CAN CONTRACT EMANCIPATE? CONTRACT THEORY AND THE LAW OF WORK

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Contract and employment law have grown apart. Long ago, each side gave up on the other. In this Article, we reunite them to the betterment of both. In brief, we demonstrate the emancipatory potential of contract for the law of work. Today, the dominant contract theories assume a widget transaction between substantively equal parties. If this were an accurate description of what contract is, then contract law would be right to expel workers. Worker protections would indeed be better regulated by—and relegated to—employment and labor law. But contract law is not what contract theorists claim. Neither is contract law what the dominant employment theorists fear—a domain that necessarily misses the constitutive place of work in people's life-plans and overlooks the systemic vulnerability of workers to their employers.

Contract, we contend, is not work law's canonical "other." Rightly understood, contract is an autonomy-enhancing device, one founded on the fundamental liberal commitment of reciprocal respect for self-determination. From this "choice theory" perspective, the presumed opposition between employment and contract law dissolves. We show that many employment law doctrines are not external to contract, but are instead entailed in liberal contract itself.

Grounding worker protections in contract theory has two salutary effects. First, it offers workers more secure protection than that afforded by their reliance on momentary public-law compromises. Second, it reveals contract's emancipatory potential for all of us—not just as workers, but also as widget buyers. Contract can empower, and employment can show the way.

I. A Happy Divorce?

The promise of contract suggested by the title of this Article is likely to sound misguided, if not deluded, to many, perhaps most, readers. Nothing in the dominant theories of contract hints at contract's emancipatory potential, certainly not for workers. Utilitarian accounts perceive contract as a tool for allocating future risks in the service of people's preference satisfaction and society's aggregate welfare. Deontological contract theories, in turn, conceptualize it as a consensual transfer

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of entitlement from promisor to promisee, who thereafter becomes the legitimate owner of the object of this exchange. Both views are most comfortably at home with a contracting universe structured around the famous widget transaction, a commodity exchange between substantively equal parties.

With contract thus conceived, it is not surprising that employment and labor lawyers tend to keep their distance. If contract is, at its core, either a mechanism for reallocating risks or a way of transferring authority over a commodity, then the *idea* of an employment contract as such—that is, without an *exogenous* set of worker-protective rules that override contract's normative underpinnings—seems indefensible.[1] Both the *constitutive* role of work in people's life-plans and the *systemic vulnerability* of workers to their employers suggest that a liberal legal regime, properly so-called—that is, a regime first and foremost committed to people's equal right to self-determination—must reject the view of the employment relationship as a simple exchange of (future) services for (future) wages.

If contract law indeed comported with its conventional understandings, then liberal legal regimes would be right to marginalize the role of contract in work law. This may explain why some authors present the law of employment contracts as "highly idiosyncratic"; others reject altogether the association of work and contract by conceiving of employment as "a status of a new kind"; and yet a third response—representing a midway position—conceptualizes the law of work as a hybrid of contract and "employee rights and entitlements that are established by external law, that reflect public values and interests, and that typically cannot be varied or waived by contract."[2]

This (substantial) divorce of contract theory and the law of work seems quite conventional. It is not hotly debated.

With one exception. Libertarians find the statutory framework for the employment relationship wholly unjustified—including rules prescribing a floor of minimum terms and immutable rights on a range of topics, such as safety in the workplace, nondiscrimination, minimum wages, working hours, and labor organization. Accordingly, libertarians call for dismantling this New Deal framework and implementing in its stead the so-called *laissez faire* view of contract,[3] a view with echoes in dominant contract theory.[4]

But aside from this libertarian call (to which we return momentarily), most contract theorists embrace the status quo of mutual disconnection. For example,

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1 *Cf.* Hugh Collins, *Is the Contract of Employment Illiberal?*, *in* Philosophical Foundations of Labour Law 48 (Hugh Collins et al. eds., 2018).

2 *See respectively, e.g.*, Rachel Arnow-Richman, *The Role of Contract in the Modern Employment Relationship*, 10 Tex. Wesleyan L. Rev. 1, 4 (2003); Frances Raday, *Status and Contract in the Employment Relationship*, 23 Isr. L. Rev. 77, 78 (1989); Cynthia L. Estlund, *Between Rights and Contract: Arbitration Agreements and Non-Compete Covenants as A Hybrid Form of Employment Law*, 155 U. Pa. L. Rev. 379, 380 (2006).

3 This term is, of course, misleading; like any other economic system, *laissez faire* necessarily relies on a robust legal infrastructure. *See generally* Hanoch Dagan et al., *The Law of the Market*, 83 Law & Contemp. Probs. i (2020).

4 *See, e.g.*, Richard A. Epstein, *Common Law for Labor Relations: A Critique of the New Deal Labor Legislation*, 92 Yale L.J. 1357 (1983).

mainstream utilitarian theories view commercial contracts between firms as contract's "main subject," whereas "the sale of a person's labor [is] regulated by laws governing the employment relation."[5] Leading deontologists concur and add that, while the state may well be justified "in imposing mandatory terms on some contracting situations and empowering associations such as labor unions to bargain collectively," this regulatory apparatus has nothing to do with contract.[6]

Our mission in this Article is to upset this conventional wisdom of happy dissociation of contract theory and work law, which we find both to be wrong and unfortunate.

Readers may suspect that what follows is yet another reformulation of the libertarian view of work law. But it is not. Quite the contrary. We agree with the conventional wisdom that repudiates work law libertarianism and rejects the imposition of dominant contract theory on employment and labor law. Indeed, as we explain in Part II, not only employment as we know it, but also any acceptable idea of an employment contract ill-fits contract's dominant theories. But the conclusion that contract's *dominant* theories must not undergird employment in a liberal polity does not imply blanket rejection of the *idea* of contract from the law of work. Instead, as we show, the conclusion testifies to the failure of the dominant theories.

Put differently, the significance of the employment contract for the lives of so many people suggests that contract theory itself should be structured *also* around work, rather than *only* around widgets. This suggests that the reasons why contract's dominant theories are incompatible with employment can point us toward better contract theory. As already implied and will be clarified below, these reasons are all related to the way contract's dominant theories fail to take seriously workers' right to self-determination.

These observations lead to our main claim. Contract, we contend, should not be work law's canonical "other." Rather, charitably conceptualized, contract can empower; it can even emancipate. To some extent, this proposition goes back to Adam Smith's vision of contract's liberating potential, epitomized by the promise of "free labor."[7] But that vision depends on a conception of contract that can deliver on this promise, and here Smith's account—one that implicitly embraces, even celebrates, contract's dominant theories—goes astray. Hence, our effort in these pages is to reconstruct the empowering potential of contract, thus reinvigorating the promise of truly free labor, by imagining the road not taken: an understanding of contract with employment, and not only widgets, at its core.

Contract, we claim, can and should be conceptualized as an autonomy-enhancing device, one that is founded on the fundamental liberal commitment of reciprocal respect for self-determination (or self-authorship; we use these terms interchangeably). This understanding—the "choice theory" of contract, which we have developed

5 *See, e.g.*, Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 Yale L.J. 541, 544 (2003).

6 *See, e.g.*, Arthur Ripstein, *The Contracting Theory of Choices*, 40 Law & Phil. 185, 211 (2020).

7 *See* Adam Smith, Lectures on Jurisprudence 172-90 (R. L. Meek et al. eds., 1982) (1762-1763); Adam Smith, The Theory of Moral Sentiments 53-90 (2000) (1759).

elsewhere[8] and restate in relevant sections of Part III—is more normatively defensible and more loyal to the modern canon of contract than the dominant contract theories in either their deontological or utilitarian versions.[9]

A central task—and contribution—of this Article is to show that when contract is understood as an autonomy-based (and not libertarian) undertaking, then many (although admittedly not all) employment and labor law rules are indeed ingrained in contract's liberal DNA. Part IV demonstrates that these rules are not necessary impositions on contract's logic, nor are they politically contingent interventions—a lesson with some practical timely significance. In a liberal legal regime, properly so-called, contract is not a refuge from work law's floor of minimum terms and immutable rights. While this floor may also be supported by other reasons, it is first and foremost a necessary entailment of the ideal of liberal contract itself. Going further, our analysis also helps justify some "off-the-wall" entailments of employment, which may imply further reforms, perhaps leading to a truly liberal contract of employment.

