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› Theories of contract and the concept of autonomy

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I. Introduction

During the last two decades, the concept of autonomy has been widely discussed in practical philosophy. Based on criticisms of minimal conceptions of autonomy, thick conceptions have been put forward which highlight the corporeal and social conditions of what it means to be a human person. A conference at the *Centre for Advanced Study in Bioethics* on “Thick (Concepts of) Autonomy?”, held in October 2012, aimed at providing a survey of thick conceptions of autonomy currently being put forward and to discuss possible objections. Carrying on this endeavor, this essay deals with the normative foundations of ‘contract’ and with a proposal to change from the ‘thin’ and formal concept of autonomy contract theory has predominantly been built on to the more substantial ideal of personal autonomy as self-authorship. Although the conceptual work provided here will primarily highlight questions of legal theory, it is expected to be relevant for biomedical ethics as well, since respect for autonomy is one of the core principles of the latter and contractual relations are a predominant means of autonomous agency in the field covered by it.

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There seems to be no such thing as a non-liberal theory of contract. The normative structure underlying the concept of contract is basically and essentially a liberal one – autonomy. (II). Alternative approaches fail to grasp its meaning. At best, they, denote limits of the realm of contracts, but cannot explain what contracts are (III). There are some theoretical implications to be derived from this. When dealing with the challenges of the liberal approach, for example, with unequal power relations between contracting parties, the crucial question is which normative tools are compatible with the very idea of a contract in order to qualify as a part of a theory of contract (IV). For a liberal theory of contract, there are two theoretical options at this point. One option is to focus upon the notion of equal respect. In this regard, a (limited) principle of non-exploitation seems to come closest to an idea of fairness intrinsic to a contract, i. e. to an idea recognizing and respecting individuals as equals (V). The second option is to build on a ‘thicker’ concept of autonomy. The most promising endeavor in this regard is the freedom-of-contracts approach taken by Hanoach Dagan and Michael Heller (VI).

II. The liberal theory of contract

A liberal theory of contract, as sketched in quite broad strokes here, locates the normative foundations of the institution ‘contract’ in individual rights, especially in freedom of contract. Contracts are seen as tools for realizing individual self-determination by means of voluntarily entering legally binding agreements. This notion of individual autonomy is not ahistorically given, but was established and expanded through social struggles leading from “status to contract”¹ as the main determinant in our lives. Guaranteeing this sphere of individual self-determination as a structural feature of liberal societies (“contract societies”, as Weber called them², or the “régime of contract” in Spencer’s words³) is “the public dimension of contract”.

A liberal theory of contract is based upon a concept of respect for persons as agents and bearers of individual rights, including contractual liberty as the right for respect of their voluntary agreements. It understands private law as only a system of reciprocal limits on freedom⁴ and contract law as a legal institution that, in general, recognizes and respects the power of private individuals to effect changes in their legal relations *inter se*.⁵

According to the liberal theory, the ‘implicit dimension’ of a contract is a relationship of mutual recognition between persons. To be more precise: it is a relationship of one special pattern of recognition, namely of legal recognition (in Axel Honneth’s terms⁶), which respects the other party as equal, as a legal person capable of following her own conception of the good and of raising accepted claims. So, the notion of contract is deeply rooted in universal respect for the equal autonomy of persons (as opposed to the non-egalitarian kinds of recognition

1 Henry Sumner Maine, *Ancient Law: Its Connection with the Early History of Society, and its Relation to Modern Ideas* 170 (1861).

2 Max Weber, *Wirtschaft und Gesellschaft. Grundriss der verstehenden Soziologie*, 399 (5th ed. 1980).

3 Herbert Spencer, *The Man versus the State, with Six Essays on Government, Society and Freedom* (1884), *passim*.

4 Arthur Ripstein, *Private Order and Public Justice: Kant and Rawls*, 92 *Virginia Law Review* 1391, 1394 (2006).

5 Peter Benson, *Contract*, in *A Companion to Philosophy of Law and Legal Theory* 29, 37 (Dennis Patterson ed., 2nd ed. 2010).

6 Axel Honneth, *The Struggle for Recognition: The Moral Grammar of Social Conflicts* (1996).

embodied in relationships of love and of solidarity⁷, i. e. a shared orientation towards values). This basic rationale for a liberal contract theory is not market-oriented. Instead, its focus on autonomy rights and equality demands priority of the right before the good, i. e. the conviction that basic individual freedoms impose limits on the collective search for the good life.⁸ In the history of ideas, this one was not fully developed until the legal philosophies of Kant, Fichte, and Hegel.⁹

The notion of ‘equality’ used here requires some clarification (for ‘autonomy and ‘rights’ see part VI). Up to a certain point, the concept of *equality* inherent in the notion “equal autonomy of persons” is a formal concept. Persons are equal as legal entities regarding their right to form their own concept of the good and to act upon it. Notwithstanding Marx’s derision¹⁰, the very notion of a contract cannot do without the idea that (basically competent adult) persons, different and unequal in every empirical aspect, meet each other as equals at the basic level of law – equal in dignity, equal in their basic rights and abilities, and also equal in their entitlement to make use of their rights by entering mutually binding agreements. As in every coherent conception of juridical equality, contract theory has to regard its addressees at this basic normative level, not in all their particularity, but as identical abstract beings.¹¹

Within the family of autonomy-based theories of contract law¹², the liberal rights-based approach does not have to refer to the convention and social practice¹³ of promising or its underlying moral principle.¹⁴ The notion of contract is best captured in the legal, not moral, idea of a transfer of entitlements, conceiving a contract as the consensual manifestation of an intention to alienate one’s *right* to another person.¹⁵ In contractual agreements, the parties consent to be legally bound, i. e. to impose legal obligations to be performed.¹⁶

7 For the misleading freedom-versus-solidarity dichotomy, see, for example, Roberto M. Unger, The Critical Legal Studies Movement, 96 Harvard Law Review 561, 616 et seq. (1983), for the notion of “contractual solidarity” cf. Brigitta Lurger, Vertragliche Solidarität (1998) and Study Group on Social Justice in European Private Law, Social Justice in European Contract Law: a Manifesto, 10 European Law Journal, 653, 656 (2004).

8 John Rawls, The Priority of Right and Ideas of the Good, 17 Philosophy and Public Affairs, 251 (1988).

9 Cf. Bernhard Jakl, Die Autonomie des Rechts. Das Vernunftrecht der klassischen deutschen Philosophie in Geschichte und Gegenwart, forthcoming.

10 Karl Marx, Zur Judenfrage [On the Jewish Question], in Karl Marx/ Friedrich Engels, Werke. Vol. I 347 (1976).

11 William Lucy, Equality under and before the Law, 61 University of Toronto Law Journal, 411, 413 (2011); cf. Peter Benson, The Unity of Contract Law, in The Theory of Contract Law: New Essays 118, at 143 (Peter Benson ed., 2001): “a very bare conception of the person”.

12 Benson, supra note 5, at 37.

13 Charles Fried, Contract as Promise: A Theory of Contractual Obligation (1981). See, for a differentiated view, Dori Kimel, From Promise to Contract: Towards a Liberal Theory of Contract (2003).

14 Thomas Scanlon, Promises and Contracts, in The Theory of Contract Law: New Essays 86 (Peter Benson ed., 2001).

15 See Randy E. Barnett, A Consent Theory of Contract, 86 Columbia Law Review 269 (1986); Ripstein, supra note 4, at 1407 and Thomas Gutmann, Iustitia Contrahentium. Zu den gerechtigkeitsrechtlichen Grundlagen des deutschen Schuldvertragsrechts, forthcoming, and, for a specific approach (transfer of ownership), Benson, supra note 11, at 127 et seq.

16 Herein lies the answer to “Atiyah’s problem” why a promisee is entitled to expect the promisor not to change his mind (Patrick S. Atiyah, Promises, Morals, and Law 127 et seq. (1981); cf. Benson, supra note 5, at 37.

III. Alternative approaches

1. Multiplicity and contradictions

As Peter Benson notes, "the world of contract theory presents itself as a multiplicity of mutually exclusive approaches with their own distinctive contents and presuppositions".¹⁷ Let us take a short look at some attempts which do address the realm of normative reasons and try to specify alternative prescriptive accounts¹⁸ of 'contract', understanding contract and contract law as serving a particular social value independent of the parties' autonomy. Some brief and incomplete sketches have to suffice.

