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When Contract's Basic Assumptions Fail

Hanoch Dagan and Ohad Somech

I. Introduction

Modern contract law accords considerable significance to the basic assumptions on which a contract is made. It thus takes to heart a failure of a belief whose truthfulness is taken for granted by both parties. Where the failure results from the parties' mistake at the time of formation, "the contract is voidable by the adversely affected party," if that mistake "has a material effect on the agreed exchange of performances" and unless that party "bears the risk of the mistake."[1] Where, in turn, the failure of such a basic assumption results from the parties' erroneous beliefs about future states of the world, a party's duty to render performance may be discharged if they are not responsible for the supervening impracticability or frustration and "unless the language or the circumstances indicate the contrary."[2]

These doctrines, which together regulate cases of failure of basic assumption[3]—the FBA doctrines, as we term them—are familiar to every student of contract. The cow that turned out to be a breeder rather than barren and the music hall that burned down before the first concert have made *Sherwood v Walker* and *Taylor v Caldwell*[4] essential features of the first-year curriculum not because they stand for an extensive line of litigation. Rather, these and a few other celebrated cases[5] and the doctrines they stand for offer an important lesson about contract law, at least in its modern incarnation.[6] As Charles Fried explained four decades ago, FBA doctrines serve as a prime example for the (misleadingly nonobvious) truism that an obligation to perform does not necessarily mean an obligation to perform come what may.[7]

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1. *Restatement (Second) of Contracts*, (American Law Institute, 1981) §152(1) [*Restatement*].
2. *Ibid* at §§261, 265. See also *ibid* at § 266 (impracticability and frustration).
3. See E Allen Farnsworth, *Contracts,* 4th ed (Aspen Publishers, 2004) at ch 9.
4. See *Sherwood v Walker*, 33 NW 919 (Mich Sup Ct 1887) [*Sherwood*] and *Taylor v Caldwell* (1863) 122 ER 309 (QB).
5. See, e.g., *Krell v Henry*, [1903] 2 KB 740 (CA) [*Krell*] (frustration).
6. The careful language of the text intentionally brackets the question as to whether FBA doctrines originate only in the mid-19th century cases mentioned above or are much older than that. See James Gordley, "Mistake in Contract Formation" (2003) 52:2 Am J Comp L 433 and James Gordley, "Impossibility and Changed and Unforeseen Circumstances" (2004) 52:3 Am J Comp L 513.
7. See Charles Fried, *Contract as Promise: A Theory of Contractual Obligations* (Harvard University Press, 1981) at 64-67. See also, e.g., *Opera Co of Boston, Inc v Wolf Trap Foundation*, 817 F (2d) 1094 at 1097-101 (4th Cir 1987).

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The main thesis of this Article is that there is yet another—related, but nonetheless distinct—critical general lesson that these doctrines exemplify. Contractual liability may be avoided or excused where a shared basic assumption has failed because the idea of contract, or at least of liberal contract, contains inherent limitations. The voidability and excusability of contracts whose basic assumption failed is a necessary entailment of one of the core principles of a liberal conception of contract.

Contract is an autonomy-enhancing device. This is why contract law must proactively facilitate, as it in fact does, people's ability to commit and thus to be able to enlist others to their plans. At the same time, contract's autonomy-enhancing *telos* requires liberal law to ensure that promisors' future selves are not unacceptably encumbered, so that their self-determination is not undermined. This seemingly simple proposition is, as we will see, quite complex. But cases of failure of *shared* basic assumption—those that are governed by the doctrines of mutual mistakes, impossibility, impracticability, and frustration—are relatively easy; they do not require contract law to consider the competing autonomy interests of the parties' present and future selves. Once the basic assumption of both parties failed, encumbering their future selves with the obligations encapsulated in their agreement can no longer be justified even by reference to the self-determination of the parties' present selves.

This does not mean that contractual parties are left to their own devices in these cases, nor does it imply that contract's principles are uninformative as to the rules that regulate the respective rights and obligations of parties to contracts whose basic assumption failed. An autonomy-enhancing contract law should not, and does not, ignore the fact that although the parties' basic assumption failed, their agreement enshrines their past intention to be contractually bound. Law's commitment to proactively facilitate people's cooperative efforts while ensuring that they are interpersonally just offers some guiding principles, which again both justify and clarify the doctrines governing mutual mistakes, impossibility, impracticability, and frustration.

Before we turn to this Article's thesis, Part II critically examines the three main existing theories of these doctrines: as instantiating an extra-contractual principle of sharing, offering 'off-the-rack' majoritarian defaults, or expressing implied-in-fact terms of the parties' own agreement. These theories either suggest that contract's animating principles have rather little bearing on FBA rules, or else reduce them to some other contractual doctrine. Appreciating the explanatory pitfalls of these competing accounts and their failure to elucidate the distinctiveness of the law of FBA clears the ground for our main acts (in Parts III and IV, respectively): explaining and defending the normative guidelines of liberal contract to FBA cases, and then elaborating on their specific doctrinal implications.

FBA cases are distinctive, we argue, because failure of the basic assumption of both parties undermines law's autonomy-enhancing justification for encumbering the parties' future selves with the prior commitment enshrined in the parties' agreement. Our FBA theory further refines this dramatic proposition by

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delimiting its scope to tacit presuppositions that the parties take for granted, as opposed to their miscalculations or mispredictions, which do not—at least not for liberal contract—justify avoidance or excuse. It also explains why these tacit basic assumptions are largely conventional, which implies that an autonomy-enhancing contract law should, as it by and large does, allow specific parties to indicate that they do not share these assumptions and thus expand the scope of their joint undertaking beyond its conventional scope.

Having delineated the proper domain of the doctrines of mutual mistakes, impossibility, impracticability, and frustration, our account turns to the second main task of an FBA theory: exploring the implications of the parties' failed attempt to articulate a joint plan. Guided by its autonomy-enhancing *telos*, we argue, liberal contract law takes seriously the parties' intention to be legally bound. In line with many other doctrines that go beyond the mere provision of enforcement services, law proactively facilitates the parties' contracting efforts. This is why contract law reinstates the parties' agreement where the FBA at hand is immaterial to the parties' shared plan; and it is also why, where such FBA is material, courts are instructed to allocate FBA risks in a reasonable way, which oftentimes means in line with how most parties would have allocated it. Finally, in proactively filling up gaps, contract law guides itself by the liberal commitment of reciprocal respect for self-determination, which also underlies contract's own legitimacy. This maxim of relational justice explains and justifies FBA doctrines' choice of outcomes that maintain the ability of both parties to achieve the goals of their shared plan over those outcomes that undermine the ability of one party while leaving the other with a windfall.

Part III provides our normative defense of these propositions, and Part IV analyzes some pertinent case-law that they elucidate. In that, Part IV also demonstrates the limited work that FBA law can do in addressing the devastating consequences of the recent COVID-19 outbreak and the measures to contain it, which quickly demarginalized the doctrines of impracticability and frustration. Although the work that FBA law can do in this context is not negligible, it is frustratingly limited. Identifying these gaps is a necessary step for refining the contract-related fallouts of the crisis for which public law bailout measures are particularly urgent.

II. Three Existing Accounts

A. Sharing

Consider first the predicament of FBA law under Fried's influential theory of contract. Contract for Fried is a species of promise; a social convention allowing individuals to enlist others in their projects. An individual is morally and legally bound by their contract because, by invoking this convention, they *willingly* undertook this obligation.[8] Thus conceived, FBA doctrines cannot be determined

8. Fried, *supra* note 7 at 13, 16.

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by reference to contractual principles. Where the parties did not consider the risk or its consequences, "there just is no agreement as to what is or turns out to be an important aspect of the arrangement."[9] Indeed, "one may ask what it would even mean to give effect to 'the will of the parties' in a case where the parties had no convergent will on the matter at hand."[10]

By implying that the parties' agreement leaves no normative impact, Fried is led to resort to extra-contractual principles for the resolution of FBA cases. The pertinent principle here, he claims, is sharing, which he identifies as one of the two "residuary principles of civil obligation"[11] (alongside harm, which is inapplicable in this context for lack of fault). Sharing applies in FBA cases, he argues, because entering into contractual relationships implies that the parties are "no longer strangers to each other": their concrete personal relation gives rise to "a focused duty to share another's good or ill fortune."[12]

We agree with Fried that some version of an other-regarding obligation is implicated in FBA doctrines, and will discuss its role and manifestations in due course. We postpone this analysis for two reasons: first, because for us it is not external to liberal contract, but rather emerges from its autonomy-enhancing *telos* as one of its guiding principles; and second, because insofar as FBA doctrines are concerned, its role is rather limited.[13]

These reasons also point to the two significant disagreements we have with Fried. Consider first the limited fitness between other-regarding obligations and FBA doctrines, in terms of both over-inclusiveness and under-inclusiveness. An account that focuses on other-regarding obligations clearly covers cases of *unilateral* mistakes,[14] although they are not part of the FBA family. In unilateral mistake cases, law needs to consider whether to impose on one party a duty to accommodate the predicament of the other party whose basic assumption failed. But FBA doctrines are different: both mutual mistake cases and cases of impossibility, impracticability, and frustration are not asymmetrical in this way. Whereas *ex post* one party is satisfied with the agreement in these cases as well, in real time (at formation) it does not in fact embody the plan of *either* party. While Fried's account requires to place unilateral mistake cases at the core of our subject matter, our theory elucidates, as we will see, the reason why they are subject to significantly different rules.[15]

Fried's account is also under-inclusive in the sense that it fails to explain important doctrinal details. Because in Fried's view the one and only implication of contract's animating principle is that FBAs fully set aside the parties' agreement, he quickly moves to sharing and skips important doctrinal signposts. Recall

9. *Ibid* at 59.
10. *Ibid* at 63.
11. *Ibid* at 69.
12. *Ibid* at 73.
13. *Cf* Mark Gergen, "A Defense of Judicial Reconstruction of Contracts" (1995) 71:1 Ind LJ 45 at 47, 56.
14. See Fried, *supra* note 7 at 62-63.
15. See the text accompanying note 66.

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that a mutual mistake as to a basic assumption would *not* give rise to contract avoidance if its effect on the agreed exchange of performances is not *material*; and consider the further rule, to which courts frequently resort,[16] that allocates the risk of the mistake to one of the parties if "it is reasonable in the circumstances to do so."[17] If an FBA *fully* nullifies the significance of the parties' agreement, these important doctrinal components become quite mysterious.

