

2021

Can Contract Emancipate? Contract Theory and The Law of Work

Hanoch Dagan

Tel Aviv University, daganh@post.tau.ac.il

Michael A. Heller

Columbia Law School, mheller@law.columbia.edu

Follow this and additional works at: https://scholarship.law.columbia.edu/faculty_scholarship



Part of the [Contracts Commons](#), and the [Labor and Employment Law Commons](#)

Recommended Citation

Hanoch Dagan & Michael A. Heller, *Can Contract Emancipate? Contract Theory and The Law of Work*, THEORETICAL INQUIRIES IN LAW, FORTHCOMING (2021).

Available at: https://scholarship.law.columbia.edu/faculty_scholarship/2754

This Working Paper is brought to you for free and open access by the Faculty Publications at Scholarship Archive. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Scholarship Archive. For more information, please contact scholarshiparchive@law.columbia.edu.

forthcoming in 23 THEORETICAL INQUIRIES L. (2022)

CAN CONTRACT EMANCIPATE?
CONTRACT THEORY AND THE LAW OF WORK

Hanoch Dagan & Michael Heller

daganh@tauex.tau.ac.il

mhelle@law.columbia.edu

April 2021

© Hanoch Dagan & Michael Heller, 2021

CAN CONTRACT EMANCIPATE? CONTRACT THEORY AND THE LAW OF WORK

Hanoch Dagan & Michael Heller

ABSTRACT

Contract and employment law have grown apart. Long ago, each side gave up on the other. In this Article, we re-unite them to the betterment of both. In brief, we demonstrate the emancipatory potential of contract for the law of work.

Today, the dominant contract theories assume a widget transaction between substantively equal parties. If this were an accurate description of what contract is, then contract law would be right to expel workers. Worker protections would indeed be better regulated by – and relegated to – employment and labor law. But contract law is not what contract theorists claim. Neither is contract law what the dominant employment theorists fear – a domain that necessarily misses the constitutive place of work in people’s life-plans and overlooks the systemic vulnerability of workers to their employers.

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

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

CAN CONTRACT EMANCIPATE?
CONTRACT THEORY AND THE LAW OF WORK

Hanoch Dagan & Michael Heller

CONTENTS

I. A HAPPY DIVORCE?	1
II. CLEARLY INCOMPATIBLE	5
A. <i>Familiar Theories</i>	5
B. <i>Familiar Complaints</i>	7
III. CONTRACT FOR AUTONOMY.....	11
A. <i>Admission Criteria</i>	11
B. <i>An Early Vision</i>	14
C. <i>Choice Theory</i>	16
IV. THE EMPLOYMENT CONTRACT	22
A. <i>Relational Justice at Work</i>	23
B. <i>Employees' Future Self</i>	26
C. <i>Employers' Limited Dominion</i>	29
V. REIMAGINING EMPLOYMENT.....	32

CAN CONTRACT EMANCIPATE?
CONTRACT THEORY AND THE LAW OF WORK
Hanoch Dagan & Michael Heller***

I. A HAPPY DIVORCE?

The promise of contract suggested by the title of this Essay is likely to sound misguided, if not deluded, to many (maybe most) readers. Nothing in the dominant theories of contract hints at contract's emancipatory potential, certainly not for workers. Utilitarian accounts perceive contract as a tool for allocating future risks in the service of people's preference satisfaction and society's aggregate welfare. Deontological contract theories, in turn, conceptualize it as a consensual transfer of entitlement from promisor to promisee, who thereafter becomes the legitimate owner of the object of this exchange. Both views are most comfortably at home with a contracting universe structured around the famous widget transaction, a commodity exchange between substantively equal parties.

Thus conceived, it is not very surprising that employment and labor lawyers tend to distance their subject from contract. If contract is at its core either a mechanism for reallocating risks or a way of transferring authority over a commodity, then the *idea* of an employment contract as such – that is: without an *exogenous* set of worker-protective rules that override contract's normative underpinnings – seems indefensible.¹ Both the *constitutive* place of work in people's life-plans and the *systemic vulnerability* of workers to their employers suggest that a liberal law, properly called, which should be first and foremost committed to

* Stewart and Judy Colton Professor of Legal Theory and Innovation & Director of the Edmond J. Safra Center for Ethics, Tel-Aviv University.

** Lawrence A. Wien Professor of Real Estate Law, Columbia Law School. Thanks to Alex Byran and Roy Kreitner for their helpful comments.

¹ Cf. Hugh Collins, *Is the Contract of Employment Illiberal?*, in PHILOSOPHICAL FOUNDATIONS OF LABOUR LAW 48 (Hugh Collins et al. eds., 2018).

people's equal right to self-determination, must reject the view of the employment relationship as a simple exchange of (future) services for (future) wages.

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

This (partial) divorce of contract theory and the law of work is not hotly debated; in fact, it seems quite conventional. To be sure, not all contract theorists are satisfied with this predicament; libertarians are certainly not. They find the statutory framework of employment relationship – prescribing a floor of minimum terms and immutable rights on a range of topics, such as safety in the workplace, nondiscrimination, minimum wages, working hours, and labor organization – wholly unjustified. Accordingly, libertarians call for dismantling this New Deal framework and reinstating in its stead the so-called *laissez faire* view of contract,³ which is echoed by dominant contract theory.⁴

And yet most contract theorists who are not libertarian embrace this status quo of mutual disconnection. Thus, mainstream utilitarian theories view commercial contracts between firms as contract's "main subject," whereas "the sale

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

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

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

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

Our mission in the Essay is to upset this conventional wisdom of happy dissociation of contract theory and work law, which we find both wrong and unfortunate. Thus presented, readers may suspect that what follows is yet another reformulation of the libertarian view of work law. But it is emphatically not; quite the contrary. The conventional wisdom aptly repudiates work law libertarianism. It thus correctly rejects the influence of contract's dominant understandings on employment and labor law. Indeed, as we explain in Part II, not only employment as we know it, but also any acceptable idea of an employment contract clearly ill-fits contract's dominant theories. But the conclusion that contract's dominant theories must not undergird employment in a liberal polity need not justify the blanket rejection of the *idea* of contract from the law of work. Rather, it may, as we further argue, testify to the failure of these theories.

Put differently, the significance of the employment contract for the lives of so many people suggests that contract theory should be structured (also) around work, rather than (only) around widgets. This means that the reasons that make contract's dominant theories clearly incompatible with employment should be regarded as contract theory's own admission criteria. As already implied and will be clarified below, these reasons are all related to the way contract's dominant theories do not take sufficiently seriously workers' right to self-determination.

