Contract Law in a Just Society

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This Article challenges Hanoch Dagan and Michael Heller's choice theory of contract, according to which contract law is autonomy-enhancing. I make three points: first, the choice theory of contract cannot clarify the critical normative distinction between enforceable formal contracts and unenforceable informal promises. Second, I develop the roads/contract-types analogy: instead of promoting individuals' autonomy and enhancing their choice among different projects, most contract types are justified by the preexisting preferences of citizens. Finally, I outline a teleological justification of contract law that is different from that propounded by Dagan and Heller. On this view, contract law should remain neutral as to which conception of the good is commendable and provide individuals with the means of shaping and pursuing a conception of a good life.

Introduction

In their ambitious new book, Hanoch Dagan and Michael Heller appeal to the Millean perfectionist justification of the state, as it was developed in Joseph Raz's *Morality of Freedom*,[1] in order to advance a perfectionist — autonomy as self-determination-based — theory of contract law.[2] They call it choice theory.

One basic idea that underlies choice theory is familiar: "contract serves autonomy by enabling people to legitimately enlist others in advancing their own projects and thus it expands the range of meaningful choices people can make to shape their own lives."[3] Dagan and Heller interpret this familiar idea in a nonstandard way. True, in entering a contract, the parties *realize*

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1 Joseph Raz, The Morality of Freedom (1986).

2 Hanoch Dagan & Michael Heller, The Choice Theory of Contracts (2017).

3 *Id.* at 66.

their autonomy — actual contracting between people is a realization of their freedom. However, for Dagan and Heller, one definitive goal of contract law is to *enhance* autonomy rather than to merely enable people to realize the normative power to form contractual relations. In particular, they argue that contract law should enhance autonomy by forming contract types from the top down, and by softly or coercively imposing these contract types through mandatory rules and sticky defaults.[4]

According to Dagan and Heller, such a proactive contract law is autonomy-enhancing in virtue of three related features. First, it assists private people to overcome collective action problems and, more importantly, their built-in limitations in inventing and pursuing worthy shared projects. By creating contract types, the state would enable private persons to pursue projects they could not have thought about in ways they could not have paved by themselves. Second, according to choice theory, contract law in a liberal state should create a variety of worthy alternatives. As such, the law is choice-enhancing: people are able to choose one way of acting together out of many other possible ways. Finally, some of the contractual relations that the law encourages people to form would be used by only a few people. That is, the supply of contract types is not guided only by demand; a well-functioning contract law enables people to pursue unique and rare projects together.

Choice theory is committed to another essential element in the perfectionist theory of liberalism: its non-neutrality.[5] In devising and supplying contract types, contract law relies on value judgments about the good life that the liberal state adopts and advances. Through its contract law, the state creates more of what it sees as worthy options and opportunities, enabling choice among shared projects that it takes to be worth pursuing. It represses what it takes to be unworthy shared projects, like fight clubs or consensual polygamy.

This Article challenges Dagan and Heller's choice theory by making three points. The first relies on Aditi Bagchi's analysis of the aims of actual legislators, who devise contract types, and the concerns of private parties who form contractual relations.[6] She claims that most actual contract types are designed to enable people to meet preexisting preferences, or pursue ends that they are morally required to set for themselves independently of their concrete conceptions of the good. Actual contract law is therefore not autonomy-enhancing in Dagan and Heller's sense: rather than open new

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4 *See id.* at 67.

5 *See* Raz, *supra* note 1, at 110-30. *Cf.* Avishai Margalit & Joseph Raz, *National Self-Determination*, 87 J. Phil. 439, 449-51 (1990).

6 *See* Aditi Bagchi, *Voluntary Obligation and Contract*, 20 Theoretical Inquiries L. 433 (2019).

unimaginable possibilities, it is governed by preexisting demand. Second, I will question Dagan and Heller's claim that choice theory can offer specific guidance as to how proper remedies for breach are to be structured by the law.[7] More specifically, I will argue that autonomy as self-determination does not justify the basic distinction between unenforceable informal promises and enforceable formal contracts. Third, I will outline a different, partly teleological justification of contract law, according to which contract law should provide contract types that enable people to efficiently execute their freedom-as-independence-based duties, as Kantians would argue; additionally, however, contract law should enable citizens to collaborate in order to secure more resources or primary goods. That is, the law ought to provide contract types in order to enable individuals to secure the means whereby they can shape and pursue *a* conception of a good life. It is neutral as to *which* conception of the good is commendable. The very possibility of this approach suggests that choice theory is not the only, or even the optimal, alternative to the Kantian or the economic approaches to contracts.[8]

This Article proceeds as follows. Part I presents some of the aspects of Raz's political philosophy to which Dagan and Heller (as I understand them) appeal in shaping their theory of autonomy-enhancing contract law. Part II presents choice theory as an attempt to structure an adequate contract law as one of the means whereby the state enhances the (Millean) autonomy of its citizens. According to my interpretation of it, choice theory appeals to the perfectionist justification of the state in order to support the forceful imposition of contract types. Part III appeals to Bagchi's factual observation about the nature of actual contract law in order to advance the roads/contract-types analogy: like roads, contract types are public goods whose supply by the state is to be justified by the demand of individuals and the collective action problems involved in producing them. Part IV appeals to Rawlsian neutralist political liberalism in order to support the roads/contract-types analogy.

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7 *See* Dagan & Heller, *supra* note 2, at 151-55.

8 The authors claim that the "efficiency theory of contract has never been persuasive." Dagan & Heller, *supra* note 2, at 5. They further argue that "Kantian and libertarian ideas of personal independence . . . . all necessarily fail . . . . Similarly, ... [neutralist] political liberalism, [is] not adequate to justify contract law . . . ." *Id.* at 1. The approach sketched here is neutralist, and as far as I can see accommodates the most important insights of choice theory.

