

# SOME PRELIMINARY REMARKS ON A LIBERAL THEORY OF CONTRACT

THOMAS GUTMANN\*

## I

### INTRODUCTION

There is no such thing as a non-liberal theory of contract. Because the normative structure underlying the concept of contract is basically and essentially a liberal one,<sup>1</sup> non-liberal approaches fail to grasp its meaning. They may, at best, be able to denote limits of the realm of contracts, but because they cannot explain what contracts *are*, non-liberal approaches lead to contract theories built around a void.<sup>2</sup> There are some theoretical implications to be derived from this.<sup>3</sup> When dealing with the challenges of the liberal approach—for example, with the problem of unequal power relations between contracting parties—the crucial question is which normative tools are compatible with the very idea of a contract in order to qualify as a part of a theory of contract.<sup>4</sup>

## II

### THE LIBERAL THEORY OF CONTRACT

The liberal theory of contract (as is sketched in quite broad strokes here) locates the normative foundations of the institution “contract” in individual rights, especially in freedom of contract. Contracts, in the liberal conception, are tools for realizing individual self-determination by means of voluntarily entering legally binding agreements. This notion of individual autonomy is not ahistorically given; rather, it was established and expanded through the social struggles that transformed the main determinant in our lives from “status to contract.”<sup>5</sup> Guaranteeing this sphere of individual self-determination as a structural feature of liberal societies (“contract societies,” as Weber called them,<sup>6</sup> or the “régime of contract” in Spencer’s words<sup>7</sup>) is the public dimension of contract.

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\* Professor of Civil Law and Philosophy of Law at the University of Münster, Germany.

1. *See infra* Part II.

2. *See infra* Part III.

3. *See infra* Part IV.

4. *See infra* Part V.

5. HENRY S. MAINE, ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY, AND ITS RELATION TO MODERN IDEAS 170 (1861).

6. MAX WEBER, WIRTSCHAFT UND GESELLSCHAFT: GRUNDRISS DER VERSTEHENDEN SOZIOLOGIE 399 (5th ed. 1980).

The liberal theory of contract is based upon the concept of respect for persons as agents and bearers of individual rights—including freedom of contract, the right to have their voluntary agreements respected. It conceives of private law only as “a system of reciprocal limits on freedom”<sup>8</sup> and of contract law as a legal institution that, in general, recognizes and respects the power of private individuals to effect changes in their legal relations *inter se*.<sup>9</sup>

According to the liberal theory, the implicit dimension of a contract is a relationship of mutual recognition between the individuals party to it. The particular pattern of this form of mutual recognition—“legal recognition,” in Axel Honneth’s terms<sup>10</sup>—respects the other party as equal, as a legal person capable of following her own conception of the good and of raising accepted claims. Thus, the notion of contract is deeply rooted in a universal respect for the equal autonomy of persons, and not in the non-egalitarian kinds of recognition embodied in relationships of love and of solidarity (that is, relationships based on a shared orientation towards values).<sup>11</sup>

This basic rationale for a liberal contract theory is not market-oriented. Instead, its focus on autonomy rights and equality demands priority of the right before the good, embracing the conviction that basic individual freedoms impose limits on the collective search for the good life.<sup>12</sup> In the history of ideas, this one was not fully developed until the legal philosophies of Kant, Fichte, and Hegel.<sup>13</sup>

The notions of “autonomy,” “equality,” and “rights” used here require some clarification. *Autonomy*, in a liberal theory of contract, is a formal notion of agency freedom. The subject matter of law, and especially of contract law, is free from any perfectionist or moral content—what Kant called “Willkür.”<sup>14</sup> The question whether a person is autonomous (or acts autonomously) has different functions in different normative settings. For reasons of social inclusion and equality, the notion of “autonomy”—regarding a person’s claim

7. HERBERT SPENCER, *THE MAN VERSUS THE STATE, WITH SIX ESSAYS ON GOVERNMENT, SOCIETY AND FREEDOM* 1, 17, 94 (1884).

8. Arthur Ripstein, *Private Order and Public Justice: Kant and Rawls*, 92 VA. L. REV. 1391, 1394 (2006).

9. Peter Benson, *Contract*, in *A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY* 29, 37 (Dennis Patterson ed., 2d ed. 2010).

10. AXEL HONNETH, *THE STRUGGLE FOR RECOGNITION: THE MORAL GRAMMAR OF SOCIAL CONFLICTS* 109 (1996).

11. For the misleading freedom-versus-solidarity dichotomy, see, for example, Roberto M. Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 616, *passim* (1983). For the notion of “contractual solidarity,” see BRIGITTA LURGER, *VERTRAGLICHE SOLIDARITÄT* 132 (1998) and Gert Brüggemeier et al., *Social Justice in European Contract Law: a Manifesto*, 10 EUR. L.J. 653, 656 (2004).

12. See generally John Rawls, *The Priority of Right and Ideas of the Good*, 17 PHIL. & PUB. AFF. 251 (1988).

13. Cf. Bernhard Jakl, *Die Autonomie des Rechts. Das Vernunftrecht der klassischen deutschen Philosophie in Geschichte und Gegenwart* 88 et seq. (Nov. 2011) (unpublished manuscript) (on file with author).

14. IMMANUEL KANT, *Metaphysische Anfangsgründe der Rechtslehre*, in 6 KANT’S GESAMMELTE SCHRIFTEN 230 (Preußische Akademie der Wissenschaften 1902–1923).

for respect as an agent who is entitled to choose her own path and follow it (such as by making contracts)—has to be a low-threshold concept. Autonomy must be the default case, at least for adults. If a person is competent—if she fulfills the minimum requirements of rationality, self-reflection, and self-control—she must be considered autonomous, independent of the extent to which she meets *ideal* conceptions of autonomous personhood or positive liberty. “Autonomy” in this sense is a binary concept, a range property.<sup>15</sup> Were it not—were autonomy an ideal condition instead of the default—the fundamental assumption of our legal systems (and of our conceptions of moral rights) that, in general, individuals have normative competency for their decisions would lose its foundation and refer to paternalistic tutelage of the average citizen.