Does this imply that contract can, if properly conceptualized, emancipate? It depends on what one means by this (big) word. Emancipation with a capital E likely requires fundamental reforms that secure health, nutrition, education, and housing for working people. It also perhaps requires—closer to our subject matter—rethinking what is entailed by owning the means of production,[10] and reconfiguring the idea of the business corporation. But those are (big and contested) projects for another day. For now, aligning contract with its liberal commitments is a step on the path to emancipation.[11]

II. Incompatible Fields?

We begin by exploring the near-consensus position that the law of work and contract theory should remain apart.

In this Part, we offer somewhat stylized accounts of theories that, in fairness, are themselves diverse and contested. There are admittedly important differences not only between deontological and utilitarian theories, but also within each camp.

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8 *See* Hanoch Dagan & Michael Heller, The Choice Theory of Contract (2017); Hanoch Dagan & Michael Heller, *Choice Theory: A Restatement*, *in* Research Handbook on Private Law Theory 112 (Hanoch Dagan & Benjamin Zipursky eds., 2020).

9 To clarify: what we reject is the *dominant theories of contract* that emerged from these traditions. *See also infra* note 39.

10 For this task and its implications for the scope of managerial authority, see Hanoch Dagan, A Liberal Theory of Property chs. 3 & 7 (2021).

11 Successful reforms along these lines would also require—or perhaps mainly require—social activism and mobilization. No normative theory, ours included, is a substitute for political action. *Cf.* Christopher Tomlins, *A Call out of Seir: The Meaning and Future of US Labor Law*, 46 Law & Soc. Inq. 572 (2021). Nonetheless, in a vibrant democratic environment, reforming the prevalent understandings of *good* contract and *good* property can make *some* difference—and making this difference is our goal.

We have engaged extensively in analyzing many of these subtleties elsewhere.[12] What matters here—the limited task of this Part—is to highlight the conceptual and normative premises of these grand traditions, flesh out their key propositions (or presuppositions), and show why they cannot plausibly serve as work law's foundational theory.

A. The Dominant Theories

Modern contract theory comes in two predominant flavors: deontological and utilitarian. Deontological theories take seriously contract's justificatory challenge: What can justify the enforcement of wholly executory contracts? Why should law be willing coercively to enforce promises even when nonperformance generates no detrimental harm? This is a particularly formidable challenge to deontologists who subscribe to a Kantian conception of rights, in which people's interpersonal (horizontal) obligation is strictly limited to reciprocal respect for independence, which means that private law must be all about misfeasance, rather than nonfeasance.

Deontological theories address (or evade) this challenge by conceptualizing contract around the metaphor of a transfer. Contract formation, in this view, is when *all* the normative drama takes place, so that after the formative moment, the promisor is a mere possessor of the promised entitlement, the rightful owner of which is the promisee. This means that breach of contract—of any type of contract—is tantamount to conversion.

Utilitarian (law-and-economics) accounts, in turn, are less concerned with contract's legitimacy and focus instead on its usefulness. First-generation theories understand contract as a decentralized instrument to ensure allocative efficiency and incentivize productive efficiency; more contemporary theories attend to the parties' joint maximization of their contractual surplus. All these theories treat contract as a tool for allocating future risks in the service of people's current preference satisfaction. Contract is perceived as an exchange that is (presumably) beneficial to both parties, and contract law should accordingly serve this function by following the parties' presumed intentions. Because contracts are bound to be incomplete, however, an important role for the law is to set up gap-filling default rules. Utilitarian theories typically base the choice of these rules on an assessment of what most parties would likely have wanted, and assume that this majoritarian preference will translate into commensurable material benefits.

To be sure, utilitarians have produced a rich literature on relational contracts: they recognize that formation is typically only one moment in the life of the contract and that the parties' relationship is oftentimes robust and multifaceted. But these factors do not change the basic structure of the utilitarian analysis of contract: in this view, the significance of the parties' relations is strictly instrumental in facilitating

12 *See* Dagan & Heller, *supra* note 8, at 17-47; Hanoch Dagan & Michael Heller, *Why Autonomy Must Be Contract's Ultimate Value*, 20 Jerusalem Rev. Leg. Stud. 148 (2019); Hanoch Dagan & Michael Heller, *Autonomy for Contract, Refined*, 40 Law & Phil. 213 (2020); Hanoch Dagan, *Two Visions of Contract*, 119 Mich. L. Rev. 1247 (2020). This Part draws on these more extensive inquiries.

the goal of joint maximization. Party relations have no bearing on the utilitarians' understanding of contract as an exchange between self-interested maximizers of commensurable utils. While the temporal horizon of contract may imply that the parties' precise entitlements cannot be prescribed at formation, this only means that they are likely to be substituted with a governance mechanism that is supposed to maximize the parties' joint surplus.

B. Familiar Complaints

While deontological and utilitarian conceptions of contract are surely distinct, both are vulnerable to the same dominant complaints against the contractualization of work.

If contract is a transfer—or even an exchange—then the wage contract vests a certain measure of ownership in the employer, such that the employer's right in the purchased labor is on par with the employer's property rights in the means of production. This parity means that the worker—who is now the mere possessor of labor that the contract has already transferred to a new owner—must yield her will to the employer's direction and control. But, as Karl Polanyi noted, "the alleged commodity 'labor power' cannot be shoved about, used indiscriminately, or even left unused, without affecting also the individual who happens to be the bearer of this peculiar commodity."[13] In other words, although "wage labor as a market relation" represents "chattel slavery's obverse," wage labor (thus conceptualized) also entails "dominion and subjection." In this conception, a free contract involving labor turns out to be a contradiction in terms.[14]

This verdict may seem to apply to any conception of contract, but—as we show later on—it doesn't. In order to see why, it is helpful to rephrase and unpack its related, but nonetheless distinct, aspects.

For both utilitarian and deontological conceptions of contract, all objects of contract are in principle indistinguishable (they are all widgets, if you will). This commensurability is inherent in the reductionist utilitarian commitments. But it similarly emerges from the abstractions that undergird deontological theories. These theories are committed to setting aside the parties' specific features as well as the goods around which they interact: for transfer theory, contract simply moves an abstract "substantive content" from one party's "rightful exclusive control" to the other's.[15] And because "*Homo Oeconomicus* and *Homo Juridicus* share the very same abstractness from particularity,"[16] deontological theories, just like utilitarian

13 Karl Polanyi, The Great Transformation: The Political and Economic Origins of Our Time 76 (2001) (1994).

14 Amy Dru Stanley, From Bondage to Contract: Wage Labor, Marriage, and the Market in the Age of Emancipation 82-84, 87, 90, 96 (1998). *See also, e.g.*, David Ellerman, Neo-Abolitionism: Abolishing Human Rentals in Favor of Workplace Democracy 2, 14, 43, 51-52 (2021); Carole Pateman, *Self-Ownership and Property in the Person: Democratization and a Tale of Two Concepts*, 10 J. Pol. Phil. 20, 33, 38, 45, 47 (2002).

15 Peter Benson, Justice in Transactions: A Theory of Contract Law 321 (2019).

16 Peter Benson, *The Unity of Contract Law*, *in* The Theory of Contract Law: New Essays 118, 188-90, 192 (Peter Benson ed., 2001).

ones, lack the normative resources to distinguish between a widget sale and an employment contract.

Thus, both approaches are indifferent to the nature of the performance that a promisee is entitled to enforce. And this indifference makes both blind to the distinction between a right to delivery of a *widget*—which requires a promisor to produce and then relinquish an external asset—and a right to a *worker's labor* that is both more comprehensive and much closer to the promisor's own self. Similarly, nothing in these approaches can distinguish long-term commercial contracts—such as output and requirements contracts, for which specific performance is readily available[17]—from employment contracts, where it is not. But if contract is understood to imply that an employer can enjoy the same dominion over a worker's current—and even future—self as the buyer of widgets has, then contractualization of work is indeed inherently and necessarily normatively bankrupt.[18]

Interestingly (and, as we will see, quite tellingly), long before the New Deal, contract law—even while "recognizing that wage work entailed submission"—not only "forbade perpetual submission," but also prescribed that "free laborers . . . were entitled to end the exchange and find other buyers whenever they chose."[19] This veteran rule—along with the possibility, hinted at earlier, of conceptualizing contract in a way that highlights, rather than suppresses, the qualitative difference between widgets and employment—is key to the constructive stage of this Article.