I. Autonomy as Self-Determination vs. Freedom as Independence

The perfectionist theory of the liberal state, most famously articulated in John Stuart Mill's writings and, more recently, in Joseph Raz's *The Morality of Freedom*, is committed to two propositions (among many others). First, the ultimate moral value is captured by humanism: the quality of life of humans is of ultimate intrinsic value, and therefore the constitutive task of states ought to be bettering the lives of their citizens.[9] The second proposition relates autonomy to wellbeing. The degree to which a person's life is good is a function of a variety of factors, for example, how joyful she is, how healthy she is, how wealthy she is, etc. Importantly, however, wellbeing is also a function of "the perfectionist factor," viz., how rich and satisfying her life is in terms of human perfections and excellences. The perfectionist factor entails that autonomy is essential to welfare: an individual leads a good life only if she has autonomously shaped it, only, that is, if it is her own life.[10]

In pursuing the wellbeing of their citizens, states ought to adopt an adequate conception of the good life that, among other things, relates wellbeing to autonomy. They ought to adopt an adequate theory about whether the goals that individuals might pursue are worth pursuing; about which ways of life are acceptable or commendable; and about which social frameworks best secure the capacity of individuals to maintain a commendable way of life and pursue worthy goals. One of its major tasks is, therefore, to secure and enhance the autonomy of its citizens.

As noted above, autonomy in the Millean tradition is understood as individual self-authorship/determination: we are autonomous if we are able to write and rewrite our life story. Liberal states ought to invest in civic society, civic services, good education, welfare, industry, cultural ventures, national projects, etc., for autonomy-related reasons, viz., their citizens will be able to choose their conception of the good, their careers and long-term projects, from a variety of meaningful, worthy options. The relation between autonomy-related considerations and other considerations to which the liberal state responds in pursuing the wellbeing of its citizens is structural: the ideal that states should advance requires them to form true value judgements about

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9 In Raz's words, "the humanistic principle . . . . claims that the explanation and justification of the goodness or badness of anything derives ultimately from its contribution, actual or possible, to human life and its quality." Raz, *supra* note 1, at 194.

10 In Raz's words, "the ideal of autonomy" is the ideal of "a life freely chosen." *Id.* at 371.

the worthiness of the options they offer to their citizens. As importantly, the liberal state enhances choice thanks to creating diverse, attractive, often incommensurable life-plans and incompatible conceptions of the good. In sum, for perfectionists, the autonomous life is the best one, and political institutions ought to be designed to promote autonomy by creating, from the top down, a variety of meaningful options.

I should like to highlight three features of this Millean picture of the liberal state by contrasting it with one of its main competitors, Kantian minimalism. The first contrast regards the very concept of freedom/autonomy. For Milleans, "if there were only one person in the world, it would make sense to ask whether and to what extent that person was autonomous."[11] We can ask whether this lonely person could have chosen an alternate possible worthy life-plan or whether the life that she had led was worthy and meaningful. In contrast, Kantian minimalism understands human freedom as independence from others. In this tradition, freedom is essentially relational, rather than a feature of the individual person considered in isolation: "Kantian independence is . . . . of relations between persons."[12] You use coercive force against another person, if you compromise her independence from you. That is, you subject her to your choices, and thus subject her to choices that are not hers. The innate right to freedom implies a right against being subject to the choices of private people as well as a right not to be subject to what Kant calls "private goals" that a state (viz., the officials that control its organs) might set for itself.

These two competing conceptions of freedom yield different understandings of the legitimate use of coercive force by states. According to Mill, the norms that govern use of force appeal, first and foremost, to facts about harm.[13] That is, the state is allowed to compromise (what Kantians take to be) the freedom of people by using (what Kantians take to be) coercive force, depending on how harmful and beneficial the coercion is. In effect, it might permissibly compromise "Kantian freedom" on a regular basis, especially if doing so does not involve harming the "victim" of coercion. For example, it might force you to testify in courts regarding a criminal event that you witnessed;

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11 Arthur Ripstein, Force and Freedom 15 (2009).

12 *Id.*

13 John Stuart Mill claims that "[t]he only purpose for which power can be rightly exercised over any member of a civilized community against his will, is to prevent harm to others." John Stuart Mill, On Liberty 9 (Elizabeth Rapaport ed., Hackett Publishing 1978) (1859). Kantians prefer Mill's other formulation: "In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his body and mind, the individual is sovereign." *Id.* at 9. *See* Arthur Ripstein, *Beyond the Harm Principle*, 34 Phil. & Pub. Aff. 215, 216 (2006).

it might force you to rescue another person in case doing so would cost you nothing. In this spirit, Raz argues that perfectionist "ideals may indeed be pursued by political means, they may not be pursued by the use of coercion except when its use is called for to prevent harm."[14]

Accordingly, the state might promote your autonomy even if you do not value it. In doing so, it permissibly subjects you to the choice of those who believe that the best life must be autonomous. *A fortiori*, the state might use its control over the education system in order to force you to support the autonomy of your child, even if you do not value it. The state might undermine the communal integrity of a religious group that rejects the value of individual self-determination, by denying license to illiberal schools.[15] Indeed, it might use soft force or even violence in eliminating the sanctions that members in an illiberal community impose on the exit of other members. Finally, it might coercively tax you in advancing worthy cultural ventures, even if you find these ventures worthless.