These observations lead to our main claim. Contract, we contend, need not be work law's canonical "other." Rather, charitably conceptualized, contract can empower; it can even emancipate. To some extent, this proposition goes back to the vision of Adam Smith of contract's liberating potential, epitomized by the promise

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

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

of free labor. But that vision depends on a conception of contract that can deliver on this promise, and here Smith's account – that implicitly embraces, even celebrates, contract's dominant theories – goes astray. Hence, our effort in these pages is to reconstruct the empowering potential of contract, thus reinvigorating the promise of truly free labor, by imagining the road not taken: an understanding of contract with employment – and not only widgets – at its core.

Contract, we claim, can and should be conceptualized as an autonomy-enhancing device, which is founded on the fundamental liberal commitment of reciprocal respect for self-determination (or self-authorship; we use these terms interchangeably). This alternative understanding – the choice theory of contract, which we developed elsewhere⁷ and summarize in Part III – is both more normatively defensible and more loyal to the modern canon of contract than both the deontological and the utilitarian theories of contract.

Viewed from this autonomy-based understanding of contract, many (although admittedly not all) employment and labor law rules, which some see as necessary impositions on its logic and others as politically controversial interventions, are in fact, as we show in Part IV, ingrained in contract's liberal DNA. Thus, this exercise implies – a lesson with some practical timely significance – that in a liberal law, properly called, contract cannot be the refuge from work law's floor of minimum terms and immutable rights. While this floor is also supported by other reasons, it is first and foremost a necessary entailment of the ideal of liberal contract itself. Furthermore, our analysis also helps uncovering "off-the-wall" options of understanding employment, which may entail important reforms, leading to a true liberal contract of employment.

Does this imply that contract can, if properly conceptualized, emancipate? It depends what one means by this (big) word. Emancipation with a capital E requires fundamental changes which secure health, nutrition, education, and housing for working people. It also requires – closer to our subject matter – to rethink and

⁷ See HANOCH DAGAN & MICHAEL HELLER, *THE CHOICE THEORY OF CONTRACT* (2017); Hanoch Dagan & Michael Heller, *Choice Theory: A Restatement*, in *RESEARCH HANDBOOK ON PRIVATE LAW THEORY* 112 (Hanoch Dagan & Benjamin Zipursky eds., 2020).

reconfigure both the meaning of ownership of means of production,⁸ and the idea of the business corporation. But while the impact of a reconstruction of contract is dependent on these other reforms, it is by no means marginal (and may also contribute to their effectuation). While no one structural reform of any of these varied areas of law can fully emancipate, each of them – including, we think, reforming contract law along the lines of its truly liberal trajectory – is sufficiently significant to be worth our while; and if such piecemeal program is a viable ideal, then contract can, after all, emancipate.

II. CLEARLY INCOMPATIBLE

We begin with refining the reasons that justify the near-consensual position in which it is better for the law of work and contract theory – or, more precisely, its dominant voices – to stay apart. For this purpose, we refer to stylized skeletons of these voices, which will serve as our foils. The accounts under scrutiny are of course diverse; there are admittedly important differences not only between deontological and utilitarian theories, but also within each camp. But we've engaged extensively in (critically) analyzing many of these theories elsewhere,⁹ and neither these differences nor the fact that no specific theory exactly fits into our constructed foils matters for this Essay. What is critical here – the limited task of this Part – is to highlight the conceptual and normative premises of these grand traditions, flesh out for each a few of its typical propositions (or presuppositions), and see why indeed neither can plausibly serve as work law's foundational theory.

A. Familiar Theories

Deontological theories take seriously contract's justificatory challenge: What can justify the enforcement of wholly executory contracts? Why should law be

⁸ For this task and its implications on the scope of managerial authority, see HANOCH DAGAN, *A LIBERAL THEORY OF PROPERTY* chs. 3 & 7 (2021).

⁹ See DAGAN & HELLER, *supra* note 7, at 17-47; Hanoch Dagan & Michael Heller, *Why Autonomy Must Be Contract's Ultimate Value*, 20 JERUSALEM REV. LEG. STUD. 148 (2019); Hanoch Dagan & Michael Heller, *Autonomy for Contract, Refined*, 40 L. & PHIL. 213 (2020). This Part draws on these more extensive inquiries.

willing to coercively enforce promises even when nonperformance generates no detrimental harm? This is a particularly formidable challenge to deontologists who subscribe to a Kantian conception of right, in which people's interpersonal (horizontal) obligation is strictly limited to reciprocal respect for independence, which means that private law must be all about misfeasance, rather than nonfeasance.

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

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

To be sure, utilitarians produced a rich literature on relational contracts: they recognize that typically formation is only one moment in the life of the contract and that the parties' relationship is oftentimes robust and multifaceted. But these factors do not change the basic structure of the utilitarian analysis of contract: the significance of the parties' relations in this view is strictly instrumental – in facilitating the goal of joint maximization – and it has no bearing on the understanding of contract as an exchange between self-interested maximizers of commensurable utils; and while the temporal horizon of contract may imply that

the parties' precise entitlements cannot be prescribed at formation, this only means that they are likely to be substituted with a governance mechanism that is supposed to maximize the parties' joint surplus.

B. Familiar Complaints

The deontological and utilitarian conceptions of contract are surely distinct. Nonetheless, they are both vulnerable, albeit in somewhat different ways and with differing emphases, to the main familiar complaints against the contractualization of work.

First, if contract is a transfer – or even an exchange – then the wage contract vests ownership in the employer, so that the employer's right in the labor purchased is on par with his property rights in the means of production. This means that the worker – who is now the sheer possessor of her labor that the contract transferred to a new owner – must yield her will to the employer's direction and control. But “the alleged commodity ‘labor power’ cannot be shoved about, used indiscriminately, or even left unused, without affecting also the individual who happens to be the bearer of this peculiar commodity.”¹⁰ In other words, although “wage labor as a market relation” represents “chattel slavery's obverse,” wage labor (thus conceptualized) also entails “dominion and subjection.” A free contract involving labor turns out to be a contradiction in terms.¹¹

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

For both utilitarian and deontological conceptions of contract, all objects of contract are in principle indistinguishable (they are all widgets, if you will). This

¹⁰ KARL POLANYI, *THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME* 76 (1944, 2001).

¹¹ AMY DRU STANLEY, *FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE, AND THE MARKET IN THE AGE OF EMANCIPATION* 82-84, 87, 90, 96 (1998). *See also, e.g.*, Carole Pateman, *Self-Ownership and Property in the Person: Democratization and a Tale of Two Concepts*, 10 J. POL. PHIL. 20, 33, 38, 45, 47 (2002).

commensurability is inherent in the reductionist utilitarian commitments. But it similarly emerges from the abstraction that undergirds deontological theories. These theories are committed to set aside the parties' specific features as well as the goods for which they interact: for transfer theory, contract simply moves an abstract "substantive content" from one party's "rightful exclusive control" to the other's.¹² And because "*Homo Oeconomicus* and *Homo Juridicus* share the very same abstractness from particularity,"¹³ deontological theories, just like utilitarian ones, lack the normative resources to distinguish between a widget sale and an employment contract.