What should attract our attention first are the extreme contradictions in the approaches presenting themselves as alternatives to the autonomy model. Even the concepts of 'welfarism' or 'social justice' in contract law are ridden by internal conflicts and cannot be reduced to any coherent structure of ideas.¹⁹ Moreover, a closer look shows no common normative ground whatsoever between the social-justice-in-contract-theory talk (4), on the one hand, and, Aristotelians' nostalgic virtue moralism (2), for example, or the hard-boiled consequentialist collectivism of the classical law-and-economic approach to contract theory (3), on the other hand. So a liberal theory of contract could very probably just relax, lean back, and watch alternative theories neutralize one another. As normative individualism and the notion of private autonomy guaranteed by individual rights are deeply embedded in the normative foundations of Western legal systems, a liberal theory of contract (although prepared to justify its own normative claims) can operate mainly as a form of 'happy positivism'. Given the weight of normative individualism within any coherent interpretation or reconstruction of Western legal systems (especially those of contract law), one should ask whether there is a meaningful "choice of paradigm" for the theory of contract at all. Normative coherence seems clearly to be on the side of a liberal theory of contract.

2. Aristotelian phantom pain

According to the liberal theory, a meaningful concept of contract has very limited compatibility with premodern concepts of contractual justice. In its framework, Aristotelian or Thomist notions of a statical *iustitia commutativa* or *aequalitas*, demanding objective equity, i. e. the strict equivalence of quid pro quo, are meaningless from the start, whether brought forward in a neoclassical (Gordley²⁰) or in a seemingly hybrid way (Weinrib²¹). The reason for this is that

17 Benson, supra note 5, at 29.

18 See Stephen A. Smith, *Contract Theory* (2004), 4.

19 Thomas Wilhelmsson, *Varieties of Welfarism in European Contract Law*, 10 *European Law Journal* 712 (2004)

20 See for example James Gordley, *Contract Law in the Aristotelian Tradition*, in: *The Theory of Contract Law: New Essays* 265 (Peter Benson ed., 2001), and James Gordley, *The Moral Foundations of Private Law*, 47 *The American Journal of Jurisprudence* 1 (2002).

21 Ernest J. Weinrib, *The Idea of Private Law* (1995); Ernest J. Weinrib, *Aristotle's Forms of Justice*, 2 *Ratio Juris* 211 (1989); cf. now: Ernest J. Weinrib, *Corrective Justice* (2012). For an analysis that sees Ernest Weinrib's approach of developing a formal idea of private law from Aristotelian and Kantian building blocks and understanding corrective justice as the special morality intrinsic to private law collapse into Aristotelian essentialism, see: Joseph Raz, *Formalism and the Rule of Law*, in *Natural Law Theory. Contemporary Essays* 309, 310

the Aristotelian tradition, based on a theory without a concept of contract clearly distinguished from tort²², lacks any understanding of private autonomy. No concept before the watershed of Normative Modernity²³, starting with Hobbes' replacement of virtues and duties with rights as the central element of legal normativity, was able to grasp the specifically modern institution of contract as a tool for the realization of individual self-determination guaranteed by liberty rights. The virtue ethics of the commutative justice perspective "sees law as a tool for enforcing decent behavior in a society"²⁴ and is therefore neither compatible with the "fact of reasonable pluralism"²⁵ regarding what constitutes the good life characteristic of social conditions secured by the basic rights and liberties of free institutions, nor with any normative concept rooted in individual liberties, nor with the functional differentiation of ethics and law. *Pace* Gordley, a modern notion of contract is necessarily a voluntaristic concept, placing "a value on choice that is independent of the value of what the parties have chosen"²⁶, and it allows no conceivable justification for the principle that transactions may not alter given distributions of holdings. It is not only that the idea of *iustum pretium* cannot claim normative priority over contractual autonomy; it has no theoretical connection at all, notwithstanding that its fragments are still to be found in European private law systems.

3. Economic analysis of contract law and the separateness of persons

Economic analysis of contract law²⁷ does provide a clear prescriptive criterion – contracts and contract law are to serve as tools for efficiency, or maximization of wealth. Due to its basic consequentialist (teleological) structure, this criterion, however, is incompatible with any contract law fundamentally based upon individual (autonomy) rights as legally respected choices. In the last analysis, within the normative economic analysis of contract law approach, all contracting parties and all the parties' rights are subject to the collective good of efficiency maximization. Maximizing teleological theories cannot deal with the 'separateness of persons'.²⁸ Lacking a discrete criterion for the distribution of benefits and burdens, they always allow for the sacrifice of one person's interests or rights if her loss is outweighed by the aggregated collective advantage. Neither separate persons nor their rights, nor the binding force of their agreements are of intrinsic importance in the end. The very idea behind the theory of incomplete contracts, its

(Robert P. George ed., 1992), and Thomas Gutmann, *Iustitia Contrahentium. Zu den gerechtigkeitsrechtlichen Grundlagen des deutschen Schuldvertragsrechts* ch. 6, forthcoming. The Aristotelian conception of *iustitia correctiva sive commutativa* is not "inchoately Kantian" (Weinrib (1995), 83), but incompatible with the Kantian concept of law and anything but formal.

22 Jan Dirk Harke, *Vorenthaltung und Verpflichtung. Philosophische Ansichten der Austauschgerechtigkeit und ihr rechtshistorischer Hintergrund* (2005).

23 Thomas Gutmann, *Religion und Normative Moderne*, in *Moderne und Religion. Kontroversen um Modernität und Säkularisierung* 447 (Ulrich Willems, Detlef Pollack, Thomas Gutmann, Helene Basu und Ulrike Spohn eds., 2012).

24 Wilhelmsson, *supra* note 19, at 717.

25 John Rawls, *Political Liberalism* 36 (1993).

26 Gordley (2001), *supra* note 20, at 268.

27 Cf. A. Mitchell Polinsky, *An Introduction to Law and Economics* chs. 5 and 8, (3rd ed. 2003); Robert Cooter, Thomas Ulen, *Law and Economics* ch. 8 (6th ed. 2012); Steven Shavell, *Foundations of Economic Analysis of Law* ch. III (2004).

28 John Rawls, *A Theory of Justice* (1971), at § 5; H. L. A. Hart, *Between Utility and Rights*, 79 *Columbia Law Review* 828 (1979).

‘cheapest cost avoider’, ‘cheapest insurers’, and ‘superior risk bearer’ criteria, and its claim for requirement of an ‘efficient breach of contract’ is to make contracting parties trustees and functionaries of collective wealth maximization. Legal systems based on individual rights, however, have a strong anti-utilitarian or anti-consequentialist bias, as rights define side constraints to maximizing strategies. Insofar as the starting principle of contract law is based on contractual freedom, a contract is a deontological notion. (This alone explains the almost complete failure of the law and economics approach to gain any influence in contract law and adjudication, in Germany, for example.) The point to be stressed here is that, although economic analysis of contract law has produced an impressive body of scholarship on the economics of contract law, there is no way to reach normative coherence between its goal of efficiency maximization, on the one hand, and a legal theory of contract based upon a concept of respect for persons as bearers of individual rights, able to effectively bind themselves in voluntary agreements, on the other hand. The two normative principles remain unconnected; at best, they are understood as a trade-off between incommensurable goals.²⁹ So far, economic analysis of law has failed to produce a *legal* theory of contract compatible with the normative premises of legal systems starting with individual rights.

4. Social justice in contracts

It seems to be an especially unsatisfying theoretical move to claim, along with Martijn Hesselink and others (in a manifesto of the ‘Study Group on Social Justice in European Private Law’), that ‘social justice’ has to be a defining element of European contract law and the very notion of contract.³⁰ The manifesto does not even give a hint about what the *theoretical* concept aimed at in contract might be. In a later publication, a study for the European Parliament, the only substantial element out of five given by Hesselink as constituting the “European notion of social justice in private law” is that “the CFR should contain a sufficient level of protection of weaker parties. In particular, where a distinction is made between different groups of people, this should be done in a way that is favourable to the least privileged (Rawls’ difference principle).”³¹

For Rawls, however, who provides a Kantian liberal theory, the realm of contracts is to be guided exclusively by the first principle of justice – the Kantian notion of the ‘liberty principle’, which demands the most extensive adequate scheme of equal rights and basic liberties compatible with the same scheme for all – and not by the difference principle. The latter serves as a background condition within a clear “division of labor” between the principles governing the basic structure of society and those governing individual transactions, “and the different institutional forms in which these rules are realized”. Rules governing voluntary transactions of individuals and associations, namely “the law of contract”, guarantee that “individuals and

29 As good as it gets: Eyal Zamir, Barak Medina, *Law, Economics, and Morality* esp. 257 et seq. (2010). See also Michael J. Trebilcock, *The Limits of Freedom of Contract* 241 et seq., 248 (1993). For the methodological side of this issue, see Jody S. Kraus, *Philosophy of Contract Law*, in *The Oxford Handbook of jurisprudence and philosophy of Law* 687, 689 et seq. (J. Coleman, S. Shapiro eds., 2002).