Some Kantians complain that just like the consequentialist theory, perfectionism should allow the perfectionist state to violently use one person in order to promote the general good.[16] Most perfectionists deny that perfectionism is vulnerable to this accusation. They insist that the perfectionist state is not allowed to violently harm one person — to torture him or imprison him — in order to allow others to live more autonomous, satisfying or rich lives. This is because a society in which people are used in this way is an unaccommodating social framework that is unlikely to support human flourishing. Put in terms coined in Raz's definition of rights, each individual's interest in equal respect and concern is a weighty reason to subject the state to the duty to treat her in this manner. The reason to hold the state under this duty is grounded not only in the interest of each right holder, but also in the interests of all members of the society in question to live in a political community that advances autonomy and human flourishing. [17]

Contrast this Millean view of the state's legitimate use of coercive force to the Kantian approach to state agency and state coercion. According to the Kantian view, any state action is, in a sense, coercive. Potentially, in

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14 *See* Raz, *supra* note 1, at 420.

15 Or as Raz put it, if effective, coercion might be used to break up illiberal communities which bring up their children in their own ways. This would be an "inevitable by-product of the destruction of their separate schools." *Id.* at 423.

16 For a general case against consequentialism, see, for example, Warren Quinn, *Actions, Intentions, and Consequences: The Doctrine of Double Effect*, 18 Phil. & Pub. Aff. 334 (1989).

17 Raz, *supra* note 1, at 177. *Cf. id.* at 207-10 (discussing collective rights).

purposefully acting with the resources it collected by taxation, the state forces private individuals — it uses things that belong to them — to pursue an end that they did not set for themselves. Possibly, the state's action does not significantly harm anyone and does not involve violence, but it is nevertheless "coercive" in this Kantian sense. Coercion is prima facie objectionable in virtue of constituting a hindrance to a person's right to freedom. It might nevertheless be legitimate if it takes the form of hindering a hindrance to freedom.[18] It might be legitimate in another context, though: if its goal is to enable people to legitimately realize their freedom (by legislating a private property regime, maintaining the market, etc.).

Thus, according to Kantian minimalism, the state might permissibly stop you from interfering with another person (viz., damaging her person or her property, or using her or her property). Additionally, the state might permissibly contain your freedom in order to secure the freedom of others. It might force you to support institutions that enforce a legitimate legal system or rescue individuals from poverty. State force is legitimate only if it fits "the fundamental rationale for the exercise of the police power," namely: "to create a regime of equal private freedom."[19] Thus, according to Kantian minimalism, the state's sole mission ought to be to enable citizens "to each enjoy their private rights in a way that is consistent with the ability of others to do the same, and to participate in the operation and oversight of public institutions."[20] In this view, any other goal the state might set for itself wouldn't be in accordance with the rights and powers that a state has. Most significantly, the state has no moral power to aim to make people happy or to promote autonomy as self-determination.

The third contrast is with regard to the moral importance of democracy and, in particular, the value of political participation and democratic decision making. The Millean conception of statehood condemns tyranny, oppression, and most instances of state violence. It considers election and democratic decision-making to be a means for preventing these evils. Yet it attaches no deeper, contractarian significance to democratic procedures. Citizens in a well-functioning democracy do not actually consent to be governed by a particular group of people, nor do they consent to the procedures whereby the people who rule over them were elected. Most individuals in a democratic state did not actually empower the government to use/employ them or their property in pursuing political ends.[21] For Milleans, the social contract-based

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18 *See* Ripstein, *supra* note 11, at 14.

19 *Id.* at 238.

20 *Id.* at 196.

21 *See* Mill, *supra* note 13, at 94.

justification is therefore an unhelpful myth. The only way to justify state actions is by justifying their aims and the unintended side-effects of their actions. Generally, liberal states are justified if they are successful in bettering the lives of their citizens by securing their autonomy; instrumental measures aside, no further contractarian rights-based legitimization is needed.

Contrast this view to the Kantian understanding of a state's legitimate use of force.[22] The government might compel private people to cooperate with others in pursuing ends that they did not choose for themselves. Ideally, however, the state permissibly interferes with private freedom only if the end that the state pursues is the end that the *general will* sets for itself: "the people give laws to themselves through their chosen representatives, whom they have elected to act on their behalf."[23] Thus, a political action is fully legitimate if the state that commits it is fully republican, such that officials decide authoritatively by deciding for everyone.

The next Part sketches Dagan and Heller's choice theory. It will emphasize the definitive role of autonomy as self-determination in this theory, and contrast it to two Kantian theories of contract.

II. Choice Theory: A Sketch

Dagan and Heller complain that the perfectionist approach to the state "has gone missing in recent generations of work on contract law."[24] Their choice theory of contracts remedies this deficit. As I read it, choice theory presents contract law as one of the means whereby the liberal state ought to enhance individual autonomy. I will further suggest that, under choice theory, contract law might use force — i.e., compromise freedom as independence — insofar as this is another state action that can be justified by its worthy telos and uncostly side effects.

The core idea is this: in designing contract law, states should aim to enable people to advance their worthy projects by collaborating with others. Moreover, it should exercise its legislative power to make shared projects more available to its citizens. Contract law should address "not just material impediments to bargaining, but also social ones rooted in the limits of individual imagination."[25] Dagan and Heller infer from this point that the supply of contract types should not be dictated solely by demand: "the state should be favorably predisposed to

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22 *See* Ripstein, *supra* note 11, at 184-98.

23 *Id.* at 203.

24 *See* Dagan & Heller, *supra* note 2, at 7.

25 *Id.* at 89.