Thus, the indifference of both approaches to the nature of the performance that a promisee is entitled to enforce, makes them both blind to the distinction between a right to the delivery of a widget, which requires a promisor to produce and then depart from an external asset, and a right to a worker's labor that is both more comprehensive and much closer to the promisor's own self. Similarly, nothing in these approaches can distinguish long-term commercial contracts – such as output and requirements contracts, for which specific performance is readily available¹⁴ – from employment contracts.

But if contract can thusly imply that an employer can enjoy the same dominion over a worker's current – and even future – self as the buyer of widgets has, then work contractualization is indeed inherently and necessarily normatively bankrupt.¹⁵ Interestingly (and, as we'll see, quite tellingly), long before the New Deal, contract law – even while "recognizing that wage work entailed submission"

¹² PETER BENSON, *JUSTICE IN TRANSACTIONS: A THEORY OF CONTRACT LAW* 321 (2019).

¹³ Peter Benson, *The Unity of Contract Law*, in *THE THEORY OF CONTRACT LAW: NEW ESSAYS* 118, 188-90, 192 (Peter Benson ed., 2001).

¹⁴ See e.g., *Eastern Air Lines, Inc. v. Gulf Oil Corp.*, 415 F. Supp. 429, 442-43 (S.D. Fla. 1975).

¹⁵ See John Gardner, *The Contractualisation of Labour Law*, in *PHILOSOPHICAL FOUNDATIONS OF LABOUR LAW*, *supra* note 1, at 33, 43-47.

– not only “forbade perpetual submission,” but also prescribed that “free laborers . . . were entitled to end the exchange and find other buyers whenever they chose.”¹⁶

This veteran rule, alongside the possibility, hinted earlier, of conceptualizing contract in a way that highlights, rather than suppresses, the qualitative difference between widgets and employment, are key to the constructive stage of this Essay. But before we can get there, we need to see how the other familiar complaint against marrying work to contract, dealing with the inherent inequality of bargaining power between employees and their employers, is also baked into contract’s dominant theories.

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

On their face, utilitarian theories are on the other side of the spectrum, as they have no principled difficulty with encumbering people with extensive burdens and duties in the service of the public good (as aggregate welfare). But in contract, as noted, these theories typically go inwards, so to speak, focusing on the joint maximization of the contractual surplus, so that each party can maximize his or her share as per their respective bargaining powers. The maxim of joint maximization may yield interpersonal duties – at times, extensive ones; but these affirmative obligations are strictly limited to those which are ultimately *ex ante* beneficial to the putative obligee. Just as with the deontological accounts, there is no freestanding source within the utilitarian ones that can justify interpersonal obligations beyond the negative duty of noninterference.

¹⁶ STANLEY, *supra* note 11, at 93. See also, e.g., DEBRA SATZ, WHY SOME THINGS SHOULD NOT BE FOR SALE: THE MORAL LIMITS OF MARKETS 187 (2010).

This is again normatively unacceptable in the context of work.¹⁷ Three cumulative *structural* features ingrained in many employment contracts explain why.¹⁸ First, “[m]ost employment contracts arise between individuals who are more or less dependent on a single job and comparatively large organizations that are repeat players with diversified investments in the labor market.”¹⁹ Second, employment is one of the canonical examples of transaction specific investment, which as such creates, even in competitive labor markets, systemic vulnerability,²⁰ especially of late-career employees.²¹ Finally, the employment contract is structurally tilted because capital is unitary whereas labor is fragmented. The capital of each firm is “always united from the beginning” since its constituent parts are “entirely unrecognizable and indistinguishable.” Labor, by contrast, is “both indivisible and ‘non-liquid’,” which means that “each individual worker controls only one unit of [labor] power and, moreover, has to sell this under competitive conditions with other workers who, in turn, have to do the same.”²²

Neither of these structural bases of the inequality of bargaining in the context of work has any bearing on contract insofar as it is premised on the deontological accounts dealing with abstract persons and universal free will.²³ By contrast, on its face (as we’ve just hinted) they are relevant to utilitarian theories, which are highly attentive to consequences and incentives. But their relevance is, by definition, contingent.

¹⁷ See, e.g., Samuel R. Bagenstos, *Consent, Coercion, and Employment Law*, 55 HARV. C.R.-C.L. L. REV. 409 (2020).

¹⁸ See also, e.g., Guy Davidov, *The Three Axes of Employment Relationships: A Characterization of Workers in Need of Protection*, 52 U. TORONTO L.J. 357 (2002).

¹⁹ Estlund, *supra* note 2, at 384.

²⁰ See [OLIVER WILLIAMSON].

²¹ See Samuel Issacharoff, *Contracting for Employment: The Limited Return of the Common Law*, 74 TEX. L. REV. 1783, 1787-89 (1996).

²² See CLAUS OFFE, *DISORGANIZED CAPITALISM: CONTEMPORARY TRANSFORMATIONS OF WORK AND POLITICS* 177-78 (1985).

²³ Cf. Aditi Bagchi, *The Myth of Equality in the Employment Relation*, 2009 MICH. ST. L. REV. 579, 579-80, 602 (2009).

Economic accounts that adhere to the canon of welfare maximization will take note if, but only if and only to the extent that, these imbalances are likely to skew either allocative or productive efficiency; those that focus on joint maximization, in turn, will take them to heart if and to the extent that they are expected to shrink the contractual surplus. Either way, as such, concerns of interpersonal injustice are, just as with the deontological account, ultimately irrelevant (in some economic accounts they are even unintelligible). Thus, if workers internalize their subordinate position due, for example, to its legal entrenchment and a corresponding legitimizing hegemonic ideology – if they take their exploitation by employers for granted – certain relational injustices might not affect incentives and thus become invisible to the utilitarian calculus.

* * *

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

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

III. CONTRACT FOR AUTONOMY

A. Admission Criteria

Thus far we've identified the reasons that disqualify the dominant contract theories from governing employment in a liberal – as opposed to libertarian – state. In that, our explanation of the conventional wisdom of a happy divorce between contract theory and the law of work identified three requirements with which a contract theory should comply in order for it to be eligible for undergirding the law

of work; three admission criteria for an acceptable contract theory once employment enjoys its rightful central place in the universe of contract:

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

The failure of the dominant – deontological and utilitarian – contract theories to comply with any of these admission criteria is admittedly discouraging. But we think that the status quo that is reflected in the conventional wisdom, which relegates these task to external so-called regulatory law – and relies on external-to-contract, public values, such as that of social equality²⁴ – is also disquieting and indeed ultimately unacceptable. Three separate reasons support this conclusion.²⁵

First, this status quo of happy divorce opens the door to the expected libertarian critique, which presents work law as an unprincipled and potentially oppressive set of rules.²⁶ To be sure, liberal-egalitarians, who recognize citizens' Rawlsian duty to support just institutions,²⁷ need not – indeed should not – be reluctant to recognize *some* measure of justified commandeering of employers' as

²⁴ See Samuel R. Bagenstos, *Employment Law and Social Equality*, 112 MICH. L. REV. 225 (2013).

