Moving Beyond Promise: A Response to the Choice Theory of Contracts

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I. The terrain

It is impossible to overestimate the impact and importance that the publication in 1981 of Charles Fried's *Contract as Promise* has had on the field of philosophically inclined contract theory.[1] The book was and still is considered seminal. At the time, the very idea of a contract law grounded on liberal premises and as an independent legal category was under sustained attack from the Critical Legal Studies ('CLS') movement, which viewed contract law and indeed law generally as an instrument of social control. Like any tool, its value depended on its usefulness for achieving the end to which it was put. Aside from that, it was dispensable.

It was this challenge that kept Fried awake at night.[2] Fried's response was as devastatingly simple as it became powerful. He linked or grounded contract law in the morality of promise, which itself was supported by a negative conception of freedom emphasizing the importance of freedom from interference in the pursuit of one's self-chosen goals and projects. With this account, Fried gave contract law an anchor. Contract was no more dispensable than promise; the freedom of the individual depended on it.

As things turned out, the economic analysis of contract law which grounds the value of contract in the goal of wealth maximization or promoting efficiency has taken centerstage as the main instrumental account of contract law. It has achieved a level of prominence and influence in thinking about contract law that the CLS could only have dreamed of. Nevertheless, Fried's book – albeit conceived as a defence against a different enemy – still stands as a beacon of resistance against the general instrumentalizing tendency in contract theory of which economic analysis is only the most recent manifestation.

Fried's theory though has come under serious pressure from those both sympathetic and antagonistic to his broader aims. The trouble lies with the account's foundations in the morality of promise. These foundations critics have pointed out seem out of kilter with the actual practice of contract law.[3] Contract law rules and doctrines seem to diverge in fairly

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[1] CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION (Harvard University Press 1981).

[2] Charles Fried, *The Ambitions of Contract as Promise*, in PHILOSOPHICAL FOUNDATIONS OF CONTRACT LAW 17, 18-21 (Gregory Klass, George Letsas, & Prince Saprai eds., 2014).

[3] Important examples include: Richard Craswell, *Contract Law, Default Rules, and the Philosophy of Promising*, 88 MICH. L. REV. 489 (1989); James E. Penner, *Voluntary Obligations and the Scope of the Law of Contract*, 2 LEGAL THEORY 325 (1996); DORI KIMEL, FROM PROMISE TO CONTRACT: TOWARDS A LIBERAL THEORY OF

fundamental ways from what a contract law grounded in promise would seem to recommend. This has led to what has become known as 'the contract and promise debate' – a debate about the extent to which the law of contract diverges from promise. In light of this, one might ask whether Fried's account of contract has become victim to Herbert Hart's old adage that a theory should not purchase a "pleasing uniformity of pattern" if it comes at the cost of distorting the very thing that it was meant to explain?[4]

In their incredibly lucid, timely, and important new book, *The Choice Theory of Contracts*, Hanoch Dagan and Michael Heller answer this question with a resounding 'yes'.[5] They claim that the central problem with Fried's account was its narrow scope. Following a tradition that goes back to the early treatise writers Fried took the commercial contract as contract's core case, and as the central object for his philosophical inquiry. Whilst contract as promise and its philosophical underpinnings in a negative account of liberty might plausibly explain the pertinent legal principles, rules, and doctrines that animate this particular domain in which legally binding agreements are made, it is largely inadequate, they argue, as an interpretation of the principles, rules, and so forth, that govern transactions in the many and varied other contexts in which contractual transactions typically occur. These include, for example: marriage, tenancy agreements, employment contracts, consumer transactions, and so forth. Dagan and Heller's key point being that Fried never did explain why the commercial contract deserves such special attention, when contracts are made in other equally important contexts.

They argue that the field of vision of contract theory needs to expand radically in order to accommodate the multiplicity of contexts in which contracts are found. In that vein, they attempt to construct a liberal non-consequentialist account of contract law which makes sense of the distinct rules and doctrines that we find in different spheres in which contracts are made, for example, the priority attached to addressing inequality of bargaining power in the employment context, or in protecting the right to property or family life in fashioning landlord and tenant law.