Up to a certain point, the concept of *equality* inherent in the notion “equal autonomy of persons” is also a formal one. Persons are equal as legal entities regarding their right to form their own concept of the good and to act upon it. Notwithstanding Marx’s derision,<sup>16</sup> the very notion of a contract cannot do without the idea that basically competent, adult persons, different and unequal in every empirical aspect, meet each other as equals at the basic level of law—equal in dignity, equal in their basic rights and abilities, and equal in their entitlement to make use of their rights by entering mutually binding agreements. At this basic normative level, contract theory—like every coherent conception of juridical equality—must regard “its addressees not in all their particularity, but as *identical abstract beings*.”<sup>17</sup>

Individual *rights* in the liberal theory of contract must be (and are) understood in a non-consequentialist way, as “legally respected choices” in H.L.A. Hart’s terms.<sup>18</sup> Private autonomy must be (and is) based on a “will” theory of individual rights that understands rights as a means for guaranteeing legally protected spheres of freedom of choice, not as serving objective “interests” or benefiting their bearers,<sup>19</sup> which is an inherently paternalistic concept.

15. See JOHN RAWLS, *A THEORY OF JUSTICE* 508 (1971).

16. Karl Marx, *Zur Judenfrage* [On the Jewish Question], in I KARL MARX & FRIEDRICH ENGELS, *WERKE* 347 (1976).

17. William Lucy, *Equality Under and Before the Law*, 61 U. TORONTO L.J. 411, 413 (2011); cf. Peter Benson, *The Unity of Contract Law*, in *THE THEORY OF CONTRACT LAW: NEW ESSAYS* 118, 143 (Peter Benson ed., 2001) (describing “a very bare conception of the person”).

18. H.L.A. HART, *Legal Rights*, in *ESSAYS ON BENTHAM: STUDIES IN JURISPRUDENCE AND POLITICAL THEORY* 162, 189, *passim* (1982). For this “will theory” of the function of rights, see FRIEDRICH C. V. SAVIGNY, *I SYSTEM DES HEUTIGEN RÖMISCHEN RECHTS* 7 (1840); CARL WELLMAN, *A THEORY OF RIGHTS* ch. 4 (1985); LEONARD W. SUMNER, *THE MORAL FOUNDATION OF RIGHTS* ch. 2, 46 et seq. (1987); HILLEL STEINER, *AN ESSAY ON RIGHTS* ch. 3 (1994).

19. Cf. RUDOLF V. JHERING, *3.1 GEIST DES RÖMISCHEN RECHTS* § 60, 339 et seq. (4th ed. 1888); Neil MacCormick, *Rights in Legislation*, in *LAW, MORALITY, AND SOCIETY. ESSAYS IN HONOUR OF H.L.A. HART* 189 (Peter M. Hacker & Joseph Raz eds., 1977); JOSEPH RAZ, *THE MORALITY OF FREEDOM* ch. 7 et seq., 183 et seq. (1986); JOSEPH RAZ, *Rights and Individual Well-Being*, in *ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS* 29 (1994); DAVID LYONS, *Utility and Rights*, in *RIGHTS, WELFARE, AND MILL’S MORAL THEORY* 147 (1994).

Within the family of autonomy-based theories of contract law,<sup>20</sup> the liberal, rights-based approach need not refer to the convention and social practice<sup>21</sup> of promising or to its underlying moral principle.<sup>22</sup> The notion of contract is best captured in the legal, not moral, idea of a transfer of entitlements, which conceives of a contract as the consensual manifestation of an intention to alienate one's *right* to another person.<sup>23</sup> In contractual agreements, the parties consent to be legally bound, that is, to impose legal obligations to be performed.<sup>24</sup>

### III

#### ALTERNATIVE APPROACHES

##### A. Outside Normative Reasoning

Law is a form of normativity. Therefore, legal theory *sensu stricto* is a normative endeavour. One role of a liberal theory of private law is to scrutinize, and criticize, the normative claims (and thus the prescriptive force) of competing, non-liberal theories. Some of those normative claims fail in a very fundamental way, as demonstrated in the following two short examples.

##### 1. Short Circuits Between “Is” and “Ought”

Sociological jurisprudence as such is not a basis for a legal theory of contract. In particular, there is no direct way to derive any sort of sound normative claims from Niklas Luhmann's systems theory, a descriptive, sociological second-order observation of the legal system from without (albeit very probably the one with the greatest explanatory power<sup>25</sup>). At least this is what Luhmann has been telling us.<sup>26</sup> Of course, observation of the functional differentiation of autopoietically closed social systems that process meaning (“Sinn”<sup>27</sup>) by different codes cannot lead to a criterion for normative

20. Benson, *supra* note 9, at 37.

21. CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* 8–20 (1981). For a differentiated view, see DORI KIMEL, *FROM PROMISE TO CONTRACT: TOWARDS A LIBERAL THEORY OF CONTRACT* (2003).

22. T.M. Scanlon, *Promises and Contracts*, in *THE THEORY OF CONTRACT LAW: NEW ESSAYS* 86 (Peter Benson ed., 2001).

23. See Randy E. Barnett, *A Consent Theory of Contract*, 86 *COLUM. L. REV.* 269 (1986); Ripstein, *supra* note 8, at 1407; Thomas Gutmann, *Iustitia Contrahentium. Zu den gerechtigkeitstheoretischen Grundlagen des deutschen Schuldvertragsrechts* 185 et seq. (July 2006) (unpublished manuscript) (on file with author). For a specific approach on transfer of ownership, see Benson, *supra* note 17, at 127 et seq.

24. Herein lies the answer to “Atiyah’s problem” of why a promisee is entitled to expect the promisor not to change his mind. See PATRICK S. ATIYAH, *PROMISES, MORALS, AND LAW* 127 et seq. (1981); cf. Benson, *supra* note 9, at 37.

25. Bijan Fateh-Moghadam, *Rezeption in der Rechtswissenschaft*, in *LUHMANN-HANDBUCH* 293 (Oliver Jahrhaus, Armin Nassehi & Mario Grizelj eds., 2012).

