The Autonomy Default Paradigm in Contract Law

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You can scribble an agreement on a napkin or hire lawyers to negotiate a hundred-page contract. Either way, most of your contractual obligations will not be in your document. They will be in the background rules contract law applies absent your express agreement. Justifying these defaults is a core task of contract theory; getting them right is a core task of contract law.

This Article introduces the autonomy default paradigm, a conceptually coherent and normatively attractive account of contract law defaults. We show that defaults are justified to the extent they enhance our autonomy, understood as self-determination. They vindicate our autonomy through two pathways: (a) empowering defaults that proactively facilitate people's autonomy and (b) safeguarding defaults that protect our future selves and ensure relational justice.

Often, the parties to commercial contracts are legally sophisticated players who just want to get wealthier. There, the welfare-maximizing default is often the autonomy-enhancing one. But for the vast run of contracts—getting jobs, getting married, buying homes, buying stuff—autonomy defaults may diverge from their efficiency-based counterparts. In these cases, the law often does and always should opt for autonomy defaults, even at the price of some efficiency.

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INTRODUCTION

You can scribble an agreement on a napkin or hire lawyers to negotiate a hundred-page contract. Either way, most of your contractual obligations will not be in your agreement. They will be in the background rules contract law applies absent your express agreement. Some of these rules are mandatory, fixed even if both parties prefer otherwise. But most rules of contract law are defaults, changeable if both parties so choose. Justifying these defaults is a core task of contract theory; getting the defaults right is a core task of contract law.

This Article provides a conceptually coherent and normatively attractive account of contract law defaults. We start from the position that contract law is, at its root, justified to the extent it enhances human freedom. That is, it supports individual autonomy defined as self-determination. Building from this normative commitment, we arrive at the *autonomy default paradigm*.

Defaults are justified to the extent they enhance our ability to write and rewrite the story of our own lives. As we show in this Article, most existing defaults are already autonomy-enhancing. And this is not a surprise given the liberal principles animating American contract law. We celebrate these defaults. But not all are freedom-enhancing. For those that are not, we show the path to reform.

Our first step is to define the scope of our project. In this Article, we leave aside mandatory rules. Mandatory rules limit parties' ability to contract for two reasons. First, contracting may come at the expense of third parties by unambiguously imposing costly negative externalities. Contracts to commit crimes are an intuitive example of a type of agreement subject to a mandatory rule of nonenforcement. The second category is when one party attempts to use the state's coercive power to undermine the other party's self-determination. Examples include limits on promisors' ability to commit their future selves, as in certain non-competes; floors for acceptable precontractual behavior, such as rules on duress or unconscionability; and non-waivable terms, such as minimum wages or maximum working hours. Mandatory rules ensure people do not use contract—one of the law's main autonomy-enhancing devices—in ways that are predictably autonomy-reducing.

Alongside this circumscribed list of mandatory rules lies the ample field of contract defaults, which is our focus here. Defaults include not only technical gap-fillers, but also many of contract law's core doctrines, including most of the rules governing contractual performance and remedies. These rules apply whenever parties do not opt for a different arrangement—which is most of the time. Often, a rule will explicitly announce its default status, as in "unless a different intention is manifested." Other times, a rule's default status is less transparent but still widely recognized, such as with "as is" clauses that opt out of disclosure duties.

Throughout the vast array of contract's default rules, there are degrees of "stickiness." Some defaults are easily contracted around, while others require

substantial effort. We offer a coherent theory for all contract default rules at all levels of stickiness. Put differently, our approach addresses all non-mandatory contract law. Our core claim is the autonomy default paradigm better describes the existing law than does any competing account. American contract law's default rules are, for the most part, already autonomy-enhancing. In cases where they are not, the default is normatively unjustified and should be changed.

Defaults serve their autonomy-enhancing function through two pathways we identify: by empowering or safeguarding autonomy.

1. Empowering Defaults. Empowering defaults proactively facilitate people's autonomy. Sometimes, parties to a commercial contract are legally sophisticated, symmetrically situated players who just want to get wealthier. For these (and similar) strictly utilitarian contracts, the empowering approach is straightforward: defaults should aim, in most cases, to maximize the contract's joint surplus by adopting majoritarian preferences when they can be reliably identified. In this limited subset of agreements, the law-and-economics approach largely dovetails with ours.

But there's a catch. This utility-maximizing approach turns out to be what even law-and-economics scholars (whom we will identify as legal-economists) acknowledge to be a corner solution. The solution is not justified for the vast run of contracts between ordinary people doing ordinary things such as getting jobs, getting married, buying homes, or buying stuff. As we move away from the corner case (utilitarian subject matter and roughly equal parties), the empowering default is increasingly likely to diverge from its efficiency-based counterpart. The divergence arises either because of distributive concerns or because the contract asymmetrically affects the autonomy interests of the typical parties to that contract type.

For most contracts people make, contract law committed to human freedom must opt for an empowering default, even at the price of some inefficiency. We use this insight to explain the prevalence of, for example, otherwise puzzling pro-consumer and pro-homeowner defaults, and to criticize the infamous holding in the canonical *Peevyhouse v. Garland Coal & Mining Co.* case.[1]

2. Safeguarding Defaults. Contract law does not only enhance autonomy. Our voluntary commitments also inescapably *limit* our self-determination. This dual nature of contracting does not mean that an autonomy perspective is agnostic among default rules. Nor does it imply that autonomy concerns only the identity of winners and losers. There is no reason to think that a contract's autonomy effects must be a zero-sum game. To be justified on autonomy principles, contract law must attend to a contract's potential autonomy-diminishing effects. This is why, alongside empowering defaults, contract law must—and indeed does—offer *safeguarding defaults*.

1. 382 P.2d 109 (Okla. 1962) (holding that the damages a lessor may recover for a lessee's incidental breach is limited to the diminution in value of the premise.); *see infra* text accompanying notes 133–137.

We identify two types of safeguarding defaults. One class ensures that contracts made today do not unnecessarily restrict the autonomy of *promisors' future selves*. The other class safeguards the autonomy of *vulnerable counterparties*, a concern that arises because of the sequential nature of typical contract performance.

Both empowering and safeguarding defaults—which together comprise autonomy defaults—justify state coercion of private contracts. But they do so in different ways, using *altering rules* tied to each category of default rule. This is as it should be. Empowering defaults consistent with the law-and-economics paradigm should be easy to alter. Easy opt-outs here pose less threat to autonomy. For other empowering defaults, and for all safeguarding defaults, altering rules typically are, and indeed should be, more stringent, as we illustrate later with the familiar case of *Jacob & Youngs, Inc. v. Kent*.[2]

As we discuss in Part I, this Article's theory of autonomy defaults places us in opposition to the dominant approaches to contract law and theory. To set the stage, we discuss the two main existing schools of thought: "traditionalist" and "legal-economic." The traditionalist view has more sway in Canada and parts of Europe; the legal-economic view is overwhelmingly dominant in the United States. Part I sketches these accounts and explains why both disappoint. While brief, this Part is important to show how gaps in the existing approaches open the conceptual and normative space for ours.

In a nutshell, traditionalists argue that default rules are implied-in-fact terms that express the presumed intent of the actual parties. Law's role is solely to make these implied intentions explicit; its ambition is strictly limited to enforcing the parties' joint will (that is, the content of their mutual consent). A strength of this approach is its healthy concern with justifying, from first principles, the coercive nature of contract law. But the traditionalist view falls apart because of its inability to account for much of contract law's doctrinal terrain and its limited vision of contract's potential for human empowerment. These failures undermine traditionalists' interpretive credentials and erode their normative standing.

Legal-economists, by contrast, set a more ambitious mission for contract law. They conceptualize contract defaults as gap-filling rules and claim these rules should follow majoritarian preferences. The goal is to minimize parties' transaction costs and maximize their contractual surplus. This *majoritarian paradigm* does better than the traditionalists' account on the fit dimension—linking normative goals with existing doctrine. It has become the overwhelmingly dominant approach in the United States. Law professors teach it to first-year contract students; lawyers and judges use it in evaluating defaults.

But the majoritarian paradigm marginalizes the challenge of justification. When the justificatory challenge is faced head on, this approach collapses as a

2. 129 N.E. 889 (N.Y. 1921); *see infra* text accompanying notes 155–159.

free-standing normative project. Legal-economists defend defaults and propose reforms their theory cannot justify.

Part II picks up the pieces, addressing the traditionalists' fit dimension and the legal-economists' normative gaps. Reconstructed through an autonomy prism, each of the existing schools contributes an important substrate to our more compelling theory of autonomy defaults. Part III and Part IV then introduce empowering defaults and safeguarding defaults, respectively, to round out the theory and provide concrete doctrinal examples.

Our method in this Article is to offer a charitable interpretation and reconstruction of modern contract law. We do not pretend to divine the intentions of the judges and lawmakers who developed the doctrinal materials. Rather, like other reconstructive efforts, our theory builds on existing practices, reaffirms much of existing law, and offers targeted proposals for justified reforms that would align contract law more closely with its animating values.

In brief, the autonomy default paradigm should replace the majoritarian paradigm at the heart of contract law scholarship, teaching, and practice.

I. THE DEFAULT LANDSCAPE

A. THE TRADITIONALISTS

1. The Challenge. Private law, like law generally, is a justificatory practice.[3] The state claims the authority to create and enforce rights and duties. For that coercive authority to be legitimate, law must be normatively justified. To meet this obligation, it is not enough simply to demonstrate the desirability of granting the remedy plaintiffs seek.[4] Additionally, defendants must be duty-bound to those in the plaintiff's predicament. In other words, we need to justify why the state should be able to coerce this particular defendant to be the agent who remedies this plaintiff's unhappy state.[5]

Contract law is bound to this justificatory imperative. But this obligation faces a substantial challenge: how do we justify modern contract law's enforcement of wholly-executory contracts? The conceptual problem for legal scholars, whom we dub the "traditionalists," is that these contracts authorize promisees to demand promisors satisfy their right to expect even when they haven't yet relied.[6] In other words, wholly-executory contracts impose affirmative interpersonal duties on promisors, even absent reliance. And that's a

3. *See* HANOCH DAGAN, RECONSTRUCTING AMERICAN LEGAL REALISM & RETHINKING PRIVATE LAW THEORY 110 (2013).

4. *Id.*

5. *Id.*

6. *Cf.* L. L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages*, 46 YALE L.J. 52, 57 (1937) (discussing why the law should protect expectation interest).

no-no for the traditionalists.[7] For them, the signature feature of private law is that individuals have no affirmative interpersonal duties.

So how can they justify modern contracting? They try to ground promisors' obligations strictly on their voluntary undertakings. But this approach does not work.

2. Descriptive and Normative Shortfalls. Peter Benson offers the most powerful recent articulation of the defining traditionalist view: default rules are implied-in-fact terms, not gap-fillers.[8] If this view fails, then all traditionalist accounts also fail—including transfer, promise, and consent theories, along with their allies rooted in Kantian or Hegelian theory.