Furthermore—and this is our second disagreement with Fried—we think that he gives up too quickly on contract's inner explanatory resources. We do not claim, to be sure, that every doctrinal detail in a given area of law must be fully explained solely based on that area's animating principles. FBA doctrines, however, are not a marginal part of contract law; and the explanatory work that Fried externalizes does not refer to a small subset of their rules. This may suggest that the reason for Fried's disappointing conclusion is that contract does not in fact simply follow the will of the parties as his theory prescribes. It implies that before we reach out to external principles, we should consider grounding FBA doctrines within contract's own normative domain.

This is indeed the direction of the two other existing accounts, to which we turn now. Alas, while they avoid the difficulty of outsourcing, they too face considerable explanatory pitfalls. Moreover, if Fried's account should be criticized for making FBA doctrines overly marginal to contract law, both of these theories end up fully collapsing FBA rules into a mere application of other doctrines—majoritarian default-rules and implied-in-fact terms, respectively—thus obscuring the distinctiveness of FBA doctrines and their specific normative core.

B. Majoritarian Default-Rules

1. The Economic Dogma

Grounding contract in utility—conceptualizing it as a means for maximizing social welfare or the welfare of the contracting parties—leads law-and-economics scholars to conceptualize FBA rules as majoritarian defaults. Prominent economic accounts argue that the two main objectives of contract law within this framework, of ensuring allocative efficiency and of economizing transaction costs, can explain and justify the rules at hand.

Thus, an assumption is basic, in this view, if its failure implies that enforcing the contract would undermine allocative efficiency, that is: if the costs of performance exceed its benefits. In cases of mutual mistake this means that an assumption is basic if—given the facts as they really are—the promisee values the promised performance more than the promisor. In impracticability, in turn,

16. See Farnsworth, *supra* note 3 at 612.
17. *Restatement, supra* note 1 at § 154(c). But see Fried, *supra* note 7 at 69 (presenting the reasonableness inquiry as the test for his sharing principle).

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an assumption is basic if, when it fails, the cost of producing the promised good (or providing the promised service) is greater than its value to the promisee.[18]

In these cases, the parties need law to intervene and prescribe default rules for the same economic reason that explains other components of contract law's gap-filling apparatus. Writing contracts is costly and setting up majoritarian defaults—rules that mimic the preferences of most contracting parties—minimizes transaction costs and thus maximizes the contractual pie. Law's assistance is particularly in place for FBAs because they represent an important category of cases in which deliberate and calculated parties are likely to leave their contract incomplete. Some events, such as FBAs, are too infrequent to justify the cost of addressing them in the contract. In these cases, contact law should facilitate the contracting process by filling these gaps with 'off-the-rack' majoritarian default-rules.[19]

To prescribe the content of the pertinent rule, law needs again to resort to allocative efficiency, since the rule most parties are presumed to prefer is the one that maximizes their joint surplus.[20] This analysis is somewhat complex in cases of mutual mistake, where it needs to examine the parties' ability to prevent the risk by acquiring information.[21] It is more straightforward in cases of impracticability and frustration, where a contract's value is maximized by allocating the risk to the superior risk bearer, namely: either the party who is "in a better position to prevent the risk from materializing" or the one who is its cheaper insurer—who can best determine "(a) the probability that the risk will materialize and (b) the magnitude of the loss if it does materialize."[22]

Pigeonholing FBA doctrines under the standard economic analysis of majoritarian defaults along these lines seems appealing. Nevertheless, it ultimately fails both because the underlying theme of majoritarian defaults necessarily mis-represents FBA cases, and since if law were to approach them as gaps that need to be filled along these lines, it should have probably eliminated FBA doctrines altogether.

2. FBA's Distinctiveness

To see why the majoritarian default paradigm ill-fits FBA cases by failing to capture their distinctiveness, consider the psychological state that a tacit basic

18. See, respectively, Eric Rasmusen & Ian Ayres, "Mutual and Unilateral Mistake in Contract Law" (1993) 22:2 J Legal Stud 309 at 322-23 and Richard A Posner & Andrew M Rosenfeld, "Impossibility and Related Doctrines in Contract Law: An Economic Analysis" (1977) 6:1 J Legal Stud 83 at 90.

19. See, e.g., Robert Cooter & Thomas Ulen, *Law and Economics*, 6th ed (Pearson, 2012) at 293-94.

20. See Posner & Rosenfeld, *supra* note 18 at 89.

21. Acquiring information which only affects the *distribution* of the contractual surplus, rather than its size, is a waste and should therefore be dis-incentivized. The legal rule that achieves this goal depends on the cost of acquiring information: when these costs are low, rescission should be granted for all mistakes of basic assumptions; but if they are high, it should not. By contrast, when the information is beneficial (i.e., productive), the law should incentivize its efficient acquisition. The legal rule that can achieve this goal is also contingent: in most, but not all, circumstances, contract law should not grant rescission of the contract. See Rasmusen & Ayres, *supra* note 18 at 330-32, 335.

22. See Posner & Rosenfeld, *supra* note 18 at 90-92.

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assumption implies. Lon Fuller and Melvin Eisenberg helpfully compare a party whose basic assumption failed to an absent-minded professor, who steps from his office into the hall as he reads a book, 'assuming' that the floor of the hall will be there to receive him. "His conduct," they rightly observe, "is conditioned and directed by this assumption," but "the possibility that the floor has been removed does not 'occur' to him, that is, is not present in his conscious mental processes."[23]

In other words, while the majoritarian default analysis of FBA cases assumes a *deliberate decision* by the parties not to address a particular risk, these cases actually do *not* involve consciousness of alternatives of either party.[24] Indeed, as Eric Posner notes, in this account the parties are never, properly speaking, mistaken. Rather, they are portrayed as "[having] probability distributions that reflect information they have about the world. They know that they do not possess the absolute truth and would not believe otherwise."[25] Judges, who actually adjudicate FBA cases, know better. They do not share the economic view of the cases at hand, but rather consider the FBA doctrines as an application of a specific solution to a unique problem.[26] It is thus no wonder that cases that comply with the majoritarian default depiction fall *outside* FBA law. In fact, conscious ignorance *precludes* avoidance. A party who "is aware, at the time the contract is made, that he has only limited knowledge . . . but treats his limited knowledge as sufficient," cannot avoid his contractual liability.[27]

3. Internal Critique

Moreover, and now we shift to the second pitfall of the majoritarian default account, if indeed FBA cases were to be analyzed as mundane instances of contractual gaps that should be filled in a way that maximizes the contractual surplus, then FBA doctrines would have been wholly inadequate. More specifically, if the standard economic assumption of conscious ignorance is valid, George Triantis seems correct when arguing that FBA doctrines improperly disincentivize the *ex ante* allocation of FBA risks and should therefore be abrogated.[28]

FBA doctrines, Triantis argues, present themselves as applied to unknown risks which the parties cannot allocate. But no such risk in fact exists. The reason for this seemingly surprising proposition is that risk can be either narrowly or

23. Lon L Fuller & Melvin Aron Eisenberg, *Basic Contract Law*, 7th ed (West, 2001) at 744.
24. See, e.g., *Restatement, supra* note 1 at § 152 cmt b.
25. Eric Posner, "Economic Analysis of Contract Law after Three Decades: Success or Failure?" (2003) 112:4 Yale LJ 829 at 846.
26. *Ibid* at 845.
27. *Restatement, supra* note 1 at § 154(b). Naturally, "[w]e form contracts in the knowledge that our information is imperfect." Andrew Kull, "Mistake, Frustration, and the Windfall Principle of Contract Remedies" (1991) 43:1 Hastings LJ 1 at 2. However, the majoritarian default-rule account suggests that the parties are also aware of each of their assumptions, of the probability distribution of their truthfulness, and of the different consequences of their possible failure.
28. See George G Triantis, "Contractual Allocations of Unknown Risks: A Critique of the Doctrine of Commercial Impracticability" (1992) 42:4 UTLJ 450. See also Kull, *supra* note 27.

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broadly framed, and that framed broadly enough all risks are known. Thus, to take the familiar example of a shipping contract,[29] narrowly framed risks, both known or unknown—say: an increase in fuel prices or the closing of a preferred shipping route—are subsumed under a broader framed risk that is surely considered, namely: an increase in overall fuel costs. More generally, all FBA risks, which are each narrowly framed, fall under the broad category of the risk that—for whatever reason—the cost of performance might increase or its benefits might decrease. Hence, "[w]hile an unknown risk cannot be priced and allocated specifically, it can be priced and allocated as part of the package of a more broadly framed risk."[30] Such packaging of unknown risks may admittedly lead to their inaccurate pricing, but "[t]here is no reason to believe that the failure to foresee is a particularly severe instance of this general phenomenon."[31]

Parties, to be sure, may deliberately choose to have some risks allocated *ex post*. But when they do so, they are likely to either pre-determine the allocation mechanism, or else rely on "extralegal norms that promote cooperation and deter opportunism in *ex post* adjustment negotiations."[32] Neither alternative requires the application of the FBA doctrines. Finally, absent any conflicting indication, it seems unlikely to attribute to the parties an intention to delegate to courts the power to allocate *ex post* unknown risks given the courts' comparative disadvantage in performing this task and the parties' aversion to uncertainty.[33] Therefore, all in all there is simply no scope or justification for the application of the FBA doctrines.

C. Implied-in-Fact Terms

The resilience of the FBA doctrines and their intuitive appeal may, however, suggest a pause before dumping them into the dustbin of history.[34] Eventually, this charitable interpretive commitment will lead us to our own account, but before we get there we need to address the third, and last, prominent competing FBA theory. Like the previous one, this account reduces FBA doctrines to another familiar contract doctrine. It perceives FBA rules as implied-in-fact terms that emerge from the interpretation of the parties' own agreement. Champions of this approach insist that—in sharp contrast to our own account—FBA doctrines need

29. *Cf Transatlantic Financing Corp v United States*, 363 F (2d) 312 (DC Cir 1966) [*Transatlantic*].
30. See Triantis, *supra* note 28 at 452.
31. *Ibid* at 474.
32. *Ibid* at 456.
33. *Ibid* at 475-76. See also, e.g., Jody S Kraus & Robert E Scott, "Contract Design and the Structure of Contractual Intent" (2009) 84:4 NYU L Rev 1023 at 1074-76.
34. We acknowledge, to be sure, that when legally-informed, sophisticated firms set up a commercial contract, they may often think along the lines of Triantis' analysis. But the autonomy account—here and elsewhere—nonetheless assumes that *general* contract law must begin with individuals: the real people which it serves and upon whom it applies its authority and coercive power.

