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# TWO VISIONS OF CONTRACT

*Hanoch Dagan\**

JUSTICE IN TRANSACTIONS: A THEORY OF CONTRACT LAW. By *Peter Benson*. Cambridge, MA: The Belknap Press of Harvard University Press. 2019. Pp. xii, 610. \$85.

## INTRODUCTION

Contract is one of the most fundamental legal concepts and one of the basic building blocks of our social and economic life. Contract theory must therefore be attentive both to the defining features of contract as a legal construct and to the conceptions of the person and of our interpersonal relationships on which they rely. In his ambitious book, *Justice in Transactions: A Theory of Contract Law*, Peter Benson<sup>1</sup> offers such an account of contract. *Justice in Transactions* carefully examines a variety of contract doctrines from formation to enforcement and defends a normative vision of the parties and their relation. Benson is one of the most thoughtful, sophisticated, and provocative contract theorists of our time, and *Justice in Transactions* is likely to become the definite modern statement of the venerable transfer theory of contract.

Benson's thesis is that contract is "a form of transactional acquisition—a transfer of ownership between the parties—that is contractually specified and complete at contract formation" (p. 41). Formation of contract in this vision is a "representational medium of mutual promises," through which each party moves "a substantive content" from her "rightful exclusive control" to the other's (p. 321). This means that the performance of a contract is of no normative significance: it merely delivers to the promisee's factual possession what was rightfully hers (pp. 24, 358–59). Accordingly, it implies that breach of contract is tantamount (or at least analogous) to conversion (p. 247).

Transfer theory figures in some prominent philosophical accounts of contract, notably Kant's and Hegel's.<sup>2</sup> But Benson's account does not rely on "any particular philosophical framework" (p. 476). Rather, it is offered as "a

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2. See generally Peter Benson, *Abstract Right and the Possibility of a Nondistributive Conception of Contract: Hegel and Contemporary Contract Theory*, 10 CARDOZO L. REV. 1077 (1989); Helge Dedek, *A Particle of Freedom: Natural Law Thought and the Kantian Theory of Transfer by Contract*, 25 CANADIAN J.L. & JURIS. 313 (2012).

public justification,” which is based on “notions implicit in the public legal culture and the private law of a liberal society” (p. 27). Contract theory, in this view, must present “a coherent and morally acceptable account of contract law” that draws on plausible interpretations of its main doctrines and expresses “normative ideas and ideals,” which are more or less intuitive “to general educated common sense.”<sup>3</sup>

A theory of contract, Benson insists, must be morally acceptable because contract law “always involve[s] coercible correlative rights and duties of performance” (p. 13). Transfer theory ensures contract’s legitimacy since it relies on a conception of the parties “solely as individual private owners” who respect each other’s independence and thus instantiates in law a conception of justice in transactions that is “indifferent to the satisfaction of substantive needs and purposes” (pp. 26, 396).

*Justice in Transactions* is a long book, which offers many insights and explores a series of major debates in law and legal theory, and I cannot possibly cover them all in this short Review. I focus on Benson’s conceptualization and normative defense of contract as a transfer of ownership. In order to both appreciate the significant contribution of *Justice in Transactions* to contract theory and explain what are in my view its critical deficiencies, I will contrast Benson’s account with a competing understanding of contract, which I have developed with Michael Heller in recent years.<sup>4</sup> Contract, in my view, is a plan coauthored by the parties in the service of their respective goals; contract law is guided by an autonomy-enhancing *telos*; law’s justification for enforcing contracts is premised on the liberal commitment to reciprocal respect for self-determination (rather than independence).

This comparison helps to refine three lines of critique of transfer theory. Transfer theory, I will argue, misrepresents law’s facilitation of contract as an exercise of implication; it marginalizes contract law’s robust commitment to relational justice; and it understates the way law’s regard to the parties’ future selves limits the range of enforceable commitments people can undertake. These pitfalls are manifestations of a deeper difficulty of transfer theory. It relies on an overly restrictive justificatory premise, which leads it to obscure the full implications of contract’s intertemporal dimension.

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3. P. 14. Benson argues that a public justification *must* “emerge from a concrete and detailed analysis of the specific doctrines.” P. 20. But there is no straightforward way to analyze these doctrines at face value, as this proposition implies, because any exercise of legal interpretation *necessarily* involves marginalization and demarginalization of various doctrinal features. See Hanoch Dagan & Avihay Dorfman, *Against Private Law Escapism: Comment on Arthur Ripstein*, Private Wrongs, 14 JERUSALEM REV. LEGAL STUD. 37, 39–45 (2016).

4. See HANOCH DAGAN & MICHAEL HELLER, THE CHOICE THEORY OF CONTRACTS (2017); Hanoch Dagan & Michael Heller, *Choice Theory: A Restatement*, in RESEARCH HANDBOOK ON PRIVATE LAW THEORY 112 (Hanoch Dagan & Benjamin Zipursky eds., 2020).

## I. THE CHALLENGE

Before I can delve into the two visions of contract I wish to compare and their main differences, it is important to clarify the challenge contract theory must face. Benson's analysis provides a perfect starting point for appreciating law's justificatory burden both in what it convincingly establishes and in what is, I will claim, an unnecessary, and indeed undesirable, excess on which he insists.

As Benson claims early on, because "contractual obligation is always coercively enforceable obligation," its legitimacy requires that it can be "shown to be consistent with the freedom and equality of the parties" (pp. 1–2). This statement correctly implies that reference to the benefits of the practice of contract to society at large, such as its contribution to aggregate welfare, cannot suffice. What is needed in order to properly justify contract law is a justification that is attuned to contract's bilateral nature, one that justifies the promisor's coercible obligation *to the promisee*.<sup>5</sup>

To see why such a justification is not trivial, Benson invokes the "question that [Lon] Fuller and [William] Perdue made central for modern contract theory but that, despite the passage of more than eighty years [from the publication of their seminal contribution],<sup>6</sup> has yet to receive a fully satisfactory answer" (p. 361). The problem, as he notes, arises from "the difference in time" between promise and performance (p. 361); it focuses, in other words, on the enforcement of wholly executory contracts.

Fuller and Perdue's specific doctrinal question is why contract law goes beyond promisors' reliance interest and vindicates their expectation interest (pp. 5–7). This seemingly technical detail raises a series of normative queries: Why is contract law willing to coercively enforce promises even when non-performance generates no detrimental harm? What can legitimize, in these circumstances, law's disrespect of the updated preference of a promisor who has changed her mind? And how can this be justified even where the promisor has not deliberately intended to be so bound? (pp. 12, 16–17, 19, 469).