26. See NIKLAS LUHMANN, *DAS RECHT DER GESELLSCHAFT* 16 et seq., 31, 83 (1993).

27. LUHMANN, *supra* note 26, at 214, 255.

acceptability of any given law.<sup>28</sup> This is, however, what the theory of law as an autopoietic system, an approach influential mainly in Germany and associated with Gunther Teubner and his disciples, claims. That claim gives rise to a severe problem by acting as, or at least impersonating, a normative theory—that is, by putting forward a lot of claims regarding how the law, especially private law, should be. Its authors, however, do not attempt to offer any normative reasoning to justify their normative premises, except for their unexplained short cut from description to prescription. Analyzed in methodological respects, this short cut, which derives legal imperatives from the mere fact of functional differentiation between social systems, seems to rely on some sort of mystic revelation, accessible only to a precious few. Or it might be a variation of the concrete-order thinking prominent in national socialist legal theory (such as that of Carl Schmitt and Karl Larenz<sup>29</sup>), which claims that it is social order itself that contains its own law—that is, its own ideals regarding what the law ought to do, thereby producing normativity out of social facts by a short circuit between “is” and “ought” (or some sort of ideological interpretation of what “is,” respectively). As a normative theory, the law-as-an-autopoietic-system approach is arbitrary, with a large normative void at its center. Today’s contracts may be exposed to a fractured and contradictory multiplicity of highly developed social rationalities,<sup>30</sup> but nothing results from this for a normative legal theory of contract. No normative reasons are given for the normative claims that the law, including private law, should give up its basic reference to persons and their rights, that the real task of the law should be to serve transindividual structures like social systems and systemic evolution, by balancing and doing justice to competing systemic imperatives,<sup>31</sup> and that constitutional rights should predominantly protect systems, not individuals, as autonomous spheres of social action.<sup>32</sup> If we were to take that seriously, some nasty questions would be posed, and not only by adherents of liberal theories of law. To start with, the theory would face problems with its interpretation of the normative coherence of the legal system.

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28. See, e.g., LUHMANN, *supra* note 26, at 83.

29. See, e.g., BERND RÜTHERS, DIE UNBEGRENZTE AUSLEGUNG. ZUM WANDEL DER PRIVATRECHTSORDNUNG IM NATIONALSOZIALISMUS 277 et seq. (7th ed. 2012).

30. See Gunther Teubner, *Contracting Worlds: The Many Autonomies of Private Law*, 9 SOC. & LEGAL STUD. 399 (2000).

31. GUNTHER TEUBNER, RECHT ALS AUTOPOIETISCHES SYSTEM ch. 6 (1989); DAN WIELSCH, ZUGANGSREGELN. DIE RECHTSVERFASSUNG DER WISSENSTEILUNG 269, *passim* (2008); Dan Wielsch, *Die epistemische Analyse des Rechts*, 64 JURISTENZEITUNG 67 (2009); Dan Wielsch, *Iustitia mediatrix: Zur Methode einer soziologischen Jurisprudenz*, in SOZIOLOGISCHE JURISPRUDENZ. FESTSCHRIFT FÜR GUNTHER TEUBNER 395 (Gralf-Peter Calliess et al. eds., 2009).

32. See generally Gunther Teubner, *Ein Fall von struktureller Korruption? Die Familienbürgerschaft in der Kollision unverträglicher Handlungslogiken*, 83 KRITISCHE VIERTELJAHRESSCHRIFT 388 (2000) (moderating somewhat Christoph B. Graber & Gunther Teubner, *Art and Money: Constitutional Rights in the Private Sphere?*, 18 OXFORD J. LEGAL STUD. 61 (1998)).

## 2. The Foucaultian Trap

For structural reasons, many critical theories and most manifestations of the Critical Legal Studies movement are not only unwilling but unable to justify any particular first-order normative principle. Such theories portray private-law adjudication as merely a battlefield for the ideological projects of legal factions, legal interpretation as inevitably rife with externally motivated, strategic reasoning.<sup>33</sup> By doing so, they create an image of law disintegrated and pervaded by irresolvable basic contradictions and antinomies—formalism versus functionalism, individualism versus collectivism, and so on.

The normative task of legal theory gets lost in that disintegration. The critical approaches fall into what may be called the “Foucaultian trap”: if law (the world)—as in Foucault’s Nietzschean theory of the 1970s—is nothing but a perennial fight over interpretations within all-embracing power relations, if reasons are but tactical tools, all that the theorist can do is arbitrarily take sides in the power game. She can no longer provide normative reasons or justifications for her positions.<sup>34</sup> A theory of contract *sensu stricto*, however, cannot do without normative justifications, and that is why poststructuralist critique tends to get so boring. Because these non-liberal theories fail from the outset to address the realm of normative reasons, they fail as theories of contract.

## B. Alternative Normative Paradigms?

### 1. Multiplicity and Contradictions

As Peter Benson notes, “the world of contract theory presents itself as a multiplicity of mutually exclusive approaches with their own distinctive contents and presuppositions.”<sup>35</sup> Let us take a short look at some attempts to specify, based on normative claims, alternative prescriptive accounts<sup>36</sup> of contract—accounts that understand contract and contract law to serve a particular social value independent of the parties’ autonomy. Some brief and incomplete sketches will have to suffice.

What should attract our attention first are the extreme contradictions in the approaches presenting themselves as alternatives to the autonomy model. Even the concepts of welfarism or social justice in contract law are ridden by internal conflicts and cannot be reduced to any coherent structure of ideas.<sup>37</sup> Moreover,

33. DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION (FIN DE SIÈCLE)* (1997); R. M. Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 616–33 (1983); STANLEY FISH, *THE TROUBLE WITH PRINCIPLE* (1999). For example, Marxist criticisms of law reduce normativity to nothing more than class interests, and their poststructuralist variations confine themselves to seeking the social power structures underlying legal realities.

34. See Nancy Fraser, *Foucault on Modern Power: Empirical Insights and Normative Confusions*, 1 PRAXIS INTERNATIONAL 272, 281 et seq. (1981); JÜRGEN HABERMAS, *THE PHILOSOPHICAL DISCOURSE OF MODERNITY*. TWELVE LECTURES 266 et seq. (F. Lawrence trans., 1987).