In my view, Dagan and Heller not only put their finger on a serious problem with Fried's account, but they defend a plausible theory of contract – 'the choice theory' – grounded in a conception of positive freedom as self-authorship or personal autonomy which overcomes this and other problems which have plagued the traditional promise-based view. In the analysis that follows, I will explain in more detail how they do this. I will also though raise a potential difficulty for the account. Although Dagan and Heller rightly expand the scope of contract theory, it's unclear that their own account – the choice theory – provides an adequate explanation of the newly expanded domain. If that's right, the book although making several steps forward, may need to take a few steps back.

II. The trouble with promise

CONTRACT (Hart Publishing 2003); Seana V. Shiffrin, *The Divergence of Contract and Promise*, 120 HARV. L. REV. 708 (2007).

[4] HERBERT L.A. HART, THE CONCEPT OF LAW (Oxford University Press 1961) 38.

[5] HANOCH DAGAN & MICHAEL HELLER, THE CHOICE THEORY OF CONTRACTS (Cambridge University Press 2017).

There were three main problems with Fried's claim that promising was the foundation of contract. I shall call them the *moral* objection, the *legal* objection, and the objection I've already mentioned about the narrow *scope* of his account. As Dagan and Heller explain in the book, the moral objection was that although Fried linked contract umbilically to promise, he actually said very little about why promises are morally binding, and what he did say was largely obscure. He said that when people make promises they invoke a convention which gives others moral grounds to trust them.[6] The difficulty as Dagan and Heller explain is that Fried failed to justify why people should have the moral power to promise in the first place.

He did say that the existence of the convention enabled people to enlist the help of others to pursue goals and projects that they could not achieve alone.[7] This sounds like a plausible start for explaining the power, but the difficulty was how such an explanation could be compatible with Fried's broadly Kantian and deontological outlook about morality and law.

To the extent that Fried even offered a justification for the moral power to promise – or why people have moral grounds for believing the promisor shall perform – that account seems to rely on an independently specifiable good, i.e., that of promoting personal autonomy, but this is an approach that one would expect from a consequentialist or teleological moral outlook. This matters of course because as Jody Kraus pointed out the account that we give of promise affects how we should think about contract.[8] The moral basis of Fried's account of promise is at best unclear and at worst incoherent.

The second problem was legal. His book defended a non-interventionist contract law, based on a conception of negative freedom which prioritized the value of personal independence. The difficulty as Dagan and Heller explain is that such an account will struggle to justify why promises or agreements should be enforced by the state in the form of a law of contract in the first place. After all, for such a view, in the absence of harm, shouldn't the state stay clear of enforcing personal morality?[9]

The third problem which I've already mentioned relates to the scope of Fried's theory. As Dagan and Heller do so well to explain, what Fried takes to be his primary explanandum – the commercial contract – requires justification, given that there are so many other and varied contexts in which promises are legally enforced. The result is that Fried's theory grounded in the promise principle and the value of personal independence although providing a plausible conception of the norms that should govern transactions between sophisticated commercial parties provides a far less satisfactory account of other contractual contexts, such as consumer contracting, employment, and so forth, where a multiplicity of other values and moral concerns, including interventionist values, such as preventing inequality of bargaining power and exploitation, seem to play a perfectly legitimate role.

Fried's book was then as Dagan and Heller rightly say "a great, though flawed, work."[10] The question arises whether it is possible to hold onto Fried's central claim that

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[6] *supra* FRIED, CONTRACT AS PROMISE (Note 1) 16.
[7] *Id*. 8, 13-14.
[8] Jody S. Kraus, *The Correspondence of Contract and Promise*, 109 COLUM. L. REV. 1603 (2009).
[9] *supra* DAGAN & HELLER, THE CHOICE THEORY (Note 5) 22.
[10] *Id*. 20.

there can be an autonomous contract law grounded on liberal premises, whilst at the same time justifying the power to promise, showing how the legal enforcement of at least some promises might be compatible with the liberal harm principle, and advancing a theory of contract that justifies the legal rules and norms that apply not just in the commercial sphere but in the wide variety of contexts, including employment, consumer, and so forth, in which contracts are actually made? Dagan and Heller think it is. To this end they advance their 'choice theory of contracts'.