But before we can get there, we need to see how the other familiar complaint against marrying work to contract—dealing with the inherent inequality of bargaining power between employees and their employers—is also baked into contract's dominant theories.

On this front, the trouble is closer to the surface of the deontological accounts of contract. These accounts, as noted above, are based on a strong commitment to *formal* equality and a clear injunction against any interpersonal obligation beyond the duty of reciprocal respect for independence. Contracting parties in this view must not actively coerce or deceive one another, but there is no injunction against advantage-taking as such, let alone any duty to rescue. Indeed, for Kantians the misfeasance/nonfeasance distinction is the signature feature of private law. Affirmative duties have no place in contract law unless they can be grounded in the intentions of the actual contracting parties.[20]

On their face, utilitarian theories appear to be at the other end of the spectrum: in principle, they have no difficulty encumbering people with extensive burdens and duties in the service of the public good (as aggregate welfare). But in contract, as noted above, these theories typically go inwards, so to speak, focusing on the joint maximization of the contractual surplus, so each party can maximize his or her

17 *See, e.g.*, Eastern Air Lines, Inc. v. Gulf Oil Corp., 415 F. Supp. 429, 442-43 (S.D. Fla. 1975).

18 *See* John Gardner, *The Contractualisation of Labour Law*, *in* Philosophical Foundations of Labour Law, *supra* note 1, at 33, 43-47.

19 Stanley, *supra* note 14, at 93. *See also, e.g.*, Debra Satz, Why Some Things Should Not Be for Sale: The Moral Limits of Markets 187 (2010).

20 *See, e.g.*, Ernest J. Weinrib, The Idea of Private Law 10 (1995).

share, given their respective bargaining powers. The maxim of joint maximization may yield interpersonal duties—at times, extensive ones—but these affirmative obligations are strictly limited to those that are ultimately beneficial *ex ante* to the putative obligee. Just as with the deontological accounts, there is no freestanding source within the utilitarian ones that can justify interpersonal obligations beyond the negative duty of noninterference.

This failure to account for unequal bargaining power is normatively unacceptable in the context of work.[21] Three cumulative *structural* features ingrained in many employment contracts explain why.[22] First, "[m]ost employment contracts arise between individuals who are more or less dependent on a single job and comparatively large organizations that are repeat players with diversified investments in the labor market."[23] Second, employment is one of the canonical examples of a transaction-specific investment, and, as such, it creates, even in competitive labor markets, systemic vulnerability, especially of late-career employees.[24] Finally, the employment contract is structurally tilted because capital typically is unitary whereas labor is fragmented. The capital of each firm is "always united from the beginning" since its constituent parts are "entirely unrecognizable and indistinguishable." Labor, by contrast, is "both indivisible and 'non-liquid,'" which means that "each individual worker controls only one unit of [labor] power and, moreover, has to sell this under competitive conditions with other workers who, in turn, have to do the same."[25]

None of these three structural bases of inequality of bargaining power in the context of work has any bearing on contract insofar as it is premised on the deontological accounts dealing with abstract persons and universal free will.[26] By contrast, on its face (as we have just hinted) these bases for inequality are relevant to utilitarian theories, which are highly attentive to consequences and incentives. But their relevance is, by definition, contingent.

Economic accounts that adhere to the canon of welfare maximization will take note of unequal bargaining power if, but only if and only to the extent that, these imbalances are likely to skew either allocative or productive efficiency. Economic accounts that focus on joint maximization, in turn, will take these inequalities to heart if, and only to the extent that, they are expected to shrink the contractual surplus. Either way, freestanding concerns of interpersonal injustice are—just as with the deontological account—ultimately irrelevant (and in some economic accounts, they are even unintelligible). Thus, if workers internalize their subordinate position due,

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21 *See, e.g.*, Samuel R. Bagenstos, *Consent, Coercion, and Employment Law*, 55 Harv. C.R.-C.L. L. Rev. 409 (2020).

22 *See also, e.g.*, Guy Davidov, *The Three Axes of Employment Relationships: A Characterization of Workers in Need of Protection*, 52 U. Toronto L.J. 357 (2002).

23 Estlund, *supra* note 2, at 384.

24 *See* Samuel Issacharoff, *Contracting for Employment: The Limited Return of the Common Law*, 74 Tex. L. Rev. 1783, 1787-89 (1996).

25 *See* Claus Offe, Disorganized Capitalism: Contemporary Transformations of Work and Politics 177-78 (1985).

26 *Cf.* Aditi Bagchi, *The Myth of Equality in the Employment Relation*, 2009 Mich. St. L. Rev. 579, 579-80, 602 (2009).

for example, to its legal entrenchment and a corresponding legitimizing hegemonic ideology—that is, if they take their exploitation by employers for granted—certain relational injustices might not affect incentives, and thus they become invisible to the utilitarian calculus. But they remain injustices, nonetheless.

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In sum, our brief encounter of employment with deontological and utilitarian contract theories yields quite devastating conclusions: both theories are indifferent to the potential of relational injustice that is structurally embedded in the employment contract; and both allow employers, as noted earlier, dominion over their workers' current—and even future—selves.

These uncomfortable conclusions may explain why champions of these contract theories tend to join mainstream work law scholars in endorsing the intellectual status quo of mutual dissociation. Moreover, given that contract, per these theories, has no resources to face these embarrassing conclusions, it is only to be expected that their champions relegate the task of remedying these pitfalls to another field, which they treat as an overlay of "regulation" guided by "public values."

III. Contract For Autonomy

A. Admission Criteria

Thus far we have identified the reasons that disqualify the dominant contract theories from governing employment in a liberal—as opposed to libertarian—state. In passing, our explanation of the conventional wisdom of a happy divorce between contract theory and the law of work identified three requirements that contract theory faces if it is to be eligible to undergird the law of work:

1. Contract theory should reflect the qualitative difference between brute instrumental uses of contract and contracts that involve constitutive features of a contractor's self; in other words, it should offer an endogenous, rather than external, reason for limiting the dominion of an employer-promisee over a worker-promisor in a way that establishes a contract-based distinction between widget sale and employment;
2. An acceptable theory should likewise offer a principled (not contingent) contract-based reason for limiting the power of promisors to lock themselves into employment obligations for an overly extended period of time;
3. Finally, contract theory should have the endogenous normative resources to attend to the structural inequalities that typify employment.

The failure of the dominant—deontological and utilitarian—contract theories to comply with any of these admission criteria is admittedly discouraging. But we think that the status quo reflected in the conventional wisdom, which relegates these tasks solely to external so-called regulatory law—and relies on public values

deemed external-to-contract such as social equality[27]—is also disquieting and indeed ultimately unacceptable. Three separate reasons support this conclusion.[28]

First, this status quo of happy divorce opens the door to the expected libertarian critique, which presents work law as an unprincipled and potentially oppressive set of rules.[29] To be sure, liberal-egalitarians who recognize citizens' Rawlsian duty to support just institutions[30] need not—indeed should not—be reluctant to recognize *some* measure of justified commandeering of employers as recruited delegates of the state that is, in this scheme, the actual duty-bearer of workers' rights. However, thus conceived, the framing is always vulnerable and on the defense; necessarily open to challenges regarding whether this external-to-the-contract burden goes too far.

This framing means that readers who share the liberal-egalitarian intuition that guaranteeing safety in the workplace, nondiscrimination, minimum wages, working hours, and labor organization is *clearly* justified, should be troubled—as we are—with a theory that implies that these guarantees are only contingent. And, as usual, any theory which runs counter to a set of strongly-held normative intuitions calls for serious reconsideration.[31]

Second, and in some sense even more fundamentally, there is something intrinsically troubling with a contract theory that needs to resort to external resources to explain why these guarantees are essential to the legitimacy of employment contracts. More specifically, there must be something wrong in implying that these guarantees are *merely* a matter of *public* concern, thus obscuring their freestanding *interpersonal* significance. We acknowledge the valid public reasons to ensure that our workplaces are safe, nondiscriminatory, and respectful of the people who work there. Indeed, nothing in this Article should be read as suggesting that work law is a concern only of private law. But the public justifications for work law's doctrines do not imply that failing to secure a factory's safety or engaging in private discrimination is interpersonally innocuous. Quite the contrary.