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not and should not resort to any standard excepting one that relies on the parties' agreement itself.[35]

1. What Goes Without Saying

Contracting parties, writes Stephen Smith, "impliedly—but genuinely—stipulate that their agreement should not be binding in the case that a certain factual assumption turns out to be false."[36] Implied-in-fact terms are parts of the agreement not explicitly expressed by the parties, but nonetheless "implied by a court on the basis that they were implicitly agreed upon by the parties; they are terms that 'go without saying' in an agreement."[37] The FBA doctrines reflect such an implicit allocation: they are implied-in-fact terms that condition performance on the truthfulness of the failed assumption, so that the answer to the question whether such a failure allows for avoidance (or excuse) is governed solely and always by the parties' tacit, but genuine, intent.[38]

Although based on genuine intent, the implied-in-fact account does not require the parties' to be aware of their (shared) assumptions or of the consequences of the failure of these assumptions. The reason for this is that communication is always grounded in objective (public) meaning, and this public basis makes meaning independent of the parties' private intentions or consciousness. When interpreting agreements, it is the public meaning that is discovered. Thus, while implied terms reflect the parties' intentions, they are (just like explicit terms) independent of their awareness or private thoughts.[39] Still, for the implied-in-fact theory to work, agreements, properly interpreted, must have *no* gaps, so that there is no need to go beyond what they, explicitly or implicitly, prescribe.[40] This means that "both parties must have shared a great deal"; and that an implied-in-fact FBA theory should point to "what it is that they share, and how it is that they could have come to share it."[41] Two main, not mutually exclusive, answers are offered to these questions: one is contextual; the other transactional.

2. The Contextual Answer

The first answer focuses on the broad context of the agreement, namely: the background customs, usages, and community standards in which it is situated.[42] At time, relying on such public indicia is indeed helpful for uncovering what goes

35. See Brian Langille & Arthur Ripstein, "Strictly Speaking: It Went Without Saying" (1996) 2:1 Legal Theory 63 at 80.
36. See Stephen A Smith, *Contract Theory* (Oxford University Press, 2004) at 280-81.
37. See *ibid* at 300-01.
38. See, e.g., Curtis Bridgeman, "Reconciling Strict Liability with Corrective Justice in Contract Law" (2007) 75:6 Fordham L Rev 3013 at 3034-39 and John CP Goldberg, "Inexcusable Wrongs" (2015) 103:3 Cal L Rev 467 at 510.
39. See Smith, *supra* note 36 at 273-74, 299.
40. See, e.g., Smith, *supra* note 36 at 302.
41. Langille & Ripstein, *supra* note 35 at 72.
42. See Smith, *supra* note 36 at 300-01; Langille & Ripstein, *supra* note 35 at 75-78.

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without saying. Unfortunately, it is typically beside the point in FBA cases. Customs, usages, and community standards are not randomly generated. They are public solutions to *recurring* problems, which emerge from people's repeated prior experience. FBAs, by contrast, are prone to defy the conditions in which such solutions emerge. Because they are usually infrequent, FBAs—consider again the burned down music hall or the cow that turned out to be a breeder—are *not* the recurring problems that typically occupy the background public domain.[43] Put differently, a risk dealt with by a community standard is unlikely to give rise to an FBA case, because the very existence of such a standard implies that the risk is too common and unsurprising for an FBA claim to be plausible.[44]

3. The Transactional Answer

The second answer to the implied-in-fact theory's core inquiry escapes this difficulty by relying directly on the parties' *particular* agreement; more specifically, on the internal logic or the nature of the particular contract at hand. FBA doctrines should apply, in Peter Benson's view, when both parties "can reasonably be held to the implicit but affirmative assumption that the obligation to perform applies only if certain specific kinds of conditions or circumstances exist when performance is due."[45] In other words, when the failure of the assumption creates a "fundamental and qualitative divergence between the contractually contemplated performance and the actually feasible performance," we can safely assume that "[t]he contract itself must transactionally, though implicitly, carve out these conditions and circumstances as necessary factors for performance."[46]

In some instances, this notion, that a 'transactional necessity' is an implied condition for performance, can produce a clear answer. Benson seems correct when commenting on the celebrated coronation case[47] that "the contract as a whole can only be made sense of on the affirmative assumption that the procession will not be canceled outright on the scheduled date."[48] But oftentimes—consider once more the burned down music hall or the cow that turned out to be a breeder—all we can learn is that the parties haven't entertain the thought of such unexpected divergence between their agreed-upon script and the conditions at the time of performance. As noted early on, this proposition in and of

43. Langille and Ripstein recognize this difficulty but radically understate it. See Langille & Ripstein, *supra* note 35 at 78.
44. See, e.g., *Transatlantic*, *supra* note 29 at 315. At times, implied-in-fact FBA theorists try to avoid this difficulty by relying on law itself as part of the public conventions that inform the parties' basic assumptions. See Langille & Ripstein, *supra* note 35 at 80. But this direction is circular. It says little about what the content of law can or should be, and therefore—without an independent normative foundation (that these theorists resist)—cannot possibly stand.
45. Peter Benson, *Justice in Transactions: A Theory of Contract Law* (Harvard University Press, 2019) at 146.
46. *Ibid* at 152-53.
47. *Krell*, *supra* note 5.
48. See Benson, *supra* note 45 at 152.

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itself only represents the dilemma of FBA cases; it does not resolve it, because it tells us nothing about the parties' intended allocation of the pertinent risk.[49]

The problem is not merely that reasonable people may disagree, but rather that the parties' transaction as such does not offer a non-arbitrary reason to prefer one interpretation over the other.[50] One may seek to settle the matter by extending the factual inquiry beyond the parties' agreement. For example, it may appear more plausible to argue that a term is absurd if it contradicts a long-standing industry standard. This, however, takes us back to the contextual answer whose inadequacy invited the transactional analysis in the first place. Neither, however, can square this circle. Rather than suppressing the normative underpinnings of FBA doctrines by mis-representing them as cases of mundane contract interpretation, contract theory should account for their own distinctive normative core.

III. Basic Assumptions and Liberal Contract Law

It is time to start afresh. Rather than discarding FBA doctrines or reaching out to external normative resources as their putative underpinnings, we claim that the doctrines governing contractors' basic assumptions are intimately connected to the most fundamental commitments of liberal contract law and should thus be analyzed on their own terms.

A genuinely liberal contract law conceptualizes contract as a plan co-authored by the parties in the service of their respective goals. Law's justification for enforcing the parties' agreement is grounded in its commitment to enhance their self-determination, and both its animating principles and its operative doctrines are guided by this autonomy-enhancing *telos*.

Thus conceived, a liberal law must take to heart a failure of the parties' shared basic assumption, because such failure implies that it can no longer be presumed that there is an 'autonomy gain' to either party from encumbering their future self by enforcing the agreement as it stands. The resulting collapse of the parties' agreement leaves them only with an indeterminate plan. But a liberal contract law does not leave the parties to their own devices. Rather, it takes this predicament as a challenge, given its mission of proactively facilitating the parties' use of contract as an autonomy-enhancing instrument.

A. Autonomy and Contract

1. Choice Theory

Our theory of failures of basic assumption follows from and relies upon the choice theory of contract, which one of us developed in recent years with

49. See the text accompanying note 7.

50. See Jennifer Nadler, "A Theory of Mistaken Assumptions in Contract Law" (2021) 71:1 UTLJ 32 at 59-60.

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Michael Heller.[51] We therefore start with a brief overview of choice theory's main tenets. Like other modern liberal theories of contract, choice theory begins with the Lon Fuller and William Perdue's challenge of the legitimacy of enforcing wholly-executory contracts: what can justify vindicating promisees' expectation interest even where it departs from the harm principle or when the contract convention is inadvertently invoked?[52] Traditional liberal theories, which perceive private law as a domain of interpersonal independence, need to develop somewhat convoluted answers. Choice theory, by contrast, relies on a very different understanding of private law's DNA, which dissolves much of the difficulty.

Private law, at least in a liberal setting, is about autonomy as self-determination. Given the significance of people's interpersonal relationships to their autonomy, people's fundamental right to self-authorship requires the state to create legal institutions that confer upon individuals the normative powers that are crucial for their ability to self-determine; as a major power-conferring institution, contract belongs to this category. The very same right applies also—although with very different effects—horizontally. We must all respect each other's right to self-determination (and not only independence).

Thus situated, contract's signature commitment—to vindicate the promisee's expectation interest—becomes straightforward. The ability to develop protected expectations is what makes contract a crucial tool for planning, and thus for self-determination. Contract's autonomy-enhancing services admittedly impose on promisors an extra interpersonal burden and an exposure to liability that goes beyond other people's actual harm. But this burden, which requires putative promisors to apply some additional caution while making promises, squarely falls within the obligation of reciprocal respect for self-determination that underlies private law as a whole.

Choice theory's core claim is that contract is both justified and best interpreted by reference to this autonomy-enhancing *telos*. Contract is, as Fried argues, "a kind of moral invention" exactly because it extends people's reach in this way.[53] By expanding the available repertoire of secure interpersonal planning engagements beyond the realm of close-knit interactions, contract law dramatically augments people's ability to plan. In that, it makes a crucial contribution to their autonomy, because self-determination involves planning. People, to be sure, may change their plans, and autonomous persons must be entitled to do so. But having a set of plans arranged in a temporal sequence is typically key to the ability to carry out higher-order projects, namely: to self-determine.

51. See Hanoch Dagan & Michael Heller, *The Choice Theory of Contracts* (Cambridge University Press, 2017) and Hanoch Dagan & Michael Heller, "Choice Theory: A Restatement" in Hanoch Dagan, Benjamin Zipursky, eds, *Research Handbook on Private Law Theory* (Edward Elgar, 2020) 112.

