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## Freedom, Choice, and Contracts

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# Freedom, Choice, and Contracts

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

*In “The Choice Theory of Contracts,” we explain contractual freedom and celebrate the plurality of contract types. Here, we reply to critics by refining choice theory and showing how it fits and shapes what we term the “Contract Canon”.*

*I. Freedom. (1) Charles Fried challenges our account of Kantian autonomy, but his views, we show, largely converge with choice theory. (2) Nathan Oman argues for a commerce-enhancing account of autonomy. We counter that he arbitrarily slights noncommercial spheres central to human interaction. (3) Yitzhak Benbaji suggests that choice theory’s commitment to autonomy is overly perfectionist. Happily, in response to Benbaji, we can cite with approval Charles Fried’s point that contract types are “enabling our liberties.”*

*II. Choice. (4) Aditi Bagchi criticizes our inattention to impediments to choice. We show how choice theory’s commitments to both multiplicity and relational justice ameliorate these impediments. (5) Gregory Klass explores parol evidence to highlight the mechanisms of choice. We substantially concur with his position, and show how such mechanisms can ensure voluntariness, an essential element of choice. (6) Oren Bar-Gill and Clayton Gillette question the institutional capacity of existing legal actors to implement choice theory. Working from the example of cohabitation, we offer a somewhat more optimistic view.*

*III. Contracts. (7) Peter Benson contends our focus on the rational slights the reasonable. Although we did not use this Rawlsian vocabulary, choice theory complies with its strictures — more so than transfer theory. (8) Daniel Markovits and Alan Schwartz claim provocatively that contract theory must: capitulate before pluralism (as they endorse); leverage it; or fall victim to a so-called “embracing”*

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*approach (their charge against us). We reject the charge that choice theory is foundationally value-pluralist. Instead, we cabin pluralism and put it to work. (9) The Contract Canon starts on the next big step for choice theory by explaining existing doctrine (rebutting Benson on lack of fit) and helping adjudicate contract practice (countering Markovits and Schwartz on the vices of our pluralism).*

*Each Article 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.*

## INTRODUCTION

In *The Choice Theory of Contracts*,<sup>1</sup> we advance a liberal approach to contract that celebrates the plurality of contract types and justifies contractual freedom. Here, we reply to critics.

First, in *Choice Theory*, we reject the universalizing tendency of the Willistonian project and instead highlight contract's *multiplicity*. We shift the emphasis from "general" contract law to (or rather, back to) particular contract types. Contract types — including the residual type of "freestanding contracting" — are the proper categories for law design. We are not the first to warn against the flattening effects of contract monism and the unprincipled multiplicity of the common law (and European civil law) that Williston hoped to systematize. But, unlike other critiques, choice theory offers a *principled* account of contract's multiplicity. The principle that grounds contract law is autonomy.

Our second departure concerns the meaning and role of freedom in contract. Liberal theories of contract typically attempt to distill an autonomy-based account purged of any teleological foundation. Our account is diametrically opposed: choice theory embraces autonomy's role as the *telos* of contract. Contract, we argue, is a valuable convention — indeed, a convention that any liberal polity must enact — because, and to the extent that, it proactively enhances individual autonomy, defined as people's self-determination or self-authorship — that is, our right to write and re-write the story of our lives.

A key takeaway of choice theory lies at the juncture of types and freedom. Our teleological theory reveals contract to be essentially a power-conferring institution, not a duty-imposing one. Contract law offers people a new power: the ability to make their lives meaningfully their own by legitimately enlisting others to their most important projects. This insight implies that one of the

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1 HANOCH DAGAN & MICHAEL HELLER, *THE CHOICE THEORY OF CONTRACTS* (2017).

most fundamental contributions contract can, does, and should make to liberal societies is to ensure an adequate range of meaningfully-available, normatively-attractive contract types in each important sphere of human interaction.

This Issue offers penetrating critiques of choice theory. We are indebted to Charles Fried, Nathan Oman, Yitzhak Benbaji, Aditi Bagchi, Gregory Klass, Oren Bar-Gill, Clayton Gillette, Peter Benson, Daniel Markovits, and Alan Schwartz for their thoughtful and generous discussions.<sup>2</sup> Each of their Articles advances the field; and in turn, each helps us refine and extend choice theory — a step, we hope, toward a more just and justified law of contract. As this Article can neither address all their points, nor do justice to all their subtleties, we have confined our comments to the three main themes of this Issue: *Freedom, Choice, and Contracts*.

Part I refines the conception of *freedom* on which choice theory relies. It highlights the distance between autonomy and independence, vindicating the loyalty of our autonomy-based theory to the liberal injunction of toleration, and explaining how law can — and should — be autonomy-enhancing without being perfectionist. In Part II, we turn to *choice*, contending that multiplicity can be (and often is) conducive to justice, and studying how close attention to contract law's mechanisms of choice, as well as to the political economy surrounding law's production, can (and should) guide choice theory. Finally, in Part III, we focus on *contract law*, arguing that the commitment of reciprocal respect to self-determination stands at the core of the liberal idea of contract, moving contract law to a form of pluralism that is principled, structured, and informed.

Since publishing *Choice Theory*, we have engaged with dozens of reviews and responses,<sup>3</sup> including the eight in this Issue. All of this rigorous debate confirms for us one core point: contract's ultimate value must be autonomy,

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2 See Charles Fried, *Contract as Promise: Lessons Learned*, 20 THEORETICAL INQUIRIES L. 367 (2019); Nathan B. Oman, *Contract Law and the Liberalism of Fear*, 20 THEORETICAL INQUIRIES L. 381 (2019); Yitzhak Benbaji, *Contract Law in a Just Society*, 20 THEORETICAL INQUIRIES L. 411 (2019); Aditi Bagchi, *Voluntary Obligation and Contract*, 20 THEORETICAL INQUIRIES L. 433 (2019); Gregory Klass, *Parol Evidence Rules and the Mechanics of Choice*, 20 THEORETICAL INQUIRIES L. 457 (2019); Oren Bar-Gill & Clayton P. Gillette, *On the Optimal Number of Contract Types*, 20 THEORETICAL INQUIRIES L. 487 (2019); Peter Benson, *Unity and Multiplicity in Contract Law: From General Principles to Transaction-Types*, 20 THEORETICAL INQUIRIES L. 537 (2019); Daniel Markovits & Alan Schwartz, *Plural Values in Contract Law: Theory and Implementation*, 20 THEORETICAL INQUIRIES L. 571 (2019).

3 For a sample, see Volume 38 of LAW & PHILOSOPHY (forthcoming 2019) (issue on CHOICE THEORY) and Volume 18 of JERUSALEM REVIEW OF LEGAL STUDIES

properly understood. We therefore conclude this Article by showing how our critics have helped us to advance choice theory.<sup>4</sup> To do this, we highlight the theory's guiding principles — proactive facilitation, regard for future selves, and relational justice — and sketch how they explain what we term the “Contract Canon”. Choice theory, thus refined, vindicates the interpretive (and not only normative) power of our autonomy-based theory of contracts.

## I. FREEDOM: AUTONOMY, NOTHING LESS

Charles Fried, Nathan Oman, and Yitzhak Benbaji take issue with the liberal foundations of choice theory. Fried argues that choice theory mistakenly disavows the Kantian approach to contracts. Oman takes a diametrically opposite view: he opposes choice theory's reliance on autonomy as unacceptable to religious believers, and suggests that the only legitimate *telos* of contract is to serve commerce. Echoing Oman's critique of neutrality, Benbaji claims that choice theory relies on an overly-robust account of autonomy, and offers a Rawlsian alternative, one not inflicted with the difficulties of what he views as choice theory's excessive perfectionism.

### A. Autonomy — Not Independence

We begin with Fried, due to his canonical status as the founding father of modern liberal theories of contract. Surprisingly to some, perhaps, our positions largely converge with his.

At first, Fried rejects the adjective “teleological” (or “instrumental”) and he refuses to renounce the Kantian premise of his promise theory.<sup>5</sup> But it is, we think, no coincidence that he ultimately embraces choice theory and graciously describes it as an “account of contract as the facilitating framework of human collaboration under our shared master norm of autonomy [that] is richer, more useful, and truer than my own account in Contract as Promise.”<sup>6</sup>

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(forthcoming 2019) (issue on CHOICE THEORY). The papers in both volumes are mostly available on SSRN.com.

4 We refine choice theory in Hanoch Dagan & Michael Heller, *Autonomy for Contract, Refined*, 38 L. & PHIL. (forthcoming 2019) [hereinafter Dagan & Heller, *Autonomy, Refined*]; Hanoch Dagan & Michael Heller, *Why Autonomy Must Be Contract's Ultimate Value*, 18 JERUSALEM REV. LEGAL STUD. (forthcoming 2019) [hereinafter Dagan & Heller, *Ultimate Value*]. Both papers are available on SSRN.com.

5 Fried, *supra* note 2, at 372-73.

6 *Id.*, at 379.

Explaining why Fried is able to subscribe to choice theory helps clarify both what we claim and what we do not.

Consider first our critique of modern Kantian approaches to contract. These are a genus of the “transfer theory” we detail in Chapter 3 of *Choice Theory*, according to which a promise makes the promisee the sole and despotic owner of the jointly-created right (however qualified it may be) *vis-à-vis* the promisor. The ambition of transfer theory, as we explain there, is to show why breach of contract is tantamount to conversion, so that the enforcement of wholly-executory contracts is justified, even absent detrimental reliance by the promisee, although the only interpersonal obligation law can justifiably enforce is (in this view) solely negative, namely: to respect each other’s independence. But we argue that transfer theory fails, because it unnecessarily assumes an unqualified right to the promisor’s performance and because it is insufficiently attuned to the implications of contract’s nature as a power-conferring institution.

There is no need for us to reiterate or further defend this critique here (we do so elsewhere, in response to Arthur Ripstein’s review of our book).<sup>7</sup> Why not? It turns out Fried interprets Kant’s view on contracts in a manner consistent with choice theory.<sup>8</sup> His restatement of promise theory happily (albeit implicitly) joins much of our critique of transfer theory.

We criticized transfer theory to show that reciprocal respect to independence cannot plausibly justify recruitment of the coercive power of the state for enforcing (wholly-executory) contracts. But law, we further argued, is nonetheless justified in enforcing contracts, thanks to contract’s important contribution to people’s self-authorship. As an essentially power-conferring legal device, contract allows people to recruit others legitimately to their goals. The word “legitimately” is key. Contract is a convention that offers this service of autonomy-enhancement, but it can only work if its invocation implies that the parties submit themselves to the jurisdiction of the convention it entrenches in the law. In a liberal polity, we claimed, people are justifiably expected to pay this (modest) price for the benefit of others, because our interpersonal relationships are governed by a reciprocal duty to respect each other’s right of self-determination (or self-authorship).<sup>9</sup>

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7 See Dagan & Heller, *Autonomy, Refined*, *supra* note 4. That piece thus also addresses Peter Benson’s claim that a transfer conception of contract is “theoretically indispensable.” Benson, *supra* note 2, at 539.

8 The question of whether it is Fried who misstates Kant’s position on contracts or Ripstein who mischaracterizes Kant’s theory is not for us to resolve.