Benson rightly claims that law in a liberal polity must be able to justify to a promisor why it authorizes the promisee to insist that the promisor does not renege on the promise even in such circumstances, and why it is furthermore willing to coercively enforce the promise in case she nonetheless fails to perform. He is thus also correct that a liberal theory of contract must not be contented with answers that rely either on the public benefits that vindicating promisees' expectations may generate or on the virtues that moralists attribute to promise keeping.<sup>7</sup>

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5. See CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* 14 (2d ed. 2015) (1981).

6. See L.L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages* (pts. 1 & 2), 46 *YALE L.J.* 52, 373 (1936–1937).

7. Because liberalism takes seriously the distinction between persons, liberal law requires that defendants should be entitled to a justification that goes beyond reference to the desirability of the state of affairs that would result if the plaintiff's complaint were to generate

Benson, however, goes further than that. For him, a proper justification must fit private law's "organizing idea of liability for misfeasance" only, in which "a party is subject to liability only insofar as he or she may reasonably be viewed as injuring or interfering with another's ownership or rightful exclusive possession of something" (pp. 367, 377). This framework imposes only negative prohibitions; that is, duties of noninterference, rather than positive duties to assist (p. 377). It thus vindicates the parties' interpersonal independence by rendering their respective needs, desires, circumstances, interests, and wellbeing, as well as purposes and motives, legally irrelevant (p. 378). The parties must "respect each other as mutually exclusive private owners"; but they need not "justify their conduct in light of these or any other substantive ends" (pp. 27, 367–69, 371–72, 377–78).

In that, transfer theory expresses a conception that Benson terms "juridical autonomy," which "presupposes particular notions of freedom and equality specified in terms of the innate mutual independence of all persons in relation to others" (pp. 373, 468–69). This conception emphatically excludes any reference to the parties' self-determination; namely, their "forming and rationally pursuing a conception of their substantive good" (p. 469). It likewise rejects any consideration of substantive equality, subscribing instead to formal equality in which "the claims parties make in relation to each other must be absolutely the same" (p. 373). As we will see, this conception of our juridical interpersonal life shapes transfer theory; it also explains much of my disagreement with Benson.

## II. TRANSFER OR PLAN

Transfer theory, Benson writes, follows the footsteps of contract's legacy at common law, where "historically, recognition of the executory contract . . . was the culmination of a long development that began centuries earlier with . . . the immediately executed barter or exchange" (p. 334). Whereas barter resulted in a transfer of ownership, "according to the earliest law, prior to payment of the price or to delivery, the parties might withdraw without penalty—all the legal effects occurring only with the actual performance" (p. 334). Benson rightly observes, however, that "the true juridical ground," and thus the ultimate mechanism that effectuated barter, was "the direct relation of will to will" that constitutes "the parties' mutual recognition" (p. 338). This means that "[t]he crucial conceptual move from immediate exchange to contract is the explicit (and therefore doctrinal) positing of a normative-temporal difference between agreement and performance" (p. 338). This conceptual move becomes possible, however, once we recognize that

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the remedy sought. See HANOCH DAGAN, RECONSTRUCTING AMERICAN LEGAL REALISM & RETHINKING PRIVATE LAW THEORY 11, 106 (2013). This means that private law should be able to justify to a defendant why she should be forced to be the agent of remedying the plaintiff's predicament as well as why the defendant is entitled to the prescribed remedy. See *id.* at 110. The former prong points to the insufficiency of utilitarian arguments; the latter suggests that virtue ethical justifications are likewise inadequate.

the parties' representations establish "the moment of the transfer of present exclusive control over a determinate object" (p. 339), so that "the whole of the juridical force and effect of the transaction [is] lodged in the moment of mutual assents alone," and performance is a mere consequence (p. 338). Benson's conceptualization of contract formation, performance, breach, and remedies nicely complies with this model of *contract as an extension of barter*.

Thus, "the parties' mutually related promises" at the moment of *formation* "function as representations, which, insofar as they can be reasonably viewed as manifesting present complete decisions to move something of value from the exclusive control of one party into that of the other party, are attributed a juridical meaning in terms of ownership and a transfer of ownership."<sup>8</sup> This means that formation is not a "joint undertaking" of a "cooperative arrangement[]"; rather, formation is a "reciprocal exchange" (p. 470), which "enshrines the basic normative independence of each party vis-à-vis the other insofar as each obtains rightful exclusive control against the other with respect to the substance of the consideration" (p. 352).

Since the promisee's "right to be put into possession of the promised thing or its value[] is fixed and crystallized" at formation, *performance* is "the contractually stipulated necessary mode of the promisor not injuring the promisee's already complete entitlements" (p. 352). Therefore, Benson rejects the term the Restatement (Second) of Contracts (following Fuller and Perdue) uses for the promisee's rightful interest against the promisor: transfer theory implies that rather than an expectation interest,<sup>9</sup> the promisee's "absolute and unconditional" entitlement is properly called the "performance interest" (pp. 264, 341, 352–53). Correspondingly, Benson conceptualizes the parties' actual performance as "taking possession via delivery" (p. 359). Performance, in this view, "does not add to or in any way change the rightful acquisition," which as between the parties is completely "effectuated at formation" (p. 64). Rather, performance only changes "the locus of rightful physical possession from promisor to promisee."<sup>10</sup>

Thus, the promisor's failure to perform must be understood "as an interference with the plaintiff's exclusive right to an asset—the substance of the consideration—that has already been moved to her at formation" (p. 251), which implies a "striking parallel" between *breach* of contract and conversion (p. 247). Indeed, once formation is "viewed as a form of transactional acquisition and transfer of rightful control as between the parties" (p. 251), any withholding of the promised performance is a failure to deliver what already belongs to another. Breach is "a per se wrongful deprivation and injury" (p. 251), because "[b]y failing to deliver, the promisor must necessarily be

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8. P. 393; *see also* p. 68.

9. *See* RESTATEMENT (SECOND) OF CONTRACTS § 344 (AM. L. INST. 1981).

10. P. 359. This is because performance provides public notice, which is necessary in order to make "the rights-establishing power of the contract . . . operative vis-à-vis third parties." P. 359.

viewed vis-à-vis the promisee as wrongfully exercising factual control over the promised subject matter against the promisee's right to have or enjoy it" (p. 252); a breaching promisor "deprives" the promisee of the "promised performance that [he] has vested with her, as a matter of rights, at contract formation" (p. 247).

Finally, if breach is tantamount to conversion, contract *remedies* must not be understood either as "the contingent product of the parties' individual or joint decisions" (p. 262) or as "implied contractual terms" (p. 261). There is, in this view, a "legally categorical difference between terms and remedies" (p. 313). Remedies "represent a second and distinct step that is completely ancillary and subordinate to and that aims to vindicate the plaintiff's performance interest" (p. 261). They are "the law's coercive response to the civil wrong of breach," namely, to the promisor's interference with what "rightfully belongs to [the promisee] exclusively" (p. 255). Thus conceived, contractual remedies embody "the organizing principle of liability for misfeasance only": the promisor is liable "for violating a negative prohibition against interference and injury, not a positive duty to preserve, assist, or enhance" (p. 255).