30 Study Group on Social Justice in European Private Law, *supra* note 7.

31 Martijn W. Hesselink, *CFR & Social Justice: A Short Study for the European Parliament on the Values Underlying the Draft Common Frame of Reference for European Private Law - What Roles for Fairness and Social Justice?* 22 (2008).

associations are [...] left free to advance their ends more effectively within the framework of the basic structure, secure in the knowledge that elsewhere in the social system the necessary corrections to preserve background justice are being made.”³² Contracts are the realm of individual basic liberties, unrestrained by duties of social justice, also because rules enforcing such duties “would be an excessive if not an impossible burden”.³³ This is but a friendly version of Savigny’s dictum that, in contract law, you may let your contracting partner starve, as long as public law takes care of him.³⁴

For Rawls, private law, especially contract law, secures for individuals the capacity to set and pursue their own conception of the good, in the face of the equally valid claims of all other individuals to do likewise.³⁵ Therefore, contractual relations between private individuals must not be subordinated to distributive concerns.³⁶ The aggregative effects of contractual transactions may lead to distributive injustice that needs to be addressed through public law³⁷, but not by way of interfering in specific contracts or by imposing duties of social justice on certain private parties.

In the last analysis, welfarist contract law in a strict sense would be conceivable only on the assumption that individuals have a direct, positive, enforceable responsibility towards other individuals and their well-being, i. e. that persons have *direct* claims against each other for assistance in the pursuit of their good. There does not seem to be sound theoretical justification for this premise. In short, the social justice approach is unable to create an alternative paradigm of contract³⁸, and, when it presents itself not as a full alternative, but as a complementing correction of the liberal approach³⁹ (with the “concern to strike a balance between private autonomy and fairness”⁴⁰), it produces a mere addendum, unable to give a coherent account of the bipolar normative structure it creates. Its idea of social justice stays extraneous to the idea of contract, it

32 Rawls, *supra* note 25, at 268 et seq. See Arthur Ripstein, *The Division of Responsibility and the Law of Tort*, 72 *Fordham L. Rev.* 1811, 1813 (2004). Rawls’ ‘Theory of Justice’ initially made it clear from the start that contractual agreements are not what it is dealing with, see Rawls, *supra* note 28, at 8.

33 *Id.* at 266.

34 Friedrich C. v. Savigny, *System des heutigen römischen Rechts* § 56, 370 et seq., 52 (1840).

35 Ripstein, *supra* note 4, at 1409.

36 Therefore, the thesis that for “Rawlsianism, contract law is properly understood as one of the many loci of distributive justice” (Kevin A. Kordana, David H. Tabachnick, *Rawls and Contract Law*, 73 *George Washington Law Review* 598, 600 (2005) is a severe misreading (based on the claim that “the Rawlsian text is confused” (621)). The whole debate on whether for Rawlsian political philosophy private law lies outside or inside the scope of the two principles of justice is misleading, and the claim that “[i]f contract law is within the basic structure (in whole or in part), it is governed by the two principles of justice” (Kordana, Tabachnick, 608) is a non sequitur. For Rawls, contracts and the right to contract are governed by the first principle of justice alone.

37 See Rawls, *supra* note 25, at 268 and Ripstein, *supra* note 32, at 1815.

38 This is particularly true for Thomas Wilhelmsson’s “antitraditionalist model” of contract as social cooperation, where the very idea of contract is dissolved by a functionalization of agreements in order to serve dynamic and flexible content-orientation depending on the changing “social and economic needs” of the parties and the (conflicting) collectivist ends of parties’ social networks and society at large, that is, “as a tool of rational distribution in the society”. So why keep the institution of contract at all? See Wilhelmsson, *Questions for a Critical Contract Law – and a Contradictory Answer: Contract as Social Cooperation*, in *Perspectives of Critical Contract Law* 9, 38 et seq., 41 (Thomas Wilhelmsson ed., 1993).

39 See Thomas Wilhelmsson, *Questions for a Critical Contract Law – and a Contradictory Answer: Contract as Social Cooperation*, in *Perspectives of Critical Contract Law* 9, 30 (Thomas Wilhelmsson ed., 1993) and Brigitta Lurger, *Grundfragen der Vereinheitlichung des Vertragsrechts in der Europäischen Union* 457 et seq. (2002).

40 Study Group on Social Justice in European Private Law, *supra* note 7, at 654.

is just setting up a clothesline between them.⁴¹ Moreover, by failing to take the ‘weak’ seriously as legal persons and treating them as objects of protection and not as persons deciding for themselves⁴², it harms not only the egalitarian commitment of law, but also the inclusionary role of juridical equality, which has to ascribe the same legal status to all.⁴³ Perhaps (even good) politics make bad legal theory. For those accustomed to the theory of social systems⁴⁴, this is no news anyway.

5. Constitutional rights and contracts

Liberal theory of contract is perfectly compatible with proposals for a ‘total constitution’, i. e. constitutional rights framing contract law. As Hugh Collins remarked, this proposal indeed derives from a demand for the unity of legal order⁴⁵, i. e. for coherence of norms within the legal system. This requirement for coherence, or for what Dworkin calls ‘integrity’⁴⁶, seems to be a necessary condition for legitimacy of modern legal systems.

Constitutionalizing private law, however, will not do the trick for the social-justice-in contract-law approach either (at least not in Europe). It rather speaks in favor of a liberal theory of contract since freedom of contract is rooted in constitutional protection of liberties. Where such liberties are protected, as, for example, in Germany, a further constitutionalization of contract law would not change anything.⁴⁷ The state’s positive constitutional duty to intervene in private relationships for the benefit of one party in order to protect that party’s constitutional rights⁴⁸ already serves as the basis for regulations against coercion, fraud, misrepresentation, and (some forms of) duress, all of which are protection required by the liberal approach.

41 See, for example, Hesselink, *supra* note 31, at 73 (“private law can be placed on a continuum from autonomy to solidarity”). A similar conception of a simple, incoherent dichotomy is found in Lurger, who inductively claims solidarity (‘party protection’ or concern for ‘regard and fairness’ in contractual relations) to be situated “on the very same level as the principle of freedom of contract, without any signs of subordination to the latter”, although both “basic values” are conceived to be in conflict with each other (Brigitta Lurger, *The Future of European Contract Law between Freedom of Contract, Social Justice, and Market Rationality*, 1 ERCL 442, 448, 453 (2005)) and in Wilhelmsson’s dichotomy between traditional contract law following the rationality of the market and “social contract law” oriented towards the personal, social, and economic ‘needs’ of the parties (Thomas Wilhelmsson, *Critical Studies in Private Law – A Treatise on Need-Rational Principles in Modern Law* (1992)). By the way, consumer-welfarism is much closer to market functionalism than liberal contract theory.

42 See *pars pro toto* Martijn W. Hesselink, *Capacity and Capability in European Contract Law*, Amsterdam Center for Law & Economics No. 2005–09, <http://ssrn.acl.e.nl> (last visited Mar. 18, 2012).

43 Lucy, *supra* note 11, at 442.

44 See Niklas Luhmann, *Theory of Society*, Volume 1 (Rhodes Barrett trans., 2012).

45 Hugh Collins, *The Impact of Human Rights Law on Contract Law in Europe*, University of Cambridge Faculty of Law Legal Studies Research Paper Series NO. 13/2011 1, 2, <http://www.law.cam.ac.uk/ssrn/> (last visited Nov. 19, 2012).

46 See Ronald Dworkin, *Law’s Empire* 411 (1986).

47 As noted by Mattias Kumm, even a constitutional amendment explicitly establishing that constitutional rights have direct horizontal effect in Germany would not provide additional protection for weaker economic parties. “As a matter of substantive law and institutional division of labor, it would simply leave things as they are. With the comprehensive scope of constitutionally protected interests in Germany, private law in Germany is already applied constitutional law” (Who is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law, 7 *German Law Journal* 341, 359 (2004)).