III. The choice theory

The choice theory is an attempt to defend a liberal theory of contract law that overcomes the problems relating to morality, law, and scope that plagued Fried's account. Dagan and Heller attempt to do this by grounding their theory not like Fried in the value of negative freedom or freedom from interference, but rather in a vision of positive freedom based on the ideal of personal autonomy or self-determination. Taking their cue from Joseph Raz's account of freedom as personal autonomy, they argue that freedom depends on people being able to fashion their own lives by making successive choices from a variety of viable options affecting how their lives might go, and the state playing an essential role in creating and fostering these opportunities for people to choose between.[11]

It is with this foundation in place that Dagan and Heller attempt to deal with the moral, legal, and scope problems that afflicted Fried's theory. Recall, the moral problem for Fried was that he failed to explain or at least explain coherently with his deontic account why we have the moral power to promise in the first place. To the extent that he offered a justification at all, it was based on the idea that promise or contract helps people enlist others to achieve their goals, but this seemed a distinctly teleological explanation. Dagan and Heller offer exactly the same account of the normative power, but, unlike Fried, they embrace the teleological underpinnings of this defense. So, they claim: "Contract is not worth keeping in and of itself. Rather, its value derives from its contribution to our autonomy, which is valued for its own sake."[12]

This teleological defense of the power to promise and contract, also enables Dagan and Heller to deal with the problem of explaining how the moral obligation to perform one's promise can legitimately be enforced by the law of contract without contravening the liberal harm principle. The harm principle proved an insurmountable object for Fried because for him the underpinning notion of freedom behind promise was personal independence or freedom from interference. Against that background, it was unclear how the state in the absence of harm could justify interfering with people's rights to change their minds about the promises they had already made.

Dagan and Heller explain this by showing how the right to independence though worthy of protection is a constitutive element of an ultimate value that both promise and contract serve which is that of promoting the agent's right to self-determination or personal

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[11] *Id*. 68. Relying on JOSEPH RAZ, THE MORALITY OF FREEDOM (Clarendon Press 1986) Part V.

[12] *supra* DAGAN & HELLER, THE CHOICE THEORY (Note 5) 40, see also 47.

autonomy.[13] Given this, some interference by the state with the agent's personal independence is justified if it promotes the ultimate value of securing the agent's personal autonomy, which it does because it is only if people feel assured that others will comply with their promises that the system of contract will serve its autonomy-promoting ends. The harm principle is overcome, because if people are not required by the state to perform their promises, that causes harm to the autonomy-supporting institutions of promise and contract.

By defending an unashamedly teleological theory of contract based on the value of personal autonomy Dagan and Heller overcome the moral problem of justifying the normative power of promise, and the legal problem of explaining the state's right to enforce such promises and the agreements based on them without violating liberal constraints such as personal independence and the harm principle. In these two respects, there is no doubt that Dagan and Heller's choice theory makes important advances in defending a plausible liberal theory of contract. However, they rely on personal autonomy not only to deal with these moral and legal problems, but also to deal with the problem of the scope of Fried's promise-based account. Here their account becomes it seems to me much more controversial.

Recall, the problem of scope related to the fact that Fried's promise-based theory and the conception of negative freedom which underpinned it seemed able to explain the law relating to commercial contracts, but not the many other spheres of contracting activity, such as employment contracts, marriage, consumer contracts, and so forth. The scope of Fried's theory seemed just too narrow. Dagan and Heller deal with this worry by arguing that the value of personal autonomy explains the existence of these distinct fields of contractual activity.

So, we know that on this view personal autonomy depends on the existence of a variety of options and that the state plays an essential role in supporting and fashioning them. In pursuit of these ends, the state might legitimately subsidize certain kinds of valuable activity, such as, for example, opera, or football, or foreign language tuition, so that people have the opportunity to participate in the goods that these activities involve during the course of their lives.

Somewhat awkwardly in my view – in ways that I will explain further below - Dagan and Heller argue that the various fields of contract law, such as consumer contract law, landlord and tenant, and so forth, are similarly to goods like football and opera valuable options that the state has a duty to support to enable people to live autonomous lives.[14] When we enter contracts, Dagan and Heller argue, we are typically motivated either by the desire to satisfy our subjective preferences reflected in say a contract of sale, or alternatively to pursue certain kinds of community with others, such as, for example, a marriage contract, or by some combination of such utilitarian and communitarian ends. According to the choice theory, "People contract not just for economic benefits, but also for the social gains that come from working together, from taking part in a successful collective enterprise."[15] What the different areas of contract law represent is an attempt by the state - in a way that is constrained by the ultimate value of autonomy - to offer contracting parties a menu of ways