²⁵ Our discussion of the first two reasons draw on Hanoch Dagan & Avihay Dorfman, *Justice in Private: Beyond the Rawlsian Framework*, 37 L. & PHIL. 171 (2018); Hanoch Dagan & Avihay Dorfman, *Interpersonal Human Rights*, 51 CORNELL INT'L L.J. 361 (2018).

²⁶ See Epstein, *supra* note 4, at 1361-62, 1364.

²⁷ See JOHN RAWLS, A THEORY OF JUSTICE 293-94 (1971).

recruited delegates of the state which is, in this scheme, the actual duty-bearer of workers' rights. However, thus conceived, the framework is always vulnerable and on the defense; necessarily open to challenges of whether this external-to-the-contract burden goes too far.

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

Second, and in some sense even more fundamental, there is something intrinsically troubling with a contract theory that needs to resort to external resources in order to explain why these guarantees are essential to the legitimacy of employment contracts. More specifically, there must be something wrong in implying that these guarantees are *merely* a matter of *public* concerns, thus obscuring their freestanding interpersonal significance. We surely acknowledge the valid public reasons to ensure that our workplaces are safe, nondiscriminatory, and respectful of the people who work there. But these reasons do not imply that failing to secure a factory's safety or engaging in private discrimination is interpersonally innocuous. Quite the contrary.

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

Finally, there is a practical implication, and a significantly disturbing one, of the resulting conventional framing of work law's floor of minimum terms and

immutable rights as “special labor rights.”²⁸ This framing does highlight the crucial role of labor law in constraining employer’s authority and vindicating workers’ rights.²⁹ But it thereby also implicitly – and, at times, even explicitly – reifies the dominant approaches to contract. It thus implies that contract *can* serve as the instrument for “hiring workers as independent contractors,” namely: “to subject their relations with workers” to the rules of “commercial contracts” unencumbered by these labor rights.³⁰ Contract – or rather liberal contract – must not be amenable to such (ab)use. Salvaging the idea of (liberal) contract from its capture by contract dominant theories may be a first necessary step in combating this abuse.

B. An Early Vision

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

Contracts – notably employment contracts – can liberate individuals from predetermined roles and hierarchical social positions. Shifting from status to contract, the queen of the market, implies, as Smith insisted, that loyalty needs to be accounted for, rather than taken for granted, thus emancipating people from relationships of excessive dependency on the authority of others.³¹ This is why,

²⁸ See HUGH COLLINS [draft book].

²⁹ See Collins, *supra* note 1, at 67.

³⁰ Cynthia Estlund, *The Fall and Rise of the Private Law of Work*, in RESEARCH HANDBOOK ON PRIVATE LAW THEORY, *supra* note 7, at 412.

³¹ See ELIZABETH ANDERSON, PRIVATE GOVERNMENT: HOW EMPLOYERS RULE OUR LIVES (AND WHY WE DON’T TALK ABOUT IT) 4, 17-22 (2017); JEDEDIAH PURDY, THE MEANING OF PROPERTY: FREEDOM, COMMUNITY, AND THE LEGAL IMAGINATION 16-17 (2010).

when Henry Maine noted the “uniform” movement of “progressive societies” towards contract, he contrasted contract with status, which he understood strictly as innate, comprehensive, and inalienable.³² In a contract-based society, individuals are no longer rigidly bound into hierarchic groups and their rights and obligations do not derive from such involuntary associations.³³

There is unfortunately a gap – and a rather significant and distressing one – between Smith’s vision of a liberating market and the contemporary instantiations of the market, especially of the labor market; and we have no pretense to offer an explanation of this gap.³⁴ But it may be nonetheless telling to see that while Smith’s *vision* implicitly relies on self-determination as contract’s *telos*, his *conception of contract* is reminiscent of contract’s dominant theories, which – at least in the context of employment contracts – are, as we’ve seen, *autonomy-reducing*.

Smith claimed that labor markets are empowering because, while most people are not landowners, almost everyone “has, or can acquire, human capital.” Thus, labor markets allow everyone to choose freely whom to work for, “rather than depending on one single employer, as had been the case in feudalism.” But Smith also believed – and this is the crucial point for our purposes – that for labor markets to perform this transformative function, people must not only acquire marketable skills, but should also stand apart from their human capital, just as they do with respect to other forms of capital (read: property). Workers must regard their ability to work as something they sell in the market to the highest bidder and accordingly “must not see their professional activity as ‘constitutive’ for their identity” or as an essential part of themselves.³⁵

Because a fully commodified view of labor is (as noted) subversive, rather than conducive, to self-determination, we do not propose to follow Smith’s account

³² HENRY SUMNER MAINE, *ANCIENT LAW* 99-100 (J.M. Dent & Sons Ltd. 1917) (1861). See also Carleton Kemp Allen, *Status and Capacity*, 46 L. Q. REV. 277, 286 (1930).

³³ See Manfred Rehbinder, *Status, Contract, and the Welfare State*, 23 STAN. L. REV. 941, 942 (1971). See also R.H. GRAVESON, *STATUS IN THE COMMON LAW* 5 (1953); O. Kahn-Freund, *A Note on Status and Contract in British Labour Law*, 30 MOD. L. REV. 635, 636 (1967).

³⁴ For one interesting explanation, see ANDERSON, *supra* note 31, at 33-36.

³⁵ See LISA HERZOG, *INVENTING THE MARKET: SMITH, HEGEL, AND POLITICAL THEORY* 69-73 (2013).

of contract. Instead, we limit our alliance with Smith to an inspiration from the mission he ascribed to contract, of liberating people by facilitating their ability, at least partly, to write the story of their lives. One way of reading what lies ahead is as an attempt to imagine the road not taken: the contract theory, which Smith would have articulated had he appreciated the incompatibility of the (disappointing) contract theories to which he (implicitly) subscribed and the exciting vision of contract to which he was committed.

C. Choice Theory

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

1. *Foundations.* Choice theory begins with Rawls' dictum in which people are entitled to act on their capacity "to have, to revise, and rationally to pursue a conception of the good."³⁶ This fundamental right to self-authorship – a truism for liberal polities – requires law to create power-conferring institutions that augment people's ability to plan. People may surely change their plans, and autonomous persons must be entitled, as Rawls indicates, to do so. But having a set of plans arranged in a temporal sequence is typically key to the ability to carry out higher-order projects, namely: to self-determine. These plans and projects always implicate, given the human predicament of interdependence, other people. Therefore, the right to self-determination also applies – although with quite different effects – horizontally. Hence, private law's *grundnorm* of reciprocal respect for self-determination, which explains why it is justified for the law to authorize people to subject others to these autonomy-enhancing powers and, if needed, coercively enforce them.