Parties can be bound, Benson argues, "only by what they have done."[9] This means contract law's default rules do not fill gaps but instead are implications of the parties' particular "self-regulating" transaction.[10] Objectively construed, "enforceable agreements are not contractually incomplete."[11] Rather, they have "all the internal resources needed to determine what can and should be implied."[12] By spelling out "what is reasonably required to make sense and to secure the full and fair value of the terms actually agreed to[,]"[13] implication can "specify" the "'secondary' or 'dependent' terms and conditions" of a transaction,[14] which "fill out, qualify, and further determine the performances owed as between the parties."[15] Implication must follow the presumed intent of the particular parties of the actual transaction. It "refers to what the parties to a given contract *must* reasonably have intended"[16] so their contract won't be "futile, devoid of the fair value and benefit that it contemplated, or plainly absurd."[17]

Benson's test of "transactional necessity"[18] ensures that implied terms indeed spring from the parties' voluntary obligations, rather than being imposed by the law.[19] And to his credit, this theory can justify a subset of contemporary defaults, including, for example, the rule in the first-year chestnut *Wood v. Lucy,*

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7. PETER BENSON, JUSTICE IN TRANSACTIONS: A THEORY OF CONTRACT LAW 367 (2019) ("[P]rivate law's normative framework of liability for misfeasance only.").

8. *Id.* at 306.

9. *Id.* at 132.

10. *See id.* at 123.

11. *Id.* at 23.

12. *Id.*

13. *Id.* at 131.

14. *Id.* at 124.

15. *Id.*

16. *Id.* at 134.

17. *Id.*

18. *See id.* at 140.

19. *Cf.* Steven J. Burton, *Default Principles, Legitimacy, and the Authority of a Contract*, 3 S. CAL. INTERDISC. L.J. 115, 117 (1993) ("Consent-based default principles respect the authority of the contract, but valid consent cannot reach beyond the agreement as needed to provide a legitimate basis for enforcing all needed default rules.").

Lady Duff-Gordon.[20] But it cannot account for the breadth and depth of modern defaults.

For example, if contract law were guided by Benson's rigid approach to voluntariness, it would still follow the old common law rule that refused to enforce an agreement when the parties did not spell out the interaction's main terms. Refusing to enforce such contracts was one method to reduce the divergence between the parties' actual intent and their contractual obligations.[21]

But contract law did not continue on this path. As Allan Farnsworth notes, contemporary law went the opposite way, with a robust default apparatus that the contracting parties may change, but that otherwise applies whether or not the parties intended it.[22] Indeed, contemporary practice is best described as a pre-existing default framework with which the parties tinker rather than a set of bespoke agreements whose gaps law then fills. The traditionalists describe a contracting world that no longer exists.

The traditionalists' approach is also normatively disappointing. Loyalty to the parties' presumed subjective intent makes contracting a costly endeavor and thus unduly limits its autonomy empowering potential.[23] Appreciating this tradeoff puts the traditionalists in a bind. They can continue adhering to the discarded *subjective* approach to contract formation,[24] but this commitment further damages their account's interpretive credentials. Or they can accept the *objective* approach that characterizes modern contract law, but then they must struggle to square reality with their dogma that law should bind parties only to commitments they can be presumed to intend to undertake.[25]

Neither Benson, nor any of the other contract traditionalists, have found a convincing way out from this impossible situation.

B. THE MAJORITARIAN PARADIGM

1. The Legal-Economic Canon. The canonical legal-economic view, which dominates American scholarly discussion on defaults, avoids these difficulties. It eagerly embraces the challenge of filling gaps in incomplete contracts. Indeed, gap-filling becomes one of contract law's core tasks because it proactively facilitates parties' transactions.[26] In this view, defaults should generally mimic the terms most contracting parties would have chosen in pursuit of maximizing

20. 118 N.Y. 214 (1917) (an exclusive dealing agreement implies a "best effort" obligation to supply the service concerned).

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

22. *See id.* at 120–21.

23. *See* Jody S. Kraus, *The Correspondence of Contract and Promise*, 109 COLUM. L. REV. 1603, 1617 (2009).

24. *See* Lawrence M. Solan, *Contract as Agreement*, 83 NOTRE DAME L. REV. 353, 405 (2008).

25. *See* BENSON, *supra* note 7, at 113–14; Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 272, 320 (1986).

26. *See* Charles J. Goetz & Robert E. Scott, *The Limits of Expanded Choice: An Analysis of the Interactions Between Express and Implied Contract Terms*, 73 CALIF. L. REV. 261, 266 (1985).

their joint gains, had they enjoyed perfect information and faced zero transaction costs.[27]

The majoritarian paradigm literature is robust and sophisticated. It explains why, in many contexts, law should mimic parties' "first-order" preferences. That is, give parties the default term most contractors want. In other settings, the approach shows why the default should be keyed instead to contractors' "second-order" preferences, such as so-called "penalty default rules"[28] that induce efficient disclosure of private information.

Exploring details of, and qualifications to, this much-analyzed paradigm is unnecessary for our purposes here. What *is* crucial for us is that this approach—which "has acquired the status of presumptive correctness"[29]—does reflect the breadth of contract law's default apparatus and thus defeats the traditionalists. The majoritarian paradigm relaxes the traditionally strict "definiteness" requirement by filling gaps with majoritarian preferences. Doing so economizes on contracting costs for the many, while still allowing the few to opt out.[30] According to this now-dominant view, much, if not all, of contract law's entire default rule apparatus can be understood in these majoritarian terms.

Legal-economists are, however, the first to admit the majoritarian paradigm faces significant implementation difficulties.[31] One difficulty is that if the goal is to minimize transaction costs, "sometimes a minoritarian rule will be efficient [either] because it will be cheaper for the majority of contractors to contract around . . . or because they will face lower costs of failing to contract around."[32] In a world where transaction costs are hard to measure, how does one choose between majoritarian and minoritarian defaults? Legal-economists have no answer to this basic question.

A related problem is epistemic and institutional: identifying majoritarian preferences is easier said than done, especially when generalist courts have to undertake the task. These difficulties raise doubts regarding the dominant paradigm's explanatory power.[33]

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27. *See* C. A. Riley, *Designing Default Rules in Contract Law: Consent, Conventionalism, and Efficiency*, 20 OXFORD J. LEGAL STUD. 367, 383 (2000).

28. *Cf.* Eric A. Posner, *There Are No Penalty Default Rules in Contract Law*, 33 FLA. ST. U.L. REV. 563, 564-65 (2006) ("The purpose of penalty default rules . . . is to force parties to reveal private information, which enables their counterparts to perform more efficiently than they would if left uninformed, . . . [but] penalty default rules simply do not exist or are not a distinctive doctrinal category.").

29. *See* Ian Ayres, *Default Rules for Incomplete Contracts*, *in* 1 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 585, 586 (Peter Newman ed. 1998).

30. *Id.*

31. As the text implies, the marriage of the economic analysis of contracts with the majoritarian paradigm is only partial.

32. Ayres, *supra* note 29, at 587. For an important application, see generally Oren Bar-Gill & Omri Ben-Shahar, *Optimal Defaults in Consumer Markets*, 45 J. LEGAL STUD. S137 (2016) (exploring an optimal design of default rules).

33. *See* Alan Schwartz & Robert E. Scott, *The Common Law of Contract and the Default Rule Project*, 102 VA. L. REV. 1523, 1526 (2016).

2. The Normative Challenge. The difficulties of the legal-economic theory of majoritarian defaults (and minoritarian ones, for that matter) go deeper than the empirical and institutional challenges just noted. To see why, we need to interrogate the paradigm's normative foundation. Law-and-economics scholars of contract usually do not explicitly address this dimension.

But Steven Shavell does. He fairly represents the legal-economists' normative canon in writing that contract law's goal should be to "maximize social welfare," and acting "to further the welfare of the parties to the contract" is presumed to be a proper means to that end because (and to the extent that) "they will ordinarily be the only parties affected by the contract."[34]

The basic idea is straightforward. Shavell's normative lodestar is maximizing aggregate welfare, typically understood as preference satisfaction.[35] The market, and thus contract, is an important means for continuously improving allocative and productive efficiency, particularly in contrast to the challenges of a planned economy, which is how legal-economists typically frame the alternative.[36] Economizing on the parties' transaction costs is a laudable enterprise because it improves how the market operates.[37] Legal-economists unashamedly embrace, indeed celebrate, the recruitment of the "invisible hand." By pursuing private interests, contracting parties serve the public good.

This view, however, cannot plausibly be accepted as contract law's normative core. Why? Because it is at root anti-liberal. Commandeering people's contracts in service of aggregate welfare fails to take seriously distinctions among people. It dissolves the significance of their individual lives and their interpersonal interactions.[38]

For a long time, this commandeering critique could be bracketed as merely academic. Contracts still left people's control over their own affairs unchallenged. But the contingency of such control is now becoming increasingly troubling. Today, technology threatens to undermine the epistemic (and computational) benefits of the market. The planned economy is no longer the relevant alternative. Artificial intelligence (AI) is rapidly becoming better at tailoring transactions that improve the welfare of the interacting parties. If AI does a better job at improving welfare than the market, then freedom of contract becomes an obstacle, not a virtue, from the perspective of allocative and productive efficiency.

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34. STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 294 (2004).

35. *See* EYAL ZAMIR & BARAK MEDINA, LAW, ECONOMICS, AND MORALITY 325 (2010).

36. *See* ERIC A. POSNER & E. GLEN WEYL, RADICAL MARKETS: UPROOTING CAPITALISM AND DEMOCRACY FOR A JUST SOCIETY 285 (2018).

37. *See* ROBERT COOTER & THOMAS ULEN, LAW & ECONOMICS 307 (6th ed. 2012); *see also, e.g.*, RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 123 (8th ed. 2011) (describing the economic function of contract law).

38. *See* Hanoch Dagan, *Why Markets? Welfare, Autonomy, and the Just Society*, 117 MICH. L. REV. 1289, 1298–99 (2019); *see also* Hanoch Dagan & Roy Kreitner, *Economic Analysis* in *Law*, 38 YALE J. REG. 566, 573–74 (2021).

In this new, dystopian world, interpersonal interactions are frictions. Contracts are frictions. From a thoroughgoing law-and-economics standpoint, aggregate welfare-increasing (technology-determined) transfers should substitute for inefficient (human-chosen) transactions.[39] Individual autonomy should be eliminated. This may well be a more efficient world. But it is not a free one.

3. Legal-Economist as Neo-Traditionalists. Many legal-economic analysts of contract law do not want to jettison freedom altogether. But they find the path back to be a challenge. Their goal is to show that the majoritarian paradigm does not, or at least need not, rely on a normative commitment to maximizing aggregate welfare. So how do they avoid that commitment?

There are two paths. One seems to us a dead end. The other, carefully worked out, ends up subsuming the majoritarian paradigm into our theory of autonomy defaults.