[13] *Id*. 46.
[14] *Id*. 68.
[15] *Id*. 58.

to realize these utilitarian or communitarian goals. In this way, the state provides contractual parties with an array of options, which promotes their ability to lead autonomous lives.[16]

So, for example, on this view I should have the choice when buying a good to use the law of sale or alternatively to rely on more heavily regulated consumer law depending on my own individual ends and the type of relationship I want to have with the other party to the transaction.[17] Similarly, in the employment context, it should be up to me whether I enter an employment contract with the relations of trust and good faith that it entails or whether instead I offer my services on the basis of the more arms-length relation of being an independent contractor. These areas of law constitute different kinds of relation I might have with the other contracting party. They provide me with the variety of options I need to lead a fully autonomous life.[18] As Dagan and Heller say: "contract law should support multiple contract types, each of which offers a distinct balance of goods, so that parties can choose their own favorite balance."[19]

Dagan and Heller deal with the problem of the scope of contract law, by claiming that the value of personal autonomy, which according to the choice theory provides contract law with its underpinning rationale, links together the various contexts in which the power to contract is exercised, such as the consumer context, marriage, employment, and so forth. These areas exist, according to this view, to promote the value of personal autonomy. Furthermore, within each area autonomy functions as a "side-constraint" on the way the state balances competing values such as utility and community in coming up with the rules that govern contractual interactions: "Within any particular type, autonomy's role as the ultimate commitment of contract implies that it should generally trump contract's other values when the conflict."[20]

The issue of contract law's scope is where, in my view, the choice theory goes awry with the value of personal autonomy. That value and Dagan and Heller's underlying teleological theory of contract does important work in overcoming what I have called the moral and legal objections to Fried's account. However, it has limits. In particular, in attempting to use personal autonomy to deal with the problem of scope they distort the nature and purpose of contract law.

IV. The limits of personal autonomy

As I have explained, Dagan and Heller's central claim is that the focal purpose of contract law is to promote personal autonomy and that it achieves this end by providing contracting parties with a variety of contract forms or types, such as consumer law, sales law, employment law, and so forth, which enable parties to pursue their broadly utilitarian or communitarian purposes autonomously. Contract law provides them with a menu or range of contract types to choose between which balance these ends in a multiplicity of ways subject to the overriding concern to uphold the autonomy of the parties. What contract law gives

[16] *Id*. 5, 14, 43, 79, 103.
[17] *Id*. 68.
[18] *Id*. 2-3.
[19] *Id*. 80.
[20] *Id*. 84-85. And see 14, 91.

these parties or at least should give is an adequate range of contract types for them to choose between.

This is a novel and interesting claim about contract law, which should be credited for at least attempting to explain a pervasive feature of the practice, which is that contract law comprises many subdomains which are constituted by their own distinct sets of rules, principles, and values. So, for example, the rules that obtain in the context of insurance contracts are not the same that we find in those governing marriage. Previously, promise-based accounts of contract law such as Fried's have been myopic about the variety of moral values and principles at play in these various domains; choosing instead to focus largely on values that are implicated in commercial contexts.

In this way, Dagan and Heller do an important job in focusing our attention on the multiplicity of subdomains that exist within any particular system of contract law. By so doing, they highlight the need for contract theory to accommodate these contract types, or at least justify their exclusion as the main contractual subject matter under inquiry. However, without diminishing the value of these insights, I do worry that Dagan and Heller's more specific proposal that these subdomains of contract law are best explained or understood through the prism of the value of personal autonomy is problematic in at least three related and important ways. They are that it, first, provides too unstable or contingent a foundation for contract law, second, provides a distorting and misleading picture of the purposes contract law serves, and, finally, has a tendency to give an overly reductive or monistic account of legal doctrine which has the potential to cause legal and moral mistakes. I will explain each of these concerns in turn.

Too unstable

As a purely conceptual matter, it seems fairly clear that there is no necessary connection between contract law and the value of personal autonomy. This is because we can easily imagine contract law existing even in a non-autonomy supporting culture, where the pursuit of personal autonomy is not a prized ideal or embedded in local customs, institutions, and practices. Contract law may well exist in such societies, even though the purposes to which it is put do not relate to the pursuit of personal autonomy, but rather to other ends or goals, such as welfare maximization or communitarian ideals.