9 The text implicitly responds to Yitzhak Benbaji’s claim that “autonomy as self-determination does not justify the basic distinction between unenforceable

On its face, such a proposition regarding this reciprocal duty might seem to aggravate, rather than relieve, the legitimacy challenge, because it openly admits that enforcing contracts even where nonperformance generates no harm is tantamount to prescribing an affirmative duty to assist others in pursuing self-determination. This proposition is indeed devastating to the (Kantian) view of private law as a stronghold of reciprocal respect for interpersonal independence.<sup>10</sup> But this view, we insisted, is wrong.

Independence is an intrinsic value, not an instrumental value and not, we argued, our ultimate value. Rather, it is a constitutive part — an essential ingredient — of the ultimate value of self-determination. This is why liberals such as H.L.A. Hart are correct in insisting 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, liberals recognize 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.”<sup>11</sup>

Fried’s contribution to this Issue largely reaffirms these claims, in which the legitimacy of contract enforcement depends on a modest affirmative interpersonal duty. Fried explains that promise theory is preoccupied not only with the exercise of our freedom, but also with its enlargement.<sup>12</sup> He thus claims that we have “a duty of virtue”<sup>13</sup> to enlarge each other’s freedom, which, in its turn, is the premise of “the rightness, the justice, of state compulsion in certain circumstances to keep faith with the promise, now called a contract.”<sup>14</sup> These propositions are largely congruent with those set out in *Choice Theory*. The only (important) difference between Fried’s position and ours arises because we renounce the (Kantian) presupposition that *any* affirmative duty is a duty

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informal promises and enforceable formal contracts.” Benbaji, *supra* note 2, at 413. Indeed, appreciating the autonomy-based justification for contract enforcement as a form of (quite minimal) affirmative interpersonal duty, which is necessary for other people’s ability to resort to contract’s autonomy-enhancing potential, implies that, where the law is *unnecessary* for this or where resort to the law might even be counter-productive, forcible enforcement should not be available. Cf. Charles J. Goetz & Robert E. Scott, *Enforcing Promises: An Examination of the Basis of Contract*, 89 YALE L.J. 1261 (1980).

10 See generally ARTHUR RIPSTEIN, *FORCE AND FREEDOM: KANT’S LEGAL AND POLITICAL THEORY* (2009).

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

12 Fried, *supra* note 2, at 372.

13 *Id.*, at 370.

14 *Id.*

of virtue.<sup>15</sup> Therefore, we conceptualize this obligation in straightforward legal terms: it is a simple entailment of people's most fundamental interpersonal duty of reciprocal respect to self-determination.

Fried's contribution also helps clarify the limited sense in which our account is teleological. Nothing in our view embraces a teleological approach to morality. We tried to be precise on this point in the book. Perhaps we should state it more forcefully: choice theory insists that contract should be analyzed in terms of its autonomy-enhancing *telos* — not that this is the proper way to analyze morality. With Fried, we treat individual autonomy as an end, rather than a means; and, like Fried, we celebrate contract's contribution to this end.

Choice theory's claim, in Fried's terms, is that the "second-order" promises that constitute the "convention or practice" of promise cannot be simply *assumed* (as they are under transfer theory). Rather — and we concur in this view — they should be *prescribed*, so that they indeed enlarge our freedom. This lesson will be our starting point for Part III of this Article.

## B. Autonomy and Liberal Toleration

Nathan Oman fiercely objects to this "grandiose vision of liberalism that places at its center a strong vision of autonomous choosing individuals."<sup>16</sup> Autonomy, he argues, cannot plausibly justify contract once "alternative moral stances, such as those informed by monotheistic religions, are seriously considered."<sup>17</sup> The reason is that, for most religious believers, "there are moral principles whose validity does not rest on their contribution to the quality of human life."<sup>18</sup> Indeed, Oman asserts that, for many, "morality consists not in the affirmation of the self but rather in forgetfulness of the self,"<sup>19</sup> and self-authorship is a sheer "myth," since by the time we reach adulthood we are "already infected by a life-time of unchosen commitments and influences."<sup>20</sup> Because choice theory rests on "highly contestable moral premises that are rejected by many reasonable citizens," it cannot "generate either practical or theoretical legitimacy,"<sup>21</sup> and should thus be rejected.

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15 See Dagan & Heller, *Autonomy, Refined*, *supra* note 4.

16 Oman, *supra* note 2, at 409.

17 *Id.*, at 384.

18 *Id.*, at 392.

19 *Id.*, at 393.

20 *Id.*, at 395.

21 *Id.*, at 391.



Instead of autonomy, contract's legitimacy relies, in Oman's view, on "more modest and thus more widely acceptable premises,"<sup>22</sup> namely, its role as "a midwife to commerce."<sup>23</sup> Contract law is legitimate, in this account, because it is "a mechanism for enhancing well-functioning markets"<sup>24</sup> that, in turn, "mediate the peaceful coexistence of those with incommensurable moral commitments."<sup>25</sup> Promoting autonomy may still be important, though not as "a primary normative ideal," but rather as an instrumental value that helps foster this "*modus vivendi* vision of liberalism," in which "[m]arket exchange provides an institutional framework for cooperation among those with incommensurable worldviews."<sup>26</sup> This means that, *pace* our critique, "Williston got it right" in perceiving contract law as "a framework of relatively abstract rules that have little if any substantive content," and in presenting "the commercial contract [as] the core case of contract law."<sup>27</sup>

Oman raises important concerns. But his critique is exaggerated; and, insofar as it is not, must still be rejected.<sup>28</sup> We begin by refining his concern. Oman does not dispute our claim that "our approach seems to score quite high on the neutrality test" insofar as it refers to "concrete neutrality,"<sup>29</sup> but argues that it fails the test of "neutrality of grounds," given that many people do not accept the prescriptions of autonomy. This failure, he seems to suggest, is troublesome, because it implies disrespect for alternative, reasonable moral stances that discount the possibility or the value of individual self-authorship.<sup>30</sup>

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22 *Id.*

23 *Id.*, at 410.

24 *Id.*, at 407.

25 *Id.*, at 384.

26 *Id.*, at 403.

27 *Id.*, at 405.

28 Moreover, the alternative justificatory premise Oman proposes is, at best, question-begging. The market, which for Oman is contract's master, is not self-defining — far from it: its design necessarily reflects value choices. *See, e.g.,* Hanoch Dagan, *Why Markets? Welfare, Autonomy, and the Just Society*, 117 MICH. L. REV. 1289 (2019).

29 DAGAN & HELLER, *supra* note 1, at 88-89.

30 It is possible to read Oman's objections in a broader way, as raising neutrality concerns regarding the use of self-authorship as the polity's ultimate value. Exploring these critiques of perfectionist liberalism (or rather the very thin version of it we endorse) or the sustainability of the alternative position — political liberalism — advocated by the critics, surely exceeds the scope of the present inquiry. For a persuasive critique, see David Enoch, *Against Public Reason*, 1 OXFORD STUD. POL. 112 (2015). For our purposes, it suffices to note that the most significant critique of perfectionist liberalism as a form of disrespectful

Religious believers certainly deserve equal concern and respect, so resorting to justifications that undermine such respect is, at least *a priori*, troublesome. But it is hard to see how treating self-authorship as contract's *telos* can be offensive in this way. One reason for this is that, while people who identify as religious believers in the ways Oman typifies may not subscribe to the ideal of self-authorship, the ideal cannot be as alien to them as he postulates. As Leslie Green explains, even people who insist that one must *follow* one's destined path cannot fully dismiss self-authorship, because they must recognize the significance of self-determination, if not "in order to *choose* one's path in life, then in order to discover it."<sup>31</sup>

Furthermore, Oman's critique disregards the nature of contract as a *voluntary* undertaking and of contract law as a power-conferring body of law. Let us assume, with Oman, that religious believers have no difficulty in recruiting contract law to facilitate commerce, but object to its use in facilitating voluntary undertakings in other spheres of interpersonal interaction consistent with interpreting, developing, and reforming contract law so it better serves self-authorship. When people object to expanding contract's empowering potential to spheres such as work, housing, or intimacy, they do not imply there should be no interpersonal interactions in these spheres, of course. Rather, they signal the acceptability — to them — of the currently-dominant forms of such interactions (say, traditional marriage) and resist the notion that law should *also* facilitate other forms.

The crucial point here is that making contract law more autonomy-enhancing does not affect objectors' ability to pursue their conception of the good. Objectors need not invoke or use these additional contract types and can limit their interpersonal interactions in these noncommercial spheres to the currently dominant forms. This means that, insofar as religious believers are offended by the notion that contract law should be autonomy-enhancing, their affront is not based on an objection that they themselves will be guided by this notion (as they are free to reject any such guidance). Rather (assuming there are no external effects), their affront must be premised on their objection to *others being allowed* to benefit from such empowerment. This observation implies that Oman's critique of grounding contract in autonomy is premised on a demand that law respects those people's "external preferences," namely,

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paternalism — see JONATHAN QUONG, LIBERALISM WITHOUT PERFECTION 85-96 (2011) — is inapplicable to choice theory, which concerns the state's obligation in contract law specifically.

31 Leslie Green, *What is Freedom For?* (Oxford Legal Studies Research Paper No. 77, 2012), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2193674](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2193674).

their views as to the proper “assignment of goods and opportunities to others.”<sup>32</sup> 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>33</sup>

Indeed, the practical implication of Oman’s celebration of relatively content-less contract rules that cater to commerce’s needs is to delimit the scope of contract’s empowerment potential to the commercial sphere. Oman may be correct in saying that this understanding of contract reflects the status quo — it reifies the Willistonian paradigm that is blind, as choice theory demonstrates, to the skewed way in which contract’s empowering potential is distributed; and it thus marginalizes the urgency of our reform proposals for enriching the repertoire of contract types in the spheres of home, work, and intimacy. But this quietism is far from neutral. Quite the contrary: it arbitrarily disfavors these noncommercial spheres of human interaction that are, for many (most?) people, at least as significant as commerce.

We do not deny that some of our autonomy-enhancing reform proposals that expand the empowering potential of contracts to noncommercial spheres are controversial.<sup>34</sup> But controversy in and of itself is not a principled objection. And because no credible vision of liberalism — as modest as it may be — can discard the injunction of respecting all persons equally, no credible version of liberalism can downgrade people’s equal right to choose — or, indeed, to discover — their own path (or, for that matter, authorize their systemic subordination, a point we discuss later).<sup>35</sup>

### C. Autonomy without Perfectionism

Yitzhak Benbaji’s Article implies that these responses may not be subtle enough. Benbaji helpfully highlights the distance between choice theory’s normative

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32 RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 275 (1977).

33 *Id.*

34 Oman invokes the inapplicability of choice theory to the discussions about same-sex marriage as evidence of “the difficulty of defending . . . liberal institutions . . . using autonomy.” Oman, *supra* note 2, at 391. Choice theory is indeed orthogonal for this discussion — not for the reason Oman mentions, but rather because the issue there is that a liberal state must make the (autonomy-enhancing) institution (or contract-type) of marriage equally available to everyone.