We call the first strategy *neo-traditionalism* because it invokes the normative authority of the parties' will. In turn, neo-traditionalist scholarship takes two forms, *ascriptive* and *conventional*. Unfortunately, neither is promising.

a. Ascriptive. The first view *ascribes* to the parties the intention to "have the most efficient arrangement."[40] This response may indeed work when both parties are sophisticated, legally informed firms whose utility functions are linear in money. Such parties may even, as the legal-economic literature often claims (or, more accurately, assumes), contract out of any other default. If this were so, there would be no point in setting defaults that do not maximize efficiency.[41]

The problem is that general contract law (as opposed to statutes or doctrines limited to commercial contracts) also applies to parties who are not strict utility maximizers, are often legally uninformed, and may not perceive their interactions solely in instrumental terms. For these contractors, the ascriptive school's reliance on the parties' *hypothetical* intentions begs, rather than answers, the justificatory challenge.[42] Why? Because some parties may be guided by second-order preferences for cooperation, altruism, or, for that matter, wagering;[43] others may be pursuing life projects that cannot be properly evaluated apart from their context. Either way, the ascriptive school fails to take

39. *See* Hanoch Dagan & Michael Heller, *Why Autonomy Must Be Contract's Ultimate Value*, 20 JERUSALEM REV. LEG. STUD. 148, 159 (2019) [hereinafter Dagan & Heller, *Ultimate Value*].

40. Omri Ben-Shahar, *A Bargaining Power Theory of Default Rules*, 109 COLUM. L. REV. 396, 396 (2009).

41. *See* Schwartz & Scott, *supra* note 33, at 1553.

42. *Cf.* Riley, *supra* note 27, at 372, 386–87 ("[W]e can hardly be sure that contracting parties have actually—subjectively—consented to the defaults by which they will be bound.").

43. *Cf.* Robert E. Scott, *A Relational Theory of Default Rules for Commercial Contracts*, 19 J. LEGAL STUD. 597, 615 (1990) ("[R]ational commercial actors will be motivated by a dominating objective: to reduce the risk of those contingencies over which one or the other has some measure of control.") [hereinafter Scott, *Relational Theory*].

seriously the *actual* intentions of parties on which it claims to ground the legitimacy of contract law's coercive authority.[44]

Contract law's justificatory challenge must address first and foremost the real people whom it serves and upon whom it exercises coercive authority. The familiar legal-economic response, what we are calling the ascriptive school, fails this challenge and therefore cannot possibly justify existing defaults.

b. Conventional. This leaves the second form of neo-traditionalism, which turns from parties' hypothetical consent to the *conventions* that typify their interactions. This approach elevates majoritarian preferences, even if they are not necessarily efficient ones, and requires adherents to subscribe to some version of Randy Barnett's account of justified defaults.[45]

Unlike Benson, Barnett recognizes the difference between *implied* terms implicit in the parties' specific interaction, and *default* rules which are not. Yet, Barnett nonetheless insists, with Benson, that the "gap filling" image of contract should be rejected because it misleadingly emphasizes "the discontinuity between contract law and the consent of the parties."[46] Contract's default rules are legitimate only if they are "conventionalist," that is, if they "reflect the commonsense expectations of persons in the relevant community of discourse."[47] Such terms, and only such terms, "can be and often are indirectly consented to by parties who could have contracted around them—but did not."[48]

Barnett's account is not much help to the legal-economists. First, it does not cover the array of facilitating default rules that typifies modern contract law.[49] Convention does not explain lots of defaults. Second, it faces the same epistemic and institutional problems that trouble legal-economists in identifying the content of these conventions.[50]

The legal-economists' account feels off—it can't be true that they are anti-liberal collectivists at core. But neo-traditionalism, whether ascriptive or conventionalist, does not help.

4. Majoritarian Defaults and Autonomy. The last plausible strategy to square the majoritarian paradigm with liberal principles is to ground it in a commitment to party autonomy. Robert Scott's influential scholarship takes this

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44. Supporters of the ascriptive school may respond that the intention they ascribe to parties is merely to maximize the satisfaction of *their* particular preferences. This response sounds innocuous, but it can work only if analysts embrace something like Benson's transactional necessity test to ensure courts try to ascertain parties' actual preferences. This position radically diverges from law-and-economic analyses and is subject to our critique of traditionalism in Part.I.A.

45. Randy E. Barnett, *The Sounds of Silence: Default Rules and Contractual Consent*, 78 VA. L. REV. 821, 894–95 (1986).

46. Randy E. Barnett, *Contract Is Not a Promise; Contract Is Consent*, 45 SUFFOLK U. L. REV. 647, 660 (2012).

47. Barnett, *supra* note 45, at 906.

48. *Id.* at 826.

49. *See* Hanoch Dagan, *Types of Contracts and Law's Autonomy-Enhancing Role*, *in* EUROPEAN CONTRACT LAW AND THE CREATION OF NORMS 109, 117–18 (Stefan Grundmann & Mateusz Grochowski eds., 2021).

50. *See supra* text accompanying note 33.

view.[51] He refuses to enlist contracting parties as delegates serving the collective goal of aggregate welfare. Instead, Scott celebrates the majoritarian paradigm as an empowerment device for individual autonomy.

For Scott, autonomy makes a cameo appearance to get things started, then drops out so conventional economic analysis can take over.[52] This approach has some virtues. It appears to justify the appeal to majoritarian preferences in places where they are observable and verifiable. And it nods to the normative resilience of autonomy, independent of its epistemic and computational benefits. Legal-economic analysts are often tempted to embrace this autonomy-lite view, declare victory, and move on.[53]

But they cannot. Autonomy is a more demanding concept. As we show in Parts III and IV, autonomy and efficiency diverge at times. Law can and should choose the autonomy path. Even more fundamentally, Scott's approach asks the wrong question.

Treating majoritarian preferences as freestanding or grounded in social welfare (rather than serving people's autonomy and limited accordingly) tends to divert lawmakers from seeing certain "pernicious, self-reinforcing social norms," that typify deep-seated injustices embedded in our social environment.[54] Reliance on majoritarian preferences thus perpetuates patterns of disadvantage ingrained in those preferences.[55] Deepening injustice in this way is inconsistent with genuinely liberal law.[56]

Grounding defaults in individual freedom requires a conceptually coherent and normatively attractive theory that cannot be crafted using the legal-economists'—or the traditionalists'—jurisprudential toolkits.

II. A LIBERAL THEORY OF CONTRACT[57]

We are now ready to start afresh. In this Part, we lay the groundwork for an autonomy-based theory of default rules. The liberal commitment to people's

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51. *See* Robert E. Scott, *A Joint Maximization Theory of Contract and Regulation*, *in* RESEARCH HANDBOOK ON PRIVATE LAW THEORY 22, 25 (Hanoch Dagan & Benjamin C. Zipursky eds., 2020) [hereinafter Scott, *Joint Maximization Theory*].

52. *See id.* at 24–25 ("[The joint maximization claim's] normative foundation rests . . . on the vindication of personal sovereignty . . . [which] requires contract law to respect the parties' ex ante intent, which in turn explains why contract law supports the parties' efforts to maximize the expected joint value of their agreements at the time they are made.").

53. *Cf.* VICTOR P. GOLDBERG, FRAMING CONTRACT LAW: AN ECONOMIC PERSPECTIVE 2 (2006) ("[T]he facilitation of voluntary exchange remains the primary goal of contract law.").

54. Jonathan Wolff & Virginia Mantouvalou, *Introduction*, *in* STRUCTURAL INJUSTICE AND THE LAW 1, 4 (Jonathan Wolff & Virginia Mantouvalou eds., 2024).

55. *See, e.g.*, IRIS MARION YOUNG, RESPONSIBILITY FOR JUSTICE 52 (2011) (describing how structural injustice exists when "social processes" put groups of people under "systematic threat of domination"); Dylan C. Penningroth, *Race in Contract Law*, 170 U. PA. L. REV. 1199 (2022) (examining contract law's role in deepening racial inequality).

56. *See* HANOCH DAGAN & AVIHAY DORFMAN, RELATIONAL JUSTICE: A THEORY OF PRIVATE LAW 44–45 (2024).

57. *See generally* Hanoch Dagan & Michael Heller, *Choice Theory: A Restatement*, *in* RESEARCH HANDBOOK ON PRIVATE LAW THEORY, *supra* note 51, at 112 [hereinafter Dagan & Heller, *Choice Theory*]. This

autonomy is, as we show, both contract's ultimate justificatory premise and the lodestar that does and should guide contract doctrine's development. Parts III and IV then introduce empowering and safeguarding defaults and show how they implement the robust autonomy commitments that actually drive contract law.

A. CONTRACT FOR AUTONOMY

1. Contract as Voluntary Joint Plan. Our liberal contract theory builds on Charles Fried's celebration of contract as "a kind of moral invention"—one that empowers people to make binding commitments.[58] The ability to commit gives "free individuals a facility for extending their reach by enlisting the reliable collaboration of other free persons."[59] Fried made an important advance, but he also introduced many jurisprudential puzzles. Liberal contract theory solves them.

Contract is rightly treated as vital to liberal law because of its service to voluntary joint planning, that is, for the fundamental right to write and re-write the story of our lives. Why are plans so important? Because having a set of plans arranged in a temporal sequence is key to carrying out higher-order projects necessary for self-determination.[60]

While some plans are purely self-regarding, human life mostly requires plans that involve others. The secure interpersonal commitments known as contracts dramatically augment the available repertoire of plans from which self-determining people can choose. Understanding contract in these terms implies contract is not just another technical means for exchanging entitlements or re-allocating risk, as the legal-economic canon assumes.[61] Nor is contract a mere reassignment of the parties' pre-existing rights, a spot exchange projected into the future, as traditionalists require.[62]

Rather, a contract is at core a *joint voluntary plan*.[63] By ensuring the reliability of contractual promises for future performance, law enables people to join forces in pursuing each of their respective goals, purposes, and projects—both material and social. An enforceable agreement is the parties' script for this

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Part may seem too long for readers familiar with liberal contract theory, too elliptical for those who are not. We refer readers in the notes to our more detailed arguments.

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

59. *Id.*

60. *See* Charles R. Beitz, *Property and Time*, 26 J. POL. PHIL. 419, 427 (2018).

61. *See supra* note 34 and accompanying text.

62. *See, e.g.*, BENSON, *supra* note 7, at 60–61. We have criticized traditionalists extensively elsewhere. *See* HANOCH DAGAN & MICHAEL HELLER, THE CHOICE THEORY OF CONTRACTS 33–40 (2017); Hanoch Dagan & Michael Heller, *Autonomy for Contract, Refined*, 40 LAW & PHIL. 213, 215–38 (2021) [hereinafter Dagan & Heller, *Autonomy for Contract*].

63. The qualifier ("at core") stands for the irreducible mission of liberal contract. It reflects the significant parts of contract law that must not be substituted by other allocation technologies. *See infra* text accompanying notes 65–68.

co-operative endeavor. Contract law provides the indispensable infrastructure that both facilitates this risky venture and ensures its integrity.[64]

2. The State's Obligation. Founding contract on autonomy along these lines generates crucial implications for the parties along two axes, vertically with the state and horizontally with each other.