35. Benson, *supra* note 9, at 29.

36. See STEPHEN A. SMITH, *CONTRACT THEORY 4* (2004).

37. Thomas Wilhelmsson, *Varieties of Welfarism in European Contract Law*, 10 EUR. L.J. 712

a closer look at the other alternatives shows that they share no common normative ground whatsoever: the social-justice-in-contract-theory talk, Teubner's idiosyncratic use of systems theory, Aristotelians' nostalgic virtue moralism, the hard-boiled consequentialist collectivism of the classical law-and-economics approach to contract theory—these approaches are, normatively, mutually exclusive. The liberal theory of contract could very probably just relax, lean back, and watch them neutralize one another. Likewise, although the liberal theory is prepared to justify its own normative claims, it could operate mainly as a form of “happy positivism,”<sup>38</sup> since normative individualism and the notion of private autonomy guaranteed by individual rights are deeply embedded in the normative foundations of Western legal systems. Given the weight of normative individualism within any coherent interpretation or reconstruction of Western legal systems (especially Western contract law systems), one should ask whether there is a meaningful “choice of paradigm” for the theory of contract at all. Normative coherence clearly seems to be on the side of the liberal theory of contract.

## 2. Aristotelian Phantom Pain

According to the liberal theory, a meaningful concept of contract has very limited compatibility with pre-modern concepts of contractual justice. In the liberal framework, Aristotelian or Thomist notions of a statical *iustitia commutativa* or *aequalitas* are meaningless from the start, whether brought forward in a neoclassical (Gordley<sup>39</sup>) or a seemingly hybrid way (Weinrib<sup>40</sup>). The reason for this is that the Aristotelian tradition, based on a theory that does not clearly distinguish contract from tort,<sup>41</sup> lacks any understanding of private autonomy. Before the watershed of Normative Modernity,<sup>42</sup> which started with Hobbes replacing virtues and duties with rights as the central element of legal normativity, no concept was able to grasp the specifically modern institution of

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(2004).

38. Cf. MICHEL FOUCAULT, *ARCHAEOLOGY OF KNOWLEDGE* 141 (A.E. Sheridan Smith trans., 2002).

39. See, e.g., James Gordley, *Contract Law in the Aristotelian Tradition*, in *THE THEORY OF CONTRACT LAW: NEW ESSAYS* 265 (Peter Benson ed., 2001); James Gordley, *The Moral Foundations of Private Law*, 47 *AM. J. JURISPRUDENCE* 1 (2002).

40. See, e.g., ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* (1995); Ernest J. Weinrib, *Aristotle's Forms of Justice*, 2 *RATIO JURIS* 211 (1989); ERNEST J. WEINRIB, *CORRECTIVE JUSTICE* (2012). For an analysis that regards Ernest Weinrib's approach of developing a formal idea of private law from Aristotelian and Kantian building blocks and of understanding corrective justice as the special morality intrinsic to private law's collapse into Aristotelian essentialism, see GUTMANN, *supra* note 23, at 349. The Aristotelian conception of *iustitia correctiva sive commutativa* is not “inchoately Kantian,” WEINRIB, *THE IDEA OF PRIVATE LAW*, *supra*, at 83, but is incompatible with the Kantian concept of law and anything but formal, see Joseph Raz, *Formalism and the Rule of Law*, in *NATURAL LAW THEORY: CONTEMPORARY ESSAYS* 309, 329 et seq. (Robert P. George ed., 1992).

41. JAN DIRK HARKE, *VORENTHALTUNG UND VERPFLICHTUNG. PHILOSOPHISCHE ANSICHTEN DER AUSTAUSCHGERECHTIGKEIT UND IHR RECHTSHISTORISCHER HINTERGRUND* 11 et seq., 98 (2005).

42. Thomas Gutmann, *Religion und Normative Moderne*, in *MODERNE UND RELIGION. KONTROVERSEN UM MODERNITÄT UND SÄKULARISIERUNG* 447 (Ulrich Willems et al. eds., 2012).

contract as a tool for realizing the individual self-determination guaranteed by liberty rights. The virtue ethics of the commutative-justice perspective “sees law as a tool for enforcing decent behaviour in a society.”<sup>43</sup> That perspective is therefore neither compatible with the “fact of reasonable pluralism”<sup>44</sup> regarding what constitutes the good life characteristic of social conditions secured by the basic rights and liberties of free institutions, nor with any normative concept rooted in individual liberties, nor with the functional differentiation of ethics and law. *Pace* Gordley, a modern notion of contract is necessarily a voluntaristic concept, placing “a value on choice that is independent of the value of what the parties have chosen,”<sup>45</sup> and it allows no conceivable justification for the principle that transactions may not alter given distributions of holdings. It is not only that the idea of *iustum pretium* cannot claim normative priority over contractual autonomy: it is that that idea has no theoretical connection to contractual autonomy at all, notwithstanding that its fragments are still to be found in European private law systems.

### 3. Economic Analysis of Contract Law and the Separateness of Persons

Economic analysis of contract law<sup>46</sup> does provide a clear prescriptive criterion: contracts and contract law are to serve as tools for efficiency, for maximization of wealth. Due to its basic consequentialist (teleological) structure, however, the efficiency criterion is incompatible with any contract law based on individual (autonomy) rights as legally respected choices. Within the normative-economic-analysis approach to contract law, all contracting parties and all the parties’ rights are subordinated to the collective good of efficiency maximization. Teleological theories focused on maximizing a particular criterion cannot deal with the separateness of persons.<sup>47</sup> Lacking a discrete criterion for the distribution of benefits and burdens, they always allow for the sacrifice of one person’s interests or rights if her loss is outweighed by the aggregated collective advantage. Neither separate persons nor their rights, nor the binding force of their agreements are of intrinsic importance in the end. The very idea behind the theory of incomplete contracts—its cheapest-cost-avoider, cheapest-insurers, and superior-risk-bearer criteria, and its claim for requirement of an efficient breach of contract—is to make contracting parties trustees and functionaries of collective-wealth maximization. Legal systems based on individual rights, however, have a strong anti-utilitarian or anti-consequentialist bias, because rights define side constraints to maximizing strategies. Insofar as the starting principle of contract law is contractual

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43. Wilhelmsson, *supra* note 37, at 717.

