

Voluntary Obligation and Contract

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Absent mistake or misrepresentation, most scholars assume that parties who agree to contract do so voluntarily. Scholars tend further to regard that choice as an important exercise in moral agency. Hanoch Dagan and Michael Heller are right to question the quality of our choices. Where the fundamental contours of the transaction are legally determined, parties have little opportunity to exercise autonomous choice over the terms on which they deal with others. To the extent that our choices in contract do not reflect our individual moral constitutions — our values, virtues, vices, the set of reasons we reject and the set of reasons we endorse — we are not justified in regulating contracts reluctantly. Contracts are entitled to the privilege of liberal regulatory deference only to the extent that they are the work product of individual autonomy. The assumption that contract is voluntary does enormous work in most normative theories of contract. This Article takes still more seriously the obstacles to autonomous choice that contracting parties face. The most important constraints are not in contract law itself but in the material and moral imperatives that dictate parties' contracting preferences. Many contracts are driven by circumstantial considerations or actual background obligations. While these contracts are not wholly lacking in the element of voluntariness, we should distinguish them from those choices — and those contracts — which more fully realize our potential to self-consciously author our relations with others. Autonomous choice in contract requires more than Dagan and Heller imply, and it is likely beyond the power of contract law standing alone to deliver it.

INTRODUCTION

Hanoch Dagan and Michael Heller rightly celebrate choice in the domain of contract. Framing the moment of decision to contract as a matter of choice

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is a useful departure from the usual question of voluntariness. The decision to enter contract is usually cast as either voluntary or not. But it is natural to ask how many choices a person had and of what kind. Thinking about the choices people have when they enter contract makes apparent that the most normatively attractive dimension of contract is not binary.

Choice is ultimately significant, though, for the same reasons that we care whether the decision to contract was voluntary. While promotion of choice is a means of promoting the quintessentially liberal interest in autonomy, it is also important to explain the normative status that we confer on promise and consent in the contractual context. Contract imposes burdensome, sometimes regrettable obligations and triggers state-enforced liability. Those burdens are accepted, individually and systematically, because they are regarded as self-assumed. Thus, redeeming the choice to contract — the task that Dagan and Heller set out for themselves — is a matter of not just bettering contract law but also ensuring that it is internally consistent, inasmuch as many doctrines and policies assume that parties entered agreements voluntarily in some meaningful sense.

Part I begins by discussing Dagan and Heller's treatment of choice and comparing it with the idea of voluntariness. I agree strongly with their central normative argument that liberal contract law should promote as wide a possible menu of contract types so that the choice to enter into agreement with a given structure is a meaningful one. I spend some time elaborating why the bare fact of voluntariness, understood in binary terms, does not properly capture what is normatively significant about contractual undertakings. Contract reflects moral agency not just because we can choose not to contract at all, but because the way we contract, or *how* we exercise normative power, reflects our moral makeup. Although this point motivates Dagan and Heller's project, and though the kinds of choices on which Dagan and Heller focus are important, the choice among contract types is not among the most important choices people make in contract. Expanding the menu of contract types would do little to expand more salient choices. Dagan and Heller seem to realize this and their focus reflects the limited tool that is contract law. But the voluntariness of contract is not primarily a function of contract law and cannot be secured by it.

The two most important classes of constraint are material and moral constraints. The last two Parts of the Article elaborate on those limits to the voluntariness of contract. Part II argues that the moral significance of exercising normative powers turns on those constraints, and Part III focuses on those constraints in the context of contract. 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. Because the

premise of voluntariness does so much work to justify the deference that both judges and legislators afford private agreement, that deference should be adjusted — before and after contract.

I. CHOICE, VOLUNTARINESS AND THE MORAL SIGNIFICANCE OF NORMATIVE POWER

Contractual obligations are quintessentially voluntary obligations. Voluntariness distinguishes them most readily from the involuntary duties of tort. Most theories of contract attach great significance to the fact that parties entered the agreement voluntarily. In legal economics, voluntariness gives rise to our confidence that parties are better off as a result of the agreement. In promissory theory, the service of one kind or another that the institution of contract performs for the normative power of promise assumes that promises are made voluntarily.¹ Similarly, consent theory predicates the authority of the state to impose contractual liability on a defendant on her having previously agreed to subject herself to such liability.² On this view too, the voluntary exercise of a normative power, *i.e.* consent, justifies the entire edifice of contract.

The central role of voluntariness in contract is easy to understand given the theoretical centrality of normative powers to our understanding of how contracts get off the ground. Normative powers are recognized as such because they advance the autonomy of moral agents, and liberal states are particularly committed to the autonomy of their citizens. Because it is the premise of liberal theories of the state, liberal theories of any particular legal subject (like contract law) are similarly committed to respecting autonomy. Autonomy is sometimes construed as abiding by its perfect requirements, and at other times as advancing a sprawling autonomy interest wherever possible, given other legitimate interests of the state. Dagan and Heller use the concept of autonomy in the latter sense, which is why they are able to speak constructively of how the liberal state can advance autonomy by adding to the menu of choices available to contracting parties.

1 For promissory theories of contract, which presume promises to be voluntary, see, for example, CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* 14 (1981); Seana Valentine Shffrin, *Promising, Intimate Relationships, and Conventionalism*, 117 *PHIL. REV.* 481, 502 (2008); Seana Valentine Shffrin, *Are Contracts Promises?*, in *THE ROUTLEDGE COMPANION TO PHILOSOPHY OF LAW* 241 (Andrei Marmor ed., 2012); Daniel Markovits, *Contracts and Collaboration*, 113 *YALE L. J.* 1417 (2004).

2 See Randy Barnett, *A Consent Theory of Contract*, 86 *COLUM. L. REV.* 269 (1986).

We are right to celebrate normative powers and the space we create for them in contract. Exercise of a normative power like promise or consent reveals something important about an agent and her moral capacities. It tells us that she is the kind of person who others regard as capable of authoring obligation, or capable of releasing others from their obligations. It tells us that she is what we recognize as a moral agent.