52. See L L Fuller & William R Perdue, Jr, "The Reliance Interest in Contract Damages" (1936) 46:3 Yale LJ 52.

53. Charles Fried, "The Ambitions of Contract as Promise Thirty Years On" in Gregory Klass, George Letsas & Prince Saprai, eds, *Philosophical Foundations of Contract Law* (Oxford University Press, 2014) 17 at 20.

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This autonomy-enhancing function of contract depends on the reliability of contractual promises, which explains, as noted, why a contractual right is the right to expect, namely: why contract law does not merely protect promisees' actual reliance. Moreover, because contract's empowerment potential depends on people's ability to count on the representations of others, an autonomy-enhancing view of contract implies that individuals may be required to satisfy promisees' expectations even if they only inadvertently invoked the convention of contract with no subjective intention to be legally obligated. Promisees are justified in expecting promisors to submit themselves to the jurisdiction of contract law even in this context: this extra interpersonal burden of the so-called objective theory of contract is again the price each person pays so that the other with whom they interact can benefit from contract law's potential to advance their self-determination.

This conception of contract entails three principles—addressing *range*, *limit*, and *floor*—that must guide contract law in a liberal society:

(1) Law should *proactively facilitate* the availability and viability of multiple contract types in each sphere of human endeavor.
(2) Contract 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.
(3) To justify coercive enforcement by the state, all contracts must comply with the demands of *relational justice*.

We cannot, and need not, fully explain these principles here. But a brief sketch of their features that guide our account of FBA doctrines is in place.

2. Proactive Facilitation

Core rules that govern the life of contracts from inception to breakdown all partake of the same autonomy-enhancing mission and thus follow these three principles. Thus, the first principle, of *proactive facilitation*, is manifested in the numerous doctrines that go beyond safeguarding the parties' independence, seeking to empower people by expanding the scope of the co-operative engagements that may be conducive to their own future plans. The objective theory of contract, which we have just mentioned, is a good first example. Many theories of contract support the objective approach, but choice theory provides a particularly-secure justification. The canonical status of the objective approach is best explained by the qualitative difference between the rather limited autonomy-enhancing potential of a subjective theory of contract and the far more impressive potential of its objective counterpart.

Many further doctrinal features of contract law follow suit, including its characteristic supply of a variety of contract types, which (when properly implemented) generates an inventory of diverse frameworks for interpersonal interaction for people to choose from in each major sphere of contracting.

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But the most important feature of modern contract law for the purposes of this Article is its treatment of incomplete agreements.

While the traditional common law was hesitant to enforce incomplete agreements, modern law takes a diametrically opposite attitude.[54] Contemporary contract law is not satisfied with providing enforcement services to parties who fully specify the terms of their engagement. To be sure, where the parties "intentionally and deliberately" do not incorporate in their agreements "readily available, verifiable terms," courts correctly infer that they do not intend legal enforcement.[55] But beyond this category, current law—both the Uniform Commercial Code (UCC) and the Restatement (Second) of Contracts[56]—goes out of its way to facilitate transactions by offering defaults that can fill gaps, even regarding crucial aspects of a transaction, like price.[57] A significant subset of the current contract law canon belongs to this category.

3. Future Self

Choice theory's second animating principle concerns the *autonomy of the parties' future self*, which stands at the core of our account of FBA doctrines. Self-determination requires that people have the right to write the story of their lives. As Michael Bratman explains, people are planning agents and planning agency implies "*diachronic* rationality constraints," which means, in turn, that people's "prior intentions provide a rational default for present deliberation."[58] A liberal law follows suit. It offers people the normative power to make contractual commitments, and it properly assumes that insofar that these commitments are indeed part of the current self's plan, the future self is presumed to adhere to them.[59]

But self-determination also requires that people have the right to re-write the story of their lives. The inter-temporal constancy that planning agency requires needs to be, in other words, sensitive to the fact that "sometimes an agent supposes there are conclusive reasons for change."[60] While new "ordinary desires and preferences" may not suffice, the constancy that planning agency implies should nonetheless be "defeasible constancy: constancy in the absence of supposed conclusive reason for an alternative."[61]

This is why a liberal law, which offers people the normative power to make contractual commitments so as to enhance their autonomy, cannot *fully* ignore the

54. See Farnsworth, *supra* note 3 at 120-21.
55. Robert E Scott, "A Theory of Self-Enforcing Indefinite Agreements" (2003) 103:7 Colum L Rev 1641 at 1657, 1659.
56. See UCC § 2-204(3) and *Restatement, supra* note 1 at § 33.
57. See UCC § 2-305.
58. See Michael E Bratman, "Time, Rationality, and Self-Governance" (2012) 22:1 Philosophical Issues 73 at 74.
59. An autonomy-enhancing contract law, that is, takes seriously the voluntary commitments individuals undertake by requiring them to make good on their promises. See the text accompanying note 76.
60. Bratman, *supra* note 58 at 82.
61. *Ibid*.

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impact of such contracts on their future selves.[62] While enhancing people's autonomy in their capacity as promisees requires, as noted, to vindicate their expectations (and not only reliance), respecting their autonomy in their capacity as promisors implies that contract law must be particularly careful in defining the scope of the obligations it enforces and in circumscribing their implications, so as to allow the required space for the *defeasibility* of their inter-temporal constancy.[63]

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, and there is no easy formula for resolving this difficulty. But this does not mean that it necessarily leads to an impasse, nor does it imply that its resolution needs to be done on an *ad hoc* basis. Instead, liberal contract law can and should apply qualitative judgments and identify categories of limitations on promisors' freedom to change their minds—think, for example, about employee non-compete agreements—that should not be enforceable (in general or under certain conditions) because they overly undermine the autonomy of their future selves.

Even more fundamentally, law should be particularly vigilant in ensuring that contractual liability does not attach in categories of cases where contractual commitments actually do not significantly serve the parties' current selves. Categories of commitment that are not autonomy-enhancing to people's current selves should not be used to constrain their future selves.[64] The mission is, as usual, to find the system that is as conducive as practicable to enhancing people's autonomy.

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62. As the text clarifies, the concern for the future self does not imply an endorsement of the idea of multiple selves, namely: the disintegration of the self; quite the contrary. Choice theory rejects, rather than subscribes to, this position; indeed, its core claim regarding the significance of planning to self-determination implies that the current self and the future self are the same self. The integrity of the self, rather than its separation to different selves, is what drives choice theory's justification for contract enforcement, and is thus a necessary feature of its account of the *telos* of contract. The discussion of the future self is a discussion of the self in the future and the liberal prescription to enable its ability to rewrite its course.

63. Put differently, because there are instances in which a conclusive reason for an alternative exists, for contract law to be autonomy-enhancing, it must take seriously Fried's insight with which we began, that a promise to perform is not a promise to perform no matter what.

64. A competing explanation of these limitations relies on people's imperfect foresight. But this explanation is unpersuasive for two reasons. First, as a matter of positive law, the claim that imperfect foresight limits the power to bind is over-inclusive, since it also covers cases of mistaken judgment (such as a bad gamble) that the doctrines at hand do not cover. See the text accompanying note 75. Second, even if this imperfection would be eliminated—say, with proper technology—liberal contract law, properly called, would not authorize indentured servitudes (and the like). See Hanoch Dagan & Michael Heller, "Why Autonomy Must Be Contract's Ultimate Value" (2019) 20:1 Jerusalem Review of Legal Studies 148 at 150-52.

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4. Relational Justice

This concern with the future self focuses on accommodating the inter-temporal autonomy demands of the parties *intra*-personally. The third, and final, animating principle of liberal contract law shifts gears to the *inter*-personal dimension, but its constitutive status is similar. Liberal contract's requirement of *relational justice*—of *reciprocal* respect for self-determination—arises from people's foundational right of self-determination, the same right that underlies the legitimacy of contract in the first instance.

This means that when one relies on contract law, that party is also necessarily undertaking the obligation to respect the other party's self-determination. Thus, people's use of contract law's empowering potential should be limited to interactions that comply with the prescription of reciprocal respect for self-determination. This obligation of respect cannot be too onerous, but neither is it limited to a negative duty of non-interference—think for example about contract law's careful, but important, deviations from the *laissez faire* mode of regulating the parties' bargaining process. Similar effect applies regarding the law governing the contractual rules of the game, epitomized by the duty of good faith and fair dealing, which protect the parties against the heightened interpersonal vulnerability that contract performance engenders and solidify a conception of contract as a cooperative venture.[65]

B. Basic Assumptions and Future Selves

Consider now cases of a failure of the parties' shared basic assumption regarding their agreement. These cases pose two distinct questions. The first is whether the parties' agreement can stand as is notwithstanding the failure of its basic assumption. If the answer to this question is negative, a second question arises, namely: whether there is any legal significance to this failed attempt of the parties to articulate a joint plan. For a liberal contract law, the answer to the first question, to which we now turn, is surprisingly easy and clear.

1. Two Difficult Cases

Examining the status of an agreement which turns out to be based on a failed basic assumption of both parties requires to focus on liberal contract's second principle, dealing with the autonomy of the future self. To see why FBAs are easy cases from this perspective, it is helpful to compare them to other typical categories that implicate this principle.

Some of the cases in which law needs to address the competing autonomy requirements of the current self and the future self are complicated because they

65. For a detailed defense, both normative and positive, of the role of relational justice in contract law, see Hanoch Dagan & Avihay Dorfman, "Justice for Contracts", *Social Science Research Network* (19 June 2020), online at papers.ssrn.com/sol3/papers.cfm?abstract_id=3435781.

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involve *interpersonal* autonomy claims. A case in point comes from the law of *unilateral mistakes*. Where only the basic assumption of *one* party fails, liberal contract's commitment to promote both parties' autonomy prescribes that law should also take seriously the other party's claim to be able to carry out their own plan, which the agreement does reflect (and always has reflected). Thus, in unilateral mistake cases contract law needs to decide not only how to accommodate the autonomy concerns of the current and future self of the mistaken party, but also whether it is just to impose, in the name of the mistaken party's future self, (some of) the consequences of the error on the other party, although they were not aware of the mistake, let alone caused or contributed to it.[66]

But even cases that do not implicate considerations of interpersonal justice are typically more difficult than FBAs, because they often raise dramatic clashes between the autonomy claims of the current self and those of the future self. Think about employee non-compete agreements, which have become endemic in recent years, and focus on those that are *not* interpersonally abusive. Many of these agreements come about where the current self plots a plan that is genuinely empowering—the employee not only earns more, but also 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 subject to critical scrutiny: liberal contract cannot remain agnostic towards severe limitations of the ability of the employee's future self to rewrite the story of their life.[67] These are genuinely hard cases, because safeguarding the future self's right to rewrite their life story implies that law limits the empowering potential that contract could have generated for the current self.[68]

The existing doctrine governing non-competes is complex and varies across jurisdictions[69] and this is not the occasion for its analysis. The only observation that is pertinent for our purposes is that cases of failure of the basic assumption of both parties are much easier. Here, respecting the autonomy of the future self to be free from the encumbrance embedded in the agreement does *not*, by definition, compete with the self-determination of a current self.