. . . . innovations even absent significant apparent demand insofar as [they] have the potential to add valuable options for human flourishing that significantly broaden people's choices."[26] Indeed, one of the means by which contract law should enhance autonomy is by supporting a multiplicity of contract types: "by stabilizing their respective types, by making them more available and attractive to contracting parties, and by making available distinct choices about the structure of important relationships, [contract types defined by] doctrinal rules can enhance contractual freedom."[27]

Plurality and diversity are important especially because they are essential to choice. People should be able to choose from more than one worthy marital arrangement, from a variety of employment contracts, as well as from a variety of contract types that govern commercial and consumer relations. More specifically, contract law should provide individuals with a variety of options in each of the concretely different spheres of social and economic life: "the contract types within a single sphere offer individuals choices among divergent values."[28]

Contracts impose burdensome, sometimes regrettable obligations and trigger state-enforced liability. As Dagan and Heller concede, contracts "require enforcement; enforcement entails coercion; and coercion seems at odds with freedom."[29] How does choice theory address the problem of force and coercion? Following the Millean conception of legitimate state force, choice theorists insist that adequately using force in enforcing contract supports individual autonomy rather than constrains it. This is because the logic of justifying the use of state force is teleological. The state is entitled to use force in order to maximize the effectiveness of contracts in promoting self-determination.

In this context, the classical objection to the consequentialist explanation of the use of force reads as follows: Why does contract law impose costs on the parties to the contract in particular? Why doesn't it use force against others if this can promote the ideal of individual self-determination? The response that choice theory offers is purely empirical, as it should be: "Contract can advance people's autonomy if, but only if, it serves as a device in which specific people can recruit other specific people who can help them in pursuing their goals, and are furthermore empowered with the authority to invoke enforcement proceedings in the case of breach."[30] True, in some imaginable circumstances, using force against individuals who are not parties to the contract might

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26 *Id.* at 158.
27 *Id.* at 4.
28 *Id.* at 7.
29 *Id.* at 1.
30 *Id.* at 65.

promote the goal of the system as choice theorists understand it. If the law would require my son to undertake my contractual duties in case I did not honor them, I would be less likely to violate these duties. In response to such hypotheticals, teleologists plausibly argue that contingency is not a vice. In reality, the policy of forcing uninvolved third parties to fulfill the contractual duties that parties to the contract undertook is counterproductive. Choice theorists conjecture that, in the real world, threats to use force against the parties who undertook a contractual duty is the only policy that will promote autonomy as self-determination.

Choice theory allows the state to exercise coercive force in another context: a state designing contract law should be searching for contract types that will allow its citizens to pursue shared, worthy goals. It should, additionally, limit unworthy contractual relations like consensual polygamy or consensual slavery. It should struggle against fight clubs or practices like Russian Roulette by prohibiting and undermining the contracts that underlie them.

Contrast choice theory to two Kantian approaches to contract law. The first is Charles Fried's. Simplistically put, on Fried's account, the parties to the contract undertake duties and acquire rights since a contract is an objectified promise. By signing a contract, the parties to the contract make promises to each other, and they are therefore duty bound to honor it: promises are "that principle by which persons may impose on themselves obligations where none existed before."[31] These duties are enforceable by coercive force since contractual duties are self-assumed. Dagan and Heller argue that Fried's approach fails. Following a prevalent line of critique, they argue that the promise principle has "little or no relevance" to "those [vast] part[s] of contract law that govern the proper remedies for breach, the conditions under which the promisor is excused from her duty to perform, etc. . . . "[32]

A different Kantian approach to contract law — the transfer theory — attempts to address the difficulty that threatens Fried's account. Contracts are *special* promises, which involve "a transfer from promisor to promisee of a legally protected interest or entitlement in performance which is either respected by performance or injured by breach."[33] Through the transfer, the parties establish "correlative rights and duties between the two transacting

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31 Charles Fried, Contract as Promise: A Theory of Contractual Obligation (2015).

32 *See* Dagan & Heller, *supra* note 2, at 32 (quoting Richard Craswell, *Contract Law, Default Rules, and the Philosophy of Promising*, 88 Mich. L. Rev, 489, 518 (1989)).

33 Peter Benson, *The Unity and Complexity of Contract Law: From General Principles to Transaction-Types*, 20 Theoretical Inquiries L. 537 (2019).

parties with respect to performance."[34] The parties to the contract conferred on each other "something which is lost by breach and compensated through receiving either the specific thing or the value of what has been promised."[35] A violation of the contract is thus an instance of misfeasance — viz., a wrong that private law should sanction by applying rules of corrective justice. Breach consists in an action or an inaction that compromises the private freedom — the independence — of the promisee; it is as if the promisor used something that belongs to the promisee, or damaged it.

Milleans justifiably challenge all aspects of these Kantian approaches to enforcement. Consider first Fried's attempt to justify coercive enforcement — Fried insists that the duty that the state coercively enforces is the duty that the promisor undertook by making the promise. The duties violently enforced by the state are self-assumed, and therefore the enforcement does not compromise private freedom. As noted in the previous Part, Milleans tend to see the social contract tradition as a myth. Individuals living in actual democracies do not govern themselves; participation in the democratic process does not really secure self-governance. For similar reasons, Milleans might reasonably argue that contractual duties are not really self-assumed, or that self-assumption is a matter of degree. In many cases, the parties are not fully aware of the terms of the contract, or of the consequences of entering the contract. When they enter long-term contracts, their preferences and interests might change in ways that they cannot predict. In many cases they resent their former selves for their undertakings, or deeply regret them. In such cases, forcing promisors to respect the contracts that they entered violates their independence from each other and/or their independence from their former selves.