35 It is thus no surprise that even harsh critics of perfectionist liberalism sanction legal practices that combat practices of (women’s) subordination and ensure people’s ability “to leave one view and opt for another.” Martha C. Nussbaum, *Perfectionist Liberalism and Political Liberalism*, 39 PHIL. & PUB. AFF. 3, 29, 36 (2011).

commitment to self-determination “as its basic, organizing, value” and Millian perfectionism, whose ultimate value is “the quality of life of humans.”<sup>36</sup> But he still thinks that a commitment to autonomy is overly perfectionist and is thus unqualified to serve as contract’s *telos*. Benbaji claims that only “freedom as independence and instrumental rationality” should “justify devising a contract law that shapes and imposes contract types.”<sup>37</sup> This means that contract law should “empower[ ] individuals to act together,” either to secure their ability “to abide by their universal moral duties” or to ensure to them the provision of resources — “stable income and wealth” — that are needed “in order to form and pursue a conception of the good life, whatever this conception of the good might be.”<sup>38</sup>

His approach to contract is “inspired by the neutralist anti-perfectionism that underlies Rawlsian political liberalism.”<sup>39</sup> This inspiration offers a non-perfectionist contract law, one that insists that “the duty of states to provide contract types” is analogous to their duty to provide roads.<sup>40</sup> The core idea is that, *pace* choice theory’s injunction to ensure “demand-insensitive diversity,” contract law should be guided only “by people’s pre-existing needs and preferences,” and therefore its supply of contract types “must be dictated by demand.”<sup>41</sup> Focusing solely on demand allows this strategy to uproot choice theory’s perfectionism, because it implies that law refrains from “shaping and imposing contract types” by reference to “worthy life plans and choice.”<sup>42</sup> It thus ensures that the state does not engage in forming “value judgements about the worthiness of the options” it offers to its citizens, thereby securing contract law’s legitimacy.<sup>43</sup>

Benbaji presents this program as “a teleological understanding of contract types,” which is “an attractive alternative to the way choice theory understands them.”<sup>44</sup> However, clarifying the distance between choice theory and liberal perfectionism, on the one hand, and the important way in which contract types are incomparable to roads, on the other, implies that Rawlsian neutralism must subscribe to choice theory rather than challenge it.

It is no coincidence that *Choice Theory* does not use the adjective “perfectionist” to describe choice theory. This omission reflects the important

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36 Benbaji, *supra* note 2, at 414, 419.

37 *Id.*, at 430.

38 *Id.*, at 426, 428.

39 *Id.*, at 428.

40 *Id.*, at 424.

41 *Id.*

42 *Id.*, at 430.

43 *Id.*, at 414.

44 *Id.*, at 427.

gap, mentioned by Benbaji, between the views of Mill (and Joseph Raz) and ours. While we indeed rely on the robust understanding of freedom as autonomy (or self-determination or self-authorship, terms we use interchangeably), for us, as Benbaji notes, autonomy is an ultimate value, rather than a means to secure a “rich and satisfying . . . life in terms of human perfections and excellences,” as it is positioned in the Mill/Raz view.<sup>45</sup> This is why our approach to paternalism is very different from that of Millian perfectionists, as Benbaji acknowledges. But it is also why choice theory does *not* include an account of “human perfections and excellences,” and is not implicated in troublesome perfectionism.

The distance of choice theory from perfectionist views that adjudicate the worthiness of people’s conceptions of the good is evident in its prescriptions on both the formation of the inventory of contract types and the reasons that “limit unworthy contractual relations.”<sup>46</sup> Thus, choice theory prescribes that law’s repertoire of contract types for each sphere of human interaction must include a sufficient number of partial functional substitutes, so that it offers people alternatives. And one of the ways in which such a meaningful choice can be secured, we have argued, is by enriching this repertoire by investing in minoritarian or utopian contract types. Hence, the demand-insensitivity of choice theory involves neither censorship nor worth-ranking.

Note, choice theory does not embrace *every* type of contractual relation. But it is important to precisely define its justifications for limiting the repertoire of contract types. Like most (if not all) contract theories, it pays attention to — and would recommend limiting — systemic externalities. To this banal limitation, choice theory adds two important autonomy-based limits, which we introduce now and discuss in (a little) more detail below:

- (1) Choice theory takes seriously contract’s role in facilitating autonomy, and thus requires contract law to always be wary of the possible detrimental implications of its operations for the autonomy of *the parties’ future selves*.
- (2) Choice theory requires that people’s use of law’s coercive power be limited to interactions that comply with its ultimate justification of reciprocal respect to self-determination, so that *relational justice* must serve as the floor of legitimate interactions eligible for law’s support.

It seems to us that the Rawlsian minimalist position, which Benbaji develops, would concur (or at least not object to) these positions. Benbaji does not

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45 *Id.*, at 414.

46 *Id.*, at 420.

challenge — indeed, he embraces<sup>47</sup> — choice theory’s critique of the “Kantian minimalist” position (as he calls it), in which the enforcement of contracts can be justified by reference only to people’s duty of reciprocal respect to independence. Furthermore, and unlike Oman, Benbaji does not repudiate the liberal commitment to facilitating people’s pursuit of their own life plans; in fact, he argues that Rawls’ first principle of justice, which ensures people “a fully adequate scheme of equal basic liberties,” is the premise of “empower[ing] individuals to act together by entering a contract that determines the terms of their collaboration.”<sup>48</sup> This means, we think, that Benbaji must acknowledge the ineradicable autonomy-enhancing role of contract in a liberal polity, as well as its implications noted in the previous two paragraphs.

Benbaji’s contracts/roads analogy need not undermine this conclusion — and the happy convergence between his position and choice theory — because, alongside the important similarities between contract types and roads, there are also significant differences. Benbaji notes that contracts, and thus also contract types, indeed piggyback on people’s preexisting goals and obligations. But contract types are nonetheless very different from roads, at least if roads are understood as Benbaji presents them, in the (almost) strictly instrumental way of reaching a destination, which implies that other types of road — say, scenic roads — are rare and indeed esoteric exceptions.<sup>49</sup> The reason for this, as far as contracts are concerned, is that how we achieve these preexisting goals does matter; and, at times, it matters a lot. This is exactly our point in emphasizing the importance of intra-sphere multiplicity and the empowerment it confers on people.

We are not saying there are no cases in which people would be indifferent to contract types as long as they get them to their desired destination. But, more often than not — even in commerce, the seemingly-classical instrumental sphere — people are *not* indifferent. (Think, for example, about the choice between a franchise and commercial agency contract, which is partly understood “as a decision between creating thin and thick contractual communities.”<sup>50</sup>) While contracts, like roads, are somewhat constrained by preexisting goals, in contract-land the significance of multiplicity is not esoteric.

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47 *Id.*, at 422.

48 *Id.*, at 430.

49 The cautionary language of the text is not coincidental. With Benbaji, we assume that “regular” roads are, by and large, demand-sensitive, setting aside further contexts in which states build roads to *create* demand, for instance when they plan to establish new communities. See Benbaji, *supra* note 2, at 425.

50 DAGAN & HELLER, *supra* note 1, at 63.

To circle back, Fried's articulation (in his contribution to this Issue) of the value of distinct contract types captures the justification for expecting law to enrich *proactively* our repertoire of such types. Contract types, he writes, "offer parties a menu of possible interactions"<sup>51</sup> that are crucial for "party autonomy and self-fulfillment . . . because human interactions and legal interventions are hardly imaginable without them."<sup>52</sup> Just like "language that enables thought[,] without types, our minds would be blank." In response to Benbaji, then, we cite with approval Fried's point that contract types are "*enabling* our liberties."<sup>53</sup>

## II. CHOICE: CHALLENGING, BUT REAL

We turn now from freedom to choice, which stands at the center of three other articles in this Issue, by Aditi Bagchi, Gregory Klass, and Oren Bar-Gill and Clayton Gillette. Bagchi is concerned that we overstate the work of choice theory in enhancing autonomy, and understate (and maybe even obscure) the most important obstacles to people's autonomous choice. Klass and Bar-Gill and Gillette turn the focus inwards, asking (respectively) how can choice — and thus autonomy — be enhanced via attention to, and development of, contract types, and which legal actors, if any, can perform this task?<sup>54</sup>

### A. Multiplicity and Justice

Aditi Bagchi criticizes our focus on contract types and our inattention to more important impediments to choice. She argues that, because oftentimes "the point of contracting"<sup>55</sup> is simply to assure promisees "that they will get something in return for conferring something of benefit on the promisor" (or to comply with their preexisting moral duty),<sup>56</sup> the fact that an obligation was "assumed voluntarily does not tell us how important the agent was to the fact of its adoption, let alone its form or content," and "it does not answer how much of a voluntary obligation is explained by the moral make-up of its

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51 Fried, *supra* note 2, at 378.

52 *Id.*

53 *Id.*, at 377.

54 Daniel Markovits and Alan Schwartz also address this question. But because their institutional critique is entailed by their substantive one, we address them below together.

55 Bagchi, *supra* note 2, at 450.

56 *Id.*, at 451.

author.”<sup>57</sup> This observation implies, Bagchi claims, that while the exercise of the normative power to promise tells us that the promisor is “the kind of person who others regard as capable of authoring obligation,” it “does not tell us much more than that.”<sup>58</sup> This means that “[m]any contractual promises poorly reflect the moral agency of contracting parties,”<sup>59</sup> which leaves our focus on “the kinds of contract forms recognized or enabled by the state” unexplained.<sup>60</sup>

Moreover, Bagchi contends that “[e]xpanding the menu of contract types would do little to expand more salient choices,”<sup>61</sup> and might even “deflect our attention from these more important constraints that inhibit people’s choices.”<sup>62</sup> Thus, she maintains, “it is not clear how expanding the menu of contract types in [the employment] sphere importantly advances employees’ interests — from the standpoint of autonomy,” because “for the array of employment types to be relevant, employees need to be in a position . . . to trade off income in exchange for a contractual relationship that suits them in other respects.”<sup>63</sup> Furthermore, Bagchi argues that we are “wrong to focus on the state as a direct regulator of individual transactions . . . as opposed to its broader role as a regulator and participant in the market,” for it is “in the latter role that it has the capacity to affect the material conditions under which parties make contract choices.”<sup>64</sup>

We agree with Bagchi’s claim that it is important to “unpack the moral significance of promising and assess” how well different promises “serve the underlying values which cause us to value promises as such,” and that there may well be “normatively significant variation among promises.”<sup>65</sup> But this proposition does not imply that “market-constrained promises” are the least “valuable or morally significant”<sup>66</sup> ones, or that expanding the range of contract types entails only marginal normative value.

To start with, even regarding the most extreme examples (of promises intended to satisfy the promisor’s decision “to eat, live in housing rather than on the street, obtain medical care, etc.”<sup>67</sup>), the more alternatives people have

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57 *Id.*, at 436.

58 *Id.*

59 *Id.*, at 455.

60 *Id.*, at 438.

61 *Id.*, at 434.

62 *Id.*, at 436.

63 *Id.*

64 *Id.*, at 438.

65 *Id.*, at 440 n.9.

66 *Id.*, at 443.

67 *Id.*, at 451.



among contract types (or among providers), the better, from the standpoint of autonomy. Moreover, Bagchi overly discounts contract's contribution to autonomy even where it is made under substantial material or moral constraints. She defines this value as a function of what it reveals "about an agent and her moral capacities."<sup>68</sup> But she unduly slights the significance of "future-oriented revelations." Because contract — for both the haves and the have-nots — is a future-oriented device, expanding the range of contract types is, other things being equal, autonomy-enhancing.