2. FBA Cases Are Easy

In FBA cases, the current selves of *both parties* committed their future selves to perform the script that the agreement articulates based on an implicit assumption, but this assumption has failed. This means that this particular script was actually not part of either party's future plan; that it deviates from what they both

66. It is therefore not surprising to see that the requirements for rescission for unilateral mistake are more stringent than those of mutual mistakes, and that they focus on considerations of relational justice. See *Restatement, supra* note 1 at § 153.

67. This proposition is not dependent upon possible cognitive failures of the employee's current self or upon possible external effects of the parties' agreement. See Dagan & Heller, *supra* note 64 at 150-52.

68. See Stewart E Sterk, "Restraints on Alienation of Human Capital" (1993) 79:2 Va L Rev 383.

69. See Viva R Moffat, "Making Non-Competes Unenforceable" (2012) 54:4 Ariz L Rev 939.

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perceived as a feature of the future as each one of them intended it to be; and that ensuring each party that they will not be subject to the script if its basic assumption turns out to fail does not discourage the other from undertaking their commitment (quite the contrary).[70]

Because a refusal to enforce such a script does not impinge upon the self-determination of the current self of *either* party, it does not limit, let alone threaten, contract's empowering potential. This is why we claim that insofar as the first question is concerned, cases of an error of both parties "as to a basic assumption on which [they] made the contract,"[71] or of "a supervening event"[72] the non-occurrence of which has been "a 'basic assumption' on which both parties made the contract,"[73] are indeed easy.[74] FBA cases do not invoke the autonomy-based prescription to support agents' inter-temporal constancy. Therefore, they do not raise even a presumptive reason to disrespect the updated choice of a promisor who has changed their mind. Allowing such a promisor to repudiate their contractual commitment where the *shared* basic assumption fails does not interfere with the promisee's planning agency. Rather, it only ensures that the application of contact law's coercive power is properly aligned to its autonomy-enhancing mission.

3. Neither Miscalculation Nor Misprediction

This last proposition, however, is overly broad and its scope should be doubly refined. First, we need to clarify that a basic assumption that eventually fails is very different from both a miscalculation and a misprediction.[75] Contract's autonomy-enhancing services empower people to make choices, and where the chooser miscalculates or mispredicts, their choice triggers regret. But respecting people's autonomy implies that they are generally responsible for such bad

70. To be sure, even in FBA cases one party is *ex post* satisfied with the contract and wants to enforce it. But the distinction between mutual and unilateral mistake implies that in the former category the contract does not in fact embody the (*ex ante*) plan of either party. In other words, the party who seeks enforcement in an FBA case tries, in a sense, opportunistically to rely on the FBA in order to get from the deal more than the joint plan contemplated. This is exactly why, unlike cases of unilateral mistakes, in FBA cases rescission need not rely on concerns of relational justice. The party seeking rescission in these cases is not invoking the other party's obligation to respect their self-determination; rather, they are simply defending against the other's attempt to overreach.

71. *Restatement, supra* note 1 at § 152 cmt b.

72. *Restatement, supra* note 1 at § 261 cmt b.

73. *Ibid.*

74. A critic may wonder whether these cases are actually not so easy in the sense that they may be accounted for even with no reliance on an autonomy-based theory of contract. Any view that insists on the familiar tort law maxim in which civil liability requires effective agency can, so the argument goes, account for FBA doctrines. But this critique misses the mark, because it fails to appreciate the significance of the distinction between contracts and torts. Contracts are *voluntary* obligations and thus oftentimes contractual liability attaches even though the cause for nonperformance was well beyond the promisor's control. See, e.g., *Stees v Leonard*, 20 Minn 494 (Sup Ct 1874). Indeed, part of the implication of contract's autonomy-enhancing function is that it does not delimit the power to commit along these lines.

75. Miscalculation is oftentimes the result of a mistaken judgment, while misprediction derives from either inadvertence or no judgment at all.

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choices, which they could have avoided. Liberal contract law need not be moved by sheer regret and is rightly reluctant to protect people from this type of choices.[76] For an autonomy-based contract law, paternalist doctrines and policies, which substitute people's judgment, circumvent their will, and thereby express disrespect for their autonomous agency, are generally impermissible.[77]

Liberal contract's concern for the autonomy of the future self is by no means paternalist; it does not disrespect people's autonomy. To see why, recall that FBA cases do *not* involve consciousness of alternatives of either party, but rather their *tacit* assumption. Ordinary living necessarily relies on such tacit assumptions, which people need not—indeed, if they are to properly plan and self-determine, should not—constantly challenge. FBA cases deal with errors about *these* types of assumptions, which one cannot expect oneself or others to avoid or protect themselves from. Therefore, absolving people from the liability to comply with agreements whose basic assumption fail does not override their judgment or their will. Quite the contrary: setting aside *this type* of impediments that people's current commitments pose to their future ability to rewrite their life-story vindicates the autonomy of both the current and the future self.[78]

The tacit basic assumptions, which accompany ordinary living, are deeply embedded in the background conventions that govern life in a given time and place. Their *deep* embeddedness explains both why they direct our lives and how they do so with no conscious deliberation. Their embeddedness in prevalent *conventions*, in turn, imply that the distinction between a 'miscalculated' agreement and one whose basic assumption failed does not require an essentialist inquiry of agreements' metaphysical essences. Rather, it springs from the way agreements are customarily categorized and understood within a certain community at a given time and place.

Notice that the conventional aspect of FBA cases does *not* go as far as champions of the implied-in-fact terms account take it. As we've argued, in and of themselves basic assumptions cannot prescribe the pertinent legal rule. Accordingly, the role of the conventions that inform the parties' basic assumptions in our account is much more limited: they only point to the type of agreements, which should not, as such, bound the future self. More specifically, the

76. On the significance of regret to human decision making, see, e.g., Terry Connolly & Jochen Reb, "Regret Aversion in Reason-Based Choice" (2011) 73:1 Theory & Decision 35 and Marcel Zeelenberg & Rick Pieters, "A Theory of Regret Regulation 1.0" (2007) 17:1 Journal of Consumer Psychology 3. On the interrelation between regret and choice theory, see Ohad Somech, "The Uneasy Move from Autonomy to Alternatives: Self-determination, Regret, and the Process of Autonomous Choice" (2019) 20:1 Jerusalem Review of Legal Studies 133.

77. See Seana Valentine Shiffrin, "Paternalism, Unconscionability Doctrine, and Accommodation" (2000) 29:3 Philosophy & Public Affairs 205 at 207, 213, 215, 220, 231.

78. Empirical evidence suggests that in these types of circumstances an inability to rewrite one's life story could lead to an abandonment of the overall project for which the contract was formed, thus further hindering one's self-determination. See Sunghwan Yi & Hans Baumgartner, "Coping with Negative Emotions in Purchase-Related Situations" (2004) 14:3 Journal of Consumer Psychology 303 at 313-314; Marcel Zeelenberg et al, "On Bad Decisions and Disconfirmed Expectancies: The Psychology of Regret and Disappointment" (2000) 14:4 Cognition & Emotion 521 at 528; Marcel Zeelenberg et al, "The Experience of Regret and Disappointment" (1998) 12:2 Cognition & Emotion 221 at 228.

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conventional background of the parties' interaction provides the *data* needed in order to apply the normative prescription that delineates the normative power of current commitments to encumber future selves in line with their contribution to the parties' self-determination. Appreciating *this* conventional aspect of FBA cases helps explain the second refinement of our conclusion, to which we now turn.

4. Opting Out

The fact that in making a certain type of transaction people *ordinarily* have a certain tacit assumption by no means imply that specific parties who contemplate a transaction of that type should be disabled from transcending this assumption. Unlike agreements that purport to excessively encumber the autonomy of the future self (such as the hard cases of non-compete doctrine), FBA cases do not typically push the limit of the current self's legitimate authority over the future self that liberal contract can authorize. Therefore, parties should be, and indeed are, able to expand the scope of their mutual obligation beyond the conventional scope of similar transactions.

This means that while the prescription that the parties are not bound by an agreement whose basic assumption failed *as it stands* is immutable, the parties can nonetheless affect its *incidents*. Thus, on the one hand, this prescription is immutable because it relies on contract's autonomy-enhancing *telos*, rather than the presumed intent of either the particular parties or of most parties. If contract is to serve people's self-determination, contract law *must* comply with this first aspect of our FBA theory. (This may be the most fundamental feature which separates our theory from both the implied-in-fact and the majoritarian-default accounts.) But, on the other hand, contract's liberal *telos* does not, and should not, imply that the parties have no control over the scope of their agreement. Quite the contrary, once it is clear that the parties in fact intend their joint undertaking to apply beyond its conventional scope, that scope no longer represents their tacit basic assumption.

Another way to put this point is to say that the particular instantiations of FBA doctrines—like the particular rules that derive from the (immutable) duty of good faith—take the form of *normative defaults*.[79] Normative defaults are chosen for their freestanding value, and the contracting parties can overrule them only if they use "apt and certain words."[80]

5. Three Guidelines

Our analysis thus far can be translated into three doctrinal guidelines, which help to identify the circumstances in which a failed assumption implies that performing the parties' original agreement—their co-authored script as contemplated at

79. See Dagan & Dorfman, *supra* note 65 at 48-52.
80. *Jacob & Youngs, Inc v Kent*, 129 NE 889 at 891 (NY Ct App 1921).

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formation—does not serve the self-determination of either party, so that its enforcement cannot be justified:

(1) The failed assumption must indicate that the agreement ill-fits the joint project to which both parties committed their future selves. This means that FBA doctrines apply to assumptions that inform the raison d'être of the parties' joint plan; that the error must refer to the *essence* of the contract, rather than to any *peripheral or collateral* matter.
(2) FBA doctrines apply only to assumptions whose truthfulness was taken for granted, which the parties could not be expected to avoid or protect against. They do not cover cases where the *risk of error was allocated*, nor do they target failed assumptions whose truthfulness was *in doubt*.
(3) Both the first and the second guidelines just noted imply that a change in value *per se*—unexpected costs or benefits—does not qualify as an FBA.