But it does not tell us much more than that, and there is more to know about a moral agent than the fact that she is one. That an obligation was assumed voluntarily does not tell us how important the agent was to the fact of its adoption, let alone its form or content; it does not answer how much of a voluntary obligation is explained by the moral makeup of its author. Even within the set of obligations created by an agent (through exercise of a normative power) there is variation in the degree to which the content of obligations can be sourced to her moral qualities, *i.e.*, her values and commitments, virtues and vices. An agent's normative power (to make promises, issue permissions, *etc.*) is not her only or most important moral attribute.

In drawing moral distinctions among the motivations behind action, my discussion here might vaguely resemble the Kantian scheme that racially prioritizes autonomous over heteronomous ends. But there are at least two important differences: First, I am not claiming here that one kind of motivation is superior or more valuable — indeed, more human — than another, all things considered. I am claiming only that some motivations *in the exercise of normative powers* render the resulting normative position *more voluntary*. I do not presume that voluntariness is the highest moral aim; only that, where we can describe our moral position in some respect as voluntary, that feature is of substantial value to moral agents. Second, the moral imprint which I argue is valuable to moral agents is not the mark of pure reason in the Kantian sense. In fact, it is presumptively not universal or common to all agents; it reflects the particular moral makeup of a single agent, including her conception of the good and her ethical character. It would not do, in a Kantian scheme, to have moral duties turn on such contingent aspects of a person. People are bound by the categorical imperative by virtue of their *essential* features as moral agents.

Voluntary obligations, unlike mandatory duties, are the moral work-product of particular agents. The concept of voluntary obligation in turn is most constructive when it captures both *whether* an obligation is the product of moral agency and the *degree* to which the obligation reflects moral agency. We usefully regard all obligations that are the output of a normative power as voluntary — but along a continuum of voluntariness.

Dagan and Heller do not talk about moral agency or moral imprint, but they are similarly interested in the context in which choices are made. They

agree with Joseph Raz that “freedom requires individuals be able to choose from among options they deem valuable.”³ The critical implication they draw from his conception of autonomy is that contract law must support “freedom to choose from among diverse, normatively attractive contract types in each important area of human interaction. Free people are defined in part by the attractive choices they reject, not just those they select.”⁴ The most important contribution of the choice theory is to challenge the implicit assumption in much of contract theory that the bare fact that the parties have accepted a contract makes the agreement morally valuable. It is a challenge rather than a rejection of this principle, because no one is prepared to say that the compromised character of most choice makes those choices altogether normatively uninteresting. But because their brand of liberalism holds that the state is bound to promote autonomy and not merely to abide by some boundaries it creates, Dagan and Heller offer a compelling argument why parties must be able to choose among types of contracts within a given sphere of human activity for their choice to be “free,” or on my terms, for it robustly to reflect their moral agency.

It is at once odd and understandable that Dagan and Heller focus on “contract types” as the relevant kind of choice that must be available to contracting parties. They are clear that diversity of contract types is not sufficient for contractual autonomy,⁵ but any claim about “contract types” is a curiously small (though substantial on its own terms) conclusion to draw from their starting proposition that it is the “obligation of liberal contract law to support choice within each familiar category of human activity.”⁶ State recognition of different types of contractual arrangements, even its facilitation of a formal menu of options, does not ensure choice among those options in any familiar category of human activity. The primary constraints on our contractual choices are material and moral. It is nevertheless understandable that Dagan and Heller do not address those constraints at any length because it is not clear that it is within the institutional capacity of contract law to do anything to relieve parties of those constraints.

Still, Dagan and Heller’s shift to “choice” from the more familiar language of voluntariness might have lent itself to considering these dimensions of the decision to contract. Rather than focus on the blunt decision to contract at all, they themselves emphasize that the normative significance of that choice turns on what other choices were available to parties. They are right that the

3 HANOCH DAGAN & MICHAEL HELLER, *THE CHOICE THEORY OF CONTRACTS* 69 (2017).

4 *Id.* at 4.

5 *Id.* at 71.

6 *Id.* at 97.

moral import of choosing to enter a given contract turns on the alternatives available, but their decision to focus on the kinds of contract recognized or enabled by the state, as opposed to the kinds of contract possible in a given market, is unexplained. Moreover, their focus on a menu of contracting possibilities potentially deflects the importance of moral constraints on choice, which undermine the value of formal possibilities in a different way than do material constraints.

Consider the example of employment types. Dagan and Heller rightly criticize the stark choice between the status of employee and independent contractor.⁷ But the vast majority of people do not make any such choice; they take what is available or maximize their income. It would not help them if there were intermediate categories recognized in employment law. Although Dagan and Heller acknowledge that employees face market constraints and provide that something must be done to protect choice for the least privileged employees, it is not clear how, from the standpoint of autonomy, expanding the menu of contract types in this sphere importantly advances employees' interests. In order for the array of employment types to be relevant, employees need to be in a position to pay for their preferences; *i.e.*, they need to be in a position to trade off income in exchange for a contractual relationship that suits them in other respects. The people who are able to do that are already pretty well-positioned from the standpoint of choice and their frustration at the crude legal categories they must choose among is not a pressing social problem.

More generally, it is wrong to focus on the state as a direct regulator of individual transactions (closest to its role as adjudicator of individual disputes) as opposed to its broader role as a regulator and participant in the market. It is in the latter role that it has the capacity to affect the material conditions under which parties make contract choices — in every realm, including the domestic sphere. It is likely that using all of its powers, it has the capacity even to affect the moral calculation that parties face when entering agreements, since it controls the background conditions for both parties as well as their prospective risks. But, using contract law alone, the state can do little to expand the choices available to contracting parties. In a world of autonomous contracting, individual agreements are the building blocks by which we make our lives and the sum of our agreements represents a kind of moral work-product. But choice among contract types will not achieve that liberal ideal.