For similar reasons, choice theorists should be skeptical of the guiding idea that underlies the transfer theory. To see why, note that even if we suppose that the normative framework that underlies tort law ought to be that of corrective justice, we might plausibly think that contract law is governed by a different normative framework. Suppose that tort law secures compensation for a damage-based or a use-based wrong by assessing the loss that the defendant suffered, or the value that the tortfeasor gained by using things that do not belong to her. Suppose, that is, that tort law should attend only to past transactions between the plaintiff and the defendant. Even if these suppositions are true, there seems to be a principled difference between contract law and tort law. As Fuller and Perdue had argued, "the plaintiff never 'had' anything at contract formation and prior to performance which could be 'injured' by

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34 *Id.*

35 *Id.*

defendant's breach."[36] The subject matter of contract law is forward-looking expectations, and as such, in calculating the loss caused by the breach of the contract, contract law cannot appeal to the just status quo ante as its reference point.[37] This is especially because the intentions and expectations of the parties who entered the contract may very well be inconsistent with each other. In some cases, there would be important mismatches between the entitlement or the interest that the promisor intended to transfer to the promisee, and the entitlement that the promisee intended to receive. Hence, even if corrective justice — a normative system that resolves disputes between private people by attending to the status quo ante as its reference point — is the essence of tort law, we should still question the availability of this normative framework to contract law.

I infer that choice theorists are justified in arguing that the coercive aspect of contract law needs an external justifying goal. The next Part will critically examine the justification offered by choice theory.

III. Challenging Choice Theory: The Roads/Contract Types Analogy

Following Dagan and Heller, I will assume that the transfer theory fails. In many cases, the breach of a contract cannot be analogized to the way Kantians like Ripstein and Peter Benson conceive damage-based or use-based wrongs in tort law.[38] Following choice theorists, I will assume that one organizing principle of contract law is teleological, and that to understand the logic of the justification of state force in this normative framework, a theory of contract law has to identify a social goal that this legal system ought to promote. This Part nevertheless questions Dagan and Heller's claim that the goal of contract law is individual autonomy, as Mill and Raz understand this ideal. Additionally, I will challenge their claim that violent interventions of the state in enforcing contracts can be justified and criticized by appealing to the ideal of self-determination.

As noted in the Introduction, Aditi Bagchi observes that most contracts are constrained by the prosaic goals that the parties to the contract already have or should have independently of the contract: subsistence, housing, income and wealth, in one case, and loyalty, mutual aid and the fulfillment of other

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36 *Id.*

37 L. L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages*, 46 Yale L.J. 52 (1936).

38 *See* Ripstein, *supra* note 11, at 107-45.

associative duties, in another. As she puts it, "the upshot is that our choice to contract is not the full-blown moment of moral agency that we associate with the simple exercise of normative power. Voluntariness in contract is less morally significant than we might ordinarily take it to be."[39] The goal of actual contracts between employer and employee, for example, is to enable both parties to pursue an end that they both set for themselves in advance (if they are rational and moral), namely, to fairly collaborate in securing income and enhancing profit. Hence, contract law that governs employment should assume that agents in the free market are profit seekers, and that contracts by which the market is run should help them to profit from their skills and work in a fair way. Legal officials elaborate contract law in this field with one goal in mind, viz., making sure that the legitimate goals that the parties to the contract set for themselves (stable income and wealth) are efficiently and fairly promoted.

This observation about the purpose of most contracts that govern employment is related to another important observation about contracts in other fields. In many cases, people enter contracts in order to be able to execute universal moral duties that apply to them independently of the contract. Think about the variety of contracts that empower individuals to form familial relations. Arguably, morality implies that married couples should support each other, be loyal to each other, and contribute to the welfare of their children in a fair way. One of the overarching tasks of the actual contract types that underlie the legal institution of family is to enable partners to set these ends for themselves. In order to fulfill their moral duty to their children, for example, individuals should enter a contract that fairly distributes the burdens involved in educating them and, more generally, in taking care of their needs and welfare. States ought to provide contract types through which pursuing these (morally required) ends would be easier and more efficient.

Why do these observations threaten choice theory? Why does Bagchi infer from her observation that it is not clear how expanding the menu of contract types in the sphere of employment "importantly advances employees' interests, from the standpoint of autonomy"?[40] To answer this question, we should look again at the ideal that informs contract law, according to choice theory. For Dagan and Heller, the overarching goal of contract law as autonomy-enhancing is manifested through its role in forming contract types. The mandatory rules and the sticky defaults that constitute contract law — the contract types that

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39 *See* Bagchi, *supra* note 6, at 2. Note that on my reading, Bagchi's note on voluntariness does *not* threaten choice theory, which insists that voluntariness is overrated.

40 *Id.* at 4.

are imposed from the top down by the state — are important for at least two related reasons. First, the different contract types that the state should devise are designed to make worthy but unimaginable life-plans available to citizens. Second, the plurality of contract types enhances the choice of citizens: it enables them to freely choose one life story out of many. Dagan and Heller infer that the supply of contract types ought not to be dictated solely by demand.

Contrast the way choice theory understands the duty of states to provide contract types to the common understanding of the duty of states to provide roads. The latter duty is understood in light of the assumption that roads are matters of convenience and coordination. Roads are goods that most individuals need or want, yet these individuals won't be able to produce them without a state that compels them to contribute their fair share to the production of roads. In other words, roads are public goods: they would be undersupplied in an unregulated market due to collective action problems, and/or would be supplied in an unfair way due to social inequalities.[41] In virtue of its power to exercise coercive force and the larger perspective it has, the state can efficiently collect the resources needed for an efficient supply of roads. It can weigh competing interests and balance them against each other on the basis of their importance and thus fairly distribute these roads.

For my purpose here, the crucial point about roads is that, in producing them, states should be guided by people's preexisting needs and preferences, and therefore their supply must be dictated by demand.[42] People need roads in order to reach various destinations. The road system should be designed so as to enable individuals to arrive at their destinations in a reasonable amount of time. This "adequacy condition" is constrained by the "compossibility condition:" the state should design a system that ensures that everyone has an *equal* chance of arriving easily at their destination.