Indeed, transfer theory's conceptualization of contract formation, performance, breach, and remedies brilliantly dissolves contract law's justificatory challenge as Benson understands it. Formation amounts to complete juridical acquisition of exclusive rights "prior to and independent from actual performance and irrespective of whether either party detrimentally relies on the other's promise" (p. 8). Thus, although factually "breach ordinarily consists in a defendant's pure omission, its normative significance is not that it is a failure to confer a benefit but rather a wrongful injury" (p. 368) that interferes with what is already under the promisee's "rightful exclusive control" (p. 393). Therefore, even though "the duty to perform is expressed in positive form," it "should properly be viewed as based on a negative prohibition: do not injure or interfere with what comes under another's rights" (p. 66). Thus, misleading appearances notwithstanding, contract law applies its coercive power only "defensively, healing a disturbed status quo" (p. 8); it annuls the "appearance of interpersonal validity attaching to the defendant's violation" (p. 259) of "the plaintiff's right to exclude" (p. 257). Contract law, again notwithstanding misleading appearances, "is fully consistent with the independence of personality": it only requires the parties to respect each other's "exclusive and independent juridical self" (p. 385); and it thus "respects them as free and equal persons with the moral power to be unconditionally independent in the face of everything given" (pp. 393-94).

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If juridical autonomy, which *strictly* upholds the parties' interpersonal independence, is the sine qua non to the legitimacy of contract law as transfer theory assumes, Benson's model of contract as an extension of barter may

be the best we can do.<sup>11</sup> But, Benson's skepticism notwithstanding, the competing view of contract as a *joint* undertaking of a *cooperative* arrangement actually fits "general educated common sense" (p. 14). Thinking about contract in *these* terms implies that formation is *not* the only normatively relevant moment in the life of contract, as it is in transfer theory. It thus requires reinstating the full significance of contract's intertemporal dimension. Focusing along these lines on the times of contract, suppressed by transfer theory, this competing account of contract brings to light the core achievement of contract, which transfer theory fails to capture, while complying with contract law's justificatory burden, properly refined.

Historically, contract might have emerged from barter.<sup>12</sup> But contract's vocation need not be dependent on its path. The shift from validating barter to enforcing contract indeed extends the range of exchanges people can make, but it does much more than that. Contract is the means through which we can legitimately enlist others to our own goals, purposes, and projects—both material and social.<sup>13</sup> 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, and contract law provides them, as we will see, with the indispensable infrastructure that both facilitates this risky venture and ensures its integrity.

Contract is, as Charles Fried argued, "a kind of moral invention" exactly because it extends people's reach in this way.<sup>14</sup> By expanding the available repertoire of secure interpersonal planning engagements beyond the realm of close-knit interactions, contract law dramatically augments people's ability to plan. In that it makes a crucial contribution to their autonomy because self-determination involves planning. People, to be sure, may change their plans, and autonomous persons must be entitled 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; namely, to self-determine.<sup>15</sup>

11. The language of the text is intentionally cautious. Benson relies, as we have seen, on a view of ownership as "rightful exclusive control over something," p. 383, which is, as I argue elsewhere, very different from the genuinely liberal conception of ownership and is furthermore indefensible. See HANOCH DAGAN, *A LIBERAL THEORY OF PROPERTY* 1–9, 41–147 (2020). This pitfall of Benson's account, shared by other versions of transfer theory, leads to further conceptual and normative difficulties. See DAGAN & HELLER, *supra* note 4, at 39–40; Hanoch Dagan & Michael Heller, *Autonomy for Contract, Refined*, 39 *LAW & PHIL.* (forthcoming 2021) (manuscript at 11–15) (on file with the *Michigan Law Review*).

12. The qualified language of the text is intentional. See Roy Kreitner, *Toward a Political Economy of Money*, in *RESEARCH HANDBOOK ON POLITICAL ECONOMY AND LAW* 7, 10 n.9 (Ugo Mattei & John D. Haskell eds., 2015).

13. See FRIED, *supra* note 5, at 8.

14. Charles Fried, *The Ambitions of Contract as Promise*, in *PHILOSOPHICAL FOUNDATIONS OF CONTRACT LAW* 17, 20 (Gregory Klass, George Letsas & Prince Saprai eds., 2014).

15. Cf. Charles R. Beitz, *Property and Time*, 26 *J. POL. PHIL.* 419, 427 (2018) (explaining the significance of security of possession in property in reference to the intertemporal nature of self-determination).



This autonomy-enhancing function of contract depends, as noted, on the reliability of contractual promises, which explains why a contractual right is the right to expect; that is, why contract law does not merely protect promisees' actual reliance. To perform its core mission of ensuring the reliability of wholly executory contracts, contract needs to recruit law's coercive power against promisors even before promisees have actually been harmed.<sup>16</sup> Moreover, because contract's empowerment potential depends on people's ability to count on the representations of others, an autonomy-enhancing view of contract implies that individuals may be required to satisfy promisees' expectations even if they only inadvertently invoked the convention of contract with no subjective intention to be legally obligated.<sup>17</sup>

As noted, for Benson these last observations are the source of contract's legitimacy crisis. Elsewhere I explain in some detail why they need not be.<sup>18</sup> Contract law, and private law more generally, can be legitimate even if law rejects the overly demanding criterion of strict adherence to interpersonal independence as long as it takes seriously the more fundamental requirement of interpersonal justification. Private law in general and contract law more particularly are premised on reciprocal respect for self-determination, not independence.<sup>19</sup> This implies that while there are good reasons to resist excessive interference with people's autonomy that many affirmative interpersonal duties to aid others entail, there is no reason for the blanket rejection of affirmative duties that Benson's notion of juridical autonomy prescribes. As H.L.A. Hart explained, since some, but not all, infringements of our independence ignore "the moral importance of the division of humanity into separate individuals and threaten the proper inviolability of persons," we must always distinguish "between the gravity of the different restrictions on different specific liberties and their importance for the conduct of a meaningful life."<sup>20</sup> In a liberal polity, the distinction between duties of right and duties of virtue need not, and does not, track the misfeasance-nonfeasance distinction; duties of right are not only duties of abstention.

Thus, once we recognize that people are justifiably expected to pay some modest price to benefit others with whom they engage or interact, we realize that there is no way, and no reason, to bypass the modest interpersonal burden that law imposes on promisors who voluntarily invoke the contract convention while engaging with promisees. Promisees *are* justified in expecting

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16. See Hanoch Dagan, *The Value of Choice and the Justice of Contract*, 10 JURISPRUDENCE 422, 428–29 (2019).