Vertically, the state may betray its autonomy-enhancing obligations by having *bad* contract law that does not adequately support individuals' planning ability. Also, the state can undermine its obligation by offering *too little* law. Planning requires law to consolidate people's expectations regarding core categories of interpersonal interactions. Law also addresses transaction costs that such interactions entail, including (symmetric and asymmetric) information costs, bilateral monopolies, cognitive biases, and risks of opportunistic behavior.[65]

Law need not facilitate contracts for all human needs or wants. New technologies, like AI, will in time bypass contracts and offer more efficient ways to satisfy certain preferences. And that's okay—up to a point.

The continuing possibility that individuals can secure contract's utility surplus matters because contract is a means to the superior end of autonomy. In a liberal polity with autonomy as the ultimate value, law cannot bypass people's choices for *all* preferences. In particular, law cannot apply this contract-substituting strategy to the spheres of work, home, and intimacy. Such contracts typically implicate our *ground projects*—the projects that make us who we are and give meaning to our lives.[66] These projects are constitutive of, not merely instrumental to, our self-determination. Having AI decide whom we marry, how we work, and where we live may in time be efficient, but it will never be liberal.[67]

A liberal theory of contract differs from its legal-economic counterpart by carefully attending to the qualitative difference between brute instrumental preferences and plans involving people's constitutive features.[68]

3. Respecting Others' Autonomy. The horizontal implications of our liberal contract theory are equally significant. A contract's *intertemporal* dimension goes beyond what the traditionalist model captures by simply reassigning the parties' preexisting rights. Therefore, a contract's legitimacy cannot rely on people's interpersonal right to security in their *existing* entitlements.[69] Rather, the promisees' authority, and the legitimacy of their claims to recruit the state's

64. *See* Hanoch Dagan, *Two Visions of Contract*, 119 MICH. L. REV. 1247, 1253 (2021).

65. *See* DAGAN & HELLER, *supra* note 62, at 72–76.

66. *See* DAGAN & DORFMAN, *supra* note 56, at 48–49.

67. The same applies to informed consent for medical procedures, a contract that implicates who we are, rather than our mere preferences.

68. *See* Hanoch Dagan & Michael Heller, *Can Contract Emancipate? Contract Theory and The Law of Work*, 23 THEORETICAL INQ. L. 49, 62 (2023) [hereinafter Dagan & Heller, *Can Contract Emancipate?*]; Hanoch Dagan, *Intimate Contracts and Choice Theory*, 7 EUR. CONT. L. & THEORY 104, 109 (2022).

69. *See* Hanoch Dagan, *The Liberal Promise of Contract*, *in* PRIVATE LAW AND PRACTICAL REASON: ESSAYS ON JOHN GARDNER'S PRIVATE LAW THEORY 315 (Haris Psarras & Sandy Steel eds., 2023).

coercive power, must rely on their right to have promisors respect promisees' self-determination. Put differently, modern law's facilitation of wholly executory contracts, and thus of people's ability to plan, depends on an underlying *interpersonal obligation* that goes beyond the traditionalist vision of reciprocal respect for independence.

This obligation, and other burdens and duties contract law imposes on contracting parties, are not confusing aberrations that need to be explained away. Rather, these modest affirmative obligations typify a genuinely liberal contract law premised not on independence, but on the interpersonal right to reciprocal respect for self-determination.[70]

Traditionalists argue that such modest duties are not morally acceptable.[71] But they are. As H.L.A. Hart observed, not all affirmative duties "ignore the moral importance of the division of humanity into separate individuals and threaten the proper inviolability of persons . . . ."[72] Duties of right, in other words, need not be limited *only* to negative duties of abstention, because "different restrictions on different specific liberties" variously affect "the conduct of a meaningful life."[73]

4. Protecting Voluntariness. Contract law's affirmative obligations are not risk-free from the standpoint of autonomy. Rather, they impinge on the traditionalist contract ideal of strict voluntariness. Any measure of involuntariness limits a promisor's independence. While independence is not of ultimate value, it is intrinsically, and not only instrumentally, valuable.[74] For contract law to be properly called liberal, it must take this challenge seriously.

And it does. The law does not abdicate responsibility for autonomy-enhancement in this realm. Two sets of contract doctrines cabin the costs and risks of the modest degree of involuntariness imposed by affirmative interpersonal obligations.

The first is straightforward: while adhering to the objective theory, contract law's "tests for avoidance [remain] largely *subjective*."[75] Core rules of contract formation, notably *duress* and *misrepresentation*, exclude from enforcement promises that arise from the promisee's manipulation of the promisor's free will.

Guarding against the endemic risks of involuntariness is also the main empowering task of *contract formalities*. "[C]ontract formalities . . . play an indispensable role as entry rules to [certain] contract types and as shields from unintended contractual obligations that might be autonomy-reducing."[76] As Lon

70. *See* DAGAN & DORFMAN, *supra* note 56, at 45.

71. *See generally* Dagan & Heller, *Choice Theory*, *supra* note 57 (advancing choice theory as liberal approach to contract law); Dagan & Heller, *Autonomy for Contract*, *supra* note 62 (discussing the critiques of choice theory); *see also* Dagan & Heller, *Ultimate Value*, *supra* note 39, at 158–64.

72. H.L.A. Hart, *Between Utility and Rights*, 79 COLUM. L. REV. 828, 835 (1979).

73. *Id.*

74. *See* DAGAN & HELLER, *supra* note 62, at 43–45.

75. Joseph M. Perillo, *The Origins of the Objective Theory of Contract Formation and Interpretation*, 69 FORDHAM L. REV. 427, 471 (2000) (emphasis added).

76. *See* Hanoch Dagan & Mark P. Gergen, *Autonomy and Form*, 53 HOFSTRA L. REV. 1, 1 (2024).

Fuller argued, the significance of contract formalities goes well beyond their evidentiary function.[77] Formalities such as a writing requirement[78] perform a cautionary (or deterrent) function by "acting as a check against inconsiderate action" and a channeling function by directing parties to tailored forms or procedures for implementing their intentions.[79]

In short, consistent with protecting voluntariness, autonomy imposes vertical obligations on the state and horizontal obligations toward each other such that each of us can securely write and re-write the story of our lives.

B. THREE CORE PRINCIPLES

This commitment to autonomy does not mean law should be oblivious to contract's external effects. Quite the contrary. Contract law should, and to some extent does, address substantial negative externalities imposed on third parties, either through specialized bodies of law, such as antitrust, or through contract law's doctrine of public policy.[80] But, apart from managing these external effects, what should contract law in a liberal polity look like?

Our core claim is that contract law must adjust its *range*, *limit*, and *floor* to implement its three liberal animating principles:

- *Range.* Law must *proactively facilitate* the availability and viability of a sufficient number of contract types in each sphere of human endeavor.
- *Limit*. Law must respect the *autonomy of a party's future self,* that is, it must take seriously the ability to *re*-write the story of one's life.
- *Floor*. To justify coercive enforcement by the state, all contracts must comply with the demands of *relational justice*.

1. Proactive Facilitation. Liberal contract's first principle is embodied in the many doctrines that go beyond vindicating party independence. These doctrines empower people by expanding the scope of co-operative engagements conducive to their own future plans.

The objective standard of contract formation is a good first example. Many theories of contract support the objective approach, but liberal contract theory provides a particularly secure justification. The canonical status of the objective standard is best explained by the qualitative difference between the limited autonomy-enhancing potential of the subjective standard and the more impressive potential of its objective counterpart.

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77. Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 800–01 (1941).

78. The existing Statute of Frauds is poorly adjusted to the task of protecting voluntariness. For suggested reforms, see *id.* at 800.

79. *Id.*

80. *See generally* HANOCH DAGAN & MARK P. GERGEN, HARNESSING THE UNRULY HORSE: PUBLIC POLICY IN CONTRACT LAW (2025). Courts also protect third parties' interests through default rules and interpretation practices. *See* Omri Ben-Shahar, David A. Hoffman & Cathy Hwang, *Nonparty Interests in Contract Law*, 170 U. PA. L. REV. 1095, 1116 (2023).

Other doctrinal features of contract law follow suit. The most important for our current purposes are the treatment of incomplete agreements and the supply of a variety of contract types for each major contract sphere. The former is the focus of this Article and will be addressed below.[81] The latter was the main focus of a book we authored repudiating the Willistonian project of unifying the universe of contracts.[82] We reject this project because it flattens the diverse array of contract types and thus renders invisible contract's contributions to self-determination.

Accordingly, we celebrate, rather than marginalize, contract's *multiplicity*. Each contract type is, as it should be, shaped by its own normative DNA, which brings coherence to its specific rules and principles. Taking seriously the commitment to facilitate autonomy proactively requires more. Specifically, law must make available, within each core sphere of human activity, enough sufficiently diverse contract types such that people have multiple off-the-shelf options for their interpersonal interactions.

For contract types to be autonomy-enhancing along these lines, they need to be *partial functional substitutes* for each other. They need to be substitutes because choice is not enhanced with alternatives that are orthogonal to each other. But their substitutability should not be too complete because types that are too similar also do not offer meaningful choice. Contract law performs impressively on this front in the commercial sphere, and much less well in the other spheres of contracting—work, home, and intimacy.[83]

2. Future Self. Liberal contract theory's second guiding principle concerns the autonomy of the party's future self. The 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 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 *re*-write our life story and start afresh.[84]

Thus, the power to revise or even discard (exit from) one's plans is an entailment of contract's own normative underpinnings. Recognizing this entailment means that liberal contract law cannot only enable people to make credible commitments, but must also recognize the impediment these commitments pose to people's ability to rewrite their life stories. Framed

81. A companion piece discusses doctrines governing implication and interpretation, which perform parallel tasks to contract defaults. *See generally* Hanoch Dagan & Mark P. Gergen, Autonomy, Implication, and Interpretation (Apr. 12, 2025) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4928208.

82. *See* DAGAN & HELLER, *supra* note 62.

83. *See id.* at 67–78, 93–134.

84. *See* HANOCH DAGAN, A LIBERAL THEORY OF PROPERTY 43–44, 200–02 (2021).

differently, liberal contract law must safeguard the self-determination of people's *future* selves.[85]

Because *any* act of self-determination constrains the future self, this tension is inherent in every contract. Resolving the tension requires limiting the range, and at times the types, of enforceable commitments the law will enforce.

This seemingly simple statement encapsulates one of the most difficult challenges to an autonomy-enhancing contract law. Since *any* act of self-authorship constrains the future self, the state's obligation to enhance autonomy implies that contract law must *both* bolster and limit people's ability to commit. This is a subtle task. There is no easy formula for resolving the difficulty.

But the challenge does not necessarily lead to an impasse, nor does it imply that resolutions must be on an *ad hoc* basis. Instead, contract law can, does, and should apply qualitative judgments to identify categories of contracts that should not be enforceable (in general or under certain conditions) because they overly undermine the autonomy of the future self.

Think, for example, about employee non-compete agreements, which have become endemic in recent years. Let's focus on those that are *not* interpersonally abusive. Often, these agreements come about because the current self makes a plan that is genuinely empowering. The employee earns more under the non-compete and gains upgraded skills that may open up new professional horizons. Nonetheless, where the *quid pro quo* is a significant encumbrance of the future self, even these agreements may be justifiably subject to critical scrutiny.[86]

Liberal contract cannot be agnostic toward severe limitations on employees' ability to rewrite their life story. Safeguarding this right can override the current self's welfarist interests. It can even, at some point, limit contract's empowering potential for the current self.