The next two Parts consider constraints on choice that are not a part of Dagan and Heller's picture, or at least, they do not figure prominently in their normative agenda. However, these constraints are the most serious threats to

7 *Id.* at 117-18.

the robust voluntariness that they promote. Although Dagan and Heller allow that freedom of choice is not assured through the expansion of contract types, their qualification is much larger and deeper than their discussion suggests. Material and moral constraints on contractual choice cut at the heart of the attribution of voluntariness that is the basis for treating contract as a valuable exercise of normative power.

II. DEGREES OF VOLUNTARINESS IN THE EXERCISE OF NORMATIVE POWERS

Promise and consent are the two normative powers most closely associated with contract. In both cases, we recognize the normative power because the control it gives us over our normative position is said to advance our autonomy. The following discussion is intended to show that the extent to which exercise of these normative powers advances our autonomy interest depends on material and moral constraints. The conclusion is not that promise or consent are not ultimately justified principles. The modest claim is instead that the weight assigned to moral reasons rooted in the principles of promise or consent should be adjusted to reflect variations in the voluntariness that is the basis for their normative value to us.

A. Material Constraints

Contractual promises are often made under circumstances in which the promisor feels she has no choice but to promise whatever is necessary to obtain a good, service or other compensation. Contract scholars point out that waivers in consumer contracts are routine and unavoidable.⁸ Of course, not all promises are necessary. Promises and permissions vary in the degree to which they are driven by material circumstance.

A farmer might feel compelled to promise to help with his neighbors' harvests because he thinks that is his best shot at obtaining similar help from his neighbors, and he has no alternative to such help. Another farmer promises to help because he hates the prospect of the harvest going to waste. Still

8 See, e.g., MARGARET JANE RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS AND THE RULE OF LAW* (2012); W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 529 (1971). Even judges not associated with the cause of consumer advocacy understand waivers to be unavoidable. See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1750 (2011) (“the times in which consumer contracts were anything other than adhesive are long past.”).

another farmer promises to help because he enjoys hard work and wishes to be a good neighbor. Only the first promise is made out of material constraint: A promise or waiver made of material constraint is made with the expectation of receiving some material benefit, or avoiding some material loss. Some but not all promises and permissions are of this sort.

We do not regard promises and permissions induced by material need as coerced as long as the constellation of entitlements that gave rise to them was a legitimate one. By contrast, if someone permits another to use her property in order to avoid being killed by that person then we would say the permission is not voluntary (and therefore not binding) because the permission would not have been granted had her background entitlements been respected. (As discussed above, this is similar to the way the doctrine of duress operates in contract, except that it is neutral as to the source of illegitimacy. Only threats of material harm *from the other contracting party* that are inconsistent with background entitlements are regarded as improper threats for purposes of duress analysis.) There is an important difference between promises and permissions that reflect “real” background entitlements and promises that are the product of threats which the promisee/grantee has no right to carry out; the latter are not voluntary at all and we have no collective interest in enforcing them.⁹

But there is *further* difference within the set of voluntary promises: a spectrum between those that are entirely gratuitous and have no material motive and those which a person feels compelled to make in order to secure a material benefit or avoid a material harm.

Why should a promise made with material motive be regarded as less voluntary than one made without such motive? Not because there is anything inherent in the concept of voluntariness at odds with material constraint, but because the normative significance of voluntariness turns at least in part

9 It is not obvious why promises that are coerced by a promisee should be regarded as involuntary while promises otherwise forced are regarded as voluntary. But it is easier to see that we have no reason to use the force of law to back promises which are coercively extracted by promisees, such that they are at least functionally involuntary. See John Deigh, *Promises Under Fire*, 112 ETHICS 483, 485-89 (2002). Deigh observes a “disparity between the modern philosophers’ ideal of morality and the actual moral practice by or through which people become bound to keep their word.” *Id.* at 484. He implies that the tendency to idealize promise may cause philosophers to dismiss too quickly coerced promises as involuntary. This Article targets the same idealism by recasting voluntariness in a way that accounts for normatively significant variation in the practice of promise.

on the idea that those making voluntary choices are able to thereby pursue values and preferences.

The normative power of making binding promises is sometimes recognized on the grounds that it facilitates valuable relationships, or more generally makes it possible to shape one's moral world. I do not aim to propose a theory of promising as such but pull as a common element from most accounts of promising that the recognition of the practice enhances moral agency.¹⁰ Promising makes it possible to impose an imprint on one's own moral world, whether generally or through its specific aspects, such as one's relationships with others. The imprint reflects something about oneself, one's conceptions of the good or life plan.

To the extent that a particular promise is entirely determined by material constraints, it does not reflect anything specific about the promisor/grantor and her particular values and preferences. To the extent that it is literally necessary to make a promise in order to eat, for example, the promise reflects facts about the promisor that she has in common with all animals. It is not easily recognizable as an exercise of moral agency.

It is nevertheless an act of moral agency and, for that reason, a commitment made from a position of material constraint is still a promise. We still recognize the promise as a voluntary commitment because one can always formally choose not to make it and there is a sense in which other animals cannot make that choice. In most but not all cases, there are also other promises — with slightly different content, or to other promisees — that one could make in order to meet the same material need.

Recognizing normative power in these circumstances is also a way of salvaging agency. By continuing to respect her power to make binding promises and issue effective permissions, we collectively construct the promisor/grantor as a moral agent even if the scope of her agency is severely constrained. Normative powers are not a function of inherent human capacities but can be realized only through others. Whether one is capable of shaping one's normative relations with others turns at least in part on whether others perceive you as so capable, *e.g.*, whether they are willing to accept your promises, to treat you as bound and rely on your commitment.¹¹ Denying agency is thus

10 See, *e.g.*, David Owens, *A Simple Theory of Promising*, 115 *PHIL. REV.* 51 (2006); Jody Kraus, *Personal Sovereignty and Normative Power Skepticism*, 109 *COLUM. L. REV. SIDEBAR* 126, 131 (2009). See also David Owens, *Duress, Deception and the Validity of a Promise*, 116 *MIND* 293, 309-12 (2007).

