).

<sup>43</sup> See Dagan & Dorfman, *supra* note 9, at 1421–24.

- (a) The *burden* of the duty of reciprocal respect of self-determination cannot be excessive. It must neither undermine the autonomy of the involved parties nor create too much interpersonal subordination between them.
- (b) Certain *practices* (such as love or friendship) are rightfully shielded from legal treatment. Legal enforcement might destroy their inherent moral value or legal intervention might backfire by crowding out internal motivations.
- (c) Law's rules should be relatively *categorical*. This helps guide law's addressees and constrains officials' ability to exercise power by minimizing resort to individualized knowledge and radically *ad hoc* judgments.

A wide array of contract rules tracks these "admission criteria" as they implement contract law's relational justice floor. Some rules resulted from adjudication, others were enacted by legislatures and regulators. Often, common law judges first set a vague standard, then legislators and regulators pinned down the rules with more specificity. We cannot fully explore this complex inventory here,<sup>44</sup> and offer instead a brief overview of how contract doctrine has implemented the relational justice floor.

### *B. The Floor in Contract Law*

1. *Mandatory Rules*. The traditional *laissez faire* mode of regulating the parties' bargaining process prohibited only the *active* interference of one party with the other's free will. Today, many mandatory contract rules go well beyond this floor, requiring affirmative interpersonal obligations that expand the range of invalidating factors for contracts. Concern for relational justice is the most persuasive justification for these rules.

For example, the law of fraud has expanded beyond the traditional categories of misrepresentation and concealment to include disclosure duties—

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<sup>44</sup> See Hanoch Dagan & Avihay Dorfman, Justice for Contracts, <https://papers.ssrn.com/abstract=3435781>; Dagan & Dorfman, *supra* note 9, at 1438–45; Hanoch Dagan & Avihay Dorfman, Poverty and Private Law: Beyond Distributive Justice, *available at* <https://ssrn.com/abstract=3637034>, on which the following section heavily relies.

notably in real estate and securities transactions. The same conceptual expansion also underlies doctrines as diverse as unilateral mistake, duress in cases of wrongful threats that do not violate others' rights, anti-price-gouging laws, and admiralty rules of salvage. Finally, concern for relational justice offers the most charitable explanation of unconscionability doctrine and some of its modern regulatory cognates, which explicitly target cases of "gross inequality of bargaining power," such as where the weaker party suffers from "physical or mental infirmities, ignorance, illiteracy or inability to understand the language of the agreement."<sup>45</sup>

2. *Rules Concerning Interpersonal Decency.* A parallel set of diverse rules that also vindicate contract's relational justice floor have not been conventionally understood as within the canon of contract law. Nevertheless, these rules are increasingly part of the actual life of contract.

Consider, for example, rules regarding minimum wages, safety in the workplace, or the habitability of homes. All these doctrines can be understood as mandating the minimal level of interpersonal decency law is willing to accept in contract types that significantly affect the person or ground projects of a contracting party. This group of mandatory contract rules are, by now, well entrenched. Yet their foundations are hotly debated as a matter of contract theory. Again, concern for relational justice offers the most plausible answer.

3. *Rules Concerning Constitutive Features.* Another set of perhaps puzzling rules concerns duties to respect contractual parties as the people they actually are, and therefore to accommodate constitutive features such as race, gender, language, nationality, religion, disability, familial status, and sexual orientation. At times, these duties may be relevant to the content of the parties' obligations.

More often, however, these duties serve as "gatekeepers" to ensure that parties who make systemic use of contract—by becoming employers, landlords, or owners of public accommodations—do not apply discriminatory practices in their

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<sup>45</sup> RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. d (1981). *See also, e.g.*, Dodd-Frank Wall Street Reform and Consumer Protection Act § 1031(d), Pub L. No. 111-203, 124 Stat. 1376, 12 U.S.C. § 5531(d) (2010).

choice of contractual counterparts and, by doing so, contravene the requirement of reciprocal respect for self-determination on which contract is founded.

4. *Intertemporal Relational Justice*. Finally, because contractual performance is typically sequential, contract generates the potential of opportunistic behavior and, therefore, of heightened interpersonal vulnerability. This contract-specific type of relational injustice implies that law must go beyond the mandatory floor of relational justice. If contract law is to facilitate contracts proactively, it must solidify a cooperative conception of contract performance.