17. See Jody S. Kraus, *The Correspondence of Contract and Promise*, 109 COLUM. L. REV. 1603, 1620–25 (2009).

18. For contract law, see Dagan & Heller, *supra* note 11. For private law more generally, see Hanoch Dagan & Avihay Dorfman, *Justice in Private: Beyond the Rawlsian Framework*, 37 LAW & PHIL. 171 (2018), and Hanoch Dagan & Avihay Dorfman, *Just Relationships*, 116 COLUM. L. REV. 1395 (2016) [hereinafter Dagan & Dorfman, *Just Relationships*].

19. See Dagan & Dorfman, *Just Relationships*, *supra* note 18; DAGAN & HELLER, *supra* note 4, at 41–47.

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

promisors to submit themselves to the jurisdiction of contract law notwithstanding the cautionary burden this may impose on them, because this is the modest price each pays so the other can benefit from contract law's potential to advance our self-determination.

Rather than rehearsing the details of this argument, the remainder of this Review contrasts these two competing views of contract at the back end by comparatively examining their major ramifications. I divide this inquiry into three sections, dealing respectively with the task of contract law, its proper conception of justice, and the appropriate limit of its reach. The last ramification, dealing with the limits of contract, also reframes the challenge posed by the difference in time between promise and performance.

### III. IMPLICATION OR FACILITATION

Adherence to interpersonal independence implies that contractual terms can be coercively enforced only if they are either expressly spelled out by the parties or implicit in their particular interaction. This stance may explain the traditional reluctance of common law judges to enforce agreements that are relatively thin in explicit terms.<sup>21</sup> But contemporary contract law takes a diametrically opposed attitude: it is typified by a robust apparatus of default rules that the contracting parties can change, but which otherwise apply whether or not the parties intended that they would.<sup>22</sup> Contemporary contract theory conceptualizes these rules in terms of filling gaps in incomplete contracts.<sup>23</sup> Faithful to its commitment to interpersonal independence, however, *Justice in Transactions* repudiates, as it must, this view: "parties can be bound," Benson argues, "only by what they have done" (p. 132).

For transfer theory, default rules of contract law do not fill gaps, but are rather implications of the parties' particular "self-regulating" transaction (p. 123). Objectively construed, "enforceable agreements are not contractually incomplete" (p. 23). Rather, they have "all the internal resources needed to determine what can and should be implied" (p. 23). By spelling out "what is reasonably required to make sense and to secure the full and fair value of the terms actually agreed to" (p. 131), implication can "specify" the "'secondary' or 'dependent' terms and conditions" of a transaction, which "fill out, qualify, and further determine the performances owed as between the parties" (p. 124). Implication must follow the presumed intent of the particular parties of the actual transaction. It "refers to what the parties to a given contract *must* reasonably have intended because *necessary*" (p. 134) to prevent rendering their contract "futile, without value or benefit, or just manifestly ab-

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

22. See *id.* at 121.

23. See Charles J. Goetz & Robert E. Scott, *The Limits of Expanded Choice: An Analysis of the Interactions Between Express and Implied Contract Terms*, 73 CALIF. L. REV. 261, 261 (1985).

surd” (p. 142). This test of “transactional necessity” ensures that implication complies with the rigid requirements of interpersonal independence.<sup>24</sup>

Implication can admittedly explain a subset of contemporary contract law’s default rules apparatus. But it can hardly account for its breadth and depth. If contract law had been guided by the rigid approach of juridical autonomy, it would have followed the old common law approach that, by refusing to enforce an agreement if the parties have not spelled out the main terms of their interaction, reduced the divergence between their actual intent and the rules that governed their agreements. Current law, however, is very different. Both the Uniform Commercial Code and the Restatement (Second) of Contracts go out of their way to proactively *facilitate* transactions by offering defaults that can fill gaps, even regarding crucial aspects of a transaction, such as price.<sup>25</sup>

This understanding of the function of law’s default rules as gap-fillers clearly departs from transfer theory’s adherence to interpersonal independence. But it need not, and I think should not, subordinate people’s *interpersonal* interactions to the collective good. Rather, properly understood, the *raison d’être* of modern contract law’s facilitative approach is to expand the scope of people’s cooperative engagements that may be conducive to their own future plans. A genuinely liberal view of contract must not be contented with implication, because nothing short of proactive facilitation properly complies with its underlying commitment to empower our self-determination.<sup>26</sup>

Substituting implication of the terms of transfer with the facilitation of joint undertakings of cooperative plans in the service of the parties’ self-determination properly accounts for the capacious fabric of defaults that can hardly fit the straitjacket of transactional necessity. It also helps representing doctrines that may be squeezed into this framework but are better understood as core features of liberal contract law. It furthermore offers a critical perspective on still other doctrines that transfer theory valorizes but that should actually be, if contract is to enhance our autonomy, reformed. Let me give four examples for these effects of settling with implication, rather than facilitation, running along the spectrum from redundant explanations to apology.

#### A. Consequential Damages

Benson concedes the challenge consequential damages for breach pose to transfer theory: as Robert Pothier noted, a consequential loss stands for “the breach’s impact on the plaintiff’s *independently* chosen purposes and

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24. See p. 133.

25. See U.C.C. §§ 2-204(3), 2-305 (AM. L. INST. & UNIF. L. COMM’N 2017); RESTATEMENT (SECOND) OF CONTRACTS § 33 (AM. L. INST. 1981).

26. See generally Hanoach Dagan, *Types of Contracts and Law’s Autonomy-Enhancing Role*, 5 EUR. CONT. L. & THEORY (forthcoming 2020) (on file with the *Michigan Law Review*).

uses” (p. 276), rather than for not obtaining the “performance interest in possession” itself (p. 276), which is “the thing” that was supposed to be delivered (p. 277). Benson rescues the by now canonical rule of liability for consequential loss by invoking implication: a promisor should be liable for such losses where the promisee can show that “the use of the promised subject matter” was “reasonably and mutually contemplated by the parties’ mutual assents at contract formation” (pp. 276–79). This is a convincing response to Pothier. But from the perspective of an autonomy-enhancing conception of contract it is one thought too many. Contract law is supposed to facilitate parties’ efforts to mutually benefit each other’s future plans, and the contemplated uses of the parties’ respective performances are obviously the point of their joint undertaking.

### B. *Contract Types*

Transfer theory, as Benson claims, has no difficulty in respecting “the shared understandings of parties in their social and economic roles in different transaction-types as these have developed and are continuing to develop over time” (p. 433). Benson furthermore concedes that insofar as these contract types (as I call them) “become routinized and culturally familiar to market participants,” contract law can validate their “principles, standards, and rules,” and thus (as a happy side effect) provide “guidance of conduct in other transactions yet to come” (pp. 432–34). This is surely true, but from an autonomy-enhancing perspective such a reactive stance is quite disappointing.