Consider the employment sphere. Bagchi agrees with our critique of "the stark choice between the status of employee and independent contractor," but insists: "the vast majority of people do not make any such choice," because "they take what is available, or maximizes their income," so it "would not help them if there were intermediate categories recognized in employment law."<sup>69</sup> But would enriching the existing employment landscape, along the lines we suggest in *Choice Theory*, actually be of only marginal significance? Wouldn't (potential) employees be better-off (autonomy-wise) if law were to facilitate, for example, job-sharing arrangements? Or what about if states were to promulgate two or more employment types, so that employers would need to select one visibly (instead of the "at will" regime mandated everywhere except for Montana, with its "for cause" regime)? And — turning from employment to the housing sphere — wouldn't the predicament of middle- and lower-income households (respectively) be improved if law followed our recommendations proactively to facilitate home equity insurance and shared equity contract types?

Bagchi may not dispute that these would be improvements, but still insist that the more pressing difficulty for choice, and thus for autonomy, lies in the material conditions under which parties make contract choices, and that choice theory may deflect attention from these concerns as addressing them seems beyond the "institutional capacity of contract law."<sup>70</sup> This is an important concern, especially given the significant wealth and power disparities that typify contemporary societies. So if choice theory indeed had such disturbing consequences, this would justifiably undermine its credibility. Fortunately, this is not the case.

We do not deny that background distributive injustices limit the ability of contract law, and thus of choice theory, to enhance autonomy. In fact, one implication of our claim that a power-conferring institution such as contract (or property) relies for its legitimacy on a commitment to self-determination

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68 *Id.*, at 436.

69 *Id.*, at 438.

70 *Id.* 437

is that this legitimacy, in turn, cannot be plausibly freestanding, but rather depends upon a robust background regime that guarantees everyone the material preconditions needed for self-authorship.<sup>71</sup> This is an important lesson that we should have clarified in *Choice Theory*. But the point does not undermine the major autonomy-enhancing role of contract law (properly understood to apply to *all* contractual spheres and encompass rules originating from courts, legislatures, and regulatory agencies alike).

To see why, recall that choice theory entails a commitment to relational justice as the floor of legitimate interactions eligible for law's support. Now, consider the implications of this commitment to employment and labor law. As we argued in *Choice Theory*, relational equality underlies labor law's (far from adequate) facilitation of workers' unionization and collective bargaining. Moreover, the hierarchical organization that typifies the workplace explains employment law's insistence on an inalienable infrastructure of just relationships, dealing with topics such as workplace safety and nondiscrimination.<sup>72</sup> And this hierarchy may well justify further reinforcement of workers' autonomy by entrenching a workplace bill of rights to protect them against managers' arbitrary and unaccountable authority, particularly insofar as they purport to regulate workers' off-hour lives.<sup>73</sup> Finally, appreciating the role of reciprocal respect to self-determination as contract's normative foundation implies that contract law cannot legitimately instrumentalize people to such an extent that it effaces their humanity by erasing their ability to self-determine. This prescription applies to employment settings such as sweatshops, in which workers are arguably dehumanized and treated as disposable commodities.<sup>74</sup>

There are, of course, also other justifications for these propositions. But grounding them on the autonomy-based foundations of choice theory is nonetheless important, because this implies that friends of contract and champions of individual autonomy cannot but support the implications of choice theory that we have just mentioned, and should work to eradicate the autonomy-reducing conditions choice theory's reformist takeaways seek to transform.

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71 See HANOCH DAGAN, *A LIBERAL THEORY OF PROPERTY* ch. 3 (forthcoming 2020).

72 See HANOCH DAGAN & ROY KREITNER, *The Other Half of Regulatory Theory*, CONN. L. REV. (forthcoming 2019); HANOCH DAGAN & AVIHAY DORFMAN, *Just Relationships*, 116 COLUM. L. REV. 1395, 1442-45 (2016).

73 See ELIZABETH ANDERSON, *PRIVATE GOVERNMENT: HOW EMPLOYERS RULE OUR LIVES (AND WHY WE DON'T TALK ABOUT IT)* 39-40, 48-54, 60, 62-64, 67-69 (2017).

74 See HANOCH DAGAN, *Markets for Self-Authorship*, 27 CORNELL J.L. & PUB. POL'Y 577, 598 (2018).

## B. The Mechanisms of Choice

Gregory Klass embraces — or at least, accepts — choice theory's claim as to the significance of both a choice among contract types, and the power to choose to alter individual terms of a type.<sup>75</sup> What is more, his extended discussion of the differences between parol evidence rules that apply — and rightly so — to different contract types importantly supports choice theory's emphasis on contract law's multiplicity. But he is critical of *Choice Theory's* neglect of “the mechanics of choice,” namely: the questions surrounding “how contracting parties make choices” and the “legal mechanisms for choosing,” with which “the law determines the choices they have made.”<sup>76</sup>

Thus, Klass' careful and interesting account of the parol evidence rule adds an important example to choice theory's prescription for tailoring contract rules to the contract type, rather than imposing a set of one-size-fits-all rules on the entire inventory of contract types. While it is “widely recognized that different U.S. jurisdictions employ different parol evidence rules,” he notes, most accounts of those rules “describe one parol evidence rule for all contracts.”<sup>77</sup> Klass studies two contract types — negotiated contracts between firms, and consumer contracts — that both respond, in his view, to the same normative (welfarist) concerns.<sup>78</sup> His analysis “suggests parol evidence rules for these spheres that significantly differ from the common, generic formulations of the rule, and from each other.”<sup>79</sup> In line with choice theory, Klass concludes that “there is not, or [at least] should not be, one big parol evidence rule, but local parol evidence rules for distinct spheres of contracting.”<sup>80</sup> This multiplicity, he further argues, brings home his more critical lesson for choice theory: that it must pay “greater attention to both the mechanics of choice and the available mechanisms of choice.”<sup>81</sup>

Klass' claim that the two contract types he investigated allow him to “hold normative concerns constant,”<sup>82</sup> is exaggerated, in our view. We certainly agree that negotiated contracts between firms should be analyzed, by and large, as a means of maximizing the parties' gains from trade, and that the welfare gains to both parties are also critical for consumer contracts. But we believe Klass' claim that “the values at stake are similar” and that therefore the

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75 Klass, *supra* note 2, at 461.

76 *Id.*, at 458.

77 *Id.*, at 463.

78 *Id.*, at 484.

79 *Id.*, at 473.

80 *Id.*, at 463.

81 *Id.*, at 486.

82 *Id.*

goal of contract law in this type as well should simply be “to help both sides maximize the gains of trade”<sup>83</sup> is overstated. Indeed, our “errand conception” of consumer contracts (which Klass mentions) implies that this contract type scores best in the autonomy-enhancement test if it is designed so that “law helps people make such transactions quickly, anonymously, and securely so they can focus their time and attention instead on other — more valuable (for them) — projects,”<sup>84</sup> which means that “the non-bargained terms correspond to (or exceed) consumers’ typical expectations.”<sup>85</sup>

With that caveat in mind, we agree with Klass’ claim that the (existing and desirable) distinctions between the different parol evidence rules, which indeed are all intended to serve as mechanisms of choice, follow from the “important differences between the mechanics of choice in consumer contracts and those [in] negotiated contracts between firms.”<sup>86</sup> This is an important refinement of choice theory: the design of contract types “should reflect not only the values at stake, but also the mechanics of choice in each sphere.”<sup>87</sup>

In *Choice Theory*, we acknowledged the significance of studying what Klass aptly terms “the mechanics of choice,” namely, the “parties’ preexisting abilities to choose, and the conditions under which they are able to make informed, autonomous and therefore valuable choices.”<sup>88</sup> But Klass must be right that, in addition to insights from cognitive psychology, choice theory must resort to the good old-fashioned work of doctrinal technique. To develop a truly autonomy-enhancing contract law, significant attention needs to be paid to what he terms “the mechanisms of choice,” including “the tools that the law gives [or can give] parties for exercising their power to choose.”<sup>89</sup>

Klass is also correct in observing that the mechanics of choice are relevant not only to “parties’ ability to choose contract terms,” but also to “their choice among pre-established contract-types,”<sup>90</sup> because “party choice can operate to enhance autonomy and resolve competing values only when parties are willing and able to choose.”<sup>91</sup> Klass focuses, in this context, on the practical viability of the mechanisms that may enable workers’ and consumers’ choice among contract types (as in the choice between being employees or independent

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83 *Id.*, at 485.

84 DAGAN & HELLER, *supra* note 1, at 81. *See also* Klass, *supra* note 2, at 480 (referring to “considerations of fairness”).

85 DAGAN & HELLER, *supra* note 1, at 83.

86 Klass, *supra* note 2, at 480.

87 *Id.*, at 484.

88 *Id.*, at 461.

89 *Id.*, at 462.

90 *Id.*, at 485.

91 *Id.*, at 486.

contractors, or between purchasing a good with the safeguards of consumer protection law or sales law).<sup>92</sup> But, in fact, the significance of the mechanisms of choice to choice theory goes even deeper than that.

In addressing the challenge of *ex post* boundary disputes among contract types, we noted in *Choice Theory* that such “boundary arbitrage concerns may justify heightened formalities for entry — and such formalities should be refined with a view to ensuring that both parties have the same contract type in mind.”<sup>93</sup> But Klass’ (justified) focus on the role of the mechanisms of choice implies that these formalities are much more important to choice theory than we appreciated. This is because viable formalities that improve contract law’s mechanisms of choice among contract types help minimize the inevitable “independence costs” that a properly autonomy-enhancing contract law inevitably entails.

Recall that one of the most fundamental claims of choice theory (endorsed by Fried) is that law needs to proactively generate robust contractual conventions to expand the scope of people’s voluntary obligations, which in turn empowers their self-determination. But as the legal infrastructure becomes increasingly elaborate — which it does in modern contract law, as we show in Part III — the risk that it will apply not only to fully voluntary obligations becomes increasingly real. Involuntariness is a problem that an autonomy-enhancing contract law must take seriously, because it infringes the promisor’s independence, which is, as noted, intrinsically valuable.<sup>94</sup> To some extent, this risk can be — and again, is — reduced by making the conventions of contract explicit and, therefore, more socially transparent. Like other major legal constructs (especially of private law), contract tends to become part of the backdrop of our lives and blend into our natural environment.<sup>95</sup> But an autonomy-enhancing contract law should not be content with this partial safeguard against the risk of involuntariness.

Two features of contract law proactively respond to this risk. The first is straightforward: familiar doctrines — notably duress and misrepresentation — delimit the scope of enforceable promises to those that are not the product of the promisee’s manipulation of the promisor’s free will. The second important

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92 *Id.*, at 462-63, 488.

93 DAGAN & HELLER, *supra* note 1, at 129.

94 In other words, while Peter Benson is wrong to attribute to us the view that “the power-conferring character of contract law [implies] recognizing party capacity to effectuate legal changes that they *deliberately* undertake and *purposely* seek to achieve” (Benson, *supra* note 2, at 544-45, emphasis ours), choice theory does seek to shape a contract regime that optimally *empowers* people to cooperate through *voluntary* undertakings.