48 German Constitutional Court, BVerfGE 89, 214; 19/10/1993.

A liberal theory of rights, however, will have serious reservations regarding attempts at turning human rights into a master key to simply moralize the law. To start with, a liberal theory will make it clear that it is constitutional rights which frame contract law, not “constitutional values”⁴⁹. There is a categorical difference between rights (as norms) and values. Norms are valid (or not); values are to be realized (more or less).⁵⁰ Although the state is certainly legitimated to care for the preconditions of the citizens’ autonomy, there cannot be such a thing as a constitutional right to positive freedom or a positive conception of liberty on the horizontal level, i. e. between citizens or contracting parties. There is especially no such thing as a constitutional right to a ‘substantial’⁵¹ or ‘positive’ form of contractual freedom. The latter notion was brought forward after the German Constitutional Court’s ruling in the *Bürgschaftsvertrag* (family surety contract) case, for example.⁵² Making a contracting party responsible for the other party’s positive freedom of contract, however, would amount to creating a duty to proactively provide a range of substantial, positive, meaningful options for the partner to choose from before contracting with him or her, in other words, a duty to rearrange his or her life. This notion is as absurd as the idea of directly (or even indirectly) applying social or economic human rights within the horizontal relationship of contracting individuals. Finally, respect for the dignity of the individual (according to Article 1 of the Charter of Fundamental Rights of the European Union) may well prove to be a limit on freedom of contract in exceptional cases.⁵³ However, human dignity as the most fundamental norm expressing mutual recognition of legal persons as legal persons⁵⁴ is hardly the right tool to serve as a placeholder for the intentions of the social-justice-in-contract-theory approaches named above. Again, it is the very notion of individual basic rights and the non-consequentialist concept of autonomy that they presuppose which stand in the way of theories promoting paternalistic restrictions on freedom of contract whenever a transaction is said to be insufficiently conducive to the well-being of a party.

IV. Implications

1. Substantial and methodological consequences

A liberal theory of contract is not a libertarian one, but is perfectly compatible with policies of massive redistribution of wealth, benefits, or primary goods in favor of disadvantaged groups of persons. There is more to the law than absolute negative property rights understood as insurmountable *side constraints* for all forms of state or private action.

At least liberalism of a Rawlsian kind, however, tries to protect spheres of agency freedom and voluntary agreements that are not conceived as mere means for collective ends. Understanding a contract in the perspective of freedom rights of the contract parties commits contract theory to concentration on their internal relationship.⁵⁵ In this perspective, a ‘contract’ demands an atomistic view. An “external perspective” of contract law – understanding a contract as serving a particular social value independent of the parties’ autonomy, as an instrument

49 Pace Collins, *supra* note 45, at 3.

50 Jürgen Habermas, *Faktizität und Geltung* 310 et seq. (1992).

51 Pace Collins, *supra* note 45, at 8.

52 German Constitutional Court, *supra* note 59.

53 Collins, *supra* note 45, at 6 et seq.

54 Thomas Gutmann, *Struktur und Funktion der Menschenwürde als Rechtsbegriff*, in *Lebenswelt und Wissenschaft*. *Deutsches Jahrbuch Philosophie* 2 309 (Carl Friedrich Gethmann, ed., 2011).

to realize social justice, virtues, non-discrimination, efficiency – is exogenous to the notion of contract and its normative foundation. There is a substantial (a) and a methodological (b) consequence to be derived from this:

- (a) Any functionalization of contracts for external ends curtails the realm of contracts, i. e. the spheres of agency freedom of legal persons mutually respecting each other as free and equal. There are some good reasons to limit freedom of contract, but it is always a question of curtailing, not defining, it. There may be good reasons for using contract law to implement distributional goals when alternative ways of doing so are likely to be less suited or more costly or intrusive (Anthony Kronman thought of usury laws and laws on minimum wages, habitability, and labor protection⁵⁶), and maybe Hugh Collins is right in thinking that even the way to socialism leads through contract law⁵⁷, but, in every instrumentalization of contract law to an end other than the parties' freedom, something gets lost: the contract. So, from a theoretical point of view, the European Commission had a point when it stated in its presentation of the proposal for a Common Frame of Reference that, in the CFR, 'contractual freedom should be the guiding principle; restrictions should only be foreseen where this could be justified with good reasons'.⁵⁸
- (b) Legal theory *sensu stricto* (as opposed to theories regarding law) is a first order reflection of the legal system it deals with. It is a reconstruction of the legal point of view. As such, it cannot proceed without some sort of normative coherence theory, interpreting statutes, court decisions, and their underlying normative principles and concepts in order to provide a consistent totality of rules. A coherent general theory of contract, reaching deeper than what Hanoch Dagan rightly calls the existing structural pluralism of contract institutions⁵⁹, is a precondition for the internal consistency and reasonableness the law must claim for its doctrines and principles.⁶⁰ Vice versa, any theory of contract has to make plausible that its conception of contractual obligation is implied by the basic doctrines of contract law and that it, in turn, holds them together in one integrated whole.⁶¹ Therefore, a theory of contract has to start with reflection upon the organizing idea of the notion of contract – autonomy –, and then try to build a consistent and coherent theory around it (which, of course, this article cannot do). In this endeavor for 'theoretical' contract law scholarship, liberal contract theory aims at a coherent set of basic legal principles and institutions governing a justifiable law of contract (if not the complete body of it, leaving room for matters of convention, of *determinatio*⁶² and of policies in specific doctrinal choices).

55 Wilhelmsson, *supra* note 19, at 719 et seq.

56 Anthony Kronman, *Contract Law and Distributive Justice*, 89 *Yale Law Journal* 472 (1980). See also Daphne Lewinsohn-Zamir, *In Defense of Redistribution Through Private Law*, 91 *Minnesota Law Review* 326 (2006).

57 Hugh Collins, *Social Market and the Law of Contract*, 49 *ARSP-Beiheft* 85, 87 (1992).

58 Brussels, 12.2.2003 COM(2003) 68 final, para. 62.

59 Hanoch Dagan, *Autonomy, Pluralism, and Contract Law Theory*, forthcoming in *Law and Contemporary Problems*, 2013.

60 Dworkin, *supra* note 46; Robert Alexy, *The Argument from Injustice. A Reply to Legal Positivism* (2002); Benson, *supra* note 11, at 118.

61 Benson, *supra* note 11, at 123 et seq.

62 William Lucy, *Philosophy and Contract Law*, 54 *University of Toronto Law Journal*, 75, 95 (2004).

It is for this reason that the liberal theory of contract holds all attempts to functionalize contracts for social or policy goals to be extrinsic to the concept of contract, i. e. these attempts cannot be developed as an integral part of contract theory even insofar as such goals are substantially or procedurally justifiable (as some are). Because the notion of contract is inherently founded on the idea of two or more persons realizing individual self-determination by means of voluntarily entering legally binding agreements, there is no such thing as a ‘choice of paradigm’ for the theory of contract. Alternative ‘paradigms’ necessarily fail to grasp the meaning of their object. At best, they denote (well-founded or not so well-founded) limits of the realm of contracts, but cannot explain what contracts are. They are built around a void. In order to grasp the core notion of a contract, alternative ‘paradigms’ of contract theory have to be parasitic upon the liberal one. As long as alternative or mixed approaches are unable to explain the internal relationship between the normative core concept of contract, autonomy, on the one hand, and the external good they want contract law to serve, on the other hand, justification of “the intrusion of the values of the welfare state into the structure of contract law”⁶³ or any other instrumentalization of contract will inevitably lead to insufficient theory. In this perspective, the “productive disintegration of private law”⁶⁴ results in the disintegration of private law theory, and perceiving contract law as just another arm of the regulatory state⁶⁵ is the self-abandonment of a theory of contract. That is why anyone who is not a political liberal may, nevertheless, have good reasons for sticking to a liberal theory of contract.

2. Two further options

A liberal theory of contract with its autonomy-based account of contract law claims to be self-sufficient and complete in its own terms. For reasons of normative coherence, liberal theory of contract starts with the central normative idea of contract, which is autonomy, and then builds a complex theory around it. In this approach, basically, the will of the parties defines the conception of justice. Therefore, contract law cannot be constituted by norms of substantive fairness. How, then, can a liberal theory of contract deal, e. g. with unequal bargaining power or ‘unjust’ or ‘unequal’ contracts (in the widest sense of these words) without falling into the theoretical traps of the alternative concepts sketched above?