C. Autonomy-Enhancing FBA Rules

1. The Task

A liberal contract law is committed to carefully scrutinize the impediments which people's current autonomy-enhancing commitments pose to their future ability to rewrite their life-story. Therefore, as long as contractual parties do not signal that they intend their agreement to apply beyond the scope of what its conventionalist basic assumptions imply, this agreement cannot be a proper object for contractual liability. Thus, if the concern for the future self would have exhausted the normative guidelines of an autonomy-based contract theory, we would have had to subscribe to Fried's disappointing conclusion, in which any further prescription is necessarily external to contract. A genuinely liberal contract law, however, resists this answer to our second question, not only for the reasons we've canvassed while discussing Fried's account, but also—and even more significantly—because an external answer fails to deliver on the very core commitment of liberal contract itself.

It is one thing to refuse to enforce a parties' agreement whose basic assumption failed. It is quite another to ignore the fact of that agreement. To live up to its autonomy-enhancing *telos*, contract law cannot contend itself with the supply of enforcement services to fully articulated agreements, which is why liberal contract's first principle is one of *proactive* facilitation. As we've seen, for modern contract law some indefiniteness is not a reason (or an excuse) to take a hands-off posture and leave the parties to their own devices. Liberal contract law takes seriously its commitment to *enhance* the parties' ability to employ contracts in the service of their self-determination. It is thus willing to go out of its way to fill gaps—including quite significant ones—as long as the parties' intent to be legally bound is clear.[81]

81. See Part III-A s 2, above.

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The very same analysis that guides law's gap-filling apparatus explains why liberal contract law should not ignore the parties' attempt to articulate a joint plan in FBA cases. That attempt, we now know, failed, and therefore their agreement as such cannot stand. But this does not mean that nothing was done, nor does it imply that the parties' engagement with a clear intent to be legally bound (albeit not, of course, in that particular agreement) bears no legal implications.

2. Analogous Cases

To see how this can be possible, consider further modern contract law's resolve to relax the indefiniteness doctrine as long as "the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy."[82] This autonomy-*enhancing* disposition generated quite far-reaching doctrinal innovations. It allowed contract law to accommodate relational contracts—think, for example, about exclusive dealings, output, and requirement contracts[83]—in which the parties set up a framework for their long-term on-going and dynamic future engagements. It also brought about the gradual recognition of what is known by now as 'Type II preliminary agreements', namely: preliminary agreements that *do not* reflect "a meeting of the mind on all the issues perceived to require negotiation"—and therefore *do not* bind the parties "to their ultimate contractual objective"[84]—but are nonetheless not legally meaningless. Rather, Type II preliminary agreements are binding "to a certain degree," committing the parties "to the obligation to negotiate the open issues in good faith in an attempt to reach the objective within the agreed framework."[85]

The same impetus underlies the laudable ambition of §2-207 of the UCC to develop alternative formation technologies, where the traditional approach to contract formation faces difficulties in empowering both parties in a mutually beneficial way.[86] The pertinent formation route for our purposes is §2-207(3), which applies where no contract can be said to be formed within the other routes, including that of implied-in-fact. Faithful to the principle of proactive facilitation, the UCC does not always give up even in such dire circumstances. Rather, it prescribes that in these hard cases "[c]onduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale," and that the terms of the contract would include the terms upon which the parties agreed "together with any supplementary terms incorporated under any other provisions of this Act," as necessary to fill in the remaining gaps.

82. See UCC § 2-204(3).
83. See UCC § 2-306.
84. *Brown v Cara*, 420 F (3d) 148 at 153 (2nd Cir 2005), citing *Teachers Ins & Annuity Ass'n v Tribune Co*, 670 F Supp 491 at 498 (SD NY 1987).
85. *Ibid.*
86. The cautionary language of the text derives from the less-than-ideal performance of this rule's autonomy-enhancing task.

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3. What Follows an FBA?

A genuinely liberal contract law should take a similar approach to the predicament of contracts whose basic assumption failed. As with these analogous cases, this is by no means an easy task. But it is not an impossible one; and it can and should be guided by the principles animating liberal contract. Indeed, while liberal contract's second principle as per the autonomy of the contracting parties' future selves determines the scope of the FBA doctrines, the significance of the parties' failed attempt to articulate a joint plan triggers liberal contract's two other principles. Law should *proactively facilitate* the parties' contracting efforts, while ensuring compliance with *relational justice.*

Thus, at times, the failure of both parties' basic assumption does not materially change their joint plan, so that an empowering contract law can use their original script notwithstanding its deficiency. In some other cases, where the original script is largely useless, the remaining framework, loose as it indeed is, can nonetheless be filled in a way that is reminiscent of the cases mentioned above. The gap-filling inquiry in cases of material change focuses on what seems reasonable in the circumstances, which would oftentimes sensibly rely on the choices most parties in similar circumstances would have made. But notice that this inquiry is still very different from the one proposed by the majoritarian default account of FBA cases. It is not employed for answering the question of whether FBAs leave the parties' agreement intact or not. That inquiry is resolved, as the previous section clarifies, in reliance on liberal contract's immutable principle of concern for the future self. By contrast, the reference to the presumed intent of the parties or to other sources of norms to fill the gaps that typify FBA cases is strictly limited to the second stage of FBA analysis.

Finally, even where gaps cannot be filled along these lines, contract law need not turn to external normative resources. Relational justice, as may be recalled, must guide the parties' interpersonal interactions in *and around* contracts (including for the regulation of the precontractual stage). The duty of good faith, which stands, as noted, at the core of relational justice in contract, seems particularly informative for addressing hard FBA cases.

4. Three Guidelines

This means that liberal contract's normative commitments yield three doctrinal guidelines for determining FBAs' consequences:

(1) Avoidance should only be allowed when an FBA indeed undermines the shared plan outlined in the parties' script. By contrast, where the effect of the FBA is immaterial to their shared plan, enforcement of the parties' script serves their autonomy better than rescission or reformation.
(2) In other cases—where the FBA does undermine the parties' script—contract law should allocate FBA risks according to what seems reasonable,

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which oftentimes follows the choices most parties in similar circumstances would have made.

(3) The law should refrain from either enforcing the parties' script or granting rescission where doing so is relationally unjust.

IV. From Rose 2d to COVID-19

Now that we've explored how FBA cases are perceived from the viewpoint of a contract law that takes the enhancement of people's self-determination as its *telos*, it is time to make good on the interpretive ambition of this Article. In what follows we demonstrate that our theory is not only normatively appealing, but also by and large captures the main features of contemporary FBA doctrines. We do not claim, to be sure, for a perfect fit: interpretation is not a description, but rather a charitable reconstruction. Indeed, part of the contribution of a successful interpretive theory is that it not only clarifies the rationale for an existing practice, but also offers internal critique that may lead to its reform.

A. Refining the Scope of FBA Doctrines

1. A Contract's Essence

The first guideline we offered for identifying FBA cases requires to determine whether the parties' error refers to the essence of their contract. In that, we deliberately invoked the widely criticized[87] holding of the Michigan Supreme Court that the sale of the cow Rose 2d of Aberlone can be rescinded due to Sherwood and Walker's mutual mistake.

While Rose was with calf, and thus of great value, both parties supposed that it was barren, and it was therefore sold for "an insignificant sum as compared with her real value if a breeder."[88] This implies, the Court held, that this is not a case of "a difference or misapprehension" in "some quality or accident."[89] Rather, here the difference goes "to the whole substance of the agreement," so that "the thing actually delivered or received is different in substance from the thing bargained for, and intended to be sold."[90] The mistake "went to the very nature of the thing": Rose "was not in fact the animal, or the kind of animal, the defendants intended to sell or the plaintiff to buy," and the parties "would not have made the contract of sale except upon the understanding and belief that she was incapable of breeding, and of no use as a cow."[91] Because this assumption is not peripheral, but rather goes "to the root of the matter"—"A barren cow is substantially a

87. See, e.g., *Lenawee County Bd of Health v Messerly*, 331 NW (2d) 203 at 209 (Mich Sup Ct 1982) [*Lenawee County*].
88. *Sherwood*, *supra* note 4 at 923.
89. *Sherwood*, *supra* note 4 at 924.
90. *Ibid*.
91. *Ibid*.

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different creature than a breeding one" —the sellers "had a right to rescind, and to refuse to deliver."[92]

It is easy to ridicule *Sherwood* as a metaphysical inquiry as to the essence of a cow or a breeder, but whatever its author's intention might have been, a more charitable reading befits our reconstructive agenda. For us, *Sherwood* stands for a test that looks at the *conventions* that inform the parties' tacit assumptions. As with other doctrinal contexts, liberal contract law takes an objective approach, which relies on prevailing conventions. It examines the type of contract at hand, and more particularly the way actors in the relevant market typically understand the main purpose of this contract type. Since there were (so we understand) separate markets for barren cows and breeding ones, the assumption that Rose was barren can be safely deemed basic, and its failure amounts to an FBA.

Other courts' decisions can further demonstrate the viability of such an analysis.[93] Indeed, careful readers of some of these cases can even identify an almost explicit reference to the need for a conventionalist focus. (One familiar example comes out from the court's discussion of the conventional wisdom of industry and government that the disposal of spent fuel would be affected by reprocessing, which was critical for assessing the dispute between Westinghouse and Florida.[94]) Nevertheless, explicitly recognizing the role of this conventionalist focus is still helpful. It can both clarify the law and limit the doctrine's indeterminacy by grounding its gatekeeping test in the everyday experience, practices, and knowledge of the people engaged in the relevant industry. This may also encourage courts to develop rules of thumb that can further improve on the doctrine's guidance.

* * *

What does this analysis mean for COVID-19 related litigation? Most parties to contracts formed before the virus began to spread did not consider the possibility of a global and lasting pandemic or the measures countries have taken (and are still taking) to contain it. Does this imply that the parties' presupposition as per the absence of a pandemic is tantamount to a basic assumption? As the preceding analysis implies, the answer varies across contract types.