11 There are a number of senses in which this could be true. First, as a pragmatic matter, we may be unable to avail ourselves of the benefits of institutions like promise unless others regard us as capable of promise-making. Second, promises

self-defeating, especially in societies characterized by substantial inequality. A severe conception of agency that renders it an elite phenomenon would only forfeit the liberating potential of the concept of agency, as a mandate on which to expand choice and self-authorship. Although one cannot attach the property of voluntariness to an obligation by willing it so, the voluntary framework of contract minimizes the risk that we artificially close off avenues for moral agency for people within their material constraints.

Finally, material constraint is an important part of our experience of the world and our sense of how we relate to it.¹² It cannot be regarded as an alien or occasional constraint that carves out territory from our moral space or there would be little left. In this respect, the inquiry into the nature of contractual voluntariness is comparable to an inquiry into the nature of responsibility in tort. Just as liability is imposed in contract only where a party breaches an obligation she voluntarily assumed, liability is imposed in tort only where a party is responsible for the injury of another.

In the course of litigation, a plaintiff needs to show that a contractual obligation was voluntarily assumed, or in tort, that a defendant is responsible for her loss. But the theoretical challenge in contract and tort, respectively, is not really to determine whether contractual obligation is voluntary as a general matter, or whether those who negligently cause injury are responsible, as a general matter — as if settling a metaphysical truth. Rather, we take as our starting point the strong premises of the legal institutions we observe. We presume the “fact” of voluntariness where there is evidence of agreement and we presume the “fact” of responsibility where plaintiff can show duty, breach and causation. We try to make sense of “voluntariness” and “responsibility” on these thin conditions notwithstanding competing moral intuitions.

In the case of contract, confidence about voluntariness is undermined by the overwhelming constraint under which voluntary choices tend to be made; in the

and permissions may require acceptance and will not be accepted by others if they do not believe in the moral agency of the would-be promisor/grantor. Third, normative powers may have no transcendental reality; they are intersubjectively constituted. The point in text requires only that, for one reason or another, moral agency depends on mutual recognition.

- 12 Although this Article is concerned with the question of whether choices are voluntary, it is also worth observing that our choices may be important for reasons quite separate from their voluntariness, and in some cases, for reasons in direct tension with voluntariness. For example, some regard our dependencies as essential to our human identity and locate value in dependent relationships, especially where they are mutual. Material and moral constraints that reflect those dependencies might be valuable, from this perspective. Nevertheless, they undercut the voluntary character of choice.

case of tort, the related struggle has been to reconcile agent responsibility with the limits of agent control.¹³ Tort scholars revealed something important about responsibility in ordinary tort actions by excavating the concept of outcome responsibility, which is less robust than culpability but still a pervasive kind of moral responsibility.¹⁴ Outcome responsibility attaches to an agent who controls and foresees an outcome even if she did not desire or specifically intend it.¹⁵ Outcome responsibility makes sense of why we hold people responsible for outcomes that they did not wish to bring about and that they might well have avoided with better luck (such as accidents caused by their negligence). It does so by distinguishing the kind of responsibility at issue in ordinary tort actions from culpability, a more robust kind of responsibility usually at issue in criminal law.

Similarly, we can make sense of voluntariness in contract by recognizing that market-constrained promises are not as valuable or morally significant as others; they exhibit only the lowest rung of voluntariness. The promise to buy disability insurance at a particular price point is less revealing of our moral agency than a promise to care for a loved one in time of illness. But though it is a thin form of voluntariness, in the way that outcome responsibility is a relatively thin form of moral responsibility, we still recognize the kind of choices we make under material constraint as voluntary. We could not recognize ourselves as agents mired in the world without a concept of voluntariness that encompasses such choices.¹⁶

13 See Larry A. Alexander, *Causation and Corrective Justice: Does Tort Law Make Sense?*, 6 *LAW & PHIL.* 1, 22-23 (1987); Ronen Avraham & Issa Kohler-Hausmann, *Accident Law for Egalitarians*, 12 *LEGAL THEORY* 181, 181 (2006); John C.P. Goldberg & Benjamin C. Zipursky, *Tort Law and Moral Luck*, 92 *CORNELL L. REV.* 1123, 1132-63 (2007); Jeremy Waldron, *Moments of Carelessness and Massive Loss*, in *PHILOSOPHICAL FOUNDATIONS OF TORT LAW* 387, 389-91 (David G. Owen ed., 1995).

14 See Stephen R. Perry, *The Moral Foundations of Tort Law*, 77 *IOWA L. REV.* 449, 505-07 (1992).

15 See Stephen R. Perry, *Responsibility for Outcomes, Risk, and the Law of Torts*, in *PHILOSOPHY AND THE LAW OF TORTS* 72, 92 (Gerald J. Postema ed., 2001).

16 This claim is intended to be parallel to the claims made on behalf of outcome responsibility. See Tony Honoré, *Responsibility and Luck*, 104 *LAW Q. REV.* 530, 543 (1988) (“If actions and outcomes were not ascribed to us on the basis of our bodily movements and their mental accompaniments, we could have no continuing history or character.”); see also John Gardner, *Obligations and Outcomes in the Law of Torts*, in *RELATING TO RESPONSIBILITY: ESSAYS FOR TONY HONORÉ ON HIS EIGHTIETH BIRTHDAY* 111, 136 (Peter Cane & John Gardner eds., 2001) (“To deny that success can have independent rational significance is to

We thus have good reason to regard even a promise made under substantial material constraint as voluntary. Nevertheless, they do not carry the full value associated with promise and permission because they reflect little more than the moral *capacities* of the promisor/grantor; they are neither evidence nor consequence of her particular moral makeup. If we do not unpack the moral significance of promising and assess whether promises equally serve the underlying values which cause us to value promises as such, we miss normatively significant variation among promises and we risk rendering the crude label of “voluntary” implausible.

B. Moral Constraints

Just as some but not all promises reflect material constraint, some but not all promises are made under moral constraint. We should distinguish between compulsory and supererogatory promises in order to understand the wide-range spectrum of voluntariness. A *compulsory* promise is a promise not to commit (what would already be) a wrong.¹⁷ A *supererogatory* promise is a promise to do something one is not otherwise obligated to do.¹⁸ Compare my promise not to steal your car to my promise to give you my car. Both promises create voluntary obligations: in one case, a freestanding obligation, and in the other, an obligation layered over a background duty. The supererogatory promise is more robustly voluntary than a promise not to be wicked.