Dagan and Heller though are clear from the start of the book that the choice theory is not a form of conceptual analysis, but rather an interpretive account of contract law that we find in existing liberal societies, like the U.S. and the U.K.[21] Their aim is to present this law "in its best light by highlighting its autonomy-enhancing function."[22] There is of course much controversy in the field of general jurisprudence about whether the best way to carry out legal philosophy is through conceptual analysis or interpretive theory. My worry about the stability of the choice theory though does not relate to these broader methodological issues. Rather, even if we accept the legitimacy of Dagan and Heller's focus on the purpose of contract law in existing autonomy-supporting cultures, there is reason to doubt that the value of personal autonomy even in these societies provides contract law with a stable enough foundation.

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[21] *Id*. 12-13.
[22] *Id*. 13.

We know from the choice theory that the state plays an essential role in creating the conditions for the pursuit of personal autonomy, in particular by fostering an adequate range of valuable options or forms of life for citizens to choose between and pursue. According to the choice theory the central purpose of contract law is to "amplify" the range of options available, by giving contracting parties a choice between a multiplicity of ways to structure their contractual relations with one another; each type differing depending on how goods or ends that individuals pursue through contract like utility or community are balanced.[23]

The reason this aspect of the choice theory seems too unstable is that Dagan and Heller don't explain why an already autonomy-supporting culture should pursue the value of personal autonomy through contract rather than another means. There are lots of ways a state might promote the availability of autonomy-promoting options for citizens that do not necessarily involve citizens entering into contracts or choosing between contract types. So, for example, the state might give citizens more control over their lives by providing them with genuine choice when it comes to selecting a state school for their children, or when choosing which state hospital to use for a necessary medical procedure. Or the state might choose to invest in certain kinds of activities to make them available to citizens as options, for example by investing in community football or rugby pitches, or cricket fields, or foreign language tuition in schools. And alongside making such options available, the state of course has a role in ensuring that citizens develop the basic capacities they need to exercise meaningful choices at all, by for example providing a basic level of education, healthcare, and material wellbeing.

The difficulty for Dagan and Heller is that by embracing the idea that contract law promotes an independently specifiable end like personal autonomy, they run the risk that in an autonomy-supporting culture there may be other perfectly legitimate and competing ways to pursue that end, with the result that their theory might recommend or at least permit the state to rely on these other methods at the expense of supporting the institution of contract law.

At times in the book, it seems unclear where Dagan and Heller stand on this issue. So, for example, they say: "*insofar* as the state invests in contract law – *as it surely does* – it must do so with an eye to its core choice-enhancing obligations, including the constitutive role it can play by offering valuable contract types." (my emphasis)[24] That "*insofar*" suggests that even for a liberal state, contract law is not a necessity, but just one of the available means by which autonomy might be promoted. On the other hand, the '*as it surely does*' in the sentence suggests that they have in mind a stronger connection between a liberal state and the existence of a law of contract.

Dagan and Heller's teleological approach leaves them open to the objection that they make contract law into an 'optional extra' in a liberal state which is just not how it seems to most people. It may be that Dagan and Heller have a plausible response to this point, but it is largely unclear from the book what it is or would be. It could be that they argue personal autonomy is impossible or incredibly difficult to achieve in a liberal state in the absence of a properly subsidized law of contract and the variety of contractual forms or associations it makes available to citizens, but if that is the case such an argument needs to be explicitly

[23] *Id*. 80.
[24] *Id*. 76.

made. In the absence of such an argument, the worry is that the choice theory fails to capture the sense in which contract law at least in a liberal state plays a necessary or essential rather than merely contingent role. The danger is that this lack of clarity uproots contract law from its foundations in promissory morality and plays into the hands of those who claim that the value of contract law is purely instrumental.

Distorts the purpose of contract law

One of the virtues of the choice theory, as I have argued, is that it acknowledges and tries to explain the variety of legal doctrines and rules that apply in the differing contexts in which contracts are made. Part of that explanation is that we have to appeal to other values beyond promise like community and utility to explain those rules and doctrines. In this way, there is no doubt that the choice theory is more pluralistic than the promise theory of contract or at least Fried's version of it. However, there are significant ways in which the choice theory is still – like the promise theory – a largely monistic account of contract law, which in problematic ways distorts the nature and purposes of the practice.