95 DAGAN & HELLER, *supra* note 1, at 76.

feature deals with contract law's "entry rules" and was highlighted by Lon Fuller's classic account of the functions performed by legal formalities. As Fuller noted, the significance of form in law goes beyond its evidentiary function. A formality, such as the requirement of writing — as well as the parol evidence rule, on which Klass focuses — also performs channeling and cautionary (or deterrent) functions by offering "channels for the legally effective expression of intention" and by "acting as a check against inconsiderate action."<sup>96</sup>

While safe "in the hands of those who are familiar with their effects," legal forms — like any other form (Fuller, like Fried in his account of choice theory, drew an analogy to language) — are not risk-free, but rather contain "dangers for the uninitiated."<sup>97</sup> This means that the performance of legal forms in minimizing the risk of involuntariness depends on their proper refinement and advertisement. By crystalizing, as choice theory prescribes, a stable set of contract types, each with its own animating principle, and by carefully adjusting — as per Klass' important prescription — their entry rules to the pertinent mechanism of choice with an eye to these channeling and deterrent functions, a robust contract law performs better than a thinner one. Having in mind a salient model (or a few salient models) of the intended transaction likely reduces the probability of misunderstandings and thus involuntariness — at least by comparison with the alternative of contracting through the necessarily vague open-ended general contract law.<sup>98</sup>

### C. Choice Theory and Political Economy

But who can undertake the task of crafting contract types so that they indeed fulfill contract's promise of enhancing our autonomy? In *Choice Theory*, we raised this institutional question in connection with familiar concerns about the capacities of legal institutions — notably, generalist courts — to create good rules for sophisticated commercial parties. We did not doubt that such private parties are more competent for the task than are competing legal institutions. We did argue, however, that there is no reason to extrapolate more devastating conclusions from the commercial context — that is, to suggest that no legal institutions are sufficiently competent to implement choice theory. Rather, "implementing choice theory is a matter of comparative institutional

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96 Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 800-01 (1941).

97 *Id.*, at 802.

98 Cf. BARRY NICHOLAS, *THE FRENCH LAW OF CONTRACT* 57 (2nd ed. 1992) (noting that, because French lawyers are conscious of the traits of different *contrats nommés*, contracting parties can be presumed to intentionally attempt to choose their preferred contract type).

competence,”<sup>99</sup> so that, while “in the commercial sphere . . . private parties [are likely] to dominate contract type creation . . . in the family and employment spheres, other, more public actors, may take the lead.”<sup>100</sup> Even in these spheres, legal institutions are surely not perfect for the task. But they are, or at least likely to be, better suited than the contracting parties.

*Choice Theory* offers some preliminary thoughts on possible strategies for coping with concerns of institutional competence — what we call the comparative, the experimental, and the incremental strategies — alongside some examples, such as the judicial recognition of cohabitation, which shows “the significant compliance (though imperfect and insufficient) of evolving contract law with the obligation to support multiplicity.”<sup>101</sup> We acknowledged that much more work needs to be done on this front, noting that “full answers will inevitably be linked to a particular contract type or a specific state or national institutional design.”<sup>102</sup>

Bar-Gill and Gillette add an important dimension to this institutional analysis by focusing on political economy.<sup>103</sup> They are justifiably concerned with the “traditional claim that government can readily solve market failure,” which “treats government actors as cognizant of and motivated by (1) a widely shared view of the public interest, (2) the extent to which market failures inhibit achievement of that public interest, and (3) the tools and political will necessary to implement policies that align with that interest.”<sup>104</sup> Bar-Gill and Gillette conclude that “Dagan and Heller’s faith in governmental processes to develop contract types is overstated,” since we are not sufficiently sensitive to “the public good nature of governance,” which implies the endemic collective action problems of government intervention.<sup>105</sup>

At times, these problems imply that government might undersupply contract types, by either “affirmatively suppressing contract types that the market

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99 Dagan & Heller, *supra* note 1, at 128.

100 *Id.*, at 131.

101 *Id.*, at 15.

102 *Id.*, at 132.

103 Bar-Gill and Gillette also address the issue of competence, arguing that “government would generally lack the access to information necessary to identify the optimal number of contract types.” Bar-Gill & Gillette, *supra* note 2, at 487. We do not underestimate the significance of this task, but the evident undersupply of contract types in the non-commercial spheres of contracting — on which choice theory’s prescription focuses — makes this concern premature. Another concern they raise relates to the imprecision of the distinction between different terms and different types. We discuss this matter in Section III.B.

104 *Id.*, at 487.

105 *Id.*

would create” or failing “to produce a contract type that the market fails to generate, and that government is uniquely positioned to produce.”<sup>106</sup> A parallel and — for Bar-Gill and Gillette — “greater concern,” is that of oversupply of contract types,<sup>107</sup> either “because interest groups with disproportionate access to the [pertinent] agency . . . lobby for an excessive number of types” or because “individuals in those agencies have incentives to create them in order to demonstrate to clients (congressmen, interest groups) or to superiors within the agency that they are performing their assigned function.” Finally, even if government actors were to produce contract types optimal in quantity, “government intervention could cause suboptimal terms to be part of a contract type.”<sup>108</sup>

Bar-Gill and Gillette do not ignore that institutional inquiries are always comparative. They fully realize that the alternative to government involvement is leaving the task to the market, and that this alternative is also far from perfect. Indeed, Bar-Gill and Gillette agree with choice theory’s premise that “standard market failures might cause markets to produce a suboptimal number of contract types,”<sup>109</sup> although they also show that these failures may push in the opposite direction at times, resulting in the provision of too many contract types. But Bar-Gill and Gillette are still concerned that the political economy consideration they highlight may suggest that government involvement “might do more harm than good.”<sup>110</sup> Thus, they conclude that, whereas the lack of an “ideal mechanism” for implementing choice theory “does not deny [its] efficacy,” we need to be careful not to replace “market failure with government failure” that “replicate[s], rather than cure[s], the shortcomings of markets.”<sup>111</sup>

Point well taken. Adding political economy considerations to the comparative analysis of the expected performance of the pertinent institutions is surely important, and there may well be contexts in which the expected shortcomings of government agencies would imply that we may be better off leaving the task to the market, notwithstanding its deficiencies. This conclusion justifies Bar-Gill

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106 *Id.*

107 Bar-Gill and Gillette are concerned about over-supply because an “excessively large number of contract types” is inefficient, as it tends to reduce the positive externality of comparison-shopping and thus dilute the forces of competition. *Id.*, at 492. Oversupply may also undermine autonomy, given people’s cognitive constraints.

108 *Id.*, at 487.

109 *Id.*

110 *Id.*

111 *Id.*



and Gillette's "cautionary note."<sup>112</sup> But nothing in this note is different from parallel concerns of "government failure" regarding the numerous contexts in which agencies are currently involved. And yet, the least controversial set of justifications for regulation by governmental agencies includes various types of market failure — that is, cases in which, for reasons such as monopolies or anti-competitive behavior, externalities or public goods, or informational inadequacies, an "uncontrolled marketplace" is likely to "fail to produce behavior or results in accordance with the public interest."<sup>113</sup> Yes, a rosy story of government must be rejected, but there is no reason to choose instead a particularly gloomy account of the supply of contract types.

Further, when we referred to the responsibility of legal institutions to contract's autonomy-enhancing *telos*, we did not limit our account to agencies. On the contrary, we mentioned a long list of pertinent legal actors, highlighting "courts or legislatures — the ordinary contract lawmakers in liberal societies."<sup>114</sup> One (relatively) happy story we noted is the judicial creation of the law of cohabitation that structures "a distinct contract type which helps stabilize relationships of long-term informal intimacy between marriage and, say, roommates." Courts' responsiveness to "an emerging — albeit minoritarian — innovation," we argued, is laudable from an autonomy-enhancing perspective, especially given the "failure of cohabitants to gain legislative recognition," which "may be best explained by a collective action and political economy story."<sup>115</sup>

The case of cohabitation may suggest a surprising but potentially important conclusion. Recall that our engagement with the institutional question in *Choice Theory* was aimed at limiting the incompetence critique of legal actors — in particular, judges — to the commercial context. Bar-Gill and Gillette's focus on political economy implies that, at least in contexts where generalist judges do not suffer from this difficulty — that is, in the contracting spheres of work, housing, and intimacy where the injunction to proactively facilitate multiplicity applies most strongly<sup>116</sup> — courts should play a particularly important role in implementing choice theory.<sup>117</sup> This conclusion nicely fits the common law tradition in which much of private law is the result the

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112 *Id.*

113 ROBERT BALDWIN ET AL., *UNDERSTANDING REGULATION: THEORY, STRATEGY, AND PRACTICE* 15 (2nd ed. 2012).

114 DAGAN & HELLER, *supra* note 1, at 130.

115 *Id.*, at 132.

116 *Id.*, at Ch. 11.

117 We do not deny that, even in these spheres, the private law of contract types may require regulatory support. *See id.*, at 76-78.

continuous law-making through judicial activity.<sup>118</sup> It also fortifies the claim that, notwithstanding Bar-Gill and Gillette's important cautionary note, "[t]here is room to implement choice theory such that contract law does a better job than the status quo in enhancing people's self-determination."<sup>119</sup>

### III. CONTRACTS: CHOICE THEORY AND THE CANON

We conclude this Article by engaging with important concerns that have been expressed regarding our understanding of contract. The first two are raised by Peter Benson, who argues that "choice theory does not seem to articulate a satisfactory conception of the reasonable for contract," and that it fails "when assessed both as an interpretation of the law and also as a justification of its coercive character."<sup>120</sup> Daniel Markovits and Alan Schwartz, in turn, argue that choice theory's embracing of multiplicity comes "at the cost of abandoning theoretical depth and coherence," which is not ameliorated by our appeal to autonomy as contract's "master value."<sup>121</sup> This difficulty is profound, because it means that either choice theory cannot plausibly guide decision-makers or that its guidance is so cumbersome as to make its implementation unlikely, if not strictly implausible.

#### A. Reciprocal Respect to Self-Determination and Contract Enforcement

Benson appreciates our invocation of John Rawls' "account of the moral powers of free and equal citizens," which "gives center-place to the moral power to form and rationally to pursue a conception of one's own good."<sup>122</sup> But he reads choice theory as solely fixated on this "idea of the 'rational'" and entirely neglectful of the other basic component of Rawls' theory, namely: "the reasonable," which is "an intrinsically moral idea involving moral sensibility in general and a sense of justice in particular." The reasonable is important — both in general and for contract — because it requires persons to "act from fair principles for social interaction and cooperation," and thus to respect "the

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118 See, e.g., Melvin A. Eisenberg, *Principles of Legal Reasoning in the Common Law*, in COMMON LAW THEORY 81, 82 (Douglas E. Edlin ed., 2007). For a defense of the role of judges in the development of private law, see Hanoach Dagan, *Judges and Property*, in INTELLECTUAL PROPERTY AND THE COMMON LAW 17 (Shyam Balganesch ed., 2013).