Two objections might be raised against this distinction. First, one might argue that promising to do what one is already obligated to do is not a promise at all. Alternatively, one might claim that a compulsory promise is “just as

leave us without any story of our lives as practical reasoners.”); Perry, *supra* note 15, at 72, 83 (“[O]utcome-responsibility in the achievement sense comprises a fundamental element in our understanding of our own agency.”).

- 17 As discussed below, compulsory promises are not actually mandatory. They are made *in service* of involuntary duties. The boundary between apparently voluntary obligation and involuntary duty is not as sure as it is analytically convenient. Many of the involuntary duties that motivate compulsory promises are imperfect; for that reason, the particular promises made are not compelled. I nevertheless characterize those as compulsory rather than supererogatory, to distinguish them from promises that do not further compliance with any duty.
- 18 Supererogatory here describes acts beyond the requirements of duty. Supererogatory promises may promise more than is required or they may promise where no promise is required. Note that I do not treat the compulsory/supererogatory divide as a categorical. Most promises are morally motivated and not entirely gratuitous, so their compulsory or supererogatory character is a matter of degree.

good” a promise as promising to do something one has no pre-existing duty to do. Both objections fail.

1. Compulsory Promises Are Real Promises

The idea of a compulsory promise sounds paradoxical. But we should not confuse a promise that is morally necessary (as are compulsory promises) with a promise that is literally compelled. So many promises are morally necessary that removing all such promises from the concept of promise would shrink the practice beyond the point of recognition.

Imagine you have promised a friend that you will help her pack her belongings when her lease ends in two months. When the date approaches, before she books a moving company, she calls to confirm that you will fulfill your earlier promise. Besides the passage of time, nothing new or surprising has taken place since the initial promise was made. You acknowledge the earlier promise and promise to keep it.

One might argue that the second promise is not a promise at all. The intuition would be that the promise not to break the earlier promise adds nothing.¹⁹ You do not acquire an obligation to *do* anything new. But the second promise gives you a new moral *reason* to do what you were supposed to do already. The action at issue in the new obligation was keeping your promise, and the compulsory promise created a new reason for keeping it. The ultimate action content of an obligation may be the same as that in a preexisting duty; moral reasons may be layered over one another such that the moral character of action is overdetermined. Still, a person who breaks a promise commits one wrong by doing so; the person who breaks a promise to keep a promise commits two.

The question whether compulsory promises constitute valid promises relates to another that David Owen has addressed: is it possible to make a wicked promise that is morally binding? That is, can it be wrong, by virtue of a promise, not to perform some act that it is clearly wrong, all things considered, to perform? He argues persuasively that it is possible to make such a promise and that it is ill-conceived to dismiss the promise as ineffective merely because the reason for action that it creates can be trumped by other duties.²⁰ The upshot of that discussion is that the validity or efficacy of a promise does not turn on background reasons for or against the performance

19 Joseph DeMarco and Richard Fox call these “superfluous promises.” See Joseph DeMarco & Richard Fox, *Putting Pressure on Promises*, 30 SOUTHERN J. PHIL. 45, 53 (1992).

20 DAVID OWENS, *SHAPING THE NORMATIVE LANDSCAPE* (2012). *But see* Seana Shiffrin, *Immoral, Conflicting and Redundant Promises*, in REASONS AND RECOGNITION:

of the promise. Just as reasons *not* to perform an act do not make a promise to perform that act ineffective — but mean that one must commit a wrong in order to avoid committing a greater wrong — similarly, existing reasons *to* perform an act do not make a promise to perform that act ineffective. They render the failure to perform the act a double wrong. Wicked promises are real promises, and compulsory promises are too.

The validity of a promise to do what one is already required to do is related to the more intuitive possibility of voluntarily performing an act one is also duty-bound to perform. For example, if a friend suggests that you visited her in the hospital out of a sense of obligation alone, you might protest that you came voluntarily. In this context, one means that one would have acted the same even in the absence of duty. Similarly, someone who refrains from committing the crime of murder might insist that she has voluntarily declined to commit the act of murder. In both cases, we can recognize the choice to perform or not to perform an action as voluntary, notwithstanding background duties. Promising to do what is morally required is voluntary in a similar sense.

Compulsory promises are properly regarded as voluntary, and more generally as valid promises, because they are not literally compulsory. First, although a promisor may be already compelled to perform some act related to the content of her promise, she is rarely required to promise to perform the act. Thus, even if showing up on time for work is compulsory in a given circumstance, making an additional promise to show up on time is not compulsory. Second, although a promisor may be compelled to perform some act related to the content of her promise, she is not usually compelled to perform the particular act she promises. The background duty is indeterminate with respect to particular courses of action. For example, though I may be duty-bound to discuss my client's case with her, I am not duty-bound to discuss the case at 9 am on Monday — until I promise to do so.

One might be tempted, as was Patrick Atiyah, to dismiss promises I characterize as voluntary, but less voluntary than supererogatory promises, as simply involuntary.²¹ But this not only overlooks some important features of compulsory promises, it is also inconsistent with our experience of compulsory promising.

The choice to promise and the choice to promise a particular thing are not just formal features of promising that render them voluntary. These elements of choice in compulsory promising make it a meaningful exercise in normative

ESSAYS ON THE PHILOSOPHY OF T.M. SCANLON 155, 156 (J. Wallace ed., 2011) (rejecting immoral promises as true promises).

21 See P.S. Atiyah, *Contracts, Promises and the Law of Obligations*, 94 *LAW Q. REV.* 193 (1978).

judgment. One can choose to weigh oneself down with additional obligation in order to strengthen the hand of another person, who would otherwise be at the whim of your future self and its later judgment about the content of your duty; or one can choose to minimize the moral fallout of a bad choice down the line. In choosing the manner in which one will fulfill some flexible, background duty, one weighs that duty against other moral and amoral interests. These choices in compulsory promising reflect something about the moral makeup of a promisor, even if they are less driven by her values and plans than are supererogatory promises.