44. JOHN RAWLS, *POLITICAL LIBERALISM* 36 (1993).

45. Gordley, *supra* note 39, at 268 (2001).

46. *Cf.* A. MITCHELL POLINSKY, *AN INTRODUCTION TO LAW AND ECONOMICS* chs. 5 & 8, (3d ed. 2003); ROBERT COOTER, THOMAS ULEN, *LAW AND ECONOMICS* ch. 8 (6th ed. 2012); STEVEN SHAVELL, *FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW* ch. 3 (2004).

47. Rawls, *supra* note 15, at 27; H.L.A. Hart, *Between Utility and Rights*, 79 *COLUM. L. REV.* 828 (1979).

freedom, a contract is a deontological notion. (This alone explains the almost complete failure of the law and economics approach to gain any influence in contract law and adjudication in Germany, for example.) The point to be stressed here is that, although economic analysis of contract law has produced an impressive body of scholarship on the economics of contract law, its goal of efficiency maximization is normatively incompatible with a legal theory of contract based upon a concept of respect for persons as bearers of individual rights, able to effectively bind themselves in voluntary agreements. The two normative principles remain unconnected; at best, they are understood as a trade-off between incommensurable goals.<sup>48</sup> So far, economic analysis of law has failed to produce a *legal* theory of contract compatible with the normative premises of legal systems predicated on individual rights.

#### 4. Social Justice in Contracts

It seems to be an especially unsatisfying theoretical move to claim, along with Martijn Hesselink and others (in a manifesto of the “Study Group on Social Justice in European Private Law”), that social justice has to be a defining element of European contract law and of the very notion of contract.<sup>49</sup> The manifesto does not give even a hint about what the *theoretical* concept aimed at in contract might be. In a later publication, a study for the European Parliament, the only substantial element out of five given by Hesselink as constituting the “European notion of social justice in private law” is that the Common Frame of Reference for European contract law “should contain a sufficient level of protection of weaker parties. In particular, where a distinction is made between different groups of people this should be done in a way that is favourable to the least privileged (Rawls’ difference principle).”<sup>50</sup>

But for Rawls, who provides a Kantian liberal theory, the realm of contracts is to be guided not by the difference principle, but exclusively by the first principle of justice: the Kantian liberty principle, which demands the most extensive adequate scheme of equal rights and basic liberties possible, subject to the condition that the same scheme applies for all. For Rawls, the difference principle is a background condition, a principle governing the basic structure of society. The principles governing individual transactions—those that make up contract law—operate independently within that basic structure. They guarantee that “individuals and associations are . . . left free to advance their ends more effectively within the framework of the basic structure, secure in the

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48. EYAL ZAMIR, BARAK MEDINA, LAW, ECONOMICS, AND MORALITY 257 et seq. (2010); *see also* MICHAEL J. TREBILCOCK, THE LIMITS OF FREEDOM OF CONTRACT 241 et seq., 248 (1993). For the methodological side of this issue, see Jody S. Kraus, *Philosophy of Contract Law*, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 687, 689 et seq. (J. Coleman & S. Shapiro eds., 2002).

49. *See* Gert Brügemeier et al., *supra* note 11.

50. MARTIJN W. HESSELINK, CFR & SOCIAL JUSTICE: A SHORT STUDY FOR THE EUROPEAN PARLIAMENT ON THE VALUES UNDERLYING THE DRAFT COMMON FRAME OF REFERENCE FOR EUROPEAN PRIVATE LAW: WHAT ROLES FOR FAIRNESS AND SOCIAL JUSTICE? 22 (2008).

knowledge that elsewhere in the social system the necessary corrections to preserve background justice are being made.”<sup>51</sup> Contracts, Rawls says, are unrestrained by duties of social justice because rules enforcing such duties “would be an excessive if not an impossible burden.”<sup>52</sup> This is but a friendly version of Savigny’s dictum that, in contract law, you may let your contracting partner starve, as long as public law takes care of him.<sup>53</sup>

For Rawls, private law, especially contract law, secures for individuals the capacity to set and pursue their own conception of the good, in the face of other individuals’ equally valid claims to do likewise.<sup>54</sup> Therefore, contractual relations between private individuals must not be subordinated to distributive concerns.<sup>55</sup> “The aggregative effects of contractual transactions may lead to distributive injustice that needs to be addressed through public law,”<sup>56</sup> but not by interfering in specific contracts or by imposing duties of social justice on certain private parties.

In the final analysis, welfarist contract law in a strict sense would be conceivable only on the assumption that individuals have a direct, positive, enforceable responsibility towards other individuals and their well-being, that is, that persons have *direct* claims against each other for assistance in the pursuit of their good. This premise seems to have no sound theoretical justification. In short, the social-justice approach is unable to create an alternative paradigm of contract,<sup>57</sup> and, when it presents itself not as a full alternative but as a complementary correction of the liberal approach<sup>58</sup> (with the “concern to strike

51. Rawls, *supra* note 44, at 268 et seq.; see also Arthur Ripstein, *The Division of Responsibility and the Law of Tort*, 72 *FORDHAM L. REV.* 1811, 1813 (2004). Rawls’ “Theory of Justice” made it clear from the start that it was not dealing with contractual agreements. See Rawls, *supra* note 15, at 8.

52. Rawls, *supra* note 44, at 266.

53. SAVIGNY, *supra* note 18, at § 56, 370 et seq.

54. Ripstein, *supra* note 8, at 1409.

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

56. See Rawls, *supra* note 44, at 268; Ripstein, *supra* note 51, at 1815.

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

58. See Florian Rödl, *Contractual Freedom, Contractual Justice, and Contract Law (Theory)*, 76 *LAW & CONTEMP. PROBS.*, no. 2, 2013 at 57; BRIGITTA LURGER, *GRUNDFRAGEN DER VEREINHEITLICHUNG DES VERTRAGSRECHTS IN DER EUROPÄISCHEN UNION* 457 et seq. (2002).

a balance between private autonomy and fairness”<sup>59</sup>), it produces a mere addendum, unable to give a coherent account of the bipolar normative structure it creates. Its idea of social justice stays extraneous to the idea of contract; it is just setting up a clothesline between them.<sup>60</sup> Moreover, by failing to take the “weak” seriously as legal persons and by treating them as objects of protection and not as persons deciding for themselves,<sup>61</sup> the social-justice approach harms not only the egalitarian commitment of law, but also the inclusionary role of juridical equality, which has to ascribe the same legal status to all.<sup>62</sup> Perhaps politics (even good politics) makes bad legal theory. For those accustomed to the theory of social systems,<sup>63</sup> this is not news anyway.