As Heller and I argue in *The Choice Theory of Contracts*, a genuinely liberal contract law, which takes seriously the commitment to our self-determination, must ensure the availability of multiple contract types that can provide people multiple off-the-shelf options for interpersonal interaction.<sup>27</sup> More specifically, contract law must, and to some (limited) extent already does, provide a sufficiently diverse repertoire of contract types for each major contracting sphere—commerce, work, intimacy, and home—so as to offer people meaningful choice for these important spheres of social activity and interaction.<sup>28</sup> For contract types to be autonomy enhancing along these lines, they need to be *partial functional substitutes* for each other: “They need to be substitutes because choice is not enhanced with alternatives that are orthogonal to each other; and their substitutability should not be too complete because types that are too similar also do not offer meaningful choice.”<sup>29</sup> Choice theory congratulates contract law’s performance on this front insofar as it relates to the commercial sphere (consider agency contracts, franchise contracts, partnership contracts and the like); and it offers

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27. DAGAN & HELLER, *supra* note 4, at 102–09.

28. *Id.* at 102–05.

29. *Id.* at 97.

some reforms as per the other spheres of contracting—work, intimacy, and home.<sup>30</sup>

### C. *Gratuitous Promises*

Benson's model of contract as an extension of barter implies that—just as with barter—contracts can be formed only if “promise and consideration are mutually joined as each given for the other” (p. 78). This is why contract formation necessarily involves a “promise-for-consideration” (p. 47), and gratuitous promises are “normatively distinct” (p. 400) from contractual ones: the duties gratuitous promises give rise to are thus necessarily “purely moral and noncoercible” (p. 401). Given such a qualitative and irreducible difference, transfer theory embraces the common law's traditional exclusion of “bare” promises from contract law, “however seriously made [and] memorialized” they may be (p. 58). Benson, to be sure, recognizes the veteran practice of the seal, which “can produce the very same contractual effects” for a mere gratuitous promise (p. 437). But he insists that this need not affect his account of contract *per se*, since here the seal functions as a power-conferring device, whose familiarity to the parties assures that its use is intended to produce such legal effects.<sup>31</sup>

An autonomy-based theory of contract analyzes these issues quite differently. Contract in this view is understood, as noted, as an *essentially* power-conferring institution, with self-determination as its grounding principle.<sup>32</sup> This does not mean that it is unconcerned with the specter of inadvertent invocation of contract. Ensuring the promisor's full voluntariness—not only regarding her interaction with the promisee but also with respect to its legal consequences—is a challenge even for Benson's scheme, which heavily relies on implication (and, of course, on the objective theory).<sup>33</sup> But this concern does not justify abdicating liberal law's obligation to facilitate through contract our self-determination. Just as the seal may have partially solved this worry, contract law can resort to other means to ameliorate—if not fully address—it, be they doctrines like duress and misrepresentation or other formal requirements, such as writing.

Therefore, Benson's claim that once the significance of the seal “is no longer generally understood in practice,” contract law should fall back to “the baseline requirement of consideration” (p. 439) cannot be satisfactory. A genuinely liberal contract law, which takes seriously its core mission of fa-

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30. See *id.* at 67–78, 93–124.

31. See pp. 436–39.

32. See DAGAN & HELLER, *supra* note 4, at 37–47. Careful readers may observe that the text highlights one of the most fundamental distinctions between transfer theory (at least as Benson presents it), which perceives contract as a duty-imposing institution, and choice theory, which insists that it is essentially power-conferring. I have criticized the duty-imposing view of contract, which typifies both transfer theory and T.M. Scanlon's assurance theory, elsewhere. See *id.* at 37–39; Dagan, *supra* note 16, at 426–29.

33. See chapter 3; section 2.2.

cilitating joint undertakings for cooperative engagements and furthermore appreciates that there are many contexts in which this would not involve new consideration, must proactively construct the means that would give effect to such endeavors. A simple solution was provided many years ago by Samuel Williston, who drafted the Uniform Written Obligation Act (enacted now only in Pennsylvania), which renders enforceable any written and signed promise that contains an “express statement . . . that the signer intends to be legally bound.”<sup>34</sup>

#### D. Liquidated Damages

Finally, Benson’s defense of the traditional doctrine governing liquidated damages nicely follows transfer theory’s understanding of breach as a wrong. The parties’ intent cannot, under this view, confer upon them the power to determine the compensation owing for breach, even where there is no concern for the promisor’s vulnerability. The most the parties can do is to indicate to the reviewing court their assessment of the performance interest. The final word must be the court’s, whose task is to determine whether “the quantum of the agreed damages sum [is] reasonably commensurate with that interest” (p. 208). The fact that an enhanced measure is used, for example, in order to reinforce the promisor’s incentive to perform is of no moment even where it “serves *both* parties’ *ex ante* rational interests” (pp. 207–09, 212–13).

But once we no longer limit contract to cases of extended barter, this analysis collapses. There is no reason to categorically deprive the parties from the power to determine contract remedies. Quite the contrary: their plans should, as they typically do, cover the eventuality of breach as well; and if they can *ex ante* devise together a mutually satisfying formula for this contingency, a facilitative law should not hesitate to follow suit. *Ex post* fairness review may well be appropriate in contract types in which promisors are vulnerable to making suboptimal choices. But where sophisticated parties to complex commercial contracts use a liquidated-damages clause in anticipation of possibly unverifiable harms of breach (or for any other reason that fits their cooperative engagement), an autonomy-enhancing contract law must validate its full effect.<sup>35</sup>

### IV. FAIRNESS OR RELATIONAL JUSTICE

Transfer theory’s commitment to reciprocal respect for independence and its notion of implication undergird its conception of contractual fairness. In transfer, the parties express their formal equality as owners. Therefore, Benson explains, the law can, indeed must, impute to them a presumption “to transact for equal value” (p. 174). Like other exercises of

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34. See ROBERT E. SCOTT & JODY S. KRAUS, *CONTRACT LAW AND THEORY* 143 (5th ed. 2013) (quoting 33 PA. STAT. AND CONS. STAT. ANN. § 6 (West 1997)).

35. See DAGAN & HELLER, *supra* note 4, at 94.

implication, this presumption, which typically utilizes as its measure the “competitive market price [that] is ordinarily fair to all transactors” (p. 184), belongs to “the principles of contract formation” (p. 168), which is the normatively significant moment for transfer theory. As such, this presumption is not conclusive: “[I]n light of the parties’ power to assert their independence, it cannot be either obligatory or required for persons to transact only for equal value” (p. 388). Unequal exchanges are thus perfectly justified where they are “consistent with the parties’ abstract equality,” namely, where a party, who knows or has access to the going market price, manifests either “donative intent or assumption of risk” (pp. 387–88).