Take, for example, rental agreements,[95] and focus first on *residential* ones. Renters, especially if they lost their job because of the crisis, may seek to be

92. *Ibid*. The dissent interpreted the facts differently, conceiving the case as one of unilateral mistake. Unilateral mistakes, however, should be (and are) analyzed differently. See the text accompanying note 66.

93. See, e.g., *Lenawee County*, *supra* note 87 at 207; *Mishara Constr Co v Transit-Mixed Concrete Corp*, 310 NE (2d) 363 at 367 (Mass Sup Jud Ct 1974); *Orlandi v Goodell*, 760 F (2d) 78 at 79 (4th Cir 1985).

94. See *Florida Power & Light v Westinghouse Elec*, 826 F (2d) 239 at 245-246, 269, 271 (4th Cir 1987) (cert denied, 485 US 1021 (1988)).

95. For another example that illustrates some subtleties in this conventionalist inquiry, consider agreements for the manufacturing of industrial equipment and machinery. The coronavirus crisis may have adversely affected both parties to such agreement, but their FBA-related significance varies. Thus, decrease in demand may render buying new industrial equipment a losing proposition, and buyers whose contracts lost part of their value may seek relief on FBA grounds. But this change in value *per se* is not an FBA, since the value of the equipment

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excused from the obligation to pay rent based on an FBA. We believe that people experiencing economic upheaval due to the crisis should be aided by the State; and we do not necessarily rule out the possibility that other contractual doctrines may be applicable.[96] But we think that the FBA doctrines are not.

The reason is twofold. First, renters and landlords rarely share assumptions about renters' financial abilities. Instead, they usually acknowledge the uncertainty and allocate the risk.[97] Second, and more importantly, COVID-19 simply did not trigger an FBA in this type of contract. The joint project in residential rents is housing for money, and the virus did not change people's need for a place to live or their ability to use the property for that purpose. COVID-19, that is, did not undermine the *essence* of residential rent agreements.

Commercial rents—for example, of a restaurant—are different. To be sure, like in residential rents, parties to commercial rents do not usually share assumptions about the renter's financial ability or profits. But they *do* share the assumption—namely: they take for granted—that eating at restaurants is a socially acceptable behavior. When this stops being the case—for example, due to an imposed lockdown or because the virus caused our social habits to change—COVID-19 is deemed to have caused an FBA.[98]

2. Risk Allocation

Whereas our first guideline for delineating the scope of FBA law asks whether we are dealing with a *basic* assumption, the second examines whether what was undermined was indeed an *assumption*. Going into a contract, the parties hold

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to the specific buyer is not an assumption shared by the parties. Only if the equipment sold was to be used for the production of goods or products that the crisis has rendered no longer socially acceptable would this amount to an FBA. It seems, however, hard to think of an example that can fit this description, which may suggest that buyers would rarely, if ever, succeed in their FBA claims.

Manufacturers' possible FBA claims, in turn, are more complicated and mostly depend on the measures taken to contain the virus. Thus, on one end of the spectrum, where no limitation on manufacturing activity has been placed, no FBA has occurred. At the other pole, where a state prohibits the manufacturer's activity, a shared basic assumption has indeed failed: with no contrary indications, when the parties' joint project concerns the manufacturing of a specific equipment, both parties can be said to have taken for granted that its production can be lawfully pursued. Other cases are not clear-cut, since the measures taken by states may fall in between these two poles.

Consider two intermediate examples: in one, manufacturing is allowed but only in a limited capacity; in the other, manufacturers may function in any capacity they desire, but must meet certain (possible but costly) conditions. In the first example, where the maximum legal capacity does not allow a manufacturer to meet its contractual obligations, we are close to the FBA end of the spectrum. That is, the restriction makes illegal (part of) the activity required to fulfil the contractual obligation and therefore a shared basic assumption has failed. By contrast, a state's imposed conditions that make production costlier is closer to the other end of the spectrum: while the conditions may cause the contract to be a losing project for the manufacturer, parties do not share assumptions about each other's profitability.

96. See David A Hoffman & Cathy Hwang, "The Social Cost of Contract" Colum L Rev [forthcoming in 2021].

97. See, e.g., Lynn M Clark, "Landlord Attitudes Toward Renting to Released Offenders" (2007) 71:1 Federal Probation at 20.

98. See *In re Hitz Restaurant Group*, No 20 B 05012 (Bankr ND Ill 2020) at *6 [*In re Hitz*].

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various *beliefs*; but not all beliefs are shared assumptions. An assumption, as we've seen, is something taken for granted by the parties—not something that they contemplated, were aware of its uncertainty, and explicitly or implicitly allocated its risk. When the parties are aware that something is uncertain, proceeding with the agreement implies that they made the choice to bind their future selves despite the risk. Enhancing their autonomy in this case requires to respect their choice.

Existing doctrine by and large follows suit, respecting the parties' risk allocation, both explicit and implicit.[99] One classic category of cases regarding explicit allocations involves 'as is' and 'force major' clauses, which courts validate as a matter of course.[100] Another particularly typical case of courts' deference to the parties' allocation of FBA risks involves settlement agreements. Settlements by their nature indicate the parties' choice to allocate FBA risks, and courts are therefore reluctant to rescind them on FBA grounds.[101] As one court stated, "[p]ractically every settlement ... involves the element of chance as to future consequences and developments. There are usually unknown and unknowable conditions ... that may affect the ultimate recovery or failure of recovery. Mutual ignorance of their existence cannot constitute 'mutual mistake.'"[102]

Risk allocation may also be implicit. This is the case where the truthfulness of the parties' shared assumption was actually in doubt, that is: where they are both aware that they may be mistaken.[103] It is also the case where a party has the opportunity to conduct the necessary due diligence, but fails to do so.[104] Finally, the same conclusion should apply in cases like the (in)famous *Alcoa* case, involving sophisticated commercial parties, who employed experts to construct a price adjustment mechanism, which ultimately yielded surprising results.[105] As critics correctly emphasize, the court should have understood that mechanism as indicating the allocation of the pertinent FBA risk, which means that the parties' contract should have been enforced.[106]

* * *

On its face, this risk allocation guideline may appear irrelevant to COVID-19 affected cases. After all, is it really likely that the parties considered and allocated the risk of a global pandemic and the extreme measures taken for its containment?

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99. See *Restatement, supra* note 1 at §§ 154 (a) & (b), 161.

100. See respectively, e.g., *Lenawee County*, *supra* note 87 at 205, 210-11 and *Northern Indiana Public Service Co v Carbon County Coal Co*, 799 F (2d) 265 (7th Cir 1986) [*Northern Indiana*].

101. A settlement may still be rescinded on other grounds.

102. *Wieland v Cedar Rapids IC Ry Co*, 46 NW (2d) 916 at 919 (Iowa Sup Ct 1951). See also, e.g., *Fisher Development Co v Boise Cascade Corp*, 37 F (3d) 104 (3rd Cir 1994) and *Billhartz v CIR*, 794 F (3d) 794 at 799 (7th Cir 2015).

103. See, e.g., *Wood v Boynton*, 25 NW 42 (Wis Sup Ct 1885).

104. See, e.g., *BP Group, Inc v Kloeber*, 664 F (3d) 1235 at 1241 (8th Cir 2012).

105. *Aluminum Co of Am v Essex Group*, 499 F Supp 53 at 56, 59, 68, 70 (WD Pa 1980) [*Alcoa*].

106. See, e.g., Jody P Kraus & Robert E Scott, "The Case Against Equity in American Contract Law" (2020) 93:6 S Cal L Rev 1323 at 1377-80 and Robert A Hillman, "Maybe Dick Speidel Was Right About Court Adjustment" (2009) 46:3 San Diego L Rev 595 at 598-603.

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Isn't it obvious that parties took the non-occurrence of that risk for granted? Not necessarily, since conventional customs and practices may indicate an implicit allocation of the risk. Here too a conventionalist approach is in order. That is, to understand what risks the parties have implicitly allocated, we need to consider the risks that are salient to actors in the relevant market. One way to perform this task is to examine the insurance policies market actors typically procure and inquire which types of risks are covered, and especially which risks that are not covered are nonetheless made salient.

Take again the restaurant example. Commercial renters typically procure 'business interruption insurance' that covers renters' lost profits. Does this indicate that the parties were aware of the relevant risk? As it turns out, business interruption insurance pertains mostly to lost revenue due to physical damage to the property. If this is indeed the case,[107] then it is only this type of risk—and not lost profits due to the coronavirus crisis—that is made salient by the policy, and that, whether actually covered or not, can be assumed to have been allocated by the parties.

3. Change in Value

Finally, as noted, a change in value *per se* does not qualify as an FBA. This guideline, which is of obvious relevance to pandemic-related cases, previously informed sub-prime-crisis FBA cases in which courts persistently held that the mere fact that a contract has become less valuable does not constitute an FBA, even when the diminution of a contract's value was caused by an unexpected economic crisis.[108]

B. FBAs' Legal Consequences

1. Where No Material Effect

As noted at the outset, black letter law prescribes that if the FBA did not materially affect the exchanged considerations, the parties' contract is reinstated notwithstanding an FBA. Our analysis suggests that the materiality requirement should turn on the effect of the pertinent FBA on the parties' joint project, realizing that—although its basic assumption failed—when this effect is

107. See Christopher C French, "COVID-19 Business Interruption Insurance Losses: The Cases For and Against Coverage" (2020) 27:1 Conn Ins LJ 1.

108. See, e.g., *Ner Tamid Congregation of North Town v Krivoruchko*, 638 F Supp (2d) 913 at 929 (ND Ill 2009); *Tri-Town Const Co v Commerce Park Assocs 12, LLC,* 139 A (3d) 467 at 475 (RI Sup Ct 2016); *Great Lakes Gas Transmission Ltd P'ship v Essar Steel Minnesota, LLC,* 2013 WL 12139846 at *12-14 (DMinn Mar 19, 2013), vacated on other grounds, 843 F (3d) 325 (8th Cir 2016); *Vision Bank v Luke*, 2010 WL 2639626 at *2 (ND Fla June 29, 2010). For similar holdings in other contexts, see, e.g., *Sheng v Starkey Laboratories, Inc*, 117 F (3d) 1081 at 1084 (8th Cir 1997) and *SCI Minnesota Funeral Services v Washburn-McReavy Funeral*, 795 NW (2d) 855 at 862 (Minn Sup Ct 2011).