Arguably, as Mill and Raz define it, autonomy should play no justificatory role in the context of road supply: the system does not have to enhance choice but rather to allow people to pursue the goals that they have already set for themselves. Even if, as part of its obligation to enhance choice, the state should sometimes respond favorably to emerging innovations that have no significant demand, this obligation is mostly irrelevant when the adequate supply of roads

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41 See choice theorists' discussion of collective action problems in Dagan & Heller, *supra* note 2, at 136, 182.

42 Jeremy Waldron, *Toleration and Reasonableness*, *in* The Culture of Toleration in Diverse Societies: Reasonable Tolerance 13 (Catriona McKinnon & Dario Castiglione eds., 2003).

is at stake. After all, there is no point in producing roads merely in order to allow drivers to choose between two possible ways to get to work.

True, more often than not, roads shape new preferences rather than merely provide the means for satisfying preexisting preferences. This is simply because the construction of roads changes the scope of what is possible. Moreover, since roads are relatively fixed and stable and their use is free or cheap, people are incentivized to use them; in many cases, the desire to use them is induced by their availability. More generally, the static view of supply/demand of public goods is obviously incomplete; we need a dynamic descriptive analysis of the role that supply has in shaping demand. However, my point about road supply is normative: the *intended* goal of providing roads should mainly be to secure the means people have to pursue their existing conception of the good. The construction of roads entails some preference-shaping effect, but that should be treated as a side-effect; a state does not have to aim to promote any conception of the good or to act on the basis of perfectionist reasons in order to justify its investment in road supply.[43]

Now, choice theorists would argue that there are exceptions to this general rule about roads. Despite my argument to the contrary, the state should invest in a road that will allow access to places that most people had no prior desire to reach. There may be two reasons for this investment, and they are both related to the ideal of autonomy as self-determination. Officials justifiably take a certain site to be interesting or important, hoping that due to the very existence of a road that leads to this site, people will form a desire to visit it. Additionally, the state might justifiably value the ability to choose that is generated by the option to visit the site, even if most won't take advantage of it. Choice theory should nevertheless concede that such cases are rare.

Unlike actual contract law as Bagchi takes it to be, choice theory understands the duty to provide (and impose) contract types in light of the rare cases described in the previous paragraph. Choice theorists insist that generating demand from the top down as well as demand-insensitive diversity are essential to contract law rather than exotic exceptions to the general policy that should inform it. If Bagchi is correct, actual contract types resemble roads. The goods provided by contract law are public goods, the demand for which exists, and is known to exist, independently of contract law or the proactive state more generally. Of course, decision makers should take into account the preference-shaping effect of the provision of contract types; however, the intended goal of this legal practice should be to enable citizens to pursue morally acceptable goals that they have already set for themselves.

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43 Moreover, Kantian minimalism has all the normative resources to justify the provision of "roads to freedom." *See* Ripstein, *supra* note 11, at 232-40.

Thus, choice theory fails if contract law in general and, the top-down contract types that law creates in particular are to be justified by the legitimate goals that people already have and cannot efficiently pursue by themselves due to collective action problems. If most contracts are constrained by these goals, contract law is justified neither by the importance of diversity and plurality, nor by the importance of worthy options whose value private people won't be able to grasp due to their built-in limitations as private people. If typically, entering contracts is required by instrumental rationality and/or by morality — if most contracts are constrained by goals that private persons have or should have (whatever their conception of the good might be) — then even if the liberal state ought to promote the ideal of autonomy as self-determination, contract law is not one of the means by which it should do so.

Choice theory faces another difficulty. The value on which it bases contract law — the value of individual self-determination — is present in many contexts. Respect for self-determination is a very general moral duty that applies in circumstances which the state does not and (probably) should not regulate by force. Suppose that I promised a friend to go with her to a retrospective of Ingmar Bergman filmography, and that she promised to read my philosophy essay in return. I got bored after watching the second movie and unilaterally left our shared venture. Suppose we were not parties to a formal contract. Suppose that (Kantians would observe that) I did not transfer a legally protected entitlement to her. Why shouldn't the state enforce the promissory duty that I undertook? If forcing me to participate in our shared venture does promote autonomy, then choice theory seems to imply that the use of force is justified. Actually, however, choice theorists would probably admit that even in these imaginable circumstances, the use of state force would be wrong.

This difficulty can be put in another way. Self-determination might be enhanced in radically different ways. Opera houses, public libraries, museums, religious institutions, public radio stations, social networks that enable people to communicate in different ways, might all advance this ideal. In particular, our autonomy is enhanced through informal relations, friendships and local communities. In most cases, an autonomy-enhancing state would support these practices and institutions in various ways, but usually not by using coercive force. Contracts, on the other hand, are enforced by force due to their formality. Choice theorists should therefore address the following question: why is coercive force to be exercised in enforcing contracts rather than promises and other autonomy-enhancing practices?

Choice theorists do have a way to explain some limitations on autonomy-enhancing use of coercive force. As Dagan recently put it in a related context (the context of private property), "an autonomy-based theory of property [can]

adequately defend independence [despite Ripstein's claim to the contrary]."[44] After all, "certain practices (such as love or friendship) are rightfully shielded from legal treatment, because legal enforcement might destroy their inherent moral value . . . ." Moreover, "The burden of the duty of reciprocal respect of self-determination must [not] undermine the autonomy of the involved parties . . . ." Finally, in order to limit officials' ability to exercise brute force, law's rules need to be relatively clear, "thus minimizing resort to individualized knowledge and radically ad hoc judgments."[45]

Yet the Kantian explanation of the value of independence is, I believe, superior to the choice theory explanation. Choice theorists render independence a derivative value, and offer a context-dependent justification of the limitations to which the state is subject in exercising autonomy-enhancing use of force: for example, sanctioning unfriendly behavior is objectionable in virtue of being counterproductive. Under Kantian minimalism, the duty of the state to maintain the independence of individuals is principled; the very idea of sanctioning, say, unfriendly behavior, is ruled out as an instance of state domination.