119 Bar-Gill & Gillette, *supra* note 2, at 502.

120 Benson, *supra* note 2, at 540.

121 Markovits & Schwartz, *supra* note 2, at 577.

122 Benson, *supra* note 2, at 547.

equality and independent claims of others and expect[] the same in return from them.” It thus imposes “genuine obligations toward others and, where justified, these obligations can be coercively enforceable.”<sup>123</sup>

A second, and somewhat related,<sup>124</sup> objection Benson raises is that, despite our aspiration “to provide an interpretative framework for presenting contract law in [its] best light,” our book fails “to show with the needed detail that [choice theory] is reflected even in the main contract doctrines.”<sup>125</sup> He believes that “this cannot be done,” making reference in this context to the doctrines governing contract formation, to the objective standard, as well as to “the whole implied dimension of a contract (including implied terms, obligations, impossibility, mistake etc.) and the entire range of remedies for breach.”<sup>126</sup>

Furthermore, Benson argues, without the component of reasonableness, choice theory cannot account for “the requisite nexus between promisor and promisee”<sup>127</sup> — linking here the “question of interpretative fit” with the requirement to “justify the basic moral fact that contractual duties are coercively enforceable.” Choice theory, Benson concedes, may imply that “[o]ne who voluntarily recruits another or accepts being recruited by another through such a device is required to perform what she has promised in order to fulfill this duty.” But this duty, he insists, is only “some sort of general positive duty” to “support and further a regime of voluntary contracts” that “enables individuals to advance their ends — hence their autonomy,” so “the most plausible obligee” is not the promisee, but rather “the community of present and future transactors or perhaps the body that is responsible for maintaining the regime of cooperation.” He continues: “To establish the requisite nexus between promisor and promisee, it is essential to show that there is a requirement of reasonableness that holds as between them,” which — and this is the key for Benson — “choice theory fails to do.”<sup>128</sup>

Benson is right to insist that a Rawlsian component of reasonableness is necessary to justify contract enforcement, and this dimension is core for accounting for the status of the promisee as the right-holder authorized to invoke enforcement proceedings. But the fact that *Choice Theory* did

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123 *Id.*, at 548.

124 As the text hints, Benson’s complaint of fit is only somewhat related to his reading of choice theory as lacking the component of reasonableness, because part of the difficulty he sees in choice theory as an interpretive account of contract derives from the extreme and unnecessarily demanding understanding of “power-conferring character” he attributes to choice theory. *See supra* note 94.

125 Benson, *supra* note 2, at 546-47.

126 *Id.*, at 545-46.

127 *Id.*, at 550.

128 *Id.*, at 550-51.

not employ Rawls' vocabulary of the rational and the reasonable, does not signify that choice theory does not appreciate the role of reciprocal respect to the equal claims of others as a necessary foundation for the legitimacy of contract and its interpersonal character. Indeed, while choice theory celebrates the autonomy-enhancing role of contracts, it explicitly recognizes that the legitimacy of recruiting law's coercive power for its entrenchment — and thus the scope of contract law's legitimate power — both depend upon a prior interpersonal obligation.

Much of Part I of *Choice Theory* argues that earlier attempts to face this legitimacy challenge, including Benson's, predictably fail, because they ask the wrong question. They seek to justify the duty contract imposes, even though people's interpersonal obligations are exhausted by reciprocal respect for each other's independence. But starting from "the obligation of reciprocal respect for self-determination that underlies private law" shows that "there is nothing mysterious in the duty to perform."<sup>129</sup> Our reference to private law here was not accidental, as we demonstrated in the subsequent pages in *Choice Theory* referring to the (modest) affirmative interpersonal duties private law imposes.

As one of us has argued in detail elsewhere, these affirmative duties are not a blemish on a liberal private law. On the contrary: the facts of interdependence and personal difference — and thus the vulnerability and the valuable options to which these social conditions give rise — imply that the liberal commitment to individual self-determination cannot be excluded from the law governing horizontal relationships.<sup>130</sup> This means that, although private law should take seriously the typically excessive interference with people's autonomy that affirmative interpersonal duties to aid others entail, it need not — indeed should not — subscribe to a blanket rejection of affirmative duties in private law, as prior formulations of contract legitimacy challenge imply.

This cautionary note explains the suspicion of liberal law towards affirmative duties (a point to which we return when we explain and justify the common law's preference for pecuniary remedies). It also explains the actual workings of private law, namely, the many affirmative duties it does acknowledge, which typically involve — in line with Hart's dictum<sup>131</sup> — an infringement of independence that does not seriously jeopardize self-determination. And it is exactly this point that provides the key to the legitimacy of contract enforcement. If affirmative interpersonal duties are categorically excluded

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129 DAGAN & HELLER, *supra* note 1, at 42.

130 See Dagan & Dorfman, *supra* note 72; Hanoch Dagan & Avihay Dorfman, *Justice in Private: Beyond the Rawlsian Framework*, 37 L. & PHIL. 171 (2018).

131 See *supra* text accompanying note 11.

from private law, it is indeed hard to explain how the autonomy-enhancing implications of contract can legitimate its legal form. But once the spurious, blanket rejection of affirmative duties from private law is rejected, we argue in *Choice Theory*, the mystery of contract enforcement dissolves.

Indeed, private law's *Grundnorm* of reciprocal respect to self-determination, which governs people's interpersonal relationships in a liberal polity, 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. Benson expresses this very same point in Rawlsian vocabulary: "Because each side has chosen to do something which brings into play the other as a co-equal participant with separate and independent interests, each has chosen to enter a relation which is subject to interpersonal norms and standards: each party, as a reasonable person, must therefore recognize the fair and reasonable meaning of their interaction as a transaction between two."<sup>132</sup>

We will shortly address Benson's second critique, regarding the challenge of fit. But because part of our response to Markovits and Schwartz overlaps with our response to this challenge, we will take both points in Part III.C. We turn now to Markovits and Schwartz's critique in which choice theory ends up in the unhappy predicament of pre-Willistonian *unprincipled* multiplicity.

## B. Principled, Structured, and Informative Pluralism

The focus of Markovits and Schwartz's penetrating inquiry is the plurality of values "that are openly and notoriously at play in contract practice," which renders, for them, "the life of the law too unruly to confine within any single logic."<sup>133</sup> Markovits and Schwartz accept that philosophers might be able to show that efficiency, autonomy, equality, and community (the four values they mention) "cohere in a single framework or arise from a single basic source."<sup>134</sup> But they believe that lawyers and judges necessarily resist any such philosophical framework, because it is unlikely to address the more concrete concerns with which law needs to engage.<sup>135</sup>

This limitation leaves contract theorists with three strategies for avoiding the perils of pluralism, each with its own virtues and vices. First, they can resort to *capitulation*, which "involves seeking domains that are insulated from

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132 Benson, *supra* note 2, at 567.

133 Markovits & Schwartz, *supra* note 2, at 573.

134 *Id.*, at 574.

135 *Id.*, at 574-75.

pluralism, because only one value governs them.”<sup>136</sup> Markovits and Schwartz illustrate this strategy by reference to their own prior work, explaining business transactions through an efficiency lens (Schwartz & Scott) and agreements regarding professional services through a community one (Markovits). They candidly admit their own work illustrates the hazards resulting from the artificial delimitation of contract’s domain and from the resulting distortion that it inevitably generates.<sup>137</sup>

The second strategy for avoiding pluralism “flees in [the] opposite direction” by *leveraging*, which “involves seeking domains to which pluralism applies but only to create redundancies, because all values recommend the same result.”<sup>138</sup> This strategy seeks to identify pockets of contract practices in which “irreducibly plural” values converge around a specific reformist argument. Leveraging necessarily has “only a very narrow scope of application.”<sup>139</sup>

Markovits and Schwartz also identify a third and “very different”<sup>140</sup> approach: *embracing* value pluralism, which “does not flee from but rather embraces the diversity of values at play in contract practice and also the varieties of practice that arise in the shadow of these values.”<sup>141</sup> This approach, Markovits and Schwartz argue, typically requires the theorist to “abandon or at least retreat from theory’s conventional simplifying ambitions in favor of interpreting and displaying the complexity that practice unavoidably presents.”<sup>142</sup> *Choice Theory*, in their view, exemplifies this “embracing” strategy, as is most clearly demonstrated by our taxonomy of contract’s domain.<sup>143</sup> The taxonomy seeks to “track lived experience,” and thus construct contract spheres and contract types “out of the intuitive, pre-theoretical categories,” namely: “out of the materials that parties, lawyers, and judges first look to when considering drafting, litigating, or adjudicating contracts.”<sup>144</sup>

For Markovits and Schwartz, choice theory involves a tradeoff. They acknowledge that embracing multiplicity has some virtues: choice theory may avoid both the incompleteness and “the distortions that arise from

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136 *Id.*, at 580.

137 *Id.*, at 576-78.

138 *Id.*, at 580.

139 *Id.*, at 578-80.

140 *Id.*, at 575.

141 *Id.*, at 580.

142 *Id.*, at 575.

143 *Id.*, at 576, 580.

144 *Id.*, at 581. The other is our attempt to “highlight backwaters,” such as bailment, to illustrate both “how fine-grained the taxonomy of contracts might become,” and how even relatively obscure doctrines can demonstrate our theory. *Id.*, at 580-84.

viewing a multifaceted practice through a single lens.”<sup>145</sup> But this virtue entails a significant theoretical cost, because it leaves “the disorder associated with accommodating too many values” intact, thus undermining “the point of a theory, which is to explain something by organizing otherwise unruly considerations into patterns that are simpler and more general than the pre-theoretical practice to be explained.”<sup>146</sup> This drawback, they insist, cannot be avoided by our resort to autonomy as contract’s ultimate value: any attempt to *really* subordinate choice theory’s pluralism to autonomy, they suggest, is bound to be self-defeating. Why? Because it inevitably collapses choice theory’s pluralism down to the capitulating strategy. In the end, they argue, we are left with an account that is both too capacious *and* unstructured—and indeed uninformative.<sup>147</sup>

As a result, choice theory cannot help with concrete legal practice. Markovits and Schwartz argue, for example, that an open-ended embrace of pluralism cannot arbitrate between an employment contract type that minimizes a typical dyad’s contracting costs and one that generates a smaller expected economic surplus because it “includes hiring disadvantaged persons.”<sup>148</sup> This indeterminacy implies that choice theory sets a task that “no institution could do.”<sup>149</sup>

How did we go so far astray? Markovits and Schwartz suggest that the source of our error lies in our background as property scholars. We were (mis)led to analyze contract as if it were property, where “the state specifies the forms that agents must use in order to hold property.”<sup>150</sup> But contract rules are dramatically different, because they function largely as implied terms. If choice theory embraces value pluralism and seeks to avoid illegitimate state impositions, then it must, in Markovits and Schwartz’ account, require contract law to offer an implausibly large number of contract types, so as to fit every possible value ranking respecting the (huge) range of possible project descriptions, sets of goals, and sets of actions needed to achieve them.<sup>151</sup>

These are heavy charges. We discuss them in reverse order because our answers to Markovits and Schwartz’s practical questions also jumpstart our responses to their theoretical challenge.

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145 *Id.*, at 587.

146 *Id.*, at 575.

147 *Id.*, at 580, 582, 587.

148 *Id.*, at 575.

149 *Id.*, at 584.

150 *Id.*, at 572, 573.

151 *Id.*, at 583-86. This difficulty is exacerbated once we consider the heterogeneity of the utility functions of parties to contracts outside the commercial spheres. *Id.*, at 585.