For such a theory, the number of possible legal concepts is restricted to ones that can be shown to be consistent with the liberal core notion of contract. Substantive unfairness, inadequacy of consideration, or impaired bargaining power *per se* do not justify non-enforcement of a contract. At first glance, only the two forms of purely procedural grounds addressing a contracting party’s lack of voluntariness⁶⁶ (and hence, of autonomy), namely coercion (including some forms of duress and even undue influence) and mistake (including fraud, misrepresentation, and non-fulfillment of duties of disclosure), are intrinsic aspects of a liberal theory of contract. Moreover, from the very idea of contract and the relationship of mutual recognition between persons underlying it, an autonomy-based account of contract law is perfectly able to extract pre-contractual and contractual duties to inform, duties to co-operate, as well as duties

63 Wilhelmsson, *supra* note 19, at 713. Cf. Roger Brownsword, Geraint Howells, Thomas Wilhelmsson, *Welfarism in Contract Law* (1994).

64 Cf. Hugh Collins, *Regulating Contracts* 53 et seq. (1999).

65 Collins, *supra* note 64, at 33 et seq.

66 Cf. Thomas Gutmann, *Freiwilligkeit als Rechtsbegriff* (2001).

of good faith and fair dealing, for example, when it comes to filling gaps in a contract or to modes of performance. There are even liberal reasons in favor of compulsory contracting under specific circumstances.

The crucial question is whether it has to leave it at that.

For a liberal theory of contract, there are two theoretical options at this point. One option is to focus upon the notion of equal respect. In this regard, a (limited) principle of non-exploitation seems to come closest to an idea of fairness intrinsic to a contract, i. e. to an idea recognizing and respecting individuals as equals (V). The second option is to build upon a ‘thicker’ concept of autonomy (VI).

V. Non-Exploitation

Focusing upon the notion of equal respect, there is one complex normative concept that has to be explored further – exploitation⁶⁷ (in its strictly analytic, not in its Marxist meaning), i. e. describing, simplified, a situation where a person takes unfair advantage of someone else’s vulnerabilities or desperation to strike a deal. Exploitation is a tricky concept, with a moral force less clear than coercion since exploitation is compatible with voluntary action (on both sides); it can be mutually beneficial; it may be harmful for an individual to be protected from being exploited, and it is far from clear which forms of exploitation should count as a kind of wrong that can justify state intervention. Moreover, notions like “excessive benefit” or “(grossly) unfair advantage” seem to depend on some standard of a “just price” (or at least, have reference to the concept of a hypothetical competitive market). Therefore, processual accounts of contractual exploitation⁶⁸ seem more promising. Anyway, the concept of non-exploitation comes closest to an idea of fairness intrinsic to a contract, i. e. to an idea recognizing and respecting individuals as autonomous subjects and equals. In this regard, Peter Benson has tried to show that a certain non-distributive reading of unconscionability covering the core concept of exploitation can be understood as a necessary element of the form and content of a contractual relation.⁶⁹ His argument, to which I cannot do justice here, is based mainly on a specific Hegelian regulative assumption about the parties’ presumed intention to give and receive equal value⁷⁰, thus ensuring that “parties can acquire rights against each other only in a way that respects the other throughout as an equal owner with a capacity for rights.”⁷¹ The Kantian liberal will have some problems digesting the argument in this form, which seems to depend on the Aristotelian heritage in Hegel’s theory, but it clearly points in the right direction. In the last analysis, a (Kantian) liberal concept of non-exploitation in contracts rests on the similar assumption that there are limits to the ways in which the parties, in making use of contract as an institution built upon a relationship of mutual recognition and equal respect between persons, can be allowed to treat one another instrumentally or only as a means.

67 Alan Wertheimer, *Exploitation* (1996); Alan Wertheimer, Matt Zwolinski, *Exploitation*, in *The Stanford Encyclopedia of Philosophy* (Edward N. Zalta ed., Spring 2013), <http://plato.stanford.edu/archives/spr2013/entries/exploitation/> (last visited Feb 24, 2013).

68 Rick Bigwood, *Exploitative Contracts* 196 et seq. (2004).

69 Benson, *supra* note 11, at 184 et seq.

70 Benson, *supra* note 13, at 187 et seq.; see also Peter Benson, *Abstract Right and the Possibility of a Nondistributive Conception of Contract: Hegel and Contemporary Contract Theory*, 10 *Cardozo Law Journal* 1077, 1119 (1989).

71 Benson, *supra* note 11, at 192.

One of the interesting parts of a liberal theory of contract is how it translates these structurally different concepts into doctrine.⁷² Within the different national legal systems, autonomy-limiting coercion, on the one hand, and exploitation, on the other, are currently being addressed in a quite nonsystematic way, by a plethora of theoretically blurry concepts, for example, by different notions of ‘coercion’ or duress, and certain aspects of undue influence and unconscionability (or ‘good morals’, in German law), respectively.⁷³ The main task of a liberal theory of contract as a form of legal theory aiming at doctrine is to reconstruct these legal notions along the lines of the different analytical structure of the two concepts, coercion and exploitation. For a start, Articles 4.108 (‘Threats’) and 4.109 (‘Excessive Benefit or Unfair Advantage’, requiring a combination of procedural and substantive unfairness) of the *Principles of European Contract Law*⁷⁴ do a good job here, a better one at least than any national law in common law or the continental traditions. The *Principles, Definitions and Model Rules of European Private Law*⁷⁵ have kept this model rule on exploitation.⁷⁶

VI. Enabling Autonomy

While the concept of non-exploitation stands for an attempt to gently broaden the ‘thin’ concept of *equality* (and equal respect) referred to by liberal legal theory, a second option might be to change from the ‘thin’ concept of *autonomy* as its base to more substantial theories. As demonstrated by Hanoch Dagan⁷⁷, drawing on Joseph Raz’s conception of the ideal of personal autonomy as self-authorship, such a move might well lead to a pluralization of the hitherto normative monism of autonomy-based theories of contract, such as, for example, the one sketched here.

After a reminder of the concept of autonomy referred to in a liberal theory of contract, as presented here (1), we will look at Dagan’s approach and its multiple strengths (2), and finally try to frame some queries (3).

72 For common law in ‘Anglian’ legal systems, see Bigwood, *supra* note 68.

73 Thomas Gutmann, *Zwang und Ausbeutung beim Vertragsschluss*, in *New Features in Contract Law* 49 (Reiner Schulze ed., 2007).

74 Ole Lando, Hugh Beale, *Principles of European Contract Law* (2000).

75 Christian von Bar, Eric Clive, *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR), Full Edition, Vol. I* 507 (2009).

76 Article II–7:207: “(1) A party may avoid a contract if, at the time of the conclusion of the contract: (a) it was dependent on or had a relationship of trust with the other party, was in economic distress or had urgent needs, was improvident, ignorant, inexperienced or lacking in bargaining skill, and (b) the other party knew or could reasonably be expected to have known of this and, given the circumstances and purpose of the contract, took advantage of the first party’s situation by taking an excessive benefit or grossly unfair advantage. (2) Upon the request of the party entitled to avoidance, a court may if it is appropriate adapt the contract in order to bring it into accordance with what might have been agreed had the requirements of good faith and fair dealing been followed. (3) A court may similarly adapt the contract upon the request of a party receiving notice of avoidance for unfair exploitation, provided that this party informs the party who gave the notice promptly after receiving it and before that party has acted in reliance on it.”