Contract nicely fits into this normative infrastructure. Contract is a crucial component of a liberal law because it is the means through which we can legitimately enlist others to our own goals, purposes, and projects – both material and social. By ensuring the reliability of contractual promises for future

³⁶ JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 19 (2001).

performance, contract law enables people to join forces in their respective plans into the future. An enforceable agreement is the parties' script for this co-operative endeavor.³⁷ Contract law provides people the indispensable infrastructure that both facilitates this risky venture and ensures its integrity. It thus expands the available repertoire of secure interpersonal planning engagements beyond the realm of close-knit interactions.

Contract's significant contribution to self-determination implies that people's interpersonal right that others respect their self-determination legitimizes the coercive enforcement of wholly-executory contracts. It also explains why (modern) contract law is not contented with the provision of enforcement services to fully specified agreements. Rather, it proactively facilitates the availability and viability of multiple contract types in the various contracting spheres; the emerging intra-sphere multiplicity offers people different modes of cooperation in the pursuit of joint plans. Hence, choice theory's core claim: that contract is both justified and best structured, interpreted, and developed by reference to its autonomy-enhancing service.³⁸

These barebones of choice theory are sufficient in order to see its normative and conceptual departure from contract's dominant theories. For choice theory, self-determination and reciprocal respect to self-determination – and not independence or self-interest – lie at the normative core of contract. Relatedly, rather than a transfer, choice theory conceptualizes contract as the contracting parties' joint plan. These fundamental differences explain why choice theory can face the justified concerns of work law scholars regarding contract's compatibility with employment.

³⁷ Cf. Lisa Bernstein & Brad Peterson, *Managerial Contracting: A Preliminary Study* (unpublished manuscript).

³⁸ As the text implies, choice theory is similar to deontological contract theories in taking seriously contract's legitimacy challenge and insisting that design should follow justification. But it is nonetheless, like utilitarian contract theories, unapologetically teleological: as a power-conferring institution contract law should be designed in a way that is most conducive to people's self-determination.

2. *Implications.* An autonomy-enhancing account necessarily makes qualitative distinction among the various choices contract enables based on how they implicate the parties' self-determination. Specifically, because choice theory conceptualizes contract's utility surplus as a means to the superior end of autonomy, it must distinguish between the use of contracts for strictly instrumental purposes and its use in the pursuit of one or both parties' "ground projects" – the projects that make us who we are and give meaning to our lives.³⁹

The former category, epitomized in the case of commercial contracts, lends itself to the familiar cost benefit analysis that renders commensurate all contract rules and terms. By contrast – because facilitating preference satisfaction is important to liberal contract only because, *and to the extent that*, it is conducive to people's self-determination – the latter category, which includes most prominently both spousal contracts and employment contracts, cannot be easily analyzed in these terms. Preferences that undermine self-determination should be generally overridden. A liberal contract law cannot legitimately facilitate transactions in which the parties' welfare-enhancement threatens to efface their self-determination.⁴⁰

This fundamental maxim of choice theory must be clearly dissociated from any form of paternalism. Paternalism is unjustified because it distrusts people's agency and thus offends their autonomy.⁴¹ But in choice theory contract law is justified – and therefore circumscribed – by reference to its autonomy-enhancing function. This means that attempts to use this instrument that are likely to be autonomy-reducing must simply be treated as *ultra vires* (at least *prima facie*). Delineating the acceptable domain of contract along these lines is of course

³⁹ See Hanoch Dagan & Avihay Dorfman, *Just Relationships*, 116 COLUM. L. REV. 1395, 1419 (2016).

⁴⁰ This maxim, to be sure, is not straightforwardly applicable where corporate or governmental bodies are involved in contracts. On its face, this limitation is devastating for the context of work, in which the paradigm employer *is* such a body. But we think it isn't, because our account captures corporations inasmuch as they are duty-bound toward natural persons, which is exactly the case at hand.

⁴¹ See Seana Valentine Shiffrin, *Paternalism, Unconscionability Doctrine, and Accommodation*, 29 PHIL. & PUB. AFF. 205, 207, 213, 215, 220, 231 (2000).

challenging and we do not offer any magic formula. But choice theory's guidance is nonetheless clear and principled, and it is nicely compatible with the three admission criteria identified a few pages ago.

(a) *Limited Promisee Authority*. Because it discards the idea that contract is a transfer, for choice theory, the pertinent question is not which transfers are unacceptable. Instead, the task is to preempt the risk that contract would become a means for the loss of self. In other words, liberal law should delineate the scope of enforceable contract so that it does not end up facilitating co-authored scripts that might render one party into the sheer instrument of the other's plans or purposes. Many contract types – even service contracts – are largely free from this risk. But contracts that implicate people's ground projects are typically vulnerable on exactly this front.

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

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

This conceptual clarification entails practical implications. Although law properly constrains the domain of enforceable contracts due to the external concerns gathered under the umbrella of public policy, it is implausible to expect that all possible negative externalities of contract will be internalized. For example, the price mechanism of supply and demand implies that almost every contract

entails *some* external effect. For private ordering to take place – for contract to perform its autonomy-enhancing task – law should aim only to address contract’s *substantial* negative externalities.⁴² But this justifiably cautious attitude is irrelevant – better: it is inappropriate – where the examined constraint of the domain of enforceable contracts emerges not from any competing value, but rather from contract’s own *telos*. A constraint that reduces the autonomy-diminishing effects of contract is not a compromise; it improves, rather than detracts from, contract’s performance of its autonomy-enhancing task. *These* constraints should certainly *not* be viewed with suspicion.

(b) *Concern for Future Self*. The second and third constraints prescribed by choice theory on the domain of enforceable contracts, which correspond, respectively, to the second and third admission criteria identified earlier, are similarly internal to the idea of contract. They also emerge from contract’s own normative DNA and need not, indeed should not, be treated as external impositions.

Thus, recall that people’s right to self-determination does not rely on a conception of self-authorship in which one constructs a “narrative arc” for one’s life in advance. Rather, self-determination allows, indeed requires, opportunities for people to take a critical perspective on any part of their identity and therefore to change and vary their plans. As agents, our life story must be neither a set of unrelated episodes, nor a script fully written in advance. Self-determination puts a high value on people’s right to “reinvent themselves.” Our autonomy requires the ability to both write and rewrite our life story and start afresh.⁴³

Once we realize that the power to revise or even discard (exit) one’s plans is an entailment of contract’s own normative underpinnings, it becomes clear that liberal contract law must be attentive not only to the significance of enabling people to make credible commitments, but also to the impediment these commitments

⁴² See Aditi Bagchi, *Other People’s Contracts*, 32 YALE L. REG. 211, 217 (2015).