Failing to comply with the floor of minimum terms and immutable rights that typifies work law is intuitively wrong in a rather straightforward way, unmediated by the state or by citizens' obligation to support its just institutions: the noncomplying employer simply fails to respect the worker's interpersonal rights. This is why such a failure is unacceptable not only vis-à-vis members of an employer's political community. Just like our other private-law duties—and their corresponding interpersonal rights—those prescribed by work law deal with our capacity as individuals and not as co-citizens or as members of the same political community, and thus need not rely on (although they can surely be supported by) the public values of "we the

27 *See* Samuel R. Bagenstos, *Employment Law and Social Equality*, 112 Mich. L. Rev. 225 (2013).

28 Our discussion of the first two reasons draws on Hanoch Dagan & Avihay Dorfman, *Justice in Private: Beyond the Rawlsian Framework*, 37 Law & Phil. 171 (2018); Hanoch Dagan & Avihay Dorfman, *Interpersonal Human Rights*, 51 Cornell Int'l L.J. 361 (2018).

29 *See* Epstein, *supra* note 4, at 1361-62, 1364.

30 *See* John Rawls, A Theory of Justice 293-94 (1971).

31 *See* Hanoch Dagan & Avihay Dorfman, *Against Private Law Escapism*, 14 Jer. Rev. Legal Stud. 37 (2017).

people." And, just as with other sections of private law, work-law doctrines set the terms for people's interactions and are therefore both constructive and prospective. Private law governs, and thus participates in the construction of, our horizontal personal interactions in a variety of social settings, such as the market, the road, the neighborhood, and the workplace.

Finally, there is a practical implication, and a significantly disturbing one, that results from the conventional framing of work law's floor of minimum terms and immutable rights as special labor rights. This framing does highlight the crucial role of labor law in constraining employers' authority and vindicating workers' rights.[32] But it thereby also implicitly—and, at times, even explicitly—reifies the dominant approaches to contract. It thus implies that contract *can* serve as the instrument for hiring workers as independent contractors, where their status as such implies that they are subject to the rules of commercial contracts unencumbered by these labor rights.[33] Contract—or rather liberal contract—must not be amenable to such (ab)use. Salvaging the idea of (liberal) contract from its capture by the dominant contract theories may be a first necessary step in combating this abuse.[34]

B. An Early Vision

It is indeed time to start afresh. But we need not start from scratch. Whereas the autonomy-enhancing account of contract that we will momentarily present breaks away from the dominant theoretical traditions, it fits (as we will shortly see) quite well with contemporary contract doctrine. Moreover, its core promise goes back to the vision of Adam Smith, contract's most prominent champion. Smith of course deeply appreciated contract's utilitarian benefits; but he celebrated contract because of its much more fundamental virtue, namely: contract's liberating potential, epitomized by the promise of free labor.

Contracts—notably employment contracts—can liberate individuals from predetermined roles and hierarchical social positions. Shifting from status to contract, the queen of the market, implies, as Smith insisted, that loyalty needs to be accounted for, rather than taken for granted, thus emancipating people from relationships of excessive dependency on the authority of others.[35] This is why, when Henry Maine noted the "uniform" movement of "progressive societies" towards contract, he contrasted contract with status, which he understood strictly as innate,

32 *See* Collins, *supra* note 1, at 67.

33 *See* Cynthia Estlund, *The Fall and Rise of the Private Law of Work, in* Research Handbook On Private Law Theory, *supra* note 8, at 412.

34 In other words, just as the shift to the prevailing understanding of labor law and employment law has become part of the problem—*see* Catherine L. Fisk, *Law and the Evolving Shape of Labor: Narratives of Expansion and Retrenchment*, 11 Law, Culture & Human. 17 (2015)—a proper conceptualization of contract may be part of the solution.

35 *See* Elizabeth Anderson, Private Government: How Employers Rule Our Lives (and Why We Don't Talk about It) 4, 17-22 (2017); Jedediah Purdy, The Meaning of Property: Freedom, Community, and the Legal Imagination 16-17 (2010).

comprehensive, and inalienable.[36] In a contract-based society, individuals are no longer rigidly bound into hierarchic groups and their rights and obligations do not derive from such involuntary associations.[37]

There is, unfortunately, a gap—and a rather significant and distressing one—between Smith's vision of a liberating market and the contemporary instantiations of the market, especially the labor market; and we have no pretension to offer an explanation for this gap.[38] But it may be telling, nonetheless, to see that while Smith's *vision* implicitly relies on self-determination as contract's autonomy-enhancing *telos*, his *conception of contract* is reminiscent of contract's dominant theories, which—at least in the context of employment contracts—are, as we have seen, autonomy-*reducing*.

Smith claimed that labor markets are empowering because, while most people are not landowners, almost everyone "has, or can acquire, human capital." Thus, labor markets allow everyone to choose freely whom to work for, "rather than depending on one single employer, as had been the case in feudalism." However, Smith also believed—and this is the crucial point for our purposes—that for labor markets to perform this transformative function, people must not only acquire marketable skills, but should also stand apart from their human capital, just as they do with respect to other forms of capital (read: property). Workers must regard their ability to work as something they sell in the market to the highest bidder and accordingly "must not see their professional activity as 'constitutive' for their identity" or as an essential part of themselves.[39]

Because a fully commodified view of labor is (as noted) subversive of, rather than conducive to, self-determination, we do not propose to follow Smith's account of contract. Instead, we limit our alliance with Smith to the mission he ascribed to contract, of liberating people by facilitating their ability, at least partly, to write the story of their lives. One way of reading what lies ahead is as an attempt to imagine the road not taken: the contract theory that Smith would have articulated had he appreciated the incompatibility of the (disappointing) contract theories to which he (implicitly) subscribed and the emancipating vision of contract to which he was committed.

C. Choice Theory

To rehabilitate Smith's vision gone astray, contract's liberating potential should be understood as its *raison d'être*, rather than merely its happy side-effect. This is exactly the core of the choice theory of contract, which shows that facilitating people's self-determination is contract's *telos*.

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36 Henry Sumner Maine, Ancient Law 99-100 (J.M. Dent & Sons Ltd. 1917) (1861). *See also* Carleton Kemp Allen, *Status and Capacity*, 46 Law Q. Rev. 277, 286 (1930).

37 *See* Manfred Rehbinder, *Status, Contract, and the Welfare State*, 23 Stan. L. Rev. 941, 942 (1971). *See also* R.H. Graveson, Status in the Common Law 5 (1953); O. Kahn-Freund, *A Note on Status and Contract in British Labour Law*, 30 Mod. L. Rev. 635, 636 (1967).

38 For one interesting explanation, see Anderson, *supra* note 35, at 33-36.

39 *See* Lisa Herzog, Inventing the Market: Smith, Hegel, and Political Theory 69-73 (2013).

1. Foundations

Choice theory begins with Rawls's dictum in which people are entitled to act on their capacity "to have, to revise, and rationally to pursue a conception of the good."[40] This fundamental right to self-authorship—a truism for liberal polities—requires law to create power-conferring institutions that augment people's ability to plan. People may surely change their plans, and autonomous persons must be entitled, as Rawls indicates, to do so. But having a set of plans arranged in a temporal sequence is typically key to the ability to carry out higher-order projects, that is, to self-determine. Given the human predicament of interdependence, these plans and projects always implicate other people. Therefore, the right to self-determination also applies—although with quite different effects—horizontally. Hence, private law's *Grundnorm* of reciprocal respect for self-determination, which explains why it is justified for the law to authorize people to subject others to these autonomy-enhancing powers and, if needed, coercively enforce them.

Contract nicely fits into this normative infrastructure. Contract is a crucial component of a liberal legal regime because it is the means by which we can legitimately enlist others to our own goals, purposes, and projects—both material and social. By ensuring the reliability of contractual promises for future performance, contract law enables people to join forces in their respective plans into the future. An enforceable agreement is the parties' script for this cooperative endeavor. Contract law provides people the indispensable infrastructure that both facilitates this risky venture and ensures its integrity. It thus expands the available repertoire of secure interpersonal planning engagements beyond the realm of close-knit interactions.