77 Dagan, *supra* note 59.

1. Liberalism's thin concept of autonomy

The concept of *autonomy* referred to in a liberal theory of contract is a formal notion of agency freedom. In this perspective, the subject matter of law, and especially of contract law, is what Kant called “Willkür”⁷⁸, free from any perfectionist or moralist content. There are two reasons for this. The first has to do with the inclusive function of law. The question of whether a person acts ‘autonomously’ has different functions in different normative settings. In almost all varieties of its philosophical use, the concept of personal autonomy (albeit often understood as a procedural one) is a ‘thick’ concept, a concept of the ‘good’, not the ‘right’. In most of its meanings, it designates an ideal which real persons can only approach, at best; in some, a realizable ideal. Autonomy in this sense, however, is always gradual – a person can be more or less autonomous. Autonomy may be understood as a second-order capacity of persons to reflect critically upon their first-order preferences, desires, wishes, and so forth, and the capacity to accept or attempt to change these in light of higher-order preferences and values.⁷⁹ A person understood as autonomous is someone who is responsive to a sufficiently wide range of reasons concerning her choices⁸⁰, who is authentic in a sense that she is able to reflectively endorse (or not be alienated from) her basic organizing values and commitments in the light of her diachronic practical identity, i. e. the historical processes that have given rise to these characteristics⁸¹, or who, on the basis of an authentic interpretation of her “real” objectives, can make “strong” evaluations in regard to the success of her life and to her identity as a whole.⁸² Autonomous life can be associated with a life with a high degree of biographical consistence and coherence that follows a “rational life plan” which “would be chosen [...] with full deliberative rationality, that is, with full awareness of the relevant facts and after careful consideration of the consequences”.⁸³ Autonomy in the sense of an ideal category of personhood can also be understood as liberty or becoming free of “heterarchy”⁸⁴ or of the motivation-power of others, as critical evaluation and formation of one’s desires⁸⁵, or as liberation from cognitive limitations on spontaneous experience.⁸⁶ In Freud’s psychoanalytic tradition, the concept of autonomy aims at a person who has worked through her unconscious connections of instinctual drives to a conscious liberty with which she can have her self-powers at her disposal as unimpededly as possible, without being hindered by frustrating, infantile expectations.⁸⁷

78 Immanuel Kant, *Metaphysische Anfangsgründe der Rechtslehre*, in *Kants gesammelte Schriften* Vol. VI 230 (Preußische Akademie der Wissenschaften ed., 1902–1923).

79 Gerald Dworkin, *The Theory and Practice of Autonomy* (1988).

80 Bernard Berofsky, *Liberation from Self. A Theory of Personal Autonomy* (1995).

81 John Christman, *The Politics of Persons. Individual Autonomy and Socio-historical Selves* 133 et seq. (2009).

82 Charles Taylor, *Self-Interpreting Animals* (1985), in *Philosophical Papers*, Vol. 1 45 (1985); Taylor, *What’s wrong with negative liberty*, in *Philosophical Papers* Vol. 2 211 (1985); Stanley L. Benn, *Freedom, Autonomy, and the Concept of a Person*, 86 *Proceedings of the Aristotelian Society* 109, 125 et seq. (1976); Benn, *A Theory of Freedom* 9, 178 (1988).

83 John Rawls, *A Theory of Justice* 408 (1971). See also Michael Bratman, *Planning Agency, Autonomous Agency*, in *Personal Autonomy: New Essays on Personal Autonomy and Its Role in Contemporary Moral Philosophy* 33 (James Taylor, ed., 2005).

84 Benn, *A Theory of Freedom* 9, 164 et seq. (1988).

85 Jon Elster *Sour Grapes. Studies in the Subversion of Rationality* 109 et seq. (1983).

86 Berofsky, *supra* note 80.

87 Sigmund Freud *Das Ich und das Es* (1923), in *Studienausgabe*, Band III 273, 317 (1972).

For reasons of social inclusion and equality, the notion of ‘autonomy’ regarding a person’s claim for respect as an agent who is entitled to choose her own path and follow it (i. e. by making contracts) has to be a low-threshold concept. Being autonomous in this sense must count as the default case, at least for adults. In this respect, autonomy must be independent of the extent to which persons meet ideal conceptions of autonomous personhood or positive liberty, provided that they fulfill certain minimum requirements in regard to rationality, self-reflection, and self-control, i. e. competency. ‘Autonomy’ in this sense designates a binary concept, a range property.⁸⁸ Otherwise, the fundamental assumption of our legal systems (and of conceptions of moral rights, as well) that, in general, individuals have normative competency for their decisions would lose its foundation and refer to paternalistic tutelage of the average citizen.

The second reason for the concept of autonomy referred to in a liberal theory of contract being a formal notion of agency freedom is what Rawls calls the “fact of reasonable pluralism”.⁸⁹ Modern democratic societies are characterized by a pluralism of incompatible yet reasonable comprehensive religious, philosophical, and moral doctrines, as well as incompatible conceptions of the good life pursued by different individuals. Two normative claims are derived from this, the first being that values are valid for a person only if those values are or can reasonably be endorsed by the person in question and the second that principles guiding the operation of institutions of social and political power – what Rawls calls the institutions of the basic structure⁹⁰ – are legitimate only if they can be endorsed in this way by those subject to them.⁹¹ Respecting a person’s claim for being recognized as an agent who is entitled to choose her own conception of the good life and follow it, the concept of autonomy referred to in a liberal theory of contract, must, again, be a ‘thin’ and formal notion of agency freedom, devoid of any perfectionist content or strong conceptions of the ‘good’.

2. The freedom-of-contracts approach

The current most promising endeavor built on a ‘thicker’ concept of autonomy is the freedom-of-contracts approach set forth by Hanoah Dagan and Michael Heller. Dagan, playing off Joseph Raz’s rich theory of autonomy⁹² against Raz’s earlier, all-too-short comments on contract theory⁹³, draws upon Raz’s conception of the ideal of personal autonomy as self-authorship and its relation to value pluralism.⁹⁴

Raz’s main point is that individual autonomy, i. e. the idea that people should be the authors of their own lives, requires the liberal state, through its laws, to actively “enable individuals to pursue valid conceptions of the good” by providing “a multiplicity of valuable

88 See John Rawls, *supra* note 28.

89 John Rawls, *supra* note 25, at 36, 37, 58 et seq.

90 John Rawls, *supra* note 25, at 258.

91 John Christman, *Autonomy in Moral and Political Philosophy*, *The Stanford Encyclopedia of Philosophy* (Spring 2011 Edition), Edward N. Zalta (ed.), URL = <http://plato.stanford.edu/archives/spr2011/entries/autonomy-moral/> (Feb. 22, 2013); cf. Martha Nussbaum, *Rawls’s Political Liberalism. A Reassessment*, 24 *Ratio Juris* 1 (2011) and Charles Larmore, *The Moral Basis of Political Liberalism*, 96 *The Journal of Philosophy* 599 (1999).

92 Joseph Raz, *The Morality Of Freedom* (1986).

93 See esp. Joseph Raz, *Promises in Morality and Law*, 95 *Harv. L. Rev.* 916 (1982) and Raz, *Promises and Obligations, in Law, Morality, and Society: Essays in Honour of H. L. A. Hart* 210 (P.M.S. Hacker & J. Raz eds., 1977).

94 Dagan, *supra* note 59.

options”⁹⁵, because “the ideal of personal autonomy [...] requires not merely the presence of options, but of acceptable ones”.⁹⁶ Dagan starts here: given “the diversity of acceptable human goods from which autonomous people should be able to choose and their distinct constitutive values, the state must recognize a sufficiently diverse set of robust frameworks for people to organize their life.”⁹⁷ As contract law plays a crucial role in expanding the possibilities of interpersonal interactions and voluntary obligations and thus of self-authorship in the Razian ideal of personal autonomy, an autonomy-based justification of contract should, for Dagan, be neither passive nor structurally monist. On the one hand, in taking seriously contract law’s enabling and empowering function, i.e. its role in the social production of stable and viable categories of human interaction and “its mission of fostering the practice of undertaking voluntary obligations due to its indispensable role for self-authorship, contract law appropriately takes a much more active approach”. On the other hand, recognizing and promoting the individuality-enhancing role of multiplicity, contract law should follow the prescriptions of structural pluralism. In the wider framework of the “pluralist turn in private law theory”⁹⁸ suggested by Dagan, “it requires a structurally pluralist theory of contract, in which contract law is an umbrella of a diverse set of contract institutions, where each institution responds to a different regulative principle, namely vindicates a distinct balance of values in accordance to its characteristic subject-matter and the ideal type of the parties’ relationships it anticipates”⁹⁹. In this regard, across a range of contracting spheres, extending from deals between distant strangers to ‘thick’ personal relations, different contract institutions – those allowing cooperation-in-personal-detachment as well as others, supporting long-term interpersonal relationships of face-to-face cooperation like employment contracts, agency contracts, partnership contracts, and landlord-tenant contracts – are governed by distinct regulative principles, thus “enabling people to freely choose their own ends, principles, forms of life, and associations by navigating their way among them.”