A liberal conception of contract should not *force* contractual parties to attend to each other's vulnerability more than they attend to the vulnerability of, say, strangers. But opportunism is anathema to contract's ability to perform its autonomy-enhancing function, particularly the ability to plan across time. So, a liberal contract law cannot be indifferent to opportunism, either.

And indeed, modern contract law embraces a set of rules that prescribe moderate cooperative duties as normative defaults. The duty of good faith and fair dealing, which sets up the contractual rules of the game, stands at the core of this web of doctrines. The substantial performance doctrine in service contracts and the principle against forfeiture in applying the condition/promise distinction, as well as the burden to mitigate and the choice of the expectation interest as the default measure of recovery can likewise be interpreted as belonging to this cooperative framework.

All these doctrines commit contractual parties to assist each other up to a point. Here, relational justice is functioning not as a floor, that is, as a prerequisite to law's legitimate use. Instead, relational justice works as an aspirational idea, one that informs contract law's normative defaults. Therefore, parties may generally opt out from many of these rules; likewise, many specific obligations that are understood to derive from the general duty of good faith are not mandatory.

## VI. BETWEEN AUTONOMY AND WELFARE

We conclude this short chapter with a reflection on the continuity and (especially) the divergence between choice theory and the economic analysis of contracts. Much debate on choice theory has placed this question at its center.

### A. Continuity

Consider first continuity. Like economic analysis, choice theory is unapologetically teleological—both are unlike familiar liberal theories of contract that fiercely resist teleological analysis.

The guiding principles discussed above are all aimed at enhancing individual autonomy through contract law. Thus, choice theory instructs the architects of contract law to take an *ex ante* perspective and to shape changes to contract doctrines by carefully examining their likely effects. Because this endeavor requires careful attention to the incentive effects of legal rules, lawmakers concerned with implementing choice theory can, and indeed should, often rely on economic analysis of contracts and the insights it offers.

That said, the task of designing contract law to comply with choice theory is quite different from shaping law to maximize social welfare. Welfare-foundationalist accounts treat contract law as a technology for better allocating resources and entitlements so as to maximize overall welfare. These accounts endorse contracts (and markets) because of their epistemic work in revealing preferences. And they focus on the contractual parties because they assume joint maximization of the parties' preferences will usually converge with social welfare maximization—except in cases of significant externalities.

We appreciate aspects of these accounts—the epistemic role of freedom of contract and the hoped-for convergence of “local welfarist” accounting with full-blown social welfare. But that is not enough.

### B. Divergences

1. *Autonomy v. Collectivism.* Our disagreement begins with our resistance to the inescapable collectivist logic of contract's economic analyses. In our view, any adequate account of contract, as it actually exists, must take seriously its nature as an interpersonal interaction, rather than a tool in service of the greater good. More fundamentally, we disagree on contract's ultimate value. It must be autonomy—each individual's freedom for self-authorship—not social welfare.

2. *Private Ordering*. Contract is law's main means of *private* ordering—that is, it empowers every single individual to carry out his or her own plans. It is not merely a tool for the public good. This is why contract law vests standing to sue for breach in the parties to the contract, rather than in society as a whole. A promisee's grievance is interpersonal. It is not derivative of, or dependent upon, the party's possible function as a private attorney general in service of social welfare.

3. *Externalities*. Likewise, autonomy, not social welfare, explains why only *excessive* externalities should be internalized. Although contractual interactions must not overly subordinate the interests of third parties, they are not, and should not be, subordinated to the dictates of the general interest. Many economic analysts of contract elide this distinction by focusing on the micro, rather than macro, effects of alternative rules. But that is not social welfare analysis. In our view, the elision reflects an indirect attempt to show concern for individuals; choice theory does this directly.

4. *Distributive v. Relational Justice*. Welfare economics, to be sure, does not only look at the size of the pie; it also allows for distributive considerations. But that is not enough. Distribution is still a collectivist concern. Liberal contract law focuses on *relational* justice, rather than *distributive* justice. As a branch of *private* law, contract focuses on the parties' individual capacities and their interpersonal interactions, rather than on the social order as a whole.