Contract's significant contribution to self-determination implies that people's interpersonal right that others respect their self-determination legitimizes the coercive enforcement of wholly executory contracts. It also explains why (modern) contract law is not content merely to provide enforcement services for fully specified agreements. Rather, it proactively facilitates the availability and viability of multiple contract types in the various contracting spheres; the emerging intra-sphere multiplicity offers people different modes of cooperation in the pursuit of joint plans. Hence, choice theory's core claim: that contract is both justified and best structured, interpreted, and developed by reference to its autonomy-enhancing service. Promisees' authority is justified, and is justifiably backed up by the coercive power of law because, *and to the extent that*, it is autonomy-enhancing.[41]

This barebones sketch of choice theory is sufficient to show its normative and conceptual departure from contract's dominant theories. For choice theory, self-determination and reciprocal respect for self-determination—and not independence or self-interest—lie at the normative core of contract. Relatedly, rather than a transfer, choice theory conceptualizes contract as the contracting parties' joint plan. In turn,

40 John Rawls, Justice as Fairness: A Restatement 19 (2001).

41 As the text implies, choice theory is similar to deontological contract theories in taking seriously contract's legitimacy challenge and insisting that its design requires justification. But it is nonetheless, like utilitarian contract theories, unapologetically teleological: as a power-conferring institution, contract law should be designed in a way that is most conducive to people's self-determination.

it is these fundamental attributes that explain why choice theory can address the justified concerns of work-law scholars regarding contract's compatibility with employment.

2. Implications

An autonomy-enhancing account necessarily makes a qualitative distinction among the various choices that contract enables, based on how they implicate the parties' self-determination. Specifically, because choice theory conceptualizes contract's utility surplus as a means to the superior end of autonomy, it must distinguish between the use of contracts for strictly instrumental purposes and their use in pursuing one or both parties' "ground projects"—the projects that make us who we are and give meaning to our lives.[42]

The instrumental category, epitomized in the case of commercial contracts, lends itself to the familiar cost-benefit analysis that renders commensurate all contract rules and terms. By contrast, the latter category, which includes most prominently both intimate contracts and employment contracts, cannot be easily analyzed in these terms—because facilitating preference satisfaction is important to liberal contract only because, *and to the extent that*, it is conducive to people's self-determination.[43] Preferences that undermine self-determination should be generally overridden. A liberal contract law cannot legitimately facilitate transactions in which the parties' *welfare-enhancement* threatens to erase or undermine their *self-determination*.[44]

This fundamental maxim of choice theory must be dissociated from any form of paternalism. Paternalism is unjustified because it distrusts people's agency and thus offends their autonomy.[45] But in choice theory, contract law is justified—and therefore circumscribed—by reference to its autonomy-enhancing function. This means that attempts to use this instrument that are likely to be autonomy-*reducing* must simply be treated as *ultra vires* (at least *prima facie*). Delineating the acceptable domain of contract along these lines is of course challenging and we do not offer any magic formula.[46] But choice theory's guidance is nonetheless robust and principled, and it is nicely compatible with the three admission criteria identified a few pages ago.

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42 *See* Hanoch Dagan & Avihay Dorfman, *Just Relationships*, 116 Colum. L. Rev. 1395, 1419 (2016).

43 For intimate contracts, see Hanoch Dagan, *Intimate Contracts and Choice Theory*, 18 Eur. Rev. Contract L. 104 (2022).

44 This maxim, to be sure, is not straightforwardly applicable where corporate or governmental bodies are involved in contracts. On its face, this limitation is devastating for the context of work, in which the paradigm employer *is* such a body. But we think it is not devastating. Why? Because our account captures corporations to the extent that they are duty-bound toward natural persons, which is just the case at hand.

45 *See* Seana Valentine Shiffrin, *Paternalism, Unconscionability Doctrine, and Accommodation*, 29 Phil. & Pub. Aff. 205, 207, 213, 215, 220, 231 (2000).

46 The remaining indeterminacy is a feature, rather than a bug, of theories like ours which aspire to apply across time and place. Theories of this type must leave room not just for local adjustments and experimentation based on social, cultural, and economic circumstances, but also—and of particular significance in the context of work law—for democratic prescriptions.

(a) Limited Promisee Authority

Because choice theory substitutes the idea that contract is a transfer with its conceptualization as a joint plan, the pertinent question is not which transfers are unacceptable. Instead, the task is to preempt the risk that contract will become a means for the loss of self or a threat to people's status as agents with projects who are entitled to govern their own lives. In other words, liberal law should delineate the scope of enforceable contract so that it does not end up facilitating coauthored scripts that might render one party the sheer instrument of the other's plans or purposes. Many contract types—even service contracts—are largely free from this risk. But contracts that implicate people's ground projects are typically vulnerable on exactly this front.

A promisee's overly intensive or overly extensive dominion in contracts affecting a constitutive feature of a contractor's self might endanger the latter's self-determination. Insofar as these contract types are concerned, a promisee's unlimited dominion is, by definition, autonomy-*defying*. Indeed, any contractual script purporting to give a promisee excessive dominion over the promisor's activities is beyond the justifiable limits of (liberal) contract.

Specifying this prescription requires attention to the characteristics of the specific contract type. For example, it translates differently in spousal contracts, contracts for membership in certain meaningful communities, and—our focus in the next Part—employment contracts. But what is important to emphasize now is that it is misleading to treat this constraint—as it is conventionally treated—in terms of "public policy." Concerns of *public* policy, strictly speaking, refer to effects on the public at large or on some specific *third* parties. By contrast, the constraint here is inherent in the idea of (liberal) contract itself. This constraint—as well as the next two we address momentarily—springs from the very same autonomy-enhancing rationale that justifies enforcing contracts in the first place.

This conceptual clarification entails practical implications. Although external concerns gathered under the umbrella of "public policy" properly constrain the domain of enforceable contracts, it is implausible to expect that all negative externalities of contract will be internalized. For example, the price mechanism of supply and demand implies that almost every contract entails *some* external effect. For private ordering to take place—for contract to perform its autonomy-enhancing task—law should aim only to address contract's *substantial* negative externalities.[47] But this justifiably cautious attitude is irrelevant—better still, it is inappropriate—where the constraint on the domain of enforceable contracts emerges not from any competing value, but rather from contract's own *telos*. A constraint that reduces the autonomy-diminishing effects of contract is not a compromise; it improves, rather than detracts from, contract's performance of its autonomy-enhancing task. *These* constraints should certainly *not* be viewed with suspicion. Therefore, it is also seriously misleading, even if conventional, to present them as interventions in parties' freedom of contract.

47 *See* Aditi Bagchi, *Other People's Contracts*, 32 Yale L. Reg. 211, 217 (2015).

(b) Concern for Future Self

The second and third constraints prescribed by choice theory on the domain of enforceable contracts are similarly internal to the idea of contract. They correspond, respectively, to the second and third admission criteria identified earlier (regarding principled limits and endogenous normative resources, respectively). Because they emerge from contract's own normative DNA, these constraints need not, indeed should not, be treated as external impositions on contract, but as arising from the same normative foundation that supports enforcement of contracts generally.

Thus, recall that people's right to self-determination does not rely on a conception of self-authorship in which one constructs a "narrative arc" for one's life in advance. Rather, self-determination allows, indeed requires, opportunities for people to take a critical perspective on any part of their identity and therefore to change and vary their plans. As agents, our life story must be neither a set of unrelated episodes, nor a script fully written in advance. Self-determination puts a high value on people's right to "reinvent themselves." Our autonomy requires the ability to both write and *re*write our life story and start afresh.[48]

Once we realize that the power to revise or even discard (exit from) one's plans is an entailment of contract's own normative underpinnings, it becomes clear that liberal contract law must be attentive not only to the significance of enabling people to make credible commitments, but also to the impediment these commitments pose to their ability to rewrite their life-story. Therefore, liberal contract law must safeguard the self-determination of people's future selves.[49]

Because any act of self-determination constrains the future self, this tension—which requires limiting the range, and at times the types, of enforceable commitments people can undertake—is inherent in contract's *raison d'être*. While its doctrinal implications again vary by context, we will focus below on its effects on employment.

At this stage it is enough to point to the continuity between those effects and the way in which liberal contract's concern for the autonomy of the future self accounts for the rules governing "regular" contract law—that is, the law governing commercial contracts. In the commercial context, the conventional doctrine carefully delimits the scope of specific performance to safeguard the autonomy of the future self. It even excuses performance altogether where changed circumstances imply that the parties' basic assumptions have failed.[50]

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48 *See* Dagan, *supra* note 10, at 43-44, 200-02.