### 5. Constitutional Rights and Contracts

The liberal theory of contract is perfectly compatible with proposals for a total constitution, that is, for constitutional rights framing contract law. As Hugh Collins remarked, this proposal indeed derives from a demand for the unity of legal order,<sup>64</sup> for coherence of norms within the legal system. This requirement for coherence, or for what Dworkin calls “integrity,”<sup>65</sup> seems to be a necessary condition for legitimacy of modern legal systems.

Constitutionalizing private law, however, will not do the trick for the social-justice-in-contract-law approach. In fact, constitutionalizing private law favors the liberal theory of contract, since freedom of contract is rooted in constitutional protection of liberties. Where such liberties are protected—in Germany, for example—a further constitutionalization of contract law would not change anything.<sup>66</sup> The state’s positive constitutional duty to intervene in

59. See Gert Brüggemeier et al., *supra* note 11, at 654.

60. See, e.g., Martijn W. Hesselink, *Capacity and Capability in European Contract Law* 62 (Amsterdam Center for Law & Economics No. 2005-09), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=869246](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=869246) (“[P]rivate law can be placed on a continuum from autonomy to solidarity”). A similar conception of a simple, incoherent dichotomy is found in Lurger, who inductively claims solidarity (“party protection” or concern for “regard and fairness” in contractual relations) to be situated “on the very same level as the principle of freedom of contract, without any signs of subordination to the latter,” although both “basic values” are conceived to be in conflict with each other, Brigitta Lurger, *The Future of European Contract Law Between Freedom of Contract, Social Justice, and Market Rationality*, 1 EUR. R. CONTRACT L. 442, 448, 453 (2005), and in Wilhemsson’s dichotomy between traditional contract law following the rationality of the market and “social contract law” oriented towards the personal, social, and economic “needs” of the parties, THOMAS WILHELMSSON, *CRITICAL STUDIES IN PRIVATE LAW: A TREATISE ON NEED-RATIONAL PRINCIPLES IN MODERN LAW* xii, 68, 146 et seq. (1992). Note, consumer-welfarism is much closer to market functionalism than liberal contract theory.

61. See, e.g., Hesselink, *supra* note 60.

62. Lucy, *supra* note 17, at 442.

63. See 1 NIKLAS LUHMANN, *THEORY OF SOCIETY* ch. 1 (Rhodes Barrett trans., 2012).

64. Hugh Collins, *The Impact of Human Rights Law on Contract Law in Europe* 425 (Univ. of Cambridge Faculty of Law Legal Studies Research Paper Series, Paper No. 13, 2011), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1837429](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1837429).

65. See RONALD DWORKIN, *LAW’S EMPIRE* 411 (1986).

66. As Mattias Kumm noted, even a constitutional amendment explicitly establishing that constitutional rights have direct horizontal effects in Germany would not provide additional protection for weaker economic parties. “As a matter of substantive law and institutional division of labor, it

private relationships for the benefit of one party in order to protect that party's constitutional rights<sup>67</sup> already serves as the basis for regulations against coercion, fraud, misrepresentation, and (some forms of) duress. All of these protections are required by the liberal approach.

A liberal theory of rights, however, will have serious reservations about attempts to turn human rights into a master key for simply moralizing the law. To start with, a liberal theory will make clear that it is constitutional *rights* that frame contract law, not constitutional “values.”<sup>68</sup> There is a categorical difference between rights (as norms) and values. Norms are valid (or not); values are to be realized (more or less).<sup>69</sup> The (liberal) idea of a total constitution at work is not a matter of realizing values, but of respecting rights and protecting them from infringement. Therefore, there cannot be such a thing as a constitutional right to positive freedom or a positive conception of liberty on the horizontal level between citizens or contracting parties. There is especially no such thing as a constitutional right to a “substantial”<sup>70</sup> or “positive” form of contractual freedom.<sup>71</sup> Making a contracting party responsible for the other party's positive freedom of contract would amount to creating a duty to proactively provide a range of substantial, positive, meaningful options for the partner to choose from before contracting with him or her—it would, in other words, impose a duty to rearrange the contracting partner's life. This notion is as absurd as the idea of directly (or even indirectly) applying social or economic human rights within the horizontal relationship of contracting individuals.

Finally, respect for the dignity of the individual (according to Article 1 of the Charter of Fundamental Rights of the European Union) may well prove to be a limit on freedom of contract in exceptional cases.<sup>72</sup> However, human dignity as the most fundamental norm expressing mutual recognition of legal persons as legal persons<sup>73</sup> is hardly the right tool to serve as a placeholder for the intentions of the social-justice-in-contract-theory approaches. Again, it is the very notion of individual basic rights (and the non-consequentialist concept of autonomy that they presuppose) that stands in the way of theories promoting

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would simply leave things as they are. With the comprehensive scope of constitutionally protected interests in Germany, private law in Germany is already applied constitutional law.” Matthias Kumm, *Who is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law*, 7 GERMAN L.J. 341, 359 (2004).

67. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Oct. 19, 1993, 89 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 214 (Ger.).

68. *But see* Collins, *supra* note 64, at 3.

69. JÜRGEN HABERMAS, FAKTIZITÄT UND GELTUNG 310 et seq. (1992).

70. *But see* Collins, *supra* note 64, at 8.

71. This latter notion was brought forward after the German Constitutional Court's ruling in the Bürgschaftsvertrag case (a family-surety-contract case), for example. 89 BVERFGE 89.

72. Collins, *supra* note 64, at 6 et seq.

73. Thomas Gutmann, *Struktur und Funktion der Menschenwürde als Rechtsbegriff*, in 2 LEBENSWELT UND WISSENSCHAFT. DEUTSCHES JAHRBUCH PHILOSOPHIE 309 (Carl Friedrich Gethmann ed., 2011).

paternalistic restrictions on freedom of contract whenever a transaction is said to be insufficiently conducive to the wellbeing of a party.