IV. A Neutralist, Anti-Perfectionist Contract Law

I will end this Article by outlining a partly teleological conception of contract law which, in light of the difficulties raised in the previous Part, seems an attractive alternative to choice theory. The proposed conception is, in a sense, semi-Kantian. Contract law ought to enable individuals to fulfill their freedom-as-independence-based moral duties, as well as to enforce these duties. That is, contract law institutes and enforces Kantian rights. Yet contract law, at its best, has another desirable feature to which Kantians are blind: it is part of a legal system that enables reasonable citizens to fairly acquire the means for pursuing what they take to be a good life, whatever their conception of the good life might be. Put differently, contract law should enable individuals to collaborate with others in executing the preexisting moral duties that follow from their Kantian freedom *and* in securing their fair share of primary goods: income, opportunities and wealth. Rather than autonomy and other human perfections, the underlying ideals that inform contract law should be negative "thin" liberty (as Kantians understand it) as well as instrumental rationality.

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44 *See* Arthur Ripstein, *The Contracting Theory of Choices*, L. & Phil. (forthcoming 2019).

45 Hanoch Dagan, A Liberal Theory of Property 42-43 (forthcoming 2019).

The alternative that I offer is inspired by the neutralist anti-perfectionism that underlies Rawlsian political liberalism. I should therefore say something about the reasons for which Rawlsian political liberalism rejects Millean perfectionism. Typically, a state that officially supports a conception of the good (what Rawls calls "a comprehensive doctrine") does so for perfectionist reasons. Some of its policies are justified by its judgement as to what makes the beneficiaries' life good, valuable or worthy. But, Rawls insists, "the principles of justice do not permit subsidizing [e.g.] universities and institutes . . . . on the grounds that these institutions are intrinsically valuable, ... at some significant expense to others who do not receive compensating benefit."[46] Perfectionist reasons are ruled out as a justification of the state's actions because, according to political liberalism, reasonable people in just societies are entitled to reject any single conception of the good. As Jonathan Quong observes, two important propositions follow from this version of Rawlsian anti-perfectionism. First, the justification of the state as a power-wielding mechanism should not be based on a particular ideal of what constitutes a valuable or worthwhile human life. Second, it is impermissible for a liberal state to promote or discourage some activities, ideals, or ways of life on grounds that are related to their value.[47] Were it to do so, it would fail to act on behalf of its citizens, and thus fail to treat them as free.[48]

Three specific political liberalism-based objections to choice theory (in general) and to the practice of imposing contract types for perfectionist reasons (in particular) suggest themselves. According to choice theory, a state might support certain contractual relations rather than others based on their value. Particularly, choice theory allows the state to coercively collect taxes from all citizens and then use these taxes to satisfy the preferences of only some of them: those citizens who value the contractual interactions that the state promotes through the imposition of the mandatory rules and sticky defaults that their favorite contract type is composed of. Political liberals complain that this practice violates the harm principle,[49] according to which the government might exercise coercion — in the case at hand, collect taxes — only in order to defend the liberties of its citizens. The harm principle implies that the state "must not constrain liberty on the ground that one citizen's conception of the good life of one group is nobler or superior to another's."[50]

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46 John Rawls, A Theory of Justice 291-92 (1971).

47 Jonathan Quong, Liberalism without Perfection 15, 36-44 (2011).

48 *See Id.* at 2 ("States, after all, purport to act in our name, and they are . . . . nothing more than a large group of individuals acting in concert.").

49 *See Id.* at 53-60.

50 Ronald Dworkin, Taking Rights Seriously 273 (1977).

Now, it is possible to impose contract types for perfectionist reasons in a non-coercive way. Suppose that the government encourages all citizens to pursue certain horizontal contractual arrangements by means of subsidizing them; in doing so, it "rewards their pursuit, and advertises their availability [and thus] encourages those activities without using coercion."[51] Yet a related political liberalism-based worry suggests itself: promoting certain contractual arrangements by subsidies is often "manipulative." The government uses taxes, achieved via threats (pay, or I will sanction you), and then offers citizens an easier access to such arrangements. In other words, the state induces citizens to make a particular choice, by putting them in a choice situation that they should rationally disprefer relative to a situation where they can use the resources (that the state coercively collected from them) as they see fit. Manipulation "perverts the way that a person reaches decisions, forms preferences, or adopts goals."[52]

A final objection that political liberalism would level against a top-down imposition of contract types aims to show that such a practice is typically paternalistic. Consider a society where the citizens enjoy the standard package of rights, liberties, and a fair share of opportunities, income, and wealth. Why do these citizens need the state's imposition of contract types in interacting with each other? Quong convincingly argues that mostly, if the government appeals to perfectionist reasons in justifying this practice, it forms a negative judgment about their ability to effectively advance a worthy conception of the good by themselves.[53] The negative judgement that underlies the imposition of contract types is illegitimate in virtue of being paternalistic.

I nevertheless suggest that political liberalism does sometimes allow the imposition of contract types even where this practice involves coercion and manipulation. As I will understand Rawlsian political liberalism here, the neutral state is subject to two basic duties.[54] First, it is under a duty to protect private freedom, as Kantians understand it. While this duty might be validated and understood in various ways, I will assume that Kantian minimalism offers a plausible theory of private freedom as well as a plausible theory of the state's duty to provide and maintain it. I assume, in other words, that the duty to which states are subject – to protect private freedom – underlies Rawls's first principle of justice: "each person has the same indefeasible claim to a

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51 *See* Raz, *supra* note 1, at 417; *See* Quong, *supra* note 47, at 52.

52 *See* Raz, *supra* note 1, at 378; *See* Quong, *supra* note 47, at 61.

53 *See* Quong, *supra* note 47, at 84-96.