⁴³ See DAGAN, *supra* note 8, at 43-44, 200-02.

pose to their ability to rewrite their life-story. Therefore, liberal contract law should safeguard the self-determination of people's *future* selves.⁴⁴

Because *any* act of self-determination constrains the future self, this tension, which requires to limit the range, and at times the types, of enforceable commitments people can undertake, is inherent in contract's *raison d'être*. Its doctrinal implications again vary by context, and we will again focus below on its effects on employment. At this stage it is enough to point to the continuity between those effects and the way in which liberal contract's concern for the autonomy of the future self accounts for the rules governing "regular" contract law – read: the law governing commercial contracts – which carefully delimit the scope of specific performance in order to safeguard the autonomy of the future self and even excuse performance altogether where changed circumstances imply that the parties' basic assumption failed.⁴⁵

(c) *Relational Justice*. Both the first and the second constraints on the domain of enforceable contracts prescribed by choice theory are *intra*-personal: they derive, as we've seen, from what contract's ultimate value of self-determination imply regarding the power of promisors to commit. The third constraint, which is likewise internal to the liberal idea of contract, shifts gears to the *inter*-personal dimension of contracting.

Contract law requires attention to *relational justice* – that is, to reciprocal respect for self-determination. This obligation arises from people's right of self-determination, the same right that justifies the enforcement of contract in the first instance. Therefore, when someone uses contract law's empowering potential, her uses should be limited to interactions that respect the other party's self-

⁴⁴ Cf. Aditi Bagchi, *Contract and the Problem of Fickle People*, 53 WAKE FOREST L. REV. 1, 3 (2018). As the text clarifies, discussion of the future self is a discussion of the self in the future; we do not endorse – in fact, choice theory clearly rejects – the idea of multiple selves or of a disintegrated self.

⁴⁵ See respectively Hanoch Dagan & Michael Heller, *Specific Performance*, available at <https://ssrn.com/abstract=3647336>; Hanoch Dagan & Ohad Somech, *When Contract's Basic Assumptions Fail*, * CANADIAN J.L. & JURIS. * (2021).

determination. This obligation cannot be too onerous, but neither is it limited to a negative duty of non-interference.⁴⁶

As usual, this principle has important consequences for the structure of contract law. We will of course zoom on its manifestation in employment. But for now it is again important to appreciate their continuity with, rather than departure from, the larger universe of contract law. Relational justice figures prominently in the law that applies to all other contract types as well. It undergirds a long list of rules – prescribed by common law judges, legislatures and regulatory agencies – that govern both the precontractual stage and the life of an on-going contract.

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

IV. THE EMPLOYMENT CONTRACT

Smith rightly celebrated contract's liberating potential. He was also correct that unleashing this potential requires to abandon the previous (religious) overly-cumbersome idea of vocation, which fails to appreciate the significance of exiting an existing workplace and starting afresh. But then he undermined his own vision by subscribing to contract's dominant theories in which the path to liberation is the *full* instrumentalization of work. Allowing people to instrumentalize their work is one thing. Requiring them to treat their work *only* as a means to an end – on a par with, say, their mundane choices as consumers – is quite another, as it robs them of

⁴⁶ For a detailed defense, both normative and positive, of the role of relational justice in contract law, on which the two following paragraphs heavily draw, see Hanoch Dagan & Avihay Dorfman, *Justice for Contracts*, available at <https://ssrn.com/abstract=3435871>.

some of the most obvious possibilities of making their life stories meaningful and thus undermine their self-determination.

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

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

A. *Relational Justice at Work*

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

The conventional framing of this floor as a regulatory override may rely on two features – institutional and substantive – but neither survives scrutiny. Thus, the fact that contract law in common law systems was historically developed through adjudication does not imply that this institutional pedigree is

determinative of the proper domain of contract. The domain of any legal concept is determined by the significance of its core substantive norms.⁴⁷ By contrast, institutional questions – at least insofar as far as private law (that is: the law governing interpersonal relationships) is concerned – are mostly determined by instrumental considerations.

In modern-day societies, typified by an increasingly complex, interconnected environment, legislation and regulation are often useful and sometimes necessary for establishing and developing the legal infrastructure for interpersonal interaction. Deviating from the court-centric view of contract law is necessary at times in order to ensure the generality of legal prescription, maintain the required technological expertise for legal decisionmaking, and target systemic failures that can hardly be addressed on the transactional level. It may also be required in order to establish effective tools for proactive (as opposed to reactive) *ex ante* guarantees of just interpersonal relationships in various settings, and to ensure that they are sufficiently predictable so as to effectively guide people's behavior as required by the rule of law. It is no wonder that hardly any contract type is governed solely by the common law. Employment contracts are by means exceptional.⁴⁸

The substantive reason for assuming that work law's floor is "special" – that is: external to contract – is no more convincing. It presupposes a conception of freedom of contract that, in line with contract's dominant theories, vindicate people's independence, rather than self-determination. But as we have seen, these theories are not only normatively dubious⁴⁹; they also fail to account, and indeed inappropriately obscure, the many manifestations of modern contract law's compliance with relational justice. Once relational justice is recognized as an endogenous, indeed indispensable, component of the liberal idea of contract, proudly premised on contract's own justificatory foundation, the floor of

⁴⁷ See Hanoch Dagan & Avihay Dorfman, *The Domain of Private Law*, 71 U. TORONTO L.J. 207 (2021).

⁴⁸ See Hanoch Dagan & Roy Kreitner, *The Other Half of Regulatory Theory*, 52 CONN. L. REV. 605 (2020).

⁴⁹ For more, see DAGAN & HELLER, *supra* note 7, at 19-47; Dagan & Heller, *Autonomy for Contract*, *supra* note 9.

acceptable employment contract can find a happy home within, and not only without, contract.

Indeed, recall that choice theory prescribes that the floor of legitimate interactions eligible for law's support should exclude interactions of gross relational injustice. This means, for example, that anti-discrimination rules – including rules that instantiate *fair* equality of opportunity in the workplace – are not external constraints on contract. Relationally unjust practices are autonomy-reducing and thus must not be authorized and coercively enforced by liberal contract, properly conceived. Thus, anti-discrimination rules *perfect* contract law's realization of its most fundamental *telos*, its *raison d'être*.⁵⁰

A similar analysis applies to other minimum terms and immutable rights of workers as individuals, such as workplace safety and minimum wage.⁵¹ Moreover, liberal contract's commitment to relational justice does not stop there. As the introductory section to the Wagner Act explicitly states – the purpose of allowing labor unions is to address “[t]he inequality of bargaining power between employees . . . and employers who are organized in the corporate or other forms of ownership association.”⁵² By giving workers the chance to bargain collectively and to place themselves on a more equal footing with employers, labor law attempts to solve this structural inequality, and thus to redeem the legitimacy of employment contracts *qua* (liberal) contracts, that is, as means of empowering people's self-determination.⁵³

To be sure, current labor law may fail to equalize the bargaining power of employers and employees. But the ability of individual employees, unionized or not, to bargain in the shadow of labor law can, if properly reconfigured, make a

⁵⁰ See Dagan & Dorfman, *supra* note 39, at 1442-45.