49 *Cf.* Aditi Bagchi, *Contract and the Problem of Fickle People*, 53 Wake Forest L. Rev. 1, 3 (2018); Dori Kimel, *Promise, Contract, Personal Autonomy, and the Freedom to Change One's Mind*, *in* Philosophical Foundations of Contract 96, 99-101 (Gregory Klass et al. eds., 2014). As the text clarifies, discussion of the future self is a discussion of the self in the future; we do not endorse—in fact, choice theory explicitly rejects—the idea of multiple selves or of a disintegrated self.

50 *See respectively* Hanoch Dagan & Michael Heller, *Freedom and Commitment in Contract Law: Specific Performance Decoded*, 98 Notre Dame L. Rev. (forthcoming 2023); Hanoch Dagan & Ohad Somech, *When Contract's Basic Assumptions Fail*, 34 Canadian J.L. & Juris. 297 (2021).

(c) Relational Justice

The first and second constraints on the domain of enforceable contracts prescribed by choice theory are both intrapersonal: they derive, as we have seen, from contract's ultimate value of self-determination and its implication regarding the power of promisors to commit. The third constraint, which is likewise internal to the liberal idea of contract, shifts gears to the interpersonal dimension of contracting.

Contract law requires attention to relational justice—that is, to reciprocal respect for self-determination. This obligation arises from people's right of self-determination, the same right that justifies the enforcement of contract in the first instance. Therefore, when someone uses contract law's empowering potential, her uses should be limited to interactions that respect the other party's self-determination. This obligation cannot be too onerous, but neither is it limited to a negative duty of noninterference.[51]

As usual, this principle has important consequences for the structure of contract law. It is important to appreciate how relational justice shows continuity with, rather than departure from, the larger universe of contract law. In the next Part we will zoom in on the role of relational justice in employment, but note that it figures prominently in the law that applies to all other contract types as well. It undergirds a long list of rules—prescribed by common-law judges, legislatures and regulatory agencies—that govern both the pre-contractual stage and the life of an ongoing contract.

For example, consider contract law's careful, but important, deviations from the *laissez faire* mode of regulating the parties' bargaining process. For example, note the expansion of the law of fraud beyond the traditional categories of misrepresentation and concealment to include affirmative duties of disclosure, or the modern rules dealing with unilateral mistake, duress, anti-price-gouging, and unconscionability. Concern for relational justice also best explains key rules during the life of a contract, as epitomized by the duty of good faith and fair dealing. This duty, now read into every contract, protects the parties against the heightened interpersonal vulnerability that contract performance engenders and solidifies a conception of contract as a cooperative venture.

IV. The Employment Contract

Smith rightly celebrated contract's liberating potential. He was also correct that unleashing this potential requires abandoning the earlier, overly cumbersome (and religiously inspired) idea of vocation, an idea that fails to appreciate the significance of exiting an existing workplace and starting afresh. But Smith then undermined his own vision by subscribing to a contract theory in which the path to liberation is the *full* instrumentalization of work. Allowing people to instrumentalize their work is

51 For a detailed defense, both normative and positive, of the role of relational justice in contract law, on which the two following paragraphs heavily draw, see Hanoch Dagan & Avihay Dorfman, *Justice in Contracts*, 67 Am. J. Juris. 1 (2022); Hanoch Dagan & Avihay Dorfman, *Precontractual Justice*, 28 Legal Theory 89 (2022).

one thing. Requiring them to treat their work *only* as a means to an end—on a par with, say, their mundane choices as consumers—is quite another, as it robs them of some of the most important possibilities for making their life stories meaningful.[52] Thus, full instrumentalization undermines individuals' self-determination.[53]

The conceptual and normative difficulties with the idea of making one's labor the object of contract are real. But a conception of contract that puts self-determination, rather than either welfare or independence, at its core *can* address these challenges. This view of contract is acutely attentive to the distinction between brute preferences and ground projects. Attending to this distinction (1) guards against excessive commodification of people's work, (2) proscribes unwarranted impositions on the parties' future selves, and (3) ensures that their interactions do not fall below an acceptable threshold of relational justice.

As we will presently show, this understanding of contract is quite compatible with the legal design of the workplace favored by contemporary critics of the idea of an employment contract. By highlighting the features of the road not taken, it can, furthermore, guide liberal architects of the law as they narrate its next episode.

A. Relational Justice at Work

We begin with the New Deal and Civil Rights requirements prescribing terms for employment contracts—a floor of minimum terms and immutable rights regarding safety in the workplace, nondiscrimination, minimum wages, working hours, and labor organization. Our focus is on the *internal*, contract-based foundation of what is conventionally addressed as a regulatory superstructure imposed on the parties' agreement. We do not deny the public rationales of these requirements, nor do we contest their dominance in the genealogy of the law of work. Nonetheless, we contend that—here and now—this contracting floor should not be regarded as a public policy encumbrance that is alien to the logic of contract. Rather, the entrenchment of this floor should be viewed as a necessary reform of the prior doctrine, a reform entailed by the idea of liberal contract, one that pushed it to live up to (liberal) contract's own implicit ideals.

The conventional framing of the New Deal/Civil Rights floor as a regulatory override relies on two features—institutional and substantive. But neither feature survives scrutiny. Thus, the fact that contract law in common-law systems developed historically through adjudication does not imply that this institutional pedigree determines in any way the proper domain of contract. The domain of a legal concept is determined by the significance of its core substantive norms.[54] By contrast, institutional questions—at least insofar as far as they concern private law (that is, the

52 *See* Hugh Collins, *Relational Justice in Work*, 24 Theoretical Inquiries L. 26, 44 (2023); Sabine Tsuruda, *Good Faith in Employment*, 24 Theoretical Inquiries L. 206, 211-12 (2023).

53 Reading this prescription into the employment contract may give rise to a concern of a suspiciously normalizing effect. *Cf.* Jürgen Habermas, Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy 413, 416 (1996). For our response, see Hanoch Dagan, *The Value of Choice and the Justice of Contract*, 10 Jurisprudence 422, 432-33 (2019).

54 *See* Hanoch Dagan & Avihay Dorfman, *The Domain of Private Law*, 71 U. Toronto L.J. 207 (2021).

law governing interpersonal relationships)—are mostly determined by instrumental considerations.[55]

In modern-day societies, typified by an increasingly complex, interconnected environment, legislation and regulation are often useful and sometimes necessary for establishing and developing the legal infrastructure for interpersonal interaction. Deviating from a court-centric view of contract law is necessary at times to ensure the generality of legal prescriptions, maintain the required technological expertise for legal decision-making, and target systemic failures that can hardly be addressed on the transactional level. Legislation and regulation may also be required to establish effective tools for proactive (as opposed to reactive) *ex ante* guarantees of just interpersonal relationships in various settings, and to ensure that these guarantees are sufficiently predictable so as to effectively guide people's behavior as required by the rule of law. It is no surprise that scarcely any contract type today is governed solely by the common law. Employment contracts are by no means exceptional in this regard.[56]

The substantive reason for assuming that work law's protective floor is "special"—that is, external to contract—is no more convincing than the institutional argument. The substantive argument presupposes a conception of freedom of contract that, in line with contract's dominant theories, vindicates people's independence, rather than their self-determination. But as we have seen, these theories are not only normatively dubious,[57] they also fail to account for, and indeed inappropriately obscure, the many instances of modern contract law's actual compliance with relational justice. Once relational justice is recognized as an endogenous, indeed indispensable, component of the liberal idea of contract, securely premised on contract's own justificatory foundation, the floor of acceptable employment contract finds a happy home within contract itself.

Recall that choice theory requires that the floor of legitimate interactions eligible for law's support excludes interactions of gross relational injustice. This means, for example, that antidiscrimination rules—including rules that instantiate *fair* equality of opportunity in the workplace—are not external constraints on contract. Relationally unjust practices are autonomy-*reducing* and thus must not be authorized and coercively enforced by liberal contract, properly conceived. Thus, antidiscrimination rules can help *perfect* contract law's realization of its most fundamental *telos*, its *raison d'ĕtre*.[58]

A similar analysis applies to other minimum terms and immutable rights of workers as individuals, either existing—such as workplace safety and minimum

55 Furthermore, shifting from adjudicatory legal fora to the legislative or regulatory ones does not change the significance of insisting upon the proper understanding of contract, because public and political debates in these latter fora also partly rely on a certain conception of contract. *Cf.* Hanoch Dagan, *Liberal Property and the Power of Law*, Can. J.L. & Juris. (forthcoming 2023).