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immaterial, effectuating the parties' intent can be best achieved by reinstating the script they have jointly created.

Happily, some pertinent case law echoes this guideline, implying that an FBA is immaterial if it leaves the parties' shared plan enshrined in their agreement more or less intact. Thus, while one promisor was allowed to rescind its contract where it turned out that a "right of vital importance" did not exist,[109] another's plea for excuse was denied where the court concluded that the FBA merely generated an economic loss without "destroy[ing] the purpose" of the agreement or making performance "vitally different from what the parties contemplated."[110] This understanding of the materiality requirement ensures that only where the unexpected events indeed undermine the parties' shared plan will the law fully discard it and turn to external sources for facilitating their failed contracting attempt.

* * *

This conclusion may be relevant to the COVID-19 litigation. To be sure, often, when COVID-19 undermined a basic assumption of the parties, it also generated a material effect on the exchanged considerations. But this is true only where the effects of the crisis were left unmitigated and may not be the case otherwise. Indeed, some of the measures taken by governments to mitigate the effects of COVID-19 change the analysis.

In the United States, for example, the Federal Paycheck Protection Program provides government assistance to businesses to cover their operating costs.[111] The Program is pertinent here not because the government provides people with funds: as we repeatedly note, financial ability *per se* rarely factors in the analysis because parties seldom share assumptions about it. Instead, what is crucial is whether state funds are made available for the purpose of allowing the contractual relations to continue. Thus, if a business receives money in order to pay its operating costs, it can no longer argue that COVID-19 had a material effect on its rent agreement.

The flipside is that government assistance does not always negate the material effect of COVID-19. One example is car insurance. Parties to such agreements do not share assumptions about the insured's use of the car. But, like with the restaurant example, they both assume that driving is a socially acceptable behavior. When this stops to be the case, as when a lockdown is imposed, an FBA has occurred, and its effect—leaving the insured party with no benefits—is material. This remains true even if the insured receives government assistance (e.g., unemployment pay). Because neither eligibility nor the program's purpose hinges on maintaining these insurance contracts, such payments do not affect an insured's FBA claim.

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109. *Dover Pool & Racquet Club v Brooking*, 322 NE (2d) 168 at 169-71 (Mass Sup Jud Ct 1975). See also *Jeselsohn v Park Trust Co*, 135 NE 315 (Mass Sup Jud Ct 1922); *Monet v PERA*, 877 SW (2d) 352 at 357 (Tex Ct App 1994); *Knudsen v Jensen*, 521 NW (2d) 415 at 418-419 (SD Sup Ct 1994).

110. *Groseth Int'l v Tenneco*, 410 NW (2d) 159 at 163, 166-67 (SD Sup Ct 1987) [*Groseth*]. See also *Eastern Air Lines, Inc v McDonnell Douglas Corp*, 532 F (2d) 957 at 991 (5th Cir 1976).

111. See *The Coronavirus Aid, Relief, and Economic Security (CARES) Act*, 116th Cong, 2020 (HR 748).

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2. Reasonable Gap-Filling

Once this first bridge is crossed and the effect of an FBA on the exchanged considerations is deemed material, there is little left from the parties' agreement to save. At this point, an autonomy-enhancing contract law should allocate that risk in a way that can best vindicate the parties' reasonable expectations.[112]

At times, such a reasonableness inquiry is quite straightforward, because the court can confidently allocate the risk in the way the contracting parties themselves would have done.[113] In other cases, where this route seems uninformative, proactively facilitating the parties' contracting efforts implies to go beyond the specific parties. In these cases courts properly apply the majoritarian risk allocation which arguably conforms to the parties' *ex ante* beliefs and best reflects their (hypothetical) choice of how to advance their joint project.[114]

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In many cases, a majoritarian allocation would require the performance of the script the parties have created or, conversely, excusing performance in its entirety. But the nature of the coronavirus crisis—its temporary immediate effects and uncertain long-term effects—implies that in some cases, an intermediary solution is required.

Consider the restaurant example one last time. Renters often invest a lot of money in renovating and adjusting the property to their specific needs and desires. Simply allowing them to terminate the agreement and walk away from the restaurant would be unhelpful and indeed frustrate, rather than advance, their expectations. Existing doctrine of temporary excuses and reformation, which allows inter-temporal as well as other forms of division of the pertinent risks, helps handling these more subtle FBA cases.[115]

3. Relational Justice

It is apt to conclude with one of the most famous FBA cases, which nicely demonstrates the (limited) role of relational justice in our doctrine.[116] As noted,

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112. See *Restatement, supra* note 1 at § 154(c). Some courts, notably the Indiana courts, dissent. See *Wilkin v 1st Source Bank*, 548 NE (2d) 170 (Ind Ct App 1990).

113. See *Karl Wendt Farm Equipment v International Harvester*, 931 F (2d) 1112 at 1120 (6th Cir 1991); *Groseth*, *supra* note 110 at 166; *US v General Douglas MacArthur Senior Village, Inc*, 508 F (2d) 377 at 381 (2nd Cir 1974).

114. See *PK Development v Elvem Development*, 226 AD (2d) 200 at 201-02 (NY Ct App 1996) and *Wasser & Winters v Ritchie Bros Auctioneers (America)*, 185 P (3d) 73 at 76-80 (Alaska Sup Ct 2008). See also *Aldrich v Travelers Ins Co*, 56 NE (2d) 888 (Mass Sup Jud Ct 1944) and *Nelson v Rice*, 12 P (3d) 238 at 242 (Ariz Ct App 2000). A similar rule applies when courts reform (as opposed to rescind) contracts for mutual mistake. See *Roseburg Lumber Co v Madigan*, 978 F (2d) 660 at 668-69 (Fed Cir 1992) and *Flippin Materials Co v United States*, 312 F (2d) 408 (Ct Cl 1963).

115. See *Restatement, supra* note 1 at §§ 269-270 and *Alcoa*, *supra* note 105 at 78-80. For the application of intermediary remedies in the current crisis, see *In re Hitz*, *supra* note 98 at *7.

116. When applying the FBA doctrines, courts often discuss their equitable roots. See, e.g., *Lloyd v Murphy*, P (2d) 47 at 50 (Cal Sup Ct 1944). In this context, if not in others, equity should be

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considerations of relational justice are triggered where one legal outcome—either enforcement or rescission—maintains the ability of both parties to achieve the goal for which they co-authored the shared script that failed, while the other undermines the goal of one party and provides a windfall to the other. A cooperative conception of contract implies that in such cases law should opt for the former alternative.

Thus, when Henry rented Krell's suite to watch the coronation of Edward VII,[117] "Henry had not intended to insure Krell against the possibility of the coronation's being postponed, since Krell could always relet the room, at the premium rental, for the coronation's new date."[118] In other words, the contract in *Krell* was justifiably rescinded because enforcement would have undermined Henry's goal while providing Krell with the opportunity to receive the premium on two occasions, whereas rescission allowed each party to accomplish the original goal of their failed contract.[119]

Indeed, a rule allowing rescission in this type of circumstances—that is, when the promisee can easily cover and the promisor did not assume the risk of the FBA—constitutes an attractive normative default. This rule can explain why a promisor is excused if the parties agreed on the sale of crops from a particular plot (or goods from a specific factory) and the crop failed (or the factory destroyed),[120] but is not excused if the hardship was caused by an event that similarly affected the market as a whole.[121] In the former type of cases, the promisee can usually procure an alternative contract in similar terms, allowing both parties to accomplish their goals. By contrast, where the effect is market-wide, cover at the contact price would often be unavailable.[122]

V. Concluding Remarks

The FBA doctrines of mutual mistake, impossibility, impracticability, and frustration stand for a crucial, but often not sufficiently appreciated, proposition: that in law, just like in life, an obligation to perform does not imply an obligation to perform come what may. They also, as we hope to have established, demonstrate both the explanatory power of the liberal—that is: autonomy-enhancing—foundation of modern contract law and the subtlety of its doctrinal workings.

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understood in terms of relational justice. *Cf* Hanoch Dagan & Avihay Dorfman "Substantive Remedies" (2020), 96:2 Notre Dame L Rev 513.

117. See *Krell*, *supra* note 5.

118. See *Northern Indiana, supra* note 100 at 277. Compare Victor P Goldberg, "Excuse Doctrine: The Eisenberg Uncertainty Principle" (2010) 2:1 Journal of Legal Analysis 359 at 362-66.

119. See also *Restatement, supra* note 1 at § 152 cmt c and *Vrabel v Scholler*, 85 A (2d) 858 at 860 (Pa Sup Ct 1952).

120. See *Restatement, supra* note 1 at §263, *Ill* 2 & 7 and UCC 2-615 cmt 9.

121. See *Eastern Air Lines, Inc v Gulf Oil Corp,* 415 F Supp 429 (SD Fla 1975); *Carolinas Cotton Growers Ass'n, Inc v Arnette*, 371 F Supp 65 (DSC 1974); *Northern Indiana*, *supra* note 100 at 277; *Transatlantic*, *supra* note 29. But see *Alcoa*, *supra* note 105.

122. See generally Goldberg, *supra* note 118 at 375; Gergen, *supra* note 13 at 55-56. A similar analysis explains and justifies *Shell Oil v Estate of Kert*, 411 NW (2d) 770 (Mich Ct App 1987).

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The rules regulating contracts whose basic assumption failed follow liberal contract's principles of proactive facilitation and relational justice. This part of our analysis is, we think, informative for the proper interpretation and application of these rules, and it nicely coheres with the liberal understanding of many other doctrines throughout contract law.

The rules which prescribe the scope of FBA doctrines, in turn, are governed by yet another principle of liberal contract, which regulates the tension that underlies its most foundational *telos*, namely: how to accommodate the autonomy-enhancing potential of the present self's power to commit with the maxim that people's right to self-determination includes the right to rewrite their plans and should thus properly safeguard against excessive encumbrance of their future selves. Situating FBA doctrines within this normative framework elucidates law's careful attention to their scope. It explains why voidability and excusability are granted where, and only where, there is a failure of an assumption which pertains to the essence of the parties' agreement and whose truthfulness they have taken for granted. Insofar as contract law is concerned, the proper understanding of the term *basic assumptions* turns, or at least so we argue, on liberal law's commitment to contractors' future selves.

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