The choice theory is monistic in the sense that the ultimate justification given for contract law is the single value of personal autonomy. It is true, as I have said, that in an attempt to expand the scope of contract law Dagan and Heller show that other values like utility and community shape contract law rules and doctrines. However, this comes with the caveat that even the role that these values play is ultimately related or justified by the master value of promoting personal autonomy – a value which also constrains the pursuit of these other concerns. For Dagan and Heller, these other values or ends are derivative of the master value of personal autonomy in at least two ways.

First, their importance is ultimately reducible to the role that their pursuit plays as a constitutive component of an autonomous life. So, for example, to the extent that contract law promotes preference satisfaction, it does so not because this maximizes utility or social welfare, but rather because it advances self-determination.[25] In the case of community, although Dagan and Heller accept that it may have intrinsic value, nevertheless ultimately its value is derivative or dependent on its status as a constitutive element of an autonomous life.[26]

The second way in which these values or ends play a derivative role in the choice theory is that their importance is repeatedly related by Dagan and Heller to the fact that these are values that the parties themselves have chosen to pursue.[27] So, for example, if I choose to provide my services as part of an employment contract where relational values play an important role rather than as an independent contractor where the primary concerns are efficiency or welfare-oriented, the value of the ends that shape these two subdomains of contract law are ultimately related to the fact that these goods – community or utility – are ones that I have sought as part of the grander enterprise of self-authoring my life.

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[25] *Id*. 90-91.
[26] *Id*. 42.
[27] *Id*. 59, 80.

In my view, the way the choice theory accommodates the plurality of aims that these subdomains of contract actually pursue is reductive and distorts the practice. According to the choice theory, the various subdomains of contract law exist to provide contracting parties with an adequate range of ways in which to structure their contractual relations. The state may on this view have a duty to create or cultivate the existence of these subdomains as part of its broader duty to promote autonomy.

The trouble with this conception or rationalization of these subdomains is that it seems to involve - to borrow Bernard Williams' famous refrain against utilitarianism – 'one thought too many'.[28] Contract law rules develop as do all legal rules as a response to particular disputes or problems that inevitably arise in any complex social order or state. So, for example, the principle of freedom of contract which dominated contract law in the U.K. in the nineteenth century, gave way in the context of consumer contracts to principles relating to inequality of bargaining power, the prevention of exploitation and unfair surprise, equality of exchange, and so forth, due to the rise of monopolistic business practices, and the increasing use of standard form contracts.[29] The legislature and the courts responded to these changes in economic circumstances and bargaining power by developing and fashioning new contract law rules particularly in the consumer context. The emergence of that area of law was *reactive* to a series of genuine moral concerns relating to inequalities of bargaining power, concentrations of wealth, exploitation, and so forth.

The difficulty as I see it with the choice theory is that it seems to present the existence of such subdomains as *proactive* attempts by the state to promote the autonomy of contracting parties by giving them more "off the shelf" choice about the "legal edifice" that governs their transaction.[30] My problem here is not that such an account is not possible, but rather that it seems to be an ex post rationalization which is both unnecessary and likely to distort the true nature of the practice.[31] I should stress that I am not claiming that the problem with the choice theory is that it misrepresents legal history. I completely accept the point that Dagan and Heller make at the start of the book that although they offer an interpretive theory their aims are full-bloodedly normative and not historical.[32] Rather, my point is that the choice theory *as a normative account of the practice* seems implausible.

To see how consider a different example which Dagan and Heller themselves use to demonstrate the choice theory's normative bite. With the emergence in recent times of the 'sharing' or 'gig' economy, there has emerged a new type of worker perhaps most prominently represented by the 'Amazon' delivery or 'Uber' driver, who does not quite fit within the traditional categories of being either an employee or an independent contractor. As Dagan and Heller explain:

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[28] BERNARD WILLIAMS, MORAL LUCK (Cambridge University Press 1981) 18.
[29] See PATRICK S. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* (Clarendon Press 1979).
[30] *supra* DAGAN & HELLER, THE CHOICE THEORY (Note 5) 74.
[31] Cf John Tasioulas' critique of James Griffin's account of person hood account of human rights rooted in the notion of normative agency. Tasioulas argues that there seems to be a "more natural" way of arguing for these rights which is "less counterintuitively circuitous". I am making a similar criticism of Dagan and Heller's attempt to ground contract law in the value of choice or personal autonomy. John Tasioulas, *Taking Rights out of Human Rights*, 120 *Ethics* 647, 663 (2010).
[32] *supra* DAGAN & HELLER, THE CHOICE THEORY (Note 5) 12.