3. Relational Justice. The third guiding principle of liberal contract law concerns the *inter*-personal dimension. Liberal contract's requirement of relational justice, of *reciprocal* respect for self-determination, arises from the same foundational right that underlies the legitimacy of contract in the first instance.[87]

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85. *Cf.* Aditi Bagchi, *Contract and the Problem of Fickle People*, 53 WAKE FOREST L. REV. 1, 3 (2018) ("In fact, on their face, promise and contract reduce the choices available to us in the future."); Dori Kimel, *Personal Autonomy and Change of Mind in Promise and in Contract*, *in* PHILOSOPHICAL FOUNDATIONS OF CONTRACT LAW, *supra* note 58, at 96, 99–101. Discussion of the future self is a discussion of the self in the future. Liberal contract does not endorse, and indeed rejects, the idea of multiple selves or of a disintegrated self.

86. *See* Viva R. Moffat, *Making Non-Competes Unenforceable*, 54 ARIZ. L. REV. 939, 978–81 (2012).

87. For a detailed normative and positive defense of relational justice's role in contract law, on which the following paragraphs heavily draw, see generally Hanoch Dagan & Avihay Dorfman, *Justice in Contracts*, 67 AM. J. JURIS. 1 (2022) [hereinafter Dagan & Dorfman, *Justice in Contracts*]; Hanoch Dagan & Avihay Dorfman, *Precontractual Justice*, 28 LEGAL THEORY 89, 90–91 (2022) [hereinafter Dagan & Dorfman, *Precontractual Justice*].

This requirement means that when one invokes or relies on the institution of contract, that party is also necessarily undertaking the obligation to respect the other party's self-determination.[88] Thus, people's use of contract's empowering potential must be limited to interactions that demonstrate reciprocal respect for self-determination. Attempts to enlist contract in ways that defy relational justice must be treated (at least *prima facie*) as *ultra vires*. They abuse the idea of contract, that is, they try to use law for a purpose that contravenes its liberal *telos*.[89]

This obligation of respect cannot be too onerous—an excessive burden also undermines self-determination and would thus be self-defeating. But as Hart showed, neither is the obligation limited to a negative duty of non-interference.[90]

Think for example about contract law's careful, but important, deviations from the *laissez faire* mode of regulating the bargaining process. The law of fraud has expanded beyond the traditional categories of misrepresentation and concealment to include disclosure duties, notably in real estate and consumer financial transactions.[91] The same conceptual expansion also underlies doctrines as diverse as unilateral mistake, duress in cases of wrongful threats that do not violate others' rights, anti-price-gouging laws, and admiralty rules of salvage.[92]

Finally, concern for relational justice offers the most charitable explanation for unconscionability doctrine and for modern regulatory cognates that explicitly target cases of "gross inequality of bargaining power," such as where the weaker party suffers from "physical or mental infirmities, ignorance, illiteracy[,] or inability to understand the language of the agreement[.]"[93]

* * *

In sum, in a liberal society, the state's coercive enforcement of private contracts is normatively justified to the extent contracts enhance autonomy, defined as reciprocal respect for self-determination. This, in turn, means proactively facilitating a range of contract types, showing tempered concern for the future self, and respecting relational justice. Every contract doctrine should be judged according to this metric. How does this apply to contract defaults?

III. EMPOWERING DEFAULTS

This Part drills down from our liberal account of contract in general to the autonomy default paradigm in particular. Part III.A shows the limited domain in which the "majoritarian paradigm" can be justified, why these defaults are never

88. *See* Dagan & Heller, *Autonomy for Contract*, *supra* note 62, at 215.

89. *But cf.* Eyal Zamir (featuring Ian Ayres), *A Theory of Mandatory Rules: Typology, Policy, and Design*, 99 TEX. L. REV. 283, 292 (2020) (explaining that substantive mandatory rules are appropriate when there are contracting failures that resist procedural interventions.).

90. *See supra* text accompanying note 73.

91. Dagan & Dorfman, *Precontractual Justice*, *supra* note 87, at 112–15.

92. *Id.* at 115–19; *see also* RESTATEMENT (SECOND) OF CONTRACTS § 153 (AM. L. INST. 1981).

93. RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. d (AM. L. INST. 1981); *see also, e.g.*, Dodd-Frank Act § 1031(d), 12 U.S.C. § 5531(d).

free-standing, and why this distinction matters. Part III.B introduces the three types of defaults that can enhance autonomy without regard to whether they maximize majoritarian preferences—defaults that (a) address power imbalances, (b) enhance extra-contractual autonomy, and (c) advance ground projects.

A. LEGITIMATE MAJORITARIAN DEFAULTS

The "majoritarian paradigm" is overwhelmingly the dominant theory of defaults in American contract scholarship and practice. In this approach, defaults should maximize people's brute preferences. For Robert Scott and like-minded legal-economists, the legitimacy of these defaults relies on contract's service to autonomy. But autonomy considered on their terms is hardly consequential.

Scott argues that facilitating joint maximization is compatible with a background regulatory framework that limits contract enforcement based on values other than autonomy, such as "social justice."[94] Autonomy, in this view, can be legitimately "compromised by the cumulative and external effects of otherwise unobjectionable transactions between moral agents."[95] For Scott, the social concerns that may warrant setting aside or adjusting an otherwise enforceable contract are "best seen as external to contract" because they require "a conceptually and legally distinct inquiry."[96]

We disagree. As Part II above shows, many of these limitations are not external impositions on contract, but rather necessary implications of its own normative foundations. This shift has important consequences for the normative status of the majoritarian paradigm.

Scott is right to argue that restating the majoritarian default paradigm in autonomy-enhancing terms does some useful work. It explains and justifies the importance of ascertaining (empirically or through a theoretical model) majority preferences in certain settings, those where maximizing the parties' joint preference satisfaction is the most autonomy-friendly legal response. But, as we've shown, identifying the proper normative status of the majoritarian paradigm necessarily requires that it comply with contract's autonomy-enhancing principles.

This means that mandatory rules protecting the parties' future selves and setting contract's floor for relational justice (like those mentioned in Part II) are not external to contract. Ensuring the parties' autonomy, both present and future, is part of contract's own normative DNA.

At first, this gap between Scott's view and ours may seem narrow. As just noted, we agree with Scott that contract law (like other fields of private law) must attend to social concerns external to contract's foundational commitment to party autonomy. While we stress that private law's justificatory burden must

94. Scott, *Relational Theory*, *supra* note 43, at 602.
95. Scott, *Joint Maximization Theory*, *supra* note 51, at 32–33.
96. *Id.* at 25–28.

respect its interpersonal structure,[97] we also recognize citizens' Rawlsian duty to support just institutions.[98] Therefore, law should not be reluctant to recognize *some* measure of justified commandeering of contracting parties, such that these individuals serve as delegates recruited to further the state's obligations to promote social justice.

But in a liberal polity that takes seriously the distinction between persons, per Rawls,[99] the burden on people's affairs as private individuals must not go too far. While social injustice is indeed partly derived from contract's "cumulative," external effects, if contract is to perform its autonomy-enhancing task, contract law should aim only to address contract's *substantial* negative externalities.[100]

A very different analysis applies to mandatory rules that serve contract's obligations regarding future selves and relational justice. Rules that further *these* principles are best understood as serving the liberal idea of contract itself. Contract law that takes seriously its ultimate normative commitment to self-determination cannot, indeed must not, be overly cautious about *these* types of measures. By the same token, where a particular social practice or prevailing doctrine is inconsistent with *these* principles, legal institutions are obliged to reform the doctrine and to push the law to live up to its ideals.[101]

Thus, one takeaway of our account and a departure from Scott's scholarship, is that the legitimacy of contract law's majoritarian defaults is not freestanding. A robust set of mandatory rules safeguard the autonomy, present and future, of the contracting parties. These rules are necessary to render legitimate contract law as a whole, and, within it, the majoritarian defaults that legal-economists so helpfully celebrate.

B. EMPOWERING PEOPLE, NOT MAXIMIZING PREFERENCES

1. Beyond Preferences. With this important refinement in place, we come to the core of autonomy defaults. Building on Scott's normative rehabilitation of the majoritarian strategy, our account embraces much of the legal-economic wisdom on defaults. But we limit it to its proper domain.

The shift to an autonomy default paradigm demands more than just this one adjustment. In Part IV, we focus on how regard for the future self and relational justice underlies contract law's *safeguarding defaults*. But even within the realm of *empowering defaults*, preference maximization is at times the wrong standard.

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97. *See supra* text accompanying note 5.

98. *See* JOHN RAWLS, A THEORY OF JUSTICE 293–94 (1971) ("[W]e are to comply with and to do our share in just institutions when they exist and apply to us [and] we are to assist in the establishment of just arrangements . . . at least when this can be done with little cost to ourselves.").

99. *See id.* at 24.

100. *See* Aditi Bagchi, *Other People's Contracts*, 32 YALE J. REG. 211, 217 (2015).

101. *See* Hanoch Dagan, *Between Regulatory and Autonomy-Based Private Law*, 22 EUR. L.J. 644, 657 (2016).

Much of Scott's work, along with other legal-economists, focuses on the sophisticated commercial subset of the contract universe. We have shown that even within that domain, the majoritarian paradigm is not free-standing. And once we move away from that domain, the challenge from autonomy grows more acute. Most fundamentally, an autonomy-enhancing law requires modes of default-setting that address concerns other than preference maximization.

Shifting to an autonomy perspective means contract's utility surplus must be conceptualized as a means to the superior end of autonomy. Contract law cannot treat people as data points or preferences to be maximized. Instead, satisfying preferences is normatively valuable to the extent it is empowering. We care about preferences because of their role in advancing people's projects—the life plans that ultimately matter.[102]

Because legal-economic analysis, even in the hands of its most-skilled theorists like Scott, reduces everything to preference, it misses the crucial juncture where efficiency-oriented and autonomy-oriented accounts diverge. The gap is particularly important where there is either a structural imbalance between the parties or a structural difference in how a contract type implicates their autonomy. Efficiency analysis must not distract lawmakers from their obligation to adopt the autonomy-enhancing default when contract law can: (1) empower the powerless, (2) enhance extra-contractual autonomy, or (3) advance ground projects.

2. Empowering the Powerless. We begin with contract types in which, typically, one party is structurally disadvantaged vis-à-vis the other. Consider, for example, if one party is economically much worse off than the other. It may seem that standard legal-economic analysis could justify a rule close to the weaker parties' typical preferences, even if it is not the majoritarian rule. The reasoning is straightforward: if defaults impose differential opting-out costs on different classes of transactors, a rule that distributes these costs more justly may *also* be more efficient. Why? Given the diminishing marginal utility of money, adopting a majoritarian default would tend to *decrease* efficiency in contract types typified by a substantial wealth imbalance between the contracting parties.[103]

Although this seems a simple enough limitation on the majoritarian paradigm, it is not part of the standard legal-economic corpus of contract's default rules.