54 I do not defend this understanding here, and do not attribute it to Rawls. I do believe that it is in a clear sense Rawlsian.

fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all."[55]

This principle justifies imposing one set of contract types: the state should promote contract types that enable people to fulfill the duties that follow from their own and others' private freedom. The paradigmatic example is the contract types that are part of family law: family law in general ought to help the parties to fulfill the duties that they undertook by, say, marrying each other; those relations involve the waiver of some of the rights that constitute the liberties that private law — as Kantians understand it — protects. Similarly, the state should rule out contract types that are inconsistent with private freedom. A slave contract is a simple example: the problem with such a contract is that "slavery is the annihilation of a legal personality: the slave becomes an object, fully subject to the master's choice."[56] Thus, according to the neutralist political philosophy outlined here, rather than worthy life-plans and choice, it is freedom as independence that justifies one subset of contract types that the state might justifiably impose.

However, contrary to Kantian minimalism, political liberalism subjects states to a further duty that is unrelated to private freedom, namely: the duty to secure each citizen an equal opportunity to pursue her conception of the good. This duty involves a more specific obligation to secure one's fair share of resources, or primary goods: the things one needs in order to form and pursue *a* conception of the good life, whatever this conception of the good might be. For example, securing a stable income is justified independently of any concrete conception of a good life. After all, a stable income is required by instrumental rationality, as part of the effort to satisfy a desire that arguably, all reasonable citizens share, to have the means necessary to pursue a life-plan. Indeed, the state is required to establish institutions that support social growth and material prosperity, in fulfilling its duty to promote fair equality of opportunity.[57] I suggest understanding contract law as part of a regime whereby the state fulfills this second duty: contract law should enable people to collaborate in producing resources, by, for example, overcoming collective action problems.

In sum, the alternative advanced here draws on the roads/contract-types analogy to put forth the argument that rather than worthy life-plans and choice, it is freedom as independence and instrumental rationality that justify devising a contract law that shapes and imposes contract types.

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55 John Rawls, Justice as Fairness: A Restatement 42 (2001).

56 *See* Ripstein, *supra* note 11, at 135.

57 *See* Rawls, *supra* note 55, at 55. *See also* Ronald Dworkin, *What is Equality? Part 2: Equality of Resources*, 10 Phil. & Pub. Aff. 283, 293 (1981).

So much for contract types and their role in a neutralist (anti-perfectionist) contract law. I will argue now that the dualistic political philosophy outlined here — a philosophy that emphasizes both private freedom and fair equality of opportunity — offers a superior understanding of coercion in the realm of contracts. Indeed, political liberalism offers intuitively attractive guiding rules as to the use of force in enforcing contractual duties.

The Rawlsian first principle of justice (which, assumingly, is to be understood through Kantian independence) requires a legal system that confers a cluster of rights over one's body and property and a cluster of powers to allow others to use one's body and property. Coercion is justified if, by exercising it, the state secures the fulfillment of the duties that follow from our independence from each other. I therefore suggest that the transfer theory is one element in a neutralist justification of coercive force in the realm of contracts: the law should coercively enforce contracts that involve a sufficiently determined transfer of legally protected interests. Now, many informal interactions between two persons — saliently, the interactions that underlie friendships between two individuals — involve undertaking moral duties. Unfriendly behavior and, obviously, the betrayal of a friend are both unvirtuous. They both involve a violation of a duty of virtue. Yet friendship does not involve a transfer of a legally protected interest and therefore, awful as it may be, unfriendly behavior does not violate the private freedom of the victim. Hence, private law should not sanction it. The same is true of most informal promises; they involve no transfer of a legally protected interest; they involve no waiver of the rights that constitute private freedom and as such involve no waiver of the rights that private law ought to protect.

Nonetheless, Fuller and Perdue are right that typically, a remedy for a breach of a *formal* contract cannot be understood as the restoration of a violation of private freedom. While their universal claim that no contract involves transfer seems too strong, a weakened claim, that the plaintiff never "had" anything *determined* at the stage of contract formation, is very plausible. Therefore, because in most formal contracts the object of transference is radically indeterminate, there is no determined legally protected object that was injured by defendant's breach.[58] In light of this observation, contract law needs other guiding rules, above and beyond those that follow from the duty to respect private freedom, as the basis of contractual remedies. I suggest that the complex duty of the state to secure fair equality of opportunity provides the normative material necessary for guiding deliberations about whether and how a breach of contract ought to be sanctioned. In a nutshell, a system of remedial rights that the state coercively imposes is justified if it fully respects

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58 *See* Fuller & Perdue, *supra* note 37, at 83.

the private freedom of the parties *and* promotes the ideal of fair equality of opportunity.

This is, of course, merely an outline of a teleological theory of remedies. My aim in presenting it here is modest: to demonstrate that choice theory is not the only middle ground between the economic/utilitarian theories of contract law and the Kantian approach to this legal subsystem. Rawlsian neutralism inspires a different non-utilitarian alternative to Kantian minimalism. A fully elaborated defense of choice theory's autonomy-informed approach to contract law should address this alternative.

Conclusion

Like the minimal and the neutral state, the perfectionist state protects freedom as independence and supports the provision of primary goods. States are perfectionists in virtue of pursuing another, more specific goal, viz., the autonomy of their citizens. According to choice theory, contract law is one of the means by which the liberal state ought to advance autonomy as self-determination. This Article raised a theoretical possibility which, as far as I can see, choice theorists did not consider. The contract types that states provide by its contract law should be one of the means by which the liberal state secures the ability of its citizens to follow their universal moral duties and one of the means by which it secures their being provided with primary goods. Even if states should pursue the autonomy of their citizens, the overarching task of the ideal contract law is unrelated to the perfectionist ideal of individual self-determination.