In work in progress, Hanoch Dagan and Michael Heller unfold this idea into a theory of “freedom of contracts”¹⁰⁰, that is, the parties’ ability to choose among attractive and well-defined contract types, thereby rejecting the idea that contractual freedom can be coherently grounded solely in negative liberty. Instead, Dagan and Heller show that creation and shaping of contract types is central to contractual freedom, when freedom is understood as an individual’s ability to make meaningful choices about her life: “Only a sufficiently rich repertoire of contract types properly facilitates people’s ability to choose and revise their various endeavors and interpersonal interactions.” In exploring such a different understanding of freedom through law and the liberal obligation to provide diverse contract law, the authors especially follow the idea that *limits* within particular contract types can expand human freedom by expanding *meaningful* choice. In their view, the definition of robust and “valuable” options requires deploying mandatory rules or sticky defaults which curtail or encumber party choice within the chosen relationship. It seems consistent to claim that the commitment to ensure a

95 Raz, *supra* note 92, at 133, 161.

96 Raz, *supra* note 92, at 205.

97 All following quotes from Dagan, *supra* note 59.

98 Hanoch Dagan, *Pluralism and Perfectionism in Private Law*, 112 *Columbia Law Review* 1409.

99 Dagan, *supra* note 59.

100 The following quotes are from Hanoch Dagan and Michael Heller, *Freedom of Contracts* (January 4, 2013 Draft).

broad range of *valuable* options thus defined entails creating a “mosaic of contract types representing distinctive balances of values”, which cannot be replaced by “a more neutral regime that equally supports all possible arrangements that people might want to take up.”

The innovative freedom-of-contracts approach can demonstrate quite plausibly that its conception is basically implied by basic doctrines of existing contract law. This is certainly true for most continental contract law systems, e.g. in Germany, where many contract types – for example, consumer contracts, employment contracts, or landlord-tenant contracts – are framed quite robustly by mandatory rules and sticky defaults which strongly curtail or encumber party choice within the chosen relationship, reflecting the legislators’ political design of these institutions (while in other areas, parties are more or less still left free to contract as they please). In the same sense, the *Principles, Definitions and Model Rules of European Private Law* (DCFR – an academic text with, however, the ambition of serving as a blueprint for European Union legislation) define “freedom” as an underlying principle in private law in a negative sense (not imposing unnecessary restrictions), as well as in a positive one, in which “it can be promoted by enhancing the capabilities of people to do things. [...] People are provided with default rules (including default rules for a wide variety of specific contracts) which make it easier and less costly for them to enter into well-regulated legal relationships”.¹⁰¹ Although the DCFR as a whole presents a normatively inconsistent (and not just pluralist) plethora of “underlying” and “overriding” principles of private law¹⁰² without hierarchy, there is at least a clear understanding of the enabling function of contract law. Moreover, the *acquis* of existing European private law is strongly defined by consumer protection rules, forming several especially robust contract institutions in Dagan’s sense¹⁰³, imposing on businesses well-defined duties of product safety and of disclosure and affording consumers very wide powers of cancellation.

Then, the approach rightfully qualifies itself as *liberal*, inasmuch it is clearly grounded in a conception of individual autonomy. Although it distances itself from the presupposition that *contract law* is, and should be, guided by one underlying principle, and, although it stresses that there is no single animating principle that captures the quintessence of all contracting practice, it presents itself as a *theory of contract law* based exclusively upon a certain notion of autonomy. The approach makes it perfectly clear that “safeguarding individual freedom must come first for any contract theory that calls itself liberal” and that “autonomy is the ultimate value of contracting, the source of the state’s obligation to provide meaningful diversity of contract types.” It is the authors’ “claim that autonomy is contract’s ultimate value, while utility and community are its instrumental values”, the latter deriving their importance from the way in which they serve the parties’ autonomous pursuit of their goals, which qualifies the freedom-of-contracts approach not only as a *liberal*, but also as a *general* theory of contract, offering an account of how contract law weaves together normative commitments to autonomy, utility, and community. Thus the freedom-of-contracts approach is immune against the criticism brought forward above (see IV.1), which claims that paradigms of contract theory alternative to the (Kantian) liberal one are not able to explain the internal relationship between the normative core con-

101 Christian von Bar, Eric Clive, *Principles*, supra note 75, at 38.

102 “Freedom, security, justice, and efficiency, [...] protection of human rights, promotion of solidarity and social responsibility, preservation of cultural and linguistic diversity, protection and promotion of welfare, promotion of the internal market” (ibid., 5 et seq.).

103 Among which are contracts regarding the sale of consumer goods, distant selling of goods or of financial services, doorstep-selling, package travel contracts, consumer credit contracts, and timeshare contracts.

cept of contract and autonomy, on the one hand, and the external good they want contract law to serve, on the other. In addition, it seems highly plausible that, while the proper place of efficiency and community cannot be at the level of animating contract law as a whole (see above, III), both values surely have a rightful place as components of distinct contract types that support people's diverse interests because "utility and community [...] are the goods that free people actually want when they choose to contract with one another."

Moreover, the focus of this approach on the *enabling* of autonomy answers a criticism rightfully directed against the classical Kantian liberal theory of law and its 'thin' concept of self-determination, addressing "how vulnerable groups are significantly disadvantaged by arrangements in which benefits are distributed in part on the basis of the autonomy-competence that individuals develop 'naturally.'"¹⁰⁴

To sum it up, the freedom-of-contracts approach poses the greatest challenge to the classical (or deontological) liberal theory (as sketched here) while remaining true to its monist autonomy-based fundamental normative commitment. It constructs (1) a coherent general theory of contract which (2) understands autonomy (as self-authorship) as the one organizing idea of contract law, while (3) recognizing the significance of other pertinent values (especially utility and community) as *subsidiary* or instrumental to autonomy, and (4) embracing the (limited) structural pluralism that typifies existing contract laws in a way that supports, rather than undermines, the monist autonomy-based fundamental normative commitment of the approach.

3. Some queries

Nevertheless, some questions can be asked. The first ones point out the dependence of the freedom-of-contracts approach on Raz's theory.

- (1) The answer to the central question of whether "Raz's consequentialist view of autonomy offers an appealing alternative"¹⁰⁵ is far from evident. Raz oscillates when it comes to the question of whether autonomy is of intrinsic or of instrumental value.¹⁰⁶ First of all, Raz's consequentialist view of autonomy is aggregative. This is to say that his concept of autonomy is incompatible with "moral individualism"¹⁰⁷ and that his moral theory "can justify restricting the autonomy of one person for the sake of the greater autonomy of others".¹⁰⁸ So his approach is open to the plea raised against utilitarian theories by Nagel¹⁰⁹, Rawls¹¹⁰, and Hart¹¹¹ – it cannot take seriously the separateness of persons¹¹² and tends to assume that the owner of the good of 'autonomy' is some sort of collective super-subject. On this basis, infringement of individual autonomy always seems possible in order to maximize

104 Joel Anderson, *Regimes of Autonomy*, forthcoming in *15 Ethical Theory and Moral Practice* (special issue on "Private Autonomy, Public Paternalism?", ed. Annette Dufner and Michael Kühler, 2013).

105 The following quotes are from Dagan and Heller, *supra* note 100.

106 David MacCabe, *Joseph Raz and the contextual argument for liberal perfectionism*, 111 *Ethics* 493 (2001).

107 Raz at note 92, at 198 et seq., 206. See Jeremy Waldron, *Autonomy and Perfectionism in Raz's 'The Morality of Freedom'*, 62 *Southern California Law Review*, 1097, 1125 f. (1989).

108 Raz at note 92, at 419.

109 Thomas Nagel, *The Possibility of Altruism* 138 (1970).

110 Rawls *supra* note 28, at § 5, 22 ff., § 30, 187; cf. Robert Nozick, *Anarchy, State, and Utopia*, 32 et seq. (1974).

111 Herbert L.A. Hart, *Between Utility and Rights*, in *Essays in Jurisprudence and Philosophy*, 198, 199 et seq. (1983).

112 *Pace* Raz, *supra* note 92, at 271.

the collective level of autonomy in Raz's sense. This seems to be a structural limit of a Razian kind of liberalism (although this problem will probably not play such a prominent role regarding the task of designing a diverse set of contract institutions equally open to all).