⁵¹ See, respectively, Dagan & Kreitner, *supra* note 48, at 631-37; Hanoch Dagan & Avihay Dorfman, Poverty and Private Law: Beyond Distributive Justice, *available at* <https://ssrn.com/abstract=3637034>.

⁵² National Labor Relations Act, 29 U.S.C § 151 (1935).

⁵³ See Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 HARV. L. REV. 1379, 1423 (1993).

real difference.⁵⁴ So long as unionization remains (or becomes) a viable and serious option, non-union employee contracts may shield under the protective shadow of labor law.⁵⁵ For this to be the case, however, unions should be able to negotiate so-called “agency shop” contracts, requiring employees to pay union dues as a condition of employment. A genuinely liberal conception of contract would thus repudiate, rather than embrace, the unfortunate *Janus* ruling,⁵⁶ which upsets this practice and thus hinders the ability of labor law to support relational justice for both union and non-union employees.⁵⁷

B. Employees’ Future Self

While the discussion of relational justice at work revolves around the New Deal and Civil Rights contributions to the law governing employment contracts, the commitment to ensure the autonomy of workers’ future selves is most clearly manifested in the rule that secures workers’ ability to exit. Indeed, it is, as noted, a bedrock contract law proposition that specific performance is not awarded against providers of personal services. Committed to its autonomy-enhancing *telos*, contract law accords special treatment to personal service contracts since these contracts uniquely involve the person of the promisor, which means that their specific performance might trigger autonomy-inhibiting effects.⁵⁸

⁵⁴ See GUY MUNDLAK, *THE TWO LOGICS OF LABOUR’S COLLECTIVE ACTION* ch.7 (2020). Cf. Kate Andrias, *The New Labor Law*, 126 *YALE L.J.* 2 (2016)

⁵⁵ See Paul Weiler & Guy Mundlak, *New Direction for the Law of the Workplace*, 102 *YALE L.J.* 1907, 1912-13 (1993).

⁵⁶ See *Janus v. Am. Fed’n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448 (2018).

⁵⁷ Agency shop does not meaningfully reduce individual autonomy. It results in an *ex ante* reduction in the amount of money belonging to an employee who has to pay dues in return for higher wages and benefits and better working conditions. Even assuming that some employees are unwilling third-party beneficiaries to agency shop provisions, a sufficiently competitive labor market ought to empower employees to seek out employers with desirable union agreements.

⁵⁸ See Dagan & Heller, *supra* note 45, on which this section heavily draws.

Ordering a worker specifically to perform her employment contract compels her to take a specific course of action. Additionally, that particular course of action requires her to do (and not only to deliver) specific things and thus involves her personal cooperation with another person's project. It is therefore no surprise that contract law – not only in the common law, but also in civil law jurisdictions, where specific performance is the default remedy for breach of contract – steadfastly resists granting specific performance for personal service contracts.⁵⁹

Critics highlight the disempowering effect of this bright-line immutable rule that prevents employees from extracting more favorable terms from employers in exchange for an enforceable commitment to perform.⁶⁰ But this critique misses the point of the rule. It applies even where there is no concern for either relational injustice, cognitive failure, or imperfect information because its rationale lies elsewhere. An autonomy-enhancing contract law must ensure some ability to cut oneself out of a relationship with other persons. Accordingly, law limits the ability of employees' current selves to commit, thus securing the right of the employees' future selves to change their plans and start afresh.

The same rationale accounts for the veteran rule, which becomes increasingly pertinent in recent years, that polices non-compete agreements. Where a non-compete imposes a significant encumbrance on the future self, specific performance is not granted irrespective of the possible *quid pro quo*. Liberal contract law cannot remain agnostic towards severe limitations on the ability of the employee's future self to rewrite the story of her life. It thus instructs courts to scrutinize the reasonableness of non-competes in terms of occupational, geographic, and temporal scope.⁶¹

Thus, both the bar on specific performance against employees and the doctrine governing non-competes are justified by reference to liberal contract's concern for the autonomy of the employee's future self. But this concern cannot

⁵⁹ See RESTATEMENT (SECOND) OF CONTRACTS § 367 (1981); Charles Szladits, *The Concept of Specific Performance in Civil Law*, 4 AM. J. COMP. L. 208, 226 (1955).

⁶⁰ See Christopher T. Wonnell, *The Contractual Disempowerment of Employees*, 46 STAN. L. REV. 87 (1993).

⁶¹ See RESTATEMENT (SECOND) OF CONTRACTS § 188 cmt. d.

vindicate the common law's symmetrical application of the former rule. Whereas in statutory contexts, particularly in collective bargaining agreements, unlawfully reinstated employees are routinely reinstated, in all other cases courts almost never reinstate an employee and consistently refuse to specifically enforce "an employer's agreement, promise, or statement" that it will continue to employ an employee.⁶² This common law position is wholly unwarranted.

In many cases, the labor market is typified by a corporate employer with many employees (at times, thousands) with whom it has no personal connection. In these cases, the common law's bright-line immutable bar to specific performance when the employee is the injured party should be rejected. The crucial difference between employee and employer, for whom the employment relationship is purely instrumental, implies that, at the very least, absent any other conflicting reason (such as excessive judicial supervision costs), specific performance should be available to employees where the parties agree to such a remedy.

It is unclear whether this asymmetry suffices in cases of structural inequality of power between employers and employees. We think that the answer to this important concern – the acceptability of the prevailing at-will employment contracts – depends on the presence of mandatory countermeasures strong enough to secure relational justice.⁶³ And yet, even if such contracts are acceptable, the current regime in all American states (except, oddly, for Montana), where employment-at-will is the default version for employees not on a fixed term contract, is unacceptable. At the very least, an autonomy-enhancing contract law should follow choice theory's prescription of securing intra-sphere multiplicity by enacting (at least) two parallel employment types – "at will" and "for cause" – so that employers would need to opt for one of them, making with a clear indication of this fundamental characteristic of the employment relationships each firm offers.

⁶² RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 9.04(a) & cmts. b & c. *Compare id.*, at § 2.02.

⁶³ Cf. Aditi Bagchi, *The Employment Relationship as an Object of Employment Law*, in THE OXFORD HANDBOOK OF NEW PRIVATE LAW 351 (Andrew Gold et al. eds., 2020).