> Like independent contractors, workers of this intermediate category provide their own equipment and control their own hours, but, like employees, many of them are economically dependent on a particular company and vulnerable to the costs of termination without notice or severance.[33]

Dagan and Heller rightly claim that this new intermediate category of worker creates a legal problem. However, what seems surprising is that they present that problem as a problem of choice. The trouble as they see it is that by not recognizing their intermediate status, the law deprives these workers of a valuable option or form of interaction with businesses like Amazon and Uber that would expand the range of their autonomous choice. In light of this, the law should design a new contract type or subdomain – the realm of say the 'dependent contractor' or 'independent worker' - to promote the autonomy of those who fall within this intermediate type. Dagan and Heller say: "A state committed to enhancing autonomy should not stand in the way of emergence of new employment types *that give people what they want in this sphere*." (my emphasis)[34]

The problem is that this seems a rather indirect or circuitous way of explaining the need for such a category. There is a much simpler explanation. There now exists a category of workers which though only providing specific services to particular businesses are nevertheless hugely dependent on them. This creates peculiar vulnerabilities for these workers which justify an enhanced level of legal protection. Here we are able to straightforwardly explain the need for such a subdomain of contract law without having to appeal to any notion of personal autonomy or choice. Indeed, appealing to personal autonomy seems to gild the lily and take our eye off what is really important about these cases, i.e., the peculiar vulnerabilities that these workers face.

A non-contractual analogy might help to illustrate the broader point here. Take the powers, duties, and responsibilities both legal and moral that come from being a parent. Now of course it is possible to say that the reason for the existence of these powers, duties, and so on, is because the role of being a parent expands the range of options available to citizens in a particular society. There is no doubt that being a parent is an autonomy-enhancing activity. Nevertheless, it seems peculiar to regard the justification for the duties and powers that shape the role of being a parent to be the promotion of personal autonomy. Rather, they seem much more naturally explained by the particular vulnerabilities, threats, and needs, that arise when people choose to have or undertake parental responsibility for children.

Similarly, the choice theory's account of the scope of contract law in terms of personal autonomy seems to me largely unnecessary and rather distorting of the reasons for the existence of contract law and its various subdomains.

Leads to legal error

[33] *supra* DAGAN & HELLER, THE CHOICE THEORY (Note 5) 117.
[34] *Id*. 118.

These distortions of the role that contract law and its various spheres play will inevitably lead to legal error about some contract law rules and doctrines. This is because the choice theory by prioritizing personal autonomy distorts the moral basis of at least some doctrine.

The choice theory makes personal autonomy so central a value to contract law that Dagan and Heller are ineluctably drawn to it to explain legal doctrine. So, for example, they argue that a number of core contractual doctrines are underlain by a concern to protect those "whose capacities for contract-making and contract keeping fall below a certain threshold for participation."[35] This includes the doctrine of incapacity which prevents children from making contracts, undue influence which reflects "the concern that one of the parties is not sufficiently competent to make and accept contractual promises", and unconscionability which protects vulnerable parties who due to poverty or ignorance are unable to exercise "meaningful" or fully voluntary choices.[36]

Beyond these core doctrines, Dagan and Heller argue that personal autonomy provides the key to understanding doctrine that is local to certain contractual subdomains or spheres. So, for example, in the context of employment law, the rights of labor unions are protected, they argue, to address the inequality of bargaining power that exists between individual employees and firms. An inequality which would otherwise threaten the personal autonomy of employees: "Labor law attempts to solve this inequality by giving employees the chance to bargain collectively and thus to place themselves on more equal footing with their employers – with the goal that their resulting contracts embody the voluntariness that is fundamental to choice."[37]

My worry is not that there is no plausibility or indeed truth in these autonomy-related explanations of contractual doctrine. It seems to me at least in the case of the incapacity doctrine that personal autonomy or voluntariness provides a good explanation for its underlying moral basis. Rather, my concern is that Dagan and Heller attach such weight to personal autonomy that there is the risk that it may be overextended as an explanation to cover doctrines that are animated by other normative concerns. In this way, the choice theory begins to feel a lot less pluralistic as an account of contract law than we might have initially hoped or expected it to be.