Compulsory promises are not only technically voluntary, they are also experienced that way. Our experience of them is important to how we conceptualize them and their normative significance. In principle, a person subject to a duty to perform an act A has no choice but to perform that act. But in reality, she experiences the decision whether to perform the act as very much a choice. Looking around her, she sees any number of people who do not comply with duty; some portion of those people will deny that the duty at issue binds them at all, or in particular circumstances. In some cases, the duty to perform A is not owed to any particular person; by choosing to promise one obligates oneself to a particular other person. Even where a specific person already has a claim on us to do A, promising to do A puts us in a different moral position *vis-à-vis* that individual. We can no longer deny that we are obligated to perform A. We concretize and raise the moral stakes of performing A. By assuring and inviting reliance, we invite our promisee and others to view us as persons who are not only subject to moral duties, but also recognize them as binding on ourselves and intend to fulfill them. Because there are so many ways in which we can and do fall short of what duty requires of us — in part because the reality of duty is always mediated by uncertainty in our judgments about it — the duties that pre-shadow compulsory promises do not deprive the latter of their voluntary character altogether.

2. Hierarchies in promise

Accepting that compulsory promises are properly regarded as voluntary, one might instead object to the hierarchy of promise described here on the grounds that compulsory promises are no less voluntary than promises to do what one is free to do or not. After all, rather than representing a lesser case of voluntary choice, actions taken to comply with moral reasons may be the ultimate expression of freedom. But while *actions* undertaken just to comply with morally binding reasons may be the pinnacle of free action, *obligations* undertaken in order to comply with existing duties do not similarly represent a triumph of will over physical inclination — at least compared to promises to perform acts one is not already duty-bound to perform. Remember that in

mapping the scale of voluntariness, at issue is the *relative* voluntariness of compulsory and supererogatory promises.

Promises made to comply with moral reasons may be more voluntary than promises made to pursue worldly ends because motivation by moral reason reveals more about a moral agent than do worldly motivations. But precisely because agency is valuable (or valued) where it allows an agent to make a moral imprint on her environment, the exercise of a normative power is a valuable expression of autonomy because it allows us a role in shaping our normative relations with others. Promising makes it possible for relational commitments to reflect our underlying values and plans.

To the extent that our room for maneuver is constrained by duty, the voluntary component of our complete set of obligations is diminished. It is not that the voluntary dimension of promises made under moral constraint is stamped out altogether. When pushed (but not too hard), we sometimes make a choice about the particular direction in which we will go. But the movement is not as voluntary as a decision to stand up and start walking.

Compulsory promises are not less voluntary because the range of acts that remain permissible is less altered by such promises than by supererogatory promises. I do not propose that the degree of voluntariness in an obligation measures the difference between one's pre- and post-promise set of permissible acts. The claim is rather that an obligation is more voluntary the more it reflects about the agent that brought it into being. Accordingly, an obligation to perform an act that one is already morally compelled to perform is less voluntary because the choice to assume the promissory obligation does not represent a choice about how to pursue one's plans or how to allocate one's limited resources. Such a promise reflects less about the particular self that makes the promise. By contrast, memories, experiences and simple tastes that lead us to prefer one contractual object over another do not undermine the voluntary character of our choice; they direct our choices. Those are just the kinds of considerations that bring our moral makeup to bear on particular transactional decisions.

Since this discussion suggests that voluntariness is best conceptualized as a matter of degree, it is worth noting that even some compulsory promises are more voluntary than others. The more general, indeterminate and uncertain the background duty, the more the promise that discharges that duty is the product of moral deliberation. Sometimes the applicability of a background duty (*e.g.*, a duty of friendship) depends on a choice to acknowledge and accept one's status as a friend *vis-à-vis* a prospective promisee. Background duties that are the subject of widespread disagreement also render related promises less compulsory than in an environment where recognition of the background duty reveals nothing particular about the promisor. For example,

a promise to help a friend in circumstances where every friend would help is less revealing — and less voluntary — than a promise to help a friend where many similarly situated persons would not make such a promise.

Some scholars may resist more generally the idea that voluntariness, the defining and most normatively interesting feature of promises, can be treated as a dimension along which promises vary.²² I do not think Dagan or Heller would resist this way of thinking, given their own emphasis on the conditions under which choices are made. But there remains some appeal to the idea that “a promise is a promise is a promise.”

But we all know it is not so. In ordinary experience, we treat some promises as more rigorously binding than others, with wider or narrower conditions of excuse. We do not feel equally badly when we break all promises. We are likely to feel only moderately guilty if we accidentally miss a party to which we suspect we have been invited, and which we agreed to attend, only as a formality; we feel worse if we fail to show up for a friend’s wedding, and; we feel still more guilty if the wedding was our own. Given the felt variation in the consequences of promise, why suppose there is no significant variation in their most important normative feature, *i.e.*, their voluntary character? It is after all the feature that explains why they are binding at all. We are bound by our promises because they are the product of our moral agency; it is unsurprising that we feel more bound where our moral agency explains more of the obligation we assumed.

No doubt, some conceptual neatness is lost by allowing for variation in voluntariness. A Platonic concept of promise or waiver that encompasses all variants of those practices has its place, and indeed, this Article invokes such concepts to describe contract in terms of promise and permission. But identifying significant common features in compulsory and supererogatory promise is not at odds with identifying significant differences between these types of promises. Speaking of promises in a differentiated way allows us to incorporate more relevant information about a promise into our characterization of it, and it is more consistent with ordinary thinking about promises and their normative consequences.

22 For example, in the “personal sovereignty” account of autonomy defended by Jody Kraus, the principle of autonomy is either satisfied by a regime of contract, or it is failed. See Jody Kraus, *The Correspondence of Contract and Promise*, 109 COLUM. L. REV. 1603 (2009).