#### IV IMPLICATIONS

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

Nonetheless, liberalism—of a Rawlsian kind, at least—tries to protect spheres of agency freedom and voluntary agreements that are not conceived of as mere means for collective ends. Understanding a contract from the perspective of the contracting parties' freedom rights commits contract theory to concentrating on the parties' internal relationship.<sup>74</sup> For normative reasons, a contract demands an atomistic view. An external perspective of contract law—one understanding a contract as serving a particular social value independent of the parties' autonomy, as an instrument to realize social justice, virtues, non-discrimination, efficiency—is exogenous to the notion of contract and its normative foundation. There is a substantive and a methodological consequence to be derived from this.

First, the substantive consequence: Any functionalization of contracts for external ends curtails the realm of contracts (that is, the spheres of agency freedom enjoyed by legal persons mutually respecting each other as free and equal). There are some good reasons to limit private autonomy and freedom of contract, but it is always a question of curtailing, not defining it. There may be good reasons for using contract law to implement distributional goals when alternative ways of doing so are likely to be more costly or intrusive (Anthony Kronman suggested that this may be the case for usury laws and laws on minimum wages, habitability, and labor protection<sup>75</sup>). And maybe Hugh Collins is right in thinking that even the way to socialism leads through contract law,<sup>76</sup> but whenever contract law is used to further an end other than the parties' freedom, something gets lost: the contract. So, from a theoretical point of view, the European Commission had a point when, in its presentation of the proposal for a Common Frame of Reference (CFR), it stated that in the CFR "contractual freedom should be the guiding principle; restrictions should only be foreseen where this could be justified with good reasons."<sup>77</sup>

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74. Wilhelmsson, *supra* note 37, at 719 et seq.

75. Anthony Kronman, *Contract Law and Distributive Justice*, 89 *YALE L.J.* 472, 473 (1980); see also Daphne Lewinsohn-Zamir, *In Defense of Redistribution Through Private Law*, 91 *MINN. L. REV.* 326 (2006).

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

77. COMMISSION OF THE EUROPEAN COMMUNITIES, COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL: A MORE COHERENT EUROPEAN CONTRACT

Second, the methodological consequence: Legal theory in the strict sense (as opposed to theories regarding law) is a first-order reflection of the legal system it deals with. It is a reconstruction of the legal point of view. As such, it cannot proceed without some sort of normative-coherence theory, without some sort of theory that interprets statutes, court decisions, and their underlying normative principles and concepts in order to provide a consistent totality of rules. A coherent general theory of contract, reaching deeper than what Hanoch Dagan rightly calls the existing structural pluralism of contract institutions,<sup>78</sup> is a precondition for the internal consistency and reasonableness the law must claim for its doctrines and principles.<sup>79</sup> Likewise, any theory of contract has to make plausible that its conception of contractual obligation is implied by the basic doctrines of contract law, and that it, in turn, holds them together in one integrated whole.<sup>80</sup> Therefore, a theory of contract has to start with reflection upon the organizing idea of the notion of contract—autonomy—and then it must try to build a consistent and coherent theory around it (which, of course, this article cannot do). In this endeavor for theoretical contract law scholarship, liberal contract theory aims at a coherent set of basic legal principles and institutions governing a justifiable law of contract (if not the complete body of it, leaving room for matters of convention, of *determinatio*,<sup>81</sup> and of policies in specific doctrinal choices).

It is for this reason that the liberal theory of contract holds all attempts to functionalize contracts for social or policy goals to be extrinsic to the concept of contract, unable to be developed as an integral part of contract theory even insofar as such goals are substantively or procedurally justifiable (as some are). Because the notion of contract is inherently founded on the idea of two or more persons realizing individual self-determination by means of voluntarily entering legally binding agreements, there is no such thing as a choice of paradigm for the theory of contract. Alternative paradigms necessarily fail to grasp the meaning of their object. They may at best denote (well-founded or not so well-founded) limits of the realm of contracts, but they cannot explain what contracts *are*. They are built around a void. In order to grasp the core notion of a contract, alternative paradigms of contract theory have to be parasitic upon the liberal one. As long as alternative or mixed approaches are unable to explain the internal relationship between the normative core concept of contract and autonomy, on the one hand, and the external good they want contract law to serve, on the other hand, justification of “the intrusion of the

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LAW—AN ACTION PLAN, COM[2003] 68 FINAL, 16 (Feb. 12, 2003), available at [http://ec.europa.eu/consumers/cons\\_int/safe\\_shop/fair\\_bus\\_pract/cont\\_law/com\\_2003\\_68\\_en.pdf](http://ec.europa.eu/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/com_2003_68_en.pdf).

78. Hanoch Dagan, *Autonomy, Pluralism, and Contract Law Theory*, 76 LAW & CONTEMP. PROBS., no. 2, 2013 at 19.

79. See Dworkin, *supra* note 65; see also ROBERT ALEXY, THE ARGUMENT FROM INJUSTICE: A REPLY TO LEGAL POSITIVISM (2002); Benson, *supra* note 9, at 118.

80. Benson, *supra* note 9, at 123 et seq.

81. William Lucy, *Philosophy and Contract Law*, 54 U. TORONTO L.J., 75, 95 (2004).

values of the welfare state into the structure of contract law”<sup>82</sup> or of any other instrumentalization of contract will inevitably lead to bad theory. From this perspective, the “productive disintegration of private law”<sup>83</sup> results in the disintegration of private-law theory, and perceiving contract law as just another arm of the regulatory state<sup>84</sup> is the self-abandonment of a theory of contract. That is why anyone who is not a political liberal may nevertheless have good reasons for sticking to a liberal theory of contract.