56 *See* Hanoch Dagan & Roy Kreitner, *The Other Half of Regulatory Theory*, 52 Conn. L. Rev. 605 (2020).

57 For more, see Dagan & Heller, *supra* note 8, at 19-47; Dagan & Heller, *Autonomy for Contract*, *supra* note 12.

58 *See* Dagan & Dorfman, *supra* note 42, at 1442-45.

wages[59]—or emerging, such as the obligation to ensure a healthy, bullying-free work environment.[60] Moreover, liberal contract's commitment to relational justice does not stop there. As the introductory section to the Wagner Act explicitly states, the purpose of allowing labor unions is to address "[t]he inequality of bargaining power between employees . . . and employers who are organized in the corporate or other forms of ownership association."[61] By giving workers the chance to bargain collectively and to place themselves on a more equal footing with employers, labor law attempts to solve this structural inequality, and thus to redeem the legitimacy of employment contracts *qua* (liberal) contracts, that is, as a means of empowering people's self-determination.[62]

To be sure, current labor law may fail to equalize the bargaining power of employers and employees. But the ability of individual employees, unionized or not, to bargain in the shadow of labor law can, if properly reconfigured, make a real difference.[63] So long as unionization remains (or becomes) a viable and serious option, nonunion employee contracts may arise under the protective shadow of labor law.[64] For this to be the case, however, unions should be able to negotiate so-called "agency shop" contracts, requiring employees to pay union dues as a condition of employment. A genuinely liberal conception of contract would, for example, repudiate, rather than embrace, the unfortunate *Janus* ruling,[65] a ruling that upsets this practice and thus hinders the ability of labor law to support relational justice for both union *and* nonunion employees.[66]

B. Employees' Future Selves

While discussion of relational justice at work revolves around New Deal and Civil Rights contributions to the law governing employment contracts, the commitment to ensuring the autonomy of workers' future selves is most directly manifested in the rules that secure workers' ability to exit. Indeed, it is, as previously noted, a

59 *See, respectively*, Dagan & Kreitner, *supra* note 56, at 631-37; Hanoch Dagan & Avihay Dorfman, *Poverty and Private Law: Beyond Distributive Justice*, 68 Am. J. Juris. (forthcoming 2023).

60 *See* David C. Yamada, *The Phenomenon of Workplace Bullying and the Need for Status-Blind Hostile Work Environment Protection*, 88 Geo. L.J. 475 (2000); David C. Yamada, *Workplace Bullying and American Employment Law: A Ten-Year Progress Report and Assessment*, 32 Comp. Lab. L. & Pol'y J. 251 (2010).

61 National Labor Relations Act, 29 U.S.C § 151 (1935).

62 *See* Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 Harv. L. Rev. 1379, 1423 (1993).

63 *See* Guy Mundlak, The Two Logics of Labour's Collective Action ch. 7 (2020). *Cf.* Kate Andrias, *The New Labor Law*, 126 Yale L.J. 2 (2016).

64 *See* Paul Weiler & Guy Mundlak, *New Direction for the Law of the Workplace*, 102 Yale L.J. 1907, 1912-13 (1993).

65 *See* Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31, 138 S. Ct. 2448 (2018).

66 Agency shop does not meaningfully reduce individual autonomy. It results in an *ex ante* reduction in the amount of money belonging to an employee who has to pay dues in return for higher wages and benefits and better working conditions. Even assuming that some employees are unwilling third-party beneficiaries of agency shop provisions, a sufficiently competitive labor market ought to empower employees to seek out employers with desirable union agreements.

bedrock contract-law proposition that specific performance is not awarded against providers of personal services. Committed to its autonomy-enhancing *telos*, contract law accords special treatment to personal service contracts because these contracts uniquely involve the person of the promisor, which in turn means that their specific performance might trigger autonomy-inhibiting effects.[67]

Ordering a worker specifically to perform her employment contract compels her to take a specific course of action. Additionally, that particular course of action requires her to do (and not only to deliver) specific things and thus involves her personal cooperation with another person's project. It is therefore no surprise that contract law—not only in the common law, but also in civil-law jurisdictions, where specific performance is the default remedy for breach of contract—steadfastly resists granting specific performance for personal service contracts.[68]

Critics highlight the disempowering effect of this bright-line immutable rule that prevents employees from extracting more favorable terms from employers in exchange for an enforceable commitment to perform.[69] But this critique misses the point of the rule. It applies even where there is no concern for either relational injustice, cognitive failure, or imperfect information. Why? Because its rationale lies elsewhere. An autonomy-enhancing contract law must ensure some ability to cut oneself out of a relationship with other persons. Accordingly, law limits the ability of employees' current selves to commit, thus securing the right of the employees' future selves to change their plans and start afresh.

The same rationale accounts for the longstanding rule that polices non-compete agreements, a rule that has received increasing notice in recent years. When a non-compete imposes a significant encumbrance on the future self, specific performance is not granted irrespective of the possible *quid pro quo*. Liberal contract law cannot remain agnostic towards severe limitations on the ability of employees' future selves to rewrite the story of their lives. The law therefore instructs courts to scrutinize the reasonableness of non-competes in terms of their occupational, geographic, and temporal scope.[70]

Thus, both the bar on specific performance against employees and the doctrine governing non-competes are justified by reference to liberal contract's concern for the autonomy of the employees' future selves. But this concern cannot vindicate the common law's *symmetrical* application of the former rule. In almost all cases, courts refuse to specifically enforce "an employer's agreement, promise, or statement" that it will continue to employ an employee, and courts consistently refuse to reinstate employees.[71] This *common law* position is wholly unwarranted. Indeed, in *statutory contexts*, particularly in collective bargaining agreements, unlawfully terminated employees are routinely reinstated.

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67 *See* Dagan & Heller, *supra* note 50, on which this section heavily draws.

68 *See* Restatement (Second) of Contracts § 367 (1981); Charles Szladits, *The Concept of Specific Performance in Civil Law*, 4 Am. J. Comp. L. 208, 226 (1955).

69 *See* Christopher T. Wonnell, *The Contractual Disempowerment of Employees*, 46 Stan. L. Rev. 87 (1993).

70 *See* Restatement (Second) of Contracts § 188 cmt. d.

71 Restatement (Third) of Employment Law § 9.04(a) & cmts. b & c. *Cf. id.*, at § 2.02.

In many cases, the labor market is typified by a corporate employer with many employees (at times, thousands) with whom it has no personal connection. The crucial point is that the employment relationship is purely instrumental for such employers.[72] And in these cases, the common law's bright-line immutable bar to specific performance when the *employee* is the injured party should be rejected. At the very least, absent conflicting reasons (such as excessive judicial supervision costs), specific performance should be available to employees if the parties agree to such a remedy.

Additionally, the structural inequality of power between employers and employees calls into question the prevailing at-will employment contract regime—the default version for employees not on a fixed-term contract in all states (except, oddly, Montana). The acceptability on liberal grounds of this regime requires the presence of mandatory countermeasures strong enough to secure relational justice.[73] At a minimum, an autonomy-enhancing contract law—that is, a regime following choice theory's prescription of intra-sphere multiplicity—should offer two parallel employment types, such as "at will" *and* "for cause." By making (at least) two types available, employers would need to opt for one and, in so doing, communicate to employees their position regarding this fundamental characteristic of the employment relationship.[74]

C. Employers' Limited Dominion

Securing relational justice in the workplace and safeguarding the autonomy of employees' future selves along the lines of the previous sections are surely important. But critics may still find our attempt to redeem the idea of employment contract dubious. The difficulty lies, so the argument may go, at the heart of the "paradigm of the employment contract." This paradigm—as Hugh Collins sharply describes it— sets up "an authority structure" and prescribes an implied duty of obedience.[75]

Collins notes that this hierarchical structure was imported from "the former legal tradition of status obligations."[76] This observation is critical, because it raises the possibility, as Sabine Tsuruda implies, that the problem may be not that work has been contractualized, but rather that it has not been contractualized enough. As she notes, the law of employment contracts is exceptional in conceptualizing a failure to perform as "insubordination," rather than simply as a breach.[77]

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72 Being instrumental to large-scale employers does not deprive the employment contract of its autonomy-enhancing foundation. Rather, it highlights the fact that its service to employers' autonomy typically is *indirect*, and thus different in kind from its service to employees' autonomy. Corporate entities, as such, do not have autonomy interests; only individuals do. This difference helps explain why the equal treatment of unequally situated employers and employees may be unjust.