Distributive justice is important—even if attempts to promote it through contract are likely futile or counter-productive.<sup>46</sup> And its demands may at times supersede those of relational justice. But our agreement on this point does not diminish the freestanding significance of relational justice. Contract law is where we constitute our interpersonal relationships, say, as workers or consumers; private law is the arena in which we vindicate our claims for relational justice. Only the most urgent distributive concerns may legitimately override the demands of relational justice within private law. By contrast, distributive justice *can* (and

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<sup>46</sup> See Richard Craswell, *Passing on the Costs of Legal Rules: Efficiency and Distribution in Buyer-Seller Relationships*, 43 STAN. L. REV. 361, 376–77 (1991).



usually should) be addressed elsewhere, say through taxes, subsidies, and other public schemes for redistribution.<sup>47</sup>

5. *Preferences and Self-Determination.* Finally, and most fundamentally, welfare-foundationalism must be rejected as the lodestar of contract law because it reverses the proper relationship between people's autonomy and their preferences. Autonomy is not important because people happen to have a preference for self-determination. It's the other way around.<sup>48</sup>

Satisfying people's preferences is important because of the role preferences play in people's life plans; similarly, promoting social welfare matters because it can serve an individual's self-determination. People are not data points of preferences or joint carriers of the aggregate social welfare. They are agents with projects who are entitled to govern their lives.<sup>49</sup> And contract, as we've argued, plays an irreducible role in promoting their self-determination.

It is thus unsurprising that welfare foundationalism cannot fully justify contract. If people's contractual choices are valuable only for their epistemic service in maximizing social welfare, then we could envision replacing contract with a more efficient way of deducing people's preferences. This may sound futuristic, but perhaps it is not. In a few decades, when global computing capacity surpasses that of human cognition, computers will be able to learn, we are told, "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>50</sup>

Contract, however, is not so easily replaceable. Even if its epistemic career ends—even if it becomes welfare-reducing—contract's fundamental role as an

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<sup>47</sup> See Dagan & Dorfman, *supra* note 11; Hanoch Dagan & Avihay Dorfman, *Interpersonal Human Rights*, 51 CORNELL INT'L L.J. 361 (2018).

<sup>48</sup> Cf. Hanoch Dagan & Roy Kreitner, *Economic Analysis in Law*, YALE J. REG. (forthcoming 2021).

<sup>49</sup> See Hanoch Dagan, *Why Markets? Welfare, Autonomy, and The Just Society*, 117 MICH. L. REV. 1289 (2019).

<sup>50</sup> ERIC A. POSNER & E. GLEN WEYL, *RADICAL MARKETS: UPROOTING CAPITALISM AND DEMOCRACY FOR A JUST SOCIETY* 277, 286–87, 289–90, 292 (2018).

irreducible tool for empowering people's self-determination will not disappear, or at least, it should not.

### *C. The Price of Freedom*

Even before we get to this juncture, there are valuable consequences from insisting that autonomy, not welfare, is contract's ultimate value. For example, return for a moment to the maxim of intra-sphere multiplicity for contract types. Economic analysts will note that they too do not always recommend following majoritarian preferences. They instruct lawmakers to look sometimes for minoritarian terms as penalty defaults that have an efficient information-forcing function. Choice theory, however, prescribes minoritarian and utopian types (not terms) for a different purpose: enriching the *range* of people's choices.

Choice theory's future-self *limit* and relational-justice *floor* likewise suggest different doctrinal paths depending on whether contract ultimately serves autonomy or welfare—and even if welfare is defined locally, as maximizing just the preference satisfaction of the contracting parties. These divergences should not be surprising. For contract law to serve its autonomy-enhancing *telos*, it must distinguish between our brute preferences and the features that make us who we are—our immutable characteristics and the choices that define our most important projects.

Welfarism aims contract law toward collective well-being. Choice theory directs it to enhance individual autonomy. Often, the approaches dovetail: the efficient rule also enhances autonomy. But not always. Then law must make a choice; and liberal contract law must choose individual autonomy first.

Contract's ultimate value must be autonomy, properly understood and refined. It cannot be welfare. Indeed, we go further: for contract law, welfare economics is indefensible without autonomy as its foundation. Freedom is not free.