First of all, we reject the sharp dichotomy between contract and property. The categories are, in large measure, artificial silos. The continuities between property and contract are quite significant (notwithstanding some differences that derive mostly from property's *in rem* character).<sup>152</sup> Property law increasingly recognizes — as it should, in a liberal polity — the possibility of contracting around property rules.<sup>153</sup> But this trend does not negate the significance of law's facilitation of property types. When, for example, property law entrenched common-interest-communities as a property type, it saved on the transaction costs involved in tailoring this type from scratch and, even more significantly, added a salient option to the housing market. Common-interest-communities vary widely and thus require further refinement, but this is not to deny the empowering effect of adding this type to our property inventory.

The exact same reasoning applies to the relationship between contract types and the possible project descriptions, sets of goals, and sets of actions of specific parties who resort to a given contract type. Choice theory requires that, for every sphere of contracting, law should provide a variety of sufficiently distinctive contract types — a *bounded variety*, not an *infinite mishmash* as Markovits and Schwartz would have it. For this bounded variety to be autonomy-enhancing, as choice theory prescribes, these types need to be *partial functional substitutes* for each other: “They need to be substitutes because choice is not enhanced with alternatives that are orthogonal to each other; and their substitutability should not be too complete because types that are too similar also do not offer meaningful choice.”<sup>154</sup>

This understanding of types implies an important, even if imprecise, distinction between different *types* and different *terms*. It also clarifies that choice theory does not expect legal institutions to tailor precise scripts for every contract dyad; its autonomy-enhancing *telos* does not, in other words, necessitate the degree of granularity ascribed to it by Markovits and Schwartz.

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152 One seemingly categorical difference derives from property's *numerus clausus*. But even strict adherence to this principle does not practically undermine parties' choice; moreover, we think a liberal property system must follow the rule in Spain (among other countries) that recognizes — alongside the state-supported property types — the option of “tailor-made” property rights. See Thomas W. Merrill & Henry Smith, *Optimal Standardization in the Law of Property: the Numerus Clausus Principle*, 110 *YALE L.J.* 1, 35-38 (2000); DAGAN, *supra* note 72, at ch. 4.

153 This trend is manifested most significantly in the traditionally immutable areas of marital property and servitudes. See AM. LAW INST., *PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS* ch. 7 (2002); *RESTATEMENT (THIRD) OF SERVITUDES* §§2.1, 2.4, 2.6, 3.2 (2000).

154 DAGAN & HELLER, *supra* note 1, at 106-07.



Rather, for contract law to perform its autonomy-enhancing work, it is enough for it to construct a repertoire of contract types, each suited to a paradigmatic *category* of projects, a *typical set* of goals, and a corresponding *typical set* of actions, which can be thus structured around a distinct (and robust) animating principle. In other words, much like the property types that law offers, its contract types also perform a role of *in rem* intelligibility.<sup>155</sup>

There is no reason to assume that the number of such categories of contract types is dramatically different from the number of property types. Either way, our claim does not rely on answering that question. We make a more limited observation: in the commercial sphere, contracting parties seem to like having choice; and when they find their choices insufficient, they seem able to catalyze new types and manage the resulting multiplicity. Private actors and legal institutions have created a robust repertoire of commercial contract types. If they are up to this task in the commercial sphere, perhaps they are equally so in other contracting spheres too.

Markovits and Schwartz maintain that choice theory would be reluctant to “simplify its type creation task by limiting types to reasonable or appropriately balanced value judgments; for to do that is to *impose* an evaluative frame,” because such limits would undermine its commitment to pluralism.<sup>156</sup> But choice theory is *not* neutral when it comes to contract types that involve relational injustice (as we clarified in Section II.A<sup>157</sup>). Let us return to the employment contract dilemma that Markovits and Schwartz raised. If the conflict involves a type that complies with relational justice (by proscribing discrimination) and one that authorizes relational injustice (by allowing contract practices that undermine contract’s own *telos* of reciprocal respect to self-determination), then choice theory would not hesitate to opt for the former.

We do not deny, of course, that this “floor” of relational justice would still leave a huge set of options, which means that only a fraction of potential alternatives could become actual contract types. That’s fine. Relational justice excludes bad types. For the rest, judgment should be guided not by normative evaluation, but by commitment to ensuring partial functional equivalents and by attention to pragmatic considerations, relating notably to what Klass dubs “the mechanics of choice.”<sup>158</sup>

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155 We thank Daniel Markovits for this formulation of our claim.

156 Markovits & Schwartz, *supra* note 2, at 586.

157 See *supra* text accompanying notes 72-74.

158 Klass, *supra* note 2.

*Choice Theory*'s discussion of these matters is admittedly preliminary, partly because it requires social scientific skills that we lack.<sup>159</sup> But this task is not unachievable: it neither implicates overly-perfectionist value judgments, nor does it require unbounded multiplicity of contract types.

These responses to Markovits and Schwartz's implementation challenge also help clarify how, specifically, choice theory is pluralist (and how it isn't). And they begin to explain how our reliance on "autonomy as self-determination" brings structure to contract's seemingly conflicting values. Let us now make the lessons here more explicit.

Markovits and Schwartz believe there is a deep, indeed irreconcilable, tension between choice theory's commitment to autonomy and its embrace of pluralism. For them, this tension pushes choice theory to employ an uninformative conception of autonomy. In this reading, a seemingly-charitable interpretation of choice theory would understand autonomy not as contract's "master value,"<sup>160</sup> but rather as merely "one value among many."<sup>161</sup>

We agree that an account of contract that relied on such *foundational* value pluralism would be vulnerable to the critique of indeterminacy and it may end up failing in its aspiration for guidance or evaluation. But choice theory is categorically *not* foundationally pluralist.<sup>162</sup> This may be hard to explain, but it is central to our argument.

As we tried to clarify in Chapters 5 and 6 of *Choice Theory*, the theory's normative pluralism is limited to the *goods* of contracts — utility and community. This domain of normative pluralism is circumscribed due to our understanding of utility and community as instrumental and intrinsic values, respectively. But, in turn, they are subordinate to autonomy, contract's ultimate value. Choice theory is not pluralist all the way up.

Because utility and community typify the goods people seek when resorting to contracts, accommodating them under autonomy's ultimate rule allows choice theory to avoid the pitfalls of capitulation that are indeed endemic to accounts — such as those of Markovits and of Schwartz — that situate utility or community at the core of their theories. Our approach also avoids the capitulation costs of previous autonomy-based accounts that fail to appreciate

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159 DAGAN & HELLER, *supra* note 1, at 106-07. We do not imply that the work of social science here should, or can, supplant legal theory, but rather that the former is a necessary input for the further development of the latter.

160 Markovits & Schwartz, *supra* note 2, at 587.

161 *Id.*, at 582.

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

the significance of multiplicity to autonomy.<sup>163</sup> Choice theory embraces the complexity of contract practice, but rejects foundational value pluralism.

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 they are above the relational justice floor, so long as there are enough partial functional substitutes, and so long as the range of types attends to the mechanics of choice (as we clarified in Part I of this Article). At the same time, choice theory is *adamantly opinionated* in its commitment to the parties’ autonomy. Thus, it actively rejects attempts to use contract for — let alone claims that contract law should actively facilitate — practices that are autonomy-reducing. Because reciprocal respect to self-determination is the foundation of contract law’s legitimacy, its implications for contract law design are not optional. In other words, while choice theory embraces the plurality of contract types, its value pluralism is emphatically not foundational, but rather autonomy-based. And Markovits and Schwartz’s skepticism notwithstanding, we argue that *this* combination — foundational autonomy with pluralist types — does generate sufficiently determinate prescriptions to make it a theory properly-so-called.

We admittedly addressed only some of these points in *Choice Theory*, but have added a few more in Part II of this Article. There is much more to be said. Happily, much of this unfinished business converges with our debt to Benson’s critique. As may be recalled, we still need to respond to Benson’s second complaint — regarding choice theory’s fit with the existing Contract Canon. Benson is correct in claiming that an important dimension in assessing a theory of contract law is the degree to which it actually accounts for existing doctrine. Sharpening the prescriptions of choice theory’s autonomy-based foundation allows us to demonstrate choice theory’s explanatory power — and simultaneously put to rest Markovits and Schwartz’s concerns about the vices of our “embracing” approach. This is the task of the last section of this Article.

### C. The Contract Canon

We hoped, in *Choice Theory*, to highlight the underappreciated potential contribution of contract types to our autonomy, and to push theorists and policymakers to consider expanding the inventory of contract types for work, home, and intimacy. In focusing on this goal — and with the aim of writing a *short* book — we indeed paid too little attention to demonstrating the broader implications of choice theory to contract law. We emphasized the hitherto

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163 This may explain, of course, Fried’s embrace of choice theory, discussed in Part I.A.

marginalized significance of the intra-sphere multiplicity of contract types by celebrating contract law's reliance on private law's foundational prescription of reciprocal respect to self-determination. But, in addition to this lesson, choice theory also fits and elucidates the fabric of the *existing* canon of contract law. In other words, choice theory better explains the most salient rules, doctrines, and cases that currently predominate in contracts casebooks and scholarship.

Reconstructing the contract canon in the mold of choice theory is an important and formidable task that we will be undertaking in the future.<sup>164</sup> For our current purposes, a quick roadmap should (hopefully) suffice. Section II.A of this Article previews such an exercise. Choice theory implies, we have argued, that contract law in a liberal society must follow three guiding principles:

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

While we discussed each of these principles in *Choice Theory*, we realize now that we did so in an *ad hoc* manner, with the building blocks scattered through Part III of the book. There is more to say on their interrelationships, particularly in the context of the existing Contract Canon. A broad set of existing contract rules respond well to, and are in fact entailed by, these three principles; indeed, we claim they play a key role in the legal constitution of contract from inception to breakdown.

Core rules that govern the life of contracts all share the same autonomy-enhancing mission and thus necessarily follow the principles it entails. Such rules include those that regulate the bargaining process and formation of contracts; determine the parties' obligations by identifying and interpreting their agreement, filling gaps, and setting norms for performance and excuse; and finally define the consequences of breach by prescribing the type and scope of available remedies. It is impossible to discuss properly this vast terrain in the little space left for this Article. So here is a snapshot, taking the three principles in turn (and reserving detailed case citation and analysis till later).

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164 Hanoch Dagan & Michael Heller, Choice Theory and the Canon of Contract Law (work in progress on file with authors).

### 1. Proactive Facilitation<sup>165</sup>

The objective theory of contract is a good first example of the principle of proactive facilitation. While many theories of contract (including Benson's) support the objective approach, choice theory provides a particularly secure justification for its role in modern contract law. Indeed, we believe the contemporary status of the objective theory is best explained by the qualitative difference between the rather limited autonomy-enhancing potential of a subjective theory of contract and the far more impressive potential of its objective counterpart. We think this explanation can also helpfully re-frame and clarify some of the most contentious issues of contract doctrine dealing with the parol evidence rule and with contract interpretation, by highlighting the empowering potential of the predictability generated by delimiting the range of admissible evidence and focusing on the literal meaning of the parties' agreement.