73 *Cf.* Aditi Bagchi, *The Employment Relationship as an Object of Employment Law*, *in* The Oxford Handbook of New Private Law 351 (Andrew Gold et al. eds., 2020).

74 *See* Dagan & Heller, *supra* note 8, at 117.

75 Hugh Collins, Employment Law 10, 34 (2d ed. 2010).

76 *Id.* at 34.

77 *See* Sabine Tsuruda, *Working as Equal Moral Agents*, 26 Legal Theory 305, 317-18 (2020).

To be sure, the master-and-servant notion—where employment entails an employee's submission to the employer's authority—may fit an understanding of contract law that follows transfer theory. But the autonomy-*reducing* implications of an implied duty of obedience suggest that it is wholly out of place in a genuinely liberal view of contract. Guided by liberal contract's autonomy-enhancing *telos*, and substituting the idea of contract as a *transfer of authority* with its understanding as the parties' *joint plan*, choice theory strongly pushes in the *opposite* direction. It prescribes, as we've seen, that contracts—and particularly employment contracts—can give a promisee-employer only a *limited* dominion over the promisor's activities.

In this alternative conception of the employment contract, managerial control, if it is to be a part of the parties' relationship, must be, as Tsuruda claims, merely instrumental. Thus, the requirement that workers "carry out orders to do particular things, such as following prescribed procedures or complying with grooming policies," is acceptable. But employers must not be legally authorized "to act as a moral authority over the lives and choices" of their workers, and their managerial control must not extend to workers' "agential activity." Tsuruda acknowledges that the interpersonal and interdependent character of work can justify *some* employer control over what employees do and say while they are at work. But she correctly insists that employers must not have a legal right "to quiet obedience and moral deference."[78]

Tsuruda discusses, for example, the needed reform regarding workers' "expression of reactive attitudes, such as indignation at being morally wronged," and recommends a rule that "permits employers to dismiss employees for indignant expression [] only when the expression is irreparably destructive of future trust and cooperation." But, as she rightly indicates, eroding "the traditional paradigm of employer control in employment" entails much broader implications.[79]

A truly liberal employment contract, guided by choice theory's prescription of *limited* promisee's dominion, cannot authorize employers' arbitrary and unaccountable authority. This prescription extends beyond the context just discussed,[80] including for example limits on an employer who attempts to regulate workers' lives off-hours.[81] One example comes from the Grand Chamber of the European Court of Human Rights, which ruled that an employee's legally protected right to privacy

78 *Id.* at 307, 313, 337.

79 *Id.* at 307-08, 320. Tsuruda mentions practices like dress codes, advertising campaigns, or client greeting scripts as well as the employment's influence on the exercise of basic liberties outside of work, on which we focus next.

80 *See also* Collins, *supra* note 1, at 65, who discusses the European Court of Human Rights jurisprudence in which "employers cannot lawfully interfere disproportionately with an employee's manifestation of religion at work, or dismiss someone simply for membership of a political party."

81 *See* Anderson, *supra* note 35, at 39-40, 48-54, 60, 62-64, 67-69. *See also* Pateman, *supra* note 14, at 33, 48, 47; Nien-hê Hsieh, *Rawlsian Justice and Workplace Republicanism*, 31 Soc. Theory & Prac. 115, 121-26 (2005).

was violated when his employer monitored personal messages he had sent from a company account.[82]

Interestingly, implementing these and similar necessary changes does not require a radical departure from existing doctrine: as Samuel Williston authoritatively writes, employees are "bound to obey the instructions and follow the rules of the employer, subject to the requirement that [they] are not unreasonable."[83] This means that the contribution of choice theory here is mostly interpretive: its prescription of limited promisee authority offers a much more restrictive interpretation of the scope of *reasonable* instructions and rules than that of other (dominant) contract theories.

These reforms are necessary. But because some employer control over employees' agential activity *may* be instrumentally required, they are still insufficient. Therefore, a genuinely liberal conception of contract may well need to prescribe further protection of the agency of workers by requiring that they have a say—a voice—not only in entering the employment contract, but also in their ongoing performance of their contractual obligations.

This additional layer is necessary particularly in the context of the recent emergence of precarious forms of work that inhibit workers' "ability to establish and maintain stable families and households"[84] such that workers have no control over a large part of their day. At least in some contexts, ameliorating workers' subordinate position may require more than that; it may call for granting workers a say in workplace decisions either by facilitating their union representation or through other means.[85]

V. Reimagining Employment

Critics of the contractualization of work are correct to reject the idea that employment should be structured and shaped in accordance with contract's dominant theories. But they are wrong to accept these existing theories as a given, and thus (somewhat paradoxically) further reify an objectionable view of the employment contract.

Contract need not, and therefore should not, reintroduce the hierarchy, analogous to the submission of servility, that it was supposed to supplant. Situating the sphere of work in the midst of the contracting universe, and subscribing to the Smithian vision

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82 *See* Bărbulescu v. Romania, App. No. 61496/08, Eur. Ct. H.R. (Grand Chamber, 2017), https://hudoc.echr.coe.int/fre?i=001-177082.

83 19 Williston On Contracts § 54:23 at 481 (4th ed. 2016). *See also id.* at § 54:24.

84 Deirdre McCann & Judy Fudge, *Unacceptable Forms of Work: A Multidimensional Model*, 156 Int'l Lab. Rev. 147, 156-57 (2017).

85 *See* Margaret Jane Radin, Contested Commodities 110 (1996); Anderson, *supra* note 35, at 69-70. At least on its face, the German model of codetermination seems a particularly inviting starting point for rethinking the workplace along these lines. *See* Grant M. Hayden & Matthew T. Bodie, *Codetermination in Theory and Practice*, 73 Florida L. Rev. 321 (2021); Sabine Tsuruda, Rescuing Workers' Freedom of Choice (unpublished manuscript) (on file with the authors). Stronger forms of workplace democracy should, we think, be available and viable—so that "every individual person must have a fair opportunity to work in a democratic workplace"—but must not be mandatory. *See* Daniel Jacob & Christian Neuhäuser, *Workplace Democracy, Market Competition and Republican Self-Respect*, 21 Ethical Theory & Moral Prac. 927 (2018).

of contract's liberating potential while repudiating the dominant contract theories he embraced, opens up the possibility of a happy marriage of contract and work.

Contract should not be conceptualized as a transfer of authority, but rather as a joint plan of parties who are bound by the private law *grundnorm* of reciprocal respect for self-determination. This alternative conception of contract—the choice theory of contract—is properly attentive to the distinction between contractors' brute preferences and their ground projects and takes to heart structural inequalities in parties' bargaining power. Accordingly, it (1) requires that employers have only a limited dominion over their workers' activities; (2) sets up limits for the power of workers to commit their future selves; and (3) prescribes a solid floor for employment contracts that ensures their compliance with relational justice.

Many features of contemporary employment and labor law—ranging from the traditional reluctance to award specific performance against service providers and to fully enforce non-compete clauses, through contemporary safety in the workplace and employees' minimum wage regulation, to antidiscrimination rules and the role of labor unions—seamlessly follow from this liberal theory of contract. This is also the case, moreover, regarding many current reform suggestions calling for a workplace bill of rights that would protect workers against managers' arbitrary and unaccountable authority, circumscribing the prevalent regime in which a vast majority of nonunion employees can be fired at will, and insisting on means by which workers would have some voice in workplace decisions.

As we write this Article, these proposed reforms—and possible others, which may seem more utopian[86]—face an uphill battle against what is perceived to follow from the liberal commitment to respecting people's contracts. Even some of the *existing* features of work law are currently on the defense along similar lines, and many more are being increasingly evaded through contract. There are undoubtedly many causes for this unhappy predicament, but one of them may be rooted in the conventional wisdom regarding what the idea of contract necessarily stands for, which unites many work-law scholars and contract theorists. Insofar as this is indeed the case, substituting contract's dominant theories with an autonomy-enhancing view of contract may help reverse the tide. It may help contract live up to its (limited, but still significant) emancipatory potential.

86 To take one example: an autonomy-based conception of the employment contract would no longer simply assume a default in which owners of the means of production deserve the *entire* surplus value of production. It may consider embracing a (sticky) normative default in which workers are also entitled to part of this surplus.