C. Employers' Limited Dominion

Securing relational justice in the workplace and safeguarding the autonomy of employees' future selves along the lines of the previous sections is surely important. But critics may still find our attempt to redeem the idea of employment contract dubious. The difficulty lies, so the argument may go, at the heart of the "paradigm of the employment contract," which – as Hugh Collins sharply describes it – sets up "an authority structure" and prescribes an implied duty of obedience.⁶⁴

Collins notes that this hierarchical structure was imported from "the former legal tradition of status obligations."⁶⁵ This observation is critical, since it raises the possibility, as Sabine Tsuruda implies, that the problem may not be that work has been contractualized, but rather that it has not been contractualized enough. As she notes, the law of employment contracts is exceptional in conceptualizing a failure to perform as an "insubordination," rather than simply a breach.⁶⁶

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

In this alternative conception of the employment contract, managerial control, if it is to be a part of the parties' relationship, must be, as Tsuruda claims, merely instrumental. Thus, the requirement that workers "carry out orders to do particular things, such as following prescribed procedures or complying with

⁶⁴ HUGH COLLINS, *EMPLOYMENT LAW* 10, 34 (2nd ed. 2010).

⁶⁵ *Id.* at 34.

⁶⁶ See Sabine Tsuruda, *Working as Equal Moral Agents*, *LEGAL THEORY* (forthcoming 2022).

grooming policies” is acceptable. But employers must not be legally authorized “to act as a moral authority over the lives and choices” of their workers, and their managerial control must not extend to workers’ “agentical activity.” Tsuruda acknowledges that the “interpersonal and interdependent character of work” can justify *some* employer control over “what employees do and say while they are at work.” But she correctly insists that employers must not have a legal right “to quiet obedience and moral deference.”⁶⁷

Tsuruda discusses, for example, the needed reform regarding workers’ “expression of reactive attitudes, such as indignation at being morally wronged,” and recommends a rule that “permits employers to dismiss employees for indignant expression [] only when the expression is irreparably destructive of future trust and cooperation.” But as she rightly indicates, eroding “the traditional paradigm of employer control in employment” entails much broader implications.⁶⁸

A truly liberal employment contract, guided by choice theory’s prescription of *limited* promisee’s dominion, cannot authorize employers’ arbitrary and unaccountable authority. This prescription is pertinent clearly – but, as we’ve just seen, by no means only⁶⁹ – insofar as an employer purports to regulate workers’ lives off-hours.⁷⁰ One example comes from the Grand Chamber of the European Court of Human Rights, which ruled that an employee’s legally protected right to privacy was violated when his employer monitored personal messages he had sent from a company account.⁷¹

⁶⁷ *Id.*

⁶⁸ *Id.* Tsuruda mentions practices like dress codes, advertising campaigns, or client greeting scripts as well as the employment’s influence on the exercise of basic liberties outside of work, on which we focus next.

⁶⁹ See also Collins, *supra* note 1, at 65, who discusses the European Court of Human Rights jurisprudence in which “employers cannot lawfully interfere disproportionately with an employee’s manifestation of religion at work, or dismiss someone simply for membership of a political party.”

⁷⁰ See ANDERSON, *supra* note 31, at 39-40, 48-54, 60, 62-64, 67-69. See also Pateman, *supra* note 11, at 33, 48, 47; Nien-hê Hsieh, *Rawlsian Justice and Workplace Republicanism*, 31 SOC. THEORY & PRACTICE 115, 121-26 (2005).

⁷¹ See *Bărbulescu v. Romania*, App. No. 61496/08, Eur. Ct. H.R. (Grand Chamber, 2017),

Interestingly enough, implementing these and similar necessary changes does not require a radical departure from existing doctrine: as Samuel Williston authoritatively writes, employees are “bound to obey the instructions and follow the rules of the employer, subject to the requirement that [they] are not unreasonable.”⁷² Indeed, the contribution of choice theory here is mostly interpretive: its prescription of limited promisee authority offers a much more restrictive interpretation of the scope of *reasonable* instructions and rules than that of other (dominant) contract theories.

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

This additional layer is clearly necessary in the context of the recent precarious forms of work that inhibit workers’ “ability to establish and maintain stable families and households”⁷³ so that workers have no control over a large part of their day. But at least in some contexts, ameliorating workers’ subordinate position may require more than that; it may call for granting workers a say in workplace decisions either by facilitating their union representation or through other means.⁷⁴

available at <http://hudoc.echr.coe.int/eng?i=001177082>.

⁷² 19 WILLISTON ON CONTRACTS § 54:23 at 481 (4th ed. 2016). *See also Id.*, at § 54:24.

⁷³ Deirdre McCann & Judy Fudge, *Unacceptable Forms of Work: A Multidimensional Model*, 156 INT’L LABOUR REV. 147, 156-57 (2017).

⁷⁴ *See* MARGARET JANE RADIN, *CONTESTED COMMODITIES* 110 (1996); ANDERSON, *supra* note 31, at 69-70. At least on its face, the German model of codetermination seems a particularly inviting starting point for rethinking the workplace along these lines. *See* Grant M. Hayden & Matthew T. Bodie, *Codetermination in Theory and Practice*, 73 FLORIDA L. REV. * (2021). Stronger forms of workplace democracy should, we think, be available and viable – so that “every individual person must have a fair opportunity to work in a democratic workplace” – but must not be mandatory. *See* Daniel Jacob & Christian Neuhäuser, *Workplace Democracy, Market Competition and Republican Self-Respect*, 21(4) ETHICAL THEORY AND MORAL PRACTICE 927 (2018).

V. REIMAGINING EMPLOYMENT

Critics of the contractualization of work are correct to reject the idea that employment should be structured and shaped in accordance to contract's dominant theories. But they are wrong to accept these theories as a given, and thus further reify an objectionable view of the employment contract. Contract need not, and thus should not, reintroduce hierarchy analogous to the submission of servility that it was supposed to supplant. Situating the sphere of work at the midst of the contracting universe, and subscribing to the Smithian vision of contract's liberating potential while repudiating contract's dominant theories he embraced, opens up the possibility of a happy marriage of contract and work.

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

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

As we write this Essay, these proposed reforms – and possible others, which may seem more utopian⁷⁵ – face an uphill battle against what is perceived to follow from the liberal commitment to respect people’s contracts. Even some of the *existing* features of work law are currently on the defense along similar lines, and many more are being increasingly evaded through contract. There are undoubtedly many causes for this unhappy predicament, but one of them may be rooted in the conventional wisdom of what the idea of contract necessarily stands for, which unites many work law scholars and contract theories. Insofar as this is indeed the case, substituting contract’s dominant theories with an autonomy-enhancing view of contract may reverse the tide. It may help contract live up to its (limited, but still significant) emancipatory potential.

⁷⁵ To take one example: an autonomy-based conception of the employment contract would no longer simply assume a default in which owners of the means of production deserve the *entire* surplus value of production. It may consider embracing a (sticky) normative default in which workers are also entitled to part of this surplus.