III. CONTRACT ON THE SPECTRUM OF VOLUNTARINESS

So far, I have suggested that we should see promises as varying in their degree of voluntariness. Here, I suggest that contracts are systematically of the least voluntary sort of promise. That is, they are usually the product of substantial material and moral constraint.

A. Material Constraint

Contracts are usually commercial. They take place in a market. The basic requirement of consideration in contract law ferrets out for enforcement precisely those promises and permissions that are made in exchange for some material benefit.

If promisors in contract make promises for material ends, their promises are similarly valued by their promisees for material reasons. By way of contrast, consider the context of most ordinary promises. Most private promises create or reinforce relationships between promisors and promisees; the point of assuming obligation is at least in part to obligate oneself — not merely to assure the other of performance. Promising to help a friend if and when she may need help has a different effect on a relationship than either handing over immediate assistance or handing it over when one observes need. A promise creates or reinforces a continuing normative relation, and that is often part of its ambition. Promising to help a friend also elevates personal values relating to friendship and aid to the status of obligation; and this alteration of the moral landscape to reflect one's values is also its ambition. Whether or not the value of assurance makes promises binding, the value of most ordinary promises is not reducible to assurance.

Contractual promises do not usually arise out of personal relations. They are not intended to create or support personal relationships through building blocks of obligation. They do not aim to create obligation *per se*. They do create obligation, but they are intended primarily to offer assurance. Contractual promises are commitment devices. The goal is to make more likely and credible parties' compliance with the terms of a planned exchange. The reasons for performance of contractual obligation motivate the formation of contract. The fact of contract (as opposed to the fact of agreement) merely layers existing reasons with a second set of reasons which may better motivate the parties to actually perform. But while normative reasons may be among the new reasons for performance created by contract, those normative reasons are not the point of contract. The point of contracting is the amoral reasons that also follow from contract, *i.e.*, reasons relating to the prospect of liability. Making a promise legally binding or forfeiting a right in contract is like tying

one's hands to the mast in order to avoid temptation; the legal dimension of the commitment is intended only to make one course of conduct more likely than another.

In contract, parties use the state like rope and mast — in order to make more likely their compliance with separately conceived obligations. If it were possible for parties to achieve the mutual assurance that legal obligation provides by some other means, *e.g.*, by having each party ingest a pill that will give her small electric shocks when she deviates from the agreed upon course of performance, then parties might forego the obligatory structure of contract. Indeed, parties probably prefer “self-enforcing” contracts which maintain a balance of power throughout contract that motivates each to perform in order to maintain the relationship and obtain further performance from the other party, without either having to rely on the specter of obligation. The need for obligation arises only because (or when) agreements are not self-enforcing in this way.

Most contractual promises and waivers are made to assure promisees/grantees that they will get something in return for conferring something of benefit on the promisor/grantor. Because most material needs in a capitalist society are met in the marketplace, some contracts (but clearly not all, or even most) are used to fulfill basic needs. Thus, once a party has decided she wants to eat, live in housing rather than on the street, obtain medical care, *etc.*, she has a choice among providers, but she must contract with someone if she is to meet those needs. The promises she makes and the permissions she grants in order to induce reciprocal promises to provide food, housing, *etc.*, qualify as voluntary but they are less voluntary than the typical private promise, in which material motivation is either absent or less salient. Similarly, waiver of a (default statutory or moral) right to leave or notice where wages are necessary for the employee to meet basic needs are less voluntary than waivers granted to those on whom one is not materially dependent — including waivers by employees with labor market power over their employers.

I take as a starting point that all the promises/permissions discussed above are voluntary and morally binding. As discussed above in Part II, even promises we make under material constraint reflect important moral deliberation, and such thinking differs across agents in a way that makes any promise a moral marker to some degree. The choices we make under constraint identify and distinguish us from one another.

Contractual promises, forged from material constraint and for material benefit, demonstrate the presence and limits of voluntariness. Consumption in an inevitably bounded market involves choice about how to allocate one's scarce resources, and these choices are important to how we think about ourselves and identify ourselves to others. This may be especially true in the

United States.²³ For the vast majority of people in developed countries who are neither living hand to mouth nor swimming in boundless luxury, contracting for goods and services is at once constrictive and expressive.

Understanding the ways in which contractual promises in particular do fulfill some of the ethical functions of promising at large should throw into relief the ways in which this species of promise is distinguishable and — from within the ethical framework of promise itself — often inferior to other kinds of promise. Although they are voluntary and valuable, by virtue of their material purposes contractual promises are less voluntary in the normatively relevant sense than most ordinary (non-legally binding) promises. Contractual promises that make it possible for promisors to obtain basic goods and services are even less so.

B. Moral Constraint

At first blush, it might appear that contractual promises are always of the supererogatory variety since contract law does not recognize as a consideration a commitment to conform to a preexisting duty.²⁴ But this rule refers only to legal duties. A commitment that brings a promisor into conformity with a moral duty qualifies as a new consideration.²⁵

In fact, by contrast with most ordinary private promises, most contracts fall into the category of promises to conform to moral duty. But the relevant moral duties are often imperfect.²⁶ They do not require that a person contract

23 See James Whitman, *Consumerism Versus Producerism: A Study in Comparative Law*, 117 *YALE L.J.* 407 (2007) (describing centrality of consumer identity in American culture).

24 2 U.C.C. § 209 (2004); RESTATEMENT (SECOND) OF CONTRACTS §89 (1981).

25 The point here is that where A and B contract, A and B usually have duties to each other outside of contract and their respective promises discharge those duties. My point is not that A need not confer consideration on B (or vice versa) in light of background duties; to the contrary, the most important duty that A has to B (and vice versa) arises as a result of her receiving a material benefit from B in connection with the planned exchange (*i.e.*, consideration). In some cases, receipt of a material benefit legally obligates the recipient to compensate even in the absence of an express promise or agreement (under unjust enrichment, restitution or quasi-contract). Those doctrines demonstrate the enforceable character of the background duty of reciprocity or fair play.