One reason legal-economists can't reach this result may be that it is not simple to integrate this observation into a utility calculus (as with other general observations about people's utility function). And that's true even if we set aside the contingency of poorer people's cultural expectations, a contingency that

102. *See* Dagan & Heller, *Ultimate Value*, *supra* note 39, at 159–60.

103. *Cf.* David Charny, *Hypothetical Bargains: The Normative Structure of Contract Interpretation*, 89 MICH. L. REV. 1815, 1878 (1991) ("[C]areful analysis requires that courts adopt the simple hypothetical bargain conception . . . .").

might tend to exacerbate distributive injustice. Another, more principled reason emerges from Scott's maxim of "joint maximization," which implies that inequalities should be addressed only to the extent they are expected to shrink the contractual surplus. If there is no shrinkage, then the power imbalance is immaterial.

A third explanation for the legal-economists' failure to attend to power imbalances goes deeper. Consider, for example, Omri Ben-Shahar's bargaining theory for defaults.[104] He argues that when considering a deal's distributive aspects, the proper legal-economic analysis should look for the "bargain-mimicking term" and thus adopt the parties' relative bargaining power.[105] This means that instead of preferring the weaker party's expectations, "the gap filler should tilt to favor" the party who "has *greater* bargaining power," since the latter's will "would have more likely prevailed if an explicit bargain were struck."[106]

An autonomy-based analysis pushes sharply in the opposite direction. It reaffirms and better justifies the plausibly efficient rule that adopts the weaker party's preferences. One clue why this *should* be the case comes from recent accounts of the psychology of poverty, in which people who find themselves poor, "cop[e] not just with a shortfall of money, but also with a concurrent shortfall of cognitive resources," meaning that "poverty-related concerns consume mental resources, leaving less for other tasks."[107] This consideration can, and theoretically should, also affect the legal-economic account, because it implies that poor people's opt-out costs are systemically higher than those of their well-off counterparts.[108] But it is unclear how legal-economic analysis can integrate this real-world finding and weigh it against the countervailing considerations just noted. So, legal-economic analysis just leaves poverty aside.

Here, then, is an example of how an autonomy-based analysis is normatively sharper than its legal-economic counterpart. This example can, and we think should, be extended beyond poverty. Unlike a system guided by the maximization paradigm, liberal contract cuts against perpetuating structural injustices. In cases of stark structural inequality, a genuinely liberal contract law, committed to empowering people's autonomy, would be careful *not to follow* majoritarian preferences.

Our approach is also better aligned with the law. The Restatement rejects Scott's "joint maximization" and Ben-Shahar's "bargain-mimicking" approaches.[109] Instead, it instructs courts to supply gap-fillers *not* according to "a hypothetical

104. *See* Ben-Shahar, *supra* note 40, at 398.

105. *Id.* at 400.

106. *See id.* at 398 (emphasis added).

107. Anandi Mani, Sendhil Mullainathan, Eldar Shafir & Jiaying Zhao, *Poverty Impedes Cognitive Function*, 341 SCIENCE 976, 976, 980 (2013).

108. *See supra* text accompanying note 32.

109. *See* RESTATEMENT (SECOND) OF CONTRACTS § 204 (AM. L. INST. 1981).

model of the bargaining process," but rather to follow "community standards of fairness and policy."[110]

This instruction is quite vague, but it is on the right track. It can and should be more precise, directing courts to give effect to "fairness and policy" by implementing contract's foundational commitment to autonomy. Reformulated along these lines, we can explain and justify the Restatement's position, which in turn reflects the position that common law courts take to addressing predictable power imbalances within certain contract types.

Managing the gaps between parties' default expectations and their contracts is cognitively taxing. We know that the tax on the life-plan of a party who is worse off is likely to be qualitatively higher.[111] Therefore, rather than mimicking parties' unequal bargaining power, contract law should aim at curbing its undue effects.[112]

We recognize that implementing this autonomy-enhancing approach presents a complex practical challenge. How do we design defaults that won't be easily frustrated by more powerful and sophisticated parties who typically have the means and incentives to opt out?[113] That said, contract law's architects already use many techniques (intentionally or not) that "produce 'sticky defaults.'"[114] There's no reason to think those "altering-impeding" techniques wouldn't be effective here as well, at least to some extent.

In short, an autonomy-based theory of contract gives normative weight to default rules friendly to economically weaker parties. Doing this justifies the Restatement's correct, but otherwise unsupported, and therefore vulnerable, position.

3. Facilitating Extra-Contractual Autonomy. Autonomy also offers a firmer normative grounding to proposals advancing "consumer-friendly" default rules.

Consider, for example, Lior Strahilevitz and Jamie Luguri's proposal.[115] They propose tailoring defaults in consumer contracts to consumer expectations and frame this as adopting "penalty default" rules.[116] Transaction costs make it hard to determine what the parties would have agreed to. Given that, "consumertarian default rules" motivate sophisticated parties to supply more

110. *Id.* § 204 cmt. d.

111. *Cf.* Mani et al., *supra* note 107, at 976 ("[P]overty directly impedes cognitive function."); Anuj K. Shah, Sendhil Mullainathan & Eldar Shafir, *Some Consequences of Having Too Little*, 338 SCIENCE 682, 682 (2012) (suggesting poverty consumes individuals' mental resources).

112. Targeting poverty in private law is a complex task, discussed in some detail elsewhere. *See* Hanoch Dagan & Avihay Dorfman, *Poverty and Private Law: Beyond Distributive Justice*, 68 AM. J. JURIS. 229, 230 (2023).

113. *See, e.g.*, Florencia Marotta-Wurgler, *What's in a Standard Form Contract? An Empirical Analysis of Software License Agreements*, 4 J. EMPIRICAL LEGAL STUD. 677, 698 (2007).

114. *See* Ian Ayres, *Regulating Opt-Out: An Economic Theory of Altering Rules*, 121 YALE L.J. 2032, 2045 (2012).

115. *See generally* Lior Jacob Strahilevitz & Jamie Luguri, *Consumertarian Default Rules*, 82 LAW & CONTEMP. PROBS. 139 (2019) (discussing "consumertarian default rules" proposal).

116. *See id.* at 146.

efficient terms should these defaults prove inefficient.[117] To prevent the latter from employing manipulative techniques for securing consumer waivers, they suggest further counter-techniques, such as anti-bundling provisions, that would render these defaults relatively sticky.[118]

It is hard to know whether consumertarian default rules maximize welfare. Legal-economic analysis is not that helpful here. But the proposed defaults do enhance autonomy. How do we know? In other work, we have developed an *errands conception* of consumer contracts that provides a solid autonomy grounding for the family of consumer-friendly defaults that includes Strahilevitz and Luguri proposal.[119]

To understand the most distinctive feature of consumer contracts, we focus on the special role they play in typical parties' lives. First, recall that preference satisfaction is not important for its own sake, but rather for its contribution to our autonomy. And this is true even where the subject matter of a transaction is strictly utilitarian, as is typical in consumer contracts. It is not enough to aggregate utilities and then compare them. Rather, it is important, and in the consumer setting crucial, to investigate *how* preference satisfaction contributes to the parties' autonomy and is situated in their respective life stories.[120]

For the typical consumer, we observe, consumer contracts are like errands whose friction needs to be minimized if contract is to be loyal to its autonomy-enhancing *telos*. Consumertarian default rules take this feature seriously and thus nicely contribute to buyers' autonomy. How? By helping people make such transactions quickly, anonymously, and securely so they can focus their time and attention instead on projects they value more.[121]

Applying this errands conception implies that voluntariness in consumer contracts is secured by ensuring that the non-bargained terms correspond to or exceed consumers' typical expectations. While strict traditionalists, whose lodestar is the parties' independence, may and probably should still be troubled by this proposition, it does not offend an autonomy-based theory.

Attributing consent to the consumer in these cases is no more objectionable than attributing consent to a buyer of a car who lacks knowledge of its mechanical features. Preferring buyers' autonomy over sellers' here, in turn, is not troublesome given that sellers are typically organizations with no

117. *See id.*

118. *See id.* at 139, 141–46, 157–58; *see also* Ian Ayres & Alan Schwartz, *The No-Reading Problem in Consumer Contract Law*, 66 STAN. L. REV. 545, 585 (2016).

119. See DAGAN & HELLER, *supra* note 62, at 81–83, on which the remainder of this Subpart relies. Our account of consumer contracts is determinedly ahistorical, in line with the interpretive approach of this Article.

120. Here, we accept the standard economic insight that highlights the crucial role of ensuring market competitiveness in properly serving consumers' preferences.

121. We acknowledge some people may find some consumer transactions to be ground projects. These shopping lovers may not benefit from consumertarian default rules as the text anticipates, but they would also not be overly disturbed by them.

freestanding claim to autonomy. And sellers surely price in these terms, as they do all others.[122]

In sum, for consumer contracts, our errands conception informs the content of defaults *indirectly*, through its *extra-contractual* effect in buyers' lives. Our autonomy perspective gives a normatively attractive reason to favor the Strahilevitz and Luguri proposal, which their own economically inflected work, looking to penalty defaults, does not.

4. Advancing Ground Projects. The third category where autonomy defaults differ from, and improve upon, preference-based ones, involves contract types that directly implicate party autonomy by advancing their *ground projects*. These are the projects through which people implement their identity-defining or self-constitutive plans.

This proposition may seem surprising given Richard Craswell's well-known critique that autonomy is unhelpful for the task of default design.[123] For him, autonomy is "completely content-neutral."[124] The same "reluctance to advise individuals as to how they ought to exercise their freedom" leaves the fundamental commitment to autonomy "unable to give legal systems any guidance" regarding its gap-filling rules.[125] Therefore, he concludes, autonomy-based theories of contract "have nothing to contribute to the selection of default rules governing such important topics as implied terms and conditions, excuses, and remedies for breach."[126]

Craswell's claim has been influential. For legal-economists, including those aligned with Scott, it may seem inescapable. But the claim is wrong. Autonomy is not as agnostic as Craswell asserts.

There is a fundamental distinction between *ground projects* and *brute preferences.*[127] Contra Craswell, this distinction carries a normative weight that can and should affect the design of empowering defaults.

To see why, consider contract types that typically engage one party's ground projects, while they are primarily utilitarian for the other party. To avoid confounding considerations, focus on contracts that do not necessarily implicate relational justice concerns and that fall outside the category of errands-like contracts. Think, for example, of a transaction that involves a homebuyer and a commercial builder. Contract types like this often implicate a homebuyer's ground project while being largely utilitarian for the entrepreneur. Buying a

122. *Cf.* Mark P. Gergen, *Contract as an Object of People's Will*, 70 AM. J. JURIS. 1, 2–3 (2025) (positing that consent plays an important but limited role in contract law).

123. *See* Richard Craswell, *Contract Law, Default Rules, and the Philosophy of Promising*, 88 MICH. L. REV. 489, 490 (1989).

124. *Id.* at 515.

125. *Id.* at 516.