This has dangers because it may lead to distorted understandings of doctrine which lead to both moral and legal error.[38] So, for example, scholars of English contract law have gone to great lengths to show that it is very difficult to rationalize longstanding case law on undue influence or unconscionability on the basis that these doctrines respond to concerns about impaired consent.[39] Rather, and as I have argued in the past, the prevention of

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[35] *Id*. 86.
[36] *Id*. 86-87.
[37] *Id*. 87.
[38] The promise theory was guilty of these sorts of mistakes. See George Letsas and Prince Saprai, *Foundationalism About Contract Law: A Sceptical View*, 1, 25-37 (July 10, 2018). Available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3211283
[39] See for example Mindy Chen-Wishart, *Undue Influence: Beyond Impaired Consent and Wrongdoing Towards a Relational Analysis*, in MAPPING THE LAW: ESSAYS IN MEMORY OF PETER BIRKS 201 (Andrew Burrows and Lord Rodger of Earlsferry eds., 2006).

exploitation provides a much more likely explanation.[40] Of course these are matters about which there is scope for disagreement, but the worry is that theories such as the choice theory are so monistic about the values at stake in contract law that they close off ex ante the possibility that there might be an *irreducible* plurality of values in play in justifying contract doctrine.

V. Conclusion

In conclusion, when Fried published *Contract as Promise* in 1981, the battle he was fighting was against the CLS movement which claimed that contract law was merely a tool for social control and could make no special claim for its own independent existence. Fried's great book though provided a powerful rebuttal and liberal defense of the existing category by rooting contract law in the morality of promise. Despite the fact that there has been in the decades since publication a new instrumentalizing onslaught from the economic analysis of law, Fried's central claim that such tendencies are reductive and fail to capture the distinctive way in which contract law serves the ends of reliance, coordination, cooperation, and so forth, in a liberal society still stands. This can all be said without denying that important moral and legal objections have been made to Fried's account.

Dagan and Heller's important new book clearly exposes the most important inadequacies of the promise theory, and the book shows convincingly how these problems arose due to Fried's deeper commitments to a deontological moral outlook and a negative conception of freedom. By jettisoning these aspects of his theory and instead embracing teleology and a positive conception of freedom Dagan and Heller are able to explain in a way that Fried failed adequately to do why promises are binding and how they might legitimately be enforced in a liberal society. These are significant advances which take the promise theory forward.

However, and as I have tried to show in this response, the choice theory has its own limits. One of the great virtues of Dagan and Heller's book is that it shows the way in which the promise theory was to a large extent myopic about the various spheres or contexts in which promises are legally enforced. Fried's theory is most at home in the commercial context, but it had very little to say about contractual subdomains such as consumer law, employment law, marriage, and so forth. In these contexts, a multiplicity of values and moral concerns seem to shape doctrine. The choice theory promised a more open outlook to the other ends and values that no doubt fashion contract law like utility and community, but on closer inspection it appears they are not of irreducible significance but ultimately depend and are constrained by the master value of personal autonomy. The sharp focus on personal autonomy has, as I argued in the previous section, significant downsides. It's unclear whether personal autonomy even in a liberal society provides contract law with a stable enough foundation. It also seems to distort the purposes that the various subdomains of contract law serve, and it might potentially give us misleading accounts of existing doctrine which cause legal and moral error.

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[40] Prince Saprai, *Unconscionable Enrichment?*, in PHILOSOPHICAL FOUNDATIONS OF THE LAW OF UNJUST ENRICHMENT 417 (Robert Chambers, Charles Mitchell & James Penner eds., 2009).

In the pursuit of a liberal theory of contract, the choice theory makes important progress. However, it has significant drawbacks too. They arise for the same reason that Fried's account struggled: by overemphasizing the role of freedom (in Fried's case the negative version, in Dagan and Heller's the positive) at the expense of other values that animate the field. Perhaps this is inevitable for any genuinely liberal theory of contract law. The problem though is that it seems as though a successful theory of contract law has to be a pluralistic one. The future of the promise theory depends on whether it can embrace this truth about contract.