Taking seriously contract's autonomy-enhancing *telos* not only justifies the widespread endorsement of the objective theory,<sup>166</sup> but also justifies and explains further doctrinal features of contract law. First, consider incomplete agreements. While the traditional common law was hesitant to enforce incomplete agreements, modern law takes a diametrically-opposite attitude.<sup>167</sup> Contemporary contract law is no longer satisfied with providing enforcement services 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>168</sup> But beyond this category, current law — both the Uniform Commercial Code and the

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165 For a more extended treatment of this principle and how it defies contract theories that rely on competing understandings of freedom, see Hanoch Dagan, *Types of Contracts and Law's Autonomy-Enhancing Role*, 5 EUR. CONTRACT L. & THEORY (forthcoming 2020).

166 Recall, however, that taking the objective theory to the extreme might override autonomy by overriding voluntariness, which underscores the role not only of doctrines such as duress and misrepresentation, but also those such as entry rules, as discussed in Section II.B. It also implies a cautious attitude towards memoranda of agreements. Such an attitude properly typifies American contract law, but — unfortunately — not Israeli contract law. Compare *Coley v. Lang*, 339 So. 2d 70 (1976) with *C.A. 158/77 Rabinai v. Man-Shaked Ltd.*, 33 (2) Sup. Ct. 281.

167 See E. ALLAN FARNSWORTH, *CONTRACTS* 120-21 (4th ed. 2004).

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

Restatement (Second) of Contracts<sup>169</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>170</sup> A significant subset of the current contract law canon belongs to this category.

Positioning gap-filling as a core function of contract law quickly necessitates a significant degree of variation among contract types. In other words, expanding the facilitative ambition of contract law requires it to adjust the means with which it can identify mutually-beneficial interactions worthy of its support as well as the rules that can best support them. This devotion to contract's autonomy-enhancement *telos* can explain and justify the development of promissory estoppel and of the material benefit rule as contracts' additional gatekeeping doctrines, alongside the traditional consideration doctrine. It likewise accounts for the gradual recognition that other rules that are, at times, presented as part of contract law's signature core — for instance, the mirror-image rule for offer and acceptance, the standard of performance of perfect tender, the promisor's strict liability, or the dominance of expectation damages — all, in fact, prevail in only certain contract types, and not in others.

The step we have emphasized most in *Choice Theory* — ensuring sufficient contract types and securing intra-sphere multiplicity — is indeed a necessary feature of a liberal contract law that takes seriously its commitment to proactively facilitate contract's autonomy-enhancing potential. While we identified an important reformist agenda in the book, we should also highlight here the substantial steps contract law has already taken to implement choice theory. Think, for example, of the contract-type innovations — exclusive dealings, outputs, and requirement contracts — that harmoniously follow choice theory's prescription of intra-sphere multiplicity and are now part of the canon.<sup>171</sup>

## 2. *Autonomy of the Future Self*

Bolstering the facilitative effect of contract law in these ways makes the second principle noted above — dealing with the need to consider the autonomy of the parties' future selves — particularly significant. But its normative power need not rely on this additional urgency. Rather, it derives immediately from contract's autonomy-enhancing *telos*: a law that confers upon people

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169 See U.C.C. § 2-204(3); RESTATEMENT (SECOND) OF CONTRACTS § 33 (1981).

170 See U.C.C. § 2-305.

171 See U.C.C. § 2-306. As the text (and *Choice Theory*) suggests, *pace* Benson's claim (Benson, *supra* note 2, at 567-70), judges' situation sense, their development of modes of currency, and their recognition of legal formalities cannot plausibly suffice for properly facilitating transaction types. Existing law therefore goes well beyond these modest means.

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

The main doctrinal manifestations of this principle can be divided into four sets of rules. The first set — the rules dealing with mutual mistake and with impossibility, impracticability, and frustration<sup>172</sup> — is straightforward. 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 material to their agreement.<sup>173</sup> Risks that fall outside this domain and are not allocated to the adversely-affected party should not encumber his or her future self. Applying this rule may be 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.

Second, and on the other side of the spectrum, in *Choice Theory* we observed a set of rules that prescribe the outer limits of people's power to commit, 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 contracts. In many of these cases, the parties' intention to commit is clear. But even when such rules apply, an autonomy-enhancing contract law must be careful not to undermine people's mobility in a way that ends up being detrimental to their self-determination. In other words, a liberal contract law must acknowledge the possibility of regret, which these rules indeed enshrine, not only as a response to rationality deficiencies or market failures, but also as an inherent entailment of our most fundamental commitment to people's right to (re)invent themselves.<sup>174</sup>

Third, consider remedies. These rules are guided by an effort to minimize the future autonomy-constraining effects of a present autonomy-enhancing commitment. Many limitations on remedies for breach of contract comfortably belong to this category. The most salient rule here deals with the severe

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172 This paragraph provides a preliminary response to Markovits and Schwartz's reference to the excuse rule (Markovits & Schwartz, *supra* note 2, at 582) as an example of a contract doctrine that may seem unrelated to choice theory and thus unaffected by its prescriptions.

173 See RESTATEMENT (SECOND) OF CONTRACTS § 152-52 (1981); U.C.C. § 2-615.

174 For more on this point, see Dagan & Heller, *Ultimate Value*, *supra* note 4.

limitations on specific performance (and its cognates) in the common law tradition. Other things being equal (for the promisee), a liberal contract law rightly refuses to compel the promisor to act in accordance with the contractual script, allowing her to choose between doing so and covering the promisee's expectation. This traditional and strong preference for monetary recovery is thus not, as mistakenly presented by some critics, an embarrassment to contract law, but rather a salutary testament to contract law's underlying liberal commitments.<sup>175</sup>

Finally, situating the parties' self-determination at the core of contract's normative infrastructure beautifully accounts for the subtle, yet at times significant, difference between the pertinent rules of contract types that implicate people's self-identity and those that are only about material concerns. The prime example here again comes from the law of specific performance typified by a rigid resistance against awarding such a remedy in service contracts.<sup>176</sup> The same sensitivity to the difference between "me" and "mine" explains, and indeed justifies, the inapplicability of any reasonableness inquiry regarding refusals to accept a different or inferior position in mitigation of breach of a personal service contract.<sup>177</sup>

### 3. *Relational Justice*<sup>178</sup>

The final guiding principle begins with choice theory's proposition, noted repeatedly in these pages, in which the legitimacy of enforcing contracts — even wholly executory contracts — necessarily relies on the most fundamental foundation of a liberal private law of reciprocal respect for self-determination, which includes (modest) affirmative interpersonal obligations. Once we appreciate that reciprocal respect for self-determination is the premise of contract's own legitimacy, it becomes evident that any attempt to recruit the law in the service of an agreement that defies this premise must be treated as *ultra vires*: an abuse of the idea of contract—that is, the use of contract law for a purpose that contravenes its *telos*.<sup>179</sup>

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175 For more on this point, see Dagan & Heller, *Autonomy, Refined*, *supra* note 4.

176 See RESTATEMENT (SECOND) OF CONTRACTS § 367(1) (1981).

177 See *Parker v. Twentieth Century-Fox Film Corp.*, 474 P.2d 689 (1970).

178 For a more extended treatment of this principle, see Hanoch Dagan, *The Value of Choice and the Justice of Contract*, JURISPRUDENCE (forthcoming 2019); Hanoch Dagan & Avihay Dorfman, *Justice for Contracts* (unpublished manuscript, on file with authors).

179 We again find ourselves here in agreement with Benson's "Rawlsian" proposition that "*at every step in the argument* contract law must specify principles and rules that reflect the requirements of the reasonable and so can legitimately constrain



There is, again, a wide array of doctrinal rules that secure contract law's integrity by guaranteeing its compliance with this prescription of relational justice. Some of these rules are products of adjudication; others were enacted by legislatures and regulatory agencies, oftentimes after the common law set a vague standard that legislators and regulators are better suited to delimit. We can identify four sets of contract rules that robustly vindicate contract law's requirement of relational justice as the "admission criterion" for recruiting its support.

Consider first those rules that regulate the parties' bargaining process in a way that goes beyond the traditional *laissez faire* mode of proscribing the *active* interference of one party with the other's free will. This set of rules expands the range of vitiating factors by prescribing affirmative interpersonal obligations. It thus accounts for the expansion of the law of fraud beyond the traditional categories of misrepresentation and concealment to include also — notably in real estate and securities transactions — disclosure duties. This conceptual expansion also underlies the doctrine of unilateral mistake. Similar analysis may help explain duress cases of wrongful threats that do not violate others' rights as well as anti-price-gouging laws and admiralty rules of salvage. Finally, a charitable reading of unconscionability doctrine and some of its regulatory cognates sits comfortably within a regime that is careful to ensure that contract is used only in settings that comply with the minimal requirements of reciprocal respect to self-determination.

A parallel set of quite diverse rules includes moderate duties to ensure that the parties assist in promoting each other's self-determination. Together, these rules solidify a cooperative conception of contract performance. The duty of good faith and fair dealing, which sets up the contractual rules of the game, stands at the doctrinal core of this conception. 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 all, likewise, be interpreted as belonging to this cooperative framework.

The last two sets of doctrines that vindicate contract law's compliance with relational justice are not part of the conventional canon of contract law, but are increasingly part of the actual life of contract. Highlighting the continuity between these doctrines and the more canonical manifestations of relational justice in contract law noted above can thus help demonstrate the prevalence of relational justice in existing doctrine.

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parties through the coercive enforcement of legal duties and rights." Benson, *supra* note 2, at 570.

One set mandates the minimal level of interpersonal decency contract law is willing to accept *vis-à-vis* contract types that significantly affect the personhood of one of the parties — regarding, for example, minimum wages, safety in the workplace, or the habitability of homes. Relational justice is the most plausible foundation for this group of immutable contract rules, which are, by now, entrenched, yet the grounds for which remain debated as a matter of contract theory. The other set concerns duties to respect the contractual party as the person she actually is, and thus accommodate her constitutive features such as race, gender, language, nationality, religion, disability, familial status, and sexual orientation. At times, these duties are relevant to the content of the parties' obligations. More often, however, they serve as “gatekeepers” to ensure that parties who make systemic use of contract — by becoming employers, landlords, or owners of public accommodations — do not apply discriminatory practices in their choice of contractual counterparts and thus contravene the requirement of reciprocal respect to self-determination on which contract is founded.

### CONCLUDING REMARKS

*Choice Theory* advances a claim about the centrality of freedom to contract. In that book, we situate efficiency-based and community-based accounts of contract as building blocks of an autonomy-enhancing contract law. We argue that a liberal and general theory requires the state to proactively ensure availability of a diverse range of normatively-attractive contract types in the key spheres of contract: commerce, work, home, and intimacy. This is a provocative position. Does it hold up?

Our goal with *Choice Theory* was, in part, to trigger debate among the world's leading contract scholars regarding contract's role in securing freedom and facilitating choice — and to move thinking forward on fundamental questions in the field. Does contract serve freedom and choice, and if so, how? Who should make the choices that contract law facilitates, and how should they do so? And what is the proper relationship between contract law and contract types?

Each Article in this Issue advances the field. Reflecting on them has helped us to adjust, clarify, and refine choice theory. On balance, choice theory holds up well. It comes out stronger and, to our minds, more persuasive. But there is much more work to be done. Together, we continue on a mutual path toward a more just and justified law of contract.