126. *Id.*

127. For an elaborate discussion, see DAGAN & DORFMAN, *supra* note 56, at 48–49.

home involves choosing where you make your life, typically a constitutive feature of the self and not merely an instrumental one.[128]

While economic theories of default rules are blind to this *qualitative* distinction,[129] it is all-important from the autonomy default perspective.[130] In this context, incomplete contracts should be filled in a way that is autonomy-enhancing, even if not necessarily welfare-maximizing.

An analogous analysis applies to asymmetric defaults in employment contracts, a contract type we discuss elsewhere.[131] Thus, in discussing the mitigation burden on wrongfully discharged employees, it has been justifiably held that "the employer must show that the other employment was comparable, or substantially similar, to that of which the employee has been deprived; the employee's rejection of or failure to seek other available employment of a different or inferior kind may not be resorted to in order to mitigate damages."[132]

This intuition from the home and employment contexts may explain why many lawyers—practitioners, professors, and students—are so uncomfortable with the infamous holding in *Peevyhouse*.[133]

Peevyhouse defined the homeowners' expectation interest by referencing the family farm's *diminished value* at the end of the mining lease. Because the cost of regrading greatly exceeded its economic benefits, the court rejected *cost of completion*.[134] But this ruling misses exactly the qualitative distinction at stake. The distinction does not imply that cost of completion should be the default in all land grading cases. But it does suggest that when the landowner is

128. *See* HELGA DITTMAR, THE SOCIAL PSYCHOLOGY OF MATERIAL POSSESSIONS: TO HAVE IS TO BE 113 (1992). *But see* Stephanie M. Stern, *Residential Protectionism and the Legal Mythology of Home*, 107 MICH. L. REV. 1093, 1097–99 (2009) (arguing that the purported psychological and sociological benefits of owning a home cannot justify the pervasive categorical protections provided to home ownership by American property law).

129. *See supra* text accompanying notes 66–68.

130. In legal-economic analysis, ground projects must be assigned "subjective values" commensurate with economic values. To do so, analysts would probably need to measure median willingness-to-pay (or willingness-to-accept) within a larger group of people. This method would face severe implementation difficulties, which may explain why it is virtually absent from the literature. It is also, more fundamentally, unjustifiably reductive. The method effaces, instead of respecting, qualitative distinctions between different-in-kind resources and interactions in people's lives.

131. *See* Dagan & Heller, *Can Contract Emancipate?*, *supra* note 68.

132. *See* Parker v. Twentieth Century-Fox Film Corp., 474 P.2d 689, 692 (Cal. 1970).

133. Peevyhouse v. Garland Coal & Mining Co., 382 P.2d 109, 114 (Okla. 1962). Another reason for the discomfort emerges from a close analysis of the case facts which suggest that the homeowners paid for this less efficient term. *Compare* Judith L. Maute, Peevyhouse v. Garland Coal & Mining Co. *Revisited: The Ballad of Willie and Lucille*, 89 NW. U. L. REV. 1341, 1349–1411(1995) (explaining that "[c]ontrary to some folklore," the final contract reflected the parties "understanding of the situation"), *with* Alan Schwartz & Robert E. Scott, *Market Damages, Efficient Contracting, and the Economic Waste Fallacy*, 108 COLUM. L. REV. 1610, 1626 (2008) (arguing courts are mistaken in overlooking the utility of awarding cost-of-completion damages).

134. *See Peevyhouse*, 382 P.2d at 114 ("We therefore hold that where, in a coal mining lease, lessee agrees to perform certain remedial work on the premises concerned at the end of the lease period, and thereafter the contract is fully performed by both parties except that the remedial work is not done, the measure of damages in an action by lessor against lessee for damages for breach of contract is ordinarily the reasonable cost of performance of the work[.]").

a homeowner, as opposed to a corporate entity for which the land plays no constitutive role, then cost of completion, rather than diminution of value, should be the default.[135]

An analogous analysis applies to so-called implied covenants regarding a tenant's right to physical possession at the outset of a lease (or, more precisely, the default rule prescribing such a right). The "American rule" default long rejected such a covenant. Incoming tenants were responsible for evicting holdovers. Today, most states and the Restatement have switched the default to the so-called "English rule," which implies this covenant and places the burden on landlords to evict holdovers.[136] While there are plausible information cost reasons for the default switch, our ground project reasoning provides a more secure autonomy-based justification.

The asymmetry between renters/homeowners and landlords/contractors has implications for a broader set of cases where, unlike in *Peevyhouse*, it is not apparent *a priori* which default is the most autonomy-enhancing. More specifically, the asymmetry implies that when the parties have not explicitly contracted for a rule that affects one party's ground project and the other's fungible interests, the default should fit the reasonable expectations of the party whose ground project is more likely at stake. An empowering default for a contract type that implicates one party's ground project should create options allowing that party to choose from a set of attractive default alternatives.

There are at least three doctrinal paths for setting up such autonomy-enhancing defaults. The most straightforward technique is an explicit statute or regulation stating that a homeowner or renter is entitled to choose from among a few specifically listed alternatives for, say, the applicable package of warranties—a minimum, mandatory floor; a standard level; or a superior package.

We know this approach is manageable because the federally mandated default for interstate home-moving contracts requires movers to offer insurance options at different price levels.[137] Buyers have to check a box, choosing either minimal or full replacement value coverage, each simply described and priced in lay language.[138]

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135. *See* ROBERT E. SCOTT & JODY P. KRAUS, CONTRACT LAW AND THEORY 952–53 (6th ed. 2023). Other cases properly address the home's constitutive role when interpreting a real estate transaction. *See, e.g.*, Miller v. Almquist, 671 N.Y.S.2d 746, 750 (App. Div. 1998).

136. *See, e.g.*, Hannan v. Dusch, 153 S.E. 824, 826–27 (Va. 1930).

137. 49 C.F.R. § 375.201 (2024).

138. *See id.* §§ 375.201(b), (c), (e). Similarly, Colorado law requires insurers to provide homeowners a minimum of twelve months of additional living expense coverage and offer them the option to purchase twenty-four months of this coverage. *See* COLO. REV. STAT. ANN. § 10-4-110.8(6)(b) (2025). It also states that "[b]efore issuance or renewal of a replacement-cost homeowner's insurance policy whose dwelling limit is equal to or greater than the estimated replacement cost of the residence, the insurer shall make available to an applicant the opportunity to obtain extended replacement-cost coverage and law and ordinance coverage." *Id.* §10-4-110.8(6)(a)(I).

A similar technique can be applied by the judiciary. A court that looks at custom as a source of gap-filling may refrain from the task of determining which of the alternatives prevalent in the market is the dominant one. In any event, this task is institutionally challenging. Instead, a court could allow homeowners to choose from among existing, customary packages.

Finally, in related cases of ambiguous language, rather than incompleteness, a court may resort to the *contra proferentem* rule (typically applied to insurance contracts) and "adopt the meaning that is less favorable in its legal effect" to the drafter,[139] which here is typically the contractor, in order to get, in essence, the same result.

* * *

We have shown that the majoritarian paradigm is better justified as an entailment of contract's commitment to autonomy rather than efficiency. The majoritarian paradigm should apply if, and only if, parties share the goal of advancing their autonomy interests by maximizing the contractual surplus, notably where both are sophisticated commercial firms. This shift rehabilitates and grounds much legal-economic wisdom on contract defaults by situating it within a robust normative framework and by properly delimiting its applicable domain.

The shift to the autonomy default paradigm has another salutatory effect. It justifies defaults that can and should apply when autonomy analysis points away from joint maximization.

We identify three such categories, those that: (1) address power asymmetries and other forms of structural injustices, (2) facilitate extra-contractual autonomy, and (3) enhance ground projects. All spring directly from liberal contract's principle of *proactive facilitation*, giving each a secure normative status independent of their responsiveness to majoritarian preferences. These three categories, as well as the familiar majoritarian one, are all species of *empowering defaults*. Parties are free to reject them, but their existence as defaults ensures that contracts presumptively enhance our autonomy as self-determining agents.

Empowering defaults make visible, and legally salient, qualitative differences among contracting parties that are mostly illegible to legal-economists and rejected by traditionalists. The autonomy perspective helps explain and refine defaults from consumer contracts to employment contracts to real estate transactions—indeed, across many contract types of daily importance in our lives.

139. MARGARET N. KNIFFIN, CORBIN ON CONTRACTS: INTERPRETATION OF CONTRACTS § 24.27 (Joseph M. Perillo ed., rev. ed. 1998).

IV. SAFEGUARDING DEFAULTS

The liberal principle of proactive facilitation justifies empowering defaults. Two other principles also animate contract law: securing autonomy of the parties' future selves and ensuring relational justice in party interactions. How do these principles enrich contract law's portfolio of default rules?

One possibility is that they don't. Perhaps these principles justify mandatory rules along the lines discussed in the Introduction and Part II.B, but not default rules.

Here's the challenge: if concerns for the future self and relational justice carry the normative weight, how can they, at the same time, underlie *default* rules? Taking these normative concerns seriously seems to require that their doctrinal entailments must be mandatory rules, rules that preclude the possibility of opt-outs.[140] Perhaps, empowering defaults are the most we can offer, and any other defaults remain outside our theory, as they remain outside the traditionalist and legal-economic theories we described in Part I.

Despite this normative challenge, there exists a category of autonomy defaults that do implement future self and relational justice imperatives. We call these *safeguarding defaults*, rules that safeguard autonomy yet allow party preferences to constrain their scope of application. Identifying these safeguarding defaults has a descriptive and conceptual payoff as well. It turns out they explain all defaults other than empowering ones.

Empowering and safeguarding defaults cover the field. Together they constitute autonomy defaults—all the rules that underlie our contractual practices and that govern these interactions unless the parties agree otherwise.

There are two types of safeguarding defaults: those protecting autonomy of the future self and those ensuring respect for relational justice. We take them up in turn.

A. FUTURE SELF

First, consider contract's obligation to safeguard the autonomy of the party's future self. Some contracts unambiguously go beyond what an autonomy-enhancing theory can sanction. Indentured servitudes are perhaps the paradigmatic case. Consider also the excessive non-competes discussed earlier.[141] For these corner cases, the law appropriately sets out a mandatory rule, invalidating the contract.

But concern for the future self can arise in cases where mandatory rules are not normatively required. Put differently, a contract law that is properly attuned to the autonomy-reducing effects of enforceable commitments must be cautious regarding attempts to encumber the future self that are not strictly required for the current self's empowerment. Thus, default rules can, and do, play a

140. For further objections and our responses, see Dagan & Dorfman, *Justice in Contracts*, *supra* note 87, at 14–20.

141. *See supra* text accompanying note 86.

precautionary role, most noticeably when a basic assumption of both parties fails.

Concern for the future self is what justifies either voidability (as in mutual mistakes) or excuse (as in the doctrines of impossibility, impracticability, and frustration) when both parties share a belief that turns out to be untrue.[142] Then, the parties' agreement deviates from what both expected to be an essential feature of the future. Voidability or excuse of such agreements does not threaten contract's empowering potential. It does not discourage people from undertaking contractual commitments. Quite the contrary, in such cases there is no reason to disrespect the updated choice of promisors who have changed their minds.[143] The safeguarding default here advances party autonomy, understood to include concern for the future self.