- (2) There are good reasons to assume that individual *rights* which shall guarantee individual autonomy have to be understood in a non-consequentialist way as legally respected choices¹¹³ (as put by H. L. A. Hart) – at least when it comes to contracts. Private autonomy is (and must be) based on a “will” theory of individual rights that understands rights as a means for protecting legally protected spheres of freedom of choice, and not only as a notion of rights serving objective “interests” or benefiting their bearers.¹¹⁴ Raz, however, claims the latter¹¹⁵ and insists not only that there is no *right* to personal autonomy (which is understood as being only a moral *ideal* to be pursued)¹¹⁶, but also, given that “rights are based on people’s interests, that it cannot be claimed that they are trumps in the sense of overriding other considerations based on individual interests.”¹¹⁷ This is an inherently paternalistic concept¹¹⁸, as the question could be raised with regard to every action of whether the action to which the bearer of a right claims to be entitled is in his overall best interest, all things considered. If not, why respect this right or a contract based on the parties’ unwise use of their contractual freedom, respectively? And again, “there is nothing essentially non-aggregative about rights”.¹¹⁹ For both reasons, the Razian concept of rights to individual freedom seems to be shaky ground in regard to contractual autonomy, legal certainty, and even the principle of *pacta sunt servanda*.
- (3) The freedom-of-contracts approach starts with reflection of the constitutive idea of the notion of contract – autonomy –, and then tries to build a consistent and coherent theory around it. It does so, however, by building upon a consequentialist understanding of autonomy presented as a collective good. Albeit the ideal of personal autonomy is a special good which is not extrinsic to the concept of contract, as a good, it also serves to functionalize and restrict contractual freedom *sans phrase*. There is great conceptual tension between autonomy in this sense and a concept of autonomy designed to respect

113 H. L. A. Hart, Legal Rights, in *Essays on Bentham. Studies in Jurisprudence and Political Theory* 162, 189 et seq. (H. L. A. Hart ed., 1982); cf. Friedrich C. v. Savigny, *supra* note 34, at §§ 4 seq., 52 (1840); Carl Wellman, *A Theory of Rights* ch. 4 (1985); Leonard W. Sumner, *The Moral Foundation of Rights* ch. 2, 46 et seq. (1987); Hillel Steiner, *An Essay on Rights* ch. 3 (1994).

114 Cf. Rudolf v. Jhering, *Geist des römischen Rechts*, Volume 3.1. § 60, 339 et seq. (4th ed. 1888); Neil McCormick, *Rights in Legislation, in Law, Morality, and Society. Essays in Honour of H. L. A. Hart* 189 (Peter M. Hacker, Joseph Raz eds., 1977); David Lyons, *Utility and Rights*, in *Rights, Welfare, and Mill’s Moral Theory* 147 (David Lyons ed., 1994).

115 Raz, *supra* note 92, at ch. 7 et seq., 183 et seq.; Joseph Raz, *Rights and Individual Well-Being*, in *Ethics in the Public Domain. Essays in the Morality of Law and Politics* 29 (Joseph Raz ed., 1994);

116 Raz, *supra* note 92, at 247.

117 Raz, *supra* note 92, at 187.

118 Pace Raz, *supra* note 92, at 191. Consequently, different from Stuart Mill’s, Raz’s harm principle “regards the prevention of harm to anyone (himself included) as the only justifiable ground for coercive interference with a person” (Raz, *supra* note 92, at 412 et seq.). Cf. Francesco Biondo, *Two Types of Liberal Perfectionism*, 18 *Ratio Juris* 519, 519, 525 et seq., 533 (2005) and Thomas Gutmann, *Paternalismus und Konsequentialismus*, Preprints of the Centre for Advanced Study in Bioethics 17, <http://www.uni-muenster.de/KFG-Normenbeugung/publikationen/preprints.html>.

119 Raz, *supra* note 92, at 187.

agency freedom and a person's claim for being recognized as an agent entitled to choose her own conception of the good life and follow it (i. e. a formal notion of agency freedom devoid of any perfectionist content or strong conceptions of the 'good'). Therefore, the freedom-of-contracts approach should acknowledge more explicitly that there is a *trade-off* between autonomy₁ conceived as an individual right, on the one hand, and the ideal of autonomy₂ as a consequentialist, summable individual value and public good, on the other hand. These two forms of autonomy cannot be reduced to each other. There is no systematic discussion of this point (although the authors implicitly hint at this trade-off by [a] rejecting the idea that contractual freedom can coherently be grounded "solely" in negative liberty and [b] by following the idea that limiting autonomy₁ within particular contract types can expand autonomy₂ by expanding meaningful choice). In other words, the approach needs to address the relation between the Right and the Good¹²⁰ more clearly. It seems that the authors would not be well advised in following Raz here, who tries to get rid of the problem by claiming that the importance of rights lies only in their service to the public good, anyway.¹²¹

- (4) Raz's definitely perfectionist account of autonomy is related to a strong concept of the good. Raz postulates a close relationship between morality and well-being¹²²; in this sense, a person's well-being "depends on the value of his goals and pursuits".¹²³ In the end, for Raz, "autonomy is valuable only if exercised in pursuit of the good"¹²⁴, it "does not extend to the morally bad and repugnant".¹²⁵ Interestingly, in order to answer the question of "who decides" about what is moral, Raz does *not* base his case on his strong concept of the authority of the state¹²⁶ or on democratic procedures. To the contrary, although the argument in his book "maintains that it is the function of governments to promote morality"¹²⁷ and that it is their goal "to enable individuals to pursue valid conceptions of the good and to discourage evil or empty ones"¹²⁸, he reminds us "that the fact that the state *considers* anything to be valuable or valueless is no reason for anything. Only being valuable or valueless is a reason."¹²⁹ Modern democratic societies (see above, VI.1), however, are characterized by a pluralism of incompatible, yet reasonable comprehensive religious, philosophical, and moral doctrines and incompatible conceptions of the good life pursued by different individuals. Thus, public reason is never univocal and contains within itself many types of disagreement. Seen from the perspective of Political Liberalism¹³⁰, Delibera-

120 John Rawls, *The Priority of Right and Ideas of the Good*, 17 *Philosophy & Public Affairs* 251 (1988).

121 Raz, *supra* note 92, at 256 and 261.

122 Raz, *supra* note 92, at 313 et seq.

123 Raz, *supra* note 92, at 298.

124 Raz, *supra* note 92, at 381.

125 Raz, *supra* note 92, at 411.

126 Raz, *supra* note 92, at 70 et seq.

127 Raz, *supra* note 92, at 415.

128 Raz, *supra* note 92, at 133.

129 Raz, *supra* note 92, at 412.

130 See *supra* notes 89 to 91.

tive Democracy¹³¹ or Pluralism¹³², there seems to be a serious problem with the legitimacy of Raz's claim to ground the law (and its coercive machinery) in objective public values of this kind. The authors, intending to be "careful not to impose a specific conception of the good life on the citizenry"¹³³ and stressing that "the existing categories [of private law] and their underlying values are always subject to debate and reform",¹³⁴ might want to differentiate their "moderately perfectionist"¹³⁵ understanding of private law and what they understand by "*meaningful* choices", "*valuable* options" and the "law's *ideals*" still more clearly from the Razian concept of objective values.

- (5) Two more minor points must be raised. Does the freedom-of-contracts approach succeed in presenting a *coherent* account of how contract law weaves together normative commitments to autonomy, utility, and community? Aren't these tensions much greater and structurally deeper? What is the deeper axiological and structural relationship between autonomy as the ultimate value of *the institution* of 'contract' and the value of utility and community which people seek to realize *by means of* contracts? If the value of utility and community in contract is neither fundamental nor freestanding, but rather derived from the way in which these serve the parties' autonomous pursuit of their goals and if autonomy even plays a "side constraint" role, how can "difficult tradeoffs" between autonomy, on the one hand, and utility or community, on the other hand, even be conceivable?
- (6) It is quite plausible to claim that "so long as there is sufficient intra-sphere multiplicity, that is, freedom to choose from among valuable contract types, and so long as people can exit such types and enter others reasonably easily, mandatory rules within any particular type do not necessarily threaten autonomy." Therefore, the authors request meaningful choice within spheres, i. e. that, within each particular sphere of contracting, contract law must offer a range of normatively attractive contract types allowing people "to contract based on a different value balance". How is this to be understood exactly? Will there be only one type of contract institution per contracting sphere (say: landlord-tenant contracts) capturing "its predominant or underlying purpose", or several? Would the existence of several contract institutions entail a multiplicity of underlying purposes? And who decides?

131 Jürgen Habermas, *Faktizität und Geltung. Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats* (1992); Amy Gutmann and Dennis F. Thompson, *Democracy and Disagreement* (1996) and *Why Deliberative Democracy?* (2004).

132 Richard Bellamy, *Liberalism and Pluralism* (1999); John Gray, *Agonistic Liberalism*, 12 *Social Philosophy & Policy* 111.

133 Cf. Dagan, *supra* note 98, at 1409.

134 Cf. Dagan, *supra* note 98, at 1434.

135 Cf. Dagan, *supra* note 98, at 1429.