Indeed, transfer theory’s principle of equal value is “purely transactional” (p. 174). It is clearly nondistributive: its “exclusive focus on given transactions viewed separately and not as part of the more comprehensive social system makes it unsuitable as a principle of distributive justice” (p. 188–190). But Benson insists that contractual fairness’s indifference to the parties’ predicament goes much further than that. Contractual fairness must strictly adhere to “the standpoint of juridical personality” (p. 388). This means, for example, that there is no transactional unfairness where “the terms obtained by a financially disadvantaged party who poses a credit risk [are] harsher than those available to one who is wealthier” (p. 186). More generally, in transfer theory’s conception of contractual fairness “[i]nexperience, infirmity, ignorance, emotional vulnerability, and so forth are relevant only if, and insofar as, they result in unequal terms and preclude an inference of donative intent or assumption of risk” (p. 189). Contractual fairness for Benson “does not aim to redress differences in bargaining power per se or unfair and unequal starting points, nor does it ensure the satisfaction of needs, however urgent” (p. 388). It has no business in protecting particular categories of individuals, be they “the economically or cognitively disadvantaged, the commercially inexperienced or the emotionally vulnerable” (p. 188).

A viable conception of justice for contract must, I think, go further than that. Substituting reciprocal respect for independence with reciprocal respect for self-determination as contract’s normative infrastructure implies that whereas distributive justice is indeed not in place, transfer theory’s exclusion of any freestanding reference to the parties’ predicament is unacceptable. Furthermore, because transfer theory focuses solely on formation, it is blind to the interpersonal vulnerability that typifies ongoing joint endeavors like contracts. This vulnerability adds an additional layer of contractual justice, whose significance is further fortified once its potential detrimental effects on contract’s ability to perform its autonomy-enhancing function is properly appreciated.

Allowing the enforcement of contracts to rely on the most fundamental commitment of a liberal private law to reciprocal respect for self-determination, which includes modest affirmative interpersonal obligations, suggests a corresponding conception of contractual justice. Avihay Dorfman

and I call this *relational justice*.<sup>36</sup> Contemporary contract law follows suits with a wide array of doctrinal rules that robustly vindicate contract law's compliance with this prescription of reciprocal respect for self-determination. Some of these rules are products of adjudication; others were enacted by legislatures and regulatory agencies, oftentimes after the common law set a vague standard that legislators and regulators are better suited to delimit.<sup>37</sup>

Many of these rules set a "floor" for enforceable agreements.<sup>38</sup> If contract law's legitimacy relies, as I claim it does, on our reciprocal respect for self-determination, then violations of this maxim must be treated (at least *prima facie*) as *ultra vires*. Relational injustice undermines any attempt to enlist contract law's enforcement services not because it conflicts with the parties' presumed intent but rather because it is an abuse of the idea of contract; that is, the use of contract law for a purpose that contravenes its *telos*.

An important subset of these justice-based rules regulates the parties' bargaining process in a way that goes beyond the traditional *laissez faire* mode of proscribing—in line with transfer theory—only the *active* interference of one party with the other's free will.<sup>39</sup> This set of rules expands the range of vitiating factors by prescribing affirmative interpersonal obligations. It accounts for the expansion of the law of fraud beyond the traditional categories of misrepresentation and concealment to include also (notably in real estate and securities transactions) disclosure duties.<sup>40</sup> This conceptual expansion also underlies the doctrine of unilateral mistakes.<sup>41</sup> Similar analysis may help explain duress cases of wrongful threats that do not violate others' rights as well as anti-price-gouging laws and admiralty rules of salvage.<sup>42</sup> Finally, a regime that is careful to ensure that contract is used only in settings that comply with the minimal requirements of relational justice embraces the unconscionability doctrine and some of its regulatory cognates, which explicitly target cases of "gross inequality of bargaining power," such as where the weaker party suffers from "physical or mental infirmities, ignorance, illiteracy or inability to understand the language of the agreement."<sup>43</sup>

The floor of relational justice is more demanding than Benson's account of contractual fairness but is also not unique to contract. Quite the contrary,

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36. See Hanoch Dagan & Avihay Dorfman, *Justice for Contracts*, SSRN (Mar. 1, 2020), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3435781](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3435781) [<https://perma.cc/SG3D-SHZJ>], on which the remainder of this Section relies.

37. See, e.g., Anne Fleming, *The Rise and Fall of Unconscionability as the "Law of the Poor,"* 102 GEO. L.J. 1383 (2014).

38. See Dagan & Dorfman, *supra* note 36, at 34–52.

39. See *id.* at 34–36.

40. See *id.* at 42–47.

41. See RESTATEMENT (SECOND) OF CONTRACTS § 153 (AM. L. INST. 1981).

42. See Dagan & Dorfman, *supra* note 36, at 36–42.

43. RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. d; see also, e.g., Dodd-Frank Act § 1031(d), 12 U.S.C. § 5531(d).



it is continuous with duties that other segments of private law, notably torts, impose on people in similar settings.<sup>44</sup> The implied covenant of good faith in performance goes beyond this floor. Benson, understandably, seeks to resist this conventional understanding and thus offers a highly circumscribed interpretation of this doctrine, in which it expresses “at the highest level of abstraction the transactional conception of implication” (p. 157). Good faith’s only task, in this view, is “to ensure that the expressly agreed-upon performances are construed and carried out in a way that the parties must reasonably have contemplated at contract formation” (pp. 157, 159). Thus conceived, the doctrine of good faith requires courts to divine *ex post* the presumed intent of the particular parties regarding the specific agreement at hand. This is, however, a costly, error-prone factual inquiry, which tends to destabilize contracts.<sup>45</sup> It frustrates parties’ ability to use contract as a planning device and might render good faith as an autonomy-reducing doctrine.

A genuinely liberal contract law does not subsume good-faith doctrine under implication. Rather, it conceptualizes good faith as the umbrella for a set of rules prescribing the heightened degree of interpersonal duties befitting the relationship of parties to an ongoing contract. Such duties are needed because contractual performance is typically sequential, which means that contract generates the potential of opportunistic behavior and, therefore, of heightened interpersonal vulnerability. This contract-specific type of relational injustice implies that law must go, as it does, beyond the mandatory floor of relational justice. If contract law is to facilitate contracts proactively, it must solidify a cooperative conception of contract performance.

This is the task of the various good-faith-based rules of the contractual game, which serve as anti-opportunistic devices for specific moments in the life of contracts in which one party is typically vulnerable (notably specification, termination, and renegotiation), as well as for specific contract types (such as insurance) that characteristically “invite” such behavior.<sup>46</sup> Similar analysis explains the substantial-performance doctrine in service contracts, the principle against forfeiture in applying the condition/promise distinction, and the mitigation doctrine.<sup>47</sup>

Admittedly, a liberal conception of contract should not *force* contractual parties to attend to each other’s vulnerability more than they should attend to the vulnerability of strangers. The parties may, for example, prefer to devise other, possibly better (for them), means to protect themselves from each other’s opportunism. But because opportunism is anathema to contract’s ability to facilitate planning across time, and thus to self-determination, a

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44. See Dagan & Dorfman, *Just Relationships*, *supra* note 18, at 1431–38, 1451–59; Avihay Dorfman, *Relational Justice and Torts*, in RESEARCH HANDBOOK ON PRIVATE LAW THEORY, *supra* note 4, at 321, 328–36.