A similar analysis applies to defaults for breach of contract. As an initial matter, remedy law inevitably and appropriately imposes on the future self. This is necessary because of the function remedies serve in making people's contractual commitments credible. A credible remedy is what allows a contract to serve as a planning device.

But not all remedies are alike in their autonomy implications. Crucially, there is a meaningful qualitative distinction between monetary remedies, in particular, expectation damages and specific performance. The former *limits* the course of action of promisors who must now cover the promisees' expectation. But the latter *dictates* a course of action through an affirmative duty, thus dramatically disrupting promisors' ability to *re*-write their future plans.[144] This difference implies that, often, the more cumbersome duty of specific performance should not be the default. More precisely, it should not be the default for contract types in which promisors can reliably gain contract's empowerment potential without imposing on their future selves.

This proposition explains and indeed justifies the otherwise puzzling limits on the role of specific performance as a default in American contract law. For most contract types, damages typically are adequate to protect promisees' right to expect and are thus sufficient for facilitating mutually beneficial future-oriented commitments.[145]

Setting the proper boundary line between damages and specific performance is a challenge (with many wrinkles we explain elsewhere).[146] For our purposes here, what matters is that contract law necessarily resorts to conventional practices and expectations in establishing when specific performance will be the default remedy. The same conventional approach

142. *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 152(1), 261, 265, 266 (AM. L. INST. 1981).

143. Hanoch Dagan & Ohad Somech, *When Contract's Basic Assumptions Fail*, 34 CAN. J.L. & JURIS. 297, 313–14 (2021).

144. *See* Hanoch Dagan & Michael Heller, *Specific Performance: On Freedom and Commitment in Contract Law*, 98 NOTRE DAME L. REV. 1323, 1352 (2023).

145. *Id.* at 1355.

146. *See* Dagan & Somech, *supra* note 143, at 316–17; Dagan & Heller, *supra* note 144, at 1335.

applies to setting defaults for mutual mistake, impossibility, impracticability, and frustration. With these doctrines, conventional understandings are the taken-for-granted assumptions whose failure triggers contractual voidability or excuse.[147] Reliance on parallel conventions explains why, for example, homebuyers are entitled to specific performance while purchasers of widgets are not.[148]

From the standpoint of autonomy, the default rule in all these areas delineates the current self's scope of legitimate authority over the future self's choices. Thus framed, defaults on voidability, excuse, and remedy are conceptually coherent and fully justified. Even in a liberal regime properly concerned with safeguarding the future self, contracting parties should have possible opt outs. Mandatory rules are not always required here.

To clarify: the law's obligation to *safeguard* the autonomy of a party's future self from excesses of their present self is always mandatory. But the law can—and indeed should—adjust the *application* of this maxim to the specific contract type. Allowing opt-outs from these defaults is fully justified if the parties' co-authored script (that is, their agreement) requires that their *specific* future plans incorporate increased jurisdiction over their future selves, more than what most similarly situated contractors need. So long as the parties do not go beyond the outer limits of their inter-temporal and intra-personal jurisdiction, law should allow and indeed facilitate such non-conventional arrangements. In other words, it should offer defaults, not mandatory rules.

Happily, this is the law by and large. To give examples, courts respect both "as is" and "force majeure" clauses.[149] By using such clauses, parties depart from the conventional expectations for that contract type. Doing so restricts the scope of a default that might otherwise trigger voidability or excuse for failure of some basic assumption.

Analogously, parties should be able to contract away from the damages default and into specific performance in settings that do not overly impose on their future selves but are necessary to implement the current selves' plans.

Courts, however, at times still refuse to accommodate party's efforts to opt *into* the specific performance remedy, not on any principled ground, but purely because of a historical accident: specific performance originated in equity courts. Expectation damages, where applicable, are not discretionary. Our account of safeguarding defaults points to justified reform.[150]

147. *See* Dagan & Somech, *supra* note 143, at 315, 321.

148. *See* Dagan & Heller, *supra* note 144, at 1353–55.

149. For an example of each, see respectively Lenawee Cnty. Bd. of Health v. Messerly, 331 N.W.2d 203, 205, 210–11 (Mich. 1982) and N. Ind. Pub. Serv. Co. v. Carbon Cnty. Coal Co., 799 F.2d 265, 268 (7th Cir. 1986).

150. *See* Dagan & Heller, *supra* note 144, at 1353–55, 1361–66.

B. RELATIONAL JUSTICE

We turn now to relational justice, liberal contract's third animating principle. This principle serves as the normative foundation for many mandatory rules that establish the floor of interpersonal interactions that qualify for contract enforcement.

Relational justice is, however, also informative beyond the mandatory floor. Like concern for the future self, relational justice justifies and explains a significant subset of contract defaults.[151] To see why, we need to explain the contract-specific source of relational *injustices*. At times, the parties themselves may be best positioned to address these injustices.[152] And that's a task for default rules, not mandatory ones.

To ensure relational justice, law must be on guard whenever people engage in contractual and pre-contractual interactions. The reason for this caution is that contracting typically occurs along a temporal sequence that implies continuous, close, and on-going interdependence. This interdependence includes moments in which one party becomes particularly vulnerable to the other's opportunism. Examples arise in long-term contracts that involve transaction-specific investments by one contracting party—such as employment, franchise, insurance, and output or requirements contracts. But asymmetrical vulnerabilities are not limited to these contract types. They also often typify the sequence of performance of many other, garden-variety, one-shot contract types, contracts that usually are wholly executory. These vulnerabilities likewise also arise during the parties' pre-contractual interactions.[153]

Contract law cannot be agnostic towards systemic opportunistic exploitation of another's vulnerability. This threat is both a textbook example of relational injustice and a challenge to its ability to perform its core empowering mission, given contract's typical intertemporal unfolding.

In response, modern contract law includes many defaults within specific contract types (such as those noted above) that address intertemporal vulnerability to opportunism. But this concern transcends specific contract types. Similar rules addressing the risk of opportunistic advantage-taking are included in general contract law as well. To note a few examples, consider (1) the substantial performance doctrine in service contracts, (2) the principle against forfeiture in applying the condition/promise distinction, and (3) the duty to mitigate.

Defaults that ensure relational justice also help solidify a cooperative approach to contract performance. This approach applies across contract types,

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151. *See supra* Part.II.B (introducing concept of relational justice).

152. This Part heavily relies on Dagan & Dorfman, *Justice in Contracts*, *supra* note 87.

153. *See* Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 559–60, 565 (2003); Alan Schwartz & Robert E. Scott, *Precontractual Liability and Preliminary Agreements*, 120 HARV. L. REV. 661, 662 (2007); G. Richard Shell, *Opportunism and Trust in the Negotiation of Commercial Contracts: Toward a New Cause of Action*, 44 VAND. L. REV. 221, 225 (1991).

most notably, with regard to the duty of good faith and fair dealing. This duty serves both as the doctrinal core of contract law's cooperative conception of performance and as a doctrinal hook for another set of specific default rules for contractual conduct. Tellingly, some of these rules target the particular moments in a contract's life that are particularly susceptible to opportunism, such as specification, termination, and renegotiation.[154]

This thick cooperative framework addresses relational injustices that may emerge during contract performance and breakup. Their normative grounding in relational justice implies that when parties enter the contractual domain, they must accept its jurisdiction. But relational justice does not require that its implementing rules be mandatory. After all, we are dealing with vulnerabilities the contracting parties voluntarily undertake, and, even more significantly, that go beyond the floor of relational justice. All else equal, contracting parties should not be *forced* to attend to each other's specific vulnerabilities more than non-parties should.

In addition, when parties design their contracts, they may legitimately prefer to use means to protect themselves from each other's opportunism other than those offered by law's defaults. Contracting parties may opt for formal bonding devices or deploy so-called smart contracts. They may prefer the option of pricing opportunism risk into their contract, or they may protect themselves by extra-contractual means and rely on informal reputation-based sanctions. These tailored responses to the contingency of opportunism may be less susceptible to verification difficulties than relying on contract defaults. So long as the decisions themselves are not marred by relational injustice, such opt-outs are consistent with self-determination. Contract law should not insist that people resort to one-size-fits-all, anti-opportunistic default devices.

In sum, in a liberal contract regime, the general duty of good faith performance must be mandatory. But most of the fine-grained specifications of that duty are *not* mandatory. If the specific rules don't work well for particular parties, they can signal their dissent by opting out of the default. If their signal is clear enough, courts should and generally will honor their individualized arrangements.[155]

C. ALTERING RULES

In a genuinely liberal legal system, parties cannot legitimately employ contract while repudiating its animating principles. But over quite a wide range of contracting practices, parties legitimately can adjust how these principles apply. That is, they can alter defaults so long as they do not challenge the range,

154. For a detailed analysis of contract's anti-opportunistic rules, see Dagan & Dorfman, *Justice in Contracts*, *supra* note 87, at 20–32.

155. *See* U.C.C. § 1-302(b) (A.L.I. & NAT'L CONF. COMM'RS UNIF. STATE L. 2023); *see also, e.g.*, Carma Devs. (Cal.), Inc. v. Marathon Dev. Cal., Inc., 826 P.2d 710, 728 (Cal. 1992); Fireman v. News Am. Mktg. In-Store, Inc., No. C.A. 05-11740, 2009 WL 3080716, at *9 (D. Mass. Sep. 26, 2009).

limit, or floor of liberal contracting. Parties may legitimately opt out of law-created autonomy defaults. These are conventional options, not one-size-fits-all mandates.

Although the parties are free to override safeguarding defaults, repudiation should not be too quick and easy. Because these defaults are grounded directly in liberal contract's fundamental autonomy commitments, they should be more resilient than majoritarian defaults. This means these defaults should be, as they often are, "sticky." That is, they should be somewhat difficult to change through bargaining. And at times, such stickiness should be asymmetrical, to make it harder to change against the interests of one party.

To give an example from the familiar case of *Jacob & Youngs*, contracting parties can be required to use "apt and certain words."[156] As Justice Cardozo wrote, "[i]ntention not otherwise revealed may be presumed to hold in contemplation the reasonable and probable. If something else is in view, it must not be left to implication."[157] Altering rules[158] for safeguarding defaults should ensure that the parties' intent to opt out is unambiguous.[159]

CONCLUSION

In this Article, we show the normative content that informs Justice Cardozo's "reasonable and probable" for default rules in contract law.[160] That normative content derives from liberal contract's three animating principles and results in the empowering and safeguarding defaults that characterize the law.

The autonomy default paradigm should replace the traditionalists' focus on implied-in-fact consent and the legal-economists' majoritarian paradigm at the heart of contract theory and law. Our approach provides a solid normative foundation for existing law. It explains a wide range of otherwise puzzling doctrines and points the way to justified reforms that bring contract defaults closer to their animating principles.

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

157. *Id.*

158. Altering rules regulate "how contractors can opt out of the default legal consequences." Ayres, *supra* note 114, at 2036. They are "the necessary and sufficient conditions for displacing a default legal treatment with some particular other legal treatment." *Id.*

159. For a discussion of altering rules, see Dagan & Gergen, *supra* note 76, at 52–55.

160. *Jacob & Youngs*, 129 N.E. at 891.

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