26 Imperfect duties “prescribe only the maxim of actions, not actions themselves,” or “leave[] a playroom (*latitudo*) for free choice in following (complying with) the law, that is, that the law cannot specify precisely in what way one is to act

with the particular party with whom she contracts and do not fully dictate the terms.

What are the background duties realized in contract? They are heterogeneous.²⁷ Some contracts arise from a *legal* duty to contract. In light of one's participation in a particular line of business, one may have a duty to contract without discriminating (*e.g.*, on the basis of race or a preexisting medical condition) or in abuse of a market position. Those duties are perfect where the choice to offer services or goods to some requires that one be prepared to contract with identifiable persons. In the latter cases, contract is actually mandatory. But even aside from these exceptional cases of mandatory contract, contract is less voluntary to the extent that one complies with a preexisting legal duty by contracting with some indeterminate set.

Still more often, contracting is constrained by duties of exchange that are not legally binding. In every contract (by virtue of the legal requirements of consideration and mutuality of obligation), each party gives up something to the other. They do so in accordance with a planned exchange. With the arguable exception of conduct within personal relationships, the bare fact that one expects to receive something from another person obligates one to give something back *with or without promise*. You may not be required to give something in particular back, or to the particular person who conferred a benefit on you, but some kinds of payback are adequate and others are not. The background moral duty is the duty of reciprocity²⁸ or fair play.²⁹ In promising you specify exactly what you will do to comply with duty when it arises.

Duties of reciprocity always underwrite contractual promise because obligations are only contractual (legally binding) when they form an exchange. Moreover, modern law treats contractual promises as dependent promises, in that the obligations of a contracting party do not even go into effect until the other party has performed.³⁰ It is thus the receipt of benefit rather than the promise to confer a benefit that underwrites the *contractual* obligation

and how much one is to do." See IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 153 (Mary Gregor ed. & trans., 1996).

27 See Greg Klass, *Promise etc.*, 45 SUFFOLK U. L. REV. 695, 702-03 (2012).

28 See LAWRENCE BECKER, RECIPROCITY 89-92 (1986) (describing the popular intuition that there is a duty to reciprocate and elaborating a virtue-based defense of a general moral obligation to reciprocate any benefits received). See also David Schmidtz, *What We Deserve, and How We Reciprocate*, 9 J. ETHICS 435, 452 (2005).

29 See John Rawls, *Legal Obligation and the Duty of Fair Play*, in *LAW AND PHILOSOPHY* 3, 10 (Sidney Hook ed., 1964); H.L.A. Hart, *Are There Any Natural Rights?*, 64 PHIL. REV. 175, 185 (1955).

30 RESTATEMENT (SECOND) OF CONTRACTS § 238 (1981).

to complete an exchange. Contractual promise creates a new reason for complying with one's obligations, but the duty to compensate the other party does not depend on it.

Neither the duty not to induce misplaced reliance nor the duty to compensate upon receipt of a material benefit is legally binding *per se*. Nevertheless, both are imminent in the law of contract broadly conceived. Even outside the doctrine of consideration, the law of promissory estoppel, misrepresentation, unjust enrichment and restitution gives limited legal effect to these background duties. These legal doctrines recognize related moral duties even if the legal forms do not encompass their moral precursors in their entirety.

One might resist the idea of moral constraint here by characterizing the duties of reciprocity as themselves voluntary because one chooses whether or not to enter an exchange. But this proves too much, for then most of what we owe others may be construed as voluntary. Voluntary obligation is only distinct from involuntary duty if it refers to the voluntary assumption of obligation, not the voluntariness of conduct that gives rise to obligation.

Reciprocity normally requires that we deliver something in contract and imposes some further requirements as to what qualifies as an adequate reciprocal benefit.³¹ Our choice of terms is sometimes further constrained by the relationships with the people with whom we contract or others in a given contractual community. Choice may be still further morally constrained by the burdens of background distributive injustice, which may not permit a party to exploit her market position *vis-à-vis* a particular buyer or seller.³² The range of contract terms that is morally available is often narrower than it appears at first blush, if we begin by assessing all those which we are capable of obtaining.

Whatever the particular constraints on a party contemplating contract, those background duties are compatible with a range of promises and qualifying permissions. A party entering contract chooses the particular promises and waivers she makes. But that choice does not come out of nowhere, and the reasons she has for making the promises and granting the permissions she ultimately makes and grants are not usually of the same sort that motivate promises and waivers outside of contract. Material and morally restrictive reasons within the world of contract make promise and permission in that sphere a less celebratory exercise of moral agency. Promises and permissions

31 See Thomas Pink, *Promising and Obligation*, 23 PHIL. PERSP. 389, 401 (2009).

32 See Aditi Bagchi, *Distributive Injustice and Private Law*, 60 HASTINGS L.J. 105 (2008); Aditi Bagchi, *Distributive Justice and Contract*, in PHILOSOPHICAL FOUNDATIONS OF CONTRACT LAW 193 (Klass et al. eds., 2014).

are voluntary, but contractual promises and contractual permissions tend to be less voluntary than others.

CONCLUSION

This Article endorses enthusiastically Dagan and Heller's proposition that enhancing contractual choice is important to contract, but wonders at the selected end point of their argument. Precisely because we must consider the choices that contracting parties face before celebrating the fact of their choice to contract, we should consider not just the legally recognized contractual possibilities but also the market-based and moral limitations that parties face. These in turn should inform what kinds of contracts the state enables, and, as Dagan and Heller allow, it might turn out to require formally constricting choices rather than formally expanding them.

Since most theories of contract take contractual obligation to be voluntary, it is a welcome turn to see Dagan and Heller press the quality of choice that contracting parties face. But their focus on contract types limits their inquiry to legal restrictions on individual transactions; the most severe constraints on contractual choice, however, lie elsewhere. This Article has offered a picture of contract that is more compatible with theirs than most theories of contract, but expands substantially the scope of their critique. Many contractual promises poorly reflect the moral agency of contracting parties and for that reason should be regarded as less voluntary. To the extent that we defer to contracting parties on the terms of their transactions out of respect for the voluntary character of those transactions, we should adjust our regulatory stance accordingly.