45. Cf. Alan Schwartz & Robert E. Scott, *Contract Interpretation Redux*, 119 YALE L.J. 926, 930 (2010).

46. See Dagan & Dorfman, *supra* note 36, at 56–63.

47. See *id.* at 52–56, 63–68.

liberal contract law cannot be indifferent to opportunism, either. Thus, modern contract law appropriately includes this web of rules that prescribe moderate cooperative duties as *normative defaults*. All these doctrines commit contractual parties to assist each other up to a point. Here, relational justice is not functioning as a floor; that is, as a prerequisite to law's legitimate use. Instead, relational justice works as an aspirational idea, one that informs contract law's normative defaults. Therefore, although these defaults are typically quite sticky, parties may generally opt out from many of these rules<sup>48</sup>; likewise, many specific obligations that are understood to derive from the general duty of good faith are not strictly mandatory.<sup>49</sup>

#### V. SERVITUDE OR EXIT

Thus far I have compared Benson's theory of contract and my competing autonomy-enhancing account on two fronts: their views as to the main mission of contract law, and their respective conceptions of contractual justice. I turn now to the third and final comparative dimension, which deals with the limits of contract. The most salient contemporary context that raises this question is the enforceability of (the proliferating)<sup>50</sup> employee non-compete agreements.

Faithful to transfer theory's adherence to interpersonal independence, Benson analyzes the limits of people's power to commit through contract in terms of "imposed servitude" (p. 202). Every "nonservile contractual relation" assumes that "parties retain control over their powers, productive or otherwise, as constitutive of their personal and material independence even while they carve out for transfer to each other circumscribed uses and crystallized products of those powers" (pp. 202–03). This means that contractual terms cannot go beyond "the mere absorption of the party's powers essential to fulfilling her primary performance for which a quid pro quo has been promised or given in return" (pp. 200–01). Because each "party's independent powers"—namely, her "ability to control and use her productive powers qua capital resource for other purposes and relations"—must remain inalienable, "even a scintilla of such transactionally unjustified imposition" is deemed oppressive and thus void (pp. 201–03). In modern contract law, assessing the reasonableness of restrictive covenants against this test is the mission of the restraint-of-trade doctrine (pp. 200–03).

There is little reason to doubt this analysis insofar as it refers to self-enslavement contracts. But restrictive covenants are typically less imposing. The characteristic noncompete purports to protect a business consumer base or its distinctive know-how by limiting an employee's future work in certain

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48. See *Jacob & Youngs, Inc. v. Kent*, 129 N.E. 889, 891 (N.Y. 1921).

49. See *Carma Devs. (Cal.), Inc. v. Marathon Dev. Cal., Inc.*, 826 P.2d 710, 728 (Cal. 1992); U.C.C. § 1-302(b) (AM. L. INST. & UNIF. L. COMM'N 2017).

50. WHITE HOUSE, NON-COMPETE AGREEMENTS: ANALYSIS OF THE USAGE, POTENTIAL ISSUES, AND STATE RESPONSES 3 (2016), [https://obamawhitehouse.archives.gov/sites/default/files/non-competes\\_report\\_final2.pdf](https://obamawhitehouse.archives.gov/sites/default/files/non-competes_report_final2.pdf) [<https://perma.cc/LXW2-DY6C>].

positions for a circumscribed duration and in a given geographic area.<sup>51</sup> Unfortunately, regarding these garden-variety restraints, Benson's instructions are, at least on their face, quite ambiguous.

Thus, if our Hohfeldian power to commit, as per transfer theory, can only be limited when we purport to alienate the "freedom to engage in productive and market activities" (p. 203), then most, if not all, of these non-competes would be valid. If, by contrast, the point is to carefully circumscribe our ability to alienate *any* fraction of our independence so that it is strictly limited to the "primary performance" of the contract, many of these ancillary obligations, as well as quite a few others, would be invalid even where their imposition on our future self is relatively marginal. Echoing the doctrinal language, Benson frames the inquiry in terms of reasonableness (pp. 464–65). But it is unclear how reasonableness figures in either of these questions. When independence is the *ultimate* currency, neither weight nor effects seems relevant.<sup>52</sup>

Benson's brief as to the significance of independence provides, however, a promising starting point for breaking this impasse. As accountable agents, he explains, we must preserve the "standpoint of sheer negative independence from everything immediately presented by [our] needs, desires, circumstances, and the like," so that we can "distinguish and distance ourselves from what we happen to desire or need and from the situation in which we find ourselves" (p. 370). This seems to be a correct, indeed an important, proposition; but it is also significantly incomplete. Accountable agency does not, indeed cannot, imply a *permanent* state of distinction between our selves and who we actually are; namely, our higher-order projects and constitutive circumstances as well as the more concrete plans and interests we currently have. What it suggests instead is that we should be able to make this distinction, to distance ourselves from the standpoint of who we are and critically examine all these features.<sup>53</sup>

This means that, *pace* Benson, while people's "moral power of asserting their sheer independence vis-à-vis everything particular and given" is indeed crucial, it need not be understood as "higher-order" or "conceptually more basic" than their self-determination (pp. 389–90, 473). Self-determination, not independence, is of ultimate value. But this does not derogate independence to the status of sheer instrument. Independence is an intrinsic value, constitutive of our self-determination. This is why, as noted, only modest affirmative duties are acceptable in private law.<sup>54</sup> This is also why, more to the point here, 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

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51. See, e.g., Suresh Naidu, Eric A. Posner & Glen Weyl, *Antitrust Remedies for Labor Market Power*, 132 HARV. L. REV. 536, 595 (2018).

52. See ARTHUR RIPSTEIN, *PRIVATE WRONGS*, at xi–xii, 37–38 (2016).

53. Cf. HANOCH DAGAN, *PROPERTY: VALUES AND INSTITUTIONS* 69 (2011) (discussing the significance of having a critical perspective on one's constitutive communities).

54. See *supra* text accompanying notes 17–19.

advance. Rather, self-determination allows, indeed requires, opportunities for people to take a critical perspective on any part of their identity and thus 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."<sup>55</sup> Our autonomy requires the ability to both write and rewrite our life story and start afresh.<sup>56</sup>

This is exactly the focus of the way an autonomy-enhancing view of contract conceptualizes the limits of contract. Once we realize that the power to revise or even discard (exit) one's plans is an entailment of contract's own normative underpinnings, it becomes clear that liberal contract law must appreciate not only the significance of enabling people to make credible commitments but also the impediment these commitments pose to their ability to rewrite their life story. Liberal contract law, in other words, should safeguard the self-determination of people's *future* selves. Because *any* act of self-determination constrains the future self,<sup>57</sup> 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*. In fact, it encapsulates the *real* challenge of liberal contract law. There is no easy formula for resolving this difficulty, which may explain the reasonableness inquiry of restraint-of-trade doctrine.