## V

### CONCLUSION

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

For such a theory, the number of possible legal concepts to deal with “unjust” or “unequal” contracts (in the widest sense of these words) is restricted to ones that can be shown to be consistent with the liberal core notion of contract. Substantive unfairness, inadequacy of consideration, or impaired bargaining power *per se* do not justify non-enforcement of a contract. At first glance, only the two forms of purely procedural grounds addressing a contracting party’s lack of voluntariness<sup>85</sup> (and hence, of autonomy)—namely coercion (including some forms of duress and even undue influence) and mistake (including fraud, misrepresentation, and non-fulfilment of duties of disclosure)—are intrinsic aspects of a liberal theory of contract. Moreover, from the very idea of contract and from the relationship of mutual recognition between persons underlying it, an autonomy-based account of contract law is perfectly able to extract pre-contractual and contractual duties to inform, duties to cooperate, as well as duties of good faith and fair dealing, for example, when it comes to filling gaps in a contract or to modes of performance. There are even liberal reasons in favor of compulsory contracting under specific circumstances.

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82. Wilhelmsson, *supra* note 37, at 713; *cf.* ROGER BROWNSWORD, GERAINT HOWELLS, THOMAS WILHELMSSON, *WELFARE IN CONTRACT LAW* (1994).

83. *Cf.* HUGH COLLINS, *REGULATING CONTRACTS* 53 et seq. (1999).

84. Collins, *supra* note 64, at 33 et seq. Perhaps it has to be admitted that the most sophisticated (albeit totalitarian) theoretical approach to understanding a contract as just another arm of the regulatory state is the national socialist theory of contract. *See* 1 KARL LARENZ, *VERTRAG UND UNRECHT* 56–93 et seq. (1936).

85. *Cf.* THOMAS GUTMANN, *2 FREIWILLIGKEIT ALS RECHTSBEGRIFF* 2 (2001).

The crucial question is whether the liberal theory of contract has to leave it at that. Investigation of whether there is a further “interpretation of contractual fairness that fits with the . . . non-distributive aspects of contract”<sup>86</sup> is the main task for a liberal theory of contract today.

There is at least one complex normative concept that has to be explored further: exploitation,<sup>87</sup> in its strictly analytic—not Marxist—sense, describing (basically) a situation where a person takes unfair advantage of someone else’s vulnerabilities or desperation to strike a deal. Exploitation is a tricky concept, with a moral force less clear than coercion, since exploitation is compatible with voluntary action. Exploitation can be mutually beneficial; it may be harmful for an individual to be protected from being exploited, and it is far from clear which forms of exploitation should count as a kind of wrong that can justify state intervention. Nevertheless, a principle of non-exploitation comes closest to an idea of fairness intrinsic to a contract, to an idea recognizing and respecting individuals as autonomous subjects and equals. In this regard, Peter Benson has tried to show that a certain non-distributive reading of unconscionability covering the core concept of exploitation can be understood as a necessary element of the form and content of a contractual relation.<sup>88</sup> His argument, to which I cannot do justice here, is based mainly on a specific Hegelian regulative assumption about the parties’ presumed intentions to give and receive equal value,<sup>89</sup> thus ensuring that “parties can acquire rights against each other only in a way that respects the other throughout as an equal owner with a capacity for rights.”<sup>90</sup> The Kantian liberal will have some problems digesting the argument in this form, which seems to depend on the Aristotelian heritage in Hegel’s theory, but it clearly points in the right direction. For reasons of coherence, processual accounts of contractual exploitation<sup>91</sup> do, however, seem more promising.

One of the interesting parts of a liberal theory of contract is how it translates these structurally different concepts into doctrine.<sup>92</sup> Within the different national legal systems, autonomy-limiting coercion, on the one hand, and exploitation, on the other, are currently being addressed in a quite non-systematic way by a plethora of theoretically blurry concepts—for example, by different notions of “coercion” or duress including economic duress, and certain aspects of undue influence and unconscionability (or “good morals,” in German

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86. Benson, *supra* note 9, at 123.

87. See ALAN WERTHEIMER, EXPLOITATION (1996); Alan Wertheimer, Matt Zwolinski, *Exploitation*, in THE STANFORD ENCYCLOPEDIA OF PHIL. (Edward N. Zalta ed., 2012), available at <http://plato.stanford.edu/archives/spr2012/entries/exploitation>.

88. Benson, *supra* note 9, at 184 et seq.

89. Benson, *supra* note 9, at 187 et seq.; see also Peter Benson, *Abstract Right and the Possibility of a Nondistributive Conception of Contract: Hegel and Contemporary Contract Theory*, 10 CARDOZO L. REV. 1077, 1119 (1989).

90. Benson, *supra* note 9, at 192.

91. RICK BIGWOOD, EXPLOITATIVE CONTRACTS 196 et seq. (2004).

92. For the common law of “Anglian” legal systems, see *id.*

law), respectively.<sup>93</sup> The main task of a liberal theory of contract as a form of legal theory aiming at doctrine is to reconstruct these legal notions along the lines of the different analytical structure of the two concepts, coercion and exploitation. For a start, Articles 4.108 (Threats) and 4.109 (Excessive Benefit or Unfair Advantage, requiring a combination of procedural and substantive unfairness) of the Principles of European Contract Law<sup>94</sup> do a good job here—a much better one than any national law.

While the concept of exploitation stands for an attempt to gently broaden the “thin” concept of *equality* to which liberal legal theory is referring, a second option might be to change from the “thin” concept of *autonomy* it is based on over to more substantial ones. As Hanoch Dagan has demonstrated, drawing on Joseph Raz’s conception of the ideal of personal autonomy as self-authorship,<sup>95</sup> such a move might well lead to a pluralization of the until-now normative monism of autonomy-based theories of contracts like the one sketched here.

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93. Thomas Gutmann, *Zwang und Ausbeutung beim Vertragsschluss*, in NEW FEATURES IN CONTRACT LAW 49 (Reiner Schulze ed., 2007).

94. OLE LANDO & HUGH BEALE, PRINCIPLES OF EUROPEAN CONTRACT LAW (2000). The *Principles, Definitions and Model Rules of European Private Law* have kept this model rule on exploitation. See Article II-7:207, in CHRISTIAN VON BAR & ERIC CLIVE, 1 PRINCIPLES, DEFINITIONS AND MODEL RULES OF EUROPEAN PRIVATE LAW. DRAFT COMMON FRAME OF REFERENCE (DCFR) 507 (2009).

95. Dagan, *supra* note 78.