This commitment to the self-determination of our future self is manifested in other segments of contract law as well.<sup>58</sup> One example, dealing with the common law's resilient reluctance towards specific performance, should suffice here.<sup>59</sup>

In the common law, as Benson indicates, "where an award of money can fully and completely compensate the plaintiff for impairment of her contractual interest in performance, the damage remedy is adequate and specific performance is ordinarily refused" (p. 266). Transfer theory seems to entail

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55. DAGAN, *supra* note 11, at 43.

56. *See id.*

57. As this Review hopefully clarifies, the concern for the future self does not imply an endorsement of the idea of multiple selves; namely, the disintegration of the self. Quite the contrary, choice theory rejects, rather than subscribes to, this position; indeed, its core claim regarding the significance of planning to self-determination implies that the current self and the future self are the same self. The integrity of the self, rather than its separation into different selves, is what drives choice theory's justification for contract enforcement, and is thus a necessary feature of its account of the *telos* of contract. The discussion of the future self is thus a discussion of the self in the future and the liberal prescription to enable its ability to rewrite its course.

58. *See* Dagan & Heller, *supra* note 4; Hanoch Dagan & Ohad Somech, *When Contract's Basic Assumptions Fail*, 34 CANADIAN J.L. & JURIS. (forthcoming 2021) (on file with the *Michigan Law Review*).

59. The following discussion heavily draws on Hanoch Dagan & Michael Heller, *Specific Performance*, SSRN (Sept. 2, 2020), <https://ssrn.com/abstract=3647336> [<https://perma.cc/2WLQ-6S4J>], where Heller and I also explain why the common law's justified preference for damages should be treated as a normative default (except when workers are in breach).

the opposite position, applied by civil law jurisdictions, in which specific performance is the presumptive contract remedy,<sup>60</sup> but Benson nonetheless defends the common law rule. Just like specific performance, such a pecuniary remedy, he claims, protects the promisee's "baseline entitlement" of "having *actual possession* of the subject matter of the contractually contemplated performance," because it puts her "in the same position in all material respects as she would have been if she obtained performance in specie" (pp. 267–69). Nothing beyond that is required or can be justified, Benson argues, since "neither party can affect or make an impact on the other's freedom of action or assets via contract remedies except insofar as this is strictly *necessary* to protect his or her rightful performance interest" (p. 271).

This argument, however, is too fast, because even where a monetary award is *materially* equivalent to specific performance, its power depends on identifying exactly "the contractually contemplated performance," namely, deciding whether it is the good or service at issue or rather its material value. I am not claiming that full equivalence, which indeed makes specific performance unwarranted, can be only inferred from an explicit reservation. Rather, my point is that transfer theory, as Benson articulates it, must invite judges to engage in implication; that is, to follow the presumed intent of the particular parties of the actual transaction. Therefore, transfer theory cannot explain, and does not justify, privileging damages in all these cases, let alone making such monetary recovery the only available remedy.

This critique should not indict the persistent position of the common law. Quite the contrary: notwithstanding its recent criticism as normatively embarrassing,<sup>61</sup> the common law rule properly vindicates contract's autonomy-enhancing commitments. To see why, recall that for choice theory the legitimacy of authorizing promisees to insist on enforcement and recruit the coercive power of the state for backing up their authority is grounded on contract's service to people's ability to plan.<sup>62</sup> This means that contract's impingement upon the self-determination of the future self can be justified only because *and to the extent that* the claimed dominion of the present self over its future self can be justified.

The common law baseline in which by and large breach of contract triggers compensation, rather than specific performance, serves as a stronghold for the autonomy of promisors' future selves. Compelling the promisor to act in accordance with the contractual script is qualitatively more imposing on her self-determination than requiring her to cover the promisee's expect-

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60. For this position, see Robert Stevens, *Contract, Rights and the Morality of Promising* (2018) (unpublished manuscript) (on file with the *Michigan Law Review*) (reviewing DAGAN & HELLER, *supra* note 4).

61. See Seana Valentine Shiffrin, *The Divergence of Contract and Promise*, 120 HARV. L. REV. 708 (2007).

62. See *supra* text accompanying notes 16–20.

tation.<sup>63</sup> In certain contract types specific performance is, to be sure, the only viable way of facilitating contract's functioning as a planning tool, and in these cases, such a remedy is indeed readily available.<sup>64</sup> But in many other contract types, contract's mission of planning facilitation is not significantly affected by the liquidation of the promise into money. In *these* cases, when other things are equal, or close to being equal, for the promisee,<sup>65</sup> liberal contract law, which properly attends not only to the autonomy of the parties at formation but also to that of their future selves, rightly opts for allowing promisors to choose between performance and damages.

#### CONCLUSION

Competing contract theories, like legal theories of other fields, are judged, as Benson suggests, according to both their ability to justify the legal practice at hand and their fit to its main doctrines and principles. Elsewhere, I've challenged transfer theory's justificatory premise.<sup>66</sup> My focus in this Review is different. Transfer theory, I've argued, offers either partial or unsatisfactory answers to many of the specific questions contract law must resolve. Contract, I've claimed, should not be understood as a transfer of exclusive control over a determinate object, and contract law need not settle with the protection of our interpersonal independence. Rather, as a joint undertaking of a cooperative arrangement, contract is a planning device that enhances people's autonomy. Contract law plays a crucial role in both proactively facilitating contracts and ensuring their integrity by securing their compliance with relational justice. Contract's reliance on people's obligation of reciprocal respect for self-determination implies that the modest affirmative duties of modern contract law do not threaten its legitimacy. The real challenge of liberal contract law lies elsewhere: in taking seriously its mission of empowering our current self while safeguarding the right of our future self to rewrite the story of our life.

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63. Cf. Dagan & Dorfman, *Just Relationships*, *supra* note 18, at 1455 (discussing the imposition of legal duties in noncontractual contexts and its effect on individual autonomy).

64. See, e.g., STEPHEN A. SMITH, *RIGHTS, WRONGS, AND INJUSTICES: THE STRUCTURE OF REMEDIAL LAW* 163 (2019) (indicating that the main exception to the common law baseline rule of no specific performance involves sales of *unique* goods or land).

65. Recall that the position of the common law is that specific performance will not be ordered only if "damages would be adequate to protect the expectation interest of the injured party." RESTATEMENT (SECOND) OF CONTRACTS § 359(1) (AM. L. INST. 1981).

66. See *supra* note 11.

